

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

Proposed 45-day changes are shown in single underline and ~~single-strikeout~~.

Proposed 15-day changes are shown in double underline and ~~double-strikeout~~.

Proposed Second 15-day changes are shown in wavy underline and ~~italic double strikeout~~.

§ 250. Definitions.

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

(a1) "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.

(b2) "APA" and "OAL" have the same definitions as in Section 1.

(c3) ~~"Interested person"~~ "Petitioner" means any person, group, business, association, or other entity who submits a petition to OAL pursuant to section 260 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.

(5) "Challenged Rule" means the regulation or rule (as defined by Government Code, section 11342.600) alleged by the petitioner to be an underground regulation.

Note: Authority cited: Section 11342.4, Government Code. Reference: Sections 11000 and 11340.5, Government Code.

§ 260. Submission of Petitions Regarding Underground Regulations.

~~(a) Any interested person may submit a written petition~~ A written petition may be submitted 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 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 ~~an purported underground regulation~~ the challenged rule.

(3) A complete description of the ~~particular purported underground regulation~~ challenged rule and a ~~written~~ an original or photocopy of the ~~purported underground regulation~~ challenged rule. If the ~~purported underground regulation~~ challenged rule 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~~ challenged rule.

(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~~ challenged rule.

(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 ~~certification~~ 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 includeing the name of the

individual at the challenged agency to whom the copy was submitted, as well as the address, and 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.

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

§ 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) Within 60 calendar days of receipt of a written petition, OAL will determine if the petition is complete. If the petition is incomplete, OAL will notify the petitioner in writing what is ~~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).

(A) Upon receipt of a complete petition, OAL will inform the challenged agency that the petition is under review and offer to provide a copy of the petition by e-

mail.

(b) No later than 60 calendar days after receipt of a complete petition filed pursuant to this chapter, ~~the office~~OAL 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 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 was or is currently being considered by a court or ~~administrative body with jurisdiction~~ other body that can address the petitioner's concerns.

(3) Whether the challenged rule is superseded.

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

~~(25)~~ Additional relevant information, if any, obtained pursuant to subsection (b) that is pertinent to a potential resolution of the issues raised by the petition.

~~(36)~~ 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 ~~letter~~ 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~~ challenged rule is not an underground regulation, OAL may issue a summary disposition ~~letter~~ stating that conclusion. A summary disposition ~~letter~~ 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~~ challenged rule 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.~~

~~(E) The challenged rule is an expressly statutory exemption from the rulemaking provisions of the APA 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 ~~litigate or 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, including the contact information of the petitioner and challenged agency or a summary of 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. Publication of the petition or summary shall include the contact information of the petitioner and challenged agency. Comments from the public must be submitted to OAL no later than 30 calendar days from the date of publication. OAL will only consider a comment if the ~~Any~~ person or entity submitting the comment~~(s)~~ to OAL ~~shall~~:

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

(2) ~~certify~~Confirms 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 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 may shall extend the time for an challenged agency to file a response to a petition if the challenged agency is a "state body" as defined in 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 (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 challenged agency response was provided to the petitioner pursuant to subsection (h).

(j) 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 challenged agency has received an extension pursuant to subsection (h)) ~~days~~ 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.

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

§ 280. Suspension of Actions Regarding Underground Regulations (Section 280 Certification).

(a)(1) 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 challenged rule alleged purported underground regulation, ~~along with proof~~

(2) With submission of the written certification to OAL, the challenged agency must also provide written confirmation that the certification has been served on ~~was provided to 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~~This certification shall be made~~designed 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 ~~proof of service~~ 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.

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