

**RESPONSE OF THE UNITED STATES OF AMERICA TO
THE SUBMISSION MADE BY THE ALLIANCE FOR THE WILD ROCKIES, ET AL.
UNDER ARTICLE 14 OF THE NORTH AMERICAN AGREEMENT ON
ENVIRONMENTAL COOPERATION**

I. INTRODUCTION

This memorandum responds to a request from the Secretariat of the Commission for Environmental Cooperation that the Government of the United States of America respond to a submission by the Alliance for the Wild Rockies; Center for International Environmental Law; Centro de Derecho Ambiental del Noreste de Mexico; Friends of the Earth; Instituto de Derecho Ambiental; Pacific Environment and Resources Center; Sierra Club of Canada; and the West Coast Environmental Law Association (“Submitters”), made under Article 14 of the North American Agreement on Environmental Cooperation (“NAAEC” or “Agreement”). Under Article 14, submissions by non-governmental organizations or persons asserting that Canada, Mexico, or the United States (“the Parties”) is failing to effectively enforce an environmental law may be considered by the Commission for Environmental Cooperation (CEC). If, following review of any response from the Party concerned, the Secretariat considers that a submission warrants the development of a factual record, the Secretariat is required to inform the governing Council of the CEC pursuant to NAAEC Article 15 and provide reasons as to why, in its view, a factual record is warranted. Pursuant to NAAEC, Article 15(2), the Secretariat shall prepare a factual record if the council by, at least a two-thirds vote, instructs it to do so.

The Submitters have filed a submission asserting that the United States is failing to effectively enforce section 703 of the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§703-712 *as amended by* the Migratory Bird Treaty Reform Act of 1998, 112 STAT. 2957, P.L.105-312, which prohibits the killing of migratory birds without a permit. Specifically, the Submitters claim that the United States deliberately refuses to enforce the MBTA against loggers, logging companies, and logging contractors, and that as a matter of internal policy the United States has exempted logging operations from the MBTA.¹

The United States Government strongly believes that the Article 14 process is a crucial

¹ See Submission Pursuant to Article 14 of the North American Agreement on Environmental Cooperation, SEM-99-002, (“the Submission”) at 2.

component of the cooperative efforts for environmental protection among the Parties to the NAAEC. Under the appropriate circumstances, the United States has repeatedly been, and continues to be, a strong supporter of the Articles 14 and 15 process. Nevertheless, the CEC Secretariat has recognized that some assertions do not merit a factual record. For instance, the Article 14 process is not intended to be a forum for challenging legislative changes to the nature and scope of a Party's environmental laws.² In another situation, the Secretariat chose not to require a factual record where there was ongoing litigation that could obviate the need to address the assertions in a factual record.³

In this case, authorization to prepare a factual record based on the assertions in the Submission should not be requested by the Secretariat for the following reasons. First, the Submitters' assertions rely heavily on an unapproved draft memorandum that states that the United States' Fish & Wildlife Service (FWS) has a policy to exempt logging activities from enforcement actions under the MBTA. In fact, the FWS has no such policy. Second, the current enforcement policies of the FWS reflect a reasonable exercise of the agency's discretion regarding investigatory, prosecutorial, regulatory, and compliance matters. Third, 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" as provided for under the NAAEC. Finally, the submission fails to discuss what the United States is doing to protect migratory birds from certain logging activities. Not only has the United States used its authority under the Endangered Species Act to protect certain migratory birds, it has also used a number of non-enforcement mechanisms. Therefore, the submission does not reflect the complete framework under which the United States protects migratory birds. For all these reasons, we urge the Secretariat to determine that Submission 99-002 does not warrant the development of a factual record under Article 15 of the NAAEC as the United States of America is not failing to effectively enforce its environmental law.

² See Letter from Victor Lichtinger to Jay Tutchton re: Submission SEM-95-001 (September 21, 1995).

³ See Determination Pursuant to Articles 14 & 15 of the North American Agreement on Environmental Cooperation (Submission SEM-96-002, May 28, 1996).

II. BACKGROUND

A. Migratory Bird Treaty Act

The United States has long recognized that migratory birds are of great ecological and economic value.⁴ Migratory birds not only contribute to biological diversity, but they also provide immense enjoyment to millions of Americans who study, watch, feed, or hunt these birds. Based on the importance of migratory birds, the United States is an active participant in the internationally coordinated management and conservation of migratory birds, through the ratification of bilateral conventions with Canada, Mexico, Japan, and Russia.⁵ Legislative measures taken by the United States to implement the migratory bird conventions, and thereby aid in the protection of migratory birds, include the enactment of the MBTA as well as the Endangered Species Act (ESA). See 16 U.S.C.A. § 1531(a)(4). Under the MBTA, it is unlawful “by any means or manner, to pursue, hunt, take, capture, [or] kill” any migratory birds except as permitted by regulation. 16 U.S.C. §§703-704. Except as applied to the baiting of game birds,⁶ the MBTA is a strict liability statute that allows for the imposition of criminal penalties. A violation of the MBTA that does not involve or contemplate the sale of the migratory birds is a misdemeanor, and the violator is subject to a penalty of a fine of not more than \$15,000 or imprisonment for up to six months, or both. 16 U.S.C. § 707(a) *as amended by* § 103 of the Migratory

⁴ The MBTA was passed in 1918.

⁵ See Convention for the Protection of Migratory Birds, Canada/U.S. 1916; Convention for the Protection of Migratory Birds and Game Mammals, Mexico/U.S. 1936; Protection of Birds and Their Environment, Japan/U.S. 1972; and Conservation of Migratory Birds and Their Environment, Union of Soviet Socialist Republics, 1978.

⁶ Migratory Bird Treaty Reform Act of 1998, 112 STAT. 2957, P.L.105-312.

Bird Treaty Reform Act of 1998, 112 STAT. 2957, P.L.105-312. Taking migratory birds for the purpose of selling them or selling migratory birds in violation of the MBTA is a felony for which violators are subject to a fine of not more than \$500,000 and imprisonment for up to two years. 16 U.S.C. § 707 (b), P.L. 86-732, 18 U.S.C. § 3571. Unauthorized takes that occur incidental to lawful logging activities, but which do not involve the sale or intended sale of migratory birds are misdemeanors.

As stated above, the MBTA prohibits the taking or killing of migratory birds. By regulation the FWS has defined “taking” as to “pursue, hunt, shoot, wound, kill, trap, capture or collect.” 50 C.F.R. § 10.12. The FWS and most courts have interpreted this prohibition broadly to apply to activities that kill or take migratory birds even when such a taking or killing is not the intended outcome of the perpetrator’s actions. Accordingly, a “take” under the MBTA is not limited to the physical conduct normally exhibited by hunters or poachers. A “take” also includes at least some otherwise legal actions that result in the death of migratory birds.

The United States has prosecuted persons under the MBTA where the “taking” resulted from the creation of hazardous conditions that lead to bird deaths in a variety of circumstances including, for example, via power line electrocution, poisoning, or drowning in oil pits. In one case a federal court found the killing of over one thousand migratory birds caused by the agricultural use of pesticides applied to an alfalfa field to be a violation of the MBTA. See United States v. Corbin Farm Service, 444 F. Supp. 510 (E.D. Cal.), aff’d, 578 F.2d 259 (9th Cir. 1978). In another case, a corporation was found in violation of the MBTA for migratory bird deaths caused by the maintenance of toxic waste ponds. See United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978). More recently, a court found an electrical distribution cooperative in violation of the MBTA for failing to install inexpensive equipment on power poles, causing the death or injury of several species of protected migratory birds. See United States v. Moon Lake Electric Ass’n, Inc., 45 F. Supp. 2d 1070 (D. Col. 1999).

Similarly some logging activities that result in the killing of migratory birds may violate the MBTA. Even logging, though not an activity that creates a hazardous condition can result in the unlawful take when, for instance, a tree with a migratory bird or migratory bird’s nest either killing the bird or crushing eggs. However, destruction of migratory bird habitat by logging activity is not *per se* a violation of the MBTA. See Seattle Audubon Soc. v. Evans, 952 F.2d 297, 302-303 (9th Cir. 1991) (“Habitat destruction causes ‘harm’ to the owls under the Endangered Species Act (ESA) but does not ‘take’ them within the meaning of the MBTA”). Logging activities that result in habitat modification are not actionable under the MBTA because no “take” of migratory birds within the meaning of the MBTA occurs.

The FWS is the federal agency within the United States that primarily administers and enforces the MBTA.⁷ The FWS refers cases it believes warrant prosecution to the United States' Department of Justice. In regard to the management of migratory birds, the primary goals of the FWS are "to conserve migratory bird populations and their habitats in sufficient quantities to prevent them from being considered as threatened or endangered," and "to ensure the citizens of the United States continued opportunities to enjoy both consumptive and nonconsumptive uses of migratory birds and their habitats."⁸ To achieve these goals, the FWS continually monitors and studies migratory bird populations, in addition to assessing and improving FWS' conservation efforts.

B. Migratory Bird Fatalities

A primary goal of the FWS's Office of Migratory Bird Management is to conserve and protect avian diversity in North America. The United States has been relatively successful in promoting and maintaining healthy migratory bird populations. However, the FWS faces significant challenges in fulfilling this mission. The conservation problems encountered today are larger in scope, more complex, and more demanding of fiscal and personnel resources than at any time in the past. Conservation efforts are further complicated by the array of different domestic, commercial, and industrial activities that cause bird fatalities. Although, logging activities are one of a long list of activities that may contribute to bird fatalities, they are not the most significant cause of bird mortality in the United States.

⁷ MBTA, 16 U.S.C. § 706; 50 C.F.R. § 10.1.

⁸ See FWS, Office of Migratory Bird Management (visited 1/24/00) <<http://www.fws.gov/r9mbmo/homepg.html>>.

Pesticide ingestion is estimated to kill millions of birds per year.⁹ Electrocutions and power line impacts kill thousands to tens of thousands per year and can have disproportionate impacts on large and relatively scarce birds such as raptors.¹⁰ In fact, some statistics suggest that the largest threat to migratory birds are domestic and feral cats that kill hundreds of millions of birds per year.¹¹ These numbers are in sharp contrast to the numbers provided in the Submission concerning birds killed by timber harvesting. One of the studies in the Submission cited an estimated 666 nests would be destroyed by four timber sales and another study predicted that seven timber sales during nesting season would likely kill an estimated 9,000 songbirds. See Submission at 7. Some other major causes of migratory bird mortality include: open oil pits, glass windows, wind generators, communication towers, fishing vessel nets and gear, cars, aircraft, oil spills and other industrial accidents, and habitat

⁹ D. Pimentel, H. Acquay, M. Biltonen, P. Rice, M. Silva, J. Nelson, V. Lopner, S. Giordano, A. Horowitz, and M. D'Amore, *Environmental and Economic Costs of Pesticide Use*, BioScience 42:750, 757 (November 1992).

¹⁰ See Trapp, John L., *Bird Kills at Towers and Other Man-Made Structures: An Annotated partial Bibliography (1960-1998)*, <<http://www.fws.gov/r9mbmo/issues/tower.html>>

¹¹ See J.S. Coleman, S.A. Temple, and S.R. Craven, *Cats and Wildlife: a Conservation Dilemma*, USFWS and Univ. WI-Extension Report, Madison (1997), <<http://wildlif.wisc.edu/extension/cattfly/3.htm>>

degradation and loss caused by a variety of land uses. Despite these bird fatality figures, the FWS has a longstanding record of successfully protecting migratory bird populations, and is continually researching approaches to conservation and protection that are more pro-active, cost-effective, and adaptable.¹²

III. DISCUSSION

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

A. Draft FWS Memorandum Relied Upon by Submitters

The Submitters' assertion that the United States has exempted logging operations from the MBTA's prohibitions is premised in part upon an unapproved and unofficial draft memorandum (See Submitters' Supporting Materials at A-1). Reliance on a draft memorandum, carrying absolutely no weight of authority, undermines the Submitters' claim.

¹²See generally, FWS, Office of Migratory Bird Management (visited 2/10/00) <<http://www.fws.gov/r9mbo/homepg.html>>; FWS, Migratory Bird Conservation, Director's Priorities FY 1999-2000 (visited 2/7/00) <<<http://www.fws.gov/priomig.html>>>.

The draft memorandum confirms that it was never finalized or adopted as official FWS policy. It was never signed by the Director of FWS and never dated, nor officially distributed as a policy document. A memorandum from the Director must always have the Director's signature and a stamped date to indicate the authenticity of the document. In contrast, this memorandum, in draft form, was a working document that had limited distribution, and was distributed solely for the purpose of soliciting comments during an internal decision-making process of the FWS relating to U.S. Forest Service activities. Finally, the author of the draft memorandum, Special Agent T. Healy, has verified the draft memorandum was never finalized or approved.

No FWS policy, formal or unwritten, is embodied or represented in this draft memorandum. Therefore, the Submitters' claim as it pertains to this draft memorandum has no basis in fact and misrepresents the true status of the FWS enforcement policy with respect to the MBTA. Records indicate that FWS has not taken enforcement actions against logging activities regarding their impacts on migratory birds that are not listed pursuant to the ESA, however, as discussed below, the FWS has appropriately exercised its discretion to focus on other threats to migratory birds.

B. FWS Policy: Implementation of the MBTA

The United States has a strong policy in favor of promoting and maintaining healthy migratory bird populations. In fact, the FWS has the primary goals "to conserve migratory bird populations and their habitats in sufficient quantities to prevent them from being considered as threatened or endangered," and "to ensure the citizens of the United States continued opportunities to enjoy both consumptive and nonconsumptive uses of migratory birds and their habitats."¹³ To achieve these goals, the FWS continually engages in administrative, regulatory, scientific, enforcement, and policy efforts to protect migratory birds.

The FWS is effectively enforcing the MBTA as contemplated by Article 14(1) of the NAAEC because the current enforcement policies of the FWS reflect a "reasonable exercise of the agency's discretion regarding investigatory, prosecutorial, regulatory and compliance matters" as defined in Article 45(1)(a).¹⁴ Furthermore, the United States is effectively enforcing the MBTA as contemplated by

¹³ See FWS, Office of Migratory Bird Management (visited 1/24/00) <<http://www.fws.gov/r9mbmo/homepg.html>>.

¹⁴ North American Agreement on Environmental Cooperation, Articles 14 and 45(1)(a), Sept. 13, 1993.

Article 14(1) of the NAAEC because the current enforcement policies of the FWS have resulted “from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities” as defined in Article 45(1)(b).¹⁵ As will be demonstrated below, the FWS has no policy to exempt logging activities from enforcement of the MBTA. Rather, the FWS has exercised its enforcement discretion reasonably, and its decisions with respect to enforcement of the MBTA reflect *bona fide* considerations regarding the allocation of scarce enforcement resources.

1. Permitting and Regulation

The FWS’ Office of Migratory Bird Management supervises and manages the MBTA permitting program which includes the development of policy, regulations, and internal directives, and issuance of permits.¹⁶ Additionally, the Office of Migratory Bird Management promulgates regulations. However, the FWS’ Division of Law Enforcement maintains oversight of enforcement and of compliance permits and regulations.

Under the MBTA, it is unlawful “by any means or manner, to pursue, hunt, take, capture, [or] kill” migratory birds except as permitted by regulation.¹⁷ Accordingly, any person, association, corporation or partnership that takes migratory birds without authorization violates the MBTA. Section 704 of the MBTA authorizes and directs a determination of “when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such [migratory] bird.” 16 U.S.C. § 704. In accordance with § 704, the FWS has established when and how migratory game birds might be taken using a permitting program. Hunting of game birds is governed by comprehensive

¹⁵ North American Agreement on Environmental Cooperation, Articles 14 and 45(1)(b), Sept. 13, 1993.

¹⁶ Migratory Bird and Eagle Permits: Program Reassignment, Review Committee, Director Order No. 84 (January 24, 1995). This Order is promulgated under the authority of the Migratory Bird Treaty Act, 16 USC 703-712; 50 CFR Parts 13 and 21. (In 1995, by means of a FWS Director’s Order, the Director reassigned the program responsibility for migratory bird permits from the Division of Law Enforcement to the Office of Migratory Bird Management office. An example of beneficial changes made under the Director’s Order is the establishment of a permit review committee within each Regional Office.)

¹⁷ MBTA, 16 U.S.C. §§703-704.

hunting regulations 50 C.F.R. Part 20. Other takes of non-game migratory birds are governed by the permit requirements of 50 C.F.R. Part 21. The FWS permits “takes” it determines to be acceptable, meaning takes which are consistent with the protection of migratory bird resources.

One purpose of the MBTA and the conventions that it implements is to regulate the hunting of game birds. On average approximately three million people per year engage in twenty-two million days of migratory bird hunting. Management of this resource is accomplished through regulations that establish procedural and substantive requirements such as setting open seasons, hunting methods, and bag limits. 50 C.F.R. § 20.1-20.155. The purpose of these hunting regulations is to keep harvest levels in balance with a sustainable population. The FWS works diligently to ensure this balance is maintained through monitoring game bird populations, permitting, and imposing appropriate conditions and limitations on takes. Prior to issuing these regulations the FWS conducts continent wide surveys of breeding populations on game species and uses this information to formulate an appropriate harvest regime.¹⁸ In this way, the FWS assures a continuous, sustainable harvest of migratory birds, while also preventing species from being listed as endangered or threatened under the ESA. For instance, in response to demands for increased hunting opportunities, waterfowl harvest regulations have grown to include features such as special seasons on more abundant species, geographic zoning, and species-specific bag limits.¹⁹ The 1999 federal framework for the early-season migratory bird hunting was announced in the Federal Register on August 27, 1999, 64 F.R. 47072, and the 1999 federal framework for the late-season migratory bird hunting was announced in the Federal Register on September, 27, 1999. 64 F.R. 52124.

Despite the FWS’ best efforts, limited resources of personnel and funding resources have hampered the permitting process. There are simply not enough personnel in the Office of Migratory Bird Management to write permits for every incoming request. Currently, the Service has 18 staff positions

¹⁸ “Harvest” is the taking of game birds as a result of a legal hunt during an established season. Office of Migratory Bird Management, FWS.

¹⁹ See FWS, Adaptive Management and the Regulation of Waterfowl Harvests, (visited 2/17/00) <<http://www.fws.gov/r9mbmo/mgmt/ahm2.html>>.

and a total nationwide budget of \$1,021,000 for this effort to manage approximately 40,000 active permits and process approximately 13,000 applications for intentional take permits, annually. The FWS puts forth its best efforts to administer the permit program. In fact, with the recent addition of a staff person, the Office of Migratory Bird Management has drafted improvements of the general permit regulations and begun revising the computerized record keeping system. Both of these recent changes to the permit program will greatly aid the FWS in using the permit program as a conservation tool.

Notwithstanding this new personnel addition, the FWS still faces significant resource limitations. Consequently, the FWS must prioritize. As a result, the permitting program focuses on activities where the take is the purpose of the activity in question. Examples where permits are given for such a take include depredation permits or permits for scientific collection.²⁰ Conversely, takes that result from but are not the purpose of the activity in question are not the focus of the permitting program. This necessary distinction is a direct result of the limited resources available for permitting, and the FWS first targets those areas where they can be most effective. Subjecting logging or other land use activities to a permitting process would require a major increase in staff resources and funding support. In addition, the program would need sufficient resources to monitor and assess the circumstances of the takes and populations of migratory birds affected by the program and need to be responsive to the significantly increased demand for permits. As a direct result of these resource limitation in the permitting program, the FWS has determined that it must exercise its discretion regarding logging activities and has not routinely reviewed such activities with regard to whether or not a permit is required.

2. Enforcement Discretion

The FWS applies discretion in the enforcement of the MBTA for three reasons: doing so can further the conservation goals of the MBTA; Congress intended for FWS to exercise reasonable discretion; and limited resources make it unavoidable. Moreover, the NAAEC recognizes that the reasonable exercise of enforcement discretion plays an important role in any enforcement program. To date, 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 ESA. This does not suggest a long-term policy of the FWS to exempt logging activities from enforcement and prosecution for violations of the MBTA as Submitters have suggested. Rather, the FWS, with its limited resources, has legitimately concentrated its regulatory, enforcement, and scientific efforts to reducing unintentional takes of migratory birds caused by

²⁰ 50 C.F.R. § 21.41-21.47 (depredating birds); 50 C.F.R. § 21.23 (scientific purposes).

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). Comparatively, the FWS focuses less on preventing takes ensuing from otherwise legal activities that modify the local environment (logging, road construction). This result, as will be discussed in more detail below, is an appropriate exercise of regulatory, enforcement, and prosecutorial discretion by the FWS.

The FWS is effectively enforcing the MBTA as contemplated by Article 14(1) of the NAAEC because the current enforcement policies of the FWS reflect a “reasonable exercise of the agency’s discretion regarding investigatory, prosecutorial, regulatory and compliance matters” as defined in Article 45(1)(a).²¹ Article 45 clearly states that, for the purposes of the NAAEC, a “party has not failed to effectively enforce its environmental law” where the actions or inactions of the agency in question reflect a reasonable exercise of the agency’s investigatory, prosecutorial, regulatory, or compliance discretion.²² Such discretion is an indispensable tool considering that the FWS simply cannot efficiently protect migratory birds solely through the permit program. Protection of migratory birds is achieved through a variety of management, statutory, and administrative approaches. In its efforts to provide the best protection possible for migratory birds, the FWS has legitimately exercised discretion as to what methods of management and statutory enforcement to utilize.

Moreover, it is clear that Congress intended the Executive Branch to employ reasonable discretion in enforcing the prohibitions of the MBTA. Congress made the prohibitions of the MBTA

²¹ North American Agreement on Environmental Cooperation, Articles 14 and 45(1)(a), Sept. 13, 1993.

²² Id.

sweepingly broad. In fact, some members objected to its breadth. See, e.g., June 4, 1918 Congressional Record – House at 7364 (Statement of Mr. Huddleston) (“But, Mr. Chairman, much as I love songbirds, I would not be willing to allow a thoughtless boy that may rob a bird’s nest or may kill a robin to be haled before a court, sent to jail, or fined the heavy fine provided in this bill. I would like to see the song birds protected, but I am not willing to see our country infested by a lot of game wardens, appointed by the Secretary of Agriculture or someone else having no responsibility to the people, snooping and spying around people’s houses, swearing out warrants, haling boys to court, and interfering with the local affairs of our people.”). However, the majority of the members of Congress apparently did not believe that the federal government would seek to enforce all technical violations of the MBTA. See, e.g., June 6, 1918 Congressional Record – House at 7456 (Statement of Mr. Dempsey) (“... I can not see why we should spend two whole days in summoning bogies from the depths, in seeing fantastic dreams of the liberties of the Republic sacrificed because of the fact that we are enacting a migratory-bird law. Gentlemen conjure up the idea that a bureaucracy will be created, and that every innocent boy who goes out to play upon the streets and breaks an egg through accident is to be haled 500 miles away and punished as if he were committing an offense of the highest degree, and with all of the rigors of the criminal law. Gentlemen, to imagine such things as that would be bad enough if it were done in sport. It is worse when it is seriously suggested.”). The courts have endorsed this notion. One appellate court stated that concerns stemming from the apparently comprehensive scope of the MBTA’s prohibitions “properly can be left to the sound discretion of prosecutors and courts.” United States v. FMC Corp., 572 F.2d 902, 905 (2d Cir. 1978) (prosecution of pesticide manufacturer for migratory birds poisoned by plant’s wastewater). That court concluded: “Imposing strict liability on FMC in this case does not dictate that every death of a bird will result in imposing strict liability on some party.” Id. at 908. Thus, non-prosecution of some violations of the MBTA should be viewed as an integral part of the MBTA’s statutory scheme.

Pursuant to the congressional intent of the MBTA, the FWS employs reasonable discretion in enforcement of the MBTA. To aid law enforcement officers in discretionary decision making, the FWS has developed a guidance manual that includes a description of investigative priorities. Such guidance was developed following the conclusion by a multi-agency Law Enforcement Advisory Commission and an internal Law Enforcement Functional Analysis that the FWS lacked clear guidance and priorities for law enforcement investigations.²³ This guidance sets as a “High Priority” the investigation of violations of

²³ Report of U.S. FWS, Law Enforcement Advisory Commission, June 15, 1990 at 49; Report of the U.S. FWS, Law Enforcement Functional Analysis; November 1, 1991 at 15. (Additionally, in August of 1992 the Director of FWS established a Statement of Objectives and Priorities to ensure that law enforcement staff and financial resources were focused on the most critical resources needs.)

laws protecting species in the wild, including migratory birds.²⁴ In general the “High Priority” category focuses on unlawful commercial activities and activities involving pollution or energy production facilities which are destructive and detrimental to efforts to conserve wildlife.²⁵ Consequently, a “High Priority” activity would be electrocution of birds on power poles or poisoning from a toxic commercial waste pond. Clearly, the FWS does not consider such offenses to be “minor” as described by the Submitters. See Submission at 10. Rather, the FWS views these activities as areas where protective efforts will have the greatest success. Prosecution for electrocution of birds on powerlines, as in the case of Moon Lake, is critical not because of how many birds were killed, but because of the thousands of miles of powerlines that cross the United States. See United States v. Moon Lake Electric Ass’n, Inc., 45 F. Supp. 2d 1070 (1999).

Beyond the general categories of prioritization described in the manual, the FWS evaluates specific cases to determine the most efficient and effective uses of its limited enforcement resources. Specifically, the FWS analyzes whether it can leverage its resources by taking enforcement actions that encourage voluntary efforts to protect migratory birds. Again Moon Lake is a good example of a case where a single prosecution under the MBTA may encourage voluntary installment of equipment by operators of other power lines to minimize the hazard that powerlines pose to migratory birds from perching on power lines. This discretionary technique of threat of prosecution to initiate voluntary efforts

²⁴ See U.S. FWS Manual, Law Enforcement Operations, Priorities, 444 FW 3.2(A)(2), December 31, 1996; see also Memorandum from Director, FWS, to Service Directorate, “Prioritization of Law Enforcement Activities” (August 10, 1992).

²⁵ Id.

works well in case scenarios where an industry can voluntarily make a relatively inexpensive alteration to their operation or equipment. By targeting enforcement activities to cases such as these, the FWS achieves the greatest migratory bird protection with minimal personnel resources.

Unfortunately, migratory bird mortality caused by logging activities is not susceptible to a simple technological fix. Logging activities modify habitat, as opposed to creating a hazardous attraction to migratory birds such as open oil pits. Consequently, it proves more challenging to identify a particular action that could voluntarily be taken by the logging industry to minimize a particular hazardous condition created by logging activities. As a result, enforcement actions, which often can initiate voluntary actions to minimize hazardous conditions by an industry, against logging activities would not likely yield as successful improvements in migratory bird protection as would occur in other industries.

3. Resource Allocation

Targeting logging activities under the MBTA is not the most efficient, effective or satisfactory means of protecting migratory birds. First, the FWS has limited enforcement resources. Second, alternative statutes and non-enforcement initiatives are more effective and efficient in protecting migratory birds. Finally, 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.

a. FWS' Law Enforcement Resources

The FWS' Division of Law Enforcement has tremendous responsibilities. General responsibilities of the Division include: uncovering major commercial activity involving illegal trade of protected wildlife and wildlife products; protecting domestic and foreign wildlife species that enter into interstate and international commerce that are protected by treaty or otherwise under Federal jurisdiction; enhancing legitimate use and enjoyment of migratory birds and other wildlife; informing citizens of various Federal laws and regulations relating to the protection of fish, wildlife, and plants. In addition, the Division is charged with the enforcement of the Lacey Act, Migratory Bird Treaty Act, Migratory Bird Hunting and Conservation Stamp Act, Eagle Protection Act, Endangered Species Act, Airborne Hunting Act, Marine Mammal Protection Act, Convention on International Trade in

Endangered Species of Wild Flora and Fauna (CITES), National Wildlife Refuge System Administration Act, Antarctic Conservation Act, Archaeological Resources Protection Act, Wild Bird Conservation Act, African Elephant Conservation Act, and the Rhino/Tiger Act.

The United States is effectively enforcing the MBTA as contemplated by Article 14(1) of the NAAEC because the current enforcement policies of the FWS have resulted “from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities” as defined in Article 45(1)(b).²⁶ A *bona fide* decision is one made in good faith, honestly, openly, sincerely, and without deceit or fraud. See BLACK’S LAW DICTIONARY (6th Ed. 1990). Given the broad scope of the FWS’ Division of Law Enforcement’s responsibilities and its shortage of personnel, good-faith decisions have to be made regarding selection of which enforcement actions to bring under which statutes. As a result, unavoidable resource allocation decisions must be made as well as application of discretion in enforcement matters. Currently, the Division struggles with a shortage of personnel and a lack of necessary funding to adequately staff itself in order to meet increasing demands. In total, there are 212 enforcement officers and approximately 40 officer vacancies due to lack of funding to pay for those positions. Those 212 officers have responsibilities that cover a vast geographic range including the contiguous United States, plus Hawaii, Alaska, Guam, Virgin Islands, Mariana Islands and other various territories. Furthermore, enforcement officers are engaged in cooperative international law enforcement with other countries that pertain to wildlife. A simple mathematical calculation using these numbers yields a ratio of approximately four officers per state or territory.

b. The Endangered Species Act

Given the resource limitations previously identified, the Division justifiably may make decisions to allocate resources to the enforcement of statutes that are considered highest priority. One such statute is

²⁶ North American Agreement on Environmental Cooperation, Articles 14 and 45(1)(b), Sept. 13, 1993.

the ESA, which is indisputably the most powerful and sweeping wildlife legislation to date in the United States. The ESA was enacted to protect endangered and threatened species and the ecosystems they depend upon for survival, and provides a program for the conservation of those species. 16 U.S.C. §1531(b). The importance of wildlife conservation interests to the United States is evidenced by the ESA's strict enforcement measures. 16 U.S.C. § 1540. For instance, the ESA can be enforced by enjoining activities which may harm listed species. *Id.* In addition, species are listed under the ESA without any regard to the economic impact. 16 U.S.C. § 1533. Individuals violating the Act may incur stiff civil and/or criminal penalties. 16 U.S.C. § 1540. As part of its enforcement scheme, the ESA expressly makes criminal knowing violations of its prohibitory provisions. 16 U.S.C. § 1540(b)(1). A principal prohibition is the "taking" of endangered species, which is more broadly defined than a "taking" under the MBTA, to include even attempts to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" such animals. 16 U.S.C. § 1532(19). Thus, a private citizen who, in almost any way, takes an endangered species, may be subject to prosecution under the ESA. Persons who violate the ESA may be subject to criminal prosecution, with a penalty of a fine of not more than \$50,000 or imprisonment for up to one year, or both. 16 U.S.C. §1540(b). Consequently, the ESA's criminal penalties effectively promote the public interest by deterring harmful interference with endangered species.

The ESA is an extremely effective method of enforcing protection of migratory birds that are listed as endangered or threatened. Often, the FWS prioritizes allocating resources to enforcement actions under the ESA because ESA listed species are the ones in the greatest jeopardy and greatest need of protection. Such resource allocation decisions pertaining to enforcement are not arbitrary, but rather made based on careful evaluation and sound reasoning. To date, approximately 90 species of birds are listed under the ESA, and the FWS regularly undertakes investigations of potential ESA violations pertaining to migratory birds. For example, the FWS launched a criminal investigation involving the logging of habitat believed to have significant conservation benefits for northern spotted owls and marbled murrelets, both federally protected species of migratory birds listed under the ESA.²⁷ Instead of litigation, the parties involved reached a recent settlement agreement. The agreement entailed the transfer of 400 acres of forest land from a private party to the federal government to be managed as habitat for the northern spotted owls and marbled murrelets.²⁸ The FWS arguably achieved greater

²⁷ See FWS, *Agreement Provides Protection to Forest Lands* (visited 2/3/00) <<http://www.r1.fws.gov/news/9987.htm>>.

²⁸ *Id.*

protection for migratory birds by negotiating an agreement that would yield preservation of migratory bird habitat than if they had prosecuted the private party for their alleged offense.

c. Technical Difficulties of Enforcing the MBTA Against Logging

Logging activities that result only in habitat modification are not actionable under the MBTA. Destruction of migratory bird habitat by logging activity is not *per se* a violation of the MBTA. See Seattle Audubon Soc. v. Evans, 952 F.2d 297, 302-303 (9th Cir. 1991) (“Habitat destruction causes ‘harm’ to the owls under the ESA but does not ‘take’ them within the meaning of the MBTA”).

Proving that any particular logging activity results in an MBTA violation poses significant technical challenges uncommon to other types of MBTA violations. In fact, law enforcement officers are regularly unable to make a viable case for a taking caused by logging activities because of the high burden of proof required under the MBTA. As a criminal statute, law enforcement officers must prove “beyond a reasonable doubt” that a party has committed a violation of the MBTA. To meet this burden of proof, direct evidence of a take in the form of a dead bird or crushed eggs is most valuable. Typically, direct evidence of a take from electrocution or oil pit incidents is easily discoverable and impacts are easily quantified because the remains of dead birds can be located. However, discovery of direct evidence of takes caused by logging is much more difficult given the large acreage of a common logging site. Logging activities will often encompass a large geographic area littered with debris, and locating dead birds or crushed nests within that area is arduous and time consuming. Moreover, during the logging process evidence is often completely destroyed. Difficulties of establishing a case under the MBTA are further compounded by the lack of personnel resources. Investigation of violations related to logging activities require analysis of large geographic areas, and repeated site visits in order to substantiate and quantify impacts on migratory birds. In contrast, cases, such as electrocution, involving smaller geographic areas are less time consuming and more likely to be successful.

d. Non-enforcement Initiatives

In the submission, the Submitters do not take into consideration the multitude of “non-prosecutorial” alternatives used to protect migratory birds that are, at present, a more productive use of limited resources. This failure suggests that Submitters’ lack a complete understanding of the laws and other methods used by the United States to protect migratory birds. The FWS implements the MBTA in a number of ways apart from taking strict enforcement action. A general summary of the types of proactive, preventative management actions routinely taken are summarized below. All of these actions are taken to prevent, limit, or eliminate adverse impacts on migratory birds. By protecting migratory

birds in more effective ways where possible, these programs allow the FWS to concentrate enforcement resources on those situations where the enforcement action is most necessary.

(1) Population Monitoring of Migratory Birds

The FWS monitors populations of migratory birds on a continuing basis conducting over 170 surveys each year.²⁹ Monitoring populations is a means to identify those species of migratory birds that are considered to be of most concern in the United States because of (1) documented or apparent population declines, (2) small or restricted populations, or (3) dependence on restricted or vulnerable habitats. In coordination with the United States Geological Survey (USGS), the FWS monitors populations through the annual roadside Breeding Bird Survey,³⁰ the aerial Breeding Population Survey (designed to estimate waterfowl productivity and survival), harvest monitoring, and species-specific surveys including the annual Woodcock and Mourning Dove breeding season surveys. See FWS, *American Woodcock Harvest and Breeding Population Status, 1999*; see also FWS, *Waterfowl Population Status, 1999*. Resulting survey information is used to identify priorities for management actions. Additionally, the FWS maintains a List of Species of Management Concern that is revised every 5 years to assure that the highest priority species are targeted for management action.³¹ One hundred and twenty-four of the 836 species on the list of migratory birds are currently on this list. Listed species are those considered to be in greatest need of protection and FWS expends significant efforts and resources to monitor and conserve listed species.

(2) Avian Mortality Studies and Management

Various forms of avian mortality are monitored by the FWS. Based on population trend data and monitoring of these activities, the FWS recommends management actions to reduce impacts. A good example is the Communications Tower Working Group, a group of governmental and private

²⁹ See FWS, *Monitoring Birds* (visited 2/7/00) <<http://www.mbr.pwrc.usgs.gov/>>.

³⁰ See, USGS, *Breeding Bird Survey* (visited 2/7/00)
<<http://www.mp2.pwrc.usgs.gov/bbs/index.htm>>.

³¹ See FWS, *Migratory Nongame Birds of Management Concern in the United States: The 1995 List*, Sept. 1995.

representatives which has been convened to determine the impact of communications towers on birds and develop the research and management actions needed to alleviate the problem. The FWS has been engaged in the management of other large scale sources of mortality, including mortality resulting from powerlines, open oil pits, pesticides and contaminants, avian disease outbreaks, oil spills, bycatch of birds in commercial fisheries and collisions of birds with aircraft. In appropriate instances, this monitoring can lead to enforcement action, such as Moon Lake, discussed previously. Due to limited resources the FWS has been unable to address all of the many forms of avian mortality but has instead sought to target those sources of mortality with a great level of impact and where that impact can be readily addressed.³²

(3) Landscape Level Planning

The FWS is involved in major landscape level bird planning efforts. Landscape level planning considers the interaction of anthropological, ecological, and geophysical characteristics that effect the conservation of migratory birds. The first continental scale conservation effort of its kind was led by the FWS in development of the North American Waterfowl Management Plan in 1986. This effort generated significant investment in habitat improvements. Additionally, efforts include the *Partner's In Flight* planning activities now nearing completion.³³ The Service has pledged to begin implementation of completed plans and received increased funding from Congress for that purpose. When implemented, these activities will greatly improve habitat restoration, monitoring, and conservation of migratory birds. The FWS is also engaged in the completion of the U.S. Shorebird Plan, having provided funding support for its preparation.³⁴ Additional funding will be provided to facilitate implementation and a National Coordinator position will be filled fiscal year 2000 to work on the highest priority shorebird management issues and to oversee implementation of the plan. Finally, the North American Colonial Waterbird Plan is also in preparation and the FWS is providing technical and funding support for that effort.

(4) Public Outreach

The FWS contributes to the conservation of migratory birds through outreach and education efforts. An example is the recently developed Urban Treaty for Migratory Birds that seeks to educate

³² See generally, FWS, Office of Migratory Bird Management (visited 2/10/00) <<http://www.fws.gov/r9mbo/homepg.html>>.

³³ See Partners in Flight (visited 2/3/00) <<http://www.PartnersInFlight.org>>.

³⁴ See, FWS, *U.S. Shorebird Plan*, (visited 2/3/00) <<http://www.manomet.org>>.

the public in urban environments about the need to conserve migratory birds. New Orleans was the first city, and there are plans for designating Chicago as the second this spring. In addition, the FWS is one of the lead partners in the International Migratory Bird Day event held each year throughout the United States in May. The primary focus of this event is to develop awareness of the need to conserve migratory birds in urban settings.

(5) North American Bird Conservation Initiative & Trilateral Committee for Wildlife and Ecosystem Conservation and Management

The North American Bird Conservation Initiative (NABCI) is an international effort involving Canada, the United States, and Mexico that was established under the auspices of the CEC. The objective of the NABCI is to improve communication regarding avian conservation needs throughout North America, identify areas of cooperation, and seek additional support for addressing those needs. To implement this objective, each participating country has recently initiated the establishment of committees under NABCI and is designating delegates.

The Trilateral Committee for Wildlife and Ecosystem Conservation and Management meets annually to discuss environmental issues of concern to Mexico, the United States, and Canada. The Fish and Wildlife Service co-chairs the Table on Migratory Birds and Wetlands. Work under the Trilateral Committee seeks to enhance communication and coordination on migratory bird issues faced by each of the member nations. For example, ways and means of reducing impacts on migratory birds resulting from improper pesticide use is an issue that was addressed at the last Trilateral meeting in Texas in February 2000.

C. The United States Forest Service and Migratory Bird Conservation

The United States Forest Service (USFS) is another agency that is an established leader in the conservation of migratory birds, providing habitat through sustainable forest and grassland management. The USFS is a steward of 192 million acres of national forest and grasslands across the United States. In addition, the USFS manages one of the largest amount of breeding bird habitat under one ownership in the United States, and provides habitat for over 250 species of migratory birds.

Although migratory bird conservation is not specifically mentioned, the USFS is subject to existing regulations under the National Forest Management Act that directs the USFS to manage habitats necessary to ensure the maintenance of viable wildlife and fish populations. 36 C.F.R. 219. To ensure

viable populations are maintained, the USFS must provide habitat to support, at least, a minimum number of reproductive individuals, well-distributed, in a population. Id. In addition, to provide habitat for endangered or threatened species under the ESA, the USFS is directed to minimize adverse affects and ensure that its actions do not jeopardize the continued existence of those species. Id. The USFS also designates sensitive species as a tool to focus management on species that are most vulnerable to viability concerns. Specifically, sensitive species are those plant and animal species identified by a Regional Forester for which population viability is a concern as evidenced by significant, current, or predicted downward trends in population number, density, or habitat capacity that would reduce a species' existing distribution. See Forest Service Manual, Title 2600, Wildlife, Fish, and Sensitive Species Habitat Management, Chapter 2670. Furthermore, the USFS identifies conservation measures and management objectives for those ESA endangered or threatened species of migratory birds with the goal to achieve recovery and their removal from ESA listing.

Pursuant to regulations, the USFS developed an official manual in which habitat planning and evaluation is a primary focus. See Forest Service Manual 2620. Some objectives of habitat planning include integrating habitat planning into land management and project plans, identifying opportunities to improve habitat, providing sound information to support management decision-making that will affect wildlife, and coordinating forest planning for wildlife with the states of the United States. Id. at 2620.2. The Manual sets forth clear policy for the monitoring and management of animal species with a focus on recovery of ESA-listed species and the evaluation of effects of proposed management activities (such as logging) on habitat capacity and the species. Id. at 2620.3. Additionally, when a threatened, endangered or sensitive species is present, or suspected to be present, in a timber sale area, the USFS will include a provision in the timber sale contract (C6.25) to identify special measures (i.e. restricting the operating season) to protect habitat for those species.

Numerous programs, plans, and other activities contribute to the protection and conservation of migratory birds. For instance, the USFS' State and Private Forestry program targets conservation of the 490 million acres of forest owned by 9.9 million non-industrial private landowners and provides technical expertise and skills in working with private forest landowners to conserve migratory bird habitats. In addition, the USFS Office of International Programs is directing substantial emphasis and investments on migratory birds, sustainable forest management, and conservation of wetlands in North America and Latin America through technical cooperation, project funding, and forest management policy assistance. Moreover, through the Landbird Conservation Program, the USFS provides, maintains, restores, and protects habitats necessary to sustain healthy migratory bird populations to achieve biological objectives and to meet public demands for bird related recreational opportunities. In 1999, this program restored

or enhanced 63,953 acres of land bird habitats, built 774 structures and inventoried 502,022 acres. Expenditures in 1999 exceeded \$2.3 million and were matched with almost another \$1.9 million in partner contributions. In fiscal year 1999, the USFS focused 280 partnership projects on migratory birds. Additionally, the USFS actively supports Partners in Flight, the North American Waterfowl Management Plan, the U.S. Shorebird Conservation Plan, and the North American Colonial Waterbird Conservation Plan.

IV. CONCLUSION

Although the United States Government is a firm supporter of the public submission process established under Article 14 and 15 of the NAAEC, this Submission does not warrant a request by the Secretariat for authorization to develop a factual record based on the Submitters' assertions of failure by the United States to effectively enforce its environmental law (the MBTA). Those assertions are based on an unapproved draft memorandum; on an erroneous interpretation of the FWS policy pertaining to enforcement of the MBTA against logging activities; on a failure to recognize a reasonable exercise of the agency's discretion regarding investigatory, prosecutorial, regulatory and compliance matters; on a failure to recognize the *bona fide* decisions to allocate resources for enforcement; and on failure to take into consideration the multitude of "non-prosecutorial" alternatives or preferable enforcement laws used to protect migratory birds, such as the ESA.

Furthermore, the Submitters' assertions are not the proper subject of a factual record under Articles 14 and 15. The FWS has no policy to exempt logging activities from the MBTA. To the contrary, the FWS maintains that prohibitions of the MBTA applies to activities, like logging, that kill or take migratory birds even when such a taking or killing is not the intended outcome of the perpetrator's actions. Nevertheless, Submitters argue, based on an unapproved and unofficial draft memorandum, that the United States is failing to effectively enforce the MBTA and has exempted logging operations from the MBTA's prohibitions. No FWS policy, formal or unwritten, is represented in the draft memorandum so heavily relied upon by Submitters. The draft memorandum was never signed by the Director of FWS, never dated, nor officially distributed as a policy document. Without these critical elements of authenticity, the document carries no weight of authority and represents no policy decision by the FWS. Absent such direct evidence of the alleged FWS policy to exempt logging from the MBTA, the Submitters' claim lacks justification for a request of a factual record.

There is no basis for recommending the preparation of a factual record as there can be no violation of Article 14 of the NAAEC where the agency (the FWS) has exhibited a reasonable exercise of discretion and *bona fide* decision making with respect to allocation of scarce resources. Submitters'

have described the MBTA as a statute devoid of discretion. To the contrary, the exercise of prosecutorial discretion is a key component of the enforcement of any criminal statute, even if its provisions impose strict liability. The FWS has applied reasonable discretion in the enforcement of the MBTA. Similarly, the FWS has made *bona fide* resource allocation decisions regarding enforcement actions to best ensure the broadest and most effective protection possible for migratory birds. Such discretion and such *bona fide* decision making is consistent with the NAAEC.

The FWS adequately protects migratory birds. To ensure the best overall effective enforcement, the FWS has established a permit program, set forth enforcement priorities, and utilized other enforcement and non-enforcement mechanisms for the protection of migratory birds. The FWS has developed a rational scheme for exercise of the prosecutorial discretion in light of the enforcement resources available to it.

Migratory bird fatalities results from a multitude of causes and logging activities is just one of these many causes. Submitters have opted not to recognize that other activities represent even greater threats to migratory birds, and other activities, if prosecuted, could have a much greater beneficial impact to the protection of migratory birds.

For all the foregoing reasons, preparation of a factual record would not be a wise use of the CEC's limited resources and would not significantly advance the goals of the NAAEC. We urge the Secretariat to determine that Submission 99-002 does not warrant the development of a factual record under Article 15 of the NAAEC as the United States of American is not failing to effectively enforce its environmental law.