



Association of Environmental & Engineering Geologists Southern California Section

"Connecting Professionals, Practice, and the Public"

April 4, 2006

Board for Professional Engineers and Land Surveyors
2535 Capitol Oaks Drive, Suite 300
Sacramento, CA 95833-2944

RE: Complaint Against [REDACTED], P.E.

Members of the Board,

I am writing to express concern over the handling of an enforcement complaint filed by the County of San Bernardino with your Board. Mr. [REDACTED], County of San Bernardino filed a complaint of unlicensed practice against Mr. [REDACTED], who had submitted a report to the County of San Bernardino entitled "*Preliminary Geologic Evaluation of Proposed Family Residence*" for a proposed single-family residential development in Lake Arrowhead, CA.

In response, a letter prepared by Ms. Sally Strubinger, Enforcement Analyst, dated August 17, 2005 states: "Mr. [REDACTED]...relates that his report complies with the limitations of this statute" [Business and Professions Code § 7838]. The letter goes on to say that "The exemption basically states that a civil engineer is allowed to practice geology without having to obtain a geologist's license." and that: "Clearly Section 7838 includes geology within the scope of a civil engineer's practice."

The Association of Environmental and Engineering Geologists (AEG) believes that the Board should conduct their own investigation. Relying on Mr. [REDACTED]'s word that "his report complies with the limitations of this statute" is not the proper way to conduct an investigation. In fact, one could argue that no investigation of the complaint was conducted at all.

Further, § 7838 reads: "A civil engineer empowered to practice civil engineering in this state, and a petroleum engineer registered in this state, under provisions of Chapter 7 (commencing with Section 6700) of Division 3 of this code **insofar as they practice civil engineering** in its various branches or petroleum engineering, respectively, are exempt from registration under the provisions of this chapter" [Emphasis added]. Contrary to the statement in Ms. Strubinger's letter, AEG asserts that there is nothing in the text of § 7838 that "clearly" allows engineers to practice geology.

AEG also requests the Board consider Business and Professions Code § 7835 which reads: "**All geologic plans, specifications, reports, or documents shall be prepared by a professional geologist or registered certified specialty geologist**, or by a subordinate employee under his or her direction. In addition, **they shall be signed by the professional geologist or registered certified specialty geologist or stamped with his or her seal**, either of which shall indicate his or her responsibility for them" [Emphasis added]. It is AEG's position that all relevant code sections should apply to an enforcement case, and that the Board should not choose to ignore codes that contradict their position.

Mr. [REDACTED]'s "Preliminary Geologic Evaluation" is wholly a geologic report, and in fact, is

claimed to be such by Mr. [REDACTED] in this report and in subsequent letters submitted to the County of San Bernardino. Having reviewed thousands of engineering geology and soils engineering reports over the past 18 years, it is my opinion that this report contains nothing that can be related to the practice of engineering, and therefore should not qualify under the Section 7838 exemption, and is very clearly subject to the requirements of Section 7835. The Board should not believe that they have the legal right to determine which sections of the Business and Professions Code they may choose to enforce, or to ignore. The Board has a fiduciary duty to enforce **all** applicable codes in their responsibility to the public.

A second offense is evidenced by a subsequent report submitted to the County prepared by a California-licensed Certified Engineering Geologist identified an existing landslide and structural conditions on the property that necessitate relocating the proposed single family residence ([REDACTED], Sept. 29, 2005). Rather than providing the information requested by the County, subsequent letters submitted by Mr. [REDACTED] discussed why he felt it was not necessary for him to respond. Perhaps if he had prepared a soils engineering report, Mr. [REDACTED] might have performed an engineering analysis that would have revealed the potentially unstable condition affecting his client's property (*note that Mr. [REDACTED] failed to address the stability of adjacent slopes steeper than 2:1, as required in the California Building Code § 3301.1*). Instead, he successfully demonstrated precisely why geology licensure is an absolute necessity in this state.

The Geologist and Geophysicist Act is a **practice** Act, which means one must be licensed as a professional geologist to offer geologic consulting services pursuant to projects subject to governance by state and local building codes, and to prepare reports and documents for said projects (Section 7835). It should be abundantly obvious that exemption from registration does not provide absolution for non-licensees to practice geology.

I submit as qualifier to the above assertion a letter dated October 27, 1988 prepared by Deputy Attorney General Nancy Ann Stoner of the office of then-Attorney General, John K. Van de Kamp. Due process necessitates that the Board's legal counsel consider existing legal decisions and case history prior to rendering opinions of legal import.

Please consider this letter as an official request to reopen the investigation into allegations of unlicensed and negligent/incompetent geologic practice, and possible misrepresentation of professional services by Mr. [REDACTED], P.E.

Sincerely,



Charles Nestle, Chair
Association of Environmental and Engineering Geologists
Southern California Section

Encl: October 27, 1988 letter from the office of Attorney General John K. Van de Kamp

cc: Board for Geologists and Geophysicists
[REDACTED], County of San Bernardino

JOHN K. VAN DE KAMP
Attorney General

State of California
DEPARTMENT OF JUSTICE



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October 27, 1988

3580 WILSHIRE BOULEVARD, ROOM 800
LOS ANGELES 90010
(213) 736-2304

John E. Wolfe
Executive Officer
State Board of Registration for
Geologists and Geophysicists

Dear Mr. Wolfe:

Re: Requested Clarification of 58 Ops.Cal.Atty.Gen. 598
Dealing with Civil and Petroleum Engineers

This informal memorandum is in response to your September 15, 1988 request for clarification of the civil and petroleum engineer's exemption from the Geologist and Geophysicist Act which was previously discussed in Opinion No. CV 73-241 (58 Ops.Cal.Atty.Gen. 598). The exemption in question is found in section 7838 of the Business and Profession Code.^{1/} You asked whether that statute allows civil or petroleum engineers to practice or offer to practice geology or geophysics for others or whether they may only perform such work if it is incidental to their engineering practice.

Our conclusion may be summarized as follows:

Section 7838 does not grant civil and petroleum engineers a total exemption and they cannot practice or offer to practice geology or geophysics for others. Such engineers may only perform geological or geophysical work that is incidental to an engineering project.

ANALYSIS

In order to clarify the exemption that was interpreted in the earlier Opinion of the California Attorney General it is important to start with the statute itself. Section 7838 states:

"A civil engineer empowered to practice civil engineering in this state, and a petroleum engineer registered in this state, under provisions of Chapter 7 (commencing with Section 6700) of Division 3 of this code insofar as they practice civil engineering in its various branches or petroleum engineering, respectively, are exempt from registration under the provisions of

1. Unless otherwise indicated, all statutory references are to the Business and Professions Code.

this chapter [referring to chapter 12.5 which governs Geologists and Geophysicists]." (Emphasis added.)

The meaning of this exemption is not entirely clear. In resolving this ambiguity "[a] fundamental rule of statutory construction is that '[l]egislative intent should be determined from the language of the statute.' (People v. Western Air Lines, Inc. v. California (1954) 348 U.S. 859 [99 L.Ed.2d 677].)" (Ron Yates Construction Co. v. Superior Court (1986) 186 Cal.App.3d 337, 345.) In doing so "we must give full effect to the apparent purpose of the entire legislative scheme [citations omitted]." Packard-Bell Electronics Corp. v. Dept. of Prof. and Voc. Standards (1966) 242 Cal.App.2d 387, 394.)

The earlier Opinion of the Attorney General (58 Ops.Cal. Atty.Gen. 598 (1975)) attempted to explain the limited scope of this statutory exemption. Unfortunately sources have taken the last paragraph of the opinion out of context. That paragraph concluded that "section 7838 operates to exempt registered civil and petroleum engineers, to the extent that they act within the scope of civil or petroleum engineering, from the Geologist and Geophysicist Act when they practice or offer to practice geology for others." (58 Ops.Cal. Atty.Gen., supra, at 606; emphasis added.)

It is incorrect to interpret the opinion or the statute as providing civil and petroleum engineers with a total exemption from the Geologist's and Geophysicist's regulatory scheme. Those engineers are not free to practice or offer to practice geology or geophysics for others when the dominant purpose of the project involves geology or geophysics, rather than civil or petroleum engineering.

Such a broad interpretation totally ignores the limitation in the statute that the exemption only applies "insofar as they practice civil engineering in its various branches or petroleum engineering" (emphasis added). If the Legislature intended to grant civil and petroleum engineers a carte blanche exemption from registration under the Geologist's and Geophysicist's Act the above phrase was unnecessary and should have been omitted.^{2/}

2. This redrafted statute would simply state that "[a] civil engineer empowered to practice civil engineering in this state, and a petroleum engineer registered in this state . . . are exempt from registration under the provisions of this chapter [governing Geologists and Geophysicists]."

Another fundamental rule of statutory construction requires that "[s]ignificance should be given, in doing so, to the section as a whole and to every word, phrase or clause thereof, leaving no part or provision useless or deprived of meaning. (Citations omitted.)" (Ron Yates Constr. Co. v. Superior Court, supra, 186 Cal.App.3d at 345.) The earlier Opinion of the Attorney General did attempt to give meaning to the "insofar as they practice" phrase. Those words usually imply a limitation (58 Ops.Cal.Atty.Gen., supra, at 604). "[E]xemption provisions in regulatory statutes are narrowly construed when such construction is necessary to accomplish the purposes of the statute." (Id., at p. 602, citing Harvey v. Davis (1968) 69 Cal.2d 362.)

In the paragraph preceding the misconstrued conclusion the Attorney General Opinion notes:

"[T]he above quoted ["insofar as they practice"] language of section 7838 also makes it clear that the Legislature intended that the **exemption be of limited nature and scope**. The parameters of the exemption, while not definable with the sharp precision of other areas of law, would seem to mandate that any geological work performed by a civil or petroleum engineer **be subordinate to or dependent upon** the practice of civil or petroleum engineering." (58 Ops.Cal.Atty.Gen., supra, at p. 605; emphasis added.)

Stated another way, the exemption only applies when the geological or geophysical work performed by the civil or petroleum engineer is incidental to the respective engineering project on which he/she is working. This interpretation gives meaning to the full terms of the statute. It also gives full effect to the apparent purpose of the entire legislative scheme for licensing these specialized fields. (Packard-Bell, supra, 242 Cal.App. at 394.)

Furthermore, this limited exemption is consistent with the interpretation of other licensing schemes in which the licensee's work overlaps with another regulated industry. For example, in Packard-Bell Electronic Corp., supra, the court examined the Repair Dealer Law which contained an exemption for contractors that is similar to the one here in question. Section 9804 stated, essence:

"No person who is licensed [under the Contractor's law] shall be required to register [as a repair dealer] if such person's activities are within the scope of his

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Executive Officer

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license." Also, he cannot "be prohibited from repairing, servicing, or maintaining equipment of any type, the installation of which may be performed under his license." (Section 9804, quoted in Packard-Bell, supra at 391.)

The court rejected Packard-Bell's broad interpretation that section 9804 granted it a total exemption from registering as a repair dealer because it already had a contractor's specialty license as an electronics installer (Class C-61). Using many of the same tools of statutory construction already discussed in this letter, the court narrowly construed the exemption to only apply to the repair of electronic equipment that had been installed in a home. (242 Cal.App.2d at 395.)

Thus Packard-Bell did not have to register to do repair work that was incidental to installations authorized by its contractor's license. However, the company was not free to repair or offer to repair equipment it had not installed. The court recognized there would be a large gap in the regulatory scheme if the exemption applied to work that was not performed pursuant to the company's contractor's license. "In short, the legislative purpose as we conceive it to be, would be completely nullified." (242 Cal.App.2d at 395.)

Similar limitations were found in the exemptions applicable to licensed landscaping contractors and professional engineers who also performed services covered by landscape architects (55 Ops.Cal.Atty.Gen. 407 (1972).) In both instances the statute provided that the contractor and the engineer were exempt from registering as landscape architects "insofar as he practices [or engages in]" an activity, within the scope of his/her own license or its branches (see § 5644 governing, exemptions from the landscape architecture laws, commencing with § 5615).

Thus, the statutory language parallels the terms used in section 7838 of the Geologists and Geophysicists Act. The same narrow construction was reached in that Opinion by comparing the services performed by each profession, as defined by their respective statutes.

For example, section 5615 describes a landscape architect as primarily a designer who creates a functional and aesthetic plan for a landscape (55 Ops.Cal.Atty.Gen. at 408-409). In contrast, a contractor is synonymous with a "builder." (Id. at p. 409.) Therefore, the exemption "only permits a contractor to design components for installation by him into a landscape, not to design a pleasing or functional landscape

scheme." (Id. at 409.) Furthermore the contractor "cannot hold himself out" as a designer who combines the component parts into a pleasing and functional whole plan, even if he supervises and performs the installation. (Id. at p. 410; emphasis added.)

Likewise, the opinion notes that civil engineering embraces the engineering of "fixed works" for many projects, including irrigation, drainage, water supply and highways--all of which affect the landscape. (Id. at p. 411.) The Opinion concludes that "[c]learly, a civil engineer in the course of his work on an engineering project, such as the creation of a proper drainage system for land, pursuant to section 5644 [the exemption statute], can perform the practice of landscape architecture as long as that practice is incidental to his engineering efforts."

However, the opinion also notes that the definition of civil engineering does not directly involve the use of aesthetics in the execution of a project. (55 Ops.Cal.Atty.Gen. 411.) Although landscape architecture may be incidental to all or part of an engineering project, the exemption still precludes a civil engineer from accepting "a project where his dominant purpose will be to design a pleasing landscape arrangement and his engineering will only be incidental to this landscape architecture (Ibid.)."

A similar comparison of the duties of civil and petroleum engineers with those of geologists helps to illustrate the limitations in the exemption found in section 7838. As noted, a civil engineer performs services "in connection with fixed works for" certain projects listed in section 6731.³⁷ One of the studies or activities that civil engineers can undertake includes "(c) the investigation of the laws, phenomena and forces of nature" (section 6731). Petroleum engineers perform similar functions in connection with devices that recover natural fluid hydrocarbons (Title 16, Cal.Code Regs. § 404(x)).

In contrast, geology is defined, in part, as the "investigation of the earth's crust and the rocks and other materials which compose it; and the applied science of

3. The list includes "irrigation, drainage, waterpower, water supply, flood control, inland waterways, harbors, municipal improvements, railroads, highways, tunnels, airports and airways, purification of water, sewerage, refuse disposal, foundations, framed and homogeneous structures, buildings or bridges."

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minerals, liquids, gases and other materials for the benefit of mankind." By regulation, geological work does not include engineering disciplines wherein geological investigation, analysis and interpretation are minimal or lacking (Title 16, Cal. Code Regs. § 3003(d)).

It is apparent from these definitions that part of a civil or petroleum engineer's licensed activity embraces geological investigations. However, these studies must be done in connection with one of the listed types of fixed works. Therefore, the exemption would not allow the civil engineer to report on geological phenomena that was not pertinent to a particular fixed work. Furthermore, there are many aspects of geology that have little or no application to recovering fluid hydrocarbons. Thus, for example, a petroleum engineer cannot undertake an analysis of an underground spring simply because it was located when someone else drilled for oil.

Hopefully this analysis clarifies the parameters of the exemption found in section 7838. It would be necessary to analyze the facts and circumstances of a particular case in order to be more specific. However, in general, the exemption grants the civil or petroleum engineer no greater license than he/she already possesses. The geological and geophysical work that falls within the scope of their civil or petroleum engineer's license can be performed without registering with the Board of Registration for Geologists and Geophysicists. However, those licensees cannot hold themselves out as able to perform the geological or geophysical portions of their work independent of an engineering project.

Very truly yours,

JOHN K. VAN DE KAMP
Attorney General



NANCY ANN STONER
Deputy Attorney General

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