

THE MANITOBA CLEAN ENVIRONMENT COMMISSION

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

AND IN THE MATTER OF Notices of Motion submitted by the Manitoba Eco-Network and Our Line in the Sand, and by Dennis LeNeve.

SIO SILICA CORPORATION

RESPONSE TO THE MOTIONS

February 23, 2023

To: Secretary
Manitoba Clean Environment Commission
305-155 Carlton Street
Winnipeg, MB R3C 3H8

I. OVERVIEW

1. On February 19, 2023, the Manitoba Eco-Network (“MBEN”) and Our Line in the Sand (“OLS”) submitted a Notice of Motion (the “MBEN/OLS Motion”) seeking an order:
 - (a) declaring that the the January 14, 2022 Stantec Consulting Ltd. (“Stantec”) report titled *Geotechnical Analysis for Sio Silica Extraction Project* (the “Stantec Geotechnical Report”) does not contain confidential information, and directing Sio Silica Corporation (“Sio Silica”) to: (i) provide participants in the Commission’s hearing for the Vivian Silica Sand Extraction Project (the “Hearing” and the “Project”, respectively) an unredacted version of the Stantec Geotechnical Report without the execution of a non-disclosure agreement (“NDA”); and (ii) produce the authors of the Stantec Geotechnical Report for questioning during the Hearing; or, in the alternative
 - (b) declaring that a portion of the Hearing be held as an *in camera* session for the purpose of confidential questioning of the authors of the Stantec Geotechnical Report, and directing Sio Silica to produce those authors for that purpose.
2. On February 22, 2023, Dennis LeNeveu submitted a Notice of Motion seeking an order directing Sio Silica to provide Hearing participants with:

“... all the limestone and overburden thickness data, calculations, methods and information used to determine the number of wells per cluster given in the Sio Silica revised extraction plan of Jan 24, 2023. The names, locations, and dates of construction of all the wells and boreholes used to obtain the limestone thickness and overburden data and the overburden, limestone, and shale aquitard thickness for each borehole and/or well must be provided. Missing information on the spacing between well clusters, how this spacing was determined, and the projected year of extraction must be provided.”
3. For reasons unexplained, the above-noted Notices of Motion (collectively, the “Motions”) were filed on the eve of the Hearing, which is set to commence on February 27, 2023. Sio Silica is providing this response in advance of the Hearing, in hopes of avoiding disruption and delay to the Hearing as a result of the late Motions.
4. For the reasons set out in this Response to the Motions, the Motions should be dismissed. However, holding a portion of the Hearing *in camera* for the purpose of questioning regarding confidential information in the Stantec Geotechnical Report may be justified if participants who have executed an NDA seek to question the confidential information in the Stantec Geotechnical Report and are unable to adequately pose questions in the Hearing without disclosing the confidential information.

II. RELEVANT FACTS

5. On August 3, 2021, CanWhite Sands Corp., now Sio Silica, submitted an Environment Act Proposal for the Project (the “EAP”) to Manitoba Conservation and Climate.
6. On November 15, 2021, the Minister of Conservation and Climate (the “Minister”) requested that the Commission conduct the Hearing to consider the potential environmental effects of the Project.
7. On January 14, 2022, a non-confidential version of the Stantec Geotechnical Report was submitted as part of Sio Silica’s responses to public comments regarding the EAP.¹
8. On February 18, 2022, the Commission issued a hearing directive for the Hearing. The hearing directive indicated that Sio Silica’s presentation by its witnesses will be subject to questioning (i.e., cross-examination) by participants during the Hearing.
9. On July 26, 2022, Sio Silica sent a non-confidential version of the Stantec Geotechnical Report to Hearing participants.²
10. On October 14, 2022, a Hearing participant, the Municipal Silica Sand Advisory Committee (“MSSAC”), submitted a Notice of Motion (the “MSSAC Motion”) seeking, among other things, an order directing Sio Silica to provide Hearing participants with the Stantec Geotechnical Report prior to the setting of dates for the Hearing.
11. On October 28, 2022, Sio Silica responded to the MSSAC Motion, including what Sio Silica understood to be a request for the confidential version of the Stantec Geotechnical Report to be made public, without the need for Hearing participants to sign an NDA. In response to that request, Sio Silica submitted that the redacted information in the non-confidential version of the Stantec Geotechnical Report:
 - (a) is commercially sensitive information, disclosure of which could reasonably be expected to result in a material loss to Sio Silica or prejudice its competitive position, including if it is used by a competitor in the development of a competing project or to otherwise gain an unfair advantage over Sio Silica; and
 - (b) has been consistently treated as confidential information by Sio Silica, whose interest in its confidentiality outweighs any public interest in its disclosure, particularly given that the Hearing participants can obtain the confidential information upon signing an NDA.
12. Sio Silica also respectfully submitted that MSSAC’s reliance on one of the Commission’s third-party technical advisors to support its claim that information in the Stantec Geotechnical Report is not confidential should be given little, if any, weight because that

¹ See “2022-01-14 Proponent Response to Public Comments” located on the public registry: https://www.gov.mb.ca/sd/eal/registries/6119/tab2_responses.pdf, starting at PDF 87

² See the letter that Sio Silica sent to the Hearing contact list on July 26, 2022, to which a non-confidential version of the Stantec Report was also attached.

third-party has no expertise in the commercial aspects of silica sand project development, and that issue was not part of the scope of the technical review requested by the Commission.

13. On November 3, 2022, the Commission issued a decision in which it dismissed the MSSAC Motion, including the request for the confidential version of the Stantec Geotechnical Report to be made public without the need for Hearing participants to sign an NDA.
14. On November 16, 2022, the Commission issued reasons for its decision to dismiss the MSSAC Motion. In those reasons, the Commission stated that it “is not convinced that it has the statutory power to grant the orders which [MSSAC] seeks and even if it does have that power, it is not inclined to exercise such authority at this stage.” The Commission further stated that “its mandate does not include the right to dictate to an applicant what it must provide in the way of evidence”.
15. On December 19, 2022, the Secretary of the Commission confirmed the dates of the Hearing, which is set to commence on February 27, 2023.³
16. On January 24, 2023, Sio Silica sent a revised extraction plan for the Project (the “Revised Extraction Plan”) to Hearing participants, which is based on the recommendations and revised parameters outlined in the Stantec Geotechnical Report.⁴ Notably, the well numbers and spacing in each cluster have been arranged to follow the allowable extraction disturbance zone dimensions provided in Table 9 of the Stantec Geotechnical Report,⁵ which includes parameters for competent limestone thickness and overburden thickness, among other things. Table 9 was included in both the confidential and non-confidential versions of the Stantec Geotechnical Report.
17. On February 13, 2023, Sio Silica notified the Commission and Hearing participants that its anticipated witnesses at the Hearing include Steve Bundrock and Arash Eshraghian from Stantec⁶ (the “Stantec Witnesses”). The Stantec Witnesses are the authors of the Stantec Geotechnical Report.

III. RESPONSE TO THE MOTION BY MBEN AND OLS

A. The Primary Relief Sought Should Not Be Granted

18. The primary relief sought in the MBEN/OLS Motion is very similar to the above-discussed part of the MSSAC Motion, which also sought an order directing Sio Silica to provide Hearing participants with an unredacted version of the Stantec Geotechnical Report without the execution of an NDA. Like the present motion, the MSSAC Motion relied on one of the Commission’s third-party technical advisors to support its claim that information

³ See the email that the Secretary of the Commission sent to the Hearing contact list on December 19 2022, which included the Hearing dates.

⁴ Now available online: http://www.cccmanitoba.ca/hearings/silica-sand-extraction-project/doc/notice_sio_silica_vivian_sandextractionprj.pdf.

⁵ See e.g., Sio Silica response to RMSF-IR-010b).

⁶ See the letter that Sio Silica sent to the Hearing contact list on February 13, 2023, which included Sio Silica’s anticipated witnesses at the Hearing.

in the Stantec Geotechnical Report is not confidential. The MSSAC Motion was dismissed, and so should the primary request for relief in the MBEN/OLS Motion.

19. Sio Silica maintains that the redacted information in the Stantec is confidential, for the same reasons previously provided in response to the MSSAC Motion and summarized above. Sio Silica also reiterates, as indicated in its response to the MSSAC Motion, that it has offered to provide any Hearing participant with a copy of the confidential version of the Stantec Geotechnical Report if they sign an NDA. There is no prejudice to any of the Hearing participants if the redacted information in the Stantec Report is kept confidential because they can access it by simply signing an NDA.
20. Sio Silica also notes that the two legal counsel of record for the moving parties, MBEN and OLS, have now each signed an NDA – and been provided with the confidential version of the Stantec Geotechnical Report – since the MBEN/OLS Motion was submitted on February 19, 2023. Accordingly, MBEN and OLS are not prejudiced by the Stantec Geotechnical Report being kept confidential.
21. Finally, the Commission has already stated, in its reasons for dismissing the similar MSSAC Motion, that “its mandate does not include the right to dictate to an applicant what it must provide in the way of evidence”. The primary relief sought in the MBEN/OLS Motion asks the Commission to do what it has already stated it cannot do.
22. For all of these reasons, the primary relief sought in the MBEN/OLS should not be granted.

B. The Alternative Relief Sought May Be Justified, But Only In Part

23. As summarized in the Overview of this response, the MBEN/OLS Motion alternatively seeks an order declaring that a portion of the Hearing be held as an *in camera* session for the purpose of confidential questioning of the authors of the Stantec Geotechnical Report, and directing Sio Silica to produce those authors for that purpose.
24. As indicated above, the Stantec Witnesses are the authors of the Stantec Geotechnical Report, and they will be witnesses at the Hearing on behalf of Sio Silica. Accordingly, they will be available for questioning by participants during the Hearing and the latter part of the alternative relief sought in the MBEN/OLS Motion is moot.
25. Regarding the first part of the alternative relief sought in the MBEN/OLS Motion, Sio Silica expects that Hearing participants will be able to pose questions regarding confidential information in the Stantec Geotechnical Report, if necessary, without disclosing the confidential information itself. However, if Hearing participants who have executed an NDA seek to question the confidential information in the Stantec Geotechnical Report and are unable to adequately pose questions in the Hearing without disclosing the confidential information, Sio Silica does not object to the holding of a short *in camera* session for that purpose.

IV. RESPONSE TO THE MOTION BY DLN

26. The DLN Motion seeks an order directing Sio Silica to provide Hearing participants with:
- (a) all the limestone and overburden thickness data, calculations, methods, and information used to determine the number of wells per cluster given in the Revised Extraction Plan;
 - (b) the names, locations, and dates of construction of all the wells and boreholes used to obtain the limestone thickness and overburden data;
 - (c) the overburden, limestone, and shale aquitard thickness for each borehole and/or well; and
 - (d) information on the spacing between well clusters, how this spacing was determined, and the projected year of extraction.
27. While Mr. LeNeveu already has the ability to ask Sio Silica's witnesses questions about the Revised Extraction Plan during the Hearing and Sio Silica's witnesses will respond to those questions (to the extent they are relevant and reasonable), the DLN Motion is effectively seeking the ability to ask a third round of information requests ("IRs") prior to the Hearing. It would be unfair, disruptive and practically very difficult (if not impossible) for Sio Silica to answer a third round of IRs over only two business days in advance of the Hearing, without any advance notice and when Sio Silica is busy preparing for the Hearing. If Mr. LeNeveu wanted the ability to ask a third round of IRs, he should have requested that ability much earlier in the process instead of on the eve of the Hearing. For these reasons alone, the DLN Motion should be dismissed.
28. Sio Silica further notes, however, that most of the information sought by Mr. LeNeveu is related to how Sio Silica arrived at the Revised Extraction Plan and none of it is relevant to (or at least required for) the Commission's mandate to assess the potential environmental effects of the Project. Rather, what is relevant to the Commission's mandate in relation to the Revised Extraction Plan is:
- (a) where the extraction wells will be located generally, including with respect to environmental or socio-economic components (e.g., vegetation, infrastructure, etc.);⁷
 - (b) the number of extraction wells that will be drilled, which has been reduced in the Revised Extraction Plan relative to the EAP;
 - (c) that the Revised Extraction Plan is based on the allowable extraction disturbance zone dimensions provided in Table 9 of the Stantec Geotechnical Report, which set out rules for operation that will reduce potential for surface subsidence and on

⁷ This information was outlined in Attachment B to the Notice of Revised Extraction Plan sent on January 24, 2023.

which well cluster locations, extraction well spacing, and the per well extraction rate will be based;⁸ and

(d) that Sio Silica will be drilling monitoring wells and boreholes to confirm caprock and overburden thickness before drilling extraction wells in a given area.

29. The above information is already available to Hearing participants and the Commission without the need for any order from the Commission. Certain of the additional information requested by Mr. LeNeveu, such as the names, locations, and dates of construction of wells, is also publicly accessible through the Government of Manitoba without the need for an order from the Commission, and the DLN Motion indicates that Mr. LeNeveu already has that information.⁹ Other information requested by Mr. LeNeveu, such as underlying data in the Stantec Geotechnical Report, is confidential and commercially sensitive information contained in the confidential version of that report. This information has been made available to the Commission, its technical advisors and Hearing participants who have executed an NDA. Sio Silica should not be required to provide Mr. LeNeveu with confidential information in the Stantec Geotechnical Report without him executing an NDA for the same reasons as discussed above in relation to the MBEN/OLS Motion.
30. As discussed above, the Commission has already stated that “its mandate does not include the right to dictate to an applicant what it must provide in the way of evidence”. Mr. LeNeveu now asks the Commission to do what it has already stated it cannot do.
31. For all of these reasons, Sio Silica respectfully requests that the DLN Motion be denied.

V. CONCLUSION

32. For all of the reasons set out above, Sio Silica respectfully requests that the Commission dismiss the Motions, subject to the above caveat that a short *in camera* session may be justified if Hearing participants who have executed an NDA seek to question the confidential information in the Stantec Geotechnical Report and are unable to adequately pose questions in the Hearing without disclosing the confidential information.

⁸ See e.g., See “2022-01-14 Proponent Response to Public Comments” located on the public registry: https://www.gov.mb.ca/sd/eal/registries/6119/tab2_responses.pdf, at PDF 1-2.

⁹ See e.g., the DLN Motion at para 17, where it states: “Data on well construction is publically [*sic*] available from the Manitoba Groundwater Branch. Forty four [*sic*] Sio Silica well information reports have already been obtained from Manitoba Groundwater. Data on many Sio Silica boreholes have been obtained from the Manitoba Mines Branch.”

33. All of which is respectfully submitted this 23rd day of February, 2023.



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