

Secretariat of the Commission for Environmental Cooperation

Secretariat determination in accordance with Articles 24.27(2) and (3) of the Canada– United States–Mexico Agreement

Submitter:	Stand Environmental Society
Party:	Canada
Date of original submission:	2 November 2023
Date of revised submission:	11 January 2024
Date of the determination:	12 February 2024
Submission No.:	SEM-23-007 (<i>Vessel Pollution in Pacific Canada</i>)

I. INTRODUCTION

1. On 1 July 2020, the Canada-United States-Mexico Agreement (CUSMA) and the Environmental Cooperation Agreement (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 CUSMA Articles 24.27 and 24.28. The Secretariat of Commission for Environmental Cooperation (“CEC Secretariat”)¹ remains responsible for implementing the SEM process, as stipulated in the ECA.²
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 set out in CUSMA Article 24.27(1) and (2). Where the Secretariat finds that a submission meets these requirements, 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

¹ The Commission for Environmental Cooperation (CEC) was established in 1994 under the North American Agreement on Environmental Cooperation (NAAEC), an instrument signed by Canada, Mexico, and the United States (the “Parties”). The constituent bodies of the CEC are its Council, Secretariat, and Joint Public Advisory Committee (JPAC).

² The Secretariat takes the view that although the provisions governing the SEM process are set forth in Chapter 24 of the CUSMA, certain related procedures are also established under the Agreement on Environmental Cooperation among the Governments of the United States of America, the United Mexican States, and Canada (ECA), namely: the Secretariat’s role in the implementation of the Submissions on Enforcement Matters process, the Council’s role in exchanging information with the Environment Committee, the preparation and publication of factual records, and the Council’s cooperation activities. The Secretariat is mindful of ECA Article 2(3) which states in part: “The Commission will continue to operate under the modalities in place as of entry into force of this Agreement, including its rules, policies, guidelines, procedures, and resolutions, to the extent these modalities are consistent with this Agreement.” Environmental Cooperation Agreement, Articles 2(3); 4(1)(l)–(m); 4(4); and 5(5).

record and, if so, it informs the CEC Council and the Environment Committee,³ providing its reasons as prescribed by CUSMA Article 24.28(1); otherwise, it terminates the review of the submission.⁴

3. On 30 October 2023, Stand Environmental Society, also known as Stand.earth, (“Submitter”) filed a submission with the CEC Secretariat, asserting that Canada (“the Party”) is failing to effectively enforce its environmental laws, particularly Section 36(3) of the *Fisheries Act*, 1985 to prevent pollution of the marine environment by cruise ships and other vessels using “exhaust gas cleaning systems” along the Pacific coast of Canada.
4. On 2 November 2023, the Secretariat informed the Submitter of minor errors of form, specifically the length of the submission exceeded 15 typed pages. The Submitter filed a corrected submission, condensing the submission down to 18 pages, on 15 November 2023.⁵
5. On 4 December 2024, the Secretariat determined that submission SEM-23-007 (*Vessel Pollution in Pacific Canada*) met the eligibility requirements of CUSMA Articles 24.27(1) and 24.27(2) and met the criteria in Article 24.27(3)(a), (b), (d), but *did not* meet the criterion of Article 24.27(3)(c) and notified the Submitter accordingly.⁶
6. The Secretariat found that the Submitter did not provide information on whether private remedies have been pursued to satisfy the criterion of Article 24.27(3)(c) and must do so to allow the Secretariat to determine whether to request a response from the Party.
7. On 11 January 2024, the Secretariat received a revised submission with additional information from the Submitter.⁷
8. After examining the additional information provided by the Submitter, the Secretariat determines that the submission meets the criterion of Article 24.27(3)(c) and determines that it merits a response from the Party under Article 24.27(3). The Secretariat supplements its reasoning in the determination from 4 December 2023 as follows.

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

³ The Environment Committee is established by CUSMA Article 24.26(2) and its role is to “oversee the implementation” of CUSMA Chapter 24.

⁴ 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/>>.

⁵ SEM-23-007 (*Vessel Pollution in Pacific Canada*), Submission pursuant to CUSMA Article 24.27(1) (15 November 2023), [Submission], at: <http://www.cec.org/wp-content/uploads/wpallimport/files/23-7-sub_corrected_redacted_en.pdf>.

⁶ SEM-23-007 (*Vessel Pollution in Pacific Canada*), Determination in accordance with CUSMA Articles 24.27(2) and (3) (4 December 2023), [First Determination] at: <http://www.cec.org/wp-content/uploads/wpallimport/files/23-7-det_en.pdf>.

⁷ SEM-23-007 (*Vessel Pollution in Pacific Canada*), Submission (11 January 2024), [Revised Submission], at: <http://www.cec.org/wp-content/uploads/wpallimport/files/23-7-rsub_en.pdf>.

device, and they must therefore be given a broad interpretation consistent with CUSMA Chapter 24.

A. Article 24.27(3)(c)

8. 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.⁸ The Secretariat found in past determinations that this criterion is evaluated according to a standard of reasonableness, keeping in mind that in some cases barriers may exist to pursuing such remedies.⁹
9. In this sense, the Secretariat considers that it is sometimes difficult or impossible to initiate judicial or administrative proceedings in relation to a multiplicity of violators,¹⁰ so litigation may not be a suitable strategy to deal with certain alleged violations;¹¹ that seeking specific remedies with respect to alleged widespread failure to enforce environmental law may be difficult or impossible;¹² that when the alleged failure to effectively enforce is of a generalized nature, the burden on the submitter to pursue remedies in relation to all violations is an important element in determining whether “reasonable actions” have been taken,¹³ and that an explanation may be available.¹⁴
10. The Submitter explains that the letter sent to the Minister of the Environment inquiring about enforcement efforts related to Section 36(3) of the *Fisheries Act* and marine pollution by cruise ships¹⁵ “was intended as a formal written complaint.”¹⁶ The

⁸ SEM-21-001 (*Fairview Terminal*) Determination in accordance with CUSMA Articles 24.27(2) and (3) (27 April 2021), §§ 30-31, at: <http://www.cec.org/wp-content/uploads/wpallimport/files/21-det2_en.pdf> (finding that filing a complaint with the Canadian Transportation Agency met the criterion of CUSMA Article 24.27(3)(c)).

⁹ SEM-18-001 (*Transboundary Agricultural Burning*) NAAEC Article 14(1) and (2) Determination (19 February 2018), §§ 27-28 at: <http://www.cec.org/wp-content/uploads/wpallimport/files/18-1-det_141-142_en.pdf> (“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.”) See *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, Guideline 7.5(b).

¹⁰ SEM-97-003 (*Quebec Hog Farms*), NAAEC Article 15(1) Notification (29 October 1999), p. 9, at: <<http://www.cec.org/wp-content/uploads/wpallimport/files/97-3-adv-e.pdf>>.

¹¹ SEM-98-003 (*Great Lakes*) NAAEC Article 14(1) and (2) Determination (8 September 1999), p. 10, at: <https://bit.ly/DET14_1_2_98-003>.

¹² SEM-98-004 (*BC Mining*), NAAEC Article 15(1) Notification (11 May 2001), p. 14-15, at: <<http://www.cec.org/wp-content/uploads/wpallimport/files/98-4-acf11-e.pdf>>.

¹³ Id.; SEM-09-005 (*Skeena River Fishery*), NAAEC Article 14(1) and (2) Determination (18 May 2010), § 44, at: <https://bit.ly/DET14_1_2_09-005> (citing Guideline 7.5(b)); SEM-04-005 (*Coal-fired Power Plants*), NAAEC Article 14(1) and (2) Determination (24 February 2005), p. 12, at: <<https://bit.ly/3N0Egm3>>.

¹⁴ SEM-23-002 (*Avocado Production in Michoacán*) Determination in accordance with CUSMA Articles 24.27(2) and (3) (6 March 2023), §§ 74-77, at: <http://www.cec.org/wp-content/uploads/wpallimport/files/23-2-det_translation_en.pdf> (finding that the submission complies with Article 24.27(3)(c) since the Submitter provided a reasonable explanation of the impossibility of seeking remedies in relation to the issue under Mexican law).

¹⁵ Submission, p. 1 and First Determination, § 34.

¹⁶ Revised Submission, p. 2.

Submitter states that the letter was sent “...in furtherance of the objective of providing the Minister and inspectors appointed by him with ‘reasonable grounds’ for taking enforcement action...”¹⁷

11. The Submitter asserts that transmission of the letter “demonstrates action by the submitter to seek a remedy under the domestic law of Canada, to prevent pollution of the marine environment.”¹⁸ The Submitter notes that it could pursue judicial review of Minister’s response to its request for enforcement action under Section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, but that “...it faces substantial financial constraints, delay and hardship in pursuing further domestic administrative law remedies....”
12. The Submitter also explains the barriers to pursuing other private remedies through litigation due to the multiplicity of violators, the inadequacy of civil claims to address a “systemic and transnational problem,” the likely substantial delay before possibly receiving a remedy, financial constraints, and the limited nature of the doctrine of standing in tort law in British Columbia.¹⁹
13. The Secretariat has previously found that when the alleged failure to effectively enforce environmental law is of a generalized nature, the Secretariat will consider the scope and complexity of the issues raised in the submission and the barriers to seeking private remedies with respect to the full scope of the submission.²⁰ The Secretariat ultimately determines whether “reasonable actions have been taken to pursue private remedies prior to making this submission, bearing in mind the barriers to private remedies that the Submitters identify.”²¹
14. Based on the additional information received from the Submitter regarding the possibility of pursuing judicial review of the Minister’s response and the barriers to pursuing that judicial review application as well as the barriers to pursuing other private remedies, the Secretariat finds that transmission of the letter to the Minister of the Environment and consideration of other private remedies constitute reasonable actions that have been taken to pursue private remedies given the widespread nature of the alleged failures and in light of the barriers identified by the Submitter.
15. The Secretariat finds that the submission meets the criterion of CUSMA Article 24.27(3)(c).

¹⁷ Id.

¹⁸ Id.

¹⁹ Revised Submission, p. 3.

²⁰ SEM-04-005 (*Coal-fired Power Plants*), NAAEC Article 14(1) and (2) Determination (24 February 2005), p. 12, at: <<https://bit.ly/3N0Egm3>>. See also SEM-04-005 (*Coal-fired Power Plants*), Article 15(1) Notification (5 December 2005), p. 15-16, at: <http://www.cec.org/wp-content/uploads/wpallimport/files/04-5-adv_en.pdf> (concluding that the availability of private remedies does not bar further consideration of the submission given the Submitters’ claim that it is “impractical and unrealistic” to pursue private remedies with limited resources due to the scope and complexity of the issues raised: “cumulative and widespread impacts of pollution from coal-fired power plants”).

²¹ SEM-04-005 (*Coal-fired Power Plants*), NAAEC Article 14(1) and (2) Determination (24 February 2005), p. 12, at: <<https://bit.ly/3N0Egm3>>.

B. Clarification regarding section 25(1) of the Wastewater Systems Effluent Regulations

16. The revised submission references an incomplete citation on page 4 of the original submission, clarifying that the Submitter meant to cite section 25(1) of the *Wastewater Systems Effluent Regulations*, SOR/2012-139.²²
17. The *Wastewater Systems Effluent Regulations* were made pursuant to the *Fisheries Act* and are administered by “authorization officers” at Environment and Climate Change Canada listed in Schedule 1 to the regulations.²³ Part 2 of the regulations state that, pursuant to paragraph 36(4)(b) of the *Fisheries Act*,²⁴ “the owner or operator of a wastewater system may, on or before June 30, 2014, apply to an authorization officer for a transitional authorization to deposit via the final discharge point effluent that contains a deleterious substance.”²⁵ According to the Department of the Environment, “There is no authority in the Regulations to issue transitional authorizations after June 30, 2014.”²⁶
18. The Submitter cites section 25(1) regarding the required information to be included in an application for a transitional authorization. Section 25(1) requires detailed information about, for example, the average daily volume of effluent to be deposited and identification of the water where the effluent is to be deposited or where it may enter.²⁷ Requiring such information as part of the application process before issuing a transitional authorization has a primary purpose of protecting the environment through the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants. Accordingly, this provision meets the definition of environmental law in CUSMA Article 24.1, but its applicability is limited to prior to 30 June 2014.

III. DETERMINATION

19. For the foregoing reasons, the Secretariat determines that submission SEM-23-007 (*Vessel Pollution in Pacific Canada*) meets the criterion of CUSMA Article 24.27(3)(c) and merits a response from the Party in accordance with Article 24.27(3), regarding the effective enforcement of the environmental laws listed below:
 - i. *Fisheries Act*, 1985²⁸
 1. Section 2.5 paragraphs (a), (c), (d), (e), (f), and (g)
 2. Subsection 34(1)

²² Revised Submission, p. 5.

²³ *Wastewater Systems Effluent Regulations*, SOR/2012-139, s. 1, schedule 1.

²⁴ Id. at s. 23(1)

²⁵ Id. at

²⁶ Regulations Amending the Wastewater Systems Effluent Regulations (Department of the Environment), (2023), C Gaz I, 21, (*Fisheries Act*), available at: <<https://canadagazette.gc.ca/rp-pr/p1/2023/2023-05-27/html/reg2-eng.html>>.

²⁷ *Wastewater Systems Effluent Regulations*, SOR/2012-139 s. 25(1)(j), (i)

²⁸ The Submission also cites sections 2.1 and 2.2 of the *Fisheries Act*, which set out the purpose of the act and its territorial application in Canada, respectively. Although the Secretariat determined that both provisions qualify as environmental law under the USMCA, they are not directly enforceable and thus are not included on the list. These provisions merely inform the Secretariat’s understanding of the *Fisheries Act* and the Government of Canada’s efforts to effectively enforce the law.

3. Subsection 36(3)
 4. Subsection 36(4)
 5. Subsection 36(5)
 6. Subsection 38(1)
 7. Subsection 38(3)
 8. Subsection 38(5)
 9. Subsection 38(6)
 10. Paragraph 40(2)(a)
 11. Paragraph 40(2)(b)
 12. Section 88
- ii. *Canada Shipping Act, 2001*
1. Subsection 10.1(1)
 2. Paragraph 35(1)(d)
 3. Subsection 35.1(1) and paragraphs (a), (g), and (i)
 4. Subsection 38(1)
 5. Section 187
 6. Paragraph 189(1)(d)
 7. Subsection 190(1)
 8. Subsections 191(1), (2), (3), and (4)
 9. Subsection 227(1)
 10. Subsection 256(1)
 11. Section 257
 12. Section 258
- iii. *Vessel Pollution and Dangerous Chemicals Regulations*
1. Section 4
 2. Section 30
 3. Section 31
 4. Section 84
 5. Subsection 96(1)
 6. Subsection 111(6)
 7. Section 111.2
 8. Section 126
 9. Section 131.1

- 10. Section 132
- 11. Section 133
- 12. Schedule 1
- iv. *Wastewater Systems Effluent Regulations*
 - 1. Section 25(1)
- 20. In accordance with Article 24.27(4) of the CUSMA, the Party may provide a response to the submission within 60 days of receiving this determination, i.e. by **12 April 2024**.

Respectfully submitted for your consideration.

Secretariat of the Commission for Environmental Cooperation

(original signed)

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