

**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

14TH MEMORANDUM OF COUNSEL FOR THE APPLICANT

4 JUNE 2020

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REQUEST FOR AMENDED HEARING PROCEDURES

1. In this memorandum, STIMBR requests the DMC to issue amended hearing procedures in advance of the hearing that is currently anticipated to commence on 27 July 2020; and seeks clarification on related timing and other hearing matters.

The Basis for Amending the Hearing Procedures

2. The DMC previously promulgated hearing procedures when the hearings were scheduled to occur in early December 2019. Since then the DMC has (among other things) received further monitoring information from a number of parties, directed modelling experts to conference (twice) and directed STIMBR to produce further air dispersion modelling.
3. The applicant submits that the application has evolved since the last hearing procedures were issued, and that the circumstances, scale and nature of the application, as it now stands, warrant the making of some amendments to the hearing procedures.
4. The DMC is required to establish a procedure that is appropriate and fair in the circumstances.¹ The relevant circumstances for this application include:
 - (a) There is a significant degree of public interest in the application. Approximately 70 submitters have provided written submissions, many of whom may wish to be heard at the hearing.
 - (b) The application is complex, and there are likely to be technical disputes between expert witnesses on a number of topics (an obvious candidate being air dispersion modelling, where, despite two rounds of expert conferencing, there remain apparent differences of opinion between experts engaged by the applicant, submitters and the EPA).
 - (c) In accordance with the Methodology Order the DMC must determine the materiality and significance of any such technical disputes.²

¹ Section 61 (7) of the HSNO Act.

² Hazardous Substances and New Organisms (Methodology) Order 1998, Schedule, cl 29.

Specific Issues for Amendments to Address

Information, including evidence

5. The extant procedures require parties to submit, 10 working days prior to the hearing, all information they intend to present at the hearing (including statements of evidence from any witnesses they intend to call).
6. This allows limited time prior to hearing for the DMC and all participants to review what may be a considerable volume of expert evidence and other information. It also means that submitters must prepare their evidence without knowledge of the evidence that the applicant intends to present.
7. STIMBR submits that an amendment to the procedures to provide for staggered filing of evidence (i.e. STIMBR first, and submitters to follow), would be fairer to submitters, would allow more time for the DMC and other participants to familiarise themselves with evidence in advance of the hearing, and would be likely to facilitate both a more efficient and more informative hearing.
8. A staggered filing of evidence (which is outlined in greater detail below) is a common feature in other judicial and quasi-judicial settings, and is consistent with the procedures that have been employed by other Decision-making Committees of the EPA dealing with contested, technical assessments.³
9. Related to this, the extant hearing procedures rely on information/evidence being uploaded to the EPA website in order to achieve circulation to all parties. A staggered filing timetable will reduce the volume of material requiring simultaneous uploading. However, even with the amendments proposed by STIMBR, the timetable in the lead-up to hearing would be relatively condensed, and any delays in uploading information/evidence to the website may materially hinder parties' preparation for the hearing. STIMBR therefore seeks clear guidance on the time of day by which materials

³ For example: Hearing procedures for Chatham Rock Phosphate marine consent application (dated 22 August 2014); Hearing procedures for Trans-Tasman Resources Ltd application for marine consents and marine discharge consents (dated 10 January 2017).

must be provided to the EPA to ensure they can be uploaded on the same day.

Questions

10. The DMC has a broad discretion in respect of what questions it will allow at the hearing (which can include cross-examination⁴), but the guiding principle is that the procedure must be appropriate and fair in the circumstances.⁵
11. Aside from the DMC's own questions, the extant procedures allow for questions only to the extent that they are questions of clarification, which require leave of the Chair.⁶ STIMBR concurs that cross-examination is not appropriate in the circumstances. However, STIMBR is concerned to ensure there is an allowance for specific, directed questions to be put to parties/witnesses where those may assist the DMC. In particular, this may be useful to the DMC on subject matter that is contested between experts, in respect of which the DMC may not possess the same expertise as the relevant witnesses.
12. In those circumstances, STIMBR submits it would be appropriate to make more formal provision for parties to ask questions, subject of course to the DMC's control. This could be achieved by requiring parties to identify questions in advance of the hearing (once the evidence has been filed), as has been the practice of other EPA Decision-making Committees hearing technical, contested matters.⁷
13. Of relevance to this STIMBR's air dispersion modelling expert, Mr Sullivan, is unlikely to be able to attend the hearing in person, due to COVID-19 border restrictions on travellers from the USA.⁸ It seems likely, therefore, that Mr Sullivan may have to give evidence by video-conference. As stated above, STIMBR anticipates air dispersion modelling will remain contested, in at least some respects; and the experts contesting Mr Sullivan's opinions are more

⁴ HSNO Act, s 61 (7)(a).

⁵ HSNO Act, s 61 (7).

⁶ Hearing Procedures at [26]-[28].

⁷ Above, footnote 3.

⁸ Other STIMBR witnesses who reside overseas may be subject to similar restrictions. Attention is drawn to Mr Sullivan's situation, because his field is the only subject area in which STIMBR is already aware of the likely other expert witnesses, and their respective positions.

likely to be able to attend the hearing in person. A more formal allowance to ask questions of the relevant witnesses may be of greater importance in such circumstances, as one of the means for ensuring the evidence comes before the DMC in an appropriately balanced fashion.

Ancillary matters

14. There are two ancillary matters that STIMBR considers would be prudent to include in any revision the DMC makes to the hearing procedures, consistent with the practices adopted by other EPA Decision-making Committees.⁹

These are:

- (a) Obtaining confirmation from submitters whether they wish to speak at the hearing. This is appropriate given the passage of time since submissions were filed, and the information that has become available since submissions were filed, either or both of which may have affected submitters' intentions.
- (b) Obtaining confirmation of the experts who will be called to give evidence. It is useful to obtain this information as early as possible, to enable better planning for the logistics of the hearing, and to ensure there is sufficient advance notice of areas that will be contested at an evidential level.

Proposed Amendments

15. Drawing on the matters above, STIMBR respectfully requests the DMC to issue amended hearing procedures that incorporate the following:

4 weeks before the hearing (29 June 2020):

- Submitters are to reconfirm with the EPA whether they wish to speak at the hearing.
- Parties are to advise the names of any expert witnesses who will provide evidence;

⁹ Above, footnote 3.

3 weeks before the hearing (6 July 2020):

- STIMBR is to provide all information and written statements of evidence that it intends to present at the hearing

2 weeks before the hearing (13 July 2020):

- Submitters are to provide all information and written statements of evidence that they intend to present at the hearing.

1 week before the hearing (20 July 2020):

- All parties are to provide notices of questions for any witnesses, which are to be made available on the EPA website.

At the hearing

- Parties may ask questions if these have been provided to the EPA one week prior to the hearing and are approved by the DMC.

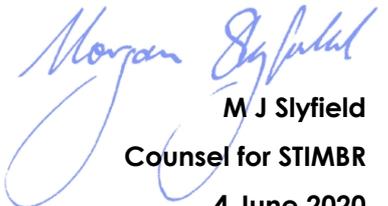
Hearing Notice

16. STIMBR also requests that the DMC issues a notice confirming the commencement date of the hearing as soon as possible.
17. The statutory period for the EPA to issue notice confirming the hearing commencement date (10 working days) is a minimum,¹⁰ and it would not be appropriate or fair for the parties to be required to undertake the substantial work necessary to prepare for hearing (with or without the amendments sought by STIMBR) if the hearing itself has not been confirmed.
18. STIMBR confirms the report on additional air dispersion modelling is still expected to be available on 15 June 2020; and submits that once that report is available, the DMC may be in a position to issue a hearing notice — which would provide greater certainty for hearing participants in advance of the procedures requested above.

¹⁰ Section 59(1)(e).

Opening Representations

19. Finally, STIMBR understands that the extant hearing procedures provide only for STIMBR to make opening representations. If that is not the case, and the DMC intends to facilitate opening representations by other parties also, then STIMBR requests a further refinement to the hearing procedures, requiring parties to confirm this 4 weeks in advance of the hearing; as this will need to be accommodated in the hearing logistics.


M J Slyfield
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4 June 2020