

Monday
March 30,
1998

P E N N S Y L V A N I A LAW WEEKLY

Volume XXI
Number 8
\$5.00

◆ News and Opinions to Use Every Day ◆

TRENDS IN THE LAW ENVIRONMENTAL LAW

New Global Environmental Management Model Will Generate New Standards of Care

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ISO 14001 — like any number of common sense ideas — took too long to articulate, sounds pretentious and unnecessarily confuses just about everyone.

But ISO 14001 is an important business and environmental development which corporate managers and their lawyers will use and talk about for years to come.

In September 1996, after five years of discussion, the International Organization for Standardization, based in Geneva, Switzerland, issued ISO 14001: the first and most generic in a series (14000 series) of consensual international business standards for environmental management.

Already, ISO 14001 is the subject of numerous articles and several books.

Despite its user-unfriendly full title ("Environmental Management Systems — Specification with Guidance for Use."), ISO 14001 does spell out a thoughtful and usable way for companies to set up an "EMS" — a disciplined comprehensive Environmental Management System or program tailored to the needs of the company and integrated into all

aspects of its operations.

An EMS helps companies and organizations establish and achieve three overall goals: regulatory compliance, internal policy goals and continual environmental improvement. An obvious by-product of an EMS is increased credibility with customers, consumers and regulatory authorities.

BACKGROUND

The term "ISO" itself has caused a fair amount of confusion. ISO, generally thought of as an abbreviation for the International Organization for Standardization, is not new. It was founded in Switzerland shortly after World War II in order to encourage international harmonization in standards for manufacturing products and communications.

Since the late 1940's, over 8,000 internationally accepted standards have been issued, ranging from weights and measures to camera speeds and paper sizes.

Contrary to what many believe, ISO is not affiliated with the United Nations or any formal European alliance. It now has approximately 120 voting member bodies (or countries). The American member is the American National Standards Institute, or ANSI, founded as a national safety organization in 1918, and based in New York City.

Although now generally identified as the International Organization for Standards, ISO is really not even an acronym for this entity. It comes from the Greek word for "equal." This connotes

the whole idea of ISO 14001 pretty succinctly. ISO is not so much an organization as it is a concept of voluntary private sector standards to be used internationally.

ISO 9000

The ISO 14000 series in part was inspired by ISO 9000, the well-known and popular consensual "quality management" system which helped fuel the quality control revolution of the 1980's (i.e. led by Edwards Deming, Warren Bennis and Stephen Covey).

Spurred by the momentum toward global markets and international trade agreements, ISO 9000 focuses primarily on product quality and meeting customer requirements. ISO 14000, the environmental standard series, like its forerunner ISO 9000, has been characterized as everything from a storybook example of international cooperation toward creation of a new age "green" economy to a conspiracy of certain North American and European companies seeking preemptively to write their own international environmental law.

The truth is somewhere in the middle. In fact, a lot of the impetus and enthusiasm for the ISO 14000 idea came from the so-called 1992 Earth Summit of the United Nations Conference on Environment and Development in Brazil (where in the summer of 1992, 100 countries agreed on the need for international environmental standards), the Montreal Protocol and certain environmental

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aspects of the North American Free Trade Agreement (NAFTA). These developments all had a diverse range of authors and participants, often concerned with cross-border pollution issues.

DEVELOPING AN EMS

ISO 14001 is important because of its emphasis on a preventative rather than after-the-fact orientation toward environmental management. A short (about 10 pages, including appendices) policy document, and organized (unfortunately) like an EPA regulation, ISO 14001 has straightforward rules on how to achieve an internal environmental program.

To create an EMS, a company must do five things. First, create a policy which everyone in the organization can understand. The policy is an environmental mission statement established by top management and communicated in writing to all employees, customers and the public. Second, set objectives and targets based on regulatory requirements and activities which affect the environment.

This entails setting specific and, whenever possible, measurable environmental goals which take into account the technological, operational and economic functions and limitations of the organization. Third, put together a program to achieve the objectives. Fourth, monitor and measure the effectiveness of the program. Finally, keep reviewing and improving the program.

For example, a regulated American company with manufacturing processes which are releasing pollutants into water, land or air would identify a complete "top-down" program to manage, monitor and adjust environmental impacts based on the actual experience, current capabilities and resources and the regulatory history of the company. The EMS is designed, however, for any type or size of organization in any country.

COMPREHENSIVE, PREVENTATIVE AND CONSENSUAL

While simple, ISO 14001 is not

benign. It is likely to evolve into a set of many industry-wide standards of care designed by business that will greatly change the thought processes of executives, environmental managers and environmental lawyers (particularly those in environmental litigation).

Twenty separate standards will comprise the ISO 14000 series. More specific environmental standards in the ISO 14000 series recently issued or under development are likely to be adopted by the same organizations which use the EMS of ISO 14001.

ISO 14004 provides guidelines on principles and techniques to implement or improve an EMS. ISO 14015 addresses environmental site assessments. ISO 14020 and 14024 provide rules on environmental labeling. ISO 14023 discusses environmental testing and verification methods.

ISO 14001, the first standard, is truly revolutionary and needed in the sense that regulatory compliance itself under 14001 has been reduced to just one aspect of overall environmental management.

Traditionally, and particularly in the United States, most companies have attempted to manage environmental affairs by complying in piecemeal fashion with the myriad of statutes and regulations within cost constraints, and often have assumed that statutory and regulatory compliance itself, often on an emergency basis, will somehow constitute an "environmental program."

Given the past successes of the ISO organization, and ISO 9000, many expect the ISO 14000 environmental series to develop new industry-wide standards of care for environmental liability.

Companies themselves will "agree upon" the rules, and may inadvertently set them in stone by following them. Trade associations have done this for years in a number of regulated health and safety areas. Ironically, ISO 14001 itself studiously avoids establishing specific performance standards.

But the very existence of the standard and other standards in the 14000 series

encourages the development of uniform environmental risk management and liability standards for labeling site assessments, environmental audits, duties of disclosure and specific pollution control requirements, to name a few.

Many state courts already consider voluntary industry standards to be relevant in determining standards of care and whether a company has acted negligently.

In two cases, advisory standards adopted by ANSI (the American member of ISO) were held admissible in defining an industry-wide standard of care. See *Kent Village Associates Joint Venture v. Smith*, 657 A.2d 330, 337 (Md. Ct. Spec. App. 1995) (ANSI 1977 standard for stability of refuse bins) and *Hansen v. Abrasive Engineering and Manufacturing*, 856 P.2d 625, 628 (Or. 1993) (ANSI standard for safety features in a sanding machine).

In *Hansen*, the Oregon Supreme Court noted:

"Because advisory safety standards that are adopted by nongovernmental entities such as ANSI may represent a consensus regarding what a reasonable person in a particular industry would do, they may be helpful to the trier of fact in deciding whether the defendant has met the standard of care due."

While the creation of new standards is still a long-term issue which deserves monitoring, the ISO 14000 series, and ISO 14001 in particular, is likely to generate scores of new standards over the next two decades as more ISO environmental practices become developed, fleshed out and followed by industry groups. ■