North American Commission for Environmental Cooperation - Secretariat

Article 15(1) Notification to Council that Development of a Factual Record is Warranted

Submission I.D.: SEM-99-002

Submitter(s): Alliance for the Wild Rockies
Center for International Environmental Law
Centro de Derecho Ambiental del Noreste de Mexico
Centro Mexicano de Derecho Ambiental
Friends of the Earth
Instituto de Derecho Ambiental
Pacific Environment and Resources Center
Sierra Club of Canada
West Coast Environmental Law Association

Concerned Party: United States of America

Date of this Determination: 15 December 2000

I EXECUTIVE SUMMARY

Article 14 of the *North American Agreement on Environmental Cooperation* (NAAEC or the "Agreement"*)* creates a mechanism for citizens to file submissions in which they assert that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the North American Commission for Environmental Cooperation* (the "Secretariat") initially considers these submissions based on criteria contained in Article 14(1) of the NAAEC. When the Secretariat determines that a submission meets these criteria, the Secretariat then determines based on factors contained in Article 14(2) whether

* As of October 2000, the Commission for Environmental Cooperation, created by NAAEC, has used the name North American Commission for Environmental Cooperation (NACEC).

the submission merits requesting a response from the Party named in the submission. In light of any response from the Party, the Secretariat may inform the Council that the Secretariat considers that development of a factual record is warranted (Article 15(1)). The Council may then instruct the Secretariat to prepare a factual record for the submission (Article 15(2)).[1]

The Submitters filed this submission, involving the asserted failure to effectively enforce the United States Migratory Bird Treaty Act (MBTA or the "Act"), on 19 November 1999. On 23 December 1999 the Secretariat determined that the submission met the criteria in Article 14(1) and that it merited a response from the Party in light of the factors listed in Article 14(2). On 29 February 2000 the Secretariat received a response from the Party. In accordance with Article 15(1), the Secretariat informs the Council that the Secretariat considers that the submission, in light of the response, warrants developing a factual record, and provides its reasons.

II SUMMARY OF THE SUBMISSION

The Submitters assert that the United States Government is "failing to effectively enforce" section 703 of the MBTA, 16 U.S.C. § 703, which prohibits the killing or "taking" of migratory birds under certain circumstances. This assertion rests on a three-step analysis. The Submitters first assert that section 703 of the MBTA prohibits any person from killing or "taking" migratory birds, including destroying nests, crushing eggs, and killing nestlings and fledglings, "by any means or in any manner," unless the U.S. Fish & Wildlife Service (FWS) issues a valid permit.[2]

Second, the Submitters assert that loggers, logging companies, and logging contractors consistently engage in practices that violate the Act.[3] The Submitters assert that, for example, "the number of young migratory birds killed, nests destroyed, and eggs crushed annually as a direct result of logging operations is enormous."[4]

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[1] This is the seventh Secretariat Notification to Council that the Secretariat considers development of a factual record to be warranted for a submission. Regarding the previous six, the Council has directed the Secretariat to develop a factual record for three (SEM-96-001, SEM-97-001 and SEM-98-007), deferred its decision on one (SEM-97-006), rejected the fifth (SEM-97-003), and is currently considering the sixth (SEM-98-006). The pertinent Council Resolutions (96-08, 98-07, 00-01, 00-02 and 00-03), are available on the CEC home page, www.cec.org.

[2] Submission at 1.

[3] Submission at 1-4, Appendix C.

[4] Submission at 4.

Finally, the Submitters claim that the United States is failing to effectively enforce this requirement of the Act because of its failure to prosecute logging operations that violate the Act by killing birds.[5] The Submitters assert that, furthermore, the United States is failing to enforce against logging operations even though it is fully aware that they consistently violate the law.[6] The Submitters assert that the United States "has completely abdicated its enforcement obligations" under the MBTA because of its failure to prosecute logging operations that the Submitters claim routinely violate the Act.[7]

III SUMMARY OF THE RESPONSE

The United States advances four arguments to support its position that development of a factual record is not warranted. First, the United States asserts that the Submitters have relied heavily on an unapproved 7 March 1996 draft Memorandum purporting to reflect a policy of the United States Fish and Wildlife Service (FWS) to exempt logging activities from enforcement actions under the MBTA. According to the United States, the Memorandum is unapproved and unofficial and embodies no FWS policy, formal or unwritten.[8]

Second, the United States asserts that development of a factual record is not warranted because under NAAEC Article 45(1)(a) the United States has not failed to effectively enforce the MBTA. Article 45(1)(a) of the NAAEC provides that a Party "has not failed to 'effectively enforce its environmental law'… where the action or inaction in question by agencies or officials of that Party reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters." The United States asserts that Article 45(1)(a) precludes a finding that the United States is failing to effectively enforce the MBTA because the current enforcement policies of the FWS "reflect a reasonable exercise of the agency's discretion regarding investigatory, prosecutorial, regulatory, and compliance matters."[9]

Third, the United States makes the same assertion with respect to Article 45(1)(b). Article 45(1)(b) of the NAAEC provides that agency action or inaction does not amount to a failure to effectively enforce if it "results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities." The United States asserts that the NAAEC precludes a

[5] *See* Submission at 4-8.
[6] *See*, *e.g*., Submission at 1,5.
[7] Submission at 1.
[8] *See* Response at 7-8.
[9] Response at 2.

determination that the United States is failing to effectively enforce the MBTA because "the current enforcement policies of the FWS result from '*bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities.'"[10]

Fourth, the response takes the position that the submission does not warrant development of a factual record because it fails to discuss the steps the United States is taking to protect migratory birds from logging activities. The United States asserts that it has used its authority under the *Endangered Species Act* (ESA) to protect migratory birds that are listed as endangered or threatened under that law. It states that it has used a number of "non-enforcement mechanisms" to provide additional protection.[11] The United States claims that because the submission does not acknowledge these efforts, it does not reflect "the complete framework under which the United States protects migratory birds."[12]

IV ANALYSIS

A. Introduction

In its 23 December 1999 Determination, the Secretariat concluded that the submission met each of the criteria contained in Article 14(1).[13] The CIEL submission is in English,[14] it clearly identifies the organizations making the submission,[15] it indicates that the matter had been appropriately communicated to the United States,[16] and it was filed by organizations established in the territory of a Party.[17] The submission is not aimed at harassing industry.[18]

Article 14(2) establishes guiding factors for the Secretariat to determine whether to request the Party to submit a response to a submission that meets the criteria in Article 14(1). The CIEL submission alleges harm from the alleged failure to effectively enforce environmental law in part because of the great public

[10] Response at 2.
[11] Response at 2.
[12] Response at 2.
[13] Determination for SEM-99-002 (23 December 1999) at 3.
[14] Article 14(1)(a).
[15] Article 14(1)(b).
[16] Article 14(1)(e).
[17] Article 14(1)(f).
[18] Article 14(1)(d).

importance of migratory birds. The submission also raises matters whose further study in the Article 14 process would advance the goals of the Agreement.[19] The submission asserts that private remedies to require the United States to enforce the MBTA are not available.[20] The submission indicates that it is not based exclusively on mass media reports.[21] Guided by these factors, on 23 December 1999, the Secretariat requested a response from the Party. A response from the Party was received on 29 February 2000.

Article 15(1) of the NAAEC directs the Secretariat to determine, based on its review of a submission and the Party's response, whether to dismiss a submission or to inform the Council that the Secretariat considers that the submission warrants developing a factual record. The text of Article 15(1) reads as follows:

> If the Secretariat considers that the submission, in the light of any response provided by the Party, warrants developing a factual record, the Secretariat shall so inform the Council and provide its reasons.

B. Analysis of the Submission in Light of the U.S. Response

The Submitters assert that the United States Government is "failing to effectively enforce" section 703 of the MBTA, 16 U.S.C. § 703, which prohibits the killing or "taking" of migratory birds under certain circumstances. The Submitters assert that loggers, logging companies, and logging contractors consistently engage in practices that violate the Act.[22] The Submitters assert that, furthermore, the United States is failing to enforce against logging operations even though it is fully aware that they consistently violate the law.[23] The Submitters assert that the United States "has completely abdicated its enforcement obligations" under the MBTA because of its failure to prosecute logging operations that the Submitters claim routinely violate the Act.[24]

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[19] Article 14(2)(b). The NACEC Secretariat noted that the sort of assertions in the submission "-- that there is a widespread pattern of ineffectual enforcement -- are particularly strong candidates for Article 14 consideration . . . ." Determination for SEM 99-002 (23 December 1999) at 5.

[20] *See* Article 14(2)(c) . The response does not take issue with this assertion (see Article 14(3)(b)(ii), providing that "[t]he Party shall advise the Secretariat . . . of any other information that the Party wishes to submit, such as . . . ii) whether private remedies in connection with the matter are available to the person or organization making the submission and whether they have been pursued.").

[21] *See* Article 14(2)(d).

[22] Submission at 1-4, Appendix C.

[23] *See, e.g*., Submission at 1,5.

[24] Submission at 1.

1. Information Supporting the Submitters' Assertion that the United States is Failing to Effectively Enforce the MBTA Against Logging Operations

The Submitters cite a 7 March 1996 FWS Memorandum for the proposition that the United States has a longstanding policy not to enforce against logging operations that violate the MBTA. The Submitters claim that the Memorandum provides support for their assertion that the United States is failing to effectively enforce the MBTA against logging operations.[25] The Memorandum states that the FWS "has had a long standing, unwritten policy relative to the MBTA that no enforcement or investigative action should be taken in incidents involving logging operations, that result in the taking of non-endangered, non-threatened, migratory birds and/or their nests."[26]

The United States claims in its response to the Submission that the Memorandum is not the official United States policy the Submitters say it is. The United States characterizes the 7 March 1996 Memorandum as "an unapproved and unofficial draft memorandum," and as "a working document that had limited distribution, and was distributed solely for the purpose of soliciting comments during an internal decision-making process of the FWS."[27] Thus, the United States asserts, the draft memorandum embodies no FWS policy, formal or unwritten, and the submission "misrepresents the true status of the FWS enforcement policy with respect to the MBTA."[28]

The Submitters do not rely exclusively on the 7 March 1996 Memorandum to support their assertion that the United States is failing to effectively enforce the MBTA as it applies to logging activities by failing to prosecute violators. Instead, the Submitters provide other support for this assertion as well.

The Submitters identify specific situations in which they allege the Act was violated and no enforcement action was taken. Specifically, the Submitters identify two recent instances in which the Party did not initiate an enforcement action against logging operations that allegedly violated the MBTA by killing covered birds and destroying nests.[29] The Submitters assert that the failure to respond to these alleged violations constitutes a failure to effectively enforce the MBTA. The Party does not address these assertions.

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[25] See e.g., Submission at 1.
[26] Submission, Appendix A.
[27] Response at 7.
[28] Response at 8.
[29] Submission at 6.

The Submitters also assert that violations for which no enforcement action is taken occur on a nationwide basis. They note the impacts in violation of the Act that logging has on birds and nests found on logged federal and non-federal lands throughout the United States. The Submitters further state that as far as they have been able to discern, the Party has never undertaken a single prosecution under the MBTA against a logging operation. The Submitters advise that they made a concerted effort to obtain from the Party information on any such prosecutions but that the Party indicated in its responses to the Submitters' requests for such information that they had no information that there have been any such prosecutions:

> [A] review of government files in response to the Submitting Party's requests, indicates that the United States has *never* enforced the MBTA against loggers, logging companies, or private landowners—in any context—no matter how egregious the violation may have been. In response to CIEL's request for information, FWS, the Forest Service, and the Department of Justice all responded that they had no documents relating to enforcement actions against anyone involved in a logging operation.[30]

Significantly, the United States does not appear to challenge either assertion by the Submitters – that logging operations cause deaths of birds covered by the MBTA and destruction of nests of such birds, or that the Party has never enforced against such operations. With respect to the level of enforcement issue, the United States appears to acknowledge that it has made little if any use of the enforcement provisions in the MBTA against logging operations, at least unless the migratory birds involved are protected under the Endangered Species Act. The United States reports that "the FWS has not taken enforcement actions against logging activities regarding their impacts on migratory birds that are not listed pursuant to the ESA… ."[31] Along the same lines, the United States notes that "[t]o date, the FWS has no record of prosecutions having been brought exclusively under the MBTA for takes caused by logging of migratory birds not listed under the [Endangered Species Act]."[32] The United States also indicates that the FWS "has not routinely reviewed [logging] activities with regard to whether or not a permit is required."[33]

In sum, the Submitters' assertion that there is a failure to effectively enforce the MBTA against logging operations does not rely exclusively on the existence of an official FWS "non-enforcement" policy of the

[30] Submission at 6. The Submitters also identify two specific incidents in which logging operations allegedly committed significant violations of the MBTA but for which no enforcement action was taken. Submission at 6.
[31] Response at 8.
[32] Response at 11.
[33] Response at 11.

sort contained in the 7 March 1996 Memorandum. The Submitters have offered other information to support this assertion, notably an apparent lack of prosecutions nationwide as well a failure to prosecute alleged logging operation violators in particular circumstances. The United States does not seek to controvert the assertion that prosecutions under the MBTA against logging operations have been rare and it does not address the alleged failure to effectively enforce with respect to the particular examples provided. The information provided by the United States appears to support the assertion that logging operations that violate the MBTA are rarely prosecuted, if ever, at least so long as the operations do not violate the ESA as well.

2. Application of Articles 14 and 15 to Assertions of a Wide-ranging Failure to Enforce Environmental Law Effectively

The focus of the submission is on an asserted failure to effectively enforce that is nationwide in scope. While the Submitters identify some specific logging operations that allegedly violated the MBTA,[34] the reference to particular operations is clearly intended to be illustrative. The Submitters' primary concern is with an asserted nationwide failure on the part of the Party to investigate or prosecute logging operations that violate the MBTA by killing birds or destroying bird nests.

Given the Submitters' broad focus on an asserted nationwide failure to effectively enforce, the Secretariat now considers whether the citizen submission process is intended for assertions of this sort. One possible view is that the citizen submission process is reserved for assertions of particularized failures to effectively enforce. Under this view a factual record would be warranted, only when a submitter asserts that a Party is failing to effectively enforce with respect to one or more particular facilities or projects. This view of the Article 14 process, in short, reads the opening sentence of Article 14(1) to confine the citizen submission process to asserted failures to effectively enforce with respect to particular facilities or projects. Under this view, assertions of a wide-ranging failure to effectively enforce that do not focus on individual facilities or projects would not be subject to review under the citizen submission process.

The text of Article 14 does not appear to support limiting the scope of the citizen submission process in this way. The opening sentence of Article 14 establishes three specific parameters for the citizen submission process. It thereby limits assertions of failures to effectively enforce to those meeting these three elements. First, the assertions must involve an "environmental law." Next, they must involve an asserted failure to

[34] *See*, *e.g.*, Submission at 6.

"effectively enforce" that law (the assertion may not focus on purported deficiencies in the law itself). Third, assertions must meet the temporal requirement of claiming that there *is* a failure to effectively enforce.

The Parties' inclusion of these three limitations on the scope of the Article 14 process reflects that they knew how to confine the scope of the process and that they decided to do so in specific ways.[35] The Parties could have limited the species of actionable failures to effectively enforce to either particularized incidents of such, or to asserted failures that are of a broad scope, in the same way that they included the limits referenced above. They did not do so. The fact that the Parties did not limit assertions to either particularized incidents or to widespread failures to effectively enforce provides a strong basis for the view that the Parties intended the citizen submission process to cover both kinds of alleged enforcement failures.[36] Thus, the text of the opening sentence of Article 14(1) supports the view that a submission may warrant preparation of a factual record, regardless of the scope of the alleged enforcement failure, so long as the submission focuses on an asserted failure to effectively enforce an environmental law. [37]

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[35] The Secretariat routinely considers whether submissions meet these three criteria; indeed, the Secretariat has dismissed several submissions on the ground that they failed to meet one or more of them. *See, e.g*., Determination for SEM-95-001 (21 September 1995) (submission did not involve alleged failure to enforce because it challenged adequacy of legislative act); Determination for SEM-98-002 (23 June 1998) (submission involved commercial forestry dispute, rather than an alleged failure to enforce an "environmental law"); Determination for SEM-97-004 (25 August 1997) (dismissing submission for failure to allege that Party "is failing" to effectively enforce); Determination for SEM-00-003 (12 April 2000) (dismissing submission as premature).

[36] See Determination for SEM 99-002 (23 December 1999) at 5 ("Assertions of this sort -- that there is a widespread pattern of ineffectual enforcement -- are particularly strong candidates for Article 14 consideration, although submissions that focus on asserted failures to enforce concerning individual facilities may warrant consideration under Article 14 under some circumstances, depending on other factors.")

[37] Article 14(1)(a)-(f), which establishes additional limits on the types of submissions subject to review under the Article 14 process, similarly does not reflect an intent to limit submissions to asserted failures to effectively enforce that focus exclusively either on particularized incidents or on asserted failures that are broad in scope. These provisions create certain threshold requirements that appear equally applicable to a submission focused on either type of asserted failure to effectively enforce (particularized incidents or widespread failures). For example, either type of submission must be in writing in an appropriate language (Article 14(1)(a)), clearly identify the submitter(s) (Article 14(1)(b)), and have been filed by an eligible entity (Article 14(1)(f)). Similarly, the requirement that a submitter provide sufficient information for the Secretariat to review the submission (Article 14(1)(c)) and that the submission appear to be aimed at promoting enforcement rather than at harassing industry (Article 14(1)(d)) are potentially relevant both to an alleged particularized failure and to an alleged widespread enforcement failure. Finally, the submission must indicate that the matter has been communicated in writing to the relevant authorities of the Party and indicate the Party's response, if any (Article 14(1)(e)). None of these requirements reflects a direct, or even an indirect, intent to exclude submissions that focus on alleged failures to effectively enforce involving particularized incidents or submissions that focus on alleged failures to effectively enforce that are broad in scope.

Moreover, in deciding whether to request a response from a Party, Article 14(2) of the NAAEC directs the Secretariat to be guided by whether a submission "raises matters whose further study in this process would advance the goals" of the Agreement. The goals of the NAAEC are ambitious and broad in scope. These goals include, for example, "foster[ing] the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations," as well as "enhanc[ing] compliance with, and enforcement of, environmental laws and regulations."[38]

Assertions that there is a failure to enforce with respect to a single incident or project may raise matters whose further study would advance these goals. Indeed, the Secretariat has concluded that such assertions merit developing a factual record in several instances and the Council has concurred.[39] But also, assertions that the failure to enforce extends beyond a single facility or project portend, at least potentially, a more extensive or broad-based issue concerning the effectiveness of a Party's efforts to enforce its environmental laws and regulations. In other words, the larger the scale of the asserted failure, the more likely it may be to warrant developing a factual record, other things being equal. If the citizen submission process were construed to bar consideration of alleged widespread enforcement failures, the failures that potentially pose the greatest threats to accomplishment of the Agreement's objectives, and the most serious and far-reaching threats of harm to the environment, would be beyond the scope of that process. This limitation in scope would seem to be counter to the objects and purposes of the NAAEC. The Secretariat declines to adopt a reading of the Agreement that would yield such a result.[40]

In sum, Article 14(1) establishes parameters for the scope of the citizen submission process. These parameters limit the scope of the process in several ways but they do not reflect an intention only to allow "particularized" assertions of a failure to effectively enforce and to exclude assertions such as those made here that there is a widespread failure to effectively enforce. Article 14(2) provides further support for the notion that the citizen submission process may include either type of assertion. Preparing factual records on submissions that take either approach would promote the objects and purposes of the NAAEC.

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[38] Article 1(a) and (g).

[39] The treatment of SEM-98-007 by the Secretariat and Council is illustrative. This submission involves an asserted failure to effectively enforce for a single facility in Mexico. The Secretariat initially requested a response and later advised the Council that a factual record was warranted. The Council recently directed the Secretariat to proceed with such a factual record.

[40] See Vienna Convention on the Law of Treaties, Article 31, providing that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

3. Analysis of the Asserted Failure to Effectively Enforce the MBTA Against Logging Operations in Light of the U.S. Response

The Submitters assert that logging operations have consistently violated the MBTA and that the Party has never prosecuted such violations, as noted above.[41] As indicated above, the response denies that the 7 March 1996 Memorandum accurately states a longstanding formal policy not to enforce the MBTA against logging activities. The response also confirms, however, that the United States has *never* prosecuted an MBTA violation in the context of logging activities, at least unless an endangered or threatened species was involved. As a result, the response appears to confirm that the lack of prosecutions under the MBTA (regardless of whether it is the result of a formal policy) is both longstanding (given that the MBTA has been in effect since 1918) and broad in geographical scope.

The Submitters assert that the alleged failure to effectively enforce against logging operations has significant consequences in that logging causes tens of thousands of direct deaths of migratory birds and destroys or crushes nests, eggs, nestlings and fledglings. Appendix C to the submission claims that logging, and the failure to enforce the MBTA against logging operations, have had "severe negative consequences for migratory bird populations." The United States alleges in its response that logging activities are not as significant a source of migratory bird takes as certain other causes, such as power line electrocution or feral cats.[42] The fact that there may be activities that have more significant consequences, however, does not necessarily mean that logging does not also have significant consequences. The response acknowledges that logging can result in unlawful takes when it kills birds or crushes eggs.[43] As noted above, the response also confirms the importance of migratory birds. The Council itself has characterized migratory birds as "a particularly important component of North American biodiversity."

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[41] Submission at 4.

[42] *See* Response at 5 ("Although, logging activities are one of a long list of activities that may contribute to bird fatalities, they are not the most significant cause of bird mortality in the United States.").

[43] Response at 4. The Secretariat notes that it received a memorandum from the American Forest & Paper Association (AFPA) that is relevant to this issue. The AFPA, the "national trade association representing the forest products and paper industries in the United States," asserts that the U.S. case law holds that logging operations are not subject to the MBTA even if such operations kill birds covered by the Act. The Secretariat appreciates AFPA's interest in this proceeding. There is, however, no provision in the NAAEC for consideration of such memoranda at this stage of the citizen submission process. The Secretariat declines to adopt a more narrow reading of a Party's legislation than the one the Party itself appears to endorse. If the Council directs preparation of a factual record for this submission, the AFPA may submit comments, which the Secretariat may consider in its development of the factual record. (Article 15(4)).

There is one portion of the United States' response that has particular bearing on the issue of whether preparing a factual record with respect to this submission is warranted. The response contends that the CIEL submission fails to take into consideration a "multitude of 'non-prosecutorial' alternatives" for protecting migratory birds that represent "a more productive use of limited resources." Because, as the response itself indicates, these alternatives are "non-enforcement initiatives,"[44] the Party's decision to pursue them in lieu of MBTA prosecutions cannot qualify as *bona fide* decisions to allocate resources to higher priority *enforcement* matters under Article 45(1)(b).[45] It may be, however, that in summarizing these non-enforcement strategies the response is suggesting that the issue of effective enforcement of the MBTA with respect to logging operations may not be worth studying through development of a factual record, if such non-enforcement strategies are effective in achieving the underlying goals of the governing statute.

The response describes several different types of "non-prosecutorial" or "non-enforcement" initiatives that, according to the United States, amount to a "proactive, preventative management" approach to the protection of migratory birds. Having considered the response's discussion of these initiatives, in the Secretariat's view, further study of the matters raised in the submission is warranted. Among other things, reasonable questions remain as to whether any of these alternatives, either alone or in combination, is effective in protecting migratory birds in the absence of enforcement against logging operations that violate § 703 of the MBTA.

The first alternative is population monitoring of migratory birds to facilitate identification of migratory bird species that are of most concern.[46] Although this kind of monitoring is unquestionably valuable in alerting the FWS to the existence of problems related to the health of migratory bird populations and the state of their habitat, monitoring alone is a means of facilitating, enhancing, and evaluating the value of other kinds of protective efforts. Information on the results of this monitoring that shows the government's approach is effective was not provided.

A second non-enforcement alternative is public outreach. Initiatives such as International Migratory Bird Day may educate members of the public on the importance of protecting migratory birds, but the response does not address issues such as the resources that have been committed to outreach efforts, whether these programs have addressed all significant sources of threats to migratory birds (including logging), the extent

[44] Response at 18.
[45] The response discusses these initiatives in the section devoted to analysis of the Party's "Resource Allocation."
[46] Response at 19.

of their actual beneficial effect, or the comparative educational benefits of public outreach efforts and the use of MBTA prosecutions as "leveraging" tools.[47]

Another alternative identified by the response, avian mortality studies and management, goes beyond study and monitoring to encompass potential protective efforts.[48] According to the response, the FWS recommends management actions to reduce adverse impacts based on population trends data and monitoring. In "appropriate instances," monitoring can lead to enforcement action against entities such as electric utilities that install power lines that can electrocute birds.[49] The response does not provide information about how effective the identified management actions (such as those initiated by the Communications Tower Working Group) have been in avoiding migratory bird deaths and habitat losses. It also does not explain why the resources available to the United States to protect migratory birds have not been sufficient to target logging activities by, for example, developing a working group for logging that is similar to the communications tower group. The response seems to indicate that the United States has not targeted logging because it does not have a "great level of impact." As indicated elsewhere, however, the response fails to provide adequate information about the absolute and relative aggregate impact of logging on migratory birds and their habitat. Finally, the response implies that the adverse effects of logging on migratory birds cannot be "readily addressed." But as indicated below, the response describes efforts by the United States Forest Service to require or induce the use of best management practices. Accordingly, there are important unresolved questions about whether the avian mortality studies and management actions described in the response are sufficiently effective to negate the utility of preparing a factual record as a means of advancing the goals of the NAAEC.

The response identifies landscape level bird planning as an additional means of protecting migratory birds and their habitat.[50] This kind of planning has the potential to protect migratory birds, but the plans described in the response do not appear to have been implemented yet and an assessment of their effectiveness in protecting migratory birds is therefore necessarily speculative. Moreover, the response does not indicate what component of the migratory bird problems identified through monitoring or otherwise will be addressed through implementation of the plans. Similarly, the participating countries apparently have just begun to implement initiatives such as the North American Bird Conservation Initiative and the Trilateral

[47] It is not clear from the response how the FWS would determine how successful these outreach efforts have been.
[48] *See* Response at 19.
[49] *E.g., United States v. Moon Lake Elec. Ass'n, Inc.*, 45 F.Supp.2d 1070 (D. Colo. 1999).
[50] Response at 20.

Committee for Wildlife and Ecosystem Conservation and Management.[51] The response does not indicate what resources the United States has committed to these endeavors, what powers the entities involved have to take actions or require those engaged in logging to take actions to protect migratory birds, what kinds of protections, if any, these endeavors have already achieved, or what kinds of protections the United States hopes to achieve through the activities of these agencies.

In sum, the assertions contained in the submission of a nationwide failure to effectively enforce the MBTA with respect to logging operations are of substantial importance. Further study of the assertions would advance several goals of the Agreement, including enhancing compliance with, and enforcement of, environmental laws and regulations,[52] and promoting transparency and public participation in the development of environmental laws, regulations, and policies.[53]

C. Consideration of Article 45(1)(a) and (b)

1. Preliminary Framework for Analysis of Article 45(1) Issues

The submission charges that the United States has failed to effectively enforce the MBTA. As indicated above, Article 45(1) of the NAAEC provides that a Party has not failed to effectively enforce its environmental law if the action or inaction in question by agencies or officials of that Party either "reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters" or "results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities."[54] The United States asserts that it has not failed to effectively enforce the MBTA for both of these reasons.

The purpose of the citizen submission process suggests that the Secretariat should dismiss a submission if the relevant Party establishes that there is no failure to effectively enforce. A fundamental purpose of the process is to enhance domestic environmental enforcement by the three Parties.[55] Accordingly, if a Party

[51] *See* Response at 21.
[52] Article 1(g).
[53] Article 1(h).
[54] Article 45(1)(a) and (b).
[55] *See, e.g.*, Sarah Richardson, *Sovereignty Revisited: Sovereignty, Trade, and the Environment—The North American Agreement on Environmental Cooperation*, 24 CAN-U.S. L.J. 183, 190 (1998) (noting that "[t]aken together, Articles 14 and 15 …represent a critical institutional mechanism to encourage the effective enforcement by the Parties of their

has made a persuasive case that there is no failure to effectively enforce, there will be little point in going forward.

This is the first Party response in which a Party has made a detailed assertion that Article 45 makes continued review of the submission inappropriate. The nature of the Secretariat's review of the submission in light of the response with respect to these issues will likely be determined on a case-by-case basis.[56] The Secretariat anticipates, however, that the following analysis will generally be relevant.

In a particular submission, if a Party has asserted that its enforcement reflects a reasonable exercise of its discretion, the Secretariat should review at least two questions in assessing the extent to which the Party provides support for this assertion. First, to what extent has the Party explained how it has exercised its discretion? Second, to what extent has the Party explained why its exercise of discretion is reasonable under the circumstances? If the Party has provided a persuasive explanation of how it has exercised its discretion, and why its exercise of discretion is reasonable, then under Article 45(1)(a), the Party would not have failed to effectively enforce its environmental law. In such a situation there would seem to be little reason to continue with further study of the matters raised in the submission. If, on the other hand, the Party has not explained how it exercised its discretion or why its exercise of discretion is reasonable, dismissal would not be warranted under Article 45(1)(a). The Secretariat might nevertheless determine that dismissal is warranted for other reasons.

With respect to the assertion that a Party's enforcement practices result "from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities," the Secretariat should review the extent to which the Party has explained at least three points: 1) its allocation of resources; 2) its priorities; and 3) the reasons why the Party's allocation of resources constitutes a *bona fide* allocation given the Party's priorities. If a Party has explained its allocation of resources and its priorities, and has provided a persuasive explanation of why its allocation of resources is *bona fide* in light of those priorities, then, again, under Article 45(1)(b), there is not a failure to effectively enforce. As a result, there is little reason to continue with further study of the submission.

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domestic environmental law").

[56] Cf. Scott C. Fulton & Lawrence I. Sperling, *The Network of Environmental Enforcement and Compliance Cooperation in North America and the Western Hemisphere*, 30 INT'L LAW 111, 128-29, 138 (1996) (noting that the NAAEC leaves to "future development" determination of standards for determining the effectiveness of each the Parties' enforcement efforts rather than "setting forth precise standards").

2. Application of this Framework to the CIEL Submission and the Party's Response

A) HOW HAS THE PARTY EXERCISED ITS DISCRETION?

In the Secretariat's view, the Party has provided substantial information concerning *how* it has exercised its discretion for purposes of Article 45(1)(a). The Party has done so by offering three basic points. First, the Party identifies its significant "enforcement"-related initiatives. These include creation and implementation of a permitting scheme, issuance of regulations for the hunting of game birds that are designed to keep harvest levels in balance with a sustainable population, and related monitoring of game bird populations. The Party also identifies law enforcement investigations and prosecutions as enforcement-related approaches.

Next, the Party explains that its resources are limited. With respect to permitting, for example, the United States asserts that the FWS' Office of Migratory Bird Management lacks sufficient personnel to write permits for every incoming request.[57] The response asserts that on average, approximately three million people each year engage in 22 million days of migratory bird hunting. The FWS has been able to commit 18 staff positions and a total nationwide budget of just over $1 million in an effort to manage approximately 40,000 active permits and process approximately 13,000 applications for intentional take permits annually.[58] According to the United States, these resources are insufficient to the task and the agency faces "significant resource limitations."[59] Thus, the Party asserts that simply addressing the large number of hunters and prospective hunters keeps its permitting resources more than fully occupied.

With respect to the impact of resource limitations on enforcement, the Party's response explains that the FWS' Division of Law Enforcement has "tremendous responsibilities" that include enforcement of a wide variety of statutes other than the MBTA that are designed to protect fish, wildlife, and plants.[60] The combination of this broad range of responsibilities and existing personnel shortages makes resource allocation decisions and the application of discretion in enforcement matters "unavoidable."[61]

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[57] Permits are the mechanism the FWS has chosen in connection with the regulations it has issued to control the taking of migratory birds through hunting and other activities. 50 C.F.R. Parts 20-21. *See* Response at 9-10.
[58] Response at 10.
[59] Response at 11.
[60] Response at 15.
[61] Response at 16.

Third, the Party identifies the different types of activities that potentially violate the Act and it explains how it has exercised its discretion in using the applicable enforcement approaches to address these different types of activities. The Party indicates that in light of its limited resources and the significant workload created by managing "intentional" killers of migratory birds through the permitting process, it has exercised its discretion to focus its permitting program exclusively on such intentional actors and not to allocate permitting resources to address unintentional or incidental killings.[62] Logging operations fit into this "unintentional" or "incidental" killings category, as do several other activities discussed in more detail below, such as electric wires, oil pits, and other "attractive nuisance"-type enterprises that the Party indicates attract birds, causing some to die. In addition, the Party asserts that, due to its limited resources, it has "legitimately concentrated its regulatory, enforcement, and scientific efforts to reducing unintentional takes of migratory birds caused by those activities where industry has created hazardous conditions which often attract migratory birds to their death."[63] According to the Party, the FWS therefore "focuses less on preventing takes ensuing from otherwise legal activities that modify the local environment (logging, road construction)" than from intentional kills (such as from hunting) and from "activities where industry has created hazardous conditions which …attract migratory birds to their death."[64]

In sum, the United States provides much of the information needed to determine whether it is exercising its discretion in a reasonable way. It identifies its enforcement tools. It further explains and substantiates limits in the Party's resources. Further, it describes the types of activities that violate the Act, and explains that it has judged it more important to use permitting to regulate one type of activity (intentional killing) in lieu of using it to regulate another (incidental or unintentional killing). Similarly, the United States explains that it focuses its enforcement efforts on other types of incidental killing (electric wires, etc.) rather than on logging operations.

B) IS THE PARTY'S EXERCISE OF ITS DISCRETION REASONABLE AND/OR ITS ALLOCATION OF RESOURCES BONA FIDE UNDER THE CIRCUMSTANCES?

1) Scope of the Regulations and Permitting Scheme

The Party falls short in one respect in showing that it has exercised its discretion reasonably and allocated its resources in a bona fide way by deciding to focus its regulatory and permitting resources exclusively on

[62] *See* Response at 11.
[63] Response at 11.
[64] Response at 11-12.

activities "where the take is the purpose of the activity in question" and to exempt incidental killing activities from this permitting scheme. What is missing is a showing as to why this exclusive focus on intentional killings, and this decision to ignore incidental killings for purposes of the regulation development and permit process, is reasonable and a bona fide allocation of resources. Section 703 of the MBTA makes it unlawful to take protected migratory birds "[u]nless and except as permitted by regulations" issued under the statute.[65] Section 704 authorizes the Secretary of the Interior to determine "when, to what extent, if at all, and by what means … to allow hunting, taking, … [or] killing" of migratory birds by permit.[66] As the United States Supreme Court has described it, the MBTA is a "conservation statute[ ] designed to prevent the destruction of [migratory] birds."[67] The Party indicates that the primary goals of the FWS in its management of migratory birds are "to conserve migratory bird populations and their habitats in sufficient quantities to prevent them from being considered as threatened or endangered and to ensure the citizens of the United States continued opportunities to enjoy consumptive and nonconsumptive uses of migratory birds and their habitats."[68] The Party asserts that its approach is a reasonable strategy to achieve these goals, but it provides no support for this assertion that would allow for independent review.

The NAAEC is silent on the type of showing a Party should make in claiming under Article 45(1) that it is not failing to effectively enforce its environmental law. The NAAEC similarly is silent on how the Secretariat should review such a claim in deciding whether to dismiss a submission or advise the Council that development of a factual record is warranted. Neither the Council nor the Secretariat have addressed these issues in detail previously.

It would appear that, to support dismissal on the basis of an Article 45(1) claim, a Party must support the reasonableness, or *bona fide* nature, of its decisions, as well as address the issues outlined above. To do so, a Party should provide a careful identification of the reasons why it chose to follow one course rather than another.[69] Here, such a showing includes providing a careful identification of the reasons why the Party chose not to include logging operations in its permitting scheme.

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[65] 16 U.S.C. § 703.
[66] 16 U.S.C. § 704(a).
[67] *Andrus v. Allard*, 444 U.S. 51, 52-53 (1979).
[68] Response at 5 (internal quotation marks omitted).
[69] In its 19 July 1999 Article 15(1) Notification to Council that Development of a Factual Record is Warranted for SEM-97-006, the Secretariat noted that a Party must provide support for its statement under Article 45 that it has reasonably exercised its enforcement discretion and/or that its enforcement approach resulted from *bona fide* decisions to allocate resources to enforcement in respect of other matters determined to have higher priorities.

It is precisely that kind of explanation, justifying the reasonableness of the Party's exercise of enforcement discretion in declining to establish a permitting scheme under § 704 of the MBTA for activities, like logging operations, which result in incidental killings, that is lacking in the response in this case. The United States does not provide information, for example, on the relative number of birds killed through intentional and incidental activities. Nor does the United States provide any other examples of where it has exercised its enforcement discretion under any of its environmental laws so as to categorically exclude a portion of the regulated community from permitting or prosecution. The U.S. has not provided this information, or any other facts, that explain why, as a policy matter, a regulation and permitting scheme focused solely on intentional killings is a reasonable exercise of discretion and bona fide allocation of resources to achieve the MBTA's goal of preventing the destruction of migratory birds.

The one assertion that the Party offers to support limiting the permit program to activities, such as hunting, whose purpose is to take migratory birds is that it is easier to monitor hunting than logging.[70] The Party presumably is thereby asserting that the ease of monitoring hunters enhances the likelihood that permits issued will be complied with, thereby enhancing the value of the permitting scheme. Presumably, the Party is suggesting that the difficulty in monitoring compliance by loggers with any permits that are issued undermines the utility of a permitting scheme focused on them. Again, however, the Party does not provide factual documentation or other support for this assertion. Nor does the Party refute the Submitters' contention that the FWS has the flexibility to impose and enforce nesting and breeding season logging restrictions.[71] It simply asserts that it is easier to monitor compliance by hunters than it would be to monitor compliance by loggers. This may well be the case, but in the Secretariat's view the Party needs to provide some support for its assertion that it is.

Thus, a factual record concerning the permitting issue would involve developing information concerning whether the Party's decision to exercise its discretion to focus its permitting efforts solely on intentional killing is reasonable in terms of achieving the purposes of the MBTA. Relevant information would include information on the numbers of birds saved through current permitting practices and information on the number of birds that could be saved through alternative permitting practices that included logging. It also would be useful to develop information on whether, and if so, why, it is easier to monitor compliance by hunters with permitting requirements than it is to monitor compliance by logging operations, and the challenges in each sphere.

[70] *See* Response at 11.
[71] Submission at 17-18. To the contrary, the response notes that the Forest Service restricts operating seasons in timber sale contracts. Response at 22.

2) Prosecutions

The Party justifies the decision to initiate prosecutions under the MBTA against certain kinds of activities that result in unintentional takes of migratory birds but not others under the rubric of both a reasonable exercise of enforcement discretion (which, according to the Party, shields its decisions from further scrutiny under Article 45(1)(a)) and a *bona fide* allocation of resources to higher priority matters (which also, according to the Party, shields its decisions involving logging operations from further scrutiny under Article 45(1)(b)). As noted above, activities that result in unintentional or incidental takes include logging operations, as well as a host of other activities. The response provides a long list of other such activities, including the construction of power lines or open oil pits that attract birds, the use of fishing vessel nets and gear, oil spills and other industrial accidents, and the operation of wind generators, communication towers, and cars and aircraft.[72] The response indicates that the Party has decided to concentrate its regulatory and enforcement efforts on "reducing unintentional takes of migratory birds caused by those activities where industry has created hazardous conditions which often attract migratory birds to their death… Comparatively, the FWS focuses less on preventing takes ensuing from otherwise legal activities that modify the local environment (logging, road construction)."[73]

The Party invokes both of the Article 45(1) defenses to justify drawing this distinction. First, the Party asserts that the U.S. Congress and courts accept and acknowledge that non-prosecution of some violations of the MBTA is integral to the statutory scheme, and therefore that the Party is entitled to exercise some degree of enforcement discretion under the Act.[74] The Secretariat agrees that the MBTA provides the United States the authority to exercise some degree of enforcement discretion. However, in view of the categorical exemption from permitting and prosecution that the Submitters assert, this threshold acknowledgment does not answer whether the exercise of discretion here was reasonable or the result of a *bona fide* allocation of resources. Moreover, where a Party's environmental law itself does not contain an enforcement exemption for a particular sector of the regulated community, the likelihood that discretionary administrative actions creating such an exemption are not reasonable or *bona fide* increases as the scope of the exemption increases. Indeed, at the extreme, such administrative exemptions could completely undermine the effectiveness of an environmental law.

[72] Response at 6.
[73] Response at 11.
[74] Response at 12-13.

The Party further asserts that it has limited resources, just as it did in explaining why it has not extended the regulatory and permit program to logging operations. According to the response, the FWS' Division of Law Enforcement "struggles with a shortage of personnel and a lack of necessary funding to adequately staff itself in order to meet increasing demands."[75] The Division has only about four enforcement officers per state or territory, so that each officer must cover a vast geographic area.[76]

Given this resource shortage, the Party asserts that it has justifiably decided to allocate its resources to the enforcement of activities other than logging that result in the incidental taking of migratory birds. According to the Party, the FWS guidance manual characterizes as a high investigative priority "unlawful commercial activities and activities involving pollution or energy production facilities which are destructive and detrimental to efforts to conserve wildlife."[77] The question before the Secretariat is whether the Party has provided a persuasive explanation that it has exercised its enforcement discretion reasonably for purposes of Article 45(1)(a) in making these high priority matters, and that its allocation of enforcement resources to matters in the high priority category, which does not include logging, constitutes a *bona fide* allocation for purposes of Article 45(1)(b). The Secretariat's view is that the Party has not done so with respect to either of the Article 45(1) exclusions from the definition of a failure to effectively enforce environmental law**.** A more detailed review of the information provided in the response may be helpful.

a) Absolute and Comparative Numbers of Violations

The Party provides several reasons why it believes it has exercised its discretion reasonably and made a *bona fide* allocation of enforcement and related resources. First, the Party asserts that more birds are killed through other types of activities that cause incidental deaths than are killed from logging operations. The

[75] Response at 16.
[76] Response at 16.
[77] Response at 13-14. The response does not provide a persuasive explanation for why it has limited the "High Priority" category in the fashion it has. The response indicates only that "the FWS views [the activities placed in the High Priority category] as areas where protective efforts will have the greatest success." *Id*. at 14. But the reasons why enforcement of activities in the High Priority category will provide greater success is not clear. Among the possible explanations are the availability of best management practices to avoid certain kinds of unintentional takes, the ease or difficulty of building a case against a violator, and the ability to "leverage" a prosecution against one violator into voluntary protective actions by others engaged in the same activity. Each of these explanations is addressed below. The response states simply that "[p]rosecution for electrocution of birds on powerlines … is critical not because of how many birds [are] killed, but because of the thousands of miles of powerlines that cross the United States." *Id*. at 14. The response does not indicate how many acres of forest land are logged each year and why prosecution of loggers is less "critical" in light of the number of birds at risk in connection with each type of activity.

response asserts that "[a]lthough logging activities are one of a long list of activities that may contribute to bird fatalities, they are not the most significant cause of bird mortality in the United States."[78] Thus, the Party suggests that the scope of the problem is greater elsewhere than it is in the context of logging operations.

It may well be the case that other types of activities cause far more incidental deaths to migratory birds than occur from logging operations. The information supplied in the response, however, does not establish that this is the case. To some extent, at least superficially the information supplied in the response is not a like comparison. The response indicates that, for example, pesticide ingestion is estimated to kill millions of birds each year. It also indicates that electrocutions and power line impacts kill thousands to tens of thousands of birds annually.[79] These are aggregate numbers that purport to describe the cumulative effect of these activities on migratory birds throughout the Party's territory. The response next asserts that these numbers contrast sharply with the numbers provided in the submission concerning birds killed by timber harvesting. But the numbers provided in the submission relate to a small number of *individual* timber sales described in studies of which the Submitters were aware.[80] The response does not provide an estimate of the aggregate number of migratory birds killed by timber harvesting throughout the territory of the Party. Again, it would be helpful to be able to put this information in context by developing aggregate numbers of deaths of protected birds and destruction of bird nests each year from logging operations. This information, along with information on avian mortality due to causes other than logging, also would be useful for examining whether the overall migratory bird mortality allowed under FWS's policy of pursuing enforcement to conserve migratory bird populations and habitats so as to prevent them from being considered as threatened or endangered, particularly as it is applied to migratory bird species that are currently far from being threatened or endangered, is consistent with the broad goals of the MBTA.

Thus, it would be useful to have a better understanding of the actual numbers of birds protected under the MBTA that are killed by logging operations each year—in terms of absolute numbers of deaths and with respect to numbers of deaths relative to other types of activities that result in incidental takes to which the Party indicates it has assigned a higher investigative and enforcement priority. The submission asserts that "the number of young migratory birds killed, nests destroyed, and eggs crushed annually as a direct result of logging operations is enormous."[81] The information supplied in the response does not refute this assertion. Extrapolating from the numbers supplied in both the submission and the response in connection

[78] Response at 5.
[79] Response at 6.
[80] Submission at 4.
[81] Submission at 4.

with just a handful of timber sales (666 nests likely to be destroyed by four timber sales in Arkansas and 9,000 young birds expected to be killed as a direct result of seven logging sales in Georgia),[82] it appears that logging operations likely cause the deaths of significant numbers of birds each year.

b) Management Practices

The second assertion the Party offers to show that it has exercised its discretion reasonably is that it can encourage parties engaged in non-logging activities that lead to incidental migratory bird deaths to engage in management practices that will minimize the risk of incidental takes, whereas such practices are not available for logging.[83] The essence of this assertion appears to be that it is reasonable to focus more on other activities that cause incidental deaths than on logging because more things can be done in these other areas to reduce or minimize such deaths. Again, on its face, this appears to amount to a reasonable basis for allocating resources to pursuing such other activities as a higher priority than logging.

The Party has not provided support, however, for the underlying factual premise that best management practices are more readily available for other kinds of activities that result in incidental bird takes than for logging.[84] The Party has not explained what such best management practices are for activities other than logging or how effective they are, or are likely to be, in reducing deaths of migratory birds. In addition, the Party's response refers to a United States Forest Service Manual that apparently details "special measures" that loggers are told or encouraged to use to minimize bird deaths and nest destruction for threatened, endangered or sensitive bird species.[85] The Party does not provide a copy of relevant portions of the Manual or explain what these "special measures" are.[86] It also does not reconcile its reference to the Forest Service Manual (which apparently includes "special measures" for logging operations) with its statement earlier in the response that best management practices do not exist for logging.[87] Thus, there appears to be

[82] Submission at 4. *See also* Response at 6.
[83] Response at 14-15. As an example, the Party cites the case of Moon Lake, where prosecution of one operator encouraged operators of other power lines voluntarily to install equipment to minimize the hazard that powerlines pose to migratory birds from perching on them. Response at 14.
[84] The Party states simply that "migratory bird mortality caused by logging activities is not susceptible to a simple technological fix. Logging activities modify habitat, as opposed to creating a hazardous attraction to migratory birds such as open oil pits." Response at 15.
[85] Response at 22.
[86] The Response contains only a parenthetical reference to one such "special measure"—"restricting the operating season." Response at 22.
[87] *See* Response at 14-15.

an internal inconsistency relating to this point in the response. This apparent inconsistency warrants clarification.

In short, it would be helpful to develop information regarding the types of best practices available to reduce incidental deaths of birds and destruction of migratory bird nests from various activities, as well as information concerning any reasons why it is easier for the Party to require or encourage the use of such best practices in contexts other than logging, or why the use of such practices in other contexts is likely to be more effective than it is likely to be in the logging context.

c) Leveraging Resources

Third, the response indicates that the FWS evaluates potential enforcement cases by analyzing whether it can "leverage its resources" by taking enforcement actions against one violator that serve to encourage voluntary efforts by similarly situated entities to protect migratory birds.[88] The response asserts that this discretionary technique works well in situations in which an industry can voluntarily make a relatively inexpensive alteration in operations or equipment. Once again, a greater ability to leverage resources in contexts other than logging would support giving priority to enforcement in these other areas. Because the Party has not provided sufficient information to permit the Secretariat to assess the relative availability of management practices and related "alterations" in logging and other contexts, it fails to provide a persuasive case that the Party is likely to be more effective in achieving this aim of leveraging its enforcement cases in other contexts than in connection with logging operations. It would be useful to develop information on why this is the case, including information from previous efforts to "leverage resources" in this way.

d) Litigation Risks/Difficulties

Fourth, the Party justifies its decision not to enforce against logging operations that kill birds or destroy nests in violation of the MBTA by asserting that it is more difficult to build successful enforcement cases against logging operations due to difficulties in the governing legal scheme and difficulties in developing the necessary facts because of the large geographic areas covered (such as the difficulty of finding nests and dead birds).[89] Assuming that cases against logging operations are more difficult to bring than cases against other activities that incidentally kill birds, it is not clear from the response why the Party's failure to bring or pursue a single prosecution against logging operations given the apparently significant numbers of bird deaths amounts to a reasonable exercise of enforcement discretion or a *bona fide* allocation of enforcement

[88] Response at 14.
[89] Response at 18.

and related resources. The response does not indicate, for example, whether there has ever been a case in which the evidence of a taking in violation of the MBTA attributable to logging has been readily available, and if so, why the FWS decided not to pursue enforcement of that violation. It would therefore be helpful to develop additional information about how difficult it is to accumulate the information necessary to pursue enforcement of § 703 of the MBTA against logging operations, as compared to enforcement against other kinds of activities that the Party has decided to pursue. It also would be helpful to develop information about what efforts the Party has made to substantiate an enforcement case against loggers and what the results of any such efforts have been.

e) The Endangered Species Act

Finally, the Party asserts in its response that it does focus on logging that kills birds when an endangered species is involved.[90] The Party seems to assert that endangered species are inherently more important and therefore deserve priority in terms of enforcement effort. The Party indicates that it uses the ESA as the basis for such prosecutions. One question concerning this assertion in the response is whether, as a matter of achieving the environmental protection goals of the MBTA and ESA statutes, it is always the case that prosecutions are of greater benefit when endangered species are involved than when they are not. It would be helpful to develop information concerning this exercise of discretion—e.g., it would be useful to know whether there are situations in which it may be more effective from an environmental protection standpoint to pursue loggers who are killing migratory birds not covered by the ESA (perhaps many in number) than to pursue loggers who are killing migratory birds that are covered by that Act (perhaps few in number). Again, the critical factual backdrop here is that the Party has apparently *never* initiated a single prosecution under the MBTA, regardless of context. It would be helpful to develop information concerning why it has exercised its discretion in this way in terms of its choice of prosecution targets among alleged ESA and MBTA offenders. Another question here is whether the Party is asserting that it focuses on ESA prosecutions because they are easier to bring than MBTA prosecutions.

3. Conclusion on Article 45(1) Issues

To sum up, this submission and response raise an issue of central importance to the citizen submission process—how should the Secretariat, in fulfilling its responsibilities under Article 15(1), address a Party's claim that it is not failing to effectively enforce based on the definition of that term in Article 45(1)(a) and/or (b). One option is for the Secretariat automatically to dismiss the submission on the theory that if a Party makes an assertion that it has engaged in a reasonable exercise of discretion for purposes of Article

[90] Response at 17.

45(1)(a) or made a *bona fide* allocation of resources for purposes of Article 45(1)(b), the Secretariat is bound to accept it. There is nothing in the Agreement to suggest that the Secretariat is bound to adopt a Party's view that it qualifies for one of the Article 45(1) exclusions from the definition of a failure to effectively enforce environmental laws. Article 31(1) of the Vienna Convention on the Law of Treaties provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[91] As indicated above, one of the Parties' fundamental purposes in establishing a citizen submission process under the NAAEC was "to enlist the participation of the North American public to help ensure that the Parties abide by their obligation to enforce their respective environmental laws."[92] If the Secretariat were obliged to accept at face value every assertion by a Party that it is not failing to effectively enforce its environmental laws because it qualifies for one of the Article 45(1) defenses, a Party could unilaterally force the termination of every single citizen submission simply by asserting such a defense. The effect would be the nullification of the opportunities nominally afforded by Articles 14 and 15 for citizen participation in the environmental enforcement process. Such a result would seriously undermine the utility of the submission process in promoting the Agreement's other goals, including fostering the protection and improvement of the environment in the territories of the Parties[93] and enhancing compliance with and enforcement of environmental laws.[94]

As a result, the Secretariat declines to read the Agreement as requiring dismissal of a submission simply on the basis of a Party's assertion that one of the Article 45(1) defenses applies. Instead, the Secretariat has determined that its role, and responsibility, is to evaluate each such Party claim on its individual merits. Thus, if a Party asserts that it is exercising its discretion reasonably, the Secretariat's responsibility is to review whether the Party has explained how it exercised its discretion. The Secretariat's responsibility is also to review whether the exercise of discretion was "reasonable." If a Party asserts that it has engaged

[91] 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969). The United States has signed but not ratified the Vienna Convention. The Convention is generally regarded as an authoritative statement of the principles of treaty interpretation.

[92] Raymond MacCallum, Comment, *Evaluating the Citizen Submission Procedure Under the North American Agreement on Environmental Cooperation*, 8 COLO. J. INT'L ENVTL. L. & POL'Y 395, 400 (1997). See also *Four-Year Review of the North American Agreement on Environmental Cooperation: Report of the Independent Review Committee* 5 (June 1998)(noting that the citizen submission process makes it possible for "some 350 million pairs of eyes to alert the Council of any 'race to the bottom' through lax enforcement.") *Cf.* Article 1(h) of the NAAEC (stating as one of the objectives of the Agreement the promotion of "public participation in the development of environmental laws, regulations and policies").

[93] Article 1(a).

[94] Article 1(g).

in a *bona fide* resource allocation to higher priority matters, the Secretariat's responsibility is to review how the party has allocated its resources in light of its stated priorities. The Secretariat's responsibility is also to review whether that allocation is indeed *bona fide*. In this case, the Secretariat finds that the Party has not provided enough information regarding the exercise of its enforcement discretion and the allocation of its resources to enable the Secretariat to find that either Article 45(1)(a) or (b) justifies terminating this proceeding. Instead, additional information of the sort identified above is needed concerning whether the Party is failing to effectively enforce the MBTA based on Article 45(1)(a) and (b).

V NOTIFICATION TO COUNCIL IN ACCORDANCE WITH ARTICLE 15(1) OF THE NAAEC

For the reasons stated above, the Secretariat considers that the submission, in light of the Party's response, warrants development of a factual record. The Submitters assert that logging operations have violated and are continuing to violate the MBTA on a nationwide basis and in particular identified situations. The Submitters further assert that the Party has not brought a single prosecution under the MBTA for such alleged violations. In its response the Party does not challenge the first assertion. The Party acknowledges that no prosecution under the MBTA has been brought against a logging operation. In the Secretariat's view the Party has not adequately supported its claim that its failure to bring a single prosecution against logging operations is the result of a reasonable exercise of its discretion or a bona fide allocation of its resources. The Secretariat is not expressing a view as to the ultimate resolution of these issues. Instead, it has determined that the purposes of the NAAEC would be well served by developing in a factual record additional information of the types referred to above concerning them. In accordance with Article 15(1) of the NAAEC, the Secretariat so informs the Council and in this document provides its reasons.

Respectfully submitted on this 15th day of December 2000.

(original signed)
Janine Ferretti
Executive Director