

Submission SEM-21-001 (Fairview Terminal) Revision

27 March 2021

“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.”

1. **Disclosure of Nationality of Submitter:** Canadian

2. **Contact Information (to remain confidential):**

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

3. **Communication to Relevant Authorities in Canada:** The matter in question has been brought repeatedly to the attention of elected and unelected officials at a municipal, provincial, and Canadian federal levels since at least March 2018 to no effect except denial, delay, and obfuscation. Most recently, [REDACTED] was filed with Secrétariat, Office des transports du Canada / Gouvernement du Canada, secretariat@otc-cta.gc.ca / Site Web www.otc-cta.gc.ca. This Case [REDACTED] filing is a formal submission that can address rail noise and vibration only and is directed toward Canadian National Railway Ltd. - Prince Rupert Port Authority's (PRPA) co-proponent in Fairview II Container Port Expansion. There is no provision under this¹ particular formal procedure to address issues of air pollution and road noise associated with hundreds of containers transiting Prince Rupert City by road as a result of Prince Rupert Port Authority (PRPA) (an agent of the Government of Canada²) not being held by the Government of Canada to the completion of mitigation measures and follow-up program obligations for Fairview II Container Port Expansion by Canada's own environmental laws.³ Furthermore,

¹ <https://otc-cta.gc.ca/eng/publication/guidelines-resolution-complaints-over-railway-noise-and-vibration>

² <https://federal-organizations.canada.ca/profil.php?OrgID=PNR&t=&lang=en>

³ <https://www.ceaa-acee.gc.ca/050/evaluations/document/exploration/37956>

5 this⁴ formal procedure is in the hands of the Canadian Transportation Agency – one of the
very “responsible authorities”⁵ of the Canadian Government that should be seeing to the
completion of mitigation measures and follow-up program for Fairview II Container Port
Expansion. The delaying tactics that have served the co-proponents so well – still not having
10 completed mitigation and follow-up measures almost 10 years after project approval –
continue: there is no timeframe for a decision on [REDACTED]. Nor is there
even an indication that the formal filing for rail noise and vibration will even be taken up and
formally and independently adjudicated. Meanwhile, as the interested and regulatory parties
delay, the local population continues to be subjected to health-damaging levels of noise,
15 vibration, and air pollution while Fairview II Container Port expands.⁶

4. **Environmental Law Cited in the Submission:** The federal environmental assessment of
the Fairview Terminal Phase II Expansion Project (the Project) proposed by PRPA and
Canadian National Railway Ltd. was made pursuant to section 125 of the Canadian
15 Environmental Assessment Act, 2012. Approval decision was taken under ‘Decision Making
- Decisions of Decision Maker’ Sections 52 & 53⁷ of the Act which by which the decision
maker (in this case The Honourable Peter Kent, Minister of the Environment)⁸ establishes
“the conditions — that are directly linked or necessarily incidental to the exercise of a power
or performance of a duty or function by a federal authority that would permit a designated
20 project to be carried out, in whole or in part — in relation to the environmental effects referred
to in that subsection with which the proponent of the designated project **must comply**.”⁹ (my
italics and bold) According to 53(4)¹⁰ these conditions are (a) the implementation of the
mitigation measures that were taken into account in making the decisions under subsection
52(1); and (b) the implementation of a follow-up program. “Must comply” makes the
25 completion of mitigation measures and follow-up program for Fairview II Container Port
Expansion detailed in Minister Kent’s decision statement¹¹ **obligatory** if the project is
approved. As much as the project Fairview II Container Port Expansion was approved, the
proponents – including PRPA (an agent of the Government of Canada) are **obliged** to
complete mitigation and follow-up mentioned in the decision statement. The proponents – of

⁴ <https://otc-cta.gc.ca/eng/publication/guidelines-resolution-complaints-over-railway-noise-and-vibration>

⁵ Decision <https://iaac-aeic.gc.ca/050/evaluations/document/92397>

⁶ <https://www.rupertport.com/land-use-plan/>

⁷ Canadian Environmental Assessment Act, 2012, SC 2012, c 19, s 52, <<https://canlii.ca/t/51zdg>> retrieved on 2021-03-20

⁸ Environmental Assessment Decision Statement, Fairview Terminal Phase II Expansion Project, British Columbia, January 25, 2013 <https://iaac-aeic.gc.ca/050/evaluations/document/85477>

⁹ Canadian Environmental Assessment Act, 2012, SC 2012, c 19, s 52, <<https://canlii.ca/t/51zdg>> retrieved on 2021-03-20

¹⁰ Canadian Environmental Assessment Act, 2012, SC 2012, c 19, s 52, <<https://canlii.ca/t/51w48>> retrieved on 2021-03-27

¹¹ <https://iaac-aeic.gc.ca/050/evaluations/document/85477>

which Canadian Government PRPA is one - cannot fail to carry out the conditions the mitigation measures and follow-up program described in the Comprehensive Study and as stated in the Environmental Assessment Decision Statement Report as appropriate for the proposed project without impugning the power of the Minister to make decisions according to the Act. Indeed, it is explicitly stated under section 6(b)¹² PROHIBITIONS Proponent 6. The proponent of a designated project must not do any act or thing in connection with the carrying out of the designated project, in whole or in part, if that act or thing may cause an environmental effect referred to in subsection 5(1) unless (b) *the proponent complies with the conditions included in the decision statement that is issued under subsection 31(3) or section 54 to the proponent with respect to that designated project.* (my italics). Canada is not enforcing its own environmental legislation against its own agencies by not insisting that the mitigation measures and follow-up program described in the Comprehensive Study Report¹³ are carried out.

5. **Whether any remedy has been pursued:** Currently, the only remedy being pursued [REDACTED] is that mentioned above, viz. [REDACTED] filed with Secrétariat, Office des transports du Canada / Gouvernement du Canada. This filing makes reference to failures to mitigate and monitor by Canadian National Railway Ltd., PRPA's co-proponent in the Fairview II Container Port Expansion. The filing covers only rail noise and vibration, and tellingly - is with one of the very Canadian government 'responsible authorities'¹⁴ that should have been seeing to the completion of mitigation measures and follow-up program for Fairview II Container Port Expansion.

Original submission follows here:

PRPA (PRPA) is an agent of the Government of Canada.¹⁵

PRPA has not been held by the Government of Canada to the completion of mitigation measures and follow-up program obligations for Fairview II Container Port Expansion.¹⁶

¹² Canadian Environmental Assessment Act, 2012, SC 2012, c 19, s 52, <<https://canlii.ca/t/51zdg>> retrieved on 2021-03-20

¹³ https://www.ceaa-acee.gc.ca/050/documents_staticpost/37956/CSR_-_Fairview_Terminal_Phase_II_Expansion-eng.pdf

¹⁴ Decision <https://iaac-aeic.gc.ca/050/evaluations/document/92397>

¹⁵ <https://federal-organizations.canada.ca/profil.php?OrgID=PNR&t=&lang=en>

¹⁶ <https://www.ceaa-acee.gc.ca/050/evaluations/document/exploration/37956>

The federal environmental assessment of the Fairview Terminal Phase II Expansion Project (the Project) proposed by PRPA and Canadian National Railway Ltd. was made pursuant to section 125 of the Canadian Environmental Assessment Act, 2012, the comprehensive study of this project was continued under the former Canadian Environmental Assessment Act (the former Act). Having
5 taken into consideration the Comprehensive Study Report and the public comments filed pursuant to subsection 22(2) of the former Act, the Minister was of the opinion that:

- the Project, taking into account the mitigation measures described in the Comprehensive Study Report, is not likely to cause significant adverse environmental effects; and
- the mitigation measures and follow-up program described in the Comprehensive Study
10 Report were appropriate for the proposed project.

PRPA's obligations are set out in the Comprehensive Study Report (CSR)¹⁷ and the associated Decision Statement¹⁸ which outline the mitigation measures and follow-up program.

The CSR and associated documents detail specific duties and obligations for PRPA as co-proponent. These documents lay out reasonable standards in order to safeguard human health and
15 liveability of an area impacted by noise, vibration, and other negative externalities of PRPA's and their co-proponent's economic operations. Air quality modelling was done on the assumption that mitigation measures and follow-up program would be carried out.

Neither PRPA, nor other branches of the Canadian government, have seen to the reasonable fulfilment of the mitigation and monitoring measures described in the Comprehensive Study Report,
20 as specifically requested in the Minister's Environmental Assessment Decision Statement for the facility dated 25 January 2013, and as echoed in the news release announcing the Decision on the Environmental Assessment of the Fairview Terminal Phase II Expansion Project: "This project was assessed using a science-based approach. If the project is permitted to proceed to the next phase, it will continue to be subject to Canada's strong environmental laws, rigorous enforcement and
25 follow-up and increased fines."¹⁹

And again when the decision maker (in this case Minister Peter Kent) referred the Project back to the responsible authorities, the Canadian Transportation Agency, Fisheries and Oceans Canada and Environment Canada, for appropriate action under section 37 of the former Act in his decision

¹⁷ The Comprehensive Study Report Pursuant to the Canadian Environmental Assessment Act for the Proposed: Fairview Terminal Phase II Expansion Project in Prince Rupert, British Columbia Proposed by: Prince Rupert Port Authority and Canadian National Railway Company Prepared by: Fisheries and Oceans Canada Environment Canada and Canadian Transportation Agency September 2012 Canadian Environmental Assessment Registry Reference Number 08-03-37956

¹⁸ <https://www.ceaa-acee.gc.ca/050/evaluations/document/85082?culture=en-CA>

¹⁹ <https://www.ceaa-acee.gc.ca/050/evaluations/document/91456>

statement of January 25, 2013²⁰.the responsible authorities, Environment Canada, the Canadian Transportation Agency, Fisheries and Oceans Canada and the Prince Rupert Port Authority in their decision ²¹ on March 6, 2013 relating to the comprehensive study of the Fairview Terminal Phase II Expansion Project again specify the implementation of appropriate mitigation measures and a follow-up program to verify the accuracy of the environmental assessment and/or determine the effectiveness of any measures taken to mitigate the adverse environmental effects is required for this project (Fairview Terminal Phase II).²²

PRPA's own CSR proposal recognizes threats to human health posed by "exceedances of the

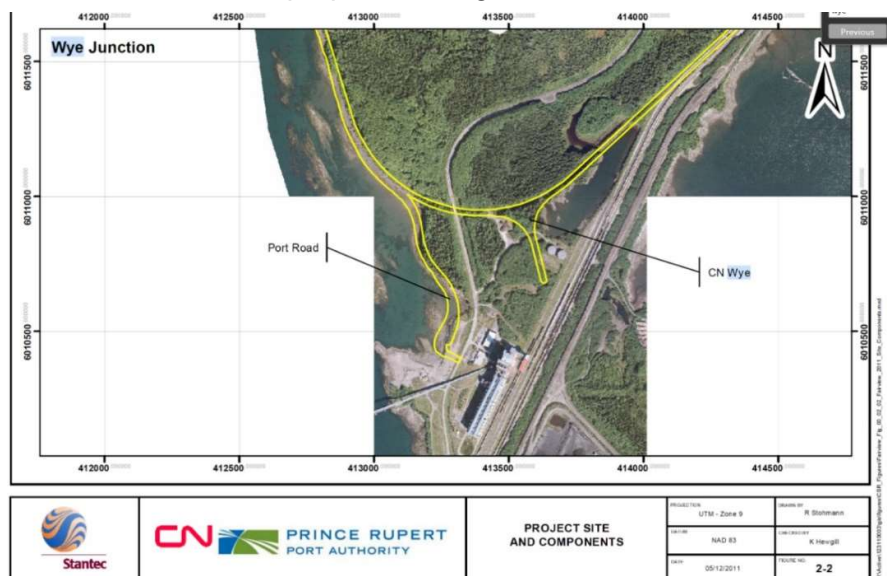


Figure 1. some of PRINCE RUPERT PORT AUTHORITY 's proposed mitigation from CSR. Ariel view dated 12 May 2011.



Figure 2 Recent (14 Sep 2020) satellite view of area where some mitigation was to be carried out.

Health Canada (2005) day-night sound level limits during operations (at receptors close to the affected rail line)" (CSR, p 80) and yet claims that "construction and installation of on-shore components (drainage system, landslide containment, intermodal yard, container yard, buildings, ancillary facilities, lighting, roads, sidings and wye)" (CSR, p. A-16) will mitigate these threats to human health that PRPA recognized and recorded in their proposal.

These 'roads, sidings and wye' which were to serve in part to mitigate noise, vibration and air emissions at receptors close to the affected rail line have not been built by PRPA or their co-proponents, as may be verified by an examination of the figures. Figure 1 shows PRPA's

²⁰ <https://iaac-aeic.gc.ca/050/evaluations/document/85477>

²² <https://iaac-aeic.gc.ca/050/evaluations/document/92397>

proposed mitigation, on the basis of which PRPA's expanded operations were approved. Figure 2 shows a recent (14 September 2020) satellite view of the area where some rail mitigation was to be built. A quick comparison between PRPA's 2011 proposed Project Footprint (CSR, p. 4) and the recent satellite imagery dated 14 September 2020 shows that PRPA has not carried out mitigation as the Minister requested. No wye is visible in the satellite imagery. Nor is the proposed road. Similarly, for PRPA's siding component (CSR, p. 4): The wye, road, and siding mitigation components are not visible in recent satellite imagery because they were never built.

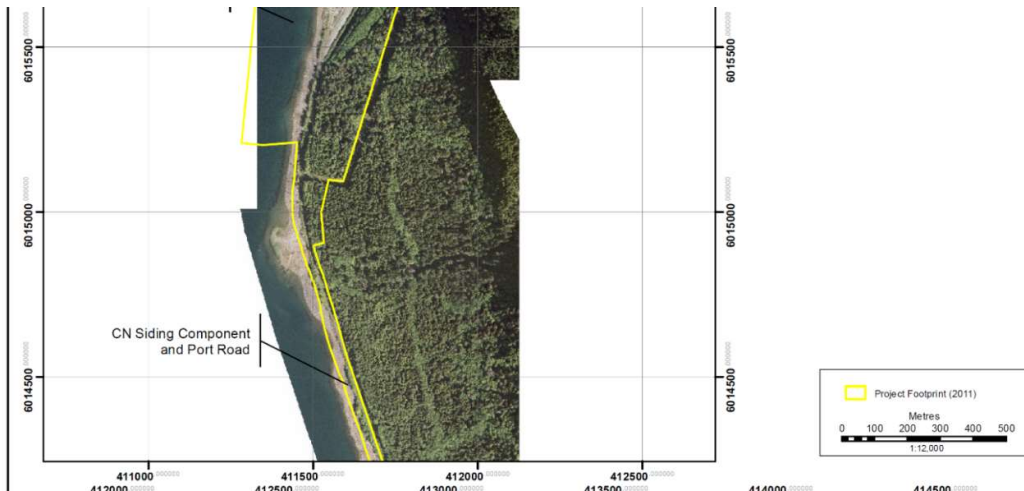


Figure 3. PRINCE RUPERT PORT AUTHORITY 's proposed mitigation from CSR. Project footprint dated 2011.

The wye was never built. Nor were the sidings. Nor was the road. In consequence, the very outcomes laid out in a decision matrix

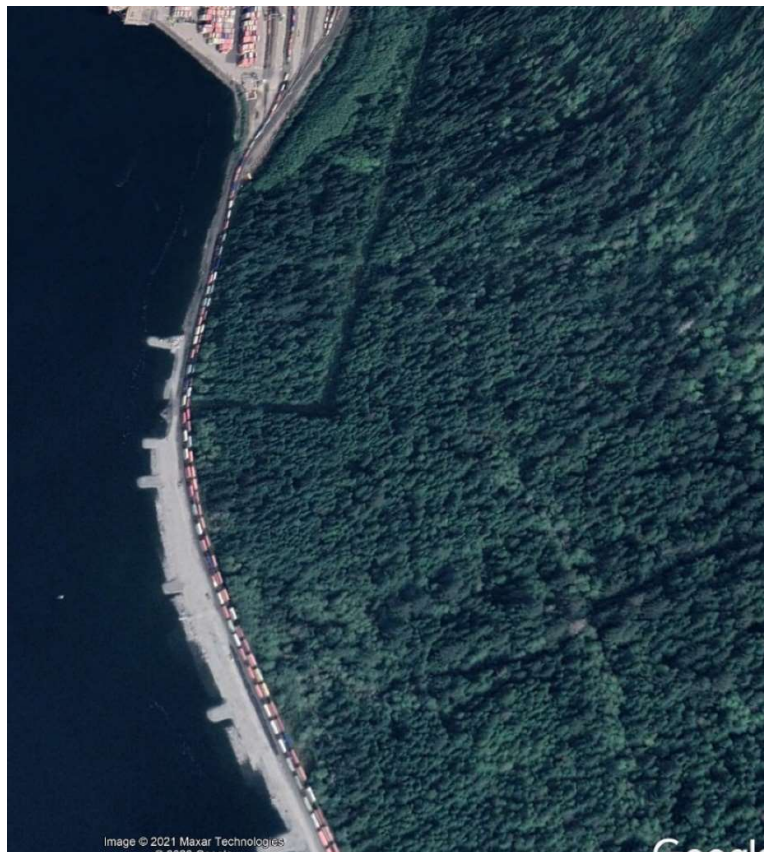


Figure 4. Recent (Sept. 14, 2020) satellite view of an area where mitigation was to be implemented.

of PRPA's own CSR proposal have come to pass with expansion of PRPA's operations in this area. These outcomes include "longer distance for trains to run; higher emissions and noise to community. Results in poor efficiencies and congestion for other rail traffic." (CSR, p. 28) Because PRPA never built the wye, sidings, or road that PRPA proposed in seeking approval to increase operations in proximity to pre-existing human habitation, PRPA's inefficient and congestion traffic has had to run day and night right past the receptors identified as at risk by Health Canada in PRPA's proposal (CSR, p. 80). The 'higher emissions and noise to

community' (CSR, p. 28) PRPA predicted in their own proposal would result if mitigation measures were not carried out – and they were not carried out - has resulted in dB(A) exceedances that are known to PRPA and are regularly shown in data from two dB(A) noise monitoring stations – at Fairview Bay and Westview. These data are collected by PRPA at two dB(A) noise monitoring stations located at either end of a stretch over which 'inefficient and congestion' (CSR, p. 28) railway traffic has had to run northward as a result of PRPA's failure to carry out required mitigation. Between these two noise monitoring stations at Fairview and Westview, close to the affected rail line, lie residential receptors referenced by Health Canada in PRPA's CSR proposal.

PRPA is well aware²³ that C-weighted noise level monitoring at these same Fairview and Westview locations would show even more egregious railway noise and vibration exceedances in this area of railway operation. As PRPA also well knows²⁴ dB(C) is typically monitored along with dB(A) when safeguarding residential receptors from harm. The dB(A) values mentioned above from Fairview

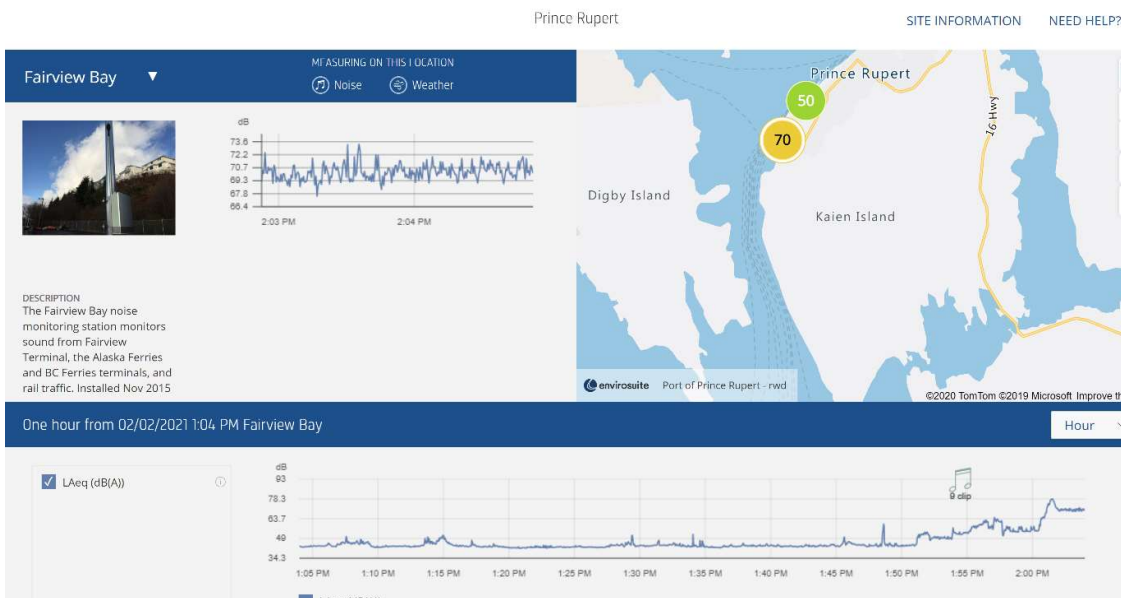


Figure 5 Screen capture showing daytime dB(A) exceedances at Fairview noise monitoring station.

and Westview are collected by PRPA so PRPA is well aware of the damaging levels of noise and vibration to which residential receptors are being regularly exposed as a result of PRPA's failure to carry out the mitigation PRPA proposed in the CSR and which the Minister reasonably requested be completed. In fact, a reason PRPA proposed mitigation in their CSR proposal was to avoid exposing residential receptors to predictable and harmful levels of noise and vibration.

²³ From, for example, a filing made by PRPA's co-proponent CN <https://www.ceaa-acee.gc.ca/050/documents/p80100/126808E.pdf> Milton Logistics Hub ("Project") CEAR File No. 80100 Response to the Review Panel's Information Request 8 Received September 25, 2018 "Therefore, in response to this IR, we have adopted the outdoor criterion for low frequency noise suggested by Broner (2011). Broner (2011) identifies a C-Weighted noise level for community annoyance from low frequency noise sources, with different thresholds applying in different circumstances based on the frequency (intermittent or continuous) of low frequency noise. For this situation, Broner (2011) identified a maximum allowable dBC level of 65 to 70 dBC for residential receptors subject to intermittent (1-2 hours in duration) low frequency noise to minimize low frequency noise and vibration problems."

²⁴ *ibid*

Recognizing threats to human health from PRPA's proposed port expansion if mitigation and monitoring were not to be carried out, the Minister, in granting approval to PRPA's proposal sets out what is reasonable. Specifically, the Minister requested that "the responsible authorities ensure the implementation of the mitigation measures described in the Comprehensive Study Report. The Minister also requests that the responsible authorities implement the follow-up program described in the Comprehensive Study Report, in order to determine the effectiveness of the measures taken to mitigate any adverse environmental effects and to verify the accuracy of the environmental assessment of the Project."²⁵

It is well within PRPA's capacities to carry out reasonable mitigation and follow-up monitoring that was specified in PRPA's expansion proposal first filed²⁶ a decade ago. PRPA's extraordinary project management capabilities are evidenced by PRPA's continuing and aggressive expansion of port infrastructure during a time of global pandemic.

In order to ensure compliance, it is reasonable that rigorous enforcement and follow-up be administered as the Minister reasonably lays out in the 25 January 2013 news release 'announcing that the proposed Fairview Terminal Phase II Expansion Project is not likely to cause significant adverse environmental effects *with the implementation of the mitigation measures described in the Comprehensive Study Report.*'²⁷ (my italics)

Unless orders to stop operations, cumulative penalties, or 'increased fines' of the kind that the Minister mentions in the news release announcing approval of PRPA's operations in this are instituted immediately and retroactively, it is cheaper and easier for PRPA as an agent of the Government of Canada to obfuscate and continue procedural delays while carrying out what amounts to expropriation on the cheap and nasty by exposing residents living near the Fairview facility, and near the highway that containers transit (because certain mitigation measures were never carried out) to health and property-damaging levels of pollution that PRPA itself recognized and noted nearly a decade ago in their proposals seeking approval to increase operations in this area. As it stands, carrying out the reasonable mitigation requested by the Minister is simply a cost centre for PRPA: it is cheaper and easier to wage a war of attrition against receptors identified in PRPA's own CSR submission.

The Minister in his decision places squarely on PRPA and its co-proponents a reasonable duty of care, given that PRPA's CSR proposal involved increasing operations near receptors in an area that

²⁵ <https://www.ceaa-acce.gc.ca/050/evaluations/document/85082?culture=en-CA>

²⁶ <https://www.ceaa-acce.gc.ca/050/documents/52726/52726E.pdf>

²⁷ <https://www.ceaa-acce.gc.ca/050/evaluations/document/91456>

was already identified by Health Canada and recognized by PRPA to have day-night noise and vibration level limits exceedances during operations (CSR, p 80).

Canada has failed in its duty of care and continues to damage the environment by failure to ensure duties and obligations as reasonably requested by the Minister and as specified by PRPA's own proposal are carried out. The reasonable requests of the Minister must be respected when it comes to safeguarding the environment according to the Act under which Fairview II Container Port Expansion was permitted.

Indeed, it is explicitly stated under section 6(b)²⁸ PROHIBITIONS Proponent 6. The proponent of a designated project must not do any act or thing in connection with the carrying out of the designated project, in whole or in part, if that act or thing may cause an environmental effect referred to in subsection 5(1) unless (b) *the proponent complies with the conditions included in the decision statement that is issued under subsection 31(3) or section 54 to the proponent with respect to that designated project.* (my italics). Canada is not enforcing its own environmental legislation against its own agencies.

²⁸ Canadian Environmental Assessment Act, 2012, SC 2012, c 19, s 52, <<https://canlii.ca/t/51zdg>> retrieved on 2021-03-20
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