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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XD982

Addition of Species to the Annexes of the Protocol Concerning Specially Protected Areas and Wildlife in the Wider Caribbean Region

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; request for public comments.

SUMMARY: During a meeting of the Parties to the Specially Protected Areas and Wildlife (SPAW Protocol), held in Cartagena, Colombia in December 2014, ten species of flora and fauna were added to the Annexes of the SPAW Protocol. The United States voted against these amendments to the Annexes because a failure by the Parties to follow the procedures for adding species to the Annexes prevented the United States from following the domestic procedures that are a prerequisite for acceptance by the United States of such amendments to the SPAW Protocol Annexes. In particular, when granting its advice and consent to ratify the SPAW Protocol, the Senate Foreign Relations Committee expressed its intent that before the Executive Branch decides to accept amendments to the Protocol Annexes, it is to consult with the Senate and solicit public comment through notice in the **Federal Register** (Senate Executive Report 107-8).

The United States has entered a reservation as to the ten newly added species in order to complete an interagency review, to solicit public comment on the addition of those species to the SPAW Protocol Annexes, and to complete consultation with the Senate.

The Department of State, U.S. Fish and Wildlife Service, and National Marine Fisheries Service solicit comment on the addition of these ten species to the Annexes, to consider whether or not to withdraw the reservation with respect to some or all of those species.

DATES: Comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments on the addition of the ten species to the Annexes of the SPAW Protocol, identified by NOAA-NMFS-2015-0087, by the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal e-Rulemaking Portal.
 1. Go to www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2015-0087.
 2. Click the “Comment Now!” icon, complete the required fields.
 3. Enter or attach your comments.

OR

- Mail: Submit written comments to Addition of Species to the Annexes of the SPAW Protocol, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Room 13535, Silver Spring, MD 20910.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All

comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible.

FOR FURTHER INFORMATION CONTACT: For further information, contact Angela Somma, NOAA (301-427-8401; angela.somma@noaa.gov); and Melida Tajbakhsh, U.S. Fish and Wildlife Service (703-358-1766; melida_tajbakhsh@fws.gov). Persons who use a Telecommunications Device for the Deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339, 24 hours a day, and 7 days a week.

SUPPLEMENTARY INFORMATION:

The SPAW Protocol is a protocol to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena Convention or Convention). The Convention also has a Protocol addressing land-based sources of pollution and a Protocol addressing regional cooperation on oil pollution preparedness and response. The SPAW Protocol was adopted in 1990 and entered into force in 2000. The United States ratified the SPAW Protocol in 2003. There are currently 16 State Parties to the SPAW Protocol from throughout the Wider Caribbean Region.

Participants at the December 2014 meeting of the Parties to the SPAW Protocol included representatives from: Bahamas, Barbados, Colombia, Dominican Republic, France, Guyana, the Netherlands, Panama, Saint Lucia, Trinidad and Tobago, and the United States of America. Representatives of several non-governmental organizations

also attended as observers.

The U.S. delegation included representatives from the U.S. Department of State; the National Oceanic and Atmospheric Administration, National Marine Fisheries Service; and the U.S. Virgin Islands. Copies of the official “Report of the Meeting” (including a complete list of the attendees) and the text of the Convention and SPAW Protocol can be obtained at <http://www.cep.unep.org/meetings/2014/spaw-cop8>.

Convention and Convention Area

The Cartagena Convention is a regional agreement for the protection and development of the marine environment of the wider Caribbean. The Convention was adopted in 1983 and entered into force in 1986. The United States ratified the Convention in 1986. The Convention area includes the marine environment of the Gulf of Mexico, the Caribbean Sea and the adjacent areas of the Atlantic Ocean south of 30 degrees north latitude and within 200 nautical miles of the Atlantic Coasts of the signatory countries. The United States’ responsibility within this Convention area includes: U.S. waters off of Puerto Rico, the Virgin Islands, and peninsular Florida, including the Atlantic coast; the waters off of a number of islands including coastal barrier islands and the Florida Keys; and the Gulf of Mexico waters under U.S. jurisdiction.

The SPAW Protocol authorizes each Party to designate related terrestrial areas over which they have sovereignty and jurisdiction (including watersheds) to be covered by the SPAW Protocol. The United States has not designated any terrestrial areas under the SPAW Protocol and “does not intend to designate a terrestrial area under the Protocol unless requested to do so by an interested state or territory . . .” (Senate Executive Report

107-8).

The Annexes and U.S. Obligations under Each Annex

The SPAW Protocol includes three Annexes listing species that the Parties believe require international cooperation to provide adequate protection. Plant species requiring the highest levels of protection are listed in Annex I, and animal species requiring the highest levels of protection are listed in Annex II. Plants and animals requiring some management, but lesser protections than those afforded to species listed in Annexes I or II, are listed in Annex III.

The Annexes were adopted in 1991. It was envisioned that, once the SPAW Protocol entered into force, species would be added to or deleted from the initial Annexes. However, until the December 2014 meeting of the SPAW Protocol Parties, there had been no changes made to the Annexes.

The SPAW Protocol additionally states that “a Party may, in the exercise of its sovereignty or sovereign rights, enter a reservation to the listing of a particular species in an annex by notifying the Depositary [Colombia] in writing within 90 days of the vote of the Parties.” By entering a reservation, the Party is declaring itself to not be bound by the SPAW Protocol’s obligations vis-à-vis the particular species.

Annexes I (flora) and II (fauna) are to include endangered and threatened species, subspecies, and their populations as well as rare species. The SPAW Protocol refers to rare species as those “that are rare because they are usually localized within restricted geographical areas or habitats or are thinly scattered over a more extensive range and which are potentially or actually subject to decline and possible endangerment or

extinction.”

For fauna listed in Annex II, Parties “shall ensure total protection and recovery to the species...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;” and (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.”

Annex III may include species that are endangered or threatened, or species that have endangered or threatened populations, or species that are essential to the maintenance of fragile and vulnerable communities and require some protection to ensure the survival and/or function of the community as a significant part of the ecosystem. 56 FR 12026, 12028 (March 21, 1991). The SPAW Protocol states that “Each Party shall adopt appropriate measures to ensure the protection and recovery of the species of flora and fauna listed in Annex III and may regulate the use of such species in order to ensure and maintain their populations at the highest possible levels.” Therefore, some regulated harvest may be permitted for species on Annex III. The protective provisions of this Annex are not intended to be more restrictive than the provisions included in Annexes I and II.

The United States ratified the SPAW Protocol, including Annexes, subject to certain reservations, including the following with respect to Article 11(1): “The United States does not consider itself bound by Article 11(1) of the [SPAW] Protocol to the extent that United States law permits the limited taking of flora and fauna listed in

Annexes I and II [] which is incidental, or [] for the purpose of public display, scientific research, photography for educational or commercial purposes, or rescue and rehabilitation.”

The United States has not designated any terrestrial area under the SPAW Protocol. The United States explained at the time the SPAW Protocol was ratified that the obligations under the SPAW Protocol do not apply in the United States with respect to terrestrial species: “The United States does not plan to designate terrestrial area under the Protocol since no state or territory has identified a need or desire to designate terrestrial area. . . .” (Senate Treaty Document 103-5). In addition, “Several terrestrial species, e.g. bats (*Tadarida brasiliensis* and *Brachyphylla cavernarum*) and falcons (*Falco peregrinus*), are listed in the Annexes. The listing of these species, however, is not intended to describe the relevant terrestrial scope of the Protocol. As the United States has not designated any terrestrial area, the Protocol obligations will not apply with respect to such species.” *Id.*

Summary of Annexes

Annex I contains a total of 57 plant species. At the time of U.S. ratification of the SPAW Protocol, all plant species on Annex I were either: (1) listed under the U.S. Endangered Species Act; (2) endemic to Florida and protected under Florida law; (3) occur only on Federal land and are fully protected where they occur; (4) are not native to the United States, and are listed in the Appendices of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) where primarily commercial trade would be prohibited; or (5) are not native to, nor believed to be

commercially imported into the United States. 56 FR 12026, 12028 (March 21, 1991).

There have been no additions to Annex I since the adoption of the SPAW Protocol.

Annex II includes all sea turtles and all marine mammals in the region. Before the December 2014 meetings, Annex II contained one hundred nine (109) other species. Most of these animal species are either: (1) listed under the U.S. Endangered Species Act or the Marine Mammal Protection Act; (2) are not native to the United States and are listed in Appendix I of CITES; or (3) are offered complete protection by domestic legislation in all range States (whereby the Lacey Act, among other things, prohibits commercial trade in specimens taken, possessed, transported or sold in violation of foreign law); or (4) are endemic to foreign countries and are not commercially imported into the United States. Six new species were added to Annex II by the SPAW Parties in December 2014. *Id.* Prior to the December 2014 meeting, Annex III included 40 species of plants and 30 species of animals in addition to species of corals, mangroves, and sea-grasses that occur in the region. Four new species of birds and plants were added to Annex III by the SPAW Parties in December 2015.

Composition of the Annexes

The plant and animal species present on each Annex can be found here:

<http://www.car-spaw-rac.org/?Annexes-of-the-SPAW-Protocol,83>.

Species Added to the SPAW Annexes in December 2014

ANNEX II

Species	Common name
CORALS	

<i>Acropora cervicornis</i>	Staghorn coral
<i>Acropora palmata</i>	Elkhorn coral
<i>Orbicella (Montastraea)</i> <i>annularis</i>	Boulderstar coral
<i>Orbicella (Montastraea)</i> <i>faveolata</i>	Mountain star coral
BIRDS	
<i>Catharus bicknelli</i>	Bicknell's Thrush
<i>Pterodroma hasitata</i>	Black-capped Petrel

ANNEX III

Species	Common name
BIRDS	
<i>Patagioenas (Columba)</i> <i>leucocephala</i>	White-crowned pigeon
PLANTS	
<i>Guaiacum sanctum</i>	Lignum vitae, Holywood
<i>Ekmanianthe longifora</i>	Roble Real
<i>Bombacopsis emarginata</i>	Seibon de Arroyo

Pending the results of an interagency review and this public comment period and internal and external consultations, including with the Senate, the United States has

entered a reservation as to each of these newly added species.

Circumstances of Addition of Species to SPAW Annexes and U.S. Reservation

Article 11(4) of the SPAW Protocol details the requirements for amending the Annexes and states, in part, that a Party may submit a nomination to add a species to an Annex; that the nomination must be accompanied by supporting documentation; and that the SPAW Scientific, Technical and Advisory Committee (STAC) shall review the nomination. At the December 2014 meeting of the SPAW Parties, the Parties decided by majority vote to add these ten species to the SPAW Annexes even though no Party had formally submitted a nomination and no supporting documentation had been made available to Parties. The decision left no time for a full scientific review, a public comment period in the United States, or consultation with the Senate. The United States voted against the decision. Nevertheless, the decision was adopted and the Annexes were amended.

The United States has entered a reservation as to these ten species pending (1) the results of interagency consideration of the added species and the obligations associated with the addition of these species to the Annexes; (2) the solicitation of public comment on the added species; and (3) consultation with the Senate.

Species under the Jurisdiction of the National Marine Fisheries Service

Four of the ten species added to the Annexes at the December 2014 Cartagena meeting fall under the jurisdiction of the National Marine Fisheries Service (NMFS). As presented earlier in this Notice, four coral species, staghorn coral, *Acropora cervicornis*; elkhorn coral, *Acropora palmata*; boulderstar coral *Orbicella (Montastraea) annularis*;

and mountain star coral, *Orbicella (Montastraea) faveolata*, were added to Annex II. All four of these species are listed as threatened species under the U.S. Endangered Species Act (ESA). Staghorn (*A. cervicornis*) and elkhorn coral (*A. palmata*) were listed under the ESA in 2006. Boulderstar (*O. annularis*) and mountain star (*O. faveolata*) coral were listed under the ESA in 2014.

The Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*, (ESA) provides substantial protections for endangered and threatened species. An endangered species is in danger of extinction throughout all or a significant portion of its range (ESA section 3(6), 16 U.S.C. 1532(6)). A threatened species is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range (ESA section 3(20), 16 U.S.C. 1532(20)). The statute prohibits certain acts for endangered species of fish or wildlife, including import, export, and “take” of endangered species unless an exemption applies (ESA section 9(a)(1), 16 U.S.C. 1538(a)(1)). “Take” is defined broadly to include harassment, harm, pursuit, hunt, shooting, wounding, killing, trapping, capturing, or collecting, or attempting to engage in any such conduct (ESA section 3(19), 16 U.S.C. 1532(19)). Violation of these prohibitions can result in criminal as well as civil penalties (ESA section 11, 16 U.S.C. 1540).

Congress allows the Secretary of Commerce or Interior to issue regulations deemed necessary and advisable to provide for the conservation of threatened species (ESA section 4(d), 16 U.S.C. 1533(d)). In such regulations, the Secretary of Commerce or Interior may, but is not obligated, to apply the prohibitions in section 9(a)(1). The ESA prohibits any activities with respect to threatened species in violation of any regulation

promulgated under section 4(d). Congress' legal regime for threatened species provides NMFS the discretion to prohibit or regulate activities of concern, while avoiding the use of limited resources to regulate activities that do not cause problems for conservation of the species.

In 2008, NMFS promulgated protective regulations for staghorn and elkhorn coral (73 FR 64264, October 29, 2008). When NMFS issued the regulations, it determined that import and export of these species was already adequately regulated by CITES. NMFS also exempted certain research and restoration activities from the take prohibitions and the need to receive a permit for such activities from NMFS under Section 10 of the ESA.

As explained earlier in this Notice, the addition of a marine species to one of the SPAW Annexes requires the United States to implement protections under Article 11(1) of the SPAW Protocol. If the United States withdraws the reservation to the listing of the four coral species in Annex II, NMFS may need to amend these exemptions to the ESA take prohibitions. Pursuant to the reservation taken by the United States at the time of ratification of the SPAW Protocol, scientific research and restoration activities could continue. However, NMFS may have to authorize such research through individual permits rather than regulations, in order to satisfy reporting requirements. The process of issuing individual permits may slow research and restoration activities, and may result in the redirection of resources from on the ground recovery activities to permitting activities.

In addition, NMFS would no longer be able to allow any commercial trade in these species, even though such trade may be permitted under CITES.

In September 2014, NMFS listed boulder star and mountain star corals as threatened species under the ESA but has not yet enacted protective regulations that impose any of the prohibitions of take that apply to endangered species. NMFS has initiated a process to determine what, if any, take prohibitions should be applied, but that process will take some time and may ultimately allow activities that would be prohibited by the SPAW Protocol. On January 13, 2105, (80 FR 1616) NMFS published an Advanced Notice of Proposed Rulemaking, seeking the public's input into which, if any, of the take prohibitions should be applied to boulder star and mountain star corals. NMFS is carefully examining the public input it received regarding which of the take prohibitions should be applied.

Species under the Jurisdiction of the U.S. Fish and Wildlife Service

Six of the ten species added to the Annexes at the December 2014 Cartagena meeting fall under the jurisdiction of the U.S. Fish and Wildlife Service (FWS). As explained earlier in this Notice, two bird species, Zorzal / Tordo de Bicknell ("Bicknell's thrush"), *Catharus bicknelli*; and Petrel de Coronilla negra ("Black-capped petrel"), *Pterodroma hasitata* were added to Annex II. One bird and three plant species, White-crowned pigeon, *Patagioenas (Columba) leucocephala*; Lignum vitae, Hollywood, *Guaiacum sanctum*; Roble Real, *Ekmanianthe longifora*; and Seibon de Arroyo, *Bombacopsis emarginata* were added to Annex III. FWS is recommending that the reservations for the six species that traditionally fall within FWS jurisdiction be withdrawn.

If reservations are withdrawn regarding the addition of the species under FWS jurisdiction to the SPAW Annexes, FWS believes that existing federal legislation provides sufficient legal authority to implement United States obligations under the SPAW Protocol with respect to these newly added species.

One bird species, the Black-capped petrel, is a marine species and the obligations of the SPAW Protocol will apply in the United States with respect to this species if the reservation regarding its addition to SPAW Annex II is withdrawn. As explained earlier in this Notice, the addition of a marine species to one of the SPAW Annexes requires the United States to implement protections under Article 11(1) of the SPAW Protocol. The Black-capped petrel is included in the list of migratory birds protected under the Migratory Bird Treaty Act (16 U.S.C. 703 *et seq.* (MBTA)). The MBTA's protections include prohibitions on taking, possession, killing, and commercial trade. While the MBTA does allow the Secretary of the Interior to authorize hunting of migratory birds, hunting of Black-capped petrel is not authorized. FWS believes that the MBTA provides sufficient authority and provides the protection necessary to meet the United States obligations that would arise upon withdrawing the United States' reservation to the addition of the Black-capped petrel to SPAW Annex II.

Five of the species under the jurisdiction of the FWS, two species of birds (Bicknell's thrush and White-crowned pigeon) and all three species of plants (*Lignum vitae*, Roble Real, and Seibon de Arroyo), are terrestrial species. As explained earlier in this Notice, the United States has not designated any terrestrial area under the SPAW Protocol and the obligations under the SPAW Protocol do not apply in the United States

with respect to terrestrial species. Accordingly, no obligations under the SPAW Protocol would apply to these five terrestrial species if the United States' reservations are withdrawn regarding the addition of these species to the SPAW Annexes.

Comments Solicited

The Agencies solicit comments regarding: (1) the extent to which existing U.S. laws and regulations offer protections for these ten species; and (2) information that informs the United States' consideration of whether or not to withdraw the reservation with respect to some or all of these ten species.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: July 10, 2015.

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