

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW
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California Code of Regulations:

Title 1, Division 1, Chapter 2. Underground Regulations

§ 250. Definitions.

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

(a) "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.

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

(c) "Interested person" means any person 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.

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

Section 260. Submission of Petitions Regarding Underground Regulations.

(a) Any interested person may submit a 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. The petitioner shall submit a copy of the petition and all attachments to the agency prior to 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 agency that has allegedly issued, used, enforced, or attempted to enforce an underground regulation.
- (3) A complete description of the particular underground regulation and a written copy of the purported underground regulation. If the purported underground regulation is found in an agency manual, the petition shall identify the specific

provision of the manual alleged to comprise the underground regulation.

(4) A description of the actions of the agency showing that it has issued, used, enforced, or attempted to enforce the 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 AP A is applicable.

(6) Information demonstrating that the petition raises an issue of considerable public importance requiring prompt resolution.

(7) The petition's certification that the petitioner has submitted a copy of the petition and all attachments to the agency, including the name, address, and telephone number of the person to whom the copy was submitted.

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 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 days of the date of the notice. OAL will decline to consider the petition if the required items are not received within 60 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 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 agency submits to OAL a certification pursuant to section 280. OAL may consult with the petitioner and the 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) Additional relevant information, if any, obtained pursuant to subsection (b).

(3) 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 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 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 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 AP A.

(D) The challenged rule has expired by its own terms.

(E) An express statutory exemption from the rulemaking provisions of the AP A 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 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 sent to the petitioner not later than 60 days following receipt of the complete petition.

(g) If OAL elects to issue a determination, it shall notify the petitioner and the 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 days from the date of publication. Any person submitting comments to OAL shall:

(1) simultaneously provide a copy of the comments to the agency and the petitioner.

(2) certify to OAL that copies were provided to the agency and petitioner.

(h) The agency may submit a response to the petition to OAL. No response may be considered by OAL unless the agency has provided a copy of the response to the petitioner simultaneously with submission of the response to OAL. Any response by the agency shall be submitted to OAL within 45 calendar days of the publication of the petition in the California Regulatory Notice Register. OAL may 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 agency's response not later than 15 calendar days after the agency response was provided to the petitioner pursuant to subsection (h).

(j) After the time for the petitioner to submit a reply to the agency's response, and no later than 120 (or 150 days if the 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 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.

(a) Any action of OAL or an agency pursuant to this chapter in connection with a petition shall be suspended if OAL receives a certification from the agency that it will not issue, use, enforce, or attempt to enforce the alleged underground regulation along with proof that the certification has been served on the petitioner. This certification shall be made by the head of the agency or a person with a written delegation of authority from the head of the agency.

(b) Upon receipt of this certification and proof of service, OAL shall do all of the following:

- (1) File 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 certification to the petitioner.