



## INITIAL STATEMENT OF REASONS

### **STATEMENT**

In 2015 the State Legislature adopted Article 3.9 Regional Railroad Accident Preparedness and Immediate Response commencing with Government Code Section 8574.30. The purpose of the Regional Railroad Accident Preparedness and Immediate Response Regulations is to establish a schedule of fees, as required by the enabling statute, to be paid for the 25 most hazardous material commodities that are transported by rail in California.

The Legislature required the Governor's Office of Emergency Services (Cal OES) to establish a schedule of fees "to be paid by each person owning any of the 25 most hazardous material commodities ... that are transported by rail in California..." and to identify the list of hazardous materials whose owners will be assessed a fee when transporting by rail in and through California (Gov. Code, § 8574.32, subd. (a)(1)-(2).) The Legislature established the Regional Railroad Accident Preparedness and Immediate Response Fund to receive deposits of the collected amounts which are not to exceed \$20 million per year during the 2016 and 2017 calendar years. (Gov. Code, § 8574.44, subds. (g)(1) & (g)(2).) During the 2018 calendar year, the total fees collected may not exceed \$10 million. (Gov. Code, § 8574.44, subd. (g)(3)(A).) No less than every three years, the Director of Cal OES must reconsider and adjust the fee "with due consideration for existing and expected operational and continued resource requirements." (Gov. Code, § 8574.32, subd. (h)(1).) Total fees must not exceed the reasonable costs incurred for the purposes identified in the statute. (Gov. Code, § 8574.32, subd. (d).)

### **BENEFITS**

The fees collected by the railroad and remitted to the State Board of Equalization will be utilized to build, develop, and enhance emergency response capabilities in the event of a hazardous material incident involving a railroad in California. Creating and enhancing a robust statewide hazardous material incident response capability mitigates the impacts of hazardous material incidents, which directly benefits the owners of hazardous material commodities. Expenditures from the revenue generated from these regulations will address the existing gaps in California's ability to effectively respond to and recover from an incident involving a hazardous material commodity transported by rail within the state, thereby mitigating the effects of such an incident by saving lives, property, and the environment.



## **PURPOSE**

**Section 2700, subdivisions (a) through (k):** To define terms utilized in the regulations or clarify terms utilized in Government Code section 8574.30.

**Section 2701, subdivisions (a) through (b):** To establish a list of the 25 most hazardous material commodities transported by rail that will be assessed a fee. This regulation clarifies that the term railroad includes short lines or regional railroads.

**Section 2702:** To clarify that the fee is applicable to intermodal cargo containers carrying any of the 25 most hazardous material commodities.

**Section 2703:** To clarify the clause “transported by rail in California,” as used in Government Code section 8574.32.

**Section 2704, subdivisions (a) through (d):** To establish a schedule of fees as required by Government Code section 8574.32(a)(1). To identify and clarify which railroad may be required to register with the California State Board of Equalization for the purpose of remitting fees collected from the owners of the hazardous material commodities. This regulation also sets forth the time in which the fee is to be imposed, as well as, clarifies what happens when the statutory collection caps are reached. Further, this regulation clarifies that a railcar containing residue is not assessed a fee.

**Section 2705, subdivisions (a) through (b):** To specify how fees collected in excess of the statutory collection caps will be refunded and who will notify the persons registered with the board when the collection caps are reached.

**Section 2706:** To clarify that the 5 percent administrative fee allowed under Government Code Section 8574.32 to offset the administrative costs, if any, must be in addition to the fee imposed pursuant to section 2704(b) of the regulations.

**Section 2707, subdivisions (a) through (d):** To specify procedures of how an owner may obtain an exemption from the fee and to clarify the basis for an exemption.

**Section 2708, subdivisions (a) through (d):** To specify procedures of how to request a refund for an in-kind contribution, the type of in-kind contribution that will be considered, the process following the granting of an in-kind contribution, and how to value an in-kind contribution.



**Section 2709, subdivisions (a) through (f):** To specify procedures on how to petition whether the rail car content is or is not a hazardous material commodity.

**Section 2710:** To clarify what may be eligible for training cost reimbursement.

## **NECESSITY**

### *OVERVIEW:*

**Sections 2700 through 2710**, created under authority of the enabling statutes, are necessitated by the Governor's Office of Emergency Services (Cal OES) having identified in March 2015 numerous risks posed by potential major hazardous materials incidents in the agency's Updated Gap Analysis for Rail in California. (See <http://www.caloes.ca.gov/cal-oes-divisions/fire-rescue/hazardous-materials/hazmat-by-rail>.)

The assessment found that high-hazard areas for derailments are generally located in areas with important natural resources, including critical waterway systems. Additionally, population centers, schools, and hospitals are frequently located near rail lines in urban areas and throughout the Central Valley. Furthermore, rail lines are located along earthquake faults in many areas, especially in urban areas in Los Angeles and the Bay Area.

Cal OES's analysis also identified gaps in the state's ability to reliably, effectively, and safely respond to and mitigate a catastrophic hazardous materials spill, release, or fire along our vast rail system. Particularly, rural and remote portions of the state lack the necessary response equipment and specialized training to support a multi-agency emergency hazardous material (Haz-Mat) response. Many populated areas throughout the state also lack certified Haz-Mat specialists, due to the high cost of maintaining qualified teams and their limited access to specialized training.

These regulations are necessary to fill these gaps with properly trained Haz-Mat responders. Cal OES must prepare California's first responders for the known risks that travel through our state each day. Any delay, could impact the life, property, and the environment in our state should an incident or derailment occur in one of the areas where Cal OES has identified a gap.

Although money has already been loaned and the training is being coordinated pursuant to the enabling statute, Cal OES needs to collect the fees, not only to repay the loan, but to continue funding the training and response for the mitigation of any disturbance of public peace, health and safety, and general welfare for the upcoming fiscal year and years as a result of a hazardous material incident by rail.



These regulations enable Cal OES to address these gaps and build out a comprehensive and reliable Haz-Mat capability that can effectively respond to the cascading impacts of an incident or derailment resulting in a catastrophic release of hazardous materials. Additionally, the regulations establish the list of hazardous material commodities whose owners will be assessed a fee when shipping the material by rail in and through California. Furthermore, the regulations establish the fee necessary to accomplish the purposes stated above.

*NECESSITY BY SECTION:*

**Section 2700, subdivisions (a) through (k):** The definitions listed in Section 2700 are necessary to provide clarification on key terms used in the regulations or in Government Code section 8574.30. In order to carry out this first-of-a-kind program, it is necessary the terms utilized are clear in their meaning.

**Section 2701, subdivisions (a) through (b):** Requiring that owners of the 25 most hazardous material commodities pay a fee when it transports such a commodity in California is necessary to address the gaps identified in California's ability to reliably, effectively, and safely respond to and mitigate the effects of a catastrophic hazardous materials incident along California's vast rail system. Particularly, rural and remote portions of the state lack the necessary response equipment and specialized training to support a multi-agency emergency hazardous material response. Many populated areas throughout the state also lack certified hazardous material specialists, due to the high cost of maintaining qualified teams and their limited access to specialized training.

It is necessary for the state to collect fees to continue to fund training and response for the mitigation of any disturbance of public peace, health and safety, and the general welfare as a result of a hazardous material incident by rail.

It is necessary to clarify that this regulation applies to short line or regional railroads as the transportation of and an incident related to hazardous material commodities may also occur with these types of railroads.

It is necessary that this regulation reference the corresponding United Nations four-digit identification numbers (UN number) which correspond to the listed hazardous material commodity for clarity purposes. The UN number helps clarify which hazardous material commodity is subject to the fee.

**Section 2702:** Imposing the fee on intermodal containers is necessary to the extent the intermodal container is loaded on a rail car, contains a hazardous material commodity identified in 2701 subdivision (b), and is transported by rail in California. A hazardous material commodity



transported by an intermodal container on rail in California carries the same or similar risk of exposure to the owners of the hazardous material commodities as a non-intermodal container.

**Section 2703:** It is necessary the phrase “transported by rail in California” is clear in its meaning so that both the owners of hazardous material commodities transporting an identified commodity in section 2701 subdivision (b) by rail in California, as well as the railroads transporting such a commodity, understand the scope of the phrase.

**Section 2704, subdivisions (a) through (d):** It is necessary to establish a schedule of fees as required by Government Code section 8574.32(a)(1) in order to ensure the state of California has the monetary resources to adequately prepare for, respond to, and mitigate the effect of, an incident involving the transportation of hazardous material commodities by rail in California.

It is necessary to set forth the time in which the fee is to be imposed, as well as, clarify what happens when the statutory collection cap on fees is reached, specifically when the fee will be reduced to \$0.00, and when it is reinstated. This provision is necessary as it directly relates to the monetary resources available to adequately prepare for, respond to, and mitigate the effect of, an incident involving the transportation of hazardous material commodities by rail in California.

It is necessary to identify and clarify which railroad may be required to register with the California State Board of Equalization for the purpose of remitting fees collected from the owners of the hazardous material commodities.

Finally, this regulation is necessary to clarify that a railcar containing residue is not assessed a fee in order avoid improperly imposing fees on railcars containing only hazardous material commodity residue.

**Section 2705, subdivisions (a) through (b):** Specifying that the State Board of Equalization has the authority to issue refunds, to whom, and on what basis is necessary in order to observe the fee collection caps set forth in the enabling statute. Clarifying that Cal OES will notify the persons registered with the State Board of Equalization when collection caps are reached is necessary so the persons registered with the board refrain from further fee collection. This regulation will ensure all parties affected by collection caps are aware of when the cap is reached thereby aiding in compliance with the enabling statute.

**Section 2706:** Clarifying that the 5 percent administrative fee collected, if any, is in addition to the \$45 fee imposed per load rail car is necessary to ensure the full \$45 is remitted to the State Board of Equalization. This provision is necessary as it directly relates to the monetary resources available to adequately prepare for, respond to, and mitigate the effect of, an incident involving the transportation of hazardous material commodities by rail in California.



**Section 2707, subdivisions (a) through (d):** Specifying procedures of how an owner may obtain an exemption from the fee and to clarify the basis for an exemption are necessary for the owners of the hazardous material commodities, the railroads, and Cal OES. This regulation is necessary for all parties identified as it ultimately affects whether a fee will be imposed and the amount of fees collected relative to the collection caps. Should an owner petition the director and the director requests additional information, the time requirement of thirty (30) calendars days to provide the requested information is necessary so the petition does not languish and the parties know whether the fee should be collected and whether the fee collection caps will be affected.

**Section 2708, subdivisions (a) through (d):** Specifying procedures of how to request a refund for an in-kind contribution, among the other listed purposes, and how the State Board of Equalization will be notified if an in-kind contribution is approved is necessary for the owners of the hazardous material commodities, the railroads, and Cal OES. This regulation is necessary for all parties identified as it ultimately affects the amount of fees collected relative to the collection caps and whether the owner may obtain a refund for the approved monetary value of the in-kind contribution. The time frame in which to request a refund for an in-kind contribution is necessary as it affects collection caps. The requirement for documentation relating to the full payment of the fee is necessary so Cal OES can determine who paid the fee and when, and the appropriate amount to refund. The types of in-kind contributions that may be considered are necessary so the owners have guidance as to what in-kind contributions the director may consider. Setting forth how an in-kind contribution will be monetarily assessed is necessary so the owners know how to explain the value of the contribution and the amount of the refund that should be issued if an in-kind contribution is approved. Finally, requiring the director to notify the State Board of Equalization and the owner that the request for an in-kind contribution was approved is necessary so all parties know that a refund may be issued to the owner.

**Section 2709, subdivisions (a) through (f):** Specifying procedures of how to petition whether the rail car content is or is not a hazardous material commodity is necessary as it affects whether a fee should have been imposed upon an owner. Additionally, a determination of whether the rail car content is not carrying a hazardous material commodity may trigger a refund and affect fee collection caps. The time requirements of thirty (30) days to submit a petition and provide documents or evidence requested by the director is necessary so to avoid stale claims, claims from languishing, and to promptly refunds fees. Further, the time requirements are necessary as a petition that is granted will potentially affect the fee collection caps.

**Section 2710:** Clarifying what is eligible for training cost reimbursement is necessary so to provide the requisite guidance of who may seek reimbursement and what is eligible for reimbursement. Training is critical and necessary to address the existing gaps in California's



ability to effectively respond to, mitigate the effects of, and recover from an incident involving a hazardous material commodity transported by rail within the state.

### **TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS**

Cal OES conducted, as referenced above, a gap analysis for rail in California to identify existing hazardous material capabilities and emergency response resources available to respond, either directly or as part of a mutual aid request, to an incident resulting in a major hazardous materials release. This analysis identified gaps in adequate planning, training, and response capabilities.

### **ECONOMIC IMPACT ASSESSMENT/ANALYSIS**

Railroads report hazardous material commodity flow data to Cal OES pursuant to Health and Safety Code section 25547.2. Cal OES is permitted to disclose, pursuant to Health and Safety Code sections 25547.2(b) and 25547.8, commodity flow data to authorized recipients only in order to assist with emergency response planning.

A list of 25 hazardous material commodities was derived from data reported by the railroads. Specifically, the top 100 hazardous material commodities most frequently transported by rail in California were identified, and the list was further refined, by incorporating guidance from the United States Environmental Protection Agency, input from Cal OES hazardous material subject matter experts, comments from the Regional Railroad Accident Preparedness and Immediate Response Fund Advisory Committee, and the public.

The United States Department of Transportation (U.S. DOT) has already determined that these commodities are hazardous. Therefore, Cal OES did not need to make that determination, but rather, consider these commodities in light of the frequency with which they are shipped and the potential response necessary for an incident involving such a class of hazardous materials, as defined by the United Nations (UN) Committee of Experts on the Transport of Dangerous Goods and adopted by the U.S. DOT.

Cal OES analyzed the data reported by the railroads relative to the number of rail cars that transport hazardous material commodities through California. Specifically, Cal OES analyzed only the rail entry points into California in an effort to eliminate the possibility of counting the same rail car of hazardous material commodities multiple times during transport within the state. Cal OES also analyzed data that would enable the capturing of rail transport that initiated and potentially terminated in California. However, the data provided by the railroads does not ensure that Cal OES's analysis does not count the same rail cars multiple times. Accordingly, Cal OES



reduced the number of rail cars that carry the 25 most hazardous material commodities by approximately half to account for potential duplicative reporting. This allowed Cal OES to arrive at a \$45 fee per rail car, which is fair, in accordance with the enabling statute, and sufficient to fund any monies loaned. Lastly, the fee reflects, among other things, the cost of preparations to respond to the release of hazardous material commodities in an incident involving a rail car.

The enabling legislation, specifically Government Code section 8574.44, subdivision (g)(1) through (3), places collection caps on the imposed fee. The economic impact on owners of hazardous material commodities on the established list will be collectively impacted no more than twenty million dollars (\$20,000,000) for the 2016 calendar year. For the 2017 calendar year, the owners will be collectively impacted no more than twenty million dollars (\$20,000,000). Commencing on January 1, 2018, and following an initial review of the amount of the fee by the industry advisory committee established pursuant the enabling statute, the owners will be collectively impacted no more than ten million dollars (\$10,000,000) annually.

The enabling statute requires the railroads to collect the imposed fee. The enabling statute further authorizes the railroad to collect an amount not to exceed 5 percent of the fee collected to offset the administrative cost to collect the fee. Accordingly, any economic impact may increase by \$2.25 (5 percent of the \$45 fee) per rail car transporting the hazardous material commodity by rail in California. Any adverse economic impact to the railroads would be equalized by the railroads' authority to collect monies to offset any administrative costs associated with implementing these regulations and the corresponding enabling statute.

There is no indication that the regulations will: (1) create or eliminate jobs within the state; (2) create or eliminate new businesses within the state; and, (3) expand businesses currently doing business within the state. Finally, the benefits of the regulations to the health and welfare of California residents, worker safety, and the state's environment are incidental but important relative to the direct benefit to the owners as set forth in the enabling statute. The incidental benefits include enabling Cal OES to address the above discussed gaps to build out a comprehensive and reliable Haz-Mat capability that can effectively respond to and mitigate the cascading impacts of an incident resulting from a catastrophic release of hazardous materials involving rail in California.

**EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS**

Prior to Cal OES promulgating these regulations through the emergency regulatory process, Cal OES solicited input from the industry advisory committee established pursuant to the enabling statute by way of publicly noticed meetings and written comments.



At least one railway expressed concern regarding its lack of systems necessary to perform the reporting and collection responsibilities under Senate Bill 84 (SB84). Specifically, Cal OES was asked to take into consideration an implementation timeline and to take into account the effort it will take the rail carriers to create the needed systems once guidance is received from the final regulations.

Prior to the adoption of the emergency regulations, the California Taxpayers Association, et al (collectively "Petitioners"), Case No. 34-2016-80002357, brought a facial challenge to the constitutionality of certain portions of the enabling statute (SB84). Through the facial challenge, "[p]etitioners argued that the public will be harmed because hazmat owners will switch to using trucks rather than rail to transport their product in order to avoid the fee. According to Petitioners, railroads are statistically safer than trucks, and switching to trucks to transport hazardous materials will thus increase the risks to public safety." (Page 13 of the Order Denying Preliminary Injunction, California Taxpayers Association v. California Governor's Office of Emergency Services, et al., Sacramento County Superior Court Case No. 34-2016-80002357). The Court concluded that Petitioners "fail[ed] to demonstrate that hazmat owners will actually switch to using trucks in order to avoid the fee. Instead, they proffer[ed] declarations from several hazardous materials owners who state[d] that they 'will *consider* switching to truck to avoid the new charge. [citations omitted].'" (Id.) The Court further concluded "[t]hat some owners may *consider* switching to truck in order to avoid the fee does not demonstrate that they will actually do so once the fee goes into effect, much less that not granting a preliminary injunction will lead to increased risks to public safety." (Id.)

Other comments by stakeholders and members of the industry advisory committee were received by Cal OES. However, these comments were not directly related to Cal OES assessing the potential for adverse economic impact when adopting these regulations as required by Government Code section 11346.3. Cal OES considered all comments received including the comments outlined above.

With respect to the concerns about needing time to create systems to collect the fee, the enabling statute controls, specifically Government Code section 8574.32(b)(1), the time frame that railroads must commence imposing the fee. While Cal OES understands the expressed concern, these regulations may not expand or change the enabling statute.

With respect to the hazardous material owners who stated that they will consider switching to truck to avoid the fee and transporting by truck increases public safety risks, the Court in the above referenced matter concluded there was no evidence to demonstrate those identified concerns were in fact the case.



Based on the foregoing, there is no evidence that suggests that the regulations would have a significant statewide adverse economic impact directly on owners of hazardous materials or the railroads in California.

**REASONABLE ALTERNATIVES TO THE REGULATIONS**

There are no reasonable alternatives to the regulations as the enabling statute requires Cal OES to promulgate regulations in order to establish a schedule of fees. Additionally, Government Code section 11346.2 (b)(4)(C) does not require an agency to artificially construct alternatives or describe unreasonable alternatives.