House Legislative Analysis Section

Washington Square Building, Suite 1025
Lansing, Michigan 48909
Phone: 517/373-6466

LEAKING UNDERGROUND STORAGE TANKS

House Bill 5508 as enrolled
Second Analysis (1-11-89)

Sponsor: Rep. Mary C. Brown
House Committee: Conservation & Environment
Senate Committee: Natural Resources & Environmental Affairs

THE APPARENT PROBLEM:

Environmental contamination is a growing problem and one which both state and federal government are attempting to battle through a myriad of legislation. Legislation has been enacted at the federal level and introduced by state legislators to address some of the problems posed by leaking underground storage tanks. The state legislation is part of a package of bills to address the state's groundwater contamination problem.

Despite efforts to clean up contamination sites in Michigan, the incidence of groundwater contamination continues to increase and leaking underground storage tanks are a contributing factor to the problem. Each year approximately 250 new sites are added to the Environmental Response Priority List to become eligible for money from the Environmental Response Fund and approximately 25 percent of these sites contain leaking underground storage tanks (LUST). However, LUSTs are not given high priority on the Environmental Response list and tanks containing petroleum are excluded from the federal Superfund program. The federal Leaking Underground Storage Tank Trust Fund (LUST Trust) was created to help states fund petroleum leak clean-ups in 1986 through the Superfund Amendments and Reauthorization Act of 1986 which amended the Resource Conservation and Recovery Act. Money credited to the fund is derived from gasoline taxes. An amount of $500 million will be available to the states over a five year period (which started in 1987). Currently, the Department of Natural Resources (DNR) is operating under a cooperative agreement with the Environmental Protection Agency to receive money from the trust fund. However, in order for the state to continue to receive money from the LUST Trust the DNR is required to demonstrate by October 1988 that it has the legal authority to take corrective action and enforcement which is at least as stringent as federal authority. Legislation is needed to require the DNR to incorporate federal standards regarding leaking underground storage tanks and implement a regulatory program which is at least as stringent as the federal program, thus enabling the state to continue to receive money to clean up sites contaminated by LUSTs.

THE CONTENT OF THE BILL:

The bill would create the Leaking Underground Storage Tank Act to regulate and correct releases from leaking storage tanks. Specifically, the bill would require the Fire Marshal Division of the Department of State Police to develop rules regarding the procedure for reporting suspected releases from underground storage tank systems and confirmation of releases from tanks, and would detail owner, operator and departmental responsibilities regarding leaking underground storage tanks.

Owner/Operator responsibilities. Within 24 hours of the confirmation of a release an owner or operator of a tank would have to take action to prevent further releases and to decrease safety hazards. The bill would also require an owner or operator to report a release to the Fire Marshal Division of the Department of State Police within 24 hours of the confirmation of a release. The division would be required to notify the Department of Natural Resources upon learning of a confirmed release.

After confirmation of a release, the bill would require an owner or operator to perform the following abatement actions:

- remove as much of the leaking substance from the tank as is necessary to prevent further release;
- upon visual inspection of a release area, prevent further migration of the released substance into surrounding soils and water;
- continue to monitor and decrease any additional safety hazards posed by vapors or free product;
- remove and dispose or remediate contaminated soil (the director of the DNR would be given reasonable notice and opportunity to monitor these activities).
- measure for the presence of a release where contamination is most likely to be present;
- investigate for the presence of free product and begin free product removal as soon as practicable and to the maximum extent practical in accordance with the procedures outlined in the bill (any abatement actions required under this section would continue in addition to free product removal); and
- report the appropriate actions taken above to the director within 20 days after confirming the release.

While an owner or operator was confirming a release or completing the initial abatement measures detailed above, the bill would require the owner or operator to assemble results of the site characterization and free product investigations required under the abatement actions. In addition, an owner or operator would assemble data on the nature and estimated quantity of the release and data concerning other factors, such as water quality, wells potentially affected by the release, and subsurface soil conditions. The results and the data would be submitted to the director of the Department of Natural Resources within 45 days after the confirmation of a release.

The bill would require an owner or operator to submit a work plan to the director of the DNR within 45 days after confirmation of a release in order to conduct an investigation that would determine the full extent and location of soils, groundwater, and surface water contaminated by the release. The determination of the presence and concentrations of the regulated substance that has contaminated the waters and soils would also be a goal of the work plan. The director would approve or disapprove the work plan within 30 days of receipt of the

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plan. Results of the investigation would be submitted in accordance with the schedule established in the work plan.

Corrective action plans. After receipt of the results of an owner's or operator's investigation, the director of the DNR could require an owner or operator to submit a corrective action plan for responding to contaminated soils and waters. If a plan was required, the director would determine when the owner or operator would submit the plan. However, the bill specifies that the owner or operator would be responsible for submitting a plan that provided for adequate protection of human health and the environment. The director would review corrective plans to determine whether the public health, safety, welfare and the environment were protected. The director would have to approve or disapprove the corrective action plan within 30 days after it had been received. If a plan was disapproved, the director would be required to provide the owner or operator with a list of changes that would result in the plan's approval. The owner or operator would be required to submit an amended corrective action plan incorporating the desired changes within a time specified by the director. Once the director approved the plan, the owner or operator of the underground storage tank system would implement the plan, and monitor and evaluate and report the results of implementation to the director in the manner required by the director. The bill would allow owners and operators to begin cleanup of soil and groundwater before the corrective action plan was approved provided that the director of the DNR was notified of the intent to begin cleanup, cleanup complied with any conditions imposed by the director, and the self-initiated cleanup measures were incorporated into the plan. After the director approved a corrective action plan and the owner or operator completed all corrective actions required in the plan and was in compliance with the bill, the director would be required to execute a document that the corrective actions had been taken. If implementation of an approved corrective action plan did not achieve the cleanup levels in the plan and termination of the plan was under consideration, the director would be required to give public notice. Public notice would be given by means designed to reach members of the public directly affected by the release and the planned corrective action.

Corrective action order. The bill would allow the director to issue a corrective action order requiring compliance with the bill within a reasonable specified time period if the director determined that a person was in violation of the bill. Within fourteen days after issuance of a corrective action order the owner or operator could either consent in writing to the order or request an opportunity for a hearing before the Commission of Natural Resources. A hearing would be held at the next regular meeting of the commission which was scheduled at least ten days after the order had been issued. The commission could make a final decision with respect to the order or refer the matter to a hearings officer for contested case proceedings under the Administrative Procedures Act and take any other actions necessary to protect the public health, safety, welfare or the environment. If the commission did not take action within 30 days after a request for a hearing was made, and owner or operator could request a contested case hearing. A final decision in an administrative proceeding could be reviewed by a circuit court for Ingham County or the county where the release occurred or where the owner or operator resided. The pendency of an administrative or judicial proceeding on a corrective action order would not preclude the director of the DNR from taking corrective action necessary to protect the public health, safety, welfare, or the environment.

Liability. Liability imposed upon an owner or operator of an underground storage tank would be strict and without regard to fault as applied to the obligation to carry out all corrective action requirements under the bill and liability for civil action taken by the attorney general's office on behalf of the director of the DNR. An owner or operator would not be liable under the bill if any of the following occurred:

- the owner or operator proved that the release was caused solely by an act of God, war, or omission of a third party (without regard to whether the act or omission was or was not negligent), or any combination of those acts; and
- the owner would normally be liable as the owner of the real property on which the underground tank system was located but the owner acquired the property after the release of a regulated substance and the owner could establish one or more of the following circumstances by a preponderance of the evidence: at the time the owner acquired the property, the owner did not know and had no reason to know that any release of a regulated substance had occurred on, in or at the property; the owner was a government entity that acquired the property through an involuntary transfer or acquisition; the owner was a government entity that acquired the property from the state by statutory transfer; or the owner acquired the property by inheritance or devise.

An owner could establish that he or she had no reason to know that a release had occurred by undertaking all appropriate inquiry at the time of acquisition into the previous ownership and uses of the property which were consistent with good commercial or customary practice in an effort to minimize liability. Courts would be required to take into account any specialized knowledge or experience on the part of the owner, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property and the ability to detect such contamination by appropriate investigation. If an owner obtained knowledge of the release of a substance at the property and then transferred ownership of the property to another person without disclosing knowledge of the release, the owner would be liable under the bill and a defense which claimed that the owner did not know about the leak would not be available to the owner. Nothing in the bill would affect the liability of a person who caused or contributed to the release of a substance that was the subject of the action relating to the property.

An indemnification, hold harmless, or similar agreement or conveyance would not be effective to transfer liability for a release or threat of a release from one person to another. However, nothing in the bill could bar an agreement to insure, hold harmless or compensate a person subject to liability under the bill. The bill would not bar lawsuits that an owner or operator (or any person subject to liability under the bill) had or could have against any person. The owner and operator of an underground storage tank would be liable for costs incurred by the state for corrective or enforcement action under the bill. Unpaid costs incurred by the state would constitute a lien on the land on which the storage tank system was located and the tank system itself and would have priority over all other liens and burdens except liens and burdens recorded

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before the date the lien under the bill was recorded. Under the bill, the lien would arise when the agency first incurred costs for taking corrective action.

Civil Action. The attorney general could commence a civil action on behalf of the director seeking:

- a temporary or permanent injunction;
- recovery of all costs incurred by the state for taking corrective action;
- damages for the full injury done to the natural resources of the state along with enforcement and litigation costs incurred by the state;
- a civil fine of not more than $10,000 for each underground storage tank system for each day of noncompliance with a requirement of the bill or a rule developed by the DNR to implement the bill;
- a civil fine of no more than $25,000 for each day of noncompliance with a corrective action order issued under the bill; and
- recovery of funds provided to the state from the United States Environmental Protection Agency's leaking underground storage tank trust fund.

Fines imposed under this section of the bill would be based upon the seriousness of the violation and any good faith efforts by the violator to comply with the act or rule. Civil action could be brought in the circuit court for Ingham County or in the county where the release occurred or the defendant resided. The state could, when appropriate, return any federal funds recovered under the bill to the United States Environmental Protection Agency (U.S. EPA). The state could also retain any federal funds recovered under the bill in a separate account for use in implementing the bill with use of the funds subject to approval by the U.S. EPA.

Other Departmental Duties. The director of the DNR could request the owner or operator of an underground storage tank to furnish information about the tank system, its associated equipment and contents, and any releases or investigation of releases. The department could enter any private or public property to:

- inspect an underground storage tank system;
- obtain samples of any substance from an underground storage tank system;
- require and supervise the conduct of monitoring or testing of an underground storage tank system, its associated equipment or contents;
- conduct monitoring or testing of an underground storage tank system in cases where there is no identified responsible party;
- conduct monitoring or testing, or take samples of soils, air, surface water, or groundwater; and
- take corrective action.

All inspections and investigations undertaken by the department under this section of the bill would be commenced and completed with reasonable promptness. The attorney general could petition a court of appropriate jurisdiction for a warrant to authorize access to any private or public property to carry out provisions of the bill or for an order authorizing the DNR to enter any private or public property as necessary to carry out the bill. The director could promulgate rules necessary to implement the bill and could contract with local units of government, or a state or federal agency, to aid in the implementation or enforcement of the bill and to obtain financial assistance. The director would be required to coordinate and integrate the provisions of the bill for purposes of administration and enforcement with appropriate state and federal law. Coordination and integration would be effected only to the extent that it could be done in a manner consistent with the goals and policies of the bill. The bill would not prohibit the Fire Marshal Division of the Department of State Police from taking action in any situation where it was otherwise authorized by law to act.

The bill would be repealed six months after its effective date and is tie-barred to Senate Bill 1040. Senate Bill 1040 would establish a fund to assist operators of petroleum underground storage tanks in meeting the financial responsibility regulations required by the federal Resource Conservation and Recovery Act, Subtitle I. Further, the Senate bill would establish an interest/loan subsidy program for tank replacements that meet new federal standards.

FISCAL IMPLICATIONS:

According to the Department of Natural Resources, the bill would allow the state to continue to be eligible to receive federal funds from the Leaking Underground Storage Tank Trust Fund (LUST trust). The state is required to provide a ten percent match of the amount it receives from the fund and is projected to receive $2-3 million for fiscal year 1988-89. The state match would be taken from the Environmental Response Fund; money received from the LUST trust would go to the Departments of Natural Resources and State Police and the attorney general's office to administer the bill. (1-11-89)

ARGUMENTS:

For:

Leaking underground storage tanks, especially petroleum tanks, can be extremely dangerous to the environment; they can cause explosions, fires and extensive groundwater contamination. Although petroleum tanks are not given high priority on the Environmental Response Fund priority list, nor are they eligible for Superfund money, industry experts estimate that the tanks comprise approximately 90 percent of the tanks in Michigan. It is also estimated that 20,000 of the state's underground storage tanks leak. Based on these statistics, a majority of the leaking tanks in the state contain petroleum and would not be eligible for clean-up money unless it came from the LUST Trust. Enactment of the bill will allow the state to continue to receive money from the trust.

Against:

Although general federal guidelines regulating leaking underground storage tanks are in place, the federal government has yet to develop rules regarding installation and operation of tanks, corrective action requirements, financial responsibility requirements, inspections and monitoring of tanks, and new tank standards. The rules were projected to be published and adopted by October 1, 1988; however, the rules have not been completed yet. The state cannot know if the laws which it is adopting are as stringent as federal laws because the federal rules are not in place yet. The state should wait until federal guidelines are effective and then enact laws which incorporate all of the federal rules and regulations.

Response: There is no guarantee that the federal rules will be published in the near future. However, the Department of Natural Resources will be in violation of its agreement with the Environmental Protection Agency if it does not have a law regulating leaking underground storage tanks by October 1988. Further, a draft of the proposed federal rules is currently available and the bill's provisions are at least as stringent as the rules proposed in the draft.