

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 WGT039 of the Decision-making
Committee (DMC) – 21 June 2021**

Background

Reassessment

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.
2. The modified reassessment is currently underway in line with the statutory requirements of the HSNO Act. The hearing for the modified reassessment of methyl bromide took place remotely from 11 – 17 August 2020. The current 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 control regarding recapture requirements set in the 2010 reassessment of methyl bromide, as reissued on 19 July 2019, was to take effect on 28 October 2020.

First application to waive the recapture deadline

4. On 2 March 2020, the 9th Memorandum of Counsel filed by counsel for the applicant sought direction from the DMC as to whether the control relating to the recapture of methyl bromide could be extended from the deadline of 28 October 2020 prior to the substantive decision on the reassessment. The Memorandum set out the issue - that is, that industry is reliant on irrevocable letters of credit in order to continue exporting logs to India. The length of the letters of credit vary from 90 to 180 days. India requires these logs to be treated with methyl bromide before importation.
5. Counsel for the Applicant considered that there was uncertainty around the 28 October 2020 recapture deadline due to the on-going reassessment. They stated that any exports which were due to be invoiced 90 days prior to that date were uncertain as industry stated that it did not know what will be required of it in respect of recapture, and it could not meet the recapture control that was due to come into force on 28 October 2020.
6. The applicant subsequently submitted an application to waive the October 2020 deadline on 14 May 2020, in the 13th Memorandum of Counsel, after considering advice from the EPA on the DMC's statutory ability to make such a decision.
7. The DMC issued Direction and Minute WGT013 seeking feedback from submitters to the reassessment application on whether they would be prejudiced if the waiver was granted, and for comments on the related impacts.
8. After considering the information available to them, the DMC issued Direction and Minute WGT015, on 1 July 2020, extending the time at which the recapture requirement was due to come into force until 28 April 2021.

Second time waiver application

9. On 21 October 2020, in the 21st Memorandum of Counsel, the applicant submitted another application to extend the recapture deadline. They asked that the recapture requirement be applied to fumigations from 28 October 2021. The basis for the request was the same as discussed in the 9th and 13th Memoranda of Counsel.
10. The DMC, in Direction and Minute WGT025 dated 29 October 2020, sought feedback from submitters to the reassessment application as to whether they would be prejudiced if the waiver was granted, and for comments on the related impacts.
11. After considering the information available to them, the DMC considered that 28 August 2021 was a more appropriate extension given the activity on the reassessment application at that time. On 11 November 2020, the DMC issued Direction and Minute WGT026, in which the DMC extended the time by which the recapture requirement was due to come into force until 28 August 2021.

Third time waiver application

12. On 18 February 2021, in the 26th Memorandum of Counsel, the applicant submitted an application for a further extension to the time frame. They requested that the recapture deadline be changed to 28 November 2021.
13. In response, the DMC issued Direction and Minute WGT030, on 1 March 2021. The DMC considered that it had sufficient information from submissions in previous applications to conclude that no submitter would be prejudiced by the waiver. The DMC extended the time at which this requirement was due to come into force to 28 November 2021.

Memorandum of Counsel for TMFAG

14. Counsel for the Tauranga Moana Fumigant Action Group (TMFAG) filed a Memorandum of Counsel on 3 June 2021. TMFAG seek clarification on three points, namely that the:
 - waivers were granted for log export fumigators only
 - waivers were granted for logs exported to India only
 - decisions on the three waiver applications granted the decisions sought by STIMBR only.
15. Related to this third point, Counsel for TMFAG considers that the DMC did not follow the requirements of section 59(4) of the HSNO Act prior to granting the third waiver application.
16. Counsel for TMFAG provided a copy of their Memorandum to the applicant. The applicant provided their response on 10 June 2021, in the 33rd Memorandum of Counsel from the Applicant.

Scope of the previous time waivers

17. The control regarding recapture requirements was set pursuant to section 77A of the HSNO Act as part of the section 29 approval that was the outcome of the 2010 reassessment. The approval for methyl bromide, including the recapture requirement, was reissued on 19 July 2019 using HSNO Act Schedule 7 powers, to take into account the changes to the Health and Safety at Work

regulatory regime. The approval was amended on 19 November 2019 to confirm the recapture target.

18. STIMBR's waiver applications related to the time within which an action required by the HSNO Act should take place.
19. Section 59 of the HSNO Act states that:

59(3) A person may apply to the Authority to-

 - (a) 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; or*
 - (ii) the information that shall be supplied; or*
 - (b) give a direction concerning-*
 - (i) the time within which any action shall be carried out; or*
 - (ii) the terms, including terms as to adjournment, costs, or other matters, on which any information shall be supplied.*
20. In the case of STIMBR's applications in the Memoranda of Counsel noted above, the DMC considered the applications to waive the recapture control that was set in 2010 (and reissued in 2019) as applications under sections 59(3)(a)(i) and 59(3)(b)(i).
21. Although the DMC has noted elsewhere that the reasons for the time waiver applications from the STIMBR were due to issues of letters of credit for logs exported to India, the DMC only has the power to waive the time when the control as a whole takes effect. This is what the DMC did in its decisions on 1 July 2020 (WGT015), 11 November 2020 (WGT026), and 1 March 2021 (WGT030).
22. The DMC does not have the statutory power to waive the control for only specific types of use, including uses for a specific market.
23. Therefore, the DMC confirms that the three time waivers extending the recapture requirement apply to all fumigations using methyl bromide.

Consent or not unduly prejudiced

24. Through their Memorandum of Counsel, TMFAG raised concerns about whether the DMC met the statutory obligations in section 59(4) of the HSNO Act in granting the third waiver application. They point out that the DMC issued their Direction and Minute WGT030 without providing submitters on the substantive reassessment application the opportunity to comment on whether they would be prejudiced by the granting of a waiver.
25. Section 59 of the HSNO Act states that:

(4) The Authority shall not extend or reduce any time period or grant an application under this section to waive a requirement as to the time within which any action shall be carried out unless it is satisfied that-

(a) the applicant and the persons making submissions consent to that waiver; or

(b) any of those parties who have not so consented will not be unduly prejudiced.

26. The DMC considers that they have the option of either obtaining consent or determining that there would be no undue prejudice.
27. In the instance of the first and second time waivers, the DMC provided submitters with the opportunity to provide comments in order to assess whether any parties would be unduly prejudiced, pursuant to section 59(4). Based on the responses received to their Directions and Minutes WGT013 and WGT025, the DMC found that no party would be unduly prejudiced when comparing the status quo with the waiver being requested.
28. The DMC also sought feedback on whether a hearing was required to consider the time waiver applications in these two Directions and Minutes. Based on the responses the DMC decided that a hearing was not required, and that they could reach a decision on the time waiver application based on the papers.
29. In considering the third application for a time waiver to the recapture requirement, the DMC considered that matters, in respect of the reassessment process and the current use of methyl bromide, had not changed from the previous waiver applications which would give rise to any alternative comments from submitters that would indicate undue prejudice.
30. As such, the DMC considered it could satisfy itself that no party would be unduly prejudiced without receiving comments from submitters.

The substantive reassessment

31. The DMC reiterates that the time waiver applications are 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 individual time waiver applications are subordinate to any decision reached in the reassessment; that is, once a decision is reached in the reassessment, the reassessment decision will take effect within the timeframe set out by the DMC in its substantive decision and the waiver timeframe would no longer apply.
32. On this basis, the waiver applications are not a quasi-reassessment application or decision. It is merely using a statutory tool in the HSNO Act to ensure that industry can continue to function while an application is being processed, until a decision is reached on the substantive reassessment application.
33. The impacts of any implementation timeframes will be considered in the substantive reassessment. The applicant and other parties should not rely on the waiver decisions to indicate the outcome of the substantive reassessment.

New time waiver application

34. In the 32nd Memorandum of Counsel, dated 28 May 2021, the applicant submitted an application for a further time waiver; extending the time for the recapture control to take effect until 28

February 2022. This application was made in accordance with sections 59(3)(a)(i) and 59(3)(b)(i) of the HSNO Act.

35. In order to ensure that exports to India can continue under current protocols from the 180 days prior to 28 November 2021, or the conditions specified in the decision reached in the reassessment apply, the applicant is seeking that the recapture deadline be extended by a further three months in order for a decision on the reassessment to be reached. The applicant considers that this would create certainty for exports to India and letters of credit for these exports could still be issued.

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

36. 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 HSNO Act, constitutes a requirement of the HSNO Act in respect of section 59(3)(a)(i) and section 59(3)(b)(i).
37. 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 under section 59(3)(a)(i) would take effect and the date at which a waiver would end.
38. In exercising this power, the considerations set out in section 59(4) must be complied with.

Process for consideration of the application

39. The DMC considers this to be a new application for a time waiver request to extend the date at which the recapture control requirements for methyl bromide come into force, rather than a variation of the previous requests.
40. The DMC considered whether to seek feedback from parties on the impacts of the waiver application to assess whether any party is unduly prejudiced, and whether a hearing was required.
41. The DMC considered that it would not receive new information to that previously provided in response to their Directions and Minutes for STIMBR's first two time waiver applications (WGT013 and WGT025).
42. As such, the DMC concluded that they did not need to seek feedback to this time waiver application.
43. The DMC considers that a hearing on this matter is not required.

Consideration

44. The DMC has considered the application as outlined in the 32nd Memorandum of Counsel.
45. The DMC notes that this scenario has been brought about due to timing of both the recapture control coming into effect and the substantive reassessment.

46. The DMC considered the evidence provided in the waiver application. Particularly it considers 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 unusual situation which requires a solution proportionate to the issue raised in the waiver application.
47. The DMC considers that sufficient information is available to the DMC to assess the waiver application in the timeframe provided.
48. The DMC considers that there has not been evidence provided previously 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. The DMC believes that this situation has not changed since the previous waiver applications.
49. The DMC notes that the purpose of the waiver request was to give those exporting methyl bromide-treated logs to India with 180 day letters of credit certainty around the rules that would be required of them in New Zealand prior to export. The 32nd Memorandum of Counsel takes this 180 days out to 28 February 2022.
50. In considering the evidence provided by the applicant, the DMC has applied the criteria for the waiver as set out in section 59 of the HSNO Act.
51. 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.
52. The DMC therefore considers it is appropriate to waive the recapture date as decided in the 2010 reassessment in order to provide certainty to all parties until such time as the substantive reassessment determines the future requirements that will apply. This includes certainty for regulators and to the public in respect of what industry should be doing.
53. For clarity, the DMC notes that the waived deadline applies to all users of methyl bromide in New Zealand, and for all intended markets.

Directions

54. Pursuant to section 59(3)(a)(i) and 59(3)(b)(i) of the HSNO Act, the DMC has considered this application to waive the date for the implementation of the recapture control.
55. Pursuant to section 59(4)(b) of the HSNO Act, the DMC considers that the waiver would not unduly prejudice any submitter or applicant to the reassessment application.
56. 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.
57. The DMC directs that the current recapture control is to take effect on **28 February 2022**, subject to a decision on the substantive reassessment.
58. 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:



21 June 2021

Dr Ngaire Philips
Chair

Date