

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

**APP203660**

**Under** the Hazardous Substances and New Organisms Act 1996

**In the matter of** the modified reassessment of methyl bromide

**By** **Stakeholders in Methyl Bromide Reduction Inc**  
Applicant

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**13<sup>TH</sup> MEMORANDUM OF COUNSEL FOR THE APPLICANT**

**14 MAY 2020**

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## Application for waiver and directions

1. In this memorandum, STIMBR requests the DMC:
  - (a) to waive the requirement to apply recapture technology to methyl bromide fumigations from 28 October 2020;
  - (b) to direct that recapture technology shall be applied to methyl bromide fumigations from 28 April 2021.

## Background

2. The EPA controls currently in place<sup>1</sup> require technology that will achieve recapture to a specified standard ("**recapture standard**") to be applied to all methyl bromide fumigations from 28 October 2020 ("**recapture deadline**").
3. The present modified reassessment application may result in changes to the recapture standard and the recapture deadline. For instance, if the recapture standard is amended, the DMC may amend the recapture deadline to allow lead time for the log export industry to implement compliance with the amended standard.<sup>2</sup>
4. The DMC has provisionally proposed that the hearing of the modified reassessment will commence on 27 July 2020.<sup>3</sup> This may allow sufficient time for the DMC to determine the modified reassessment before the recapture deadline.
5. However, the recapture deadline may have a significant impact on log exports to India advance many months in advance of the recapture deadline, due to the financial mechanisms for securing payment from Indian importers.
6. It is not feasible for the modified reassessment to be heard, let alone determined, any sooner than the end of July 2020. To alleviate the advance

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<sup>1</sup> Approval HSR001635, Reissued on 19 July 2019.

<sup>2</sup> *Stakeholders in Methyl Bromide Reduction Inc v Environmental Protection Authority* [2019] NZHC 3482 at [27(a)]. See also Direction and Minute WGT003 at [8]-[9]; and 7<sup>th</sup> Memorandum of Counsel for the Applicant.

<sup>3</sup> Direction and Minute WGT009 at [12].

impact that the recapture deadline may have (which to some extent is already occurring, but is likely to worsen with the passage of time), STIMBR is therefore seeking a waiver and a direction that will, in effect, delay the recapture deadline from taking effect for 6 months after 28 October 2020.

### **The factual basis for the application**

7. The factual basis for this application is described in detail in the affidavit of Ian Gear sworn on 14 May 2020. In summary:
  - (a) Log exports to India, which are presently required by the Indian Government to be fumigated with methyl bromide, are typically subject to payment on letters of credit.
  - (b) Depending on their terms, and the date of issue, many of those letters of credit will fall due after 28 October 2020.
  - (c) If the recapture obligation remains unchanged and takes effect on 28 October 2020, this will end all further log exports to India for the foreseeable future; and the lack of an ongoing trade relationship may put at risk the payments that fall due under letters of credit beyond that date.
  - (d) In effect this presents exporters with a choice of either ceasing to trade with India in advance of 28 October 2020, or continuing to trade and taking the risk of non-payment. Either way, this would bring forward in time (by the length of the relevant credit terms, i.e. typically 180, 150 or 90 days) the impact of the recapture obligation.

### **Why 6 months is proposed**

8. The effects outlined above, and explained in more detail in the affidavit of Mr Gear, can be avoided if the recapture deadline is extended to ensure there is a gap of at least 6 months (180 days), between the estimated date of the DMC's final determination and the recapture deadline.
9. At present the reassessment hearing date is not certain, which adds to the difficulty of reliably estimating the date of final determination. Even if the hearing date was certain, the DMC is likely to hear matters of technical and scientific dispute that could foreseeably lead to the hearing being

extended, re-convened, or adjourned, to enable the DMC to obtain the information it needs.

10. Once the DMC has all the information it needs, and the hearing is closed, there is a further uncertainty about the time the DMC may need to issue its decision. The Act requires the DMC to decide the application within a statutory time period (30 working days), but that time period can be subject to waiver where appropriate.
11. In all these circumstances STIMBR respectfully submits it would be prudent to extend the recapture deadline by 6 months, to 28 April 2021. This would allow (in a practical sense) up to 28 October 2020 for the DMC to determine the reassessment before the recapture deadline may impact on Indian log trade due to the issues with letters of credit.
12. Any shorter waiver (e.g. 2 months) will not be sufficient to address the risks associated with longer letters of credit — 180 and 150 days — as these risks arise from the start of May and the start of June, respectively. Further, a short waiver period may not reliably provide a reasonable buffer in addition to the time the DMC may need to reach a fully informed decision, such that repeated waiver applications might need to be made. To avoid the distraction and potential inefficiency of multiple applications — for the applicant, for submitters and for the DMC — STIMBR proposes a 6-month extension. On any presently foreseeable trajectory, this ought to allow sufficient time for the reassessment to be finally determined at least 6-months prior to the (new) recapture deadline.
13. In further support of a 6 month extension, STIMBR observes that there continue to be some impediments to the air dispersion modelling work that the DMC has requested. In its last memorandum of counsel<sup>4</sup> STIMBR estimated the modelling and associated report could be completed by 15 June 2020. This was on the basis that STIMBR would request its expert, Mr Sullivan, to compile CALMET data for 2018-2019 in addition to his other work (on the assumption that Bay of Plenty Regional Council (**BOPRC**) is unwilling to comply with the DMC's direction<sup>5</sup> to produce this CALMET data). STIMBR has requested Mr Sullivan to undertake this additional work. However, Mr

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<sup>4</sup> 12<sup>th</sup> Memorandum of Counsel for the Applicant, 24 April 2020.

<sup>5</sup> Direction and Minute WGT011 at [9](a).

Sullivan is still awaiting pre-requisite data from BOPRC to enable him to undertake this task. STIMBR has requested the EPA to facilitate this, yet until this is resolved there will be some uncertainty over the date for completion of the modelling work and associated report. This could affect the provisional hearing dates, and STIMBR respectfully submits this adds support for a 6 month extension, to ensure there is time for production of the modelling work that the DMC has requested.

### **The legal basis for the application**

#### *Jurisdiction*

14. STIMBR initially raised the issues surrounding letters of credit for Indian log exports in its 9<sup>th</sup> Memorandum of Counsel.
15. This led the DMC to seek further advice from the EPA.<sup>6</sup>
16. The EPA advised:<sup>7</sup>
  - (a) that s 59(3)(a)(i) of the Hazardous Substances and New Organisms Act 1996 (**the Act**) confers on the DMC the power to waive the deadline;<sup>8</sup>
  - (b) that the DMC can rely on s 59(3)(b)(i) of the Act to make a direction specifying a new recapture deadline;<sup>9</sup> and
  - (c) that both these powers could be exercised by the DMC in a stand-alone fashion in advance of hearing and determining the reassessment.<sup>10</sup>
17. STIMBR relies on that advice.

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<sup>6</sup> Direction and Minute WGT010 at [12]

<sup>7</sup> Memorandum to the DMC, 26 March 2020.

<sup>8</sup> At [18]-[20].

<sup>9</sup> At [21]-[22].

<sup>10</sup> At [14].

### *Legal tests*

18. The DMC may waive the recapture deadline if it is satisfied that either:
  - (a) The applicant and persons making submissions consent; or
  - (b) Any submitters who have not consented will not be unduly prejudiced.
19. STIMBR's position is that no submitter would be unduly prejudiced by a 6-month extension of the recapture deadline. The ability of submitters to participate in the reassessment would not be diminished in any way by the extension. Further, the extension would not be creating a new state of affairs. It would be continuing the status quo (the use of methyl bromide without an EPA requirement<sup>11</sup> for recapture). That has been the status quo since before the 2010 reassessment. Viewed on that time-scale, STIMBR submits an extension of 6 months is neither inappropriate nor prejudicial.

### *Procedure*

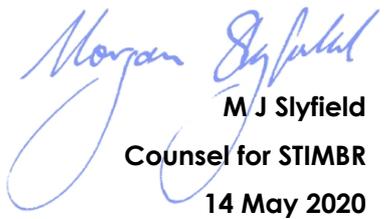
20. STIMBR concurs with the EPA advice, that submitters must be provided a reasonable opportunity to comment on this request for waiver and directions.
21. STIMBR considers this can be achieved in writing; and unless submissions (or DMC evaluation) give rise to something out-of-the-ordinary that requires to be resolved by hearing directly from the parties, then STIMBR's request could and should be determined on the papers.
22. In support of this, STIMBR observes that the Act's provisions concerning waiver do not require the DMC to hold a hearing, and waivers are commonly assessed and granted without a hearing. Within the present reassessment application there have been multiple waivers. The statutory periods for notifying the reassessment, for receiving submissions, and for commencing the hearing were all waived, without any hearings being held.
23. With this in mind, STIMBR requests that the DMC issue timetable directions to ensure this application can be determined as swiftly as is reasonably possible, while ensuring that all participants have a fair and reasonable

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<sup>11</sup> Notably, there are other recapture requirements, such as those imposed on fumigations at the Port of Tauranga under consents issued by the Bay of Plenty Regional Council to Genera Ltd.

opportunity to put their respective positions. STIMBR offers the following outline for the DMC's consideration:

- (a) The EPA notifies all submitters of this application (and the supporting affidavit) as soon as possible;
  - (b) Submitters have 2 weeks (10 working days) from notification to file any responses to the application (which could include submissions and/or evidence);
  - (c) The applicant has 1 week (5 working days) to file any reply submissions or evidence;
  - (d) The DMC publicly notifies its decision as soon as reasonably practicable, and no later than 10 working days after the receipt of reply evidence or any hearing.
24. This timetable would lead to the DMC making a decision on the waiver application by the end of June 2020. It is important that a decision is made as swiftly as possible within the bounds of due, and fair, process; as the risks associated with longer-term (180-day and 150-day) letters of credit, are imminent.

  
**M J Slyfield**  
**Counsel for STIMBR**  
**14 May 2020**