Environmental Gatekeeping in State Laws

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Table of Contents

EXECUTIVE SUMMARY

This report explores the use of "gatekeeper" mechanisms as a means of enhancing the effectiveness of State environmental programs. A gatekeeper is an independent third party (viz. neither a government employee nor a member of the regulated community) who is enlisted by the government to assure that regulated entities properly perform under a regulatory scheme.

Gatekeeping mechanisms offer many potential benefits. The use of gatekeepers enhances achievement of regulatory objectives, promotes competent compliance through professional performance of required actions, and minimizes government resources necessary to achieve regulatory objectives. Environmental programs are among the regulatory programs that could take advantage of these benefits.

The report identifies three features that a gatekeeping scheme must have to realize these benefits to the greatest extent. First, all regulated entities must be required to use the gatekeeper. Second, the gatekeeping scheme must assure that the gatekeeper has the necessary skills to perform the gatekeeping function. Third, the gatekeeping scheme must include quality control measures to assure continuous proper performance by the gatekeeper.

To evaluate any gatekeeping scheme, the report suggests that environmental regulators must consider the existence or potential availability of these features and the costs, both direct and indirect, of providing for these features.

The report presents one model gatekeeping scheme already familiar to regulators--the use of accountants to certify certain financial statements filed with the Securities and Exchange Commission. Several existing and one proposed State environmental

gatekeeping mechanism are then described and analyzed. These mechanisms cover a wide-variety of gatekeeping functions ranging from certifying toxic use reduction plans to managing the cleanup of hazardous waste sites. The specific mechanisms discussed in the report are:

- Toxic Use Reduction Plans
- High Sulfur Fuel Emissions Audits
- Certified Hydrogeological Assessments
- Certified Wastewater Treatment Facility Operators
- Certified Backflow Prevention Device Testers
- Real Property Transaction Gatekeepers
- Licensed Site Managers

From this analysis, the report identifies the characteristics of a regulatory situation that could significantly benefit from the use of a gatekeeper mechanism. These characteristics are: (1) a large regulated community; (2) gatekeeping function that requires the use of technical skills provided by the private sector; and (3) the existence of quality control measures that rely primarily on the private sector to be implemented.

The report concludes that since many of the most innovative and expansive environmental gatekeeping mechanisms are still in the experimental phase, State environmental regulators must continue to experiment with these programs and share with each other information on their successes and failures. Environmental gatekeeping shows a strong potential to enhance environmental protection efforts.

I. INTRODUCTION

This report explores the use of "gatekeeper" mechanisms as a means of enhancing the effectiveness of State environmental programs. Gatekeepers are mechanisms established by law to enlist third parties in the work of assuring environmental compliance by a regulated community. As the examples described in the report illustrate, gatekeepers offer a way to extend the government's reach by promoting efficient use of limited resources and by tapping into private expertise. Thus, the private sector becomes responsible, in part, for legitimizing and professionalizing, as well as improving, environmental protection.

The report first describes the concept of gatekeeping and identifies some of the common characteristics of gatekeeping mechanisms. The report then examines several gatekeeper mechanisms used by State environmental agencies.

II. THE GATEKEEPING CONCEPT

A. Features of the Gatekeeping Mechanism

A gatekeeper is an independent third party (viz. neither a government employee nor a member of the regulated community) who is enlisted by the government to assure that regulated entities properly perform under a regulatory scheme. Gatekeepers possess special professional or technical skills that qualify them to perform their function, and they are compensated directly by the regulated entity for their services.

Gatekeepers are familiar tools in the non-environmental regulatory arena. For example, private physicians act as government-certified gatekeepers to prevent illegal distribution of controlled substances.[1] An individual may obtain a prescription drug only by first securing a prescription from a licensed physician. By requiring physicians to refrain from prescribing unnecessary or illegal prescription drugs, the law sets the physician up as a gatekeeper to control access to those drugs. The physician possess special training that qualifies him or her to evaluate the propriety of any prescription, and the patient pays the physician directly for writing the prescription.

This example illustrates some of the potential benefits of a gatekeeping scheme for any regulatory program:

- It enhances achievement of regulatory objectives. In this example, individuals are prohibited from access to controlled substances unless they obtain a prescription.

- It promotes competent compliance through professional performance of required actions. In this instance, only a trained physician can assure proper distribution of the controlled substances.

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[1]See R.H. Kraakman, "Gatekeepers: The Anatomy of Third Party Enforcement Strategy," 2 Journal of Law, Economics, and Organization 52 (Spring 1986) for further discussion of this example and the gatekeeper mechanism in general.

- It minimizes government resources necessary to achieve regulatory objectives. In this instance, the government does not need to spend resources to screen each individual transaction or decision; only the performance of the physician must be monitored.

Environmental programs are among the regulatory programs that could take advantage of these benefits. Before exploring the uses of environmental gatekeepers, however, it is necessary to understand how a gatekeeping mechanism must be structured.

In order for a gatekeeping scheme to reap all of these benefits, it must have the following features. First, all regulated entities must be required to use the gatekeeper. For example, if the law allowed an individual to obtain a controlled substance in certain circumstances without a prescription, the gatekeeping function served by physicians would be undermined.

Second, the gatekeeping scheme must assure that the gatekeeper has the necessary skills to perform the gatekeeping function. Again turning to the example of the physician, if unskilled individuals were allowed to write prescriptions, there would be a greater risk of the scheme not working.

Third, the gatekeeping scheme must include quality control measures to assure continuous proper performance by the gatekeeper. For example, if physicians could not be sanctioned for writing illegal prescriptions, the scheme would not work.

Thus, in evaluating any gatekeeping mechanism, environmental regulators need to confirm the existence or potential availability of these features. As the examples of gatekeeping mechanisms described in this report illustrate, some gatekeeper-type mechanisms share only some of these features, while others do not fully take advantage of these features. In evaluating any gatekeeping mechanism, environmental regulators also need to consider the costs, both direct and indirect, of providing for these features.

The direct cost of drafting and passing a law or regulation imposing a requirement on regulated entities to use a gatekeeper may be negligible. However, requiring the use of a gatekeeper in a given situation may result in indirect additional transaction costs.

There are also costs involved in assuring that gatekeepers possess the special technical or professional skills that qualify them to perform their gatekeeping function. These skills may be acquired (i) in the course of the professional training that an individual receives independent of the gatekeeper function or (ii) through a training program especially created to provide special skills for a specific gatekeeper function. For example, under the federal securities laws, accountants are used as gatekeepers to assure the proper preparation of certain financial statements filed with the federal Securities and Exchange Commission. The accountants acquire the necessary gatekeeping skills in the course of their professional training and their preparation for professional examinations, such as the CPA (certified public accountant) examinations. Consequently, the government does not have to provide special training for accountants to conduct their gatekeeping function. On the other hand, individuals who will certify toxic use reduction plans in Massachusetts will need to receive special training to qualify them to review these plans. This training will be provided through a program established by the Commonwealth for this purpose.

Establishing and administering mechanisms to assure the quality of a gatekeeper's performance may also require resources. Quality control mechanisms options that can be implemented directly by the government include: (1) monitoring the performance of a gatekeeper, (2) establishing penalties or imposing liability on gatekeepers for inadequate performance, and/or (3) retesting and retraining gatekeepers. The government may also be able to rely on other institutional mechanisms, such as

professional associations, market forces, or ethical constraints, to take the lead in safeguarding the quality of a gatekeeper's performance.

Finally, in evaluating any gatekeeping mechanism, the amount and availability of public resources necessary to fund a governmental effort in lieu of a private gatekeeper must be considered. If such resources are not available, even an imperfect gatekeeping scheme may be preferable to no regulatory action.

B. A Gatekeeping Model

Environmental regulators can look to the federal securities laws for a time-tested model of the gatekeeper mechanism. The federal securities laws require use of accountants as gatekeepers to assure the accuracy and consistency of certain financial statements filed with the Securities and Exchange Commission (SEC). Every corporation registered on a national exchange is required to file an annual report with the SEC.[2] As part of the annual report, these corporations must supply the SEC with "audited" financial statements.[3] To be "audited", the statement has to be examined by an accountant "in accordance with generally accepted auditing standards for the purpose of expressing an opinion thereon."[4] The gatekeeper in this situation is the private accountant, chosen and paid by the corporation, that verifies the financial statements of the corporation.

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[2] 15 USC Section 78m. These annual reports are often commonly referred to as "10-K's," the name of the form generally prescribed by the SEC for filing these reports. The federal securities laws have other financial reporting requirements, such as those required in connection with the registration of publicly traded securities, that also rely in varying degrees on accountants as gatekeepers.

[3] 40 CFR Part 210 (1990).

[4] 40 CFR Part 210.1-02(d) (1990).

The securities laws and regulations contain several safeguards to assure that the gatekeeper mechanism works, i.e., that the audit by the private accountant results in the form of financial statements desired by the SEC. First, the SEC regulations prescribe the method of accounting that the private accountant must follow in auditing the financial statements: the financial statements must be audited in accordance with generally accepted auditing standards for the purpose of expressing an opinion thereon.[5] By specifying the use of standard procedures to audit the financial statements of a company, the SEC prevents misrepresentations of financial conditions through the use of unorthodox accounting procedures.

Second, the SEC confirms that these procedures have been followed through its regulations requiring the accountant's report (which accompanies the audited financial statement) to state whether the audit was made in accordance with generally accepted auditing standards, to identify any necessary auditing procedures which have been omitted, and to provide the reasons for any such omissions.[6] The SEC also requires the accountant's report to include an "opinion" on the financial statements covered by the report, the accounting principles and practices reflected in such statements, and the consistency of the application of the accounting principles or any changes in such principles that have a material effect on the financial statements.[7] Finally, any matters as to which an accountant takes exception must be clearly identified and the effect of

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[5] Id.

[6] 40 CFR Part 210.2-02(b) (1990).

[7] 40 CFR Part 210.2-02(c) (1990).

each exception on the related financial statements must be stated.[8] As a result of these requirements, any misrepresentations of a company's financial condition due to the use of unorthodox accounting principles should be disclosed by the accountant certifying the audited financial statement.

Third, the SEC has adopted regulations to assure that the private accountant used by a company to audit the financial statements it files with the SEC is professionally competent. These regulations rely on State professional licensing and disciplinary procedures to guarantee the qualifications of these accountants. The SEC has interpreted the federal securities laws to require certification of the financial statements filed with the annual report by an accountant qualified as a "certified public accountant" or "public accountant."[9] To be recognized as a certified public accountant by the SEC, an individual has to be duly registered and in good standing as such under the laws of the place of the individual's residence or office.[10] To be recognized as a public accountant by the SEC, an individual must be in good standing and entitled to practice as such under the laws of the individual's place of residence or principal office.[11] The SEC has also set standards to determine whether an accountant is in fact independent.[12]

The risk of liability under federal and State securities and tort laws further assures that these accountants will properly perform their duties. Under the federal securities

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[8] 40 CFR Part 210.2-02(d) (1990).

[9] Telephone conversation with Bob Burns, attorney, Securities and Exchange Commission, Office of the Chief Accountant.

[10] 40 CFR Part 210.2-01(a) (1990).

[11] Id.

[12] 40 CFR Part 210.2-01(b) (1990).

laws, an accountant may be subject to civil suits for damages instituted by private plaintiffs or the SEC, and/or to criminal prosecution if the audited financial statements do not accurately reflect the financial condition of the company.[13] The SEC also has the authority under its administrative regulations to suspend unqualified accountants, accountants that have engaged in unethical or improper conduct, and accountants that have wilfully violated or wilfully aided and abetted the violation of the federal securities laws, from practicing before the SEC.[14] Such suspension from practice precludes preparation of any statement to be filed with the Commission -- a significant sanction. Finally, accountants who fail to properly perform their auditing duty are potentially subject to liability for damages under State tort law.

Accountants also risk loss of professional licenses and accreditation if they fail to properly audit the financial statements of a company. Licensing of accountants is a matter of State law. Most States have a State Board of Accountancy which handles licensing and professional disciplinary actions. Failure to follow generally accepted auditing principles in the preparation of a company's financial statements could subject an accountant to disciplinary action before the State Board. Membership in the American Institute of Certified Public Accountants may also be suspended or revoked in such event.

The required use of accountants to certify financial statements filed with the SEC illustrates the three common features of a gatekeeping scheme. The SEC has required all corporations filing these annual reports to use a third party, the accountant, to assure

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[13] 15 USC Section 78j; 15 USC Section 78m; 15 USC Section 78r.

[14] 40 CFR Part 201.2(e) (1990).

performance of a required action, i.e., preparation of accurate and consistent financial statements. The SEC relies on the accountant's professional training and expertise to assure proper review of the financial statements. Finally, the accountant is subject to the imposition of a variety of sanctions for dishonest or incompetent performance in certifying these financial statements.

The environmental gatekeeping mechanisms described in the next section of this report all incorporate, in varying degrees, these features.

III. USE OF GATEKEEPERS IN ENVIRONMENTAL COMPLIANCE

In this section, we analyze the actual use of gatekeepers in some State environmental regulatory programs. We also discuss one proposed scheme (the "licensed site manager"). These examples suggest that gatekeeping may have significant potential benefits for environmental programs. Massachusetts has experimented with a significant number of these systems (as noted below), although several other States have used variations of the gatekeeper approach. The following discussion describes some of the State programs that take advantage of gatekeeper mechanisms.

A. Massachusetts Toxics Use Reduction Planners

With the adoption of the Toxics Use Reduction Act (TURA) on July 24, 1989, Massachusetts set out to achieve by 1997 a fifty percent reduction in the quantities of toxic or hazardous byproducts generated by firms in the Commonwealth, based on 1987 levels.[15] Firms are to accomplish this reduction through several approved toxic use reduction techniques. These techniques will be implemented through the required preparation by certain firms of toxic use reduction (TUR) plans. The effectiveness of these plans is to be assured through a gatekeeping mechanism -- namely the review and certification of the plan by a certified toxic use reduction planner.

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[15]M.G.L. Chap. 21(I)(13)(A). "Byproduct" is defined as "all nonproduct outputs of toxic or hazardous substances generated by a production unit, prior to handling, transfer, treatment or release."

Toxic Use Reduction Techniques

"Toxics use reduction" is defined by the Act as:

> in-plant changes in production processes or raw materials that reduce, avoid, or eliminate the use of toxic or hazardous substances or generation of hazardous byproducts per unit of product, so as to reduce the risk to the health of workers, consumers, or the environment, without shifting risks between [sic] workers, consumers, or parts of the environment.[16]

The law identifies six categories of process changes as legitimate toxics use reduction techniques:

1. Input substitution, which refers to replacing a toxic or hazardous substance or raw material used in a production unit with a non-toxic or less toxic substance;

2. Product reformulation, which refers to substituting for an existing end-product an end-product which is non-toxic or less toxic upon use, release, or disposal;

3. Production unit redesign or modification, which refers to developing and using production units of a different design than those currently used;

4. Production unit modernization, which refers to upgrading or replacing existing production unit equipment and methods with other equipment and methods based on the same production unit;

5. Improved operation and maintenance of production unit equipment and methods, which refers to modifying or adding to existing equipment or methods including, but not limited to, such techniques as improved housekeeping practices, system adjustments, product and process inspections, or production unit control equipment or methods; or

6. Recycling, reuse, or extended use of toxics by using equipment or methods which become an integral part of the production unit of concern, including but not limited to filtration and other closed loop methods.[17]

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[16]M.G.L. Chap. 21(I)(2).

[17]Id.

By July 1, 1994, large quantity toxics users (LQTs) must prepare a toxics use reduction plan using any of the approved techniques for each facility that manufactures or processes at least 25,000 pounds of a toxic or hazardous substance, or that otherwise uses at least 10,000 pounds of a toxic or hazardous substance.[18] LQTs are defined as owners or operators of facilities within certain Standard Industrial Classification (SIC) Codes that manufacture or process at least 25,000 pounds of a toxic or hazardous substance, or that otherwise use at least 10,000 pounds of a toxic or hazardous substance.[19]

The number of facilities that will be covered by TURA's planning requirements is difficult to estimate. At a minimum, the 584 Massachusetts manufacturing facilities that have reported their toxic emissions in the Toxics Release Inventory established by EPCRA §313 will have to prepare plans. A number of additional facilities will be covered by TURA because EPCRA §313 is limited to manufacturers (i.e. only to facilities within SIC Codes 20-39) and covers fewer substances.[20]

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[18]M.G.L. Chap. 21(I)(11)(A). The TURA list of toxic or hazardous substances consists of (i) the Toxic Chemical List established pursuant to EPCRA §313 and (ii) all chemicals listed pursuant to CERCLA §101(14) and §102.

[19]M.G.L. Chap. 21(I)(2) TURA's planning requirements cover facilities in SIC Codes 10-14, 20-40, 44-51, 72-73, 75, and 76.

[20]Moreover, according to EPA's National Toxics Release Inventory Report for 1988, nationwide about one-third of the facilities covered by EPCRA §313 have failed to submit TRI reports.

Plan Contents and Certification

A toxics use reduction plan must include:[21]

1. A statement of facility-wide management policy regarding toxics use reduction.

2. A statement of the scope and objectives of the plan, containing two- and five-year goals for reducing facility-wide toxics use and byproduct generation.

3. For each production unit:

   a. A comprehensive economic and technical evaluation of appropriate technologies, procedures and training programs for potentially achieving toxics use reduction for each covered substance;

   b. An analysis of current and projected toxics use, byproduct generation, and emissions;

   c. An evaluation of the types and amounts of toxic substances used;

   d. An identification of the economic impacts of the use of each toxic substance, including but not limited to:

      - raw material storage and handling costs
      - byproduct storage and handling costs
      - potential liability costs
      - costs associated with regulation;

   e. An identification of each technology, procedure, or training program to be implemented for the purposes of achieving toxics use reduction, and the anticipated costs and savings associated with each;

   f. A schedule for implementation of such technologies, procedures and training programs; and

   g. A two-year and five-year goal for the byproduct reduction index.[22]

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[21] M.G.L. Chap. 21(I)(11)(A)(2).

[22] The "byproduct reduction index" is calculated by the formula "100 x ((A - B)/A)," where A represents byproduct generated per unit of product in the base year, and B represents the byproduct generated per unit of product in the current year. M.G.L. Chap. 21(I)(10)(C)(1)(d). Thus, an index of "0" would indicate that the same amount of

Each toxics use reduction plan must be certified by a qualified toxics use reduction planner. The planner must state that the plan meets the criteria established by the Massachusetts Department of Environmental Protection (MDEP) for acceptable plans.[23] Furthermore, each plan must be updated and recertified every two years.

To become a certified toxics use reduction planner, an individual must either (i) satisfactorily complete the required program of study at the Toxics Use Reduction Institute[24] and pass a uniform certification examination, or (ii) have two years of relevant work experience in toxics use reduction activities. The statute does not indicate who has the authority to certify planners on the basis of work experience or what the criteria are for sufficient experience. Those who qualify for certification by work experience, rather than by training and examination, are certified only to prepare, review and approve of TUR plans in facilities owned or operated by their employers.

The Toxics Use Reduction Institute is to develop by July 1, 1991 a program for training and certifying individuals to prepare, review and approve of toxics use reduction

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byproduct was generated in the current year as in the base year, while an index of "100" would indicate that byproduct generation was reduced to zero in the current year. The "base year" is the later of (i) the facility's first EPCRA §313 reporting obligations, or (ii) the first year for which information is available to measure toxics use and byproduct generation. M.G.L. Chap. 21(I)(A)(2)(b).

[23]MDEP is required to promulgate regulations specifying criteria for "acceptable plans" by January 1, 1991. These regulations are currently available in draft form.

[24]The Toxics Use Reduction Institute is established by TURA at the University of Lowell. The Institute, funded in part by fees assessed on the use of toxic and hazardous substances by firms in the Commonwealth, is currently developing a curriculum for higher education of students and faculty on toxics use reduction. In addition to educating and training professionals, the Institute is required to provide technical assistance on toxics use reduction for citizens, community groups, workers, labor representatives and local government officials. M.G.L. Chap. 21(I)(6).

plans.[25] Other public and private colleges and universities in the Commonwealth may also develop these training programs, subject to approval of the Administrative Council on Toxics Use Reduction.[26] Planners' certifications must be renewed every two years by completing continuing eduction instruction in toxics use reduction activities, and certification may be suspended or revoked at any time by MDEP based on a finding of fraud, gross negligence, or other good cause.[27]

Plan Summaries and Other Reporting Requirements

Each company must file a plan summary with MDEP by July 1 of each year in which it is required to prepare a TUR plan. MDEP must make these plan summaries available to the public. The plan summary must include (i) a copy of the plan certification by the TUR planner, (ii) the plan's analysis of current and projected toxics use, byproduct generation, and emissions at the facility, (iii) the plan's two-year and five-year goal for the facility's byproduct reduction index, and (iv) a matrix form for each production unit in which a toxic or hazardous substance is used.[28] The matrix must indicate the methods by which the facility intends to reduce the unit's generation of byproduct. The horizontal axis of the matrix lists the six toxics use reduction techniques recognized by the Act (described above). The vertical axis lists the following types of

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[25]M.G.L. Chap. 21(I)(6)(E).

[26]The Council is an oversight board on which sit representatives of MDEP, the executive offices of Environmental Affairs, Economic Affairs, and Labor, the Department of Public Health, and the Office of Science and Technology.

[27]M.G.L. Chap. 21(I)(12)(C) & (E).

[28]M.G.L. Chap. 21(I)(11)(F).

production operations: materials handling and storage, processing operations, and finished goods handling.

The annual progress that a facility makes in realizing the byproduct reduction goals contained in its TUR plan and plan summary will be measured by the facility's annual toxic or hazardous substance reports submitted to the MDEP.[29] These reports are intended to supplement, and must be submitted in conjunction with, the federal toxic chemical release reports required under EPCRA §313. Among other information, the annual reports contain, for each production unit, a byproduct reduction index and a matrix indicating the methods used to reduce byproduct generation during the current reporting year.

Plan Review

LQT's are required to keep a facility's TUR plan on the premises of the facility and to make the plan available for review by MDEP upon request.[30] Unlike the plan summaries, the plans themselves do not have to be submitted to MDEP or any other State agency, nor do they have to be made available for public review.[31]

TURA also authorizes citizens to require MDEP to review and determine the adequacy of a facility's TUR plan. Any ten residents living within ten miles of a facility may petition MDEP to examine that facility's TUR plan, summary, and any required back-up data and determine their adequacy. MDEP must determine whether the plan,

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[29]M.G.L. Chap. 21(I)(10).

[30]M.G.L. Chap. 21(I)(11)(C).

[31]M.G.L. Chap. 21(I)(18)(A).

plan, summary, and back-up data meet the standards established pursuant to TURA and must report its finding in writing to the petitioners within a reasonable time.[32]

Enforcement of Planning and Reporting Requirements

If, in the course of reviewing a TUR plan or plan summary, MDEP determines that the plan or plan summary does not meet the requirements of TURA, MDEP must give notice of the deficiency to the facility. The facility has ninety days from the date of the notice to correct the deficiency, unless the deficiency was intentional.[33] The statute does not specify a particular procedure for MDEP to follow in the case of an intentional deficiency.

For violation of any provision of TURA, or any regulation or approval issued or adopted thereunder, MDEP may (i) provide the facility with technical assistance, (ii) issue an administrative order requiring compliance with the applicable requirement, and/or (iii) issue an administrative penalty.[34] Additionally, TURA authorizes citizens[35] to bring a judicial action against facilities alleged to be in violation of the requirements of the Act, or against an appropriate official of the Commonwealth for an alleged failure to perform a nondiscretionary duty under TURA.[36]

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[32]M.G.L. Chap. 21(I)(18)(B).

[33]M.G.L. Chap. 21(I)(11)(H).

[34]M.G.L. Chap. 21(I)(16).

[35]"Any ten residents of the Commonwealth," M.G.L. Chap. 21(I)(18)(C)(1).

[36]Id.

Command and Control Authority

If the planning and technical assistance "self-help" approach to toxics use reduction fails to work, TURA includes a second phase that authorizes "command and control" regulation. Beginning July 1, 1995, the Administrative Council on Toxics Use Reduction is authorized to designate certain industry groups as "priority user segments" based in part on the industry's lack of progress in achieving toxics reductions.[37] Once a group of firms is designated, MDEP has the authority, among other things, to require "small quantity users" in that group, otherwise exempt, to comply with TURA's planning and reporting requirements.[38] MDEP can also impose performance standards on user segments or particular firms.[39] These performance standards will require firms to achieve a specified level of byproduct generated per unit of product within a reasonable time frame, not to exceed three years. Such performance standards must be based on reasonably proven, public domain technologies and/or industry practices.[40]

Analysis of TURA's "Gatekeeper" Functions

TURA provides for "gatekeepers" in the form of toxic use reduction planners. These planners, and not MDEP or any other State agency, are assigned primary responsibility for ensuring that a firm's toxic use reduction plan is "acceptable." In fact, in most cases, neither MDEP nor the public will see a copy of the plan because only the plan summary is required to be submitted to MDEP.

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[37]M.G.L. Chap. 21(I)(14)(A).

[38]M.G.L. Chap. 21(I)(11)(G).

[39]M.G.L. Chap. 21(I)(15)(A).

[40]M.G.L. Chap. 21(I)(15)(B) and (C).

TURA includes mechanisms and incentives for these gatekeepers to perform their duties satisfactorily. The certification process for toxics use reduction planners ensures that these gatekeepers have the minimum skills necessary to carry out their duties. TURA also provides opportunities for MDEP and the public to monitor performance of the planners. In addition to having plan summaries on file for review, MDEP has the authority to review a facility's TUR plan and any back-up data. Residents of the Commonwealth also have the authority to require MDEP to review plans for adequacy. If this review uncovers an inadequate plan, the facility could be subject to imposition of administrative penalties by MDEP or suit by citizens groups. As a result, facility owners and operators have an incentive to use qualified and competent planners.

Furthermore, planners may lose their accreditation in the case of "fraud, gross negligence or other good cause." However, whether planners may lose their accreditation for preparing or approving an inadequate plan, short of fraud or gross negligence, is unclear. Also, an individual who qualifies on the basis of work experience rather than through the training program may have less incentive to perform satisfactorily as a gatekeeper. Those qualifying through work experience are only authorized to prepare and approve of plans for facilities owned by their employers. Since these individuals are not "career" or "professional" planners, they may have less to lose if their accreditation were revoked.

Finally, TURA does not provide for its gatekeepers to play a direct role in ensuring that facilities actually implement the plan or meet its goals. No certification by the planners on implementation of a plan or achievement of goals is required. The statutory incentive for companies to meet their reduction targets is provided by the threat of "command and control" regulations which may be promulgated in phase two of

TURA. Companies are expected to be motivated to carry out their plans voluntarily and to achieve significant toxics use reduction by the specter of this regulatory burden.

Review and certification of toxic use reduction plans is a good opportunity for use of gatekeepers because of the highly technical nature of the skills necessary to perform this function, as well as the large number of facilities subject to the planning requirement. Although the Commonwealth will incur some costs in administering the certification program, using gatekeepers saves the government the cost of directly reviewing and certifying plans for each facility.

Toxic Use Reduction Planning Requirements in Other State Laws

Several other States, including California, Illinois, Indiana, Minnesota, New York, North Carolina, Oregon, and Washington, are experimenting with the use of planning requirements in recent legislation on toxics use reduction, pollution prevention, and/or hazardous waste reduction. In contrast to Massachusetts, however, none of these plan mechanisms requires the use of a third party as a gatekeeper in order to accomplish reductions of toxic and hazardous substances. Although all of these State laws rely on the skills of the private sector for plan preparation, they vary widely in their means of enforcing planning and reporting requirements and ensuring adequacy of plans.

Oregon

The Oregon Toxics Use Reduction and Hazardous Waste Reduction Act,[41] requires Oregon facilities subject to EPCRA §313 and other large generators of

[41] 1989 Or. Laws Chap. 833 §§2-16.

hazardous waste to prepare a toxics use reduction (TUR) and hazardous waste reduction (HWR) plan by September 1, 1991. The Oregon law requires these plans to include many of the same types of information as are required under the Massachusetts law, including an internal analysis of toxic substance usage and hazardous waste streams, a schedule for implementing technically and economically practicable TUR and HWR options, and specific performance goals (expressed in numerical terms if possible) for the reduction of toxics and hazardous waste.

The Oregon law, however, does not require that the plans be certified, reviewed, or approved by a third party in any way, nor does it require plan preparers to have any particular qualifications. The Oregon Department of Environmental Quality (DEQ) may review a plan and determine if it is complete and prepared in accordance with the regulations.[42] If a facility fails to prepare an adequate plan, DEQ may notify the facility of the deficiency and provide at least ninety days for a modified plan.[43] If the modified plan is deficient, DEQ may issue an administrative order requiring submission of an adequate plan within ninety days.[44] If the facility fails to comply with the order, the law requires DEQ to conduct a public hearing on the plan, at which time the plan, which was previously considered confidential, becomes a public document.[45] The statute, however, does not directly provide for judicial enforcement of the planning requirements or the issuance of civil penalties.[46]

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[42]Or. Laws Chap. 833 §9(1).

[43]Id.

[44]Or. Laws Chap. 833 §9(2).

[45]Or. Laws Chap. 833 §9(3).

[46]See Larry Edelman and David K. Rozell, "Oregon's Toxics Use Reduction and Hazardous Waste Reduction Act: A Bellwether for Pollution Prevention Regulation," National Environmental Enforcement Journal, September, 1990, p. 5.

Minnesota

The Minnesota Toxic Pollution Prevention Act[47] requires industries to prepare plans for eliminating or reducing the generation or release of toxic pollutants. The Minnesota law affects only those facilities in the State that are subject to EPCRA §313.[48] The deadline for firms in certain SIC Codes to complete toxic pollution prevention plans is July 1, 1991.[49]

Although the Minnesota law does not include a "gatekeeper" provision, it does provide other means for plan certification and review. First, the law requires facilities that prepare plans to submit a certification, signed and dated by the facility manager and an officer of the company attesting, under penalty of the law, that a plan has been prepared in accordance with requirements, and the information in the plan is accurate.[50] Second, the Minnesota law contains a provision, similar to the provision in TURA, that allows citizens to trigger a review of the plan. Twenty-five or more persons living within ten miles of a facility may petition the Minnesota Pollution Control Agency to review that facility's plan for adequacy.[51]

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[47] Minnesota Statutes, Chapter 115D.

[48] Minnesota Statutes, Chap. 115D.07.

[49] Id.

[50] Minnesota Statutes Chap. 115D.08.

[51] Minnesota Statutes Chap. 115D.08.

Indiana

Of the States listed above, Indiana is the only State other than Massachusetts, that establishes a program for training and certifying planners. The Indiana Industrial Pollution Prevention Act[52] establishes the Pollution Prevention and Safe Materials Institute and requires the Institute to develop a curriculum for individuals who wish to become qualified as pollution prevention planners. The Institute will be responsible for qualifying as pollution prevention planners individuals who successfully complete a pollution prevention program designed by the Institute.[53] Planners will be trained, among other things, to prepare and review pollution prevention plans.

The planning provisions in the Indiana Act are, however, purely voluntary. Thus, it is not truly a gatekeeper scheme. The law does not establish criteria for acceptable plans, nor does it require that qualified planners prepare or certify the plans or that the government review the plans for adequacy. Rather than qualifying planners as "gatekeepers" to ensure that planning requirements are carried out, Indiana qualifies planners basically to provide technical assistance for self-motivated companies.

B. High Sulfur Fuel Emissions Audits

In 1974, the Massachusetts legislature adopted a law that required a relaxation of the State ambient air standards for sulfur emissions to the level of the federal standards. The new law required regulated entities to be allowed to meet these standards in the least costly manner.[54]

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[52]Indiana Code, Title 13, Article 9, Chaps. 1-7.

[53]IC 13-9-4.5.

[54]Ch. 494, Massachusetts Acts of 1974.

As a result of this law, certain large sources of sulfur emissions are permitted to use a higher content sulfur fuel than previously permitted. In order for a facility to be allowed to use a higher sulfur fuel, the facility has to present to MDEP a plan demonstrating that its use of the higher sulfur fuel will not result in emissions exceeding applicable ambient air standards. MDEP then has to approve the plan in writing and the conditions of approval have to be agreed to by the applicant in writing.[55]

MDEP requires these sources to implement a monitoring program to ensure that the ambient levels for sulfur predicted by the modeling programs are not being exceeded. These monitoring programs are usually conducted by outside contractors. MDEP requires facilities to hire a third party to audit on a quarterly basis the monitoring data collected by the outside contractors. These third party auditors act as gatekeepers to ensure adequate performance of the monitoring program.

MDEP uses the plan approval process to review the qualifications of the third party auditors, including consideration of any potential conflicts-of-interest. The quality of the work of the third party auditors is also assured through field audits conducted by MDEP. If MDEP uncovers an irregularity during the course of its field audit, it can verify whether the third party auditor was doing a proper job by comparing its audit results against the results that the third party auditor had submitted to MDEP. MDEP does not have the authority to take any action directly against the third party auditor, however; it can only take enforcement action against the audited facility.

Each facility is responsible for paying the fees of the third party auditor. MDEP originally wanted to hire the third party auditors as State employees; however, it did not

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[55]310 CMR Section 7.05(1).

have the legal authority to obtain the money from the facilities to pay for such a program. Therefore, it imposed an audit requirement which essentially accomplished the same thing: the regulated entities must pay for oversight.

Overall, MDEP has found the use of third party auditors as gatekeepers to be an effective factor in improving the quality of the monitoring data. Initially, between 40 and 50 facilities were subject to this auditing program. The number of facilities that continue to participate is unclear. Many facilities have changed the type of fuel they use and consequently are no longer subject to the auditing program. The success of the gatekeeper mechanism to date in this instance may be due to the close control MDEP has been able to exercise over the gatekeepers because of the small number of facilities involved and the small number of third party auditors used.

C. Certified Hydrogeological Assessments

California uses a gatekeeper mechanism in connection with hydrogeological assessments required under its hazardous waste program. Under California law, each regional water resources board, as part of its oversight responsibilities for surface impoundments, required the submission by January 1, 1988 of a hydrogeological assessment report from every person discharging liquid hazardous wastes or hazardous wastes containing free liquid into a surface impoundment located within the jurisdiction of the regional board.[56] Regional boards continue to receive reports for sites that failed to comply with the original deadline, and to request reports from new sites.[57]

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[56]Cal. Health and Safety Code, Section 25208.7(a).

[57]Conversation with Rick Rempel, State Water Resources Control Board/Division of Clean Water Programs.

California employs a variety of the gatekeeper mechanism to assure the quality of these reports. A "qualified person" is responsible for the preparation of the hydrogeological report and is required to certify as to its completeness and accuracy.[58] California law does not specify what skills, training or experience is necessary for a person to be considered a "qualified person" for purposes of this regulation.

The highly technical nature of the information required to be supplied in the report, in addition to the requirement that the preparer certify as to the completeness and accuracy of the report, however, act somewhat as a safeguard against unqualified individuals attempting to prepare the report. Also, any person who submits false information to the regional board is liable civilly for an amount not less than two thousand dollars ($2,000) and not more than twenty-five thousand dollars ($25,000) for each day the false information goes uncorrected.[59] Thus, the persons who are required to submit the reports have significant incentive to hire qualified persons to prepare the hydrogeological report in order to avoid these penalties.

In addition, if a hydrogeological assessment report contains false information, the regional board is required to submit the report to the State Board of Registration for Geologists and Geophysicists or to the State Board of Registration for Professional Engineers and Land Surveyors for the purpose of taking disciplinary action against the preparer of the report, if the preparer has a professional certification.[60]

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[58]Cal. Health and Safety Code, Section 25208.8.

[59]Cal. Health and Safety Code, Section 25208.9(b).

[60]Cal. Health and Safety Code, Section 25208.9(d).

The State Board of Registration for Geologists and Geophysicists is authorized to receive and investigate complaints against registered geologists and geophysicists. One of the grounds on which this State Board is allowed to reprove, privately or publicly, or suspend or revoke the certificate of any registered geologist or geophysicists is commission of any deceit, misrepresentation, violation of contract, fraud, negligence or incompetency in his or her practice.[61] Similarly, the State Board of Registration for Professional Engineers and Land Surveyors is authorized to receive and investigate complaints against registered professional engineers. One of the grounds on which this State Board is allowed to reprove, privately or publicly, or suspend or revoke the certificate of any registered professional engineer is the commission of any deceit, misrepresentation, violation of contract, fraud, negligence or incompetency in his or her practice.[62]

To date, the regional water resources boards have not identified any reports as containing false information and consequently, no occasion has arisen for any of the regional boards to make a referral to either of these State Boards for disciplinary action.[63]

D. Certified Wastewater Treatment Facility Operators

Under the law of several States, operators of all wastewater treatment facilities (including facilities treating wastewater from homes, public buildings, commercial and industrial establishments) must be certified by the State. Massachusetts is one of those

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[61]Deering's California Codes (1984), Section 7860 B.P.C.A.

[62]Deering's California Codes (1984), Section 6776 B.P.C.A.

[63]Conversation with Rick Rembel of the State Water Resources Control Board/Division of Clean Water Programs.

using this gatekeeper mechanism.[64] MDEP runs training programs and administers standardized tests for certification.

The operators of wastewater treatment facilities may be municipal employees or private individuals. There are different levels of certification based on the size of the facility and the difficulty of operation. Operators are not required to have any prior professional training or skills in order to be eligible for the certification test; however, different levels of experience are required in order to be eligible for certain certified jobs based on the level of skill and responsibility involved in the job.

The training programs run by MDEP are not mandatory. However, the success rate on the certification test is higher for candidates who have completed the training programs than for those who have not. MDEP develops the course materials and provides the instructors for most of the training programs. In addition, MDEP contracts with private parties to provide special seminars, such as a seminar on operation of clarifiers.

The quality of performance of the certified operators is monitored by MDEP through the inspection of treatment plants for compliance with maintenance requirements and the requirements of the plant's discharge permit. An operator's certificate can be revoked by the Board of Certification of Operators of Wastewater Treatment Facilities if, following a hearing by the Board, it is found that:

> the operator has practiced fraud or deception; that reasonable care, judgement or the application of his knowledge or ability was not used in the performance of his duties; or that the operator is incompetent or unable properly to perform his duties.[65]

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[64] M.G.L., Ch. 21, Section 34C (Massachusetts Clean Water Act).

[65] 257 CMR 2.05.

According to the MDEP Training Center, the wastewater treatment facility operator training programs have been successful in producing qualified operators.[66]

E. Certified Backflow Prevention Device Testers

In order to protect drinking water systems from the health hazards of backflow contamination, Massachusetts law requires the installation of backflow prevention devices (backflow preventers) at all points where a drinking water line connects to any equipment or system containing chemicals or potentially contaminated water.[67] These connection points are referred to as "cross-connections." Cross connections can occur at boilers, air conditioning systems, irrigation systems, laboratory equipment, etc. The backflow preventer protects the drinking water supply by ensuring the direction of the flow of the drinking water in the drinking water line and by preventing the contaminated fluid from entering the drinking water line.

Owners of cross connections are required to have backflow preventers inspected once a year by a certified backflow preventer inspector.[68] In addition, the local public water supplier is required to have backflow preventers inspected twice a year by a certified backflow preventer.[69] No two of these routine tests by the public water supplier or owner are to be conducted within three months of each other without the approval of MDEP.[70]

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[66]Conversation with Grace Costa, Board of Certification of Operators of Wastewater Treatment Facilities 12/90.

[67]248 CMR 2.13; 310 CMR 22.22.

[68]310 CMR 22.22 Cross Connections (9)(e).

[69]310 CMR 22.22 Cross Connections (9)(d).

[70]310 CMR 22.22 Cross Connections (9)(g).

In order for an individual to be certified as a backflow prevention device tester in Massachusetts, the individual must demonstrate competence in all areas of backflow prevention device inspection and testing by successfully passing a written and a practical certification examination.[71] The Massachusetts Department of Environmental Protection, Division of Water Supply ("MDEP/WS"), approves the institutions that are eligible to conduct the training programs and administer the certification test for backflow prevention testers. The MDEP/WS reviews the training materials and the instructors to be used by an institution before granting approval. At present, two organizations are qualified to conduct the training program and administer the test: the New England Waterworks Association and the local Plumbers Union. The MDEP/WS also participates in the training program and in the administration of the certification test. A standard test that has been prepared by the MDEP/WS is given to all of the course participants.

The local Plumbers Union offers the course and test to all of its members free of charge. The New England Water Works Association charges a fee of approximately $400 for the course and the test. The results of the certification tests are sent to the MDEP/WS. Applications to be certified as a tester by the State are then sent to all of the individuals that passed the test. The individuals then submit their application and fee to the State, and are certified for a three year period.[72]

MDEP receives the results of all of the tests conducted by the certified backflow prevention device testers and reviews them to assure that they were conducted in the

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[71] 310 CMR Section 22.22 Cross Connections (8)(a).

[72] 310 CMR Section 22.22 Cross Connections (8)(c).

appropriate manner. MDEP does not conduct spot checks or joint tests to assure the quality of the work done by the certified testers. MDEP relies on the public water suppliers to check the results of the tests conducted by the owner against the results of their own tests to signal any irregularities. The public water suppliers and owners normally use different certified backflow prevention device testers to conduct their tests.

After the three year certification period has expired, if a tester has conducted at least 50 tests over the three year period, the certification is automatically renewed.[73] If the tester has conducted between 25 and 50 tests, the tester has to retake the practical portion of the certification test in order to be recertified.[74] If the tester has conducted fewer than 25 tests, the tester has to retake the written and practical portions of the certification test in order to be recertified.[75]

MDEP has the authority, after notice and an opportunity for a hearing, to revoke the certification of a backflow prevention device tester for noncompliance with applicable regulations.[76] MDEP is also authorized to revoke an owner's permit for a cross connection or order a supplier of public water to cease supplying water to any premises if one or more cross connections is maintained in violation of the applicable regulations.[77]

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[73]310 CMR Section 22.22 Cross Connections (8)(d).

[74]Id.

[75]Id.

[76]310 CMR 22.22 Cross Connections (12)(d).

[77]310 CMR 22.22 Cross Connections (12)(c) and (e).

The fees of the private certified testers are set by the marketplace. At present, the average fee is approximately $75 per test. The suppliers and owners of the water supply backflow prevention device are responsible for payment of the fee.

According to MDEP/WS[78], the certified tester program has worked effectively. MDEP/WS attributed the program's success to the substantial involvement of MDEP/WS in monitoring the certification training program and the actual test results. The only criticism MDEP/WS had heard of the program was the occasional dissatisfaction of the owners with the cost of using the private certified testers.

F. Real Property Transaction Gatekeepers

A significant amount of environmental improvement is being carried out through the growing use of environmental auditors to screen a wide variety of real estate transactions for potential liability of the parties under applicable federal or State laws for hazardous waste cleanups. The transactions in which such liability might arise include the sale, leasing, or financing of a parcel of real property or the financing, transfer, or liquidation of a business with real property interests. Potentially liable parties in these transactions include buyers and sellers, lessors and lessees, banks, insurance companies, and underwriters. The screening activity conducted by these auditors and their employers is in effect an indirect version of gatekeeping.

The impetus for audits in connection in these types of transactions is two-fold: (1) the desire of the parties to the transaction to avoid a potential indeterminate liability (e.g., if the property acquired or subject to a security interest becomes a superfund site);

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[78]Telephone conservation with Karen Doherty, MDEP/WS, 11/90.

and (2) the enactment by a number of States of property transfer laws requiring disclosures and imposing conditions on the validity of transfers. In the first instance, the gatekeeping function is essentially self-imposed. Lenders and acquirers are not required by law to obtain an environmental audit or to use a qualified auditor, but they consider it prudent to do so given the potential magnitude of their prospective liability. In the second instance, gatekeeping is required by law. In order to make the legally-required disclosure or satisfy the condition precedent to a transfer, the parties, as a practical matter, will need to seek expert assistance. In both cases, however, the existence of a governmental regulatory scheme has led to the use of private third parties. Because these transactions cannot go forward as a practical matter without using a gatekeeper, and because such use results indirectly in the accomplishment of a variety of governmental objectives (site identification, site assessment and site cleanup), these State property transfer laws fall within the discussion of gatekeeper mechanisms.

Unlike some other gatekeeping schemes (e.g., toxics use reduction planners, or certified public accountants), however, the only check on the qualifications of the transactional environmental gatekeeper is the scrutiny of the client. This scrutiny is significant, particularly in the case of mortgage bankers and other lenders, whose primary interest is in protecting their investment. The government does not prescribe use of a particular kind of professional. Likewise, the government imposes no sanction upon these types of gatekeepers for misfeasance or incompetence. The sanction for misfeasance is that of the marketplace. In certain cases, however, the client may have the right to bring an action in contract or tort against the environmental auditor or the client may be able to initiate a disciplinary action through the appropriate professional association.

New Jersey's "Environmental Cleanup Responsibility Act"

The most comprehensive of the State transactional environmental laws is New Jersey's Environmental Cleanup Responsibility Act (ECRA), which became effective January 1, 1984.[79] ECRA requires any industrial "establishment" (within a long list of SIC numbers) that is closing, selling, or transferring operations to give the State notice of the transaction and to submit either a "negative declaration" or a "cleanup plan" for the site. A negative declaration is a statement that there has been no discharge of hazardous substances, or that any such discharge has been cleaned up in accordance with the provisions of the law. A negative declaration must be approved by the State before the transaction may proceed. A cleanup plan must be prepared for sites unable to submit a negative declaration. The plan must be reviewed and approved by the State before the transaction may proceed.

Although not required by law, professional assistance is usually needed to determine whether a negative declaration or a cleanup plan is to be submitted and/or to prepare an acceptable plan. The onerous penalties that ECRA imposes for failing to comply with its submission requirements also encourage the use of a professional: absent a negative declaration or cleanup plan or in the event of a false negative declaration, the transaction is voidable by the transferee, and the transferor (or owner of a closing establishment) is strictly liable for all cleanup costs and damages and for civil penalties of up to $25,000 per day. The transaction is also voidable by the State if a negative declaration or cleanup plan is not submitted. Thus, because the transaction may be voided if the proper submissions under ECRA are not made and because the

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[79]N.J. Stat. Ann. 13:1K-6 et seq.

proper submissions require as a practical manner professional assistance in preparation, ECRA indirectly establishes a gatekeeping mechanism.

The ECRA regulatory system also qualifies as a gatekeeper mechanism because it has resulted in the substantial involvement of the private sector in the accomplishment of environmental objectives --site identifications, site assessments, and site cleanups -- without comparable site-by-site efforts by governmental personnel.[80]

The onerous penalties that can be imposed under ECRA on the parties using a gatekeeper if the gatekeeper's work is inadequate or incompetent provide for quality control of the work of these gatekeepers.

Connecticut's "Transfer Act"

Connecticut enacted a law similar to ECRA in 1985, known as the "Transfer Act."[81] The Transfer Act operates like ECRA except that (i) it only applies to the sale, and not the cessation or closing of, industrial operations, and (ii) it does not void transactions that do not comply with the requirements of the act, but holds the transferor strictly liable for any and all cleanup costs and damages and allows the State to assess penalties of up to $100,000 against any noncomplying party. Again, because of the onerous penalties that the transferor may be subject to if the proper submissions under the Transfer Act are not made and because the proper submissions as a practical

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[80]The State does have a large staff responsible for reviewing negative declarations and cleanup plans. This staff is funded by fees associated with the submission of ECRA documents. Despite the use of a state staff, the heavy reliance on industry self-identification, self-enforcement by lenders and parties to the transaction, and self-design of the cleanup make this clearly a version of gatekeeping.

[81]Conn. Gen. Stat. Ann. 22a-134 to -134d.

matter require professional assistance in preparation, the Transfer Act establishes another gatekeeping mechanism -- requiring the use environmental auditors for industrial property transfers. This gatekeeping mechanism has allowed Connecticut to reap the same benefits as New Jersey in terms of involving the private sector in site identification, site assessments and site cleanups.

Other State Property Transfer Laws

Several other States have enacted laws with disclosure provisions that have encouraged the use of auditors when property transfers are to occur.[82] Such States have not required submission of negative declarations or cleanup plans by parties to the State. Instead, these laws simply require certain disclosures by the transferor to the transferee, with opportunities for the latter to back out of the transaction. These laws essentially reinforce the tendency, already referenced above, for parties to use an environmental auditor to attempt to determine their potential environmental liabilities prior to entering into a transaction.

The gatekeeping aspects of State transactional laws are strongest in States with laws like New Jersey and Connecticut because the ability of the parties to proceed with the transaction is more dependent on the use of a gatekeeper. Even these State laws, however, do not use all of the possible gatekeeper features. In particular, they do not prescribe the use of any particular professional with a specified expertise, nor do they provide for any direct sanction against such person for misfeasance. They do exhibit the features of shifting to private parties functions that might otherwise be performed by the

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[82] See, e.g., Cal. Health & Safety Code §25359.7; Cal. Civ. Code §1102.6; Ill. Rev. Stat. Ch. 30 §§901-907; and Ind. Code Ann. §13-7-22.

government, such as site identification, site assessment and site cleanup. They also make the performance of certain duties a condition precedent to the enjoyment of a government benefit--viz. the recognition of a sale of property or of a company.

G. Licensed Site Managers: A Proposed Gatekeeping Mechanism

In 1983, Massachusetts launched a major program for the cleanup of oil and hazardous material disposal sites with the enactment of the Oil and Hazardous Materials Release Prevention and Response Act.[83] However, of the 4,200 sites in Massachusetts that have been identified to date as needing or potentially needing cleanup, only 770 sites are actually in the process of being assessed or cleaned up and the cleanup process is a slow and difficult one for all of the parties involved.

Part of the reason for the backlog is MDEP's lack of staff and resources to closely oversee implementation of various phases of the cleanups as is required by current regulations. To address this problem, Massachusetts began allowing potentially responsible parties (PRPs) to do preliminary site and risk assessments for non-priority sites. A non-priority site is a site that does not now pose, but may in the foreseeable future present, a significant risk of harm. If MDEP agreed with the characterization of the site as a non-priority site, the PRP could obtain a waiver of the requirement that MDEP participate and oversee the subsequent phases of the cleanup. To date almost 300 sites have opted for a waiver. MDEP audits a sampling of the waiver sites. Although the waiver program allows an expedited cleanup of the site, it does not release PRPs from liability for the cleanup.

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[83] M.G.L. Chap 21E.

The waiver program has not expedited cleanup of any of the other categories of sites namely (i) priority sites; (ii) locations to be investigated; and (iii) non-priority sites that did not opt to participate in the waiver program. In August 1990 the Massachusetts legislature directed MDEP to convene a Study Committee of environmentalists and industry representatives to examine alternative ways to operate and fund the oil and hazardous waste site cleanup program. One proposal that the Study Committee is exploring is the use of private third parties as licensed site managers.

The licensed site manager (LSM) program is designed to expedite cleanup of those sites that were not addressed by the waiver program as well as to provide the oversight lacking in the waiver program. At the site discovery stage, LSMs would be authorized to provide an opinion as to whether a release meets or exceeds the thresholds in the notification regulations being developed by MDEP and consequently should be reported to MDEP.[84] For those sites which must be reported, LSMs would also be authorized to provide an opinion as to whether such site requires additional response action according to criteria to be established by MDEP. These opinions would be maintained in a file available to the public and MDEP would audit 25% of these opinions annually.

MDEP would establish criteria for two tiers of sites needing further action. Tier I sites would be sites that involve a high risk of exposure to contaminants or sites that are located in environmentally critical areas and would require substantial MDEP involvement in their assessment and cleanup. Tier II sites would be those sites not

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[84] MDEP is currently developing threshold concentrations for approximately 30 of the most commonly found contaminants in soil and groundwater at sites in Massachusetts. The threshold levels would identify the levels of contamination at which a response action is necessary to avoid risk of harm to public health or the environment.

presenting a high risk of exposure or located in an environmentally critical area and would require less MDEP involvement in their assessment and cleanup.

LSMs would be authorized to provide an opinion as to whether a site needing further action qualified as a Tier I or Tier II site. If a site qualified as a Tier II site, the LSM would be authorized to coordinate planning and implementation of short term, interim and long term response actions for the site and to provide an opinion after such actions have been taken as to whether the site needed further action. MDEP would audit 25% of the sites for which LSMs have provided opinions that no further action is necessary.

MDEP would review the notifications of all Tier I sites and prioritize the sites based on their risk to health, safety, public welfare and the environment. MDEP would notify PRPs associated with the highest priority sites that they must submit a permit application within 120 days. Permit applications would include a recommendation by an LSM of the appropriate category for the site within Tier I, along with detailed information on the site allowing MDEP to review the basis for such recommendation. The permit application for certain lesser risk categories would also include a draft scope of work for the Comprehensive Site Assessment. PRPs that failed to submit a permit application within the 120-day period would be subject to enforcement action by MDEP. MDEP could also use public funds to start the response action and seek cost recovery from the appropriate PRPs.

Prior to the grant of the permit application for Tier I sites, LSMs would be authorized to develop recommendations for any appropriate short term or interim measures. If the recommendations are approved by MDEP, an LSM could coordinate implementation of these measures and provide an opinion after implementation as to

whether further action on the site is necessary. If a notification of a Tier I site indicated the need for a short term measure and the PRP were unable or unwilling to take the necessary action, MDEP could take enforcement action against the PRP to compel the action, or MDEP could perform the necessary action and attempt to recover its costs from the PRP.

If MDEP approves a permit application, the LSM would be authorized to coordinate planning and implementation of the response action, except for the highest category of sites -- in which case the LSM would be authorized to conduct response actions jointly with MDEP approval of each phase. MDEP would require reports on the progress of the response actions for Tier I sites and would audit a certain percentage of response action sites annually. The percentage of sites audited will be based on the site category. If an audit reveals inadequate response actions, MDEP could take an enforcement action against the PRP or implement the appropriate action itself and seek cost recovery. Permits would also require the conduct of appropriate public involvement activities if the public indicates an interest in being involved with the response action. LSMs would be authorized to provide an opinion after implementation of the response action as to whether a permanent solution had been achieved.

In order to qualify as an LSM an individual would have to meet certain educational and/or experience requirements. A testing and continuing education program for LSM certification is not currently contemplated, but would be added if site audits indicated the necessity for such programs. LSMs would also be subject to certain technical and professional standards in the performance of their work. LSMs would be subject to license revocation for failure to meet these standards. Their work would be reviewed by MDEP during site audits; the public would also have the opportunity to request MDEP to audit the work of an LSM at a particular site.

The LSM program exhibits the three common characteristics of a gatekeeping mechanism. The Commonwealth has designated the use of a third party, the LSM, to assure proper notification and cleanup of hazardous waste sites. The Commonwealth is relying on the professional skills and experience of the LSMs to assure proper performance of these tasks. Finally, the LSM program includes a sanction for poor performance -- license revocation. Moreover, the use of a gatekeeper mechanism in this instance is attractive because of the large number of sites awaiting cleanup and the availability of many qualified professionals to perform as LSMs.

IV. CONCLUSION

The descriptions of the various gatekeeper mechanisms used by State environmental agencies illustrate the potential benefits of these mechanisms and the types of situations in which these benefits can be maximally realized. These descriptions also illustrate some of the limitations, disadvantages or drawbacks involved in any gatekeeper mechanism.

The primary benefit of any gatekeeping mechanism is the ability of a State environmental agency to enhance participation in or compliance with a regulatory scheme at minimal additional cost to the State agency. Given nearly universal tight budgetary situations and the prospect of an uncertain economy, this feature of gatekeeping mechanisms is particularly attractive.

The examples discussed in the report identify some of the characteristics of the regulatory situations where costs savings can be maximized. First, significant cost savings can be achieved where the gatekeeping mechanism would apply to a large universe of regulated entities. For example, the gatekeeping scheme established by Massachusetts requiring facilities to use certified toxic use reduction planners to certify their toxic use reduction plans will apply initially to at least 500 facilities. By implementing a gatekeeping mechanism in this situation, Massachusetts is saving the cost of having to have government regulators initially review the more than 500 plans that will be prepared under TURA. On the other hand, if there were only a few facilities that were going to have to prepare these plans, the cost of establishing and maintaining this gatekeeper mechanism would probably be greater than the cost of a government program.

Second, if the gatekeeper mechanism involves the use of technical skills already provided and verified by the private sector, substantial cost savings are possible. The gatekeeping mechanism employed by the SEC that requires certain financial statements filed by corporations to be certified by an accountant illustrates this situation best. The skills required of the accountants to perform this task are already taught by the private sector. Accountants receive professional training and are required to take professional licensing examinations which verify their competence.

Most of the environmental gatekeeper mechanisms discussed in the report require some State resources to be devoted to either the training or verification of training of the gatekeeper. In these situations, the spending of State resources can be minimized if there are minimal skills that need to be taught or the training builds on existing skills so that such training and verification of training could eventually be entrusted to the private sector. For example, since the skills and training required of the backflow prevention device testers in Massachusetts build upon existing professional skills, the Commonwealth is able to allow two private sector organizations, the New England Waterworks Association and the local Plumbers Union, to conduct the training program and administer the certification test. Allowing the private sector to conduct the training and certification test saves the Commonwealth the cost of conducting such programs directly. Furthermore, since these professional associations are familiar with the skills involved in the training, the likelihood that the training will be competently done is greater. Massachusetts does participate in the preparation of training materials and the certification test in order to assure that such training is competently performed.

Third, significant cost savings are possible when the mechanisms that assure that a gatekeeper continues to perform competently on the job require minimal government

resources to establish and administer. One situation in which this is usually possible is if there is an existing professional association which already has the authority to bring sanctions against a member for dishonest or incompetent performance. In order for the State environmental regulatory agency to rely on such existing control mechanism, all it would have to do, theoretically, would be to make sure such professional association received information of all dishonest or incompetent performances. For example, California relies on the State Board of Registration for Geologists and Geophysicists and the State Board of Registration for Professional Engineers and Land Surveyors to help ensure the quality of the hydrogeological assessment reports prepared by their respective members. If a hydrogeological assessment report contains false information, the regional water resources board is required by law to submit the report to the appropriate professional board for the purpose of taking disciplinary action against the preparer of the report.

Professional associations, however, are not always effective in disciplining their members. For example, many incompetent physicians continue to practice even though medical professional associations are aware of their incompetence and have the authority to impose sanctions against them. Thus, it is important to assure that other quality control mechanisms that depend primarily on private resources are available. The existence of a marketplace for the particular type of gatekeeper may provide quality control by allowing competitive forces to weed out incompetent gatekeepers. In addition, the existence of a right of action under common law or a newly created statutory scheme for a private party to bring suit against the gatekeeper for incompetent performance would also help to assure the quality of a gatekeeper's performance.

In calculating the cost savings presented by an gatekeeping mechanism, another factor that must be taken into account is any indirect transactional costs result from the use of the mechanism. For example, one consequence of the property transfer law in New Jersey has been the creation of a bottleneck in the transfer of properties in the State. Significant increase in State staffing have been necessary to resolve this problem.

In the final analysis, the decision as to whether a gatekeeping mechanism is the best alternative may not depend on the cost savings involved in using such a mechanism, but on the amount and availability of public resources necessary to fund a governmental effort in lieu of a private gatekeeper. If no public resources are available to fund a government regulatory effort, a gatekeeping mechanism may be chosen in a situation where a governmental effort might have ordinarily been preferred.

The exploration in this report of some examples of the use of gatekeeping mechanism in State environmental programs has highlighted some of the possible benefits and limitations of this mechanism. Since some of the most creative and expansive gatekeeper programs are in the initial or planning phases, such as the certified toxic use reduction planner and licensed site manager programs in Massachusetts, a final verdict on these uses is not yet possible. State environmental agencies may benefit from further experimentation with these and other gatekeeping programs. They show a strong potential for enhancing environmental protection efforts.