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**RE: ASBG's Submission on Draft Guidelines: Pollution Incident Response Management Plan**

The Australian Sustainable Business Group (ASBG) welcomes the opportunity to comment on the [Guidelines: Pollution Incident Response Management Plans](#) (the Guidelines)

The [Australian Sustainable Business Group](#) (ASBG) is a leading environment and energy business representative body that specializes in providing the latest information, including changes to environmental legislation, regulations and policy that may impact industry, business and other organisations. We operate in NSW and Queensland and have over 110 members comprising of Australia's largest manufacturing companies and other related businesses.

Overall the Guidelines are an improvement on the current set with a much clearer set of what is expected from PIRMPs well explained. Much of the draft Guidelines are also helpful providing much reference material in order to write more effective plans.

There are two areas in which ASBG has further comment:

- The hard line interpretation for the trigger to redo a PIRMP test and update following any pollution incident
- The limitation of PIRMPs to the management of incident response, and not as a risk management tool for non-management process such as engineering, process and structural changes to reduce risks.

## 1 Issue – Any Pollution Incident Trigger

ASBG wishes to raise concern with the interpretation of [s98E \(2\)\(b\) POEO \(General\) Regulation 2009](#) in the Guidelines; quote:

*In addition to scheduled testing, the PIRMP must be tested within one month of **any** pollution incident. This means any type of pollution incident that occurs while the licensed activity is taking place, not just incidents that cause material harm.*

The review of the Guidelines provides the EPA with an opportunity to practically and purposefully interpret the PIRMP sections of the POEO General Regulation. ASBG can only see that to trigger the redoing of both testing and updating of the plan is to set to mean the Material Harm trigger, but the draft Guideline has interpreted s98E(2)(b) verbatim to be **any pollution incident**, which includes *likely to pollute*. This

interpretation has both legal and practical difficulties and goes well beyond the usual reasonable and practical measures usually adopted by the EPA in enforcement and practice.

## 1.1 Legal issues – PIRMP retesting Trigger

Legal issues with such an interpretation include:

- S98E(2)(b) raises the meaning of *any pollutant incident* and how trivial should this be. For example, increasing risk by leaving a door or valve open may increase the risk, but only if a leak or other upstream failure or change occurs. Would such generally reported non-compliance issues also trigger the need to red testing and updating?
- S 153C POEO Act - *Information to be included in plan* has a number of areas to consider:
  - S153C(a) Focuses on notification of a pollution incident referring indirectly to Part 5.7 *Duty to Notify Pollution Incidents*, which includes the Material Harm trigger. As a consequence, there is a strong link between the PIRMP and Material Harm trigger. It appears consideration of sub-material harm incidents in a PIRMP are at best an optional extra.
  - S153C(b) and (c) describe actions to undertake following actual pollution incidents, rather than likely. They also focus on coordination and communication with other combat agencies, again indicating the concern for Material Harm incidents.
- Read together Parts 5.7 and 5.7A focus on management response to pollution incidents and not to the causes, root causes or other contributing issues which may have given rise to an incident. As a consequence, the purpose of the PIRMP is to respond well to an incident, rather than consider engineering, process and structural changes and approaches and techniques to prevent the occurrences of such incidents. To bend the interpretation of the PIRMP to include this as part of its risk minimisation approach should be subject to separate legislation and full public debate.
- It undermines Part 6.3 Voluntary Environmental Audits, which was established under the Act to permit sites to inspect their environmental issues without fear of being penalised if faults, errors, problems occur. It was a purposeful provision to assist sites to inspect, log and investigate to improve overall environmental performance. Similarly, trivial pollution incidents should be permitted to be similarly addressed in similar circumstances as voluntary auditing. Otherwise, reporting documenting and investigating trivial incidents will not be conducted as they can trigger testing and updating, which if not conducted can be subject to punishment.

As a consequence of the above, section 98E(2)(b) is considered poorly drafted. There is an opportunity to correct this via interpretation in the Guidelines. However, in the draft it been taken out of context with the intent and objectives of the PIRMP processes under the POEO Act and General regulation.

## 1.2 Practical Issues – PIRMP Re-testing

Many trivial spills and incidents occur all the time. Most people has spilt a cup of coffee or other beverage at work, which is a trivial pollution incident. All incidents, especially trivial should be considered internally, checking for systematic errors and other changes to internal practice and controls, which prevent, rather than respond to the incident. Any pollution incident, including likely can include the tiny very trivial, for example:

- Small spills which occurring during rain considered likely water pollution.
- Minor spills of dusty substances, causing a small cloud of dust
- One piece of litter entering a stormwater drain.
- A spill of 10 L of oil into a spoon drain, but the drain is dry and is easily cleaned.
- One or two complaints received by the EPA on odour or dust.
- A dropped 500 ml sample of a pollutant on its way to a lab.

From a practical perspective, many such sub-Material Harm incidents are routinely internally reported, documented and acted upon by many holders of Environmental Protection Licences (EPL). For example:

- Company A, a large ASBG member, reported 54 trivial incidents in the first five and half months in 2019
- Company B indicated at least 3 to 5 per month are documented each month.
- Company C, another large industrial site records around 80 breaches a month internally.

These incidents are in generally very trivial with many reporting minor procedural non-conformances such as:

- Leaving doors or vents open where dust or odour may escape, if present
- Not closing a valve on an empty bund or tank which is empty, but poses a risk of harm if not pick up when fluids become present in the future
- Minor spills of less than 2 litres of liquids, ranging from coffee, oil even paint spills on hard surfaces, but some distances from drains etc
- Odours where staff members have reported minor odours inside the factory
- Overfilled waste bins where there is a litter risk

There is also a grey area between a reported increased environmental risk and likely to pollute, so this issue to determine any pollution incident is also subjective and will result in wide variations of interpretation. A good Environmental Management System works best if such minor issues are routinely reported. Punishment via mandatory testing and updating is considered counterproductive.

Another issue is how should these companies then act on testing for **any** pollutant incident? Would it be once per month as that captures all 'incidents' for that 30-day period leading up to the actual testing day, or would the EPA expect a PIRMP test for every incident? For large sites with multiple reports per day the latter is absurd and unworkable. Even enforcement of monthly testing is considered extreme for trivial incidents. A maximum 12 month frequency requirement is considered unproductive as the testing would become so repetitive its effectiveness would be minimal, and would be seen as a punishment process rather than an environmental improvement practice.

### 1.3 Zealous Nature of EPA Inspectors

ASBG is seeing increasingly frequent examples of overzealous and harsh interpretation of environmental laws and policies by EPA inspectors and other staff who interact with EPL holders. A more reasonable and practical approach, which is the desired firm but fair approach has diminished. The old adage the less you know the more conservative and risk adverse approach is taken is becoming more pronounced within the EPA, especially with some of the inspectors. Examples where this has occurred is in the interpretation of Non-Trivial Material Harm (NTMH) by EPA inspectors. Here ASBG finds an increasing gap between EPL holder's interpretation and the EPA. For example, EPA inspectors are calling NTMH:

- Dust emissions where a few complaints were received by the EPA
- Odour emission where two complaints and the EPA officer also smelled the odour
- 'Any emission which leaves the site boundary is consider NTMH' was stated by an EPA inspector recently to a member

The issue here is that NTMH is subjective. The EPA takes a ardent approach in protecting the environment and swings the NTMH trigger to very small emissions and incidents. However, equally, ASBG members view NTMH as being in the same level of seriousness as the \$10,000 threshold which also applies. Using this as a basis then dust and odour emissions can be interpreted to mean complaints

where there is a health issue associated with the emission. Offensive odour definition contains two types, with one being annoying and the other health related. So the outcome is a polarised view of NTMH as the legislation is simply vague.

Nevertheless, the key point is that some EPA inspectors can be overzealous in their interpretation of environmental laws and policies. As a consequence, reasonability of what “*any Pollution incident*” means as is and can be taken to absurd levels by most inspectors if appears in the EPA’s official Guidelines as discretion on the officers behalf is not an option.

What is likely to happen, as a result, is that to avoid doing excessive PIRMP testing, these trivial incidents will simply not be internally covered. It will drive the practice of documenting and fixing root causes of trivial incidents underground and they simply will not be formally managed, leading to poorer environmental outcomes. This process also undermines the concept of [Voluntary Environmental Auditing](#) as discussed above.

NSW EPA generally employs reasonable and practical criteria to most of its enforcement actions. Application of reasonable and practical on s98(2)(b)’s **any** pollution incident is clearly the approach which is required, based on the definition of Material Harm in the POEO Act.

***R1 ASBG strongly recommends interpreting [s98E \(2\)\(b\) POEO \(General\) Regulation 2009](#) trigger for undertaking PIRMP testing and updating should be limited to pollution incidents that triggered Material Harm.***

## 2 Purpose of a PIRMP

Another issue is to what extent should [updating a PIRMP take following an incident](#)? Here there is some confusion, but at least with a general direction. Section [153C POEO Act](#) requires the PIRMP to primarily focus on incident management and then follow the regulations. From the Act the principle purpose of the PIRMP is response to an incident. Sub-[sections 98C \(a\), \(b\), \(c\) & \(d\)](#) POEO (Gen) Reg. do consider as the amounts and locations of pollutants, likelihood of hazards and pre-emptive measures. This is viewed by PIRMP holders as a listing of prior work undertaken as part of risk assessment processes, largely based on Work Health and Safety legislative requirements and perhaps internal and voluntary Environmental Management Systems. So risk assessment processes considering prevention of an incident is seen separate from the improvement process of incident response which is primarily management procedural practices.

However, the issue here is when updating a PIRMP, after an incident, how much of upstream risk assessment should be reviewed? As discussed, the PIRMP is considered to focus on the management of incident response and not on changing engineering, process or structural changes. With the [Draft PIRMP Guidelines](#) calling for any incident to trigger testing and updating, how far up the chain of risk controls does the EPA expect sites to go? Obviously trivial incidents, even in safety do not trigger a root cause analysis or other investigations that seek to rectify the risk level down, unless they are systemic and repetitive. Even then updating for an incident response plan is more about staff actions and support equipment and not about higher level risk management requiring engineering changes or similar.

Also documenting incident response management instructions must be kept broad and open to accommodate a wide range of scenario’s, some, which are not foreseeable. Documenting in too much detail or too rigidly would either reduce the effectiveness of the response or if not followed properly, make the company liable for failing to follow its PIRMP precisely. Given this limited scope for updating it corresponds to minimal to zero effectiveness in relying on repetitive testing to improve response.

As discussed, the PIRMP is specifically for the management of incident response. In a very minor way it may consider some changes to secondary risks control measures<sup>1</sup>, but being seen as limited to management and support equipment. Clearly PIRMPs are not designed or used for primary risk control. Primary risk management has and always will be part of basic engineering, process and equipment design to prevent incidents occurring. By their nature primary risk controls generally cannot be updated or changed easily. Other tools such as HAZOP studies and similar design investigation methodologies can help, but are not perfect. Using the PIRMP to reach into primary control methods is well beyond the intent and objectives of its purpose. Consequently, the Guidelines should state the boundaries of the PIRMP and where their main focus should lie and discuss the types of 'updates' and where they should apply.

***R2 ASBG Recommends that the Guidelines clarify the purpose of the PIRMP to be limited to its primary focus on incident planning and this be considered in the PIRMP updating process.***

### **3 Other Areas for Improvement**

There are other upgrades, such as listing names and job descriptions in the PIRMP of principle officers and responders. Inventory identification and risk assessment are also beefed up. Further investigations will likely reveal additional tightening and requirements.

Listing of the regulatory requirements is welcomed, but it is puzzling why Part 5.7A from the POEO Act was not included.

On the up side it does provide some good details on how to write a good PIRMP with many examples and map details which should improve the responses to an incident.

This submission has been prepared with the input and assistance of members of ASBG's Policy Reference Group (PRG).

Should you require further details and clarification of the contents of this submission please contact me.

**Yours Sincerely**

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<sup>1</sup> Secondary risk control methods are like seat belts and air bags in a car; to minimise harm once an incident has or is occurring. In contrast Primary risk measure includes having good reliable systems in place to prevent an incident occurring. In practice this means well designed, maintained and operating equipment, good effective procedures all designed to prevent an incident occurring.

