



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 WGT015 of the Decision-making
Committee (DMC) – 1 July 2020**

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. The assessment of this application is currently being undertaken as a modified reassessment by the EPA.
2. The control regarding recapture requirements set in the 2010 reassessment of methyl bromide, as reissued on 19 July 2020, will take effect on 28 October 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 modified reassessment is currently underway in line with the statutory requirements of the HSNO Act. The hearing and consideration of the application is pending the assessment of additional information provided by the applicant on 22 June 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 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 2020.
5. On 14 May 2020 the Counsel for applicant submitted the 13th Memorandum of Counsel which formed an application for a waiver of the recapture deadline, with an accompanying affidavit from Ian Gear. This application was received in accordance with section 59(3)(a)(i) and 59(3)(b)(i) of the Act.
6. In order to ensure that exports to India remain certain from the 90 days prior to 28 October 2020 and beyond, the applicant is seeking that the recapture deadline be extended by six 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 13th Memorandum of Counsel and the affidavit accompanying it provides further information in relation to this matter.

The substantive reassessment

7. 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, if a different timeframe is set in the reassessment, the reassessment decision 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 utilising a statutory tool in the HSNO Act to ensure that industry can continue to function while an active application is being processed, until a decision is reached on the substantive reassessment application.
8. 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.

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

9. 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”.
10. Section 59(3)(b)(i) 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.”
11. 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 Act, constitutes a requirement of the Act in respect of section 59(3)(a)(i) and section 59(3)(b)(i).
12. 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 applied under 59(3)(a)(i) would take effect and the date at which a waiver would end.
13. In exercising this power, the considerations set out under section 59(4) must be complied with.

Process for consideration of the application

14. The DMC issued the Direction and Minute WGT013 which acknowledged the application for the waiver had been received and initiated the processing of the waiver application.
15. Upon receiving the waiver application the EPA provided the opportunity for submitters to comment on the impacts of the waiver application and whether a hearing is required. As stated in the Direction and Minute this was not to be an opportunity for additional submission on the substantial reassessment.
16. At the conclusion of the submission period the comments were provided to the applicant for response. The applicant provided a response in the 16th Memorandum of Counsel. The comments and applicant’s response were subsequently provided to the DMC for consideration.

Assessment of comments from submitters

17. The DMC has considered the comments provided by submitters in addition to the waiver application and applicant’s response to the comments.
18. The comments received were a mix of positions in support of and in opposition to the waiver.
19. The DMC notes that Direction and Minute WGT013 outlines the scope of consideration for the waiver and highlights that issues pertinent to the risks and use of methyl bromide are to be addressed in the substantive reassessment and are therefore outside of the scope of the waiver application and consideration.
20. The DMC identified that a number of the points raised by submitters, both in favour and in opposition to the waiver, relate to the substantive reassessment of the use of methyl bromide and the recapture controls. Noting paragraph 19 and the relevant points of WGT013 the DMC considers that a number of these aspects are relevant to the substantive reassessment and will be considered at the substantive hearing.
21. The comments received from submitters in support, which included MPI and forestry groups, note that, without the time waiver, the last shipment of logs to India would occur in June and to China in October. These submissions noted there would be impacts on exports and employment in the industry without a waiver to allow for continuing use of methyl bromide with current controls until there is the certainty of the outcome of the substantive reassessment.
22. The DMC accepted the information provided on the impacts to the forestry industry under the current timeframes until a decision on the reassessment.

23. One submitter noted that Covid 19 had impacted the ability of treatment suppliers to invest in meeting the recapture requirements. The DMC accepted this in part however noted that the six months would not be considered significant relative to the ten years lead in time from the original reassessment decision.
24. Three submitters in opposition to the waiver all noted opposition to continued discharge of methyl bromide. They cited impacts on the community health from continued discharge.
25. The DMC acknowledged this point and considered that the health effects will be better and more appropriately addressed in the substantive reassessment.
26. The submitters in opposition also noted that industry has had ten years since the previous reassessment decision to invest and seek solutions to comply with the control and that the waiver application was a continuation of the 'status quo'. The submitters considered that there are other potential recapture or log treatment options which have not been explored by industry.
27. The DMC acknowledged this point but considered that the consideration of alternative recapture or treatment options is pertinent to the consideration of recapture at the substantive reassessment. They also considered, based on the information before them, that there are not sufficient alternatives available to the current fumigation and recapture methods that could be implemented immediately to resolve the issue that has given rise to the waiver application.
28. The DMC reiterates that the points raised by submitters considered relevant to the substantive reassessment aspects will be considered in the hearing and consideration of the substantive reassessment.

Hearing

29. As part of the consideration of submitter comments provided on the waiver application, the DMC noted requests from submitters to hold a hearing on this matter.
30. Only one submitter requested to hold a hearing on the basis that there was insufficient time to address matters raised in the application.
31. The DMC considers that sufficient time and information was available to address matters pertinent to the waiver application itself.
32. Furthermore the DMC considers the aspects raised in the submission which the submitter requests to be heard on relate more pertinently to the substantive reassessment as noted above. The DMC reiterates that these concerns will be addressed and considered in the substantive reassessment.
33. The DMC considers that sufficient information has been provided in the waiver application and comments on the waiver application in order to make a decision on the waiver on the papers and therefore a hearing on this matter is not required.

Consideration

34. The DMC has considered the application as outlined in the 13th Memorandum of Counsel, the comments provided, and the response of the applicant in the 16th Memorandum of Counsel.
35. The DMC notes that this scenario is unusual and unprecedented, but has been brought about due to timing of both the recapture control coming into effect in October 2020 and the substantive reassessment.
36. The DMC considered the evidence provided in the waiver application. Particularly they consider 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 unprecedented situation which requires a solution proportionate to the issue raised in the waiver application.
37. The DMC considers that sufficient information is available to submitters and to the DMC to assess the waiver application in the timeframe provided, without the need for a hearing.
 38. The DMC considers that there has not been evidence provided 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 for six months.
 39. In considering the submitters comments and the evidence provided by the applicant, the DMC has applied the criteria for the waiver as set out in s59.
 40. 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. Due to the timing of the recapture control set in the 2010 approval, and the delay in the reassessment hearing, this has created an unusual situation which leaves industry unable to comply with the original control.
 41. This issue was also addressed in the High Court decision on the interim orders the applicant applied for in December 2019. Cooke J noted the applicants submission that *“...the exporters are now being placed in an impossible position from a practical point of view. That is because of the need for lead time before the industry was able to make effective changes to their business practices for what is a substantial export industry. The new control takes effect in October next year, but as things presently stand the exporters have no way of knowing what the requirements will be at that time in order to plan for any required changes...”*
 42. The Court also questioned Counsel for the EPA as to whether the DMC in the reassessment has the ability to change the timing for the recapture control: *“...whether the decision-making committee that is hearing the reassessment application early next year has jurisdiction to extend the time for implementation of the control that is presently to take effect at the end of October 2020...”*
 43. The DMC therefore consider 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

44. Pursuant to section 59(3)(a)(i) and 59(3)(b)(i) of the Act, the DMC has considered this application to waive the date for the implementation of the recapture control.
45. Pursuant to section 59(4)(b) of the Act the DMC considers that the waiver would not unduly prejudice any submitter or applicant to the reassessment application.
46. 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 six months later than the currently approved date, that being on **28 April 2021**.
47. The DMC will continue to issue Direction and Minutes as necessary to advise parties to the process of further communications or procedural matters.

Direction & Minute WGT015 of the Decision-making Committee (DMC) – 1 July 2020



Tipene Wilson

Date: 1 July 2020

**Chairperson,
Hazardous Substances and New Organisms Decision Making Committee**

Appendix 1: Recapture control

Requirement for recapture technology

- (1) Clause (2) takes effect 10 years after the date of this approval.
- (2) A person must not **apply methyl bromide** unless **recapture technology** is used.
- (3) A person who **applied methyl bromide** in the preceding calendar year must provide a report to ERMA New Zealand by 30 June each year setting out that person's progress in introducing **recapture technology**.

Recapture technology means a system that mitigates **methyl bromide** emissions from **fumigation** enclosures such that the residual level of **methyl bromide** in the **enclosed space** is less than the Worker Exposure Standard set under section 77B.

Appendix 2: submitters' details

Table 1 Submitters' details

Submission number	Submitter name	Submitter organisation
1	Aubrey Wilkinson	Tauranga Moana Fumigant Action Group (TMFAG)
2	Shane Olsen	Ministry of Primary Industries
3	Chris Rayes	Matariki Forests
4	John Gardner	Pacific Forest Products
5	Craig Wilson	Rentokil
6	Jane Murray	Nelson Marlborough District Health Board
7	Emma Jones	Clear the Air – Mt Maunganui
8	Retracted	Guardians of the Sounds

Full submissions can be found on the application register:

<https://www.epa.govt.nz/database-search/hsno-application-register/view/APP203660>