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Sixth Meeting of the Scientific and Technical Advisory Committee (STAC6) to the Protocol Concerning Specially Protected Areas and Wildlife (SPA) in the Wider Caribbean Region

Cartagena, Colombia, 8 December 2014

**REPORT OF THE WORKING GROUP TO DEVELOP THE
CRITERIA AND PROCESS TO ASSESS EXEMPTIONS UNDER ARTICLE 11(2) OF THE SPAW
PROTOCOL (INCLUDES DRAFT GUIDANCE DOCUMENT)**

For reasons of economy and the environment, Delegates are kindly requested to bring their copies of the Working and Information documents to the Meeting, and not to request additional copies.

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I. Background

1. During the Sixth Conference of the Parties to the SPAW Protocol (SPAW COP6) in Montego Bay, Jamaica, 5 October 2010, it was decided to establish an *Ad Hoc* Working Group of Experts to develop criteria for the assessment of exemptions regarding Article 11(2)¹ of the SPAW Protocol (UNEP(DEPI)/CAR IG.29/5, Decision 12²). The SPAW-RAC was nominated as coordinator and chair of the Working Group.
2. Members of the *Ad Hoc* Working Group were nominated in February 2011 by SPAW Parties, as well as by the scientific and NGO communities.
3. The draft Guidance document prepared by the Working Group was presented at the Fifth Meeting of the Scientific and Technical Advisory Committee to the SPAW Protocol (SPAW STAC5) and subsequently reviewed by the Parties during the Seventh Conference of the Parties (SPAW COP7) in Punta Cana, Dominican Republic, 23 October 2012 (see UNEP(DEPI)/CAR WG.34/5 available at <http://cep.unep.org/meetings/previous-meetings/spaw-cop7/@@downloads>). A number of Parties endorsed the Draft document as presented. Other Parties requested additional time for internal reviews following COP7.
4. Further to the internal review period (60 days) decided by SPAW COP7, the Secretariat received comments from the government of the United States. Given the substantive nature of these comments, a number of email exchanges took place between the Secretariat and the United States during 2013-2014 in an effort to reconcile those comments with the draft negotiated up to COP7.
5. As a result, the government of the United States submitted a revised version of the Guidance document that was circulated in October 2014 for review by the members of the Working Group and by all SPAW Parties in preparation to SPAW COP8. A “tracked changes” version of the U.S. proposal is provided in Annex I, that shows how the revised version differs from the original one presented at SPAW COP7.
6. Comments received from Members of the Working Group are in Annex II of this report.
7. The table below summarizes the feedback received from members of the Working Group during October-November 2014. Since some comments referred to previous comments made by other members, the chronological order of the feedback is indicated in the table.

Country	Nominees	Feedback (chronological order)	Content of the feedback
Colombia	Claudia Luz Rodriguez	No	
	Andrea Ramirez M		
Guyana	Michelle Kalamandeen	No	
	Damian Fernandes		
St. Vincent and the Grenadines	Raymond Ryan	No	
	Kris Isaacs		
The Netherlands)	Paul Hoetjes	Yes (3)	<ul style="list-style-type: none"> - Applauds the work done by the U.S. to propose a more streamlined document. - Considers that the main issue remain the question, raised by WDC, HSI, AWI and WIDECAS, of what the COP should do if the STAC considers an exemption not to be pertinent and proposes an alternative language to address this issue. - Proposes, in case the exemption is found pertinent, a request to the Party to report on the results of the activity. - Provides an annotated version of the U.S. proposal of the Guidance document

¹ Article 11(2) states “Each Party may adopt exemptions to the prohibitions prescribed for the protection and recovery of the species listed in Annexes I and II for scientific, educational or management purposes necessary to ensure the survival of the species or to prevent significant damage to forests or crops. Such exemptions shall not jeopardize the species and shall be reported to the Organization in order for the Scientific and Technical Advisory Committee to assess the pertinence of the exemptions granted.”

² “The Contracting Parties [...] **Decide to:** [...] 12. Prioritize in the 2010-2011 Workplan the establishment of a Working Group to develop the draft criteria for the assessment of exemptions regarding Article 11 paragraph 2, and to this end, establish a Working Group under the leadership of SPAW-RAC to begin its work as soon as feasible.”

Country	Nominees	Feedback (chronological order)	Content of the feedback	
			<i>(see Annex III, comments in red characters, underlined)</i>	
France	<i>To be designated</i>	-		
Cuba	Yadira Medina Guevara	No		
	Susana Pereira			
St. Lucia	Sarita Williams-Peter	No		
Mexico (observers)	Oscar Ramirez	No		
	Hesiquio Benitez			
United States of America	Nancy Daves	Yes (4)	Builds on the Netherlands' proposal and suggests the following language for the case the exemption is considered not to be pertinent: " (...) in the case of an assessment by the STAC that the exemption is not pertinent, the COP may take a decision noting such and inviting the Party to consider terminating or modifying the activity. The Party is then informed of the decision by the Secretariat." <i>(see Annex III, section highlighted in yellow, bold characters)</i> Also, the U.S. wouldn't object to include in their proposal an invitation to the Party by the COP to report back on the matter.	
	Trevor Spradlin			
	Robert Mearkle			
NGOs/ Experts	Nominees	Feedback (chronological order)	Content of the feedback	
Humane Society International (HSI)	Ronald Orenstein*	Yes (1) ----- Yes (6)	They are concerned that the U.S. proposal represents a significant departure from their understanding of the original mandate of the working group and the original document presented at the SPAW COP7. The two main comments are: - Their legal interpretation of Article 11(2) is that a Party may adopt an exemption conditionally, but that it must be assessed by the STAC and presented at the COP to validate the exemption. However, as it stands, the U.S. interpretation removes any prior approval for granting an exemption, and leaves just a reporting function to the Parties. - They wonder what happen if the assessment finding is "non-pertinence". (...) In the present state, the U.S. proposal leaves no process or consequence for an exemption gone awry or that may undermine the Protocol. Additionally, they expressed to the Secretariat a series of procedural concerns. ----- - Consider that it is up to Parties to clarify if the process described in section 5 of the draft Guidance document should present the Exemption request as (1) a proposal to the STAC or (2) a report of a granting exemption to the STAC. They favor the language of the original document (case 1). - Consider that, at a minimum, Parties should be "invited to report" beforehand rather than "invited to consider reporting" - Suggest that should the attached document be adopted, that it be adopted conditionally, with an opportunity for review and revision in the future <i>(see Annex III, comments highlighted in green, double underlined)</i>	
Whale and Dolphin Conservation (WDC)	Courtney Vail*			Collective comments
Animal Welfare Institute (AWI)	Susan Milward*			

NGOs/ Experts	Nominees	Feedback (chronological order)	Content of the feedback
Society for the Conservation and study of Caribbean Birds	Lisa Sorenson	No	
Wider Caribbean Sea Turtles Conservation Society (WIDECAST)	Karen Eckert	Yes (2) ----- Yes (5)	Suggests returning to the language used in the original draft Guidance Document for describing the last step of the process for reporting an exemption, i.e., the consequences that should follow the decision of the COP on the exemption proposal, especially if the assessment finding is "non-pertinence". ----- Considers that the U.S. last proposal is the best recommendation.
SPAW Secretariat			
UNEP-CAR/RCU	Alessandra Vanzella-Khouri		
SPAW-RAC	Anne Fontaine		

** These three experts were the ones drafting the Guidance Document in collaboration with the SPAW-RAC. They provided collective comments on the U.S revised version of the Guidance document.*

Table 1: Status of feedback received from the members of the Working Group on the draft guidance document

II. Recommendations to SPAW STAC6

- The Working Group recommends that SPAW STAC6 reviews the comments received on the U.S. revised version of the Guidance Document and provides guidance on the next steps with respect to the adoption of a final version of the Guidance Document;
- The Working Group recommends that SPAW STAC6 provides guidance on the next steps with respect to the formats for reporting on an exemption.

ANNEX I

Revised version of the Guidance Document proposed by the Government of the United States
("tracked changes" version)

1. Introduction

Article 11(1) of the SPAW Protocol requires all SPAW Parties to adopt measures to protect species listed in Annexes I and II of the Protocol¹. These measures include prohibitions on the destruction and disturbance of listed species. Article 11(2) provides for exemptions from these prohibitions under defined exceptional circumstances².

The purpose of this document is to provide guidance to stakeholders, Parties, the Secretariat and the Scientific and Technical Advisory Committee (STAC) on how an exemption proposal-report might be prepared and assessed in order to comply with Article 11(2). ~~Contracting Parties should agree on the proper interpretation of Article 11(2), with the help of these guidelines, and develop proper procedures for its implementation, before considering further exemptions.~~

According to Article 11(2), only three situations can trigger the possibility of an exemption to Article 11(1) prohibitions, namely:

- Scientific purposes necessary to ensure the survival of the species or to prevent significant damage to forests or crops
- Educational purposes necessary to ensure the survival of the species or to prevent significant damage to forests or crops
- Management purposes necessary to ensure the survival of the species or to prevent significant damage to forests or crops

Further, granting of an exemption must not jeopardize the species, and the exemption must be properly-reported to the Organization ~~and to~~ in order for the STAC to assess the pertinence of the exemption granted.

2. Definitions

NB: In this section, as in the guidance document, in general, only Article 11(2) is considered: therefore section 2 presents definitions for the terms that are used in Article 11(2) only, and does not address definitions of the terms contained in Article 11(1).

Article 11(2) contains a number of key terms and operative phrases - Definitions of these key terms and phrases as used in Article 11(2) are provided below:

1

Article 11(1) states "The Parties shall adopt co-operative measures to ensure the protection and recovery of endangered and threatened species of flora and fauna listed in Annexes I, II and III of the present Protocol.

a) The Parties shall adopt all appropriate measures to ensure the protection and recovery of species of flora listed in Annex I. For this purpose, each Party shall prohibit all forms of destruction or disturbance, including the picking, collecting, cutting, uprooting or possession of, or commercial trade in such species, their seeds, parts or products. They shall regulate activities, to the extent possible that could have harmful effects on the habitats of the species.

b) Each Party shall ensure total protection and recovery to the species of fauna listed in Annex II by prohibiting:

i) the taking, possession or killing (including, to the extent possible, the incidental taking, possession or killing) or commercial trade in such species, their eggs, parts or products;

ii) to the extent possible, the disturbance of such species, particularly during periods of breeding, incubation, estivation or migration, as well as other periods of biological stress...."

2

Article 11(2) states "Each Party may adopt exemptions to the prohibitions prescribed for the protection and recovery of the species listed in Annexes I and II for scientific, educational or management purposes necessary to ensure the survival of the species or to prevent significant damage to forests or crops. Such exemptions shall not jeopardize the species and shall be reported to the Organization in order for the Scientific and Technical Advisory Committee to assess the pertinence of the exemptions granted".

Adopt – the granting of a license, permit or other authorization of an activity by a Party.

Assess the pertinence – ~~first, to consider whether the exemption follows the criteria under the specific terms of Article 11(2), and then whether it is within the scope of the Protocol in general. assess whether the exemption meets the criteria specifically set forth in Article 11(2).~~

For Educational purposes – the use of species and/or their parts, or their habitats, for ~~the purposes~~ of conducting educational programmes for members of the public, including children and/or adults, that have been shown to effectively proven to better protect the species, or to diminish its negative interactions with forests and/or crops.

For Management purposes – measures undertaken by humans ~~for purposes with the aim~~ of controlling or conserving species by means of, *inter alia*, artificial propagation and habitat conservation.

Necessary to ensure the survival of the species – ~~an effort without which a species can be proven not to be capable of survival within the geographical boundary of the Party adopting the exemption. Significantly contributing to maintaining or increasing distribution or numbers necessary to ensure the survival or recovery of the species. Activities necessary to ensure survival of the species may include scientific research, educational or management activities.~~

Organization – the SPAW Protocol Secretariat.

Shall not jeopardize the species – ~~shall not compromise the maintenance of the species' conservation status in the long-term and/or the maintenance of a species' role in the ecosystem. shall not engage in an action that would reasonably be expected, directly or indirectly, to reduce appreciably the likelihood of survival or recovery of a covered species by reducing the reproduction, numbers or distribution of the species.~~

NOTE: As endemic species are generally not listed on the Annexes, exemptions will normally apply to species whose range extends elsewhere and may occur region-wide. It may, therefore, be necessary to ask whether the term "species" as used in Article 11(2) refers only to national populations or to the regional or global population. For example, an action that either ensures the survival of, or jeopardizes, a national population might arguably not do so for the species in other parts of its range. In addition, the term "jeopardize" may also cover activities that compromise the fitness and welfare of individuals within a species, such as those activities inducing suffering or disturbance of essential biological behaviours. The findings on the fulfilment of the obligation not to jeopardize the species must take into account the conclusions of the Environmental Impact Assessment (required by Article 13) and an evaluation of the possible direct, indirect and cumulative impacts of the exemption being reviewed. A case-by-case, precautionary approach should be adopted in such situations. Migratory species pose a special concern, and care should be taken to evaluate the extent to which actions anticipated under the exemption will affect population dynamics, including recruitment, within the population in other parts of its natural range.

For Scientific purposes – ~~research activities necessary to acquire data required [to ensure the survival of] [for the conservation and/or protection of] the species or necessary to prevent significant damage to forests or crops. for purposes of conducting bona fide research activities by qualified scientific researchers who have applied in good faith to acquire data regarding survival, the conservation and/or protection of the species.~~

Significant damage – ~~to be significant, damage must be evaluated according to the intensity and length of the harmful action and scale of destruction or disturbance, its effect on the species concerned, and the notion of direct or indirect causality. damage of such an intensity or of such a duration as to have a measurable harmful or destructive effect on forests or crops.~~

Survival – persistence of a viable population of a species within the geographic boundaries of the Party adopting the exemption. ~~In the case of populations of a species migrating between two (or more) countries, the survival of the populations should be assessed in both countries separately and jointly [see note above].~~

3. Roles and Responsibilities

The description of the roles and responsibilities of the various key players in the exemptions process are outlined below, based on the text of Article 11(2) and other relevant Articles of the SPAW Protocol (e.g. Article 20 on the mandate of the STAC, Article 13 on Environmental Impact Assessments, etc.).

– *SPAW Parties*

Parties may adopt exemptions in accordance with Article 11(2). Parties are invited to consider reporting their exemptions projects before granting them. Any Party having granted an exemption must report the exemption to the Secretariat for assessment of pertinence by the STAC. The Party should ensure that the appropriate data are collected, organized and collated for presentation to the STAC for assessment. Parties are not excused from compliance with other provisions in the Protocol, including those related to protected areas and environmental impact assessments. Parties are permitted to adopt exemptions, subject to prior assessment by the STAC and approval by the COP. Any Party seeking to adopt an exemption must submit a proposal to the Secretariat for assessment of pertinence by the STAC before an exemption is finally approved by the COP (see process and procedures). The Party must ensure that the appropriate data required to justify the exemption are collected, organized and collated for presentation to the STAC and COP for assessment and final approval. The Party must also ensure the proper application of the exemption after approval, and is responsible for post-implementation review and reporting. The approval of an exemption does not relieve Parties of the requirement to comply with other provisions in the Protocol, including those related to protected areas and environmental impact assessments. Because it is the responsibility of a Party to notify the Organization of its desire, intent, or necessity to adopt an exemption, preliminary consultation with the Secretariat may provide guidance on whether an exemption proposal-report is required or necessary for a given activity.

– *The Secretariat*

The Secretariat is responsible for acting as a conduit for information and document dissemination among the Parties, STAC and COP. It receives exemption reports and forwards them to the STAC for the assessment of their pertinence proposals, ensures that they contain the minimum essential elements as prescribed below, and requests Parties to provide additional information where necessary. The Secretariat is also responsible for conveying the recommendation of the STAC to the COP and the final decision of the COP to the Party. The Secretariat is also responsible for keeping records of reported exemptions, requested, assessed, and granted, including records of monitoring and/or review of exemptions once granted, and providing preliminary guidance to Parties regarding the need for an exemption proposal with respect to any activity (i.e. whether the activity is prohibited by Article 11(1) and therefore, requires the approval of an exemption proposal to proceed).

– *The Scientific and Technical Advisory Committee*

The role of the STAC in the exemptions process is to assess whether exemptions proposals satisfy the various criteria for pertinence contained herein set forth in Article 11(2), namely that the exempted activity is necessary for the intended purpose (scientific, educational or management as discussed below) and will not jeopardize the species. The STAC's assessment should take into account the special needs of migratory species where actions taken in one jurisdiction may have unintended and unacceptable consequences to the population elsewhere in its range. An assessment of pertinence may also need to consider whether the activity is within the scope of the Protocol in general. The STAC refers the results of its assessment to the COP via the Secretariat. If appropriate, and to the extent possible, before submitting its assessment report to the Secretariat, the STAC may request a Party to provide additional information and/or make changes to its exemption justification. If appropriate, and to expedite matters between meetings of the STAC, the STAC may establish a Review Committee to provide a preliminary assessment of the reported exemption proposal.

– *The Conference of the Parties*

The Conference of the Parties makes the final decision to approve or deny the proposed exemption, based on its consideration of the recommendation of the STAC. Once approved, a Party may adopt and implement the exemption. If the COP denies the exemption, the reason for doing so must be clearly articulated and the Party shall not adopt or implement the exemption. The Party may, however, submit an amended exemption proposal for further assessment by the STAC. Considering that a Party's failure to comply with an assessment of non-pertinence by the STAC and denial by the COP could undermine the authority of the Protocol, the COP may recommend a series of appropriate measures in response to non-compliance. Such measures might include, for example, advice and assistance, public notification of non-compliance, and/or the suspension of rights and privileges.

The Conference of Parties (COP) will review the assessment of the STAC regarding the pertinence of the exemption reported by the Party. In the case of an assessment by the STAC that the exemption is pertinent, the COP may take a decision noting such.

4. Justifications for Exemptions Reports

Article 11(2) states three scenarios under which an exemption may be warranted: namely, for scientific, educational or management purposes, each of which must be necessary to ensure the survival of the species or to prevent significant damage to forests or crops.

- *Scientific purposes necessary to ensure the survival of the species or to prevent significant damage to forests or crops*

An exemption may be warranted if it can be ~~demonstrated proven~~ to the satisfaction of the STAC ~~and COP~~ that ~~unless an otherwise prohibited activity will significantly contribute to maintaining or increasing distribution or numbers necessary to ensure the survival or recovery of the species is undertaken as part of a scientific research project, the species would face extinction. Any removal of individuals (or forms of, including seeds, eggs, etc.) shall not jeopardize the survival of the species. Steps should be taken to protect the welfare of removed living individuals, must be carried out in ways that minimize the likelihood that the remaining wild populations will not be adversely affected, whether by the disturbance or by the decrease in their abundance, and that also minimize the likelihood of the survival and long-term welfare of removed living individuals. Any action must should~~ be undertaken in accordance with international best practices, and these should be specified in the ~~documentation sent by the Party proposal~~ as outlined in Annex A.

- *Educational purposes necessary to ensure the survival of the species or to prevent significant damage to forests or crops*

Education can be a key component to ensuring a species' survival. Any educational activity that would result in a prohibited act, ~~including a prohibited act incidental to an educational activity undertaken in accordance with the Protocol, including reasonably foreseen incidental actions, requires may warrant~~ an exemption. Any removal of individuals (or forms of, including seeds, eggs, etc.) from the wild ~~also requires must be subject to~~ an exemption ~~proposal~~. Educational activities should not normally result in the intentional killing, capture or destruction of a listed species. Possession for primarily commercial purposes ~~should with~~ not be accepted as constituting any educational purpose. Any action ~~must should~~ be undertaken in accordance with international best practices, and these should be specified in the ~~documentation sent by the Party proposal~~ as outlined in Annex A.

- *Management purposes necessary to ensure the survival of the species or to prevent significant damage to forests or crops*

An exemption may be warranted when the ~~demonstrated proven~~ consequence of the otherwise prohibited activity is ~~likely to contribute to maintaining or increasing distribution or numbers necessary to ensure the survival or recovery of the species the preservation or conservation of this or another listed species, or. An exemption may also be warranted if necessary~~ to prevent significant damage to forests or crops. Any action ~~must should~~ be undertaken in accordance with international best practices, and these should be specified in the ~~documentation sent by the Party proposal~~ as outlined in Annex A.

5. Process for Reporting Providing for an Exemption

~~Article 11(2) states that the STAC is to assess the pertinence of the exemptions granted. Therefore, the assessment by the STAC takes place after the Party has granted an exemption. Parties are invited to consider reporting their exemption projects before adopting exemptions.~~

Taking into account the roles and responsibilities set out in Section 2, this section aims to present the step-by-step process ~~for a Party's informing the STAC of an exemption. Parties are kindly invited to note that the process below is given only for their guidance, and may be adapted as appropriate. Nonetheless Parties should recall that reporting their exemptions to the STAC for assessment of their pertinence is a requirement of the Protocol, whatever the process they choose to follow that an exemption proposal would follow, from the stage of its conception to its possible adoption and implementation.~~

1. *Step 1: Identification of a Prohibited Act*

A Party becomes aware that a prohibited activity is planned within its borders, or the Party itself considers that a prohibited activity is necessary, and decides to seek ~~approval of guidance regarding~~ an exemption in advance.

If a Party is uncertain whether any activity, either ongoing or planned for the future, is prohibited by Article 11(1) ~~and would require approval of an exemption to proceed, it may undertake preliminary consultation with the Secretariat to seek guidance.~~, it may undertake preliminary consultation with the STAC to seek guidance.

2. *Step 2: Decision to ~~Pursue~~ Grant an Exemption*

Once a Party determines that an activity is prohibited under Article 11(1), it determines whether to grant an exemption pursuant to its domestic law, must either forbid it or defer it pending the outcome of an application for an exemption. If a decision is taken to pursue an exemption, the Party may proceed with Step 3.²²

3. *Step 3: Preparation of an Exemption ~~Proposal~~ Report*

It is assumed here that the Party has granted the exemption prior to its assessment by the STAC. Parties are nonetheless invited to consider reporting their exemption projects before actually granting them.

Proponent Reporting Parties prepare the necessary ~~proposal~~ documentation concerning the exemption, with the assistance of interested stakeholders as determined by the Party to be appropriate, for assessment by the STAC. Documentation prepared to receive an exemption under domestic law may be submitted in lieu of the information suggested below, using the guidance contained herein, and with the assistance of interested stakeholders as necessary, for assessment by the STAC. The exemption justification (Annex A) is submitted to the Secretariat, which will ensure its completeness before notification and presentation to the STAC.

An activity may potentially impact species in more than one country or the conservation status of a species across its range and within the region. In the case of species or populations of a species migrating between two (or more) countries, the survival of the populations should be assessed separately for each country the species resides in or migrates through and jointly for all countries the species resides in or migrates through. In the case of a common activity undertaken by a number of Parties in cooperation, a joint exemption report proposal may be submitted, but assessment of the pertinence approval of an exemption must be granted is done on a Party-by-Party basis. If the activities involved are significantly different (e.g. capture of animals by one Party for exhibition by another), each proponent-reporting Party must should submit a separate exemption proposal-report for the prohibited acts.

4. *Step 4: Assessment of the Exemption ~~Proposal~~ by the STAC*

The STAC, taking into account the recommendations of a Review Committee if appropriate, assesses whether the exemption proposal satisfies the criteria for pertinence. In the case of species or populations or populations of a species migrating between two (or more) countries, the survival of the populations should be assessed separately for each country the species resides in or migrates through and jointly for all countries the species resides in or migrates through. If the STAC's finds the exemption to be pertinent assessment is favourable, its recommendations are assessment is reported to the COP via the Secretariat.

If the STAC determines that additional information is necessary before it can complete its assessment, it may ask the Party, through the Secretariat, to provide the necessary additional information. The STAC assessment will complete its assessment once the required information, in the form of an amended proposal, if necessary, is provided to the STAC via the Secretariat. At any time, a Party may decide to withdraw an exemption proposal without providing justification. In the event that a party does not wish to provide either additional information or an amended proposal to the STAC, the Secretariat conveys the Party's decision to the STAC.

Final assessment of the pertinence of the exemption is reported to the COP by the STAC, accompanied by any recommendations for approving, modifying or denying the exemption.

The STAC assessment process can be carried out during a formal meeting, or via electronic consultation (such as e-mail or teleconference).

The Conference of Parties (COP) will review the assessment of the STAC regarding the pertinence of the exemption reported by the Party. In the case of an assessment by the STAC that the exemption is pertinent, the COP may take a decision noting such.

~~5. The COP Makes a Determination on the Exemption Proposal~~

~~After considering the STAC's assessment and recommendations, the COP makes a decision to approve (either in full or subject to modifications) or deny the exemption. The Party is informed of the decision by the Secretariat and can then proceed to implement the exemption, with the incorporation of any required modifications, in the case of a favourable finding. If an exemption has been denied by the COP, then the activity shall not be implemented or, if implementation has proceeded, shall be terminated or modified to eliminate activities prohibited under Article 11(1).~~

NOTE: In the event that a Party anticipates that an activity for which an exemption is granted sought will recur, without significant change from its description in Annex A, then the party may apply for report a programmatic exemption, under which all occurrences of the activity may be covered assessed in by a single exemption proposal report. ~~An adopted exemption expires once the exempted activity has taken place or the programme is significantly modified or terminated. For non-programmatic exemptions, an exemption report will apply to a single occurrence of an exempted activity. Any additional occurrence of the exempted activity will require a new exemption report for assessment by the STAC. For programmatic exemptions, any significant A request for any modification or extension of the conditions of the exemption request will require a new exemption proposal report and a separate review by the STAC and COP.~~

6. Exemption Proposal Reporting

The exemption proposal must report should provide the information below regarding the exemption explain why the proponent believes that the exemption criteria are met. A sample proposal report form is contained in Annex A of this guidance document, but at a minimum, the proposal report should contain:

- Details of the prohibited activity, including: the species affected; the type of prohibited activity to be undertaken; the government department with responsibility for oversight of the activity; the location of the activity; a detailed description of the activity, including if relevant any mitigation measures designed to limit or counteract any deleterious effects; the names, affiliations and qualifications of the people involved; the methodology and equipment, if any, to be used; and the duration of the activity. Any methodology should conform to international best practices, and these should be specified.
- A detailed explanation of how the prohibited activity is likely to contribute to will ensure the species' survival or prevention of significant damage to forests or crops (and whether the exemption is being sought for scientific, educational or management purposes).
- A detailed explanation of why the prohibited activity will not jeopardize the species or, if relevant, other listed species.

In the case of species or populations of a species migrating between two (or more) countries, the survival of the populations should be assessed separately for each country the species resides in or migrates through and jointly for all countries the species resides in or migrates through.

- A detailed explanation of the monitoring or evaluation protocols that will be used to assess the effect of the activity on species populations, including changes in range, numerical trend, or reproductive success.
- ~~Evidence indicating that there is no alternative option available that would achieve the same result with less risk to the species concerned or to other listed species.~~
- In all cases, the justification report should include, consistent with Article 13 (Environmental Impact Assessment): i) a detailed description of the current conservation status of the species subject to the prohibited activity; ii) the threat to the subject species from the prohibited activity, including impacts on the population size, distribution and fragmentation, cumulative impacts, and impacts on the quantity and quality of suitable habitats available for the species; iii) other threats to the species in the short- and long-term; and iv) the potential for impacts on other species as a consequence of the prohibited activity. In the case of prohibited activities taken to ensure the survival of the species, evidence should be presented as to how the proposed activities will accomplish this end.

7. Post-Implementation Reporting

~~After a prohibited activity for which an exemption exists has taken place, the concerned Party is encouraged to prepare a report on that activity, a report must be prepared by the proponent Party(ies). In the case of programmatic exemptions, interim reports must be prepared as prescribed by the COP.~~

~~The format described in Annex B of this guidance document can be usefully followed to that purpose.~~

~~Reports should follow the format described in Annex B of this guidance document, and should contain at a minimum:~~

- ~~a) summary of the activity, whether it was carried out as originally described in the exemption proposal or subject to any modifications imposed by the COP;~~
- ~~b) an explanation of any changes if necessary;~~
- ~~c) efforts taken to monitor the impact of the activity on listed species, including the output from the monitoring or evaluation protocols described in the exemption proposal, and the impacts on listed species;~~

~~any unforeseen consequences of the activity; and~~

- ~~d) measures taken to mitigate impacts, including those from unforeseen activities.~~

In order to reduce the reporting burden on Parties, the reports on prohibited activities subject to an exemption may be combined with reporting undertaken under Article 19 of the SPAW Protocol and other reports required by the Cartagena Convention.

****Note of the Secretariat:**

Annex B of the Guidance document is not included in this Report to the SPAW STAC5, as discussions within the Working Group have not yet taken place.

ANNEX II

Comments received from members of the ad hoc Working Group on the revised version of the Guidance Document proposed by the Government of the United States

Sujet : RE: Comments on Draft Guidance for Exemptions under SPAW Art. 11(2)

Date : Wed, 15 Oct 2014 01:36:17 +0000

**De : Courtney S. Vail <courtney.vail@whales.org>
Campaigns and Programs Manager
WDC
Whale and Dolphin Conservation**

Note of the Secretariat: the submission of these comments reflect the comments of two other working group members, including Susan Millward of Animal Welfare Institute and Ron Orenstein of Humane Society International (see following e-mail).

Hello, Alessandra and Anne!

Thank you for this opportunity to comment upon the US' revisions and proposals to the Exemptions document that was presented at the last STAC and COP. The attached comments reflect our concerns with the current proposal. I note that the working group, at this late hour and with just a few days to review the proposal, did not have the benefit of seeing the US' suggested edits tracked within the original document, and that these changes might not be evident to all working group members unless they had the opportunity to conduct a side-by-side comparison of the US proposal that you circulated, with the original from the last COP. Having conducted that comparison, we are concerned that the US proposal represents a significant departure from our understanding of the original mandate of the working group and the original document presented at the last COP in October 2012.

Thank you for the opportunity to present our feedback on the US' proposal.

Warmest regards,

Courtney Vail

Note of the Secretariat: In addition to numerous comments on the U.S. revised version of the Guidance Document, the following outstanding procedural concerns were expressed:

1. Three rounds of comments were called for by the SPAW-RAC on the guidance document, respectively in late March 2012, in mid-May 2012 and in early July 2012. The US provided no comments during this time period. The US only provided comments at the COP (note that no comments were provided by the US at the STAC during the preceding day) in Punta Cana, DR at the end of the day, and as the document had not received any objection from other Parties at the meeting as it was about to be accepted by the Meeting. We feel that the US had not acted in good faith, and is being obstructionist to this process in light of the consensus that was pending at the last STAC/COP. In light of this, and the extensive changes made by the US well beyond the required timeframe for comments as agreed at the last STAC/COP and that are fundamental to a precautionary interpretation of the Exemption process, the US proposal essentially scuttles years of progress and consensus.
2. Furthermore, we question whether the US has any justification or standing to comment on Article 11(2) in light of its taking a reservation to this article upon ratifying the Protocol. Initial consultation with legal experts suggests that there is room to legitimately interpret the US reservation to Article 11(2) as meaning they are essentially a 'non-party' for the purposes of its implementation, and that there may be an argument to be made that they therefore do not have the right to a vote on the matter or block consensus (and are, rather, relegated to observer status for that provision).
3. The changes made by the US eliminate both a proactive interpretation and role of the STAC in the Exemptions process and any procedural approach that would allow the COP to impose consequences on a Party that proceeds with an exemption deemed non-pertinent. This essentially undermines the interpretation that the Secretariat and Working Group established, and that did not receive objection by any Party but the US, and renders the Exemptions process meaningless. The US proposal removes all language suggesting an exemption should be proactively 'requested', and, rather, interpret the Protocol to mean a party only has to report on an exemption after the fact. The US states repeatedly throughout its proposal that it does not believe there should be an exemptions

process and eliminates references to an exemption 'proposal', and instead refers to all procedural requirements/recommendations as being merely reporting on an exemption. We are concerned that the full working group has not been provided the time to evaluate all of the substantive changes that were eliminated from the document presented in Punta Cana and agreed to by all Parties but the US, who sought last minute review. Perhaps the Secretariat could circulate a document that outlines the differences between the original document and the US proposal that does not include track changes to identify its edits.

4. US comments are inconsistent with the established aims of the working group, that were agreed by consensus, and that were not objected to by the US when the working group was initiated, or during the course of working group deliberations (which have been extensive, and to which the US has not participated in despite their membership in the working group).
5. Presumably the US response is based in concerns (stemming from their original reservation to Article 11(2)) over the infringement of the Article 11(2) exemption process on domestic/national legislation (although the US would not itself be affected as they hold a reservation). We think it would be wise for the Secretariat to respond to this point with a statement about the spirit, intent and purpose of the Protocol, and your understanding of the positioning of SPAW/Cartagena alongside a Party's domestic legislation. As it stands, the US interpretation removes any prior approval for granting an exemption, and leaves it as just a reporting function by Parties. The legal analysis [UNEP(DEC)/CAR WG.29/INF.5] that was presented to the Parties addresses this issue and provides a legal justification for the interpretation of the Article as the Working Group and Secretariat have proceeded over these past four years.

Sujet : RE: Comments on Draft Guidance for Exemptions under SPAW Art. 11(2)

Date : Tue, 28 Oct 2014 18:32:41 +0000

**De : Courtney S. Vail <courtney.vail@whales.org>
Campaigns and Programs Manager
WDC
Whale and Dolphin Conservation**

Dear working group members:

I wanted to inform the working group that the submission of my comments on October 14th reflect the comments of two other working group members, including Susan Millward of Animal Welfare Institute and Ron Orenstein of Humane Society International. I failed to note this when I posted our collective comments to this group, and wanted to clarify that for working group members.

Thank you!

Courtney S. Vail

Whale and Dolphin Conservation

Sujet : Comments on Draft Guidance for Exemptions under SPAW Art. 11(2)

Date : Wed, 29 Oct 2014 00:56:28 -0500

**De : Dr. Karen L. Eckert <keckert@widecast.org>
Executive Director
Wider Caribbean Sea Turtle Conservation Network (WIDECAST)**

With regard to WDC's concern:

« And what happens if the assessment finding is 'nonpertinence' ? The US proposal leaves no room for challenging an exemption or guiding a Parties potentially destructive activities. The US offers no alternative proposal, and removes the original language of the proposed guidance document presented at the STAC/COP in the DR. In this current state, the US proposal leaves no process or consequence for an exemption gone awry or that may undermine the Protocol. It has stripped any proactive, guiding role of the STAC in assessing an exemption request, and likewise have stripped the COP of any meaningful role except as a repository for already-adopted exemptions. The US proposal removes the highlighted language that was accepted by Parties at the last STAC/COP in the original document. »

The Conference of Parties (COP) will review the assessment of the STAC regarding the pertinence of the exemption reported by the Party. In the case of an assessment by the STAC that the exemption is pertinent, the COP may take a decision noting such.

After considering the STAC's assessment and recommendations, the COP makes a decision to approve (either in full or subject to modifications) or deny the exemption. The Party is informed of the decision by the Secretariat and can then proceed to implement the exemption, with the incorporation of any required modifications, in the case of a favourable finding. If an exemption has been denied by the COP, then the activity shall not be implemented or, if implementation has proceeded, shall be terminated or modified to eliminate activities prohibited under Article 11(1).

Would the working group agree to return to the original language? Bob, would returning to the original language be unacceptable to the US? The working group has labored for many years (since 2011) on this language.

Kindly, Karen

Sujet : Comments on Draft Guidance for Exemptions under SPAW Art. 11(2)

Date : Sat, 1 Nov 2014 17:39:14 -0500

De : **Dr. Karen L. Eckert <keckert@widecast.org>**
Executive Director
Wider Caribbean Sea Turtle Conservation Network (WIDECAST)

Sounds good, thanks Rob!

In the meantime, could the US please address the concern from members of the Working Group regarding an assessment finding of 'nonpertinence'? WDC's concern is that the US proposal "leaves no room for challenging an exemption or guiding a Party's potentially destructive activities. The US offers no alternative proposal, and removes the original language of the proposed guidance document presented at the STAC/COP in the DR. In this current state, the US proposal leaves no process or consequence for an exemption gone awry or that may undermine the Protocol. It has stripped any proactive, guiding role of the STAC in assessing an exemption request, and likewise have stripped the COP of any meaningful role except as a repository for already-adopted exemptions."

I'm confident that the US did not intend to articulate a recommendation that "leaves no process or consequence for an exemption gone awry or that may undermine the Protocol". If your office could offer clarification it would be wonderful, thank you in advance!

Warmly, Karen

Sujet : RE: Comments on Draft Guidance for Exemptions under SPAW Art. 11(2)

Date : Wed, 12 Nov 2014 19:40:59 +0000

De : **Paul Hoetjes <Paul.Hoetjes@rijksdienstCN.com>**
Policy Coordinator Nature
Ministry of Economic Affairs (EZ)
National Office for the Caribbean Netherlands (RCN)
Mailing address: P.O.Box 357, Kralendijk, Bonaire, Caribbean Netherlands

Hi everyone,

First, my apologies for his late response. I'm sure it is much too late to change the document, but still, maybe this can be helpful to the discussions at the STAC and COP. I applaud the work done by the US in cleaning up a lot of the language, it makes for a much more streamlined document. The main issue remains with the point raised by Courtney and Karen, what should the COP do if the STAC considers an exemption not to be pertinent. The proposed deletion of the second paragraph addressing this leaves the text begging this question. In my opinion the COP must do something, and cannot but at least decide to accept or not the finding of the STAC. Consequently my proposal would be to add the following after the truncated text:

"In case the exemption is considered not to be pertinent, the COP may similarly take a decision noting this and including the underlying reasons of this finding."

This should remove any qualms about the COP telling Parties what to do, and leaves it to the Party in question to do what it will, even though it be in contravention of the Protocol text.

One more thing that could be useful, I think, considering that it the desirability of reporting on the activity is also mentioned further on, is to include in the decision taken by the COP in case the exemption is found pertinent, a request of the Party in question to report on the results of the activity. The whole paragraph would then read as follows (my additions highlighted in yellow):

“The Conference of Parties (COP) will review the assessment of the STAC regarding the pertinence of the exemption reported by the Party. In the case of an assessment by the STAC that the exemption is pertinent, the COP may take a decision noting such **and including a request to the Party to report on the results of the activity. In case the exemption is considered not to be pertinent, the COP may similarly take a decision noting this and including the underlying reasons of this finding.**”

It could further be debated whether it should be “may take” or “shall take” a decision. In the attached document I have made some further small edits for clarification of text.

I hope this may be helpful.
Best,
Paul

Note of the Secretariat: Comments from Paul Hoetjes on the U.S. revised version of the Guidance Document are shown in Annex III (in red characters, underlined).

Sujet : RE: Comments on Draft Guidance for Exemptions under SPAW Art. 11(2)

Date : Thu, 13 Nov 2014 21:37:52 +0000

**De : Mearkle, Robert <MearkleR@state.gov>
Foreign Scientific Affairs Officer | U.S. Department of State
Bureau of Oceans and International Environmental and Scientific Affairs
Office of Ocean and Polar Affairs**

Working Group members,

We'd like to thank Courtney for collating the comments of AWI, HSI, and WDC and also Karen for WIDECASST's input. As Paul mentions, it seems the main issue here is the role of the COP in the case of a finding of non-pertinence by the STAC of an exemption granted. This is indeed an aspect that we have paid attention to, since the Protocol doesn't specify anything in such an instance.

Article 11(2) provides that Parties may adopt exemptions under certain circumstances and that any exemptions granted should be reported to the Organization so that the STAC may assess their pertinence. It does not require that Parties submit proposed exemptions for evaluation by the STAC or approval by the COP before adopting them, nor does it provide that an exemption be terminated at the direction of the COP. Since the text (highlighted in Karen's message below) from the original draft guidance elaborates a process for the COP to approve or deny exemptions and suggests that Parties are bound by that decision, the United States considers that text to be fundamentally at odds with Article 11(2).

That said, we do see, as others have pointed out, that the COP is left without a clear role after the STAC's assessment. With that in mind, we believe that the Netherlands' suggestion is a very good one in offering a role for the COP that is consistent with the Protocol and also leaves room for the COP to opine on the pertinence. We acknowledge that a finding of non-pertinence of an exemption may lead the COP to want to advise the Party on a course of action – but not dictate that course of action, since that would not be consistent with the Protocol.

In considering the Netherlands' proposal, we were thinking that we might want to take it slightly further and suggest a more specific role for the COP, perhaps something along the lines of what is highlighted here:

“The Conference of Parties (COP) will review the assessment of the STAC regarding the pertinence of the exemption reported by the Party. In the case of an assessment by the STAC that the exemption is pertinent, the COP may take a decision noting such. **Likewise, in the case of an assessment by the STAC that the**

exemption is not pertinent, the COP may take a decision noting such and inviting the Party to consider terminating or modifying the activity. The Party is then informed of the decision by the Secretariat. “

Paul mentions an invitation to the Party by the COP to report back on the matter. We wouldn't object to that, though we think our formulation above would allow for such a request.

We look forward to further discussion on this matter at the meetings in Cartagena.

Sincerely,

Note of the Secretariat: this wording (highlighted in yellow) has been included in the revised version of the Guidance document in Annex III.

Sujet : Comments on Draft Guidance for Exemptions under SPAW Art. 11(2)

Date : Fri, 14 Nov 2014 10:16:03 -0600

De : Dr. Karen L. Eckert keckert@widecast.org
 Executive Director
 Wider Caribbean Sea Turtle Conservation Network (WIDECAST)

I find that the suggested revision addressed the identified gap. Thank you so much Paul for your proactive intervention, and I think Rob's further revision is the best recommendation. What does WDC think?

Warmly, Karen

Sujet : RE: Comments on Draft Guidance for Exemptions under SPAW Art. 11(2)

Date: Lundi 17 Novembre 2014 22:17:52

De: "Courtney S. Vail" courtney.vail@whales.org
 Campaigns and Programs Manager
 WDC
 Whale and Dolphin Conservation

Dear Alessandra and working group members:

Thank you to Paul for his helpful language, and to Robert for incorporating additional clarifying language into this operative section of the working Guidance Document. Consistent with my past feedback to the Working Group, the following comments reflect the position of WDC, AWI, and HSI. All comments reflect our respect for, and acknowledgement of, the very arduous and protracted working group process through which the original Exemptions Guidance Document, presented at the last COP in Punta Cana in October 2012, was forged over the course of several years and accepted by participants to this Working Group. It also acknowledges the general acceptance of the prior document (which has since been significantly revised by the US) by the last STAC and COP.

The suggested text gets us closer to clarifying the role of the COP in the Article 11(2) Exemptions process. This is a positive step forward, and it does provide a mechanism for encouraging a Party to reconsider those actions that have been deemed contrary to Article 11(2) criteria and to broader obligations under the Protocol. It does not, however, provide for any specific remedy for any noncompliance or violation of the protective provisions of the Protocol associated with an exemption that has been deemed 'non-pertinent' by the STAC.

In addition, this role of the COP is fundamentally reliant upon an interpretation of the role of the STAC in its assessment of pertinence. Because the US proposal also significantly alters the role of the STAC in the proposed guidance, we believe the Working Group must now clarify this additional component of the Exemptions process.

The Working Group will note that the US proposal (attached again and incorporating the new language from the email exchange below) removes the precautionary and proactive review role of the STAC in the Exemptions process. As outlined in the legal analysis that was commissioned for the Secretariat (also attached), which provided the recommendations upon which a precautionary interpretation of the language of Article 11(2) was developed in the original Guidance Document, an interpretation that leaves the STAC in a reactive position without any ability to influence the course of an Exemption request is inconsistent with the language of Article 11(2). If an exemption is granted in advance by a Party, and then merely reported to the STAC and COP after it has already been granted and the

activities commenced, there seems little sense to the very specific language outlined in Article 11(2). Relegating the STAC to a non-advisory and non-evaluative role in the process specifically contradicts the requirement in Article 11(2) that an assessment of pertinence is to be carried out. In other words, ideally and consistent with the spirit of the Protocol, we believe an exemption should be ‘requested’ and assessed by the STAC before the activity is conducted. We note that the US proposal does invite Parties to “consider reporting their Exemption” projects before granting them, but we have concerns that welcoming consultation with the STAC on an Exemption is not the same as requiring it as part of Article 11(2) assessment process. At a minimum, Parties should be “invited to report” beforehand rather than “invited to consider reporting.” The attached document includes changes to remove the word “consider.”

Essentially, we agree with the attached legal analysis which recommends a ‘conditional’ granting of an exemption subject to review by the STAC before a Party undertakes an activity. This interpretation is consistent with other treaty law, enables a Party to benefit from the collective expertise of the STAC, and provides a common sense approach aimed at curtailing harmful activities before they occur, rather than trying to reform them after they have already been implemented. Without this interpretation, the assessment role of the STAC becomes meaningless as a Party is merely obligated to report an exemption after-the-fact. Rather than a consultative exercise, the Exemption process becomes, without this interpretation, a reporting exercise. Therefore, we support the original language that presents an Exemption request as a proposal to the STAC, rather than a report of a granted exemption to the STAC.

Which interpretation is consistent with the aims and spirit of the Protocol? The relevant language from the attached legal analysis, which has guided this working group to this point, is provided below.

“Article 11(2) provides that the STAC is to assess “the pertinence of the exemptions granted” (emphasis added). This seems to suggest that the STAC is to conduct its assessment only after an assessment has been adopted by a contracting Party. This interpretation, however, was not followed in the only assessment conducted thus far by the STAC, and makes no practical sense if the assessment by the STAC is to have an effect. It may be advisable, therefore, to interpret the term “granted” in Article 11(2) to mean “granted conditionally subject to the assessment by the STAC and approval by the COP.” Such an interpretation would maintain the important role of the STAC in the exemptions process. It would also promote collaboration between the Contracting Parties, the COP and the STAC before an exemption is granted, reducing the chances of disagreement between the Contracting Party wishing to adopt an exemption and the STAC. Under this interpretation of Article 11(2), Contracting Parties must first make a unilateral assessment of the conformity of the exemption they wish to grant by making sure that all of the conditions set in the article are met.”

We believe the Exemptions clause of any treaty is a very critical component: it outlines the specific and special circumstances (exceptions) under which actions that would otherwise violate the protective provisions of a treaty can be legitimized through a justification process. Considering this, we believe this key interpretation and component of the original document, which has now passed through many years of Working Group processes and which was received without objection by the majority of Parties at the last COP and STAC, deserves a discussion before it is abandoned.

As a result, we favor the language of the original document. We understand that it is up to Parties to clarify this process, and we suggest that should the attached document be adopted, that it be adopted conditionally, with an opportunity for review and revision in the future.

Thank you for your consideration,

Courtney S. Vail

Note of the Secretariat: Changes from WDC, AWI, and HSI on the revised version of the Guidance Document are shown in Annex III (highlighted in green, double-underlined).

ANNEX III

Revised version of the Guidance Document based on the U.S. proposal annotated by members of the ad hoc Working Group

Annotations from Paul Hoetjes are shown in red characters and underlined. The revised wording proposed by Robert Mearke is highlighted in yellow and in bold characters. The latest changes from WDC, AWI and HSI are highlighted in green and double-underlined.

1. Introduction

Article 11(1) of the SPAW Protocol requires all SPAW Parties to adopt measures to protect species listed in Annexes I and II of the Protocol¹. These measures include prohibitions on the destruction and disturbance of listed species. Article 11(2) provides for exemptions from these prohibitions under defined circumstances².

The purpose of this document is to provide guidance to stakeholders, Parties, the Secretariat and the Scientific and Technical Advisory Committee (STAC) on how an exemption report might be prepared and assessed in order to comply with Article 11(2).

According to Article 11(2), only three situations can trigger the possibility of an exemption to Article 11(1) prohibitions, namely:

- Scientific purposes necessary to ensure the survival of the species or to prevent significant damage to forests or crops
- Educational purposes necessary to ensure the survival of the species or to prevent significant damage to forests or crops
- Management purposes necessary to ensure the survival of the species or to prevent significant damage to forests or crops

Further, granting of an exemption must not jeopardize the species, and the exemption must be reported to the Organization in order for the STAC to assess the pertinence of the exemption granted.

2. Definitions

NB: In this section, as in the guidance document, in general, only Article 11(2) is considered: therefore section 2 presents definitions for the terms that are used in Article 11(2) only, and does not address definitions of the terms contained in Article 11(1).

Article 11(2) contains a number of key terms and operative phrases - Definitions of these key terms and phrases as used in Article 11(2) are provided below:

Adopt – the granting of a license, permit or other authorization of an activity by a Party.

Assess the pertinence – assess whether the exemption meets the criteria specifically set forth in Article 11(2).

¹ Article 11(1) states “The Parties shall adopt co-operative measures to ensure the protection and recovery of endangered and threatened species of flora and fauna listed in Annexes I, II and III of the present Protocol.

a) The Parties shall adopt all appropriate measures to ensure the protection and recovery of species of flora listed in Annex I. For this purpose, each Party shall prohibit all forms of destruction or disturbance, including the picking, collecting, cutting, uprooting or possession of, or commercial trade in such species, their seeds, parts or products. They shall regulate activities, to the extent possible that could have harmful effects on the habitats of the species.

b) Each Party shall ensure total protection and recovery to the species of fauna listed in Annex II by prohibiting:

- i) the taking, possession or killing (including, to the extent possible, the incidental taking, possession or killing) or commercial trade in such species, their eggs, parts or products;
- ii) to the extent possible, the disturbance of such species, particularly during periods of breeding, incubation, estivation or migration, as well as other periods of biological stress....”

² Article 11(2) states “Each Party may adopt exemptions to the prohibitions prescribed for the protection and recovery of the species listed in Annexes I and II for scientific, educational or management purposes necessary to ensure the survival of the species or to prevent significant damage to forests or crops. Such exemptions shall not jeopardize the species and shall be reported to the Organization in order for the Scientific and Technical Advisory Committee to assess the pertinence of the exemptions granted”.

For educational purposes – the use of species and/or their parts, or their habitats, for purposes of conducting educational programmes for members of the public, including children and/or adults, that have been shown to protect the species.

For management purposes – measures undertaken by humans for purposes of controlling or conserving species by means of, *inter alia*, artificial propagation and habitat conservation.

Necessary to ensure the survival of the species –. Significantly contributing to maintaining or increasing distribution or numbers necessary to ensure the survival or recovery of the species. Activities necessary to ensure survival of the species may include scientific research, educational or management activities.

Organization – the SPAW Protocol Secretariat.

Shall not jeopardize the species – shall not engage in an action that would reasonably be expected, directly or indirectly, to reduce appreciably the likelihood of survival or recovery of a covered species by reducing the reproduction, numbers or distribution of the species.

For scientific purposes – for purposes of conducting bona fide research activities by qualified scientific researchers who have applied in good faith to acquire data regarding survival, the conservation and/or protection of the species.

Significant damage – damage of such an intensity or of such a duration as to have a measurable harmful or destructive effect on forests or crops.

Survival – persistence of a viable population of a species within the geographic boundaries of the Party adopting the exemption.

3. Roles and Responsibilities

The description of the roles and responsibilities of the various key players in the exemptions process are outlined below, based on the text of Article 11(2) and other relevant Articles of the SPAW Protocol (e.g. Article 20 on the mandate of the STAC, Article 13 on Environmental Impact Assessments, etc.).

– SPAW Parties

Parties may adopt exemptions in accordance with Article 11(2). Parties are invited to **consider-reporting report** their exemptions projects before granting them. Any Party having granted an exemption must report the exemption to the Secretariat for assessment of pertinence by the STAC. The Party should ensure that the appropriate data are collected, organized and collated for presentation to the STAC for assessment. Parties are not excused from compliance with other provisions in the Protocol, including those related to protected areas and environmental impact assessments. Preliminary consultation with the Secretariat may provide guidance on whether an exemption report is required or necessary for a given activity.

– The Secretariat

The Secretariat is responsible for acting as a conduit for information and document dissemination among the Parties, STAC and COP. It receives exemption reports and forwards them to the STAC for the assessment of their pertinence. The Secretariat is also responsible for keeping records of reported exemptions presented.

– The Scientific and Technical Advisory Committee

The role of the STAC in the exemptions process is to assess whether exemptions satisfy the various criteria for pertinence set forth in Article 11(2), namely that the exempted activity is necessary for the intended purpose (scientific, educational or management) and will not jeopardize the species. The STAC's assessment should take into account the special needs of migratory species where actions taken in one jurisdiction may have unintended and unacceptable consequences to the population elsewhere in its range. An assessment of pertinence may also need to consider whether the activity is within the scope of the Protocol in general. The STAC refers the results of its assessment to the COP via the Secretariat. If appropriate, and to the extent possible, before submitting its assessment report to the Secretariat, the STAC may request a Party to provide additional information. If appropriate, and to expedite matters between meetings

of the STAC, the STAC may establish a Review Committee to provide a preliminary assessment of the reported exemption.

– *The Conference of the Parties*

The Conference of Parties (COP) will review the assessment of the STAC regarding the pertinence of the exemption reported by the Party. In the case of an assessment by the STAC that the exemption is pertinent, the COP may take a decision noting such.

4. Exemption Reports

Article 11(2) states three scenarios under which an exemption may be warranted: namely, for scientific, educational or management purposes, each of which must be necessary to ensure the survival of the species or to prevent significant damage to forests or crops.

– *Scientific purposes necessary to ensure the survival of the species or to prevent significant damage to forests or crops*

An exemption may be warranted if it can be demonstrated to the satisfaction of the STAC that an otherwise prohibited activity will significantly contribute to maintaining or increasing distribution or numbers necessary to ensure the survival or recovery of the species. Any removal of individuals (or forms of, including seeds, eggs, etc.) shall not jeopardize the survival of the species. Steps should be taken to protect the welfare of removed living individuals. Any action should be undertaken in accordance with international best practices, and these should be specified in the documentation sent by the Party as outlined in Annex A.

– *Educational purposes necessary to ensure the survival of the species or to prevent significant damage to forests or crops*

Education can be a key component to ensuring a species' survival. Any educational activity that would result in a prohibited act, including a prohibited act incidental to an educational activity undertaken in accordance with the Protocol, may warrant an exemption. Any removal of individuals (or forms of, including seeds, eggs, etc.) from the wild also requires an exemption. Educational activities should not normally result in the intentional killing, capture or destruction of a listed species. Possession for primarily commercial purposes should not be accepted as constituting any educational purpose. Any action should be undertaken in accordance with international best practices, and these should be specified in the documentation sent by the Party as outlined in Annex A.

– *Management purposes necessary to ensure the survival of the species or to prevent significant damage to forests or crops*

An exemption may be warranted when the demonstrated consequence of the otherwise prohibited activity is likely to contribute to maintaining or increasing distribution or numbers necessary to ensure the survival or recovery of the species. An exemption may also be warranted if **the prohibited activity is demonstrably** necessary to prevent significant damage to forests or crops. Any action should be undertaken in accordance with international best practices, and these should be specified in the documentation sent by the Party as outlined in Annex A.

5. Process for Reporting an Exemption

Article 11(2) states that the STAC is to assess the pertinence of the exemptions granted. **Therefore, the assessment by the STAC takes place after the Party has granted an exemption.** Parties are invited to **consider reporting-report** their exemption projects before adopting exemptions.

Taking into account the roles and responsibilities set out in Section 3, this section aims to present the step-by-step process for a Party's informing the STAC of an exemption. Parties are kindly invited to note that the process below is given only for their guidance, and may be adapted as appropriate. Nonetheless Parties should recall that reporting their exemptions to the STAC for assessment of their pertinence is a requirement of the Protocol, **whatever the process they choose to follow.**

1. *Step 1: Identification of a Prohibited Act*

A Party becomes aware that a prohibited activity is planned within its borders, or the Party itself considers that a prohibited activity is necessary, and decides to seek guidance regarding an exemption in advance.

If a Party is uncertain whether any activity, either ongoing or planned for the future, is prohibited by Article 11(1) and falls within the remit of Article 11(2), it may undertake preliminary consultation with the STAC to seek guidance.

2. *Step 2: Decision to Grant an Exemption*

Once a Party determines that an activity is prohibited under Article 11(1) and complies with the requirements of Article 11(2), it determines whether to grant an exemption pursuant to its domestic law.

3. *Step 3: Preparation of an Exemption Report*

It is assumed here that the Party has granted the exemption prior to its assessment by the STAC. Parties are nonetheless invited to **consider reporting report** their exemption projects before actually granting them.

Reporting Parties prepare the necessary documentation concerning the exemption, with the assistance of interested stakeholders as determined by the Party to be appropriate, for assessment by the STAC. Documentation prepared to receive an exemption under domestic law may be submitted in lieu of the information suggested below, when it is pertinent to demonstrating compliance with the criteria set out in Article 11(2).

An activity may potentially impact species in more than one country or the conservation status of a species across its range and within the region. In the case of species or populations of a species migrating between two (or more) countries, the survival of the populations should be assessed separately for each country the species resides in or migrates through and jointly for all countries the species resides in or migrates through. In the case of a common activity undertaken by a number of Parties in cooperation, a joint exemption report may be submitted, but assessment of the pertinence of an exemption is done on a Party-by-Party basis. If the activities involved are significantly different (e.g. capture of animals by one Party for exhibition by another), each reporting Party should submit a separate exemption report for the prohibited acts.

4. *Step 4: Assessment of the Exemption by the STAC*

The STAC, taking into account the recommendations of a Review Committee if appropriate, assesses whether the exemption satisfies the criteria for pertinence. In the case of species or populations of a species migrating between two (or more) countries, the survival of the populations should be assessed separately for each country the species resides in or migrates through and jointly for all countries the species resides in or migrates through. If the STAC finds the exemption to be pertinent, its assessment is reported to the COP via the Secretariat.

If the STAC determines that additional information is necessary before it can complete its assessment, it may ask the Party, through the Secretariat, to provide additional information.

Final assessment of the pertinence of the exemption is reported to the COP by the STAC

The STAC assessment process can be carried out during a formal meeting, or via electronic consultation (such as e-mail or teleconference).

The Conference of Parties (COP) will review the assessment of the STAC regarding the pertinence of the exemption reported by the Party. In the case of an assessment by the STAC that the exemption is pertinent, the COP may take a decision noting such and including a request to the Party to report on the results of the activity. In case the exemption is considered not to be pertinent, the COP may similarly take a decision noting this and including the underlying reasons of this finding. Likewise, in the case of an assessment by the STAC that the exemption is not pertinent, the COP may take a decision noting such and inviting the Party to consider terminating or modifying the activity. **The Party is then informed of the decision by the Secretariat.**

NOTE: In the event that a Party anticipates that an activity for which an exemption is granted will recur, without significant change from its description in Annex A, then the party may report a programmatic exemption, under which all occurrences of the activity may be assessed in a single exemption report. For non-programmatic exemptions, an exemption report will apply to a single occurrence of an exempted activity. Any additional occurrence of the exempted activity will require a new exemption report for assessment by the STAC. For programmatic exemptions, any significant modification or extension of the conditions of the exemption will require a new exemption report and a separate review by the STAC.

6. Exemption Reporting

The exemption report should provide the information below regarding the exemption. A sample report form is contained in Annex A of this guidance document, but at a minimum, the report should contain:

- Details of the prohibited activity, including: the species affected; the type of prohibited activity to be undertaken; the government department with responsibility for oversight of the activity; the location of the activity; a detailed description of the activity, including if relevant any mitigation measures designed to limit or counteract any deleterious effects; the names, affiliations and qualifications of the people involved; the methodology and equipment, if any, to be used; and the duration of the activity. Any methodology should conform to international best practices, and these should be specified.
- A detailed explanation of how the prohibited activity is likely to contribute to the species' survival or prevention of significant damage to forests or crops (and whether the exemption is for scientific, educational or management purposes).
- A detailed explanation of why the prohibited activity will not jeopardize the species or, if relevant, other listed species.

In the case of species or populations of a species migrating between two (or more) countries, the survival of the populations should be assessed separately for each country the species resides in or migrates through and jointly for all countries the species resides in or migrates through.

- A detailed explanation of the monitoring or evaluation protocols that will be used to assess the effect of the activity on species populations, including changes in range, numerical trend, or reproductive success.
- In all cases, the report should include, consistent with Article 13 (Environmental Impact Assessment): i) a detailed description of the current conservation status of the species subject to the prohibited activity; ii) the threat to the subject species from the prohibited activity, including impacts on the population size, distribution and fragmentation, cumulative impacts, and impacts on the quantity and quality of suitable habitats available for the species; iii) other threats to the species in the short- and long-term; and iv) the potential for impacts on other species as a consequence of the prohibited activity. In the case of prohibited activities taken to ensure the survival of the species, evidence should be presented as to how the proposed activities will accomplish this end.

7. Post-Implementation Reporting

After a prohibited activity for which an exemption exists has taken place, the concerned Party is encouraged to prepare a report on that activity.

The format described in Annex B of this guidance document can be usefully followed to that purpose.

In order to reduce the reporting burden on Parties, the reports on prohibited activities subject to an exemption may be combined with reporting undertaken under Article 19 of the SPAW Protocol and other reports required by the Cartagena Convention.

****Note of the Secretariat:**

Annex B of the Guidance document is not included in this Report to the SPAW STAC5, as discussions within the Working Group have not yet taken place.