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## **Commission for Environmental Cooperation - Secretariat**

### **Determination pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation**

**Submission I.D.: SEM-95-002**

**Submitter(s) :**

Sierra Club, Alaska Center for the Environment, Ancient Forest Rescue, Friends of the Earth, Headwaters, Hells Canyon Preservation Council, Idaho Conservation League, Inland Empire Public Lands Council, Institute for Fisheries Resources, Klamath Forest Alliance, National Audubon Society, Natural Resources Defense Council, Northcoast Environmental Center, Northwest Ecosystem Alliance, Oregon Natural Resources Council, Pacific Coast Federation of Fishermen's Associations, Pacific Rivers Council, Pilchuck Audubon Society, Portland Audubon Society, Seattle Audubon Society, Southern Rockies Ecosystem Project, Western Ancient Forest Campaign, The Wilderness Society, Earthlife Canada Foundation *operating as* BC Wild, Environmental Resource Centre of Alberta, Centro Mexicano de Derecho Ambiental, Grupo de Los Cien, and Red Mexicana de Accion Frente al Libre Comercio

**Concerned Party:**

United States of America

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## I- SUMMARY OF THE SUBMISSION

On August 30, 1995, the Submitters filed with the Secretariat of the Commission for Environmental Cooperation (“Secretariat”) a submission on enforcement matters pursuant to Article 14 of the North American Agreement on Environmental Cooperation (“NAAEC” or “Agreement”).

The submission alleges that the *Fiscal Year 1995 Supplemental Appropriations, Disaster Assistance and Rescissions Act* (“*Rescissions Act*”), Pub. L. No. 104-19 (109 Stat. 194), passed by the U.S. Congress and signed into law by the President of the United States on July 27, 1995, contains a rider (“Logging Rider”) suspending the enforcement of U.S. environmental laws for a “massive” logging program on U.S. public lands.

The submission further alleges that U.S. environmental laws governing logging remain on the books and even remain applicable to logging on these federal forests. The rider, however, “...erects what may be insurmountable obstacles to citizen enforcement of these environmental laws for the expansive logging mandated or permitted by the rider.” Submission at p. 1.

According to the Submitters, the Logging Rider “suspends enforcement of most U.S. environmental laws with respect to logging for so-called “salvage” purposes and also for non-salvage logging in the Western Ancient Forests.” Submission at p. 2. Specifically, the Submitters allege that the Logging Rider “effectively suspends enforcement of environmental laws for two logging programs : (1) logging in the old-growth forest under Option 9 -- the plan adopted by federal agencies to balance timber harvest against protecting old-growth dependent species like the northern spotted owl, salmon, and other aquatic species; and (2) so-called salvage logging.” Submission at p. 2.

The Submitters contend that for both logging programs, the Logging Rider provides that any environmental analysis produced, and any procedures followed by federal agencies for such timber sales “*shall be deemed to satisfy the requirements*” of several specifically listed laws and “[a]ll other applicable federal environmental and natural resource laws.” Submission at p. 2. The Submitters then conclude that “[a]ccordingly, the logging rider provides that such timber sales are specifically not subject to challenge for violations of such laws. Submission at p. 2.

## II- ARTICLE 14

Article 14 of the Agreement allows 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. The Secretariat may consider any submission that meets the criteria set out in Article 14:1. Where the Secretariat determines that the Article 14:1 criteria are met, it shall then determine whether the submission merits requesting a response from the Party named in

the submission. In light of any response provided by that Party, the Secretariat may recommend to the Council that a factual record be prepared. The Council, comprised of the environment 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 publicly available upon a 2/3 vote of the Council.

### **III- PROCEDURAL HISTORY**

On August 30, 1995, the Submitters filed with the Secretariat submission No. SEM-95-002 under Article 14 of the NAAEC. The Secretariat now reviews the submission to determine whether the submission satisfies the screening criteria established in Articles 14:1 and 14:2.

### **IV- ANALYSIS**

#### ***Environmental law***

Article 14:1 empowers the Secretariat to consider alleged failures to enforce “environmental law” as that term is defined in Article 45:2(a) of the Agreement. Article 45 excludes from the definition of “environmental law” statutes, regulations or provisions thereof, “...the primary purpose of which is managing the commercial harvest or exploitation ... of natural resources”. The Article continues by explaining that the “primary purpose” of a particular statute or regulatory provision shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part.

Submitters allege a general failure to enforce the environmental statutes referenced in the Logging Rider, including the Endangered Species Act and the National Environmental Policy Act. Also, the Submitters underscore the loss of administrative and judicial review procedures regarded as important enforcement tools available to citizens prior to the enactment of the Logging Rider. While the submission refers to “environmental laws”, it focuses almost exclusively on the language and effect of the Logging Rider.

Although the Logging Rider clearly addresses the harvesting of natural resources (timber), the Secretariat reads the submission as alleging a failure to enforce the environmental laws enumerated in the Logging Rider, some of which clearly meet the definitional requirements established in Article 45. Accordingly, the Secretariat next considers both whether a “failure to effectively

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<sup>1</sup> The contents of a factual record are set-forth in the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*. The *Guidelines* can be obtained through the CEC’s home page on the Internet at the following address: <http://www.cec.org>. Copies of the *Guidelines* are also available on request from the CEC Secretariat in Montreal, Canada.

enforce” has been alleged under Article 14:1, and whether the submission merits a response under Article 14:2 of the Agreement.

### ***Failure to effectively enforce***

The Logging Rider provides expedited procedures for the complex, multi-phase process involved in timber sales; vests discretion in the Secretary of Agriculture and Interior to consider certain environmental effects; limits or eliminates administrative and judicial review of specified decisions and agency action; and stipulates that certain documents and procedures required by the Logging Rider shall be deemed to satisfy the requirements of enumerated environmental laws along with all other applicable Federal environmental and natural resource laws.

The Submitters contend that by enacting the Logging Rider, the United States is failing to effectively enforce its environmental law. The Submitters also emphasize that “[s]uspending citizen enforcement of federal environmental laws constitutes a failure to effectively enforce such laws” and that “[b]y eliminating the most effective (and often only) judicial remedies for violations of environmental laws, the logging rider violates Articles 5(2) and 6(3)(b), (d).” Submission at p.10-11.

The submission focuses on a later-enacted law that impacts on the implementation of an existing environmental law without directly amending or repealing it. The Secretariat considers that the enactment of legislation which specifically alters the operation of pre-existing environmental law in essence becomes a part of the greater body of 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.

Accordingly, the Secretariat cannot find any dereliction of a duty or other “failure” as contemplated by Article 14. Rather, the new law will be read side-by-side with pre-existing environmental law. Where the new law explicitly exempts, modifies or waives provisions of an earlier law, the later-enacted law will prevail<sup>2</sup>.

As mentioned above, the submission focuses on the enactment of a law impacting on the implementation of existing environmental laws, including the “suspension” of citizen enforcement through additional limitations on administrative and judicial review. Yet, the enactment of a law does not, without more, provide facts upon which to charge a failure to enforce. Essentially, the submission is prospective in nature, alleging anticipated but unrealized enforcement consequences. For example, the Submitters allege that “[t]he logging rider precludes them from effectively using administrative appeals and the courts to facilitate or compel compliance with U.S. environmental

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<sup>2</sup> The Secretariat also considers that “failures” to enforce are best construed to apply to the actions or omissions of the agencies and officials charged with enforcing environmental law, and not to the House of Representatives, Senate and President of the United States acting collectively by enacting legislation.

laws. As a result, many environmental violations *will be left* unredressed and a great deal of on-the-ground environmental harm *will occur*.”<sup>3</sup> Submission at p.14.

The absence of specific facts and of a concrete situation or event(s) also complicates the determination of which environmental law the Party is failing to effectively enforce. In the absence of a factual basis supporting the assertion that the United States is failing to effectively enforce, the Secretariat is not provided with sufficient information to allow it to review the submission.<sup>4</sup> NAAEC at Article 14:1a.

### ***Developing a Factual Record***

An alternative but related consideration for declining to consider further this matter stems from examining the potential outcome of the Articles 14 and 15 process in this particular submission--the development of a factual record -- and how that process might promote the goals of NAAEC.

A factual record may assist the public and Parties in assessing the effectiveness of specified enforcement practices. This is especially true, though perhaps not exclusively so, in matters where the facts are inchoate, disputed or where the facts simply have not been put before the public. To the extent possible, the record will center on those facts which appear more or less likely to indicate that an alleged “failure” to enforce took place. Depending on the circumstances, the information may focus on particular actions, omissions or events casting light on the alleged “failure”. The preparation of a factual record may also at times include consideration of the impacts and effects of an alleged failure to enforce where developing such information would assist in determining whether a failure to enforce actually occurred, or would otherwise promote the objectives of the Agreement.<sup>5</sup>

In the present matter, developing facts pertaining directly to the alleged failure to enforce environmental law could do little more than restate the language of the Logging Rider, since presumably the failure is manifest in the words of the legislation. Instead, the development of a factual record in the pending matter would necessarily consider the *actual and potential impacts and effects* of a new law. Essentially, the Secretariat would then record facts relating to the implementation of that new law.

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<sup>3</sup> Despite the “suspension” of administrative and judicial review, the relevant agency, department or official may still vigorously enforce the environmental laws in question.

<sup>4</sup> Had specific facts been alleged, the Secretariat’s determination of this matter might have been the same due to the sufficiency clause contained in the Logging Rider. Sufficiency clauses are not without precedent in appropriations bills. *See e.g.*: Pub. L. 101-121 (103 Stat. 701) at s. 1351(b)(6)(A) and, Pub. L. 100-446 (102 Stat. 1774) at s. 321. The Secretariat is aware of no successful challenges to the constitutionality of the Logging Rider under consideration. To the contrary, courts appear to give full effect to the language of the Rider. *See e.g. Northwest Forest Resources Council v. Glickman*, DC Oregon [No. 95-6244-HO, 9/13/95].

<sup>5</sup> For example, in a submission alleging failure to enforce laws prohibiting the discharge of pollutants to a body of water, assessing the aquatic health of receiving waters or the level of specific contaminants in such waters may shed light on the nature of the discharges under consideration.

That evaluation, however, is an intrinsic function of the legislative process. In this regard, the Secretariat is reluctant to recommend to Council that the Commission for Environmental Cooperation become a secondary forum for legislative debate of one of its Parties. Indeed, the elected representatives of both Houses of Congress, the President of the United States, and an important representation of the mass media have recently considered to some degree the possible impacts of the Logging Rider.<sup>6</sup> The reprise of this debate almost immediately following the enactment of the law would contribute marginally, if at all, to the overall goals of the Agreement.

## VI. CONCLUSION

For the foregoing reasons, the Secretariat will take no further action in connection with submission No. SEM-95-002. 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>7</sup> The Secretariat will consider separately the Submitters' request for the preparation of an Article 13 report on the matter.

Dated this 8th day of December, 1995.

### **Commission for Environmental Cooperation - Secretariat**

per : Victor Lichtinger  
Executive Director

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<sup>6</sup> See e.g.: U.S. Newswire, May 18, 1995, "Green Group Leaders Praise President Clinton's Plan to Veto Anti-Environmental Rescissions Bill"; The New York Times, May 21, 1995, "A Presidential Contract"; International Herald Tribune, May 22, 1995, "Clinton Can Start to Fight"; The Christian Science Monitor, July 11, 1995, "Murrelets Are Just Sounding the Alarm Bell"; The Santa Fe New Mexican, July 25, 1995, "Bill Could Increase Logging 20 Percent"; Greenwire, August 11, 1995, "Salvage Logging: Enviros File Suit Contesting Rider Sale", BNA National Environment Daily, August 14, 1995, "Suit Filed by Coalition against Logging 'Green' Timber under Rescissions Bill Rider".

<sup>7</sup> *Guidelines* at 8.1.