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**Secretariat of the Commission for Environmental Cooperation  
of North America**

**Notification to Council pursuant to Council Resolution 03-05  
recommending preparation of a factual record**

**Submitters:** Canadian Nature Federation  
Canadian Parks and Wilderness Society  
Earthroots  
Federation of Ontario Naturalists  
Great Lakes United  
Sierra Club (United States)  
Sierra Club of Canada  
Wildlands League

**Represented by:** Sierra Legal Defence Fund (SLDF)

**Concerned Party:** Canada

**Date received:** 6 February 2002

**Date of this determination:** 17 December 2003

**Submission I.D.:** SEM-02-001 / Ontario Logging

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**I. INTRODUCTION**

On 6 February 2002, the Submitters listed above filed with the Secretariat of the Commission for Environmental Cooperation (CEC) a submission alleging “the failure of the Canadian Government to effectively enforce subsection 6(a) of the *Migratory Birds Regulations* against the logging industry in Ontario.”<sup>1</sup> On 25 February 2002, the Secretariat determined that the submission meets the requirements of Article 14(1) of the *North American Agreement on Environmental Cooperation* (NAAEC) and requested a response from the Party in accordance with Article 14(2). The Party submitted its response on 25 April 2002.<sup>2</sup> On 12 November 2002, the Secretariat notified the Council that the submission, in light of the Party’s response, warrants the development of a factual record.<sup>3</sup> On 22 April 2003, in Council Resolution 03-05, the Council voted unanimously:

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<sup>1</sup> Submission at 1.

<sup>2</sup> Government of Canada, “Response to submission SEM-02-001 submitted to the Secretariat of the Commission for Environmental Cooperation” (11 April 2002) [hereinafter “Canada’s response to the original submission”].

<sup>3</sup> SEM-02-001 (Ontario Logging), Article 15(1) Notification (12 November 2002) [hereinafter “Article 15(1) Notification”].

TO DEFER consideration of the Secretariat's notification of 12 November 2002, pending the following:

- a) the submitters being provided a period of 120 calendar days from the date of this resolution to submit the requisite sufficient information in support of the allegations set forth in SEM-02-001;
- b) the termination of the submission process for SEM-02-001 if the submitters elect not to provide further information within the 120 calendar day time frame;
- c) in the event such further information is provided, the Secretariat determining whether that information warrants a response from Canada or whether the submission process should be terminated;
- d) in the event such a response is requested and provided by Canada, the Secretariat, after considering both the new information provided by the submitters and the response of Canada to that information, notifying Council whether it recommends the preparation of a factual record.

On 20 August 2003, within the 120 calendar day time frame provided in Council Resolution 03-05, the Submitters provided the Secretariat with further information.<sup>4</sup> On 21 August 2003, pursuant to Council Resolution 03-05, the Secretariat determined that the further information provided by the Submitters merited requesting a response from Canada and requested a response.<sup>5</sup> On 16 October 2003, Canada submitted its response.<sup>6</sup> Pursuant to Council Resolution 03-05, and after consideration of both the new information provided by the Submitters and the response of Canada to that information, the Secretariat recommends the preparation of a factual record.

## **II. SUMMARY OF NEW INFORMATION PROVIDED BY THE SUBMITTERS**

On 20 August 2003, pursuant to Council Resolution 03-05, the Secretariat received from the Submitters a document entitled "Supplementary Submission to the Commission for Environmental Cooperation in Response to Council Resolution 03-05 dated April 22, 2003" (the "Supplementary Submission").

In the Supplementary Submission, the Submitters state that they interpret Council Resolution 03-05 "as an attempt to scope our request for a factual record in a manner that goes beyond the Council's mandate under the NAAEC."<sup>7</sup> They add "[n]onetheless, in an effort to avoid any further delay in the

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<sup>4</sup> Submitters, "Supplementary Submission to the Commission for Environmental Cooperation in Response to Council Resolution 03-05 dated April 22, 2003" (19 August 2003).

<sup>5</sup> SEM-02-001 (Ontario Logging), Notification Pursuant to Council Resolution 03-05 (21 August 2003).

<sup>6</sup> Government of Canada, "Response to supplemental information submitted to the Secretariat of the Commission for Environmental Cooperation" (16 October 2003) [hereinafter "Response to Supplemental Information"].

<sup>7</sup> Supplementary Submission at 3.

preparation of a factual record, we have obtained all additional ‘facts’ and the ‘sufficient information’ currently available to respond to the Council Resolution.’<sup>8</sup>

The Submitters explain that when they drafted their submission, they based their calculations on projected figures for clearcut harvest areas contained in *Forest Management Plans* (FMPs) rather than actual numbers, because those numbers were not available when the submission was filed, in February of 2002.<sup>9</sup> They note that in its Article 15(1) Notification, the Secretariat stated “[t]he only information missing is a more precise identification of the areas actually harvested in those forests in 2001” and that such information “[...] could readily be developed in a factual record.”<sup>10</sup>

Section II of the Supplementary Submission, entitled “The Supplementary Evidence,” describes the process engaged by the Submitters to gather additional information in response to Council Resolution 03-05, and the information obtained.

The Submitters contacted the Ontario Ministry of Natural Resources (“OMNR”) for information regarding areas actually harvested in 2001. They were told that the information they were seeking is reported annually to the OMNR by logging companies for each forest management unit (“FMU”), in a report table titled *Annual Report of Depletion Area*.<sup>11</sup> Reports are prepared on a fiscal year basis (1 April -31 March), and they are due by 15 November following fiscal year end.<sup>12</sup> Once submitted, they are reviewed by OMNR, which provides comments.<sup>13</sup> Finalization of the reports can take several months.<sup>14</sup> When the Submitters contacted the OMNR in May 2003, only 15 of the 59 FMUs referenced in the submission had completed reports for the fiscal year beginning 1 April 2001.<sup>15</sup>

OMNR provided the Submitters with a list of OMNR telephone numbers to allow them to gather information concerning harvest data for the 44 FMUs whose reports were not yet complete.<sup>16</sup> According to the Submitters, this proved fruitful in some cases and additional data was obtained.<sup>17</sup> In others, the information could not be released by the OMNR because the annual reports had not yet been finalized and approved by district managers.<sup>18</sup> As a last resort, the Submitters contacted FMP

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<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.* and note 6, referencing the Article 15(1) Notification at 10.

<sup>11</sup> *Ibid.* at 4 and note 7.

<sup>12</sup> *Ibid.* at 4.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.* at 5 and note 10.

<sup>16</sup> *Ibid.* at 5.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

authors directly.<sup>19</sup> They report that in many cases, FMP authors were forthcoming with information and actual harvest data was obtained for 49 of the 59 FMUs included in the original submission.<sup>20</sup> The Submitters explain that “[o]f the remaining 10 units, five had been amalgamated with other units, one logging license had been revoked, and clearcut harvest data was not yet available from any of the sources we contacted for four units.”<sup>21</sup> The Supplementary Submission provides detailed information regarding attempts made by the Submitters to obtain information regarding the remaining four units.<sup>22</sup>

The Supplementary Submission contains a table listing the 59 FMUs referenced in the original submission.<sup>23</sup> For each FMU, it provides information on the planned clearcut area (drawn from the FMPs used to prepare the original submission) and on the actual clearcut area (drawn from annual reports and telephone interviews referenced in the Supplemental Submission).<sup>24</sup> For each FMU, the table also lists the source of the information.<sup>25</sup> The Submitters remark that information they gathered regarding the number of hectares clearcut in fiscal year 2001-2002 indicates that numbers were lower than projected.<sup>26</sup> They explain that this is due in part to the absence of data regarding four FMUs.<sup>27</sup> They add that since FMPs contain projected harvest information for five-year periods, the original submission simply divided those figures by five to obtain a one-year estimate.<sup>28</sup> The Submitters explain that the rate of cutting varies over the course of a five-year period for various reasons, including weather conditions, contractor availability and First Nations issues, and they add that when asked about the variations, OMNR consistently replied that while rate of harvesting may vary from year to year, it typically balances out after five years.<sup>29</sup>

The Supplementary Submission then addresses whether clearcut logging occurred during the migratory bird nesting season.<sup>30</sup> The Submitters begin by remarking that OMNR does not collect harvest data on a monthly basis.<sup>31</sup> They explain that in order to determine whether and how much logging may have taken place during the migratory bird nesting season, they relied on lumber scaling data obtained from OMNR.<sup>32</sup> They assert that this data can be used as an indicator of the rate of

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<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.* at 6, note 13.

<sup>23</sup> *Ibid.* Table 1. “Comparison of Planned and Actual Clearcut Areas for 2001-02.”

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.* at 8.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.* at 9.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

logging on a monthly basis throughout the year.<sup>33</sup> The Submitters report that the 2001-2002 scaling data shows that more logging occurred during the winter months than the summer and spring months.<sup>34</sup> They add that the nesting period occurs predominantly between April and August and lasts one month, starting when nest construction begins and ending once the brood has fledged.<sup>35</sup> The Submitters totaled the percentage of the annual harvest scaled from April to August 2001 and determined that approximately 27% of annual harvest occurred during that period.<sup>36</sup> By then prorating for one month to coincide with the average length of nesting, they estimated that on average 5.3% of the annual harvest occurred during nesting.<sup>37</sup> Using the breeding bird density data gathered for the original submission, the Submitters calculated the number of nests destroyed by multiplying the discounted breeding bird density per hectare by the number of hectares clearcut in 2001-2002 multiplied by a factor of 0.0536 to account for the seasonal variation in the logging rate and a nesting period of one month.<sup>38</sup> Based on this calculation, the Submitters estimated at approximately 43,700 the total number of nests destroyed.<sup>39</sup>

In sections III and IV of the Supplemental Submission, entitled “The nature of the evidence that can reasonably be expected from a citizen group” and “The Problem with Scoping,” the Submitters assert that their submission sets out evidence about a wide-scale failure of the Government of Canada to effectively enforce s. 6(a) of the MBR and they state that they have asked that a factual record be prepared for each of the FMUs in which clearcutting takes place.<sup>40</sup> They maintain that statistical or modeling information is appropriate where it is the best information that is reasonably available to a citizen’s group.<sup>41</sup> They note that the object of the NAAEC citizen submission process is not to meet the standard of proof applicable in legal proceedings, but rather to provide sufficient information to allow the Secretariat to review the allegation of non-enforcement.<sup>42</sup> They contend that there is little merit in investigating specific instances when all of the evidence, particularly government records, points to both a widespread problem of nest destruction and a widespread failure to enforce the law.<sup>43</sup>

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<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.* at 10.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.* at 12.

<sup>41</sup> *Ibid.* at 12-13.

<sup>42</sup> *Ibid.* at 13.

<sup>43</sup> *Ibid.* at 15.

### III. SUMMARY OF CANADA’S RESPONSE TO NEW INFORMATION PROVIDED BY THE SUBMITTERS

Canada’s Response to Supplemental Information contains comments on the additional information provided by the Submitters as well as a description of the Canadian Wildlife Service (“CWS”) approach to bird nest conservation and some observations concerning enforcement activities within the 49 FMUs for which the Submitters presented additional information in the Supplemental Submission.<sup>44</sup>

Canada remarks that unlike the original submission, the Supplemental Submission asserts, rather than hypothesizes, that harvesting took place during the migratory bird nesting season, by relying on actual harvest data and the application of a method for determining how much logging took place during each month of the year.<sup>45</sup> Canada states that the Submitters have found that actual harvesting during the migratory bird nesting season was far less than hypothesized in the original submission.<sup>46</sup> It remarks that in the Supplementary Submission, the Submitters did not reveal any complaints in addition to the one identified by the CWS in Canada’s response to the original submission.<sup>47</sup>

Regarding the Submitters’ calculations, Canada notes that

[t]o arrive at an estimate of the number of nests potentially destroyed as a result of the logging that likely took place during the nesting season, the submitters continue to use the same simple method that was used in the original submission.<sup>48</sup>

According to Canada, in quantifying the density of sixteen selected breeding birds using data from the Canadian Breeding Bird (Mapping) Census Database, the Submitters did not take into consideration important variability displayed in the breeding density of those species and the possibility of stratifying the data.<sup>49</sup> Canada asserts that for this reason, the Submitters’ estimate of the number of nests potentially destroyed as a result of logging during the migratory bird nesting season remains very imprecise.<sup>50</sup> Canada asserts that “[t]he NAAEC Article 14/15 submission process should be grounded in specific instances of alleged failures to effectively enforce a Party’s environmental law.”<sup>51</sup> It remarks that although the Submitters’ estimate “is still based on extrapolations from a simple model, rather than on evidence of specific bird nests having been

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<sup>44</sup> Response to Supplemental Information at 3.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.* at 4.

destroyed by specific logging operations, the supplemental information does provide some specific information.”<sup>52</sup> Canada states that given the particular circumstances of this submission, the supplemental information now provides sufficient information to enable the Government of Canada to provide a meaningful response.<sup>53</sup>

Canada then describes the CWS approach to bird nest conservation, stating

CWS continues, in addition to inspections, investigations and prosecution, to utilize education, compliance promotion, regulation development and public reporting, as means to achieve bird conservation.<sup>54</sup>

Canada recalls that no permitting system has been created pursuant to s. 6(a) of the *Migratory Bird Regulations* (“MBR”) “[...] to recognize circumstances where industry has taken considerable measures that will benefit the conservation of migratory birds, for example through the preparation and implementation of conservation plans.”<sup>55</sup> Canada observes that “[t]his has created legal uncertainty for the Forestry industry because even after they have implemented conservation plans that would benefit migratory bird populations, they would still be at risk for prosecution should any small limited incidental take of nests occur during the course of their activities.”<sup>56</sup> Canada explains that as a result, CWS has been involved in a joint effort with industry and nongovernmental organizations to develop solutions to improve the regulatory framework as it applies to the conservation of birds affected by industrial activity.<sup>57</sup>

Canada’s response refers to workshops held in October 2001, February 2002, and March 2003, in which Environment Canada staff met with the Forest Products Association of Canada, some nongovernmental organizations, and other stakeholders.<sup>58</sup> According to Canada, the first workshop affirmed the significance of the forest environment for the conservation of a large number of migratory bird species and the difficult compliance issues faced by industry.<sup>59</sup> In the second workshop, CWS explained that its approach on regulations and enforcement has two main objectives: to ensure the sustainability of migratory birds, and to ensure that CWS officials, as agents of the Minister of Environment, fulfill their legal responsibilities.<sup>60</sup> CWS organized the meeting to obtain input from the Submitters on the overall approach for the conservation of migratory birds, and where relevant, on

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<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.* at 5.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

possible new directions for regulations.<sup>61</sup> At the third meeting, also attended by representatives of the natural resources departments of Ontario, British Columbia, New Brunswick and Alberta, the focus was on discussing conservation and compliance issues with the MBR.<sup>62</sup> Canada reports that the outcome of the workshop was a general agreement by participants on a draft framework to deal with migratory bird conservation within the forestry context.<sup>63</sup> A working group was tasked with further developing the framework, with recommendations to be made by the end of December 2003.<sup>64</sup> Canada anticipates that regulatory changes may be required to allow for an approval system to deal with the destruction of nests that may result from industrial operations.<sup>65</sup>

Canada explains that the CWS wants to focus its efforts on species of conservation priority and continue to work collaboratively with stakeholders to sustain viable populations of migratory birds within the forests of Canada.<sup>66</sup> Canada's response notes that "[n]o federally protected migratory bird species nesting in the boreal region of the province of Ontario is currently identified as threatened or endangered."<sup>67</sup> Canada adds that "[g]iven the nature of the submission, which references areas in boreal forest to a large extent, it follows that the Submitters have not established a case that any threatened or endangered species were involved."<sup>68</sup> Canada notes that a major project running until 2006 has been undertaken to compile additional information on migratory birds in the boreal forests of Ontario to assist Environment Canada in determining locations and trends of migratory birds in Ontario and provide a baseline for monitoring species populations and habitat change.<sup>69</sup>

Regarding enforcement activities in the 49 FMUs for which additional information was provided in the Supplemental Submission, Canada remarks that the CWS enforcement program received no complaints from the Submitters regarding the 49 FMPs referenced in the original submission during the period referenced in the submission.<sup>70</sup> In regard to the one complaint received by the CWS and referenced in Canada's response to the original submission, Canada notes that the complaint was received on 12 July 2001, that receipt was acknowledged on 1 August 2001, and that wildlife officers determined that it did not warrant further action since the logging operations had ceased some time before and OMNR indicated that no other logging was planned.<sup>71</sup>

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<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.* at 5-6.

<sup>65</sup> *Ibid.* at 6.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.* at 6-7.



#### IV. ANALYSIS

The Secretariat has considered the Supplemental Submission and Canada’s Response to Supplemental Information. For the reasons contained in the Secretariat’s Article 15(1) Notification and in light of the considerations set out below, preparation of a factual record is warranted in order to gather additional information concerning the matters raised in submission SEM-02-001/Ontario Logging that is necessary for a consideration of whether Canada is failing to effectively enforce s. 6(a) of the MBR in regard to clearcut logging activities carried out in 2001 in harvest areas referenced in the original submission. Section V of the Article 15(1) Notification, which contains a description of information the Secretariat recommends gathering during development of a factual record, is reproduced as Appendix 1 to this Notification. Additional information the Secretariat recommends gathering during development of a factual record is identified below.

The Supplemental Submission contains some information which the Secretariat proposed, in its Article 15(1) Notification, to gather in the context of a factual record investigation, namely information regarding “timing of [...] nesting seasons and the estimated number of nests destroyed as a result of clearcutting activities” and

[s]pecific information [...] regarding clearcut logging activities carried out in 2001 in the harvest areas referenced in the submission, including activities planned and actually carried out [...].

However, as Canada points out in its Response to Supplemental Information, this information could be refined further.<sup>72</sup> Developing a factual record would allow the Secretariat to gather additional information regarding migratory bird populations in the harvest areas identified by the Submitters, including as regards variability in the breeding bird density across species and the possibility of stratifying the data.

The Party’s Response to Supplemental Information contains information not included in the Party’s response to the original submission. Canada suggests that the forest industry may be taking considerable measures, including conservation plans, to protect migratory birds.<sup>73</sup> Canada also provides additional information about CWS workshops on migratory bird conservation.<sup>74</sup> Canada explains that CWS wants to focus its efforts on species of conservation priority.<sup>75</sup> It states that CWS uses inspections, investigations and prosecutions as a means to achieve bird conservation,<sup>76</sup> and it provides some additional information concerning a complaint referenced in Canada’s response to the

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<sup>72</sup> *Ibid.* at 3.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.* at 5-6.

<sup>75</sup> *Ibid.* at 6.

<sup>76</sup> *Ibid.* at 4.

original submission.<sup>77</sup> However, the Response to Supplemental Information does not contain certain types of information which the Secretariat identified in its Article 15(1) Notification as being necessary for a consideration of whether Canada is failing to effectively enforce s. 6(a) of the MBR in regard to clearcut logging in 2001 in harvest areas referenced in the original submission.

For example, missing is information regarding any measures adopted by industry in the harvest areas referenced by the Submitters to achieve or increase compliance with s. 6(a) of the MBR. In the Article 15(1) Notification (see Appendix 1, below), the Secretariat recommends gathering information on

[...] data relied upon by foresters or EC to anticipate species and numbers of migratory bird nests to be encountered during logging; any reconnaissance procedures implemented by foresters or EC to identify migratory bird nests prior to clearcutting; measures taken to protect migratory bird nests during clear-cutting; and effectiveness of those measures in preventing migratory bird nest disruption and/or destruction.

While the Response to Supplemental Information mentions that industry may be taking considerable measures that will benefit the conservation of migratory birds,<sup>78</sup> additional information is required for a consideration of the role of any such measures in promoting compliance with s. 6(a) of the MBR in the harvest areas referenced in the original submission, including information on the nature, extent and timing of measures adopted, information used to design and evaluate those measures, and overall success of those measures in achieving (or increasing) compliance with s. 6(a) of the MBR during logging identified by the Submitters in the original submission. In the context of developing a factual record, the Secretariat would gather information regarding any conservation plans or other measures that have been prepared and implemented in the harvest areas identified by the Submitters in the original submission,<sup>79</sup> as well as information regarding the “difficult compliance issues faced by industry”<sup>80</sup> and the joint effort by CWS, industry and nongovernmental organizations “to develop solutions to improve the regulatory framework as it applies to the conservation of birds affected by industrial activity” referenced in the Response to Supplemental Information.<sup>81</sup>

The Response to Supplemental Information does not contain information regarding any compliance promotion activities carried out by CWS in regard to the harvest areas referenced in the original submission, except as regards three workshops on migratory bird conservation held between October 2001 and March 2003. With regard to those workshops, the Response to Supplemental Information does not contain information such as meeting agendas, meeting minutes and related

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<sup>77</sup> *Ibid.* at 6-7.

<sup>78</sup> Response to Supplemental Information at 4.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.* at 5.

<sup>81</sup> *Ibid.* at 4.

correspondence, or a copy of the draft framework to deal with migratory bird conservation in the forestry context.<sup>82</sup> Such information would be gathered by the Secretariat in the context of preparing a factual record.

The Response to Supplemental Information indicates that CWS wants to focus its efforts on species of conservation priority.<sup>83</sup> The legal provision identified by the Submitters in the original submission, s. 6(a) of the MBR, states “[...] no person shall [...] disturb, destroy or take a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird;” s. 2(1) of the MBR provides a definition of “migratory bird.”<sup>84</sup> Neither provision makes reference to the notion of “species of conservation

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<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.* at 6.

<sup>84</sup> S. 2(1) of the MBR defines “migratory bird” as follows: “migratory birds” or “birds” means migratory game birds, migratory insectivorous birds and migratory non-game birds as defined in the Act, and includes any such birds raised in captivity that cannot readily be distinguished from wild migratory birds by their size, shape or colour, and any part or parts of such birds. S. 2(1) of the MBCA defines “migratory bird” as follows: “migratory bird” means a migratory bird referred to in the Convention, and includes the sperm, eggs, embryos, tissue cultures and parts of the bird. The 1994 Protocol between the Government of Canada and the Government of the United States of America Amending the 1916 Convention Between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States states at Article I: “In order to update the listing of migratory birds included in the terms of this Convention in a manner consistent with their current taxonomic (Family and Subfamily) status, Article I of the Convention is deleted and replaced by the following:

The High Contracting Powers declare that the migratory birds included in the terms of this Convention shall be as follows:

1. Migratory Game Birds:

Anatidae, or waterfowl (ducks, geese and swans); Gruidae, or cranes (greater and lesser sandhill and whooping cranes); Rallidae, or rails (coots, gallinules and rails); Charadriidae, Haematopodidae, Recurvirostridae, and Scolopacidae, or shorebirds (including plovers and lapwings, oystercatchers, stilts and avocets, and sandpipers and allies); and Columbidae (doves and wild pigeons).

2. Migratory Insectivorous Birds:

Aegithalidae (long-tailed tits and bushtits); Alaudidae (larks); Apodidae (swifts); Bombycillidae (waxwings); Caprimulgidae (goatsuckers); Certhiidae (creepers); Cinclidae (dippers); Cuculidae (cuckoos); Emberizidae (including the emberizid sparrows, wood-warblers, tanagers, cardinals and grosbeaks and allies, bobolinks, meadowlarks, and orioles, but not including blackbirds); Fringillidae (including the finches and grosbeaks); Hirundinidae (swallows); Laniidae (shrikes); Mimidae (catbirds, mockingbirds, thrashers, and allies); Motacillidae (wagtails and pipits); Muscicapidae (including the kinglets, gnatcatchers, robins, and thrushes); Paridae (titmice); Picidae (woodpeckers and allies); Sittidae (nuthatches); Trochilidae (hummingbirds); Troglodytidae (wrens); Tyrannidae (tyrant flycatchers); and Vireonidae (vireos).

3. Other Migratory Nongame Birds:

priority” as qualifying the general prohibition set out in s. 6(a) of the MBR. The Response to Supplemental Information does not contain information regarding the legal or policy basis for focusing on species of conservation priority in Canada’s enforcement of s. 6(a) of the MBR. Since the Article 15(1) Notification recommends gathering information on how EC establishes and balances priorities for wildlife enforcement and compliance promotion (see Appendix 1, below), in the context of preparing a factual record, the Secretariat would gather information regarding the basis for CWS’s intention to focus on species of conservation priority in the context of enforcing and seeking compliance with s. 6(a) of the MBR.

In the Response to Supplemental Information, Canada remarks that no migratory bird species in the boreal region of the province of Ontario is currently identified as threatened or endangered, and points out that since the Submitters refer to the boreal region of Ontario, “[...] they have not established that any threatened or endangered species were involved.”<sup>85</sup> As noted above, s. 6(a) of the MBR and the definition of migratory birds in the MBR do not refer to the notion of “species of conservation priority”. Similarly, these provisions do not refer to “threatened” or “endangered” species. Nonetheless, information regarding any special consideration given to threatened or endangered species in enforcing s. 6(a) of the MBR in the harvest areas referenced in the submission would be appropriate for inclusion in a factual record. For example, the Response to Supplemental Information suggests that information required to establish a baseline for measuring species population and habitat change – which may be relevant to determining whether any species are threatened or endangered - is being gathered as part of a project that began in 2000 and will end in 2006; information related to this project would be appropriate for inclusion in a factual record. Information regarding threatened or endangered species considerations would also be relevant in conjunction with the recommendation in the Article 15(1) Notification to gather information on data used by CWS to anticipate species and numbers of migratory bird nests in different areas in monitoring compliance with s. 6(a) of the MBR.

The Response to Supplemental Information does not contain information on enforcement activities, such as inspections, investigations and prosecution, undertaken by Environment Canada or CWS pursuant to s. 6(a) of the MBR in the harvest areas referenced in the original submission. The Response to Supplemental Information provides summary information regarding CWS follow-up on a complaint referred to by Canada in its response to the original submission. A factual record would provide an opportunity to gather information on enforcement activities undertaken by Environment

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Alcidae (auks, auklets, guillemots, murre, and puffins); Ardeidae (bitterns and herons); Hydrobatidae (storm petrels); Procellariidae (petrels and shearwaters); Sulidae (gannets); Podicipedidae (grebes); Laridae (gulls, jaegers, and terns); and Gaviidae (loons).”

<sup>85</sup> Response to Supplemental Information at 6.

Canada and CWS in the harvest areas identified in the original submission, as well as information concerning processing of complaints regarding non-compliance with s. 6(a) of the MBR.

In regard to complaints to the CWS, in its Article 15(1) Notification (see Appendix 1, below), the Secretariat recommended gathering information concerning actions taken by CWS and Environment Canada in response to suspected violations of the MBR, including responses to complaints. In the Response to Supplemental Information, Canada remarks that in their Supplemental Submission, “[...] the Submitters have not revealed additional complaints other than the one identified by CWS in its response.”<sup>86</sup> It also states “[t]he enforcement program of CWS received no complaints from the submitters related to the 49 Forest Management Plans identified in the SEM-02-001 during the period referenced in the submission.”<sup>87</sup> In the context of developing a factual record, the Secretariat would gather information regarding the role of complaints from the public in the enforcement of s. 6(a) of the MBR, including as regards resources expended by Environment Canada to respond to complaints in comparison to carrying out routine inspections, and effectiveness of public complaints as a vehicle for monitoring and enforcing compliance with s. 6(a) of the MBR in the harvest areas referenced in the original submission.

In regard to the complaint referenced in Canada’s response to the original submission and Response to Supplemental Information, Canada noted that

[t]he letter of complaint referred to the fact that the Contingency Forest Management Plan, which encompassed the brief period of July 12 to September 1, 2001, included a number of clear-cuts and claimed that these clear-cuts would destroy the nests of migratory birds during nesting season.<sup>88</sup>

The Response to Supplemental Information states that the complaint was received on July 12, 2001, the first day on which logging was authorized under the Contingency Forest Management Plan.<sup>89</sup> It explains that wildlife officers dealing with the complaint determined that it did not warrant further investigation after consultation with the OMNR, and it states that “[s]ince the reported logging operations had ceased some time before, it would be very difficult to collect potential evidence of nest destruction.”<sup>90</sup> In the Supplemental Submission, the Submitters maintain that there are good practical and public policy reasons why eyewitness evidence of violations should not be expected from the public, including lack of legal access to logging areas, the danger of falling trees, and the onus this puts on the public.<sup>91</sup> In developing a factual record, the Secretariat would gather information regarding the role of CWS consultation with the OMNR in the enforcement of s. 6(a) of

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<sup>86</sup> *Ibid.* at 3.

<sup>87</sup> *Ibid.* at 6.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.* at 7.

<sup>91</sup> Supplemental Submission at 13.

the MBR; the timing of CWS follow-up on complaints from the public and any effects on the ability of the CWS to gather evidence of violations of s. 6(a) of the MBR; and the type of information required for a complaint from the public to lead to enforcement action by the CWS in regard to suspected violations of s. 6(a) of the MBR. Accordingly, the Secretariat would gather information regarding whether and how the CWS has followed up on the Submitters' allegation that an estimated 43,700 nests were destroyed by clearcut logging during the period and in the areas referenced in the original submission.

In light of the above considerations, after review of the Response to Supplemental Information, central questions remain regarding whether Canada is failing to effectively enforce s. 6(a) of the MBR in regard to clearcut logging activities carried out in 2001 in areas of central and northern Ontario referenced in the original submission.

## **V. RECOMMENDATION**

Pursuant to Council Resolution 03-05, and after consideration of both the new information provided by the Submitters and the response of Canada to that information, the Secretariat recommends the preparation of a factual record to gather information identified by the Secretariat in Section V of the Article 15(1) Notification (reproduced at Appendix 1 to this determination) and Section IV of this determination, except the information identified in Section IV of this determination already provided to the Secretariat by the Submitters in the Supplemental Submission.

Respectfully submitted on this 17th day of December 2003.

*(original signed)*  
*per:* William Kennedy  
Executive Director

## **APPENDIX 1**

### **INFORMATION TO BE CONSIDERED IN A FACTUAL RECORD**

(Section V. of the Article 15(1) Notification)

“The submission, taken together with the response, leaves open central questions regarding whether Canada has effectively enforced s. 6(a) of the MBR in 2001 in connection with the logging industry in Ontario, and in particular the areas harvested under fifty-nine FMPs referenced in the submission. This section identifies information relevant to a consideration of these open questions.

In respect of the harvest areas referenced in the submission, information required for an assessment of the Submitters’ allegations would include information regarding species of migratory birds found in those areas, timing of their nesting seasons and the estimated number of nests destroyed as a result of clearcutting activities. Also required is information on provincial FMPs for those areas, including specific information on the role and outcome of any consultations with federal officials during the development of those FMPs, as regards compliance with s. 6(a) of the MBR; on whether the federal guidelines and/or any other federal conditions related to protection of nests of migratory birds are referenced in the FMPs and if so, whether the FMPs require compliance with such conditions; and on whether any provincial conditions under those FMPs require compliance with s. 6(a) of the MBR or equivalent provincial statutory provisions. The Secretariat would also need to review information regarding compliance promotion activities organized by EC officials in the harvest areas referenced in the submission, attendance by personnel from forestry companies operating in those areas, and effectiveness of such activities in helping achieve compliance with s. 6(a) of the MBR.

Specific information is also required regarding clearcut logging activities carried out in 2001 in the harvest areas referenced in the submission, including activities planned and actually carried out, with precise information on locations and timing; data relied upon by foresters or EC to anticipate species and numbers of migratory bird nests to be encountered during logging; any reconnaissance procedures implemented by foresters or EC to identify migratory bird nests prior to clearcutting; measures taken to protect migratory bird nests during clear-cutting; and effectiveness of those measures in preventing migratory bird nest disruption and/or destruction.

Information is also required regarding efforts by federal officials to monitor compliance with s. 6(a) of the MBR in connection with clearcutting activities carried out in 2001 in harvest areas referenced in the submission. Such information includes information regarding the scope, operation and budget of any monitoring program, data used to anticipate species and numbers of migratory bird nests in different areas, and information obtained through monitoring or inspection. The Secretariat would also need to consider actions taken in response to suspected violations of s. 6(a) of the MBR, including actions taken in response to any failure to implement conditions in an FMP relating to

protection of migratory bird nests; follow-up measures to test effectiveness of compliance promotion activities; actions taken to follow up on any monitoring results indicating potential violations of s. 6(a) of the MBR; and responses to complaints.

In addition to the information provided in Canada’s response, information relevant to a consideration of the effectiveness of federal enforcement and compliance promotion actions in connection with clearcutting activities in the forest harvest areas referenced in the submission also includes information on how EC establishes and balances priorities for wildlife enforcement and compliance promotion, and how financial and human resources are allocated in this area, including at the regional level in Ontario. Also relevant is information regarding current initiatives and programs related to enforcing and promoting compliance with s. 6(a) of the MBR in the forestry sector in Ontario, and specifically, how such initiatives address any compliance issues noted in the harvest areas referenced in the submission.”