

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

Memorandum of Counsel for Submitter

Tauranga Moana Fumigant Action Group

3 June 2021

Purpose of Memorandum

1. This Memorandum:
 - a) seeks clarification from the DMC as to what directions have been provided in relation to how the three waiver decisions in relation to Methyl Bromide recapture (sought by STIMBR)¹ are to take effect; and
 - b) sets out concerns as to whether the DMC met the statutory obligations in Section 59(4) of the HSNO Act, in exercising its power under Section 59(3)(a)(i)² to grant the third waiver application (sought in STIMBR's 26th Memorandum of Counsel dated 18th February 2021).

Background

2. On 2 March 2020, Counsel for the applicant submitted a 9th Memorandum of Counsel, seeking confirmation from the DMC that it had jurisdiction to issue an interim decision to alter the deadline for recapture technology.
3. The memorandum noted that the current EPA controls require recapture technology to be applied to all methyl bromide fumigations from 28 October 2020 (the "recapture deadline").
4. The memorandum stated that:
 - (a) the Indian government requires **logs for export to India** to be fumigated with methyl bromide; and
 - (b) the payment terms for **logs to be exported to India** are typically on 180-day letters of credit.(Our emphasis added)
5. STIMBR sought directions from the DMC to provide certainty on behalf of New Zealand log exporters that any requirements imposed by the DMC as to recapture would not mean that contracts that had been entered into (on 180-day letters of credit) for export to India would

¹ Three Applications for extensions pursuant to Section 59(3)(a) (i) were filed in 13th, 21st and 26th Memorandum of Counsel for Applicant dated 14th May 2020, 21 October 2020, 18 February 2021, respectively.

² Section 59(4) of the HSNO Act provides that EPA *must not extend a time period or waive a time requirement unless it is satisfied that: (a) the applicant and the persons making submissions (if applicable) consent to that waiver; or (b) any of those parties **who have not so consented** will not be unduly prejudiced.* (Our emphasis added)

have to be cancelled. STIMBR therefore indicated that it intended to apply for an *“interim decision from the DMC to provide a short extension of the recapture deadline in advance of a final decision on the reassessment. The length of extension would be as short as possible. The length would be based on an estimate of the date for a final determination of the reassessment, plus 180 days.”*³

6. On 11 March 2020, the DMC issued a direction and minute stating its position that it did not have jurisdiction to make an interim decision at this point in the reassessment process. It also considered that even if it did have such jurisdiction, at this point in the reassessment process it would not be able to make such a decision due to the information currently before it. In that direction and minute (WGT010), the DMC directed that the EPA provide it with advice as to whether there are any other options available to it in the statutory reassessment process which might assist in managing the timing issue.
7. A legal opinion dated 26 March 2020 provided to the DMC advised that an application from STIMBR could not be considered under Section 67A (para 12): *the reality is that the effect of the amendment will not be minor, and therefore does not fit within the scope of a s67A amendment. It significantly changes the compliance obligations of an entire industry in respect of a control that is meant to come into force to manage previously identified risks.*
8. The advice suggested a second option of a standalone hearing to consider a time extension under Section 59(3)(a)(i) and (b)(i) could be made, however emphasising the importance all obtaining input from all parties to the process:

27. *“If the DMC goes ahead with Option 2 (however that looks – see paragraph 31 below), it will **require information to be provided by submitters and STIMBR** in order to be able to make a decision.*

28. ***Information provided by parties to this process in writing will be of the utmost importance to the DMC being able to make a fully informed decision.** If this information is unable to be provided during this time, or if parties are prejudiced by their inability to engage in the process, then the proposed option 2 may not be feasible.*

³ 9th Memorandum of Counsel, para 5.

9. STIMBR's 9th Memorandum related to a potential application under Section 67A was then withdrawn (10th Memorandum of Counsel for STIMBR). An application for an extension of the recapture date under Section 59(3)(i) was then applied for (13th Memorandum of Counsel for STIMBR dated 14 May 2020), supported by an affidavit of Ian Gear on behalf of STIMBR. In the application ('First Application'), STIMBR sought an extension of the recapture deadline for 6 months, from 28 October 2020 to 28 April 2021. The Memorandum stated:

"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 issues with letters of credit".

10. The DMC then sought written comments from submitters on the First Application, without a stand-alone hearing. It advised all parties that it would determine the matter on the papers without a hearing, primarily due to Covid 19 lockdown during this time.
11. The DMC, in a decision dated 1 July 2020, acknowledged the difficulties that would be caused for forestry exporters if the waiver application was not granted and agreed to a waiver of the recapture requirements, as sought, to 28 April 2021.
12. Another waiver application ('Second Application') was filed by the applicant⁴ dated 21 October 2020. DMC provided written notice to the other parties that the application was being made and again provided an opportunity for submitters to make comment. DMC deliberated again on the papers without a hearing. It determined, after considering comments from the parties who advised they did not give their consent to the extension, that there was no undue prejudice arising. A waiver was granted by the DMC on 11 November 2020, extending the time for the October 28, 2020, extending the recapture control another 4 months until 28 August 2021.
13. STIMBR then filed another application (Third Application) for an extension on 18 February 2021 (26th Memorandum of Counsel for the Applicant). The other parties were not advised of this application nor was their consent sought. The DMC considered the third waiver application and granted an extension (on 1 March 2021) through to 28 November 2021 determining through their decision that there was no need to advise other parties of the

⁴ STIMBR 21st Memorandum of Counsel 21st October 2020.

application as their views on an extension to the recapture date had already been heard on the other applications and there was no undue prejudice on them.

“In order to ensure that exports to India can continue under current protocols from the 180 days prior to 28 August 2021, or the conditions specified in the decision reached in the reassessment apply, the applicant is seeking that the recapture deadline be extended by a further three months in order for a decision on the reassessment to be reached. This would create certainty for exports to India and letters of credit for these exports could still be issued.”

14. The first mandatory part of the two steps of Section 59(4) were not followed prior to DMC deciding under Section 59(3)(a)(i) to grant STIMBR’s Third Application for extension.
15. The DMC minute and direction dated April 12, 2021, in relation to the Third Application does not follow the Section 59(4) requirement to enquire as to whether the other submitters consent to the waiver sought by STIMBR in the in its Third Application. As other submitters’ consent and/or comments were not obtained, they were not able to be considered for DMC to be able to have made an informed decision as to what process to follow or whether undue prejudice on other parties in relation the Third Application could arise. This process was also contrary to the process set out in the legal advice to the DMC dated 26 March 2021.

Directions /Clarification/Reconsideration sought

16. Each of the three separate applications made by STIMBR for the waiver of the recapture requirement (to apply from October 28, 2020), and the substantive evidence filed in support (Affidavit of Mr. Gear) clearly state that STIMBR was only seeking waivers in relation to the effect of the control in relation to fumigation (with methyl bromide) of logs bound for India.
17. The reasons for each of the three DMC decisions are that the extension *“would create certainty for exports to India and letters of credit for these exports could still be issued.”*
18. This action/outcome of the three waivers as granted by DMC are significant decisions as noted by EPA legal advice dated 26 March 2021, regardless of whether Section 67A or Section 59(3)

(a)(i) process under HSNO was followed⁵. The DMC decisions have allowed logging exporters to breach the 2010 EPA approval for continued use of Methyl Bromide in New Zealand stated that by 2020 all methyl bromide fumigations must use recapture technology to reduce the amount discharged into the atmosphere⁶.

19. TMFAG therefore seeks:

- (a) Confirmation that the DMC has granted the waiver to STIMBR on behalf of log exporters only, as no other Methyl Bromide users sought an extension;
- (b) Confirmation from the DMC that the waiver granted to STIMBR is restricted in scope to what was asked for by STIMBR through its applications and substantive supporting evidence, specifically a time extension waiver in relation to the recapture date requirement- for application of Methyl Bromide on logs bound for India only; and
- (c) Related directions to provide certainty to all parties that DMCs decisions on the three waiver applications by STIMBR only grant the decision as sought, namely allowing logging exporters an extension to apply methyl bromide without recapture to logs bound for India until 28 November 2021.

Kate Barry-Piceno



Legal Counsel

Dated 3 June 2021

For and on behalf of Tauranga Moana Fumigant Action Group Inc

⁵ Para 12 of Legal memo dated 26 March 2020, cited in para 7 above,

⁶ EMRA decision dated 28 October 2010 amended 11 June 2011, conclusion para 16.11.49