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**Secretariat of the Commission for Environmental Cooperation**

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

**Submitters:** Canadian Nature Federation  
Canadian Parks and Wilderness Society  
Earthroots  
Federation of Ontario Naturalists  
Great Lakes United  
Sierra Club (United States)  
Sierra Club of Canada  
Wildlands League

**Represented by:** Sierra Legal Defence Fund (SLDF)

**Concerned Party:** Canada

**Date received:** 12 October 2004

**Date of this determination:** 14 October 2004

**Submission I.D.:** SEM-04-006 / Ontario Logging II

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**I - INTRODUCTION**

On 12 October 2004, the Submitters listed above filed with the Secretariat of the Commission for Environmental Cooperation (the “Secretariat”) a submission on enforcement matters pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* (“NAAEC” or “Agreement”). Under Article 14 of the NAAEC, the Secretariat may consider a submission from any nongovernmental organization or person asserting that a Party to the Agreement is failing to effectively enforce its environmental law if the Secretariat finds that the submission meets the requirements of Article 14(1). When the Secretariat determines that those requirements are met, it then determines whether the submission merits requesting a response from the Party named in the submission (Article 14(2)).

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

## II - SUMMARY OF THE SUBMISSION

The Submitters assert that Canada is failing to effectively enforce section 6(a) of the *Migratory Birds Regulations* (“MBR”)<sup>1</sup> adopted under the *Migratory Birds Convention Act, 1994* (“MBCA”)<sup>2</sup> in regard to the logging of four Forest Management Units (“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 section 6(a) of the MBR may be prosecuted by way of summary conviction or as an indictable offence.<sup>3</sup>

In February 2002, these same Submitters filed the Ontario Logging submission (SEM-02-001), which essentially made the same core assertions as are contained in the new submission with respect to the same four FMUs, as well as many 49 others. Pursuant to a decision of the CEC Council in April 2003, the Submitters presented supplemental information in connection with 49 of the FMUs mentioned in the original Ontario Logging submission in August 2003. The CEC Secretariat is currently developing a factual record for the Ontario Logging submission, pursuant to instructions from the Council issued in March 2004. In its instructions, Council noted “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.”<sup>4</sup> The Submitters note the “intimate connection” between this submission and SEM-02-001.<sup>5</sup>

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 presented in August 2003, they estimate that 1,270 migratory bird nests were destroyed in 2001 in those four FMUs.<sup>6</sup> 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 relevant FMUs, plus actual harvest data.<sup>7</sup> 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

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<sup>1</sup> C.R.C., c. 1035.

<sup>2</sup> S.C. 1994, c. 22.

<sup>3</sup> 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.

<sup>4</sup> Council Resolution 04-03 (12 March 2004).

<sup>5</sup> Submission at 1.

<sup>6</sup> Submission at 4.

<sup>7</sup> *Ibid.*

persistent inquiries, until October 1, 2004: almost three years since extraction activities took place in this part of the public forest!”<sup>8</sup>

The Submitters allege that Environment Canada, through its Canadian Wildlife Service, is primarily responsible for enforcing the MBCA and that virtually no action has been taken to enforce section 6(a) of the MBR against logging companies, logging contractors and independent contractors.<sup>9</sup> The Submitters assert that the alleged failure to enforce section 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.<sup>10</sup>

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.<sup>11</sup> The Submitters further assert that “despite the estimated widespread destruction of bird nests,”<sup>12</sup> an access to information request filed in 2001 revealed no investigations or charges in Ontario for violations of section 6(a) of the MBR.<sup>13</sup> 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.”<sup>14</sup>

The Submitters claim that “EC itself acknowledges that migratory bird nests are destroyed during logging operations.”<sup>15</sup> They assert that the CWS considers nest destruction during logging to be “incidental” kill and that the CWS has decided not to use proactive enforcement measures against the logging industry because violations of section 6(a) of the MBR that occur during logging operations are not intentional.<sup>16</sup>

The Submitters assert that “[t]he term ‘incidental’ is not a recognized justification under the MBCA or MBR for destroying bird nests or eggs.”<sup>17</sup> They assert that the MBCA is a public

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<sup>8</sup> Submission at 1-2.

<sup>9</sup> Submission at 2.

<sup>10</sup> *Ibid.*

<sup>11</sup> Submission at 6.

<sup>12</sup> Submission at 1.

<sup>13</sup> Submission at 6 and Appendix 6.

<sup>14</sup> Submission at 2.

<sup>15</sup> Submission at 5.

<sup>16</sup> Submission at 6-7.

<sup>17</sup> Submission at 8.

welfare law and that “[w]hen these laws are infringed it is often the result of unintentional, not wilful, conduct.”<sup>18</sup>

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”<sup>19</sup> and non-enforcement initiatives “do not relieve the Wildlife Service from enforcing subs. 6(a), MBR.”<sup>20</sup> 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.”<sup>21</sup> 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.<sup>22</sup>

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’.”<sup>23</sup>

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”<sup>24</sup> 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.”<sup>25</sup>

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,

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<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> Submission at 11.

<sup>21</sup> Submission at 8.

<sup>22</sup> Submission at 9.

<sup>23</sup> Submission at 11.

<sup>24</sup> Submission at 10.

<sup>25</sup> Submission at 9.

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.<sup>26</sup>

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:”<sup>27</sup> (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 - ANALYSIS

Article 14 of the NAAEC directs the Secretariat to consider a submission from any nongovernmental organization or person asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. When the Secretariat determines that a submission meets the Article 14(1) requirements, it then determines whether the submission merits requesting a response from the Party named in the submission based upon the factors contained in Article 14(2). As the Secretariat has noted in previous Article 14(1) determinations,<sup>28</sup> Article 14(1) is not intended to be an insurmountable procedural screening device.

The Secretariat’s prior analysis of the previous Ontario Logging submission greatly simplifies the analysis of this submission. This submission is modeled closely on the original Ontario Logging submission, except that in estimating the number of bird nests destroyed as a consequence of logging, it only provides information regarding the four forest management units for which information was not available at the time the Submitters filed supplemental information in August 2003. The information regarding the four FMUs includes actual harvest data similar to the actual harvest data provided in connection with the 49 FMUs which are covered by the Ontario Logging factual record now in development. Accordingly, the Secretariat concludes that this submission satisfies the criteria in Article 14(1) and merits requesting a response from Canada based on the factors in Article 14(2), for the same reasons underlying the Secretariat’s Determination under Articles 14(1) and (2) of 25 February 2002 and its request for a response from Canada of 21 August 2003.

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<sup>26</sup> Submission at 10.

<sup>27</sup> *Ibid.*

<sup>28</sup> See e.g. SEM-97-005 (Biodiversity), Determination pursuant to Article 14(1) (26 May 1998) and SEM-98-003 (Great Lakes), Determination pursuant to Article 14(1) & (2) (8 September 1999).

The Secretariat further notes that, in connection with Article 14(2)(b), this submission raises matters in combination with the original Ontario Logging submission, for which the Council has voted to instruct the Secretariat to prepare a factual record.

#### **IV - CONCLUSION**

For the foregoing reasons, the Secretariat has determined that submission SEM-04-006 (Ontario Logging II) meets the requirements of Article 14(1) and merits requesting a response from the Party in light of the factors listed in Article 14(2). Accordingly, the Secretariat requests a response from the Government of Canada subject to the provisions of Article 14(3). A copy of the submission, along with supporting information provided with the submission, was previously forwarded to the Party under separate cover.

Respectfully submitted,

**Secretariat of the Commission for Environmental Cooperation**

*(original signed)*

*per:* Geoffrey Garver  
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c.c.: Ms. Norine Smith, Environment Canada  
Ms. Judith E. Ayres, US-EPA  
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