Proposed Text

Section 250. Definitions.

The following definitions shall apply to the regulations contained in this chapter:

“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.

“APA” and “OAL” have the same definitions as in Section 1.
“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.

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


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 agency.
agency prior to or concurrently with 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 challenged agency that has allegedly issued, used, enforced, or attempted to enforce [The word “an” is changed to “a”] a purported underground regulation.

(3) A complete description of the purported underground regulation and an original or photo copy of the purported underground regulation. If the purported underground regulation is found in an agency manual, then the petition shall additionally identify the specific provision of the manual alleged to comprise the purported underground regulation.

(4) A description of the actions of the challenged agency showing that it has issued, used, enforced, or attempted to enforce the purported 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 requiring prompt resolution.

(7) The petitioner's written confirmation that the petitioner has submitted a copy of the petition and all attachments to the challenged agency, as required by subsection (a).

(A) The petitioner's written confirmation must include the name of the individual at the challenged agency to whom the copy was submitted, as well as the address or e-mail address where submitted, as applicable. Telephone number of the person to whom the copy was submitted.

(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.


Section 270. OAL Review of Petitions Regarding Underground Regulations.

(a) Upon receipt of a written 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 calendar days of the date of notice. OAL will decline to consider the petition if the required items are not received within 60 calendar 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 calendar days after receipt of a complete petition filed pursuant to this chapter, the office 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 challenged agency submits to OAL a certification pursuant to section 280.
OAL may consult with the petitioner and the [begin underline] challenged [end underline] 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 [begin strikeout] requiring prompt resolution. [end strikeout] [begin underline] (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. [end underline]

([begin strikeout] 2-[end strikeout] [begin underline] 5 [end underline]) Additional relevant information, if any, obtained pursuant to subsection (b) [begin underline] that is pertinent to a potential resolution of the issues raised by the petition. [end underline]

([begin strikeout] 3-[end strikeout] [begin underline] 6 [end underline]) 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 [begin underline] challenged [end underline] 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 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 stating that conclusion. A summary disposition 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) The challenged rule has been superseded.
(B) The challenged rule is contained in a California statute.
(C) The challenged rule is contained in a regulation that has been adopted pursuant to the rulemaking provisions of the APA.
(D) The challenged rule has expired by its own terms.
The challenged rule is expressly statutory exemption from the rulemaking provisions of the APA is applicable to the challenged rule.

(3) A summary disposition shall state the basis for concluding that the challenged rule is not an underground regulation and shall specify that the issuance of the 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 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 [begin underline] calendar [end underline] days from the date of publication. Any person submitting [add parentheses around letter s] comment[s] to OAL shall:

(1) [begin strikeout] simultaneously [end strikeout] [begin underline] Concurrently [end underline] provide a copy of the [add parentheses around letter s] comment[s] to the [begin underline] challenged [end underline] agency and the petitioner.

(2) [begin strikeout] certify [end strikeout] [begin underline] Confirm in writing [end underline] to OAL that [begin strikeout] copies [end strikeout] [begin underline] a copy of the comment(s) was [end underline] [begin strikeout] were [end strikeout] provided to the [begin underline] challenged [end underline] agency and petitioner. [begin underline] 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. [end underline]

(h) The [begin underline] challenged [end underline] agency may submit a response to the petition to OAL.

[begin underline] (1) [end underline] No response may be considered by OAL unless the [begin underline] challenged [end underline] agency [begin strikeout] has [end strikeout] provided a copy of the response to the petitioner [begin strikeout] simultaneously [end strikeout] [begin underline] concurrently [end underline].
with submission of the response to OAL. 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) Any response by the challenged agency shall be submitted to OAL within 45 calendar days of the publication of the petition in the California Regulatory Notice Register. OAL shall extend the time for an agency to file a response to a petition if the agency is a “state body” as defined in Section 11121 of the Government Code and the 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 challenged agency’s response not later than 15 calendar days after the
(i) After the time for the petitioner to submit a reply to the challenged agency's response, and no later than 120 calendar days (or 150 calendar days if the agency has received an extension pursuant to subsection (h)) after publication of the accepted petition in the California Regulatory Notice Register, OAL shall issue a determination as to whether or not the challenged agency has issued, used, enforced, or attempted to enforce an underground regulation.


**Section 280. Suspension of Actions Regarding Underground Regulations**

(a) Any action of OAL or an agency pursuant to this chapter in connection with a petition shall be suspended if, prior to filing its determination with the Secretary of State, OAL receives a written certification from the challenged agency that it will not issue, use, enforce, or attempt to enforce the
(2) With submission of the written certification to OAL, the challenged agency must also provide written confirmation that the certification has been served on the petitioner. 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 certification shall be signed by the head of the challenged agency or a person with a written delegation of authority from the head of the challenged agency.

(b) Upon receipt of this certification and written confirmation that the certification was provided to the petitioner, OAL shall do all of the following:

(1) File the original or a copy of 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.