

Chapter 40 ENVIRONMENT

ENVIRONMENT

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§ 40.01 INTRODUCTION

Environmental compliance can be one of the most challenging issues facing companies today. Companies are subject to a myriad of environmental rules and regulations, fall within the jurisdiction of numerous environmentally related governmental agencies, and must follow different environmental laws in dozens of states or countries.

The challenge of environmental compliance is not insurmountable. A well-designed environmental management system (EMS) combined with committed management and employees can significantly reduce the risk of environmental liability. Very simply, an EMS is a system to establish knowledge of applicable environmental standards, accountability to meet those standards, and record keeping and reporting to acknowledge the results. A strong EMS can earn praise from government and community leaders and can help the company develop a strong environmentally friendly brand with customers. A successful EMS can also reduce the company's costs and provide a net benefit to the company's bottom line.

§ 40.02 BACKGROUND

The U.S. Environmental Protection Agency (EPA) is the primary governmental authority responsible for environmental regulation in the United States. The EPA has the authority to bring either civil¹ or criminal² actions against corporations or individuals who violate environmental laws. As a part of its civil enforcement, the EPA can demand civil penalties and settlements of

¹See Section 309(a) of the Clean Water Act, 33 U.S.C. § 1319(a); Section 113(a) and (b) of the Clean Air Act, 42 U.S.C. § 7413(a), (b); Section 3008(a)-(c) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928; Sections 104 and 106 of CERCLA, 42 U.S.C. §§ 9604, 9606.

²Section 309(c) of the Clean Water Act, 33 U.S.C. § 1319(c); Section 113(c) of the Clean Air Act, 42 U.S.C. § 7413(c); Section 3008(d) and (e) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928; Section 103 of CERCLA, 42 U.S.C. § 9603.

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claims can be very costly for the company.³

EPA criminal enforcement can have major consequences for individuals and corporations. Criminal fines for a corporation can range from hundreds of thousands to millions of dollars, in addition to legal fees and the cost of negative publicity.⁴ If the crimes are egregious enough, responsible corporate individuals can be personally named and face prison sentences,⁵ or a court may ban a company convicted of environmental crimes from doing business in the United States altogether.⁶

The EPA's authority derives from several major laws related to specific environmental media or regulated substance: The Clean Air Act (CAA) allows the EPA to regulate air emissions from stationary and mobile sources.⁷ It covers pollutants that Congress deems “conventional” and “hazardous.” The EPA regulates those pollutants in part through National Ambient Air Quality Standards, a system of air permits for emissions of regulated pollutants from stationary sources, as well as fuel efficiency and other standards for motor vehicles.⁸

The Clean Water Act (CWA) provides the EPA with authority to regulate discharges of certain pollutants into navigable waters in order to “restore and maintain the chemical, physical,

³I. Urbina, *Coal Company Hit With E.P.A.'s Largest Civil Penalty*, N.Y. Times, Jan. 17, 2008, <http://www.nytimes.com/2008/01/17/us/17cnd-mine.html> (describing \$20 million fine for Massey Energy for environmental violations).

⁴Press Release, Environmental Protection Agency, BP to Pay Largest Criminal Fine Ever for Air Violations (Oct. 25, 2007), <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/1af659cf4ce8a7b88525737f005979be!OpenDocument> (energy company agrees to pay \$60 million in criminal fines and spend \$400 million on safety upgrades because of Clean Air Act violations); *see also* EPA's list of 2016 Major Criminal Cases, <https://archive.epa.gov/epa/enforcement/2016-major-criminal-cases.html> and the U.S. EPA Environmental Crime Case Bulletin, <https://www.epa.gov/enforcement/environmental-crimes-case-bulletin>.

⁵Chemetco Inc. pleaded guilty to installing an illegal and hidden pipe that discharged waste to a lake. As part of the plea, Chemetco Inc. agreed to pay a \$3.8 million penalty. Chemetco Inc.'s CEO, Denis Feron, was indicted for criminally violating the CWA and fled the United States. In 2011, Mr. Feron agreed to pay a penalty of \$500,000 in exchange for deferral of prosecution by the United States. http://www.stltoday.com/news/local/illinois/smelter-near-hartford-coming-down-but-toxic-waste-remains/article_f0b4322c-8713-590a-8083-708c5d29b4ac.html.

⁶Press Release, Department of Justice, Repeat Offender Shipping Firm Sentenced in New Orleans to Pay \$1 Million and Banned in “Magic Pipe” Case (July 28, 2011), <https://www.justice.gov/opa/pr/repeat-offender-shipping-firm-sentenced-new-orleans-pay-1-million-and-banned-magic-pipe-case> (banning shipping company from doing business in United States for five years).

⁷42 U.S.C. §§ 7401 *et seq.*

⁸National Ambient Air Quality Standards, <https://www.epa.gov/criteria-air-pollutants/naaqs-table>.

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and biological integrity of the Nation's waters.”⁹ The EPA regulates discharges of the materials in part through the National Pollutant Discharge Elimination System, which requires permits covering the discharge of regulated pollutants or the dredge and fill of wetlands.¹⁰

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) creates a federal “Superfund” and regulatory structure to identify and clean up historic sites that contain hazardous substances.¹¹ Under CERCLA, the EPA can require private parties to undertake cleanup of sites at which they generated, transported, arranged for disposal, or disposed of hazardous substances.¹²

The Resource Conservation and Recovery Act (RCRA) is a “cradle-to-grave” system that regulates the generation, transportation, storage, and disposal of hazardous waste.¹³ Under RCRA, the EPA sets standards for generation and short-term storage of hazardous waste, and requires permits for treatment, long-term storage, and disposal of hazardous waste.¹⁴ The EPA enforces RCRA through a permit system and a corrective action program that can require on-site remediation.¹⁵ RCRA also addresses non-hazardous solid waste and regulates underground storage tanks. The Toxic Substances Control Act (TSCA) provides the EPA with authority to set standards for certain new chemicals and specified toxic substances or mixtures.¹⁶ Permitting and reporting specific to each chemical are required.¹⁷ TSCA also controls management and cleanup methods for polychlorinated biphenyls (PCBs).¹⁸ TSCA was updated in 2016 to require risk evaluations for existing and new chemicals and revised chemical data reporting.¹⁹

Finally, the Securities and Exchange Commission (SEC) requires certain environmental disclosures.²⁰ Item 103 of Regulation S-K requires a company to disclose environmental legal proceedings if the proceeding is material to the company, the claim for damages exceeds 10 percent of the company's current assets, or if the government is a party to the litigation and the potential monetary sanctions exceed \$100,000.²¹ Failure to comply may result in enforcement

⁹33 U.S.C. §§ 1251(a)

¹⁰Section 402 of the Clean Water Act, 33 U.S.C. § 1342; National Pollutant Discharge Elimination System, <http://cfpub.epa.gov/npdes/>.

¹¹42 U.S.C. §§ 9601, *et seq.*

¹²Superfund Liability, <https://www.epa.gov/enforcement/superfund-liability>.

¹³42 U.S.C. §§ 6901-6992.

¹⁴42 U.S.C. §§ 6902 *et seq.*

¹⁵Corrective Action, <http://www.epa.gov/osw/hazard/correctiveaction/index.htm>.

¹⁶15 U.S.C. §§ 2601-2629.

¹⁷*Id.*

¹⁸15 U.S.C. § 2605(e), 40 C.F.R. § 761, <https://www.epa.gov/pcbs>.

¹⁹Frank R. Lautenberg Chemical Safety for 21st Century Act.

²⁰Item 103 of Regulation S-K, Sec. & Exchange Comm'n, 17 C.F.R. § 229.103.

²¹*Id.*

brought by the SEC.

States have their own environmental agencies and applicable requirements. A state may either incorporate components of the federal environmental laws or may have more stringent environmental laws and regulations. In any case, a state's laws cannot be more lenient than the federal requirements. Any EMS must include a review of federal, state, and applicable local environmental requirements.

§ 40.03 ESTABLISHING AN ENVIRONMENTAL MANAGEMENT SYSTEM

An effective environmental management system (EMS) is a key component to limit environmental violations, reduce potential penalties if an environmental issue arises, and create a positive environmentally friendly reputation. An EMS is a holistic approach to environmental compliance, focusing on the entire company's interaction with the environment and environmental regulations, instead of a piecemeal approach. An EMS also defines clear procedures for employees to follow and lays out environmental goals for the company. There is no statute or regulation that requires creation of an EMS, but EPA and most states strongly consider whether an entity has an EMS as part of its discretion to pursue environmental violations and the type and amount of any potential penalty.²² As a result, they have become more common in companies striving to achieve a good compliance record and meet industry and international standards.

There is no specific or required model for an EMS. Instead, the general framework of an EMS is a cycle of “Plan, Do, Check, Act.”²³ The basis for this framework is that a consistent review and evaluation of a facility or process will identify opportunities for improving and implementing environmental performance.²⁴ The goal is to reduce the risk of non-compliance and improve health and safety practices for employees and the public, and it may even address non-regulated issues such as energy conservation.²⁵ The “Plan, Do, Check, Act” model for an EMS is composed of five categories.²⁶ The first category is the environmental policy. The second category is planning, which includes identifying environmental aspects, legal requirements, objectives and targets, and developing an environmental management program.²⁷ The third category is implementation, including training and awareness, EMS documentation and document

²²*See infra* § 40.04[B].

²³EPA, Environmental Management Systems, <https://www.epa.gov/ems/learn-about-environmental-management-systems#what-is-an-EMS>.

²⁴*Id.*

²⁵*Id.*

²⁶Environmental Management Systems: An Implementation Guide for Small and Medium-Sized Organizations, 8, 15 (2d ed. NSF International, Jan. 2001), *available at* https://www.epa.gov/sites/production/files/2015-07/documents/ems_an-implementation-guide-for-small-and-medium-sized-organizations_2nded.pdf.

²⁷*Id.*

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control, and emergency preparedness and response.²⁸ The fourth category is checking and corrective action, including monitoring and measurement, records, and EMS audits.²⁹ The last category is management review.³⁰

These elements are based upon international standards for environmental management systems created by the International Organization for Standardization (ISO 14001). The ISO 14001 Standard is a voluntary and somewhat complex standard that may be cost prohibitive for some organizations.³¹ However, it can be used as a basic framework for an organization's EMS. Additionally, various environmental consulting firms can create a tailored EMS for an organization.³² The EMS can be limited to only environmental compliance or can be expanded to Occupational Safety and Health Administration (OSHA), Department of Transportation (DOT), and even preventative maintenance. This chapter will use the ISO 14001 standard as well as the EPA's publicly available EMS guidance, available on EPA's website, as a touch point for discussing development and implementation of a compliance program. Ultimately, the keys to a successful EMS include top management commitment, focus on continual improvement, flexibility, compatibility with organizational culture, and employee awareness.³³

[A] Commitment of Top Management

The commitment of top management personnel is an important factor to the success of an EMS. To sustain the EMS effort, top management must communicate to employees the importance of making the EMS an organizational priority, integrating the environmental management throughout the organization, and looking at problems as opportunities.³⁴ Upper management is also usually the only personnel in the company with the authority to establish important procedures, ensure funding for equipment upgrades and employee training, and order changes if a process is inadequate.³⁵

In order for top management to integrate their vision for an EMS with the rest of the company, management should appoint a top management representative.³⁶ This representative (1) ensures that the EMS is established and implemented; (2) reports on its performance over time;

²⁸*Id.*

²⁹*Id.*

³⁰*Id.*

³¹International organizations and companies may be required to follow ISO 14001 as a condition of doing business in certain regions of the world or with certain clients.

³²<http://www.mostardi-platt.com/services/compliance-management-process>.

³³Environmental Management Systems, Second Edition.

³⁴Environmental Management Systems, Second Edition at 8-9.

³⁵*Id.* at 35.

³⁶*Id.* at 35 and ISO 14001 at 5.3.

and (3) works with others to modify the EMS as needed.³⁷ The representative should also have at least limited authority to deploy resources and authorize EMS-related decisions to ensure that the new elements can be adopted efficiently.

[B] The Policy Statement

After top management commits to establishing an EMS, the next step is the creation of the environmental policy statement. The environmental policy statement is the vision for the company's environmental compliance system and serves as the foundation of the EMS.³⁸ The statement should be reflective of the culture and values of the company. While some companies may choose to adhere to the baseline standards of compliance with laws in their environmental policy statement, others may choose to go substantially beyond the basic requirements. For some companies, this will open the way for a sustainability program.

The environmental policy statement should reflect three key commitments: a commitment to continual improvement, pollution prevention, and compliance with relevant laws and regulations.³⁹ It is best to keep the policy simple and understandable. It should be communicated internally to all employees, and may also be communicated externally via websites, social media, business cards, advertisements, or annual reports.⁴⁰

Several examples of policy statements follow:

Example 1

It is Company X policy to carry out all activities in a manner that minimizes environmental impacts, conserves natural resources and provides effective stewardship of the environment. To that end, Company X is committed to making environmental management an integral core value and vital part of the Company X culture by: integrating environmental considerations into work practices at all levels; providing necessary resources; promoting pollution prevention, waste minimization, and conservation; and complying with applicable laws, regulations and other promulgated environmental requirements.

Example 2

We strive to make our operations as reliable and effective as possible, driving increased standards for environmental performance. Our strategic management of environmental resources achieves a positive effect on the bottom line, helps manage risk, inspires ways to help our clients succeed, and supports our communities around the

³⁷*Id.*

³⁸Environmental Management Systems, Second Edition at 16.

³⁹Environmental Management Systems, Second Edition at 16 and ISO 14001 at 5.

⁴⁰Environmental Management Systems, Second Edition at 16 and ISO 14001 at 5.2.

world.

Example 3

- Company X believes that we have a responsibility to care for and protect the environment in which we operate. We are fully committed to improving environmental performance across all of our business activities, and will encourage our business partners and members of the wider community to join us in this effort. Company X recognizes our key impacts to be in the areas of energy use, raw material use, waste generation, emissions to air/water, and water use.

We will strive to: adopt the highest environmental standards in all areas of operation, meeting and exceeding all relevant legislative requirements; assess our organizational activities and identify areas where we can minimize impacts; minimize waste through careful and efficient use of all materials and energy; and continually assess the environmental impact of all our operations.

[C] Planning

After crafting an environmental policy statement, the company should begin the planning to establish the EMS. The elements to conduct the planning include identifying environmental aspects and impacts, identifying applicable legal requirements, establishing objectives and targets, and preparing an EMS manual.

[1] Environmental Aspects and Impacts

Identifying environmental aspects involves identifying the impacts of an organization's facility on the environment and the source of the impacts.⁴¹ An “environmental aspect” is an “element of an organization's activities, products, or services that can interact with the environment.”⁴² Identifying environmental aspects can be a lengthy and detailed process. Upon identifying the environmental aspect, the facility must evaluate whether it can control or has influence over the environmental aspect.⁴³ For instance, a facility has control over the amount of electricity it uses, but likely does not have control over how the electricity is generated. Thus, the focus should be only on the environmental aspects of the *facility's* products or services. Once the environmental aspects of the facility's products or services are identified, then the facility can identify the environmental impact and whether the impacts are significant.⁴⁴ An “environmental impact” is “any change to the environment, whether adverse or beneficial wholly or partially resulting from an organization's activities, products or services.”⁴⁵

As an example, in a candy production company there is often a jelly bean line. In order to

⁴¹Environmental Management Systems, Second Edition at 20.

⁴²Environmental Management Systems, Second Edition at 20 *citing* ISO 14001 at 3.2.2.

⁴³Environmental Management Systems, Second Edition at 20.

⁴⁴*Id.*

⁴⁵Environmental Management Systems, Second Edition at 20 *citing* ISO 14001 at 3.2.4.

obtain a shine on the jelly beans, a coating is added to large, spinning drums that dry the coating onto the jelly bean. The excess coating volatilizes and is released through a chimney to the air. The environmental aspect is the jelly bean coating process (the company's product and activity) that is releasing to the air (the interaction with the environment).

Each individual process in a facility should be reviewed to assess its impact to the environment, even if the impact is as limited as the use of electricity. The *Environmental Management Systems: An Implementation Guide for Small and Medium-Sized Organizations, Second Edition*, includes a useful worksheet to assist a facility in identifying environmental aspects and potential environmental impacts.⁴⁶

[2] Legal Requirements

Once the environmental aspects and impacts are identified, a facility must identify all applicable legal and other requirements and ensure that they are factored into the EMS plan. There are multiple sources to identify the applicable laws and regulations. A facility's primary sources should be the federal, state, and local regulatory agencies and/or the trade group or associations associated with the facility. These sources will have the most readily accessible information for the facility and its processes.⁴⁷ Additional sources include libraries, seminars and sources, and environmental consultants and attorneys.⁴⁸

In the jelly bean example above, both the CAA and state law regulate emissions to the air, including permitting and ongoing reporting requirements. RCRA (and associated state law) may apply to the hazardous materials and various laws (i.e., Emergency Planning and Community Right to Know Act) may require reporting of quantities of materials stored or used on site.

[3] Establishing Objectives and Targets

Objectives and targets help an organization move the goals established in the environmental policy into action. The “objective” is the overall environmental goal an entity sets, and the “target” is the detailed performance requirement to be met to achieve the objective. In setting the objectives, an organization should keep in mind the three pillars established in the policy: a commitment to continual improvement, pollution prevention, and compliance with relevant laws and regulations. Additionally, an organization should consider the significant environmental aspects, the applicable legal requirements identified, and other organizational considerations.⁴⁹ The objectives and targets do not necessarily mean only following all of the applicable legal requirements, but also can be reducing usage of hazardous substances or reducing energy or water consumption.

An objective in the jelly bean example discussed above could be to reduce volatile air

⁴⁶Environmental Management Systems, Second Edition at 24.

⁴⁷*Id.* at 25.

⁴⁸*Id.*

⁴⁹*Id.* at 28.

emissions; a target could be to reformulate the coatings to reduce the use of volatiles by 30 percent by a certain date.

[4] EMS Manual

After identifying the foundational elements of an EMS, the organization must capture the elements in a written plan, which is also called the EMS manual. The EMS manual should reflect the results of the identification of the environmental impacts, the applicable legal requirements, and the organization's objectives and targets. In other words, the manual should describe *how* the organization will translate its objectives, targets, and goals into actual actions so that the objectives are achieved.⁵⁰

To ensure the EMS manual's effectiveness, it should define the person or people responsible for achieving the goals, specific steps on how the goals will be achieved, and the time frame for achieving the goals.⁵¹ Importantly, the organization should be able to easily modify the plan to accommodate new objectives or targets, new legal requirements, or changes in the organization.⁵² Additionally, as best as an organization can, the plan should be simple so that it is easy to follow.⁵³ The *Environmental Management Systems Guide, Second Edition*, has a sample form as a starting point for an organization to use in writing its plan.⁵⁴ Ideally, the organization should appoint a “management representative” who would ensure that the plan is established and followed, reports on the performance over time, and modifies the plan as needed.⁵⁵

[D] Establishing Proper Documentation

One of the most critical steps of building an effective EMS is establishing proper documentation. Key documentation includes the environmental policy statement, the EMS plan/manual (both described above), a description of environmental procedures, and records evidencing that the procedures have been followed.⁵⁶

While the EMS manual will contain a summary of the EMS core elements, an organization should maintain other documentation of its EMS. A company should document its “procedures”—the processes the organization uses to meet the EMS elements. In other words, answering *how* the organization identified its environmental aspects, or *how* it has implemented its corrective actions. In the example of jelly bean production, the environmental aspect (the release of volatile substances to the air) could have been identified through an inspection or through participation in trade group discussions. How the issue will be corrected could be

⁵⁰*Id.* at 32.

⁵¹*Id.*

⁵²*Id.*

⁵³*Id.* at 33.

⁵⁴*Id.*

⁵⁵*Id.* at 35.

⁵⁶*Id.* at 47-51.

documented through a regular reporting procedure from the person charged with reformulating the coating. The actual reports are the records that support the procedure.

One document that is integral to an EMS is an emergency response plan to describe the process that the organization will follow in event of an environmental emergency. An effective emergency response plan should contain both short-term and long-term elements and should incorporate elements required by various applicable statutes such as the Resource Conservation and Recovery Act (RCRA), the CAA, or the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). In particular, an effective emergency response plan should include provisions for assessing the potential for accidents or emergencies, preventing or mitigating adverse environmental impacts, responding to actual emergency situations, and periodic testing of the emergency plan and procedures.⁵⁷ Additionally, an organization should review the emergency response plan periodically and in particular after an incident has occurred to determine if the plan was effective or should be revised.⁵⁸

For example, in the event of a toxic emission release, the plan should provide procedures for evacuation, emergency response, and obtaining protective equipment as well as the process for coordinating with an emergency response team onsite and giving notices to the appropriate external emergency response authorities. The emergency response plan should consider a wide-range of potential hazards, including natural hazards such as a tornado. The plan should also contain a flexible command structure to allow for a clear chain of command if certain employees or supervisors cannot be reached during an emergency.

EMS records are a subset or derived from EMS documentation. EMS records show that the organization is following the EMS documents that describe the “procedures”—i.e., doing what the documentation states the organization will do.⁵⁹ The company should create a central recordkeeping system to ensure that applicable documents and records are readily available⁶⁰ and to enable the company to efficiently evaluate the success of the EMS. The system should ensure accurate identification and description of the records, the proper format, and should have a system for review and approval for suitability and adequacy.⁶¹ The organization should consider the proper number of copies, distribution of records, and the location of the records for ease of access.⁶² Additionally, the organization should consider preparing a document control index that shows all of the EMS documents and records, the history of the revisions, and the distribution lists.⁶³

⁵⁷Environmental Management Systems, Second Edition at 57 and ISO 14001 at 8.2.

⁵⁸Environmental Management Systems, Second Edition at 57 and ISO 14001 at 8.2(e).

⁵⁹Environmental Management Systems, Second Edition at 47.

⁶⁰ISO 14001 at 7.5.3.

⁶¹*Id.* at 7.5.2.

⁶²Environmental Management Systems, Second Edition at 51 and 69 and ISO 14001 at 7.5.3.

⁶³Environmental Management Systems, Second Edition at 51 and ISO 14001 at 7.5.3.

[E] Training Employees

Once the company has completed the design of its EMS documents and procedures, the next step is training employees in the EMS Manual and the proper procedures. The two fundamental reasons to train employees in proper procedures are that every employee can have potential impacts on the environment and an employee may have a good understanding of how to improve the environmental management efforts.⁶⁴ Thus, an organization should educate its employees on the environmental impact of the employees' activities and the potential consequences of failing to follow procedures.⁶⁵

In developing a training program, an organization should assess the training and skill needs, both in general terms and specific needs.⁶⁶ Importantly, the training under the EMS program should build upon the training the organization has already conducted, so as not to have too much repetition or potential inconsistencies.⁶⁷ Overall, the training should ensure that the employees are aware of the organization's environmental policy, the significant environmental aspects, and impacts associated with that employee's work, the employee's contribution to the effectiveness of the environmental management system, and the implications of not conforming with the environmental management system requirements, including not fulfilling the organization's compliance requirements.⁶⁸ The company should also establish procedures for employee refresher courses and training procedures for future hires, again taking into consideration requirements of applicable statutes.⁶⁹

Companies should be aware that seven key federal environmental laws have whistleblower protections, which provide for reinstatement, back pay, damages, and attorney fees if an employee can show that he or she was discharged or penalized for reporting violations under the CAA,⁷⁰ CWA,⁷¹ Safe Drinking Water Act,⁷² CERCLA,⁷³ Toxic Substances Control Act,⁷⁴ Nuclear Whistleblower Protection under the Nuclear Regulatory Commission,⁷⁵ and the Solid Waste Disposal Act.⁷⁶ Further information on whistleblower information and rights can be found

⁶⁴Environmental Management Systems, Second Edition at 39.

⁶⁵Environmental Management Systems, Second Edition at 39 and ISO 14001 at 7.3.

⁶⁶*Id.*

⁶⁷Environmental Management Systems, Second Edition at 39-40.

⁶⁸ISO 14001 at 7.3.

⁶⁹Environmental Management Systems, Second Edition at 40.

⁷⁰42 U.S.C. § 7622.

⁷¹33 U.S.C. § 1367.

⁷²42 U.S.C. § 300j-9(i).

⁷³42 U.S.C. § 9610.

⁷⁴15 U.S.C. § 2622.

⁷⁵42 U.S.C. § 5851.

⁷⁶42 U.S.C. § 6971.

on the U.S. Department of Labor's (DOL's) website at http://www.whistleblowers.gov/wb_filing_time_limits.html.

§ 40.04 MAINTAINING AND IMPROVING AN EMS

Establishing the EMS is simply the beginning of an organization's system. The company must continue to determine not only whether pre-existing systems are in compliance, but also whether new systems, facilities, or new regulations require updates to the EMS procedures or other activities to keep the facility in compliance. Thus, after the company has properly evaluated its EMS, the company must begin the cycle anew by acting to update or correct deficiencies in the EMS.

[A] Monitoring and Measurement

The term used by EPA to assess how well an EMS system is performing is, “monitoring and measurement.” Monitoring and measurement enables an organization to evaluate performance, analyze causes of problems, assess compliance with legal requirements, and improve performance and efficiencies.⁷⁷

An organization should determine which operations and activities should be monitored and develop procedures for that monitoring.⁷⁸ The procedures should include the methods to monitor, measure, analyze, and evaluate to ensure valid results, the criteria against which the organization will evaluate its environmental performance, and the timeframes to conduct the monitoring and measuring.⁷⁹ Additionally, the organization should periodically evaluate the organization's compliance with applicable laws and regulations through an internal audit and take action as needed.⁸⁰

[B] Internal EMS Audits

An internal EMS audit is the objective evidence of whether the company is conforming to EMS requirements, specifically applicable laws and regulations. The goals of the EMS audit should be to determine whether each facility covered by the EMS complies with existing law, continues to meet the standards established in the EMS, and whether improvement is possible. The company should also calibrate audit goals to fit its own policies, especially if the company's EMS extends beyond minimum legal requirements.

For the EMS audit to be effective, the organization should first develop audit procedures and protocols that take into consideration the environmental importance of the processes concerned, the changes affecting the organization and the results of any previous audit.⁸¹ The organization

⁷⁷Environmental Management Systems, Second Edition at 60.

⁷⁸Environmental Management Systems, Second Edition at 60 and ISO 14001 at 9.1.1.

⁷⁹Environmental Management Systems, Second Edition at 60-61 and ISO 14001 at 9.1.1.

⁸⁰ISO 14001 at 9.1.2

⁸¹ISO 14001 at 9.2.2.

should determine the appropriate frequency of the EMS audit, which can depend upon the nature of the operations and activities, the significant environmental aspects and impacts, and the results of the monitoring processes and the previous audit.⁸² Generally, an organization should conduct an audit of its EMS at least annually.⁸³ Additionally, the organization should properly identify and train the auditor(s) to conduct the EMS audits.⁸⁴ The auditors should be objective and impartial.⁸⁵ The organization should define the audit criteria and scope for the audit, and ensure that the results are reported to the relevant managers.⁸⁶

In addition to evaluating compliance, EMS audits can also help protect senior management from liability. The Securities and Exchange Commission requires certain companies to disclose environmental liabilities and the material effects of compliance costs on covered businesses.⁸⁷ Regular and systematic EMS audits may help ensure that senior management can accurately disclose environmental concerns. Similarly, the audits will help to ensure that certifications on EPA filings are accurate.

Companies undertaking EMS audits should consider protecting the audit under attorney-client privilege prior to beginning the audit process. The attorney-client privilege can help protect EMS audit results from external parties under certain circumstances. EMS audit results may be protected if the company's decision to begin an audit was based on and directed by legal counsel for the purpose of providing legal advice to the company.⁸⁸ In addition, courts have generally granted more protection for EMS audit material if the audit would not have occurred but for possible litigation.⁸⁹ EMS audit materials receive less protection if the company authorized the

⁸²Environmental Management Systems, Second Edition at 71.

⁸³*Id.*

⁸⁴Environmental Management Systems, Second Edition at 71-72.

⁸⁵ISO 14001 at 9.2.2 and A.9.2.

⁸⁶ISO 14001 at 9.2.2.

⁸⁷17 C.F.R. § 229.101; 17 C.F.R. § 229.103; 17 C.F.R. § 229.303.

⁸⁸In re Grand Jury Proceedings, 220 F.3d 568, 571 (7th Cir. 2000) (“[W]hat is vital to the privilege is that the communication be made in confidence for the purpose of obtaining legal advice from the lawyer.”), *quoting* United States v. Brown, 478 F.2d 1038, 1040 (7th Cir. 1973).

⁸⁹The federal work-product doctrine provides its protection to certain documents created in “anticipation of litigation,” which means that a “substantial and significant threat of litigation” must exist before any document created (because of this threat) may be considered for work-product protection in the federal courts. *Coltec Indus., Inc. v. American Motorists Ins. Co.*, 197 F.R.D. 368, 371 (N.D. Ill. 2000), *quoting* *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 145 F.R.D. 84, 87 (N.D. Ill. 1992); *see also* *Resurrection Healthcare & Factory Mut. Ins. Co. v. GE Health Care*, 2009 WL 691286 (N.D. Ill. 2009). *But see* *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1119 (7th Cir. 1983) (party seeking to assert work-product privilege has burden of proving that “at the very least some articulable claim, likely to lead to litigation, [has] arisen”), *quoting* *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980).

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audit for business purposes, such as attempting to reduce costs at a particular facility.⁹⁰ While courts vary on their protection for audit materials, some states also protect environmental audit materials under state law;⁹¹ however, Illinois is not one of those states.⁹² Additionally, the EPA may not routinely request environmental audit reports, however if the EPA has an independent evidence of a violation it may seek the audit to establish the nature and extent of the violation and the degree of culpability.⁹³ This variation in protection means that it is best to involve inside or outside counsel in the process before the audit procedure is initiated.⁹⁴

If the company discovers violations of environmental laws during an EMS audit, the company may reduce possible penalties by self-reporting the violations to the EPA within 21 days and meeting other requirements of the EPA Audit Policy.⁹⁵ It is important that inside or outside counsel be consulted at the earliest possible time in order to assess the potential risks and values of utilizing the Audit Policy, as well as other strategies for bringing the company back into compliance.

[C] Management Review

Maintaining an EMS also requires top management review.⁹⁶ The goal for management review is to locate areas where the company could improve the EMS and evaluate whether the company should alter its current environmental objectives.⁹⁷ The management review should include people who have the right information and knowledge and people who can make decisions about the organization and its resources.⁹⁸ During the management review, management

⁹⁰See *In re Grand Jury Proceedings*, 220 F.3d at 571. See also *Wychocki v. Franciscan Sisters of Chicago*, 2011 WL 2446426, slip op. at 5 (N.D. Ill. 2011) (financial or business advice is not protected by the attorney-client privilege); *CNR Inv., Inc. v. Jefferson Trust & Savings Bank of Peoria*, 115 Ill. App. 3d 1071, 451 N.E.2d 580, 583, 71 Ill. Dec. 612 (3d Dist. 1983) (documents relating to business decisions, as opposed to legal advice, are not privileged).

⁹¹See generally *Environmental Audit Privilege and Immunity Fact Sheet*, Michigan Environmental Science and Services Division (Jan. 2006), http://www.michigan.gov/documents/deq/deq-ess-audit-slfaudit_274862_7.pdf (describing Michigan's attorney-client privilege statute for environmental audits).

⁹²See former 415 ILCS 5/52.2, *et seq.* (repealed by P.A. 94-580, § 10, eff. Aug. 12, 2005).

⁹³65 Fed. Reg. 19,618 (Apr. 11, 2000). See also EPA's Audit Policy and "eDisclosure" at: <https://www.epa.gov/compliance/epas-audit-policy>.

⁹⁴For further discussion on potential privileges associated with audits and consultants who conduct audits, please see ICLE, *Environmental Law in Illinois Corporate and Real Estate Transactions*, Supplement, Ch. 13, *Consultant Privileges and Proving CERCLA Defenses* (2013); and ICLE, *Environmental Law*, Ch. 12, Section 12.70-12.75 (2012).

⁹⁵EPA's Audit Policy, <http://www.epa.gov/oecaerth/incentives/auditing/auditpolicy.html>.

⁹⁶*Environmental Management Systems*, Second Edition at 75 and ISO 14001 at 9.3.

⁹⁷*Id.*

⁹⁸*Environmental Management Systems*, Second Edition at 75.

should consider the prior reviews, changes in external and internal issues relevant to the EMS, the compliance obligations, the significant environmental aspects, the extent to which environmental objectives were achieved, trends in corrective actions, monitoring and measurements results, and the fulfillment of the compliance obligations.⁹⁹ The result of the management review should include the conclusions on the adequacy and effectiveness of the EMS, decisions related to continual improvement opportunities, decisions related to any need for changes to the EMS, and actions, if needed, if the environmental objectives have not been achieved.¹⁰⁰

[D] Reacting to Recent and Developing Legislation

While a company may be in compliance with local, state, and federal regulations at the time its EMS was crafted, regulations and laws change significantly and often. Each regulatory change includes an effective date, and the company should be in compliance with the new rule or law on the effective date of the law or be in a position to seek a variance or extension of time. To ensure that a company remains in compliance with the statutes and regulations, companies must be aware of pending legislation and regulatory proposals prior to their effective dates and must have procedures in place to monitor for and implement required changes.¹⁰¹ There are various resources available to a company to track changes in environmental laws and regulations, including trade and professional associations and Internet resources.¹⁰² Additionally, if the company is multinational, it should have procedures to track legislation in each country where it operates.

§ 40.05 AVAILABLE RESOURCES

Companies have a number of resources available to improve their environmental compliance systems. Perhaps the best resource is the EPA's website, which identifies various free resources to assist in establishing an EMS.¹⁰³ The website contains links and information regarding laws and regulations (including proposed regulations), statistics on compliance and enforcement, details on EPA pollution prevention programs, and comprehensive information on several major environmental management topics.¹⁰⁴ In addition, there are many qualified attorneys and consultants available to assist a company in establishing an EMS, gaining certification under ISO or other standards, and auditing for compliance.

⁹⁹Environmental Management Systems, Second Edition at 75-76 and ISO 14001 at 9.3.

¹⁰⁰*Id.*

¹⁰¹Environmental Management Systems, Second Edition at 29 and ISO 14001 at 6.1.3.

¹⁰²Environmental Management Systems, Second Edition at 112.

¹⁰³<https://www.epa.gov/ems>.

¹⁰⁴Including the Environmental Management Systems, Second Edition, relied upon here, https://www.epa.gov/sites/production/files/2015-07/documents/ems_an-implementation-guide-for-small-and-medium-sized-organizations_2nded.pdf.

§ 40.06 CONCLUSION

Establishing, maintaining, and continually improving a successful EMS is a challenge for a company of any size. The company must identify and update its environmental aspects and impacts and track proposed laws and regulations to ensure that the company's EMS does not become outdated. Careful tracking of legislation allows the company to prepare well in advance of new legislation and regulations becoming effective.

The key to a successful EMS is to establish efficient procedures for planning, implementing, and evaluating company environmental compliance. But even the most careful planning cannot succeed without adequate training and investment. As a result, an effective EMS is a company-wide commitment—from the boardroom to the break room.

The core value of an effective EMS is assisting the company in avoiding civil and criminal penalties for environmental violations. In addition, an EMS can reduce environmental compliance costs, ensure sustainable use of resources, and lower expenses by reforming inefficient processes. It can also boost employee morale and increase the company's ability to attract new talent. A successful EMS can also lead to positive consumer and community support for the company and establish the company as an industry environmental leader.