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UNDERGROUND STORAGE TANKS

House Bill 5301 (Substitute H-2)
Sponsor: Rep. Tom Alley

House Bill 5302 (Substitute H-1)
Sponsor: Rep. James M.Middaugh

Committee: Conservation, Environment and Recreation
First Analysis (12-9-97)

THE APPARENT PROBLEM:

The Michigan Underground Storage Tank Financial Assurance (MUSTFA) Act was enacted primarily to help the owners of small businesses (i.e., service stations) upgrade their storage tank systems and clean up contaminated sites. When legislation establishing the act was adopted in 1989, many of the interested parties believed that the program was underfunded. The MUSTFA fund faltered in 1993, when an audit of the program revealed that total revenues were roughly $110 million and expenditures were approximately $250 million during the first two years of the program, and became insolvent in 1995. After that date, various measures were adopted to allow the state to pay for work invoices and requests for indemnification received before June 29, 1995. Since then, MUSTFA funds have been restricted to claims for cleanup costs, rather than costs for removing underground storage tanks. (For a history of the Michigan Underground Storage Tank Fund, see *BACKGROUND INFORMATION*.)

Under the federal Resource Conservation and Recovery (RCRA) Act, all underground storage tanks must be upgraded to the highest standards by December 22, 1998. However, many people maintain that, for various reasons, the MUSTFA program never reached enough small business owners. Some may have been afraid to apply, and some may have been unaware that the program existed. Some may have lacked the financial resources to apply (a business must have a tangible net worth of at least $10 million in order to pass the self-insurance test established under the MUSTFA provisions of the Natural Resources and Environmental Protection Act [NREPA]). Accordingly, a consortium of interests, including members of the House Conservation, Environment and Recreation Committee and representatives of the Department of Environmental Quality (DEQ) and industry, has worked for some time to assemble legislation that would provide assistance for small businesses to upgrade their underground storage tanks and address possible contamination before next year's deadline.

THE CONTENT OF THE BILLS:

The bills would add a new part, Part 216, to the Natural Resources and Environmental Protection Act (NREPA) and would amend Parts 201, 213, and 215 (MCL 324.20113 et al.) to establish provisions for small business loans and grants for leaking underground storage tanks (LUSTs) . The bills are tie-barred to each other.

House Bill 5301 (MCL 324.20113 et al.) would add a new part, Part 216, entitled "Small Business Assistance for Underground Storage Tank Cleanups," to the Natural Resources and Environmental Protection Act (NREPA) to establish a small business assistance program for LUST cleanups. Under the bill, the Emergency Response Fund would be replaced by a Small Business Cleanup Revolving Loan Fund to provide loans for a Small Business Site characterization and Initial Abatement Loan Program established to deal with LUST releases at contaminated sites owned by small businesses that lacked the resources to receive assistance under the financial assurance provisions of the act. The bill would also establish the Small Business Grants Cleanup Program, which would be funded by the Emergency Response Fund. "Site characterization and initial abatement activities" would be defined under the bill to mean abating fire and explosion hazards; delineating the horizontal and vertical extent of contamination in soil and groundwater; and preparing an initial assessment report and conducting initial response actions, as specified under the act. The main provisions of the bill are as follows:

- The Cleanup and Redevelopment Fund, which replaced the Environmental Response Fund under the provisions of Public Act 380 of 1996, could be used for a Small Business Grants Cleanup Program established under the bill.

• The DEQ would be required to establish a site classification system, based on the level of threat that a site posed to human health, safety, or sensitive environmental receptors; and would develop a protocolfor conducting sampling and monitoring site activities to determine a site's classification.

• If a consultant completed site characterization and initial abatement activities and determined that a site was a Class 3 or Class 4 site, corrective action activities would be suspended, provided that the site was monitored annually, the owner or operator complied with the due care provisions of the act, and the site remained a Class 3 or Class 4 site.

• The owner or operator of a Class 1 site (one that poses an immediate threat to public health or the environment) or a Class 2 site (one that poses a short-term [0-2 years] threat), who were eligible for the Small Business Grants Cleanup Program would not have to perform any further corrective actions or submit additional reports until a grant was available.

Site Classification System. The Department of Environmental Quality (DEQ) would be required to include the following classifications of sites, based on each site's threat to human health, safety, or sensitive environmental receptors:

• "Class 1 Sites" would mean those that posed an immediate threat.

• "Class 2 Sites" would mean those that posed a short-term (0-2 years) threat.

• "Class 3 Sites" would mean those sites that posed a long-term (greater than 2 years) threat.

• "Class 4 Sites" would mean those sites that posed no demonstrable long-term threat.

Small Business Site Characterization and Initial Abatement Loan Program. The Department of Environmental Quality (DEQ) would be required to establish the loan program to grant zero interest loans to eligible participants for conducting site characterization, initial abatement, and monitoring activities at Class 3 and Class 4 sites, that is, at sites where it had been determined that no health or environmental risks exist. An eligible participant could submit an application if he or she had reported a release and removed the LUST system or had agreed to remove it at his or her own expense; had agreed to having a lien placed on the property on which the response activities would take place; and had submitted a nonrefundable $75 application fee. These fees would be deposited into a Small Business Cleanup Revolving Loan Fund.

The amount of a loan would be determined by bids solicited by the DEQ. Under the bill, the DEQ could solicit bids for individual activities, individual sites, or for groups of activities or sites. Only qualified consultants could respond. An owner or operator would not be obligated to have the work performed by the consultant who submitted the lowest responsive bid, although the DEQ could not issue a loan for an amount in excess of that bid. Loans would be issued for ten-year terms and repaid in monthly installments.

A business owner or operator would be eligible for a loan from the loan program provided that he or she provided retail sales of refined petroleum products; owned or operated only one facility; maintained a site with LUSTs that had been installed before December 22, 1988 and had not been upgraded according to the act's underground storage tank regulations; and did not have an alternative financial mechanism to pay for corrective action. An owner or operator who met the fifty percent financial responsibility requirement under the self-insurance test specified under the Administrative Code (R.280.95) would not qualify as an eligible participant. (One of the requirements under the self-insurance test, as specified under R.280.95, is that the owner or operator must have a tangible net worth of at least $10 million.)

Small Business Grants Cleanup Program. A LUST owner or operator would be considered eligible and could submit an application for a grant if he or she met the eligibility requirements specified under the bill for the loan program; had expended at least $50,000 to have a LUST system removed and for corrective actions; agreed to a ten percent copay of the total grant amount; and submitted a $75 nonrefundable application fee. The DEQ would issue a grant based upon a classification of a site and its impact on public health, safety, welfare, and the environment. The maximum amount would be determined by a competitive bidding process, and would be issued only to bring a site to a Class 3 level, as described under the act.

Under the grants cleanup program, the DEQ would solicit competitive bids from qualified consultants, according to procedures described under the Management and Budget Act (MCL 18.1101 to 18.1594), for the corrective actions that would bring a site to a Class 3 level. The DEQ would also be responsible for contract performance oversight.

House Bill 5302. Under the act, a consultant retained by a LUST owner or operator must submit a closure

report within 30 days after corrective actions are completed at

a site, and the DEQ must confirm receipt of the report within 60 days after it is received. House Bill 5302 would amend the act (MCL 324.21312b et al.) to establish additional procedures, under which an owner or operator could submit a request for a department Certification of Closure. The bill would establish a Closure Certification Fund, which would receive deposits from administrative fees collected from applications for certificates of closure, and which could be spent only to conduct closure certifications and to issue closure letters.

The bill would also establish a Qualified Consultant and Underground Storage Tank Professional Oversight Fund, which would receive deposits from administrative fees collected from applications from underground storage tank consultants and professionals, and which could only be spent by the DEQ either to review applications from consultants and underground storage tank professionals, or to oversee their responsibilities, as specified under the provisions of House Bill 5301.

Certificate of Closure. After submitting a closure report, together with an administrative fee of $1,250, an owner or operator could request that the DEQ certify closure of a site. The DEQ would be required to determine whether the site met the cleanup criteria specified under the act within 90 days. Within that time, the DEQ would have to either issue a closure letter certifying the closure, or notify the owner or operator that the site did not meet the cleanup criteria. If closure were denied, the owner or operator could conduct additional corrective action at the site and resubmit a request for certification of closure. The DEQ would be required to submit one additional review at no charge, after which an additional administrative fee would be charged. However, if the DEQ did not respond with 90 days to the original application, the fee would have to be refunded and a determination completed as soon as possible. If a determination wasn't made within 180 days after a request for certification of closure was submitted, the site would be considered closed and the DEQ would have to issue a closure letter.

Qualified Underground Storage Tank Consultant List. The bill would amend the act to require that the DEQ update this list annually to include qualified consultants (QCs) who payed the required administrative fees.

Qualified Consultant Administrative Fees. Under the bill, a qualified consultant would be required to pay a fee of $1,500 to be included on the department's list of qualified underground storage tank consultants. Of this amount, $500 would have to be refunded if the DEQ denied an application. The fees collected under this provision would be deposited into the Qualified Consultant and Underground Storage Tank Professional Oversight Fund.

Certified Underground Storage Tank Professional Administrative Fees. Under the bill, the administrative fee for certification as an underground storage tank professional would be $1,000, $250 of which would be reimbursed if the DEQ denied an application. Certification would be valid for one year and would have to be renewed annually. The fees collected under this provision would be deposited into the Qualified Consultant and Underground Storage Tank Professional Oversight Fund. In addition, the bill would delete the current requirement that certified underground storage tank professionals must have in-state experience.

BACKGROUND INFORMATION:

The extensive problems caused by contamination of soils and groundwater due to leaking underground storage came to the attention of environmental policy makers in the 1980s. In 1984, the state established a program under the Underground Storage Tank Regulatory Act (Public Act 423 of 1984) that required owners of underground storage tanks to register them with the Department of Natural Resources (now the Department of Environmental Quality). The act was consistent with new federal laws, and was a preliminary step in gathering data to assess the problem. Despite efforts to clean up contaminated sites, however, incidents of groundwater contamination continued to increase, and each year approximately 250 new sites were added to the state's Environmental Response Priority List of contaminated sites, to become eligible for money from the Environmental Response Fund. Although LUSTs were not given high priority on the Environmental Response list, approximately 25 percent of the contaminated sites contained leaking underground storage tanks, and states could obtain funding for cleanup of these sites from the federal Leaking Underground Storage Tank Trust Fund (LUST Trust), which was created for that purpose by the federal Superfund Amendments and Reauthorization Act of 1986. Money from the fund was made available to the states over a five-year period, which started in 1987, provided that they incorporated federal standards regarding leaking underground storage tanks and implemented a regulatory program.

Michigan created its own LUST Act in 1988 (Public Act 478 of 1988) to assure that it would receive money from the federal trust. The act required the Fire Marshal Division of the Department of State Police to develop rules regarding the procedure for reporting suspected releases, and outlined owner, operator, and departmental responsibilities regarding leaking storage tanks. In addition, Public Act 479 of 1988 amended the Underground Storage Tank Regulatory Act to require the owners of underground storage tank systems to register annually. Under Public Act 479 of 1988, money from the registration fees was to be deposited into a proposed Underground Storage Tank Regulatory Enforcement Fund and used only to enforce the act. In addition, Public Act 518 of 1988 created the Michigan Underground Storage Tank Financial Assurance (MUSTFA) Fund and the Emergency Response Fund to assist people in Michigan in meeting the financial requirements of the federal Solid Waste Disposal Act, and also to promote compliance with the Underground Storage Tank Regulatory Act and the Leaking Underground Storage Tank Act, and to provide for corrective actions to be taken when underground storage tanks are found to be leaking. Under Public Act 518, money from the MUSTFA fund was to be used, among other things, for payments (up $1 million per release) for approved work in cleaning up contamination from storage tank releases from owners or operators who had registered their tanks prior to reporting releases. The fund was also to be used to cover the administrative costs incurred by the various departments involved in carrying out the duties imposed under the act. Money in the Emergency Response Fund is used to undertake corrective actions under the LUST Act for leaking underground storage tanks that may contain several substances, including petroleum.

Public Act 152 of 1989 established a revenue source for the MUSTFA Fund and the Emergency Response Fund. Under this act, an "environmental protection regulatory fee" of ½ cents per gallon (later raised to 7/8 cents per gallon) was imposed on the sale of all refined petroleum products. The regulatory fees collected under the act were to be deposited in the Emergency Response Fund until it reached $1 million, at which time the fees were to be deposited in the assurance fund. The assurance fund began operating on February 15, 1990. However, portions of Public Act 518, including those that created the fund and provided for its revenue source and distribution, were scheduled to expire on January 1, 1995. With that deadline approaching, Public Act 1 of 1993 extended the sunset for the regulatory fee and the act's repeal to January 1, 2000, and -- in response to concerns that the fund would be in debt by 1995 -- deleted the sunset on sections providing for the MUSTFA fund, the 7/8-cent regulatory fee, and payments from the fund for indemnification and corrective action.

As concern over the fund's projected insolvency grew, a Michigan Underground Storage Tank Financial Assurance Authority was created under Public Act 132 of 1993 to administer the assurance fund. The program was restructured under Public Acts 212 and 213 of 1993, which, among other things, eliminated the DNR's role in reviewing work plans, and instead, allowed it to focus on assuring that cleanups were completed in a timely fashion. The DNR's role in reviewing work plans was to be taken over by certified consultants, who

would be responsible for certifying the work. The MUSTFA

program would eventually be phased out, and private insurance companies would be allowed to provide coverage to owners of underground storage tank systems. Public Act 269 of 1995 raised the threshold of the Emergency Response Fund to $3 million. Public Act 12 of 1995 extended for one year the maximum funding amounts for certain claims against the MUSTFA fund, and required that the DEQ complete a study of the fund's fiscal soundness by May 1, 1995. Subsequently, on April 3, 1995, as required under the act, the fund administrator notified the owners and operators of registered underground tanks that no claims, work invoices, or requests for indemnification received after June 19, 1995 would be eligible for funding. The state was then sued by organizations representing gas stations to keep MUSTFA open, and a preliminary injunction was issued on September 5, 1995, requiring that the state continue to receive work invoices and claims for indemnification through June 19, 1995. The Environmental Response Fund was replaced by the Cleanup and Redevelopment Fund under Public Act 380 of 1996, as part of an effort to address "brownfield" redevelopment. Public Act 380 added the requirement that the DEQ submit annual requests for appropriations from the Cleanup and Redevelopment Fund when state funds are required to match federal funds for response activities at Superfund sites. The appropriation request must include a list of the sites where the DEQ proposes to spend the funds. The appropriation for cleanups on specific sites on the DEQ's list was $18 million for the 1996-97 fiscal year, and $11 million for the 1997-98 fiscal year. An amendment to the federal Resource Conservation and Recovery Act (RCRA) specifies that all underground storage tanks must either be removed or brought up to the highest standards by December 22, 1998. After that date, according to the provisions of Public Acts 212 and 213 of 1993, which restructured the MUSTFA program, no distributions will be made from the fund.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

Controversy surrounded the MUSTFA program almost from its inception. At one point, rumors circulated that the MUSTFA Fund had been victimized by unscrupulous contractors who submitted claims for work that was not performed, or who overcharged for their work. A 1993 analysis released by the Office of the Auditor General noted that, although, at the time, the Departments of Management and Budget, Natural Resources, Treasury, and State Police each performed

key functions within the program, no one department had the authority to ensure that the internal controls of the program were effective, and that the overall best interests of the state were achieved. In 1995, the state was sued by organizations representing gas stations to keep MUSTFA open after the fund administrator notified underground storage tank owners and operators that funding would no longer be available. The state agreed to continue to pay for work invoices and requests for indemnification (but not for claims) received by June 29, 1995.

The MUSTFA Fund was established primarily to help the owners of small businesses (sometimes referred to as "mom and pop" operations) -- those that typically cannot afford to upgrade their storage tank systems nor to clean up contaminated sites. However, some maintain that the fund was, instead, drained by larger companies. The bill would provide some assistance to these businesses by establishing a small business assistance program, a revolving loan fund to provide loans for site characterization and initial abatement activities; and a grants cleanup program that would issue grants for corrective actions that would bring a site to a Class 3 level, that is, a level where it had been determined that no health or environmental risks existed.

A chart prepared by the Science and Technology Division of the Legislative Service Bureau indicates how the new programs would operate, under the provisions of House Bill 5301, for eligible participants (applicants who, among other requirements, had no other financial resources and who operated only one facility). An owner or operator who discovered a release from an underground storage tank and who reported the release and performed initial response activities could apply for a small business site characterization and initial abatement loan. If the DEQ determined that the site was a Class 3 or 4 site, a ten-year interest free loan could be granted, and a lien would be placed on the property on which the response activities would take place. After site classification and initial abatement activities were completed, no additional work would have to be performed at a site, provided that it was monitored annually, remained a Class 3 or 4 site, and due care requirements were conducted. The owner or operator would have to pay for any tank removals, upgrades, or replacements. Funds for this program would be disbursed from a proposed Small Business Cleanup Revolving Loan Fund, which would replace the current Emergency Response Fund. If the DEQ determined that the site was a Class 1 or 2 site, and the owner or operator had spent $50,000 at the site, he or she could apply for a grant under the Small Business Grants Cleanup Program. The grant would be used to bring the site to the same level as a Class 3 site, that is, one that posed a long-term threat to human health or the environment. This program would be funded by a proposed Small Business Grants

Cleanup Program, which would be funded by the Emergency Response Fund. Under House Bill 5302, an owner or operator could request that the DEQ certify a site closure by submitting a $1,250 fee with the closure report completed by the company's consultant. The department would have 90 days to certify the closure. Within the 90 days, the department could either issue a closure letter or notify the owner or operator of deficiencies. If the closure was denied, the owner or operator could perform additional corrective action at the site and request a second review. One additional review would be performed without charge. The $1,250 closure certification fees would be deposited into a proposed closure certification fund, which would be used to administer these provisions. In addition, a $1,500 application and annual renewal fee would be required from contractors who wished to be placed on the DEQ qualified consultant (QC) list, and a $1,00 application and annual renewal fee would be required from persons who wanted to be placed on the certified underground storage tank professional list. These fees would be deposited in a proposed Qualified Consultant and Underground Storage Tank Professional Oversight Fund and used for reviewing applications and overseeing QC work.

Against:

According to written testimony received by the House committee, one of the problems with the provisions of the current MUSTFA Act is the requirement that qualified consultants be selected from the DEQ's approved list. Since it is the owners and operators, and not the consultants, who must endure the financial risks involved in cleanup activities, they should be allowed to select a consultant of their own choosing.

Response:

It is anticipated that several amendments will be introduced to amend provisions that have raised concern among various interest groups.

Against:

Some have raised concerns that the provision under House Bill 5301 that a "low risk" site -- one with a classification of 3 or 4 -- be allowed to remain on hold. This means that the owner or operator of the site may postpone final closure of the site as long as annual monitoring activities are performed and the site classification does not increase to levels 1 or 2. This could result in contamination remaining at the site for long periods of time.

Response:

The provision is designed to ensure that small businesses, "mom and pop" operations, are not pressured into expending money immediately to remediate contamination that can be cleaned up at a later date with little risk to human health or the environment.

POSITIONS:

The Michigan Health and Hospital Association (MHA) supports the bills. (12-8-97)

The Michigan United Conservation Clubs supports the bills. (12-8-97)

The Michigan State Chamber of Commerce supports the bills. (12-8-97)

The Small Business Association (SBA) of Michigan supports the bills. (12-8-97)

The Services Station Dealers Association of Michigan supports the concept of the bills. However, among other concerns, the association maintains that the eligibility requirements for loans from the revolving loan fund are too narrow. (12-8-97)

The American Consulting Engineers Council/Michigan Chapter supports the concept of House Bill 5301. However, the council is concerned that the process by which the DEQ would solicit bids from qualified consultants for corrective actions might result in bids being accepted from the lowest bidder rather than from qualified consultants. (12-8-97)

The Michigan Environmental Council, an association of environmental concerns including the Sierra Club, Mackinac Chapter; the American Lung Association of Michigan; Clean Water Action; the Detroit Audubon Society; the League of Women Voters of Michigan; the Michigan Audubon Society; the Public Interest Research Group in Michigan (PIRGIM); and the East, West, and Northern Michigan Environmental Action Councils, has no position on the bills. (12-8-97)

Associated Petroleum Industries of Michigan has no position on the bills. (12-8-97)

The Michigan Truck Stop Operators Association has no position on the bills. (12-8-97)

The Michigan Bankers Association has no position on the bills. (12-8-97)

The Michigan Municipal League has no position on the bills. (12-8-97)

The Michigan Farm Bureau has no position on the bills. (12-3-97)

The Michigan Townships Association has no position on the bills. (12-3-97)

The Michigan Waste Industries Association has no position on the bills. (12-3-97)

The Department of Environmental Quality (DEQ opposes the bills. (12-3-97)

Analyst: R. Young

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.