
Secretariat of the Commission for Environmental Cooperation**Determination in accordance with Articles 14(1) and (2)
of the North American Agreement for Environmental Cooperation**

Submitters: Nature Canada
Sierra Club (U.S. and Canada)
Conservation Northwest
David Suzuki Foundation
Environmental Defence
ForestEthics
Ontario Nature
Western Canada Wilderness Committee
BC Nature (formerly Federation of BC Naturalists)
Federation of Alberta Naturalists
Natural History Society of Newfoundland and Labrador
Nature Nova Scotia
Nature Quebec

Represented by: Sierra Legal Defence Fund

Party: Canada

Date received: 10 October 2006

**Date of this
determination:** 11 December 2006

Submission I.D.: SEM-06-005 (Species at Risk)

I. INTRODUCTION

On 10 October 2006, the Submitters listed above filed with the Secretariat of the Commission for Environmental Cooperation (the “Secretariat”) a submission on enforcement matters pursuant to Article 14 of the *North American Agreement on Environmental Cooperation* (“NAAEC” or “Agreement”). Under Article 14 of the NAAEC, the Secretariat may consider a submission from any nongovernmental organization or person asserting that a Party to the Agreement is failing to effectively enforce its environmental law if the Secretariat finds that the submission meets the requirements of Article 14(1). When the Secretariat determines that those requirements are met, it then determines whether the submission merits requesting a response from the Party named in the submission (Article 14(2)).

The Submitters assert that Canada is failing to effectively enforce the Federal *Species at Risk Act* (SARA) in regard to the process and timelines for listing species, developing and adopting recovering strategies, and ensuring that SARA requirements are met on non-federal lands.

The Secretariat has determined that the following allegations, contained in the submission, meet the criteria set forth in Article 14(1) and merit requesting a response from Canada in light of the factors contained in Article 14(2): (1) Canada is failing to effectively enforce the SARA's recovery planning requirements as regards identification of critical habitat (s. 41) and mandatory planning timelines (s. 42), and (2) Canada is failing to effectively enforce the emergency order provision in s. 80 with respect to the Spotted Owl in British Columbia and the Woodland Caribou in Alberta. The reasons for this determination are provided below.

II. SUMMARY OF THE SUBMISSION

This Submitters assert the failure of the Canadian federal government to effectively enforce the SARA with respect to at least 197 of the 529 species identified as at risk in Canada, so as to frustrate the Act's purpose: preventing wildlife species from becoming extirpated or becoming extinct and providing for the recovery of wildlife species that are extirpated, endangered or threatened as a result of human activity.¹ More particularly, the Submitters allege that Environment Canada, Parks Canada Agency, the Minister of the Environment and the Department of Fisheries and Oceans are failing to enforce the SARA with regard to listing (s. 27), recovery planning (ss. 41 and 42), and national enforcement through "safety net" and emergency orders (ss. 34 and 80).²

The Submitters summarize the SARA's provisions as follows:

An overview of how the foregoing provisions work together to address species endangerment is as follows: a scientific body for the classification of species, the Committee on the Status of Endangered Wildlife in Canada (COSEWIC), is created which assesses the status of species, species are "listed" on the official list of species that are extirpated, endangered, threatened or of special concern (ss. 27-31) which triggers obligations under the Act including prohibitions against harm (ss. 32-36), and protections of residence or habitat (ss. 33-36 and ss. 56-64), recovery planning and critical habitat identification (ss.37-46), and recovery plan implementation (action planning) (ss.47-64). The SARA also contains a provision to enable protecting species and habitat on an emergency basis (s.80).³

The Submitters claim that responsibility for enforcing and implementing the SARA lies primarily with the federal Minister of the Environment and Environment Canada, as well as with the federal Department of Fisheries and Oceans and the Parks Canada Agency.⁴

The Submitters state that listing is a prerequisite to protection under the SARA, and that Canada is failing to effectively enforce the listing process by adopting an interpretation of s. 27 of the SARA that circumvents the statutory timeline for listing and allows Environment Canada to conduct protracted socio-economic consultations prior to deciding whether to make a listing recommendation to the Governor in Council.⁵ According to the Submitters, the legislative record as well as the wording of s. 27 of the SARA reflect a compromise whereby

¹ Submission at 1.

² *Ibid.*

³ Submission at 2.

⁴ *Ibid.*

⁵ Submission at 2-6.

the Governor in Council (and not the Minister of the Environment) is allowed to take into account socio-economic considerations in a listing decision, provided it makes a decision within nine months of COSEWIC completing its assessment in respect of a species and not, as advanced by the Minister, within nine months of the Minister forwarding to the Governor in Council a copy of the COSEWIC assessment along with the Minister's listing recommendation.⁶ According to the Submitters, when the SARA came into force, the federal government was not adequately prepared to implement the Act, and that is why it is now failing to honour the compromise reflected in s. 27.⁷

As regards recovery planning, the Submitters maintain that Canada has fallen behind in meeting statutory timelines for posting recovery strategies for listed species, with only 23 of 133 strategies due in 2006 posted as of 29 September (contrary to s. 42).⁸ Further, they assert that Canada is not systematically identifying critical habitat in recovery strategies (as required by s. 41(1)(c)), in particular where such habitat is located on non-federal lands.⁹

Finally, the Submitters maintain that the federal government is failing to effectively enforce the SARA by refusing to extend the application of the Act to lands other than federal lands and species other than those otherwise protected under federal law (migratory birds and aquatic species).¹⁰ The Submitters maintain that in accordance with the SARA, the application of the Act must be extended, by ministerial order, if the Minister finds that the laws of a province or territory do not effectively protect species at risk, their residences or critical habitat (s. 34), or a species faces an imminent threat to its survival or recovery (s. 80).¹¹ The Submitters allege that Alberta, British Columbia, the Northwest Territories and the Yukon lack laws protecting endangered species or biological diversity,¹² and they assert that the federal Environment Minister's failure to recommend to the Governor in Council that the SARA's provisions be made to apply in those provinces and territories amounts to a failure to effectively enforce s. 34 of the SARA in respect of the SARA-listed species that occur therein, with the result that the SARA is no longer an act of national application.¹³ In addition, the Submitters cite the Spotted Owl (British Columbia) and the Woodland Caribou (Alberta) as examples of species that, according to the Submitters, face imminent threats to their survival or recovery,¹⁴ and they assert that the failure to issue emergency orders in respect of these species amounts to a failure to effectively enforce s. 80 of the SARA.¹⁵

⁶ *Ibid.*

⁷ Submission at 3.

⁸ Submission at 7-8.

⁹ Submission at 9: "[...] to date, of the 23 recovery strategies posted on the SARA registry, only 3 identify critical habitat, and 5 partially identify critical habitat. There is little certainty as to whether the prohibitions in the SARA apply where critical habitat has been identified only partially. Moreover, the 3 species where recovery plans identify critical habitat are located within protected areas (Aurora Trout and Horsetail Spike-rush), or have restricted distribution (Barrens Willow)."

¹⁰ Submission at 9-13.

¹¹ Submission at 9-10.

¹² Submission at 11.

¹³ *Ibid.*

¹⁴ Submission at 11-13.

¹⁵ Submission at 13.

III. ANALYSIS

Article 14 of the NAAEC directs the Secretariat to consider a submission from any nongovernmental organization or person asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. When the Secretariat determines that a submission meets the Article 14(1) requirements, it then determines whether the submission merits requesting a response from the Party named in the submission based upon the factors contained in Article 14(2).

A. Opening Phrase of Article 14(1)

The opening phrase of Article 14(1) authorizes the Secretariat to consider a submission “from any nongovernmental organization or person asserting that a Party is failing to effectively enforce its environmental law [...]” The submission meets, in part, the requirements inherent in this phrase. The Submitters are nongovernmental organizations as defined in Article 45(1) of the NAAEC. In addition, the provisions of the SARA identified by the Submitters are clearly environmental law within the meaning of NAAEC Article 45(2), as they are provisions of a statute whose primary purpose is the protection of the environment through the protection of endangered species and their habitat.¹⁶ However, while the submission alleges a failure to effectively enforce the cited provisions of law and not a deficiency in the law itself, the Secretariat is of the view that not all of the allegations made by the Submitters can be considered by the Secretariat under Article 14 of the NAAEC, for the reasons set forth below.

1. Alleged failure to effectively enforce listing process in SARA s. 27

The Submitters allege, first, that “[t]he federal government is failing to enforce the 9-month timeline for listing, as well as frustrating the listing process by considering matters not contemplated by the SARA.”¹⁷ Specifically, the Submitters allege:

[S]ection 27 of the SARA requires that species be listed within 9 months and does not admit an extended consultation by the Minister of the Environment. Additionally, there is no jurisdiction for the Minister of the Environment to consider the socio-economic consequences of listing in determining whether or not to recommend to the federal Cabinet to list a species. By creating indefinite timelines and undertaking socio-economic assessments of the implications of species listing prior to the statutory 9-month time frame for discussion by the federal Cabinet, the Government of Canada is failing to enforce the listing provisions of the SARA. The consequences of this failure to enforce, by the design of the SARA which requires listing as a precondition to all protections and recovery measures that flow from the Act, is to jeopardize the SARA in its entirety.¹⁸

The Submitters also allege that the Government is delaying listing because “[...] after the SARA came into force, the federal Government realized that it was not adequately prepared to

¹⁶ Art. 45(2)(a)(iii) of the NAAEC.

¹⁷ Submission at 4.

¹⁸ Submission at 6.

implement the SARA.”¹⁹ The question of whether the language and legislative history of s. 27 of the SARA support the Government’s interpretation regarding timelines, and the question of whether the Government is acting within the bounds of the law in taking into account socio-economic considerations in deciding on listing recommendations to the Governor in Council, are essentially questions of law. The Secretariat finds that the NAAEC’s submissions on enforcement matters process, which is intended to shed light on facts regarding alleged failures to effectively enforce environmental laws, is ill-suited to assertions grounded to such an extent in threshold questions of law

The Secretariat notes that it is not determining the broader question of whether s. 27 of the SARA can ever give rise to an allegation that would be eligible for review under the NAAEC’s submissions on enforcement matters process. It is simply finding that the allegations advanced by the Submitters in this submission, as regards the interpretation of s. 27 of the SARA, do not raise a factual question of enforcement which can be considered by the Secretariat under Article 14.

2. Alleged failure to effectively enforce recovery planning requirements in SARA ss. 41 and 42

Next, the Submitters allege that Canada is failing to effectively enforce the SARA’s recovery planning timelines (s. 42) and recovery planning requirements (s. 41).²⁰ On the issue of timelines, the Submitters assert that as of 29 September 2006, Canada had failed to meet mandatory deadlines for placing over 100 recovery strategies for newly listed species in the SARA public registry.²¹ They assert that an evaluation of the SARA’s implementation raises concern that the process for developing and posting recovery strategies will fall even further behind in 2007 and thereafter.²² In addition, the Submitters allege that most of the posted recovery strategies do not identify the species’ critical habitat, as required by s. 41(1)(c).²³ They cite an external evaluation which concludes that “[w]here provinces/territories are leading recovery planning efforts, they report a reluctance to identify critical habitat on non-federal lands until the supporting policy framework is clarified.”²⁴ The Submitters further allege that “[...] because critical habitat is not identified, the SARA’s prohibitions against harming critical habitat cannot be enforced and the Act’s intent to protect endangered or threatened species by protecting their habitat is frustrated.”²⁵

Sections 41 and 42 of the SARA are clear as regards timelines for posting recovery strategies and the requirement that such strategies include an identification of the species’ critical habitat, to the extent possible. The Submitters allege that in the case of many species, Canada is not meeting these obligations. In the past, the Secretariat has found that assertions regarding

¹⁹ Submission at 3.

²⁰ Submission at 7.

²¹ *Ibid.*

²² *Ibid.*

²³ Submission at 8.

²⁴ Submission at 9.

²⁵ *Ibid.*

an alleged failure by a government to fulfill a clear, specific legal obligation satisfy the requirements of Article 14(1).²⁶ The assertions in the submission regarding enforcement of the requirements in ss. 41 and 42 are based on factual questions regarding the alleged delays in meeting those requirements, and not solely on legal interpretations of the act. The Secretariat finds that the Submitters' allegations regarding the alleged failure by Canada to effectively enforce the SARA in regard to timelines for posting recovery strategies under s. 42 and identify species' critical habitat within such strategies pursuant to s. 41 satisfy the requirements of Article 14(1) of the NAAEC.

3. Alleged failure to effectively enforce "safety net" and emergency order provisions under SARA ss. 29, 34 and 80

Finally, the Submitters assert that Canada is failing to effectively enforce the SARA's "safety net" (s. 34) and emergency order (ss. 29, 80) provisions, which allow the federal government to take action to ensure the SARA is respected on non-federal lands in cases where either the laws of a province do not effectively protect a species at risk (safety net provisions) or a species faces an imminent threat to its survival or recovery (emergency order).²⁷ Both s. 34 and s. 80 provide that the Minister "shall" exercise his or her powers under the provision if the Minister "is of the opinion" that either the laws of a province do not adequately protect a species or its residence, or that a species faces imminent threats to its survival or recovery. These sections create a clear, specific obligation to act, but only when a prior condition is met: the Minister must form an opinion on the matter. Forming an opinion involves the exercise of discretion. Generally, a Minister's decision based on the exercise of discretion can only be challenged, as the Submitters appear to acknowledge,²⁸ if it is patently unreasonable. A decision may be patently unreasonable if it was made arbitrarily or in bad faith, cannot be supported on the evidence, or did not take into account the appropriate factors.

With respect to the "safety net" provisions, the Submitters contend that if a province's laws do not address the components in SARA's "Measures to Protect Listed Wildlife Species" to ensure a species is effectively protected (SARA ss. 32-36), "the Minister has no choice but to recommend to the Governor in Council (in accordance with s. 34) that s. 32 and/or s. 33 apply to the provincial lands."²⁹ The Secretariat finds that whether the laws of a province or territory fail to meet the SARA's standards is essentially a threshold legal question that is ill-suited to the submissions on enforcement matters process under NAAEC Articles 14 and 15.

With respect to the SARA's emergency order provisions (s. 80), as applied to the Spotted Owl, the Submitters state that they

²⁶ SEM-98-003 (Great Lakes), Determination pursuant to Article 14(1) and (2) (8 September 1999) at 7.

²⁷ Submission at 10.

²⁸ Submission at 14: "On September 15, 2006, the Submitters launched another court action to review the minister's decision and have it declared patently unreasonable."

²⁹ Submission at 12.

[...] consider that the [circumstances set out in the submission] are egregious and likely represent a worst-case scenario in terms of emergencies facing endangered species. They consider that by failing to recommend the issuance of an emergency order, the Minister of the Environment is failing to effectively enforce the Act.”³⁰

The Submitters make similar assertions with respect to the Woodland Caribou.³¹

The Secretariat finds that whether facts exist which trigger the Minister’s duty to recommend the issuance of an emergency order pursuant to s. 80 of the SARA in respect of the Spotted Owl and the Woodland Caribou involves factual questions of enforcement to which the submissions on enforcement matters process under Articles 14 and 15 of the NAAEC is well-suited.

B. Six Specific Criteria under Article 14(1)

Article 14(1) lists six specific criteria relevant to the Secretariat's consideration of submissions. The Secretariat must find that a submission:

- (a) is in writing in a language designated by that Party in a notification to the Secretariat;
- (b) clearly identifies the person or organization making the submission;
- (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based;
- (d) appears to be aimed at promoting enforcement rather than at harassing industry;
- (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and
- (f) is filed by a person or organization residing or established in the territory of a Party.³²

The submission meets the above criteria. It has been submitted in writing, in English, a language designated by Canada. It clearly identifies the Submitters.³³

The submission provides sufficient information to allow the Secretariat to review it, including a copy of an extensive, formative evaluation of federal species at risk programs commissioned by the federal government and made public in July 2006.³⁴ Subsection 2.4 of the Stratos Report concerns recovery planning, and it lists “meeting the Act’s specified timelines” and “identification of critical habitat for species at risk” as expected outputs for recovery planning. It concludes:

³⁰ *Ibid.*

³¹ Submission at 12-13.

³² NAAEC Article 14(1)(a)-(f).

³³ Submission at ii.

³⁴ Submission at Tab 3: Stratos Inc., “Formative Evaluation of Federal Species at Risk Programs – Final Report, July 2006” (Prepared for Environment Canada, Fisheries and Oceans Canada, Parks Canada Agency) [hereinafter the “Stratos Report”].

It is too early to reach a conclusion on whether the expected outcomes will be realized. On the one hand, hundreds of recovery strategies are currently in various stages of development. Should these be finalized, they will represent a significant accomplishment vis-à-vis past, non-mandated recovery planning efforts.

On the other hand, there are numerous warning signs that the recovery planning process is not yet on track, and a great deal of uncertainty and concern exists with respect to the progress of recovery planning processes. The following factors are of particular concern:

- Not all legislated deadlines for the development of recovery strategies are being met.
- With a few exceptions, critical habitat is not being identified by the core departments.
- The development of action plans has not been approached in a systematic manner. As a result, few scientifically defensible and socio-economically desirable actions have been identified.
- All core departments lack resources and appropriate guidance for involving Aboriginal peoples, consulting affected parties, and conducting socio-economic analysis.
- A great deal of uncertainty and concern exists with respect to the process for recovery strategy development going forward.³⁵

These are identified as cross-cutting issues that affect all core federal departments.³⁶

As regards the question of enforcing the SARA on non-federal lands, including through issuance of emergency orders pursuant to SARA s. 80, Subsection 2.6 of the Stratos Report, entitled “Protections (Permitting, Compliance Promotion, and Enforcement),” lists a number of expected outputs regarding federal enforcement, and expecting provinces and territories to do the same.³⁷ An expected intermediate outcome is that “Parties to the [National Accord for the Protection of Species at Risk] take action to legally protect species at risk and their habitat.”³⁸ As regards Environment Canada, the evaluation concludes:

Environment Canada has significant responsibilities for ensuring compliance with and enforcing SARA on all federal lands, with the exception of those under the jurisdiction of Parks Canada. At the time of this evaluation, however, a number of gaps were identified in the Department’s related activities and programs, including

- the lack of a formal and funded compliance promotion strategy/program;
- the lack of an enforcement strategy with respect to SARA, with investigations occurring only on a reactive basis, for the most part;
- no enforcement agreements in place with the provinces or territories;
- no clear strategy or plan to authorize other persons to act as enforcement officers;
- resources that [sic] were allocated to support the Department’s enforcement activities, but these did not reach the regional offices responsible for undertaking enforcement activities; and
- the policy framework to support the Act’s safety net provisions, which remains outstanding.

Moreover, the Department does not have a system or mechanism for determining the degree to which equivalent actions have been taken by other parties to the Accord (i.e., provinces and territories).³⁹

³⁵ Stratos Report at 35.

³⁶ Stratos Report at 42.

³⁷ Stratos Report at 45.

³⁸ *Ibid.*

³⁹ Stratos Report at 47.

In addition, the Submitters support their assertions regarding recovery planning and emergency orders with copies of many submissions to the federal government.⁴⁰

In accordance with the CEC Council's *Guidelines for Submissions on Enforcement Matters* (the "Guidelines"), in its review of a submission under Article 14(1)(c), the Secretariat considers whether the submission addresses the factors listed in Article 14(2).⁴¹ The submission addresses these factors.⁴² The submission is accompanied by more than ten appendices containing information about actions taken by one or some of the Submitters to communicate their concerns regarding all of the matters raised in the submission to the federal Minister of the Environment and government agencies. Considering all of the information provided in support of the submission, including a detailed document describing the Submitters' objections to British Columbia's recovery strategy for the Spotted Owl,⁴³ and recalling that Article 14(1) is not intended to be an insurmountable procedural obstacle,⁴⁴ the Secretariat finds that the submission provides sufficient information to allow the Secretariat to review it.

The submission appears to be aimed at promoting enforcement rather than at harassing industry: the submission is concerned with Canada's actions to apply and enforce the law, rather than with the actions of any one industry or corporation. The submission is accompanied by copies of submissions made by the Submitters to government authorities, as well as responses received, if any.⁴⁵

C. Article 14(2)

The Secretariat reviews a submission under Article 14(2) if it finds that the submission meets the criteria in Article 14(1). The purpose of this review is to determine whether to request a response to the submission from the Party concerned.

During its review under Article 14(2), the Secretariat considers each of the four factors listed in that provision based on the facts involved in a particular submission. Article 14(2) lists these four factors as follows:

⁴⁰ See submission at Tab 4 (identifying critical habitat in a recovery strategy); Tab 5 (alleged shortcomings of provincial recovery strategy for the Spotted Owl); Tab 7 (petition requesting emergency order under s. 80 for Spotted Owl); Tab 8 (petition requesting emergency order under s. 80 for Woodland Caribou); Tab 9 (Environment Canada acknowledgement of receipt for Woodland Caribou petition); Tab 10 (petition and federal government response to Petition 121, concerning, *inter alia*, Question 6, identification of critical habitat); Tab 11 (letter to Minister of Environment regarding delays in posting recovery strategies, and Minister's response); Tab 13 (letter to the Canadian Wildlife Service commenting on a federal policy discussion paper regarding critical habitat), Tab 14 (letter to Minister of the Environment regarding the Stratos Report).

⁴¹ Guideline 5.6.

⁴² Submission at 14-15.

⁴³ Submission at Tab 5.

⁴⁴ See SEM-97-005 (Biodiversity), Determination pursuant to Article 14(1) and (2) (26 May 1998) at 2: "The Secretariat is of the view that Article 14, and Article 14(1) in particular, are not intended to be insurmountable procedural screening devices."

⁴⁵ Submission at 13-14 and at Tabs 4-14.

In deciding whether to request a response, the Secretariat shall be guided by whether:

- (a) the submission alleges harm to the person or organization making the submission;
- (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement;
- (c) private remedies available under the Party's law have been pursued; and
- (d) the submission is drawn exclusively from mass media reports.⁴⁶

The Secretariat, guided by the factors listed in Article 14(2), has determined that the submission merits requesting a response from Canada with respect to the assertion that (1) Canada is failing to effectively enforce the SARA's recovery planning requirements as regards identification of critical habitat (s. 41) and mandatory planning timelines (s. 42), and (2) Canada is failing to effectively enforce the emergency order provisions under s. 80 with respect to the Spotted Owl in British Columbia and the Woodland Caribou in Alberta.

First, the submission contains an allegation of harm to the organizations making the submission: the Submitters state that as nongovernmental organizations dedicated to the protection of nature and the environment, they are directly concerned by the disappearance of species in Canada and by Canada's failure to enforce the law that has been adopted to protect species at risk.⁴⁷ Next, the submission raises matters whose further study in this process would advance the goals of the Agreement, including fostering the protection of the environment in Canada for the well being of present and future generations; avoiding creating trade distortions; and enhancing compliance with, and enforcement of, environmental laws and regulations.⁴⁸ Furthermore, the submission does not rely on mass media reports.

The Submitters have pursued private remedies in connection with matters raised in the submission. They state that in December 2005 and September 2006, they initiated court actions in connection with the application of s. 80 of the SARA in the case of the Spotted Owl in British Columbia.⁴⁹ In addition, in December 2005, the Submitters filed a detailed petition with the federal Minister of the Environment setting out why they believe the Minister should issue an emergency order under s. 80 of the SARA for the protection of the Woodland Caribou in Alberta.⁵⁰

As regards recovery planning, in June 2006, Sierra Legal Defence Fund contacted the Minister of Environment on behalf of some of the Submitters, asking for a meeting with the Minister on the issue of delays in posting recovery strategies on the public registry, and the

⁴⁶ Article 14(2) of the NAAEC.

⁴⁷ Submission at 14-15.

⁴⁸ Article 1 (a), (e), (g) of the NAAEC.

⁴⁹ Submission at 12.

⁵⁰ Submission at Tab 8.

Minister replied in September, stating that ministry officials are aware of the delays and are doing everything in their power to overcome unexpected obstacles which have arisen.⁵¹

As regards identification of critical habitat in recovery strategies, in 2004, one of the Submitters, Canadian Nature Federation (now Nature Canada), provided comments to the Canadian Wildlife Service on a federal policy discussion paper regarding critical habitat,⁵² and in August 2006, this Submitter wrote to the Minister of Environment, underscoring the findings of the Stratos Report that identify challenges in the recovery planning area, including the need to meet legislated deadlines, as well as less than anticipated progress by core departments in identifying critical habitat.⁵³ In that letter, Nature Canada recommended that core departments publicly report back on progress towards implementing the evaluation's recommendations; that Environment Canada be ensured adequate resources for migratory bird conservation and protected area delivery; and that core departments and the responsible Minister ensure stronger delivery of the Act by seeking adequate resources for departmental SARA programs.⁵⁴

The Submitters maintain that resorting to the courts “[...] has proven protractile and strongly suggests that private remedies are unsuitable concerning listing, recovery planning, critical habitat identification and failure to enforce prohibitions (before critical habitat is identified), particularly where many species, by both their legal status and their circumstances, require timely action to avoid extirpation.”⁵⁵ They state further that given a lack of jurisprudence in Canada and a lack of success in earlier proceedings in provinces to protect species, “Canada’s courts are not proving to be an effective forum for addressing concerns regarding species endangerment.”⁵⁶

The Secretariat has carefully considered - in light of the factors contained in Article 14(2) - those allegations of the Submitters which meet the Article 14(1) criteria, in order to determine whether these allegations, taken together, merit requesting a response from Canada. In doing so, the Secretariat has examined whether private remedies available under the Party’s law have been pursued. The submission and its appendices indicate that the Submitters have engaged in a range of actions in regard to all of the matters covered by these allegations, including responding to public calls for comments on discussion papers; addressing requests for meetings, offers to cooperate, and formal petitions to the Minister of the Environment; and applying to the courts for review of ministerial decisions. Not all actions were pursued in connection with each allegation. On the other hand, it appears that there are issues common to each of the allegations, such as the connection between the timeliness and adequacy of recovery strategies and the existence of imminent threats that would necessitate the issuance of an emergency order, such that a remedy pursued in respect of one allegation could serve to address, in part, issues raised in another.

⁵¹ Submission at Tab 11.

⁵² Submission at Tab 13.

⁵³ Submission at Tab 14.

⁵⁴ *Ibid.*

⁵⁵ Submission at 15.

⁵⁶ *Ibid.*

The Secretariat has weighed these considerations in light of its determination that the submission – focusing, as it does, on legislation for the protection of species at risk in Canada, and supported by a recent, in-depth, government-funded assessment that raises concerns about enforcement matters addressed in the submission – clearly raises matters whose further study in this process would advance the NAAEC’s goal of fostering the protection and improvement of the environment in Canada for the well-being of present and future generations, as well as supporting the environmental goals and objectives of the NAFTA.

In sum, having reviewed the submission in light of the factors contained in Article 14(2), the Secretariat has determined that the submission merits requesting a response from Canada with respect to the assertions that (1) Canada is failing to effectively enforce the SARA’s recovery planning requirements as regards identification of critical habitat (s. 41) and mandatory planning timelines (s. 42), and (2) Canada is failing to effectively enforce the emergency order provision in s. 80 with respect to the Spotted Owl in British Columbia and the Woodland Caribou in Alberta.

IV. CONCLUSION

For the foregoing reasons, the Secretariat has determined that submission SEM-06-005 (Species at Risk) meets the requirements of Article 14(1) of the NAAEC and merits requesting a response from the Party in light of the factors listed in Article 14(2), with respect to the assertions that (1) Canada is failing to effectively enforce the SARA’s recovery planning requirements as regards identification of critical habitat (s. 41) and mandatory planning timelines (s. 42), and (2) Canada is failing to effectively enforce the emergency order provisions under s. 80 with respect to the Spotted Owl in British Columbia and the Woodland Caribou in Alberta. Accordingly, the Secretariat requests a response to these allegations from Canada, subject to the provisions of NAAEC Article 14(3). A copy of the submission and its appendices were previously forwarded to the Party under separate cover.

Respectfully submitted,

Secretariat of the Commission for Environmental Cooperation

(original signed)

Katia Opalka

Legal Officer, Submissions on Enforcement Matters Unit

c.c.: José Manuel Bulás, SEMARNAT
David McGovern, Environment Canada
Judith E. Ayres, US-EPA
Felipe Adrián Vázquez-Gálvez, CEC Executive Director
Devon Page, Sierra Legal Defence Fund