

evidence-based review of potential environmental risks, consistent with its statutory mandate and Terms of Reference.

3. SSC argues that the CEC's determination of this Motion should be informed by four factors which are irrelevant to its mandate and the task before it. These are:
 - a. that delaying the process to obtain additional information would run counter to the Minister's direction that the CEC complete its public hearing in a timely manner;¹
 - b. that the relief sought by MBEN and OLS is unnecessary because its application meets and exceeds the requirements of an application for a license under *The Environment Act*;²
 - c. that the delay sought by MBEN and OLS would have a detrimental impact on SSC's "Project Economics";³ and
 - d. that the proposed 60 days is insufficient to rectify the significant omissions and deficiencies identified in the CEC's Technical Reports.⁴

¹ Sio Silica Corporation Response to the Motions (October 28, 2022) at para 19.

² Sio Silica Corporation Response to the Motions (October 28, 2022) at paras 14-15.

³ Sio Silica Corporation Response to the Motions (October 28, 2022) at para 22.

⁴ Sio Silica Corporation Response to the Motions (October 28, 2022) at para 23.

4. None of these four points are relevant to the question of whether the omissions and deficiencies identified in the CEC's Technical Review Reports prevent the CEC from "[considering] the potential environmental effects of the proposed [...] silica sand extraction project,"⁵ and so should not inform the determination of this Motion.
5. First, recognizing that the CEC has been asked to complete the hearing process in a timely manner, its mandate is to conduct an evidence-based review of the project's potential environmental effects. The Minister's directions respecting timeline do not authorize the Commission to depart from its mandate in order to meet a deadline.⁶
6. Second, the question of whether SSC met the procedural requirements of a license application under *The Environment Act* is not relevant to the CEC's consideration of the risks of the activities contemplated by that application.

⁵ Manitoba Clean Environment Commission, "Hearing Directive for the Vivian Silica Sand Extraction Project" at Appendix III, Terms of Reference.

⁶ Letter from the Minister of Conservation and Climate to Jonathan Scarth, Chair, Manitoba Clean Environment Commission (13 January 2022), online: < http://www.cecmanitoba.ca/hearings/silica-sand-extraction-project/doc/TermsOfReference/Letter_to_Jonathan_Scarth_dated_January_13_2022.pdf>.

7. Third, SSC's concerns related to the profitability of its business case are unrelated to the project's environmental risks and should have no bearing on proceedings before the CEC.
8. Finally, the 60 day suspension or adjournment sought by MBEN and OLS was proposed as a "minimum", as confirmed in paragraph 1(a) of its Amended Notice of Application, and should not be relied on to preclude the preparation of the information sought.
9. In effect, SSC's arguments on these points are invitations to undermine the integrity of the CEC hearing process and should be disregarded. The information set out in Appendix A to the MBEN and OLS Notice of Motion is necessary for the CEC to meet its obligations respecting this hearing process and for hearing participants to meaningfully participate.

Reliance on Adaptive Management is not appropriate in the circumstances

10. SSC acknowledges that the materials before the CEC create uncertainty regarding the potential environmental effects of its proposed project. It argues that this uncertainty is unavoidable, and that the principle of adaptive management should enable the project

to proceed despite the significant and material omissions and deficiencies in its filings.⁷

11. Adaptive management is “a systematic process for improving strategies and practices by learning and acting on the outcomes of management experience.” It can be employed to “monitor expected interactions, address unexpected outcomes, learn from unanticipated effects and make changes, as appropriate.”⁸

12. However, adaptive management is not appropriate in the present circumstances because of the significant and material omissions and deficiencies in the materials before the CEC. Adaptive management is “not a tool to sidestep discussions about potential adverse effects, nor as a measure to compensate for inadequate baseline information.”⁹

⁷ Though “adaptive management” is not named in SSC’s Brief, the source cited explains that “[t]he concept of “adaptive management” responds to the difficulty, or impossibility, of predicting all the environmental consequences of a project on the basis of existing knowledge”. See *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302 at para 32, citing *Canadian Parks and Wilderness Society v Canada (Minister of Canadian Heritage)*, 2003 FCA 197 at para 24.

⁸ Patricia Fitzpatrick and Byron Williams, “Building the System: Follow-up, monitoring & adaptive management” (2020) University of Winnipeg, online: <
<https://winnspace.uwinnipeg.ca/bitstream/handle/10680/1787/08%2004%202020%20KMG%20IA%20Folow%20Up%20Fitzpatrick%20Williams.pdf?sequence=1>>.

⁹ *Ibid.*

13. As explained in the same Federal Court decision cited by SSC, adaptive management is only appropriate where sufficient information about potential impacts and mitigation measures is in place:

...adaptive management permits projects with uncertain, yet potentially adverse environmental impacts to proceed based on flexible management strategies capable of adjusting to new information regarding adverse environmental impacts where sufficient information regarding those impacts and potential mitigation measures already exists.¹⁰

14. Further, the former Canadian Environmental Assessment Agency (CEAA) made clear that adaptive management was not appropriate in circumstances where all potential mitigation measures are not identified, or where there remains “uncertainty about whether the project is likely to cause significant adverse environmental effects...”¹¹

15. The former CEAA explained further that

...a commitment to implementing adaptive management measures does not eliminate the need for sufficient information regarding the environmental effects of the

¹⁰ *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302 at para 32. [emphasis added]

¹¹ Canadian Environmental Assessment Agency, “Operational Policy Statement: Adaptive Management measures under the Canadian Environmental Assessment Act” (2009), online: <<https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/adaptive-management-measures-under-canadian-environmental-assessment-act.html>>.

project, the significance of those effects and the appropriate mitigation measures required to eliminate, reduce or control those effects.¹²

16. As set out in the Motion Brief of MBEN and OLS, the omissions and deficiencies in SSC's filings are such that significant potential effects have not been considered.
17. SSC's claim that adaptive management can mitigate potential environmental impacts which are not identified, assessed, or understood is not consistent with the literature or with the jurisprudence cited by SSC in support of its position.
18. SSC's misstatement of adaptive management as a proposed solution to significant omissions and deficiencies in its filings is a worrisome indication among others that this application is not ready for review.

Conclusion

19. SSC's Response to the Motion brought by MBEN and OLS invites the CEC to depart from its statutory mandate and responsibility.

¹² Canadian Environmental Assessment Agency, *supra*.

20. Its justification for proceeding without the information sought on the basis of adaptive management is not credible and should be rejected.
21. MBEN and OLS maintain the position set out in their Amended Notice of Motion and Motion Brief in favour of the relief sought.
22. All of which is respectfully submitted this 1st day of November, 2022.

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