

**Before a Decision-Making Committee
of the Environmental Protection Authority**

APP202804

Under

the Hazardous Substances
and New Organisms Act 1996

In the matter of

an application to import EDN
(ethanedinitrile)

By

Draslovka
Applicant

Memorandum of Counsel on behalf of the Bay of Plenty Regional Council

Dated 11 January 2022

Counsel acting: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1. By Direction and Minute WGTO16 dated 2 December 2021 the DMC directed¹

“Any party to the application wishing to provide legal submissions in response to the EPA’s legal advice (referred to at c and d above) and/or STIMBR’s legal submission (referred to at a above) are to provide this by 5pm Monday, 17 January 2022.”
2. The Bay of Plenty Regional Council (Regional Council) is a party to the application and wishes to make submissions in response. Its general interests in the wider matter were set out in a presentation on its behalf by [REDACTED] dated 25 November 2021² and in its submission dated 19 April 2018³. For completeness I refer to **Appendix A**⁴, being a general summary table that shows the role of the Regional Council in conjunction with the EPA and WorkSafe in managing EDN and its effects.
3. I have read the legal opinions on behalf of the EPA dated 18 November 2021 and 20 November (EPA legal advice) and the legal submissions on behalf of STIMBR dated 6 December 2021.
4. I agree with the legal position set out in the EPA legal advice for the following reasons:
 - (a) A decision cannot be made without **first** being able to consider the relevant information: Section 29(1)(a) Hazardous Substances and New Organisms Act 1996 (HSNO) is clear about the situations in which an approval can be granted, and this requires the Authority may:

approve the application if, after taking into account—
(i) any controls which may be imposed on the substance; and
(ii) all effects of the substance during the life cycle of that substance; and
(iii) the likely effects of the substance being unavailable,—(emphasis added)
 - (b) Any decision is to be made in accordance with Methodology established under Section 9 HSNO, clause 12 of which requires the nature of the adverse effects to be taken into account when assessing risks⁵. This assessment would not be possible unless that information was available **prior** to a decision being made.
 - (c) Decision-making under HSNO must be based upon evidence and that evidence must be sufficient regarding the proposed use, which is not the case for use of EDN in ship’s holds⁶.

¹ Paragraph 10(e).

²[https://www.epa.govt.nz/assets/FileAPI/hsnoar/APP202804/Presentation from Bay of Plenty Regional Council.pdf](https://www.epa.govt.nz/assets/FileAPI/hsnoar/APP202804/Presentation%20from%20Bay%20of%20Plenty%20Regional%20Council.pdf)

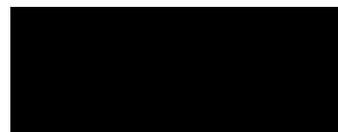
³ Submission 126980.

⁴ <https://www.worksafe.govt.nz/about-us/news-and-media/a-new-way-of-managing-hazardous-substances-epa-and-worksafes-changed-responsibilities/>

⁵ Hazardous Substances and New Organisms (Methodology) Order 1998.

⁶ I concur with the analysis in the EPA legal advice dated 20 December on these points.

- (c) A decision to grant permission for a use without undertaking a proper consideration first would be *ultra vires* and if it was a permission contingent on a non-existent SWI being created then it may appear to delegate the decision making to another authority acting under another statute. That does not, with respect, appear to be a decision possible under s29 HSNO which has different purposes.
5. In addition, the Regional Council is concerned that proceeding as proposed by STIMBR would result in its not being able to be heard on any conditions under HSNO but only to make submissions to WorkSafe on matters within WorkSafe's jurisdiction under the Health and Safety at Work Act 2015 (HSW) for its consideration of a new SWI in relation to use of EDN within a ship's hold – if in fact that occurs.
 6. This limitation of a right to be heard under the HSNO jurisdiction would be a significant detriment for the Regional Council as its concerns in this matter are related to the wider issues of protection of people and the environment, not just people in workplaces, and it requires these matters to be considered in full under the HSNO procedure and jurisdiction⁷. It would consider not having an opportunity to be heard on those matters to be a serious concern. It does not see how the procedure proposed by STIMBR would meet the purpose of HSNO as set out in section 4 as it would circumvent submissions being made on whether to approve the use of EDN in ship's holds, and any conditions that might be required under the HSNO jurisdiction (which is wider than the HSW concerns).
 7. It also appears that a change in controls under the HSW is a ground to request a decision of the Authority to reassess a hazardous substance under s62(2)(aa) HSNO, which may suggest that the legislature has already considered and provided a different process for the situation that STIMBR is addressing.
 8. For all of the above reasons, it is respectfully submitted that the DMC is limited to *either* adjourn the hearing until it has information appropriate for a full consideration⁸ of the use of EDN in ship's holds; or to make a decision under s29(c) HSNO to "decline⁹ the application if insufficient information is available to enable the Authority to determine the adverse effects of the substance."



On behalf of the
Bay of Plenty Regional Council

⁷ I concur with the concern expressed in the EPA legal advice dated 20 December 2021 that the effect of the STIMBR approach "would be to circumvent the EPA conducting a proper assessment of the risks to the environment and bystanders, thereby undermining the regulatory regime." (at [9]).

⁸ As required by s29(1) and s9 HSNO.

⁹ It could decline the application in part, by approving the application other than the ship hold fumigation.

APPENDIX 1

<https://www.worksafe.govt.nz/about-us/news-and-media/a-new-way-of-managing-hazardous-substances-epa-and-worksafes-changed-responsibilities/>