

**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

9TH MEMORANDUM OF COUNSEL FOR THE APPLICANT

2 March 2020

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Introduction

1. In this memorandum STIMBR requests a direction from the Decision-making Committee (**DMC**) on whether the DMC has jurisdiction to issue an interim decision to alter the deadline for recapture technology.

Background

2. The current EPA controls require recapture technology to be applied to all methyl bromide fumigations from 28 October 2020 ("**recapture deadline**").
3. The reassessment seeks to redefine what "recapture technology" is (by altering the standard of recapture that constitutes "recapture technology"). If the reassessment is successful, STIMBR anticipates the recapture deadline will also require to be altered, in order to provide time for the industry to comply with the new definition. STIMBR considers the reassessment provides jurisdiction to alter the recapture deadline, and the EPA agrees.¹
4. STIMBR has recently become aware of an issue relating to how exporters receive payment for log exports to India:
 - (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 180-day irrevocable letters of credit.
 - (b) 1 May 2020 is 180 days prior to the recapture deadline. This means log shipments to India from 1 May 2020 onwards would be subject to uncertainty about the outcome of the reassessment process (pending final determination from the DMC, which is not expected until after July 2020).
 - (c) The upshot of this uncertainty appears to be that New Zealand log exporters may not be able to rely on payment for log exports to India from 1 May 2020 onwards. STIMBR understands this is likely to bring forward in time some of the impact of the recapture deadline to 1

¹ *Stakeholders in Methyl Bromide Reduction Inc v Environmental Protection Authority* [2019] NZHC 3482 at [27(a)].

May 2020, despite the possibility that the recapture deadline and the definition of recapture technology might yet be changed (by final decision on the reassessment) prior to 28 October 2020.

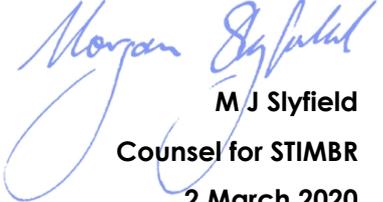
5. STIMBR is therefore considering applying for an interim decision from the DMC to provide a short extension of the recapture deadline in advance of a final decision on the reassessment. The length of extension would be as short as possible. The length would be based on an estimate of the date for a final determination of the reassessment, plus 180 days.

Jurisdiction

6. The interim decision that STIMBR is contemplating would not be a final decision on any of the issues that are before the DMC on the substance of the application. It would not foreclose any of the range of substantive outcomes possible from the reassessment.
7. STIMBR considers that the DMC has jurisdiction to make an interim decision of this sort, for the following reasons:
 - (a) The reassessment may vary the EPA controls that attach to methyl bromide (sections 63A(2) and (7) and 77A of the HSNO Act);
 - (b) Such controls include the recapture deadline;
 - (c) When the DMC approves a hazardous substance or imposes controls, it issues a "decision" (sections 29(3) and 59(2) of the HSNO Act);
 - (d) As a matter of interpretation, words in the singular include the plural, so the DMC may make more than a single "decision" on the reassessment (section 33 of the Interpretation Act 1999);
 - (e) The contemplated interim decision would not pre-determine the final outcome of the reassessment; so it is open to the DMC to determine an application of this sort in advance of forming any view on the merits of the remainder of the reassessment application; and
 - (f) The DMC is a judicial decision-making body, and Courts and other judicial bodies commonly issue interim or preliminary decisions.
8. STIMBR is not at this stage asking the DMC to make any assessment of the merits of any interim decision that may be sought. It purely seeks a direction

on the question of jurisdiction. Any application for an interim decision would need to be supported by evidence and submissions, and submitters on the reassessment would need an opportunity to respond before any interim decision was issued. Before STIMBR commits resources to make an application for an interim decision, it is requesting a direction confirming that the DMC considers it has jurisdiction.

9. STIMBR respectfully requests that the DMC provides the direction sought by 5pm on 13 March 2020. The DMC will appreciate the need for urgency: if the DMC confirms it has jurisdiction, then STIMBR will advance an application promptly, to endeavour to have an interim decision made prior to 1 May 2020.


M J Slyfield
Counsel for STIMBR
2 March 2020