

DIRECTION & MINUTE OF THE DECISION- MAKING COMMITTEE

Hazardous Substances and New Organisms Act 1996 (“HSNO Act”)

Application APP203660: modified reassessment of methyl bromide

**Direction & Minute WGT030 of the Decision-making
Committee (DMC) – 1 March 2021**

Background

1. The Applicant Stakeholders in Methyl Bromide Reduction (STIMBR) submitted, on 25 March 2019, a reassessment application to consider the recapture requirements for the use of methyl bromide.
2. The modified reassessment is currently underway in line with the statutory requirements of the HSNO Act. The hearing for the modified reassessment of methyl bromide took place remotely from 11 – 17 August 2020. Currently, the approval for methyl bromide requires that any use of methyl bromide must include a process to recapture a significant amount of the residual substance post-use.
3. The control regarding recapture requirements set in the 2010 reassessment of methyl bromide, as reissued on 19 July 2020, was to take effect on 28 October 2020.
4. On 2 March 2020 the Counsel for applicant submitted a 9th Memorandum of Counsel in which the basis for a possible application for the waiver of the recapture deadline was set out – that is, that industry is reliant on irrevocable letters of credit in order to continue exporting logs to India, the length of which vary from 90 to 180 days. India requires these logs to be treated with methyl bromide before importation. As there was uncertainty around the 28 October 2020 recapture deadline due to the current reassessment, any exports which are due to be invoiced 90 days prior to that date are uncertain as industry states it does not know what will be required of it in respect of recapture, and it cannot meet the current recapture control that is due to come into force on 28 October 2020.
5. In response to a subsequent application for a waiver of this October 2020 deadline, received in the 13th Memorandum of Counsel, the DMC issued Direction and Minute WGT015 on 1 July 2020 extending the time at which this requirement was due to come into force until 28 April 2021.
6. On 21 October 2020, the applicant submitted an application for a further extension to this time frame, until 28 October 2021, in the 21st Memorandum of Counsel. The basis for that request is the same as that discussed in the 9th and 13th Memoranda of Counsel. In response, the DMC issued Direction and Minute WGT026 on 11 November 2020 extending the time at which this requirement was due to come into force until 28 August 2021.
7. On 18 February 2021, in the 26th Memorandum of Counsel, the applicant submitted an application for a further extension to this time frame; until 28 November 2021. This application was received in accordance with section 59(3)(a)(i) and 59(3)(b)(i) of the Act.
8. 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. The 26th Memorandum of Counsel provides further information in relation to this matter.

The substantive reassessment

9. The DMC notes that the waiver application is supplementary to the substantive reassessment. The reassessment will continue as per the current time line and following the statutory process set out in the HSNO Act. Any decision reached on this waiver application will be subordinate to any decision reached in the reassessment; that is, once a decision is reached in the reassessment, the reassessment decision will take effect within the timeframe set out by the DMC in its substantive decision and the waiver timeframe would no longer apply.

10. On this basis, this waiver application is not a quasi-reassessment application or decision. It is merely utilising a statutory tool in the HSNO Act to ensure that industry can continue to function while an application is being processed, until a decision is reached on the substantive reassessment application.
11. The impacts of any implementation timeframes will be considered in the substantive reassessment. The applicant and other parties should not rely on the waiver decision to indicate the outcome of the substantive reassessment.
12. In Direction and Minute WGT023, as clarified by WGT024, the DMC directed additional air dispersion modelling be conducted to assist with the decision making process in the modified reassessment. In Direction and Minute WGT027, the DMC directed parties to the hearing to provide their feedback on this additional modelling, with the response deadlines amended by Directions and Minutes WGT028 and WGT029. These responses have now been received and are being incorporated into the DMC's on-going deliberations.
13. The DMC anticipates, therefore, that a decision will be able to be notified in early-mid 2021.

The power to give direction and waive a requirement of the Act

14. Section 59(3)(a)(i) of the HSNO Act provides that a person may apply to the EPA “to waive a requirement of this Act or a regulation or an EPA notice concerning — (i) the time within which any action shall be carried out”.
15. Section 59(3)(b)(i) of the HSNO Act provides that “A person may apply to the Authority to — ... give a direction concerning— (i) the time within which any action shall be carried out.”
16. The DMC considers that the time frame for a control to come into effect, as applied to an approval for a substance issued under the HSNO Act, constitutes a requirement of the HSNO Act in respect of section 59(3)(a)(i) and section 59(3)(b)(i).
17. Therefore there is a power for the DMC to waive the time at which the control takes effect and must be complied with, and to provide direction concerning how a waiver under 59(3)(a)(i) would take effect and the date at which a waiver would end.
18. In exercising this power, the considerations set out in section 59(4) must be complied with.

Process for consideration of the application

19. The DMC considers this to be a new application for a time waiver request to extend the date at which the recapture control requirements for methyl bromide come into force, rather than a variation of the previous requests.
20. The DMC considered whether to seek feedback from parties on the impacts of the waiver application to assess whether any party is unduly prejudiced, and whether a hearing was required, as they have done in Directions and Minutes WGT013 and WGT025 for the previous waiver application requests.
21. The DMC considered that it would not receive new information to that previously provided in response to the earlier two time waiver applications.
22. As such, the DMC concluded that they would not seek feedback to this time waiver request.
23. The DMC considers that a hearing on this matter is not required.

Consideration

24. The DMC has considered the application as outlined in the 26th Memorandum of Counsel.
25. The DMC notes that this scenario is unusual, but has been brought about due to timing of both the recapture control coming into effect and the substantive reassessment.
26. The DMC considered the evidence provided in the waiver application. Particularly it considers that the evidence regarding the potential negative impacts of not approving the waiver, including the loss of significant market access for industry, is such that it provides evidence in support of the waiver requested. The DMC reiterates that this is an unusual situation which requires a solution proportionate to the issue raised in the waiver application.
27. The DMC considers that sufficient information is available to the DMC to assess the waiver application in the timeframe provided.
28. The DMC considers that there has not been evidence provided previously to show that there would be undue prejudice to any submitters or parties to the reassessment process by issuing the direction to grant a waiver of the recapture requirement. The DMC believes that this situation has not changed since the previous waiver application.
29. The DMC notes that the purpose of the waiver request was to give those exporting methyl bromide-treated logs to India with 180 day letters of credit certainty around the rules that would be required of them in New Zealand prior to export. The 26th Memorandum of Counsel takes this 180 days out to 31 November 2021.
30. In considering the evidence provided by the applicant, the DMC has applied the criteria for the waiver as set out in section 59 of the HSNO Act.
31. The DMC notes that there is a unique situation arising from the timing of the reassessment process in this case which has given rise to this waiver application. The application to waive the date at which the recapture control will come into effect is made on the basis that there is no current certainty as to the timing of the reassessment decision which will address the recapture control timing.
32. The DMC therefore considers it is appropriate to waive the recapture date as decided in the 2010 reassessment in order to provide certainty to the industry until such time as the substantive reassessment determines the future requirements that will apply.

Directions

33. Pursuant to section 59(3)(a)(i) and 59(3)(b)(i) of the HSNO Act, the DMC has considered this application to waive the date for the implementation of the recapture control.
34. Pursuant to section 59(4)(b) of the HSNO Act the DMC considers that the waiver would not unduly prejudice any submitter or applicant to the reassessment application.
35. The DMC therefore considers it appropriate to approve the waiver application and issue a direction in respect of the date at which the recapture control takes effect. The DMC issues a direction that the current recapture control is to take effect on **28 November 2021**.
36. The DMC will continue to issue Directions and Minutes as necessary to advise parties to the process of further communications or procedural matters.

For the Decision-making Committee:



1 March 2021

Tipene Wilson

Date

Chairperson