



REGULATORY AGENCY ACTION

regulations adopted after good cause shown.

FUTURE MEETINGS:

March 20-21 in Los Angeles.

May 29-30 in Sacramento.

July 30-August 1 in Sacramento.

October 16-17 in Los Angeles.

BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS

Executive Officer: Darlene Stroup
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The Board of Registration for Professional Engineers and Land Surveyors (PELS) regulates the practice of engineering and land surveying through its administration of the Professional Engineers Act, sections 6700 through 6799 of the Business and Professions Code, and the Professional Land Surveyors' Act, sections 8700 through 8805 of the Business and Professions Code. The Board's regulations are found in Division 5, Title 16 of the California Code of Regulations (CCR).

The basic functions of the Board are to conduct examinations, issue certificates, registrations, and/or licenses, and appropriately channel complaints against registrants/licensees. The Board is additionally empowered to suspend or revoke registrations/licenses. The Board considers the proposed decisions of administrative law judges who hear appeals of applicants who are denied a registration/license, and those who have had their registration/license suspended or revoked for violations.

The Board consists of thirteen members: seven public members, one licensed land surveyor, four registered Practice Act engineers and one Title Act engineer. Eleven of the members are appointed by the Governor for four-year terms which expire on a staggered basis. One public member is appointed by the Speaker of the Assembly and one by the Senate President pro Tempore.

The Board has established four standing committees and appoints other special committees as needed. The four standing committees are Administration, Enforcement, Examination/Qualifications, and Legislation. The committees function in an advisory capacity unless specifically authorized to make binding decisions by the Board.

Professional engineers are registered through the three Practice Act categories of civil, electrical, and mechanical engineering under section 6730 of the Business and Professions Code. The Title

Act categories of agricultural, chemical, control system, corrosion, fire protection, industrial, manufacturing, metallurgical, nuclear, petroleum, quality, safety, and traffic engineering are registered under section 6732 of the Business and Professions Code.

Structural engineering and geotechnical engineering are authorities linked to the civil Practice Act and require an additional examination after qualification as a civil engineer.

MAJOR PROJECTS:

Regulatory Determination. In September 1989, the law firm of Turner & Sullivan requested a regulatory determination from the Office of Administrative Law (OAL) regarding PELS' policy of requiring registered civil engineers to have one year of responsible field training and one year of responsible office training in order to take the examination for licensure as a land surveyor. (See CRLR Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 117 for background information.) On November 2, OAL issued its determination, finding that the policy is indeed a regulation within the meaning of the Administrative Procedure Act (APA). As a result, PELS' enforcement of the policy violates Government Code section 11347.5(a), which prohibits state agencies from issuing, utilizing, or enforcing agency policies which have not been, but are required to be, adopted under the APA's procedural requirements. Since PELS did not comply with the APA, the regulation is without legal effect.

The Professional Land Surveyors' Act (Act) governs the licensing of land surveyors in California. In order to become licensed, the Act requires applicants to pass two examinations—known as the first division and the second division—unless specifically exempt by statute or regulation. Business and Professions Code section 8741(a) exempts registered civil engineers from taking the first division. Section 8742 requires that all applicants meet certain educational qualifications and experience in land surveying before they may take the second division, and section 8742(a) provides that these requirements may be satisfied by one of the following: (1) graduation from a four-year curriculum with an emphasis in land surveying and two years of actual experience in land surveying, including one year of responsible field training and one year of office training; (2) actual experience in land surveying for at least six years, including one year of responsible field training and one year of responsible office training; or (3) registration as a civil engineer

with two years of actual experience in land surveying. Under PELS' challenged policy, civil engineers applying for land surveyor licensure were required to satisfy the "two years of actual experience in land surveying" applicable to them under section 8742(a)(3) by completing "one year of responsible field training and one year of responsible office training" applicable to non-civil engineer applicants in section 8742(a)(1) and (a)(2).

OAL found that requiring registered civil engineers to obtain "one year of responsible field training and one year of responsible office training in order to take the Professional Land Surveyor examination" implements, interprets, and makes specific Business and Professions Code section 8742(a)(3). Therefore, OAL concluded that PELS' policy is a regulation and subject to the requirements of the APA.

OAL's "underground rulemaking" ruling is the third such determination regarding challenged PELS policies in the past ten months. (See CRLR Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 117 for background information on the other two OAL determinations.)

PELS Rulemaking. On August 31, PELS submitted proposed amendments to section 424, Division 5, Title 16 of the CCR, to OAL. The proposed regulatory action, which was the subject of a November 1989 public hearing, delineates the necessary experience required for registration as a professional engineer based upon completion of various categories of engineering education or work experience. (See CRLR Vol. 10, No. 1 (Winter 1990) p. 92 for background information.)

On October 1, OAL disapproved the proposed regulatory changes, because PELS did not provide the 15-day notice required for substantial sufficiently-related changes as required by the Administrative Procedure Act (APA), and because PELS had not complied with the "reference" standard of the APA.

In response to a public comment received during the initial 45-day notice, PELS added the word "registered" to the existing language of section 424(c), so that qualifying experience could only be gained under a registered professional engineer. Because of this change, PELS reopened the public comment period for fifteen days. During this 15-day period, PELS received a comment urging that the word "registered" be deleted from the text; this comment came from the same person who had originally requested the word's inclusion.



PELS complied with this second request and deleted the word "registered." However, PELS did not publish the modified language for another 15-day notice period, opining that the change was insubstantial and did not fall into the reach of the statutory mandate. In rejecting this contention, OAL noted that there is no exception to the 15-day notice requirement when the original text is amended and then revised to reflect the original text. In addition, OAL pointed out that PELS had initially believed that the change was substantial and required a 15-day notice when the word "registered" was added; therefore, when the word was deleted, it was also a substantial change requiring a 15-day notice.

Second, OAL found that the reference requirement of Government Code section 11349.1 was not met because the Business and Professions Code section referred to in the rulemaking package (section 6753.3) does not exist. Further, OAL stated that the Board's reference to Business and Professions Code sections 8742-8743 is unclear because no intervening sections, such as 8742.1 or 8742.2, exist. Finally, OAL stated that the citation to Business and Professions Code section 8743 is inappropriate, and should be deleted as a reference citation.

PELS corrected these deficiencies and resubmitted the proposed amendments; OAL approved the changes on December 17.

Board Member Training Conference. On October 10-12, PELS Board members participated in a training conference designed to provide them with pertinent information concerning the processes of state government, such as the budget, enforcement, and regulatory processes. This informational meeting was aimed at assisting the members in understanding how these processes affect PELS and the nature of PELS' general regulatory role. Emphasis was placed on informing the members as to who the players are in the various processes and how to implement a policy change, if PELS so desires.

Special Civil Examination. On October 1, PELS administered the first Special Civil Exam under its new contract with CTB MacMillan/McGraw-Hill. (See CRLR Vol. 10, No. 4 (Fall 1989) p. 101; Vol. 9, No. 2 (Spring 1989) pp. 72-73; and Vol. 7, No. 2 (Spring 1987) p. 66 for background information.) According to PELS, the exam was well received by many of the examinees.

Training Session for Expert Witnesses. On December 5 in Sacramento and December 7 in San Clemente, PELS held one-day training sessions for the expert witnesses who will be reviewing

enforcement cases for PELS. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 101 for background information.) The purpose of the training sessions, which were supervised by both PELS' Enforcement Unit and the Attorney General's Office, was to inform those involved what being an expert witness for PELS entails and what is expected of them. Also, PELS provided the participants with information regarding how the administrative process works.

Proposed Deregulation of Photogrammetry. Photogrammetry is the process of making surveys and maps through the use of photographs. Pursuant to Business and Professions Code section 8775, no person shall use the title of photogrammetrist or photogrammetric surveyor unless he/she holds registration as a civil engineer or licensed land surveyor, or unless he/she is licensed as a photogrammetric surveyor. According to PELS staff: (1) the majority of photogrammetric services are provided by professional land surveyors or registered civil engineers; (2) the unlicensed practice of photogrammetry appears to be limited to services provided to professional land surveyors, registered civil engineers, or governmental entities; (3) it is not unusual for PELS registrants to use the services of an unlicensed photogrammetrist; and (4) no state, other than California, regulates the practice of photogrammetry. As a result of its findings, PELS staff determined that state regulation of photogrammetry is not necessary, and recommended that the Board's Enforcement Committee consider taking steps to introduce legislation to deregulate photogrammetry. According to PELS staff, the intent of the legislation would be to clarify that the practice of photogrammetry is considered a part of land surveying and civil engineering.

In response to this recommendation, the Board received a letter from Donald Lewis, Chair of the California Committee for Registration of Photogrammetrists, in which Mr. Lewis documented his objection to each of the four findings cited by PELS and noted that the Board had received (and apparently ignored) similar documentation in the past.

At its November 28 meeting, the Enforcement Committee passed a motion to deregulate photogrammetry by a vote of 2-1. However, at its December 14 meeting, the Board took no action on the Committee's recommendation, due to strong opposition to the concept.

Department of Consumer Affairs Investigating Board's Exam Grade Change. On October 25, Department of Consumer Affairs (DCA) Director

Michael Kelley announced that, pursuant to his authority under section 153 of the Business and Professions Code, DCA's Division of Investigation will conduct a full inquiry into the conduct of the Board, and specifically Board member James Dorsey, in amending the grading plan of the October 1989 land surveyor examination. Kelley stated that his decision came at the request of Dorsey; however, Dorsey states that he did not request a DCA investigation of the matter. Instead, Dorsey has requested that the investigation be conducted by the Attorney General or the Auditor General, because he believes that DCA cannot be impartial.

The DCA investigation stems from the Board's April 1990 closed-session to amend the grading plan for the October 1989 land surveyor exam of the Board's exam contractor, CTB MacMillan/McGraw-Hill. Dorsey suggested the amendment, apparently based upon an exam appeal filed by one Kevin McHugh, Jr., an applicant who had missed the pass cut-off by one point. McHugh is the son of Kevin McHugh, Sr., a prominent California land surveyor who is acquainted with Dorsey. Further complicating the situation is the fact that Dorsey's son also took and failed the examination. However, according to Dorsey, "my son failed the examination so badly that nothing anyone could do would get him a passing score." When Dorsey learned of his son's score, he believed his exposure to conflict of interest allegations ceased to exist, and set about to right what he believed to have been an error by the exam contractor. According to Dorsey, had his son not been an examinee, Dorsey would have reviewed the exam and the grading plan prior to the exam's administration, and would have caught the error in the grading plan in any event.

The incident has raised several important issues, including the authority of the Board to overrule the exam contractor, the circumstances under which such action should be taken, the extent to which Board members should be personally involved in the examination process, and conflict of interest rules which should guide the actions of Board members and staff in such situations. The incident also underscores the dangers of constituting an occupational licensing board with members of the very profession regulated by that board, who regularly and routinely have personal and professional relationships with individuals who are applying for licensure by that board and who are under investigation by that board for disciplinary violations.



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The grade-change incident has also disrupted the Board's functioning, and triggered a heavy flow of heated correspondence and cross-correspondence among Board members, Board staff, legal counsel, and members of the public. Among other things, Dorsey accuses Board Executive Officer Darlene Stroup and two other Board members of discussing the matter with DCA Deputy Director Jeff Marschner without Dorsey's knowledge, and misrepresenting the facts surrounding Board's and the exam contractor's decisions on McHugh's appeal.

LEGISLATION:

Anticipated Legislation. The California Land Surveyors Association (CLSA) may introduce a number of bills during 1991. For example, CLSA may seek to amend the Subdivision Map Act. Government Code section 66442, which concerns final maps for subdivisions creating five or more parcels, requires that the certificate of the city engineer or county surveyor guarantee that he/she has examined the map, the subdivision as shown is substantially the same as it appeared on the tentative map, all relevant statutes and ordinances have been complied with, and the map is technically correct. Government Code section 66450, which concerns parcel maps applicable to subdivisions creating four or fewer parcels, merely requires the county surveyor or city engineer to certify that the map is technically correct and meets the requirements of the Subdivision Map Act and local ordinance. Thus, the statutes require different guarantees on the certificates; CLSA hopes to expand section 66450 to require the assurances contained in section 66442.

CLSA may introduce a bill which would require the county recorder to transmit a certified copy of a filed subdivision map to the county surveyor or county engineer, who shall maintain an index of the filed maps and records of survey. The proposed bill would also permit the recorder to charge a fee for recording in order to finance the index.

CLSA may propose a minor change to section 8726 of the Business and Professions Code. Currently, section 8726(d) states that a person practices land surveying when he/she "determines the configuration or contour of the earth's surface...by...applying trigonometry...." CLSA may seek to change "trigonometry" to "mathematics," in order to broaden the authority of land surveyors.

CLSA may also propose substantial changes in the current requirements for

certification, by amending Business and Professions Code section 8741(a) to provide that the first division of the land surveyor's examination shall test the applicant's fundamental knowledge of surveying, mathematics, basic science, real property law, boundary law, and land title transfer.

CLSA may seek to amend various sections of the Professional Engineers Act. Section 6731.1(a)-(b) enumerates the two land surveying functions which a civil engineer may perform without possessing a land surveyor's license. CLSA's proposed bill would add language ensuring that civil engineers are restricted to performing only those two specified activities, which are identical to the activities identified in section 8726(a)-(b) of the Professional Land Surveyors' Act.

In addition, another proposed bill would add language to Business and Professions Code section 6755.1, to ensure that the questions on the second division of the examination for registration as a professional engineer regarding engineering surveying principles are as difficult as those on the land surveying exam.

LITIGATION:

Floyd E. Davis, et al. v. Department of Consumer Affairs, et al., No. 512457 (Sacramento County Superior Court) was scheduled to go to trial on January 16; the trial was expected to last three days. In this action, plaintiffs challenge the validity of PELS regulations which provide that only structural engineers may serve as references for structural engineering candidates, and only plan-checking experience obtained under the supervision of a structural engineer constitutes valid qualifying structural experience. (See CRLR Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 119; Vol. 9, No. 4 (Fall 1989) pp. 76-77; and Vol. 9, No. 3 (Summer 1989) p. 68 for background information.)

RECENT MEETINGS:

At its November 2 meeting, PELS directed its Legislative Committee to research the legislative history of the exemptions to the Professional Engineers Act. PELS believes that the rationales behind many of the exemptions may no longer exist.

Also at its November 2 meeting, PELS directed its staff to automatically implement the Accreditation Board of Engineering and Technology (ABET) recommendations for accreditation of foreign schools after receiving clarification from ABET.

At the Board's December 14 meeting, PELS decided to make the ratio between the grading system and point system on the land surveyor exam 1 to 100. If the exam is worth 300 points, then the grading system will be based on three-point increments.

PELS also discussed the Board's position on having a retired status for engineers and land surveyors, and agreed that it is still opposed to having such a status.

FUTURE MEETINGS:

March 22 in San Diego.

BOARD OF REGISTERED NURSING

Executive Officer: Catherine Puri
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Pursuant to the Nursing Practice Act, Business and Professions Code section 2700 *et seq.*, the Board of Registered Nursing (BRN) licenses qualified RNs, certifies qualified nurse midwifery applicants, establishes accreditation requirements for California nursing schools, and reviews nursing school curricula. A major Board responsibility involves taking disciplinary action against licensed RNs. BRN's regulations implementing the Nursing Practice Act are codified in Division 14, Title 16 of the California Code of Regulations (CCR).

The nine-member Board consists of three public members, three registered nurses actively engaged in patient care, one licensed RN administrator of a nursing service, one nurse educator and one licensed physician. All serve four-year terms.

The Board is financed by licensing fees, and receives no allocation from the general fund. The Board is currently staffed by 60 people.

MAJOR PROJECTS:

BRN Rulemaking. At its November meeting, BRN adopted proposed new sections 1410.1 and 1419.2, Division 14, Title 16 of the CCR. The proposed regulations specify time periods for the processing of licensure and renewal applications, in conjunction with the Permit Reform Act of 1981, Government Code section 15374 *et seq.* (See CRLR Vol. 10, No. 4 (Fall 1990) p. 103 for background information.)

The Board also adopted a proposed amendment to section 1417, which increases the fees for RN license renewals, applications, and examinations. Based on historical workload trends, the Board's budget projections indicate that expenditures will deplete