



Innovation, Management Systems and Trading Committee Newsletter

Vol. 4, No. 3

August 2004

MESSAGE FROM THE CHAIR

Dennis Hirsch

Writing my last Message from the Chair gives me a chance to reflect on where our Committee has been since its inception four years ago, and where it is going in the years to come. Four years ago we were the “Special Committee on Second Generation Issues,” a group of a dozen or so lawyers who believed that the Section of Environment, Energy, and Resources should pay more attention to alternative regulatory strategies. During our first two years, under the excellent guidance of our first Chair George Wyeth, the Special Committee grew nearly ten-fold. In our third year the Section recognized the importance our subject area by promoting the group to full Committee status and renaming it the “Innovation, Management Systems and Trading Committee.” Since that time, the Committee has continued to grow and to provide lawyers with informed discussion of cutting-edge regulatory methods and their relationship to the law.

None of this would have been possible without the commitment and contributions of a superb group of vice chairs. During my term, Ira Feldman and later Jamie Conrad have successfully developed and placed numerous programs at Section meetings. Joe Dawley (our incoming chair) has regularly produced

stimulating issues of this newsletter. Brenda Hustis Gotanda has built our unique pro bono program from scratch. Beth Termini has carefully tended to and expanded our Web site. Linda Breggin has reached out to lawyers and added to our membership. Joel Bolstein has successfully produced our *Year in Review* submissions. Bob Sussman (trading), Chris Bell (management systems), J.B. Ruhl (trading and resources), and Marylou Barton and Cary Coglianesse (innovation) have provided leadership in their areas of expertise. The Committee’s achievements are largely due to the efforts of these individuals and other Committee members who have given generously of their time. To them I say “thank you.”

Much remains to be done. Environmental regulation is still hotly contested ground, perhaps even more so today than when I became chair two years ago. At its best, our Committee provides neutral territory in which lawyers representing government, industry, NGO’s and academia can come together to discuss the merits and legal implications of new regulatory approaches. Such innovative policies, if implemented correctly, can play an important role in the move to an improved level of environmental performance. If our Committee can contribute in a small way to that end, it will be serving a useful purpose.

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and Trading Committee Newsletter
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Joseph M. Dawley, Editor**

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MESSAGE FROM THE EDITOR

Joseph M. Dawley

Innovation is the theme of this issue. Innovation issues comprise of state and federal regulatory initiatives that complement traditional command and control approaches to environmental regulation through performance-based outcomes and enhanced public involvement. These government initiatives provide one avenue for corporations and other regulated entities, such as municipalities to pursue performance-based goals. While regulated entities may have other reasons for achieving superior environmental performance, such as supply chain requirements, shareholder initiatives and corporate objectives, government initiatives can spur the regulated community's efforts in going above and beyond what the law requires by providing administrative and regulatory flexibility, certainty and credible recognition. In this aspect, government can truly play an important role to encourage superior environmental performance. This issue highlights recent state and federal innovation initiatives from a sort of Wisconsin perspective – given that three articles are authored by Wisconsin residents.

Kristine Euclide of Madison Gas and Electric Company provides a perspective on her company's experience from its participation in Wisconsin's Environmental Cooperation Pilot Program. Wisconsin Department of Natural Resources' Secretary Scott Hassett, Wisconsin State Senator Neal Kedzie and Wisconsin State Assemblyman Mark Miller provide a bipartisan discussion on the evolution of Wisconsin's performance based approach to environmental and natural resource protection and the issues surrounding the recently enacted Green Tier legislation. With regards to federal innovation, Todd Palmer, a private practitioner from Madison, Wisconsin, provides an analysis of EPA's April 2004 "Strategy for Determining the Role of Environmental Management Systems in Regulatory Programs."

Lastly, moving east, Dennis Treacy provides an insightful analysis on the power that voluntary programs can have on a company's ability to transform its goals from environmental compliance to leadership by highlighting Smithfield Foods' experiences with the EPA's Sector Strategy Program, the Virginia Environmental Excellence Program and the North Carolina Environmental Stewardship Initiative.

In addition to demonstrating recent developments in state and federal innovation, these articles also highlight the various practical and legal issues that a company must consider when considering alternative regulatory pathways. I hope that you find this issue as interesting as I have. Many thanks to the authors for making this issue a success and special thanks to Jeff Smoller of the Wisconsin Department of Natural Resources for orchestrating the article by Secretary Hassett, Sen. Kedzie and Rep. Miller.

**INNOVATION, MANAGEMENT
SYSTEMS AND TRADING
COMMITTEE NEWSLETTER**

LIKE TO WRITE?

The Innovation, Management Systems and Trading Committee welcomes the participation of members who are interested in preparing this Newsletter. If you would like to lend a hand by writing, editing, identifying authors or identifying issues, please contact Lee Paddock at lpaddock@law.pace.edu.

**WISCONSIN'S ENVIRONMENTAL
COOPERATION PILOT PROGRAM:
COMMENTS OF A
PARTICIPATING COMPANY**

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In 1997, Wisconsin adopted an innovative regulatory approach called the Environmental Cooperation Pilot Program (EC Pilot Program). Section 299.80, Wis. Stats. This article presents a brief overview of the program and contains observations of one of the companies participating in Wisconsin's EC Pilot Program, Madison Gas and Electric Company (MGE).

**Wisconsin's Environmental Cooperation
Pilot Program**

The EC Pilot Program grants increased administrative flexibility to qualifying companies who enter into contracts in which they commit to superior environmental performance, including implementation of an environmental management system. Opportunity for public input is provided before agreements are entered. The program does not relax any emission limits or environmental standards.

The enabling legislation limited the pilot program to no more than 10 agreements which needed to be finalized by Oct. 1, 2002. The agreements have an initial term of 5 years with the possibility of one 5-year renewal term. According to an October 2003 evaluation by the Wisconsin Department of Natural Resources (WDNR), the EC Pilot Program achieved impressive environmental gains for both the participating entities and the public. These gains included decreased energy consumption, emission reductions, increased materials reuse and recovery and improved regulatory processes. Additionally, the EC Pilot Program produced unprecedented examples of

collaborative stakeholder involvement on environmental issues. *The Environmental Cooperative Pilot Program: 2003 Progress Report*, Oct. 31, 2003, WDNR, www.dnr.state.wi.us/org/caer/cea/eccp/reports.

Some view the achievements of the EC Pilot Program as paving the way for the adoption earlier this year of Wisconsin's new Green Tier program. Sections 299.83 and 299.85, Wis. Stats.

Why Did MGE Participate?

MGE is an investor-owned public utility providing energy services to approximately 130,000 customers primarily in and around Madison, Wisconsin. It owns and operates a 200 MW electric generating plant (Blount Station) in the City of Madison, which provides about 15 percent of the electricity used by MGE customers. The plant is located within blocks of Madison's downtown, the State Capitol building and numerous state government office buildings.

In September 2002, after a substantial period of detailed negotiations and public comment, WDNR and MGE entered into an Environmental Cooperative Agreement (EC Agreement) under the EC Pilot Program. Why did it do so? When MGE began working with WDNR on the EC Agreement, it had three primary goals in mind: i) enhanced community involvement on environmental issues, ii) better regulatory processes, and iii) improved environmental results.

MGE perceived increased public involvement as both a better way to do business and a better way to obtain valuable community input for enhancing the company's environmental profile. This objective was particularly important given Madison's strong environmental ethic and MGE's well-established corporate emphasis on meeting the energy needs of the local community by working together to produce positive results.

Similarly, achieving better regulatory processes was critical to MGE's decision to participate in the EC Pilot Program. MGE was contemplating several future activities where a more creative and informed regulatory approach and more streamlined record-keeping procedures were essential to moving forward. One example included Blount Station's increased use of alternative, paper-derived fuels. This was seen as beneficial because these products burned cleaner than coal and their use as a fuel also prevented them from being landfilled. However, restrictions in MGE's air permit made it very difficult to accept alternative fuels as they became available on the market because the testing process was cumbersome and the approval time so lengthy.

Finally, MGE's overriding objective in entering the EC Pilot Program was to focus on achieving improved environmental results. As a relatively small company (approx. 700 employees), MGE wants its resources devoted to achieving meaningful environmental results, rather than excessive record-keeping and reporting activities.

Highlights Of The MGE/WDNR Agreement

The MGE/WDNR EC Agreement, which is fifteen pages long, contains general commitments of both WDNR and MGE to work cooperatively toward superior environmental performance, as well as several pages of specific commitments. The MGE/WDNR EC Agreement became effective on Sept. 26, 2002 and has a term of five years with a possible renewal of up to another five years.

Some of the voluntary commitments made by MGE include:

- using a citizen environmental advisory group to enhance public involvement;
- increasing the beneficial use of alternative fuels that burn cleaner than coal;

- expanding on storm water control practices;
- studying combustion efficiency improvements, environmental performance and cogeneration possibilities at Blount Station;
- upgrading its existing Environmental Management System to ISO 14001 quality;
- performing a benchmark audit within 180 days and an annual progress report thereafter;
- reducing use of diesel fuels; and
- accelerating replacement of PCB transformers.

Some of the specific WDNR commitments include:

- collaborating on an innovative storm water management demonstration project;
- assigning knowledgeable WDNR staff to consistently work more closely with MGE;
- approving some additional specific paper-derived wastes that could be burned as fuel at Blount Station; and
- establishing an expedited review process for future MGE requests for approval of other paper-derived products to be used as alternative fuels.

A more detailed description of the ECA is available on MGE'S Web page at: www.mge.com/environment/agreement.

Observations On How The EC Pilot Program Is Working

To date, having operated under Wisconsin's innovative EC Pilot Program for approximately two years, MGE's primary goals for entering the program seem to be largely on track. Each of these goals will be examined below. However, the next three years will greatly influence MGE's overall evaluation of the program.

Goal 1: Enhanced Community Involvement

MGE's goal of enhanced community involvement on environmental issues is largely being met through use of a broad-based citizen environmental advisory group that meets regularly with representatives of MGE and WDNR to provide advice, ask questions, and review MGE's progress under the EC Agreement. MGE shares a good deal of information with the group, including the annual audit reports. MGE's public involvement approach has been cited as an exemplary model for encouraging stakeholder collaboration on environmental issues. This is largely attributable to the dedicated, active involvement of the members of the citizen advisory group, as well as the regular participation of WDNR and MGE staff.

One of the most positive outcomes of this shared information/open dialogue approach has been a better appreciation by all parties (citizens, WDNR and MGE) of the interaction of the operational issues MGE faces as it serves the area's growing energy needs and the community's strong environmental interests. Meeting face-to-face in an open dialogue has created among all the players a heightened sense of personal accountability for energy consumption and the accompanying environmental impacts. It isn't often that consumers of energy, power plant operators and environmental regulators voluntarily sit down to respectfully and sincerely discuss these shared concerns.

Working in partnership with all components of the community is something MGE has long embraced as a good way to do business. Thus, although still presenting obvious risks to the company, the EC Agreement's emphasis on public involvement is viewed as positive by MGE. However, as discussed further below, for businesses less comfortable with this collaborative approach, the concept of openly sharing and discussing information regarding

environmental performance and plans with “outsiders” may not be viewed so positively.

Goal 2: Better Regulatory Processes

Progress has also been made in furthering MGE’s goal of securing more efficient and effective regulatory processes. For example, like any potential alternative, paper-derived fuel products need to be fully analyzed and approved by WDNR before they can be burned at Blount Station. The faster WDNR turn-around provided under the EC Agreement has allowed MGE to react more quickly to industry requests to accept products that may differ only slightly from products previously approved. This permits MGE to more timely respond to market requests and thus safely and beneficially use more products that otherwise would be unnecessarily landfilled simply because the producers can’t economically store the products for a lengthy period.

Another very positive development growing out of the ECA experience has been having professional and committed WDNR staff dedicated to working with MGE on a consistent basis. This has not only improved communications generally, but also provides an opportunity for WDNR personnel to gain a better understanding of MGE’s daily business operations.

Although these examples of regulatory process improvements are valued, additional improvements need to be advanced over the next few years in order for MGE to fully satisfy its goals in this regard.

Goal 3: Improved Environmental Results

Finally, the most important question is whether the goal of improved environmental results is being achieved. Although work is continuing, MGE is on track in meeting this goal as well. Some highlights of superior environmental performance results emanating from the

EC Agreement are described in the following paragraph.

MGE (and several other partners, including WDNR), installed an innovative storm water control device in a parking lot as part of MGE’s storm water management program. The cutting-edge demonstration project will be monitored and the results evaluated and shared as a research tool. Substantial upgrading of MGE’s Environmental Management System to ISO 14001 standards is well under way. MGE is using bio-diesel fuels in its fleet to decrease vehicle emissions. A new pulsed energization system is being pursued at the Blount Station to reduce air particulate emissions. Furthermore, a comprehensive analysis of pollution control technologies for Blount Station was recently completed and is the subject of continuing discussion with the citizen advisory group. Finally, MGE is ahead of its self-imposed schedule to voluntarily replace PCB transformers. Numerous other activities are underway and MGE’s progress under the EC Agreement is evaluated annually in a report shared with WDNR and citizen environmental advisory group.

Conclusion

After two years of participating in Wisconsin’s innovative EC Pilot Program, MGE believes the program is furthering the goals of obtaining superior environmental performance while reducing certain administrative procedures and providing more regulatory flexibility. An added benefit of the program appears to be enhanced opportunities for the public, businesses and WDNR to address environmental issues in a more open and collaborative fashion.

However, in order for Wisconsin’s EC Pilot Program to continue its potential for maximum success, three challenges need to be addressed.

First, there needs to be better and more consistent support for these innovative

approaches throughout WDNR, as well as between DNR and EPA. In MGE's case, for example, the EC Agreement was almost abandoned because of eleventh-hour input received from EPA. Additionally, in attempting to implement some of the provisions contained in MGE's EC Agreement, there remains uncertainty as to how other areas of WDNR, not directly involved with the EC Program, may respond. This same uncertainty exists regarding EPA's position on implementation of certain actions under the EC Agreement. It will take continued diligent efforts by WDNR leadership to develop a better understanding of the benefits of the EC Pilot Program within all areas of WDNR and with EPA in order to ensure more business participation in the EC Program and other innovative programs.

And that leads to the second challenge. The future of the EC Pilot Program (and for that matter, any innovative program) is largely dependent on the dedication and expertise of the WDNR staff. To date, the WDNR staff working in this area have been committed, creative professionals who believe in the merits of the program and who work well with stakeholders and industry alike. The increased sharing of information and access to MGE's business operations produced by the EC Agreement has also benefited the WDNR employees and expanded their knowledge base. But, just as the participating businesses must have top management support and be willing and able to consistently devote a reasonable level of resources to the EC Program, so too must WDNR. Although recent state budget reductions have strained WDNR, if the EC Pilot Program is to realize its potential for success, WDNR management must find a way to appropriately staff and consistently support the program long-term.

Finally, unless the incentives for business participation can be increased, there may be limited interest in continued or expanded enrollment in the EC Program or other

innovative programs. For example, if WDNR cannot find more ways to reduce administrative requirements and simplify the processes, then companies may conclude that the added time and effort to participate in the EC Program is not justified. Similarly, under the EC Program, participants must annually prepare and file significant information about their environmental performance. Any violations discovered during these evaluations must be reported to WDNR. Yet, the EC Agreement statute provides only limited protection from State-commenced civil forfeiture actions for violations disclosed as a result of a company's voluntary participation in the program. Section 299.80(14), Wis. Stats. In addition, again with only limited exception, records filed with WDNR by companies voluntarily participating in the EC Program are available to the public.

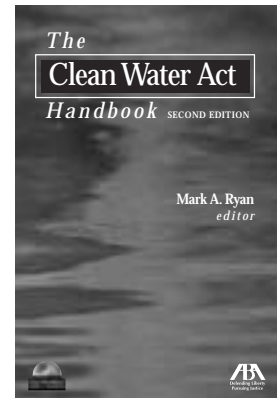
Thus, some companies may perceive that the benefits offered by the current EC Pilot Program do not outweigh the potential costs and risks posed by participation. WDNR needs to continue to explore ways to increase the benefits to the business side of the equation. This could be difficult to do under the parameters of the existing law. However, for example, WDNR could provide more recognition of the participating companies and more technical assistance.

In conclusion, assuming the above challenges can be addressed, Wisconsin's Environmental Cooperative Pilot Program appears well on its way to not only successfully meeting its goals, but also advancing other innovative Wisconsin programs that promote superior environmental performance through collaborative community efforts.

From ABA Publishing and The Section of Environment, Energy, and Resources

The Clean Water Act Handbook, Second Edition **Mark A. Ryan, editor**

This updated guide is the definitive resource to the provisions and complexities of the federal Clean Water Act and how it continues to evolve. Recent court rulings and the change of administration have resulted in significant changes that dramatically affect practitioners working in the area. This new edition provides detailed explanations of these changes and considers the impact of recent court decisions, including the Supreme Court's decision in *SWANCC* and the Court of Appeals decisions in *American Mining Assoc.*, *Talent Irrigation*, and *Forsgren*, among others.



Beginning with an overview of the law's provisions and pertinent regulation and enforcement issues, the subsequent chapters address specific issues, such as:

- NPDES permits
- Control of publicly owned treatment works
- Requirements applicable to indirect discharges
- The regulation of wetlands and the impact of recent judicial decisions
- Oil and hazardous substance spills
- Enforcement options under Section 309
- Judicial review

Chapters begin with a section on applicability and scope. Within each fully annotated chapter, clear explanations of specific statutory and regulatory provisions and court decisions applicable to the issue are presented in the order needed for full and accurate analysis – a virtual checklist of requirements and considerations. Making this new edition more useful than ever, the authors reference URL addresses for quick, up-to-the-minute information on government documents that are often difficult to locate.

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Issues of Legal Ethics in the Practice of Environmental Law **by Irma S. Russell**

This new book is an essential guide for every environmental lawyer on representing industrial clients, government agencies, individuals, and public interest groups. It focuses primarily on the rules of ethics that raise significant concerns for the environmental practitioner. A proactive approach to ethics helps lawyers avoid problems by making reasoned decisions before ethical problems arise in urgent or complicated context. This book helps you anticipate and analyze these difficult ethics issues. This book also examines the American Bar Association's Model Rules of Professional Conduct (Model Rules), judicial decisions, formal and informal ABA Opinions, and opinions of state boards of professional responsibility. Contents Include:



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WISCONSIN'S GREEN TIER LAW

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Natural Resources

Sen. Neal Kedzie (R)
Chair, Wisconsin Senate Environment and
Natural Resources Committee

Rep. Mark Miller (D)
Wisconsin Assembly Natural
Resources Committee

We are writing as members of different parties and branches of government to explain the environmental and economic potential of Wisconsin's Green Tier law and how it differs from past policies and legal practice.

On April 16, 2004, Gov. Jim Doyle signed Senate Bill 61 at the Green Bay Wisconsin facility of the Georgia Pacific Co., creating Chapters 299.83 and 299.85. The law fulfills the governor's policy in Grow Wisconsin that businesses with good environmental records that strive for superior results should be eligible for regulatory benefits from the Wisconsin Department of Natural Resources (WDNR).

Our story describes several of the law's key points and an 8-year process that led to the statute. It also is a narrative about how law in general and this law in particular can promote new green thinking that helps companies voluntarily exceed high environmental standards like those in Wisconsin.

We hope that Wisconsin's action prompts discussion elsewhere. New thinking is especially critical for states like Wisconsin that are manufacturing dependent and vulnerable to the fact that America is "on the front lines of the stiffest global competition the world has ever seen." (Patrick Cleary, Sr., vice president for public and external affairs, National Association of Manufacturers.)

On a national level, "the environmental debate has not moved far from where it was a decade ago," complains John C. Dernbach, Esq., policy director of the Pennsylvania Dept. of Environmental Protection. ("Why Lawyers Should Care," The Forum, The Environmental Law Institute, July/August, 2002). Dernbach argues that lawyers have a "new professional duty" to move beyond "yesterday's wars with yesterday's weapons and strategies."

Although the existing regulatory system has served America well, it alone cannot produce the environmental, economic and community value required in these times. Parts of the old system also are reaching the point of diminishing returns in regard to the problems of air, water, land and waste it attacked with separate approaches nearly two generations ago. Knowledge has advanced far beyond what we knew ecologically, economically and socially in the 1960's and 70's. A Phase Two of environmental law is needed to update America and tap its ingenuity to secure its future. Green Tier is a step toward that phase. (Secretary Scott Hassett, Esq., to state bar; <http://dnr.wi.gov/org/caer/cea/innovation/speech1.htm>)

Green Tier is the product of years of hard work and tireless efforts of a large consensus group, including past and current WDNR secretaries from three administrations in both parties. Bipartisanship won the day as the Republican Legislature and Democratic administration worked cooperatively to enact Green Tier. Its implementation is one of three top priorities in the Hassett administration of WDNR.

This article's shared authorship symbolizes our pride in Wisconsin's policy accomplishment and confidence in WDNR's ability to implement it with the Legislature's constructive oversight.

Wisconsin's Innovation and Conservation History

Green Tier is consistent with the state's political tradition of innovative ideas and high ideals.

Theodore Roosevelt, former president and conservationist, wrote that Wisconsin “has become a laboratory for wise experimental legislation” for which “the whole nation owes them so much.” (“The Wisconsin Idea,” by Charles McCarthy, 1912).

Green Tier could be a reform that again marks us as a public policy laboratory, a state that is small enough to manage and large enough to matter.

Wisconsin also is a state with great environmental values. It is Aldo Leopold’s home and where he wrote *Sand County Almanac*. It is Gaylord Nelson’s home, too, and the place that inspired the father of Earth Day. Innovative public policies reforested the northwoods. SO₂ trading to control acid rain started here. Most recently, Wisconsin was the first state to enact a law protecting one million acres isolated wetlands after a U.S. Supreme Court decision put them at risk.

This solid environmental tradition is evidenced in many ways by businesses that support environmental projects and have compliance records that are in the 90 percent range and above in many regulatory categories. We have many businesses that are simply very good environmental citizens.

Frustrations and Opportunities

Like many new public policies, Green Tier borrowed ideas and was refined through the legislative process. There were several main political ingredients for Green Tier:

The first related to limited audit immunity. Some 35 other states have it in different forms but Wisconsin did not. This was a negotiating issue involving the governor, Legislature and stakeholders, especially small businesses that strongly supported Green Tier. In this instance, audit immunity provides limited immunity from civil penalties for self detected, promptly

corrected and publicly disclosed civil infractions. Violations posing a serious threat to public health and the environment are not eligible for audit protections. However, not all of Wisconsin’s environmental community supported Green Tier legislation as passed, mainly due to their opposition to any limited audit immunity provision for businesses.

The second related to frustrations with the status quo. Regulators, activists, lawyers and businesses all were frustrated with what laws failed to do or how much they cost. Concerns were documented in a UW-Madison La Follette School report. (“Footprints of the Future: The Search for Common Ground,” December, 1998.) The sense that “something’s not right” also is documented in studies of societies that create detailed laws to deal with complex issues like the environment but experience “diminishing returns on efforts to solve problems, including problems of natural resources.” (“The Collapse of Complex Societies,” Joseph A. Tainter, 1988.) Stakeholders wanted to “do better.”

The third related to environmentalists and innovation. In July 1999 some environmentalists announced that they would conditionally accept innovative policies if they passed a “sniff test.” “We support any system that challenges businesses and others to positively and significantly contribute toward achieving a healthy environment. All systems, including the existing one, must be held to this standard,” they wrote. This signaled that an innovation conversation was possible with some environmentalists. (<http://dnr.wi.gov/org/caer/cea/innovation/paper.htm>)

The fourth was that innovation was happening elsewhere. Domestically, new policies were helping restore brownfields, control acid rain and protect endangered resources through (Habitat Conservation) bubbles, markets and adaptive management. Internationally, covenants in The Netherlands, pacts in Bavaria

and a tiered system in Indonesia were noticed. Outside examples reduced anxiety about “being first.”

The fifth was WDNR’s sense that it needed new tools. The advent of ISO 14001 prompted round-tables involving the WDNR, UW-Madison’s La Follette School, U-Penn’s Wharton School and Pennsylvania Dept. of Environmental Protection. WDNR created a business-NGO innovation committee and helped found the Multi-State Working Group on Environmental Performance (MSWG), a group dedicated to innovation through respectful collaboration among business, government and non-government interests. These actions created learning and networking opportunities for WDNR staff, businesses and environmentalists and nurtured the long-germinating seeds of culture change.

In 1996 WDNR employees drafted “breakthrough” legislation that authorized 10 innovation pilot projects. It was adopted in the 1997 biennial state budget. However, fear of EPA, transparency and transaction costs slowed participation, as did the limited involvement of stakeholders in the drafting.

It took nearly two years to negotiate an innovation MOU between WDNR and EPA Region 5, an agreement now borrowed by other states and EPA. (<http://dnr.wi.gov/caer/cea/ecpp/moa.htm>.) In February 2001 the first pilot project was approved in a sign-up period that closed in October 2002. The question became: “What’s next?”

Developing the Law

Five key factors informed our approach to a results-based system where businesses, citizens and regulators work as a team to protect the environment.

The first came from the Progressive Policy Institute, which said innovation should be

grounded in law, results-driven, locally relevant and citizen-based. The Institute and others noted that non-statutory reforms failed to provide business participants adequate protection and that the projects were not connected to larger environmental goals. (“Second Generation: A New Strategy for Environmental Protection,” Debra S. Knopman, 1996; “Second Generation of Environmental Stewardship: Improve Results and Broaden Civic Engagement,” Knopman and Emily Fleschner, 1999.)

The second came from E. Donald Elliott, Esq., former EPA general counsel, who advised WDNR on a tiered, performance-based system that would allow better actors to climb out of the old way but always with a default position if they unacceptably faltered. (“Thinking Ecologically: The next generation of environmental policy,” edited by Marian R. Chertow and Daniel C. Esty, Esq., 1997.) The tier idea was floated at a Brookings Institution-UW La Follette School dialogue in winter 1999. Although some environmentalists were cautious, it was generally well received.

The third came from Elliott and Gail Charnley, director of the Presidential/Congressional Commission on Risk. They advised WDNR, then published an article on regulating through bubbles. Thinking in bubbles means addressing problems in facilities, processes, regions or watersheds as though they were under an imaginary bell jar, allowing integrated regulation. (“Think bigger bubbles,” Forum for Applied Research and Public Policy 1998.)

The fourth was to provide innovators a bridge between industrial and natural resource regulatory systems to tap the potential of both. Bridging makes it easier to address issues like groundwater, watersheds, river-way renewal and ecosystems. (“Cross Pollination,” David J. Hayes, Esq., counselor to the Secretary of Interior, Environmental Forum, July 1998.) This integrated approach fits WDNR with its range of

duties involving land, water, air, fish, wildlife, endangered resources and forests and supports another priority of the Hasset administration to “take back the rivers,” restoring them as ecological, recreational and community assets.

The fifth was “think ecologically and act economically.” This advice came from a 1998 Brookings Institution Forum, in which WDNR was involved, that favored tapping the inventiveness, efficiency and entrepreneurship of business to solve environmental problems. This complements an environmental strategy to create public entrepreneurship networks. (“Public Entrepreneurship Networks,” David Laws and Lawrence Susskind, 2001.)

In May 1999 WDNR issued a white paper that outlined a performance-based policy framework. (<http://dnr.wi.gov/org/caer/cea/environmental/background/history/whitepaper.htm>.)

In October 1999, a delegation visited Bavaria (with which Wisconsin has a regulatory reform working partnership) and The Netherlands to learn about their approaches to environmental protection. Upon return, the delegation was eager for reform and advised WDNR to create a citizen committee to draft an innovation law. (At the time, WDNR was considering keeping the drafting process internal.) The result was enhanced credibility for the product and a collaborative model for the isolated wetlands law, wetlands mitigation law and groundwater protection law.

“It is time for the U.S. and Wisconsin to move forward,” wrote Thomas Schmidt, president of the Wisconsin Paper Council and trip participant in the Nov. 28, 1999 Appleton Post-Crescent. “Reform is absolutely essential if the US paper industry (and others) are to remain economically competitive in a global marketplace.”

In June 2000 WDNR created a 14-person advisory committee of lawyers, (large and small) businesspersons, environmentalists and local officials to “create the best ever Wisconsin environmental law and get it enacted.” Among the notable committee decisions, the following four stand out.

The first was the environmentalists’ recommendation to include the principles established by the Coalition for Environmentally Responsible Economics (CERES) in the law, creating a menu for negotiating agreements. The list includes sustainable natural resources use, energy conservation, environmental restoration, product stewardship and business mentoring, among others.

The second was that the environmental good deeds must be “proportional” to regulatory considerations, setting the table for a constructive discussion about results. In the September 2001 ABA Second Generation Issues Committee Newsletter, Editor Marylou Barton, Esq., called the language on incentives that are proportional to environmental benefits “a gutsy move.”

By incorporating proportionality into law, the committee opened the door to new thinking about organizations and social welfare, shifting from “What’s the minimum and how can I catch you?” to “What’s possible and how can we achieve it together?” It is a shift from adversarial law to aspirational law, reflecting the work of Prof. Robert A. Kagan, Esq., UC-Berkeley (“Adversarial Legalism, the American Way of Law,” Robert A. Kagan, 2001).

Green Tier parallels an Aspen Institute recommendation for an “aspirational vision of the future” that recognizes that “the environment can be significantly better off and companies better off” with new laws that include performance tiers. This report was the product of attorneys and others from environmental groups, regulatory agencies, think tanks and

businesses. (“A Call to Action to Build a Performance-based Environmental Management System,” The Aspen Institute Series on the Environment in the 21st Century, 1999.)

In this context, the law can be used to leverage performance, and inspire a new understanding of public interest practice for agency lawyers and businesses as well. (“Solving Problems vs. Claiming Rights,” William A Simon, Esq., 2003.) This inspired approach includes, under Green Tier, going beyond the regulatory minimum, addressing unregulated aspects as well as environmental restoration and other focused “good deeds.” This may include wetland restoration in rural areas or community building in urban ones.

One example that some legislators liked is drawn from Los Angeles where community-benefit agreements result in project-specific contracts between developers and the community in ways that produce value for all. This approach complements the concept called EnAct in the Madison area that has voluntary teams forming in neighborhoods, businesses and churches to reduce waste, save energy and improve the environment.

The third is the decision to accommodate short-term flexibility and long term certainty: flexible means and certain ends. Wisconsin is one of America’s great manufacturing states. World competition requires manufacturers to shift production overnight. Green Tier’s bigger bubbles over production units can facilitate flexibility. Highly mobile capital and business decisions made in distant headquarters require facilities to communicate regulatory certainty and confidence to the investor “herd” and home offices. (“The Lexus and the Olive Tree,” Tom Friedman, 1999.) Green Tier’s long-term contracts with capital-intensive firms can provide greater certainty for investors. These firms also may offer opportunities for socially responsible investors or be lesser risks under

corporate governance laws like Sarbanes-Oxley.

The fourth is the decision to create charters. This reduces the barriers to environmental problem solving created by fence lines, political boundaries and segregated media approaches. Charters invite new green thinking about supply chains, geographic areas, sectors, communities, etc. to organize in ways that create a new legal model without unnecessarily challenging an organization’s core purpose. (“The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought,” Orley Lobel, Esq., 2003) This can result in the use of the capacity of an organization such as a small business association to serve its members and society better by helping them achieve and go beyond compliance. Small business participants and others at the 1999 Aspen Institute Forum specifically recommended this approach.

The committee completed its work in nine meetings over six months and versions of its work were contained in several proposals that were offered, but not enacted in the 2001-03 legislative session. New versions were introduced in the 2003-05 session. One passed but was vetoed due to a disagreement relating to audit immunity. However, each of us knew the significance of the idea and vowed to remain talking and advocating. Green Tier passed in the last hours of the session. The enacted Green Tier law is at: www.legis.state.wi.us/2003/data/acts/03ACT276.pdf.

Green Tier does not replace command and control. It is voluntary for those that qualify and want to cooperate with the WDNR and others to do great environmental things beyond the minimum but in law. For scholars, Green Tier is described as “practice that defines law.” This is a hallmark of an adaptive, performance-based system. In contrast, in the existing system, “law defines the practice.” Simply, Green Tier is a law based on a “we can” negotiated approach rather than “you can’t” directed approach.

The law establishes a two-tiered system with entry requirements for both.

Tier One is straightforward and contains language relating to environmental management systems, annual self-audits, corrective action and continuous improvement. This tier should be especially attractive to small business and reflects Aspen's "Incremental Performance Track B."

Tier Two allows negotiated environmental agreements that may not be possible in the existing regulatory system.

Charters allow groups of companies or other entities to join with the state in pursuing common goals that traditional approaches may not be able to address due to fiscal, staffing or other constraints. For example, charters are tools that can be used to assist small business meet and attain compliance through associations, vendors, original equipment manufacturers (OEMs) or supply chains and reflects Aspen's "Leading Performance Track A."

In signing the binding agreements, the state pledges to honor its commitments. Respectful negotiations and kept promises will enhance working relationships among WDNR, industry and other stakeholders. The third priority of the Hasset administration is to build WDNR's reputation through partnerships and in other ways. Partnerships can be of great benefit to WDNR and earn respect from many quarters, including environmentalists.

A recent report by the River Alliance of Wisconsin calls on WDNR to form new partnerships to protect the rivers. Many types of partnerships are possible, including informal, non-binding ones that are not task specific. However, partnerships under Green Tier can be focused on results and leverage resources in WDNR and elsewhere to achieve those results whether they relate to river restoration, urban

revival, estuary protection or groundwater management.

In addition to the agreements, the Green Tier law encourages the use of community outreach, transparency and compliance auditing to adhere to requirements. These tools will help build better working relationships based on performance and open communications with WDNR and community.

Implementation

The experience of the pilot projects and similar experience in other states produced these lessons:

1. Recruit candidates. Overcome the fear, anxiety and distrust that deter sign-ups;
2. Discuss results first and then how to get there. Don't revert to bean-counting and processes based on distrust;
3. Keep transaction costs low and cost them out over the long term and across multiple entities;
4. Support entrepreneurs in government, business and law. Give them the support to use new environmental tools in Green Tier; and
5. Acknowledge that the greatest risk may be to take no risk. This may be especially true for some manufacturers and agency programs under the budget gun.

While the legislation was pending, 36 businesses and 11 trade groups and associations indicated an interest in participating. Since enactment, more have come forward including these examples:

- A dairy farm wants to use environmental stewardship to build a relationship with the DNR and community;

- A large wholesale operation wants to limit emissions beyond permit provisions and to address community concerns;
- Three manufacturing firms want to make beyond compliance environmental performance a part of their corporate strategies;
- An infrastructure company wants to link natural heritage protection with environmental performance.

In addition, a citizen-based effort in Northeast Wisconsin wants to use Green Tier to support farming neighborhoods that (using “bubbles”) connect neighbors with each other and urban communities into a sustainable region. Funded by the Joyce Foundation, this experiment is called Dairy Gateway and is generating enthusiasm from citizens who see themselves as taking actions that can make everyone better off environmentally, economically and socially.

That these businesses and others would step forward for Green Tier is not surprising based on the results achieved in the Green Tier pilot projects. For example, one firm found a way to improve environmental performance 7.5 times that of the standard. Another agreement found a way to save thousands of hours on reports that did nothing to protect or improve the environment. A third converted a waste stream and environmental liability into an energy source with reuse of combustion byproducts. Two companies built strong relationships with the community, including one that had previously experienced community opposition to its operations.

Implementing Green Tier presents learning challenges for everyone including regulators, businesspersons, activists, lawyers, consultants and legislators. Each group has a way of thinking about issues and each other. Each has norms, beliefs and cultures that define “the other” and affect actions. Environmental law affects these beliefs and cultures.

In “The Cultural Study of Law,” 1999, Paul W. Kahn, Esq., helps us understand the shift of thinking that lawyers, whomever they represent, including government, may make to help their clients in a Green Tier like situation. He notes that law frames the present in terms of past failings, including environmental failings. By basing action on failings, law frames relationships based on blame. It is designed to prevent repeated failure through threats.

The cultural result is predictable: institutionalized suspicion and adversarial thinking that produces a climate of distrust that affects thoughts and deeds. Lawyers on both sides can conveniently advise clients against collaborative agreements like Green Tier because you can’t trust “them.”

Even if valid, distrust has a social cost of inhibiting society from creatively and collaboratively addressing problems. It can alienate potential WDNR partners and erode the moral authority of the expert-driven government agency itself. (“Trust: From Socrates to Spin,” Kieron O’Hara, 2004.)

Green Tier also is about changing culture in a way that rational people can see promise in an evolution of environmental management to a new way that focuses on performance, flexible compliance, legal accountability and incentives that serve everyone’s self interest.

Green Tier is good news for WDNR and gives employees the opportunity to break away from the “regulator” stereotype and see themselves as a new breed of environmental performance managers. Some employees are already working with trade groups, businesses and communities to develop performance relationships. Some have found open-minded compatriots in EPA who share their hopes. Green Tier gives both WDNR and EPA employees the legal standing needed to mainstream their work, emerging from the innovation underground imposed by agency

cultures. It is a safe harbor for public employees as well as businesses.

This safe harbor can encourage environmental stewardship that produces results and solves problems that often cannot be tackled alone, especially if “the era of big government is over.” By re-framing relationships and roles, the law can become the product of citizen action rather than the action the product of the law. It can foster what the Progressive Policy Institute called “civic environmentalism,” not only a cultural shift for those in government but those in business who now can be seen as a part of the solution rather than the problem.

Kahn wrote that law should be an expression of something citizens want to do rather than something that is done to them. It also should express a community’s consent at a particular time and confirm its unity through time. On the matter of social welfare, including environmental protection, the law should provide a supportive framework for human actions to create public goods as well as consequential framework for human failings that put public them at risk. Green Tier provides a legal framework that empowers and enables citizens and organizations to ask what is the best possible environmental outcome which commits us to a better the future, all things considered, not what is the minimum and the precedent that links us to the past. All parties, therefore, are challenged to expand our environmental vocabulary to elicit the best of the human spirit and potential while acknowledging the worst in us remains ever present.

Finally, the legislation contains a little noticed requirement that WDNR list environmental priorities to guide Green Tier decisions. This requirement will help WDNR and the public to focus on larger goals. One way that will happen will be through the Innovation Stakeholders Group that advises WDNR on matters like culture change. The group includes business, law, municipal, non-government and academic interests.

A goal-driven system like Green Tier will help businesses understand how they can help the state protect and improve the environment in priority areas. This approach is more common in Europe where tools such as covenants and pacts are used to voluntarily harness entire business sectors to on a particular goal such as climate change. Green Tier also recognizes the European practice of solving environmental problems at the lowest possible level be it the company, facility, farm, neighborhood or watershed level.

Evaluation

Green Tier sunsets on July 1, 2009, although existing agreements will be honored. Its record will have to justify its continuation by the Legislature.

In addition to the routine annual reports from WDNR, the uniqueness of the law merits deeper evaluation. Some of the evaluation will come through the UW-Madison’s La Follette School, which is referenced in the law and has a Wisconsin Idea grant from the Baldwin Fund to follow Green Tier and other policy innovations worldwide. La Follette plans a January 2005 innovation conference; the law school has a course on new approaches to regulation, law and policy; and an environmental excellence exchange Web site is planned with the MSWG.

Clearly, just as the law has broken new ground in public policy development, it is incumbent for the executive and legislative branches to be open to new ways of evaluation and accountability. As a beginning we will list six areas for evaluation:

1. Environmental results: What environmental outcomes has Green Tier produced?
2. Economic results: Did businesses and other Green Tier participants derive financial or other value through reduced

costs, increased consumer confidence (brand protection), more assured governance (director and officer liability), greater public confidence or better treatment in the financial sector?

3. Community results: Did Wisconsin citizens use Green Tier to support their commitment to the environment, community and each other in meaningful and measurable ways?
4. Transaction costs: Was the cost of program participation proportional to the environmental and business value amortized over time?
5. WDNR learning and trust: Did the WDNR use Green Tier partnerships and agreements to develop and maintain public confidence and has the agency's reputation noticeably improved?
6. Legislative learning and trust: Did the Legislature use Green Tier's innovative approach to help it better address problems, develop policies, monitor agencies and serve constituents?

The preferred approach to evaluating Green Tier will be for the executive and legislative branches to collaborate and design a system that credibly responds to the performance categories. The breakthrough nature of the law requires an evaluation system that measures up to the level of change that's being attempted and depth of concern about the status quo.

Conclusion

Each of us has ideals but we also are realists. Change takes time and there are many that oppose it. So patience is required when it comes to demanding measurable results from any new program, Green Tier included. However, it may be that some of the most enduring benefits of Green Tier will be

qualitative, evidenced by the relationships that were built on the stakeholder drafting advisory committee and among the three of us. By that measure, the law is off to a good start.

GET OUT OF THE WAY OF EMS DEVELOPMENT

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Environmental policy in the United States is at a crossroads. Generally speaking, environmental quality in this country has improved dramatically in the last 30 years. We have regulated almost every pipe, stack, "point source" and "discreet conveyance" in the land by means of an elaborate permitting program. The environmental results have been quite remarkable. Fishing tournaments are now held on stretches of rivers that were formerly starved for oxygen. We now contain solid, toxic and hazardous waste in enormous bathtub-like synthetically lined holes in the ground that have impermeable barriers and drains. Once obscured city skylines are now sharply visible because of strict air pollution restrictions on emissions from factories, businesses and cars. These successes have been driven by a tough "command and control" approach.

Despite these environmental improvements Americans want more. We are now looking at an entirely new set of environmental issues. Agriculture practices, runoff from cities and construction sites, concern about our view of mountain vistas, and movement of air pollutants across regions of the country are just a few of the "new" issues that need to be tackled. These issues do not fit neatly into the current statutory schemes. Not many pipes here. And the traditional vilification doesn't work so well with

family farmers, city fathers or those who consume electrical power or drive cars. Not so long ago farmers were often viewed as examples of the American ideal of decency. Now many think they are polluters. All truly dedicated environmentalists who I know drive cars. Everybody I know has power in his or her home. How should we address the new issues? I suggest that what's lacking in our current regulatory scheme is a mechanism to encourage and reward those who go beyond compliance. I propose that we supplement existing programs with those that are more optimistic and oriented to engaged cooperative problem solving.

I have spent some time during my nearly 30-year environmental career in the public, private and non-profit sectors. Most of that time I have either been, or advised, a regulator. In my experience I have run into very few people who purposely make decisions that they think will harm the environment. Ironically, most people who make decisions (which is all of us) about our government, companies or our personal lifestyles make environmentally damaging decisions everyday. I also have observed that those decision makers who act out of fear of enforcement drive almost every decision to the lowest common compliance denominator. Are these bad people? I do not think so. I believe that they are people like you and me who want to be ALLOWED to make positive and optimistic environmental decisions.

At Smithfield Foods, Inc., where I am employed, I have noticed a remarkable phenomenon in the last few years. A company that was formerly "vilified" by the press and some regulators now has a new and exciting energy. Smithfield has deployed ISO 14001 environmental management systems (EMSs) on the more than 450 farms it owns in the United States. We have also worked in conjunction with the North Carolina Department of Environment and Natural Resources to develop a voluntary EMS for use by our contract farmers. Smithfield plans

to have each meat processing facility in its system ISO 14001-certified by year's end. Why has Smithfield chosen this route? The answer is rather simple. These systems allow Smithfield to be an environmental leader within and without its industry while challenging its employees to do what they do best – make meat products efficiently. Compliance-centric programs have the tendency to drain both resources and employee energy. Voluntary programs that demand efficiency stop the money drain and invigorate employees. It is that simple.

Recognizing the environmental improvement power of motivated members of the regulated community, the U.S. Environmental Protection Agency (EPA) and many state environmental agencies have adopted programs to encourage dialogue. Three wonderful examples are EPA's Sector Strategies Program, Virginia Department of Environmental Quality's Environmental Excellence Program and North Carolina Department of the Environment and Natural Resources' Environmental Stewardship Initiative.

EPA's Sector Strategy Program

EPA's Office of Policy, Economics and Innovation (OPEI) has for some years now generated innovative programs to make compliance and beyond-compliance programs easier and less threatening. (Information on EPA's Sector Strategy Program can be found at <http://www.epa.gov/sectors/program.html>.) The results have been enthusiastically embraced by companies throughout the country from metal finishers to shipbuilders to meat processors. In partnership with the American Meat Institute (AMI)'s Environmental Committee, OPEI has developed an EMS specific for meat processors. This pilot effort has become an integral part of AMI's "MAPS" program that establishes a four-tiered environmental management system program tailored to the meat processing industry. See <http://www.meatami.com>. The partnership that has

developed between EPA and the industry has resulted in a continued productive dialogue about environmental protection and continual improvement. Industry is excited. EPA is excited. The environment wins.

Virginia DEQ's Environmental Excellence Program

As a result of a 1998 agreement between the Environmental Council of the States and EPA, the Commonwealth of Virginia developed the Virginia Environmental Excellence Program. See <http://www.deq.virginia.gov/veep/>. It is an incentive-based program that encourages meaningful partnerships between state government and participating members of Virginia's regulated community by promoting widespread use of EMSs. The program has two levels, Environmental Enterprise (E2) and Exemplary Environmental Enterprise (E3). The E2 level of participation is for those organizations interested in beginning – or in the early stages of implementing – an EMS. The E3 level is for those organizations with a fully-implemented EMS, pollution prevention programs and demonstrated performance. This positive program promises recognition and regulatory flexibility. Companies that are involved find the approach refreshing and a corporate challenge to find creative ways to improve profits and the environment. Several Smithfield facilities have applied for the E2 level and all will apply for E3 after completion of our company-wide ISO 14001 EMS development later this year.

North Carolina's Environmental Stewardship Initiative

Like Virginia's program North Carolina's Environmental Stewardship Initiative has a tiered approach to its program. See <http://www.p2pays.org/esi/>. The Environmental Partner level is designed for adoption by a broad range of organizations that are interested in beginning the process of developing a

systematic approach to improving their environmental performance. Partners must set environmental performance goals that include pollution prevention. The Rising Steward level is for those organizations that have an existing environmental management system in place and requires adoption of aggressive performance goals. The Environmental Steward level is a beyond-compliance level that requires pollution prevention and performance improvement goal-setting. This program is new but already has attracted the attention of North Carolina companies. Smithfield's Tar Heel meat processing plant participates as an Environmental Partner, but since its recent ISO 14001 certification it has applied for the Environmental Steward level.

We have a chance in this country to choose a new path toward environmental improvement, without changing a word of the Clean Water Act, the Clean Air Act or any of the other major environmental statutes. By encouraging environmental problem-solving instead of environmental finger-pointing we can address our "new" set of environmental issues in an effective and positive way. Backstopped by the existing statutes and regulations, programs like those described above allow companies to be excited – not cautious – about environmental improvement. Positive and productive problem-solving requires patience, perseverance and the ability to get out of the way when things are going well. Regulators must strongly resist the urge to fit EMSs into their regulatory mindset to avoid compliance programs set at the lowest common denominator level. For rapid and real environmental improvement we all should get out of the way of successful programs like those discussed above, allow them to mature and demand results. The excitement level in corporate America about EMSs is high but cautious. My advice to regulators is simple. Insist upon compliance with the law, encourage EMSs, do NOT incorporate them into your regulatory programs, reward those who adopt them and demand results. This is my recipe for environmental improvement.

EPA'S LATEST EMS POLICY PROVIDES OPPORTUNITIES FOR INNOVATIVE ORGANIZATIONS

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On April 2, 2004, EPA released its new policy entitled "EPA's Strategy for Determining the Role of Environmental Management Systems in Regulatory Programs" (Policy). See, www.epa.gov/ems/policy/index.htm. The Policy sets forth EPA's plan for evaluating whether – and if so, how – environmental management systems (EMSs) might be incorporated into the federal regulatory structure to either improve the design of regulatory programs or to encourage the use of EMSs by the regulated community, or both. To date, EPA has implemented EMSs through voluntary efforts outside of the traditional regulatory regime. The Policy takes a logical (albeit extremely cautious) next step of encouraging coordinated experimentation to evaluate the potential benefits of incorporating EMS options directly into permits and regulations.

This article provides a brief background of EPA's previous EMS guidance, an overview of this latest Policy and example EMS projects which might be implemented under the Policy.

I. Background of EPA's Previous EMS Policies

EPA has consistently encouraged the use of EMSs as a voluntary mechanism to improve environmental performance, increase compliance, prevent pollution through source reduction and provide a framework for continuing improvement in these areas. Past EPA policies have viewed EMSs as a tool to supplement, rather than supplant, federal regulatory programs. Accordingly, EPA has treated EMS projects as voluntary efforts

undertaken outside of the traditional regulatory regime.

This philosophy is reflected in EPA's 1998 "Position Statement on Environmental Management Systems and ISO 14001." See, 63 Fed. Reg. 12094 (Mar. 12, 1998). This statement recognizes the potential environmental benefits and increased compliance offered by EMS programs. However, EPA also quotes verbatim from the North American Commission on Environmental Cooperation (CEC) Council Resolution #97-05 which states that EMSs merely supplement existing environmental programs:

Voluntary compliance programs and initiatives developed by governments can supplement strong and effective enforcement of environmental laws and regulations, can encourage mutual trust between regulated entities and government, and can facilitate the achievement of common environmental protection goals... Adoption of an EMS pursuant to ISO 14001 does not constitute or guarantee compliance with legal requirements and will not in any way prevent the government from taking enforcement actions where appropriate. (Emphasis added.)

In May 2002, EPA adopted its own "Position Statement on EMSs" which reaffirmed support for the widespread use of EMSs as a means to achieve improved environmental performance and compliance. Yet, EPA reiterated its position that "EMSs do not replace the need for regulatory and enforcement programs, but rather complement them." Notably, EPA did acknowledge that EMSs "can indicate opportunities for EPA to streamline regulations and can be considered in compliance assistance, monitoring, and enforcement."

Despite EPA's cautious pace, states have been forging ahead on these issues. Several states, including Wisconsin, have enacted statutes,

promulgated regulations and/or entered into agreements that incorporate EMS concepts into state environmental programs. This has created uncertainty and has sent conflicting messages to the regulated community. On one hand EMS programs are being encouraged by EPA and many states. Yet on the other hand EPA does not yet recognize EMS-based compliance approaches in its regulatory programs.

As an interim measure, EPA continues working with stakeholders to develop and implement EMS-based programs as “voluntary measures” undertaken despite the confines of existing regulations. This cooperative approach is reflected in various “pilot programs” including Project XL, the National Environmental Performance Track, the EMS Pilot Program for Local Governments and Design for the Environment. EPA has also sought to provide more certainty to organizations with its “Audit Policy” wherein EPA agrees not to routinely seek audit data in enforcement actions and to limit certain penalties for violations discovered through an EMS audit. See, www.epa.gov/compliance/resources/policies/incentives/auditing/auditpolicy.pdf

The recent April 2, 2004 Policy stops short of taking the next full step and changing federal regulations to formally accommodate sources which implement EMSs and innovative “next generation” regulatory approaches. Instead, the Policy takes “half a step” by announcing a strategy for coordinated experimentation designed to determine whether federal programs should be changed to accommodate EMSs. The Policy is meant to evaluate the potential benefits and disadvantages of providing options in rules and permits for organizations that choose to implement an EMS.

II. The April 2, 2004 Policy

The Policy can be characterized as EPA’s roadmap for evaluating the use of EMSs in

regulatory programs. The strategy will rely upon real life EMS projects as implemented by states and regulated organizations. Regulators, regulated entities and non-governmental organizations are encouraged to use the Policy as a guide for proposing projects which can be used in the evaluation process. EPA will compile the results to allow for a more informed decision on how to incorporate these concepts into rules and permits.

The Policy contains three sections. The first defines the principles which should guide the design and evaluation of EMS projects that are proposed for the study. The second section lists EMS-related concepts which EPA would like to evaluate within the regulatory context. The third section is EPA’s action plan and timeline for implementing the strategy. The Policy also contains two appendices which flesh out policy ideas and design considerations, respectively, which should be considered in implementing an EMS. The three sections are discussed in order.

A. Section One – Guiding Principles

Section one outlines five principles to guide policy makers considering the use of EMSs in a regulatory context. For each principle, EPA lists several “implementation considerations” which suggest ways to address the concepts in practice. Regulators and the regulated community are directed to consider these principles when designing and evaluating EMS programs for use in the overall strategy. The five principles are as follows:

1. *An EMS should make “business sense.”*
EPA recognizes that an EMS is most effective when an organization actively embraces the program as furthering the goals a business finds important. Therefore the EMS/regulatory structure must allow a business to design a program to fit its own needs and circumstances. EPA suggests that permits and rules provide enough flexibility to allow businesses to adapt

requirements to their individual situations. At the same time those requirements must be specific enough to be transparent and auditable to an outside observer.

2. *Regulators should focus on performance.* EPA reiterates that properly designed EMSs promote positive environmental results, but do not guarantee performance or compliance. As a consequence, EPA cautions that an EMS should not be used to replace performance standards defined by regulatory programs, but rather is a tool for achieving those standards. EPA suggests that if EMSs are written into rules or regulations, it is important to distinguish between (1) enforceable performance standards, which are regulatory violations if not met and (2) EMS elements which are not enforceable, but rather are conditions for receiving the regulatory benefits and flexibility that are inherent in EMS partnerships.

This principle sends mixed messages to business. As discussed below, greater environmental benefits can often be realized by changing existing regulatory performance standards (e.g., plant bubbles). Yet, the Policy suggests that EMS-based programs should not alter these standards. This could be an impediment to truly innovative programs.

3. *Organizations should measure and report results.* Organizations employing an EMS should measure and publicly share performance results on a regular basis. To the extent EMSs generate more useful and timely information, EPA questions whether EMS data can substitute for reports otherwise required under traditional regulatory programs.

4. *EMSs should use a comprehensive, multi-media approach that considers all environmental impacts, regulated and unregulated.* Although EPA cannot require organizations to address unregulated environmental impacts (e.g., energy consumption), EMSs can foster such

considerations. Accordingly, EPA recommends that EMSs identify and address the full range of environmental impacts from a facility using integrated, multi-media approaches. Yet, rule writers are cautioned about incorporating EMS provisions, which are multi-media in nature, into media-specific regulations.

5. *EMS-related incentives should be proportional to improved environmental performance.* The degree of environmental benefit achieved by an EMS will vary widely between organizations. As a matter of fairness, the incentives offered to an organization for implementing an EMS should be proportional to the degree of environmental improvement that is realized.

B. Section Two – Regulatory Concepts and Example Projects to Evaluate Under the Policy

As explained above, EPA is encouraging regulatory partners to experiment with incorporating EMS concepts into existing regulatory structures. To that end, the Policy contains a non-exhaustive list of ideas/concepts that EPA and states are most interested in testing. This section lists those concepts along with example projects that organizations might consider undertaking for evaluation under the Policy.

1. *Can EMSs, in tandem with performance standards, achieve better and more efficient regulatory/permitting environmental results than prescriptive operational controls?* The concept here is to replace prescriptive “technology forcing” regulations with performance standards that could be attained using an EMS. A Project XL initiative by the City of Albuquerque provides a good experiment to test this concept.

The City of Albuquerque publicly owned treatment works (POTW) manages the industrial pre-treatment program for its indirect industrial

dischargers. In an effort to reduce metal loadings to the POTW, the City defined a system-wide performance standard for reduced metal loading from dischargers. The City used its own EMS to help indirect industrial dischargers develop their own EMSs that would encourage pollution prevention activities for their processes.

2. *Can the multi-media analysis that is the hallmark of an EMS support cross-media tradeoffs to achieve higher overall environmental performance and pollution prevention?* Existing regulations often force a particular control technology based upon a limited consideration of only one environmental medium. For example, an emission control device required under the Clean Air Act can result in increased water pollution. An EMS encourages a broader, multi-media analysis of a facility's impacts and thereby leads to emission control strategies which achieve greater overall environmental benefits.

A project for testing this idea might be a large coal burning source located in the arid west which is required to install a wet scrubber as Best Available Control Technology (BACT). A wet scrubber uses a relatively large quantity of water. The organization's EMS might consider water usage as a significant environmental impact of the facility. Accordingly, the facility could propose a dramatic reduction in facility water usage by substituting the wet scrubber air emission BACT with a catalytic converter technology which is slightly less effective at controlling air emissions.

3. *Under what conditions could regulators rely on EMSs in permits and rules to redirect regulatory oversight from lower to higher priority areas?* EMSs require continuous self-evaluation, objective auditing and the reporting of those results. Regulators should be able to rely on the EMS process to redirect agency resources to other activities and sources.

A straightforward project testing this concept might involve a facility which agrees to an enhanced EMS program that requires periodic, third party audits by an accredited and independent firm. Audit results would be promptly provided to the regulators and made available to the general public in various ways. The state would be authorized to participate in any audit and could have access to the underlying audit records at any time.

Another project testing this concept might involve a business subject to rapidly changing market conditions. The business anticipates needing multiple equipment modifications over the course of the next five years and is concerned about the delays inherent in obtaining permits to authorize these modifications. The facility could use an EMS to develop a series of alternative operating scenarios that would be incorporated into the facility's Title V permit. The business could then make operation changes in the future without having to wait for case-by-case approvals. This would allow regulators to redirect those permitting resources to other activities.

4. *Can EMS elements improve performance and efficiency by substituting for overlapping administrative and information-gathering requirements in rules and permits?* Organizations (including regulators) devote considerable resources to reporting and recordkeeping obligations under the various environmental programs. This data is often disjointed, overlapping and frankly, of little practical value. An EMS can improve this situation by synthesizing recordkeeping data and reports into more useful information.

A test project for this idea might be a single environmental operating permit for a facility. The facility would develop a comprehensive operating plan to consolidate federal, state and local environmental permits into a single document. All agencies involved in regulating the facility would have input into the document.

Among other things, the permit would consolidate recordkeeping and reporting requirements to minimize duplication. The streamlined permit would likely result in cost savings and would reduce the burden on regulators. It would also provide more useful and understandable data for the public. The consolidated permit would be valid for up to twenty years and set forth all future regulations which might affect the facility. This would allow for a more comprehensive, multi-media planning approach for all stakeholders.

5. *Does incorporating an EMS into a permit yield better public involvement procedures and environmental results than traditional permit models?* Traditional environmental permitting provides limited public involvement. Once a permit is issued, public input is essentially complete. An EMS allows for a more continuous dialogue with the public using a comprehensive, multi-media approach.

As explained by Kris Euclide in this issue, Madison Gas & Electric (MGE) is implementing this concept by involving an external stakeholder group in the environmental planning for a facility. This external group helps identify the impacts of the facility, determine the significance of those impacts, and select performance objectives for the facility based upon the values of the community. The community targets can be compared with the targets identified by the business and with the regulatory programs to see how closely they align.

6. *Can regulated facilities use their EMSs to enhance the environmental performance of third parties, such as suppliers, customers, or environmental quality trading partners?* With rare exception, existing programs focus on regulating the pollutants released by an individual facility. An EMS can encourage companies to work with vendors and other third parties to minimize pollution throughout the production chain.

A project for evaluating this concept might involve a water quality trading program for a specific water body. A permitted source discharging to that waterway could use its own EMS to identify water quality improvement opportunities that other dischargers might undertake. For instance, the permittee could encourage non-point discharges to reduce their pollutant loadings and thereby generate trading credits that could be of value to other dischargers.

C. Action Plan for EMS Experimentation

The last section of the Policy outlines the actions which EPA will undertake to implement its strategy along with a rough timeline for implementation. The first objective is to conduct stakeholder outreach and communication. To this end, EPA proposes a series of stakeholder workshops in regions and states during the spring and summer of 2004. Some activities are already underway and can be found on EPA's Web site. See, www.epa.gov/ems/assist/index.htm.

The second objective is to implement a series of EMS projects to experiment with the concepts discussed above. This will involve continuing outreach activities along with the solicitation of proposals during fiscal years 2004 and 2005. EPA will review and act on those proposals through the State Innovating Grant Program and the Joint EPA-State Agreement to Pursue Regulatory Innovation process.

The third and final objective is the evaluation of experimentation results. EPA planned to have a draft evaluation strategy available for state review during the spring of 2004. The strategy, once released, will establish performance metrics, create a process for data compilation and sharing, and allow for third party evaluation. The actual evaluation process would occur within one to three years after implementation of the program. A process for experimentation

closure and the mainstreaming of successful EMS ideas would follow the evaluation process.

III. Opportunities/Risks Associated with the Policy

Clearly the Policy defines a *process* for reaching decisions on how, if ever, to incorporate EMS concepts into rules and permits. The actual decisions will be made years down the road after this evaluation process is completed. Although many are rightfully frustrated with the lack of a firm position from EPA on these important issues, there are opportunities presented by the Policy.

EPA has reaffirmed its belief that EMSs promote positive environmental outcomes and has acknowledged the opportunities to streamline regulations. The Policy identifies very specific and real examples of nontraditional regulatory approaches which EPA believes, at the very least, are sufficiently legitimate to warrant formal evaluation. On many levels that is a significant step forward.

On the negative side, some statements in the Policy suggest EPA is viewing the flexibility offered by EMSs as more limited than many had hoped. The time period for action is also slow. As long as these issues go unresolved, the critics and nay sayers of "next generation" regulation will continue to rule the day and scare businesses away from innovative approaches to merge environmental compliance with overall business strategies.

Until EMSs are formally incorporated into rules and permits, there is little comfort offered to those pioneering organizations that are implementing EMS-based, nontraditional regulatory approaches for compliance. Although these companies are largely praised as exemplary and seen as achieving superior environmental performance, they remain at risk for enforcement from citizen groups, states and even EPA. The Policy provides no relief on these fronts.

AMERICAN BAR ASSOCIATION SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

Calendar of Section Events

Brownfields 2004

Sept. 20-22, 2004

St. Louis

(Cosponsored with U.S. EPA and the International City/County Management Association. For more information, see brownfields2004.org.)

12th Section Fall Meeting

Oct. 6-10, 2004

San Antonio

Clean Water Act: Law and Regulation

Oct. 27-29, 2004

Washington, DC

(Cosponsored with ALI-ABA. For more information, see ali-aba.org.)

Environmental Sciences

Nov. 4-5, 2004

Dallas

23rd Annual Water Law Conference

Feb. 24-25, 2005

San Diego

34th Annual Conference on Environmental Law

March 10-13, 2005

Keystone, Colo.

***For more information, see the
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