House
Legislative
Analysis
Section

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TRANSFER MUSTFA

House Bill 4783 (Substitute H-1*)
House Bill 4785 (Substitute H-1)
Sponsor: Rep. Tom Alley

House Bill 4784 (Substitute H-1*)
Sponsor: Rep. James M. Middaugh

First Analysis (5-25-93)
Committee: Conservation, Environment & Great Lakes Affairs

THE APPARENT PROBLEM:

In view 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.)

Various rumors and complaints -- some of them contradictory -- that have circulated during the past six months concerning inefficiencies in the administration of MUSTFA have alerted the legislature to the fact that all is not well in the program. The greatest cause for concern was the Department of Management and Budget's estimate last fall that the fund would be insolvent in February, 1993 (the department's latest estimate is that the fund will be $350 million in debt by 1995). A portion of Public Act 518 that created the fund and provided for its revenue source and distribution was scheduled to expire on January 1, 1995. With that deadline approaching, Public Act 1 of 1993, among other provisions, extended the sunset for the regulatory fee and the act's repeal to January 1, 2000. This temporary measure gave the legislature a few months to correct deficiencies in the program. There have, however, been other indications that the program has not been operating in the best interests of the state. In March of this year, the Office of the Auditor General released a preliminary analysis of a financial audit for fiscal years 1990-91 and 1991-92, which estimated that by September, 1993, the program would have approved sufficient cleanup projects that would use up its anticipated revenue through January, 2000, the year the program is scheduled to end. The preliminary analysis disclosed other weaknesses in the program, including the following:

Program Oversight. The auditor general's analysis noted that, although the Departments of Management and Budget (DMB), Natural Resources (DNR), Treasury, and State Police each perform key functions within the program, no one department has the authority to ensure that the internal controls of the program are effective, and that the overall best interest of the state is achieved. (Note: the auditor general's analysis did not specify the Department of Attorney General, which does, however, share responsibility in administering the program).

Initial Identification of Contamination. The preliminary analysis found that most claim sites were not inspected by state employees at any time, and, in some cases, the cleanup work plan indicated that the contamination was not the result of leaking tanks or piping. Because of this, the analysis concluded that the program cannot assure that third

party liability has been identified, or that unnecessary costs aren't incurred.

Accounts Payable. According to the audit report, the program recorded accounts payable of approximately $20 million as of September 30, 1991; however, the actual accounts payable as of that date totalled approximately $71 million. As a result, accounts payable and expenditures were understated by approximately $51 million for fiscal year 1990-91 and expenditures for fiscal year 1991-92 were overstated by $51 million. Similarly, accounts payable as of September 30, 1992 were estimated at $60 million, while the audit determined that the actual amount was approximately $97 million. The report concluded that the program did not have the necessary procedures to accurately identify and record accounts payable in accordance with generally accepted accounting principles for the audit period.

Verification of Services Received. The preliminary analysis found that the DMB relied on a third party administrator (TPA) to verify that services had been received prior to payment. The TPA compared the types of services billed with the types of services outlined in the corresponding work plan (approved by the DNR). However, since the work plans usually did not specify the quantities of each type of service needed, the TPA couldn't verify that the quantity provided was actually needed. Also, since the TPA didn't always receive DNR-approved amendments to work plans, it couldn't effectively compare services billed with services approved. In addition, in a test group of 156 invoices, the audit report found that approximately 50 percent of the invoices paid by the TPA had not been certified by the primary contractor, and approximately 55 percent of those invoices were for services provided after the initial abatement period. (Although the program allows for owners or operators to obtain initial abatement services from any contractor, the MUSTFA program requires that all invoices be certified by a primary contractor).

Reasonable Cost Determination. The audit report also noted that the program did not gather sufficient cost information to develop a base for determining that bills were reasonable. The analysis concluded that the system used under the program had the potential for paying greater than reasonable costs for some services and in some areas.

In response to these concerns, the Office of the Auditor General's preliminary analysis made several recommendations. It recommended: that the enabling statute be amended to specify that one department would be responsible for oversight of the program; that the program improve internal controls over the initial identification of the source and extent of contamination; that the MUSTFA program implement internal controls to ensure that it paid only for services actually needed and received; and that the program gather sufficient detail cost information to develop a base for determining that billings are reasonable. Since the legislature must make substantive changes to the way the program operates by September of this year, legislation has been proposed that would combine some of the auditor general's recommendations with other proposals to streamline the program. Specifically, the legislation would transfer the program to a single department, accept new MUSTFA claims only until May 20, 1993, issue bonds to pay off the backlog of claims under the current program, and pay the bond debt with revenue from the 7/8-cent regulatory fee. These proposals would effectively end the MUSTFA program between May 20, 1993, and September 30, 1993. During that period, the legislature would explore new ways to fund the program.

THE CONTENT OF THE BILLS:

House Bills 4783, 4784, and 4785 would amend the acts that regulate underground storage tanks -- the Underground Storage Tank Regulatory Act (MCL 299.708), the Leaking Underground Storage Tank Act ((MCL 299.833 et al.), and the Michigan Underground Storage Tank Financial Assurance (MUSTFA) Act (MCL 299.802 et al.) -- to create the Michigan Underground Storage Tank Financial Assurance Authority, which would administer the MUSTFA fund; to authorize the use, issuance, and payment of bonds, notes, obligations, and other evidence of indebtedness; and to transfer certain departmental responsibilities, staff, and other resources. House Bill 4785 would permit an eligible owner or operator of an underground storage tank system to receive money from either the MUSTFA fund or from a bond proceeds account established under the bill. House Bills 4784 and 4785 would also provide new penalties for violations of the Leaking Underground Storage Tank Act and MUSTFA. The bills are tie-barred to each other.

House Bill 4783. The provisions of the Underground Storage Tank Regulatory Act are enforced by the fire marshal division of the Department of State Police (FM-DSP). The department may also delegate its authority to a local unit of government. House Bill 4783 would amend the act to relieve the department of the financial responsibilities involved in enforcing corrective actions for releases from underground storage tank systems between the effective date of the bill and September 30, 1993. The bill would specify, however, that these restrictions would not apply to, and would not terminate, pending administrative or judicial enforcement proceedings by the department or by the attorney general.

House Bill 4784. The provisions of the Leaking Underground Storage Tank (LUST) Act are enforced by the fire marshal division of the DSP (FM-DSP), which receives reports of releases from leaking tanks, and by the Department of Natural Resources (DNR), which receives notification of these releases from the FM-DSP, and takes corrective and enforcement actions. Under House Bill 4784, the FM-DSP would assume the DNR's duties and responsibilities. However, between the effective date of the bill and September 30, 1993, the FM-DSP would be prohibited from taking action against any person who complied with the act's provisions for reporting suspected leaks from underground storage tanks, and who undertook to perform the appropriate response, abatement, and reporting requirements. The bill would specify, however, that these restrictions would not apply to, and would not terminate, pending administrative or judicial enforcement proceedings by the department or by the attorney general. The bill would also establish criminal and civil penalties for violations of the act, and would repeal current provisions of the act which retain the authority of the fire marshal division to take action in certain situations.

Transfer of Staff and Equipment. On the effective date of the bill, all staff, FTEs (full-time equated positions), files, equipment, and other resources, and all DNR revenues relating to the implementation of the Leaking Underground Storage Tank Act would be transferred to the fire marshal division of the DSP.

Criminal Penalties. Beginning 180 days after the effective date of the bill, a person who made or submitted a fraudulent statement, report, confirmation, certification, proposal, or other information, or a person who committed a fraudulent practice, would be guilty of a felony, punishable by imprisonment for up to five years, a fine of up to $50,000, or both.

Civil Penalties. In addition to the criminal penalties provided under the bill, a person who submitted a fraudulent statement or committed a fraudulent practice would be subject to a civil fine of $50,000 for each submission or fraudulent practice. Under the bill, a "submission" would include transmittal by any means, and each transmittal would constitute a separate submission.

Fraudulent Practice. Under the bill, "fraudulent practice" would include, but not be limited to, the following:

**Representing that services or work had been provided when it had not been provided.

**Contaminating an otherwise clean resource or site with contaminated soil or product from a contaminated resource or site.

**Returning a load of contaminated soil to its original site for reasons other than remediation of the soil.

**Intentionally causing, by gross negligence, damage that resulted in a release at an underground storage tank system.

**Placing an underground storage tank system at a contaminated site where a storage tank system did not previously exist in order to disguise the source of contamination.

**Any intentional act, or act of gross negligence, that caused or allowed contamination to spread at a site.

**Submitting a false or misleading lab report, or misrepresenting or falsifying any test result, analysis, or investigation.

**Conducting sampling, testing, monitoring, or excavation that was 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.

**Misrepresenting or falsifying the date upon which a release had occurred.

**Falsely characterizing the contents of an underground storage tank system or reporting regulated substances or parameters other than the substance that was in the underground storage tank system.

**Failing to report subsequent suspected or confirmed releases from sites with a previously reported release.

**Falsifying the date on which a tank system, or any of its components, were removed from the ground and site.

**Any other act or omission of a false, fraudulent, or misleading nature undertaken to gain compliance with the requirements of the act.

Attorney General Investigations. Under the bill, the attorney general or county prosecutor could conduct an investigation and bring an action for an alleged violation of the bill, and make an ex parte request to a magistrate if he or she had reasonable cause to believe that a person had information or was in possession of any documents or records that could lead to an investigation. An action could be brought in district court to enforce the demand against a person who objected to or otherwise failed to comply with the subpoena, or for an order to grant immunity to a person who refused or objected to giving information. Attorney general actions and requests could be brought in Ingham County.

Fines. A person who failed to comply with a subpoena or a requirement to appear and be examined would be subject to a civil fine of up to $25,000 for each day of continued noncompliance. All civil fines would be apportioned as follows:

--50 percent would be deposited in the general fund and used by the department to fund fraud investigations, as mandated under the act.

--25 percent would be paid to the county prosecutor or attorney general, whichever office brought the action.

--25 percent would be paid to a local police department or sheriff's office, or city or county health department, if their investigation led to the action. If more than one office or department were eligible, then the payment would be divided equally. If no local office or department were entitled to payment, then the money would be deposited into the Emergency Response Fund.

The provisions of the bill would not preclude prosecution under the Michigan Penal Code.

Rewards. The department would be require to promulgate rules to establish procedures for reward claims, and to periodically publicize the availability of the rewards to the public. A reward, equal to the greater of ten percent of the amount of the civil fine, or $1,000, would be paid to anyone who provided information leading to a civil fine or criminal conviction for information submitted on or after the effective date of the bill. Public officers and employees of the United States, the states of Michigan, Wisconsin, Illinois, Indiana and Ohio, or counties and cities in those states, would not be eligible for the reward unless reporting the violations did not relate in any way to their public responsibilities. In addition, an employee who provided information that a business had violated the act would not be eligible for a reward if the employee intentionally caused the violation.

The department would promulgate rules to establish procedures for the receipt and review of claims for payment of rewards, and all decisions concerning an award's eligibility would be made according to these rules. The department would periodically publicize the availability of the rewards.

House Bill 4785 would amend the Michigan Underground Storage Tank Financial Assurance (MUSTFA) Act to transfer certain responsibilities, which are currently undertaken by the DMB and the DNR under the act, to the fire marshal division of the State Police; to create a Michigan Underground Storage Tank Financial Assurance Authority to administer the assurance fund; to permit the assurance fund to be used to pay off bonds or notes, and 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 may be required by resolution indenture or other agreement of the authority; to limit administrative costs paid from the fund to those incurred by the FM-DSP, the

Department of Treasury, the Department of Attorney General, and the authority; and to permit either the eligible owner or the eligible operator of a leaking underground tank to receive money either from a bond proceeds account or from the assurance fund for corrective actions or indemnification. Under the act, total administrative costs may not exceed seven percent of the fund's projected annual revenues. Under the bill, costs that had been approved by the FM-DSP and the DMB, and that had been incurred by the authority to issue bonds or notes, and which might also be payable from the proceeds of the bonds or notes, would not be considered administrative costs under this provision. The bill would also limit money expended from the Emergency Response Fund to claims submitted before May 20, 1993, and would delete the current provision which specifies that a claim is considered approved if no determination is made on it within 30 days after receipt of its certification. House Bill 4785 would also establish new civil penalties for violations of the act, and would allow the state to impose a lien upon a violator's real or personal property to recover funds.

Transfer of Staff and Equipment. On the effective date of the bill, all staff, FTEs (full-time equated positions), files, equipment, and other resources, and all DMB revenues relating to the implementation of the Leaking Underground Storage Tank Act, would be transferred to the fire marshal division of the DSP.

Financial Assurance Policy Board. The Michigan Underground Storage Tank Financial Assurance Policy Board currently consists of 11 members, including the directors of the DMB, the DNR, and the FM-DSP (or their designees), the state treasurer (or the treasurer's designee), and seven members appointed by the governor. Under the bill, the standing members of the board would be the state fire marshal, the directors of the FM-DSP and DNR, and the state treasurer, or their designees. The board's first meeting would be called by the director of the DSP. Currently, the act requires that the DNR prepare and annually update a list of approved contractors qualified to undertake corrective actions. Under the bill, this report would be prepared by the fire marshal division of the DSP.

Michigan Underground Storage Tank Financial Assurance (MUSTFA) Authority. The authority would be created within the Department of Management and Budget (DMB), but would exercise its statutory power, financial duties, and financial functions independently of the director of the department. The authority's funds would be handled in the same manner as state funds, or as specified in a resolution that authorized the issuance of bonds or notes. The authority's board of directors would consist of the directors of the Departments of State Police, fire marshal division and Management and Budget, or their designees, and three state residents appointed by the governor with the advice and consent of the Senate, who would serve staggered terms for the first three years, after which they would each serve three-year terms. The director of DMB would designate the authority's executive director. The authority would determine the qualifications, duties, and compensation of its employees, except that an employee could not receive a higher salary than the director of DMB. In discharging his or her duties, a member of the board or an officer, employee, or agent of the authority could rely upon the authority's counsel; on an independent appraiser's report; or upon the authority's financial statements. Among other provisions, the board of directors' activities would include promulgating the necessary rules to carry out authority responsibilities; adopting an official seal and bylaws; borrowing money and issuing negotiable revenue bonds and notes; entering into contracts; procuring insurance against loss in connection with its property, assets, or activities; indemnifying and procuring insurance to indemnify board members from personal loss or from accountability from liability for the authority's bonds or notes; and investing the authority's money.

The MUSTFA Authority would be required to file an annual report with the legislature within 270 days after the end of the fiscal year, specifying the amount and source of its revenues, the status of its investments, and the money it had expended with the proceeds of bonds it had sold. Its accounts would be subject to annual audits by the state auditor general or by a certified public accountant. The authority could sue and be sued in its own name; borrow money and issue negotiable revenue bonds and notes; enter into contracts and other instruments; procure insurance against loss or to indemnify its members from personal loss or liability ; invest in instruments, obligations, securities, or property and name and use depositories; contract for goods and services and engage personnel; and -- with the director's prior

consent -- solicit and accept gifts, grants, loans, and other aid.

Insurance Contracts. The authority could authorize and approve an insurance contract, an agreement for a line of credit, a letter of credit, a commitment to purchase notes or bonds, 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.

Michigan Underground Storage Tank Financial Assurance (MUSTFA) Fund. Currently, under the act, regulatory fees from the sale of refined petroleum products are deposited, first, into the Emergency Response Fund. When that fund reaches $1 million, the fees are deposited into the Michigan Underground Storage Tank Financial Assurance Fund. Money from the Emergency Response Fund is spent by the director of the Department of Natural Resources (DNR) to undertake the corrective actions required under the Leaking Underground Storage Tank Act. Money from the assurance fund may be spent only for the administrative costs incurred by the Department of Management and Budget (DMB), the DNR, the FM-DSP, the Department of Treasury, and the Department of Attorney General in implementing the act; for the interest subsidy program, which subsidizes interest on loans; for assistance given by the DNR to those who must undertake corrective actions for accidents that result in leaks from petroleum underground storage tank systems; and for the recycling and disposal of used tires. Under the bill, the DNR's role in this process would be eliminated. In addition, the proceeds of bonds or notes issued by the MUSTFA Authority would be deposited into the fund or bond proceeds account, as authorized or designated by resolution indenture or other agreement of the authority. Bonds and notes would be payable solely from revenues collected from regulatory fees, would not be considered a debt or liability of the state, and would not create or constitute any indebtedness, liability, or obligation of the state, nor constitute a pledge of the state's faith and credit, but would be payable solely from revenues or funds pledged or available for their payment as provided under the provisions of the bill. Each bond and note would bear an inscription stating that the authority was obligated to pay the principal of, and the interest on, the bond or note only from revenues or from authority funds pledged for such payment, and that the state was not obligated to pay that principal or interest and that neither the faith and credit, nor the taxing power of the state, was pledged. All expenses incurred in carrying out the provisions of the act would be paid solely from revenues or funds provided, or to be provided, under the act.

The Emergency Response Fund. Under the act, money from the Emergency Response Fund is spent by the director of the Department of Natural Resources (DNR) to undertake the corrective actions required under the Leaking Underground Storage Tank Act. House Bill 4785 would transfer the DNR's responsibility under this provision to the FM-DSP.

Notes and Bonds: Terms. The authority could issue, from time to time, bonds or notes in principal amounts as necessary to provide funds for any purpose, including, but not limited to, all of the following:

**To pay off bonds or notes in order to maintain a fully funded debt reserve to secure the principal and interest on the bonds or notes, as required by resolution indenture, or other agreement.

**For corrective action and for indemnification.

**The payment, funding, or refunding of the principal of, interest on, or redemption premiums on the authority's bonds or notes, whether or not they had become due.

**The establishment or increase of reserves to secure or pay authority bonds or notes, or interest on those bonds or notes.

**The payment of interest on the bonds or notes for a period, as determined by the authority.

**The payment of all other costs or expenses incident to, and necessary or convenient to carry out, the authority's corporate purposes and powers.

Notes and Bonds: Restrictions. The bonds or notes would not be considered a general obligation of the authority, but would be payable solely from revenues or funds that were pledged to the payment of the principal or, and interest on, the bonds or notes. Under the bill, the bonds or notes would be authorized by resolution; would bear the date or dates of issuance; could be issued as either tax-exempt or taxable bonds or notes for IRS purposes;

would be serial bonds, term bonds, or term and serial bonds; would mature at such time or times, not exceeding 50 years from the date of issuance; could provide for sinking fund payments; could provide for redemption at the option of the authority or the bondholder for any reason; would bear interest at a fixed or variable rate or at no interest; would be registered bonds, coupon bonds, or both; could contain a conversion feature; could be transferable; and would be in a form and denomination and with such other provisions and terms as determined necessary or beneficial by the authority.

Currently, under the act, an owner of an underground storage tank who has received money from the fund for corrective action or indemnification for a spill or leak from a tank is not eligible to receive money from the fund for a subsequent occurrence unless the owner or operator has upgraded or replaced all the underground tank systems at the location of the occurrence so as to meet the requirements of the Federal Solid Waste Disposal Act for new tanks installed after January 1, 1989. The same restrictions on "double dipping" would apply to owners and operators of storage tanks who received money from a bond proceeds account.

Notes and Bonds: Liability. Neither the members of the authority nor any person executing bonds or notes or any person executing any agreement on behalf of the authority would be personally liable on the bonds or notes by reason of their issuance.

Notes and Bonds: Pledge of the State. The bill would specify that the state pledges and agrees with the holders of any notes or bonds issued under the act that the state would not limit or restrict the rights vested in the authority under the provisions of the bill to fulfill the terms of an agreement made with the holders of authority bonds or notes, or in any way impair the rights or remedies of the holders of the bonds or notes until they, together with interest and interest on any unpaid installments of interest, and all costs and expenses in connection with an action or proceedings by or on behalf of the holders were fully met, paid, and discharged.

Notes and Bonds: Resolution. A resolution authorizing bonds or notes could provide for all, or any portion of, the following that would be part of the contract with the holders:

**A pledge to any payment or purpose all or any part of the fund or authority revenues or assets to which its right then existed or later came to exist, and of money derived from the revenues or assets, and of the proceeds of bonds or notes or of an issue of bonds or notes, subject to any existing agreements with bondholders or noteholders.

**A pledge of a loan, grant, or contribution from the federal or state government.

**The establishment and setting aside of reserves or sinking funds and the regulation and disposition of reserves or sinking funds subject to the provisions of the bill.

**Authority for, and limitations on, the issuance of additional bonds or notes, as required by a resolution.

**The procedure by which the terms of a contract with note- or bondholders could be amended or abrogated.

**A contract with the bondholders as to the custody, collection, securing, investment, and payment of any money of the authority.

**Vesting in a trustee, or a secured party, such property, income, revenues, receipts, rights, remedies, powers, and duties, in trust or otherwise, that the authority determined necessary or appropriate to adequately secure and protect noteholders and bondholders, or to limit or abrogate the right of the holders to appoint a trustee under the provisions of the bill, or to limit the trustee's rights, powers, and duties.

**Provide to a trustee or the note- or bondholders remedies that could be exercised if the authority failed or refused to comply with the provisions of the bill, or defaulted in an agreement made with the holders of a bond or note issue, which might include any action to bring suit or any other matter that in any way affected the security of protection of the bonds or notes.

Notes and Bonds: Agreements with Holders. A pledge made by the authority would be valid and binding from the time it was made. The money or property pledged by the authority would be immediately subject to the lien of the pledge without a physical delivery or further act. The lien of a pledge would be valid and binding against

parties having claims of any kind in tort, contract, or otherwise against the authority, and would be valid and binding as against the transfers of the money or property pledged. Neither the resolution, the trust agreement, nor any other instrument by which a pledge was created would have to be recorded to establish and perfect a lien or security interest in the pledged property.

Notes and Bonds: Legal Investment. Notwithstanding any restriction contained in any other law, the bonds and notes of the authority would be considered securities in which all public officers and bodies of the state, and all municipalities, banks, trust companies, savings banks and institutions, savings and loan associations, investment companies, and insurance companies and other persons carrying on an insurance business, all administrators, guardians, executors, trustees and other fiduciaries could legally invest funds in their control or belonging to them.

Notes and Bonds: Exemption from Taxation. The property of the authority and its income and operation would be exempt from all taxes and special assessments by the state or any of its political subdivisions, and all bonds and notes of the authority, including their interest and income, would be exempt from all taxation by the state or any of its political subdivisions.

Notes and Bonds: General Provisions. Other requirements regarding MUSTFA Authority notes, bonds, or coupons would include the following:

**A board member's or officer's signature on a note, bond, or coupon would remain valid after that member left office.

**Bonds or notes could be sold at public or private sale, and at a time, price, and discount as determined by the authority.

**Bonds and notes would not be subject to the Municipal Finance Act; would not require the approval of the state treasurer; would not have to be registered; and would not have to be filed under the Uniform Securities Act.

The authority could also issue bonds or notes in the amounts it considered necessary to refund its outstanding bonds or notes, including the payment of any redemption premium and accrued interest. The proceeds of bonds or notes issued to refund outstanding bonds or notes could be applied to the purchase or retirement at maturity, or to the redemption of outstanding bonds or notes, either on the earliest or subsequent redemption date, and pending such applications, could be placed in escrow, to be applied to the purchase or retirement at maturity, or redemption on the determined date. Pending such application, and subject to agreements with noteholders or bondholders, the escrowed proceeds could be invested and reinvested in the manner determined by the authority. Subject to agreements with noteholders or bondholders, the escrowed proceeds could be invested and reinvested in the manner the authority determined, maturing at the date or times as appropriate to assure the prompt payment of the principal, interest, and redemption premium, if any, on the outstanding bonds or notes to be refunded. After the terms of the escrow had been fully satisfied and carried out, the balance of the proceeds and interest, income, and profits earned, would be returned, to be used by the authority in any lawful manner. In a resolution authorizing bonds or notes to refund bonds or notes, the authority could provide that they be considered paid when money or investment obligations had been deposited in escrow to provide payments of principal and interest on the bonds to be refunded as they became due. When the money or investment obligations were deposited, the authority's obligations to the holders would be terminated, except as to the rights to the money or investment obligations deposited in trust.

The authority could also authorize payment from the proceeds of the notes or bonds, or other funds, of the cost of issuance, including fees for placement, charges for insurance and other costs. Within limitations contained in the authority's resolution, the authority could also authorize a member of the board, the executive director, or other officer of the authority to do one or more of the following:

**Sell and deliver and receive payment for notes or bonds.

**Deliver new notes or bonds to refund notes or bonds, whether or not the old notes or bonds had matured or were subject to redemption.

**Deliver notes or bonds, partly to refund notes or bonds, and partly for any other authorized purpose.

**Buy notes or bonds so issued and resell those notes or bonds.

**Approve interest rates or methods for fixing interest rates, prices, discounts, maturities and other matters.

**Direct the investment of any and all authority funds.

**Approve terms of any insurance contract, agreement for a line of credit, a letter of credit, a commitment to purchase notes or bonds, or other matters.

**Execute any power, duty, function, or responsibility of the authority.

Notes and Bonds: Validity. Currently, the act states that if any provisions of the act were found to be unconstitutional, then the whole act would be considered unconstitutional. The bill would specify that if the authority's bonds or notes had been fully paid or provided for, then this provision would apply.

Criminal and Civil Penalties. Currently, the act specifies that, effective August 8, 1993, a person who knowingly makes or submits, or causes to be made or submitted, any false, misleading or fraudulent statement, report, bid, work invoice or other request for payment is guilty of a felony and will be imprisoned for up to five years or fined not more than $50,000, or both. House Bill 4785 would clarify that the penalty would apply to any application, as well as statement, report, claim, bid, work invoice, or other request for payment or indemnification, made directly or indirectly. The bill would also include a "fraudulent practice" as a punishable act under this provision. In addition, under the bill, a person who was found guilty of this violation of the act would be subject to a civil fine of not more than $50,000, or twice the amount submitted, whichever was greater.

Fraudulent Practice. The bill would define "fraudulent" or "fraudulent practice" to include, but not be limited to, the following:

--Submitting a work invoice for excavation or disposal, or for providing soil, sand, or backfill for an amount greater than was actually carried or provided.

--Submitting paperwork for services that were not provided or not directly provided by the individual indicated on the paperwork.

--Contaminating an otherwise clean resource or site.

--Returning a load of contaminated soil to its original site.

--Intentionally causing damage as the result of gross negligence to a storage tank that resulted in a release.

--Placing a storage tank at a contaminated site where no storage tank had previously existed in order to disguise the source of contamination or obtain funding.

--Submitting a work invoice for soil excavation from a site that was removed for reasons other than removal of the storage tank or remediation.

--Any intentional act or act of gross negligence that caused or allowed contamination to spread at a site.

--Registering a nonexistent storage tank system with the department.

--Loaning the required deductible amount to an owner or operator and then submitting inflated claims or invoices designed to recoup the deductible amount.

--Unnecessary excavation.

--Confirming a release without simultaneously providing notice to the owner or operator.

--Inflating bills or work invoices, or both, by adding charges for work not performed.

--Submitting a false or misleading lab report.

--Submitting bills or work invoices, or both, for sampling, testing, monitoring, or excavation that were not justified by the site condition.

--Falsely characterizing the contents of an underground storage tank to obtain funding.

--Characterizing legal services as consulting services to obtain funding.

--Misrepresenting or concealing the identity, credentials, affiliation, or qualifications of principals or persons seeking, either directly or indirectly, funding or approval for participation.

--Falsifying a signature on a claim application or work invoice.

--Failing to accurately disclose 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 to obtain funding.

Attorney General Investigations/Fines. House Bill 4785 would establish the same provisions for attorney general investigations, and for fines for violations of MUSTFA, as is provided under Bill 4784 for violations of the Leaking Underground Storage Tank Act, and the same provisions for rewards contained in House Bill 4784. In addition, House Bill 4785 would permit the department to attach a lien against the property of a person who attempted to defraud the fund. Under the bill, the attorney general or county prosecutor could conduct an investigation and bring an action for an alleged violation of the bill, and make an ex parte request to a magistrate if he or she had reasonable cause to believe that a person had information or was in possession of any documents or records. An action could be brought in district court to enforce the demand against a person who objected to or otherwise failed to comply with the subpoena, or for an order to grant immunity to a person who refused or objected to giving information. Attorney general actions and requests could be brought in Ingham County.

A person who failed to comply with a subpoena or a requirement to appear and be examined would be subject to a civil fine of up to $25,000 for each day of continued noncompliance. All civil fines would be apportioned as follows:

--50 percent would be deposited in the general fund and used by the department to fund fraud investigations, as mandated under the act.

--25 percent would be paid to the county prosecutor or attorney general, whichever office brought the action.

--25 percent would be paid to a local police department or sheriff's office, or city or county health department, if their investigation led to the action. If more than one office or department were eligible, then the payment would be divided equally. If no local office or department were entitled to payment, then the money would be deposited into the Emergency Response Fund.

The provisions of the bill would not preclude prosecution under the Michigan Penal Code.

Judgment Liens. In addition to civil fines or criminal penalties, the bill would require the person to repay any money obtained under the provisions of the act. Unpaid costs for which a person was liable would constitute a lien in favor of the fund upon any real or personal property owned either directly or indirectly by the violator and would attached regardless of whether the person was insolvent or bankrupt. The lien would have the force and effect of a first in time and right judgment lien.

Repeal. The act currently is set to expire January 1, 2000. The bill would specify that the act would be repealed effective January 1, 2005, and that, upon repeal of the act, any money in the fund or in the authority's possession would revert to the Environmental Response Fund. (Note: this provision of the bill would appear to be in conflict with Public Act 1 of 1993, which repealed the Environmental Response Fund, effective December 22, 1998).

BACKGROUND INFORMATION:

In the 1980s, both the state and the federal government attempted to battle the growing problem of environmental contamination through a myriad of legislation. For example, in 1984, in light of the contribution that leaking underground storage tanks (LUSTs) make to groundwater contamination, 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 (DNR). 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 (FM-DSP) 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 with the FM-DSP, rather than with the DNR. (The registration provisions of the act do not apply to all storage tanks. Small storage tank systems with a capacity of 110 gallons or less, natural gas pipelines, storm water systems, storage tank systems that held hazardous waste as identified under the federal Solid Waste Disposal Act, or a mixture of such hazardous waste were among those excluded from the requirement).

Under Public Act 479 of 1988, money from the registration fees was to be deposited by the fire marshal division into a proposed Underground Storage Tank Regulatory Enforcement Fund and used only by the fire marshal division to enforce the act. In addition, Public Act 518 of 1988 created the Michigan Underground Storage Tank Financial Assurance (MUSTFA) Fund (administered by an employee of the Department of Management and Budget) 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: the FM-DSP, which inspects petroleum releases, determines if a tank was registered at the time of the release, and notifies the DNR of confirmed releases; the DNR, which has the responsibility for approving cleanup work plans and project completions for the cleanup of environmental contamination resulting from releases of refined petroleum products; the Department of Management and Budget (DMB), which administers the financial transactions of the program; the Department of Treasury, which collects the environmental protection regulatory fees and administers the interest subsidy portion of the program; and the Department of Attorney General, which handles civil suits on behalf of the DNR. Money in the Emergency Response Fund is used by the DNR 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 1/2 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. Not more than $1 million can be spent from the emergency fund in any one year. 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. The act also contained a provision requiring that the Department of Management and Budget (DMB) notify owners and operators of underground storage tanks and others involved in cleaning them up 90 days before it expected 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. As a

temporary measure to allow the fund to continue assisting businesses with leaking underground storage tanks, Public Act 1 of 1993 amended the MUSTFA Act to, among other things, specify that the act would be repealed as of January 1, 2000, and deleted from the act the January 15, 1995, sunset on sections providing for the MUSTFA Fund, the 7/8-cent regulatory fee, and payments from the fund for indemnification and corrective action. (Public Act 1 also established criminal penalties that could be imposed on persons who knowingly defrauded the fund, and adopted provisions to allow for better oversight of fund expenditures). Extension of the sunset date to 2000 was expected to generate about $250 million in additional revenue, which would allow the fund to remain solvent until September of this year and grant the legislature about 8 months to work on making more substantive changes to the way revenues are generated by the fund.

FISCAL IMPLICATIONS:

According to the Department of Management and Budget, since the MUSTFA fund is separate from the state general fund, the bill would have no impact on state funds. (Revenues from fines imposed for violations of the acts that were deposited in the general fund would subsequently be appropriated to fund Department of State Police fraud investigations.) (5-18-93)

ARGUMENTS:

For:

The bills would designate one department as the responsible agency for oversight of the MUSTFA Program. According to a preliminary analysis, released by the auditor general, of a financial audit of the program for fiscal years 1991 and 1992, the fact that responsibility was not assigned to any one department was a contributing factor in the internal control weaknesses identified in the audit. The preliminary analysis reports:

"One department needs to have the authority to provide management and oversight of the entire program. One department must be allowed to limit expenditures at clean-up sites where the public health and safety is not in danger or where extenuating circumstances make the clean-up impractical."

Many business owners and those involved in environmental issues have been concerned for some time about the financial viability of the program. In fact, the Department of Management and Budget's latest estimate anticipates that the fund will have a deficit of approximately $350 million by 1995. The bills would be a first step in removing some of the concerns raised by these groups. In addition, the bills would emphasize the state's determination to prosecute those found guilty of fraudulent practices by establishing heavy fines and penalties, and by granting the attorney general the authority to attach a lien against the property of a person found guilty of fraud, to appeal to local magistrates if there was reasonable cause to believe that a person had information regarding fraud, and to bring action in district court for violations of the act.

Against:

House Bills 4784 and 4785 would make sweeping changes in the acts pertaining to underground storage tanks. The bills would transfer most of the Department of Natural Resource's (DNR) responsibilities under the acts to the fire marshal division of the Department of State Police (FM-DSP) and would bring the MUSTFA Program to a halt for several months. However, the bills contain amendments to separate acts, each of which were designed to fulfill certain requirements regarding separate and distinct environmental problems. The bills would amend the Leaking Underground Storage Tank (LUST) Act and the Michigan Underground Storage Tank Financial Assurance (MUSTFA) Act, respectively, to transfer DNR responsibilities under the acts to the FM-DSP. Under the LUST act, an owner or operator of a leaking underground storage tank is required to report a release from an underground storage tank to the FM-DSP. The FM-DSP notifies the DNR when it has confirmed that there has been a release, and the DNR then oversees the corrective actions that must be taken. Under the MUSTFA act, regulatory fees, imposed on refined petroleum products, are deposited, first, into the Emergency Response Fund. When that fund reaches $1 million, the fees are deposited into the Michigan Underground Storage Tank Assurance (MUSTFA) Fund. Money in the MUSTFA Fund is used by the DNR mainly for the cleanup of releases of refined petroleum products; money in the Emergency Response Fund is used by the DNR to undertake corrective actions under the LUST Act for leaking underground storage tanks that may contain several substances. Under the bill, a situation could very well occur where an owner of a leaking underground storage tank, after following the

required procedures, applied for funds, only to find that the leaking substances from his or her tank had been contaminated by more than one source. If the contamination from one source contained a substance regulated under the Environmental Response Act (Public Act 307 of 1982), and the contamination from one of the other sources contained a substance regulated under the LUST Act, then the owner of the storage tank would be faced with the difficult problem of dealing with two regulatory agencies -- the DNR, in the case of the first substance, and the FM-DSP, in the case of the second. The result would add unneeded complexity and confusion to the state's long stated goals of cleaning up its contaminated sites. In addition, splitting the cleanup responsibilities for correcting releases from underground storage tanks between agencies would add even more confusion to the MUSTFA program and probably violate federal Environmental Protection Agency regulations.

Against:

For some time, many have believed that the MUSTFA fund has been victimized by unscrupulous contractors who submitted claims for work that was not performed, or who overcharged for their work. Reportedly, the attorney general's investigations into these cases of suspected fraud will result in the payment of civil fines into the fund. In light of this, the bills should accommodate these investigations. For example, House Bill 4784 establishes new criminal and civil penalties for violations of the LUST Act, and House Bill 4785 establishes new civil penalties for violations of the Michigan Underground Storage Tank Regulatory Act. The bills should be amended to assure that these penalties can be applied retroactively for violations that occurred prior to the bills' effective dates.

Against:

The bills are unnecessary. A Senate task force, composed of all the state agencies involved in the MUSTFA program and representatives of industrial and environmental organizations and the legislature, has been at work for approximately a year to correct deficiencies in the program. The task force's proposals include a proposal to eliminate the DNR's role in reviewing work plans, and instead, allow it to focus on assuring that cleanups were completed in a timely fashion. The task force recommended that the DNR's role in reviewing work plans be taken over by certified consultants, who would be responsible for certifying cleanup work for MUSTFA eligibility and for overseeing the work. The task force also recommended phasing out the MUSTFA program and allowing private insurance companies to provide insurance coverage to owners of underground storage tank systems.

Response:

Regardless of the merits of the Senate task force's proposal to reduce the DNR's function in the MUSTFA program to auditing cleanups, the proposal to allow the program to phase out and be replaced by private insurance companies holds little promise. According to the Department of Natural Resources, 2,500 releases of refined petroleum products still occur each year, a fact that would encourage private insurance companies to charge high premiums. Private insurance companies would also have to charge premiums commensurate with the amount of risk involved in insuring cleanup and indemnification liability. This could result in policyholders whose underground storage tanks were located on sites whose soil type and proximity to water wells could potentially incur greater cleanup and indemnification costs being charged exorbitant premiums -- a cost which many small businesses could not afford.

Against:

House Bill 4783 would amend the Underground Storage Tank Regulatory Act to relieve the FM-DSP of the financial responsibilities involved in enforcing corrective actions for releases from underground storage tanks for four months. The act requires that underground storage tanks be registered, however, in compliance with federal law that requires financial assurance for owners and operators of underground storage tanks. Consequently, enactment of the bill could result in the Environmental Protection Agency stepping in to enforce the federal provisions, and, if the DNR does not fulfill its responsibilities under the act, the state could stand to lose federal funds.

Against:

House Bills 4784 and 4785 conflict with the state constitution and with the DNR's enabling legislation, which specifies that the Department of Natural Resources is the state regulatory agency charged with protecting and preserving the natural resources of the state. Instead, the bills would transfer the DNR's responsibilities under the Leaking Underground Storage Tank Act (LUST) and the MUSTFA Act to the fire marshal division of the Department of State Police. The DNR is also the agency with the necessary environmental cleanup expertise and technical support staff

experienced in dealing with environmental matters.

Response:

House Bill 4784 contains provisions to transfer the Department of Natural Resources (DNR) technical staff. Under the bill, all DNR staff, as well as all files, equipment, and revenues relating to implementation of the LUST Act would be transferred to the fire marshal division of the State Police on the effective date of the bill.

POSITIONS:

A representative of the executive office testified in support of the bills. (5-18-93)

The Department of Management and Budget supports the bills. (5-18-93)

The fire marshal division of the Department of State Police (FM-DSP) supports the bills, and accepts the governor's recommendation that MUSTFA requirements should be controlled by one department. (5-21-93)

Representatives of the Department of Natural Resources (DNR) and Michigan United Conservation Clubs (MUCC) testified in support of overall changes in MUSTFA, but opposed provisions of the bills relating to the transfer of DNR responsibilities. (5-18-93)

The Michigan Chemical Council supports the concept of the bills, but takes no official position. (5-18-93)

The Michigan Manufacturers Association supports the concept of the bills, but is concerned about the provision to designate total responsibility for MUSTFA to the fire marshal division of the State Police. (5-18-93)

Mid-States Petroleum, Inc. supports the concept of the bills, but is concerned about the bills' provisions for replenishing the MUSTFA Fund after May 20, 1993. (5-18-93)

The Michigan Municipal League has no position on the bills. (5-18-93)

The Michigan Environmental Consultants and Contractors Association (MECCA) has no position on the bills. (5-18-93)

Associated Petroleum Industries of Michigan has no position on the bills. (5-18-93)

The Small Business Association (SBA) of Michigan has no position on the bills. (5-18-93)

The Michigan Trucking Association has no position on the bills. (5-18-93)

The Michigan Truck Stop Operators Association has no position on the bills. (5-21-93)

The Michigan Merchants Council and Associates has no position on the bills. (5-21-93)

The Michigan Townships Association has no position on the bills. (5-21-93)

The Michigan Environmental Council, an association of environmental concerns which include 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 West, East, and Northern Michigan Environmental Action Councils, opposes the bill. (5-18-93)

House
Legislative
Analysis
Section

Olds Plaza Building, 10th Floor
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CO-SPEAKERS: APPOINTMENTS

House Bill 4786 as introduced
First Analysis (5-26-93)

Sponsor: Rep. Candace Curtis
Committee: House Oversight & Ethics

THE APPARENT PROBLEM:

The November 1992 general election produced a 55-55 tie between Democrats and Republicans in the 110-member Michigan House of Representatives. An agreement reached by the leadership of the two caucuses and ratified by the body as a whole calls for shared committee chairs, equal representation on committees, and the appointment of Co-Speakers, one from each party. Among the duties of the Speaker of the House is the appointment of members to various special committees created under the Legislative Council Act. That act needs to be amended to reflect the shared leadership arrangement.

THE CONTENT OF THE BILL:

The bill would amend the Legislative Council Act (MCL 4.1301 et al.) to take into account, in the making of several appointments, that the House of Representatives is controlled by Co-Speakers rather than a single Speaker.

Currently, the Speaker appoints two members of the Michigan Commission on Uniform State Laws, one of whom must be a member of the minority party. Under the bill, that would continue to be the case if there is a single Speaker, but if there are Co-Speakers pursuant to a joint leadership agreement, the two members would be appointed jointly, one from each party. The same would be true of the Speaker's appointments to the Michigan Law Revision Commission.

The Speaker currently appoints four members of the House to serve on the Michigan Capitol Committee, one from the minority party. That would continue if there is a single Speaker, but Co-Speakers would appoint the four members jointly, two from each party. Provisions regarding the duties of the Capitol Committee would also be amended to reflect the joint leadership of the House.

FISCAL IMPLICATIONS:

There is no information at present.

ARGUMENTS:

For:

The bill would allow certain appointment powers of the Speaker of the House to be shared by Co-Speakers when there is a joint leadership agreement.

POSITIONS:

There are no positions at present.