

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW
300 CAPITOL MALL, SUITE 1250
SACRAMENTO, CA 95814**

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

PROPOSED TEXT

PLEASE NOTE: The proposed text is illustrated for greater accessibility. Proposed changes are illustrated with additions underlined and the following bracketed text, [begin underline] and [end underline], to show the beginning and end of the underline where new text is added. Text proposed for deletion is shown in strikethrough with the bracketed language, [begin strikethrough] and [end strikethrough], to denote the beginning and end of stricken text. In some instances, changes are described in brackets where indicating changes by identifying the beginning and end of the underline and/or strikeout in brackets would be confusing.

Section 250. Definitions.

[begin underline] (a) [end underline] The following definitions shall apply to the regulations contained in this chapter:

([begin strikeout] ~~1~~ [end strikeout] [begin underline] 1 [end underline])

“Underground regulation” means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

([begin strikeout] ~~2~~ [end strikeout] [begin underline] 2 [end underline]) “APA” and “OAL” have the same definitions as in Section 1.

~~3~~ 3

“Interested person” means any person , group, business, association, or other entity who submits a petition to OAL alleging that a state agency has issued, used, enforced, or attempted to enforce an underground regulation in violation of section 11340.5 of the Government Code.

(4) “Challenged agency” means the state agency a petitioner alleges has issued, used, enforced, or attempted to enforce an underground regulation.

Note: Authority cited: Section 11342.4, Government Code. Reference: [The word “section” is changed to “sections”.] Sections 11000 and 11340.5, Government Code.

Section 260. Submission of Petitions Regarding Underground Regulations.

(a) Any interested person may submit a written petition to OAL alleging that a state agency has issued, used, enforced, or attempted to enforce an underground regulation and seeking a determination from OAL pursuant to Section 11340.5 of the Government Code. If mailed or personally delivered, the petition must be delivered to Office of Administrative Law, Attention: CTU, 300 Capitol Mall, Suite 1250, Sacramento, CA, 95814. If e-mailed, the petition must be sent to staff@oal.ca.gov. The petitioner shall submit a copy of the petition and all attachments to the challenged

underline] agency prior to [begin underline] or concurrently with [end underline] submitting it to OAL. The submission of a petition pursuant to this chapter is not required prior to commencing legal action alleging a violation of section 11340.5 of the Government Code.

(b) Any petition seeking a determination shall include all of the following:

(1) The name and contact information of the petitioner.

(2) The name of the [begin underline] challenged [end underline] agency that has allegedly issued, used, enforced, or attempted to enforce [The word “an” is changed to “a”] a~~n~~ [begin underline] purported [end underline] underground regulation.

(3) A complete description of the [begin strikeout] ~~particular~~ [end strikeout] [begin underline] purported [end underline] underground regulation and [begin strikeout] ~~a written~~ [end strikeout] [begin underline] an original or photo [end underline] copy of the purported underground regulation. If the purported underground regulation is found in an agency manual, [begin underline] then [end underline] the petition shall [begin underline] additionally [end underline] identify the specific provision of the manual alleged to comprise the [begin underline] purported [end underline] underground regulation.

(4) A description of the actions of the [begin underline] challenged [end underline] agency showing that it has issued, used, enforced, or attempted to enforce the [begin underline] purported [end underline] underground regulation.

(5) The legal basis for concluding that the guideline, criterion, bulletin, provision in a manual, instruction, order, standard of general application, or other rule or procedure is a regulation as defined in Section 11342.600 of the Government Code and that no express statutory exemption to the requirements of the APA is applicable.

(6) Information demonstrating that the petition raises an issue of considerable public importance[begin strikeout] ~~requiring prompt resolution.~~ [end strikeout]

(7) The [The word "petition's" is changed to "petitioner's"] petitioner's [begin strikeout] ~~certification~~[end strikeout] [begin underline] written confirmation [end underline] that the petitioner [begin strikeout] ~~has~~ [end strikeout] submitted a copy of the petition and all attachments to the [begin underline] challenged [end underline] agency, [begin underline] as required by subsection (a). [end underline]

[begin underline] (A) The petitioner's written confirmation must [end underline]
[The word "including" is changed to "include"] includeing the name [begin underline] of the individual at the challenged agency to whom the copy was submitted, as well as the [end underline] address [begin strikeout] ~~,~~[end strikeout] [begin underline] or e-mail address where submitted, as applicable. [end underline] [begin strikeout] ~~telephone number of the person to whom the copy was submitted.~~ [end strikeout]

[begin underline] (B) When a petition is submitted to OAL and the challenged agency concurrently in the same e-mail, and the e-mail address of the recipient

at the challenged agency is visible to OAL, the e-mail satisfies the written confirmation requirement. [end underline]

Note: Authority cited: Section 11342.4, Government Code. Reference: Section 11340.5, Government Code.

Section 270. OAL Review of Petitions Regarding Underground Regulations.

(a) Upon receipt of a [begin underline] written [end underline] petition submitted pursuant to this chapter from an interested person:

(1) If the petition is incomplete, OAL will notify the petitioner in writing what items are missing from the petition, and that the deficiencies must be cured within 60 [begin underline] calendar [end underline] days of the date of notice. OAL will decline to consider the petition if the required items are not received within 60 [begin underline] calendar [end underline] days of the date of the notice. OAL will begin the review period required in subsection (b) when the petition is complete.

(2) If the petition is complete, OAL will either accept or decline to consider the petition pursuant to subsection (b).

(b) No later than 60 [begin underline] calendar [end underline] days after receipt of a complete petition filed pursuant to this chapter, [begin strikeout] ~~the office~~ [end strikeout] [begin underline] OAL [end underline] shall determine whether or not to consider the petition on its merits, in its entirety or in part, unless, prior to the end of the 60-day period, the [begin underline] challenged [end underline] agency submits to OAL a certification pursuant to section 280.

OAL may consult with the petitioner and the challenged agency to obtain additional information for its use in determining whether or not to consider the petition on its merits.

(c) The decision to consider or to decline to consider a petition shall be at the exclusive discretion of OAL. Factors considered in deciding whether or not to accept a petition shall include, but are not necessarily limited to:

(1) The degree to which the petition raises an issue of considerable public importance ~~requiring prompt resolution.~~

(2) Whether the issue raised by the petition is currently being considered by a court or administrative body with jurisdiction.

(3) Whether the challenged rule is superseded.

(4) Whether the challenged rule expired by its own terms.

~~2~~ 5) Additional relevant information, if any, obtained pursuant to subsection (b) that is pertinent to a potential resolution of the issues raised by the petition.

~~3~~ 6)

Availability of OAL personnel to complete the review of the petition pursuant to the time limits established by this chapter.

(d) If OAL declines to consider the petition, it shall immediately advise the petitioner and the challenged agency of the

decision and specifically indicate that the decision in no way reflects on the merits of the underlying issue presented by the petition.

(e) If OAL decides to consider the petition on its merits, it shall either issue a summary disposition ~~[begin strikeout] letter~~[end strikeout] pursuant to subsection (f) or issue a determination pursuant to this section.

(f)(1) If facts presented in the petition or obtained by OAL during its review pursuant to subsection (b) demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition ~~[begin strikeout] letter~~[end strikeout] stating that conclusion. A summary disposition ~~[begin strikeout] letter~~[end strikeout] may not be issued to conclude that a challenged rule is an underground regulation.

(2) Circumstances in which facts demonstrate that the rule challenged by the petition is not an underground regulation include, but are not limited to, the following:

(A) ~~[begin strikeout] The challenged rule has been superseded.~~

~~(B)~~ [end strikeout] The challenged rule is contained in a California statute.

~~(C)~~ ~~[begin strikeout] C~~[end strikeout] [B][end underline]) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.

~~(D)~~ ~~[begin strikeout] The challenged rule has expired by its own terms.~~ [end strikeout]

(~~E~~) C) The challenged rule is ~~An~~ ~~The word “express” is changed to “expressly”~~ expressly ~~statutory~~ ~~The word “exemption” is changed to “exempt”~~ exemption from the rulemaking provisions of the APA ~~is applicable to the challenged rule~~.

(3) A summary disposition ~~letter~~ shall state the basis for concluding that the challenged rule is not an underground regulation and shall specify that the issuance of the ~~letter~~ summary disposition does not restrict the petitioner's right to adjudicate the alleged violation of section 11340.5 of the Government Code.

(4) A summary disposition ~~letter~~ shall be filed with the Secretary of State and sent to the petitioner and challenged agency not later than 60 calendar days following receipt of the complete petition. OAL will also publish the summary disposition in the California Regulatory Notice Register.

(g) If OAL elects to issue a determination, it shall notify the petitioner and the challenged agency of this decision and shall publish the petition, or a summary of the petition, in the next California Regulatory Notice Register, giving notice to the public that comments on issues

raised by the petition may be submitted to OAL. Comments from the public must be submitted to OAL no later than 30 calendar days from the date of publication. Any person submitting ~~comment(s)~~ comment(s) to OAL shall:

(1) ~~simultaneously~~ Concurrently provide a copy of the ~~comment(s)~~ comment(s) to the challenged agency and the petitioner.

(2) ~~certify~~ Confirm in writing to OAL that ~~copies~~ a copy of the comment(s) was ~~were~~ provided to the challenged agency and petitioner. When a comment is submitted to OAL, the challenged agency, and the petitioner in the same e-mail, and the e-mail addresses of the recipient at the challenged agency and petitioner are visible to OAL, the e-mail satisfies the written confirmation requirement.

(h) The challenged agency may submit a response to the petition to OAL.

(1) No response may be considered by OAL unless the challenged agency ~~has~~ provided a copy of the response to the petitioner ~~simultaneously~~ concurrently

[end underline] with submission of the response to OAL. [begin underline] The challenged agency shall include written confirmation that the challenged agency provided a copy of the response to the petitioner. The challenged agency's written confirmation must include the address or e-mail address where sent, as applicable. When a response is submitted to OAL and the petitioner concurrently in the same e-mail, and the e-mail address of the petitioner is visible to OAL, the e-mail satisfies the written confirmation requirement.

(2) [end underline] Any response by the [begin underline] challenged [end underline] agency shall be submitted to OAL within 45 calendar days of the publication of the petition in the California Regulatory Notice Register. OAL [begin strikeout] ~~may~~ [end strikeout] [begin underline] shall [end underline] extend the time for [The word "an" is changed to "a"] ~~an~~ [begin underline] challenged [end underline] agency to file a response to a petition if the [begin underline] challenged [end underline] agency is a "state body" as defined in Section 11121 of the Government Code and the [begin underline] challenged [end underline] agency's response requires action taken at a meeting subject to the Bagley-Keene Open Meeting Act (commencing with Section 11120 of the Government Code), except that no extension pursuant to this subsection may be granted if it would prevent OAL's compliance with subsection (j).

(i) The petitioner may submit to OAL a reply to the [begin underline] challenged [end underline] agency's response not later than 15 calendar days after the

[begin underline] challenged [end underline] agency response was provided to the petitioner pursuant to subsection (h).

(j) After the time for the petitioner to submit a reply to the [begin underline] challenged [end underline] agency's response, and no later than 120 [begin underline] calendar days [end underline] (or 150 [begin underline] calendar [end underline] days if the [begin underline] challenged [end underline] agency has received an extension pursuant to subsection (h)) [begin strikethrough] ~~days~~ [end strikethrough] after publication of the accepted petition in the California Regulatory Notice Register, OAL shall issue a determination as to whether or not the [begin underline] challenged [end underline] agency has issued, used, enforced, or attempted to enforce an underground regulation.

Note: Authority cited: Section 11342.4, Government Code. Reference: Section 11340.5, Government Code.

Section 280. Suspension of Actions Regarding Underground Regulations [begin underline] **(Section 280 Certification)** [end underline].

(a) [begin underline] (1) [end underline] Any action of OAL [begin strikethrough] ~~or an agency~~ [end strikethrough] pursuant to this chapter in connection with a petition shall be suspended if [begin underline], prior to filing its determination with the Secretary of State, [end underline] OAL receives a [begin underline] written [end underline] certification from the [begin underline] challenged [end underline] agency that it will not issue, use, enforce, or attempt to enforce the [begin

strikeout] ~~alleged~~ [end strikeout] [begin underline] purported [end underline]
underground regulation, [begin strikeout] ~~along with proof~~[end strikeout]
[begin underline] (2) With submission of the written certification to OAL, the
challenged agency must also provide written confirmation [end underline] that
the certification [begin strikeout] ~~has been served on~~[end strikeout] [begin
underline] was provided to [end underline] the petitioner. [begin underline] The
challenged agency's written confirmation must include the address or e-mail
address where sent, as applicable. When the written certification is submitted to
OAL and the petitioner concurrently in the same e-mail, and the e-mail address
of the petitioner is visible to OAL, the e-mail satisfies the written confirmation
requirement.

(3) The challenged agency's written [end underline] [begin strikeout] ~~This~~ [end
strikeout] certification shall be [begin strikeout] ~~made~~ [end strikeout] [begin
underline] signed [end underline] by the head of the [begin underline]
challenged [end underline] agency or a person with a written delegation of
authority from the head of the [begin underline] challenged [end underline]
agency.

(b) Upon receipt of this certification and [begin strikeout] ~~proof of service~~ [end
strikeout] [begin underline] written confirmation that the certification was
provided to the petitioner, [end underline] OAL shall do all of the following:

(1) File [begin underline] the original or a copy of [end underline] the petition
and the certification with the Secretary of State.

(2) Publish a summary of the petition and the certification in the California Regulatory Notice Register.

(3) Provide a copy of the Secretary of State-endorsed certification to the petitioner head of the challenged agency, and head of the cabinet-level state agency, when under one.

(c) OAL may reconsider a petition that has been suspended pursuant to section 280(a) if evidence is brought to OAL's attention indicating that the challenged agency continues to issue, use, enforce, or attempt to enforce the challenged rule.

(1) Reconsideration of a petition pursuant to this section will be conducted in accordance with section 270 (b) through (j), except that the timeframe in subsection (b) will commence from the date the evidence is brought to OAL's attention indicating that the challenged agency continues to issue, use, enforce, or attempt to enforce the challenged rule. [end underline]

Note: Authority cited: Section 11342.4, Government Code. Reference: Section 11340.5, Government Code.