February 2011

MICHIGAN PETROLEUM ASSOCIATION
MPAMACS
MICHIGAN ASSOCIATION of CONVENIENCE STORES

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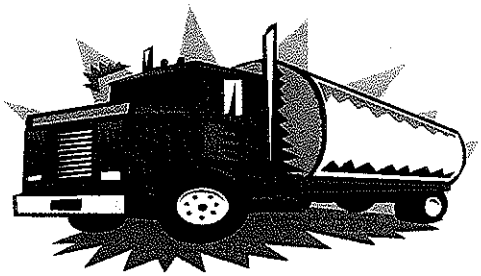
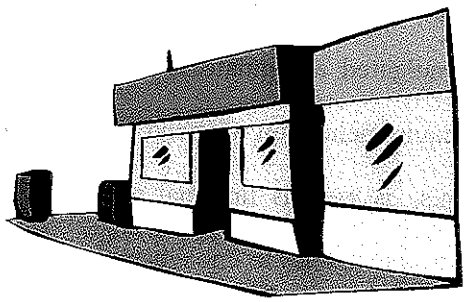
The Michigan Petroleum Association (MPA) has been serving the state's independent petroleum marketers since 1934. MPA was incorporated by a group of petroleum distributors who believed that by promoting a cooperative spirit and encouraging group effort, marketers across the state could best achieve their common goals.



The Michigan Association of Convenience Stores (MACS) was established by MPA in 1986 to serve the interests of the state's c-store industry on the legislative front and in other matters of concern to c-store operators. In 1996, truckstop operators, service station operators, and retail/wholesale providers of propane were invited to join MPA/MACS and benefit from the Association's services and expertise.



MPA/MACS counts 500 companies as members, with over 1,500 retail locations. Our members employ over 15, 000 people statewide in all of Michigan's 83 Counties.

The "average" gas station/convenience store is a major partner for the State of Michigan when it comes to the collection and payment of State Taxes. Please keep in mind that **most of these taxes are prepaid to the State**, not just passed along and collected from the customer.

The average gas station/convenience store pays about $140,500 per year in cigarette taxes. They pay $25,500 per year in sales tax on those cigarettes. The average gas station/convenience store pays to the State about $170,360 per year in gasoline motor fuel taxes and about $31,930 per year in diesel motor fuel taxes. They also pay about $141,670 and $35,970 per year in sales tax on gasoline and diesel fuel respectively.

All told, the average gas station/convenience store pre-pays about $**545,930 per year** and **as an industry we pay over $2,675,057,000** to the State just on cigarette and motor fuel sales. Obviously this does not include sales or use taxes on other items sold in the store, bought for use in the store, income taxes, etc. We pre-pay an **additional $1,062,896,000 to the Federal Government in gasoline and diesel motor fuel taxes. Total taxes on motor fuel exceed $2,924,456,000 per year. 53.2 cents per gallon for gas/56.3 cents for diesel.**

NEEDED REFORMS TO MICHIGAN'S LEAKING UNDERGROUND STORAGE TANK (LUST) PROGRAM PARTS 213 AND 215 OF THE NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT (NREPA)

Background

On November 8, 1984 President Reagan signed into law the hazardous and solid waste disposal amendments to the Resource Conservation and Recovery Act (RCRA) which added a new subtitle I to the federal hazardous waste statutes. The amendments required the Environmental Protection Agency (EPA) to develop comprehensive regulations to prevent, detect and correct releases from certain USTs. The amendments also encouraged states to develop, with EPA approval, their own UST regulatory programs, so long as they were no less stringent than the federal standards. The federal UST legislation appears at 42 USC §6991, *et seq.*

In response to the federal statutes, the EPA promulgated a regulatory scheme which addressed several areas, including UST design, operating requirements, upgrade and construction requirements, reporting and recording keeping requirements, as well as financial responsibility requirements and the requirement for each state to designate a state agency to implement the federal UST regulations. The regulations also address liable parties' responsibilities to respond to releases or leaks from USTs. (See, 40 CFR 280.10, *et seq.*)

Michigan's Response[1]

In response, the Michigan Leaking Underground Storage Tank Act (LUST), 1988 PA 478 (MCL 299.831, *et seq.*) was enacted. Under the 1988 LUST Act, owners and operators were strictly liable to perform corrective actions to address contamination emanating from USTs and for damages to third parties or natural resources without regard to fault. Responsible parties were required to undertake corrective action under the supervision of the Department of Natural Resources (DNR)

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[1]In addition to the LUST Act and the MUSTFA Act discussed herein, the Michigan Underground Storage Tank Regulatory Act (USTA), 1988 PA 479 (MCL 299.701, *et seq.* was enacted which required registration and regulated USTs prior to discovery and reporting of a release. The USTA was recodified as Part 211 of NREPA, MCL 324.21101.

and to submit a detailed corrective action plan to the DNR for review and approval. Contaminated sites were required to be remediated to generic criterion without regard to site specific risk posed to public health, safety, welfare or the environment.

The Michigan Underground Storage Tank Financial Assurance Act (MUSTFA) was also enacted as 1988 PA 518, (MCL 299.801, *et seq.*) This statute was enacted to assist tank owners in meeting the EPA financial responsibility requirements.[2]

1995 Amendments

Shortly after codification of Michigan's environmental laws into the NREPA, 1994 PA 451, work began to remedy several shortcomings identified in the LUST and MUSTFA programs during the six year implementation experience. A similar effort was also underway to amend Michigan's general clean-up program, Part 201 of NREPA.

Several generalized deficiencies were identified:

- Strict liability was unfair, and as with the Part 201 program, inhibited re-development of contaminated properties.
- Generic clean-up criteria resulted in an inefficient use of resources without a corresponding improvement in level of protection to public health, safety, welfare or the environment.
- The existence of the MUSTFA program significantly increased the discovery of releases from USTs which overwhelmed the DNR/Department of Environmental Quality's (DEQ) ability to conduct meaningful review and approval of required reports and corrective action plans.
- Given that public funds were being utilized to conduct corrective action, some level of quality assurance/quality control and oversight was needed for individual professionals and environmental consulting companies engaged in providing services at LUST sites.

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[2]All three of these enactments, LUST, USTA and MUSFTA contained six month "sun set" provisions which were eliminated in 1989 by enacting 1989 PA 150, 151 and 152, respectively.

To address the deficiencies, 1995 PA 25 and 1996 PA 116 were enacted which accomplished the following:

- Adopted Part 201's causation based liability scheme.
- Adopted the American Society for Testing and Materials (ASTM) Standard Guide for Risk-Based Corrective Action Applied at Petroleum Release Sites E1739-95 (RBCA) which effectively moved from a performance based standard to a risk based clean-up standard.
- Established a "Certified Professional" (CP) and "Qualified Consultant" (QC) program whereby the DEQ approved individuals and consultants to perform corrective action at LUST sites.
- Changed from a DEQ prior approval program to a owner/operator implemented corrective action program monitored through an "audit" program.

The Status of the Current Program

Over the past seven years or so, through the publication and enforcement of Operational Memorandum, and through DEQ management policy choices, implementation of the LUST program has strayed significantly from the objects of the 1995-1996 amendments. In addition, DEQ is currently seeking support to completely eliminate the LUST program and move responsibility for oversight of LUST corrective action to the Part 201 program.

Problems associated with the current status of the LUST program are manifest in the following ways:

- Unnecessary difficulty in attaining closure of LUST sites.
- Misuse/abuse of the audit program.
- Failure to follow the ASTM RBCA process by DEQ.
- Enforcement of guidance documents, even draft guidance documents which have not be distributed to the public, as though they were law.

- Forcing CPs and QCs to perform corrective action inconsistent with the ASTM RBCA process through the threat of revoking certification.
- The lack of an unbiased, cost effective method of resolving disputes between owners, operators, CPs, QCs and the DEQ staff.

The Proposed Solution

Stakeholders are proposing amendments to Parts 213 and 215 of NREPA to advance the following goals:

- Maintain separation of the Part 201 and 213 programs.
- Reform the audit program.
- Create an UST Policy Board, modeled after the former MUSTFA Policy Board, with authority to resolve disputes between owners, operators, CPs, QCs and the DEQ related to audits, corrective action, CP/QC certification, information requests and similar issues.
- Reaffirm adoption of ASTM RBCA corrective action.
- Maintain causation based liability.
- Require a more consistent implementation and application of the LUST program through the promulgation of administrative rules.
- Require a cost/benefit analysis prior changing or adopting any procedure or criterion.

MUSTFA Environmental Regulatory Fee Termination
Significant Events/Milestones

- 1988. Michigan Underground Storage Tank Financial Assurance Act (MUSTFA) was enacted to pay eligible owners and operators corrective action costs and to meet the federal financial assurance requirements. 1988 PA 518.

- 1989. Public Act 152 adopted to establish the funding mechanism. An environmental regulatory of 7/8 cents per gallon on refined petroleum products is assessed as of August 1, 1989. Fee to sunset 5 years 6 months after effective date of PA 152.

- 1990. MUSTFA begins accepting claims for reimbursement of corrective action costs and requests for indemnification.

- 1992. Treasurer determines that fund revenues will not be sufficient to pay expected expenditures from the fund. Fund administrator gives notice to owners/operators that claims would not be accepted after 90 day period.

- 1993. Sunset on collection of the fee extended so that revenues will be sufficient to pay expected expenditures. 1993 PA 1. Fund administrator continues to accept claims for corrective action costs and requests for indemnification.

- 1995. Treasurer again determines that fund revenues will not be sufficient to pay expected expenditures.

- 1996. 1995 PA 269 becomes effective. PA 269 halted acceptance of claims for corrective action costs and requests for indemnification and established the MUSTFA Authority to issue bonds and other evidence of debt to generate funds to pay claims filed as of June 29, 1995. Debt is to be paid with revenues generated from regulatory fee. Includes the following provision:

  Notwithstanding any other provision of this part, the department of treasury ***shall stop collecting regulatory fees*** *under this part when it has received sufficient revenues to pay in full all obligations listed in section 21506(4).*

- 2003. As of May 1, 2003 Treasury collects fees in excess of $1.4 Million more than necessary to pay in full all obligations listed in section 21506(4). **Treasury continues to collect the fee in violation of the above provision.** (See financial analysis of R.W. Baird & Co., the MUSTFA Authority financial advisor).

- April 2003. Treasurer meets with staff to discuss MUSTFA. All agree that as of July/August there would be sufficient revenue to pay all obligations listed in section 21506(4). (See 4/23/03 e-mail).

- June 2003. Treasurer is told that there was sufficient revenue to pay all obligations, "notwithstanding June collections". Treasurer responds: *Don't cut off the fee yet. We are now going for a formal AG opinion* ***to cover our butts.*** Collection of the fee continues in violation of the law. (See June 19, 2003 e-mail).

- 2004. Treasury continues to collect the fee in violation of law. As of July 2004, **treasury has collected over $80 Million in excess of what is necessary to pay in full all obligations listed in section 21506(4).**

- 2004. Legislature passes PA 390 of 2004 which ***retroactively*** extends the requirement to impose and collect the regulatory fee and the obligation to pay the fee, so that it shall not be considered to have ceased at any time since the date the requirement and obligation were originally enacted into law.

- 2010. Legislature continues to appropriate over $3,000,000 per year from underground storage cleanup to fund pump calibration inspections. After spending well in excess of over $10,000,000, it is noted that pump calibration compliance has risen from approximately 98% to 99%.

- 2010. Legislature continues to mention its intent to make the Refined Petroleum Fund whole for 3rd year in a row.

- 2010. Legislation is introduced that will extend the sunset of the fee from 2010 to 2015 as provided for in PA 390 of 2004.

- 2010. Legislation is passed that extends the sunset of the fee from 2010 to 2012.

In the intervening years (2003-2010) the State has collected approximately $350,000,000 in the name of underground storage tank cleanup and has directed less than 10% of those funds to assist private industry.

Part 213 Background, Problems and Solutions

Presented by: Michigan Petroleum Association/Michigan Association of Convenience Stores

February 16, 2011

Michigan regulates leaking underground storage tanks (LUSTs) under Part 213 of the Natural Resources and Environmental Protection Act (NREPA), P.A. 451 of 1994, as amended. Contamination from sources other than LUSTs, such as industrial plants is regulated under Part 201 of NREPA. The federal government regulates LUSTs separately from other contamination, under Subtitle I of the federal Resource Conservation and Recovery Act that was enacted in 1984. The types of contamination at LUST sites are primarily from petroleum fuel sources while contamination at the larger industrial sites may include a greater variety of hazardous substances. Both federal and state regulators recognized the differences and continue to regulate them differently.

In 1995, Michigan's Part 213 adopted the American Society for Testing and Materials (ASTM) Standard Guide for Risk-Based Corrective Action (RBCA) Applied at Petroleum Release Sites (E1739-95). RBCA approach was adopted by many other states as well. The RBCA process allows for a site specific evaluation of LUST sites to determine whether or not there is a complete exposure pathway to unhealthy concentrations of contaminants.

Use of the RBCA process resulted in financial resources being targeted at the LUST sites that posed the greatest risk. For example, a LUST site in an urban area that has municipal water and sewer, the ground surface covered with pavement and other commercial properties surrounding it, presents a much lesser risk than a LUST site in a rural area with residential properties nearby and drinking water provided by private potable wells. Using the RBCA process it is possible to look at the sites presented in the above examples differently, where contamination at the urban site may be left in place and managed properly through land use restrictions and engineering controls where the contamination at the rural site would require active remediation of the soil and groundwater contamination to reduce the risk of exposure of receptors to unacceptable levels of contaminants.

When the RBCA process was adopted, Part 215 of NREPA established Qualified Consultant (QC) and Certified Professional (CP) requirements for environmental firms and professionals who work on Part 213 LUST site investigations and cleanups. Part 215 and the ASTM RBCA process require QCs and CPs to follow RBCA and to select the most cost efficient, technically sound approach to cleanup.

Michigan's environmental cleanup programs under Part 201 and Part 213 were very different. From 1995 until the approximately 2002, many LUST sites were closed. However, in contrast very few Part 201 sites were closed. Unfortunately, since approximately 2002 the DEQ has become increasingly more conservative and during the last eight years the RBCA process has essentially been eliminated. This has resulted in all LUSTs sites being regulated as the worst

case scenario. In the above example sites, now both the urban and rural sites would require significant soil and groundwater remediation resulting in the expenditure of unnecessary resources. It has become very difficult to achieve closure either under Part 201 (industrial sites) or Part 213. In fact, Michigan is ranked the near the bottom nationally for closing LUST sites based on USEPA statistics (http://www.epa.gov/swerust1/cat/camarchv.htm). Summary tables and charts presenting the USEPA data are attached.

During the last two years a variety of stakeholder groups led by the Michigan Chamber of Commerce worked to amend Part 201, primarily to undo counterproductive policies that had been established by the DEQ. Sweeping changes to Part 201 were enacted on December 14, 2010. The changes should make achieving a closure under Part 201 easier. Some of the changes result in use of a site specific approach, which is similar to how Part 213 and RBCA were intended. Additionally, a response review panel was established so now DEQ decisions can be challenged by industry.

The following are the major problems with how the DEQ is currently managing the Part 213 cleanup program.

- **Problem: The DEQ has become hyper-conservative.** The ability of the regulated community to conduct corrective actions and cleanup/close LUST sites has been greatly diminished because DEQ regularly redefines what it considers to be unacceptable risk. This has resulted in a "moving target" issue where policies are constantly changing. In evaluating corrective action plans and developing cleanup policy, the DEQ uses unrealistic, worst case hypothetical situations to define potential contaminant exposure. This has led to a flurry of operational memoranda and policy trends to assess unrealistic risk such as sewers being evaluated as trout streams, part per billion concentrations of hydrocarbons being treated as free phase petroleum, and soil beneath a roadway identified as a vapor inhalation hazard. As the DEQ increases conservatism in its often unrealistic perception of hazards associated with trace amounts of petroleum, the effort and cost to appease the DEQ increases. In general: what was considered clean last year now needs further study if you want closure this year, with no guarantees for next year.

Solution: *Return to strict interpretation of Part 213 as intended, including uninhibited use of Risk Based Corrective Action methods.*

Problem: The DEQ is not following the statutes and is circumventing the Risk Based Corrective Action (RBCA) process. The 1995 amendments to Part 213 included a RBCA process which enabled the regulated community to assess and cleanup sites on a site specific basis by eliminating realistic exposure risks to fuel constituents left in the soil and groundwater. But since about 2002, an increasingly risk adverse DEQ has found ways to compel owner/operators of LUST sites to conduct corrective action work that is not even required by law, and which exceeds work necessary to complete RBCA. Part 215 and the ASTM RBCA process require QCs and CPs to follow RBCA and to select the most cost

efficient, technically sound approach to cleanup. Yet the DEQ uses Operational Memoranda to disallow information that can be used in a RBCA evaluation thus undermining the effectiveness of this decision making process. In addition, DEQ has influenced the regulated community by making demands for additional information on DEQ-required reporting forms, and has made audit "requirements" that rely on compliance with Part 215 Rules (and not statutory requirements under Part 213).

Solution: *Hold DEQ accountable for strict adherence to statues and promulgated rules by establishing metrics and oversight.*

- **Problem: The DEQ uses the QC/CP process to force environmental firms to comply with the DEQ's current policy approach.** Part 215 established the Certified Professional (CP) and Qualified Consultant (QC) program whereby only DEQ-approved consultants were allowed to perform corrective action and report to DEQ for LUST sites. Under Part 215 the DEQ is the agency that has oversight of the QCs and CPs and has the authority to sanction these professionals as it sees fit. As such, consultants licensed by the DEQ must comply with any written request of the DEQ, or potentially face revocation and loss of its license to work. This "fox watching the hen house" scenario has lead QCs and CPs to the perception that they must perform corrective action and reporting in a manner required by DEQ directives, whether or not such measures are consistent with Part 213, Part 215 and the RBCA process. This enabling cycle must be stopped to cause the DEQ to be legally accountable for their actions.

Solution: *Change oversight of the QC and CP program from the DEQ to the Department of Labor and Economic Growth or similar agency.*

- **Problem: There is no recourse for the regulated community to challenge DEQ decisions.** During the corrective action implementation and reporting for a LUST site, the DEQ makes the final decision on any disputed matter. When it is time for the QC to recommend closure, the DEQ convenes a private "Quality Review Team" in the Lansing headquarters, during which the closure request is reviewed; often resulting in rejection and arbitrary requests for more costly investigation. In many instances the DEQ District office staff has already agreed with the QC that sufficient site investigation or corrective actions have been completed and then the QRT Board overrides the district staff. If the owner/operator or QC disagrees with a DEQ decision there is no means for an appeal other than to take civil action against the DEQ. This is particularly frustrating for the regulated community during this era of moving target regulation in which the DEQ is not strictly following the statutes under Part 213. The end result is often a stalemate in which a LUST site which should be closed is left to languish because DEQ lacks the legal justification for further enforcement.

Solution: *Create a review board comprised of independent qualified technical experts to whom a person could appeal DEQ decisions regarding policy or interpretation of the statutes.*

- **Problem: Abuses in LUST regulation are inhibiting business and jobs creation in Michigan.** Increasingly complex environmental compliance requirements and the inability to bring LUST sites to closure increase the cost of doing business in Michigan. Real estate ownership transition is more difficult for contaminated properties that are not able to be closed. The constant changes to how the Part 213 cleanup program is approached by DEQ results in uncertainty for sellers, buyer and lenders. Even if a site is closed, there is the fear that the DEQ's moving target policies will result in the closed LUST site being "re-opened". Businesses operating in Michigan must factor in these costs and risks when considering whether or not to close a store, develop a new property, or even operate in Michigan compared to other states.

  Solution: Encourage or direct the *DEQ bureaucracy to make Michigan more business friendly so that jobs can be retained and created.*

National LUST Site Closure Rates (as of September 30, 2010)

State	Ranking	% of Sites Closes in 12 Month Period 10/1/09-09/30/10
WY	49	1.9%
MI	**48th of 49***	2.5%
WA	47	2.7%
MT	46	3.4%
FL	45	4.8%
KS	44	5.5%
NM	43	5.7%
NV	42	5.9%
NJ	41	6.3%
CT	40	6.3%
VT	39	6.9%
NE	38	7.2%
AL	37	7.8%
OR	36	7.8%
NC	35	9.2%
SC	34	9.6%
AK	33	9.7%
CA	32	9.9%
IA	31	9.9%
RI	30	10.2%
NH	29	11.1%
WI	28	12.4%
PA	27	12.6%
AR	26	12.8%
WV	25	12.9%
HI	24	13.7%
IL	23	13.7%
IN	22	14.1%
MO	21	15.5%
AZ	20	15.8%
MA	19	16.3%
GA	18	17.6%
UT	17	18.4%
KY	16	20.1%
ID	15	20.9%
TX	14	22.4%
OH	13	25.4%
LA	12	25.9%
CO	11	28.3%
DE	10	31.8%
NY	9	34.9%
TN	8	36.9%
MS	7	37.1%
MN	6	38.3%
OK	5	38.8%
MD	4	47.2%
ND	3	50.0%
VA	2	51.8%
ME	1	122.2%
SD	NA	NA

State	Ranking	% of Sites Closed vs Cleanups Initiated
MI	**50th of 50**	60%
WY	49	66%
VT	48	67%
NJ	47	67%
MT	46	70%
CT	45	70%
WA	44	70%
NH	43	71%
KS	42	72%
SC	41	73%
LA	40	74%
FL	39	77%
WV	38	77%
CA	37	78%
IN	36	80%
PA	35	81%
IL	34	82%
RI	33	83%
AK	32	83%
IA	31	84%
MO	30	85%
NC	29	86%
KY	28	87%
OR	27	88%
GA	26	88%
AL	25	89%
WI	24	91%
HI	23	91%
CO	22	91%
UT	21	92%
NY	20	93%
ID	19	93%
OK	18	93%
NV	17	93%
NE	16	94%
OH	15	94%
MA	14	95%
TX	13	95%
AZ	12	96%
MN	11	96%
VA	10	96%
DE	9	97%
TN	8	97%
NM	7	97%
MS	6	97%
MD	5	97%
ME	4	99%
SD	3	100%
ND	2	100%
AR	1	101%

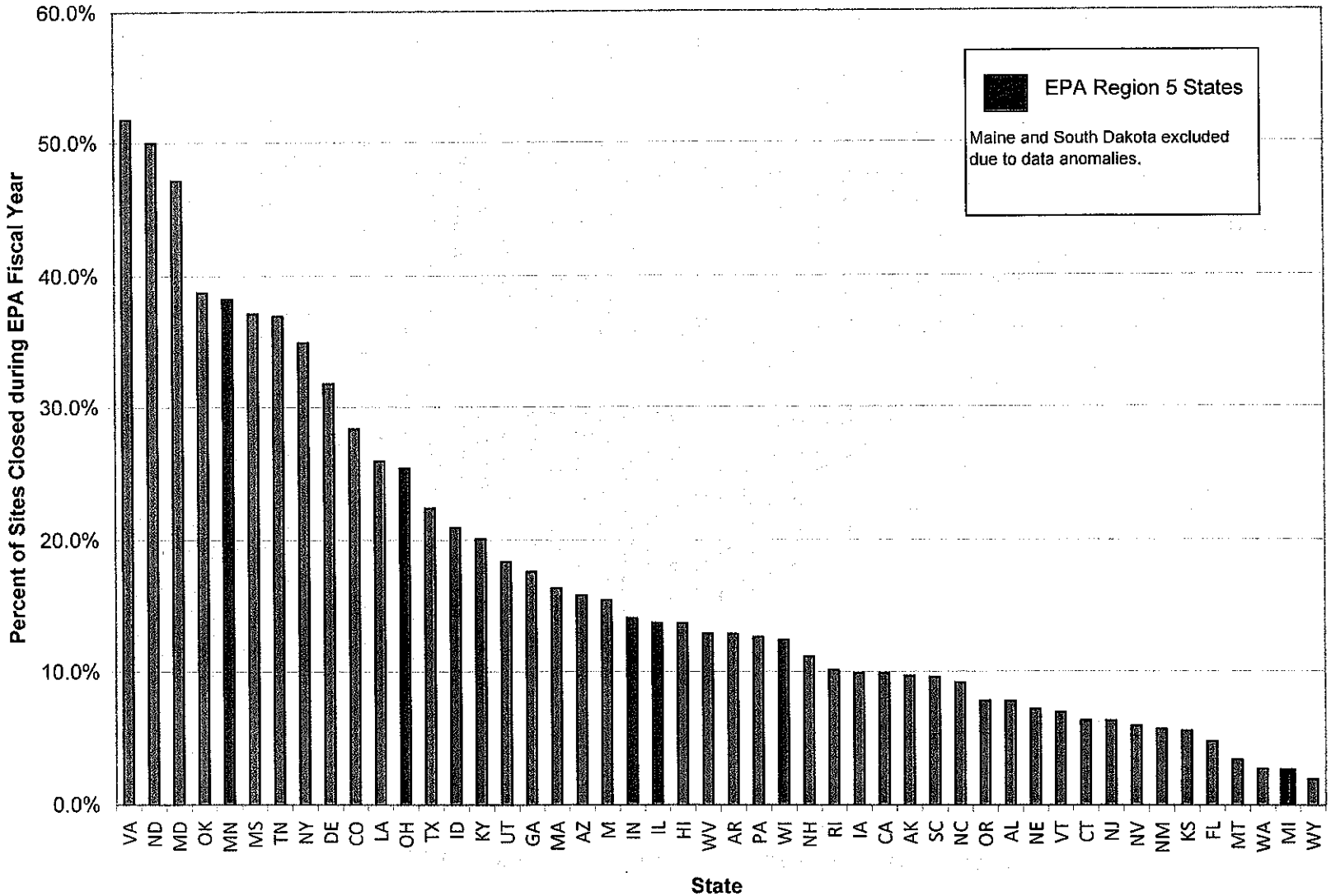
State	Ranking	% of Sites Closed vs Total Releases Reported
FL	50	47%
WY	49	50%
MI	**48th of 50**	59%
NJ	47	62%
MT	46	65%
VT	45	67%
CT	44	68%
WA	43	70%
KS	42	70%
SC	41	70%
NH	40	71%
NM	39	71%
NE	38	74%
LA	37	74%
WV	36	74%
IN	35	76%
IL	34	77%
CA	33	78%
NC	32	79%
IA	31	79%
AR	30	80%
PA	29	81%
AK	28	81%
RI	27	83%
MO	26	84%
OR	25	85%
GA	24	87%
KY	24	87%
AL	22	88%
HI	21	89%
WI	20	89%
CO	19	89%
AZ	18	90%
ID	17	91%
UT	16	91%
TX	15	91%
OH	14	91%
DE	13	93%
NY	12	93%
OK	11	93%
NV	10	93%
MN	9	94%
MA	8	94%
VA	7	95%
MD	6	95%
MS	5	96%
TN	4	96%
ME	3	98%
SD	2	98%
ND	1	99%

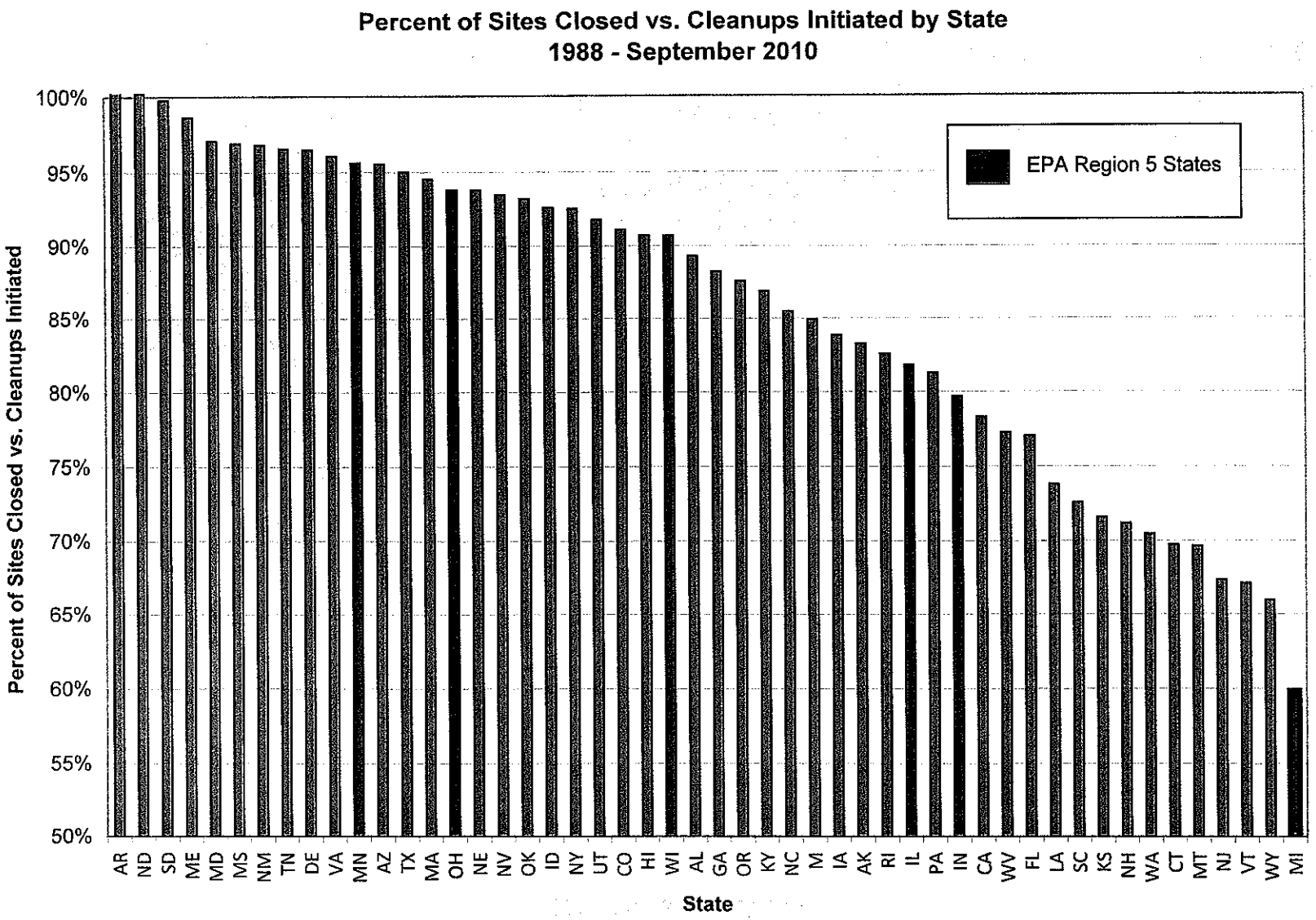
* South Dakota was excluded from the ranking due to anomalous data.

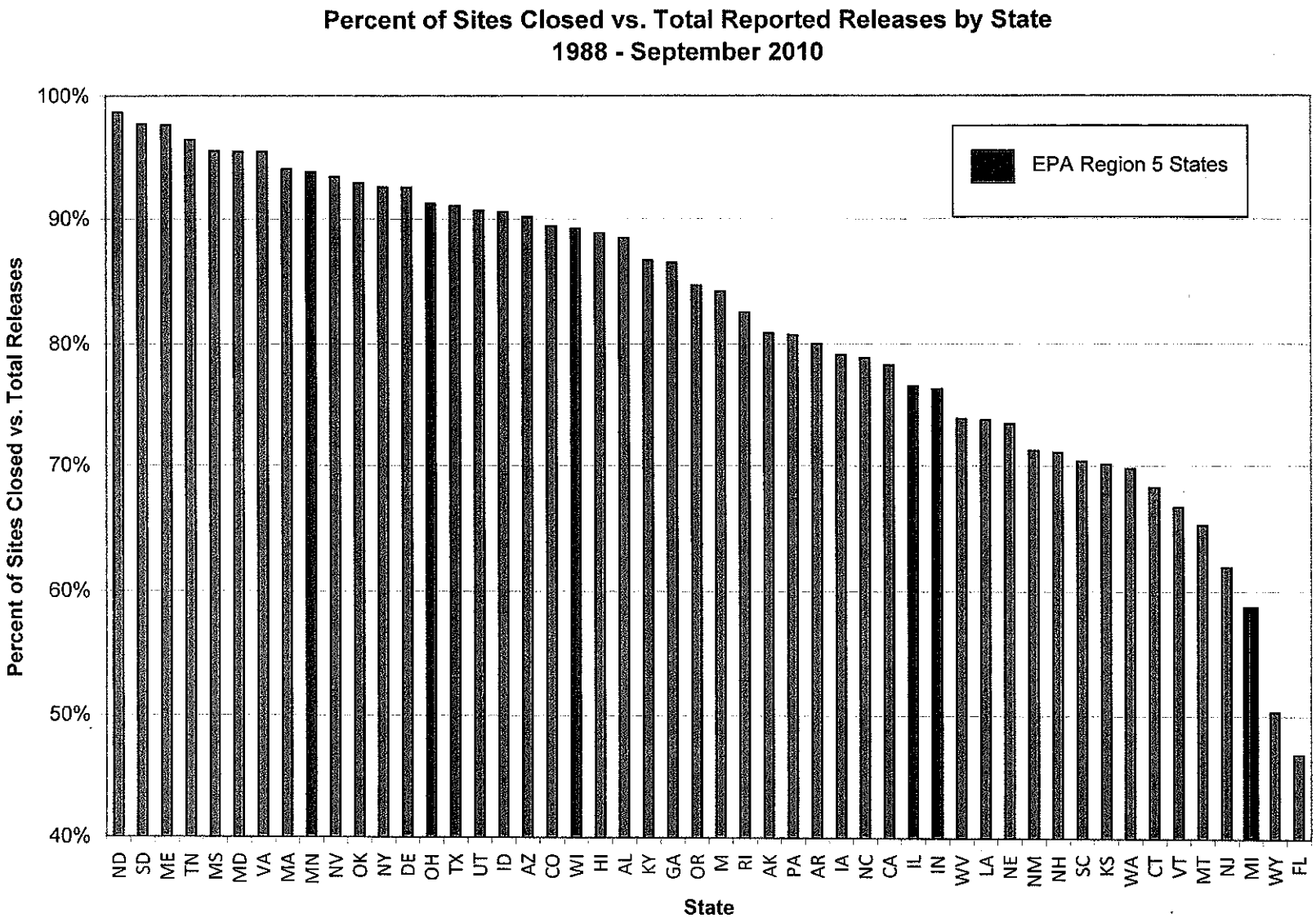
States in blue text denote US EPA Region 5 states (Michigan peer states).

Rankings calculated based on statistics located at US EPA Web Site http://www.epa.gov/swerust1/cat/camarchv.htm

Percent of Sites Closed during EPA Fiscal Year by State
10/01/2009 - 09/30/2010




Percent of Sites Closed vs. Cleanups Initiated by State
1988 - September 2010
EPA Region 5 States
Percent of Sites Closed vs. Cleanups Initiated
100%
95%
90%
85%
80%
75%
70%
65%
60%
55%
50%
AR ND SD ME MD MS NM TN DE VA MN AZ TX MA OH NE NV OK ID NY UT CO HI WI AL GA OR KY NC M IA AK RI IL PA IN CA WV FL LA SC KS NH WA CT MT NJ VT WY MI
State


Percent of Sites Closed vs. Total Reported Releases by State
1988 - September 2010
EPA Region 5 States
Percent of Sites Closed vs. Total Releases
100%
90%
80%
70%
60%
50%
40%
ND SD ME TN MS MD VA MA MN NV OK NY DE OH TX UT ID AZ CO WI HI AL KY GA OR M RI AK PA AR IA NC CA IL IN WV LA NE NM NH SC KS WA CT VT MT NJ MI WY FL
State