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OFFICE OF ADMINISTRATIVE LAW  
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**TITLE 1, CALIFORNIA CODE OF REGULATIONS  
UNDERGROUND REGULATIONS: AMENDMENT OF SECTIONS 250, 260, 270, AND 280**

**INITIAL STATEMENT OF REASONS**

**INTRODUCTION**

The rulemaking provisions of the California Administrative Procedure Act (“APA,” Gov. Code, § 11340 *et seq.*) govern state agency rulemaking. Specifically, the APA establishes procedures that state agencies must comply with, unless exempt, to adopt regulations lawfully. Government Code section 11340.5, subdivision (a), prohibits any state agency subject to the APA from employing any regulation that has not been lawfully adopted pursuant to APA procedures. When an agency violates this section by issuing, using, enforcing, or attempting to enforce a regulation that has not been properly adopted, it is said to be employing an “underground regulation.”

The Office of Administrative Law (“OAL”) is charged with enforcement of the APA. This includes the review of a petition alleging that an agency has issued, used, enforced, or attempted to enforce an underground regulation. (Gov. Code, § 11340.5(b)). In response to evidence that an agency issued, used, enforced, or attempted to enforce an underground regulation, OAL may issue a determination as to whether or not the agency’s action in fact violates Government Code section 11340.5, subdivision (a). The agency named in a petition as having allegedly violated section 11340.5 will be hereinafter referred to in this Initial Statement of Reasons as the “challenged agency.”

**PROBLEM STATEMENT**

The existing regulations in Title 1, Division 1, Chapter 2 of the California Code of Regulations (“CCR”) were adopted in 2006 and have remained largely unchanged. Since that time, electronic communication has become much more prevalent, and OAL recognizes the need to update the regulations to account for technological advancements over the last decade. Additionally, OAL identified a situation that should be addressed with respect to an agency that continues to use and/or enforce a challenged rule after the agency certified it would not. Further, the existing regulations sometimes employ inconsistent wording and syntax, which may confuse the reader.

## **ANTICIPATED BENEFITS**

The proposed changes result in more uniform usage of terminology throughout the regulations, which will improve clarity and readability and reduce the potential for confusion or misinterpretation or misapplication of the rules. And by bringing the regulations up to date with today's commonly used technology, such as e-mail, directly affected individuals will have a better awareness of their options for submitting underground regulation petitions to OAL for review. Additionally, allowing OAL to reconsider a petition based on evidence that an agency continues to use or enforce a regulation after certifying it would not, allows OAL to issue a determination without the burden of requiring a subsequent petition.

## **SPECIFIC PURPOSE OF, AND RATIONALE FOR, EACH PROPOSED AMENDMENT**

Section 250. The subsections are renumbered consistent with the numbering of title 1, section 1. This amendment is nonsubstantive and provides consistency of style throughout OAL regulations.

Section 250, subsection (a)(3). The existing regulation defines interested person as "any person who submits a petition to OAL," however, a petition may be submitted by a business, industry association, or group of persons or entities who have an interest in the results of the petition. By further defining interested person it is clear to the public that petitions are not limited to submission only by an individual.

Section 250, subsection (a)(4). Chapter 2 does not define who the challenged agency is pursuant to a petition. As a result, it is unclear to certain agencies if a bureau or commission within a larger agency that is alleged to have issued, used, enforced, or attempted to enforce a purported underground regulation may issue a certification pursuant to section 280, or if they must seek the certification from the head of the cabinet level agency. This amendment defines "challenged agency" as the state agency the petitioner alleges has issued, used, enforced, or attempted to enforce an underground regulation. By defining "challenged agency" it is clear that action must be taken by the agency who actually issued, used, enforced, or attempted to enforce the purported underground regulation. References to the challenged agency are updated in sections 260(a), (b)(2), (b)(4), (b)(7), (b)(7)(A), (b)(7)(B); 270(b), (c), (d), (g), (g)(1), (g)(2), (h), (h)(1), (h)(2), (i), (j); and 280(a)(1), (a)(2), (a)(3), (c) consistent with this new definition.

Section 250, Reference Citation. Government Code section 11000 is added to the references for this section. Government Code section 11000 defines "State

Agency" which is being interpreted by this new definition of "challenged agency."

Section 260, subsection (a). The regulation is amended to clarify that a petition submitted to OAL must be in writing. Inserting the word "written" is consistent with the existing requirement that a petitioner provide a copy of the challenged rule and also provide a copy of the petition to the challenged agency. Specifying that the petition must be submitted to OAL in writing will ensure OAL's ability to review complete petitions and maintain accurate and complete records of all petitions received.

The existing regulatory language does not specify the physical address and/or email address to be used by a petitioner in submitting the petition. As a result, petitions are sometimes received by unintended recipients at OAL or members of the public may have difficulty determining where to send their petition. The regulation is amended to include the physical address and email address, as well as to whom the petition must be addressed. Including this information in the regulation provides clear instruction to the public as to where their petition must be submitted.

The regulation is further amended to allow the petitioner to submit a copy of the petition and all its attachments to the petitioned state agency concurrently with its submission to OAL. The existing regulation requires the petitioner to submit the documents to the petitioned agency prior to submitting them to OAL, but OAL recognizes that petitions and attachments are now very easy to submit electronically to multiple parties at the same time. Further, the intent of the existing regulation was not to prevent concurrent submissions, but to ensure that the challenged agency, and not just OAL, received a copy of the petition from the petitioner. This amendment is necessary to modernize the requirement and resolve any ambiguities or uncertainties stemming from the existing text.

Section 260, subsection (b)(2). The existing regulatory language suggests that at the time a petition is submitted to OAL for review, the challenged rule is already presumed to be an underground regulation. Thus, the term "underground regulation" is changed to "purported underground regulation" to acknowledge that at this phase, the rule is still being challenged and no determination has been made. Further, the term "purported underground regulation" is already used elsewhere in the regulation and this change is necessary for consistent usage throughout Title 1, Division 1, Chapter 2.

Section 260, subsection (b)(3). The existing term "particular underground regulation" is changed to "purported underground regulation" to acknowledge that at this phase, the rule is still being challenged and no determination has been made. Further, the term "purported underground regulation" is already

used elsewhere in the regulation and this change is necessary for consistent usage throughout Title 1, Division 1, Chapter 2.

The existing regulatory language only requires the petitioner to submit a written copy of the alleged underground regulation. Occasionally, OAL receives petitions including a handwritten copy of a challenged rule, and the validity and accuracy of these handwritten copies is often difficult to ascertain. Requiring the petitioner to submit an original or photocopy of the challenged rule removes this obstacle, making OAL's determination process more efficient.

The word "additionally" is added when requiring the petitioner to identify an agency manual containing the purported underground regulation to clearly indicate this information is required in addition to an original or photocopy of the rule.

Section 260, subsection (b)(4). The existing term "particular underground regulation" is changed to "purported underground regulation" to acknowledge that at this phase, the rule is still being challenged and no determination has been made. Further, the term "purported underground regulation" is already used elsewhere in the regulation and this change is necessary for consistent usage throughout Title 1, Division 1, Chapter 2.

Section 260, subsection (b)(6). The existing regulation requires the petitioner provide information demonstrating that the petition raises an issue of considerable public importance requiring prompt resolution. The proposed amendments to this subsection repeal the superfluous language that the issue require prompt resolution. It is implicit that an issue of considerable public importance be resolved promptly.

Section 260, subsection (b)(7). The existing regulation requires the petitioner to provide OAL with a certification that they submitted a copy of the petition and all attachments to the challenged agency. "Certification" is proposed to be replaced with "written confirmation" to avoid confusion about the existence of a particular certification process, and to align with similar changes being proposed in this rulemaking (e.g., section 270, subsection (g)(2)). Also, "petition's" is changed to "petitioner's" to eliminate any confusion about who is responsible for providing the written confirmation.

Section 260, subsection (b)(7)(A). The requirement for a petitioner's written confirmation to include the agency contact person's telephone number is removed and e-mail address added, if applicable. Often, the petitioner does not know or cannot obtain a contact person's telephone number, and since a telephone number is not required to send a petition by e-mail or mail, the lack of a telephone number should not invalidate an otherwise complete petition.

OAL simply wants to ensure it can determine where and to whom the petition was sent once it starts its review of the petition.

Section 260, subsection (b)(7)(B). This proposed new subsection simplifies the requirement in subsection (b)(7) for petitions submitted by e-mail. If an e-mail contains the petition and its attachments and is sent to the challenged agency and OAL concurrently, all recipients of the e-mail are usually listed in the message. Thus, if OAL can easily verify that the challenged agency received a copy of the petition and its attachments, there is no need for a separate, written confirmation. This change brings the regulation up to date with commonly used technology and takes into account the manner in which state agencies are currently doing business.

Section 270, subsection (a). The regulation is amended to specify that a petition submitted to OAL must be in writing. Inserting the word written is consistent with the existing requirement that a petitioner provide a copy of the challenged rule and also provide a copy of the petition to the challenged agency. Specifying that the petition must be submitted to OAL in writing will ensure OAL's ability to review complete petitions and maintain accurate and complete records of all petitions received.

Section 270, subsections (a)(1), (b), (f)(4), (g), (j). These regulation sections are amended to clarify that the time periods related to an underground regulation petition are measured in calendar days. The existing regulations in chapter 2 inconsistently specify "days" vs "calendar days". To ensure it is clear to the public and for consistency throughout the regulation the regulations are updated to add the word "calendar" where it was not previously included.

Section 270, subsection (b). The term "office" is changed to "OAL" for consistent usage throughout the regulations. This is a non-substantive change.

Section 270, subsection (c)(1). Whether an issue requires prompt resolution is removed from the list of factors that may OAL consider when deciding whether to accept a petition. Consistent with proposed amendments to section 260(b)(6), it is implicit that an issue of public importance be resolved promptly.

Section 270, subsection (c)(2). This new subsection is added to state whether the issued raised by the petition is currently being considered by a court or administrative body with jurisdiction is a basis for OAL to decline to consider a petition. Consideration by a court or administrative body is more likely to offer relief to the petitioner because a court or administrative body can award damages or injunctive relief. Further, in the case where the petitioner is also the litigant, pursuant to Government Code section 11340.5(e), a determination by

OAL will not be “considered by a court by an administrative agency in an adjudicatory proceeding if all of the following occurs:

(1) The court or administrative agency proceeding involves the party that sought the determination from the office.

(2) The proceeding began prior to the party’s request for the office’s determination.

(3) At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that is the legal basis for the adjudicatory action is a regulation as defined in Section 11342.600.”

Section 270, subsections (c)(3) and (c)(4). Existing subsections (f)(1)(A) and (f)(1)(D) are moved and renumbered to new subsections (c)(3) and (c)(4), respectively. Whether a challenged rule has been superseded, or expired on its own terms, are factors more appropriately considered by OAL before accepting a petition rather than before issuing a summary disposition. Non-substantive grammatical changes are also made for better readability.

Section 270, subsections (c)(5) and (c)(6). As a result of the proposed amendments described above, existing subsections (c)(2) and (c)(3) are renumbered to new subsections (c)(5) and (c)(6), respectively. These are non-substantive changes.

Section 270, subsection (c)(5). The existing regulatory language permits OAL to decline a petition based on “additional relevant information, if any, obtained” in consultation with the petitioner and challenged agency. This provision is amended because if OAL is provided additional pertinent information that demonstrates the petitioner’s issue may be resolved through other recourse, that information may be useful in deciding whether the petition should be accepted. Many different factual scenarios exist that may address the petitioner’s issue that would make a determination by OAL less relevant or more beneficial to the petitioner and such information would be valuable in deciding whether to accept the petition.

Section 270, subsection (e). The word “letter” contained in the term “summary disposition letter” is removed. The word “letter” is superfluous because the actual document issued by OAL is called a “summary disposition.” This is a non-substantive change.

Section 270, subsections (f)(1)-(4). The word “letter” is either deleted from the term “summary disposition letter” or replaced with the term “summary

disposition," as applicable, for the same reason provided above regarding subsection (e).

Section 270, subsections (f)(2)(A), (D). Existing subsections (f)(1)(A) and (f)(1)(D) are moved and renumbered to new subsections (c)(3) and (c)(4), respectively. Whether a challenged rule has been superseded or expired on its own terms are factors more appropriately considered by OAL before accepting a petition rather than before issuing a summary disposition.

As a result of the proposed amendments described above, existing subsections (f)(2)(B) and (f)(2)(C) are renumbered to subsections (f)(2)(A) and (f)(2)(B), respectively. These are non-substantive changes.

Section 270, subsection (f)(2)(E). This provision was restructured to be clearer and more consistent with the language used throughout the regulations, but the meaning of the regulation remains the same. Additionally, as a result of the proposed amendments to subsections (f)(2)(A)-(D) described above, this subsection is being renumbered to subsection (f)(2)(C). These are non-substantive changes.

Section 270, subsections (f)(4). The existing regulation states that a summary disposition will be sent to the petitioner not later than 60 days following receipt of the complete petition, however, it does not detail all the actions that OAL takes after issuing a summary disposition. This subsection is amended to set out everything OAL does following issuance of the summary disposition which include filing with the summary disposition with Secretary of State, sending it to the challenged agency, and publishing it in the California Regulatory Notice Register. The addition of this language provides transparency in the process and makes it clear that all parties involved in the petition, as well as the public, receive notice of the outcome of this petition.

Section 270, subsection (g)(1). The term "simultaneously" is changed to "concurrently" for consistency throughout the regulations. (See the explanation of proposed amendments to section 260, subsection (a), above.) This is a non-substantive change.

Section 270, subsection (g)(2). The existing regulation requires the commenter to certify to OAL that they submitted a copy of the comment to the petitioner and the challenged agency in addition to OAL. The proposed text replaces the requirement to "certify" with a requirement to "confirm in writing" to avoid confusion about the existence of a particular certification process, and to align with similar changes being proposed in this rulemaking (See, section 260, subsection (b)(7)).

The proposed text further provides that the written confirmation requirement is deemed satisfied for comments submitted to all parties concurrently by e-mail. If an e-mailed comment is sent to the challenged agency and OAL concurrently, all recipients of the e-mail are usually listed in the message. Thus, if OAL can easily verify that all parties received the comment, there is no need for a separate, written confirmation. This change brings the regulation up to date with commonly used technology and takes into account the manner in which the public and state agencies are currently doing business.

Section 270, subsection (h). The existing regulation text is proposed to be divided into two subsections for ease of understanding and compliance with the requirements. This is a non-substantive change.

Section 270, subsection (h)(1). The term “simultaneously” is changed to “concurrently” for consistency throughout the regulations. (See the explanation of proposed amendments to section 260, subsection (a)(1), above.) This is a non-substantive change. Additionally, language consistent with subsections 260(b)(7) and 270(g)(2) is added to require written confirmation that the response was provided to the petitioner. The existing regulatory language states that OAL will only consider a response by the challenged agency if the challenged agency provided a copy to the petitioner, however, there is no current mechanism for confirming the response was provided. Written confirmation, or verification when the response is sent in the same email, is consistent with other requirements pursuant to this chapter and allows OAL to determine whether the challenged agency complied with the requirements of this subsection.

Section 270, subsection (h)(2). The existing language in this subsection states that OAL “may” extend the time for a challenged agency to submit a response to the petition when the challenged agency is a state body as defined by Section 11121 of the Government Code and the challenged agency’s response requires action taken at a meeting subject to the Bagley-Keene Open Meeting Act, unless the extension would prevent OAL’s compliance with 270(j). The word “may” in this subsection is changed to “shall”. Shall is more appropriate in this subsection because OAL will grant the extension, except in the situation where the extension would prevent compliance with 270(j).

Section 270, subsection (j). The word “days” is moved to correct a syntax problem. The meaning of the regulation remains the same. This is a non-substantive change.

Section 280, subsection (a). The existing regulation text is proposed to be divided into an itemized list for ease of understanding and compliance with the

requirements. This reorganization required the addition of transitional, non-substantive language between the listed requirements.

Section 280, subsection (a)(1). The phrase “or an agency” is deleted because the requirement to suspend action “pursuant to this chapter” relates to the actions by OAL in issuing a determination. In terms of the challenged agency suspending action, the certification by the challenged agency pursuant to this section that it will not issue, use, enforce, or attempt to enforce the purported underground regulation speaks for itself.

The phrase “prior to filing its determination with the Secretary of State” is added so there is no question that a challenged agency must submit a written certification pursuant to section 280 prior to filing the determination with Secretary of State to stop action by OAL.

The existing regulatory language uses the word “certification,” suggesting that a challenged agency’s certification can be either written or oral. The proposed change specifies that the certification must be in writing consistent with subsection (a)(2) which requires a copy be provided to the petitioner, (a)(3) which requires signature on the certification, and (b) which requires filing with Secretary of State and printing in the California Regulatory Notice Register.

Section 280, subsection (a)(2). The existing regulation requires the challenged agency to provide proof of service of the certification on the petitioner. With respect to litigation, “proof of service” is a legal process defined in statute, where proof is required to be made by an affidavit, certificate, or other authorized form whenever documents are served on a party in a legal proceeding. (See, e.g., Code Civ. Proc. § 1013a.) Service in this sense is not necessary, was not intended by the use of the term in this context, and may be difficult or costly depending on the identity of the petitioner. This subsection is amended to make it clear that only written confirmation from the challenged agency that the certification was provided to the petitioner is necessary and not the more stringent requirements are necessary in litigation.

Consistent with the requirements in sections 260(b)(7), 270(g)(2), and 270(h)(1) written confirmation, or verification when the response is sent in the same email, allows OAL to determine whether the challenged agency complied with the requirements of this subsection.

Section 280, subsection (a)(3). The existing regulation was intended to specifically hold heads of state agencies accountable for making certifications pursuant to this section. This proposed amendment clarifies the persons able to make these important certifications by specifying the head of the challenged agency or their delegee may sign since it is the challenged agency that is

actually issuing, using, enforcing, or attempting to enforce the challenged rule. It is the agency that is actually using the challenged rule that should be certifying that they will no longer do so, and this change makes it clear that the certification must come from that agency, even when they are within a cabinet level agency.

Section 280, subsection (b). The term “proof of service” is replaced with “written confirmation of compliance” to align with the proposed changes described above regarding subsection (a)(2).

Section 280, subsection (b)(1). Existing text states that OAL will file the petition and certification with the Secretary of State. The regulation is amended to make clear original documents are not required to be filed with Secretary of State and an original or a copy may be filed to document the agency’s certification so that in the event that a certification gets lost in the mail, an emailed copy suffices.

Section 280, subsection (b)(3). The proposed amendment requires OAL provide a copy of the certification submitted in compliance with subsection (a) and endorsed by the Secretary of State as having been filed with the Secretary of State, to the petitioner, head of the challenged agency, and the head of the cabinet-level state agency when the challenged agency is under one. This change is made to promote transparency and accountability in state government by ensuring that OAL performed the action required by subsection (b)(1), and all relevant parties are notified of the action taken and its effects.

Section 280, subsections (c), (c)(1). Although Government Code section 11340.5(b) permits OAL to issue a determination if it learns on its own that a state agency has issued, used, enforced, or attempted to enforce a purported underground regulation, there is no procedure for OAL to reconsider a petition if it learns that a challenged agency continues to issue, use, enforce, or attempt to enforce a purported underground regulation after the agency certifies it will not. This amendment would allow OAL to reconsider a petition when evidence is brought to its attention, following the same procedures for an original petition, and would eliminate the need for a second petition. Although OAL will still follow the same procedures to decide whether to consider a petition, commencing on the date the evidence is brought to OAL’s attention, because a petitioner has already submitted all the necessary information once, the public benefits by not having to incur the time and any potential cost related to submitting a full petition again. Thus, holding agencies accountable for their certifications by issuing a determination.

## **OTHER REQUIRED SHOWINGS – GOVERNMENT CODE § 11346.2(b)(2)-(5)**

Studies, Reports, or Documents Relied Upon – Gov. Code § 11346.2(b)(2): None.

Reasonable Alternatives That Would Lessen the Impact on Small Businesses- Government Code § 11346.2(b)(3)(B): None.

Reasonable Alternatives That Would Be Less Burdensome and Equally Effective – Government Code section 11346.2(b)(4)(A): No such alternatives have been proposed, however, OAL welcomes comments from the public.

Evidence Relied Upon to Support the Initial Determination That the Regulation Will Not Have A Significant Adverse Economic Impact on Business – Government Code § 11346.2(b)(4): Since the adoption of these regulations in 2006, no businesses have been exposed to any adverse economic impact as a result of the regulations becoming effective. While a business may submit a petition to OAL for review, the costs of preparing and submitting the necessary document is likely minimal. Thus, OAL finds that these regulations will not have a significant adverse economic impact on business.

## **ECONOMIC IMPACT STATEMENT – GOVERNMENT CODE § 11346.3(b)(1)(A)-(D)**

The regulations in this action only address the procedures related to underground regulations. These procedures only affect state agencies, the petitioners of underground regulations, and OAL. Businesses would only be affected to the extent that they would submit a petition to the OAL for review. Even in that instance, the business would not be affected to the point of creating jobs, eliminating jobs, creating businesses, eliminating businesses, or expanding businesses. The proposed amendments will benefit California residents by adding specificity to the underground regulation petition process and increased openness and transparency of government. By explicitly permitting email for delivery of documents to OAL there may be minimal benefit to the environment by saving paper. OAL does not anticipate any benefits to worker safety.