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VOLUNTARY ENVIRONMENTAL AGREEMENTS AND CERTIFICATION – EXPERIENCES FROM AMERICA

Incorporation of “Private” Environmental Certification Systems in Formal Legal Systems: the U.S. Case*

Errol E. Meidinger**

1 Introduction

More and more industrial organizations are willingly committing to meet heightened environmental standards through private environmental certification programs. Such programs generally claim to harness the incentives of the market to promote the public interest.¹ The programs typically define the environmental standards that firms must meet and establish organizational mechanisms for achieving and “certifying” compliance. Well known examples include the chemical industry’s “Responsible Care” program,² the International Organization for Standardization’s ISO 14000 environmental management program,³ and the Forest Stewardship Council’s well-managed forests program.⁴

With their standard setting, adjudication, and implementation mechanisms, certification programs bear an interesting resemblance to government regulatory programs. Yet, because of their apparently autonomous and voluntary nature, these “unilateral commitment” programs⁵ are often conceptualized as separate and distinct from legal systems. It appears, however, that certification systems are deeply intertwined with law. Not only do they use legal mechanisms to organize themselves and control their members, they also cite the possibility of intensified legal regulation to attract members. Perhaps more importantly, they can have a significant influence on governmental policies, and on the content and implementation of legal rules. Given the common focus of certification and legal systems on policy-making and control, it seems obvious that they will intersect and interact in various ways.

The goal of this paper is to describe the main ways in which environmental certification systems are likely to interact with the U.S. legal system. Although certification systems depend on legal systems to organize themselves, and may also increase the institutionalization of law in private organizations in important ways, this paper focuses primarily on how legal systems use, are influenced by, and respond to certification systems.⁶ Its working hypothesis is that environmental certification systems will have a substantial influence on the substance and operation of the U.S. legal system over time. Its primary goal is to describe the avenues through

* Errol E. Meidinger, 2000. This is a revision of a paper presented to the CAVA workshop on “The Integration of Voluntary Approaches into Existing Legal Systems,” held in Brussels, February 24-25, 2000. Helpful comments by workshop participants, and by Guyora Binder, Chris Elliott, and students in my University of Freiburg Forest Certification seminar are gratefully acknowledged, as is the research assistance of Patrick Omilian. Also much appreciated was the supportive work environment of the Institute for Forest Economics at the University of Freiburg, where the paper was completed.

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¹ E.g., Errol Meidinger, *Look Who’s Making the Rules: the Roles of the FSC and ISO in International Environmental Policy*, 4 HUM. ECOL. REV. 52 (1997).

² The American Responsible Care Program is described at <http://www.cmahg.com>. The Canadian program (the first in the world) is at <http://strategis.ic.gc.ca/SSG/ca00797e.html>. For a general overview see, Neil Gunningham, *Environment, Self-Regulation, and the Chemical Industry: Assessing Responsible Care*, 17 L. & POL. 57-109 (1995).

³ See ISO Website: <http://www.iso.ch/9000e/isoanden.htm>. For a general overview, see e.g., Steven Bass, *Introducing Forest Certification*, Report of the International Institute for Environment and Development (1997) http://www.efi.fi/publications/Discussion_Papers/01.pdf or Errol Meidinger, *Private Environmental Regulation, Human Rights, and Community*, 6 BUFF. ENV. L. J. 132 (1999) (hereafter Meidinger, *Private Environmental Regulation*) <http://www.ublaw.buffalo.edu/fas/meidinger/hrec.pdf>.

⁴ See FSC Website: <http://www.fscoax.org/principal.htm>. For general overviews, see again Bass or Meidinger, *supra* note 3. There are numerous other private environmental certification programs. Many of the older ones concentrate on food labeling, particularly in Europe. Many of the newer ones focus on particular sectors of environmental management, such as forestry, fishing, chemical production, and so on.

⁵ This categorization reflects the work of the Concerted Action on Voluntary Approaches (CAVA) project, an EU-supported effort to develop a research network and a body of research on the use of “voluntary approaches” to improved environmental management.

<http://www.ensmp.fr/Fr/CERNA/CERNA/Progeuropeens/CAVA/index.html>
See, Steven Baeke, Marc DeClercq, and Erik Matthijs, *The Nature of Voluntary Approaches: Empirical Evidence and Patterns: Literature Survey*, CAVA Working Paper no 99/08/3, August 1999; Organization for Economic Cooperation and Development, *VOLUNTARY APPROACHES FOR ENVIRONMENTAL POLICY: AN ASSESSMENT* (1999). Certification systems are a special kind of unilateral commitment program, since they do not claim to be “one shot” efforts, but rather set up frameworks for long-term policy development and implementation.

⁶ The use of law by certification organizations is the topic of a planned subsequent paper.

which certification systems are likely to shape the legal system. Because of the potentially high degree of legal influence by certification, legal systems are also likely to try to constrain or shape certification systems. So the paper also describes the primary means through which this may happen.

It is too early in the development of private environmental certification systems to offer either an assessment of their overall societal importance or a strong theory explaining their emergence and expansion.⁷ Their normative implications must also be left to other papers.⁸ Before reviewing the ways in which certification systems can be incorporated into law, however, it is helpful to give some definition to the key terms: “legal system” and “certification system.”

a Legal Systems

Of course, the definitions of “law” and “legal system” have been much disputed over the years, and will not be resolved here. For present purposes it is sufficient to note that there is widespread acceptance that legal systems have the following features:⁹

- (1) **Legislative bodies**, often representing defined interests, make rules governing actors within their jurisdiction.
- (2) **Adjudicative bodies** determine the applicability of rules in particular cases. In doing so they often give further definition to rules.
- (3) **Enforcement bodies**
 - (a) **gather information** on compliance with rules, and
 - (b) use **sanctions** (punishments and rewards), to promote compliance.
- (4) The legal bodies **operate under rules**, ordinarily governing both their **composition and procedures**. The latter often include public participation requirements.
- (5) Actions taken by legal bodies are not fully determined by rules. They also involve the exercise of judgment and **discretion**.¹⁰

⁷ For a preliminary effort, see Meidinger, *supra* note 3.

⁸ See *id.*

⁹ See, e.g., Joseph Raz, *THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM* (2d ed. 1980). Although I am using western legal terms here, such as legislation and adjudication, these terms need not be used by legal systems. The key idea is that they have ways of formulating rules, determining their applicability, applying sanctions, and so on.

¹⁰ The amount of discretion, however, may often look larger when viewed from the perspective of rules than when viewed within a social context including cultural assumptions, shared operating procedures, and the like. E.g., Errol Meidinger, *Regulatory Culture: A Theoretical Outline*, 9 L. & POL., 355-386 (1987); Edward L. Rubin, *Discretion and Its Discontents* 1997, 72 CHI.-KENT. L. REV. 1299 (1997).

- (6) **Sovereign states** provide the primary authority and implementation mechanisms.

The last criterion is asserted by many,¹¹ but not all¹² legal theorists. It has long faced problems regarding how democratic a state must be for its rules to qualify as law. More recently, the growth of a global order transcending individual states yet enacting rules that operate like laws has created problems for this conception.¹³ These issues receive further attention in the conclusion of this paper.

b) Certification Systems

Although there is no uniform definition of a certification system, and existing programs that are classified as certification systems vary greatly, most definitions include the following elements:

- (1) **Standard setting bodies** operating with defined membership and decision processes. These can be either industry groups, as in the Responsible Care Program, or broader sets of stakeholders, as in the Forest Stewardship Council.¹⁴
- (2) **Standards** for certification,
 - (a) These tend to follow either or both of two general approaches:
 - (i) **Substantive performance** standards (the FSC approach),¹⁵
 - (ii) **Environmental management system** standards (the ISO approach)¹⁶, stressing
 1. enterprise-based policy making;
 2. detailed organizational arrangements for planning, information gathering, monitoring, compliance assessment, and plan revision; and
 3. **continuous improvement** in either
 - a. the management system, or
 - b. environmental performance.¹⁷

E.g., Hans Kelsen, *GENERAL THEORY OF LAW AND THE STATE* (1945). Kelsen, like most western legal theorists of the late 19th and 20th centuries, argued that law must involve a threat of punishment by the state.

¹² E.g., Friedrich Charles von Savigny, *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* (Arno Press 1975) (Abraham Hayward trans., London 1831). Savigny argued that law “is first developed by custom...next by jurisprudence -- everywhere, therefore, by internal silently-operating powers, not by the arbitrary will of a law-giver.” *Id.* at 30. He was arguing against the creation of a national law for Germany, and in favor of preserving local variation.

¹³ E.g., Guenther Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems*, 45 AM. J. COMP. LAW. 149 (1997).

¹⁴ The scope of certification programs varies. They can be global, regional, national, or even sub-national, though subnational and national programs are likely to be viable only in the narrowest markets.

¹⁵ See Appendix A for the primary FSC management principles, and examples of criteria applying them.

¹⁶ See Appendix B for the primary ISO environmental management system standard.

- (b) Certification can attach to an enterprise, a product, or both.
- (3) Organizational mechanisms for **certifying compliance** of individual firms with applicable standards, which generally:
- (a) rely heavily on professional expertise,
 - (b) focus on information production and management,
 - (c) struggle over the **relative independence** of the certification body from the firm.¹⁸
- (4) Provisions for **public participation**¹⁹
- (5) Mechanisms for **sanctioning non-compliance**, usually:
- (a) withdrawal of certification, and/or
 - (b) expulsion from an industry group.²⁰

Thus, many environmental certification systems have most of the basic organizational elements of legal systems. The Forest Stewardship Council (FSC), for example, has a constitutional structure establishing an international "general assembly" representing economic, environmental, and social interests in equal proportions, and giving northern (developed) and southern (developing) societies equal voting power within each interest.²¹ It also provides for national and regional legislative bodies to define place-based forest management standards and criteria, which become applicable upon approval by the General Assembly. The central and regional legislative bodies have promulgated a large number of rules governing forest management, its evaluation, and certification, which closely resemble what legal scholars ordinarily call legislation.²²

Much like a government agency, the FSC also has standards and procedures for accrediting the certifiers who determine whether forest management units meet FSC management standards. The certifiers act as both adjudicators and enforcers of standards. First they are charged with determining whether applicants for certification meet the various ecological, operational, economic, and social criteria. Second, they are charged with monitoring firms that receive certification and can revoke certificates if forest management falls below set standards. As in many regulatory regimes, considerable responsibility for collecting information and reporting on compliance falls to regulated firms.

FSC certifiers exercise a great deal of discretion and judgment in determining whether individual forest management operations meet the standards for certification. This is due to both the inherent complexity of forest management and the multiple environmental, social, and economic goals of the certification regime. Although substantive and organizational details vary, other environmental certification systems, including those of the International Organization for Standardization and the Chemical Manufacturers Association, established primarily by industry,²³ show similar organizational patterns.²⁴

The institutional characteristic typical of a legal system that the FSC and most other private environmental certification systems lack is a command from a sovereign directing all management organizations in a given category to achieve certification standards, and subjecting them to sovereign-imposed penalties for failure to do so. As indicated above, certification systems are generally characterized as "voluntary." Firms subscribe to them because they determine that it is in their interest to do so. Yet it is increasingly common to describe environmental certification as a "de facto require-

¹⁷ Whether improvements in the system are acceptable, or whether improvements in outcome measures should be required is a major source of in the debate about certification systems. See e.g., Naomi Rohit-Arriaza, *Private Voluntary Standard-Setting, the International Organization for Standardization, and International Environmental Lawmaking*, in Gunther Handl, 6 YEARBOOK OF INTL ENVTL LAW 107 (1995); Joel Ticknor, *ISO 14,000: Will it Deter Cleaner Production*, 8 NEW SOLUTIONS 285, 286 (1998); Pierre Hauselmann, *ISO Inside Out: ISO and Environmental Management*, WWF International Discussion Paper (1997).

¹⁸ Many voluntary codes and certification programs started with self-certification by the firm, then moved to trade association certification, and now seem to be moving to third party certification. There is a growing understanding in the field that unless programs are monitored by credible third parties (sometimes environmental NGOs, sometimes organizations vetted by them), they are unlikely to be seen as credible.

¹⁹ Public participation provisions vary considerably among programs, and often seem designed to limit rather than expand the public role in standard setting and certification. See Meidinger, *Private Environmental Regulation*, *supra* note 3.

²⁰ There is no systematic information on how often certification systems actually employ sanctions. My impression from communicating with knowledgeable sources is that sanctions have rarely been imposed to date.

²¹ For a thorough description of the FSC structure, see Meidinger, *Private Environmental Regulation*, *supra* note 3.

²² For examples, see Appendix A. Note that much but not all of the legislation is applicable to forestry management. Much of it also defines how the

various bodies in the FSC system are to operate, as would be the case with traditional legislation. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989).

²³ I do not use the term "self regulation" here, for two reasons. The most obvious is that some systems, such as those of the Forest Stewardship Council and the Marine Stewardship Council, have been established primarily by environmental NGOs, and not by industry. Secondly, the term "self" can obscure the organizational dynamics of regulation, since there are complex and distinct interests within many industry based regulatory programs. Nonetheless, the work of scholars who have studied self-regulation is fundamental to this research. E.g., Ian Ayres and John Braithwaite, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992); Peter N. Grabosky, *Green Markets: Environmental Regulation by the Private Sector*, 16 L. & POL. 419-48 (1994).

²⁴ See generally Meidinger, *Private Environmental Regulation*, *supra* note 3; Gunningham *supra* note 2. The primary institutional differences at this time have to do with how broad participation is in the standard setting process and the degree of independence and professionalism necessary to make verification of compliance credible.

ment” for doing business in many jurisdictions.²⁵ When interviewed, corporate officials often state that they feel they have “no real choice” but to become environmentally certified. The reasons they give vary, and include such factors as avoiding intensified government regulation, maintaining or expanding market share, averting negative publicity, improving community and/or employee relations, improving organizational efficiency, meeting demands of up-stream sellers or down-stream buyers,²⁶ obtaining higher prices, avoiding legal liability, increasing shareholder confidence, and so on. Although many of these reasons do not flow directly from state regulation, they do suggest a context in which industrial enterprises view environmental certification as a mandatory condition of operating in modern society.

Thus, the gap between coercive state regulation and “voluntary” private certification is not as wide as one might expect. Moreover, many of the reasons given to explain the growth of certification have at different times in history been grounds for expanded government regulation. It is not surprising, therefore, that complex relationships might emerge between certification and legal systems.

The next two sections catalog some of the legal channels through which those relationships can operate. Section 2 lists legal mechanisms that seem largely receptive to certification systems, while Section 3 lists ones that seem resistant. It is important to note, however, that most of the legal mechanisms described below could in principle be used either to promote or to undermine certification programs. State environmental regulatory agencies, for example, could prohibit certification of firms or otherwise punish certified firms. The primary reason that they do not appear likely to do so is that certification programs claim to build upon state regulatory programs. Participating firms claim to be going “beyond compliance,” and it would be very difficult for agencies to rationalize prohibiting firms from doing so, or punishing them for it. Nonetheless, it is possible to interpret rules as “ceilings” and not just as “floors,” and regulatory folklore has it that officials and industry groups sometimes punish firms informally for going above ceilings.

²⁵ E.g., Virginia Haufler, “Private Sector International Regimes,” 4 *POLIBUS* 2 (1998); Roht-Arriaza, *supra* note 17 at 119; Ticknor, *supra* note 17 at 286.

²⁶ Ford Motor Company, for example, recently announced that it will require all of its suppliers to have at least one manufacturing site ISO 14001 certified by the end of 2001. General Motors Corporation is requiring to meet the ISO 14001 standard, but not necessarily to be registered, by the end of 2002. Amy Zuckerman, *Ford, GM set ISO 14000 Requirements*, *NEW STEEL*, Mar. 1, 2000 at 58.

2 Legal Incorporation of Certification Systems

Private environmental certification systems can be incorporated in formal legal systems in many possible ways. The list that follows is preliminary, and is intended to characterize the problem with sufficient precision to allow further inquiry. As will be discussed in Section 4, the list is largely limited to “legal” mechanisms as they are conceived in traditional legal scholarship. Other important micro and macro dimensions of incorporation should also be considered.

a) Legal requirement of certification

The most obvious means of incorporating certification into a legal system would be for an authoritative legal body to require that firms operating within its jurisdiction be certified. That legal body could be either a legislature, or an administrative agency with a broad mandate to achieve environmental improvement. There is much to commend this strategy, since it can mandate global, state-of-the-art standards, place much of the administrative burden on non-state bureaucracies funded by the enterprises involved, and garner some of the political legitimacy of environmental NGOs for the state regulatory system. Its downsides include a reduction in state control over regulatory policy (although the state retains the option of imposing and administering its own standards) and potentially higher costs of operation for enterprises than if state agencies bore the costs of administration.²⁷ To date there are only a few examples of states requiring environmental certification: the Brazilian state of Acre recently made FSC certification a requirement of practicing forestry in the state²⁸ and Zimbabwe has incorporated ISO 14001 into its regulatory system.²⁹ Yet it seems likely that their numbers will grow as the certification systems mature and become better known.

Administrative agencies also have the capacity to require certification. They would most likely use

²⁷ Of course there are contending normative arguments regarding who should bear administrative costs. One position is that the public should bear them, since the certification program promotes the public interest in an improved environment. The other is that the enterprise should bear them, ordinarily through increased costs to its consumers, since it creates the situation requiring the regulatory program. This is the so-called “polluter pays” principle. The position one takes on these questions depends on the entitlement structure from which one begins the analysis.

²⁸ Personal communications, Professor Dr. Michel Becker, Institute for Forest Policy, University of Freiburg and Dr. Dietrich Burger, Deutsche Gesellschaft für Technische Zusammenarbeit (German Organization for Technical Cooperation), Frankfurt.

²⁹ Paulette L. Stenzel, *Can the ISO 14000 Series Environmental Standards Provide a Viable Alternative to Government Regulation?* 37 *AM. BUS. L.J.* 237, 276 (2000). Whether these examples are evidence that developing countries are especially likely to adopt private environmental certification requirements in their regulatory systems can only be known over time.

rules, in conjunction with contracts, as mechanisms for doing so. A rule, for example, could simply require firms operating in the jurisdiction to be certified by a specific program, or by one of several eligible programs. Contracts could then be used by the agency to achieve a degree of control over the certification programs without going through more cumbersome rulemaking or adjudication procedures. While these methods are being used in some other areas of privatization, such as prisons and healthcare,³⁰ their extension to environmental regulation would probably be a new development. It should be noted, however, that the U.S. environmental laws already give a large role to private enforcers through "citizen suit" provisions, which allow interested parties to bring enforcement actions for violations of federal or state pollution control standards.³¹

In the U.S. legal system a law requiring private certification would probably face legal challenges based on the "non-delegation doctrine," which is generally held to prohibit the delegation of law making powers to private actors.³² There is a simple solution, however, which is for the legislature to review the standards involved and to enact them as its own if it so chooses. It may even suffice for the legislature to reserve the power to review the private rules and to provide for judicial review of them under general administrative law.³³ In the case of administrative agencies, which have convened a number of negotiated rulemaking ("reg-neg") committees of stakeholders to negotiate draft rules in recent years, it is sufficient that the agency convene a "balanced" committee, review the rule developed by the committee, and subject it to normal agency decisional procedures.³⁴

³⁰ See generally, Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U.L. Rev. 543 (2000); Laurent Hourcade and Frederick J. Lees, *Applicability of ISO 14000 Standards to Government Contracts*, 27 ENVTL. L. REP. 10071 (1997).

³¹ See generally, Barry Boyer and Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Analysis of Citizen Suits Under Federal Environmental Laws*, 35 BUFF. L. REV. 834-965 (1985). Government agencies can exercise control over such actions either by taking over prosecution of the case or by intervening in the private enforcement action. If the government does take over prosecution of the case, the private litigant retains the right to continue participating as an intervenor. *Id.*

³² The key decision was *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) which invalidated a New Deal statute allowing bituminous coal producers to elect boards to set minimum prices for coal in their districts. The court stressed the possible conflicts of interests of business representatives regulating others in their industry. For a sophisticated contemporary analysis, see Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw. U.L. REV. 62 (1990).

³³ This is what the states often have done when privatizing prison administration. Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911 (1988).

³⁴ As authorized by the Negotiated Rulemaking Act of 1990, 101 P.L. 648; 104 Stat. 4969. The statute requires the agency to exercise somewhat

If state or federal governmental bodies in the U.S. were to mandate certification, questions regarding the applicability of anti-trust law and administrative law would also arise. While they are too involved to discuss fully here, they could likely be managed. U.S. anti-trust law has a general exception for anti-competitive conditions resulting from intentional state action.³⁵ Thus anti-trust questions could be handled by clear, legislatively authorized policies combined with state supervision of the certification program.³⁶

The administrative law issues would divide among statutory and constitutional questions. The main constitutional question would be whether the Due Process clause applies to certification processes. The Supreme Court has tended to narrow the definition of "state action" to which the clause applies in recent years.³⁷ But it is not entirely clear that the rulemaking and adjudication involved in standard setting and certification processes would be exempt. Thus, it is at least conceivable that certifiers would have to meet due process standards if certification were state mandated. That might not be particularly difficult, however, since Due Process requirements generally are not stringent, and since many nominally private organizations have already incorporated comparable procedures.³⁸ In the statutory realm, it seems likely that, on their own terms, statutes such as the federal Administrative Procedure Act and similar state acts would not be held to apply to certification processes. Nothing, however, would preclude legislatures from making them applicable, and it seems likely that if states chose to

more control over the reg-neg process than described in the text, but this is not a constitutional requirement.

³⁵ *Parker v. Brown*, 317 U.S. 341 (1943) (upholding a California statute fixing the price of raisins).

³⁶ *California Retail Liquor Dealer's Association v. Midcal Aluminum, Inc.*, 445 U.S. at 97 (1980) (defining the clear statement and state supervision criteria). Absent such active state involvement, however, firms participating in self-regulatory standard setting do face risks of anti-trust liability. See, e.g., *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988) (holding the National Fire Protection Association (NFPA), a non-governmental standard setting organization, liable for anti-trust violations, when steel manufacturers used its processes to prevent approval of plastic conduit as an alternative to steel in the NFPA's National Electrical Code, which was subsequently adopted by many governmental bodies).

³⁷ See, e.g., Freeman, *supra* note 30.; Alfred C. Aman, Jr., *Globalization and the U.S. Administrative Procedures Act: Furthering Democracy and the Global Public Interest*, Bloomington Snyder Lecture, Lauterpacht Center for International Research, University of Cambridge, February 3, 1999. http://papers.ssrn.com/paper.taf?abstract_id=176691 Copy on file with author.

³⁸ See generally, Lauren Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. OF SOC. 1401 (1990). There are complex problems in standard setting organizations, however, some of which do not provide the equivalent of notice and comment rulemaking, or do limit participation those with direct, material interests. See generally John P. Shoaf, "Business as Usual or an Instance of Reinvention and Privatization in Environmental Rulemaking? New Rules and Issues with the Use of Voluntary Consensus Standards," May 25, 1999, at 31. Copy on file with author..

require regulated industries to achieve certification they could eventually be persuaded to subject certification systems to administrative law-like procedural requirements.³⁹

b) Official promotion of certification

Rather than “sticks,” governments can use “carrots” to promote preferred policies. Given their ability to avert legal and political challenges based on delegation of lawmaking powers while still altering environmental practices, government-provided incentives could turn out to be the preferred policy instrument for promoting certification. Several large U.S. administrative agencies either are considering or have made ISO 14001 certification one of their purchasing criteria.⁴⁰ The EPA has promulgated a number of policies that explicitly or implicitly promote certification. Its enforcement policies, for example, while not directed solely at certification systems, indicate that environmental certification will be viewed as a positive factor in reviewing organizational compliance records.⁴¹ EPA’s Office of Compliance Assurance and Monitoring is integrating environmental management system elements into its enforcement protocols and settlement criteria.⁴² The agency has also used ISO 14001 in several of its Project XL multimedia permitting processes.⁴³ EPA has published several documents and handbooks assisting and promoting development of ISO 14000-style management systems for both industry and for local governments,⁴⁴ and has supported research in support of the further deployment of environmental management systems.⁴⁵ The Federal Sentencing Commission has also provided that criminal defendants with “environmental

compliance programs,” which many certification programs would probably qualify as, can have their sentences significantly reduced.⁴⁶ Even the Overseas Private Investment Corporation has published draft guidance indicating that an ISO 1400 management system will help project sponsors demonstrate environmental monitoring and management capacity meeting its requirements for support.⁴⁷

One of the most direct efforts to promote certification occurred recently at the state level, when Connecticut passed an “Act Concerning Exemplary Environmental Management Systems.” The Act provides special benefits to companies that have: (1) registered ISO 14001 environmental management systems, (2) adopted approved principles of sustainability, and (3) good compliance records. The benefits include: (1) expedited permit review, (2) reduced fees, (3) less frequent reporting, (4) facility wide permits for approved firms, and (5) public recognition of having attained this achievement.⁴⁸ While it is difficult to track developments like this, other states might well adopt similar legislation. Whether they do or not, it is important to remember that favorable treatment of certified firms is only part of the government enforcement package that will best promote certification. The other part is effective enforcement of the environmental laws, which minimizes the relative economic disadvantages of certification for firms.

Government agencies can also promote the expansion of private certification programs by subjecting themselves to them. A number of state and local agencies responsible for managing public forests have had their forests certified. Some have chosen the more environmentally and socially demanding FSC program,⁴⁹ others the somewhat less protective American Forest and Paper Association program.⁵⁰

³⁹ See Section 3 *infra*.

⁴⁰ The Department of Defense and the Department of Energy require ISO 14001 certification for first and second-level suppliers. (Second level suppliers are those who provide supplies to firms which actually supply products to the agencies.) Stenzel, *supra* note 29 at 270.

⁴¹ USEPA, Audit Policy: Incentives for Self-Policing, 60 Federal Register 66706 (December 22, 1995) (“Where violations are found through voluntary environmental audits or efforts that reflect a regulated entity’s due diligence, and are promptly disclosed and expeditiously corrected, EPA will not seek gravity-based (i.e., noneconomic benefit) penalties and will generally not recommend criminal prosecution against the regulated entity.”).

⁴² USEPA Draft EMS Action Plan for Public Comment, December 20, 1999 <http://www.epa.gov/ems/plan99.htm>

⁴³ The most recent is with Imation Enterprises Corporation, the world’s largest manufacturer of magnetic data storage tapes. *Id* at 15.

⁴⁴ E.g., EPA Office of Pollution Prevention and Toxics, *Environmental Management Systems*. <http://www.epa.gov/opptintr/dfe/tools/ems/ems.html>; EPA Office of Wastewater Management, *Environmental Management Systems: An Implementation Guide for Small and Medium-Sized Organizations*, <http://www.epa.gov/owmitnet/vm046200.htm>

⁴⁵ E.g., Position Statement on Environmental Management Systems and ISO 14001 and a Request for Comments on the Nature of the Data To Be Collected From Environmental Management System/ISO 14001 Pilots, 63 Federal Register 12094-12097 (March 12, 1998) <http://www.epa.gov/fedrgstr/EPA-GENERAL/1998/March/Day-12/q6389.htm>

⁴⁶ See Tom Tibor & Ira Feldman, ISO 14000: A GUIDE TO THE NEW ENVIRONMENTAL MANAGEMENT STANDARDS 226 (1995); see also Organization Sentencing Guidelines, 56 Fed. Reg. 22,762, § 8A1.2, Comment K (U.S. Sentencing Comm. 1991); Draft Corporate Guidelines for Environmental Violations, §§ 9C1.2, 9D1.1 (U.S. Sentencing Comm. 1993).

⁴⁷ United States International Development Cooperation Agency (ICDA), Overseas Private Investment Corporation (OPIC), Request for Comments on Draft Environmental Handbook; Notice, 63 FR 9696 (1998).

⁴⁸ Connecticut State Statutes. <http://www.cga.state.ct.us/ps99/Act/pa/1999PA-00226-R00HB-06830-PA.htm>. This provision, like much of the other information in this article, came to my attention through the “voluntary codes” list-serve maintained by Kernaghan Webb. This is an invaluable source of information, and can be accessed at <http://strategis.ic.gc.ca/SSG/ca00973e.html>.

⁴⁹ Thus far, the agencies responsible for managing state-owned lands in Pennsylvania, Minnesota, and New York have either achieved FSC certification or announced that they intend to do so. Margaret Higgins, New York forests get green thumbs-up, Environmental News Network, February 5, 2000, http://www.enn.com/enn-news-archive/2000/02/02052000/certification_9680.asp

⁵⁰ E.g., Itaska and Lake County Minnesota. http://www.afandpa.org/forestry/sfi/sfi_license.html

The federal land management agencies appear to have no near term intention of seeking third party certification of their lands.⁵¹ The EPA, by contrast, has put a considerable effort into promoting the use of ISO-style environmental management systems at all levels of government, including its own operations and those of other agencies.⁵²

c) Express adoption of the same or substantially similar standards

As noted above, independent enactment of certification standards would be one way of avoiding delegation doctrine problems. Because the states and the federal government share authority over environmental protection, adoption of certification standards could occur at either level. Moreover, it could be done either by legislatures, or by administrative agencies with broad substantive and procedural mandates. At the legislative level, no evidence of formal adoption of environmental certification standards has come to light during the preparation of this paper.⁵³ In the past, moreover, many other types of privately generated standards have been adopted by North American legislatures.⁵⁴ Given the inherent attractiveness of ready-made standards, environmental certification system standards seem likely to become increasingly important in federal and state legislative processes over time. As that happens, legislatures will doubtless be tempted to change private standards to reflect their particular concerns, as they have done with model legislation in other areas such as criminal and product liability law.⁵⁵ On the other hand, pressure for inter-jurisdictional consistency in standards is growing, and privately generated international environmental standards could prove quite robust.⁵⁶

At the administrative level, U.S. agencies have a long history of incorporating privately generated standards in public regulations. Sometimes the private standards are small elements of rules covering larger topics, as in a Federal Trade Commission rule incorporating the American Society for Testing and Materials' standard for measuring gasoline octane in a rule requiring sellers to post octane ratings on their pumps.⁵⁷ Other times agency rules are aimed at essentially the same issues as the private standards. When the Occupational Safety and Health Administrative began operations in 1971, for example, it quickly converted a whole raft of private health and safety standards into regulatory requirements.⁵⁸ Other agencies have done the same.⁵⁹ It is clear that EPA has often drawn upon private standards in setting regulatory requirements, but there appear to be no published studies providing a comprehensive overview of how it has done this. In addition, National Technology Transfer and Advancement Act of 1995 (NTTAA) requires that federal agencies "use technical standards that are developed or adopted by voluntary consensus bodies" and participate in their development where possible.⁶⁰ The exact reach of the statute remains open to interpretation, particularly because it does not define key terms such as "technical standard" and "voluntary consensus body."⁶¹ Nonetheless, it seems likely to exert a steady pull that on agency practice over time.

It is also important to note that some of the emerging private environmental standards might be difficult for agencies to incorporate, because they include areas beyond the jurisdiction of any single

⁵¹ Forest Stewardship Council United States, Federal Lands Policy Statement Concerning FSC-Endorsed Certification on U.S. Federal Lands. http://www.fscus.org/current_issues/federallands.html

⁵² See generally, USEPA Draft EMS Action Plan for Public Comment, December 20, 1999 <http://www.epa.gov/ems/plan99.htm>; USEPA, Code of Environmental Management Principles for Federal Agencies, 61 Federal Register 54061-54066 (October 16, 1996).

⁵³ However, Bolivia recently adopted forestry standards virtually identical to the FSC standards. Personal Communication, Dr. Dietrich Burger, Forestry Program, Deutsche Gesellschaft für Technische Zusammenarbeit (German Organization for Technical Cooperation), Eschborn.

⁵⁴ See generally, Robert W. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329-1484 (1978). State and local legislatures have also adopted uncounted private codes in such areas as plumbing, construction, accounting practices, and the like. *Id.*

⁵⁵ Examples include the Model Penal Code, the Uniform Commercial Code, Restatements of Torts and Contracts, and the like.

⁵⁶ The question of how much demand there is for inter-jurisdictional consistency is in fact quite complex. While some industrial interests operating in multiple legal jurisdictions have powerful interests in uniform standards, others, either operating in a narrower set of jurisdictions or having more capacity to vary performance according to locale, have equally strong interests in differential standards, which they have a comparative advantages in meeting.

⁵⁷ See, e.g., *National Petroleum Refiners Association v. Federal Trade Commission*, 482 F.2d 672 (D.C. Cir. 1973).

⁵⁸ The OSHA's review of private standards was not always stellar, and it sometimes mandated standards that were either poorly developed or obsolete, such as a rule against ice in drinking water that derived from the days when all ice was obtained from frozen lakes and rivers. On the other hand, it also achieved considerable successes by using private standards. See generally, Hamilton, *supra* note 54. Though over twenty years old, this study remains one of the few serious pieces of research ever to have been done on regulatory incorporation of privately set standards in the U.S.

⁵⁹ *Id.*

⁶⁰ National Technology Transfer and Advancement Act of 1995, 15 U.S.C. § 3701 (1996). The statute requires agencies to utilize voluntary standards unless doing so would be "inconsistent with law or otherwise impractical," and to report decisions not to use such standards to the Office of Management and Budget.

⁶¹ For a careful analysis of the statute and its possible effects on environmental regulation by the Environmental Protection Agency, see Shoaf, *supra* note 38. It is also important to note that the Office of Management and Budget has promulgated a revised version of Circular A-119, which seeks to provide guidance to executive branch agencies on how to implement the Act. OMB Circular A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities," 63 Fed. Reg. 8545 (1998). Shoaf's analysis explores an number of important ambiguities in the reach of the statute in terms of what kinds of what kinds of standards and standard setting bodies are promoted by the statute.



agency. The FSC standards, for example, include indigenous rights, worker safety, and community economic concerns, in addition to environmental protection -- concerns well beyond the jurisdiction of any single agency. Although some federal and state administrative agencies have been trying to achieve cross-agency policy coordination in recent years, the going has been very difficult.⁶² This could conceivably mean either that non-governmental programs have a significant long-term structural advantage over governmental ones, or that their efforts to integrate multiple concerns are too far ahead of governmental programs to be attractive to most industries.

Overall, the quality of legislative and administrative deliberation in adopting private standards has varied tremendously in different situations. Sometimes the legal bodies have carefully reviewed, evaluated, and appropriately amended, private standards, other times they have not.⁶³ When administrative agencies incorporate standards, they are subject to judicial review and must produce decisional records sufficient to persuade reviewing courts that their decisions were rational and based on adequate evidence.⁶⁴ The NTTAA may make it somewhat easier for agency rules incorporating private standards to sustain judicial review, since it expresses a general preference for such standards, and puts a special burden on agencies to explain decisions in which they choose not to use them.

d) Indirect adoption through "environmental" laws

Some of the most important and difficult-to-trace forms of legal change unfold in informal processes. These processes include broad discussions in industrial, professional, and policy circles,⁶⁵ as well as specific transactions among firms, regulators,⁶⁶ and

sometimes community organizations.⁶⁷ It seems quite likely that the private environmental certification programs will affect regulatory programs through these almost invisible channels, beyond whatever changes are promulgated as official policy. Some of tacit changes are likely to occur as inspectors evaluate practices at industrial facilities and question whether firms are following best practices. Others may come into play when permits go through revision cycles, and regulators or public interest groups push for up-to-date standards. Regulatory officials can also promote private standards in their choices of which firms to inspect and monitor. Thus, they might decide to treat certification as an indicator of strong performance, and to concentrate their enforcement efforts on other firms.⁶⁸ As it became apparent in an industry that certified firms were likely to suffer fewer or less intensive inspections, or to find it easier to get necessary regulatory approvals, the standard of practice in the industry would likely converge with that of the certification program.

In the Canadian legal system certification standards may play an additional indirect role in shaping environmental regulatory standards. Regulated firms are subject to "strict liability." To convict, the government need simply show that a firm violated a standard, and offer no evidence about the overall quality of its management. The firm can counter with a "due diligence" defense, which involves showing that the defendant exercised reasonable care under the circumstances.⁶⁹ At least one Ontario court has treated failure to receive industry certification as failure of the due diligence defense.⁷⁰ Certification standards have also been incorporated

⁶² See, e.g., Errol Meidinger, *Organizational and Legal Challenges for Ecosystem Management*. In Kathryn A. Kohm and Jerry F. Franklin, eds., *CREATING A FORESTRY FOR THE 21ST CENTURY: THE SCIENCE OF ECOSYSTEM MANAGEMENT*, Chapter 23 (1997).

⁶³ Hamilton, *supra* note 54. It appears to be extremely common for state legislatures to include private standards in legislation by reference, sometimes providing that changes in the standards will automatically be mandated by the legislation. *Id.*

⁶⁴ Several Consumer Product Safety Commission rules based on pre-existent standards, for example, failed the 'substantial evidence' test on judicial review. *Id.* at 1401. Absent statutory directives to the contrary, agency rules are subject to the nominally less stringent "arbitrary and capricious" standard under APA Section 706(2)(a), though there is disagreement among scholars about whether there is really any difference between the two review standards.

⁶⁵ An example is the growth of the field of "industrial ecology." See, e.g., Robert U. and Leslie W. Ayers, *INDUSTRIAL ECOLOGY: TOWARDS CLOSING THE MATERIAL CYCLE* (1996) and Thomas E. Graedel and Braden R. Allenby, *INDUSTRIAL ECOLOGY* (1995).

⁶⁶ See for example the negotiations described by Keith Hawkins, *ENVIRONMENT AND ENFORCEMENT: REGULATION AND THE SOCIAL DEFINITION OF POLLUTION* (1984).

⁶⁷ For a description of community participation see R. Nils Olsen, Jr., *The Concentration of Commercial Hazardous Waste Facilities in the Western New York Community*, 39 BUFF. L. REV. 473 (1991).

⁶⁸ The appropriateness of preferential treatment for certified firms should not be presumed, however. At present there appears to be little empirical evidence that firms in certification programs generally perform better than uncertified firms. In the American Responsible Care program, in fact, it appears that participants have reduced their pollution discharges no more quickly, and possibly more slowly, than non-participants. Andrew King and Michael Lenox, *Industry Self-Regulation Without Sanctions: the Chemical Industry's Responsible Care Program*, ACAD. OF MGMT. J. (forthcoming). The authors hypothesize that this may reflect several factors, including the possible attractions of participation as a "smoke screen" for poorly performing firms and the failure of the program to apply significant sanctions to date. They note that the program is considering taking stronger action against poor performers and the possibility of implementing a third-party verification program to replace the current self-verification program. They also indicate that increased external scrutiny, whether by government, NGOs, or community members, could stimulate significant improvements in the effectiveness of the program.

⁶⁹ Kernaghan Webb, *Voluntary Initiatives and the Law*, in R. Gibson, ed., *VOLUNTARY INITIATIVES: THE NEW POLITICS OF CORPORATE GREENING*, at 32-50 (1999) at 33.

⁷⁰ R. v. Domtar, O.J. No. 3415 (Ont.C.J., Gen. Div.) (1993), as cited in Webb, *id.*

into law through remedies. In another Canadian case involving a violation of air pollution standards the defendant proposed, and the judge accepted, a remedy requiring the defendant to achieve ISO 14001 certification. Of course, such certification was not a requirement of the regulations involved, but was incorporated through the equitable powers of the judge to impose an appropriate remedy.⁷¹

Finally, it should also be noted that international environmental law may become an important source of indirect incorporation of private standards. Discussions about how to implement the Kyoto Protocol for the reduction of greenhouse gasses, for example, include the possibility of using FSC forest certification to verify the maintenance of carbon retention "sinks,"⁷² as well as using ISO 14000 management systems to achieve reductions in of greenhouse gas emissions.⁷³ What role such mechanisms will in fact play remains open at present, but their proponents are actively promoting them as important tools for attacking global climate change.

In all of the above ways, certification programs can be incorporated implicitly into legal systems without going through formal legislative or rulemaking processes. They effectively change the definition of proper behavior and increase the rewards for compliance with certification standards and the penalties for non-compliance. Given the paucity of empirical research in the area, it is unclear how often they are doing so. Yet it is clear that we need to carefully survey such indirect processes if we are to understand the incorporation of private initiatives in law.

e) *Indirect adoption through "non-environmental" laws*

Environmental certification standards can also be incorporated into legal systems through nominally non-environmental laws. This section lists some key areas where this is likely to happen.

i) *Tort Law*

Tort law sets standards for liability between parties who have not dealt with potential liability issues by contractual or other means. It usually applies to

"accidents," often but not always between strangers. In general, American tort law requires parties who fail to follow standards of "reasonable care" to compensate those who are foreseeably injured as a result. Certification standards can be expected to infuse several different areas of tort law.

(1) *Toxic torts*

The most obvious arena for potential incorporation is that of toxic torts, which involves liability for damage resulting from exposure to toxic environmental agents. The agents are usually chemicals, but can be biological organisms as well.⁷⁴ Certification standards are most likely to apply to the question of what constitutes reasonable care. Both substantive and management system standards have the potential for raising requirements. Consider the example of a firm that releases a toxic agent into a community and claims non-liability on grounds that its practices conformed to government regulations⁷⁵ and industry standards. Plaintiffs could argue that the firm's lack of an ISO 14001 management system constituted a failure to exercise reasonable care under the circumstances. Such an argument would be difficult for a defendant to counter, especially in light of the fact that a harmful release occurred.

Often the most difficult elements to prove in toxic tort suits are injury and causation. Environmental certification systems have the potential to aid plaintiffs in these areas too, since they may require firms to gather and maintain data on a broad array of environmental effects. These data would probably be subject to discovery by plaintiffs in a law suit in many jurisdictions, and could help show chains of causation and injury. Although some states have enacted statutes to protect companies from compulsory disclosure of information generated in preparing voluntary environmental audits, such as would be done for ISO 14001 certification, many states and the federal government have not enacted such statutes.⁷⁶

(2) *Negligence*

Certification standards might also change liability standards for run-of-the-mill, non-toxic accidents. Consider the example of an auto accident triggered

⁷¹ R. v. Prospec Chemicals Ltd., A.J. No. 174 Alta. Prov. Ct. (Jan. 25, 1996). As cited in Webb, *id.* The judge required the defendant to post a bond of \$40,000 subject to forfeiture if the company failed to comply with the certification order.

⁷² Forest Stewardship Council, "Background Paper for FSC and Carbon Certification Workshop," FSC Website: http://www.fsc.org/html/assembly_general/carbon_bkgd.htm

⁷³ ISO Technical Committee 207 Climate Change Task Force, "Application of the ISO 14000 Series of Standards to the Issue of Global Climate Change, Draft Third Interim Report, June 2000 (Document Reference: ISO TC 207 CCTF N29R3).

⁷⁴ See e.g., Gene J. Heady, *Stuck Inside These Four Walls: Recognition of Sick Building Syndrome Has Laid the Foundation to Raise Toxic Tort Litigation to New Heights*, 26 TEX. TECH. L. REV. 1041, 1053 (1995).

⁷⁵ This is sometimes called the "regulatory compliance" defense. On the whole, American courts have tended not to defer to regulatory standards in tort cases. They have been criticized for this tendency in recent years, and doctrine in the area may be undergoing some change. See generally, Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L. J. (2000) (forthcoming).

⁷⁶ Donald A. Carr & William L. Thomas, *Devising a Compliance Strategy Under the ISO 14000 International Environmental Management Standards*, 15 PACE ENVTL. L. REV. 85, 191-205 (1997).



by road damage resulting from slumping earth where a firm harvested timber on steep slopes. Although government regulations might permit it, and other firms might engage in similar harvesting, prohibition by a program such as that of the FSC could be taken as persuasive evidence of failure to exercise due care.⁷⁷ Again note that the firm could be liable whether it was certified or not. Thus law would operate to extend “voluntary” standards to non-participants.

(3) Nuisance

General standards for land use in Anglo-American law are defined through the law of nuisance, which generally prohibits uses of land which “substantially” and “unreasonably” interfere with the use and enjoyment of land by others.⁷⁸ Just what is unreasonable is hard to define, and depends on many factors (common practices in the area, priority in time, costs and benefits of the use, etc.). It is possible to anticipate, however, that in some instances certification standards, particularly substantive ones, could be called upon to define land uses as unreasonable. To offer a forestry example again, stream pollution which results from a clear cut larger than would be allowed by a certification system and which substantially affects the water quality of a downstream owner could potentially be cited as unreasonable, and enjoined by a court. The same might be true of air pollution suffered by downwind residents from a non-certified chemical plant.

(4) Misrepresentation

American tort law has long provided a cause of action to anyone physically injured as a result of reasonable reliance on a fraudulent misrepresentation made by one who is in the business of selling a product.⁷⁹ The common law requirement of physical harm is likely to limit the number of plaintiffs who can bring general common law actions involving certification programs,⁸⁰ but it is conceivable that some physical harm might result from misrepresentation of fact such as certification status and give rise to suits outside of the negligence framework.⁸¹

In any case, related statutory provisions regarding misrepresentation clearly provide actions for economic harm. The most important is a broadly worded provision of the federal “Lanham Act,” creating general liability for commercial misrepresentation of goods or services to either competitors or others who are damaged.⁸² It seems clear that this provision could be used in suits against firms said to be misrepresenting their certification status. It is even possible that it might be used against firms who claim to be managing their forests sustainably, but are not certified. Such suits could conceivably be brought by competitors who are certified, and who claim that their competitors are falsely implying that they are as well.⁸³ Suits under this provision will certainly be worth watching! In addition, the Federal Trade Commission and various state attorneys general have the authority to bring suits against companies for commercial misrepresentation, and have often done so.⁸⁴

ii) Property Law

American property law allows land owners to make environmental management commitments that will continue to be binding even if the land comes under new ownership. One of the most important forms is the “conservation easement,” through which an owner, while retaining possession of the land and the right to use it in many ways, can make specific commitments to another party regarding how the land will be used.⁸⁵ That party, which ordinarily

⁷⁷ Though the issue is not central to this article, note that the converse is also possible. Someone injured by a product or enterprise that met a privately set standard could sue the standard setting organization in tort. Although American courts traditionally eschew such suits, some important ones have been successful. See Shoaf, *supra* note 38 at 38 for an overview. See also Jeffrey Q. Smith, Jeanne P. Bolger and Amy Marasco, *Products Liability Claims Against Voluntary Standards Developers -- An Update on Recent Developments*, American National Standards Institute Website: http://web.ansi.org/public/library/guides/prod_liability.html.

⁷⁸ See generally, Prosser and Keeton, *LAW OF TORTS* (5th Ed, 1984).

⁷⁹ See *RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY*, Section 42B (1998) (“one engaged in the business of selling or otherwise distributing products who, in connection with the sale of a product, makes a fraudulent, negligent, or innocent misrepresentation of a material fact concerning the product is subject to liability for harm to persons or property caused by the misrepresentation.”)

⁸⁰ *Id.*, Section 21.

⁸¹ There have certainly been suits for misrepresentation of human rights records. One brought against clothing manufacturers operating in Saipan, for example, contributed to a fairly far reaching settlement monitored by an American not-for-profit organization. Monitoring Program: A Plan for Implementing Settlement on Apparel Production in Saipan <http://www.globalexchange.org/economy/corporations/saipan/monitoring.html>

⁸² Originally passed in 1946, the Lanham Act’s false advertising provision was amended in 1988 to read as follows: “Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.” 15 U.S.C. §1125(a)(1) (1994).

⁸³ For examples of the many kinds of suits that have been brought by competitors under the Lanham Act, see Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 29 B.U.L.REV. 807(1999).

⁸⁴ See Lee Goldman, *The World’s Best Article on Competitor Suits for False Advertising*, 45 FLA. L.R. 487, 505-506 (1993).

⁸⁵ The Uniform Conservation Easement Act defines a conservation easement as “[a] nonpossessory interest of a holder in real property imposing

must be a governmental or a not-for-profit organization, holds the “benefit” of the easement. It has the power to determine whether the commitments are being met, and to take action to enforce them if they are not. Certification appears to be an excellent way of enforcing the kinds of conservation easements which allow continued management for forestry, but prohibit overcutting, reductions of biodiversity, and the like. Using certification as an enforcement mechanism would considerably reduce the burden on benefit holders, and provide a “neutral,” third-party assessment of how well the burdens of the easement are being met. Accordingly, it seems likely that drafters of conservation easements will discover the benefits of certification and begin incorporating them in the agreements.

iii) Tax Law

Tax law could also become an important means of incorporating certification in the legal system. Conservation easements, for example, are often donated or sold to conservation organizations for very low prices. If the price received is less than the reduction in property value resulting from the transfer of the easement,⁸⁶ that difference can qualify as a charitable deduction under federal income tax law⁸⁷ and may bring additional tax benefits under state laws. Given the creativity of tax lawyers in arguing for deductions generally, it seems likely that other avenues in tax law will be probed in order to improve the financial benefits of certification.

iv) Information Regulation

As the Lanham Act indicates, U.S. law tends to treat information relatively seriously.⁸⁸ One very important statute in the environmental arena is the “community right to know” law, which requires users of specified toxic and hazardous chemicals to file annual reports disclosing names and quantities of chemicals either stored on site or released into

the air, land, or water.⁸⁹ Other laws require additional reporting of information on water and air pollution. Information reported under these statutes is generally available to the public from state and federal environmental agencies. Although it can be poorly coordinated and difficult to analyze, the value and accessibility of this information are likely to improve steadily as agencies implement modern, internet-oriented information systems. Moreover, if certification programs deliver on their promise to improve information production, management, and analysis in firms, those improvements may be reflected over time in the rules governing public disclosure requirements. Finally, public reporting laws are likely to be important aids to public and private monitoring of the implementation of environmental certification programs in firms. By creating external capacity to compare certified firms to each other and to uncertified firms, it may also provide extra leverage for those pushing firms to become certified and certification programs to become stringent.⁹⁰

v) Financial Regulation

U.S. financial regulation may be even more reliant on information disclosure than environmental regulation. Because the economic prospects of firms can be heavily affected by their environmental performance, financial regulation also has considerable potential to reinforce certification standards. Corporate disclosures are regulated both by detailed Securities and Exchange Commission (SEC) regulations, and by the general “anti-fraud” provisions of the securities laws, as well as by state laws. At present, the formal requirements of SEC rules are not particularly demanding regarding environmental issues. They tend to focus on potential legal liabilities of firms, and accord firms considerable discretion in deciding what to report.⁹¹ However, certified firms are free to report their status, and many will do so. Such information is valuable both to general analysts assessing the likely profitability of firms and to green consumers seeking to distinguish between investment options based on environmental performance. SEC regulations mandate “generally accepted accounting principles,” which are largely established by the profession itself through its own

limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property.” Unif. Conserv. Easement Act, § 1(1) (1981). The easement document ordinarily defines in much greater detail which uses will be allowed and which will not. See, e.g., Janet Kiehl and Thomas Barrett, *THE CONSERVATION EASEMENT HANDBOOK* (1988). The easement is recorded in the file on the property which is maintained by the central registry in the local jurisdiction where the property is located.

⁸⁶ Conservation easements are generally expected to reduce the market value of property because they transfer some of its development potential away from the property.

⁸⁷ 26 U.S.C. § 170(h) (1994)

⁸⁸ One possibly important exception is continuing reliance on industry self-regulation in the area of electronic commerce. This area remains very dynamic, and it is not clear either whether industry self-regulation will persist or whether it will have a significant influence on other areas.

⁸⁹ 42 U.S.C. § 11022 and 11023.

⁹⁰ The King and Lennox research on the American Responsible Care program indicates to potential power of public information reporting in assessing the effectiveness of certification programs. Andrew King and Michael Lennox, *Industry Self-Regulation Without Sanctions: The Chemical Industry's Responsible Care Program*, ACAD. OF MGNT. J. (forthcoming). Copy on file with author.

⁹¹ See generally, John W. Bagby, Paula C. Murray, and Eric T. Andrews, *So How Green Was My Balance Sheet?: Corporate Liability and Environmental Disclosure*, 14 VA. ENVTL. L.J. 225 (1995).

private standards setting process.⁹² While the long term existence and relative success of this division of responsibility suggests the potential of environmental certification programs, the immediately relevant point is that it provides a potential mechanism for incorporating certification status into financial reporting. Whether and how this will happen remains to be seen. An important trend, however, is that financial reporting standards relating to environmental performance are currently subject to increased attention and debate in the U.S.⁹³ The critique that reporting standards are overly conservative regarding environmental performance appears to be gaining ground. To the extent that it prevails, both formally and informally, financial reporting may become an increasingly important channel for legal incorporation of environmental certification in the future.

vi) Trade Law

The U.S. is signatory to a number of international trade treaties, including the series of agreements referred to as the General Agreement on Technical Barriers to Trade (GATT). The GATT requires, among other things, that “where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them . . . as a basis for technical regulations.”⁹⁴ While this provision pushes governments to formally incorporate international standards in their positive laws, the GATT is also likely to have broader informal incorporation effects over time. By presumptively privileging international standards, the GATT may give private international environmental standard setting programs implicit legal standing regardless of whether their standards formally incorporated in state laws. This is especially so because the World Trade Organization, the GATT’s primary trade regulation body, has found it extremely difficult to promulgate rules to date.⁹⁵ This situation virtually invites private international standard setting bodies to fill the vacuum as quickly as possible.

⁹² The standard setting process is organized through the Financial Standards Accounting Board, which also has an Emerging Issues Task Force that deals with problems such as those in the changeable field of environmental accounting and reporting. *Id.* at 306-7.

⁹³ *Id.* See also Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999).

⁹⁴ Agreement on Technical Barriers to Trade, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, REGULATION OF INTERNATIONAL TRADE, Basic Documents of International Economic Law, 1 B.D.I.E.L. 141 (Commerce Clearing House, 1994).

⁹⁵ See, e.g., Marco Bronkers, *Better Rules for a New Millennium: A Warning Against Undemocratic Developments in the WTO*, 2 J. INT. BUS. L. 547 (1999).

f) Forbearance

What does it mean when state legal systems take no direct action regarding private certification systems? Inaction is to be expected when certification systems are new and government has little experience with them. After certification programs become better understood, however, government forbearance may begin to take on meaning. Most likely it will be taken to indicate tacit approval. It could even be seen as an implicit delegation of regulatory authority to the program. In practice, of course, it might simply be the case that legislatures and agencies see more pressing needs for scarce government resources in other areas. Intentionally or not, however, government forbearance could grow into a form of tacit delegation over time, making it increasingly unlikely that government will significantly expand its regulatory presence in the areas. Assuming there remains a societal expectation that some program is necessary, government forbearance may thus contribute to the long-term strengthening of environmental certification programs. Institutionally oriented scholars would see them as having been incorporated into the social control system of which the formal legal system forms a part. That would have been accomplished with the assistance of the legal system by its essentially doing nothing!

3 Legal Control of Certification Systems

Legal systems can shape certification systems, and not merely incorporate them. Indeed, many of the legal incorporation mechanisms described above may affect the content and practice of certification as well. Certification systems are likely to be shaped in part with an eye to how legal systems may react.

a) Informal Steering

While government forbearance may be seen as a tacit form of approval or delegation, it can also be a tactical strategy for “steering” the development of certification programs. Regulatory officials and certification officials are likely to observe each other’s behavior. Government agencies are likely to be able to affect the substance and implementation of certification programs to some extent simply by how they signal they “might” react to them. Of course, this is simply the mirror image of certification programs trying to steer government policy, but it is important to note the capacity of government to affect programs by doing nothing yet giving signals about what it might do.

Governments might also be able to steer certification programs by providing them with technical expertise, by actively participating in them, or by supporting research on their performance, all of

which the U.S. is doing.⁹⁶ In particular, they could gather and support the analysis of data regarding the relative performance of certification programs and firms within them. Governments can thereby simultaneously hedge their policy bets and enhance the transparency of certification programs. By thus facilitating increased production and dissemination of information, they may also increase the learning capacity of the regulatory system as a whole.

b) Direct Regulation

Should informal steering not suffice, governments always have the option of regulating certification programs.⁹⁷ They might do this in a number of ways. First, they could redefine the substantive management standards which must be met by firms seeking to be certified.⁹⁸ Of course such an action would pose a dilemma for certification programs, particularly global ones, and they would have to decide whether to remain in business in the jurisdiction, try to get the law changed, ignore it, etc. Second, governments could impose rules governing the procedures followed by certification programs -- standard setting processes, certification processes, enforcement processes, etc. They might, for example, require more or different kinds of public participation in certification proceedings.⁹⁹ They might require the disclosure of information that designers of certification processes planned not to disclose. Given the discretion vested in certifiers by many private certification schemes, governments might also decide to define minimum qualifications for certifiers. In fact, governments could go so far as develop public certification standards for private certification programs! Note that the Connecticut law discussed above carries the seeds of such possibilities within it.

There are many more possibilities. Two points should be kept in mind. First, certification programs

perform public functions, functions which are most often carried out by government agencies under the types of rules listed above. Second, such forms of regulation have been imposed on other private actors with public responsibilities, such as medical professionals,¹⁰⁰ accountants,¹⁰¹ lawyers, and so on. There is no reason to assume that environmental professionals will enjoy permanent immunity.

c) Inhibition of Certification Systems

i) National Trade Regulation

Where industrial firms cooperate to set standards governing themselves, potentially raising prices for their products or inhibiting entry into their industry, national fair trade laws, such as the U.S. anti-trust laws, are always likely to be an issue. They have received considerable attention in development of certification programs to date. Often this attention has been private, with certification organizations seeking confidential advice from law firms and conducting confidential consultations with national trade authorities.¹⁰² Other times it has been public, sometimes when certification programs explain why they cannot be more ambitious,¹⁰³ and sometimes when they instruct participants on how to avoid anti-trust problems.¹⁰⁴ As noted in Section 2, national trade laws can impose some constraints, but do not seem to be a major obstacle to certification programs at this time.¹⁰⁵

ii) International Trade Regulation

The past few years have seen a major expansion in the power of the international trading institutions, which have used a series of international treaties to impose increasingly significant constraints on domestic regulatory programs. The World Trade Organization is currently responsible for implementing global trading policy by interpreting and applying

⁹⁶ Shoaf, *supra* note 38. See also General Accounting Office, "Certification Requirements: New Guidance Should Encourage Transparency in Agency Decision Making," Report to the Chairman, Committee on Small Business, House of Representatives, GAO/GCD-99-179 (September, 1999).

⁹⁷ The federal government, for example, has passed a statutory framework authorizing the U.S. Department of Agriculture to regulate the certification of organic foods. Organic Foods Production Act of 1990 (OFPA), 7 U.S.C. §6501 (2000). The department has yet to promulgate final standards under the Act, so many states have enacted their own programs. J. Howard Beales III, *Modification and Consumer Information: Modern Biotechnology and the Regulation of Information*, 55 FOOD AND DRUG L.J. 105, 117 (2000). See e.g. FLA. ADMIN. CODE ANN. 5h-19.004 (2000); IOWA ADMIN. CODE 21-47.1(190C) (2000).

⁹⁸ It should also be noted that the standards for certified firms could continue to be different from those for non-certified firms.

⁹⁹ Indeed, the American anti-trust laws already do so to some degree, by favoring standard setting processes that are open, balanced, and transparent. See generally, David A. Swankin, *How Due Process in the Development of Voluntary Consensus Standards Can Reduce the Risk of Anti-trust Liability*, Prepared for the U.S. Dept of Commerce, Nat'l Inst. of Standards and Tech., NIST-GCR-90-571 (1990); Shoaf, *supra* note 38.

¹⁰⁰ The American health care system, for example, involves a very complicated mix of non-governmental regulation by the Joint Commission on the Accreditation of Hospitals and detailed regulation of the behavior health care professionals and specific aspects of health care provision. See, e.g., Timothy Stoltzfus Jost, *The Joint Commission on Accreditation of Hospitals: Private Regulation of Health Care and the Public Interest*, 24 Bos. C. L. R., 835 (1983) and Steve P. Calandrillo, *Physician-Assisted Suicide Under Managed Care*, 26 J.L. MED. & ETHICS 72 (1998).

¹⁰¹ See, e.g., Daniel L. Goelzer and Susan Ferris Wyderko, *Rule 2(E): Securities and Exchange Commission Discipline of Professionals*, 85 NW. U. L. REV. 652 (1991).

¹⁰² E.g., Webb, *supra* note 69.

¹⁰³ Meidinger, *Private Environmental Regulation supra* note 3 (describing the American Forest & Paper Association's decision to employ a voluntary logger training program, rather than a requirement that all suppliers be trained in sustainable forestry methods).

¹⁰⁴ E.g., Swankin, *supra* note 99.

¹⁰⁵ Their primary effects have been on so-called "buyers groups," which are groups of wholesalers and retailer who jointly commit to buy only certified products. These groups have evidently been constrained in various ways by trade laws, but no published information has been found that explains how.

the General Agreement on Tariffs and Trade and recent important amendments on “technical barriers to trade” (TBTs).¹⁰⁶ As noted in Section 2, the GATT system is likely to be an importation mechanism for legal incorporation of certification systems. It can also pose some problems, however. The main issue facing private certification systems is whether they might be classified by the WTO as TBTs on grounds that they seek to differentiate among similar products based on how they were produced. Since the primary targets of the treaties are states, some observers question whether private certification organizations should be covered at all. The TBT amendments do apply to “recognized bodies,” however, a term not defined in the treaty.¹⁰⁷ Kernaghan Webb concludes that an organization like the ISO, with its designated national standards bodies, should be viewed as a recognized body, but that groups like the Forest Stewardship Council should not. This makes some sense, but is also vulnerable based on the analysis of the paper thus far. “Recognition” could be given either a broad or a narrow interpretation. On the broad side, even forbearance from regulating based on an assessment that a certification program is performing acceptably could be viewed as recognition. On the narrow side, the WTO could conclude that unless a state explicitly delegates authority to regulate in a field to a certification program, it is not a recognized program. This is another area that will bear watching. The effects of the WTO on domestic legal incorporation of certification programs could be quite significant in years to come. And of course, if the WTO is treated as a form of legal system even though it is not a nation state, we must ask the question to what degree it incorporates certification programs.

4 Conclusions

a) *Patterns of Legal Incorporation*

Certification programs are natural targets for legal incorporation because they have elements of formality, continuity, and institutionalization that other, ostensibly one-shot industry initiatives may not have, and also because they reduce the costs of deliberation for legal bodies. Although the incorporation of certification programs into U.S. law is only beginning to unfold, the analysis in Sections 2 and 3 suggests that it is occurring, mostly through indirect legal processes. Yet the process of legal

incorporation is very difficult to monitor. On the one hand, it can occur in so many small steps simultaneously in so many avenues that it is very difficult to trace. It can go forward almost unnoticed. On the other hand, there is a tension between the quasi-legal analysis performed above and quantitative analysis. The facts that the forms of incorporation described above can occur, and are occurring, do not necessarily demonstrate that a widespread change is taking place. They indicate that larger changes may be occurring, though, and that it is appropriate to inquire further.

b) *Implications*

Exactly how to inquire further is not clear. The problem is not only how to measure change, but also what change to measure. One of the primary reasons legal incorporation of certification is interesting is that it may signal larger shifts in social governance structures. The challenge is to grasp the dimensions of the change that are likely to most important. To date, most analysis has focused on questions such as whether private environmental programs yield environmental performance better than would have occurred otherwise, and whether they improve cost-effectiveness. Although the answers vary with specific cases, they seem to incline toward a cautious “yes.”¹⁰⁸ Provided certain safeguards are present, such as transparency and watchdog groups with the ability to monitor activities, environmental and efficiency gains can be achieved.¹⁰⁹ And of course, the fact that these gains are possible may be what impels the establishment of certification systems and other private initiatives in the first place.

Yet, other dimensions of change may be equally or more important. For example, the proliferation and institutionalization of certification systems may signal a general shift in political power from some actors to others. Who exactly who is gaining and losing power? Cutler, Haufler, and Porter, who have studied the growth of private authority in a number of sectors, conclude that traditional nation states are clearly losing ground, while corporate industrial interests are gaining.¹¹⁰ They argue that this shift is bringing a diminution of public participation and accountability.¹¹¹ In their even more expansive study, Braithwaite and Drahos agree that many

¹⁰⁶ GATT, *supra* note 94.

¹⁰⁷ Annex I of the TBT Amendments defines “standard” as a “document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory.” GATT, *supra* note 94.

¹⁰⁸ E.g., Carlo Carraro and Francois Leveque, eds., *VOLUNTARY APPROACHES IN ENVIRONMENTAL POLICY* (1999). See also the papers collected at the website on the Second CAVA Workshop on the Efficiency of Voluntary Approaches to Environmental Policy, <http://www.akf.dk/cava/wp.htm>.

¹⁰⁹ Carraro and Leveque, *id* at 10.

¹¹⁰ A. Claire Cutler, Virginia Haufler, and Tony Porter, eds., *PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS* (1999) at 369-70.

¹¹¹ *Id.*

states are losing ground to corporations and self-regulatory organizations in the emerging global regulatory system.¹¹² They see the system as fluid and highly variable, however, depending on the particular area of regulation and problem. Actors pursue their agendas in significant part by hashing out guiding principles, and even relatively small-scale players encounter a surprising number of strategic opportunities to affect the system. Nonetheless, the overall pattern is one of increasing control by large, powerful actors, working as often through private governance processes as through state ones.

The growth of a global regulatory system relying heavily on private regulation also raises important questions about the nature of political legitimacy, and whether it might be changing. Received social theory holds that to survive governance systems must establish significant claims to legitimacy with the public. How do private environmental regulatory systems do this? One possibility, of course, is that people simply do not understand how they work or how important they are. While this is true of some systems, which pretend to seek transparency while thwarting it in practice, it is not true of all of them. Moreover, the ones reviewed in the research underlying this paper seem to be moving on the whole toward increased transparency. Thus, it seems important to ask whether a new form of legitimacy may be emerging, one that is not based on traditional political processes managed by the state. If so, perhaps it is based on the certification systems' peculiar combination of commitments to laudable but diffuse goals, high expertise, selective stakeholder participation, and independence from government. Plausible or not, this kind of hypothesis has received only the most preliminary exploration to date. If private environmental certification systems flourish, such questions will have to be addressed.¹¹³

Fourth, as suggested above, voluntary agreements, certification programs, and legal incorporation may and perhaps should be seen in connection to larger developments in society. There has been a certain amount of work attempting to make such linkages to conventional legal institutions. Some approaches focus more on discursive processes in society,¹¹⁴

while others focus on organizational structures and patterns of relationships.¹¹⁵ The next step is to link the study of the incorporation of private regulatory systems to those constructs.

Finally, it may be time to revisit the meaning of "law" and "legal system." As the discussion of international trade law suggested, the role of the nation-state and state-based law is becoming increasingly problematical. It is being challenged from one side by the growth of a global trading system with an accompanying legal system, and from the other by the growth of private, often global regulatory mechanisms such as the certification systems. Yet the two supposedly defining characteristics of certification systems, their privateness and their voluntariness, are highly contingent. They are under serious threat as a result of the linkages of certification systems to national and transnational legal systems. They could turn into their opposites before we really notice it. If so, perhaps they were not what they seemed.

Appendix A. Examples of Forest Stewardship Council Principles and Standards.

The Forest Stewardship Principles and Criteria, applicable around the world, are as follows:

Forest management shall **respect all applicable laws** of the country in which they occur, and international treaties and agreements to which the country is a signatory, and comply with all FSC Principles and Criteria.

1. Long-term **tenure and use rights** to the land and forest resources shall be **clearly defined**, documented and legally established.
2. The legal and customary **rights of indigenous peoples** to own, use and manage their lands, territories, and resources shall be recognized and respected.
3. Forest management operations shall maintain or enhance the long-term social and economic **well-being of forest workers and local communities**.
4. Forest management operations shall encourage **the efficient use of the forest's multiple products and services** to ensure economic viability and a wide range of environmental and social benefits.
5. Forest management shall **conserve biological diversity** and its associated values, water resources, soils, and unique and fragile ecosystems and landscapes, and, by so doing, maintain the ecological functions and the integrity of the forest.
6. A **management plan** -- appropriate to the scale and intensity of the operations -- shall be written, implemented, and kept up to date. The long term objectives

¹¹² John Braithwaite and Peter Drahoš, *GLOBAL BUSINESS REGULATION* (2000). They see the U.S. and the European Union, however, as still the most powerful actors in the global regulatory system.

¹¹³ It should also be noted that the question of legitimacy plagues both private certification systems and supra-national governmental entities, such as the WTO and the EU, which also stand in some tension with nation states. See, e.g., Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: the Example of the European Community*, 99 *COLUM. L. REV.* 628 (1999).

¹¹⁴ E.g., Teubner, *supra* note 13.

¹¹⁵ E.g., David M. Trubek, Yves Dezalay, Ruth Buchanan, and John R. Davis, *Global Restructuring and The Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 *CASE W. RES. J. INT'L L.* 407 (1994) (emerging systemic relationships, particularly the growth of a global trading order, may drive changes in both private and public legal orders).

of management, and the means of achieving them, shall be clearly stated.

7. **Monitoring** shall be conducted -- appropriate to the scale and intensity of forest management -- to assess the condition of the forest, yields of forest products, chain of custody, management activities and their social and environmental impacts.
8. Management activities in **high conservation value forests** shall maintain or enhance the attributes which define such forests. Decisions regarding high conservation value forests shall always be considered in the context of a precautionary approach.
9. **Plantations** shall be planned and managed in accordance with Principles and Criteria 1 - 9, and Principle 10 and its Criteria. While plantations can provide an array of social and economic benefits, and can contribute to satisfying the world's needs for forest products, they should **complement** the management of, reduce pressures on, and promote the restoration and conservation of **natural forests**.

Exemplifying the countless standards and indicators implementing the principles and criteria are those of the Canadian Maritime Region regarding biodiversity, which were promulgated as a regional application of Principle 6 above:

- 6.2** * Safeguards shall exist which protect rare, threatened, and endangered species and their habitats (e.g. nesting and feeding areas). Conservation zones and protection areas, appropriate to the scale and intensity of forest management and the uniqueness of the affected resources, shall be established. Inappropriate hunting, fishing, trapping and collecting shall be controlled.
- 6.2.1** * Threatened and endangered species (listed by provincial and federal endangered species legislation) and their habitat must be protected or managed in accordance with approved recovery plans. Where recovery plans are not yet approved, disturbance of known occurrences of such species is to be avoided and a cautionary approach taken to protect their habitat. Forest owner/manager activities must ensure that species that are rare, vulnerable or under investigation by COSEWIC, or their provincial equivalents as designated by recognized authorities (e.g. academic experts, provincial or national museums or COSEWIC) are not further threatened by timber or non-timber activities.

Indicators:

Areas are inventoried for such species before harvesting, stand improvement or road-building activities are carried out (appropriate to the scale and intensity of the operation).

Protection of such species is addressed in the management plan.

Known occurrences of such species and their habitat are not disturbed.

Forest workers are aware of known occurrences of such species and are following the management plan with respect to protecting such species and their habitat.

Management staff is aware of those species that may occur locally.

6.2.2 * Old growth stands must not be harvested.

Indicators:

Inventories are carried out to identify old growth stands (appropriate to the scale and intensity of the operation).

Old growth stands are identified on management plan maps.

No evidence of harvesting old growth stands exists.

Management and forest workers are aware of the characteristics of old growth stands.

6.2.3 Areas with unusually high native species or ecosystem diversity must be identified, and protected or managed in such a way as to ensure that the diversity is not lost.

Indicators:

Management has identified areas with unusually high native species or ecosystem diversity using the latest regional methodology, formulae, and/or techniques (e.g. those used by WWF, Greater Fundy Ecosystem Research Group or New Brunswick Nature Trust).

Such areas are identified on management plan maps.

Management plans detail measures to ensure the diversity of such sites is not lost.

Forest workers are following the management plan measures to ensure the diversity of such sites is not lost.

Appendix B. The ISO Environmental Management System Standard's environmental policy provision.

4.2 Environmental Policy

Top management shall define the organization's environmental policy and ensure that it

- a) is **appropriate** to the nature, scale and environmental impacts of its activities, products or services;
- b) includes a **commitment to continual improvement and prevention of pollution;**
- c) includes a **commitment to comply with relevant environmental legislation and regulations,** and with **other requirements** to which the organization subscribes;
- d) provides the **framework for setting and reviewing environmental objectives and targets;**
- e) is **documented, implemented and maintained and communicated** to all employees;
- f) is **available to the public.**¹¹⁶

¹¹⁶ ISO, International Standard 14001, Environmental management systems -- Specification with guidance for use. § 4.2.