

Drivers and Drawbacks: regulation and environmental risk management systems

Marius Aalders

Contents

1.	External or internal forces driving environmental risk management	1
2.	Co-regulation, pressures and behavioural strategies	2
3.	ISO 14001 and government regulation	4
4.	EMS and regulation in the Netherlands	6
4.1.	The assessment system	6
4.2.	Declining interest	7
4.3.	Main problems of VOH (FP) as considered by Dutch companies	8
4.4.	Less regulation breeds more government involvement?	10
4.5.	Case study.....	11
5.	Clearing the way for rewarding voluntary business efforts	12
6.	Conclusion.....	14
7.	References	15

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Drivers and Drawbacks: regulation and environmental risk management systems

Marius Aalders¹

1. External or internal forces driving environmental risk management

In the literature on environmental risk management in firms, it is often proposed that environmental performance and innovation are driven primarily by external forces, such as regulatory or market pressures. But gradually, organisational forces in business itself are also suggested as drivers for the improvement of environmental performance (Andrews et al, 2001). Many companies have adopted systems approaches in their corporate strategy. Organisational strategies include quality, health and safety, and environmental systems approaches. In systemising, management companies seek to improve the evaluation of organisational performance. One of these systematic approaches involves environmental management. Systems of internal company environmental management include elements such as an environmental policy statement, an environmental programme, the integration of environmental management in business operation, internal monitoring, information, training and environmental reporting and auditing (Aalders, 1993).

In studying Environmental Management Systems (EMSs), it is important to also highlight the ways environmental policy and regulation respond to the adoption of EMSs in industries that employ their own organisational and individual environmental improvement strategies (Coglianese and Nash, 2001). While assessing the impact of EMSs on regulatory strategies, it is necessary to study the relationship of government regulation and industrial self-regulatory strategies, for which the best theoretical starting point is an interaction perspective. In most industrialised countries there is a widespread feeling that new ways of governance should be developed, including regulatory strategies, facilitating self-regulatory schemes in industry, and applying levels of monitoring and controlling compliance. Facilities that have adopted EMSs that are certified on the basis of the ISO 14001 standard, are expected to be better prepared to comply with environmental law because of their interaction and intensive relationship with regulatory control agencies.

In the research that is reported here, the interactions between government and industry in the Netherlands regarding these new developing strategies have been assessed. These interactions may be characterised as a movement away from regulation to self-regulation and co-regulation (the latter being, in a Hegelian way, the synthesis of the first two concepts). The results are that: (1) a mixture of three factors – market, regulation and organisation (a triple bottom line) - influence the successes and failures of EMSs in individual firms, (2) these

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factors are interdependent, and (3) it is not easy to evaluate the various related impacts and the interdependence of the three factors.

2. Co-regulation, pressures and behavioural strategies

In this paper, an inventory is presented of some recent research on environmental management systems and their relationship with government regulation. In the Netherlands, this relationship has materialised in the form of a more flexible framework permit (FP), issued for the benefit of those companies that have emphatically shown an improvement in environmental performance.

Contrary to the vast literature on environmental management systems, the relationship with government regulation up till now has not aroused the interest of the academic community. This may be an indication of the purely technical approach to environmental management in industry. Understandable as this may seem to scholars of business organisations, it should also be self-evident that scholars of regulation are interested in this relationship. There are several reasons for this. First, the requirements for certification of an environmental management system, summed up in the international standard ISO 14001, include an obligation to comply with public administrative standards. Second, government seeks more and more to delegate regulatory power to the regulated industries. This process of regulation towards self-regulation demands considerable critical scrutiny from socio-legal scholars.

Much has been written about regulation and self-regulation (Rees, 1988; Ayres and Braithwaite, 1992; Gunningham and Rees, 1997; Gunningham and Grabosky, 1998), but comprehensive studies of the relationship between environmental regulation and environmental self-regulation, or *environmental co-regulation*, are relatively rare. The least that can be said for this relationship is that self-regulation is not a real-life example of absence of law (Cohn, 2001: 475). Most scholars are thinking in terms of degrees of government involvement, for example, regulated self-regulation (Aalders and Wilthagen, 1997: 430), mandated self-regulation (Rees, 1988; Gunningham and Grabosky, 1998: 55) or enforced self-regulation (Ayres and Braithwaite, 1992: Ch. 4).

The few research reports there are on corporate environmental behaviour in reaction to government regulation, are doubtful as to a direct causal link between the two. Results from an empirical study on the use of EMSs in the pulp and paper industry by Kagan, Gunningham and Thornton (2001) suggest that factors external to the firm (regulation, market pressure, and community demands) may be the most important determinants of corporate environmental performance. The authors outline possible interactions of those influencing factors, using a set of concepts of qualifications of Environmental Managerial Strategies: (1) Environmental Laggards, (2) Reluctant Compliers, (3) Committed Compliers, (4) Front Runners, which could be distinguished as Environmental Strategists and True Believers. They suggest two forms of interactions; one takes place among external variables: legal, economic and social/political factors; the other interaction is between corporate managerial attitudes and external variables.

The authors also try to answer the question of differences in performance of companies as being caused by differences in regulatory regimes and enforcement styles of different jurisdictions. But, they found that this hypothesis was not correct. In fact, they prove the correlation between the size of a company and its profit, on the one hand, and environmental performance and technology, on the other hand, to be correct; but this correlation is only

partially decisive. Companies must earn something like a “social permit” that must be derived from the community. Furthermore, all pressures from outside are conditions for such a social permit, which they call “a license to operate”, that includes economic reality and demands of social actors. These pressures, moreover, are essentially ‘interactive’, not unidirectional.

These findings theoretically resonate with the systems approach by Teubner (1992). According to Teubner’s reflexive law (or autopoietic) theory, legal, economic and political subsystems are closed systems, excluding one another in the sense that pressures or messages may reach the inner system through boundaries, but are only understood and accepted in as much as the system itself is able to internalise these messages. If this is not the case, communication is hardly effective. Systems may reflect on external messages, but are self-referential, which means that if these messages cannot be referred to through familiar characteristics within the subsystem, they will not be ‘received’ from the other system and, therefore, there will be no response or action upon these impulses. However, although self-referential or autopoietic systems are considered operationally closed to intervention from outside, informational openness exists at the same time, as subsystems create “internal order” from “external noise”. Thus, it is necessary for the political or the legal subsystem to permeate the world of the economic subsystem, and therefore a set of strategies to regulate self-regulation should be available. One of these strategies is systems monitoring or systems enforcement (Aalders and Wilthagen, 1997: 431). A strategy of regulating in-company management systems might be promising because its focus is strategic intervention into certain characteristics of an organisation’s decision-making process. As Rees (1988) points out: “If a firm has a strong indigenous regulatory system, a regulatory task environment that readily lends itself to consensual problem solving, and workers who would directly benefit from a strong self-regulation program, then that firm may well be a good candidate for mandated self-regulation,” (Rees, 1988: 238).

The findings, in another way, reflect the theorem of Moore (1978) on Semi-Autonomous Social Field (SASF). People form associations (*soziale Verbände*, Ehrlich, 1929), and are interacting in social fields. They stick together on the basis of what binds them: work, play, fishing, hunting, family, politics or culture. Just so, a group of officials at an environmental agency having as its main task the issuing of permits, will act upon the requirements of the situation and the social characteristics of the questions they are called upon to decide, as well as the set of regulations they are presumed to apply. These social fields are semi-autonomous because of the fact that they see law as an important guidance, but are also influenced by their own perspectives and perceptions of the situation in which they have to act. The law-applying process is dependent on that interaction.

To be sure, Teubner’s reflexive law theory and Moore’s SASF theorem serve different paradigms or points of view, the former trying to explain the boundaries of communication of social subsystems, the latter explaining the relative and limited dissemination of legal messages from one social field to the other. What these theories have in common, is an interaction perspective, in which the two ‘worlds’ of government regulation and company management may interact to overcome the restrictions of their subsystem, or to influence the indigenous norms of their social field. These subsystems or social fields define their situation by exchanging views and concepts, getting to a common understanding of their respective working modes. Admittedly, theories of social subsystems or semi-autonomous social fields are limited, in the sense that they do not explain or identify all the influences which put pressure on the interactions in the regulated field. Generally, it can be said that social actors

are potentially influencing interactions in the regulatory process to different degrees, and that their demands play an increasing role in eventually acquiring the 'social permit'.

Gunningham and Grabosky (1997) coined the term 'smart regulation', meaning the preservation of the advantages of the old command-and-control type regulation, while excluding the disadvantages and replacing them with more favourable market-based strategies. It is, therefore, appropriate to ask ourselves to what extent government is able to elaborate stimulating and facilitating self-regulatory activities, and what the limits of these strategies are (Ayres and Braithwaite, 1992). At the same time we are interested in the response and pressure of companies themselves, to promote or avoid better environmental performance.

This paper is based on research being conducted in the Netherlands, comparing perceptions of government officials and environmental company managers participating in the process for the application of a so-called 'framework permit'. This framework permit differs from the ordinary permit, in that it gives more leeway for firms that prove to be better performers on the basis of their certified EMSs. The framework permit is given to companies that show outstanding environmental performances, evident from ISO 14001 certificates, environmental programmes and environmental reporting.² In return, these companies get permits with less technical prescriptions and performance standards. Quality or target standards suffice. Also, it is promised in a government paper that monitoring by the inspectors will be less burdensome for these companies.³

The provisional conclusion will be that after a promising start with the framework permit application process, there is presently some cause for scepticism about the effectiveness of this form of co-regulation. The forerunners and committed compliers still stay ahead of their counterparts, while the laggards and reluctant compliers will continue to perform badly.

3. ISO 14001 and government regulation

Having summarised some of the research on the interaction between government and industry regarding compliance with government regulation, we now have to refer to the research of environmental management itself. Several efforts have been undertaken to explain the rise of environmental management systems that have been developed nationally and internationally during the last decade. The international standard ISO 14001 requires that a firm's internal environmental risk policy includes the goal of regulatory compliance and that the firm explicitly commits its policy to improving its EMS. It furthermore requires that managers monitor their progress at regular intervals and offer their own system for external verification by accredited third parties. Openness with surrounding communities is another prerequisite.

If ever an EMS were to be accepted as a substitute for conventional regulatory strategies, then the last requirement has to be an indication for the necessary monitoring and public reporting. It is questionable, though, that this situation will materialise in the near future, given the existing critical views of legal theorists on the 'privatisation' of government enforcement.

² The Green Permit was developed in the American state of Oregon, where government developed a multi-tiered programme with requirements much the same as in the Dutch framework scheme (Coglianese and Nash, 2001: 209).

³ Cf. Project XL of the Environmental Protection Agency in the US, providing regulatory flexibility in exchange for a demonstration of superior environmental performance (Coglianese and Nash, 2001: 108, 196).

Self-regulatory mechanisms such as voluntary agreements, forbearance of enforcement and bilateral agreements in the shadow of administrative law, may be in accordance with market approaches, but they lack transparency and visibility. It is the administrative legal procedure that at least guarantees openness, participation of third parties, liability and accountability.⁴

This is not to say that firms have no propensity to take into account legal procedures and their consequences, nor that lacking the pressure of legal procedures, they would automatically act contrary to environmental protection requirements in general. In fact, over the years, firms have increasingly accepted their obligation to comply with command-and-control environmental regulations. Large firms have established legal and environmental departments staffed with specialists who are responsible for knowing how regulatory requirements apply to their organisations. Environmental Health and Safety managers in regulatory departments of firms are often devoted environmentalists themselves, having been educated in environmental sciences. In many facilities they are the figurehead of the firms' environmental awareness and policy. In short, ecological modernism has penetrated the more enlightened companies (Hajer, 1995; Mol, 1995, 2001). But many firms also loathe the way command-and-control strategies work out, in the sense that they are unnecessarily inflexible and costly. Uniform standards often require firms to do more in areas where the costs of regulation exceeds the benefits, or too little in areas where the benefits of regulation would outweigh the costs (Coglianese and Nash, 2001: 9). Rigid regulation may also discourage innovation and diffusion of alternative, less costly means of achieving environmental protection (Bardach and Kagan, 1982). Command-and-control is often considered not to be an incentive for firms to comply beyond minimal regulatory standards.

Trying to answer the question of the success of EMSs in stimulating environmental awareness may pose many obstacles. For example, the effects of EMSs have to be untangled from other factors that may also contribute to environmental improvement. Studying groups of facilities that have established EMSs and control groups without EMSs, may result in finding that the latter are functioning as well as, or even better than, the former, even though they do not employ an EMS. If we find that large firms have EMSs and that their better environmental performance is due to the greater regulatory oversight of large firms, we actually have said nothing about the advantage of EMSs. In fact, many firms may use EMSs to simply document current practices, not to transform them (Coglianese and Nash, 2001: 14).

Establishing EMSs and framework permits should, according to most insiders, be focused on larger enterprises. However, some observers think otherwise. Ruth Hillary (1999) analysed studies on the barriers, opportunities and drivers for smaller and medium sized establishments (SMEs) in the adoption of EMSs in the UK and across the rest of Europe. She concluded that, overall, real and valuable benefits may be found from adopting EMSs, such as generating financial savings, improved communication channels, skills, knowledge and attitudes, as well as attracting more new business and customers and better satisfying customer requirements. Also, SMEs found positive outcomes in terms of improved environmental performance, assured legal compliance, and energy and material efficiencies; while their image was enhanced and their dialogue with stakeholders improved. But there were also internal barriers, such as scarcity of human resources, practical problems with determining environmental aspects and assigning significance, the interruption of the process in an SME

⁴ See Black (2000: 598) for a discourse on the ways that the need for more imaginative regulatory strategies can divert attention from the issue of how societal ends should be defined, and by whom.

setting, lack of knowledge about EMSs, and attitudes that the environment is simply neither a core SME business issue, nor one that offers economic benefits.

Considering these advantages and drawbacks, it may be argued that they are not specific to SMEs alone. Bigger companies have to deal with these problems too, and taking into account the advantages, the real and valuable benefits from adopting EMSs may well be the same for big and small and medium sized enterprises. The simple barrier for SMEs might well be a lack of financial resources to pay for expensive auditors, verifiers and the certification process; a factor that surprisingly enough does not appear in Hillary's list of barriers to SMEs.

So the question remains as to whether, on the basis of this standard, the ISO 14001 and EMS certification are beneficial for the environment. Some researchers find that even in a firm with environmentally-efficient operations already in place, ISO 14001 certification can have important behavioural and managerial impacts that contribute to better environmental performance (Rondinelli and Vastag, 2000). Others confirm these results, finding that firms that had mature EMSs in place before adopting ISO 14001, still report on experiencing substantial benefits as a result of improved organisational control, communications and manufacturing efficiency (Darnall et al, 2001). But having said that, a better look at the causes of these findings may be in place. If there is any truth in saying that regulation still is of considerable influence on environmental management, the complicated relationship between government regulation and industry must be part of any research scheme regarding the effects of EMSs.

4. EMS and regulation in the Netherlands

4.1. The assessment system

In this section, the course of events in establishing EMSs in companies in the Netherlands will be accentuated. In 1993, the European Union adopted its Regulation for an Eco-Management and Auditing Scheme (EMAS).⁵ The EMAS was intended as a voluntary scheme for industry. To participate, organisations must adopt an environmental management system, publish an environmental report, and have both controlled and verified by independent external verifiers. Participants then have the right to carry the EMAS logo. It is not so much just the logo, but also the image and reputation that makes companies participate. The Dutch government also opted for a voluntary scheme on the basis of EMAS that guaranteed confidence and quality of assessments of EMSs. From 1994 till 2000, about 800 companies set up EMSs in the Netherlands. These were certified initially on the basis of the British Standard BS 7750 – due to the lack of a set of international standards at that time - and later on, since 1997, on the basis of ISO 14001 or EMAS. The important difference between the two standards is that the EMAS contains, as an objective, the improvement of the environmental performance of the participants in the scheme and the provision of environmental information to the public, whereas the ISO standard aims to support the implementation of the internal goals of the participating organisations.⁶

⁵ Council Regulation No. 1836/93 Allowing Voluntary Participation in the Industrial Sector in a Community Eco-Management and Audit Scheme; repealed and replaced by Regulation 761/2001/EC.

⁶ In England, lately, the quality of assessment by certification bodies has been a matter of intense debate (ENDS report, 2002). The Environmental Agency in England and Wales has explicitly expressed its preference for EMAS certification, but, in practice, some 2000 company EMSs have been ISO 14001 certified, while only 100 EMSs were EMAS-verified. EMAS certification is not very common in the Netherlands, as opposed to in

In the Dutch system, ISO 14001 certifiers and EMAS verifiers belong to the Association for the Co-ordination of Certification of Environmental Management Systems, the SCCM. This is the competent body charged with the implementation of the tasks described in the EMAS regulation, and also those of the ISO 14001 standard. SCCM consists of a central expert committee, which includes representatives of the Dutch employers' federation, the environment ministry (VROM), certification bodies and the environmental organisation: *Stichting Natuur en Milieu* (SNM). This committee has set out rules on how to evaluate a company's achievement of each requirement of the standard, based on its interpretation of ISO 14001 and EMAS. The rules stipulate how certification bodies should research and judge their clients' compliance with each aspect of the standard, including compliance with legislation and the Dutch system of semi-legal covenants. The system makes competition among certification bodies less probable and promotes professional discipline, while at the same time creating confidence in the quality of the assessors with both government and companies. In 1995, the Dutch environment ministry issued a paper in which the details of a linking of the EMS with a framework permit were announced (VROM, 1995). Municipal and provincial authorities could issue this framework permit to companies that would apply for it. Although the framework permit was voluntary, the requirements for being eligible for a framework permit, according to a follow-up document, were described as compulsory (VROM, 1999):

- The company must have an environmental policy/strategy (e.g. a company environmental plan approved by the authorities).
- The company must give proof of a good environmental performance and a proactive attitude towards improving this performance.
- The company must have an EMS certified by an accredited agency on the basis of ISO 14001.
- Openness to government and third parties must be evident from the results of reporting obligations, such as publication of environmental yearly reports.

The next section will show how the process of framework permitting developed during the years from 1994 up to now.

4.2. Declining interest

Despite a promising start, by 2001 the linking of EMS with framework permits suddenly seemed to be less well received by industry and decentralised government alike. An enquiry by the SCCM showed good perspectives of participating companies on the EMSs and the framework permits. Seemingly, however, companies were still favourably inclined to establishing EMSs and applying for framework permits (SCCM, 2001), but negative feelings were already looming ahead.⁷

Germany. In the Netherlands, most participants are of the opinion that since the renewed EMAS regulation expressively opts for ISO 14001, the debate seems to have lost its relevance.

⁷ The enquiry was sent to 800 environmental managers in big companies and returned by 343.

Figure 1. Results of the SCCM enquiry on company EMS

74% consider the verification process as added value:

- Continuous improvement
- Better environmental performance

87% of the companies are also ISO 9000 certified.

44% consider reduction of environmental risks as the most important factor for having a certified EMS

20% consider reduction of costs as their main motive.

Concerning the contacts with government:

- 25% have a framework permit (FP)
- 21% are in the process of consultation for an FP

Source: SCCM, 2001.

The percentage of 25 having a framework permit seems doubtful. It would mean that some 108 of 343 responding firms have linked their EMS with a framework permit. According to the information the author obtained from various Dutch officials, an estimated number of 50 would be nearer the truth. Moreover, since 1999, the enthusiasm to start up an application process for a framework permit had withered somewhat, both in government – that is, the permitting authorities - and in industry. In a recent piece of research, conducted under the authority of the Dutch Evaluation Committee of the Environmental Management Act (EMA), entailing case studies of 20 enterprises that were in the process of applying for a flexible permit, an inventory of problems were analysed as follows under sections 4.3 and 4.4 (ECWM, 2002).

4.3 Main problems of VOH (FP) as considered by Dutch companies

According to some, the *vergunning op hoofdzaken* or framework permit, was not the appropriate permit for facilities with installations that do not change or transform during an extended period. Apparently, they did not need this flexibility. Most of the companies agreed that the framework permit took more time and consultation than a conventional permit, this being also the reason why the permit was not appropriate in the case of establishing a new facility. After all, in the case of the issuing of a revision permit, the facility is legally allowed to continue its production process.

The majority of the interviewed company managers were of the opinion that the framework permit imposed a heavy burden on the company: that more information had to be generated, while this surplus of information did not really lead to an improvement of environmental performance. Moreover, there was a minority of respondents who thought that the more detailed information on the production process required by government for a framework permit would consequentially lead to more troublesome interference and meddling of government in the firms' own policy and activities. One of the requirements for getting a framework permit is a facility environmental plan, which has to be approved by the competent authority. As a result, however, some companies feared more government

interference in the management of the facility. These companies were worried about the larger-than-usual degree to which they opened up to the regulators. Some companies became sceptical of the whole scheme. They felt that the permit did not at all mean more flexibility, as was promised by the government paper, because information and reporting would not be reduced, on the contrary, they argued, more details were being required.

Last but not least, the highest administrative court⁸ has systematically refused to accept government decisions entailing framework permits because of a lack of legal requirements, such as the approval of environmental programmes and plans by the competent authority.⁹ The *Afdeling* did not accept framework permits, arguing that the required company environmental plan lacked a legal basis. Such a plan may only be prescribed in the permit if the targets are clearly spelt out, and if the targets are reasonably obtainable and, thus, enforceable. Furthermore, the plan may not function as a delay for the permit holder to comply with standards prescribed in the plan. It has to be authorised by the competent authority and this authorisation should be open to review and appeal procedures. Also pure self-regulation, in the sense that the company decides what the environmental plan should entail, is not allowed, according to the *Afdeling*. However, these conditions make the framework permit less flexible. This, and the possibility of legal disapproval after a long administrative procedure, moved some of the interviewed companies to stop the application of the framework permit and to switch to applying for a regular environmental permit. On the other hand, it must be said that virtually all of the respondents also praised the invaluable interaction between government and industry that was enhanced by the application process. The consultations and negotiation were viewed as a learning process by both sides (see below).

It was evident from the interviews that the majority of companies had experienced serious complaints about the system, although in theory they sympathised with the benefits of it. They found that government required too much and too detailed information. Often the same information had to be provided twice and sometimes information was required that bore no relation to the environmental performance of the plant. Contrary to the expectation and promises of the government, the framework permit seemed to guarantee *less* procedural flexibility than in the case of regular permits. The permit was also not in accordance with the ideas or culture of some management cultures. It did not fit with company culture, notably American and Japanese company cultures or management strategies. In the USA, consultation and bargaining of permit conditions in a pre-decision stage hardly exists, let alone linking the EMS with the environmental permit. Only firms that have adapted to the Dutch system and culture are prepared to apply for a framework permit.

After the permit had been issued, follow-up activities by government (monitoring, enforcement) often took place irregularly, due to lack of interest and time. Some companies did not understand this and felt reluctant to accept this attitude after such a long period of intensive consultations. At the time of writing, the Dutch Environmental Ministry is considering an amendment in the *Wet milieubeheer* (Environmental Management Act), to ease procedures and phase out major obstacles in the system. Moreover, the *Afdeling* recently decided positively on a case involving a framework permit, arguing that the obligations of the

⁸ Afdeling Bestuursrechtspraak, Raad van State (ABRvS)

⁹ ABRvS 19 October 1995, AB 1996, 165; ABRvS 25 August 2000, AB 2000, Nr. 455.

permit-holder were clearly formulated in the permit, in which government approval of environmental company plans and programmes was included.¹⁰

According to the environmental managers interviewed in the same case studies, their government counterparts consider the framework permit more difficult to enforce. Command-and-control of compliance will be harder to realise, although others contend that a lesser influence of government control was actually just the reason for issuing the permit. The permit will demand serious and timely examination and control of reporting obligations. This is not only time-consuming, but also demands more manpower and more skills which agencies may not be able to provide due to lack of resources. Trust-building includes government understanding of company strategies and policies, and some managers think this is not the core business of law enforcers.

4.4 Less regulation breeds more government involvement?

It is an astonishing thought that, in some cases, the Dutch Environment Ministry's plan to ease the regulatory burden for well-performing companies turned out to be counterproductive. The policy scheme that was carefully thought out in The Hague, did not get the necessary follow-up in Groningen or Nijmegen. The most remarkable paradox seems to be the notion of more government involvement, while government was promising just the opposite and emphasising its intention to deregulate and to stimulate more self-regulation. But this is not as strange as it seems. The fact that the relationship between government and industry is becoming increasingly less standardised, does not mean that the influence of the state is decreasing. Informal justice can even extend the ambit of state control (Abel, 1982: 268). It gives the opportunity to control more behaviour because coercion becomes less vigorous and less visible (Cohen, 1985). It also requires lower state expenditures per case, so that more intervention is possible within the same budget. Notwithstanding the Dutch case, this development of mutual trust calls for long periods of consultation and negotiation. Obligations to report on the status of EMS and on compliance with the permit were much more extensive than in the case of a conventional permit, for example reporting environmental performance, and internal control and inspection; reporting results of certain examinations and investigations of improving EMS; reporting results of measuring and registration systems - to name but three of the options. These reporting obligations not only increase the work of environmental managers more so than under the circumstances of a regular permitting process, but also that of government officials, who suffer from a much greater work-load. Industry, as well as government, expresses these complaints. The framework permit makes government tasks more arduous. Reports, of which there are many, have to be read and controlled and responded to. There is a need for enhancement of knowledge and experience for controlling sophisticated paperwork, as well as for more personnel with higher education and more professional attitudes. At the same time, disappointment is felt under the rank-and-file inspectors who are supposed to apply less on-site control. This is especially difficult for the enforcement personnel, who are traditionally less well educated and, consequently, are being paid less.

Paradoxically, to some industrial observers, the FP results in more governmental involvement although the essence of the government policy should be, or was, declared to be the promotion of self-regulation by industry and the abandoning of obsessive meddling with industry. Why is it then that about a thousand Dutch firms are still willing to establish an

¹⁰ ABRvS 7 November 2001, JM 2-1-2002, Nr. 3.

EMS and also take the trouble to accept the costs of having their EMS audited and verified by accredited experts for certification? Admittedly, up till now, only 25 per cent of them seem prepared to opt for linking their EMS with an FP. Why do they actually want this?

From research conducted in 1995 on facilities which were either in the process of negotiating a framework permit or had just finished this process (Nijenhuis and Aalders, 1995), it is concluded that most of them had decided to go for it because of the promises of less red tape and reduced monitoring and enforcement. Reduced regulatory burdens, notably reduced regulatory inspections, encouraged companies to take up EMS and link EMS with the permit. But, in almost all of the successful cases, the interviewed managers were primarily satisfied by the improved interactions between the agency officials and themselves, which led to learning processes and more mutual understanding of each other's problems. After all, this self-regulatory risk monitoring strategy is, in the words of Putnam (1993), one of the "features of social organisation that can improve the efficiency of society by facilitating co-ordinated actions," which he calls "social capital" (Putnam, 1993: 167).

4.5 Case study

For more than seven years, the author participated regularly as an observer to the process of FP conditions negotiation between officials of a municipal environmental agency and the environmental managers of the firm that applied for a framework permit (Aalders, 2001). Of course, this case study stands out alone and could not be considered as representative for all companies that engaged in the process of getting a framework permit. But, the case study illustrates a good deal of the transactional process that goes on between the officials and managers, especially in the preparation of the application for an environmental permit.

What happened during the seven year period of consultations for the issuing of an FP? To begin with, this was not an ordinary procedure. Preparations for a well-formulated permit application can take time and both parties are keen to have a good application so that eventually issuing the permit will be simple. Every party agrees that it is the pre-consultations for a framework permit that take the longest. But this was an extraordinary case, due to several reasons, one of which was a change of responsibility from the provincial to the municipal authority and another was a thorough reorganisation in the company. The process had to be restarted from scratch twice.

Most important was the learning process that developed between the two. For example, it was decided that the environmental manager of the firm would first draw up a description of all the processes in the plant and their relevant environmental impacts. During the consultation, the agency officials regularly commented on these descriptions. They were changed and adapted time and again. In the meantime, a mutual growth in the understanding of each other's positions and interests developed, as well as a development in working methods and dependencies. The agency officials learnt to understand the importance of the approval of the top management of the firm, and the managers began to understand the importance of the politicians and the officials of the legal department regarding the outcome of the negotiations. These kinds of constraints play an important role in the discretion both parties obviously have in negotiating the outcome of the application procedures and emphasises the semi-autonomous character of their actions. In this case, the processes of developing a management system and preparing the permit application went off simultaneously, which gives one an idea of the co-regulatory process that took place. For example, the agency official would advise the firm managers to map all the relevant

environmental risks in the plant or, in other words, to work on the fulfilment of the environmental management system, while in the same session the firm manager used to recommend the official not to forget to also join forces preparing the application of the permit.

Both parties expressed their satisfaction that they were speaking the same language.

5. Clearing the way for rewarding voluntary business efforts

Particularly industry-orientated authors are often of the opinion that government should now strive for new forms of regulation, or rather, de-regulation. They suggest government incentives should focus on rewarding voluntary business efforts to deliver environmental performances superior to the requirements mandated by statutes and regulations, and on eliminating perverse incentives caused by some environmentally-damaging taxes and other policies (Schmidheiny, 1992). Most governments, at least verbally, do express their interest in this ‘compliance-plus’ approach to environmental strategy.

But, from the industrial point of view, there is some danger in discarding the essential role government has to play in the overall solution and ordering of social problems such as environmental pollution. In the enthusiasm of embarking on ‘modern regulation’ governments should be particularly aware of the administrative, legal and constitutional consequences of their changing role in this ‘ecological modernisation’. Care should be taken that both government and industry are not throwing dust into each other’s eyes.

Issues for further research should now concentrate on the general question of what can be said about the sustainability of EMS commitments over time and across changes in personnel and in organisational ownership, structure and management, when, as expected, real externalities and common problems continue to exist (Coglianese, 2001). Some indications and preliminary answers of existing research questions on the value of EMS for achieving regulatory goals might be given:

- Does the implementation of an EMS improve businesses’ environmental performance and reduce environmental impacts? There are no systematic research findings, but the indications are that the answer is positive.
- Does the EMS process improve relationships between business and their neighbours and communities, and between business and environmental and other citizen organisations? Again, no systematic results are known, but the indications are that EMSs are favourable for these relationships.
- Does it improve environmental performance by suppliers and customers as well as the primary business itself? This very much depends on the size of facilities, on the categories of production, etc. But, provisionally, the answer is positive.
- What difference, if any, does third-party certification make? The odds are that certification and verification by private experts is beneficial to a better performing facility. It has even been argued that Dutch assessors, in general, are better at monitoring environmental performance than their government counterparts.
- What changes in federal and state regulations should be considered, if any, to promote EMS innovations that benefit public environmental goals? What difference, if any, does linking EMS with more flexible environmental permits make? Here, the answer is not yet clear. It seems, that much depends on the willingness, the building of trust, the expertise and the experience resources of both government and industry.

In this respect, additionally, questions about the relationship between government and industry relating to 'self-compliance' still need more attention. What are the benefits and the costs of an EMS to the facility, to government, and to the public? What differences do state assistance and third-party certification make? What evidence is there of continuing environmental improvement over time or, alternatively, slackening of commitment that might occur after the initial implementation process?

Coglianesse (2001) distinguishes three forms of preferential treatment of firms:

- Public recognition, e.g. product labelling and publicity,
- Enforcement forbearance (moderate impact),
- Regulatory and permitting flexibility.

But, here again, we see that administrative and other transaction costs will pose the greatest challenge for any performance track programme. Government should overcome complex and sometimes burdensome administrative procedures to decide whether firms are eligible for regulatory flexibility. EMSs generate paperwork, as does the certification process and audit inspections. From the beginning of the promotion of the notion of self-regulation, it has been emphasised that if on-site visits were replaced by a regime of self-regulation, paperwork was likely to increase and multiply (Bardach 1982: 316; see also Aalders 1993: 89).

Experience with some of the regulatory intervention initiatives of the US Environmental Protection Agency, such as Project XL, EPA Region 1's Star Track programme and Oregon's Green Permit programme, shows that participation has been much lower than originally intended. But, this is not only a question of transaction costs. It is only normal that a company's EMS itself will generate paperwork, as will audit inspections and the certification process. Systems monitoring also continues to be part of company strategy and presupposes that the following conditions are fulfilled (Aalders and Wilthagen, 1997: 431):

- The decision-making process of all categories of firms and institutions (size, branch, or hazards) must be influenced by stimulating or requiring internal risk management structures;
- Wherever absent, these structures can be established or promoted by law or regulatory agencies;
- Risk management systems should show sufficient dynamics to warrant ongoing and profound activity; risk management systems should not be isolated from the company's general management;
- Regulatory agencies should be capable of judging the actual performance of management systems and in case of a negative judgement these agencies should be capable of making and promoting adjustment.

From the research reported in this paper, it is clear that if these conditions are not fulfilled, the linking of government regulation and company risk management systems may turn out to be a disappointment. But, if both parties are willing to build up mutual trust, to realise communication channels and take into account the time and resources needed for the endeavour, then both may gain long term successes.

6. Conclusion

What is the policy role towards EMS establishing? What regulatory strategy is desirable? After considering the results of recent research, Coglianesi and Nash (2001) propose that the best policy response to widespread adoption of EMS may be no response at all (Coglianesi and Nash, 2001: 228). After all, they say, it is quite possible for the widespread use of EMS to coexist with the current system of environmental regulation. Furthermore, according to them, private mandates may be far stronger than public ones in encouraging EMS adoption. Non-Government Organisations (NGOs), Public Interest groups, customers, suppliers, contractors, outsourcers, insurance companies and the like, may influence a firm to adopt a certified EMS.

Gunningham, Kagan and Thornton (2001) argue in the same sense. Although one is inclined to agree with their point of view, it is also arguable that for some enterprises better communication may be beneficial for relationships between government and industry. But, admittedly, this is not dependent on a company having an EMS. More precisely, the questions remain: what do these communication devices look like and what do they entail? Maybe ISO 14063 – currently in preparation – will shed more light on the improvement of communication systems in environmental management in industry.¹¹ It is by creating better communication channels and devices that the worlds of government and industry, political and juridical life and economic life will be able to learn from each other, so that environmental improvement may be the result of a common effort, based on a shared inspiration of caring for the environment.

¹¹ Personal information from Dr Ruth Hillary.

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