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SFA BILL ANALYSIS

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Senate Bill 644 (as enrolled) — PUBLIC ACT 212 of 1993
Senate Bill 645 (as enrolled) — PUBLIC ACT 213 of 1993
House Bill 4783 (as enrolled) — PUBLIC ACT 192 of 1993
House Bill 4785 (as enrolled) — PUBLIC ACT 132 of 1993
Sponsor: Senator Vern Ehlers (Senate Bills 644 & 645)
Representative Tom Alley (House Bills 4783 & 4785)
Senate Committee: Natural Resources and Environmental Affairs
House Committee: Conservation, Environment, and Great Lakes

Date Completed: 3-22-94

RATIONALE

Michigan law contains several statutes governing petroleum underground storage tanks (USTs), such as those found at gas stations. These statutes were enacted largely in response to Federal requirements. Specifically, 1984 amendments to the Federal Resource Conservation and Recovery Act directed the U.S. Environmental Protection Agency (EPA) to establish a comprehensive program for registration and regulation of USTs, while 1986 amendments mandated the regulation of USTs and provided for the cleanup of leaking tanks. Congress also directed the EPA to promulgate financial responsibility requirements for USTs. These regulations took effect in January 1989 and require tank owners and operators to demonstrate their financial ability to take prompt corrective actions or compensate for bodily injury or property damage resulting from UST releases. In general, owners and operators are required to demonstrate an ability to pay up to $1 million in damages per incident. Owners and operators may use various methods, including insurance and a state fund, to demonstrate financial responsibility.

In response to the Federal mandates, Michigan enacted the Underground Storage Tank Regulatory Act in 1984, which requires the registration of USTs and imposes a fee on tanks. This Act is enforced by the Department of State Police Fire Marshal Division, which is responsible for inspecting tanks, investigating releases, registering tanks, and collecting the fee. In 1988, the State enacted the Leaking Underground Storage Tank (LUST) Act to regulate and provide for corrective action due to releases from LUSTs. The Department of Natural Resources (DNR) is the lead agency in the implementation of this Act, which includes overseeing the remediation of contaminated sites, and initiating compliance and enforcement actions against owners and operators. The Michigan Underground Storage Tank Financial Assurance (MUSTFA) Act also was enacted in 1988 to assist tank owners and operators in meeting the Federal financial responsibility requirements, since few gas stations and other UST owners could afford to do so on their own, and insurance was apparently unavailable. This Act, which is primarily administered by the Department of Management and Budget (DMB), provides for the MUSTFA Fund, permits owners and operators to receive Fund money for corrective action (e.g., cleanup) or indemnification (pursuant to a judgment or settlement) associated with a release, subjects owners and operators to a deductible, and imposes a regulatory fee on refined petroleum products to finance these efforts. (For an overview of all UST laws enacted since 1984, see BACKGROUND.)

In the last several years, various financial and administrative problems concerning the implementation of these laws have developed, and allegations of abuse and fraud have been made. In November 1992, the MUSTFA Fund Administrator notified the Department of Treasury that paid claims, reserves, and

administrative costs would exceed projected revenues as of January 1995 by $81.6 million. To keep the Fund solvent and allow new claims to continue to be submitted, the Legislature enacted Public Act 1 of 1993, which repealed the January 15, 1995, sunset on the regulatory fee imposed under the MUSTFA Act. According to the DMB, however, although the Fund is currently solvent, annual Fund expenditures approximate $150 million, while revenues amount to $51.8 million. The DMB also reports that, due to the large volume of claims, there has been considerable delay in reimbursement; for example, if an invoice had been submitted in June 1993, a check would not have been issued until February 1994.

In addition, some of the burden on the MUSTFA Fund allegedly has been due to fraudulent practices on the part of some tank owners and operators and contractors: a result, some claim, of the absence of oversight by the State and the fact that the UST laws are administered by three different departments. According to an October 1992 analysis of the LUST and MUSTFA programs by the DNR's Environmental Response Division, potential fraud issues included billing for work not performed, doing more work than necessary, charging the Fund more than necessary, representing old releases as new, representing ineligible releases as eligible, overbilling to satisfy the owner/operator deductible, submitting false documentation to satisfy the deductible, and misrepresenting contractors' qualifications. The DNR analysis also cited lack of control over initial abatement actions, lack of control over corrective actions, inadequate control of contractors, lack of owner/operator accountability, and lack of a single accountable agency for implementation. Further, although excessive cleanup measures may be taken for nonfraudulent reasons, such as ensuring safety, it appears that there has been little or no incentive to use more cost-effective methods or to explore alternative approaches to cleaning up the environment.

In addition, the Auditor General conducted a financial audit of the MUSTFA program for the period of October 1, 1990, through September 30, 1992. This assessment of the program's internal control structure disclosed several material weaknesses, including that the program did not inspect most claim sites and, as a result, the program did not have an appropriate level of assurance that it paid only for cleanups resulting from accidental causes. The assessment also disclosed "reportable conditions" in the areas of verification of services received and reasonable cost determination. A subsequent performance audit, for the period of July 18, 1989, through March 31, 1993, concluded that the program was not able to provide continuing financial assurance to owners/operators; the program did not actively manage risk within its financial assurance function; and the program did not have adequate procedures to ensure that the most cost-effective cleanups were performed.

To remedy these problems, as well as to ease the State out the business of providing financial assurance, it was suggested that a number of changes be made in such areas as departmental authority and oversight, owner/operator responsibility, contractor accountability and qualifications, criminal sanctions, and cleanup methods.

CONTENT

Senate Bill 644 amended the MUSTFA Act to:

- Reduce the cap on MUSTFA funding per claim from $1 million to $200,000 by 1998 for upgraded tanks, or $600,000 by 1998 for nonupgraded tanks, and provide that funding will not be available after December 22, 1998.
- Impose a co-payment based upon a percentage of costs, rather than the previous $10,000 deductible, on a tank owner or operator making a claim.
- Revise requirements that an owner or operator comply with other regulatory acts to be eligible for MUSTFA funding.
- Provide that an owner or operator may not receive funding for more than two releases at a location.
- Permit the State or a local unit to receive MUSTFA funding for an involuntarily acquired tank.
- Revise claim submission and determination requirements, and provide for appeals to the circuit court.

-- Require work invoices to state that a competitive bidding process was used, and to explain why a lowest bid was rejected.
-- Require the Department of Management Budget (DMB) to establish an audit program, including on-site inspections, to monitor compliance with the Act.
-- Require a tank owner or operator to retain a consultant in order to receive funding under the Act.
-- Increase the membership of the MUSTFA Policy Board and provide for the Board to review a consultant's competitive bidding process.
-- Require the DMB to maintain a list of qualified consultants and to certify underground storage tank professionals.
-- Establish limitations on interest rate subsidy loans and interest rates.

The bill was tie-barred to Senate Bill 645, and House Bill 4783.

Senate Bill 645 amended the Leaking Underground Storage Tank Act to:

-- Increase the initial response actions that a tank owner or operator must take upon the confirmation of a release, and require initial abatement reports.
-- Require that a consultant complete an initial assessment of a release.
-- Differentiate between releases that affect groundwater and those that do not; and, for those that do not, differentiate between releases that affect over 100 cubic yards of soil per tank and 500 cubic yards per location, and releases that do not exceed that limit, in regard to correction action that must be taken.
-- Require hydrogeological studies, feasibility analyses, and corrective action plans if groundwater might have been contaminated by a release.
-- Require the identification of a preferred corrective plan alternative for a release.
-- Describe Type C cleanup requirements, if that is the preferred corrective action alternative.
-- Allow corrective action to be delayed under certain circumstances.
-- Require a consultant to be retained to perform various tasks.
-- Allow de minimis spills to be removed and disposed of.
-- Establish penalties for late reporting.
-- Require the Department of Natural Resources to audit or oversee all aspects of corrective action.
-- Provide for penalties for fraudulent practices or the submission of false information; and authorize the Attorney General and county prosecutors to investigate violations.
-- Require the payment of rewards to persons who provide information leading to the imposition of a civil fine or a criminal conviction.

The bill was tie-barred to Senate Bill 644 and House Bill 4783.

House Bill 4783 amended the Underground Storage Tank Regulatory Act to:

-- Require the Department of State Police to enhance its audit and inspection program to monitor UST systems.
-- Require the Department to conduct a study regarding causes of UST leaks.
-- Permit the Department or a certified UST system inspector to enter upon property to determine compliance with the Act.
-- Modify registration requirements for UST systems.
-- Increase the amount that must be in the UST Regulatory Enforcement Fund for registration fees to be reinstated, after they are suspended.
-- Require a person who installs or removes UST systems to maintain pollution liability insurance with limits of at least $1 million per occurrence.

House Bill 4785 amended the MUSTFA Act to:

-- Postpone the Act's expiration from January 1, 2000, to January 1, 2005.

- **Create the MUSTFA Authority; authorize it to issue bonds and notes; require proceeds to be deposited into the MUSTFA Fund or bond proceeds account; and permit the account to be used for corrective action and indemnification.**
- **Make it a felony to commit a "fraudulent practice"; provide for civil fines and restitution; and authorize the Attorney General and county prosecutors to conduct investigations.**
- **Require the payment of rewards to persons who provide information leading to the imposition of a civil fine or a criminal conviction.**
- **Specify legislative findings and declare the purpose of the Act and the Authority.**

Senate Bill 644

Claim Limit/Deadline

Previously, the Act set a limit of $1 million of approved work invoices per claim on the amount of MUSTFA funding that an UST owner or operator could receive for corrective action or indemnification. The bill deleted that amount and established the following schedules of the maximum allowed per claim:

1) For tank systems that, on the bill's effective date, had been upgraded pursuant to the UST Regulatory Act:

Claims submitted through 12-31-94:	$1,000,000
Claims submitted during 1995:	800,000
Claims submitted during 1996:	600,000
Claims submitted during 1997:	400,000
Claims submitted from 1-1-98 to 12-22-98:	200,000

2) For tank systems that, on the bill's effective date, had not been upgraded pursuant to the UST Regulatory Act:

Claims submitted through 12-31-96:	$1,000,000
Claims submitted during 1997:	800,000
Claimed submitted during 1998:	600,000

Beginning December 23, 1998, the Fund will not be available to provide any portion of an owner's or operator's financial responsibility requirements.

If, upon review of the Department's study of the availability and cost of environmental impairment insurance, the DMB Director, in consultation with the Insurance Commissioner, determines that insurance is not available to meet an owner's or operator's portion of financial responsibility requirements, or that the insurance is not available for a reasonable cost, the Director may delay implementation of the above schedule. Upon making that determination, the Director must publish notice of the revised schedule. The revised schedule, however, cannot require the Fund to provide any portion of an owner's or operator's financial responsibility requirements after December 22, 1998.

Co-Payment

Previously, to be eligible for money from the Fund for a release, an owner or operator was responsible for paying the first $10,000 of corrective action or indemnification costs associated with the release. The bill provides, instead, that an owner or operator is responsible for paying 10% of each work invoice submitted up to a maximum of $15,000 of corrective action or indemnification costs. An owner or operator who had paid $10,000 of corrective action costs on the bill's effective date for a release in which a claim was submitted, is exempt from any additional co-pay amounts for that release. An owner or operator who is eligible to receive MUSTFA funding for a second release at a location is responsible for paying 30% of each work invoice up to a maximum of $45,000.

Claims: Owner/Operator Compliance

Under the Act, a tank owner or operator must meet certain requirements to receive money from the Fund. The bill deleted the requirement that the owner or operator was presently and at the time of discovering the release, in compliance with 30-day notice and 24-hour reporting requirements of the UST Regulatory Act, and the applicable requirements of the LUST Act, or requirements of the Federal Solid Waste Disposal Act. Instead, the bill requires that the owner or operator, or a consultant retained by the owner or operator, have reported

the release within 24 hours after its discovery as required by the UST Regulatory Act and rules promulgated under it.

The bill also deleted the requirement that the owner or operator have provided the Fund Administrator with proof of financial responsibility for the deductible amount that would satisfy the requirements for financial responsibility under the Federal Solid Waste Disposal Act.

In addition, the bill repealed a section under which the owner or operator of a tank system that had not met the standards of the Federal Solid Waste Disposal Act for a new UST system installed after January 1, 1989, and had not satisfied all requirements for an interest subsidy on a loan that would bring the system into compliance with those standards, was ineligible for MUSTFA money for indemnification for a release associated with that system (MCL 299.811).

The bill requires a claim to include the name, address, telephone number, and Federal tax identification number of the consultant retained by an owner or operator to carry out responsibilities under the LUST Act.

Until January 1, 1997, a claim cannot be for a release from an UST closed before January 1, 1974, in compliance with the Fire Prevention Code.

Subsequent Releases

The Act provides that an owner or operator who discovers a subsequent release at the same location as an initial release may receive Fund money to perform corrective action on the subsequent release, if the owner or operator has upgraded, replaced, removed, or properly closed all underground storage tanks at the location in compliance with the UST Regulatory Act, and otherwise complies with the MUSTFA Act and rules promulgated under it. Under the bill, the owner or operator also must pay the subsequent release co-pay amount, and may receive money from the Fund or bond proceeds account for a subsequent release only if there have not been more than two releases at the location.

Claims: Acquired Tanks

Under the Act, a financial institution or land contract vendor may receive money from the Fund for corrective action or indemnification if, before discovering a release, the financial institution makes a loan to the owner or operator of a tank system or the vendor enters into a land contract with the owner, and subsequently takes title to or assumes ownership of the tank system by foreclosure, acceptance of a deed in lieu of foreclosure, or forfeiture. The bill deleted the requirement that a financial institution comply with reporting and registration requirements that apply to a tank owner or operator. Instead, the bill requires a financial institution to report the release to the Fire Marshal Division within 24 hours of taking title or assuming ownership, if the release has not already been reported, and, within seven days of taking title or assuming ownership, come into compliance with the registration and fee requirements of the UST Act.

The bill provides that the State or a local unit of government may receive money from the Fund as an owner or operator if the State or local unit acquires ownership or control of a tank system or the property on which it is located through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title or control by virtue of its governmental function. The State or local unit must meet the criteria that apply to owners and operators concerning date of release, attributes of a release, and submission of a claim. The State or local unit must report the release to the Fire Marshal Division within 24 hours of taking title or assuming ownership, if it has not already been reported, and, within seven days of taking title or assuming ownership, come into compliance with the registration and fee requirements of the UST Act. The State or local unit is not responsible for the co-pay amount.

Under the bill, at any time after obtaining title to property under these provisions, a regulated financial institution or land contract vendor may sell the property on which a claim has been approved, in a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, and time, and at a price that takes into account the property's fair market value and the costs associated with holding the property, and other relevant factors. Upon sale, a regulated financial institution or land contract vendor may retain the loan balance plus interest and reasonable costs of obtaining title and

maintaining or repairing the property, and 10% of the sale price as a brokerage fee, minus the co-pay amount. Upon sale by a local unit of government, the local unit may retain 10% of the sale price as a brokerage fee.

A regulated financial institution, land contract vendor, or local unit that applies for reimbursement must enter into an agreement to repay the State, out of any excess proceeds of a sale pursuant to the preceding provisions. Upon a sale of the property, the new owner must be able to accept an assignment of the approved claim as provided in the Act.

Corrective Action Claims

Under the Act, to receive money from the Fund for corrective action, an owner or operator must follow the procedures outlined in the Act and must submit reports and work plans required under the LUST Act. The bill requires an owner or operator, or a consultant retained by an owner or operator, also to submit feasibility analyses, hydrogeological studies, and corrective plans to the Department, and to provide other information required by the Fund Administrator relevant to determining compliance with the MUSTFA Act.

The bill also specifies that, to receive money from the Fund for corrective action, an owner or operator must submit a claim to the Administrator, and may not do so until work invoices in excess of $5,000 of corrective action costs have been incurred.

Under the Act, upon receiving a claim, the Administrator is required to make certain determinations, e.g., whether the cost of the work is reasonable and whether the owner or operator is eligible for funding. The bill requires the DMB also to determine whether the work performed was necessary and appropriate considering conditions at the site of the release, and whether the consultant retained by the owner or operator has complied with requirements established by the bill for consultants. The bill also deleted reference to the Administrator's making the determinations after receiving responses from the Departments of Natural Resources and State Police.

Previously, the Administrator had to approve a claim if he or she determined that it was reasonable in terms of cost and consistent with the requirements of the LUST Act. Under the bill, the Administrator must determine instead that the work invoices included with a claim are necessary and appropriate considering conditions at the site of the release and reasonable in terms of cost.

The Act requires the Administrator to forward payment vouchers for approved work invoices to the State Treasurer as long as the owner or operator has not exceeded the allowable amount of expenditure. The bill further requires the Administrator to forward payment vouchers within 45 days after determining that the work invoice complies with the Act and that the owner or operator is in compliance with the registration and fee requirements of the UST Regulatory Act.

The bill requires the DMB to prepare and make available to owners, operators, and consultants standardized claim and work invoice forms.

Indemnification Claims

Previously, to receive money from the Fund for indemnification, the owner or operator had to submit to the Administrator a request for indemnification containing the information requested by the Administrator. If the owner or operator was eligible for funding, the Administrator had to forward a copy of the request to the Attorney General, who was required to approve it if there was a legally enforceable judgment against the owner or operator caused by a release or if a settlement with a third party due to a release was reasonable. If the Attorney General approved the request, the Administrator had to review whether the owner or operator had met the deductible requirements, had not exceeded the allowable amount of expenditure, and was eligible under Section 11 (which pertains to nonconforming tanks and interest subsidy loans). If, upon review, the owner or operator was eligible for funding, the Administrator had to forward the approved request to the Department of Treasury.

The bill provides, instead, that to receive money from the Fund for indemnification, the owner or operator must submit to the Administrator a request for indemnification containing the information required by the Administrator,

including a copy of the judgment or settlement, all documentation supporting the reasonableness and justification for the judgment or settlement, and work invoices that conform to requirements in the bill. If the Administrator determines that the owner or operator is eligible for funding, is eligible for the amount requested, has paid the co-pay amount, has not exceeded the allowable amount of expenditure, and is eligible under Section 11, and that the work invoices are reasonable in terms of cost, the Administrator must forward a copy of the request along with all supporting documentation to the Attorney General.

The Attorney General must approve the request if there is a legally enforceable judgment against, or settlement with, the owner or operator that was caused by an accidental release and that is reasonable and consistent with the Act's purposes. The Attorney General may raise as a defense to the request any rights or defenses that were or are available to the owner or operator and, in the case of a judgment, were not heard and ruled upon by the court. If the Attorney General approves the request, the Administrator must forward it for indemnification to the Department of Treasury.

Appeals

Under the Act, if the Administrator denies a claim or work invoice, or request for indemnification, the owner or operator who submitted it may request review by the MUSTFA Policy Board. The bill allows a person to appeal the Board's decision directly to the Circuit Court for Ingham County. Previously, a person who was denied approval by the Board could request a contested case pursuant to the Administrative Procedures Act, and had to exhaust his or her administrative remedies under that Act before seeking judicial review of the Administrator's or Board's decision.

Work Invoice

The Act previously defined "work invoice" as a detailed billing acceptable to the Administrator and signed by a contractor stating the contractor's name and address, a specific itemized list of the work performed, and a specific itemized list of the cost of the items or a receipt signed by a contractor not on the approved contractor list. The bill, instead, defines "work invoice" as an original billing acceptable to the Administrator and signed by the owner or operator and a consultant that includes all of the following:

-- The name, address, and Federal tax identification number of each contractor who performed work.
-- The name and Social Security number of each employee who performed work.
-- A specific itemized list of the work performed by each contractor and an itemized list of the cost of each item.
-- A statement that the consultant employed a documented sealed competitive bidding process for any contract award exceeding $5,000.
-- A specific reason why the lowest responsive bid was rejected, if the consultant did not accept the lowest responsive bid received.
-- Upon the Administrator's request, a list of all bids received.
-- Proof of payment of the required co-pay amount.
-- Authorization by the owner or operator as to whether the State Treasurer should make payment to the owner or operator or to the consultant.

Audit Program

The bill requires the DMB to establish an audit program to monitor compliance with the MUSTFA Act. As part of the program, the Department must employ or contract with qualified individuals to provide on-site inspections of locations where there has been a release. The on-site inspectors must assure that the preferred corrective action alternative selected by the consultant and the work performed on sites eligible for funding under the Act are necessary and appropriate considering conditions at the location, and that work is performed in a cost-effective manner. The DMB annually must evaluate the need for on-site inspectors, and if it determines that they are unnecessary due to other cost-containment procedures implemented by the Department, the DMB may discontinue the inspections.

Consultants

Under the bill, to receive money from the Fund, an owner or operator must retain a consultant

to perform the responsibilities required under the LUST Act. A consultant must submit the following items for competitive bidding in accordance with procedures established by the DMB: well drilling, including monitoring wells; laboratory analysis; construction of treatment systems; removal of contaminated soil; and operation of treatment systems. All bids received by a consultant must be submitted on a standardized bid form prepared by the Department.

A consultant may perform work activities only if he or she bids for the work activity and his or her bid is the lowest responsive bid. A consultant who intends to submit a bid must submit it to the Administrator before receiving bids from contractors. Upon receiving bids, a consultant must submit to the Administrator a copy of all bid forms received and the bid accepted. The consultant must provide a specific reason why the lowest bid was not accepted, if that is the case. Bids are not required for initial response actions under the LUST Act.

An owner or operator may request that the consultant retained by the owner or operator add qualified bidders to the list for requests for bids. After the consultant employs the competitive bidding process, the owner or operator may hire contractors directly. Upon hiring a contractor, a consultant may mark up the contractor's work invoice only if the consultant pays the contractor and does the billing.

The bill provides that the removal of underground storage tank systems is not eligible for funding under the MUSTFA Act. If a release is discovered during removal, the consultant must allow the contractor removing the system to complete the removal.

An owner or operator may receive funding under the Act to implement a corrective action alternative that is not the preferred corrective action alternative only if the owner or operator pays the difference between the selected alternative and the preferred alternative.

Board Membership/Consultant Review

The Act provides for the creation of the MUSTFA Policy Board and specifies its membership, including individuals appointed by the Governor with the advice and consent of the Senate. The bill provides for two, rather than one, representatives of the general public. In addition, the bill provides that the public members, as well as the individual representing an environmental public interest organization, may not be associated with any of the other organizations from which a representative must be appointed.

The bill permits the Administrator or the DMB to submit to the Board for its review and evaluation, the competitive bidding process employed by a consultant. In conducting this review and evaluation, the Board may convene a peer review panel. Following its review and evaluation, the Board must forward a copy of its findings to the Department, the Administrator, and the consultant. If the Board finds the practices employed by a consultant to be inappropriate, the Board may recommend that the DMB remove the consultant from the list of qualified consultants.

Upon the Administrator's or Department's request, the Board must recommend to the DMB whether a consultant should be removed from the list of qualified consultants. Before making this recommendation, the Board may convene a peer review panel to evaluate the consultant's conduct regarding compliance with the Act.

The bill requires a Board member to abstain from voting on any matter in which he or she has a conflict of interest.

List of Consultants

Previously, the Department of Natural Resources, after consultation with the Policy Board, had to prepare and annually update a list of approved contractors who, based on DNR guidelines, were qualified to undertake corrective action. The bill, instead, requires the Department of Management and Budget, after consultation with the Board, to prepare and annually update a list of qualified underground storage tank consultants who, based on DMB guidelines, are qualified to carry out the responsibilities of consultants as provided in the LUST Act.

Upon application, the DMB must include a person on the list if he or she meets all of the

following requirements:

-- The person demonstrates experience in all phases of UST work, including tank removal oversight, site assessment, soil removal, feasibility, design, remedial system installation, remediation management activities, and site closure.
-- The person has one or more individuals actively on staff who are certified UST professionals. Each certified professional must provide a letter declaring that he or she is employed by the applicant and has an active operational role in the applicant's daily activities.
-- The person demonstrates that he or she has or can obtain, if approved, workers' compensation insurance; professional liability errors and omissions insurance, which may not exclude bodily injury, property damage, or claims arising out of pollution for environmental work, and must have a limit of at least $1 million per occurrence; contractor pollution liability insurance with limits of at least $1 million per occurrence, if not included under the professional liability and errors insurance; commercial general liability insurance with limits of at least $1 million per occurrence, $2 million aggregate; and automobile liability insurance with limits of at least $1 million per occurrence. (Pollution liability insurance is not required for consultants who do not perform contracting functions.)
-- The person demonstrates compliance with the Federal Occupational Safety and Health Act (OSHA), the Michigan OSHA, and regulations and rules promulgated under those Acts, and that all of those regulations and rules have been complied with during the person's previous corrective action activity.

A person applying to be placed on the list must submit to the DMB an application along with documentation that he or she meets the foregoing requirements. If the person is a corporation, it must include a copy of its most recent annual report. After submitting an application or any time after a consultant is included on the list, the person must notify the Department within 10 days of a change in any of the above requirements, or any material change in the person's operations or organizational status that might affect his or her ability to operate as a consultant.

A consultant must be suspended or removed from the list for fraud or other cause as determined by the DMB, including failing to select and employ the most cost effective corrective action measures. "Cost effective" includes a consideration of timeliness of implementation of the corrective action measures.

Certified UST Professionals

The bill requires the DMB, upon request, to certify an individual as an underground storage tank professional if he or she meets any of the following requirements:

-- The individual is a licensed professional engineer and has three or more years of relevant soil corrective action experience in the State.
-- The individual is a certified professional geologist or holds a similar approved designation, and has three or more years of relevant soil corrective action experience in the State.
-- The individual can demonstrate that he or she has three or more years of relevant environmental assessment and corrective action experience in the State and at least 10 years of specific experience in relevant environmental work with increasing responsibilities.

An individual requesting certification must submit to the DMB a copy of all of his or her credentials along with a letter requesting consideration and attesting that the information is a true and accurate reflection of the individual's capabilities and qualifications. False or erroneous information or representations constitute fraud on the part of the individual and may involve enactment of legal proceedings, revocation of certification, and permanent suspension from all activities funded by the Fund.

Interest Subsidy

The Act requires the Department of Treasury to establish a program that provides interest subsidies to lenders on loans for the replacement

of underground storage tank systems.

The bill also requires the Department of Treasury to provide qualified applicants with an interest rate subsidy 1% above the six-month U.S. Treasury bill rate in effect at the beginning of the calendar quarter in which an owner or operator is eligible, but no more than the actual interest rate paid. The maximum loan amount that an interest rate subsidy will be provided for is $200,000. The maximum loan period is 10 years.

Insurance Study

The Act requires the DMB to conduct a study to determine the availability and cost of environmental impairment insurance for tank owners and operators, and to report to the Legislature on the results of the study. The bill requires the study to be conducted by June 22, 1994, instead of June 22, 1998, and to be reported to the Insurance Commissioner, as well as the Legislature.

Definitions

The Act previously defined "corrective action" as an action to stop, minimize, eliminate, or clean up a release or its effects, as may be necessary to protect the public health, safety, or welfare, or the environment, including release investigation, mitigation of fire and safety hazards, tank repair or removal, soil remediation, hydrogeological investigations, free product removal, groundwater remediation and monitoring, exposure assessments, the temporary or permanent relocation of residents, and the provision of alternate water supplies. The bill defines "corrective action", instead, as the investigation, assessment, cleanup, removal, containment, isolation, treatment, or monitoring of regulated substances released into the environment, or the taking of such other actions as necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, the environment, or natural resources.

The Act had defined "indemnification" as indemnification of a person for a judgment entered against that person in a court of law or for a settlement entered into by that person and approved by the Attorney General, if the judgment or settlement arose out of an injury suffered because of a release from a petroleum underground tank system operated by that person. The bill, instead, defines "indemnification" as indemnification of an owner or operator for a legally enforceable judgment entered against the owner or operator by a third party, or a legally enforceable settlement entered between the owner or operator and a third party, compensating that third party for bodily injury or property damage, or both, caused by an accidental release as those terms are defined in the Michigan Administrative Code (R 29.2163).

The Act defines "release" as any spilling, leaking, emitting, discharging, escaping, or leaching from a petroleum underground storage tank system into groundwater, surface water, or subsurface soils. The bill deleted reference to "disposing".

Repeal

The bill repealed Section 11 of the Act, under which an owner or operator was ineligible for indemnification associated with a release from a tank system if the system had not met standards of the Federal Solid Waste Disposal Act for a new system installed after January 1, 1989, and the owner has not satisfied requirements for an interest subsidy on a loan that would bring the system into compliance (MCL 299.811).

Senate Bill 645

Confirmed Release

Previous Law. Previously, upon confirmation of a release, the owner or operator had to comply with various abatement measures; submit a report to the DNR Director summarizing the initial abatement steps; assemble information about the site and the nature of the release and submit the information to the Director; remove free product; submit a work plan to conduct an investigation; and submit a corrective action plan (MCL 299.837). The bill deleted that section, and replaced those provisions, as well as requirements for reporting releases and submitting corrective action plans, as described below.

Reporting/Initial Response Actions. Previously, upon confirmation of a release or the discovery of a release from an UST system, the owner or operator was required to take certain initial response actions within 24 hours, i.e., reporting the release to the Michigan Department of State

Police (MSP) Fire Marshal Division; identifying and mitigating fire, explosion, and vapor hazards; and taking action to prevent further release into the environment.

The bill provides, instead, that upon confirmation of a release, the owner or operator must report the release, as well as whether free product has been discovered, to the Fire Marshal Division, within 24 hours after its discovery. Upon receiving a release report, a member of the Division or the MSP may investigate the release. A State Police investigation, however, does not relieve the owner or operator of any responsibilities related to the release as provided in the LUST Act. ("Free product" means a regulated substance in a liquid phase that is not dissolved in water and that has been released into the environment. The bill refers to a regulated substance in a liquid phase "equal to or greater than 1/8 inch of measurable thickness".)

After a release has been reported, the owner or operator or a consultant must immediately begin and expeditiously do all of the following:

-- Identify and mitigate fire, explosion, and vapor hazards.
-- Take action to prevent further release into the environment, including removing the regulated substance from the system that is causing a release.
-- Excavate and contain, treat, or dispose of soils above the water table that are visibly contaminated with a regulated substance if the contamination is likely to cause a fire hazard or spread and increase the cost of corrective action.
-- Take any other action necessary to abate an immediate threat to public health, safety, or welfare, or the environment.
-- If free product is discovered after the release was reported, report the discovery to the DNR within 24 hours.
-- Identify and recover free product.

If free product is identified, the owner, operator, or consultant must:

-- Conduct free product removal in a manner that minimizes the spread of contamination into previously uncontaminated zones by using recovery and disposal techniques appropriate to the conditions at the site, and that properly treat, discharge, or dispose of recovery by-products as required by law.
-- Use abatement of free product migration as a minimum objective for the design of the free product removal system.
-- Handle any flammable products in a safe and competent manner to prevent fires or explosions.
-- If a discharge is necessary in conducting free product removal, obtain all necessary permits or authorization as required by law.

Initial Abatement Report. Under the bill, within 20 days after a release has been reported, the consultant must submit to the DNR an initial abatement report that describes the conditions on the property in which the release occurred, the status of free product, and any actions taken pursuant to these provisions. The report must include: the facility address and name; the name, address, and telephone number of a facility compliance contact person; the time and date the release was discovered and reported to the State Fire Marshal; a site map that includes locations of underground storage tanks and other structures; a description of how the release was discovered; a list of the regulated substances the system contained when the release occurred and in the past; and the location of nearby surface waters, underground sewers, and utility lines.

The report also must include: the component of the system from which the release occurred; whether the system was emptied to prevent further release; a description of what other steps were taken to prevent further migration of the regulated substance into the soil or groundwater; whether vapors or free product was found and what steps were taken to abate those conditions, and the current levels of vapors or free product in nearby structures; the extent to which all or part of the system and/or soil was removed; data from analytical testing of soil and groundwater samples; a description of the free product investigation and removal if free product was present; and identification of any other contamination on the site not resulting from the release and its source.

Other Consultant Responsibilities. Immediately after initial response actions are initiated, the consultant must inspect the areas of any

aboveground releases or exposed areas of belowground releases and prevent further migration of the released substance into surrounding soils, groundwater, and surface water. The consultant also must continue to monitor and mitigate any additional fire and safety hazards posed by vapors or free product that has migrated from the excavation zone and entered into subsurface structures. Further, if free product is discovered at any time at a location not previously identified, the consultant must report the discovery within 24 hours to the DNR and initiate free product recovery as described above; and, within 20 days after the discovery, submit a report including the information required in an initial abatement report.

Initial Assessment of Release

Under the bill, within 60 days after a confirmed release has been reported, the consultant retained by the owner or operator must complete an initial assessment of the release. In conducting the initial assessment, the consultant must do the following:

-- Using quantitative field screening techniques, estimate the horizontal and vertical extent of on-site soil contamination and, if possible, estimate the extent of off-site contamination.
-- Determine the depth to groundwater via any of the several methods described in the bill.
-- Identify potential migration and exposure pathways and receptors.
-- Estimate the amount of soil in the vadose zone that is contaminated. ("Vadose zone" means the zone between the land surface and the water table, or zone of saturation, also known as unsaturated zone and zone of aeration.)
-- Upon completing the above, submit a report of the findings to the DNR.

If the on-site initial assessment indicates that off-site soil or groundwater may be affected, the consultant also must submit a plan that identifies the steps that have been taken or will be taken, including an implementation schedule expeditiously to secure access to off-site property to complete the delineation of the extent of the release.

Uncontaminated Groundwater

Corrective Action Report. Within 75 days after a confirmed release has been reported, the consultant retained by the owner or operator must submit to the DNR a report describing what corrective action will be undertaken, including a proposed schedule for completion, if the estimated volume of soil affected by the release identified in the initial assessment does not exceed 100 cubic yards per underground storage tank and does not exceed 500 cubic yards per location, the initial assessment indicates that groundwater has not been affected by the release, and the owner or operator intends to implement a Type A or Type B cleanup. If these requirements are met, the contaminated soil may be removed and disposed of in a landfill, if appropriate, as provided by law.

("Type A cleanup level" means compliance with R 299.5707 of the Michigan Administrative Code, which provides that compliance with Type A criteria is attained when the hazardous substance concentration does not exceed either background or the method detection limit for the substance in question. Under the Code, "Type B" means the degree of cleanup that provides for hazardous substance concentrations that do not pose an unacceptable risk on the basis of standardized exposure assumptions and acceptable risk levels described in R 299.5709-299.5715. The bill defines "Type B cleanup level" as compliance with those rules.)

Soil Feasibility Analysis. If the total estimated volume of soil affected by a release exceeds 100 cubic yards per system or 500 cubic yards per location and groundwater is not affected, the consultant must prepare, within 150 days after the release has been reported, a soil feasibility analysis that conforms to administrative rules (R 299.5701-299.5715 and 299.5721-299.5727), and does all of the following:

-- Identifies technically feasible and reasonably practical on-site and off-site correction action alternatives to remediate contaminated soils, including alternatives that permanently and significantly reduce the volume, toxicity, and mobility of the regulated substances.
-- Describes the costs associated with each corrective action alternative.

-- Describes the effectiveness and feasibility of each corrective action alternative in meeting cleanup standards.
-- Identifies the time necessary to implement and complete each alternative.
-- Identifies the preferred alternative based upon the above factors and includes an implementation schedule for completion of the corrective action.

Soil Remediation Corrective Action Plan. For sites in which a soil feasibility analysis is prepared, within 210 days after the confirmed release has been reported, the consultant must prepare a soil remediation corrective action plan, including a schedule to implement the soil feasibility analysis recommendation.

Implementation. If the preferred corrective action alternative is a Type A or Type B cleanup, the consultant must implement the corrective action plan in accordance with the schedule included in it. If the preferred alternative is a Type C cleanup, the consultant must prepare and submit to the DNR a Type C corrective action plan, as described below. ("Type C cleanup" means a degree of cleanup that assures that a regulated substance does not pose an unacceptable risk considering a site-specific assessment of risk.)

Contaminated Groundwater

Phase I Study. If the initial assessment of a release indicates that the release of a regulated substance might have contaminated groundwater, within 150 days after the release was reported, the consultant must complete a Phase I hydrogeological study to verify groundwater contamination. The study must include the installation of three monitoring wells as described in the bill, unless the consultant determines that more monitoring wells are needed. If the source of the release is more than 100 feet from the border of the property where the tank system is located, up to three additional wells may be installed near the property line to establish whether contamination has migrated off of the property.

The Phase I study must include all of the following:

-- A determination of groundwater flow rate and direction.
-- Laboratory analytical data sufficient to confirm if groundwater is contaminated based upon the regulated substance involved.
-- The vertical distribution of contaminants.

Phase II/Feasibility Analysis. If the Phase I study has not delineated the horizontal and vertical extent of the contamination, the consultant must prepare and submit, within 210 days after the release was reported, a work plan including an implementation schedule for conducting a Phase II hydrogeological study to determine the vertical and horizontal extent of the contamination. Upon completing the Phase II work plan, the consultant must implement the Phase II study according to the completion schedule in the work plan.

Within 90 days after delineating the horizontal and vertical extent of the contaminant plume, the consultant must prepare a soil and groundwater feasibility analysis that does all of the following:

-- Identifies on-site and off-site corrective action alternatives to remediate contaminated soil and groundwater for each cleanup type, including alternatives that permanently and significantly reduce the volume, toxicity, and mobility of the regulated substances.
-- Describes the costs associated with each corrective action alternative.
-- Describes the effectiveness and feasibility of each alternative in meeting cleanup standards.
-- Identifies the time necessary to implement and complete each alternative.
-- Identifies the preferred alternative and includes an implementation schedule for completion of the corrective action.

Corrective Action Plan. Within 90 days of completion of the feasibility analysis, the consultant must prepare a soil and groundwater remediation corrective action plan according to the preferred alternative recommended by the analysis. The plan must include a schedule for implementation, designed to implement the preferred alternative. The plan also must propose corrective action measures that conform with the Michigan Administrative Code. If the preferred alternative is a Type A or Type B cleanup, the consultant immediately must

implement the corrective action plan according to the plan's schedule. If the preferred alternative is a Type C cleanup, the consultant must prepare and submit to the DNR a Type C corrective action plan.

DNR Copies. Upon completion, the consultant immediately must submit a copy of each of the following to the DNR: the soil feasibility analysis; the Phase I hydrogeological study; the Phase II hydrogeological work plan and study; the soil and groundwater feasibility analysis; and the corrective action plan.

Delay of Corrective Action

The bill provides that a tank system owner or operator may delay initiation of corrective action measures at one or more lower priority sites for 12 months after the horizontal and vertical extent of the contamination has been delineated if all of the following conditions are met:

- -- Corrective action measures are being implemented according to the Act at all high priority sites for which the owner or operator is responsible.
- -- The owner or operator or a consultant retained by the owner or operator has provided notice, as described in the bill, to the owners of all off-site property onto which contamination has migrated. If it is anticipated that corrective action will not begin within 60 days of the date in the notice, the owner or operator or consultant must provide an updated notice of when corrective action is projected to begin.
- -- No contamination has migrated off site, or if it has, potable water for all users within a one-half mile radius of the furthest extent of migration is supplied by a Type I public water supply, and any source for that water supply is not located within one-half mile of the furthest extent of migration.

Corrective action may be deferred for only one 12-month period unless groundwater sampling during the period shows evidence of natural attenuation. If a consultant determines that groundwater sampling shows attenuation, corrective action may be extended for an additional 12 months.

An owner or operator who delays initiation of corrective action measures must monitor the groundwater at the lower priority site, and off-site property if applicable, on a quarterly basis. If monitoring shows that concentrations of regulated substances in groundwater exceeded one or more Type B criteria and the conditions specified above regarding off-site migration are not met, the owner or operator immediately must retain a consultant to implement corrective action measures as otherwise required under the Act.

These provisions do not limit the ability of the DNR Director to take any actions as otherwise provided by law.

("High priority site" means a site that has free product or that meets certain specified conditions, including sites where a delay in the initiation of corrective action will result in increased costs to the MUSTFA Fund. "Lower priority site" means a site that does not meet the conditions of a high priority site.)

Post-Remediation Activities

Under the bill, following completion of corrective action measures in which a Type A or Type B cleanup was implemented, the owner or operator must retain a consultant to demonstrate through sampling and testing of soils and groundwater that all soils and groundwater affected by the release have been remediated to the respective cleanup standards.

If the sampling and testing demonstrate that cleanup standards have been met, the consultant must submit a release closure report to the DNR. The report must include adequate soil and groundwater data to show that the cleanup standards have been met at all points in the affected area.

Within 60 days after receiving a report, the DNR Director is required, before its next publication, to remove the site or portion of the site that has been remediated from any list of the Department that identifies sites of contamination, and to notify the owner or operator that that action has been taken. If a subsequent audit determines, however, that the contamination has not been remediated, the DNR must place the site back on the list and require further corrective action as otherwise provided in the Act.

Type C Cleanup

Risk Assessment/Corrective Action Plan. If a soil feasibility analysis or the soil and groundwater feasibility analysis identifies the preferred corrective action alternative to be a Type C cleanup, the owner or operator must retain a consultant to submit a risk assessment and a Type C corrective action plan for responding to contaminated soils, groundwater, and surface water to the DNR within 60 days of the completion of the analysis. The Type C plan must provide for adequate protection of public health, safety, and welfare, and the environment as determined by the Director.

The required risk assessment may be submitted in a "short form" format specified by the Department. The DNR may limit the applicability of the short form to corrective action plans that address a release of an unused and uncontaminated petroleum fuel or lubricant. The short form must address all of the following:

- -- Potential exposure of human and natural resource targets.
- -- Environmental media affected by contamination.
- -- All of the following with respect to the physical setting of the site: geology, hydrology, soils, hydrogeology, and other aspects of the physical setting that might have a bearing on the appropriateness of the proposed corrective action plan.
- -- Potential pathways of regulated substance migration.
- -- Amount, concentration, and form of the regulated substances in the material released.
- -- The extent to which regulated substances have migrated or are expected to migrate from the area of the release.
- -- The uncertainties of the risk assessment.
- -- Other factors appropriate to the site.

The risk assessment portion of a corrective action plan for sites that do not meet the criteria for a short form must address all of the factors listed above. The risk assessment must be presented in a manner that facilitates efficient DNR review.

In addition to the risk assessment, the Type C corrective action plan must include all of the following:

- -- A description of the proposed corrective action, including a demonstration that it is appropriate for the site, considering the reasonably foreseeable uses of the site and natural resources in question.
- -- Information about the cost of what the consultant believes to be the lowest cost, technically feasible corrective action alternative that would comply with Type B cleanup levels.
- -- Identification of any limitations on the ability to monitor remedial performance.
- -- Other factors appropriate to the site.

Cleanup Criteria. Any corrective action plan submitted under these provisions to address surface water or sediments must include cleanup criteria established by the DNR on the basis of sound scientific principles and considering the need to eliminate or mitigate the following use impairments, as appropriate to the site: restrictions on fish or wildlife consumption; degraded fish or wildlife populations; fish tumors or other deformities; bird or animal deformities or reproductive problems; degradation of benthos; restrictions on dredging activities; eutrophication or undesirable algae; restrictions on drinking water consumption or taste or odor problems; beach closings; degradation of aesthetics; degradation of phytoplankton or zooplankton populations; and loss of fish or wildlife habitat.

Plan Approval. If the Director determines that a risk assessment submitted is complete, accurately reflects available information about the site, and satisfies the requirements for a Type C corrective action plan, the Director may approve of the corrective action plan if a consultant retained by the owner or operator demonstrates that all of the following conditions are met:

- -- The corrective action plan provides for site monitoring sufficient to assure the integrity and effectiveness of the remedy.
- -- If the corrective action relies on land use restrictions to prohibit exposures that might result in unacceptable risk, the restrictions are described in a restrictive covenant that is executed by the property owner and recorded with the register of deeds for the county in which the site is

located. The restrictions will run with the land and be binding on the owner's successors and assigns. The restrictive covenant is subject to approval by the State and must accomplish various objectives identified in the bill.

-- If the Director determines that it is necessary to assure the continued adequacy of a corrective action that includes containment measures, the owner or operator, through an acceptable financial mechanism other than the MUSTFA Fund, provides funding to pay for monitoring, operation and maintenance, oversight, and other costs necessary to assure the effectiveness and integrity of the containment measures.

The Director is required to approve or disapprove a corrective action plan within 120 days after it is received. (Previously, the Director had to approve or disapprove a plan within 45 days.) If the Director disapproves the plan, he or she must give the owner or operator and the consultant an explanation of why a Type C corrective action is not appropriate or a list of deficiencies, and modifications that if incorporated will result in the plan's approval, along with a schedule for resubmittal.

Pre-Approval Cleanup. Under the Act, in the interest of minimizing environmental contamination and promoting more efficient cleanup, an owner or operator may begin cleanup of soil and groundwater before a corrective action plan is approved as long as the owner or operator notifies the Director of the intention to begin cleanup, complies with any conditions imposed by the Director, and incorporates these self-initiated cleanup measures in the corrective action plan submitted for approval. The bill also allows the owner or operator to retain a consultant to begin cleanup, requires that the Director be notified at least 48 hours before cleanup begins, and requires the owner or operator to assure that the initial cleanup is not inconsistent with the anticipated corrective action.

Public Notice. Previously, for each confirmed release that required a corrective action plan, the Director had to provide notice to the public by means designed to reach those members of the public directly affected by the release and the corrective action. Under the bill, the public notice requirement applies to Type C corrective action plans, and the owner or operator must give the notice. The notice must include the name, address, and telephone number of a contact person. A copy of the notice and proof that it was provided must be submitted to the DNR. The bill also deleted a requirement that the Director give public notice if implementation of a corrective action plan did not achieve the established cleanup levels in the plan and termination of the plan was under consideration by the Director.

De Minimis Spills

The bill defines "de minimis spill" as a spill of petroleum that contaminates not more than 20 cubic yards of soil per underground storage tank or 50 cubic yards of soil per location, in which groundwater has not been affected by the spill, and that is abated pursuant to the bill.

Under the bill, if a de minimis spill occurs, the owner or operator or a consultant retained by the owner or operator may remove and properly dispose of the contaminated soils. After removal and disposal, a consultant must conduct sampling and testing of soils in the vicinity of the de minimis spill pursuant to rules promulgated by the MSP. If, upon removal of up to 20 cubic yards of soil per UST or 50 cubic yards per location, the sampling and testing show the presence of contamination, the spill must be reported as a release and corrective action must be implemented as otherwise provided in the Act. If the results of the soil tests show no evidence of contamination, they must be submitted to the MSP, Fire Marshal Division, along with other information required by the Fire Marshal Division on a de minimis spill closure report provided by the Division, within 45 days after discovery of the spill.

A de minimis spill is not eligible for funding under the MUSTFA Act.

Penalties for Late Reports

The bill imposes the following penalty if various reports are not filed during the time required:

-- $100 per day for the first seven days that a report is late.

-- $500 per day for days eight through 14 that a report is late.

-- $1,000 per day for each day beyond day 14 that a report is late.

The penalty applies to the initial abatement report, the report on free products discovered at a location, the report on findings of an initial assessment, and the report on corrective action on a release not exceeding 100/500 cubic yards. An owner or operator may by contract transfer the responsibility for paying these fines to a consultant retained by the owner or operator.

Upon request, the Director may grant an extension to a reporting deadline for good cause. An appeal of a penalty may be taken to the circuit court.

The Director is required to forward all money collected under these provisions to the State Treasurer for deposit in the MUSTFA Fund.

The Attorney General may commence a civil action to recovery a penalty under these provisions.

Obligation to Retain Consultant

Notwithstanding any other provision of the Act, unless directed to do otherwise by the DNR, an owner or operator who had prepared a corrective plan on the bill's effective date, may implement the plan without retaining a consultant. The owner or operator must retain a consultant, however, to perform the post-remediation activities described above.

An owner or operator who had not prepared a corrective action plan on the bill's effective date is required to retain a consultant to carry out the activities provided in the Act. The consultant must use all relevant information that has been obtained before being retained, and, unless material new information is discovered, the consultant may not repeat activities that were performed before the bill's effective date.

If an owner or operator is a consultant or employs a consultant, the bill does not require the owner or operator to retain an outside consultant to perform responsibilities required under the Act. Those responsibilities may be performed by the owner or operator who is a consultant or by a consultant employed by the owner or operator.

Actions taken by a consultant under the Act do not limit or remove the liability of an owner or operator except as specifically provided for in the Act.

Department Oversight

The bill requires the DNR to design and implement a program selectively to audit or oversee all aspects of corrective actions taken under the Act to assure compliance with the Act.

If the Department conducts a complete audit of a release, and the audit confirms that a corrective action has been conducted in compliance with the Act and that the cleanup standards are met, the DNR must give the owner or operator a letter describing the audit and its results.

If an audit does not confirm that corrective action has been conducted in compliance with the Act or that cleanup standards are met, the Director may require the owner or operator to do any of the following: provide additional information related to any requirements of the Act; retain a consultant to implement corrective actions, hydrogeological studies, or remediation alternative studies on an accelerated implementation schedule; or retain a consultant to take additional corrective actions necessary to comply with the Act or to protect public health, safety, or welfare, or the environment.

The Department may create and require the use of forms to assist in the reporting requirements provided in the Act.

Under the Act, the Director has the right to enter at all reasonable times in or upon any private or public property for various specified purposes. The bill includes the purpose of inspecting and copying any records related to an underground storage tank system.

Penalties/Fraudulent Practice

Under the bill, it is a felony, punishable by imprisonment for up to five years and/or a maximum fine of $50,000, for a person to make or submit, directly or indirectly, any statement, report, confirmation, certification, proposal, or other information under the Act, knowing it to be false or misleading. In addition to any criminal penalty imposed, a person convicted

must pay restitution to the Fund for the amount received in violation of this provision.

Further, a person who knowingly makes or submits a false, misleading, or fraudulent statement, report, confirmation, certification, proposal, or other information, or commits a fraudulent practice, is subject to a civil fine of up to $50,000 for each submission or fraudulent practice. In addition to any civil fine imposed under this provision, a person found responsible must pay restitution to the Fund for the amount received in violation. The bill specifies that, "The legislature intends that this subsection be given retroactive application."

For purposes of these provisions, a submission includes transmittal by any means, and each transmittal constitutes a separate submission.

"Fraudulent" or "fraudulent practice" includes, but is not limited to, the following:

- Representing that work was done or services were performed that were not done or performed.
- Contaminating an otherwise clean resource or site with contaminated soil or product from a contaminated resource or site.
- Returning any load of contaminated soil to its original site for reasons other than soil remediation.
- Intentionally causing damage, or causing damage as the result of gross negligence, to an UST system that results in a release at a site.
- Placing an UST system at a contaminated site where no system previously existed for purposes of disguising the source of contamination.
- Performing any intentional act or act of gross negligence that allows or causes contamination to spread at a site.
- Conducting sampling, testing, monitoring, or excavation that is not justified by the site condition.
- Falsifying a signature on a statement, report, confirmation, certification, proposal, or other document provided under the Act.
- Misrepresenting or falsifying the source of data regarding site conditions, or the date upon which a release occurred.
- Falsely characterizing the contents of an UST system or reporting regulated substances or parameters other than the substance that was in the system.
- Failing to report subsequent suspected or confirmed releases from sites with a previously reported release.
- Falsifying the date on which an UST system or any of its components was removed from the ground and site.
- Any other act or omission of a false, fraudulent, or misleading nature undertaken to gain compliance with the Act.

The Attorney General or county prosecutor may conduct an investigation of an alleged violation and bring an action for a violation. If the Attorney General or prosecutor has reasonable cause to believe that a person has information or is in possession, custody, or control of any document or records, however stored or embodied, or tangible object relevant to an investigation, the Attorney General or prosecutor, before bringing any action, may make an ex parte request to a magistrate for issuance of a subpoena requiring the person to appear and be examined under oath or to produce the document, records, or object for inspection and copying. Service may be accomplished by any means described in the Michigan Court Rules.

The Attorney General or prosecutor may apply to the district court for an order granting immunity to any person who refuses or objects to providing information, documents, records, or objects sought under these provisions. If the judge is satisfied that it is in the interest of justice that immunity be granted, he or she must enter an order granting immunity to the person and requiring him or her to appear and be examined under oath, and/or to produce the document, records, or object for inspection and copying.

If a person objects to or otherwise fails to comply with a subpoena or requirement to appear, an action may be brought in circuit court to enforce the demand. Actions filed by the Attorney General may be brought in Ingham County Circuit Court. A person who fails to comply with a written demand is subject to a civil fine of up to $25,000 for each day of continued noncompliance.

All civil fines collected under the foregoing provisions must be apportioned in the following manner:

- -- 50% must be deposited in the General Fund and used by the Department of State Police to fund fraud investigations under the Act.
- -- 25% must be paid to the office of the county prosecutor or Attorney General, whichever office brought the action.
- -- 25% must be paid to a local police department or sheriff's office, or city or county health department, if investigation by that office or department led to the bringing of the action. If more than one office or department is eligible for payment, division of payment must be on an equal basis. If no local office or department is entitled to payment, the money must be deposited into the Emergency Response Fund created under the MUSTFA Act.

These provisions do not preclude prosecutions under the laws of the State.

Rewards

Under the bill, a person who provides information that materially contributes to the imposition of a civil fine or a criminal conviction under the Act against any person must be paid a reward pursuant to rules adopted by the Department of State Police. The reward must be 10% of the amount of the civil fine collected or $1,000, whichever is greater.

A person is not eligible for a reward for a violation previously known to the investigating agency unless the information materially contributes to the civil judgment or criminal conviction. If more than one person provides information, the first to notify the investigating agency is eligible for the reward. If more than one notification is received on the same day, the reward must be divided equally among the informants.

Public officers and employees of the United States, the States of Michigan, Wisconsin, Illinois, Indiana, and Ohio, or counties and cities in those states, are not eligible for a reward, unless reporting the violation does not relate in any manner to their responsibilities as public officers or employees.

An employee of a business who provides information that the business violated the Act is not eligible for a reward if the employee intentionally caused the violation.

The Department of State Police is required to promulgate rules that establish procedures for the receipt and review of claims for payment of rewards. All decisions concerning the eligibility for an award and the materiality of the provided information must be made under the rules. In each case brought for a violation, whichever office prosecuted the action must determine whether the information materially contributed to the imposition of a civil fine or a criminal conviction.

The Department of State Police is required periodically to publicize the availability of rewards to the public. A claim for a reward may be submitted only for information provided on or after the bill's effective date.

Definitions

The bill defines "contamination" as the presence of a regulated substance in soil or groundwater in a concentration that exceeds Type A cleanup levels or Type B cleanup levels, whichever is higher.

The Act defines "regulated substance" as a) a substance defined in the Federal Comprehensive Environmental Response, Compensation, and Liability Act, or b) petroleum, including crude oil or any fraction of crude oil that is liquid at standard conditions of temperature and pressure. The bill includes a substance listed as a hazardous air pollutant in the Federal Clean Air Act.

The Act previously defined "corrective action" as an action to stop, minimize, eliminate, or clean up a release or its effects, as may be necessary to protect the public health, safety, or welfare, or the environment, including release investigation, mitigation of fire and safety hazards, tank repair or removal, soil remediation, hydrogeological investigations, free product removal, groundwater remediation and monitoring, exposure assessments, the temporary or permanent relocation of residents, and the provision of alternate water supplies. The bill

defines "corrective action", instead, as the investigation, assessment, cleanup, removal, containment, isolation, treatment, or monitoring of regulated substances released into the environment, or the taking of such other actions as necessary to prevent, minimize, or mitigate injury to the public health, safety, or welfare, the environment, or natural resources.

The Act defines "release" as any spilling, leaking, emitting, discharging, escaping, or leaching from an underground storage tank system into groundwater, surface water, or subsurface soils. The bill deleted reference to "disposing", and provides that "release" does not include a de minimus spill.

House Bill 4783

The bill requires the Department of State Police to enhance its audit and inspection program to monitor the installation and operation of new UST systems or components to insure that equipment meets minimum quality standards, the installation is done properly, and the monitoring systems are properly used.

The Department also is required to conduct a study regarding the causes of UST leaks and prepare a report making recommendations regarding upgrading UST system standards, establishing timetables for the replacement of equipment, and instituting any other practices or procedures that will maximize releases of regulated substances into the environment. The report must be submitted by July 1, 1995, to the members of the Legislature who are members of committees dealing with natural resource issues.

The bill permits the Department or a certified UST system inspector within his or her jurisdiction, at the discretion of the Department or inspector, at an hour reasonable under the circumstances, to enter into and upon real property including a building or premises where regulated substances may be stored, for the purpose of inspecting and examining the property, buildings, or premises, and their occupancies and contents, to determine compliance with the Act and rules promulgated under it. The Department or inspector may do so without a complaint and without restraint or liability for trespass.

Under the Act, if the amount of money in the UST Regulatory Enforcement Fund exceeds $8 million at the close of any fiscal year, the Department cannot collect a registration fee for the following year from existing UST systems. After the registration fee has been suspended, it can be reinstated only if, at the close of any succeeding fiscal year, the balance of the Fund is less than a certain amount. The bill increased that amount from $2 million to $4 million.

The Act requires the owner of an UST system to register and annually renew the registration of the system with the Department, and the system must be registered before the owner brings it into use. The bill provides that, in addition, an installation registration form containing the information required by the Department must be submitted to the Department at least 45 days before the system's installation. The bill also specifies that the owner or operator of an UST closed before January 1, 1974, in compliance with the Fire Prevention Code is exempt from the registration requirements.

Under the Act, the owner or operator must notify the Department if there is a suspected or confirmed release from an UST system. The bill requires notice within 24 hours.

The Act defines "regulated substance" as petroleum or a substance defined in the Federal Comprehensive Environmental Response, Compensation, and Liability Act. The bill also includes a substance listed in the Clean Air Act.

House Bill 4785

MUSTFA Authority

Creation/Board/Operations. The bill created within the DMB the Michigan Underground Storage Tank Financial Assurance Authority, which is to exercise its prescribed statutory power, financial duties, and financial functions independently of the Department Director. Authority funds must be handled in the same manner and subject to the same provisions of law applicable to State funds or in a manner specified in a resolution of the Authority authorizing the issuance of bonds or notes.

The Authority is to be governed by a board of directors consisting of the DMB Director, the Director of the Department of State Police, and three residents of the State appointed by the

Governor with the advice and consent of the Senate. The board is subject to the Open Meetings Act. A board member or an officer, employee, or agent of the Authority must discharge the duties of his or her position in a nonpartisan manner, with good faith, and with the degree of diligence, care, and skill that an ordinarily prudent person would exercise under similar circumstances in a like position.

The Governor is required to designate the executive director of the Authority, which may employ legal and technical experts, and other officers, agents, or employees paid from Authority funds. An employee cannot be paid a higher salary than the DMB Director. The budgeting, procurement, and related functions of the Authority are to be performed under the direction and supervision of the DMB Director. The Authority may contract with the DMB for the purpose of maintaining and improving the rights and interests of the Authority.

Board members and Authority officers and employees are subject to laws that govern public officers' conflict of interest with respect to contracts with the State and political subdivisions (MCL 15.321-15.330 and 15-301-15.310).

Within 270 days following the end of the fiscal year, the Authority is required to file with the Legislature a written report on its activities of the last year. The report must specify the amount and source of revenues received, the status of investments made, and money spent with proceeds of bonds or notes sold under the MUSTFA Act.

Accounts of the Authority are subject to annual audits by the State Auditor General or a certified public accountant appointed by the Auditor General. Records must be maintained according to generally accepted accounting principles.

The property of the Authority and its income and operation, and bonds or notes issued by the Authority and interest on and income from them, are exempt from all taxes and special assessments of the State or a political subdivision of the State.

Bonds/Notes. The Authority may authorize and issue its bonds or notes payable solely from the revenues or funds available to the MUSTFA Fund from the environmental protection regulatory fee imposed under the Act. Authority bonds or notes are not a debt or liability of the State and do not create or constitute a pledge of the faith and credit of the State. All Authority bonds or notes are payable solely from revenues or funds pledged or available for their payment as authorized in the Act. All expenses incurred in implementing the Act are payable solely from revenues or funds provided under the Act. The Act does not authorize the Authority to incur any indebtedness or liability on behalf of the State.

The proceeds of bonds or notes issued under the Act must be deposited into the Fund or bond proceeds account as authorized or designated by resolution indenture or other agreement of the Authority.

The Authority may issue from time to time bonds or notes in principal amounts it considers necessary to provide funds for any purpose, including the following:

- The pay off of notes and bonds pursuant to the Act plus any amount necessary to maintain a fully funded debt reserve or other reserve intended to secure the principal and interest on the bonds or notes.
- The interest subsidy program.
- The payment, funding, or refunding of the principal of, interest on, or redemption premiums on bonds or notes issued by the Authority.
- The establishment or increase of reserves to secure or pay Authority bonds or notes or interest on them.
- The payment of interest on the bonds or notes for a period determined by the Authority.
- The payment of all other costs or expenses of the Authority incident to and necessary or convenient to carry out its purposes and powers.

The bonds or notes are not a general obligation of the Authority but are payable solely from the revenue and/or funds pledged to the payment of the principal of and interest on the bonds or notes as provided in the resolution authorizing them.

Authority bonds or notes must be authorized by resolution of the Authority; must bear the date(s) of issuance; may be issued as either tax-exempt bonds or notes or taxable bonds or notes for Federal income tax purposes; must be serial bonds, term bonds, or term and serial bonds; must mature within 20 years from the date of issuance; may provide for sinking fund payments; may provide for redemption at the option of the Authority for any reason; may provide for redemption at the option of the bondholder for any reason; must bear interest at a fixed or variable rate or rates per annum or at no interest; must be registered bonds and/or coupon bonds; may contain a conversion feature; may be transferable; and must be in the form, denomination, and with other provisions and terms as determined necessary or beneficial by the Authority.

Authority bonds or notes may be sold at a public or private sale at the time(s), price(s), and at a discount as the Authority determines. An Authority bond or note is not subject to the Municipal Finance Act and does not require the approval of the State Treasurer, have to be registered, or have to be filed under the Uniform Securities Act.

The Authority may provide for the issuance of bonds or notes in the amounts it considers necessary for the purpose of refunding outstanding Authority bonds or notes. In the resolution authorizing refunding bonds or notes, the Authority may provide that the bonds or notes to be refunded will be considered paid when there has been deposited in escrow, money or investment obligations that will provide payments of principal and interest adequate to pay the principal and interest on those bonds or notes, as the principal and interest became due, and that, upon the deposit of money or obligations, the Authority's obligations to the bond or note holders are terminated.

The Authority may authorize and approve an insurance contract, an agreement for a line of credit, a letter of credit, a commitment to purchase bonds or notes, an agreement to remarket bonds or notes, an agreement to manage payment, revenue or interest rate exposure, and any other transaction to provide security to assure timely payment of a bond or note. The Authority may authorize payment from the proceeds of the notes or bonds, or other funds available, of the cost of issuance.

A resolution authorizing bonds or notes may provide for various specified pledges, provisions of authority, and procedures, which will be part of the contract with the bond or note holders.

The members of the Authority, any person executing bonds or notes issued under the Act, and any person executing any agreement on behalf of the Authority will not be liable personally on the bonds or notes by reason of their issuance.

Notwithstanding any restriction contained in any other law, the State and a public officer, local unit of government, or State or local agency; a bank, trust company, savings bank and institution, savings and loan association, investment company, or other person carrying on a banking business; an insurance company, insurance association, or other person carrying on an insurance business; or an executor, administrator, guardian, trustee, or other fiduciary may legally invest funds belonging to or within the control of the person or entity in bonds or notes issued under the Act, and Authority bonds or notes may be authorized security for public deposits.

MUSTFA Fund

The MUSTFA Act provides that the MUSTFA Fund may be used only for administrative costs of implementing the Act, for an interest subsidy program, and for corrective action and indemnification. Under the bill, the Fund also may be used to pay off bonds or notes pursuant to the Act plus any amount necessary to maintain a fully funded debt reserve or other reserve intended to secure the principal and interest on the bonds or notes as required by resolution indenture or other agreement of the Authority.

Under the Act, total administrative costs cannot exceed 7% of the Fund's projected revenues in any year. The bill provides that costs incurred by the Authority for the issuance of bonds or notes that also may be payable from the proceeds of bonds or notes cannot be considered administrative costs in making that determination.

Penalties/Fraudulent Practice

Previously, the Act made it a felony, punishable by imprisonment for up to five years and/or a maximum fine of $50,000, for a person to make or submit a statement, report, claim, bid, work invoice, or other request for payment knowing that it was false, misleading, or fraudulent. Under the bill, beginning August 8, 1993, it is a felony, subject to the same penalty, for a person to make or submit, directly or indirectly, any statement, report, application, claim, bid, work invoice, or other request for payment or indemnification under the Act, knowing it to be false or misleading. In addition to any criminal penalty imposed, a person convicted must pay restitution to the Fund for the amount received in violation of this provision.

Further, a person who knowingly makes or submits a false, misleading, or fraudulent statement or report, application, claim, bid, work invoice, or request for indemnification, or commits a fraudulent practice, is subject to a civil fine of up to $50,000, or twice the amount submitted, whichever is greater. In addition to any civil fine imposed under this provision, a person found responsible must pay restitution to the Fund for the amount received in violation. The bill specifies that, "The legislature intends that this subsection be given retroactive application."

"Fraudulent" or "fraudulent practice" includes, but is not limited to, the following:

- -- Submitting a work invoice for the excavation, hauling, disposal, or provision of soil, sand, or backfill for an amount greater than the legal capacity of the carrying vehicle or for more than was actually carried, excavated, disposed of, or provided.
- -- Submitting paperwork for services done or work provided that was not in fact provided or that was not directly provided by the individual indicated on the paperwork.
- -- Contaminating an otherwise clean resource or site with contaminated soil or product from a contaminated resource or site.
- -- Returning any load of contaminated soil to its original site for reasons other than soil remediation.
- -- Intentionally causing damage, or causing damage as the result of gross negligence, to an UST system that results in a release at a site.
- -- Placing an UST system at a contaminated site where no system previously existed for purposes of disguising the source of contamination or obtaining MUSTFA funding.
- -- Submitting a work invoice for the excavation of soil from a site that was removed for reasons other than removal of the UST system or remediation.
- -- Performing any intentional act or act of gross negligence that allows or causes contamination to spread at a site.
- -- Registering a nonexistent UST with the DMB.
- -- Loaning to an owner or operator the co-pay amount required under the Act and then submitting inflated claims or work invoices designed to recoup that amount.
- -- Confirming a release without simultaneously providing notice to the owner or operator.
- -- Inflating bills and/or work invoices by adding charges for work not performed.
- -- Submitting a false or misleading laboratory report.
- -- Submitting bills and/or work invoices for sampling, testing, monitoring, or excavation that are not justified by the site condition.
- -- Falsely characterizing the contents of an UST system for purposes of obtaining MUSTFA funding.
- -- Submitting bills or work invoices by or from persons who did not directly provide the service.
- -- Characterizing legal services as consulting services for purposes of obtaining MUSTFA funding.
- -- Misrepresenting or concealing the identity, credentials, affiliation, or qualifications of principals or persons seeking, either directly or indirectly, funding or approval for participation under the Act.
- -- Falsifying a signature on a claim application or a work invoice.
- -- Failing to disclose accurately the actual amount and carrier of unencumbered insurance coverage available for new environmental impairment or professional liability claims.

-- Any other act or omission of a false, fraudulent, or misleading nature undertaken in furtherance of obtaining funding under the Act.

The bill permits the Attorney General or county prosecutor to conduct an investigation of an alleged violation and bring an action for a violation. If the Attorney General or prosecutor has reasonable cause to believe that a person has information or is in possession, custody, or control of any document or records, however stored or embodied, or tangible object relevant to an investigation, the Attorney General or prosecutor, before bringing any action, may make an ex parte request to a magistrate for issuance of a subpoena requiring the person to appear and be examined under oath or to produce the document, records, or object for inspection and copying. Service may be accomplished by any means described in the Michigan Court Rules.

The Attorney General or prosecutor may apply to the district court for an order granting immunity to any person who refuses or objects to providing information, documents, records, or objects sought under these provisions. If the judge is satisfied that it is in the interest of justice that immunity be granted, he or she must enter an order granting immunity to the person and requiring him or her to appear and be examined under oath, and/or to produce the document, records, or object for inspection and copying.

If a person objects to or otherwise fails to comply with a subpoena or requirement to appear, an action may be brought in circuit court to enforce the demand. Actions filed by the Attorney General may be brought in Ingham County Circuit Court. A person who fails to comply with a written demand is subject to a civil fine of up to $25,000 for each day of continued noncompliance.

In addition to any civil fines or criminal penalties imposed under the Act or the State's criminal laws, a person must repay any money obtained directly or indirectly under the Act. This money will constitute a claim and lien by the Fund upon any real or personal property owned either directly or indirectly by the person. The lien will attach regardless of whether the person is insolvent and cannot be extinguished or avoided by bankruptcy. The lien will have the force and effect of a "first in time and right" judgment lien.

All civil fines collected under the foregoing provisions must be apportioned in the following manner:

-- 50% is to be deposited in the General Fund and used by the DMB to fund fraud investigations under the Act.
-- 25% is to be paid to the office of the county prosecutor or Attorney General, whichever office brought the action.
-- 25% is to be paid to a local police department or sheriff's office, or city or county health department, if investigation by that office or department led to the bringing of the action. If more than one office or department is eligible for payment, division of payment must be on an equal basis. If no local office or department is entitled to payment, the money must be forwarded to the State Treasurer for deposit into the Emergency Response Fund.

Rewards

Under the bill, a person who provides information that materially contributes to the imposition of a civil fine or a criminal conviction under the Act against any person is to be paid a reward pursuant to rules adopted by the DMB. The reward is to be 10% of the amount of the civil fine collected or $1,000, whichever is greater.

A person will not be eligible for a reward for a violation previously known to the investigating agency unless the information materially contributes to the civil judgment or criminal conviction. If more than one person provides information, the first to notify the investigating agency is eligible for the reward. If more than one notification is received on the same day, the reward must be divided equally among the informants.

Public officers and employees of the United States, the States of Michigan, Wisconsin, Illinois, Indiana, and Ohio, or counties and cities in those states, are not eligible for a reward, unless reporting the violation does not relate in any manner to their responsibilities as public officers or employees.

An employee of a business who provides information that the business violated the Act is not eligible for a reward if the employee intentionally caused the violation.

The DMB is required to promulgate rules that establish procedures for the receipt and review of claims for payment of rewards. All decisions concerning the eligibility for an award and the materiality of the provided information must be made under the rules. In each case brought for a violation, whichever office prosecuted the action must determine whether the information materially contributed to the imposition of a civil fine or a criminal conviction.

The DMB is required periodically to publicize the availability of rewards to the public. A claim for a reward may be submitted only for information provided on or after the bill's effective date.

Payment Vouchers

Under the bill, if an owner of operator has submitted approved work invoices totaling the deductible amount, then the Administrator must forward payment vouchers to the State Treasurer or to the Authority, as long as the owner or operator has not exceeded the allowable amount of expenditure. (The Act previously required that payment vouchers be sent only to the Treasurer.)

Previously, upon the Administrator's direction, the State Treasurer could withhold partial payment of money on payment vouchers to assure acceptable completion of the proposed work. The bill permits the Treasurer or the Authority, upon the Administrator's direction, to withhold partial payment if there is reasonable cause to believe that there are suspected violations involving false or misleading requests for payment or fraudulent practices, or if it is necessary to assure acceptable completion of the proposed work.

Legislative Fundings/Purpose of the Act

The bill specifies that the Legislature "finds that leaking underground storage tanks are a significant cause of contamination of the natural resources, water resources, and groundwater in this state. It is hereby declared to be the purpose of this act and of the authority created by this act to preserve and protect the water resources of the state and to prevent, abate, or control the pollution of water resources and groundwater, to protect and preserve the public health, safety, and welfare, to assist in the financing of repair and replacement of petroleum underground storage tanks and to improve property damages by any petroleum releases from those tanks, and to preserve jobs and employment opportunities or improve the economic welfare of the people of the state".

Repeal

The bill postpones the Act's expiration from January 1, 2000, to January 1, 2005. Upon repeal of the Act, any money in the MUSTFA Fund or in the possession of the Authority must revert to the Environmental Response Fund created in the Environmental Response Act.

The Authority's obligation to pay off any bonds or notes issued under the MUSTFA Act will survive the Act's repeal.

MCL 299.804 et al. (S.B. 644)
299.833 et al. (S.B. 645)
299.701 et al. (H.B. 4783)
299.804 et al. (H.B. 4785)

BACKGROUND

The following is a brief description of the UST laws that have been enacted since 1984.

Public Act 423 of 1984 created a new act (later named the Underground Storage Tank Regulatory Act) to require the registration of certain underground storage tanks and to levy fees on USTs.

Public Act 165 of 1985 amended the UST Regulatory Act to change the deadline for tank registrations and to limit the registration requirements to tanks subject to Federal notification requirements.

Public Act 227 of 1987 amended the UST Regulatory Act to repeal the Act's December 31, 1987, expiration date.

Public Act 478 of 1988 created the Leaking Underground Storage Tank Act to provide for reporting and investigation of leaking USTs, as well as removal and cleanup of environmental contamination due to a leaking tank.

Public Act 479 of 1988 amended the UST Regulatory Act to include underground storage tank systems, as well as tanks, to create the UST Regulatory Enforcement Fund, to establish criminal penalties for violations, and to name the Act.

Public Act 518 of 1988 created the Michigan Underground Storage Tank Financial Assurance Act to assist UST owners and operators in meeting Federal financial responsibility requirements, and to create the LUST Emergency Response Fund (ERF).

Public Act 150 of 1989 amended the LUST Act to remove its sunset date, to extend the allowable time for the DNR to review LUST correction plans, and to require the DNR Director, upon receiving a statement, to indicate that corrective action has been completed or identify actions that remain to be completed.

Public Act 151 of 1989 amended the UST Regulatory Act to increase the civil penalty for knowing violations, and to re-enact expired provisions of Public Act 479 of 1988.

Public Act 152 of 1989 amended the MUSTFA Act to establish a 7/8-cent-per-gallon environmental protection regulatory fee on all refined petroleum products sold in Michigan.

Public Act 161 of 1989 amended the MUSTFA Act to revise and prioritize the expenditure of money in the MUSTFA Fund.

Public Act 51 of 1990 amended the MUSTFA Act to specify how regulatory fees are to be calculated, and to require the fees to be collected from a person in Michigan who received refined petroleum products for resale or consumption pursuant to a product exchange agreement.

Public Act 1 of 1993 amended the MUSTFA Act to delete the January 15, 1995, sunset on sections providing for the MUSTFA Fund, the regulatory fee, Fund payments for corrective action and indemnification, and other related matters.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

When this State originally enacted its underground storage tank legislation, Michigan received commendations from a number of other states and national organizations for having one of the best programs in the nation. A few years ago, however, this lauded program fell into disrepute. Several principal reasons for this can be identified. First, it was known from the start that the program was underfunded, and not long ago it ran short of money. Although the per-cleanup cost actually had been overestimated, the number of releases discovered turned out to be far greater than expected. Second, the State did not anticipate the extent of the greed on the part of some beneficiaries of the program, which has led to numerous allegations of fraud and misuse and contributed significantly to the funding problem. Concerns about fraudulent practices have been raised by both the DNR and the Auditor General, as well as others, and are being investigated by the State Police and Attorney General. Third, the State apparently failed to foresee that tank owners or operators frequently would opt to use cleanup standards that were more rigorous than what a release called for.

This package of bills provides a number of common sense solutions to these problems by, among other things, improving the State's oversight of the program, providing incentives for UST owners and operators to keep costs down, establishing stiff criminal penalties, providing for investigations, improving the program's administration, and governing the use of particular cleanup standards.

Supporting Argument

Senate Bill 644 aims to ease the State out of the business of providing financial assurance to UST owners and operators. The State is trying to encourage commercial insurers to move back in and reportedly has received assurance from some that they are ready, but they first must gain some experience in order to develop a rate structure. Thus, the bill will phase out MUSTFA funding for claims submitted through 1998, and make funding unavailable after that year.

In addition, the bill will give UST owners and operators a vested interest in their cleanup projects by setting a co-payment of 10%, up to $15,000, for a release, or 30%, up to $45,000, for a second release, and cutting off funding after a

second release. Previously, owners and operators were simply liable for $10,000 in each case and therefore had no incentive to keep costs down or prevent subsequent releases. Also, under the bill, corrective action funding will be available only for cleanup projects, not for the removal and replacement of tanks.

Further, the bill will reduce costs and abuses by requiring the use of competitive bidding, requiring that consultants be retained, and requiring the DMB to establish an audit program, maintain a list of qualified consultants, and certify UST professionals. The bill will improve operations of the program by standardizing claim forms, invoices, and bid forms, which will facilitate auditing.

In addition, the bill allows the State and local governments to receive funding without making a co-payment if property has been acquired involuntarily. Apparently, units of government often are forced to clean up tax-reverted land. Although the MUSTFA Fund has in the past paid most of the costs, local units should not have to come up with a co-payment if they acquire property by virtue of the law and through no action of their own. (If a local unit acquires property through condemnation or other action, however, it still will be liable for the co-payment.) The bill also provides a mechanism for the sale of involuntarily acquired property by a governmental unit or a financial institution, and for reimbursement to the State of excess proceeds.

Supporting Argument

Senate Bill 645 contains detailed provisions that govern the standards and procedures to be followed in the event of a release, taking into account the size of the release and whether groundwater is affected. While these provisions continue to rely upon the Type A, Type B, and Type C cleanup standards promulgated under Act 307 (the Environmental Response Act), the bill strongly encourages the use of the Type C standard, which provides a wide range of corrective action measures and therefore is the most flexible approach. While it originally was thought that most UST owners and operators would opt for Type C, in practice many owners and operators, apparently concerned about selling their property, selected the less flexible Type A or B standard to ensure that the land was as pristine and marketable as possible. Although a Type A or B remediation can be more expensive than Type C cleanup options, the owners' and operators' liability was still limited to $10,000 per cleanup.

Under the bill, however, a preferred corrective action plan must be identified for each release, and the DNR is required to audit or oversee all aspects of corrective action. In addition, the bill contains comprehensive antifraud provisions and penalties, as well as a system for making rewards. These measures will ensure that the cleanup actions taken are tailored to the individual problem and unnecessarily costly measures are not taken through either ignorance or artifice.

Supporting Argument

House Bill 4783 contains various provisions designed to clarify the UST Regulatory Act and bring it into line with Federal changes made since the law's enactment. In particular, the bill makes it clear that the State Police and certified UST inspectors have the authority to enter upon and inspect premises where regulated substances may be stored. The bill also redefines "regulated substance" to cite the Federal Clean Air Act, which includes an additional 45 hazardous substances, according to the Department. The Department further reports that the exemption for tanks closed before January 1, 1974, is based upon discussions with the EPA. In addition, the bill calls for the Department to enhance its audit and inspection program, and to study and report on the causes of UST leaks.

Supporting Argument

The bonding provisions of House Bill 4785 will give the State the needed means to remedy the MUSTFA Fund's cash flow problems. Although the Fund currently is solvent, due to Public Act 1 of 1993, there is a considerable delay before approved invoices are paid, and expenditures still are two or three times greater than revenues. By allowing the MUSTFA Authority to issue bonds and notes, whose proceeds may be used for corrective action and indemnification, the bill will enable the Fund Administrator to pay claims in a timely manner and will assure the Fund's future solvency.

In addition, like Senate Bill 645, House Bill 4785 contains severe penalties designed to deter and punish fraudulent practices, as well as a reward system designed to encourage the reporting of violations.

Opposing Argument

The State should not lower cleanup standards by encouraging Type C corrective action, which emphasizes containing contaminants, rather than disposing of them. The standards promulgated under Act 307 also provide for flexibility, and a Type C cleanup is available under those standards if that is the appropriate remedy. Instead of providing for less stringent standards, the State should ensure that the right approach is designed for a particular site. The problem of excessive cleanups and cost overruns can be addressed without lowering standards.

Response: Senate Bill 645 does continue to rely upon Act 307 standards, requires the preparation of a corrective action plan for every release, and requires that Type C corrective action plans be submitted to the DNR for review and approval. While the Type C standard does encompass a wide range of options, some of them can be as stringent as Type A and B cleanups.

Opposing Argument

One of most frequently criticized aspects of the UST program is its fragmentation among three different State departments. This concern was echoed, in fact, by the Auditor General. According to the Auditor General's financial audit of the MUSTFA program, the lack of one department responsible for program oversight is a material weakness in the program's internal control structure. The audit report further indicated that this lack of oversight was evidenced by other internal control weaknesses identified in the report, including inadequate controls over the initial identification of the source and extent of contamination, and the lack of internal controls to ensure that the program paid only for services actually needed and received. The report recommended that the law be amended to designate one department to be responsible for program oversight.

Response: While these bills do not consolidate the program's operations, they do contain a number of provisions designed to improve the State's oversight. In particular, Senate Bill 644 requires the DMB to establish an audit program to monitor compliance with the MUSTFA Act, Senate Bill 645 requires the DNR to audit or oversee all aspects of corrective action, and House Bill 4783 requires the Department of State Police to enhance its audit and inspection program.

Opposing Argument

Requiring tank owners and operators to retain a consultant nearly every time a release occurs might be unreasonably costly and burdensome to many small operations. Some small outfits might even go out of business if they have to hire a consultant on top of making the required copayment.

Response: Consultants are not required if a spill is de minimus or if the business has a qualified person on staff.

Opposing Argument

The MUSTFA program was originally and continues to be underfunded. While the bills' structural changes should increase accountability and lower cleanup costs, they also impose additional responsibilities on the State departments responsible for administering the program, particularly the DNR. Moreover, although the sale of bonds or notes can provide a new revenue source for corrective action and indemnification payments, it also will generate considerable administrative fees, which will further reduce the money available for cleanups. In effect, borrowing simply will shortchange an already underfunded program. Rather than allowing the program to collapse under its own weight in a couple years, it is imperative that the State raise the 7/8-cent-per-gallon regulatory fee now.

Opposing Argument

Senate Bill 644 restricts corrective action payments from the MUSTFA Fund to claims for cleanup costs, excluding claims for storage tank removals. Shifting from resource protection to exposure control in this way will weaken groundwater protection and cleanup standards, since contaminants from leaking storage tanks can migrate deeper into the ground and into groundwater.

Opposing Argument

Regardless of the merits of phasing out the State's involvement in financing cleanups, the plan to replace the State with private insurers may hold little promise. Reportedly, some 2,500 releases still occur each year, which might encourage commercial insurers to charge high premiums. Insurers also will have to charge premiums commensurate with the amount of risk involved in insuring cleanup and indemnification liability. This may result in exorbitant premiums to some policyholders

whose tanks are located on sites where the soil type and proximity to water wells could incur greater cleanup and indemnification costs. Although the schedule for phasing out the State's involvement can be delayed if the DMB Director determines that insurance is not available or affordable, the MUSTFA Fund will be completely unavailable after 1998.

Opposing Argument

The new powers granted to consultants under the LUST Act might lead to possible abuses. Under Senate Bill 645, consultants will establish the cleanup program for sites on which they are working and then certify when cleanup is completed. Potentially, contractors could continue projects beyond the necessary work in order to continue billing the State. If the owner or operator does not know what to expect in the way of cleanup, he or she has no way of judging when the process should be completed. This could be a problem particularly in cases involving groundwater contamination, which is more complicated to eradicate and makes it more difficult to keep to specific time lines or courses of action. It is important to define what constitutes a final cleanup.

Legislative Analyst: S. Margules

FISCAL IMPACT

Senate Bill 644

Senate Bill 644 will have an indeterminate impact on State government. The bill provides that MUSTFA claims may be accepted through 1998. The number of new claims to be filed cannot be estimated but, according to the DMB, there are approximately 14,100 active-registered underground storage tanks in the State. The DNR has reported that there are between 8,000 and 9,000 leaking underground storage tank (LUST) sites.

The reduction of the cap on claims should produce a cost savings to the program but the savings is dependent on new claims, which cannot be estimated at this time. The co-payment may encourage savings on claim reimbursement costs, especially on leaks that cost less than $100,000 to clean. There will be an incentive for the owner/operator to find someone to do the cleanup for the lowest price possible to decrease the co-payment amount. On cleanups greater than $150,000, the bill will for all intents and purposes create a $15,000 deductible.

No estimates on the cost of an audit program to monitor compliance with the Act can be made at this time. Previously, the Department of Natural Resources performed this function and was appropriated $2,200,000 for the prior fiscal year.

Maintenance of the qualified consultant list also would be an administrative cost incurred by the Department of Management and Budget. The DNR estimates that it will have a savings of approximately $100,000 and one FTE for no longer compiling the list.

Since the MUSTFA program has begun, $5 million of the gas tax revenue has been allocated for the interest rate subsidy program. Approximately $1 million has been committed to subsidize loans, leaving the program with $4 million. The program previously subsidized maximum loans of $100,000 and subsidized loans at five years or less at 2% less than the six-month U. S. Treasury bill rate in effect or seven years or less at the six-month U.S. Treasury bill rate. The bill increases the interest rate subsidy to 1% above the six-month U.S. Treasury bill rate, increases the maximum loan period to 10 years, and increases the maximum loan amount to $200,000. These changes will increase the cost of the program. It cannot be determined whether more revenues will be needed to support this portion of the MUSTFA program. According to the Department of Treasury, a loan for a system is well under $100,000. However, owners usually have more than one system and the $200,000 will cover costs of about five or six.

Senate Bill 645

The bill will have an indeterminate fiscal impact on State and local government.

The bill could result in cost efficiencies to the Department of Natural Resources through the requirement of specific and timely information reports and actions by qualified consultants; prioritization of sites as de minimis, high priority, and low priority; and more stringent requirements that consultants comply with all aspects of the law or face penalties, civil fines,

and/or felony charges. The Department anticipates that any funds saved will be re-deployed to increase on-site review of corrective actions. There also may be cost savings to the MUSTFA Program through more efficient administration of the Leaking Underground Storage Tank Act, and certain restrictions in the bill on actions not covered by MUSTFA reimbursement (i.e., increased costs due to delay in corrective actions). In addition, there may be some anticipated increased costs to the Department for the development and implementation of an audit program for corrective actions.

There will be an indeterminate increase in revenues to the MUSTFA Emergency Response Fund from penalties applied to late reports. There also will be increased revenues to the General Fund, Attorney General, and/or local law enforcement entities from civil fines. A portion of the increased fines could be used to pay for rewards for information leading to collection of the fine.

The FY 1993-94 DNR appropriation for the LUST Program is $4.3 million ($3.3 million Federal funds and $ 1 million Environmental Response Fund) for 39.0 FTEs, based on DNR administration of a program equal to or more stringent than Federal requirements. DNR administration of the MUSTFA Program is funded with $2.04 million in MUSTFA revenue for 34.0 FTEs, and an additional $1 million for the Emergency Response Fund.

The Department of State Police can use existing departmental resources to promulgate rules, publicize availability of rewards, and review claims for rewards, as required under the bill. The amount of funds from the provision that dedicates 50% of civil fines to fund State Police fraud investigations cannot be determined at this time.

House Bill 4783

The Department of State Police will be able to perform its responsibilities under the bill with existing resources.

It is unclear how often the UST Regulatory Enforcement Fund will be at a level less than $4,000,000 at the end of a year, which will trigger the reinstatement of suspended registration fees.

House Bill 4785

To pay out additional claims for corrective action and indemnification, the bill creates the MUSTFA Authority to issue and authorize bonds and notes. Any costs associated with the Authority's activities will be paid for by the bond proceeds. The new proceeds also will be used to pay approved claims. The Department of Management and Budget does not anticipate hiring any new staff for the MUSTFA Authority, because State Building Authority staff in the Department also may take on the MUSTFA Authority activities.

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