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Submission Pursuant to Article 14 of the North American Agreement on Environmental Cooperation on the U.S. Logging Rider

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Northwest Ecosystem Alliance, Oregon Natural Resources Council,
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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

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INTRODUCTION

This submission, filed pursuant to Article 14 of the North American Agreement on Environmental Cooperation ("NAAEC" or the "Agreement"), raises serious concerns about an egregious failure by the U.S. Government to effectively enforce its environmental laws governing logging on federal lands. Specifically, the U.S. Congress has passed, and the President has signed into law, the Fiscal Year 1995 Supplemental Appropriations, Disaster Assistance and Rescissions Act ("Rescissions Act"), Pub. L. No. 104-19, 109 Stat. 194 (July 27, 1995) (Exhibit 1), which contains a rider suspending enforcement of U.S. environmental laws for a massive logging program on U.S. public lands. 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.

The sponsor of the logging rider in the House of Representatives summed up the stark impact of the rider on enforcement of U.S. environmental statutes:

> This means, for example, that the Secretary cannot be sued for violation of the Clean Water Act, the provisions of the National Forest Management Act concerning species' viability, unsuitability, or consistency with the resource management plans, or the jeopardy or take standards of the Endangered Species Act. Furthermore, as indicated, a [timber] sale can be offered that does not comport with a resource management plan, or interim guidelines, or management directives. ... Finally, a sale can be offered even if it would be barred under any decision, injunction, or order of any federal court.

141 Cong. Rec. H3233 (daily ed. March 14, 1995) (statement of Rep. Taylor). True to its design, the logging rider obstructs public participation and citizen enforcement of U.S. environmental laws. While the undersigned will seek to mitigate the rider's harsh effects, such efforts are sure to be costly, difficult, and less effective than direct citizen enforcement of U.S. environmental laws.

This submission seeks preparation by the Secretariat of a factual record pursuant to Article 15 of the Agreement (or, in the alternative, under Article 13). In addition, this submission raises the prospect that the U.S. Congress is embarking on a race to the bottom by attempting to suspend enforcement, funding, and implementation of a vast array of environmental laws and programs. This development threatens the fundamental underpinnings of the NAAEC -- that environmental protection and economic development may go hand in hand. Before this race to the bottom propels North American countries on a downward spiral, the Secretariat should facilitate a dialogue and thorough analysis of the current move to suspend and defund environmental foenrcement and implementation. The Secretariat has the power to retain experts, facilitate consultations, and sponsor conferences, seminars, symposia, and the like. Article 13. The Secretariat should use these powers to assess, and to ensure that the parties assess, the full implications of short-sighted and widespread circumvention of environmental laws.

I. THE LOGGING RIDER

The logging rider to the Rescissions Act is a far-reaching assault on U.S. public forests and environmental laws. To promote a cheap supply of timber from federal lands for timber industries, 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.

It is important to recognize that the logging rider did not emerge as free-standing legislation. If it had, it would have been referred to congressional committees with jurisdiction to hold hearings, analyses, committee votes, and public reports. It also would have been more visible to the public, U.S. trading partners, and Members of Congress.

Instead, the logging rider was tacked onto a popular budget-cutting and disaster-assistance measure that few Members of Congress wanted to vote against. The rider was not the subject of full congressional scrutiny, which normally includes public hearings, committee review, and committee and floor votes on substantive legislation. Even the committees with jurisdiction over forestry and forest reserves were denied the opportunity to review fully and comment on the rider in violation of congressional rules. See House Rules X.1 (a)(15), (1)(2); Senate Rules XXV(1)(a)(1)(10). This circumvention of ordinary rules of congressional process stifled fully informed consideration of the important policy and ecological questions raised by the rider. Folding the rider into a popular fast-moving piece of legislation is the type of political logrolling that prevents a publicly accountable vote and forces Members of Congress to accept undesirable legislation as part of a larger package.

The logging rider effectively suspends enforcement of environmental laws for two logging programs: (1) logging in the old-growth forests 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. For both logging programs, the rider provides that whatever environmental analysis is produced and whatever procedures are followed by federal agencies for such timber sales "shall be deemed to satisfy the requirements" of several specifically listed and "[a]ll other applicable Federal environmental and natural resource laws." Rescissions Act, § 2001(i)(1)-(7) & (8). Accordingly, the logging rider provides that such timber sales are specifically not subject to challenge for violations of such laws. Id. § 2001(f)(4).

As Senator Slade Gorton, the principal sponsor of the rider in the Senate, explained, the rider contains "what is commonly known as 'sufficiency language' -- language insulating timber sales from frivolous legal challenges filed under various environmental statutes." 141 Cong. Rec. at S10,463 (daily ed., July 21, 1995). While Senator Gorton referred to "frivolous" legal challenges, sufficiency provisions are not so discriminating, but instead close the door to all legal actions to enforce the specified environmental laws.

With respect to the old-growth forests, the logging rider directs the Secretary of Agriculture expeditiously to prepare, offer, and award timber contracts on these forests. It then provides that any such timber sales are deemed to satisfy all federal environmental laws, Rescissions Act, § 2001(i), and specifically are not subject to administrative appeals or challenge for violations of such laws. Id. §§ 2001(e) & (f)(4).

The rider's definition of "salvage timber sale" is incredibly broad encompassing any timber sale:

> for which an important reason for entry includes the removal of disease- or insect-infested trees, dead, damaged, or down trees, or trees affected by fire or imminently susceptible to fire or insect attack. Such term also includes the removal of associated trees or trees lacking the characteristics of a healthy and viable ecosystem for the purpose of ecosystem improvement or rehabilitation, except that any such sale must include an identifiable salvage component of trees described in the first sentence.

Rescissions Act, § 2001(a)(3).

The rider directs the Secretaries of Agriculture and Interior to increase the volume of salvage timber sales "to the maximum extent feasible" between July 27, 1995, when the rider became law, to December 31, 1996, when it expires. Under the rider, the Secretaries need only prepare one document combining an environmental assessment under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(E), and a biological evaluation under the Endangered Species Act, 16 U.S.C. § 1536(a)(2). Rescissions Act, § 2001(c)(1)(A).

As with Option 9 timber sales, the rider provides that salvage timber sales "shall not be subject to administrative review," Rescissions Act, § 2001(e), and that the sales "shall be deemed to satisfy all federal environmental and natural resource laws." Id. § 2001(i). No claims alleging violations of federal environmental laws may be heard, id., § 2001(f)(4) & (i), and the relief and procedures for other, limited claims that may be brought are sharply curtailed. Id. § 2001(f).

The logging rider leaves federal environmental laws in place. It simply eviscerates effective enforcement of those laws. In addition, it eliminates opportunities for the public to participate in and comment on the sales and their environmental effects. Through administrative appeals and court challenges, the public can ameliorate harmful environmental effects of specific timber sales and ensure compliance with environmental laws. The rider effectively suspends these avenues for public participation.[1/]

[1/] The rider even seeks to foreclose any proceedings under the NAAEC. Thus, it deems the timber sales to satisfy any "executive agreement, convention, treaty, and international agreement...." Id., § 2001(i)(7). Although Senator Hatfield and Representative Taylor stated that this provision was added to foreclose any claim that the rider violated the North American Free Trade Agreement ("NAFTA"), 141 Cong. Rec. H6638 (daily ed. June 29, 1995); 141 Cong. Rec. S10,465 (daily ed. July 21, 1995), they were most likely referring to this submission and thus to the NAAEC, not NAFTA. The United States cannot selectively exempt itself from the NAAEC (or from NAFTA for that matter). The NAAEC entered into force, i.e., became a binding international obligation, on January 1, 1994. NAAEC Article 51. The United States, like any other party, may withdraw after providing six months notice, id. Article 54, but there is no provision for the United States to opt out of the Agreement on a case-by-case basis.

II. THE ROLE OF CITIZEN ENFORCEMENT IN ENSURING LOGGING ON FEDERAL LANDS COMPLIES WITH FEDERAL ENVIRONMENTAL LAWS

One of the cornerstones of our democracy is that government agencies are not above the law. As Chief Justice Marshall stated so eloquently in Marbury v. Madison, the right of individuals to challenge government violations of the law is "the very essence of civil liberty." It is inimical to both this fundamental tenet of democracy and to the design and effectiveness of our environmental laws to suspend citizen enforcement of them.

. Administrative Appeals Enable Citizens To Enforce Environmental Laws.

The administrative appeal process resolves disputes, modifies environmentally unsound decisions, and shapes future of land management actions without litigation. Administrative appeals are not a new idea; the United States Forest Service has conducted administrative appeals since 1906. As a Forest Service employee observed:

> What have we learned from appeals? The biggest lesson is that we don't always follow our own rules. We have been inconsistent in how we apply them, seemingly doing what is right and proper when it is convenient and doing something else when it is not. We haven't always given people notice of proposed actions so they view some actions as end runs to avoid involving them in planning. Our documentation is often incomplete. Our written decisions are often unclear, and our writing too often fuzzy and obtuse. We've relied on after-the-fact explanations to satisfy NEPA obligations instead of doing NEPA correctly in the first place. Often, Deciding Officers make decisions that are reserved to Reviewing Officers. Lastly, and as GAO [General Accounting Office] reported, we seldom meet required timelines. In summary, our record hasn't been good.

Larry Hill, Staff Assistant to the Deputy Chief, National Forest System, USDA Forest Service, A Glimpse of the USDA Forest Service Administrative Appeals Process, Cong. Research Serv. Symposium on Appeals, at 6-7 (Nov. 17, 1989).

Administrative appeals provide the public an opportunity for input into timber sale decisions and give the agency a chance to correct its own mistakes. In a review of 100 timber appeals, the Forest Service found that it lost on review 90% of the time because of failure to comply with NEPA. Id. at 7. And yet the Forest Service believed that "[l]egislative attempts to modify agency NEPA, planning, or appeal procedures simply puts attention in the wrong place and postpones the inevitable." Id. at 4.

In fact, in 1992, Congress passed the Craig/DeConcini Forest Service appeals amendment to the Fiscal Year 1993 Interior Appropriations Bill. Section 322 of the 1993 Interior Appropriations Act, Pub. L. No. 102-381, 106 Stat. 1419 (1992). This amendment statutorily mandates the Forest Service's administrative appeals process. As Senator Leahy said in support of the Craig/DeConcini amendment: "we have now preserved an appeals process that gives the citizens of this county an opportunity to participate in the management of their National Forests." 138 Cong. Rec. S15848 (1992) (statement of Sen. Leahy).

B. Citizen Suits Provide Effective Enforcement of Environmental Laws Against the Government.

Private enforcement actions are the most effective, indeed, often the only, means of enforcing environmental laws against the federal agencies managing public forests. By way of example, litigation brought by several environmental organizations, including several of the undersigned, uncovered what a federal judge called "a remarkable series of violations of the environmental laws" in the Forest Service's logging activities in the threatened spotted owl's habitat. Seattle Audubon Society v. Evans, 771 F. Supp. 1081 (W.D. Wash.), aff'd, 952 F.2d 297 (9th Cir. 1991).

The northern spotted owl lives in the old-growth forests of the Pacific Northwest. As explained by one of the courts addressing illegalities in management of those forests:

> Why all the fuss about the status and welfare of this particular bird? The numbers, distribution, and welfare of spotted owls are widely believed to be inextricably tied to mature and old-growth forests.

771 F. Supp. at 1088 (quoting Interagency Scientific Committee, A Conservation Strategy for the Northern Spotted Owl 7 (1990)). Similarly, "[t]he owl is considered an 'indicator species' for old-growth forest, meaning that the presence and number of northern spotted owls give an accurate indication of the health of the old-growth forest and the presence of other old-growth dependent species. As go the owls, naturalists say, so go the other species." Portland Audubon Soc'y v. Lujan, 884 F.2d 1233, 1235 (9th Cir. 1989), cert. denied, 494 U.S. 1026 (1990).

Prior to citizen enforcement of U.S. environmental laws, the Pacific Northwest forests were managed with little regard for the owl, the health of the forest ecosystem, and the law. Federal agencies sought to ensure logging of the old-growth forests at record levels throughout the 1980s at great, indeed tragic, costs to this treasured ecosystem.

- A citizen suit compelled the U.S. Fish and Wildlife Service to list the northern spotted owl under the Endangered Species Act with a federal judge ruling that:

  > [T]he Service disregarded all the expert opinion on population viability, including that of its own expert, that the owl is facing extinction, and instead merely asserted its expertise in support of its conclusions. The Service has failed to provide its own or other expert analysis supporting its conclusions. . . . Accordingly, the [FWS'] decision not to list at this time the northern spotted owl as endangered or threatened under the Endangered Species Act was arbitrary and capricious and contrary to law.

  Northern Spotted Owl v. Hodel, 716 F. Supp. 479, 483 (W.D. Wash. 1988).

- Litigation forced the Fish and Wildlife Service to designate critical habitat for the northern spotted owl under the Endangered Species Act. Again, a federal district court harshly criticized the agency's failure to act:

> The federal defendants fail to direct this Court to any portion of the administrative record which adequately explains or justifies the decision not to designate critical habitat for the northern spotted owl. . . . Whatever the precise contours of the Service's obligations under the ESA, clearly the law does not approve such conduct.

Northern Spotted Owl v. Lujan, 758 F. Supp. 621, 627-28 (W.D. Wash. 1991).

- Another citizen suit compelled the Bureau of Land Management to consult with the Fish and Wildlife Service on the effects of logging under its management guidelines on the northern spotted owl, as required by the Endangered Species Act. Lane County Audubon Society v. Jamison, 958 F.2d 290, 294 (9th Cir. 1992).

- When the Bureau of Land Management refused to analyze new, significant information about the risk of extinction facing the owl, a district court held that the agency acted arbitrarily, capriciously, and in violation of the National Environmental Policy Act:

> It is the duty of the BLM [under NEPA] to identify, evaluate and address the new information, allow public comment, and formulate its plans accordingly. The only credible conclusion to be reached in this controversy, regardless of which "responsible experts" the court chooses to believe, is that NEPA requires the public to be involved, and the BLM has not followed procedures to allow the public to be involved.

Portland Audubon Society v. Lujan, 795 F. Supp. 1489, 1502 (D.Or. 1992), aff'd, 998 F.2d 705 (9th Cir. 1993).

- Another federal judge ordered the Forest Service to adhere to the public process for revising land management plans prescribed in the National Forest Management Act. See 36 C.F.R. § 210.6(a)(1),(2). Seattle Audubon Society v. Robertson, No. C89-160WD, 1991 WL 180099 (W.D. Wash. Mar. 7, 1991). Noting express directions of the Secretaries of Interior and Agriculture to abandon efforts to prepare an environmental impact statement and considerable political pressure on agency scientists to create a plan which had a minimal impact on logging but little probability of protecting the owls, the district judge further observed:

> More is involved here than a simple failure by an agency to comply with its governing statute. The most recent violation of NFMA exemplifies a deliberate and systematic refusal by the Forest Service and the FWS to comply with the laws protecting wildlife. This is not the doing of the scientists, foresters, rangers, and others at the working levels of these agencies. It reflects decisions made by higher authorities in the executive branch of government.

Seattle Audubon Soc'y v. Evans, 771 F. Supp. 1081, 1090 (W.D.Wash.), aff'd, 952 F.2d 297 (9th Cir. 1991).

- Another citizen suit uncovered that the Forest Service's environmental impact statement on its 1992 timber management plan still failed to address "[a] chief concern of scientists of all persuasions . . . whether the owl can survive the near-term loss of another half-million acres of its habitat." Seattle Audubon Soc'y v. Moseley, 798 F. Supp. 1473, 1478 (W.D. Wash. 1992), aff'd, 998 F.2d 699 (9th Cir. 1993). The Court also held that the Forest Service had failed to assess whether its plan would maintain viable populations of other species that depend on old-growth forests:

> The FEIS has thus mentioned what appears to be a major consequence of the plan -- jeopardy to other species that live in the old-growth forests -- without explaining the magnitude of the risk or attempting to justify a potential abandonment of conservation duties imposed by law. An EIS devoid of this information does not meet the requirements of NEPA.

Id. at 1483.

This series of enforcement actions ultimately forced the federal agencies to devise a plan that took into account the needs of the northern spotted owls, salmon, and other old-growth dependent species while allowing some logging in old-growth forests. That plan is known as Option 9 because it was the ninth of ten alternatives considered by the government in its planning process. Although many of the undersigned organizations challenged that plan, as did the timber industry (for different reasons), a U.S. district court upheld the plan. The court noted that "the order now entered, if upheld on appeal, will mark the first time in several years that the owl-habitat forests will be managed by the responsible agencies under a plan found lawful by the courts." Seattle Audubon Society v. Lyons, 871 F.Supp. 1291, 1300 (W.D. Wash. 1994), appeal pending, 9th Cir. Nos. 95-35052, 95-35214, 95-35215.

C. Citizen Enforcement Is Critical To Ensuring Enforcement Of Option 9.

The Clinton Administration adopted Option 9 to allow some logging to go forward in the old-growth forests, subject to a set of environmental safeguards for streams, rivers, and salmon. Option 9 also set aside reserves of old-growth forests to be safe harbors for old-growth dependent species like the northern spotted owl. Option 9 subjects all logging to a series of environmental analyses, starting with a large-scale snapshot of ecosystem conditions in a watershed analysis, and ending with site-specific consideration of environmental impacts for particular timber sales, road building, and other activities.

In a legal challenge to Option 9, environmental groups argued that Option 9 relied too heavily on untested environmental planning processes and future monitoring. Although the district court upheld the plan, it cautioned that:

> [A]ny more logging sales than the plan contemplates would probably violate the laws. Whether the plan and its implementation will remain legal will depend on future events and conditions. . . . Careful monitoring will be needed to assure that the plan, as implemented, maintains owl viability. New information may require that timber sales be ended or curtailed. . . . The effectiveness of the [Aquatic Conservation Strategy] is still subject to debate among scientists. If the plan as implemented is to remain lawful the monitoring, watershed analysis, and mitigating steps called for by [Option 9] will have to be faithfully carried out, and adjustments made if necessary.

Seattle Audubon Society v. Lyons, 871 F. Supp. 1291, 1300, 1321-22 (W.D.Wash. 1994). In addition, the court observed that:

> The plan includes monitoring for implementation, verification as to results, and validation as to the underlying assumptions. . . . As written it is legally sufficient. It remains, of course, to be carried out. Monitoring is central to the plan's validity. If it is not funded, or not done for any reason, the plan will have to be reconsidered.

Id. at 1324.

The court's conclusion is significant because rather than impose prescriptions and limits on all logging, Option 9 leaves some of the most critical decisions, particularly with respect to protecting aquatic species, to future assessments and decisionmaking processes. Without the kind of active citizen oversight that led to the production of Option 9, the monitoring and on-going assessment that is essential to the plan's effectiveness is unlikely to take place.

D. Citizens Suits Are Vital To Ensuring Salvage Sales Comply With U.S. Environmental Laws.

Citizen enforcement is equally important for salvage sales. Prominent scientists believe that "salvage logging and the accompanying roadbuilding is one of the most damaging management practices that could be proposed for burned areas." Letter to President Clinton from G. Wayne Minshall, et al. (Sept. 19, 1994) (Exhibit 2).

First, salvage logging and its associated sediment impacts often degrade watersheds so that they can no longer sustain viable populations of salmon and bull trout, both of which are in dire straits in the Pacific Northwest and Upper Columbia River Basin.

Second, salvage logging is occurring in roadless areas which provide the last undisturbed habitat for many forest species, including grizzly bears, gray wolves, lynx, and elk. These areas are often off-limits to green tree logging and associated road-building, although this is not the case under the logging rider. Salvage logging also removes downed trees (or snags) that are home to numerous birds and forest dwellers, such as woodpeckers and bats.

Third, low-burn fires cause many forest areas to be in better ecological health than they have been since European settlement. The Forest Service's own environmental impact statements for two recent fire sales have reached this conclusion.

The Forest Service found that the Copper Butte fire on the Colville National Forest in Washington provided ecological benefits:

> The Copper Butte fire has done an excellent job of providing sites for the establishment of young, seral stands of trees. In the process, the fire often killed stands of overcrowded trees, over mature trees, or diseased trees. ... Overall, the fire had a positive effect on forest health and we can anticipate large areas regenerated to young healthy trees that can be managed (or not) to meet a variety of resource objectives.

Copper Butte Fire Salvage Sale Final Environmental Impact Statement at III-17. Indeed, the Forest Service stated that "[f]rom a silvicultural standpoint, salvage of dead trees does little to improve stand health and vigor." Id.

In the Boise River salvage sale, the largest timber sale ever offered on the Boise National Forest in Idaho, over half of the Boise River sale area -- about 40,000 acres -- burned at low intensity during the 1994 wildfires. The Forest Service found that:

> Many of the lightly burned landscapes are probably the closest they have been to their historic range of variability [in] the past 100 years.

Boise River Wildfire Recovery Project Final Environmental Impact Statement at III-57. In areas of low burn,

> there is little change to the important watershed conditions and associated resources. Oftentimes, there is a benefit to soil nutrient recycling, increased riparian vegetative growth, and reduction in risk from future catastrophic wildfires.

Id. at III-29.

As with Option 9, the courts have recognized the importance of judicial oversight of salvage logging. Indeed, in denying a request for an injunction with respect to the Boise River salvage sale, a district court expressly reserved jurisdiction over the case to ensure that the "specific mitigation measures, Project prescriptions, and Timber Sale Contract requirements will be strictly monitored to ensure the Project's credibility and to exact strict compliance from the timber sale purchasers." Idaho Conservation League, et al. v. Forest Service, No. CV 95-0257-S-EJL (D. Idaho July 21, 1995).

The potential for significant adverse environmental effects from salvage logging is heightened by the sheer magnitude of the rider's salvage program and by the broad definition of "salvage timber sales" to include many green or live tree timber sales.

By effectively cutting off citizen enforcement of federal environmental statutes, federal agencies are elevated above the law. President Clinton indicated his satisfaction with the final version of the rider because it permits the agencies to follow the law. This "largess" of Congress provides little solace to those who have witnessed "a remarkable series of violations of the environmental laws" by these same agencies. Moreover, the logging rider does not permit compliance with many administrative and judicial review provisions, thereby obstructing citizens' ability to have input in shaping timber sales and to hold the government accountable to the law.

III. THE LOGGING RIDER CONSTITUTES A FAILURE TO EFFECTIVELY ENFORCE U.S. ENVIRONMENTAL LAWS WITH RESPECT TO LOGGING.

During the negotiations leading to NAFTA, the public expressed grave concerns that a country might weaken or deliberately fail to enforce its environmental laws in order to lure foreign investment and otherwise obtain an unfair advantage. Many feared that NAFTA would fuel a race to the bottom, creating incentives for the three NAFTA countries to lower their environmental standards to increase their competitive position within North America.

To address concerns that NAFTA would fuel a race to the bottom, the three NAFTA countries negotiated the NAAEC to further "enhance compliance with, and enforcement of, environmental laws and regulations." NAAEC Article 1(g). Under the NAAEC, each country "shall effectively enforce its environmental laws and regulations." Id., Article 5(1).

To ensure that countries abide by this obligation, citizens may file submissions asserting that a party is failing to effectively enforce its environment laws. NAAEC, Article 14. The Secretariat has the power to investigate such matters and to develop a factual record. Id., Article 15. This submission warrants an investigation because it raises (1) a failure to effectively enforce (2) U.S. environmental law.

A. Suspending Citizen and Judicial Enforcement Is A Failure to Effectively Enforce.

The logging rider eliminates the most effective (and often only) mechanism for enforcing U.S. environmental statutes against federal agencies managing public forests. The spotted owl controversy reveals the prolonged recalcitrance of these agencies to abide by such laws until the courts ordered them to do so. Suspending citizen enforcement of federal environmental laws constitutes a failure to effectively enforce such laws.

The NAAEC itself elaborates on what constitutes effective enforcement of environmental laws. Thus, it obligates countries:

> To "ensure that judicial, quasi-judicial or administrative enforcement proceedings are available under its law to sanction or remedy violations of its environmental laws and regulations," Article 5(2), and

> To "ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial or judicial proceedings for the enforcement of the Party's environmental laws and regulations." Article 6(2).

More specifically, interested persons must have the ability "to seek . . . orders to mitigate the consequences of violations of its [a Party's] environmental laws and regulations" and "to seek injunctions where a person suffers, or may suffer, loss, damage or injury as a result of conduct by another person under that Party's jurisdiction contrary to that Party's environmental laws and regulations . . .." Article 6(3)(b) and (d).

In addition, NAAEC Article 6(1) provides that "[e]ach Party shall ensure that interested persons may request the Party's competent authorities to investigate alleged violations of its environmental laws and regulations and shall give such requests due consideration in accordance with law." Under the NAAEC, the Parties must also preserve the right "to request competent authorities to take appropriate action to enforce that Party's environmental laws and regulations in order to protect the environment or to avoid environmental harm." Article 6(3)(c); see also Principle 10 of the Rio Declaration on Environment and Development ("Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided").

The undersigned have legally recognized interests under U.S. law to protect endangered species and natural areas from which their members obtain aesthetic, recreational, and avocational benefit. Sierra Club v. Morton, 405 U.S. 727 (1972). To protect those interests, they have the right under U.S. law to file administrative appeals seeking changes to timber sales to comply with environmental laws and to challenge timber sales in federal court for violating federal environmental laws.

Administrative appeals enable the public to request modifications in timber sales to comply with U.S. environmental laws. The logging rider short-circuits this avenue of appeal in violation of NAAEC Article 6(1) and (3)(c).

Litigation provides those harmed by environmentally destructive logging "to seek injunctions," "to seek . . . orders mitigating the consequences," and to otherwise "remedy violations of [a country's] environmental laws and regulations." By eliminating the most effective (and often only) judicial remedies for violations of environmental laws, the logging rider violates NAAEC Articles 5(2) and 6(3)(b), (d).

B. The Rider Targets Enforcement of Environmental Laws.

While the NAAEC specifies that the term "environmental law" excludes laws whose primary purpose is to manage the commercial harvest of natural resources, Article 45(2)(b), that exclusion is inapplicable to the core purpose of the rider's sufficiency provision. The NAAEC applies to any provision of law, "the primary purpose of which is the protection of the environment," including "wild flora or fauna, endangered species, their habitat, and specially protected natural areas." Article 45(2)(a) & (iii). The primary purpose is determined by reference to each statutory or regulatory provision, rather than to the law as a whole. Article 45(2)(c).

The principal target of the logging rider's sufficiency provision is environmental mandates, not other laws governing commercial harvest. While some of the federal statutes named in the rider's sufficiency language have provisions governing the management of commercial harvest of natural resources for reasons other than protecting the environment, those provisions are not the primary focus of the logging rider, nor are they the focus of this submission.

Indeed, the rider's sufficiency provision names the National Environmental Policy Act and the Endangered Species Act, both of which have environmental protection as their sole purpose. Rescissions Act, § 2001(i). Moreover, the specific legal controversies targeted by the rider imposed environmental safeguards on logging in old-growth habitat in order to protect threatened species, namely the northern spotted owl and the marbled murrelet. Id. §§ 2001(d) & (k).

Not only are many of the listed statutes designed exclusively to protect the environment, even those dealing with various aspects of logging have specific provisions mandating protection of wildlife viability, water quality, and soil productivity. See, e.g., National Forest Management Act, 16 U.S.C. § 1604(g)(3)(E)(i), (iii); 36 C.F.R. §§ 219.19, 219.27(a). The rider itself acknowledges that it is designed to and, in fact, does reach environmental laws in its catch-all suspension of enforcement of "[a]ll other applicable Federal environmental" laws. Rescissions Act, § 2001(i)(8).

IV. THIS SUBMISSION RAISES MATTERS WHOSE FURTHER STUDY WOULD ADVANCE THE GOALS OF THE NAAEC.

This submission raises important issues whose further study would advance the goals of the NAAEC.

A. Failure To Effectively Enforce Environmental Laws and Denial of Private Remedies.

Of course, by cutting off effective citizen and judicial enforcement of U.S. environmental laws, the logging rider blatantly violates the core principles of the NAAEC. In this particular context, suspending enforcement is synonymous with eviscerating important private remedies, in violation of another overriding NAAEC objective.

B. Transparency And Fair Process.

The rider collides with the transparency and fair process principles that permeate the entire Agreement. One of the Agreement's objectives is to "promote transparency and public participation in the development of environmental laws, regulations and policies." Article 1(h). This is in keeping with Principle 10 of the Rio Declaration on Environment and Development, which provides: "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level."

To achieve this objective, the NAAEC requires the Parties to publish advance notice of proposed laws of general application and to afford interested persons a reasonable opportunity to comment on them. Article 4(2). For more specific government actions, the Parties must ensure that interested persons have access to "fair, open and equitable" administrative and judicial enforcement proceedings at which they may present information, support their positions, and seek review and correction of final decisions, in accordance with the country's law. Article 5(2), 6(1), 7(1), (1)(c), (3), (4).

In contravention of these principles, timber sales may be developed under the logging rider without administrative appeal rights. Eliminating such public input denies the agencies information that may be useful in shaping the project and may be essential to preventing long-term environmental harm.

Not only does the rider clash with the openness and fairness principles embodied in the NAAEC, but the process by which this rider became law also contravenes those principles. Incorporating the logging rider into the popular rescissions legislation denied this measure a full and fair hearing on its own merits, and ensured its passage even though it is doubtful that Congress would have adopted it as stand-alone legislation. Neither the public nor our trading partners had notice that a significant environmental (or more correctly, an anti-environmental) initiative was buried in that bill. No public hearings were held on the rider, and the final vote in the House took place before Members (or the public) had access to an agreement on the particular reach of the rider. 141 Cong. Rec. H6637-38 (daily ed., June 29, 1995) (Rep. DeFazio). The NAAEC recognizes the importance of open and fair processes to adoption of strong environmental protection. The logging rider is proof positive of that link.

C. Environmental Assessments.

The NAAEC requires the countries to "assess, as appropriate, environmental impacts." Article 2(e). The logging rider severely truncates the environmental assessment process for timber sales.

D. Avoidance Of Trade Distortions And Economically Inefficient Environmental Measures.

The NAAEC seeks to "avoid creating trade distortions" and to "promote economically efficient and effective environmental measures." Article 1(e), (i). The logging rider violates these principles because it mandates a massive salvage logging program, regardless of economic and environmental costs. Indeed, it provides that "[s]alvage timber sales undertaken pursuant to this section shall not be precluded because the costs of such activities are likely to exceed the revenues derived from such activities." Rescissions Act, § 2001(c)(6).

Timber sales, particularly salvage timber sales, often are loss leaders. Particularly, outside the old-growth forests, below-cost sales are commonplace. The costs of preparing and administering the sales, environmental documentation, reforestation, and payments made to counties from the proceeds of the sales often exceed the sale revenues. Especially when environmental costs of unsound logging are considered, the moneys generated by timber sales are inadequate to cover the taxpayers' costs of the sales. This phenomenon has been exacerbated in recent months; for many recent timber sales east of the Cascade crest, including portions of the Copper Butte Fire Salvage, the Boise Fire Sale, and green tree sales on the Okanogan and Idaho Panhandle National Forests, there have been no original bidders and the asking price has been greatly reduced to attract bids in second offerings. Seattle Times, Aug. 17, 1995.

Not only will the logging rider lead to economically inefficient logging, but it may also provide a subsidy to timber companies logging on public lands and otherwise distort softwood lumber trade. For over a decade, the United States and Canada have been embroiled in heated disputes over Canadian subsidies of softwood lumber products through below-market stumpage rates for timber from provincial lands. The two countries are engaged in consultations to try to resolve this longstanding dispute. The logging rider threatens to upset those consultations. By increasing the supply of timber from U.S. forests, it will drive down the price of timber, which will, in turn, reduce the price commanded by Canadian timber exported to the United States. See Congressional Research Service Memorandum on Stumpage Price Change Associated with Changing Forest Service Timber Salvage Sales (March 7, 1995) (Exhibit 3) (projecting 13-16% price decline for softwood lumber under House version of logging rider). In this way, the logging rider threatens to upset consultations that may resolve a trade controversy that has plagued the United States and Canada for years. By pursuing this submission, the Secretariat may be able to play a useful role in forestalling further trade distortions and controversies in this area.

E. Diminishing Environmental Protection.

By eliminating effective enforcement of environmental standards, the logging rider has the effect of lowering environmental protection. It does this not by actually changing the controlling environmental standards, but by essentially rendering them unenforceable.

In this respect, the logging rider is distinct from a change in the underlying environmental standards. The U.S. Congress did not make a reasoned decision that the normative environmental standards should be changed. Thus, it did not change the level of environmental protection afforded under its laws, something it has the right to do. NAAEC, Article 3. If Congress had squarely addressed the environmental standards, the public and U.S. trading partners could have provided their views and held elected officials accountable for their decisions. Instead, Congress sidestepped full, public deliberations about the level of environmental protection afforded under U.S. law, while ensuring that existing environmental protections would be almost impossible to attain.[1/]

In sum, this submission raises important concerns that fall squarely within the purposes and safeguards of the NAAEC. Further study by the Secretariat would further the purposes of the Agreement.

V. THE CONDITIONS FOR ARTICLE 14 SUBMISSIONS ARE MET.

Article 14 of the NAAEC sets forth several conditions that must be met for the Secretariat to consider and request a response to a submission. These conditions are met here.

A. Harm to the Submitters

The U.S. submitters, who are identified on the cover page, have utilized administrative and judicial proceedings to ensure adequate enforcement of environmental laws applying to logging on federal forests. The logging rider precludes them from effectively using administrative appeals and the courts to facilitate or compel compliance with U.S. environmental laws. As a result, many environmental violations will be left unredressed and a great deal of on-the-ground environmental harm will occur. Members of the undersigned U.S. organizations are harmed because they use public lands and resources for recreation, aesthetic enjoyment, and their livelihoods and avocations, particularly in the case of the commercial fishing groups joining the submission. The organizations themselves are harmed because they promote the interests of their members and achieve their organizational missions through the administrative and judicial avenues foreclosed by the logging rider. See NAAEC, Article 14(2)(a). The Mexican and Canadian

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[2/] The logging rider offends the spirit of the NAFTA admonition to avoid waiving or derograting from environmental measures to attract or retain investment. NAFTA, Article 1114. However, the undersigned do not contend that the rider violates the letter of these commands because the sponsors of the rider sought the measure to protect domestic jobs, rather than to lure foreign investment. Moreover, while the logging rider contravenes the NAAEC direction to each country to "ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations," Article 3, this submission does not involve a change in the level of environmental protection, as discussed in the text.

submitters have an interest in ensuring that the U.S. does not suspend enforcement of its environmental laws and thereby initiate a race to the bottom.

B. Communication to U.S. Authorities

Many of the undersigned organizations have communicated their views to Members of Congress, the President, the Vice President, the U.S. Representative to the CEC, and the agencies that manage federal forest lands, among others. See NAAEC, Article 14(1)(e). A copy of a letter sent to the above-named Executive Branch officials urging defeat of the rider is attached (Exhibit 4). Carol Browner, U.S. Representative to the North American Council on Environmental Cooperation, indicated that she "fully supports the CEC serving as a forum for these issues . . ." and that she believes "the CEC is an important tool to use in pursuing [these] concerns. . .." Letter from William Pistor, NAFTA Coordinator (June 23, 1995) (Exhibit 5).

C. No Private Remedies Need Be Pursued

Since the logging rider eliminates critical private remedies for salvage timber sales and Option 9 timber sales, the undersigned can no longer pursue those remedies. NAAEC, Article 14(2)(c). While the undersigned will continue to pursue remedies that remain, the focus of this submission is the vast range of remedies eliminated by the rider.

The precise reach of another provision of the rider mandating certain other logging of old-growth forests is in litigation, and thus is not being pursued in this submission. See Pilchuck Audubon Society v. Glickman, No. 95-1234 (W.D.Wash. filed Aug. 15, 1995); NFRC v. Glickman, No. 95-6244 (D.Ore. filed Aug. 8, 1995). The extent to which that provision cuts off citizen enforcement of environmental laws depends on the outcome of the pending litigation.

D. This Submission is Aimed at Promoting Enforcement.

The undersigned seek to promote effective enforcement of U.S. environmental laws related to logging on public lands. This submission is aimed at holding the government accountable for its actions; it is not an attempt to harass industry. NAAEC, Article 14(1)(d).

CONCLUSION

This submission seeks preparation of a factual record on the logging rider's suspension of effective enforcement of environmental laws. The submitters also ask the Secretariat to facilitate a dialogue and thorough analysis of the current move to suspend and defund environmental enforcement and implementation.

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