

**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

LEGAL SUBMISSIONS ON SCOPE ISSUE

17 August 2020

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1. These submissions set out STIMBR's position on the scope issue that has arisen during the course of the EPA hearing.
2. The issue arises because the application form that STIMBR lodged with the EPA in March 2019 requested a change of the definition of recapture control to require at least 80% recapture, but STIMBR has now indicated that it seeks the definition to be changed to require at least 30% recapture.
3. STIMBR says that this change of position is within scope of the reassessment process. That is because the scope of the process is not set by STIMBR's application document, but by the EPA's decision to run a modified reassessment (the "Pathway Decision" dated 12 April 2019).
4. STIMBR did not control whether this proceeded as a modified reassessment, or as a full reassessment — that was a matter entirely within the discretion of the EPA under section 63A. The Act provided STIMBR with the ability to lodge an application (s 63(1)), but whether that application proceeded as a full reassessment (s 63(2)), or as a modified reassessment (s 63A) was up to the EPA.
5. This process is unlike the RMA consent processes that some submitters have referred to. In an RMA setting, the application is the main reference point for assessing whether a refinement made by an applicant is within the scope of the process. Here, by comparison, after STIMBR made its application, the EPA made a decision for which there is no RMA equivalent — the decision to proceed under the modified reassessment procedure.
6. This is significant because what STIMBR asked for, and what the EPA decided to proceed with are not the same thing.
7. STIMBR's application:

To reassess the controls that apply under Decision HRC08002 that relate to the recapture of methyl bromide when used as fumigant for Quarantine and Pre-Shipment (QPS) purposes. We ask for a section 63A modified reassessment to provide clarity regarding the current controls, specifically to reassess the feasibility of recapture technology and refine the controls to:

- require recapture of 80% of methyl bromide remaining at the end of fumigations
- extend by 10 years the deadline for achieving recapture from ship hold fumigations, and
- make related refinements to strengthen buffer zone requirements at the completion of recapture.

8. The EPA's decision:

I have decided under section 63A(1) of the Act that the EPA will conduct a modified reassessment of methyl bromide. The specific aspects of the approval to be reassessed are:

- hazard classification
- benefits
- controls on the use of methyl bromide (within the scope of the Act and excluding those within the Health and Safety at Work regime).

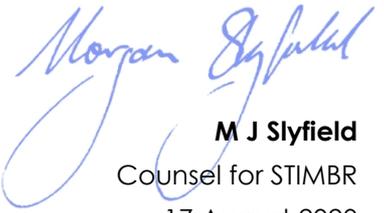
9. There are a number of obvious differences between what STIMBR asked for and what the Chief Executive decided. STIMBR did not ask for the hazard classification to be reassessed, nor benefits to be reassessed – yet both of these are explicitly made part of the reassessment by the Chief Executive's decision. Conversely, not one of the detailed proposals for refinement of the recapture controls in STIMBR's application is restated in the Chief Executive's decision. Instead of those details the decision refers, simply and broadly, to "controls on the use of methyl bromide".

10. Consistent with that breadth, there are now a number of suggestions before the DMC, that were not explicitly sought in STIMBR's application. Here are four examples:

- (a) The recommendation in the EPA science memo to make changes to the hazard classification of methyl bromide;
- (b) The recommendations in the EPA staff report to impose additional controls for monitoring and reporting fumigation activities;
- (c) The recommendations in the EPA staff report to set a new recapture deadline for recapturing from log stacks, to allow 24 months lead time for the construction and installation of recapture equipment;
- (d) Bay of Plenty Regional Council's suggestion in its presentation at the hearing that there be a control imposing a cap on the number of ship hold fumigations that can occur in a given period of time;

11. If the scope of this reassessment were to be limited to what STIMBR explicitly requested in its application, then all of these examples would also be out of scope. That would impose a significant restriction on the DMC's power to consider a range of regulatory responses to the information that comes to light during the modified reassessment process, and would not be consistent with the breadth of the Chief Executive's decision. There is nothing in the Chief Executive's decision to indicate an intention to tie the DMC's hands in this way.
12. Further, the information about what levels of recapture are achievable is continuing to evolve. When STIMBR commenced its request for a modified reassessment, 17 months ago, it based its proposal on the best information it had. Since then, better information has come to light. Had STIMBR not adjusted its position to reflect that information, the reassessment would have stood little chance of delivering controls that could actually be achieved in practice, and the entire exercise would have been futile.
13. For all these reasons, STIMBR maintains that it is within the DMC's jurisdiction to evaluate STIMBR's revised position alongside the positions of all other participants in this process. If the DMC concludes that the evidence supports STIMBR's proposed controls, and that imposing those controls will satisfy all the relevant statutory tests, then it is within the DMC's jurisdiction to grant the reassessment and vary the controls in the manner STIMBR is seeking.
14. It is also important that the DMC is satisfied that the process has been fair and in particular that no unfairness arises due to parties having insufficient time to express a position on STIMBR's revised proposal. As stated last Friday, STIMBR would support the DMC if it were minded to provide all parties with a period of time to express a position, for example a two to four week period as Ngāi Tahu suggested it would need to consider the change.
15. Plainly there are a number of submitters (TMFAG, for example) who will say that an extension of that sort will not be adequate to address the issue. They may say that they would need much more time to obtain additional assessments or call new evidence. That position must be considered in the context of the existing hearing procedures. Under those procedures, no party had any notice of the evidence that would be led by any other party, or of the various assessments by EPA staff, until 10 working days prior to the hearing. STIMBR, as the applicant, had no insight whether EPA staff recommended approving or declining the application, and if approving, under what revised controls, until 10 working days prior to hearing. Implicitly, 10 working days was considered sufficient time for participants to be able to evaluate that body of information prior to the hearing. STIMBR submits that a

two to four week period to allow parties to comment on its revised position would be proportionate and consistent with the existing hearing procedures.



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