

Draft Submission on the draft Underground Petroleum Storage System Regulation

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Opening

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing all NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.

LGNSW welcomes the opportunity to comment on the draft Protection of the Environment (Underground Petroleum Storage Systems) Regulation 2019 (UPSS Regulation), particularly as responsibility for regulating UPSS is scheduled to transition to councils on 1 September 2019. The Regulation will be the primary tool used by councils for regulating this activity, along with any guidance subsequently published by the EPA.

Please note that to meet the consultation deadline, this submission is provided in draft form, in anticipation of LGNSW Board endorsement at its August meeting. LGNSW will advise of any amendments to the submission at that time.

Purpose

This submission is in response to the Regulatory Impact Statement for the Proposed Protection of the Environment (Underground Petroleum Storage Systems) Regulation 2019 (UPSS Regulation) and the accompanying draft Regulation, both issued on 17 May 2019. The EPA has also proposed a set of questions on the Have Your Say website, which have been addressed as part of this submission.

Response

Regulatory responsibility for UPSS is set to transition to councils on 1 September 2019, which will necessitate an adjustment for councils and allocation of additional resources. LGNSW acknowledges that the EPA has committed to provide training and support for councils in the coming months, however councils are concerned about the late timing of this. The EPA has funded regional capacity building staff to assist councils with contaminated land matters and UPSS transition, however due to delays in announcements these staff are only now being recruited. As a result they will have a very short timeframe to get up to speed and be in a position to support councils with the early part of the transition.

Definitions

The draft Regulation includes an amended definition of '**duly qualified person**' such that the competence and experience of a person is recognised by the 'peak body in the relevant industry'. To assist councils and others work with this definition, there needs to be clarity/guidance on which peak body/bodies are recognised by relevant industries.

Councils generally acknowledge and support the intent of tightening up the definition, however there are potential negative implications in regional and rural areas where it may be more difficult to engage suitably qualified people to quote or repair UPSS. This can also then impact on timeframes for resolving any losses/leaks. Until it is clear who the peak bodies are, and therefore how that changes the number and accessibility of duly qualified persons (if at all), the revised definition is only supported in-principle.

Recommendation 1: The 'peak body in the relevant industry' is to be identified in the UPSS guidance material provided by the EPA. There needs to be clear guidance on who is qualified to make decisions and who is responsible for accrediting and maintaining that qualification.

The draft Regulation proposes an expanded definition of ‘**person responsible**’ for a storage system such that it includes the person who has management and control of the system where a storage system has not yet been commissioned or where a storage system is no longer in use but has not been decommissioned. LGNSW considers it helpful to widen the definition to clarify who is responsible in situations where the system is not currently in use.

Clause 4(2) goes on to state that “a person responsible for a storage system continues to be the person responsible for the system for the purposes of this Regulation whether or not the person has entered into a contract or other arrangement that provides for some other person to be the person responsible for the system or to carry out functions of the person responsible for the system.” This clause appears to be trying to align with the definition of the Person Conducting a Business or Undertaking (PCBU) under Work Health and Safety legislation, however clause 4(2) is confusing and somewhat circular, and will make enforcement difficult as councils will have to ‘follow the chain’ to work out who is the original ‘person responsible’.

Recommendation 2: Clause 4(2) be redrafted to say that the person responsible for a system cannot discharge their responsibility for the system through contract or other means.

Recommendation 3: Require the name of the person responsible for the system to be included on system documentation and reports provided to the regulator.

Plan Name Change

The draft Regulation proposes to change the name of the ‘Environment Protection Plan’ prepared by underground petroleum storage system operators to ‘Fuel System Operation Plan’, so as to better describe the contents of the plan and align it with language used in the petroleum industry. This change is supported.

Recommendation 4: Change the name of the ‘Environment Protection Plan’ to ‘Fuel System Operation Plan’.

Exemption

The Have Your Say website notes that sites with UPSS used for the storage of fuel for generators, heating and waste oil have been exempted from parts of the Regulation until 31 August 2019. Feedback is sought on whether this exemption should continue beyond 31 August 2019.

LGNSW notes that the EPA will retain power to issue exemptions and will also expand the power so councils can issue exemptions in their local areas. The UPSS Guidelines, which outline the exemptions and criteria, are proposed to be updated once the Regulation is revised (ie, by 1 September 2019).

In light of the numerous changes occurring to the Regulation and guidance, we suggest keeping the transition process simple and extend the exemptions above for a further 12-18 months. This will enable councils to bed-down their processes for the UPSS that are currently subject to the Regulation. After that time, the decision on whether UPSS used for the storage of fuel for generators, heating and waste oil should continue to be exempt needs to be taken collectively by regulators to ensure consistency of approach.

Recommendation 5: Extend the exemption for UPSS used for the storage of fuel for generators, heating and waste oil for a further 12-18 months, with the final decision on exemption determined collectively by regulators.

Annual Report

Clause 29 is a new provision that requires all UPSS operators to lodge an annual report with their regulatory authority (ie council) providing details of any system modification or decommissioning, a summary of the results of equipment integrity tests, and a summary of any leak detection tests or actions taken in response to other loss detection. Annual reports will also include a short description of the leak detection and loss monitoring systems and the Fuel System Operation Plan.

This provision is met with mixed views. The principle of operators demonstrating compliance is well supported, however there is concern that councils may not have the technical capacity or staff to adequately assess the reports they receive and to decide whether follow up inspection is needed. This technical knowledge may need to be brought in at an additional cost. Furthermore, there is uncertainty regarding the associated liability for councils receiving the reports. It is essential that the EPA provides scientific or technical guidelines that allow councils to make a solid risk-based assessment on when to inspect UPSS.

Some councils have suggested that third party auditing of annual reports would assist councils undertake their regulatory role. The annual reporting requirements for cooling towers has been suggested as a desirable model for how UPSS reporting could be approached.

Recommendation 6: Scientific or technical guidelines must be provided that will assist councils to make a solid risk-based assessment on when to inspect UPSS.

Recommendation 7: Consider a third-party audit / compliance program (such as that used for cooling towers) for application to UPSS.

Timeframes and resourcing

Clause 23 of the draft Regulation requires UPSS operators to notify council of the intention to decommission a system at least 30 days in advance. It is unclear what action is required of councils upon receipt of notification (other than to update records). Is there an expectation that councils will comment on the proposed approach to decommissioning? LGNSW notes that clause 23(3) requires the decommissioning process and assessment of site contamination to be reported to council after the decommissioning.

Recommendation 8: Provide guidance to councils on what is required / best practice when receiving notification of decommissioning.

It is proposed to change clause 20 and 21 of the Regulation to require the person responsible for the UPSS to take any necessary action no later than 60 days after becoming aware of any loss or leak. The Regulation currently requires action 'as soon as is practicable'.

Councils support the inclusion of a timeframe in the Regulation as it provides clarity for operators and regulators, however there is concern that 60 days is too long to allow a leak to occur unmitigated. Councils suggest that action needs to be taken promptly (either immediately or (say) within 30 days, depending on the scale of leak) to reduce further loss and/or prevent offsite migration eg site bunding, pump out the tank. Substantial repairs and clean up can then be taken over a longer period of time, providing the environmental or health risks are contained.

Recommendation 9: The timeframe in clauses 20 and 21 should be reduced so that action is taken to immediately reduce identified losses / leaks and prevent offsite migration/pollution.

Costs of Regulating

Section 6.1 of the RIS identifies that under section 608 of the *Local Government Act 1993* councils may charge and recover an approved fee for services, and this could be used to recover costs of any necessary UPSS inspections.

While some councils have included a service charge for inspecting UPSS in their 2019/20 fees and charges schedules, many councils have not gone down this path as yet as they are unsure what the regulatory workload will be. While s608 is suitable for recovering inspection fees it is not well suited to recovering administrative costs that are likely to arise in regulating UPSS such as:

- establishment of registers, policies and procedures within council
- receipt, assessment, reply and recording of responsive and regular notifications including intent to decommission UPSS or notification of UPSS removal
- receipt, assessment, reply and recording of actions taken in relation to reports provided to council following remediation, tank removal or relocation, pollution incident, and provided to council as an annual report.

In smaller local government areas in particular it may be cost-prohibitive to recover these costs from UPSS operators in full, and therefore a portion may need to be funded from rate revenue representing a cost-shift to local government and to ratepayers.

While the RIS is correct in stating that councils are already the appropriate regulatory authority (ARA) for service stations and other likely UPSS sites (eg with regard to noise and air pollution), the EPA has acted as regulator for UPSS since the UPSS Regulation was first introduced. The RIS also states that councils should be able to incorporate UPSS into their usual site compliance practices, however it does not acknowledge that there are specific new compliance activities and processes required for UPSS. As such, the RIS underestimates the scope of change and resourcing impact on councils.

LGNSW recognises that the EPA is providing grants to regional groups of councils to employ an officer for up to 3 years to help build capacity in managing contaminated land and UPSS. This support is very welcome, however program announcement was delayed meaning that officers are only now being recruited, less than 3 months before UPSS transition.

Recommendation 10: The EPA extend support for rural and regional councils beyond the current grant period should it be required, and broaden eligibility for capacity building grants to include metropolitan councils where the need for additional capacity to set up systems etc can be demonstrated.

Other Comments

Clause 25 outlines requirements relating to the incident log. It would be useful if provision was included here for the log to be provided to an authorised officer (ARA) upon request, thus eliminating the need for formal notices/directions.

Recommendation 11: Add provision to clause 25 that requires the incident log to be provided to an authorised officer upon request.

Clause 26 outlines the documents that are required to be kept for 7 years from date of creation but does not include the Fuel System Operation Plan (FSOP) or information needed to prepare an FSOP eg system designs, specifications. While we acknowledge the FSOP may need to

be periodically updated, the most recent version plus the underlying technical specifications of the system should be kept by the person responsible (clauses 26 and 28).

Recommendation 12: Add the requirement to keep the Fuel System Operational Plan to clause 26 of the Regulation.

Conclusion

LGNSW appreciates the opportunity to comment on the draft UPSS Regulation and RIS, particularly given that the responsibility of regulating UPSS will transition to councils in less than 3 months. LGNSW acknowledges that council training and support for the transition is planned, however the short lead time is of concern to councils.

Several of the proposed changes to the Regulation are supported or supported in-principle, however we have also highlighted recommendations for further improvements to the Regulation and supporting guidelines to improve clarity and operability.

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