

This is Chris Micheli with the Sacramento governmental relations firm of Aprea & Micheli and an adjunct professor at McGeorge School of Law in its Capital Lawyering program. Today's podcast is on underground regulations and the role of the Office of Administrative Law.

The Office of Administrative Law, OAL, is charged with ensuring that agency and department regulations are "clear, necessary, legally valid, and available to the public." The OAL is responsible for reviewing proposed regulations by California's more than 200 state agencies and departments that have rulemaking authority.

Recall that the formal rulemaking process is established by the California Administrative Procedure Act, found in the Government Code, and the APA sets forth the criteria by which OAL reviews all of these regulations.

OAL reviews regular and emergency rulemaking projects. In addition, it reviews challenged underground regulations. If you will, let me give you a easily understood definition.

Regular and emergency rulemaking, which is found in the APA, could be considered above-ground or legitimate, rulemaking. Underground regulations are those which did not undertake the APA process, but nonetheless qualify as a regulation.

On OAL's website, found at [www.oal.ca.gov](http://www.oal.ca.gov), readers can track on a table the list of rulemaking actions submitted to OAL for review. This list is updated daily per the OAL.

The website also contains a listing of underground regulation petitions that are currently under review by the OAL. Concerning the review of alleged underground regulations, the role that OAL plays is specified in the California Code of Regulations, the CCR, found in Title 1, Division 1, Chapter 2. This chapter is actually titled "Underground Regulations."

In section 250, subdivision (a), it provides the following definition of an underground regulation and says, "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."

In CCR, section 260, the submission of an underground regulation petition is provided for. Section 270 of the CCR deals with OAL's review of these underground regulation petitions, and section 280 in the CCR describes the suspension of underground regulation actions.

In terms of underground regulations, again, the OAL is charged with reviewing any such challenged regulatory actions by way of a petition filed. According to the OAL, if a state agency issues, utilizes, enforces, or attempts to enforce a rule without following the APA, which it is otherwise required to do so, then the rule is called an underground regulation.

Note that state agencies are prohibited by law from enforcing these underground regulations. If an individual or an entity believes that a state agency or a department has issued an alleged underground regulation, then that issuance can be challenged by filing these written petitions with the OAL.

If the OAL accepts the petition for review, then the OAL may issue a determination. According to the OAL, this program is informally known as its Chapter Two Unit, or the CTU.

That's because OAL's regulations regarding underground regulations are found in the CCR Title 1, Chapter 2. That's why they're called Chapter Two Unit.

The OAL website provides information on these underground regulations and directions on how to submit a written petition to OAL alleging an underground regulation exists.

OAL's review of an underground regulation -- an alleged one -- is limited to a three-step analysis to determine whether the alleged underground regulation must be adopted as a regulation pursuant to the state's APA.

First, is the policy or procedure either a rule or a standard of general application, or is it a modification or supplement to such a rule? Second step, has the policy or procedure been adopted by the agency to either implement, interpret, or make specific the law in force or administered by the agency or to govern the agency's procedure?

If the answer to these two questions is yes, then the challenged rule is in fact a regulation. However, before a determination by OAL is complete, OAL must review the final step in the three-step analysis.

That is, has the policy or procedure been expressly exempted by statute from the requirement that it be adopted as a regulation pursuant to the APA? If the answer to this final question is yes, then the underground regulation did not have to go through the APA process.

On the other hand, if the answer to this last question is no, then the rule is in fact an underground regulation and it therefore cannot be enforced by the agency or department. Instead, in order to take effect, it must go through the formal rulemaking process pursuant to the APA.

Finally, you should be aware of Government Code section 11340.5, subdivision (e). This code section provides that if an interested person has already begun litigation that challenges an underground regulation, then a determination issued by OAL may not be considered by the court in that pending litigation.

Those challenging an alleged underground regulation should determine whether they want to pursue OAL review of the agency action, or whether they want to go directly to a court to challenge the alleged underground regulation.

Thanks for joining this podcast. Hope you learned something about underground regulations and the role of OAL in reviewing them.