

Secretariat of the Commission for Environmental Cooperation
Secretariat determination in accordance with Articles 24.27(2) and (3) of the
United States-Mexico-Canada Agreement

Submitter: [Confidential name pursuant to ECA Article 16(a)]
Party: Canada
Date of original submission: 8 February 2021
Date of revised submission: 29 March 2021
Date of the determination: 27 April 2021
Submission no.: SEM-21-001 (*Fairview Terminal*)

I. INTRODUCTION

1. On 1 July 2020, the Canada–United States–Mexico Agreement (CUSMA) and the Agreement on Environmental Cooperation (“ECA”) entered into force. After this date, the Submissions on Enforcement Matters (SEM) process originally established by Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC) is governed by Articles 24.27 and 24.28 of the CUSMA. The Secretariat of the Commission for Environmental Cooperation (“CEC Secretariat”) remains responsible for implementing the SEM process, as stipulated in the ECA.¹
2. Articles 24.27 and 24.28 of the CUSMA provide a process for any national of a Party or entity organized under the laws of a Party to file a submission asserting that a Party to the CUSMA is failing to effectively enforce its environmental laws. The CEC Secretariat initially reviews submissions based on the requirements and criteria set out in CUSMA Article 24.27(1) and (2). Where the Secretariat finds that a submission meets these requirements and criteria, it then determines, in accordance with the criteria of Article 24.27(3), whether the submission merits a response from the Party in question. In light of the Party’s response, the Secretariat then determines whether the matter warrants the preparation of a factual record and, if so, it so informs the CEC Council and the Environment

¹ The Commission for Environmental Cooperation was created in 1994 under the North American Agreement on Environmental Cooperation (NAAEC), signed by Canada, the United States, and Mexico (the “Parties”). Pursuant to Article 2(3) of the *Agreement on Environmental Cooperation among the Governments of the United States of America, the United Mexican States, and Canada* (ECA), the Commission for Environmental Cooperation (CEC) “will continue to operate under the modalities in place as of entry into force of [the ECA].” The constitutive bodies of the CEC are the Council, the Secretariat, and the Joint Public Advisory Committee (JPAC).

Committee,² providing its reasons as prescribed by CUSMA Article 24.28(1); otherwise, it terminates the review of the submission.³

3. On 8 February 2021, a person who requested confidentiality pursuant to ECA Article 16(a) filed a submission with the CEC Secretariat (“Submitter”), asserting that Canada is failing to effectively enforce Section 125 of the Canadian Environmental Assessment Act, 2012 (CEAA or “the Act”) in relation to the Fairview Terminal Phase II Expansion Project.⁴
4. On 9 March 2021, the Secretariat found that the submission SEM-21-001 (*Fairview Terminal*) did not meet all of the admissibility requirements of CUSMA Article 24.27 because the Submitter did not provide sufficient contact and nationality information to determine whether the Submitter was a “person of a Party.” The Submitter did not identify the legal provisions that the competent authorities are allegedly failing to enforce, nor include information as to how the matter was communicated to the competent authorities of the Party.⁵ The Secretariat notified the Submitter of its determination and the opportunity to file a revised submission within 60 days from the date of the determination.⁶
5. The Submitter filed a revised submission on 29 March 2021.⁷
6. The Secretariat finds that the revised submission meets the admissibility requirements in CUSMA Article 24.27 and that, pursuant to Article 24.27(3), it merits a response from the government of Canada in regard to the Submitter’s assertions. The Secretariat’s reasoning is set out below.

² The Environment Committee is established by CUSMA Article 24.26(2) and its role is to “oversee the implementation” of CUSMA Chapter 24.

³ More details on the various stages of the submissions on enforcement matters process, the public registry of submissions, and previous Secretariat determinations and factual records can be found on the CEC website at <<http://www.cec.org/submissions-on-enforcement/>>.

⁴ SEM-21-001 (*Fairview Terminal*), Submission pursuant to CUSMA Article 24.27(1) (8 February 2021), available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/fairview-terminal/>>.

⁵ SEM-21-001 (*Fairview Terminal*), Determination under Article 24.27(2) and Article 24.27(3) (9 March 2021), available at <http://www.cec.org/wp-content/uploads/wpallimport/files/21-1-det_en.pdf>.

⁶ The Secretariat is guided by the procedures set out in the *Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation* insofar as the guidelines are consistent with the provisions of the ECA and CUSMA. The Secretariat will also take into consideration the review criteria set out in previous determinations and notifications issued in accordance with NAAEC Articles 14 and 15 and available in the CEC Registry of Submissions at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/>>. Proceeding in this way will help to ensure the uniform implementation of the SEM mechanism. SEM-97-001 (*BC Hydro*), Article 15(1) Notification (27 April 1998), online at <www.cec.org/wp-content/uploads/wpallimport/files/97-1-adv-e.pdf> (“At a minimum, references to previous determinations will assist in ensuring that the Secretariat consistently applies the provisions of the NAAEC. Such a contextual approach to a treaty is suggested by general canons of statutory interpretation as well as Articles 31 and 32 of the Vienna Convention on the Law of Treaties.”).

⁷ SEM-21-001 (*Fairview Terminal*), Revised Submission pursuant to CUSMA Article 24.27(1) (29 March 2021), [Revised Submission], available at <http://www.cec.org/wp-content/uploads/wpallimport/files/21-1-rsub_public_en.pdf>.

II. ANALYSIS

7. Article 24.27(1) allows “[a]ny person of a Party” to file a submission with the CEC Secretariat “asserting that a Party is failing to effectively enforce its environmental laws.” The Secretariat bears in mind that the requirements of CUSMA Articles 24.27(1), (2), and (3) are not intended to be construed as an insurmountable procedural screening device, and they must therefore be given a broad interpretation consistent with CUSMA Chapter 24.

A. Article 24.27(1)

8. Under Article 24.27(1), the CEC Secretariat first determines whether the Submitter is a “person of a Party” under the CUSMA.
9. CUSMA Article 1.5 provides a definition: “**person of a Party** means a national of a Party or an enterprise of a Party;”
10. The Submitter has requested confidentiality pursuant to Article 16(1)(a) of the ECA.
11. The Submitter has provided an email address, name, mailing address, phone number, and nationality in transmitting the revised submission. Based on this information, the Secretariat determines that the Submitter is a “person of a Party” within the meaning of the CUSMA.
12. The Submitter’s contact information and nationality will be maintained in confidence according to Article 16(1)(a) of the ECA.

B. Environmental law

13. The next criterion in Article 24.27(1) is whether the revised submission identifies an “environmental law” within the meaning of the CUSMA.
14. CUSMA Article 24.1 provides the following definition:

environmental law means a statute or regulation of a Party, or provision thereof, including any that implements the Party’s obligations under a multilateral environmental agreement, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through:

- (a) the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;
- (b) the control of environmentally hazardous or toxic chemicals, substances, materials, or wastes, and the dissemination of information related thereto; or
- (c) the protection or conservation of wild flora or fauna,¹ including endangered species, their habitat, and specially protected natural areas,²

but does not include a statute or regulation, or provision thereof, directly related to worker safety or health, nor any statute or regulation, or provision thereof, the primary purpose of which is managing the subsistence or aboriginal harvesting of natural resources; and

statute or regulation means: (a) for Canada, an Act of the Parliament of Canada or regulation made under an Act of the Parliament of Canada that is enforceable by action of the central level of government;

¹ The Parties recognize that “protection or conservation” may include the protection or conservation of biological diversity.

² For the purposes of this Chapter, the term “specially protected natural areas” means those areas as defined by the Party in its law.⁸

15. The Canadian Environmental Assessment Act, 2012 (CEAA or “the Act”)⁹ is an act of the Parliament of Canada enforceable by the central government. The Impact Assessment Agency of Canada, formerly known as the Canadian Environmental Assessment Agency, is responsible for administering the Act as a division of Environment and Climate Change Canada, reporting to the federal Minister of the Environment.

16. The Act has a primary purpose of protecting the environment. The purposes of the Act, in part, are “(a) to protect the components of the environment that are within the legislative authority of Parliament from significant adverse environmental effects caused by a designated project; (b) to ensure that designated projects...are considered in a careful and precautionary manner to avoid significant adverse environmental effects.”¹⁰ The revised submission cites Sections 52, 53, and 125 of the CEAA. The Secretariat considers whether other provisions cited by the Submitter qualify as environmental law.

17. In the revised submission, the Submitter notes that the comprehensive study was completed pursuant to section 125 of the Act,¹¹ a transitional provision for completion of comprehensive studies commenced under the former Canadian Environmental Assessment Act S.C. 1992.¹² The Submitter asserts that the decision to approve the project was made by the Honourable Peter Kent, then-Minister of the Environment according to sections 52 and 53 of the CEAA.¹³ Section 52(1) of the Act states that the decision maker “must decide if, taking into account the implementation of any mitigation measures that the decision maker considers appropriate, the designated project is likely to cause significant adverse environmental effects...” referred to in either subsection 5(1) or 5(2).¹⁴ Sections 53(1) and 53(2) of the Act state that “If the decision maker decides...that the designated project is not likely to cause significant adverse environmental effects [either referred to in subsection 5(1)

⁸ These two footnotes (marked as 1 and 2) support, respectively, the two marked phrases in (c) and appear in CUSMA Article 24.1, page 24-1 of the CUSMA text.

⁹ *Canadian Environmental Assessment Act*, S.C. 2012, c 19, s 52, [*Canadian Environmental Assessment Act, 2012*], available at: <<https://canlii.ca/t/52zzf>> (consulted on 24 February 2021).

¹⁰ *Canadian Environmental Assessment Act, 2012*, s. 4.

¹¹ *Canadian Environmental Assessment Act, 2012*, s. 125.

¹² *Canadian Environmental Assessment Act S.C. 1992*. Available at: <<https://laws-lois.justice.gc.ca/eng/acts/c-15.2/20100712/P1TT3xt3.html>>.

¹³ Revised Submission at page 2, lines 15-17.

¹⁴ *Canadian Environmental Assessment Act, 2012*, s. 52(1).

or 5(2)] the decision maker must establish the conditions in relation to the environmental effects referred to in that subsection with which the proponent of the designated project must comply.”¹⁵ These conditions “must include (a) the implementation of the mitigation measures that were taken into account in making the decisions under subsection 52(1); and (b) the implementation of a follow-up program”¹⁶ per Section 53(4), as noted by the Submitter.

18. In other words, the Act requires the decision maker to decide if a project is “likely to cause significant adverse environmental effects” if executed with appropriate mitigation measures. If the decision maker decides that the project is *not* likely to cause significant adverse environmental effects with appropriate mitigation measures, the decision maker must establish the implementation of those mitigation measures and a follow-up program that the project proponent “must comply” with as part of the project’s approval.
19. The Secretariat finds that Sections 52 and 53 of the CEAA qualify as “environmental law” because they are aimed at the protection of the environment by setting out the decision-making process for the conditional approval of projects that are not likely to cause significant adverse environmental effects with mandatory mitigation measures and follow-up programs. Section 125 also qualifies as “environmental law” because it is aimed at the protection of the environment by establishing requirements for comprehensive studies submitted under the former Act. Section 125 provides continuity between the two laws and guides this determination by contextualizing the comprehensive study completed for this project.
20. The Submitter alleges that the Government of Canada has failed to uphold its obligations under sections 52 and 53 of the CEAA. Specifically, that the Government of Canada has failed to implement the mitigation measures and follow-up program in the Comprehensive Study Report for the Environmental Assessment of the Fairview Terminal Phase II Expansion Project undertaken by the Prince Rupert Port Authority and the Canadian National Railway Ltd. These mitigation measures and the follow-up program were conditions for approval of the project, making it not likely to cause significant adverse environmental effects.¹⁷ The proponents of the project were required to comply with these conditions.
21. At issue are the roads, sidings, and wye which were meant to mitigate noise, vibration, and air emissions near the rail line. These mitigation measures are asserted to have been the basis for the Environmental Assessment Decision Statement approving the expanded railway operations.¹⁸ Yet, the revised submission alleges that these mitigation measures have not

¹⁵ *Canadian Environmental Assessment Act, 2012*, s. 53(1)-(2).

¹⁶ *Canadian Environmental Assessment Act, 2012*, s. 53(4).

¹⁷ Fisheries and Oceans Canada Environment Canada and Canadian Transportation Agency, *Comprehensive Study Report, Fairview Terminal Phase II Expansion Project*, Table 9-1, page 179-188 (September 2012), available at: <[https://www.ceaa-acee.gc.ca/050/documents_staticpost/37956/CSR - Fairview Terminal Phase II Expansion-eng.pdf](https://www.ceaa-acee.gc.ca/050/documents_staticpost/37956/CSR_-_Fairview_Terminal_Phase_II_Expansion-eng.pdf)>.

¹⁸ Revised Submission at page 2, line 17 (referencing the Environmental Assessment Decision Statement by the Honourable Peter Kent, Minister of the Environment on 25 Jan. 25, 2013, available at: <<https://www.ceaa-acee.gc.ca/050/evaluations/document/85082?culture=en-CA>>).

been constructed even as the expansion project was completed and is in operation. The Submitter asserts that the lack of implementation of these mitigation measures has resulted in higher air emissions and noise levels in the local community.

22. The revised submission meets the requirement to allege that a Party is “failing to effectively enforce” environmental laws by setting out how the lack of implementation of the mitigation measures and the follow-up program by Canada demonstrates a failure to effectively enforce environmental laws.

C. Article 24.27(2) Requirements

23. In its determination dated 9 March 2021, the Secretariat found that the submission met the requirements in Article 24.27(2) (a) and (d) and now proceeds to reconsider the remaining requirements in light of the revised submission:

b. clearly identifies the person making the submission;

24. The Secretariat finds that the revised submission meets CUSMA Article 24.27(2)(b), since the revised submission clearly identifies the person making the submission to the CEC Secretariat.

c. provides sufficient information to allow for the review of the submission, including any documentary evidence on which the submission may be based and identification of the environmental law of which the failure to enforce is asserted;

25. The Secretariat finds that the revised submission meets CUSMA Article 24.27(2)(c). As explained in paragraphs 17-21, the revised submission cites relevant sections of environmental law to allege that the mitigation measures and follow-up program are binding obligations under the CEEA as conditions of the approval of the project.

26. The revised submission includes a link to the Canadian Impact Assessment Registry’s page on the Fairview Terminal Phase II Expansion Project, where there are links to 18 documents related to the project, including news releases, a Mitigation Strategy Report, the Comprehensive Study Report, and the Environmental Assessment Decision Statement, among other documents. The revised submission also includes several figures: maps and satellite views of the project area, outlining the project footprint and showing the proposed mitigation measures from the Comprehensive Study Report. The revised submission includes a screen capture showing daytime dB(A) exceedances at Fairview noise monitoring station and a link to the Response to the Review Panel’s Information Request 8 for the Milton Logistics Hub CEAR File No. 80100 Prince Rupert Port Authority (received September 25, 2018) to support concerns about C-weighted noise levels.

e. indicates whether the matter has been communicated in writing to the relevant authorities of the Party and the Party’s response, if any

27. The Secretariat finds that the revised submission meets CUSMA Article 24.27(2)(e). The revised submission indicates that the matter has been communicated in writing to the Canadian National Railway Company in a complaint about rail noise and vibration pursuant

to subsection 95.3(1) of the Canada Transportation Act. The revised submission alleges that there is no timeframe for a response from the Canadian Transportation Agency.

D. Article 24.27(3) Criteria

28. If the Secretariat determines that a submission meets the criteria in paragraph 2, it must determine whether the submission merits a response from the Party. In this case, the revised submission meets the criteria in paragraph 2 and to determine whether to request a response from Canada, the Secretariat is guided by the criteria in Article 24.27(3). In its determination dated 9 March 2021, the Secretariat found that the submission met the requirements in Article 24.27(3) (a), (b), and (d) and now proceeds to reconsider (c) in light of the revised submission.

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

29. The Secretariat has found that pursuing private remedies can be interpreted broadly and this criterion can be met by filing a complaint or referencing a complaint filed by another person, organization, or entity. This criterion is evaluated according to a standard of reasonableness, keeping in mind that in some cases barriers exist to pursuing such remedies.¹⁹

30. In the revised submission, the Submitter provides information on a complaint filed with Canadian Transportation Agency. This filing references failures to mitigate and monitor rail noise and vibration by Canadian National Railway Company, the co-proponent in the Fairview Container Terminal Phase II Expansion. The status of the proceedings is listed as “pleadings closed” on the Canadian Transportation Agency’s Open Data Portal, yet the website also states: “These dispute proceedings are ongoing and no decision has been rendered by the Agency with respect to the merits of the applications posted on this page.”²⁰

31. The Secretariat finds that the revised submission fulfills the criterion of CUSMA Article 24.27(3)(c).

III. DETERMINATION

32. For the foregoing reasons, the Secretariat finds that revised submission SEM-21-001 (*Fairview Terminal*) meets the eligibility requirements of CUSMA Articles 24.27(1), 24.27(2), and 24.27(3), and that pursuant to Article 24.27(3), a response from the government of Canada is warranted in relation to the Submitter’s assertions.

¹⁹ SEM-18-001 (*Transboundary Agricultural Burning*) Article 14(1) and (2) Determination (19 February 2018) (“In similar situations, the Secretariat has considered if reasonable actions were taken prior to file a submission. It has also considered that in some cases, the lack of resources may limit a submitter’s ability to undertake private remedies before filing a submission. The Secretariat considers that a barrier to a private remedy may include economic and social factors.”)

²⁰ Current adjudication cases before the Agency, Open Data Portal, Canadian Transportation Agency, available at: <<https://portail-portal.otc-cta.gc.ca/en/current-adjudication-cases-before-agency>> (consulted on 13 April 2021).

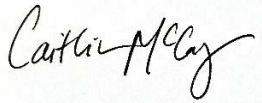
33. Pursuant to CUSMA Article 24.27(4), the Party may provide a response to the submission within the sixty days following the receipt of this determination, i.e., by 28 June 2021.

Respectfully submitted for your consideration.

Secretariat of the Commission for Environmental Cooperation



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