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MUSTFA: CONTINUE FUND

AS ENROLLED

Senate Bill 45 with House committee and
floor amendments
First Analysis (2-4-93)

Sponsor: Sen. Paul Wartner
Senate Committee: Natural Resources &
Environmental Affairs
House Committee: Conservation,
Environment & Great Lakes Affairs

THE APPARENT PROBLEM:

In light of the contribution that leaking underground storage tanks make to groundwater contamination and the need to assist owners and operators of these tanks (e.g., service stations) with adequate funds to correct the problem, Public Act 518 of 1988 created the Michigan Underground Storage Tank Financial Assurance (MUSTFA) Fund. In conjunction with this act, Public Act 152 of 1989 imposed environmental protection regulatory fees on the sale of all refined petroleum products. The regulatory fees are deposited into the assurance fund, from which money is made available to the owners of underground storage tank systems for corrective action for accidents that result in leaks. The assurance fund also has functioned as an insurance program in cases where a service station or other business owner seeks a business loan. (Financial institutions generally are reluctant to make such loans unless they receive assurance that, should the property contain leaking underground storage tanks, corrective action would be taken and funds provided to cover the costs of such action.) However, the portion of Public Act 518 that created the fund and provided for its revenue source and distribution is scheduled to expire on January 1, 1995. Also, a provision currently in the act requires the Department of Management and Budget to notify owners/operators of underground storage tanks and others involved in cleaning them up 90 days before it expects the fund to be insolvent, based on projected fund revenues and expenditures. With the fund expected to sunset January of 1995, DMB officials projected last fall that the fund would be insolvent on February 8 of this year; thus, it notified all interested parties on November 11, 1992, that 90 days hence the fund no longer would accept requests for assistance. With the deadline approaching fast, legislation has been introduced to correct these and other problems.

THE CONTENT OF THE BILL:

The bill would amend the Michigan Underground Storage Tank Financial Assurance (MUSTFA) Act to, among other things, specify that the act would be repealed as of January 1, 2000, and delete from the act the January 15, 1995, sunset on sections providing for the MUSTFA Fund, a 7/8-cent regulatory fee on refined petroleum products sold in the state, payments from the fund for indemnification and corrective action, an interest subsidy program, and related matters.

Money for Corrective Actions. Currently, an owner or operator may receive money from the MUSTFA Fund for corrective action or indemnification only if certain requirements are satisfied, including the following:

- * The petroleum underground storage tank from which the release occurred was, at the time the release was discovered, in compliance with the registration requirements of the Underground Storage Tank Regulatory Act. The bill would also require that the tank to be in compliance at the time money was received.

- * The owner or operator was at the time the release was discovered in compliance with all record-keeping and reporting requirements of the Underground Storage Tank Regulatory Act, the Fire Prevention Code, the Leaking Underground Storage Tank Act, or the federal Solid Waste Disposal Act. The bill would delete reference to the Fire Protection Code and would require, instead, the owner or operator to be in compliance at the time money was received with the 30-day notice of closure, removal, or change in service reporting and the 24-hour notice of release reporting required by the Underground Storage Tank Regulatory Act and applicable requirements of the other acts.

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* The owner or operator has not defaulted on a loan subsidized through the interest subsidy program. The bill would delete this provision.

Under the bill, a claim or request for indemnification would have to be submitted by December 22, 1998, to the administrator pursuant to the act and rules promulgated under it. The owner or operator could receive money from the fund for corrective action or indemnification due to a release that originated from an aboveground piping and dispensing portion of a petroleum underground storage tank system, if the owner or operator otherwise was in compliance with the act and its rules; the release was sudden and immediate; it exceeded 25 gallons and was released into groundwater, surface water, or soils; and the release was reported to the Department of State Police, Fire Marshall Division within 24 hours of its discovery.

Currently, if an owner or operator received money from the fund for an "occurrence," he or she is not eligible to receive money for a subsequent occurrence unless he or she has upgraded or replaced all underground storage tank systems at the location of the occurrence to meet requirements of the federal Solid Waste Disposal Act and the Underground Storage Tank Regulatory Act. The bill would delete reference to an occurrence and specify, instead, a "release" at a location. In addition, the bill provides that an owner or operator could not receive money for a subsequent release unless he or she had done either or both of the following: discovered the subsequent release pursuant to remedial action being taken on a confirmed release and included the subsequent release as part of the corrective action for the confirmed release; or upgraded, replaced, removed, or properly closed in place all underground storage tank systems so as to meet the requirements of the Underground Storage Tank Regulatory Act and rules promulgated under it.

An owner or operator who discovered a subsequent release at the same location as an initial release, pursuant to remedial action being taken on a confirmed release, or pursuant to upgrading, replacing, removing, or closing all tank systems, could receive money from the fund to perform corrective action on the subsequent release, if he or she otherwise complied with the act's requirements and rules promulgated under the act. A subsequent release discovered pursuant to a remedial action,

however, would have to be considered as part of the claim for the initial release when the total amount of expenditures for corrective action and indemnification was determined. A subsequent release discovered pursuant to upgrading, replacing or closing would have to be considered a separate claim for determining the total amount of expenditures for corrective action and indemnification.

Financial Institutions. A regulated financial institution or land contract vendor could receive money from the fund for corrective action or indemnification if, prior to the discovery of the release, the institution had made a loan to an owner or operator or to an approved claimant under the interest subsidy program, or a land contract vendor had entered into a land contract with the owner, and subsequently the institution or land contract vendor took title or assumed ownership of the petroleum underground storage tank system or the property on which it was located by foreclosure, acceptance of a deed in lieu of foreclosure, or forfeiture.

If an eligible institution or land contract vendor had met the act's requirements on receiving money for corrective actions or indemnification upon taking title to or assuming ownership of the tank system or the property on which it was located, the financial institution or land contract vendor could use the deductible provided by the owner or operator or could pay the deductible amount specified in the act. Upon meeting these requirements and those in the act for corrective actions or indemnification, a regulated financial institution or land contract vendor could receive money from the fund for corrective action or indemnification and could accept a transfer or assignment of an approved claim.

Currently, the administrator is required to approve expenditures for corrective action and indemnification, on behalf of an owner or operator, of not more than a total of \$1 million of approved work invoices and approved requests for indemnification per tank system per occurrence, provided the owner or operator met the act's requirements. The bill specifies that the administrator would be required to approve such expenditures per claim. Under the bill, the approved expenditure would have to be reduced by the amount of the interest subsidy paid to an owner

or operator who had defaulted on a loan subsidized through the act's interest subsidy program.

Eligibility of Operators. Currently, an owner or operator of a petroleum underground storage tank system that had not met federal or state standards by February 15, 1990 for a new tank system installed after January 1, 1989, and who had not submitted a complete application and satisfied other requirements for an interest subsidy on a loan that would bring the system into compliance, is ineligible to receive money from the fund for indemnification associated with a release from that tank system. The bill would change the deadline to February 15, 1995.

Deductible Amount. Upon transfer or sale of any legal, equitable, or possessory interest in property, that at the time of transfer was otherwise in compliance with the act and its rules, or upon which an approved claim and the corresponding corrective act was in progress, any deductible amount paid could be transferred by written agreement.

Procedures to Receive Fund Money. Under the act, upon receipt of a bid, the fund administrator must make certain determinations including whether the Department of Natural Resources (DNR) has determined that the work performed or proposed to be performed is consistent with the corrective action plan. The bill specifies, instead, that the work would have to be consistent with the Leaking Underground Storage Tank Act and its rules. The bill also would require the administrator, upon receiving a claim, to make the determinations within 30 days after responses had been received from the DNR and state police. If the administrator did not make the determinations within 30 days after receiving certification from the DNR and the state police, the claim would be considered approved. The bill also specifies that within one year after the bill's effective date, the Department of Management and Budget (DMB) would have to promulgate rules to implement the act. The rules would have to address, at a minimum, a procedure that the fund administrator would have to follow in making determinations and various procedures that currently must be followed, as specified in the act.

The owner or operator currently may submit work invoices to the administrator after a bid's approval. The bill instead would permit the submission of additional work invoices after a claim was approved. Upon receiving a work invoice, the administrator

must determine whether the invoice is reasonable in terms of cost and consistent with the approved bid, and whether the DNR has determined that the work performed is consistent with the corrective action plan. Under the bill, the administrator instead would have to determine if the invoice was consistent with the Leaking Underground Storage Tank Act and whether the owner or operator was in compliance with the registration requirements of the Underground Storage Tank Regulatory Act and its rules.

Currently, the administrator must keep records of approved bids and work invoices. The bill would delete reference to approved bids. The act also requires the administrator, if the owner or operator has submitted approved work invoices totaling the deductible amount, to forward approved work invoices to the state treasurer, as long as the owner or operator did not exceed the allowable expenditure of \$1 million. The bill would require the administrator to forward "payment vouchers," instead of approved work invoices. Also, the bill would delete the current requirement that the DNR determine whether the work performed is consistent with the approved corrective action plan.

Under the act, upon receiving an approved work invoice, the state treasurer must make a payment to the contractor listed on the invoice and bid within 30 days if there is sufficient money in the fund. Under the bill, upon receiving a payment voucher, the treasurer would have to pay the owner or operator if he or she submitted certified canceled checks, or the owner or operator and the contractor listed on the voucher and claim.

Property Sale or Transfer. An owner or operator with an approved claim, for which corrective action was in progress, who sold or transferred to another person the property that was the subject of the approved claim, could assign or transfer the claim to that person. The person to whom the assignment or transfer was made would be eligible to have access to the fund as an owner or operator for the release that was the subject of the approved claim. Allowable, outstanding approved or paid work invoices of the owner or operator making the assignment or transfer could be counted toward the deductible of the person to whom the assignment or transfer was made.

An owner or operator assigning or transferring an approved claim would have to notify the

administrator of the proposed assignment or transfer at least 10 days before the assignment's or transfer's effective date.

Denial/Review Requested. If the fund administrator denies a bid or work invoice, or request for indemnification, under the act, the owner or operator may request, within 14 days following the denial, review by the Michigan Underground Storage Tank Financial Assurance Policy Board. If the board determines, upon review, that the bid, work invoice, or request should be approved, the administrator must approve it. The bill would delete the provision requiring administrator approval upon review and the reference to bids.

The bill would require the administrator, upon review by the board, to approve a claim, work invoice, or request for indemnification if the board determined that the claim, work invoice, or request substantially complied with both of the following:

- * The proper registration of tanks, the 30-day notice of closure removal, or change in service reporting, and the 24-hour notice of release reporting as required by the Underground Storage Tank Regulatory Act and its rules.

- * The requirements of the Leaking Underground Storage Tank Act, rules promulgated under that act, or provisions of the federal Solid Waste Disposal Act and its rules.

If the board approved a claim based on substantial compliance, it could refuse to pay for costs incurred during the time the owner or operator was not in strict compliance with above requirements.

Currently, a person who is denied board approval may request a contested case hearing pursuant to the Administrative Procedures Act (APA). The bill specifies that the request would have to be made within 30 days of the board's written denial. A person would have to exhaust his or her administrative remedies under the act or the APA before seeking judicial review of the administrator's or board's decision.

Interest Subsidy Program. The act provides for the establishment of an interest subsidy program to provide subsidies to an owner or operator of a petroleum underground storage tank system. Applications for the program must have been submitted within two years after the effective date of Public Act 152 of 1989 (which took effect July 18,

1989). The bill would extend the deadline to December 22, 1998. The bill would delete the current requirement that an interest subsidy be valid for the entire loan period.

Environmental Impairment Insurance Study. The Department of Management and Budget currently is required to conduct a study to determine the availability and cost of environmental impairment insurance for owners and operators of underground storage tank systems, and to report the results of the study to the legislature. The bill specifies that it would apply to petroleum tank systems. The act requires that the study be conducted during the year preceding the repeal of provisions concerning the MUSTFA Fund. This section is to be repealed as of January 19, 1995. The bill would extend the study period to June 22, 1998.

Penalty Provisions. The bill specifies that, beginning 180 days after its effective date, a person who made or submitted, or caused to be made or submitted, any statement, report, bid, work invoice or other request for payment knowing that the same was false, misleading or fraudulent would be guilty of a felony and could be imprisoned for up to five years or fined not more than \$50,000, or both. This provision would not preclude prosecutions under other state laws.

Emergency Response Fund. Currently, money in the Emergency Response Fund must be spent by the director of the DNR to undertake corrective actions pursuant to the Leaking Underground Storage Tank Act. The bill specifies that corrective actions would have to address releases from petroleum underground storage tank systems.

Repeal. The act provides for the repeal, as of January 19, 1995, of a number of provisions concerning the MUSTFA Fund, including the environmental protection regulatory fee, money for corrective actions, funds for indemnification, corrective actions and their funding, payment of work invoices and requests for indemnification, an interest subsidy program, and the Underground Storage Tank Financial Assurance Policy Board (MCL 299.808 to 299.824). The bill would delete that sunset date. Also, the bill specifies that the act would be repealed effective January 1, 2000.

The bill would repeal as of December 22, 1998, provisions concerning the Emergency Response

Fund. Upon repeal, any unspent money in that fund would revert to the MUSTFA Fund.

The act provides that prior to the repeal of the MUSTFA Fund, the state treasurer must reserve enough money in the fund to pay for interest subsidies and for bids, work invoices, and certain indemnification requests. Under the bill, the money would have to be reserved before December 22, 1998, and reference to bids would be deleted.

MCL 299.804 et al.

HOUSE COMMITTEE ACTION:

The House Committee on Conservation, Environment and Great Lakes Affairs adopted amendments to the Senate-passed version of the bill that 1) moved the sunset specified for the act from February 15, 2003, up to January 1, 2000, 2) changed a provision regarding the bill's penalty provisions for someone convicted of fraudulent behavior so that this provision would become effective 180 days after the bill's effective date, rather than 60 days after, and 3) deleted language found in the Senate-passed version that would have changed the definition of "indemnification" under the act.

BACKGROUND INFORMATION:

The federal Leaking Underground Storage Tank Trust Fund (LUST Trust) was created by the Superfund Amendments and Reauthorization Act of 1986, which amended the Resource Conservation and Recovery Act (RCRA), to help states clean up sites contaminated by underground tanks. Money from the fund was made available to the states over a five-year period, which started in 1987, provided that they incorporate federal standards regarding leaking underground storage tanks and implemented a regulatory program. Toward that end, Public Acts 478 and 479 of 1988 provided for the regulation of underground storage tanks and for corrective action to be taken when such tanks are found to be leaking. In addition, Public Act 518 of 1988 created the Michigan Underground Storage Tank Financial Assurance Fund and the Emergency Response Fund, and Public Act 152 of 1989 imposed environmental protection regulatory fees on the sale of all refined petroleum products. The regulatory fees are first deposited into the Emergency Response Fund. When that fund reaches \$1 million, the fees are deposited into the assurance fund, from which money is made available to the

owners or the operators of leaking underground storage tank systems for corrective action.

FISCAL IMPLICATIONS:

According to the Department of Management and Budget, the bill would generate additional revenue to the Michigan Underground Storage Tank Financial Assurance Fund by extending the sunset for the 7/8 cent fee per gallon on refined petroleum to January 1, 2000. A minimal revenue increase would occur from including oxygenates within the definition of refined petroleum. The regulatory fee currently generates \$55 million annually and is anticipated to generate \$120.9 million prior to the 1995 sunset. Extension of the sunset to 2000 could generate about \$250 million in additional revenue.

The bill would increase expenditures from the fund by extending the sunset for filing claims to December 22, 1998, and including aboveground portions of a petroleum underground storage tank system for claims against the fund. Approximately \$116.4 million in claims have been paid from the fund and \$203.1 million in claims are pending. (2-3-93)

ARGUMENTS:

For:

Businesses with underground storage tanks on their properties often incur costs in excess of those for which they will receive reimbursement from the assurance fund. In the first place, the owner or operator of a leaking underground storage tank is responsible for the first \$10,000 of the cleanup action costs. Secondly, measures taken to correct the leaking tank usually involve related work: paving, removal of gasoline pumps, etc., which may not be reimbursed by the fund. The assurance fund has functioned as an insurance program for businesses needing to borrow money to pay these costs or desirous of making other changes or improvements on their properties, since the financial institutions that advance loans to these businesses have had assurance that the fund would provide money for any corrective action required on the property. In a situation, for example, where a service station sought to add a convenience store to its business, the financial institution that supplied the loan for the addition could rest assured that underground storage tanks on the property were either in compliance with federal and state environmental standards regarding underground

storage tanks or would be eligible for funds for corrective action measures should a leak be discovered.

For:

When the Michigan Underground Storage Tank Financial Assurance Fund was originally established, it was anticipated that private insurance companies would eventually replace the necessity of the fund by providing insurance coverage to owners of underground storage tank systems. This did not happen, and as the country in general becomes more aware of, and more concerned with, the lasting effects of environmental contamination, it seems unlikely to happen. According to the Department of Natural Resources, 2,500 releases of refined petroleum products still occur each year, so it is important that the fund continue so that owners of underground storage tanks can be assured that funds will be available for corrective action measures.

For:

The bill would establish criminal penalties that could be imposed on persons who knowingly defrauded the fund by submitting inaccurate information to the administrator of the fund. Though most officials acknowledge that this problem is probably not widespread, it is expected that the threat of criminal penalties would help deter those who otherwise might try to defraud the fund. In addition, provisions would be adopted that would allow for better oversight of fund expenditures, which could help to ensure that more funds were available for legitimate cleanup efforts.

Against:

Concerns were expressed, when the Michigan Underground Storage Tank Assurance Fund was established, that claims against the fund would, at some point, exceed fund revenues, and that failure of the fund would cause the state to be held liable for payment of losses. According to estimates, the fund has paid out \$70.6 million in claims, and its balance, as of September 30, 1991, was \$73.8 million. However, the fund carries \$1 billion in liabilities. Simply extending the sunset date for the fund to the year 2000--to allow the fund to continue operating based on projected revenues from this mere accounting change--ignores changes that should be made to the way fund revenues are generated (i.e., the current 7/8 cent per gallon fee imposed on refined petroleum products should be increased to reflect the burdens facing the fund).

Response:

It should be noted that the changes proposed in the bill are only temporary measures to allow the fund to continue assisting businesses with leaking underground storage tanks. More substantive changes to the act are being considered, but more time is needed to study exactly what changes are necessary. Based on revenue projections by the DMB, if the bill is enacted the fund will remain solvent only until September of this year; thus, the legislature would have about 8 months to work on making more substantive changes to the way revenues are generated by the fund.

POSITIONS:

The Department of Management and Budget supports the bill. (2-3-93)

The Department of Natural Resources supports the bill. (2-3-93)

The following groups have expressed their support for the bill (2-2-93):

- * Associated Petroleum Industries of Michigan
- * Michigan Bankers Association
- * Michigan Chemical Council
- * Michigan Farm Bureau
- * Michigan Municipal League
- * National Federation of Independent Businesses--Michigan Chapter
- * Small Business Association of Michigan
- * Michigan Association of Home Builders
- * Michigan Chamber of Commerce
- * Michigan Environmental Consultants and Contractors Association
- * Michigan Manufacturers Association
- * Michigan Petroleum Association
- * Service Station Dealers Association of Michigan