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ARTICLES

Devising a Compliance Strategy Under the ISO 14000 International Environmental Management Standards

DONALD A. CARR AND WILLIAM L. THOMAS*

I. Introduction

Over the last twenty-five years, Congress and the U.S. Environmental Protection Agency (EPA or Agency) have built a pervasive system of governmental controls aimed at regulating chemicals and wastes, and safeguarding land, water and air. Until the mid-1980s enforcement primarily emphasized civil and administrative penalties, cleanup orders, utilization of new pollution control technologies or other supplemental remedial projects. Since then, federal and state prosecutors have been increasingly threatening criminal sanctions, including million dollar fines and incarceration, and targeting major businesses as well as corporate officers, directors and employees.¹ This deterrent message,
although somewhat indiscriminate, is not falling on deaf ears. U.S. businesses, foreign companies involved in transactions with U.S. firms, and foreign companies with business enterprises in the U.S. are taking a much closer look at the risk of criminal prosecution for environmental violations and the precautions that can be taken to reduce the risk of violations and maximize chances of securing prosecutorial leniency if an enforcement action is brought.

There is a contemporaneous, somewhat interrelated movement in many corporations to implement comprehensive environmental management systems. Major firms such as Apple Computer, Colgate-Palmolive, Nissan, Lufthansa Airlines, Anheuser-Busch, and the Coca-Cola Company\(^2\) are rethinking traditional production methods and discovering new ways to lower costs and improve the value of

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products through such techniques as benchmarking, life-cycle analysis, design for disassembly, cost-impact analysis, and environmental (or eco-) labeling. Businesses that once considered environmental regulation solely in the context of risk analysis are now looking closely at the way it promotes innovation and ultimately affects competitiveness. The greening of industry is, in many respects, a global trend affecting small and large companies in almost every major sector. Firms with this sort of approach to their environmental footprint and public image should generally be less susceptible to prosecution, and better able to defend against any charges which may be levied against them.

Also closely interwoven are national, regional and international environmental management standards such as the ISO 14000 series of international standards presently being developed by the International Organization for Standardization. Companies achieving certification under such regimes may expect enhanced relations with employees, the public, and government. Certification might also enable some firms to expand market share, gain easier access to permits and authorizations, improve cost control, meet end-product manufacturer criteria, demonstrate reasonable care, and reduce overall liability exposure. The implications of such programs could be profound, especially for U.S. based transnational companies with operations or customers in Europe and Asia, where certification may provide a means of avoiding multiple registrations, labels, and conflicting requirements. An incidental but not insignificant benefit to the ISO-driven exercise is the general enhancement of defensive positioning in regulatory disputes which might ripen into environmental prosecution scenarios.


This Article examines these developments, emphasizing the role of a well-conceived corporate compliance program. In the first section, we describe the evolution of criminal enforcement in environmental regulation and offer some suggestions to companies striving to navigate a hostile regulatory current. We follow this discussion with a brief survey of the "beyond-compliance" movement. In doing so, we will explain the integral role of compliance auditing in ISO 14000 and other environmental management systems (EMS). Finally, we will offer some suggestions on EMS design and on how firms may incorporate compliance program elements within their overall implementation strategies.

II. Prosecutions Against Corporate Criminal Liability for Environmental Violations and Compliance Programs: Justifying Prosecutorial Leniency

A. Environmental Prosecution: A New World Order?

It is a serious understatement to say that the enforcement of corporate environmental crime has been in rapid evolution in the last few years. There are a number of forces at work beneath this upsurge, but one thing is clear: the old days are gone. Executives are expected, on pain of corporate and personal criminal penalty, to direct their affairs in such a way as to achieve and maintain full compliance with environmental laws. The knowledge standards of many environmental laws and regulations allow a prosecutor to target officers and managers even where they did not intend to violate the law. This trend does not appear to be abating much yet in the current deregulatory or "reinvention" vogue. There still seems to be a reticence in Congress and the EPA to concede that it may be wrongheaded or unfair to criminalize innocent transgressions; that would be perceived as the epitome of being "soft on polluters."

The enforcement community and prosecutors at both the state and federal levels proclaim this shift as healthy and long overdue given the modest impact of civil sanctions on corporate behavior.6 Bolstered by developments in areas such as federal sentencing, prosecutors increasingly push for larger fines and stricter penalties, often with success. Industry is uneasy because few firms are in perfect compliance with the myriad of waste, chemical, water and air regula-

6. Under federal sentencing guidelines prescribing the sentence a judge may impose in a particular instance, jail time will be longer and more frequently imposed. See Federal Sentencing Guidelines Manual § 8C2.1 (1994) [hereinafter Organizational Guidelines]. Although the Organizational Guidelines penalty schedule does not strictly apply to environmental crimes at this juncture, environment-specific provisions are being considered. In the meantime, courts which used to be extremely reluctant about incarceration in environmental cases are increasingly meting out stiff sentences. The Agency's approach in the prosecution of Morrell for violations of the Clean Water Act exemplifies the trend. See United States v. John Morrell & Co., No. 96-CR-40004 (D.S.D. May 28, 1996), Chiquita Brands International, parent of John Morrell & Co. until December 1996, had reported the violations to the EPA. According to the Agency, the company's disclosure, coupled with its subsequent cooperation, led the government to seek a smaller fine than EPA otherwise would have sought, given the nature of Morrell's conduct. Even so, the fine totaled $3 million. A representative sampling of cases, such as United States v. Rudd, No. CA-6-96-CR28 (E.D. Texas June 13, 1996) (President of road stripping contracting business pled guilty to violations of Clean Water Act and agreed to pay $250,000 for the benefit of a local ecological education center); United States v. Rockwell Int'l Corp., No. CR96-372-MRP (C.D. Cal. Apr. 8, 1996) ($6.5 million in connection with criminal hazardous waste charges stemming from a 1994 explosion that killed two workers); United States v. Consolidated Rail Corp., No. CR95-10227-DPW (D. Mass Oct. 23, 1995) (Conrail sentenced to five years probation and ordered to pay a criminal fine of $2.75 million for the illegal discharge of oil and grease into the Charles River); and United States v. Regency Cruises, Inc., No. 94-245-CR-T-21(C) (M.D. Fla. Mar. 8, 1995) (Regency received a $250,000 fine for dumping plastic garbage into the Gulf of Mexico in violation of the Act to Prevent Pollution from Ships) further illustrates the pattern. State enforcement priorities are comparable. See, e.g., Massachusetts v. H.C. Starck, Inc., No. 95-2292-001 (Mass. Super. Ct. Jan. 4, 1996) (Massachusetts manufacturing company ordered to pay $1.37 million in fines for criminal violations of state environmental laws that resulted in a 1993 explosion injuring eleven firefighters and two others); Arizona v. TRW Vehicle Safety Sys., Inc., No. CV95-18901 (Ariz. Nov. 11, 1995) ($1.7 million fine for violations of hazardous waste management requirements - the biggest corporate criminal fine in the history of the state); see also Exposures to Medical Waste Draw $3.3 Million Fine Against Rhode Island Firm, Daily Env't Rep. (BNA) 71 (Apr. 13, 1995).
tions. This is especially true of certain sectors of business and of older facilities. Many businesses face a real risk of prosecution, which should genuinely motivate them to clean up their environmental acts and not impose upon the public the health and welfare costs of pollution. While this greater severity is a popular policy, it has several troublesome aspects. To understand them requires a brief review of how the enforcement of environmental law evolved to its present status.

B. The History of the Environmental Crimes Program

Until 1983, there was no organized environmental crimes program at the federal level. In fact, except for a few notable prosecutions such as the James River Kepone case and in the area of wildlife trade, there was essentially no criminal component to environmental enforcement. There were few U.S. Attorneys Offices with any interest in, or resources for, the area. The Department of Justice’s (DOJ) establishment of a fledgling, three-lawyer Environmental Crimes Unit in 1983 was a start. In that year and each of the


next two, an average of approximately forty environmental indictments were handed up. Then Fiscal Year (FY) 1987 saw an explosive trebling to 127 indictments. By FY 1994, the EPA had pushed the record for the number of enforcement actions with sanctions in a given year up to 2246. The EPA initiated 525 criminal cases, setting records in other categories, including: (i) 220 criminal case referrals to the DOJ—a 57% increase over the record of 140 set in 1993; (ii) criminal charges brought against 250 individual and corporate defendants—a 55% more than the record of 161 in 1993; (iii) ninety-nine years of jail sentences imposed—a 33% more than the 74.3 years imposed in 1993; and (iv) $36.8 million in criminal fines—a 24% increase over the 29.7 million assessed in 1993.9 Also during this period, enthusiasm on the part of state and local prosecutors sparked cooperative arrangements adding still more manpower.

The EPA could point to modest increases in some areas in FY 1995, e.g., criminal case referrals (up to 256 from 220 in FY 1994) and criminal cases initiated (up to 562 from 525 in FY 1994),10 though the overall figures disappointed many. Some observers pointed to a greater emphasis on case quality (rather than quantity) within the Office of Enforcement & Compliance Assurance, while others blamed the reorganization of the department, (real and threatened) budget reductions, and lack of direction11 for what were thought in many

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circles to be sub-par numbers. In the words of the EPA's Deputy Administrator Sylvia Lowrance, the "environmental cop" returned to "the beat" in 1996, making over 260 criminal referrals.\textsuperscript{12} The period of jail time to which defendants were sentenced during this period totaled 1160 months, up from 860 the previous year. The Agency also assessed $76,660,670 in criminal fines, as compared with $23 million in FY 1995.\textsuperscript{13} The numbers, and the pronouncements of Clinton Administration officials,\textsuperscript{14} indicate that criminal sanctions will remain a potent weapon in the Agency's enforcement arsenal well into the foreseeable future.\textsuperscript{15}


15. The Agency increased the number of criminal investigators to 151 in Fiscal Year 1996, and planned to have 200 by the end of Fiscal Year 1997.
The criminalization of environmental law is primarily an American phenomenon, yet a number of other countries have recently invested in enforcement infrastructure and


toughened penalties for non-compliance. The European
Community’s (EC) Fifth Environmental Action Program, for example, highlights enforcement, envisaging the establishment of an implementation and enforcement network composed of environmental inspectors and enforcement bodies of the member states and the EC Commission aided by the European Environment Agency. Other countries may well follow the lead of the U.S. in this area, giving further incentive to firms to develop rigorous corporate compliance programs.

C. Selecting Targets for Environmental Enforcement

The major category of defendants in environmental cases used to be the so-called “midnight dumpers” and others at the seamy edges of commerce. In earlier years, it was often fairly easy to portray the conduct as criminal. Such cases frequently involved defunct or failing businesses in which the corporate entity was insignificant for penalty purposes and incarceration for the individual malefactors was not hugely controversial. Similarly, many of the earlier cases against


"respectable" companies involved blatant environmental recalcitrance, such as total disregard of the Clean Water Act, or outright falsification in reporting of environmental data. Again, there was manifestly bad conduct and the defense was hard-pressed to find a sympathetic ear. Cases like this are still prosecuted, of course, and it is clearly important to continue to root out that straightforwardly culpable behavior. With due respect to government investigators, however, today's defendant is likely to be a Fortune 500 company and/or its officer, and the prosecution theory is as likely to be negligence or imputed knowledge that some complex, expensive environmental problem was not fully or timely attended.

Certainly, those who fail to act in good faith with respect to the applicable environmental regulatory scheme should get no moment of safe harbor because they are otherwise upscale or economically productive. To the contrary, those who, with ample means to meet compliance or cleanup costs, deliber-


ately choose to maximize their gain by corner-cutting ought to be defendants. Nevertheless, there is a limit beyond which it is no longer realistic or fundamentally fair to criminalize mere mistakes in judgment, such as in the spill reporting requirements area, where there are frequently multiple tenable interpretations. Yet an aggressive prosecutor can often fashion a charge superficially and literally faithful to the negligence standard or even the statutory definition of “knowing.” This systemic tension is especially pronounced in the context of general DOJ and specific Environment and Natural Resources Division policy guidance in favor of charging responsible individuals along with their firms.

D. Growing Corporate Environmental Consciousness

Prosecutors may not realize the extent to which they have succeeded in getting their point across to at least much of corporate management. For a combination of reasons headed by an appropriate aversion to enforcement consequences and complementary concern for valuable materials lost in wastestreams, enterprises have become much better at environmental self-examination and self-correction. As will be discussed in detail below, most major businesses now conduct environmental audits, defined under the EPA policy as “systematic, documented, periodic and objective review[s] by regulated entities of facility operations and practices related to meeting environmental requirements,” or employ consultants to critique management systems and regulatory compliance. This salutary development deserves encouragement, as


23. See discussion infra Part II.F.1.

in the end it is only through self-driven change that significant, across-the-board improvement is likely to occur. Government enforcement will never catch a big fraction of violations. But some Agency officials and government prosecutors, figuring out that voluntary audit documents may candidly reveal infractions and provide, in effect, a road map to indictment, have been too inclined to seek punishment on the basis of information obtained from the self-examination process.25 In the case of Procter & Gamble Manufacturing Co.'s payment of $381,000 to settle allegations that it was eight years late in installing proper air pollution control equipment to reduce methanol emissions at its Sacramento plant,26 little was made of the fact that the soap maker's lapse was uncovered through the company's own good faith compliance inspection.27 Making "examples" of lawbreakers is much of what enforcement is about, but in such applications the examples are counterproductive. In many cases, the threat that information developed in an audit might be used to found criminal charges against the executive who commissioned it may be sufficient persuasion against undertaking the audit. Legislators in some states have enacted laws creating a blanket privilege for environmental audit materials as the


27. See Chris Bowman, Government Socks P & G for Pollution Violations, SACRAMENTO BEE, Apr. 2, 1996, at B4. Procter & Gamble's practices, deemed by EPA as so worthy of sanction, had previously been approved by the local Air Quality Management District.
answer to such concerns, while lawmakers in other jurisdictions have not, reasoning that such insulation is inappropriate. A consensus appears to be growing, however, in favor of a level of protection against criminal charges for firms that have genuine comprehensive audit systems, where prompt response is made to any environmental violations that are uncovered. Yet the balance between providing this incentive for improved compliance, and preventing the manipulative use of "audits of convenience" as cover for violations, has and will continue to be difficult to define and implement. The EPA and DOJ have reduced some of the ambiguity and unfairness of audits through recent initiatives in the enforcement context, but the controversy will likely continue well into the foreseeable future.

E. Changing and Inconsistent Concepts of When Pollution Is a Criminal Violation

One of the most agonizing questions in environmental law under the new world order described above concerns when arguable infractions become potential felonies. With federal and state governments dramatically stepping up enforcement over the last several years, most major American corporations as well as foreign businesses with significant activities in the U.S. have prudently devoted more attention and resources to environmental compliance. Their management genuinely intends to live by the rules. Understandably, given the complexity (and opacity) of many of these provisions, management wants to know what level of environmental performance will satisfy the regulators and, at least, keep any adversary action on the civil side of the docket. Thus far, there has been no steady pattern to prosecutorial case selection or conviction which allows confident judgment about what will not be within the zone of possible criminal liabil-


29. See discussion of the DOJ and EPA guidance documents infra Part II.F and Part II.F.1 respectively.
ity.\textsuperscript{30} How can it be that there is no relatively bright line separating the world of regulatory give-and-take or civil litigation, on the one hand, and the world of indictment and grand juries on the other? Negotiations or civil contests may be rough or have high stakes but they are by definition about respectable disagreements. Being a defendant or target in a criminal case is an entirely different, painful exercise in which the least unpleasant consequence is the threat of ruined careers and reputations. Surely there ought to be some reliable guides to staying a safe distance from the prosecutorial cauldron.

Unfortunately, as Professor Lazarus pointed out, the environmental criminal justice system is in a real state of disorder, and prosecutorial sights are often set on marginal or subjectively negligent conduct, rather than on truly culpable or environmentally significant misbehavior.\textsuperscript{31} There are at least a few reasons for the inconsistencies and anomalies which have developed in the charging practice since the early 1980's. First, the decentralized organizations of both the EPA and the DOJ have impeded coherent review of the comparative significance and merits of environmental prosecutions in real time.\textsuperscript{32} Thus, there is a striking unevenness in the kinds of cases initiated by the different U.S. Attorneys Offices and


the EPA regions. Second, because the criminal provisions of the environmental statutes typically contain no real intent requirement or knowledge standard, there are no meaningful boundaries between the civil and criminal arenas. As Professor Lazarus observed,

What Congress did not consider in crafting environmental criminal law was the relevance of those distinctive features of environmental law itself that Congress criminalized by adopting the administrative law model for environmental crime. It never focused on those features in defining the requisite mens rea for criminal conduct, in assigning burdens of proof, or in allowing for possible affirmative defenses or mitigating circumstances. Congress did not consider these issues when it first enacted those criminal provisions, and it ignored them again in the second and third waves of congressional action when, by increasing the associated sanctions and improving the efficacy of enforcement, it made the provisions that much more important. . . . Congress avoided addressing at all what it meant by the mens rea requirements it enacted. By not addressing these issues directly, Congress left them, in effect, to the other two branches of government to resolve; first, to the executive branch, through the exercise of prosecutorial discretion; and second, to the courts, through the application of canons of statutory construction. Both of these branches, however, are ill-equipped to resolve these issues and have done so in a way that can generously be described as haphazard and exacerbating.

The government has no formal threshold as to when to initiate a criminal or civil case. Such decisions are most often made on an ad hoc, visceral basis. Even minimally exceeding the Clean Water Act discharge requirements or modest transgressions of Resource, Conservation and Recovery Act haz-


34. Lazarus, supra note 30, at 2453-54.
ardous waste storage requirements may be deemed worthy of prosecution in some cases but treated as administrative civil penalty matters in others. Although Assistant Attorney General Lois Schiffer and her deputy, James Simon, might have us think otherwise, it must be recognized that the recent spate of environmental criminal cases is at least in part the product of a political sea-change, which has encouraged many regulators, investigators and prosecutors to make opportunistic examples of polluters even where the alleged misconduct would not have formerly been deemed serious.

F. Minimizing the Corporate Environmental Crime Profile

An increasing number of companies have attempted to address these intimidating prosecution scenarios by making compliance the central focus of overall environmental management systems. A compliance program incorporates and


36. As Norman Weiner and other commentators describe in a short but revealing article, this opportunism extends to the civil sphere as well. Norman S. Weiner et al., A Case of EPA Overkill, 25 ENVTL. L. 1127 (1995).

37. A survey of 369 companies performed in 1995 by Price Waterhouse revealed that 75% of respondents had established a program to audit regulatory compliance. See Price Waterhouse, The Voluntary Environmental Audit Survey of U.S. Business (1995). The results of the Price Waterhouse survey are consistent with those of another poll in which nearly all of the seventy-eight respondents reported that they regularly perform regulatory compliance audits. See Coopers and Lybrand, Strategic Environmental Management Preparedness for ISO 14000 – A Survey by Coopers and Lybrand (1995). Of this number, slightly more than half had also audited their environmental management systems. See id. The number of firms performing audits would undoubtedly increase, however, if information obtained from such efforts were protected from disclosure. New Survey Shows Enforcement Questions Block Use of Voluntary Audits, Inside EPA Wkly. Rep., Apr. 14, 1995, at 4; Companies Would Perform More Audits If Penalties Were Eliminated, Survey Says, 25 Envtl Rep. (BNA) 1606 (Apr. 14, 1995). EPA efforts to smooth over these concerns have thus far been ineffectual. See generally Internal Investigations of Offenses Under Environmental Laws, in ENVIRONMENTAL CRIMINAL LIABILITY: AVOIDING AND DEFENDING ENFORCEMENT ACTIONS 53, 75-86 (Donald A. Carr ed., 1995); The EPA 1994 Public Meeting: Legislative Answers to the Auditing Quandary, 4 DICK. J. ENVTL. L. & POL’Y 182 (1995); Environmental Audits Not Privileged Business Information, EPA Announces, Daily Rep. for Executives (BNA) A-12 (Apr. 3, 1995); Craig N. Johnston, An Essay On Environmental Au-
extends beyond an environmental audit scheme, encompassing an explicit statement of corporate policy, commitment of management and resources, training, response mechanisms, and internal discipline, among other components. The EPA policy statements purport to encourage such self-examination as does the non-binding statement issued by the DOJ which elaborates points to be considered by prosecutors in charging decisions involving companies which have adopted adequate auditing schemes and taken sufficient corrective action with respect to any violations detected. The Organizational Guidelines similarly allow the harshness of penalties to be mitigated where a firm has implemented a compliance


program that meets certain criteria. To the extent that the EPA expands its multimedia “targeting” approach to emphasize corporate violators with significant noncompliance in more than one state, it could prove even more important that large and medium size firms identify and correct persistent compliance problems at separate facilities. Some of the major enforcement inducements to development of compliance audit programs are discussed below.

1. Department Of Justice Prosecution Discretion

The July 1, 1991 DOJ guidance document on environmental audits and voluntary disclosure, entitled Factors In Decisions On Criminal Prosecutions For Environmental Violations In the Context of Significant Voluntary Compliance Or Disclosure Efforts By The Violator [hereinafter Factors], articulates a basic set of principles for federal prosecutors to consider when making charging decisions. It contains helpful hypotheticals to illustrate the concepts intended to control the exercise of prosecutorial discretion.

40. See discussion infra Part II.F.2.


42. U.S. DEPARTMENT OF JUSTICE, FACTORS IN DECISIONS ON CRIMINAL PROSECUTIONS FOR ENVIRONMENTAL VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR (July 1, 1991) [hereinafter FACTORS]. Since the promulgation of Factors, a number of states have followed suit. See, e.g., NEW JERSEY PROSECUTOR’S OFFICE, VOLUNTARY ENVIRONMENTAL AUDIT/COMPLIANCE GUIDELINES (Jan. 12, 1992).
Factors represents a serious effort to promote environmental self-policing which proceeds from a sensitive appreciation of the central conundrum faced by major companies: how to investigate performance so thoroughly and systematically as to permit fully informed, cost-effective decisions, yet not have the fruits of the effort become the prosecutor's brief establishing violations and executive knowledge of same. As the drafters of Factors plainly recognized, there was an acute need for guidance and consistency in this unsettled area. The 1986 EPA audit policy shed very little light on the scenarios in which the government would request production of audit documents or take enforcement action predicated thereon. Further, the Agency reserved essentially unlimited discretion regarding evidence thought to be relevant to a criminal investigation. This was problematic even then, but the large increase in environmental prosecutions has heightened the tension dramatically. In fact, it may fairly be said that the ambiguities of the 1986 EPA policy were serving as a disincentive to audits in some situations, and prompting modifications which emphasized legal protections rather than management utility in many others.43

Basically, the notion underlying the Department of Justice policy is that companies with sound audit programs that take care of compliance problems on their own should get a full pass, or at least a partial break, in the charging decision. The conceptual requirements for this favorable treatment include: (a) regularized internal and/or external audit procedures; (b) audit integrity safeguards; (c) comprehensive evaluation of all pollution sources; (d) timely implementation of audit recommendations; (e) adequate resource commitment to the audit and follow-up; (f) incorporation of environmental criteria into overall company performance evaluations; (g) adoption of control measures beyond existing law, as a comfort zone to prevent noncompliance events; and (h) a "strong institutional policy" to meet environmental re-

43. See supra n.25 and discussion of the risks faced by companies which perform environmental audits infra Part II.F.2.
quirements.\textsuperscript{44} These primary factors are complemented by three more: (i) absence of prior pervasive non-compliance; (ii) effective internal disciplinary system; and (iii) effective subsequent (\textit{i.e.}, post-violation event) efforts including efforts to reach compliance agreements with federal and state authorities.\textsuperscript{45} In essence, \textit{Factors} creates a presumption against prosecution – though it is silent on civil enforcement – where the corporate record is positive on each of the above. Credit is also to be afforded for voluntary disclosure\textsuperscript{46} and general cooperation, including the willingness to make all audit materials and other relevant information available to the government.\textsuperscript{47}

Not many companies will score 100 on this test all the time. It is not clear how stringent the phrase "fully meets all the criteria" is intended to be. The DOJ apparently anticipates that some will fall short, providing that "[e]ven if satisfaction of the criteria is not complete, still the company may benefit in terms of degree of enforcement response . . . ."\textsuperscript{48} In other words, the result may be prosecution on lesser or fewer charges (or, implicitly, in not taking an expansive view of the responsible corporate officer doctrine). Hopefully, over the course of applying this guidance to actual circumstances in real time, the DOJ will show that the price of forbearance is not impossible purity.

2. The EPA Self-Policing Policy

It has long been thought by many that the EPA should want to provide positive inducement for voluntary self-policing, as this would enable the Agency to focus enforcement efforts on those who do not pay as much attention to their environmental record, and to target bad actors more effec-

\begin{itemize}
\item \textsuperscript{44} \textit{See Factors, supra} note 42, at Section II. A & C.
\item \textsuperscript{45} \textit{See id.} at Section II. D.
\item \textsuperscript{46} In the context of the Clean Water Act, \textit{see DOJ Official Encourages Companies to Report CWA Violations Voluntarily, Env't Rep. (BNA) 1808 (Jan. 26, 1996)}.
\item \textsuperscript{47} \textit{See Factors, supra} note 42.
\item \textsuperscript{48} \textit{Id.}
\end{itemize}
After considerable internal debate, the Agency finally announced a new policy on environmental audits and audit-related disclosures in late 1995. While the policy


hardly ushered in a new era, it marked an advance of sorts. At least some elements within the EPA now seem to appreciate industry concerns about the potentially punitive impact of environmental audits and compliance management systems, though the impetus for the statement probably had as


much if not more to do with developments in state legislatures\textsuperscript{52} and the judiciary,\textsuperscript{53} fear of congressional preemption,\textsuperscript{54} and nudging by senior Clinton Administration officials.

The non-binding guidance offers three conditional incentives to environmental self-policing and self-disclosure: (i) elimination (or reduction) of gravity-based penalties;\textsuperscript{55} (ii) the EPA restraint in DOJ criminal charge recommendations;\textsuperscript{56} and (iii) the EPA’s pledge to refrain from requesting voluntary environmental audits in pre-enforcement investigations.\textsuperscript{57} The first incentive, elimination or reduction of any gravity-based penalty, is conditioned upon a number of factors, including voluntary self-policing (auditing), voluntary\textsuperscript{58}

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\textsuperscript{52} See discussion \textit{infra} Part III.C.2. A number of states have enacted laws affording a limited evidentiary privilege for environmental audits.


\textsuperscript{54} See discussion of federal legislation \textit{infra} Part III.C.2.


\textsuperscript{57} \textit{See} Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66,708, 66,711. \textit{Compare Cal/EPA Self-Policing Policy, supra} note 51, at 6. In an attempt to provide greater confidence to stakeholders that due diligence efforts will meet with beneficial consideration under the policy, Cal/EPA also offers to perform a fee-for-service audit/due diligence review. \textit{See id.} at 6. Although certification will not provide a guarantee of immunity, it should reduce uncertainty and may ultimately lead to the development of audit/due diligence protocols. \textit{See id.}

\textsuperscript{58} “The violation must be identified and disclosed by the regulated entity prior to: the commencement of a federal, state or local agency inspection, investigation, or information request; notice of a citizen suit; legal complaint by a third party; the reporting of a violation to EPA by a ‘whistleblower’ employee; and imminent discovery of the violation by a regulatory agency.”

disclosure\textsuperscript{59} of the violations which have "or may have occurred"\textsuperscript{60} within ten\textsuperscript{61} days (or shorter period if set by law),\textsuperscript{62}


61. The EPA may accept reports after the reporting period has run where the violation is complex and compliance cannot be determined within that period, provided that the circumstances "do not present a serious threat and that the regulated entity meets its burden of showing that the additional time was needed to determine compliance status. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66708. See Cal/EPA Self-Policing Policy, supra note 51, at 7-8. The agency is developing a system to give national companies a "one stop" process for voluntarily disclosing violations. See EPA To Centralize Reviews Of Multi-Regional Voluntary Audit Disclosures, Inside EPA Wkly. Rep., Aug. 16, 1996, at 3.

62. Certain violations would not be covered, e.g., violations that resulted in serious actual harm or which may have presented an imminent and substantial endangerment to public health or the environment, or violations which contravene the specific terms of any judicial or administrative order, or consent agreement. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66709, 66,712. Moreover, the same or a closely related violation must not have occurred previously within the past three years at the same facility, or be part of a pattern of violations on the regulated entity's part over the past five years. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66,708. The Cal/EPA Self-Policing Policy, supra note 51, at 9. In response to comments filed concerning the interim policy, see Final EPA Audit Policy May Cover Violations Not Currently Eligible, Daily Rep. for Executives (BNA) A-7 (Nov. 3, 1995), the final guidance affords lenient treatment even in cases where the company reporting the violation was already required by statute or regulation to disclose the violation. See Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66,708. The policy does not, however, encompass violations detected through continuous emissions monitoring, violations of NPDES discharge limits found through prescribed monitoring, and violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66,708. The Cal/EPA Self-Policing
prompt correction (within sixty days or as expeditiously as practicable),\textsuperscript{63} appropriate remediation,\textsuperscript{64} implementation of appropriate measures to avoid repeat violations,\textsuperscript{65} and corporate cooperation.\textsuperscript{66} In determining whether to seek gravity-based penalties, the EPA will evaluate whether the organization discovered the violation through an environmental audit or, alternatively, through "an objective, documented procedure or practice reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations."\textsuperscript{67} In order to demonstrate that it has exercised "due diligence" a firm must show that it has:

- in place "compliance policies, standards, and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits

\textit{Policy, see supra} note 51, at 6-7, is more restrictive, excluding all mandatory reporting requirements.


\textsuperscript{67} Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66,711. Companies discovering violations through some other means, or which cannot document due diligence, may still receive a reduction in gravity-based penalties of up to 75% by demonstrating satisfaction of the other conditions, e.g., voluntary discovery, prompt disclosure, expeditious correction and remediation, preventative action to avoid recurrence, the absence of repeat violations, and cooperation. See id. at 66,707, 66,711-12. \textit{Compare Cal/EPA Self-Policing Policy, supra} note 51, at 2 (allowing the agency, at its discretion, to grant a reduction of up to 90% to companies choosing to invest in pollution prevention programs).
and other sources of authority for environmental requirements,"\textsuperscript{68}

- provided for "assignment of overall responsibility for overseeing compliance with policies, standards and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation";\textsuperscript{69}

- developed "mechanisms for systematically assuring that compliance policies, standards and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation";\textsuperscript{70}

- made an effort to "communicate [its] standards and procedures to all employees and other agents";\textsuperscript{71}

- established "appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards and procedures, including consistent enforcement through appropriate disciplinary mechanisms";\textsuperscript{72} and

- implemented procedures "for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's program to prevent future violations."\textsuperscript{73}

\textsuperscript{68} Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66,710.

\textsuperscript{69} Id.

\textsuperscript{70} Id. at 66,711.

\textsuperscript{71} Id.

\textsuperscript{72} Id.

\textsuperscript{73} Id. The Agency recognizes that a variety of compliance management programs may develop under the due diligence criteria, but it seems clear that the larger and more complex the operations of the facility, the greater will be EPA's expectation that the facility conduct routine and periodic compliance audits that are comprehensive, objective, systematic and documented. See Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66,708 ("Due diligence" encompasses the regulated entity's systematic efforts, appropriate to the size and nature of its business.). Cal/EPA adopts the EPA's definition of "due diligence." See Cal/EPA Self-Policing Policy, supra note 51, at 2-3. Companies that have developed state-of-the-art comprehensive environmental management systems, e.g., programs certified in the future under ISO 14000, could receive additional benefits under other incentive programs in development, as described infra Part III.
The EPA pledges not to recommend criminal prosecution in cases where the regulated entity uncovers violations through environmental audits or due diligence, promptly discloses and expeditiously corrects those violations, and complies with the other conditions noted above, so long as the violation does not demonstrate or involve "(i) a prevalent management philosophy or practice that concealed or condoned environmental violations; or (ii) high-level corporate officials' or managers' conscious involvement in, or willful blindness to, the violations." The Agency expressly reserves the right under the policy, however, to recommend criminal prosecution for the criminal conduct of any culpable individual. The third incentive is a deceptively straightforward reaffirmation of its historic policy to refrain from routing requests for audits.

Whether such limited assurances and immunities will suffice to alleviate industry concerns is doubtful. The policy

74. When a company has met the conditions for avoiding a recommendation for criminal prosecution under the policy, it will not face civil liability for gravity-based penalties. See Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66,707.

75. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66,711. The Cal/EPA's policy is similar, applying "so long as the violation does not demonstrate or involve ... knowing or negligent involvement in or deliberate ignorance of the violations by high-level corporate officials or managers." See Cal/EPA Self-Policing Policy, supra note 51, at 5. As in, for example, United States v. Hopkins, 53 F.3d 533 (2d Cir. 1995) (individual could have been convicted of Clean Water Act violations based upon his avoidance of knowledge that samples had been falsified), and Citizens for a Better Environment-California v. Union Oil, No. 94-0712, (N.D. Cal., July 8, 1994) (officer convicted of charges of tampering with samples and violated terms of company's discharge permit under the Clean Water Act where court found he had consciously avoided finding out about violations).


77. See Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66,708, 66,711. The policy would not preclude the Agency from requesting audits or compliance management system information where it could point to independent evidence hinting that a violation had occurred. 60 Fed. Reg. at 66,711. The Cal/EPA policy is the same. See Cal/EPA Self-Policing Policy, supra note 51, at 6.


80. Given its limited scope, the EPA Self-Policing Policy has not brought an end to calls for legislative reform. Senate Majority Leader Trent Lott (R-Miss.) and Senator Kay Bailey Hutchison (R-Texas) introduced S. 866, the Environmental Protection Partnership Act, in June of 1997. The bill seeks to encourage voluntary environmental audit and compliance management systems by granting limited protection from disclosure of voluntary environmental audits, and by granting limited protection for parties that promptly disclose information from audits or compliance management systems and correct any violation discovered as a result of the information. That same month, Rep. Joel Hefley (R-
While some at the EPA may have expressed sentiment for broader reform, their voices were apparently drowned out by those of the enforcement lawyers who feared audits would be used to shelter misconduct or negligence. Many staff.

CO) influenced H.R. 1884, the Voluntary Self-Evaluation Act. The Hefley bill is similar in so far as it would establish a limited protection for information contained in any voluntary self-evaluation report and provide limited immunity from prosecution for violations discovered as a result of an audit or environmental compliance management system used by the company. The bill's immunity provision would not apply where the violation was part of a pattern of "significant violations" occurring within the previous three years. The Democrats may also be working on a bill of their own. See Condit Leads Conservative Democrats Seeking Audit Law Compromise, State Env'tl. Monitor, May 5, 1997, at 26.


EPA's strong opposition to such laws likely has much to do with the fact that many environmental organizations are also against such reforms, see EPA Pressed To Revoke Programs From States With Questionable Audit Laws, INSIDE EPA WKLY. REP., Aug. 2, 1996, at 1; Cheryl Hogue, Environmentalists Considering Challenges To State Delegation Because of Audit Laws, Daily Rep. for Executives (BNA) A-22 (Mar. 26, 1996); see also EPA Asked To Use Federal
members were also concerned about the recognition of an overbroad evidentiary privilege that could defeat proper regulatory inquiry, and about the general political appearance of government being cozy with industry and softening the enforcement hammer. Some critics also have the idea that because companies must inevitably develop environmental auditing schemes anyway, the Agency does not need to offer significant inducements. As the risk that audit disclosure will come back to haunt the auditor in a variety of realistic litigation scenarios remains, many firms will continue to struggle with audit risk/benefit analysis.

3. Federal Sentencing Guidelines
   a. Organizational Guidelines

Envisioned as a major step toward deterrence of corporate crime, the Organizational Guidelines use a carrot and stick approach to impose upon the corporation the obligation to deter, detect and prevent corporate crime. To compel cor-

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Authority To Acquire "Privileged" Corporate Audits, INSIDE EPA WKLY. REP., Nov. 22, 1996. Industry groups are not without their own allies, however. The National Governors' Association, for example, has long advocated pro-environmental audit positions, see National Governors Association, Committee on Natural Resources, Proposed Changes in Policy (1996 Annual Meeting); see generally Governors Seek No Interference In Voluntary Self-Audit Programs, Daily Rep. for Executives (BNA) C-2 (July 17, 1996), and many state environmental commissioners are resisting the Agency's efforts to leverage the delegation process. See States Seek To Prevent EPA From Using Audit Laws To Withhold Delegations, INSIDE EPA WKLY. REP., Feb 7, 1997, at 16; States To Craft Strategy To Oppose EPA Threats Over Audit Laws, INSIDE EPA WKLY. REP., Aug. 30, 1996, at 2.

82. Perhaps most troublesome is the fact that third parties would remain free to use audit information disclosed to the government against a company, e.g., in private tort litigation, even when a company had met the conditions of the guidance. See discussion infra Part III.C.2. The government's disavowals notwithstanding, one need only peruse public comments filed in connection with the EPA's new Self-Policing Policy to see that the government has obtained audit information and used it against forthcoming companies. See, e.g., EPA Docket # C-94-01, II-E-21, Comments of Timothy J. Mohin, Government Affairs Manager, Environment, Health and Safety, Intel (June 30, 1995); EPA Docket # C-94-01, II-E-12, AT&T's Written Statement for the U.S. EPA's July 27-29, 1994 Public Meeting on U.S. EPA's Auditing Policy (July 28, 1994).

83. See Organizational Guidelines, supra note 6, §§ 8B1.1, 8C, and 8D. See generally Joseph G. Block, Sentencing for Environmental Offenses Under Fed-
orations to adhere to the law, the guidelines increase the potential criminal fines to four times the illegal gain to the corporation or loss to the victim. On the other hand, to encourage efforts to fight crime, the guidelines provide substantial mitigation of sentence (up to 95%) to those corporations who try to prevent crime, report violations and cooperate with government investigations. Assuming the Organizational Guidelines will govern for many years to come, it is vital for industry to understand how it works and how its often harsh results may be mitigated.84 In particular, it is imperative to understand the provisions affording reduction in the severity of sentence for maintaining an "effective program to prevent and detect violations of law."85 The defined elements of such a program, as articulated in the Commentary to § 8A1.2 of the Organizational Guidelines, are in some ways studies in ambiguity.

The Organizational Guidelines are closely patterned after those for individuals, but naturally depart from the latter in significant ways. Like the Individual Guidelines, they seek to categorize corporate criminal behavior and then apply a formula to calculate a guideline range for the penalties to be imposed. The sentencing formula takes into account not

84. Although the guidelines penalty schedule does not strictly apply to environmental crimes, and the environment-specific provisions proposed in 1993 by an Advisory Working Group are currently in limbo, it is evident that prosecutors and the courts are being influenced by the salient portions of the Organizational Guidelines. Jed Rakoff and others explain why environmental violations were excluded in Corporate Sentencing Guidelines: Compliance And Mitigation §§ 8.01[1] – 8.01[2] (1994).

only the crime, but also the corporation's enforcement history and its response to the criminal activity at issue. The Organizational Guidelines also contain other unique provisions:

- The fines imposed on the corporation are to be over and above full restitution to the victims of the criminal activity.
- Any company found to be "primarily criminal" in nature shall have its net assets forfeited in their entirety.
- A company may be placed on probation under court supervision for a period of time to insure that the fines imposed are paid in full, or to insure that an effective compliance program is put into effect. 86

The formula for determining the sentence is simple in concept, though it requires sophisticated analysis in the final details. The two factors which determine the sentences for corporations are: (i) seriousness of the offense (base fine); and (ii) culpability score. The seriousness of the offense is set by the highest of: (i) the pecuniary gain to the corporation; (ii) the pecuniary loss to the victims, or (iii) a table which converts the standard calculation under the Individual Guidelines into a dollar amount. 87 Once the seriousness of the offense is established it is multiplied by the culpability score to determine a guideline range for sentencing. The culpability multiplier extends from 0 to 10 points, and is determined by the level of management involvement in the criminal activity, the corporation's history, and the response to the criminal activity. 88 The corporation starts with a base culpability

87. ORGANIZATIONAL GUIDELINES, supra note 6, § 8C2.4.
88. See id. § 8C2.5(c).
score of five points (equivalent to a sentence range of 1-2 times the base fine), which may be increased or decreased by a number of factors. Each point of increase or decrease will reflect approximately a 20% change from the base culpability score, leading to a final sentencing range from a maximum of four times the base fine in the worst case, down to 5% of the base fine in the best case.89

The culpability score will be increased or decreased based on a set of aggravating and mitigating factors. Aggravating factors include: (i) tolerance of criminal activity by “high-level personnel” or “substantial authority personnel”;90 (ii) prior history of similar misconduct by the company, whether criminal, civil or administrative, in the last five and last ten years; (iii) violation of an order of probation; and (iv) obstruction of justice.91 Reduction in the culpability score will be given for the following mitigating factors: (i) an effective program to prevent and detect crime;92 (ii) self-reporting;93 (iii) cooperation with government investigation;94 and (iv) acceptance of responsibility.95 In short, the sentencing range substantially increases if high-level personnel were involved, or there is a prior history, or obstruction, while the corporation’s exposure decreases where there is self-reporting, cooperation, and an effective compliance program.96

89. See id. § 8C2.6.
90. The presence of this aggravating factor will add to the corporate sentence on a sliding point scale related to the number of employees in the company or unit at issue. The larger the company (50, 200, 1000, 5000 employees), the higher the penalty on the point scale.
91. See ORGANIZATIONAL GUIDELINES, supra note 6, § 8C2.5(E).
92. A rebuttable presumption against the deduction exists if there was criminal participation by substantial authority personnel. Further, the deduction is not available if there was “unreasonable delay” in reporting the offense to government authorities.
93. If, prior to an imminent threat of disclosure or government investigation, within a reasonably prompt time after becoming aware of the offense, the corporation reports the offense to appropriate government officials.
94. See Organizational Guidelines, supra note 6, § 8C4.1.
95. See id. § 8C2.5(g).
96. See generally SELECTED PAPERS IN UNITED STATES SENTENCING COMMISSION, CORPORATE CRIME IN AMERICA: STRENGTHENING THE “GOOD CITIZEN” CORPORATION (1996).
The Sentencing Commission intends that these elements be judged according to the context and conditions of each individual company, with three factors being key to the judgment: (i) bigger organizations must be held to more formal and complex compliance policy standards; (ii) organizations whose business involves special risks must have compliance programs which specially address those risks (giving the example of a company with hazardous waste management issues as one needing very specific environmental compliance procedures); and (iii) organizations which have a history suggesting the risk of certain kinds of offenses must make special compliance standards and take precautions in those respects.97

Because the Organizational Guidelines only apply to crimes committed by organizations on or after November 1, 1991,98 we are just now beginning to acquire some experience in applying them to actual cases. As of June 30, 1995, 208 organizations had been sentenced pursuant to the Organizational Guidelines, with an additional seventy-two organizations sentenced pursuant to former antitrust guidelines.99 Approximately 97% of the organizations sentenced under the guidelines as of that time were closely held corporations. Only four of the organizations officially sought credit for having an effective compliance program, and of this number, one

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97. Seemingly, this could be stretched by some courts or prosecutors to mean that chemical firms which have experienced significant industrial accidents must have special compliance standards and procedures concentrating on the reduction of negligent accident scenarios.

98. As a result of this limitation, most organizations sentenced during fiscal years 1991 through 1995 were sentenced pursuant to pre-guideline rules.

99. Approximately 12% of the cases sentenced under the guidelines as of June 1995 involved environmental offenses. John Scalia Jr., Cases Cited Under The Guidelines, Sept. 8, 1995, at 3 (on file with the author). Some analysts attributed the small number of publicly traded corporations sentenced under the guidelines to (i) the fact that cases against such organizations tend to be larger and more complex and thus, it takes longer for them to wind their way through the system, and (ii) the possibility that some prosecutors may be opting to pursue such cases civilly rather than criminally. See id. at 2; see also Jed S. Rakoff, Avoiding Corporate Indictments Under New Sentencing Guidelines, BUS. CRIMES BULL., Feb. 1994 at 1, 2-4.
received credit.100 The number of organizations sentenced under the Organizational Guidelines has climbed such that 157 organizations were sentenced under Chapter Eight in 1996; 14.2% of the cases involved environmental offenses.101 Significantly, the largest organizational fine imposed in 1996 ($25 million) was imposed upon three separate corporations for environmental offenses.102 None of the organizations sentenced during the period had in place “an effective program to prevent and detect violations of law.”103

As noted above, there are some situations in which a hypothetically perfect program will nevertheless be unavailing (e.g., no reduction in the Sentencing Guidelines culpability score will be given). For example, there is no quarter to be given where the organization “unreasonably delayed” reporting the violation to the authorities.104 Clearly, whether it is advisable for a corporation to make voluntary disclosure will often be an excruciating matter of estimating the benefits and risks, especially insofar as the disclosing company gets no up-front assurance of non-prosecution.

It should also be noted that there is no reduction permitted where any “high-level personnel” (executive officer, director, or others with major supervisory authority) or any person in charge of the compliance program is involved in the offense.105 This factor disqualified two of the organizations seeking credit for a compliance program in recent years. In one case, a corporation quality assurance department had been established to assure compliance with the EPA testing

100. The company, a small business engaged in the business of selling smoking paraphernalia, received credit for having an “effective” program by showing that it had given employees previous verbal and video instruction on how to comply with drug paraphernalia laws. See Scalia, Cases Cited Under The Guidelines, at 5.


103. See id.

104. See Organizational Guidelines, supra note 6, § 8C2.5(g).

105. See id. § 8C2.5(b).
regulations; however, because the corporate president was involved in the offense, the court determined the quality assurance program to be ineffective. In another case, the organization argued that it had an effective compliance program because each employee was expected to review training materials containing applicable Occupational Safety and Health Agency and EPA standards for asbestos removal, and senior management conducted surprise inspections to monitor compliance with those standards. The court declined to credit the corporation with having an effective compliance program, however, because the firm's president had known that asbestos was being disposed of improperly yet denied the fact when questioned about it initially by government investigators. A third case differed insofar as the organization had instituted a compliance program consisting of a code of business conduct, a compliance officer, a hotline, regular seminars on antitrust and contract bidding, and procedures to audit contract bids, and there was no evidence that senior management had been involved in the offense. Unfortunately for the organization, however, the illegal conduct occurred at a couple of newly acquired facilities that did not have compliance programs prior to their acquisition. Thus, the court declined to give the company credit under the Organizational Guidelines.106

b. Draft Environmental Sentencing Guidelines

The issue of sentencing guidelines for corporations found guilty of violations of environmental law continues to be a divisive one within and without the federal enforcement community. The U.S. Sentencing Commission's Advisory Working Group107 on Environmental Sanctions for organizational offenses (the Advisory Group) issued recommendations in 1993 calling for harsh sentences for corporate violations of

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107. The Working Group is a panel comprised of two members of the United States Sentencing Commission, as well as fourteen individuals from the U.S. EPA, DOJ, public interest environmental groups, in-house and outside corporate counsel, and academia.
federal environmental laws. The Draft Environmental Sentencing Guidelines prescribe a five-step process for judges to follow in sentencing organizations convicted of environmental crimes:

- **Step I.** A base fine amount is set at the greater of: (i) the economic gain plus costs directly attributable to the offense; or (ii) a percentage, derived from a base fine table, of the maximum fine that could be imposed for the offense (e.g., 90-100% for offenses involving knowing endangerment, 60-90% for offenses involving unlawful handling of a hazardous substance resulting in an actual release into the environment).

- **Step II.** The base fine amount may be increased or decreased within a yet-to-be fixed percentage range, if one or more aggravating or mitigating factors are present. The Guidelines contain ten aggravating, and four mitigating, factors.

  **Aggravating Factors** include: (i) management involvement in the offense, (ii) actual harm or significant risk of material degradation of the environment, (iii) threat to human life or safety, (iv) reckless indifference to legal requirements, (v) prior (within five years) criminal and civil compliance history, (vi) concealment or obstruction of an investigation, (vii) violation of an order, (viii) absence of a compliance program, and (ix) absence of a permit.

  **Mitigation Factors** include: (i) prior commitment to environmental compliance (see discussion of step three below), (ii) cooperation and self-reporting, (iii) unintentional conduct, and (iv) prompt action to assist victims.

- **Step III.** In determining whether a base fine amount should be decreased because of a corporation’s prior commitment to environmental compliance, the Guidelines direct the judge to consider whether all of the fol-

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110. See id. § 9C1.1.
111. See id.
112. See id. § 9C1.2.
lowing factors were “substantially satisfied”: (i) line management attention to compliance, (ii) integration of environmental policies, standards and procedures, (iii) auditing, monitoring, reporting and tracking systems, (iv) regulatory expertise, training and evaluation, (v) incentives for compliance, (vi) disciplinary mechanisms, and (vii) provisions for measuring achievement of environmental compliance.\textsuperscript{113}

- \textit{Step IV}. While a judge generally may not reduce a fine as a result of one or more mitigating factors below the greater of (a) 50\% of the base fine calculated in step one or (b) the economic gain form the offense, a judge is allowed to reduce the fine where its imposition would impair the corporation’s ability to make restitution to the victim.\textsuperscript{114}

- \textit{Step V}. A court can also impose a term of probation of up to five years upon a corporation under certain conditions.\textsuperscript{115}

The Advisory Group draft follows the general structure of the Organizational Guidelines but differs in a number of significant ways. The Advisory Group draft would have courts calculate the base fine as the greater of: (i) the sum of the economic gain to the offender by avoiding compliance and the quantifiable harms to human health and the environment, or (ii) percentage of the maximum statutory fine for certain offense types ranked subjectively according to seriousness.\textsuperscript{116} The overall effect of this approach may be to foster erratic sentencing results, skewed to result in much higher fines. To begin with, the recommendations prescribe that offenses involving knowing endangerment or actual release of pollutants into the environment should be sentenced at or near the statutory maximum fine, without meaningfully addressing the prosecutorial tendency to charge multiple counts for each day of release, thereby greatly inflating the total fine.

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\begin{itemize}
\item \textsuperscript{113} \textit{See id.}
\item \textsuperscript{114} \textit{See id.} § 9E1.2(d).
\item \textsuperscript{115} \textit{See id.} § 9F1.2.
\item \textsuperscript{116} \textit{See id.} at § 9B2.1.
\end{itemize}

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Because quantification of environmental harm involves novel and highly malleable issues, judges will likely resolve them differently according to different prosecutors’ and defendants’ sentencing presentations. This may thwart the central purpose of reducing the disparity among sentences. In addition, the Advisory Group’s approach to the definition of aggravating factors for management involvement – threat to the environment or worker or public safety; scienter (phrased as “at least a reckless indifference to legal requirements”); and prior criminal or civil compliance history – could involve significant “double counting” to the detriment of the defendant. Moreover, provisions on mitigating factors which might reduce a sentence – cooperation and self-reporting; absence of scienter; and remedial or restitutionary assistance – all seem structured to give little benefit to the organization seeking to address environmental problems. This is particularly evident in the limitation on the cumulative effect of mitigating factors, including the leniency value of environmental compliance programs, to no greater than 50% of the base fine.

The Advisory Group seemingly developed its proposals as if it were a stand-alone regime for all infractions against environmental standards, rather than as one component of a comprehensive regulatory framework. The EPA and DOJ administer an extensive scheme of civil remedies designed to remove any economic benefit for corporate regulatory noncompliance and to exact a penalty commensurate with the gravity of the offense. Given the punitive aspect of civil enforcement, criminal prosecutions seem more appropriate in cases where the organization’s culpability crosses the threshold deserving heightened stigma. The tension in delineating this threshold is acute because the environmental statutes allow the government the discretion to bring criminal charges without proof of the defendant’s intent to violate the law.

The Advisory Group recommendations assign incremental sentencing penalties to all conduct and consequences of noncompliance, creating a duplicative overlay of punitive factors especially unjustifiable where the corporation is being held vicariously responsible for the mistakes or oversights of its employees. This problem is exacerbated by the Advisory
Group's failure to explain why it determined that environmental violations should be punished more severely than other areas under the general sentencing guidelines. For example, as noted above, the Advisory Group puts a 50% ceiling on the mitigating value of an environmental compliance program, no matter how substantial the program or how insignificant the violation. In doing so, however, the Advisory Group articulates no rationale for differing from the Organizational Guidelines' allowance of a reduction of up to 95% for a compliance program in other areas. Nor does it offer a reason for not allowing mitigation or reduction for loss of government contract business attributable to environmental offense-related listing and debarment, as the Organizational Guidelines would allow in other areas of the law. Notably, the Advisory Group would also mandate corporate probation under intrusive conditions, compliance audit oversight requirements, and shareholder disclosure well beyond those of the existing guidelines or other applicable law. Again, no rationale is offered for the greater harshness in the environmental context.

Former senior government officials, including nearly every Assistant Attorney General for Environment and Natural Resources and the EPA General Counsel in the last four Administrations, submitted written comments asking that the Advisory Group's proposal be fundamentally reconsidered. In particular, the group contended that there should be thorough reexamination of those culpable states of mind.


118. See Draft Environmental Organizational Guidelines, supra note 108, § 9F1.3.

119. See COMMENTS OF FORMER JUSTICE DEPARTMENT AND EPA OFFICIALS ON DRAFT ENVIRONMENTAL GUIDELINES PREPARED BY ADVISORY WORKING GROUP ON ENVIRONMENTAL SANCTIONS (1993), reprinted in ENVIRONMENTAL CRIMINAL LIA-
and types of conduct that are the appropriate targets of deterrence and punishment.\textsuperscript{120} The former EPA and DOJ officials proposed that the factors to be used in setting the base offense level should be: (i) the degree of culpable knowledge of the defendant organization, and (ii) the foreseeability of harm to people or the environment, taking into account the social utility of the defendant's overall conduct.\textsuperscript{121} They also argued that the Sentencing Commission should extend normal credit for environmental compliance programs, impose no onerous probation provisions, and authorize a greater reduction if the defendant will incur significant collateral economic loss as a result of being barred from government contracts. The former officials offered alternative base fine scenarios reflecting specific gradations of culpability and a general range of offense levels to be applied to foreseeable harm.\textsuperscript{122}

\textsuperscript{120} See id.

\textsuperscript{121} See id.

The Sentencing Commission eventually decided not to go forward with the Advisory Group's proposal. The recommendations, particularly those bearing on the value of corporate compliance auditing, retain instructive value, however, for they illumine the views of the EPA and DOJ enforcement communities on compliance efforts and the elements of effective compliance programs. These materials suggest that
companies with salable compliance programs will occupy a more favorable position in an enforcement context than those without them.

We have much yet to learn about how federal sentencing guidelines will be applied to large corporations. Obviously, many companies now have in place some of the sorts of systems envisioned by the Organizational Guidelines. The utility of such programs will ultimately depend largely upon their effectiveness at persuading an inherently skeptical prosecutor who is preparing to indict the company and/or its officers to reconsider on the basis that every possible step had been taken to avoid the alleged offense and that, therefore, he or she should accord the full measure of leniency available in structuring the charge. The presentation of weighty and handsomely bound volumes of company policies and attor-
neys’ summaries of some applicable areas of the law is not likely to carry the day.\textsuperscript{125} If there is to be a serious prospect of accomplishing the desired result, hard thought must be given to the sorts of things that will look genuine and credible even to a jaundiced prosecutorial eye.

G. Looking Ahead

Many think these EPA, DOJ, and Sentencing Commission standards give rise to a more dense and dangerous fog, further obscuring the shoals of corporate criminal liability for environmental offenses. After all, if full voluntary disclosure is the usual precondition to a charging or sentencing break for the corporation, a strong tendency will develop to err on the side of caution and to disclose even very debatable issues. This ostensibly risk-averse course may lead to an increase in unwarranted scrutiny by prosecutors and regulators who do not ordinarily have an appreciation for real-world situations at industrial facilities. And then there is the specter that such programs may backfire and generate a documentary trail of violations amounting to a road map for an interested prosecutor, as well as a means of identifying senior corporate officers who saw the audit reports and thus putatively had “knowledge” of the problem.

The perils of corporate self-incrimination notwithstanding, many major companies are widening and deepening their compliance audit programs.\textsuperscript{126} Companies outside the Fortune 500 are also beginning to build audit programs, in some cases modeled directly on those developed by other major businesses. The sentencing statistics recounted above, moreover, suggest that smaller enterprises may have a relatively greater need for environmental monitoring and improvement. Because the existing EPA and DOJ policies leave open

\textsuperscript{125} U.S. Sentencing Commissioner Wayne A. Budd touched on this point in a speech June 3, 1996, emphasizing that compliance efforts that are mere “window dressing” simply “won’t cut it.” Mike Moore, \textit{Compliance Efforts Keep Companies On The Right Track, Will Become More Crucial, Sentencing Commissioner Predicts}, Corp. Couns. Wkly. (BNA) 8 (June 19, 1996).

\textsuperscript{126} See discussion of recent surveys on the extent of corporate environmental auditing \textit{supra} note 37.
the distinct possibility that audit materials can be subpoenaed, some firms have structured their audit reviews so as to optimize claims of attorney-client privilege and work product doctrine, even though this may impede the core objectives of auditing and even though such claims will seldom prevail. As of yet, however, few oil, chemical, pharmaceutical or other environment-intensive companies appear to have declined to establish or have shut down audit programs out of concern for what the regulators or the prosecutors might do with them. On the contrary, it seems that auditing is now both a practical necessity and an industry standard.

III. Compliance and Environmental Management Strategy

Many firms, especially those with operations outside the U.S. (where the threat of prosecution is less acute), assess environmental performance in order to meet evolving global demand for resource-efficient materials and products rather than simply to avoid liability. 127 An audit system can be

designed, for example, to illumine improvements (or deficiencies) in such areas as: (i) the "environmental friendliness" of production processes; (ii) the effectiveness of management; (iii) employee training; (iv) progress toward corporate goals; and (v) the adequacy of internal policies and standards.\(^{128}\)


Increasingly, companies also perform some form of environmental self-evaluation as part of a strategy to secure environmental insurance and investment capital.129

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AT&T, 3M, Eastman Kodak Company, and other leading firms are discovering new ways to prevent pollution at the source through benchmarking,130 life-cycle analysis,131 and

130. The practice of benchmarking, the technique of comparing a company's processes or products to a "best-in-class" example, is examined in Kenneth M. Karch, Getting Organizational Buy-In for Benchmarking at Environmental Management at Weyerhaeuser, 3 TOTAL QUALITY MGMT., 1996, at 297-308; B.M. Kleiner, Benchmarking For Continuous Performance Improvement: Tactics For Success, TOTAL QUALITY ENVTL. MGMT., Spring 1994, at 283; GLOBAL ENVIRONMENTAL MANAGEMENT INITIATIVE, BENCHMARKING: THE PRIMER (1994); Brenda A. Klafter et al., Environmental Benchmarking: AT&T and Intel's Project to Determine the Best-in-Class Corporate Pollution Prevention Programs, in QUALITY ENVIRONMENTAL MANAGEMENT III: LEADERSHIP-VISION To REALITY (1993); ROBERT C. CAMP, BENCHMARKING: THE SEARCH FOR INDUSTRY BEST PRACTICES THAT LEAD TO SUPERIOR PERFORMANCE (1989).

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greater resource productivity. This trend may continue as regulators experiment with more flexible, innovation-friendly approaches to environmental regulation, as envisioned under the President's Council on Sustainable Development's (PCSD) report, Sustainable America: A New Consensus for Prosperity, Opportunity, and a Healthy Environment for the Future. Creative companies may find ways to avoid some

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of the burdens of regulation, gaining an edge over the competition. Yet legal compliance assessment remains a fundamental part of the environmental management strategies of even the greenest firms.\textsuperscript{134} By carefully studying the applica-


ble laws and regulations as well as the firm’s ability to exceed them, firms can gain needed insights into costs and efficiencies which can later be used to inform product design and manufacturing strategy. A firm cannot comprehensively improve its performance without being able to measure its compliance with corporate policies, principles, and standards, as well as applicable laws and regulations. Companies which understand the impact of regulation in a particular industry may also be better positioned to satisfy customer expectations in those sectors.


Nascent national, regional, and international EMS standards regimes affirm the importance of compliance auditing for sound environmental management. Voluntary environmental management standards are currently in effect or in development in countries around the world; each examine an organization's commitment to compliance. Of the various standards presently under development, the ISO 14000 series crafted by the International Organization for Standardization (ISO) may ultimately gain the widest acceptance. The ISO 14000 series, encompassing all aspects of EMS design, and composed of both organization or process standards and product-oriented standards, gives organizations of all types and sizes the tools to voluntarily raise their levels of environmental responsibility worldwide.

A. The ISO 14000 Series of International Environmental Management Standards

The International Organization for Standardization, a federation of more than 100 national standards bodies from countries around the world, introduced its ISO 14000 series of international standards little more than a year ago. The


136. See Naomi Roht-Arriaza, Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment 22 ECOLOGY L.Q. 479, 488 (1995) ("standards development has two objectives: (1) proactive – aimed at streamlining regulations, fostering commerce, and improving performance; and (2) defensive – aimed at facilitating legal compliance while avoiding more onerous mandatory environmental requirements.").

ISO standards encompass various aspects of EMS design and provide organizations of varying types and sizes with a set of tools to voluntarily raise levels of environmental performance. Although some trace the genesis of the standards as far back as the 1972 United Nations (UN) Conference on Human Environment in Stockholm, Sweden, it is as likely to be found in what Frances Cairncross has described as "the favorable change of attitude among many companies to environmental policy" which occurred during the years leading up to the 1992 UN Conference on Environment and Development (UNCED), or Earth Summit, in Rio de Janeiro, Brazil.


140. See FRANCES CAIRNCROSS, COSTING THE EARTH xii (1991). A number of events and participants contributed to the development of the ISO 14000 series. Naomi Roht-Arriaza, in her excellent 1995 article, Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment, isolates the principle "stage setting" events leading up to the drafting of the ISO 14000 standards:

First, the European Community's recently adopted approach to technical regulation, coupled with other European initiatives in the areas of eco-auditing and in labeling or banning certain products for environment-related reasons, propelled ISO into the environmental arena to prevent unwanted competitive effects on global industry. Second, the negotiation of the Uruguay Round of the [GATT], together with emerging controversy over the role of trade agreements in environmental protection, raised questions about harmonization of standards. Third, as uncoordinated schemes proliferated, business and consumer policy groups asked ISO to study them... Fourth, the success of the ISO's series 9000 quality control standards became a viable model for designing and implementing environmental management standards. Finally, in response to requests during preparation for [UNCED], the ISO began exploring a possible role in sustainable development.


http://digitalcommons.pace.edu/pelr/vol15/iss1/7
In the period leading up to UNCED, Maurice Strong, Secretary General of the Earth Summit, enlisted the support for, and participation of business in, the conference through his advisor, Swiss businessman Stephan Schmidheiny. Mr. Schmidheiny formed the Business Council for Sustainable Development (BCSD) for this purpose and, among other actions, approached ISO and another organization, the International Electrotechnical Commission (IEC), to explore the possibility of a set of global environmental management standards building on ISO's experience with ISO 9000. ISO and IEC established the Strategic Advisory Group on the Environment (SAGE) in August of 1991 to evaluate the practica-
The SAGE reviewed ISO's experience with ISO 9000 and studied various national EMS schemes, including BS7750, before issuing a set of recommendations on environmental management for consideration during preparations for the Earth Summit. According to John Wolfe, SAGE's "call for better environmental management" became a key element of the two principal UNCED documents, the Rio Declaration and Agenda 21, the global environmental action plan for sustainable development. In October of 1992, SAGE called on ISO and IEC to organize a new technical committee responsible for the development of a set of international environmental management standards. ISO promptly did so, creating Technical Committee 207 (TC 207) in 1993 and charged it with the mission of "standardization in the field of environmental management tools and systems."


146. Six TC 207 subcommittees and one working group cover the following focus areas: (i) environmental management systems (SC1); (ii) environmental auditing and related environmental investigations (SC2); (iii) environmental labeling (SC3); (iv) environmental performance evaluation (SC4); (v) life-cycle assessment (SC5); (vi) terms and definitions (SC6); and (vii) environmental aspects in product standards (WG1). See W.M. Von Zharen, Understanding the Environmental Standards 9-10 (1996). Additional background concerning TC 207 is provided in Tom Tibor, ISO 14000 A Guide to the New Environmental Management Standards 32-38 (1996).
tries subsequently formed parallel technical advisory groups, e.g., the U.S. TAG formed by ANSI, as well as sub-technical advisory groups (each with their own working group) for the various international subcommittees, in order to help them forge a national consensus on content and application of the standards for advocacy at the international level.


147. Members in the U.S. TAG include representatives from: (i) government organizations, e.g., Defense, Energy, and EPA; (ii) industry, i.e., Fortune 500 companies in the petroleum, electronics, communication, and chemical industries; (iii) consultants; (iv) registrars, auditors, and standards bodies; and (v) public interest organizations.

148. See Von Zharen, W.M. Von Zharen, Understanding the Environmental Standards 11 (1996). (The U.S. TAG is to have "the opportunity to review, comment, and recommend how the U.S. will vote on all new work item proposals.") (quoting the U.S. TAG Operating Procedures).

149. ISO issued ISO 14001 and ISO 14004 in September 1996. Publication of the auditing standards came one month later. Copies of ISO documents may be purchased from the American National Standards Institute, 11 West 42nd Street, New York, New York, 10036; Tel: 212-642-4900; Fax: 212-398-0023.


new, the ISO 14000 series seems to have captured the goodwill, if not the imprimatur, of regulatory officials in North America, Asia, Latin America and Europe, and comes closest to offering companies an international vehicle to project the sincerity and credibility of their commitment to environmental protection, as well as an overarching framework within which to integrate their regulatory compliance programs.


153. The drafters of ISO 14001 suggest that demonstration of successful implementation of the specification can be used, for example, for any of the following purposes: to demonstrate compliance with environmental laws and regulations; to assure customers of their commitment to demonstrable environmental management; to satisfy investor criteria and improve access to capital; to obtain insurance at reasonable cost; enhance image and market share; to meet vendor certification criteria; to improve relations with the government; and to demonstrate reasonable care. See generally Implementing ISO 14000, CAL. ENVTL. COMPLIANCE MONITOR, Sept. 9, 1996, at 1, 2; ISO 14001: Performance Through Systems?, ENVTL. F., Nov.-Dec. 1995, at 36, 38; Joe Cascio, International Environmental Management Standards (ISO 9000's Less Tractable Siblings) in Conference Proceedings, GLOBAL ENVIRONMENTAL MANAGEMENT INITIATIVE, ENVIRONMENTAL MANAGEMENT IN A GLOBAL ECONOMY (Mar. 16-17, 1994), at 11, 13; Linda Spedding, Environmental Auditing and International Standards, 3 REV. OF EUR. COMMUNITY & INT'L ENVTL. L. 14 (1993); Gordon Belle et al., International, North American, and National Standards for Environmental Management Systems, in GLOBAL ENVIRONMENTAL MANAGEMENT INIT.
B. The ISO 14001 Environmental Management System

ISO developed the EMS specification, ISO 14001, as a means to provide organizations of all sizes and types with the ISO 14001 Environmental Management System

with a "stand alone" document that, by itself, will improve environmental protection or performance. It must be read together with local, state, and federal laws that establish actual compliance obligations. It will, however, provide a comprehensive management platform on which compliance, pollution prevention, and environmental performance activities can take place.

Bell, supra note 122. For this and other reasons, many consider the standards to be "of extreme importance to the industrial community." House Committee on Science, Subcommittee on Technology, The Increasing Importance of International Standards to the U.S. Industrial Community and the Impact of ISO 14000 (June 4, 1996)(opening statement of Rep. Constance Morella (R-Md)).

As used in the standards, the term "organization" means a "[c]ompany, corporation, firm, enterprise or institution, or part or combination thereof, whether incorporated or not, public or private, that has its own functions and administration." ISO 14001 § 3.12. For "organizations with more than one operating unit," a "single operating unit" may be defined as an organization. Id. The standard is intended to cover all types and sizes of organizations wherever they may be located, and to reach both the service and manufacturing sectors. See generally Series Suits Many Types of Business, S. CHINA MORNING POST, Sept. 10, 1996, available in 1996 WL 3767357.

It is yet unclear whether small and medium sized firms will find the hurdles to certification insurmountable. Although ISO 14001 is ostensibly applicable to all types and sizes of organizations, many companies will undoubtedly find implementation expensive. Just how much it will cost to implement ISO 14001 depends in part upon the state of the organization's present system. Sample cost estimates are given in Daniel M. Steinway, ISO 14000: The Pros and Cons of Certification, METROPOLITAN CORP. Couns., Sept. 1997, at 6 ("One of the chief practical concerns is obviously the administrative costs and burdens imposed in becoming ISO 14001 certified. By some estimates, these costs may range from $100,000 to $1 million for large multi-national companies and as much as $10,000 to $100,000 for medium-size concerns"); Patrick A. Toensmeier, ISO Certification Doesn't Need To Be Expensive for Small Processors, MOD. PLASTICS, Sept. 1, 1997, at 40; Singapore Launching Program To Help SMEs Understand Requirements of ISO 14000 Series, Int'l Env't Rep. (BNA) 1013 (Nov. 13, 1996); Cash Grants To Help SMEs Get ISO, Bus. TIMES (Singapore), May 29, 1996, available in 1996 WL 6292631; Raymond Martin, What Are The Developmental and Implementation Costs Associated With An ISO 14001 EMS?, INT'L ENVTL. SYS. UPDATE, Nov. 1996, at 16; Susan Rost, ISO 14001 Cost-Benefit Analysis, INT'L ENVTL. SYS. UPDATE, Aug. 1996, at 27; Tim Triplett, Is Environmental Certification Worth The Cost? INDUS. PAINT & POWDER, June 1, 1996, at 60; Hearings before the U.S. House of Representatives, Subcomm. on Technology, Committee on Science (June 4, 1996)(statement of Steven A. Bold, estimating the cost of becoming ISO 14000 certified at between


Private actors have also developed an array of helpful EMS implementation tools for SMEs. The United Nations Environment Program, the International Chamber of Commerce, and the International Federation of Consulting
the elements of an effective environmental management system "which can be integrated with other management requirements to assist organizations to achieve environmental and financial goals."\textsuperscript{155} ISO 14001 neither mandates particular technologies nor requires an organization to meet certain emission restrictions.\textsuperscript{156} Rather, the ISO EMS is an organizing framework that firms should monitor and periodically review to ensure effective direction of their environmental activities in response to changing internal and external factors. ISO 14004 offers guidance on the implementation of the ISO EMS, defined as that part of the overall management system (which includes organizational structure, planning activities, responsibilities, practices, procedures, processes and resources) "for developing, implementing, achieving, reviewing and maintaining" the firm's environmental policy.\textsuperscript{157} The writers of the standards view such systems as "essential to an organization's ability to anticipate and meet its environmental objectives and to ensure ongoing compliance with national and/or international requirements."\textsuperscript{158} The requirements of the specification may be objectively audited for certi-
The core themes of ISO 14001 are: (i) environmental policy; (ii) planning; (iii) implementation and operation; (iv) checking and corrective action; and (v) management review. The specification is designed to ensure that a company gives thought to the environmental impacts of its operations, products and services, and then frames a policy and establishes a plan to address impacts identified during the process. Once its policy and plan are in place, each company should audit performance and push ever onward for improvement. The basic elements of the ISO EMS model are elaborated on below.160

159. There is no “one way” to determine conformance with ISO 14001. Generally, organizations implementing the specification may either self-declare conformance or seek certification by an accredited “registrar/certification body.” See generally Scott Foster, Registrars, Accreditation, and ISO 14001, ENVTL. QUALITY MGMT., Autumn 1996, at 63. The terms “registration” and “certification” are used interchangeably in this context to describe the process by which an organization applies for placement on a public list of entities that conform to ISO 14001. A “registrar,” or “certification body,” is the entity that accepts the registration after making a judgment that the organization’s EMS meets the requirements of the specification.

160. Anyone interested in learning more about the standards and the implementation process is encouraged to consult the growing body of material on implementation of ISO 14001. To learn about ISO 14000 resources on the web, see Rafe Petersen, ISO 14000 Internet Databases, 3 ENVTL. LAW. 613 (1997), and ENVIRONMENTAL GUIDE TO THE INTERNET (3d ed. 1997).


• An organization should define its environmental policy and ensure commitment to its EMS. 161

ISO 14001 § 4 162 requires the top management of the


161. See ISO 14004 § 4.1.

162. Cf. ISO 9001 § 4.2.1; NATIONAL INSTITUTE OF STANDARDS, MALCOM BALDRIDGE NATIONAL QUALITY AWARD CRITERIA § 1.1 (Dept. of Commerce 1995).
organization to prepare a written environmental policy and ensure that it: (i) is appropriate to the nature, scale and environmental impacts of the organization's activities, products or services; (ii) includes a commitment to continual improvement and prevention of pollution;\(^{163}\) (iii) includes a commitment to comply with relevant environmental legislation and regulations and other requirements;\(^{164}\) (iv) provides a framework for setting and reviewing environmental objectives\(^{165}\) and targets;\(^{166}\) (v) is implemented, maintained, and communicated to all employees; and (vi) is available to the public.\(^{167}\) As ISO 14004 § 4.1.2 makes clear, it is criti-

\(^{163}\) The specification requires continual improvement of the management system, not of environmental performance directly. The concepts of "continual improvement" and "pollution prevention" are explored by David Freeman and Leonardo J. Cardenas in *Defining Continual Improvement*, INT'L ENVTL. SYS. UPDATE, July 1996, at 39, and *Is Pollution Prevention the Same as Prevention of Pollution*, INT'L ENVTL. SYS. UPDATE, Sept. 1996, at 20, respectively.


\(^{165}\) The term "environmental objective" is defined in ISO 14001 § 3.7 as the "[o]verall environmental goal, arising from the environmental policy, that an organization sets itself to achieve, and which is quantified where practicable."

\(^{166}\) The term "environmental target" is defined in ISO 14001 § 3.10 as a "[d]etailed performance requirement, qualified where practicable, applicable to the organization or parts thereof, that arises from the environmental objectives and that needs to be set and met in order to achieve those objectives."

\(^{167}\) See ISO 14001 § 4.2.F and Annex A § A.2. Practical advice on preparation of environmental policies is offered at ISO 14004 § 4.1.4. The elements of an effective environmental policy statement are discussed in W. Lee Kühre, *ISO 14010s Environmental Auditing* 39, 40-57 (1996) (policy statements should: (i) be relevant and straightforward; (ii) express the organization's commitment to continued improvement of environmental performance and compliance with laws and regulations; (iii) specify which organizational activities are covered by the statement; (iv) signal environmental objectives and targets; and (v) provide a framework for assessing progress) and the Global Environmental Management Initiative, *ISO 14001 Environmental Management System Self-Assessment Checklist* (Mar. 1996), at 38-40; *Practical Guide to Environmental Management*, supra note 124, at 82-90, 154 (policies should include: (i) a commitment to compliance with applicable environmental laws, regulations, and standards, as well as to make the expenditures necessary for implementation; (ii) a statement of core principles and philosophy, mandate development, implementation, and maintenance of management systems; (iii) an indication that employees will be held accountable for environmental performance and compliance; (iv) a requirement concerning the development of a self-monitoring environmental assessment program to ensure compliance; (v) a promise to train employees to identify issues of environmental concern, emphasizing individual
cal that the organization secure the commitment of top management, and that these leaders remain committed to the system over time.

- An organization should formulate a plan to fulfill its environmental policy.\textsuperscript{168}

Spesifically, ISO 14001 § 4.3\textsuperscript{169} requires the organization to: (i) establish and maintain a procedure to identify its environmental aspects, namely those elements

\begin{itemize}
  \item [\textsuperscript{168}] ISO 14004 § 4.2; 1995 Baldrige Criteria §§ 3.1 and 3.2.
  \item [\textsuperscript{169}] Cf. ISO 9001 § 4.2.3.
\end{itemize}
of the "organization's activities, products or services that it can control and over which it can be expected to have an influence, in order to determine those which can have significant impacts on the environment," and to ensure that the aspects related to these significant impacts are considered in setting its environmental objectives; (ii) establish and maintain a procedure to identify, have access to and understand all legal and other requirements directly applicable to the environmental aspects of its activities, products or services; (iii) establish and maintain documented environmental objectives and targets at each relevant function and level within the organization; and (iv)

170. ISO 14001 § 4.3.1. See ISO 14001 Annex A § A.3.1; ISO 14004 § 4.2.2. The environmental aspects of an organization's activities create environmental impacts, and can be identified by, for example, working backward from legal or other requirements or points of business exposure that affect the organization's activities, or by focusing on products or services that affect the environment. The term "environment" is defined as the "[s]urroundings in which an organization operates, including air, water, land, natural resources, flora, fauna, humans, and their interaction." ISO 14001 § 3.2. See generally Reeve I. Schiffman et al., ISO 14001 Implementation-Getting Started, in IMPLEMENTING ISO 14000: A PRACTICAL, COMPREHENSIVE GUIDE TO THE ISO 14000 ENVIRONMENTAL MANAGEMENT STANDARDS 37, 48-50 (Tom Tibor & Ira Feldman eds., 1997); Suzan L. Jackson, ISO 14000 IMPLEMENTATION GUIDE: CREATING AN INTEGRATED MANAGEMENT SYSTEM 53-64 (1996); Philip J. Stapleton et al., ENVIRONMENTAL MANAGEMENT SYSTEMS: AN IMPLEMENTATION GUIDE FOR SMALL AND MEDIUM-SIZED ORGANIZATIONS 16-19 (1996).

171. ISO 14001 § 4.3.1. See ISO 14001 Annex A § A.4.2.1. An "environmental impact" is "[a]ny change to the environment, whether adverse or beneficial, wholly or partially resulting from an organization's activities, products or services." ISO 14001 § 3.4.


173. ISO 14001 § 4.3.3. See ISO 14001 Annex A § A.3.3. See generally Reeve I. Schiffman et al., ISO 14001 Implementation-Getting Started, in IMPLEMENTING ISO 14000: A PRACTICAL, COMPREHENSIVE GUIDE TO THE ISO 14000 ENVIRONMENTAL MANAGEMENT STANDARDS 37, 52-53 (Tom Tibor & Ira Feldman eds., 1997); Suzan L. Jackson, ISO 14000 IMPLEMENTATION GUIDE: CREATING AN INTEGRATED MANAGEMENT SYSTEM 69-76 (1996); Philip J. Stapleton et al., ENVIRONMENTAL MANAGEMENT SYSTEMS: AN IMPLEMENTATION GUIDE FOR SMALL AND MEDIUM-SIZED ORGANIZATIONS 22-24 (1996). Examples of objectives include commitments to: (i) reduce waste; (ii) eliminate releases of pollutants into the environment; and (iii) design products to minimize their environmental impact in production, use and disposal. Once an organization has identified a worth-
establish and maintain a program, or programs, for achieving its objectives and targets.\textsuperscript{174} 

- For effective implementation an organization should develop the capabilities and support mechanisms necessary to achieve its environmental policy, objectives, and targets.\textsuperscript{175}

  - When beginning implementation, an organization must give seven areas special attention: (i) structure and responsibility;\textsuperscript{176} (ii) training, awareness and compe-

while set of objectives, it should set specific and measurable targets to achieve them within a specified time frame. An organization could use such measures as the quantity of raw material or energy used, the quantity of emissions, percentage of waste recycled, or other comparable indicators. See ISO 14004 § 4.2.5.\textsuperscript{174}


Although most of these subjects are self-explanatory, it is worth noting that the specification requires that an organization define, document, and communicate the roles, responsibilities, and authorities of its personnel, from the highest levels on down. It is also significant that the specification requires the organization to make available the human, physical (e.g., equipment), and financial resources necessary to ensure the EMS is effective.

The drafters of the specification envision that an organization will identify the knowledge and skills necessary to achieve its environmental objectives and give such matters their due when designing appropriate recruitment and training programs. The organization must ensure that personnel whose conduct may create a "significant impact on the environment" receive appropriate training, and establish and maintain procedures to make employees aware of: (i) the importance of conformance with the organization's environmental policy and procedures and with the requirements of the EMS; (ii) the significant environmental impacts of their work activities and the environmental benefits of improved performance; (iii) their roles and responsibilities; and (iv) the potential consequences of departing from specified operating procedures. Companies which fail to sustain these commitments over time will risk losing ISO certification.


184. See ISO 14001 § 4.4.2; ISO 14004 § 4.3.2.5.

185. See ISO 14001 § 4.4.2. Employees at all levels should be held accountable. See ISO 14004 § 4.3.2.3.
An organization should measure, monitor and evaluate its environmental performance.186

Under the ISO EMS model, an organization must measure, monitor, and evaluate the system to ensure that the organization is performing in accordance with its environmental management program. Generally, ISO 14001 calls on each organization to implement a documented system for measuring and monitoring actual performance against its environmental objectives and targets in the areas of management systems and operational processes, including compliance with relevant environmental legislation and regulations.187 The organization's procedures must cover "the recording of information to track performance, relevant operational controls and conformance with the organization's objectives and targets."188 The organization must establish and maintain a documented procedure for periodically evaluating compliance with relevant environmental legislation and regulations,189 and also maintain up-to-date environmental records.190 Any findings, conclusions, and recommendations arrived at as part of checking and corrective action should be documented.191

186. See ISO 14004 § 4.4.
188. ISO 14001 § 4.5.1.
189. ISO 14001 § 4.5.1; see ISO 14004 § 4.4.2.
191. ISO 14001 § 4.5.1; ISO 14004 § 4.4.3.
Objective and impartial internal personnel, or an outside party, are required periodically to audit the EMS in order to determine whether the EMS conforms to planned arrangements for environmental management including the requirements of the specification, and has been properly implemented and maintained. The results of this ongoing assessment of environmental performance can then be used to


determine areas of success and identify needed corrective action.\footnote{194}

- An organization should review and continually improve its environmental management system, with the objective of improving its overall environmental performance.\footnote{195}
  - ISO 14001 § 4.6 requires top management to review the EMS at regular intervals in order to "ensure its continuing suitability, adequacy and effectiveness." Management reviews should encompass: (i) audit results; (ii) the extent to which objectives and targets have been met; (iii) the continuing suitability of the EMS in relation to changing conditions and information; and (iv) concerns amongst relevant interested parties.\footnote{196} This review must be documented.\footnote{197}

Joseph Cascio, über ISO negotiator, explained the linkage between regulatory compliance and ISO 14001 in testimony before the U.S. House of Representatives:


\footnote{195} See ISO 14004 § 4.5.


\footnote{197} See ISO 14001 § 4.6.
ISO 14001 is expected to promote the development of processes to maintain environmental compliance. While compliance with environmental laws may be difficult or elusive in many countries, ISO expects organizations to implement processes to maintain such compliance. In countries where enforcement is strict, compliance processes are part of doing business and can simply be integrated into the overall management system. In countries where enforcement is either lacking or ineffectual, ISO 14001 will provide the needed (and some cases only) impetus to develop processes to reach and maintain compliance.\(^{198}\)

Later in his remarks, Mr. Cascio clarified that, "under ISO 14001, no proof of actual compliance is required for an organization to obtain registration. ISO 14001 requires only evidence of working processes that are designed to maintain compliance."\(^{199}\) Mr. Cascio and others are undoubtedly correct that ISO 14001 audits will focus on an organization's EMS rather than its compliance record per se, but that will not relieve firms of the obligation to "establish and maintain a procedure to identify and have access to legal, and other requirements to which the organizations subscribes directly applicable to the environmental aspects of its activities, products or services."\(^{200}\)

We are a bit less sanguine about the legal risks of ISO certification than Mr. Cascio, whose primary concern seems


\(^{199}\). Id. He adds that it "is certainly a great desire and expectation that, over time, efforts to implement such processes will lead to more consistent compliance and more supportive infrastructures where they are needed." Id.

\(^{200}\). ISO 14000 § 4.3.2. With regard to the issue of whether the specification requires organizations to set compliance-related objectives and targets, see Cheryl Hogue, ISO 14001 Certification Does Not Require Compliance as Goal, Draft Clarification Says, Daily Rep. for Executives (BNA) A-15 (Aug. 8, 1997). We share Christopher Bell's view that ISO 14001 "is crystal clear on the commitment to compliance." Cheryl Hogue, ISO 14001 Requires Overall Commitment To Compliance, Not Explicit Objective, Target, Daily Env't Rep. (BNA) A-7 (Aug. 12, 1997). Accordingly, the firm's objectives and targets must be consistent with its overall compliance commitment.
to be that of increased "administrative noncompliance" as employees learn the ropes. Evaluation of a firm's compliance system, and the generation of materials during the course of such a review, may well lead to broader disclosure risks than many currently contemplate.

C. Interrelationship of ISO 14000 and Other Voluntary Standards Regimes

Most large companies, especially those in heavily regulated industries in the U.S., Asia and Europe, will likely recognize many of these management principles. One issue to watch closely, however, is how individual countries will tailor or revise their own standards regimes in light of the ISO standards, and whether participation becomes mandatory as a matter of fact or law in some jurisdictions. Great Britain has already withdrawn its EMS standard, BS 7750, "British

201. See Cascio, supra note 4, at 35, 36, stating: "the diffusion of environmental responsibility from the environmental engineering function to all employees of the enterprise will be the biggest challenge and one that, in the short term, may carry some risk of administrative noncompliance as employees learn documentation and other record keeping tasks." Id.

202. See discussion at infra Part III.C.2.

Standards Institution, Specifications for Environmental Management Systems, BS 7750,” replacing it with ISO 14001 on March 31, 1997. The primary competition for ISO 14001 is the European Union Eco-Management and Audit Scheme (EMAS), which went into effect on April 10, 1995. Companies seeking registration of a particular site


205. The term “company” is defined as “the organization which has overall management control over activities at a given site.” EMAS, Article 3(i). The voluntary scheme is open to companies participating in any activity listed under sections C (Mining and Quarrying) and D (Manufacturing) of the classification of economic activities in the European Community (NACE rev. 1) as established by Council Regulation (EEC) No. 3037/90 (OJ No. L, 24.10 1990, at 1), with the addition of electricity, gas, steam, and hot water production and the recycling, treatment, destruction or disposal of solid liquid waste. EMAS, Article 2(i). The regulation left open the possibility that other activities, e.g., the distributive trades and public service, might subsequently be included under the scheme. See EMAS, Article 14; see also Commission Calls For Proposals on Areas Where EMS Rule Can Be Extended, Int’l Envtl Rep. (BNA) 259 (Apr. 3, 1997). Germany announced plans to extend the scheme to include financial services, public utilities, power plants, the transport sector, and mail-order businesses earlier this year. See Germany to Expand Eco-Audit Scheme, ENVT WATCH: WESTERN EUR., May 2, 1997, at 6. Consistent with the mandate of Article 13, the Commission has pursued a number of strategies designed to increase the participation of small and medium-sized firms in EMAS.

206. Under an EMAS, the term “site” is used to describe all land on which the industrial activities under the control of a company at a given location are carried out, including any connected or associated storage of raw materials, products, and waste material as well as any equipment and infrastructure involved in the activities. EMAS, Article 2(k). It is the site which is registered under
under EMAS must fulfill the requirements of Council Regulation EEC No. 1836/93 of 29 June 1993 Allowing Voluntary Participation By Companies in the Industrial Sector in a Community Eco-Management and Audit Scheme, or simply, "the Regulation."²⁰⁷ Participants in the voluntary, site-based scheme must establish a written environmental policy, conduct an initial environmental review of the site, and use that review to inform the development of an environmental program aimed at the achievement of the commitments articulated in the company's environmental policy. In addition, the company must implement an environmental management system applicable to all activities of the site and audit the system's effectiveness. In order to be registered, companies must publish an environmental statement containing a description of activities at the site, an assessment of relevant, significant environmental issues and information on other aspects of their environmental performance at the site. The company's statement must be validated, and its environmental policy, program, EMS, and review or audit procedure verified, by an accredited verifier.²⁰⁸


Companies seeking an independent imprimatur for sites located in Europe may pursue ISO 14001 certification, EMAS registration, or use ISO 14001 as a route to EMAS registration.\textsuperscript{209} As even the less-than-detailed summaries given above make clear, ISO 14001 and EMAS, though generally similar, differ in certain material respects.\textsuperscript{210} For example, the ISO specification does not require an initial environmental review of the company’s environmental performance.\textsuperscript{211} More importantly, and in contrast to ISO 14001, the EMAS

Regulation requires preparation of a public environmental statement including, among other information: (i) an assessment of all significant environmental issues of relevance; (ii) a summary of figures on pollutant emissions, waste generation, consumption of raw material, energy and water, noise, and other significant environmental aspects; and (iii) other factors regarding environmental performance. EMAS, unlike ISO 14001, also requires external verification of the environmental policy, program, management system, review or audit procedure and environmental statement(s).\footnote{Companies should consider these points when evaluating which of the two approaches to pursue.}

The difference between ISO 14001 and EMAS reflects carefully constructed compromises, primarily between the U.S. and European delegations to ISO's TC 207.\footnote{See Paula C. Murray, The International Environmental Management Standard, ISO 14000: A Non-Tariff Barrier Or A Step To An Emerging Global Environmental Policy?, 18 U. Pa. J. Int'l Econ. L. 577, 593-599 (1997); Naomi Roht-Arriaza, Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment, 22 Ecology L.Q. 479, 502-510 (1995). On the positions staked out by the U.S. delegation, see generally ISO 14001 Standard on its Way, Quality Sys. Update, Special Rep., July 1995 at SR-1, SR-5.} Given the more prevalent threat of criminal prosecution and toxic tort litigation in the U.S., the American delegation sought a flexible, procedural standard, whereas the Europeans tended to favor a more substantive approach in keeping with their EMAS experience and objectives.\footnote{See Paula C. Murry, The International Environmental Management Standard, ISO 14000: A Non-Tariff Barrier Or A Step To An Emerging Global Environmental Policy?, 18 U. Pa. J. Int'l Econ L. 577, 593 (1997).} When it became clear that the U.S. delegation would not concede on a number of key points, controversial requirements such as a fixed set of mandatory improvements in environmental performance, a specific level of pollution control technology, an environmental effects register, and publication of environmental impact data fell by the wayside.\footnote{See Naomi Roht-Arriaza, Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment, 22 Ecology L.Q. 479, 502-10 (1995).} Even so, firms bent on using ISO 14001 certification to leverage registration under EMAS will...
be required to ensure that their management systems address the different or additional requirements of the EMAS Regulation, as outlined in the "bridging document" prepared by Europe's standard body, the Comite Europeen de Normalisation.216

Companies motivated to pursue compliance auditing as part of implementation of an environmental management system standard should carefully evaluate whether it is better to participate in one of the national or regional programs or the ISO 14001 initiative.217 Companies also have to make


decisions about how implementation fits with other business strategies and commitments, e.g., in areas such as quality and product stewardship. Perhaps most significantly,


219. See Patricia S. Dillon & Michael S. Baram, *Forces Shaping the Development and Use of Product Stewardship in the Private Sector*, in *Environmental Strategies for Industry* 329 (Kurt Fischer & Johan Schot eds., 1993). Perhaps the best known product stewardship program is the Chemical Manufac-
firms must decide whether to pursue a certification or self-declaration strategy — a point which will turn in no small part on the regulatory and legal considerations described below.

1. Regulatory and Legal Considerations
   a. Regulatory Initiatives Involving ISO 14001

   During this early phase, companies should also monitor governmental efforts to utilize the ISO 14000 standards as a complement to traditional "command-and-control" regulation. Although the Agency has yet to formally endorse the...
ISO initiative, the EPA's Office of Enforcement and Compliance (OECA) set up a task group in June 1996 to examine the relationship between environmental management systems, ISO 14000 and regulatory enforcement and compliance. The working group is compiling a set of metrics which can be used for pilot projects in agency programs in order to assess the extent to which an EMS can improve performance in these areas.


223. See Memorandum from Steven A. Herman, Assistant Administrator, U.S. EPA Office of Enforcement and Compliance Assurance, to Addressees, Enforcement and Compliance Policy Toward ISO 14001 and Establishment of the OECA ISO 14001/EMS Task Group (June 25, 1996). The working group includes representatives from various OECA offices (Office of Compliance (OC), Office of Planning and Policy Analysis, Office of Regulatory Enforcement, Federal Facilities Enforcement Office, Office of Federal Activities and the Office of Criminal Enforcement) and other offices, including Office of Prevention, Pesticides and Toxic Substances, Office of Audits, Office of Policy Planning and Evaluation, Office of Solid Waste and Emergency Response, Office of Water, Office of Air and Radiation and participants from eight Regional Offices. The DOJ is also represented. The group also began with representation from various states, including Arkansas, Arizona, California, Colorado, Delaware, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Tennessee, Washington and Wisconsin, some of which are also conducting independent assessments of environmental management systems.

224. The working group submitted its metrics for outside review in the spring of 1997. Although the draft metrics have not been widely disseminated to the public, published reports claim that the metrics target such issues as: (i) whether an EMS affects the number, nature and seriousness of a facility's violations, and the promptness with which violations are reported and corrected; (ii) whether an EMS will reduce the volume of pollutants released to the air, water and land; and (iii) whether the frequency of auditing and training leads to improved environmental performance. See EPA Drafts Measure To Gauge The Merits Of Environmental Management System, Inside EPA WKLY. Rep., Apr. 18, 1997, at 5. The EPA intends to use the data to inform its understanding of whether EMSs produce "beyond compliance" results. See Office of Enforcement and Compliance Assurance, Briefing on EPA/State ISO 14001/EMS Task Group and Proposed Metrics for Evaluating Environmental Performance in Facilities Participating in EMS/ISO 14001 Experiments (July 1997) (on file with authors).
The ISO 14000 standards have already come into play (explicitly or implicitly) in two of the EPA's reinvention initiatives, Project XL and the Environmental Leadership Program (ELP). Of the Project XL pilots currently in the


226. Project XL, a principal component of the Clinton Administration's regulatory re-invention effort, offers the exercise of regulatory flexibility by EPA in exchange for a commitment on the part of "responsible companies" to achieve better environmental results than would have been attained through mere regulatory compliance. See EPA Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. 27,282 (1995); and Notice of Modifications, 62 Fed. Reg. 19,873 (Apr. 23, 1997) (attempting to clarify the concepts, definitions and boundaries of superior environmental performance, regulatory flexibility and stakeholder involvement); Memorandum from David Gardiner, Assistant Administrator, U.S.
implementation and evaluation phase, two involve ISO


227. The Agency divides Project XL pilots into three phases: (i) a proposal phase, in which the sponsors propose the project to EPA, which then reviews the proposal in collaboration with the appropriate state; (ii) a development phase, in which the project sponsors develop a final project agreement (FPA),

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14001. The Final Project Agreement (Agreement) for Weyerhaeuser's Flint River facility in Oglethorpe, Georgia commits the company to continue its policy of “Minimum Impact Manufacturing.” The Agreement, reached with EPA's Region 4 and the Georgia Department of Natural Resources in January 1997, includes the goal of revising the company's current EMS to conform with ISO 14001. The company working with public stakeholders and regulatory agencies; and (iii) an implementation and evaluation phase, in which the project is implemented at participating facilities and evaluated by project sponsors, stakeholders, regulatory agencies, and third parties.

228. The EPA, the State of Minnesota, and 3M Co. sought, without success, to negotiate a multimedia permit under the Project XL Program. This alternative permit would have authorized 3M to construct, modify and operate a tape and coating manufacturing facility, provided that the permittee implemented an EMS, operated and maintained the facility consistent with the EMS, conducted regular EMS audits, and subjected itself to independent audits by a third party. Talks stalled and eventually broke down, however, when 3M would not agree to make an up-front guarantee of “superior environmental performance.” See 3M Withholds From Project XL, Tells EPA Business Interests Forced Move, Daily Rep. for Executives (BNA) A-6 (Sept. 12, 1996); Susan Bruninga, 3M's Project XL Proposal Suspended Due To EPA Inflexibility, Minnesota Says Daily Rep. for Executives (BNA) A-21 (Sept. 3, 1996); Minnesota Abandons Leading XL Project In Dispute Over EPA Requirements, INSIDE EPA WKLY. REP., Aug. 30, 1996, at 1.


230. The Weyerhaeuser plant in Georgia also received regulatory relief from the pulp and paper cluster rule which sets maximum achievable control technology (MACT) standards under the Clean Air Act. This rule would be waived if the company could achieve pollutant reductions by other means such as emissions control equipment, pollution prevention or innovative technology. The EPA and Weyerhaeuser expect the alternative compliance plan to produce superior environmental results than would adherence to the MACT rule and if they found this would not be the case then EPA could still require the company
and agencies expect the ISO 14001 management system to help the facility continually improve environmental performance by such means as reduction of solid and hazardous waste generation and reduction of daily bleach plant flow. A second firm, Jack M. Berry, Inc., reached an XL agreement with EPA Region 4, Florida Department of Environmental Protection, and the South Florida Water Management District in July of 1996. In the agreement, Berry committed to institute an ISO 14001 environmental management program which is expected to lead to superior environmental performance in a number of areas including increased re-use of wastewater, decreased water consumption, decreased VOC and nitrous oxide emissions, a reduction in solid waste produced, and an increase in scrap metal recycled.

The Agency also built heavily on the ISO EMS specification in designing the environmental management system for its Environmental Leadership Program (ELP). The Gil-

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231. See EPA, Final Project Agreement Berry XL Project (July 1996) (on file with the authors).

232. The Berry XL agreement also allows the facility to consolidate its seven operating permits under a single Comprehensive Operating Permit, thereby accelerating the company's permit application process. The seven permits will henceforth be evaluated collectively every five years. See Susan Bruninga, Florida Citrus Company Becomes First to Implement Project XL One-Stop Permit, Daily Env't Rep. (BNA) 596 (July 19, 1996).

lette Company, Ocean State Power, Duke Power, Ciba Geigy, Motorola and other firms completed a series of pilot projects under the program in August of 1996. The pilots were designed to evaluate whether environmental management systems do in fact encourage innovative compliance activities. The EPA used the results of these pilots to draft a proposed framework for a full-scale ELP program, including the components of an ELP environmental management system.

In its current draft form, the program requires a "mature environmental management system" of participants. Specifically, firms must have had an EMS in place for two years, and have tested the system to ensure its proper operation. Participating firms must also have a compliance auditing program in place, as well as community outreach and employee involvement programs. As presently framed, ELP does not require ISO 14001 certification, even though many of the elements of the ELP EMS are consistent with ISO 14001. The draft ELP EMS Guidelines go beyond ISO 14001

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in requiring "explicit inclusion of compliance assurance, pollution prevention, and community outreach elements." ELP participants should also anticipate requirements to: (i) publish factual compliance data in an Annual Performance Report; (ii) conduct compliance and EMS audits in years two and five of the planned six-year ELP cycle; and (iii) implement a mentoring program or make a good faith effort to mentor other firms. In return, according to the ELP Draft Proposed Framework, participants will receive "Inspection Discretion Benefits," such as reduced and/or modified discretionary inspections. The Agency is also planning reduced "Regulatory Burden Benefits," which have yet to be finalized, but which may include expedited access to other reinvention projects (which themselves include benefits, such as expedited permits, streamlined permit modifications, and the like).

Some EPA regions have begun leadership programs of their own. Region 1's StarTrack program grew out of ELP, and was initiated to evaluate the credibility of third-party assessments of environmental performance. StarTrack emphasizes three main components; (i) implementation of an EMS benchmarked to ISO 14001; (ii) facility compliance audits meeting the guidelines of EPA and stakeholders; and (iii) correction of any violations discovered by a specific time frame, in accordance with the EPA's Self-Policing Policy. A third-party auditor must prepare a public report summarizing each component. Benefits to certified companies could include penalty reduction for most violations discovered during a voluntary audit, expedited regulatory decisions, and future regulatory flexibility, such as reduced record keeping or reporting.

EPA Region 10 funded an initiative called the "ISO

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237. See George Hawkins, Compliance and Enforcement Changes In Congress and EPA, NATURAL RESOURCES & ENV'T, Spring 1997, at 42, 44.
238. See StarTrack Gears Up For Next Year, INT'L ENVTL. SYS. UPDATE, June 1997, at 1, 3.
14000 Leadership Project," designed to clarify the potential environmental, economic, and regulatory benefits of ISO 14001 certification. The eight-month project took the form of three forum meetings with participants from private industry, environmental interest groups, regulatory agencies and federal facilities. The first forum defined the levels of awareness of ISO 14001 and provided information on the standard. Three of the industry participants (Matsushita Semiconductor Corp. of America (Panasonic), Intalco Aluminum Corp., and Murray Pacific Corp.) then undertook an EMS analysis. A second forum was held to discuss lessons learned by the companies. A registrar also discussed the certification process, particularly as it related to compliance issues. A final forum centered around preparation of a final report. Among the group's findings was a realization that an ISO 14001 EMS should provide significant internal organizational motivation to maintain compliance and to move beyond compliance to superior environmental performance, and that third-party certification is a meaningful process. A decision has not been made on how to follow up on this mainly theoretical project. It may be that interested companies will enter the Environmental Leadership Program when it is launched as a full-scale program or that work will continue within the region.


240. The Washington Department of Ecology, which participated in this project, is recruiting for an Environmental Management System Alternative to Pollution Planning. In this scheme a company which has an EMS which satisfies Washington's criteria on pollution prevention can substitute it as an alternative for a traditional Pollution Prevention Plan or Five Year Plan Update. Washington's definition of pollution prevention calls for the use of processes or practices that reduce or eliminate the use of hazardous substances and the generation of pollutants or wastes at the source, unlike the definition of pollution control used in ISO 14001, which relies on end of pipe treatment. Washington officials have indicated that facilities in compliance with ISO 14001 should have little difficulty meeting the requirements under its EMS program. WASHINGTON STATE DEPARTMENT OF ECOLOGY, ENVIRONMENTAL MANAGEMENT SYSTEM (EMS) ALTERNATIVE TO POLLUTION PREVENTION PLANNING (1997) (on file with authors).
Other initiatives, within and outside the EPA, also explore the potential significance of ISO 14000. EPA Region 9's Merit Partnership for Pollution Prevention will study companies which implement the ISO 14000 EMS in an effort to discover whether such systems aid pollution prevention and promote economic growth. Region 9 representatives are also working with financial and insurance institutions in an attempt to create incentives, such as new types of insurance coverage or lower premiums, or reduced transaction costs for companies with certified EMSs. Another program, run by the Agency's Office of Water, awards grants to states interested in using ISO 14000 in their water programs.

One of the more intriguing pilot concepts is one under consideration by the EPA's Chemical Emergency Preparedness and Prevention Office which would facilitate compliance with federal risk management planning requirements. Congress, concerned about the environmental and human health and safety risks posed by uncontrolled releases of volatile organic compounds, acids, and other hazardous substances, authorized the Agency to require owners or operators of facilities handling a regulated substance in more than a threshold quantity to prepare a risk management plan as part of the

241. The Merit Steering Committee is seeking to determine if the environmental protection afforded by EMSs can be worthwhile enough to be promoted by regulatory agencies or considered by the agencies "in their interactions with industry." U.S. EPA Region 9, The Merit Partnership for Pollution Prevention - An Overview (Feb. 1997), at 2 (on file with authors).


244. That such accidents can also be extremely expensive requires no emphasis. For recent estimates of losses, further insights into the role of management in their prevention, and insight into the stock price implications of such events, see Michael Bradford, Property Loss Control: Plants Turning To Prevention To Keep Losses Under Control: Strict Standards Paying Off For Chemical, Petroleum Industries, BUS. INS., Aug. 18, 1997, at 12; United Kingdom, Health and Safety Executive, HSG-96, The Cost of Accidents at Work (1997); Robert D. Klasson & Curtis P. McLaughlin, The Impact of Environmental Management on Firm Performance, MGMT. Sci., Aug. 1996, at 1199.
Clean Air Act amendments of 1990. The EPA responded in June of 1996, promulgating a comprehensive set of risk management regulations plan for chemical accidental release prevention known as the "RMP Rule." Compliance with the RMP Rule will entail, for an estimated 66,000 facilities, preparation and implementation of a risk management plan by June 21, 1999.

The RMP Rule requires the establishment of management systems to oversee implementation of risk management program elements. The purpose of this requirement is to ensure that facility managers define a system that integrates the implementation of all elements of the risk management program and assign responsibility for that implementation. To that end, the RMP Rule also mandates the assignment of a qualified person or position with overall responsibility for the development, implementation, and integration of risk management program elements. The EPA

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245. The Clean Air Act of 1990 and the EPA RMP Rule give owners and operators of stationary sources which produce, process, handle or store listed substances above threshold amounts, see 42 U.S.C. § 7412(r)(3), until June 21, 1999 to prepare and implement:

- a risk management plan to detect and prevent or minimize accidental releases of such substances from the stationary source, and to provide a prompt emergency response to any such releases in order to protect human health and the environment.


247. The RMP Rule mandates that the owner or operator of a source with a process subject to Program 2 or Program 3 must "develop a management system to oversee the implementation of the risk management program elements." 40 C.F.R. §§ 68.12(c)(1), 68.12(d)(1), 68.15. The emphasis on systems reflects a growing recognition of their importance in accident prevention strategy. Exxon Co., for example claims to have cut the incidence of accidents and pollutant releases at its facilities in half since it implemented a comprehensive facility management system in 1991. See OCTANE WK., July 29, 1996, at 4.


249. See 40 C.F.R. 68.15(a)-(b). The regulations state that when responsibility for implementation of individual elements of the risk management program is delegated to others, the names and positions of such persons must be documented and lines of authority defined through an organization chart or similar document. See id. at (c).
left it to the regulated community to interpret and apply the "management system" requirement.

The ISO 14001 scheme offers firms a flexible management framework for preventing uncontrolled releases, and for meeting their obligations under the RMP Rule. The management system elements overlap in many key respects. For example, in the area of planning, ISO 14001 requires an organization to formulate a plan to fulfill its environmental policy, including any commitments it may have made to the prevention of pollution, and to compliance with relevant environmental laws and regulations and other requirements. This means identifying the significant environmental impacts associated with the firm's operations and setting objectives and targets to improve performance in selected areas. An RMP could be linked to objectives to reduce or eliminate the release of toxic pollutants into the environment, or to improve control measures to prevent and limit the severity of accidental releases of pollutants. ISO 14001 firms must also establish a program for achieving their objectives and targets. This task includes designation of responsibility for achieving objectives and targets at each relevant function and level of the organization. The RMP Rule similarly requires the owner or operator to assign a qualified person or position with overall responsibility for the development, implementation, and integration of risk management program elements.

The possibilities for synergy have not been missed by the EPA, which is contemplating a pilot designed to study whether ISO 14001 enhances implementation of the RMP Rule. The RMP Rule calls for the EPA to audit RMPs of selected sources for adequacy, with audit sites determined on the facility's accident history, hazards identified in the plans, measurement of actual improvement in safety performance. See generally David M. Kiser & J. Grant Esler, Kodak's Safety Performance Indexing - A Tool For Environmental Improvement, TOTAL QUALITY ENVTL. MGMT., Autumn 1995, at 35.

and other factors.\textsuperscript{252} Under a pilot study proposal put forward for consideration by Dr. Isadore Rosenthal, of the Wharton Risk Management and Decision Processing Center, and Donald Theiler, of the Wisconsin Department of Natural Resources' Bureau of Air Management, firms would be entitled to, among other benefits under consideration, automatic approval of the risk management plan by the agency and low priority in regard to compliance inspections, provided the organization agreed to:

- Incorporate a specific objective calling for development and execution of an RMP Rule risk management program in their EMS;
- Obtain ISO 14001 certification from an outside registrar, who would perform the initial registration audits and subsequent audits;
- Request that performance on risk management objectives be reviewed in such external audits;
- Make audit results available to the government, the local emergency response committee, and the public; and
- Hold public meetings to discuss the audit and surveillance reports.

The agencies and public also stand to gain much under such a proposal. This or a similar initiative would, for example, allow regulators to target dwindling resources on those facilities most likely to be out of compliance. And, because it provides better information and more meaningful opportunity for local community input, the pilot would likely give concerned citizens greater confidence in the RMP exercise. The Risk Management Plan Implementation Workgroup, composed of representatives of local, state and federal governments, public interest organizations, and industry, is currently examining this proposal, as well as others. Workgroup members are also discussing the pros and cons of potential pilot initiative approaches with regulators in vari-

\textsuperscript{252} See 40 C.F.R. § 68.220. Stationary sources with Star or Merit rankings under OSHA's voluntary protection program will be exempt from such audits.
ous offices within the EPA and it is possible that an ISO 14001/RMP pilot could emerge from this dialogue in 1998.

Outside the EPA, the DOJ (a participant in the OECA working group),253 NASA,254 and other departments255 are assessing the potential significance of the standards for enforcement and government operations. The Department of Defense is considering EMS procurement pilot initiatives designed around the ISO system.256 The Department of Defense is also examining whether or not to certify selected in-

253. Mr. Cascio optimistically predicts that ISO 14001 may actually become the model EPA and DOJ will use when determining the appropriate use of prosecutorial and sentencing discretion. See Testimony Before the U.S. House of Representatives, Committee on Science, Subcommittee on Technology (June 4, 1996); see also Cascio, supra note 4, at 35. It is much too early to have high confidence in that prospect. EPA suspicions about ISO 14000 certification are described by Ronald Begley in ISO 14000 A Step Toward Industry Self-Regulation, ENVR. SCI. & TECH., June 1996, at 298.

254. See States, Industry Weigh In on Regulatory Relief, CHEM. WK., Oct. 9, 1996, at 52. It is reported that NASA may require its suppliers to seek ISO 14000 certification. This may also include suppliers of electricity, thus forcing some utilities to seek certification. See New ISO 14000 Standards Aim to Help Utilities With Environmental Programs, UTILITY ENV'T REP., Jan. 3, 1997, available in 1997 WL 8883454.

255. For example, the Department of Energy has contemplated a requirement that major contractors become certified to an ISO-type EMS. See generally Government Grapples with ISO 14001 as Model EMS, INT'L ENVTL. SYS. UPDATE, Nov. 1996, at 9; DOE May Mandate ISO 14001 For Contractors, INT'L ENVTL. SYS. UPDATE, Aug. 1996, at 4; see also Chair of DOE Advisory Committee Pushes Faster Use of Technology, AIR WATER POLLUTION REP. (Dec. 2, 1996), available in 1996 WL 14657213. Laurent Hourcle, Co-director of George Washington University’s Environmental Law Program, observes that ISO 14000 certification can be incorporated into government contracts without major changes to procurement laws and regulations, perhaps as a prequalification “requirement,” as an “evaluation factor” under in the context of “best value” contracts, or as a remedial factor for contractors seeking to avoid debarment or suspension, or to regain the ability to obtain federal contracts. Letter from Laurent R. Hourcle to Erik Meyers (Feb. 12, 1996) (copy of letter on file with authors).

installations under the ISO 14001 EMS specification.\textsuperscript{257}

A number of state environmental agencies have begun, or soon will begin, ISO 14000 pilot initiatives\textsuperscript{258} and studies of the effectiveness of environmental management systems.\textsuperscript{259} California’s pilot project, currently in the recruit-

\footnote{257. See, DOD Weighs ISO 14001 Options, INT’L ENVTL. SYS. UPDATE, June 1997, at 1. See also Annette Dennis McCully, Northwest Naval Installations Regionalize Using ISO 14001, INT’L ENVTL. SYS. UPDATE, Apr. 1997, at 8.}


\footnote{259. Several states split off from OECA’s Task Group to formulate their own set of metrics to assess the effectiveness of voluntary EMSs, “Environmental Management System Project Evaluation Guidance”, as part of the Multi-State Working Group (MSWG) on EMS/ISO 14000. The focus of these states, which include Arizona, California, Pennsylvania, North Carolina, Texas, Wisconsin, Minnesota, Illinois, Massachusetts, and Oregon, is on ways to track EMS performance — looking beyond basic compliance issues. Other members of the MSWG on EMS/ISO 14000 include representatives from the Environmental Law Institute, Sidley & Austin, Tulane Law School, National Institute of Standards and Technology, and the University of North Carolina at Chapel Hill. The MSWG matrix covers six main areas or categories:}
ment stage, aims to evaluate several issues, including the factors associated with the establishment and implementation of an EMS, e.g., environmental performance, compliance, public acceptance, pollution prevention, information quality, and cost. The goal of the program is to assess the appropriateness and feasibility of using an EMS based on ISO 14001 as a voluntary alternative mechanism to achieve more effective and efficient compliance with existing regulatory standards. Oregon’s “Environmental Management System

- Environmental Performance Indicators – measuring discharges of pollutants
- Environmental Conditions Indicators – measuring ambient conditions such as air, land and water associated with a specific facility
- Environmental Compliance Indicators – measuring the extent to which emissions are in compliance with existing laws and whether an EMS has resulted in faster discovery and correction of any problems
- Management Framework Indicators – information about the organizations business plan and management system and what specific practices and tools are applied to support the system
- Costs/Benefit Indicators associated with an EMS – such as the costs of certification and whether there are any benefits such as stock prices increasing
- Pollution Prevention Indicators – measures whether EMS leads to activities that prevent pollution
- Stakeholder Confidence Indicators – measuring community and stakeholder acceptance and involvement in an EMS.


260. In assessing applications for the program, CAL/EPA staff will be looking for projects where the EMS is clearly connected to environmental regulations which would offer some demonstration value. Applicants will be expected to be in good environmental standing with local agencies. Any violations found during the pilot as a result of self-audits will be handled according to the self-auditing policy of the affected CAL/EPA board or department. The project will contain a public involvement program. California EPA, ISO 14000 Pilot Project Request for Proposals, May 16, 1997 (on file with authors).
Incentives" project is still in the planning stages but as initially designed would recruit companies which have an effective EMS based on ISO 14001, which have demonstrated superior environmental performance and which have meaningful stakeholder activities in place. In return for "beyond compliance" performance, the government might give regulatory "benefits" such as fast-track permitting, single-contact permitting, and administrative flexibility. In time, lessons learned from experiences under these programs could inform major regulatory reforms emphasizing corporate self-policing and third party verification in the U.S. and elsewhere.

261. This project was initially to be called the "Green Permits" Project, but the name changed in the development phase. See Oregon Department of Environmental Quality, Green Permits Project Overview (June 1997) (on file with authors).

262. ISO 14000 regulatory initiatives in other countries are also in a very formative stage of development. See generally Susan Rost, Special Supplement: Global ISO 14001 Progression Evident, Int'l Envtl. Sys. Update, June 1997, at 1; Dylan Tanner et al., Environmental Management in Asia: A Guide to ISO 14000 (1997). Preliminary background on ISO pilots and regulatory experiments worldwide is also offered in the sources listed below.

- Japan. In a 1996 survey of leading firms in Japan, 44.7% of the respondents indicated that they are preparing to apply for registration. See Japan's Local Governments Embracing ISO 14000
Malaysia. See Esther Tan, Cabinet Adopts Environ Standard, The New Straits Times, June 19, 1997, available in 1997 WL 11335441; Anita Gabriel, Sirim Set To Award EMS To Five Local Firms In December, BUS. TIMES (Malaysia), Nov. 13, 1996, at 7; Zuraimi Abdullah, At Least Four Companies To Receive ISO 14000 By Year-End, NEW STRAITS TIMES, Nov. 13, 1996, at 23.

Mexico. See Mexico, Canada, U.S. to Share Data, Technology Linked to Compliance, INT'L ENVTL. DAILY (BNA) 3 (Feb. 1, 1996); New Water Pollution Standards Changes to Other Rules Forecast for 1996, INT'L ENVTL. DAILY, Jan. 22, 1996, at 4 (discussing small-firm version of ISO 14000 as part of Mexico's environmental agenda for 1996); John Nagel, Mexican Official Describes "Environmental Regulation Revolution", INT'L Env't Daily (BNA) D-5 (Aug. 29, 1995); International Standards Certification Expected to be Key to National Enforcement, INT'L Env't Daily (BNA) D-3 (June 6, 1995); Susan Bruninga, ISO 14000 Standards May Be Substitute For Differing Rules In Many Nations, INT'L Env't Daily (BNA) D-2 (Apr. 26, 1995). Prospects look especially good for integrating ISO 14001 certification with Mexico's voluntary environmental audit system, the Terminos de Referencia para la Realizacion de Auditorias Ambientales ("Terms of Reference for Conducting Environmental Audits").


2. ISO 14001: Recognizing the Disclosure Risks

Executives contemplating implementation of ISO 14001 have a number of significant legal issues to evaluate. Perhaps the most difficult matter to resolve is what measures, if any, the firm will take to ensure that ISO reports and documents are not later used against it in an enforcement or civil action setting. Earlier in this Article we highlighted the risks created by the use of audit-generated documents by prosecutors and third-party litigants. As the experience of Lucent Technologies with its ISO 14001-influenced Project XL proposal proves, it is possible that similar questions may arise in the ISO context, especially in circumstances where a company seeks third-party certification or verification of its EMS.

Queue for ISO 14000 Award Thailand: Several Industrial Facilities Owners Try to Attain ISO 14000 Certificate for Waste Treatment, Bangkok Post, Nov. 13, 1996, at 3; Thai Companies to Take Part in Pilot Project on ISO 14000, Int'l Envtl Rep. (BNA) 407 (May 15, 1996); Thailand Preparing For ISO Implementation, INT'L ENVTL. SYS. UPDATE, Apr. 1996, at 5; Thailand: Country To Look To Private Sector To Handle Pollution Control, Monitoring, Int'l Envtl. Daily (BNA) (Mar. 18, 1996) (as part of a regulatory drive to reduce pollution, the government of Thailand plans to encourage firms to conduct EMS audits and bring their environmental management in line ISO 14000).

263. As the authors of one article on the ISO scheme framed the issue: "Will companies be [sorry] when ISO audits discover areas of noncompliance with federal regulations, making the company vulnerable to millions of dollars in fines from government agencies?" Kara Sissell & Rick Mullin, Fitting in ISO 14000 A Search for Synergies, CHEM. WK Nov. 8, 1995, at 39. See also 14010s Environmental Auditing, supra note 128, at 69-72 (describing potential confidentiality problem under the ISO standards).

264. Lucent Technologies and regulators struggled over an auditing policy for the company's XL project. Lucent sought an up-front pledge that violations discovered under the initiative would not be met with sanctions (since they would have been corrected in accordance with the company's ISO-based EMS); the government argued that the new Self-Policing Policy was itself sufficient. See Susan Bruninga, EPA Not Likely To Waive Provisions In Audit Policy For Project XL Proposal, Daily Rep. for Executives (BNA) A-11 (Aug. 20, 1996); Susan Bruninga, EPA Audit Policy May Determine Success Of Company's Project XL Proposal, Daily Rep. for Executives (BNA) A-15 (Aug. 19, 1996).

265. The fears of U.S. industry in this regard are recounted in Committee Draft on Management Standards Addresses Pollution Avoidance, Compliance, 18 Int'l Env't Rep. (BNA) 175 (1996). Jack Goldman analyzes these risks at
EMS audits should focus on the soundness of the auditee's EMS rather than its compliance history. A company cannot obtain certification under ISO 14001, however, without demonstrating that it has in place an effective program to evaluate compliance. Moreover, registrars will require that the organization's policy include a commitment to comply with relevant environmental legislation and regulations.266 Debate continues within the registrar and auditor communities over how compliance aspects of the specification should be assessed.267 Until we acquire some field experience with how auditors will construe their responsibilities under the standards, it is reasonable to assume some auditors will develop materials bearing on environmental aspects of the auditee's operations, and specifically, data on the auditee's compliance. Of such information, little, if any, would be shielded from disclosure to the government or third-parties268 under common law principles or audit privilege laws, especially under third-party certification or verification scenarios.269 As described above, it is also questionable whether

length in Will Implementing ISO 14001 Destroy the Confidentiality of Environmental Compliance Audits?, Env't Rep. (BNA) 426 (June 7, 1996).

266. ISO 14001 § 4.2(c).


policies developed thus far by the EPA or DOJ would dramatically alter most firms' evaluation of the risks and benefits of undertaking the exercise. 270

Communications between counsel and client concerning legal matters are generally protected from disclosure to the government and third-party litigants under the attorney-client privilege. 271 This privilege might conceivably protect some ISO 14001 communications, provided that the exercise was initiated and performed under the supervision and direction of a lawyer, 272 and that the privilege was not otherwise


272. The most oft-cited definition of the attorney-client privilege remains that set forth by Judge Wyzanski in United States v. United Shoe Mach. Corp.: The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his [or her] subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his [or her] client (b) without the
presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.


from a functional standpoint, few if any businesses would want counsel running their compliance programs, let alone their ISO 14000 EMSs. Nor would the attorney-client privilege prevent disclosure of information concerning environmental conditions at the site; such data would arguably fall into the unprotected category of fact material. 275

Similarly, it would be difficult to make a case for nondisclosure of ISO 14000 material under the work product doctrine. 276 In almost every case it would be impossible to estab-


275. The mere existence of an attorney-client relationship does not mean that a communication will be immune from compelled disclosure. The privilege only "protects the disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." Upjohn Co. v. United States, 449 U.S. 383, 395 (1981). See, e.g., In re Six Grand Jury Witnesses, 979 F.2d 939 (2d Cir. 1992); Dawson v. New York Life Ins. Co., 901 F. Supp. 1362 (N.D. Ill. 1995); United States v. Davis, 132 F.R.D. 12, 15 (S.D.N.Y. 1990); City of Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962) ("The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his [or her] knowledge merely because he [or she] incorporated a statement of fact into [the] communication . . ."). Similarly, the privilege does not protect from disclosure the facts surrounding the making of the communication. See Ramseur v. Chase Manhattan Bank, 865 F.2d 460, 467 (2d Cir. 1989); In re Walsh, 623 F.2d 489 (7th Cir.), cert. denied, 449 U.S. 994 (1980). While the privilege belongs to the client rather than the attorney, the attorney may assert the privilege on the client's behalf. Fisher v. United States, 425 U.S. 391, 402 (1976); In re Impounded Case, 879 F.2d 1211, 1213 (3d Cir. 1989).

lish that ISO documents and other tangible materials were prepared "in anticipation of litigation."277 And, even if this hurdle could be surmounted, protection could be circum-

Rev. 333 (1978). Distinct from, and in some ways broader than the attorney-client privilege, the work product doctrine promotes the adversarial nature of our system by safeguarding the fruits of an attorney's trial preparations from discovery. Whereas the attorney-client privilege only encompasses confidential communications between attorney and client, the work product doctrine reaches communications with others, as well as all materials developed by counsel. F.R. Civ. P. 26(b)(3), substantially codifying the rule of Hickman, at 495, sets forth the elements of the work product doctrine:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b) (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his [or her] case and that he [or she] is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Id.

277. In order to find protection under the work product doctrine, a document or other item must have been prepared in anticipation of litigation. See, e.g., In re Woolworth Corp. Sec. Class Action Litig., No. 94 CIV.2217 (RO), 1996 WL 306576, at 3 (S.D.N.Y. June 7, 1996); Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465, 471 (S.D.N.Y. 1993). This requirement has been construed broadly — but some possibility of litigation must exist. See generally Powell, Discovery Privileges: What Constitutes "Anticipation of Litigation"?, 57 Tex. B.J. 122 (Feb. 1994). Although what is meant by "litigation" has not been precisely defined, the key seems to be whether the proceeding for which the materials were prepared is adversarial in nature. The term "litigation," as used in this clause, has been construed to include administrative investigations. See Maertin v. Armstrong World Indus., Inc., No. 95-2849 (D.N.J. Apr. 29, 1997). It is highly questionable whether an environmental audit prepared prior to any anticipation of a government enforcement action would satisfy this criterion. See Terrell E. Hunt & Timothy A. Wilkins, Environmental Audits & Enforcement Policy, 16 Harv. Envtl. L. Rev. 365, 385-86 (1992).
vented by a showing of compelling need\textsuperscript{278} or waiver.\textsuperscript{279} Like the attorney-client privilege, the work product doctrine does

\textsuperscript{278} The work product doctrine does not provide absolute protection against disclosure of tangible materials. For example, if a party seeking to discover material has substantial need for the information and cannot obtain the substantial equivalent without undue hardship, a court can order that the information be disclosed. \textit{See In re Kidder Peabody Sec. Litig.}, No.94CIV.3954, 1996 WL 263030, at 2 (S.D.N.Y. May 31, 1996); Bowne of New York City, Inc. v. AmBase Corp., 150 FRD 465, 471 (S.D.N.Y. 1993). In evaluating whether or not there is sufficient need to overcome a claim under the work product doctrine, courts draw a distinction between treatment of material which does not reveal any of the attorney's mental processes, e.g., "ordinary work product" (witness statements, surveys, intra-office memoranda, photographs and charts), and material which shows the mental impressions of the attorney, e.g., "opinion work product" (mental impressions, conclusions, opinions, or legal theories about litigation). An audit could conceivably contain both "ordinary" work product and "opinion" work product.

Of the two, "opinion" work product receives greater protection from disclosure. Ordinary work product will not be protected from discovery if an adverse party can: (i) show substantial need for the information, and (ii) demonstrate that he or she is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. \textit{See Fed. R. Civ. P. 26(b)(3)}. On the distinction between opinion and ordinary work product, \textit{see generally} K. Waits, \textit{Opinion Work Product: a Critical Analysis of Current Law and a New Analytical Framework}, 73 Or. L. Rev. 385 (1994). The determination of substantial need and undue hardship is made case-by-case, based on factors such as the nature of the materials requested, the effort involved in composing or assembling the materials, the potential for alternative sources of information, the importance of the materials in relation to the issues at hand, and the procedural posture in which the claim arises. \textit{See Thomas R. Mulroy, Jr. & W. Joseph Thesing, Jr., Trial Techniques: Protecting Client Confidences When the Client is a Corporation}, 25 Tort & Ins. L. J. 476, 483 (1990). A higher threshold must be met to compel the disclosure of opinion work product but an exact standard has yet to be established. All that is clear is that the party seeking disclosure must show more than substantial need and inability to obtain the material elsewhere. \textit{See Upjohn v. United States}, 449 U.S. 383, 401 (1981) (fact that investigative materials sought by government included documentation gathered from parent corporation's international offices and subsidiaries did not constitute "undue hardship").

\textsuperscript{279} \textit{See In re Kidder Peabody Sec. Litig.}, at 15-16. Although it has been said that "the mere showing of a voluntary disclosure to a third person will . . . not suffice in itself for waiver of the attorney work product privilege," courts have held that work product protection may be waived if materials are disclosed to anyone other than one with a common interest. \textit{See, e.g.}, United States v. American Telephone & Telegraph Co., 642 F.2d 1285, 1298-1300 (D.C. Cir. 1980); \textit{see generally} J.L. Hall, \textit{Limited Waiver" of Protection Afforded By the Attorney-Client Privilege and the Work Product Doctrine}, 1993 U. Ill. L. Rev. 981 (1993).
not bar discovery of facts.\textsuperscript{280}

The self-critical analysis doctrine, or self-evaluative privilege,\textsuperscript{281} would seem a more likely refuge. Yet, just like the work product doctrine, it too is sharply qualified. In Reich-

\textsuperscript{280} The work product doctrine covers only "mental impressions, conclusions, opinions, or legal theories" of an attorney or other representative of a party concerning the litigation. See Fed. R. Civ. P. 26(b)(3).

hold Chem. Inc. v. Textron, Inc., a federal district court held for the first time that environmental reports and documents prepared for retrospective analysis of past conduct and practices (and its resulting environmental consequences) contain information protected from disclosure under the self-critical analysis doctrine. The decision thus offers another form of protection, in addition to the attorney-client privilege and the work product doctrine, that companies can invoke in order to prevent disclosure of environmental documents.

In upholding Reichhold's exercise of the privilege, the court examined four factors. Specifically, the court asked whether: (i) the information resulted from a critical self-analysis undertaken by the party seeking protection; (ii) the party and the public had a strong interest in preserving the free flow of the type of information sought; (iii) the information was of a type whose flow would be curtailed if discovery was allowed; and (iv) the information was prepared with the expectation that it would be kept confidential, and has in fact remained confidential. The court also tried to explain conflicting precedent, stating that the self-critical analysis privilege: (i) applies only to subjective impressions and opinions and does not apply to objective facts; (ii) in some circumstances may not apply to documents that have been subpoenaed by a government agency as part of an administrative investigation; (iii) can be overcome by a showing of extraordinary circumstances or special need; and (iv) may only apply to retrospective analysis, not to the evaluations of the potential environmental risks of a proposed course of action made.

283. The dispute in Reichhold centered around documents prepared by the plaintiff in connection with the cleanup of groundwater contamination pursuant to a consent decree with the Florida Department of Environmental Regulation. In 1992, when Reichhold filed suit for contribution under Superfund against former owners of the site, the former owners sought to discover the results of the state mandated environmental investigation. Reichhold argued that the documents from the investigation were privileged under the self-critical analysis doctrine.
in advance of the decision to adopt that course of action. The court identified several limitations that may limit the decision's value as a shield against disclosure, e.g., the privilege does not apply to a government subpoena pursuant to an administrative investigation.

If applied to environmental audits, limitations such as the one allowing documents to be subpoenaed pursuant to an administrative investigation would greatly reduce the amount of protection offered by this privilege since a company's biggest concern with environmental audits is that they provide a roadmap to government enforcement actions. Courts may consider much of the data contained in compliance audits, e.g., sampling results, emission rates, amount of time hazardous waste has been stored on a site, etc., to be "objective facts" and thus not covered by the privilege. Portions of audit reports containing recommendations for improvement may also be considered outside the scope of the privilege, i.e., "proposed course of action." Moreover, like the work product doctrine, this privilege is also vulnerable to a showing of extraordinary circumstances or special need. Finally, the self-evaluative privilege applies only to retrospective analysis and not to evaluations of the potential environmental risks of a proposed course of action made in advance of the decision to adopt that course of action. Greater acceptance of the privilege may make compliance auditing more common, but we doubt it will prove generally efficacious.

Two recent court decisions bring the limitations of these doctrines out in sharp relief. During the course of its defense against a Clean Water Act lawsuit brought by a local citizens organization in Louisiana Env'tl. Action Network, Inc. v. Evans Indus., Inc., Evans Industries sought to withhold memo-

286. See id.
randa describing the results of an EPA inspection and other biomonitoring test results contending the documents were off-limits from disclosure under the work product and self-critical analysis doctrines. The court ruled that the documents fell outside the scope of the work product doctrine because it was "clear that the instant documents were prepared during the normal course of business of investigating environmental problems rather than in anticipation of litigation." Even assuming the self-critical analysis privilege is recognized in the Fifth Circuit, the court found justification for application of it wanting in cases involving "voluntary environmental self-analyses."

A group of plaintiffs also prevailed in their attempt to obtain the defendant's environmental audit report in Carr v. El Dorado Chem. Co. The court concluded that the audit of El Dorado Chemical's facility was neither protected under Arkansas' audit privilege statute (because it was prepared two years before enactment of the Arkansas statute creating an environmental audit privilege), nor shielded under the self-critical analysis doctrine. Even assuming recognition of such a privilege, it would not apply in cases like this where there was no evidence that the defendant "would cease performing environmental audits or similar analyses, if discovery" of the audit were allowed, but ample evidence of "special need" for the documents.

289. Id. at 2.
290. Id. The court also doubted that such environmental reviews were always performed with the expectation that the results would be kept confidential. See id. Also, the fairness rationale offered to justify application of the privilege to documents that a party has been legally required to prepare is inapplicable to documents voluntarily prepared. See id. at 3.
292. See id. at 15-16. The self-evaluative privilege has also been rejected in the following environmental cases. See, e.g., Detroit Newspaper Agency and the Detroit Free Press, Inc. and Newspaper Guild of Detroit, Local 22, of the Newspaper Guild, AFL-CIO-CLC, 149 L.R.R.M. (BNA) 1241 (June 30, 1995) (declining to protect environmental report for management from disclosure to employees union under the privilege of self-critical analysis); United States v. Dexter Corp., 132 F.R.D. 8 (D. Conn. 1990); State ex rel. Celebrezze v. CECLOS Int'l, Inc., 583 N.E.2d 118 (Ohio App. 1990); see generally Patrick J. Ennis,
The EPA and DOJ self-policing incentives may induce some firms to implement and assess an EMS – but the discretionary nature of both policies will likely give some executives pause. Moreover, as the dispute in *In re Harmon Electronics Inc.* illustrates, the government and defendants often disagree sharply over the interpretation of such policies.\(^{293}\) Broadening such incentives to explicitly cover environmental management systems was a good step,\(^{294}\) but as discussed above, such policies have no binding effect on the government and, perhaps even more significantly, fail to address state regulators and private litigants. The policies also contain conditions many firms will find intolerable or impossible to meet.\(^{295}\)

Audit privilege/immunity laws would appear to provide the most explicit and expansive protection for ISO 14001 communications and documents. Thus far, however, only a limited number of states have enacted some form of legislation protecting audits from disclosure or granting some level of immunity for voluntary disclosure of violations uncovered during environmental audits, and as of yet there is no compa-

\(^{293}\) See RCRA Docket No. VII-91-H-0037 (Mar. 24, 1997). Harmon Electronics, facing more than $585,000 in penalties for violations of the RCRA, sought elimination of all but $6,000 (the amount of the economic benefit the company was thought to have enjoyed for not complying with the regulations) on the grounds that it had discovered the violations and reported them voluntarily to the Missouri Department of Natural Resources. Agency counsel rejected the company's arguments, as did the EPA Environmental Appeals Board. See Amy Porter, *Harmon Electronics Ruling On Overfiling, Audit Policy Has Implications For Other Laws*, Daily Rep. for Executives (BNA) A-14 (Mar. 26, 1997).


\(^{295}\) For example, the DOJ's FACTORS statement might offer ISO participants a full pass, or at least a partial break, in charging decisions. In order to benefit, however, companies would need to adopt control measures beyond existing law as a comfort zone to prevent noncompliance events. It is unclear that all, or even most, companies would care to make this commitment.
rable federal statute.\textsuperscript{296} It is also significant that, of the state audit statutes that have been enacted, all contain notable restrictions.\textsuperscript{297} For example, several statutes explicitly state that the privilege is lost in criminal proceedings if the prosecutor has a need (commonly expressed as a substantial or compelling need) or circumstances exist requiring disclosure of the information.\textsuperscript{298} In most states, the privilege will also be lost if the company did not act promptly and with "reasonable diligence" to rectify the situation. Most statutes would not apply to information that must be collected, developed, maintained, reported or otherwise made available to regulatory agencies.\textsuperscript{299} Nor would such laws bar the federal govern-

\begin{itemize}
  \item \textsuperscript{296} The state statutes and prospects for federal legislation are discussed \textit{supra} note 79, and note 80 respectively.
  \item \textsuperscript{297} The privilege provided by such statutes is distinct from the attorney-client privilege that may also be asserted if the audit was performed with the assistance of counsel. The statutes generally attempt to strike a balance between the government's interest in detecting culpable violations and in encouraging self-detection and correction of environmental violations. Each uses essentially the same model statutory language to create the privilege. To qualify as privileged material under many of the laws enacted thus far, an environmental audit report must include: (i) a report by the auditor; (ii) a memorandum analyzing portions of the auditor's report; (iii) implementation plans that address compliance, improve compliance and prevent further non-compliance; and (iv) the words "environmental audit report – privileged document" on each document. Some of the states also protect those individuals hired to conduct the audit from examination by investigators or enforcement officials unless the owner or operator for whom the audit was performed consents to the questioning. Access to the environmental audit documents fitting this description will be permitted in criminal cases if, after a review by the judge in chambers, the court determines that: (i) the privilege was asserted for a fraudulent purpose; (ii) the audit report showed evidence that the facility had discovered non-compliance and failed to rectify the situation with reasonable diligence; or (iii) there was a compelling need for the information and it was not otherwise obtainable without incurring unreasonable cost and delay. The privilege also does not apply to information that must be collected, developed, maintained, reported or otherwise made available to regulatory agencies. Prosecutors are often allowed under these statutes to consult with the enforcement agency regarding the contents of the audit report in order to prepare for the in-camera hearing. If the privilege is successfully upheld, the information used in preparation for this hearing cannot be used in any investigation or proceeding against the defendant, although it may be difficult to prove that a prosecutor violated this privilege.
  \item \textsuperscript{298} See, e.g., Colorado, Indiana, Kentucky, and Oregon.
  \item \textsuperscript{299} On the pros and cons of audit privileges, compare David Ronald, \textit{The Case Against Environmental Audit Privilege}, \textit{Nat'l Envtl. Enforcement J.},
\end{itemize}
ment from taking action.

Many firms will implement EMSs and conduct EMS audits anyway on the grounds that the overall benefits\(^{300}\) of the exercise exceed the potential downside risks. Companies concerned about the limited efficiency of common law and statutory privileges or which remain unconvinced by pledges of governmental restraint, however, should carefully circumscribe the scope of EMS audits and ensure that documentation closely conforms to the requirements of the specification.\(^{301}\) Companies opting to proceed with ISO implementation should also build firewalls and establish procedures to ensure that counsel is given the role of analyzing any legal issues, so that viable protections are neither waived nor otherwise lost.\(^{302}\) Those firms which have not previously

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\(^{300}\) Especially rewards under regulatory initiatives that could possibly be developed based on experiences with ELP, Project XL, CSI, and other state and federal pilot programs.

\(^{301}\) See Michael D. McIntyre et al., *New Cutting Edge Environmental Management Standard – ISO 14001*, *Advoc.*, June 1997, at 36, 39 (describing the implementation of Micron Technologies’ ISO 14001-based EMS and noting that the most difficult aspect of the decision to pursue certification “centered on confidentiality”).

\(^{302}\) See Donald A. Carr, *Internal Investigations of Offenses Under Environmental Laws, in Environmental Criminal Liability: Avoiding and Defending Enforcement Actions* (Donald A. Carr ed., 1995) and *Environmental Crimes Deskbook* 45-47 (1995) for a discussion of how to minimize disclosure risks. In general, counsel must endeavor to ensure that: (i) the role of counsel is documented so that it is evident that counsel was retained to provide legal advice, not business judgment, and where appropriate, that counsel is acting in anticipation of litigation; (ii) any non-legal personnel used to assist lawyers, including any environmental consultants, operate at the request of counsel and under counsel’s direction; (iii) attorney-client communications are kept discrete and confidential; (iv) legal advice is carefully channeled in accordance with the resolution authorizing the endeavor; (v) work product is structured as “opinion” rather than “fact” by, to the extent practicable, interweaving legal analysis with factual reporting; and (vi) all disclosure to government attorneys or regulatory attorneys is carefully circumscribed. Further advice on how to shield audit information is offered in Anne C. Flannery & Katherine M. Polk, *Recent Decisions On The Attorney-Client Privilege And Their Impact On Internal Corporate Investigations*, *Metropolitan Corp.*
evaluated environmental performance may wish to begin with an environmental compliance audit before making a decision about implementation of ISO 14001 at a particular facility.\textsuperscript{303}

IV. Implications of ISO 14000 for International Trade

The U.S. TAG is beginning to explore potential areas of conflict between the ISO 14000 standards and the provisions of various international trade laws. Of the issues to be considered, one of the most difficult will be whether an unfair trade barrier under the Agreement on Technical Barriers to

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Trade ("TBT Agreement," one of the family of international trade agreements negotiated during the Uruguay Round and administered by the World Trade Organization (WTO)), would be created if a country were to impose a requirement of ISO 14001 registration on imports from other countries. Forty-eight percent of respondents in one poll expressed concern that ISO 14001 could be employed as a non-tariff trade barrier. Although a detailed examination of the reasonableness of such fears would take us beyond the scope of


this Article, a short treatment of the theme makes sense, if only to highlight the questions for those who would seek to tailor a compliance program to ISO 14001 out of some trade-based concern.

Since the TBT Agreement sets rules regarding international trade in goods, its primary implications are for the product-related standards in the ISO 14000 series.\textsuperscript{308} Thus, to the extent that trade warnings relate to the EMS specification, ISO 14001, or the auditing standards, they probably overstate the threat.\textsuperscript{309} The far more relevant question is whether, given (i) the scientific and technical content of some of the standards, e.g., the eco-labeling (ISO 14020) and life-cycle assessment (ISO 14040) standards, and (ii) the relative lack of accreditation and/or registration bodies in some parts of the world, developing countries will view the ISO standards as technical barriers to trade under the TBT Agree-


309. See Genevieve Mullett, ISO 14000: Harmonizing Environmental Standards And Certification Procedures Worldwide, 6 Minn. J. Global Trade 379, 400 (1997) (Concluding that ISO 14000 is not likely to have a major impact on the overall trade versus environment dispute).
In Mexico, for example, the Secretaria de Comercio y Fomento Industrial has resisted previous eco-labeling initiatives, characterizing such measures as non-tariff barriers to trade. Officials with the Thailand Ministry of Industry have already publicly characterized the ISO 14000 series as a new technical barrier to trade.

In his article on ISO 14000 and its trade implications in the National Law Journal, Stephen Kass assessed the validity of the ISO 14000 standards under the Uruguay Round agreements and the North American Free Trade Agreement, concluding that “ISO sponsors can have considerable confidence that their efforts will survive challenges.” Mr. Kass concentrated primarily on the EMS specification, however, and left for a later day the tougher problems presented by the life-cycle and eco-labeling standards. Professor Roht-Arriaza examined these issues in some detail and offered a more mixed forecast. In our view, the ISO 14000 standards could have substantial implications under the TBT Agreement, as well as the WTO Agreement on Government Procurement, especially if: (i) countries require imported products to meet the ISO 14000 standards (and it can be es-


established that the criteria of the standards are biased in favor of domestic products); (ii) government agencies mandate registration to the standards as a contractual requirement; or (iii) government agencies use ISO 14001 registration as a factor in regulatory and enforcement decisions (and in doing so discriminate in favor of domestic producers). The answers to some of these questions may become clearer when the WTO Committee on Trade and the Environment completes its review of the implications of national and international standards under the Uruguay Round agreements. In the interim, organizations tying compliance to ISO 14001 because of concerns over market access should focus carefully, and realistically, on the potential trade issues presented by the ISO standards regime.

V. Some Approaches to the Design and Implementation of Compliance Programs

An organization may maximize its certification prospects and at the same time reduce the risk of serious sanctions for noncompliance occurrences by factoring the criteria of the DOJ's Factors document, the EPA's Self-Policing Policy, the compliance program provision of the Organizational Guidelines, and ISO 14001 into the design of its EMS.


315. In India, for example, ISO 14000 could soon become a precondition for government purchases. See Jayanta Mallick, India: Govt. Purchase on ISO 9000 Basis Likely, BUS. LINE, June 6, 1997, at 2.

316. See discussion supra Part II.E.1.

317. See discussion supra Part III.C.1.

318. See Organizational Guidelines, supra note 6, § 8A1.2; Draft Environmental Sentencing Guidelines, supra note 108, § 9D1.1.

319. Additional insight into program design and implementation, are offered in many of the sources cited supra Part III.B, and in Frank B. Friedman, Practical Guide to Environmental Management supra note 124; N.P. Cheremisinoff & M. Graffia, Environmental and Health & Safety Management: A Guide to Compliance (1995); W. Lee Kuhre, ISO 14001 Certification: Environmental Management Systems (1995); Groskaufmanis, supra note 124, at § 5.07A; D. Keith Denton, Enviro-Management (1994); Rogene A. Buchholz,
Generally, such an approach entails addressing the following areas of inquiry:

- ISO 14001.
  - Does the organization's EMS meet the requirements set forth in § 4 of ISO 14001?
- Organizational Guidelines.
  - Does the organization have an effective program to prevent and detect violations of law?320
- DOJ Factors.

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320. Specifically, a program 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 the instant offense, by itself, does not mean that the program was not effective. The hallmark of an effective program to prevent and detect violations of law is that the organization exercised due diligence in seeking to prevent and detect criminal conduct by its employees and other agents.

§ 8A1.2. Commentary 3.(k).

For purposes of comparison, we will also point out relevant provisions of the Draft Environmental Organizational Guidelines, which evaluate the organization's "commitment to environmental performance" to evaluate the Base Offense Level as described in detail supra Part II.3.a.

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Explore the establishment and scope of "any regularized, intensive, and comprehensive environmental compliance program" in place and if so, what was its scope?  

- EPA Self-Policing Policy

Was the violation discovered through an environmental audit or an objective, documented, systematic procedure or practice reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations? Where the violation is discovered through a "systematic procedure or practice" which is not an audit, the regulated entity will be asked to document how its program reflects due diligence.

The general facets of such an environmental preventive maintenance and defense strategy are outlined below.

The task of integrating compliance with the larger ISO 14001 EMS may be divided into several stages, beginning with the establishment of a select group of company executives responsible for EMS strategy, including implementation of ISO 14001. Early in the process of developing or reshaping the firm's EMS to meet the requirements of the specification, the aim of this group should be to identify, with the

321. See Factors, supra note 42, at Section II.C.
323. Id. at 66,708.
324. Of course, the structure and specific characteristics of an ISO EMS and any compliance sub-system will depend on the nature and size of the firm as well as its unique goals and objectives. See generally ISO 14001 §§ 4.2, A.3.1 and ISO 14004 § 0.1; Organizational Guidelines, supra note 6, § 8A1.2. Commentary 3.(k)(7)(i) and (ii) (compare Draft Environmental Sentencing Guidelines, supra note 108, § 9D1.1(a)(2) and Comment 3; Factors, supra note 42, Sections I and II. The EPA recognizes that "a variety of compliance management programs may develop under the "due diligence criteria." Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66,708. Accordingly, the term "due diligence" is interpreted to encompass the regulated entity's systematic efforts, appropriate to the size and nature of its business . . . . " Id. at 66,708. See Bell, supra note 122, at 10,684-85.
325. Compliance with ISO 14001 will require companies to take a multi-disciplinary approach to implementation, drawing on expertise from operations, production, and marketing and public relations. Given the regulatory and other legal issues involved in ISO 14000 implementation, the team will want to consult with counsel from an early stage forward to ensure that the ISO 14001
aid of counsel and on the basis of prior auditing experience, the legal and other requirements applicable to the environmental aspects of the company's activities, products or services. There is no "one size fits all" model; the organization must tailor its overall strategy, and any compliance sub-component, to reflect the unique characteristics, goals, and objectives of the firm.

Effort is consistent with the organization's overall compliance strategy and objectives. Most firms contemplating implementation of ISO 14001 will find it useful to perform the following tasks before proceeding with implementation: (i) identify all key ISO stakeholders; (ii) develop an ISO 14001-based market strategy; (iii) perform a "gap analysis," or comparison of their existing management system against one fulfilling the criteria of the ISO specification, using an analytical tool like the one developed by the Global Environmental Management Initiative, ISO 14001 ENVIRONMENTAL MANAGEMENT SYSTEM SELF-ASSESSMENT CHECKLIST (Mar. 1996); and (iv) analyze the costs and benefits of various implementation responses.


327. See generally ISO 14001 §§ 4.2 ("Top Management shall define the organization's environmental policy and ensure that it a) is appropriate to the nature, scale and environmental impacts of its activities, products or services") and A.4.1.2; ORGANIZATIONAL GUIDELINES, supra note 6, at § 8A1.2. Commentary 3.(k)(7)(i) and (ii) ("The precise actions necessary for an effective program to prevent and detect violations of law will depend upon a number of factors. Among the relevant factors are: (i) Size of the organization – The requisite degree of formality of a [compliance] program will vary with the size of the organization: the larger the organization, the more formal the program typically should be . . . ; (ii) Likelihood that certain offenses may occur because of the nature of its business. If because of the nature of an organization's business, there is a substantial risk that certain types of offenses may occur, management must have taken steps to prevent and detect those types of offenses.") (compare Draft Environmental Organizational Guidelines, supra note 108, § 9D1.1(a)(2) and Comment 3 (describing the differences in compliance programs of small and large companies, and companies with varying environmental impacts and risks)); FACTORS (Sections I and II state clearly that the DOJ's policy is a framework document rather than a checklist. The application of the
A questionnaire might be circulated to a wider group of line managers selected by the company, in order to more specifically ascertain what the most troublesome obligations are and will be on the ground. Having traced a broad outline of the firm's various commitments, counsel and company executives should systematically analyze the most pressing issues. In any near-close call, executives for the company should meet with counsel and possibly other outside consultants to analyze whether and how to proceed. Some organizations may ask counsel to perform an environmental audit. As described previously, companies should make every effort to shield the results of such assessments to the maximum extent possible under state and federal common law and statutory protections, and carefully weigh the risks and advantages of any disclosures to the government. After sorting through these questions, company executives will then be in positions to sit down with counsel to plan implementation and, perhaps certification or some other form of external verification, at selected business units or sites. In most cases, these decisions will hinge on the reasons for implementation of the standards.\textsuperscript{328}

In both the international environmental management standards and enforcement contexts, it is essential that the organization make a genuine commitment to legal compli-
ance and to continual improvement of the EMS.\textsuperscript{329} Company management at the highest level must pledge to pursue these goals.\textsuperscript{330} The organization must have a firm policy in place

\textsuperscript{329} The introductory section of ISO 14001 states that the success of the system depends on commitment from all levels and functions, especially from top management. See ISO 14001 § 0.1. See also ISO 14001 §§ 4.2 ("Top management shall define the organization's environmental policy . . . ."), 4.4.1 ("The organization's top management shall appoint: a) specific management representative(s) who, irrespective of other responsibilities, shall have defined roles, responsibilities and authority for b) ensuring that environmental management system requirements are established, implemented and maintained in accordance with this International Standard; c) reporting on the performance of the environmental management system to top management for review and as a basis for improvement of the environmental management system.")., and A.2 ("The [environmental] . . . policy should . . . reflect the commitment of top management to compliance with applicable laws and continual improvement."). Guidance concerning this facet of the specification is offered at ISO 14004 § 4.1.2. The EPA and DOJ place a similar emphasis on commitment at all levels of the organization, including top management. See generally FACTORS, supra note 42, at Section II.D.1 (In evaluating the pervasiveness of noncompliance, the Department will take into account the level of employees involved in noncompliance), and Section III. Example 2 (indicating that the likelihood of prosecutorial leniency is not as great where company management makes no attempt to oversee implementation of the compliance program); Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66,707 (The EPA Self-Policing Policy will not apply where "corporate officials are consciously involved in or wilfully blind to violations, or conceal or condone noncompliance."); ORGANIZATIONAL GUIDELINES, supra note 6, § 8A1.2 Commentary 3.(k)(2) (In order for the organization to have an effective compliance program, "specific individual(s) within high level personnel of the organization must have been assigned overall responsibility to oversee compliance with [the] standards and procedures [of the organizations compliance program]."). "High-level personnel" are defined in § 8A1.2 Commentary 3.(b) as "individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization." Id. Compare Draft Environmental Organizational Guidelines, supra note 108, § 9.D1.1(a)(1) ("In the day-to-day operation of the organization, line managers, including the executive and operating officers at all levels, direct their attention, through the management mechanisms utilized throughout the organization . . . to measuring, maintaining and improving the organization's compliance with environmental laws and regulation.").

articulating these commitments, and the overall program
must be designed to foster better performance. Goal-setting and a sound method for measuring progress are also critical.\textsuperscript{332}

Ranking managers must be actively engaged in supervising compliance by the "troops," leading to an atmosphere in which it is appreciated that the hierarchy insists upon attentiveness to applicable legal requirements. Relegating oversight of compliance programs to lower-level staff will not do, though line personnel must also be involved. The compliance effort, just as other components of the EMS, must be supported by appropriate human,\textsuperscript{333} physical (e.g., facilities,

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\textsuperscript{332} See generally ISO 14001 §§ 4.3.2 ("The organization shall establish and maintain a procedure to identify and have access to legal and other requirements to which the organization subscribes, that are applicable to the environmental aspects of its activities, products or services."); 4.3.3 ("When establishing and reviewing its objectives, an organization shall consider . . . legal . . . requirements."); 4.5.1 ("The organization shall establish and maintain a documented procedure for periodically evaluating compliance with relevant environmental legislation and regulations."); A.3.1 ("An organization with no existing environmental management system should, initially, establish its current position with regard to the environment by means of a review. The aim should be to consider all environmental aspects of the organization as a basis for establishing the environmental management system. . . . The review should cover . . . legislative and regulatory requirements . . . " and guidance concerning this aspect of the specification offered) at ISO 14004 § 4.2.3; \textit{Organizational Guidelines}, supra note 6, § 8A1.2 Commentary 3.(k)(1) (In order for the organization to have an effective compliance program, the "organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prospect of criminal conduct."); and (7)(i) ("The precise actions necessary for an effective program to prevent and detect violations of law will depend upon a number of factors. Among the relevant factors are: (i) . . . [A] larger organization generally should have established written policies defining the standards and procedures to be followed by its employees and other agents.") (\textit{Compare Draft Environmental Organizational Guidelines}, supra note108, § 9D1.1(a)(2)); \textit{Factors}, supra note 42, at Section II.C ("Were there procedures and safeguards to ensure the integrity of any audit conducted?"); Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66,710 (Due diligence inquiry encompasses "(a) Compliance policies, standards and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits and other sources of authority for environmental requirements."").

\textsuperscript{333} See Grace H. Wever, \textit{Strategic Environmental Management} 123 (1996); Kuhre \textit{supra} note 128, at 54-55 (suggesting that the organization has reached an adequate level of personnel when it is able not only to put out "fires," but take proactive environmental action).
equipment), and financial resources. As noted above, the organization conveys its commitments through policies, procedures, and standards addressing a variety of "legal" and other obligations. An organization seeking ISO 14001 registration or favorable treatment from a prosecutor should set in motion a process of building, implementing, and regularly revising an oversight scheme specifically tailored to the kinds of issues most likely to be confronted in real life at its facilities. The process should be integrated with the firm's overall compliance strategy and structured towards the compilation of policies and procedures devoted to all applicable legal and other requirements to which it subscribes. Obvious examples of "legal" requirements include federal, state, and local environmental laws and regulations (listed and proposed), ordinances, permits, licenses, and authorizations. Corporate action may also be circumscribed by the terms of other regulatory/governmental commitments, e.g., judicial or administrative orders or consent agreements. Somewhat less conspicuous environmental requirements arise out of mergers and acquisitions agreements, credit agreements, insurance policies, and financial resources.

334. See KUHRE supra note 128, at 60 (Information resources should also be taken into account, e.g., chemical and legislative databases, access to agency information, and technical literature).
335. See ISO 14001 § 4.4.1 ("Management shall provide resources essential to the implementation and control of the environmental management system.").
337. See supra note 332 and ISO 14001 § A.1 (The management system "should enable an organization to . . . identify . . . relevant legislative and regulatory requirements . . . ").
338. See ISO 14004 § 4.2.3.
and supply contracts. 339

The design of the EMS system should account for all of the organization's major environmental commitments, not merely its legal ones. 340 Additionally, companies striving to exceed "mere compliance" levels should account for voluntary commitments in their EMS strategies as well. Section 4.3.2 of ISO 14001 acknowledges that many firms will undertake to fulfill obligations beyond those required by law, and calls for mechanisms to ensure their identification and accessibility of such obligations. As used in the specification, legal and other requirements are distinct from, but related to, "objectives and targets," with "objectives" consisting of goals the organization sets for itself arising from its environmental policy, and "targets" signifying the detailed performance requirement arising from identified objectives. 341 Activities,

339. See ISO 14000 ENVIRONMENTAL AUDITING, supra note 128, at 10; Bell, supra note 122, at 10,681.

340. See generally ISO 14001 § 4.3.2 (requiring organizations to "establish and maintain a procedure to identify and have access to legal, and other requirements to which the organization subscribes, . . . [directly] applicable to the environmental aspects of its activities, products or services.") (Compare ISO 14001 § 4.3.2 with EMAS, Article 3 and Annex I, B.3 (requiring participating companies to maintain a register of "legislative, regulatory and other policy requirements" applicable to its activities), B.S. 7750 § 4.4.1 ("The organization shall establish and maintain procedures to record all legislative regulatory and other policy requirements pertaining to the environmental aspects of its activities, products, and services."), and ISO 9004-1, art. 0.1 (declaring that "in order to be successful, a company must offer products or services that . . . comply with statutory (and other) requirements of society.")), and guidance concerning this aspect of the specification offered at ISO 14004 § 4.2.3; ORGANIZATIONAL GUIDELINES, supra note 6, § 8A1.2. Commentary 3.(k)(7) ("An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective program to prevent and detect violations of law.") (Compare DRAFT ENVIRONMENTAL ORGANIZATIONAL GUIDELINES, supra note 108, § 9D1.1(a)(4)(i) (The program must be adequate "to maintain up-to-date, sufficiently detailed understanding of all applicable environmental requirements . . . "); FACTORS, supra note 42, at II.C ("Had safeguards beyond those required by existing law been developed an implemented to prevent noncompliance from occurring?"); Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66712 (requiring only that the organization to develop a program to comply with the federal environmental statutes administered by the agency).

341. Compare ISO 14001 § 4.3.2 with §§ 3.7, 3.10, and 4.3.3 ("When establishing and reviewing its objectives, an organization shall consider the legal and
products, and services of the organization could be measured against "other" requirements arising out of, for example:

- agreements with public authorities,\footnote{See ISO 14001 § A.3.2.} under, e.g., voluntary initiatives such as the EPA's Natural Gas Star, Climate Wise, Project XL, and the ELP;
- non-regulatory guidelines,\footnote{See id.} e.g., principles developed by the International Chamber of Commerce ("Business Charter for Sustainable Risk"), the Organization for Economic Development ("Guidelines for Multinational Enterprises"), and the Coalition for Environmentally Responsible Economics ("CERES Principles");\footnote{See ISO 14001 § A.3.2.}
tainable Development;\textsuperscript{348}
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\item corporate policies and standards;\textsuperscript{349}
\item other standards, e.g., ISO 9000;\textsuperscript{350} and B.S. 7750;
\item agreements with lenders and insurers;\textsuperscript{351}
\item supplier criteria;\textsuperscript{352}
\item voluntary partnership agreements with nonprofit organizations and communities, e.g., McDonald's partnership with the Environmental Defense Fund, the Natural Resource Defense Council's recycled paper initiative with Bank of America, Chevron and others, and the Industry Cooperative for Ozone Layer Protection;\textsuperscript{353}
\item prerequisites under various voluntary enforcement initiatives and guidelines, e.g., Cal/EPA’s General Policy on Incentives for Self-Evaluation and the guidance on the use of environmental marketing claims developed by the Federal Trade Commission.
\end{itemize}

Compliance with such requirements evinces a firm's commit-


349. See 14010s Environmental Auditing, supra note 128, at 9.

350. See Bell, supra note 122, at 10,679; Hall & Tockman, supra note 204.

351. See sources referenced supra Part II for a description of some of the ways leading banks and insurance firms are striving to reduce environmental risks.


ment to pursue continual improvement and thus they should be integrated with the organization's procedures to maintain compliance with applicable legal obligations as described above.

Executives of the company, aided by counsel, should develop a sufficient grounding in the range of issues needed to compile a set of procedures and other materials concerning the organization's obligations and objectives. At a minimum, each site should maintain a list of all requirements and retain access to a complete set of applicable laws, regulations, policies and other requirements. Companies should also maintain materials summarizing site-specific requirements at corporate headquarters. Firm policies should be widely circulated throughout the organization and made available to the public. A solid training program and, where appropri-


355. See supra Part II.F and accompanying notes. The company's procedures should also cross-reference ISO 14001. See Kuhre supra note 128, at 24.

356. See generally Kuhre supra note 128, at 39 ("Procedures for identification, assembly, and analysis of impacts and regulations into the organization's systems are needed . . . it is a good idea to actually obtain the regulations and impacts and assemble them into . . . binders."); Practical Guide to Environmental Management, supra note 124, at 81 ("Policies should be broad-based, outlining the key aspects of an environmental program and establishing the company's commitment to that program. Means of implementing policies should be described separately in procedures and guidelines. Procedures should be mandatory methods of implementing policies. Guidelines should be written when implementation of a policy does not lend itself to specific procedures or when a procedure itself needs explanation.") See id. at 155-57. Corporate procedures may address organization, assessment of environmental impacts, responses to proposed and newly enacted environmental laws and regulations, monthly environmental reporting, implementation, reporting, and employee awareness and training. Id. at 81. See also Bell, supra note 122, at 10,681; Dan K. Webb & Steven F. Molo, Some Practical Considerations in Developing Effective Compliance Programs: A Framework for Meeting the Requirements of the Sentencing Guidelines, 71 Wash. U.L.Q. 375, 386 (1993).

357. See ISO 14004 § 4.2.3.

ate, publications should be developed to convey the compliance message in each relevant area or discipline in a way that can be understood and acted upon by company officers, directors, and employees. Training must be provided for all employees and contractor personnel so that they understand the impact of their actions on the environment, and their responsibilities for minimizing those impacts under the organization's procedures. The organization should pre-

359. See generally ISO 14001 § 4.4.2 ("The organization shall identify training needs. It shall require that all personnel whose work may create a significant impact upon the environment, have received appropriate training. It shall establish and maintain procedures to make its employees or members at each relevant function and level aware of: a) the importance of conformance with the environmental policy and procedures and with the requirements of the environmental management system; b) the significant environmental impacts, actual or potential, of their work activities and the environmental benefits of improved personal performance; c) their roles and responsibilities in achieving conformance with the environmental policy and procedures and with the requirements of the environmental management system, including emergency preparedness and response requirements; d) the potential consequences of departure from specified operating procedures. Personnel performing the tasks which can cause significant environmental impacts shall be competent on the basis of appropriate education, training and/or experience.") and guidance on training under the specification offered at ISO 14004 § 4.3.2.5; ORGANIZATIONAL GUIDELINES, supra note 6, § 8A1.2 Commentary 3.(k)(4) (In order for the organization to have an effective program, it must have taken steps to communicate effectively its standards and procedures to all employees and other agents, e.g., by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required.") (Compare DRAFT ENVIRONMENTAL ORGANIZATIONAL GUIDELINES, supra note 108, § 9D1.1(a)(4)(ii)); FACTORS, supra note 42, Section III (The significance of employee training can be seen by contrasting the first and second hypothetical); Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66711 (Due diligence inquiry encompasses "(d) Efforts to communicate the regulated entity's standards and procedures to all employees and other agents.").

pare training procedures covering environmental impacts, legal and other obligations, and assessment of employee performance. Logs should also be kept to document training at all levels of the organization.\textsuperscript{361} As with other aspects of the EMS, the training program must be continually reevaluated and updated to meet changing business expectations and shifting legal requirements.\textsuperscript{362}

A sound program will also clearly define the accountability and responsibilities of relevant personnel, especially in areas such as reporting and emergency preparedness and response. Responsibilities should be assigned judiciously, so that employees with a "propensity" for wrongdoing are precluded from rising to a position of substantial discretionary authority in the organization.\textsuperscript{363} The organization should

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\bibitem{362. See KUHRE supra note 128, at 60; David M. Zornow & Dana H. Freyer, Corporate Compliance Programs: Implementation Rationale and Methodology, C900 ALI-ABA 537, 554 (Jan. 20, 1994).}
\bibitem{363. See generally ISO 14001 §§ 4.3.3 ("The organization shall establish and maintain documented environmental objectives and targets, at each relevant function and level within the organization."), 4.3.4 ("The organization shall establish and maintain (a) program(s) for achieving its objectives and targets. It shall include: a) designation of responsibility for achieving objectives and targets at each relevant function and level of the organization . . ."), 4.4.1 ("Roles, responsibility and authorities shall be defined, documented and communicated in order to facilitate effective environmental management."), 4.4.2(c) (The organization "shall establish and maintain procedures to make its employees or members at each relevant function and level aware of . . . their roles and responsibilities"), and guidance concerning this aspect of the specification offered at ISO 14004 § 4.3.2.3; Sentencing Guidelines for Organizations, § 8A1.2. Commentary 3.(k)(2) ("Specific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures.") and (k)(3) (In order for the organization to have an effective program, it must have “used 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
give at least one management representative the authority to ensure implementation of the EMS. Responsibilities and authorities for the rest of the employees in the organization should also be clearly spelled out. There must be a tough disciplinary structure to mete out sufficient punishment to offenders, as well as to penalize supervisors and upper management who are not vigilant enough. Environmental compliance must be incorporated into the standards by which all personnel are evaluated. The organization may also find it useful to implement rewards, recognition, and other

engage in illegal activities.

compare Draft Environmental Organizational Guidelines, supra note 108, § 9D1.1(a)(3)(v) ("The organization . . . has . . . the systems that are necessary for: (v) redundant, independent checks on the status of compliance, particularly in those operations where the organization knows, or has reason to believe, that employees may have, in the past, concealed noncompliance through falsification or other means, and in those operations, facilities or processes where the organization reasonably believes such potential exists."); FACTORS, Section III, Example 2 (indicating that the likelihood of prosecutorial leniency is not as great where company makes no effort to impress upon employees the significance of the compliance program); Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66,710 (Due diligence inquiry encompasses "(b) Assignment of overall responsibility for overseeing compliance with policies, standards and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation.").

364. See KUHRE supra note 128, at 52.

365. Id. at 52-54; see Bell, supra note 122, at 10681; PRACTICAL GUIDE TO ENVIRONMENTAL MANAGEMENT, supra note 124, at 80-83, 154 (illustrating how to delineate and communicate duties and responsibilities); Herbert I. Zinn, Chickens and Eggs and Carts and Horses: A Case Study in the Development of a Corporate Compliance Program, C110 ALI-ABA 91, 98-99 (Mar. 2, 1995) (at Arizona Public Service Company, employees each manager is accountable for developing strategies with his/her staff to make the compliance program work in his/her area); Richard H. Porter, Corporate Compliance – Implications for Counsel and Corporate Management, C900 ALI-ABA 121, 125 (Jan. 20, 1994) ("Corporate compliance must play a role in annual evaluations" as must "[s]anctions and employee discipline. . . ."); James T. Banks, Corporate Environmental Programs: Are We Seeing an Evolution in Federal Policy, C964 ALI-ABA 467, 477-78 (Oct. 20, 1994).

366. The program should be designed to provide positive as well as negative recognition. Performance evaluations should encompass environmental protection. See KUHRE supra note 128, at 65-66; David M. Zornow & Dana H. Freyer, Corporate Compliance Programs: Implementation Rationale and Methodology, C900 ALI-ABA 537, 553 (Jan. 20, 1994); James T. Banks, Corporate Environmental Programs: Are We Seeing an Evolution in Federal Policy, C964 ALI-ABA 467, 486-87 (Oct. 20, 1994); Kenneth D. Woodrow, The Proposed Federal

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measures to motivate compliance efforts.\textsuperscript{367}

Many firms will probably find it useful to draft a manual addressing attendant issues and problems.\textsuperscript{368} The manual should cover applicable requirements and include descriptions and copies of relevant federal statutes and regulations. Requirements of interest to a particular facility, e.g., laws pertaining to facilities in a particular state or country, as well


367. \textit{See generally ISO 14001} § 4.4.2(d) (The organization \ldots shall establish and maintain procedures to make its employees or members at each relevant function and level aware of \ldots the potential consequences of departure from specified operating procedures.) and guidance concerning employee accountability and recognition offered at ISO 14004 § 4.3.2.3 – 4.3.2.4; \textit{Organizational Guidelines}, \textit{supra} note 6, at § 8A1.2 Commentary 3.(k)(6) (In order for the organization to have an effective program, its compliance "standards must have been consistently enforced through appropriate disciplinary mechanisms, including, as appropriate, discipline of individuals responsible for the failure to detect an offense.") (Compare \textit{Draft Environmental Organizational Guidelines}, \textit{supra} note 108, § 9D1.1(a)(5) (concerning incentives) and (6) (concerning disciplinary procedures)); Factors, \textit{supra} note 42, at Section II.C ("Was environmental compliance a standard by which employee and corporate departmental performance was judged?"); Section II.D.2 ("Effective internal disciplinary action is crucial to any compliance program. The attorney for the Department should consider whether there was an effective system of discipline for employees who violated company environmental compliance policies. Did the disciplinary system establish an awareness in other employees that unlawful conduct would not be condoned?"); and Section III, Example 1; Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66,711 (Due diligence inquiry encompasses "(e) Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards and procedures, including consistent enforcement through appropriate disciplinary mechanisms.").

as agreements pertaining to a particular facility, could be referenced in separate inserts. New laws, regulations, agreements and other events could be described in bulletins (with appropriate guidance for compliance and filing) or covered in seminars for management and line personnel. All materials should be regularly reviewed and updated so that new laws, regulations, agreements and other events are incorporated in the organization's policies and procedures on a timely basis.369 Such materials should suffice to address the concerns of the EMS auditor seeking to verify conformance to ISO 14001, whereas the process of producing the manual or workbook should help the company respond to the question most likely to be on the mind of an Assistant U.S. Attorney whose grand jury or whistleblower has developed evidence unfavorable to the company in the scenario our program must be designed to address: What did the company try to do to prevent this? Most important, however, is that the organization follow through on its commitments.370 The company must have real policies, standards and procedures to encourage compliance which actually guide employee behavior, not just a pretty book on the shelf; the commitment to compliance and continual improvement of environmental performance should permeate the organization and be an integral part of operations.371

369. See ISO 14001 §§ A.1 (The management system “should enable an organization to ... (g) be capable of adapting to changing circumstances ...”) and A.6 (“Management review should include (c) the continuing suitability of the environmental management system in relation to changing conditions and information ...”).

370. The Assistant U.S. Attorney or DOJ prosecutor will carefully evaluate the diligence with which the program is actually pursued and kept up-to-date.

371. See generally ISO 14001 §§ 4.3.2 (requiring organizations to “establish and maintain a procedure to identify and have access to legal, and other requirements to which the organization subscribes, [directly] applicable to the environmental aspects of its activities, products or services.”), A.1 (“The system [shall] enable an organization to: ... (c) identify the relevant legislative and regulatory requirements.”); Organizational Guidelines, supra note 6, § 8A1.2 Commentary 3.(k) (Compare DRAFT ENVIRONMENTAL ORGANIZATIONAL GUIDELINES, supra note 108, § 9D1.1(a)); FACTORS, supra note 42, at Section II.C (“Particular consideration should be given to whether the compliance or audit program includes sufficient measures to identify and prevent future noncompliance ... .”), Section II.D.1 (“Pervasive noncompliance may indicate systemic or
The organization must also implement auditing, monitoring and reporting systems such that it could be expected to deter repeated participation in or condonation of criminal behavior. It may also indicate the lack of a meaningful compliance program. In evaluating this factor, the attorney for the Department should consider, among other things, the number and level of employees participating in the unlawful activities and the obviousness, seriousness, duration, history, and frequency of noncompliance.


374. Concerning reporting, see generally David M. Zornow & Dana H. Freyer, Corporate Compliance Programs: Implementation Rationale and Methodology, C900 ALI-ABA 537, 553 (Jan. 20, 1994); James T. Banks, Corporate Environmental Programs: Are We Seeing an Evolution in Federal Policy, C964 ALI-ABA 467, 481-84 (Oct. 20, 1994); Kenneth D. Woodrow, The Proposed Federal Environmental Sentencing Guidelines: A Model for Corporate Environmental Compliance Programs, 25 Env't Rep. (BNA) 325 (June 17, 1994); Dan K. Webb & Steven F. Molo, Some Practical Considerations in Developing Effective
pected that criminal conduct would not go undetected, and such that an organizational culture or "honor code" would develop to turn in any offenders. A mechanism to encourage "whistleblowers" (employees who inform regulatory or law enforcement agencies of alleged violations) and to preserve their confidentiality will often be desirable. Firms should make provision for "postmortem" changes to the compliance program after an offense is uncovered to take account of its failures and to maximize prevention of further similar offenses. As Christopher Bell observed, "[t]op management


375. See generally ISO 14001 § 4.5 and guidance concerning these subjects offered at ISO 14004 § 4.4; Organizational Guidelines, supra note 6, § 8A1.2 Commentary 3.(k)(5) (In order for the organization to have an effective compliance program, the "organization must have taken reasonable steps to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents and by having in place and publicizing a reporting system whereby employees and other agents could report criminal conduct by others within the organization without fear of retribution.") (Compare Draft Environmental Organizational Guidelines, supra note 108, § 9D1.1(a)(1) (requiring line managers to routinely review environmental monitoring and reports, and direct the resolution of identified compliance issues), and (a)(3)); Factors, supra note 42, at Section II.C ("Were there regular procedures, including internal or external compliance and management audits, to evaluate, detect, prevent and remedy circumstances like those that led to the noncompliance? Were there procedures and safeguards to ensure the integrity of any audit conducted? Did the audit evaluate all sources of pollution (i.e. all media), including the possibility of cross-media transfers of pollutants? Were the auditor's recommendations implemented in a timely fashion?") and Section III (The significance of auditing, monitoring and reporting may be gleaned from a comparison of the hypotheticals); Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66,710-11 (Due diligence inquiry encompasses "(c) Mechanisms for systematically assuring that compliance policies, standards and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation.").

376. See generally ISO 14001 §§ 4.5.2, 4.6 (The organization's top management shall, at intervals that it determines, review the adequacy of the environmental management system, to ensure its continuing suitability, adequacy and effectiveness.), A.5.2 ("In establishing and maintaining procedures for investigating and correcting non-conformance, the organization should include these basic elements: a) identifying the cause of the non-conformance; b) identifying

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must periodically review the environmental management system to ensure its continuing adequacy and effectiveness.”

In addition, the organization should establish and maintain communications with the surrounding community...

and implementing the necessary corrective action; c) implementing or modifying controls necessary to avoid repetition of the non-conformance; d) recording any changes in written procedures resulting from the corrective action”), and guidance on such aspects of the specification offered at ISO 14004 § 4.5.3; ORGANIZATIONAL GUIDELINES, supra note 6, § 8A1.2 Commentary 3.(k)(7) (In order for the organization to have an effective compliance program, the “organization must have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses – including any necessary modifications to its [compliance] program . . .”) and § 8A1.2. Commentary 3.(k)(7)(iii) (“The precise actions necessary for an effective program to prevent and detect violations of law will depend upon a number of factors. Among the relevant factors are: . . . (iii) Prior history of the organization – An organization’s prior history may indicate types of offenses that it should have taken actions to prevent. Recurrence of misconduct similar to that which an organization has previously committed casts doubt on whether it took all reasonable steps to prevent such misconduct.”) (Compare Draft Environmental ORGANIZATIONAL GUIDELINES, supra note 108, § 9D1.1(a)(7)); FACTORS, supra note 42, at Section II.C. (“Were the auditor’s recommendations implemented in a timely fashion?”), Section II.D.3 (the attorney for the Department should consider the “promptness and completeness of any action taken to remove the source of the noncompliance and to lessen the environmental harm resulting from the noncompliance . . . .”), and Section III. (the hypotheticals indicate that the likelihood of prosecutorial leniency is not as great where company makes no effort to strengthen its compliance procedures after discovery of a violation); Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66711 (due diligence inquiry encompasses “(f) Procedures for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's program to prevent future violations.”).

377. See Bell, supra note 122, at 10,681. See generally David M. Zornow & Dana H. Freyer, Corporate Compliance Programs: Implementation Rationale and Methodology, C900 ALI-ABA 537, 554 (Jan. 20, 1994) (suggesting that the compliance program be reviewed annually to determine whether it is operating properly and to assist the company in updating policies, procedures, and manuals); GROSKAUFMANIS, supra note 124, at § 5.07[3]; James T. Banks, Corporate Environmental Programs: Are We Seeing an Evolution in Federal Policy, C964 ALI-ABA 467, 487 (Oct. 20, 1994); Colleen C. Murnane, Criminal Sanctions For Deterrence Are a Needed Weapon, But Self-Initiated Auditing Is Even Better: Keeping the Environment Clean and Responsible Corporate Officers Out of Jail, 55 OHIO ST. L.J. 1181, 1196 (1994) (“The CEO should always put a good faith effort into the program and be ready to make any corrections or take any remedial measures necessary to fix or prevent problems once the plan has been enacted”); Dan K. Webb & Steven F. Molo, Some Practical Considerations in Developing Effective Compliance Programs: A Framework for Meeting the Requirements of the Sentencing Guidelines, 71 WASH. U.L.Q. 375, 395-96 (1993).
and interested groups, as appropriate. Communications with the community may include limited access to information concerning environmental aspects of the organization's operations.378

VI. Summary

In summary, ISO 14001 and the enforcement initiatives described in this Article require the organization to put in place a system containing the following general elements: (i) commitment from everyone at the company, including top management, ranking managers, and line employees, to compliance and continual improvement of environmental performance; (ii) adequate human, physical (e.g., facilities, equipment), and financial resources; (iii) a design which accounts for all of the organization's major environmental commitments, not merely its legal ones; (iv) an institutional policy articulating these commitments; (v) procedures designed to foster compliance and continual improvement; (vi) clear definition and assignment of responsibilities so that employees with a "propensity" for wrongdoing are precluded from rising to a position of substantial discretionary authority in the organization; (vii) training programs and, where appropriate, publications to convey the compliance message in each relevant area or discipline in a way that can be easily understood; (viii) auditing, monitoring, and reporting such

378. See generally ISO 14001 §§ 4.2(f) ("Top Management shall define the organization's environmental policy and ensure that it . . . is available to the public."); 4.4.3 ("The organization shall consider processes for external communication on its significant environmental aspects and record its decision."); and guidance concerning program transparency and communication with the public offered at ISO 14004 § 0.1 ("key principles for managers implementing or enhancing an [EMS] include establish[ing] and maintain[ing] communications with . . . external interested parties); Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66,711 (The "EPA may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available."). Neither the Sentencing Guidelines for Organizations nor the DOJ's FACTORS address matters of transparency or public disclosure (though FACTORS does mention the need for the firm to fulfill its legal reporting obligations in Section III). See also Thomas Flahive, EMS External Communications Strategies, INT'L ENVTL. SYS. UPDATE, Oct. 1996, at 21.
that it could be expected that criminal conduct would not go undetected; (ix) provision for "postmortem" changes to the compliance program after an offense is uncovered to take account of its failures and to maximize prevention of further similar offenses; (x) checks to ensure policies, procedures, and other EMS materials remain complete, well-organized, and up-to-date; and (xi) communication with the surrounding community and interested groups, including limited access to information concerning the environmental aspects of the organization's operations.

VII. Conclusion

The trend towards criminalizing the complex body of U.S. environmental rules will continue to challenge the ability of American businesses, as well as foreign corporations with business enterprises in the United States, to build good records of what they have done to ensure environmental compliance and to demonstrate why mercy is more appropriate than an extra measure of vengeance. In this regard, companies will more likely be successful if they have factored into the design and implementation of their compliance programs an insightful assessment of how a prosecutor will view the measures taken to anticipate and address specific potential violations. Insofar as compliance auditing will become critical to certification under ISO 14001 and other EMS standards regimes, many companies will have more compelling reasons to evaluate compliance. The compliance program designer must anticipate such questions as: "Can I demonstrate its effectiveness to outsiders?"; "Does the program reflect the unique structure of the organization?"; and "Will it help the company establish a pattern of continual improvement?" If the answer to each of these questions is "Yes," then the odds are that the program will yield not only EMS certification, but greater prospects of prosecutorial leniency.