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Previously Filed Petitions before the Commission for Environmental Cooperation

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Previously Filed Petitions before the Commission for Environmental Cooperation:

Commission for Environmental Cooperation – Secretariat

Determination Pursuant to Articles 14 & 15 of the North American Agreement on
Environmental Cooperation

Submission I.D.: SEM-95-002

Submitter(s) :

Sierra Club, Alaska Center for the Environment, Ancient Forest Rescue, Friends of the Earth, Headwaters, Hells Canyon Preservation Council, Idaho Conservation League, Inland Empire Public Lands Council, Institute for Fisheries Resources, Klamath Forest Alliance, National Audubon Society, Natural Resources Defense Council, Northcoast Environmental Center, Northwest Ecosystem Alliance, Oregon Natural Resources Council, Pacific Coast Federation of Fishermen's Associations, Pacific Rivers Council, Pilchuck Audubon Society, Portland Audubon Society, Seattle Audubon Society, Southern Rockies Ecosystem Project, Western Ancient Forest Campaign, The Wilderness Society, Earthlife Canada Foundation operating as BC Wild, Environmental Resource Centre of Alberta, Centro Mexicano de Derecho Ambiental, Grupo de Los Cien, and Red Mexicana de Accion Frente al Libre Comercio

Concerned Party:

United States of America

I. SUMMARY OF THE SUBMISSION

On August 30, 1995, the Submitters filed with the Secretariat of the Commission for Environmental Cooperation ("Secretariat") a submission on enforcement matters pursuant to Article 14 of the North American Agreement on Environmental Cooperation ("NAAEC" or "Agreement").

The submission alleges that the Fiscal Year 1995 Supplemental Appropriations, Disaster Assistance and Rescissions Act ("Rescissions Act"), Pub. L. No. 104-19 (109 Stat. 194), passed by the U.S. Congress and signed into law by the President of the United States on July 27, 1995, contains a rider ("Logging Rider") suspending the

enforcement of U.S. environmental laws for a “massive” logging program on U.S. public lands.

The submission further alleges that U.S. environmental laws governing logging remain on the books and even remain applicable to logging on these federal forests. The rider, however, “...erects what may be insurmountable obstacles to citizen enforcement of these environmental laws for the expansive logging mandated or permitted by the rider.” Submission at p. 1.

According to the Submitters, the Logging Rider “suspends enforcement of most U.S. environmental laws with respect to logging for so-called “salvage” purposes and also for non-salvage logging in the Western Ancient Forests.” Submission at p. 2. Specifically, the Submitters allege that the Logging Rider “effectively suspends enforcement of environmental laws for two logging programs : (1) logging in the old-growth forest under Option 9 — the plan adopted by federal agencies to balance timber harvest against protecting old-growth dependent species like the northern spotted owl, salmon, and other aquatic species; and (2) so-called salvage logging.” Submission at p. 2.

The Submitters contend that for both logging programs, the Logging Rider provides that any environmental analysis produced, and any procedures followed by federal agencies for such timber sales “shall be deemed to satisfy the requirements” of several specifically listed laws and “[a]ll other applicable federal environmental and natural resource laws.” Submission at p. 2. The Submitters then conclude that “[a]ccordingly, the logging rider provides that such timber sales are specifically not subject to challenge for violations of such laws. Submission at p. 2.

II. ARTICLE 14

Article 14 of the Agreement allows the Secretariat to consider a submission from any non-governmental organization or person asserting that a Party to the Agreement is failing to effectively enforce its environmental law. The Secretariat may consider any submission that meets the criteria set out in Article 14:1. Where the Secretariat determines that the Article 14:1 criteria are met, it shall then determine whether the submission merits requesting a response from the Party named in the submission. In light of any response provided by that Party, the Secretariat may recommend to the Council that a factual record be prepared. The Council, comprised of the environment ministers (or their equivalent) of Canada, Mexico and the U.S., may then instruct the Secretariat to prepare a factual record on the submission.¹ Final factual records are made publicly available upon a 2/3 vote of the Council.

1. The contents of a factual record are set forth in the Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation. The Guidelines can be obtained through the CECs home page on the Internet at the following address: <http://www.cec.org>. Copies of the Guidelines are also available on request from the CEC Secretariat in Montreal, Canada.

III. PROCEDURAL HISTORY

On August 30, 1995, the Submitters filed with the Secretariat submission No. SEM-95-002 under Article 14 of the NAAEC. The Secretariat now reviews the submission to determine whether the submission satisfies the screening criteria established in Articles 14:1 and 14:2.

IV. ANALYSIS

Environmental law

Article 14:1 empowers the Secretariat to consider alleged failures to enforce "environmental law" as that term is defined in Article 45:2(a) of the Agreement. Article 45 excludes from the definition of "environmental law" statutes, regulations or provisions thereof, "...the primary purpose of which is managing the commercial harvest or exploitation...of natural resources." The Article continues by explaining that the "primary purpose" of a particular statute or regulatory provision 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.

Submitters allege a general failure to enforce the environmental statutes referenced in the Logging Rider, including the Endangered Species Act and the National Environmental Policy Act. Also, the Submitters underscore the loss of administrative and judicial review procedures regarded as important enforcement tools available to citizens prior to the enactment of the Logging Rider. While the submission refers to "environmental laws", it focuses almost exclusively on the language and effect of the Logging Rider.

Although the Logging Rider clearly addresses the harvesting of natural resources (timber), the Secretariat reads the submission as alleging a failure to enforce the environmental laws enumerated in the Logging Rider, some of which clearly meet the definitional requirements established in Article 45. Accordingly, the Secretariat next considers both whether a "failure to effectively enforce" has been alleged under Article 14:1, and whether the submission merits a response under Article 14:2 of the Agreement.

Failure to effectively enforce

The Logging Rider provides expedited procedures for the complex, multi-phase process involved in timber sales; vests discretion in the Secretary of Agriculture and Interior to consider certain environmental effects; limits or eliminates administrative and judicial review of specified decisions and agency action; and stipulates that certain documents and procedures required by the Logging Rider shall be deemed to satisfy the requirements of enumerated environmental laws along with all other applicable Federal environmental and natural resource laws.

The Submitters contend that by enacting the Logging Rider, the United States is failing to effectively enforce its environmental law. The Submitters also emphasize that "[s]uspending citizen enforcement of federal environmental laws constitutes a failure to effectively enforce such laws" and that "[b]y eliminating the most effective (and often only)

judicial remedies for violations of environmental laws, the logging rider violates Articles 5(2) and 6(3)(b), (d).” Submission at p.10-11.

The submission focuses on a later-enacted law that impacts on the implementation of an existing environmental law without directly amending or repealing it. The Secretariat considers that the enactment of legislation which specifically alters the operation of pre-existing environmental law in essence becomes a part of the greater body of laws and statutes on the books. This is true even if pre-existing law is not amended or rescinded and the new legislation is limited in time. The Secretariat therefore cannot characterize the application of a new legal regime as a failure to enforce an old one.

Accordingly, the Secretariat cannot find any dereliction of a duty or other “failure” as contemplated by Article 14. Rather, the new law will be read side-by-side with pre-existing environmental law. Where the new law explicitly exempts, modifies or waives provisions of an earlier law, the later-enacted law will prevail.²

As mentioned above, the submission focuses on the enactment of a law impacting on the implementation of existing environmental laws, including the “suspension” of citizen enforcement through additional limitations on administrative and judicial review. Yet, the enactment of a law does not, without more, provide facts upon which to charge a failure to enforce. Essentially, the submission is prospective in nature, alleging anticipated but unrealized enforcement consequences. For example, the Submitters allege that “[t]he logging rider precludes them from effectively using administrative appeals and the courts to facilitate or compel compliance with U.S. environmental laws. As a result, many environmental violations will be left unredressed and a great deal of on-the-ground environmental harm will occur.”³ Submission at p.14.

The absence of specific facts and of a concrete situation or event(s) also complicates the determination of which environmental law the Party is failing to effectively enforce. In the absence of a factual basis supporting the assertion that the United States is failing to effectively enforce, the Secretariat is not provided with sufficient information to allow it to review the submission.⁴ NAAEC at Article 14:1(a).

2. The Secretariat also considers that “failures” to enforce are best construed to apply to the actions or omissions of the agencies and officials charged with enforcing environmental law, and not to the House of Representatives, Senate and President of the United States acting collectively by enacting legislation.
3. Despite the “suspension” of administrative and judicial review, the relevant agency, department or official may still vigorously enforce the environmental laws in question.
4. Had specific facts been alleged, the Secretariat’s determination of this matter might have been the same due to the sufficiency clause contained in the Logging Rider. Sufficiency clauses are not without precedent in appropriations bills. See e.g.: Pub. L. 101-121 (103 Stat. 701) at s. 1351(b)(6)(A) and, Pub. L. 100-446 (102 Stat. 1774) at s. 321. The Secretariat is aware of no successful challenges to the constitutionality of the Logging Rider under consideration. To the contrary, courts appear to give full effect to the language of the Rider. See e.g. Northwest Forest Resources Council v. Glickman, DC Oregon [No. 95-6244-HO, 9/13/95].

Developing a Factual Record

An alternative but related consideration for declining to consider further this matter stems from examining the potential outcome of the Articles 14 and 15 process in this particular submission—the development of a factual record—and how that process might promote the goals of NAAEC.

A factual record may assist the public and Parties in assessing the effectiveness of specified enforcement practices. This is especially true, though perhaps not exclusively so, in matters where the facts are inchoate, disputed or where the facts simply have not been put before the public. To the extent possible, the record will center on those facts which appear more or less likely to indicate that an alleged “failure” to enforce took place. Depending on the circumstances, the information may focus on particular actions, omissions or events casting light on the alleged “failure”. The preparation of a factual record may also at times include consideration of the impacts and effects of an alleged failure to enforce where developing such information would assist in determining whether a failure to enforce actually occurred, or would otherwise promote the objectives of the Agreement.⁵

In the present matter, developing facts pertaining directly to the alleged failure to enforce environmental law could do little more than restate the language of the Logging Rider, since presumably the failure is manifest in the words of the legislation. Instead, the development of a factual record in the pending matter would necessarily consider the actual and potential impacts and effects of a new law. Essentially, the Secretariat would then record facts relating to the implementation of that new law.

That evaluation, however, is an intrinsic function of the legislative process. In this regard, the Secretariat is reluctant to recommend to Council that the Commission for Environmental Cooperation become a secondary forum for legislative debate of one of its Parties. Indeed, the elected representatives of both Houses of Congress, the President of the United States, and an important representation of the mass media have recently considered to some degree the possible impacts of the Logging Rider.⁶ The reprise of this debate almost immediately following the enactment of the law would contribute marginally, if at all, to the overall goals of the Agreement.

5. For example, in a submission alleging failure to enforce laws prohibiting the discharge of pollutants to a body of water, assessing the aquatic health of receiving waters or the level of specific contaminants in such waters may shed light on the nature of the discharges under consideration.
6. See e.g.: U.S. Newswire, May 18, 1995, “Green Group Leaders Praise President Clintons Plan to Veto Anti-Environmental Rescissions Bill”; The New York Times, May 21, 1995, “A Presidential Contract”; International Herald Tribune, May 22, 1995, “Clinton Can Start to Fight”; The Christian Science Monitor, July 11, 1995, “Murrelets Are Just Sounding the Alarm Bell”; The Santa Fe New Mexican, July 25, 1995, “Bill Could Increase Logging 20 Percent”; Greenwire, August 11, 1995, “Salvage Logging: Enviro File Suit Contesting Rider Sale”, BNA National Environment Daily, August 14, 1995, “Suit Filed by Coalition against Logging Green Timber under Rescissions Bill Rider”.

VI. CONCLUSION

For the foregoing reasons, the Secretariat will take no further action in connection with submission No. SEM-95-002. Accordingly, in the absence of new or supplemental information provided within 30 days of receipt of this notice, the Secretariat concludes its consideration of this matter.⁷ The Secretariat will consider separately the Submitters request for the preparation of an Article 13 report on the matter.

Dated this 8th day of December, 1995.

Commission for Environmental Cooperation - Secretariat

per :

Victor Lichtinger
Executive Director

7. Guidelines at 8.1.

**A PETITION PURSUANT TO ARTICLE 14 OF THE NORTH AMERICAN AGREEMENT
ON ENVIRONMENTAL COOPERATION SUBMITTED TO THE SECRETARIAT OF
THE COMMISSION FOR ENVIRONMENTAL COOPERATION ON BEHALF OF:**

**BIODIVERSITY LEGAL FOUNDATION; CONSEJO ASESOR SIERRA MADRE;
FOREST GUARDIANS; GREATER GILA BIODIVERSITY PROJECT; AND SOUTH-
WEST CENTER FOR BIOLOGICAL DIVERSITY**

INTRODUCTION

Pursuant to Article 14 of the North American Agreement on Environmental Cooperation (NAAEC), the Biodiversity Legal Foundation, Consejo Asesor Sierra Madre, Forest Guardians, Greater Gila Biodiversity Project, and Southwest Center for Biological Diversity (collectively "Petitioners") hereby petition the Secretariat to determine that the United States is failing to effectively enforce its Endangered Species Act of 1973 ("ESA"). 16 U.S.C. 1531 - 1544.¹

STATEMENT OF FACTS

On April 10, 1995, President William Clinton signed into law the "Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995." Public Law 104-6. Exhibit 1. Buried within this bill was a completely unrelated amendment, denominated as a budgetary rescission, which has become known as the "Hutchinson Rider" or "ESA Moratorium." 109 Stat 73, 86 (Exhibit 1 at 13). The Hutchinson Rider is named for its author, Senator Kay Bailey Hutchison (R.Tex.).

The United States Fish and Wildlife Service (FWS), the federal agency charged with enforcing the ESA, has determined the Hutchinson Rider affects its enforcement of the ESA's listing provisions in two ways: First, it prohibits the Service [FWS] from making "final determinations" for species or critical habitat designations for the remainder of Fiscal Year 1995. Second, the bill rescind[s] \$1.5 million from the budget allocated to the listing program and prohibit[s] the Service from compensating for the loss from other programs.

Memorandum from FWS Director Mollie Beattie to FWS Regional Directors, April 21, 1995. Exhibit 2. FWS further interpreted the Hutchinson Rider "to mean that [FWS] cannot publish final rules, including emergency rules, to list species or designate critical habitat under section 4(a)(1) or 4(a)(3) [16 U.S.C. 1533(a)(1) & (a)(3)] of the Endangered Species Act." Id. Exhibit 2. As a result, FWS has completely halted its enforcement of the Section 4 of the ESA.

1. All citations in this Petition follow standard American legal practice. If the Secretariat does not have access to any of the cited materials, we would be happy to provide copies.

The ESA is this Continent's, if not the world's, most important and successful environmental law. As described by the United States Supreme Court, the ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978).² Section 4 of the ESA is vital to its effectiveness.

The ESA protects biodiversity by conserving endangered and threatened species and the "ecosystems upon which endangered species and threatened species depend." 16 U.S.C. 1531. However, before the ESA can protect a species or its "critical habitat," that species must be listed as "threatened" or as "endangered" under Section 4. 16 U.S.C. 1533; see 16 U.S.C. 1532(5),(6) & (20)(definitions of "critical habitat," "endangered species," and "threatened species"). Section 4's listing process is the first and most important step in the ESA's system of species protection.

Under U.S. law, any interested person (or group, such as the Petitioners) can initiate the ESA's listing process by submitting a petition to the United States Secretary of the Interior.³ 16 U.S.C. 1533; 5 U.S.C. 533. The Petitioners have frequently availed themselves of this process. Petitioners have filed many successful ESA listing petitions which have forced the Secretary of the Interior to list, and thus protect, several species of plants and animals. Petitioners have also filed successful petitions forcing the Secretary to designate critical habitat for endangered and threatened species. The Hutchison Rider has halted this process and deprived the Petitioners of their ability to protect endangered species and their habitats. Accordingly, neither FWS, nor the Petitioners, presently have the ability to enforce Section 4 of the ESA. 16 U.S.C. 1533.

For purposes of this Petition to the Secretariat, it is vital to note that the Hutchison Rider does not amend the ESA. Rather, it simply suspends the enforcement of Section 4. The United States District Court for the District of Arizona has explicitly agreed with the Petitioners on this issue. See *Silver, et al. v. Babbitt, et al.*, Civ. No. 94-337 PHX CAM (May 10, 1995)("Plaintiff correctly replies that there is no substantive amendment in the ESA by the [Hutchinson] rider."). A copy of this opinion is attached as Exhibit 3. The quoted statement appears at page 7 of the Court's order. The "Plaintiff" referred to by the Court includes all of the present Petitioners save Consejo Asesor Sierra Madre.

2. See also Secretary of Interior Bruce Babbitt, *The Endangered Species Act and Takings: A Call for Innovation Within the Terms of the Act*, 24 ENVTL. L. 355, 356 (1994)(The ESA is "the most innovative, wide-reaching, and successful law ... enacted in the last quarter century.").
3. After receipt of such a petition, the U.S. Secretary of the Interior must make a finding whether the petition "presents substantial scientific or commercial information indicating that the petitioned action may be warranted." 16 U.S.C. 1533(b)(3)(A). This determination must be made, to the maximum extent practicable, within 90 days of receiving the petition. *Id.* If the Secretary determines that the petitioned action "may be warranted," he must then make a second determination within twelve months of receiving the petition, finding the petitioned action either warranted, not warranted, or warranted but precluded. 16 U.S.C. 1533(b)(3)(B). If the Secretary determines the petitioned action is warranted, he must then undertake procedures to finalize the petitioned action within less than eighteen months. 16 U.S.C. 1533(b)(6).

It is equally important, for purposes of this Petition, to note that the United States has suspended its enforcement of Section 4 of the ESA for economic reasons - including consideration of the United State's ability to attract and retain economic investments and to export commodities (principally timber and farm products) at the lowest possible cost. In the words of Rider's author, Senator Hutchison, the Rider declared a "time-out" on the enforcement of the ESA's listing provisions so that "silly things will not happen." 141 Cong. Rec. S4028, S4034 (daily ed. March 16, 1995). A copy of this portion of the Congressional Record is attached as Exhibit 4.

The "silly things" to which Ms. Hutchinson referred are the allegedly harmful economic impacts of the ESA. As Ms. Hutchinson put it, the Rider was designed to ensure that: bait fish and golden checked warblers and jaguars and salmon that are running the wrong way in a stream will not take precedence over the rights of farmers and ranchers who have toiled on their land and who are working for a living and providing the food for citizens to eat in this country. *Id.* (Exhibit 4).

Other Senators' who spoke in favor of the Rider made it equally clear that they objected to the economic effects of the ESA. See *Id.* at 4029 (Exhibit 4), Statement of Senator Gorton ("A mere finding of threatened or endangered status for any species subject to listing automatically results in restrictions of the use of property, restriction in economic activity, and in cultural, social and community disruptions."); *Id.* at 4031 (Exhibit 4), Statement of Senator Craig ("We have heard rhetoric on this floor for the last 5 years that the Endangered Species Act is not working. It is costing hundreds of millions of dollars of lost economy and lost jobs, and we have done nothing about it."); *Id.* at S4033 (Exhibit 4), Statement of Senator Domenici ("I could speak at great length about how listings have decimated the timber industries in small towns such as Reserve, NM [New Mexico]. I suspect that most of the Members of this Chamber have been confronted with similar stories.").

In sum, the United States has ceased to effectively enforce Section 4 of the ESA, without amending the underlying statute. The quoted statements from the author of the Hutchinson Rider and other Senators who supported this bill make it abundantly clear that the United States decided to halt enforcement of the ESA because of its allegedly harmful economic impacts. The economic activities identified by the Senators who supported the Hutchinson Rider: farming; ranching; logging; fishing; and hydropower projects (See Exhibit 4) are closely tied to trade among the Parties to the North American Free Trade Agreement (NAFTA). As is discussed in detail below, the United States cannot simply halt enforcement of the ESA to benefit these economic activities without violating its obligations under the NAAEC.

ARGUMENT

Petitioners argument is quite simple. Article 5(1) of the NAAEC provides that "each Party shall effectively enforce its environmental laws and regulations through appropriate governmental action...." The applicable definition of an "environmental law" specifically includes laws designed to protect "wild flora or fauna, including endangered species, [and] their habitat." NAAEC, Art. 45(2)(a)(iii). The ESA falls within this definition. Accordingly, the United States must effectively enforce the ESA under the NAAEC.

Effective enforcement is not defined; however, the NAAEC does provide that: A Party has not failed to "effectively enforce its environmental law" or to comply with Article 5(1) in a particular case where the action or inaction in question by agencies or officials of the Party: (a) reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters; or (b) results from bona fide decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities. NAAEC Art. 45(1).

This is not such a case. The United States has exercised no "discretion in respect of investigatory, prosecutorial, regulatory or compliance matters." The Hutchinson Rider is a blanket prohibition on all new listings of endangered and threatened species and designations of critical habitat for these species. It does not attempt to argue that some designations are worthy and others are not. See Exhibits 1 & 2.

Nor, is the Hutchinson Rider the result of a "bona fide decision to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities." The Rider simply removes \$1.5 million from FWS's budget allocated to the listing program. Additionally, the Rider prohibits FWS from spending any of its remaining funds on listing decisions. See Exhibits 1 & 2. Indeed, rather than a bona fide decision to allocate resources to environmental matters of higher priority, the budget rescission is a punitive strike at FWS - to keep it from doing its job. Again, in the words of Senator Hutchinson: "essentially, today what we are doing is saying, no longer are we going to fully fund the implementation of this act [the ESA]...." 141 Cong. Rec. S4028, S4033 (daily ed. March 16, 1995)(attached as Exhibit 4).

Accordingly, because the United States has neither exercised discretion with respect to the enforcement of the ESA, nor made a decision to allocate its enforcement resources to environmental matters of higher priority, the United States is failing to effectively enforce Section 4 of the ESA within the meaning of Article 5(1) of the NAAEC.

While it is true that the NAAEC does "[recognize] the right of each Party to establish its own levels of domestic environmental protection and environmental development polices and priorities, and to adopt or modify accordingly its environmental laws and regulations..." NAAEC, Art. 3 (emphasis added), this is not what the United States has done. Rather, the Hutchinson Rider simply suspends enforcement of the listing provisions of the ESA. It does not amend or modify the ESA. See *supra*, *Silver v. Babbitt*, Civ. No. 94-337 PHX CAM (May 10, 1995)("there is no substantive amendment in the ESA by the rider")(Exhibit 3 at 7). That a legislative body, in this case Congress, has chosen to suspend enforcement of the ESA makes no difference. If Congress wanted, it could amend the ESA. This has not happened. Instead, Congress buried its suspension of the ESA in a Defense Appropriations Bill that President Clinton was forced to sign for other reasons. See Press Release issued by the White House on April 10, 1995. A copy of this press release is attached as Exhibit 5. The Secretariat should not allow this suspension of environmental law by stealth.

If Congress wishes to amend or modify the ESA it can do so directly and with appropriate debate. What Congress, or any other branch of the government, cannot do - without

violating Article 5(1) of the NAAEC - is to refuse to enforce an existing environmental law. This is particularly true where, as in the present case, Congress suspended enforcement of the ESA because of its perceived harmful economic impacts. Congress has suspended enforcement of an environmental law to achieve an economic advantage - an advantage which will presumably benefit the United States at the expense of its NAFTA partners. This is exactly what the NAAEC is supposed to prohibit. The Secretariat cannot endorse such conduct.

Accordingly, unless the NAAEC prohibits the suspension of enforcement of environmental laws, by any branch of government, the NAAEC is useless. Perhaps the principal objective of the NAAEC is to "enhance compliance with, and enforcement of, environmental laws and regulations." NAAEC, Article 1(g). At least, as NAFTA was debated in the United States over two years ago, the NAAEC's petition process (Article 14) was frequently cited by NAFTA proponents as a new tool to ensure the effective enforcement of environmental laws - with Mexico being frequently singled out as the enforcement target.⁴ Ironically, it is now the United States -not Mexico-that has halted enforcement of perhaps this Continent's most important and successful environmental law. This Petition squarely raises the issue of whether or not the NAAEC prohibits a NAFTA party from refusing to enforce its environmental laws to gain an economic advantage. The ESA has not been amended or modified. Congress has simply suspended its enforcement. If Article 5(1) of the NAAEC does not address such conduct, it is ineffective, and the Petitioners can expect to see many more such legislative "suspensions" of the enforcement of environmental law.

PETITIONERS HAVE SATISFIED ALL OF THE REQUIREMENTS TO FILE THIS PETITION

Article 14 of the NAAEC provides that "[t]he Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law..." NAAEC, Art. 14(1). Petitioners bring their Petition pursuant to this provision.⁵

4. See e.g. *New York Times*, NAFTA'S TRUE IMPORTANCE, November 14, 1993 ("Most major environmental groups in the U.S. support Nafta. And for good reason. It explicitly protects U.S. environmental regulations and builds in a mechanism for sanctions if Mexico fails to enforce its own environmental laws, which are already strict."); *New York Times*, NAFTA AND THE ENVIRONMENT, September 27, 1993 ("Although Mexico has strong environmental laws, it rarely enforces them. ... However, Nafta explicitly binds all three parties to the agreement from creating 'pollution havens' by waiving or ignoring environmental laws for the purpose of seeking investment. The trick is to insure that this pledge is honored. To that end, the side agreement sets up a three-nation mechanism, the Commission on Environmental Cooperation. Any country (or private group like the Sierra Club), believing that a nation is not enforcing its laws, can complain. If the commission finds a pattern of violations, it can impose fines of up to \$20 million on the offending country and, if that doesn't work, invoke trade sanctions."). Copies of these two articles are attached as Exhibit 6.
5. As described below, all of the Petitioners qualify as "non-governmental organizations" under the NAAEC. See NAAEC, Art. 45(1) ("non-governmental organization" means any scientific, professional, business, non-profit, or public interest organization or association which is neither affiliated with, nor under the direction of, a government.").

I. THIS PETITION SATISFIES ALL OF THE CRITERIA OF ARTICLE 14(1) OF THE NAAEC.

This Petition satisfies all of the requirements of Article 14(1) of the NAAEC: Article 14(1)(a) - The Petition is written in an acceptable language (English). See NAAEC Art. 19.

Article 14(1)(b) - The Petitioners are the: Biodiversity Legal Foundation, Consejo Asesor Sierra Madre, Forest Guardians, Greater Gila Biodiversity Project, and Southwest Center for Biological Diversity. The Petitioners and their interests in this matter are described below.

Petitioner, BIODIVERSITY LEGAL FOUNDATION (BLF) is an American non-profit corporation based in Boulder, Colorado. It uses research, education, and the law to protect the biodiversity of North America. The Biodiversity Legal Foundation (BLF) is an unquestioned leader in efforts to protect threatened and endangered species and their habitats. BLF has successfully filed numerous listing petitions under Section 4 of the ESA. These petitions have resulted in the extension of ESA protection to many species and their habitats. BLF has several such petitions currently pending. These petitions are directly thwarted by the Hutchinson Rider. Indeed, BLF was a plaintiff in the lawsuit which resulted in the "Fund for Animals" settlement agreement that requires FWS to make expeditious progress towards the listing of many species. This settlement agreement is jeopardized by the Hutchinson Rider.⁶ BLF and its staff derive scientific, aesthetic, and conservation benefits from the existence in the wild of the threatened and endangered species. BLF and its staff have a substantial interest in this matter and are adversely affected and aggrieved by the United States' refusal to enforce Section 4 of the ESA.

Petitioner, CONSEJO ASESOR SIERRA MADRE, A.C. (CASMAC) is a Mexican environmental group. Its mission is to provide technical and legal services principally to Tarahumara and Tepehuan Indian communities in the Sierra Madre region of Mexico. CASMAC has entered into a cross-border partnership with Petitioner, FOREST GUARDIANS, of the United States, to build sustainable communities in the Sierra Madre Occidental of Chihuahua, Mexico. This partnership is the only significant conservation effort underway in Chihuahua. A central purpose of the partnership is to protect threatened and endangered species, principally from logging operations. Many of the threatened and endangered species of concern to CASMAC, such as the Mexican Spotted Owl, are cross-boarder species existing in the United States as well as Mexico. CASMAC and its staff derive scientific, aesthetic, and conservation benefits from the existence in the wild of threatened and endangered species. CASMAC and its staff have a substantial interest in protecting these species and are adversely affected and aggrieved by the United States' refusal to enforce Section 4 of the ESA.

6. The "Fund for Animals" settlement agreement is discussed in the Memorandum from FWS Director Mollie Beattie to FWS Regional Directors, April 21, 1995 ("[T]he [budget] rescission [of the Hutchinson Rider] significantly hinders, especially in Region 1, the Service's [FWS's] ability to meet the conditions of the settlement.") Exhibit 2.

Petitioner, FOREST GUARDIANS is a New Mexico, non-profit corporation with its principal office in Santa Fe, New Mexico. Forest Guardians has approximately 1,000 members, most of whom reside in New Mexico and Arizona. Members of Forest Guardians frequently use and enjoy forest lands throughout the southwestern United States for recreational, aesthetic, and scientific activities. In pursuit of these activities, Forest Guardians' members regularly observe and enjoy wildlife, including threatened and endangered species, in their native habitats. Forest Guardians and its members are committed to the protection of intact forest ecosystems throughout the Southwest. To achieve this protection, Forest Guardians works through administrative appeals, litigation, and otherwise to assure that all provisions of the Endangered Species Act are upheld. Forest Guardians, its staff, and its members have a substantial interest in this matter and are adversely affected and aggrieved by the United States' refusal to enforce the ESA. Forest Guardians has filed this Petition on behalf of itself and its adversely affected members.

Petitioner, GREATER GILA BIODIVERSITY PROJECT (GGBP) is a New Mexico, non-profit corporation with its principal office in Silver City, New Mexico. GGBP is dedicated to the preservation, protection, and restoration of biodiversity, native species, ecosystems, and public lands in the Greater Gila region. GGBP has members throughout New Mexico and Arizona. GGBP's staff has surveyed, researched, observed, studied, and sought protection for threatened and endangered species and their habitats under Section 4 of the ESA. GGBP and its members use and enjoy lands throughout the Southwest for wildlife observation, research, photography, aesthetic enjoyment, and other recreational, scientific, and educational activities. GGBP, its staff, and its members have a substantial interest in this matter and are adversely affected and aggrieved by the United States' refusal to enforce the ESA. GGBP brings this action on behalf of itself and its adversely affected members.

Petitioner, SOUTHWEST CENTER FOR BIOLOGICAL DIVERSITY (SWCBD) is a New Mexican, non-profit corporation with its principal office in Phoenix, Arizona. SWCBD is dedicated to the preservation, protection, and restoration of biodiversity, native species, ecosystems, and public lands in the Southwest. SWCBD's staff has researched, studied, observed, and sought protection for many threatened and endangered species under Section 4 of the ESA. Its efforts to add species to the threatened and endangered species list have been directly thwarted by the Hutchinson Rider. SWCBD and its staff have a substantial interest in this matter and are adversely affected and aggrieved by the United States' refusal to enforce Section 4 of the ESA.

Article 14(1)(c) - The Petitioners believe this Petition and its Exhibits provide sufficient information to allow the Secretariat to review this submission. However, if the Secretariat would like additional documentary evidence, the Petitioners would be happy to provide whatever information the Secretariat requests.

Article 14(1)(d) - This Petition is aimed solely at promoting enforcement of the ESA. The Petitioners have no ties to any industry and have no commercial interests.

Article 14(1)(e) - On June 9, 1995, Earthlaw, as the legal representative of the Petitioners, sent a letter to President William Clinton, Senate Majority Leader Robert Dole, Speaker of the House Newt Gingrich, Secretary of the Interior Bruce Babbitt, and Director of the Fish

and Wildlife Service Mollie Beattie. The letter, which is attached as Exhibit 7, informed these relevant authorities of the United States that the Petitioners believe the Hutchinson Rider violates the United States' obligations under the NAAEC. The letter further informed these authorities that unless the Petitioners received a response within 10 working days, they would view the failure to respond as a rejection of their concerns. Exhibit 7 at 3. Petitioners have not received and do not expect any response. Article 14(1)(f) - All of the Petitioners save Consejo Asesor Sierra Madre reside in the territory of the United States. Consejo Asesor Sierra Madre resides in the territory of Mexico.

Accordingly, this Petition satisfies all of the criteria of Article 14(1) of the NAAEC.

II. THIS PETITION SATISFIES THE CRITERIA OF ARTICLE 14(2) OF THE NAAEC.

If a Petition meets the criteria of Article 14(1) of the NAAEC, the Secretariat shall determine whether the Petition merits requesting a response from a NAFTA Party. NAAEC Art. 14(2). As is discussed below, this Petition also satisfies the criteria of Article 14(2). Accordingly, the Secretariat should request a response to this Petition from the United States.

Article 14(2)(a) - This Petition alleges substantial harm to the Petitioners. See the description of the Petitioners, *supra*, under the discussion of Article 14(1)(b). The Petitioners are vitally interested in the protection of all threatened and endangered species. Obviously, the Hutchinson Rider's suspension of the listing provisions of the ESA harms Petitioners' interests in securing protection for these species under the Act. As discussed above, the ESA offers no protection to a species until it is listed. As Congress itself observed during the debate of the Hutchinson Rider: "There are currently 118 species that have been proposed for ESA listing. Senator Hutchinson's amendment would render us powerless to protect the future of these 118 threatened species." Statement of Senator Lautenberg, 141 Cong. Rec. S4028, S4032 (daily ed. March 16, 1995)(attached as Exhibit 4).

Article 14(2)(b) - The study of this Petition will raise matters whose further study will advance the goals of the NAAEC. This Petition highlights Petitioners' broader concerns with the protection of all endangered species and this Continent's imperiled biodiversity. This is a matter which should be of concern to the Council of the Commission for Environmental Cooperation. See e.g. NAAEC Art. 10(2)(i) & (j).⁷ See also E.O. Wilson, *The Diversity of Life* at 281-305 (1992); Commodity, Amenity and Morality: The Limits of Quantification in Valuing Biodiversity, in *Biodiversity* 200, 203 ("[t]he value of biodiversity is the value of everything that there is.").

Additionally, as discussed above, this Petition squarely raises the issue of whether a legislative suspension of the enforcement of an environmental law to benefit economic

7. NAAEC Art. 10(2)(i) provides, "The Council may consider, and develop recommendations regarding: (i) the conservation and protection of wild flora and fauna and their habitat, and specially protected natural areas." NAAEC Art. 10(2)(j) provides, "The Council may consider, and develop recommendations regarding: (j) the protection of endangered and threatened species."

activities, without an amendment of the environmental law itself, is a failure to effectively enforce the environmental law under Article 5(1) of the NAAEC. This is a very important issue. The United States Congress is currently considering several bills similar to the Hutchinson Rider. These bills would suspend the enforcement of environmental laws, with respect to certain activities such as grazing and logging, without amendment of the environmental laws themselves. The Secretariat can expect to receive more petitions, just like the present one, if these laws are enacted. Accordingly, the Secretariat needs to resolve this issue. If the Secretariat does not find that the protection of Article 5(1) extends to legislative decisions to suspend the enforcement of environmental laws, then the NAAEC will become ineffectual: Industries which wish to avoid compliance with environmental laws will simply lobby the legislative body of their respective countries to grant them an exemption. The environmental laws will remain on the books, but will not be enforced. As discussed above, this is the exactly the situation the NAAEC is supposed to prevent.

Finally, Petitioners point out that even though by its terms, the Hutchinson Rider only suspends enforcement of the ESA's listing provisions through the government's current fiscal year - through September 30, 1995 - Congress is currently considering an extension of the Rider. More importantly, even if the Hutchinson Rider is only a "time-out" in the enforcement of the ESA (a "time-out" which could expire before the Council is able to rule on this Petition) the Secretariat and the Council should still resolve this issue. Many forests can be felled during a six month suspension of environmental laws. In the present case, species denied the protection of the ESA may go extinct before the "time-out" is lifted. Under U.S. law, this is known as an issue "capable of repetition yet evading review." U.S. courts have long held that such issues should still be resolved to avoid their "repetition." Accordingly, the Secretariat should not hesitate to determine that resolution of this Petition will advance the goals of the NAAEC.

Article 14(2)(c) - There are no private remedies available to the Petitioners under U.S. law. As detailed above, in the discussion of Article 14(1)(e), the Petitioners have presented their concerns to the relevant authorities of the United States and have received no redress.

Article 14(2)(d) - This submission is not drawn exclusively from mass media reports.

Accordingly, the Secretariat should easily determine that this Petition satisfies the requirements of Article 14(2). The Secretariat should request a response to this Petition from the United States under Article 14(3). As detailed above in Petitioners' Argument, the United States has no credible defense. This matter is not the subject of any pending judicial or administrative proceeding. See Article 14(3)(a). Nor, has this matter previously been the subject of such a proceeding. See Article 14(3)(b)(i). Finally, as mentioned above under the discussion of Article 14(2)(c), Petitioners have no private remedies available. In sum, the Secretariat should request the Council allow it to develop a factual record for this Petition and to present the factual record to the Council for a vote.

CONCLUSION

As of today, the Commission for Environmental Cooperation and the Secretariat set up by the NAAEC are organizations full of promise. This is the first petition ever filed

under Article 14. It raises a very important, and what will undoubtedly be a recurring, issue: Whether a legislative suspension of the enforcement of an environmental law to benefit economic activities, without an amendment of the environmental law itself, is a failure to effectively enforce the environmental law under Article 5(1) of the NAAEC. Moreover, the subject matter of the this Petition could not be more important. Once an endangered species is lost, it is lost for good. As expressed by Aldo Leopold, the father of endangered species protection: The last word in ignorance is the man who says of an animal or plant: "What good is it?" If the land mechanism as a whole is good, then every part is good, whether we understand it or not. If the biota, in the course of aeons, has built something we like but do not understand, then who but a fool would discard seemingly useless parts?

Aldo Leopold, Round River, in *A Sand County Almanac* 190 (1970). Again, as described by the United States Supreme Court, the ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). The United States holds out the ESA as a model to the rest of the world. The Secretariat should not allow the United States to gut the enforcement provisions of the ESA through an obscure budgetary rescission attached to a Supplemental Defense Appropriations Bill. To do so would make a mockery of the ESA and the NAAEC's promise.

The Petitioners would be happy to discuss any aspect of this Petition with the Secretariat at its earliest convenience. Additionally, the Petitioners stand ready to submit any supplemental information the Secretariat should desire to help it in its consideration of this Petition.

Dated:

Respectfully submitted,

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