

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, by the Municipal Silica Sand Advisory Committee, and by Dennis LeNevue and What the Frack Manitoba Inc.

SIO SILICA CORPORATION

RESPONSE TO THE MOTIONS

October 28, 2022

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

I. OVERVIEW

1. On October 3, 2022, the Manitoba Eco-Network (“MBEN”) and Our Line in the Sand (“OLS”) submitted a Notice of Motion seeking, among other things, an order that would delay the hearing for Sio Silica Corporation’s (“Sio Silica”) proposed Vivian Silica Sand Extraction Project (“Project”) by the Manitoba Clean Environment Commission (“Commission”) by at least 60 days. MBEN and OLS submitted an Amended Notice of Motion on October 14, 2022. Also on October 14, 2022, Notices of Motion were submitted by the Municipal Silica Sand Advisory Committee (“MSSAC”) and by Dennis LeNeve (“DLN”) and What the Frack Manitoba Inc. (“WTFMB”), each also seeking, among other things, an order delaying the Commission’s hearing for the Project (“Hearing”). These three Notices of Motion are referred to collectively in this submission as the “Motions”.
2. The grounds upon which the moving parties are seeking to delay the Hearing include views set out in the Hydrogeology Technical Review and Geotechnical Technical Review reports that were prepared by the Commission’s third-party technical advisors (together, the “Technical Reports”). The Motions also include grounds upon which moving parties have previously sought to delay the Hearing, which Sio Silica has previously addressed through responses circulated to the parties in this proceeding.
3. For reasons set out in this Response to the Motions, each of the Motions should be dismissed.

II. RELEVANT FACTS

4. On August 3, 2021, CanWhite Sands Corp., now Sio Silica, submitted an application to the Environmental Approvals Branch of Manitoba Conservation and Climate for an *Environment Act* Licence for Sio Silica’s proposed sand extraction activities associated with the Project (the “Application”). The Application contained the information described in the Manitoba Sustainable Development’s “Information Bulletin – Environment Act Proposal Report Guidelines” (Manitoba Sustainable Development 2018).
5. Between August and October, 2021, Sio Silica and the Environmental Approvals Branch received comments on the Application from the Technical Advisory Committee (“TAC”) for the Project and members of the public. Sio Silica responded to all of these comments in December 2021 and January 2022, respectively.
6. On November 15, 2021, the Minister of Conservation and Climate (the “Minister”) referred the Application to a hearing before the Commission. The Minister provided the Commission with Terms of Reference for conducting the Hearing, including a direction that the Hearing commence “as soon as possible” and that it be completed by March 15, 2022 (4 months later).
7. On December 14, 2021, the Commission wrote to the Minister requesting an extension to the March 15, 2022 deadline. By letter dated January 13, 2022, the Minister granted the extension request, noting that the Environmental Approvals Branch was continuing to

conduct its environmental assessment review of the Application and that the Commission should “proceed in a timely manner” once the Environmental Approvals Branch confirmed that its review was complete.

8. On February 3, 2022, the Environmental Approvals Branch wrote to the Commission informing the Commission that the Environmental Approvals Branch’s environmental assessment review of the Application was complete and that the Hearing could commence.
9. On February 18, 2022, the Commission issued a hearing directive for the Hearing. The hearing directive indicated that the Hearing would occur in late Summer/Fall 2022 and that the Commission would retain a technical advisor to prepare a technical review of the Application as an initial step in the Hearing process.
10. The Technical Reports were distributed to Sio Silica and the Hearing participants on September 26, 2022.
11. On October 4, 2022, the Commission held a pre-hearing meeting in which the Commission informed parties that the Hearing process was now underway and that the Hearing would likely occur in late January or early February 2023. The first step in the Hearing process, which remains ongoing, is the ability for participants to issue Information Requests (“IRs”) to Sio Silica.

III. RESPONSE TO THE MOTION BY MBEN AND OLS

A. Overview of the Motion

12. In their Motion, MBEN and OLS seek an order: (i) suspending or adjourning the Hearing process for a minimum of 60 days; (ii) directing Sio Silica to file materials “rectifying” the “deficiencies” identified in the Technical Reports as set out in the Appendix A attached to their Motion (“Alleged Deficiencies”), within 60 days; and (iii) directing the third party authors of the Technical Reports to review any such materials filed by Sio Silica and revise their Technical Reports accordingly.
13. The grounds for the Motion submitted by MBEN and OLS are entirely predicated on the assumptions that the Alleged Deficiencies: (i) are, in fact, deficiencies in the Application; and (ii) must be rectified before the Hearing process can continue. But neither of those assumptions are true, for the reasons set out in Section III.B below.

B. The Alleged Deficiencies are not deficiencies in the Application and do not need to be rectified before the Hearing process can continue

14. Contrary to the Motion brief submitted by MBEN and OLS, the Alleged Deficiencies are not, in fact, deficiencies in the Application and do not preclude the Hearing process from continuing. As Sio Silica has noted previously, the Technical Reports contain fundamental flaws and misunderstandings about the Project, and they also recommend work that goes beyond the requirements of an *Environment Act* proposal. Sio Silica intends to provide a full response to the Technical Reports as part of its responses to IRs

(assuming responses to the Technical Reports are requested in IRs), or in a supplemental filing in the same timeframe.

15. Through the Application, responses to comments from the TAC and members of the public, and supplemental filings submitted by Sio Silica to date, Sio Silica has provided extensive information about the likely environmental effects of the Project, including cumulative effects. This information has been prepared by a large team of subject matter experts, and in many cases has been peer reviewed by independent third parties. While Sio Silica expects that additional information will be produced through the Hearing process (including through IRs), Sio Silica submits that the information it has submitted to date meets – and in many cases exceeds – what is required for an *Environment Act* proposal and allows the Commission to be able to make credible, informed decisions about what the likely environmental effects of the Project will be.
16. Courts have recognized that environmental assessments, by their nature, can never achieve finality or certainty because they are performed early in project planning and are designed to be predictive.¹ Recommendations regarding the effects of a project are not flawed simply because insufficient evidence is available to eliminate all uncertainty.² Conditions on regulatory approvals and monitoring during construction and operations can be used to manage future uncertainties and the risk that actual environmental effects are different than those predicted in the environmental assessment.³
17. Ultimately, a balance must be struck between the amount of studies that are conducted during an environmental assessment, and the need to review proposed projects in a timely and efficient way. In Sio Silica’s view, arguments about where that balance should be struck for the Project should be made at the conclusion of the Hearing based on a full evidentiary record (including testing of the Technical Reports); they should not form the basis for the entire Hearing to be suspended or adjourned before it has even begun.
18. Sio Silica also notes that the current IR process is designed to allow parties to request additional information about the Application, including the kinds of information that MBEN and OLS are requesting in their Motion. It would be premature and unfair to Sio Silica for the Commission to significantly delay its review process before it has even begun in earnest, on the basis that Sio Silica needs to provide additional information which parties can request as part of the current Hearing process, and before Sio Silica has been able to test and fully respond to the Technical Reports on which the Motions are based. Instead, the Commission should let its Hearing process unfold, as established, to address the Technical Reports and all other matters that parties choose to raise.

¹ *Canadian Parks and Wilderness* at para 24; also cited in *Pembina Institute for Appropriate Development v Canada (Attorney General)*, [2008] FCJ No 324 (TD) at para 61.

² *Pembina Institute for Appropriate Development v Canada (Attorney General)*, [2008] FCJ No 324 (TD) at para 32.

³ See e.g., *Pembina Institute for Appropriate Development v Canada (Attorney General)*, [2008] FCJ No 324 (TD) at para 32; cited with approval in *Wet'suwet'en Treaty Office Society v British Columbia (Environmental Assessment Office)*, [2021] BCSC 717.

C. Further delaying the Hearing process will prejudice Sio Silica

19. The Hearing process should proceed in a timely manner, as mandated by the Minister.⁴ It should not be further and significantly delayed, as requested in the Motions, to the prejudice of Sio Silica.
20. The Commission must conduct the Hearing process in accordance with the Terms of Reference.⁵ The Terms of Reference require the Commission to commence the Hearing “as soon as possible”. At the time the Terms of Reference were issued, they contemplated that the entire Hearing process would be completed within four months (by March 15, 2022).⁶ While the Minister subsequently extended this deadline, the Minister directed the Commission to “proceed in a timely manner” after it received notification that the departmental environmental review process was complete.⁷ The Commission received such notification on February 3, 2022,⁸ almost nine months ago.
21. Based on the directions from the Minister, the Commission must proceed with the Hearing process in a timely manner and has been required to do so since February 3, 2022. The Hearing process has already been delayed by the time it took the Commission’s technical advisors to prepare the Technical Reports. Delaying the Hearing further, as requested in the Motions, would be inconsistent with the Minister’s directions, and would transform what the Minister intended to be a four-month Hearing process into a process spanning well over a year.
22. The longer the Hearing process takes, the more prejudice Sio Silica will suffer. In addition to the added costs associated with the longer review process itself, such delays also push back the timing of any *Environment Act* licence and, if a licence is ultimately granted, Project construction and operations. Delays to the commencement of operations (i.e., production), in turn, harm Project economics because from a business planning and financing perspective, every month of delayed production will be moved from the start of Project operations to the end. The time value of money means that the net present value of that future production is much lower at the end of the Project’s operations than at the start. As a result, every month of Project delay results in real, adverse impacts on Sio Silica’s Project economics.

⁴ Minister letter to the CEC dated November 15, 2021 and enclosing the Terms of Reference, online: http://www.Commissionmanitoba.ca/Commissionm/hearings/pubs/silicasandextractionproject/termsofreference/terms_of_reference_-_canwhite.pdf.

⁵ *The Environment Act*, CCSM c E125, s 6(5). See also CEC, *Process Guidelines Respecting Public Hearings* (November 2015) at 6, 10 and 22, online: <http://www.Commissionmanitoba.ca/Commissionm/pubs/procedures-manual-2015-final.pdf>.

⁶ Minister letter to the CEC dated November 15, 2021 and enclosing the Terms of Reference, online: http://www.Commissionmanitoba.ca/Commissionm/hearings/pubs/silicasandextractionproject/termsofreference/terms_of_reference_-_canwhite.pdf.

⁷ Minister letter to the CEC dated January 13, 2022, online: http://www.Commissionmanitoba.ca/Commissionm/hearings/pubs/silicasandextractionproject/termsofreference/letter_to_jonathan_scarth_dated_january_13_2022.pdf.

⁸ Manitoba Environment, Climate and Parks letter to the CEC dated February 3, 2022, online: https://www.gov.mb.ca/sd/eal/registries/6119/20220203_letter.pdf.

23. Further, Sio Silica notes that 60 days would not be enough time to complete many of the additional studies recommended in the Technical Reports. As a result, if the MBEN and OLS Motion is granted, the Hearing would likely be delayed by many months if not longer. Such a delay would exacerbate the prejudice to Sio Silica and further deviate from the expected timing and directions provided by the Minister to the Commission. And as explained above, such outcomes are unnecessary and unwarranted because the additional studies recommended in the Technical Reports do not need to be done before the Hearing can commence.

IV. RESPONSE TO THE MOTION BY MSSAC

24. MSSAC’s Motion is very similar to the Motion filed by MBEN and OLS. In MSSAC’s Motion, MSSAC seeks an order: (i) directing Sio Silica to file materials “rectifying” the Alleged Deficiencies at least 60 days prior to the setting of dates for the Hearing; and (ii) directing Sio Silica to provide Hearing participants with the Geotechnical Analysis Report prepared by Stantec Consulting Ltd. for the Project (the “Stantec Report”) at least 60 days prior to the setting of dates for the Hearing.
25. The first part of MSSAC’s Motion is addressed in Section III above. Sio Silica relies on those submissions for the MSSAC Motion as well.
26. With respect to the second part of MSSAC’s Motion, a non-confidential version of the Stantec Report is already available to Hearing participants.⁹ Sio Silica has also offered to provide any Hearing participant with a copy of the confidential version of the Stantec Report if they sign a non-disclosure agreement (“NDA”). Sio Silica understands that MSSAC is requesting that the confidential version of the Stantec Report be made public, without the need for parties to sign NDAs. This request is unreasonable and unsupported. The redacted information in the non-confidential version of the Stantec Report is commercially sensitive information, the disclosure of which could reasonably be expected to result in a material loss to Sio Silica or prejudice its competitive position. This information could be used by a competitor of Sio Silica in the development of a competing project or to otherwise gain an unfair advantage over Sio Silica. The redacted information 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.
27. MSSAC relies on one of the third-party authors of the Technical Reports to support its claim that information in the Stantec Report is not confidential. But, respectfully, that author does not have any expertise in the commercial aspects of silica sand project development, and that was not part of the scope of the technical review requested by the Commission. As a result, this uninformed observation by one of the authors of the Technical Reports should be given little, if any, weight by the Commission.

⁹ 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. See also 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.

28. Finally, there is no prejudice to MSSAC or any other Hearing participant if the redacted information in the Stantec Report is kept confidential and not filed publicly. Participants can access the confidential information by simply signing an NDA.
29. For all of these reasons, Sio Silica's interest in confidentiality outweighs any perceived benefits of the confidential version of the Stantec Report being filed publicly.

V. RESPONSE TO THE MOTION BY DLN AND WTFMB

A. Overview of the Motion

30. In their Motion, DLN and WTFMB seek: (i) an order directing Sio Silica to complete six actions listed in an attachment to their Motion to "rectify" certain Alleged Deficiencies, and to file associated documents "prior continuation [*sic*] of the Hearing"; and (ii) delay or suspension of the Hearing until completion of Indigenous consultation. These requests are unreasonable and unjustified, for the reasons set out below.

B. The actions listed in the attachment to the Motion do not need to be completed before the Hearing process can continue

31. The six requested actions listed in the attachment to DLN and WTFMB's Motion are related to certain Alleged Deficiencies in the Technical Reports, and Sio Silica relies on its submissions in Section III above related to this aspect of DLN and WTFMB's Motion as well.
32. Specifically regarding pilot field tests of water treatment options, Sio Silica has previously addressed a similar request by DLN and WTFMB in this proceeding. As indicated by Sio Silica previously, testing of treatment options is typically and appropriately done after a licence is issued for a project. Sio Silica has committed that the process wastewater from its silica sand extraction wells complies with the effluent criteria identified in the Process Wastewater Treatment Options Technical Memorandum prepared by AECOM ("AECOM Memo") before it is re-injected underground, but the process to carry out the testing requires sand and water extraction which Sio Silica is unauthorized to do without a licence. Following the Hearing and the issuance of a licence for the silica sand extraction wells, Sio Silica will finalize its detailed design for the Project and conduct tests to confirm that its selected equipment and designs will meet wastewater effluent limits. The AECOM Memo demonstrates that there are different technical options that will allow Sio Silica to fulfil this commitment.
33. Sio Silica also notes that, contrary to the suggestion in DLN and WTFMB's Brief supporting their Motion, the information that Sio Silica provided in its supplemental filing regarding water treatment options does not constitute an alteration to Sio Silica's Application. Process water treatment, including a UV disinfection procedure, was identified as a component of the Project within the Application (see, in particular, Sections 2.1, 2.2.5 and 6.2.3). The supplemental filing does not alter the Project description in the Application; rather, it demonstrates that there are many suitable options available to provide water treatment as described in the Application.

34. For the remaining requested actions, Sio Silica has already completed full-scale extraction tests and geotechnical modelling, as recommended in the Technical Reports. Sio Silica will respond more fully to the Technical Reports through the IR process, but it disagrees that any of the requested actions are reasonably required to understand the likely environmental effects of the Project.
35. Finally, Sio Silica submits that much of the content of DLN and WTFMB's Brief to support its Motion comprises technical submissions and arguments that can – and should – be addressed through the Commission's established Hearing process. This will allow Sio Silica and other participants to test the information and make arguments to the Commission based on a complete evidentiary record. As noted in Section III above, it would be premature and unfair to Sio Silica for the Commission to significantly delay its review process before it has even begun in earnest, on the basis that Sio Silica needs to provide additional information which parties have the ability to request as part of the current Hearing process, and before Sio Silica has been able to test and fully respond to the technical information on which the Motion is based.

C. Indigenous consultation should proceed separate and outside of the Commission's process

36. This aspect of DLN and WTFMB's Motion also repeats submissions that DLN and WTFMB have previously made during this proceeding, to which Sio Silica has already responded. As noted in Sio Silica's response to the previous request by DLN and WTFMB, responsibility for Indigenous consultation rests with the Province of Manitoba, not the Commission or Sio Silica. During the pre-hearing meeting on October 4, 2022, the Commission Chair confirmed that Indigenous consultation regarding the Project is separate and outside of the Commission's review process. It is also well-established law in Canada that the adequacy of Indigenous consultation should not be assessed until the government's ultimate decision on a project.¹⁰ As such, it would be an error of law for the Commission to delay or suspend the Hearing until the completion of Indigenous consultation.

VI. CONCLUSION

37. For all of the reasons set out above, Sio Silica respectfully requests that the Commission dismiss each of the Motions.

¹⁰ For example, see *Conseil des innus de Ekuanitshit c Canada (Procureur général)*, 2013 FC 418 at paras 108-112, aff'd 2014 FCA 189 at paras 107-110, leave to appeal to SCC refused, 2015 CanLII 10578.

38. All of which is respectfully submitted this 28th day of October, 2022.

A handwritten signature in blue ink, consisting of a stylized 'S' followed by a horizontal line extending to the right.

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