

Memorandum

To: Tipene Wilson (Chair), Derek Belton, Ngaire Phillips
Copy to: Doug Jones, Gayle Holmes, Miriam Robertson, Milana Blakemore
From: Phillipa McKenzie, Senior Solicitor
Date: 26 March 2020
Subject: Reassessment of methyl bromide (APP203660): Other options for managing timing issues in the reassessment

Purpose

1. The purpose of this memorandum is to provide legal advice to the decision-making committee (DMC) in respect of the reassessment of methyl bromide. The DMC has requested legal advice in its Direction and Minute WGT010 in respect of a timing issue with industry's ability to comply with the current recapture control due to come into force on 28 October 2020.

Background

2. Counsel for the applicant submitted a memorandum on 2 March 2020 in respect of an urgent request for a direction from the DMC.
3. This urgent request related to whether the DMC has jurisdiction to issue an interim decision in the current reassessment of methyl bromide.
4. On 11 March 2020 the DMC issued a direction and minute stating its position that it does not have jurisdiction to make an interim decision at this point in the reassessment process. It also considered that even if it did have such jurisdiction, at this point in the reassessment process it would not be in a position to make such a decision due to the information currently before it.
5. In that direction and minute (WGT010), the DMC directed that the EPA provide it with advice as to whether there are any other options available to it in the statutory reassessment process which might assist in managing the timing issue. We are now providing that advice.
6. We have also taken into consideration the current situation in relation to COVID-19 and the government's level 4 lock down affecting New Zealand over the next 4 weeks. We consider that it would be prudent to obtain an update from STIMBR in relation to industry's ability to engage in the process, and respond to any requests for information during this time, and whether the 1 May 2020 deadline for shipments to India remains an issue at this point.

Option 1: s67A

7. Section 67A of the Hazardous Substances and New Organisms Act ("the Act") states that: "*The Authority may, of its own motion, amend any approval given by it under this Part if it considers that the alteration is minor in effect or corrects a minor or technical error.*"
8. Section 67A is routinely used to correct any minor issues or errors contained in an approval. These are commonly typographical mistakes, and similar matters.

9. In this case, the issue is that - due to technicalities relating to the invoicing of log exports from 1 May - the applicant and industry face uncertainty as the time frame for invoicing is directly relevant to the 28 October recapture deadline. Industry has already indicated that it cannot now practically comply with this deadline. It is therefore uncertain whether these shipments will be able to be invoiced and exported on time due to the uncertainty of the reassessment outcome.
10. In this case, a s67A amendment would take the form of amending the current approval for methyl bromide to change the date for which the recapture control is due to come into force (currently 28 October 2020).
11. While an argument to support this option is that the amendment could be seen to be minor and technical. It is merely changing the date in an approval. Supporting this is the fact that industry has indicated that it cannot comply with this control as it stands, which is why it is the subject of the current reassessment. By pushing this date out, the DMC would just be allowing the current reassessment more time to review all of the information it needs in order to make a thorough assessment of what the timeframe for recapture should be.
12. However, the reality is that the effect of the amendment will not be minor, and therefore does not fit within the scope of a s67A amendment. It significantly changes the compliance obligations of an entire industry in respect of a control that is meant to come into force in order to manage previously identified risks. By making this an amendment pursuant to s67A, it minimises the effect of the recapture control. It also appears to pre-determine the outcome of the reassessment by indicating that the 28 October recapture control will be changed in the reassessment decision. This is not a “given” at this stage of the process as the DMC does not currently have all of the information available to it to make such a decision.
13. Therefore we consider that this is not a viable option in these circumstances.

Option 2: a stand-alone hearing on this matter with additional statutory considerations

14. Given where matters currently stand in the reassessment process, and the issue raised by the applicant in the 9th Memorandum of Counsel, another option is for all parties to agree that a hearing (in some form) could be convened sooner than the proposed reassessment hearing date. This new hearing would only deal with the timing of the recapture control to the extent necessary to complete the reassessment process, as opposed to the entire reassessment. The hearing could then be adjourned and reconvened at a later date to complete consideration the remainder of the matters at issue in this reassessment.
15. This would still need to follow the process in the Act in respect of hearings – that is, all information being available to all parties 10 days prior to the hearing, and submitters given the opportunity to provide comment or be heard at the hearing (depending on the form it took).
16. If it can be shown that no party would be unduly prejudiced in relation to this proposal to hold a stand-alone hearing, and all of the relevant information could be presented to the DMC in order to make a decision on this specific matter, there is a possibility that this could be a viable option.
17. This would have to work at a practical level in order to ensure that all parties are available to consider and respond to the information presented to the DMC on this matter. Given the practical challenges of the current COVID-19 situation, this hearing would be carried out remotely (this is further set out below). Parties should be requested to advise the DMC of their ability to teleconference or videoconference into this hearing should this option progress. Alternatively (and further discussed below) the matter could be dealt with on the written information if that is able to address all parties’ concerns.

18. In order for there to be an outcome in this proposed process, the DMC requires a power to change the time frame for the recapture control to take effect. For this, the DMC can rely on sections 59(3)(a)(i) and 59(3)(b)(i) of the Act.
19. Section 59(3)(a)(i) of the 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”*.
20. This could be read broadly and interpreted so as to also include a requirement in an approval given under the Act, such as a control set by virtue of a s29 approval. In that sense, the argument could be made that the DMC (as the EPA’s delegated decision maker in the reassessment) has the ability to waive a *“time within which any action needs to be carried out”*. This would mean the DMC could waive the October 2020 date for compliance with the recapture control for the purpose of allowing time to fully consider the reassessment.
21. In order for this to take practical effect, should that decision be made, the DMC would also require the ability to make a direction as to how this waiver would take effect and the date by which the waiver would end. In order to do this, the DMC could rely on s59(3)(b)(i) of the Act.
22. This section of the 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.”*
23. Pursuant to s59(3)(b)(i), the process for commencing the stand alone hearing discussed above could originate by the applicant applying to the DMC to seek a direction in the current reassessment process in relation to the time within which the recapture control should come into force.
24. The DMC would then obtain the necessary information to deal with the specific issue of changing the deadline for compliance with the recapture control until after the reassessment process is completed. This may involve holding a hearing or could be done on the papers (discussed further in paragraph 31 below), the outcome of which could be to waive the recapture control time frame (as set out above), and make a direction as to when the recapture control time frame would be waived until, and any other necessary directions relating to this waiver.
25. From a practical perspective, this gives the DMC the ability to consider all of the relevant evidence to determine how best to manage the imminent issue of compliance with the current recapture control deadline, and make a decision as to how best to manage this, should it be found that a change to that control is necessary.

The EPA will further advise on process matters relating to this proposal should the DMC decide that this is a viable way to manage the recapture control issue. The DMC will issue a Direction and Minute once it has reached a decision as to next steps.

Additional consideration – COVID-19

26. As you will be aware, on 25 March 2020 New Zealand entered Level 4 of the COVID-19 alert levels. This means that New Zealand will be in lock down with only essential services (as defined by the Government) able to continue to operate outside of the lock down.
27. To this end, the DMC will require information from STIMBR as to industry’s ability to engage in the processes set out above. If the DMC goes ahead with Option 2 (however that looks – see paragraph 31 below), it will require information to be provided by submitters and STIMBR in order to be able to make a decision.

28. Information provided by parties to this process in writing will be of the utmost importance to the DMC being able to make a fully informed decision. If this information is unable to be provided during this time, or if parties are prejudiced by their inability to engage in the process then the proposed option 2 may not be feasible.
29. It is acknowledged that in light of the level 4 lock down, it may not be possible to obtain the information required for a consideration of all of the available evidence on this matter. People may not physically be able to access or provide the information necessary for the DMC's consideration.
30. The Chief Justice noted in her message to legal practitioners on 25 March, judicial processes in some courts are continuing to the extent that they can be carried out remotely. This could mean that some judicial processes are carried out on the papers should that option be available in the circumstances.
31. The DMC could consider following this precedent – looking at this issue on the papers rather than conducting a remote hearing, if all parties to the process agree that does not create any prejudice. Due to the time critical nature of the issues raised by STIMBR, and the current level 4 lock down, this may be a more practical way of managing the matter at hand. However, in order to progress this issue even on the papers, it still requires relevant information to be able to be provided by people who at this time may not be available. This needs to be considered and assessed if the DMC progress on the basis of option 2 above.
32. The DMC will also require information from STIMBR as to an update in relation to the issue raised in the 9th memorandum of counsel, and how this is now affected by COVID-19.