

Memorandum

To: Tipene Wilson (Chair), Derek Belton, Ngaire Phillips
Copy to: Gayle Holmes, Miriam Robertson, Milana Blakemore
From: Phillipa McKenzie, Senior Solicitor
Date: 5 March 2020
Subject: Reassessment of methyl bromide (APP203660): 9th Memorandum of Counsel

Purpose

1. The purpose of this memorandum is to provide initial advice to the decision making committee (DMC) in response to the issues raised in the 9th memorandum of counsel for the applicant in the reassessment of methyl bromide, dated 2 March 2020.

Background

2. The 9th memorandum of counsel raises a question in relation to the jurisdiction of the DMC to make an interim decision in the reassessment process.
3. This question is linked to the timeframe for the recapture control from the 2010 methyl bromide approval, which provides that the recapture control in that approval is due to come into force on 28 October 2020.
4. An issue has been highlighted in counsel's memorandum relating to payment for log shipments to India which are subject to 180 day irrevocable letters of credit. 1 May 2020 is 180 days prior to the recapture deadline. Counsel for the applicant states that because of the 28 October recapture deadline, and the current ongoing reassessment process, this creates a real uncertainty for payments to log exporters to India from 1 May onwards.
5. Due to this, counsel for the applicant has asked the DMC whether it has the jurisdiction to make an interim decision to provide a short extension of time to the recapture control contained in the 2010 decision. The extension has been requested to be based on an estimated time of the date of a decision, plus 180 days.

Jurisdiction

6. Under the Hazardous Substances and New Organisms Act 1996 (HSNO) there is no express power for a DMC to make an interim decision on a reassessment. The ability to do so is not set out anywhere in the legislation.
7. The EPA doesn't find the reasoning set out in paragraph 7(a)-(f) of the memorandum of counsel to be persuasive in terms of providing jurisdiction for the DMC to make an interim decision. It does not point to a power which is held by either the EPA or DMC.
8. At this point in the reassessment process it would be very difficult for a DMC to make any kind of interim decision that is lawful.

9. Even if there was an arguable power to make an interim decision in a reassessment process, it is unlikely that at this point in the process that would practically be able to be done. The expert conferencing directed by the DMC is not yet complete, and the applicant is still to carry out further modelling in order to provide further information to the DMC, and to submitters, in order to hold a hearing to discuss all of the evidence relevant to making a decision.
10. It would be difficult to say therefore that at this point in the process that the DMC could make an informed decision on an application for an interim order on the basis of the information it has before it currently.
11. While all parties are aware that it is critical for this matter to proceed to a hearing as soon as possible, it cannot do so without all of the evidence.

Other options

12. Should the DMC direct, the EPA can look into other options as to how to address the issue raised in the memorandum of counsel. It may be that there are other mechanisms in the Act and consistent with the current statutory process that the DMC could use to manage the timing concerns of the applicant.