

***SUPPLEMENTARY SUBMISSION TO THE COMMISSION FOR
ENVIRONMENTAL COOPERATION***

IN RESPONSE TO COUNCIL RESOLUTION 03-05
DATED APRIL 22, 2003

*(NORTH AMERICAN AGREEMENT
ON ENVIRONMENTAL COOPERATION)*

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I. Summary

This document details our response to the CEC Council Resolution of April 22, 2003.

On February 6, 2002 we filed a submission with the Commission for Environmental Cooperation (CEC) under Article 14 of the North American Agreement on Environmental Cooperation (NAAEC) asserting a failure by Canada to enforce subsection 6(a) of the *Migratory Birds Regulations* made under the *Migratory Birds Convention Act* (MBCA). The Secretariat reviewed this submission and determined that it merited a response from Canada, which was provided on April 11, 2002. After reviewing the Canadian response, the Secretariat on November 12, 2002 recommended to the Council that the development of a factual record proceed. On April 22, 2003, the Council, comprised of the environment ministers or delegates of Canada, the United States, and Mexico, resolved¹ that we must provide additional information within 120 calendar days to support the allegations set out in our original submission.

The Council resolution read, in part, as follows:

NOTING that the submission, as it is based in large part on an estimation derived from the application of a descriptive model, and does not provide facts related to cases of asserted failures to enforce environmental law, does not contain the sufficient information required to proceed with the development of a factual record at this time ...²

We interpret the CEC Council decision as an attempt to scope our request for a factual record in a manner that goes beyond the Council's mandate under the NAAEC. Nonetheless, in an effort to avoid any further delay in the preparation of a factual record, we have obtained all additional "facts" and the "sufficient information" currently available to respond to the Council Resolution. This new information is from the Ontario Ministry of Natural Resources (MNR) --- in many cases obtained by contacting local MNR offices³ --- and from companies carrying out logging activities in Ontario.

In our original calculations our numbers were based on projected figures for clearcut harvest areas (along with certain assumptions about the timing of those cuts) from *Forest Management Plans* (FMPs) that were approved by the MNR, instead of actual numbers, simply because such numbers were not yet available to us.

Not surprisingly the projected numbers vary from actual numbers --- as a factual record would have determined --- for a variety of reasons including decisions made locally by

¹ See Council Resolution 03-05, dated April 22, 2003.

² *Ibid.*, at p. 1.

³ MNR staff were generally very helpful in replying to our inquiries for information on clearcutting data, but the difficulty of obtaining up to date information itself raises important questions about the monitoring capability of the Canadian Wildlife Service, and hence its ability to enforce within the wide meaning of that term in Article 5, NAAEC.

logging companies based on weather conditions and contractor availability. Therefore, with the information now available we are able to update our original estimate of the number of bird nests destroyed in 2001 from **85,000 to approximately 44,000 nests**, excluding the four units for which data has not yet been provided.⁴ In our original submission we had recognized that "our calculation of the destruction of bird nests may under or overestimate the actual problem."⁵ The CEC Secretariat had also noted, in making its recommendation, that "the only information missing is a more precise identification of the areas actually harvested in those forests in 2001" but that such information "could readily be developed in a factual record".⁶

II. The Supplementary Evidence

Our original submission estimated the number of nests destroyed using planned harvest areas by clearcut method as found in the FMPs. Our original submission assumed an equal rate of logging throughout the year (the total clearcut area for any one month is 1/12th of the planned annual clearcut area). In response to the Council Resolution further information is provided below.

a. Did the 2001-2002 clearcut harvest occur as planned and projected in our estimate?

To answer this question actual clearcut harvest area data for the 2001-2002 fiscal year was obtained from the MNR for most of the FMUs included in the complaint. Harvest area data is reported annually to the MNR for each FMU in a report table titled *Annual Report of Depletion Area*.⁷ The fiscal year extends from April 1 to March 31 and operations within this period are reported according to a set format described in the *Forest Management Planning Manual for Ontario's Crown Forests* published by the MNR. **The MNR does not collect monthly data on harvested areas.**

Annual monitoring and reporting on forest operations is the responsibility of the FMP author⁸ although the MNR is responsible for specific components.⁹ The report, which includes the harvest area data, is due by November 15 following the fiscal year end. After the report is submitted the MNR may request revisions from the FMP plan author. This process can take several months before the report is finalized. **Based on this timeline it is worth noting that the actual harvest data would not have been available at the time of the initial submission in February of 2002.**

⁴ Footnote 13 details our efforts to secure this data.

⁵ Submission, at p. 14.

⁶ Secretariat's Determination, at p. 10.

⁷ Personal communication with Robert Mears, MNR Forest Information Coordinator, April 2003.

⁸ The FMP author is generally a representative of the forestry license holder.

⁹ At p. C-5, MNR. September 1996. *Forest Management Planning Manual for Ontario's Crown Forests*, Toronto: Queen's Printer for Ontario.

As of May 2003, only 16 of the 54 annual reports (one for each FMU) were complete. Of those 16 FMUs,¹⁰ 15 had been included in the complaint. The MNR provided a list of phone numbers¹¹ so that we could obtain data on the remaining FMUs included in the complaint. In some cases, contacting the listed MNR officials proved fruitful and additional data was obtained. In other cases the information could not be released because the annual reports had not been finalized and approved by the District Managers. As a last resort the FMP authors were contacted directly (if one existed and the unit was not managed by MNR). More specifically, the FMP authors, as listed on Ontario's *Environmental Bill of Rights* Registry, were contacted to request the data. In many cases they were forthcoming with information and actual harvest area data was obtained for 49 of the 59 FMUs included in the initial complaint. Of the remaining 10 units, five had been amalgamated with other units, one logging license had been revoked, and clearcut harvest area data was not yet available from any of the sources we contacted for four units.¹²

The details of the planned versus actual clearcut harvest area for the 2001-2002 fiscal year and the source of the actual clearcut area information are listed in Table 1.

Table 1. Comparison of Planned and Actual Clearcut Areas for 2001-2002

	Forest Management Unit	Planned Clearcut Area (ha)	Actual Clearcut Area (ha)	Source
1	Algoma Forest	985	300	James Miller, Clergue Forest Management Inc.
2	Armstrong Forest	3563	2844.9	W. D. Baker, District Manager Thunder Bay District via email May 12/03.
3	Auden Forest	2095.2		Amalgamated into the Lake Nipigon Forest - Robert Mears, MNR via email July 22/03.
4	Bancroft and Minden Forest	145	593	Robert Mears, MNR Forest Information Coordinator via email May 1/03.
5	Big Pic Forest	6748.4	4300	Derek Tirshermann, MNR estimated via personal communication May 6/03.
6	Black River Forest	2053	2820	Robert Mears, MNR Forest Information Coordinator via email May 1/03
7	Black Sturgeon Forest	5401.62	2764	Dave West, Bowater Fibre Supply and Planning Manager personal communication July 22/03.
8	Brightsand Forest	2687.6	3564	Bob McColm, MNR District Manager via email June 9/03.

¹⁰ Email from Robert Mears dated May 1/03.

¹¹ *Ibid*

¹² Amalgamated with other units were Auden, Elk Lake, Kapuskasing, Upper Spanish Forest and Watabeag Forests. The license was revoked for Kiashke River and data could not be obtained for Cochrane, Shiningtree, Wawa, and Temagami Forests.

	FMU	Planned Clearcut Area	Actual Clearcut Area	Source
9	Caribou Forest	5440	3496	Arne Saari, MNR, Lac Seul Area Forester via e-mail May 12/03
10	Cochrane	1294		Not available ¹³
11	Dog River-Matawin Forest	9555.1	7478	W. D. Baker, MNR District Manager Thunder Bay District via email May 12/03.
12	Driftwood Forest	1144	447	Jordan Burkitt, MNR Cochrane District via e-mail July 2/03
13	Dryden Forest	1523.24	1521	Robert Mears MNR Forest Information Coordinator via email May 1/03
14	Elk Lake	2992.5		Amalgamated into the Temiskaming Forest - Robert Mears MNR via email July 22/03.
15	English River Forest	5078.4	4692	Bob McColm, MNR District Manager via email June 9/03
16	Flanders Fort Frances Forest	5645	4806	Robert Mears, MNR Forest Information Coordinator via email May 1/03
17	French-Severn Forest	1900	72	Robert Mears, MNR Forest Information Coordinator via email May 1/03
18	Gordon Cosens Forest	11097	10933	Bob Robinson, Area Forester Hearst via email May 9/03
19	Hearst Forest	10585.54	9259	Robert Mears, MNR Forest Information Coordinator via email May 1/03
20	Highrock Forest	5364	6726	Robert Mears, MNR Forest Information Coordinator via email May 1/03
21	Iroquois Falls Forest	9168	5495	John Kennedy, MNR Cochrane District via voice mail May 8/03

¹³ Details (provided by staff scientist Dr. Elaine MacDonald) about our efforts to obtain information for FMUs for which data was not ultimately received:

Temagami - Left voice mail at number given on May 5. Guylsaine Thauvette of MNR called back on May 6 and told us that they were still finalizing the data. Called back and left voice mail with MNR district office on July 21. I received a message from Don Perintoge, North Bay Area Forester, on July 22, 03 saying annual report is still not complete. Left a voice mail on Aug 18 with Don Perintoge to check if it is available now. [Note: This FMU is managed by the Crown, therefore there was no licensee to contact.]

Shiningtree Forest - Left voice mail on May 6/03 with Gail Ballack Area Forester. Sent Gail Ballack an email on June 2/01 when I did not hear back from her. Called again and left a voice mail on July 22/03 with Gail Ballack Area Forester. Area Forester called back on July 24 and left a voice mail saying information would be available in early August but then called back later that week and said that in fact it would not be available until late in August. I left a voice mail message with the plan author Tom McLean on July 23 but did not hear back from him. Left a voice mail Monday August 18/03 with Gail Ballack

Cochrane - Left Voice mail message at contact number May 5/03 regarding harvest areas for three units including Cochrane. I received an email from Stephane Foley Area Forester for Cochrane Forest saying annual reports are not ready yet and that the reports are backlogged, he promised to forward the info when it is finalized. I followed up with an email to Stephane Foley on July 21 asking if info is now available. He replied with an email on July 21/03 stating that the annual report on the Cochrane FMU will not be ready for some time. [Note: This FMU is managed by the Crown, therefore there was no licensee to contact.]

Wawa - Called and left message at contact number provided May 6/03. Called and spoke with Jay Nichols at MNR on June 2 told me there is no forester on those areas and promised to get a technician to call me. I called the technician on July 23 when I didn't get a call from him, he said he didn't have the info but would send me contact information. Received email on July 25/03 giving me contact info for Wendy LeClair (newly returned from another job at MNR) as the Area Forester on the Wawa forest. Called and left a message with her but did not hear back from her with data. Called again on August 18/03 but she is out of the office until August 20/03. Called licensee contact at Clergue Forest Mangement Inc. and left a voice mail message on July 23/03. I heard back from him later that week via voicemail but he did not provide the information. Left another message late on August 18/03.

	FMU	Planned Clearcut Area	Actual Clearcut Area	Source
22	Kapuskasing	1747		Amalgamated into the Gorden Cosens Forest: Robert Mears, MNR via email July 22/03.
23	Kenogami Forest	12921.2	13161.70	Hector Vincent, plan author Kimberly Clark via voice mail July 23/03.
24	Kenora	2659.04	690.4	Shawn Stevenson, Area Supervisor Kenora East MNR via email May 7/03.
25	Kiashke River	194		License revoked Robert Mears via email July 22/03.
26	Lac Seul Forest	7697.2	3617	Arne Saari, MNR Lac Seul Area Forester via email May 12/03
27	Lake Nipigon Forest	6815.6	6013.1	Ian Hagman, MNR District Manager Nipigon via personal communication July 23/03.
28	Lakehead Forest	1798.92	1012	W. D. Baker MNR District Manager Thunder Bay District via email May 12/03.
29	Mazinaw-Lanark Forest	353.88	5.3	Arne Mikkelsen, MNR via fax May 23/03.
30	Magpie Forest	2822	2764	Robert Mears MNR Forest Information Coordinator via email May 1/03.
31	Moose River	3914	1426.85	John Kennedy MNR Cochrane district via voice mail May 8/03.
32	Nagagami Forest	3174	3484	Robert MacLeod of Abitibi-Consolidated via email July 23/03.
33	Nakina North Forest	1466	1909.6	Ian Hagman, MNR District Manager Nipigon via voice mail August 8/03.
34	Nipissing Forest	2786.6	1,252	Norm Cottam R.P.F. Planning Forester Nipissing Forest Resource Management Inc. sent via email August 12/03.
35	Northshore Forest	1999.2	3449	Robert Mears, MNR Forest Information Coordinator via email May 1/03
36	Ogoki Forest	3137	2568.9	Ian Hagman, MNR District Manager Nipigon via voice mail August 8/03
37	Ottawa Valley Forest	926	1372	Robert Mears, MNR Forest Information Coordinator via email May 1/03.
38	Pic River Ojibway Forest	1435	1674	Robert Pinder via email June 8/03.
39	Pineland-Martel Forest	4622.8	4564	Susan Klause, MNR Area Forester personal communication May 6/03
40	Red Lake Forest	2015	2264	Robert Mears, MNR Forest Information Coordinator via email May 1/03.
41	Romeo Malette Forest	2945.4	4133	Robert Mears, MNR Forest Information Coordinator via email May 1/03
42	Sapawe Forest	2022.7	2143	Robert Mears, MNR Forest Information Coordinator via email May 1/03.
43	Shiningtree Forest	2781.4		Not available for several weeks Gail Ballack, MNR Area Forester August 1/03.
44	Smooth Rock Falls	3470.58	2059.9	Jordan Burkitt, MNR Cochrane District

	Forest			via email July 24/03.
45	Spanish	11732	6388	Craig Boddy, Domtar personal communication, August 12/03. Confirmed by Paul Leale, MNR Espanola August 18/03.
	FMU	Planned Clearcut Area	Actual Clearcut Area	Source
46	Spruce River Forest	5300.26	4900.5	W. D. Baker, District Manager Thunder Bay District via email May 12/03.
47	Sudbury Forest	3099	1,497	Norm Cottam, R.P.F. Planning Forester Nipissing Forest Resource Management Inc. via email August 12/03.
48	Superior Forest	7779	4327.7	Paul Bernier, Area Forester MNR via e-mail May 8/03.
49	Temagami	2528		Not available
50	Temiskaming	6195.48	5920.8	Mike Clark, MNR Kirkland Lake estimated June 3/03.
51	Timmins	375.4	233	Robert Mears, MNR Forest Information Coordinator via email May 1/03
52	Timmins Forest	1504	1395	Terry Possum, via personal communication June 3/03.
53	Trout Lake Forest	7227.8	5570	Robert Mears, MNR Forest Information Coordinator via email May 1/03
54	Upper Spanish Forest	6905.5		Amalgamated into the Spanish Forest Robert Mears via email July 22/03.
55	Wabigoon Forest	6374	5356	Bob McColm, MNR District Manager via email June 9/03
56	Watabeag	1138		Amalgamated into the Temiskaming Forest, Robert Mears via email July 22/03.
57	Wawa Forest	2215		Not available
58	Whiskey Jack Forest	6423	2855.99	Shawn Stevenson, Area Supervisor Kenora East MNR via e-mail May 7/03.
59	White River Forest	5265	3646.1	Chris Grant, Domtar July 23/03 via personal communication.
	TOTAL	242,231.6	173,764.7	

Table 1 shows that during the 2001-2002 fiscal year a total of 173,764.7 hectares of forest were clearcut in 49 FMUs in Ontario, based on the available data. **The number of hectares clearcut was less than had been planned for two reasons: the exclusion of four units for which actual clearcut data was not available and because the 2001-2002 actual clearcut area was less than the planned clearcut area for many units.**

The amount of forested area to be clearcut is planned over a five year period and to determine the amount cut in one year we had simply taken the five year cut allowance and divided it by five. In practice the rate of cutting varies from one year to the next for

many reasons including weather conditions, contractor availability, and First Nations issues.¹⁴

b. Did the clearcut logging occur during the migratory bird-nesting season?

As mentioned above MNR does not collect harvest area data on a monthly basis. However, MNR does collect information on lumber *scaling* on a monthly basis for the purpose of collecting stumpage fees.¹⁵ After the trees are cut they may be stored on site for a brief period and then they are *scaled*¹⁶ before they are processed. The delay (or *lag time*) between cutting and *scaling* of the trees is ideally no more than a few weeks and data is quickly available since this aspect of the operation is now computerized.¹⁷ The monthly *scaling* data is reported in volume as cubic meters and can be used as an indicator of the rate of logging on a monthly basis throughout the year. The monthly *scaling* data for 2001-2002 was obtained from MNR.¹⁸ This data showed that the rate of logging is not uniform throughout the year.

If the logging had been conducted at a uniform rate throughout the year, as we had assumed in the initial submission, each month's total harvest would represent about 8.3% of the annual total (i.e. 1/12 of the annual total). However, as the 2001-2002 scaling data shows (Table 2) more logging occurred during the winter months than the spring and summer months. The nesting period occurs predominately between April and August and lasts one month for one brood.¹⁹ The nesting period starts when nest construction begins and is complete once the brood have fledged.

To account for the seasonal variation in harvesting, the percentage of the annual harvest scaled during each month from April to August 2001 was totalled. We determined that approximately 27% of the annual harvest occurs during this five month period. By then prorating for one month to coincide with the average length of nesting from nest construction to fledging, we estimate that on average 5.3% of the annual harvest occurs during nesting (see Table 2 for the calculations).

¹⁴ When asked about actual variations from the planned cuts, MNR staff provided a consistent explanation, namely, over a five-year cycle the actual cut varies from the planned but typically balances out after five years. The reasons given for those variations are set out in the text above.

¹⁵ Personal communication Robert Mears, MNR Forest Information Coordinator, April 2003.

¹⁶ *Scaling* is defined as "the estimated sound volume of a log or group of logs in terms of a given log rule or formula; used to estimate the sound volume of a log or group of logs". Source: *A Silvicultural Guide for the Great Lakes – St. Lawrence Conifer Forest in Ontario*, OMNR. 1998. Queen's Printer for Ontario.

¹⁷ Ibid, note 14.

¹⁸ Robert Mears via email May 1/03.

¹⁹ See Tab 6, Appendix B of original submission. The nesting period for 16 species is calculated and the average is estimated to be 31 days while nesting occurs predominantly between April and August. Some bird species may nest into September and October especially if multiple broods occur. For ease of calculation and to ensure a conservative estimate we assume only one brood per year.

Table 2: Volume of Wood Scaled

Month	Total volume of wood scaled (cu. meters)	Percentage of annual total harvest	Percentage of annual harvest during nesting period
April 2001	487,205	2.29	2.29
May 2001	920,491	4.33	4.33
June 2001	1,135,866	5.35	5.35
July 2001	1,539,635	7.25	7.25
August 2001	1,607,935	7.57	7.57
September 2001	1,485,540	6.99	N/A
October 2001	1,642,850	7.73	N/A
November 2001	1,780,624	8.38	N/A
December 2001	1,728,749	8.14	N/A
January 2002	3,042,793	14.32	N/A
February 2002	3,047,992	14.35	N/A
March 2002	2,825,671	13.30	N/A
Total	21,245,351	100.00	26.79
Monthly Average	N/A	N/A	5.36

c. Estimate of the number of nests destroyed based on new information

In order to estimate the number of nests destroyed due to clearcut harvesting in 2001 in the 49 FMUs listed above it is necessary to determine the density of breeding birds. The breeding bird density was estimated based on data obtained from the *Canadian Breeding Bird Mapping Census Database*. The breeding bird density was discounted by 18% to account for birds included in the database but not protected by the MBCA and birds that do not nest in forest habitat or in the FMUs included in the submission.²⁰ The following calculations use the same breeding bird densities as were used in the initial submission (therefore no further explanation is given of our method).

The calculation of nests destroyed is done by multiplying the discounted breeding bird density per hectare²¹ by the number of hectares clearcut in 2001-2002 multiplied by a factor of 0.0536 (from Table 2) to account for the seasonal variation in the logging rate and a nesting period of one month. The results of this calculation are presented in Table 3 and the total number of nests destroyed is estimated at 43,692.

²⁰ For further explanation of the breeding bird density data and the discounting please refer to the initial submission at Tab 6.

²¹ Tab 6, Appendix A of the original submission lists the breeding bird densities according to the FMU based on the ecoregion(s) for each FMU. The densities are reported per 100 hectares in the database and in Table 3, therefore for the calculation of nest destruction we divided the density by 100.

Table 3: Estimate of Number of Nests Destroyed

Forest Management Unit	Discounted density of breeding males per 100 hectares	Actual clearcut area 2001-2002	Estimated number of nests destroyed
Algoma Forest	351	300	56
Armstrong Forest	519	2845	791
Bancroft and Minden Forest	514	593	163
Big Pic Forest	689	4300	1588
Black River Forest	689	2820	1041
Black Sturgeon Forest	519	2764	769
Brightsand Forest	519	3564	992
Caribou Forest	133	3496	249
Dog River-Matawin Forest	255	7478	1022
Driftwood Forest	689	447	165
Dryden Forest	278	1521	227
English River Forest	278	4692	699
Flanders Fort Frances Forest	750	4806	1933
French-Severn Forest	514	72	20
Gordon Cosens Forest	689	10933	4036
Hearst Forest	689	9259	3418
Highrock Forest	278	6726	1002
Iroquois Falls Forest	689	5495	2029
Kenogami Forest	519	13162	3662
Kenora	278	690	103
Lac Seul Forest	133	3617	258
Lake Nipigon Forest	519	6013	1673
Lakehead Forest	255	1012	138
Mazinaw-Lanark Forest	514	5	1
Magpie Forest	689	2764	1020
Moose River	689	1427	527
Nagagami Forest	689	3484	1286
Nakina North Forest	519	1910	531
Nipissing Forest	514	1252	345
Northshore Forest	351	3449	649
Ogoki Forest	519	2569	715
Ottawa Valley Forest	514	1372	378
Pic River Ojibway Forest	519	1674	466
Pineland-Martel Forest	351	4564	859
Red Lake Forest	133	2264	161
Romeo Malette Forest	520	4133	1152
Sapawe Forest	255	2143	293
Smooth Rock Falls Forest	689	2060	761
Spanish	514	6388	1760
Spruce River Forest	519	4901	1363
Sudbury Forest	514	1497	413

FMU	Discounted density of breeding males per 100 ha	Actual Clearcut area 2001-2002	Estimated number of nests destroyed
Superior Forest	351	4328	814
Temiskaming	351	5921	1114
Timmins	351	233	44
Timmins Forest	351	1395	262
Trout Lake Forest	133	5570	397
Wabigoon Forest	278	5356	798
Whiskey Jack Forest	133	2856	203
White River Forest	689	3646	1346
Total			43,692

III. The Nature of the Evidence that can Reasonably be Expected from a Citizen Croup

Our petition sets out evidence about a wide-scale failure of the Government of Canada to effectively enforce subs. 6(a) of the regulations made under the MBCA. Indeed, we have asked that a factual record be prepared for each of the FMUs in which clearcutting takes place. The Secretariat has noted in previous determinations, and repeated in its determination to our original submission, that:

... the Article 14 and 15 citizen submission process lends itself both to allegations of a widespread or systemic failure to effectively enforce an environmental law as well as to submissions concerning single violations.²² In fact, the Secretariat has found that "[...] [t]he larger the scale of asserted failure, the more likely it may be to warrant developing a factual record, other things being equal."²³

The Secretariat has also previously stated that "[a]ssertions of this sort --- that there is a widespread pattern of ineffectual enforcement --- are particularly strong candidates for Article 14 consideration."²⁴

We agree with the Secretariat's conclusion that the issue is therefore not whether such a pattern of non-enforcement can be the subject of an Article 14 submission but rather "what kind of information Submitters must present in support of such an allegation ..."²⁵

We believe that the required kind of information will depend on the nature of the alleged non-enforcement and the circumstances of the violations. Statistical or modeling information is appropriate where it is the best information that is reasonably available. In

²² Secretariat's Determination, at p. 9, Note 41 refers to the various cases where similar determinations were previously made including BC Logging, BC Mining, Migratory Birds, Quebec Hog Farms, and BC Hydro.

²³ *Ibid.*, referencing SEM-99-002 (Migratory Birds).

²⁴ SEM-99-002 (Migratory Birds), Determination pursuant to Article 14(1) and (2) of the NAAEC (23 December 1999) and SEM-02-001, Ontario Logging, at p. 9.

²⁵ Secretariat's Determination, at p. 9.

this case, we provided the best information that was reasonably available to a citizen's group at the time of our submission. With the material now provided (see the tables above) in response to the Council Resolution, we are providing additional information, most of which would not have been previously available. The Secretariat had said in its Determination that information about actual harvests "could readily be developed in a factual record".²⁶

In any case, to insist on information of an eyewitness or similar quality in this case would not, in our opinion, be reasonable or further the objectives of the NAAEC. In addition, circumstantial evidence, as our statistical and modeling data might be characterized, is simply of a different but no less useful, quality.

There are also good public policy and practical reasons why eyewitness or similar evidence of violations is neither desirable nor reasonable in the circumstances of our complaint. A citizen may try to gain (illegal) access to a site where logging is taking place and in the midst of falling trees observe trees containing nests being cut down. Alternatively a citizen would have to determine where and when clearcut logging was proposed, find his/her way through dense forest (if access is legally permitted or obtained), locate trees with migratory bird nests, determine when logging actually takes place, return to that site when logging has been completed, and establish that the tree or trees in question had been cut down.

In the first scenario the citizen is put in danger. In the second scenario the citizen is put to such an onerous test that the complaint procedure under Article 14 is of little practical value to the public.

It is worthwhile to note that the object of the complaint procedure is not to prove the commission of an offence beyond a reasonable doubt or on a balance of probabilities, as would be necessary in a criminal/quasi-criminal or civil proceeding respectively. The focus, rather, is on a failure by the government of Canada, the U.S. or Mexico to effectively enforce environmental laws. The objectives of the Act are achieved not from evidence of the violations, although this is a necessary element of a factual record, but from establishing the failure to enforce and assessing the implications of that failure in the context of the NAAEC.

Article 14 requires the submitter to "provide sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based". Thus the test set out in the NAAEC is not the same as it would be in a legal proceeding. If "sufficient information" is provided to allow the Secretariat to review the allegation of non-enforcement, and the other requirements of Articles 14 and 15 are met, then the matter should proceed to the development of a factual record with a view to achieving the broader objectives of the NAAEC, which

²⁶ At p. 10.

include such things as the promotion of sustainable development and the avoidance of trade distortions.²⁷

IV. The Problem with *Scoping*

Although we are providing the information required by the Council in its April 2003 Resolution, we believe there are both legal and public policy reasons which suggest that limiting the factual record to particular instances, as was done in the US Migratory Bird submission²⁸ and as appears to be suggested here, both goes beyond the Council's authority under the NAAEC and will potentially lead to a factual record that has little or no value²⁹ in furthering the goals of the NAAEC.

First, the NAAEC sets out the various powers of the Council but nowhere gives it the authority to order a factual record that is by its nature wholly different from the factual record recommended by the Secretariat. The Council is only empowered to recommend or reject the Secretariat's recommendation. This is as it should be in that the Secretariat is the expert body mandated to report to the Council. The Council's role is not that of a new or *de novo* panel charged with the task of determining whether the Article 14 or 15 requirements have been met.

Second, from a public policy point of view, there is a serious danger that any interference with the Secretariat's recommendation will undermine respect for the institution of the CEC. In this case, for instance, the public will be mindful of the fact that Canada's Minister of the Environment is one of the Council members being asked to decide whether the CEC should undertake a factual record of the very ministry for which he is responsible. For this reason, a departure from the recommendation of the Secretariat should not occur, except, for example, if the Secretariat has acted in a patently unreasonable way. Allowing or encouraging the Environment Minister, his delegate, or his staff to reargue, at the Council level, the positions it took in the Party (government) response to the Secretariat is inappropriate and threatens to undermine the credibility of the CEC and the important independent role of the Secretariat.

²⁷ See NAAEC Article 1(b) and (e). In contrast, an object of the Criminal Code would be to not deprive a citizen of his or her liberty without proof beyond a reasonable doubt established in a fair trial.

²⁸ See SEM-99-002 (Migratory Birds).

²⁹ In SEM-99-002 (Migratory Birds) the Council did not follow the Secretariat's recommendation for a factual record of widespread non-enforcement, in circumstances where the Secretariat noted that the "information provided by the United States appears to support the assertion that logging operations that violate the MBTA are rarely prosecuted, if ever ..." (at p. 8) Instead the Council instructed the Secretariat to prepare a factual record,

with respect to the two specific cases identified [in the submission]. The first case involves the logging of several hundred trees by a private landowner during the nesting season of Great Blue Herons allegedly resulting in hundreds of crushed eggs. The second case involves a logging company's alleged intentional burning of four trees on private land, including one allegedly nested by a pair of ospreys ...

Ultimately, the factual record determined that other authorities had already investigated these two cases. The result, in the context of a detailed submission of widespread non-enforcement, was presumably a rather barren one for the submitters and of little value in achieving the objectives of the NAAEC.

In this case the Council Resolution is essentially identical to the original response from the government of Canada, which was rejected by the Secretariat after a detailed analysis in its Determination. The government response of April 11, 2002 said:

... 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**... 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. (our emphasis)³⁰

The very brief Council Resolution of April 2003 concludes, without reasons, that the evidence is "**based in large part on an estimation derived from the application of a descriptive model**, and does not provide facts related to cases of **asserted failures** to enforce environmental law ..." (our emphasis)³¹

The similarity between the government and Council responses exposes the CEC to allegations of bias and impartiality, in circumstances where Canada's environment ministry is at the same time the "accused" and its Minister (or his delegate) the "judge". The perception of bias can only be avoided if the Council remains within its NAAEC mandate of accepting or rejecting the Secretariat's recommendation and if the Minister refrains from "rearguing" its case before a panel (the Council) of which he is a member.

Finally, we believe that to look at particular cases as originally proposed by Canada (for example that a particular stand of trees near Sudbury with migratory bird nests was cut) would be to distort the reality of the actual situation. In other words, there is little merit in investigating overly narrow 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.³² Significantly, the Secretariat's Determination has already found that "[b]oth the submission and Canada's response recognize that destruction of migratory bird nests is a frequent environmental consequence of logging."³³

As noted earlier, the Canadian government response may be justified under criminal law notions of proving the guilt of a party beyond a reasonable doubt for a specific offence, but the NAAEC's objectives are much different. The US *Migratory Birds* factual record released on April 24, 2003 is a sobering example of the futility of scoping a factual

³⁰ Government of Canada response to SEM-02-001, dated April 11, 2002 at p. 2.

³¹ At p. 1.

³² It should be noted, however, that in our original submission we had already significantly narrowed the scope of the factual record being requested. First we narrowed our request to Ontario, then to FMUs, and then to FMUs where clearcutting was taking place during the nesting season. We did this despite our belief that there was evidence that would have justified a factual record that also included the rest of Ontario and Canada.

³³ At p. 7.

record in such a way that only limited observed instances of violations are examined, despite the evidence of a widespread problem. It is for these reasons that we believe that the objectives in Article 1 of the NAAEC³⁴ are much better served by preparing a factual record of the type our original submission requested.

We believe the arguments above must also be given careful consideration in light of the fact that the CEC has not issued guidelines about the scale or scope for investigations, nor does the Council's Resolution in this matter of April 22, 2003 provide further guidance. In this context it would be unreasonable to expect citizen groups themselves to ignore available evidence of widespread non-enforcement in an attempt to make the CEC's task less onerous and thereby potentially diminish the value of its findings.

V. Conclusions

Although we recognize the broad scope of the factual record we have requested, we believe it is premature to limit our request to a smaller area.

We believe it is the expert body charged with preparing a factual record that is best suited to determine the necessary scope of the investigation. We are prepared to work with that investigative body in determining whether there can be any such beneficial *scoping*. For instance, it may be possible to conclude that certain findings related to one FMU can be applied to other FMUs without further work. We believe, however, that it would be both unfortunate and premature to *tie the hands* of the international investigative body prior to its review of the available evidence, without knowing what resources will be at its disposal, and without giving it an opportunity to canvass the views of the parties, including the submitters, in this matter. We therefore respectfully submit that this matter should proceed to the factual record stage without any further limitations imposed by Council.

³⁴ The objectives of this Agreement are to:

- (a) foster the protection and improvement of the environment ... for the well-being of present and future generations;
- (b) promote sustainable development based on cooperation and mutually supportive environmental and economic policies;
- (c) increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna;
- (d) support the environmental goals and objectives of the NAFTA;
- (e) avoid creating trade distortions or new trade barriers;
- (f) strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices;
- (g) enhance compliance with, and enforcement of, environmental laws and regulations;
- (h) promote transparency and public participation in the development of environmental laws, regulations and policies;
- (i) promote economically efficient and effective environmental measures; and
- (j) promote pollution prevention policies and practices.

We do not simply assert that the government of Canada has a policy of non-enforcement --- although the apparent existence of such a policy³⁵ is evidence to support our assertion of the widespread failures to enforce ---but rather that, based on available information, there is strong evidence that thousands of migratory bird nests have been and are being destroyed in specified areas in Ontario where clearcut logging has taken and is taking place during the nesting season.

Although we have set out our arguments regarding the problematic nature of the Council Resolution, we have nonetheless worked diligently and at significant expense to obtain all information available to us about actual harvest areas. We submit that the CEC has sufficient information upon which to proceed to the preparation of a factual record, namely, information that:

- a. clearcut logging took place in areas previously specified in our petition;
- b. the logging (although not precisely in accordance with the projections) took place during specified periods of time;
- c. migratory birds were nesting in the specified areas;
- d. nesting trees were cut during logging operations; and
- e. there was no enforcement by Canada of the relevant MBCA provisions against violators.

Where gaps remain in our information it is the result of the failure of the relevant entities, which hold such information, from responding to our requests. Citizen groups are of course rarely able³⁶, especially in a limited time frame, to require the provision of information from other bodies.

We believe that to require evidence beyond that which we have obtained through significant effort would set the bar too high for citizen complaints and thereby discourage participation. Indeed the perception may develop that to obtain a factual record under the citizen complaint procedure one must essentially provide a factual record to the CEC.

Finally, we believe we have again set out, to the best of a citizen group's ability, evidence showing the failure by Canada to enforce the MBCA regulations in specified areas of Ontario. We trust that the information we have provided to date will be sufficient for a factual record to proceed so that the important objectives of the NAAEC may be achieved.

³⁵ Indeed in its response there was no suggestion by Environment Canada that its Canadian Wildlife Service had ever pursued a charge under the MBCA against a logging company.

³⁶ With the exception of legal rights set out in access to information laws, which nonetheless often involve significant delays and the substantial outlay of funds.