

THE MANITOBA CLEAN ENVIRONMENT COMMISSION

IN THE MATTER OF: The Manitoba Clean Environment Commission
 Technical Review and Public Hearing respecting the
 proposed Vivian Silica Sand Extraction Project

AND IN THE MATTER OF: Section 6 of *The Environment Act*, CCSM c.E125

AND IN THE MATTER OF: Section 88(1) of *The Manitoba Evidence Act*, CCSM
 c.E150

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I. List of Documents

1. Notice of Motion of the Municipal Silica Sand Advisory Committee, filed October 19, 2022;
2. Dr. Hartmut Holländer and Dr. Allan Woodbury, “Technical Review: Sio Silica Corporation’s Environment Act Project Proposal” (19 September 2022);
3. Arcadis Canada Inc., “Technical Review of Sio Silica Corporation’s Environment Act Project Proposal” (13 September 2022);
4. Manitoba Clean Environment Commission, “Process Guidelines Respecting Public Hearings” (July 2022);
5. Manitoba Clean Environment Commission, “Hearing Directive for the Vivian Silica Sand Extraction Project” (February 2022); and
6. Such further and other materials as counsel may advise and the CEC Hearing Panel may permit.

II. List of Authorities

1. *The Environment Act*, CCSM c E125
2. *The Manitoba Evidence Act*, CCSM c E150

III. Statement of Submissions

a. Overview

1. The application of Sio Silica Corporation (the “Proponent”) before the Clean Environment Commission (the “Commission”) is not ready for review.
2. The findings of the Commission’s technical advisors confirm that the material omissions and deficiencies in the Proponent’s application are such that the project’s environmental risks, including likely cumulative effects, cannot be known.
3. Without this information, the Commission cannot fulfil its mandate to assess environmental risk and hearing participants cannot fulfil their role in understanding the risk and assist the Commission to develop a full understanding of those risks.
4. In the case of Municipal Silica Sand Advisory Committee the principle of fairness requires that hearing participants be provided with all relevant information regarding the subject matter of the hearing (the Project) before the hearing. To participate fully in a review of the Project and to fully develop an understanding of the risks their constituents face it is necessary to have a complete record. It is the only way that Municipal Silica Sand Advisory Committee prepare and deliver a complete and comprehensive presentation to the Commission regarding the Project and the possible effects or more importantly cumulative effects.
5. The Commission has the authority to require the Proponent to:
 - (i) direct the Proponent to file materials rectifying the material deficiencies in its application as identified in the “Hydrogeology Technical Review” and “Geotechnical Technical Review” reports at least sixty (60) days before setting dates for the hearing. Municipal Silica Sand Advisory Committee will require sufficient time to complete the review of the missing documentation and respond if necessary to those deficiencies with its own expert evidence. and
 - (ii) direct the Proponent to provide hearing participants with the Stantec Geotechnical Report at least sixty (60) days before setting dates for the hearing.

b. Statement of Facts

6. On July 23, 2021, the Proponent (then “CanWhite Sands Corporation”) applied for a license under *The Environment Act*¹ for a mining project which would remove silica sand from the Winnipeg Sandstone aquifer in the Rural Municipality of Springfield.
7. Following the receipt of public comments and input from a Technical Advisory Committee, the Proponent’s application was referred to the Commission for a technical review and public hearing through a letter from the then Minister of Conservation and Climate to the Chair of the Commission. Terms of Reference were attached to this letter.
8. The Terms of Reference indicate that the Commission’s mandate is to “conduct a technical review and a public hearing to consider the potential environmental effects of the proposed [Sio Silica Corporation] silica sand extraction project.” The Commission was directed to conduct the hearing in “general accordance with its *Process Guidelines Respecting Public Hearings*”, and ultimately to provide “advice and recommendations to the Minister in the form of a report...”²
9. The Terms of Reference for this process require the Commission to technically review the *Environment Act* proposal and the hydrogeology and geochemistry assessment report and advise and recommendations to the Minister regarding potential environmental and health effects of the proposed sequential installation, operation and decommissioning of silica sand extraction wells for the silica sand extraction project.³
10. In doing so, the Commission is also required to “provide members of the public the opportunity for input regarding the [Sio Silica Corporation] silica sand extraction project proposal at a public hearing in a location consistent with the affected community.”⁴
11. The Commission retained a team of technical consultants, including Arcadis Canada Inc., which published a Technical Review report referred to by the Commission as the “Geotechnical Technical Review”, dated September 13, 2022, and Drs. Allan Woodbury and Hartmut Holländer, who published a report referred to by the Commission as the “Hydrogeology Technical Review”, dated September 19, 2022.

¹ CCSM c.E125

² Manitoba Clean Environment Commission, “Hearing Directive for the Vivian Silica Sand Extraction Project” (the “Hearing Directive”) at Appendix III, Terms of Reference

³ *Ibid*

⁴ *Ibid*

12. These reports identify significant and material deficiencies in the Proponent's application. The Hydrogeology Technical Review indicated that "the potential impacts [of the project] are many and not all the relevant issues were identified and resolved with the work described in the proposal."⁵ The Geotechnical Technical Review identified "multiple potentially significant concerns" with the proponent's application including the risk that its focus on the 4-year horizon rather than the 24-year project life span precluded meaningful assessment of the project's risks.⁶
13. The Municipal Silica Sand Advisory Committee filed a Notice of Motion on October 14, 2022 seeking an order:
- (i) directing the Proponent to file materials rectifying the material deficiencies in its application as identified in the "Hydrogeology Technical Review" and "Geotechnical Technical Review" reports at least sixty (60) days before setting dates for the hearing; and
 - (ii) direct the Proponent to provide hearing participants with the Stantec Geotechnical Report at least sixty (60) days before setting dates for the hearing.
14. The Commission issued directions respecting the process by which this motion would be determined by letter on October 14, 2022.

⁵ Hydrogeology Technical Review, at 3.

⁶ Geotechnical Technical Review, at 8.

c. Points to be argued

15. The Municipal Silica Sand Advisory Committee will argue that:

- (i) the Commission possesses the authority to require the Proponent to file specific additional information; and
- (ii) proceeding to a public hearing without the Proponent rectifying the significant omissions and deficiencies in its application and providing hearing participants with the Stantec Geotechnical Report precludes the Commission from fulfilling its mandate and hearing participants from participating in a meaningful way in which the legislation intended.

d. Argument

The Commission Possesses Authority to require additional filings

16. *The Environment Act* sets out processes for environmental licensing and impact assessment in Manitoba intended to “ensure that the environment is protected and maintained in such a manner as to sustain a high quality of life, including social and economic development, recreation and leisure for this and future generations...”⁷
17. To achieve this, the Act “provides for the environmental assessment of projects which are likely to have significant effects on the environment.”⁸ It also calls for using “...effective review processes that adequately address environmental issues.”⁹
18. One such review process is conducted by the Commission, which has a statutory mandate to “provide advice and recommendations to the minister...”¹⁰ when directed to conduct a review by issuing Terms of Reference.
19. The Commission may “make rules governing its procedure.”¹¹ The Commission has done so in its “Process Guidelines Respecting Public Hearings”, which include multiple provisions relevant to the relief sought in the present motion.
20. First, the Commission possesses the express authority to require the production of information, particulars, or documents. In rule 3.21:

⁷ Section 1(1)

⁸ Clause 1(1)(b)

⁹ Clause 1(1)(c)

¹⁰ Clause 6(5)(a)

¹¹ Subsection 6(8)

*The Commission may require a party to any proceedings to provide such information, particulars or documents as it may require and may suspend the proceedings until it receives the required information, particulars or documents.*¹²

21. Also consistent with rule 3.21 is the Commission's authority to require, through summoning witnesses, the production of "documents and things as the Commission deems necessary to the full investigation of the matter it is hearing."¹³ This power is made express in *The Environment Act* via reference to *The Manitoba Evidence Act*.¹⁴

The Technical Reports Identify significant and material omissions and deficiencies which preclude review of the project

22. The findings of both of Hydrogeology Technical Review and the Geotechnical Technical Review are summarized by Drs. Holländer and Woodbury, who note that "the potential impacts [of the project] are many and not all the relevant issues were identified and resolved with the work described in the proposal."¹⁵
23. The reports identify significant risks that the Proponent has failed to address, including but not limited to the introduction of salinity to the aquifers, the collapse of the shale aquitard, and the potential for impacts on groundwater quality.
24. The reports also undermine the credibility of conclusions drawn from the Proponent's hydrogeological modeling and the data collected through its well test site. The reports identify certain studies needing to be re-done due to fundamental flaws in methodology and analysis.
25. In addition, the Proponent has not submitted final management plans, but only "examples" of what such plans might look like. As stated in the Geotechnical Technical Review, "The Management Plans submitted to date lack the information necessary to confirm that operational practices will be capable of identifying and mitigating potential environmental impacts from the Project."¹⁶
26. The foregoing factors make a comprehensive assessment of the proposal's environmental risks impossible.

¹² Manitoba Clean Environment Commission, "Process Guidelines Respecting Public Hearings" (July 2022) (the "Process Guidelines"), Rule 3.21

¹³ *Ibid*, Rule 3.18.1

¹⁴ *The Environment Act*, subsection 6(6), referring to Part V of *The Manitoba Evidence Act*, CCSM c.E150

¹⁵ Hydrogeology Technical Review, at 3.

¹⁶ Geotechnical Technical Review, at 27.

27. Compounding these shortcomings is the truncated scope of the application, which only provides information on the first four years of proposed activities, and only on the areas affected by these initial activities. The information provided is not only incomplete, but the Proponent's failure to assess the entire project area and life span makes it doubly challenging for the Commission to fulfill its mandate. As stated in the Geotechnical Technical Review:¹⁷

“The Project Proposal and supporting documents do not include an assessment of cumulative effects. Given the wide range of land uses in the vicinity of the Project and the importance of the groundwater resource, this represents a substantive deficiency in the Project Proposal.”

¹⁷ Geotechnical Technical Review, at 25.

28. To date, the Proponent has also refused to provide hearing participants with the Stantec Geotechnical Report unless participants sign a non-disclosure agreement. However, the Geotechnical Review Report states that:¹⁸

“Based on our experience in other contexts, none of the information provided to Arcadis to support our review would normally be classified as confidential and withheld from the Public Record. Nonetheless, the Proponent has submitted some evidence on the condition that it be kept confidential. To illustrate, the report “*Geotechnical Analysis for Sio Silica Extraction Project*” Stantec (2022), contains information that is necessary to evaluate whether the Project is likely to result in significant environmental impacts. Despite the importance of this information, the document is currently classified as confidential by the Proponent. We are unaware of any reasons for withholding this or any other document that has been provided to date from the Public Registry. In the opinion of Arcadis, doing so has the potential to limit the use of the information as evidence during the EA decision-making process. It also has the potential to unnecessarily erode public trust that the EA process is open and transparent.”

¹⁸ *Ibid*, at 27.

29. In other words, the Commission's own experts support the release of the Stantec Geotechnical Report to hearing participants, without the requirement to sign a non-disclosure agreement.

The significant and material omissions and deficiencies cannot be resolved through Information Requests

30. The gaps in the Proponent's application cannot be filled through the Proponent's responses to Information Requests. The Commission's Practice Direction addressing Information Requests indicates that "the purpose of an IR process is to ensure that parties to the proceeding have access to all of the information necessary for the review of the matter before the hearing panel."¹⁹
31. However, the Commission's Hearing Directive narrows the scope of Information Requests for this proceeding, confirming that they are "written [questions] to the Proponent asking for additional information about or clarification of evidence already submitted..."²⁰ Therefore, this process is not intended to obtain information never submitted, but rather simply to seek clarification regarding information currently filed with the Commission.
32. The principle of fairness requires that not only must hearing participants receive all relevant materials before the hearing, they must also have a meaningful opportunity to review and respond to such materials. Given new and supplemental information requested to be provided by the Proponent, hearing dates should not be set until those materials are provided and such hearing dates should be at least sixty (60) days following the provision of such materials.

¹⁹ Process Guidelines, at Appendix A (Information Requests)

²⁰ Hearing Directive, at Information Requests

e. Conclusion

33. To fulfil its statutory mandate and the directions set out in its Terms of Reference, the Commission should have all information to assess the environmental risks raised by the proposed project.
34. The Proponent must provide information resolving all omissions and deficiencies set out in the Hydrogeology Technical Review and the Geotechnical Technical Review, as well as provide the Stantec Geotechnical Report.
35. The Municipal Silica Sand Advisory Committee is not seeking an adjournment of the hearing process, but a production of all relevant materials and a meaningful opportunity to review and analyze such materials. The only way these materials can be provided, reviewed and analyzed in a meaningful way is for the Commission to require production at least sixty (60) days before setting hearing dates.
36. The Commission possesses the authority to grant the relief sought, and the Municipal Silica Sand Advisory Committee urges the Commission to do so. This motion is brought to enable the Commission to fulfill its mandate and Terms of Reference, to ensure that Participants can meaningfully participate, and to protect the integrity of this evidence-based process.

DATED this 19th day of October, 2022.



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