

FAIRVIEW TERMINAL - PHASE II EXPANSION PROJECT

Commission for Environmental Cooperation

Response to Submission SEM-21-001

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1. Introduction

Canada is committed to the effective enforcement of environmental law in Canada and across North America. Since 1994, Canada has supported the Submission on Enforcement Matters (SEM) process as a unique mechanism to promote transparency, public participation and to ensure government accountability regarding the enforcement of environmental laws.

In February 2021, a private citizen from Canada filed a Submission related to the Fairview Terminal - Phase II Expansion Project (henceforth referred to as the “Expansion Project”), in Prince Rupert, British Columbia (BC) under Articles 24.27 and 24.28 of the *Canada-United States-Mexico Agreement* (CUSMA). The Submitter alleged that Canada was failing to enforce the *Canadian Environmental Assessment Act, 2012*, S.C. 2012 c. 19, (CEAA 2012) and that, as a consequence, this lack of enforcement has resulted in harm to public health caused by poor air quality, noise, and vibration impacts.

In April 2021, the CEC Secretariat requested that as per CUSMA’s Article 24.27(4), Canada provide a Response to the Submission made. This document is Canada’s Response.

Pursuant to a comprehensive analysis of the Submission, Canada has identified criteria, outlined in CUSMA, that have not been met in order for the Submission to proceed:

- i. The Submitter’s claim is currently the subject of an administrative proceeding at the Canadian Transportation Agency (CTA), which is an independent quasi-judicial body. The pending case relates to rail noise and vibration. As such, the Submitter’s claim cannot proceed any further as per CUSMA’s Article 24.27(4)(a).
- ii. With regards to CUSMA’s Article 24.27 4(b)(i), the Submitter has filed the SEM referencing incorrect legislation (CEAA 2012) and therefore has not identified an environmental law that Canada has failed to enforce. Only one section identified by the Submitter may apply; namely subsection 125 (1) of CEAA 2012, a “transition provision”. This “transition provision” provided that any Comprehensive Study commenced under CEAA 1992, prior to CEAA 2012 entering into force, was to be continued and completed as if CEAA 1992 had not been repealed. This applies to the Expansion Project, as the Comprehensive Study was commenced under CEAA 1992, prior to CEAA 2012. Consequently, the Submitter has not identified appropriate legislation on which to base the claim of failure to enforce.

Given the aforementioned, the Submitter’s claim should not proceed.

2. The Submitter’s Allegations

On February 8, 2021, the Submitter filed a Submission to the CEC Secretariat related to the Expansion Project. The Submitter alleges that the failure to enforce CEAA 2012 has resulted in harm to public health caused by poor air quality, noise, and vibration impacts.

The Submitter’s Revised Submission, dated March 27, 2021, is publicly available on the CEC website.

3. Canada's Response

3.1 The Submitter's Claim is the Subject of a Pending Administrative Proceeding

As per CUSMA, Article 24.27 (4)(a): the Party shall inform the CEC Secretariat within 60 days of delivery of the request:

“[W]hether the matter at issue is the subject of a pending judicial or administrative proceeding, in which case the CEC Secretariat shall proceed no further.¹”

As indicated in the Revised Submission (see page 1 and page 3), a portion of their claim (specifically as it relates to rail noise and vibration) is the subject of a complaint before the CTA. The CTA is an independent, quasi-judicial tribunal and regulator that has, with respect to all matters necessary for the exercise of its jurisdiction, all the powers of a Superior Court. In accordance with the *Canada Transportation Act*, S.C. 1996, c. 10, s. 40, the CTA's decision may also be appealed to the Federal Court of Appeal within 30 days of the decision².

As per CUSMA, given that the Submitter's claim is the subject of a pending administrative proceeding before the CTA the claim cannot proceed further.

3.2 The Submitter Has Not Identified an Environmental Law that Canada has Failed to Enforce

With reference to CUSMA's Article 24.27 4(b)(i), the Submitter has founded their SEM claim under incorrect legislation (CEAA 2012) and therefore has not identified an environmental law that Canada has failed to enforce.

The Submitter argues that the Prince Rupert Port Authority (PRPA) has failed to comply with paragraph 6(b), sections 52 to 54 and section 125 of CEAA 2012, as well as the conditions included in the 2013 Decision Statement issued in that process.

The Submitter's SEM claim is founded in CEAA 2012, a legislation that not only does not apply (as it is CEAA 1992 that applies in this case), but also which has since been repealed and replaced by the *Impact Assessment Act*, S.C. 2019, c. 28, s. 9.

Of the aforementioned provisions referenced by the Submitter, only subsection 125 (1), a transition provision in CEAA 2012, applies to the Expansion Project. CEAA 2012's subsection 125 (1) notes that any Comprehensive Study of a project commenced under the former Act (CEAA 1992) continues as if that Act had not been repealed.

Given that the Comprehensive Study was commenced under CEAA 1992, prior to CEAA 2012 coming into force, CEAA 2012 is not the appropriate legislation in this case.

¹ *Canada-United States-Mexico Agreement*, 2019, c. 24, s 27 (4) (a) online: < <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/24.aspx?lang=eng> >.

² *Canada Transportation Act*, SC 1996, c. 10, s 40 online: < <https://laws-lois.justice.gc.ca/eng/acts/C-10.4/page-5.html#h-54405>>.

3.2.1 Context: Expansion Project at a Glance and the Environmental Assessment Process

The PRPA and the Canadian National Railway Company Ltd. (CN) are the two proponents of the Expansion Project.

The Expansion Project consists of a wharf extension and expansion of the container and intermodal facilities at the PRPA's Fairview Terminal, within the boundaries of the Port of Prince Rupert on Kaien Island, Prince Rupert, BC.

On March 11, 2008, the Responsible Authorities (RAs) posted a Notice of Commencement triggering the commencement of an environmental assessment. The Expansion Project commenced its environmental assessment pursuant to CEAA 1992 and the *Canada Port Authority Environmental Assessment Regulation* (SOR/99-318). Environment Canada (now Environment and Climate Change Canada), Fisheries and Oceans Canada (DFO), and the CTA were the RAs.

On November 2, 2009, the Federal Minister of the Environment determined that the Expansion Project would undergo its environmental assessment by means of a Comprehensive Study under CEAA 1992³.

On July 6, 2012, CEAA 2012, came into force. As part of the coming into force of that Act, CEAA 1992 was repealed. CEAA 2012's transition provisions, however, ensured the continued conduct of ongoing environmental assessments. Under those transition provisions, in particular subsection 125(1), any Comprehensive Study commenced under CEAA 1992, prior to the CEAA 2012 entering into force was to be continued and completed as if the CEAA 1992 had not been repealed.

Since the Expansion Project's Comprehensive Study had commenced under CEAA 1992 before the coming into force of CEAA 2012, the Comprehensive Study was continued under CEAA 1992 as required by subsection 125(1) of CEAA 2012.

In September 2012, Environment Canada, DFO, and the CTA produced a Comprehensive Study Report, which was made available for public comment on October 16, 2012. The report concluded that the Expansion Project was not likely to cause significant adverse environmental effects. Indigenous and public consultations occurred during the environmental assessment.

On January 25, 2013, the Minister of the Environment issued his Decision Statement pursuant to section 23 of CEAA 1992, indicating that taking into consideration the Comprehensive Study Report and the mitigation measures, the Expansion Project was not likely to cause significant adverse environmental effects⁴.

Following the issuance of the Decision Statement, on March 6, 2013, the RAs took their course of action under section 37 of CEAA 1992. The RAs, after taking into account the identified mitigation measures and a follow-up program agreed that the Expansion Project was unlikely to result in significant adverse environmental effects⁵.

³ Impact Assessment Agency of Canada, *Notice of Decision to Continue as a Comprehensive Study* (2009) online: < <https://www.ceaa-acee.gc.ca/050/evaluations/document/39346?culture=en-CA> >.

⁴ Impact Assessment Agency of Canada, *Environmental Assessment Decision Statement* (2013) online: < <https://iaac-aeic.gc.ca/050/evaluations/document/85082?culture=en-CA> >.

⁵ Impact Assessment Agency of Canada, *Decision of Responsible Authorities* (2013) online: < <https://iaac-aeic.gc.ca/050/evaluations/document/92397?culture=en-CA> >.

3.2.2 Application of Section 125 (1) of CEAA 2012: The Obligations Have Been Met

Subsection 125 (1) sets out the following:

Subject to subsections (2) to (6), any comprehensive study of a project commenced under the former Act before the day on which this Act comes into force is continued and completed as if the former Act had not been repealed⁶.

As required by the transition provisions under subsection 125(1) under CEAA 2012, the Expansion Project continued and completed its environmental assessment as a Comprehensive Study under CEAA 1992. The obligation to complete an environmental assessment under CEAA 1992, in accordance with subsection 125 (1) of CEAA 2012, was fulfilled.

Therefore, the obligation set out in CEAA 2012 under subsection 125 (1) was met.

3.2.3 The Remaining CEAA 2012 Provisions Cited by the Submitter Do Not Apply to the Expansion Project:

As established above, only subsection 125 (1) of CEAA 2012 applied to the Expansion Project. The other provisions of CEAA 2012 identified by the Submitter, including subsection 6(b) and sections 52 to 54, of CEAA 2012, do not apply to the Expansion Project and as a result, Canada could not fail to enforce them against PRPA.

Even while CEAA 2012 was in force, the CEAA 2012 provisions cited by the Submitter would not have applied to this Expansion Project. The section 6 prohibition and the Decision Statement issued as a result of the process set out in sections 52 to 54, that include enforceable conditions with which a proponent had to comply with and the supporting enforcement regime including prohibitions and offences, were new in CEAA 2012 and, consequently, they only applied to new projects undergoing an environmental assessment under that Act. These CEAA 2012 provisions did not apply to a project for which the environmental assessment had commenced under CEAA 1992 and was continued under CEAA 1992 pursuant to the transition provision, subsection 125 (1). For those projects that commenced an environmental assessment by Comprehensive Study under CEAA 1992, only CEAA 1992 applied. As a result, no Decision Statement under CEAA 2012 section 54 that would have included conditions such as mitigation measures and follow-up programs with which the Proponent had to comply was issued for the Expansion Project. None of the provisions cited by the Submitter from CEAA 2012, except for subsection 125 (1), applied to the Expansion Project's environmental assessment and decision-making.

Given the above, the Submitter has not identified an environmental law that Canada has failed to enforce and therefore this matter does not meet the eligibility requirements of CUSMA Article 24.27(2)(c) and should not proceed.

4. Conclusion

As the Response demonstrates:

⁶ *Canadian Environmental Assessment Act*, SC 2012 [repealed], c. 19, s 125 (1) online: < <https://www.canlii.org/en/ca/laws/stat/sc-2012-c-19-s-52/latest/sc-2012-c-19-s-52.html> >.

- i. Given that part of the Submitter's claim relating to rail noise and vibration is the subject of a pending administrative proceeding before the CTA, it should not proceed further as per CUSMA's Article 24.27(4)(a).
- ii. The Submitter has not identified an environmental law that Canada has failed to enforce. The only section identified by the Submitter that applies is subsection 125 (1) of CEAA 2012 and the obligation under that section of CEAA 2012 was met. The balance of the provisions identified do not apply.

In conclusion, given the comprehensive analysis of the Submission, the claim does not meet the criteria set out in CUSMA. Consequently, this matter should not proceed.

Canada will continue to contribute to the SEM process by considering and responding to citizen Submissions on environmental laws in Canada, the US and Mexico.

5. References

Canada-United States-Mexico Agreement, 2019, c. 24. Online: <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/24.aspx?lang=eng>

Canadian Environmental Assessment Act, SC 1992, c. 19. Online: [SC 1992, c 37 | Canadian Environmental Assessment Act | CanLII](https://www.canlii.org/en/ca/laws/stat/sc-1992-c-37/page-1.html)

Canadian Environmental Assessment Act, SC 2012, c. 19. Online: <https://www.canlii.org/en/ca/laws/stat/sc-2012-c-19-s-52/latest/sc-2012-c-19-s-52.html>

Federal Courts Act, R S C 1985, c. F-7. Online: <https://laws-lois.justice.gc.ca/eng/acts/f-7/page-6.html#docCont>

Impact Assessment Act, SC 2019, c. 28. Online: <https://laws.justice.gc.ca/eng/acts/I-2.75/index.html>

Canada, Fisheries and Ocean, Environment Canada & Canadian Transportation Agency, *Comprehensive Study Report Fairview Terminal Phase II Expansion Project*, by Fisheries and Ocean Canada, Environment Canada & Canadian Transportation Agency, Canadian Environmental Assessment Registry Reference Number 08-03-37956 (Prince Rupert, British Columbia, 2012). Online: https://www.ceaa-acee.gc.ca/050/documents_staticpost/37956/CSR_-_Fairview_Terminal_Phase_II_Expansion-eng.pdf

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