American Bar Association

ADOPTED BY THE HOUSE OF DELEGATES

August 6-7, 2001

Environmental Law (Report Nos. 108)

RESOLVED, That the American Bar Association recommends that federal, state, local and territorial legislative bodies, departments and agencies responsible for environmental protection adopt and implement legal and policy incentives designed to support and encourage businesses, governmental agencies, and other entities subject to environmental regulation to implement voluntary environmental management systems ("EMS").

FURTHER RESOLVED, That the American Bar Association encourages federal, state, local and territorial legislative bodies, departments and agencies as well as businesses, governmental agencies and other entities subject to environmental regulation to recognize and champion voluntary EMS as an increasingly important means of enhancing compliance assurance and environmental stewardship supplementing existing and future environmental control regulations and enforcement.
An environmental management system ("EMS") is intended to systematically identify, manage and meet (or exceed) an organization's environmental obligations. EMS have been adopted by an increasing number of organizations choosing to pursue not only compliance with existing regulations, but also more far-reaching environmental initiatives and objectives. EMS are a significant feature of the shifting focus in environmental policy from external "command and control" regulation toward instruments that recognize the significance of voluntary efforts, partnership programs, and process-based approaches.

An EMS can be used to integrate environmental considerations and responsibilities into the day-to-day policies and operations of organizations. In some cases, an EMS distributes responsibility for environmental risk identification and control to a much broader pool of human resources within the organization, rather than simply to environmental professionals. An EMS can integrate environmental management directly into firms' decision-making processes and operations. A growing number of firms also are integrating health and safety considerations into such systems.

An EMS generally consists of the following main elements: (i) a policy statement; (ii) procedures for identifying legal requirements and environmental issues; (iii) measurable environmental objectives and performance targets; (iv) monitoring, measuring and preventive/corrective action procedures; and (v) senior management reviews of system effectiveness and overall environmental performance. Under some EMS approaches, such matters as process optimization and pollution prevention are viewed as important to financial as well as environmental performance. Two of the most prominent EMS models, ISO 14001 and the European Union Eco-management and Audit Scheme, or "EMAS," require not only a commitment to compliance but also a commitment to continual improvement.

Existing Incentives for EMS Implementation

A number of incentives already exist for organizations to implement EMS. At the outset, systematically identifying and meeting one's environmental obligations will generally produce better performance, including compliance performance, than not managing them at all. The most important incentive for implementing EMS is simple: like any other management system, EMS are intended to help organizations achieve good performance efficiently. This is a direct incentive on the compliance side: an effective EMS makes it less likely that an organization will be in non-compliance and more likely to quickly detect and correct non-compliance if and when it occurs. This concept has been reflected in federal and state enforcement policies for a decade.

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1 An EMS can be implemented not only by firms engaged in private enterprise for profit but also by governmental entities, colleges and universities, and other types of organizations whose operations have the potential to impact the environment.
Further, many industrial organizations have internalized some concept of environmental consciousness as a form of social or civic responsibility. As well, higher levels of environmental protection often directly improve product quality and bring desired enhancements to an organization’s public image. The fact that consumers, suppliers, lenders, insurers, and host communities have heightened environmental expectations, and increasingly make decisions according to those expectations, provides incentives to companies to develop more effective and voluntary internal control systems. Furthermore, the threat of tort liability—even when regulations have been fully met—similarly encourages companies to implement internal controls for assessing and improving the environmental impacts of business activities.

**EMS Implementation at Home and Abroad**

EMS-based approaches to environmental performance have met with success abroad and in the United States. For example, companies in Europe, Asia, South America and the U.S. have implemented and in some cases certified systems in accordance with ISO 14001 (almost 20,000 certifications have been issued as of December 2000), one of the international environmental standards developed by the Geneva-based International Organization for Standardization. The European Union’s EMAS is similar, though it requires that companies prepare and publicly disclose statements concerning the contours of their EMS and their performance in addition to the planning-through-review elements laid down by ISO 14001. Such statements must also be verified by third parties to ensure compliance with EMAS. Similar EMS-based efforts have been the subject of recent legislation in Australia.

In the U.S., the federal government has encouraged EMS since the early 1990s, with various enforcement discretion and penalty policies that encourage organizations to implement effective compliance assurance. More recently, the U.S. Environmental Protection Agency (“EPA”) has instituted different pilot projects involving EMS with a broader focus than compliance assurance, such as the Performance Track, the Environmental Leadership Project and EPA Region 1’s StarTrack. The appeal of ISO 14001, EMAS, and other EMS-related programs highlight the importance of EMS in an increasingly global economy. More and more firms are requiring as a condition of doing business that firms on the other side of the table have effective internal control systems in place. As globalization continues to transform the nature of commerce, EMS will become increasingly important to the competitiveness of U.S. businesses.

Accordingly, the American Bar Association (“ABA”) should recommend that federal and state regulators encourage the implementation of environmental management systems.
Concerns about EMS-based Approaches – Accountability and the Status Quo

For some commentators, the potential that there may be reduced reliance upon traditional monitoring and enforcement controls in response to EMS-based approaches raises concerns about attenuated accountability and increased potential for abuse. The concern is that industry compliance with environmental requirements turns upon the threat of regulatory enforcement—absent strict monitoring and the threat of penalties for non-compliance, a cost-benefit analysis of environmental performance (compliance vs. non-compliance) gives businesses little reason to be conscientious environmental actors. Other commentators worry that EMS are implausible policy tools given that businesses have invested considerable resources in adjusting to the current regulatory regime. According to this view, regulated entities are stakeholders in the regulatory status quo and have little incentive to voluntarily add an EMS to their list of responsibilities.

None of the existing EMS models, particularly the prominent ones such as ISO 14001, call for reduced regulatory oversight. However, by systematically and effectively managing a broad range of environmental obligations, including some not currently regulated, EMS-based approaches may reduce the need always to wed environmental performance to the threat of regulatory sanctions.

More importantly, promoting EMS as an effective environmental policy tool does not require abandoning traditional regulatory methods or relaxing environmental performance standards. EMS will always be a supplement to, rather than a substitute for, regulation. By definition, EMS are simply management tools that do not themselves contain substantive requirements. Those requirements, or environmental obligations, are established by governments, customers, the public, and other stakeholders. EMS will not replace regulatory requirements for compliance with laws. Indeed, EMS are a mechanism for improved compliance assurance by encouraging systematic and consistent, rather than merely episodic, compliance. The ABA should recommend that EMS be implemented as a complement to traditional regulatory mechanisms.

Advantages of Incentive Programs for EMS Implementation

An EMS-based approach encourages companies to devise flexible, cost-effective methods for improving environmental performance. Any incentives should not promote a particular type of EMS, but rather encourage each company or facility to select and implement the EMS that management concludes is most appropriate for that company or facility. At the same time, combining EMS-implementation approaches with traditional regulatory mechanisms could help reduce agency oversight costs and allow regulators to allocate limited monitoring and enforcement resources where they are most needed.

Furthermore, as both regulators and regulated entities are beginning to realize, highly prescriptive command and control regulations may not always be the best means of fostering innovative techniques for improving environmental performance. Providing incentives for an EMS-based approach to environmental regulation may help overcome technological hurdles to further environmental gains. By granting companies the flexibility to identify and devise appropriate solutions to environmental problems themselves, EMS-based approaches may prove an effective means of developing innovative solutions for the challenges and costs associated with advanced stages of pollution prevention and correction.
The provision of incentives to companies to implement EMS should expand the list of available environmental policy tools rather than dismantle traditional enforcement mechanisms. At the same time, it is important to recognize that the potential for innovation and cost-effectiveness associated with EMS may stem in part from the voluntary character of EMS. Incorporating EMS implementation into a mandatory regulatory scheme would undermine the voluntary, entrepreneurial character of EMS and might provoke resistance to EMS on the part of companies in the form of general resistance to more regulation.

Critical Challenges

The belief that managing a function or process will improve performance is a foundation of virtually all management activity. This has resulted in management systems covering most significant organizational activities (e.g., financial, production, services, human resources, quality). Therefore, it should not be controversial to conclude that systematically identifying and managing environmental obligations will likely produce better environmental performance than will addressing these issues in a non-systematic fashion. However, before public policy (e.g., legislation and regulations) can be changed meaningfully in light of implementation of EMS by organizations, the relationship between environmental performance and EMS should be defined more precisely. Some of the key factual issues that bear further examination and evaluation are listed below.

- Do organizations with a defined EMS produce better environmental performance than those without?
- Are some types of management systems more effective in promoting environmental protection than others?
- Is an EMS approach more conducive to improvements in environmental performance in some areas rather than others?

Answers to these and other questions would allow fact-based public-policy decisions about EMS.

Countless organizations in the U.S. have been implementing various types of EMS for over a decade. The reasons vary, including improving efficiency and economic performance, satisfying customer requirements, compliance assurance and liability management, and improving brand image. Many believe that implementing an EMS is in organizations' self-interest because it will improve economic, overall environmental and compliance performance. Therefore, in designing any incentives, a threshold issue is what role government incentives should play in encouraging organizations to implement EMS. For similar reasons, it is important to ensure that any government action does not undercut either existing private incentives to implement EMS, or traditional government oversight functions. Some of the more significant issues and points meritting further consideration in this regard are referenced below.

- If it is already in an organization’s self-interest to implement an EMS, what incentives could, and should, government provide in order to encourage this behavior?
Would providing EMS implementation incentives raise fairness questions? For example, should a facility with an EMS receive regulatory incentives that are not available to a facility without an EMS but with similar or even better performance? If a facility has fully complied with its permits, should it have to implement an EMS and attain "beyond compliance" performance to obtain "fast-track" permit service?

Is the issue one of creating incentives for organizations to implement EMS, or is it rather a question of whether EMS approaches to achieving environmental performance can provide a basis for different regulatory strategies? This would change the focus of discourse from what should be done to encourage organizations to implement EMS to what, if any, changes in public policy should be made in light of the fact that organizations are already implementing EMS.

What effect will government incentives have on the nature of EMS that are being implemented? Some popular EMS models, e.g., ISO 14001, have been developed outside of the regulatory context. Involving federal, state and local government in the creation of incentives may result in regulatory bodies getting involved in establishing criteria for what constitutes a "good" EMS. Further, the more organizations say that they "want" from the government "in exchange for" implementing EMS, the more regulators and the public may "want" in return. The potential impact of such developments should be considered.

Can regulators provide meaningful incentives that will increase the rate of EMS implementation? The complex, multi-jurisdictional, multimedia regulatory structure makes the provision of meaningful incentives that will actually change organizational behavior especially difficult. An incentive program aimed at EMS implementation presupposes that, without such incentives, some firms will not proceed with EMS implementation. It remains unclear precisely what kind of incentives would motivate organizations not otherwise inclined to implement EMS to do so -- this is a different issue from providing recognition to high-performing organizations that already have implemented EMS.

Do current regulations and/or policies create barriers or disincentives that government might eliminate or reduce in order to encourage the use of EMS?

Finally, providing meaningful regulatory benefits in exchange for implementing EMS will lead many to question the extent to which such benefits should be accompanied by regulatory and/or public oversight. This is particularly true if any of the incentives would change existing opportunities for public involvement in decisions about environmental issues or the disclosure of information about environmental performance. The balance between incentives and oversight should be considered if organizations are to be encouraged to change their behavior.

**Conclusion**

The ABA, then, should recommend the establishment of voluntary EMS-based programs, which would operate in conjunction with traditional monitoring and enforcement techniques as part of a comprehensive regulatory and internal process-based approach to improving environmental
performance. This approach would combine appropriate incentives for developing proactive environmental strategies via EMS with traditional monitoring and enforcement techniques to ensure that such systems are effective. Such a regime would safeguard past environmental gains while promoting innovative, forward-looking approaches to the environmental challenges of the future.

Respectfully Submitted,

Robert L. Rhodes, Jr., Chair
Standing Committee on Environmental Law

Theodore Louis Garrett, Chair
Section of Environment, Energy & Resources

August 2001
1. Summary of Recommendation(s).
Recommends that government departments and agencies responsible for environmental protection adopt and implement legal and policy incentives designed to support and encourage businesses, government agencies and other entities subject to environmental regulation to carry out voluntary Environmental Management Systems ("EMS"), and encourages all of these entities to recognize and champion EMS as an increasingly important means of enhancing compliance assurance and environmental stewardship supplementing existing and future environmental control regulations and enforcement.

2. Approval by Submitting Entity. Approved by SCEL following its winter meeting in February 2001 and by the Section Council at its meeting of April 29, 2001.

3. Has this or a similar recommendation been submitted to the House or Board previously?
No

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?
The proposed resolution is generally consistent with several existing ABA policy positions that seek to improve environmental decision making and environmental protection, including the policy position adopted by the House of Delegates in February 1995 that calls for greater public participation in environmental laws and the policy adopted by the House in February 1991 that calls upon legal organizations to participate in voluntary recycling programs. No existing ABA policy positions bear directly on environmental management systems.

5. What urgency exists which requires action at this meeting of the House?
While the matter is not "urgent," legislation already has been introduced. Further, the earlier the organized bar calls on agencies to encourage EMS by the regulated community, (a) the sooner the country may see improved environmental performance and hence clearer water, air and soil. There is no reason to delay addressing this matter; (b) the more likely that ABA can become involved meaningfully in future efforts in this arena.

6. Status of Legislation. (If applicable.)
Legislation has been introduced in the 107th Congress that would encourage companies to institute environmental compliance management systems and undertake voluntary environmental self-evaluations.
by providing such companies with liability exemptions. H.R. 352, introduced by Rep. Joel Hefley (R-CO) on January 21, 2001, would grant administrative, civil, and criminal immunity to companies that voluntarily disclose violations of state or federal environmental laws that were discovered through voluntary environmental self-evaluations or through environmental compliance management systems. The liability exemptions would apply only to companies that were attempting to remedy the violation and that met certain other conditions. No relief would be available, however, if the violations discovered were part of a continuing pattern, the company was acting fraudulently, or the disclosure was made for the purpose of avoiding penalties in an existing or imminent investigation. H.R. 352 was referred to the House Agriculture, Energy and Commerce, Judiciary, Resources and Transportation and Infrastructure Committees, although no hearings have been scheduled yet on the measure.

7. Cost to the Association. (Both direct and indirect costs.) None to our knowledge.

8. Disclosure of Interest. (If applicable.)

There are no known conflicts of interest on the part of the proponents of this resolution.

9. Referrals. Referred both during drafting stages and upon completion to: Sections of Administrative Law & Regulatory Practice; Business Law; Environment, Energy & Resources; Individual Rights & Responsibilities; International Law & Practice; Litigation; Public Utility Law; Real Property & Probate; State & Local Government; Taxation; Science & Technology; Tort & Insurance Practice; Young Lawyers Division; and Governmental Affairs Office.

10. Contact Person. (Prior to the meeting.)

Robert L. Rhodes, Jr.
Holland & Knight
2099 Pennsylvania Avenue, NW
Suite 100
Washington, DC 20006-6801
Tel. 202-457-5943
Fax 202-955-5564
E-mail: rrhodes@hklaw.com

11. Contact Person. (Who will present the report to the House.)

Robert L. Rhodes, Jr.
Holland & Knight
2099 Pennsylvania Avenue, NW
Suite 100
Washington, DC 20006-6801
Tel. 202-457-5943
Fax 202-955-5564
E-mail: rrhodes@hklaw.com