

Legal memorandum

To: Decision-making Committee for APP202804
Copy to: Lauren Fleury, Manager – HSNO, Chris Hill, GMHSNO
From: Kendyl Oates, Senior Solicitor
Date: 18 November 2021
Subject: APP202804

Purpose

1. The purpose of this memorandum is to provide advice regarding the extent to which the DMC is able to consider the use of EDN in a ship's hold for the purposes of making a decision on the application in light of the draft Safe Work Instruments (**SWIs**).

Summary of advice

2. The DMC must rely on the statutory process WorkSafe has been through – and the outcome of that process (draft SWIs agreed in principle that require Ministerial approval to take legal effect) to make its decision in light of current evidence.
3. WorkSafe has considered the information available in relation to the risks and potential mitigations for the use of EDN in a ship's hold. However, WorkSafe has excluded use in a ship's hold from the draft SWIs.
4. Therefore, it would not be valid for the DMC to conclude that risks regarding use in a ship's hold (which will always be a workplace) have been adequately assessed or managed. Based on the current evidence, an approval for EDN cannot set controls that would permit a use in a workplace not covered by an SWI because there is insufficient information available on these risks and mitigations. Additional evidence has not been put before (nor specifically sought by) the DMC. The DMC has expressed an expectation that those who wish to be heard at the reconvened hearing will rely on or speak to documentation already before the DMC.
5. The DMC's decision will inform WorkSafe's next steps which may include putting the draft SWIs forward for Ministerial approval or not progressing with current draft SWIs at all, and instead initiating the SWI process (or aspects of it) again. The processes and outcomes of each statutory process intersect and are intended to be complementary.

Discussion

6. Use in a ship's hold is clearly excluded from the draft *Health and Safety at Work (Hazardous Substances— Requirements for Specified Fumigants) Amendment Safe Work Instrument 2021*:

Additional requirement restricting use of EDN

3 Purpose for which EDN may be used

For the purposes of regulation 13.46(4)(a) of the Regulations, a PCBU with management or control of EDN must ensure that the substance is used—

(a) only for the purpose of carrying out the fumigation of logs or processed wood (or both)— (i) either—

(A) under a sheet; or

(B) to the extent specified in an approval granted by the EPA under the HSNO Act, in a shipping container; and

(ii) in accordance with clause 9; and

(b) for no other purpose.

7. Therefore, the draft SWIs do not mitigate the adverse effects of use of EDN in a ship's hold. WorkSafe publicly consulted on the draft SWIs and had the opportunity to incorporate use in a ship's hold into the draft SWIs. However, it did not – and the reasoning is set out in WorkSafe's consultation document dated February 2020.¹ Broadly, based on the information available to WorkSafe it concluded that the requirements to manage risk were considered likely to be impracticable.
8. This means there are no controls under the Health and Safety at Work Act 2015 (HSWA) for the DMC to consider under [section 29\(1\) of HSNO](#).²
9. Therefore, it would not be valid for the DMC to conclude that risks of EDN have been adequately managed in the workplace (including a ship, which will always be a workplace) because the draft SWIs exclude use for any purpose other than those specified.
10. The EPA's Staff Report and Science Memo were updated on the basis that the draft SWIs would take legal effect in their current form. Accordingly, neither of the EPA documents considered detailed data or information about the use of EDN in ships holds, including risks and any potential controls to mitigate adverse effects.

¹ The WorkSafe Public Consultation document entitled *Safe Work Instrument Specifying Requirements For Using Ethanedinitrile (EDN)* dated February 2020 on page 3 states: Log fumigation with other fumigants such as methyl bromide is permitted in a ship's hold under the Hazardous Substances Regulations. The WorkSafe-commissioned modelling included air dispersion from fumigations in a ship's hold. However, as the volume of logs in these fumigations is significantly larger, **the requirements that would be required to manage the risk of fumigation are likely to be impracticable for the locations where fumigation would take place. On this basis we are proposing to restrict fumigation with EDN to fumigation under sheets only and not to allow fumigation in a ship's hold.**

11. Currently, there is inadequate information about the use of EDN in a ship's hold before the DMC and, as noted above, WorkSafe concluded that the requirements to manage risk were considered likely to be impracticable. This is the case despite parties having the opportunities to put relevant information forward. The DMC has advised reconvened hearing participants that it expects they will rely on or speak to information already before the DMC. New information has not been sought (nor proffered) since the draft SWI's were completed and the updated EPA documents were published.
12. This is not an impediment to making a decision on the application if the DMC considers it has the information necessary to assess risks and any proposed controls regarding bystanders/members of the public and the environment. Although, it is important to note that any approval based on information currently before the DMC could not include controls that permitted use in a ship's hold for the reasons set out above. However, such use could be addressed in future through a modified reassessment and a further process being run by WorkSafe to deliver another SWI covering a ship's hold.
13. It is difficult to conceive of any risk arising from the DMC proceeding to consider the application and make a decision that reflects the draft SWIs. A decision on the application will provide clarity and certainty to the applicant, and others.
14. The risk of seeking further information regarding use in a ship's hold where that use is excluded in the draft SWIs is greater than making a decision regarding an approval where a specific use (in a ship's hold) is excluded via controls. It is important to note that:
 - a. the near completion of the SWI process (drafts agreed in principle) is an important and significant step (within the context of this application, and the statutory regime more broadly). The process has delivered documents reflecting WorkSafe's assessment of risks arising from the specific use of EDN in the workplace, and appropriate mitigations. The DMC can rely on these documents for the purposes of progressing the application;
 - b. in order for workplace risks of fumigation in a ship's hold to be identified and managed, WorkSafe can either amend the current SWI (if the drafts were given legal effect) or create a new separate SWI;
 - c. a future reassessment could amend controls set in an approval to permit use in a ship's hold at a future date;
 - d. while it is absolutely correct that a HSNO approval and the SWI development are entirely separate statutory processes, they intersect and are designed to work together to form the complete regulatory framework for use of a specific hazardous substance (like EDN) in a workplace;
 - e. it is appropriate (and necessary) for each organisation to have regard to the remit and decisions of the other. This means that the scope of any approval under HSNO and how it matches against the scope of the draft SWIs will have a bearing on steps that WorkSafe may or may not take in order to finalise or revise the draft SWIs – they should go hand in glove;

- f. a HSNO approval cannot authorise use where the risks have not been adequately assessed (either by the DMC or by WorkSafe in the course of developing an SWI); clause 12 of the HSNO Methodology Order requires the nature of adverse effects to be taken into account when assessing risks. It is not open to the DMC to issue an “*in principle*” approval contingent on an SWI for use in a ship’s hold being created; risks must have been assessed in order for an approval to permit a specific use, otherwise that use must be prohibited (if other uses are approved); and
- g. unless sufficient additional evidence relevant to risks and mitigations in respect of use in a ship’s hold is provided to the DMC, the only course of action available (if the DMC did not wish to make a decision on the application without excluding use in a ship’s hold (as the risks are not managed)) would be to adjourn the hearing for a second time to allow WorkSafe to initiate a further process to develop and/or refine draft SWIs (where WorkSafe has already considered addressing use in a ship’s hold but did not do so). This would leave the applicant (and others) in a similar position to where they are today. The two complementary parts of the regulatory system should take effect at the same time to give clarity and certainty to those who have an interest in the substance.

Conclusion

15. Without sufficient information (including a draft SWI) about the risks and mitigations of using EDN in a ship’s hold it is not open to the DMC to approve the import or manufacture of EDN without controls that prohibit that specific use.

This advice has been peer reviewed by Celia Haden, Principal Solicitor.