

ENVIRONMENTAL REGULATION: Self-Policing Environmental Management Systems

EMAS AND ISO 14001

EMAS is a “voluntary regulation” that establishes the requirements for environmental management systems which industries operating in the European Union can adopt. Based on British Standard 7750, EMAS was developed by the European Parliament, and was adopted by the European Union Council of Ministers. EMAS relates to site-specific industrial activity in Europe and its objectives are to (1) achieve and maintain “economically viable application” of best available technology, (2) promote continuous environmental performance improvements, and (3) provide relevant information to the public.

ISO is a Swiss-based, worldwide federation of national standards-setting bodies from 112 countries. The American National Standards Institute (ANSI), which is the United States’ ISO representative, is a federation of businesses and industries, standards developers, trade associations, labor unions, professional societies, and representatives from universities and governmental agencies. ISO is well known for having developed a series of international quality management/quality assurance standards in the early 1990s known as ISO 9000. ISO 14001 sets forth more general (*i.e.*, not site-specific) international consensus standards for environmental management systems to be used by both public and private sector organizations. ISO 14001 standards require (1) an environmental policy, (2) an implementation plan, (3) plan audits and (4) continual improvement of the plan. Unlike EMAS, ISO 14001 does not, *per se*, require compliance with environmental laws and regulations.

As between the two approaches, EMAS is generally deemed by regulators to provide a greater likelihood of regulatory compliance. To demonstrate conformance with EMAS, a company must obtain a third-party compliance audit. By contrast, an organization implementing an ISO 14001 environmental management system may self-certify compliance or may have it certified by an official “registrar.” ANSI and the Registrar Accreditation Board have established a National Accreditation Program that accredits and authorizes “registrars” to

conduct “conformity assessments” and certify that an individual entity has adopted and implemented an environmental management system that meets or exceeds ISO 14001 standards.

Third-party certifications increase the credibility of the management system to the extent that the registrar is credible. By contrast, self-certified or uncertified environmental management systems are given little weight by regulators. A recent study identified 5,698 certified ISO 14001 environmental management systems in Europe, 2,531 in Japan, and 520 in the United States. Comparable figures for certified EMAS environmental management systems were 3,045 in Europe, and none in Japan or the United States.

STATES PUSH REGULATING INNOVATION

Ironically, EMAS/ISO 14001 “regulatory innovation” in the United States is being pushed hardest by states. At least fourteen states have enacted legislation creating incentives (*e.g.*, regulatory flexibility, the right to cure discovered violations, and penalty mitigation) to encourage voluntary adoption of environmental management systems *if* such systems provide for regulatory compliance and disclosure of audit results for agreed upon “targets” and “objectives” (*i.e.*, “transparency”), and *if* results are achieved that exceed otherwise applicable obligations (*e.g.*, a commitment, for example, to undertake action on “unregulated aspects” such as energy usage and pollution prevention).

The state-led reform movement led to the Joint EPA/State Agreement to Pursue Regulatory Innovation in 1998 between EPA and the Environmental Council of States (ECOS). Proactive states include Pennsylvania, Illinois, Minnesota, North Carolina, Florida, California, and Wisconsin. Various states have adopted pilot programs providing for, variously, Green Tier Permits (Wisconsin) or Green Environmental Management System Permits (Oregon). The Wisconsin program led to a Memorandum of Agreement between the Wisconsin Department of Natural Resources and EPA implementing the “Wisconsin Environmental Cooperation Pilot Program” in February 1999.

Under the Wisconsin “cooperative agreements” program, state-company agreements can provide for penalty mitigation and the waiver or modification of permit procedures.

Oregon has adopted a similar innovative program that establishes new Green Environmental Management System Permits (GEMS). Such permits include Custom Waiver Permits, GEMS Participant Permits, GEMS Achiever Permits, and GEMS Leader Permits. Oregon’s law allows trading increasing regulatory incentives for moving up the “Green Permit” ladder. The Oregon Department of Environmental Quality is currently negotiating a Memorandum of Agreement with EPA similar to the agreement between Wisconsin and EPA.

SIGNIFICANCE OF SELF-POLICING

Both state and federal regulators candidly admit that the current command and control system is outmoded and imperfect; they also see the opportunity to trade regulatory flexibility for enhanced environmental benefits. This position is consistent with the federal environmental criminal sentencing guidelines (which provide that culpability for the violation of environmental regulations can be mitigated where the offense occurred despite an “effective program” to prevent and detect violations of law) and the due diligence provisions of EPA’s 1995 environmental audit policy. *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations* (1995).

Pursuant to the sentencing guidelines, an “effective program” is defined as one that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct. Failure to prevent or detect an offense does *not*, by itself, mean that the program was not effective. The hallmark of an effective program is that an organization exercises due diligence in seeking to prevent and detect criminal conduct by its employees and other agents by, for example, taking the following steps:

- establishing compliance standards and procedures reasonably capable of reducing the prospect of illegal conduct;
- assigning overall responsibility for compliance oversight to specific individuals within high-level personnel of the organization;
- exercising due care not to delegate substantial discretionary authority to individuals whom the organization knew, or should

have known through the exercise of due diligence, had a propensity to engage in illegal activities;

- taking steps to effectively communicate standards and procedures to all employees and other agents (*e.g.*, via publication or by requiring participation in training programs);
- taking reasonable steps to achieve compliance with its standards (*e.g.*, establishing an auditing system reasonably designed to detect illegal conduct and publicizing a system for reporting of illegal conduct); and consistently enforcing standards through discipline, including discipline of individuals responsible for the failure to detect an offense.

To be “effective,” an EMAS or ISO 14001 environmental management system should both provide for achieving regulatory compliance *and* meet the requirements for “due diligence” under federal sentencing guidelines and EPA’s environmental audit policy.

A NEW WORLD ORDER?

Major purchasers of goods and multi-national corporations increasingly require that their suppliers have an environmental management system that conforms to international standards. In addition to multiple states, the reform movement involves such institutions as the Wharton School of Business, the University of Wisconsin’s LaFollette Institute, the Brookings Institution, the University of North Carolina, Harvard University, MIT, Carnegie Mellon, the University of Maryland, and Tufts University. As a result, it is too late to put the genie back into the bottle.

The key moral to this situation is this: Opportunities exist *now* to leverage self-policing environmental management systems in order to achieve desirable regulatory flexibility *if* a business is willing to be bold, imaginative, and realistic in seeking such opportunities.

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