
**Secretariat of the Commission for Environmental Cooperation
of North America**

**Article 15(1) Notification to Council that Development of a
Factual Record is Warranted**

Submitters: Canadian Nature Federation
Canadian Parks and Wilderness Society
Earthroots
Federation of Ontario Naturalists
Great Lakes United
Sierra Club (United States)
Sierra Club of Canada
Wildlands League

Represented by: Sierra Legal Defence Fund (SLDF)

Concerned Party: Canada

Date received: 6 February 2002

Date of this determination: 12 November 2002

Submission I.D.: SEM-02-001 / Ontario Logging

I. EXECUTIVE SUMMARY

Article 14 of the *North American Agreement on Environmental Cooperation* (“NAAEC”) creates a mechanism for citizens to file submissions in which they assert that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the North American Commission for Environmental Cooperation (the “Secretariat”) initially considers these submissions based on criteria contained in Article 14(1) of the NAAEC. When the Secretariat determines that a submission meets these criteria, the Secretariat then determines, based on factors contained in Article 14(2), whether the submission merits requesting a response from the Party named in the submission. In light of any response from the Party, the Secretariat may inform the Council that the Secretariat considers that development of a factual record is warranted (Article 15(1)). The Council may then instruct the Secretariat to prepare a factual record for the submission (Article 15(2)).

On 6 February 2002, the Submitters filed with the Secretariat a submission alleging “the failure of the Canadian Government to effectively enforce subsection 6(a) of the *Migratory Birds Regulations*

against the logging industry in Ontario.”¹ On 25 February 2002, the Secretariat determined that the submission meets the requirements of Article 14 of the NAAEC and requested a response from the Party in accordance with Article 14(2). The Party submitted its response on 25 April 2002.² In its response, Canada identifies wildlife enforcement priorities and asserts that it is currently engaged in compliance promotion activities in the forestry context, although it is committed to acting on any instances of non-compliance it becomes aware of and to pursuing the most effective remedy possible. Canada further states that “because the submitters did not provide any actual case, the Canadian Government was not able to respond in a meaningful and factual way to their main assertion” and “[f]or this reason, as well as the submitters’ failure to otherwise make a complaint to [the Canadian Wildlife Service] that a logging operation in Ontario was in violation of subsection 6(a) of the [*Migratory Birds Regulations*], the Government of Canada believes that a factual record is not warranted.” In accordance with Article 15(1), the Secretariat informs the Council that the Secretariat considers that the submission, in light of the Party’s response, warrants developing a factual record, and provides its reasons.

II. SUMMARY OF THE SUBMISSION

The Submitters assert that Canada is failing to effectively enforce s. 6(a) of the *Migratory Birds Regulations* (“MBR”)³ adopted under the *Migratory Birds Convention Act, 1994* (“MBCA”)⁴ in regard to the logging industry in Ontario. S. 6(a) of the MBR provides that “[...] no person shall (a) disturb, destroy or take a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird [...] except under authority of a permit therefor.” Violations of s. 6(a) of the MBR may be prosecuted by way of summary conviction or as an indictable offence.⁵ The Submitters allege that Environment Canada (“EC”), through its Canadian Wildlife Service (“CWS”), is primarily responsible for enforcing the MBCA.⁶

The Submitters claim that their research, based on statistical data, estimates that in the year 2001, clear-cutting activity destroyed over 85,000 migratory bird nests in areas of central and northern

¹ Submission at 1.

² “Response to submission SEM-02-001 Prepared by the Government of Canada Submitted to the Secretariat of the Commission for Environmental Cooperation” dated 11 April 2002 [the “response”].

³ C.R.C., c. 1035.

⁴ S.C. 1994, c. 22.

⁵ Section 13 of the MBCA provides that for a summary conviction offence, a company faces a maximum fine of \$100,000, an individual a maximum \$50,000 fine. Individuals are also liable to jail terms of up to six months, or a combination of jail and a fine. For indictable offences, the maximum fines are \$250,000 for a company and \$100,000 for an individual. Individuals are also liable to jail terms of up to five years, or to both a fine and jail sentence. With subsequent offences the maximum fine to which an individual is liable is doubled.

⁶ Submission at 3.

Ontario.⁷ The Submitters further assert that “despite the estimated widespread destruction of bird nests,”⁸ an access-to-information request filed in 2001 revealed no investigations or charges in Ontario for violations of s. 6(a) of the MBR.⁹

The Submitters assert that logging activity in Ontario is carried out under forest management plans (“FMPs”) prepared under the supervision of the Ontario Ministry of Natural Resources (“MNR”) in accordance with provincial standards and without any input from federal authorities on matters related to enforcing the MBCA, which is a federal statute.¹⁰ They assert that while EC can be contacted for input on FMPs and has produced a non-binding guideline¹¹ directing that activities be avoided during critical periods of migratory birds’ lifecycles, “EC fails to take enforcement activities to ensure that this requirement [...] is adhered to.”¹²

According to the Submitters, the CWS considers nest destruction during logging to be “incidental” kill and the CWS has decided not to use proactive enforcement measures against the logging industry because violations of s. 6(a) of the MBR that occur during logging operations are not intentional.¹³ The Submitters claim that the MBCA does not distinguish between intentional and unintentional violations, and that like other public welfare laws, when it is infringed, it is often the result of unintentional, not wilful, conduct.¹⁴

The Submitters allege that the CWS favours conservation initiatives over enforcement in regard to the logging industry even though it lacks evidence that this approach is more effective. Further, they contend that even though logging has been an important industry in Canada and Ontario for many decades, when the MBCA was updated in 1994, the Canadian government did not exempt the logging industry from laws to protect migratory birds or their nests.

Finally, the Submitters assert that by giving the logging industry special consideration, Canada is not following the requirement of the *Compliance and Enforcement Policy for Wildlife Legislation*, which states that “[c]ompliance and enforcement activities must be securely founded in law and must

⁷ Submission at 4 and Appendix 6 of the Submission: Dr. Elaine MacDonald & Kim Mandzy, “*Migratory Bird Nest Destruction in Ontario*” (Toronto: Sierra Legal Defence Fund (SLDF), 2001).

⁸ Submission at 1.

⁹ Submission at 6 and Appendices 7 and 8 of the submission (access to information request respecting enforcement efforts under s. 6(a) of the MBR dated 13 July 2001 from Elaine MacDonald, SLDF to Michael Bogues, Chief Access to Information and Privacy Secretary, Environment Canada, and materials received in response to access to information request).

¹⁰ Submission at 5.

¹¹ *Environmental Assessment Guideline for Forest Habitat of Migratory Birds*.

¹² Submission at 5, note 32.

¹³ Submission at 8.

¹⁴ *Ibid.*

be fair, predictable, and consistent across Canada.”¹⁵ They also argue that “prosecutorial discretion” must be exercised on a case-by-case basis and cannot support a decision not to engage in prosecutions on an industry-wide basis.¹⁶

The Submitters claim that a reasonable exercise of enforcement discretion would require an environmental assessment of a proposed FMP or logging operation in order to weigh the relative costs associated with each option, something which, they claim, has not been done. They also advance several arguments in support of their view that the cost of enforcing section 6(a) of the MBR need not have a significant impact on EC’s enforcement budget.”¹⁷

III. SUMMARY OF THE RESPONSE

In its response, Canada advises that the Submitters did not adequately inform the Secretariat of remedies, such as complaints to CWS, which were available to them.¹⁸ Canada asserts that prior to the filing of the submission, it received only one written complaint of nest destruction pursuant to logging in Ontario, and this complaint, which was duly investigated, was not filed by one of the Submitters.¹⁹ Canada notes that the Submitters sent only two written communications to relevant authorities before filing the submission and that CWS officials replied to these communications, committing to pass along further information as it became available.

Canada points out that CWS staff had been trying to set up a meeting with several of the Submitters as well as other interested nongovernmental organizations long before the filing of the submission. The purpose of the meeting would have been to allow the CWS to explain the legal basis of the MCBA regulations; the overall approach to the conservation of migratory birds, including enforcement; and the foundations of the current policy on enforcement of the regulations. The CWS would also have sought input from the Submitters on the overall approach for the conservation of migratory birds, and where relevant, on possible new directions for regulations. Canada claims that the Submitters delayed scheduling a meeting with the CWS until after the filing of the submission, and expresses concern that the decision to do so “is not reflective of the letter and spirit of the NAAEC.”²⁰ According to Canada, at least one Submitter, the Canadian Nature Federation, did participate in a workshop on migratory bird issues, including enforcement of the MBR, on 12-13 October 2001.

¹⁵ Submission at 11.

¹⁶ Submission at 10.

¹⁷ Submission at 10.

¹⁸ *Ibid.*

¹⁹ Response at 1.

²⁰ Response at 2.

Canada claims that the Submitters' assertions are not based on any actual case where a failure to effectively enforce the MBR may or may not be occurring, and that as a result, the Canadian Government is precluded from addressing in a direct and factual manner the assertions made by the Submitters.²¹

Despite these reservations, Canada provided a response to the submission. In its response, Canada states that EC and its agency, the CWS, are responsible for the conservation and protection of migratory birds in Canada.²² It notes that CWS programs address migratory bird conservation on several fronts, including law enforcement, habitat stewardship, scientific research and other conservation actions. Canada states that annual priorities for wildlife enforcement respond to public complaints, international commitments, and wildlife conservation goals, and reflect a balancing of public concern, conservation science, and international commitments. It remarks that given that resources and staff are limited, and that enforcement of the MBR must take place over a very large geographical range, some components of the migratory bird conservation program, including the range of enforcement options, will necessarily receive more attention than others. Canada states that enforcement activities aim both to proactively address key conservation goals, as defined by the CWS, and to respond to public concerns and emerging conservation issues.

Canada states that the CWS must work cooperatively “with other federal departments and agencies, provincial and territorial governments, as well as industry, NGOs, and the research community, to make choices that promote a healthy landscape in an increasingly complex environment.”²³

Canada states that forestry legislation and guidelines in Ontario provide for protection of the environment, including biodiversity, and that federal agencies are invited to public consultations to provide input in the development of FMPs. Canada disputes the Submitters' apparent view that a proposed FMP can routinely trigger the federal environmental assessment process under the *Canadian Environmental Assessment Act*. Canada states that approval of a provincial FMP does not absolve companies of their responsibilities under the federal MBCA.

Canada denies the Submitters' assertion that it has a sweeping policy not to enforce the MBR against the logging industry.²⁴ The response states that in regard to wildlife law enforcement, Canada traditionally targets hunting, and, in recent years, illegal import and export of wildlife and derivatives. Current enforcement priorities at the national level include commercial smuggling and migratory bird protection, primarily off- and near-shore spills that result in oiled birds. Canada notes that the

²¹ Response at 2.

²² Response at 4.

²³ *Ibid.*

²⁴ Response at 7.

regional offices of EC establish a subset of these priorities so that the Department can obtain the most effective coverage possible with the resources available.

Canada contends that it is addressing the issue of nest destruction during logging activities, mainly through compliance promotion.²⁵ In January 2001, the CWS met with industry representatives and told them that the taking of migratory bird nests is prohibited except under the authority of a permit and that compliance with s. 6(a) of the MBR is mandatory. In October 2001, the CWS held a workshop on the topic of compliance with the MBCA and associated regulations and conservation of migratory birds in the forestry context that was attended by industry groups, Canadian Nature Federation, government representatives and specialists.

Canada states that compliance promotion and education are a necessary first step in a long-term enforcement approach in the forestry context that will eventually facilitate arguments in court that a given logging company will have been aware of the impacts of its actions. Canada “is concerned that obtaining limited results in a court of law for non-compliance at this stage would devalue the offence, and would be counterproductive to conservation of migratory birds.”²⁶ Canada states that EC is nevertheless committed to acting on any instances of non-compliance that it becomes aware of and to pursuing the most effective remedy possible, including prosecutions where appropriate.

Canada asserts that the CWS is planning and in the process of implementing significant new initiatives and programs to address the growing needs of compliance promotion and enforcement of wildlife laws among industry in general.²⁷

In conclusion, Canada asserts that because the Submitters failed to provide any actual case, and because of their failure to otherwise make a complaint to the CWS that a logging operation in Ontario was in violation of s. 6(a) of the MBR, the Government of Canada believes that a factual record is not warranted.

IV. ANALYSIS

The Secretariat considers that the submission, in light of the response provided by the Party, warrants developing a factual record as recommended in this notification. The reasons for the Secretariat’s recommendation are set forth below.

²⁵ *Ibid.*

²⁶ Response at 8.

²⁷ Response at 9.

Why preparation of a factual record is warranted

Migratory birds are a cherished and valuable resource in North America. The study of migratory bird populations yields clues about long-range environmental impacts of local activities. Birds play a very important role in insect pest control, plant pollination and seed dispersal.²⁸ Birdwatchers, hunters and photographers contribute significantly to a large ecotourism industry.²⁹

Canada and the United States recognized the importance of protecting this shared resource when they signed the Canada-U.S. Migratory Birds Convention in 1916. In Canada, the MBCA and MBR translate Canada's commitments under the Convention into legal requirements that are enforceable against companies and individuals, under penalty of high fines and even prison time. By prohibiting the unauthorized destruction of nests and eggs of migratory birds, s. 6(a) of the MBR is potentially a powerful provision for the protection of migratory birds and for the fulfillment of Canada's commitments under the Convention. Only aboriginals are exempted from the prohibition contained in s. 6(a) of the MBR, consistent with aboriginal and treaty rights recognized under the Constitution.³⁰

Primary resource industries have always played an important role in Canada's economy, and forestry is central among these industries. In many communities, forestry is the backbone of the local economy, and because forest products are the first link in the supply chain of many other industries, the performance of the forestry sector is often used as one indicator in assessing the strength of Canada's economy. As well, concern for sustainability can condition consumer demand for forest products and create incentives to identify and address environmental impacts of activities carried on in this sector.

Both the submission and Canada's response recognize that destruction of migratory bird nests is a frequent environmental consequence of logging.³¹ The importance in Canada of both protecting migratory birds and maintaining a healthy and sustainable forestry sector underscores the value in examining enforcement of s. 6(a) of the MBR so as to better understand its role in achieving the resource conservation goals of the MBCA within the resource development context of forest development.

Together, the submission and response demonstrate that enforcing s. 6(a) of the MBR in connection with logging poses a significant challenge.³² First, gathering evidence necessary to enforce s. 6(a) of

²⁸ Submission at 4.

²⁹ *Ibid.*

³⁰ See Section s. 2(3) of the MBCA and Article II of the Convention, as amended by a 1994 Protocol.

³¹ Submission at 4-5 and Response at 7-9.

³² Submission at 5-8 and Response at 8-9.

the MBR consistently across the logging sector would require ongoing efforts over large areas.³³ Second, the federal government – not the provinces - is responsible for enforcing the MBCA and the MBR, but the provinces own the natural resources within their boundaries and play a primary role in regulating the industries that bring those resources to market.³⁴ Finally, the text of s. 6(a) of the MBR suggests that forestry activities which result in destruction of migratory bird nests and eggs could be legalized through the issuance of federal permits, but the MBR does not contain any provisions for the issuance of such permits.³⁵

Nevertheless, both the submission and response point to measures that have been taken by Canada to address the issue of compliance with the MBR in the forestry sector. For example, Canada has issued a guideline outlining measures to protect migratory birds in the context of forest management planning.³⁶ Canada has organized information and education sessions to make the forest industry aware of its obligations under s. 6(a) of the MBR.³⁷ Canada mentions that “CWS is planning and in the process of implementing significant new initiatives and programs to address the growing needs of compliance promotion and enforcement of wildlife laws among industry in general.”³⁸ Finally, Canada has indicated that it enforces s. 6(a) of the MBR on the basis of specific complaints, and that when such complaints are brought to its attention, it takes appropriate actions.³⁹

The submission and the response, taken together, are insufficient to dispel central questions regarding whether Canada is failing to effectively enforce s. 6(a) of the MBR in the context of logging in Ontario. Missing from the materials provided to the Secretariat, for example, is specific information regarding how the federal guidelines are implemented in practice, in particular in connection with the FMPs covering the harvest areas mentioned in the submission. Similarly, it would be useful to obtain information regarding whether and how federal information and education sessions have resulted in changes in forestry company practices and procedures, in the hiring or training of personnel and in investment in new equipment and scientific studies, and whether Canada has put in place measures to ensure that its industry outreach initiatives are improving compliance rates. Information is also needed regarding the new initiatives that Canada mentions in its response. A factual record would provide an opportunity to gather such information, as well as information regarding the type and outcome of actions taken in response to specific complaints, with a view to considering whether, in light of all of these federal actions, Canada is failing to effectively enforce s. 6(a) of the MBR.

³³ Response at 7.

³⁴ Submission at 5 and Response at 5.

³⁵ Response at 8.

³⁶ Submission at 5, note 32.

³⁷ Response at 8-9.

³⁸ Response at 9.

³⁹ Response at 8.

Canada claims that the submission is not based on any actual case where a failure to effectively enforce may or may not be occurring, and that

[i]t is our firm belief that in order to examine whether there has been a failure to effectively enforce an environmental law, one has to look at the facts of a particular instance, or instances. Without those facts, there can be no examination of whether the law has been enforced or not.⁴⁰

In the past, the Secretariat has determined that the Article 14 and 15 citizen submission process lends itself both to allegations of a widespread or systemic failure to effectively enforce an environmental law as well as to submissions concerning single violations.⁴¹ In fact, the Secretariat has found that “[...] [t]he larger the scale of the asserted failure, the more likely it may be to warrant developing a factual record, other things being equal.”⁴²

The question before the Secretariat is therefore not whether there can be an inquiry under Article 15 of the NAAEC into an alleged pattern of failing to effectively enforce an environmental law, but rather what kind of information Submitters must present in support of such an allegation, and how, from a practical perspective, the Secretariat might go about preparing a factual record in connection with a submission making such an allegation. The answer will depend on the nature of the allegation.

The Secretariat has already found that the submission meets the requirements of Articles 14(1) and (2) of the NAAEC and has provided its reasons.⁴³ The Secretariat explains below how the Submitters have supported their assertions, and it identifies potential sources of additional information relevant to a consideration of these assertions in the context of a factual record.

The submission alleges that Canada is failing to effectively enforce s. 6(a) of the MBR against the logging industry in Ontario⁴⁴ and states that “[t]his is a widespread pattern of ineffectual enforcement [...]”⁴⁵ The Submitters refer to e-mail statements of enforcement authorities as evidence that there is a general policy of non-enforcement vis-à-vis the logging sector,⁴⁶ and they cite an access-to-

⁴⁰ *Ibid.*

⁴¹ See SEM-00-004 (BC Logging), Article 15(1) Notification (27 July 2001); SEM-98-004 (BC Mining), Article 15(1) Notification (11 May 2001); SEM-99-002 (Migratory Birds), Article 15(1) Notification (15 December 2000); SEM-97-003 (Quebec Hog Farms), Article 15(1) Notification (29 October 1999); and SEM-97-001 (BC Hydro), Article 15(1) Notification (27 April 1998).

⁴² SEM-99-002 (Migratory Birds), Article 15(1) Notification (15 December 2000).

⁴³ SEM-02-001 (Ontario Logging), Article 14(1) & (2) Determination (25 February 2002).

⁴⁴ Submission at 1.

⁴⁵ Submission at 10.

⁴⁶ Submission at 6-7 and Appendix 8. In particular, an e-mail dated 22 May 2001 from Yvan Lafleur, Director, Wildlife Enforcement, Environment Canada, to Robert Mclean, Director, Wildlife Conservation, Environment Canada, stating “Bob, as I said in an earlier e-mail I have met with a representative of the Pulp and Paper industry. We had an open discussion about the impact of the lumber operations on migratory birds and express clearly that

information request which yielded no information on specific enforcement actions.⁴⁷ They also reference clearcutting activities under fifty-nine provincial FMPs that they estimate will result in, or have resulted in, the destruction of approximately 85,000 nests, with no enforcement taken in response.⁴⁸

The Secretariat considers that this information, which, taken together, reinforces the Submitters' concerns regarding how and whether s. 6(a) of the MBR is enforced, is relevant to whether Canada is failing to effectively enforce that provision. By focusing their assertions on fifty-nine provincial FMPs, the Submitters suggest that gathering and developing information regarding activities undertaken under those FMPs would be an appropriate way to anchor a factual record inquiry. The Secretariat agrees.

Within each of the forest management units covered by the selected FMPs, the Submitters identified the planned harvest areas pursuant to the FMPs.⁴⁹ The Submitters matched these specific harvest areas to one of eight eco-regions in Ontario and calculated a breeding bird density discounted to account only for the presence of birds both actually found in those specific areas and included under the MBCA.⁵⁰ They also confirmed that logging occurred during the 2001 bird breeding season and regularly occurs within the breeding season, and they cross checked and determined that numerous breeding birds were observed in areas that were clearcut during the breeding season.⁵¹ While the Submitters admit that the estimate of 85,000 destroyed nests in those areas is not exact, the estimate is compelling. The only information missing is a more precise identification of the areas actually harvested in those forests in 2001, the identities of the timber harvesters and, to the extent it exists, additional information regarding the actual destruction of migratory bird nests during logging operations.

This information could readily be developed in a factual record. For example, a factual record would afford an opportunity to examine in detail the harvesting that actually took place in the FMP harvest areas identified in the submission and to present facts regarding Canada's efforts to promote compliance with or take enforcement action under s. 6(a) of the MBR in regard to the timber operators who conducted those harvests. This compliance promotion and enforcement information could be a source of information regarding the actual number of nests destroyed during logging operations, since enforcement cases would likely provide evidence regarding actual nest destruction.

we were not planning any enforcement operations to charge the industry. I also said that we are concerned and that we would like to work with them and Steve Wendt [Chief, Migratory Birds Conservation, Environment Canada] to better understand the situation and support positive actions taken by the companies. [...]"

⁴⁷ Submission at 6.

⁴⁸ Submission at 4-5.

⁴⁹ Submission at note 25 and Appendix 6.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

At the same time, gaps in available information regarding the extent of actual nest destruction might also be relevant to whether Canada is failing to effectively enforce s. 6(a) of the MBR as alleged in the submission. Identifying such information gaps could reveal an area where additional efforts to obtain information – through surveys, inspections, investigations or other activities - could improve efforts to enforce or otherwise achieve compliance with s. 6(a) of the MBR.

Enforcement necessarily involves the exercise of discretion in setting priorities and making decisions about the allocation of resources. In its response to the submission, Canada explains in part how it exercises certain discretionary powers in the context of wildlife enforcement. A factual record would provide an opportunity to gather valuable additional information regarding how Canada has exercised its discretion, thereby providing meaningful context for any individual enforcement actions documented in a factual record. This would involve, for example, gathering information used to establish current enforcement priorities; information on methods used to balance priorities; information on regional (particularly Ontario) priorities and how they are set; information supporting the decision to engage in compliance promotion in the forestry context; information supporting the position that compliance promotion activities are a necessary precursor to prosecution; and information on current initiatives. Information would also be gathered regarding the manner in which resources are allocated in the context of administering the migratory bird conservation program.

A factual record is therefore warranted to present a detailed factual account of the full range and effectiveness of Canada's compliance promotion and enforcement efforts in the specific context of actual harvests in 2001 in the forest harvest areas identified in the submission, including relevant contextual information on enforcement priorities, resource allocation and recent initiatives. A detailed description of relevant information is provided below.

V. INFORMATION TO BE CONSIDERED IN A FACTUAL RECORD

The submission, taken together with the response, leaves open central questions regarding whether Canada has effectively enforced s. 6(a) of the MBR in 2001 in connection with the logging industry in Ontario, and in particular the areas harvested under fifty-nine FMPs referenced in the submission. This section identifies information relevant to a consideration of these open questions.

In respect of the harvest areas referenced in the submission, information required for an assessment of the Submitters' allegations would include information regarding species of migratory birds found in those areas, timing of their nesting seasons and the estimated number of nests destroyed as a result of clearcutting activities. Also required is information on provincial FMPs for those areas, including specific information on the role and outcome of any consultations with federal officials during the development of those FMPs, as regards compliance with s. 6(a) of the MBR; on whether the federal guidelines and/or any other federal conditions related to protection of nests of migratory birds are

referenced in the FMPs and if so, whether the FMPs require compliance with such conditions; and on whether any provincial conditions under those FMPs require compliance with s. 6(a) of the MBR or equivalent provincial statutory provisions. The Secretariat would also need to review information regarding compliance promotion activities organized by EC officials in the harvest areas referenced in the submission, attendance by personnel from forestry companies operating in those areas, and effectiveness of such activities in helping achieve compliance with s. 6(a) of the MBR.

Specific information is also required regarding clearcut logging activities carried out in 2001 in the harvest areas referenced in the submission, including activities planned and actually carried out, with precise information on locations and timing; data relied upon by foresters or EC to anticipate species and numbers of migratory bird nests to be encountered during logging; any reconnaissance procedures implemented by foresters or EC to identify migratory bird nests prior to clearcutting; measures taken to protect migratory bird nests during clear-cutting; and effectiveness of those measures in preventing migratory bird nest disruption and/or destruction.

Information is also required regarding efforts by federal officials to monitor compliance with s. 6(a) of the MBR in connection with clearcutting activities carried out in 2001 in harvest areas referenced in the submission. Such information includes information regarding the scope, operation and budget of any monitoring program, data used to anticipate species and numbers of migratory bird nests in different areas, and information obtained through monitoring or inspection. The Secretariat would also need to consider actions taken in response to suspected violations of s. 6(a) of the MBR, including actions taken in response to any failure to implement conditions in an FMP relating to protection of migratory bird nests; follow-up measures to test effectiveness of compliance promotion activities; actions taken to follow up on any monitoring results indicating potential violations of s. 6(a) of the MBR; and responses to complaints.

In addition to the information provided in Canada's response, information relevant to a consideration of the effectiveness of federal enforcement and compliance promotion actions in connection with clearcutting activities in the forest harvest areas referenced in the submission also includes information on how EC establishes and balances priorities for wildlife enforcement and compliance promotion, and how financial and human resources are allocated in this area, including at the regional level in Ontario. Also relevant is information regarding current initiatives and programs related to enforcing and promoting compliance with s. 6(a) of the MBR in the forestry sector in Ontario, and specifically, how such initiatives address any compliance issues noted in the harvest areas referenced in the submission.

VI. PRIVATE REMEDIES

The NAAEC provides that a Party, in responding to a submission, may advise the Secretariat “whether private remedies in connection with the matter are available to the person or organization making the submission and whether they have been pursued.”⁵² In its response, Canada claims that the Submitters did not adequately inform the Secretariat of remedies, such as complaints to the CWS, which were available to them but which were not pursued. Pursuant to Article 15(1) of the NAAEC and for the reasons outlined below, the Secretariat has considered this assertion and finds that preparation of a factual record is warranted nonetheless.

The texts of Articles 14(2)(c) and 14(3)(b)(ii) of the NAAEC, relating to the pursuit of private remedies, do not make the identification⁵³ or pursuit of such remedies a condition precedent to the Secretariat’s requesting a response from the Party or recommending the preparation of a factual record.⁵⁴ Rather, the opening words of Article 14(2)⁵⁵ and the text of Article 15(1)⁵⁶ suggest that the existence and pursuit of private remedies is a factor, among others, to be considered by the Secretariat in determining whether a particular submission merits further review under the Article 14 and 15 citizen submission process. The weight to be accorded this factor in determining whether to move forward with a particular submission depends on the facts of each submission.

This submission identifies two types of remedies – civil suits and private prosecutions – and explains why, in the Submitters’ opinion, legal, practical and policy obstacles effectively put those remedies out of reach as a means of compelling enforcement of the MBCA.

First, the Submitters believe they would be denied standing to bring a civil suit to compel the logging industry in Ontario to comply with s. 6(a) of the MBR.⁵⁷ They cite caselaw affirming the principle that infringement of a private right, or proof of special and personal damages, is required before a private individual or organization can bring a suit in its own name to protect a public interest (such as

⁵² Article 14(3)(b)(ii) of the NAAEC.

⁵³ The *Guidelines for Submissions on Enforcement Matters under Article 14 and 15 of the North American Agreement on Environmental Cooperation* (“Guidelines”) state at s. 5.6 that “[...] the Submission should address [...] (c) The actions, including private remedies, available under the Party’s law *that have been pursued*” [emphasis added]. Thus, submitters are asked to provide information regarding remedies they have pursued; they are not required to list all potential remedies.

⁵⁴ Previous Secretariat determinations have made this observation. See *e.g.* SEM-98-006 (*Aquanova*), Article 15(1) Notification (4 August 2000); SEM-98-004 (BC Mining), Article 15(1) Notification (11 May 2001); SEM-97-007 (Lake Chapala), Article 15(1) Notification (14 July 2000); SEM-97-002 (*Río Magdalena*), Article 15(1) Notification (5 February 2002).

⁵⁵ “In deciding whether to request a response, the Secretariat shall be *guided by* whether [...] (c) private remedies available under the Party’s law have been pursued.” [emphasis added].

⁵⁶ “If the Secretariat considers that the submission, *in the light of any response provided by the Party*, warrants developing a factual record, the Secretariat shall so inform the Council and provide its reasons” [emphasis added].

⁵⁷ Submission at 14 and 15 and Appendix 13: *Manitoba Naturalists Society Inc. v. Ducks Unlimited Canada* [1992] 2 W.W.R. 377 (Man. Q.B.) [hereinafter “*Manitoba Naturalists Society*”].

the public interest in the conservation of migratory birds), absent the consent of the Attorney General.⁵⁸ The interest of conservationists in protecting a natural resource has been qualified as “special,” but not equivalent to a private right.⁵⁹ While the courts have discretion to grant standing to challenge legislation or the statutory authority for administrative actions, a court has specifically denied standing to a private organization seeking to enforce s. 6(a) of the MBR.⁶⁰

Second, the Submitters state that charges sworn by private individuals are arguably an alternative to a civil suit, but they claim that they are not a viable alternative. Private citizens, they argue, do not have the financial resources or access rights needed to gather evidence required for a prosecution in connection with violations of s. 6(a) of the MBR by logging companies, and gathering evidence in areas where logging is occurring is potentially very hazardous. In addition, the Submitters argue that prosecutions are after-the-fact events that do not remedy the harm done.

The NAAEC instructs the Secretariat, in determining whether a submission merits requesting a response from the Party, to be guided by whether, among other things, private remedies available under the Party’s law have been pursued.⁶¹ In its 25 February 2002 Determination in Accordance with Article 14(1) and (2) of the NAAEC, the Secretariat considered the arguments of the Submitters regarding private remedies and concluded that “[i]t therefore appears from the submission that private remedies may in effect not be available.” On the basis of this finding, along with a consideration of the other factors listed in Article 14(2), the Secretariat requested a response from the Party.

Pursuant to Article 14(3)(b)(ii) of the NAAEC, Canada’s response to the submission cites complaints to the CWS as a remedy that was available to the Submitters and was not pursued. However, the response does not explain the source of this remedy, and the Secretariat has been unable to identify any provision of the MBCA, the MBR, or the *Compliance and Enforcement Policy for Wildlife Legislation* that creates such a remedy. This raises the question of what characteristics a particular form of redress must possess to qualify as a “private remedy” pursuant to the NAAEC.⁶²

⁵⁸ *Manitoba Naturalists Society* at 380.

⁵⁹ *Ibid.* at 381.

⁶⁰ *Ibid.* at 382.

⁶¹ Article 14(2)(c) of the NAAEC. Section 7.5 of the Guidelines provides that “[i]n considering whether private remedies available under the Party’s law have been pursued, the Secretariat will be guided by whether: (a) requesting a response to the submission is appropriate if the preparation of a factual record on the submission could duplicate or interfere with private remedies that are being pursued or have been pursued by the Submitter; and (b) reasonable actions have been taken to pursue such remedies prior to making a submission, bearing in mind that barriers to the pursuit of such remedies may exist in some cases.”

⁶² The Secretariat has previously found that a citizen complaint process provided for under environmental legislation constituted a private remedy for the purposes of the NAAEC. See SEM-97-007 (*Lake Chapala*), Article

Article 14(2)(c) of the NAAEC refers to “private remedies available under the Party’s *law*” [emphasis added], whereas Article 14(3)(b)(ii) refers to “private remedies in connection with the matter [...]” Since complaints to the CWS are not mentioned in the MBCA or the MBR, it seems reasonable for the Submitters not to have mentioned them in the submission. However, Article 14(3)(b)(ii) does not contain the condition that the private remedy be “available under the Party’s law.” Other indications are therefore needed to determine whether complaints to the CWS qualify as a private remedy under the NAAEC.

Article 6 of the NAAEC, entitled “Private Access to Remedies,” makes the Parties responsible for implementing measures to give redress to those aggrieved by environmental wrongs. It imposes different requirements on a Party depending on whether a complainant is an “interested person” or has a “legally recognized interest under its law in a particular matter.”⁶³ On the basis of the caselaw discussed above, it can be said that the Submitters are “interested persons,” as defined in Article 6 of the NAAEC, since they do not appear to have a “legally recognized interest” in the enforcement of s. 6(a) of the MBR.⁶⁴ Under Article 6(1) of the NAAEC, remedies available to “interested persons” must give such persons the right to “request the Party’s competent authorities to investigate alleged violations of its environmental laws and regulations” and must require the Party to “give such requests due consideration in accordance with law.”

The *Canadian Environmental Protection Act, 1999* (“CEPA”) contains provisions that meet the requirements found in Article 6 of the NAAEC.⁶⁵ Under CEPA, a person need only be 18 years of age and resident in Canada to be entitled to request the Minister of the Environment to investigate an alleged offence under CEPA.⁶⁶ Individuals who are dissatisfied with the Minister’s response may bring an “environmental protection action” before the courts.⁶⁷ Since neither the MBCA nor the MBR contain these types or similar types of provisions, and in the absence of information in the Party’s response concerning the source, rules and functioning of the CWS complaints process, the

15(1) Notification (14 July 2000); SEM-98-006 (*Aquanova*), Article 15(1) Notification (4 August 2000); and SEM-97-002 (*Río Magdalena*) Article 15(1) Notification (5 February 2002).

⁶³ Article 6: Private Access to Remedies

1. Each Party shall ensure that interested persons may request the Party’s competent authorities to investigate alleged violations of its environmental laws and regulations and shall give such requests due consideration in accordance with law.
2. Each Party shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial or judicial proceedings for the enforcement of the Party’s environmental laws and regulations.
3. [...].

⁶⁴ See discussion above regarding standing to bring a civil suit.

⁶⁵ Sections 17-40 of the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33.

⁶⁶ Section 17(1) of CEPA.

⁶⁷ Section 22 of CEPA.

Secretariat declines to conclude that complaints to the CWS qualify as a private remedy under the NAAEC.

Even if complaints to the CWS were considered a private remedy pursuant to the NAAEC, however, the Secretariat notes that the Submitters raise concerns about alleged violations that are geographically widespread and vast in number – 85,000 nests allegedly destroyed under fifty-nine FMPs. It is not evident in the response that the CWS complaints procedure on which Canada relies is conceived to address complaints of this nature.

Furthermore, it appears that the Submitters did bring their concerns about non-enforcement of s. 6(a) of the MBR to the attention of EC in a letter dated 16 January 2001, and that EC replied on 13 February 2001, saying that it was gathering relevant information.⁶⁸ The Submitters claim that they never received a reply to their follow-up request for information on compliance measures.⁶⁹ In addition, an e-mail quoted in the submission and reproduced in an appendix to the submission suggests that EC employees are aware of the destruction of migratory bird nests and eggs during logging.⁷⁰ The author of the e-mail states that “[...] the NGOs are pushing us to take action.”⁷¹

As Canada’s response to the submission does not indicate what types of procedures have been established to process complaints from the public and to give them “due consideration in accordance with law” as provided by Article 6(1) of the NAAEC, and because Canada has listed public complaints as one of the bases for enforcing, and setting enforcement priorities for, s. 6(a) of the MBR, a factual record would provide an opportunity to develop information regarding the functioning of the complaints procedure and its role in ensuring effective enforcement of s. 6(a) of the MBR.

VII. RECOMMENDATION

For the reasons stated above, the Secretariat has determined that the submission, in light of the Party’s response, warrants development of a factual record. The Submitters have raised central questions that Canada’s response leaves open regarding enforcement of s. 6(a) of the MBR by Canada with respect to the logging industry in Ontario, with particular reference to clearcut logging carried out in areas of central and northern Ontario in 2001.

⁶⁸ Submission 12-13 and Appendix 9.

⁶⁹ Submission at 13. The Secretariat has previously found that the requirements of Article 14(2)(c) were satisfied where concerns were communicated and information requests made to environmental authorities by way of regular correspondence. See. SEM-98-007 (*Metales y Derivados*), Article 15(1) Notification (6 March 2000).

⁷⁰ Submission at 13 and Appendix 8.

⁷¹ *Ibid.*

As noted in detail above, additional information required for a consideration of the Submitters' assertions through a factual record includes information regarding the state of the migratory bird resource in the forest harvest areas referenced in the submission and information regarding timing and extent of clearcut logging activities carried out in those areas during 2001. Particularly relevant is information on measures taken by foresters to identify migratory bird nests and avoid their destruction during clearcut logging in those areas, and the success of those measures in preventing violations of s. 6(a) of the MBR. Information is also required regarding FMPs for those areas, including any FMP provisions on protection of migratory bird nests and eggs and the federal role in the development and enforcement of FMP conditions related to protection of the migratory bird resource. Also relevant is additional information regarding federal compliance promotion efforts in the harvest areas referenced in the submission, including information on the effectiveness of those efforts in reducing or avoiding violations of s. 6(a) of the MBR during clearcut logging in 2001 in those areas. Information is also required regarding any federal compliance monitoring and responses to suspected violations. Finally, relevant additional information includes information on how the CWS establishes and balances wildlife enforcement priorities, how resources are allocated and how the new initiatives and programs referenced in Canada's response to the submission are promoting compliance with s. 6(a) of the MBR.

Accordingly, pursuant to Article 15(1), and for the reasons set forth in this document, the Secretariat informs the Council of its determination that the objectives of the NAAEC would be well served by developing a factual record as recommended herein regarding the submission.

Respectfully submitted on this 12th day of November, 2002.

(original signed)

per: Victor Shantora
Acting Executive Director