

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 WGT013 of the Decision-making Committee (DMC) – 2 June 2020

Background

1. On 2 March Counsel for the Applicant submitted the 9th memorandum of counsel which sought a decision on whether the DMC had jurisdiction to make an interim decision in the reassessment. This decision was related to a letter of credit issue which affects exports to India.
2. In response, the DMC issued direction and minute WGT010 which held that it did not have the jurisdiction to make an interim decision, but would seek advice from the Environmental Protection Authority (EPA) in order to see if there was any other process for addressing the issue.
3. On 26 March, the EPA provided advice to the DMC and published that advice. The advice concluded that it was possible for the applicant to submit an application for a waiver of the recapture deadline pursuant to s59 HSNO Act. That application would be published for submitters to the reassessment process to submit on, and then all of the material relating to the application be considered by the DMC. This could be in the form of a ‘mini hearing’ or a decision on the papers. The decision of the DMC would then be whether or not to approve the waiver application, and if approved, what conditions to place around it, in the form of a direction under s59(3)(b)(i).
4. On 27 March, Counsel for the applicant submitted the 10th memorandum of counsel for the applicant, acknowledging the EPA’s advice, but stating that it would not be seeking to progress such an application at that time.
5. Subsequently, Counsel for the applicant has submitted the 13th memorandum of counsel on 14 May 2020 which forms an application for a waiver of the recapture deadline, with an accompanying affidavit from Ian Gear.

Application for waiver of recapture deadline

6. The 9th memorandum of Counsel sets out the basis for the application for the waiver of the recapture deadline – 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 is 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. This is of course being looked at in the current reassessment.

7. In order to ensure that exports to India remain certain from the 90 days prior to 28 October and beyond, the applicant is seeking that the recapture deadline be extended by 6 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.
8. The 13th memorandum of counsel and the affidavit accompanying it provides further information in relation to this issue.

Process for consideration of the application

9. The advice from the EPA on 26 March sets out the legal basis for the consideration of such an application and the process which it will need to follow.
10. A key consideration in this process will be for all parties to bear in mind that this application is supplementary to the reassessment process. 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, if a different timeframe is set in the reassessment this would take effect and the waiver timeframe would no longer apply. On this basis, this waiver application is not a quasi-reassessment application or decision. It is merely using a legal tool in the HSNO Act to ensure that industry can continue to function while a decision is reached on the substantive reassessment application.
11. As set out in the EPA's advice of 26 March, submitters will have the opportunity to comment on the impact on them of this waiver application. It is not an opportunity to provide further information in respect of the substantive reassessment.
12. We will set out directions for timetabling of the process further below.
13. Once the period to provide comments has ended, we will review the comments and application, and make a decision on whether a hearing on this discrete matter is required, whether any further information is required or whether the decision can be made on the written information provided. Limitations in respect of COVID Alert Levels will also be taken into account.
14. While the impacts of any implementation timeframes might be considered for the substantive reassessment, the applicant and any other parties should not rely on the waiver decision to indicate what such implementation timeframes or recapture controls might be.

Directions

15. The DMC directs the following:
 - a. The 13th Memorandum of Counsel and supporting affidavit is published on the EPA website on the date of this Direction and Minute.
 - b. Submitters to the reassessment application will have 10 working days to consider whether the waiver, if granted, would prejudice them and provide comments about that impact. Comments should be received by 5pm on 16 June.

- c. Once comments have been received, the applicant will have 5 working days to respond to any comments.
 - d. The DMC will consider all information provided and advise parties if a hearing is required. Otherwise, the DMC will provide a decision on the application within 10 working days of receiving the applicant's reply.
16. 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:



2 June 2020

Tipene Wilson

Date

Chairperson