RULES AND REGULATIONS

Title 25—ENVIRONMENTAL PROTECTION

ENVIRONMENTAL QUALITY BOARD

[25 PA.CODE CH. 245]

Storage Tank and Spill Prevention

The Environmental Quality Board (Board) by this order amends Chapter 245 (relating to administration of the storage tank and spill prevention program). This final-form rulemaking mainly concerns amendments to Subchapter D (relating to corrective action process for owners and operators of storage tanks and storage tank facilities and other responsible parties). This subchapter is commonly known as the "Corrective Action Process regulation" (CAP regulation). The CAP regulation was originally adopted at 23 Pa.B. 4033 (August 21, 1993). This final-form rulemaking contains changes necessary to update the CAP regulation because of several developments since its adoption in 1993. This final-form rulemaking also adds, modifies or deletes several definitions in Subchapter A (relating to general provisions) and makes a minor technical change in Subchapter E (relating to technical standards for underground storage tanks).

This order was adopted by the Board at its meeting of September 18, 2001.

A. *Effective Date*

These amendments will go into effect upon publication in the *Pennsylvania Bulletin* as final-form rulemaking.

B. *Contact Persons*

For further information contact Charles Swokel, Chief, Storage Tanks and Hazardous Sites Corrective Action Section, P. O. Box 8471, Rachel Carson State Office Building, Harrisburg, PA 17105-8471, (717) 783-7509; or Kurt E. Klapkowski, Assistant Counsel, Bureau of Regulatory Counsel, P. O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service by calling (800) 654-5984 (TDD users) or (800) 654-5988 (voice users). This final-form rulemaking is available electronically through the Department of Environmental Protection's (Department) website (http://www.dep.state.
pa.us).

C. *Statutory Authority*

This final-form rulemaking is being made under the authority of section 106 of the Storage Tank and Spill Prevention Act (Storage Tank Act) (35 P. S. § 6021.106), which authorizes the Board to adopt rules and regulations governing aboveground and underground storage tanks to accomplish the purposes and carry out the provisions of the Storage Tank Act; sections 301(a)(5) and 501(a)(5) of the Storage Tank Act (35 P. S. §§ 6021.301(a)(5) and 6021.501(a)(5)), which direct the Department to adopt regulations governing corrective action by responsible parties for releases from aboveground and underground storage tanks, respectively; sections 301(a)(6) and 501(a)(6) of the Storage Tank Act, which direct the Department to adopt regulations governing reporting of releases and corrective actions taken in response to releases from aboveground and underground storage tanks, respectively; section 501(a)(2) and (3) of the Storage Tank Act, which directs the Department to adopt regulations concerning release detection system operation and recordkeeping for underground storage tanks; section 501(a)(13)—(15) of the Storage Tank Act, which directs the Department to adopt regulations concerning the handling of soil and subsurface material affected by a release of a regulated substance; section 5(b)(1) of The Clean Streams Law (35 P. S. § 691.5(b)(1)), which authorizes the Department to formulate, adopt and promulgate rules and regulations that are necessary to implement the provisions of that act; section 105(a) of the Solid Waste Management Act (35 P. S. § 6018.105(a)), which requires the Board to adopt the rules and regulations of the Department to accomplish the purposes and carry out the provisions of that act; and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20), which authorizes the Board to formulate, adopt and promulgate rules and regulations that may be determined by the Board to be for the proper performance of the work of the Department.

D. *Background and Purpose*

Releases of regulated substances have occurred from thousands of storage tanks in this Commonwealth. These releases have resulted in substantial quantities of regulated substances entering the environment, including contamination of numerous public and private water supplies. The CAP regulation establishes a process under which these releases are to be reported and remediated.

As noted, the CAP regulation was originally promulgated over 8 years ago. Since that time, several developments have occurred which necessitated amending these regulations. First and foremost is the passage in 1995 of the Land Recycling and Environmental Remediation Standards Act (35 P. S. §§ 6026.101—6026.909) (Act 2), and the promulgation of regulations under that statute in 1997, codified in Chapter 250 (relating to administration of land recycling program). See 27 Pa.B. 4181 (August 16, 1997). Act 2's environmental remediation standards expressly apply to the remediation of releases under section 106(a) of Act 2 (35 P. S. § 6026.106(a)). Therefore, changes to the CAP regulation were needed to harmonize the two programs' approach to remediation of releases.

It should be noted, however, that section 904(c) of Act 2 (35 P. S. § 6026.904(c)) states:

> The environmental remediation standards established under this act shall be used in corrective actions undertaken pursuant to the [Storage Tank Act]. However, *the procedures in the [Storage Tank Act] for reviewing and approving corrective actions shall be used in lieu of the procedures and reviews required by this act.* (emphasis added).

Because of this provision in Act 2, the final-form rulemaking amends the CAP regulation to harmonize its provisions with those of Act 2, while maintaining a separate procedural system for corrective actions at regulated storage tank facilities.

Additional changes to the CAP regulation were identified by the Department as necessary as part of its review of all regulations under the commands of the Department's Regulatory Basics Initiative (RBI) and Executive Order 1996-1. Because there are counterpart Federal regulations regarding corrective actions for releases from regulated underground storage tanks at 40 CFR Part 280

(relating to technical standards and corrective action requirements for owners and operators of underground storage tanks (UST)), the Department reviewed the CAP regulation for consistency with those provisions, along with the other factors identified in the Executive Order and the RBI. Several of the changes reflect the conclusions of that review.

Third, several changes to the CAP regulation were required to harmonize the CAP regulation with Legislative changes to the Storage Tank Act (primarily the act of June 26, 1995 (P. L. 79, No. 16) (Act 16 of 1995)).

Finally, several changes in this rulemaking are simply the result of the experience of carrying out the corrective action program in this Commonwealth over the past 8 years. As the program has matured, the Department and the regulated community have worked on overcoming obstacles and identifying opportunities for improving the operation of the corrective action program. Several of these changes reflect that experience.

Comments received on the proposed rulemaking and draft final regulatory language were reviewed by the Storage Tank Advisory Committee (STAC) at its meetings on March 6, 2001, and June 6, 2001, and reviewed by a subcommittee of STAC at meetings on April 30, 2001, and May 11, 2001. STAC, which was established by section 105 of the Storage Tank Act, consists of persons representing a cross-section of organizations having a direct interest in the regulation of storage tanks in this Commonwealth. As required by section 105 of the Storage Tank Act, STAC has been given the opportunity to review and comment on these final-form regulations. Following its June 2001 meeting, STAC prepared a report indicating its support of this final-form rulemaking. A list of members of STAC may be obtained from the agency contacts identified in Section B of this Preamble.

E. *Summary of Regulatory Requirements and Changes to the Proposed Rulemaking*

A brief description of the rulemaking is as follows:

Subchapter A. General Provisions

1. *Section 245.1. Definitions.*

The final-form regulations add, modify or delete several definitions. Definitions for the terms "background," "cleanup or remediation," "contaminant," "property," "remediation standard" and "risk assessment" have been added as those terms are defined in either Act 2 or Chapter 250. Definitions for the terms "aquifer," "free product," "groundwater," "site" and "survey" have been modified to match the definitions for those terms in Act 2 or Chapter 250. The Board is deleting the term "groundwater degradation," as the term is no longer necessary after the passage of Act 2.

The definition of the term "reportable release" is modified to match the Federal definition of the term in 40 CFR Part 280, in accordance with the Department's RBI and Executive Order 1996-1. Although there is no direct definition for the term in 40 CFR 280.12 (relating to definitions), the substance of the term is outlined in 40 CFR 280.53(a)(1) (relating to reporting and cleanup of spills and overfills). The final-form regulations replace the hierarchical approach to spill or overfill amounts requiring reporting with a straight 25 gallon cutoff for petroleum releases and the CERCLA reportable quantity for hazardous substance releases. It should be noted that these amounts do not apply to underground releases, which must be reported regardless of the amount released. Also, for all releases from regulated storage tanks, the requirements of § 245.305(a) (relating to reporting releases) supersede the requirements of § 91.33 (relating to incidents causing or threatening pollution).

Two new definitions have been added in the final-form regulations at the suggestion of STAC. "Environmental media" is defined as soil, sediment, surface water, groundwater, bedrock and air. Because of multiple uses of the term in § 245.305, efficiencies of space are achieved by defining and using this single term rather than listing each environmental medium separately. This term is necessary because of the enhanced reporting requirements that have been added to the final-form rulemaking. These are discussed in this Preamble at § 245.305. The term "potential to be affected" is used in §§ 245.306 and 245.309 (relating to interim remedial actions; and site characterization) in connection with water supplies that might be impacted by a release. The term has been defined to clarify the intended target population of water supplies, and the factors that should be evaluated in identifying these water supplies for sampling during both the interim remedial action and site characterization phase of the corrective action.

Finally, the term "responsible party" is revised in accordance with amendments made to the Storage Tank Act by Act 16 of 1995. Section 503(b) of the Storage Tank Act (35 P. S. § 6021.503(b)) originally held any person who filled an unregistered storage tank potentially liable for a release from that tank. Act 16 of 1995 amended this section by limiting this "delivery liability" to tanks that never held a valid registration in any prior year. Section 303(b) of the Storage Tank Act (35 P. S. § 6021.303(b)) contains a similar provision regarding "delivery liability" for filling aboveground tanks that do not possess a current valid registration; that section was not changed by Act 16.

Subchapter D. Corrective Action Process for Owners and Operators of Storage Tanks and Storage Tank Facilities and Other Responsible Parties

1. *Section 245.304. Investigation of suspected releases.*

The amendments clarify subsection (c) to indicate that in addition to "reporting" a reportable release, corrective action must be initiated.

2. *Section 245.305. Reporting releases.*

Subsection (a) currently requires the owner or operator to verbally notify the Department of a reportable release as soon as practicable but in no case more than 2 hours after confirming a release. At 40 CFR 280.50 (relating to reporting of suspected releases), the Federal regulation allows 24 hours to notify, but requires reporting of both suspected and confirmed releases. In accordance with the RBI and Executive Order 1996-1, this subsection is modified to conform to the Federal requirement for timely reporting of releases and requires owners and operators to verbally notify the Department of reportable releases as soon as practicable but in no case more than 24 hours after the release is confirmed. For these tank releases, the requirements of § 245.305(a) supersede the requirements of § 91.33(a). The Department believes that 24 hours is a reasonable time for the initial report of a confirmed release, and does not believe that this change will result in environmental harm since interim remedial actions must be initiated immediately upon release confirmation.

In subsection (c), the phrase ". . . the contamination of surface water, groundwater, soil or sediment . . ." has been replaced with the term "affected environmental media." Environmental media is now defined in § 245.1 as "soil,

sediment, surface water, groundwater, bedrock and air." Subsection (c) has been revised to require reporting of affected environmental media and also to require reporting of impacts to water supplies, buildings, sewer or other utility lines. Impacts to water supplies and buildings, sewer or other utility lines were not specifically identified in the existing regulation. These important impacts of a release, if identified, must now be reported in the verbal and subsequent written notifications.

Subsection (d) has been modified in the final-form regulations to indicate that the initial written notification that is due within 15 days of the release confirmation must be sent to each municipality in which impacts of the release have been identified, not just the Department and the municipality in which the release itself occurred, as was previously the case.

Subsection (e) has been added to the final-form regulations and requires the responsible party to notify the Department and impacted municipality, in writing, upon discovery of a new impact. The notification is required within 15 days of discovery of the new impact. The Department's experience is that not all impacts of a release are known or evident within 15 days of the verbal notification when the initial written notification is due. The purpose of this subsection is to assure that the Department and municipal officials in impacted municipalities are updated on a more continuous basis about the impacts of a release that become known during the interim remedial action and site characterization phases of the corrective action. Only the first occurrence of an impact to a specific environmental medium, water supply, building, sewer or other utility line in each municipality needs to be reported. For example, if contamination of groundwater is discovered in a monitoring well drilled in a municipality, the Department and that municipality must be notified, in writing, of the impact to groundwater. If another well is drilled in that municipality and contaminated groundwater is also discovered, additional notification that groundwater is impacted in that particular municipality is not required. The Department is planning to revise form 2530-FM-LRWM0082 to facilitate compliance with the new reporting requirements. The revised form will be available on the Department's website or can be obtained from the persons listed in Section B of this Preamble.

Subsection (f) has been modified to indicate that each written notification required by § 245.305 must include the same information as required by subsection (c).

Subsection (g) is a new section in the final-form rulemaking and provides for an additional mechanism to assure that details of releases that pose an immediate threat to public heath and safety are communicated to the general public. The dissemination of information concerning the release may, at a minimum, take the form of a notice in a newspaper of general circulation serving the area or may involve other means of keeping the public informed on a regular basis depending on the level of severity and general public interest in details of the release. The Department could undertake this public notice, or the Department could work with the responsible party to provide this notice.

Existing subsections (e) and (f) are renumbered in the final-form rulemaking as (h) and (i), respectively.

3. *Section 245.306. Interim remedial actions.*

A new subsection (a)(4) has been added to this section of the final-form rulemaking. This subsection requires that the identification and sampling of affected water supplies and water supplies with the potential to be affected be initiated immediately as an interim remedial action. In the existing regulation, this activity is listed as an element of the site characterization. Initiation of this activity was subject to unnecessary delay until well into the site characterization phase of the corrective action. By including initiation of this activity as an interim remedial action, the identification and sampling of affected water supplies and water supplies with the potential to be affected is elevated to a more appropriate level of urgency and importance. This section also requires that a copy of the sample results must be provided to the Department and the water supply owner within 5 days of receipt by the responsible party, and emphasizes that all water supplies determined to be affected or diminished must be restored or replaced in accordance with § 245.307 (relating to affected or dimished water supplies). A definition of the term "potential to be affected" has been added to § 245.1 to help clarify how wells with the potential to be affected are defined and identified.

Act 16 of 1995 amended the Storage Tank Act to add the requirement that the Department develop regulations regarding the proper handling of soil and subsurface material affected by a release. The final-form rulemaking amends § 245.306 to reflect those statutory amendments.

First, section 501(a)(13) of the Storage Tank Act requires the minimization of the amount of soil and subsurface material affected by a release by segregating the unaffected soil and subsurface material during removal of an underground storage tank from the material affected by a release. The amendments add this requirement in subsection (b)(4).

Second, section 501(a)(15) of the Storage Tank Act requires that the person removing the material affected by a release provide to the responsible party a receipt documenting acceptance of the material at a permitted treatment or disposal facility. The amendments add a new subsection (d) to reflect this requirement.

4. *Section 245.309. Site characterization.*

The Department has changed this section to bring storage tank site characterizations into line with the requirements of Act 2.

Subsection (b) outlines the objectives of a site characterization. Paragraph (5) is added to have the responsible party determine more site-specific information during the site characterization for use in fate and transport analysis. Heavy reliance on fate and transport analysis in demonstrating attainment of certain Act 2 standards necessitates this change.

Paragraph (6) is added to indicate that the site characterization must provide sufficient information to allow selection of an Act 2 remediation standard.

Paragraph (7) has been deleted in the final-form rulemaking in response to comments.

Subsection (c) provides a list of potential tasks to satisfy the site characterization objectives. The Board has made the following amendments to subsection (c):

a. Paragraph (4) has been modified in the final-form rulemaking to mirror the requirements of § 245.306(a)(4) to emphasize that the identification and sampling of affected water supplies and water supplies with the potential to be affected must continue, as necessary, throughout the site characterization phase of the corrective action as new information is gathered and evaluated regarding the current and projected extent of contaminant migration.

b. Existing paragraphs (5) and (6) involve identifying affected populations and sensitive environmental receptors and populations and sensitive environmental receptors with the potential to be affected. Some examples are provided. The amendments replace these two activities with the single activity in paragraph (5) of "determining the location of the ecological receptors identified in § 250.311(a)" of the Act 2 regulations. Only direct impacts to the four specific receptors listed in § 250.311(a) (relating to remedial action plan) need to be assessed and addressed.

c. Added a new paragraph (11) to provide for a demonstration that groundwater is not used or currently planned to be used. This activity is necessary where the remediator intends to use the Act 2 nonuse aquifer standards.

d. Paragraph (15) currently requires the remediator to identify and apply appropriate groundwater modeling methodologies to characterize the site. The amendments rephrase this activity as "developing a conceptual site model that describes the sources of contamination, fate and transport of contaminants and potential receptors" in order to be more consistent with the terms used in Act 2. Use and discussion of groundwater models comes later in the corrective action process.

e. Deleted paragraph (18) in response to comments.

f. Added new activities in paragraph (19), "selection of a remediation standard," and paragraph (20), "if the site-specific standard is selected, performance of a risk assessment in accordance with §§ 250.601—250.606." These additions are necessary to bring the CAP regulation site characterization requirements into line with Act 2.

5. *Section 245.310. Site characterization report.*

The Board has amended this section to bring storage tank site characterization reports into line with the requirements of Act 2.

Subsection (a) provides a list of potential elements for an acceptable site characterization report. The Board has made the following changes to subsection (a):

a. Amended subsection (a)(4)(v)(C) to implement the requirements of Act 16 of 1995. This mirrors the requirement added to § 245.306(d).

b. Subsection (a)(4)(v)(F) is required to demonstrate attainment; however, the Department has deleted this subsection and addresses this requirement under § 245.310(b).

c. Moved and rewrote paragraphs (11) and (12). The impacts to ecological receptors and surface water are now reported under new paragraphs (28) and (29), respectively.

d. Revised paragraph (23) to read "a conceptual site model describing the sources of contamination, fate and transport of contaminants and potential receptors."

e. Added a new paragraph (26) to establish that the site characterization report should identify the Act 2 remediation standard that has been chosen.

f. Added a new paragraph (27) to include the Department's written determination under § 250.303 (relating to general requirements) that groundwater is not used or currently planned to be used. This should be included in the report when the nonuse aquifer standards are being utilized under the Act 2 Statewide health standard (SHS).

g. Deleted existing paragraph (28). The Board believes that the discussion of the remedial action options selected is sufficient (paragraph (30)). A new paragraph (28) has been added to identify the impacts to ecological receptors as a result of the receptor evaluation conducted in accordance with §§ 250.311 or 250.402(d) (relating to evaluation of ecological receptors; and human health and environmental protection goals).

h. Added a new paragraph (29) to identify the impacts to surface water as a result of the evaluation conducted in accordance with § 250.309 or § 250.406 (relating to MSCs for surface water; and relationship to surface water quality requirements).

i. Revised paragraph (30) to indicate that a site must be remediated as opposed to completely recovering or removing the regulated substance that was released.

j. Added a new paragraph (31) to include a risk assessment report in accordance with § 250.409 (relating to risk assessment report).

k. Added a new paragraph (32) to require demonstration that no current or future exposure pathways exist.

Subsection (b) affords the responsible party the opportunity to submit a site characterization report as the "final report," where soil is the only media of concern and all contaminated soil has been excavated as an interim remedial action. Further, this subsection is intended to allow a "closure report" to serve as the final report in localized contamination situations. This § 245.310(b) report is intended to be applicable only for use with the SHS. With this rationale in mind, the Board has made the following revisions to subsection (b):

a. Amended subsection (b), in response to comments, to clarify that this report is appropriate where soil is the only media of concern, in lieu of the proposed language "that groundwater is not a media of concern."

b. Revised subsection (b) to indicate that a site must be remediated as opposed to completely recovering or removing the regulated substance that was released.

c. In response to comments, added language to clarify that if submission of a site characterization report satisfying the requirements of § 245.310(b) is acceptable, a site characterization report satisfying the requirements of § 245.310(a) is not required.

d. With respect to the items for inclusion in the report, revised paragraph (2) to indicate that data demonstrating attainment with the SHS should be provided in accordance with Chapter 250, Subchapter G (relating to demonstration of attainment).

e. Added paragraph (3) to require explanation of the basis for selecting residential or nonresidential SHSs.

f. Added paragraph (4) to require reporting the results of the evaluation of ecological receptors conducted in accordance with § 250.311.

Subsection (c) has been changed in a significant way from both the existing and proposed regulation. In response to comments, the Department has incorporated a process for review time frames and "deemed approvals" into Chapter 245 for site characterization reports, remedial action plans and remedial action completion reports. These time frames will apply only to original reports received after the effective date of the regulation. The time frames will also apply to the review of resubmissions received in response to deficiency letters generated by the Department for these reports. This process includes review time frames for site characterization reports submit-

ted under § 245.310(b), and for site characterization reports where the site-specific standard is selected. All other site characterization reports which elect the background or SHS will be subject to review provisions upon receipt of and in conjunction with review of the remedial action plan designed to attain those standards.

Subsection (c) has therefore been amended to restrict the list of Department actions to site characterization reports submitted under § 245.310(b) or to site characterization reports where the site-specific standard is selected. The subsection has also been amended to indicate that the Department shall take one or more of the actions listed in subsection (c). One option, paragraph (3), which allows the Department to review and disapprove the report, citing deficiencies, has been added. Existing section (c)(5) has been deleted as no longer necessary since paragraph (1) provides for the same review and approval. Subsection (c)(6) has been modified to indicate that one option available to the Department is to review the site characterization report without further action. This would be the case with a report that became deemed approved.

The amendments delete existing subsection (d). Under Act 2 and Chapter 250, a responsible party is entitled to choose the remediation standard it will use when remediating a release from a storage tank.

A new subsection (d) has been added to the final-form rulemaking which sets out the review time frames that apply to site characterization reports meeting the requirements of subsection (b) or to site characterization reports where the site-specific standard is selected. Reports submitted in accordance with subsection (b) will be reviewed or deemed approved by the Department within 60 days of receipt and a site characterization report where the site-specific standard is selected will be reviewed or deemed approved within 90 days of receipt.

An important additional provision of subsection (d) is that an automatic "deemed approval" can be overridden if the Department and the responsible party agree, in writing, to an alternate time frame for review of the report. This provision has been added to accommodate responsible parties who would prefer not to receive a deemed approval, even if some extra time on the part of the Department was necessary for completing the review.

6. *Section 245.311. Remedial action plan.*

Subsection (a) has been amended to require submission of a remedial action plan within 45 days of submission of the site characterization report only in cases where the background or SHS has been selected in the site characterization report. In these cases, the site characterization report and remedial action plan will be reviewed and acted upon by the Department as one package. In cases where the site-specific standard has been selected, the remedial action plan is not due until 45 days after the responsible party has either received a written approval of the site characterization report or it has been deemed approved. This provision assures that the responsible party is not obligated to submit a remedial action plan for the site-specific standard until action on the site characterization report has occurred.

Subsection (a) also provides a list of potential elements for the remedial action plan. The Board has made the following revisions to subsection (a):

a. Revised paragraph (4) to provide for a discussion of how the remedial action will attain the selected remediation standard for the site, as opposed to how the remedial action will completely recover or remove the regulated substance that was released.

b. Added a new paragraph (5) to provide for the results of treatability, bench scale or pilot scale studies or other data collected to support the remedial action.

c. Revised paragraph (11) to provide for a description of the methodology that will be utilized to demonstrate attainment of the selected remediation standard (as opposed to the methodology that will be utilized to completely recover or remove the regulated substance that was released).

d. Added a new paragraph (12) to provide for a description of any proposed postremediation care that may be required.

The final-form rulemaking deletes subsection (b). Under Act 2 and Chapter 250, a responsible party is entitled to choose the remediation standard it will use when remediating a release from a storage tank.

The final-form rulemaking includes revisions to subsection (c), now subsection (b), which lists the Department's options upon receiving site characterization reports and remedial action plans that have selected the background or SHS. The Department's actions here mirror those in § 245.310(c), except that the options apply to both the site characterization report and remedial action plan, which will be subject to review as a single package.

A new subsection (c) has been added which, in a fashion similar to (b), specifies the Department's alternatives upon receiving a remedial action plan, which is designed to attain the site-specific standard. This separate subsection is needed here to distinguish between remedial action plans that select the background and SHS and those selecting the site-specific standard. In the latter case, the site characterization report would have already been submitted and approved, so the wording of subsection (b) would not be applicable.

A new subsection (d) has been added to indicate that where the site-specific standard is chosen, a remedial action plan is not required and no cleanup is required to be proposed or completed if no current or future exposure pathways exist.

A new subsection (e) has been added in the final-form rulemaking, which specifies that the time frame for the Department's review of a remedial action plan where the background or SHS has been selected is 60 days and 90 days for a remedial action plan where the site-specific standard has been selected. If the Department fails to approve or disapprove the plan, in writing, within the designated time, the report and plan or plan will be deemed approved. As in the case of site characterization reports, these time frames will apply only to original reports received after the effective date of the regulation. The time frames will also apply to the review of resubmissions received in response to deficiency letters generated by the Department for these reports. The "deemed approval" can be overridden if the Department and responsible party agree, in writing, to an alternate time frame for reviewing the report.

A new subsection (f) has been added at final-form rulemaking to address the Department's review time frames if site characterization reports and remedial action plans are submitted at the same time. Site characterization reports and remedial action plans selecting the background and SHS will be reviewed in 60 days, and combined reports selecting the site-specific standard will be reviewed in 90 days. If the Department does not respond in writing within the given time frame, the report and plan shall be deemed approved.

7. *Section 245.312. Remedial action.*

The amendments revise subsection (c) to indicate that remedial action progress reports are to show the progress toward attainment of the selected remediation standard (as opposed to cleanup levels established by the Department). A new paragraph (6) has been added to require specific information to be provided for fate and transport analyses. An incorrect reference that appeared in the proposed rulemaking has also been corrected.

In response to comments, the final-form rulemaking revises subsection (d) to clarify that the final remedial action progress report is to be submitted as part of the remedial action completion report.

The final-form rulemaking changes the process in subsection (e) for terminating a remedial action plan when the responsible party decides to change it for any reason. First, subsection (e)(1) of the existing regulation is deleted, as it no longer applies. Subsection (e)(1) was an option under the defunct Groundwater Quality Protection Strategy and allowed a remedial action completion report to be submitted where the cleanup levels would not be achieved.

In the proposed rulemaking, subsection (e) required the responsible party to request and receive approval from the Department prior to terminating their remedial action plan, and to submit a new or modified plan selecting a new remediation standard. In response to comments, subsection (e) has been revised in this final-form rulemaking. Subsection (e) now simply requires that the responsible party submit a new remedial action plan for review if and when a decision is made to change it. The time frames established in § 245.311(e) will apply to the review of the new plan. The approved remedial action plan may be terminated upon approval of the new plan. The new remedial action plan need only identify a new remediation standard if a different one is selected. Selection of a new remediation standard alone does not require submission of a new remedial action plan.

Subsection (f) is revised to establish the process for suspending remedial action if continued implementation of the remedial action plan will cause additional environmental harm. Subsection (f)(1), which allowed for submission of a remedial action completion report, has been deleted since it was an option under the defunct Groundwater Quality Protection Strategy.

In response to comments, subsection (f) of the proposed rulemaking has been modified to clarify that the verbal notification that the remedial action plan has been suspended is due within 24 hours of the suspension. The requirement in the proposed rulemaking that the Department must approve the suspension has been eliminated. The responsible party is now only obligated to submit a new or modified remedial action plan in accordance with § 245.311, and identify a new remediation standard, if applicable.

As originally adopted in 1993, subsection (g) required that when groundwater contamination occurred and the level of cleanup had been achieved, that groundwater be sampled quarterly for 1 year to demonstrate "attainment." Since this is an "attainment" requirement and has been superseded by the attainment requirements of the Act 2 remediation standards, this subsection has been deleted. The attainment requirements are now addressed in § 245.310(b) and § 245.313(b) (relating to remedial action completion report).

Subsection (h) is related to and follows the requirements of subsection (g). Accordingly, the Board has also deleted subsection (h).

8. *Section 245.313. Remedial action completion report.*

Subsection (a) provided for the submission of a remedial action completion report upon achieving the level of cleanup established by the remedial action plan and indicated that the report must demonstrate that the remedial goals have been achieved. This subsection is still appropriate, but it has been revised to delete the terms "level of cleanup" and "remedial goals." These terms have been replaced with "selected remediation standard" in accordance with Act 2.

The amendments delete the existing subsection (b) since it no longer applies. Subsection (b) was an option under the defunct Groundwater Quality Protection Strategy and allowed a remedial action completion report to be submitted where the cleanup levels were not achieved. The subsection has been replaced with the required contents of the remedial action completion report, including references to the specific and relevant attainment demonstration sections from Chapter 250 that must be addressed depending on which of the Act 2 remediation standards was used by the remediator. In addition, since a heavy reliance is placed on fate and transport analyses in demonstrating attainment of certain Act 2 standards, specific requirements with regard to this information have been added.

Subsection (c) lists the actions available to the Department upon submission of a remedial action completion report. The Board has changed "may" to "shall" to indicate that the Department will act on all remedial action completion reports, providing final resolution to remedial actions, or they will be deemed approved. A new paragraph (3) has been added that allows the Department to review and disapprove the remedial action completion report, citing deficiencies. Paragraph (5) has been deleted, since it does not result in a final remedial action determination by the Department. A new paragraph (6) has been added at final that allows the Department to review the remedial action completion report without further action, as would be the case if the report were deemed approved.

New subsection (d) has been added to specify the time frames for the Department's review of remedial action completion reports. Remedial action completion reports demonstrating attainment of the background or SHS will be reviewed within 60 days of receipt. Remedial action completion reports demonstrating attainment of the site-specific standard will be reviewed within 90 days of receipt. If the responsible party does not receive a written approval or disapproval of the report within the specified time frame, the report will be deemed approved. As in the case of site characterization reports and remedial action plans, these time frames will apply only to original reports submitted after the effective date of the final-form regulations. The time frames will also apply to the review of resubmissions received in response to deficiency letters generated by the Department for these reports. The "deemed approval" can be superseded if the responsible party and Department agree, in writing, to an alternative time frame for review.

9. *Section 245.314. Professional seals.*

This section has been added to require report submittals to be sealed by appropriate registered professionals where the practice of geology or engineering is performed. This requirement is in accordance with the Engineer, Land Surveyor and Geologist Registration Law (63 P. S. §§ 148—158.2).

Subchapter E. Technical Standards for Underground Storage Tanks

1. *Section 245.444. Methods of release detection for tanks.*

Section 245.444(8) provides procedures and reporting requirements for conducting leak detection on underground storage tanks using the Statistical Inventory Reconciliation (SIR) method. Section 245.444(8)(ii)(A) currently requires final reports from SIR vendors to be available within 7 days of the end of the monitoring period. The regulated community and SIR vendors have expressed an inability to thoroughly process SIR data and provide reports within this period. Operation of these rules since their adoption in October 1997 has shown that this reporting requirement simply does not allow enough time to complete the necessary SIR analysis and return the report. In addition, other states that have established reporting time periods for SIR have set this reporting requirement at 20 days. The amendments change the reporting requirement to 20 days, which should be achievable in this Commonwealth and is in line with other states' regulations.

F. *Summary of Comments and Responses on the Proposed Rulemaking*

There were four commentators to the proposed rulemaking. In general, the commentators supported the proposed rulemaking and welcomed the integration of Chapters 245 and 250.

The most significant issue raised during the public comment period was the incorporation of mandatory review times and deemed approved provisions for site characterization reports and remedial action plans. In response, the Board has amended the proposed rulemaking to include mandatory review time frames and deemed approved provisions for all of the corrective action process reports. The time frame and deemed approved provisions will apply only to new reports submitted after the effective date of the final-form regulations. Deemed approved provisions may be superseded if the Department and the responsible party agree in writing to an alternative time frame. The review time frames are as follows:

The Department will review a site characterization report submitted under § 245.310(b) within 60 days of receipt or a site characterization report submitted under § 245.310(a) selecting the site-specific standard within 90 days of receipt.

Site characterization reports submitted under § 245.310(a) for the background or SHS will be reviewed within 60 days of receipt of a remedial action plan designed to attain those standards. The review will include the remedial action plan.

Site characterization reports and remedial action plans for the background or SHS which are submitted together will be reviewed within 60 days of receipt.

The Department will review a remedial action plan designed to attain the site-specific standard within 90 days of receipt.

Remedial action completion reports for the background and SHS will be reviewed within 60 days of receipt. A remedial action completion report demonstrating attainment of the site-specific standard will be reviewed within 90 days of receipt.

Definitions—§ 245.1

In response to concerns that the proposed definition of "reportable release" might include reporting a release of petroleum of less than 25 gallons to a synthetic surface, the Board has changed the term "to the surface of the ground" to "to an aboveground surface."

The Board has not excluded a "de minimis" thickness of 1/8 inch or less from the definition of "free product" as suggested by one commentator. The definition was revised solely for consistency with terminology used in Chapter 250. Further, the Board is concerned that the suggested change would exclude accumulations of this thickness or less from any requirements for removing free product to the maximum extent practicable, which based on site-specific considerations, may be more or less than 1/8 inch, for example, on surface water.

One commentator requested defining the word "contamination" or "contaminated soil" to mean the presence of constituents exceeding the applicable Act 2 SHS levels. The Board has not made this change. Meeting the applicable Act 2 SHS levels means that contaminants have been reduced to within an acceptable risk range. It does not mean that contamination has been eliminated in its entirety. Therefore, soil, for example, which meets SHS levels, must be managed in accordance with the Department's residual waste management regulations.

One commentator suggested referencing the definitions of "aquifer," "background," "cleanup or remediation," "contaminant" and "groundwater" in section 103 of Act 2 (35 P. S. § 6026.103) rather than reiterate the definitions in the regulations. The Board considered making this change. However, the full definitions have been included to make it less cumbersome for the user who would otherwise need to consult the other reference cited.

One commentator requested explanation of the term "sufficient level of detail" as used in the definition of "survey." The Board included the phrase "at a sufficient level of detail" in the existing definition of survey to emphasize the importance of the study to the owner or operator. However, since § 245.304(d) (relating to investigation of suspected releases) begins by saying that "To overcome the presumption of liability established in § 245.303(c), the owner or operator shall affirmatively prove, by clear and convincing evidence . . .", the Board believes that the phrase "at a sufficient level of detail" is not necessary in the definition of "survey." Therefore, the phrase has been deleted.

Reporting releases—§ 245.305

One commentator requested a definition of the word "confirmation" as used in the context of "confirming" a reportable release in order to make it clear when the 24-hour reporting period begins. The question was asked: "Is it when the release is discovered by the operator or by someone walking by who reports it?"

"Confirmation" of a reportable release has been widely understood in the program to mean "verification" by the owner or operator that a release meeting the definition of a reportable release has occurred. The confirmation may be made in a number of ways including through the investigation of a suspected release, by the direct observation of a release by the owner/operator, or conceivably, by verifying a report of a release made by someone walking by. In this latter case, the 24-hour period would begin when the release was confirmed by the owner/operator, not the time it was noticed by the person walking by. The Board does not believe that it is necessary to define "confirmation," as clarity in this area has not been an issue.

Two of the commentators wanted to know how the new reporting requirement in § 245.305(a) related to The Clean Streams Law reporting requirement in § 91.33,

and one requested that the § 245.305(a) requirement apply to all discharges, including those subject to The Clean Streams Law. The time frame in § 245.305(a) is applicable to releases of regulated substances from storage tanks regulated under the Storage Tank Act. For these tank releases, the requirements of § 245.305(a) supersede the requirements of § 91.33. As stated in § 245.302 (relating to scope), the scope of Chapter 245, Subchapter D, is restricted to releases of regulated substances from storage tanks regulated under the Storage Tank Act. To mandate that all spills, discharges or releases subject to The Clean Streams Law be subject to the notification requirements of § 245.305(a) would expand the regulation beyond its authorized scope.

One commentator requested that the word "regulated" be inserted before "storage tanks" in § 245.304(a) to better clarify the intent and scope of the provision. The Board does not believe the suggestion is necessary. The scope of all provisions of Chapter 245, Subchapter D, is clearly stated in § 245.302 to be storage tanks regulated by the Storage Tank Act.

Site characterization—§ 245.309

Two of the commentators were concerned with proposed § 245.309(b)(5). This objective lists certain kinds of physical data that might be needed for later use in fate and transport analysis to demonstrate attainment of an Act 2 standard. One commentator felt that the objective erroneously assumed that a fate and transport analysis would be needed in every case, and another questioned the availability of the data and the detail required.

The final-form rulemaking does not amend this paragraph. One clear objective of a site characterization in a risk-based corrective action program is to anticipate and collect the kind of field data that may be needed to support conclusions made at the end of an investigation. Further, fate and transport analysis is required in demonstrating attainment of any Act 2 standard, although the method and form of fate and transport analysis selected will vary depending on the complexity of the release.

The primary purpose of the data is to establish reliable and accurate input parameters for mathematical models that may be used or required to support demonstrations of attainment of Act 2 standards. The number of samples collected and measurements made is site-specific and proportional to the hydrogeologic complexity of the site being characterized and the data requirements of the fate and transport analysis method chosen. Where mathematical models are not used or necessary, the importance of some parameters will be diminished.

One commentator suggested that to be consistent with harmonizing these regulations with Act 2, § 245.309(c)(18) should not be amended (as proposed), but should be deleted in its entirety. The proposed language has been deleted as suggested.

One commentator questioned what constituted "sufficient information" for selecting a remediation standard as required by § 245.309(b)(6) and (7).

Subsection (b)(6) states that one of the objectives of a site characterization is to provide the responsible party with sufficient information to select a remediation standard. What is "sufficient" is a determination to be made by the responsible party, not the Department. The responsible party gets to select the remediation standard. Failure to meet this objective could result in the selection of an unattainable or inappropriate standard for the site by the responsible party.

Subsection (b)(7) states that one of the objectives of a site characterization is to collect enough information to define and assess the relative merits of the remedial action options. To be consistent with the deletion of the proposed language in § 245.309(c)(18), the Department has deleted this objective. While a responsible party may choose to conduct this exercise, it is not required as the responsible party may choose a remediation standard without an analysis of alternatives.

Site characterization report—§ 245.310

One commentator requested assurance that changes in the proposed rulemaking would be effective only on a going-forward basis. The changes to site characterization report submissions, as well as all revisions to this regulation, will be effective upon publication in the *Pennsylvania Bulletin* as final-form rulemaking.

One commentator asked that the regulation define the consequences if a responsible party does not meet the objectives of a site characterization report. The commentator asked whether the Department would add provisions addressing a deficient site characterization report and whether the Department would notify a responsible party of any deficiencies and the procedure to correct them.

Existing § 245.310(c) lists the actions the Department may take following submission of a site characterization report. In general, site characterization reports are evaluated in terms of the validity and completeness of the elements listed in § 245.310(a), based upon the complexity of the release, rather than an evaluation of the objectives. If a responsible party fails to consider or satisfy a relevant objective, it will very likely be reflected as a deficiency in one or more of the elements necessary in the site characterization report. The Board has added a new § 245.310(c)(3), which allows the Department to disapprove the site characterization report, citing deficiencies, as one of its options.

One commentator requested clarification that if a site characterization report meeting the conditions and requirements of § 245.310(b) was submitted, a report meeting the requirements of § 245.310(a) was not needed. The Department has added wording to § 245.310(b) to clarify this concern. A site characterization is not required to be submitted under both subsections.

Two commentators requested that a cross reference be added to § 245.310(b)(4) to indicate that the evaluation of ecological receptors should be done in accordance with § 250.311. The cross reference has been added.

One commentator requested that § 245.310(b) be amended to delete the condition that a remediator prove that groundwater is not a media of concern, and insert language which applies this paragraph to sites where soil is the only media of concern. While the proposed language was not intended to imply that the responsible party must prove that groundwater is not a media of concern in every case, the language has been changed as suggested to clarify this concern.

One commentator requested that additional revisions to § 245.310(b) be made to allow a site characterization report to be submitted as a final report where groundwater can be demonstrated to achieve the SHS and increase the period of time required for submission of the site characterization report from 180 days to 1 year where a remediator chooses to achieve SHS for groundwater.

Demonstrating attainment of the SHS in groundwater normally requires 8 quarters of monitoring. Less than 8

quarters of monitoring may be allowed with written approval of the Department in accordance with § 250.704(d) (relating to general attainment requirements for groundwater). Deviation from the attainment requirements as set out in Chapter 250 is beyond the scope of this amendment.

In cases when a site characterization shows that groundwater meets SHS, a remedial action plan requesting less than 8 quarters of monitoring to demonstrate attainment can be submitted with the site characterization report. Section 245.303(e) currently provides for this combining of reports/plans. Monitoring data would then be submitted in quarterly (or at an alternative interval) progress reports with the final remedial action progress report being submitted as part of the remedial action completion report.

One commentator requested deletion or amendment of § 245.310(a) to eliminate interim site characterization reports as a generic requirement. The commentator indicated that a report might be appropriate once all remedial action is completed or, in those few cases where applicable, in conjunction with remedial action progress reports, but believed that these are special cases and should be handled as such.

On a somewhat related note, the commentator also suggested that site characterization reports and remedial action plans should be combined into a single report subject to a single Department review.

No change has been made. Section 245.303(e) already provides that the Department can accept a combined site characterization report and remedial action plan. However, the Department does not believe that the combined submission of this report/plan should be mandatory. Unlike the Act 2 program, which is largely voluntary, the CAP regulation implements a mandatory regulatory program that requires responsible parties to conduct cleanup and attain an Act 2 remediation standard. To help assure that the selected standard will be attained through the remedial action, the remedial action plan is reviewed and approved by the Department prior to its implementation. Allowing the submission of one report at the completion of remedial action would preclude the Department's review of the remedial action plan and quarterly progress reports which the Department feels is needed to fulfill its oversight role under the Storage Tank Act and assure that a cleanup standard is being attained.

Remedial action plan—§ 245.311

One commentator questioned the need and burden imposed on responsible parties by § 245.311(a)(5), which requires "the results of treatability, bench scale or pilot scale studies or other data collected to support remedial action."

Treatability studies, bench scale and pilot scale studies are generally used to evaluate experimental or innovative technologies that have little or no history of application at the field scale. The purpose of the studies is to demonstrate the feasibility or effectiveness of a new technology by testing it at a laboratory or on a small field-scale before applying the technology to the larger field problem. In some cases, these studies are reported in the scientific literature. In other cases, especially with pilot scale studies, the consultant for the responsible party or a subcontractor marketing the new technology would complete the studies. The Department believes it is important not to close the door on innovative technology, but at the same time be able to require some demonstration or documentation that the innovative technologies have merit prior to their application. In most cases, this element of the remedial action plan will not be necessary, since most remediations rely on well-established technologies.

One commentator asked whether a remedial action plan is required when the SHS is selected and no current or future exposure pathways exist. The SHS is a numeric standard. Attainment of the numeric SHS must be demonstrated regardless of whether pathways exist or not, in accordance with Chapter 250, Subchapter G.

Two commentators asked whether a remedial action plan could be denied based on which remediation standard the remediator selected. The regulations do not specify under what circumstances the Department can deny the remedial action plan.

Existing § 245.311(c), (§ 245.311(b) in the final-form rulemaking), lists the actions the Department may take upon submission of a remedial action plan. Basically, the Department looks to see if the remedy has a reasonable chance of attaining the selected standard. With conventional technologies, this should be straightforward. Since the responsible party has the option of selecting the remediation standard, the Department will not disapprove a remedial action plan based solely on the selected remediation standard.

One commentator questioned how a responsible party could show attainment of the selected standard. Attainment requirements for each remediation standard under Act 2 are set out in Chapter 250, Subchapter G. Demonstration of attainment for the remediation standard selected will be reported in the remedial action completion report as described in § 245.313(b).

One commentator stated that because Act 2 leaves the choice of remedial action to the responsible party, not to Department approval, proposed § 245.311(a)(5) should be discarded from further consideration, and existing § 245.31l(a)(5) should be deleted in its entirety.

While it is true that the responsible party chooses the remediation standard, unlike the Act 2 administrative process, the CAP regulation requires the remedial action plan to be approved by the Department prior to its implementation. Therefore, the Board believes both elements to be necessary, where appropriate. Treatability studies, bench scale and pilot scale studies are generally used to evaluate experimental or innovative technologies that have little or no history of application at the field scale. In most cases, this element of the remedial action plan will not be necessary, since most remediations rely on well-established technologies. Design and construction details are important in reviewing a remedial action plan to determine the effectiveness of the remedy.

Remedial action—§ 245.312

One commentator suggested allowing a responsible party to combine the reports required by § 245.310, relating to site characterization reports, and this section. Section 245.303(e) states the Department may waive or combine requirements. The commentator questioned whether the reports required by §§ 245.310 and 245.312 could be combined. If they could be, the commentator wondered whether Department permission would be required prior to submitting them together to the Department.

The Department believes the commentator was requesting that site characterization reports and remedial action plans (§ 245.311) be combined. Section 245.303(e) does allow for this report/plan to be a single submission.

However, the responsible party should contact the Department and agree upon a time frame for submission of the combined report/plan, unless the report/plan combination is submitted within the regulatory time frame governing the site characterization report.

Several comments addressed § 245.312(e), which deals with termination of remedial action plans. One commentator stated that while subsection (e) requires the responsible party to request termination of the remediation plan if the plan is not achieving the remediation standard, there is no time requirement for the Department to respond to the request. Another commentator requested clarification regarding subsection (e)—whether a new remedial action plan must be submitted when the remediator decided to select a more stringent remedy with no change in the remediation standard selected; and, if the new remedy could proceed without waiting for Department approval.

The Board has revised subsection (e) extensively. The proposed requirement for the responsible party to write to the Department requesting termination of the remedial action plan has been eliminated. Under the final-form regulation, when responsible parties wish to change the remedial approach, they simply submit a new or modified remedial action plan to the Department for review and approval. As indicated earlier in this section, a 60- or 90-day time frame for Department review would apply to the new or modified plan depending on the remediation standard selected. The responsible party is expected to continue to implement the existing remedial action plan until approval of the new or modified plan. Selection of a more (or less) stringent remedy would require submission of a new or modified remedial action plan. Selection of a new remediation standard, but not a change of the remedy, would not require submission of a new or modified remedial action plan.

One commentator suggested that a time limit for submission of the new or modified remedial action plan should be added to § 245.310(e). The final-from rulemaking does not add a time limit here. As with other submissions under this regulation that may be returned to the responsible party for additional information or work, the Board would prefer that the Department request resubmission of a report/plan or submission of a new report/plan within a reasonable time frame based on the particulars of the case.

One commentator requested that the final remediation action progress report should be consolidated into the remedial action completion report. Language has been added to § 245.312(d) to provide for this.

One commentator pointed out that § 245.312(e) and (f) should be structured to allow for the possibility of a change in remediation method without a change in the remediation standard. As proposed, when a responsible party notified the Department of a mid-course change in a remediation action plan, the notice would have had to include "selection of a new remediation standard." These two subsections have been revised to address this concern by indicating that it is only necessary to identify a new remediation standard, if one has been selected.

One commentator suggested that because § 245.312(g), which related to demonstrating groundwater cleanup, was being deleted, a cross reference should be added to § 250.704, which relates to general attainment requirements for groundwater.

The Department believes that the concern is accommodated in § 245.313(b), which establishes the requirements for a remedial action completion report. Section 245.313(b) cites the specific subsections in Chapter 250 that are to be addressed in the remedial action completion report for each standard. These subsections include the attainment requirements of Chapter 250, Subchapter G, which includes § 250.704.

One commentator objected to the deletion of § 245.312(g), which required only 4 quarters of groundwater monitoring, and replacing it with Act 2's general requirement of 8 quarters of monitoring to demonstrate attainment of groundwater standards.

Section 250.704(d) specifically mandates 8 quarters of monitoring as the general requirement for demonstrating attainment of an Act 2 standard in groundwater. Because releases from regulated storage tanks are subject to the standards and attainment requirements of Act 2 and Chapter 250, § 245.312(g) is deleted in the final-form rulemaking.

One commentator suggested further amendment of proposed § 245.312(f) to establish the starting point for the 24-hour deadline to report suspension of a remedial action because it was causing environmental harm. The Board has clarified this subsection by indicating that the notification is to be made to the Department within 24 hours of suspension of the remedial action plan.

G. *Benefits, Costs and Compliance*

Executive Order 1996-1 requires a cost/benefit analysis of the final-form rulemaking.

Benefits

This final-form rulemaking is primarily intended to harmonize the requirements of the CAP regulation and the requirements of Act 2 and the Chapter 250 regulations. By making these changes, the Board hopes to reduce confusion faced by responsible parties for releases from regulated storage tanks regarding what requirements they need to meet. By making the changes necessary to have the CAP regulation reflect the most recent statutory amendments affecting storage tanks, owners and operators of storage tanks can be confident that the requirements outlined in Chapter 245 represent a comprehensive overview of their responsibilities for corrective action should a release occur. Finally, the citizens of this Commonwealth should benefit through quicker and more efficient remediations occurring, along with the reuse of contaminated sites under the Act 2 program.

With the incorporation of report review time frames and deemed approved provisions, responsible parties are guaranteed an action, either approval or disapproval, from the Department regarding all corrective action process reports.

By extending the time allowed for preparing SIR reports under Subchapter E's release detection rules, this final-form rulemaking should allow for sufficient time for proper reports to be generated when tank owners use this leak detection method.

An alternative approach would have been to delete Subchapter D entirely, and simply have storage tank cleanups proceed under Act 2 and Chapter 250's procedures. Given the requirements of section 904(c) of Act 2, the Board felt that the General Assembly recognized that the procedures established for corrective actions under the Storage Tank Act were working, and so should be preserved. Therefore, this final-form rulemaking only represents the modifications needed to integrate the programs.

Compliance Costs

Persons responsible for corrective actions under the Storage Tank Act should see no net increases in compliance costs as a result of this rulemaking. Generally speaking, most requirements in this final-form rulemaking to amend the CAP regulation are already in place through statutory amendment (such as Act 2, Act 16 of 1995 and the Engineer, Land Surveyor and Geologist Registration Law) or regulations that are already in effect (such as Chapter 250). The Board does not anticipate any additional costs to the Commonwealth as a result of this final-form rulemaking. While the final regulatory language includes a commitment on the part of the Department to review corrective action process reports and plans in a timely manner, it is believed that implementation of these provisions can be handled by existing regional office staff. However, the Department acknowledges that shifting of staff in some regional offices may need to occur for effective implementation.

Compliance Assistance Plan

The Department currently operates a fairly extensive program of outreach activities designed to assist owners and operators of storage tanks and other potentially responsible parties. This program includes the *Storage Tank Monitor*, a biannual newsletter; a series of detailed fact sheets that focus on single issues in the program (such as release reporting); and seminars and training sessions presented by both central and regional office training teams on a variety of issues. The Department has also prepared a number of detailed guidance documents on specific topics to assist both program staff and regulated persons in understanding and meeting the requirements of the Storage Tank Act and Chapter 245. Department personnel regularly present and participate in program seminars jointly with the regulated community and the Underground Storage Tank Indemnification Fund (USTIF) and consults with STAC on regulatory, policy and program development. As with any new or amended regulations, the Department will make every effort to inform the regulated community and the general public about the new requirements.

The costs of corrective actions for most releases from underground storage tanks should be covered by the USTIF created by Chapter 7 of the Storage Tank Act (35 P. S. §§ 6021.701—6021.712) and administered by the Insurance Department. The Department does have a limited amount of funding under section 710(b.1) of the Storage Tank Act (35 P. S. § 6021.710(b.1)) for special environmental cleanup projects. This money is limited to use in carrying out remedial actions at sites where owners of underground storage tanks are not eligible for USTIF coverage, for remediation not completed due to financial hardship and for owners of retail gasoline facilities or commercial distribution centers that are no longer in business. Corrective actions at storage tank sites may also be eligible for funding under the programs established by Acts 2 and 4 of 1995.

Paperwork Requirements

This final-form rulemaking does require responsible parties for storage tank releases to prepare and submit to the Department and any municipality affected a release notification report where new impacts to environmental media or water supplies, buildings, or sewer or other utility lines are discovered after the initial notification already required by regulation. This notification process is already familiar to responsible parties, will not be necessary in all cases and will not pose a significant additional burden. One area where paperwork required to be submitted to the Department should decrease is in release reports. By following the Federal standard in 40 CFR 280.53, fewer release reports will be submitted to the Department, reducing the paperwork burden on the regulated community under these final-form regulations.

H. *Pollution Prevention*

"Pollution prevention (P2)" is defined as measures taken to avoid or reduce generation of all types of waste—solid/hazardous waste, wastewater discharges and air emissions—at their points of origin. It does not include activities undertaken to treat, control or dispose of pollution once it is created, such as end-of-the-stack or pipe control equipment or procedures. Because the CAP regulation only becomes applicable after a release of regulated substances occurs from a regulated storage tank, it does not generally provide P2 opportunities. It should be noted, however, that this regulation was designed to be flexible, rather than prescriptive, with the goal of having cleanups completed more quickly, thus minimizing the polluting impacts of a release. In addition, the new provision in § 245.306(b)(4) regarding segregation of soils should help to reduce the volume of contaminated soils at storage tank remediation sites.

I. *Sunset Review*

This final-form rulemaking will be reviewed in accordance with the sunset review schedule published by the Department to determine whether it effectively fulfills the goals for which it was intended.

J. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on July 11, 2000, the Department submitted a copy of the notice of proposed rulemaking, published at 30 Pa.B. 3897 (July 29, 2000), to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing these final-form regulations, the Department has considered the comments from IRRC, the Committees and the public.

Under section 5.1(d) of the Regulatory Review Act (71 P. S. § 745.5a(d)), on October 11, 2001, these final-form regulations were deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on October 18, 2001, and approved the final-form regulations.

K. *Findings*

The Board finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and regulations promulgated thereunder at 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law, and all comments were considered.

(3) These final-form regulations do not enlarge the purpose of the proposal published at 30 Pa.B. 3897.

(4) These final-form regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this Preamble.

L. *Order.*

The Board, acting under the authorizing statutes, orders that:

(a) The regulations of the Department, 25 Pa. Code Chapter 245, are amended by amending §§ 245.1, 245.304—245.306, 245.309—245.313 and 245.444 and by adding § 245.314, to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(b) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.

(c) The Chairperson shall submit this order and Annex A to IRRC and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(d) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.

(e) This order shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

DAVID E. HESS,
Chairperson

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 31 Pa.B. 6120 (November 3, 2001).)

Fiscal Note: Fiscal Note 7-355 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart D. ENVIRONMENTAL HEALTH AND SAFETY

ARTICLE VI. GENERAL HEALTH AND SAFETY

CHAPTER 245. ADMINISTRATION OF THE STORAGE TANK AND SPILL PREVENTION PROGRAM

Subchapter A. GENERAL PROVISIONS

GENERAL

§ 245.1. Definitions.

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

* * * * *

Aquifer—A geologic formation, group of formations or part of a formation capable of a sustainable yield of significant amount of water to a well or spring.

Background—The concentration of a regulated substance determined by appropriate statistical methods that is present at the site, but is not related to the release of regulated substance at the site.

* * * * *

Cleanup or *remediation*—To clean up, mitigate, correct, abate, minimize, eliminate, control or prevent a release of a regulated substance into the environment to protect the present or future public health, safety, welfare or the environment, including preliminary actions to study or assess the release.

* * * * *

Contaminant—A regulated substance released into the environment.

* * * * *

Environmental media—Soil, sediment, surface water, groundwater, bedrock and air.

* * * * *

Free product—A regulated substance that is present as a separate phase liquid; that is, liquid not dissolved in water.

* * * * *

Groundwater—Water below the land surface in a zone of saturation.

Hazardous substance storage tank system—A storage tank system that contains a hazardous substance defined in section 101(14) of CERCLA (42 U.S.C.A. § 101(14)). The term does not include a storage tank system that contains a substance regulated as a hazardous waste under Subtitle C of CERCLA, or mixture of the substances and petroleum, and which is not a petroleum system.

* * * * *

Potential to be affected—In the context of water supplies, a water supply that, by virtue of its location with respect to a release of regulated substances, is reasonably likely to be impacted by that release, based on an evaluation of the known physical and hydrogeologic environment in which the release occurred and the fate and transport properties of the contaminants released.

* * * * *

Property—A parcel of land defined by the metes and bounds set forth in the deed for that land.

* * * * *

Remediation standard—The background, Statewide health or site-specific standard, or any combination thereof, as provided for in the Land Recycling and Environmental Remediation Standards Act (35 P. S. §§ 6026.101—6026.909).

* * * * *

Reportable release—A quantity or an unknown quantity of regulated substance released to or posing an immediate threat to surface water, groundwater, bedrock, soil or sediment. The term does not include the following, if the owner or operator has control over the release, the release is completely contained and, within 24 hours of the release, the total volume of the release is recovered or removed in the corrective action:

(i) A release to the interstitial space of a double-walled aboveground or underground storage tank.

(ii) A release of petroleum to an aboveground surface that is less than 25 gallons.

(iii) A release of a hazardous substance to an aboveground surface that is less than its reportable quantity under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C.A. §§ 9601—9675) and 40 CFR Part 302 (relating to designation, reportable quantities, and notification).

* * * * *

Responsible party—A person who is responsible or liable for corrective action under the act. The term includes: the owner or operator of a storage tank; the landowner or occupier; a person who on or after August 5, 1990, knowingly sold, distributed, deposited or filled an

underground storage tank regulated by the act which never held a valid registration, with a regulated substance; and a person who on or after August 5, 1990, knowingly sold, distributed, deposited or filled an unregistered aboveground storage tank regulated by the act, with a regulated substance, prior to the discovery of the release.

Risk assessment—A process to quantify the risk posed by exposure of a human or ecological receptor to regulated substances. The term includes baseline risk assessment, development of site-specific standards and risk assessment of the remedial alternatives.

* * * * *

Site—For purposes of § 245.303(c) and (d) (relating to general requirements), the term means the property which includes the storage tank facility. For other purposes, the term means the extent of contamination originating within the property boundaries and all areas in close proximity to the contamination necessary for the implementation of remedial activities to be conducted.

* * * * *

Survey—For purposes of § 245.303(d), the term means a study to establish background for surface water, groundwater, soil and sediment prior to the use of a storage tank facility.

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Subchapter D. CORRECTIVE ACTION PROCESS FOR OWNERS AND OPERATORS OF STORAGE TANKS AND STORAGE TANK FACILITIES AND OTHER RESPONSIBLE PARTIES

§ 245.304. Investigation of suspected releases.

(a) The owner or operator of storage tanks and storage tank facilities shall initiate and complete an investigation of an indication of a release of a regulated substance as soon as practicable, but no later than 7 days after the indication of a release. An indication of a release includes one or more of the following conditions:

(1) The presence of a regulated substance or an unusual level of vapors from a regulated substance of unknown origin, at a storage tank facility.

(2) Evidence of a regulated substance or vapors in soils, basements, sewer lines, utility lines, surface water or groundwater in the surrounding area.

(3) Unusual operating conditions, indicative of a release, such as the erratic behavior of product dispensing equipment.

(4) The sudden or unexpected loss of a regulated substance from a storage tank, or the unexplained presence of water in a storage tank.

(5) Test, sampling or monitoring results from a release detection method which indicate a release.

(6) The discovery of holes in a storage tank during activities such as inspection, repair or removal from service.

(7) Other events, conditions or results which may indicate a release.

(b) The investigation required by subsection (a) shall include a sufficient number of the procedures outlined in this subsection and be sufficiently detailed to confirm whether a release of a regulated substance has occurred. The owner or operator shall investigate the indication of a release by one or more of the following procedures:

(1) A check of product dispensing or other similar equipment.

(2) A check of release detection monitoring devices.

(3) A check of inventory records to detect discrepancies.

(4) A visual inspection of the storage tank or the area immediately surrounding the storage tank.

(5) Testing of the storage tank for tightness or structural soundness.

(6) Sampling and analysis of soil or groundwater.

(7) Other investigation procedures which may be necessary to determine whether a release of a regulated substance has occurred.

(c) If the investigation confirms that a reportable release has occurred, the owner or operator shall report the release in accordance with § 245.305 (relating to reporting releases) and initiate corrective action.

(d) If the investigation confirms that a nonreportable release has occurred, the owner or operator shall take necessary corrective actions to completely recover or remove the regulated substance which was released.

(e) If the investigation confirms that a release has not occurred, further investigation by the owner or operator is not required.

§ 245.305. Reporting releases.

(a) The owner or operator of storage tanks and storage tank facilities shall notify the appropriate regional office of the Department as soon as practicable, but no later than 24 hours, after the confirmation of a reportable release.

(b) Upon the occurrence of a confirmed, nonreportable release, the owner or operator shall take necessary corrective actions to completely recover or remove the regulated substance which was released.

(c) The notice required by subsection (a) shall be by telephone and describe, to the extent of information available, the regulated substance involved, the quantity of the regulated substance involved, when the release occurred, where the release occurred, the affected environmental media, relevant, available information concerning impacts to water supplies, buildings or to sewer or other utility lines and interim remedial actions planned, initiated or completed.

(d) Within 15 days of the notice required by subsection (a), the owner or operator shall provide written notification to the Department and to each municipality in which the reportable release occurred, and each municipality where that release has impacted environmental media or water supplies, buildings or sewer or other utility lines.

(e) The owner or operator shall provide written notification to the Department and each impacted municipality of new impacts to environmental media or water supplies, buildings, or sewer or other utility lines discovered after the initial written notification required by subsection (d). Written notification under this subsection shall be made within 15 days of the discovery of the new impact.

(f) Written notification required by this section shall contain the same information as required by subsection (c).

(g) If the Department determines that a release poses an immediate threat to public health and safety, the Department may evaluate and implement reasonable procedures to provide the public with appropriate information about the situation which may, at a minimum,

include a summary of the details surrounding the release and its impacts in a newspaper of general circulation serving the area in which the impacts are occurring.

(h) Upon the occurrence of a reportable release at the aboveground storage tank, the owner or operator of aboveground storage tank facilities with a capacity greater than 21,000 gallons shall immediately notify the county emergency management agency, the Pennsylvania Emergency Management Agency and the Department. Downstream water companies, downstream municipalities and downstream industrial users within 20 miles of an aboveground storage tank facility located adjacent to surface waters shall be notified on a priority basis based on the proximity of the release by the owner or operator or the agent of the owner or operator within 2 hours of a release which enters a water supply or which threatens the water supply of downstream users. If the owner or operator or an agent fails to notify or is incapable of notifying downstream water users, the county emergency management agency shall make the required notification. This notification shall be done in accordance with section 904 of the act (35 P. S. § 6021.904).

(i) The owner or operator of storage tanks and storage tank facilities shall immediately notify the local fire authority where fire, explosion or safety hazards exist at the site.

§ 245.306. Interim remedial actions.

(a) Upon confirming that a release has occurred in accordance with § 245.304 (relating to investigation of suspected releases) or after a release from a storage tank is identified in another manner, the responsible party shall immediately initiate the following interim remedial actions necessary to prevent or address an immediate threat to human health or the environment while initiating, as necessary, one or more of the tasks identified in § 245.309(c) (relating to site characterization):

(1) Remove the regulated substance from the storage tank to prevent further release to the environment.

(2) Identify, mitigate and continue to monitor and mitigate, fire, explosion and safety hazards posed by vapors and free product.

(3) Prevent further migration of the regulated substance released from the storage tank into the environment as follows:

(i) If contaminated soil exists at the site, the interim remedial action may include excavation of the soils for treatment or disposal.

(ii) If free product is present, free product recovery shall be initiated immediately.

(4) Identify and sample affected water supplies and water supplies with the potential to be affected in a reasonable and systematic manner consistent with § 245.309(b)(1) and (4) and (c)(4), (6) and (13). The responsible party shall restore or replace an affected or diminished water supply in accordance with § 245.307 (relating to affected or diminished water supplies). The responsible party shall provide a copy of the sample results to the water supply owner and the Department within 5 days of receipt of the sample results from the laboratory.

(b) At sites where free product recovery, regulated substance removal or contaminated soil excavation is performed, the responsible party shall:

(1) Conduct recovery, removal, storage, treatment and disposal activities in a manner that prevents the spread of contamination into previously uncontaminated areas.

(2) Handle flammable products in a safe and competent manner to prevent fires or explosions.

(3) Obtain required State and local permits or approvals for treatment and disposal activities.

(4) Minimize the amount of soil and subsurface material affected by a release of a regulated substance by segregating the unaffected soil and subsurface material from the material affected by a release of a regulated substance.

(c) If free product recovery affects or diminishes the quality or quantity of a water supply, the responsible party shall restore or replace the water supply in accordance with § 245.307.

(d) Where soil and subsurface material affected by a release is removed from the site, the person removing the material shall provide to the owner, operator, landowner or other responsible party a receipt documenting acceptance of the material at a permitted treatment or disposal facility.

§ 245.309. Site characterization.

(a) Upon confirming that a reportable release has occurred in accordance with § 245.304 (relating to investigation of suspected releases) or after a reportable release from a storage tank is identified in another manner, the responsible party shall perform a site characterization.

(b) The objectives of a site characterization are to accomplish the following:

(1) Determine whether additional interim remedial actions are necessary to abate an imminent hazard to human health or the environment.

(2) Determine whether additional site characterization work is required upon completion of an interim remedial action.

(3) Determine or confirm the sources of contamination.

(4) Provide sufficient physical data, through field investigations, to determine the regulated substances involved, and the extent of migration of those regulated substances in surface water, groundwater, soil or sediment.

(5) Determine, from measurements at the site, values for input parameters including hydraulic conductivity, source dimensions, hydraulic gradient, water table fluctuation and fraction organic carbon necessary for fate and transport analysis.

(6) Provide sufficient information to select a remediation standard.

(7) Provide sufficient information to allow for completion of a remedial action plan or a design for remedial action.

(c) The responsible party shall conduct the site characterization activities necessary to satisfy the objectives established in subsection (b). The site characterization shall include the following tasks, as necessary, based on the nature, extent, type, volume or complexity of the release:

(1) Identifying the need for and initiating additional interim remedial actions.

(2) Opening and sampling storage tanks to determine the regulated substances stored in the tanks.

(3) Tightness testing or other release detection testing and monitoring to determine the structural integrity of the storage tank.

(4) Identify and sample affected water supplies and water supplies with the potential to be affected not previously identified or sampled under § 245.306(a)(4) (relating to interim remedial actions). The responsible party shall restore or replace an affected or diminished water supply in accordance with § 245.307 (relating to affected or diminished water supplies). The responsible party shall provide a copy of the sample results to the water supply owner and the Department within 5 days of receipt of the sample results from the laboratory.

(5) Determining the location of the ecological receptors identified in § 250.311(a) (relating to evaluation of ecological receptors).

(6) A review of the site history.

(7) A review and analysis of data from removal from service and interim remedial action activities.

(8) Using geophysical survey techniques to locate storage tanks and to determine geologic and hydrogeologic characteristics of affected hydrogeologic zones and hydrogeologic zones with the potential to be affected.

(9) Drilling soil borings, conducting soil gas surveys and collecting soil samples to determine soil characteristics and the horizontal and vertical extent of soil contamination.

(10) Using piezometers, well points, monitoring wells and public and private wells to:

(i) Determine the direction of groundwater flow.

(ii) Determine soil, geologic, hydrogeologic and aquifer characteristics.

(iii) Measure the horizontal extent and thickness of free product.

(iv) Sample groundwater to determine the horizontal and vertical extent of groundwater contamination.

(11) A demonstration that groundwater is not used or currently planned to be used.

(12) Sampling surface water and sediments to determine the extent of surface water and sediment contamination.

(13) Assessing potential migration pathways, including sewer lines, utility lines, wells, geologic structures and hydrogeologic conditions.

(14) Performing site surveying and topographic mapping.

(15) Developing a conceptual site model that describes the sources of contamination, fate and transport of contaminants and potential receptors.

(16) Handling and disposing of site characterization wastes.

(17) Preparing and implementing a site-specific plan for the provision of the following:

(i) Worker health and safety in accordance with OSHA requirements established at 29 CFR 1910.120 (relating to hazardous waste operations and emergency response), including health and safety policies, medical monitoring, training and refresher courses, emergency and decontamination procedures, personal protective equipment and standard work practices.

(ii) The identification, management and disposition of solid, hazardous, residual and other wastes generated as part of the site characterization.

(iii) A quality assurance/quality control program for the performance of site characterization field activities and for the accurate collection, storage, retrieval, reduction, analysis and interpretation of site characterization data.

(18) An analysis of the data collected as a result of the site characterization.

(19) Selection of a remediation standard.

(20) If the site-specific standard is selected, performance of a risk assessment in accordance with Chapter 250, Subchapter F (relating to exposure and risk determinations).

(21) Recommendation of preferred remedial action options.

(22) Recommendation for further site characterization work.

(23) Developing a conceptual design of the selected remedial action options and identifying additional investigations or pilot studies needed to design and implement a detailed remedial action plan.

(24) Additional tasks necessary to characterize the site.

§ 245.310. Site characterization report.

(a) The responsible party shall prepare and submit to the Department within 180 days of reporting a reportable release under § 245.305(a) (relating to reporting releases), or within an alternative time frame as determined by the Department, two copies of a site characterization report which describes the activities undertaken in accordance with § 245.309 (relating to site characterization). The site characterization report shall be complete and concisely organized and shall contain the following elements, as necessary, based on the nature, extent, type, volume or complexity of the release:

(1) A narrative description of the site and the historical and current operations conducted at the site.

(2) A site map showing location of buildings, roads, storage tanks, including those removed from service or closed in place, utilities, property boundaries, topographic contours, potential receptors and other information pertinent to the site characterization.

(3) A description of natural and manmade features pertinent to the site characterization.

(4) Details of interim remedial actions conducted at the site in accordance with § 245.306 (relating to interim remedial actions). These details shall include the following, as necessary:

(i) A description of the type and volume of the regulated substance removed from the storage tank.

(ii) A discussion of fire, explosion and safety hazards which have been identified, mitigated and monitored.

(iii) A discussion of necessary relocation of affected residents.

(iv) Where free product recovery is performed:

(A) The regulated substance released and the thickness of free product in wells, boreholes or excavations.

(B) The type of free product recovery system used.

(C) Whether a discharge has or will take place during the recovery operation and where this discharge is or will be located.

(D) The type of treatment applied to, and the effluent quality expected from, a discharge.

(E) The steps that have been or are being taken to obtain necessary permits or approvals for a discharge.

(F) The volume and disposition of the recovered free product.

(G) The date free product recovery was initiated.

(H) The date free product recovery was completed.

(v) Where excavation of contaminated soil is performed:

(A) The regulated substance released and actual volume of soil excavated.

(B) The method used to determine the existence and extent of contaminated soil.

(C) The treatment method or disposition of the excavated soil, including receipts documenting acceptance of the material at a permitted treatment or disposal facility.

(D) The date excavation was initiated.

(E) The date excavation was completed.

(F) The rationale for terminating soil excavation where the contaminated soil has not been excavated, including the volume of contaminated soil remaining in place, and a description of what steps will be taken to address the soils that remain unexcavated.

(5) The steps that have been or are being taken to restore or replace affected or diminished water supplies.

(6) A description of the type and characteristics of regulated substances involved, including quantities, physical state, concentrations, toxicity, propensity to bioaccumulate, persistence and mobility.

(7) The results of tightness testing or other release detection method used or conducted to determine the structural integrity of the storage tanks.

(8) The details of removal from service activities conducted at the site.

(9) The identification of the sources of contamination, including the actual or estimated date and quantity of release from each source.

(10) The location and description of affected water supplies and water supplies with the potential to be affected.

(11) A description of further site characterization work needed.

(12) A discussion and conclusions that demonstrate the site characterization objectives outlined in § 245.309(b) have been satisfied.

(13) The rationale, equipment, methodology and results of geophysical surveys.

(14) The location, rationale and logs of soil borings.

(15) The location, rationale, construction details, including methods and materials, and depth to groundwater of piezometers, well points and monitoring wells.

(16) Groundwater contour maps depicting groundwater flow direction at the site.

(17) A description of methods and equipment used to determine site-specific soil, geologic, hydrogeologic and aquifer properties.

(18) Sampling locations and rationale for selection of these locations.

(19) The results of a survey used to identify and sample public and private wells.

(20) Parameters analyzed for, analytical methods used and detection limits of these methods.

(21) Field and laboratory analytical results and interpretations.

(22) Contaminant distribution maps in the media and contaminant phases.

(23) A conceptual site model describing the sources of contamination, fate and transport of contaminants and potential receptors.

(24) The disposition of site characterization wastes.

(25) A copy of site-specific plans prepared and implemented for the provision of the following:

(i) Worker health and safety in accordance with OSHA requirements established at 29 CFR 1910.120 (relating to hazardous waste operations and emergency response), including health and safety policies, medical monitoring, training and refresher courses, emergency and decontamination procedures, personal protective equipment and standard work practices.

(ii) The identification, management and disposition of solid, hazardous, residual and other wastes generated as part of the site characterization.

(iii) A quality assurance/quality control program for the performance of site characterization field activities and for the accurate collection, storage, retrieval, reduction, analysis and interpretation of site characterization data.

(26) The identification of the remediation standard which has or will be attained at the site.

(27) The Department's written determination that groundwater is not used or currently planned to be used.

(28) The impacts to ecological receptors as a result of the evaluation conducted in accordance with § 250.311 or § 250.402(d) (relating to evaluation of ecological receptors; and human health and environmental protection goals).

(29) The impacts to surface water as a result of the evaluation conducted in accordance with § 250.309 or § 250.406 (relating to MSCs for surface water; and relationship to surface water quality requirements).

(30) A discussion of the remedial action options selected to remediate the site.

(31) A risk assessment report in accordance with § 250.409 (relating to risk assessment report).

(32) A demonstration that no current or future exposure pathways exist following the procedures described in § 250.404 (relating to pathway identification and elimination).

(33) A conceptual design of the remedial action options selected.

(34) A report of additional tasks performed to characterize the site.

(b) If the responsible party determines, after completion of interim remedial actions, that further site characterization is not required, that soil is the only media of concern, and that interim remedial actions have remediated the site, the responsible party may submit a site characterization report to the Department, in lieu of the report required in subsection (a), which contains the following:

(1) A concise statement that describes the release, including information such as the amount of regulated substance that was released, the extent of contamination and interim remedial actions taken under § 245.306.

(2) Data demonstrating that the interim remedial actions have attained the Statewide health standard for the site in accordance with Chapter 250, Subchapter G (relating to demonstration of attainment).

(3) The basis for selection of the residential or nonresidential Statewide health standard.

(4) The results of the evaluation of ecological receptors conducted in accordance with § 250.311.

(5) Additional information as identified in subsection (a) necessary to fully describe the release, the extent of contamination and the interim remedial actions taken to address the release.

(c) Following submission of a complete site characterization report prepared under subsection (a), selecting the site-specific standard, or subsection (b), the Department will do one or more of the following:

(1) Review and approve the site characterization report as submitted.

(2) Review and approve the site characterization report with modifications made by the Department.

(3) Review and disapprove the site characterization report, citing deficiencies.

(4) Review and disapprove the site characterization report and direct, require or order the responsible party to perform other tasks or make modifications as prescribed by the Department.

(5) Review and disapprove the site characterization report, perform the site characterization in whole or in part and recover, in accordance with § 245.303(b) (relating to general requirements), the Department's costs and expenses involved in performing the site characterization.

(6) Review the site characterization report without further action.

(d) The Department will take one or more of the actions listed in subsection (c) within 60 days of receipt of a site characterization report meeting the requirements of subsection (b) or within 90 days of receipt of a site characterization report selecting the site-specific standard. If the Department does not respond, in writing, within the allotted time, the report shall be deemed approved, unless the responsible party and the Department agree, in writing, to an alternative time frame.

§ 245.311. Remedial action plan.

(a) Unless a site characterization report is submitted in accordance with § 245.310(b) (relating to site characterization report), the responsible party shall prepare and submit to the Department within 45 days of submission of a site characterization report required by § 245.310(a) selecting the background or Statewide health standard, within 45 days of deemed approval or receipt of a written approval of a site characterization report selecting the site-specific standard or within an alternative time frame as determined by the Department, two copies of a remedial action plan prior to implementation of the remedial action plan. The remedial action plan shall be complete and concisely organized and shall contain the following elements, as necessary, based on the nature, extent, type, volume or complexity of the release:

(1) A brief summary of the site characterization report conclusions.

(2) A copy of the plans relating to worker health and safety, management of wastes generated and quality assurance/quality control procedures, as they relate to the remedial action, if different from the plans submitted in accordance with § 245.310(a)(27).

(3) A list of required Federal, State and local permits or approvals to conduct the remedial action.

(4) A discussion of how the remedial action will attain the selected remediation standard for the site.

(5) The results of treatability, bench scale or pilot scale studies or other data collected to support the remedial action.

(6) Design and construction details for the remedial action, including expected effectiveness.

(7) Operation and maintenance details for the remedial action, including:

(i) A schedule including initiation and completion dates for all elements of the remedial action plan.

(ii) The expected concentrations and quantities of regulated substances in any discharge.

(iii) The disposition of the discharge.

(iv) A schedule for monitoring, sampling and site inspections.

(8) A site map showing the location of buildings, roads, property boundaries, remedial equipment locations and other information pertinent to the remedial action.

(9) A description of the media and parameters to be monitored or sampled during the remedial action.

(10) A description of the analytical methods to be utilized and an appropriate reference for each.

(11) A description of the methodology that will be utilized to demonstrate attainment of the selected remediation standard.

(12) A description of proposed postremediation care requirements.

(13) A description of additional items necessary to develop the remedial action plan.

(b) Following submission of a complete remedial action plan selecting the background or Statewide health standard, the Department will do one or more of the following:

(1) Review and approve the site characterization report and remedial action plan as submitted.

(2) Review and approve the site characterization report and remedial action plan with modifications made by the Department.

(3) Review and disapprove the site characterization report and remedial action plan, citing deficiencies.

(4) Review and disapprove the site characterization report and remedial action plan and direct, require or order the responsible party to perform other tasks or make modifications as prescribed by the Department.

(5) Review and disapprove the site characterization report and remedial action plan, prepare a remedial action plan or perform the remedial action in whole or in part, and recover, in accordance with § 245.303(b) (relating to general requirements), the Department's costs and expenses involved in preparing the remedial action plan or performing the remedial action.

(6) Review the site characterization report and remedial action plan without further action.

(c) Following submission of a complete remedial action plan selecting the site-specific standard, the Department will do one or more of the following:

(1) Review and approve the remedial action plan as submitted.

(2) Review and approve the remedial action plan with modifications made by the Department.

(3) Review and disapprove the remedial action plan, citing deficiencies.

(4) Review and disapprove the remedial action plan and direct, require or order the responsible party to perform other tasks or make modifications as prescribed by the Department.

(5) Review and disapprove the remedial action plan, prepare a remedial action plan or perform the remedial action in whole or in part, and recover, in accordance with § 245.303(b), the Department's costs and expenses involved in preparing or performing the remedial action plan.

(6) Review the remedial action plan without further action.

(d) A remedial action plan is not required and no remedy is required if the site-specific standard is chosen and no current or future exposure pathways exist.

(e) The Department will take one or more of the actions listed in subsection (b) within 60 days of receipt of a remedial action plan to attain the background or Statewide health standard, or the Department will take one or more of the actions listed in subsection (c) within 90 days of receipt of a remedial action plan to attain the site-specific standard. If the Department does not respond, in writing, within the allotted time, the report and plan or plan shall be deemed approved, unless the responsible party and the Department agree, in writing, to an alternative time frame.

(f) If the site characterization report and remedial action plan are submitted to the Department at the same time, the Department will take one or more of the actions listed in subsection (b) within 60 days of receipt of a report and plan to attain the background or Statewide health standard, or the Department will take one or more of the actions listed in subsection (c) within 90 days of receipt of a report and plan to attain the site-specific standard. If the Department does not respond, in writing, within the allotted time, the report and plan shall be deemed approved, unless the responsible party and the Department agree, in writing, to an alternative time frame.

§ 245.312. Remedial action.

(a) Upon reasonable notice by the Department to the responsible party, or upon approval of the remedial action plan by the Department, the responsible party shall implement the remedial action plan, or a portion of the remedial action plan, according to the schedule contained therein.

(b) During implementation of the remedial action plan, remedial action progress reports shall be submitted to the Department quarterly or at an alternative interval as determined by the Department.

(c) Each remedial action progress report shall provide the data generated during the reporting period and shall show the progress to date toward attainment of the selected remediation standard. Each report shall be complete and concisely organized and shall contain the following elements, as necessary, based on the nature, extent, type, volume or complexity of the release:

(1) A summary of site operations and remedial progress made during the reporting period.

(2) Data collected from monitoring and recovery wells showing depth to groundwater and thickness and horizontal extent of free product.

(3) Groundwater contour maps depicting groundwater flow direction.

(4) Quantitative analytical results from groundwater, surface water, soil and sediment sampling.

(5) Maps for all media and all phases at specified times that indicate the distribution of concentrations of regulated substances.

(6) For fate and transport analyses, the following information, in addition to that required by § 250.204(f)(5) (relating to final report):

(i) An isoconcentration map showing the configuration and concentrations of contaminants within the plume being analyzed.

(ii) Sufficient information from monitoring data to establish whether the plume is stable, shrinking or expanding.

(iii) Input parameters for the analysis and the rationale for their selection.

(iv) Figures showing the orientation of the model or analysis to the field data.

(v) Comparison and analysis of the model or mathematical output to the actual field data.

(7) Reporting period and cumulative amounts of free product recovered, groundwater treated, and soil and sediment treated or disposed.

(8) Treatment and disposal documentation for waste generated during the reporting period.

(9) Demonstration that required Federal, State and local permits and approvals are being complied with.

(10) A report of additional items necessary to describe the progress of the remedial action.

(d) The first remedial action progress report shall be received by the Department 3 months following the date of remedial action plan implementation. The final remedial action progress report shall be submitted to the Department as part of the remedial action completion report.

(e) If during implementation of the remedial action plan the responsible party decides to change the remedial action plan, the responsible party shall prepare and submit, to the Department, a new or modified remedial action plan, to include selection of the new remediation standard, if applicable, in accordance with § 245.311 (relating to remedial action plan).

(f) If during implementation of the remedial action plan the responsible party determines that continued implementation of the remedial action plan will cause additional environmental harm, the responsible party shall suspend remedial action and notify the Department, by telephone, within 24 hours of suspension. The responsible party shall prepare and submit a new or modified remedial action plan, to include selection of the new remediation standard, if applicable, to the Department in accordance with § 245.311.

§ 245.313. Remedial action completion report.

(a) When the selected remediation standard has been attained, the responsible party shall submit a remedial action completion report to the Department.

(b) The remedial action completion report shall be complete and concisely organized and shall contain the following elements, as necessary, based on the remediation standard attained:

(1) When the background standard has been attained, the remedial action completion report shall include the requirements of § 250.204(f) and (g) (relating to final report).

(2) When the Statewide health standard has been attained, the remedial action completion report shall include the requirements of § 250.312(b)—(h) (relating to final report).

(3) When the site-specific standard is attained, the remedial action completion report shall include the requirements of § 250.411(c)—(f) (relating to final report).

(4) For fate and transport analyses, the following information, in addition to that required by § 250.204(f)(5):

(i) An isoconcentration map showing the configuration and concentrations of contaminants within the plume being analyzed.

(ii) Sufficient information from monitoring data to establish whether the plume is stable, shrinking or expanding.

(iii) Input parameters for the analysis and the rationale for their selection.

(iv) Figures showing the orientation of the model or analysis to the field data.

(v) Comparison and analysis of the model or mathematical output to the actual field data.

(c) Following submission of the remedial action completion report, the Department will do one or more of the following:

(1) Review and approve the remedial action completion report as submitted.

(2) Review and approve the remedial action completion report with modifications made by the Department.

(3) Review and disapprove the remedial action completion report, citing deficiencies.

(4) Review and disapprove the remedial action completion report and direct, require or order the responsible party to perform other tasks or make modifications as prescribed by the Department.

(5) Review and disapprove the remedial action completion report, perform the site characterization or remedial action and recover, in accordance with § 245.303(b) (relating to general requirements), the Department's costs and expenses involved in preparing the remedial action completion report.

(6) Review the remedial action completion report without further action.

(d) The Department will take one or more of the actions listed in subsection (c) within 60 days of receipt of the remedial action completion report demonstrating attainment of the background or Statewide health standard, or within 90 days of receipt of a remedial action completion report demonstrating attainment of the site-specific standard. If the Department does not respond, in writing, within the allotted time, the report shall be deemed approved, unless the responsible party and the Department agree, in writing, to an alternative time frame.

§ 245.314. Professional seals.

Reports submitted to satisfy this subchapter containing information or analysis that constitutes professional geologic or engineering work as defined by the Engineer, Land Surveyor and Geologist Registration Law (63 P. S. §§ 148—158.2) shall be sealed by a professional geologist or engineer who is in compliance with the requirements of that statute.

Subchapter E. TECHNICAL STANDARDS FOR UNDERGROUND STORAGE TANKS

RELEASE DETECTION

§ 245.444. Methods of release detection for tanks.

Each method of release detection for tanks used to meet the requirements of § 245.442 (relating to requirements for petroleum underground storage tank systems) shall be conducted in accordance with the following:

* * * * *

(8) *Statistical Inventory Reconciliation (SIR).* SIR shall meet the performance standards of paragraph (9)(i) for monthly monitoring.

* * * * *

(ii) A separate report for each tank monitored shall be maintained by the owner/operator in accordance with § 245.446(2) (relating to release detection recordkeeping). Each report shall meet the following requirements:

(A) Owners and operators shall have reports available within 20 days of the end of the monitoring period.

* * * * *

[Pa.B. Doc. No. 01-2169. Filed for public inspection November 30, 2001, 9:00 a.m.]

INSURANCE DEPARTMENT
[25 PA. CODE CHS. 971, 973, 975 AND 977]
Underground Storage Tank Indemnification Fund

The Underground Storage Tank Indemnification Board (Board) adopts Chapter 977 (relating to underground storage tank indemnification fund) (Fund) and deletes Chapters 971, 973 and 975 to read as set forth in Annex A.

Statutory Authority

The final-form regulations are adopted under the authority of the Storage Tank and Spill Prevention Act (act) (35 P. S. §§ 6021.101—6021.2104).

Comments and Response

Notice of proposed rulemaking was published at 30 Pa.B. 6593 (December 23, 2000) with a 30-day comment period. During the 30-day comment period, comments were received from Earthtech, Inc., Professional Enterprises, Inc. and Associated Petroleum Industries of Pennsylvania (APIP). During its regulatory review, the Inde-

pendent Regulatory Review Commission (IRRC) also submitted comments to the Board. The following is a response to those comments.

Comments from the Public

1. APIP questioned, in § 977.61(a) (relating to dispute procedures), whether 15 days is enough time to analyze the Executive Director's decision, draft another appeal and send it to the Board.

The Board can understand this concern and has no objection to increasing the allotted time to file an appeal to 35 days. Changes to § 977.61(a) reflect this revised 35-day period.

2. Earthtech believed that the regulations will cause qualified individuals and companies to allow their certifications to expire and that the requirements of the regulations are excessive for companies who already have errors and omissions (E&O) insurance.

Since the proposed rulemaking was published at 30 Pa.B. 6593, the Board has reduced the certified company fee from $2,000 to $1,000, made the certification fees $0, and decreased the activity fees, thereby significantly reducing the fee requirements in the regulations. These new fees were established in accordance with actuarial review and input, and are very reasonable for the amount of coverage provided by the Fund.

3. Professional Enterprises Inc. expressed concern with respect to the "minimum" $2,000 certified company fee in § 977.19 (relating to certified company fees).

As mentioned previously, the Board has reduced the certified company fee from $2,000 to $1,000, thereby effectively addressing the concerns in this regard.

IRRC Comments

During its review, IRRC expressed a number of concerns. Those concerns are addressed as follows.

1. *Method of fee assessment. Statutory authority; economic impact; reasonableness; clarity.*

The main concern expressed by IRRC was whether the Board had statutory authority to set a maximum fee and then adjust the fees outside of the regulatory promulgation process by publishing a notice in the *Pennsylvania Bulletin*. IRRC believes that this proposed process does not provide the opportunity for legislative or public input on the fee reductions, or on the underlying required actuarial study that is the basis for the fees.

The Board has eliminated the concept of "maximum fees" in the regulations. Fees will now be established by regulation, and any changes to these fees in the future will be accomplished through the appropriate regulatory process.

2. *Section 977.4. Definitions.—Clarity.*

IRRC had some concerns with respect to the definition section. IRRC stated that the definitions of "operator," "owner," "regulated substance," "release" and "UST" are identical to the act and therefore the statutory definition of these terms would be sufficient in the chapter.

The Board reviewed the definitions and noticed that a few ("operator," "owner" and "release") reference the term "HOT." This reference is not in the act, and therefore the definition should be provided in its entirety rather than referencing the definition in the act. The term "UST" is not in the act, although it does appear in § 245.1 (relating to definitions). The Board considered defining the term by referencing § 245.1, but was concerned that many of the parties affected by the regulations would not have access to that publication. Additionally, the cost for a hard copy of 25 Pa. Code (relating to environmental protection), which consists of 9 volumes, is $284 for an initial subscription and $222.50 for the annual renewal. Accordingly, cross references have been added for clarity, but otherwise the Board has kept the definition of "UST" as it appeared in the proposed rulemaking. The Board also considered replacing the definition of "regulated substance" with the statutory reference. Although cross references have been added, upon further review, the Board is requesting that the term "regulated substance" be printed as proposed rather than having the parties affected by the regulations spend additional time and money researching other reference materials.

3. IRRC questioned whether there is a certification that is not in 25 Pa. Code with respect to the definition of "certified company." The Board is not aware of any certification other than those in 25 Pa. Code; therefore, reference to "this title or" has been removed from the definition of "certified company."

4. IRRC commented that a reference to the Department of Environmental Protection's (DEP) certification regulations would add clarity to the definition of "certified tank installer."

The Board agrees and has added a reference to the DEP's regulations.

5. IRRC had a concern that the term "corrective action cost" uses the phrases "corrective action as defined in the act" and "as specified in the regulations promulgated by the Department." IRRC asked for specific references to the act and the DEP's regulations.

The Board agrees and has added the appropriate references to the act and the DEP's regulations.

6. IRRC asked the Board to clarify what regulation the phrase "determined by the DEP by regulation" pertained to in subparagraph (i)(C) of the definition of "regulated substance."

This phrase pertains to regulations that the DEP may promulgate, if necessary, in the future, but they do not exist at this time. Accordingly, the Board has removed this term to avoid any confusion.

7. IRRC also asked the Board to cite the appropriate Federal regulations that were referred to in subparagraph (i) of the definition of the term "release."

The Board has cited the appropriate Federal regulations.

8. IRRC also questioned what other policies or regulations were being referred to in "Other tanks excluded by policy or regulation promulgated under the act" in subparagraph (ii)(S) of "UST—underground storage tank."

The Board used the definition for "UST—underground storage tank" as found in § 245.1. Because there are no other tanks excluded by policy or regulation under the act, this phrase has been deleted for clarity.

9. IRRC questioned why "waste oil" is defined as "an accumulation of oil from several sources," and whether "waste oil" could be from one source. Also, under subparagraph (ii), IRRC wanted to know what is meant by "the reaction of incompatible oils that have been mixed."

The Board agrees that an accumulation of oil could be from one source. Therefore, the definition of waste oil now reads, "An accumulation of oils from one or more sources [. . .]" Additionally, to clarify the sentence, "The reaction of

incompatible oils that have been mixed [. . .]", the sentence now reads, "Incompatible oils that have been mixed [. . .]".

Section 977.12. Owner and operator fees.—Clarity.

10. IRRC noted that § 977.12(d) (relating to owner and operator fees) states that the Board may charge a fee that "is calculated in accordance with section 705(d)(2) of the act." However, section 705(d)(2) of the act (35 P. S. § 6021.705(d)(2)) does not contain a formula for a calculation. It states that the "capacity fee shall be set on the same actuarial basis" as the other fees. Hence, IRRC contends that the word "calculated" should be removed from this subsection.

The Board agrees and has revised the section to use the word "established." In accordance with this comment, the Board has also replaced the word "calculated" in § 977.18(b) (relating to capacity fee payment procedure) with the word "established."

Subsection (e). Changes to applicability of fees to particular substances.

11. IRRC commented that this subsection allows "any changes regarding which substances are assessed a tank fee" to be done by publication in the *Pennsylvania Bulletin*. In this regard, IRRC had a question and a comment. First, IRRC asked whether this subsection is intended to refer to the defined term "regulated substances." If so, IRRC contends that the word "regulated" should be added to subsection (e). Secondly, IRRC commented that the regulation relies on the defined term "regulated substances" to establish fees. For example, § 977.12(b)(2) assesses "a gallon fee on all regulated substances. . . ." IRRC pointed out that publishing changes in the *Pennsylvania Bulletin* will not amend the regulation. The result will be a definition in the regulations and a different definition published in the *Pennsylvania Bulletin*. Therefore, IRRC noted that subsection (e) should be deleted.

The Board agrees that § 977.18(e) is not needed and therefore has deleted it from the regulations. This deletion also renders moot the question about the defined term "regulated substance" mentioned previously.

Section 977.13. Tank fee payment procedure.—Reasonableness; Clarity.

12. IRRC notes that subsection (b) states "the tank fee shall be calculated in § 977.12." However, § 977.12 does not contain a formula for calculating fees. Section 977.12 states that the Board may charge and modify fees, not to exceed an established maximum and based on an annual actuarial review. IRRC contends that the word "calculated" should be removed from this subsection.

The Board agrees and has removed "calculated" and replaced it with "established."

Section 977.14. Gallon fee payment procedures.—Statutory authority; Reasonableness; Clarity.

13. IRRC had three questions with respect to § 977.14. They are as follows:

First, section 705(e) of the act (35 P. S. § 6021.705(e)) states that owners and operators are required to pay the fees to the Fund. Section 977.14 requires distributors to collect the gallon fee. IRRC questioned the statutory authority for "requiring" distributors to collect the gallon fee.

The gallon fee payment procedures that require distributors to collect the gallon fees are found in the current Fund regulations in § 973.4 (relating to gallon fee payment procedure), which the Board promulgated under its statutory authority found in section 705(f) of the act (relating to additional powers). Section 705(f) of the act provides in pertinent part, "To make bylaws for the management and regulation of its affairs and to adopt, amend and repeal rules, regulations and guidelines governing the administrative procedures and business of the board and operation and administration of the fund." See section 705(f)(2) of the act.

Second, IRRC stated that subsection (e) applies to UST owners or operators who pay their fees directly to the Fund and not through distributors. The other subsections before and after subsection (e) establish procedures and requirements for distributors to collect the gallon fee. Hence, IRRC suggested that subsection (e) be placed before subsection (h).

The Board agrees and has placed the requirements found in subsection (e), before subsection (h).

Third, IRRC stated that subsection (h) limits "gallon fees" to no more than $5,000 per tank in 1 year. Section 705(d)(3) of the act uses the word "fees," not "per gallon fees." Hence, IRRC suggested that the maximum of $5,000 should apply to all fees paid by owners and operators, not only to the per gallon fee described in this section.

The Board agrees that the reference to "per gallon fees" is incorrect and has deleted it from this section.

Section 977.17. Security for payment of gallon fees.—Reasonableness; Clarity.

14. IRRC stated that subsection (a) states that the security shall be "calculated by multiplying the gallon fee in § 977.12(b)(ii) by the number of gallons of regulated substance. . ." There were two concerns.

First, IRRC noted a typographical error. IRRC stated that there is no § 977.12(b)(ii), and questioned whether the reference should be § 977.12(b)(2).

The Board agrees that this was a typographical error and has changed it accordingly.

Second, IRRC stated that even if the reference to § 977.12(b)(2) is correct, the reference is still unclear. Section 977.12(b)(2) states that the gallon fee will not exceed a maximum of $.02 per gallon. It does not set the fee level. It states that fee levels will be published in the *Pennsylvania Bulletin* under § 977.12(a). Since the fee is subject to change, IRRC questioned how a tank owner will determine the amount required for the security. IRRC suggested that the phrase "the gallon fee as set forth in § 977.12(b)(ii)" should be replaced with "the gallon fee as established under § 977.12(a) and (b)(2)."

The Board agrees with this comment and has changed this section to read "[. . .] the gallon fee as established under § 977.12(a) and (b)(2) [. . .]", as requested by IRRC.

Section 977.19. Certified company fees.—Fiscal impact; Reasonableness; Clarity.

15. IRRC had three concerns. They are as follows:

First, subsection (b) states that certified companies may be required to pay a fee not to exceed a maximum of $2,000 per year. There is a concern with the fiscal impact of the maximum of $2,000 on smaller companies that perform only 12 to 15 installations in a 3-year period. IRRC noted that one commentator (see previous comment from Professional Enterprises) suggested that the fee should be "per tank" or linked to the number of tank

installations performed by the company. IRRC suggested that the Board should examine the fiscal impact of the fee level on smaller businesses.

As previously explained, since the proposed version of this section was published, in accordance with actuarial review and input, the Board has reduced the certified company fee to $1,000, set the certification fees at $0, and reduced the activity fees as well.

Second, IRRC points out that subsection (c) uses the acronyms, "UMX," "UMR," "UTT" and "TL" as used by the DEP. IRRC suggested clarity would be improved by adding a cross reference to the definitions in the DEP's regulations.

The Board agrees and has made the appropriate cross references.

Third, subsection (d) requires an activity fee per tank for all activities on a UST or heating oil tank (HOT). The required fee and an activity fee form for each activity must be submitted to the Fund 30 days before the start of the activity. Similar language also appears in § 977.20(b) (relating to certified company fee, certification fee and activity fee payment procedures). IRRC questioned where and how can UST or HOT owners obtain copies of the activity fee forms. Additionally, the requirement to submit the fee and forms 30 days before any activity will cause an unwanted delay if immediate action is required to correct problems with a storage tank system. Accordingly, IRRC further questioned what steps UST or HOT owners can pursue if immediate action is necessary.

The Board agrees that the 30-day rule would not be feasible in an emergency situation where immediate action is necessary. Therefore, the Board has added "[. . .] except in an emergency [. . .]" to this section to allow for immediate action. Forms are now provided by DEP for the activity, and the regulation now denotes this change.

Section 977.31. Eligibility requirements.—Clarity.

16. IRRC had a concern with clarity in this section. This section states ". . . to be eligible for Fund coverage, the participant shall meet the following eligibility requirements as set forth in section 706 of the act." However, IRRC noted that the list of requirements differs from the language in section 706 of the act (35 P. S. § 6021.706). IRRC pointed out that although the Board has the authority to clarify and establish additional requirements, the phrase should be changed to ". . .under section 706 of the act, the participant shall meet the following eligibility requirements . . ."

IRRC also pointed out that the first paragraph is designated as subsection (a). This designation could be deleted since there is no subsection (b).

The Board agrees and has made these recommended changes. The language in the regulation is now as consistent as possible with the language in the act.

Section 977.33. Fund coverage and exclusions.—Clarity.

17. IRRC suggested that a reference to the limits referred to in paragraphs (1) and (2) of subsection (a) should be added.

The Board agrees and has made the recommended clarifications.

Section 977.37. Priority of payment.—Clarity.

18. IRRC had a concern with respect to clarity in this section, because the title of the section is "Priority of payment," but the first sentence uses the phrase "prioritize reimbursements." Section 705(b) of the act uses the phrase "prioritizing claims," and therefore IRRC contended that the word "claims" should be used consistently.

The Board agrees and has renamed the section "Priority of claims." Also changed was the first line so that the phrase "prioritize reimbursements" now reads "prioritize claims."

Section 977.61. Dispute of procedures.—Reasonableness.

19. IRRC was concerned because subsection (a) allows 35 days to file an appeal of a Fund decision to the Executive Director, while subsection (b) only allows 15 days to appeal the Executive Director's decision to the Board. IRRC questioned whether 15 days is sufficient time to receive and review a decision of the Executive Director, and prepare an appeal of that decision to the Board.

The Board agrees and has made both appeal periods 35 days, as noted earlier.

Other changes

Some other minor changes appear in the final-form regulations from the proposed format. These changes were to make the regulations accurately reflect the act. None of the changes were substantive therefore additional comments and concerns are not expected.

In § 977.4, it was determined that the DEP does not require certification to perform activities on a HOT. Accordingly, the "or a HOT" language in the definition of "certified tank installer" is being changed to "and who may also perform activities on a HOT."

In § 977.31, the term "or HOT" in subsection (a)(3) has been removed, as a HOT is not required to be registered under the act.

In § 977.33(a)(3) states that "A certified installer is subject to one deductible. . .". It should state "A certified company is subject to one deductible. . .". The company is the participant and therefore the installer is not subject to the deductibles.

Affected Parties

A participant or a distributor transacting business in this Commonwealth is affected by this rulemaking. There is a fiscal impact as a result of this rulemaking relating to fees. However, this 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 rulemaking since they constitute a portion of the owner, operator and certified company 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, as well as owners of certified companies, 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 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 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 rulemaking becomes effective January 1, 2002. No sunset date has been assigned.

Contact person

Any questions regarding these final-form regulations should be directed to Peter J. Salvatore, Regulatory Coordinator, Special Projects Office, 1326 Strawberry Square, Harrisburg, PA 17120, (717) 787-4429. In addition, questions may 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 February 9, 2001, the agency submitted a copy of these final-form regulations to IRRC and to the Chairpersons of the House Insurance Committee and the Senate Banking and Insurance Committee. In addition to the submitted final-form regulations, the agency has provided IRRC and the Committees 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 that material is available to the public upon request.

In preparing these final-form regulations, the agency considered all comments received from IRRC, the Committees and the public. These final-form regulations were deemed approved by the House and Senate Committees on October 17, 2001. In accordance with section 5a(d) of the Regulatory Review Act (71 P. S. § 745.5a(d)), IRRC met on October 18, 2001, and approved the final-form regulations in accordance with section 5a(e) of the Regulatory Review Act (71 P. S. § 745.5a(e)).

Findings

The Insurance Commissioner and the Chairperson of the Board find that:

(1) Public notice of intention to adopt this rulemaking as amended by this order has been given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No240) (45 P. S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) The adoption of this rulemaking in the manner provided in this order is necessary and appropriate for the administration and enforcement of the authorizing statutes.

Order

The Insurance Commissioner and the Chairperson of the Board, acting under the authorizing statutes, order that:

(a) The regulations of the Board, 25 Pa. Code Part VIII, are amended by deleting §§ 971.1—971.4, 973.1—973.12, 975.1—975.6; and by adding §§ 977.1—977.4, 977.11—977.24, 977.31—977.40, 977.51—977.54 and 977.61, to read as set forth in Annex A.

(b) The Insurance Commissioner and Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and Office of Attorney General for approval as to form and legality as required by law.

(c) The Insurance Commissioner and Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) The order shall take effect January 1, 2002.

M. DIANE KOKEN,
Insurance Commissioner

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

(*Editor's Note*: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 31 Pa.B. 6120 (November, 3, 2001).)

Fiscal Note: Fiscal Note 11-179 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART VIII. UNDERGROUND STORAGE TANK INDEMNIFICATION BOARD

CHAPTER 971. (Reserved)

§§ 971.1—971.4. (Reserved).

CHAPTER 973. (Reserved)

§§ 973.1—973.12. (Reserved).

CHAPTER 975. (Reserved)

§§ 975.1—975.6. (Reserved).

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 fee assessed upon a certified company for all activities on a UST or a HOT as established in accordance with section 705(d)(1) of the act (35 P. S. § 6021.705(d)(1)) and § 977.19(d) (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, as established in accordance with section 705(d)(2) of the act and § 977.18 (relating to capacity fee payment procedure).

Certification fee—The annual fee assessed upon a certified company which performs tank-handling activities on a UST, as established in accordance with section 705(d)(1) of the act and § 977.19(c).

Certified company—An entity, including, but not limited to, a sole proprietorship, a partnership or a corporation, which is authorized by the DEP to conduct tank-handling activities, tightness testing activities or inspection activities using certified installers, certified inspectors or both. See § 245.1 (relating to definitions).

Certified company fee—The fee assessed upon a certified company as established in accordance with section 705(d)(1) of the act and § 977.19(b).

Certified tank installer—A person certified by the DEP to perform tank-handling activities on a UST and who may also perform activities on a HOT. See § 245.1.

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 onsite visits and any information obtained from these visits.

(iii) Other relevant information.

Corrective action costs—Reasonable and necessary expenses for corrective action, as defined in section 103 of the act (35 P. S. § 6021.103), 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. See § 245.1.

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 § 977.15 (relating to gallon fee discount for distributors).

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 the DEP 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. See section 103 of the act and § 245.1.

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 (See 40 CFR 302.1—302.8 (relating to designation, reportable quantities, and notification)), 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 (See 40 CFR 110.1—110.6 (relating to discharge of oil)).

(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 (49 U.S.C.A. App. §§ 1671—1687).

(II) The Hazardous Liquid Pipeline Safety Act of 1979 (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).

Waste oils—An accumulation of oils from one or more sources, including the following:

(i) Water emulsified in oil.

(ii) 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.

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

§ 977.12. Owner and operator fees.

(a) *Annual fees.* The Board may charge fees established in this section, based on an annual actuarial review.

(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 the DEP may be assessed the following fees:

(1) *Tank fee.* A tank fee of $0 per UST per year.

(2) *Gallon fee.* A gallon fee on all regulated substances entering a UST of $.0005 per gallon. For example, 10,000 gallons at $.0005 per gallon equals $5.

(c) *Nonretail bulk storage.* Total fees paid by an owner or operator of a nonretail bulk storage or wholesale distribution UST storing gasoline are established 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 of $.01 per gallon of capacity, which amount is established in accordance with section 705(d)(2) of the act. (For example, 10,000 gallons at $.01 per gallon equals $100).

§ 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 established 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) 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.

(f) 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).

(g) 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.

(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. 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 procedure) 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 fee).

(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 established under § 977.12(a) and (b)(2) (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 shall charge the capacity fee to an owner or operator.

(b) The capacity fee shall be established 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) *Annual fees.* The Board will charge fees established in this section, based on an annual actuarial review.

(b) *Certified company fee.* Certified companies shall be required to pay to the Fund a certified company fee of $1,000 per year.

(c) *Certification fee.* Certified companies which perform tank-handling activities on a UST as described in this subsection, shall 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 (See 25 Pa. Code § 245.110 (relating to certification of installers)):

(1) Installation and modification certification (UMX) fee of $0.

(2) Removal certification (UMR) fee of $0.

(3) Tightness Tester certification (UTT) fee of $0.

(4) Storage tank liner certification (TL) fee of $0.

(d) *Activity fee.* An activity fee shall be assessed on all activities on a UST or a HOT. The tank installer shall complete an activity fee form, supplied by the DEP for each activity. Except in an emergency these forms shall be submitted to the DEP 30 days prior to the commencement of the activity. The fees are as follows:

(1) Installation Activity Fee of $50.

(2) Major Modification Activity Fee of $50.

(3) Removal Activity Fee of $15.

§ 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 established 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 required installation, modification and removal fees to the Fund upon receipt of the monthly invoice from the Fund.

(3) The activity fee shall be established in § 977.19(d).

§ 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 the 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 the 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 claims.
977.38. Primary coverage.
977.39. Claim dispute procedures.
977.40. Subrogation for corrective action cost.

§ 977.31. Eligibility requirements.

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

(1) The claimant is the owner, operator or certified tank installer of the tank which is the subject of the claim.

(2) The current fee required under section 705 of the act (35 P. S. § 6021.705) has been paid.

(3) A UST 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.

(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. See paragraph (4).

(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. See paragraph (4).

(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 company 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 (See section 704 of the act (35 P. S. § 6021.704)) 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 $1 million for each owner and operator of 100 or less USTs or an owner or operator of 100 or less HOTs.

(B) An annual aggregate of $2 million for each owner or operator of 101 or more USTs or an owner or operator of 101 or more HOTs.

(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 this paragraph.

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

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

(2) 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) A claim made against a certified company before the date of coverage.

(5) A 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 shall 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 claims.

The Fund may prioritize claims for payment. 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 § 977.32 (relating to participant cooperation), the Fund may deny further payments on a claim.

Subchapter D. HEATING OIL TANK OPTIONAL PROGRAM

§ 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 shall be completed within the 30-day period preceding the application date.

(3) Submit a $50 fee. 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 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 in § 977.61 (relating to dispute procedures).

Subchapter E. 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 35 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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