

**State of California
Office of Administrative Law**

**In re:
Department of Transportation**

**Regulatory Action: Title 21
California Code of Regulations**

Amend section: 1411.7

**DECISION OF DISAPPROVAL OF
REGULATORY ACTION**

Government Code Section 11349.3

OAL File No. 2009-1030-01 S

SUMMARY OF REGULATORY ACTION

The Department of Transportation (“Department”) proposed to amend section 1411.7 of title 21 of the California Code of Regulations. Specifically, the amendments sought to define the term “fire apparatus,” increase the allowable length of a single unit fire apparatus, increase the weight limit on a steering axle and a single drive axle, and provide that a fire apparatus meeting the requirements of this regulation may operated on state and local roadways without a transportation permit. On October 30, 2009, the Department of Transportation submitted the proposed amendments to the Office of Administrative Law (“OAL”) for review in accordance with the Administrative Procedure Act (“APA”). On December 16, 2009, OAL disapproved the proposed amendments. This Decision of Disapproval explains the reasons for OAL’s action.

DECISION

OAL disapproved the proposed amendment of section 1411.7 for failure to meet the clarity and consistency standards, failure to obtain the required approval of the State Fire Marshall, failure to include the National Fire Protection Association 1901 Standard in the record as reference material and comply with the requirements of title 1, CCR, section 20 concerning incorporation of that standard by reference, and for a minor defect in the signing of the form 400.

DISCUSSION

FIRE MARSHAL APPROVAL - The proposed amendment to section 1411.7 would change a few of the standards applicable to the weight, length and configuration of fire trucks. The primary purpose for these changes is to enable fire departments to purchase more types of standard fire apparatus and allow for the operation of this equipment on highways as necessary for fire fighting, training and related activities. Government Code section 11359, subdivision (a), requires that any amendment to a regulation which is intended to promote fire and panic

safety or provide fire protection and prevention, including fire suppression systems, equipment, or alarm regulation must be either submitted to OAL by the State Fire Marshal or approved in writing by the State Fire Marshal before transmittal to OAL. This requirement applies to the proposed regulation however the Department did not include the necessary approval in the rulemaking file.

CLARITY AND CONSISTENCY

OAL reviews proposed regulations for compliance with the clarity and consistency standards pursuant to Government Code section 11349.1. Clarity is defined in section 11349, subdivision (c) to mean “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.” Consistency is defined in subdivision (d) to mean “being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.”

(A) Proposed section 1411.7, subdivision (a) is not clear and it is inconsistent with other relevant provisions of law. Subdivision (a) would add a definition of the term “fire apparatus” as follows:

(a) ‘Fire Apparatus’ is defined, for the purposes of these regulations, as a vehicle designed to be used under emergency conditions to transport personnel and equipment, or to support the suppression of fires or mitigation of other hazardous situations. This definition is based on the NFPA [National Fire Protection Association] 1901 Standard for Automotive Fire Apparatus 2009 Edition. This definition shall not include haul equipment.

Fire apparatus shall be built to the Federal Motor Vehicle Safety Standard (FMVSS) and NFPA 1901 Standard in effect at the time of manufacture.

There are five reasons the newly proposed definition will not be easy to understand and would be inconsistent with other laws.

(1) This regulation would interpret, implement and make specific Vehicle Code section 35002, a statute which in subdivision (b)(3), already defines a “fire apparatus.” That definition is substantively different from the proposed definition, and it would be difficult to reconcile those differences. Vehicle Code section 35002, subdivision (b)(3) provides:

For purposes of this section, a "fire apparatus" is any vehicle or combination of vehicles designed, maintained, and used exclusively for the suppression of fires or for fire prevention activities, including the training of firefighters. A tank vehicle owned by a regularly organized fire suppression agency and used to transport water or other fire suppression materials is a fire apparatus. A vehicle or combination of vehicles which is not designed primarily for fire suppression, including, but not limited to, a hazardous materials response vehicle, dedicated rescue vehicle, command post communications vehicle,

passenger vehicle, bus, mobile kitchen, mobile sanitation facility, and heavy equipment transport vehicle, are not a fire apparatus for purposes of this section.

The proposed regulation and Vehicle Code section 35002 would have to work together. A regulation may interpret and implement a statute or make it specific but it may not amend the statute or supplant it. Here it appears that the new definition is broader and would include vehicles excluded from the statutory definition, essentially an amendment to serve as the statute's replacement.

(2) There is also a definition of the term "fire truck" in title 27, CCR, section 1411.1, subdivision (c), which is not being proposed for a change. It provides:

"For purposes of this article, "Fire truck" is any fire apparatus defined in 35002(b)(3) of the California Vehicle Code."

The proposed amendment would change "fire truck" to "fire apparatus" everywhere it appears in section 1411.7, however we see from section 1411.1 immediately above and Vehicle Code section 35002 that these terms mean the same thing. Proposing a new and different meaning for one of two terms used in the special permits regulations when those terms mean the same thing without changing the other is sure to create confusion. Moreover, when a term is already defined in a relevant statute, it is not necessary to define in again in a regulation.

(3) The proposed new definition of "fire apparatus" requires that fire apparatus must be built to meet the "NFPA 1901 Standard in effect at the time of manufacture." The record does not include any indication of what this standard would require. The NFPA 1901 standard is not in the file and the initial statement of reasons and final statement of reasons do not indicate why this is necessary. We realize that Vehicle Code section 35002, subdivision (a)(1), provides that some emergency vehicles purchased during 1992 and 1993 were subject to NFPA Standards 1901 to 1904, but without further explanation in the record, OAL cannot be sure of the Department's intentions concerning the NFPA 1901 standard. If it will be a new legal requirement and will be incorporated by reference into the Department's regulation, a copy must be made available for public comment and the requirements of title 1, CCR, section 20 must be met.

(4) The proposed definition of "fire apparatus" excludes "haul equipment." The term "haul equipment" has not been defined in these regulations, but we are concerned that the exclusion may be inconsistent with the definition of "fire apparatus" set forth in Vehicle Code section 35002, which includes the concept of "any vehicle or combination of vehicles designed, maintained, and used exclusively for the suppression of fires or for fire prevention activities, . . ." (Emphasis added.) If haul equipment means a tractor, and if such a tractor meets the limitations on design, maintenance and use, perhaps it qualifies as "fire apparatus." The Department must describe the effect of this

provision in the record, the necessity for the regulation, and if necessary, should reconcile any apparent conflicts.

(5) The proposed definition of “fire apparatus” includes a phrase that indicates that it applies “for the purposes of these regulations.” Section 1411.7 is one of seven sections that make up the rather small Chapter 7, entitled Transportation Permits. The reference to *these regulations* should be clarified to indicate whether the definition is for Chapter 7 or for a larger or smaller grouping. The other definitions for Chapter 7 are included in section 1411.1, so any new definition affecting all of Chapter 7 should probably be included there instead of in section 1411.7.

(B) Proposed subdivision (n) is not clear and may be inconsistent with Vehicle Code section 35002. The amendment is shown below in underline and strike-out.

This section shall ~~be effective and apply to vehicles purchased on or after January 1, 1994~~ all fire apparatus, except that the braking system and performance test requirements in (l) shall apply to vehicles purchased on or after January 1, 1994.

As previously discussed, Vehicle Code section 35002 specifies the application of NFPA standards to some emergency vehicles purchased in 1992 and 1993 and provides that vehicles purchased after that shall comply with the Department’s applicable permit requirements. The regulation includes in subdivision (a), the concept that fire apparatus shall be built to the standards in effect at the time of manufacture. To the extent proposed subdivision (n) would depart from that principle and set new standards for previously manufactured vehicles, it creates a contradiction that the Department must clarify. We are not sure if the change would have any practical effect. It may be that the higher weight limits and longer length allowed under the amendments would not limit the older vehicles in any way. On the other hand, new requirements in the NFPA standards for equipment of which we are unaware may be difficult to apply to older vehicles. In any event the rationale behind the change in subdivision (n) must be explained so that the public can understand the purpose and consider whether there would be a consequence they’d like to comment upon before the rule is adopted. At the present time, it is not clear what the new language means or is intended to accomplish.

MINOR DEFECTS IN DOCUMENTS

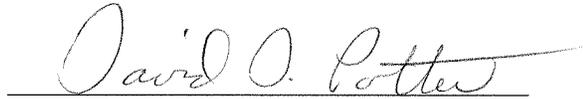
The OAL form 400, a cover sheet for the text of the proposed regulations has been signed by Cindy McKim. The legend following her signature indicates she has signed “for Director, California Department of Transportation.” The Department provided a written delegation of authority from Randell H. Iwasaki, Director to Cindy McKim, Chief Deputy Director sufficient to cover signing the form 400. Clearly Ms. McKim is authorized to sign, however the signing must include her printed name and title and should not indicate that she is signing “for” anyone other than herself. A signing *for* another person is not legally cognizable when it is made as a certification.

There is a small omission of underlining of new text in proposed subdivision (h), lines 1 and 2.

CONCLUSION

For the foregoing reasons OAL disapproved the Department's proposed amendment to section 1411.7, Fire Apparatus within Chapter 7, Transportation Permits of the Department's regulations.

Date: December 23, 2009



David D. Potter
Senior Staff Counsel

FOR: SUSAN LAPSLEY
Director

Original: Randell Iwasaki
Copy: Casey Robb