

**Final Factual Record for
Submission SEM-99-002
(Migratory Birds)**

**Prepared in Accordance with Article 15
of the North American Agreement
on Environmental Cooperation**

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North American
Environmental
Law and Policy

Commission for
Environmental Cooperation
of North America



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PROFILE

In North America, we share a rich environmental heritage that includes air, oceans and rivers, mountains and forests. Together, these elements form the basis of a complex network of ecosystems that sustains our livelihoods and well-being. If these ecosystems are to continue to be a source of life and prosperity, they must be protected. Doing so is a responsibility shared by Canada, Mexico, and the United States.

The Commission for Environmental Cooperation of North America (CEC) is an international organization created by Canada, Mexico, and the United States under the North American Agreement on Environmental Cooperation (NAAEC) to address regional environmental concerns, help prevent potential trade and environmental conflicts, and promote the effective enforcement of environmental law. The Agreement complements the environmental provisions of the North American Free Trade Agreement (NAFTA).

The CEC accomplishes its work through the combined efforts of its three principal components: the Council, the Secretariat and the Joint Public Advisory Committee (JPAC). The Council is the governing body of the CEC and is composed of the highest-level environmental authorities from each of the three countries. The Secretariat implements the annual work program and provides administrative, technical and operational support to the Council. The Joint Public Advisory Committee is composed of 15 citizens, five from each of the three countries, and advises the Council on any matter within the scope of the Agreement.

MISSION

The CEC facilitates cooperation and public participation to foster conservation, protection and enhancement of the North American environment for the benefit of present and future generations, in the context of increasing economic, trade and social links among Canada, Mexico and the United States.

NORTH AMERICAN ENVIRONMENTAL LAW AND POLICY SERIES

Produced by the CEC, the North American Environmental Law and Policy series presents some of the most salient recent trends and developments in environmental law and policy in Canada, Mexico and the United States, including official documents related to the novel citizen submission procedure empowering individuals from the NAFTA countries to allege that a Party to the agreement is failing to effectively enforce its environmental laws.

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22 April 2003

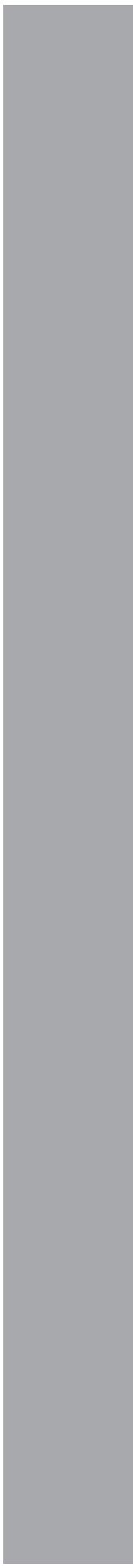


TABLE OF CONTENTS

| | |
|--|-----------|
| 1. Executive Summary | 7 |
| 2. Summary of the Submission | 14 |
| 3. Summary of the United States' Response | 15 |
| 4. Scope of the Factual Record | 18 |
| 5. Summary of Other Relevant Factual Information | 22 |
| 5.1 The Process to Gather Information | 22 |
| 5.2 Meaning and Scope of MBTA Section 703 | 26 |
| 5.2.1 Overview | 27 |
| 5.2.2 Habitat Modification or Loss | 28 |
| 5.2.3 Unintentional Takes | 29 |
| 5.2.4 Summary | 34 |
| 5.3 Federal Policies Regarding Enforcement of MBTA Section 703 | 34 |
| 5.3.1 Enforcement of MBTA Section 703 in Connection with Logging | 35 |
| 5.3.2 Penalties for Violations of MBTA Section 703 | 36 |
| 5.3.3 MBTA Enforcement Priorities | 38 |
| 5.3.4 Federal-State Cooperation and Coordination on Enforcement | 40 |

| | |
|---|-----------|
| 5.4 California Laws Concerning Protection of Migratory Birds | 43 |
| 6. Facts Presented by the Secretariat with Respect to Matters Raised in Council Resolution 01-10 | 46 |
| 6.1 The Great Blue Heron Rookery Case. | 46 |
| 6.1.1 Facts Regarding the Destruction of the Rookery . . | 46 |
| 6.1.2 Actions taken by California in Regard to the Great Blue Heron Rookery Case | 47 |
| 6.1.3 Actions taken by the United States in Regard to the Great Blue Heron Rookery Case. | 50 |
| 6.2 The Osprey Nests Case | 55 |
| 6.2.1 Facts Regarding the Destruction of Osprey Nests | 55 |
| 6.2.2 Actions taken by California in Regard to the Osprey Nests Case | 56 |
| 6.2.3 Actions taken by the United States in Regard to the Osprey Nests Case | 59 |
| 7. Closing Note | 63 |

Appendices

| | |
|--|-----|
| 1) Council Resolution 01-10, Instruction to the CEC Secretariat with Regard to the Assertion that the Government of the United States is Failing to Effectively Enforce the Migratory Bird Treaty Act (SEM-99-002) | 65 |
| 2) Overall Plan to Develop a Factual Record with regard to submission SEM-99-002 | 69 |
| 3) Comments of the United States of America on the Overall Plan to Develop a Factual Record with regard to submission SEM-99-002 | 77 |
| 4) Request for Information describing the scope of the information to be included in the factual record and giving examples of relevant information | 83 |
| 5) Information Requests to US Authorities and List of Recipient Authorities | 91 |
| 6) Information Requests to NGOs, the JPAC and other Parties of the NAAEC | 101 |
| 7) List of Nongovernmental Organizations Recipient of a Request for Information for the Development of the Factual Record on SEM-99-002 | 107 |

Attachments

| | |
|--|-----|
| Attachment 1 Council Resolution 03-03 – Instruction to the Secretariat of the Commission for Environmental Cooperation to make public the Factual Record for Submission SEM-99-002 (Migratory Birds) . . | 113 |
| Attachment 2 Comments of United States of America | 117 |

1. Executive Summary

Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC) establish the process regarding citizen submissions and development of factual records relating to assertions that one of the Parties to the NAAEC—Canada, Mexico and the United States—is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (CEC) of North America administers this process.

On 16 November 2001, the CEC Council voted unanimously to instruct the Secretariat to develop a factual record with respect to two specific cases identified in submission SEM-99-002, filed on 19 November 1999 by several environmental nongovernmental organizations from Canada, Mexico and the United States. 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. The Submitters included these two cases in the submission to illustrate their assertion that the United States is failing to effectively enforce Migratory Bird Treaty Act (MBTA) Section 703, 16 U.S.C. § 703, as it relates to loggers, logging companies and logging contractors on federal and non-federal lands throughout the United States.

Section 703 of the MBTA prohibits any person from (among other things) killing, “taking,” capturing or possessing a migratory bird, including any part, nest or eggs of any such bird, “by any means or in any manner,” unless authorized pursuant to federal regulations. According to the United States, it is an open question whether the destruction of a migratory bird nest violates the MBTA if the destruction does not result in collection or possession of the nest or the death or destruction of migratory birds or their eggs. The U.S. Fish and Wildlife Service (FWS) issues permits pursuant to the MBTA, primarily for activities such as hunting that involve the intentional take of migratory birds.

However, the FWS permitting program generally does not cover unintentional taking of migratory birds and it does not require, nor does the MBTA authorize, the issuance of a permit for situations that do not violate the MBTA.

Council Resolution 01-10 governs the scope of this factual record. The Resolution authorizes a factual record narrower in scope than the factual record that the Submitters sought and that the Secretariat considered to warrant development in its notification to Council under NAAEC Article 15(1). The focus of the factual record is on the two cases mentioned in the Resolution. Information regarding general policies and practices of the United States government for enforcing section 703 of the MBTA are included in the factual record to the extent they provide context and background relevant to those two cases. Certain information that the Submitters suggested be included or that was discussed in the Secretariat's Article 15(1) notification is beyond the scope of Council Resolution, such as information regarding the overall number of migratory birds taken (as defined in the MBTA) as a result of logging operations in the United States; the effectiveness, in the absence of any enforcement of the MBTA in the context of logging, of certain "non-enforcement" initiatives discussed in the United States response to the submission; the reasonableness under NAAEC Article 45(1)(a) of the exercise of the United States' discretion in never to date having enforced the MBTA in regard to logging operations; and whether under NAAEC Article 45(1)(b) the United States' general approach to enforcing the MBTA to date results from *bona fide* decisions to allocate resources to enforcement matters of higher priority than enforcement of the MBTA against logging operations.

In both of the cases referenced in Council Resolution 01-10, the state of California took enforcement action pursuant to state law. Neither the Submitters nor the United States had provided the Secretariat information regarding California's enforcement actions prior to the Secretariat's Article 15(1) notification to Council recommending a factual record. The United States later informed the Secretariat that both of the cases would have been high priorities for criminal investigation under FWS policy. Both the United States and the California Department of Fish and Game (CDFG) informed the Secretariat that in their view, the state enforcement actions adequately addressed the violations of state and/or federal law in the two cases, although in the great blue heron case the county district attorney in charge of the state prosecution expressed the view that the maximum penalty available under state law was inadequate, given the nature of the violation.

The first case involved the destruction of a great blue heron rookery near Arcata, California, in April 1996. The logging took place under the direction of the owner of the land containing the rookery and it destroyed at least five great blue heron nests, at least some of which contained eggs, plus at least one fledgling great blue heron. A registered professional forester prepared a Notice of Conversion Exemption Timber Operations on the basis that the timber harvest involved less than three acres, but the Notice was not approved by the California Department of Forestry and Fire Protection (CDF) prior to the logging, as required by California law. Consistent with state law, the Notice required that no sites of rare, threatened or endangered plants or animals or species of special concern, such as great blue herons, be disturbed, threatened or damaged during the logging.

After neighbors contacted state wildlife enforcement authorities, the CDF and the CDFG launched an investigation on 10 April 1996. These neighbors later sent the FWS a letter, dated 16 April 1996, regarding the rookery destruction. The FWS did not participate in the investigation, but the CDFG investigating officer was a deputized US deputy game warden with authority to investigate both state and federal violations of law, including violations of MBTA section 703. After the landowner pleaded no contest to six misdemeanor violations of state law, the district attorney recommended the maximum sentence of six months in jail and a \$2,700 fine.¹ The county probation office recommended that the landowner be ordered to pay \$310,000 in restitution as well. On 9 December 1998, the landowner was sentenced to 120 days in county jail, a fine of \$540 and three years' probation, with no order of restitution.

CDF took separate action against the registered professional forester who prepared the exemption notice for the landowner. The district attorney had concluded that a criminal case could not be proven against the forester and recommended administrative action instead. The California Board of Forestry and Fire Protection found that the forester was negligent in preparing the exemption notice and revoked his registration. The forester challenged the revocation and lost at both the County Superior Court level and on appeal.

The state of California did not charge either the landowner or the registered professional forester under section 3513 of the California Fish and Game Code, which makes a violation of the federal MBTA an offense under state law. Therefore, the state actions against the landowner and the forester provide no precedent regarding application of the MBTA to a logging operation.

1. All dollar values referenced in this factual record are U.S. dollars.

The FWS first became aware of the destruction of the great blue heron rookery upon receipt of the 16 April 1996 letter from the landowners' neighbors. The FWS had no MBTA permitting program that applied to the logging activity that took place, and had no ongoing program for inspecting or monitoring logging operations to determine compliance with the MBTA. On receipt of the letter, the FWS senior resident agent contacted law enforcement officials at the CDFG. The FWS and CDFG agreed that the state would take the lead in the investigation. State officials had already conducted inspections on 10 April and 16 April 1996, by the time federal officials contacted them about the case. The FWS concluded that the case involved possible violations of the MBTA and would be a high priority for investigation. At the same time, the FWS had no discussion with state officials regarding whether the case could or should be prosecuted under section 3513 of the California Fish and Game Code.

In the view of the FWS , once the state's prosecution of the landowner was completed, it was inappropriate for the FWS to seek federal prosecution under the United States Department of Justice's 'Petite Policy.' The Petite Policy establishes guidelines for deciding whether to bring a federal prosecution based on conduct involved in a prior state or federal proceeding. The Petite Policy provides an explanation for why the United States believes federal enforcement would have been inappropriate. The United States informed the Secretariat that the Petite Policy was applicable to the landowner, who was convicted and sentenced in a state proceeding. By contrast, it is not clear that the Petite Policy was applicable in connection with the registered professional forester, as to whom the state dismissed criminal charges and sought administrative sanctions.

Under the Petite Policy, for federal prosecution to have proceeded following completion of the state's action against the landowner, the federal government would have had to determine that the case involved a substantial federal interest, that the state prosecution left that interest demonstrably unvindicated, that the landowner's conduct constituted a federal offense, and that he could be convicted on admissible evidence. In addition, the Assistant Attorney General for Environment and Natural Resources, U.S. Department of Justice, would have had to approve a federal prosecution. Last, federal prosecutors would still retain discretion not to pursue the case.

In regard to whether the case involved a substantial federal interest, one might consider the FWS's conclusion that the case was a high priority for investigation because it involved a wild population of a spe-

cies protected under the MBTA. One might also consider the view of FWS officials that great blue herons are likely to be given special consideration in regard to enforcement of the MBTA because they are colonial nesters.

Regarding whether the state prosecution left the federal interest in protecting migratory birds demonstrably unvindicated, one might consider the district attorney's opinion that the maximum punishment available under state law is insufficient given the nature of the crime in assessing whether additional federal penalties could or should have been sought under the MBTA. Although significant penalties were imposed in MBTA cases that the United States describes as similar, it is not clear that significant additional punishment could have been obtained against the landowner with an MBTA prosecution. The United States and the CDF believe that the state enforcement action adequately addressed the landowner's conduct.

As to the likelihood of success, the evidence that led to the landowner's conviction under state charges might have supported a federal MBTA prosecution as well. The United States asserts that the case would have been a high priority for investigation and that logging that kills birds will be prosecuted in appropriate circumstances when a violation of the MBTA can be proven. However, a federal MBTA prosecution might have raised significant legal issues. As far as the United States is aware, a prosecution against the landowner would have been the first MBTA section 703 prosecution ever sought in connection with a logging operation since the MBTA was enacted in 1918. One possible outcome would be a broad ruling that the MBTA does not apply to any unintentional, yet direct takes, contrary to the United States' successful prosecutions, none involving logging, of unintentional takes resulting from otherwise lawful activities. Such an outcome would be a significant setback to the FWS's overall program for enforcing the MBTA. The law in the United States on the applicability of the MBTA to unintentional takings, as opposed to intentional takings resulting from activities such as hunting, is conflicting and unsettled, at least in the context of timber harvesting.

The incident involving the destruction of two osprey nest trees, one active and one historic, took place in October 1995, in Humboldt County, California. The nest trees were destroyed during the course of a prescribed burn conducted pursuant to an approved timber harvesting plan that the private landowner, a subsidiary of the Pacific Lumber Company (Pacific Lumber), had submitted to CDF. The timber harvest-

ing plan required protection of one active and three historic osprey nest trees in the area where the prescribed burn took place.

On 30 October 1995, CDF issued the landowner a citation for one count of violating a state regulation requiring protection of active nest trees in connection with the damage to the active osprey nest tree and one count of violating a state regulation requiring compliance with the approved timber harvesting plan in connection with damage to the historic osprey nest tree. The landowner was not charged under section 3513 of the California Fish and Game Code, which makes violations of the federal MBTA state offenses as well.

The landowner pleaded no contest and paid a fine of \$2,700. In addition, the Court ordered the landowner to complete corrective work, as specified by CDFG, within 60 days. CDF had recommended that the landowner also be sentenced to 12 months probation, but no sentence of probation was imposed.

On 19 July 1996, CDFG concluded that the landowner had satisfied its court-ordered obligation to create four suitable replacement osprey nest trees. The CDFG biologist recommended that long-term monitoring be conducted to determine the success of the replacement nest sites. The Secretariat has no information indicating that the landowner was asked or required to do such monitoring. On 11 December 1997, the landowner provided an update indicating initial success with at least some of the replacement trees.

Officials of the United States with whom the Secretariat met during preparation of the factual record informed the Secretariat that the United States was not aware of the case involving the destruction of osprey nests case until filing of the submission in November 1999. The federal government has no MBTA permit program for logging operations that would have provided the FWS with advance notice of the timber harvesting plan, and there is no indication that other federal permits were required.

In November 1998, an attorney representing environmental NGOs wrote local offices of the FWS and the CDF requesting that the federal and state agencies deny an application by Pacific Lumber for an Incidental Take Permit, relying in part on the company's alleged connection to the osprey nests cases referenced in Council Resolution 01-10. The FWS never responded to this letter. The Secretariat has no information indicating whether or how the federal government took the osprey nests

case into consideration in connection with the incidental take permit, which was granted.

FWS officials informed the Secretariat that the osprey nests case would have been considered a high priority for investigation had the state not taken action. United States officials provided the Secretariat no information regarding application of the Petite Policy to the osprey case, and it appears it was not formally applied. The Petite Policy might be applicable to the osprey case because the landowner was convicted and sentenced in the state system.

In regard to whether the case involved a substantial federal interest, one might consider the FWS's conclusion that the case would have been a high priority for investigation because it involved a wild population of a species protected under the MBTA. One might also consider the view of FWS officials that osprey are likely to be given special consideration in regard to enforcement of the MBTA because they are high on the food chain and, at least occasionally, colonial nesters.

Regarding whether the state prosecution left the federal interest in protecting migratory birds demonstrably unvindicated, one might take into account the facts that the recommended sentence of probation was not imposed and that long-term monitoring was not required, as well as CDFG's conclusion that the landowner met its obligation to create replacement trees for the destroyed nest trees. The United States informed the Secretariat that a sentence of probation would not have been possible had the landowner been issued a federal Notice of Violation, as opposed to referring the case to the United States Attorney. The United States stated that the case would not likely be the type of case to refer to the United States Attorney. Also, because MBTA provides only misdemeanor penalties in cases such as these, it is not clear that significant additional punishment or a significant deterrent could have been obtained with an MBTA prosecution. The United States and the CDF informed the Secretariat that in their view, the state enforcement action was adequate to address the landowner's conduct.

As to the likelihood of success, it is not clear that the evidence that led to the landowner's conviction under state charges would have supported an MBTA prosecution as well. It is an open question whether destruction of an osprey nest in a prescribed burn would violate the MBTA, absent evidence that a migratory bird or egg was killed or destroyed as a result. In addition, as with the great blue heron case, . the osprey case would have been, as far as the United States is aware, the first case ever brought under the MBTA in connection with a logging operation.

2. Summary of the Submission

On 19 November 1999, the 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 and West Coast Environmental Law Association filed a submission asserting that the United States is failing to effectively enforce section 703 of the MBTA, 16 U.S.C. § 703, as it relates to loggers, logging companies and logging contractors on federal and non-federal lands throughout the United States. Section 703 of the MBTA prohibits any person from (among other things) killing, "taking," capturing or possessing migratory birds, including any part, nest or eggs of any such bird, "by any means or in any manner," unless authorized pursuant to federal regulations.

The Submitters assert that throughout the United States, loggers, logging companies, and logging contractors consistently violate the Act and that "the number of young migratory birds killed, nests destroyed, and eggs crushed annually as a direct result of logging operations is enormous."² The Submitters assert that the United States is failing to effectively enforce MBTA section 703 against logging operations despite being fully aware that those operations consistently violate the law. They assert that the United States "has completely abdicated its enforcement obligations" under the MBTA because it has never prosecuted a logger or logging company for a violation of the MBTA. The Submitters claim that in responding to an information request, the United States found no documents relating to MBTA enforcement actions against anyone involved in a logging operation. They point also to a 7 March 1996 memorandum from the FWS director to FWS law enforcement officers that states:

The [FWS] has had a longstanding, unwritten policy relative to the MBTA that no enforcement or investigative action should be taken in incidents involving logging operations, that result in the taking of non-endangered, non-threatened migratory birds and/or their nests... [T]he Service will continue to enforce the MBTA in accordance with this longstanding policy.³

The submission is concerned solely with the direct "taking" of migratory birds that occurs, particularly during nesting season, when logging operations destroy nests, crush eggs and kill fledglings. By con-

2. Submission at 4 and Appendix A.
3. Submission at 6.

trast, the submission does not involve the loss of migratory birds that could result indirectly from the loss of habitat.

The submission refers to several specific logging operations or timber sales that illustrate the Submitters' concern that there is widespread lack of enforcement of the MBTA. For example, they point to a study that found that up to 666 nests containing juvenile birds or eggs of seven migratory bird species would be destroyed as a direct result of four specific timber sales in Arkansas. Another study they cite estimated that up to 9,000 young migratory songbirds would be killed as a direct result of logging seven specific timber sales during the nesting season in the Chattahoochee National Forest in Georgia. They point also to two "well documented and publicized killings of migratory birds due to logging" in California as to which they claimed the FWS took no enforcement action. The first involved a private landowner whose logging operation, according to the Submitters, destroyed an entire great blue heron rookery. The second involved a logging company that, according to the Submitters, purposely burned four identified osprey nest trees on private land, one tree of which was known to be nested by a pair of ospreys.

The submission contrasts the alleged complete failure to enforce the MBTA against logging operations in the United States with the prosecutions of "others for relatively minor violations of the MBTA."⁴ After alleging that "tens of thousands of migratory birds" are directly killed or taken annually as a result of logging for which no enforcement is ever taken, the Submitters note three prosecutions in other contexts that involved the unintentional killing of, respectively, four birds, 17 birds and 92 birds. The Submitters contend that, because the FWS "has made a sweeping policy decision, not a case-by-case judgment associated with its prosecutorial discretion,"⁵ and because it "has prosecuted non-loggers for taking small numbers of birds in comparison to the number taken as a direct result of logging,"⁶ the United States' complete failure to enforce the MBTA in connection with logging operations cannot be considered a reasonable exercise of enforcement discretion under Article 45(1) of the NAAEC.

3. Summary of the United States' Response

The United States filed its response to the submission on 29 February 2000. The United States advances four arguments against the devel-

4. Submission at 6.
5. Submission at 8.
6. Submission at 8.

opment of a factual record. First, the United States asserts that the Submitters relied too heavily on the 7 March 1996 memorandum from the FWS Director to Service Law Enforcement Officers, purporting to reflect a FWS policy to exempt logging activities from enforcement actions under the MBTA. According to the United States, the Memorandum is an unapproved and unofficial draft that embodies no FWS policy, formal or unwritten.⁷ The response states that “logging that kills birds will be prosecuted in appropriate circumstances when a violation of the MBTA can be proven.”⁸ It acknowledges that “the FWS has no record of prosecutions having been brought exclusively under the MBTA for takes caused by logging of migratory birds not listed under the [Endangered Species Act (ESA), 16 U.S.C. §§ 1531-1534].”⁹

Second, the United States asserts that under NAAEC Article 45(1)(a) the United States is not failing to effectively enforce the MBTA. Article 45(1)(a) of the NAAEC provides that a Party “has not failed to ‘effectively enforce its environmental law’...where the action or inaction in question by agencies or officials of that Party reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters.” The United States asserts that Article 45(1)(a) precludes a finding that the United States is failing to effectively enforce the MBTA because the current enforcement policies of the FWS “reflect a reasonable exercise of the agency’s discretion regarding investigatory, prosecutorial, regulatory, and compliance matters.”¹⁰ The response states that “the FWS, with its limited resources, has legitimately concentrated its regulatory, enforcement, and scientific efforts to reducing unintentional takes of migratory birds caused by those activities where industry has created hazardous conditions which often attract migratory birds to their death (i.e., birds attracted to perching on power lines or open oil pits that appear as water ponds to overflying birds).”¹¹

Third, the United States asserts that under Article 45(1)(b) it is not failing to effectively enforce the MBTA. Article 45(1)(b) of the NAAEC provides that agency action or inaction does not amount to a failure to effectively enforce if it “results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities.” The United States asserts that the

7. See Response at 7-8.
8. Response at 7.
9. Response at 8.
10. Response at 2.
11. Response at 11.

NAAEC precludes a determination that the United States is failing to effectively enforce the MBTA because “the current enforcement policies of the FWS result from ‘*bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities.’”¹² Noting that the FWS has limited resources, the response states:

[A]lternative statutes and non-enforcement initiatives are more effective and efficient in protecting migratory birds [and] habitat modification *per se* is not prohibited by the MBTA. This means that establishing a violation of the MBTA due to logging activities poses more significant technical challenges than many other types of MBTA violations. Therefore, the FWS has thus far made *bona fide* decisions to allocate enforcement resources to investigating and prosecuting other possible violations instead of those caused by logging activities. The FWS made its resource allocation decisions in good faith and always with the objective to conserve migratory bird populations and their habitats in sufficient quantities to prevent them from becoming threatened or endangered.¹³

Fourth, the response takes the position a factual record is not warranted in light of the steps the United States is taking to protect migratory birds from logging activities. The United States asserts that it has used its authority under the ESA to protect migratory birds that are listed as endangered or threatened under that law. It states that it has used a number of “non-enforcement mechanisms” to provide additional protection.¹⁴ According to the response, these mechanisms include population monitoring of migratory birds, avian mortality studies and management, landscape level planning, public outreach and the North American Bird Conservation Initiative and Trilateral Committee for Wildlife and Ecosystem Conservation and Management. The United States claims that because the submission does not acknowledge these efforts, it does not reflect “the complete framework under which the United States protects migratory birds.”¹⁵

The United States response provided no information regarding any of the specific examples mentioned in the submission of logging operations or timber sales in Arkansas, Georgia and California that purport to illustrate the Submitters’ allegation of the United States’ complete nationwide failure to enforce the MBTA in connection with logging activity.

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- 12. Response at 2.
 - 13. Response at 15.
 - 14. Response at 2.
 - 15. Response at 2.

4. Scope of the Factual Record

On 15 December 2000, the Secretariat notified the Council under Article 15(1) that the Secretariat considered that the submission, in light of the response, warranted development of a factual record. The Secretariat concluded that the United States' response had not resolved central questions that the submission raised regarding whether certain "non-enforcement" initiatives discussed in the United States' response obviated the need to enforce the MBTA in the context of logging, whether the exercise of the United States' discretion in not enforcing the MBTA in regard to logging operations is reasonable as contemplated in Article 45(1)(a), and whether the United States' non-enforcement of the MBTA in regard to logging operations to date results from *bona fide* decisions to allocate resources to higher priority enforcement matters as contemplated in Article 45(1)(b). Based on these conclusions, the Secretariat recommended a factual record regarding the full scope of the Submitters' assertion that logging operations have violated and are continuing to violate the MBTA on a nationwide basis and in particular identified situations, and that the complete lack of any enforcement of the MBTA in regard to logging operations indicates that the United States is failing to effectively enforce the MBTA throughout the United States.

Council Resolution 01-10, which is set out in its entirety in Appendix 1, instructs the Secretariat:

to prepare 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 North American Agreement on Environmental Cooperation* 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.

In light of this instruction, the scope of this factual record is different from the scope of both the factual record requested in the submission and the factual record that the Secretariat considered to warrant development in its Article 15(1) notification.¹⁶

16. Council Resolution 01-10 is binding on the Secretariat. It should not be assumed that the Secretariat's Article 15(1) Notification to Council recommending a factual record for SEM-99-002 was intended to include a recommendation to prepare a factual record of the scope set out in Council Resolution 01-10, or that the Secretariat

The scope of the instruction in Council Resolution 01-10 resulted in divergent views as to how the Secretariat should develop the factual record. For example, in comments provided to the Secretariat regarding the overall workplan for the factual record, the Submitters stated:

With respect to the Secretariat's plan to develop a factual record concerning the US failure to enforce the Migratory Bird Treaty Act (MBTA), SEM-99-002, our comments focus on whether the workplan ensures that the factual record responds to the specific enforcement issue raised in the submission. We note at the outset that the Secretariat recommended the preparation of a factual report concerning the matter raised in SEM-99-002—the failure of the United States to enforce the MBTA against loggers. Nonetheless, the Council, by Resolution 01-10, approved the preparation of a factual report focused on the two illustrative examples included in the submission—a focus that will not obviously result in any useful information unless it is placed in a broader context. ...

An examination of facts associated with the two examples listed by the Council does not respond fully to the specific enforcement issue raised in the submission: Is a consistent pattern of non-enforcement of the MBTA against logging practices a failure to effectively enforce environmental law? Although the facts of these examples might be useful, additional facts should also be gathered. More specifically, to better understand the context of the US federal government's acknowledged non-enforcement of the MBTA, including with respect to enforcement by state governments, it would be helpful for the Secretariat to gather facts to address the following questions:

- How extensive are logging operations that likely violate the MBTA?
- What is the relative impact on migratory birds of these logging operations?
- To what extent are activities of the United States effective in protecting migratory birds?
- To what extent would enforcement of the MBTA in logging operations increase protection of migratory birds?¹⁷

would have recommended a factual record of this scope. Notably, neither the submission nor the response provided the Secretariat any information regarding California's enforcement actions in connection with the two cases referenced in Council Resolution 01-10, and therefore the Secretariat was unaware of those actions when it made its factual record recommendation.

17. Comments on the Secretariat's "Overall Plan to Develop a Factual Record" for SEM-99-002, submitted by the Center for International Environmental Law (18 January 2002).

By contrast, in information presented to the Secretariat in regard to the factual record, the American Forest and Paper Association stated:

The Council has specifically limited the scope of the factual record to the “two specific cases identified in SEM-99-002.” Accordingly, the factual record that the Secretariat is assembling, and will prepare in written form, should be limited to describing the facts of those two alleged violations of the MBTA and of the remedial actions taken by State and Federal authorities in those two circumstances. Any information on broader topics that the Secretariat may receive from commenters should not become part of the published factual record... If the CEC decides that its published record should go beyond assembling the facts concerning the two site-specific instances authorized by the Council, to be fair and complete, that record should explain that there are considerable legal doubts that the MBTA reaches and constrains timber harvesting.¹⁸

In light of these divergent views, this section clarifies the scope of the factual record and briefly summarizes the matters raised in the submission and the Secretariat’s Article 15(1) notification to Council that fall outside the scope of Council Resolution 01-10.

As stated in the overall work plan for the factual record, this factual record presents information 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.

Legal background regarding the scope and meaning of the MBTA as it applies to the two cases included in Council Resolution 01-10 is within the scope of the factual record. Information regarding general policies and practices of the United States government for enforcing section 703 of the MBTA are included in the factual record to the extent they provide context and background relevant to those two cases. The following matters raised in the submission and put forward in the Secre-

18. Letter from William R. Murray to Geoffrey Garver (28 June 2002).

tariat's Article 15(1) notification are generally excluded from the factual record under Council Resolution 01-10:

- Information regarding the effectiveness nationwide of the "non-enforcement" initiatives described in the US response in protecting migratory birds, in the absence of enforcement against logging operations. The non-enforcement initiatives described in the US response include 1) population monitoring of migratory birds, 2) public outreach and education, 3) avian mortality studies and management, 4) landscape-level bird planning and 5) the North American Bird Conservation Initiative and Trilateral Committee for Wildlife and Ecosystem Conservation and Management.
- Information regarding the number of migratory birds taken (as defined in the MBTA) as a result of logging in the United States and a comparison of that number to the number of birds taken as a result of other activities described in the United States response as to which the United States has taken enforcement action or has established a permit program under the MBTA.
- Information regarding the effect nationwide of limiting the MBTA permit program to activities involving the intentional killing of migratory birds, including information regarding the effect that a permit program for logging would have in reducing bird deaths due to logging, and regarding the assertion that difficulties in monitoring compliance would undermine the utility of an MBTA permit program for logging, both in general terms and in comparison to hunting and other activities for which the FWS issues MBTA permits.
- Information regarding whether, as a general matter, it is easier to require or encourage the use of best practices to reduce takes of migratory birds in contexts other than logging, and whether the use of such best practices in other contexts is likely to be more effective than in the logging context.
- Information regarding the assertion that, as a general matter, it is more effective to leverage enforcement resources to achieve greater levels of compliance for activities other than logging than it is for logging.
- Information regarding whether the US practice to date of only pursuing enforcement action under the ESA in connection with threatened or endangered migratory birds killed or taken as a result of logging activity is an effective means of achieving the goals of the MBTA.

- Information regarding the other examples included in the submission to illustrate the Submitters' enforcement concerns, in particular the four specific timber sales in Georgia that the Submitters estimated would destroy an estimated 666 nests containing migratory bird eggs or fledglings and the seven specific timber sales in Arkansas that the Submitters asserted would result in the death of an estimated 9,000 migratory songbirds.

5. Summary of Other Relevant Factual Information

This section includes information that provides context and background for the information in section 6 regarding the facts of the two cases referenced in Council Resolution 01-10 and regarding whether the United States failed to effectively enforce section 703 of the MBTA in connection with those two cases. This background and contextual information includes a description of the process that the Secretariat used to gather information for the factual record, background on the meaning and scope of section 703 of the MBTA as it applies to the two cases, a summary of federal policies of the United States regarding enforcement of section 703 that are relevant to the two cases, and a summary of the provisions of California law that were applied or were relevant in the enforcement action the state of California took in regard to the two cases.

5.1 *The Process to Gather Information*

The CEC Council instructed the Secretariat, on 16 November 2001, to develop a factual record in regard to submission SEM-99-002, pursuant to Council Resolution 01-10 (Appendix 1). 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 nongovernmental organizations or persons; (c) submitted by the Joint Public Advisory Committee; or (d) developed by the Secretariat or by independent experts."

On 14 December 2001, the Secretariat published the Overall Plan to Develop a Factual Record (Appendix 2) pursuant to Council Resolution 01-10. The plan stated the Secretariat's intention to 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.

To comply with Council's instruction to the Secretariat in Council Resolution 01-10 "to provide the Parties with its overall work plan for gathering the relevant facts and to provide the Parties with the opportunity to comment on that plan," the Secretariat stated that execution of the plan would begin no sooner than 14 January 2002. The United States provided the Secretariat with comments on the plan on 23 January 2002 (Appendix 3).

As noted above in Section 4 regarding the scope of the factual record, and as reflected in the overall plan to develop the factual record, the Council, in Resolution 01-10, and not the submission or the Secretariat's Article 15(1) notification to Council, determined the scope of the information gathered for the factual record. Accordingly, the Secretariat prepared a Request for Information (Appendix 4) limited, as described above, to the matters set out in Council Resolution 01-10. The Request for Information provided the following examples of relevant information falling within the scope of the factual record:

1. Information on the two alleged violations involving great blue herons and ospreys that are provided as examples in the submission and referenced in Council Resolution 01-10.
2. Information on local, state or federal policies or practices (formal or informal) regarding enforcement of, or ensuring compliance with, section 703 of the MBTA, specifically ones that might apply to the cases referenced in Council Resolution 01-10.
3. Information on federal, state or local enforcement or compliance-related staff or resources available for enforcing or ensuring compliance with section 703 of the MBTA in connection with the cases referenced in Council Resolution 01-10.
4. Information on federal, state or local efforts to enforce or ensure compliance with section 703 of the MBTA in connection with the

cases referenced in Council Resolution 01-10, including for example:

- efforts to prevent violations, such as by placing conditions on or requiring modifications of the logging or tree-removal operations, or providing education or technical assistance;
 - monitoring or inspection activity before, during or after logging or tree-removal operations;
 - investigations into whether the logging or tree-removal operations violated section 703 of the MBTA;
 - warnings, orders, charges or other enforcement action issued to persons or organizations responsible for the logging or tree-removal operations;
 - actions to remedy MBTA section 703 violations due to logging or tree-removal operations; or
 - coordination between different levels of government on enforcement and compliance assurance.
5. Information on the effectiveness of federal, state or local efforts to enforce or ensure compliance with section 703 of the MBTA in connection with the cases referenced in Council Resolution 01-10, for example, their effectiveness in:
 - remedying any violations of section 703 of the MBTA that occurred; or
 - preventing future violations of section 703 of the MBTA.
 6. Information on barriers or obstacles to enforcing or ensuring compliance with section 703 of the MBTA in connection with the cases referenced in Council Resolution 01-10.
 7. Information on the exercise of enforcement discretion in connection with the cases referenced in Council Resolution 01-10.
 8. Any other technical, scientific or other information that could be relevant.

In early February 2002, the Secretariat posted the Request for Information on the CEC web site and issued a press release notifying the pub-

lic of its availability. In addition, on 1 February 2002, the Secretariat sent the Request for Information to the Government of the United States, inviting a response by 15 April 2002, in order to allow time to request follow-up information and also requesting meetings with officials from relevant federal, state and/or local agencies to discuss the matters to be addressed in the factual record (Appendix 5). As requested by the United States, all requests for information from the United States federal government were made in writing through designated points of contact. On 25 February 2002, the Secretariat sent the Request for Information to the California Department of Forest and Fire Protection, emphasizing in particular information regarding California's enforcement actions in regard to the two cases referenced in the Request for Information, and any federal involvement in those efforts. The Secretariat also sent the Request to the Submitters, the Governments of Canada and Mexico, the Joint Public Advisory Committee (JPAC) and nongovernmental organizations identified as potentially having relevant information, inviting them to respond with any relevant information by 30 June 2002 (Appendix 6). Appendix 7 contains a list of the NGOs to whom the Request for Information was sent.

The United States responded to the Secretariat's information request on 22 February 2002 and 19 April 2002, and the California Department of Forest and Fire Protection responded on 10 May 2002. The Secretariat sent the federal government of the United States an additional information request on 24 May 2002 (Appendix 5), and on 30 May 2002, the Secretariat met with federal officials of the United States in regard to that information request. Following that meeting, the Secretariat received additional information from the United States on 25 June 2002.

The Submitters provided comments on the Overall Plan to Develop a Factual Record pursuant to Council Resolution 01-10 and also provided specific documents that the Secretariat requested from them. The Secretariat also met with a representative of the Submitters on 28 May 2002, to discuss, among other things, the Submitters' reasons for including in the submission the two cases referenced in Council Resolution 01-10. The Submitters sent the Secretariat a letter dated 25 June 2002 explaining that the two cases referenced in Council Resolution 01-10 were included in the submission to illustrate the alleged broad policy failure that was of primary interest to them.¹⁹

19. The Submitters explained that, under the Freedom of Information Act, they had sought site-specific information regarding MBTA violations, but the federal government provided "little or no site-specific information." The Submitters stated that they viewed this lack of information as further support of their assertion that,

The Secretariat received information from 3 NGOs in addition to the Submitters: the American Forest and Paper Association, the American Farm Bureau Federation and the law firm of Vinson and Elkins.²⁰ In addition to the responses received to the Secretariat's requests for information, the Secretariat developed information through publicly available sources and hired an independent expert to assist in the development of information regarding the meaning and scope of the MBTA.

Article 15(5) of the NAAEC provides that “[t]he Secretariat shall submit a draft factual record to the Council. Any Party may provide comments on the accuracy of the draft within 45 days thereafter.” Pursuant to Article 15(6), “[t]he Secretariat shall incorporate, as appropriate, any such comments in the final factual record and submit it to the Council.” The Secretariat submitted the draft factual record to the Council on 28 November 2002 and received comments from the United States on 13 January 2003. Canada and Mexico did not comment on the draft factual record.

5.2 *Meaning and Scope of MBTA Section 703*

The MBTA, 16 U.S.C. §§ 703-712, was enacted in 1918 as a “conservation statute[] designed to prevent the destruction of certain species of birds.”²¹ This section provides background on the language, legislative history and judicial interpretation of MBTA section 703 that is relevant to application of section 703 to the facts of the two cases referenced in Council Resolution 01-10. As explained below, several questions of interpretation of the MBTA as it might apply to those two cases remain unresolved.

as a matter of policy, the FWS “[is not only] failing to enforce the MBTA, but it is also failing to evaluate the potential scope of MBTA violations due to logging.” Letter from Chris Wold, CIEL, to Geoffrey Garver, CEC Secretariat (25 June 2002). In regard to the two California examples, the Submitters explained:

Although we selected these two examples for inclusion in the Submission, it is important to note that there are numerous other specific examples of the failure to enforce the MBTA. Given that our interest in bringing the Submission was to focus on the broad policy of non-enforcement of the MBTA, we sought only to illustrate the effects of that policy by including these two examples. Naturally, we are deeply disappointed that the Council acted to shift the focus on the factual record away from the broad policy failure.

Ibid.

20. Vinson and Elkins also provided information regarding the two cases referenced in Council Resolution 01-10 to the EPA prior to Council's vote on the Resolution. It is not clear from the materials provided to the Secretariat who, if anyone, Vinson and Elkins represented in providing information to the EPA or to the Secretariat.

21. *Andrus v. Allard*, 444 U.S. 51, 52-53 (1979).

5.2.1 Overview

Section 703 of the MBTA makes it “unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, [or] attempt to take, capture, or kill... any migratory bird, nest, or eggs of any such bird,” unless authorized by regulation. The Act provides that any person who violates the statute or any regulation issued under the statute is guilty of a misdemeanor. Upon conviction, such a person may be fined up to \$15,000 or imprisoned for up to six months, or both.²²

The FWS has promulgated regulations implementing the MBTA. Under the regulations, “*Migratory bird* means any bird, whatever its origin and whether or not raised in captivity, which belongs to a species listed in § 10.13, or which is a mutation or a hybrid of any such species, including any part, nest, or egg of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof.”²³ The migratory birds listed in 50 C.F.R. § 10.13 include both great blue herons and ospreys.

Federal regulations define the term “take” as follows: “*Take* means to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to [engage in these activities].”²⁴ According to the United States, it is not clear that a “take” of a migratory bird includes the destruction of a migratory bird nest if such nest destruction does not result in collection or possession of the nest or the death or destruction of migratory birds or their eggs. Among other things, this factual record presents information relevant to whether the conduct referred to in the specific cases referenced in Council Resolution 01-10 could amount to the taking of migratory birds, nests or eggs as defined by this regulation.

Regulations relating to the hunting of migratory game birds are set out at 50 C.F.R. Part 20. These hunting regulations establish hunting seasons, allowable hunting methods, daily bag limits, possession limits and other matters related to the hunting of migratory birds. Regulations relating to permits for the taking, possession, transportation, sale, purchase, barter, importation, exportation and banding or marking of migratory birds are set out at 50 C.F.R. Part 21. The regulations state:

22. 16 U.S.C. § 707(a). Felony violations of the MBTA are governed by 16 U.S.C. § 707(b). The Secretariat is not aware of any allegation that either of the two cases referenced in Council Resolution 01-10 involved felony violations of the MBTA.

23. 50 C.F.R. § 10.12.

24. 50 C.F.R. § 10.12.

No person shall take, possess, import, export, transport, sell, purchase, barter, or offer for sale, purchase or barter, any migratory bird, or the parts, nests, or eggs of such bird except as may be permitted under the terms of a valid permit issued pursuant to the provisions of this part and part 13, or as permitted by regulations in this part or part 20 (the hunting regulations).²⁵

Specific permit provisions set forth requirements for import and export permits, banding or marking permits, scientific collection permits, taxidermist permits, waterfowl sale and disposal permits, special Canada goose permits, special purpose permits, falconry permits and raptor propagation permits.²⁶ The regulations also establish requirements for depredation permits and depredation orders.²⁷ The regulations establish limited exceptions to the permit requirement for, among other things, certain MBTA enforcement activity, as well as certain game parks, zoos, museums, and public and educational institutions.²⁸

According to the United States, the MBTA permitting program does not apply to logging operations. None of the current MBTA permitting regulations expressly apply to unintentional take of migratory birds and, according to the United States, the FWS has not issued MBTA permits to cover the take by logging operations of migratory birds that are not listed under the ESA. As well, the FWS permitting program does not require, nor does the MBTA authorize, the issuance of a permit for situations that do not violate the MBTA.

5.2.2 *Habitat Modification or Loss*

The submission involves the direct take of migratory birds or their nests or eggs and does not involve the death of migratory birds or destruction of their nests or eggs that could result indirectly from the loss or modification of migratory bird habitat. For example, logging of trees containing migratory bird nests or eggs would likely amount to direct loss of those nests or eggs, while logging of trees that merely have the potential to house migratory bird nests would constitute habitat modification that could affect those migratory birds only indirectly. Federal courts that have addressed whether habitat modification or loss caused by logging or other activities alone can amount to a taking under

25. 50 C.F.R. § 21.11.

26. 50 C.F.R. Part 21, Subpart C.

27. 50 C.F.R. Part 21, Subpart D. Felony violations of the MBTA are governed by 16 U.S.C. § 707(b). The Secretariat is not aware of any allegation that either of the two cases referenced in Council Resolution 01-10 involved felony violations of the MBTA.

28. See 50 C.F.R. §§ 21.12, 21.13, 21.14.

the MBTA have all concluded that it cannot.²⁹ For example, a federal district court in Oregon held in 1991 that the MBTA was “not intended to include habitat modification or degradation in its prohibitions.”³⁰ By contrast, the ESA does reach takings that result solely from habitat modification.³¹

5.2.3 Unintentional Takes

The cases referenced in Council Resolution 01-10 raise the issue of whether the taking prohibition of section 703 is confined to intentional takes, such as through hunting or poaching, or instead also includes unintentional takes that result from conduct such as logging. This issue has arisen in cases challenging decisions of the US Forest Service regarding timber sales in national forests. If section 703 only reaches the kind of intentional taking of birds involved in hunting, poaching or similar activity, then it arguably would not apply to the loss of migratory birds or their nests or eggs that was involved in the cases that are the subject of the factual record. This issue is unsettled at this time, and no attempt is made here to reach a conclusion as to its proper resolution. The ultimate authority to resolve that legal issue resides with the United States Supreme Court.

The language of the MBTA does not expressly limit the taking prohibition of section 703 of the MBTA to intentional killings through activi-

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29. Not all observers agree with this interpretation. One commentator, for example, stresses that “[t]he MBTA’s legislative history includes recognition of the importance of habitat in protecting migratory birds.” Scott Finet, *Habitat Protection and the Migratory Bird Treaty Act*, 10 Tulane Envtl. L.J. 1, 8 (1996) (citing H.R. Rep. No. 65-243, at 2 (1918)). See also *ibid.* at 10 (asserting that the treaties which the MBTA implements “demonstrate knowledge and understanding of the link between habitat and bird protection, and the desire to incorporate that knowledge and understanding in the statute.”); Bob Neufeld, Comment, *The Migratory Bird Treaty: Another Feather in the Environmentalist’s Cap*, 19 S.D. L. Rev. 307, 318 (1974) (noting that congressional debate on the MBTA in 1918 “shows that at least one representative believed that the Treaty was made necessary because of increased hunting and the draining of swamps”). Neufeld ultimately asserts that “[a]ny activity or project that can be shown to be causally related to a reduction in the number of migratory birds or nests should be a violation” of the MBTA. *Ibid.* at 320.
 30. *Portland Audubon Soc’y v. Lujan*, 21 Envtl. L. Rep. (Envtl. L. Inst.) 21341, 1991 WL 81838, at *7 (D. Or. May 8, 1991). See also *Seattle Audubon Soc’y v. Evans*, 952 F.2d 297, 302-03 (9th Cir. 1991) (holding that under the MBTA, a taking includes direct, though unintended action that kills members of protected bird species, but does not include “habitat destruction, leading indirectly to bird deaths.”); *Sierra Club v. United States Dep’t of Agriculture*, 116 F.3d 1482 (Table), 1997 WL 295308, at *18 (7th Cir. May 28, 1997) (unpublished); *Citizens Interested in Bull Run v. Edrington*, 781 F. Supp. 1502, 1510 (D. Or. 1991); *Mahler v. United States Forest Serv.*, 927 F. Supp. 1559 (S.D. Ind. 1996).
 31. *Seattle Audubon Soc’y v. Evans*, 952 F.2d at 303.

ties such as hunting or poaching. The broad language of section 703 makes it unlawful “by any means or in any manner” to take, capture or kill migratory birds or their nests or eggs. Section 707(a), which imposes misdemeanor liability on any person “who shall violate” the MBTA does not require that the violation be knowing or intentional. Section 707(b), by contrast, imposes felony liability on anyone who “shall knowingly” take any migratory bird “with intent” to sell, offer to sell, barter, or offer to barter such a bird. The absence of the intent requirement in section 707(a) might be viewed as supporting the conclusion that proof of intent is not a prerequisite to the imposition of misdemeanor liability for a taking in violation of section 703. On the other hand, some have argued that despite the apparently broad language of section 703, the list of terms included in the definition of *take* all relate to activities the purpose of which is to kill or capture migratory birds or their nests and eggs.³²

The legislative history contains no definitive information regarding whether the taking prohibition was meant to apply to activities, beyond hunting or poaching, that result in unintentional takes. The House Report on the 1918 legislation indicates that the statute, “[b]y preventing the indiscriminate slaughter of birds which destroy insects which feed upon our crops and damage them to the extent of many millions of dollars,... will thus contribute immensely to enlarging and making more secure the crops” available to the nation.³³ In addition, one court noted the inclusion of migratory birds that are not commonly hunted under the protection of the MBTA.³⁴ One might view these aspects of the legislative history as supporting a relatively broad application of the statute. By contrast, the Senator who introduced the MBTA stated: “Nobody is trying to do anything here except to keep pothunters from killing game out of season.”³⁵ This might be viewed as supporting a more limited scope of the MBTA.

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32. See Note, *Prohibiting Conduct, Not Consequences: The Limited Reach of the Migratory Bird Treaty Act*, 97 Mich. L. Rev. 823 (1998).
 33. H.R. Rep. No. 65-243, at 2 (1918). See also S. Rep. No. 65-27, at 2 (1917) (stating that the legislation was supported by those who urged “the economic value of the insectivorous birds as a protection to agriculture and the vital necessity of conserving bird life of the country by Federal laws and regulations”); Cong. Rec. at 4400 (June 28, 1917) (statement of Rep. McLean) (describing the MBTA as a “food conservation measure”); *ibid.* at 7361 (June 4, 1917) (statement of Rep. Stedman) (referring to “the very great importance of this bill as a conservation measure [considering] the enormous extent of the destruction of our crops by insects... Save the birds which destroy the insects and an incalculable service will be rendered to our country by increasing its supply of food”).
 34. *Sierra Club v. Martín*, 933 F. Supp. 1559, 1565 (N.D. Ga. 1996), reversed on other grounds, 110 F.3d 1551 (11th Cir. 1997).
 35. 55 Cong. Rec. 4816 (July 9, 1917).

The courts in the United States have reached different conclusions on the question of whether the MBTA's taking prohibition reaches otherwise lawful conduct that results in unintentional takes of migratory birds. Some courts have clearly held that the taking prohibition in section 703 applies to both intentional and unintentional takes. At least one court found that section 703 prohibits unintentional takes of migratory birds resulting from timber harvesting during nesting.³⁶ Other courts have interpreted the Act as applying only to activities, primarily hunting, whose purpose is to kill birds, and not to unintentional takes due to logging pursuant to timber sales.

In *Mahler v. United States Forest Serv.*,³⁷ the plaintiff alleged that the Forest Service violated section 703 of the MBTA by authorizing a series of salvage timber sales in migratory bird habitat that would "indirectly" take the birds by destroying their habitat and "directly" take birds as a result of logging during nesting season. The district court rejected any distinction between "indirect" takings caused by habitat modification, which the court concluded were not covered by section 703, and "direct" takings attributable to logging of trees with active nests. The court acknowledged that the language of section 703 and successful MBTA prosecutions involving unintended deaths of migratory birds supported broad application of the MBTA. Nonetheless, the court ultimately concluded that the MBTA "should not be read to prohibit any and all deaths of migratory birds that may result from logging operations in national forests, even in nesting season."³⁸ The court held that "the MBTA applies to activities that are intended to harm birds or to exploit harm to birds, such as hunting and trapping," but not "to other activities that result in unintended deaths of migratory birds."³⁹ The court saw the broad language of section 703 as including only activities leading to intentional takes, and the complete absence of criminal prosecutions against loggers since the statute's adoption convinced the court not to interpret the statute for the first time in 80 years to prohibit logging that results in the direct but unintended deaths of migratory birds.⁴⁰

36. *Sierra Club v. Martín*, 933 F. Supp. 1559, 1565 (N.D. Ga. 1996), reversed on other grounds, 110 F.3d 1551 (11th Cir. 1997).

37. 927 F. Supp. 1559 (S.D. Ind. 1996).

38. *Ibid.* at 1579.

39. *Ibid.*

40. *Ibid.* at 1581. See also *Newton County Wildlife Ass'n v. United States Forest Serv.*, 113 F.3d 110 (8th Cir. 1997), cert. denied, 522 U.S. 1108, 1115 (1998) (concluding that "it would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute prohibition on conduct, such as timber harvesting, that indirectly results in the death of migratory birds"); *Curry v. United States Forest Serv.*, 988 F. Supp. 541, 549 (W.D. Pa. 1997) (holding that "the loss of migratory birds as a result of timber sales of the type at issue in this case do not constitute a 'taking' or 'killing'

Other courts have clearly held that intent to take is not required for a violation of section 703. As noted above, one federal district court, in a decision reversed on other grounds, found that the MBTA prohibits timber harvesting that results in the unintentional take of migratory birds during nesting season.⁴¹ In that case the court found that 2,000 to 9,000 migratory songbirds would be killed directly as a result of the seven timber projects on national forest land challenged in the case.⁴²

One of the first cases holding that no proof of intent to take is required under section 703 is *United States v. Corbin Farm Serv.*⁴³ There, the federal government charged the defendants with misdemeanor violations of the MBTA for applying pesticides to an alfalfa field, causing the deaths of a number of American widgeon. According to the court, the use of broad language in section 703 "belies the contention that Congress intended to limit the imposition of criminal penalties to those who hunted or captured migratory birds."⁴⁴ In addition, the court found that the legislative history "reveals no intention to limit the Act so that it would not apply to poisoning."⁴⁵ The court therefore held that section 703 includes poisoning as a prohibited act within the meaning of the prohibition on killing "by any means or in any manner."⁴⁶ The court further held that criminal liability under the MBTA could constitutionally be imposed on those who did not intend to kill migratory birds.

A federal appeals court case decided around the same time reached a similar result. In *United States v. FMC Corp.*,⁴⁷ the government charged the defendant with violating section 703 by killing migratory birds through its operation of a chemical production process that resulted in the accumulation of wastewater in a ten-acre pond. The water in the pond attracted migratory waterfowl, which died when exposed to the chemical waste in the water. FMC argued that "there must be 'an intent to harm birds culminating in their death for there to be a conviction'" for violation of the MBTA's taking prohibition.⁴⁸ The court disagreed, concluding that the fact that the company manufac-

within the meaning of the MBTA"). At least one commentator endorses the conclusion of these courts. See Note, *Prohibiting Conduct, Not Consequences: The Limited Reach of the Migratory Bird Treaty Act*, 97 Mich. L. Rev. 823 (1998).

41. *Sierra Club v. Martín*, 933 F. Supp. 1559, 1565 (N.D. Ga. 1996), *reversed on other grounds*, 110 F.3d 1551 (11th Cir. 1997).

42. *Ibid.* at 1563.

43. 444 F. Supp. 510 (E.D. Cal.), *aff'd on other grounds*, 578 F.2d 259 (9th Cir. 1978).

44. *Ibid.* at 532.

45. *Ibid.*

46. *Ibid.*

47. 572 F.2d 902 (2d Cir. 1978).

48. *Ibid.* at 906.

tured a highly toxic chemical and failed to prevent that chemical from escaping into the pond and killing birds was sufficient to subject FMC to liability for violating the taking prohibition.⁴⁹

Cases decided more recently also conclude that unintentional takes violate section 703. For example, in *United States v. Moon Lake Elec. Ass'n*,⁵⁰ the United States charged a rural electric cooperative with violations of § 703 of the MBTA due to bird deaths that resulted from the defendant's failure to install inexpensive equipment on power poles. The court held that the plain language of the MBTA belies the contention that § 703 applies only to intentionally harmful conduct, and thus a defendant need not intend to cause bird deaths to be liable for violating section 703.⁵¹

The federal government has argued that the government's exclusive authority to enforce the MBTA precludes private actions to apply section 703 in the logging context, without arguing that logging operations resulting in unintentional takes are outside the reach of section 703.⁵² The government as criminal prosecutor has successfully argued that section 703 applies to direct, yet unintentional, takes involving, for example, the death of migratory birds resulting from electrocution by power lines, the application of pesticides to agricultural crops and the storage of toxic wastewater in ponds attractive to birds. Further, in responding to the submission, the United States stated that "logging that kills birds will be prosecuted in appropriate circumstances when a violation of the MBTA can be proven."⁵³ Thus, the United States has informed the Secretariat that the two cases that are the subject of this factual record, both of which related to logging operations, involved violations

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49. Cf. *United States v. Van Fossam*, 899 F.2d 636 (7th Cir. 1990) (upholding conviction for poisoning grackles and mourning doves).
 50. 45 F.Supp.2d 1070 (D. Colo. 1999).
 51. *Ibid.* at 1073-74. Other recent cases holding that section 703 prohibits unintentional takes resulting from otherwise lawful activity include *United States v. Morgan*, 283 F.3d 322 (5th Cir. 2002) and *Center for Biological Diversity v. Pirie*, 1919 F. Supp. 2d 161 (2002) (currently on appeal to the D.C. Circuit Court of Appeals).
 52. The *Mahler* case provides a good discussion of the US government's position in regard to the application of section 703 to the unintentional killing of migratory birds or destruction of their nests or eggs in the course of logging under a timber sale on a national forest. The court noted that "the Forest Service has had a difficult time [responding to the argument that section 703's broad language applies to unintentional conduct such as logging that results in the taking of migratory birds]. It is apparently unwilling to disavow the holdings of *FMC Corp. or Corbin Farm Service*, yet it cannot accept the reasoning of those cases as applied to logging activities." *Mahler*, 927 F. Supp. at 1578.
 53. Response at 7.

of section 703 of the MBTA that would be high priority for investigation and possible prosecution.⁵⁴

5.2.4 *Summary*

In summary, the cases interpreting section 703 of the MBTA have unanimously rejected the proposition that habitat modification or loss alone is sufficient to amount to a violation of the taking prohibition. The cases are split, however, on the question of whether section 703 of the MBTA prohibits unintentional as well as intentional takes, at least in the context of logging. The statutory text is not definitive. The majority of cases in which courts have interpreted the taking prohibition in section 703, including the most recent cases, have held that section 703 prohibits unintentional as well as intentional takes. At least one of those cases involved the application of the MBTA to logging activities. In most cases involving logging activity associated with timber sales on national forests, the courts have concluded that section 703 does not apply to logging activity that directly (but unintentionally) results in the killing of migratory birds or the destruction of their nests or eggs. However, in each of these cases, the United States sought to avoid private enforcement of section 703 with respect to timber sales, and no court in the United States has ever faced a case in which the federal government sought a prosecution under section 703 for the direct but unintentional taking of migratory birds resulting from logging. The United States considers that the two cases that are the subject of this factual record both involved violations of section 703 of the MBTA, and both of those cases concerned logging operations.

5.3 *Federal Policies Regarding Enforcement of MBTA Section 703*

This section summarizes the federal policies relevant to enforcement of MBTA section 703 in connection with the two cases referenced in Council Resolution 01-10. Because both cases involved possible violations of section 703 resulting from logging operations, a background discussion of federal policy regarding the enforcement of section 703 in connection with logging is provided. A discussion of federal policy regarding appropriate penalties for section 703 violations is provided to assist in determining whether federal penalties could or should have been sought in connection with the two cases. A summary of the FWS's policy regarding enforcement priorities is provided to assist in deter-

54. Letter from Kevin R. Adams, Assistant Director for Law Enforcement, FWS, to Geoffrey Garver, CEC Secretariat (19 April 2002) (hereafter, "Adams Letter"); Meeting between US officials and Geoffrey Garver, CEC, on 30 May 2002.

mining the relative priority the FWS would have given the two cases under section 703. Finally, in light of the enforcement actions that California took in regard to the two cases, a summary of relevant federal policy regarding cooperation and coordination between federal and state enforcement agencies is included.

5.3.1 *Enforcement of MBTA Section 703 in Connection with Logging*

A central assertion in submission SEM-99-002 is that it is the unofficial policy and practice of the United States government not to enforce section 703 of the MBTA in connection with logging operations. The Submitters rely chiefly on responses to Freedom of Information Act (FOIA) requests indicating that the United States has never sought a prosecution under MBTA in connection with a logging operation, and on an unsigned, unofficial memorandum from the Chief of the FWS that states:

The [FWS] has had a longstanding, unwritten policy relative to the MBTA that no enforcement or investigative action should be taken in incidents involving logging operations, that result in the taking of non-endangered, non-threatened migratory birds and/or their nests... [T]he Service will continue to enforce the MBTA in accordance with this longstanding policy.⁵⁵

The United States informed the Secretariat that to the best of its knowledge, the United States has never sought to prosecute under the MBTA an incident involving a logging operation. The United States confirms that in response to FOIA requests, it found no record of any such prosecutions.⁵⁶ Representatives of the United States also informed the Secretariat that, to the best of their knowledge, federal prosecutions of either of the two cases referenced in Council Resolution 01-10 would have been the first ever prosecution of the MBTA in connection with a logging operation. The United States asserts that the absence to date of any federal prosecutions of the MBTA in connection with logging operations reflects an exercise of prosecutorial discretion and allocation of resources to higher enforcement priorities.

The United States further states:

The FWS has no policy that exempts logging activities from MBTA enforcement. Logging activities result in habitat modification. Habitat

55. Submission at 6.

56. The United States informed the Secretariat that its records of MBTA enforcement actions are not organized according to what kind of activity was involved.

modification *per se* is not prosecutable under the MBTA. Nevertheless, logging that kills birds will be prosecuted in appropriate circumstances when a violation of the MBTA can be proven.⁵⁷

Representatives of the United States informed the Secretariat that whether “appropriate circumstances” exist depends, at least in part, on the availability of evidence of an MBTA violation and on the nature of the violation and the migratory bird involved. For example, United States officials informed the Secretariat that appropriate circumstances for prosecution are more likely to exist for violations involving raptors, such as ospreys, because they are relatively high in the food chain, and involving the rookeries of colonial nesters, such as great blue herons and (occasionally) ospreys, because such violations affect high concentrations of birds and therefore have a relatively high impact on the species.⁵⁸ In responding to the submission, the United States asserted that the memorandum from the Director of the FWS on which the Submitters relied is an unapproved and unofficial draft that embodies no FWS policy, formal or unwritten.⁵⁹

5.3.2 *Penalties for Violations of MBTA Section 703*

Information regarding the penalties that are available for violations of MBTA section 703, and regarding the policies of federal enforcement personnel as to the appropriate penalties to seek for a specific violation, assists in considering what federal penalties, if any, would be appropriate in connection with the two cases referenced in Council Resolution 01-10.

As noted above, Section 707(a) of the MBTA makes a violation of section 703, or of regulations made pursuant to it, a misdemeanor punishable by a fine not more than \$15,000, imprisonment of not more than six months or both. Officials of the United States informed the Secretariat:

In cases similar to the one in which active great blue heron nests were destroyed, the [FWS] routinely charges violations of the MBTA using a Notice of Violation under a forfeiture of collateral system. The US District Courts have specifically established the (monetary) collateral schedules for misdemeanor offenses such as these. The collateral schedule established in the Northern District of California established a base amount of

57. Response at 7.

58. Meeting between US officials and Geoffrey Garver, CEC, on 30 May 2002.

59. See Response at 7-8.

\$250 for unlawful take violations under the MBTA. Cases involving the limited take of birds under the MBTA, like those in the two instances cited by CIEL, are generally not referred to the US Attorney with a request that they be charged using a complaint, information, or indictment.⁶⁰

United States officials informed the Secretariat that the following are examples of MBTA cases they consider similar to the great blue heron case referenced in Council Resolution 01-10, none of which involved a logging operation:⁶¹

- In November 1998, two Arkansas developers and their two companies were sentenced in federal court to \$44,244 in fines and restitution for bulldozing a rookery to clear land for a housing development, killing approximately 5,000 cattle egrets and little blue herons and destroying approximately 4,500 nests. Each developer was fined \$5,000 individually, and each company was fined \$10,000. The developers were sentenced to pay an additional \$14,244 in restitution.
- In June 1999, the City of Carrollton, Texas, was issued a Notice of Violation under the MBTA and fined \$70,000 for using heavy equipment to destroy a rookery during nesting season in response to neighbors' complaints of its noise, odor and perceived unsanitary condition, killing approximately 300 cattle egrets, great egrets, little blue herons and other migratory birds.
- In April 1999, ten individuals pleaded guilty and agreed to fines up to \$2,500, terms of incarceration ranging from six months' probation to six months of in-home confinement, and a total of \$27,500 in restitution for slaughtering more than 1,000 double-crested cormorants in Lake Ontario that they blamed for harming the local sports fishing industry. Each of the five most serious violators was sentenced to six months of home confinement, a \$2,500 fine and \$5,000 in restitution.

In another MBTA case, Moon Lake Electric Association was sentenced in August 1999 for violations of the MBTA and the Bald and

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- 60. Adams Letter (19 April 2002). Under a forfeiture of collateral system, the violator receives a Notice of Violation and pays the collateral sum to the court (like a fine) without having to make an appearance in court. As of 13 September 2001, the collateral schedule for the Northern District of California indicates that the current collateral amount for a misdemeanor violation of the MBTA is a base amount of \$1,000, plus \$100 per bird taken, if the violation involved the taking of birds for commercial purposes; and a base amount of \$500, plus \$100 per bird taken, if the violation involved a non-commercial taking.
 - 61. Letter from Kevin R. Adams, Assistant Director for Law Enforcement, FWS, to Geoffrey Garver, CEC Secretariat (10 June 2002).

Golden Eagle Protection Act⁶² involving the electrocution of 17 eagles and hawks on the company's power lines and poles in Colorado. Pursuant to a plea agreement, the utility pleaded guilty to three Bald and Golden Eagle Protection Act misdemeanor charges and three MBTA charges and was sentenced to three years of probation and \$100,000 in penalties.⁶³ The company was also ordered to retrofit its utility lines to prevent electrocutions in the future.

5.3.3 MBTA Enforcement Priorities

As discussed below in section 6, the United States provided information regarding the investigative priority the FWS would have given the two cases referenced in Council Resolution 01-10. This section summarizes the FWS's policies regarding enforcement priorities.

The FWS Manual, Part 444, Chapter 3, presents the investigative priorities for FWS enforcement personnel that are applicable to enforcement of the MBTA. It is intended to "serve[] as a guide for Special Agents to determine the investigative priority of a proposed law enforcement activity."⁶⁴ High priority violations are:

[v]iolations that involve *wild* populations of Federally protected species, including species listed on Appendix I to CITES, with emphasis on commercial exploitation. Examples include:

- (1) Unlawful commercial activities affecting wild populations of fish, wildlife or plants listed as endangered or threatened, or listed on Appendix I to CITES.
62. In regard to the Bald and Golden Eagle Protection Act, the US Interior Department web site states as follows:
"The Act imposes criminal and civil penalties on anyone (including associations, partnerships and corporations) in the US or within its jurisdiction who, unless excepted, takes, possesses, sells, purchases, barter, offers to sell or purchase or barter, transports, exports or imports at any time or in any manner a bald or golden eagle, alive or dead; or any part, nest or egg of these eagles; or violates any permit or regulations issued under the Act. A criminal conviction requires that the violator acted knowingly or with wanton disregard of the consequences. According to the Act, the criminal penalty is a maximum \$5,000 fine or one-year imprisonment, or both, doubled for subsequent convictions, but the Sentencing Reform Act of 1984, as amended in 1987, increases maximum fines significantly. Each prohibited act is a separate violation. One-half of the criminal fine, but not to exceed \$2,500, must be paid to whoever gives information leading to conviction." <<http://ipl.unm.edu/cwl/fedbook/eagleact.html>> (11 September 2002).
63. US Department of Justice press release, *Electric Utility Sentenced for Killing Eagles and Hawks* (12 August 1999), viewed at <<http://www.usdoj.gov/opa/pr/1999/August/353enr.htm>> on 1st March 2002.
64. 444 FW 3, Section 3.2.

- (2) Unlawful commercial activities involving wild populations of other Federally protected fish or wildlife such as waterfowl or other Federally protected migratory birds.
- (3) The unlawful take of Federally protected species of fish, wildlife or plants by energy production facilities and environmental contaminants such as pesticides, poisons, oil pits, oil spills, cyanide leach pits or other toxins.
- (4) Enforcement of Federal laws or regulations related to non-commercial violations that involve the taking, possession, importing or exporting of wild populations of Federally protected species, with emphasis on sport hunting and fishing.
- (5) Enforcement of Federal laws or regulations related to commercial violations that involve the taking, possession, importing or exporting of wild populations of protected species of wildlife within National Wildlife Refuges.⁶⁵

Medium priority violations are:

[v]iolations that involve *wild* populations of species protected by state, tribal, or foreign laws, with emphasis on interstate commercial exploitation and support of refuge enforcement activities on Service lands as well as assistance to other federal, tribal, and state agencies on their lands. Examples include:

- (1) Assistance to the Division of Refuges in providing protection of the public and the environment within the National Wildlife Refuge System and on other Service lands, including archeological sites, as well as assisting other Federal agencies with conservation enforcement on their lands.
- (2) The unlawful commercialization of wild populations of fish, wildlife or plants which are protected by state, tribal, or foreign law, including CITES Appendix II and III species. In situations involving non-CITES species that are protected by either state, tribal, or foreign law, there should be an indication that the aggrieved government does not have jurisdiction over the principal violators and/or that the aggrieved government enforces the applicable laws.
- (3) Enforcement of the Lacey Act relating to non-commercial violations involving illegal taking of wild populations of species protected by state, tribal, or foreign laws. Again, there should be some indication

65. 444 FW 3, Section 3.2.A.

that the aggrieved government does not have jurisdiction over the primary violators and/or that the aggrieved government actually enforces the applicable laws.⁶⁶

Low priority violations are:

[v]iolations that involve permit compliance inspections, non-wildlife related activities off-Service lands, and captive-bred wildlife violations. Examples include:

- (1) Investigations of non-wildlife related violations that may fall within the jurisdiction of Service law enforcement officers.
- (2) Compliance inspections of Service permit holders.
- (3) Investigations involving captive-bred fish, wildlife and plants or those legally taken from the wild but are otherwise possessed or transported in violation of Federal regulations. Such investigations should not be initiated unless there is a clear indication that the infraction is detrimental to the wild resource.
- (4) Investigations of violations of laws or regulations over which the Service does not have jurisdiction.⁶⁷

The FWS Manual indicates that the date of the priorities policy set out above is 31 December 1996, which is after the dates of the incidents involved in the two cases referenced in Council Resolution 01-10. However, representatives of the United States informed the Secretariat that these priorities are relevant to those two cases.

5.3.4 Federal-State Cooperation and Coordination on Enforcement

In both of the cases referenced in Council Resolution 01-10, the state of California took enforcement action, as explained below in section 6. California's enforcement actions were pursuant to state wildlife and forestry laws, and not pursuant to the MBTA or to the provision of California law, described more fully below in section 5.4, that makes violations of the MBTA state offenses as well. In light of California's enforcement actions, federal policy regarding cooperation between federal and state wildlife enforcement agencies and the appropriate federal enforcement response for an incident as to which a state has taken enforcement action is relevant to the factual record.

66. 444 FW 3, Section 3.2.B.

67. 444 FW 3, Section 3.2.C.

In 1990, the FWS and the CDFG entered into a Memorandum of Agreement (MOA) for Cooperative Law Enforcement between the US Fish and Wildlife Service and the State of California Department of Fish and Game. The MOA notes the FWS's determination that "it is necessary and appropriate to utilize certain officers, services, and facilities of the State of California to assist in providing effective enforcement of Federal and DFG laws on the lands and waters and within the State of California." Under the MOA, the Regional Director of the FWS delegates to the CDFG certain authority to enforce the MBTA and its implementing regulations. This means that both state and federal enforcement personnel can take part in enforcing the MBTA; the federal government did not delegate all of its authority to enforce the MBTA to the state. In addition, unlike some other environmental laws in the United States, the MBTA does not explicitly allow the federal government to delegate enforcement entirely to a state, with federal oversight, if the state's regulatory and enforcement program meets certain statutory prerequisites.

Under the MOA, the FWS delegates to the state the authority to enforce the MBTA "within the limitations of and subject to the jurisdiction of the laws of the state." The Regional Director specifically delegates to the DFG "the same authority to search, seize, arrest, and exercise other law enforcement functions" as federal wildlife enforcement personnel carry. Among other things, the MOA states that

[w]here illegal activities may constitute violations of both state and federal laws or regulations, the DFG will determine whether to investigate and/or prosecute under applicable California law. The DFG will refer appropriate violations of federal law or regulation for which that state decides not to prosecute under state law to the Service's ARD/LE in Portland, Oregon, or the local resident Special Agent as expeditiously as possible.

The MOA states the "DFG shall submit in a timely manner appropriate investigative or other reports to the ARD/LE, or his/her designee, on law enforcement activities conducted under authority of this agreement." The MOA does not require the California agencies to submit reports to the FWS regarding acts that violate both state and federal law for which the state decides to take enforcement action solely under state law. For acts that only violate federal law, the MOA requires the state to obtain FWS's concurrence before initiating an investigation.

The principal policy applicable where a state has taken criminal enforcement action in regard to a potential federal criminal offense, known as the Petite Policy, is set out in section 9-2.031 of the United States Attorneys' Manual. The Petite Policy states, in relevant part:

This policy establishes guidelines for the exercise of discretion by appropriate officers of the Department of Justice in determining whether to bring a federal prosecution based on substantially the same act(s) or transactions involved in a prior state or federal proceeding....Although there is no general statutory bar to a federal prosecution where the defendant's conduct already has formed the basis for a state prosecution, Congress expressly has provided that, as to certain offenses, a state judgment of conviction or acquittal on the merits shall be a bar to any subsequent federal prosecution for the same act or acts....

The purpose of this policy is to vindicate substantial federal interests through appropriate federal prosecutions, to protect persons charged with criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same act(s) or transaction(s), to promote efficient utilization of Department resources, and to promote coordination and cooperation between federal and state prosecutors.

This policy precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s) unless three substantive prerequisites are satisfied: first, the matter must involve a substantial federal interest; second, the prior prosecution must have left that interest demonstrably unvindicated; and third, applying the same test that is applicable to all federal prosecutions, the government must believe that the defendant's conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact. In addition,... the prosecution must be approved by the appropriate Assistant Attorney General.

Satisfaction of the three substantive prerequisites does not mean that a proposed prosecution must be approved or brought. The traditional elements of federal prosecutorial discretion continue to apply....

In order to insure the most efficient use of law enforcement resources, whenever a matter involves overlapping federal and state jurisdiction, federal prosecutors should, as soon as possible, consult with their state counterparts to determine the most appropriate single forum in which to proceed to satisfy the substantial federal and state interests involved, and, if possible, to resolve all criminal liability for the acts in question.⁶⁸

The Petite Policy "applies only to charging decisions; it does not apply to pre-charge investigations."⁶⁹ It "applies whenever there has been a prior state or federal prosecution resulting in an acquittal, a con-

68. US Attorneys' Manual, Section 9-2.031(A).
69. US Attorneys' Manual, Section 9-2.031(B).

viction, including one resulting from a plea agreement, or a dismissal or other termination of the case on the merits after jeopardy has attached.”⁷⁰

5.4 California Laws Concerning Protection of Migratory Birds

The focus of the submission is on federal enforcement of the MBTA, and not on enforcement of related laws in California or other states. The submission does not raise, and this factual record does not address, the issue of whether California is failing to effectively enforce its environmental law. However, because California authorities took enforcement action in regard to both of the cases referenced in Council Resolution 01-10, general background on relevant California state laws concerning the protection of migratory birds is relevant to the factual record. The following is a summary of key provisions of California law that were invoked, or arguably could have been invoked, in those two cases. Their inclusion here is intended to assist in understanding the actions that California took in connection with those cases.

The Fish and Game Code of California contains several provisions concerning protection of migratory birds. Provisions relevant to the two cases referenced in Council Resolution 01-10 include the following:

- Section 3503: “It is unlawful to take, possess, or needlessly destroy the nest or eggs of any bird, except as otherwise provided by this code or any regulation made pursuant thereto.”
- Section 3513: “It is unlawful to take or possess any migratory nongame bird as designated in the Migratory Bird Treaty Act or any part of such migratory nongame bird except as provided by rules and regulations adopted by the Secretary of the Interior under provisions of the Migratory Bird Treaty Act.”
- Section 3800: “All birds occurring naturally in California which are not resident game birds, migratory game birds, or fully protected birds, are nongame birds.”

Great blue herons and ospreys are both migratory nongame birds under the Fish and Game Code. Violations of Section 3503, 3513 and 3800 are misdemeanors punishable by a fine of not more than \$5,000, imprisonment for not more than six months, or both.

70. US Attorneys’ Manual, Section 9-2.031(C).

The Z'berg-Nejedly Forest Practice Act of 1973, which is Chapter 8 of the California Public Resources Code, also contains relevant provisions. The Forest Practice Act establishes, *inter alia*, requirements for conducting timber harvests in California. Section 4571 states that “[n]o person shall engage in timber operations until that person has obtained a license from the board [of Forestry].” Section 4581 states that “[n]o person shall conduct timber operations unless a timber harvesting plan prepared by a registered professional forester has been submitted for such operations to the department....”

Regulations promulgated under the Forest Practice Act also contain relevant provisions, particularly those involving the protection of nest trees during timber operations, timber harvest planning requirements, and exemptions for timber harvesting conducted in connection with the conversion of timber land to non-timber land. These provisions include the following:

- 14 C.C.R. 919.2(b): “During timber operations, nest tree(s), designated perch tree(s), screening tree(s), and replacement tree(s), shall be left standing and unharmed except as otherwise provided in these following rules.”
- 14 C.C.R. 919.3: This section establishes timber operations requirements applicable to nest sites containing active nests, but not to nest sites containing only abandoned nests. These requirements include the establishment of buffer zones surrounding trees with active nests, as well as year-round and critical-period restrictions on timber operations within the buffer zone. For great blue herons, “the buffer zone shall consist of the area within a 300-foot radius of a tree containing a group of five or more active nests in close proximity as determined by the Department of Fish and Game.” Under 14 C.C.R. 895.1, great blue heron nests are considered active if breeding efforts have occurred within the past two years. All nest trees containing active nests must be left standing and unharmed at all times, and during the critical period of either February 15 to July 1 or March 15 to July 15 (depending on the county), “timber operations within the buffer zone shall be staged with a gradual approach to the nest.” For ospreys, “the buffer zone may be up to five acres in size [and] [w]hen explained and justified in writing, the Director may increase the size of the buffer zone to a maximum of 18 acres when necessary to protect nesting birds.” At all times, “designated nest trees, perch trees, screening trees and replacement trees shall be left standing and unharmed,” but

construction of artificial nest structures may be proposed if retention is determined to be unfeasible. Under 14 C.C.R. 895.1, osprey nests are considered active if breeding efforts have occurred within the past three years. During the critical period of either March 1 to April 15 for active nests (with an extension to August 1 for occupied nests) or March 15 to May 1 (with an extension to August 15 for occupied nests), the dates depending on the county, “at nests sites where Osprey have shown historical tolerance to disturbance, timber operations are permitted using a gradual approach to the nest, except that no cutting is permitted.” If osprey are determined to be intolerant to timber operations, “no timber operations are permitted within the buffer zone unless the Director determines there are no feasible alternatives.”

- 14 C.C.R. 1035.3(d): “Each Licensed Timber Operator shall... [c]omply with all provisions of the [Forest Practice Act], Board [of Forestry] rules and regulations, and the applicable approved [timber harvesting plan] and any approved amendments to the [timber harvesting plan].”
- 14 C.C.R. 1104.1: This section provides an exemption from “conversion permit and timber harvesting plan requirements” for certain timber operations. It applies “to a conversion of timberland to a non-timber use only, of less than three acres in one contiguous ownership, whether or not it is a portion of a larger land parcel and shall not be part of a [timber harvesting plan].” Section 1104.1(a)(1) requires a Notice of Conversion Exemption Timber Operations to be prepared by a registered professional forester and submitted to the Director. Section 1104.1(a)(2) sets out conditions applicable to conversion exemption timber operations. Section 1104.1(a)(2)(G) states that “[t]he timber operator shall not conduct timber operations until receipt of the Director’s notice of acceptance. Timber operations shall not be conducted without a valid on-site copy of the Director’s notice of acceptance of operations and a copy of the Notice of Conversion Exemption Timber Operations as filed with the Director.” Section 1104.1(a)(2)(H) states that “[n]o sites of rare, threatened or endangered plants or animals shall be disturbed, threatened or damaged and no timber operations shall occur within the buffer zone of a sensitive species as defined in 14 C.C.R. 895.1.” This includes buffer zones for active great blue heron and osprey nests.

Section 4601 makes willful violations of the Forest Practice Act, or rules or regulations promulgated under the Act, misdemeanors punishable by a fine of not more than \$1,000, imprisonment for not more than six months, or both. Under Section 4601.1, intentional, knowing or negligent violations of the Act or a rule or regulation promulgated under it are subject to a civil penalty of not more than \$10,000.

6. Facts Presented by the Secretariat with Respect to Matters Raised in Council Resolution 01-10

This section focuses on the facts of the two cases referenced in Council Resolution 01-10 and on the actions that the state of California and the United States took in connection with those two cases. This information is intended to provide a basis for determining whether the United States failed to effectively enforce section 703 of the MBTA in connection with those two cases.

6.1 The Great Blue Heron Rookery Case

According to Council Resolution 01-10, 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.⁷¹

6.1.1 Facts Regarding the Destruction of the Rookery

On 3 or 4 April 1996, three men cut down eight to ten trees containing great blue heron nests, some with fledglings, in a rookery in Arcata, California. The logging took place under the direction of the owner of the land containing the rookery, David Wallace Van Derlin (hereinafter Wallace), who had recently purchased the land. The closing for the sale of the property to Wallace took place on 3 April 1996. The loggers spent approximately one hour cutting down the trees, targeting those containing great blue heron nests. Immediately after the cutting stopped, adult great blue herons attempted to locate the nests and fledglings. The adult great blue herons continued the search for several days before giving up. A week later, great blue herons were still observed in trees adjacent to the logged area. The logging destroyed at least five, and as many as six-

71. Except as otherwise noted, the information on which the facts presented in this section are based is primarily from the Adams Letter (including attachments); the 30 May 2002 meeting between the CEC and US officials; and the 10 May 2002 letter from Norman E. Hill, Chief Counsel, CDF, to Geoffrey Garver, Director, CEC Submissions on Enforcement Matters Unit (including attachments).

teen, great blue heron nests, at least some of which contained eggs, plus at least one fledgling great blue heron.

The registered professional forester, Scott Feller, prepared and submitted a Notice of Conversion Exemption Timber Operations on the basis that the timber harvest involved less than three acres. Neighbors of the land on which the logging took place received notice of the timber harvesting on 5 April 1996, after destruction of the rookery had been completed. Prior to the logging, the CDF had no record of the logging operation and had not approved the Notice of Conversion Exemption Timber Operations. The Notice was marked "received" by the CDF on 12 April 1996. The Notice lists limitations and requirements applicable to timber operations conducted under the Notice of Exemption, including the condition that "[n]o sites of rare, threatened or endangered plants or animals of special concern shall be disturbed, threatened or damaged." The Notice also states: "TIMBER OPERATIONS CANNOT START UNTIL VALID COPY OF AN ACCEPTED NOTICE IS RECEIVED FROM CDF."

Neighbors claimed that they had informed Wallace of the presence of the great blue heron rookery shortly prior to the logging. The previous owner of the parcel on which the logging took place also stated that Wallace knew about the heron rookery. After the logging, Wallace told state investigators that he noticed old nests in the trees that were cut during the logging operation, and he claimed that he was unaware that the heron rookery was active. The RPF who prepared the Notice of Conversion Exemption Timber Operations told investigators that he had visited the site of the logging on 21 February 1996 and had not noticed the heron rookery or observed any "whitewash" that might have indicated the presence of an active rookery. The rookery was listed in the CDFG's Natural Diversity Data Base as a rookery in which great blue herons were "presumed extant." An 18 April 1996 print-out of the listing indicates that the site had been last visited in June 1993. During the June 1993 visit, six nests were counted and a dead juvenile heron and broken eggshells were observed under the rookery.

6.1.2 Actions taken by California in Regard to the Great Blue Heron Rookery Case

On 16 April 1996, neighbors of Wallace wrote to the FWS and the CDFG regarding the logging that took place on Wallace's property on 3 or 4 April 1996, resulting in the destruction of the heron rookery. The neighbors officially requested that the matter be investigated and criminal charges be sought in regard to any individuals involved. These or

other neighbors of Wallace had also contacted the CDF, CDFG and the County District Attorney on or before 10 April 1996 regarding the logging incident. On 10 April 1996, a CDFG biologist contacted a CDF Forestry Assistant regarding the logging.

After Wallace's neighbors called state officials, CDF inspectors and representatives of the CDFG visited the site of the logging on 10 April 1996.⁷² The CDFG investigating officer who participated was a deputized US Deputy Game Warden. During the 10 April 1996 visit, the inspectors found one dead chick and many pieces of eggshell. At the site, they also met Wallace, who stated that he was responsible for the logging. A notice of Exemption was posted on a gate at the entrance to the property, but Wallace admitted during the inspection that he did not have a CDF-approved Notice of Exemption. Several great blue herons were flying around the rookery site during the inspection. One of the CDF inspectors noted that the stand in which the logging had occurred "has characteristics that make it good wildlife habitat for a number of species, including those associated with older forests." The inspection revealed violations of California Fish and Game Code sections 3503 and 3800. The state also determined that the landowner had violated sections 4571 and 4581 of the California Public Resources Code, as well as 14 C.C.R. 919.3, 14 C.C.R. 1104.1(a)(2)(H) and 14 C.C.R. 1038. At the conclusion of the inspection, Wallace was issued a citation for violations of 14 C.C.R. 1104.1(a)(2)(G) (logging without an approved Notice of Exemption), 14 C.C.R. 1104.1(a)(2)(H) (logging of a nest site of a species of special concern) and section 4571 of the Public Resource Code (logging without a timber operators' license).

CDF inspectors returned to the site on 16 April 1996 to meet with Feller, the registered professional forester who had prepared the Notice of Exemption. Prior to that visit, Feller had told a CDF inspector that he had mailed the Notice of Exemption to CDF on 9 April 1996, after the logging had occurred. At the conclusion of the inspection, the CDF issued Feller a citation for several violations, including violations of 14 C.C.R. 1104.1(a)(2)(H) (failure to identify and allowing logging of a nest site of a species of special concern) and 14 C.C.R. 919.3(b)(3) (failure to establish and flag a 300-foot buffer around active great blue heron nest sites).

On 3 January 1997, the Humboldt County District Attorney filed a criminal complaint against David Glenn Wallace (aka Van Derlin) in the Humboldt County Superior Court. The complaint contained nine counts charging Wallace with violations of Sections 3503 and 3800 of the Fish

72. The reports of the CDF inspectors are not consistent as to the date of the inspection.

and Game Code, 14 C.C.R. 1104.1(a)(2)(H), 14 C.C.R. 919.3, and Section 4571 of the Public Resources Code. On 28 September 1998, Wallace pleaded no contest to six misdemeanor counts and the District Attorney recommended the maximum sentence of six months in jail and a \$2,700 fine.⁷³ Prior to sentencing, the Humboldt County Probation Department recommended that, in addition to jail time and a fine, Wallace be required to pay restitution in the amount of \$310,000, the estimated cost of relocating a great blue heron rookery similar to the one destroyed. On 9 December 1998, Wallace was sentenced to 120 days in county jail, a fine of \$540 and three years' probation. The Humboldt County Superior Court has no record of any order of restitution.

Shortly after filing the criminal complaint against Wallace, the Humboldt County District Attorney wrote to the California Secretary of Resources about the case and stated that he "did not believe the maximum possible punishment, a \$2,000 fine and 6 months in County Jail per charge, is sufficient to address the magnitude of the harm caused. The bottom line is that the potential punishment to Mr. Wallace may well be outweighed in his mind by his financial gain."⁷⁴

CDF took separate action against the registered professional forester, Feller, who prepared the exemption notice for the landowner. The district attorney concluded that "[f]actual circumstances preclude criminal action against Mr. Feller... While we cannot prove that he was an actual conspirator to Mr. Wallace's criminal acts, such can be reasonably speculated."⁷⁵ The District Attorney recommended that administrative action be taken against Feller's registered professional forester license. CDF presented evidence showing that Feller was negligent in preparing the exemption notice in not noting the presence of the heron rookery, and on that basis the California Board of Forestry and Fire Protection revoked Feller's registration. Feller challenged the revocation and lost at both the County Superior Court level and on appeal.

Regarding the action taken against Feller, an official of the CDF informed the Secretariat:

CDF regards the action against Scott Feller as an essential part of this case. Under California law, professional foresters are licensed by the State. Peo-

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- 73. Although Wallace pleaded no contest to six separate counts, the maximum prison term was only one six-month term, and not six consecutive six-month terms, because the crimes were all committed at the same time.
 - 74. Letter to Douglas P. Wheeler, Secretary of Resources, from Terry R. Farmer, District Attorney (4 February 1997).
 - 75. Letter to Douglas P. Wheeler, Secretary of Resources, from Terry R. Farmer, District Attorney (4 February 1997).

ple wishing to conduct timber harvesting operations are required to obtain the assistance of a Registered Professional Forester to advise them of the requirements of the Forest Practice Rules, to assist them in preparing a Timber Harvesting Plan or an exemption notice for approval by CDF, and to make sure that the licensed timber operator follows the provisions of the approved Timber Harvesting Plan or exemption notice. Registered Professional Foresters play an important role in the State's program for regulating the conduct of timber harvesting. Where a forester fails in his or her professional responsibilities, the forester may be subject to disciplinary action as happened in this case. As a result of the revocation action, Feller was unable to practice his profession for a period of more than one year.⁷⁶

The state of California did not charge either Wallace or Feller under Section 3513 of the Fish and Game Code. That provision makes violation of the federal MBTA an offense under state law. Therefore, the actions against Wallace and Feller provide no precedent in the state of California or elsewhere regarding application of the MBTA to a logging operation. In addition, the Secretariat has received no information indicating that migratory birds, or their nests or eggs, of species other than great blue herons were taken as a result of the logging of the heron rookery. The Secretariat is unaware whether or not the state of California, in investigating the Wallace case, looked for or attempted to gather evidence of a taking of other species of migratory birds. In the materials provided to the Secretariat, there is no indication that such an attempt was made.

6.1.3 Actions taken by the United States in Regard to the Great Blue Heron Rookery Case

United States officials informed the Secretariat that the FWS first became aware of the destruction of the great blue heron rookery upon receipt of the 16 April 1996 letter from neighbors of Wallace's that California officials had also received. The FWS had no MBTA permitting program that applied to the logging activity that took place, and had no ongoing program for inspecting, monitoring or requiring self-reporting of logging operations to determine compliance with the MBTA. According to the United States, when the FWS senior resident agent received the letter from Wallace's neighbors, "he determined that the alleged take of great blue heron nests could be a violation of the MBTA."⁷⁷ He also determined that there were potential violations of the California Fish and Game Code and, following standard practice where violations of

76. Letter from Norman E. Hill, Chief Counsel, CDF, to Geoffrey Garver, Director, CEC Submissions on Enforcement Matters Unit (10 May 2002).

77. Adams Letter (19 April 2002).

both federal and state laws are alleged, he contacted law enforcement officials at the CDFG. The FWS and CDFG discussed the matter and agreed that the state would take the lead in the investigation.

Wallace's neighbors sent another letter to the FWS on 19 April 2002, providing additional information about the rookery destruction and about Wallace, and stating their "understanding that your office may have more power to penalize David Wallace VanDerlin who we believe will continue to purchase properties, cut without permits, and intentionally destroy protected species."⁷⁸ The FWS responded in a 24 April 2002 letter, stating that the FWS was conducting a coordinated investigation with the CDFG. The neighbors sent additional letters updating the FWS on the case on 29 April 1996 and 21 May 1996.

As explained above in section 6.1.2, state officials had already learned of the case and had already conducted inspections on 10 April and 16 April 1996 by the time federal officials contacted them about it. Therefore, the FWS was not present at those inspections and provided no input as to how they should be conducted. However, as a deputized US deputy game warden, the CDFG investigator who participated in the investigation of Wallace and who was present at the 10 April 1996 inspection of the Wallace property, had the authority to investigate violations of both the MBTA and Section 3513 pursuant to the MOA discussed above in section 5.3.4. United States officials informed the Secretariat that they had no discussion with state officials regarding whether the Wallace case could or should be prosecuted under Section 3513 of the California Fish and Game Code, which makes a violation of the MBTA a state offense. Therefore, although the FWS senior resident agent believed the case presented possible violations of the MBTA, the opportunity for the state to apply provisions equivalent to the federal MBTA was not pursued.

Because the state took the lead in the investigation, FWS officials told the Secretariat they had no need to determine the enforcement priority to give to the Wallace case, and did not do so at the time. However, United States officials informed the Secretariat that it would have been considered a high priority investigation under Part 444 of the FWS Manual, discussed above in section 5.3.3. According to the United States, the case would have been a high priority case because it involved a wild population of a federally protected species, namely great blue herons protected under the MBTA. The United States did not consider this to be

78. Letter from Wallace neighbors to Scott Pearson, FWS (19 April 2002).

a case involving commercial exploitation or unlawful commercial activities; those terms refer to commercial exploitation of, or commercial activities involving, the protected species.

United States officials informed the Secretariat that once the state's prosecution of Wallace was completed, "it was inappropriate for the Service to seek federal prosecution as provided by the Department of Justice's 'Petite Policy.'"⁷⁹ United States officials explained that application of the Petite Policy to a case is not typically documented, and the United States provided no contemporaneous documentation of its application in the Wallace case. The United States did not request information from state enforcement authorities regarding the penalties imposed in the case or other matters that would be relevant to determining whether the state's case met the criteria for applying the policy. United States officials stated that this was also consistent with normal practice regarding the Petite Policy. However, the Petite Policy provides an explanation for the United States' view that federal enforcement would have been inappropriate. The United States informed the Secretariat that the Petite Policy was applicable to the Wallace case, because Wallace was convicted and sentenced. By contrast, it is not clear that the Petite Policy was applicable in connection with Feller, against whom the District Attorney dismissed criminal charges and recommended administrative action. Therefore, the Petite Policy is primarily relevant to the United States' actions in regard to the Wallace case.

Under the Petite Policy, for federal prosecution to have proceeded following completion of the state's action against Wallace, the federal government would have had to determine that the case involved a substantial federal interest, that the state prosecution left that interest demonstrably unvindicated, that Wallace's conduct constituted a federal offense, and that he could be convicted on admissible evidence. In addition, the Assistant Attorney General for Environment and Natural Resources would have had to approve the case. Last, federal prosecutors would still retain discretion not to pursue the case.

In regard to whether the case involved a substantial federal interest, one might consider the FWS's conclusion that the case would have been a high priority for investigation because it involved a wild population of a species protected under the MBTA. The federal interest is clear, and the fact that the case would have been a high priority for investigation sheds light on whether that interest is substantial. One might also consider the view of FWS officials that great blue herons are likely to be

79. Adams letter (19 April 2002).

given special consideration in regard to enforcement of the MBTA because they are colonial nesters.

Regarding whether the state prosecution left the federal interest in protecting migratory birds demonstrably unvindicated, one might consider the district attorney's opinion that the maximum punishment available under state law is insufficient given the nature of Wallace's crime in connection with whether additional federal penalties could or should have been sought under the MBTA. In MBTA cases that the United States describes as similar, discussed above in section 5.3.2, fines as high as \$70,000 were obtained, but those violations involved the taking of a greater number of birds or their nests and eggs. On the other hand, the MBTA provides only misdemeanor penalties and it is not clear that significant additional punishment could have been obtained with an MBTA prosecution. United States officials told the Secretariat that in their view "federal prosecution... under the MBTA would not have furthered the interests of the MBTA, as those interests were adequately addressed by the enforcement action taken under other authorities."⁸⁰ Despite the fines imposed in other MBTA cases, it appears that the United States does not believe fines in the same range could have been obtained against Wallace.

As to the likelihood of success, the evidence, including destroyed nests and at least one dead fledgling heron, that led to Wallace's conviction under state charges might have supported a federal MBTA prosecution as well. As noted below, however, a federal MBTA prosecution might have raised significant legal issues.

The United States does not assert that the federal government would have sought prosecution of Wallace or Feller under the MBTA had the state not acted. However, the United States' view that the case would have been a high priority for investigation might be interpreted to indicate that the United States would have taken enforcement action if the state had not, even though the United States did not seek to have the state charge Wallace or Feller under the California statute that makes violations of the MBTA state offenses as well.

On one hand, the United States asserts that logging that kills birds will be prosecuted in appropriate circumstances when a violation of the MBTA can be proven. The United States informed the Secretariat that "appropriate circumstances" are more likely in cases involving the taking of colonial nesters such as great blue herons, or destruction of their

80. Adams letter (19 April 2002).

nests or eggs. As noted above, the evidence might have supported a successful federal MBTA prosecution against Wallace as well, putting aside the legal issues that might have been raised. Therefore, the Wallace case might have provided an opportunity to set a precedent in regard to enforcement of the MBTA in connection with logging operations. The district attorney's conclusion that the state's case against Feller lacked sufficient evidence linking Feller with the taking of birds might be taken into account in considering the likelihood of a successful MBTA case against Feller.

Evidentiary considerations aside, a federal MBTA action against Wallace would have been, as far as the United States is aware, the first case ever brought under the MBTA in connection with a logging operation.⁸¹ As noted above, the United States explains that the lack to date of any MBTA prosecutions in connection to logging operations is the result of enforcement discretion. It is possible that Wallace would have argued, in reliance on cases such as the *Mahler* case discussed in section 5.2.3 above, that the MBTA does not apply to the taking of migratory birds resulting from logging. Therefore, one possible outcome would be a broad ruling that the MBTA does not apply to any unintentional, yet direct takes, contrary to the United States' successful prosecutions of unintentional takes in the *Corbin Farm Serv., United States v. FMC Corp.*, and *Moon Lake Elec. Ass'n* cases discussed in section 5.2.3. above. The risk of such an outcome, which could be a significant setback to the FWS's overall program for enforcing the MBTA, would be relevant to deciding whether to prosecute Wallace under the MBTA. In addition, officials of the United States informed the Secretariat that, in their view, the Wallace case would have had little value as a precedent under the MBTA because it involved a relatively small number of birds and nests, for which Wallace likely would not have received a level of punishment that could serve as a significant deterrent to others.

Finally, concerns regarding the allocation of resources are relevant. The United States informed the Secretariat that three of the ten Special Agent positions in the region during 1996–98 were vacant. Resource constraints also would be relevant in regard to involvement of the United States Attorney's office in the case (as opposed to using a Notice of Violation with forfeiture of collateral), which according to the United States would have been unlikely. United States officials informed the Secretariat:

81. Nonetheless, the United States asserts that “[t]here were no complex or precedent-setting circumstances involved in the great blue heron rookery case.” Adams letter (19 April 2002).

Any cases referred to the U.S. Attorney would be subject to review and acceptance as part of that office's established intake process. Normally, the San Francisco office only accepts Service cases for prosecution that involve felony or particularly egregious misdemeanor violations of Federal wildlife statutes. The San Francisco office, like every U.S. Attorney office, frequently declines cases that are referred by the Service and other Federal agencies when State laws have been violated and the cases can be prosecuted by State or local authorities. The competition for staff and prosecution support resources within a U.S. Attorney office is keen and impacts all Federal agencies, regardless of the drug, firearms, fraud, white-collar or wildlife crimes involved. Deferring prosecutions to effective state authorities, where appropriate, enables the U.S. to maximize limited enforcement resources.⁸²

The Secretariat received no information from the United States or other sources indicating that the non-enforcement initiatives that the United States described in its response were relevant to the great blue heron case. As noted above, these mechanisms include population monitoring of migratory birds, avian mortality studies and management, landscape level planning, public outreach and the North American Bird Conservation Initiative and Trilateral Committee for Wildlife and Ecosystem Conservation and Management.

6.2 *The Osprey Nests Case*

According to Council Resolution 01-10, 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.⁸³

6.2.1 *Facts Regarding the Destruction of Osprey Nests*

The incident involving the destruction of two osprey nest trees, one active and one historic, took place in October 1995. The nest trees were destroyed during the course of a prescribed burn that was done to prepare so-called Unit A, the area in which the trees were located, for timber harvesting. The prescribed burn was called for in timber harvesting plan (THP) # 1-94-360 HUM, which the landowner, Scotia Pacific

82. Adams letter, at 6 (19 April 2002).

83. Except as otherwise noted, the information on which the facts presented in this section are based is primarily from the Adams Letter (including attachments); the 30 May 2002 meeting between the CEC and US officials; the 10 May 2002 letter from Norman E. Hill, Chief Counsel, CDF, to Geoffrey Garver, Director, CEC Submissions on Enforcement Matters Unit (including attachments); and a 27 June 2002 letter from Carol E. Dinkins, Vinson and Elkins, to the CEC Secretariat (including attachments).

Holding Company (ScoPac), had submitted prior to the site-preparation activity. ScoPac is a subsidiary of the Pacific Lumber Company (Pacific Lumber). The timber harvesting plan stated as follows:

The active nest in Unit A is currently occupied... No timber falling shall occur within 265' of the nest tree prior to the end of the critical [nesting and fledging] period and no yarding shall occur in Unit A prior to the end of the critical period. There are three other historic nest trees in the unit that shall be retained and can be used along with leave trees in the [Watercourse and Lake Protection Zone] for perch, screen, and replacement trees.⁸⁴

A CDF inspector had conducted a pre-harvest inspection for the timber harvesting plan on 1 September 1994. The inspection had confirmed the presence of an active osprey nest tree and at least two historic osprey nest trees in Unit A, as indicated in the THP. It appears that the third historic nest tree in Unit A had fallen down naturally sometime prior to the prescribed burn. A CDF biologist confirmed in May 1995 that ospreys had used the active nest tree in the 1995 nesting season. All three nest trees were tagged as osprey nest trees, and the timber harvesting plan required that all three nest trees be protected. The plan also provided for burning in Unit A as site preparation work. CDF approved the plan on 23 September 1994.

On 11 October 1995, ScoPac notified CDF that prescribed burning of Unit A was beginning, as allowed in THP# 1-94-360 HUM. Portions of Unit A were still undergoing prescribed burning as of 20 October 1995. The site preparation fire burned the tagged active osprey nest tree, leaving only a 15 to 20 foot stub that was no longer suitable for osprey nesting. The fire also burned one of the historic nest trees, leaving a 40 to 60-foot stub that was also no longer suitable for osprey nesting.

6.2.2 Actions taken by California in Regard to the Osprey Nests Case

On 18 October 1995, a CDF inspector observed a snag burning in Unit A but could not determine whether the snag was an osprey nest tree. The inspector returned on 20 October 1995 and noticed fire suppression activity in a portion of Unit A. He noticed two ospreys in flight making agitated voicings. The inspector then visited the site of the active osprey nest tree on Unit A and determined that the snag he had observed on 18 October 1995 was a tagged osprey nest tree. All that remained of the tree was a 15 to 20-foot high stub.

84. THP# 1-94-360 HUM.

On 27 October 1995, the CDF inspector returned to Unit A with a CDFG biologist. A ScoPac biologist joined them at the site. They visited the location of the active osprey nest tree and found osprey feathers, down and "whitewash" near where the top of the active nest tree hit the ground. The inspectors also visited the site of one of the historic nest trees. They found that the historic nest tree had been burned to the top and that the top had broken off, leaving a 40 to 60-foot stub. The top of the tree had fallen into the burn area and the inspectors presumed that any nest structure that existed had been consumed by the fire. The CDF inspector gathered evidence indicating that the tree had been tagged as a nest tree to be protected under the THP.

On 30 October 1995, CDF issued ScoPac a citation for one count of violating 14 C.C.R. 919.2(b) (requiring protection of active nest trees) in connection with the damage to the active osprey nest tree and one count of 14 C.C.R. 1035.3(d) (requiring compliance with the approved THP) in connection with damage to the historic osprey nest tree. ScoPac was not charged under section 3513 of the California Fish and Game Code, which makes violations of the federal MBTA state offenses as well.

ScoPac pleaded no contest and paid a fine of \$2,700. In addition, the Court ordered ScoPac to complete corrective work, as specified by CDFG, within 60 days. CDF had recommended that ScoPac also be sentenced to 12 months probation conditioned on no further citations for violations of the Forest Practice Rules and Forest Practice Act during the probationary period. The CDF's law enforcement report for the case indicates that ScoPac was not sentenced to a term of probation.

Based on a field review conducted on 26 October 1995, CDFG wrote to the CDF as follows, in regard to appropriate mitigation for the loss of the nest trees:

The Elk River drainage has historically contained numerous osprey nests primarily due to the areas [sic] many suitable nest sites and close proximity to Humboldt Bay, with the Bay's abundance of prey (fish) for osprey. Ospreys have typically chosen the tops of old growth trees and large snags as nest sites. These older trees and large snags will often possess a platform like [sic] structure needed by ospreys to build their large, primarily stick nests. Due to land management practices (mostly timber harvesting) over the last 100+ years most of these larger older trees and snags have been removed from this area. It is also important to realize that current commercial forest management practices will not likely allow trees to grow for a hundred or more years and develop the structural characteristics ospreys appear to prefer as nest trees. In order to preserve the Elk River area as a significant osprey nesting location all reasonable efforts should be taken to at least maintain the current number of suitable nest structures.

To this end, SCOPAC should follow [the CDFG biologist's] recommendation to select and top suitable live old growth residual trees in the immediate periphery. This approach should also consider the designation of perch trees, screen trees and replacement trees as outlined in California Forest Practice Rule 919.2(b). SCOPAC can also propose it's [sic] own solution(s) to replacing the destroyed osprey nest trees. Their proposal should be contingent on review and concurrence by the Department of Fish and Game. The goal of whatever approach is taken and effort made is to reestablish at least two functioning osprey nests in as close proximity to the destroyed nest trees as possible.⁸⁵

On 7 December 1995, an environmental specialist from the CDFG visited the burn site with a ScoPac biologist in order to locate and designate replacement trees. Four replacement trees were tentatively designated as a result of the inspection. For each tree, the CDF proposed that ScoPac could top the tree and then evaluate the need to construct a man-made platform to enhance the potential for use by osprey as nest sites. The CDFG explained the decision to seek four replacement trees for the two destroyed nest trees as follows:

Since monitoring (to see if these attempts actually do produce two functioning osprey nests) is not part of this effort I have designated four replacement nest trees. Given there is a degree of uncertainty as to whether ospreys will use the topped trees and/or platforms this 2:1 ratio of replacement to destroyed nest trees seems reasonable and prudent.⁸⁶

On 2 April 1996, a CDFG environmental specialist, accompanied by a ScoPac biologist, inspected the site and observed an osprey pair initiating nest-building in a historic nest tree that had not been damaged in the site-preparation burn. A final decision was made in the selection of three of the four replacement trees. The CDFG decided that nest platform construction in the replacement trees should proceed according to the progress of the osprey's nesting and the impact of construction activity on the ospreys. On 16 April 1996, a ScoPac biologist notified CDFG that an osprey was on the nest, most likely incubating an egg or eggs. On 24 April 1996, attorneys representing ScoPac informed the Eureka Municipal Court that the presence of nesting ospreys had delayed the completion of the court-ordered corrective action.

On a return inspection on 14 June 1996, the CDFG environmental specialist and the ScoPac biologist observed an adult osprey and two osprey chicks in the nest. The fourth replacement nest tree was selected during this inspection.

85. Letter from Ken C. Moore, CDFG, to Hugh Scanlon, CDF (8 November 1995).
86. Letter from Ken C. Moore, CDFG, to Hugh Scanlon, CDF (8 December 1995).

On 19 July 1996, a CDFG biologist returned to the site with a ScoPac biologist and concluded that ScoPac had satisfied its obligation to create four suitable replacement osprey nest trees. Artificial nest platforms had been constructed in two of the replacement trees, and "natural whorls," with branches woven into natural structures in the trees, were created in the two others. On 22 July 1996, the CDF signed a Certificate of Correction, indicating that ScoPac had met the court-imposed corrective action obligations, for filing with the Eureka Municipal Court. The CDFG biologist recommended that long-term monitoring be conducted to determine the success of the replacement nest sites, with monitoring reports to be filed for a period of five years. The Secretariat has no information indicating that ScoPac was asked or required to file monitoring reports.

On 11 December 1997, the ScoPac biologist wrote to CDFG to provide an update on the replacement trees, which he designated as Tree #1, Tree #2, Tree #3 and Tree #4. He wrote:

In March of 1997 adult ospreys were seen placing sticks on top of the Tree #1 platform. It may have just been courtship or "housekeeping" behavior, and they again nested on the large snag used in 1996. At least one young was produced in 1997... I recently visited the area to check on the condition of the trees. Enough sticks were placed by the ospreys on top of the Tree #1 platform to make it look like a useable nest. The sticks woven into the Tree #3 platform are no longer there, but the platform is in good condition. The natural whorls of Tree #2 and #4 look to be in very good condition, and quite natural. The whorl of Tree #4 looks very dense, but from the road above I could not tell if sticks had been placed there by osprey.⁸⁷

There is no indication in the materials that the Secretariat received from federal or state authorities in connection with the factual record of evidence that the prescribed burn area resulted in the taking of birds, or birds nests or eggs, of species other than osprey. Nor is there any evidence that the CDF or CDFG attempted to gather such evidence. Notably, the prescribed burn occurred outside of the typical nesting seasons for most species.

6.2.3 Actions taken by the United States in Regard to the Osprey Nests Case

Officials of the United States informed the Secretariat that they were not aware of the case involving the destruction of osprey nests until

87. Letter from Sal Chinnici, ScoPac, to Ken C. Moore, CDFG (11 December 1997).

filings of the submission in November 1999. The federal government has no MBTA permit program for logging operations that would have provided the FWS with advance notice of the timber harvesting plan, and there is no indication that other federal permits were required. Because the state of California prosecuted the case solely under state law, and there is no indication that the state of California believed a federal violation had occurred as well, the MOA between the FWS and CDFG discussed above in section 5.3.4 did not require California to report the case to the FWS.

In November 1998, an attorney representing the Environmental Protection Information Center (EPIC) and the Sierra Club wrote local offices of the FWS and the CDF requesting that the federal and state agencies deny an application by Pacific Lumber for an Incidental Take Permit, relying in part on Pacific Lumber's connection to the osprey nests cases referenced in Council Resolution 01-10.⁸⁸ The Incidental Take Permit was requested in connection with Pacific Lumber's proposed logging in its so-called Headwaters Forest, located in the same county as the site of the osprey nests. EPIC informed the Secretariat that the FWS never responded to this letter. The Secretariat has no information indicating whether or how the federal government took the osprey nests case into consideration in connection with the incidental take permit, which was granted.

Because the FWS had no knowledge of or role in the osprey nest case, FWS officials had no opportunity to determine the enforcement priority to give to the case. However, United States officials informed the Secretariat that the osprey case would have been considered a high priority investigation under Part 444 of the FWS Manual, discussed above in section 5.3.3. According to the United States, the case would have been a high priority case because it involved a wild population of a federally protected species, namely osprey protected under the MBTA. As with the great blue heron case, the United States did not consider this to be a case involving commercial exploitation or unlawful commercial activities.

United States officials provided the Secretariat no information regarding application of the Petite Policy to the osprey case. The Petite Policy might have been applicable to the osprey case because ScoPac was convicted and sentenced in the state system.

88. Letter from Brendan R. Cummings, Attorney at Law, to Bruce Halstead, FWS, and John Munn, CDF (15 November 1998), published at <http://www.wildcalifornia.org/THP/PacificLumber/pl_itp.html> (visited 18 September 2002).

Under the Petite Policy, for federal prosecution to have proceeded following completion of the state's action against ScoPac, the federal government would have had to determine that the case involved a substantial federal interest, that the state prosecution left that interest demonstrably unvindicated, that ScoPac's conduct constituted a federal offense, and that ScoPac could be convicted on admissible evidence. In addition, the Assistant Attorney General for Environment and Natural Resources would have had to approve the case. Last, federal prosecutors would still retain discretion not to pursue the case.

In regard to whether the case involved a substantial federal interest, one might consider the FWS's conclusion that the case would have been a high priority for investigation because it involved a wild population of a species protected under the MBTA. The federal interest is clear, and the fact that the case would have been a high priority for investigation sheds light on whether that interest is substantial. One might also consider the view of FWS officials that osprey are likely to be given special consideration in regard to enforcement of the MBTA because they are high on the food chain and, at least occasionally, colonial nesters.

Regarding whether the state prosecution left the federal interest in protecting migratory birds demonstrably unvindicated, one might consider the fact that the recommended sentence of probation was not imposed and that long-term monitoring was not required, as well as CDFG's conclusion that ScoPac met its obligation to create replacement trees for the destroyed nest trees. The United States informed the Secretariat that a sentence of probation would not have been possible had ScoPac been issued a federal Notice of Violation, as opposed to referring the case to the United States Attorney. The United States believes that, because this case involved a limited take of birds under the MBTA, it would not likely be the type of case to refer to the United States Attorney. Also, because the MBTA provides only misdemeanor penalties, it is not clear that significant additional punishment could have been obtained with an MBTA prosecution. United States officials told the Secretariat that in their view "federal prosecution... under the MBTA would not have furthered the interests of the MBTA, as those interests were adequately addressed by the enforcement action taken under other authorities."⁸⁹

As to the likelihood of success, it is not clear that the evidence, including evidence that one of the destroyed nests was an active osprey

89. Adams letter (19 April 2002).

nest and the osprey feathers and “whitewash” found near where the top of the active nest tree had fallen, that led to ScoPac’s conviction under state charges would have supported an MBTA prosecution. Specifically, it is not clear that destruction of an osprey nest in a prescribed burn would violate the MBTA, absent evidence that a migratory bird or egg was killed or destroyed as a result. In addition, as with the Wallace case, a federal MBTA prosecution might have raised significant legal issues.

As with the great blue heron case, the United States does not assert that the federal government would have sought prosecution of ScoPac under the MBTA had the state not acted. On one hand, the United States asserts that the case would have been a high priority for investigation, and that logging that kills birds will be prosecuted in appropriate circumstances when a violation of the MBTA can be proven. The United States informed the Secretariat that “appropriate circumstances” are more likely in cases involving the taking of osprey because they are high on the food chain and, at least occasionally, colonial nesters. It might be argued that the evidence could have supported a successful federal MBTA prosecution against ScoPac as well, assuming the United States prevailed on legal issues that might have been raised. Therefore, the osprey nest case, like the Wallace case, might have provided an opportunity to set a precedent in regard to enforcement of the MBTA in connection with logging operations.

However, the osprey case, too, would have been, as far as the United States is aware, the first case ever brought under the MBTA in connection with a logging operation. Therefore, as with the Wallace case involving great blue herons, prosecution of the ScoPac case under the MBTA could have risked an outcome problematic to the FWS’s overall enforcement program. In addition, officials of the United States informed the Secretariat that, in their view, the osprey case, like the Wallace case would have had little value as a precedent under the MBTA because ScoPac likely would not have received a level of punishment that could serve as a significant deterrent to others. The considerations regarding enforcement resources relevant to the Wallace case would have been relevant to a decision regarding whether to prosecute the osprey case as well.

The Secretariat received no information from the United States or other sources indicating that the non-enforcement initiatives that the United States described in its response were relevant to the great blue heron case. As previously noted, these mechanisms include population monitoring of migratory birds, avian mortality studies and manage-

ment, landscape level planning, public outreach and the North American Bird Conservation Initiative and Trilateral Committee for Wildlife and Ecosystem Conservation and Management.

7. Closing Note

Factual records provide information regarding asserted failures to effectively enforce environmental law in North America that may assist submitters, the NAAEC Parties and other interested members of the public in taking any action they deem appropriate in regard to the matters addressed. Pursuant to Council Resolution 01-10, which determined its scope, this factual record provides information regarding two alleged violations of the MBTA resulting from logging operations as to which the federal government took no enforcement action. These examples are consistent with the federal government's record to date of never having enforced the MBTA in regard to logging operations. The state of California achieved criminal convictions or administrative sanctions under state law in regard to both cases. Therefore, the federal policy for determining when a prior state enforcement action precludes federal enforcement provides a measure for assessing, in retrospect, the federal government's non-enforcement of the MBTA in these cases.

Appendix 1

**Council Resolution 01-10, Instruction to the
CEC Secretariat with Regard to the Assertion
that the Government of the United States
is Failing to Effectively Enforce the
Migratory Bird Treaty Act (SEM-99-002)**





Montreal, November 16, 2001

COUNCIL RESOLUTION 01-10

Instruction to the Secretariat of the Commission for Environmental Cooperation Regarding the Assertion that the Government of the United States is Failing to Effectively Enforce the Migratory Bird Treaty Act (SEM-99-002)

THE COUNCIL,

SUPPORTIVE of the process provided for in Articles 14 and 15 of the *North American Agreement on Environmental Cooperation* (NAAEC) regarding submissions on enforcement matters and the preparation of factual records;

CONSIDERING the submission filed on the above-mentioned matter by the 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, and the West Coast Environmental Law Association and the response provided by the Government of the United States on February 29, 2000;

HAVING REVIEWED the notification by the Secretariat of December 15, 2000 that the development of a factual record is warranted with respect to the submission (SEM-99-002); and

MINDFUL that the United States in its reply has indicated that, as a general matter, the assertions in the submission reflect, or result from, circumstances referred to in NAAEC Article 45(1), which provides that “[a] Party has not failed to “effectively enforce its environment law” or to comply with Article 5(1) in a particular case where the action or inaction in question by agencies or officials of the named Party: (a) reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters; or (b) results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities”;



HEREBY UNANIMOUSLY DECIDES:

TO INSTRUCT the Secretariat to prepare 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 North American Agreement on Environmental Cooperation* 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;

TO DIRECT the Secretariat to provide the Parties with its overall work plan for gathering the relevant facts and to provide the Parties with the opportunity to comment on that plan; and

TO DIRECT the Secretariat to consider, in developing the factual record, whether the Party concerned "is failing to effectively enforce its environmental law" since the entry into force of the NAAEC on January 1, 1994. In considering such an alleged failure to effectively enforce, relevant facts that existed prior to January 1, 1994, may be included in the factual record.

APPROVED BY THE COUNCIL:

Government of the United States of America
by Judith E. Ayres

Government of the United Mexican States
by Olga Ojeda Cárdenas

Government of Canada
by Norine Smith

Appendix 2

**Overall Plan to Develop a Factual Record
with regard to submission SEM-99-002**



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 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 "com-

1. Submission at 1-4, Appendix C.
2. Submission at 4.

plete[] 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

3. Submission at 1, 6.
4. Council Resolution 01-10.

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

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

5. Submission at 6 (references omitted).

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

Appendix 3

**Comments of the United States of America on
the Overall Plan to Develop a Factual Record
with regard to submission SEM-99-002**



U.S. Comments on the Overall plan to develop a factual record on SEM-99-002 submitted by the CEC Secretariat on December 14, 2001

1/23/02

Background Section

First paragraph, second sentence: The Secretariat's characterization of the requirements of Section 703 of the Migratory Bird Treaty Act with respect to "taking" is inaccurate. The U.S. proposes that this sentence be revised to read as follows:

"...which prohibits the killing or 'taking' of migratory birds and their nests or eggs, against loggers, logging companies, and logging contractors."

First paragraph, third sentence: We ask that the Secretariat revise this sentence to include language directly from the Submission (as opposed to re-characterizing statements in the Submission and then citing four pages and an appendix). We propose reworking the sentence to read as follows:

"The Submitters claim that logging operations consistently result in violations of the Act which have 'significant consequences, because logging directly kills or takes migratory birds by destroying nests, crushing eggs, and killing nestlings and fledglings.'"

First paragraph, fourth sentence: Please revise this sentence as follows:

"The Submitters assert that despite being aware of these alleged violations...."

Overall Scope of the Fact Finding Section

While the Submitters' allegations are described in some detail, almost no information is provided regarding the U.S. government response. To maintain balance, the Secretariat should provide additional information describing the main elements of the U.S. government response to the MBTA submission.

For consistency, please revise bullet (i) to read as follows: "the alleged violations of section 703 of the MBTA **in connection with the two cases** that are referenced in Council Resolution 01-10".

Bullet (iii) is unnecessary. Bullet (ii) is general in nature and effectively covers the substance addressed in bullet (iii), therefore, the third bullet should be removed.

Overall Plan Section

In order to facilitate the fact finding as well as internal U.S. coordination efforts, it is requested that all communications between the Secretariat and U.S. federal government officials, as outlined under the first and second bullets, be in writing and go through the following primary points of contact, with an electronic copy to the U.S. Environmental Protection Agency/Office of International Activities (frigerio.lorry@epa.gov):

U.S. Department of Interior/ Fish and Wildlife Service

Kevin Adams
Assistant Director, Law Enforcement
U.S. Fish & Wildlife Service
Mail Stop 3012
1849 C Street NW
Washington, D.C. 20240
ph: 202-208-3809
fx: 202-482-3716

*DOI does not have email access at this time

U.S. Department of Agriculture

Tom Darden
Acting Director Wildlife, Fish, Watershed, Air, and Rare Plants Staff
USDA Forest Service
Sidney R. Yates Federal Building
201, 14th Street at Independence Avenue, SW
Washington, D.C. 20250
ph: 202-205-1167
fx: 202-205-1599
email address to follow

Additionally, the contacts identified above should be copied on all communications between the Secretariat and U.S. state and local officials (including an electronic copy to the U.S. Environmental Protection Agency via <frigerio.lorry@epa.gov>.

Second bullet:

- The following sentence should be included after the first sentence in the first paragraph: "All requests for information from government authorities will be in writing."

- Bullet (i) under the second bullet should be revised as outlined above.
- Bullet (iii) under the second bullet should be removed for the reasons stated above.

Fourth bullet: If the Secretariat obtains independent experts to develop information, the Secretariat should ensure that such experts represent a balanced point of view.

**U.S. Comments on the Overall plan to develop a factual record
on SEM-97-006, 98-004, 98-006, and 00-004 submitted by the
CEC Secretariat on December 14, 2001**

Since these four documents contain much of the same “boilerplate” language, the comments outlined below apply to all four work plans.

Overall Scope of the Fact Finding Section

Bullet (iii) is unnecessary. Bullet (ii) is general in nature and effectively covers the substance addressed in bullet (iii), therefore, the third bullet should be removed.

Overall Plan Section

Second bullet:

- The following sentence should be included after the first sentence in the first paragraph: “All requests for information from government authorities will be in writing.”
- Bullet (i) under the second bullet should be revised as outlined above.
- Bullet (iii) under the second bullet should be removed for the reasons stated above.

Fourth bullet: If the Secretariat obtains independent experts to develop information, the Secretariat should ensure that such experts represent a balanced point of view.

Appendix 4

**Request for Information describing the scope
of the information to be included in the
factual record and giving examples
of relevant information**



Secretariat of the Commission for Environmental Cooperation

REQUEST FOR INFORMATION For Preparation of a Factual Record Submission SEM 99-002 (Migratory Birds) January 2002

I. The factual record process

The Commission for Environmental Cooperation (CEC) of North America is an international organization created under the North American Agreement on Environmental Cooperation (the NAAEC) by Canada, Mexico and the United States. The CEC operates through three organs: a Council, made up of the top environmental official from each country; a Joint Public Advisory Committee (JPAC), comprised of five citizens from each country; and a Secretariat located in Montreal.

Article 14 of the NAAEC allows persons or non-governmental organizations in North America to assert to the Secretariat, in a submission, that any NAAEC country (referred to as a Party) is failing to effectively enforce its environmental law. This initiates a process of review of the submission, which can result in the Council instructing the Secretariat to prepare a factual record in connection with the submission. A factual record seeks to provide detailed information to allow interested persons to assess whether a Party has effectively enforced its environmental law with respect to the matter raised in the submission.

Under Articles 15(4) and 21(1)(a) of the NAAEC, in developing a factual record, the Secretariat shall consider any information furnished by a Party and may ask a Party to provide information. The Secretariat also may consider any relevant technical, scientific or other information that is publicly available; submitted by the JPAC or by interested non-governmental organizations or persons; or developed by the Secretariat or independent experts.

On 16 November 2001, the Council issued Council Resolution 01-10, unanimously instructing 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.¹

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.

The Secretariat is now requesting information relevant to matters to be addressed in the factual record for the Migratory Birds submission, SEM-99-002. The following sections provide background on the submission and describe the kind of information requested.

II. The Migratory Birds submission

On 19 November 1999, the Alliance for the Wild Rockies and other groups presented to the Secretariat a submission asserting that the United States is failing to effectively enforce section 703 of the Migratory Bird Treaty Act (MBTA), which prohibits the killing or "taking" of migratory birds and their nests or eggs, against loggers, logging companies, and logging contractors. The Submitters claim that logging operations consistently result in violations of the MBTA on federal and non-federal lands nationwide, killing an enormous number of birds or destroying bird nests and eggs.²

The Submitters assert that despite being aware of these alleged violations, the United States never prosecutes logging operations that violate the MBTA.³ They claim that the United States has a nation-wide 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. Among other information provided to 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 MBTA as to logging operations on federal and non-federal lands throughout the United States.⁴

-
1. Submission at 4.
 2. Submission at 1, 6.
 3. Submission at 6 (references omitted).
 4. Response at 2.

The Submitters, 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

In regard to the Great Blue heron case, the Submitters cite (but do not attach to the submission) an October 16, 1998 article by Gordon Johnson, *Wallace Pleads No Contest to Heron Bashing*, in *The Arcata Eye*. In regard to the osprey case, the Submitters cite to (but do not attach to the submission) a March 23, 1998 Memorandum from the California Department of Forestry and Fire Protection, Humboldt/Del Norte Unit, to Glen J. Newman, Region Chief, Coast-Cascade Region.

The United States in its response confirms that the United States has never prosecuted an MBTA violation in the context of logging activities, at least unless a taking of an endangered or threatened species under the Endangered Species Act was involved. Nonetheless, the United States asserts generally that it is not failing to effectively enforce the MBTA in general because the current enforcement policies of the FWS “reflect a reasonable exercise of the agency’s discretion regarding investigatory, prosecutorial, regulatory, and compliance matters⁶” and “result from ‘bona fide decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities.’⁷” The United States also describes non-enforcement activity it undertakes to protect migratory birds. However, the United States’ response makes no reference to the two cases referenced in Council Resolution 01-10. Aside from the assertions in the submission regarding the cases, the Secretariat has no information regarding them, including any information on any federal, state or local enforcement action taken in regard to them.

5. Response at 2.

6. Council Resolution 01-10.

7. Submission at 1-4, Appendix C.

III. Request for information

The Secretariat requests information relevant to the facts concerning:

- (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.

IV. Examples of relevant information

Examples of relevant information include the following:

1. Information on the two alleged violations involving Great Blue herons and ospreys that are provided as examples in the submission and referenced in Council Resolution 01-10.
2. Information on local, state or federal policies or practices (formal or informal) regarding enforcement of, or ensuring compliance with, section 703 of the MBTA, specifically ones that might apply to the cases referenced in Council Resolution 01-10.
3. Information on federal, state or local enforcement or compliance-related staff or resources available for enforcing or ensuring compliance with section 703 of the MBTA in connection with the cases referenced in Council Resolution 01-10.
4. Information on federal, state or local efforts to enforce or ensure compliance with section 703 of the MBTA in connection with the cases referenced in Council Resolution 01-10, including for example:
 - efforts to prevent violations, such as by placing conditions on or requiring modifications of the logging or tree-removal operations, or providing education or technical assistance;

- monitoring or inspection activity before, during or after logging or tree-removal operations;
 - investigations into whether the logging or tree-removal operations violated section 703 of the MBTA;
 - warnings, orders, charges or other enforcement action issued to persons or organizations responsible for the logging or tree-removal operations;
 - actions to remedy MBTA section 703 violations due to logging or tree-removal operations; or
 - coordination between different levels of government on enforcement and compliance assurance.
5. Information on the effectiveness of federal, state or local efforts to enforce or ensure compliance with section 703 of the MBTA in connection with the cases referenced in Council Resolution 01-10, for example their effectiveness in:
 - remedying any violations of section 703 of the MBTA that occurred; or
 - preventing future violations of section 703 of the MBTA.
 6. Information on barriers or obstacles to enforcing or ensuring compliance with section 703 of the MBTA in connection with the cases referenced in Council Resolution 01-10.
 7. Information on the exercise of enforcement discretion in connection with the cases referenced in Council Resolution 01-10.
 8. Any other technical, scientific or other information that could be relevant.

V. Additional background information

The submission, the United States' response, the determinations by the Secretariat, the Council Resolution, the overall plan to develop the factual record and other information are available in the Registry and Public Files section of Citizen Submissions on Enforcement Matters on the CEC website: <<http://www.cec.org>>. These documents may also be requested from the Secretariat.

VI. Where to Send Information

Relevant information for the development of the factual record may be sent to the Secretariat until 30 June 2002, to 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
Tel. (514) 350-4300

For any questions, please send an e-mail to the attention of Geoffrey Garver, at <info@ccemtl.org>.

Appendix 5

Information Requests to US Authorities and List of Recipient Authorities



Letter to the Party Requesting Information to Develop the Factual Record on SEM-99-002

1 February 2002

Re: Development of Factual Record regarding Submission SEM-99-002

As you know, the CEC Secretariat recently began the process of preparing a factual record for the Migratory Birds submission, SEM-99-002. Consistent with Council Resolution 01-10, the factual record will focus on the assertion that the United States is failing to effectively enforce section 703 of the Migratory Bird Treaty Act (MBTA) in connection with two California cases.

Consistent with Articles 15(4) and 21(1) of the NAAEC, I am writing to request from the Government of the United States information relevant to the Migratory Birds factual record. The attached Request for Information describes the scope of the information to be included in the factual record and provides examples of relevant information. Please provide the Secretariat any information responsive to the Request for Information. Under our current schedule, we intend to accept information for consideration in connection with the factual record until June 30, 2002. To allow time for possible follow-up information requests to the United States prior to that date, we ask that you provide the information requested here by 15 April 2002.

In addition to this written request for information, the Secretariat would like to arrange meetings with officials from relevant federal, state and/or local agencies to discuss the matters to be addressed in the factual record. In regard to the federal government, I am interested in meeting with both headquarters and regional officials involved with enforcing and ensuring compliance with the MBTA, including officials involved in any decisions taken with respect to the two cases referenced in Council Resolution 01-10. I am tentatively planning to make fact-gathering trips to Washington, D.C. and to California in connection with the factual record during the period March 11-29, and I would like to schedule these meetings during that time. Please let me know, by February 15 if possible, the availability of relevant federal officials in Washington, D.C. and California during that time so that I can finalize my schedule for those trips.

.../2

-2-

I appreciate your consideration of this request and your assistance in coordinating the Secretariat's contacts with federal government agencies. I look forward to any relevant information the United States is able to provide and to working with you on finalizing the schedule for my meetings with federal government officials. Please feel free to contact me at (514) 350-4332 or ggarver@ccemtl.org, or my assistant, Doris Millan at (514) 350-4304 or dmillan@ccemtl.org, to discuss this request.

Sincerely,

Director,
Submissions on Enforcement Matters Unit

c.c.: US EPA
Semarnat
Environment Canada
CEC Executive Director

Enc.

Form Letter to Relevant United States Authorities

25 February 2002

Re: Factual Record Regarding Submission SEM-99-002

The Secretariat of the Commission for Environmental Cooperation of North America recently began the process of preparing a "factual record" regarding an assertion that the United States is failing to effectively enforce section 703 of the Migratory Bird Treaty Act with respect to two cases in California. This assertion was made in a "submission" filed with the Secretariat in November 19 by the Alliance for the Wild Rockies and others.

I am writing to invite you to submit information relevant to the factual record. The attached Request for Information explains the citizen submissions process and factual records, gives background about the so-called Migratory Birds submission (SEM-99-002), describes the scope of the information to be included in the factual record for the Migratory Birds submission, and provides examples of information that might be relevant. We will accept information for possible consideration in connection with the factual record until June 30, 2002.

I am particularly interested in information you may have regarding California's enforcement actions in regard to the two cases referenced in the Request for Information, and in any federal involvement in those efforts. Although our general deadline for receiving information is in June, it would be helpful to receive any relevant information you may have by 15 April 2002 in order to allow for possible follow-up.

We appreciate your consideration of this request and look forward to any relevant information you are able to provide. Please feel free to contact me at (514) 350-4332 or <ggarver@ccemtl.org> regarding this request.

Sincerely,

Director,
Submissions on Enforcement Matters Unit

Enc.

**REQUEST TO RELEVANT US AUTHORITIES
FOR ADDITIONAL INFORMATION
REGARDING SUBMISSION SEM-99-002**

24 May 2002

Please provide answers to and copies of supporting information for each of the following questions. If requested information will not be provided (including on a confidential basis) because it is non-existent, confidential or privileged, or otherwise unavailable, please provide an explanation.

1. Please explain whether the U.S. Fish and Wildlife Service (FWS) or the State of California acting on behalf of the FWS had in place an ongoing inspection, monitoring or self-reporting program designed to detect possible violations of section 703 of the Migratory Bird Treaty Act (MBTA) in the area in which the two incidents referenced in Council Resolution 01-10 took place, at the time they took place. If yes, please describe the program and explain whether it applied to inspection, monitoring or self-reporting of logging operations.
2. Please explain whether prosecution of either of the two incidents referenced in Council Resolution 01-10 would set a national precedent in the United States in regard to enforcement of section 703 of the MBTA in connection with a logging operation. In other words, would such a prosecution be the first ever prosecution in the United States of a violation of MBTA section 703 resulting from logging operations?
3. Please explain whether, for high priority cases involving possible violations of section 703 of the MBTA by a logging operation such as in the Wallace case involving great blue herons (see page 3 of the United States' 19 April 2002 letter responding to the Secretariat's request for information) (hereinafter U.S. letter), it is FWS policy to pursue investigation and possible prosecution when the state does not act. Would the Wallace case have been the first such case in the nation (i.e. involving a logging operation), had the FWS pursued a federal investigation and possible enforcement action?
4. Please explain under which provision of Section 3.2(A) of the enforcement priorities policy (U.S. letter, Attachment 10) the Wallace incident would be considered a high investigation priority.

5. Under Section 3.2(A)(2) of the priorities policy (U.S. letter, Attachment 10), high investigation priorities include violations involving “[u]nlawful commercial activities involving wild populations of other Federally protected fish or wildlife such as waterfowl or other Federally protected migratory species.” Please explain whether timber harvesting or logging operations can be considered an “unlawful commercial activity” under this provision.
6. Please explain if any contemporaneous documentation exists of the FWS’s determination in 1996 that the Wallace incident was considered a high investigation priority (see page 3 of the U.S. letter). If so, please provide copies.
7. Please explain if any contemporaneous documentation exists of the application of the “Petite Policy” regarding the Wallace case. If so, please provide copies.
8. Please explain, in regard to the reference on page 4 of U.S. letter to “cases similar to the one in which active great blue heron nests were destroyed,” what kinds of cases are considered similar.
9. The U.S. letter states on page 4 that the CDFG charges against Wallace “resulted in penalties that were significantly beyond those normally handed down for similar offenses if charges are filed by the U.S. Attorney and heard before a U.S. Magistrate.” On page 3, the U.S. letter states that “[i]nformation provided by the CDFG indicates that David Wallace served time in jail, paid a fine, and was placed on probation. The Service has no documents pertaining to the State investigation, prosecution or summary results.” Please explain how the FWS concludes that the state enforcement action was adequate without having that documentation, and provide any contemporaneous FWS documentation of the conclusion that the state enforcement action was adequate.
10. Section 3513 of the California Fish and Game Code (U.S. letter, Attachment 12, page 24) makes violation of the MBTA a violation of state law as well. Please describe any discussion or other contacts the federal government has had with the state of California regarding whether either of the two cases referenced in Council Resolution 01-10 could or should be prosecuted under section 3513.

11. The U.S. letter states on page 7 that “logging that kills birds will be prosecuted in appropriate circumstances when a violation of the MBTA can be proven.” Please explain what is meant by “appropriate circumstances” and explain whether this has ever occurred.
12. The U.S. letter states on page 6 that the FWS did not issue permits associated with logging operations in connection with the two incidents referenced in Council Resolution 01-10, and that the permitting program generally focuses on activities where the take of migratory birds is the purpose of the activity in question. Please clarify whether a federal permitting program was in place that applied to the logging operations involved in those two incidents.
13. The United States’ response to submission SEM-99-002 states on page 2, in regard to federal enforcement of section 703 of the MBTA in connection with logging operations, that “the current enforcement policies of the FWS result from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities.” Please explain whether and how this statement applies to the two incidents referenced in Council Resolution 01-10.
14. Please explain what investigative priority the FWS would apply to the osprey incident referenced in Council Resolution 01-10, based on information now available to the FWS.
15. The U.S. letter states on page 5 in regard to the great blue heron incident that “[t]he remedies obtained by the CDFG prosecution were, if anything, more effective in deterring similar violations of the MBTA as Federal prosecution under the MBTA itself.” Please explain how the state enforcement action in each of the cases referenced in Council Resolution 01-10 acts as a deterrent to MBTA violations in the United States as a whole. Would any such deterrent effect extend beyond California? Would federal enforcement of the MBTA in these two cases have had a nationwide deterrent effect?

| US AUTHORITIES RECIPIENT OF A REQUEST FOR INFORMATION FOR THE DEVELOPMENT OF THE FACTUAL RECORD ON SEM-99-002 | |
|--|--|
| United States Environmental Protection Agency Office of International Affairs | California Department of Forestry and Fire Protection |
| United States Department of the Interior/Fish and Wildlife Service Office of Law Enforcement | United States Department of Agriculture USDA Forest Service Wildlife, Fish, Watershed, Air, and Rare Plants Staff |

Appendix 6

Information Requests to NGOs, the JPAC and other Parties of the NAAEC



Form Letter to NGOs

31 January 2002

Re: Preparation of the factual record for submission SEM-99-002

The Secretariat of the Commission for Environmental Cooperation of North America recently began the process of preparing a "factual record" regarding an assertion that the United States is failing to effectively enforce section 703 of the Migratory Bird Treaty Act with respect to two cases in California. This assertion was made in a "submission" filed with the Secretariat in November 19 by the Alliance for the Wild Rockies and others.

I am writing to invite you to submit information relevant to the factual record. The attached Request for Information explains the citizen submissions process and factual records, gives background about the so-called Migratory Birds submission (SEM-99-002), describes the scope of the information to be included in the factual record for the Migratory Birds submission, and provides examples of information that might be relevant. We will accept information for possible consideration in connection with the factual record until June 30, 2002.

We appreciate your consideration of this request and look forward to any relevant information you are able to provide. Please feel free to contact the Secretariat if you have questions. Contact information is provided at the end of the Request for Information.

Sincerely,

Director,
Submissions on Enforcement Matters Unit

Enc.

Memorandum

DATE: 1 February 2002

À / PARA / TO: Chair, Joint Public Advisory Committee (JPAC)

CC: JPAC Members, CEC Executive Director, JPAC Liaison Officer

DE / FROM: Director, Submissions on Enforcement Matters Unit

OBJET / ASUNTO /RE: Request for information relevant to the factual record for the Migratory Birds submission, SEM-99-002.

As you know, the CEC Secretariat recently began the process of preparing a factual record for the Migratory Birds submission, SEM-99-002. This submission was filed with the Secretariat in November 1999 by the Alliance for the Wild Rockies and others. Consistent with Council Resolution 01-10, the factual record will focus on the assertion that the United States is failing to effectively enforce section 703 of the Migratory Birds Treaty Act with respect to two cases in California.

I am writing to invite the JPAC to submit information relevant to the factual record, consistent with Article 15(4)(c) of the NAAEC. The attached Request for Information, which will be posted on the CEC website, gives background about the Migratory Birds submission, describes the scope of the information to be included in the factual record, and provides examples of information that might be relevant. We will accept information for possible consideration in connection with the factual record until June 30, 2002.

We appreciate your consideration of this request and look forward to any relevant information you are able to provide. Please feel free to contact me if you have questions regarding this request or the factual record process.

Letter to the Other Parties of the NAAEC (Canada and Mexico)

1 February 2002

Re: Preparation of the factual record for submission SEM-99-002

As you know, the CEC Secretariat recently began the process of preparing a factual record for the Migratory Birds submission (SEM-99-002), consistent with Council Resolution 01-10. I am writing to invite the [Canadian] [Mexican] Party to submit information relevant to the factual record, consistent with Article 15(4) of the NAAEC.

The attached Request for Information, which will be posted on the CEC website, gives background about the Migratory Birds submission, describes the scope of the information to be included in the factual record, and provides examples of information that might be relevant. We will accept information for consideration in connection with the factual record until June 30, 2002.

We appreciate your consideration of this request and look forward to any relevant information you are able to provide. Please feel free to contact me if you have questions regarding this request or the factual record process.

Sincerely,

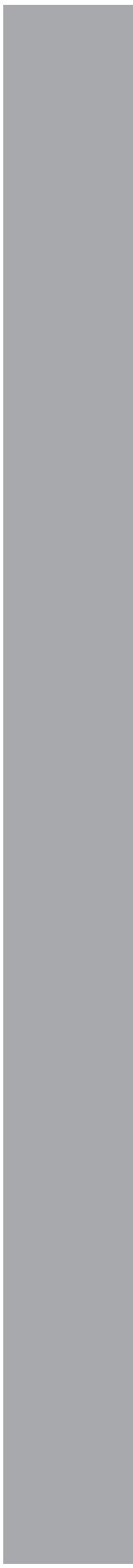
Director
Submissions on Enforcement Matters Unit

c.c.: Semarnat
Environment Canada
US EPA
CEC Executive Director

Enc.

Appendix 7

**List of Nongovernmental Organizations
Recipient of a Request for Information
for the Development of the Factual
Record on SEM-99-002**



**Organizations Recipient of a
Request for Information for the Development
of the Factual Record on SEM-99-002**

| | |
|---|---|
| American Birding Association | American Farm Bureau Federation |
| American Forest & Paper Association | California Partners in Flight (PIF) |
| City College of San Francisco | Conservation International |
| Cornell Laboratory of Ornithology | Defenders of Wildlife |
| Earth Island Institute | Earth Share of California |
| Ecology Center | Fauna & Flora International – USA |
| Humbolt State University | Izaak Walton League of America |
| Mendocino Coast Audubon Society | National Audubon Society |
| National Wildlife Federation | Natural Resources Defense Council |
| Point Reyes Bird Observatory | Redwood Region Audubon Society |
| Roger Tory Peterson Institute | Sacramento Audubon Society |
| Save the Redwoods League | Society for Conservation Biology |
| Sustainable Forestry Initiative (SFI) – in California | The California Public Interest Research Group |
| The Conservation Fund | The Institute for Bird Populations |
| The Peregrine Fund | The Wilderness Society |
| The Wildlife Society | University of California |
| Vinson & Elkins L.L.P. | World Wildlife Fund |

ATTACHMENT 1

**Council Resolution 03-03 – Instruction to
the Secretariat of the Commission for
Environmental Cooperation to make public
the Factual Record for Submission SEM-99-002
(Migratory Birds)**



22 April 2003

COUNCIL RESOLUTION 03-03

Instruction to the Secretariat of the Commission for Environmental Cooperation to make public the Factual Record for Submission SEM-99-002 (Migratory Birds)

THE COUNCIL:

SUPPORTIVE of the process provided for in Articles 14 and 15 of the *North American Agreement on Environmental Cooperation* (NAAEC) regarding submissions on enforcement matters and the preparation of factual records;

HAVING RECEIVED the final factual record for Submission SEM-99-002;

NOTING that pursuant to Article 15(7) of the NAAEC, the Council is called upon to decide whether to make the factual record publicly available; and

AFFIRMING its commitment to a timely and transparent process;

HEREBY DECIDES:

TO MAKE PUBLIC and post on the registry the final factual record for Submission SEM-99-002; and

TO ATTACH to the final factual record comments provided by the Parties to the Secretariat on the draft factual record.

APPROVED BY THE COUNCIL:

Judith E. Ayres
Government of the United States of America

Olga Ojeda Cardenas
Government of the United Mexican States

Norine Smith
Government of Canada

ATTACHMENT 2

Comments of United States of America



13 January 2003

Mr. Geoffrey Garver
Secretariat of the Commission for Environmental Cooperation
Submissions on Enforcement Matters Unit (SEM Unit)
393, rue St-Jacques west, bureau 200
Montreal QC H27 1N9

Dear Mr. Garver,

Thank you for providing the United States with a copy of the Draft Factual Record for Submission SEM-99-022 (Migratory Birds) (the "MBTA Factual Record"). We appreciate the hard work of the Secretariat involved in preparing this document.

Ensuring the accuracy of developed factual records is vital in guaranteeing that they fulfill their intended purpose of providing the public with truly objective assessments of environmental law enforcement. The United States strongly supports the submissions process, and takes its responsibility to ensure the accuracy of this factual record very seriously. We provide the following general and specific (attached) comments in order to assist the Secretariat in the development of the MBTA Factual Record.

Although the term "factual record" is not defined in the North American Agreement on Environmental Cooperation (NAAEC), Article 15 of the NAAEC and the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* both provide guidance regarding the type of information a factual record should contain. Specifically, a factual record should include factual information relevant to the matter(s) at issue in a record and should do so for the purpose of providing members of the public with the information necessary to enable them to draw their own conclusions regarding whether a Party is effectively enforcing its environmental laws.

Given that a factual record is intended to consist of a presentation of the relevant facts, the United States has concerns with certain text of the draft MBTA Factual Record that includes overly speculative or conclusive statements without a clear factual foundation. If, for example, a thought or conclusion was articulated by a U.S. official or some other source, then this should be clearly indicated in the text. If this is not the case, such statements should be modified or removed so as to avoid providing the public with inappropriate conclusions or overly speculative

commentary. Specifically, phrases such as "it appears", "might imply", and "might have supported", should generally be avoided to the extent they go beyond a presentation of the facts. With this in mind, we have attached specific comments in this regard.

Additionally, while the U.S. recognizes the value of providing information related to U.S. case law as it pertains to the two cases at issue in the factual record, overly conclusive or speculative statements regarding the interpretation of U.S. jurisprudence should be removed or revised to reflect the factual basis for such statements. There are several instances in the draft MBTA Factual Record where such statements are included absent the necessary foundation. Again, specific comments in this regard are included in the attachment to this letter.

Finally, although the U.S. agrees that explaining the scope of the factual record for purposes of providing context is appropriate, we do not believe it is appropriate for the Secretariat to include commentary regarding its view of the Council's decision. Rather, a factual record scope discussion should be limited to providing information relevant to the Council's actual instruction to the Secretariat not on whether the Secretariat agrees with the Council's decision. Additionally, a substantial portion of the scope discussion involves detailing what is not addressed in the factual record. Again, such a discussion should focus on what the factual record actually covers. For these reasons, you will find specific comments regarding the scope discussion included in the attachment.

Thank you again for the opportunity to review this draft record. The success and vitality of the CEC is not only dependent on the close cooperation of the Council, Secretariat, and Joint Public Advisory Committee, but also on the strong interest and participation of the citizens of the member nations. The submission process remains an important mechanism by which the public is able to participate through the CEC in the protection of our shared North American environment.

Should you have any questions, please contact Jocelyn Adkins (202-564-5424) or David Redlin (202-564-6437).

Sincerely,

(Original signed)

Judith E. Ayres
Assistant Administrator
United States Environmental Protection Agency

**UNITED STATES' COMMENTS ON THE
DRAFT MBTA FACTUAL RECORD**

13 January 2003

1. In several places in the draft factual record the Secretariat indicates that particular information is “relevant” (e.g., page 4, paragraphs 1 and 2; page 42, paragraphs 1 and 2). Presumably all of the information contained in the factual record is relevant or it would not be included. Additionally, such references might be interpreted to provide undue weight to particular factual information. For these reasons, we request that the factual information be presented without repeated references to its “relevancy.”
2. In some instances, “US” is included in front of monetary amounts (e.g., page 2, US \$310,000). In other instances, it is not (e.g., page 2, \$2,700). The text throughout the document should be revised to be consistent in this regard.

Section 1. Executive Summary

3. Page 1, paragraph 2, inaccurately summarizes the prohibited conduct outlined in the Migratory Bird Treaty Act (MBTA), 16 U.S.C. 703-712. The MBTA specifically protects migratory bird nests from “possession, sale, purchase, barter, transport, import, export” and “take.” The regulatory definition of *take*, as defined by Title 50, Code of Federal Regulations, Part 10.12, means to “pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, shoot, wound, kill, trap, capture, or collect.” Only “collect” applies to nests. While it is illegal to collect, possess, and by any means transfer possession of any migratory bird nest, the MBTA, as implemented by the current regulations, does not contain any prohibition that clearly applies to the destruction of a bird nest alone, provided that no possession occurs during the destruction and that the destruction does not otherwise cause a taking. This limitation on the application of the MBTA to incidents involving the destruction of nests is not discussed in the factual record but should be.
4. Page 1, paragraph 2. The citation to the MBTA is incorrect. The correct citation is “16 U.S.C. Sections 703-712.” This correction should be made throughout the document.

5. Page 1, paragraph 3. For the reasons articulated in our cover letter, the first sentence and third sentences should be merged and revised to read: "Council Resolution 01-10 governs the scope of this factual record and pertains to the two cases identified in the resolution." The fifth sentence should be deleted.
6. Page 3, 2nd full paragraph, sentence 2, refers to the Fish and Wildlife Service (Service) permitting program under the MBTA. While the sentence is accurate, we recommend adding the following text: "The Service permitting program does not require, nor does the MBTA authorize, the issuance of a permit for situations that do not violate the MBTA, such as the destruction of migratory bird nests that does not result in the possession or collection of the nest, or associated death of migratory birds or their eggs."
7. Page 3, 2nd and 3rd full paragraphs, make reference to "United States officials." These references should be to the Service.
8. Page 3, 3rd full paragraph, 3rd sentence, uses the term "in retrospect" which indicates that the Service did not consider the Petite policy at the time the State of California prosecuted Wallace. This statement is not accurate and "in retrospect" should be deleted.
9. Page 3, 3rd full paragraph, 4th sentence, "It appears the Petite Policy would have applied in connection with the landowner . . ." Did the U.S. provide the Secretariat with information to this effect? If so, this should be clearly articulated. If not, this statement is overly speculative and should be deleted or revised. This sentence could be revised as follows: "Given this information, it is possible that the Petite Policy might have applied in connection with the landowner . . ."
10. Page 3, 4th full paragraph, sentence 2, should reflect that the "Assistant Attorney General for Environment and Natural Resources, U.S. Department of Justice, would have to approve the prosecution."
11. Page 4, 3rd paragraph, 1st sentence. This statement is overly conclusive. We request it be revised to read: "As to the likelihood of success, the evidence that led to the landowner's conviction under state charges might arguably have supported a federal MBTA prosecution as well."

12. Page 6, 1st full paragraph, 1st sentence. The relevancy of this issue was never discussed with Service officials. See also, comment # 1. Further, we request that the middle of this sentence be revised to read: “long-term monitoring was not required and is considered relevant by the Secretary, as is . . .”
13. Page 6, 1st full paragraph, sentence 4, states that the MBTA only provides misdemeanor penalties. We recommend changing the sentence to read: “Also, because MBTA provides only misdemeanor penalties in cases such as these, it is not clear that significant additional punishment or a significant deterrent could have been obtained with an MBTA prosecution.”
14. Page 6, 2nd full paragraph, states that the evidence in the osprey nest incident appeared to support an MBTA prosecution. Based on information provided by State of California officials, the nests were destroyed by burning, but there is no indication they were possessed by the individuals or company during the destruction. There has also been no specific evidence presented that the one occupied nest contained any egg(s) or that the actions otherwise caused a taking. Therefore, the first, second, and last sentence of this paragraph should be deleted. The third sentence should be merged with the preceding paragraph and revised to read: “As with the great blue heron case, the osprey case, too, would have been, as far as the United States is aware, the first case brought under the MBTA in connection with a logging operation.”

Section 2. Summary of the Submission

15. Page 6, 3rd full paragraph, 2nd sentence, inaccurately summarizes the prohibited conduct outlined in the MBTA. We request that the wording be revised to read: “Section 703 of the MBTA prohibits any person from killing or ‘taking’ migratory birds, or their eggs, ‘by any means or in any manner,’ unless authorized under federal regulations.”

Section 3. Summary of the United States’ Response

16. Page 8, 1st paragraph, last sentence. ESA should be spelled out and the proper citation included. ESA would then not need to be spelled out on page 9.

Section 4. Scope of the Factual Record (pages 10-13)

17. For the reasons articulated in our cover letter, we request the following revisions:
 - Page 10. The sentence beginning, "In light of the instruction . . ." and the accompanying footnote should be deleted.
 - Given that the document provides a summary of the submission (which indicates the scope of the factual record requested by the Submitters), as well as Council Resolution 01-10 (which clearly describes the intended scope of the factual record), the full page bullet point list of issues falling outside the scope of the factual record are unwarranted and should be deleted.
 - Text referring to comments on the draft MBTA factual record workplan, provided by the Submitters and the American Forest & Paper Association should be deleted.

Section 5. The Environmental Law in Question: MBTA Section 703

18. Page 15, 3rd full paragraph. We recommend adding the following sentence: "None of the current MBTA permitting regulations expressly apply to unintentional take of migratory birds and, according to the United States, the FWS has not issued MBTA permits to cover the take by logging operations of non-ESA-listed migratory birds."

Section 6.2. Meaning and Scope of MBTA Section 703

19. Pages 19-20 essentially repeat the same narrative and information provided on pages 14-15, **The Environmental Law in Question: MBTA Section 703**. We recommend the duplicative text be deleted or the two sections merged.
20. Page 20, 1st full paragraph, last sentence. This statement requires a citation.

Section 6.2.2. Unintentional Takes

The United States does not object to the Secretariat providing a summary of the facts and legal holdings of various court cases, but does object to the extent to which the Secretariat offers its analysis of the holdings (as explained in the cover letter). This concern also applies to

the discussion involving legislative history. For these reasons and to correct specific inaccuracies, we request the changes identified below.

21. Page 21, 1st full paragraph, 4th sentence. This sentence is overly conclusive and, therefore, we request it be revised as follows: "The absence of the intent requirement in section 707(a) might be interpreted to provide support for the conclusion . . ."
22. Page 21, 2nd full paragraph. Although we recognize the intended purpose of providing a description of the legislative history of the MBTA in the factual record, the summary of the legislative history contained in this section is inappropriate in that it goes well beyond an objective presentation of the facts. Specifically, the Secretariat opines on the "aims" of the statute, postulates whether legislative history contains "evidence" to support a particular reading of the statute and hypothesizes as to whether certain interpretations of the MBTA are "consistent" with the Act's purpose. Such speculation is outside the scope of a factual record and, therefore, must properly be redacted. The fourth sentence in this paragraph is of particular concern to the U.S. given the extremely speculative nature of the statement. A discussion of legislative history in the factual record should be limited to providing a summary of the history and should not include a separate analysis by the Secretariat offering conclusions as to whether the legislative history supports particular positions.
23. Page 22, n. 37. The Newton County case parenthetical text should begin with the word "tentatively" to reflect the court's statement that its conclusion on this issue was necessarily tentative because FWS was not a party to the case.
24. Pages 22-23. The discussion in several places fails to reflect one District Court decision in a logging case that found that the MBTA applies to unintentional take. *Sierra Club v. Martin*, 933 F. Supp. 1559 (N.D. Ga. 1996), reversed on other grounds, 110 F.3d 1551 (11th Cir. 1997). Statements in the narrative that no case involving logging reached this conclusion are inaccurate.
25. Page 23, 1st full paragraph, 2nd to last sentence. Although a citation is included in the middle of this statement, an additional citation is required at the end of the statement.

26. Page 23. The following statements are overly speculative and conclusive:
 - 1st full paragraph, last sentence. This statement should be deleted unless the source of the proposition can be and is cited. Also, as indicated in FN 39, *Sierra Club v. USDA* is an unpublished, per curiam 7th Circuit opinion. As noted by one district court, the *Sierra Club v. USDA* (7th Circuit) decision "has no precedential value." (*Indiana Forest Alliance v. Forest Service*, 2001 U.S. Dist. Lexis 11996 (S.D. Ill. July 5, 2001) (footnote 26).
 - 2nd full paragraph, last sentence. This statement should be deleted unless the source of the proposition can be and is cited.
27. Page 24, n. 49, the citation to *United States v. Morgan* should be deleted. Contrary to the text, that case did not involve unintentional taking of migratory birds. The case was a prosecution for possession of birds in excess of bag limits under hunting regulations. In addition, the cited opinion was withdrawn and replaced (see 2002 U.S. App. LEXIS 23499 Oct. 31, 2002).
28. Page 24, 3rd full paragraph, 1st sentence, should be deleted. It is unclear what is meant by "complex" in this context and, therefore, the U.S. cannot confirm that this statement is accurate.
29. Page 24, 3rd paragraph, 2nd sentence. This statement is overly conclusive and should be deleted, or the source(s) providing the basis for this statement should be cited.
30. Page 24, 3rd paragraph, 4th sentence. "In other contexts (discussed above)" should be deleted and replaced with "However."

Section 6.2.3. Summary

31. Page 25, 1st full paragraph, 3rd sentence. This statement is overly conclusive and should be deleted or revised as follows: "Arguably, one might interpret the statutory text as providing some support . . ."
32. Page 25, 1st full paragraph, sentence 7, should begin: "However, in each of these cases, the United States sought to avoid private enforcement of section 703 with respect to timber sales. . ." The United States does not resist, in principle, as implied by the current language, the application of the MBTA to logging activities.

Section 6.3.2. Penalties for Violations on MBTA Section 703

33. Page 27, 1st full paragraph of this section. The point of this paragraph is unclear. Is the Secretariat trying to say that the type of penalties provided for in the MBTA are relevant to the issue of whether the United States is effectively enforcing the MBTA? If so, this paragraph should be revised to read: "Understanding the penalties available for violations of MBTA section 703, and the policies of federal enforcement personnel as to the appropriate penalties to seek for a specific violation, might be helpful in reviewing the two cases referenced in Council Resolution 01-10." The latter part of this paragraph, "determining the effectiveness of the penalties imposed . . .", should be deleted because although the state penalties might be deemed relevant, the "effectiveness" of the state penalties is not the subject of this factual record.

Section 7. Facts Presented by the Secretariat with Respect to Matters Raised in Council Resolution 01-10

34. Page 41, 3rd full paragraph, sentences 2 and 3, imply that the Petite policy is a "process" that involves documentation and formal application. The policy is a guideline for federal investigators and prosecutors; there is no process to document whether application of the policy is considered. We recommend deleting the 2nd, 3rd, and 4th sentences in this paragraph and the words "It appears that" at the beginning of sentence 5.
35. Page 41, 3rd full paragraph, sentences 4-7, see comments #8 and #9. We have the same or similar concerns with respect to these four sentences.
36. Page 42, 2nd full paragraph. See comment #13 regarding subject of misdemeanor penalties.
37. Page 42, 3rd full paragraph, see comment #11.
38. The following statements on pages 42-51 are overly speculative or conclusive and should be deleted or revised:
 - Page 42, last paragraph, 2nd sentence. This statement could be revised to read: "However, the United States' view that the case would have been a high priority for investigation might be

interpreted to indicate that the United States would have taken . . .”

- Page 43, 1st full paragraph, 3rd and last sentence. The use of the phrase “it appears” is problematic for the reasons previously indicated.
 - Page 43, 2nd full paragraph, 1st sentence, should be revised as follows: “Although the argument might be made that the evidence would have supported a federal prosecution . . .”
 - Page 43, 2nd full paragraph, 4th sentence. We request that “would be” be replaced with “might have been.”
 - Page 50, 2nd full paragraph, 2nd sentence. Use of the phrase “it appears” is problematic for reasons previously indicated.
 - Page 51, 3rd full paragraph, 4th sentence, should be revised to read, “. . . it might be argued that the evidence could have supported . . .”
39. Page 48-50. Section 7.2.3. This section includes a detailed discussion of an application by Pacific Lumber for an Incidental Take Permit in the same county as the location of the osprey nests at issue. It appears that the only purpose to this discussion is to highlight the fact that the FWS was informed of the osprey matter via a 1998 letter from members of the public requesting that Pacific Lumber’s permit application be denied. Although a brief reference to the 1998 letter is appropriate given the potential relevance to the osprey case, a detailed discussion of this separate permit matter is far beyond the scope of this factual record. Therefore, the detailed discussion in this regard must be deleted.

Section 8. Closing Note

40. Page 52, 2nd sentence, “possible” should be replaced with “alleged.”

