

Response to Submission SEM-02-001

Prepared by the Government of Canada

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

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Introduction

On February 7, 2002, the Commission for Environmental Cooperation (CEC) acknowledged receipt of a submission (identified as SEM-02-001 on the public registry) pursuant to Article 14 of the North American Agreement on Environmental Cooperation (NAAEC). The submitters, a coalition of Canadian and US 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.

Prior to providing a response, the Canadian Government would like to address: a) how the matter identified in the submission was communicated to the relevant authorities; b) how private remedies could have been pursued; and c) the absence of any specific documented case in the submission. Recognizing and supporting the Secretariat’s duty to carry out its mandate under Article 14 of the NAAEC, the Canadian Government would first like to draw the Secretariat’s attention to information, of which it may not have been aware when it determined that submission SEM-02-001 warranted a response from the Government of Canada.

To Canada’s knowledge, the formal filing of submission SEM-02-001 was preceded by only one written complaint of nest destruction pursuant to logging in Ontario. This complaint was not made by any one of the submitters (see point four under section “The General Context of Enforcement Activities”). The complaint was duly investigated. Similarly, the submission was preceded by only two communications from the submitters to relevant authorities, as detailed in the submission: a letter dated January 16, 2001, and an e-mail dated April 10, 2001. Canadian Wildlife Service (CWS) officials replied to these communications and committed to pass along further information when it would become available. As a matter of fact, CWS staff had been trying to set up a meeting with several of the submitters, as well as other interested NGOs, long before the filing of submission SEM-02-001.

In May 2000, CWS approached one of the submitters, the Canadian Nature Federation (CNF), for a meeting. CNF indicated they would be prepared to participate in a meeting with CWS, along with a number of the submitters. The intended purpose of the meeting was to allow CWS to explain the legal basis of the MBCA regulations, the overall approach for the conservation of migratory birds, including enforcement, and the foundations of the current policy on enforcement of the regulations. By organizing this meeting, CWS was seeking input from the submitters on the overall approach for the conservation of migratory birds, and

where relevant, on possible new directions for regulations. CWS has been having similar meetings with various industry groups.

Although it proved difficult to schedule the intended meeting in the short term, CNF was also invited to participate in the planning and implementation of a workshop on forest bird conservation and forest management that took place in Toronto on October 12 and 13, 2001. This workshop included CWS biological staff, Environment Canada enforcement staff, planners working in the forest industry, members of the Sustainable Forestry network, and CNF. 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 plan additional meetings with other groups that CNF had previously contacted.

Submission SEM-02-001 was filed one day before a long-planned and frequently rescheduled meeting between CWS staff and several of the submitters, held on February 5, 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 Canadian Government is concerned that the decision to delay a meeting in order to file a submission is not reflective of the letter and spirit of the NAAEC. The Canadian Government feels that the submitters did not provide all relevant information to the Secretariat on how the matter had been communicated by them to the relevant Canadian authorities. In addition, pursuant to Article 14(3)(a)(ii), the Government of Canada would like to advise the Secretariat that the Secretariat was not adequately informed by the submitters of remedies, such as complaints to CWS, which were available to the submitters, but which were not pursued. Nevertheless, the Government of Canada, through CWS, intends to continue its dialogue with the submitters and other interested organizations on the conservation of forest birds, and the role that regulations and enforcement can play.

The Canadian Government would also like to point out to the Secretariat that the assertions made by the submitters are not based on any actual case where a failure to effectively enforce the MBR may or may not be occurring. Instead, the assertions provided by the submitters are based on an estimation derived from the application of a descriptive model. The lack of actual cases found in submission SEM-02-001 precludes the Canadian Government from addressing in a direct and factual manner the assertions made by the submitters. It is our firm belief that in order to examine whether there has been a failure to effectively enforce an environmental

law, one has to look at the facts of a particular instance, or instances. Without those facts, there can be no examination of whether the law has been enforced or not.

Despite these reservations, the Government of Canada is providing a response to submission SEM-02-001. This response will present background information on migratory bird conservation in Canada. It will then comment on the general assertions found in the submission and explain the context in which relevant enforcement activities are exercised.

Background

The Migratory Bird Program in Canada

Environment Canada and its agency, the Canadian Wildlife Service (CWS), is responsible for the conservation and protection of migratory birds in Canada. The Migratory Birds Convention Act (MBCA) is the legislation that implements the Migratory Birds Convention, an international Treaty which provides the federal Government with jurisdiction over migratory birds in Canada to ensure their long-term conservation.

Migratory birds are affected by a large number of everyday urban, industrial and natural resource sector activities. In response, CWS programs address migratory bird conservation issues on several fronts, including law enforcement, habitat stewardship, scientific research and other conservation actions. Delivering conservation programs requires that CWS work cooperatively with other federal departments and agencies, provincial and territorial governments, as well as industry, NGOs, and the research community, to make choices that promote a healthy landscape in an increasingly complex environment.

The Migratory Bird Convention Act, 1994 and Migratory Bird Regulations

Section 4 of the MBCA states the purpose of the Act: “The purpose of this Act is to implement the Convention by protecting migratory birds and nests”. Section 5 enunciates the Act’s prohibition: “Except as authorized by the regulations, no person shall, without lawful excuse,

- (a) be in possession of a migratory bird or nest; or
- (b) buy, sell, exchange or give a migratory bird or nest or make it the subject of a commercial transaction”.

Section 12, subsection (1) describes regulating powers: “The Governor In Council may make any regulations that the Governor In Council considers necessary to carry out the purposes and provisions of this Act and the Convention, including regulations:

- (a) providing for the periods during which, and the areas in which,
 - (ii) nests may be damaged, destroyed, removed or disturbed...”

In the MBR, subsection 6(a) states that: “no person shall 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.”

Assertions Made by the Submitters

The potential impact of logging on migratory birds' nests

The main assertion made by the submitters is based on their estimation of the potential number of nests being affected annually by logging in Ontario. According to their calculations, a potential 85,000 nests may have been affected in 2001. This estimation is derived from a model that makes the following general assumptions:

- the undertaking of planned forestry activities are spread out equally throughout the year in each of 59 Forest Management Plans (FMPs) located in the boreal forest in Ontario;
- and the calculation of an average forest breeding bird density for broad areas based on scarce data.

In their model, submitters refer to the Forest Management Plans (FMPs), which are operational units developed on provincial Crown land. The province of Ontario has the authority to grant Forest Resource Licenses under the Crown Forest Sustainability Act (CFSA). These licenses require forest products companies to protect the environment and pay the full cost of reforestation on the lands they cut.¹ All FMPs follow provincial guidelines and CWS is aware that the provincial guidelines include biodiversity components. Input by federal agencies to the development of FMPs is invited as part of public consultations. Approval of a provincial FMP does not absolve companies of their responsibilities towards the federal MBCA.

In conclusion, in the absence of specific cases being identified, the response cannot provide detailed information pertaining to specific cases of asserted failures to effectively enforce the MBCA.

Assertion of a sweeping policy not to enforce against the logging industry

The submitters also assert that CWS has a sweeping policy not to enforce the MBR against the logging industry. The submitters arrive at this conclusion based on their interpretation of several documents obtained by an Access to Information request. None of those documents contain a statement to such effect, nor is there any such policy in existence. The following section intends to provide facts on this matter describing in more detail Environment Canada's enforcement approach regarding logging activities.

First however, the Canadian Government would like to clarify one particular element that is used by the submitters to support their assertion that CWS has a sweeping

¹ (Site is maintained by the Ministry of Natural Resources of the Government of Ontario [May,2001].)

policy not to enforce against the logging industry. The submitters state that “despite their legal jurisdiction to do so, Environment Canada has failed to conduct an environmental assessment of a single FMP or proposed logging operation for the threat to migratory birds”. This statement is based on the erroneous understanding that the federal environmental assessment process can routinely be triggered by a proposed FMP. In the absence of a federal authority exercising one of the powers or performing one of the duties or functions in respect of a project, as described in section 5 of the Canadian Environmental Assessment Act, a federal environmental assessment of a project is not required by that act. These duties or functions are as follows: proposing a project; granting money or any other form of financial assistance to the project; granting an interest in land to enable a project to be carried out (that is, selling, leasing, or otherwise transferring control of land); or exercising a regulatory duty in relation to a project, such as issuing a permit or license, that is included in the Law List prescribed in the regulations to the Act.

The General Context of Enforcement Activities

Environment Canada's Wildlife Enforcement Branch has not made a sweeping policy decision not to enforce subsection 6(a) of the MBR with regard to logging operations, as asserted in submission SEM-02-001. The following four points will explain the context in which the actions of the Canadian Government are exercised pursuant to discretionary powers recognized under Article 45(1)(a) and (b) of the NAAEC, and the extended notion of "enforcement" stipulated in Article 5(1) of the NAAEC. Enforcement is understood to include a broad range of activities from inspections, investigation and prosecution to education, compliance promotion, regulation development and public reporting, among others².

1. Priorities

Priorities for wildlife enforcement, which are set on an annual basis, respond to public complaints, international commitments, and wildlife conservation goals. Environment Canada must carefully balance the three aspects of public concern, conservation science, and international commitments when prioritizing enforcement activities. As documented in point three in this section, Environment Canada recognizes logging during nesting season as an important issue and is addressing it. However, it should be noted that only one complaint about the enforcement of the MBR in the context of logging operations in Ontario has been submitted to Environment Canada. This complaint is referred to in point four below.

Given that resources and staff are limited, and that enforcement of the MBR must take place over a very large geographical range, some components of the migratory bird conservation program, including the range of enforcement options, will necessarily receive more attention than others. Through the annual process of setting priorities for enforcement of wildlife laws, and by responding to public complaints over the course of the year, enforcement activities aim both to proactively address key conservation goals, as defined by the CWS, and to respond to public concerns and emerging conservation issues. Given that public consultation is an important means by which the Government of Canada establishes priorities, Environment Canada would like to meet with the submitters so that they may communicate their concerns and try to work cooperatively toward solutions.

In North America, cooperative work on wildlife enforcement priorities for the three countries Party to the NAAEC is undertaken through the North American Wildlife Enforcement Group (NAWEG). As the Canadian Government stated in the NAWEG report to the CEC, Canada traditionally targets enforcement activities at individuals and groups involved with hunting. In recent years, consumption of wildlife

² *Special Report on Enforcement Activities*. Report prepared by the North American Working Group on Enforcement and Compliance Cooperation. Commission for Environmental Cooperation. June 2001. Page 2.

resources has become more complex, requiring enforcement activities to deal with illegal import and export of wildlife and derivatives. The report indicates that current federal wildlife law enforcement priorities at the national level include commercial smuggling and migratory bird protection, primarily off- and near-shore spills that result in oiled birds. The Regional Offices of Environment Canada establish a subset of these priorities so that the Department can obtain the most effective coverage possible with the resources available³.

2. Compliance Promotion

In the forestry context, an enforcement approach that will be helpful to migratory bird conservation over the long term first requires compliance promotion and education among industry, particularly decision-makers. Once these compliance promotion activities have occurred, this will facilitate arguments in court that a given logging company will have been aware of the impacts of actions likely to harm the nests of migratory birds. At the current stage of developing the compliance promotion program around subsection 6(a) of the MBR, Environment Canada is concerned that obtaining limited results in a court of law for non-compliance would only devalue the offense, and be counterproductive to conservation of migratory birds. Nevertheless, Environment Canada is committed to acting on any instances of non-compliance that it becomes aware of, and to pursuing the most effective remedy possible, including prosecutions where appropriate.

3. Measures by Environment Canada to address the taking of nests during logging

CWS is addressing the issue of nest destruction during logging activities. Environment Canada's overall wildlife enforcement approach generally entails that activities like conducting investigations and laying charges for non-compliance take place after compliance promotion. CWS has initiated such compliance promotion activities. For example, CWS staff met with industry representatives in January 2001. At that meeting, attendees were told that the taking of migratory bird nests is prohibited except under the authority of a permit and that compliance with subsection 6(a) of the MBR is mandatory. The authority to issue permits under the MBR is limited and does not include a permit for the taking of nests and eggs in the course of logging. A list of the specific permits that may be issued is found in Schedule II of the MBR.

Subsequently, in October 2001, CWS held a workshop on the topics of compliance with the MBCA and associated regulations, and conservation of migratory birds in the forestry context. Attending participants were industry groups, CNF, government representatives and specialists. Thus, Environment Canada is specifically engaged

³Ibid. Page 27.

in addressing the issue of subsection 6(a) of the MBR with respect to logging in Canada and Ontario.

In addition, CWS is planning and in the process of implementing significant new initiatives and programs to address the growing needs of compliance promotion and enforcement of wildlife laws among industry in general. Environment Canada will investigate possible violations of subsection 6(a) of the MBR, and lay charges as may be appropriate.

4. Environment Canada acts on public complaints

A single complaint has been received with regard to the issue of logging and the application of subsection 6(a) of the MBR in the Ontario Region. The complaint pertains to the Bancroft Minden Forest Company's Contingency Forest Management Plan, and falls within the area identified by the 59 Forest Management Plans in submission SEM-02-001. The complaint was duly recorded and followed up. This illustrates an avenue that an interested member of the public can pursue in order to bring attention to certain wildlife conservation concerns. Environment Canada has not received such a complaint from the submitters.

Conclusion

The response of the Canadian Government to submission SEM-02-001 has provided the necessary background information on migratory bird conservation in Canada in order to facilitate a better understanding of the general issues raised by the submitters. We are confident that Canada's response and the information on the context in which enforcement activities relevant to the MBCA are exercised will enable the Secretariat to exercise its mandate pursuant to Article 15(1) of the NAAEC. However, because the submitters did not provide any actual case, the Canadian Government was not able to respond in a meaningful and factual way to their main assertion. For this reason, as well as the submitter's failure to otherwise make a complaint to CWS that a logging operation in Ontario was in violation of subsection 6(a) of the MBR, the Government of Canada believes that a factual record is not warranted.