

**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

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**MEMORANDUM OF COUNSEL FOR STIMBR**  
**17 JANUARY 2022**

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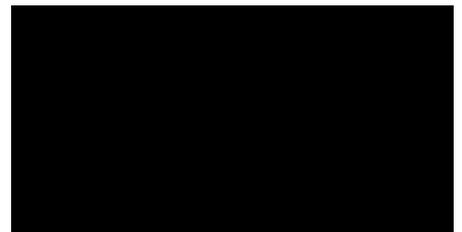
**Counsel Acting**

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1. By Direction & Minute WGT016 dated 2 December 2021 the DMC directed that any party to the application wishing to provide legal submissions in response to the EPA's legal advice are to provide this by 5pm on 17 January 2022. This memorandum comprises the legal submissions STIMBR wishes to provide in response to the EPA's legal advice.
2. The EPA legal team states that there is not sufficient evidence regarding ship holds to enable the DMC to issue an approval that would permit use of EDN in ship holds.
3. There are two issues with this. First, the sufficiency of the evidence is a matter for the DMC to assess. Whatever view the EPA legal team takes regarding the sufficiency of the evidence, their view does not displace the DMC's obligation to assess for itself the sufficiency of the evidence. In other words, it is not legally permissible for the DMC to determine that it "cannot" approve EDN use in ship hold relying on the legal team's view of the sufficiency of the evidence: the DMC must reach its own view as to whether the evidence is sufficient or not.
4. Second, the DMC should be cautious about assessing sufficiency in a similar way to the EPA legal team, as the EPA legal team seems not to have assessed sufficiency in proportion to the relevant risks. In particular, the legal team seems to place no weight on two factors that materially alter the relevant risks:
  - (a) The risks to workers will have to be addressed by an SWI before EDN can be used in ship holds. Such an SWI is a "control" within the definitions of the HSNO Act, and the DMC is therefore obliged under s 29(1) of that Act to take into account that such a control may be prescribed, which will address any risks to workers.
  - (b) The evidence already before the DMC supports a conclusion that risks to the public can be addressed by imposing a TEL(24hr) of 0.034ppm, and ensuring this TEL is met in any locations that may be publicly accessible.

5. STIMBR acknowledges that the outcome of any future assessment by WorkSafe regarding the development of an SWI for shipholds is not certain, but that does not mean the DMC needs to speculate. Either an SWI will be implemented, or it will not. All STIMBR is asking is that the DMC consider whether it can fashion an HSNO approval that appropriately manages risk in both of those potential situations.
6. STIMBR respectfully submits that it is open to the DMC, on current evidence, to approve EDN use in ship holds in a manner that will appropriately manage risk in both those situations:
  - (a) If an SWI for ship-holds is not implemented, then EDN use in ship-holds cannot proceed, and all risks associated with ship-hold use will be avoided absolutely.
  - (b) If an SWI for ship-holds is implemented, then all risks to workers associated with that ship-hold use will be managed under the SWI, and the only question for the DMC is whether (on current evidence) it can put in place controls that adequately manage the risks *beyond* the workplace. STIMBR considers the current evidence supports a conclusion that those risks can be managed adequately, in particular through the setting of a TEL to protect public health at the boundary of any buffer zones.
7. Contrary to the EPA legal advice, STIMBR's proposed course of action would not circumvent WorkSafe's or the EPA's obligations under either statutory scheme. WorkSafe's potential future development of an SWI would proceed in accordance with the HSWA, unencumbered by any constraint arising from a conditional HSNO approval (as STIMBR is seeking)—though it would be open to WorkSafe to take account of the TEL that would be already set under the HSNO approval. Conversely, the DMC can properly discharge its obligations in accordance with the purpose and provisions of the HSNO scheme based on the evidence it has already received.
8. The alternative promoted by the EPA legal team requires the DMC to decline the application in relation to ship-holds, await implementation of an SWI for ship-holds by WorkSafe (despite the lack of a HSNO approval), and then complete a reassessment of the HSNO approval to enable ship-hold use.

9. STIMBR does not share the EPA legal team's optimism that such a reassessment is "not likely to be unduly complex or time-consuming". The process to date with the current EDN application, and the process followed for the methyl bromide reassessment strongly suggest that a further reassessment for EDN in the future may take many years. The potential for such delays occurring again must be taken into account (for example under s 29 of the HSNO Act, and cl 14 of the Methodology Order). There is uncontested evidence that delaying the use of EDN in ship holds will result in significant economic and reputational losses for New Zealand's log export industry. The outcome promoted by STIMBR has the potential to lessen further delays. The DMC is bound to consider this factor.
  
10. The application requested approval to enable the treatment of ship holds. There is no reason that conditional approval for the use of EDN in ship holds (contingent on the development of an SWI) cannot be included in the decision. There is nothing in the HSNO Act or the Methodology Order that prohibits a conditional approval. Whether a conditional approval is appropriate is a matter for assessment; and given the particular circumstances of this application, including the matters outlined above, STIMBR respectfully submits the DMC should consider a conditional approval in this case.



**17 January 2022**