

MANITOBA CLEAN ENVIRONMENT COMMISSION

RULES RESPECTING PROCEDURES UNDER THE CONTAMINATED SITES REMEDIATION ACT

Preamble:

These *Rules* have been prepared to provide information on the practices adopted by the Commission with respect to proceedings conducted under *The Contaminated Sites Remediation Act*. They are intended to ensure that all proceedings conducted by the Commission are fair, open, easily understood, and cost effective. The *Rules* have been drafted so as to encourage cooperation, facilitate public participation, and reduce the adversarial nature of public Hearings. In preparing these *Rules*, the Commission has sought procedures that will respect the need for efficiency and timeliness while recognizing the importance of due process.

These *Rules* will be reviewed and amended as appropriate to ensure that they remain relevant and responsive to changing needs and aspirations.

1 GENERAL MATTERS

1.1 Definitions

These *Rules* shall adopt the terms and definitions as contained in Section 2 of *The Contaminated Sites Remediation Act*. In addition, these *Rules* define the following:

- (a) "Act" means *The Contaminated Sites Remediation Act*;
- (b) "Chairperson" means the Chairperson of the Commission and the member of the Commission who chairs any Hearing, as the context may allow or require;
- (c) "Commission Secretary" means the individual appointed as Secretary to the Commission;
- (d) "document" includes:
 - (i) forms, correspondence, memoranda, files, books of account, agreements, reports, charts, graphs, e-mails and any other written or pictorial communication;
 - (ii) an electronic recording, map, plan, survey;
 - (iii) facsimiles or copies of the above outlined under (d)(i)(ii).
- (e) "Hearing" has the following meanings:

- (i) "the Hearing" is the portion of the proceedings before the Commission for which a Notice has been issued and following which the Commission will make a final determination;
- (ii) "Pre-hearing Conference" means any other Hearing which precedes the "Hearing" as described in 4.3 of these *Rules*;
- (iii) "Oral Hearing" means a Hearing at which parties or their representatives attend before the Commission in person;
- (f) "Motion" means a request of the Commission for an action, ruling, or decision on a particular matter at any stage during a proceeding or intended proceeding;
- (g) "participant" or "participants" means a person or group of persons, who has been granted permission by the Commission to participate in all or part of a proceedings;
- (h) "party" or "parties" means a person or group of persons who have status before the Commission in a proceeding under the Act;
- (i) "proprietary information" means information or data provided to the Commission on a confidential basis which includes without limitation a trade secret and/or know-how, but does not include the environmental effects or associated mitigation measures of a proposed undertaking;
- (j) "representative" means legal counsel or an agent who is authorized to represent a party or participant in a proceeding and who is recognized as such by the Commission;
- (k) "status" indicates standing before the Commission and entitles a party to direct access to all documentation respecting the proceeding and permits the cross-examination of witnesses brought forward by all other parties or the Commission;
- (l) "settlement conference" is a meeting between parties during which an agreement, acceptable to all parties and the Director, is sought regarding all or some of the issues before the Commission;
- (m) "telecommunications link" includes a remote connection via electronic means between a person and a public Hearing.

1.2 Application of *Rules*

These *Rules* apply to all proceedings conducted by the Commission under *The Contaminated Sites Remediation Act*.

1.3 Flexibility

- (1) The Commission may vary these *Rules* to suit a particular situation providing that such variation is in substantial compliance with these *Rules*.
- (2) Where any matter arises during any proceeding that is not contemplated by these *Rules*, the Commission may adopt any procedure necessary to enable it to effectively and completely adjudicate on the matter before it.
- (3) Providing that all statutory requirements are met, and with consideration to the capabilities, interests, and resources of the parties and/ or participants, the Commission may, under exceptional circumstances, allocate procedural obligations among parties and/ or participants, exempt parties and/ or participants from procedural obligations, limit procedural obligations, or carry out these obligations itself.

1.4 Defects in Form

No proceeding before the Commission under the Act shall be defeated or be deemed invalid by reason of any defect in form or any technical irregularity, and all necessary amendments to correct any such defect in form or technical irregularity shall be made upon such terms as the Commission may direct.

1.5 Parties and Other Participants

- (1) The following shall be considered parties under a proceeding conducted by the Commission:
 - (a) person or persons identified by the Director as a “potentially responsible person” in relation to a contaminated site under consideration by the Commission;
 - (b) person or persons identified, and so notified, by the Commission;
 - (c) the Director.
- (2) Any person, or group of persons, may with the approval of the Commission, or at the express request of the Commission, participate in all or part of a proceeding to the extent that the Commission considers appropriate, without requesting or receiving status as a party.
- (3) Participant status granted under subsection (2) does not entitle a participant to direct receipt or exchange of documentation, to cross-examine witnesses, or make final argument before the Commission.
- (4) The Commission in granting the right of participation to any person or group of persons may require that participants with similar interests designate one person to act as representative or spokesperson during the proceedings.

1.6 Expectation of Cooperation Between Parties

Parties and their representatives shall cooperate with each other in matters such as scheduling, disclosure, procedures, and agreements on undisputed facts to the fullest extent possible.

1.7 Communication Between Commission and Parties

- (1) No person in a proceeding shall communicate in any way with a member of the Commission presiding at a Pre-hearing Conference or a Hearing except in the presence of all parties.

1.8 Expectations for Representatives

- (1) Where a party or participant's representative ceases to act on behalf of that party or participant in the proceeding, the representative shall notify the Commission and all other parties in writing as soon as practically possible.
- (2) Where a party or participant's representative becomes unavailable to appear on the date scheduled for a Hearing, that representative shall immediately advise the Commission as to the reasons for unavailability, and if an adjournment or postponement of the hearing is sought, the Commission may postpone or adjourn the hearing of any matter for such time, and to such place and upon such terms as the Commission may deem fit.

1.9 Commission Counsel

- (1) The Commission may appoint and direct its own independent counsel to perform such duties as the Commission may direct.

1.10 Time Limits

The Commission may extend or bridge any time prescribed by these *Rules* on such terms as the Commission may determine.

2 DOCUMENTATION

2.1 Production and Inspection of Documents

- (1) Unless otherwise directed by the Commission, any documents which a party intends relying upon at a Hearing shall be filed with the Commission and served on all other parties at least seven days prior to the Hearing date, as per the following specifics:

- (i) where a period of seven days is directed, Saturdays, Sundays, and statutory holidays shall not be counted;
 - (ii) where a period of eight or more days are directed by the Commission, Saturdays, Sundays, and statutory holidays shall be counted;
 - (iii) where a party to a hearing fails to comply with Section 2.1 (i), that party shall not put any document into evidence that was not filed with the Commission and served upon all other parties in accordance with these *Rules* unless the Commission is satisfied that the party has sufficient cause for its failure to comply, and that no prejudice results to other parties as a result of the late filing.
- (3) Where a participant to a Hearing fails to comply with Section 2.1(1), that party may not put any document into evidence that was not filed with the Commission and all other parties in time unless that party satisfies the Commission that there is sufficient cause for not complying, and that no prejudice results to the other party as a result of the late filing.
 - (4) Unless the Commission advises otherwise, all parties shall be responsible to ensure that all other parties to the Hearing shall receive copies of all relevant information being presented at the Hearing or for ensuring that convenient access to that material is provided.

2.2 Service and Filing

In addition to the methods for service set out in Section 59 of the Act, any notice, order or other document required to be provided, given, issued or served may also be provided, given, issued or served by electronic mail or by facsimile transmission.

3 MOTIONS

3.1 Prior to the Hearing

Motions respecting procedural matters prior to commencement of a hearing shall be subject to the following conditions:

- (1) The motion shall be in writing and shall:
 - (a) identify the moving party;
 - (b) the precise relief sought;
 - (c) the grounds to be argued, including a reference to any statutory provisions or rules to be relied on; and
 - (d) the documentary evidence to be used or relied upon.
- (2) Motion documents and all supporting material, including affidavit material, shall be served upon the Commission and all other parties.

- (3) Upon receipt of a Motion prior to the opening of the Hearing, the Commission may direct that the Motion will be dealt with by an Oral Hearing, or through the use of a conference call between all parties, the Commission Chairman, and the Commission Secretary.
- (4) Where a Motion is to be dealt with at an Oral Hearing, the timing of such a Hearing shall be determined by the Commission in consultation with all parties.
- (5) Oral Hearings on Motions may be scheduled prior to, or at the beginning of, the Hearing.
- (6) Any parties wishing to respond to a Motion shall file material in response with the Commission and serve a copy upon the moving party prior to the hearing of the Motion.
- (7) Upon the hearing of a Motion, the Commission may allow, dismiss or adjourn the Motion, in whole or in part, and with or without terms, or may make such other order as it deems fit.

3.2 During the Hearing

- (1) Motions with respect to procedural matters during a hearing may be received from any party to a hearing subject to the conditions set out in Section 3.1.
- (2) The Commission may adjourn the Hearing to provide an opportunity for the preparation of responses to any Motion.
- (3) Upon the hearing of a Motion, the Commission may allow, dismiss or adjourn the Motion, in whole or in part, and with or without terms, or may make such other order as it deems fit.

3.3 Motion Hearing

- (1) Hearings to consider Motions may be convened by the Commission at any point prior to or during any proceeding before the Commission.
- (2) Motion Hearings shall be arranged by the Commission in consultation with all parties, and shall be scheduled, to the extent possible, so as to accommodate the participation of the parties.
- (3) Where the Commission deems appropriate, Motion Hearings may also be conducted through the use of telephone conference calls with the parties, the Commission Chairman, and the Commission Secretary.

4 HEARINGS

4.1 Pre-hearing Conference

- (1) Upon receipt of a request from the Minister, pursuant to Section 16(4) of the Act, to convene a Hearing respecting a proposed remediation plan, or upon receipt of a request from the Director, pursuant to Section 23(2) of the Act, to convene an Apportionment Hearing, the Commission shall serve Notice, in accordance with clause 5(1) of these *Rules*, of the Commission's intent to convene a Pre-hearing Conference in order to facilitate the following:
 - (i) the identification of all parties;
 - (ii) to provide an opportunity for other persons or groups of persons to request party or participant status before the Commission for the duration of the proceedings;
 - (iii) the hearing of Motions;
 - (iv) identification, definition or simplification of issues;
 - (v) ascertaining facts or evidence that may be agreed upon;
 - (v) disclosing of evidence, including:
 - (a) identifying documents the parties intend to rely upon;
 - (b) exchange, or arrangements for exchange, of all documentation between parties;
 - (c) identification of witnesses, the nature of their evidence, and the order of presentation;
 - (vi) review of the procedures to be followed at the Hearing;
 - (vii) setting the time and place for the commencement of the Hearing;
 - (viii) consideration of the possibility of settlement of any or all of the issues in the proceeding; and
 - (ix) any other matters that the Commission deems appropriate.
- (2) Representatives who attend a Pre-hearing Conference on behalf of the parties or persons seeking party or participant status must be authorized to take positions on and make decisions regarding the matters listed under clause 4.1(1) of these *Rules*.
- (3) The Commission may conduct a settlement conference as part of the Pre-hearing Conference and may limit involvement in such a process to only those with party status.
 - (i) all documents submitted and all statements made at the settlement conference are confidential and without prejudice; and

- (ii) any confidential documents shall not be accessible to the public, shall be returned to the party who filed the documents after the conference; shall not be considered to be filed in the proceedings, and are not part of the official record.
- (4) Where a settlement conference is conducted, any member of the Commission who meets with the parties during the settlement conference shall not sit as a member of the Pre-hearing Conference panel or the Hearing panel.

4.2 Hearing

- (1) Any outstanding Motions not dealt with prior to the opening of the Hearing shall be addressed before any other statement or evidence is presented to the Commission.
- (2) Each party shall give a brief opening statement that describes the issues the party will address at the Hearing. The statement shall include an outline of the evidence the party intends present, a list of the witnesses to be called, the topics to be covered by each witness, the relief sought, and the approximate time required to present their case.
- (3) Opening Statements will be made in the following order:
 - (i) the Director;
 - (ii) other parties whose interest or position is, in the opinion of the Commission, similar to the Director's
 - (iii) the other parties in order as agreed to at the Pre-hearing Conference;
- (4) At the discretion of the Commission, evidence at the Hearing shall be presented by parties in the following order:
 - (i) the Director;
 - (ii) other parties whose interest or position is, in the opinion of the Commission, similar to the Director's
 - (iii) the other parties in order as agreed to at the Pre-hearing Conference;
 - (iv) the Commission's witnesses, if any;
 - (v) participants in order as agreed to at the Pre-hearing Conference, or as directed by the Commission.

- (5) Parties shall examine, and cross-examine witnesses, as the Commission may allow, in the following order:
 - (i) the party calling the witness;
 - (ii) each of the other parties whose interest or position is, in the opinion of the Commission, similar to the party calling the witness;
 - (iii) other parties whose interest or position is, in the opinion of the Commission, adverse to the party calling the witness;
 - (iv) Commission Counsel, if any, and members of the Commission;
- 6) Each party will be provided with an opportunity to present evidence in rebuttal to the evidence presented by other parties or participants.
- (7) After the parties have had an opportunity to present evidence, and evidence in rebuttal, the Commission shall provide all parties an opportunity to make final argument in the order in which they presented evidence.
- (8) The Commission may order the parties to submit written arguments in addition to, or in the place of, oral argument and shall direct the timing for the filing of such written arguments.

5 NOTICE

5.1 Pre-hearing Conference

- (1) Where the Commission undertakes to hold a Pre-hearing Conference, pursuant to provisions contained in these *Rules*, Notice shall be prepared and filed in the Public Registry and served by the Commission upon the Director, all potentially responsible persons as designated by the Director, the municipality in which the contaminated site is located, all property owners within 200 metres of the contaminated site, and such other persons as are determined by the Commission.
- (2) The Notice of a Pre-hearing Conference shall be prepared in such form as determined by the Commission and shall include the time, date, and location of the Pre-hearing Conference, along with instructions as to how further information respecting the contaminated site to be considered can be obtained.

5.2 Motion Hearing

- (1) Where the Commission undertakes to hold a Motion Hearing, pursuant to provisions contained in these *Rules*, Notice shall be prepared and served by the Commission upon the Director, and all other parties.

- (2) The Notice of a Hearing respecting Motions shall be prepared in such form as determined by the Commission and shall include the time, date, format, and location of the Motion Hearing.

5.3 Hearing

- (1) Where the Commission undertakes to hold a Hearing, pursuant to provisions contained in these *Rules*, Notice shall be prepared and served by the Commission upon the Director and all parties and participants as identified at the Pre-hearing Conference.
- (2) The Notice of Hearing shall be prepared in such form as determined by the Commission and shall include the time, date, and location of the Hearing.

6 GENERAL FORMAT OF HEARINGS

6.1 Public Access

- (1) All Hearings of the Commission, except where specifically provided for under these *Rules*, shall be open and accessible to the public.
- (2) Under circumstances where all or part of a hearing is not open to the public, the Commission shall provide written reasons for its decision to restrict public access in this manner, and shall file such reasons on the Public Registry.

6.2 Special Needs

The Commission shall endeavor, wherever possible, to ensure that all proceedings are conducted in facilities and at locations which are accessible to those with physical disabilities. Parties, participants, and public spectators to a proceeding before the Commission shall advise the Commission Secretary at the earliest possible opportunity of any special accommodation required to facilitate participation in the proceedings.

6.3 Truth in Proceedings

All parties and participants to a proceeding before the Commission shall be required to provide evidence that is truthful, and shall be asked to acknowledge this obligation.

6.4 Evidence by Group of Persons

The Commission may permit evidence to be given by a panel of witnesses provided that the Commission is satisfied that in the particular case the tendering of evidence in this manner will result in a full and fair Hearing and will not result in prejudice to any other party.

6.5 Telecommunications

The Commission may permit the use of a telecommunications link to facilitate the receipt of evidence from parties or participants unable to attend a Hearing, subject to the following:

- (1) It shall be demonstrated to the satisfaction of the Commission that the proposed electronic testimony will bring relevant information to bear on the questions or issues under consideration at the hearing, and that this information may only be received through the use of a remote electronic link-up.
- (2) Upon receiving a request for electronic testimony, an opportunity will be provided for the parties at the hearing to comment on the appropriateness of the link-up prior to the Commission reaching a decision on the use of the link-up procedure.
- (3) Where the Commission has proposed the use of a electronic link-up as a means of securing information, an opportunity shall be provided for the parties at the hearing to comment on the appropriateness of the proposed link-up.
- (4) The background of the witness, along with an outline of the areas or topics to be covered in the testimony, shall be available for consideration and approval by the Commission prior to the commencement of the electronic link-up.

6.6 Witnesses

- (1) A party to a Hearing may request the Commission to compel the attendance of any person at the Hearing as a witness and the Commission may, by subpoena or summons, require that witness to give evidence either orally or in writing, and to produce such documents as the Commission deems necessary.
- (2) Where a party requests the Commission to issue a subpoena or summons and the reason for the request is not clear, the Commission panel reviewing the matter may hear submissions from the parties prior to deciding on the issuance of a subpoena or summons.
- (3) The Commission may retain, at its own expense, any person having specialized knowledge to assist the Commission and to give evidence in respect of the matter before the Commission.
- (4) Any witnesses retained by the Commission shall testify orally and be subject to cross-examination by all parties.
- (5) The Commission may, at the request of a party, order that a witness be excluded from the Hearing until called to give evidence.
- (6) Where an order is made to exclude a witness from a Hearing, there shall be no communication to the witness of any evidence given during his or her absence from the Hearing until after the witness has been called and has given evidence.

- (7) A witness who gives expert opinion evidence at a Hearing may be requested by the Commission, or any other party, to present a written curriculum vita of his or her qualifications.
- (8) The Commission may hear challenges to the qualifications of any expert witness from any party to the Hearing.

6.7 Proprietary Information

- (1) At the request of a party, the Commission may close all or part of the Hearing to the public and treat all or part of the material or business information filed with the Commission as confidential.
- (2) All proprietary material shall be marked as “confidential” and sealed.

6.8 Hearing Transcript

- (1) The Commission may maintain a recording of all testimony presented at a Hearing.
- (2) Where the Commission has arranged for a recording, and/or a transcript of a recording, of any proceeding, that recording or transcript shall be made available for viewing at the office of the Commission, and shall be made available to all parties or participants at a cost to be determined by the Commission.
- (3) No person shall make a visual or audio recording of any part of the Hearing for the purpose of broadcasting or publishing the record unless authorized by the Commission, subject to the following:
 - (i) A request for authorization to record should be made to the Commission panel Chair through the Commission Secretary in advance of the part of the Hearing sought to be recorded.
 - (ii) The panel Chair may refuse to authorize the recording of all or portions of the Hearing if, in his or her opinion, the recording may inhibit witnesses or disrupt the proceedings in any way.
 - (iii) When a recording is authorized, the following Rules shall be observed:
 - (a) only photographic and audio equipment that does not produce distracting sound or light shall be used;
 - (b) photographic and audio equipment should be positioned unobtrusively before the proceedings begin and must not be moved while the Hearing is in progress;
- (4) Upon receipt of a written request, the Commission may allow any party to record part or all of the proceedings and, if so allowed, may order that the recording or

transcript of the recording be made available to the Commission or any other party at reasonable cost.

7 SITE VISITS AND INSPECTIONS

- (1) The Commission may make one or more visits or inspections of a contaminated site where in the opinion of the Commission such visit(s) or inspection(s) would lead to a better understanding of the evidence given at a Hearing.
- (2) Where the Commission has decided on a site visit(s) or inspection(s), all parties shall be given notice of the date and time of the visit(s) or inspection(s) and are entitled, but not required, to be present.
- (3) If the Commission makes any material observations during the visit(s) or inspection(s) upon which it intends to rely that are not confirmed by evidence presented at the Hearing, it shall first advise the parties of its observations and give them an opportunity to make submissions before making any decision or order which has relied on those observations.

8 COMMISSION SECRETARY

All inquiries concerning the Hearing process shall be directed to the Commission Secretary.

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