

CRS Report for Congress

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Leaking Underground Storage Tank Cleanup Issues

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Summary

The 105th Congress has taken up legislation to increase states' flexibility in using funds from the Leaking Underground Storage Tank (LUST) Trust Fund and to require that the Environmental Protection Agency (EPA) allocate to states at least 85% of the annual LUST Trust Fund appropriation. On April 23, 1997, the House passed H.R. 688, the *Leaking Underground Storage Tank Amendments Act of 1997*. Companion legislation, S. 555, was introduced in the Senate on April 10, 1997.

The LUST Trust Fund has been financed primarily by a motor fuels tax which expired in December 1995, but was reinstated in 1997. Congress has appropriated about one-third of the funds for states and EPA to administer the LUST program. In addition to the cleanup program, tank leak prevention and detection regulations have been phased in since 1988. All tanks must be upgraded, replaced, or closed by December 1998.

States currently use LUST funds to enforce corrective action requirements, to clean up orphan sites, to take emergency corrective actions, and to take cost recovery actions. H.R. 688 and S. 555 would further allow states to use funds to administer financial assurance programs, to enforce leak prevention and detection regulations, and to compensate parties for cleanups in cases of financial hardship. Bill proponents include petroleum marketers and states who seek greater flexibility to meet programs demands. EPA cautions that an 85% distribution requirement would reduce its program flexibility, and that funds are best used overseeing cleanups paid for by responsible parties. All parties have urged Congress to increase Fund appropriations, and states have expressed concern that the legislation's benefits may not be realized without additional funding.

Federal Underground Storage Tank Program Overview

In the 1980s, the states and EPA estimated that many of the several million underground storage tanks in the United States that contain petroleum or hazardous chemicals were leaking. Many more tanks were approaching the end of their useful life

expectancy and were expected to leak in the near future. States have reported that leaking underground storage tanks (USTs) are the leading source of groundwater contamination, and that petroleum is the most prevalent contaminant.

To address this nationwide problem of leaking underground storage tanks, Congress established a leak prevention and detection program through the 1984 amendments to the Resource Conservation and Recovery Act (RCRA). The law directed EPA to set operating requirements and technical standards for tank design and installation, leak detection, spill and overfill control, corrective action, and tank closure (RCRA, Subtitle I). Regulations have been phased in since 1988, and the last of these regulations (which requires that all tanks be upgraded, replaced, or closed) goes into effect on December 22, 1998.

In 1986, Congress created a federal response program for cleaning up releases from leaking petroleum USTs through the Superfund Amendments and Reauthorization Act (SARA, P.L. 99-499) which amended RCRA Subtitle I. These provisions authorized the federal government to respond to petroleum spills and leaks, and created the Leaking Underground Storage Tank (LUST) Trust Fund to fund cleanup of leaks from petroleum USTs in cases where the UST owner or operator does not clean up a site. The LUST Trust Fund money is used primarily by EPA, and states that have entered into cooperative agreements with EPA, to oversee and enforce corrective actions performed by responsible parties. EPA and states also use Trust Fund monies to conduct corrective actions where no responsible party has been identified, where a responsible party fails to comply with a cleanup order, or in the event of an emergency, and to take cost recovery actions against parties.

The money in the LUST Trust Fund has been derived primarily from a 0.1 cent-per-gallon motor fuels tax which commenced in 1987. The tax generated approximately \$150 million per year.¹ More than \$1.6 billion was collected for the Trust Fund before the taxing authority expired in December 1995. Interest earnings on the Fund are about \$50 million per year. Congress reinstated the tax in the Taxpayer Relief Act of 1997 (P.L. 105-34) for the period October 1, 1997, through March 31, 2005.²

The 1986 amendments also directed EPA to establish financial responsibility requirements for UST owners and operators to cover costs of taking corrective action and to compensate third parties for injury and property damage caused by leaking tanks. As mandated, EPA issued regulations requiring most tank owners and operators selling petroleum products to demonstrate minimum financial responsibility of \$1 million; non-marketers with monthly throughputs of less than 10,000 gallons per tank must maintain \$500,000 worth of per-occurrence coverage. Alternatively, owners and operators may rely on state assurance funds to demonstrate financial responsibility.

¹ U.S. Congress. House. Committee on Appropriations. Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Bill, 1997. Report to accompany H.R. 3666. H. Rept. 104-628. June 18, 1996. p. 64.

² Congress reinstated the tax through March 31, 2005 to fund the LUST Trust Fund and to help offset other tax cutting provisions in the Taxpayer Relief Act of 1997 (P.L. 105-34). For a discussion of this tax and its reinstatement, see CRS Report 97-472 E, *Leaking Underground Storage Tank Trust Fund (LUST)*, by Nonna Noto and Louis Talley.

LUST Program Appropriations

Through FY1997, Congress has appropriated about one-third of the available funds (approximately \$651 million) for states and EPA to oversee and enforce (and when necessary undertake) corrective actions. For FY1996, the Administration requested \$77.3 million, while Congress provided approximately \$46 million for the LUST program. For FY1997, the Administration requested \$71.2 million, and Congress provided \$60 million. EPA has allocated an average of 85% (with a range of 81%-89%) of the LUST Trust Fund appropriation to states. The remainder has been used by EPA for its program responsibilities.

EPA uses LUST Trust Fund money to oversee cooperative agreements with states, develop program policies and guidance, and provide training. EPA also uses the funds to implement the LUST corrective action program on Indian lands. Major activities planned for FY1998 include: implementing Risk-Based Corrective Action (RBCA) which focuses resources on sites posing the highest risks; providing assistance to Indian Tribes; involving the private sector in the LUST program; promoting alternative site investigation and remediation technologies; working with state fund managers to develop cost control mechanisms to strengthen fund solvency; and providing technical assistance to state and local governments to build strong LUST programs.³

For FY1998, EPA requested \$71.2 million from the LUST Trust Fund under this account. EPA proposed to use \$67.9 million for LUST response activities and the remainder primarily for administration, enforcement, and research purposes. Of the \$67.9 million, EPA planned to award 85% (\$60.9 million) directly to the states in the form of cooperative agreements. Fifty states have entered into cooperative agreements, and states generally use the LUST Trust Fund grants under these agreements to hire staff for technical oversight of corrective actions performed by responsible parties, and also for undertaking emergency responses and cleaning up orphan tank sites.

Congress approved \$65 million for this program for FY1998. The conference report for EPA's FY1998 appropriations (H.Rept. 105-297) requires EPA to use a maximum of \$7.5 million for the program's administrative costs and to allocate to the states not less than 85% of the funds provided.

State Activities

Forty-five states have established financial assurance funds, which in most cases satisfy financial responsibility requirements for tank owners and operators. Unlike the federal LUST Trust Fund, state funds are often used to reimburse financially solvent owners and operators for some or all of the costs of remediating leaking UST sites. Revenues for state funds are typically generated through gas taxes and tank fees. In 1996,

³ Environmental Protection Agency. FY1998 Justification of Appropriation Estimates. p. 7- 30.

the total balance for state funds was \$1.3 billion, current income amounted to \$1.2 billion, and outstanding claims against state funds reached \$2.8 billion.⁴

In addition to the state assurance funds, some states have established financial assistance programs primarily to assist small business and local government entities. EPA reported in 1995 that 14 states had established loan or grant programs to assist businesses or municipalities with remediating sites and/or upgrading, replacing and closing tanks.⁵ Some state programs specifically target small, remote businesses in an effort to maintain an effective fuel supply and distribution network in rural areas.

Program Status

EPA estimates that since the federal underground storage tank program began, about half of the roughly 2.1 million tanks subject to regulation have closed. From the program's inception in the mid-1980s, 317,000 releases have been identified, 252,000 cleanups have been initiated, and 153,000 cleanups had been completed.⁶ Cleanups remain to be completed at 164,000 sites where releases have been confirmed. EPA also estimates that states could identify 100,000 new UST releases as owners and operators upgrade tanks to comply with regulations that enter into force in 1998. This estimate appears to be plausible, given that a recent state survey indicated that compliance with the UST technical standards that take effect in 1998 was just 29% complete.⁷

In roughly 95% of cases, EPA or states have been successful in getting the responsible party to perform the cleanup. In these cases, the cleanup costs have been typically paid for by the responsible party, a state fund, and/or private insurance. In July 1996, EPA testified that responsible parties had completed cleanup at more than 112,000 UST sites. In contrast, LUST Trust Fund monies had been used to finance cleanups at fewer than 900 sites during the past 7 years. States and EPA use LUST Trust Fund money primarily to oversee cleanups by responsible parties and to take enforcement actions at leaking UST sites. Less frequently, the LUST Fund is used to pay for cleanups where a responsible party cannot be found or is unable or unwilling to remediate a site which presents an imminent threat to public health or the environment.

⁴ Statement of Michael Shapiro, Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency, before the Subcommittee on Finance and Hazardous Materials of the Commerce Committee, U.S. House of Representatives. Hearing on H.R. 688, the Leaking Underground Storage Tank Trust Fund Amendments Act of 1997. Mar. 20, 1997. p. 7

⁵ EPA. Financial Assistance Programs for UST Owners and Operators: Federal and State Funding Programs. July 26, 1995. p. 2.35-2.39

⁶ Statement of Michael Shapiro. p. 2

⁷ Statement of Mary Jean Yon on behalf of the Association of State and Territorial Solid Waste Management Officials before the House Committee on Commerce, Subcommittee on Finance and Hazardous Materials. Hearing on H.R. 688. March 20, 1997. p. 2

Legislative Issues and Activity

States are facing increased work loads at a time when many state assurance funds have claims that exceed fund balances. More claims are expected as the 1998 deadline for UST upgrade regulations approaches. States have urged Congress to increase appropriations from the Trust Fund to enable them to respond to the growing oversight and enforcement demands of their LUST programs. Some stakeholders are also urging Congress to broaden the allowable uses of the federal Trust Fund.

In addition, some state officials and market observers note that the federal UST regulatory program may be a significant contributing factor in many business closures, but add that a range of economic and market factors are often at work. A commonly held view seems to be that the December 1998 deadline for complying with UST technical standards could lead to a number of business closures, particularly among small businesses.

104th Congressional Action. Late in the 104th Congress, the House Committee on Commerce, Subcommittee on Commerce, Trade, and Hazardous Materials, held hearings on, and reported, H.R. 3391, the LUST Trust Fund Amendments Act of 1996 (H.Rept 104-822). The bill would have required EPA to distribute at least 85% of the amounts appropriated from the Trust Fund to states for undertaking corrective action and enforcement of the UST program and would have permitted states to reimburse solvent owners or operators for the costs of corrective action in cases of financial hardship. In September 1996, the House passed H.R. 3391 by voice vote. In the Senate, the bill was referred to the Committee on Environment and Public Works. EPA expressed concerns with the proposed changes to the UST program, and insufficient time remained for the Senate committee to evaluate the legislation. The 104th Congress ended without further action on the bill.

105th Congressional Action. In the 105th Congress, two bills modifying LUST Trust Fund uses have been introduced (H.R. 688 and S. 555). These nearly identical bills are equivalent to the House-passed bill from last year and would require EPA to distribute at least 85% of the amounts appropriated from the LUST Trust Fund to states for undertaking corrective action and enforcing the UST program. They would broaden the allowable uses of Trust Fund monies to permit states to use Fund monies for the following new purposes: 1) to compensate tank owners for cleanup costs where the state determines that the financial resources of the owner (excluding resources provided by state assurance funds) are not adequate to pay for the cost of a corrective action without significantly impairing the ability of the UST owner to continue in business; 2) to enforce federal, state or local tank leak detection, prevention and other UST requirements; and 3) to pay for necessary administrative expenses related to state corrective action and compensation programs. The bills would also remove the cost recovery requirement in those cases where corrective actions were paid for with LUST Trust Fund monies through state financial assurance programs.

Neither LUST bill addresses Trust Fund appropriations levels, and although the 105th Congress reinstated the Lust Trust Fund tax, Congress did not increase the appropriation for this program. A key purpose of the reinstated tax appears to be to help offset other tax cutting provisions in the Taxpayer Relief Act of 1997.

On March 20, 1997, the House Commerce Committee, Finance and Hazardous Materials Subcommittee, held a hearing and markup, and unanimously approved H.R. 688 for full Committee consideration. On April 16, the House Commerce Committee unanimously approved H.R. 688, the *Leaking Underground Storage Tank Amendments Act of 1997* without amendment. The bill was reported (H. Rept. 105-58) on April 17, and on April 23, the House passed H.R. 688 under suspension. On April 10, 1997, companion legislation, S. 555, was introduced in the Senate and referred to the Committee on Environment and Public Works.

In testifying before the House Commerce Committee, EPA expressed concern that the legislation's reimbursement provision is excessively broad (because determination of financial hardship excludes the availability of resources from a state assurance fund), and that using the Trust Fund to reimburse solvent owners could significantly reduce the number of cleanups that would be accomplished under the current arrangement in which Fund monies are used primarily for overseeing and enforcing cleanups performed by tank owners and operators. Thus, EPA would like Congress to ensure that adequate appropriations are provided to support the proposed new uses. EPA also expressed concern over the 85% allotment requirement, noting that while the Agency, on average, has distributed 85% of the appropriation to states, it requires some flexibility to adjust to changes in appropriations levels. The Agency, for example, is responsible for the LUST program on Indian lands, and like states, EPA expects that many new releases will be discovered with the approach of the 1998 regulatory deadline. Unlike states, EPA lacks a financial assurance fund to supplement LUST Trust Fund monies to help pay for cleanups on Indian lands.

The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) and representatives from the petroleum marketing industry endorsed the measure and testified in support of using the LUST Trust Fund monies to achieve both the prevention and cleanup goals of the federal underground storage tank program, particularly as demands on states and businesses increase with the approaching 1998 regulatory deadline. Some states have a backlog of corrective actions to complete, while others are ready to allocate more resources to enforcing leak prevention and detection regulations. Some states also want flexibility to use federal funds to assist small, rural gas stations and other businesses to keep their services available in communities. In this view, increasing states' flexibility in using LUST Trust Fund monies would enable states to meet their particular needs and to achieve the federal underground storage tank program goals in the manner each state finds most efficient and effective. ASTSWMO noted, however, that at recent LUST Trust Fund appropriations levels, states probably would not have the option to make extensive use of the proposed new authorities.⁸ This is because many states find that available LUST resources are often insufficient to support the existing program.

⁸ Statement of Mary Jean Yon. P. 6.