

United States Exemptions Report to the Specially Protected Areas and Wildlife Protocol of the Cartagena Convention for 2022-2024

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Background

Under Article 11(2) of the Specially Protected Areas and Wildlife Protocol (SPAW Protocol) 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. These exemptions shall not jeopardize the species and shall be reported to the Caribbean Environment Programme Secretariat in order for the Scientific and Technical Advisory Committee to assess the pertinence of the exemptions granted.” At the 9th Conference of Parties meeting of the SPAW Protocol in Cayenne, French Guiana, 13 March 2017, Parties decided on a voluntary reporting format for exemptions under Article 11(2) of the SPAW Protocol. Parties also noted that Member States could report exemptions programmatically. This document serves as the report for exemptions issued by the United States during the years 2022-2024 (some of which are issued in the form of permits or other authorizations). This report also includes information regarding exemptions and permits that exceed the reporting obligations of the United States under Article 11(2) of the SPAW Protocol. To the extent the document exceeds United States reporting obligations, that reporting is voluntary and does not create any legal obligations.

The United States has several laws and programs in place for the conservation of protected species listed in Annex II of the SPAW Protocol. For example, the United States broadly prohibits “take” of endangered and threatened species and of all marine mammals under two statutes: the U.S. Endangered Species Act (ESA) and the U.S. Marine Mammal Protection Act (MMPA). Permits and exemptions, based on narrow and well-defined issuance criteria, may be issued for otherwise prohibited activities under the ESA and MMPA, as described below. The United States also prohibits “take” of migratory birds protected under the Migratory Bird Treaty Act (MBTA), unless and except as permitted by regulations. The federal agencies authorized to issue permits and exemptions are the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration of the U.S. Department of Commerce and the United States Fish and Wildlife Service of the U.S. Department of the Interior.

Endangered Species Act

Under the Endangered Species Act (ESA), the United States lists species in danger of extinction as endangered, and species that are likely to become endangered in the foreseeable future as threatened. Take, defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct,” of endangered species is prohibited by the statute, with the authorization to extend take prohibitions to threatened species by regulation. Pursuant to the ESA and its implementing regulations, permits may be issued to authorize take for purposes of scientific research, enhancement of the survival or propagation of the species, and for incidental take. Most of these permits are evaluated under other laws, particularly the National Environmental Policy Act, which requires review of environmental impacts, and the ESA consultation process described below.

Incidental Take Permits

Permits and exemptions may be issued for take of species incidental to otherwise lawful activities by two legal mechanisms. The first is for non-Federal entities such as states, counties, local governments, and private landowners. Non-Federal entities that do not require federal authorization or federal funding may receive a permit for incidental take. In order to qualify for that permit, the applicant must submit a conservation plan that identifies the impact that will likely result from the take, the steps that will be taken to minimize and mitigate impacts, what alternatives were considered and the reasons why such alternatives are not being utilized, and such other measures that the permitting authority may require as being necessary or appropriate for purposes of the plan. The applicant must also ensure that adequate funding for the plan will be provided. The permitting authority may grant the permit upon a determination that the taking will be incidental, the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such take, that funding will be available for the plan, that the take will not appreciably reduce the likelihood of the survival and recovery of the species in the wild, and that other measures, if any, required by the permitting authority will be met.

The other legal mechanism for allowing incidental take is for Federal agencies. A Federal agency authorizing, funding or carrying out an activity must consult with the expert wildlife agencies – the permitting authorities – to ensure that the proposed activity is not likely to jeopardize the continued existence of a listed species or destroy or adversely modify its designated critical habitat. During such consultations, the permitting authorities conduct a comprehensive review of a proposed activity to determine whether the activity would likely jeopardize the continued existence of any listed species or destroy or adversely modify its critical habitat and, if so, recommend a reasonable and prudent alternative that would allow the action to proceed. At the conclusion of the consultation, the permitting authorities provide a Biological Opinion and incidental take statement that, among other things, assess the extent and impact of the take, identify reasonable and prudent measures (RPMs) to minimize and mitigate the impact of the take, and set terms and conditions to implement the RPMs. In addition, if marine mammals listed as endangered or threatened species under the ESA may be incidentally taken, the requirements of the MMPA (discussed below) must also be met for the incidental take statement to be issued. Consultations are conducted for a variety of activities, including:

- Commercial and recreational fisheries
- Military training exercises and operations
- Ocean Energy Activities
- Dredging
- Pesticides and water quality

Scientific and enhancement of survival permits

As explained above, under the ESA, the permitting authorities may issue permits for scientific research purposes or to enhance the propagation or survival of endangered or threatened species. Scientific permits may authorize take of listed species to study the biology and long-term survival needs of a listed species, and may include genetic studies, surveys and stock assessment, and monitoring of the listed species among other things.

Additional information regarding scientific, enhancement of survival, and incidental take permits

and Biological Opinions issued under the ESA can be found at the listed websites. Species covered by these permits and exemptions that are listed in Annex II of the SPAW Protocol include all sea turtles, several whales, the West Indian manatee, and the smalltooth sawfish.

Scientific and enhancement of survival permits

<https://www.fisheries.noaa.gov/permit/esa-scientific-research-and-enhancement-permits>

<https://apps.nmfs.noaa.gov/search/search.cfm>

<https://www.fws.gov/service/permits>

Incidental take permits for private entities

<https://www.fisheries.noaa.gov/national/endangered-species-conservation/incidental-take-permits>

Biological opinions exempting incidental take by Federal agencies

<https://www.fisheries.noaa.gov/national/endangered-species-conservation/biological-opinions>

Exemption for Antiques

Antiques, including scrimshaw, may be imported into the United States if, among other things, they are accompanied by documentation that shows the article is at least 100 years old and has not been repaired or modified with any part of an endangered or threatened species since December 28, 1973. Such antiques must enter through a designated U.S. Customs Service port. Once imported, otherwise prohibited activities, such as interstate sale or offer for sale, do not apply. If the antique contains a species listed under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the shipment must be accompanied by a Pre-Convention Certificate.

Marine Mammal Protection Act (MMPA)

Under the MMPA, all marine mammal species are protected. Take of marine mammals in waters or on lands under the jurisdiction of the United States and on the high seas by persons subject to U.S. jurisdiction is prohibited. Under the MMPA, “take” is defined as: “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal” (16 U.S.C. 1362) and further defined by regulation ([50 CFR 18.3](#); [50 CFR 216.3](#)) as “to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill any marine mammal.” This includes, without limitation, any of the following:

- the collection of dead animals, or parts thereof;
- the restraint or detention of a marine mammal, no matter how temporary;
- tagging a marine mammal;
- the negligent or intentional operation of an aircraft or vessel;
- the doing of any other negligent or intentional act which results in disturbing or molesting a marine mammal; and,

- feeding or attempting to feed a marine mammal in the wild (for species under the jurisdiction of the National Marine Fisheries Service).

The MMPA also prohibits importation into the United States and possession of any marine mammal or marine mammal product that was taken in violation of the MMPA. In addition, transport, purchase, sale, export, and offer to purchase, sell, or export, any marine mammal or marine mammal product that was taken in violation of the MMPA or for any purpose other than public display, scientific research, or enhancing the survival of the species or stock is prohibited.

The MMPA restrictions do not apply to any marine mammal taken before December 21, 1973, or to any marine mammal product consisting or composed in whole or in part of a marine mammal taken before the same date.

Authorizations for take or import in the form of permits may be granted for scientific research, public display, enhancing the survival or recovery of a species or stock, and photography for educational or commercial purposes. In addition, MMPA permit authorizations are evaluated under other laws, particularly the National Environmental Policy Act, which requires review of environmental impacts, and the ESA via the consultation process. Marine mammal species listed under the ESA and those species or population stocks that are below optimum sustainable population levels are designated as depleted and receive additional protections, as indicated below.

For scientific research, the permitting authority must determine that the take is required for a bona fide scientific purpose. Lethal take can be permitted only if the applicant can demonstrate that non-lethal take is not feasible. For depleted species or stocks, the permitting authority must determine that lethal take directly benefits that species or stock or that such research fulfills a critically important research need.

For take or import of marine mammals for purposes of public display, the permitting authority must determine that the applicant's program for conservation or education is based on professionally recognized standards of the public display community, the applicant is registered or licensed under the U.S. Animal Welfare Act, and the applicant's facilities are open to the public on a regular basis and are not restricted other than by charging an admission fee. For stocks designated as depleted, permits cannot be issued for import for purposes of public display.

For enhancing the survival or recovery of a species or a stock, the permitting authority must determine that the take or importation is likely to contribute significantly to maintaining or increasing distribution or numbers necessary to ensure the survival or recovery of the species or stock. For a depleted species or stock, the permitting authority must determine that captive maintenance is likely to contribute to the survival or recovery of the species or stock by maintaining a viable gene pool, increasing productivity, providing biological information, or establishing animal reserves, and that the expected benefit to the species or stock outweighs the expected benefit of alternatives that do not require removal of animals from the wild.

The MMPA also allows, upon request, the incidental take of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a

specified geographic region. Incidental take is an unintentional, but not unexpected, take of which there are two types of authorizations: Incidental Harassment Authorizations (IHAs; for activities that result in non-lethal “harassment” only) and Letters of Authorization (LOAs; for activities that result in harassment only *and* are planned for multiple years OR may cause serious injury or mortality).

For incidental take caused by activities other than commercial fishing, the permitting authority must determine that the total incidental take for the duration of the authorization (up to five years) will be of small numbers (except for military readiness activities), have a negligible impact on such species or stock, and not have an "unmitigable adverse impact" on the availability of the species or stock for subsistence uses. Many incidental take authorizations have been issued for activities that produce underwater sound. Some of these activities include:

- Military sonar and training exercises;
- Oil and gas development, exploration, and production activities;
- Other energy (renewable and LNG) activity;
- Scientific research projects; and
- Construction Projects.

Information regarding LOAs and IHAs can be found on the following websites:

<https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>

<https://www.fws.gov/service/incidental-take-authorizations-marine-mammals>