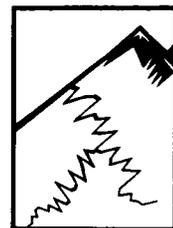


# Board of Registration for Geologists and Geophysicists

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The Board of Registration for Geologists and Geophysicists (BRGG) is mandated by the Geologist and Geophysicist Act, Business and Professions Code section 7800 *et seq.* The Board was created by AB 600 (Ketchum) in 1969; its jurisdiction was extended to include geophysicists in 1972. The Board, whose regulations are found in Division 29, Title 16 of the California Code of Regulations (CCR), is a consumer protection agency within the Department of Consumer Affairs (DCA).

BRGG registers geologists and geophysicists, and certifies engineering geologists and hydrogeologists. In addition to successfully passing the Board's written examination, an applicant must fulfill specified undergraduate educational requirements and have the equivalent of seven years of relevant professional experience. The experience requirement may be satisfied by a combination of academic work at a school with a Board-approved program in geology and geophysics, and qualifying professional experience. However, credit for undergraduate study, graduate study, and teaching—whether taken individually or in combination—may not exceed a total of four years toward the requirement of seven years of professional geological or geophysical work.

BRGG is authorized to investigate and discipline registrants who act in violation of its statutes or regulations. The Board may issue a citation to registrants or unlicensed persons for violations of Board rules; an administrative fine of up to \$2,500 may accompany such a citation.

The seven-member Board is composed of four public members, two geologists, and one geophysicist. BRGG's staff consists of five full-time employees and two part-time employees. BRGG is funded by the fees it generates.

## MAJOR PROJECTS

### BRGG Prepares for "Sunset II"

On October 1, in preparation for its upcoming sunset review hearing, BRGG submitted a report to the Joint Legislative Sunset Review Committee (JLSRC) documenting the actions it has taken since its original 1995–96 sunset review. Following that review, the legislature passed SB 1077 (Greene) (Chapter 1137, Statutes of 1996) and SB 2031 (Ayala) (Chapter 1136, Statutes of 1996), which extended the Board's existence until July 1, 2001 and reduced the Board's composition from eight to seven members (including a majority of four public members). Additionally, the JLSRC recommended that the Board (1) adopt rules of professional conduct for its licensees; (2) enhance its enforcement system by periodically reviewing geologic reports to determine whether they are substandard or contain false/misleading information;

(3) establish standards for identifying negligent and/or incompetent practice; (4) determine whether its seven-year experience requirement for geologist applicants who do not have a bachelor's degree should be decreased; and (5) determine why the pass rate on its licensing exam was only 19%, and whether it should continue to administer its own written exam or shift to the nationally standardized written exam created by the National Association of State Boards of Geology (ASBOG). [16:2 CRLR 102–03; 16:1 CRLR 118; 15:4 CRLR 80–82]

In its October 1999 sunset report, BRGG stated that it has followed most of the JLSRC's 1996 recommendations. Specifically, the Board noted that in 1997, it decided to shift to the ASBOG written exam to move toward greater reciprocity so that other states will allow California licensees to practice in their jurisdictions without additional examination. To that end, the Board supported SB 1984 (Greene) (Chapter 992, Statutes of 1998), which requires BRGG—on or before June 30, 2000—to cease administering its own written examination to candidates for geologist registration and to instead administer "a national examination created by a nationally recognized entity approved by the Board, supplemented by a California-specific examination which tests the applicant's knowledge of state laws, regulations, and of seismicity and geology unique to practice within California" (see below for details).

The Board has also adopted section 3065, Title 16 of the CCR, which establishes a code of professional standards for Board licensees (see below); amended section 3064, Title 16 of the CCR, to establish in regulation that it will rely on its newly revised disciplinary guidelines in reaching disciplinary decisions against licensees (see below); adopted and continually revised a Strategic Plan that includes as objectives shortening the duration between initial application for licensure and the issuance of a license, and considering the necessity of continuing education (which is not currently required of BRGG licensees); added an Enforcement Coordinator to its staff who, in addition to processing complaints against licensees, conducts an outreach program to inform the public and other governmental agencies of the Board's enforcement activities and "is prepared to review reports of licensees in the files of agencies"; and published a "Board Member Guidelines and Procedures Manual."

In its report, BRGG argued that it has substantially streamlined its operations since its last sunset review, such that it should continue as the entity that regulates geologists and geophysicists in California. Further, it argued that continued licensure of geologists and geophysicists is necessary and in the public interest because these individuals "make

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professional judgments that have major consequences impacting the economy of California and the health, safety, and welfare of the public.”

At this writing, the Board’s sunset review hearing is scheduled for November 30.

## **The Role of Geologists in Preparing Real Estate Disclosure Documents**

At its August 13 meeting, the Board engaged in a lengthy discussion of the preparation by geologists of the “natural hazard disclosure statements” (NHDS) that are now required to be submitted by real estate sellers to buyers under AB 1195 (Torlakson) (Chapter 65, Statutes of 1998), an urgency bill that became effective on June 9, 1998. AB 1195 made almost all real estate transactions in California subject to disclosure of flood hazard zones, areas of potential flooding, high fire hazard severity zones, wildland areas, earthquake fault zones, and seismic hazard zones. Under AB 1195, anyone may prepare a NHDS, because the information to be disclosed is derived from publicly available government maps provided by government agencies; the use of a licensed professional to prepare a NHDS is required only when the public map “is not of sufficient accuracy.”

During late 1998, BRGG received several complaints regarding geologist-owned “disclosure companies” that have been preparing and issuing NHDSs signed by a geologist and stamped with his/her official seal. The complainants (sellers and agents in real estate transactions) alleged that they were being told that only a registered geologist may prepare a NHDS. Further, the complaints alleged that the preparation by a geologist of a NHDS is unlawful because such preparation is not the practice of geology and a NHDS is not a “geologic report,” and the use of a geologist’s seal on a NHDS is misleading because it implies that the geologist has actually inspected the site (when all he/she has done is to perform “ministerial map checking” that can be done by anyone). The issue heated up when the Legislative Counsel’s Office issued a May 26 opinion finding that the use of an official seal by a geologist on a NHDS is misleading and unauthorized. The Legislative Counsel argued that the intent of Business and Professions Code section 7835 is to limit the use of a geologist’s seal and/or signature to work products that are geologic in nature.

At its August 13 meeting, the Board considered another legal opinion issued on August 12 by its DCA legal counsel,

Gary Duke. First, Duke emphasized that he disagreed with the Legislative Counsel’s opinion, finding it conclusory and unsupported by law. Second, his own legal opinion concluded that (1) simple ministerial map checking does not fall within the scope of practice requiring geologist registration, and such work does not constitute “geology”; (2) registered geologists are neither specifically authorized to nor specifically proscribed from preparing a NHDS on behalf of a real estate seller or agent; (3) because the statute permits anyone to prepare a NHDS, and because geologists are not prohibited from doing so, they may prepare NHDSs; (4) registered geologists are not specifically authorized nor are they prohibited from using their official seal or signature on a NHDS; (5) how-

ever, by affixing an official seal and/or signature on any document, a registered geologist takes responsibility for the geologic content of that document; and (6) a registered geologist may subject his/her license to discipline for affixing, in a misleading manner, the geologist’s seal or signature to a NHDS or to other official docu-

ment which includes conclusions or determinations not derived from, or the result of, work related to geologic practice. According to Duke, the use of a geologist’s seal on a NHDS is not *per se* misleading; “the specific facts of each complaint or case concerning allegations of deceit, fraud, or misrepresentation related to a NHDS would have to be evaluated on a case-by-case basis in order to determine whether grounds exist for license disciplinary action.”

Public comment on Duke’s legal opinion was mixed. Representatives of real estate organizations argued that the use of a geologist’s seal (which is required when a geologist

is certifying to the geologic content of a “geologic report”) is misleading when used on a NHDS and all that has been done is simple map checking. Geologist organizations argued that it is not inappropriate for a qualified licensed geologist to stamp and seal NHDSs that have been prepared or supervised by a geologist. DCA Director Kathleen Hamilton appeared at the hearing as well, to

stress her consumer protection concerns. Hamilton stated that DCA has no problem with geologists preparing NHDSs; however, when an official seal is attached to a NHDS, consumers may misunderstand the meaning of the document and the work behind it. According to Hamilton, “there is potential for a consumer to believe that more serious geologic survey work was conducted than may have actually been conducted.” She noted that use of an “official-looking seal” is effective and gets consumers’ attention, and that the federal government

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has restricted the private use of symbols that resemble government seals in mass mail transactions. Hamilton suggested that the Board formulate standards on the appropriate use of the registered geologist's seal.

After considerable discussion, the Board acknowledged the need to provide licensees with an immediate resolution to this issue, and approved a motion to release a notice to licensees stating that (1) it is legal for a registered geologist to sign and seal a NHDS but not required; and (2) BRGG enforcement staff will be using Duke's legal opinion in reviewing future complaints about geologists preparing and sealing NHDSs. Additionally, BRGG directed staff to create a consumer pamphlet on real estate disclosure reports.

At its October 22 meeting, the Board revisited this issue. BRGG noted that Governor Davis signed AB 248 (Torlakson), a clean-up bill to AB 1195 (Torlakson). Among other things, AB 248 expressly permits a registered geologist to prepare a NHDS (see LEGISLATION). However, it remains unclear whether that bill resolves the issue of whether a geologist's use of his/her official seal on a NHDS, where all that has been done is map checking, is misleading to consumers. BRGG Executive Officer Paul Sweeney stated that he had no success in locating the federal statutes or regulations restricting the use of an "official-looking" seal for unofficial purposes, as referenced by DCA Director Hamilton at the August meeting. Board President Sharon Reid continued the matter to BRGG's December 3 meeting, and instructed Sweeney to contact Hamilton and let her know that the Board is pursuing this matter in a broader context and would appreciate backup material on the laws and regulations she cited.

## **OAL Rules "Fields of Expertise" Document Is Underground Rulemaking**

In 1989, BRGG and the Board for Professional Engineers and Land Surveyors (PELS) developed a document entitled *Fields of Expertise for Geologists and Civil Engineers*. The document is intended to differentiate between the responsibilities and duties of registered civil engineers (regulated by PELS) and geologists (regulated by BRGG). It identifies activities within the scope of practice of engineering and geology, reviews the "gray areas" where civil engineering and geology overlap, and lists activities that are normally performed by both professions. Recently, the two boards have been at odds with each other about the document, and a task force consisting of representatives from both boards has been meeting to try to iron out disagreements over the content and format of the document. [16:2 CRLR 102; 16:1 CRLR 120]

On May 13, in response to a petition for regulatory determination filed by former BRGG member Howard "Buzz" Spellman, the Office of Administrative Law (OAL) ruled that the 1996 version of *Fields of Expertise*, which was approved as "Board Policy Resolution #96-10" by PELS but rejected by BRGG, is a "regulation" as defined in Government Code section 11342(g), and should have been adopted by either or both boards under the rulemaking requirements of the Administrative Procedure Act. Neither board has ever adopted *Fields of Expertise* as a regulation.

In OAL Determination No. 15 (1999), OAL concluded that the *Fields of Expertise* document is a standard of general application that "applies to the professional activities of all civil engineers, and ostensibly, geologists as well." OAL further found that *Fields of Expertise* asserts that civil engineers may

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perform numerous tasks not mentioned in the Business and Professions Code, and purports to establish a "qualitative" vs. "quantitative" distinction between functions performed by geologists vs. civil engineers—a distinction that is not set forth in the Business and Professions Code; as such, the document interprets state law that establishes the scope of civil engineering. Finally, OAL found that *Fields of Expertise* does not qualify for any of the permitted exemp-

tions to the APA's rulemaking requirement, thus requiring PELS to formally adopt the document as a regulation in order for it to be binding on licensees.

As a result of OAL's finding and advice from the Attorney General's Office, PELS has rescinded Board Policy Resolution #96-10 (see agency report on PELS for related discussion).

## **Notice to Clients of State Licensure**

SB 2238 (Committee on Business and Professions) (Chapter 879, Statutes of 1998) requires BRGG and other DCA occupational licensing boards to adopt regulations requiring their licensees to provide notice to clients that they are licensed by the State of California. [16:1 CRLR 121] On July 9, BRGG published notice of its intent to adopt new section 3066, Title 16 of the CCR, to implement SB 2238. On August 30, BRGG published a modified version of the section; on October 22, the Board held a public hearing on the proposed regulation. At the hearing, several licensees commented on the details of the regulation, and the Board further modified the section and directed staff to republish the modified version for an additional 15-day comment period.

Under draft section 3066 as modified and adopted by the Board on October 22, a BRGG licensee may provide notice to clients that he/she is licensed by the state by any of the following methods: (1) displaying his/her license in a public

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area of the premises where the licensee provides the licensed service; (2) posting a notice in a public area of the premises where the licensee provides the licensed services, in at least 48-point type, that states that the named licensee is licensed by the Board; or (3) providing a statement to each client, to be signed and dated by the client and retained in the licensee's records, that states that the client understands that the licensee is licensed by the Board. Section 3066 further requires the party in responsible charge of geologic and/or geophysical projects to (1) include a statement that he/she is licensed by the Board on contracts for service, bid documents, and/or responses to requests for proposals or qualifications; the notice must be placed immediately above the signature line for the client in at least 12-point type; (2) print his/her license number on the firm's correspondence; and (3) print his/her license number on the firm's business cards bearing his/her name. Additionally, a licensed principal or partner in a geologic or geophysical firm must print his or her license number on all advertising, including telephone directory and website.

At this writing, staff is preparing to release the modified version of section 3066 for a 15-day comment period, after which BRGG will submit the new regulation to DCA and OAL for approval.

## Update on Other Board Rulemaking

The following is an update on recent BRGG rulemaking proceedings described in detail in Volume 16, No. 2 (Summer 1999) of the *California Regulatory Law Reporter*:

◆ **Implementation of SB 1984 (Greene).** On August 24, OAL approved much of BRGG's rulemaking package to implement SB 1984 (Greene) (Chapter 992, Statutes of 1998), which requires BRGG to cease administering its own written examination to candidates for geologist registration. Instead, the Board must administer—on or before June 30, 2000—"a national examination created by a nationally recognized entity approved by the Board, supplemented by a California-specific examination which tests the applicant's knowledge of state laws, regulations, and of seismicity and geology unique to practice within California." As noted above, BRGG intends to administer ASBOG's written examination to geologist candidates in California. To implement SB 1984, BRGG must enter into an agreement with ASBOG enabling it to utilize ASBOG's written geologist examination, develop the supplemental California-specific examination for geologist registration, and amend its regulations to phase out use of the old exam and phase in use of ASBOG's exam. To implement SB 1984, BRGG amended sections 3005, 3021, 3023,

3024, 3031, 3036.1, 3037.1, 3041, and 3042; repealed sections 3036 and 3037; and adopted new sections 3026, 3036.2, and 3037.2, Title 16 of the CCR. Among other things, these regulatory changes require geologist applicants to take and pass ASBOG's exam, revise provisions relating to the inspection and appeal of examinations, revise procedures for application processing, increase fees to apply for registration, establish a \$300 examination fee for geologists taking both the national exam and the California-specific exam, and establish a \$100 exam fee for applicants taking only the California-specific geologist exam. [16:1 CRLR 118, 121]

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its rulemaking file, BRGG stated that section 3024 was authorized by Business and Professions Code section 7887, which requires applicants for geologist registration to pay "an examination fee fixed by the board at an amount equal to the actual cost

to the board for the purpose of a national examination[.]...not to exceed \$300." Section 7887 also requires applicants for other BRGG licenses to pay "an examination fee fixed by the board at an amount equal to the actual cost to the board for the development and maintenance of the written examination[.]...not to exceed \$100." OAL determined that section 7887 does not specifically authorize BRGG to retain the entire examination fee in the event an application is abandoned, and that the rulemaking record fails to demonstrate by substantial evidence that \$300 (the full examination fee for geologists) is the "amount equal to the actual cost to the board for the purchase of a national examination" when an applicant does not take the examination, and

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that \$100 (the full exam fee for other applicants) is the "actual cost to the board for the development and maintenance of the written examination" when an applicant does not take the examination. OAL stated: "In our view, the retention of an unearned examination fee in the event an appli-

cation is abandoned is akin to a penalty. The establishment of a penalty is a legislative function, and the legislature cannot delegate the power to impose it to a state agency." To the extent that section 7887 permits BRGG to keep part of that fee (its cost), the Board's rulemaking file did not clearly establish its cost, so OAL rejected the regulation.

The approved regulations became effective on September 23. At this writing, the Board plans to rewrite and republish section 3024. The first administration of ASBOG's exam in California is scheduled for March 2000; however, at this

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writing, the contract between BRGG and ASBOG for the use of ASBOG's exam has not yet been signed.

◆ **Professional Standards.** On September 27, OAL approved BRGG's April 1999 adoption of new section 3065, Title 16 of the CCR, which establishes professional standards for geologists and geophysicists in the areas of competence, misrepresentation, conflict of interest, and confidential information. [16:2 CRLR 100-01; 16:1 CRLR 120] The new rule became effective on October 27.

◆ **Disciplinary Guidelines.** On May 18, OAL approved BRGG's amendments to section 3064, Title 16 of the CCR. The amendments require the Board—in deciding disciplinary cases—to consider the 1998 version of its disciplinary guidelines. [16:2 CRLR 101; 16:1 CRLR 119]

◆ **Criteria for Sentencing or Rehabilitation.** Also on May 18, OAL approved BRGG's amendments to section 3061, Title 16 of the CCR. Section 3061 sets forth criteria the Board must consider when evaluating an individual's rehabilitation for purposes of a license denial, revocation, or suspension. Among other things, BRGG's proposed amendments to section 3061 require it to consider the same criteria when determining an appropriate sanction in disciplinary proceedings. The amendments also add actual or potential harm to the public, client, or employee, prior disciplinary record, and number and/or variety of current violations to the list of criteria which must be considered by an administrative law judge and the Board when deciding whether to revoke or suspend a license. [16:2 CRLR 101-02; 16:1 CRLR 119]

## LEGISLATION

**AB 248 (Torlakson)**, as amended September 1, is a clean-up bill to AB 1195 (Torlakson), which requires real property transferors and their agents, when specified conditions are met, to make certain disclosures on a form known as a Natural Hazard Disclosure Statement if the real property to be transferred is located in an earthquake fault zone, or an area subject to flooding, fire hazards, or seismic hazards. AB 248 creates a separate statutory section for the Natural Hazard Disclosure Statement, removing it from the statutory section dealing with the Transfer Disclosure Statement; it also makes other technical and substantive changes to the Natural Hazard Disclosure Statement to clarify existing law. In particular, it exempts from liability for errors in the NHDS sellers and buyers who rely on "experts" to prepare a NHDS; those experts include licensed geologists. Thus, the bill clarifies that it is lawful for a geologist to prepare a NHDS, but may not resolve the issue whether it is misleading for a geologist to affix his/her official seal to a NHDS where all the geologist has done is map checking (see MAJOR PROJECTS). The Governor signed AB 248 on October 8 (Chapter 876, Statutes of 1999).

**AB 303 (Thomson)**, as amended August 16, would enact the Local Groundwater Management Assistance Act and create the Local Groundwater Assistance Fund; upon appropriation by the legislature, the money in the fund would be

used by the Department of Water Resources to assist local public agencies by awarding grants to those agencies to conduct groundwater studies, carry out groundwater monitoring and management activities, or both. The bill would require the Department to award grants based on the recommendations of a Technical Advisory Panel, the members of which would be appointed by the Secretary of the Resources Agency. BRGG supports this bill, as it requires that a licensed geologist and a licensed hydrogeologist be included in the Technical Advisory Panel. [S. Appr]

## RECENT MEETINGS

At its June 3 meeting, the Board discussed the meetings of its advisory committees (including its Examination, Enforcement Oversight, Legislative, and Technical Advisory Committees), which consist of non-Board members. Board members may attend most advisory committee meetings, but only as "ex officio" members without voting rights. On occasion, not enough committee members show up at committee meetings to form a quorum, such that the committee is unable to take action. On those occasions, Board President Sharon Reid suggested that Board members present at a committee meeting where no quorum has been achieved be permitted to vote on committee issues. Following discussion, the Board voted to amend its current policy to permit a professional Board member to vote to establish a quorum at a committee meeting; if an additional member is needed to establish a quorum, a public Board member may fill that role.

On June 4, the Board discussed Business and Professions Code section 7841(b), which defines the educational requirements for geologist licensure. The section states that an applicant for geologist registration shall meet one of the following educational requirements "at a school or university whose geological curricula meet criteria established by rules of the board": (1) graduation with a major in geology; or (2) completion of 30 semester units in geological science courses leading to a major in geology, of which at least 24 units are in the third or fourth year, or graduate courses. The Board has never adopted regulations defining the "core curriculum" as contemplated by section 7841(b). However, the Board's strategic plan, recently revised in April 1999 [16:2 CRLR 103], states: "By the first Board meeting in the year 2000, the Technical Advisory Committee and the Examination Committee will provide a recommendation to the Board regarding the establishment of core curricula." At its June meeting, the Board discussed "core curricula" components previously recommended by its Technical Advisory Committee and by a former exam consultant, and decided to convene a meeting with representatives of all California academic institutions with geology departments. The Board seeks to explore the connections among academic curricula, recent occupational analyses of the geologist profession, and examination requirements with those who are instructing future licensees, and seek the input of academia on any "core curricula" regulations the Board may choose to adopt in the future.

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At its August 13 meeting, BRGG elected public member Sharon Jasek Reid as President and geophysicist David Cummings as Vice President.

Also on August 13, DCA legal counsel Gary Duke briefed the Board on his ongoing attempt to rewrite and reorganize the existing Geologist and Geophysicist Act into a new "California Geologists and Geophysicists Licensing Act of 1999," which the Board had hoped to introduce as legislation during 2000. Because of the complexities involved in this project, BRGG continued this matter until its December 3 meeting and directed staff to inform DCA that it would not be introducing the legislation in 2000.

Also in August, BRGG approved *Note 45: Guidelines for Engineering Geologic Reports for Timber Harvesting Plans* (July 1999), prepared by the Division of Mines and Geology of the California Department of Conservation. The Note was developed with input from a number of professional organizations, universities, and state and federal agencies (including BRGG), and addresses the preparation of engineering geologic reports for timber harvesting plans (THPs) on private, state, and local agency timberlands. The Note identifies specific components of a properly prepared engineering geologic report on a THP, and stresses that the geologic report should assess how activities associated with timber harvesting could affect the physical environment, particularly with respect to slope stability and landslide potential, surface soil erosion, and sediment input to watercourses and lakes. Once areas of concern are identified, the report should describe specific mitigative measures needed to minimize potential effects for the identified areas of concern.

Also in August, BRGG considered a draft memorandum of understanding (MOU) with the Professional Soil Scientists Association of California (PSSAC). The purposes of the MOU are to: (1) identify the work areas of overlapping com-

petence within which professional soil scientists (who are unregulated), registered geologists, and registered geophysicists may legally and ethically practice without interference and disagreement; and (2) recognize that professional soil scientists, when engaged in the practice of soil science as described in the definitions in the MOU, should not be subject to the disciplinary authority of the Board. DCA legal counsel Gary Duke reminded the Board that OAL had just invalidated the *Fields of Expertise* document, which was intended to accomplish the same purposes with respect to civil engineers and geologists (see MAJOR PROJECTS), and that the proposed MOU with PSSAC would likely be challenged as "underground rulemaking" as well. BRGG directed Duke to draft a new document that would accomplish its intent without being challengeable as "underground rulemaking."

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At BRGG's October 22 meeting, Gary Duke informed the Board that it may not enter into a MOU with PSSAC because it will be subject to challenge as an underground rule. He recommended that if the Board seeks to pursue the policies expressed in the draft MOU, it do so by way of amending existing section 3003, Title 16

of the CCR, or adopting a new regulation codifying the MOU. The Board referred the matter to its Technical Advisory Committee for a recommendation on a regulations.

## FUTURE MEETINGS

- December 3, 1999 in San Francisco.
- February 4–5, 2000 in Sacramento.
- April 7, 2000 in Ontario.
- June 16, 2000 in Sacramento.
- August 11–12, 2000 in Sacramento.
- October 6, 2000 in Sacramento.
- December 1, 2000 in San Diego.