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January 10, 2023

Paolo Solano, Director of Legal Affairs and SEM Unit
Secretariat of the Commission for Environmental Cooperation
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VIA EMAIL

Dear Mr. Solano:

Re: Addendum to Submission No. SEM-23-007 (*Vessel Pollution in Canada*)

We write on behalf of our client Stand Environmental Society (“Stand”) in response to the Secretariat’s determination of December 4, 2023 (the “Determination”) with respect to Submission No. SEM-23-007 (*Vessel Pollution in Canada*) (the “Submission”).

Specifically, we write to provide information with respect to remedies under the private law of Canada, and to further explain the rationale for Stand’s Submission, which as you are aware requests an investigation by the Commission for Environmental Cooperation (the “Commission”) into Canada’s failure to effectively enforce its environmental laws, particularly Section 36(3) of its *Fisheries Act*, RSC 1985, c F-14 to prevent pollution of the marine environment by cruise ships and other vessels using “exhaust gas cleaning systems” along the Pacific coast of Canada.

This letter is intended as an addendum to Stand’s complaint letter of November 15, 2023, with the two letters intended to be read together as a revised submission from Stand for Submission No. SEM-23-007.

Interpretation of Article 24.27(3)(c)

Stand notes that the criterion at Article 24.27(3)(c) of Chapter 24 of the *Canada-United States Mexico Agreement* (“CUSMA”) — whether “private remedies available under the Party’s law have been pursued” — is a factor informing the exercise of the Secretariat’s discretion to request a Response from a Party. While the Article states that the Secretariat “shall be guided by” the four enumerated criteria, including the criterion specified at Article 24.27(3)(c), the express language of the Article does not impose a mandatory condition on either the Secretariat nor on a person making a submission.

This is consistent with the Secretariat’s interpretation of the Chapter, as stated in the Determination: “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.”

Furthermore, and specifically with respect to Article 24.27(3)(c) (and as stated in the Determination), the “Secretariat has found in past determinations that this criterion is evaluated according to a standard of reasonableness, keeping in mind that in some cases barriers exist to pursuing such remedies.”

Pursuit of private remedies by Stand: Complaint to the Minister

Stand’s letter to Canada’s Minister of Environment and Climate Change, the Honourable Steven Guilbeault, dated April 12, 2023 (which was appended to Stand’s November 15, 2023 Submission to the Secretariat), was intended as a formal written complaint to the federal Minister responsible for enforcement of Section 36(3) of the *Fisheries Act*, to draw the Minister’s attention to evidence of the deposit of deleterious substances into fish-bearing waters by cruise ships and other vessels employing “exhaust gas cleaning systems” in the coastal waters of Canada.¹

While Stand was not bound by a statutory duty to notify the Minister of the deposit of deleterious substances (in contrast to the statutory duty imposed on a vessel owner or other person responsible for pollution, pursuant to 38(5) of the *Fisheries Act*), Stand submitted its complaint letter to the Minister for the purpose of reporting harm and preventing further harm to the marine environment.

The letter was provided to the Minister in furtherance of the objective of providing the Minister and inspectors appointed by him with “reasonable grounds” for taking enforcement action (pursuant to Sections 38(3), 38(7.1), 39(1) and associated provisions of the *Fisheries Act*).

While Stand’s letter to the Minister included a request for information with respect to investigation and enforcement of violations of Section 36(3) of the *Fisheries Act*, the overriding message of the letter when read as a whole was that: (1) Canada has obligations under domestic law and international law to take enforcement action to prevent pollution of the marine environment; that (2) cruise ships and other vessels are polluting the marine environment by depositing deleterious substances through discharges of “exhaust gas cleaning system” washwater; and that (3) the Minister on behalf of Canada should take action to prevent this pollution.

Stand submits that its complaint letter to the Minister of April 12, 2023 demonstrates action by the submitter to seek a remedy under the domestic law of Canada, to prevent pollution of the marine environment, satisfying the provision under Article 24.27(3)(c).

Stand further notes that the Secretariat has recognized (as stated in the Determination) 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.” For example, in response to a recent submission (from 2021) respecting the *Canadian Environmental Assessment Act* and the Prince Rupert Port Authority’s Fairview Terminal expansion, the Secretariat found that a complaint to the Canadian Transportation Agency was sufficient to satisfy the criterion under Article 24.27(3)(c).²

¹ Stand to the Honourable Steven Guilbeault, April 12, 2023.

² Secretariat Determination in Submission No. SEM-21-001 (Fairview Terminal), April 27, 2021, at para. 30.

Stand also notes that it faces substantial financial constraints, delay and hardship in pursuing further domestic administrative law remedies to challenge the Minister's refusal to enforce Section 36(3) of the *Fisheries Act*. Specifically, Stand faces financial constraints as well as years of probable delay in pursuing a judicial review application under Section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7.

Barriers to pursuing additional private remedies for a systemic, transnational problem

Stand considered pursuing private remedies against specific vessel owners and operators, including owners and operators of cruise ships equipped with "exhaust gas cleaning systems" that are depositing deleterious substances into the fish-bearing waters of coastal Canada, including the sensitive marine ecosystems of the Salish Sea, Kwakwaka'wakw Sea and Great Bear Sea ecoregions.

However, pursuing Notices of Civil Claim in the British Columbia Supreme Court against dozens of individual vessel owners and operators (including many non-Canadian entities) (as well as civil claims in the courts of other Canadian provinces and territories where deleterious substances are being deposited) poses substantial financial, procedural and evidentiary barriers. It also constitutes an inadequate response to a systemic and transnational problem involving dozens (or perhaps hundreds) of vessels operating in the coastal waters of Canada.

This strategy of private litigation to prevent harm to the marine environment by a multiplicity of individual vessel owners and operators (many of whom are non-Canadian entities) also entails substantial delay between initiation of a lawsuit and the eventual awarding of a remedy by the courts. It is certain that vessel owners and operators would rigorously defend themselves against any civil claim brought by Stand, resulting in several years of litigation before any final order was issued by the courts.

Stand's finite financial resources as a non-profit organization is also a relevant factor for the Secretariat to weigh in determining the availability of private remedies against a multiplicity of vessel owners and operators under Canadian law.

There is also a problem of standing, with the law of tort in British Columbia and other Canadian jurisdictions being less developed than tort law respecting environmental harm in other international jurisdictions, where rights of non-human life are accorded legal standing. There is no "guardian" (or equivalent entity) representing the legal interests of non-human entities in Canadian law, in contrast to legal regimes in place in several international jurisdictions.³ Stand therefore faces a substantial barrier in having its standing recognized by the courts of British Columbia to pursue a civil claim on behalf of Southern Resident Killer Whales and other species of wild fauna and flora impacted by the deposit of deleterious substances into Canada's coastal waters by private vessel owners and operators.

³ See, for example, *Mohd. Salim v. State of Uttarakhand*, 2017 SCC OnLine Utt 367 at para. 19; *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ 2017 No 7), Section 20.

An additional consideration is the evidentiary barriers faced by a non-governmental and non-profit entity such as Stand in collecting and testing samples of washwater effluent from dozens (or hundreds) of vessels, including vessels operating in off-shore areas and restricted port areas. Vessel owners and operators do not disclose the schedule or timing of discharges of “exhaust gas cleaning system” washwater, further complicating the process of gathering evidence of environmental harm in support of private litigation. There are also restrictions on navigating in proximity to other vessels under Canadian law, which complicate the gathering of washwater samples of appropriate concentration to support litigation.

For these reasons, substantial practical challenges impede the pursuit of private litigation to address this type of marine pollution. Stand submits that government entities (and Canada’s Minister of Environment in particular) have legislative and regulatory tools at their disposal that are not available to non-governmental entities such as Stand, including access to ships’ logs relating to the functioning of “exhaust gas cleaning systems” and other monitoring, investigative and enforcement tools.

In the face of these barriers, Stand deemed that its complaint to the responsible Minister offered a more direct and effective potential remedy to prevent further pollution, in combination with its Submission to the Secretariat (after the Minister responded on August 18, 2023 in a manner indicating that Canada was not enforcing its environmental laws to prevent this pollution, including disclosing that only two investigations had occurred in the preceding five years and that neither investigation had resulted in enforcement action).⁴

The Secretariat has recognized (as stated in the Determination) that “it is sometimes impossible to initiate judicial or administrative proceedings in relation to a multiplicity of violators; that seeking specific remedies available to individuals with respect to the alleged widespread failure to enforce environmental law may be difficult; ... 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, ... and that an explanation may be available.”⁵

Stand notes that the Secretariat determined in 2005 that a submission with respect to coal-fired power plants under the former NAFTA treaty (Submission No. SEM-04-005) merited a response from the United States, despite the absence of private litigation by the submitters.⁶ The multiplicity of coal-fired power plants in connection with that Submission was relevant to the Secretariat’s determination regarding the availability of private remedies.

Similarly, the systemic and transnational problem of the Government of Canada’s refusal — apparently as a matter of policy — to enforce its environmental laws with respect to pollution of the marine environment by cruise ships and other vessels equipped with “exhaust gas cleaning systems” is a problem worthy of investigation by the Secretariat, which warrants a Response from Canada.

⁴ The Honourable Steven Guilbault to Stand, August 18, 2023, p. 2.

⁵ Determination (Submission No. SEM-23-007) at para. 48.

⁶ CEC Determination for Submission No. SEM-04-005, February 24, 2005, p. 12.

Clarification regarding the Wastewater Systems Effluent Regulations

Finally, to clarify an issue raised in the Determination (at Footnote 13), the citation to Section 25(1) in Stand's November 13, 2023 letter refers to Section 25(1) of the *Wastewater Systems Effluent Regulations*, SOR/2012-139, setting out the application procedure for authorization to discharge deleterious substances, pursuant to s. 36(4) of the *Fisheries Act*.

Conclusion

In closing, Stand notes that it has pursued a private remedy under Canadian law, in the form of a formal complaint to the Minister responsible for enforcement of Canada's *Fisheries Act*.

Stand further notes, for the reasons outlined above, that pursuing private litigation against a multiplicity of private vessel owners and operators (many of whom are non-Canadian entities) is impractical, expensive and otherwise ineffective at addressing the systemic and transnational problem of Canada's non-enforcement of Section 36(3) of its *Fisheries Act* with respect to vessel pollution.

Based on the foregoing, Stand submits that it has taken reasonable steps to satisfy the criterion under Article 24.27(3)(c) and that the Secretariat should request a Response from Canada to Submission No. SEM-23-007.

If you require any further information to review Stand's Submission, please let us know.

Sincerely,



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Barrister and Solicitor
Counsel for Stand Environmental Society

cc. Caitlyn McCoy, Legal Officer, Legal Affairs and Submissions on Enforcement Matters,
Commission for Environmental Co-operation

Attachments:

1. Stand Submission No. SEM-23-007, November 15, 2023
2. Letter from Stand to the Honourable Steven Guilbeault, April 12, 2023
3. Letter from the Honourable Steven Guilbeault to Stand, August 18, 2023