

**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

21ST MEMORANDUM OF COUNSEL FOR THE APPLICANT

21 OCTOBER 2020

Counsel Acting

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Application for further waiver and directions

1. In this memorandum, Stakeholders in Methyl Bromide Reduction Inc (**STIMBR**) requests the Decision-making Committee (**DMC**):
 - (a) to grant a further waiver of the requirement to apply recapture technology to methyl bromide fumigations;
 - (b) to direct that recapture technology shall be applied to methyl bromide fumigations from 28 October 2021.

Background

2. The EPA controls currently in place require recapture technology to be applied to all methyl bromide fumigations from a specified date (known as the “recapture deadline”). The DMC has previously granted a waiver of this recapture control and directed that the recapture deadline be extended from 28 October 2020 until 28 April 2021.¹
3. The basis for the DMC’s decision was that the recapture deadline has an impact on log exports to India many months in advance of the deadline actually being reached. This was due to the letters of credit used to secure payment from Indian importers, typically on 90 to 180 day payment terms. In summary, exporters faced a risk of non-payment for logs exported *prior* to the recapture deadline, if payment would fall due *after* the recapture deadline; and under typical credit terms this risk would arise 6 months (180 days) prior to the deadline, and would increase as the deadline approached.
4. These issues were described in detail in STIMBR’s previous application for waiver and supporting affidavit.²

The need for a further waiver

5. The DMC’s previous waiver of the recapture deadline alleviated the impact of the letters of credit issue up to 31 October 2020 — that being 180 days prior to 28 April 2021.

¹ Direction and Minute WGT015 (1 July 2020) at [46].

² 13th Memorandum of Counsel for the Applicant (14 May 2020); Affidavit of Ian Gear (14 May 2020).

6. As 31 October 2020 approaches, the issue arises again. Payment for logs exported after 31 October 2020 on 180-day credit terms will fall due after 28 April 2021. The risk of non-payment will arise, for the reasons described in STIMBR's previous application for waiver,³ and further described in the submissions of Rayonier Matariki⁴ and evidence presented by Christopher Rayes at the methyl bromide reassessment hearing.⁵
7. The risk will increase and accumulate as log exports continue and the recapture deadline approaches:
 - (a) 180-day payment terms will be at risk after the end of October 2020;
 - (b) 180 and 150-day payment terms will be at risk after the end of November 2020;
 - (c) 180, 150 and 120-day payment terms will be at risk after the end of December 2020, and so on.
8. The advance impact of the letters of credit issue can be avoided if a gap of at least 6 months is maintained between the date of the DMC's final determination and the recapture deadline.
9. The date of the DMC's final determination cannot be reliably predicted; but it is at least clear that it will not be before 31 October 2020. Taking into account the additional modelling work that the DMC has recently directed to occur,⁶ and the opportunity to review and comment on that work, it does not appear likely that the DMC will be in a position to potentially close the hearing until late in November 2020, at the earliest. Once the hearing closes the DMC will have 30 working days to issue its decision. Putting aside the possibility of extension to that timeframe, this would likely result in a decision around the start of February 2021.
10. By then, the log trade with India is likely to be impacted significantly due to the letters of credit issues. It is likely that New Zealand log exporters will progressively decrease trade with India from the end of October 2020 if the

³ Above n 2.

⁴ Submission dated 16 June 2020, in response to Direction and Minute WGT013.

⁵ Expert statement of Christopher Rayes (27 July 2020); Transcript of hearing (12 August 2020) at p 136, lines 17-33.

⁶ Directions and Minutes WGT023 (28 August 2020) and WGT024 (28 September 2020).

recapture deadline remains 28 April 2021; with little, if any, trade continuing beyond January 2021.⁷

11. Accordingly, STIMBR is making this application now, in advance of 31 October 2020, seeking a further extension of the recapture deadline.
12. STIMBR respectfully submits that it would be prudent to extend the recapture deadline by a further 6 months, i.e. to 28 October 2021. This would allow, in a practical sense, up until 28 April 2021 for the DMC to issue its final decision before the letters of credit issue begins to impact (again) on log trade with India.
13. STIMBR acknowledges that an extension of less than 6 months *could* be adequate, but this depends on the actual date of the DMC's final determination of the modified reassessment. If a short extension is granted, and the DMC's final determination is delayed, then further applications for extension will be needed. STIMBR submits that a single further 6-month extension is preferable to multiple, sequential applications for shorter extensions, with all the distraction and inefficiency (for all participants) that multiple applications would entail.
14. Further, STIMBR submits that this application cannot be delayed. The evidence before the DMC is that the 28 April 2021 deadline will start to impact on log exports from the end of October 2020;⁸ and any delay in making this application might jeopardise a decision being made in advance of the Christmas holiday period.

The legal basis for the application

15. The DMC may waive the recapture deadline if it is satisfied that either:
 - (a) The applicant and submitters consent; or
 - (b) Any submitters who have not consented will not be unduly prejudiced.⁹

⁷ Expert statement of Christopher Rayes (27 July 2020) at [27]-[28].

⁸ Above n 7.

⁹ Hazardous Substances and New Organisms Act 1996, s 59(4).

16. STIMBR's position is that no submitter will be unduly prejudiced by a further 6-month extension of the recapture deadline. There has been no change of circumstances since the first waiver decision that would mean any submitter is prejudiced by a further waiver.
17. The DMC may wish to provide other participants with an opportunity for comment on this request for waiver and directions. If so, STIMBR respectfully submits that the timeframe can be kept fairly brief, as submissions have already been provided on the previous waiver application, and any comments will need to be limited to the impact of the present application (rather than the substantive Reassessment).
18. If the DMC decides to provide an opportunity for submitters to comment, then STIMBR would support a short timetable, such as this:
 - (a) The EPA notifies all submitters of this application as soon as possible;
 - (b) Submitters have 5 working days from notification to file any responses to the application;
 - (c) STIMBR has 2 working days to file any reply to submitters;
 - (d) The DMC decides the application within 5 working days of STIMBR's reply.
19. This timetable would enable the DMC to make a decision on the waiver application early in November 2020.


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21 October 2020