

**Secretariat of the Commission for Environmental Cooperation**  
**Secretariat determination in accordance with Article 24.28(1)**  
**of the United States-Mexico-Canada Agreement**

**Submitter:** [Confidential name pursuant to ECA Article 16(1)(a)]  
**Party:** Canada  
**Date of original submission:** 8 February 2021  
**Date of revised submission:** 29 March 2021  
**Date of the determination:** 27 August 2021  
**Submission no.:** SEM-21-001 (*Fairview Terminal*)

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**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”) remains responsible for implementing the SEM process, as stipulated in the ECA.<sup>1</sup>
2. The SEM mechanism allows any person or entity established in Canada, the United States or Mexico to file a submission asserting that a Party to the ECA is failing to effectively enforce its environmental laws. The CEC Secretariat initially reviews submissions based on the requirements specified in CUSMA Article 24.27(1) and (2). Where the Secretariat finds that a submission meets these requirements and criteria, it then determines whether the submission merits a response from the Party in question in accordance with the criteria of CUSMA Article 24.27(3). In light of the Party’s response, the Secretariat determines whether the matter warrants the preparation of a factual record. If so, it shall so inform the CEC Council and the Environment Committee<sup>2</sup> and provide its reasons in accordance with CUSMA Article 24.28(1); otherwise, it shall terminate its review of the submission.<sup>3</sup>

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<sup>1</sup> The Commission for Environmental Cooperation 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”). Under 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 this Agreement [the ECA].” The constituent bodies of the CEC are its Council, Secretariat and Joint Public Advisory Committee (JPAC).

<sup>2</sup> The Environment Committee was established under Article 24.26(2) of the Canada-United States-Mexico-Agreement (CUSMA) to oversee the implementation of Chapter 24.

<sup>3</sup> For detailed information on the various stages of the submissions on enforcement matters process, as well as on the public register of submissions and the Secretariat’s determinations and factual records, please consult the CEC website <<http://www.cec.org/submissions-on-enforcement/>>.

3. On 8 February 2021, a person who requested confidentiality pursuant to ECA Article 16(1)(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 2012) in relation to the Fairview Terminal Phase II Expansion Project.<sup>4</sup>
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.<sup>5</sup> 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.<sup>6</sup>
5. The Submitter filed a revised submission on 29 March 2021.<sup>7</sup>
6. On 27 April 2021, the Secretariat determined that the submission met the criteria of CUSMA Articles 24.27(1) and (2) and requested a response from the Government of Canada in accordance with Article 24.27(3).<sup>8</sup> Canada submitted its response on 28 June 2021.<sup>9</sup>
7. Having reviewed the submission in light of this response, with reference to Article 24.28(1), the Secretariat terminates the submission due to the applicability of the Canadian Environmental Assessment Act, 1992 (CEAA 1992) as raised by Canada in its response.

## II. SUMMARY OF THE SUBMISSION

8. The Submitter alleges that the Government of Canada has failed to uphold its obligations under sections 52 and 53 of the Canadian Environmental Assessment Act, 2012 for the Fairview Terminal Phase II Expansion Project in Prince Rupert, British Columbia. Specifically, that the Prince Rupert Port Authority and the Canadian National Railway Company have failed to implement the

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

<sup>5</sup> SEM-21-001 (*Fairview Terminal*), Determination in accordance with Articles 24.27(2) and (3) (9 March 2021), available at <[http://www.cec.org/wp-content/uploads/wpallimport/files/21-1-det\\_en.pdf](http://www.cec.org/wp-content/uploads/wpallimport/files/21-1-det_en.pdf)>.

<sup>6</sup> 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](http://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.”).

<sup>7</sup> 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](http://www.cec.org/wp-content/uploads/wpallimport/files/21-1-rsub_public_en.pdf).

<sup>8</sup> SEM-21-001 (*Fairview Terminal*), Determination in accordance with Articles 24.27(2) and (3) (27 April 2021), available at <[http://www.cec.org/wp-content/uploads/wpallimport/files/21-det2\\_en.pdf](http://www.cec.org/wp-content/uploads/wpallimport/files/21-det2_en.pdf)>.

<sup>9</sup> SEM-21-001 (*Fairview Terminal*), Government of Canada Response (28 June 2021) [Response], available at <[http://www.cec.org/wp-content/uploads/wpallimport/files/21-1-rsp\\_en.pdf](http://www.cec.org/wp-content/uploads/wpallimport/files/21-1-rsp_en.pdf)>.

mitigation measures and follow up program from the Comprehensive Study Report, prepared in accordance with section 125 of the CEEA 2012.

9. 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.<sup>10</sup> Yet, the submission alleges that these mitigation measures have not been constructed even as the expansion project was completed and is in operation.

### **III. SUMMARY OF THE RESPONSE**

10. In its response, the Government of Canada advises the Secretariat that the submission is subject to a pending administrative proceeding regarding noise and vibration impacts and requests the Secretariat to proceed no further, as provided under CUSMA Article 24.27(4)(a).
11. The Government of Canada also asserts that the CEEA 2012 does not apply to the Fairview Terminal Phase II Expansion Project and thus, the submission does not identify an environmental law that Canada has failed to enforce. Furthermore, the mitigation measures and follow up program in the Comprehensive Study Report are not mandatory under the applicable law, CEEA 1992.

#### **A. Administrative proceeding**

12. Article 24.27(4) provides that “The Party shall inform the CEC Secretariat...whether the matter at issue is the subject of a pending judicial or administrative proceeding, in which case the CEC Secretariat shall proceed no further...”<sup>11</sup>
13. The CUSMA does not provide a definition for a judicial or administrative proceeding. The Secretariat seeks guidance in the former North American Agreement on Environmental Cooperation Article 45(3)(a) which defines a judicial or administrative proceeding as: “a domestic judicial, quasi-judicial or administrative action pursued by the Party in a timely fashion and in accordance with its law. Such actions comprise: mediation; arbitration; the process of issuing a license, permit, or authorization; seeking an assurance of voluntary compliance or a compliance agreement; seeking sanctions or remedies in an administrative or judicial forum; and the process of issuing an administrative order;”<sup>12</sup> The Secretariat considers that the threshold of whether judicial or administrative proceedings are pending should be construed narrowly to give full effect to the object and purpose of the CUSMA.<sup>13</sup>

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<sup>10</sup> Revised Submission at page 2 (referencing the Environmental Assessment Decision Statement by the Honourable Peter Kent, Minister of the Environment on 25 January 2013, available at <<https://www.ceaa-acee.gc.ca/050/evaluations/document/85082?culture=en-CA>>).

<sup>11</sup> Canada-United States-Mexico Agreement, Article 24.27(4), available at <[https://ustr.gov/sites/default/files/files/agreements/usmca/24\\_Environment.pdf](https://ustr.gov/sites/default/files/files/agreements/usmca/24_Environment.pdf)>.

<sup>12</sup> NAAEC Article 45(3), available at <<https://ustr.gov/sites/default/files/naaec.pdf>>.

<sup>13</sup> The Secretariat cannot construe CUSMA as allowing a determination to be based on the mere assertion of the existence of a pending proceeding. *See* SEM-01-001 (Cytrar II), Determination pursuant to Article 14(3) of the North American Agreement on Environmental Cooperation (NAAEC) (13 June 2001).

14. The Secretariat is guided by past determinations where the issue of pending proceedings has been raised. The Secretariat has consistently found that ongoing enforcement and defensive litigation involving the same matter that is the subject of the submission meets the definition of a pending judicial or administrative proceeding. Despite the differences between administrative and judicial proceedings,<sup>14</sup> both types of pending proceedings are evaluated the same way and the Secretariat has historically worked to avoid pursuing submissions which could interfere with such pending proceedings.<sup>15</sup>
15. The Secretariat considers such factors as whether the matter is being pursued by the Party in a timely fashion and in accordance with its law and if the proceeding invoked by the Party in its response has the potential to resolve the matter raised in the submission. The Secretariat has also found that the exclusion of such pending proceedings helps avoid duplication of effort and prevents interference with pending actions.<sup>16</sup>
16. The Government of Canada notes in its response and the Secretariat noted in its prior determination<sup>17</sup> that the issue of rail noise and vibration impacts from the project are the subject of an administrative complaint (“application”) filed before the Canadian Transport Agency in July 2020 with pleadings opened in December 2020.<sup>18</sup>
17. The Canadian Transport Agency (CTA) is an independent quasi-judicial body which “has, with respect to all matters necessary for the exercise of its jurisdiction, all the powers of a Superior Court.”<sup>19</sup> A decision issued by the CTA may be appealed to the Federal Court of Appeal within 30 days of issuance.<sup>20</sup>
18. On 28 July 2021, the CTA dismissed the application regarding rail noise and vibration impacts from the project, ending the proceeding. The CTA found that the applicant failed to meet the burden in the first step of the analytical framework for assessing claims under subsection 95.3(1) of the *Canada Transportation Act*, SC 1996, c 10. Specifically, the CTA found that the applicant “failed to discharge his burden of providing sufficient evidence to prove, on a balance of probabilities, that the noise and vibration from [Canadian National Railway Company]’s railway operations

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<sup>14</sup> Administrative proceedings operate under different legal frameworks than judicial proceedings. Complaints are filed with specific agencies or review boards with special knowledge and expertise. In some situations, the agency or tribunal’s decision may be subject to judicial review. There may be limited remedies available, and decisions may or may not create precedent within the administrative system. Despite their differences from civil litigation, for example, these proceedings have the potential to resolve issues between the government and private parties. See Michael Asimow, *A Comparative Approach to Administrative Adjudication*, in Oxford Handbook of Comparative Administrative Law (Peter Cane, Herwig C H Hofmann, Eric C Ip, & Peter L Lindseth eds., 2021).

<sup>15</sup> Previous determinations issued under the NAAEC: See generally SEM-07-001 (*Minera San Xavier*), Article 15(1) Determination, §33 (15 July 2009). See SEM-15-001 (*La Primavera Forest*), Article 15(1) Notification, §9-13 (4 November 2016); SEM-05-002 (*Coronado Islands*), Article 15(1) Notification, pp. 12-13 (18 January 2007).

<sup>16</sup> Previous determinations issued under the NAAEC: SEM-01-001 (*Cytrar II*), Determination pursuant to Article 14(3) (13 June 2001); SEM-97-001 (*BC Hydro*), Article 15(1) Notification (27 April 1998); SEM-03-003 (*Lake Chapala II*), Article 15(1) Notification (18 May 2005); SEM-04-005 (*Coal-fired Power Plants*), Article 15(1) Notification (5 December 2005); SEM-05-002 (*Coronado Islands*), Article 15(1) Notification (18 January 2007).

<sup>17</sup> Response at 4. SEM-21-001 (*Fairview Terminal*), Determination in accordance with Articles 24.27(2) and (3) (27 April 2021), available at <[http://www.cec.org/wp-content/uploads/wpallimport/files/21-det2\\_en.pdf](http://www.cec.org/wp-content/uploads/wpallimport/files/21-det2_en.pdf)>.

<sup>18</sup> Canadian Transportation Agency, [REDACTED] (28 July 2021) [CTA Decision].

<sup>19</sup> Response at 4.

<sup>20</sup> Id.

constitute substantial interference with the ordinary comfort or convenience of living, according to the standards of the average person.”<sup>21</sup>

19. The matter is no longer part of a pending proceeding since the proceeding has concluded. Thus, the Secretariat finds that the noise and vibration impacts raised in the submission may be considered. The Secretariat moves on to assess whether the submission cites an applicable environmental law in light of Canada’s response.

## **B. Applicable Law: CEAA 1992 and CEAA 2012**

20. In its response, the Government of Canada asserts that the submission did not identify an environmental law that it has failed to enforce because CEAA 1992 applies to the project, not CEAA 2012.
21. Canada asserts, “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.”<sup>22</sup> Canada explains, “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.”<sup>23</sup>
22. The definitions in CEAA 1992 support Canada’s conclusion that only CEAA 1992 applies to the project.<sup>24</sup> First, “‘comprehensive study’ means an environmental assessment that is conducted under section 21, and that includes a consideration of the factors required to be considered under subsections 16(1) and (2).”<sup>25</sup>
23. Next, “‘environmental assessment’ means, in respect of a project, an assessment of the environmental effects of the project that is conducted in accordance with this Act and the regulations;”<sup>26</sup>
24. Taken together, the definitions clarify that a comprehensive study is an assessment of the environmental effects of a project conducted in accordance with CEAA 1992. With these definitions in mind, section 125(1) of the CEAA 2012<sup>27</sup> can be read to state that the former Act

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<sup>21</sup> CTA Decision at 9, paragraph 46.

<sup>22</sup> Response at 4.

<sup>23</sup> Response at 6.

<sup>24</sup> Canadian Environmental Assessment Act, SC 1992, c. 19, available at: <<https://www.canlii.org/en/ca/laws/stat/sc-1992-c-37/latest/sc-1992-c-37.html>>.

<sup>25</sup> Id. at s. 2(1)

<sup>26</sup> Id.

<sup>27</sup> *Canadian Environmental Assessment Act*, SC 2012, c. 19, subsection 125(1), available at <<https://www.canlii.org/en/ca/laws/stat/sc-2012-c-19-s-52/latest/sc-2012-c-19-s-52.html>> (“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 repealed.”).



(CEAA 1992) continues to apply, even after the comprehensive study itself is complete, and governs the Decision Statement process as well. This is how projects like the Fairview Terminal Phase II Expansion remain subject to CEAA 1992, which did not provide for enforceable mitigation measures and follow up programs, even though the CEAA 2012 came into force on 6 July 2012 and the Decision Statement for this project was issued on 25 January 2013.<sup>28</sup>

25. Canada provides a brief overview of the policy change regarding enforceable mitigation measures and follow up programs and the inapplicability of CEAA 2012 to the Fairview Terminal Phase II 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).”<sup>29</sup>
26. Although CEAA 2012 did not apply to this project because its comprehensive study process started under CEAA 1992, the Secretariat notes that there could be some review of whether the mitigation measures recommended in the Comprehensive Study Report were ever completed. The CTA decision describes how the project was intended to be completed in two stages which raises questions around whether and how the mitigation measures were designed to be implemented in relation to the separate stages of the project.
27. In its response to the application filed before the CTA, the Canadian National Railway Company (“CN”) explains that the wye and second siding were proposed as part of stage 2 of the project and neither had not been constructed yet because “Stage 2 of the project is dependent on market conditions and the need for such construction, [and] there are no guarantees that the construction will occur.”<sup>30</sup>
28. The Comprehensive Study Report describes the stages: “The Project will be built in two stages. Stage 1 will include construction of the northern terminal expansion, one CN siding, and the Port-dedicated road. All remaining components (southern terminal expansion, yards, second CN siding, and wye) will be constructed as Stage 2, when market economies and traffic volumes require it.”<sup>31</sup>
29. CN’s response in the CTA proceeding illuminates what appears to have been a point of confusion in the stages and nature of the project. CN contends that the wye and second siding were not

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<sup>28</sup> *Canadian Environmental Assessment Act*, SC 2012, c. 19, available at <<https://www.canlii.org/en/ca/laws/stat/sc-2012-c-19-s-52/latest/sc-2012-c-19-s-52.html>>. Environmental Assessment Decision Statement by the Honourable Peter Kent, Minister of the Environment (25 January 2013), available at <<https://iaac-aeic.gc.ca/050/evaluations/document/85082?culture=en-CA>>.

<sup>29</sup> Response at 6.

<sup>30</sup> CTA Decision at 3, paragraph 15.

<sup>31</sup> Fisheries and Oceans Canada Environment Canada and Canadian Transportation Agency, Comprehensive Study Report for the Proposed Fairview Terminal Phase II Expansion Project in Prince Rupert, British Columbia, iii, [CSR] (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)> .

intended to be mitigation measures for the effects of stage 1 of the project, but for the effects of stage 2 which has not been completed due to a lack of market conditions and need.<sup>32</sup>

30. The CTA explains how these facts relate to the law in question, “As the CEAA [1992] contained no stand-alone enforcement powers, the Agency would have to require conditions as part of the mitigation measures attached to the approval. However, the part of the project requiring an approval from the Agency under subsection 98(2) of the [*Canada Transportation Act*] never proceeded and, as a result, CN never applied to the Agency for and the Agency never issued the approval.”
31. Despite describing the separate stages and noting that the second stage would only be constructed depending on market conditions and need, the Comprehensive Study Report analyzes the effects of both stages together when considering air quality effects,<sup>33</sup> and noise and vibration effects.<sup>34</sup> The mitigation section for noise and vibration recognizes that the sidings would be built in different stages but does not discuss whether one siding would be sufficient if the second stage and second siding were never completed.<sup>35</sup>
32. For air quality, the Report concludes, “Based on the information summarized in this CSR and provided that the Proponents implement the mitigative actions as described, the Project residual environmental effects on air quality are considered to be not significant.”<sup>36</sup>
33. For noise and vibration, the Report concludes, “Based on the information summarized in this CSR and provided that the Proponents implement the mitigative measures as described above the Project will not likely result in significant adverse effects on ambient Noise and Vibration in the Project area.”<sup>37</sup>
34. It is notable that both conclusions rely on implementing the mitigative measures or actions, but there is a lack of precision regarding *when* the measures should be implemented in relation to the stages of the project. Even though the stages were predicted to have similar, if not identical effects, questions remain around the magnitude of the effects in each stage and the sufficiency of the mitigation measures to address them.
35. Reviewing the “Summary of Design, Mitigation, Monitoring and Follow-up Commitments” in Table 9-1, there is no indication of whether the measures should be implemented during stage 1 or in response to stage 1 effects, or during stage 2 or in response to stage 2 effects. The commitments are categorized in terms of timing by “Construction,” “Operation,” and “Maintenance.”<sup>38</sup>

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<sup>32</sup> CTA Decision at 3, paragraph 15.

<sup>33</sup> CSR at 49-56.

<sup>34</sup> CSR at 57-61.

<sup>35</sup> CSR at 59 (“*Construction of Sidings*: the sidings proposed, with one planned for construction starting in 2012, will provide additional operational capacity and efficiencies with Fairview Terminal. This will reduce the need for Fairview rail traffic to use the CN downtown yard.”).

<sup>36</sup> CSR at 56.

<sup>37</sup> CSR at 61.

<sup>38</sup> CSR at 179.

36. Ultimately, these mitigation measures are not enforceable conditions that the project proponent had to comply with since CEAA 1992 applies to the project rather than CEAA 2012.

#### **IV. DETERMINATION**

37. For the reasons stated herein, the Secretariat has determined it can proceed no further with its review of Submission SEM-21-001 (*Fairview Terminal*). The Submitter and the Council of the CEC are hereby notified that the process relating to this submission is now terminated without prejudice to the Submitter's ability to file a new submission.

#### **Secretariat of the Commission for Environmental Cooperation**

*(Original signed)*

Per: Richard Morgan  
Executive Director

cc: Iván Rico, Alternate Representative of Mexico  
Catherine Stewart, Alternate Representative of Canada  
Jane Nishida, Alternate Representative of the United States  
Environment Committee contact points  
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Submitters