

28 March 2023

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Dear Tracey and Darren

Genesis views regarding hazardous areas for in-situ filled LPG cylinders

A. Introduction

1. On 24 March 2023, Genesis Energy Limited (**Genesis**) sent a letter (**Genesis Letter**) to compliance certifiers attaching extracts from a report it commissioned from AECOM dated 14 December 2022. The AECOM scope is not described but evidently involved calculating the hazardous area applicable to the *in-situ* filling of Genesis' 222 kg LPG cylinders (**Genesis 222's**). The implied conclusion is that the appropriate hazardous area is a cylindrical shape with radius of 1.5 metres from the fill point of the cylinders (**Genesis HA Assessment**).
2. Genesis' Letter purports to contain the equivalent of *res judicata* in relation to hazardous areas – in effect, the Genesis HA Assessment has been determined and that compliance certifiers should adopt this as the correct answer for all Genesis *in situ* filled 222kg cylinders. There is a direct suggestion that WorkSafe New Zealand (**WorkSafe**) "has accepted the findings" with the inference being that compliance certifiers ought to also utilise the Genesis HA Assessment when inspecting and certifying all locations with Genesis 222's. I invited WorkSafe to state what it had done but have had no reply.
3. The question for DGC's certifiers is whether they will apply the Genesis HA Assessment. In this letter, we explain the many issues with Genesis' approach and why they will not.
4. The relevant Australian standard for hazardous areas is AS 60079 (**Standard or AS60079**). References in this letter to regulations are references to the Health and Safety at Work (Hazardous Substances) Regulations 2017 (**Regulations**).

B. Issues with Genesis HA Assessment

5. There are many issues with what Genesis is proposing.
 - a. An expert opinion (such as the AECOM opinion) is **not** one of the two defined ways in regulation 10.6 for a hazardous area to be defined. PCBUs must comply with regulation 10.6 and establish hazardous areas in one of the two ways referred to in the regulation. This is a critical threshold issue.

- b. HSNOCOP 38, which defined the hazardous where *in-situ* fill cylinders were fitted with AFL valves only (and no ullage valves), has been repealed. Genesis' approach purports to (i) revive elements of HSNOCOP 38 without the due process that is required before codes of practice are published and (ii) go further than HSNOCOP38 by applying a smaller hazardous area to *in situ* fill cylinders which have ullage valves.
- c. Even if an expert opinion were a viable means of defining a hazardous area pursuant to reg 10.6, the Genesis approach does not meet the Standard's expectations for expert views – that they be specific to the LPG location and that the basis for the specific conclusions be documented. A “blanket opinion” such as has been presented is not suitable. The Standard acknowledges that if the examples are to be adapted “account must be taken of the **specific details of each individual case.**” (emphasis added)
- d. Parliament would not have intended that the compliance regime could descend into a pot pourri of the Standard and various expert opinions. The latter scenario could very well eventuate – Elgas has 222's with the same features and may procure its expert opinion. From the LPG customers' perspectives, it would be odd if Genesis and Elgas each had different hazardous areas for the same cylinders; regardless, it is a correct, legal approach that is seesential.
- e. AECOM has introduced a concept of “**fair ventilation**” which is not defined and is different from the two defined concepts in the Standard of “adequate ventilation” and “inadequate ventilation.” This dovetails into the reason why expert views need to be specific to the location in question, taking into account in particular the ventilation, for one.
- f. Genesis' 222s are fitted with ullage valves and these valves have been used frequently in the past. There is a specific hazardous area for this scenario in AS 60079 for *in situ* filling with limited gas bleeding (via the ullage valves).
- g. AECOM and Genesis do not explain what the hazardous area is for an *in situ* filled cylinder at an inadequately-ventilated location. AS 60079 has answers for cylinders at inadequately ventilated locations – one for exchange cylinders (2 metre cylindrical shape), whereas the same answer applies to *in-situ* filled cylinders (3.5 metres, conical shape) regardless of whether the location is adequately or inadequately ventilated. Thus, if AECOM is correct, there are at least three options. Such a plethora of options is poor policy for WorkSafe to have “accepted.”
- h. In the past Genesis has had high failure rates with its AFLs. The risk that this continues, with Genesis' drivers defaulting to using the ullage valves has not been addressed. This risk has not been addressed by Genesis or AECOM. There is no evidence identified which suggests the behavioural change has occurred – in such circumstances, relying on a corporate policy is ill advised.
- i. Compliance certifiers need to rely on site-specific documentation, especially when it comes to technical or expert opinions. No legal reliance has been offered by AECOM and I very much doubt any will be offered. DGC would also expect to have a full indemnity tied to the reliance on the Genesis HA Assessment.

- j. WorkSafe only has an option to create a legally binding new hazardous area if it creates a safe work instrument. It has not done so and, therefore, any alleged support or acceptance from WorkSafe for the Genesis HA Assessment has no legal effect whatsoever. There is no reliance available for certifiers to anything WorkSafe does outside the legal channels such as safe work instruments.
 - k. Genesis fails to recognise that compliance certifiers perform an independent function under the regime - it is for certifiers to reach an independent decision at each location they are asked to audit. DGC's offers to Genesis and WorkSafe provide input into this issue have been wholly shunned by both organisations. Genesis' approach to this issue is fundamentally misaligned with the independent role certifiers are required by law to perform and it is no surprise that the outcome is highly unsatisfactory.
6. DGC's certifiers will not accept the Genesis HA Assessment. Other compliance certifiers ought to consider the implications in terms of their potential liability for negligence especially in light of the High Court's 2023 decision in *Tasman District Council*, where the Council was held to be negligent in relation to issuing a code of compliance following two negligent inspections. At a minimum, certifiers should ask for a full indemnity from Genesis. I doubt this will be offered for many good reasons.
 7. If WorkSafe has "accepted" the Genesis HA Assessment, the correct legal option is to consider issuing a Safe Work Instrument following full consultation with industry.
 8. I note that the AECOM report is unlikely to be reasonably considered as independent. AECOM has an ongoing business relationship with Genesis and it cannot therefore be regarded as independent. Genesis is the only party which instructed AECOM, it presumably paid for the report and it has not shared the terms of reference for the assignment and has not published the majority of the report. In such circumstances, scepticism is the prudent course.

C. Background – How the issues arose

9. I believe the specific hazardous area issues arose following an inspection that DGC conducted in March 2022 at a new installation (more than 1.5 tonnes of LPG) commissioned by Genesis at Te Rapa. DGC identified that there were sources of ignition within the 3.5 metre hazardous area and proposed the solution of erecting a vapour barrier. Genesis chose instead to fly up a certifier resident in the South Island to certify the location apparently on the basis that the applicable hazardous area was 1.5 metres. DGC complained to WorkSafe and raised the concern with Genesis that it was not appropriate for PCBUs to "certifier shop" to procure a location compliance certificate, especially in circumstances where there was a source of ignition inside the hazardous area.
10. I understand that at the time of the Te Rapa issue arose:
 - a. Genesis' 222s were invariably marked with beige stripes (evidently to indicate that the cylinders complied with HSNO COP 38);
 - b. Genesis' 222s did not comply with the requirements of HSNO COP 38 because of the existence of the ullage valves on all 222 cylinders;
 - c. At the time, ullage valves were the most frequently used manner of filling the 222's;

- d. There was a high failure rate with the AFLs which meant the Genesis drivers generally defaulted to using the ullage valves; and
 - e. Genesis had conflicting views internally about the required hazardous areas – the internal South island view was 1.5 metres, the internal North island view was 3.5 metres.
11. Genesis' letter to WorkSafe dated 15 July 2022 claimed there was industry uncertainty regarding hazardous areas, but then acknowledged:
- a. that its cylinders were marked with beige stripes;
 - b. that HSNO COP 38 had been "superseded" by the Regulations;
 - c. that the only example in AS 60079 was for *in situ* cylinders with limited gas bleeding which specified a 3.5 metre hazardous area; and
 - d. Genesis did not have an expert opinion to provide a first principles assessment to provide an answer different from the 3.5 metres specified in AS 60079.

The letter reads as one written by someone who has an answer that he didn't like and seeking some assistance from the regulator but, in any event, the letter conveys the organisation's lack of confidence about what the rules required (for a large part of its business) and its failed compliance by virtue of:

- a. non-compliance with HSNO COP 38 while it remained in force;
 - b. mislabelling its cylinders with beige stripes; and
 - c. adopting hazardous area for in situ filled LPG cylinders of 1.5 metres, without having a reasonable basis for doing so.
12. The factual position with regards to the failure rates of AFL valves and utilisation of ullage valves ought to be clarified by Genesis particularly as its entire argument for the Genesis HA Assessment is predicated upon there being no usage of the ullage valves and the completion of what was promised in the 15 July letter to WorkSafe.

"Genesis is of the opinion that an operational control would be adequate to prevent operation of the ullage bleed valve during filling of 222 cylinders. This will be accomplished by means of detailing in our 222 cylinder in-situ filling procedure that the ullage bleed valve may not be operated during filling and this practice will be reinforced with adequate training."

13. Genesis frequently claims its commitment to key ethical principles, including as written in the Genesis Letter:

Health and safety is fundamental to how Genesis Energy Limited (Genesis) operates and we have a strong focus on this across our business.

14. No business can have a fundamental way of doing things safely when it does not have a solid grasp of what the relevant fundamentals (including the rules) are. In my experience, compliance and safety is not a lottery but the product of knowledge and sound practices applying that knowledge. Without knowledge, one is more prone to be a clanging cymbal asserting a high standard without

truly understanding how it can be achieved. The most critical weaknesses in the entire hazardous substances' compliance regime stem from the ignorance of too many major market participants.

15. Among the many weaknesses is over-reliance by major market participants upon the opinions or decisions of small-time compliance certifiers with limited skills and poor understanding of regulatory requirements who are often “very strongly commercially encouraged” into issuing certificates. Major market participants such as Genesis will only evolve “fundamental” safety performance when they acquire and apply regulatory requirements independently of the compliance certifiers whom they tap on the shoulder to send certificates their way. The blind leading the ignorant is only a path to consistent failure.
16. In the last four months, we have identified more than ten non-compliant installations commissioned and supplied by Genesis for many years – the defects appear to us to be products of ignorance, lack of sound processes and recurring failures by the same certifiers. Had we not escalated the Te Rapa issues, I doubt that Genesis would have had any other catalyst to correct its practices. I am now not confident that it will because of the AECOM report and WorkSafe's acceptance of it. The one remaining independent control is the independent compliance certifier who follows the rules.

D. The Role of WorkSafe

17. I raised the hazardous area issues with WorkSafe several times after one of my colleagues made a complaint about the conduct of the South Island certifier. I argued that:
 - a. there was no reasonable basis for a hazardous area other than 3.5 metres not to have been applied at Te Rapa;
 - b. it is evident today that neither Genesis, nor the South island certifier, had any such reasonable basis to support their combined decisions to apply a hazardous area of less than 3.5 metres; and
 - c. the responsibilities of PCBUs and certifiers cannot be satisfied if there is not in existence at the time authority for key assumptions (hazardous areas) especially when there is specific answer in AS 60079.
18. Further, prudence must be assessed based upon the information available at the time decisions were made. As noted in section 2 above, the AECOM report is not a specific assessment of the appropriate hazardous area at Te Rapa and, therefore, the site has operated for 12 months without adequate due processes being followed by Genesis, in particular, in my opinion. My sceptical view is that this exercise involving AECOM has been undertaken to somehow mitigate Genesis' compliance failures over many years.
19. Events over the last nine months suggest strongly that WorkSafe did not have any researched answer regarding the appropriate hazardous areas. My OIA request sought all such documents and none was provided; therefore, I assume none exists. This issue thus fits into the paradigm that I have been concerned about for some time – how can WorkSafe perform its statutory roles when it does not have a strong command of regulatory requirements especially in the hazardous substances' regime. Hazardous areas are one of a handful of absolutely essential skill sets – how can WorkSafe not be truly expert in them?

20. If the Genesis Letter is accurate, notwithstanding that it does not have one document on the relevant topic or any internal document analysing the relevant issues, WorkSafe has “accepted the findings.” In any organisation in New Zealand with sound governance practices, this could never happen – there would have to be internal memoranda, internal committee or Board papers and likely independent advice which would create the due diligence folder inherent in any adequate decision-making construct. How does WorkSafe go about its work if it is not following due process – are decisions still being made by individual executives on the fly?
21. I do not believe it is WorkSafe’s role to opine upon such issues, in particular without industry consultation, including through consulting the LPG Association, other LPG operators, major LPG customers, compliance certifiers, electrical inspectors and, in particular, the Certifier Reference Committee that WorkSafe established ostensibly to provide input on issues such as this. It was not Genesis which first brought the issues to WorkSafe’s attention, it was DGC. WorkSafe was apparently willing to provide open dialogue with Genesis and to wholly exclude DGC, other certifiers and the Certifiers Reference Committee. Were I a member of that committee, I would be asking WorkSafe whether it has been established for optical reasons only; if not, why were members not consulted?
22. WorkSafe’s alleged (by Genesis) direct engagement only with Genesis fits with other concerns that I have regarding how WorkSafe regulates large PCBUs, in particular, and the petroleum industry more broadly. Those interactions from WorkSafe have hallmarks of kowtowing to industry, rather than performing its legislative role which is primarily an administrative one. WorkSafe must conclusively answer which of its two contradictory positions in relation to petroleum tanks is to prevail:
 - a. That certifiers must ensure they collate all relevant “dossier” requirements before issuing certificates for petroleum tanks (“the law prevails”). By extension, the petroleum companies must also comply; and
 - b. That the last five years of *laissez-faire* is allowed to prevail and the law does not have to be followed (“turn a blind eye to legal requirements”).

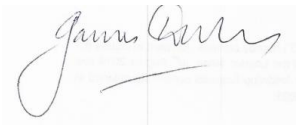
As with this LPG hazardous area issue, the petroleum industry issues are huge in terms of impact and have been in front of WorkSafe for years generally and from DGC specifically for three months.

E. Conclusion

23. Minister Wood and the WorkSafe CEO speak in the tongues of politicians and bureaucrats regarding “upstreaming the focus” of compliance in relation to health and safety responsibilities. I take this to mean prosecuting directors of PCBUs whose standards are found to be in breach. The regime does, of course, impose legal liabilities on management and directors for their failures to comply with their organisations’ health and safety compliance. Yet, when faced with profound non-compliance, in practice what we see is dithering failure and kowtowing to the large PCBUs, not unlike the same issue that has been inherent in the administration of New Zealand’s workplace health and safety laws in the events leading up to Pike River.
24. On 27 March, WorkSafe informed me that its “Regulatory Assurance Team received the correspondence circulated by Genesis on Friday and relied on that to make an informed decision to close the complaint” an outcome Genesis appeared to have been told about several days before it sent the Genesis Letter to WorkSafe.

25. Maybe some of the same names will resurface in the documents which the court has now ruled should be released in connection with WorkSafe's decision to not prosecute the CEO of Pike River. Are large PCBUs simply exempt from any enforcement action or prosecutions by WorkSafe? If that is the case, someone should tell Minister Wood who gave parliament a very different story.
26. On 8 January in a column in the Otago Daily Times, John Farrow wrote:
- By not offering evidence against Mr Whittall, it managed to secure \$3.41million reparation for the affected families. It must have done so with the best of intentions. However, in doing so it entered into a bargain to stifle the prosecution.*
- Let's hope that in the future, for the sake of all workers, WorkSafe puts its obligation to enforce compliance with Health and Safety legislation first.*
27. In relation to this Genesis hazardous area issue and in relation to the other large failures by the same PCBU, WorkSafe has failed to act prudently and has, once again, not put the legislation first. They are part of the repeating failures that were exposed with Pike River, repeated in the lead-up to Whakaari Island and occur much more regularly than anyone would dare to fear.

Sincerely



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