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**INDEPENDENT REGULATORY REVIEW COMMISSION**  
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

March 12, 2001

E. Bruce Sheller, Chairman  
Underground Storage Tank Indemnification Board  
Sheller Oil Company  
P.O. Box 3311  
West Chester, PA 19381

Re: Regulation #11-179 (IRRC #2165)  
Underground Storage Tank Indemnification Board  
Underground Storage Tank Indemnification Fund

Dear Mr. Sheller:

Enclosed are our Comments. They will soon be available on our website at [www.irrc.state.pa.us](http://www.irrc.state.pa.us).

Our Comments list objections and suggestions for consideration when you prepare the final version of this regulation. We have also specified the regulatory criteria which have not been met. These Comments are not a formal approval or disapproval of the proposed version of this regulation.

If you would like to discuss these Comments, please contact my office at 783-5417.

Sincerely,

Robert E. Nyce  
Executive Director

cae

Enclosure

cc: Honorable Nicholas A. Micozzie, Majority Chairman, House Insurance Committee  
Honorable Anthony DeLuca, Democratic Chairman, House Insurance Committee  
Honorable Edwin G. Holl, Chairman, Senate Banking and Insurance Committee  
Honorable Jack Wagner, Minority Chairman, Senate Banking and Insurance Committee  
Honorable M. Diane Koken, Commissioner, Insurance Department  
Pete Salvatore, Regulatory Coordinator, Insurance Department  
Michael P. Sullivan, Executive Director, USTIFB

## **Comments of the Independent Regulatory Review Commission**

on

### **Underground Storage Tank Indemnification Board Regulation No. 11-179**

#### **Underground Storage Tank Indemnification Fund**

**March 12, 2001**

We submit for your consideration the following objections and recommendations regarding this regulation. Each objection or recommendation includes a reference to the criteria in the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) which have not been met. The Underground Storage Tank Indemnification Board (Board) must respond to these Comments when it submits the final-form regulation. If the final-form regulation is not delivered by January 22, 2003, the regulation will be deemed withdrawn.

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

##### *Maximum fees*

Section 705(d)(1) of the Storage Tank and Spill Prevention Act (Act) (35 P.S. § 6021.705(d)(1)) states "The board, by regulation, shall establish fees to be paid by the owner, operator or certified tank installer, as appropriate, of underground storage tanks....Fees shall be adjusted as deemed necessary by the board, but no more than once a year."

Existing Section 971.2, which would be deleted by this proposed regulation, currently establishes the specific fees the Fund will collect. However, this new proposed regulation would not "establish fees to be paid." Instead, Sections 977.12, 977.19 and 977.51 contain "maximum fees." Subsections 977.12(a) and 977.19(a) state the Board may modify fees not to exceed the maximum fees in the regulation. To do this, the Board is proposing to publish the actual fees in the *Pennsylvania Bulletin* 30 days prior to their effective date.

We question the statutory authority to "adjust" fees outside of the regulatory promulgation process. Even if the Board can justify its authority for the provision, we maintain that the actual fees should continue to be established by regulation, to increase clarity and to afford adequate notice to those who will be affected by the fee change. This new 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.

## 2. Section 977.4. Definitions. - Clarity.

### *Statutory definitions*

The following definitions are identical to those in the act: *Operator, Owner, Regulated substance, Release, and UST – Underground Storage Tanks*. A reference to the statutory definitions would be sufficient, rather than repeating the statutory definitions in the regulation.

### *Certified company*

Since Title 25 is Environmental Protection, is the phrase "...which is authorized by this title or the DEP [Department of Environmental Protection]...." accurate? Is there a certification that is not in Title 25?

### *Certified tank installer*

Since this definition relies upon certification by DEP, a reference to DEP's certification regulations would add clarity.

### *Corrective action costs*

This definition uses the phrases "corrective action as defined in the act" and "as specified in regulations promulgated by the DEP." Specific references are needed to the Act and DEP regulations.

### *Regulated substance*

Subparagraph (i)(C) includes the phrase "determined by DEP by regulation." To what regulation does this phrase refer?

### *Release*

Paragraph (i) under this definition refers to two federal laws including Section 311 of the Federal Water Pollution Control Act (33 USCA § 1321) "and regulations promulgated thereunder." A reference to the appropriate federal regulations is needed.

### *UST – Underground Storage Tanks*

Subparagraph (ii)(S) of this definition states that the definition does not include: "Other tanks excluded by policy or regulations promulgated under the act." To what policies and regulations, is this exclusion referring?

### *Waste oils*

Why is a waste oil defined as "an accumulation of oil from several sources"? Couldn't it be from a single source? Also, under Paragraph (ii), what is meant by "the reaction of incompatible oils that have been mixed"?

### **3. Section 977.12. Owner and operator fees. - Clarity.**

#### *Subsection (d) Capacity fee.*

Section 977.12(d) states that the Board may charge a fee not to exceed an established maximum 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 word “calculated” should be removed from this subsection.

Similarly, Subsection 977.18(b) states: “The capacity fees shall be calculated as set forth in § 977.12(d).” The word “calculated” should also be deleted from this subsection.

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

This subsection allows “any changes regarding which substances are assessed a tank fee” to be done by publication in the *Pennsylvania Bulletin*. There are two questions. First, is this intended to refer to the defined term “regulated substances”? If so, the word “regulated” should be added to Subsection (e).

Second, the regulation relies on the defined term “regulated substance” to establish fees. For example, Section 977.12(b)(2) assesses “a gallon fee on all regulated substances....” 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, Subsection (e) should be deleted.

### **4. Section 977.13. Tank fee payment procedure. – Reasonableness; Clarity.**

Subsection (b) states “the tank fee shall be calculated as set forth in § 977.12.” However, Section 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 word “calculated” should be removed from this subsection.

### **5. Section 977.14. Gallon fee payment procedure. – Statutory authority; Reasonableness; Clarity.**

There are three questions. 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. What is the statutory authority for “requiring” distributors to collect the gallon fee? If there is no such authority, the word “shall” should be replaced with “may,” so that collection of fees by distributors is optional.

Second, 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, Subsection (e) seems to be misplaced. It should be placed before Subsection (h).

Third, 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 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.

#### **6. Section 977.17. Security for payment of gallon fee. - Reasonableness; Clarity.**

Subsection (a) states that the security shall be “calculated by multiplying the gallon fee as set forth in Section 977.12(b)(ii)” by the number of gallons of regulated substance. There are two concerns.

First, there is a typographical error. There is no Section 977.12(b)(ii). Should the reference be to Section 977.12(b)(2)?

Second, even if the reference to Section 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 2¢ 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, how will a tank owner determine the amount required for the security? 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).”

#### **7. Section 977.19. Certified company fees. - Fiscal impact; Reasonableness, Clarity.**

There are three concerns. 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. One commentator suggested that the fee should be “per tank” or linked to the number of tank installations performed by a company. The Board should examine the fiscal impact of the fee level on smaller business.

Second, Subsection (c) uses the acronyms, “UMX”, “UMR”, “UTT” and “TL.” We understand these acronyms are used by DEP. Clarity would be improved by adding a cross-reference to their definitions in DEP regulations.

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 Section 977.20(b). 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 an activity will cause an unwanted delay if immediate action is required to correct problems with a storage tank system. What steps can UST or HOT owners pursue if immediate action is necessary?

#### **8. Section 977.31. Eligibility requirements. – Clarity.**

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 following list of requirements differs from the language in Section 706 of the Act. The Board

has the authority to clarify and establish additional requirements. However, the phrase should be changed to “pursuant to Section 706 of the Act, the participant shall meet the following eligibility requirements:...”

Also, the first paragraph is designated as Subsection (a). This designation could be deleted since there is no Subsection (b).

**9. Section 977.33. Fund coverage and exclusions. - Clarity.**

In Paragraphs (1) and (2) of Subsection (a), what is “the available coverage limit”? A reference to these limits should be added.

**10. Section 977.37. Priority of payment. - Clarity.**

The title of this 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.” The word “claims” should be used consistently.

**11. Section 977.61. Dispute procedures. - Reasonableness.**

Subsection (a) allows 35 days to file an appeal of a Fund decision to the Executive Director. Subsection (b) only allows 15 days to appeal the Executive Director’s decision to the Board. Is 15 days sufficient time to receive and review a decision of the Executive Director, and prepare an appeal of that decision to the Board?

# INDEPENDENT REGULATORY REVIEW COMMISSION

**To:** Pete Salvatore OR  
Terry Seneca  
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**From:** Kristine M. Shomper  
Deputy Director for Administration  
**Company:** Independent Regulatory Review  
Commission  
**Phone:** (717) 783-5419 or (717) 783-5417  
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**Date:** March 12, 2001  
**# of Pages:** 7

**Comments:** We are submitting the Independent Regulatory Review Commission's comments on the Insurance Department's regulation #11-179. Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

**Accepted by:** Pete Salvatore **Date:** 3/12/01



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