

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

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Authority

The provisions of this Chapter 977 issued under sections 106, 301(a)(5) and 501(a)(5) of the Storage Tank and Spill Prevention Act (35 P. S. §§ 6021.106, 6021.301(a)(5) and 6021.501(a)(5)); section 5(b)(1) of The Clean Streams Law (35 P. S. § 691.5(b)(1)); section 105(a) of the Solid Waste Management Act (35 P. S. § 6018.105(a)); and section 1920-A of The Administrative Code of 1929 (71 P. S. § 510-20), unless otherwise noted.

Source

The provisions of this Chapter 977 adopted November 30, 2001, effective January 1, 2002, 31 Pa.B. 6615, unless otherwise noted.

Editor's Note: Underground Storage Tank Indemnification Fund coverage for tank installers did not become available until January 1, 2002, upon adoption of Chapter 977 regulations.

Subchapter A. GENERAL PROVISIONS

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§ 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

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§ 977.11. Fund fees.

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

Cross References

This section cited in 25 Pa. Code § 977.51 (relating to election requirements).

§ 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 \$.011 per gallon. (For example, 10,000 gallons at \$.011 per gallon equals \$110).

(c) *Nonretail bulk storage.* Total fees paid by an owner or operator of a non-retail 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 \$.0825 per gallon of capacity, which amount is established in accordance with section 705(d)(2) of the act (35 P. S. § 6021.705(d)(2)).(For example, 10,000 gallons at \$.0825 per gallon equals \$825).

Authority

The provisions of this § 977.12 amended under sections 206, 506, 1501 and 1502 of The Administrative Code of 1929 (71 P. S. §§ 66, 186, 411 and 412); and section 705 of the Storage Tank and Spill Prevention Act (35 P. S. § 6021.705).

Source

The provisions of this § 977.12 amended March 22, 2002, effective April 1, 2002, 32 Pa.B. 1515; amended December 20, 2002, effective December 21, 2002, 32 Pa.B. 6258; amended December 26, 2003, effective January 1, 2004, 33 Pa.B. 6420. Immediately preceding text appears at serial pages (294813) to (294814).

Cross References

This section cited in 25 Pa. Code § 977.4 (relating to definitions); 25 Pa. Code § 977.13 (relating to tank fee payment procedure); 25 Pa. Code § 977.14 (relating to gallon fee payment procedure); 25 Pa. Code § 977.17 (relating to security for payment of gallon fee); 25 Pa. Code § 977.18 (relating to capacity fee payment procedure).

§ 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 Common-

wealth 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.

Cross References

This section cited in 25 Pa. Code § 977.4 (relating to definitions); 25 Pa. Code § 977.14 (relating to gallon fee payment procedure).

§ 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.

Cross References

This section cited in 25 Pa. Code § 977.14 (relating to gallon fee payment procedure); and 25 Pa. Code §977.17 (relating to security for payment of gallon fee).

§ 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.

Cross References

This section cited in 25 Pa. Code § 977.16 (relating to posting and collecting security).

§ 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.

Cross References

This section cited in 25 Pa. Code § 977.4 (relating to definitions).

§ 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 § 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.

Cross References

This section cited in 25 Pa. Code § 245.132 (relating to standards of performance); 25 Pa. Code § 977.4 (relating to definitions); and 25 Pa. Code § 977.20 (relating to certified company fee, certification fee and activity fee payment procedure).

§ 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)).

Cross References

This section cited in 25 Pa. Code § 977.61 (relating to dispute procedure).

§ 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

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§ 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.

Cross References

This section cited in 25 Pa. Code § 977.22 (relating to fee dispute procedures); and 25 Pa. Code § 977.52 (relating to coverage period).

§ 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.

Cross References

This section cited in 25 Pa. code § 977.32 (relating to eligibility requirements); 25 Pa. Code § 977.35 (relating to third-party suit); and 25 Pa. Code § 977.40 (relating to subrogation for corrective action cost).

§ 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 \$1.5 million per tank per occurrence and may not exceed the annual aggregate limit.

(ii) Payments may not exceed:

(A) An annual aggregate of \$1.5 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 \$3 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.

Authority

The provisions of this § 977.33 amended under sections 206, 506, 1501 and 1502 of The Administrative Code of 1929 (71 P. S. §§ 66, 186, 411 and 412).

Source

The provisions of this 977.33 amended December 20, 2002, effective December 21, 2002, 32 Pa.B. 6258. Immediately preceding text appears at serial pages (285938) to (285939).

§ 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).

Cross References

This section cited in 25 Pa. Code § 977.31 (relating to eligibility requirements).

§ 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.

Cross References

This section cited in 25 Pa. Code § 977.32 (relating to participant cooperation).

§ 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.

Cross References

This section cited in 25 Pa. Code § 977.32 (relating to participant cooperation).

Subchapter D. HEATING OIL TANK OPTIONAL PROGRAM

Sec.

977.51. Election requirements.

977.52. Coverage period.

977.53. Cancellation of coverage.

977.54. Dispute procedures.

§ 977.51. Election requirements.

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

- (1) Complete and submit an application form available from the Fund.
- (2) Provide the Fund with a copy of a tank tightness test utilizing an EPA approved testing system, indicating a satisfactory result. The test 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 continu-

ous 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

Sec.
977.61. Dispute procedures.

§ 977.61. Dispute procedures.

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

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

(b) An appeal of the Executive Director's decision shall be made in writing to the Board. The appeal must be received by the Board within 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.

Cross References

This section cited in 25 Pa. Code § 977.22 (relating to fee dispute procedure); 25 Pa. Code § 977.39 (relating to claim dispute procedures); and 25 Pa. Code § 977.54 (relating to dispute procedures).

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