
Secretariat of the Commission for Environmental Cooperation

**Determination in accordance with Article 14(1) and (2)
of the North American Agreement for Environmental Cooperation**

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: 25 February 2002

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

I - INTRODUCTION

On 6 February 2002, the Submitters listed above filed with the Secretariat of the Commission for Environmental Cooperation (the “Secretariat”) a submission on enforcement matters pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* (“NAAEC” or “Agreement”). Under Article 14 of the NAAEC, the Secretariat may consider a submission from any nongovernmental 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). When the Secretariat determines that those requirements are met, it then determines whether the submission merits requesting a response from the Party named in the submission (Article 14(2)).

The Secretariat has determined that the submission meets all of the requirements in Article 14(1) and merits requesting a response from the Party in light of the factors listed in Article 14(2). The Secretariat's reasons are set forth below in Section III.

II - SUMMARY OF THE SUBMISSION

The Submitters assert that Canada is failing to effectively enforce section 6(a) of the *Migratory Birds Regulations* (“MBR”)¹ adopted under the *Migratory Birds Convention Act, 1994* (“MBCA”)² in regard to the logging industry in Ontario. Section 6(a) of the MBR provides that “[...] no person shall (a) disturb, destroy or take a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird [...] except under authority of a permit therefor.” Violations of section 6(a) of the MBR may be prosecuted by way of summary conviction or as an indictable offence.³

The Submitters claim that their research, based on statistical data, estimates that in the year 2001, clear-cutting activity destroyed over 85,000 migratory bird nests in areas of central and northern Ontario.⁴

The Submitters allege that Environment Canada (“EC”), through its Canadian Wildlife Service (“CWS”), is primarily responsible for enforcing the MBCA.⁵

The Submitters assert that logging activity in Ontario is carried out under *Forest Management Plans* prepared under the supervision of the Ontario Ministry of Natural Resources (“MNR”) in accordance with provincial standards and without any input from federal authorities on matters related to enforcing the MBCA, which is a federal act.⁶ They assert that while EC can be contacted for input on *Forest Management Plans* and has produced a non-binding guideline⁷ directing that activities be avoided during critical periods of migratory birds’ lifecycles, “EC fails to take enforcement activities to ensure that this requirement [...] is adhered to.”⁸ The Submitters further assert that “despite the estimated widespread destruction of bird nests,”⁹ an access to

¹ C.R.C., c. 1035.

² S.C. 1994, c. 22.

³ Section 13 of the MBCA provides that for a summary conviction offence, a company faces a maximum fine of \$100,000, an individual a maximum \$50,000 fine. Individuals are also liable to jail terms up to 6 months, or a combination of jail and a fine. For indictable offences, the maximum fines are \$250,000 for a company and \$100,000 for an individual. Individuals are also liable to jail terms up to 5 years, or to both a fine and jail sentence. With subsequent offences the maximum fine to which an individual is liable is doubled.

⁴ Submission at 4 and Appendix 6 of the Submission: Dr. Elaine MacDonald & Kim Mandzy, “*Migratory Bird Nest Destruction in Ontario*” (Toronto: SLDF, 2001).

⁵ Submission at 3.

⁶ Submission at 5.

⁷ *Environmental Assessment Guideline for Forest Habitat of Migratory Birds*.

⁸ Submission at 5, note 32.

⁹ Submission at 1.

information request filed in 2001 revealed no investigations or charges in Ontario for violations of section 6(a) of the MBR.¹⁰

The Submitters claim that “EC itself acknowledges that migratory bird nests are destroyed during logging operations.”¹¹ They assert that the CWS considers nest destruction during logging to be “incidental” kill and that the CWS has decided not to use proactive enforcement measures against the logging industry because violations of section 6(a) of the MBR that occur during logging operations are not intentional.¹²

The Submitters assert that “[t]he term ‘incidental’ is not a recognized justification under the MBCA or MBR for destroying bird nests or eggs.”¹³ They assert that the MBCA is a public welfare law and that “[w]hen these laws are infringed it is often the result of unintentional, not wilful, conduct.”¹⁴

They allege that the CWS favours conservation initiatives over enforcement in regard to the logging industry even though “[...] there is no evidence that the existing vague strategy of the Wildlife Service is effective compared to a more proactive strategy”¹⁵ and “non-enforcement initiatives do not negate the need for enforcement.”¹⁶ The Submitters further assert that through a “self-imposed prohibition against using enforcement action” in cases of incidental kill, “Wildlife Service officials appear to be making a choice about priorities without any authority to do so.”¹⁷ Finally, they contend that even though logging has been an important industry in Canada and Ontario for many decades, when the MBCA was updated in 1994, the Canadian government

[...] did not exempt the logging industry from laws to protect migratory birds or their nests. The Wildlife Service cannot undermine Parliament’s intention by arbitrarily failing to enforce the MBCA.¹⁸

The Submitters assert that Canada does not follow its own *Compliance and Enforcement Policy for Wildlife Legislation*, which states that “[c]ompliance and enforcement activities must

¹⁰ Submission at 6 and Appendices 7 and 8 of the submission (access to information request respecting enforcement efforts under s. 6(a) of the MBR dated 13 July 2001 from Elaine MacDonald, SLDF to Michael Bogues, Chief Access to Information and Privacy Secretary, Environment Canada, and materials received in response to access to information request).

¹¹ Submission at 5.

¹² Submission at 8.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ Submission at 11.

¹⁷ Submission at 8.

¹⁸ Submission at 9.

be securely founded in law and must be fair, predictable, and consistent across Canada,” since “the actual practice of enforcing some of the law and only against some parties, but excluding the logging industry for subs. 6(a) violations, is hardly ‘fair’ or ‘consistent’.”¹⁹

The Submitters assert that “[a] systematic failure to enforce against an entire industry known to engage in practices that violate the MBCA cannot be a legitimate exercise of [prosecutorial] discretion”²⁰ pursuant to Article 45(1)(a) of the NAAEC “because the CWS has made a sweeping policy decision, not a case-by-case judgement associated with prosecutorial discretion.”²¹

The Submitters then cite two reasons why “[t]he failure to enforce subs. 6(a), MBR against logging companies, contractors and individual operators is not a *bona fide* decision to allocate resources to the enforcement of other environmental matters that have higher priority” pursuant to Article 45(1)(b) of the NAAEC. First,

despite their legal jurisdiction to do so, EC has failed to conduct an environmental assessment of a single *Forest Management Plan* or proposed logging operation for the threat to migratory birds. A reasonable exercise of enforcement discretion presupposes some assessment of the relative costs associated with each option.

Second, the Submitters list four reasons why “the cost of enforcing [subs.] 6(a), MBR need not have a significant impact on EC’s enforcement budget.”²² (i) because of competition, the logging industry would be responsive to enforcement action; (ii) EC could work with MNR to include MBCA requirements in the province’s *Forest Management Planning Manual*; (iii) surveyors must already search for certain nests and the added cost of searching for all nests would be roughly similar across companies; and (iv) logging operations could be scheduled to reduce their impact during the nesting season. The Submitters further claim that pursuant to Article 5(1) of the NAAEC, Canada is required to effectively enforce its environmental laws.²³

The Submitters assert that the alleged failure to enforce section 6(a) of the MBR against the logging industry, in addition to the harmful impact on the migratory bird population, has negative consequences for wildlife biodiversity, tourism, respect for the law, fair competition within the logging industry and healthy wood stocks.²⁴

¹⁹ Submission at 11.

²⁰ Submission at 10.

²¹ Submission at 9.

²² Submission at 10.

²³ Submission at 3.

²⁴ Submission at 1. At pp. 3-4, the Submitters cite a Canadian government study, *The Economic Significance of Nature-Related Activities*, as well as the *Strategy and Action Plan* of the *North American Bird Conservation Initiative*, in support of their allegations.

III - ANALYSIS

Article 14 of the NAAEC directs the Secretariat to consider a submission from any nongovernmental organization or person asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. When the Secretariat determines that a submission meets the Article 14(1) requirements, it then determines whether the submission merits requesting a response from the Party named in the submission based upon the factors contained in Article 14(2). As the Secretariat has noted in previous Article 14(1) determinations,²⁵ Article 14(1) is not intended to be an insurmountable procedural screening device. Rather, Article 14(1) should be given a large and liberal interpretation, consistent with the objectives of the NAAEC.

A. Article 14(1)

The opening sentence of Article 14(1) authorizes the Secretariat to consider a submission “from any nongovernmental organization or person asserting that a Party is failing to effectively enforce its environmental law [...]” The Submission meets these requirements.

The Submission is filed by nongovernmental organizations within the meaning of Article 45(1) of the NAAEC. The Submission alleges that a Party, Canada, is failing to effectively enforce section 6(a) of the MBR. Section 6(a) of the MBR comes within the definition of “environmental law” found in Article 45(2)(a) of the NAAEC, since it is a provision of a regulation of a Party, the primary purpose of which is the protection of the environment through the protection of wild flora or fauna. Section 6(a) of the MBR is not directly related to worker safety or health. The Submission alleges an ongoing failure to effectively enforce section 6(a) of the MBR against the logging industry in Ontario. Finally, the Submission alleges a failure to effectively enforce section 6(a) of the MBR and not a deficiency in the law itself.

Article 14(1) then lists six specific criteria relevant to the Secretariat's consideration of submissions. The Secretariat 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;

²⁵See e.g. SEM-97-005 (Biodiversity), Determination pursuant to Article 14(1) (26 May 1998) and SEM-98- 003 (Great Lakes), Determination pursuant to Article 14(1) & (2) (8 September 1999).

- (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.²⁶

The submission meets these criteria. The submission is in English, a language designated by the Parties.²⁷ It clearly identifies the organizations making the submission.²⁸

The submission provides sufficient information to allow the Secretariat to review the submission with respect to the assertions of a failure to effectively enforce the law cited.²⁹ First, information about the research method used and results obtained in estimating the number of alleged violations of section 6(a) of the MBR referenced in the submission is provided in an appendix to the submission.³⁰ Second, assertions concerning the Party's failure to effectively enforce section 6(a) of the MBR are based on government materials available on the Internet, caselaw, and information obtained pursuant to an access to information request, all of which is reproduced in appendices to the submission.³¹

The submission appears to be aimed at promoting enforcement rather than at harassing industry, as required by Article 14(1)(d) of the NAAEC. It is focused on the acts or omissions of a Party rather than on compliance by a particular company or business.³²

The submission meets the criterion contained in Article 14(1)(e) of the NAAEC, that it indicate that the matter has been communicated in writing to the relevant authorities of the Party and the Party's response, if any. The submission states that the issues raised in the submission have been communicated to the Party. The submission also provides copies of correspondence sent to the Party, and copies of the reply received. It states that a request for information on enforcement of

²⁶ Article 14(1)(a)-(f).

²⁷ Article 14(1)(a), Guideline 3.2.

²⁸ Article 14(1)(b) and submission at ii.

²⁹ Article 14(1)(c), Guideline 5.2, 5.3.

³⁰ Appendix 6 to the submission.

³¹ Appendices 1, 8, 10, 11 to the submission.

³² See Guideline 5.4(a).

and compliance with section 6(a) of the MBR with respect to logging operations went unanswered.³³

Finally, because the Submitters are established in the United States or Canada, the submission meets the requirement in Article 14(1)(f) that it be filed by a “person or organization residing or established in the territory of a Party.”³⁴

B. Article 14(2)

The Secretariat reviews a submission under Article 14(2) if it finds that the submission meets the criteria in Article 14(1). The purpose of such a review is to determine whether to request that the Party concerned prepare a response to the submission. During its review under Article 14(2), the Secretariat considers each of the four factors listed in that provision based on the facts involved in a particular submission. Article 14(2) lists these four factors as 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.”³⁵

The Secretariat, guided by the factors listed in Article 14(2), has determined that the submission merits requesting a response from the Party.

The Submitters allege harm to the persons they represent:

The Submitters represent many outdoor enthusiasts, birders and conservationists. Since birds are an integral part of the sounds, sights, and diversity of the natural landscape, a failure to protect them ultimately diminishes the splendour of the outdoors for enthusiasts and birders. The destruction of migratory bird nests and eggs harms conservationists by destroying the subject of their study and by damaging the delicate balance in the

³³ Submission at 12-13 and Appendix 9 to the submission.

³⁴ Submission at ii.

³⁵ Article 14(2) of the NAAEC.

ecosystem. Moreover, birds have their own intrinsic value regardless of human benefit. All of this harm is beyond monetary calculation.³⁶

Such assertions have been considered under Article 14(2)(a) for other submissions and they are relevant here as well.³⁷ We note that the Submitters claim that “[t]he failure to enforce subs. 6(a), MBR is the direct cause of the harm suffered by these groups.”³⁸

The submission also raises matters whose further study in the Article 14 process would advance the goals of the Agreement.³⁹ The Submitters allege that

[a] blanket absence of enforcement against the logging industry may result in lower costs for timber harvests but higher costs to our environment because of the harm to migratory birds. This failure to enforce environmental law may thereby distort the significant trade in wood products between the parties, contrary to Article 1(e) [of the NAAEC], by permitting some producers to externalise environmental costs.⁴⁰

Article 1(e) of the Agreement lists as an objective of the NAAEC to “avoid creating trade distortions or new trade barriers.” A failure by one Party to effectively enforce a regulatory provision mirroring an obligation also undertaken by another Party pursuant to a bilateral treaty could conceivably result in trade distortions in the regulated industry. Therefore, a submission such as the one under review, seeking to ensure effective enforcement of such provision, advances the goals of Article 1(e) of the Agreement.

The Submitters characterize the alleged failure by EC to effectively enforce section 6(a) of the MBR as a “widespread pattern of ineffectual enforcement.”⁴¹ The Secretariat has previously determined that “[a]ssertions of this sort - that there is a widespread pattern of ineffectual enforcement - are particularly strong candidates for Article 14 consideration.”⁴²

³⁶ Submission at 13.

³⁷ In SEM-96-001 (Cozumel), Recommendation to the Council for the Development of a Factual Record (7 June 1996), for example, the Secretariat noted: “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.”

³⁸ Submission at 13.

³⁹ Article 14(2)(b) of the NAAEC.

⁴⁰ Submission at 13.

⁴¹ Submission at 10.

⁴² SEM-99-002 (Migratory Birds), Determination pursuant to Article 14(1) and (2) of the NAAEC (23 December 1999).

The submission also furthers the Agreement’s objective of enhancing “compliance with and enforcement of environmental laws and regulations.”⁴³ Finally, the submission promotes the conservation of shared bird populations “for the well-being of present and future generations.”⁴⁴

The Submitters assert that “Canadian caselaw demonstrates the difficulty of pursuing private remedies for MBCA violations” because courts have refused to grant standing to private parties barring proof that the applicant faces the infringement of some personal or private right or will suffer personal damages.⁴⁵ They also assert that charges sworn by private individuals are not a viable alternative because logging operations are carried on in remote areas where access is often forbidden, making it difficult for citizens to witness violations of section 6(a) of the MBR; citizens usually do not have the expertise or financial resources to prosecute charges in court; in any private prosecution, the Crown could intervene to withdraw or stay the charge; and prosecutions are after-the-fact events that do not remedy the harm done.⁴⁶ It therefore appears from the submission that private remedies may in effect not be available.

Finally, the submission is not based exclusively on mass media reports. The submission is based primarily on SLDF research, government information available on the Internet, caselaw and information obtained pursuant to an access to information request.

In sum, having reviewed the submission in light of the factors contained in Article 14(2), the Secretariat has determined that the assertion that there is a failure to effectively enforce section 6(a) of the MBR merits requesting a response from the Party.

IV - CONCLUSION

For the foregoing reasons, the Secretariat has determined that submission SEM-02-001 (Ontario Logging) meets the requirements of Article 14(1) and merits requesting a response from the Party in light of the factors listed in Article 14(2). Accordingly, the Secretariat requests a response from the Government of Canada subject to the provisions of Article 14(3). A copy of the submission, along with supporting information provided with the submission, was previously forwarded to the Party under separate cover.

⁴³ Article 1(g) of the NAAEC.

⁴⁴ Article 1(a) of the NAAEC.

⁴⁵ Submission at 14.

⁴⁶ Submission at 15.

Respectfully submitted,

Secretariat of the Commission for Environmental Cooperation

(original signed)

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