

# State Notes

## TOPICS OF LEGISLATIVE INTEREST

Spring 2010



### History of the Underground Storage Tank Programs in Michigan

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#### Introduction

Since 1986, over 21,800 releases from underground storage tanks (USTs) have been reported or discovered in tanks storing petroleum products. These releases have the potential to affect groundwater quality near and around the release site, and as a result, USTs are regulated on the State and Federal levels. Underground storage tank regulations essentially have three goals:

- To ensure proper installation, maintenance, and removal of USTs so as to help prevent releases.
- To ensure that releases are reported promptly, and that parties liable for releases are held accountable for costs associated with ensuing mitigation and cleanup actions.
- To ensure that releases from tanks that have no legally responsible owner, so-called "orphan" tanks, are dealt with.

It is estimated that since the UST programs were created almost 25 years ago, approximately 12,750 releases have been cleaned up, leaving about 9,100 releases unaddressed. The Department of Natural Resources and Environment (DNRE) estimates that approximately half of these 9,100 remaining sites are orphan sites, meaning that the State is the only entity likely to take any remedial action on them. At a cost of \$400,000 per site, on average, the DNRE estimates that this backlog of orphan sites needing action could cost upward of \$1.8 billion. The bulk of these documented releases are not newly discovered; 60.0% of them are more than 10 years old, and 88.0% are over five years old. These older release sites represent a "catch-22" situation for the DNRE, as older sites tend to require more extensive cleanups, since released products have had more time to seep further into the ground and spread. This makes these cleanups more expensive, and consequently the Department is unable to perform as many cleanups, which in turn allows existing releases to age and become more extensive.

This article gives a brief history of the three major UST-related programs administered by the State of Michigan, and shows how funds have been appropriated to these programs historically.

#### Underground Storage Tank Program

Efforts to regulate USTs began in 1984, when the United States Congress enacted Subtitle I of the Resource Conservation and Recovery Act. Subtitle I required the U.S. Environmental Protection Agency (EPA) to promulgate a regulatory structure for USTs that held petroleum or other hazardous materials. Subtitle I allowed states to establish their own regulations as long as they were no less stringent than those of the EPA. Additionally, funding was offered to help states implement UST regulatory programs. In response to Subtitle I, Michigan enacted Public Act (PA) 423 of 1984, known as the Underground Storage Tank Regulatory Act (UST Act). The UST Act, which is now Part 211 of the Natural Resources and Environmental Protection Act (NREPA), required all owners of USTs (with certain exceptions) to register them with the Fire Marshal Division of the State Police, and to comply with regulations regarding installation and removal of USTs. (Currently, the Bureau of Fire Services and the State Fire Marshal are within the Department of Energy, Labor, and Economic Growth.) Underground storage tanks exempted from regulation under the UST Act include:

- farm and residential tanks of 1,100 gallons or less holding fuel used for noncommercial purposes,

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- tanks storing heating oil to be used on the premises where it is stored,
- tanks mounted on or above the floor of below-grade areas such as basements,
- septic tanks and systems for collecting storm water and wastewater,
- flow-through process tanks,
- tanks of 110 gallons or less, and
- emergency spill and overflow tanks.

The UST Act also charged the Fire Marshal Division with investigating reported leaks from tanks, periodically inspecting existing tanks, and inspecting tanks before they are decommissioned. The program was initially funded by a \$100 annual fee paid by owners of USTs and EPA grant funds. Today, the program, which is now housed within the DNRE, uses both of those funding sources, as well as revenue from the Refined Petroleum Fund for its operations, as revenue from the annual registration fee is no longer sufficient to sustain the program. The \$100 annual fee has not been increased since it was first collected in 1988. Table 1 shows a history of appropriations to the UST program.

**Table 1**  
**Appropriations for Underground Storage Tank Program**  
**(dollars in thousands)**

Fiscal Year	Department Housing UST Program	FTEs Appropriated	Total Appropriation	UST Fees Appropriated	Federal Funds Appropriated	Refined Petroleum Fund Appropriated	Other Funds Appropriated
1988-89	State Police	3.0	326.5	0.0	244.9	0.0	81.6 IDG from DNR
1989-90	State Police	20.0	6,262.5	6,000.0	262.5	0.0	0.0
1990-91	State Police	24.0	10,209.5	10,047.0	162.5	0.0	0.0
1991-92	State Police	48.0	8,835.2	8,582.6	252.6	0.0	0.0
1992-93	State Police	48.0	8,963.7	8,707.5	256.2	0.0	0.0
1993-94	State Police	48.0	8,930.3	8,674.1	256.2	0.0	0.0
1994-95	DNR	48.0	9,230.0	8,973.8	256.2	0.0	0.0
1995-96	DNR	45.0	6,375.5	6,114.4	261.1	0.0	0.0
1996-97	DEQ	45.0	6,359.1	6,098.7	260.4	0.0	0.0
1897-98	DEQ	45.0	6,305.6	6,047.2	258.4	0.0	0.0
1998-99	DEQ	45.0	6,413.1	6,148.5	262.2	0.0	2.0 GF/GP
1999-2000	DEQ	45.0	6,534.1	6,264.5	267.6	0.0	2.0 GF/GP
2000-01	DEQ	45.0	6,668.7	6,201.1	267.6	0.0	200.0 CMI - Administration
2001-02	DEQ	39.0	5,480.3	5,009.7	267.6	0.0	203.0 CMI - Administration
2002-03	DEQ	37.0	4,102.9	3,864.9	238.0	0.0	0.0
2003-04	DEQ	37.0	4,102.9	3,864.9	238.0	0.0	0.0
2004-05	DEQ	35.0	4,263.1	4,007.7	255.4	0.0	0.0
2005-06	DEQ	35.0	4,292.2	4,039.2	253.0	0.0	0.0
2006-07	DEQ	35.0	3,186.3	2,925.6	260.7	0.0	0.0
2007-08	DEQ	35.0	3,394.6	3,125.5	269.1	0.0	0.0
2008-09	DEQ	33.0	3,068.7	1,977.0	269.8	821.9	0.0
2009-10	DEQ	33.0	3,558.1	2,170.2	416.8	1,001.1	0.0
2010-11 <sup>a)</sup>	DNRE	33.0	3,663.1	2,017.9	627.0	1,018.2	0.0

<sup>a)</sup> FY 2010-11 figures based on Senate-passed version of Senate Bill 1161 and the Executive Recommendation for the FY 2010-11 budget.



### **Leaking Underground Storage Tank Program**

Several years after enacting the UST Act, Michigan enacted PA 478 of 1988, the Leaking Underground Storage Tank Act (LUST Act). The objectives of the LUST Act, now Part 213 of NREPA, are to regulate and provide for corrective action when releases are discovered or reported. Originally, the program operated under the rules and guidelines set by the EPA, but now has its own set of rules, which comply with the mandate from Congress that state programs be "no less strict" than the EPA guidelines. Historically, the program was funded predominantly with grants from the EPA; however, in recent years, Federal support for the LUST program has been reduced significantly and State resources have been used instead. The department responsible for administration of the LUST Act was initially the Department of Natural Resources (although the Act requires release reporting to the State Fire Marshal). Program implementation responsibilities under the LUST Act were delegated to the Department of Environmental Quality (DEQ) when it was created in 1995, and have since been assigned to the DNRE. The major responsibilities of the Department under the LUST Act include:

- Overseeing remediation efforts by liable parties and conducting State-funded cleanups of orphan sites;
- Initiating compliance and enforcement actions against UST/LUST owners who fail to comply with UST/LUST regulations; and
- Administering Federal grant funds.

Under State law, UST owners are normally held liable in the event of a release from one of their tanks. If there is a party that can legally be held responsible, the Department will oversee remediation actions taken by the responsible party to ensure that cleanups meet the standards set forth by law. If there are no liable parties, the Department may use State funds to perform cleanup actions that normally would be required of the owner, depending on the severity of the release. An example of an orphan site is a release discovered at a gas station that has been abandoned and whose owner is a corporation that has gone bankrupt or no longer exists.

### **Michigan Underground Storage Tank Financial Assurance Program**

In 1986, before the EPA had completed its Subtitle I rules in 1988, Congress amended Subtitle I to include a provision for rules concerning the financial liability of owners when leaks in USTs were discovered. When the EPA completed its Subtitle I rules in 1988, it concluded that UST owners who owned between one and 100 USTs had to be able to show their ability to pay up to \$1.0 million, and those owning 101 or more USTs had to demonstrate ability to pay up to \$2.0 million for the remediation of UST leaks if any were discovered. Owners of USTs could demonstrate their ability to meet this requirement in a number of ways, including purchasing private environmental insurance against UST leaks. In many cases, however, owners were not able to satisfy the financial assurance requirement, as many owners found private environmental insurance to be too expensive or unavailable. To assist Michigan UST owners, Michigan enacted PA 518 of 1980, the Michigan Underground Storage Tank Financial Assurance Act (MUSTFA Act), now Part 215 of NREPA. Under the program, owners of USTs who complied with the registration and reporting requirements of the UST Act would be eligible to receive money from the MUSTFA Fund for corrective actions in the event a leak was detected in their respective USTs. Additionally, PA 518 called for the Department of Treasury to establish an interest subsidy program designed to help UST owners seeking to upgrade or install new, and presumably safer, USTs. Because future demand for the program was largely unknown, the law also included a clause allowing the State Treasurer to stop all MUSTFA payments in the event the program was found insolvent.



To fund the MUSTFA program, a 7/8<sup>th</sup>-cent-per-gallon regulatory fee was levied on each gallon of refined petroleum products (gasoline, on- and off-road diesel, jet fuel, aviation fuel, kerosene, etc.) sold. The statute originally allowed the following uses of the MUSTFA Fund:

- Administrative costs up to 7.0% of projected revenue in a given year. The Departments of Attorney General, Natural Resources, Management and Budget, State Police, and Treasury could draw on the Fund for this purpose.
- Up to 10.0% of projected annual revenue for the interest subsidy program.
- Indemnification payments to parties affected by petroleum product releases on behalf of UST owners found responsible for those releases.
- Payments for corrective action in cases where UST owners complied with registration and inspection requirements and a leak was discovered and promptly disclosed.

The demand for the MUSTFA program was initially underestimated, as was the case in several other states that implemented similar programs. A 1993 audit revealed that in the first two years of the program, the fee generated about \$110.0 million in revenue, but approximately \$250.0 million in claims had been filed. In response, Michigan enacted Public Acts 132 and 212 of 1993 to alter how the MUSTFA program operated. These changes included delaying a sunset on the regulatory fee to January 1, 2005; creating the MUSTFA Authority, which was allowed to issue revenue bonds; reducing the amount that the program would pay out for eligible claims; implementing a competitive bid process; and making various other changes aimed at combating fraudulent practices by UST owners and contractors doing remediation work.

Perhaps the most significant of these changes was language that eventually would phase-out the MUSTFA program altogether. Public Act 212 created a timeline that limited the amount an individual claim would be eligible to receive in financial support from the MUSTFA program. Under PA 212, no new claims for remediation and indemnification from the MUSTFA program were to be accepted after December 22, 1998. To address the shortfalls in fee revenue relative to the large number of claims, the MUSTFA Authority authorized the sale of approximately \$215.0 million in revenue bonds. Public Act 132 also increased the allowable uses of the MUSTFA Fund to permit it to be used to service these bonds.

The proceeds from the bonds were spent or encumbered within the first two fiscal years they were issued, as a significant backlog of claims had accumulated in the five years the program operated without the bonds. This quick expenditure and the subsequent returning deficit in the program led the State Treasurer, on March 31, 1995, to determine that MUSTFA Fund revenue was no longer sufficient to cover claims. This declaration gave UST owners and the affected public 90 days, by law, to file a claim for remediation or indemnification payments. Public Act 269 of 1995 then codified June 29, 1995, as the last day a MUSTFA claim could be filed. From June 29, 1995, onward, no new claims were accepted, and revenue to the MUSTFA Fund was used solely to pay eligible claims filed before that date, and to pay principal and interest on the bonds.

Public Act 390 of 2004 earmarked all funds deposited into the MUSTFA Fund during fiscal year (FY) 2002-03 and FY 2003-04 to be used for paying off the bonds. Public Act 390 also transferred the remaining balance of the MUSTFA Fund into the new Refined Petroleum Fund created by the Act.

### **Transition from MUSTFA to the Refined Petroleum Fund**

Under PA 390 of 2004, the purposes for which the Refined Petroleum Fund (RPF) could be used were broader than the purposes for the MUSTFA Fund. Public Act 390 also delayed the sunset date

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on the regulatory fee to December 31, 2010, the date it remains today. The expansions contained in PA 390 allowed the Department of Agriculture to draw on the RPF to fund the motor fuel quality program as well as the weights and measures program, and changed the nature of how the RPF would be used in the future. The allowable uses of the RPF under PA 309 were:

- Funding the Weights and Measures Act and the Motor Fuels Quality Act in the Department of Agriculture;
- Cleanups of LUSTs as provided by law (Part 213 of NREPA); and
- Administrative costs of the Departments of Agriculture, Attorney General, Environmental Quality, and Treasury associated with programs receiving RPF dollars, and for administering the RPF.

Additionally, PA 318 of 2006 added two allowable uses of the RPF. These two uses were:

- Up to \$15.0 million for the (then) DEQ to establish a cleanup program for orphan sites; and
- Up to \$45.0 million to establish a temporary reimbursement program.

The temporary reimbursement program allowed a limited pool of applicants to receive reimbursements for remediation actions taken on LUSTs. This program was similar to MUSTFA, but had a much more limited scope. The last reimbursements were made from this program in September 2009.

**Table 2**

<b>MUSTFA/RPF Appropriations by Department (Dollars in Thousands)</b>						
Fiscal Year	DNR/DEQ/ DNRE	Treasury	Agriculture	Attorney General	DMB	Other/Notes
1989-90	835.0	165.0	0.0	0.0	0.0	First yr. 7/8 <sup>th</sup> cent tax is collected.
1990-91	1,092.2	220.1	0.0	0.0	47,004.8	First yr. program has funds to operate.
1991-92	2,893.5	225.6	0.0	229.3	47,017.3	
1992-93	2,090.4	180.6	0.0	141.3	55,000.0	
1993-94	2,178.0	180.7	0.0	145.8	51,599.0	
1994-95	153,784.1	186.6	0.0	140.0	0.0	
1995-96	212,426.0	191.4	0.0	144.0	0.0	
1996-97	92,072.8	191.4	0.0	140.4	0.0	
1997-98	62,084.5	191.4	0.0	141.0	0.0	
1998-99	62,087.1	192.4	0.0	141.9	0.0	
1999-00	62,194.9	199.0	0.0	147.9	0.0	
2000-01	62,321.6	206.2	0.0	154.2	0.0	
2001-02	62,411.2	219.3	0.0	159.3	0.0	
2002-03	62,455.7	224.4	0.0	161.3	0.0	
2003-04	0.0	30,000.0	0.0	0.0	0.0	Refined Petroleum Fund created
2004-05	11,921.0	23,914.5	3,000.0	0.0	0.0	
2005-06	114,327.8	23,914.5	3,191.1	0.0	0.0	
2006-07	30,272.1	23,914.5	3,317.7	0.0	0.0	\$70.0 million transferred to EPF for debt service.
2007-08	30,684.5	23,914.5	3,520.4	0.0	0.0	
2008-09	17,600.7	15,514.5	3,339.0	0.0	0.0	
2009-10	36,208.0	15,514.5	3,454.9	0.0	0.0	
2010-11 <sup>a)</sup>	37,437.1	15,514.5	3,870.9	0.0	0.0	

<sup>a)</sup> FY 2010-11 figures based on Senate-passed version of Senate Bill 1161 and the Executive Recommendation for the FY 2010-11 budget.



### **Future of the Refined Petroleum Fund**

Table 2 shows how money from the MUSTFA Fund and the RPF has been appropriated historically. The figures in Table 2 reflect departmentwide appropriations from the Funds; it is important to note that not all of the funding is used for cleanup and remediation actions. In the FY 2009-10 DNRE appropriation, for instance, while approximately \$36.2 million was appropriated from the RPF, \$20.0 million will go toward cleanup and remediation, while the remainder supports various other lines in the budget. Additionally, starting in FY 2003-04, appropriations to the Department of Treasury have been servicing Quality of Life bonds. This appropriation was made initially as a fund shift in order to save General Fund/General Purpose revenue, and has occurred every year since, although to a lesser extent in years following FY 2003-04. It should be noted that while the enabling statute for the MUSTFA Fund (MCL 324.21506) contained language allowing its funds to be used to "defease principal and interest due and owing on bonds issued by the authority pursuant to this part", the enabling statute for the RPF (MCL 324.21506[a]) does not specifically mention the use of RPF dollars to service debt as an allowable use of the RPF. The "authority" mentioned in the MUSTFA statute refers to the MUSTFA Authority, the entity which, as previously mentioned, approved the issuance on bonds in the 1990s to help pay for the large number of claims the MUSTFA program was experiencing at that time. A similar fund shift was used as part of the FY 2006-07 budget, when \$70.0 million from the RPF was appropriated to the Environmental Protection Fund (EPF). The EPF, which has many more statutorily allowable uses than the RPF, then was used to pay debt service on general obligation bonds, freeing up State General Fund/General Purpose dollars.

Currently, the 7/8<sup>th</sup>-cent per-gallon regulatory fee, which is the sole revenue source for the RPF, is set to expire on December 31, 2010. The Senate-passed version of Senate Bill 1161, the FY 2010-11 DNRE budget, contains approximately \$37.4 million in appropriations from the RPF. If legislation does not address the RPF fee sunset, much of the revenue necessary to support these appropriations will not be collected. Similarly, a total of approximately \$19.4 million in appropriations is contained in Governor Granholm's recommended budgets for the Departments of Treasury and Agriculture. Revenue to support these potential appropriations also will be jeopardized if the fee is allowed to sunset.

### **Conclusion**

While Michigan's UST programs have been successful in facilitating the removal or cleanup of over 12,800 UST releases in the last 20 years, over 9,100 releases still remain. Many of these releases are old and have the potential to develop extensive release "plumes" underground, potentially affecting the quality of groundwater. While the DNRE will be able to locate liable parties for many releases, it is estimated that roughly half of them are orphan sites, and will at some point require cleanup action by the DNRE, an estimated \$1.8 billion liability.