

# Use Compliance to Make the Business Case for Implementing an Environmental Management System



**Every company must have an Environmental Management System.**

Many EHS coordinators would agree with this. And, as a statement of values, it makes a lot of sense. After all, to any company with an earnest concern for conserving the planet, the need for an Environmental Management System (EMS) is self-evident. But in the business world where most EHS coordinators operate, having the right values doesn't always translate into having the right environmental systems. An EMS can cost massive amounts of money, time and administrative effort. Appealing to values might not be enough to justify such an investment.

## **EMS & Environmental Compliance**

One motivation that does work is the desire to comply with the laws. For example, in a venerable Ernst and Young survey, 82% of large BC companies cited compliance as their primary motivation for adopting an EMS. But does the law really require a company to adopt an EMS? The answer to that question is Yes and No.

You can't simply march into your CEO's office and proclaim that "we need an EMS because the law requires it." The CEO might just call your bluff and ask you to cite the law. And then you'll be in a bind because such a law that expressly says that a company must have an EMS doesn't really exist. But just because the laws don't say this doesn't necessarily mean they don't require it. You just need to know how to demonstrate how having an EMS improves environmental compliance.

## The Law of Environmental Management

The terms "environmental management system" and "ISO 14001" don't normally appear in environmental statutes and regulations. What the laws **do** say is that companies must implement a proper system to prevent the commission of environmental violations. Although they may sound like interchangeable terms, a proper system to prevent violations isn't the same thing as an EMS. You need to understand the differences between these 2 things to make an effective business case for an EMS.

## What Is a Proper System?

The term "proper system" that appear in many environmental laws essentially means a set of organized and sustained measures to manage the environmental aspects of a company's operations. Although the specific measures required will vary by company size, resources available, the degree of harm involved and other circumstances, the general consensus among environmental enforcers, courts, and tribunals is that a "proper system" must be proactive and provide for, at a minimum:

- A company statement of environmental policy.
- Leadership by persons with experience and authority.
- Remedial and contingency planning for spills.
- Employee training and awareness efforts.

- Regular auditing.
- Continual efforts to improve the system.

## **What Is an EMS?**

The definition of EMS that most people use comes from ISO 14001:

“Part of the management system used to manage environmental aspects, fulfill compliance obligations, and address risks and opportunities.”

To comply with ISO 14001, the EMS must include at least the following elements:

- A company statement of environmental policy.
- An assessment of the environmental impacts of the various parts of the company's operations.
- The establishment and documentation of environmental targets.
- Communication and coordination among staff.
- Consistency between environmental policies and operational and emergency procedures.
- An environmental management system.
- A clearly defined responsibilities and reporting structure.
- Employee training and awareness.
- Audits and monitoring.
- Continual efforts to improve the system.

## **How the EMS Reduces Liability Risks**

Although there's a lot of overlap, the EMS is much more elaborate than the “proper system.” The big difference is that implementing a “proper system” is a legal requirement and implementing ISO 14001 or any EMS is voluntary. Even so, the decision to implement or not implement an EMS has a major impact on a company's liability. Studies show that companies

that have an EMS are less likely to violate environmental laws than those that rely on the barebones “proper system.”

## The Due Diligence Factor

The EMS also mitigates liability risks for violations that do occur. **Explanation:** Under Canadian environmental laws, companies that do something the law prohibits or don't do something the law requires can still avoid liability by proving that they exercised “[due diligence](#),” that is, made all reasonable efforts to comply with the law and prevent the violation. Implementing an ISO-certified EMS is potent evidence of “reasonable efforts.”

One of the best examples of how complying with voluntary standards can bolster a due diligence defence is an Alberta case involving a metals worker who got killed after crawling under a moving conveyor and ensnaring his clothes in the metal roller that was guarded on one side only. The company was charged with violating its OHS duty to install “effective safeguards” on machines. The problem is that Alberta OHS laws don't define the term “effective safeguards.” That left the door open for the company to argue that the conveyor guard it did install was “effective” because it met American Society of Mechanical Engineers (ASME) machine guarding standard. The court agreed and ruled that the company exercised due diligence to prevent the machine guard violation [[R. v. Maple Leaf Metal Industries Ltd.](#), 2000 ABPC 95 (CanLII)].

**Strategic Pointer:** Although *Maple Leaf* involves an OHS violation, courts consistently treat compliance with nonvoluntary standards as evidence of reasonable efforts to comply with environmental duties that aren't expressly defined in the statute or regulations.

## The Mitigation of Penalties Factor

Even if it doesn't prevent you from being convicted of an

environmental offence, having an EMS may result in a less harsh penalty. **Explanation:** When deciding on an appropriate sentence for an environmental offence, judges look at what are called “aggravating” and “mitigating” factors. Adoption of an EMS may be considered a “mitigating” factor calling for a lighter penalty. The fact that the company has an EMS in place suggests that it took its environmental obligations seriously and made an earnest effort to comply with them.