

PROPOSED RULEMAKING

INSURANCE DEPARTMENT

[25 PA. CODE CHS. 971, 973, 975 AND 977]

Underground Storage Tank Indemnification Fund

The Underground Storage Tank Indemnification Board (Board) hereby proposes to delete Chapters 971, 973 and 975 (relating to fees of the underground storage tank indemnification fund; fee collection procedures; and heating oil tank optional program) and proposes to adopt Chapter 977 (relating to underground storage tank indemnification fund), in their place. The new chapter is proposed to read as set forth in Annex A. This chapter is proposed under the authority of the Storage Tank and Spill Prevention Act (act) (35 P. S. §§ 6021.101—6021.2104).

Purpose

Chapter 977 is proposed to consolidate the regulatory requirements into one chapter and to clarify and explain the establishment and collection of fees, the administration of claims, the Heating Oil Tank Optional Program and dispute resolution procedures.

Background

The Board has determined that the adoption of Chapter 977 will facilitate the regulated community's understanding of the Underground Storage Tank Indemnification Fund's (Fund) requirements. Also, legislative amendments to the act in 1998 have added new responsibilities to the Fund, which are explained in this proposed rulemaking.

Subchapter A (relating to general provisions) contains the definitions of those words that are used throughout the chapter. Additionally, the purpose, scope and applicability sections are found in Subchapter A.

Chapter 971 presently establishes the fees to be assessed to Fund participants. The provisions of Chapter 971 are being proposed for deletion, and similar provisions are being proposed for incorporation into Subchapter B (relating to fees and collection procedures). Chapter 973, Subchapter B also includes provisions of Chapter 973.

Chapter 975 currently establishes the requirements for owners or operators of underground heating oil tanks of 3,000 gallons capacity or greater that elect to participate in the Fund (HOT owners or operators). The provisions of Chapter 975 are being proposed for deletion, and similar provisions are being proposed for incorporation into Subchapter C of Chapter 977.

The Board is also proposing to add Subchapter C (relating to coverage and claims procedure), which addresses claims administration. The Board anticipates this subchapter will provide underground storage tank owners or operators (UST owners or operators), HOT owners or operators, certified companies and distributors insight into the Fund's claims procedure.

Lastly, the Board is proposing to add Subchapter F (relating to dispute procedures), to assist owners or operators of a UST or a HOT, certified companies and distributors in understanding the Fund's dispute resolution process.

The Board decided to include statutory language in its regulation in certain instances to assist the regulated community's understanding of the Board's requirements.

Subchapter A. (General Provisions)

Subchapter A provides common definitions used throughout the chapter.

Specifically, § 977.1 (relating to purpose) is being proposed to refer to the requirements that owners or operators of a UST or a HOT and certified companies must satisfy to become eligible for coverage from the Fund.

Section 977.2 (relating to scope) is being proposed to provide the regulated community with a general understanding of the areas addressed in this rulemaking. The section covers the establishment and collection of fees from owners or operators of a UST or a HOT and certified companies, as well as claims procedures that owners or operators of a UST or a HOT and certified companies must follow to pursue their claim. The Board is also proposing to add provisions to this regulation for HOT owners or operators relating to the Heating Oil Tank Optional Program. Additionally, the Board is proposing to promulgate standard dispute resolution procedures.

Section 977.3 (relating to applicability) is being added to identify who is affected by this regulation. Specifically, this proposed section applies to owners and operators of a UST or a HOT and certified companies. (For the purpose of this preamble, a "participant" shall include any of the following: an owner or operator of a UST or a HOT or a certified company as defined in the proposed rulemaking. A "UST" refers to an underground storage tank and a "HOT" refers to an underground heating oil tank as defined in the proposed regulations.) This section also addresses the responsibilities of distributors of regulated substances.

Section 977.4 (relating to definitions) is being added to assist the regulated community and other interested parties in understanding the words or phrases used in Chapter 977. These definitions are derived from several sources, including the existing regulations, statutory definitions and words used in the environmental industry and insurance market.

Subchapter B. (Fees and Collection Procedures)

Section 977.11 (relating to fund fees) states that fees are established and assessed by the Board to finance the Fund. The Board's statutory authority for establishing fees is found in section 705(d) of the act (35 P. S. § 6021.705(d)). Section 977.12 (relating to owner and operator fees) establishes fees which may be assessed upon owners or operators of a UST or a HOT, while § 977.19 (relating to certified company fees) establishes fees which may be assessed upon certified companies.

Section 977.12 provides the Board with the flexibility to lower fees as established in this section by notifying UST owners or operators at least 30 days prior to the scheduled fee change, however, the act limits fee changes to once annually. This fee will also apply to HOT owners and operators. Additionally, the Board is adding language that allows flexibility to change the fee assessed on regulated substances by publishing a notice in the *Pennsylvania Bulletin*. Specifically, § 977.12(e) is added indicating that the Board will publish a list of any changes regarding which substances are assessed which fees.

Section 977.12(c) is proposed to allow the Fund to limit the total fees paid by owners and operators of nonretail bulk storage or gasoline tanks used for wholesale distribution to no more than the \$5,000 annual limit as

required by the act. The remaining provisions of § 977.12 are similar to the provisions found in Chapter 971, which is being proposed for deletion.

Section 977.13 (relating to tank fee payment procedure) proposes to incorporate language which is similar to language currently found in § 973.3 without any substantive or procedural changes.

Section 977.14 (relating to gallon fee payment procedures) proposes to incorporate language which is similar to language in § 973.4. The Board also proposes adding language in § 977.14(d) to address the statutory change relating to distributors located outside the territorial boundaries of this Commonwealth. Section 705(e) of the act allows distributors located outside this Commonwealth to collect and remit the gallon fees; however, the distributors that fall into this category must post a performance bond in the amount of \$1 million.

Section 977.15 (relating to the gallon fee discount for distributors) is similar to language currently found in § 973.5. There are no procedural or substantive changes to this proposed section.

Section 977.16 (relating to posting and collecting security) is similar to language currently found in § 973.8. There have been no procedural or substantive changes made to this section.

Section 977.17 (relating to security for payment of gallon fees) is similar to the language currently found in § 973.9. There have been no procedural or substantive changes made to this section.

Section 977.18 (relating to capacity fee payment procedure) is similar to language currently found in § 973.6. Previously, the Fund used the term "invoice"; it will now use the term "statement." Generally, the Fund will use a database of pertinent information as maintained by the Department of Environmental Protection (Department) to prepare statements. These statements will be forwarded to the participant for payment. The statements will provide sufficient detail to show how fees are determined.

Section 977.19 (relating to certified company fees) is being proposed as the result of an amendment to the act, specifically the act of January 30, 1998 (P. L. 46, No. 13) (Act 13). Act 13 requires the Board to provide coverage to certified companies which is financed by fees to be assessed upon these companies. The Board, as required by law, performed an actuarial evaluation of liabilities under this program and has adopted the fee structure as found in § 977.19. To accomplish this task, the Board established a subcommittee comprised of three Board members, Fund staff, and Department regulatory staff to recommend a fee structure, billing mechanism and fee levels. Additionally, the Board hired William M. Mercer, Inc., consulting actuaries, to perform an actuarial evaluation of the liabilities associated with this new provision. At the September 1998 Board meeting, the subcommittee's recommendations were submitted to the Board. The Board unanimously approved the recommendations and ordered that they be incorporated in this proposed rulemaking.

Specifically, the Board has decided that the fees for certified companies will be delineated into three major categories. The following fees may be assessed: a certified company fee assessed at a maximum of \$2,000 per year on all certified companies; a certification fee assessed on the tank installer when an installation, major modification, or removal activity is performed; and an activity fee which is assessed at a maximum rate of \$100 per activity.

The Department's database of certified companies and installers will be utilized by the Fund in assessing fees.

Section 977.20 (relating to certified company fee, certification fee and activity fee payment procedures), is proposed as a result of Act 13, which provides the Fund authority to assess fees and provide coverage to certified companies.

Section 977.20(a) proposes to establish the procedures to be used by the certified companies that are required to pay the certified and certification fees. This process is similar to the capacity fee payment procedures proposed to be found in § 977.18. The Fund will use the existing certified tank installer and company database maintained by the Department to prepare and forward statements to the certified companies. The certified company shall pay the fee shown on the statement.

Section 977.20(b) proposes to outline the process by which certified companies shall remit payments of their activity fees to the Fund. In this particular section, the Board requires the certified companies that perform the installations, major modifications, or removals to pay the fees to the Fund. The certified companies shall submit the fees using a form provided by the Fund. These forms for activities shall be submitted with the activity fee 30 days prior to the inception of the particular activity identified on the form. This prior notification will allow uninterrupted coverage for the certified companies during the activity for which this fee is being assessed to ensure the certified companies maintain their coverage in the event that a loss from the activity occurs during the installation, major modification or removal of the tank.

Section 977.21 (relating to penalty for late payment of fees) proposes to incorporate language similar to language presently found in § 973.3, relating to penalties for late payment of fees. The only change to this section from its currently published format is that the Board is given discretion in assessing a late penalty for fees. Prior to Act 13, the Board was required to assess a penalty of up to 5% of the amount due on a monthly basis.

Section 977.22 (relating to fee dispute procedure) proposes to identify the rights of a participant, as well as a distributor, who disputes the amount of an assessed or collected fee. This section incorporates similar provisions currently found in § 973.7 relating to fee dispute procedures, and also refers the reader to § 977.51 (relating to dispute procedures) for specific guidelines for presenting an appeal for resolving disputes.

Section 977.23 (relating to recordkeeping responsibilities) is similar to the language currently found in § 973.11. The only modifications made to § 977.23 clarify the types of records that the certified companies shall retain.

Section 977.24 (relating to the audit of records) proposes to incorporate language similar to language currently found in § 973.12. Language has been added to allow the Fund to audit the records of certified companies because they now receive coverage under the Fund.

Subchapter C. (Coverage and Claims Procedure)

Since inception of the Fund's coverage on February 1, 1994, the Fund has handled approximately 2,400 claims for corrective action and for property damage and bodily injury. The Fund established a well-defined and efficient program for handling claims that is designed to insure uniform claims handling. The Board is taking this opportunity to publish the Fund's procedure to assist the regulated community in understanding the coverage claims procedure.

Subchapter C establishes the claims procedure as detailed in Annex A. This subchapter also explains what a participant must file to have a claim paid by the Fund. This subchapter is necessary to clarify the coverage as outlined in the act and to encourage early reporting of claims which will expedite cleanup and lower costs.

Section 977.31 (relating to eligibility requirements) is being proposed to publish the five existing statutory eligibility requirements as found in section 706 of the act (35 P. S. 6021.706), and add additional eligibility requirements. These new requirements include that the participant cooperate with the Fund in investigating a claim and in any litigation that may occur as a result of a release from a storage tank. Cooperation is essential if the Fund is to be effective and efficient in claims handling. Another requirement for eligibility is that the participant meet the notification requirements as proposed in § 977.34 (relating to claims reporting). Early claim notification assists the Fund in documenting facts and other costs and identifying potential third-party actions. Early notification allows facts to be collected while information is still fresh and allows for swift intervention to minimize the environmental impact. Section 977.31 also proposes to explain when a certified company, performing a tank handling activity on a UST or a HOT, is eligible for coverage.

Section 977.32 (relating to participant cooperation) explains the type of cooperation that is expected of a participant. Generally, cooperation requires that the participant assist the Fund during the eligibility determination process, claims investigation, the defense of a third-party action and any subrogation actions. This section further provides that a lack of cooperation may result in denial of a claim or cessation of further payments on a claim. These requirements are prudent business practices because they assist the Fund in processing claims effectively and efficiently for the benefit of the participant.

Section 977.33 (relating to Fund coverage and exclusions) is being proposed to explain the types of costs that are covered by the Fund. This language is necessary to effectuate the purposes of the Fund and to avoid any confusion on the part of the participant. This section provides a succinct description of the coverage available for corrective action and for liability for property damage and bodily injury claims. This section outlines the limitations on coverage, including deductibles, limits on payment and exclusions.

Certain exclusions from coverage are being proposed in this section. For example, the regulation bars coverage for any release caused by the intentional acts of a participant. Contractual obligations whereby there is an assumption of liability are also not covered, nor are default judgments. Any portion of a release which occurred before February 1, 1994, is not covered.

Section 977.34 (relating to claims reporting) explains the responsibility of a participant to notify the Fund of any potentially covered releases. In this section, a participant is required to notify the Fund no later than 60 days after confirmation of a release as explained in the regulation. This proposal provides the participant adequate time to report a claim. The 60-day notification also allows the Fund to promptly begin investigations. Currently, there is no claims reporting requirement and there have been instances where claims are reported years after the release actually occurred to the detriment of the Fund.

Section 977.35 (relating to third-party suit) outlines procedures for the participant to follow in the event of a

third-party claim. This section also clarifies the Fund's role in handling third-party suits brought against a participant. The Board believes that defending third-party claims is a proper cost containment tool and should be used wisely. Specifically, this proposed section provides guidance as to what type of information the participant must provide to assist the Fund in its defense of any third-party suits. This section establishes the Fund's authority to settle any claim presented by the third-party for bodily injury or property damage. Also, this section establishes the Fund's role in assigning legal counsel where appropriate. In addition, this section limits the Fund's obligation to defend any third-party actions when limits of liability have been exhausted for corrective action and third party settlements.

Section 977.36 (relating to corrective action payments) establishes the process by which a participant may receive payments for corrective actions taken as a result of a release from a UST or a HOT. This section also establishes that corrective action costs must be reasonable and necessary. It clarifies what type of information must be submitted so that the Fund can make informed reimbursement decisions.

Section 977.37 (relating to priority of payment) explains that the Fund may prioritize reimbursements to take into account those items that directly impact on corrective action costs and human health.

Section 977.38 (relating to primary coverage) explains that the Fund is primary to all other coverage with respect to eligible claims for personal injury and property damage from a release. Additionally, this section explains that when the Fund determines that a certified company is responsible for a release that is the subject of a claim, the coverage of a certified company will be exhausted before the coverage of an owner or operator of a UST or a HOT is applied. This section will assist the insurance industry, the participant and the Fund in coordinating benefits.

Section 977.39 (relating to claim dispute procedures) outlines the procedures necessary for a participant, or a distributor, to appeal an adverse decision from the Fund. This section references the standard procedures found in § 977.51.

Section 977.40 (relating to subrogation for corrective action costs) explains that the Fund is subrogated to the rights of recovery against any person for the costs of remediation. It also states that if an owner or operator does not comply with the requirements of § 977.32, the Fund may deny any further payments on a claim.

Subchapter D. (Heating Oil Tank Optional Program)

Subchapter D is similar to the provisions currently found in Chapter 975.

Section 977.51 (relating to election requirements) addresses the procedure for HOT owners or operators to participate in the Fund. This section incorporates similar language as currently found in § 975.3, and adds an additional requirement in § 977.12, allowing the Board to require that fees be paid under this program.

Section 977.52 (relating to the coverage period) is similar to the language currently found in § 975.4. In this section there are no substantive changes.

Section 977.53 (relating to cancellation of coverage) is similar to the language currently found in § 975.5. In this section there are no substantive changes.

Section 977.54 (relating to dispute procedures) is similar to language currently found in § 975.6. In this section, HOT owners or operators that have a dispute concerning the Heating Oil Tank Optional Program may seek redress by filing a complaint using the procedures found in § 977.61.

Subchapter F. (Dispute Procedures)

Subchapter F is similar to language currently found in Chapters 973 and 975. The procedure in this subchapter shall be followed by a participant or a distributor that wants to appeal a decision of the Fund.

Section 977.61 (relating to dispute procedures) is similar to the procedures currently found in Chapters 973 and 975. Certified companies and distributors may utilize the dispute procedures in keeping with the statutory requirements. A 35-day period has been established during which a participant or distributor may request an appeal once the Fund makes an eligibility decision. The 35-day time frame begins upon the mailing date of the Fund's decision. Further, appeals of the Executive Director's decision to the Board shall be made within 15 days. The 15-day time frame begins upon the mailing date of the Executive Director's decision letter.

This section also requires a participant to pay fees in full during the pendency of any appeal. If the complainants prevail in a fee dispute, fees paid plus interest will be refunded. The interest will be computed at the rate determined by the Secretary of Revenue for interest payments for overdue taxes under section 806 of the Fiscal Code (72 P. S. § 806). This section provides clear guidance on how to pursue an appeal involving fee disputes and to ensure that coverage for an eligible claimant remains in place during the pendency of the dispute.

Affected Parties

A participant or a distributor transacting business in this Commonwealth is affected by this proposed rulemaking. There is a fiscal impact as a result of this proposed rulemaking relating to fees. This proposed rulemaking will have minimal impact on owners and operators as they have previously been paying fees and receiving benefits.

Fiscal Impact

State Government

State government will not be affected by this rulemaking since the program is funded entirely by fees paid by participants. No tax dollars are used to support this program. The fees paid by participants cover both claims and administrative expenses.

General Public

The general public may be minimally affected to the extent that fees are assessed, since the general public is a consumer of goods and services provided by owners and operators of a UST or a HOT who utilize the services of certified companies. Theoretically, any fees imposed by this rulemaking may add additional costs which in turn may lead to higher prices to consumers. However, the competitive market will likely serve as a buffer to any increase to consumers.

Political Subdivisions

Political subdivisions are directly affected by the implementation of this proposed rulemaking since they constitute a portion of the UST and HOT owner and operator community. The political subdivision may pay fees based upon the types of product stored in their underground storage tanks and the cost of necessary services supplied by certified companies to keep their tank systems in compliance with Federal and State mandates. However, the political subdivisions receive benefits from the fees. If a release occurs, the political subdivision may receive up to \$1 million to clean the environment and minimize adverse impact to third parties.

Private Sector

Owners and operators of a UST or a HOT are directly affected by the implementation of these regulations since they constitute a portion of the regulated community. The private sector may pay fees based upon the types of product stored in their underground storage tanks and the cost of necessary services supplied by certified companies. To offset this increase in costs the private sector shall receive up to \$1 million in coverage in the event of a release.

Paperwork

This proposed rulemaking will affect all UST owners and operators and certified companies in this Commonwealth. There will be additional paperwork relating to payment of fees and claims made by a participant. However, the Fund is developing electronic commerce capabilities to minimize paperwork burdens. A participant can choose which method (hard copy or electronic commerce) best meets the participant's individual business needs for paying fees, reviewing transactions and facility information, and communicating with the Fund.

Effectiveness/Sunset Date

This proposed rulemaking will become effective upon final adoption and publication in the *Pennsylvania Bulletin* as a final rulemaking. No sunset date is being assigned.

Contact Person

Questions or comments regarding the proposed rulemaking may be addressed in writing to Peter J. Salvatore, Regulatory Coordinator, 1326 Strawberry Square, Harrisburg, PA 17120, within 30 days following the publication of this notice in the *Pennsylvania Bulletin*. Questions or comments may also be e-mailed to psalvatore@state.pa.us or faxed to (717) 772-1969.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on December 12, 2000, the Insurance Department submitted a copy of this proposed rulemaking to the Independent Regulatory Review Commission (IRRC). In accordance with section 5(f) of the Regulatory Review Act (71 P. S. § 745.5(f)), the Insurance Department did not submit the proposed rulemaking to the Chairpersons of the Senate Committee on Environmental Resources and Energy and the House Environmental Resources and Energy Committee due to the adjournment of the legislative session sine die. The Insurance Department will submit the proposed rulemaking to the standing committees, once designated, in accordance to section 5(a) and (e).

In addition to the submitted proposed rulemaking, the Insurance Department has provided IRRC with a copy of a detailed Regulatory Analysis Form prepared by the

agency in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of the material is available to the public upon request.

If IRRC has objections to any portion of the proposed rulemaking, it will notify the Insurance Department within 10 days after the close of the Committees' review period. The notification shall specify the regulatory review criteria that have not been met by that portion. The Regulatory Review Act specifies detailed procedures for the agency, the Governor and the General Assembly to review these objections before final-form publication of the rulemaking.

M. DIANE KOKEN,
Commissioner

E. BRUCE SHELLER,
Insurance Chair; Underground Storage Tank Indemnification Board

Fiscal Note: 11-179. No fiscal impact; (8) recommends adoption.

Annex A

**TITLE 25. ENVIRONMENTAL PROTECTION
PART VIII. UNDERGROUND STORAGE TANK
INDEMNIFICATION BOARD**

(Editor's Note: As part of this proposed rulemaking, the Board proposes to delete the following sections which appear in 25 Pa. Code pages 971-1—975-2, serial pages (222039)—(222042), (199559)—(199566), (222043), (222045) and (222046).

§§ 971.1—971.4. (Reserved).

§§ 973.1—973.12. (Reserved).

§§ 975.1—975.6. (Reserved).

The following chapter is new and is printed in regular type to enhance readability.)

**CHAPTER 977. UNDERGROUND STORAGE TANK
INDEMNIFICATION FUND**

Subchapter A. GENERAL PROVISIONS

Sec.	
977.1.	Purpose.
977.2.	Scope.
977.3.	Applicability.
977.4.	Definitions.

§ 977.1. Purpose.

This chapter sets forth the requirements that participants in the Fund shall satisfy to be eligible for Fund coverage of corrective action costs, bodily injury and property damage.

§ 977.2. Scope.

This chapter addresses the establishment and collection of fees, the claims procedures, the optional heating oil tank program and the dispute procedures of the Fund.

§ 977.3. Applicability.

This chapter applies to owners and operators of USTs, owners and operators of HOTs that elect to participate in the Heating Oil Tank Optional Program, certified companies and distributors.

§ 977.4. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

Act—The Storage Tank and Spill Prevention Act (35 P. S. §§ 6021.101—6021.2104).

Activity—Installing, making major modifications to or removing all or part of a storage tank system or storage tank facility.

Activity fee—The per tank fee assessed upon a certified company for all activities on a UST or a HOT calculated in accordance with section 705(d)(1) of the act (35 P. S. §§ 6021.705(d)(1)) and § 977.19 (relating to certified company fees).

Board—The Underground Storage Tank Indemnification Board.

Bodily injury—Physical injury, sickness, disease or death sustained by a third party, resulting from a release from a UST or a HOT, or a certified company activity.

Capacity fee—The fee assessed upon an owner or operator, calculated in accordance with section 705(d)(2) of the act and § 977.18 (relating to capacity fee payment procedures).

Certification fee—The annual fee assessed upon a certified company which performs tank-handling activities on a UST, calculated in accordance with section 705(d)(1) of the act and § 977.20(a) (relating to certified company fee, certification fee and activity fee payment procedures).

Certified company—An entity, including, but not limited to, a sole proprietorship, a partnership or a corporation, which is authorized by this title or the DEP to conduct tank-handling activities, tightness testing activities or inspection activities using certified installers, certified inspectors or both.

Certified company fee—The fee assessed upon a certified company calculated in accordance with section 705(d)(1) of the act and § 977.20(a).

Certified tank installer—A person certified by the DEP to perform tank-handling activities on a UST or a HOT.

Claim—A request for coverage and reimbursement from the Fund which is made by the participant that has incurred, or will incur, corrective action costs or liability for bodily injury or property damage caused by a release.

Claim investigation—The obtaining and reviewing of information concerning a reported claim including:

- (i) Verbal or written statements.
- (ii) Conducting on site visits and any information obtained from these visits.
- (iii) Any other relevant information.

Corrective action costs—Reasonable and necessary expenses for corrective action, as defined in the act, incurred by an owner or operator in response to a confirmed underground storage tank release as specified in regulations promulgated by the DEP. The term does not include the cost of upgrading, routine inspections, investigations or permit activities not associated with a release.

DEP—The Department of Environmental Protection of the Commonwealth.

Defense costs—Expenses incurred by the Fund in the investigation, settlement or defense of a specific claim, including fees of attorneys that the Fund retains and other litigation expenses.

Discount—The amount retained by distributors who collect the gallon fee in accordance with § 977.22 (relating to fee dispute procedure).

Distributor—An intermediary that retains title to a regulated substance prior to delivery, and which delivers that substance into a UST.

Distributor delivery invoice—The document supplied by the distributor to a UST owner or operator which identifies the number of gallons of regulated substance delivered into a UST and the total gallon fee to be paid.

EPA—The United States Environmental Protection Agency.

Fund—The Underground Storage Tank Indemnification Fund.

Gallon fee—The fee assessed upon a UST owner or operator on regulated substances placed into a UST. The gallon fee is calculated by multiplying the number of gallons of regulated substance entering a UST by the unit charge in § 977.12 (relating to owner and operator fees).

Gallon fee statement—A form supplied by the Fund to a distributor or to a UST owner or operator upon which the assessed gallon fee is noted, and which is returned to the Fund with the remittance.

HOT—Heating oil tank—An underground heating oil tank not regulated under regulations promulgated by DEP, with a capacity of 3,000 gallons or greater used for storing heating oil products for use on the premises.

Nonretail bulk storage UST—A UST which is not used for dispensing gasoline to end-users.

Operator—Includes any of the following:

(i) A person who manages, supervises, alters, controls, or has responsibility for the operation of a UST.

(ii) A person who manages, supervises, alters, controls, or has responsibility for the operation of a HOT, and elects to participate in the Heating Oil Tank Optional Program.

Owner—Includes any of the following:

(i) A person who owns a UST storing regulated substances on or after November 8, 1984.

(ii) A person who owns a UST at the time all regulated substances were removed when removal occurred prior to November 8, 1984.

(iii) A person who owns a HOT and elects to participate in the Heating Oil Tank Optional Program.

Participant—Includes any of the following:

(i) An owner or operator of a UST.

(ii) An owner or operator of a HOT.

(iii) A certified company.

Property damage—Damage to the property of third parties that includes:

(i) Destruction of, contamination of, or other physical harm to real property or tangible personal property, including the resulting loss of use of that property which occurred from a release from a UST on or after February 1, 1994, or a release from a HOT on or after the date of election of coverage.

(ii) Loss of use of real property or tangible personal property that is not physically injured, destroyed or contaminated, but has been evacuated, withdrawn from use, or rendered inaccessible because of a release from a UST which occurred on or after February 1, 1994, or a release from a HOT on or after the date of election of coverage.

Regulated substance—

(i) An element, compound, mixture, solution or substance that, when released into the environment, may present substantial danger to the public health, welfare or the environment, and which is:

(A) Any substance defined as a hazardous substance in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C.A. § 9601), but not including substances regulated as a hazardous waste under Subtitle C of the Resource Conservation and Recovery Act of 1976 (42 U.S.C.A. §§ 6921–6931).

(B) Petroleum, including crude oil or a fraction thereof and hydrocarbons which are liquid at standard conditions of temperature and pressure (60° and 14.7 pounds per square inch absolute), including oil, petroleum, fuel oil, oil sludge, oil refuse, oil mixed with other nonhazardous wastes and crude oils, gasoline, and kerosene.

(C) Other substances determined by DEP by regulation whose containment, storage, use or dispensing may present a hazard to the public health and safety or the environment, but not including gaseous substances used exclusively for the administration of medical care.

(ii) The term does not include the storage or use of animal waste in normal agricultural practices.

Release—

(i) Spilling, leaking, emitting, discharging, escaping, leaching or disposing from a UST or a HOT into surface waters and groundwaters of this Commonwealth or soils or subsurface soils in an amount equal to or greater than the reportable release quantity determined under section 102 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C.A. § 9602), and regulations promulgated thereunder, or an amount equal to or greater than a discharge as defined in section 311 of the Federal Water Pollution Control Act (33 U.S.C.A. § 1321), and regulations promulgated thereunder.

(ii) The term also includes any spilling, leaking, emitting, discharging, escaping, leaching, or disposing from a UST or a HOT into a containment structure or facility that poses an immediate threat of contamination of the soils, subsurface soils, surface water or groundwater.

Security—A bond of the Commonwealth or the United States, a surety bond or an irrevocable letter of credit.

Statement—A document supplied by the Fund to the participant which documents the appropriate fees.

Subrogation—The right of the Fund to pursue a claim against a third party when the participant has been indemnified by the Fund.

Suit—A civil action instituted against the participant for bodily injury or property damage resulting from a release.

Tank fee—The fee assessed upon a UST owner or operator whose tanks store regulated substances, which is calculated by multiplying the number of the USTs owned or operated by the per tank charge in § 977.12.

UST—Underground Storage Tank—

(i) Any one or a combination of tanks (including underground pipes connected thereto) which are used to contain an accumulation of regulated substances, and the volume of which (including the volume of underground pipes connected thereto) is 10% or more beneath the surface of the ground.

(ii) The term does not include:

(A) Farm or residential tanks of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes.

(B) Tanks used for storing heating oil for consumptive use on the premises where stored unless they are specifically required to be regulated by Federal law.

(C) A septic or other subsurface sewage treatment tank.

(D) A pipeline facility (including gathering lines) regulated under:

(I) The Natural Gas Pipeline Safety Act of 1968, Pub.L. No. 90-481, 82 Stat. 720 (49 U.S.C.A. App. §§ 1671—1687).

(II) The Hazardous Liquid Pipeline Safety Act of 1979, Pub.L. No. 96-129, 93 Stat. 989 (49 U.S.C.A. § 2001—2015).

(E) An interstate or intrastate pipeline facility regulated under state laws comparable to the provisions of law in subparagraph (iv).

(F) Surface impoundments, pits, ponds or lagoons.

(G) Stormwater or wastewater collection systems.

(H) Flow-through process tanks.

(I) Liquid traps or associated gathering lines directly related to oil or gas production and gathering operations.

(J) Storage tanks situated in an underground area (such as a basement, cellar, mine working, drift, shaft or tunnel) if the tank is situated upon or above the surface of the floor.

(K) Except for tanks subject to the requirements of 40 CFR Part 280 (relating to technical standards and corrective action requirements for owners and operators of UST), tanks regulated under the Solid Waste Management Act (35 P. S. §§ 6018.101—6018.1003), including piping, tanks, collection and treatment systems used for leachate, methane gas and methane gas condensate management.

(L) A UST whose capacity is 110 gallons or less.

(M) Tanks containing radioactive materials or coolants that are regulated under The Atomic Energy Act of 1954 (42 U.S.C.A §§ 2011—2297).

(N) A wastewater treatment tank system.

(O) Equipment or machinery that contains regulated substances for operational purposes such as hydraulic lift tanks and electrical equipment tanks.

(P) A UST that contains a de minimis concentration of regulated substances.

(Q) An emergency spill or overflow containment UST system that is expeditiously emptied after use.

(R) A UST that is part of an emergency generator system at nuclear power generation facilities regulated by the Nuclear Regulatory Commission under 10 CFR Part 50, Appendix A (relating to general design criteria for nuclear power plants).

(S) Other tanks excluded by policy or regulations promulgated under the act.

Waste oils—An accumulation of oils from several sources, including the following:

(i) Water emulsified in oil.

(ii) The reaction of incompatible oils that have been mixed.

(iii) Foul or wet oil and sludge received from receipt operations.

(iv) Sludges or bottom sediment accumulating in the bottoms of storage tanks after a significant period of time.

(v) Oil which has been spilled and then recovered from sumps, basins or other spaces.

(vi) Oil contaminated by gasoline or other petroleum products.

Wholesale distribution UST—A UST used for intermediate storage of gasoline prior to delivery into a UST that directly serves end users.

Subchapter B. FEES AND COLLECTION PROCEDURES

Sec.	
977.11.	Fund fees.
977.12.	Owner and operator fees.
977.13.	Tank fee payment procedure.
977.14.	Gallon fee payment procedure.
977.15.	Gallon fee discount for distributors.
977.16.	Posting and collecting security.
977.17.	Security for payment of gallon fee.
977.18.	Capacity fee payment procedure.
977.19.	Certified company fees.
977.20.	Certified company fee, certification fee and activity fee payment procedures.
977.21.	Penalty for late payment of fees.
977.22.	Fee dispute procedure.
977.23.	Recordkeeping responsibilities.
977.24.	Audit of records.

§ 977.11. Fund fees.

The fees in this subchapter are established and assessed by the Board to finance the Fund.

§ 977.12. Owner and operator fees.

(a) *Maximum fees.* The Board may charge and modify fees, not to exceed the maximum fees established in this section, based on an annual actuarial review. The Fund shall publish the annual fee in the *Pennsylvania Bulletin* at least 30 days prior to the effective date of the scheduled fee change.

(b) *Tank and gallon fees.* A UST owner or operator storing gasoline, new motor oil, hazardous substances, gasohol, aviation fuel, mixture, farm diesel and other types of substances based on the tank registration information maintained by DEP may be assessed the following fees:

(1) *Tank fee.* A tank fee not to exceed a maximum fee of \$100 per UST per year.

(2) *Gallon fee.* A gallon fee on all regulated substances entering a UST not to exceed a maximum fee of 2¢ per gallon.

(c) *Nonretail bulk storage.* Total fees paid by an owner or operator of a nonretail bulk storage or wholesale distribution UST storing gasoline are calculated using the method described in subsection (b) and are capped at \$5,000 per UST per year in accordance with section 705(d)(3) of the act (35 P. S. § 6021.705(d)(3)).

(d) *Capacity fee.* An owner or operator which stores regulated substances including diesel, heating oil, used motor oil, kerosene and unknown substances based on the tank registration information maintained by the DEP may be assessed a capacity fee not to exceed a maximum fee of 15¢ per gallon of capacity, which amount is calculated in accordance with section 705(d)(2) of the act.

(e) *Changes to applicability of fees to particular substances.* The Board may establish, by publishing a notice in the *Pennsylvania Bulletin*, any changes regarding which substances are assessed a tank fee, a capacity fee or a gallon fee.

§ 977.13. Tank fee payment procedure.

(a) The Board may charge a per tank fee to a UST owner or operator.

(b) The tank fee shall be calculated as set forth in § 977.12 (relating to owner and operator fees)

(c) The UST owner or operator shall pay the tank fee on or before the fee payment due date on the statement.

§ 977.14. Gallon fee payment procedure.

(a) A distributor shall collect any gallon fee directly from a UST owner or operator. If a UST owner or operator pays the fee, but a distributor fails to remit the fee, a UST owner or operator, upon proof of payment, will be eligible for Fund coverage. A distributor who fails or refuses to remit fees shall be subject to sanctions as provided in § 977.16 (relating to posting and collecting security).

(b) On or before the last day of each month, a distributor shall remit to the Fund any collected gallon fees, less the discount described in § 977.15 (relating to gallon fee discount for distributors). A distributor shall submit a completed gallon fee statement to the Fund on a monthly basis to document the amount of product distributed. The gallon fee will be based on the amount of regulated substance delivered into a UST by a distributor in the preceding month.

(c) A distributor shall record the number of gallons delivered on the delivery invoice, the receipt or another form which documents the date and amount of regulated substance delivered. A distributor shall provide a copy of this document to a UST owner or operator at the time of delivery. The number of gallons recorded on each delivery invoice shall be used to calculate the total number of gallons on the gallon fee report form for the preceding month. A distributor shall use the total of gallons recorded to calculate the gallon fee.

(d) A distributor located outside the territorial boundaries of this Commonwealth may collect and remit gallon fees upon proof that a performance bond by a licensed company has been secured and maintained in the amount of \$1 million. If a UST owner or operator is using an out-of-State distributor that chooses not to collect the fees, the UST owner or operator shall notify the Fund and shall remit fees to the Fund.

(e) A UST owner or operator who pays the gallon fee to the Fund shall pay the fees directly to the Fund and record deliveries in accordance with subsections (a)—(d). A UST owner or operator who does not receive regulated substances from a distributor shall notify the Fund and pay the fee directly to the Fund.

(f) If a UST owner or operator fails or refuses to pay the gallon fee, by the due date, a distributor shall provide the Board in writing with the following information: the name and address of the owner or operator, the street address of the UST location, the point of contact for the distributor, product delivery dates and the amount of gallon fee not paid.

(g) If the Board determines that a distributor is ineligible, in accordance with § 977.16 to collect and remit the gallon fee in accordance with § 977.12 (relating to owner and operator fees), a UST owner or operator shall, after

notification of the distributor's status by the Board, pay the fee directly to the Fund following the procedures in subsections (a)—(e).

(h) A UST owner or operator with tanks used for nonretail bulk storage or wholesale distribution of gasoline is not required to pay more than \$5,000 per tank per year in per gallon fees. See section 705(d)(3) of the act (35 P. S. § 6021.705(d)(3)).

§ 977.15. Gallon fee discount for distributors.

(a) The net monthly gallon fee remitted to the Fund by a distributor under § 977.14 (relating to gallon fee payment procedures) shall be the gallon fee less a discount computed as follows: 1% multiplied by the gallon fee collected.

(b) The gallon fee discount will not be allowed when the gallon fee payment is received by the Fund after the due date.

§ 977.16. Posting and collecting security.

(a) *Requirement to post security.*

(1) A distributor shall remit fees on or before the last day of each month. Fees shall be calculated based on the quantity of the regulated substance distributed by the distributor in the preceding month. A distributor shall be considered delinquent if fees are not received by the Fund within 45 days after the end of the calendar month in which the product was delivered.

(2) A distributor shall post security for a minimum of 12 months following a delinquency.

(3) Following the posting of security, the Fund will have recourse against the security if the distributor fails to timely remit to the Fund, all or part of the gallon fee due to the Fund.

(4) The form of security and the calculation of the amount of security shall be as set forth in § 977.17 (relating to security for payment of gallon fees).

(b) *Collecting posted security.*

(1) For any delinquent payment the Fund may make demand for payment upon the distributor's surety or guarantor for payment of the full amount due the Fund.

(2) The distributor shall post replacement security within 5 days after collection of the posted security. A distributor who fails or refuses to post replacement security is ineligible to collect the fees of the Fund.

§ 977.17. Security for payment of gallon fee.

(a) The value of the security posted by a distributor shall be calculated by multiplying the gallon fee as set forth in § 977.12 (b)(ii) (relating to owner and operator fees) by the number of gallons of regulated substance (except heating oil and diesel fuel products) distributed over the 3-month period in the past calendar year in which the distributor distributed the greatest volume of regulated substance.

(b) The Fund will accept only payment bonds issued by surety companies licensed to do business in this Commonwealth.

(c) Negotiable securities of the United States or the Commonwealth may be used in lieu of a surety bond if the face value of the security is not less than the amount of the security required. The securities shall be held by the State Treasurer.

(d) Bank letters of credit submitted as collateral shall be subject to the following conditions:

(1) The letter of credit shall be a standby or guarantee letter of credit issued by a Federally insured or equivalently protected bank or banking institution authorized to do business in this Commonwealth.

(2) The letter of credit shall be irrevocable and shall be so designated. The letter of credit shall name the Fund as the beneficiary and shall be payable to the Fund. The Fund may accept a letter of credit for which a limited time period is stated if the following conditions are met and are stated in the letter:

(i) The letter of credit is automatically renewable for additional time periods unless the bank gives at least 90 days prior written notice to both the Fund and the owner or operator, of its intent to terminate the letter of credit at the end of the current time period.

(ii) The Fund may draw upon the letter of credit before the end of its time period, if the distributor is required to post security under § 977.16 (relating to posting and collecting security) and has failed to replace the letter of credit with other acceptable means of compliance in accordance with section 215 of the Oil and Gas Act (58 P. S. §§ 601.215) within 30 days of the bank's notice to terminate the letter of credit.

(iii) A distributor will notify the Fund within 30 days of the bank's notice to terminate the letter of credit.

(3) The letter of credit shall be governed by the *Uniform Custom and Priorities for Accounting Credits*, International Chamber of Commerce, Publication Number 400 (1983 edition), and the laws of the Commonwealth, including 13 Pa.C.S. § 5101 (relating to letters of credit).

(4) The Fund will not accept a letter of credit from a bank, which has failed or refused to pay, in full, on a letter of credit previously submitted as collateral to the Fund.

(5) The Fund will not accept a letter of credit that contains rights of set-off, or liens in favor of the issuing bank.

(e) If the Fund collects an amount under the letter of credit in excess of the fees due, following failure of the distributor to replace the letter of credit after demand by the Fund, the Fund will hold the excess proceeds as cash collateral. The distributor may obtain the excess after the distributor has submitted, and the Fund has approved, a bond or other form of security posted in compliance with this section.

§ 977.18. Capacity fee payment procedure.

(a) The Fund may charge the capacity fee to an owner or operator.

(b) The capacity fee shall be calculated as set forth in § 977.12(d) (relating to owner and operator fees).

(c) An owner or operator shall pay, on or before the due date indicated on the statement, the full amount of the capacity fee or a monthly payment of 1/12 of the total capacity fee due.

§ 977.19. Certified company fees.

(a) *Maximum fee.* The Board may charge and modify fees, not to exceed the maximum fees established in this section, based on an annual actuarial review. The Fund shall publish the annual fee in the *Pennsylvania Bulletin* at least 30 days prior to the effective date of the scheduled fee change.

(b) *Certified company fee.* Certified companies may be required to pay to the Fund a certified company fee not to exceed a maximum fee of \$2,000 per year.

(c) *Certification fee.* Certified companies which perform tank-handling activities on a UST as described in this subsection, may be required to pay to the Fund an annual certification fee for each of the certifications held for each of the certified installers, based on the certification information maintained by the DEP:

(1) Installation and modification certification (UMX) fee not to exceed a maximum fee of \$100.

(2) Removal certification (UMR) fee not to exceed a maximum fee of \$50.

(3) Tightness Tester certification (UTT) fee not to exceed a maximum fee of \$25.

(4) Storage tank liner certification fee (TL) not to exceed a maximum fee of \$100.

(d) *Activity fee.* A per tank activity fee may be assessed on all activities on a UST or a HOT. The tank installer must complete an activity fee form for each activity. These forms and the activity fees shall be submitted to the Fund 30 days prior to the commencement of the activity. The fees are as follows:

(1) Installation Activity Fee not to exceed a maximum fee of \$100.

(2) Major Modification Activity Fee not to exceed a maximum fee of \$100.

(3) Removal Activity Fee not to exceed a maximum fee of \$100.

§ 977.20. Certified company fee, certification fee and activity fee payment procedures.

(a) *Certified company fee and certification fee payment procedures.*

(1) This section applies to a certified company that performs installations, major modifications, or removals of a UST or a HOT.

(2) A certified company shall pay the certified company fee and the certification fee to the Fund on or before the due date on the statement.

(3) The assessed fees shall be calculated as set forth in § 977.19 (relating to certified company fees).

(4) A certified company shall pay, by the due date indicated on the statement, the full amount of the fee or a monthly payment of 1/12 of the total certified company fee and certification fee.

(b) *Activity fee payment procedures.*

(1) This section applies to a certified company that performs installations, major modifications, and removals of a UST or a HOT.

(2) The certified company shall submit any required installation, modification and removal fees on a form provided by the Fund for each facility where the certified company is performing an activity.

(3) The certified company shall submit the form and activity fee at least 30 days prior to the inception of the tank-handling activity.

(4) The activity fee shall be calculated as set forth in § 977.19(d) (relating to certified company fees).

§ 977.21. Penalty for late payment of fees.

Failure or refusal of a participant to pay the fee or a part of the fee by the date established by the Board for the payment of fees may result in a penalty of 5% of the amount due which shall accrue on the first day of delinquency. Thereafter, on the last day of each month

during which a part of a fee or a prior accrued penalty remains unpaid, an additional 5% of the then unpaid balance shall accrue in accordance with section 705(e) of the act (35 P. S. § 6021.705(e)).

§ 977.22. Fee dispute procedure.

(a) *General disputes.* The participant or a distributor that disputes the amount of an assessed fee may obtain review by filing a complaint with the Fund's Executive Director following the procedure established in § 977.61 (relating to dispute procedures).

(b) *Change in tank ownership.* If a change in the ownership of a UST occurs and the prior owner failed to pay assessed fees, the current owner may file an affidavit supplied by the Fund to establish date of ownership. The Fund may waive unpaid assessed fees up to and including the date of purchase of a UST. Coverage for releases occurring on or after the date of ownership may be considered for Fund coverage, based on the eligibility requirements as found in § 977.31 (relating to eligibility requirements).

§ 977.23. Recordkeeping responsibilities.

(a) An owner or operator shall maintain for 3 years documents necessary to verify the payment of the gallon, capacity, and tank fees. At a minimum, these records shall include:

- (1) Distributor delivery invoices.
- (2) Financial records documenting payment of fees.
- (3) Regulated substance inventory documents.
- (4) Copies of the statement for a gallon, capacity, or tank fee.

(b) A distributor shall maintain for a minimum of 3 years documents necessary to verify the number of gallons of regulated substances delivered into a UST. Records shall be maintained by customer account and shall include at a minimum:

- (1) Distributor delivery invoices.
- (2) Financial records, by customer account, documenting payment of the gallon fee.
- (3) Financial records pertaining to remittance of the gallon fee by distributor.
- (4) Regulated substance inventory records.
- (5) Copies of the Fund's gallon fee statement.

(c) A certified company shall maintain for 3 years documents necessary to verify the company certification and the number of installer certifications held by the employees of the company for the installation, major modification, and removal of a UST or a HOT. This documentation shall include, at a minimum:

- (1) Copies of DEP company certification and tank installer certificates.
- (2) Financial records documenting payment of fees to the Fund.

(d) A certified company shall maintain documents necessary to verify the number of installations, modifications, and removal activities performed on a UST or a HOT. This documentation shall include, at a minimum:

- (1) Copies of the tank activity report form originally submitted to DEP.
- (2) Financial records documenting payment of fees to the Fund.

(e) Documents identified in this section shall be made available to the Fund upon request.

§ 977.24. Audit of records.

The Fund may require audits of the participant or a distributor to protect the rights and responsibilities of the Fund.

Subchapter C. COVERAGE AND CLAIMS PROCEDURES

Sec.	
977.31.	Eligibility requirements.
977.32.	Participant cooperation.
977.33.	Fund coverage and exclusions.
977.34.	Claims reporting.
977.35.	Third-party suit.
977.36.	Corrective action payments.
977.37.	Priority of payment.
977.38.	Primary coverage.
977.39.	Claim dispute procedures.
977.40.	Subrogation for corrective action cost.

§ 977.31. Eligibility requirements.

(a) To be eligible for Fund coverage, the participant shall meet the following eligibility requirements as set forth in section 706 of the act (35 P. S. §§ 6021.706):

- (1) The participant is potentially liable for the corrective action costs, bodily injury or property damage.
- (2) The current fee required under section 705 of the act (35 P. S. § 6021.705) has been paid.
- (3) A UST or HOT has been registered in accordance with the requirements of section 503 of the act (35 P. S. § 6021.503).

(4) The participant has obtained the appropriate permit or certification, if required under sections 108, 501 and 504 of the act (35 P. S. §§ 6021.108, 6021.501 and 6021.504).

(5) The release that is the subject of the claim occurred after the date established by the Board for payment of the fee required by section 705(d) of the act (35 P. S. § 6021.705(d)). This date is established as February 1, 1994.

(6) The participant cooperates, as defined in § 977.32 (relating to participant cooperation), with the Fund in its eligibility determination process, claims investigation, the defense of any suit, the pursuit of a subrogation action and other matters as requested.

(7) The participant has met the notification requirements of § 977.34 (relating to claims reporting).

(8) If the claimant is a certified company, the company conducted a tank-handling activity on a UST or a HOT from which the release occurred.

§ 977.32. Participant cooperation.

(a) At a minimum, the participant shall cooperate by:

(1) Providing all information requested by the Fund including tank system design documents, inventory records, tank tightness test results, contracts, and other information pertinent to a claim within 30 days of the request of the Fund, or additional time as set by the Fund.

(2) Permitting the Fund or its agent to inspect, sample, and monitor on a continuing basis the property or operation of the participant.

(3) Providing access to interview employees, agents, representatives, or independent contractors of the participant; and to review any documents within the possession, custody or control of the participant concerning the claim.

(4) Submitting, and requiring employees, consultants, and other interested parties subject to its control to submit, to an examination under oath upon the request of the Fund.

(5) Obtaining competitive proposals for work to be performed when requested by the Fund.

(b) The participant shall cooperate in all respects with the Fund, its investigators, attorneys, and agents during the investigation and resolution of a claim, including the defense of a suit, as provided in § 977.35 (relating to third-party suit) and any subrogation action as provided in § 977.40 (relating to subrogation for corrective action cost).

(c) Lack of cooperation by the participant with the Fund or its investigators, attorneys, or agents may result in denial of the claim or cessation of further payments on a claim.

§ 977.33. Fund coverage and exclusions.

(a) *Fund coverage.*

(1) *Corrective action.* The Fund shall indemnify an eligible owner or operator for up to the available coverage limit, for reasonable and necessary corrective action costs.

(2) *Bodily injury or property damage.* The Fund shall indemnify the eligible participant, up to the available coverage limit, for bodily injury and property damage.

(i) The Fund may defend any suit against the eligible participant. The cost of this defense does not reduce Fund coverage limits.

(ii) Punitive or exemplary damages awarded against the participant as a result of a suit are excluded from Fund coverage.

(3) *Deductible.* Payment of a claim for corrective action costs shall be subject to a deductible in an amount not less than \$5,000 per tank per occurrence for each UST or HOT that contributed to the release. If an eligible claim for bodily injury or property damage results from the release, an additional deductible per tank per occurrence in an amount not less than \$5,000 applies to all claims in addition to the deductible for corrective action. A certified tank installer is subject to one deductible per tank per occurrence. The Fund in its discretion may pay the entire claim and seek reimbursement of the applicable deductible from the participant. The Fund shall publish the deductibles in the *Pennsylvania Bulletin* annually.

(4) *Limits of liability.* Payment of corrective action costs and bodily injury and property damage claims are subject to the following limits of liability:

(i) Payments for reasonable and necessary corrective action costs, and bodily injury or property damage may not exceed a total of \$1 million per tank per occurrence and may not exceed the annual aggregate limit.

(ii) Payments may not exceed:

(A) An annual aggregate of \$ million for each owner and operator of 100 or less UST or an owner or operator of 100 or less HOT.

(B) An annual aggregate of \$2 million for each owner or operator of 101 or more UST or an owner or operator of 101 or more HOT.

(iii) For the purpose of determining coverage limits, any release, whether sudden, accidental, intermittent or continuous will be considered one occurrence.

(iv) The Fund will only reimburse an owner or operator for reasonable and necessary corrective action costs.

(v) Damages paid to a third party for bodily injury or property damage may not exceed the amount of damages awarded by a court of competent jurisdiction or the amount agreed to by the Fund in settlement of the claim or suit resulting from a release. Under no circumstances will the Fund pay any amount in excess of the Fund's limit of liability as found in paragraph (4).

(b) *Exclusions.* Fund coverage does not apply to the following:

(1) Any release caused in whole or in part by the intentional act of the participant.

(2) Any damages which the participant is legally obligated to pay solely by reason of the assumption of liability in a contract or agreement unless the participant has paid all current and past-due fees to the Fund as required by section 705(e) of the act (35 P. S. § 6021.705(e)), and the release was not discovered or known by the participant or by any previous participant, prior to the payment of any past due fees.

(3) Any portion of a release which occurred before February 1, 1994.

(4) Any claim made against a certified company before the date of election of coverage.

(5) Any claim made against the participant for a release discovered before any required fees are paid.

(6) Default judgments.

§ 977.34. Claims reporting.

The participant shall notify the Fund within 60 days after the confirmation of a release under §§ 245.304 and 245.305 (relating to investigation of suspected releases; and reporting releases).

§ 977.35. Third-party suit.

(a) *Suit.* In addition to the requirements of § 977.32 (relating to participant cooperation), the participant shall assist the Fund in its defense of a suit. The participant shall forward to the Fund all materials including:

(1) Technical reports, laboratory data, field notes, or any other documents gathered by or on behalf of the participant to abate a release or to implement corrective action.

(2) Documentation of release detection methods, such as tank and line tightness tests or inventory records to verify that a release has taken place.

(3) Correspondence between the participant and any other persons relating to the release or claim that is the subject of the suit

(4) Demands, summons, notices, or other processes or papers filed with, in or by a court of law, administrative agency, or an investigative body relating to the release or claim.

(5) The expert reports, investigations and data collected by experts retained by the participant relating to the release or claim.

(6) Other information developed or discovered by the participant concerning the release or claim.

(b) *Legal defense undertaken by the Fund.* The Fund may settle or defend any claim for bodily injury or property damage. The Fund may assign legal counsel to defend any suit brought against the participant by a third party. The Fund will not reimburse legal fees for any firm not assigned by the Fund.

(c) *Defense and exhaustion of limits.* The Fund is not required to pay defense costs after the limit of liability is exhausted.

§ 977.36. Corrective action payments.

(a) The Fund shall make payments for reasonable and necessary corrective action costs to an owner or operator, unless a signed Authorization to Pay Form provided by the Fund has been submitted designating another person to receive Fund payments.

(b) Time and expense charges for remediation invoices shall be submitted to the Fund for all work performed. For invoices to be paid by the Fund, the invoices must be fully documented to include:

- (1) Time sheets for personnel and equipment.
- (2) Statements of work performed.
- (3) Receipts or other documentation for expendable supplies and subcontractor supplies.
- (4) A list of tests performed with costs and results for any laboratory analyses.
- (5) The owner, operator or remediation contractor shall supply rate schedules, fees for service schedules, and contracts with consultants.

(6) All subcontractor invoices.

(c) An owner or operator may request that the Fund employ an alternative remediation payment option to include pay for performance type contracts.

§ 977.37. Priority of payment.

The Fund may prioritize reimbursements. The prioritization may take into account corrective action costs and the impact of the release on human health.

§ 977.38. Primary coverage.

(a) *Primary coverage.* The Fund provides primary coverage for corrective action costs and eligible claims for personal injury and property damage due to a release from a UST or a HOT.

(b) *Combined limits.* When the Fund determines a certified company is responsible for the release that is the subject of the claim, the coverage of a certified company will be exhausted before the coverage of an owner or operator of a UST or a HOT is applied.

§ 977.39. Claim dispute procedures.

The participant, or a distributor, that disputes a determination of the Fund may obtain a review of the determination by filing an appeal with the Executive Director of the Fund by following the procedures established in § 977.61 (relating to dispute procedures).

§ 977.40. Subrogation for corrective action cost.

(a) The Fund, after any payment, shall be subrogated to all of the rights of recovery of an owner or operator against any person for the costs of remediation.

(b) If an owner or operator does not comply with the requirements of § 977.32 (relating to participant cooperation), the Fund may deny any further payments on a claim.

Subchapter D. HEATING OIL TANK OPTIONAL PROGRAM

Sec.	
977.51.	Election requirements.
977.52.	Coverage period.
977.53.	Cancellation of coverage.
977.54.	Dispute procedures.

§ 977.51. Election requirements.

To elect coverage from the Fund, a HOT owner or operator shall:

(1) Complete and submit an application form available from the Fund.

(2) Provide the Fund with a copy of a tank tightness test utilizing an EPA approved testing system, indicating a satisfactory result. The test must have been completed within the 30-day period preceding the application date.

(3) Submit a fee determined by the Fund not to exceed a maximum of \$100. The fee will be credited to the applicant's account if the application is approved or returned if the application is rejected.

(4) Pay any fee established in § 977.11 (relating to Fund fees).

§ 977.52. Coverage period.

If the Fund determines that the requirements set forth in § 977.31 (relating to eligibility requirements) have been satisfied, coverage by the Fund will be effective from the date the application is received. A HOT owner or operator will have continuous coverage provided all fees are paid within 30 days of the due date indicated on the statement provided by the Fund.

§ 977.53. Cancellation of coverage.

(a) A HOT owner or operator may cancel coverage by providing advance written notice to the Fund. Coverage will be terminated on the date notice is received by the Fund or on a later date as requested by the HOT owner or operator. Fee refunds shall be made on a pro-rata basis.

(b) The failure of a HOT owner or operator to remit fees within 30 days of the due date indicated on the statement will cause coverage to be canceled as of the due date. A fee is deemed paid on the date the payment is received by the Fund. Coverage may be reinstated as provided in section 705(e) of the act (35 P. S. § 6021.705(e)).

§ 977.54. Dispute procedures.

A HOT owner or operator who disputes a decision of the Fund may obtain review by filing a complaint with the Fund's Executive Director following the procedures set forth in § 977.61 (relating to dispute procedures).

Subchapter E. DISPUTE PROCEDURES

Sec.	
977.61.	Dispute procedures.

§ 977.61. Dispute procedures.

(a) An appeal of a decision of the Fund shall be made in writing to the Executive Director of the Fund. The appeal must be received within 35 days of the mailing date of the Fund's decision. An appeal shall contain:

- (1) The name and address of the appellant.
- (2) A statement of the facts forming the basis of the complaint.
- (3) Supporting material.

(b) An appeal of the Executive Director's decision shall be made in writing to the Board. The appeal must be received by the Board within 15 days of the mailing date of the decision. The appeal process shall be conducted in accordance with 1 Pa. Code Part II (relating to the General Rules of Administrative Practice and Procedure).

(c) An adjudication of the Board may be appealed in accordance with 2 Pa.C.S. § 702 (relating to appeals).

(d) To remain eligible for Fund coverage, disputed fees shall be paid in full during the pendency of an appeal.

(1) If a participant or a distributor prevails in the appeal, fees paid in excess of the amount determined to be due plus interest shall be refunded. Interest shall be computed at the rate determined by the Secretary of Revenue for interest payments for overdue taxes under section 806 of the Fiscal Code (72 P. S. § 806).

(2) Penalties authorized by the act or by § 977.21 (relating to penalty for late payment of fees) will be retroactive to the first day of delinquency.

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