

Regulatory Analysis Form

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REVIEW US

(1) Agency

Underground Storage Tank Indemnification Board

(2) I.D. Number (Governor's Office Use)

11-179

IRRC Number: 2165

(3) Short Title

Regulations of the Underground Storage Tank Indemnification Fund

(4) PA. Code Cite

25 Pa. Code, Chapter 977, §§977.1-977.61

(5) Agency Contacts & Telephone Numbers

Primary Contact: Peter J. Salvatore, Regulatory Coordinator, 1326 Strawberry Square, Harrisburg, PA 17120, (717) 787-4429

(6) Type of Rulemaking (check one)

- Proposed Rulemaking
 Final Order Adopting Regulation
 Final Order, Proposed Rulemaking Omitted

(7) Is a 120-Day Emergency Certification Attached?

- No
 Yes: By the Attorney General
 Yes: By the Governor

(8) Briefly explain the regulation in clear and nontechnical language.

The purpose of this rulemaking is to adopt 25 Pa. Code Chapter 977 §§977.1 – 977.61, titled “Regulation of the Underground Storage Tank Indemnification Fund” in order to delete 25 Pa. Code, Chapters 971, 973 and 975 and replace them with a consolidated regulation to comply with the amendments to the Storage Tank and Spill Prevention Act. This rulemaking establishes new sections dealing with the fees for certified companies, new claims procedures for underground storage tank owners, operators and certified companies and dispute resolution procedures.

(9) State the statutory authority for the regulation and any relevant state or federal court decisions.

This regulation is promulgated under the authority of the Storage and Spill Prevention Act (“Act”) (35 P. S. §§6021.101 – 6021.2104).

(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

The Board is authorized to establish and assess fees and set claim's handling procedures via a regulatory scheme. Authority is granted to the Board at 35 P. S. §6021.701 et seq.

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

The Board is repealing Chapter's 25 Pa. Code §§971, 973 and 975, dealing with fees, fee collection procedures and heating oil tanks, respectively. The Board is also promulgating a new regulation found at 25 Pa. Code 977 which incorporates similar language found at §§971, 973 and 975. It also adds subchapters dealing with General Provisions, Claims Procedures and Dispute Procedures.

(12) State the public health, safety, environmental or general welfare risks associated with nonregulation.

The Underground Storage Tank Indemnification Fund pays for the cleanup and resultant impacts to third parties when a release occurs from a regulated underground storage tank. Therefore, this regulation is needed to capitalize the Fund and establish necessary claims procedures to ensure swift eligibility determination, which leads to expedited cleanups.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

The regulation benefits the regulated tank owner and operator community as well as certified tank installer companies. These entities will pay fees but may also receive claim benefits if a regulated underground storage tank discharges into the environment.

REGULATION ANALYSIS FORM

(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effects as completely as possible and approximate the number of people who will be adversely affected.)

There will be no adverse effects on any party as a result of the repeal of the old regulations and the addition of this new regulation.

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

The regulation applies to all regulated tank owners and operators and certified companies permitted by the Department of Environmental Protection to do business in the Commonwealth.

(16) Describe the communications with and input from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

The proposed regulation was published in the *Pennsylvania Bulletin* at 30 Pa.B. 6593 (December 23, 2000) with a 30-day public comment period. Comments that were received from the public and the IRRC were considered in drafting the final form regulation.

(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures, which may be required.

The regulation imposes fees on tank owners and operators and certified companies but provides up to \$1 million in coverage to each of these candidates. The fees paid by each entity varies depending on the type and size of tanks owned or operated and the number of installations, major modifications and removals performed by the certified installer.

(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures, which may be required.

The regulation imposes maximum fees on tank owners and operators and certified companies but provides up to \$1 million in coverage to each of those candidates with less than 100 tanks and \$2 million in coverage for those candidates with 101 or more tanks. The fees that each entity pays varies depending on the type and size of tanks owned or operated and the number of installations, major modifications and removals performed by the certified installer.

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting, or consulting procedures, which may be required.

There are no costs or savings associated to state government associated with this rulemaking. The Fund is financed entirely by fees paid by the regulated community. No tax dollars support the Underground Storage Tank Indemnification Fund.

Regulatory Analysis Form

(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years. N/A

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community						
Local Government						
State Government						
Total Savings						
COSTS:						
Regulated Community						
Local Government						
State Government						
Total Costs						
REVENUE LOSSES:						
Regulated Community						
Local Government						
State Government						
Total Revenue Losses						

(20a) Explain how the cost estimates listed above were derived.

The repeal of the existing regulations (§971, 973 and 975) and adoption of the new regulation (§977) are merely administrative tools to assist the regulated community in understanding Fund operations. Consolidation of the regulations as proposed should provide faster retrieval of information by the regulated community. Since fees are already assessed on tank owners or operators there are no savings, costs or revenue losses to consider.

REGULATORY ANALYSIS POINT

(20b) Provide the past three-year expenditure history for programs affected by the regulation.
N/A.

Program	FY -3	FY -2	FY -1	Current FY
Underground Storage Tank Indemnification Fund	\$16 million	\$17 million	\$24 Million	\$35 million (estimated)

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

No costs or adverse effects are anticipated as a result of this regulation.

(22) Describe the nonregulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

Repealing chapters 971, 973 and 975 of Title 25 of the Pennsylvania Code and incorporating similar provisions into Chapter 977 is the most efficient method to achieve consistency with the authorizing statute. No other alternatives were considered.

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

No other regulatory schemes were considered. The repeal of the older regulations and adoption of a new combined regulation is the most efficient method of updating the regulatory requirements.

Regulatory Analysis Form

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

Yes, certified companies are not mandated to show proof of financial responsibility. However, Act 13 of 1998 mandates that the Board provide coverage for those entities. The Board has no discretion.

(25) How does this regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

The rulemaking will not put Pennsylvania at a competitive disadvantage with other states.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

No.

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

No public hearings or informational meetings are anticipated.

Regulatory Analysis Form

(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports, which will be required as a result of implementation, if available.

The repeal of the regulation imposes no additional paperwork requirements on the Department, regulated community, or the public. However, the imposition of fees on certified companies will involve paper work due to payment of fees.

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

N/A

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

The rulemaking will take effect upon approval of the final form regulation by the legislative standing committees, the Independent Regulatory Review Commission, the Office of the Attorney General, and upon final publication in the *Pennsylvania Bulletin*.

(31) Provide the schedule for continual review of the regulation.

The Department reviews each of its regulations for continued effectiveness on a triennial basis.

CDL-1

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE
BUREAU

(Pursuant to Commonwealth Documents Law)

2165

DO NOT WRITE IN THIS SPACE

Copy below is hereby approved as to
form and legality. Attorney General

By _____
(Deputy Attorney General)

Date of Approval

→ Check if applicable.
Copy not approved. Objections
attached.

Copy below is hereby certified to be a true and correct
copy of a document issued, prescribed or promulgated
by:

Insurance Department and
Underground Storage Tank
Indemnification Board

(AGENCY)

DOCUMENT/FISCAL NOTE NO. 11-179

DATE OF ADOPTION: _____

BY: *M. Diane Koken*

M. Diane Koken
Insurance Commissioner
and
E. Bruce Sheller
Chair
TITLE: *ES*
(EXECUTIVE OFFICER, CHAIRMAN OR
SECRETARY)

Copy below is hereby approved as to form and
legality. Executive or Independent Agencies

BY: *John V. Turner*

9/26/01

DATE OF APPROVAL

(DEPUTY GENERAL COUNSEL)
(~~CHIEF COUNSEL, INDEPENDENT AGENCY~~)
(STRIKE INAPPLICABLE TITLE)

→ Check if applicable. No Attorney General
approval or objection within 30 days after
submission.

NOTICE OF FINAL FORM RULEMAKING

INSURANCE DEPARTMENT

25 Pa. Code, Chapter 977, §§977.1-977.61

Regulation of the Underground Storage Tank Indemnification Fund

PREAMBLE

The Underground Storage Tank Indemnification Board (Board) hereby adopts 25 Pa. Code, Chapter 977, Regulation of the Underground Storage Tank Indemnification Fund, as set forth in Annex A.

Statutory Authority

The final form regulation is 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 Independent 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), 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 regulation will cause qualified individuals and companies to allow their certifications to expire and that the requirements of the regulation are excessive for companies who already have errors and omissions (E&O) insurance.

Since the proposed regulation was published on December 23, 2000, the Board has reduced the certified company fee from \$2000 to \$1000, made the certification fees \$0, and decreased the activity fees, thereby significantly reducing the fee requirements in the regulation. 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 concerned with respect to the "minimum" \$2000 certified company fee in §977.19.

As mentioned above, 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 the IRRC expressed a number of concerns. Those concerns are addressed below.

1. Method of fee assessment. - Statutory authority; Economic impact; Reasonableness; Clarity.

The main concern expressed by the 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*. The 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 regulation. 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.

The IRRC had some concerns with respect to the definition section. The 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 proposed regulation.

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 (35 P. S. §§ 6021.101--6021.2104), although it does appear in 25 Pa. Code §245.1 (relating to definitions). The Board considered defining the term by referencing Title 25 of the Pennsylvania Code, but was concerned that many of the parties affected by the regulation would not have access to that publication. Additionally, the cost for a hard copy of Title 25, 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 regulation. 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 regulation spend additional time and money researching other reference materials.

3. The IRRRC questioned whether there is a certification that is not in Title 25 with respect to the definition of *certified company*.

The Board is not aware of any certification other than those in Title 25; therefore, reference to “this title or” has been removed from the definition of *certified company*.

4. The IRRRC commented that a reference to DEP’s certification regulations would add clarity to the definition of *certified tank installer*.

The Board agrees and has added a reference to DEP’s regulation.

5. The IRRRC 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 DEP.” The IRRRC asked for specific references to the act and the DEP regulations.

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

6. The IRRRC asked the Board to clarify what regulation the phrase “determined by DEP by regulation” pertained to in subparagraph (i)(C) of the definition of *regulated substance*.

This phrase pertains to regulations that 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. The IRRRC also asked the Board to cite the appropriate Federal regulations that were referred to in paragraph (i) of the definition of the term *release*.

The Board has cited the appropriate Federal regulations.

8. The IRRRC 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 25 Pa. Code §245.1 (relating to definitions). Because there are no other tanks excluded by policy or regulation under the act, this phrase has been deleted for clarity.

9. The IRRRC 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 paragraph (ii), the IRRRC 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

Subsection (d) Capacity fee.

10. The IRRC noted that section 977.12(d) 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) 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, the IRRC contends that the word “calculated” should be removed from this subsection.

The Board agrees and has revised the regulation to use the word “established”. In accordance with this comment, the Board has also replaced the word “calculated” in subsection 977.18(b) with the word “established”.

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

11. The 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, the IRRC had a question and a comment. First, the IRRC asked whether this subsection is intended to refer to the defined term *regulated substances*. If so, the IRRC contends that the word “regulated” should be added to subsection (e). Secondly, the 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” The IRRC pointed out that publishing changes in the *Pennsylvania Bulletin* will not amend the regulation. The result will be a definition in the regulation and a different definition published in the *Pennsylvania Bulletin*. Therefore, the IRRC noted that subsection 9(e) should be deleted.

The Board agrees that subsection 977.18(e) is not needed and therefore has deleted it from the regulation. This deletion also renders moot the question about the defined term *regulated substance* mentioned above.

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

12. The IRRC notes that Subsection (b) states “the tank fee shall be calculated as set forth 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. Hence, the 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. The IRRC had three questions with respect to section 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 at 25 Pa. Code §973.4, which the Board promulgated pursuant to its statutory authority found at section 705(f) of the act (relating to additional powers). Section 705(f) 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 35 P.S. 705(f)(2)).

Second, the 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, the 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, the IRRC stated that subsection (h) limits “gallon fees” to no more than \$5,000 per tank in one year. Section 705(d)(3) of the act uses the word “fees”, not “per gallon fees”. Hence, the IRRC suggests 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 as set forth in §977.12(b)(ii) by the number of gallons of regulated substance...” There were two concerns.

First, is the IRRC noted a typographical error. The 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, the 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* pursuant to §977.12(a). Since the fee is subject to change, the IRRC questioned how a tank owner will determine the amount required for the security. The 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 pursuant to §§977.12(a) and 977.12(b)(2).”

The Board agrees with this comment and has changed this section to read “[...] the gallon fee as established pursuant to §§977.12(a) and 977.12(b)(2) [...]”, as requested by the 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 three-year period. The 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. The 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 regulation 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, the IRRC points out that subsection (c) uses the acronyms, “UMX”, “UMR”, “UTT” and “TL”, as used by DEP. The IRRC suggested clarity would be improved by adding a cross-reference to the definitions in the DEP 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). The 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, the 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. The 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.” (Emphasis added.) However, the IRRC noted that the list of requirements differs from the language in section 706 of the act. The IRRC pointed out that although the Board has the authority to clarify and establish additional requirements, the phrase should be changed to “... pursuant to section 706 of the act, the participant shall meet the following eligibility requirements ...”

The 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. The 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. The 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.” (Emphasis added.) The act (35 P.S. §6021.705(b)) uses the phrase “prioritizing claims”, and therefore IRRC contends 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. The 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. The 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 regulation from the proposed format. These changes were to make the regulation 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 DEP does not require certification to perform activities on a heating oil tank (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 (relating to fund coverage and exclusions) subsection (a)(3) states that "A certified installer is subject to one deductible..." It should state "A certified *company* is subject to one deductible..." (Emphasis added.) 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 their underground storage tanks and the cost of necessary services supplied by certified companies. To offset this increase in costs the private sector shall receive up to \$1 million in coverage in the event of a release.

Paperwork

This 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 this regulation, should be directed to Peter J. Salvatore, Regulatory Coordinator, Special Projects Office, 1326 Strawberry Square, Harrisburg, PA 17120, phone

(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)), the agency submitted a copy of this regulation on February 9, 2001 to the Independent Regulatory Review Commission and to the Chairmen of the House Insurance Committee and the Senate Banking and Insurance Committee. In addition to the submitted regulation, the agency has provided the Commission 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 this final form regulation, the Board considered all comments received from IRRC, the Committees and the public. This final form regulation was (deemed) approved by the House and Senate Committees on _____. In accordance with section 5a(d) of the Regulatory Review Act (71 P.S. §745.5a(d)), IRRC met on _____ and (deemed) approved the regulation in accordance with section 5a(e) of the Regulatory Review Act (71 P.S. §745.5a(e)).

Findings

The Commissioner and the Chairman of the Underground Storage Tank Indemnification 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 Commissioner and the Chairman of the Underground Storage Tank Indemnification Board, acting under the authorizing statutes, orders that:

- (1) The regulations of the Underground Storage Tank Indemnification Board, 25 Pa. Code, are amended by adopting §§977.1-977.61, to read as set forth in Annex A.
- (2) The Commissioner and Chairman of the Underground Storage Tank Indemnification 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.

(3) The Commissioner and Chairman of the Underground Storage Tank Indemnification Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(4) The regulation adopted by this order shall take effect January 1, 2002.

M. Diane Koken, Insurance Commissioner

E. Bruce Sheller, Chair, Underground Storage Tank Indemnification Board

Annex A

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

§§ 971.1--971.4. (Reserved).

§§ 973.1--973.12. (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 per tank fee assessed upon a certified company for all activities on a UST or a HOT calculated 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 ACTIVITY fees).

Board--The Underground Storage Tank Indemnification Board.

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

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

Certification fee--The annual fee assessed upon a certified company which performs tank-handling activities on a UST, calculated AS ESTABLISHED in accordance with section 705(d)(1) of the act and § 977.20(a) 977.19(C) (relating to certified company fee, certification FEES fee and activity fee payment procedures).

Certified company--An entity, including, but not limited to, a sole proprietorship, a partnership or a corporation, which is authorized by this title or the DEP to conduct tank-handling activities, tightness testing activities or inspection activities using certified installers, certified inspectors or both. SEE 25 PA. CODE §245.1 (RELATING TO DEFINITIONS).

Certified company fee--The fee assessed upon a certified company calculated AS ESTABLISHED in accordance with section 705(d)(1) of the act and § 977.20(a) 977.19(b).

Certified tank installer--A person certified by the DEP to perform tank-handling activities on a UST or a HOT AND WHO MAY ALSO PERFORM ACTIVITIES ON A HOT. SEE 25 PA. CODE §245.1 (RELATING TO DEFINITIONS).

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

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

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

Corrective action costs--Reasonable and necessary expenses for corrective action, as defined in the act (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 25 PA. CODE §245.1 (RELATING TO DEFINITIONS).

DEP--The Department of Environmental Protection of the Commonwealth.

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

Discount--The amount retained by distributors who collect the gallon fee in accordance with § 977.22 977.15 (relating to GALLON fee dispute procedure-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 DEP ~~by regulation~~ whose containment, storage, use or dispensing may present a hazard to the public health and safety or the environment, but not including gaseous substances used exclusively for the administration of medical care.

(ii) The term does not include the storage or use of animal waste in normal agricultural practices. SEE 35 P.S. 6021 §103 and 25 PA. CODE §245.1 (RELATING TO DEFINITIONS).

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 (RELATING TO OWNER AND OPERATOR FEES).

UST--Underground Storage Tank--

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

(ii) The term does not include:

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

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

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

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

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

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

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

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

(G) Stormwater or wastewater collection systems.

(H) Flow-through process tanks.

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

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

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

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

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

(N) A wastewater treatment tank system.

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

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

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

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

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

Waste oils--An accumulation of oils from several ONE OR MORE sources, including the following:

(i) Water emulsified in oil.

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

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

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

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

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

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

Subchapter B. FEES AND COLLECTION PROCEDURES

Sec.

977.11. Fund fees.

977.12. Owner and operator fees.

977.13. Tank fee payment procedure.

977.14. Gallon fee payment procedure.

977.15. Gallon fee discount for distributors.

977.16. Posting and collecting security.

977.17. Security for payment of gallon fee.

977.18. Capacity fee payment procedure.

977.19. Certified company fees.

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

977.21. Penalty for late payment of fees.

977.22. Fee dispute procedure.

977.23. Recordkeeping responsibilities.

977.24. Audit of records.

§ 977.11. Fund fees.

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

§ 977.12. Owner and operator fees.

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

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

(1) *Tank fee.* A tank fee not to exceed a maximum fee of ~~\$100~~ \$0 per UST per year.

(2) *Gallon fee.* A gallon fee on all regulated substances entering a UST not to exceed a maximum fee of ~~2¢~~ \$0.0005 per gallon. (FOR EXAMPLE, 10,000 GALLONS AT \$0.0005 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 ~~calculated~~ 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 not to exceed a maximum fee of ~~15¢~~ \$0.01 per gallon of capacity, which amount is ~~calculated~~ ESTABLISHED in accordance with section 705(d)(2) of the act (35 P.S. § 6021.705(D)(2)). (FOR EXAMPLE, 10,000 GALLONS AT \$0.01 PER GALLON EQUALS \$100).

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

§ 977.13. Tank fee payment procedure.

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

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

(f) (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.

(g) (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 in per-gallon fees. See section 705(d)(3) of the act (35 P. S. § 6021.705(d)(3)).

§ 977.15. Gallon fee discount for distributors.

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

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

§ 977.16. Posting and collecting security.

(a) Requirement to post security.

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

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

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

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

(b) Collecting posted security.

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

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

§ 977.17. Security for payment of gallon fee.

(a) The value of the security posted by a distributor shall be calculated by multiplying the gallon fee as set forth in §977.12(b)(ii) ESTABLISHED PURSUANT TO §§ 977.12(A) AND 977.12 (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 ~~may~~ SHALL charge the capacity fee to an owner or operator.

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

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

§ 977.19. Certified company fees.

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

(b) *Certified company fee.* Certified companies ~~may~~ SHALL be required to pay to the Fund a certified company fee ~~not to exceed a maximum fee of \$2,000~~ \$1,000 per year.

(c) *Certification fee.* Certified companies which perform tank-handling activities on a UST as described in this subsection, ~~may~~ 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 ~~not to exceed a maximum fee of \$100~~ \$0.

(2) Removal certification (UMR) fee ~~not to exceed a maximum fee of \$50~~ \$0.

(3) Tightness Tester certification (UTT) fee ~~not to exceed a maximum fee of \$25~~ \$0.

(4) Storage tank liner certification (TL) fee (TL) not to exceed a maximum fee of \$100 \$0.

(d) Activity fee. A AN ~~per tank activity fee may~~ SHALL be assessed on all activities on a UST or a HOT. The tank installer must complete an activity fee form, SUPPLIED BY THE DEP for each activity. These EXCEPT IN AN EMERGENCY THESE ~~forms and the activity fees~~ shall be submitted to the ~~Fund~~ DEP 30 days prior to the commencement of the activity. The fees are as follows:

(1) Installation Activity Fee ~~not to exceed a maximum fee of \$100~~ \$50.

(2) Major Modification Activity Fee ~~not to exceed a maximum fee of \$100~~ \$50.

(3) Removal Activity Fee ~~not to exceed a maximum fee of \$100~~ \$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 calculated ESTABLISHED as set forth in § 977.19 (relating to certified company fees).

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

(b) Activity fee payment procedures.

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

(2) The certified company shall submit any required installation, modification and removal fees ~~on a form provided by TO~~ the Fund ~~for each facility where the certified company is performing an activity~~ UPON RECEIPT OF THE MONTHLY INVOICE FROM THE FUND.

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

~~(4)(3) The activity fee shall be calculated ESTABLISHED as set forth in § 977.19(d) (relating to certified company ACTIVITY fees).~~

§ 977.21. Penalty for late payment of fees.

Failure or refusal of a participant to pay the fee or a part of the fee by the date established by the Board for the payment of fees may result in a penalty of 5% of the amount due which shall accrue on the first day of delinquency. Thereafter, on the last day of each month during which a part of a fee or a prior accrued penalty remains unpaid, an additional 5% of the then unpaid balance shall accrue in accordance with section 705(e) of the act (35 P. S. § 6021.705(e)).

§ 977.22. Fee dispute procedure.

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

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

§ 977.23. Recordkeeping responsibilities.

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

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

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

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

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

(1) Copies of DEP company certification and tank installer certificates.

(2) Financial records documenting payment of fees to the Fund.

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

(1) Copies of the tank activity report form originally submitted to DEP.

(2) Financial records documenting payment of fees to the Fund.

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

§ 977.24. Audit of records.

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

Subchapter C. COVERAGE AND CLAIMS PROCEDURES

Sec.

977.31. Eligibility requirements.

977.32. Participant cooperation.

977.33. Fund coverage and exclusions.

977.34. Claims reporting.

977.35. Third-party suit.

977.36. Corrective action payments.

977.37. Priority of payment CLAIMS.

977.38. Primary coverage.

977.39. Claim dispute procedures.

977.40. Subrogation for corrective action cost.

§ 977.31. Eligibility requirements.

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

(1) The participant is potentially liable for the corrective action costs, bodily injury or property damage 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 or HOT has been registered in accordance with the requirements of section 503 of the act (35 P. S. § 6021.503).

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

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

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

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

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

§ 977.32. Participant cooperation.

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

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

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

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

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

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

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

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

§ 977.33. Fund coverage and exclusions.

(a) Fund coverage.

(1) Corrective action. The Fund shall indemnify an eligible owner or operator for up to the available coverage limit, for reasonable and necessary corrective action costs. (SEE SUBSECTION (4) OF THIS SECTION).

(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 SUBSECTION (4) OF THIS SECTION).

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

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

(3) Deductible. Payment of a claim for corrective action costs shall be subject to a deductible in an amount not less than \$5,000 per tank per occurrence for each UST or HOT that contributed to the release. If an eligible claim for bodily injury or property damage results from the release, an additional deductible per tank per occurrence in an amount not less than \$5,000 applies to all claims in addition to the deductible for corrective action. A certified ~~tank installer~~ 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 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 UST or an owner or operator of 100 or less HOT.

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

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

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

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

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

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

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

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

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

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

(6) Default judgments.

§ 977.34. Claims reporting.

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

§ 977.35. Third-party suit.

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

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

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

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

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

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

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

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

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

§ 977.36. Corrective action payments.

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

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

(1) Time sheets for personnel and equipment.

(2) Statements of work performed.

(3) Receipts or other documentation for expendable supplies and subcontractor supplies.

(4) A list of tests performed with costs and results for any laboratory analyses.

(5) The owner, operator or remediation contractor shall supply rate schedules, fees for service schedules, and contracts with consultants.

(6) All subcontractor invoices.

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

§ 977.37. Priority of payment. CLAIMS.

The Fund may prioritize reimbursements 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 the requirements of § 977.32 (relating to participant cooperation), the Fund may deny any further payments on a claim.

Subchapter D. HEATING OIL TANK OPTIONAL PROGRAM

Sec.

977.51. Election requirements.

977.52. Coverage period.

977.53. Cancellation of coverage.

977.54. Dispute procedures.

§ 977.51. Election requirements.

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

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

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

(3) Submit a \$50 ~~fee determined by the Fund not to exceed a maximum of \$100.~~ The fee will be credited to the applicant's account if the application is approved or returned if the application is rejected.

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

§ 977.52. Coverage period.

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

§ 977.53. Cancellation of coverage.

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

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

§ 977.54. Dispute procedures.

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

Subchapter E. DISPUTE PROCEDURES

Sec.

977.61. Dispute procedures.

§ 977.61. Dispute procedures.

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

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

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



COMMONWEALTH OF PENNSYLVANIA
INSURANCE DEPARTMENT

SPECIAL PROJECTS OFFICE
1326 Strawberry Square
Harrisburg, PA 17120

Phone: (717) 787-4429
Fax: (717) 772-1969
E-mail: psalvatore@state.pa.us

September 27, 2001

Mr. Robert Nyce
Executive Director
Independent Regulatory Review Comm.
333 Market Street
Harrisburg, PA 17101

Re: Insurance Department Final
Form Regulation No. 11-179,
Underground Storage Tank
Indemnification Fund
Regulation

Dear Mr. Nyce:

Pursuant to Section 5a(c) of the Regulatory Review Act, enclosed for your review and approval is final form regulation 31 Pa. Code, Chapter 977, Underground Storage Tank Indemnification Fund.

Chapter 977 will consolidate the regulatory requirements located in Chapters 971, 973 and 975 into one chapter and will clarify and explain the establishment and collection of fees, the administration of claims, the Heating Oil Tank Optional Program and dispute resolution procedures.

If you have any questions regarding this matter, please contact me at (717) 787-4429.

Sincerely yours,

A handwritten signature in cursive script that reads "Peter J. Salvatore".

Peter J. Salvatore
Regulatory Coordinator

The Final Form Regulation listed below has been sent to the following:

<i>Reg #</i>	<i>Regulation Title</i>	<i>Date Sent</i>	<i>09/27/2001</i>
<i>11-179</i>	<i>USTIF Claims Regulations</i>		
<hr/>			
<i>Mr. David</i> <i>David E. Callahan</i> <i>Executive Director</i> <i>Associated Petroleum Industries of Pennsylvania</i> <i>240 N. Third Street</i> <i>Harrisburg, PA 17108</i> <i>Phone (717) 234-7983 X00000</i>	<i>Letter Co-Author</i> <i>EMail apip@worldnet.att.net</i>		
<hr/>			
<i>Mr. John D. Pile</i> <i>PA DEP Certified Remover</i> <i>Earthtech, Inc.</i> <i>336 Bloomfield St., Suite 201</i> <i>Johnstown, PA 15904</i> <i>Phone (814) 266-6402 X00000</i>	<i>Letter Co-Author</i> <i>EMail</i>		
<hr/>			
<i>Mr. John W. Myers</i> <i>NA</i> <i>Professional Enterprises Inc.</i> <i>140 Buckeye Road</i> <i>Karns City, PA 16041-1408</i> <i>Phone (724) 445-7064 X00000</i>	<i>Letter Co-Author</i> <i>EMail fullycertified@aol.com</i>		

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT**

I.D. NUMBER: 11-179
SUBJECT: Regulation of the Underground Storage Tank Indemnification Fund
AGENCY: DEPARTMENT OF INSURANCE

TYPE OF REGULATION

- Proposed Regulation
- X Final Regulation
- Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor
- Delivery of Tolled Regulation
 - a. With Revisions
 - b. Without Revisions

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
9-27-01	<i>Shyla Eubank</i>	HOUSE COMMITTEE ON INSURANCE
9/27/01	<i>[Signature]</i>	
9/27/01	<i>Denise Patton</i>	SENATE COMMITTEE ON BANKING & INSURANCE
9/27/01	<i>T. McDaniel</i>	
9/27/01	<i>E. Pagan</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
_____	_____	ATTORNEY GENERAL
_____	_____	LEGISLATIVE REFERENCE BUREAU

September 27, 2001