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FOURTH MEETING OF THE TECHNICAL COMMITTEE OF THE AGREEMENT ON THE
CONSERVATION OF AFRICAN-EURASIAN MIGRATORY WATERBIRDS (AEWA)
12-13 MAY 2003, Tashkent, Uzbekistan

GUIDELINE ON NATIONAL LEGISLATION ON THE PROTECTION OF WATERBIRDS AND THEIR HABITATS

INTRODUCTION

The Meeting of the Parties adopted at its second session, which took place from 25-17 September 2002 in Bonn, Germany, the Guideline on National legislation on the Protection of Waterbirds and their Habitats by Resolution 2.3. In the operational part of this resolution the following is stated:

1. Takes note of the conservation guidelines on national legislation for migratory waterbirds as contained in AEW/MOP2.12 and of the conservation guideline on avoidance of introductions of non-native migratory waterbird species as contained in AEW/MOP2.13, in the sense of article IV of the Agreement, and accepts them as interim guidance for Contracting Parties in the implementation of its Action Plan;

The 5th paragraph of the same part of this Resolution reads as follows:

2. Instructs the Secretariat and the Technical Committee, within available resources and in consultation with Parties and appropriate organizations, to review all the existing AEW guidelines regularly, in particular taking account of the additional comments provided by participants to the Meeting of the Parties;

This paragraph makes clear with is expected of the Technical Committee.

PROPOSAL OF THE SECRETARIAT

Regarding this specific Guideline the Secretariat is not only planning to publish the Guideline as part of the complete set of all existing Guidelines but also to initiate a case study. The idea is to do a case study in one of the countries in West Africa, probably in Burkina Faso, to check the Guideline mentioned-above at national level. The outcome of such a case study may lead to proposals to amend the current guideline.

Nonetheless the Secretariat is aware that the Guideline on national legislation is dealing with a very specific issue the Technical Committee is requested to review it once more before it is published by the Secretariat. Also the Technical Committee is requested to give some guidance regarding the Terms of Reference for the case study as mentioned earlier. Last but not least the Secretariat seeks guidance to which target groups the Guideline should be submitted and on how a broad audience could be reached to inform them of its existence.

Annex 1:

**DRAFT GUIDELINE CONSERVATION GUIDELINE
ON NATIONAL LEGISLATION
FOR PROTECTION OF SPECIES OF
MIGRATORY WATERBIRDS AND THEIR HABITATS**

Drafted by IUCN-Environmental Law Centre
July 2002

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Ministry of Agriculture, Nature Management and Fisheries of the Netherlands, and
UNEP/ AEWa Secretariat

Conservation Guideline on National Legislation for Protection of Migratory Species and their Habitats¹

Introduction

This Conservation Guideline is intended to assist countries in drafting new legislation, and reviewing and amending their existing national legislation covering the conservation and sustainable use of migratory waterbird and their habitats. It is offered as part of the AEWA series of Conservation Guidelines, and will address the basic question of how to legislatively implement the Agreement and presenting that analysis in simple terminology accessible to non-lawyers.

It is intended to satisfy item 1 on AEWA's list of "International Implementation Priorities for 2000-2004", adopted by Resolution 1.4 of the Meeting of the Parties (MOP) to AEWA. That priority item noted that

Throughout the Agreement Area, there is a great diversity of national legislation for the conservation of migratory waterbirds. Species can migrate across country borders and their status in relation to taking, trade, disturbance and habitat conservation may change within metres. Whilst the development of international legislation, such as this Agreement and the EU Birds Directive, certainly helps to set minimum standards for national legislation, many countries will wish to improve their legislation further to meet specific needs.

Accordingly, it recommended the development of a new "Conservation Guideline" similar in style and level to the nine Conservation Guidelines that have been adopted in AEWA-MOP-1, "adjusted as necessary to the subject matter of legislation."

To the extent possible when dealing with legislative issues, this Guideline follows the style of AEWA's other Conservation Guidelines. However, because legislative matters are complex and deal with matters outside the usual knowledge of conservation professionals generally charged with the oversight of programmes for migratory waterbird conservation, it was necessary that this Conservation Guideline be somewhat longer than others in the series, and that explanatory material on each point be somewhat more extensive.

In addition, the MOP recommendation called for the creation of lists of case studies of innovative legislation from around the Agreement Area, as well as contact points for further information and expertise. As noted below, however, existing legislation cannot be easily cited as a "case study" for any other country's activities. In recognition of that fact, the preparers of this Conservation Guideline have created a compendium of the hundreds of examples of legislation that were examined in the drafting process. That compendium will be indexed, to the extent of available resources, and will be available to AEWA parties, as discussed below.

1. Beyond the Requirements of the Agreement

While it is important, in this connection, for parties to ensure that they have complied with all of their obligations and commitments under the African Eurasian Waterbird Agreement (AEWA), and the Convention on Migratory Species (CMS), the Conservation Guideline is broader than this, as required in the MOP Decision. It is clearly permissible for the Parties to adopt legal provisions for migratory waterbird conservation that are stricter than those described in AEWA, its Action Plan, or any specific action plans that may be developed pursuant to AEWA. (AEWA, § XI.2.)

¹ This Conservation Guideline is based on the work of the IUCN Environmental Law Centre, Godesberger Allee 108-112, D-53175 Bonn, Germany (Phone ++49.228.2692-231; Fax ++49.228.2692-250; Internet: <http://www.iucn.org/themes/law>). Principle contributors to this document are Tomme R. Young, Senior Legal Advisor; Anni Lukacs, Head of IUCN-ELC Legislation Library; Alexandra Fante, Head of IUCN-ELC Literature Library; and Aicha Zergani, and Claudiane Chevalier, legal interns.

2. Good Practices

Beyond this basic objective, the drafters of this Conservation Guideline have sought to provide information on a variety of good practices in the development of legislation to address migratory species protection. In this effort, a number of promising documents and individual provisions were investigated in detail.

These investigations indicated an underlying difficulty, which prevented the use of specific laws and specific drafting as "examples of good practices." This difficulty arises from the fact that national legislative development is a very *individual* process. Even in countries whose legislative documents are in the same language and based on the same type of legal system, the legal interpretation or effectiveness of a particular provision may be very different.

Moreover, once a law, regulation or other document is actually enacted or adopted, it has gone through a negotiation process through which political and other non-legal and non-conservation factors influence the final form that the document takes in many ways.

For this reason, the Conservation Guideline does not provide explicit model or draft provisions, and does not identify any country's laws as "models" for other countries' use. Instead, suggestions are offered regarding particular legislative powers and other provisions that seem to be necessary, and the manner in which particularly effective legislative provisions may be designed where they do not already exist.

The Conservation Guideline's recommendations regarding good practice are supplemented by a collection of relevant national legislation, contained in several loose-leaf volumes, which will be maintained in the permanent collection of the IUCN Environmental Law Centre's Legislation Library, and to which Parties may obtain access upon request.²

These documents (more than 250 in number) were studied in the course of the drafter's comparative research of national legislation dealing with matters relevant to the conservation of migratory waterbirds. They include legislation from all of the countries listed in Annex A, as well as summaries of other documents that were not available in a language accessible to the drafters.

They include –

- Legislation for the protection of important, endangered, threatened or otherwise valuable species of animals
- Legislation regarding to wetlands, freshwater, coastal waters and other ecosystems;
- Environmental framework and other basic environmental and general conservation laws;
- Basic national legislation (constitutional provisions relating to environmental rights and duties, interpretation and government acts, etc.)
- Other laws relevant to conservation and sustainable use of natural (especially biological) resources.

3. "Legislation" and "Legislative Draftsmen"

This Conservation Guideline generally refers to the development of "legislation" by "legislative draftsmen". Hence, it is important to consider two definitions. In this Conservation Guideline –

"legislation" is used to describe "laws/acts, regulations, decrees, administrative rules and protocols, and all other documents promulgated by any governmental agency or official and presumed to have legal effect or to be a requirement binding government or individuals; and

"legislative draftsmen" is used to refer to any person who is preparing a draft of "legislation," as above described.

By these terms, a "legislative draftsmen," would include protected area managers, conservation professionals in charge of wildlife conservation agencies at various levels of government. Such

² Requests for information, or reservations of library time should be addressed to Legislation Library, Environmental Law Centre, IUCN - The World Conservation Union, Godesberger Allee 108-112, D-53175 Bonn, Germany, Phone ++49.228.2692-2313, Fax ++49.228.2692-250, Email:Secretariat@elc.iucn.org (please write "Attention Legislation Library in the subject line). There may be a fee for requests requiring "remote research" (by IUCN-ELC library staff) and photocopying.

conservation professional often prepare a draft or recommendation for a law, regulation, protocol or even the operating rules of a protected area.

While, in some countries all such legislation will eventually be reviewed or vetted by the solicitor general's office or other government lawyers, it is generally true that the lawyers vetting an agencies legislative proposals are generally not aware of particular needs of the countries' conservation regime.

Accordingly, this Conservation Guideline is intended to assist conservation professionals and officials in conservation ministries and agencies in developing draft and final legislation and making suggestions for improvement of existing and proposed legislation. It can also provide some assistance to lawyers reviewing or vetting draft legislation, as well.

Steps in the legislative drafting and approval process

Step 1: Legislative analysis

Step 2: Analysis of relevant physical, political, social, and conservation factors

Step 3: Preparation of initial draft legislation

Step 4: (Usually) submission of initial draft to pre-Parliamentary review processes (vetting by parliamentary committee, attorney general or other central legislative drafting body)

Step 5: Submission to and enactment by Parliament (including parliamentary committee consideration, renegotiation of various provisions, etc.)

Step 6: Enactment

This Conservation Guideline focuses on Steps 1 through 3, and may be of assistance to the lawyers undertaking step 4 (who will generally not be experts in conservation legal issues.)

This Conservation Guideline is organised into two major sections:

- a discussion of preliminary requirements, including steps 1 and 2 above, and
- a lengthy discussion of particular legislative matters (Step 3), including specific advice and recommendations regarding legislative drafting. This part is divided into 10 sections reflecting particular legal/legislative issues that should be addressed.

Steps 1 & 2: Preliminary Requirements – The “Context” of Legislation

It is essential, in legislative drafting, to have an understanding of the manner in which legislative requirements for conservation must be addressed within the legal, legislative, social and biological context that is unique to the country. This need for “context” is based on two indisputable facts:

First, conservation objectives and commitments are not met by legislation. At best, legislation is a tool by which government can be more effectively empowered and mandated to meet its objectives. The most important elements of such a tool are

- (1) the manner in which governmental activities may be authorised within the country; and
- (2) the particular biological, cultural and other factual conditions of the country which may affect the nature of the legislative tools needed.

Second, as noted below, each country’s legislation is some of the clearest evidence of the country’s individuality. Legislative terminology, and the manner in which it is interpreted by the courts, agencies, and the regulated members of the public differ widely, even among countries in the same region and which share a common legislative language and legal system³,

³ In this Conservation Guideline, the term “legal system” refers to the generic categories of national legal framework – generally referred to as “common” law, “code” (or “Code Napoleon”) law, and “_____,” and such other categories as might be used to describe hybrid systems.

Step 1 – Analysis of the Legislative System and Related Decisions

A key first step in the development of legislation and institutions for conservation is to be fully aware of the role of legislation, and what can be expected from it. The following section summarises some of the activities and research that must be required of the legislative draftsman. It begins with a brief explanation of the reason that this Conservation Guideline does not include specific “model” legislation, which Parties can simply submit for parliamentary approval.

1. “Legislative Analyses” or “Legislative Profiles”

It is essential to create a proper baseline of knowledge, prior to developing new legislation or recommending major revision of existing legislation. The most effective mechanism for undertaking this is to undertake a “legislative analysis” – a study of all of the existing legislation that relates to or affects the legislative objective being addressed – in this case, the conservation of migratory birds. It is essential that the legislation development process must be based on an understanding of existing laws.

To be effective, the legislative analysis must examine all legislative documents currently in force, that relate to –

- Wildlife conservation;
- Protected areas;
- Wetlands and water;
- Forests;
- Environmental impact assessment (EIA) and other environmental framework legislation;
- Licensing
- Trade and international trade;
- Tax;
- Infrastructure;
- Empowerment of governmental agencies and officers; and
- Central authorities and the national legal system.⁴

New legislation must work in concert with all these types of legislation. Where new legislation would alter, affect or conflict with existing legislation, measures to ensure that enforcement of the new law is not blocked can only be effective on the basis of complete and detailed information.

Beyond this, the legislative analysis also should evaluate the effectiveness of existing legislation and the practical problems that a new legal tool would assist in resolving. This process, requires interviews and other processes for engaging officials at all levels – from the officer protecting an individual habitat to the central government.

Legislative Suggestion: *New legislation should studiously avoid any possibility of creating or continuing a conflict with other legislative documents or ministerial mandates. Where a new legislative proposal would create a conflict with, or ambiguity about, another law or another agency’s authority, it is strongly recommended that the conflicting provisions of both laws be revised, through collaborative process. In this process, it may be necessary to prepare separate legislative documents for each piece of existing legislation that should be revised.*

2. Why not “Model” Legislation?

As noted above, an important starting point in all national legislative analysis and national legislative drafting is the realisation that *no two countries’ legal systems are alike*. Legislative drafters who fail to realise this often fall into the common failing of duplicating one or many other country’s laws within their own legal system or attempting to adopt so-called “model legislation” because those documents address a problem which the legislative drafter is grappling with.

⁴ (such as the documents often referred to as the “Constitution”, the “Government Act,” the “Interpretation Act,” the “Courts Act,” and laws which designate the various authority of local and district governmental units, etc.)

Long experience has shown that the adoption of such short-cuts has not proven to be useful. Model legislation is typically used, where there is an outside mandate (from a donor or international body) which the country can fill only by very promptly enacting legislation. The fact that the legislation is never implemented in such cases may be of only secondary concern to those adopting the legislation. The legislative draftsman can learn from the example of other countries' legislation, and the original thinking of the drafters of model legislation. It is absolutely essential, however, that each country's legislation be designed to function effectively within that country's legal framework, and to take into account political, social and other unique factors, if it is to achieve its objectives.

3. A Separate “Migratory Bird Law” or a Combination of Laws?

One of the most important questions to be addressed is whether a single integrated “migratory bird law” should be prepared, or a number of laws, or revisions of a variety of existing laws. Often, at first consideration, the creation of a single legislative document seems the most attractive option, particularly at the highest level (“laws,” “acts” or “ordinances.”) This option is not advisable in most countries, where individual laws are separately developed and implemented, and are not automatically fitted into a general national code. In these countries, the relevant provisions of a new unified law might never be considered by other key ministries and agencies. It is usually more appropriate to amend existing laws, or to develop a variety of laws, based upon the legislative analysis, and the authority and portfolio of the relevant governmental agencies and ministries.⁵ This Conservation Guideline assumes this latter approach, although all of the matters discussed herein are equally relevant where a unified law is being developed.

⁵ In this connection, it should be noted that in relatively few countries are migratory birds protected by separate agencies that are not responsible for other legislative implementation.

Step 2 – Analysis of Scientific, Technical and Other Essential Factors

Beyond the legal requirements, the most important factors affecting the legislation are

- the technical information regarding the species and habitats within the country, and
- socio-cultural factors particularly involving the role of the species, and their use, within the country.

4. Scientific and Monitoring Data

In modern legislation, most conservation activities are increasingly dependent on scientific understanding – particularly information on the size and recovery rate of species populations, the impacts of uses affecting of species, and the effectiveness of conservation techniques.

The success of legislation for migratory species protection will be largely a function of–

- its use of technical information concerning the nature of conservation needs, problems and special situations;
- its provisions that ensure the compilation and utilisation of relevant scientific data; and
- its provision for administrative response to changes in conditions and new developments in scientific understanding of species biology, ecology, and other relevant factors.

5. Social and Cultural Factors

Finally, many factors relating to the social, cultural and economic context within the society – the “role” of the species, and of conservation generally – are essential to the legislative process. Among the issues that must be considered are –

- the extent of community cohesion,
- the nature of current and traditional uses of the species and ecosystems of concern;
- factors indicating the public beliefs and expectations regarding the use of species and ecosystems and the dependability of government assurances and new governmental laws and programmes.

Step 3: Drafting Legislation

This section, is divided into 8 sub-parts, each addressing an element of the framework of national legislation that would be required in order to adopt legislation:

- Definitions
- Sustainable use of waterbirds (and species and habitat components on which they depend);
- Direct controls on the taking of specimens;
- Habitat conservation measures;
- Exceptions to provisions regarding controls on takings, sustainable use and habitat conservation;
- Market and other indirect controls;
- Research, education and monitoring; and
- Other provisions, including international co-operation and emergency planning

Each sub-part begins by restating the relevant provisions of the AEWA and of the AEWA Action Plan. (In some cases, the same provision is restated in more than one sub-part, recognising that a combination of legal provisions will be important to achieve the various requirements and objectives set out in the international documents.)

Each sub-part next discusses the particular legislative issues that may be of assistance to the creation of laws, regulations and other legislative documents for protection of migratory waterbirds. Some of these discussions are sub-divided. Each subdivision will conclude with one or more Legislative suggestions, regarding issues that should be addressed.

A. Species definitions and lists

One of the most important elements of many species protection laws relates to the definitions which clarify which species are protected, or place protected species within categories, for purposes of determining the level of protection that will apply.

1. Obligations of the Parties

AEWA defines “waterbirds” to mean those species of birds that are ecologically dependent on wetlands for at least part of their annual cycle, have a range which lies entirely or partly within the Agreement Area and are listed in Annex 2 to this Agreement;” (AEWA Article I.2(c).)

More particularly **AEWA’s Action Plan** “is applicable to the populations of migratory waterbirds listed in Table 1 to this Annex (Table 1).” (AEWA Action Plan (Annex 3 to AEWA) § 1.1.) Table 1 lists populations of species that are not listed in Annex 2 to AEWA, and includes a variety of designations. The Action Plan gives particular attention to subgroups of species, such as “populations listed in Categories 2 and 3 in Column A only and which are marked by an asterisk” (see, e.g., AEWA Action Plan (Annex 3 to AEWA) § 2.1.1(c)) and “populations listed in column B of Table 1” (see, e.g., AEWA Action Plan (Annex 3 to AEWA) § 2.1.2.)

In addition, it is very important for purpose of adopting and utilising definitions that AEWA’s specific statement that “the provisions of this Agreement shall in no way affect the right of any Party to maintain or adopt stricter measures for the conservation of migratory waterbirds and their habitats.” (Art. XI.2)⁶

2. Particular Legal Measures

In defining the coverage of migratory waterbird conservation legislation, it is important to consult with national legislative drafting experts before proposing definitions within draft legislation.

Level of detail: Different levels of legislative documents have different purposes, and therefore, different levels of detail, particularly in definitional matters. For example, one of the most important unique roles for **national law** is to serve as a long-term mandate – an overall plan – regarding important national objectives. National laws’ principles and concepts are often the basis for evaluating the legal validity of actions by enforcing agencies, and of the regulations adopted under that law. Hence, if the law is overly specific regarding scientific and technical matters, it may tie the hands of implementing agencies. Moreover, national legislation is usually adopted by designated “lawmakers” rather than by specialists in the field being addressed. In order to fulfil their offices, these officers must be able to understand and debate the issues and concepts that are the subject of the legislation. For this reason, it is essential that national legislative terminology is be clear to national legislators and others who are not scientific specialists. Hence, broader definitions, possibly requiring later clarification by regulations drafted by scientific and technical experts, are appropriate at this level.

More specific blueprints for achieving these objectives are then adopted at the ministerial and other levels. Depending on the intended audience for these documents, they may include a scientifically specific level of detail.

Definitional approaches to coverage: In some cases, definitions will be descriptive (“all waterbirds that...”). These are generally expansive and inclusive approaches, found in national acts. At the regulatory level, the document might use a more scientific description, or might utilise lists or other limiting approaches.

⁶ In this Conservation Guideline, the provisions of AEWA and its Action Plan which discuss certain categories of species will be noted, however, no attempt will be made to guide the application of those categories in national legislation. It assumes that all Parties will develop a programme that includes absolute protection for certain highly endangered species which require such protection, and a framework of controlled sustainable use of another category of species.

It is for each country to decide how these shall work, and to ensure as to each AEWA species, that the protections are *AT LEAST* as strict as AEWA requires. This will nearly always be easier, by increasing the breadth of more strictly protected categories. As noted, AEWA allows parties to treat its requirements as “minimum standards” and impose stricter protections where it believes them to be appropriate.

One common practice in species protection legislation must be mentioned here – the practice of incorporating by reference the list of protected species as adopted by an international agreement or its Conference or Meeting of the Parties. This practice has both positive and negative aspects

- ⇒ **on the positive side:** it ensures that the country's law always applies to all relevant species, since they are automatically included in the law, as soon as they have been added to the international list.
- ⇒ **on the negative side:** there are several issues that must be dealt with:
 - through this mechanism, the country's law includes every species protected internationally, even where the country is only obliged to take action relating to migratory species populations that are found within the country;
 - international lists often do not include local common names, which often vary greatly from country to country. A government official or member of the public may find it difficult to determine which species are covered;
 - international meetings are often not well publicised at the national level. One who is aware of older lists may not know of changes which affect his activities.

The solution must be determined for each country, based on how effectively listing information is implemented within the country, and how well that information is understood and applied by the individuals whose actions are regulated by the law, and the officials involved in its administration

Legislative suggestions:

Species definition and categorisation provisions are most effective where they –

- *use clear terminology, including consistently using the same, precisely defined term to refer to each category.*
- *provide a clear statement of which species are protected within each category, either
 - *by adopting one or more annexed lists of species, which can be amended, if necessary, without additional legislation, or*
 - *by describing the qualities of each category of species, leaving to each official (or to each member of the regulated public) the duty of making this determination of which category a particular species belongs in..⁷**
- *ensure that descriptive definitions can encompass in some appropriate manner
 - *bird species (in other words, ensure that the law is not limited, for example, to mammals and fish);*
 - *relevant⁸ species protected under AEWA, whether directly or by incorporation of AEWA's Annex 2;*
 - *relevant species listed in Table 1 of AEWA's Action Plan, whether directly or by incorporation of Table 1;*
 - *both live and dead whole specimens;*
 - *their parts and products;*
 - *nests, eggs, feathers, shells;*
 - *environmental species (food or other species) on which the protected species relies, or*
 - *similar looking bird species which are not protected.⁹**
- *identify the procedures and criteria and procedures for adding species to the various lists and/or for removing species from any list, and*
- *clarify that the decision to add a species (both plant and animal) to any national list of protected species may be based on factors other than the species' status as (endangered, threatened, vulnerable, etc.) in particular that
 - *a species may be protected if it is essential to the survival of a protected species;**

⁷ In many countries, laws like this would be invalidated on the basis of "indeterminacy" or "ambiguity," since they do not make it clear to the public which actions are legal and which illegal.

⁸ For this purpose, a species is "relevant" if it is sometimes found within the country or the area affected by actions within the country.

⁹ The need to include such species within the basic prohibition on taking will depend on many factors for each country.

- *conservation and listing decisions may be based on the international conservation status of the species, and the impact of certain activities outside of the country's jurisdiction;*
- *address the situation in which a particular specimen (or part or derivative) cannot be identified. Among the options available here, are some combination of the following:*
 - *temporary impoundment of the specimens (or parts or derivatives) for testing,*
 - *empowering the person in possession of the specimen (or part or derivative) to obtain his own certification of the identity of the specimen from specific experts, to protect himself against such possible impoundment,*
 - *imposing on such person the duty to do so as a prerequisite for taking or keeping the specimen;*
 - *Where non-governmental actors are empowered or required to obtain such certification, either*
- ◆ *create of a specific list of "certified experts", or*
- ◆ *describe the qualifications that such an expert must have and the nature of the documentation that he/she must provide.*
- *indicate where and how a member of the public or government official can find the complete current lists of species in each category.¹⁰*

¹⁰ This provision addresses a serious problem that exists in many countries, where printed copies of particular legislative documents may be difficult even for government officials to obtain, and where it may be equally difficult to determine whether the copy in hand represents the most current or complete version of the document. Access to the most current version is essential, however, for many reasons, including especially the fact that governmental officials need to be able to identify protected species, by scientific and common name, and on sight.

B. Sustainable Use

The sustainable use of migratory waterbird species, is an important element of their conservation. Particularly, where such uses are a basis of traditional subsistence livelihoods, undertaken with strong popular recognition and approval, a law that does not recognise and work with them is unlikely to be efficient or effective. Absolutely prohibiting taking of a species, for example, often succeeds only in uniting subsistence users of that species in defying the law. In contrast, a law which allows sustainable use, gives government a basis for requiring that such uses be sustainable, and utilise methods that are most beneficial or least harmful to the habitat. (Please note, the issue of exceptions to these provisions is discussed in part E below.)

1. Obligations of the Parties

With regard to sustainable use, the relevant provisions of AEWA and CMS may be considered in two categories – (i) general provisions, applicable to both subsistence and commercial uses, and (ii) special dispensations for traditional and subsistence uses.

a. General Concept of Sustainable Use

As an initial matter, **AEWA**'s preamble notes that all Parties agree –

- that waterbird conservation is intended to preserve this precious resource “for the benefit of present and future generations” (AEWA Preamble, 3rd paragraph); and
- that “any taking or migratory waterbirds must be conducted on a sustainable basis, taking into account the conservation status of the species concerned over their entire range as well as their biological characteristics” (AEWA Preamble, 5th paragraph.)

In its operative provisions, **AEWA** requires that the Parties “ensure that any use of migratory waterbirds is based on an assessment of the best available knowledge of their ecology and is sustainable for the species as well as for the ecological systems that support them.” (AEWA, § III.2(b).)

As a further general premise underlying this work, **AEWA** provides that “in implementing the [conservation] measures..., Parties should take into account the precautionary principle.” (AEWA, § II.2.)

In a similar vein, the **Action Plan** requires the Parties to “endeavour to make wise and sustainable use of all wetlands in their territory.” (AEWA Action Plan (Annex 3 to AEWA) § 3.2.3.)

In furtherance of this basic obligation, the Agreement and Action Plan require a number of specific activities:

Inventory: **AEWA** requires that the Parties

- “identify sites and habitats for migratory waterbirds occurring within their territory and encourage the protection, management, rehabilitation and restoration of these sites... concerned with habitat conservation.” (AEWA, § III.2(c).)
- “ensure that any use of migratory waterbirds is based on an assessment of the best available knowledge of their ecology and is sustainable for the species as well as for the ecological systems that support them.” (AEWA, § III.2(b).)

Threat analysis: **AEWA** specifically requires Parties to “investigate problems that are posed or are likely to be posed by human activities and endeavour to implement remedial measures, including habitat rehabilitation and restoration, and compensatory measures for loss of habitat.” (AEWA, § III.2(e).)

Connected to this, the **Action Plan** calls upon the Parties to “endeavour to gather information on the damage, in particular to crops, caused by populations listed in Table 1.” (AEWA Action Plan (Annex 3 to AEWA) § 4.3.2.) Beyond this they are called upon to identify techniques to mitigate this damage. (*Id.*, 4.3.3.)

Management Planning: **AEWA** notes specifically that the Action Plan for the Agreement should specify “actions which the Parties shall undertake ..., consistent with the general conservation measures specified in ... the Agreement, [in relation to] ... the management of human activities,” (AEWA, Art IV.1(c).)

In this connection, **AEWA** also requires the parties to give “special attention to endangered species as well as to those with an unfavourable conservation status.” (AEWA, §3.1.)

The **Action Plan** requires Parties to “develop strategies, according to an ecosystem approach for the conservation of the habitats of all populations listed in Table 1, including the habitats of those populations that are dispersed.” (AEWA Action Plan (Annex 3 to AEWA) § 3.2.4.)

More directly focused on sustainable use, the **Action Plan** provides, as a basis for establishing the necessary framework, that the parties must “prepare and implement national single species action plans for the populations listed in Column A of Table 1” for a variety of purposes, including addressing damage caused by the protected species, particularly to agricultural crops and activities. (AEWA Action Plan (Annex 3 to AEWA) § 2.2.2(c).) This type of planning, however, is a two-way street, since the Parties must also “co-operate with a view to developing single species action plans for populations which cause significant damage, in particular to crops. . (AEWA Action Plan (Annex 3 to AEWA) § 4.3.4.)

Based on (and presumably included within) these action plans, the Parties should establish of “limits on taking,” and “adequate controls to ensure that these limits are observed.” (AEWA Action Plan (Annex 3 to AEWA) § 2.1.2(c).)

It is also essential that management planning be regularly updated based on new and more dependable information. In this connection, the **Action Plan** requires the Parties to “co-operate with a view to developing a reliable and harmonised system for the collection of harvest data in order to assess the annual harvest of populations listed in Table 1.” (AEWA Action Plan (Annex 3 to AEWA) § 4.1.3.)

Control Measures: In this connection, the **Action Plan** requires the Parties to “endeavour to avoid degradation and loss of habitats that support populations listed in Table 1 through the introduction of appropriate regulations or standards and control measures... [regarding] the use of agricultural chemicals, pest control procedures and the disposal of wastewater, which are in accordance with international norms for the purpose of minimising their adverse impacts on the population listed in Table 1. (AEWA Action Plan (Annex 3 to AEWA) § 3.2.3.)¹¹

Further, under the **Action Plan**, the Parties should establish of “limits on taking,” based on the species-specific action plans, described above, and to impose “adequate controls to ensure that these limits are observed.” (Annex 3 to AEWA) § 2.1.2(c).)

The **Action Plan** gives some specific advice concerning the nature of such limits and controls. As to populations listed in **Column B of Table 1**, the **Action Plan** requires that the Parties “regulate the taking of birds and eggs, with the object of “maintain[ing] or contribut[ing] to the restoration of those populations to a favourable conservation status and ensuring on the basis of the best available knowledge of population dynamics that any taking or other use is sustainable.” (AEWA Action Plan (Annex 3 to AEWA) § 2.1.2.)

Finally, with regard to these controls, the **Action Plan** recognises that the awareness of the various users of migratory waterbirds is another critical element, essential to effective systems of sustainable use. For this reason, it requires Parties to “promote the requirement of a proficiency test for hunters, including among other things bird identification.” (AEWA Action Plan (Annex 3 to AEWA) § 4.1.8)

Sectoral Co-operation: As an essential element of any kind of sustainable use framework, the **Action Plan** calls upon the parties to ensure that the “sustainable use” aspects of their legislation must work in conjunction with many others, (AEWA Action Plan (Annex 3 to AEWA) § 3.2.3.) The recommended vehicle for this effort is “the introduction of appropriate regulations or standards and control measures... [regarding] the use of agricultural chemicals, pest control procedures and the disposal of wastewater, which are in accordance with international norms for the purpose of minimising their adverse impacts on the population listed in Table 1.” (AEWA Action Plan (Annex 3 to AEWA) § 3.2.3.)¹²

¹¹ This provision also requires the preparation and distribution of materials regarding these controls, so that they are well known to and understood by the regulated public.

¹² This provision also requires the preparation and distribution of materials regarding these controls, so that they are well known to and understood by the regulated public. This objective of inter-sectoral co-ordination is also found in other international documents, including the Convention on Biological Diversity (CBD) – a convention which has been signed and ratified by all current Parties to AEWA.

In addition, the Parties' governmental processes with regard to development must give appropriate consideration to the waterbird species and habitat protection. The **Action Plan** requires the Parties to "as far as possible, promote high environmental standards in the planning and construction of structures to minimise their impact on the populations listed in Table 1. (AEWA Action Plan (Annex 3 to AEWA) § 4.3.5.)

It further calls on Parties to "assess the impact of proposed projects which are likely to lead to conflicts between populations listed in Table 1 that are in the areas referred to in paragraph 3.2 and human interests, and shall make the results of the assessment publicly available." (AEWA Action Plan (Annex 3 to AEWA) § 4.3.1.)

Particular uses: The **Action Plan** requires the parties to "encourage, where appropriate but not in the case of core zones of protected areas, elaboration of co-operative programmes between all concerned to develop sensitive and appropriate eco-tourism at wetlands holding concentrations of populations listed in Table 1." (AEWA Action Plan (Annex 3 to AEWA) § 4.2.1.) This "encouragement" is to be undertaken based on cost/benefit analysis and consideration of "other consequences that can result from ecotourism." (AEWA Action Plan (Annex 3 to AEWA) § 4.2.2.)

b. Special Provisions for Traditional and Subsistence Use

AEWA gives specific attention to traditional and subsistence users of migratory waterbirds, to ensure that they are not inappropriately burdened by the migratory species protections and the general planning and limitations on the use of the species. In particular, **AEWA** specifically incorporates provisions of **CMS** which authorise Parties to draft their laws and create exceptions which "accommodate the needs of traditional subsistence users of Appendix I species." (CMS § III.5, incorporated by AEWA, § IV.2(a).)

The **Action Plan** also provides that the general limitations on taking (discussed above) and on the trade in and utilisation of specimens and their parts (described below) should not apply (as to populations listed in categories 2 and 3 in Column A of Table 1), with regard to hunting which is undertaken "on a sustainable use basis, where hunting of such populations is a long-established cultural practice." (Annex 3 to AEWA) § 2.1.1(c).)

The Parties are also called upon to take traditional and subsistence uses, and the traditional knowledge on which they are based, into consideration in the creation of management plans. The **Action Plan**, calls on Parties to "ensure that their hunting legislation implements the principle of sustainable use... taking into account the full geographical range of the waterbird populations concerned and their life history characteristics." (AEWA Action Plan (Annex 3 to AEWA) § 4.1.1.)

The Plan also requires that these special requirements are not a "free ride." In particular, it notes that even as to traditional and subsistence uses, "sustainable use shall be conducted within the framework of special provisions of a species action plan at the appropriate international level." (Annex 3 to AEWA) § 2.1.1(c).) In this, the Plan appears to require that seasonal limitations (AEWA Action Plan (Annex 3 to AEWA) § 2.1.2(a).), restriction of hunting methods (AEWA Action Plan (Annex 3 to AEWA) § 2.1.2(b).), and even appropriate limits on taking, possession, utilisation, and trade" (AEWA Action Plan (Annex 3 to AEWA) § 2.1.2(c) and (d)) may be applicable to these users, as necessary in order to ensure the continued survival of the species and its ecosystem.

2. Particular Legal Measures

General Legislative Recommendation: *It is advisable to ensure that an appropriate statement of the "precautionary principle" is clearly relevant to all activities and decisions affecting migratory waterbird protection. Internationally agreed expressions of the precautionary principle exist in many places. Current controversy concerning the exact wording of the principle in other international work suggests that the precise formulation chosen should be based on national political concerns.*

c. Inventory, Monitoring and Data Evaluation

Information and proper understanding of it is the key to effective sustainable use of species, habitats or ecosystems. Such information must give authorities

- A continuously accurate understanding of the current status of each relevant species, group of species, habitat, or ecosystem, within in the area of concern;

- an understanding of the factors and activities that are affecting the various species, habitats and ecosystems; and
- an effective knowledge of the biology and ecology of each species, habitat and/or ecosystem, including specifically the rate of offtake that will allow the species population to remain stable, at a healthy level.

All three factors are closely influenced by the status, activities and conditions of species, habitats and ecosystems at all stages in the species' migratory cycle. It is essential that the species evaluation process must include close co-operation with other countries in the migratory path of each protected population.¹³ In addition, it may be essential to evaluate and understand all three factors with regard to other species that are essential to the health of the birds and their ecosystems.

Legislative suggestion: Provisions for to data collection, evaluation and inventory serve should --

- indicate to the officials charged with collecting and using data the specific legislative objectives behind data collection;
- set forth the frequency of collection of follow-up monitoring data;
- designate the agenc(ies) or other bod(ies) to be charged with
 - responsibility to develop, revise, and disseminate the terms of reference for data collection (categories of information to be collected and the level of detail involved, etc.), as necessary to meet the stated legislative objectives;
 - serving as the repository for the collected data;
 - setting out the obligations for use of the data in the management process, including public involvement in that process;
 - complying with the AEWA requirement of co-operate in the establishment of (and providing data to) "a reliable and harmonised system for the collection of harvest data." (AEWA Action Plan (Annex 3 to AEWA) § 4.1.3);¹⁴
 - designating the manner of access to this data, as well as powers for protection of the data where it contains information which, if generally known, might negatively effect conservation and sustainable use of the species;
- designate responsibility for providing data, including, where possible, allocating some elements of the data-gathering responsibility to licensees (especially tourist-service operators, organisations managing protected areas under contract, concessionaires, traditional users, communities and others subject to preferential sustainable use permits, licenses, etc.)
- ensuring that existing internal data sources, including records of previous licenses and other known use is included in the process and used to validate the information submitted in the inventory process;
- authorising those conducting the data collection and evaluation process to utilise information from other Parties and other sources, and to develop specific relationships for sharing information with such others;
- empowering specific agencies, authorities or expert bodies to review data submitted and to determine its sufficiency and veracity; and
- providing adequate penalties and other disincentives to any who would submit incorrect or insufficiently verified data.

d. Planning and the Ecosystem Approach

The planning process primarily involves the work of biologists, social scientists, and other technical specialists. As such, the role of legislation is primarily to create a framework in which relevant management plans and related documents can be created and implemented, and to empower their enforcement.

One of the most important characteristics of successful planning frameworks is flexibility – the ability to adjust the plan to respond to new information and to advances in science, changes in uses and attitudes,

¹³ For this reason, legislative powers with regard to inventorying and evaluating the status, uses, and related factors, relating to sustainable use of species, habitats and ecosystems must be closely tied to the powers and duties to co-operate with other parties in collecting and collating relevant data (discussed in 0.E.2.)

¹⁴ Clearly, this requirement should also be a component of the development of terms of reference and forms for data collection.

unexpected activities, previously misunderstood or unknown conditions and other factors. Legislation alone is not generally sufficiently flexible to be a primary planning tool, but must define and empower the process.

Counterbalancing their flexibility, planning processes must be rational and dependable. People, communities and other entities acting in reliance on the plan should be fairly treated in any change of that plan. To avoid abuses at the governmental level, legislation should include provisions that aim to ensure that the plan be based on scientific data, and be designed to achieve its objectives.

The planning must also encompass multiple levels of activity, taking into account a range of activities and factors. In many countries, the planning process occurs initially at one level and then is adopted at others. For example, the law could require that a draft plan be initially developed at the district (local) or provincial (sub-national) level, and then all of these plans be submitted to the central authority for a process of rationalisation and for the creation of a “national plan.” It is equally possible to begin by developing the plan at the national level, and require that local or sub-national plans be developed in conformity with basic planning.

Finally, as noted in the **Action Plan**,¹⁵ it is also essential to any management planning arrangement to recognise the “ecosystem approach” – a concept that has been elucidated in a detailed “operational guidance” adopted by the Conference of the Parties to the CBD. (CBD COP Decisions IV-1, and V-6.)

This document was designed to “reflect the present level of common understanding, and to encourage further conceptual elaboration, and practical verification” of the approach. Accordingly, given that all Parties to AEWA are also Contracting Parties to the CBD, the CBD’s operational guidance on the ecosystem approach should be the basis of national implementation of the AEWA requirement regarding the ecosystem approach.

The CBD describes the “ecosystem approach” as “a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way. Application of the ecosystem approach ... is based on the application of appropriate scientific methodologies focused on levels of biological organization which encompass the essential processes, functions and interactions among organisms and their environment. It recognises that humans, with their cultural diversity, are an integral component of ecosystems.” For this purpose, “ecosystem” means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.” (CBD, Article 2.)

The CBD sets for the 12 principles for the ecosystem approach. Among its other provisions, it strongly advocates

- Utilising the appropriate spatial and temporal scales of ecosystem protection;
- Decentralisation and the need for a long-term approach and evaluation;
- Recognition of societal choices and social/economic/cultural factors relevant to conservation and sustainable use decisions;
- Addressing the interconnection among various protected and managed areas, and between such areas and other areas;
- Ensuring that “ecosystem structure and function” is the primary basis on which activities are evaluated to determine their value in conservation and sustainable use;
- Integrate and reflect trade, markets, incentives and related economic issues;
- Flexible responsiveness to unavoidable and dynamic ecosystem changes;
- Balance and integrate conservation and sustainable use;
- Consider all forms of information including traditional knowledge; and
- Involve all relevant sectors and all relevant scientific disciplines.

In addition, it “encourages Parties and Governments to promote regional co-operation, for example through the establishment of joint declarations or memoranda of understanding in applying the ecosystem approach across national borders. “

All of the above provisions appear to be dealt with already in other provisions of AEWA and its Action Plan. The value of the ecosystem approach and the Action Plan’s reference to it is that it provides guidance in how these principles can be integrated.

¹⁵ AEWA Action Plan (Annex 3 to AEWA), 3.2.3.

Legislative suggestions: *Most countries already include one or more provisions for management planning for conservation and sustainable use, which can be made applicable to planning for the management of migratory waterbirds. To be effective, legislation for conservation and sustainable use management and planing should –*

- *specify a deadline for the completion of the initial management plan, and a period for regular systematic reconsideration and revision of the plan;*
- *identify the main components of the plan to be developed, including, for example:*
 - *identification of the species and populations of concern and other animal and plants species most important to their survival;*
 - *a full description of the nature and location of relevant habitat areas;*
 - *a description of the biological, environmental, geologic and cultural resources in and near such habitats, including use by local residents;*
 - *detailed statements of proposed conservation and sustainable use objectives for each species and/or site;*
 - *a detailed account of the means and methods by which those objectives will be harmonised with other areas, and other levels of planning, including proposed activities, zoning and other mechanisms; and*
 - *such regulations as are necessary for specific implementation of the zoning, local resident user, and other elements of the plan (including identification of classes and categories of persons to whom those regulations will apply.)*
- *specify the procedures for final plan adoption;*
- *authorise the adoption of (and specify procedures for proposing) such regulation at all levels as may be necessary to give effect to the plan;*
- *identify mandatory sources to be consulted in the management planning process, including*
 - *the information gathered in the inventory process;*
 - *any designated organisations (research organisations, zoos, aviaries, herbaria, universities, etc.) which may be designated as advisors to the management planning process;*
 - *information from other countries within the migratory range of relevant species and populations;*
- *contain some program for central awareness, oversight, co-ordination or approval of plans developed provincial or local plans;*
- *be based on a specific requirements for detailed contribution to national information base, and planning process, by appropriate local, district or provincial officials;*
- *enable the management plan and implementing agency to regulate activities outside of protected habitats or other designated areas, to ensure that such activities do not damage or endanger protected species or ecosystems;*
- *enable the designation of zones of protection, including not only critical habitat areas, but also those buffer areas in which activities might impact such habitats, and migratory pathways;*
- *address sectoral co-ordination needs, and public awareness of and/or participation in the management process, including the following:*
 - *specifying the means of ensuring substantive and valuable participation by governmental agencies and ministries in related sectors, including specifically financial, industrial, and agricultural authorities*
 - *specifying mechanisms for publicising the process and for public participation (public meetings, submission of written comments, etc.) by affected individuals and groups within private sector;*
 - *specifying mechanisms by which the primary agency preparing the plan can foster, encourage and assist the participation of*

- ◆ *local populations,*
- ◆ *subsistence users of affected areas, and*
- ◆ *those in traditional lifestyles in the relevant areas*
in the planning process. And identify whether the use of such mechanisms will be mandatory in planning process;
- *specify the procedures for ensuring that all comments and information received is properly considered.*

e. Licensing and Preferential Uses

In most countries, licensing and other governmental permissions (permits, concessions, leases, etc.) are important tools by which planning processes are implemented. Sustainable use of relevant resources must be controlled, overseen, tracked, and to this end, all of these permissions should be subject to provisions which allow government to impose special requirements and conditions in the event of urgent conditions or other new information which alters the management plan on which the license was given.

In addition, legislation often designates categories of preferential users (including, for example, traditional and subsistence users), who are subject to less strict limitations. Although often these users are not subject to licensing requirements, the concept of sustainable use requires that these uses, too, should be controlled and tracked.

Legislative suggestion: *Legislation for licensing exists in most countries. However, even as to conservation-related licensing, there are many issues that may not be adequately addressed, in order for such licensing to be effective tools of migratory waterbird management, the legislation governing such legislation must –*

- *Specifically provide that **all** licensing decisions **must** be made in accordance with the migratory waterbirds management plan,¹⁶ unless a specific procedure is followed. (In general, the procedure for issuing a license that does not accord within the plan should include the same consultation, including public participation, consultation of the private sector, and consultation of all relevant government sectors);*
- *identify the powers of government to prohibit or control access to protected habitat areas, including, if appropriate, the ability to charge an entrance fee, to arrest or eject illegal entrants or those who violate the conditions on which entrance is granted;*
- *identify the particular activities that may only be undertaken with a license (so long as the license is not inconsistent with the management plan and relevant quotas), such as boating, motoring, low overflying; fishing, hunting, killing/capturing relevant species; gathering any terrestrial or aquatic vegetation, sand, minerals, or other substrate; possession of a weapon, explosive, trap or poison; grazing, agricultural or aquacultural activities; tourism or other commercial activity; grading, drilling; or siting or construction of buildings, roads or other works;*
- *identify particular situations of exemptions – seasons in which some or all of these activities will be permitted (those seasons in which the migratory species of concern are not present), particular situations (emergencies, critical research and testing, etc.) in which permission should be assumed – and clarification of the need for reporting of actions taken subject to these exemptions;*
- *identify the mandatory conditions on which a license may be granted, such as mandatory or unacceptable qualities about the applicant (citizenship, past record of compliance, etc.), the proposed activity, etc.;*
- *identify mandatory provisions which must be included in every license, including as necessary*
 - ◆ *specifications of the species that may be taken, the manner in which they may be taken, and the use to which they will be put;*
 - ◆ *geographic restrictions;*
 - ◆ *time or seasonal restrictions;*
 - ◆ *specifically described quotas, if applicable; and*

¹⁶ This refers to the plan in which sustainable migratory waterbird management is addressed, regardless of which legislation it is contained in.

- ◆ *reporting and other oversight mechanisms;*¹⁷
- *mandate a mechanism for registration, regulation, tracking, or other governmental knowledge and oversight of preferential use of species or habitats by those exempt from licensing requirements (traditional and subsistence users, residents within protected regions, owners of land containing migratory waterbird habitat areas, and others). Depending on social and other factors, these measures will vary, from mandatory registration or certification, on one extreme, to incentive measures (special training or other benefits) on the other*
- *specify the power to set and collect fees for licenses and permits;*
- *specify the power to issue emergency directives or to alter the conditions of licenses or permits, individually or collectively, and of exemptions, in the event of emergencies, significant changes in the status of the protected species or habitats; or the receipt of new information altering the national conclusions regarding status, levels of acceptable use, etc.*
- *specify the mechanism (if any is to be permitted) for transfer or sale of permits;*
- *specifying the conditions upon which a permit, license or similar document may be amended (in writing only, and not by oral agreement);*
- *include, at a minimum, some kind of administrative appeal process for those whose application for a license or other permission has been denied, and for those whose license has been revoked or negatively changed, and those administratively penalised for violating their license.*

In addition, where appropriate, legislation should authorise the licensing agency to include specific conditions within licenses relevant to the sustainable use of migratory waterbirds and their habitats. This legislation may either require such conditions in all licenses, or give the agency the option of including them. Some examples of this type of condition include –

- *requiring licensees and preferential users to participate in national data-gathering processes;*
- *allow the development of a list of license violators whose offences have negative impacts on conservation/sustainable use, and provisions that no person included in this list, nor any company or organisation in which they have a financial or other interest, may obtain any listed type of license;*
- *allow the government to bring a civil action for compensation (or remediation) of any damage caused by the licensee.*

Finally, relevant to licensing, it is important to examine licensing provisions under other law, where the licensees' activities may impact on migratory waterbirds and their habitats (including licenses for the use of water and wetlands, for discharge of waste into waters, for agricultural uses (including application of pesticides), for tourism operations, forest harvesting (both timber and non-timber), taxidermy, mining, boating, development, etc.). where possible waterbird issues should figure in the decisions relating to these licenses, and vice versa.

f. Benefit-sharing and Sustainable Use in Local Communities

Within the AEWA's geographic region, particularly in Africa, great attention has been given to the need to develop affirmative programmes for ensuring that local communities in critical conservation regions share appropriately in the benefits from the sustainable use of the biological resources within their region.

Perhaps the most well-known of these is Zimbabwe's CAMPFIRE program¹⁸, which utilises decentralised governmental units as the primary vehicles for the sharing of benefits with co-operating communities, and oversight of their compliance with the conditions and requirements of the programme.

While CAMPFIRE itself is focused primarily on the use of large mammals (for hunting, bushmeat, non-consumptive tourism, etc.), it may be possible to utilise similar incentives with regard to the sustainable use of migratory waterbirds, which are also subject to both consumptive (trade in live and stuffed birds, for example) and non-consumptive (tourism and birdwatching) uses.

¹⁷ Migratory species are generally distributed in a number of countries, at least during various points in their migratory cycle. As a result, it may be easier to disguise violations or confound punishment by claiming the specimen came from elsewhere. Accordingly oversight mechanisms are essential to ensure that in-country activities are adequately known, overseen and controlled.

¹⁸ The CAMPFIRE programme is remarkably well documented. Information regarding programme operations can be found online at <http://www.campfire-zimbabwe.org/>. Such information can also be obtained non-electronic form from THE AFRICA RESOURCES TRUST, PO Box HG 690, Highlands, Harare, Zimbabwe (Tel: (263-4) 732625; Fax: (263-4) 739163).

Legislative suggestion: *Such benefit-sharing sustainable-use programmes necessarily require enabling legislation. This legislation should –*

- ◆ *Restate and interpret the provisions of national law regarding the sovereign control over wildlife and related resources;*
- ◆ *Identify the legal basis for devolving certain control over specific wildlife resources to particular community groups, and to the owners and occupiers of land on which relevant species are found, may be undertaken.¹⁹*
- ◆ *Identify the nature of the right to collect money for tourism and other uses of species and their habitats (i.e., whether that right is based solely on the ownership of the lands that are used or entered, or whether any part of such charge is based on sovereign rights in the wildlife itself.)*
- ◆ *Clarify and delineate the relationship between*
 - *holders of direct rights to use the wildlife (i.e., persons licensed to use particular species or hunt within a particular area, or those who are exempt, and need no permit to use the habitat area and the species within it) and*
 - *communities who may be recipients of benefits under a sustainable-use programme.*
- ◆ *Describing in detail the specific requirements imposed on community groups qualifying for such programmes (in some countries, existing community administrative systems may be used for this purpose, in others a specific species-utilisation co-operative or other group must be formed as a legal entity, in other situations, informal groupings may be recognised) and how these organisations' operations shall be overseen and controlled.*

g. Sectoral Co-ordination

Most species and habitat protection is dependant on the decision-making processes of ministries, agencies, and sectors that may not have conservation or sustainable use of natural resources within their mandates. Since 1992, the international community has formally recognised that conservation can be significantly impacted by activities that do not directly utilise protected species or habitats. As a consequence, most countries have developed environmental impact assessment (EIA) processes, whether in law or other documents (regulations, directives, protocols, etc.)

It is essential to the success of programmes for sustainable use of migratory waterbirds that –

- That other agencies and legislation (including particularly those mentioned in the Action Plan, involve agricultural chemicals, pest control procedures and the disposal of wastewater) give special attention to the needs of migratory species conservation
- The migratory waterbird planning process should account appropriately for planned or reasonably expected development activities;
- Licensing and related decisions in the conservation/sustainable use sector, and especially such decisions within other sectors, should ensure appropriate balance of all concerns, recognising that, since extinction is a non-reversible phenomenon, special priority should be given to the potential impacts of any action or decision on unique and important resources such as migratory waterbirds; and
- (especially) that, in the EIA of proposed development activities, the potential impacts of those activities on migratory waterbirds should be considered and given priority.

Such co-ordination operates in both directions, as evidenced by the provisions of the Action Plan which authorise the Parties to create exceptions from the strict protections of waterbirds and habitats, and from licensing and sustainable use restrictions as well, where the exceptions are necessary, *inter alia*, “to prevent serious damage to crops, water and fisheries, or in the interests of air safety or other overriding public interests.” (AEWA Action Plan (Annex 3 to AEWA) §§ 2.1.3(a)-(d).)

Legislative Suggestions: *In creating legislative prohibitions on the taking or destruction of specific habitat species, or evaluating/amending provisions regarding licensing and decision-making, the Parties should –*

- *Where possible under national law, impose restrictions on both individuals who take actions harmful to such species, and the landowners on whose land the species are found.*

¹⁹ These arrangements give a single group within the country control over or the benefits from a resource that should otherwise be considered a “national resource.” This “preferential relationship” is a special benefit, which should be subject to special justification and conditions.

- *Confirm that licensing laws (both those relevant to conservation/sustainable use rights and activities, and other types of licensing that may have the potential to impact migratory waterbird habitat areas) must consider the potential impact of the activity or right under consideration on waterbird species and habitats, and that all species, including migratory species that are only present in the country for part of the year (and may, therefore not be considered “indigenous” or “native,” or meet other criteria that often appear in regard to the consideration of habitat issues in licensing decisions.)*
- *ensure that licensing, decision-making and EIA laws in all sector recognises the particular priority required under AEWA, in order to meet the country’s international obligation to “promote high environmental standards in the planning and construction of structures to minimise their impact” on migratory waterbird species and their habitats, as discussed above.*
- *Require that environmental impact assessment provisions should include, as a mandatory element, that the agency involved in the decision should seek out and give priority to the comments of the agency or institution charged with migratory waterbird conservation, or designated as scientific advisor on these issues, whenever –*
 - *some or all of the proposed activities will occur within a specific radius of an area that has been protected as (or another area that has been designated for special legal protection as) a migratory waterbird habitat area;*
 - *some or all of those activities will or might result in a discharge into a water system that eventually passes through such an area;*
 - *some or all of those activities will or might result in the emission of pollutants into the air within a designated radius around such area, or otherwise affect migration;*
 - *the activity will or might lead to an increase in the traffic of humans, domestic animals, and vehicles in, over or near such an area;*
 - *other activities that will have particular resulting impacts that might affect waterbirds or their habitats (such as, for example, changes to the flow or location of a watercourse);*
 - *the activity will or might utilise resources on which waterbird species depend, or which are found within waterbird habitats (even if also found in other non-habitat areas), including, sand, gravel, minerals, fish, timber, non-timber forest products, etc., even if the waterbird species do not depend on these resources;*
 - *the activity, although providing only a minimal impact on waterbirds and habitat areas, might have an even smaller or non-existent impact, if particular reasonable changes or mitigation measures were made conditions of approval;*

In addition, as detailed in the previous bullet point about licensing legislation, it is essential that protection of migratory waterbirds is not limited by definitions of “indigenous,” or “native,” species, or by other criteria that appear in the EIA legislation or procedure.

In this connection, it should be noted that many EIA laws focus on specific categories of activity, necessitating that legislative analysis relating to migratory waterbird protection will need to include careful and expansive thinking about whether any types of activities or other criteria that might have particular impact on waterbirds (noise, overflight, etc.) have been omitted that should trigger the EIA requirement.

- *Ensure that there is a role for the agency charged with protection of waterbirds and their habitats, and for the consideration of migratory waterbird-related concerns, in the laws regulating the development of zoning (land-use planning or town and country planning) at the local, subnational and national levels, and that such agency is entitled to automatic notice of and participation in all zoning decision-making processes (including the granting of variances) that relate to activities or areas which have the potential to impact migratory waterbirds or their habitats, as described above..*
- *Internally (within the agency in charge of waterbird conservation), it will also be of vital importance to ensure that, when requests for consultation regarding EIAs on proposals for new developments or activities, those requests are scrupulously considered and responded to in a timely and assertive fashion.*

Sectoral co-ordination is one of the most difficult legislative mandates to implement. At a minimum, it requires a careful legal scrutiny of all licensing and decision-making laws to conflicts with the AEWA

obligations. for which an EIA is needed must be examined, as well as the means for challenging or enjoining activities where the EIA process was not acceptable (did not address the relevant concerns. The greatest challenge, will be to find a way of addressing conflicts between enactments. A consensus-based negotiation process of resolving these issues is strongly recommended.

C. Direct Controls on taking of specimens

This Section of the Guidelines will examine the provisions that control human activities that remove or harm specimens in or from the wild – that is, hunting, killing, capturing, or disturbing them, or taking their eggs. For these purposes, it will address such activities, as they effect either specimens of protected species or faunal specimens of species on which the protected species depend.

The following discussion addresses “basic prohibitions” on taking of or harm to migratory bird specimens. (Exceptions to these provisions are discussed separately, in part E.)

6. Obligations of the Parties

AEWA, its Action Plan, and CMS each include a number of basic provisions that comprise the minimum requirements applicable to all parties regarding direct control on the taking of specimens. **CMS** requires its Parties to specifically prohibit the taking of animals belonging to species listed on Appendix I of that Convention. (CMS § III.5, specifically incorporated into AEWA in AEWA, § IV.2(a).)

AEWA addresses this most directly in requiring the parties to “take measures to conserve migratory waterbirds, giving special attention to endangered species as well as to those with an unfavourable conservation status.” (AEWA, § III.1.)

In making these choices, **AEWA** provides that the Parties, “in implementing the [conservation] measures..., Parties should take into account the precautionary principle.” (AEWA, § II.2.)

Under **AEWA**, the **Action Plan** expresses the Parties obligations in terms of the particular species populations in each country –

- With regard to obligated to populations listed in *Column A of Table 1*, Parties are required to
 - “prohibit the taking of birds and eggs of those populations occurring in their territory.”
 - “prohibit deliberate disturbance insofar as such disturbance would be significant for the conservation of the population concerned.”

(AEWA Action Plan (Annex 3 to AEWA) § 2.1.1(a) and (b).)

In addition, the **Action Plan** requires Parties to “consider,” where appropriate, the problem of “accidental killing of birds by hunters as a result of incorrect identification of the species.” (AEWA Action Plan (Annex 3 to AEWA) § 2.2.2.)

Finally, as to populations listed in *Column B of Table 1*, they must “regulate the taking of birds and eggs, with the object of “maintain[ing] or contribut[ing] to the restoration of those populations to a favourable conservation status and ensuring on the basis of the best available knowledge of population dynamics that any taking or other use is sustainable.” (AEWA Action Plan (Annex 3 to AEWA) § 2.1.2.)

The **Action Plan** further requires Parties to

- “endeavour to phase out the use of lead shot for hunting in wetlands by the year 2000.” (AEWA Action Plan (Annex 3 to AEWA) § 4.1.4.)
- “develop and implement measures to reduce and as far as possible eliminate the use of poisoned baits.” (AEWA Action Plan (Annex 3 to AEWA) § 4.1.5)
- “develop and implement measures to reduce and as far as possible eliminate Illegal taking.” (AEWA Action Plan (Annex 3 to AEWA) § 4.1.6)
- “promote the requirement of a proficiency test for hunters, including among other things bird identification.” (AEWA Action Plan (Annex 3 to AEWA) § 4.1.8)

7. Particular Legal measures

Most legal measures relating to controls on the taking of specimens are based on the use of lists of species subject to various types of protections. Controls of this type typically turn on an array of specific provisions.

Some of the basic types of measures for control of taking are specifically listed under **AEWA’s Action plan**:

- Prohibitions of all takings or specific types of takings;
- Prohibitions of deliberate disturbance insofar as such disturbance would be significant for the conservation of the population concerned;
- Regulation of methods of taking;

- Establishment and enforcement of limits on taking; and
- Prohibition of the possession, as well as the utilisation of and trade in, birds and eggs and their parts.

(AEWA Action Plan (Annex 3 to AEWA) § 2.1.2.)

In addition to these required measures, parties should consider measures such as

- controls on the possession of certain types of tools and weapons within bird habitat areas,
- limitation of activities which disturb protected species of birds;
- controls on takings disturbance or removal of fauna species on which birds depend;
- provisions tying these controls to integrated planning and monitoring of waterbird takings and use; and
- procedures for, and limitations on the issuance of permits, exceptions, etc.

The following discussion will address only faunal species (animals, fish, insects, etc.). Plant species will be addressed under “habitats,” discussed below.

h. A “Suite” of provisions

One of the most important concepts in controlling the taking of protected migratory birds (or any protected species) is to recognise the value of a multifaceted approach. While a basic prohibition on unpermitted takings is important, it can be most effective only when coupled with other provisions described in this Guideline. The configuration of this suite of provisions is variable, depending on many factors of national law and the current situation.

For example, under many countries’ laws, a person cannot be convicted of violating a prohibition on hunting of protected waterbird species, unless the apprehending officer can give evidence that the person actually killed a specimen of that species. In most cases, the only possible proof will be eyewitness testimony, leading to a situation in which the testimony of one or two officers must be weighed against the testimony of one or several alleged hunters. Under some countries’ constitutions or judicial procedures, the courts are unable to convict on the basis of circumstantial evidence (such as the possession of killed birds). The case against the violator may fall because the evidence is not sufficient to overcome reasonable doubts about the violator’s actions and motives. In these cases, the basic prohibition alone may not be sufficient to deter hunters from illegal actions. Possible solutions to this kind of problem might include revising the law to

- define “hunting” to include possession of dead animals and or weapons for killing birds (guns, bows and arrows, nets, etc.); or
- include a separate provision making it illegal to have dead animals in one’s possession, and/or
- prohibit the possession of weapons for killing birds within a bird sanctuary, or other area in which hunting is not permitted.

For this reason, this Part discusses many concepts that should be addressed in conjunction with a basic prohibition or limit on the hunting or other taking of protected species, and includes some alternatives for their inclusion.

i. Taking of specimens

AEWA calls on parties to enact “prohibitions on the taking of birds belonging to the populations concerned during their various stages of reproduction and rearing and during their return to their breeding grounds if the taking has an unfavourable impact on the conservation status of the population concerned;” (AEWA Action Plan (Annex 3 to AEWA) § 2.1.2(a).)

Restrictions and prohibitions on “taking” can have many aspects. In addition, different types of takings may be subject to different types of limitations. As a result, it is important to approach the limitation on takings in a systematic way.

Legislative suggestion: *In many countries, it has proven useful to define “taking” (or some equivalent term) to include all types of activities that may result in the direct loss of or damage to a specimen, including all types of killing or capturing, as well as activities that cause undue disturbance of them. Often this can be part of a basic prohibition on unpermitted takings, which may serve as an “umbrella” – closing loopholes that might otherwise exist between more specific prohibitions and regulations of various methods of taking, seasonal and other permits, etc.*

(i) Increased awareness by those taking specimens

One of the most important provisions relating to controls on the taking of specimens is to exert some kind of control on the minds and attitudes of those who take birds and animals in the country, to ensure that they know which species may not be taken, and so that they comply with requirements and recommendations for “environmentally conscientious hunting and taking.”

In many cases, the knowledge that compliance is essential to maintain the species being hunted or taken, will operate to encourage compliance. AEWA’s Action Plan provisions which require the Parties Accordingly, it is important for countries to ensure that bird hunters and others who are permitted to take any bird specimens or to engage in other kinds of hunting and taking that may impact migratory waterbirds. Legislative suggestions: *For this purpose, legislation can be most effective if it*

- *places restrictions on all persons who engage in hunting and other takings, including the requirement of hunting licenses, or*
- *imposes other restrictions, which must apply to any person who engages in hunting or takings, including age restrictions and the requirement of a “proficiency test for hunters.” (AEWA Action Plan (Annex 3 to AEWA) § 4.1.7)*

(ii) Methods of taking

Under AEWA’s Action plan, all Parties are required to “regulate the modes of taking” of specimens from protected populations. (AEWA Action Plan (Annex 3 to AEWA) § 2.1.2(b).) So long as it is clearly subject to the general prohibition on all unpermitted takings (above), regulation of the methods of taking may take many forms.

In nearly all countries, one element of the control of modes of taking will be the identification of particular types of weapons and hunting activities that are not permitted. A law may, for example, give preference to “traditional” hunting methods, while strictly regulating the use of modern equipment.

Legislative suggestions: *When identifying permissible and impermissible methods, it is generally preferable specify permitted methods, as specifically as possible.*²⁰

Having specified permissible methods, the law should note that so that all other methods are impermissible unless specific authority or permit is obtained.

In virtually all countries, there are certain methods that should be specifically prohibited: These include the capture of specimens through the use of

- *lead shot for hunting in wetlands,*
- *fire,*
- *using poisoned baits and other types of hunting with poison, drugs or other chemicals,*
- *explosives,*
- *automatic weapons,*
- *set nets, traps, spring guns and other indiscriminate methods.*

These prohibitions should apply to ALL hunting or taking of any faunal species, since these methods could kill or damage waterbirds and their food species, even if they were used with the intent of taking other species.

(iii) Involuntary or unintended takings

One of the most important components of this prohibition will be its application to unintentional takings, such as situations in which specimens are killed or damaged accidentally. These provisions should probably extend beyond the Action Plan’s provisions regarding “the problem of accidental killing of birds by hunters as a result of incorrect identification of the species.” (Annex 3 to AEWA) § 2.2.2.) Other situations which should be addressed might include unintentional or involuntary takings caused by a vehicle or other machinery, by a domesticated animal, by a legal or illegal activity (such as setting fires, building permanent or temporary structures, etc.) that are not intended to capture protected species, etc.

²⁰ Where all hunting by “traditional methods” is permitted, for example, it is preferable to list traditional methods specifically, or in the alternative, note that the term includes only those methods that have been used prior to a specific date within a specific geographic area, by the then indigenous population of that area.

Unless these situations are carefully addressed, they may constitute “loopholes” by which violators may evade liabilities. Such loopholes may be severe impediments to the effective operation of the law. For example, where a prohibitory law specifically excludes unintentional takings, the result may be that all violators characterise their actions as unintentional. It is rare that an investigation of the killing of a waterbird will be sufficiently detailed to determine whether that killing was intentional or accidental. Here also, the only possibility of defeating that claim might be the situation in which an official’s or other person’s eyewitness testimony is available.

Legislative suggestion: *If the basic prohibition on all takings, is softened by a specific exemption for involuntary takings, that exception should only apply if the person involved complies with specific requirements, such as reporting the event and/or turning over the carcass to the authorities .*

(iv) Establishment and enforcement of limits on taking

AEWA’s Action plan requires the Parties to “establish limits of taking, where appropriate, and provide adequate controls to ensure that these limits are observed;” (AEWA Action Plan (Annex 3 to AEWA) § 2.1.2(c).) c

The establishment of limits involves a combination of activities and information. Factors such as the nature of usual hunting and other takings of the species within the country (including especially, whether the use is strictly by hunters, or arises from a demand for meat, feathers, eggs or nests), its recovery rate, and its conservation status will go into the setting of limits, and the manner in which they are expressed.

Legislation to support this process should authorise and empower the setting and enforcement of these limits; however, in most countries it is generally not advisable to specify limits within the legislation. (As above, this recommendation is based on the fact that, in most countries, revision or amendment of legislation is a difficult and time-consuming process, and undertaken by negotiation at the political level. For this reason, technical issues and those that require constant revision and oversight are generally better set by ministerial and agency processes.)

Legislative suggestion: *Legislation should address the possibility of seasonal limitations (open and closed seasons) on either a per-species basis or a regional basis, the establishment of sanctuaries, limitations on the taking of undersized specimens, feathers, eggs, etc.*

With regard to enforcement, where a hunting prohibition is in place and not effective, the reasons for that ineffectiveness should be investigated, as they will vary greatly. It is really not possible to address these problems in any generic way – rather, each country or agency must evaluate all of the relevant factors and conditions, and attempt to address them directly. Some examples of potential problem areas and various possible solutions are listed below:

Problem identified	Potential Solution
1. Insufficient attempts to apprehend lawbreakers	1. Following an evaluation of the country’s enforcement authorisation –
	a. devolve some limited enforcement responsibilities from the national police to conservation agencies;
	b. authorise the government to deputise citizens (as “forest guards”, “conservation wardens”, etc.)
2. Enforcement focuses on minor, subsistence lawbreakers, rather than smugglers and others involved in illegal commercial takings	c. adopt incentives under which enforcement agencies and district offices can get a share in collected fines or some other bonus based on their apprehension and enforcement activities.
	2. After evaluation, repeal or revise enforcement incentives, under which the enforcing agencies were encouraged to maximise the number of citations given, leading enforcers to target the easiest, least dangerous offenders.
	3. Significant offences unpunished because officers do not have jurisdiction (offences occurring on private or community lands)
a. including effective conservation activities and oversight as a condition of licenses, leases, or other rights given for use of species in private or community lands and concession areas (discussed below.)	
	b. provide incentives (such as increased community benefits and infrastructure development) to communities in which the census of protected bird species increases

4. Violations of permit conditions, falsification of permits	4. The possible responses vary widely (random examples):
	<ul style="list-style-type: none"> a. Legislative provisions specifying many mandatory provisions of the permit, and identifying limits on official discretion with regard to other permits. b. Development of a centralised database or other central and accessible reference file. This solution requires either the physical ability of officers in the field to consult this database or file at any time, or the legal authority to temporarily impound specimens and/or hunting equipment while the officer confirms the existence and conditions of the permit.
5. Inability to control tourists and citizens of other countries apprehended taking or attempting to take specimens.	5. After confirming that the law forbids removal of illegally obtained goods from the country, develop internal protocols for co-operation between the agencies involved in migratory bird conservation and those in charge of controls on customs and movement across national borders.
6. Apprehensions generally do not result in successful prosecutions	6. Many possible issues to address, including (random examples):
	<ul style="list-style-type: none"> a. Revise the legislation, so that the basic case for violations can be more easily made (see "possessory prohibitions", below.) b. Authorise training for conservation officials and wardens in the skills of evidence collection and preservation.

j. Possessory prohibitions

As noted above, several principles underlie migratory species legislation, including the following:

- one cannot expect prohibitory provisions to prevent people from violating the law, whether intentionally or due to lack of knowledge.
- it is difficult to apprehend violators “in the act,” or otherwise to obtain sufficient evidence to enable successful prosecution of violators.
- in terms of the overall objective migratory species conservation, it is significantly better to prevent illegal takings than to punish them.

All of these principles are supported by the enactment of prohibitions and controls on the possession or utilisation of, and trade in, illegally obtained birds and their eggs and parts, as well as prohibitions and controls on the possession of certain types of tools and weapons within bird sanctuaries and habitat areas. However, in many countries, where the law does not prohibit such possession, it will only be “circumstantial evidence,” and may not be found sufficient to convict the possessor of illegal taking or accomplice to such taking.

Possessory prohibitions place the responsibility on the possessor to prove that his possession is lawful. This can be done either by producing a valid, unaltered license to take the animal, or by proving that he acquired it in a lawful sale or other transaction.

Perhaps most important, unlike the crimes of illegal taking (which make single, fleeting events illegal), possession violations is a continuing offence that can be relatively easily proven by evidence.

Legislative suggestion: *It is important, before adopting legislation specifying a prohibition on possession, to ensure that evidentiary laws and practices under general law are available and can be properly exercised by the officers in charge of enforcing migratory bird protection legislation.*

(i) Possession of dead or captive specimens

For the reasons mentioned above, AEWA specifically requires Parties to

As to populations listed in Column A of Table 1 (subject to the exceptions listed in paragraph 2.1.3, below) “prohibit the possession or utilization of, and trade in, birds or eggs of those populations which have been taken in contravention of the prohibitions [on the taking of birds and eggs of listed populations] as well as possession or utilisation or, and trade in, any readily recognisable parts or derivatives of such birds and their eggs.”

AEWA Action Plan (Annex 3 to AEWA) § 2.1.1(c.)

Beyond the fact that it is required under the Agreement, it is important to impose some kind of possession controls, given that possession of illegally obtained captive animals, dead specimens or their parts is generally one indication that the possessor has violated prohibitions on taking.

Legislative suggestion: *In general, a direct prohibition on the possession of specimens or their parts is advisable, which can be subject to exceptions.*

In some cases, however, it may be equally effective to provide that anyone found in possession of such specimens must prove that they have been legally obtained and held, or will be deemed to have violated the prohibition on unpermitted takings.

Either of these provisions should be integrated with license provisions and any other provisions relating to permitted usage of specimens. Depending on the nature of the specimens, parts and derivatives, and the manner in which they are used, it may be necessary

- ◆ *to adopt a registration system for the ownership or possession of specimens; or,*
- ◆ *to require the same license that will be necessary for takings that involve the killing or removal of specimens from the wild,*

In many cases, these provisions may be less strict, or inapplicable as to but not for those parts (such as feathers or used nests) that can be taken without direct harm to wild specimens. In some situations the taking of other species (including those that are confusingly similar to the protected species, and species on which it depends) may be similarly controlled.

(ii) Possession of weapons, tools and other equipment

If it is possible to prohibit possession of particular weapons and other items that are frequently used in the country for the illegal taking of or damage to migratory waterbirds, the officers enforcing that prohibition may be able to prevent such taking or damage before they occur.

Legislative suggestions: *Limits on possession of weapons, tools and other equipment for taking of or other damage to waterbirds should be drafted only upon consideration of several critical factors:*

- *In general, limits on possession of such items should be tied to other types of protections, usually geographical protections for waterbirds, e.g., the restriction should be on possessing of the weapons, tools or equipment within designated sanctuaries, and other protected areas;*
- *Where particular methods are used only for the illegal taking of migratory waterbirds or other protected species, possession of them may be prohibited more generally;*
- *In drafting national law, it may sometimes be advisable to identify specific problem items and activities within the law, however, in general regulations should allow for amendment of the list as new practices arise that threaten migratory birds.*

k. Disturbance or other damage to protected species of birds;

A great many activities can impact on the conservation status of migratory birds, beyond killing or capturing them directly. In some countries, for example, habitats have been disturbed by low over-flight by helicopters, or other motorised vehicles, and birds have been damaged by activities directed at collecting other specimens, or by mining or other activities undertaken without due care for the conservation of the environment.

Legislative suggestions: *A legislative framework can be more effective in enabling officials to take action to achieve AEWA's objective, if –*

- *it opens with a general prohibition against “actions that can be reasonably expected to cause damage or disturbance to specimens of migratory waterbirds”;*
- *where particular problems have been discerned that are causing a current threat to migratory waterbirds, it addresses those problems; and*
- *it authorises the addition of specific activities that are subsequently found to be problems.*

D. Protection of Migratory Bird Habitats and Ecosystems

Habitat protection, including the protection of the ecosystem that produces food, nesting materials and other things essential to the lifestyle of the protected species is an essential component of species protection. The need to protect these habitats is, in fact, the primary motivation underlying AEWA. Indeed the need for the joint action arose out of the fact that none of parties, individually, could ensure species survival. Only protection of all habitats within the migratory range could do that.

The following discussion addresses “basic provisions” on protection of migratory bird habitats. (Exceptions to these provisions are discussed separately, in part E.)

1. Obligations of the Parties

The Parties’ responsibilities with regard to habitat protection are provided in detail in AEWA and related documents.

Habitat inventory: AEWA requires that the Parties “identify sites and habitats for migratory waterbirds occurring within their territory and encourage the protection, management, rehabilitation and restoration of these sites.” (AEWA, § III.2(c).)

In this connection, the **Action Plan** requires the parties to

- “as a matter of priority, to identify all sites of international or national importance for populations listed in Table 1 (AEWA Action Plan (Annex 3 to AEWA) § 3.1.2.) and
- to publish national inventories of habitats within their territory which are important to the populations listed in Table 1.” (AEWA Action Plan (Annex 3 to AEWA) § 3.1.1.)

Protected Areas and habitat protections: AEWA requires that the Parties co-ordinate with one another “to ensure that a network of suitable habitats is maintained or, where appropriate, re-established throughout the entire migratory range of each migratory waterbird species concerned, in particular where wetlands extend over the area of more than one Party to this agreement.” (AEWA, § III.2(d).)

Similarly, but less mandatorily, **CMS** calls on parties to conserve and, where feasible and appropriate, restore those habitats of the species which are of importance in removing the species from danger of extinction. (CMS, § III(4)(a).) It also calls for them to “prevent, remove, compensate for or minimize, as appropriate, the adverse effects of activities or obstacles that seriously impede or prevent the migration of the species.” (CMS, § III(4)(b).) Although this latter provision is of less importance in the case migratory waterbirds, it may still be relevant in some instances ; and

In this connection, the **Action Plan** requires the Parties to endeavour to

- continue establishing protected areas to conserve habitats important for populations listed in Table 1 and develop and implement management plans for these areas (AEWA Action Plan (Annex 3 to AEWA) § 3.2.1.);
- give special protection to those wetlands which meet internationally accepted criteria of international importance (AEWA Action Plan (Annex 3 to AEWA) § 3.2.2.);
- make wise and sustainable use of all wetlands in their territory. In particular they shall endeavour to avoid degradation and loss of habitats that support populations listed in Table 1 through the introduction of appropriate regulations or standards and control measures... [regarding] the use of agricultural chemicals, pest control procedures and the disposal of wastewater, which are in accordance with international norms for the purpose of minimising their adverse impacts on the population listed in Table 1. (AEWA Action Plan (Annex 3 to AEWA) § 3.2.3.)
- develop strategies, according to an ecosystem approach, for the conservation of the habitats of all populations listed in Table 1, including the habitats of those populations that are dispersed.” (AEWA Action Plan (Annex 3 to AEWA) § 3.2.4.)

Regulations regarding Protected Areas and other Ecosystems: AEWA requires Parties to “prohibit the deliberate introduction of non-native waterbird species into the environment and take all appropriate measures to protect the unintentional release of such species if this introduction or release would prejudice the conservation status of wild flora and fauna.” (AEWA, § III.2(g).)

CMS similarly recognises the invasive species threat, calling on parties “to the extent feasible and appropriate, to prevent, reduce or control factors that are endangering or are likely to further endanger the species, including strictly controlling the introduction of, or controlling or eliminating, already introduced exotic species.” (CMS § III.4(c).)

To this end, under the **Action Plan**, “if they consider it necessary,” Parties must

- prohibit the introduction of non-native species of animals and plants which may be detrimental to the populations listed in Table 1. (AEWA Action Plan (Annex 3 to AEWA) § 2.5.1.)
- require the taking of appropriate precautions to avoid the accidental escape of captive birds belonging to non-native species. (AEWA Action Plan (Annex 3 to AEWA) § 2.5.2.)
- take measures to the extent feasible and appropriate, ... to ensure that ... non-native species or hybrids thereof [that] have already been introduced... do not pose a potential hazard to the populations listed in Table 1. (AEWA Action Plan (Annex 3 to AEWA) § 2.5.3.)

Zoning and other limitations: The **Action Plan** provides that “where human disturbance threatens the conservation status of waterbird populations listed in Table 1, Parties should endeavour to take measures to limit the level of threat. Appropriate measures might include ... the establishment of disturbance-free zones in protected areas, where public access is not permitted.” (AEWA Action Plan (Annex 3 to AEWA) § 4.3.6.)

Habitat restoration: AEWA specifically requires Parties to “investigate problems that are posed or are likely to be posed by human activities and endeavour to implement remedial measures, including habitat rehabilitation and restoration, and compensatory measures for loss of habitat.” (AEWA, § III.2(e).) This requirement is connected to the requirement, as to populations listed in Column B of Table 1, to promote the restoration of those populations to a favourable conservation status. (AEWA Action Plan (Annex 3 to AEWA) § 2.1.2.)

Towards this objective, the **Action Plan** requires the Parties,

- to attempt to rehabilitate or restore, where feasible and appropriate, areas which were previously important for the populations listed in Table 1; (AEWA Action Plan (Annex 3 to AEWA) § 3.3.)
- when re-establishing populations listed in Table 1, to “develop and follow a detailed re-establishment plan based on appropriate scientific studies. Re-establishment plans should constitute an integral part of national and, where appropriate, international single species action plans. A re-establishment plan should include assessment of the impact on the environment and shall be made widely available.” (AEWA Action Plan (Annex 3 to AEWA) § 2.4.)

Additionally, the **Action Plan** requires Parties to “consider steps to minimise the impact of structures already in existence where it becomes evident that they constitute a negative impact for the populations concerned.” (AEWA Action Plan (Annex 3 to AEWA) § 4.3.5.)

When non-native waterbird species have been introduced within a waterbird habitat area, AEWA requires the parties to “take all appropriate measures to prevent these species from becoming a potential threat to indigenous species.” (AEWA, § III.2(g).)

2. Particular Legal Provisions

Protections of habitats for migratory waterbirds are generally of two types – formally designated protected areas; and protections and legislation applicable to other areas. These protections are integrally connected to the application of the ecosystem approach and included in subject to the provisions of the management plan for migratory birds.

1. General protections and decision-making

Habitat protection measures include a great many specific provisions of relatively limited scope, such as those discussed in subsections k through o, below. However, several more general types of protection provisions should also be mentioned. In particular, provisions relating to more general ecosystem-related

protections, , and requirements of sectoral coordination (including licensing and other controls on decision-making)²¹ can be very important.

m. Direct Protection of Specific Areas

One of the most important developments in national and international conservation legislation is the recognition of the need for a “network” of protected areas, in order to achieve general and specific conservation objectives. The formal designation of protected areas offers a basis for rigorous control on the conservation and sustainable use of protected species and ecosystems.

Most, if not all, countries have specific legislation regarding the designation and governance of protected areas. In some cases, more than one agency has separate authority to create and manage various kinds of protected areas.

Legislative suggestions: *To ensure that the various protected area legislation effectively supports the conservation and sustainable use of migratory waterbird species, the legislative draftsman should endeavour to ensure that –*

- *Conservation of migratory waterbirds is encompassed within the specified legally appropriate bases that can be used to justify the declaration of a protected area;*
- *Within protected areas designated for the purpose (among others) of the protection of migratory waterbird species, it must be clear that*
 - *the management plan which addresses the conservation and sustainable use of those species is the primary legal tool governing activities within that protected area;*
 - *the authority of the agency charged with conservation of such species is clear with regard to all activities within the protected area that can have an impact on the species. In this connection, a legislative analysis of all of the legislation potentially applicable to any of the lands and resources within any protected will be essential.*

n. Protection Outside Protected Areas

It is generally impossible to formally protect all migratory waterbird habitats (and supporting areas) within a country. As a consequence, it is sometimes essential to legislate various kinds of protection applicable to private (and non-protected public) lands and to activities outside protected areas. Often, a migratory bird’s daily existence is closely tied to specific species (“habitat species”), including

- plant species (a tree species in which they nest, or a plant used for food or nest materials) or
- particular animals (used for food, camouflage, or other purposes.)

As a result, in some countries, certain requirements related to habitat protection are specifically focused on the protection of those other species, wherever they occur.

Ecosystem protection outside protected areas presents difficult challenges to the legislative draftsman, and to the relevant government agency. While the objectives and specific protections may be relatively straightforward (such as restrictions on cutting particular species of trees and other plants; utilising or altering watercourses, wetlands and waters; etc.), governmental ability to enforce these provisions is more problematic, given that officials may lack of free access to private lands.

Legislative suggestions: *In creating legislative prohibitions on the taking or destruction of specific habitat species, the Parties should –*

- *Ensure that, in the case of legal protection of “habitat species” of migratory waterbirds are impose, that such protections are reasonable, and*
- *Give the owners or other legal users of property involved the right and power to seek special permission to remove such species, or to take actions that may affect them, subject to specific descriptions of*
 - *the situations in which these rights may be sought and granted, and*
 - *the conditions, including minimisation of the harm to such species, that may apply to such permissions.*
- *Involve incentives, such as tax reductions and special permissions, applicable to the property owner or other individual with greatest interest in the area or greatest ability to exert control over activities on it;*

²¹ Discussed in 0B2e, above.

Require, where possible, the maintenance of a governmental inventory of the resources within such areas, and assess fees or penalties based on changes in their status.

o. Habitat Rehabilitation and Species Re-introduction

As noted above, the action plan specifically calls upon the parties to act with a view to “restoration of those populations to a favourable conservation status.” The restoration of species populations is a highly technical activity, which will be governed by the management plan and by the scientific, biological, and ecological facts that determine the methods, and probable success of these measures. It is important, however, that legislation should ensure that the government has the proper powers to undertake or compel the necessary actions.

Legislative suggestions: *To properly empower the restoration of species, it is usually important for the legislation to*

- *Authorise or mandate the creation or licensing of facilities for conservation-based captive breeding of bird species,*
- *Governmental takings or governmentally mandated/authorised private takings of the affected species (and other species on which they depend) for conservation purposes,*
- *Authorisation for reintroduction of such species into appropriate habitat areas, and such special protection and management activities as may be necessary to ensure that the species becomes well re-established.*
- *Empower the imposition of specific stricter controls on takings and other activities, of the affected species and/or in the affected areas.*

p. Introduction of Potentially Harmful Species

A variant of “habitat rehabilitation” is the response to or prevention of habitat damage caused by the intentional or unintentional introduction of species that are not indigenous to the particular habitat into which they are introduced. This may include the intentional introduction of non-native waterbirds, but also unintentional introductions of bird species, and the intentional and unintentional introductions of plant and animal species into waterbird habitats and agricultural and other areas, which may damage the waterbirds or their environment.

In a variety of situations, species may be introduced into the country that are potentially harmful or whose potential impact cannot be known. Among the reasons for such introduction are

- agriculture (cultivation of non-endemic agricultural and forest varieties);
- aquaculture (introduction of fish and shellfish species);
- importation of ornamental plants;
- importation of animals, as pets, for animal husbandry, or as bio-controls on existing invasions or other biologically caused environmental problems;
- research and development activities;
- *ex situ* conservation of species from other areas, to preserve them during the restoration of their habitat (or for other purposes); and
- inadvertent introductions occasioned by international transport, and other activities.

In many instances, “invasiveness” may not be predictable, as to a particular non-endemic species that is to be introduced. In general, in light of the number of potential types of activity and objectives affected by alien species introductions, they are addressed in a variety of very different legislative provisions throughout the national legal framework. Often, even as to the same type of activity (agriculture, for example), separate provisions may exist regarding the introduction of “genetically modified organisms” (species which are, by their nature of having been “created in the laboratory”, necessarily “alien” to any environment in which they are introduced), as opposed to introductions of other species that are not already present in the particular habitat.

In some cases, specific decision-making and a variety of risk assessment processes have been set out for each different kind of activity or for each category of introduced species.

Legislative suggestions: *Given the variety of kinds of activities and pathways by which species are introduced, legislative provisions for control of species introductions may take several forms. In seeking to ensure that these provisions can appropriately protect migratory waterbird species and their habitats, legislative provisions should –*

- ◆ ensure that a mandatory element of each decision-making or risk-assessment process related to the introduction of such species, **requires** participation the agency or institution charged with migratory waterbird conservation, or designated as scientific advisor on these issues, whenever –
 - some or all of those activities will occur within a specific radius of an area that has been protected as (or another area that has been designated for special legal protection as) a migratory waterbird habitat area;
 - some or all of those activities will or might place at risk water systems that eventually passes through such an area; or
 - some or all of those activities might have an impact on critical parts of the migratory waterbirds' food chain (insects, pollen, etc.)
- ◆ For purposes of evaluating the impact of a species introduction on migratory species habitats, recognise that the introduction of a species that is national “native” or “indigenous” or “already present in the country” may be equally harmful as a “foreign” species, if it is not native to the ecosystem into which it is being introduces.
- ◆ Ensure that the decision-making regarding introduction applies separately to every situation in which an introduction will potentially involve a different “ecosystem”, rather than allowing a single evaluation at the time of the first introduction into the **country**, after which introductions need not be evaluated. For this purpose, each area that is designated as a migratory waterbird habitat should be considered a separate “ecosystem.”
- ◆ Identify and provide for the progressive elimination of perverse incentives (legal provisions that promote risky or damaging practices.)²²
- ◆ Give priority to the prevention of application of a precautionary approach with regard to decision-making, regarding intentional species introductions, and actions that may lead to inadvertent introductions.

q. Transboundary Protected Areas and “Green Corridor” Agreements

In many instances, a critical habitat area may extend beyond a single country’s territory. In addition, the “network” of protected areas and habitats, as described above, may not be complete within a single country, but may extend widely throughout a region. While the negotiation of Transboundary Protected Areas and Green Corridor Agreements to address these facts is well beyond the scope of this Conservation Guideline, legislation can provide a basis for pursuing this path.²³

In many countries transboundary contact between relevant agencies must first be subject to oversight by foreign affairs ministries. While such oversight itself is generally a positive process, it is often time consuming, and may result in the communication of critical scientific, technical and management concerns being communicated through individuals whose expertise in diplomacy and politics has not equipped them to communicate effectively on the technical plane of discussion.

Legislative suggestions: *One part of the national legislative protection relating to transboundary protected areas, is the fact that in many cases, while the protected area does not extend across national boundaries, a reasonable buffer zone would need to do so. Hence, it is important to ensure that transboundary impacts are addressed, both as a part of rational management of protected areas and as a function of good corporate citizenship.*

Beyond this, transboundary impacts and concerns form the factual basis on which Transboundary Protected Areas (TBPAs) can be developed. Although it is clear that, national legislation need not “pre-address” the issues that must be considered in a TBPA agreement, it should ensure that preliminary

²² Additional perspectives on national legislation relating to alien species may be found in Shine, C., *et al.*, A Guide to Designing Legal and Institutional Frameworks on Alien Invasive Species (IUCN Environmental Law Programme, Environmental Law and Policy Paper, No. 40) (IUCN, 2000), available from IUCN publication services Unit, 219c Huntingdon Road, Cambridge, CB3 0DL, UNITED KINGDOM, or via internet at <http://www.iucn.org/bookstore/>

²³ For further assistance in this process, the reader is recommended to consult Sandwith, T., *et al.*, Transboundary Protected Areas for Peace and Co-operation (IUCN World Commission on Protected Areas, Best Practice Protected Area Guidelines Series, No. 7) (IUCN, 2001)), available from IUCN publication services Unit, 219c Huntingdon Road, Cambridge, CB3 0DL, UNITED KINGDOM, or via internet at <http://www.iucn.org/bookstore/>

relationships and informational authorities are in place to facilitate the joint work that will be necessary in order to “take the first steps” toward such an agreement. These include --

- *Maintenance of careful records regarding impacts on protected areas from outside of national jurisdiction, as well as impacts of in-country activities (of all types) across national boundaries (and efforts to minimise or avoid such impacts, whether unilateral or by agreement);*
- *Authorising and mandating officials charged with protecting migratory species habitats to contact their opposite numbers in neighbouring countries (or throughout the region, as appropriate) to address issues relating to migratory waterbird habitat areas, including specific instances of transboundary impact;*
- *Authorising and mandating such communication in connection with planning and management of waterbird habitat areas (whether subject to legal protection or not), in relevant EIA processes, or in other situations;*
- *Permitting officials charged with protecting migratory species habitats to undertake co-ordinated efforts with their opposite numbers in nearby countries to address violators who flee across national boundaries, and other implementation and enforcement problems; and*
- *Authorising the relevant officials to work with and through multi-national NGOs and IGOs to examine and seek resolution to transboundary impact and related issues. .*
- *Require the development (n co-ordination with the foreign affairs office) appropriate protocols for expedited and direct communication, and to specify the situations in which they may be applied.²⁴*

²⁴ In this effort, it will be important that the conservation agency has clear and unequivocal instructions about when it may use these protocols, since it may be as time consuming and difficult to obtain a ruling on an ambiguous provision as to work through the Foreign Affairs ministry without reference to the special permission.

E. Exceptions

Clearly, neither the prohibitions on taking, the controls on the use of specimens nor the protections for habitats can be absolute. At a minimum, the Parties may have to violate these provisions themselves, in order to implement their other commitments under AEWA, such as re-establishment of the species. In addition, the interrelationship between human lives/livelihoods and the conservation of waterbirds suggests that there are many situations in which exceptions may be necessary. The following discussion focuses on creating carefully limited exceptions, to ensure that necessary takings do not unduly harm conservation and implementation activities.

1. *Obligations of the parties*

Both AEWA and CMS recognise that prohibitions on taking and possession of specimens of migratory birds and their parts, subject to a specific requirement that they be “precise as to content and limited in space and time” and also that they do not operate to the detriment of the populations involved.²⁵

AEWA addresses the need for exceptions to its general prohibition on the taking of endangered migratory waterbirds, by specifically incorporating the provisions of Article III, section 5 of **CMS**. That section specifically permits exceptions to the requirement that takings of Appendix I species, “only if the taking is

- a) “for scientific purposes”;
- b) “for the purpose of enhancing propagation or survival of such species;”
- c) “to accommodate the needs of traditional subsistence users”²⁶; or
- d) required owing to “extraordinary circumstances.” (CMS § III.5.)

AEWA’s Action Plan adds clarity by specifying four permissible types of exceptions which will be considered to address “extraordinary circumstances” under Article III, section 5 of **CMS**. Relevant to all exceptions, it notes that they will be appropriate only “where there is no other satisfactory solution.” In addition, it reiterates that the use of an exception is only permissible where that exception is “precise as to content and limited in space and time and [does] not operate to the detriment of the populations [involved].” Within these strictures, the Action Plan will countenance exceptions that are necessary –

- a) to prevent serious damage to crops, water and fisheries;
- b) in the interests of air safety or other overriding public interests;
- c) for the purpose of research and education;
- d) to permit under strictly supervised conditions on a selective basis and to a limited extent the taking and keeping or other judicious use of certain birds in small numbers.

AEWA Action Plan (Annex 3 to AEWA) §§ 2.1.3(a)-(d).

The **Action Plan** also allows an exception for hunting of “those populations listed in categories 2 and 3 in Column A only and which are marked with an asterisk”, where such hunting is allowed to “continue on a sustainable basis” and is a “long-established cultural practice” which is “conducted within the framework of special provisions of a species action plan at the appropriate international level.” (AEWA Action Plan (Annex 3 to AEWA) § 2.1.1(c).) This exception is discussed in this Conservation Guideline, in the section related to “Sustainable Use.”

Finally, the Action Plan clarifies the exception from CMS § III.5.b, regarding for the purpose of enhancing propagation or survival of such species, noting that such exceptions must be made “where there is no other satisfactory solution” and requiring that these exceptions must be “precise as to content and limited in space and time” and must “not operate to the detriment of the populations.” (AEWA Action Plan (Annex 3 to AEWA) § 2.1.3(e).)

2. *Particular Legal Measures*

In all cases, when drafting each exception, it is important to separately consider the scope of the exception – *i.e.*, which specific prohibitions or limitations each exception shall apply to. Often, although it add length to the legislation, it may be valuable to separately restate the exceptions relevant to each prohibition. This allows the drafter or legislator to consider all situations in which the exception will apply to each particular regulatory provision. (If the exceptions are instead going to be stated only once, it is critical that the drafter

²⁵ See, CMS § III.5, AEWA Action Plan (Annex 3 to AEWA) § 2.1.3.

²⁶ This exception is discussed in this Conservation Guideline under “Sustainable Use.”

should undertake this same consideration process, applying each exception to each provision of the law, and including whatever derogations are necessary to ensure that the exception does not operate to violate the objectives of AEWA.

The form of the exceptions is guided by a combination of factors, including factual information, national legal system, and the particular objectives addressed by each exception. For these purposes, an exception may either –

- (i) allow takings (or other actions) which would otherwise be prohibited, either
 - in an unlimited way (that is, all takings that are subject to the exception are automatically permitted) or
 - subject to limitations (that is, creating a requirements or approval processes),
- (ii) as to species which may be taken or used subject to licensing requirements or other controls, either
 - permit takings without those controls or
 - make the controls more lenient in cases covered by the exception,
- (iii) as to protected areas, buffer zones and other migratory bird habitats,
 - enable activities and land uses, which would otherwise not be permitted, within those areas; or
 - eliminate or reduce controls that would otherwise apply to those actions.

It is rare that a country will adopt a complete exception, that is, one that applies to all takings within a particular time period or geographical area. **Accordingly, for most exceptions discussed in this section**

- the actor should still be required to obtain specific government approval (*i.e.*, a license, permit or other approval) before undertaking the relevant activities;
- such approvals should be given in writing, and include certain minimum provisions regarding the nature, and extent of the exception. (This requirement protects the regulated individual, who can show the written approval as *prima facie* evidence that his taking of specimens has been approved and is not a violation of law);
- government officials should have the power to temporarily impound specimens pending verification that the person qualifies or that documentation is genuine;
- an exception that permits an activity which is otherwise prohibited, restricted, or regulated should not relieve the actor from other requirements under the law.

r. Scientific Purposes and Research exceptions

One of the most important components of scientific/research exceptions is to validate the limits of the exception. It is important, as noted in both CMS/AEWA and the Action Plan, that exceptions should be limited to their specific objectives, so that they may not be used as means of evading the prohibitions and limits described above

Legislative suggestions: A “scientific and research exception” should specify

- what activities are “scientific and research activities” (to address this issue, the legislation should probably identify criteria or standards for this determination);
- whether the exception will be limited to “scientific and research institutions” or available to others whose work meets the definition of “scientific and research activities;” and if the former, what kinds of institutions are to be considered “scientific and research institutions;”
- whether “scientific and research activities” may include or lead to commercial activities, and whether scientists/researchers what will happen, if their research yields financial benefits;
- whether there is a difference in the applicable standard, when the scientific work or other research is to occur in the country granting the exception, as opposed to when that work is to be done in another country; and
- what follow-up or result will occur if one has obtained this exception, and used the taken specimens for other purposes.

s. Propagation, Breeding and Re-establishment exceptions

In many countries, propagation and/or breeding exceptions have been used as a justification for many kinds of takings and uses of specimens. As a result, it is important that the configuration of these exceptions should be clearly stated and bounded.

Legislative suggestions: In these provisions, legislators should address whether and how –

- to certify breeding facilities and/or to certify their products (*e.g.*, the offspring, eggs and feathers);

- *to impose controls on the use of products of breeding facilities (i.e., to limit the exception to those activities aimed at re-establishment of species, prevention of extinction, or improvement of their conservation status);*
- *to specify prerequisites, limitations and conditions on the propagation and breeding exceptions, for example, requiring the participation in conservation activities, and setting rules regarding facility siting approvals, methods of specimen collection and release, and possibly restrictions on hybridisation,*
- *to validate and monitor compliance with the limitations and conditions on the use of propagation and breeding exceptions; and/or*
- *to ensure that breeding facilities are designed and operate using the best practices for maximising production, post-hatching survival of species, and capability to be reintroduced into the wild (where relevant), etc.*

t. Education exceptions

Exceptions are also authorised for activities related to education. Such activities might include collection of specimens for zoos, aviaries, and other scientific displays. Other possible educational activities might include collecting activities by supervised student groups. These exceptions are generally rather straightforward.

Legislative suggestions: *In general, legislation authorising education-based exceptions, should*

- *be focused on activities sponsored by “educational institutions” (a term which may include universities and similar institutions of higher education, zoos, aviaries, museums, etc.)*
- *be limited to the collection of species for (live or preserved) display, classroom study and similar purposes.*

u. Exceptions based on Public “Necessity” and Public Interest

In general, legislators must consider situations of “public necessity” (that is urgent needs based on safety, health, and the maintenance of other important public services and goods. AEWAs’ Action Plan specifically notes that problems of air safety – which affect the critical need of most countries for reliable and safe transportation – may affect or be affected by migratory birds and the prohibitions and requirements related to their conservation.

In addition, in many countries, other “overriding public interests” may also be cited as reasons to moderate or compromise with regard to otherwise mandatory prohibitions and controls on the taking of species. Unfortunately, the concept of “overriding public interest” varies greatly among countries, and is sometimes governed by separated legislation, which overrides provisions in specific legislation, including conservation legislation.

Properly bounded exceptions relating to public necessity and public interest are the product of careful research and drafting. It is essential to clearly understand the manner in which national law addresses –

- governmental decisions to take land or to engage in other activities or development on private or protected lands. In particular, it is important to know what particular objectives can be considered to be “in the public interest,” and what limitations are imposed on these decisions (for example, whether a simple statement that the activity is “for the public interest” is sufficient, or whether the government is required to seek alternatives which do not cause a taking of these lands, or which do not conflict with the existing uses or plans for these areas);
- the situation in which a government agency or officer intends to take an action which is prohibited or limited under legislation administered by a different ministry, agency or department; and
- the types of compensation that must be given, if any, where land is taken in the public interest.

Legislative suggestions: *In addressing exceptions for public necessity, conservation legislation should, to the extent and in the manner possible under national law, specify –*

- *limitation of the use of exception to “overriding public interests” – i.e., those matters of public interest which are clearly of the highest national importance, and which clearly override national policies, objectives and commitments relating conservation and sustainable use.*

- *the procedures that must be followed in order to seek some “other satisfactory solution” by which the necessity may be addressed without violating or conflicting with conservation provisions and objectives. In general, these procedures should include procedures for*
 - (i) *public meetings and participation, including both those groups that are resident in the area, those that are stakeholders, NGOs, and other members of the civil society that benefit (both directly and indirectly) from the conservation of migratory waterbirds and their habitats, and*
 - (ii) *inter-sectoral consultation with other governmental agencies and ministries whose activities might directly or indirectly be affected or involved.*

v. Exceptions for Prevention of Particular Types of Harm

Recognising the relationship between conservation and human lives and livelihoods, AEWA acknowledges the need for a type of private or limited “necessity” exceptions, directed at situations in which migratory waterbirds and related conservation activities might damage crops, waters and fisheries.

Parties to grant exceptions, which allow the taking, frightening, harming or other direct actions against bird specimen, when such activities are necessary for the purpose of preventing serious damage to crops, water and fisheries. Provisions relating to this kind of “necessity” must focus on validation of the threat of serious damage, and be written in a way which encourages the use of these exceptions only in cases of clear threat.

Legislative suggestions: *Accordingly, exceptions relating to the prevention of damage to important resources should –*

- *apply to both government and private action;*
- *as a basic provision, limit the exception to the particular kinds of harm identified in the Action Plan – that is, damage to crops, waters and fisheries, unless a particular and serious threat is discerned from the scientific, monitoring and administrative data;*
- *in order to accommodate serious damage situations that may arise in future, the legislation should authorise an agency, or ministry to issue regulations or decrees, in future, if necessary. This power should be limited, so that such decrees can only permit activities that affect critical matters, including food security, agriculture, and important natural resources;*
- *require approval from the relevant government agency prior to the exercise of this exception, unless there is no time to obtain approval before the serious damage occurs;*
- *require reporting and review of any action taken under this exception, if the action had to be taken without prior approval, as mentioned above;*
- *in situations in which non-urgent or unnecessary action that was taken without prior approval, or the actor has gone beyond what was necessary to prevent damage, the individual will be obliged to compensate for the damage to waterbirds, habitats, etc.*

w. Keeping Migratory Waterbirds

Under the least specific of AEWA’s exceptions, countries may “permit ... the taking and keeping or other judicious use of certain birds in small numbers” so long as that permission is (i) “under strictly supervised conditions”, (ii) “on a selective basis” and (iii) “to a limited extent.” AEWA Action Plan (Annex 3 to AEWA) §§ 2.1.3(d).

Legislative suggestions: *Legislative provision for this exception would appear to*

- *require countries to license the collection of bird specimens for non-essential uses (as pets, for hunting, etc.), under some kind of license or permit system (this is implied by the requirement of “strict supervision.”)*
- *identify, by regulation,*
 - *the species that may be taken and kept under this exception;*
 - *the methods of taking and conservation measures that must be taken by anyone who is seeking to capture specimens for these purposes;*
 - *the number of species that may be taken and held by any individual;*
 - *whether the individual who takes the specimens may subsequently sell or transfer them to others (either as a common commercial practice or on a regular basis) and what limitations apply to such subsequent transfers of ownership.*

F. Controls on Marketing and Possession

This section examines an issue that is critical as a support for sustainable use frameworks – the manner in which external evidence of the true level of use can be collected, and the manner in which one of the primary negative incentives – the incentive to illegally take specimens of protected species (the possibility of sale of the items taken) can be controlled.

1. Obligations of the Parties

AEWA's Action plan provides, as to populations listed in Column A of Table 1 (subject to certain exceptions, as noted below), that parties should "prohibit the possession or utilisation of, and trade in, birds or eggs of those populations, which have been taken in contravention of the prohibitions [on the taking of birds and eggs of listed populations] as well as possession or utilisation or, and trade in, any readily recognisable parts or derivatives of such birds and their eggs." AEWA Action Plan (Annex 3 to AEWA) § 2.1.1(c).

This provision provides an exception for a long-established cultural practice of hunting, where the specimens involved come from "populations listed in categories 2 and 3 in Column A only and which are marked with an asterisk" (AEWA Action Plan (Annex 3 to AEWA) § 2.1.1(c)).²⁷

2. Particular Legal Measures

As shown above, AEWA's Action Plan clearly recognises that AEWA's sustainable use and conservation objectives necessarily rely on the existence of controls on the marketing and other commercial utilisation of migratory waterbirds. Beyond this, however, migratory bird populations can be very negatively affected by trade in biological and other resources found in their habitat areas, both where the uncontrolled or illegal taking of those resources deprives the migratory waterbirds of food or other essentials, and where the manner of taking causes more general damage to habitats.

In this connection it is important to distinguish the provisions cited in part III.F.1, above, from the requirements of CITES (the Convention on International Trade in Endangered Species of Fauna and Flora (Washington, 1973)).²⁸ While CITES offers a comprehensive approach to 'international trade' in protected species, it does not address domestic trade in any way. In addition, under CITES, "international trade" is defined to be any situation in which through human intervention, a specimen or any part thereof, crosses an international boundary (unless one of the very limited CITES exceptions applies).

Hence it is important to realise that CITES's finding that a country's national legislation satisfies the basic legislative requirements of that convention goes only a small way in satisfying the more general AEWA requirement relating to controlling trade and possession of specimens.

Moreover, in many countries, this requirement cannot be satisfactorily addressed solely by provision in conservation and criminal laws. It is not uncommon, in a country that flatly prohibits all takings of a particular species and all possession of such specimens or their parts (except by governmental agencies for purposes of enforcement and/or research), to find the species and its parts included as a marketable commodities under regulations governing local markets and setting market standards.

Finally, implementation of this requirement shares with other species protection laws the evidentiary problems relating to

- distinguishing items that have been "taken in contravention of the prohibitions,"
- Defining and identifying "readily recognisable parts or derivatives."

Legislative suggestions: *The options for controlling marketing and possession of specimens protected species of migratory waterbirds depend rather clearly on the nature of the controls on taking of those specimens.*

- *Where the species involved is completely protected, so that no takings are permitted without specific exemption,*

²⁷ This exception, and the manner in which exceptions and exemptions should be drafted and implemented, is discussed in detail in Part 0.C above.

²⁸ All AEWA parties, except the EU (due to a technical matter relating to the drafting of CITES) and Albania, are also party to CITES.

- *it is often appropriate to provide that whenever any person is found in possession of or undertaking commercial activities involving such a specimen, the specimen should be immediately seized and only returned to the person when he/she furnishes proof of such exemption.*
These provisions may also apply against the purchasers or other recipients of these specimens, since such persons should be aware that the specimen cannot be legally possessed, and should have a legal obligation to ensure the existence of a legitimate exception, before agreeing to the transaction.
- *civil and criminal penalties may be more easily proven against the possessors of sellers and buyers of these species, for the same reason.*
- *Where the specimen is of a species for which takings and trade are legal but controlled, the enforcing agency may find it difficult to prove that the specimen was illegally taken unless the provisions limiting the taking of species require specific permitting, and identify and document quotas and allowable takes.*
Where it is not possible to require such documentation of all legal takings, enforcement may lead to inconsistent results, or may only be effective where the enforcing officer has evidence of the original illegal taking (usually this will be eyewitness testimony).
In this instance, as well, the governmental seizure authority can be a powerful incentive to legal enterprises to maintain proper documentation. However, where some trade is legal, it may be more difficult to establish a reasonable cause to seize the merchandise. It is sometimes possible under national law to identify specific factual or other situations or criteria which would justify seizure.
- *As to both types of situations, it is strongly suggested that the most effective mechanism for controlling trade is to establish controls on the operations that transform specimens into commercially marketable products, including*
 - *facilities for processing animals, fish, nests, eggs, and plants for human or consumption.*
 - *taxidermy operations and other businesses that process animal skins and feathers, and egg shells, for collectors.*
Most such operations depend in some, perhaps large, measure on their “legitimate” operations (i.e., those involving legally taken specimens.) A citation for illegal taking
- *Where the taking is pursuant to an exception for “traditional and subsistence use,” it will usually not be permitted to market the specimens.²⁹ This limitation should be clarified in legislation.*
- *The primary issues relating to the definition of “readily recognisable parts and derivatives” have been well debated and negotiated by the Conference of the Parties to CITES (which uses the same terminology as AEWa on this point.)³⁰ Legislative implementation of the limitation on trade in or possession of “readily recognisable parts and derivatives” would be facilitated by two types of provisions –*
 - *Provision in legislation governing consumer and wholesale goods, stating that all goods must be sold with some labelling clearly stating its ingredients or components. While such legislation exists in many countries, it often does not require that the species source of biological components be identified, even when the biological component is taken from a wild species of plant or animal; and*
 - *Adoption of the CITES COP’s definitional language, which states that a part or derivative is “readily recognisable” where its labelling identifies it as coming from a particular species.*

²⁹ Although the Action Plan’s provisions for hunting that is part of a long-established local custom are not clear on this point, AEWa incorporates as mandatory CMS’s provisions which appear to limit the exception to “traditional and subsistence uses.” It is assumed that these provisions will be controlling.

³⁰ The most complete statement of the COP’s determination’s with regard to this issue is found in Resolution Conf. 9.6 (Rev.), available online at http://www.cites.org/eng/resols/9/9_6.shtml#startitle. It should be noted that AEWa’s MOP is not bound by this Resolution and may adopt a different definition, if it chooses.

G. Research, Information and Reporting

AEWA's strong emphasis on planning and management for sustainability necessarily requires an equally strong emphasis on the development and sharing of information among the parties. While the actual research and compilation of data is an activity not bound by or requiring legislation in most cases, certain legislative provisions may help to foster the process and avoid conflicts that might otherwise arise with regard to information gathered (i) about a valuable resource; and (ii) which may demonstrate national needs for additional protection, etc.

1. Obligations of the Parties

AEWA requires that the parties "ensure that any use of migratory waterbirds is based on an assessment of the best available knowledge of their ecology and is sustainable for the species as well as for the ecological systems that support them." (AEWA, § III.2(b).)

In support of this requirement, AEWA requires Parties to

- "initiate or support research into biology and ecology migratory waterbirds including the harmonisation of research and monitoring methods and, where appropriate, the establishment of joint or co-operative research and monitoring programmes." (AEWA, § III.2(h));
- "cooperate with a view to assisting each other to implement this Agreement, particularly in the areas of research and monitoring" (AEWA Article III.2(l).)
- "analyse their training requirements for, *inter alia*, migratory waterbird surveys, monitoring, ringing and wetland management to identify priority topics and areas for training and cooperate in the development and provision of appropriate training programmes;" (AEWA, § III.2(i)); and
- "exchange information and results from research, monitoring, conservation and education programmes" (AEWA, § III.2(k).)

Beyond this, the **Action Plan** requires the Parties to

- "co-operate with a view to developing a reliable and harmonised system for the collection of harvest data in order to assess the annual harvest of populations listed in Table 1" (AEWA Action Plan (Annex 3 to AEWA) § 4.1.3);
- "co-operate with a view to identifying appropriate techniques to minimize damage, or to mitigate the effects of damage, in particular to crops, caused by populations listed in Table 1, drawing on the experience gained elsewhere in the world" (AEWA Action Plan (Annex 3 to AEWA) § 4.3.3);
- "co-operate to improve the measurement of bird population trends as a criterion for describing the status of such populations" (AEWA Action Plan (Annex 3 to AEWA) § 5.3); and
- "co-operate with a view to determining the migration routes of all populations listed in Table 1, using available knowledge of breeding and non-breeding season distributions and census results, and by participating in co-ordinated ringing programmes" (AEWA Action Plan (Annex 3 to AEWA) § 5.4.)

and asks them to "endeavour to" --

- "gather information on the damage, in particular to crops, caused by populations listed in Table 1" (AEWA Action Plan (Annex 3 to AEWA) § 4.3.2);
- "carry out survey work in poorly known areas, which may hold important concentrations of the populations listed in Table 1. The results of such surveys shall be disseminated widely" (AEWA Action Plan (Annex 3 to AEWA) § 5.1); and
- "monitor the populations listed in Table 1. The results of such monitoring shall be published or sent to appropriate international organizations, to enable reviews of population status and trends" (AEWA Action Plan (Annex 3 to AEWA) § 5.2.)
- "initiate and support joint research projects into the ecology and population dynamics of populations listed in Table 1 and their habitats, in order to determine their specific requirements as well as the techniques which are the most appropriate for their conservation and management" (AEWA Action Plan (Annex 3 to AEWA) § 5.5);
- "undertake studies on the effects of wetland loss and degradation and disturbance on the carrying capacity of wetlands used by the populations listed in Table 1 and on the migration patterns of such populations" (AEWA Action Plan (Annex 3 to AEWA) § 5.6);

- “undertake studies on the impact of hunting and trade on the populations listed in Table 1 and on the importance of these forms of utilization to the local and national economy” (AEWA Action Plan (Annex 3 to AEWA) § 5.7); and
- “co-operate with relevant international organisations and to support research and monitoring projects.” (AEWA Action Plan (Annex 3 to AEWA) § 5.8.)

In furtherance of this myriad of informational responsibilities, the **Action Plan** provides an exemption from the strict protections of AEWA regarding conservation and sustainable use, “for the purpose of research and education.” (AEWA Action Plan (Annex 3 to AEWA) § 2.1.3(c).)

2. Particular Legal Measures

One critical element in the satisfaction of research, information collection and reporting objectives relates to the cost and time involved in data collection and co-ordination processes. While there is no way to fully eliminate these costs, they may sometimes be reduced through the use of careful legislative provisions, and careful drafting of licenses, permits and other documents.

Having collected such data, however, other questions arise regarding the data itself, as a potentially valuable asset. Particularly, where migratory waterbird species, eggs, or parts, or critical components of their habitats are directly utilised for commercial profit, there may be instances in which critical information regarding the location and abundance of these assets will have commercial value. In addition, the advent and uncertain future of concepts of “fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources” may suggest that those resources could increase in value in future, and that access to them must be controlled.³¹

These same concerns may influence the need for legislation regarding who may have access to the collected data, and on what conditions.

Legislative suggestions: *Regardless of political and other decisions regarding ownership and access to data, legislation regarding its collection and use as described above, should at a minimum –*

- *Note that it is an offence to provide incorrect data, or to certify data whose accuracy is not known to the individual supplying the data;*
- *Specify the manner in which data will be used, and make it clear that the supplier of data pursuant to these provisions will not have any further claim on it.*
- *Specifically authorise the sharing of all relevant types of data mentioned in the CMS, AEWA and the Action Plan with the Parties to AEWA and the AEWA Secretariat, and include within this provision the possibility of future changes to the Action Plan which might broaden the data collection and sharing requirements.*

H. International Co-operation: Emergency Measures

1. Obligations of the Parties

AEWA calls for co-operation in many situations. A number of these are examined in the discussion of research and information requirements, above, focusing on the international sharing of information. Beyond these, however, **AEWA** addresses another important type of co-ordination, by calling on the parties to “co-operate in emergency situations requiring international concerted action and in identifying the species of migratory waterbirds which are the most vulnerable to these situations as well as co-operate in developing appropriate emergency procedures to provide increased protection to these species in such situations and in the preparation of guidelines to assist individual Parties in tackling these situations” (AEWA Article III.2(f).)

³¹ The quoted language is taken from the Convention on Biological Diversity, Article I. Concepts of equitable benefit-sharing in this context have been the subject of intense legal scrutiny, however, no international framework or clear legal principles govern its application at present. Developing countries tend to be also the countries in which the greatest diversity of species, and the most unique species are found. In some cases, such species may be critical to migratory bird habitats. For a discussion of the “Access and benefit-sharing issue, see Glowka, L., Guide to Designing Legal Frameworks for Access and Benefit-sharing (IUCN Environmental Law Programme, Environmental Policy and Law Paper, No. 34) (IUCN, 1998), and more generally Glowka, L. et al., A Guide to the Convention on Biological Diversity (IUCN Environmental Law Programme, Environmental Policy and Law papers, no 30 (IUCN, 1994.)

In furtherance of this critical objective, **AEWA's Action Plan** requires the Parties to co-ordinate to “develop and implement emergency measures for [listed] populations, when exceptionally unfavourable or endangering conditions occur anywhere in the Agreement Area.” (AEWA Action Plan (Annex 3 to AEWA) § 2.3.)

2. Particular Legal Measures

Legislative suggestion: *It is an essential element of compliance with AEWA that countries provide a mechanism for **immediate** reporting to neighboring countries, in the event of threats to shared populations of migratory birds. This reporting should*

- *if possible, be direct, whether by express legislative provision, or by a more general permission to co-ordinate with international environmental NGOs, in respect of transboundary populations and protected areas³² and*
- *place a priority on alacrity;*
- *include a special procedure for internal communication of hazards from local officials to the official charged with the duty to co-ordinate in transboundary and migratory species emergencies, and to develop, agree to, and implement emergency procedures and protocols recommended by Single Species Action Plans.*

³² Note the problems addressed in Part D. 2.f, above, however, regarding the involvement of foreign affairs offices in this type of official international communication.