

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 Article 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

¹ Council Resolution 01-10.

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[] abdication of] its enforcement obligations” under the MBTA as to logging operations on federal and non-federal lands throughout the United States.⁴

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

² Submission at 1-4, Appendix C.

³ Submission at 4.

⁴ Submission at 1, 6.

⁵ Submission at 6 (references omitted).

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 the current enforcement policies of the FWS “reflect a reasonable exercise of the agency’s discretion regarding investigatory, prosecutorial, regulatory, and compliance matters”⁶ 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.

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.

⁶ Response at 2.

⁷ Response at 2.

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, rue St-Jacques west,
bureau 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.