

**State of California
Office of Administrative Law**

**In re:
Office of the State Fire Marshal**

**Regulatory Action:
Title 19, California Code of Regulations**

Amend sections: 905.3, 925.1

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL Matter Number: 2023-0720-02

OAL Matter Type: Regular (S)

SUMMARY OF REGULATORY ACTION

This regulatory action by the Office of the State Fire Marshal (OSFM) proposes to establish a new fee structure for automatic fire extinguishing systems certification.

On July 20, 2023, OSFM submitted the above-referenced regulatory action to the Office of Administrative Law (OAL) for review. On August 31, 2023, OAL notified OSFM that OAL disapproved the proposed regulatory action pursuant to the Administrative Procedure Act (APA). This Decision of Disapproval of Regulatory Action explains the reasons for OAL's action.

DECISION

OAL disapproved the above-referenced regulatory action because the proposed regulatory changes failed to comply with the consistency, clarity, and necessity standards of Government Code section 11349.1 (subdivisions (a)(4), (a)(3), and (a)(1), respectively) and section 6614 of the State Administrative Manual (SAM).

DISCUSSION

OSFM's regulatory action must satisfy requirements established by the part of the APA that governs rulemaking by a state agency. Any regulation adopted, amended, or repealed by a state agency to implement, interpret, or make

specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage. (Gov. Code, sec. 11346.) No exemption applies to the present regulatory action under review.

Before any regulation subject to the APA may become effective, the regulation is reviewed by OAL for compliance with the procedural requirements of the APA and the standards for administrative regulations in Government Code section 11349.1. Generally, to satisfy the APA standards, a regulation must be legally valid, supported by an adequate record, and easy to understand. In this review, OAL is limited to the rulemaking record and may not substitute its judgment for that of the rulemaking agency regarding the substantive content of the regulation. This review is an independent check on the exercise of rulemaking powers by executive branch agencies intended to improve the quality of regulations that implement, interpret, and make specific statutory law, and to ensure that the public is provided with a meaningful opportunity to comment on regulations before they become effective.

1. Consistency Standard

The APA requires proposed regulations to be consistent with other laws. (Gov. Code, sec. 11349.1, subd. (a)(4).) "Consistency" is defined as "being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." (Gov. Code, sec. 11349, subd. (d).) Government Code section 11342.2 also provides the following regarding consistency:

Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.

OSFM's Automatic Fire Extinguishing Systems Program (hereafter, "AES Program" or "Program") is governed by Health and Safety Code (HSC) sections 13195 through 13199. HSC section 13198 specifically addresses Program licensing fees and provides, in pertinent part:

The State Fire Marshal shall adopt a schedule of fees to be paid by licensees ***in an amount which is necessary to cover the cost of administering and enforcing the provisions of this chapter by the State Fire Marshal.*** [Emphasis added.]

According to the Initial Statement of Reasons (ISR) prepared by OSFM for this regulatory action, current licensing fees in California Code of Regulations (CCR), title 19, sections 905.3 and 925.1 only generate annual revenue of approximately \$1.08 million, which is insufficient to cover AES Program operating costs. (ISR, pp. 1, 4.) OSFM's Form 399 Attachment, Fiscal Impact Statement, Section B – Fiscal Effect on State Government (Rev. 7/6/2022) projects ongoing annual Program expenditures of approximately \$1.74 million.¹ The ISR explains that because fees are the only source of revenue for the Program, OSFM can only resolve the problem by raising fees enough to overcome the anticipated annual revenue deficit of approximately \$675,000. (ISR, pp. 2, 4.)

OSFM's proposed amendments to the fee schedules in sections 905.3 and 925.1, which were calculated to generate enough additional annual revenue to overcome the \$675,000 deficit, were noticed to the public on November 4, 2022. Following the close of the 45-day comment period, OSFM revised the proposed regulation text to undo all fee increases in section 925.1 and made the changes available for further public comment from December 23, 2022, through January 9, 2023. These revisions halved the projected annual revenue amount, from approximately \$675,000 to approximately \$331,000.

However, OSFM's rulemaking record still indicates that approximately \$675,000 in additional annual revenue is required to maintain the Program's solvency in compliance with HSC 13198. Because the projected additional revenue that would be generated by the final proposed regulation text is insufficient to cover OSFM's stated costs to administer and enforce the AES Program, the regulation is inconsistent with HSC 13198 and in violation of the Consistency standard of the APA.

¹ Government Code section 11357 requires the Department of Finance to adopt "instructions for inclusion in the State Administrative Manual prescribing the methods that [a rulemaking] agency ... shall use in making the determinations and the estimates of fiscal or economic impact required by Sections 11346.2, 11346.3, and 11346.5." For purposes of reporting these estimates and other information, the Department of Finance requires rulemaking agencies to use the Form 399, Economic and Fiscal Impact Statement. (State Administrative Manual, sec. 6601.)

2. Clarity Standard

In adopting the APA, the Legislature found that the language of many regulations was unclear and confusing to persons who must comply with the regulations. (Gov. Code, sec. 11340, subd. (b).) Government Code section 11349.1, subdivision (a)(3), requires that OAL review all regulations for compliance with the clarity standard. Government Code section 11349, subdivision (c), defines "clarity" to mean "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."

The "clarity" standard is further defined in section 16 of title 1 of the CCR, which provides, in relevant part:

In examining a regulation for compliance with the "clarity" requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:

(a) A regulation shall be presumed not to comply with the "clarity" standard if any of the following conditions exists:

(1) [...]

(2) ***the language of the regulation conflicts with the agency's description of the effect of the regulation;*** or

(3) [...]

[Emphasis added.]

OSFM's description in the rulemaking record of the effect of the regulation (that the proposed fees are sufficient to cover the costs necessary to administer and enforce the AES Program) conflicts with the final proposed fee language in sections 905.3 and 925.1 in violation of section 16(a)(2) of title 1 of the CCR.

3. Necessity Standard

OAL must review regulations for compliance with the necessity standard of Government Code section 11349.1, subdivision (a)(1). Government Code section 11349, subdivision (a), defines "necessity" as follows:

"Necessity" means the record of the rulemaking proceeding ***demonstrates by substantial evidence the need for a regulation*** to

effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion. [Emphasis added.]

To further explain the meaning of "substantial evidence" in the context of the necessity standard, subdivision (b) of section 10 of title 1 of the CCR provides:

(b) In order to meet the "necessity" standard of Government Code section 11349.1, the record of the rulemaking proceeding shall include:

- (1) A statement of the specific purpose of each adoption, amendment, or repeal; and
- (2) information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An "expert" within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.

In order to provide the public with an opportunity to review and comment upon an agency's perceived need for a regulation, the APA requires that the agency describe the need for the regulation in the Initial Statement of Reasons (ISR). Specifically, Government Code section 11346.2, subdivision (b)(1), states:

- (b) An initial statement of reasons ... shall include ...:
- (1) A statement of the specific purpose of each adoption, amendment, or repeal, the problem the agency intends to address, and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose and address the problem for which it is proposed. The statement shall enumerate the benefits anticipated from the

regulatory action, including the benefits or goals provided in the authorizing statute....

This regulatory action focuses solely on raising fees imposed on AES Program participants in order to generate sufficient revenue to fund the Program for the foreseeable future. OSFM's rulemaking record generally describes various factors that prompted this action. For example, OSFM's ISR states:

The current fee schedule was established and updated over time. The current levels are insufficient to sustain the Automatic Extinguishing Systems Program without incurring a deficit. Since that time, program costs have risen significantly due to inflation, rising personnel costs, amounts required to maintain the reserve recommended by the Department of Finance, and adoption of online electronic systems. (ISR, p. 3.)

However, the question that must be answered in order to satisfy Government Code section 11349, subdivision (a), and CCR, title 1, section 10 is: "Why is each fee being increased by the amount indicated?" OSFM rarely answers that question in their rulemaking record. The following examples further illustrate how OSFM failed to satisfy the Necessity standard of the APA in this rulemaking action.

3.1. Subsection (b) of Section 905.3

Section 905.3 establishes license fees for three license types: Type 1, Type 2, and Type L. Type L licenses are issued only after the applicant's automatic fire extinguishing system passes an inspection, which may be performed – for a fee – by either OSFM or a local agency. OSFM charges one fee for the initial inspection and another fee for each subsequent inspection, if required. Subsequent inspection fee amounts are located in Section 905.3(b), which is shown below as OSFM proposed to amend it in this action.

Type of License	Type of System	Primary Location		Additional Location
(b)	Fee for Second and each subsequent	\$200.00	<u>\$300.00</u>	<u>\$300.00</u>

OSFM did not articulate the need for the new \$300 fee for subsequent inspections at additional locations. Regarding this fee, the ISR and both ISR Addenda state:

The ... amendment ... adds the fee amount for a second and each subsequent inspection at additional locations. This is a non-substantive amendment and is not a change in policy from the existing regulations. This change will clarify in the existing regulations text by showing that the second or subsequent inspections at an additional location has the same cost as the other fees for an additional location. (ISR, p. 8.)

OSFM's description of this proposed change as a "non-substantive amendment" mischaracterizes what is in fact the adoption of a brand-new fee. OSFM must provide substantial evidence of the need for this new fee in the amount of \$300 in the rulemaking record.

3.2. Subsection (a) of Section 905.3

OSFM proposes to increase all of the fees in subsection (a) of section 905.3, which is shown below with changes highlighted as originally published on November 4, 2022.

(a) The original or renewal fee for licensees to service or test each type of automatic fire extinguishing systems shall be:

License Fees

Type of License	Type of System	Primary Location, <i>original and renewal</i>		Additional Location, <i>original and renewal</i>	
1	Water Based Fire Suppression Systems	\$500.00	<u>\$750.00</u>	\$100.00	<u>\$300.00</u>
2	Engineered and Pre- Engineered Fixed Extinguishing Systems	\$500.00	<u>\$750.00</u>	\$100.00	<u>\$300.00</u>

L	Annual Testing and Maintenance of Wet	\$135.00	<u>\$350.00</u>	\$100.00	<u>\$300.00</u>
	With State Inspection	\$335.00	<u>\$600.00</u>	\$100.00	<u>\$300.00</u>

The ISR that accompanied the originally proposed text does not provide any evidence of the need to raise the fees by the amounts indicated. Instead, the ISR simply states:

The problem is that the current fee amounts are insufficient to operate the program without incurring a deficit. The rationale is that the program has no other sources of revenue aside from fees, so an increase in fees is required to increase revenue. (ISR, p. 8.)

OSFM's 1st ISR Addendum does not revise or supplement the above statement. OSFM's 2nd ISR Addendum includes some additional information; however, it still falls short of justifying the amount of each fee increase with substantial evidence. Regarding Type 1 and Type 2 licenses, the 2nd ISR Addendum provides:

In order to sufficiently to [sic] cover actual costs to operate the Automatic Extinguishing Systems Program it was determined all fees must increase by a minimum of 50%. No other conditions or determinations were changed within this program, these fees were increased only by the baseline of 50%.

Pursuant to CCR, title 1, section 10(b), OSFM's conclusion that all fees must increase by 50% must be supported by additional facts, studies, expert opinions, or other information. In other words, OSFM must show their work in explaining how they arrived at a 50% "baseline," and why Type 1 and Type 2 license fees were increased "only" by 50% rather than a higher amount.

Necessity for the Type L license fee increase of \$215 is similarly lacking. The rulemaking record states:

The Type L license is a limited license. While the L license does not require the entire skill base required for a Type 1 License, there are

still extensive requirements as outlined above. The four choices within an L License are each one portion of the Type 1 Water Based Fire Suppression Systems License, as described in CCR 905.3(a). The Type L license is limited to a specific building's internal function and includes only the specified duties within the designated building or campus. In order to bring this license type in-line with the remaining fee structure this fee was increased greater than the 50% baseline. (2nd ISR Addendum, p. 10.)

The above statement does not reveal why the Type L license fee is proposed to be increased by nearly 160%. OSFM must revise the rulemaking record to clearly explain how this increase "bring[s] this license type in-line" with other fees in order to justify the need for this fee increase.

3.3. Subsection (c) of Section 905.3

OSFM failed to address the following proposed amendment:

(c)	The original or annual renewal fee for the Weekly Fire Pump Test Certificate shall be:	\$80.00 \$150.00
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To the extent OSFM intended the 50% "baseline" fee increase described above to apply to licenses other than Type 1 and Type 2, the record does not explain why this fee was instead raised by 87.5%. If the 50% "baseline" was not intended to apply to other fees, then the record is simply devoid of evidence to support the amendment of this subsection. OSFM must revise the rulemaking record to clearly state the purpose of this fee increase and include substantial evidence in support of the new fee amount.

4. Failure to comply with State Administrative Manual section 6614

The Form 399 included in OSFM's rulemaking record for this action was completed and signed prior to publication of the NOPA on November 4, 2022, first by OSFM's Fiscal Officer and Agency Secretary on October 19, 2022, then by a Department of Finance Program Budget Manager on October 26, 2022. In the Fiscal Impact Statement, OSFM explains that "this regulation package will result in additional revenue of \$675,360 to adequately cover the cost of the [AES]

program." (Form 399, p. 5.) All of OSFM's projections and calculations in the Form 399 are based on initially proposed amendments to sections 905.3 and 925.1.

These projections changed when OSFM decided after the close of the 45-day comment period not to proceed with any certification or registration fee increases in section 925.1, and later increased the annual Type L license (with state inspection) fee by an additional \$50. However, OSFM failed to update the Form 399 with revised projected fiscal impacts based on these regulatory modifications.

Pursuant to section 6614 of the State Administrative Manual (SAM), "If the proposed regulation is modified and this modification would cause a change to the fiscal impact of the proposed regulation after the Form 399 was submitted to Finance and signed, an updated Form 399 must be submitted to Finance." OSFM must comply with SAM section 6614 and obtain Department of Finance approval before resubmitting this regulatory action to OAL for review.

Additionally, OAL notes that neither the Fiscal Impact Statement of OSFM's Form 399, nor the estimates provided in their NOPA in accordance with Government Code section 11346.5, subdivision (a)(6), indicate any anticipated costs to state agencies other than OSFM. Based on a review of comments in the rulemaking record, it appears that the proposed regulations may affect state agencies that own or manage AES-equipped buildings, such as the Department of General Services (DGS). If OSFM's proposed regulations will result in costs or savings to DGS or any other state agency, then the rulemaking record – including the Fiscal Impact Statement of the Form 399 – must be revised to incorporate these impacts.

CONCLUSION

For the foregoing reasons, OAL disapproved the above-referenced regulatory action. Pursuant to Government Code section 11349.4, subdivision (a), OSFM may resubmit revised regulations within 120 days of its receipt of this Decision of Disapproval of Regulatory Action. A copy of this Decision will be emailed to OSFM on the date indicated below. OSFM must make any substantive regulatory text changes, which are sufficiently related to the originally noticed text, available for public comment for at least 15 days pursuant to subdivision

(c) of Government Code section 11346.8 and section 44 of title 1 of the CCR. Any objections or recommendations raised by the public during the 15-day public comment period must be summarized and responded to in the Final Statement of Reasons. OSFM must resolve all issues raised in this Decision of Disapproval of Regulatory Action prior to the resubmittal of this regulatory action. OAL reserves the right to review OSFM's resubmitted regulations and rulemaking record for compliance with all substantive and procedural requirements of the APA.

Date: September 7, 2023



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