

**January 2010
Proposed Settlement Agreement**

From Charles Nestle, President, California Association of Professional Geologists

In the following ten pages is the 1st Amended Proposed Settlement Agreement submitted to the Attorney General. The first settlement agreement was ultimately rejected out of hand by the A.G. based on the A.G.'s opinion that some of the demands required legislative action to implement. This dismissal followed weeks of discussion and negotiation, wherein progress toward a mutually acceptable solution appeared imminent. This first revised agreement excludes elements that may require legislation, and we hope will be acceptable to all parties. If accepted, the lawsuit filed by the California Association of Professional Geologists will be dropped.

In addition to filing with the Attorney General, this proposed agreement has been submitted to David Brown (david_brown@dca.ca.gov) the Executive Officer of the Board for Professional Engineers and Land Surveyors (BPELS), and the Board's attorney. We expect this proposed agreement to have been discussed with agenda items 7 and/or 8 at BPELS meeting in Sacramento on Wednesday, January 27. Although not included in the board packet sent to all board members, it fits within the context of two existing agenda items.

Charles Nestle President, CAPG cnestle@dpw.lacounty.gov **SETTLEMENT AGREEMENT and RELEASE**
This Settlement Agreement and Release (hereinafter "Agreement") is entered into between and among California Association of Professional Geologists (hereinafter "CAPG") and Brian Stiger in his capacity as the Director of the California Department of Consumer Affairs (hereinafter "Stiger"), and Arnold Schwarzenegger in his capacity as the Governor of California (hereinafter "the Governor"), who may be collectively referred to hereinafter as the "Parties."

RECITALS WHEREAS, Assembly Bill (AB) x4 20 was passed on July 22, 2009 during a special session of the Legislature called to address a fiscal emergency; **WHEREAS**, ABx4 20 included a provision for abolishment of the Board for Geologists and Geophysicists (hereinafter "BGG") and transfer of authority for administration of the Geologist and Geophysicist Act (the "Act") to the Board for Professional Engineers and Land Surveyors (hereinafter "BPELS");

WHEREAS, California Association for Professional Geologists, Inc. (hereinafter "CAPG"), representing a group of Geologists and Geophysicists licensed and regulated by BGG, filed a Complaint for Declaratory Relief (hereinafter "Declaratory Relief Action") naming Governor Arnold Schwarzenegger as a Defendant, seeking to determine the Constitutionality of the portion of ABx4 20 pertaining to BGG;

WHEREAS, CAPG filed a concurrent Application for Preliminary Injunction naming Stiger as a Defendant, and seeking to enjoin him from implementing the portion of ABx4 20 pertaining to BGG, which is the subject matter of this Agreement;

WHEREAS Stiger implemented ABx4 20 in its entirety on or about October 23, 2009 and transferred authority of the former Board for Geologists and Geophysicists to the BPELS;

WHEREAS, CAPG has alleged in its Application for Preliminary Injunction that BPELS is unqualified to administer the Act in that its Board lacks representative Geologists or Geophysicists and its staff lacks licensed personnel with the requisite knowledge of Geology and Geophysics that CAPG and concerned licensees deem necessary to administer the Act;

WHEREAS, BPELS has indicated a good faith willingness to address the concerns of Geologists and Geophysicists by holding Town Hall Meetings to hear their concerns and by this Agreement hopes to address such concerns to the satisfaction of the concerned licensees and CAPG through actions it has the authority to take at a Board or staff level;

WHEREAS the Hearing on CAPG's Application for Preliminary Injunction and Declaratory Relief Action (collectively "the Action") is currently pending;

WHEREAS, the Parties desire to fashion a remedy that will ensure preservation of the integrity of the Geologist and Geophysicist professions while the administration of the Act is under the authority of BPELS;

WHEREAS, the Parties, without the necessity of litigation or adjudication on any issues of fact or law, and without any admission of liability, wish to settle all claims, contentions and disputes related to the Action once and for all;

NOW, THEREFORE, IT IS AGREED AS FOLLOWS: TERMS

1. No Admissions. In making this Agreement, no Party to this Agreement is admitting the validity or sufficiency of any claims, allegations, assertions, contentions or positions of any other Party, or the validity or sufficiency of any defenses to any such claims, allegations, assertions, contentions, or positions. The Parties hereto desire to resolve the matters which are the subject of pending Action in an amicable fashion and have entered into this Agreement in good faith and with the desire to fashion their own remedy and settle all disputes between them.

The Parties hereby covenant and agree as follows:

2. Geology Program. BPELS shall establish a separate staff level Geology Program within BPELS, whose staff shall include the two person years transferred from BGG under ABx4 20, and a full-time Geology Program Director and others as may be recommended by the Work Force Study, who shall handle and oversee all matters related to administration of the Act;

3. Geology Program Director. BPELS shall employ, within sixty (60) days of this Agreement, a full-time, Certified Engineering Geologist or Professional Geologist as the Geology Program Director who shall oversee the day-to-day operation of the Geology Program and its employees within BPELS. The Geology Program Director shall have at least seven (7) years experience as a licensed Geologist but may *not* also be a licensed engineer. This position may be filled by a full-time, state civil service employee or a contractor whose responsibilities will be those of BGG's former Executive Officer and will specifically include, but will not be limited to:

4.

a. Screening all complaints against unlicensed practice of Geology or Geophysics and taking appropriate enforcement action and/or making recommendations to BPELS (via the Geology Program Committee described below) for appropriate action;

b. Reviewing all examination applications to ensure that only qualified applicants are allowed to take the Geology, Geophysics or Certified Hydrogeologist and Engineering Geologist examinations;

c. Vetting of subject matter experts to be used for generation of examination questions for the California-specific, Engineering Geology, or Hydrogeologist examinations and expert witnesses to be used in enforcement actions; and

d. Representing BPELS in ASBOG membership activities. **Geophysicist Oversight.** BPELS shall employ, within sixty (60) days of this Agreement a Geophysicist, licensed for at least seven (7) years, who shall be called on by the Geology Program Director as needed to:

a. Review complaints against the unlicensed or negligent practice of Geophysics and take appropriate enforcement action and/or make recommendations to BPELS (via the Geology Program Committee described below) for appropriate action; and

b. Review all examination applications to ensure that only qualified applicants are allowed to take the Geophysics examination;

c. Vet Subject Matter Experts to be used for generation of examination questions for the Geophysics examination and expert witnesses to be used in Geophysics enforcement actions.

5. Geology Program Committee. BPELS shall establish a Geology Program Committee comprised of at least five (5) volunteers who shall regularly meet in person or via teleconference at duly noticed meetings open to the public.

a. Three members of the Committee shall constitute a quorum.

b. The Committee shall be comprised of at least one Geophysicist **and** one or more licensed Geologists, Certified Engineering Geologists, and/or Certified Hydrogeologists.

c. The Geology Program Committee shall regularly meet with Geology Program staff no less frequently than quarterly, in advance of BPELS Board meetings and in sufficient time to make recommendations at BPELS' next Board Meeting, regarding matters pertaining the Geology Program.

d. The Geology Program Committee shall make recommendations for appropriate action to BPELS' Board regarding matters pertaining to administration of the Act which BPELS Board shall adopt unless Good Cause for denial exists;

6. Examination Schedules. BPELS shall maintain all currently scheduled Geology, Geophysics and Certification licenses or examinations, unless otherwise recommended by the Geology Committee or modified by subsequent legislation;

7.

Subject Matter Experts. BPELS shall interview Subject Matter Experts previously vetted by the former BGG for evaluation of examination materials and participation in enforcement actions until new Subject Matter Experts shall have been designated by the Geology Program Director or Geophysicist for possible use as current Subject Matter Experts;

8.

File Retention. BPELS shall maintain all files of the former BGG separately from other BPELS files subject to destruction according to DCA's and/or BPELS' written records retention schedule, except that some enforcement action files may be retained longer on recommendation of the Geology Program Director or Geology Program Committee;

9. Enforcement Actions Against Engineers for Geology Practice. BPELS shall diligently pursue to conclusion any open past or future complaints against *Engineers* deemed to be engaged in the unlicensed or negligent practice of Geology or Geophysics, on review and recommendation by the Geology Program Director and/or Geology Program Committee.

10. Assignment of Separate Legal Affairs Counsel. DCA Legal Affairs shall assign separate legal counsel (independent of BPELS' assigned legal counsel) to advise BPELS' and/or the Geology Program Director regarding prosecution of complaints against Engineers related to the practice of Geology or Geophysics. **11. Definition of Roles.** DCA, on its own, or by and through BPELS, shall not undertake any action or proposal to restrict, redefine or undermine the roles of Geologists or Geophysicists unless such action or proposal has been reviewed and/or recommended by the Geology Program Committee;

12. Separate Accounting. DCA shall maintain a separate accounting for funds generated from administration of the Act (hereinafter "Geology Program Funds") and shall not "lump" such funds into BPELS' account. Geology Program Funds shall only be used by BPELS to administer the Act, which shall include payment for the Geology Program contract personnel and expenses related to the Geology Program Committee described herein;

13. Dismissal of Application for Preliminary Injunction. As consideration for Stiger's acceptance and his further agreement to direct DCA, BPELS, and Legal Affairs to comply with this Agreement and each of the terms, CAPG agrees to accept the terms and covenants described above and shall promptly dismiss its Action with prejudice;

14. Dismissal of Declaratory Relief Action with Prejudice. As consideration for Schwarzenegger's acceptance and agreement with the terms described herein, CAPG agrees to accept the terms and covenants described above and promptly dismiss the Declaratory Relief Action or other litigation as may be pending at the time of execution of this Agreement;

15. Mutual Releases. The Parties, and each of them, for themselves, their insurers, their successors-in-interest, agents and/or assigns, do fully and forever release, acquit and discharge one another, and their affiliated and/or subsidiary companies, together with any and all past, present and future employees, agents (whether ostensible or actual), officers, directors, shareholders, insurance carriers, attorneys, successors, predecessors, assigns, and servants from and of any and all claims, demands, rights, and causes of action of every kind, nature or character, whatsoever, whether known or unknown, suspected or unsuspected, actual or potential, absolute or contingent, pending or anticipated, including, without limitation, any claims for damages as not yet occurred, which they may have, which may arise from the facts and allegations which are the subject of this Agreement.

16. No Further Claims. The Parties, and each of them, further agree that they will not institute any action, claim or proceeding in any court or other tribunal for relief based in whole or in part upon any act, action, claim or demand which is the subject of this Agreement unless enforcing a breach of this Agreement;

17. Forbearance. The Parties hereby covenant and agree never to commence or prosecute either individually or on behalf of any other person and/or entity, against any other Party, or any of them, any action or proceeding based upon a claim that is the subject matter of this Agreement, and this Agreement shall constitute a judicial bar to the institution or maintenance of any such action or proceeding.

18. Full Agreement. This Agreement constitutes the full and entire agreement between the Parties hereto and each such Party acknowledges that there is no other agreement, oral and/or written, between the Parties hereto. **19.**

Execution in Counterparts. This Agreement may be executed in counterparts, with the same force and effect as if executed in one complete document.

20. Authority. Each individual signing this Agreement warrants and represents that s/he has full authority to execute the Agreement on whose behalf s/he so signed.

21. Construction. The Parties to this Agreement, and each of them acknowledge (i) this Agreement and its reduction to the final written form is the result of extensive good faith negotiations between the Parties through their respective counsel to the extent each deemed such counsel necessary, (ii) said CLIENT and/or their counsel have carefully reviewed and examined this Agreement before execution by said Parties, or any of them, and (iii) any statute or rule of construction that ambiguities are to be resolved against the drafting Party shall not be employed in the interpretation of this Agreement.

22. Costs. The Parties shall bear their own fees and costs with respect to the claims being released herein, however, in the event that any Party should bring an action or other proceeding for the enforcement of, or seek a declaration as to, or assert by way of defense, any term or provision of this Agreement, then there shall be an award of reasonable attorneys' fees and costs to the prevailing Party or Parties pertaining to such enforcement action.

23. Duration of Agreement. This Agreement shall remain in full force and effect for so long as BPELS retains authority for administration of the Act and/or until subsequent legislation modifies or supersedes this Agreement.

24. Severability. Should legislation action specifically supersede this Agreement or any of its terms, or should any of the terms herein be declared invalid or unenforceable, the remaining terms shall remain in full force and effect.

25. Signatures.

BY: ARNOLD SCHWARZENEGGER AS GOVERNOR OF THE STATE OF CALIFORNIA: _____ Date: _____

BY: BRIAN STIGER AS DIRECTOR OF THE CALIFORNIA DEPARTMENT OF CONSUMER AFFAIRS _____ Date: _____

BY: CHARLES NESTLE, PRESIDENT CALIFORNIA ASSOCIATION OF PROFESSIONAL GEOLOGISTS, INC. _____ Date: _____

OFFICE OF THE ATTORNEY GENERAL, ATTORNEYS FOR DEFENDANTS _____ Date: _____
DEUTSCH & ASSOCIATES, ATTORNEYS FOR PLAINTIFFS _____ Date: _____