

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 the submission: 8 February 2021
Date of the determination: 9 March 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 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

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).

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/>.

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. Having reviewed submission SEM-21-001 (*Fairview Terminal*) according to CUSMA Article 24.27, the Secretariat finds that the submission does not meet all of the eligibility requirements and hereby so notifies the Submitter.
5. The Submitter has 60 days from the date of this determination to file a revised submission.⁵ If the Secretariat does not receive a revised submission by **10 May 2021**, it will terminate processing of submission SEM-21-001 (*Fairview Terminal*). The Secretariat's reasoning is set out below.

II. ANALYSIS

6. 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)

7. Under Article 24.27(1), the CEC Secretariat first determines whether the Submitter is a “person of a Party” under the CUSMA.
8. CUSMA Article 1.5 provides a definition: “**person of a Party** means a national of a Party or an enterprise of a Party;”
9. The Submitter has requested confidentiality pursuant to Article 16(1)(a) of the ECA. The Secretariat did not find information in the submission that clearly identifies the nationality of the Submitter and it cannot determine whether the Submitter is a “person of a Party” within the meaning of the CUSMA.

⁴ SEM-21-001 (*Fairview Terminal*), Submission pursuant to CUSMA Article 24.27(1) (8 December 2020), [Submission], available at <<http://www.cec.org/submissions-on-enforcement/registry-of-submissions/fairview-terminal/>>.

⁵ 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.”).

10. The Submitter has provided an email address and name in transmitting the submission. A revised submission should disclose the Submitter's nationality and include a mailing address and, if possible, a phone number to complete the Submitter's contact information. The Submitter's contact information and nationality will be maintained in confidence according to Article 16(1)(a) of the ECA.

B. Environmental law

11. The next criterion in Article 24.27(1) is whether the submission identifies an "environmental law" within the meaning of the CUSMA.
12. 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.⁶

13. The Canadian Environmental Assessment Act, 2012 (CEAA or "the Act")⁷ 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

⁶ 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.

⁷ *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).

administering the Act as a division of Environment and Climate Change Canada, reporting to the federal Minister of the Environment.

14. 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.”⁸ The provision in question, section 125 of the Act,⁹ is a transitional provision for completion of comprehensive studies commenced under the former Act, Canadian Environmental Assessment Act S.C. 1992.¹⁰ While this provision 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, the Submitter does not identify relevant provisions in the 1992 Act applicable to the alleged failure to implement mitigation measures and a follow-up program.
15. The Submitter alleges that the Government of Canada has failed to uphold its obligations under section 125 of the Canadian Environmental Assessment Act, 2012 as set out in the Comprehensive Study Report for the project in question. 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.
16. 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.¹¹ Yet, the submission alleges that these mitigation measures have not been constructed even as the expansion project was completed and is in operation.
17. The submission meets the requirement to allege that a Party is “failing to effectively enforce” environmental laws. However, the submission does not provide additional detail on how the lack of implementation of the mitigation measures by Canada demonstrate a failure to effectively enforce environmental laws. Specifically, the submission does not explain how the mitigation measures are enforceable under the law and does not identify the applicable provision in the Act or the 1992 Act. Failure to do so may limit the Secretariat to only consider transitional provisions under s. 125 of the Act.

⁸ *Canadian Environmental Assessment Act, 2012*, s. 4.

⁹ *Canadian Environmental Assessment Act, 2012*, s. 125.

¹⁰ *Canadian Environmental Assessment Act S.C. 1992*. Available at: <https://laws-lois.justice.gc.ca/eng/acts/c-15.2/20100712/P1TT3xt3.html>.

¹¹ Submission at page 1, 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>).

C. Article 24.27(2) Requirements

18. Article 24.27(2) provides five more requirements for a submission to be eligible for consideration by the CEC Secretariat:
 - a. *is in writing in English, French, or Spanish;*
19. The Secretariat finds that the submission meets CUSMA Article 24.27(2)(a), given that the submission is in writing in English.
 - b. *clearly identifies the person making the submission;*
20. The Secretariat finds that the submission does not meet CUSMA Article 24.27(2)(b), since the submission does not clearly identify the person making the submission to the CEC Secretariat in terms of nationality and full contact information, including mailing address and phone number.
21. A revised submission should provide full contact information and disclose the Submitter's nationality to allow the Secretariat to determine whether the Submitter is a person of a Party within the meaning of CUSMA Article 1.5 for eligibility purposes under Article 24.27(1). The Submitter's contact information and nationality will be maintained in confidence according to Article 16(1)(a) of the ECA.
 - 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;*
22. The Secretariat finds that the submission does not meet CUSMA Article 24.27(2)(c). As explained in paragraph 14, the submission needs to provide additional detail on how the mitigation measures are alleged to be binding obligations under the CEAA and on the relevance of section 125 of the Act. The Submitter may identify other applicable provisions of the Act and the 1992 Act in a revised submission.
23. The 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 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 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).
24. A revised submission should include a more detailed explanation of how the Comprehensive Study Report, prepared in accordance with the CEAA, gives rise to a requirement to implement the mitigation measures listed in the report, as well as the applicable sections of the Act and 1992 Act.

d. appears to be aimed at promoting enforcement rather than at harassing industry; and

25. The Secretariat finds that the submission meets CUSMA Article 24.27(2)(d), since it is evident from the information and documentation included in the submission that it is aimed at promoting the effective enforcement of the environmental law related to mitigation of noise, vibrations, and air emissions associated with the expansion project at the Fairview Terminal.

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

26. The Secretariat finds that the submission does not meet CUSMA Article 24.27(2)(e). The submission fails to indicate whether the matter has been communicated in writing to Canadian authorities either by the Submitter or any other person or entity. Accordingly, no response from Canadian authorities is provided either.

27. A revised submission should include information evidencing that the matter was communicated in writing to the relevant authorities, along with the replies, if any.

D. Article 24.27(3) Criteria

28. Article 24.27(3) provides four more criteria that are part of the Secretariat's review process:

(a) the submission alleges harm to the person making the submission;

29. The Secretariat has found in previous determinations that, when considering the question of harm, it must determine whether the harm asserted is due to the alleged failure to effectively enforce the environmental law and whether the harm is related to environmental protection.¹²

30. The submission alleges harm to the environment and nearby residents due to the alleged failure to implement the mitigation measures, "exposing residents living near the affected rail line to health and property-damaging levels of noise and vibration that PRPA itself recognized and noted nearly a decade ago in their proposals seeking approval to increase operations in this area."¹³ The Secretariat finds that the submission fulfills CUSMA Article 24.27(3)(a).

(b) the submission, alone or in combination with other submissions, raises matters about which further study would advance the goals of this Chapter;

31. CUSMA Article 24.2(2) establishes that the objectives of Chapter 24 are "to promote mutually supportive trade and environmental policies and practices; promote high levels of environmental protection and effective enforcement of environmental laws; and enhance the capacities of the

¹² SEM-19-004 (*Barred Owl*), Article 14(1) and (2) Determination (21 November 2019), §28; SEM-11-002 (*Sumidero Canyon II*), Article 14(1) and (2) Determination (6 September 2012), §36; SEM-13-001 (*Tourism Development in the Gulf of California*), Article 14(1) and (2) Determination (23 November 2013). See also, SEM-20-001 (*Loggerhead Turtle*) Article 24.27(2) and (3) Determination (8 February 2020), §58.

¹³ Submission at page 7, lines 12-15.

Parties to address trade-related environmental issues, including through cooperation, in the furtherance of sustainable development.”

32. The Secretariat finds that the study of the submission in question would help further the effective enforcement of environmental law and enhance the capacities of the Parties to address environmental issues of common concern such as the effective implementation of mitigation measures following an environmental impact assessment. The Secretariat finds that the submission fulfills the criterion of CUSMA Article 24.27(3)(b).

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

33. 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.¹⁴
34. The Submitter did not provide information on whether any remedy has been pursued or whether any barrier exists to pursue such remedy. The Secretariat finds that the submission does not fulfil the criterion of CUSMA Article 24.27(3)(c).
35. A revised submission should explain whether a remedy has been pursued and if not, why the Submitter has not attempted to pursue a private remedy previously.

(d) the submission is not drawn exclusively from mass media reports

36. The Secretariat finds that the submission fulfills the criterion of CUSMA Article 24.27(3)(d) since the submission contains information drawn from official sources and technical documentation like the Comprehensive Study Report. There is no reference to mass media reports in the submission.

III. DETERMINATION

37. For the foregoing reasons, the Secretariat finds that submission SEM-21-001 (*Fairview Terminal*) does not meet the eligibility requirements of CUSMA Articles 24.27(1), 24.27(2), and 24.27(3).
38. A revised submission should disclose the nationality of the Submitter and provide more contact information; clarify whether the matter has been communicated to the relevant authorities in Canada; revise the environmental law cited in the submission, clarifying which provisions are not being effectively enforced; and explain whether any remedy has been pursued.

¹⁴ 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.”)

39. The Submitter may file a revised submission within 60 days from the date of this determination as well as any additional information in electronic form, to the following email address: <sem@cec.org>. The Submitter need not include the documents already enclosed with the original submission. The Secretariat will then re-consider the eligibility of the submission.

Secretariat of the Commission for Environmental Cooperation

(original signed)

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