



California Regulatory Notice Register

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SEPTEMBER 13, 2013

PROPOSED ACTION ON REGULATIONS

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TITLE 2. FAIR POLITICAL PRACTICES COMMISSION

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California Mental Health Services Authority

Amendment

Multi-County Agency:

Paratransit, Inc.

Sacramento Municipal Utility District (SMUD)

State Agency:

Assembly Rules Committee

TITLE 3. DEPARTMENT OF FOOD AND AGRICULTURE

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*Time-
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Material*

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF OCCUPATIONAL SAFETY AND HEALTH
1515 Clay Street, Suite 1901
Oakland, CA 94612

NOTICE OF PROPOSED RULEMAKING

Subject: INSPECTION AND PERMIT FEES, PRESSURE VESSELS, TANKS & BOILERS

**TITLE 8, CALIFORNIA CODE OF REGULATIONS,
SECTIONS 344 AND 344.1**

The Division of Occupational Safety and Health (“the Division” or “DOSH”), in the Department of Industrial Relations, proposes to permanently amend sections 344 and 344.1 of Title 8 of the California Code of Regulations (“8 CCR”) to increase hourly inspection fees and to increase the charge for mileage associated with the scheduled inspection of air tanks, liquid petroleum gas tanks and boilers. The proposed changes were adopted by the Division as emergency regulations, as directed by Labor Code section 7721(e), effective March 18, 2013. The purpose of this rulemaking process is to adopt these changes as permanent regulations after considering all public comments and recommendations about the proposed action.

PUBLIC HEARING

The Division will hold a hearing to receive public comments on the proposed regulations on:

**November 7, 2013
10:00 AM and until conclusion of all comments
Conference Rooms A & B
Elihu Harris State Building
1515 Clay Street
Oakland, California, 94612**

At the hearing, any person may present statements orally or in writing relevant to this proposed action. Persons making oral comments are encouraged, but not required, to submit their comments in writing as well. Equal weight will be given to oral and written comments. **Please note that the hearing of public comment will begin promptly at 10 AM and will conclude after the last speaker has concluded his or her presentation.**

PLEASE BE ADVISED: Visitors to this building are required to go through security screening including metal detection and inspection of belongings. **DISABILITY ACCOMMODATION NOTICE:** This State Building and its conference rooms are accessible to persons with mobility impairments. Disability accommodation is available upon request. Any person with a disability requiring an accommodation, auxiliary aid or service, or a modification of policies or procedures to ensure effective communication and access to the programs of the Division of Occupational Safety and Health, should contact Ms. Tracy Kwon, Statewide Disability Accommodation Coordinator at 1-866-326-1616 (toll free). The Coordinator can also be reached through the California Relay Service, by dialing 711 or 1-800-735-2929 (TTY) or 1-800-855-3000 (TTY-Spanish).

WRITTEN COMMENT PERIOD

Any person interested in the proposed rulemaking action, or his or her authorized representative, may submit written comments relevant to the proposed regulations to the Division by writing to:

Division of Occupational Safety & Health, Legal Unit
PV Rulemaking
Attn: Suzanne P. Marria, Special Counsel
1515 Clay Street, Ste. 1901
Oakland, CA 94612

Comments may also be submitted by facsimile (FAX) at 510-286-7037, or by email to: smarria@dir.ca.gov. **The written comment period closes at 5 PM on November 7, 2013.** The Division will consider only comments received by that time.

AUTHORITY AND REFERENCE

Under Labor Code sections 59, 60.5(c) and 7721, the Chief of the Division of Occupational Safety and Health has the authority to adopt regulations governing the assessment of fees for inspections performed by Division safety engineers of shops, field inspection and resale inspection of tanks and boilers and for the issuance of permits for the operation of such pressurized tanks, vessels and boilers. The proposed regulations implement, interpret and make specific section 7721 of the Labor Code governing the assessment of such fees.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

This rulemaking permanently adopts increased fee amounts and mileage reimbursement amounts charged by the Division under Labor Code section 7721 for various types of inspections it performs for pressurized vessels, tanks and boilers operated in California.

The Division of Occupational Safety and Health ("Division" or "DOSH"), within the Department of Industrial Relations, is responsible for administering and enforcing the provisions of the California Occupational Safety and Health Act, which begins at section 6300, in Part 1 of Division 5 of the Labor Code, as well as all other parts of Division 5 that previously were the responsibility of the Division of Industrial Safety. (Lab. Code §§ 60.5 and 6308.) The laws governing the use of pressure vessels, other pressurized tanks and boilers begin at section 7620, Part 6 of Division 5 of the Labor Code.

No tank or boiler shall be operated unless a permit for its operation has been issued by, or on behalf of, the Division. (Lab. Code § 7680.) The Division's Pressure Vessel Unit conducts regular inspections of such equipment prior to issuing a permit to operate air tanks, liquefied petroleum gas (L.P.G.) tanks and boilers. (Lab. Code §§ 7681 - 7683.) Qualified safety engineers who are certified by the Division and employed by a county, city, insurer or employer to inspect the employer's tanks and boilers may also perform inspections. (Lab. Code § 7650.) Only the Division issues permits based on inspection reports filed either by Division qualified safety engineers or those certified inspectors who are employed by a county, city, insurer or

employer in compliance with the Labor Code and regulations. (Lab. Code § § 7681, 7682 and 7683.)

Generally, permits for unfired L.P.G. tanks are valid for 3 years and other unfired air tanks are valid for 5 years. (8 Cal. Code Regs. § 462.) Permits for fired boilers are valid generally for 12 months, except for specified petroleum, chemical and power generating facilities that may obtain permits for longer periods after meeting specified conditions. (8 Cal. Code Regs. §§ 770, 771.) The owner/operator of a tank or boiler may request the Division to inspect and issue a permit to operate the equipment, or may have the inspection performed by one of the certified inspectors listed in Labor Code section 7650. The Division is authorized to charge fees for conducting inspections, providing consultations, conducting surveys, audits and other activities required or related to meeting national standards for safe design and construction of tanks and boilers, and for processing permit applications, and for field consultations (Lab. Code § 7721). Whenever the inspection to operate a pressurized air tank, L.P.G. or boiler is performed by a private sector certified inspection, the Division may charge only \$ 15.00 to review the inspection report and issue a permit to operate. (Lab. Code § 7721.)

Effective March 18, 2013, the existing fee amounts and mileage reimbursement amounts were increased as explained below. This rulemaking proposes to adopt those amendments on a permanent basis.

Section 344.

Prior to the emergency rulemaking, section 344(a) of Title 8 of the California Code of Regulations provided that the Division would charge a fee of \$ 110.00 per hour, or any part of an hour, including travel time as specified, based on quarter hour intervals, with a minimum charge of one-half hour, for all shop inspections, field erection and resale inspections of all tanks, boilers, parts of tanks and boilers, nuclear components and for consultation, surveys, audits, manual review and other activities required or related to the ASME code or other national standards concerning the design or construction of boilers or pressure vessels or for evaluating fabricator's plant facilities when these services are requested by entities desiring these services. The Division proposes to amend section 344 to increase the hourly inspection rate to **\$ 135.00** per hour. In addition, the Division proposes to add language to allow the Division to charge, for inspections requested to be conducted after 5 PM on Monday through Friday, and at any hour on Saturday, Sunday or on any State holiday, the hourly inspection rate of **\$ 202.50** per hour. The Division also proposes to amend section 344(c) to increase the rate of reimbursement from 31 cents per mile to **55.5** cents per mile for inspection related travel.

The purpose of the proposed fee increase is to enable the Division to cover all of its actual costs in performing the inspections referenced in regulation 344. The purpose of the higher hourly inspection rate for inspections conducted after 5 PM on Monday through Friday or at any time on a Saturday, Sunday and State holiday, is to cover all of the Division's personnel costs of providing inspection services at such hours since often the Division will be required to pay time and one-half to the safety inspector. The purpose of the increase in the mileage reimbursement rate proposed in section 344(c)(1) is to ensure the mileage fee covers the Division's costs for

reimbursing the Division inspector for mileage expenses incurred while on state business conducting such inspections or otherwise cover car expenses paid by the Division.

Section 344.1

Prior to the emergency rulemaking, section 344.1(c) of Title 8 of the California Code of Regulations allowed the Division to charge an hourly fee of \$ 130.00 per hour or any part thereof, including travel time as set forth in subdivision (a)(1), for field permit inspections of air tanks, liquefied petroleum gas (L.P.G.) tanks and boilers by qualified safety engineers employed by the Division. Subdivision 344.1(a)(1) provides that travel time shall include the travel time from the Division's local office or the site of previous inspection, whichever is less, to the inspection site and travel time from the inspection site to the Division's local office or the site of the following inspection, whichever is less. The subdivision also prohibits the Division from charging more than one employer for the same period of travel.

The Division proposes to amend section 344.1 to increase the hourly fee to \$ 160.00 per hour or any part thereof, including travel time.

The purpose of the increased hourly inspection fee for the inspection of air tanks, liquefied petroleum gas and boilers is to enable the Division to cover all of its costs in performing the inspection services addressed by regulation 344.1.

The Division is required by state fiscal policy and law to charge sufficient hourly inspection fees and mileage reimbursement amounts to cover the Division's actual costs for performing the mandates of the Pressure Vessel Unit. These charges cover the Division's costs for qualified safety inspectors, supervisory and support staff, operating expenses, travel charges, and direct and indirect administrative charges, in performing the mandated inspections, consultations, and audits, and for maintaining the permit system.

The Division has been advised by the Department of Industrial Relations that the projected inspection fee and permit revenues to be collected in the 2012/2013 fiscal year, based on the existing hourly inspection fees of \$ 110 and \$ 130, respectively, and the \$ 15 permit fee allowed under Labor Code section 7721 for pressure vessels and boilers that are inspected by qualified safety inspectors employed by a county, city, an insurance company or specified employers, are projected to fall short of the Division's actual costs for administering the pressure vessel inspection and permit services it performs under the Labor Code. Approximately 40% of the pressure vessels and boilers requiring an inspection during a fiscal year are inspected by the Division. Seventy five percent of these businesses are small businesses. The remaining 40% of private sector pressure vessels and boilers are inspected by inspectors employed by an insurance company or the employer that is using the equipment, as allowed under the Labor Code. The remainder of permit inspections is performed at state, local government or other public sector political subdivision entities (special districts, etc.) In the case of permit inspections performed by certified inspectors employed by an insurance company or employer, the Division receives an inspection report with the permit application, reviews and evaluates the report for compliance with applicable regulations and statutes, enters relevant data into the pressure vessel permit database system and, when appropriate, issues the permit. Division safety engineers also spend

considerable time on the phone and in the field providing advice to the inspectors employed by cities, counties, insurance companies and specified employers about applicable laws, regulations, code interpretations and technical matters.

Labor Code section 7721(b) mandates, in pertinent part, "...that the Division may charge a fee of not more than \$ 15 to cover the cost of processing a permit...", based on the inspection reports filed by non-Division inspectors. Accordingly, under current law the Division is unable to increase the statutorily fixed permit fee to cover the Division's costs of maintaining the inspection and permit database that includes permits issued on the basis of non-Division inspections. To meet the Division's costs, it must increase the hourly inspection fees for the inspections, consultations, audits and field permit inspections the Division conducts. In addition the Division proposes to raise the mileage reimbursement rate to the amount the Division must reimburse Division employees or otherwise pay for vehicle transportation used by Division inspectors.

The Division's hourly inspection fees in sections 344 and 344.1 of title 8 of the California Code of Regulations, and the mileage reimbursement fee, were last increased in 2000. The Division's costs have increased each year in the interim. If the Division is unable to increase the hourly inspection fees and the mileage reimbursement rate, as proposed by the amendments to regulations 344 and 344.1 summarized above, the Division may be required to suspend its safety inspection and permit program for pressure vessels and boilers operated in California, which would expose the public and employees in the vicinity of such pressurized vessels and boilers to a credible risk of significant injury, impairment or death upon failure of the pressure vessel or boiler. In addition, should a vessel or boiler explode, there would be related economic losses due to business interruption.

Anticipated Benefits of the Proposed Regulation:

The benefits that will result from the Division's proposed amendments to increase the hourly inspection fees under regulations 344 and 344.1, explained above, and the mileage reimbursement rate are:

- The Division will be able to cover the Division's actual costs in having qualified safety engineers provide on-site inspection services for the private sector owners/operators using pressure vessels and boilers in California which must be inspected prior to the issuance of a permit to operate.
- Inspection of pressure vessels, tanks and boilers, as required by Labor Code sections 7620 *et seq*, is necessary to protect the lives, health and safety of the public and of employees working in the vicinity of such equipment, as well as to avoid business disruption from such explosions. It is also necessary to protect the environment from contamination that could result from uncontrolled emissions or spills of the materials, gases and substances stored in such tanks and boilers.

Determination of Inconsistency/Incompatibility with Existing State Regulations:

The Division has determined that these proposed regulations are not inconsistent or incompatible with existing regulations. Based on a review of regulations that would relate to or affect this area, the Division has concluded that these are the only regulations that concern the fees and mileage rates to be charged by the Division for inspections performed by its safety engineers of tanks, pressure vessels and boilers operated in California.

DISCLOSURES REGARDING THE PROPOSED ACTION

The Division has made the following initiation determinations:

Determination of Reimbursable Mandate:

The Division has determined the proposed amendments to sections 344 and 344.1 do not impose a mandate on local agencies or school districts requiring reimbursement by the State pursuant to Part 7 (commencing with Section 7500) of Division 4 of the Government Code because the proposed regulations do not constitute a "new program or higher level of service of an existing program within the meaning of section 6 of Article XIII B of the California Constitution." Public entities that require permits and inspections of pressure vessels and boilers are statutorily exempt from being charged fees by the Division for these purposes since there is no express statutory provision allowing it to do so. (Gov. Code § 6103.).

The California Supreme Court has determined that a "program" within the meaning of section 6 of Article XIII B of the California Constitution is one which carries out a governmental function of providing services to the public, or which, to implement a state policy, imposes unique requirements on local governments and does not apply generally to all residents and entities in the state. (County of Los Angeles v. State of California (1987) 43 Cal. 3d 46.)

Moreover, the Division receives an appropriation from the Occupational Safety and Health Fund to cover the costs of the inspection and permit program for public agencies, which are not otherwise assessed permit or inspection fees by the Division. Those program costs previously were paid for by the state's General Fund.

Costs or Savings to Local Agencies or School Districts:

No costs to local agencies or school districts are required to be reimbursed. See explanation under "Determination of Reimbursable Mandate".

Costs or Savings to State Agencies:

The Division has determined that the proposed amendments to regulations 344 and 344.1 will not result in costs to state agencies that require inspections and permits for pressurized tanks and boilers under the Labor Code, because there is no express statutory authority that provides for charging state agencies such permit fees and therefore state agencies are statutorily exempt from such fees (Gov. Code § 6103.). An annual appropriation from the Occupational Safety and Health Fund is made to the Division to cover the cost of the inspection of tanks and boilers operated by state agencies. Those program costs previously were paid for by the state's General Fund.

Other Nondiscretionary Costs or Savings Imposed on Local Agencies:

The proposed amendments to regulations 344 and 344.1 do not impose non-discretionary costs on local agencies.

Costs or Savings in Federal Funding to the State:

The proposed amendments will not result in costs or savings in federal funding to the State.

Cost impacts on Small Business; Representative Private Person or Business:

The Division has determined the proposed regulations may affect small businesses. However, the express terms of the proposed regulations are drafted in plain English, as required by Government Code section 11346.2(a)(1), since the proposed amendments consist primarily of changing numbers (for the fee amounts and mileage charge) rather than text. The Informative Digest for the proposed amendments includes a plain-English policy statement overview.

The proposed amendment to regulation 344(a) will increase the hourly inspection fee for shop inspections performed during normal business hours over the regular work week from \$ 110.00 to \$ **135.00**, a 23% increase. The hourly fee for these inspections has not been increased since 2000. The increase of \$ 25 in the hourly fee represents an increase of \$ 2.08 per hour per year in the hourly fee rate since the last fee increase. The Division performed shop inspections at 40 separate locations involving approximately 6214 hours of inspection time in fiscal year 2011/2012. Using the total number of inspection hours for the shop inspections in 2011/2012, the increase of \$ 25 per hour for shop inspection, audit and consultation time will result in an average increase of \$ 3884 per shop inspection, assuming that all shop inspections require the same amount of time.

The proposed amendment to regulation 344(a), for a higher hourly inspection fee of \$ **202.50** for inspections performed after 5 PM Monday through Friday, or at any hour on Saturday, Sunday or State holidays, represents time and a half of the hourly rate of \$ 135.00. The owner/operator of a pressure vessel or boiler is able to schedule the time of the inspection, therefore can either avoid the higher hourly rate or to decide pay the higher rate for the convenience of having the inspection performed at hours and on days that are preferable to the requesting owner/operator.

The proposed amendment to regulation 344.1 will increase the hourly inspection fee for air tanks, liquefied petroleum gas tanks and boiler inspections to \$ **160.00** from \$ 135.00. Each inspection is one hour. The increase is 18.5%, however, this fee was last increased in 2000. The \$ 25/hour increase from the existing fee is effectively an increase of \$ 2.02/hr. per year since the last increase. Approximately 75% of the permits subject to this increase are valid for 5 years so the effective impact of the \$ 25.00 increase on businesses needing such permits would be \$ 5.00 per year since the last fee increase.

Statewide adverse economic impact directly affecting businesses and individuals:

Although the proposed action *will* directly affect business statewide, including small businesses, the Division concludes that the adverse economic impact, including the ability of California business to compete with businesses in other states, *will not* be significant.

Results of Economic Impact Analysis/Assessment

The Division concludes that it is (1) unlikely that the proposed fee and mileage changes will eliminate any jobs in California, (2) unlikely that the proposals will create any jobs in California, (3) unlikely that the proposals will create any new businesses in California, and (4) unlikely that the proposals will eliminate or expand any existing businesses in California.

Benefits of the proposed Action: The proposed inspection fees and mileage fee to be charged by the Division when its inspectors conduct the various inspections described above will enable the Division to meet the range of its costs and expenses in having an inspector conduct the inspection at a given place of business, and thereby continue public protection through the inspection program. Pressure vessel, tank and boiler inspection in California is a critical to ensuring such equipment is properly constructed, maintained and used. The inspection determines that the equipment complies with applicable California safety laws. Prior to obtaining a permit to operate each such vessel must pass the required inspection. The permit inspection program ensures that pressurized tanks, vessels and boilers are constructed, maintained and used in a manner that should prevent unexpected releases or explosions of the contents of such tanks and boilers, including hazardous, hot, toxic or corrosive materials. In doing so, the Division is protecting the public and workers in the vicinity of such equipment from the hazards of death or serious bodily injury or illness and preventing the economic disruption that could affect other businesses and activities of the local government and residents in a community where such equipment is used.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5(a)(13), the Division must determine that no reasonable alternative it considered, or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective as and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Reasonable Alternatives Considered by the Division:

The Division has considered initiating a statutory change to increase the existing permit inspection fee in Labor Code section 7721(b). Section 7721(b) provides, in pertinent part, that the Division "...may charge a fee of not more than fifteen (\$ 15.00) to cover the cost of processing a permit." Currently, however, the Legislature is has concluded its session for the year.

This section applies to the fee charged by the Division when it receives a request to issue a permit based on an inspection performed by a certified inspector employed by a county, city, an insurer or an employer for the purpose of inspection only tanks and boilers under the employer's jurisdiction. The statutory maximum fee in section 7721(b) was last increased in 2000 from a maximum of \$ 5.00. The Division's costs of reviewing and evaluating the 'certified' inspector's inspection report, and costs of updating and maintaining the permit database for pressure vessels

and boilers exceed the amount of revenue obtained from the statutory maximum fee of \$ 15.00. As the need to increase Division's revenue from the inspection and permit fees for pressure vessels and boilers became clear, it also became clear that a statutory change of the fee amount in Labor Code § 7721(b) would not be an effective immediate solution because it would not take effect in the same fiscal year. Therefore, the Division initiated this rulemaking to increase hourly inspection fees and mileage reimbursement fees, while the statutory maximum fee for permits based on non-Division inspections will remain the same until amended statutorily.

Consideration of Performance Standard:

The regulations being amended by this regulation are not, and cannot be adequately addressed by, a performance standard as defined in Government Code § 11342.570. The Labor Code sections discussed above require the Division to perform inspections and otherwise ensure the safe use, maintenance and operation of pressurized air tanks, L.P.G. tanks and boilers by issuing permits to operate only after such inspections, whether performed by the Division or other certified inspectors as allowed by statute. In addition, the permit fee paid based on a non-Division certified inspector's inspection is fixed by statute.

CONTACT PERSONS

Inquiries concerning the substance of the proposed administrative action may be directed to:

Suzanne P. Marria
Special Counsel
Division of Occupational Safety and Health, Legal Unit
1515 Clay Street, Ste. 1901
Oakland, CA 94612
Telephone: (510) 286-7000
Fax: (510) 286-7037
Email: smarria@dir.ca.gov

The backup person for inquiries is:

Elizabeth Cameron
Office Assistant
Division of Occupational Safety and Health, Legal Unit
1515 Clay Street, Ste. 1901
Oakland, CA 94612
Telephone: (510) 286-7000
Fax: (510) 286-7037
Email: ecameron@dir.ca.gov

Please direct requests for copies of the proposed text (the "express terms") of the regulations, the initial statement of reasons, the modified text of regulations or other information upon which the rulemaking is based to Ms. Cameron at the above address.

AVAILABILITY OF THE INITIAL STATEMENT OF REASONS, TEXT OF PROPOSED REGULATIONS AND RULEMAKING FILE

The Division will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office at the above address. As of the date this Notice is published, the rulemaking file consists of this notice, the proposed text of the regulations, the Initial Statement of Reasons, and the NOTICE OF ADOPTION OF EMERGENCY REGULATIONS, FINDING OF EMERGENCY AND INFORMATIVE DIGEST. Copies may be obtained by contacting Ms. Marria.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After holding the hearing and considering all timely and relevant comments received, the Division may permanently adopt the proposed regulations substantially as described in this Notice. If the Division makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Division adopts the regulations as revised. Please send requests for copies of any modified regulations to the attention of Suzanne P. Marria, Special Counsel, at the address indicated above. The Division will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting Ms. Marria at the above address.

AVAILABILITY OF DOCUMENTS ON THE INTERNET

Copies of this Notice of Proposed Rulemaking Action, the Initial Statement of Reasons and the text of the regulations in underline and strikeout format can be accessed through the Division's website at www.dir.ca.gov/Rulemaking/DIRProposed.html.