

21 September, 1995

**BY CERTIFIED MAIL**

Earthlaw  
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**Submitter(s):**

Biodiversity Legal Foundation  
Consejo Asesor Sierra Madre  
Forest Guardians  
Greater Gila Biodiversity Project  
Southwest Center for Biological Diversity

**Party:**

United States of America

**Submission I.D. # SEM-95-001**

Dear Mr. Tutchton:

The Secretariat has concluded its review of your submission under the criteria established in Article 14:2(a-d) of the *North American Agreement on Environmental Cooperation* (“the Agreement”).

**I- SUMMARY OF SUBMISSION**

The Submitters have requested that the Secretariat “... determine that the United States is failing to effectively enforce its *Endangered Species Act* of 1973 (‘ESA’).” (Biodiversity Submission at p.2). The Submitters’ request arises out of language from the *Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995*, (“the *Rescissions Act*”), signed into law on April 10, 1995 (Public Law 104-6). A portion of the *Rescissions Act*, known as the “Hutchison Amendment”, rescinds \$1,500,000(US) from the amounts available in Fiscal Year 1995 for making determinations as to whether a species should be declared “threatened” or “endangered” and whether a habitat should be designated as “critical habitat” under the *Endangered Species Act* of 1973 (16 U.S.C. 1531-1544). The *Rescissions Act* also prohibits the U.S. Fish and Wildlife Service from compensating for the loss of funds from other programs and precludes the application of funds appropriated under that heading for making a final determination that a species is “threatened” or “endangered” or that habitat constitutes “critical habitat” under the ESA.

The Submitters complain that without repealing, modifying or otherwise amending the ESA, the *Rescissions Act* has nonetheless halted the listing process thereby depriving these organizations of their ability to protect endangered species. Consequently, the submission asserts that both the U.S. Fish and Wildlife Service and the Submitters are currently unable to enforce certain aspects of Section 4 of the ESA.

## II- ARTICLE 14

Article 14 of the Agreement empowers the Secretariat to consider a submission from any non-governmental organization or person asserting that a Party to the Agreement is failing to effectively enforce its environmental law. If the submission conforms to the criteria established in Article 14:1 and 14:2, the Secretariat may request a response from the NAFTA party named in the submission. In light of any government response, the Secretariat may recommend to the Council that a factual record be prepared. The Council, comprised of the environmental ministers (or their equivalent) of Canada, Mexico and the U.S., may then instruct the Secretariat to prepare a factual record on the submission.<sup>1</sup> Final factual records are made public upon a 2/3 vote of the Council.

## III- PROCEDURAL HISTORY

On July 5, 1995, the Submitters requested the Secretariat to consider this matter under Article 14 of the Agreement. On July 19, the Secretariat notified the Submitters that their submission

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<sup>1</sup> At present, the contents of a factual record are set-forth in the *Draft Procedures for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*. Copies of the *Draft Procedures* are available on request from the CEC Secretariat in Montreal, Canada.

satisfied the screening criteria established in Article 14:1 of the Agreement. The Secretariat now reviews the submission under Article 14:2 of the Agreement in order to determine whether or not to request a response from the government of the United States of America.

#### IV- ANALYSIS

##### A. The Endangered Species Act

The ESA was enacted in 1973 to conserve endangered species and the ecosystems upon which they depend. A species must be listed as “threatened” or “endangered” under Section 4 of the ESA before that species and its habitat are extended protection under the law. As the Submitters point out, any interested person can initiate the ESA listing process by submitting a petition to the United States Secretary of the Interior. Under current law, interested persons can also take legal action to ensure that the Secretary of the Interior designates “critical habitat” for endangered species as required by the statute. The ESA in Section 9 lists prohibited acts. Violation of the provisions of the ESA may lead to enforcement actions and civil or criminal penalties assessed pursuant to Section 11.

##### B. Articles 14 and 15 of the Agreement

Article 14:2 states:

*Where the Secretariat determines that a submission meets the criteria set out in paragraph 1, the Secretariat shall determine whether the submission merits requesting a response from the Party. In deciding whether to request a response, the Secretariat shall be guided by whether:*

*(a) the submission alleges harm to the person or organization making the submission;*

*(b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of the Agreement;*

*(c) private remedies available under the Party’s law have been pursued; and*

*(d) the submission is drawn exclusively from mass media reports.*

In evaluating the submission under Article 14:2, the Secretariat is confronted with the fact, acknowledged by the Submitters, that the alleged failure to enforce environmental law results from competing legislative mandates, and not from other action or inaction taken by agencies or officials. Indeed, under U.S. law the Department of Interior is legally precluded from implementing the provisions of the ESA specified in the *Rescissions Act*.<sup>2</sup> Consequently, the submission impels the Secretariat to consider whether a “*failure to effectively enforce*” under Article 14 may result from the enactment of a law which suspends the implementation of certain provisions of another statute.

Cast in the language of 14:2(b), the Secretariat must evaluate whether the goals of the Agreement will be advanced by considering this matter under Articles 14 and 15. For the reasons set out below, the Secretariat is persuaded that Articles 14 and 15 do not address the facts raised in the submission.

Article 14:1 allows the Secretariat to consider a submission asserting that “... *a Party is failing to effectively enforce its environmental law...*” On its face, there is little to support the notion in Article 14:1 that the word *Party* is restricted to include only the executive functions of agencies or departments, or that the term should mean anything other than “government” in a broader sense, including its separate branches. However Articles 14 and 15 read in conjunction with other provisions of the Agreement strongly suggest that a failure to enforce environmental law applies to the administrative agencies or officials charged with implementing laws and regulations.

Article 45(1) provides some guidance on the question raised above by specifying categories of conduct which do *not* constitute a failure to effectively enforce environmental law. That article reads:

*A Party has not failed to ‘effectively enforce its environmental law’ or to comply with Article 5:1 in a particular case where the action or inaction in question by agencies or officials of that Party ...*

The quoted passage ascribes action or inaction to “*agencies or officials of that Party.*” This suggests, at least in the context of what is not a failure to enforce, that Articles 14 and 15 primarily envisage administrative breakdowns (failures) resulting from acts or omissions of an agency or official charged with implementing environmental laws.

The focus on agency or departmental action or inaction is reinforced in Article 5:1 of the Agreement. Article 5:1 includes a non-exhaustive list of governmental actions appropriate to effectively enforce environmental law. Examples listed in Article 5:1 in the U.S. may arise from

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<sup>2</sup> See Anti-Deficiency Act, 31 U.S.C. 1341 et seq.

statutes or regulations enacted by the legislature and signed into law by the President. Yet the obligation to exercise the prescribed enforcement response rests with the department or agency charged with that responsibility. In the present submission, the Department of the Interior has not “failed” to discharge its duty to enforce certain provisions of the ESA since the Department is legally precluded from taking such action.

Article 14 provides further guidance on the nature of the failure to enforce environmental law. While not conclusive, the provisions of Article 14 are most logically triggered when a failure to enforce is brought about by administrative shortcomings rather than legislative mandates. For example, Article 14:2 states that the Secretariat shall consider whether private remedies were pursued prior to filing a submission. The Submitters assert that no private remedy is available to challenge a Rescissions Act which impacts on the implementation of another law<sup>3</sup> (Biodiversity Submission at p.12). The absence of a legal remedy further underscores the difficulties associated with evaluating legislative actions under Article 14<sup>4</sup>. Here, the Submitters have lodged a submission immediately after the U.S. has spoken through the voice of its elected representatives. Article 14 was not intended to create an alternate forum for legislative debate.

Article 14:3(a) also supports the proposition that Articles 14 and 15 of the Agreement were intended to address failures by enforcement agencies or departments, and not inaction mandated by law. Article 14:3(a) directs the Secretariat to take no further action on a submission where the matter is the subject of a pending judicial or administrative proceeding. Article 45 defines “*judicial or administrative proceeding*” as “*a domestic judicial, quasi-judicial or administrative action pursued by the Party ...*” In the present submission, the *Rescissions Act* curtails the listing of new species during Fiscal Year 1995, thereby eliminating the possibility of any enforcement actions with regard to such species. Accordingly, the Department of Interior is foreclosed from bringing an enforcement action on a provision of the ESA which the Department itself is prevented by law from implementing. Interpreting Article 14 as the Submitters propose would render Article 14:3(a) inapplicable in many circumstances.

### C. Article 3

Article 3 of the Agreement recognizes “... *the right of each Party to establish its own levels of domestic environmental protection ... and to adopt or modify accordingly its environmental laws and regulations...*” The Parties further commit to maintaining high levels of environmental protection. While the Submitters emphasize that the ESA has not been repealed or modified, it is clear that the *Rescissions Act*, which has the force and effect of law, operates to restrict full implementation of the ESA. In effect, the application of the *Rescissions Act* has suspended for a stipulated period of time the implementation of certain provisions of the

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<sup>3</sup> The result may differ where a law impinges upon a constitutionally guaranteed right.

<sup>4</sup> There may be circumstances where no legal remedy exists to redress a matter that falls squarely within the ambit of Article 14 submissions.

ESA. Insofar as Article 14 and 15 are concerned, the Secretariat defers to a Party's explicit right to modify its laws.

## V- CONCLUSION

The enactment of legislation which specifically alters the operation of pre-existing environmental law in essence becomes a part of the greater body of environmental laws and statutes on the books. This is true even if pre-existing law is not amended or rescinded and the new legislation is limited in time. The Secretariat therefore cannot characterize the application of a new legal regime as a failure to enforce an old one. While the Submitters may contend that such legislative action amounts to a breach of the obligation to maintain high levels of protection, Articles 14 and 15 do not repose in the Secretariat the power to explore aspects of the Agreement not arising from a failure to enforce environmental law.

For the foregoing reasons, the Secretariat will not request a response from the government of the United States of America. Accordingly, in the absence of new or supplemental information provided within 30 days of receipt of this notice, the Secretariat concludes its consideration of this matter.<sup>5</sup>

Victor Lichtinger  
Executive Director

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<sup>5</sup> *Draft Procedures* at 8.1.