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BILL ANALYSIS



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House Bill 4583 (Substitute H-1 as reported without amendment)

Sponsor: Representative Mary Whiteford

House Committee: Natural Resources

Senate Committee: Natural Resources

Date Completed: 10-10-17

RATIONALE

The Michigan Underground Storage Tank Authority is tasked with assisting Michigan's petroleum underground storage tank (UST) owners and operators in meeting their financial responsibility requirements regarding leaking underground storage tanks (LUSTs) and providing financial assistance to remediate contamination caused by releases from LUSTs. The money for this assistance comes from the Underground Storage Tank Cleanup Fund. This Fund may be used to reimburse qualified owners and operators of leaking USTs for costs related to cleaning up a site. The Refined Petroleum Fund finances the direct cleanup of contaminated underground storage tank (UST) sites considered to be "orphan sites"--sites for which there is no longer a liable party and the State will likely assume responsibility for remediation. Some people believe that money from the Refined Petroleum Fund (RPF) also should be used to reimburse owners and operators of USTs for UST compliance and cleanups.

All refined petroleum products sold in Michigan are subject to an environmental protection regulatory fee, which is 7/8 of a cent per gallon of refined petroleum sold for resale or consumption in Michigan. The first \$20.0 million of the revenue collected from this fee goes into the UST Cleanup Fund for reimbursing owners of USTs and the remaining revenue goes into the Refined Petroleum Fund for orphan sites and other purposes for which money in the Fund may be spent. The RPF currently has a surplus that is not being spent on orphan sites. It has been suggested that reimbursing owners or operators of LUSTs will allow them to focus on cleaning up other sites that require attention.

CONTENT

The bill would amend Part 215 (Underground Storage Tank Corrective Action Funding) of the Natural Resources and Environmental Protection Act to require the Department of Environmental Quality to create the Legacy Release Program, which would, under certain conditions, reimburse owners and operators for the costs of corrective actions for releases from refined petroleum underground storage tank systems that occurred before December 30, 2014.

The bill also would allow money in the Refined Petroleum Fund to be spent, upon appropriation, for the Legacy Release Program; grants and loans to facilitate brownfield development at property with leaking USTs; the permanent closure of USTs; and reimbursement to local units of government and county road commissions for costs of corrective action in situations where regulated substances were left in place within a public highway.

In addition, the bill would allow an UST owner or operator to rely on certain financial assurance mechanisms or a deposit account to demonstrate its financial responsibility for a deductible amount, if it intended to rely on the UST Cleanup Fund.

The bill would take effect 90 days after it was enacted.

Legacy Underground Tank Cleanup Program

The bill would require the Department of Environmental Quality (DEQ) to establish the Legacy Release Program and would require the Michigan Underground Storage Tank Authority (MUSTA) to administer it. An eligible person could be reimbursed for corrective action costs incurred if the person demonstrated all of the following:

- The release from which the corrective action or indemnification arose was discovered and reported before December 30, 2014.
- The release upon which the request for reimbursement was based had not been closed pursuant to Part 213 (Leaking USTs) before December 30, 2014.
- Any refined petroleum UST systems operating at the location from which the release occurred were currently in compliance with the registration requirements of Part 211 (UST Regulations).
- The request for reimbursement did not include reimbursement for money that was reimbursed from any other source, including insurance policies.
- The request for reimbursement was for corrective action performed on or after December 30, 2014.

An eligible person seeking to be reimbursed under the Legacy Release Program would be required to submit to MUSTA a request for reimbursement on a form provided by the Authority containing the documentation it required.

(Under the bill, "eligible person" would mean the owner or operator of a refined petroleum underground storage tank system at the time of the reporting of the release.)

The Authority could not approve a claim submitted to the Legacy Release Program for any of the prohibitions listed in Section 21510c. (That section prohibits MUSTA from approving a claim for any of the following:

- A release that was expected or intended by an owner or operator, or an employee of an owner or operator.
- Punitive, exemplary, or multiplied damages, fines, taxes, penalties, assessments, punitive or statutory assessments, or any civil, administrative, or criminal fines, sanctions, or penalties.
- A claim made by an owner or operator against any other person that is also an owner or operator of the refined petroleum UST system.
- A release caused by, based upon, resulting from, or attributable to the owner's or operator's intentional, knowing, willful, or deliberate noncompliance with any statute, regulation, ordinance, administrative complaint, notice of violation, notice letter, executive order, or instruction of any governmental agency or body.
- A release arising from the ownership, maintenance, use, or entrustment to others of any aircraft, auto, rolling stock, or watercraft, including loading and unloading.
- Costs, charges, or expenses incurred by the owner or operator for goods supplied by the owner or operator or services performed by the staff or employees of the owner or operator, or its parent, subsidiary, or affiliate, unless the costs, charges, or expenses are incurred with the prior written approval of MUSTA.
- A release arising from any consequence of war, invasion, act of a foreign enemy, act of terrorists, hostilities, civil war, strike, riot, or civil commotion.
- Costs arising out of the reconstruction, repair, replacement, upgrading of a refined petroleum UST system, or any other improvements and any site enhancements or routine maintenance on, within, or under a location.
- Costs arising out of the removal, replacement, or recycling of a refined petroleum UST system or its contents.
- Costs, charges, or expenses incurred to investigate or verify that a confirmed release has taken place.

- Costs related to the injury of an employee of the owner or operator or its parent, subsidiary, or affiliate arising out of and in the course of employment by the owner or operator or its parent, subsidiary, or affiliate or performing duties related to the conduct of the business of the owner or operator or its parent, subsidiary, or affiliate by a spouse, child, parent, brother, or sister of that employee.
- Any obligation of the owner or operator under worker's compensation, unemployment compensation, or disability benefits law or similar law.
- Any liability or claim for liability of others assumed by the owner or operator under any contract or agreement, unless the owner or operator would have been liable in the absence of the contract or agreement.
- A release on, within, under, or emanating from a location if the release commenced after the location was sold, given away, or abandoned.
- Costs that have been or will be submitted to or that have been paid pursuant to an insurance policy or policies.
- Costs arising from corrective actions performed in excess of the corrective actions required to obtain a restricted closure based on then current land use.
- Costs incurred after the closure date of the release or releases for which the claim was filed except for costs for monitoring well abandonment or remediation system decommissioning, or both, performed within one year of the closure date.)

The bill would require MUSTA to approve a request for reimbursement under the Legacy Release Program only as follows:

- The amount approved for reimbursement would have to be 50% of the aggregate indemnification and corrective action costs incurred, but not more than 50% of the reasonable and necessary eligible costs as determined by the MUSTA administrator pursuant to Section 21515(2) to (10).
- The total amount approved for reimbursement could not exceed \$50,000 for all releases from refined petroleum underground storage tank systems at a single location.
- An owner or operator could request a review of a denied claim or work invoice within 14 days of the denial pursuant to Section 21521.

(Section 21515 establishes the procedure for an owner or operator to receive money for corrective action from MUSTA after receiving notice that a claim for has been approved. Subsections (2) through (10) require the Authority to make certain determinations after receiving work invoices; require MUSTA to approve a work invoice after determining that it is reasonable and necessary; permit the owner or operator to submit work invoices only after initial approval of a claim and if the aggregate amount of invoices in the submission is \$5,000 or more; require the administrator to deny reimbursement if these conditions are not met; require the administrator to approve a reimbursement if it meets the requirements of Part 215 for an approved claim and an approved work invoice; require MUSTA to make a joint payment to the owner or operator and the contractor that performed the work within 45 days after the administrator's approval if sufficient money exists in the Refined Petroleum Fund; permit MUSTA to withhold partial payment under certain circumstances; and require MUSTA to prepare and make available standardized claim and work invoice forms.

Under Section 21521, if the administrator denies a claim, work invoice, request for indemnification, or request for eligibility determination, the owner or operator may, within 14 days, request review by the board of the Authority. A person who is denied approval by the board may appeal the decision to the circuit court.)

Refined Petroleum Fund

Part 215 establishes the Refined Petroleum Fund (RPF) within the State Treasury. Money from the RPF may be spent, upon appropriation, only for one or more of the following purposes:

- The reasonable costs of the DEQ in administering the RPF and providing remedies for sites posing a threat to the public health, safety, or welfare, or to the environment, as a result of releases from UST systems under Part 213.
- Not more than \$5.0 million annually for petroleum product inspection programs under the Weights and Measures Act and the Motor Fuels Quality Act.
- Not more than \$3.0 million annually for the Bureau of Fire Services and Office of the State Fire Marshal, Storage Tank Division, in the Department of Licensing and Regulatory Affairs.

Under the bill, money from the RPF also could be spent, upon appropriation, for only one or more of the following purposes:

- The Legacy Release Program.
- Not more than \$5.0 million annually for the DEQ to provide grants and loans in accordance with Part 196 (Clean Michigan Initiative Implementation) to facilitate brownfield redevelopment at properties with leaking USTs covered under Part 213, but not to fund the performance of response activities at a Part 213 property to address contamination solely attributable to a release regulated under Part 201 (Environmental Remediation).
- The permanent closure of an UST system by the DEQ if the UST system met the conditions that require permanent closure under an administrative rule or the Department determined it was necessary to protect public health, safety, welfare, or the environment.

In addition, the bill would allow money from the RPF to be spent, upon appropriation, for reimbursement by MUSTA to local units of government and county road commissions for the costs of corrective action to manage, relocate, or dispose of any media contaminated by regulated substances left in place within a public highway pursuant to Section 21320a if all of the following occurred:

- The local unit of government or county road commission had submitted to MUSTA a claim for reimbursement on a form it created.
- The claim for reimbursement was for reasonable and necessary eligible corrective action costs determined by the administrator pursuant to Section 21515(2) to (10).
- The amount of reimbursement was not more than \$200,000 per claim.

(Section 21310a requires the implementation of "institutional controls" and the use of a restrictive covenant under certain circumstances; and allows the use of alternative mechanisms, including a license or license agreement with the Department of Transportation under which regulated substances are left in place within a public highway, under certain circumstances.)

Financial Responsibility Requirements

Part 215 provides for the creation of the Underground Storage Tank Cleanup Fund and allows it to be used for the payment of approved claims under Part 215, after the payment of principal and interest on bonds and notes issued pursuant to Part 215 and administrative costs.

If an owner or operator intends to rely on the UST Cleanup Fund to meet financial responsibility requirements, the owner or operator must submit to MUSTA a request for a determination that the owner or operator would be eligible for funding under Part 215 in the event of a release from a refined petroleum UST system. Upon receiving a request, MUSTA must make a determination and notify the owner or operator. A determination must be based upon a demonstration of certain factors, including that the owner or operator has financial responsibility for the deductible amount.

Under the bill, in order to demonstrate that the owner or operator has financial responsibility for a deductible amount under Part 215, the owner or operator could rely upon any financial assurance mechanism listed in the Code of Federal Regulations (40 CFR 280.95 - 280.107) or either of the following:

- A financial test of self-insurance, which the owner or operator would have to pass by submitting, on a form developed by MUSTA, financial information certified as accurate by the chief financial officer or comparable position that demonstrated a tangible net worth of at least three times the deductible amount required under Part 215.
- A deposit account in the amount of the deductible amount required under Part 215 in a financial institution as defined in the Banking Code, if access to the deposit account were restricted by a deposit account control agreement or similar restriction as approved by
- MUSTA that required the approval of the administrator for a withdrawal from the deposit account.

(The Federal regulations cited above list various mechanisms that UST owners and operators may use to meet financial responsibility requirements, including a financial test of self-insurance, a guarantee, insurance, a surety bond, a state fund, a trust fund, and others.)

MCL 324.21506a et al.

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

Since its establishment by Public Act 416 of 2014, the UST remediation program has become the most successful remediation program in the State. More than 1,000 sites have been identified as leaking and corrective actions have been completed to meet the appropriate land use criteria. However, under the Act, an owner or operator of an UST system is eligible to receive money from the UST Authority for corrective action or indemnification due to a release from the system only if the release was or is discovered and reported on or after December 30, 2014 (the effective date of Public Act 416). Due to the success of the program and the number of sites that have been rehabilitated, this program should be extended to releases discovered before December 30, 2014. Because this program uses funds already collected and because the RPF currently has a surplus not being used on other sites, the bill would ensure that more sites were rehabilitated without increasing the burden on taxpayers.

Opposing Argument

Cleaning up leaking UST sites is a positive action but the State also has many orphan sites and money from the Fund should be used to clean up those sites first. Orphan sites are solely the responsibility of the State and the State has an obligation to protect money that was collected specifically to deal with them and clean them up. The bill would allow money to be spent reimbursing owners of sites that have already been cleaned up instead of sites known to be a threat, and thus would divert tax dollars from their intended use. According to the Michigan Environmental Council (MEC), the State knows of 7,000 orphan sites in Michigan that have not been addressed. Unlike USTs with owners, the only source of funding available to clean up the orphan sites is the Refined Petroleum Fund. Through the Statewide Expanded Triage (SWET) program, the State has found that about 10% of the orphan sites pose an immediate risk to public health and need to be addressed, according to the MEC.

Response: Money in the RPF accumulates more rapidly than the DEQ can spend it addressing the orphan sites because the Department lacks the staff to work on this project at that speed. A better use of this surplus would be to reimburse owners and operators of USTs and allow them to shift their focus to other LUST sites that require action.

Opposing Argument

The financial responsibility requirements that make an owner or operator eligible to rely on the RPF are already too low, and the bill would not require an owner or operator to have enough financial interest in an UST before relying on the RPF to clean up a site. If an owner or operator has fewer than eight USTs, the deductible is just \$2,000 per claim. This does not properly discourage operators from running substandard gas stations, which due to the age of the tanks

pose an unreasonable danger to Michigan's groundwater; demonstrating a tangible net worth of at least three times that deductible amount further reduces that owner's financial interest. Because many of these tanks are more than 30 years old, the gas stations are not worth much more than \$6,000. The stations where the tanks are leaking probably are now worth nothing and will likely be abandoned. If an owner decides to abandon a gas station under these conditions, that site will become an orphan site and therefore the responsibility of the State.

Legislative Analyst: Nathan Leaman

FISCAL IMPACT

The bill would have a negative fiscal impact on the Refined Petroleum Fund within the Department of Environmental Quality budget, and a potentially positive fiscal impact on local units of government. Under the bill, the allowable uses of the RPF would be expanded to include reimbursements of up to \$200,000 to local units of government for cleanup of roadway construction refuse regulated under Part 213, up to \$5.0 million per year in brownfield redevelopment grants for sites that had received corrective action under Part 213, and reimbursements to eligible underground storage tank operators of up to \$50,000 under the proposed Legacy Release Program. It is unclear how much these new uses would cost on an annual basis, but the fiscal year 2017-18 DEQ budget contains an additional \$14.9 million in one-time RPF revenue for these purposes as well as accompanying boilerplate that allows for up to \$36.0 million to be spent on reimbursements to underground storage tank operators. As of September 30, 2016, the RPF had a balance of about \$67.7 million.

Fiscal Analyst: Josh Sefton

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.