

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 Technical Review

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

MOTION BRIEF of THE MANITOBA ECO-NETWORK and OUR LINE IN THE SAND

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I. List of Documents

1. Amended Notice of Motion of the Manitoba Eco-Network and Our Line in the Sand, filed October 14, 2022;
2. Appendix A to the Notice of Motion of the Manitoba Eco-Network and Our Line in the Sand, filed October 3, 2022;
3. Dr. Hartmut Holländer and Dr. Allan Woodbury, [“Technical Review: Sio Silica Corporation’s Environment Act Project Proposal”](#) (19 September 2022);
4. Arcadis Canada Inc., [“Technical Review of Sio Silica Corporation’s Environment Act Project Proposal”](#) (13 September 2022);
5. Manitoba Clean Environment Commission, [“Process Guidelines Respecting Public Hearings”](#) (July 2022);
6. Manitoba Clean Environment Commission, [“Hearing Directive for the Vivian Silica Sand Extraction Project”](#) (February 2022);
7. Manitoba Clean Environment Commission, [“A Review of the Regional Cumulative Effects Assessment for Hydroelectric Developments on the Nelson, Burntwood, and Churchill River Systems”](#) (2018);
8. Manitoba Clean Environment Commission, [“Report on Public Hearing: Bipole III Transmission Project”](#) (June 2013); and
9. 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 (“SSC”, the “Proponent”) presently before the Clean Environment Commission (the “CEC”, the “Commission”) is not ready for review.
2. The findings of the CEC’s technical advisors confirm that the material omissions and deficiencies in SSC’s application are such that the project’s environmental risks, including likely cumulative effects, cannot presently be known.
3. Without this information, the CEC cannot fulfil its mandate to assess environmental risk. Hearing participants are left unable to assist the Commission in developing its understanding of the issues and cannot represent their own interests in full knowledge of the risks their constituents face.
4. These omissions and deficiencies cannot be overcome through Information Requests or other aspects of the hearing process.
5. Our Line in the Sand and the Manitoba Eco-Network call on the Commission to exercise its authority to adjourn or suspend this process for a minimum of 60 days and require SSC to rectify the

material omissions and deficiencies in its application in order to protect the integrity of this evidence-based process.

b. Statement of Facts

6. On July 23, 2021, SSC (then “CanWhite Sands Corporation”) filed an application 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. The proponent projected a 24-year project life span involving the drilling of potentially more than 10,000 wells,² but only provided assessments of 4 years of mining activity involving 1680 wells in support of its application.³
8. Following the receipt of public comments and input from a Technical Advisory Committee, the Proponent’s Application was referred to the CEC for a technical review and public hearing.

¹ CCSM c E125.

² Arcadis Canada Inc., “Technical Review of Sio Silica Corporation’s Environment Act Project Proposal”, 13 September 2022 at 8.

³ Arcadis Canada Inc. at 8; Dr. Hartmut Holländer and Dr. Allan Woodbury, “Technical Review: Sio Silica Corporation’s Environment Act Project Proposal”, 19 September 2022 at 7.

9. The referral to the CEC was issued by letter from the then Minister of Conservation and Climate to the Chair of the CEC. Terms of Reference were attached.
10. The Terms of Reference indicate that the CEC'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 CEC 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..."⁴
11. The Terms of Reference for this process require the CEC to:

conduct a technical review of the Environment Act proposal and the hydrogeology and geochemistry assessment report and provide advice 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.⁵

⁴ Manitoba Clean Environment Commission, "Hearing Directive for the Vivian Silica Sand Extraction Project" at Appendix III, Terms of Reference. [*Hearing Directive*]

⁵ *Ibid.*

12. In doing so, the CEC 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.”⁶
13. The CEC 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.
14. 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.”⁷ The Geotechnical Technical Review Report identified “multiple potentially significant concerns” with the proponent’s application including the risk that its focus on

⁶ Manitoba Clean Environment Commission, *Hearing Directive, supra* at Appendix III, Terms of Reference.

⁷ Holländer and Woodbury, *supra* at 3.

the 4-year horizon rather than the 24-year project life span precluded meaningful assessment of the project's risks.⁸

15. The Manitoba Eco-Network and Our Line in the Sand jointly filed a Notice of Motion on October 3, 2022 seeking an order adjourning proceedings and requiring the Proponent to rectify the significant omissions and deficiencies in its filing. The Commission issued directions respecting the process by which this motion would be determined by letter on October 7, 2022.

c. Points to be argued

16. Our Line in the Sand and the Manitoba Eco-Network will argue that:
 - a. The CEC possesses the authority to adjourn or suspend this process and to require the Proponent to file specific additional information; and
 - b. Proceeding to Information Requests and a Public Hearing without the Proponent rectifying the significant omissions and deficiencies in its Application precludes the CEC from fulfilling

⁸ Arcadis Canada Inc., *supra* at 8.

its mandate and Participants from effectively participating in the process.

d. Argument

The CEC Possesses Authority to Adjourn or Suspend this Process and to require additional filings

17. *The Environment Act* sets out processes for environmental licensing and impact assessment in Manitoba that are 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...”⁹
18. To achieve this, the Act “provides for the environmental assessment of projects which are likely to have significant effects on the environment.”¹⁰ It also calls for the use of “...effective review processes that adequately address environmental issues.”¹¹

⁹ *The Environment Act*, *supra* at s 1(1).

¹⁰ *Ibid* at s 1(1)(b).

¹¹ *Ibid* at s 1(1)(c). [emphasis added]

19. One such review process is conducted by the Clean Environment Commission, which has a statutory mandate to “provide advice and recommendations to the minister...”¹² when directed to conduct a review by the issuing of Terms of Reference.¹³ The Commission possesses special expertise in environmental impact assessment processes including cumulative effects assessment, and has previously held that “in order to be done well, [environmental impact assessments] must also include an assessment of cumulative effects.”¹⁴
20. The Commission is authorized to “make rules governing its procedure.”¹⁵ 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.
21. First, the Commission possesses the express authority to suspend proceedings. As stated in rule 3.21,

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

¹² *The Environment Act, supra* at s 6(5)(a).

¹³ *Ibid* at s 6(5.1).

¹⁴ Manitoba Clean Environment Commission, “Regional Cumulative Effects Assessment Review” (2018) at 7. [*RCEA Report*]

¹⁵ *The Environment Act, supra* at s 6(8).

*receives the required information, particulars or documents.*¹⁶

22. The Commission also possesses analogous authorities over the timing and pace at which it proceeds, with rule 3.22 expressly authorizing the Commission to adjourn hearings, to reconvene them, and to grant extensions of time.¹⁷
23. 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."¹⁸ This power is made express in *The Environment Act* via reference to *The Manitoba Evidence Act*.¹⁹

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

24. The findings of both of the CEC's technical review reports are aptly summarized by Drs. Holländer and Woodbury, who note that "the potential impacts [of the project] are many and not all the relevant

¹⁶ Manitoba Clean Environment Commission, "Process Guidelines Respecting Public Hearings" (July 2022) at r 3.21. [*Process Guidelines*]

¹⁷ *Ibid* at r 3.22.

¹⁸ *Ibid* at r 3.18.1.

¹⁹ *The Environment Act*, *supra* at s 6(6), referring to Part V of *The Manitoba Evidence Act*, CCSM c E150.

issues were identified and resolved with the work described in the proposal.”²⁰

25. As outlined in Appendix A to Our Line in the Sand and the Manitoba Eco-Network’s Notice of Motion, the reports identify significant risks that SSC has entirely 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.
26. The reports also undermine the credibility of conclusions drawn from SSC’s hydrogeological modeling and the data collected through its well test site. Importantly, the reports identify certain studies as needing to be re-done due to fundamental flaws in methodology and analysis.
27. These are significant and material shortcomings that make a comprehensive assessment of the proposal’s environmental risks impossible.
28. 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 impacted by these

²⁰ Holländer and Woodbury, *supra* at 3.

initial activities.²¹ Not only is the information provided incomplete, but the Proponent's failure to assess the entirety of the project area and life span makes it doubly challenging for the CEC to fulfill its mandate.

29. The Commission has identified cumulative effects assessment as an integral element of environmental impact assessment.²²

However, cumulative effects assessment is only possible if the proponent's analysis considers the appropriate spatial and temporal scope to adequately capture the project's effects.

30. For example, the Commission has found that the spatial scope of review in an environmental impact assessment report must neither overestimate nor underestimate the project's "zone of influence."²³

31. With respect to temporal scoping, the Commission has found that even a restrictive approach to cumulative effects assessment requires consideration of a time period that includes actions that are reasonably foreseeable, as well as those which are certain.²⁴

²¹ Holländer and Woodbury, *supra* at 7, 13, 20. See also Arcadis Canada Inc., *supra* at 10, Conclusion 2.

²² Manitoba Clean Environment Commission, *RCEA Report*, *supra* at 7.

²³ *Ibid* at 9

²⁴ *Ibid* at 9.

32. In the present process, the Proponent has expressly excluded specific future stages of the project from its environmental impact assessment report. Despite the Commission having held previously that “in order to be done well, [environmental impact assessments] must also include an assessment of cumulative effects,”²⁵ and that “the cumulative effects analysis should be the most important section of an environmental assessment report,”²⁶ the Proponent’s application is structured to make cumulative effects assessment impossible.
33. Even if all other material omissions and deficiencies identified by the CEC’s technical advisors were resolved, the Proponent’s failure to identify and assess risks beyond the 4-year horizon is fatal to the CEC’s ability to complete its task.

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

34. 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

²⁵ Manitoba Clean Environment Commission, *RCEA Report, supra* at 7.

²⁶ Manitoba Clean Environment Commission, “Report on Public Hearing: Bipole III Transmission Project” (June 2013) at 111.

- 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.”²⁷
35. However, the CEC’s Hearing Directive narrows the scope of Information Requests for the purposes of this proceeding, confirming that they are “written [questions] to the Proponent asking for additional information about or clarification of evidence already submitted...”²⁸
36. It is clear that the Commission intends the Information Request process to address information already on the record, and not to enable the Proponent to provide entirely new information that was previously missing.
37. This is further confirmed by the narrow scope of second round questions, which are permitted only to seek clarification of the responses to first round questions,²⁹ as well as the short timelines

²⁷ Manitoba Clean Environment Commission, *Process Guidelines*, *supra* at Appendix A Practice Directions: Information Requests.

²⁸ Manitoba Clean Environment Commission, *Hearing Directive*, *supra* at Information Requests.

²⁹ *Ibid.*

proposed by the Commission for the exchange of questions and responses.³⁰

38. The Commission's proposed timeline will not allow the Proponent to meaningfully respond to the deficiencies identified in Appendix A of the moving parties' Notice of Motion. Some of these deficiencies require the Proponent to conduct entirely new studies with accompanying analysis, which may not be feasible in the short period proposed.
39. As well, neither the timeline nor the constraints on second round questions would allow the Commission or Participants a meaningful opportunity to review these new materials, nor to have any remaining questions clarified through two subsequent rounds of questions.
40. Information requests are intended to allow the proponent to clarify and explain information that is already filed. The practical limitations of the exchange of written questions, particularly given the Commission's design of the process in this specific hearing,

³⁰ In the October 4, 2022 Pre-Hearing Meeting, the Commission proposed only 14 working days for the Proponent to prepare responses to first round questions (November 8 to 29), and only 10 working days for these responses to be reviewed and second round questions prepared (November 29 to December 13).

confirm that Information Requests are inadequate and incapable of rectifying the significant and material omissions and deficiencies in the Proponent's Application.

e. Conclusion

The only solution is to adjourn or suspend this process and require the Proponent to supplement its Application

41. In order to fulfil its statutory mandate and the directions set out in its Terms of Reference, the Commission must have all information necessary to assess the environmental risks raised by the proposed project.
42. The Proponent must provide information resolving all omissions and deficiencies set out in Appendix A to the Notice of Motion of the Manitoba Eco-Network and Our Line in the Sand, as well as information identifying the environmental risks of the entire project life span, not only the first 4-year period.
43. The only means of the Commission obtaining this information is for this process to be adjourned or suspended for a period of time, and to require the Proponent to provide the information identified by the CEC's technical advisors and listed in Appendix A to the moving parties' Notice of Motion.

44. The Commission possesses the authority to grant the relief sought, and the Manitoba Eco-Network and Our Line in the Sand jointly urge 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.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14TH DAY OF OCTOBER, 2022.

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