

Secretariat of the Commission for Environmental Cooperation

Overall Plan to Develop a Factual Record

Submission I.D.: SEM-99-002

Submitter(s): Alliance for the Wild Rockies
Center for International Environmental Law
Centro de Derecho Ambiental del Noreste de Mexico
Centro Mexicano de Derecho Ambiental
Friends of the Earth
Instituto de Derecho Ambiental
Pacific Environment and Resources Center
Sierra Club of Canada
West Coast Environmental Law Association

Party: United States

Date of this plan: 14 December 2001

Background

On 19 November 2000, the Submitters identified above presented to the Secretariat of the Commission for Environmental Cooperation (CEC) a submission in accordance with Article 14 of the North American Agreement on Environmental Cooperation (NAAEC). The Submitters assert that the United States is failing to effectively enforce section 703 of the Migratory Bird Treaty Act (MBTA or the “Act”), which prohibits the unpermitted killing or “taking” of migratory birds and destruction of their nests or eggs, against loggers, logging companies, and logging contractors. The Submitters claim that logging operations consistently result in violations of the Act, killing an enormous number of birds or destroying their nests and eggs.¹ The Submitters assert that despite being aware of these violations, the United States never prosecutes logging operations that violate the Act.² Among other information provided to

¹ Submission at 1-4, Appendix C.

² Submission at 4.

support the submission, the Submitters refer to two instances in California in which the United States failed to prosecute violations of section 703 as examples of the United States' alleged "complete[] abdicat[ion of] its enforcement obligations" under the Act as to logging operations.³

On 16 November 2001, the Council decided unanimously to instruct the Secretariat to develop 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 NAAEC (Guidelines)*, "with respect to the two specific cases identified in SEM-99-002. The first case involves the logging of several hundred trees by a private landowner during the nesting season of Great Blue Herons allegedly resulting in hundreds of crushed eggs. The second case involves a logging company's alleged intentional burning of four trees on private land, including one allegedly nested by a pair of ospreys."⁴ The Council directed the Secretariat, in developing the factual record, to consider whether the Party concerned "is failing to effectively enforce its environmental law" since the entry into force of the NAAEC on 1 January 1994. In considering such an alleged failure to effectively enforce, relevant facts that existed prior to 1 January 1994, may be included in the factual record.

Under Article 15(4) of the NAAEC, in developing a factual record, "the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information: (a) that is publicly available; (b) submitted by interested non-governmental organizations or persons; (c) submitted by the Joint Public Advisory Committee; or (d) developed by the Secretariat or by independent experts."

Overall Scope of the Fact Finding:

The Submitters, after asserting that the United States has a policy of never taking enforcement or investigative action with respect to logging operations that result in the "taking" of non-endangered, non-threatened migratory birds and/or their nests, describe the two incidents referenced in Council Resolution 01-10 as follows:

FWS maintains its no enforcement policy even with respect to well documented and publicized killings of migratory birds due to logging. In one notable case, a private landowner logged hundreds of trees during the nesting season of Great Blue herons. The landowner destroyed the entire rookery, leaving hundreds of eggs and nests lying on the ground, crushed by logging equipment and falling trees. Despite the public outrage and media attention this incident generated, FWS refused to bring an action under the MBTA against the landowner. In another recent case, FWS refused to prosecute a logging company that purposely burned four identified osprey trees on privately-held land, one of which was known to be nested by a pair of ospreys.⁵

³ Submission at 1, 6.

⁴ Council Resolution 01-10.

⁵ Submission at 6 (references omitted).

The United States' response makes no reference to these two incidents.

To prepare the factual record, the Secretariat will gather and develop information relevant to facts regarding:

- (i) the alleged violations of section 703 of the MBTA that are referenced in Council Resolution 01-10;
- (ii) the United States' enforcement of section 703 of the MBTA in connection with the two cases referenced in Council Resolution 01-10; and
- (iii) whether the United States is failing to effectively enforce section 703 of the MBTA in the context of the two cases referenced in Council Resolution 01-10.

Overall Plan:

Consistent with Council Resolution 01-10, execution of the overall plan will begin no sooner than 14 January 2002. All other dates are best estimates. The overall plan is as follows:

- Through public notices or direct requests for information, the Secretariat will invite the Submitters; JPAC; community members; the regulated community; and local, provincial and federal government officials to submit information relevant to the scope of fact-finding outlined above. The Secretariat will explain the scope of the fact finding, providing sufficient information to enable interested non-governmental organizations or persons or the JPAC to provide relevant information to the Secretariat (section 15.2 of the *Guidelines*). **[January 2002]**
- The Secretariat will request information relevant to the factual record from federal, state and local government authorities of the United States, as appropriate, and will consider any information furnished by a Party (Articles 15(4) and 21(1)(a) of the NAAEC). **[January 2002]** Information will be requested relevant to the facts concerning:
 - (i) the two alleged violations of section 703 of the MBTA that are referenced in Council Resolution 01-10;
 - (ii) the United States' enforcement of section 703 of the MBTA in connection with the two cases referenced in Council Resolution 01-10; and
 - (iii) whether the United States is failing to effectively enforce section 703 of the MBTA in the context of the two cases referenced in Council Resolution 01-10.

- The Secretariat will gather relevant technical, scientific or other information that is publicly available, including from existing databases, public files, information centers, libraries, research centers and academic institutions. **[January through April 2002]**
- The Secretariat, as appropriate, will develop, through independent experts, technical, scientific or other information relevant to the factual record. **[January through June 2002]**
- The Secretariat, as appropriate, will collect relevant technical, scientific or other information for the preparation of the factual record, from interested non-governmental organizations or persons, the JPAC or independent experts. **[January through June 2002]**
- In accordance with Article 15(4), the Secretariat will prepare the draft factual record based on the information gathered and developed. **[June through September 2002]**
- The Secretariat will submit a draft factual record to Council, and any Party may provide comments on the accuracy of the draft within 45 days thereafter, in accordance with Article 15(5). **[end of September 2002]**
- As provided by Article 15(6), the Secretariat will incorporate, as appropriate, any such comments in the final factual record and submit it to Council. **[November 2002]**
- The Council may, by a two-thirds vote, make the final factual record publicly available, normally within 60 days following its submission, according to Article 15(7).

Additional information

The submission, the Party's response, the Secretariat determinations, the Council Resolution, and a summary of these are available in the Registry on Citizen Submissions in the CEC home page www.cec.org or upon request to the Secretariat at the following address:

Secretariat of the CEC
Submissions on Enforcement
Matters Unit (SEM Unit)
393 St-Jacques St. West,
Suite 200
Montreal QC H2Y 1N9
Canada