

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

Submitter: Friends of Animals
Party: United States of America
Date of receipt: 30 September 2019
Date of determination: 21 November 2019
Submission no.: SEM-19-004 (*Barred Owl*)

I. INTRODUCTION

1. Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC or the “Agreement”) provide for a process allowing any person or nongovernmental organization residing or established in North America to file a submission asserting that a Party to the NAAEC is failing to effectively enforce its environmental law. The Secretariat of the Commission for Environmental Cooperation (the “Secretariat” of the CEC)¹ initially considers submissions to determine whether they meet the criteria contained in NAAEC Article 14(1). When the Secretariat finds that a submission does meet these criteria, it then determines, pursuant to the provisions of NAAEC Article 14(2), whether the submission merits a response from the concerned Party.
2. On 30 September 2019, Friends of Animals (the “Submitter”) filed an Article 14(1) submission with the CEC Secretariat.² The Submitter asserts that the United States Fish and Wildlife Service (USFWS) is failing to effectively enforce the *Migratory Bird Treaty Act* (MBTA) when it issued to itself scientific collection permits that allow the lethal take of barred owls. The MBTA implements four international conventions, including the US/Mexican agreement for the protection of migratory birds and game mammals (“Mexico Convention”), which specifically lists the barred owl as a protected species.
3. Having reviewed the submission with reference to Article 14 of the Agreement and to the *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* (the “Guidelines”), the Secretariat finds that submission SEM-19-004 (*Barred Owl*) meets all the eligibility requirements of Article 14(1) and, pursuant to the criteria of Article 14(2), merits a response from the Government of the United States, for the reasons set out below.

¹ The Commission for Environmental Cooperation (CEC) was established in 1994 under the North American Agreement on Environmental Cooperation (NAAEC or Agreement) signed by Canada, Mexico, and the United States (the “Parties”). The bodies which comprise the CEC are the Council, the Secretariat, and the Joint Public Advisory Committee (JPAC). The NAAEC remains in effective despite the Parties recent renegotiations concerning NAFTA resulting in a revised trade agreement and a new Environmental Cooperation Agreement, neither of which has yet to be implemented.

² SEM-19-004 (*Barred Owl*), NAAEC Article 14(1) Submission (30 September 2019). Details of this submission are available at <<http://www.cec.org/sem-submissions/barred-owl>>.

II. SUMMARY OF THE SUBMISSION

4. According to the submission, the collection permits allow the USFWS to study the effects of the taking of barred owls on the northern spotted owl (NSO) under an experimental pilot project implemented in 2013, called the barred owl removal experiment (BORE). On 17 September 2013, the USFWS approved BORE, authorizing the removal, primarily through lethal means, of approximately 3,603 barred owls over four years in three states: California, Oregon and Washington.³ This number was later modified to 1,600 in 2014, after USFWS issued itself a modified permit and published an additional memorandum stating that “[the] take of Barred Owls requested in this application is for bona fide scientific research that advances the scientific understanding of both species of owls [Spotted and Barred Owls].”⁴ According to the Submitter, the USFWS’s memorandum was an attempt to qualify the BORE within the exemptions of MBTA or Mexico Conventions, but the Submitter contends that the memorandum fails to justify how FWS’s BORE falls within the exception.⁵
5. The Submission summarizes the historical status of the NSO and notes that the USFWS listed it in 1990 as a “threatened” species under the Endangered Species Act “due to loss and adverse modification of spotted owl habitat as a result of timber harvesting.”⁶ At that time, the Submitter notes that the barred owl was not recognized as a threat to the NSO. Although the USFWS listing was designed to protect the NSO, the Submitter maintains that attempts at habitat conservation have been insufficient because NSO populations have continued to decline in the Pacific Northwest region of the United States.⁷ The Secretariat notes that the barred owl is not a listed species under the Endangered Species Act.
6. The submission observes that, historically, barred owls resided only in the eastern United States but that their range has expanded to overlap with the majority of the NSO’s traditional territory.⁸ The submission states that the USFWS now believes that the barred owl’s incursion into this territory hinders the survival of the NSO and that a 2011 draft recovery plan for the NSO released by the USFW included a step to “manage barred owls.”⁹ Habitat loss and fragmentation were also identified as threats to the NSO. The Submitter contends that the 2013 BORE was issued as a result of this plan.
7. The environmental law applicable to the implementation of the BORE is the MBTA cited in the submission, and summarized below in section III (B). The Submitter maintains that the scientific take permits the USFWS issued to its Oregon office are in contravention of law because they are not scientifically related to the study or of benefit to the barred owl as a species. Specifically, the Submitter asserts that the USFWS permit does not require taken barred owls to be studied in any way and, furthermore, that this type of permit cannot be issued for the scientific benefit of another species, in this case, specifically the

³ Submission at 4.

⁴ *Id.*

⁵ *Id.*

⁶ Submission at 2.

⁷ *Id.*

⁸ Submission at 3.

⁹ *Id.*

NSO. The Submitter is also particularly concerned that the USFWS's barred owl removal experiment could set a dangerous precedent for the future management of species that could endanger countless animals as climate change shifts their habitats. And, more crucially, the Submitter maintains that the practice is not a feasible long-term solution to aid northern spotted owl population recovery.¹⁰

III. ANALYSIS

8. Under the terms of NAAEC Article 14, the Secretariat may consider submissions asserting that a Party to the Agreement is failing to effectively enforce its environmental law. As the Secretariat has stated in previous Article 14 determinations, Article 14 is not intended to be an "insurmountable screening device" to submitters¹¹ and should be broadly interpreted, in a manner consistent with the Agreement's objectives.¹² The Secretariat reviewed the submission with this perspective in mind.

A. Opening paragraph of Article 14(1)

9. The opening paragraph of Article 14(1) allows the Secretariat to consider submissions "from any nongovernmental organization or person asserting that a Party is failing to effectively enforce its environmental law, if the Secretariat finds that the submission" meets the admissibility criteria in Article 14(1) (a) to (f).
10. The Secretariat finds that the Friends of Animals is a nongovernmental organization advocacy organization, incorporated in the State of New York, and its Wildlife Law Program, which filed the submission, was established in 2013 and is located in Centennial, Colorado.¹³ The program is designed "to ensure the right of all wildlife to live in an ecosystem free from human manipulation, exploitation, or abuse."¹⁴ There is no information in the submission to suggest that the Submitter belongs to the government or is under its direction.
11. The next criteria to determine are whether the Submitter has identified an "environmental law" as defined in the NAAEC and whether the Submitter has alleged that a Party is "effectively failing to enforce" that law.
12. NAAEC Article 45(2) defines "environmental law" as follows:

2. For purposes of Article 14(1) and Part Five:

- (a) "**environmental law**" means any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through
 - (i) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants,

¹⁰ *Id.* at 10-11.

¹¹ SEM-97-005 (*Biodiversity*), Article 14(1) Determination (26 May 1998); and SEM-98-003 (*Great Lakes*), Article 14(1)(2) Determination (8 September 1999).

¹² SEM-01-002 (*AAA Packaging*), Article 14(1) Determination (24 April 2001), at 2: "Article 14(1) should be given a large and liberal interpretation, consistent with the objectives of the NAAEC."

¹³ Submission at 14.

¹⁴ See, <<https://www.friendsofanimals.org/wildlife-law-program/>> (viewed 5 November 2019).

- (ii) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto, or
 - (iii) the protection of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party's territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.
- (b) For greater certainty, the term "**environmental law**" does not include any statute or regulation, or provision thereof, the primary purpose of which is managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, of natural resources.
- (c) The primary purpose of a particular statutory or regulatory provision for purposes of subparagraphs (a) and (b) shall be determined by reference to its primary purpose, rather than to the primary purpose of the statute or regulation of which it is part. [Emphasis in the original]

B. Environmental law in question

13. It is clear that the NAAEC's definition of "environmental law" includes laws designed to protect wild flora or fauna, including endangered species and their habitat.
14. The MBTA is a US federal law originally enacted by Congress in 1918 and implements four bilateral international conventions aimed at protecting migratory birds native to the United States.¹⁵ In 1936, the United States signed a convention with Mexico to prevent the extinction of migratory birds and the MBTA was amended in consequence. Section 703 of the law generally makes the taking, killing, and possessing of migratory birds unlawful, unless such is authorized under section 704 and its implementing regulations, including those necessary to implement the Mexican convention.¹⁶ The USFWS has promulgated its Migratory Bird Permit regulations at 50 Code of Federal Regulations Part 21.¹⁷
15. The Submitter points out that the Mexico Convention is the only convention that includes barred owls on its list of protected species.¹⁸ The Submitter also asserts that its provisions allow a take only when the bird is used for scientific purposes, for propagation, or for museums."¹⁹ Scientific collection permits are authorized under 50 C.F.R. 21.23.²⁰ The

¹⁵ See, 16 U.S.C. sections 703-712. <<https://www.law.cornell.edu/uscode/text/16/chapter-7/subchapter-II>> (viewed 5 November 2019).

¹⁶ 16 U.S.C. sections 704 and 712. <<https://www.law.cornell.edu/uscode/text/16/704>> and <<https://www.law.cornell.edu/uscode/text/16/712>> (viewed 5 November 2019).

¹⁷ <<https://www.law.cornell.edu/cfr/text/50/part-219>> (viewed 5 November 2019).

¹⁸ Submission at p. 5.

¹⁹ The Mexican convention specifically provides, in part, at Article II: "The high contracting parties agree to establish laws, regulations and provisions to satisfy the need set forth in the preceding Article, including:

A) The establishment of close seasons, which will prohibit in certain periods of the year the taking of migratory birds, their nests or eggs, as well as their transportation or sale, alive or dead, their products or parts, except when proceeding, with appropriate authorization, from private game farms or when

Submitter asserts that “the MBTA and Mexico Convention clearly require that when a protected migratory bird is properly taken under the Mexico Convention exemption, the taken specimen must itself be used for the exempted purpose, regardless of whether the intended purpose is scientific, for propagation, or for museums.”²¹

16. The Submitter contends that the take permit the USFWS issued to itself is invalid because the killing of the barred owl has no scientific purpose related to the species; nothing in the permit, Submitter argues, requires any kind of research related to the specimens taken, whether those specimens are killed by shotgun, live-trapped, or retained. The Submitter also contends that the statements of the USFWS related to purported scientific purpose are conclusory and with no scientific research conditions included in the permit issued.”²²
17. The Secretariat finds that the MBTA, and section 703-712 in particular, qualify as “environmental law” because their primary purpose is to protect and preserve wildlife fauna, including barred owls, in accordance with NAAEC Article 45(2)(a) iii).²³ Further, the Submitter asserts that the USFWS is not effectively enforcing these provisions of the law because it has issued permits which the Submitter maintains are not valid.

C. The six requirements of NAAEC Article 14(1)

18. The Secretariat also reviewed the submission with reference to the other six requirements of NAAEC Article 14(1) and finds that it meets all of these. The Secretariat's reasoning follows.

a) *[Whether the submission] is in writing in a language designated by that Party in a notification to the Secretariat*

used for scientific purposes, for propagation or for museums.” Available at <<https://www.fws.gov/le/pdf/MigBirdTreatyMexico.pdf>> (viewed 5 November 2019).

²⁰ The regulation provides, in part: “(a) *Permit requirement*. A scientific collecting permit is required before any person may take, transport, or possess migratory birds, their parts, nests, or eggs for scientific research or educational purposes.”

²¹ Submission at 5.

²² The original permit was issued on 23 September 2013, amended on 18 October 2013, then amended again in the fall of 2014 because implementation of the removal experiment was delayed because of funding, thereby reducing the number of barred owls taken. This amendment was supported by a findings document, Memorandum from Migratory Birds Permit Office to Nanette Soto, *Findings Document for Migratory Bird Scientific Collecting Permit*, 29 August 2014, in which the following statement is made: “The take of Barred Owls requested in this application is for bona fide scientific research to obtain information on the effect of the take of Barred Owls on Spotted Owl populations. This permit will authorize research that advances the scientific understanding of both species.” See, Submission at 4.

²³ The Secretariat has found, in a prior submission concerning the US, that the MBTA qualifies as environmental law under NAAEC Article 45(2): “Further, the law involved, the Migratory Bird Treaty Act, qualifies as an ‘environmental law’ for purposes of the NAAEC... because the ‘primary purpose’ of the MBTA is to protect and preserve wild fauna - wild birds.” See, SEM-99-002 (*Migratory Birds*), Determination pursuant to Article 14(1)(2) (23 December 1999) at 4.

19. The submission is written in English, one of the languages designated by the Parties for the filing of submissions, pursuant to paragraph 3.2 of the Guidelines.²⁴ Therefore, the Secretariat finds that the submission meets the requirement of Article 14(1)(a).

b) [Whether the submission] clearly identifies the person or organization making the submission

20. The submission provides a name, address, and other contact information for the purposes of identifying and communicating with the Submitter; therefore, it satisfies Article 14(1)(b).

c) [Whether the submission] provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based

21. The submission contains sufficient information to allow for review, since it includes information and links to documents supporting the Submitter's assertions. The information cited in the submission and the Annexes provided include, among other documents, government records, published scientific studies, and the collecting permits issued by the USFWS. Further, the submission includes the Draft, Final and Revised Recovery Plan for the Northern Spotted Owl of April 2007, 13 May 2008, and 28 June 2011,²⁵ respectively; the comments received of the Draft Environmental Impact Statement on the Experimental Removal of Barred Owls²⁶; and the Record of decision for Final Impact Statement of 17 September 2013.²⁷

22. The Secretariat finds that the submission contains sufficient information for it to be reviewed.

d) [Whether the submission] appears to be aimed at promoting enforcement rather than at harassing industry

23. The Secretariat finds that the submission satisfies Article 14(1)(d), since it appears to be aimed at promoting enforcement of the MBTA rather than at harassing industry.

e) [Whether the submission] indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any

24. The information attached to the submission confirms that the matter raised by the Submitter has been communicated to the relevant authority in the United States, in this case, the USFWS. The Submitter has filed various legal actions against the agency. Particularly, it has brought litigation challenging USFWS's issuance of the permits in the Eastern District of California, the District of Oregon, the Ninth Circuit, and petitioned the

²⁴ The Guidelines' paragraph 3.2 provides: "Submissions may be made in English, French or Spanish, which are the languages currently designated by the Parties for submissions."

²⁵ US Fish and Wildlife Service, Revised Recovery Plan for the Northern Spotted Owl (28 June 2011).

²⁶ US Fish and Wildlife Service, Comments on Draft Environmental Impact Statement on the Experimental Removal of Barred Owls to Benefit Threatened Northern Spotted Owls (20 June 2012).

²⁷ US Fish and Wildlife Service's Experimental Removal of Barred Owls to Benefit Northern Spotted Owls: Record of Decision for Final Impact Statement (17 September 2013).

Supreme Court.²⁸ Through these procedures, the Submitter has communicated its concerns to the USFWS. In addition, the Submitter advised the USFWS via email of its intention to file this submission, but received no response.²⁹

25. The Secretariat finds that the submission meets the requirement of Article 14(1)(e).

f) [Whether the submission] is filed by a person or organization residing or established in the territory of a Party

26. Since the Submitter has been incorporated in the state of New York since 1957 and has offices in Connecticut and Colorado, the requirement of Article 14(1)(f) is met.

D. NAAEC Article 14(2)

27. Having determined that the submission satisfies all the requirements of NAAEC Article 14(1), the Secretariat proceeded to determine whether it merits a response from the Party under NAAEC Article 14(2).

a) The submission alleges harm to the person or organization making the submission

28. Paragraph 7.4 of the SEM Guidelines provides that when determining whether a submission alleges harm, the Secretariat must consider whether “the alleged harm is due to the asserted failure to effectively enforce environmental law” and whether “the alleged harm related to the protection of the environment”.

29. As noted in paragraph 10, the Submitter is a US nonprofit international advocacy organization that seeks “to ensure the right of all wildlife to live in an ecosystem free from human manipulation, exploitation and abuse.”³⁰ The submission asserts the organization has a long-standing interest in barred owl protection and its members have a “spiritual, educational, and recreational interests in the barred owl.”³¹ The Submitter maintains its members “are suffering harm from the United States’ failure to enforce the MBTA by allowing [US]FWS to issue scientific take permits that authorize killing barred owls.”³² The Submitter asserts that the failure to effectively enforce the provisions cited in the submission had resulted in the killing of hundreds of barred owls and the targeting of even more.³³ Furthermore, the Submitter contends the “issuance of scientific collection permits to study a species other than the one taken is in direct conflict with the MBTA and [the] underlying Mexico Convention”³⁴ and that “such take will yield no conservation benefit to, or scientific understanding of, barred owls as a species or

²⁸ Friends of Animals v. Jewell, No. 13-cv-02034 JAM CKD, 2014 US Dist. LEXIS 106 030 (E.D. Cal 31 July 2014), Friends of Animals v. US Fish and Wildlife Serv., No. 6 14 cv 01449 AA, 2015 Dist. LEXIS 93734 (D. Or. 16 July 2015), Friends of Animals v. US Fish and Wildlife Serv., 879 F.3d 1000 (9th Cir. 2018); Friends of Animals v. Fish and Wildlife Serv. 2018 US LEXIS 3607, 138 S. Ct. 2628.

²⁹ Submission at 14.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 14.

³³ *Id.* at 1.

³⁴ *Id.*

population.”³⁵ The submission indicates that the USFWS has failed to protect the barred owls, a protected migratory bird under the Mexico Convention.

30. The Secretariat concludes from the foregoing that the alleged harm mentioned in the submission is a consequence of the alleged failure to effectively enforce the MBTA and the underlying Mexico Convention and, based on paragraph 7.4 of the Guidelines, finds that the submission satisfies the criteria specified in NAAEC Article 14(2)(a).

b) [Whether] the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement

31. The Secretariat finds that the Submission raises matters whose further study in this process would advance the goals of the NAAEC, specifically Article 1(a), (b), (c), (f), (g), and (h)³⁶, and finds that it meets the requirements of Article 14(2)(b) of the Agreement.

c) Whether private remedies available under the Party's law have been pursued

32. The Submitters have taken various actions to pursue legal remedies with respect to the United States’ failure to enforce the MBTA regarding the barred owl.
33. The Submitter originally filed a lawsuit against the USFWS on 30 September 2013, alleging two causes of actions for (1) violation of the Conventions, including the Mexico Convention, the MBTA and the implementing regulations, and (2) for violation of National Environmental Policy Act (NEPA). Subsequently, on 31 July 2014, the Submitter filed for a motion of summary judgment on these issues.³⁷ The District court denied the motion for summary judgment because it ruled that the Submitter did not have standing to bring the lawsuit against the USFWS.
34. Subsequently, in September 2014 the Submitter filed the same claims in the US District Court of Oregon and moved for summary judgment. In a decision issued on 16 July 2015, the District court found, with respect to the MBTA claim, that the USFWS pursued an exhaustive inquiry and articulated a rational basis, supported by facts, for the experimental removal program and dismissed the Submitter’s action.³⁸ Specifically, the

³⁵ *Id.* at 6.

³⁶ NAAEC Article 1:

The objectives of this Agreement are to:

- (a) foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations;
- (b) promote sustainable development based on cooperation and mutually supportive environmental and economic policies;
- (c) increase cooperation between the Parties to better conserve, protect, and enhance the environment, including wild flora and fauna;...
- (f) strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices;
- (g) enhance compliance with, and enforcement of, environmental laws and regulations;
- (h) promote transparency and public participation in the development of environmental laws, regulations and policies;...

³⁷ *Friends of Animals v. Jewell*, No. 13-cv-02034 JAM CKD, 2014 US Dist. LEXIS 106 030 (E.D. Cal 31 July 2014).

³⁸ *Friends of Animals v. US Fish and Wildlife Serv.*, No. 6 14 cv 01449 AA, 2015 Dist. LEXIS 93734. The Secretariat notes that the court also dismissed the Submitter’s NEPA claim.

court rejected the Submitter's interpretation of the MBTA and the Mexican Convention and found that nothing in them requires the issuance of a permit to advance the species being taken. The Court also found that the USFWS decision was supported by the record, including the NEPA documentation, and is consistent with other court decisions addressing this issue directly or indirectly.³⁹

35. The Submitter appealed the Oregon decision to the Ninth Circuit, which issued an opinion on 10 January 2018 (but only on the MBTA claim). The Ninth Circuit rejected the appeal and concluded the scientific collection permit issued by the USFWS did not violate the MBTA. Specifically, the Court found that the MBTA imposed few substantive conditions and delegated to the Secretary of the Interior broad discretion to implement the MBTA. The Court rejected the Submitter's interpretation of the MBTA and related convention and found that the "used for scientific purposes" exception in Article II(A) of the Mexico Convention included taking birds to study whether their absence benefits another protected bird species.⁴⁰
36. The Submitters then filed a petition for writ of certiorari with the United States Supreme Court, which it denied on 8 June 2018.⁴¹
37. In light of the foregoing, the Secretariat concludes that reasonable steps have been taken to pursue the private remedies available in the United States and that the submission meets the criterion of Article 14(2)(c).

d) Whether the submission is drawn exclusively from mass media reports

38. The Submitter notes that information included in the submission includes records drawn primarily from the US Government, published scientific studies, and United States court litigation.⁴²
39. The Secretariat finds that the documentation included in the Submission has not been drawn from mass media reports.

IV. DETERMINATION

40. Having conducted its NAAEC Article 14(1) review of submission SEM-19-004 (*Barred Owl*), the Secretariat finds that it meets the requirements of that article for the reasons set out herein. In addition, taking account of the criteria of NAAEC Article 14(2), the Secretariat finds that the submission warrants requesting a response from the Party of concern, in this case the United States, in regard to the Submitters' assertions concerning the alleged failure of the USFWS to effectively enforce the Migratory Bird Treaty Act with respect to the scientific collection permits issued for the taking of barred owls.
41. The Party, in any response, may also choose to provide other information related to the submission, for example:

³⁹ *Id.* At pp. 8-10.

⁴⁰ *Friends of Animals v. US Fish and Wildlife Serv.*, 879 F.3d 1000 (9th Cir. 2018).

⁴¹ *Friends of Animals v. Fish and Wildlife Serv.* 2018 US LEXIS 3607, 138 S. Ct. 2628.

⁴² See, Submission at 15.

- (i) Examples of other scientific take permits issued by the USFWS whereby one species is taken to benefit another species;
 - (ii) any scientific information that has been gleamed so far regarding the BORE and related to the issues raised in this submission; and
 - (iii) the current status of the scientific collection permit and the BORE, including ongoing monitoring and assessment of the project.
42. In addition, the Party may give notice of the existence of a “judicial or administrative proceeding—as defined in NAAEC Article 45(3), pursuant to NAAEC Article 14(3)(i). The Secretariat notes the federal litigation referenced in its discussion on whether the submission satisfies the criteria listed in Article 14(2)(c).
43. As stipulated by NAAEC Article 14(3), the Party may provide a response to the submission within the 30 days following receipt of this determination; i.e., by **7 January 2020**. In exceptional circumstances, the Party may give written notice of the extension of this period to 60 days; i.e., by **20 February 2020**.

Secretariat of the Commission for Environmental Cooperation

(Original signed)

per: Robert Moyer
Director, SEM and Legal Unit

cc: Chad McIntosh, Alternative Representative, United States
Rodolfo Godínez Rosales, Alternative Representative, Mexico
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Submitter