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Environmental Management Systems
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Environmental Management Systems—Managing Cost-Effectively While Assuring Compliance

Frank B. Friedman

This article addresses how and why environmental management systems (EMS) work or do not work, what is needed for a successful system, and what managers and in-house and outside legal counsel can do to improve the odds. An EMS is a formal systematic process for making decisions expected to yield consistent, predictable results. It does not come out of a "cookie cutter," but needs to be designed to work for each specific company and its culture. An EMS designed strictly for legal compliance is a poor management system, but a comprehensive management system that works with the corporate culture will assure compliance. This article describes the basics of an EMS, the importance of integration of environment, health, safety, process safety and security, the role of program reviews and activity value analysis in analyzing the effectives of a system and the integration of sustainability concepts. It also raises cautionary flags with respect to ISO 14001 and particularly ISO 14001 certification.

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Environmental Management Systems in Context

An environmental management system (EMS) does not come out of a "cookie cutter." An EMS should be designed to work for each specific company and its culture. Similarly, if an EMS is designed strictly for legal compliance, it is a poor management system. This is the trap that too many lawyers fall into in working with companies on compliance. They view the issues as strictly legal issues, not management issues with legal implications. A comprehensive management system that works with the corporate culture will be respected and followed within that culture. Compliance is only one

aspect of that system, but compliance will be obtained with such a system.[1]

A management systems approach to environmental management is equally applicable to safety and process safety. Indeed, many companies now manage these functions together. If for example, you have a good process safety management program in place, with a clear understanding of your process, process flow and risks, as well as a well-documented management of change program, you probably have resolved most of your significant environmental issues in a manufacturing setting. Today, these same techniques are being applied to security as more environment, health and safety (EHS) departments are also being assigned the security function.

There are many complex issues that are of concern to the environmental manager, and in many cases to his or her lawyer. The environmental department has not been immune and in some cases has suffered more cost and personnel reductions than other departments in the drive to improve the bottom line, as well as downgrading of the importance of the function.[2] In many instances, environmental managers have difficulty quantifying longer–term values in cultures that require "hard dollar" justifications and a need to meet this quarter's numbers. At the same time, there are new issues such as environmental justice and corporate stakeholders pressing for greater transparency and improved corporate governance that cannot be handled easily with staffs or personnel that are strictly managing for day-to-day compliance. It is hard to deal with sustainable development concerns or whether ISO 14001 makes sense for your company if your staff and budget is limited to fire fighting. In too many instances, companies may be talking about sustainable development, but their facilities and management systems have deteriorated.

The decentralization effort in many companies has exacerbated the traditional tensions between corporate staff and business units.[3] In many companies, the perceived difficulties of "committing truth" at the corporate staff level are even greater for the EHS professional at the operational level whose salary and bonus, in many instances, is paid by the operational person most intent on being able to show progress toward bottom line objectives.

Conversely, there are many companies that have excellent management systems and are attuned to what is going on in the world, including some of the regulatory trends from Europe. Generally, companies that manage their business well, also do a good job in managing the EHS function. Similarly, developing a good cost-effective systematic approach to EHS management, helps drive improved systems on the business side and can significantly improve the bottom line. It is in that context, namely that a good cost-effective EMS can improve the bottom line while

[1] See generally, Friedman, *Practical Guide to Environmental Management* (9th edition, 2003, Environmental Law Institute, Washington, D.C.). The issues and concepts described in this paper are covered in detail in that book. See also Friedman, "Management Systems and Forest Products," 10th *Section Fall Meeting*, Portland, Oregon, October 9-13, 2002 at pages 93-104.

[2] Note that a senior Department of Justice official has advised that when there are issues within a company, one of the first things he looks at is to see if the senior EHS position is buried in the organization or reports at a high level, preferably to the CEO.

[3] Corporate staff is invariably viewed as a "nuisance" to entrepreneurial businesses, regardless of the capability and political skills of the staff. This reality is not lost on EHS professionals who are faced with the problem of what they perceive as trying to "commit truth." Their advice is often rejected by managers that "don't know what they don't know" and lash out in frustration at the EHS manager. This "hunker-down" mentality of avoiding being the "Persian messenger" is present in many EHS Departments. See Richard MacLean and Frank Friedman, "Green Arthritis", 17 *Environmental Forum* 41 (November/December 2000). This issue is also the subject of an ongoing study by the Center for Environmental Innovation and the Boston University School of Management in which the author participates.

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maintaining compliance, that this paper is addressed.

The Differences Between Systems and Codes

There is considerable misunderstanding as to what is an EMS. In a critique of an article that claimed that a study of the chemical industry's Responsible Care™ program concluded " the use of an EMS does not predictably lead to better environmental performance"[4] it was noted that:

> "Responsible Care™ is a code of practice" while an "EMS is a formal systematic process for making decisions expected to yield consistent, predictable results. It is institutionalized through its integration in the culture of the organization.… It must look at the totality of the organization's interactions with the environment and have a process in place to prioritize and focus on those that are most important to the organization.… It must contain a continual feedback and learning loop."

It was also noted that "compliance-oriented" EMSs "diminish" a key value of an EMS, the requirement that the organization look within itself and determine its own values and commitments."[5]

Sustainable Development as Part of Management Systems

Similarly, an effective EMS can and should include "sustainable development" concepts. However, as with the difference between codes and management systems, there is considerable confusion as to the meaning of "sustainable development." The standard definition of "sustainable development" assumes that present development must not compromise "the ability of future generations to meet their own needs."[6] Another definition recognized by the thirty-nine U.S. multi-national corporations that are members of the Global Environmental Management Initiative (GEMI) as "more aspirational and results oriented than the previously cited Bruntland definition,"[7] is "Sustainable development is about ensuring a better quality of life for everyone, now and for generations to come."[8]

Sustainable development is generally viewed to encompass the entire panoply of social policy issues.[9] Besides the definition of "sustainable development" previously cited, which is the common definition of sustainable development and comes directly from the Brundtland Report,[10] the Brundtland Commission also added that the concept of sus-

[4] Richard P. Wells, *Misunderstandings on What EMSs Are*, 17 *Environmental Forum* 4 (July/August 2000).

[5] *Ibid.*

[6] World Comm'n on Env't and Dev., *Our Common Future* 43 (1987).

[7] *Exploring Pathways to a Sustainable Enterprise: SD Planner, A Sustainable Development Planning Tool, User Guide*, GEMI 2002, p. 1.This management tool is a very effective technique for checking where a company stands with respect to a variety of generally accepted elements of sustainable business practices. It is available without charge from GEMI. www.gemi.org

[8] *Ibid.*

[9] John C. Dernbach, "Sustainable Development as a Framework for National Governance," 49 *Case Western Reserve Law Review* 1, 17 (Fall 1998). This article is by far the best and most comprehensive analysis of the sustainable development model. A book edited by John Dernbach, *Stumbling Toward Sustainability* (Environmental Law Institute 2002) attempts to detail where the U.S. stands on sustainable development at this time, through thirty-two chapters covering a wide-variety of subjects.

[10] The UN General Assembly formed the World Commission on Environment and Development "to examine the relationship between development and the environment." Dernbach, *supra*, note 9 at p. 18. The Commission was headed by the Norwegian Prime Minister, Gro Harlem Brundtland and the report which was issued in 1987, *Our Common Future*, is commonly known as the Brundtland Report. The Brundtland Commission "found that the four basic components of development-peace and security, economic development, social development and proper governance-require environmental protection." Dernbach, *supra*, note 9 p. 19.

tainable development contains within it two key concepts. These concepts are "the concept of 'needs,' in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs."[11]

The International Chamber of Commerce created a "charter for sustainable development" in 1990 as a guideline for the environmental management of world business.[12] The many U.S. based multi-national companies that are part of GEMI have endorsed this Charter. The Charter states that:

> *Corporate priority:* To recognize environmental management among the highest priorities and as a key determinant to sustainable development; to establish policies, programmes, and practices for conducting operations in an environmentally sound manner.

The following suggests an approach for an effective EMS that would also encompass industry codes, sustainable development and systems concepts of ISO 14001, without necessarily requiring ISO 14001 certification.

Policy, Core Values and Directives—The Basis for a Management System[13]

The Policy and Core Values are designed to catalyze the changes that: (1) recognize a broad-based environment, health and safety management system; (2) provide assurances of compliance with law, regulations and government programs while limiting corporate involvement in today's decentralized organization; and (3) establish accountability and acceptable modes of corporate governance throughout the organization.

The objective is that each business unit within a company will have systems in place and programs designed to meet fundamental corporate requirements. Each business unit is generally free to develop systems and programs to meet these requirements in its own way. The critical corporate documents are: (1) an Environmental, Health and Safety Policy (which meets regulatory needs and establishes accountability within the business units); (2) a statement of Core Environmental, Health and Safety Responsibilities of Employees and Contractors; and (3) Corporate Directives, designed to establish the minimum requirements for each business unit such as an audit program, in order to meet the required elements contained in the Environmental, Health and Safety Policy.

In other words, the Policy is the equivalent of a constitution. The Core Values, which each employee and employee of contractors is required to sign acknowledging that they have read and understood them, explains the basic responsibilities of managers, employees and employees of contractors under this constitution. The Directives are the laws. Each business unit writes its own regulations (procedures) to comply with the constitution and laws.

Environment, Health, and Safety Policy

An effective Policy[14] includes language that meets:

- Regulatory needs such as the Department of Justice Policy on Criminal Prosecutions, EPA Audit Policy, OSHA standards, and other agencies' understandings of appropriate policies.
- Clearly establishes accountability at the business units. As part of that accountabil-

[11] Dernbach, *supra*, note 9 at p. 21 and note 105.

[12] For a copy of the principles developed by the International Chamber of Commerce, see Friedman, *supra*, note 1 at pp. 158-159, footnote 281.

[13] These concepts are described in detail in Friedman, *supra* note 1.

[14] See Appendix D in Friedman, *supra* note 1 at page 455 *et. seq*.

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ity, certain "required elements" of a management system, which are auditable, are described in the Policy. Among the systems that should be included are:

a. Risk Management;

b. Maintenance;

c. Recordkeeping;

d. Communication and reporting;

e. Assessment;

f. Evaluation of independent contractors; and

g. Organizational planning and operational evaluation of health, safety and environment related risks.

As noted previously, the business units are free to develop their own procedures as long as they are consistent with the Policy. The Policy also makes clear that "compliance" is not just compliance with law, but also compliance with company policy, directives and standards.

Core Environmental, Safety and Health Responsibilities of Employees and Contractors

This statement is distributed in pamphlet form throughout the entire company to all employees, contractors and employees of contractors. The document "describes the core environment, health and safety (EHS) responsibilities that apply to all employees and contractors in conducting their day-to-day activities while working at the company's facilities and operations."[15] It also communicates the company's commitment and describes in general the relevant policies, directives, standards and procedures in order that every manager, employee and employee of contractors has at least been provided with a basic overview of the importance of EHS and what are each person's commitments and responsibilities.

Employee and Contractor Responsibilities

The basic environment, health, and safety responsibilities, which apply to employees and contractors can be summarized as:

1. Understand your job responsibilities and your role in implementing company policies, directives, standards and procedures;
2. Conduct your day-to-day activities in a manner which complies with all applicable company and legal requirements and promotes safety and protection of human health and the environment;
3. Communicate information on EHS issues or incidents to your supervisor and others in the company, as appropriate;
4. Be truthful, accurate, and complete in maintaining records, submitting documents, and making statements and reports to company personnel, government agencies, and others; and
5. Cooperate with the company's EHS audit teams, other EHS personnel, government agencies and others.[16]

Additional Responsibilities of Management

In addition to the above, supervisors and other managers in the company must work with the EHS professionals assigned to their organization to fulfill the following additional responsibilities:

1. Identify the specific EHS responsibilities which apply to your employees;
2. Determine that personnel at company facilities have received environmental, health, and safety training commensurate with their job responsibilities or needs and the requirements of this Policy;
3. Ensure sufficient training is conducted so that employees may uphold their EHS responsibilities;

[15] See Appendix F in Friedman, *supra*, note 1 at p. 463, *et. seq.*

[16] Friedman, *supra*, note 1 at p. 465.

4. Identify EHS issues and be open to the concerns of employees;
5. Develop and implement action plans to resolve identified EHS issues by taking those actions which may be necessary and consistent with the company's EHS commitment;
6. Communicate identified EHS issues and their resolution to appropriate members of the organization, especially employees;
7. Provide adequate consideration of EHS factors throughout the Company's planning and operational activities;
8. Develop and implement programs designed to prevent the occurrence of EHS problems and reduce short and long-term risks; and
9. Ensure checks and balances control and discourage behavior and activities which may undermine the company's commitment to EHS matters.[17]

Corporate Directives

Corporate Directives tell management who does what and how often. These documents do not tell the organization how to perform tasks. The directives explain what the corporation has in mind in the broad language of the Policy. In essence, they establish accountability throughout the organization for developing and implementing systems and programs which meet the "required elements" contained in the Policy, which are in turn based on the guiding principles, also contained in that Policy. Recommended guiding principles include: protection, performance and compliance.[18]

Compliance Assurance Letter

A Compliance Assurance Letter is a very useful technique to ensure that each business unit is doing what it should in managing the EHS function. The president of a business unit is delegated substantial responsibility. The Compliance Assurance Letter, which the president of each Business Unit would be required to sign annually and submit directly to the General Counsel (with eventual submission to senior management and the Board, with a copy to the head of EHS), is a comprehensive document providing a basis for ensuring a substantial portion of the accountability that must go with that responsibility. However, while the Compliance Assurance Letter needs to be coupled with other systems discussed in this paper, it is by its nature the most critical tool for providing the necessary corporate assurances that management systems are functioning effectively.

Many companies have general compliance letters, but these letters to be effective should include details such as processes developed and implemented to further compliance with applicable EHS regulatory requirements and company policies; the status of audit findings; and investigation processes for all significant EHS incidents and the implementation of measures to prevent their occurrences. Here, again, the focus is systems in place. A business unit head would also want similar letters from those reporting to him/her in order to assure that appropriate due diligence has taken place. This approach is not very different from Sarbanes-Oxley,[19] but is designed not only for compliance but to provide further assurances that systems are in place and working effectively. It is not only a compliance tool, but also an effective management tool.

The Compliance Assurance Letter also accomplishes the purpose of bringing forward to management and the Board those issues that may need immediate attention and allows management and the Board to understand

[17] Friedman, *supra*, note 1 at p. 466.

[18] Friedman, *supra*, note 1 at p. 467.

[19] Sarbanes-Oxley is a recent piece of U.S. federal legislation that was passed in the wake of a variety of U.S. corporate scandals. It is designed to improve disclosure and credibility of information for shareholders of publicly traded companies. It also requires CEO certification in many instances.

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what actions, including funding, may be necessary for correction and to provide appropriate capital through the budget process as may be necessary.

Overview of ISO 14001 and Determinations to Certify or Not Certify—Political and Strategic Issues

ISO 14001 is widely touted as the basis for an EMS. ISO 14001 describes principles that are "no brainers" for inclusion in an EMS.[20] They are:

- Setting and documenting quantifiable environmental targets and objectives;
- A program for meeting objectives and targets (an environmental management program);
- Providing adequate resources, roles, and responsibilities within that system;
- Documented procedures to control operations with identified significant environmental aspects;
- Procedures for identifying and responding to accidents and emergencies;
- Broad training requirements (beyond those legally required in the United States);
- Procedures for internal communication;
- Communication of relevant environmental procedures to suppliers and contractors;
- Documentation of each element of the management system; and
- Document control system to ensure that documents are maintained, accessible and periodically reviewed.

However, U.S. industries are still, as a whole, skeptical of the value of ISO 14001 certification, but *not* of the value of environmental management systems. Most still take the position that unless there is a strong business justification, there is limited if any value in improving management, obtaining favors from government agencies, or credit with the public by obtaining ISO 14001 certification. There is also a danger in getting caught up in the paperwork and not in the process, having manuals on the shelf, which may not be effectively utilized. If strong environmental management systems are in place and they are "functionally equivalent" to ISO 14001, this is usually sufficient.[21] Moreover, from a strategic standpoint the same companies feel that rather than spend the time and money on ISO 14001 certifications, they should assure that their environmental management systems are strategically based. They should be focused not only on the basics, but also on emerging issues such as sustainable development and global warming that may have significant to profound impacts on future profitability.

There are many companies and regulators, particularly in the European Union (EU) and Asia, who view ISO 14001 as a "magic bullet." For a while some U.S. regulators shared this view, but this infatuation seems to be passing. However, it is useful for purposes of understanding the differences in pressures to certify, to understand some of the historical differences between U.S. and EU regulatory regimes. As a generalization, virtually all-European regulatory systems are technically driven, not legally driven. The regulations and statutes are nowhere near as detailed as in the U.S. Nor are there the punitive aspects of enforcement that are the hallmark of U.S. environmental law. Technical people, not lawyers, normally resolve issues. Citizen suits are limited.

[20] Friedman, supra, note 1, p. 290, et. seq.

[21] For a detailed look at certification programs including ISO 14001, Responsible Care and the American Forest & Paper Association's Sustainable Forestry Initiative see Errol E. Meidinger, "Environmental Certification Programs and U.S. Environmental Law: Closer Than You Think", 31 *ELR* 10162 (February 2001).

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Another critical factor is the lack of transparency in most European regimes. Detailed data is easily available to both the public and competitors in the U.S., but not in Europe. A good example of this is the differences between EMAS (Eco-management and Audit System) Regulation and EPA policy concerning disclosure of audits in the United States.

Parenthetically, EMAS revisions are moving ahead to include ISO 14001 as part of EMS requirements. In essence, the distinctions between ISO 14000 and EMAS are rapidly evaporating. "… The EMS component of EMAS can now be satisfied by implementation of ISO 14001 and the text of the ISO standard is included as an appendix to the EMAS 2 regulation. EMAS 2 goes a step further than ISO 14001 in requiring initial reviews and disclosure statement regarding environmental performance."[22]

However, EMAS requires independent verification that the EMS is delivering continuous environmental performance improvements and legal compliance as well as disclosure to the public. ISO 14001 is seen in Europe as a more inward-looking management tool, "a characteristic seen as a drawback for its use in public policy circles."[23] This is a view generally shared by U.S. regulators.

The EPA auditing policy places some limits on disclosure, recognizing that the U.S. enforcement regime creates legal consequences for disclosure. The EU takes the opposite approach. This difference arises because of both the lack of self-reporting requirements in European law and the EU's relatively limited enforcement options. The European Commission lacks legal authority to bring direct enforcement actions against violators. The EMAS Regulations are weighted toward the use of public disclosure to set the stage for pressure by nongovernmental organizations and the public rather than direct enforcement. Thus, formal certified management systems in Europe, both ISO 14000 and EMAS, will continue to be more popular with regulators than in the U.S.

Regulators in the U.S. have their doubts that ISO 14001 supports compliance. Certainly, the standard by itself will not guarantee better environmental performance. Perhaps the best example frequently cited is the Firestone/Bridgestone plant, which is both ISO 9000 and ISO 14000 certified and the subject of intense litigation for manufacturing faulty tires. Another comment heard with respect to ISO 9000 is that "we still make a lousy product, but we do it consistently!"

A recent study by the Science and Technology Policy Research Unit of the University of Sussex on behalf of the European Commission gives credence to the skeptics. "An analysis of information from 280 European companies at 430 production sites turns up no statistically significant relationship between better environmental performance and certification either to ISO 14001 or the EU's ecomanagement and audit scheme [EMAS]." [24]

Another recent study by the National Academy of Public Administration on ISO 14001, "Learning from Innovation in Environmental Protection," is helpful in showing the value of ISO 14001 certification in certain cases.[25] The study noted that based on the amount of toxic substances released each year, below average performers in the U.S. are more likely to adopt ISO 14001 than their industry peers. The authors of the study conclude that many if not most of the U.S. facilities that have adopted ISO 14001 have done it to improve their practices because they lacked an effective environmental management standard. The other probable reason for certification is that

[22] Ira Feldman and Douglas Weinfield, "EMS Roundup; Understanding the Emergence of Environmental Management Systems," 33 *Trends* (January/February 2002) at page 1.

[23] See "EMAS Languishes Ahead of Revision Due in the Fall," 6 *ISO 14000 Update*, June 2000, p. 1.

[24] "No Link Between Management Systems and Performance," 7 *ISO 14001 Update*, January 2001, p. 1.

[25] See www.napawash.org/napa/epafile02.pdf.

these plants are larger, may be more subject to public scrutiny and believe that formal registration will enhance their reputation.[26] As noted earlier, ISO 14001 registration alone is not viewed very positively either by environmental organizations or government agencies in the U.S. Data derived from a baseline report completed for 50 U.S. facilities in a test program by various organizations including the EPA, the Multi-State Working Group and the Environmental Law Institute for a three year period prior to the institution of environmental management programs in 1998 to determine the effect of such programs may eventually be helpful in giving some objective determination of value.[27]

Even those extolling the virtues of ISO 14001 certifications recognize its weaknesses:

> "This is not to say that ISO 14001 is a failsafe against regulatory violations; indeed there have been many cases whereby violations have occurred within registered companies. For example, Brazil's Petrobras, the largest petroleum company in South America, has experienced numerous oil spills and has been fined more than $100 million since its first facility was registered to ISO 14001 in January 1998. Despite these noncompliances, Petrobras retains its ISO 14001 registration status. In contrast, Ebara Corporation, one of Japan's largest electronic machinery manufacturers, voluntarily withdrew its ISO 14001 certificate in April 200, after discovering a dioxin leak into rainwater drains that have been undetected for seven years. According to The ISO Survey, no ISO I4001 certificates have ever been withdrawn due to a failed re-certification audit. This raises the question of credibility of ISO 14001 and related registration practices, a debate that has been underway for some time." [28]

Many in the U.S. have been suspicious of some ISO 14001 certifications in some other countries. While these certifications are designed to be consistent throughout the world, the quality of audits and certification boards does vary, in some cases, probably significantly.

Finally, in an extensive article on environmental management it was noted:

> "… Much of business management's attention of late has been focused on certification to the ISO 14001 environmental management system standard. Certification can create the illusion that all must be well because the process is in place. But the standard only requires that a process must be in place, not that the performance improves as a result of the process. Consequently, business management's attention may shift from creating ever-higher performance goals to insuring the completion of a procedure.
>
> Additionally, the ISO implementation process can make it quite difficult to stay above the detail and develop an environmental management system with a strategic environmental direction. It is a good starting tool, but it is not the endpoint or substitute for a strategic environmental program. Indeed, if the entire goal is to get ISO-certified, the EMS implementation focus may shift to certification, regardless of performance." [29]

[26] See "ISO 14001-Registered Facilities are Profiled in the US," 6 *ISO 14000 Update*, August 2000, p. 3.

[27] See "Baseline Report Completed for US Facilities in Test Program," 6 *ISO 14000 Update*, June 2000, p. 3.

[28] (Citations omitted) Lorna J. Midgelow, "ISO 14001: A Status Review," *EM*, December 2001, p. 16, 17-18.

[29] Richard MacLean and Frank Friedman, "Green Arthritis," 17 *Environmental Forum*, Nov/Dec 2000 36 at 47.

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Performance and Strategic Value for an EMS

In reviewing the need for ISO 14001 certification, it is important to recognize the need for not only consistency in a management system, but assurances that the system is performance and strategically oriented. Indeed, Ford, which probably more than any other U.S. Company has encouraged ISO 14001 certification, as a result of its requirement for ISO 14001 certification from its suppliers, has now tied its efforts to an integrated quality and environmental management system.[30] "Ford recognized that the implementation of the [Ford Environmental System] FES was generally viewed by corporate and manufacturing facility personnel as bureaucratic and confusing. Worse, the implementation process was not clearly related to the Ford Enterprise Model, which incorporates the company's vision, mission and values."[31] Ford also recognized that "Ford's reputation as a company that focuses on environmental issues is largely measured by its products, such as vehicle air emissions, rather than the environmental performance of its manufacturing activities."[32] By combining the quality and environmental systems Ford has "successfully eliminated the company's existing ISO 9001 [manuals] and the creation of long narrative document manuals that describe the interaction of the ISO 14001 standard and the FES."[33] "Ford's integrated quality and environmental management system was developed, in part, as a way to eliminate ISO terminology in the roll-out of the FES to the company's non-manufacturing facilities." [34]

The confusion as to the numbers of registrations to ISO 14001, with figures ranging from 900 to 1400,[35] may relate to duplication of registrations between organizations and facilities. It is quite possible that the increase in certifications is primarily related to automobile industry pressure to certify facilities which act as suppliers. Ford in particular has put pressure in this area and Daimler Chrysler and Toyota are following. The electronics industry is facing similar pressure, particularly in Europe and Asia. Some U.S. companies have commented privately that these certifications would not have happened in the U.S., but for European pressure, since their programs were in good shape and in most instances there was no significant business value in the U.S. from certifying. Other U.S.-based operations of foreign owned companies, which may be certified in European and other worldwide operations, are only certifying operations in the U.S. that required such certification for business reasons, e.g., supplier to the auto industry, but there was no business case otherwise. There is also the danger, as noted previously, as to the difficulty in engrafting an ISO culture, particularly if a facility is not ISO 9000 certified and is not accustomed to this approach.

Obtaining Value From an EMS—The Program Review and Activity Value Analysis Processes[36]

While most responsible companies audit, they don't step back as much as they should and take a close look at their environment, health, safety and process risk (risk engineering) programs to determine how well they are integrated and executed in fact. The results of such program reviews are greatly improved management understanding of what is needed

[30] John Connor and Robert W. Niemi, "ISO 14001 at Ford: Certification and Beyond," *EM*, December 2001, p. 24.

[31] *Supra*, note 33, p. 26.

[32] *Ibid.*

[33] *Supra*, note 33, p. 27.

[34] *Supra*, note 33, p. 26.

[35] See *International Environmental Law, 2001 Annual Report, Environment, Energy and Resources Law, The Year in Review 2001* (2002) at p. 275 and "Certifications Create Paper Blizzard in 2000," 6 *ISO 14000 Update*, April 2001, p. 4.

[36] The material on program review and activity value analysis, are summaries of the detailed discussion in Friedman, *supra*, note 1.

to be done to improve the programs and to better integrate them into the company's culture. There are opportunities for significant savings and improvements in efficiency and compliance.

Such a review should:

- Review the Company's policies, procedures and guidelines to assure that they provide the basis for consistent performance and a positive culture;
- Determine where the company or a business unit of that company's health, environment, safety and risk engineering (HESRE) programs are inconsistent with:
    - Corporate policies, procedures and guidelines
    - Regulatory norms, e.g. OSHA's Safety and Health Program Management Guidelines; OSHA Policy on Treatment of Voluntary Employer Safety and Health Self Audits; and the EPA Environmental Audit Policy
    - Preventive measures and compliance programs suggested by the Department of Justice policy on "factors in decisions on criminal prosecutions for environmental violations in the context of significant voluntary compliance or disclosure efforts by the violator."[37]
- Evaluate those programs relative to their stated intent;
- Assess where the programs require increased integration and upgrading; and
- Capitalize on identified improvements.

The initial review will examine:

- Organizations;
- Planning guidance;
- Communication;
- Documentation;
- Monitoring;
- Measurement of accomplishments; and
- Management systems in place to ensure effective coverage of overlapping areas of the disciplines involved.

Such a review should help identify:

- Specific program element deficiencies;
- Implementation inconsistencies; and
- Inconsistent management criteria and execution.

Special emphasis should be placed in the initial review on:

- Strategy;
- Objectives and philosophy;
- Organizational structure;
- Reporting relationship; and
- Feedback loops, e.g., assuring that management at all levels understands costs of compliance and non-compliance.

Activity Value Analysis

Similarly, with respect to "activity value analysis," companies often don't take a close look at what tasks are being performed, who is doing them and does the division of labor and the tasks themselves make sense. An "activity value" analysis can be utilized to identify how EHS issues are handled and whether there are too many instances of work being given to the EHS staff that should be handled by operations or engineers doing the work of technicians, etc. Similarly, such an analysis should be utilized to determine if EHS staff is appropriately prioritizing their workload. Such an analysis would be designed to determine:

[37] Reprinted in Friedman, *supra* note 1 at Appendix C, p. 447 *et. seq.*

- What activities in a functional area are recognized by the organization being evaluated?
- What is the relative value of that activity to the organization?
- What is the priority ranking of the activity as determined by that organization?
- What tasks are associated with each activity?
- Who in the organization currently perform the tasks associated with such activity?

Part of such an evaluation is the organization's estimate of the time committed and relative cost of conducting such tasks. In essence, what resources are needed to address each issue, activity or task and who is responsible for each issue, activity, or task? Such a review can help to identify potential organizational changes and increase efficiencies in staffing and organization. There are tremendous opportunities for cost savings and improvement in productivity and compliance assurance as a result of these reviews.

Conclusion

The environment, health and safety functions should be systematically managed, as any other important function in a business. Industry and other codes are useful vehicles as part of a management system, but are not a substitute for such a system. There are many opportunities for adding value by utilizing effective management systems that are designed for the specific company and culture, not taking a "cookie-cutter." approach. If an effective system is in place, compliance follows and overall is a far more effective and cost efficient system than a compliance-only system or a system that doesn't fit a company's culture.

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