

Ottawa ON K1A 0H3

October 16th, 2003

Mr. William Kennedy
Executive Director
Secretariat
Commission for Environmental Cooperation
393 St. Jacques Street West, Suite 200
Montréal QC H2Y 1N9

Dear Mr. Kennedy:

In accordance with Council resolution 03-05, you will find enclosed the Government of Canada's response to the supplemental information provided by the submitters with respect to SEM-02-001.

Yours sincerely,

Original signed

Norine Smith
Assistant Deputy Minister
Policy and Communications

Enclosure

c.c.: Ms. Judith Ayres
Mr. José Manuel Bulás

Response to supplemental information

Prepared by the Government of Canada

**Submitted to the Secretariat of the
Commission for Environmental Cooperation**

October 16th, 2003

Introduction

On August 20th, 2003, the Secretariat for the Commission for Environmental Cooperation (CEC) received supplemental information from the submitters within the time frame provided in Council Resolution 03-05. The CEC Secretariat considered the supplemental information and determined on August 21st, 2003 that a response is warranted from the Government of Canada.

The initial submission, filed pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* (NAAEC), was received and acknowledged by the CEC Secretariat on February 6th 2002 (identified as SEM-02-001 on the public registry). The submitters, a coalition of Canadian and American non-governmental organizations (NGOs) claim that "Canada is failing to effectively enforce section 6(a) of the Migratory Bird Regulations (MBR) adopted under the *Migratory Birds Convention Act*, 1994 (MBCA) against the logging industry in Ontario." On February 26th, the CEC Secretariat requested a response from the Government of Canada after assessing that the submission met the requirements of Article 14. The Government of Canada provided the CEC Secretariat with a response on April 11th, 2002.

After considering the submission, in the light of Canada's response, the CEC Secretariat recommended to Council that a factual record be prepared for SEM-02-01. On April 22nd, 2003 the Council voted unanimously:

"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-02-01;
- b) the termination of the submission process for SEM-02-01 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 and the response of Canada to that information, notifying Council whether it recommends the preparation of a factual record."

On August 21st, 2003 the CEC Secretariat requested a response from the Government of Canada after assessing the supplemental information provided by the submitters.

Prior to providing a response to the supplemental information, the Government of Canada would like a) to describe the contents of the supplemental information and explain why the additional information was necessary in order for the Government of Canada to prepare a meaningful response; b) to describe the Canadian Wildlife Service (CWS) approach to bird conservation; and c) to address the enforcement activities during the months of April through to August 2001 within the 49 forest management units (FMUs) identified in the supplemental information.

The Supplemental Information

The original submission contained no information demonstrating that any logging actually occurred during the migratory bird nesting season (or at all in 2001), nor any information identifying the destruction of any migratory bird nest or the source of the destruction, despite the accessibility of some of this information.

As recognized by the submitters, the original submission was based on two erroneous assumptions, namely that logging activities occur at an equal rate throughout the year and that the planned logging activities occur equally over the five year plan. The supplemental information, on the other hand, provides harvesting data during 2001 in most of the specified geographic areas listed in the original submission. The submitters also utilized a method for determining approximately how much logging took place during each month of the year. As a result, the supplemental information asserts that logging took place in 2001 (rather than hypothesizes that it did) in the geographic areas specified, and asserts that, based on scaling data, a certain amount of logging did take place in those areas during the migratory bird nesting season (the submitters noted that the amount of logging which likely took place during the migratory bird nesting season was far less than they had hypothesized in their original submission). Furthermore, the submitters have not revealed additional complaints other than the one identified by CWS in its response.

To 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. This implies that they quantified the density of sixteen selected breeding birds by using data from the Canadian Breeding Bird (Mapping) Census Database (CBBCD). Unfortunately, when examining the CBBCD, one can observe that the selected sixteen species display important variability in the breeding density¹. In providing an estimate of nests potentially destroyed, the submitters do not take into

¹ For example, the American Redstart is recorded as breeding in densities as low as 0.1 pairs per square kilometer to 253 pairs (average = 44, stdev = 50, median = 25, geometric mean = 20). Other birds display similar variability.

consideration this significant variability nor the possibility of stratifying the data. For this reason, the estimate remains very imprecise.

The NAAEC Article 14/15 submission process should be grounded in specific instances of alleged failures to effectively enforce a Party's environmental law. A submission based entirely on assumptions or hypothesis cannot be the basis for a meaningful response from a Party, let alone the development of a factual record. Although the number of bird nests estimated by the submitters to have been destroyed due to logging (now half of the estimate in the original submission) is still based on extrapolations from a simple model, rather than on evidence of specific bird nests having been destroyed by specific logging operations, the supplemental information does provide some specific information. Given the particular circumstances of this submission, the supplemental documentation now provides sufficient information to enable the Government of Canada to provide a meaningful response.

Canadian Wildlife Service (CWS) approach to bird nest conservation

Canada is the host to a large migratory bird breeding population. It is roughly estimated that anywhere from 1 billion to 3 billion birds, encompassing approximately 230 species, nest in the boreal forest of Canada². Nearly a third of them potentially nest in the province of Ontario. 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.

As explained in the original response, there is a prohibition on the taking of nests in the *Migratory Birds Convention Act* and *Migratory Birds Regulations* (MBR). It is prohibited to destroy migratory bird nests except under the authority of a permit (MBR s. 6 (a)). However, the MBR do not have a provision to give permits for the take of nests, which may result from activities such as logging operations.

Without a permitting system for these activities, CWS recognizes that there is currently no legal mechanism 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. This 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. As a result, CWS has been involved in a joint effort (with Industry and non-governmental organizations) to develop solutions to

² Blancher, P. 2003. Importance of Canada's Boreal Forest to Landbirds. Canadian Boreal Institute and Boreal Songbird Initiative.

improve the regulatory framework as it applies to the conservation of birds affected by industrial activity.

Prior to the filing of the submission, in 2001, CWS and the Forest Products Association of Canada had started working jointly to organize a workshop on migratory bird conservation and forestry which included a discussion of compliance issues. The workshop was held in October 2001. This workshop included CWS biological staff, Environment Canada enforcement staff, planners working in the forest industry, members of the sustainable forestry network, and Canadian Nature Federation (CNF, one of the NGO submitters to SEM-02-001). The workshop covered the current situation pertaining to the MBR, the enforcement approach of Environment Canada, and issues related to the conservation of forest birds. CWS stated its intention to continue to hold additional meetings with other groups that CNF had previously contacted. Outcomes of this workshop were an affirmation of the significance of the forest environment for the conservation of a large number of migratory bird species and of the difficult compliance issues faced by industry.

Following this workshop, CWS continued its attempt to widen the dialogue by involving a larger spectrum of non-governmental environmental organizations. As described in the initial response to SEM-02-001, a meeting was held on February 5th 2002, at the Sierra Legal Defence Fund office in Toronto. In particular, representatives of the following groups attended: Sierra Legal Defence, CNF, Federation of Ontario Naturalists and Wildlands League. Environment Canada was represented by migratory birds program staff, and enforcement staff. At that meeting, Environment Canada officials understood that the meeting, which they had wanted for some time, had been delayed until after submission SEM-02-001 was filed with the Secretariat. The intended purpose of the meeting was to allow CWS to explain the legal basis of the MBR, the overall approach for the conservation of migratory birds, including enforcement, and the foundations of the current policy on MBR enforcement. By organizing this meeting, CWS sought input from the submitters on the overall approach for the conservation of migratory birds, and where relevant, on possible new directions for regulations. CWS explained that their approach on regulations and enforcement had two main objectives, first to ensure the sustainability of migratory birds, and second to ensure that their officials, as agents of the Minister of Environment, fulfill their legal responsibilities.

In the fall of 2002, CWS continued the dialogue with the forestry industry and NGOs and started jointly preparing a second workshop to be held in March 2003. This meeting was attended by a similar mix of people from the forest industry, NGOs (including CNF, Ducks Unlimited, World Wildlife Fund) and CWS (including the science, program and enforcement sections). Provincial natural resources departments (Ontario, British Columbia, New-Brunswick and Alberta) also participated in this second workshop. The focus was to discuss conservation and compliance issues with the MBR. The outcome of the workshop was a general agreement by the participants on a draft framework that could deal with migratory

bird conservation within the forestry context. The participants also agreed to task a smaller working group to further develop the draft framework. The smaller working group meets monthly and is preparing recommendations for the end of December 2003. It is envisioned that to implement such a system, regulatory changes would be required to allow the department to consider an approval system to deal with the destruction of nests that may result from industrial operations.

The CWS wants to focus its efforts on species of conservation priority and continue to work collaboratively with stakeholders (NGOs, industry, etc.) to sustain viable populations of migratory birds within the forests of Canada. No federally protected migratory bird species nesting in the boreal region of the province of Ontario is currently identified as threatened or endangered. Given 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. Nevertheless, CWS, along with partners monitor the status of migratory bird populations to identify any species that could become of conservation concern. Migratory bird surveys undertaken by staff, contractors and volunteers, to collect data for the second Ontario Breeding Bird Atlas are underway throughout the province. This major project, running from 2000 until 2006, includes surveys of migratory birds in the boreal forest of Ontario and supplements other survey information such as the Breeding Bird Survey. The information collected will assist Environment Canada to determine the locations and trends of migratory birds in Ontario and provide a baseline against which species populations and habitat change can be monitored.

Enforcement activities in the 49 FMU

This response will review enforcement activities, within the 49 FMUs identified by the submitters with respect to actual logging activities that took place during the months of April to August 2001.

The 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. Only one complaint was received with regards to the issue of logging and the application of MBR s. 6(a) in the Ontario Region. The complaint pertained to the Bancroft Minden Forest Company's Contingency Forest Management Plan, which falls within the area identified by the 49 Forest Management Plans in submission SEM-02-001. The 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 nest of migratory birds during nesting season.

The complaint was received on July 12, 2001 and was followed up with a response to acknowledge the complaint on August 1, 2001. The wildlife officers dealing with the complaint determined that it did not warrant further investigation or inspection after consultation with the Ontario Ministry of Natural Resources (OMNR). Since the reported logging operations had ceased some time before, it would be very difficult to collect potential evidence of nest destruction. The OMNR further indicated that no other logging activities were planned and in the absence of any indication of further activities, the officer assessed, in light of the fact that the breeding season was over for many species, that there was no immediate threat to migratory birds in this area that would warrant further enforcement activities at this point.

Conclusion

We note that while this submission employs calculations and modeling to support its assertions, it is based on information regarding key elements of the assertions (e.g., whether or not and how much logging actually took place, where logging took place, whether or not logging actually took place during the nesting season of migratory birds). Calculations and modeling alone, using off-site survey information, as in the case of the original submission, would not have provided a sufficient basis for a meaningful response.

As stated in our original response, EC will continue to put emphasis on conservation priorities and it will also act on specific complaints related to MBR paragraph 6(a), while working collaboratively towards the development of an improved regulatory solution to deal with the taking of nests, which may result from activities such as logging operations.