

Migratory Birds—Submission

A14/SEM-99-002/01/SUB

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**Submission to the Commission on Environmental Cooperation Pursuant to Article 14 of the
North American Agreement on Environmental Cooperation**

submitted by

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
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This submission is made by the following organizations from Canada, Mexico, and the United States.

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I. SUMMARY OF THE SUBMISSION

The Center for International Environmental Law (CIEL), on behalf of the Submitting Parties, presents this Submission pursuant to Article 14 of the North American Agreement on Environmental Cooperation (NAAEC). This Submission presents evidence that the United States Government is "failing to effectively enforce" Section 703 of the Migratory Bird Treaty Act (MBTA), 16 U.S.C. §§703-712, which prohibits the killing of migratory birds.

The MBTA implements four international treaties, including agreements with Canada and Mexico, aimed at protecting migratory birds. Section 703 of the MBTA prohibits any person from killing or "taking" migratory birds, including the destruction of nests, the crushing of eggs, and the killing of nestlings and fledglings, "by any means or in any manner," unless the U.S. Fish & Wildlife Service (FWS) issues a valid permit. The United States deliberately refuses, however, to enforce this clear statutory prohibition as it relates to loggers, logging companies, and logging contractors. As a matter of internal policy, the United States has exempted logging operations from the MBTA's prohibitions without any legislation or regulation that authorizes such an exception. The United States has never prosecuted a logger or logging company for a violation of the MBTA, even though it acknowledges that the MBTA has consistently been, and continues to be, violated by persons logging on federal and non-federal land. In fact, the Director of the FWS has stated that the FWS, the agency responsible for enforcement of the MBTA, "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."¹ This policy is not based on a determination that killing migratory birds in the context of logging is compatible with the terms of the MBTA as provided under Section 704 of the MBTA. Nor does it reflect a reasonable exercise of the agency's discretion with respect to investigatory, prosecutorial, regulatory or compliance matters. Instead, FWS has completely abdicated its enforcement obligations.

There is no domestic remedy available to the Submitting Parties. Citizens cannot obtain private remedies under the MBTA itself, because the MBTA is a criminal statute and citizens have no authority to bring "private criminal enforcement actions." In addition, an appeals court has ruled that enforcement decisions of FWS are immune from civil suits by citizens. Moreover, courts have rejected repeated attempts by environmental organizations to compel the Forest Service to implement the MBTA by including provisions to protect migratory birds in its timber licensing agreements for logging on federal

¹Memorandum from Director, FWS, to Service Law Enforcement Officers, "MBTA Enforcement Policy" (March 7, 1996).

lands. Even if these cases had been successful, they would have applied only to implementation of the MBTA on federal lands, and not to non-federal lands which supply 94% of the total U.S. timber supply. Only FWS has the authority to enforce the MBTA against private individuals on non-federal lands.

FWS has not responded to CIEL's letter of April 26, 1999 asking if FWS plans to continue its "no investigation/no enforcement" policy. The record clearly indicates that FWS, as it admits, "will continue to enforce the MBTA in accordance with this longstanding policy."²

This enforcement failure has significant consequences, because logging directly kills or takes migratory birds by destroying nests, crushing eggs, and killing nestlings and fledglings. This enforcement failure permits the ongoing destruction within the United States of migratory bird populations shared by Canada, Mexico, and the United States. This enforcement failure undermines the cooperative efforts of Canada, Mexico and the United States to maintain biodiversity, a goal which the CEC has explicitly recognized and recently adopted through its North American Biodiversity Conservation Project. The CEC itself has recognized in its 1996 Annual Report that "migratory birds are a particularly important component of North American biodiversity."

This failure to enforce the MBTA is precisely the kind of failure that NAAEC is designed to address. The Submitting Parties therefore respectfully request that the Commission prepare and publish a factual record documenting the allegations contained in this Submission.

II. THE SUBMISSION

A. FACTS

1. The Migratory Bird Treaty Act (MBTA)

In response to the decline of the Earth's species and their natural habitat, the world's governments have developed many treaties, statutes, and regulations to ensure that future generations enjoy at least the same environmental quality that exists today. The MBTA implements four treaties designed specifically to protect migratory birds which the United States has signed with Great Britain (for Canada), Mexico, Japan and Russia. The United States and Great Britain signed their 1916 treaty because they feared the possibility of migratory bird extinction. The treaty proclaims that "[m]any of these species are of great value as a source of food or in destroying insects which are injurious to forests and forage plants [and] agricultural crops ... but are nevertheless in danger of extermination through lack of adequate protection

²*Id.*

during the nesting season or while on their way to and from their breeding grounds....³ In 1936, the United States signed a similar treaty with Mexico to protect migratory birds species from extermination.⁴ The 1972 treaties with Japan and Russia both explicitly recognize the scientific, economic, aesthetic, cultural, educational, recreational and ecological value of migratory birds, the importance of

³Convention between the United States and Great Britain for the Protection of Migratory Birds in the United States and Canada, preamble, para. 3, August 16, 1916, 39 Stat. 1702.

⁴Convention between the United States and Mexico for the Protection of Migratory Birds and Game Mammals, preamble, para. 2, February 7, 1936, 50 Stat. 1311.

protecting the viability of migratory bird species, and the need to preserve and enhance their environment.⁵

The MBTA implements these treaties primarily by prohibiting the killing or "taking"⁶ of listed migratory birds.⁷ The heart of the MBTA, Section 703, states that "it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill" any migratory bird or nest or egg of such bird, except as may be permitted according to the strict terms of a valid permit.⁸ The MBTA makes "any person, association, partnership, or corporation" who violates the statute or its regulations guilty of a misdemeanor and upon conviction thereof, subject to a fine of not more than \$500 or imprisonment for up to six months, or both.⁹ In 1920, U.S. Supreme Court highlighted the importance of the MBTA's prohibitions: "But for the treaty and the statute there soon might be no birds for any power to deal with."¹⁰ Taken together, the treaties and the MBTA impose "conservation measures of prime importance."¹¹

⁵See Convention between the United States of America and Japan for the Protection of Migratory Birds in Danger of Extinction, and their Environment, art. VI, March 4, 1972, 25 U.S.T. 3329; Convention between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment, art. IV, May 23, 1972, 29 U.S.T. 4647.

⁶The regulations define "take" to mean "pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to pursue, hunt, shoot, wound, kill, trap, capture, or collect. 50 C.F.R. § 10.12.

⁷For a complete list of birds protected by the MBTA, see 50 C.F.R. § 10.13.

⁸MBTA, 16 U.S.C. §§ 703, 704.

⁹MBTA, 16 U.S.C. § 707(a).

¹⁰Missouri v. Holland, 252 U.S. 416, 435 (1920).

¹¹H.R. REP. NO. 65-243, at 3 (reprinted letter from Robert Lansing, Secretary of State, to President Woodrow Wilson, Aug. 17, 1916).

The FWS administers and enforces the MBTA.¹² Pursuant to this authority, FWS has issued regulations for taking migratory birds injurious to agriculture,¹³ but not for taking migratory birds in logging operations. In addition, only certain federal enforcement personnel of FWS are exempted from the provisions of the MBTA.¹⁴ No other government officials or private entities are exempted. Similarly, no activities are exempt from the prohibitions of the MBTA.

2. Logging Directly Results in the Deaths of Migratory Birds

As the CEC has reported, "migratory birds are a particularly important component of North American biodiversity" and "[h]undreds of species of birds migrate between the three countries, depending on areas where they can stop for food, shelter or nesting. Yet, logging remains an economically significant activity in these forests¹⁵ that results in the killing of migratory birds.

¹²MBTA, 16 U.S.C. § 706; 50 C.F.R. § 10.1.

¹³50 C.F.R. Parts 13, 20, and 21.

¹⁴50 C.F.R. § 21.12

¹⁵See CEC, ECOLOGICAL REGIONS OF NORTH AMERICA: TOWARD A COMMON PERSPECTIVE, 19, 23, 25, 42 (1997).

The United States does not dispute that logging of forests during the nesting season directly kills or takes migratory birds. FWS admits that "[i]ncidental to the process of legal timber harvests migratory birds, particularly during nesting season, are being taken,"¹⁶ on non-federal and federal lands. The Forest Service also admits that individual nests are destroyed and birds killed as a result of logging and other activities.¹⁷

Logging operations directly kill or take a staggering number of migratory birds through road building, staging of heavy equipment, cutting and bulldozing and burning, activities which all result in the downing of trees and direct destruction of birds and their nests and eggs. One study found that up to 666 nests containing juvenile birds or eggs of seven migratory bird species would be destroyed as a direct result of just four timber sales in Arkansas.¹⁸ Another study estimated that up to 9,000 young migratory songbirds would be killed as a direct result of logging a mere seven timber sales during the nesting season in the Chattahoochee National Forest in Georgia.¹⁹ When logging is considered on all federal lands — as well as State and private lands which provide about 94% of the U.S. timber supply²⁰ — the number of young migratory birds killed, nests destroyed, and eggs crushed annually as a direct result of logging operations is enormous.

¹⁶Memorandum from Deputy Director, Fish and Wildlife Service, to Directorate, "Issue/Process Review of MBTA Take Permitting" (May 28, 1996).

¹⁷Memorandum from Eddie Morris, Forest Wildlife biologist, Forest Service, to District Ranger, Tallulah, "Crop Tree Release and NTMB's" (Aug. 10, 1995) (stating that the "loss of individual nests and or birds is an unavoidable cost of any type of land management activity, whether it be agricultural plowing, mowing, road maintenance, lawn maintenance, clearing land for construction, or cutting trees").

¹⁸Declaration of J. Christopher Haney, Ph.D., In Support of Application for Temporary Restraining Order and Motion for Preliminary Injunction, paras. 9-13, Newton County Wildlife Association v. Rogers (Civ. No. LR-C-95-673) (E.D. Ark. 1996).

¹⁹See Sierra Club v. Martin, 110 F.3d 1551, 1553 (11th Cir. 1997).

²⁰*Forest Service Fiscal Year 2000 Budget, Hearing before the Subcommittee on Department Operations, Oversight, Nutrition, and Forestry of the House Committee on Agriculture*, 106th Cong., 1st Sess. 68 (Mar. 11, 1999) (statement of Michael Virga, Society of American Foresters).

B. THE UNITED STATES' FAILURE TO ENFORCE THE MBTA**1. The United States Has a Legal Obligation to Enforce the MBTA Against Loggers and Logging Companies**

Under the MBTA, FWS has an affirmative obligation to enforce the MBTA against “any person, association, partnership, or corporation” that “by any means or in any manner,” pursues, hunts, takes, captures, kills or attempts to take, capture, or kill a migratory bird or any part, nest or eggs of any migratory bird.²¹ FWS has admitted that "Federal contractors and permittees, or any other non-Federal entities bearing some relationship to a Federal action are still subject to the prohibitions of the [MBTA]."²² FWS has also stated in a recent environmental impact statement relating to a timber sale that "[a]ctions undertaken by contractors of the Forest Service that include cutting occupied trees, resulting in the death of migratory birds, nestlings or eggs, are not in compliance with the MBTA [C]ontractors felling trees with nestlings or eggs would result in take of migratory birds, and *persons that cut such trees are liable under the MBTA.*"²³ In fact, the United States has argued that Congress enacted the MBTA to bring non-federal entities into compliance with the four Migratory Bird Treaties that the MBTA implements.²⁴ In sum, FWS must enforce the MBTA against all persons engaged in logging activities, whether on federal, State, or private land, who take migratory birds.

Under the MBTA, a person may take or kill migratory birds only as permitted under FWS regulations and based on FWS's determination that the take or kill is compatible with the migratory bird treaties.²⁵ FWS's determination shall take into account scientific factors such as species abundance and distribution, migratory patterns, and breeding habits, as well as the economic value of birds.²⁶ FWS has never made such a determination or issued regulations with respect to logging. Consequently, killings and takings due to logging are legally prohibited under the MBTA.

²¹MBTA, 16 U.S.C. §§ 703, 707.

²²Memorandum from Acting Director, Fish and Wildlife Service, to Regional Directorate, Region 1-7, "Guidance on 'Take' under Migratory Bird Treaty Act," page 1 (April 16, 1997).

²³Memorandum from Acting Supervisor, Snake River Basin Office, to Assistant Regional Director, Columbia River Ecosystem, Region 1, "DEIS for the Deadwood Ecosystem Analysis, Boise National Forest, ER 97/0208 (File #110.0400)," pages 4-5 (May 20, 1997) (emphasis added). This FWS statement directly contradicted the Forest Service's conclusion in the draft environmental impact statement that the felling of trees with unidentified but occupied nests complied with the MBTA.

²⁴Federal Appellants' Response to Appellees' Petition for Rehearing with Suggestion for Rehearing En Banc, pages 12-13, Sierra Club v. Martin, 110 F.3d 1551 (11th Cir. 1997) (No. 96-8840).

²⁵MBTA, 16 U.S.C. §§ 703, 704.

²⁶MBTA, 16 U.S.C. § 704.

Logging operations result in the *direct* killing and taking of migratory birds, by destroying nests, crushing eggs, and killing fledglings. These killings and takings are prohibited by Section 703 of the MBTA.²⁷

Both the Forest Service and FWS admit that on non-federal as well as federal lands, "[i]ncidental to the process of legal timber harvests migratory birds, particularly during nesting season, are being taken."²⁸

2. The United States Has Never Enforced the MBTA Against Loggers Whose Conduct Violates the Act

Despite a clear statutory mandate to enforce the MBTA, FWS has never enforced the MBTA against

²⁷See Moon Lake Electric Association, 45 F.Supp.2d 1070, 1078. This court interpreted "take" and "kill" to include unintentional takes and kills, such as when a bird dies after landing on a high voltage power line. The court based its decision on the Supreme Court's interpretation of similar terms under the Endangered Species Act in Babbitt v. Sweet Home, 515 U.S. 687, 132 L. Ed. 2d 597, 115 S. Ct. 2407 (1995), and the ordinary definitions of "kill" and "take" do not include the word "directly" or suggest that only direct applications of force constitute "killing" or "taking." *Id.* Further, FWS has always enforced the MBTA consistently with the reasoning of *Moon Lake*, see Section II(B)(3) of this Petition, and it has argued in court against narrower interpretations, Federal Defendant's Opposition to Plaintiffs' Motion for Temporary Restraining Order or Preliminary Injunction, Newton County Wildlife Association v. Rogers (Civ. No. LR-C-95-673).

²⁸Memorandum from Deputy Director, Fish and Wildlife Service, to Directorate, "Issue/Process Review of MBTA Take Permitting" (May 28, 1996).

loggers and logging companies, on federal or non-federal land. Nor has any other federal agency. The Director of FWS has stated:

The [Fish & Wildlife] Service 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.²⁹

Consistent with this, a review of government files in response to the Submitting Party's requests, indicates that the United States has *never* enforced the MBTA against loggers, logging companies, or private landowners — in any context — no matter how egregious the violation may have been. In response to CIEL's request for information, FWS, the Forest Service, and the Department of Justice all responded that they had no documents relating to enforcement actions against anyone involved in a logging operation.³⁰

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 active rookery, leaving hundreds of eggs and nests lying on the ground, crushed by logging equipment and falling trees.³¹ 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

²⁹Memorandum from Director, FWS, to Service Law Enforcement Officers, "MBTA Enforcement Policy" (March 7, 1996).

³⁰Letter from Kevin R. Adams, Chief, Law Enforcement, Fish and Wildlife Service, to Chris Wold, CIEL (April 5, 1999) ("A search of Fish and Wildlife Service, Division of Law Enforcement records failed to locate any records"); Letter from James Eichner, U.S. Department of Justice, Environment and Natural Resources Division, to Chris Wold, CIEL (Nov. 30, 1998) ("We have conducted a search of this Division's files and have located no records responsive to your request").

³¹Gordon Johnson, *Wallace Pleads No Contest to Heron Bashing*, THE ARCATA EYE (Oct. 16, 1998).

known to be nested by a pair of ospreys.³²

3. The United States Enforces the MBTA in Other Contexts

³²Memorandum from the California Department of Forestry and Fire Protection, Humboldt/Del Norte Unit, to Glen J. Newman, Region Chief, Coast-Cascade Region, page 8 (March 23, 1998).

While the United States refuses to enforce the MBTA against loggers who collectively and directly kill or take tens of thousands of migratory birds, it prosecutes others for relatively minor violations of the MBTA. For example, the United States has enforced the MBTA against persons who poisoned, shot, trapped, and baited migratory birds. In one case, the United States enforced the MBTA against a farmer who applied a registered pesticide to an alfalfa field, causing the death of over one thousand birds who ate the alfalfa.³³ The court examined the MBTA and its legislative history and concluded that even "killing a single bird is sufficient to create criminal liability."³⁴

FWS has taken that court's conclusion to heart — it successfully prosecuted a landowner who unintentionally killed four birds, two grackles and two doves.³⁵ In a very recent case, FWS prosecuted a utility for unintentionally electrocuting and killing 17 birds.³⁶ In an earlier case, the United States prosecuted a pesticide manufacturing corporation that discharged toxic waste into a storage pond, incidentally killing 92 birds attracted to the pond over a two-month period.³⁷

FWS's prosecution and federal court decisions in these cases clearly illustrate that Section 703's prohibitions apply to all killings and takings "by any means or in any manner," including all direct and unintentional killings and takings of migratory birds.³⁸

4. The Failure of the United States to Enforce the MBTA Against Loggers Constitutes a Failure to Effectively Enforce Environmental Law

The failure of the United States to enforce the MBTA against loggers and logging operations constitutes a "failure to effectively enforce environmental law" under the NAAEC. The MBTA is an "environmental law" within the meaning of Articles 14 and 45(2)(a) of the NAAEC, because its primary purpose is the protection of wild fauna, specifically migratory birds. Section 703, which Submitting Parties claim the United States is failing to effectively enforce, prohibits the killing or taking of any

³³United States v. Corbin Farm Service, 444 F.Supp. 510 (E.D. Cal), *aff'd*, 578 F.2d 259 (9th Cir. 1978).

³⁴United States v. Corbin Farm Service, 444 F.Supp. at 530.

³⁵United States v. Van Fossan, 899 F.2d 636 (7th Cir. 1990).

³⁶United States v. Moon Lake Electric Association, Inc., 45 F.Supp.2d 1070 (D. Col. 1999).

³⁷United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978).

³⁸*See, e.g.*, United States v. Moon Lake Electric Association, Inc., 45 F.Supp.2d 1070, 1075-1079 (D. Col. 1999) (expressly rejecting plaintiffs claims that the MBTA applies only to poaching and hunting related activities).

migratory bird or nest or egg of such bird, except as may be allowed according to the strict terms of a valid permit issued by FWS under regulations promulgated pursuant to Section 704 of the MBTA. As discussed in Section II(B)(1), however, FWS has never made the necessary determination that killings and takings directly caused by logging operations are compatible with the migratory bird treaties upon which to base regulations to issue permits for killing and taking birds during logging operations. Further, FWS does not issue permits of any kind to loggers or logging companies before they engage in the direct killing or taking of migratory birds and it does not prosecute loggers and logging companies when they kill or take migratory birds.

This abdication of enforcement responsibilities cannot be considered prosecutorial discretion,³⁹ because FWS has made a sweeping policy decision, not a case-by-case judgment associated with prosecutorial discretion. FWS has a "longstanding, unwritten policy" and it "will continue its longstanding policy" not to enforce *or even investigate* logging-related takings of non-endangered migratory birds. A policy decision to avoid prosecutions and investigations in all cases all the time, including all future cases, bears no relation to a "reasonable exercise of ... discretion in respect of investigatory, prosecutorial, regulatory or compliance matters."⁴⁰

Meanwhile, FWS has prosecuted non-loggers for taking small numbers of birds in comparison to the number taken as a direct result of logging. The manifest unreasonableness of FWS's position is highlighted by its prosecution of a homeowner for the inadvertent poisoning of two doves and two grackles.⁴¹ Such prosecutions contrast sharply with FWS's refusal to enforce the MBTA against loggers and logging companies that result in the large-scale direct killing of thousands of migratory birds annually.

4. EFFORTS TO PERSUADE THE UNITED STATES TO IMPLEMENT AND ENFORCE THE MBTA

1. MBTA Litigation and Logging in National Forests

Because the MBTA is a criminal statute, citizens cannot directly challenge the actions of persons who violate the Act. However, due to the growing concern about the impacts of logging on migratory bird species, environmental groups have sued the U.S. Forest Service under the Administrative Procedure

³⁹The United States has argued that enforcement of the MBTA must be left to the complete discretion of the of FWS. *See, e.g.*, Brief for Federal Appellants, *Sierra Club v. Martin*, pages 32-35, 110 F.3d 1551 (11th Cir. 1997) (No. 96-8840).

⁴⁰*See NAAEC*, art. 45(1).

⁴¹United States v. Van Fossan, 899 F.2d 636 (7th Cir. 1990).

Act (APA)⁴² for failing to implement the MBTA through restrictions in logging permits for national forests. Courts have rejected these claims, holding that the MBTA does not apply to activities of federal agencies.⁴³

Those cases sought implementation of the MBTA on federal lands by federal agencies other than FWS or compliance by those federal agencies with the MBTA's prohibitions. Even if the MBTA does not apply to the activities of federal agencies, FWS remains responsible for enforcement of the MBTA against Federal contractors, Federal permittees, and all other private persons who kill or take migratory birds in violation of the MBTA during logging operations on both federal and non-federal land. As discussed in Section II(E)(2)(c) below, Submitting Parties have no alternative legal avenues to compel enforcement of the MBTA.

⁴²5 U.S.C. §§ 701-706.

⁴³*See, e.g.*, Sierra Club v. Martin, 110 F.3rd 1551 (11th Cir. 1997).

2. Written Inquiry Regarding the FWS Policy of Non-Enforcement of the MBTA With Regard to Loggers

In response to the growing concern about the failure of the United States to implement the MBTA against loggers, the Center for International Environmental Law (CIEL) requested government documents pursuant to the Freedom of Information Act relating to any MBTA enforcement actions against loggers and logging companies. FWS, the Forest Service, and the Department of Justice all responded that they had no documents relating to past or present enforcement actions against anyone involved in a logging operation.⁴⁴ The reason for this response became evident when CIEL received the memorandum from the Director of FWS stating that FWS has a longstanding, unwritten policy of not enforcing MBTA violations resulting from logging operations.⁴⁵ Alarmed by this information, CIEL wrote a letter to FWS, dated April 26, 1999, explaining its concerns and inquiring whether FWS intended to change its policy in accordance with the requirements of the MBTA.⁴⁶ CIEL has received no response.

5. THE ISSUES RAISED IN THIS SUBMISSION MERIT THE PREPARATION OF A FULL FACTUAL RECORD

1. The Submission meets the requirements of Article 14(1) of the NAAEC

This English language Submission and the Submitting Parties meet all the requirements of Article 14(1) of the NAAEC. First, the Submitting Parties have clearly identified themselves and they are all "non-governmental organizations" as defined by Article 45(1) of the NAAEC. Each of the Submitting Parties is located in the territory of Canada, Mexico, or the United States.

⁴⁴Letter from Kevin R. Adams, Chief, Law Enforcement, Fish and Wildlife Service, to Chris Wold, CIEL (April 5, 1999) ("A search of Fish and Wildlife Service, Division of Law Enforcement records failed to locate any records"); Letter from James Eichner, U.S. Department of Justice, Environment and Natural Resources Division, to Chris Wold, CIEL (Nov. 30, 1998) ("We have conducted a search of this Division's files and have located no records responsive to your request").

⁴⁵Memorandum from Director, FWS, to Service Law Enforcement Officers, "MBTA Enforcement Policy" (March 7, 1996).

⁴⁶Letter from Chris Wold, CIEL, to Jamie Rappaport Clark, Director, FWS (April 26, 1999).

Second, the MBTA is an "environmental law" within the meaning of Articles 14 and 45(2)(a) of the NAAEC. The primary purpose of the MBTA is to protect and preserve wild fauna — migratory birds. The provision of the MBTA that FWS is failing to effectively enforce, Section 703, is at the heart of the MBTA's purpose to protect and preserve migratory birds: Section 703 prohibits the killing or taking of any migratory bird, nest or egg of such bird, except as allowed by a permit issued under regulations implemented pursuant to Section 704 of the MBTA.

Third, the Submitting Parties have presented this Submission to promote enforcement of the MBTA, not to harass the timber industry or loggers. Diligent enforcement of environmental law results in improved environmental protection. In this case, effective enforcement of the MBTA against loggers and logging companies would benefit migratory bird species, furthering the purpose and intent of the MBTA and the four Migratory Bird Treaties. Thousands of migratory birds shared by Canada, Mexico, and the United States might be saved if the United States effectively enforces the MBTA in compliance with its NAAEC commitments. In Section F below, we offer suggestions for effective enforcement and implementation of the MBTA with respect to logging operations.

Fourth, this Submission provides sufficient information to allow the Secretariat to review the failure of the United States to enforce the MBTA. FWS's failure to enforce the MBTA against loggers is systematic. It is well documented by the government's own records. It is not the result of a reasonable exercise of discretion in prosecutorial, regulatory or compliance matters. While the United States zealously enforces the MBTA against some individuals, it has adopted, and maintains in the face of opposition, an internal policy to exempt all loggers and logging companies on federal and non-federal land. Given the relatively little harm to migratory birds caused by some individuals whom FWS has prosecuted, the blanket exemption for logging interests cannot be the result of "bona fide decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities" under Article 45(1) of the NAAEC.

Fifth, as described in Section D above, CIEL has communicated its concerns to the Director of FWS. We have received no response. In addition, the issue of implementation of the MBTA to protect migratory birds from logging operations has been the subject of significant litigation. The United States is clearly on notice that a significant segment of the public, including the Submitting Parties, are very concerned about its failure to implement and enforce the MBTA.

2. The Submission Merits a Response from the United States pursuant to Article 14, Paragraphs 2 and 3, of the NAAEC

This Submission meets the criteria identified in Article 14, paragraphs 2 and 3, of the NAAEC to guide

the CEC's decision to request a response from the United States Government. Consistent with Article 14(2), the Submitting Parties are harmed and have no private remedies, the Submission raises matters whose study would advance the goals of the NAAEC, and the Submission is not drawn exclusively from mass media reports. Further, there are no pending legal proceedings that would prevent the Secretariat from moving forward under Article 14(3).

a. The Submitting Parties are harmed.

This Submission is made by CIEL on behalf of the Submitting Parties, all of which have a common interest in protecting migratory bird populations shared by Canada, Mexico and the United States. All of these organizations are harmed by the failure of the United States to enforce the MBTA and to protect migratory birds with respect to logging operations.

CIEL works to protect the Earth's integrity, and to ensure equitable access to natural resources and environmental quality, through the rule of law. As part of this mission, CIEL's biodiversity program promotes the implementation of international laws and policies that support conservation of biodiversity, including North America's migratory bird populations. CIEL's achievement of its mission is harmed by the U.S. failure to enforce the MBTA's prohibitions against loggers.

The goals of the Alliance for the Wild Rockies, 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 include the conservation of migratory birds that spend part of their life cycles in Mexico, Canada or the United States. Their interests in achieving these goals are harmed by the failure of the United States to enforce the MBTA.

Many of these groups have members or staff who are avid birdwatchers. These members frequent forested areas inhabited by migratory birds for recreational, spiritual and other purposes. The failure to enforce legal measures to protect migratory birds harms them by interfering with their ability to enjoy birdwatching and other activities in forested areas.

While the interests of the Submitting Parties and their staff and members are harmed by the failure to enforce the MBTA, previous submissions indicate that particularized, individual harm is not required to bring a petition under Article 14 of the NAAEC. The Secretariat has stated:

While the Secretariat recognizes that the submitters may not have alleged the particularized, individual harm required to acquire legal standing to bring suit in some civil proceeding in North America, the especially public nature of marine resources bring

the submitters within the spirit and intent of Article 14 of the NAAEC.⁴⁷

Similarly, migratory birds are of great public importance. Migratory birds provide food to individuals and direct economic benefits to local economies through recreation, hunting, and birdwatching. They provide benefits to farming through insect control. They also disperse seeds. The especially public nature of migratory birds also brings Submitting Parties within the spirit and intent of Article 14.

2. The Submission raises matters whose study would advance the goals of the NAAEC.

This Submission raises issues whose study would advance the objectives set forth in Article 1 of the NAAEC. It contributes to the objective of increasing "cooperation between the Parties to better conserve, protect and enhance ... wild flora and fauna" (Article 1(c)). The treaties between the NAAEC countries testify to the longstanding importance of international cooperation on conservation of migratory birds. This cooperation continues to be important as evidenced by the extensive cooperative activities among the Parties, including through the CEC's own North American Network of Important Bird Areas and the North American Biodiversity Information Network.

This Submission also advances the fostering of environmental protection for the well-being of present and future generations (Article 1(a)), by calling for more effective enforcement of an environmental law that would enhance protection of migratory bird species threatened by logging operations. It also seeks to enhance compliance with, and enforcement of, environmental laws (Article 1(g)).

The Submission promotes sustainable development based on cooperation and mutually supportive environmental and economic policies (Article 1(b)), by encouraging enforcement of a law intended to implement treaty obligations between the NAAEC Parties, with respect to an economic activity, timber harvesting, that is the subject of significant trade among the Parties. The submission also contributes to the goal of avoiding the creation of trade distortions (Article 1(e)) that could result from the inadequate enforcement of environmental laws in the forestry sector, a sector in which the Parties engage in significant trade of products.

⁴⁷Secretariat's Notification to Council (Article 15(1)), SEM-96-001 at Section IV(B) (June 7, 1996).

Sustainable management of forests entails the conservation of populations of migratory birds in those forests. The United States has formally recognized this by enacting legislation that imposes criminal prohibitions for killing migratory birds except as established through regulations establishing seasonal and other limits. A blanket abdication of enforcement with respect to logging may result in the production of timber at a lower cost and price per unit because of the lack of restrictions on production, but at a higher cost to society and the environment because of the greater impacts on migratory birds. This failure to enforce environmental law may thereby distort trade by permitting producers to externalize environmental costs and reduce prices beyond the levels selected through the lawmaking process.⁴⁸

c. The Submitting Parties have no private remedies.

⁴⁸Trade among the NAAEC Parties in the forest product sector is significant. In 1998, U.S. exports of wood products totaled over US\$1.5 billion to Canada and \$367 million to Mexico. U.S. exports to NAAEC Parties included nearly 3.6 million cubic meters of logs and more than 1.9 million cubic meters of lumber and plywood. Meanwhile, the United States imported more than \$9.6 billion in wood products from Canada and more than \$400 million from Mexico. U.S. Department of Agriculture, Foreign Agricultural Service, *Wood Circular*, <http://www.fas.usda.gov/ffpd/wood-circulars/apr99/toc.htm>.

Submitting Parties have no "private remedies" available because the provisions of the MBTA are criminal prohibitions enforceable by FWS. In addition, the Supreme Court has ruled that an agency's decision not to take enforcement action is "presumed immune from judicial review" under the Administrative Procedure Act,⁴⁹ and an appeals court has found specifically that FWS enforcement decisions under the MBTA are unreviewable under the APA.⁵⁰

Courts have also rejected attempts to compel implementation of the MBTA by the Forest Service in its timber contracts for logging on federal lands. The courts have ruled that the MBTA's prohibitions do not apply to the activities of federal agencies and that citizens have no right to ensure that federal activities respect the prohibitions of the MBTA.⁵¹ Importantly, these cases do not indicate that a private remedy is available to compel enforcement by FWS, because they sought to compel implementation of the MBTA in Forest Service activities only. They did not seek criminal enforcement of the MBTA's prohibitions. Even if the Forest Service included restrictions in its timber licensing agreements, those restrictions would still need to be enforced.

Further, any decision that required the Forest Service to include MBTA restrictions in its timber licensing agreements would be inadequate, because the Forest Service does not have jurisdiction to regulate or manage non-federal lands, which provide 94% of the U.S. timber supply. Only FWS has the authority and the duty to enforce the MBTA on non-federal lands. This Submission seeks enforcement of the MBTA by FWS on both federal and non-federal lands.

In sum, enforcement authority is entirely within the power of FWS. Submitting Parties have no additional legal avenues to compel enforcement of the MBTA by FWS.

d. The Submission is not drawn exclusively from mass media reports.

This Submission is not based exclusively or even primarily on "mass media" reports. Rather, it is supported by evidence from many sources, including non-governmental organizations, scientific studies, independent experts, and case law. The Submission is also based on documents of the United States itself, obtained in response to Freedom of Information Act requests.

e. There are no other pending judicial or administrative proceedings.

⁴⁹ See, e.g., Heckler v. Chaney, 470 U.S. 821, 832 (1985).

⁵⁰ Alaska Fish and Wildlife Federation v. Dunkle, 829 F.2d 933, 939 (9th Cir. 1987).

⁵¹ Sierra Club v. Martin, 110 F.3d 1551 (11th Cir. 1997); Newton County Wildlife Association v. U.S. Forest Service, 113 F.3d 110 (8th Cir. 1997); but see Humane Society of the United States v. Glickman, No. 98-1510 (CKK) (July 6, 1999) (finding that the MBTA applies to the federal officials of the Animal and Plant Health Inspection Service who themselves would kill migratory birds pursuant to a federal program).

The Submitting Parties are not aware of any judicial or administrative proceeding currently underway with respect to the matters raised in this Submission that would prevent the Secretariat from proceeding under Article 14(3). As stated in Section II(E)(2)(c) above, actions to compel federal agencies to implement the MBTA do not constitute an available remedy to compel criminal enforcement by FWS of the MBTA on federal and non-federal lands and thus do not constitute a pending judicial or administrative proceeding.

6. MEANS TO ENFORCE THE MBTA

As discussed in this Submission, the FWS's current abdication of its enforcement powers with respect to logging is not authorized by the terms of the MBTA. Nonetheless, FWS has the flexibility to craft regulations that implement and enforce the MBTA in a way that significantly reduces the impacts of logging operations on migratory birds while allowing logging, an activity that the Submitting Parties recognize as an economically valuable use of forests.

For example, FWS could develop regulations, based on scientific determinations made pursuant to Section 704 of the MBTA, for issuing permits to take birds in logging operations. These regulations would need to take into account management plans, such as the Bird Conservation Plans prepared by Partners In Flight, in order to place logging impacts in the broader context of the full range of impacts and species' needs. For example, habitat configuration and fragmentation play a role in determining a species' population, abundance, distribution and dynamics but "the magnitude and nature of this role may vary geographically and over time in relation to changes in regional habitat conditions and other factors, and probably varies among species."⁶² Thus, it is essential that FWS design criteria at the regional level rather than the national level. Such a permitting system would be analogous to FWS's permitting system for scientific collecting, depredating birds, and for "special purposes."⁶³ Important first steps toward developing these regulations could be the identification of forest-dependent migratory birds covered by the MBTA and an assessment of the impacts on them from various logging techniques. Ultimately, regulations could incorporate principles for managing forests so as to minimize direct impacts on birds.

As part of these regulations, FWS could implement seasonal restrictions on logging based on the breeding behavior of migratory birds. Such restrictions would ensure that young birds can fledge before nests or eggs are destroyed by logging. Because most birds killed due to logging are killed during the

⁵²Kevin McGarigal & William C. McComb, *Relationships between Landscape Structure and Breeding Birds in the Oregon Coast Range*, 65(3) ECOLOGICAL MONOGRAPHS 235, 255 (1995).

⁵³50 C.F.R. § 21.23 (scientific purposes); 50 C.F.R. §§ 21.41-21.47 (depredating birds); 50 C.F.R. § 21.27 (special purposes).

breeding season, seasonal restrictions would substantially increase protections for migratory birds. FWS itself has recommended that the Forest Service include "timing and implementation requirements to protect migratory birds and their habitats, and correctly describe liability associated with the take of migratory birds, nestlings and eggs."⁵⁴ Regarding another timber sale, FWS recommended that logging operations should avoid nesting birds or "the Forest Service should wait until the young have fledged from the area or reschedule the project outside of the period of March through August."⁵⁵

⁵⁴ Memorandum from Acting Supervisor, Snake River Basin Office, to Assistant Regional Director, Columbia River Ecosystem, Region 1, "DEIS for the Deadwood Ecosystem Analysis, Boise National Forest ER 97/0208 (File #110.0400)," page 5 (May 20, 1997).

⁵⁵ Letter from Jennifer Fowler-Propst, Field Supervisor, FWS, Albuquerque, New Mexico, to Kurt L. Winchester, District Ranger, Forest Service, El Rito Ranger District, Carson National Forest (Date).

Submitting Parties would be pleased to work with FWS and other interested parties to discuss options for effective enforcement of the MBTA that take into account the biological status and needs of migratory birds in various forest types as well as the specifics of logging practices.