BOARD FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS

FINAL STATEMENT OF REASONS

Hearing Date: June 14, 2002.

Subject Matter of Proposed Regulations: Codes of Professional Conduct for Professional Engineers and Professional Land Surveyors

Section Affected: Title 16, California Code of Regulations sections 475 and 476

Updated Information: The Initial Statement of Reasons is included in the file.

Local Mandate: A mandate is not imposed on local agencies or school districts.

Business Impact: This regulation will not have a significant adverse economic impact on businesses.

Underlying Data
Technical, theoretical or empirical studies or reports relied upon (if any):

1. Code of Professional Conduct
   10. Minutes and Agenda Item from the March 7-8, 2002, Board Meeting
   [NOTE: The Draft Minutes as listed in the Initial Statement of Reasons were approved and adopted in whole by the Board at its June 13-14, 2002, meeting with no changes. Therefore, the final Minutes are included in the rulemaking file.]

Consideration of Alternatives: No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the Board would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation.

Summary of Comments Received and Board Response
A summary of comments received regarding this rulemaking file and the Board's response to those comments are included in this Final Statement of Reasons. The actual written comments received are contained in the rulemaking file under Tab XII. The transcript of the public hearing is contained in the rulemaking file under Tab XI.

Comments were received from a geotechnical engineer, two attorneys, two structural engineers, six professional engineers, one insurance representative, one electrical engineer, one representative of a professional society, and one land surveyor representing land surveyors employed at a state agency.

Written Comments Received During 45-day Comment Period

The following written comments were submitted during the 45-day comment period, April 26 through June 10, 2002. In the summary of the comments and Board responses below, these individuals are referred to as "attorney JC", "professional engineer JH, LC, DY, KC, ST, and BM", "insurance representative GW" and "representative of a professional society LA," respectively:

COMMENT: Attorney JC commented that the need for a Board regulatory code of conduct seems unnecessary, in light of all of the existing codes of conduct and added that the Board does not have the statutory authority to adopt a Code of Professional Conduct.

RESPONSE: The Board rejects these comments. Both the Board and the Legislature believe that the public interest will be better served by the adoption of the Codes of Professional Conduct. The Board believes that it must pursue these Codes of Professional Conduct in order to meet its legislative mandate to protect the health, safety, welfare, and property of the public. Effective January 1, 2001, Assembly Bill (AB) 2629 (Chap. 976, Stats. 2000), amended Business and Professions Code sections 6716 and 8710 to specifically authorize the Board for Professional Engineers and Land Surveyors to adopt rules and regulations of professional conduct for professional engineers and land surveyors. A violation of this Code of Professional Conduct in the practice of professional engineering or professional land surveyors constitutes unprofessional conduct and is grounds for disciplinary action pursuant to sections 6775 and 8780 of the Code.

COMMENT: Professional engineers, DY, LC, ST, BM, KC, the representative of a professional society LA, the representative of an insurance company GW, and the attorney JC, commented that the introductory language should be made clear that a violation of the code of conduct is not based on a malpractice action or should not be used to establish financial or civil liability against an engineer or land surveyor.

RESPONSE: The Board accepts this comment. The language was modified by adding a sentence at the end of the introductory paragraph stating that the Code of Professional Conduct shall be used for the sole purpose of investigating complaints and making findings thereon under section 6775 and 8780 of the code. The language was noticed for a 15-day comment period from December 3 through December 18, 2002.

COMMENT: Attorney JC commented that in the Informative Digest, the Board determined there is no business impact, cost impact on private persons or entities, or effect on small business, which he respectively disagrees with and should be identified.

RESPONSE: The Board rejects this comment. Licensees who are in compliance with the law will not be impacted by the proposed regulations. The proposed regulations will not have an adverse economic impact on businesses. Licensees who violate the laws themselves create a negative economic impact on the

legitimate business community. These regulations establish codes of professional conduct that will serve to correct poor professional practices and thereby improve the business community.

Subdivision 475(a) and 476(a) – Compliance with Laws Applicable to a Project

COMMENT: GW representing an insurance company and attorney JC commented that these provisions contain a mandatory legal compliance standard in which a licensee is required to comply with the laws, codes, ordinances, rules and regulations applicable to a project when undertaking or performing professional services on that project. However, it is argued that this mandate is patently unreasonable. Attorney JC also stated that CELSOC has long advocated that this should be tempered by the inclusion of the word "knowingly" adding that it seems unfair to present the risk of disciplinary action for an innocent violation.

RESPONSE: The Board rejects these comments. The Board's attorneys believe that the word "knowingly" creates a very high standard and makes it seem that "ignorance of the law" would be an acceptable defense. The attorneys further stated that including the word "knowingly" would create a difficult legal standard for disciplinary proceedings.

Subdivision 475(b) and 476(b) – Conflict of Interest

COMMENT: JC expressed his concern with the imposition of disclosure requirements contained in this subdivision. Additionally, Attorney JC was concerned that there is no definition of a "project" or "related projects". GW representing an insurance company, Professional Engineer LC, and Attorney JC noted that terms such as "business association" or "financial interest" are not defined and rather ambiguous.

RESPONSE: The Board rejects these comments. The Board decided that these terms did not need further definition since they are generally used and understood based on common dictionary definitions of the words.

COMMENT: The Professional Engineer JH, representing civil, geotechnical and structural engineers commented that the phrase "project owner" in subdivision (b)(1) was confusing and could make it difficult and impractical for the design engineer to identify all owners of a project and could impose a significant burden on the engineer.

RESPONSE: The Board accepts these comments. The language was changed to "property owners" as is used in the Lien Laws. Modifications were made to the language and noticed for a 15-day public comment period from December 3 through December 18, 2002.

COMMENT: Attorney JC and Professional Engineers LC, DY, ST, and KC and LA representing a professional society all suggested that subdivision (b)(2) be rephrased to provide for more clarity.

RESPONSE: The Board accepts these comments. Modifications were made to the language and noticed for a 15-day public comment period from December 3 through December 18, 2002.

Subdivision 475(c) and 476(c) – Representations

COMMENT: Professional engineer LC commented that the legal profession may interpret an absence of proactive prevention of misrepresentation and believed that "nor permit" should be stricken. However, LC suggested that the language should be amended with "knowingly" added to read "nor knowingly permit".

RESPONSE: The Board rejects this comment. The Board's attorneys believed that adding the word "knowingly" would create a difficult legal standard for disciplinary proceedings.

Comments Received at the Public Hearing

The following comments were made at the public hearing which was held on June 14, 2002. In the summary of the comments and Board responses below, these individuals are referred to as "structural engineer CG", "electrical engineer TS", "attorney JC", and "structural engineer (representing a professional society) DB", respectively. Attorney JC summarized the written comments he had previously submitted. All of his comments are summarized and responded to under the title "Written Comments Received During the 45-day Comment Period". In addition to speaking at the public hearing, the Structural Engineer CG also provided his comments in writing. They will be addressed jointly.

COMMENT: In addition to testifying at the public hearing, the Structural Engineer CG, submitted written comments stating he was opposed to the adoption of the entire section of 475 because the engineering profession does not need additional governmental regulation to protect the public health or safety. He also wanted to know how the Board intended to enforce such requirements and if it would be by complaint only. CG further believed that the regulations are a weak and unnecessary imposition of government regulation. He further stated that professional engineers are being attacked from all directions by attorneys that have no Code of Conduct and when you put into law the requirements for Code of Conduct, it will be just one more avenue for attorneys to sue professional engineers. The Structural Engineer CG further stated that it would be better served to require a code of conduct for licensed attorneys.

RESPONSE: The Board rejects these comments. As part of its last Sunset Review, the Board was directed to adopt a Code of Professional conduct for professional engineers and professional land surveyors. Both the Board and the Legislature believe that the public interest will be better served by the adoption of Codes of Professional Conduct. Additionally, even if there were not already a

Code of Professional Conduct in law for attorneys, it would be outside the Board's jurisdiction to adopt one.

COMMENT: CG believed there was no evidence of necessity for adopting any particular thing in the proposed regulation. He further commented that the Initial Statement of Reasons is rife with misleading, manipulative and false assertions, and fails to allege, let alone substantiate, the existence of any existing problems with respect to licensee conduct involving any of the 25 separate line items making up the proposed regulation. Additionally, CG stated that Board staff's Factual Basis entry satisfactorily establishes legislative authority in B&P Code Section 6716(b) for the Board to adopt rules and regulations of professional conduct for licensees. However, the Factual Basis (and later, the Consideration of Alternatives part of the Initial Statement) cannot show a legislative mandate to adopt any particular rule on professional conduct or any mandate to adopt any rules at all, because there isn't any mandate expressed in the legislative enactments that pertain.

RESPONSE: The Board rejects these comments. CG stated that the Board cannot show a legislative mandate to adopt any particular rule on professional conduct or any mandate to adopt any rules at all. The Board disagrees with this statement. Effective January 1, 2001, Assembly Bill (AB) 2629 (Chap. 976, Stats. 2000), amended Business and Professions Code section 6716 and 8710 to specifically authorize the Board for Professional Engineers and Land Surveyors to adopt rules and regulations of professional conduct for professional engineers and land surveyors. A violation of this Code of Professional Conduct in the practice of professional engineering or professional land surveyors constitutes unprofessional conduct and is grounds for disciplinary action pursuant to Sections 6775 and 8780 of the Code.

COMMENT: The Structural Engineer (CG) stated that under Consideration of Alternatives of the Board's Initial Statement of Reasons preposterously claims that the only alternative to this proposal is to not adopt any Code of Conduct at all. CG further added that a somewhat different slate of fully acceptable and necessary individual rules could emerge after further changes are stimulated by comments, the hearing, and later reviews.

RESPONSE: The Board rejects these comments. Both the Board and the Legislature believe that the public interest will be better served by the adoption of the Codes of Professional Conduct. The Board believes that it must pursue these Codes of Professional Conduct in order to meet its legislative mandate to protect the health, safety, welfare, and property of the public.

COMMENT: CG commented that the enforceability of anything that is adopted for the Code of Professional Conduct depends upon the subsequent adoption of recommended administrative penalties. CG believes failure to comply with the Administrative

Procedures Act (APA) would harm and prejudice the future operation of any code of conduct.

RESPONSE: The Board rejects this comment. The Board has already adopted its "disciplinary guidelines" into regulation (Section 16, California Code of Regulations section 419). The Board sees no reason to include separate disciplinary guidelines in its Code of Professional Conduct. If it is appropriate, the Board will amend section 16, CCR 419 at a later date and through the appropriate rulemaking process.

COMMENT: Structural Engineer DB commented that he was concerned that the regulations could bring an action against an engineer and provided recommended language to make it clear that the sanctions shall be applied to code violations and not be utilized to establish financial or civil liability.

RESPONSE: The Board accepts this comment. The language was modified by adding a sentence at the end of the introductory paragraph stating that the Code of Professional Conduct shall be used for the sole purpose of investigating complaints and making findings thereon under section 6775 and 8780 of the code. The language was noticed for a 15 day comment period from December 3 through December 18, 2002

Subdivision 475(a) and 476(a) – Compliance with Laws Applicable to a Project

COMMENT: The Structural Engineer CG, stated that clarity and consistency problems abound with the impossibility of compliance. He believed the subdivision had a one-sentence rigid regulatory requirement to comply with laws, codes, etc., applicable to a project, and a second sentence that is permissive in nature. Additionally he had a clarity problem with the meaning of the second part in that, if a licensee inquires of "other professionals" and relies on what a reply inaccurately or erroneously indicate, and complies with "the intent and meaning" of laws and codes so obtained, that the licensee has a complete defense against being disciplined for violation of the first sentence.

RESPONSE: The Board accepts these comments in concept. The Board agreed that clarity problems existed in the sentence and modifications were made for a 15-day comment period from December 3 through December 18, 2002.

Subdivision 475(b) and 476(b) – Conflict of Interest

COMMENT: Structural Engineer DB commented on the first sentence in subdivision (b)(2) and recommended deleting the word "any" and changing it to "a".

RESPONSE: The Board accepts this comment. A modification was made and noticed for a 15-day comment period from December 3 through December 18, 2002.

COMMENT: Structural Engineers DB and CG commented on subdivision (b)(2) and the use of the phrase "may influence." DB believed "may" should be deleted.

RESPONSE: The Board rejects these comments. The Board believed that clients should be informed if the licensee's professional judgment may be influenced because of the business or financial relationships. There is no requirement that every client be notified about every other client. Only those business or financial relationships which may influence the licensee's judgment must be disclosed.

COMMENT: Structural Engineer DB believed "and project owners" should be deleted from subdivision (b)(1) because it would be burdensome.

RESPONSE: The Board accepts the comment in concept. The language was changed to "property owners"

Subdivision 475(c) and 476(c) – Representations

COMMENT: CG and TS, electrical engineer, commented on plagiarism and copyright issues. The comments suggested that these issues should not be included in the Codes of Professional Conduct because they are issues outside the Board's purview to adjudicate and do not reflect the public's interest.

RESPONSE: The Board accepts these comments. The Board agrees that the issues of plagiarism and copyright infringement should not be included. Therefore, references to plagiarism in subdivision (c)(4) and the entire subdivision regarding copyright infringement was deleted. Modifications were made to the language and noticed for a 15-day public comment period from December 3 through December 18, 2002.

COMMENT: The Structural Engineer CG, submitted comments regarding subdivision (c)(4). He stated that the use of the word "purposes" as it applies to entities with which the licensee is associated is not clear.

RESPONSE: The Board accepts this comment. The term "purposes" is misplaced and the sentence needs to be modified. Modifications were made and noticed for a 15-day public comment period from December 3 through December 18, 2002.

COMMENT: Structural Engineer CG commented on subdivision (c)(7) and recommended adding the phrase "or accepted engineering principles" and "or accepted land surveying principles."

RESPONSE: The Board accepts these comments and added the recommended phrases. Modifications were made and noticed for a 15-day public comment period from December 3 through December 18, 2002.

Written Comments Received During the 15-day Comment Period

The following comments were submitted during the 15-day comment period, December 3 through December 18, 2002. In the summary of the comments and Board responses below, these individuals are referred to as "land surveyor (representing land surveyors employed at a state agency) SM", "attorney JC" and "attorney SD", "geotechnical engineer MG", and "structural engineer CG", respectively:

> COMMENT: The Structural Engineer CG noted that the last sentence in the opening paragraph does not grammatically follow the subject "violation" of the existing sentence it is appended to.
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> > RESPONSE: The Board accepts this comment and separated the last sentence into two sentences. These amendments are nonsubstantial, grammatical changes that do not require any further public notice. The language showing these changes can be found under Tab X.

COMMENT: The land surveyor SM, representing a group of land surveyors working for a state agency, stated that the Codes of Professional Conduct do not clarify the meaning of the terms "negligence" and "incompetence," which should be done. They further stated that the itemized list under each of the subdivisions gives the appearance that the lists are exhaustive and they are concerned that the Board's Enforcement Unit staff may find itself facing an even bigger workload of complaints, thereby straining the Board's already slim resources.

> RESPONSE: The Board rejects these comments. The Codes of Professional Conduct do not purport to clarify Sections 6775 and 8780 of the meanings of "negligence" and "incompetence." The Board does agree that the terms "negligence" and "incompetence" should be defined, which is why the Board has separately pursued rulemaking to add such definitions to Board Rule 404.
>
> At this time, the items listed in the various subdivisions would constitute an exhaustive list of what the Board believes should be included in the Codes of Professional Conduct for professional engineers and land surveyors. However, as previously stated, the Board and the Legislature believe that the public interest will be better served by the adoption of Codes of Professional Conduct for professional engineers and land surveyors.
>
> In response to the workload of complaints, the Board is very cognizant of its depleted resources but still believes that it must pursue these Codes of Professional Conduct in order to meet its legislative mandate to protect the health, safety, welfare, and property of the public.

<u>Subdivision 475(a) and 476(a) – Compliance with Laws Applicable to a Project</u>

COMMENT: The surveyors working for a State agency indicated that they believe that the existing laws are adequate for the regulation of the profession and that the Code of Professional Conduct is simply restating existing law. They further stated that if the intent was to clarify Business and Professions Code section 6775 and 8780, then amendments should be made to those sections rather than adopting a regulation regarding Codes of Professional Conduct.

RESPONSE: The Board rejects these comments. It is not the intent of the Board to clarify Section 6775 and 8780 by the adoption of the Codes of Professional Conduct.

COMMENT: The group of surveyors submitted comments indicating that they believe this subdivision should simply require compliance with laws and not reference the specifics related to a project. The Structural Engineer submitted comments regarding subdivision (a) indicating that the modifications to this subdivision do not remove "…the potential for naïve and abusive enforcement" and do not "…remedy the harsh, "no wiggle room" objection to the word "comply"… previously used in this subdivision, especially since the subdivision is still entitled "Compliance with Laws Applicable to a Project."

RESPONSE: The Board rejects these comments. Based on the number of comments received from licensees regarding this subdivision during the entire rulemaking process, it appears that many licensees are confused about their obligation to know and obey the laws relating to their professional projects and to each specific project they undertake. This subdivision is necessary to remedy that confusion. Contrary to the implication in the comments from the Structural Engineer, licensees are already required to comply with the law. This subdivision simply reinforces that obligation and alerts the profession to that obligation.

<u>Subdivision 475(b) and 476(b) – Conflict of Interest</u>

COMMENT: The group of surveyors believed the agency they work for would have to adopt an approval process for Sections 475(b)(4) and 476(b)(4) if they are performing professional engineering or land surveying duties while engaged by a governmental agency.

RESPONSE: The Board rejects this comment. This is outside this Board's authority to address what another state agency might require of it's employees.

COMMENT: The Structural Engineer CG, submitted comments indicating that the addition of the term "property owners" as used in subdivision (b)(1) is not clear. He stated that he does not know if he is required to notify the property owners "regardless of whether they are among the multiple clients or …only …if they are included among the multiple clients." CG also commented that he still has the same objections to subdivision (b)(2) as he previously submitted during the 45-day public comment period on the original language. The attorney JC representing the professional

association submitted comments specific to subdivisions (b)(1) and (b)(2) and recommended that these two subdivisions be deleted. He stated that he believes these subdivisions are ambiguous and lack clarity because several of the terms used in them, such as "projects," "related projects," "authorized representative," "business association," and "financial interest," are not defined. He further stated that there is no justification for the policy of requiring the types of disclosure described in these subdivisions. He stated that he does not believe that rendering professional services to more than one client is a conflict interest requiring disclosure. He stated that "…law firms are not required to disclose their other client relationships and, in fact, are precluded from doing so…"

RESPONSE: The Board rejects these comments. Contrary to the attorney's comments, an attorney is required to disclose potential conflicts of interest in order to protect the interest of clients (Rules of Professional Conduct of the State Board of California, Rule 3-310.). A professional engineer or a professional land surveyor should be required to do the same. Furthermore, these subdivisions do not require any clarification because a common sense reading of the terms and phrases used in these subdivisions makes their meanings plain. Subdivision (b)(1) simply requires that the licensee provide notice to his clients that he is working on related projects; it does not require him to disclose confidential information regarding the projects. It also specifically requires notice be provided to the property owners, who may or may not be the licensee's clients, because the property owners will be directly affected by the licensee's work on the project. Clients should also be informed if the licensee's professional judgment may be influenced because of the business or financial relationships. There is no requirement that every client be notified about every other client. Only those business or financial relationships which may influence the licensee's judgment must be disclosed.

<u>Subdivision 475(c) and 476(c) – Representations</u>

COMMENT: The surveyors and the Structural Engineer both submitted comments regarding subdivision (c)(8). The surveyors stated that the use of the word "misappropriate" is confusing. The Structural Engineer pointed out that the deletion of the phrase "shall not plagiarize the professional work of others" leaves the remainder of the section vague with respect to the term "others" in relationship to the work or contribution. The Structural Engineer CG reiterated his objection to this entire subdivision as he had previously commented during the 45-day comment period, which was previously considered by the Board.

RESPONSE: The Board rejects the comments regarding the word "misappropriate". It is not confusing and has a common sense meaning and, therefore, does not need to be changed or defined.

COMMENT: The Structural Engineer CG stated that the deletion of first use of the modifying word "professional" before the word "work" inadvertently caused the remainder of the sentence to become ungrammatical and unclear.

RESPONSE: The Board accepts this comment. These amendments are nonsubstantial, grammatical changes that do not require any further public notice. The language showing these changes can be found under Tab X.

COMMENT: The Structural Engineer CG, thanked the Board for making the modification to subdivision (c)(7) that he had previously recommended.

RESPONSE: The Board accepts this comment. No change needed.

Subdivision 475(d) and 476(d) – Confidential Information

COMMENT: The group of land surveyors stated that some surveyors feel that Section 475(d) and 476(d) may be in conflict with existing whistleblower laws.

RESPONSE: The Board rejects these comments. This subdivision does not require any type of disclosure. This subdivision makes it a violation of the Code of Professional Conduct for a licensee to disclose confidential information, as it is specifically defined for this subdivision. This subdivision then lists the specific times when it would not be a violation of the Code of Professional Conduct for a licensee to disclose such information. Any privileges or protections regarding disclosure that exist in other laws, including case law, would still apply.

COMMENT: The law firm presumably representing an Agricultural Engineer (SD) and the group of surveyors submitted comments regarding subdivision (d). These comments indicated that they believe that this subdivision will be in conflict with existing laws and case laws regarding attorney-client privilege, attorney work product doctrine, whistleblower protection, and other cases regarding disclosures of information.

RESPONSE: The Board rejects these comments. This subdivision does not require any type of disclosure. This subdivision makes it a violation of the Code of Professional Conduct for a licensee to disclose confidential information, as it is specifically defined for this subdivision. This subdivision then lists the specific times when it would not be a violation of the Code of Professional Conduct for a licensee to disclose such information. Any privileges or protections regarding disclosure that exist in other laws, including case law, would still apply.

COMMENT: The Structural Engineer CG, submitted comments specific to subdivision (d)(6). He commented that the phrase "other licensees" seems to be misplaced following "unlicensed individuals."

RESPONSE: The Board accepts this comment. The Board agreed that this sentence is not grammatical as worded. Therefore, the phrase "other licensees" was moved before the phrase "unlicensed individuals." This amendment is a nonsubstantial, grammatical change and does not require any further public notice. The language showing these changes can be found under Tab X.

COMMENT: The Structural Engineer CG, thanked the Board for deleting subdivision 475(d) regarding copyright infringement, as he had previously recommended.

RESPONSE: The Board accepts this comment. No change needed.

COMMENT: Geotechnical Engineer MG commented that he opposed to the entire Code of Professional Conduct regulation because the engineering profession does not need additional governmental regulation to protect the public health or safety. He believed the profession would be better served to require a code of conduct for licensed attorneys.

RESPONSE: The Board rejects these comments. Both the Board and the Legislature believe that the public interest will be better served by the adoption of the Codes of Professional Conduct. The Board believes that it must pursue these Codes of Professional Conduct in order to meet its legislative mandate to protect the health, safety, welfare, and property of the public. Effective January 1, 2001, Assembly Bill (AB) 2629 (Chap. 976, Stats. 2000), amended Business and Professions Code sections 6716 and 8710 to specifically authorize the Board for Professional Engineers and Land Surveyors to adopt rules and regulations of professional conduct for professional engineers and land surveyors. A violation of this Code of Professional Conduct in the practice of professional engineering or professional land surveyors constitutes unprofessional conduct and is grounds for disciplinary action pursuant to sections 6775 and 8780 of the Code. Additionally, there is already a Code of Professional Conduct for attorneys practicing in California (Business and Professions Code sections 6076 and 6077).

Comments Received Outside of a Noticed Comment Period

The Board received one set of comments from RM, a representative from the Consulting Engineers and Land Surveyors of California (CELSOC) after the 45-day period but before the 15-day period. These comments simply reiterated comments made by Attorney JC (attorney representing CELSOC) that he had already submitted during the 45-day period or that he later submitted during the 15-day period. As such, the comments have been summarized, considered, and responded to with either the 45-day period comments or the 15-day period comments.

Written Comments Received During the 15-day Comment Period Re Availability of Documents Added to the Rulemaking File

The Board for Professional Engineers and Land Surveyors did not receive any written comments during the 15-day comment period regarding the availability of documents added to the rulemaking file. The public comment period began May 20, 2002 and ended on June 4, 2002.