



Legal Submission

To:	Decision-making Committee for APP202804 Provided by email: EDN@epa.govt.nz
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From:	[REDACTED]
Date:	18 January 2022
Subject:	APP202804 MPI Legal Submission

PURPOSE

1. This submission is pursuant to WGT016: Direction and Minute of Decision-making Committee – December 2021. The purpose of this submission to respond to Environmental Protection Authority (EPA) legal advice and the Stakeholders in Methyl Bromide Reduction Incorporated (STIMBR) legal submission.
2. In summary, the Ministry for Primary Industries (MPI) submits that:
 - A. any approval of ethanedinitrile (EDN) should not be limited solely to use for export purposes; and
 - B. the Decision-making committee (DMC) can approve EDN for use in ship holds, should it determine the positive effects of EDN being available outweigh the negative effects. We request that the DMC examine to their ability to consider controls which may, and need to, be imposed before EDN may be used in ship holds.

A. Use of EDN for export and import

3. MPI submits that any approval of EDN should not be limited solely to use for export purposes. The EPA August 2021 Updated Staff Report proposes that, under section 77A of the Hazardous Substances and New Organisms Act 1996 (HSNO), the use of EDN is restricted to "... only be used as a fumigant for timber and logs for export under a sheet or shipping container".
4. On 17 July 2017, Lučební Závody Draslovka a.s. Kolín (the Applicant) applied for approval to import or manufacture EDN for use as a fumigant for the phytosanitary treatment of wood products (including logs) to control a wide range of insects, nematodes and fungi.¹ The application did not limit itself to seeking approval to use EDN for export purposes only.
5. MPI notes that the WorkSafe Save Work Instrument (SWI) does not differentiate between import and export.
6. MPI requests that any approval of EDN is not limited solely for export purposes. We see no reason why this condition has been imposed, as the fumigation method and resulting exposure to people and the environment is identical.

¹ EPA Application Form 14 July 2017, 2.1 Purpose statement.

B. DMC decision on EDN use within ship holds without draft SWI

7. MPI submits that the decision to approve EDN within ship holds is open to the DMC, as the determination of an application under section 29 of HSNO is ultimately a balancing exercise. We agree with the EPA that there is no bar on the DMC on making a decision on the use of EDN within ship holds without an empowering WorkSafe SWI.
8. MPI requests that the DMC examine its ability under section 29(1)(a)(i) of HSNO to take into account any controls that may be imposed on the substance when undertaking its decision, including ones that must be developed to allow the activity to take place.
9. The decision-making criteria under section 29 of HSNO requires the DMC to consider “any controls which may be imposed on the substance”. As nothing in HSNO affects the requirements of the Health and Safety at Work Act 2015 (HSWA) that relate to hazardous substances in a workplace (such as a SWI),² an approval of EDN for use in ship holds by the DMC would not lead to such use until a related SWI is developed.
10. We agree that existing controls (or almost existing, as in this case) that will be imposed on the use of EDN, such as the draft SWI, are a mandatory consideration under section 29 of HSNO. MPI’s understanding is that section 29(1)(a)(i) also allows the decision-maker to take into account controls which may be imposed in the future, especially ones which are required to be developed to enable use of the chemical.
11. Should the DMC find that the positive effects of the substance outweigh adverse effects, we submit that EDN could be approved for use in ship holds. If the DMC made the decision to make EDN available in ship holds, they could further consider noting in their decision that a SWI would need to be developed before lawful use of EDN in ship holds could take place.

Positive effects of EDN being available for use in ship holds

12. With respect to the above points (that controls will need to be imposed) MPI submits that it is open to the DMC to find on balance that positive effects of approving the use of EDN in ship holds outweigh the adverse effects.
13. A mandatory consideration of the DMC’s determination is to take into account the likely effects of the substance being unavailable. As the DMC is aware, MPI has submitted in support of this application for strong economic and biosecurity reasons.
14. MPI seeks the approval of EDN as a substitute for methyl bromide to assist its work in controlling biosecurity threats at New Zealand’s border. Methyl bromide is a highly effective fumigant used for treating primary products for export – as well as imported goods – to control quarantine pests. Methyl bromide fumigation of ship holds will be banned from 1 January 2023. From 1 January 2022 until its use is banned, the buffer zone has been set at 900 metres.
15. As noted in MPI’s previous submissions, about 90% of the methyl bromide used in New Zealand is estimated to be used for log fumigations. The use of methyl bromide for this purpose could potentially be replaced with EDN. Also timber exports to Malaysia that are treated with methyl bromide can be replaced with EDN immediately, if registration is successful, since Malaysia already accepts EDN as a phytosanitary treatment.
16. The volume of export logs has increased significantly (ca. tenfold) in the last 10 years and will continue to increase. In 2016/17, 4.48 million m³ of logs were treated with methyl bromide, principally to China and India; ten years ago, this volume was 1.7 million m³ of logs. Forestry is a significant part of New Zealand’s primary production and export sector,

² Section 142(7) of HSNO.

forming 14% of total export revenue for the year ended June 2017 (~\$5.5 billion), with China being the largest export market. Primary industry export revenue is forecast to increase by 10.8% to \$42.2 billion in the year ending June 2018, the largest annual increase since 2014. Part of this forecast reflects high log prices driving record forestry harvest volumes and will likely result in log exports increasing to ~\$6.1 billion, over 11% higher than in 2017. The landscape of New Zealand's primary industries continues to change. For forestry, the government's One Billion Trees Programme will create change in primary sector land use, increased planting rates and further increases in logs and timber available for forest exports. These economic benefits are only possible if a suitable replacement for methyl bromide is approved.

17. As the DMC is aware, clause 13 of the Hazardous Substances and New Organisms (Methodology) Order 1998 requires when evaluating the assessments of costs and benefits associated with the substance, it must take into account the magnitude or expected value of costs and benefits. As set out above, MPI submits that unavailability of EDN for use in ship holds will substantially increase the cost of exporting timber.

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Senior Solicitor