

Secretariat of the Commission for Environmental Cooperation
Determination pursuant to Article 14(1) and (2) of the North American
Agreement on Environmental Cooperation

Submitters: 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

Represented by: The Center for International Environmental Law (CIEL)

Concerned Party: United States

Date Received: 19 November 1999

Date of this
Determination: 23 December 1999

Submission No.: SEM-99-002

I-INTRODUCTION

Article 14 of the North American Agreement on Environmental Cooperation ("NAAEC" or "Agreement") provides that the Secretariat of the Commission for Environmental Cooperation (the "Secretariat") may consider a submission from any non-governmental organization or person asserting that a Party to the Agreement is failing to effectively enforce its environmental law, if the Secretariat finds that the submission meets the requirements of Article 14(1). On 17 November 1999 the Submitters filed with the Secretariat a submission on enforcement matters pursuant to Article 14 of the NAAEC. The Secretariat has determined that the submission meets the criteria in Article 14(1) and that it merits a response from the Party in light of the factors listed in Article 14(2). The Secretariat sets forth its reasons in Section III below.

II-SUMMARY OF THE SUBMISSION

The submission asserts that the United States Government is "failing to effectively enforce" section 703 of the Migratory Bird Treaty Act (MBTA or the Act), 16 U.S.C. § 703, which prohibits the killing or "taking" of migratory birds except under limited circumstances. This assertion rests on a three-step analysis. The submission first asserts that section 703 of the MBTA prohibits any person from killing or "taking" migratory birds, including the destruction of nests, the crushing of eggs, and the killing of nestlings and fledglings, "by any means or in any manner," unless the U.S. Fish & Wildlife Service (FWS) issues a valid permit.¹ Next, it asserts that loggers, logging companies, and logging contractors frequently engage in practices that violate the Act and that the government has conceded that such practices occur and violate the MBTA.² Finally, the submission claims that the United States is failing to effectively enforce this requirement of the Act against these parties.³

The submission characterizes the government's position as one of "deliberately refus[ing] . . . to enforce this clear statutory prohibition as it relates to loggers, logging companies, and logging contractors."⁴ It elaborates on this assertion as follows:

As a matter of internal policy, the United States has exempted logging operations from the MBTA's prohibitions without any legislation or regulation that authorizes such an exception. The United States has never prosecuted a logger or logging company for a violation of the MBTA, even though it acknowledges that the MBTA has consistently been, and continues to be, violated by persons logging on federal and non-federal land. In fact, the Director of the FWS has stated that the FWS, the agency responsible for enforcement of the MBTA, "has had a longstanding, 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."⁵

The submission asserts that, as a result, the United States "has completely abdicated its enforcement obligations."⁶

1 Submission at 1.

2 Submission at 1, Appendix C.

3 See e.g., Submission at 1.

4 Submission at 1.

5 Submission at 1. Memorandum from Director, FWS, to Service Law Enforcement Officers, "MBTA Enforcement Policy" (March 7, 1996).

6 Submission at 1.

III-ANALYSIS OF THE SUBMISSION

A. Article 14(1)

The submission meets the criteria in Article 14(1) for further consideration. First, the submission meets the requirements contained in the opening sentence of Article 14(1).⁷ This sentence authorizes the Secretariat to consider a submission "from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law. . . ." The submitters qualify as "non-governmental organizations."⁸ Further, the law involved, the Migratory Bird Treaty Act, qualifies as an "environmental law" for purposes of the NAAEC. Article 45(2) of the NAAEC defines "environmental law" to mean, *inter alia*, any statute "the primary purpose of which is the protection of the environment . . . through . . . the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party's territory. . . ." As the submission suggests, the MBTA, and section 703 of the MBTA in particular, involves "environmental law" because the "primary purpose of the MBTA is to protect and preserve wild fauna - wild birds."⁹

As is also required by the opening sentence of Article 14(1), the focus of the submission is on a Party's asserted failure to effectively enforce the law. For example, as noted above, the submitters assert that the Party has "completely abdicated its enforcement obligations" through its failure to enforce against logging operations that allegedly kill or take migratory birds and/or their nests.¹⁰ The submission does not purport to challenge the effectiveness of the law itself.¹¹

Finally, the submission focuses on asserted failures to enforce that are ongoing. It thereby meets the jurisdictional requirement in the first sentence of Article 14(1) that a submission assert that a Party "is failing" to effectively enforce its environmental law.

⁷ The Secretariat has noted in previous Article 14(1) determinations that the requirements contained in Article 14 are not intended to place an undue burden on submitters. We review the submission with this perspective in mind.

See e.g., Submission No. SEM-97-005 (26 May 1998); Submission No. SEM-98-003 (8 September 1999).

⁸ See NAAEC Article 45(1), Guideline 2.1, Submission at 9.

⁹ Submission at 9. See e.g., 16 U.S.C. section 703; *Andrus v. Allard*, 444 U.S. 51, 52-53 (1979) (noting that the MBTA is a "conservation statute[] designed to prevent the destruction of certain species of birds.") The U.S. Fish and Wildlife Service has described the MBTA as "a landmark in wildlife conservation legislation." See Origins of the U.S. Fish & Wildlife Service web page, www.fws.gov/who/origin (visited December 9, 1999). For these reasons the MBTA does not qualify as a statute "the primary purpose of which is managing the commercial harvest or exploitation. . . of natural resources." Article 45(2)(b).

¹⁰ See e.g., Submission at 1.

¹¹ Cf. SEM-98-003, Determination pursuant to Article 14(1) of the North American Agreement on Environmental Cooperation (14 December 1998). The Secretariat accepts the submission as styled at this stage of the process. The Party, of course, has the opportunity to discuss in its response whether in its view the submission involves a challenge to the content of the underlying law rather than a failure to enforce, among other issues.

Under Article 14(1), the Secretariat also must find that a submission:

- (a) is in writing in a language designated by that Party in a notification to the Secretariat;
- (b) clearly identifies the person or organization making the submission;
- (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
- (d) appears to be aimed at promoting enforcement rather than at harassing industry;
- (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and
- (f) is filed by a person or organization residing or established in the territory of a Party.¹²

The submission meets these six listed criteria. The submission is in English, a language designated by the Party involved.¹³ It clearly identifies the organizations making the submission.¹⁴ The submission provides sufficient information to allow the Secretariat to review the submission.¹⁵ Among other things, the submission provides as Appendices various government documents relating to the subject matter at issue. Fourth, the submission appears to be aimed at promoting enforcement.¹⁶ Fifth, the submission indicates that the matter has been communicated in writing to the relevant authorities of the Party and it indicates the Party's response, if any.¹⁷ Among other things, the submission attaches as Appendix C an April 26, 1999 letter from the Center for International Environmental Law (CIEL) to the Fish and Wildlife Service of the Department of the Interior in which CIEL raises the issues covered in the submission. The submission indicates that the Party has not responded to this letter.¹⁸ Finally, the submission is filed by an organization residing or established in the territory of a Party.¹⁹

B. Article 14(2)

The Secretariat, guided by the factors listed in Article 14(2), has determined that the submission merits a response from the Party. This provision provides in pertinent part as

¹² Article 14(1)(a)-(f).

¹³ Article 14(1)(a), Guideline 3.2.

¹⁴ Article 14(1)(b), Guideline 2.2, Submission, cover page and inside cover page.

¹⁵ Article 14(1)(c), Guideline 5.3, Submission at 10.

¹⁶ Article 14(1)(d), Guideline 5.4, Submission at 9, 10.

¹⁷ Article 14(1)(e), Guideline 5.5, Submission at 9, 10.

¹⁸ Submission at 9, 10.

¹⁹ Article 14(1)(f), Submission at 9.

follows:

In deciding whether to request a response, the Secretariat shall be guided by whether:

- (a) the submission alleges harm to the person or organization making the submission;
- (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;
- (c) private remedies available under the Party's law have been pursued; and
- (d) the submission is drawn exclusively from mass media reports.²⁰

The submission alleges harm to the submitters and summarizes the types of harm they allegedly have sustained.²¹ Among other things, the submitters indicate that they "have a common interest in protecting migratory bird populations shared by Canada, Mexico and the United States."²² The submission indicates that each submitter has an organizational goal of protecting migratory birds and it claims that each submitter is harmed in achieving its organization's goals by the alleged failure of the Party to enforce the MBTA and protect migratory birds with respect to logging operations.²³ The submission also asserts that migratory birds are of "great public importance."²⁴ Among other benefits, migratory birds are a source of food, and they provide "direct economic benefits to local economies through recreation, hunting, and birdwatching."²⁵ We note that the submitters claim that the harm they have allegedly sustained is due to the asserted failure to effectively enforce the environmental law involved and that the alleged harm relates to protection of the environment.²⁶

The submission also raises matters whose further study in the Article 14 process would

²⁰ Article 14(2). See also Guideline 7.3.

²¹ In its Recommendation to the Council for the development of a factual record with respect to SEM-96-001 (*Comité para la Protección de los Recursos Naturales, A.C., et al.*), the Secretariat discussed the issue of harm as follows: "In considering harm, the Secretariat notes the importance and character of the resource in question – a portion of the magnificent Paradise coral reef located in the Caribbean waters of Quintana Roo. While the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceedings in North America, the especially public nature of marine resources bring the submitters within the spirit and intent of Article 14 of the NAAEC."

²² Submission at 10.

²³ Submission at 10, 11.

²⁴ Submission at 11.

²⁵ Submission at 11.

²⁶ Guideline 7.4.

advance the goals of the Agreement.²⁷ The submission asserts that the failure to enforce is one that is longstanding in nature and that it is nationwide in scope. 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. The submission asserts that the alleged failure to enforce involved here has "significant consequences. . ."²⁸ It asserts that "logging directly kills or takes migratory birds by destroying nests, crushing eggs, and killing nestlings and fledglings" and that the failure to effectively enforce "permits the ongoing destruction within the United States of migratory bird populations shared by Canada, Mexico, and the United States" and "undermines . . . efforts to . . . maintain biodiversity. . ."²⁹ As the submission notes, the CEC itself has found that that "migratory birds are a particularly important component of North American biodiversity."³⁰

Third, the submission indicates that private remedies to require the Party to enforce its law are not available.³¹ Finally, the submission is not based exclusively on mass media reports. Instead, as noted above, the submission includes several government documents. In addition, the submitters have sought to obtain relevant information from the government through a Freedom of Information Act (FOIA) request.³²

27 Article 14(2)(b).

28 Submission at 2.

29 Submission at 2.

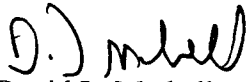
30 Submission at 2.

31 Submission at 12, 13. Article 14(3)(b)(ii) provides that the Party may address in its response the availability of private remedies to the submitter if the Party believes additional consideration of this issue is warranted.

32 Submission at 13, Appendices D, E.

CONCLUSION

For the foregoing reasons, the Secretariat has determined that the submission meets the requirements of Article 14(1) of the Agreement. The Secretariat has determined under Article 14(2) that the submission merits requesting a response from the Government of the United States. Accordingly, the Secretariat requests a response from the Government of the United States to the above-mentioned submission within the time frame provided in Article 14(3) of the Agreement. A copy of the submission and of the supporting information is annexed to this letter.



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c.o. Mr. William Nitze, US-EPA (with annexes)

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