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

**Article 15(1) Notification to Council that Development
of a Factual Record is Warranted**

Submitters: Canadian Nature Federation
Canadian Parks and Wilderness Society
Earthroots
Federation of Ontario Naturalists
Great Lakes United
Sierra Club (U.S. and Canada)
Wildlands League
Represented by: Sierra Legal Defence Fund (SLDF)
Concerned Party: Canada
Date received: 12 October 2004
Date of this determination: 17 December 2004
Submission I.D.: SEM-04-006 (Ontario Logging II)

I. INTRODUCTION

On 6 February 2002, the Submitters listed above filed with the Secretariat of the Commission for Environmental Cooperation (CEC) a submission alleging “the failure of the Canadian Government to effectively enforce s. 6(a) of the *Migratory Birds Regulations* against the logging industry in Ontario.”¹ On 25 February 2002, the Secretariat determined that the submission, SEM-02-001 (Ontario Logging), met the requirements of Article 14(1) of the *North American Agreement on Environmental Cooperation* (NAAEC) and merited requesting a response from the Party in accordance with Article 14(2).² The Party submitted its response on 25 April 2002.³ On 12 November 2002, the Secretariat notified the Council that the submission, in light of the Party’s response, warranted development of a factual record.⁴ On 22 April 2003, in Council Resolution 03-05, the CEC Council voted unanimously:

¹ Submitters, “Submission to the Commission for Environmental Cooperation Pursuant to Article 14, North American Agreement on Environmental Cooperation” (4 February 2002) at 1.

² SEM-02-001/Ontario Logging, Article 14(1)(2) Determination (25 February 2002).

³ Government of Canada, “Response to submission SEM-02-001 submitted to the Secretariat of the Commission for Environmental Cooperation” (11 April 2002) [hereinafter “Canada’s response to the original submission”].

⁴ SEM-02-001 (Ontario Logging), Article 15(1) Notification (12 November 2002) [hereinafter “Ontario Logging Article 15(1) Notification”].

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

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

On 20 August 2003, within the 120 calendar day time frame provided in Council Resolution 03-05, the Submitters provided the Secretariat with further information.⁵ On 21 August 2003, pursuant to Council Resolution 03-05, the Secretariat determined that the further information provided by the Submitters merited requesting a response from Canada and requested a response.⁶ On 16 October 2003, Canada submitted its response.⁷ On 17 December 2003, pursuant to Council Resolution 03-05, the Secretariat recommended preparation of a factual record.⁸

On 12 March 2004, pursuant to Council Resolution 04-03, the Council voted to:

INSTRUCT the Secretariat to prepare a factual record in accordance with Article 15 of the NAAEC and the *Guidelines for Submissions on Enforcement Matters* under Articles 14 and 15 of the *North American Agreement on Environmental Cooperation* for the assertions set forth in Submission SEM-02-001 with regard to alleged failures by Canada to effectively enforce Section 6(a) of the Migratory Bird Regulations (MBR) adopted under the Migratory Birds Convention Act, 1994 (MBCA), in regard to clearcut logging activities carried out from 1 January to 31 December 2001, particularly with respect to the migratory bird nesting season, in the forty-nine (49) forest management units located in the Province of Ontario identified by the submitters, which include the five that were amalgamated; [...]

Regarding four forest management units ("FMUs") for which the Submitters were unsuccessful in obtaining further information within the 120 calendar day time frame provided in Council Resolution 03-05, in Council Resolution 04-03, the Council stated:

⁵ Submitters, "Supplementary Submission to the Commission for Environmental Cooperation in Response to Council Resolution 03-05 dated April 22, 2003" (19 August 2003) [hereinafter "Supplemental Submission"].

⁶ SEM-02-001 (Ontario Logging), Determination Pursuant to Council Resolution 03-05 Requesting a Response from Canada (21 August 2003).

⁷ Government of Canada, "Response to supplemental information submitted to the Secretariat of the Commission for Environmental Cooperation" (16 October 2003) [hereinafter "Canada's Response to Supplemental Information"].

⁸ SEM-02-001(Ontario Logging), Notification Pursuant to Council Resolution 03-05 Recommending Preparation of a Factual Record (17 December 2003).

FURTHER RECOGNIZING that information for four forest management units was not available in time to meet the deadline that was established in Council Resolution 03-05 for submitting additional information and therefore was not provided by the submitters;

NOTING that when submitters provide information, the Party is afforded the opportunity to respond to that information; and

FURTHER NOTING that the submitters may, if they wish, submit a new submission with the requisite sufficient information with respect to the four (4) forest management units for which information was not available.

On 12 October 2004, the Submitters filed with the Secretariat submission SEM-04-006 (Ontario Logging II) (“Ontario Logging II” or the “submission”), containing additional information regarding the four FMUs which were excluded from the scope of the factual record for submission SEM-02-001 (Ontario Logging) by Council Resolution 04-03.⁹ On 14 October 2004, the Secretariat asked Canada for a response to Ontario Logging II.¹⁰ Canada provided its response on 8 December 2004.¹¹ The Secretariat has determined that the submission, in light of Canada’s response, merits development of a factual record, and provides its reasons in Section IV. of this Notification.

II. SUMMARY OF THE SUBMISSION

The Submitters assert that Canada is failing to effectively enforce s. 6(a) of the *Migratory Birds Regulations* (“MBR”)¹² adopted under the *Migratory Birds Convention Act, 1994* (“MBCA”)¹³ in regard to the logging of four FMUs 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 s. 6(a) of the MBR may be prosecuted by way of summary conviction or as an indictable offence.¹⁴

In the new submission, the Submitters focus on the Cochrane, Shiningtree Forest, Temagami and Wawa Forest FMUs. Using the same methodology used in the supplemental information

⁹ Submitters, “Submission to the Commission for Environmental Cooperation Pursuant to Article 14, North American Agreement on Environmental Cooperation [And Related to Ontario Logging SEM-02-001, dated February 4, 2002]” (5 October 2004).

¹⁰ SEM-04-006 (Ontario Logging II), Article 14(1)(2) Determination (14 October 2004).

¹¹ Government of Canada, “Response to Submission SEM-04-006 Submitted to the Secretariat of the Commission for Environmental Cooperation” (7 December 2004).

¹² C.R.C., c. 1035.

¹³ S.C. 1994, c. 22.

¹⁴ 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.

presented in August 2003, they estimate that 1,270 migratory bird nests were destroyed in 2001 in those FMUs.¹⁵ The methodology used to make this estimate is based on data from The Canadian Breeding Bird (Mapping) Census Database and forest management plans for the FMUs, plus actual harvest data.¹⁶ The Submitters state:

The actual harvest data information was obtained as it became available from industry or government sources in the period between April and October 1, 2004. In the case of the fourth unit --- Shiningtree Forest – harvest data was not made available, despite our persistent inquiries, until October 1, 2004: almost three years since extraction activities took place in this part of the public forest!¹⁷

The Submitters allege that Environment Canada (EC), through its Canadian Wildlife Service (CWS), is primarily responsible for enforcing the MBCA and that virtually no action has been taken to enforce s. 6(a) of the MBR against logging companies, logging contractors and independent contractors.¹⁸ The Submitters assert that the alleged failure to enforce s. 6(a) of the MBR, 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.¹⁹

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.²⁰ The Submitters further assert that “despite the estimated widespread destruction of bird nests,”²¹ access to information requests filed in 2001 and 2003 revealed no investigations or charges in Ontario for violations of s. 6(a) of the MBR.²² The Submitters state that since the original submission was filed in February 2002,

[...] no information has come to light in any government response, media reports, meetings with government, access to information requests, or other information to cast doubt on the Submitters' original assertion that no charges were ever laid or investigations conducted --- or other effective action taken, for that matter --- against logging companies in any FMU in Ontario, including the four FMUs at issue in this submission.²³

The Submitters claim that “EC itself acknowledges that migratory bird nests are destroyed during logging operations.”²⁴ They assert that the CWS considers nest destruction during

¹⁵ Submission at 4.

¹⁶ *Ibid.*

¹⁷ Submission at 1-2.

¹⁸ Submission at 2.

¹⁹ *Ibid.*

²⁰ Submission at 6.

²¹ Submission at 1.

²² Submission at 6 and Appendix 6.

²³ Submission at 2.

²⁴ Submission at 5.

logging to be “incidental” kill and that the CWS has decided not to use proactive enforcement measures against the logging industry because violations of s. 6(a) of the MBR that occur during logging operations are not intentional.²⁵

The Submitters assert that “[t]he term ‘incidental’ is not a recognized justification under the MBCA or MBR for destroying bird nests or eggs.”²⁶ 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.”²⁷

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”²⁸ and non-enforcement initiatives “do not relieve the Wildlife Service from enforcing subs. 6(a), MBR.”²⁹ 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.”³⁰ 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.³¹

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 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’.”³²

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”³³ 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.”³⁴

²⁵ Submission at 6-7.

²⁶ Submission at 8.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Submission at 11.

³⁰ Submission at 8.

³¹ Submission at 9.

³² Submission at 11.

³³ Submission at 10.

³⁴ Submission at 9.

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.³⁵

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:”³⁶ (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.

III. SUMMARY OF CANADA’S RESPONSE TO THE SUBMISSION

Acknowledging the close relationship between SEM-02-001 (Ontario Logging) and SEM-04-006 (Ontario Logging II), in its response to the submission, Canada referred the Secretariat to its response to the Ontario Logging submission³⁷ and its response to additional information provided by the Submitters pursuant to Council Resolution 03-05.³⁸ Summaries of these responses are included as Appendices I and II to this Notification. In its response, Canada also stated that the CWS did not receive any public complaints with respect to enforcement of s. 6(a) of the MBR in any of the four FMUs referenced in Ontario Logging II for the time period specified in the submission.

IV. ANALYSIS

The Secretariat has considered the submission in light of Canada’s response. For the reasons contained in the Secretariat’s Ontario Logging Article 15(1) Notification and in light of the considerations set out in the Secretariat’s Notification Pursuant to Council Resolution 03-05 Recommending Preparation of a Factual Record, preparation of a factual record is warranted in order to gather additional information concerning the matters raised in submission SEM-

³⁵ Submission at 10.

³⁶ *Ibid.*

³⁷ Canada’s response to the original submission, *supra* note 3.

³⁸ Canada’s Response to Supplemental Information, *supra* note 7.

04-006 (Ontario Logging II) that is necessary for a consideration of whether Canada is failing to effectively enforce s. 6(a) of the MBR in regard to clearcut logging activities carried out in 2001 in harvest areas referenced in the submission. Section V. of the Ontario Logging Article 15(1) Notification, which contains a description of information the Secretariat recommends gathering during development of a factual record, is reproduced as Appendix III to this Notification. Section IV. of the Notification to Council Pursuant to Council Resolution 03-05 Recommending Preparation of a Factual Record, which sets out the considerations of the Secretariat in recommending a factual record pursuant to Council Resolution 03-05, is reproduced as Appendix IV to this Notification.

V. RECOMMENDATION

Pursuant to Article 15(1) of the NAAEC and for the reasons set out in this Notification, the Secretariat has determined that the submission, in light of Canada's response, warrants developing a factual record. Given the close relationship between the submission and the Ontario Logging submission, and considering that factual record development for the Ontario Logging submission has already begun pursuant to Council Resolution 04-03, the Secretariat recommends that the submission be combined with the Ontario Logging submission for the purpose of developing one consolidated factual record for both submissions.

Respectfully submitted on this 17th day of December 2004.

(original signed)

per: William Kennedy
Executive Director

APPENDIX I

(Summary of Canada's response to the original submission)³⁹

“In its response, Canada advises that the Submitters did not adequately inform the Secretariat of remedies, such as complaints to CWS, which were available to them.⁴⁰ Canada asserts that prior to the filing of the submission, it received only one written complaint of nest destruction pursuant to logging in Ontario, and this complaint, which was duly investigated, was not filed by one of the Submitters.⁴¹ Canada notes that the Submitters sent only two written communications to relevant authorities before filing the submission and that CWS officials replied to these communications, committing to pass along further information as it became available.

Canada points out that CWS staff had been trying to set up a meeting with several of the Submitters as well as other interested nongovernmental organizations long before the filing of the submission. The purpose of the meeting would have been to allow the CWS to explain the legal basis of the MCBA regulations; the overall approach to the conservation of migratory birds, including enforcement; and the foundations of the current policy on enforcement of the regulations. The CWS would also have sought input from the Submitters on the overall approach for the conservation of migratory birds, and where relevant, on possible new directions for regulations. Canada claims that the Submitters delayed scheduling a meeting with the CWS until after the filing of the submission, and expresses concern that the decision to do so “is not reflective of the letter and spirit of the NAAEC.”⁴² According to Canada, at least one Submitter, the Canadian Nature Federation, did participate in a workshop on migratory bird issues, including enforcement of the MBR, on 12-13 October 2001.

Canada claims that the Submitters' assertions are not based on any actual case where a failure to effectively enforce the MBR may or may not be occurring, and that as a result, the Canadian Government is precluded from addressing in a direct and factual manner the assertions made by the Submitters.⁴³

Despite these reservations, Canada provided a response to the submission. In its response, Canada states that EC and its agency, the CWS, are responsible for the conservation and protection of migratory birds in Canada.⁴⁴ It notes that CWS programs address migratory bird conservation on several fronts, including law enforcement, habitat stewardship, scientific research and other conservation actions. Canada states that annual priorities for wildlife enforcement respond to public complaints, international commitments, and wildlife

³⁹ Section III. of the Ontario Logging Article 15(1) Notification, *supra* note 4.

⁴⁰ Response at 2.

⁴¹ Response at 1.

⁴² Response at 2.

⁴³ Response at 2.

⁴⁴ Response at 4.

conservation goals, and reflect a balancing of public concern, conservation science, and international commitments. It remarks that 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. Canada states that 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.

Canada states that the CWS must 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.”⁴⁵

Canada states that forestry legislation and guidelines in Ontario provide for protection of the environment, including biodiversity, and that federal agencies are invited to public consultations to provide input in the development of FMPs. Canada disputes the Submitters’ apparent view that a proposed FMP can routinely trigger the federal environmental assessment process under the *Canadian Environmental Assessment Act*. Canada states that approval of a provincial FMP does not absolve companies of their responsibilities under the federal MBCA.

Canada denies the Submitters’ assertion that it has a sweeping policy not to enforce the MBR against the logging industry.⁴⁶ The response states that in regard to wildlife law enforcement, Canada traditionally targets hunting, and, in recent years, illegal import and export of wildlife and derivatives. Current enforcement priorities at the national level include commercial smuggling and migratory bird protection, primarily off- and near-shore spills that result in oiled birds. Canada notes that the regional offices of EC establish a subset of these priorities so that the Department can obtain the most effective coverage possible with the resources available.

Canada contends that it is addressing the issue of nest destruction during logging activities, mainly through compliance promotion.⁴⁷ In January 2001, the CWS met with industry representatives and told them that the taking of migratory bird nests is prohibited except under the authority of a permit and that compliance with s. 6(a) of the MBR is mandatory. In October 2001, the CWS held a workshop on the topic of compliance with the MBCA and associated regulations and conservation of migratory birds in the forestry context that was attended by industry groups, Canadian Nature Federation, government representatives and specialists.

⁴⁵ *Ibid.*

⁴⁶ Response at 7.

⁴⁷ *Ibid.*

Canada states that compliance promotion and education are a necessary first step in a long-term enforcement approach in the forestry context that will eventually facilitate arguments in court that a given logging company will have been aware of the impacts of its actions. Canada “is concerned that obtaining limited results in a court of law for non-compliance at this stage would devalue the offence, and would be counterproductive to conservation of migratory birds.”⁴⁸ Canada states that EC is nevertheless 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.

Canada asserts that the 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.⁴⁹

In conclusion, Canada asserts that because the Submitters failed to provide any actual case, and because of their failure to otherwise make a complaint to the CWS that a logging operation in Ontario was in violation of s. 6(a) of the MBR, the Government of Canada believes that a factual record is not warranted.”

⁴⁸ Response at 8.

⁴⁹ Response at 9.

APPENDIX II

(Summary of Canada's Response to Supplemental Information)⁵⁰

"Canada's Response to Supplemental Information contains comments on the additional information provided by the Submitters as well as a description of the Canadian Wildlife Service ("CWS") approach to bird nest conservation and some observations concerning enforcement activities within the 49 FMUs for which the Submitters presented additional information in the Supplemental Submission.⁵¹

Canada remarks that unlike the original submission, the Supplemental Submission asserts, rather than hypothesizes, that harvesting took place during the migratory bird nesting season, by relying on actual harvest data and the application of a method for determining how much logging took place during each month of the year.⁵² Canada states that the Submitters have found that actual harvesting during the migratory bird nesting season was far less than hypothesized in the original submission.⁵³ It remarks that in the Supplementary Submission, the Submitters did not reveal any complaints in addition to the one identified by the CWS in Canada's response to the original submission.⁵⁴

Regarding the Submitters' calculations, Canada notes that

[t]o arrive at an estimate of the number of nests potentially destroyed as a result of the logging that likely took place during the nesting season, the submitters continue to use the same simple method that was used in the original submission.⁵⁵

According to Canada, in quantifying the density of sixteen selected breeding birds using data from the Canadian Breeding Bird (Mapping) Census Database, the Submitters did not take into consideration important variability displayed in the breeding density of those species and the possibility of stratifying the data.⁵⁶ Canada asserts that for this reason, the Submitters' estimate of the number of nests potentially destroyed as a result of logging during the migratory bird nesting season remains very imprecise.⁵⁷ Canada asserts that "[t]he NAAEC Article 14/15 submission process should be grounded in specific instances of alleged failures to effectively enforce a Party's environmental law."⁵⁸ It remarks that although the Submitters'

⁵⁰ Section III. of the Notification Pursuant to Council Resolution 03-05 Recommending Preparation of a Factual Record, *supra* note 8.

⁵¹ Response to Supplemental Information at 3.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.* at 4.

estimate “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.”⁵⁹ Canada states that given the particular circumstances of this submission, the supplemental information now provides sufficient information to enable the Government of Canada to provide a meaningful response.⁶⁰

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

CWS continues, in addition to inspections, investigations and prosecution, to utilize education, compliance promotion, regulation development and public reporting, as means to achieve bird conservation.⁶¹

Canada recalls that no permitting system has been created pursuant to s. 6(a) of the *Migratory Bird Regulations* (“MBR”) “[...] to recognize circumstances where industry has taken considerable measures that will benefit the conservation of migratory birds, for example through the preparation and implementation of conservation plans.”⁶² Canada observes that “[t]his has created legal uncertainty for the Forestry industry because even after they have implemented conservation plans that would benefit migratory bird populations, they would still be at risk for prosecution should any small limited incidental take of nests occur during the course of their activities.”⁶³ Canada explains that as a result, CWS has been involved in a joint effort with industry and nongovernmental organizations to develop solutions to improve the regulatory framework as it applies to the conservation of birds affected by industrial activity.⁶⁴

Canada’s response refers to workshops held in October 2001, February 2002, and March 2003, in which Environment Canada staff met with the Forest Products Association of Canada, some nongovernmental organizations, and other stakeholders.⁶⁵ According to Canada, the first workshop affirmed the significance of the forest environment for the conservation of a large number of migratory bird species and the difficult compliance issues faced by industry.⁶⁶ In the second workshop, CWS explained that its approach on regulations and enforcement has two main objectives: to ensure the sustainability of migratory birds, and to ensure that CWS officials, as agents of the Minister of Environment, fulfill their legal responsibilities.⁶⁷ CWS organized the meeting to obtain input from the Submitters on the overall approach for the conservation of migratory birds, and where relevant, on possible new

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.* at 5.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

directions for regulations.⁶⁸ At the third meeting, also attended by representatives of the natural resources departments of Ontario, British Columbia, New Brunswick and Alberta, the focus was on discussing conservation and compliance issues with the MBR.⁶⁹ Canada reports that the outcome of the workshop was a general agreement by participants on a draft framework to deal with migratory bird conservation within the forestry context.⁷⁰ A working group was tasked with further developing the framework, with recommendations to be made by the end of December 2003.⁷¹ Canada anticipates that regulatory changes may be required to allow for an approval system to deal with the destruction of nests that may result from industrial operations.⁷²

Canada explains that the CWS wants to focus its efforts on species of conservation priority and continue to work collaboratively with stakeholders to sustain viable populations of migratory birds within the forests of Canada.⁷³ Canada's response notes that "[n]o federally protected migratory bird species nesting in the boreal region of the province of Ontario is currently identified as threatened or endangered."⁷⁴ Canada adds that "[g]iven the nature of the submission, which references areas in boreal forest to a large extent, it follows that the Submitters have not established a case that any threatened or endangered species were involved."⁷⁵ Canada notes that a major project running until 2006 has been undertaken to compile additional information on migratory birds in the boreal forests of Ontario to assist Environment Canada in determining locations and trends of migratory birds in Ontario and provide a baseline for monitoring species populations and habitat change.⁷⁶

Regarding enforcement activities in the 49 FMUs for which additional information was provided in the Supplemental Submission, Canada remarks that the CWS enforcement program received no complaints from the Submitters regarding the 49 FMPs referenced in the original submission during the period referenced in the submission.⁷⁷ In regard to the one complaint received by the CWS and referenced in Canada's response to the original submission, Canada notes that the complaint was received on 12 July 2001, that receipt was acknowledged on 1 August 2001, and that wildlife officers determined that it did not warrant further action since the logging operations had ceased some time before and OMNR indicated that no other logging was planned.⁷⁸

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.* at 5-6.

⁷² *Ibid.* at 6.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* at 6-7.

APPENDIX III

(Information to be considered in a factual record)⁷⁹

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

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

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

Information is also required regarding efforts by federal officials to monitor compliance with s. 6(a) of the MBR in connection with clearcutting activities carried out in 2001 in harvest areas referenced in the submission. Such information includes information regarding the

⁷⁹ Section V. of the Ontario Logging Article 15(1) Notification, *supra* note 4.

scope, operation and budget of any monitoring program, data used to anticipate species and numbers of migratory bird nests in different areas, and information obtained through monitoring or inspection. The Secretariat would also need to consider actions taken in response to suspected violations of s. 6(a) of the MBR, including actions taken in response to any failure to implement conditions in an FMP relating to protection of migratory bird nests; follow-up measures to test effectiveness of compliance promotion activities; actions taken to follow up on any monitoring results indicating potential violations of s. 6(a) of the MBR; and responses to complaints.

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

APPENDIX IV

(Considerations of the Secretariat in recommending a factual record pursuant to Council Resolution 03-05)⁸⁰

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

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

However, as Canada points out in its Response to Supplemental Information, this information could be refined further.⁸¹ Developing a factual record would allow the Secretariat to gather additional information regarding migratory bird populations in the harvest areas identified by the Submitters, including as regards variability in the breeding bird density across species and the possibility of stratifying the data.

The Party’s Response to Supplemental Information contains information not included in the Party’s response to the original submission. Canada suggests that the forest industry may be taking considerable measures, including conservation plans, to protect migratory birds.⁸² Canada also provides additional information about CWS workshops on migratory bird conservation.⁸³ Canada explains that CWS wants to focus its efforts on species of conservation priority.⁸⁴ It states that CWS uses inspections, investigations and prosecutions as a means to achieve bird conservation,⁸⁵ and it provides some additional information concerning a complaint referenced in Canada’s response to the original submission.⁸⁶ However, the Response to Supplemental Information does not contain certain types of information which the Secretariat identified in its Article 15(1) Notification as being necessary for a consideration of whether Canada is failing to effectively enforce s. 6(a) of the MBR in regard to clearcut logging in 2001 in harvest areas referenced in the original submission.

For example, missing is information regarding any measures adopted by industry in the harvest areas referenced by the Submitters to achieve or increase compliance with s. 6(a) of

⁸⁰ Section IV. of the Notification to Council Pursuant to Council Resolution 03-05 Recommending Preparation of a Factual Record, *supra* note 8.

⁸¹ Canada’s Response to Supplemental Information at 3.

⁸² *Ibid.*

⁸³ *Ibid.* at 5-6.

⁸⁴ *Ibid.* at 6.

⁸⁵ *Ibid.* at 4.

⁸⁶ *Ibid.* at 6-7.

the MBR. In the Article 15(1) Notification (see Appendix 1, below), the Secretariat recommends gathering information on

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

While the Response to Supplemental Information mentions that industry may be taking considerable measures that will benefit the conservation of migratory birds,⁸⁷ additional information is required for a consideration of the role of any such measures in promoting compliance with s. 6(a) of the MBR in the harvest areas referenced in the original submission, including information on the nature, extent and timing of measures adopted, information used to design and evaluate those measures, and overall success of those measures in achieving (or increasing) compliance with s. 6(a) of the MBR during logging identified by the Submitters in the original submission. In the context of developing a factual record, the Secretariat would gather information regarding any conservation plans or other measures that have been prepared and implemented in the harvest areas identified by the Submitters in the original submission,⁸⁸ as well as information regarding the “difficult compliance issues faced by industry”⁸⁹ and the joint effort by CWS, industry and nongovernmental organizations “to develop solutions to improve the regulatory framework as it applies to the conservation of birds affected by industrial activity” referenced in the Response to Supplemental Information.⁹⁰

The Response to Supplemental Information does not contain information regarding any compliance promotion activities carried out by CWS in regard to the harvest areas referenced in the original submission, except as regards three workshops on migratory bird conservation held between October 2001 and March 2003. With regard to those workshops, the Response to Supplemental Information does not contain information such as meeting agendas, meeting minutes and related correspondence, or a copy of the draft framework to deal with migratory bird conservation in the forestry context.⁹¹ Such information would be gathered by the Secretariat in the context of preparing a factual record.

The Response to Supplemental Information indicates that CWS wants to focus its efforts on species of conservation priority.⁹² The legal provision identified by the Submitters in the original submission, s. 6(a) of the MBR, states “[...] no person shall [...] disturb, destroy or take a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird;” s. 2(1) of the

⁸⁷ *Ibid.* at 4.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.* at 5.

⁹⁰ *Ibid.* at 4.

⁹¹ *Ibid.*

⁹² *Ibid.* at 6.

MBR provides a definition of “migratory bird.”⁹³ Neither provision makes reference to the notion of “species of conservation priority” as qualifying the general prohibition set out in s. 6(a) of the MBR. The Response to Supplemental Information does not contain information regarding the legal or policy basis for focusing on species of conservation priority in Canada’s enforcement of s. 6(a) of the MBR. Since the Article 15(1) Notification recommends gathering information on how EC establishes and balances priorities for wildlife enforcement and compliance promotion (see Appendix 1, below), in the context of preparing a factual record, the Secretariat would gather information regarding the basis for CWS’s intention to focus on species of conservation priority in the context of enforcing and seeking compliance with s. 6(a) of the MBR.

⁹³ S. 2(1) of the MBR defines “migratory bird” as follows: “migratory birds” or “birds” means migratory game birds, migratory insectivorous birds and migratory non-game birds as defined in the Act, and includes any such birds raised in captivity that cannot readily be distinguished from wild migratory birds by their size, shape or colour, and any part or parts of such birds. S. 2(1) of the MBCA defines “migratory bird” as follows: “migratory bird” means a migratory bird referred to in the Convention, and includes the sperm, eggs, embryos, tissue cultures and parts of the bird. The 1994 Protocol between the Government of Canada and the Government of the United States of America Amending the 1916 Convention Between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States states at Article I: “In order to update the listing of migratory birds included in the terms of this Convention in a manner consistent with their current taxonomic (Family and Subfamily) status, Article I of the Convention is deleted and replaced by the following:

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

1. Migratory Game Birds:

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

2. Migratory Insectivorous Birds:

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

3. Other Migratory Nongame Birds:

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

In the Response to Supplemental Information, Canada remarks that no migratory bird species in the boreal region of the province of Ontario is currently identified as threatened or endangered, and points out that since the Submitters refer to the boreal region of Ontario, “[...] they have not established that any threatened or endangered species were involved.”⁹⁴ As noted above, s. 6(a) of the MBR and the definition of migratory birds in the MBR do not refer to the notion of “species of conservation priority”. Similarly, these provisions do not refer to “threatened” or “endangered” species. Nonetheless, information regarding any special consideration given to threatened or endangered species in enforcing s. 6(a) of the MBR in the harvest areas referenced in the submission would be appropriate for inclusion in a factual record. For example, the Response to Supplemental Information suggests that information required to establish a baseline for measuring species population and habitat change – which may be relevant to determining whether any species are threatened or endangered - is being gathered as part of a project that began in 2000 and will end in 2006; information related to this project would be appropriate for inclusion in a factual record. Information regarding threatened or endangered species considerations would also be relevant in conjunction with the recommendation in the Article 15(1) Notification to gather information on data used by CWS to anticipate species and numbers of migratory bird nests in different areas in monitoring compliance with s. 6(a) of the MBR.

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

In regard to complaints to the CWS, in its Article 15(1) Notification (see Appendix 1, below), the Secretariat recommended gathering information concerning actions taken by CWS and Environment Canada in response to suspected violations of the MBR, including responses to complaints. In the Response to Supplemental Information, Canada remarks that in their Supplemental Submission, “[...] the Submitters have not revealed additional complaints other than the one identified by CWS in its response.”⁹⁵ It also states “[t]he enforcement program of CWS received no complaints from the submitters related to the 49 Forest Management Plans identified in the SEM-02-001 during the period referenced in the submission.”⁹⁶ In the context of developing a factual record, the Secretariat would gather information regarding the role of complaints from the public in the enforcement of s. 6(a) of the MBR, including as

⁹⁴ Response to Supplemental Information at 6.

⁹⁵ *Ibid.* at 3.

⁹⁶ *Ibid.* at 6.

regards resources expended by Environment Canada to respond to complaints in comparison to carrying out routine inspections, and effectiveness of public complaints as a vehicle for monitoring and enforcing compliance with s. 6(a) of the MBR in the harvest areas referenced in the original submission.

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

[t]he letter of complaint referred to the fact that the Contingency Forest Management Plan, which encompassed the brief period of July 12 to September 1, 2001, included a number of clear-cuts and claimed that these clear-cuts would destroy the nests of migratory birds during nesting season.⁹⁷

The Response to Supplemental Information states that the complaint was received on July 12, 2001, the first day on which logging was authorized under the Contingency Forest Management Plan.⁹⁸ It explains that wildlife officers dealing with the complaint determined that it did not warrant further investigation after consultation with the OMNR, and it states that "[s]ince the reported logging operations had ceased some time before, it would be very difficult to collect potential evidence of nest destruction."⁹⁹ In the Supplemental Submission, the Submitters maintain that there are good practical and public policy reasons why eyewitness evidence of violations should not be expected from the public, including lack of legal access to logging areas, the danger of falling trees, and the onus this puts on the public.¹⁰⁰ In developing a factual record, the Secretariat would gather information regarding the role of CWS consultation with the OMNR in the enforcement of s. 6(a) of the MBR; the timing of CWS follow-up on complaints from the public and any effects on the ability of the CWS to gather evidence of violations of s. 6(a) of the MBR; and the type of information required for a complaint from the public to lead to enforcement action by the CWS in regard to suspected violations of s. 6(a) of the MBR. Accordingly, the Secretariat would gather information regarding whether and how the CWS has followed up on the Submitters' allegation that an estimated 43,700 nests were destroyed by clearcut logging during the period and in the areas referenced in the original submission.

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

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.* at 7.

¹⁰⁰ Supplemental Submission at 13.