

DEPARTMENT OF INDUSTRIAL
RELATIONS
DIVISION OF OCCUPATIONAL SAFETY
AND HEALTH



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October 31, 2018

**NOTICE OF PROPOSED EMERGENCY REGULATORY ACTION OF
THE DIVISION OF OCCUPATIONAL SAFETY AND HEALTH,
DEPARTMENT OF INDUSTRIAL RELATIONS**

TITLE 8 of the CALIFORNIA CODE OF REGULATIONS

Chapter 3.2. California Occupational Safety and Health Regulations

Subchapter 2. Regulations of the Division of Occupational Safety and Health

Article 5. Boiler and Tank Permit and Inspection Fee Schedule

**§344. Shop and Resale Inspection Fees, Consultation and Audit Fees, Boilers and
Tanks**

§344.1. Air Tank, Liquefied Petroleum Gas (L.P.G.), and Boiler Inspection Fees.

§344.2. Boiler, Tank and Resale Inspection Reports and Permits to Operate.

The Division of Occupational Safety and Health (“Division”) hereby proposes to amend sections 344, 344.1 and 344.2 of title 8, of the California Code of Regulations¹. Under section 344, the Division proposes to increase the hourly inspection rate from \$135.00 to \$150.00, and delete subsections (a)(1), (b)(1), (b)(2) and (b)(3). Under section 344.1, the Division proposes to decrease the hourly fee amount charged for field permit inspections from \$160.00 to \$150.00, delete subsection (a)(1), separate subsection (a) into subsections (a), (b) and (c), and change subsection (b) to subsection (d). Under section 344.2, the Division proposes to increase the fees related to the issuance of a Permit to Operate from \$15.00 to \$45.00, and delete superfluous language under subsections (a), (b) and (c). The Division finds that the adoption of these proposed amendments as an emergency regulation are necessary for the reasons discussed below.

¹Unless otherwise specified, all references are to sections of the California Code of Regulations, title 8.

FINDING OF EMERGENCY

First, Labor Code, section 7721, subdivision (e), which governs the adoption of the Division's pressure vessel fee regulation, expressly exempts the proposed amendments from approval by the Office of Administrative Law pursuant to the Administrative Procedure Act:

Any fees required pursuant to this section shall be in amounts sufficient to cover the direct and indirect costs of the division for administering this part and shall be adopted as emergency regulations. These emergency regulations shall not be subject to the review and approval of the Office of Administrative Law pursuant to the provisions of the Administrative Procedure Act provided for in Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code. These regulations shall become effective immediately upon filing with the Secretary of State.

(Lab. Code, § 7721, subd. (e).) Pursuant thereto, the Legislature has deemed the proposed amendments to constitute an "emergency regulation."

Second, the Division is responsible for enforcing the provisions of Labor Code sections 7620 through 7804, which comprise Part 6 of Division 5 of the Labor Code and govern the use of tanks, pressure vessels and boilers in California that are not specifically exempted by Labor Code sections 7624 and 7625.² Tanks are defined as any unfired pressure vessel used for storage of air pressure or liquefied petroleum gases and any unfired pressure vessel built according to the rules of any nationally recognized pressure vessel code. (Lab. Code, § 7622.) Boiler is defined as any fired or unfired pressure vessel used to generate steam pressure by the application of heat. (Lab. Code, § 7621.) The Division's Pressure Vessel Unit (PV Unit) enforces the pressure vessel and boiler safety standards through shop inspections, tank and boiler inspections, and the issuance of permits to operate. Shop inspection is defined as "the inspection and testing of tanks or boilers, manufactured, or in the process of manufacture, repair, or alteration, in the manufacturer's shops, or at the jobsite, in accordance with the applicable rules of the respective codes under which they are manufactured." (Lab. Code, § 7725, subd. (c).)

² Exempted tanks are those under the jurisdiction or inspection of the federal government, air pressure tanks used in household domestic services, tanks of 1 ½ cubic feet or less not subject to a pressure of more than 150 pounds per square inch, and air pressure tanks supplied with air by the same air compressor which supplies air for the brakes of any motor vehicle or street car under the jurisdiction of the federal Department of Transportation or the California Highway Patrol. (Lab. Code § 7624.) Exempted team boilers are those under the jurisdiction or inspection of the federal government, boilers operated by employers not subject to Division 4 of the Labor Code (§§ 3201 et seq), boilers on which pressure does not exceed 15 pounds per square inch, boilers on automobiles and road motor vehicles. (Lab. Code § 7625.)

Field inspection is defined as “the inspection and testing of installed tanks or boilers or both tanks and boilers, regardless of location.” (Lab. Code, § 7725, subd. (d).) Resale inspection is defined as “the inspection of boilers or tanks in the possession of a dealer or vendor at the request of a user who contemplates the purchase thereof.” (Lab. Code, § 7725, subd. (e).)

Labor Code section 7721 authorizes the Division to charge inspection fees and permit fees for services it provides. At the direction of the Department of Industrial Relations, the Division has evaluated the costs associated with administering its PV Unit, and determined that the Unit is expending significantly more money issuing permits, performing inspections, and providing related services at private, non-governmental businesses than it recoups.³ The Pressure Vessel Account has been in a deficit for several years now. The proposed amendments are necessary to achieve full cost recovery of the PV program.

Lastly, the proposed amendments will allow the Division to make technical revisions to the fee structure prior to promulgating permanent regulations. Given the multiple variables inherent in the revised fee calculation (actual time spent on inspections, actual time spent on the type of inspection, etc.), there is no viable argument for promulgating permanent regulations at this time instead of emergency regulations. The Division intends to commence a regular rulemaking to adopt the same or similar proposals on a permanent basis.

STATEMENT UNDER TITLE 1, CALIFORNIA CODE OF REGULATIONS, §48

Government Code section 11346.1, subdivision (a)(2) requires that at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law, the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency to the Office of Administrative Law, the Office of Administrative Law shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6, subdivision (b).

Title 1, California Code of Regulations, section 55, subdivision (b) sets forth the requirements for submitting comments to the Office of Administrative Law on the proposed emergency action. Comments must be in writing, must identify the topic of this rulemaking, and must be submitted directly to the Office of Administrative Law as follows:

³ Government Code, section 6103 prohibits the Division from charging fees for inspections or permits of pressure vessels and boilers owned or operated by public entities including the state or any city, county, district or other political subdivision. The costs associated with such inspections by the Division and permits issued to public entities have been funded through revenues received pursuant to Labor Code, section 62.5, subdivision (d).

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In addition, a copy of the comments must be transmitted to the Division's contact person for this rulemaking. To ensure prompt receipt and consideration of your comments, the Division requests that you transmit a copy either by e-mail to dcardoso@dir.ca.gov, or by fax, to the attention of Denise Cardoso, at (510) 286-7039.

AUTHORITY AND REFERENCE

Section 344

Authority cited: Sections 60.5, 6308, 7721, 7722 and 7728, Labor Code. Reference: Sections 7650, 7721, 7725 and 7728, Labor Code.

Section 344.1

Authority cited: Sections 60.5, 6308, 7721, 7722 and 7728, Labor Code. Reference: Sections 7650, 7680, 7681, 7682, 7683, 7721 and 7728, Labor Code.

Section 344.2

Authority cited: Sections 60.5, 6308, 7721 and 7728, Labor Code.
Reference: Sections 7650, 7654, 7680, 7683, 7721 and 7728, Labor Code.

INFORMATIVE DIGEST

Labor Code sections 60.5 and 6308 provide that the Division is charged with the administration and enforcement of the provisions of the California Occupational Safety and Health Act, commencing with Labor Code section 6300, as well as other provisions of law affecting the health and safety of employees in the State of California. The laws governing the use of pressure vessels, other pressurized tanks and boilers commence 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 PV 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.) Certified inspectors who are certified by the Division and employed by a county, city, insurer or employer to inspect the employer's tanks and boilers also may perform inspections. (Lab. Code, § 7650.) The Division is responsible for issuing permits to operate tanks and boilers based on inspection reports received from qualified safety engineers and certified inspectors showing compliance with all applicable statutes and regulations. (Lab. Code, §§ 7680-

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7683.)

Generally, permits for unfired L.P.G. tanks are valid for 3 years and other unfired air tanks are valid for 5 years. (Cal. Code Regs., tit. 8, § 462, subd. (a).) 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. (Cal. Code Regs., tit. 8, §§ 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 certified inspector at a private, non-governmental businesses, the Division may charge a fee to review the inspection report and issue a permit to operate (Lab. Code § 7721(b).)

All fees promulgated under sections 7720 through 7728 must cover the Division's costs in performing its statutory duties, including administrative costs. As discussed above, Labor Code, section 7721, subdivision (e) expressly exempts regulations governing tank and boiler inspection and permitting fees from approval by the Office of Administrative Law.

The purpose of the proposed amendments is to correct the PV Unit's deficit by increasing most PV-related inspection and permitting fees.

PROPOSED AMENDMENTS TO EXISTING REGULATION

Section 344. Shop and Resale Inspection Fees, Consultation and Audit Fees, Boilers and Tanks.

The purpose for the proposed emergency amendments is to increase the hourly fee under subsection (a) from \$135.00 to \$150.00.

Title. The proposed emergency regulation would amend the title of section 344 to read, "Shop, Field and Resale Inspection Program Fees" to more accurately describe the regulation's subject matter.

Subsection (a). The proposed emergency regulation would increase the hourly rate for services rendered by the division under subsection (a) from \$135.00 to \$ 150.00 per hour. In addition, the proposed emergency regulation would delete the heightened fee 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 because the division anticipates that the combined proposed fee modifications to sections 344 to 344.2 will achieve full cost recovery of the PV program. The division included all expenditures when calculating the proposed fee modifications.

The proposed emergency regulation also would (1) delete the terms “or any part thereof” after the hourly fee amount, and insert at the end of the subsection the sentence, “Time shall be billed in quarter-hour increments, rounded up to the nearest quarter hour” for clarity; (2) insert the terms “all work performed in connection with” before the terms “all shop, field erection and resale inspections . . .” to clarify that the fee applies to all work related to the services specified therein, including, for example, travel and research; and (3) insert the term “and” between the terms “boilers, and nuclear” for clarity.

Subsection (a)(1). The proposed emergency regulation would delete subsection (a)(1) because the combined proposed fee modifications to sections 344 to 344.2 stand to achieve full cost recovery to the PV program. The proposed modified fees incorporate travel time as an expenditure.

Subsection (b). The proposed emergency regulation would (1) change “qualified engineers” to “a qualified safety engineer employed by the division” to ensure consistency with Labor Code, section 7650; and (2) delete the last sentence, and combine the content therein into the first sentence for brevity and clarity.

Subsections (c), (c)(1), (c)(2), & (c)(3). The proposed emergency regulation would delete subsections (c), (c)(1), (c)(2), and (c)(3) because the proposed fee modifications incorporate the expenses addressed therein rendering these subsections unnecessary.

Note: Authority cited. Insert section 7728 which vests the Division with the authority to charge a penalty for late payment.

Reference. Insert Labor Code section 7650 because it defines the term “qualified safety engineer” referenced in section 344, and Labor Code section 7725 because it defines the terms “shop inspection,” “field inspection,” and “resale inspection” referenced in section 344.

Section 344.1. Air Tank, Liquefied Petroleum Gas (L.P.G.) Tank, and Boiler Inspection Fees.

The purpose for the proposed emergency amendments is to decrease the hourly fee under subsection (a) from \$160.00 to \$150.00.

Title. The proposed emergency regulation would amend section 344.1 to read, “Air Tank,
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Liquefied Petroleum Gas (L.P.G.), and Boiler Permit Inspection Program Fees” to more accurately describe the regulation’s subject matter.

Subsection (a). The proposed emergency regulation would decrease the hourly rate for services rendered by the division under subsection (a) from \$160.00 to \$150.00 perhour. The proposed decrease would make the hourly fee under section 344.1 consistent with the proposed hourly fee under section 344.

In addition, the proposed emergency regulation would (1) break subsection (a) into three subsections titled (a), (b), and (c); (2) delete the reference to travel time because anticipated travel expenditures were calculated into the proposed fee modifications; (3) replace the text reading, “for field permit inspection of air tanks, L.P.G. tanks, and boilers by qualified safety engineers employed by the division” with the following text, “for all field, resale and alteration permit inspections of air tanks, liquefied petroleum gas (L.P.G.) tanks, and boilers performed by a qualified safety engineers employed by the division” for clarity; (4) insert the terms “all work performed in connection with all” before the terms “field, resale and alteration permit inspection . . .” to clarify that the fee applies to all work related to the services specified therein, including, for example, travel and research; and (5) delete the terms “or any part thereof” after the hourly fee amount, and insert at the end of the subsection the sentence, “Time shall be billed in quarter-hour increments, rounded up to the nearest quarter hour” for clarity.

New subsection (b). The proposed emergency regulation would (1) insert the \$150 proposed fee amount and rephrase the sentence structure for clarity; (2) replace the term “subsequent” with “all follow-up” for clarity and consistency with new subsection (c); (3) delete the term “consultation” and specify the stated fee only applies to follow-up inspections where safety requirements have not been complied with within 15 days of the date shown on the preliminary order; (4) insert the terms “all work performed in connection with” before “all follow-up inspections” to clarify that the fee applies to all work related to the services specified therein, including, for example, travel and research; and (5) insert at the end of the subsection the sentence, “Time shall be billed in quarter-hour increments, rounded up to the nearest quarter hour” for clarity.

New subsection (c). The proposed emergency regulation would remove the capitalization from words for consistency with the balance of the regulations, and insert the terms “is” and “of such compliance” for clarity.

Subsection (a)(1). The proposed emergency regulation would delete subsection (a)(1) because the combined proposed fee modifications to sections 344 to 344.2 stand to achieve full cost recovery to the program. The proposed modified fees incorporate travel time as an expenditure.

Subsection (b). The proposed emergency regulation would renumber subsection (b) to

new subsection (d) and rephrase the sentence structure for clarity and consistency with the balance of the regulation.

Note: Authority cited. Insert section 7728 which vests the Division with the authority to charge a penalty for late payment.

Reference. Insert Labor Code sections: 7650 because it defines the term “qualified safety engineer” referenced in section 344.1; 7680 because it sets forth the permit mandate referenced in section 344.1; 7681 because it sets forth the permit inspection of tanks mandate referenced in section 344.1; 7682 because it sets forth the permit inspection of boilers mandate referenced in section 344.1; and 7683 because it sets forth the permit requirements and specifications referenced in section 344.1.

Section 344.2. Boiler, Tank and Resale Inspection Reports and Permits to Operate.

The purpose for the proposed emergency amendments is to increase the permit fee under subsection (b) from \$15.00 to \$45.00.

Title. The proposed emergency regulation would amend the title of section 344 to read, “Air Tank, Liquefied Petroleum Gas (L.P.G.) Tank, and Boiler Permit to Operate Program Fees” to more accurately describe the regulation’s subject matter.

Subsection (a). The proposed emergency regulation would delete the text appearing after the term “division” under subsection (a) to clarify that permits to operate must be issued by or in behalf of the division pursuant to Labor Code section 7680.

Subsection (b). The proposed emergency regulation would increase the permit fee under subsection (b) from \$15.00 to \$45.00. In addition, the proposed emergency regulation would rephrase the sentence structure for brevity and clarity.

Subsection (c). The proposed emergency regulation would rephrase the sentence structure for clarity, and replace the term “L.P.G.” with “liquefied petroleum gas (L.P.G.).”

Note: Authority cited. Insert Labor Code section 60.5 which vests the Division with the authority to implement, interpret and makes specific sections 7680 *et seq.* relating to the permitting of tanks and boilers, and Labor Code section 7728 which vests the Division with the authority to charge a penalty for late payment.

Reference. Insert Labor Code section 7683 because it sets forth the permit requirements and specifications referenced in section 344.2, and Labor Code section 7728 which sets forth the late payment penalty mandate referenced in section 344.2.

Consistence and Compatibility with Existing State Regulations: The proposed emergency regulations are not inconsistent or incompatible with existing state regulations.

Comparable Federal Statutes and Regulations: None

Anticipated Benefits of the Proposed Regulation: The broad objective of the proposed regulations is to correct the PV Account's deficit by increasing most PV-related inspection and permitting fees. The proposed regulations will allow the Division to cover the actual costs in having its 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. In addition, the inspection of pressure vessels, tanks and boilers is necessary to (1) protect the lives, health and safety of the public and of employees working in the vicinity of such equipment; (2) avoid business disruption from any equipment-related explosions; and (3) 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.

Technical or Theoretical, or Empirical Studies, Reports, or Documents Relied on: The Division relies on no technical studies or reports other than the cost and expense calculations provided in support of the proposed rulemaking, attached as Appendix A.

Mandate on Local Agencies or School Districts: The Division has determined that the proposed amendments would not impose a mandate on local agencies or school districts or a mandate requiring reimbursement by the State pursuant to Part 7 (commencing with section 17500) of Division 4 of the Government Code because the proposed amendment will not require local agencies or school districts to incur additional costs in complying with the proposal. The Division cannot charge local agencies and school districts fees for inspections and permits of pressure vessels and boilers because there is no express statutory authority allowing the Division to do so. (Gov. Code § 6103.)

Furthermore, these 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." 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 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.)

FISCAL IMPACT STATEMENT

Cost or savings to any state agency: The proposed emergency regulations will result in {00076519.DOCX}

the estimated added revenues to the Division of approximately \$964,000.00 annually through fees collected from private businesses for the inspection of boilers and pressure vessels. (See attached, Appendix A.) The proposed emergency regulations 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 to charge state agencies such permit fees and therefore state agencies are statutorily exempt from such fees. (Gov. Code § 6103.)

Cost to any local agencies or school districts required to be reimbursed under Part 7 (commencing with section 17500) of Division 4: None. The proposed emergency regulations will not result in costs to local agencies and school districts that require inspections and permits for pressurized tanks and boilers under the Labor Code, because there is no express statutory authority to charge public agencies such permit fees, and therefore local agencies and school districts are statutorily exempt from such fees. (Gov. Code § 6103.)

Other non-discretionary costs or savings imposed on local agencies or school districts: The proposed emergency regulations do not impose non-discretionary costs on local agencies.

Cost or savings in federal funding to the state: The proposed emergency regulations will not result in costs or savings in federal funding to the State.

Results of the economic impact assessment/analysis: The Division has made an initial determination that the proposed emergency regulations will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California business to compete with businesses in other states. However, the proposed amendment will affect businesses with boilers and tanks subject to the Pressure Vessel Safety Orders by (1) increasing the hourly rate for all services under section 344 by about 11% (\$135/\$150); (2) decreasing the hourly rate for all services under section 344.1 by about 6% (\$160/\$150); and (3) tripling the permit fee under 344.2 from \$15.00 to \$45.00.

STATEMENT CONFIRMING COMPLIANCE WITH GOVERNMENT CODE § 11346.1(a)(2)

(California Code of Regulations, title 1, section 50(a)(5)(A))

The Division sent notice of the proposed emergency action to every person who has filed a request for notice of regulatory action at least five working days before submitting the emergency regulation to the Office of Administrative Law in accordance with the requirements of Government Code section 11346.1, subdivision (a)(2). Such notice was sent electronically on October 31, 2018.