Gavin Newsom, Governor

Board for Professional Engineers, Land Surveyors, and Geologists

Meeting of the Board for Professional Engineers, Land Surveyors, and Geologists

Thursday, April 11, 2019 beginning at 9:00 a.m.
and continuing on Friday, April 12, 2019
beginning at 9:00 a.m., if necessary

City of Calabasas, Founders Hall
200 Civic Center Way
Calabasas, CA 91302

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MEETING OF THE BOARD FOR PROFESSIONAL ENGINEERS,
LAND SURVEYORS, AND GEOLOGISTS
APRIL 11-12, 2019

City of Calabasas, Founders Hall
200 Civic Center Way
Calabasas, CA 91302

BOARD MEMBERS
Mohammad Qureshi, President; Fel Amistad, Vice President; Natalie Alavi; Alireza Asgari; Duane Friel; Andrew Hamilton; Kathy Jones Irish; Eric Johnson; Coby King; Asha Lang; Betsy Mathieson; Frank Ruffino; Jerry Silva; Robert Stockton; and Steve Wilson

D. Pending Litigation [Pursuant to Government Code section 11126(e)]

1. Mauricio Jose Lopez v. Board for Professional Engineers, Land Surveyors, and Geologists, Department of Consumer Affairs, San Bernardino County Superior Court Case No. CIVDS1718786

XVI. Open Session to Announce the Results of Closed Session

XVII. Adjourn

I. Roll Call to Establish a Quorum

II. Pledge of Allegiance

III. Public Comment for Items Not on the Agenda

NOTE: The Board cannot take action on items not on the agenda. The Board will also allow for Public Comment during the discussion of each item on the agenda. Please see the last page of this Official Notice and Agenda for additional information regarding Public Comment.

IV. Hearing on the Petition for Reinstatement of the Revoked License of Jeffrey Canfield

This hearing will be held on Thursday, April 11, 2019, beginning at 9:00 a.m., or as soon thereafter as the matter may be heard.

V. Sunset Review (Possible Action)

A. Response to the Issues Raised in the Background Paper

B. Discussion of the Impact of the California Supreme Court decision in Dynamex Operations West, Inc. v. Superior Court (4 Cal.5th 903) on the Board's Operations and Licensees in Response to Issue #3 in the Sunset Review Background Paper.

BACKGROUND PAPER FOR THE
Board of Professional Engineers, Land Surveyors, and Geologists

Joint Oversight Hearing, March 5, 2019

Senate Committee on Business, Professions and Economic Development
and
Assembly Committee on Business and Professions

BRIEF OVERVIEW OF THE BOARD FOR PROFESSIONAL ENGINEERS, LAND SURVEYORS, AND GEOLOGISTS

History and Function of the Board

The Board of Professional Engineers, Land Surveyors, and Geologists (Board or BPELSG) has operated in its current form since January 1, 2011, however the professions regulated by the Board have been supervised by various regulatory entities for much longer.

Land Surveyors have been licensed in California since 1891, the same year that the Legislature established the State Surveyor General. In 1933 the Legislature enacted the Professional Land Surveyors Act (Business and Professions Code (BPC) Section 8700), abolishing that office and expanding the authority of the Board of Registration for Civil Engineers to include Land Surveyors. Civil Engineers had been regulated by the Board since 1929 when the legislature determined that the unregulated design of construction projects represented a hazard to the public.

The Professional Engineers Board had regulated various other categories of engineering since just after the end of World War II when the legislature required the registration of chemical, electrical, and petroleum engineers in 1947. The law was further amended in 1968 to give the Board authority to create new title acts via petition by practitioners. Eventually the Board came to regulate agriculture, control system, corrosion, fire protection, manufacturing, nuclear, quality, safety, and traffic engineering. Land surveying laws were later amended so that civil engineers licensed after January 1, 1982 would no longer have authority to practice surveying without an additional license as a land surveyor. Currently there are nine remaining title acts overseen by the Board: agricultural, chemical, control systems, fire protection, industrial, metallurgical, nuclear, petroleum, and traffic engineering.

The former Board for Geologists and Geophysicists was created in 1969 and was driven by concern over landslides in Southern California and associated losses. In 2009 the duties and authorities of the Board were transferred to the Board for Professional Engineers and Land Surveyors. In 2011 the name of the Board was changed to its current incarnation as the Board for Professional Engineers, Land Surveyors, and Geologists.

The current BPELSG mission statement, as stated in its 2015-2018 Strategic Plan, is as follows:

The Mission of the Board for Professional Engineers, Land Surveyors, and Geologists is to protect the public's safety and property by promoting standards for competence and integrity through licensing and regulating the Board's professions. The Board accomplishes its Mission by:

- ***Empowering applicants and licensees with a method for providing services in California.***
- ***Promoting appropriate standards so that qualified individuals may obtain licensure.***
- ***Ensuring that statutes, regulations, policies, and procedures strengthen and support its mandate and mission.***
- ***Protecting health and safety of consumers through the enforcement of the laws and regulations governing the practices of engineering, land surveying, geology, and geophysics.***
- ***Promoting the importance of licensing in an effort to regularly and consistently educate consumers, licensees, and stakeholders about the practice and regulation of the professions.***
- ***Working to develop and maintain an efficient and effective team of professional and public leaders and staff with sufficient resources to improve the Board's provision of programs and services.***

Licensing

The licenses and certifications currently regulated by the BPELSG are comprised of three primary categories: Practice Acts, Title Acts, and Title Authorities. Practice Act licenses indicate that both the actual practice and the use of the title are regulated. Title Act licenses indicate that only the use of the title is regulated and the actual practice is not. Title Authorities represent additional authorities obtained by an individual that is subsequent to a practice act license. The following chart illustrates these primary categories.

For example, someone seeking to use the title of Structural Engineer, a title protected by title authority, must be licensed as a Civil Engineer first. Under this structure, the Board licenses and regulates 25 license types with the highest licensee populations being Civil, Mechanical, and Electrical engineers, in that order. Each profession has its own scope of practice, entry-level requirements, and professional settings, with some overlap in areas as dictated by the Title Authorities.

Practice Acts	Title Acts	Title Authorities
Civil Engineer	Agricultural Engineer	Geotechnical Engineer
Electrical Engineer	Chemical Engineer	Structural Engineer
Land Surveyor	Control System Engineer	Certified Engineering Geologist
Mechanical Engineer	Fire Protection Engineer	Certified Hydrogeologist
Professional Geologist	Industrial Engineer	
Professional Geophysicist	Metallurgical Engineer	
	Nuclear Engineer	
	Petroleum Engineer	
	Traffic Engineer	

Professional Engineering Practice Acts

Civil Engineering:

- Relates to the design, analysis, investigation, etc. of fixed works for 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, grading, framed and homogeneous structures, buildings, or bridges;
- Also includes engineering surveying, which involves locating, relocating, establishing, reestablishing, and retracing the alignment or elevation of any of the fixed works within the practice of civil engineering, and also involves determining the configuration or contour of the earth's surface or the position of fixed objects above, on, or below the surface by applying principles of trigonometry or photogrammetry.

Electrical Engineering:

- Relates to the generation, transmission, and utilization of electrical energy, including the design of electrical, electronic, and magnetic circuits, and the technical control of their operation and of the design of electrical gear; it also includes the research, organizational, and economic aspects of the above. [Note: The statute specifies that the design of electronic and magnetic circuits is not exclusive to the practice of electrical engineering.]

Mechanical Engineering:

- Deals with engineering problems relating to generation, transmission, and utilization of energy in the thermal or mechanical form; to the production of tools, machinery, and their products; and to heating, ventilation, refrigeration, and plumbing; including the research, design, production, operational, organizational, and economic aspects of the above.

Professional Engineering Title Acts

Agricultural Engineering:

- Involves the engineering sciences relating to physical properties and biological variables of foods and fibers; atmospheric phenomena as they are related to agricultural operations; soil dynamics as related to traction, tillage, and plant-soil-water relationships; and human factors relative to safe design and use of agricultural machines; also includes the safe and proper application and use of agricultural chemicals and their effect on the environment.

Chemical Engineering:

- Relates to the development and application of processes in which chemical or physical changes of materials are involved and are usually resolved into a coordinated series of unit physical operations and unit chemical processes.

Control System Engineering:

- Relates to the science of instrumentation and automatic control of dynamic processes; and planning, development, operation, and evaluation of systems of control.

Fire Protection Engineering:

- Involves understanding the engineering problems relating to the safeguarding of life and property from fire and fire-related hazards; and applying that knowledge to the identification, evaluation, correction, or prevention of present or potential fire and fire-related panic hazards in

buildings, groups of buildings, or communities; includes recommending the arrangement and use of fire-resistant building materials and fire detection and extinguishing systems, devices, and apparatus.

Industrial Engineering:

- Requires the ability to investigate, to design, and to evaluate systems of persons, materials and facilities for the purpose of economical and efficient production, use, and distribution by applying specialized engineering knowledge of the mathematical and physical sciences, together with the principles and methods of engineering analysis and design to specify, predict, and evaluate the results to be obtained from such systems.

Metallurgical Engineering:

- Involves applying the principles of the properties and behavior of metals in solving engineering problems dealing with the research, development, and application of metals and alloys, as well as the manufacturing practices of extracting, refining, and processing of metals.

Nuclear Engineering:

- Encompasses, but is not limited to, the planning and design of the specialized equipment and process systems of nuclear reactor facilities; and the protection of the public from any hazardous radiation produced in the entire nuclear reaction process. These activities include all aspects of the manufacture, transportation, and use of radioactive materials.

Petroleum Engineering:

- Involves the exploration, exploitation, location, and recovery of natural fluid hydrocarbons, including research, design, production, and operation of devices, and the economic aspects of the above.

Traffic Engineering:

- Involves understanding the science of measuring traffic and travel and the human factors relating to traffic generation and flow; and requires the ability to apply this knowledge to planning, operating, and evaluating streets and highways and their networks, abutting lands and interrelationships with other modes of travel, to provide safe and efficient movement of people and goods.

Professional Engineering Title Authorities

"Soil Engineering," as it relates to the authorization to use the title "Geotechnical Engineer":

- Involves the investigation and engineering evaluation of earth materials including soil, rock, groundwater, and man-made materials and their interaction with earth retention systems, structural foundations, and other civil engineering works;
- Also involves application of the principles of soil mechanics and the earth sciences, and requires a knowledge of engineering laws, formulas, construction techniques, and performance evaluation of civil engineering works influenced by earth materials.

[Note: The terms "soil engineering," "soils engineering," and "geotechnical engineering" are synonymous, as are the titles "Soil Engineer," "Soils Engineer," and "Geotechnical Engineer."]

"Structural engineering," as it relates to the authorization to use the title "Structural Engineer":

- Involves the application of specialized civil engineering knowledge and experience to the design and analysis of buildings or other structures that are constructed or rehabilitated to resist forces induced by vertical and horizontal loads of a static and dynamic nature; and requires the design and analysis to include consideration of stability, deflection, stiffness, and other structural phenomena that affect the behavior of the building or other structure;
- Also includes familiarity with scientific and mathematical principles, experimental research data, and practical construction methods and processes.

As of 2018, the BPELSG licenses and regulates more than 83,446 Professional Engineers in the Practice Act disciplines (Civil, Mechanical, & Electrical), 4,173 Land Surveyors, and 6,790 Geologists and Geophysicists. Each profession has its own scope of practice, entry-level requirements, and professional regulations.

Not all engineers who practice in California have to be licensed. There are a number of licensing exemptions for engineers who work as subordinates to (under the responsible charge of) licensed engineers, or who work for industrial corporations, public utilities, or the federal government. In 1997, the industrial exemption was broadened to include temporary employees, contract employees, and those hired through third-party contracts.

Professional Geology and Geophysics Practice Acts

Geology
- the science which treats of the earth in general, including the investigation of the earth's crust and the rocks and other materials which compose it; and the applied science of utilizing knowledge of the earth and its constituent rocks, minerals, liquids, gases, and other materials for the benefit of mankind.

Geophysics
- the science which involves study of the physical earth by means of measuring its natural and induced fields of force, including, but not limited to, electric, gravity, and magnetic, and its responses to natural and induced energy and the interpreting of these measurements and the relating of them to the physics of the earth.

Professional Geology Title Acts

Engineering Geology as it relates to the Certified Engineering Geologist specialty license
- the application of geologic data, principles, and interpretation so that geologic factors and processes affecting planning, design, construction, maintenance, and vulnerability of civil engineering works are properly recognized and utilized.

Hydrogeology as it related to the Certified Hydrogeologist specialty license
- the application of the science of geology to the study of the occurrence, distribution, quantity, and movement of water below the surface of the earth, as it relates to the interrelationships of geologic materials and processes with water, with particular emphasis given to groundwater quality.

Professional Land Surveying (Practice Act)

Land Surveying
- Involves the performance of surveys for

o locating, relocating, establishing, reestablishing, or retracing the alignment or elevation of any of the fixed works embraced with the practice of civil engineering;
o determining the configuration or contour of the earth's surface, or the position of fixed objects above, on, or below the earth's surface by applying the principles of mathematics or photogrammetry;
o locating, relocating, establishing, reestablishing, or retracing any property line or boundary of any parcel of land, right-of-way, easement, or alignment of those lines or boundaries;
o the subdivision or resubdivision of any tract of land, where the term "subdivision" or "resubdivision" are defined to include, but not limited to, the definition in the Subdivision Map Act (Division 2 (commencing with Section 66410) of Title 7 of the Government Code) or the Subdivided Lands Law (Chapter 1 (commencing with Section 11000) of Part 2 of Division 4 of this Code);
o determining the position for any monument or reference point which marks a property line, boundary, or corner, including setting, resetting, or replacing any such monument or reference point.
• Geodetic or cadastral surveying.
o Geodetic surveying is defined in Business and Professions Code section 8726 to performing surveys, in which account is taken of the figure and size of the earth to determine or predetermine the horizontal or vertical positions of fixed objects thereon or related thereto, geodetic control points, monuments, or stations for use in the practice of land surveying or for stating the position of fixed objects, geodetic control points, monuments, or stations by California Coordinate System coordinates.
• Land surveying also includes:
o creating, preparing, and reviewing documents in connection with the above work;
o creating, preparing, and reviewing the description of any deed, trust deed, or other title document prepared for the purpose of describing the limit of real property in connection with the above work;
o rendering a statement regarding the accuracy of maps or measured survey data.

The BPELSG also issues certifications for "Engineer-In-Training" (EIT), "Geologist-In-Training" (GIT), and "Land Surveyor-In-Training" (LSIT), which recognizes individuals who have obtained a specific level of engineering, geology, or land surveying education or work experience, as the entry-level step towards eventual licensure.

Board Membership and Committees

The BPELSG is comprised of fifteen (15) members – seven (7) professional and eight (8) public members. The professional members are appointed by the Governor and consist of one of each:

- Civil Engineer
- Electrical Engineer
- Mechanical Engineer
- Structural Engineer
- Other Professional Engineer (any branch not otherwise represented)
- Land Surveyor
- Professional Geologist or Geophysicist.

Additionally, one professional member must be from a local public agency and another professional member must be from a State agency (Business and Professions Code (BCP) §§ 6711-12).

The eight public members are appointed in the following manner. Six (6) public members are appointed by the Governor. One (1) public member is appointed the Senate Rules Committee. One (1) public member is appointed by the Speaker of the Assembly (BPC §§ 6711-12).

An appointment to the BPELSG is for a term of four years, with vacancies filled by appointment for the unexpired term. Each appointment thereafter is for a four-year term expiring on June 30 of the fourth year following the year in which the previous term expired. A member may remain on the Board until the appointment of his or her successor or until one year has elapsed after the expiration of the term for which he or she was appointed, whichever occurs first ("grace year"). No person is allowed to serve as a member of the Board for more than two consecutive full four-year terms (BPC §6712). Board and committee meetings are subject to the Bagley-Keene Open Meetings Act. The Board generally meets six times per year to review legislation, regulatory proposals, and the budget; make policy decisions; and take action on disciplinary cases. As of December 1, 2018, there are no vacancies on the Board.

The following is a listing of the current Board members.

Member Name (Includes Vacancies)	**Appointed**	**Reappointed**	**Term Ends**	**Appointing Authority**	**Public or Professional**
Nejla Natalie Banshad-Alavi	12/17/2013	7/19/2016	6/30/2020	Governor	Professional
Fel Amistad, Vice President (FY 18/19)	11/24/2015	7/2/2018	6/30/2022	Governor	Public
Alireza Asgari	6/15/2018		6/30/2021	Governor	Professional
Duane E. Friel	10/10/2018		6/30/2019	Governor	Public
Andrew Hamilton	3/12/2018		6/30/2019	Speaker of the Assembly	Public
Kathy Jones Irish	7/6/2012	6/5/2014, 7/2/2018	6/30/2022	Governor	Public
Eric Johnson	12/3/2013	2/1/2018	6/30/2021	Governor	Professional
Coby King	5/29/2013	7/19/2016	6/30/2020	Governor	Public
Asha Malikh Brooks Lang	12/17/2013	7/19/2016	6/30/2020	Governor	Public
Elizabeth Mathieson	2/12/2015	7/2/2018	6/30/2022	Governor	Professional
Mohammad Qureshi, President (FY 18/19)	3/6/2014	6/5/2014, 7/2/2018	6/30/2022	Governor	Professional
Frank Ruffino	5/3/2018		6/30/2019	Senate Rules Committee	Public
William Jerry Silva	2/13/2008	1/2/2011, 2/12/2015	6/30/2018	Governor	Public
Robert Stockton	7/6/2012	7/10/2015	6/30/2019	Governor	Professional
Steven Wilson	6/14/2016		6/30/2019	Governor	Professional

The BPELSG currently has no standing committees and has no plans to reinstate standing committees at this time.

The BPELSG has the authority to appoint Technical Advisory Committees (TACs) (BPC §§ 6728, 7826, and 8715). A TAC consists of five licensed technical members. Board members may not serve on a TAC. These committees are appointed as needed to advise BPELSG members and staff on technical matters typically pertaining to civil engineering, electrical engineering, geotechnical engineering, mechanical engineering, structural engineering, land surveying, and geology and geophysics, although the Board may appoint TACs in other areas of practice as necessary.

The Board has not had any meetings that had to be canceled due to a lack of a quorum in the last four years. As of December 1, 2018, there are no vacancies on the Board.

Fiscal and Fund Analysis

As a Special Fund agency, the BPELSG receives no General Fund support and relies solely on fees set by statute and collected from licensing and renewal fees.

At the last sunset review the Board's budget authority was comprised of the Professional Engineer's and Land Surveyor's Fund (PELS) and the Geology and Geophysics Account (G&G). However, the G&G account was abolished effective July 1, 2016 and merged with the PELS fund. (Chapter 428, Statutes of 2015.) The new fund is abbreviated PELSG, with the inclusion of geologists.

As of July 31, 2018, the reserve fund of the Board was projected to be 6.8 months, though expenditures exceeded revenues by $2.0 million by FY 17/18. If the fiscal structure remains unchanged, the Board anticipates a deficit in FY 20/21 and a regulatory fee increase will be required in FY 19/20. The Board is researching a fee change based on an evaluation of costs that redistributes fees across all licensing disciplines while maintaining responsible reserve levels.

PELSG Fund

The total revenues (resources) anticipated in the PELSG Fund for FY 2018/19 is $16.1 million and FY 2019/20 is $14.2 million. The total expenditures anticipated from the PELS Fund for FY 2018/2019 is $12.6 million and for FY 2019/20 is $12.9 million.

The BPELSG has an outstanding loan made to the General Fund (GF) in FY 2011/12 totaling $4.5 million. The initial loan amount was $5 million with an interest rate of 0.379%. PELS Fund was repaid $500,000 in FY 2013/14 (Executive Order 127). A total of $4,200,000 has been repaid, and a scheduled repayment of $800,000 is expected in FY 18/19 to complete all repayments of the initial loan made to the GF.

In order to support and enforce statutes and regulations, the BPELSG operates four units – Enforcement, Licensing, Examination Development and Administration/Executive Services. In FY 2017/18, the total expenses relating to the Professional Engineers and Land Surveyors were:

- The Enforcement Unit for approximately 23% ($2.6 million).
- The Licensing Unit for approximately 25% ($ 2.9 million).
- The Examination Development Unit for approximately 21% ($2.3 million)

- The Administration/Executive Services Unit for approximately 15% ($1.6 million).
- The DCA Pro Rata accounted for the remaining 16% ($1.7 million).

G&G Fund
The fund balance in the G&G Fund for FY 2017/18 was $1.1 million (which is scheduled to be transferred to the PELS Fund in the current year).

Licensing and Renewal Fees
BPELSG licensees renew on a biennial cycle from the original assigned date of renewal. Renewals for professional engineers and land surveyors are staggered on a quarterly basis throughout the calendar year. Renewals for professional geologists and geophysicists are based on the licensee's birth month.

Staffing Levels

The Board's Executive Officer is appointed by the Board and serves as the executive officer of the Board. The current Executive Officer, Richard Moore, has served as executive officer since 2011. For FY 2018/19, the Board has 65.7 authorized positions, broken down as 42.7 authorized permanent positions, 1.0 authorized exempt position, and 22.0 authorized temp help positions. For FY 2019/20, the Board has reduced the number of authorized temp help positions to 3.5, for a total of 47.2 authorized positions.

The overall vacancy rates for the Board are as follows:
- FY 2014/2015: 7.0%
- FY 2015/2016: 2.3%
- FY 2016/2017: 4.6%
- FY 2017/2018: 6.2%

Since the submittal of the its sunset report, the Board has filled the vacant Senior Registrar (SR) classification position relating to civil engineering; as such, the Board is now fully staffed at the SR position. The Board has also filled the one Association Governmental Program Analyst (AGPA) position and one of the two Program Technician (PT) II positions in its Licensing Unit. The Board is continuing to recruit to fill the remaining PT II position at this time.

Licensing

The licensing program of the Board provides public protection by ensuring licenses or registrations are issued only to applicants who meet the minimum requirements of current statutes and regulations and who have not committed acts that would be grounds for denial.

During the application process, the Board checks prior crimes and unlawful acts of the applicant. The application form contains a question requiring the applicant to notify the Board of any criminal history and to provide the Board with any related court documents. To augment this background investigation, the Licensing Unit finalized the fingerprinting program so that all applicants beginning July 1, 2015, will be required to submit fingerprints for a criminal history background check from the Department of Justice and the Federal Bureau of Investigation (BPC §144).

Additionally, the educational and experience requirements must be submitted by the applicant to prove the necessary criteria are met for licensure. These criteria vary depending on the licensure sought.

As of January 1, 2015, in addition to the standard application requirements for relevant education and employment experience, the Licensing Unit includes on every application a question asking if the applicant is serving in, or has previously served in, the military (BPC §114.5). Historically, the BPELSG has always considered military experience, education, and training to qualify applicants for licensure (BPC §§ 6735.5 and 35). Further, the Board waives delinquency fees for renewal applications that were late due to military service (BPC §114.3).

Another step in the licensure process is the successful passage of the licensure examination. The BPELSG utilizes both national-level and state-developed examinations as part of the criteria to measure competency for licensure. In order to streamline the application process, the Licensing Program has undergone significant changes relating to the examination process since the last sunset review. The Board has traditionally had two exam cycles per year: one in the spring, and one in the fall. However, as the Board continues to move toward implementing more flexible opportunities to accommodate the exam needs of its candidates, exams are now being administered in several ways: continuously, once a year, twice a year, and in one-week windows. The Board does not track pending applications because, historically, there has not been a need because all applications received by the deadline date are processed before the exam cycle ends (usually a span of 2-3 months). As such, there are no pending applications by the time the exams are administered.

The BPELSG continues to actively maintain and expand its pool of experts for state-examination development through social media and outreach through licensing organizations and conferences.

School Approvals and Continuing Education

The approval of schools is not within the scope of the Board's licensing authority. The Board's laws and regulations do not require its licensees to complete continuing education/competency programs.

Enforcement

Complaints investigated by the Enforcement Unit are often complex due to the technical nature of the engineering, land surveying, geological, and geophysical professions. The majority of cases against licensees involve allegations of negligence or incompetence in their professional practices. The Enforcement Unit must obtain evidence from all of the parties involved and often retain the services of an independent Technical Expert Consultant to review all of the evidence. The consultant then opines as to whether or not the subject failed to perform his or her services in accordance with the standards of the practices or has violated other laws in his or her professional practice. With this information, the Enforcement Unit can determine the next course of action. The Enforcement Unit maintains a pool of licensees, who are independently employed in their own private practices, to serve as experts.

The Enforcement Unit also utilizes the Department of Consumer Affairs - Division of Investigation (DOI) as a resource to assist in collecting evidence for some of its investigations, particularly those involving allegations of unlicensed practice or when there is a lack of response from parties involved. DOI also assists the Board with prosecutorial actions against unlicensed practitioners in cases where violations of the Board's laws are classified as criminal violations. In these cases, the Enforcement

Unit works in conjunction with the DOI to refer cases to local district attorneys. However, these complaints rarely lead to criminal prosecution due to the local district attorneys' limited resources and the belief by the local prosecutors that these actions can be handled administratively by the BPELSG.

As a result of its investigations, the BPELSG may issue administrative citations to both licensed and unlicensed individuals. The citations may contain an order of abatement or an order to pay an administrative fine up to a maximum amount of $5,000 per incident per violation or both an order of abatement and an order to pay an administrative fine.

Another outcome of the Board's investigations, particularly in a case where the investigation reveals that a licensee has failed to meet the standard of care or has demonstrated incompetency in the professional practice, is to seek formal disciplinary action, which includes referring cases to the Office of the Attorney General, which serves as the Board's attorney in the prosecution of these matters. The table below shows the timeframes for the last three years for investigations and formal discipline. Although the timeframes for formal discipline, which include time at the Office of the Attorney General and Office of the Administrative Hearings, have decreased (as shown in the table below), they still exceed the performance measure for formal discipline as established by the Department of Consumer Affairs.

Enforcement Timeframes	FY 2015/16	FY 2016/17	FY 2017/18
Investigations: Average days to close	237	238	234
Discipline: Average Days to Complete	1078	1106	825

The table below identifies the actual formal disciplinary actions taken by the Board in the past three years.

Formal Disciplinary Actions	FY 2015/16	FY 2016/17	FY 2017/18
Accusations Filed	31	29	27
Revocation	7	6	5
Voluntary Surrender	7	3	4
Suspension	0	0	0
Probation with Suspension	0	2	0
Probation	14	13	21
Probationary License Issued	N/A	N/A	N/A
Other	5	3	3

PRIOR SUNSET REVIEWS: CHANGES AND IMPROVEMENTS

The Board was last reviewed by the Senate Committee on Business, Professions and Economic Development and the Assembly Committee on Business and Professions in 2015. During the previous sunset review, the Committee staff raised 19 issues and provided recommendations. Below are actions which have been taken over the last four years to address the issues. For those which were not addressed and which may still be of concern, they are addressed and more fully discussed under the *Current Sunset Review Issues for The Board of Professional Engineers, Land Surveyors, and Geologists* section.

Recommendation 1. Posting of Licensees' Addresses on the Website. Is the licensee's city and county of record sufficient to post on the on-line License Lookup database?

Board Response: *The Board is no longer considering pursuing legislation to amend B&P Code § 27 regarding what information is disclosed about its licensees' addresses. The Board's licensees have always had the option to provide a home address, a business address, or an alternate address, including a P. O. Box. The Board has updated its application forms to make it clear to applicants that, once licensed, their address of record will be available to the public and to indicate that they do not have to provide their home address. The Board also published an article in its Spring 2015 newsletter advising applicants and licensees about the address of record.*

Recommendation 2. Consumer Protection Enforcement Initiative. What efforts has the Board made to implement the DCA recommendations to apply the policy changes outlined in the initiative?

Board Response: *As indicated in the Board's last Sunset Report and Response, the majority of these items applied to the healing arts boards since those boards were the focus of the CPEI and SB 1111. Following the DCA list of items is the action taken by the Board or the reason that no action was taken.*

BOARD ACTION OR REASON FOR NO ACTION

Revocation for sexual misconduct

Denial of application for registered sex offender

Sexual misconduct

The Board does not believe there is a sufficient nexus to the Board's regulated professions, as there would be to the healing arts professions, to require the automatic denial or revocation of a license if the person had been convicted of a sexually-based offense, as was proposed by several of the items. The Board already has the statutory authority to deny or revoke a license based on a conviction of a crime that is substantially related to the regulated practice and regulations that define the substantial relationship and that address the rehabilitation evidence that the Board must consider prior to denying or revoking the license. The Board believes these laws are sufficient to ensure public protection in the event that an applicant or licensee is convicted of a sexually-based offense, especially with the added statutory authority that the Board now has to obtain fingerprints and criminal histories of its applicants.

Psychological or medical evaluation of applicant

The Board also did not believe there was a sufficient nexus to its regulated professions, as there was for the healing arts professions, to support requiring applicants to submit to psychological or medical evaluations as a condition for licensure.

Confidentiality agreements regarding settlements

Legislation was passed to add a provision to the Business and Professions Code (Section 143.5) to prohibit licensees from including conditions in civil settlements that would prevent a consumer from

filing a complaint or cooperating with the licensing boards during an investigation. As such, there is no need for the Board to adopt a regulation addressing that issue.

Failure to provide information or cooperate in an investigation

Failure to provide documents and failure to comply with court order

As the Board noted in its last Sunset Review and Response, the Board did not have the statutory authority to adopt regulations to require a licensee to cooperate with the Board and its staff or other representatives (such as DOI or the AG's Office) during the course of an investigation. As such, the Board could not pursue regulations to address this and sought to obtain the Committees' assistance to enact a statutory requirement similar to that already in place for the Contractors State License Board (Business and Professions Code section 7111.1). Sections 6775.2, 7860.2, and 8780.2 were added to the B&P Code, effective January 1, 2016, to address this issue (Chapter 428, Statutes of 2015).

Failure to report an arrest, conviction, etc.

The Board's statutes already require its licensees to report convictions; therefore, there is no need for the Board to enact regulations for such a requirement.

Board delegation to Executive Officer regarding stipulated settlements to revoke or surrender license

The Board is the final decision maker in matters relating to formal disciplinary actions taken against licensees. The Board did not believe it was appropriate to abrogate its responsibility to make these decisions, especially in cases that involve taking away a licensee's right to practice. Furthermore, allowing the person (the Executive Officer) who has the ultimate authority to negotiate a settlement to be the one to adopt the settlement as a final decision gives the appearance of a conflict of interest, bias, and lack of oversight by the Board. Additionally, the Board's statutes indicate that a person must wait three years to petition the Board for reinstatement of a revoked license, unless the Board specifies a shorter period of time in its order of adoption of the final decision; when considering whether to adopt a default decision that orders the revocation of a license, the Board always considers whether it should reduce that time period, and sometimes chooses to do so. This is a decision that must be made by the Board. Finally, the Board does not believe that allowing the Executive Officer to adopt default decisions and stipulations for surrender or revocation would have much impact on the aging of the Board's cases, which was the stated reason for DCA's recommendation of such delegation. The Board meets often enough to take action without delay and can also vote on formal disciplinary actions via mail ballot. As such, the Board voted to decline to amend its regulations to delegate the authority to adopt default decisions and stipulations for surrender or revocation to its Executive Officer.

Recommendation 3. Merger of the G&G Account into the PELS Fund. Considering that operational aspects after the merger of the two Boards in 2009 have been consolidated, should the two funds be combined?

Board Response: *Legislation enacted during the 4th Extraordinary Session of 2009 (ABX4 20) eliminated the Board for Geologists and Geophysicists (BGG) and transferred all of the duties, powers, purposes, responsibilities, and jurisdiction to regulate the practices of geology and geophysics to this Board. The transfer of authority became effective October 23, 2009. At the time, the former BGG's Geology and Geophysics Fund (0205) was not merged into the Professional Engineer's and*

Land Surveyor's (0770) Fund. Legislation enacted in 2016 (Bonilla, Chapter 428, AB 177) merged the Geology and Geophysics Account (0205) into the Professional Engineer's and Land Surveyor's Fund (0770). Legislation defined that the merger be effective July 1, 2016, to align with the beginning of the new Fiscal Year. All collected revenues and reported expenditures moved to the Board Fund (0770) and the remaining fund balance is scheduled to be transferred in FY 2018/19.

Recommendation 4. Out-of-State Travel and Other Travel Restriction Issues. Should travel to professional conferences that directly affect licensure of California licensees and enforcement of licensing laws be deemed "mission critical" and receive automatic budgetary approval for this type of travel?

Board Response: *During the years leading up to the Board's 2014 Sunset review, the Board indicated a severe impact associated with its ability to appropriately protect the health, safety, welfare, and property of the public due to restrictions on travel. The Board had been unable to obtain approval to travel to the majority of out-of-state meetings with the national organizations that develop, administer, and score the examinations California uses to ensure that applicants for licensure are qualified to practice in California. In addition, the Board had been unable to attend conferences held within California where its members and staff could meet with various licensee and consumer groups to discuss the laws and regulations and services the Board offers.*

The national examinations used by the Board for licensure of engineers and land surveyors are developed, administered, and scored by the National Council of Examiners for Engineering and Surveying (NCEES). The examinations used by the Board for licensure of geologists are developed and scored by the National Association of State Boards of Geology (ASBOG) and administered by the Board. The Board's participation is critical to ensure California's interests are expressed and that we are given consideration in decisions that could potentially affect future licensing applicants and current California-based licensees, ultimately trickling down to an impact on the public. Since these are national organizations, the majority of the meetings are generally held outside of California.

NCEES regularly schedules two primary member meetings on an annual basis, an Interim Zone meeting for each zone and the Annual Meeting. Each member board of NCEES is allowed one vote during the Interim Zone meeting and the Annual Meeting for actions associated with changes to the established policies or procedures related to exam development, exam administration, fees charged, model licensing criteria, and overall NCEES organizational goals. Many times, the attendees of these two primary meetings separate into concurrent sessions devoted to engineering, surveying, and board administration/enforcement discussions, which supports the Board's reasoning for making sure a sufficient number of Board representatives are present at the meeting and able to be a voice for California interests. Fifteen of the Board's twenty-two licenses and certifications require passage of the national engineering and land surveying examinations that are developed, scored, and administered by NCEES. Often, the actions will result in changes to the criteria that are considered acceptable for licensure and to the content of the exams. It is important to note that even though the Board or the State does not incur any travel or attendance related costs for representatives of the Board to participate in these meetings, the benefits associated with that attendance far outweigh the annual membership fee that the Board pays to NCEES for the right to utilize the national engineering and surveying exams for California's licensing purposes.

The Board is also an active voting member of the ASBOG. ASBOG is a national non-profit organization comprised of 30 member licensing boards from across the nation. ASBOG is dedicated to advancing professional licensure for geologists. As discussed, it develops, administers, and scores the national examinations predominantly used to license geologists in the United States. ASBOG

regularly schedules Council of Examiner Workshops twice a year and an Annual Meeting usually held in the fall concurrent with the fall workshop. These meetings are generally held to evaluate examination content and determine exam policy and fees.

As such, in-person attendance by California Board representatives at these meetings is critical towards ensuring that these actions are not discriminatory for California applicants and licensees and that the content of the exams is appropriate for licensure in California with due regard to protecting the public health, safety, welfare, and property.

Overall, California represents one-fourth of all applicants for engineering, land surveying, and geology licenses nationwide. Nevertheless, previous denials of travel requests severely curtailed the Board's involvement in the discussion and decision-making on issues that impact the licensees and consumers in our state.

Fortunately, this trend has significantly changed. Since the Board's 2014 Sunset review, representatives from the Board were granted approval to attend the majority of the requested national meetings based on the Board's continued efforts in communicating the mission-critical nature of those discussions as well as the willingness to listen to the Board's concerns by the oversight departments and agencies.

This need for the Board's continued involvement in the national licensing organizations has never been more evident due to the many nationwide discussions in recent years pertaining to the deregulation of occupational licensing in many jurisdictions. It is imperative for the Board to remain vigilant and fully aware of any changes to licensing requirements in other jurisdictions, particularly those that are located within close proximity to California due to the large volume of applicants and licensees who are located out of state. Any significant changes pertaining to the deregulation of professional occupations that the Board regulates could have a substantial impact on the ease of licensing mobility across states and a potential increase in the volume of unlicensed complaints due to individuals/businesses becoming unaware that California's regulations require licensure.

More recently, and due directly to the Board obtaining travel approval, the Board has conducted an internal Business Modernization Study which resulted in several substantial changes to how it conducts operational business. More specifically, these changes have led the Board to implement a more flexible model for future licensing candidates to sit for national examination components required by California law, which in turn facilitated a change in application guidelines to eliminate unnecessary deadlines towards streamlining the initial application and licensing process for many of the Board's applicants. Due to the concerted collaboration at national meetings with similar boards in other jurisdictions, these changes are also being implemented, or at least being considered for implementation, in a significant number of other jurisdictions with the overall goal to reduce any actual or perceived restriction to multi-jurisdictional licensing models.

The Board will continue to seek out-of-state travel approval to attend national examination meetings in order to affect policy and influence positive change on behalf of our applicants and licensees. Voting is the key component to attendance and this requires Board members and staff to be physically present. Actions associated with changes to the established policies or procedures related to exam development, exam administration, fees charged, model licensing criteria, and overall organizational goals are put to vote. As such, in-person attendance by California Board representatives at these meetings is critical towards ensuring that these actions are not discriminatory towards California applicants and licensees and that the content of the exams is appropriate for licensure in California with due regard to protecting the public health, safety, welfare, and property. Overall, California represents one-fourth of all applicants for engineering, land surveying, and geology licenses

nationwide. Our attendance in force to participate in the issues should be equal to our population size.

Recommendation 5. Pro Rata. What services does BPELSG receive for its share of pro rata?

Board Response: *Through its various divisions, DCA provides centralized administrative services to all boards and bureaus, including such services as personnel (human resources), budget monitoring, contract review and approval, legislative and regulatory review, legal services, public affairs (editing/designing the newsletter), cashiering, training, travel reimbursement processing, and some information technology services.*

The pro rata calculation is dependent upon the service provided. Some services are distributed based on staffing levels at the Board ("position allocation," such as personnel services), and some are service-level based ("cost per service," such as publication design and editing). DCA, in consultation with the Board, annually reviews and determines the pro rata to be charged to the Board. The Board continually monitors pro rata as part of its review of its overall budget.

Recommendation 6. The Need for Continued Licensure of Geophysicists in the State of California. Should the licensing of Geophysicists continue in this State and should the Board still have to provide a State-specific Professional Geophysicist (PGp) Examination to potential applicants for licensure?

Board Response: *The 2014 Sunset Review discussed a previous issue from the 2010 Sunset review related to the need to continue the regulation of the Professional Geophysicist (PGp) license. Some concerns in the past included the difficulty in the recruitment of in-state subject matter experts to assist with developing and constructing a legally-defensible licensing examination; the cost of developing such an examination, and the level of protection of the public that licensure actually provides.*

The Board discussed this issue during its meeting on April 15, 2015, where many individuals from the geophysicist and geologist community presented testimony pertaining to the benefits their clients receive due to the fact that they hold a license issued by a state agency in support of their belief that the geophysicist license should be continued. After much discussion and consideration of the testimony, the Board voted to recommend to the Committees that no changes be made at that time on the issue of the Professional Geophysicist license even though the Board recognized that the costs directly related to application processing and examinations are not sustainable due to continued low interest in obtaining a geophysicist license. The Board agreed to closely review and consider suggestions from the affected parties related to reforms, including but not be limited to:

- *Reduction for the frequency of exam administration (i.e., every other year).*
- *Eliminating the authorization for Professional Geologists to practice geophysics.*
- *Realign all examination development processes to reflect private practitioner workload.*
- *Implement mandatory participation requiring licensees to assist with exam development.*

Since that time, the Board has continued to monitor the applicant and licensee populations, as well as the interest in the profession to assist in exam development for future licensure examinations. The chart below lists the application and examination totals for the last four years.

Professional Geophysicist Applicant Population

Examination Cycle	Number of New Examinees	Number Re-Attempting Examination	Number of Examinees Who Passed Exam	Pass Rate
2014	4	2	1	17%
2015	3	5	4	50%
2016	8	1	5	56%
2017	4	2	5	83%

Below is a list of the total population of the Professional Geophysicists (PGp) as of the end of FY 2017/18.

Licensee Population					
		FY14/15	FY15/16	FY16/17	FY17/18
Professional Geophysicist License	Total Active	140	144	149	154
	Out-of-State	56	58	61	64
	Out-of-Country	4	4	4	4
	Delinquent	35	35	35	35

NOTE: *"Out of State" and "Out of Country" are two mutually exclusive categories. A licensee should not be counted in both. "Active" status includes all active licenses regardless of where the licensee is located.*

A significant issue relating to the licensure of geophysicists is the inability to retain a sufficient number of subject matter experts for developing licensing examination content and validation. Despite the Board's open and active efforts to recruit licensees for examination development, and the initial willingness of the professional licensing community's commitment to assist in this regard, the Board has continued to encounter significant difficulty in obtaining the services of the minimum number of subject matter experts required to properly support examination efforts.

The Board's psychometric vendor normally requires a minimum number of licensed subject matter experts to participate in the necessary exam development workshops for the production of a legally-defensible exam appropriately designed to measure the competence of licensing candidates. The PGp examination development normally requires three meetings per year to properly develop an examination and determine a recommended passing score. Under preferable conditions, this would require 15 to 18 licensed subject matter experts on an annual basis to support adequate exam development efforts. Over the last four years, the Board has been able to secure a total attendance of only 6 to 8 individual subject matter experts on an annual basis, and typically 3 to 4 of those same experts attend multiple meetings. As a result, the Board's psychometric vendor has raised concerns over how the statistical validity of the examination could be questionable simply due both to the low number of subject matter experts involved and the low number of exams in which to derive statistics from. While every effort is made by the Board to ensure that the examination process meets the same level of public protection assured through the examination processes for the Board's other

examinations, it is unknown, statistically speaking, whether the examination is serving its purpose simply due to the low number of examinees and the relatively low involvement from the professional community.

Another obstacle to recruitment is that the Board can only contract with licensees who reside within the state. As noted in the Licensee Population chart above, a significant portion of the licensee base resides outside of California. While the trend appears to show a slight increase in licensees, it is primarily in those licensees who reside out-of-state. The Board believes this increase is more reflective of out-of-state individuals seeking to comply with a law that is unique to California rather than an indication that the geophysicist profession is becoming more popular or necessary within the state. It is important to note that California may soon be the only state that licenses individuals as geophysicists and regulates the practice of geophysics as a separate practice. Texas, previously the only other state to license geophysicists, is in the legislative process considering abolishment of its Board of Professional Geoscientists, which regulates the practice of geophysics. [The decision date for abolishment is currently scheduled for November 14-15, 2018]

In addition to the technical component of the examination development, there are several significant examination expenses directly related to the PGp examination:

- *The cost to develop, administer, and score the PGp examination averages $17,000 to $21,000 a year, including the recruitment of expert consultants and the facilitation of development workshops.*
- *The additional costs of approximately $40,000 to perform an Occupational Analysis and Test Plan. (It is the Board's policy to require a new Occupational Analysis and Test Plan every five to seven years in accordance with normal licensing examination development industry standards for all its examinations.)*

Based on the Applicant Population chart shown above and an average of five new geophysicist applicants annually, the Board incurs a net line item loss of $5,242 to $6,439 annually (based on the required application or exam fees of $350 each, which accounts for $1,750 total revenue each year). Factoring in the requirement for producing a new Occupational Analysis and Test Plan every five years, the Board incurs a net line item loss of $10,242 to $13,106 on an average annual basis simply to produce the PGp examination.

Since California is the only known jurisdiction that issues geophysicist licenses separate from geologist licenses, the Board does not have other sources of examination content to consider in lieu of defraying costs for developing its own examination. According to a 2018 informal study conducted by the National Association of State Boards of Geology (ASBOG), at the request of the Board, 88% of the 18 member boards that responded indicated that "geophysics" is encompassed within the definition of geology in their respective jurisdictions and would require a licensed geologist to offer and perform services defined as "geophysics."

Additionally, the majority of the complaints the Board receives relating to the practice of geophysics are from licensed geophysicists against unlicensed individuals who appear to be offering geophysical services through websites or other advertisements and have acquired and use highly technical equipment such as ground-penetrating radar (GPR) instruments. While use of these instruments does provide an indication that the practice of geophysics could potentially be occurring, the Board only licenses individuals, not tools, and it is the use and interpretation of the resulting data that may likely confirm whether a license is required.

The cases sometimes lack sufficient evidence that the unlicensed individuals have actually performed work for consumers in California or that they performed work in a manner that poses a threat to the health, safety, welfare, and property of the public. Many of the firms advertising these services are located or otherwise originated in locations outside of California. Many of these unlicensed individuals are unaware that the services they are offering nationwide are regulated in California and a license is required.

Recommendation 7. Delinquent Reinstatements and Inactive Status. Should the Board adopt an "inactive" license status and standardize the requirements to reinstate delinquent licenses across all professions?

Board Response: *In 2016, the Board sponsored legislation (SB 1165 (Cannella), Chapter 236, Statutes of 2016) to extend the period in which professional engineers and land surveyors may renew delinquent licensees from three years to five years and removed the provisions that allowed for the reinstatement of a license that had been expired (delinquent) for more than three years. This change brought the provisions for engineers and land surveyors in line with similar provisions for geologists and geophysicists. At its September 2018 meeting, the Board directed staff to begin reviewing the laws relating to the retired license status and researching an "inactive" license status. Staff will be presenting the results of this review and research to the Board in the next year.*

Recommendation 8. Review of Experience Requirements to Qualify for Licensure. Are the current experience and education requirements sufficient to ensure adequate competency standards to protect public health, safety, welfare, and property?

Board Response: *Since the 2014 Sunset review, the Board made efforts to address these concerns in several different ways:*

SB 1165, Cannella (Chapter 236, Statutes of 2016) – The Board sponsored legislation that amended all three Acts under the Board's jurisdiction to clarify that individuals apply for licensure or certification and not just to sit for an examination.

16 CCR 425 (effective October 1, 2017) – The Board adopted clarifying amendments to the regulation regarding the experience required to obtain a license as a professional land surveyor.

Fall 2017 – The Board implemented changes to the application submittal process to provide more flexibility in allowing potential licensure candidates to schedule and sit for required examinations. This change has streamlined the application submittal and processing procedures.

Currently, the Board is in the process of revising 16 CCR 3031 pertaining to the education requirements for geologist and geophysicist applicants in an effort to more clearly define what would be considered as qualifying education. The regulatory proposal is currently going through the new pre-notice review process implemented by DCA and Agency. The Board anticipates it will be able to notice the proposal for public comment in December 2018.

Recommendation 9. Examination on California Laws and Regulations. Should the Board institute a required take-home examination relating to California laws and regulations as part of the licensee's renewal application?

Board Response: *During its 2014 Sunset review, the Board expressed concerns with the volume of common violations committed by licensees discovered during complaint investigations that are not*

necessarily standard of practice issues. The laws and regulations of the Board are readily available to its licensees on the Board's website. While it is expected that licensees will familiarize themselves of the laws governing their practice, it is apparent that many licensees do not review them on a regular basis or even when significant changes are made.

To ensure adequate public protection and curtail unnecessary complaint investigations, the Board expressed the belief that licensees should be required to periodically demonstrate their knowledge of the state laws and the Board's rules regulating their areas of practice.

Based on the Board's experience, licensees continually fail to adequately and independently stay abreast of critical legal and regulatory updates. The Board proposed that licensees be required to demonstrate their knowledge of the laws and regulations at the time of each renewal in an effort to curb unnecessary practice violations and to assure the public that its licensees are well versed in current applicable law.

While the Board did provide the Sunset Committee with proposed language to this effect, the Committee provided direction by way of a recommendation for the Board to pursue other legislative effort in this regard, separate from the Committee's bill. Subsequently, the Board sponsored SB 1085 during the 2016 legislative cycle which was fully vetted by the legislature and became chaptered, effective January 1, 2017.

Since that time, the Board has consulted with vendors and pertinent programs at the Department of Consumer Affairs (DCA) to arrive at an online delivery solution that would be both cost effective while proving to not be a cumbersome application to the board's licensees, while also providing the Board with a reasonably effective method for determining compliance rates that can be accountable and measurable.

During these consultations, it became apparent that the delivery model necessary for the Board to achieve its legislative purpose was beyond the (then) capabilities of software applications currently in use by DCA or would be cost-prohibitive for the Board to implement. Concurrently during this time, the Board self-embarked on a Business Modernization Study involving all of the Board's processes and operational needs with the overall goal in mind towards improving internal workflows for the Board's entire customer base and the development of stakeholder/system requirements which would primarily be used for the future determination of a new applicant and licensee management system within the Board. As part of this process, system requirements associated with an effective implementation of the proposed renewal assessment were developed.

As further result of this effort, the Board, in close collaboration with the Office of Integration Services (OIS) under DCA, has initiated the Project Approval Lifecycle (PAL) process with the California Department of Technology (CDT); obtained approval of Stage 1 plan for PAL from CDT; and as of the time of this report, recently completed and submitted the Stage 2 plan to CDT for further consideration.

While the Board has encountered rather onerous, and based on the Board's observations in some instances, unreasonable cost expectations associated with the aforementioned PAL process implemented by CDT, the Board does anticipate that its responsibilities for implementing the renewal assessment requirements will be included within the planned acquisition/implementation of the new applicant and licensing management system sometime during the 2019-20 time period.

Recommendation 10. Complaint Timelines Over Two Years to Reach Resolution. Is the Enforcement Program as it currently operates able to reduce its timeline for average complaint resolution to meet DCA's goal into the twelve to eighteen month range?

Board Response: *The Board has aggressively focused its efforts to reduce the average age of resolution of complaint investigation cases. Over the last four years, the average days to complete the desk investigation phase has been reduced to approximately eight months. However, the Board recognizes that it is not yet meeting the goal set by DCA to complete formal disciplinary action cases within 540 days. The external factors affecting this issue are addressed more thoroughly in Section 5 – Enforcement Program.*

Recommendation 11. Licensee Response Requirement. Should the Board have the authority to require a licensee to respond to the Board's requests for information relating to a complaint?

Board Response: *Through the Board's 2015 Sunset legislation (AB 177 (Bonilla), Chapter 428, Statutes of 2015), sections were added to the Professional Engineers Act, the Geologist and Geophysicist Act, and the Professional Land Surveyors' Act to require licensees to cooperate with the Board during investigations of the licensees themselves. The successful effectiveness of these laws is fully addressed in Section 5 – Enforcement Program. Additionally, when these laws were enacted, a sunset date of January 1, 2020, was included to allow time to monitor how effective the requirement would be. Based on the low number of licensees who fail to respond to and cooperation with the Enforcement Unit during the investigations, the Board believes these laws are working as intended and the sunset date included in each section needs to be eliminated so that these laws will be permanent.*

Recommendation 12. Unlicensed Activity – Online Advertising and Cellular Telephones. Should the Board have the ability to request the shut-down of websites and cellular phones for persons engaged in the unlicensed practice of the professions?

Board Response: *The use of mobile telephones and web sites for the purposes of advertising professional services has greatly increased since the Board's last Sunset Review. The Board would like to continue to pursue studying methods to inhibit illegal solicitation of services and the management of businesses by unlicensed individuals.*

Recommendation 13. Citation and Fine Recovery Options. Should the Board have other options for recovering fines from unlicensed persons?

Board Response: *The Board currently has few feasible options for recovering fines from unlicensed individuals. The Board does participate in the FTB recovery program, which allows collection of state tax refunds and lottery and gambling winnings. The only other options available to the Board, pursuing collection through the civil courts or collection agencies, are cost-prohibitive. The Board's ongoing concerns with the recovery of fines from unlicensed individuals are more fully discussed in Section 5 – Enforcement Program, Cite and Fine.*

Recommendation 14. Regulation of the Business Entity Requirements. How can the Board monitor compliance, oversight, and enforcement of the requirement that business entities be properly structured under BPC § 6738 and BPC § 8729?

Board Response: *The Board's ongoing review of the issues regarding the regulation of business entities is fully discussed in Section 5 – Enforcement Program.*

More specifically, the Board would like to research options for licensing companies, such as Certificates of Authorization which are issued in many other states, in order to provide the Board the opportunity to exercise more authority over companies not operating in compliance with the Board's law. The Board has been exploring, through its Business Modernization Project, means to integrate certain data elements that will better enable the tracking of licensee association with California companies operating in California. The Board would also like to enact the same requirements for geology and geophysics companies as may be enacted for engineering and land surveying companies.

Recommendation 15. BreEZe Rollout. What is the status of BreEZe implementation by the Board?

Board Response: *As addressed in Section 9 – Current Issues, IT Issues and BreEZe, the Board is one of the 19 boards and bureaus that were formerly scheduled to be in Release 3 for BreEZe implementation when that release was removed from the project. The Board is currently still on DCA's legacy systems, the Applicant Tracking System (ATS) and the Consumer Affairs System (CAS), for the day-to-day operations of processing applications, licensure, and enforcement efforts, with additional tracking through workarounds using spreadsheets and databases created in-house. The Board is currently participating in the Department of Technology's (CDT) Project Approval Lifecycle (PAL) (project #1111-016). The status of this project is fully addressed in Section 9 – Current Issues, IT issues and BreEZe.*

Recommendation 16. Webcasting. Should the Board be required to webcast its meetings?

Board Response: *The Board believes that providing opportunities for the public to actually participate in the discussions at Board meetings is of prime importance; however, webcasting does not allow for such actual participation by the public. A webcast is simply a static video recording; it is not a video conference that allows for interaction between the individuals physically present at the meeting location and those viewing it remotely. The Board's concerns with webcasting are fully discussed under Section 6 – Public Information Policies, Webcasting and Meeting Calendar.*

Recommendation 17. Technical, Clean-Up Legislation. What BPC sections need non- substantive updates and what language is needed to standardize the Professional Engineers Act, the Land Surveyor's Act, and the Geologists & Geophysicists Act?

Board Response: *Since the last Sunset Review, legislation has been enacted to standardize and provide technical clean-up of various provisions in the Professional Engineers Act, the Geologist and Geophysicist Act, and the Professional Land Surveyors' Act. This legislation is summarized in Section 1 – Background and Description of the Board and Regulated Profession, All Legislation Sponsored by the Board and Affecting the Board since the Last Sunset Review. Other clean-up legislation identified by the Board is addressed under Section 11 – New Issues.*

Recommendation 18. Definition of Significant Structures and Requirement that Limits Their Design to Structural Engineers. Should "significant structures" language be added to BPC §6735 that limits the design of these designated structures to licensed structural engineers?

Board Response: *As directed by the Committees during the last Sunset Review, the Board facilitated discussions between the professional associations regarding the proposal by the Structural Engineers Association of California (SEAOC) and provided a status report to the Committees in 2016. A copy of the letter sent to the Committees is included in Section 12 – Attachments, Attachment G. It is the Board's understanding that SEAOC is still considering pursuing this proposal; however, until legislation is introduced, the Board has no involvement in this matter.*

Recommendation 19. Continued Regulation by the Board. Should the licensing and regulation of engineers, land surveyors, and geologists be continued and regulated by the current Board membership?

Board Response: *Legislation enacted in 2016 (AB 177 (Bonilla), Chapter 428, Statutes of 2016) continued the regulation of engineers, land surveyors, geologists, and geophysicists by the Board for another four years. The Board believes the information contained in this report supports the continued operation of the Board.*

CURRENT SUNSET REVIEW ISSUES FOR THE BOARD OF PROFESSIONAL ENGINEERS, LAND SURVEYORS, AND GEOLOGISTS

The following are unresolved issues pertaining to the Board, or those which were not previously addressed by the Committees, and other areas of concern for the Committees to consider along with background information concerning the particular issue. There are also recommendations the Committee staff have made regarding particular issues or problem areas which need to be addressed. The Board and other interested parties, including the professions, have been provided with this *Background Paper* and can respond to the issues presented and the recommendations of staff.

BUDGET ISSUES

ISSUE #1: ***What is the status of the long term fund condition?***

Background: The Board receives no General Fund support and relies solely on licensing and renewal fees. As of July 2018 the Board's reserve is projected at 6.8 months, equating to $7.2 million fund balance. Due to issues with FI$Cal, the Board does not currently have estimates for the FY 2017/18 but expects to have them in March 2019. However, the Board does note that it exceeded revenues in FY 2017/18 by $2.0 million,

The Board notes in its report that if its fiscal structure remains unchanged, it will encounter a deficit in FY 2020/21. To prevent this, the Board is researching a regulatory fee change based on an evaluation of actual costs that would redistribute all fees and provide a more consistent fee structure.

Table 2. Fund Condition [1]
FY 2014/15 – FY 2015/16: 0770 Engineer's & Land Surveyor's Fund [2]

FY 2016/17 – FY 2019/20: 0770 Professional Engineer's, Land Surveyor's, and Geologist's Fund [2]						
(Dollars in Thousands)	**FY 2014/15**	**FY 2015/16**	**FY 2016/17**	**FY 2017/18**	**FY 2018/19**	**FY 2019/20**
Beginning Balance	$5,832	$6,991	$8,263	$10,042	$7,238	$5,381
Prior Year Adjustment	-$45	$28	$8	$0	$0	$0
General Revenues	$8,048	$8,994	$8,988	$8,822	$8,892	$8,863
Total Revenue	**$13,835**	**$16,013**	**$17,259**	**$18,864**	**$16,130**	**$14,244**
Loans to General Fund	$0	$0	$0	$0	$0	$0
Loans Repaid From General Fund	$500	$0	$3,200	$0	$800	$0
Accrued Interest, Loans to General Fund	$0	$0	$0	$0	$1,131	$0
Total Resources	**$14,335**	**$16,013**	**$20,459**	**$18,864**	**$18,061**	**$14,244**
Budget Authority					$11,828	$12,065
Expenditures	$7,336	$7,732	$9,853	$10,927		
Other Adjustments (SCO, Fi$Cal)	$9	$18	$564	$699	$852	$852
Total Expenditures	**$7,345**	**$7,750**	**$10,417**	**$11,626**	**$12,680**	**$12,917**
Fund Balance	**$6,990**	**$8,263**	**$10,042**	**$7,238**	**$5,381**	**$1,327**
Months in Reserve	**10.8**	**9.5**	**10.4**	**6.8**	**5.0**	**1.2**

Table 2. Fund Condition – 0205 Geologist and Geophysicist Account [1, 2]						
(Dollars in Thousands)	**FY 2014/15**	**FY 2015/16**	**FY 2016/17**	**FY 2017/18**	**FY 2018/19**	**FY 2019/20**
Beginning Balance	$989	$1,122	$1,132	$1,131		
Prior Year Adjustment	$98	$66	-$1	$0		
General Revenues	$1,103	$1,083	$0	$0		
Total Resources	**$2,190**	**$2,271**	**$1,131**	**$1,131**		
Budget Authority						
Expenditures	$1,067	$1,136			**N/A [2]**	**N/A [2]**
Other Adjustments (SCO, Fi$Cal)	$1	$3	**N/A [2]**	**N/A [2]**		
Total Expenditures	**$1,068**	**$1,139**				
Fund Balance	**$1,122**	**$1,132**	**$1,131**	**$1,131**		
Months in Reserve	**11.8**	**N/A [2]**	**N/A [2]**	**N/A [2]**		

Staff Recommendation: ***The Board should advise the committees on the source of its excess expenditures and whether anticipated fee increases will be sufficient to prevent further shortfalls in the near future.***

LICENSING ISSUES

ISSUE #2: ***Does the Board need more staff in order to meet its performance goals?***

Background: The Board has indicated that it faces challenges in effectively tracking delays in license processing due to the variance in statutory requirements for its various license types. Additionally, while the Board will accept an application for licensure as a professional engineer or land surveyor at any time throughout the year, it has historically only offered required examinations twice a year. Similarly, applicants for licensure in the geology and geophysics professions still must meet filing deadlines due to the need to schedule for national and state exams that are administered only once per year on a specific date. The Board indicates that though pending applications often are greater than completed applications, the application pool stabilizes within two months of each application deadline when exams are offered.

In FY 2016/17, the Board performed an internal reorganization of staff from three units into four units to better address the administrative, examination, licensing, and enforcement functions of the Board. The Licensing Unit was split back into two units. Previously, the unit associated with examination functions was combined with the application-processing unit to form a single unit. It had been anticipated that the integration of these units would help to increase communication, training, and direction to improve the processing time of applications and the efficiency of issuing new licenses. In three years, the Board did not see the results it had anticipated and decided to separate the units. Having the units separate again has allowed each unit to have its own manager who can focus on the needs and development of that specific unit.

The Board completed its required processes in 2013 to enable it to hire a licensed Geologist Registrar and, in 2015, was finally able to appoint a full-time Geologist Registrar. The addition of the new staff position has allowed technical review of applications to be done on a flow basis, thus improving the application review and approval processing time and providing consistency throughout all application review. The Geologist Registrar has also served as a technical resource for all geological matters relating to the Board and has participated in outreach events on behalf of the Board.

The Board indicates that it continues to use the DCA legacy systems for licensing and application processing (the Consumer Affairs System (CAS) and the Applicant Tracking System (ATS)). These systems are antiquated and requests for updates/fixes can be a lengthy, costly, and, in some cases, non-existent. The lengthy process for updates or correction can significantly affect the processing of applications, which may delay the licensing of applicants.

Staff Recommendation: ***The Board should advise the Committee of what additional steps it will be taking to address licensing delays. Additionally, the Board should advise the Committees on its efforts to offer year-round examination and whether additional action is necessary to expedite licensing timelines.***

ISSUE #3: ***Does the new test for determining employment status, as prescribed in the court decision*** **Dynamex Operations West Inc. v. Superior Court,** ***have any potential implications for licensees of the Board working as independent contractors?***

Background: In the spring of 2018, the California Supreme Court issued a decision in *Dynamex Operations West, Inc. v. Superior Court* (4 Cal.5th 903) that significantly confounded prior assumptions about whether a worker is legally an employee or an independent contractor. In a case involving the classification of delivery drivers, the California Supreme Court adopted a new test for determining if a worker is an independent contractor, which is comprised of three necessary elements:

A. That the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
B. That the worker performs work that is outside the usual course of the hiring entity's business; and
C. That the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Commonly referred to as the "ABC test," the implications of the *Dynamex* decision are potentially wide-reaching into numerous fields and industries utilizing workers previously believed to be independent contractors. Occupations regulated by entities under the Department of Consumer Affairs are no exception to this unresolved question of which workers should now be afforded employee status under the law. In the wake of *Dynamex*, the new ABC test must be applied and interpreted for licensed professionals and those they work with to determine whether the rights and obligations of employees must now be incorporated.

Staff Recommendation: ***The Board should inform the committees of any discussions it has had about whether the* Dynamex *decision may somehow impact the professions under its jurisdiction.***

ENFORCEMENT ISSUES

ISSUE #4: ***Why are the Board's enforcement timeframes increasing?***

Background: The Board has noted "aggressive efforts" to reduce processing times for complaint investigations, however, the Board also notes that its efforts have been significantly impacted by delays at the Department of Investigation (DOI). Over the last four fiscal years, 57% of the completed cases that were referred to DOI took more than a year to process. Because DOI also investigates cases on behalf of other boards and bureaus within DCA, it must set priorities for its investigations. Those cases that present evidence of an immediate threat to the public health, safety, and welfare receive the highest priority. The Board notes that since there is rarely the same level of "immediate threat" relating to the practices of professional engineering, land surveying, geology, and geophysics as there might be with cases involving nursing or other healing arts professions, DOI does not give the Board's cases the highest priority.

Enforcement Timeframes	FY 2015/16	FY 2016/17	FY 2017/18
Investigations: Average days to close	237	238	234
Discipline: Average Days to Complete	1078	1106	825

The Board also notes its desire to collaborate more closely with DOI on efforts to more effectively investigate the Board's cases. As the Board overwhelmingly refers its complaints to investigation, it seems plausible that enforcement delays may in fact be attributable to this hand-off.

Staff Recommendation: ***The Board should advise the Committee about where it believes the bottlenecks are in its investigation processes and disciplinary actions in addition to the backlog at DOI. In the Board's opinion, what are viable solutions to the extensive timeframes in its enforcement processes? The Board should inform the committees of what steps it has taken to***

increase productivity between DOI and the Board and if there impediments that the committees may be able to address.

ISSUE #5: ***What is the Board doing to counteract unlicensed activity?***

Background: Over the last several years, the Board has increasingly observed the proliferation of unlicensed activity. This increase in activity coincides with the advancement of electronic technology, especially Global Positioning System (GPS) and Ground Penetrating Radar (GPR) technology and particularly as the use of that equipment or tools related to the practices of land surveying and geophysical studies.

The Board has consistently stated that unlicensed activity is more about the practice of the activity and actions than it is about the use of technology or tools. However, despite this, the Board has observed that GPS and other widely available technologies are being utilized by unlicensed laypersons. The evolution of GPS technology and decreased cost of equipment have made the acquisition and use of that equipment or tools more easily accessible to many others outside of the traditional land surveying industry. The Board notes that GPS equipment is not a perfect tool and just like any other highly sophisticated tools, can produce inconsistent or incorrect results if not used properly.

Another example is the use of Ground Penetrating Radar (GPR) technology. GPR is an electromagnetic equivalent to sonar, but conducted through the earth to detect abnormalities within the subsurface portion of the earth's crust. It is the Board's understanding that licensed geophysicists consider GPR equipment as only one tool to be used along with other technology or equipment to confirm data findings prior to reporting.

As with the use of GPS equipment, it is not the actual operation of GPR equipment or tool that is considered the practice of geophysics in California, but rather the intended purpose and interpretation of the data results that is being produced by the GPR device including any subsequent recommendations for how to rely upon that data which is considered an activity associated with the practice of geophysics in California. While primarily designed for the above stated purpose, many users of GPR technology also use the equipment to detect the presence of reinforcing steel within concrete buildings and bridges or for use by law enforcement personnel during criminal investigations for the purposes of recovering evidence of organic material within the subsurface of the earth.

More recently, the Board has seen an increase in the use of GPR by businesses that provide on-site field services to locate existing underground utilities prior to excavation. The Board writes that it has participated in several outreach presentations at industry events related to the use of GPR and related services and has established a close working relationship with the recently formed California Facilities Safe Excavation Board in an effort to collaborate and extend its reach. Despite this, the Board continues to receive complaints about this practice and encounters businesses throughout the state that are completely unaware of the geophysics licensing requirements or that they may be in violation of several state laws.

Staff Recommendation: ***The Board should advise the Committee of its ongoing efforts to combat unlicensed activity and what outreach efforts have been pursued to educate unlicensed operators.***

TECHNOLOGY ISSUES

ISSUE #6: ***What is the status of BreEZe implementation by the Board?***

Background: The BreEZe Project was to provide DCA boards, bureaus, and committees with a new enterprise-wide enforcement and licensing system. BreEZe would replace the existing outdated legacy systems and multiple "work around" systems with an integrated solution based on updated technology.

BreEZe would have provided all DCA organizations with a solution for all applicant tracking, licensing, renewal, enforcement, monitoring, cashiering, and data management capabilities. In addition to meeting these core DCA business requirements, BreEZe was intended to improve DCA's service to the public and connect all license types for an individual licensee. BreEZe is web-enabled, allowing licensees to complete applications, renewals, and process payments through the Internet. The public can also file complaints, access complaint status, and check licensee information.

BreEZe is an important opportunity to improve the Board's operations to include electronic payments and expedite processing. Staff from numerous DCA boards and bureaus have actively participated with the BreEZe Project. Due to increased costs in the BreEZe Project, SB 543 (Steinberg, Chapter 448, Statutes of 2011) was amended to authorize the Department of Finance (DOF) to augment the budgets of boards, bureaus and other entities that comprise DCA for expenditure of non-General Fund moneys to pay BreEZe project costs.

The Board is a "Release 3" board that never received the system and instead utilizes legacy programs and software.

It would be helpful to update the Committee about the Boards' current work to implement the BreEZe project.

Staff Recommendation: ***The Board should update the Committee about the current status of its implementation of BreEZe. What have been the challenges to improving IT services at the board? What are the costs of implementing this system? Is the cost of BreEZe consistent with what the Board was told the project would cost?***

TECHNICAL CLEANUP

ISSUE #7: ***Is there a need for technical cleanup?***

Background: The Board submitted the below code sections in its report for technical cleanup.

- Section 6704.1 – This section relates to the review of the engineering branch titles to determine whether certain title acts should be eliminated, retained, or converted to practice acts (the so-called "Title Act Study"). The law required the Title Act Study report to be submitted to the Legislature in 2002. The report was submitted as required. As such, this section is now obsolete and should be repealed.

• Section 8727 – This section provides an exemption to the licensure requirements in the Professional Land Surveyors' Act regarding who may legally perform surveys solely for geological or landscape purposes that do not involve property boundaries. At the time Section 8727 was originally added, there were no licensure laws governing the practices of geology or landscape architecture, as there are now. This section needs to be updated to clarify that the exemption applies only to those individuals legally authorized to practice geology or landscape architecture.

• Sections 6787, 7872, and 8792 – These three sections describe actions that constitute "unlicensed activity" if done by people not legally authorized under the three licensing acts. These sections contain outdated and confusing cross references to other sections. Language also needs to be added to make it clear that it is a violation to use a licensee's signature or license number, as well as their name or seal. Other changes are needed to standardize the three sections with each other.

• Section 7860.1 – Currently, the Board has the authority to take action against the holder of an Engineer-in-Training certificate under Section 6775.1 and the holder of a Land Surveyor-in-Training certificate under Section 8780.1, but it does not have the same authority with regards to the holder of a Geologist-in-Training certificate. As such, a section needs to be added to give the Board that authority.

• Sections 6775.2, 7860.2, and 8780.2 – These sections need to be amended to remove the subdivision containing a sunset date. It has been demonstrated in the years since these laws were enacted (in 2016) that they are effective and have not been abused by the Board. Based on the low number of licensees who fail to respond to and cooperation with the Enforcement Unit during the investigations, the Board believes these laws are working as intended and the sunset date included in each section needs to be eliminated so that these laws will be permanent.

The Board should recommend additional cleanup amendments for this section and submit proposed language to the committees for inclusion in the sunset bill.

Staff Recommendation: ***The Board should recommend cleanup amendments and submit proposed language to the Committees.***

CONTINUED REGULATION OF PROFESSIONAL ENGINEERS, LAND SURVEYORS, AND GEOLOGISTS BY THE BOARD OF PROFESSIONAL ENGINEERS, LAND SURVEYORS, AND GEOLOGISTS

ISSUE #8: ***Should the licensing and regulation of professional engineers, land surveyors, and geologists be continued and be regulated by the current Board membership?***

Background: The health, safety and welfare of consumers are protected by the presence of a strong licensing and regulatory Board with oversight over professional engineers, land surveyors, and geologists. The BPELSG has shown over the years a strong commitment to improve the Board's overall efficacy and effectiveness and has worked cooperatively with the DCA, the Legislature, and these Committees to bring about necessary changes.

Staff Recommendation: ***Recommend that the licensing and regulation of the engineering, land surveying, and geology professions continue to be regulated by the current Board members in order to protect the interests of the public and be reviewed once again in four years to review whether the issues and recommendations in this Background Paper have been addressed.***

RESPONSE TO THE
BACKGROUND PAPER FOR THE
BOARD OF PROFESSIONAL ENGINEERS, LAND SURVEYORS, AND GEOLOGISTS

Submitted to the
Senate Committee on Business, Professions and Economic Development
and the
Assembly Committee on Business and Professions

March 2019

For more detailed information regarding the responsibilities, operation and functions of the Board for Professional Engineers, Land Surveyors, and Geologists (BPELSG or Board), please refer to the Board's "2018 Sunset Review Report and Attachments." This report is available on its website at http://www.bpelsg.ca.gov/pubs/2018_sunset_review_report.pdf.

CURRENT SUNSET REVIEW ISSUES

The following are unresolved issues pertaining to the Board, or those which were not previously addressed by the Committees, and other areas of concern for the Committees to consider along with background information concerning the particular issue. There are also recommendations the Committees' staff have made regarding particular issues or problem areas which need to be addressed. The Board's responses follow the recommendations of the Committees' staff on each issue.

BUDGET ISSUES

ISSUE #1: ***What is the status of the long term fund condition?***

Background: The Board receives no General Fund support and relies solely on licensing and renewal fees. As of July 2018 the Board's reserve is projected at 6.8 months, equating to $7.2 million fund balance. Due to issues with FI$Cal, the Board does not currently have estimates for Fiscal Year (FY) 2017/18 but expects to have them in March 2019. However, the Board does note that it exceeded revenues in FY 2017/18 by $2.0 million.

The Board notes in its report that if its fiscal structure remains unchanged, it will encounter a deficit in FY 2020/21. To prevent this, the Board is researching a regulatory fee change based on an evaluation of actual costs that would redistribute all fees and provide a more consistent fee structure.

Table 2. Fund Condition FY 2014/15 – FY 2015/16: 0770 Engineer's & Land Surveyor's Fund FY 2016/17 – FY 2019/20: 0770 Professional Engineer's, Land Surveyor's, and Geologist's Fund						
(Dollars in Thousands)	**FY 2014/15**	**FY 2015/16**	**FY 2016/17**	**FY 2017/18**	**FY 2018/19**	**FY 2019/20**
Beginning Balance	$5,832	$6,991	$8,263	$10,042	$7,238	$5,381
Prior Year Adjustment	-$45	$28	$8	$0	$0	$0
General Revenues	$8,048	$8,994	$8,988	$8,822	$8,892	$8,863
Total Revenue	**$13,835**	**$16,013**	**$17,259**	**$18,864**	**$16,130**	**$14,244**
Loans to General Fund	$0	$0	$0	$0	$0	$0
Loans Repaid From General Fund	$500	$0	$3,200	$0	$800	$0
Accrued Interest, Loans to General Fund	$0	$0	$0	$0	$1,131	$0
Total Resources	**$14,335**	**$16,013**	**$20,459**	**$18,864**	**$18,061**	**$14,244**
Budget Authority					$11,828	$12,065
Expenditures	$7,336	$7,732	$9,853	$10,927		
Other Adjustments (SCO, Fi$Cal)	$9	$18	$564	$699	$852	$852
Total Expenditures	**$7,345**	**$7,750**	**$10,417**	**$11,626**	**$12,680**	**$12,917**
Fund Balance	**$6,990**	**$8,263**	**$10,042**	**$7,238**	**$5,381**	**$1,327**
Months in Reserve	**10.8**	**9.5**	**10.4**	**6.8**	**5.0**	**1.2**

Table 2. Fund Condition – 0205 Geologist and Geophysicist Account						
(Dollars in Thousands)	**FY 2014/15**	**FY 2015/16**	**FY 2016/17**	**FY 2017/18**	**FY 2018/19**	**FY 2019/20**
Beginning Balance	$989	$1,122	$1,132	$1,131	**N/A**	**N/A**
Prior Year Adjustment	$98	$66	-$1	$0		
General Revenues	$1,103	$1,083	$0	$0		
Total Resources	**$2,190**	**$2,271**	**$1,131**	**$1,131**		
Budget Authority			**N/A**	**N/A**		
Expenditures	$1,067	$1,136				
Other Adjustments (SCO, Fi$Cal)	$1	$3				
Total Expenditures	**$1,068**	**$1,139**				
Fund Balance	**$1,122**	**$1,132**	**$1,131**	**$1,131**		
Months in Reserve	**11.8**	**N/A**	**N/A**	**N/A**		

<u>Committees' Staff Recommendation</u>: ***The Board should advise the Committees on the source of its excess expenditures and whether anticipated fee increases will be sufficient to prevent further shortfalls in the near future.***

<u>BOARD RESPONSE:</u>

The Board works closely with the Department of Consumer Affairs (DCA) Budget Office to monitor revenue, expenditures, fund balance, and reserves. In August 2018, DCA's Chief of Fiscal Operations issued a FI$Cal Implementation Status Update that identified official year-end FI$Cal reports to close out FY 2017/18 are currently estimated for delivery March 2019. On February 20, 2019, DCA issued

out FY 2017/18 are currently estimated for delivery March 2019. On February 20, 2019, DCA issued a FI$Cal Status Update that indicated they are on "…track to produce year-end financial statements in March 2019." DCA also acknowledged that this is an "…issue and has made a commitment with the Department of Finance to update all fund conditions as part of the Governor's May Revise Budget display with updated figures from reconciled financial year-end statements." Based on budget reports provided from the DCA Budget Office and generated from the FI$Cal system, expenditures exceeded revenues by $2.0 million by the end of FY 2017/18. Expenditures have increased over the past four years by an average of 8%, or $872,000 per year, and are tied to increases in staffing, employee salaries and benefits, operating expenses related to examination development costs, and pro rata charges, which in themselves have been affected by increases in employee salaries and benefits, as follows:

	FY 2014-15	FY 2015-16	FY 2016-17	FY 2017-18
Actual Positions	48.0	51.0	50.0	47.0
Personal Services	$ 3,675	$ 4,184	$ 4,535	$ 4,621
Operating Expenses	$ 3,580	$ 3,621	$ 3,706	$ 4,829
Departmental Prorata	$1,315	$1,300	$1,748	$1,736

Note: Dollars represented in thousands

Since FY 2014/15, personal services have increased for salaries and wages, temporary help, and benefits by $946,000 related to filling program vacancies, merit salary adjustments, retirement and healthcare increases, and bargaining unit salary adjustments. Operating expenses have increased by $1,249,000 related to contracts for examination development examination expert consultant services and to enforcement expenses. Departmental Prorata rose by $421,000 and Statewide Prorata rose by $690,000. Operating expenses have increased for examination development as the Board built up examination item banks to offer continuous testing and transitioned to computer based testing (CBT). Future costs related to examination development will trend down as the Board progresses into maintenance mode for all state-specific examinations. Enforcement costs for the Division of Investigation have gone up over the last four years but will be trending down in future fiscal years based on usage and DCA's two-year roll forward prorata adjustment calculation.

As noted in the Sunset Report, the Board anticipates that if its fiscal structure remains unchanged, it will encounter a deficit in FY 2020/21. Additionally, since the July 1, 2016, merger of the Professional Engineer's and Land Surveyor's Fund and the Geologist and Geophysicist Account, the Board has recognized that the fees charged to the different professions it regulates need to be standardized. The Board directed its staff to conduct a review of the services provided, such as licensure application processing, examination development, enforcement, and renewal processing, and determine the appropriate fees that should be charged for the services in order to support the overall operations of the Board. Based on this review, at its November 2018 meeting, the Board approved staff's proposed revisions to the regulations that specify the exact fees to be paid to the Board for these services. Staff is preparing to initiate the rulemaking process to amend the fees specified in the regulations with the goal that the new fees will be implemented as of January 1, 2020. The Board expects to review the fee structure within three years beyond the effective date of the new proposed fee structure so as to take advantage of the new efficiencies expected as a result of its business modernization efforts (more fully described in the response to Issue #6 below).

The Board anticipates the standardized fee structure proposed will foster an affordable path to licensure, align fees with the full cost of operational services, set fees to facilitate the effective administration of the Board, and respond more efficiently to the needs of the public, applicants, and licensees.

LICENSING ISSUES

ISSUE #2: ***Does the Board need more staff in order to meet its performance goals?***

Background: The Board has indicated that it faces challenges in effectively tracking delays in license processing due to the variance in statutory requirements for its various license types. Additionally, while the Board will accept an application for licensure as a professional engineer or land surveyor at any time throughout the year, it has historically only offered required examinations twice a year. Similarly, applicants for licensure in the geology and geophysics professions still must meet filing deadlines due to the need to schedule for national and state examinations that are administered only once per year on a specific date. The Board indicates that, though pending applications often are greater than completed applications, the application pool stabilizes within two months of each application deadline when examinations are offered.

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Committees' Staff Recommendation: ***The Board should advise the Committees of what additional steps it will be taking to address licensing delays. Additionally, the Board should advise the Committees on its efforts to offer year-round examination and whether additional action is necessary to expedite licensing timelines.***

BOARD RESPONSE:

There are four major milestones which must be reached to become licensed as a professional engineer, a professional land surveyor, a professional geologist, or a professional geophysicist in California:

- Acquire the requisite combination of experience and education
- Pass up to two national examinations (if required based on the discipline of license sought)
- Apply for licensure with the Board
- Pass any applicable state examinations

Since the last sunset review, the Board has made a significant change in separating the required examination criteria from the licensure application process. A potential candidate for licensure now applies to the Board once they have acquired the requisite education and experience and after they have passed the appropriate national examinations. Furthermore, they may now take the national examinations whenever they feel prepared to do so and no longer must wait for the Board to approve their experience and education.

With this change, the Board now directly influences only two of these major milestones: the approval of an applicant for licensure upon receipt and review of a complete application, and the offering of any state examinations that may be required.

While the Board has input on the offering of national examinations, it does not directly influence when or how often they are offered. For professional engineer and land surveyor applicants, approximately one third of the national examinations are currently offered via computer based testing (CBT). The examinations with high demand, based on applicant population, are, or will be, offered on a year-round basis, while examinations with less demand will continue to be offered on specific dates nationwide. Currently, the Fundamentals of Engineering, the Fundamentals of Surveying, the Professional Surveyor, the Chemical Engineering, the Nuclear Engineering, and the Petroleum Engineering examinations are offered by CBT. The remaining examinations are expected to be converted to CBT by 2024, as shown below.

Year	**Examination**
2020	Fire Protection Engineering
2020	Industrial and Systems Engineering
2020	Mechanical Engineering
2021	Agricultural and Biological Engineering
2021	Electrical Engineering
2022	Control Systems Engineering
2022	Metallurgical and Materials Engineering
2023	Civil Engineering
2024	Structural Engineering

For professional geologists, the national examinations are offered twice a year on paper. Board staff are actively involved at a leadership level with ASBOG, the national organization that develops the national geology examinations, to determine an implementation plan for transition of these examinations to CBT in the future.

Upon application approval, some applicants may be required to pass a state-specific examination. Currently all state-specific examinations developed by the Board are offered by CBT. This approach provides the applicants with the flexibility and convenience of scheduling the examination at a time and location of their choosing while also ensuring that the security and standardization of the examinations are not compromised. The examinations in higher demand, based on application population, are offered year-round, while the remaining examinations are offered once or twice a year on specific dates, depending on the levels of demand.

For the applicants seeking a license in a discipline that does not require a state examination component, the application process is now the final step to licensure.

The Board regularly conducts outreach on this new process as well as helping applicants ensure their applications are complete. When an incomplete application is received, the Board works directly with the applicant to assist them in understanding the necessary information they need to provide to complete their application.

In terms of the application process with the previously described changes, the Board has established an internal goal towards notifying the applicant of acceptability or incompleteness of their application within a 30-day timeframe. Currently, this change in the process is resulting in a timeframe of between 30 to 60 days on average and is heavily influenced by the Board's reliance on outdated application licensing database systems. Through the eventual acquisition of a new, comprehensive licensing and case management system (as more fully described in Issue #6, below), and by regular process improvement validation, the Board anticipates it will have the ability to achieve its timeframe goals.

These changes have resulted in licenses being issued by the Board up to twice a month rather than twice a year as was done in the past. Consequently, the Board feels it has taken significant measures to streamline the steps in the process to achieve licensure that are under its control and influence.

ISSUE #3: ***Does the new test for determining employment status, as prescribed in the court decision* Dynamex Operations West Inc. v. Superior Court*, have any potential implications for licensees of the Board working as independent contractors?***

Background: In the spring of 2018, the California Supreme Court issued a decision in *Dynamex Operations West, Inc. v. Superior Court* (4 Cal.5th 903) that significantly confounded prior assumptions about whether a worker is legally an employee or an independent contractor. In a case involving the classification of delivery drivers, the California Supreme Court adopted a new test for determining if a worker is an independent contractor, which is comprised of three necessary elements:

A. That the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact;
B. That the worker performs work that is outside the usual course of the hiring entity's business; and,
C. That the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Commonly referred to as the "ABC test," the implications of the *Dynamex* decision are potentially wide-reaching into numerous fields and industries utilizing workers previously believed to be

independent contractors. Occupations regulated by entities under the Department of Consumer Affairs are no exception to this unresolved question of which workers should now be afforded employee status under the law. In the wake of *Dynamex,* the new ABC test must be applied and interpreted for licensed professionals and those they work with to determine whether the rights and obligations of employees must now be incorporated.

Committees' Staff Recommendation: ***The Board should inform the Committees of any discussions it has had about whether the* Dynamex *decision may somehow impact the professions under its jurisdiction.***

BOARD RESPONSE:
The Board has not yet had the opportunity to review and discuss the *Dynamex* decision. Board staff and its DCA Legal Counsel are reviewing the matter and will make a presentation at the April 2019 Board meeting. An updated response will be provided to the Committees after that meeting regarding the Board's discussion and any impact the decision may have on the Board's operations and licensees.

ENFORCEMENT ISSUES

ISSUE #4: *Why are the Board's enforcement timeframes increasing?*

Background: The Board has noted "aggressive efforts" to reduce processing times for complaint investigations; however, the Board also notes that its efforts have been significantly impacted by delays at the Division of Investigation (DOI). Over the last four fiscal years, 57% of the completed cases that were referred to DOI took more than a year to process. Because DOI also investigates cases on behalf of other boards and bureaus within DCA, it must set priorities for its investigations. Those cases that present evidence of an immediate threat to the public health, safety, and welfare receive the highest priority. The Board notes that since there is rarely the same level of "immediate threat" relating to the practices of professional engineering, land surveying, geology, and geophysics as there might be with cases involving nursing or other healing arts professions, DOI does not give the Board's cases the highest priority.

Enforcement Timeframes	FY 2015/16	FY 2016/17	FY 2017/18
Investigations: Average days to close	237	238	234
Discipline: Average Days to Complete	1078	1106	825

The Board also notes its desire to collaborate more closely with DOI on efforts to more effectively investigate the Board's cases. As the Board overwhelmingly refers its complaints to investigation, it seems plausible that enforcement delays may in fact be attributable to this hand-off.

Committee's Staff Recommendation: ***The Board should advise the Committees about where it believes the bottlenecks are in its investigation processes and disciplinary actions in addition to the backlog at DOI. In the Board's opinion, what are viable solutions to the extensive timeframes in its enforcement processes? The Board should inform the committees of what steps it has taken to increase productivity between DOI and the Board and if there are impediments that the committees may be able to address.***

BOARD RESPONSE:

As noted in the table included in the Background section, the enforcement timeframes for the investigative stage have steadily averaged less than eight months over the last three years. This is in stark contrast to the average of more than a year at the time the Board's 2014 Sunset Review Report was published. Furthermore, as also noted in the table included in the Background section, the average days to complete disciplinary matters have decreased by more than nine months from FY 2016/17 to FY 2017/18. The Board has been able to accomplish this reduction in the length of time it takes to investigate complaint cases through additional staffing and concerted efforts to improve efficiency while still maintaining the integrity of its investigations.

It is important to understand that all cases are investigated by the Board's Enforcement Unit staff, who are analysts and not field investigators. Only a small portion of the cases are referred to DOI to assist the Board's staff with the investigation; the majority of the Board's case investigations rarely involve DOI participation. The investigation timeframe is calculated from receipt of a complaint through a determination of whether or not violations occurred and what enforcement action, if any, is warranted. If a case is referred to DOI to assist with the investigation, the time the case is at DOI is included in the investigative stage timeframe.

While the DOI portion of an investigation can take an average of several months to complete, affecting the overall aging of the entire investigative stage of the case, less than 10% of the Board's cases are referred to DOI to assist in investigations, markedly down from previous years. One of the reasons for the decrease in the number of cases referred to DOI is the implementation of Business and Professions Code sections 6775.2, 7860.2, and 8780.2. These laws require licensees who are the subject of a complaint investigation to respond to requests from the Board to cooperate in the investigation of the complaint. It was common practice prior to the enactment of these laws to request the assistance of DOI to contact licensees and elicit responses after efforts by Board staff had proved fruitless.

Typically, the cases referred to DOI involve allegations relating to unlicensed activity, such as unlicensed individuals operating businesses without an appropriately licensed individual in responsible charge of the business operations, as well as cases where unlicensed people are posing as licensees. Due to the complexity of the Board's laws regarding who may offer professional services, exactly what services require licensure, and how businesses must be structured, there are nuances that may be overlooked by investigators who are not fully versed on the Board's laws. Other cases referred to DOI involve those where Board staff lacks sufficient resources to locate individuals and obtain documents. DOI has the resources to locate individuals and conduct in-person interviews, as well as obtain documents from individuals, private businesses, and government agencies. Because of the technical nature of the professions, laypeople, including trained investigators, may not be familiar with the terminology used or types of documents produced. These issues, while understandable, can lead to prolonged investigations due to the need for clarification and follow-up. In discussions with DOI, it was agreed that it would be beneficial to the DOI investigators for Board staff to provide training regarding specific aspects of our laws and the technical aspects of our professions so that the DOI investigators would have a better understanding of these issues before beginning to conduct the investigations. Board staff is working with DOI to develop the training with the goal of presenting it to the investigators in the late spring or early summer of 2019.

As to the current average for completion of the investigative stage, there are a number of factors contributing to the processing timeframe. The majority of complaint cases are referred to independent Technical Expert Consultants during the investigative stage to provide an expert opinion regarding

whether or not violations of the laws have occurred. Independent Technical Expert Consultants are not Board employees and typically have their own full-time private practice. Contracting with outside experts ensures independent, unbiased review of the evidence and technical aspects of the cases. Technical Expert Consultants complete the review of cases, many of which contain voluminous project documents and other related evidence, as their time permits with their own full-time workload. Depending on the extent of the review due to the technical nature of the investigations, the timeframe solely for expert review can range from 30 to 90 days of the overall investigative stage. Pursuant to the Board's Strategic Plan, measures have been taken to improve the timeframes in which experts are assigned cases. Internal milestones were established, and experts are more closely tracked to ensure they are meeting deadlines prescribed by a more formal contracting process. In addition, Board staff recently provided training to all contracted Technical Expert Consultants to discuss processes and expectations related to the completion of thorough reviews and preparation of reports.

Another factor determining the length of the investigative stage is the gathering of all relevant written documentary evidence from any number of parties. While the Board has seen marked improvement in the licensees' responses to requests for information, there are still unlicensed individuals, complainants, property owners, public agencies, and other professionals who are relied upon to provided necessary documentation. The collection of documentation via electronic means has begun to replace antiquated systems involving postal mail, which is time-consuming, or facsimile, which can be difficult to read or limits the number of pages that can be sent. This has resulted in a more expedient way in which to exchange information with related parties.

Additionally, as shown in the statistical table included in the Background section, there has been a significant decrease in the timeframe for discipline cases as calculated from the receipt of a complaint through the date a final decision becomes effective. This reduction can likely be attributed to the recent implementation of reporting of case aging by the Office of the Attorney General and the Office of Administrative Hearings (OAH) to the Legislature, in addition to the Board's efforts to reduce the timeframe for the investigative stage. Focus by all involved entities on the aging of cases has resulted in collaboration between the Office of the Attorney General and the Board to determine avenues to decrease timeframes to complete cases. However, the necessity to prioritize cases by imminent threats to public safety or statute of limitation constraints will likely continue to affect the aging of the Board's cases, since the Board's cases rarely involve such an imminent threat and do not have a statute of limitations. Furthermore, due to the complex nature of the subject matter in the Board's cases, hearings conducted by OAH often take two or more days, resulting in the scheduling of hearings several months out from the submission of the calendaring request.

Monitoring and tracking the aging of cases is important in terms of identifying areas where timeframes can be reduced or where processes can be made more efficient. It is anticipated that the new, comprehensive licensing and case management system the Board is currently seeking to procure and implement (as more fully discussed in the response to Issue #6, below) will provide the ability to collect pertinent statistical data that can be used to perform analytics to help identify workload issues and delays during various stages of the investigations.

Ultimately, the Board continues to experience reduction in the processing timeframes of its cases. With increased efforts by the Board, DOI, the Office of the Attorney General, and OAH to reduce aging in their respective processes, we will continue to experience shorter timeframes to complete all cases. However, it is likely that the Board's cases will always average several months to complete, due to the complex technical nature of the professions it regulates.

ISSUE #5: ***What is the Board doing to counteract unlicensed activity?***

Background: Over the last several years, the Board has increasingly observed the proliferation of unlicensed activity. This increase in activity coincides with the advancement of electronic technology, especially Global Positioning System (GPS) and Ground Penetrating Radar (GPR) technology and particularly as the use of that equipment or tools related to the practices of land surveying and geophysical studies.

The Board has consistently stated that unlicensed activity is more about the practice of the activity and actions than it is about the use of technology or tools. However, despite this, the Board has observed that GPS and other widely available technologies are being utilized by unlicensed laypersons. The evolution of GPS technology and decreased cost of equipment have made the acquisition and use of that equipment or tools more easily accessible to many others outside of the traditional land surveying industry. The Board notes that GPS equipment is not a perfect tool and just like any other highly sophisticated tools, can produce inconsistent or incorrect results if not used properly.

Another example is the use of Ground Penetrating Radar (GPR) technology. GPR is an electromagnetic equivalent to sonar but conducted through the earth to detect abnormalities within the subsurface portion of the earth's crust. It is the Board's understanding that licensed geophysicists consider GPR equipment as only one tool to be used along with other technology or equipment to confirm data findings prior to reporting.

As with the use of GPS equipment, it is not the actual operation of GPR equipment or tool that is considered the practice of geophysics in California, but rather the intended purpose and interpretation of the data results that is being produced by the GPR device, including any subsequent recommendations for how to rely upon that data, which is considered an activity associated with the practice of geophysics in California. While primarily designed for the above stated purpose, many users of GPR technology also use the equipment to detect the presence of reinforcing steel within concrete buildings and bridges or for use by law enforcement personnel during criminal investigations for the purposes of recovering evidence of organic material within the subsurface of the earth.

More recently, the Board has seen an increase in the use of GPR by businesses that provide on-site field services to locate existing underground utilities prior to excavation. The Board writes that it has participated in several outreach presentations at industry events related to the use of GPR and related services and has established a close working relationship with the recently formed California Facilities Safe Excavation Board in an effort to collaborate and extend its reach. Despite this, the Board continues to receive complaints about this practice and encounters businesses throughout the state that are completely unaware of the geophysics licensing requirements or that they may be in violation of several state laws.

Committees' Staff Recommendation: ***The Board should advise the Committees of its ongoing efforts to combat unlicensed activity and what outreach efforts have been pursued to educate unlicensed operators.***

BOARD RESPONSE:
Unlicensed activity is of great concern to the Board, particularly with the rapid growth of technology, ranging from wide-spread use of the internet to conduct business to the actual tools used to perform

professional engineering, land surveying, geology, and geophysics. Companies not properly overseen by licensees are conducting businesses through web sites and communicating via cell phone and electronic communication. This causes difficulty in locating the responsible individuals, as there is often no physical address included in the contact information on the website. Furthermore, unlike the authority to shut down telephone services regulated under the Public Utilities Commission, the Board has no authority to shut down websites and cell phones.

Current efforts to discourage unlicensed activity include the issuance of administrative citations, which may include the assessment of an administrative fine. Unfortunately, citations and fines are not always the most effective tools in motivating violators to cease and desist unlicensed activity. Violators may choose to simply pay the fine and continue operations. Others ignore the citation, and the Board has little recourse in collecting fines that are not paid. The current practice of referring matters to the Franchise Tax Board is not sufficiently effective, as the Board can only recover monies through individual tax returns and gambling and lottery winnings. It would be beneficial to this Board, as well as other boards under DCA, if the DCA and the boards were able to contract jointly with collection agencies to recover the unpaid fines.

One of the most common forms of unlicensed activity that is brought to the Board's attention involves licensed contractors who may be unknowingly exceeding their license authority by performing professional engineering, land surveying, geological, and geophysical services on projects, particularly in the use of technologically advanced tools. The Board has worked with the Contractors State License Board in the past to publicize the limitations of licensed contractors and offer education regarding the restrictions of the use of particular tools, such as GPS, drones, and GPR equipment, and the limitations of exemptions provided by the Board's laws.

Other efforts to discourage unlicensed activity include outreach to both licensed and unlicensed individuals, as well as to government agencies that deal with the professions the Board regulates, to educate them regarding potential areas of unlicensed activity, including the unknowing practice by unlicensed individuals. During meetings and outreach events with various professional organizations, Board staff have focused on identifying for industry professionals ways in which they can participate in the Board's efforts to curtail unlicensed activity. Licensees who discover such activity are encouraged to file formal complaints and include documentary evidence, rather than passing along unsubstantiated allegations in an informal conversational setting or correspondence. The Board also works with government agencies, both at the local and state level, to help them understand what services must be provided by licensed individuals so that the agencies do not accept work done by unlicensed individuals and do not inadvertently require unlicensed individuals to offer to provide such work when proposing (bidding) on government contracts.

TECHNOLOGY ISSUES

ISSUE #6: *What is the status of BreEZe implementation by the Board?*

Background: The BreEZe Project was to provide DCA boards, bureaus, and committees with a new enterprise-wide enforcement and licensing system. BreEZe would replace the existing outdated legacy systems and multiple "work around" systems with an integrated solution based on updated technology.

BreEZe would have provided all DCA organizations with a solution for all applicant tracking, licensing, renewal, enforcement, monitoring, cashiering, and data management capabilities. In addition to meeting these core DCA business requirements, BreEZe was intended to improve DCA's service to the public and connect all license types for an individual licensee. BreEZe is web-enabled, allowing licensees to complete applications, renewals, and process payments through the Internet. The public can also file complaints, access complaint status, and check licensee information.

BreEZe is an important opportunity to improve the Board's operations to include electronic payments and expedite processing. Staff from numerous DCA boards and bureaus have actively participated with the BreEZe Project. Due to increased costs in the BreEZe Project, SB 543 (Steinberg, Chapter 448, Statutes of 2011) was amended to authorize the Department of Finance (DOF) to augment the budgets of boards, bureaus, and other entities that comprise DCA for expenditure of non-General Fund moneys to pay BreEZe project costs.

The Board is a "Release 3" board that never received the system and instead utilizes legacy programs and software.

It would be helpful to update the Committees about the Boards' current work to implement the BreEZe project.

Committees' Staff Recommendation: ***The Board should update the Committees about the current status of its implementation of BreEZe. What have been the challenges to improving IT services at the Board? What are the costs of implementing this system? Is the cost of BreEZe consistent with what the Board was told the project would cost?***

BOARD RESPONSE:
The Board is not utilizing BreEZe because it is one of 19 boards and bureaus in the former Release 3 implementation of BreEZe that were removed from the BreEZe project entirely in 2015.

Based on information that identifies all actual and projected costs associated with the BreEZe program provided to the Board by DCA, the Board's actual expenses for BreEZe, even though the Board does not and will not utilize BreEZe, total $1,380,033 from FY 2009/10 through FY 2016/17. Projected expenses for FY 2017/18 are $340,000, with no expenses identified in FY 2018/19. DCA has identified that a credit for FY 2017/18 should reduce the amount currently projected.

The Board currently depends upon DCA's legacy systems, the Applicant Tracking System (ATS) and the Consumer Affairs System (CAS), for the day-to-day operations of processing applications, licensure, and enforcement efforts. Due to the extended reliance upon these legacy systems, operations at the Board require additional workarounds for data tracking and storing information, mainly through the use of other software, such as Microsoft Access or Excel.

Beginning in 2016, the Board began a Business Modernization effort for the purposes of evaluating current organizational processes with the overall goal of improving all services, not just those involving interaction with a computer system. The Board worked with consulting vendors to map, analyze, and document As-Is and To-Be workflow processes; develop stakeholder requirements that were then converted to functional system requirements; and create use cases that correspond to the

To-Be processes. In addition, the Board conducted extensive market research on the solutions available and in use by both other State of California agencies and similar licensing boards nationwide.

The Board has also worked in concert with the DCA Office of Information Services (OIS) through the California Department of Technology's (CDT) Project Approval Lifecycle (PAL) process towards acquiring a new licensing and case management system. In February 2018, the Board received approval from CDT of its PAL Stage 1 – Business Analysis. The Board's PAL Stage 2 – Alternatives Analysis is currently under review by CDT, after having received DCA and Agency approval.

The Board is committed to seeking a comprehensive licensing and case management solution that will facilitate applicant processing, licensing and renewals management, enforcement case management and monitoring, cashiering, and other data management capabilities. DCA OIS is fully supportive of the Board's effort to transition off of the legacy systems and move through the PAL approval process with CDT to obtain the most appropriate solution to best meet the Board's individual business needs.

TECHNICAL CLEANUP

ISSUE #7: ***Is there a need for technical cleanup?***

Background: The Board submitted the below code sections in its report for technical cleanup.

• Section 6704.1 – This section relates to the review of the engineering branch titles to determine whether certain title acts should be eliminated, retained, or converted to practice acts (the so-called "Title Act Study"). The law required the Title Act Study report to be submitted to the Legislature in 2002. The report was submitted as required. As such, this section is now obsolete and should be repealed.

• Section 8727 – This section provides an exemption to the licensure requirements in the Professional Land Surveyors' Act regarding who may legally perform surveys solely for geological or landscape purposes that do not involve property boundaries. At the time Section 8727 was originally added, there were no licensure laws governing the practices of geology or landscape architecture, as there are now. This section needs to be updated to clarify that the exemption applies only to those individuals legally authorized to practice geology or landscape architecture.

• Sections 6787, 7872, and 8792 – These three sections describe actions that constitute "unlicensed activity" if done by people not legally authorized under the three licensing acts. These sections contain outdated and confusing cross references to other sections. Language also needs to be added to make it clear that it is a violation to use a licensee's signature or license number, as well as their name or seal. Other changes are needed to standardize the three sections with each other.

• Section 7860.1 – Currently, the Board has the authority to take action against the holder of an Engineer-in-Training certificate under Section 6775.1 and the holder of a Land Surveyor-in-Training certificate under Section 8780.1, but it does not have the same authority with regards to the holder of a Geologist-in-Training certificate. As such, a section needs to be added to give the Board that authority.

• Sections 6775.2, 7860.2, and 8780.2 – These sections need to be amended to remove the subdivision containing a sunset date. It has been demonstrated in the years since these laws were enacted (in 2016) that they are effective and have not been abused by the Board. Based on the low number of licensees who fail to respond to and cooperate with the Enforcement Unit during the investigations, the Board believes these laws are working as intended, and the sunset date included in each section needs to be eliminated so that these laws will be permanent.

The Board should recommend additional cleanup amendments for this section and submit proposed language to the committees for inclusion in the sunset bill.

Committees' Staff Recommendation: ***The Board should recommend cleanup amendments and submit proposed language to the Committees.***

BOARD RESPONSE:
Board staff has provided proposed language to the Committees' staff to accomplish the necessary clean-up amendments. The proposed language is included as an attachment to this response paper for reference.

CONTINUED REGULATION OF PROFESSIONAL ENGINEERS, LAND SURVEYORS, AND GEOLOGISTS BY THE BOARD OF PROFESSIONAL ENGINEERS, LAND SURVEYORS, AND GEOLOGISTS

ISSUE #8: ***Should the licensing and regulation of professional engineers, land surveyors, and geologists be continued and be regulated by the current Board membership?***

Background: The health, safety, and welfare of consumers are protected by the presence of a strong licensing and regulatory Board with oversight over professional engineers, land surveyors, and geologists. The BPELSG has shown over the years a strong commitment to improve the Board's overall efficacy and effectiveness and has worked cooperatively with the DCA, the Legislature, and these Committees to bring about necessary changes.

Committees' Staff Recommendation: ***Recommend that the licensing and regulation of the engineering, land surveying, and geology professions continue to be regulated by the current Board members in order to protect the interests of the public and be reviewed once again in four years to review whether the issues and recommendations in this Background Paper have been addressed.***

BOARD RESPONSE:
The Board greatly appreciates the Committees' recognition of its efforts to improve its operations and the continued support for its future endeavors. The Board members and staff look forward to working with the Committees and their staff over the next four years to accomplish the recommendations outlined in the Background Paper.

Proposed Legislative Language in Response to Issue #7

Section 6704.1 of the Business and Professions Code is repealed.

~~(a) The Department of Consumer Affairs, in conjunction with the board, and the Joint Committee on Boards, Commissions, and Consumer Protection shall review the engineering branch titles specified in Section 6732 to determine whether certain title acts should be eliminated from this chapter, retained, or converted to practice acts similar to civil, electrical, and mechanical engineering, and whether supplemental engineering work should be permitted for all branches of engineering. The department shall contract with an independent consulting firm to perform this comprehensive analysis of title act registration.~~

~~(b) The independent consultant shall perform, but not be limited to, the following:~~

~~(1) meet with representatives of each of the engineering branches and other professional groups;~~

~~(2) examine the type of services and work provided by engineers in all branches of engineering and interrelated professions within the marketplace, to determine the interrelationship that exists between the various branches of engineers and other interrelated professions;~~

~~(3) review and analyze educational requirements of engineers;~~

~~(4) identify the degree to which supplemental or "overlapping" work between engineering branches and interrelated professions occurs;~~

~~(5) review alternative methods of regulation of engineers in other states and what impact the regulations would have if adopted in California;~~

~~(6) identify the manner in which local and state agencies utilize regulations and statutes to regulate engineering work; and,~~

~~(7) recommend changes to existing laws regulating engineers after considering how these changes may effect the health, safety, and welfare of the public.~~

~~(c) The board shall reimburse the department for costs associated with this comprehensive analysis. The department shall report its findings and recommendations to the Legislature by September 1, 2002.~~

Section 6775.2 of the Business and Professions Code is amended to read:

~~(a)~~ The failure of, or refusal by, a licensee or a certificate holder to respond to a written request from a representative of the board to cooperate in the investigation of a complaint against that licensee or certificate holder constitutes a cause for disciplinary action under Section 6775 or 6775.1.

~~(b) This section shall remain in effect only until January 1, 2020, and as of that date is repealed.~~

Section 6787 of the Business and Professions Code is amended to read:

Every person is guilty of a misdemeanor:

(a) Who, unless he or she is exempt from licensure under this chapter, practices or offers to practice civil, electrical, or mechanical engineering in this state according to the provisions of this chapter without legal authorization.

(b) Who presents or attempts to file as his or her own the certificate of licensure of a licensed professional engineer unless he or she is the person named on the certificate of licensure.

(c) Who gives false evidence of any kind to the board, or to any member thereof, in obtaining a certificate of licensure.

(d) Who impersonates or uses the seal<u>, signature, or license number</u> of a licensed professional engineer <u>or who uses a false license number</u>.

(e) Who uses an expired, suspended, surrendered, or revoked ~~certificate issued by the board~~ <u>license</u>.

(f) Who represents himself or herself as, or uses the title of, a licensed or registered civil, electrical, or mechanical engineer, or any other title whereby that person could be considered as practicing or offering to practice civil, electrical, or mechanical engineering in any of its branches, unless he or she

is correspondingly qualified by licensure as a civil, electrical, or mechanical engineer under this chapter.
(g) Who, unless appropriately registered, manages, or conducts as manager, proprietor, or agent, any place of business from which civil, electrical, or mechanical engineering work is solicited, performed, or practiced, except as authorized pursuant to subdivision ~~(d)~~ (e) of Section 6738 and Section 8726.1.
(h) Who uses the title, or any combination of that title, of "professional engineer," "licensed engineer," "registered engineer," or the branch titles specified in Section 6732, or the authority titles specified in Sections 6736 and 6736.1, or "engineer-in-training," or who makes use of any abbreviation of such title that might lead to the belief that he or she is a licensed engineer, is authorized to use the titles specified in Section 6736 or 6736.1, or holds a certificate as an engineer-in-training, without being licensed, authorized, or certified as required by this chapter.
(i) Who uses the title "consulting engineer" without being licensed as required by this chapter or without being authorized to use that title pursuant to legislation enacted at the 1963, 1965 or 1968 Regular Session.
(j) Who violates any provision of this chapter.

Section 6788 of the Business and Professions Code is amended to read:
Any person who violates any provision of subdivisions (a) to ~~(i)~~ (j), inclusive, of Section 6787 in connection with the offer or performance of engineering services for the repair of damage to a residential or nonresidential structure caused by a disaster for which a state of emergency is proclaimed by the Governor pursuant to Section 8625 of the Government Code, or for which an emergency or major disaster is declared by the President of the United States, shall be punished by a fine up to ten thousand dollars ($10,000), or by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for 16 months, or for two or three years, or by both the fine and imprisonment, or by a fine up to one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment.

Section 7830 of the Business and Professions Code is amended to read:
It is unlawful for anyone other than a geologist ~~registered~~ licensed under this chapter to stamp or seal any plans, specifications, plats, reports, or other documents with the seal or stamp of a professional geologist or ~~registered~~ licensed certified specialty geologist, or to use in any manner the title "professional geologist" or the title of any ~~registered~~ licensed certified specialty geologist, or any combination of the words and phrases or abbreviations thereof, unless ~~registered~~ licensed or ~~registered~~ licensed and certified under this chapter.

Section 7830.1 of the Business and Professions Code is amended to read:
It is unlawful for anyone other than a geophysicist ~~registered~~ licensed under this chapter to stamp or seal any plans, specifications, plats, reports, or other documents with the seal or stamp of a ~~registered~~ licensed geophysicist, professional geophysicist, or ~~registered~~ licensed certified specialty geophysicist, or to use in any manner the title "registered geophysicist," "professional geophysicist," or the title of any ~~registered~~ licensed certified specialty geophysicist, or any combination of the words and phrases or abbreviations thereof, unless ~~registered~~ licensed, or ~~registered~~ licensed and certified, under this chapter.

Section 7860.1 of the Business and Professions Code is added to read:
The board may, upon its own initiative or upon the receipt of a complaint, investigate the actions of any geologist-in-training and make findings thereon.
By a majority vote, the board may revoke the certificate of any geologist-in-training:

(a) Who has been convicted of a crime as defined in subdivision (a) of Section 480.
(b) Who has committed any act that would be grounds for denial of a license pursuant to Section 480 or 496.
(c) Who has committed any act of fraud, deceit, or misrepresentation in obtaining his or her geologist-in-training certificate or license as a professional geologist, certified specialty geologist, or professional geophysicist.
(d) Who aids or abets any person in the violation of any provision of this chapter or any regulation adopted by the board pursuant to this chapter.
(e) Who violates Section 119 with respect to a geologist-in-training certificate.
(f) Who commits any act described in Section 7872.
(g) Who violates any provision of this chapter.

Section 7860.2 of the Business and Professions Code is amended to read:
~~(a)~~ The failure of, or refusal by, a licensee or a certificate holder to respond to a written request from a representative of the board to cooperate in the investigation of a complaint against that licensee or certificate holder constitutes a cause for disciplinary action under Section 7860 or 7860.1.
~~(b) This section shall remain in effect only until January 1, 2020, and as of that date is repealed.~~

Section 7872 of the Business and Professions Code is amended to read:
Every person is guilty of a misdemeanor and for each offense of which he or she is convicted is punishable by a fine of not more than one thousand dollars ($1,000) or by imprisonment not to exceed three months, or by both fine and imprisonment:
(a) Who, unless he or she is exempt from ~~registration~~ licensure under this chapter, practices or offers to practice geology or geophysics for others in this state according to the provisions of this chapter without legal authorization.
(b) Who presents or attempts to file as his or her own the certificate of registration of another.
(c) Who gives false evidence of any kind to the board, or to any member thereof, in obtaining a certificate of registration.
(d) Who impersonates or uses the seal, signature, or license number of any ~~other practitioner~~ professional geologist, certified specialty geologist, or professional geophysicist or who uses a false license number.
(e) Who uses an expired, suspended, surrendered, or revoked ~~certificate of registration~~ license.
(f) Who shall represent himself or herself as, or use the title of, professional geologist, or any other title whereby the person could be considered as practicing or offering to practice geology for others, unless he or she is qualified by ~~registration~~ licensure as a professional geologist under this chapter, or who shall represent himself or herself as, or use the title of, professional geophysicist, or any other title whereby the person could be considered as practicing or offering to practice geophysics for others, unless he or she is qualified by ~~registration~~ licensure as a geophysicist under this chapter.
(g) Who, unless appropriately licensed, manages, or conducts as manager, proprietor, or agent, any place of business from which geological or geophysical work is solicited, performed, or practiced for others, ~~unless the geological work is supervised or performed by a professional geologist, or unless the geophysical work is supervised or performed by a professional geophysicist or geologist~~ except as authorized pursuant to Section 7834.
(h) Who uses the title, or any combination of that title, of "professional geologist," "registered geophysicist," or "professional geophysicist," the title of any licensed certified specialty geologist or any licensed certified specialty geophysicist, or "geologist-in-training," or who makes use of any abbreviation of such title that might lead to the belief that he or she is licensed as a geologist, a

geophysicist, a certified specialty geologist, or a certified specialty geophysicist, or holds a certificate as a geologist-in-training, without being licensed, licensed and certified, or certified as required by this chapter.
(i) Who violates any provision of this chapter.

Section 8710 of the Business and Professions Code is amended to read:
(a) The Board for Professional Engineers, Land Surveyors, and Geologists is vested with power to administer the provisions and requirements of this chapter, and may make and enforce rules and regulations that are reasonably necessary to carry out its provisions.
(b) The board may adopt rules and regulations of professional conduct that are not inconsistent with state and federal law. The rules and regulations may include definitions of incompetence and negligence. Every person who holds a license or certificate issued by the board pursuant to this chapter, or a license or certificate issued to a civil engineer pursuant to Chapter 7 (commencing with Section 6700), shall be governed by these rules and regulations.
(c) This section shall remain in effect only until January 1, ~~2020,~~ 2024, and as of that date is repealed. Notwithstanding any other law, the repeal of this section shall render the board subject to review by the appropriate policy committees of the Legislature.

Section 8727 of the Business and Professions Code is amended to read:
Surveys made exclusively for geological purposes performed by a person authorized to practice geology under the provisions of Chapter 12.5 (commencing with Section 7800) of Division 3 of this code or exclusively for landscaping purposes performed by a person authorized to practice landscape architecture under the provisions of Chapter 3.5 (commencing with Section 5615) of Division 3 of this code~~, which~~ that do not involve the determination of any property line do not constitute surveying within the meaning of this chapter.

Section 8780.2 of the Business and Professions Code is amended to read:
~~(a)~~ The failure of, or refusal by, a licensee or a certificate holder to respond to a written request from a representative of the board to cooperate in the investigation of a complaint against that licensee or certificate holder constitutes a cause for disciplinary action under Section 8780 or 8780.1.
~~(b) This section shall remain in effect only until January 1, 2020, and as of that date is repealed.~~

Section 8792 of the Business and Professions Code is amended to read:
Every person is guilty of a misdemeanor:
(a) Who, unless he or she is exempt from licensing under this chapter, practices, or offers to practice, land surveying in this state without legal authorization.
(b) Who presents as his or her own the license of a professional land surveyor unless he or she is the person named on the license.
(c) Who attempts to file as his or her own any record of survey under the license of a professional land surveyor.
(d) Who gives false evidence of any kind to the board, or to any member, in obtaining a license.
(e) Who impersonates or uses the seal, signature, or license number of a professional land surveyor or who uses a false license number.
(f) Who uses an expired, suspended, surrendered, or revoked license.
(g) Who represents himself or herself as, or uses the title of, professional land surveyor, or any other title whereby that person could be considered as practicing or offering to practice land surveying, unless he or she is correspondingly qualified by licensure as a land surveyor under this chapter.

(h) Who uses the title, or any combination of that title, of "professional land surveyor," "licensed land surveyor," "land surveyor," or the titles specified in Sections 8751 and 8775, or "land surveyor-in-training," or who makes use of any abbreviation of that title that might lead to the belief that he or she is a licensed land surveyor or holds a certificate as a land surveyor-in-training, without being licensed or certified as required by this chapter.

(i) Who, unless appropriately licensed, manages, or conducts as manager, proprietor, or agent, any place of business from which land surveying work is solicited, performed, or practiced, except as authorized pursuant to Section 6731.2 and subdivision ~~(d)~~ (e) of Section 8729.

(j) Who violates any provision of this chapter.

Dynamex Operations W. v. Superior Court, 4 Cal.5th 903 (2018)
416 P.3d 1, 232 Cal.Rptr.3d 1, 168 Lab.Cas. P 61,859, 83 Cal. Comp. Cases 817...

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Rosset v. Hunter Engineering Company, Cal.App. 1 Dist., September 27, 2018

4 Cal.5th 903
Supreme Court of California.

DYNAMEX OPERATIONS WEST, INC., Petitioner,
v.
The SUPERIOR COURT of Los Angeles County, Respondent;
Charles Lee et al., Real Parties in Interest.

S222732

Filed 4/30/2018

Synopsis
Background: Delivery company filed petition for writ of mandate in the Court of Appeal, seeking to compel the Superior Court, Los Angeles County, No. BC332016, Michael L. Stern, J., to vacate its order denying motion to decertify class in action by two delivery drivers alleging that company's misclassification of drivers as independent contractors rather than employees violated provisions of state wage order governing transportation industry, as well as various sections of Labor Code, and resulted in unfair and unlawful business practices. The Supreme Court granted review, superseding the opinion of the Court of Appeal that denied petition in part and granted petition in part.

Holdings: The Supreme Court, Cantil-Sakauye, C.J., held that:

"ABC" test applied to determination of whether drivers were employees or independent contractors under suffer or permit work standard in wage orders;

sufficient commonality of interest existed as to whether drivers' work was outside company's usual course of business, as prong of "ABC" test, and thus resolution on classwide basis was warranted; and

sufficient commonality of interest existed as to whether drivers were engaged in independent business, as prong of "ABC" test, and thus resolution on classwide basis was warranted.

Court of Appeal affirmed.

Opinion, 179 Cal.Rptr.3d 69, superseded.

*****4 **4** Ct.App. 2/7 B249546, Los Angeles County Super Ct. No. BC332016

Attorneys and Law Firms

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Horvitz & Levy, John A. Taylor, Jeremy B. Rosen, Felix Shafir and David W. Moreshead for Chamber of Commerce of the United States of America and California Chamber of Commerce as Amici Curiae on behalf of Petitioner.

No appearance for Respondent.

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Duckworth Peters Lebowitz Olivier and Monique Olivier for California Employment Lawyers Association as Amicus Curiae on behalf of Real Parties in Interest.

Counsel: Judith A. Scott; Altshuler Berzon, Michael Rubin, Barbara J. Chisholm, P. Casey Pitts; Nicole G. Berner; Nicholas W. Clark; and Bradley T. Raymond for Service Employees International Union, United Food and Commercial Workers International Union and International Brotherhood of Teamsters as Amici Curiae on behalf of Real Parties in Interest.

David Balter for Division of Labor Standards Enforcement, Department of Industrial Relations as Amicus Curiae on behalf of Real Parties in Interest.

Opinion

CANTIL-SAKAUYE, C.J.

[*] Associate Justice of the Court of Appeal, First Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

*****5 *912** Under both California and federal law, the question whether an individual worker should properly be classified as an employee or, instead, as an independent contractor has considerable significance for workers, businesses, and the public generally.[1] On the one ****5** hand, if ***913** a worker should properly be classified as an employee, the hiring business bears the responsibility of paying federal Social Security and payroll taxes, unemployment insurance taxes and state employment taxes, providing worker's compensation insurance, and, most relevant for the present case, complying with numerous state and federal statutes and regulations governing the wages, hours, and working conditions of employees. The worker then obtains the protection of the applicable labor laws and regulations. On the other hand, if a worker should properly be classified as an independent contractor, the business does not bear any of those costs or responsibilities, the worker obtains none of the numerous labor law benefits, and the public may be required under applicable laws to assume additional financial burdens with respect to such workers and their families.

[1] See United States Department of Labor, *Commission on the Future of Worker-Management Relations* (1994) page 64 ["The single most important factor in determining which workers are covered by employment and labor statutes is the way the line is drawn between employees and independent contractors"] <https://digitalcommons.ilr.cornell.edu/key_workplace/2/> (as of Apr. 30, 2018).

Although in some circumstances classification as an independent contractor may be advantageous to workers as well as to businesses, the risk that workers who should be treated as employees may be improperly misclassified as independent contractors is significant in light of the potentially substantial economic incentives that a business may have in mischaracterizing some workers as independent contractors. Such incentives include the unfair *****6** competitive advantage the business may obtain over competitors that properly classify similar workers as employees and that thereby assume the fiscal and other responsibilities and burdens that an employer owes to its employees. In recent years, the relevant regulatory agencies of both the federal and state governments have declared that the misclassification of workers as independent contractors rather than employees is a very serious problem, depriving federal and state governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled.[2]

[2] See United States Department of Labor, Wage & Hour Division, *Misclassification of Employees as Independent Contractors* <https://www.dol.gov/whd/workers/misclassification/> (as of Apr. 30, 2018); California Department of Industrial Relations, *Worker Misclassification* <http://www.dir.ca.gov/dlse/worker_misclassification.html> (as of

Apr. 30, 2018); see also National Employment Law Project, Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries (July 2015) pp. 2-6 <http://nelp.org/content/uploads/Independent-Contractor-Costs.pdf> (as of Apr. 30, 2018).

The issue in this case relates to the resolution of the employee or independent contractor question in one specific context. Here we must decide what standard applies, under California law, in determining whether workers should be classified as employees or as independent contractors *for purposes of California wage orders*, which impose obligations relating to the minimum ***914** wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks) of California employees.[3]

[3] In California, wage orders are constitutionally-authorized, quasi-legislative regulations that have the force of law. (See Cal. Const., art. XIV, § 1; Lab. Code, §§ 1173, 1178, 1178.5, 1182, 1185; *Industrial Welfare Com. v. Superior Court* (1980) 27 Cal.3d 690, 700-703, 166 Cal.Rptr. 331, 613 P.2d 579 (*Industrial Welf. Com.*).)

In the underlying lawsuit in this matter, two individual delivery drivers, suing on their own behalf and on behalf of a class of allegedly similarly situated drivers, filed a complaint against Dynamex Operations West, Inc. (Dynamex), a nationwide package and document delivery company, alleging that Dynamex had misclassified its delivery drivers as independent contractors rather than employees. The drivers claimed that Dynamex's alleged misclassification of its drivers as independent contractors led to Dynamex's violation of the provisions of Industrial Welfare Commission wage order No. 9, the applicable state wage order governing the transportation industry, as well as various sections of the Labor Code, and, as a result, that Dynamex had engaged in unfair and unlawful business practices under Business and Professions Code section 17200.

Prior to 2004, Dynamex classified as employees drivers who allegedly performed similar pickup and delivery work as the current ****6** drivers perform. In 2004, however, Dynamex adopted a new policy and contractual arrangement under which all drivers are considered independent contractors rather than employees. Dynamex maintains that, in light of the current contractual arrangement, the drivers are properly classified as independent contractors.

After an earlier round of litigation in which the trial court's initial order denying class certification was reversed by the Court of Appeal (*Lee v. Dynamex, Inc.* (2008) 166 Cal.App.4th 1325, 83 Cal.Rptr.3d 241), the trial court ultimately certified a class action embodying a class of Dynamex drivers who, during a pay period, did not themselves employ other drivers *****7** and did not do delivery work for other delivery businesses or for the drivers' own personal customers. In finding that the relevant common legal and factual issues relating to the proper classification of the drivers as employees or as independent contractors predominated over potential individual issues, the trial court's certification order relied upon the three alternative definitions of "employ" and "employer" set forth in the applicable wage order as discussed in this court's then-recently decided opinion in *Martinez v. Combs* (2010) 49 Cal.4th 35, 64, 109 Cal.Rptr.3d 514, 231 P.3d 259 (*Martinez*). As described more fully below, *Martinez* held that "[ ]o employ ... under the [wage order], has three alternative definitions. It means: (a) to exercise control over the wages, hours, or working conditions, *or* (b) to suffer or ***915** permit to work, *or* (c) to engage, thereby creating a common law employment relationship." (49 Cal.4th at p. 64, 109 Cal.Rptr.3d 514, 231 P.3d 259.) The trial court rejected Dynamex's contention that in the wage order context, as in most other contexts, the multifactor standard set forth in this court's seminal decision in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399 (*Borello*) is the only appropriate standard under California law for distinguishing employees and independent contractors.

In response to the trial court's denial of Dynamex's subsequent motion to decertify the class, Dynamex filed the current writ proceeding in the Court of Appeal, maintaining that two of the alternative wage order definitions of "employ" relied upon by the trial court do not apply to the employee or independent contractor issue. Dynamex contended, instead, that those wage order definitions are relevant only to the distinct joint employer question that was directly presented in this court's decision in *Martinez*—namely whether, when a worker is an admitted employee of a primary employer, another business or entity that has some relationship with the primary employer should properly be considered a joint employer of the worker and therefore also responsible, along with the primary employer, for the obligations imposed by the wage order.

The Court of Appeal rejected Dynamex's contention, concluding that neither the provisions of the wage order itself nor this court's decision in *Martinez* supported the argument that the wage order's definitions of "employ" and "employer" are limited to the joint employer context and are not applicable in determining whether a worker is a covered employee, rather than an excluded independent contractor, for purposes of the obligations imposed by the wage order. The Court of Appeal concluded that the wage order definitions discussed in *Martinez* are applicable to the employee or independent contractor question with respect to obligations arising out of the wage order. The Court of Appeal upheld the trial court's class

certification order with respect to all of plaintiffs' claims that are based on alleged violations of the wage order.

At the same time, the Court of Appeal concluded that insofar as the causes of action in the complaint seek reimbursement for business expenses such as fuel and tolls that are not governed by the wage order and are obtainable only under section 2802 of the Labor Code,[4] the *Borello* standard is the applicable standard for determining whether a worker is properly considered an employee or an independent contractor. With respect to plaintiffs' non-wage-order claim under section 2802, the Court of Appeal remanded the matter to *****8** the trial court to reconsider its ****7** class certification of that claim pursuant to a proper application of the *Borello* standard as further explicated in this court's ***916** decision in *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 173 Cal.Rptr.3d 332, 327 P.3d 165 (*Ayala*).

[4] Unless otherwise specified, all further statutory references are to the Labor Code.

Dynamex filed a petition for review in this court, challenging only the Court of Appeal's conclusion that the wage order definitions of "employ" and "employer" discussed in *Martinez* are applicable to the question whether a worker is properly considered an employee or an independent contractor for purposes of the obligations imposed by an applicable wage order. We granted review to consider that issue.[5]

[5] In their answer brief filed in this court, the drivers challenge the Court of Appeal's conclusion that the *Borello* standard is applicable to their cause of action under section 2802 insofar as that claim seeks reimbursement for business expenses other than business expenses encompassed by the wage order. The drivers contend that the wage order definitions should apply to all the relief sought under section 2802, maintaining that the obligation to reimburse business expenses is necessary to preclude circumvention of the minimum and overtime wage obligations imposed by the wage order. The drivers, however, did not seek review of that aspect of the Court of Appeal decision or file an answer to the petition for review requesting review of that issue. Accordingly, that issue is not before us and we express no view on that question. (Cal. Rules of Court, rules 8.500(a), 8.516(b).)

For the reasons discussed below, we agree with the Court of Appeal that the trial court did not err in concluding that the "suffer or permit to work" definition of "employ" contained in the wage order may be relied upon in evaluating whether a worker is an employee or, instead, an independent contractor for purposes of the obligations imposed by the wage order. As explained, in light of its history and purpose, we conclude that the wage order's suffer or permit to work definition must be interpreted broadly to treat as "employees," and thereby provide the wage order's protection to, *all* workers who would ordinarily be viewed as *working in the hiring business*. At the same time, we conclude that the suffer or permit to work definition is a term of art that cannot be interpreted literally in a manner that would encompass within the employee category the type of individual workers, like independent plumbers or electricians, who have traditionally been viewed as *genuine* independent contractors who are working only in their own independent business.

For the reasons explained hereafter, we conclude that in determining whether, under the suffer or permit to work definition, a worker is properly considered the type of independent contractor to whom the wage order does not apply, it is appropriate to look to a standard, commonly referred to as the "ABC" test, that is utilized in other jurisdictions in a variety of contexts to distinguish employees from independent contractors. Under this test, a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of ***917** the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Although, as we shall see, it appears from the class certification order that the trial court may have interpreted the wage order's suffer or permit to work standard too literally, we conclude that on the facts *****9** disclosed by the record, the trial court's certification order is nonetheless correct as a matter of law under a proper understanding of the suffer or permit to work standard and should be upheld.

Accordingly, we conclude that the judgment of the Court of Appeal should be affirmed.

I. FACTS AND PROCEEDINGS BELOW

We summarize the facts as set forth in the prior Court of Appeal opinions in this matter, supplemented by additional facts set forth in the record.

****8** Dynamex is a nationwide same-day courier and delivery service that operates a number of business centers in California. Dynamex offers on-demand, same-day pickup and delivery services to the public generally and also has a number of large business customers—including Office Depot and Home Depot—for whom it delivers purchased goods and picks up returns on a regular basis. Prior to 2004, Dynamex classified its California drivers as employees and compensated them pursuant to this state's wage and hour laws. In 2004, Dynamex converted all of its drivers to independent contractors after management concluded that such a conversion would generate economic savings for the company. Under the current policy, all drivers are treated as independent contractors and are required to provide their own vehicles and pay for all of their transportation expenses, including fuel, tolls, vehicle maintenance, and vehicle liability insurance, as well as all taxes and workers' compensation insurance.

Dynamex obtains its own customers and sets the rates to be charged to those customers for its delivery services. It also negotiates the amount to be paid to drivers on an individual basis. For drivers who are assigned to a dedicated fleet or scheduled route by Dynamex, drivers are paid either a flat fee or an amount based on a percentage of the delivery fee Dynamex receives from the customer. For those who deliver on-demand, drivers are generally paid either a percentage of the delivery fee paid by the customer on a per delivery basis or a flat fee basis per item delivered.

***918** Drivers are generally free to set their own schedule but must notify Dynamex of the days they intend to work for Dynamex. Drivers performing on-demand work are required to obtain and pay for a Nextel cellular telephone through which the drivers maintain contact with Dynamex. On-demand drivers are assigned deliveries by Dynamex dispatchers at Dynamex's sole discretion; drivers have no guarantee of the number or type of deliveries they will be offered. Although drivers are not required to make all of the deliveries they are assigned, they must promptly notify Dynamex if they intend to reject an offered delivery so that Dynamex can quickly contact another driver; drivers are liable for any loss Dynamex incurs if they fail to do so. Drivers make pickups and deliveries using their own vehicles, but are generally expected to wear Dynamex shirts and badges when making deliveries for Dynamex, and, pursuant to Dynamex's agreement with some customers, drivers are sometimes required to attach Dynamex and/or the customer's decals to their vehicles when making deliveries for the customer. Drivers purchase Dynamex shirts and other Dynamex items with their own funds.[6]

[6] Although several drivers indicated in depositions that they did not wear Dynamex shirts when making deliveries for Dynamex, it is undisputed that Dynamex retains the authority to require drivers to wear such shirts by agreeing to such a condition with the customer to whom a pick-up or delivery is to be made.

*****10** In the absence of any special arrangement between Dynamex and a customer, drivers are generally free to choose the sequence in which they will make deliveries and the routes they will take, but are required to complete all assigned deliveries on the day of assignment. If a customer requests, however, drivers must comply with a customer's requirements regarding delivery times and sequence of stops.

Drivers hired by Dynamex are permitted to hire other persons to make deliveries assigned by Dynamex. Further, when they are not making pickups or deliveries for Dynamex, drivers are permitted to make deliveries for another delivery company, including the driver's own personal delivery business. Drivers are prohibited, however, from diverting any delivery order received through or on behalf of Dynamex to a competitive delivery service.

Drivers are ordinarily hired for an indefinite period of time but Dynamex retains the authority to terminate its agreement with any driver without cause, on three days' notice. And, as noted, Dynamex reserves the right, throughout the contract period, to control the number and nature of deliveries that it offers to its on-demand drivers.

****9** In January 2005, Charles Lee—the sole named plaintiff in the original complaint in the underlying action—entered into a written independent contractor agreement with Dynamex to provide delivery services for Dynamex. ***919** According to Dynamex, Lee performed on-demand delivery services for Dynamex for a total of 15 days and never performed delivery service for any company other than Dynamex. On April 15, 2005, three months after leaving his work at Dynamex, Lee filed this lawsuit on his own behalf and on behalf of similarly situated Dynamex drivers.

In essence, the underlying action rests on the claim that, since December 2004, Dynamex drivers have performed essentially the same tasks in the same manner as when its drivers were classified as employees, but Dynamex has improperly failed to

comply with the requirements imposed by the Labor Code and wage orders for employees with respect to such drivers. The complaint alleges five causes of action arising from Dynamex's alleged misclassification of employees as independent contractors: two counts of unfair and unlawful business practices in violation of Business and Professions Code section 17200, and three counts of Labor Code violations based on Dynamex's failure to pay overtime compensation, to properly provide itemized wage statements, and to compensate the drivers for business expenses.

The trial court's initial order denying class certification was reversed by the Court of Appeal based on the trial court's failure to compel Dynamex to provide contact information for potential putative class members that would enable plaintiffs to establish the necessary elements for class certification. (See *Lee v. Dynamex*, *supra*, 166 Cal.App.4th 1325, 1336-1338, 83 Cal.Rptr.3d 241.) After the trial court permitted plaintiffs to file a first amended complaint adding Pedro Chevez (a former Dynamex dedicated fleet driver) as a second named plaintiff and the parties stipulated to the filing of a second amended complaint (the current operative complaint), the parties agreed to send questionnaires to all putative class members seeking information that would be relevant to potential class membership.

Based on the responses on the questionnaires that were returned by current or former Dynamex drivers, plaintiffs moved for certification of a revised class of Dynamex drivers. As ultimately modified by the trial court, the proposed class includes those individuals (1) who were classified as *****11** independent contractors and performed pickup or delivery service for Dynamex between April 15, 2001 and the date of the certification order, (2) who used their personally owned or leased vehicles weighing less than 26,000 pounds, and (3) who had returned questionnaires which the court deemed timely and complete. The proposed class explicitly excluded, however, drivers for any pay period in which the driver had provided services to Dynamex either as an employee or subcontractor of another person or entity or through the driver's own employees or subcontractors (except for substitute drivers who provided services during vacation, illness, or other time off). Also excluded were drivers who provided services concurrently for Dynamex and for another ***920** delivery company that did not have a relationship with Dynamex or for the driver's own personal delivery customers. Thus, as narrowed by these exclusions, the class consisted only of individual Dynamex drivers who had returned complete and timely questionnaires and who personally performed delivery services for Dynamex but did not employ other drivers or perform delivery services for another delivery company or for the driver's own delivery business. The trial court's certification order states that 278 drivers returned questionnaires and that from the questionnaire responses it appears that at least 184 drivers fall within the proposed class.

On May 11, 2011, the trial court, in a 26-page order, granted plaintiffs' motion for class certification. The validity of that order is at issue in the present proceeding.

After determining that the proposed class satisfied the prerequisites of ascertainability, numerosity, typicality, and adequacy of class representatives and counsel required for class certification, the trial court turned to the question of commonality—that is, whether common issues predominate over individual ****10** issues. Because of its significance to our subsequent legal analysis, we discuss this aspect of the trial court's certification order in some detail.

The trial court began its discussion of the commonality requirement by observing that " '[ ]he ultimate question in every [purported class action] is whether, given an ascertainable class, the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' " The court noted that in examining whether common issues of law or fact predominate, a court must consider the legal theory on which plaintiffs' claim is based and the relevant facts that bear on that legal theory. The court explained that in this case all of plaintiffs' causes of action rest on the contention that Dynamex misclassified the drivers as independent contractors when they should have been classified as employees. Thus, the facts that are relevant to that legal claim necessarily relate to the appropriate legal standard or test that is applicable in determining whether a worker should be considered an employee or an independent contractor.

The court then explained that the parties disagreed as to the proper legal standard that is applicable in determining whether a worker is an employee or an independent contractor for purposes of plaintiffs' claims. Plaintiffs relied on this court's then-recent decision in *Martinez*, *supra*, 49 Cal.4th 35, 109 Cal.Rptr.3d 514, 231 P.3d 259, maintaining that the standards or tests for employment set forth in *Martinez* are applicable in the present context, and that the standard for determining the employee or independent contractor question set forth in this court's decision in *Borello*, *supra*, 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399 is not the *****12** sole applicable standard. Dynamex, by contrast, took the position that the alternative definitions of ***921** "employ" and "employer" discussed in *Martinez* are applicable only in determining whether an entity that has a relationship with the primary employer of an admitted employee should be considered a *joint employer* of the employee, and *not* in deciding whether a worker is properly classified as an employee or an independent contractor. Dynamex asserted that even with respect to claims arising out of the obligations imposed by a wage order, the question of a worker's status as an employee or independent contractor must be decided solely by reference to the *Borello* standard.

In its certification order, the trial court agreed with plaintiffs' position, relying on the fact that the *Martinez* decision "did not indicate that its analysis was in any way limited to situations involving questions of joint employment." The court found that the *Martinez* decision represents "a redefinition of the employment relationship under a claim of unpaid wages as follows: 'To employ, then, under the IWC's [Industrial Welfare Commission's] definition, has three alternative definitions. It means (a) to exercise control over the wages, hours or working conditions, (b) to suffer or permit to work, or (c) to engage, thereby creating a common law employment relationship.' " (Quoting *Martinez*, *supra*, 49 Cal.4th at p. 64, 109 Cal.Rptr.3d 514, 231 P.3d 259.) The trial court concluded that "[ ]hese definitions must be considered when analyzing whether the class members are employees or independent contractors" and thereafter proceeded to discuss separately each of the three definitions or standards set forth in *Martinez* in determining whether common issues predominate for purposes of class certification.

With regard to the "exercise control over wages, hours or working conditions" test, the trial court stated that " 'control over wages' means that a person or entity has the power or authority to negotiate and set an employee's rate of pay" and that "[w]hether or not Dynamex had the authority to negotiate each driver's rate of pay can be answered by looking at its policies with regard to hiring drivers. ... [I]ndividual inquiry is not required to determine whether Dynamex exercises control over drivers' wages."

With regard to the suffer or permit to work test, the trial court stated in full: "An employee is suffered or permitted to work if the work was performed with the knowledge of the employer. [Citation.] This includes work that was performed that the employer ****11** knew *or should have known* about. [Citation.] Again, this is a matter that can be addressed by looking at Defendant's policy for entering into agreement with drivers. Defendant is only liable to those drivers with whom it entered into an agreement (i.e., knew were providing delivery services to Dynamex customers). This can be determined through records, and does not require individual analysis."

With regard to the common law employment relationship test referred to in *Martinez*, the trial court stated that this test refers to the multifactor standard ***922** set forth in *Borello*, *supra*, 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399. The trial court described the *Borello* test as involving the principal factor of " 'whether the person to whom services is rendered has the right to control the manner and means of accomplishing the result desired' " as well as the following nine additional factors: "(1) right to discharge at will, without cause; (2) whether the one performing the services is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether in the locality the work *****13** is usually done under the direction of the principal or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time for which the services are to be performed; (7) method of payment, whether by the time or by the job; (8) whether or not the work is part of the regular business of the principal; and (9) whether or not the parties believe they are creating the relationship of employer-employee." As the trial court observed, *Borello* explained that " 'the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.' " (*Borello*, *supra*, 48 Cal.3d at p. 351, 256 Cal.Rptr. 543, 769 P.2d 399.)

The trial court then discussed the various *Borello* factors, beginning with whether the hiring business has the right to control work details. In analyzing this factor, the court stated: "A determination of control of the work details must look to 'all meaningful aspects of the business relationship.' [Citation.] For a delivery service, those aspects include obtaining customer/customer service, prices charged for delivery, routes, delivery schedules and billing. Plaintiffs contend that these factors are all controlled by Dynamex because it obtains the customers, maintains a centralized call system, maintains a package tracking system, sets the prices for its services and customers are billed by Dynamex. This is not necessarily borne out by the evidence. Defendants' [supervising officer], Mr. Pople,[7] testified that the drivers solicit new customers. [Citation.] There is also evidence that customer service is handled by some of the drivers, depending on the customer's relationship to that driver. [Citation.] Finally, defendant does not necessarily control the drivers' delivery schedules, as a number of drivers state that their only obligation is to complete the deliveries by the end of the business day. [Citation.] The degree to which Dynamex controls the details of the work varies according to different circumstances, including the particular driver or customer that is involved. Determining whether Dynamex controls the details of the business, therefore, does not appear susceptible to common proof."

[7] Although the class certification order does not specify Pople's position, the record indicates that Pople was Dynamex's area vice president for the West, with management and supervisory authority over Dynamex's operations in California.

***923** With regard to the right to discharge factor, the trial court stated: "[T]he right to discharge at will, without cause, is an important consideration. Defendant's [supervising officer] testified that Dynamex maintains the right to discharge the drivers

at will. [Citation.] This does not appear to vary from driver to driver. So it is a classwide factor, which is particularly relevant to demonstrating the existence of an employer-employee relationship."

With regard to the "distinct occupation or business" factor, the trial court stated: "A distinct business relates to whether the drivers have the opportunity for profit and loss. [Citation.] Plaintiffs contend that the drivers have no opportunity for profit or loss because ****12** they are charged according to standardized rate tables. This may be a misrepresentation of defendants' evidence. Defendant['s supervising officer] testified that it tries to standardize the rates paid to on-demand drivers, however, drivers enter into different compensation arrangements. [Citations.] The opportunity for profit or loss depends on the nature of the agreement negotiated between Dynamex and the particular driver. Each arrangement *****14** would have to be reviewed to determine the extent of the driver's opportunity for profit and loss."

With regard to the "who supplies instrumentalities" factor, the court stated: "Defendant admitted that the drivers had to provide the instrumentalities of their work and that this was a classwide policy. This factor is subject to common inquiry."

With regard to the duration of service factor, the court stated: "Defendants concede that the drivers are at-will. [This] [f]actor is also subject to common inquiry."

With regard to the method of payment factor, the court stated: "Defendants identify different payment scenarios: (a) percentage of the fee Dynamex charges its customer for each delivery performed; (b) flat rate per day, regardless of the number of packages delivered; (c) set amount per package, regardless of the size or type of package; (d) flat fee to be available to provide delivery service regardless of whether the Driver's services are used; or (e) a combination of these payment types. [Citation.] These factors vary from driver to driver and raise individualized questions."

Finally, with regard to the "parties' belief regarding the nature of relationship" factor, the court noted that "this factor is given less weight by courts" and stated "[a]ll the drivers signed agreements stating that they were independent contractors. The drivers' belief could reasonably be demonstrated through this classwide agreement."

The court then summarized its conclusion with regard to the *Borello* standard: "Thus, most of the secondary factors are subject to common proof ***924** and do not require individualized inquiry of the class members. But the main factor in determining whether an employment agreement exists—control of the details—does require individualized inquiries due to the fact that there is no indication of a classwide policy that only defendants obtain new customers, only the defendants provide customer service and create the delivery schedules."

With respect to the entire question of commonality, however, the trial court concluded: "Common questions predominate the inquiry into whether an employment relationship exists between Dynamex and the drivers. The first two alternative definitions of 'employer' can both be demonstrated through common proof, even if the common law test requires individualized inquiries."

Having found that common issues predominate, the trial court went on to conclude that "[a] class action is a superior means of conducting this litigation." The court stated in this regard: "Given that there is evidence from Plaintiffs that common questions predominate the inquiry into [the] employment relationship[,] managing this as a class action with respect to those claims will be feasible. There appears to be no litigation by individual class members, indicating that they have little interest in personally controlling their claims. Finally, consolidating all the claims before a single court would be desirable since it would allow for consistent rulings with respect to all the class members' claims."

On the basis of its foregoing determinations, the trial court granted plaintiffs' motion for class certification.

In December 2012, Dynamex renewed its motion to decertify the class action that the trial court had certified in May 2011. Dynamex relied upon intervening Court of Appeal decisions assertedly demonstrating that the trial court had erred in relying upon the wage order's alternative definitions of employment, as set forth in *Martinez.* The trial court denied the renewed motion to decertify the class.

*****15** In June 2013, Dynamex filed a petition for writ of mandate in the Court of Appeal, challenging the trial court's denial of its motion to decertify the class. In response, plaintiffs, while disagreeing with Dynamex's claim that the trial court had erred, urged the ****13** Court of Appeal to issue an order to show cause and resolve the issues presented in the writ proceeding. The Court of Appeal issued an order to show cause in order to determine whether the trial court erred in certifying the underlying class action under the wage order definitions of "employ" and "employer" discussed in *Martinez.*

After briefing and argument, the Court of Appeal denied the petition in part and granted the petition in part. The appellate

court concluded that the trial ***925** court properly relied on the alternative definitions of the employment relationship set forth in the wage order when assessing those claims in the complaint that fall within the scope of the applicable wage order, and it denied the writ petition with respect to those claims. With respect to those claims that fall outside the scope of the applicable wage order, however, the Court of Appeal concluded that the *Borello* standard applied in determining whether a worker is an employee or an independent contractor, and it granted the writ to permit the trial court to reevaluate its class certification order in light of this court's intervening decision in *Ayala*, *supra*, 59 Cal.4th 522, 173 Cal.Rptr.3d 332, 327 P.3d 165, which clarified the proper application of the *Borello* standard.

As already noted, Dynamex's petition for review challenged only the Court of Appeal's conclusion that the trial court properly determined that the wage order's definitions of "employ" and "employer" may be relied upon in determining whether a worker is an employee or an independent contractor for purposes of the obligations imposed by the wage order. We granted the petition for review to consider that question.

II. RELEVANT WAGE ORDER PROVISIONS

We begin with a brief review of the relevant provisions of the wage order that applies to the transportation industry. (See Cal. Code Regs., tit. 8, § 11090.)

In describing its scope, the transportation wage order initially provides in subdivision 1: "This order shall apply to all persons employed in the transportation industry, whether paid on a time, piece rate, commission, or other basis," except for persons employed in administrative, executive, or professional capacities, who are exempt from most of the wage order's provisions. (Cal. Code Regs., tit. 8, § 11090, subd. 1.)[8]

[8] The order contains extensive provisions setting forth the requirements that apply "in determining whether an employee's duties meet the test to qualify for an exemption" under the executive, administrative, or professional category. (Cal. Code Regs., tit. 8, § 11090, subd. 1 (A)(1)-(3).) The professional category includes persons who are licensed and primarily engaged in the practice of law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting, or another learned or artistic profession. (*Id.*, § 11090, subd. 1 (A)(3)(a)-(g).)
The wage order also specifically exempts from its provisions, in whole or in part, (1) employees directly employed by the state or any political subdivision, (2) outside salespersons, (3) any person who is the parent, spouse, or child of the employer, (4) employees who have entered into a collective bargaining agreement under the federal Railway Labor Act, and (5) any individual participating in a national service program such as AmeriCorps. (Cal. Code Regs., tit. 8, § 11090, subd. 1 (B)-(F).)

***926** Subdivision 2 of the order, which sets forth the definitions of terms as used in *****16** the order, contains the following relevant definitions:

"(D) 'Employ' means to engage, suffer, or permit to work.

"(E) 'Employee' means any person employed by an employer.

"(F) 'Employer' means any person as defined in Section 18 of the Labor Code, who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours, or working conditions of any person." (Cal. Code Regs., tit. 8, § 11090, subd. 2(D)-(F).)[9]

[9] The definitions of "employ," "employee," and "employer" that appear in subdivision 2 of the transportation industry wage order are also included in the definitions set forth in each of the other 15 wage orders governing other industries in California, although several of the other industry wage orders include additional definitions of the term "employee." (See Cal. Code Regs., tit. 8, § 11010, subd. 2(D)-(F) [Manufacturing Industry]; *id.*, § 11020, subd. 2(D)-(F) [Personal Service Industry]; *id.*, § 11030, subd. 2(E)-(G) [Canning, Freezing, and Preserving Industry]; *id.*, § 11040, subd. 2(E)-(H) [Professional, Technical, Clerical, Mechanical, and Similar Occupations]; *id.*, § 11050, subd. 2(E)-(H) [Public Housekeeping Industry]; *id.*, § 11060, subd. 2(D)-(F) [Laundry, Linen Supply, Dry Cleaning, and Dyeing Industry]; *id.*, § 11070, subd. 2(D)-(F) [Mercantile Industry]; *id.*, § 11080, subd. 2(D)-(F) [Industries Handling Products After Harvest]; *id.*, § 11100, subd. 2(E)-(G) [Amusement and Recreation Industry]; *id.*, § 11110,

subd. 2(E)-(G) [Broadcasting Industry]; *id.*, § 11120, subd. 2(D)-(F) [Motion Picture Industry]; *id.*, § 11130, subd. 2(D)-(F) [Industries Preparing Agricultural Products for Market, on the Farm]; *id.*, § 11140, subd. 2(C)-(G) [Agricultural Occupations]; *id.*, § 11150, subd. 2(E)-(G) [Household Occupations]; *id.*, § 11160, subd. 2(G)-(*I*) [On-Site Occupations].)

****14** Thereafter, the additional substantive provisions of the wage order that establish protections for workers or impose obligations on hiring entities relating to minimum wages, maximum hours, and specified basic working conditions (such as meal and rest breaks) are, by their terms, made applicable to "employees" or "employers." (See, e.g., Cal. Code Regs., tit. 8, § 11090, subds. 3 [Hours and Days of Work], 4 [Minimum Wages], 7 [Records], 11 [Meal Periods], 12 [Rest Periods].)

Subdivision 2 of the wage order does not contain a definition of the term "independent contractor," and the wage order contains no other provision that otherwise specifically addresses the potential distinction between workers who are employees covered by the terms of the wage order and workers who are independent contractors who are not entitled to the protections afforded by the wage order.

*927 III. BACKGROUND OF RELEVANT CALIFORNIA JUDICIAL DECISIONS

We next summarize the most relevant California judicial decisions, providing a historical review of the treatment of the employee or independent contractor distinction under California law.

The difficulty that courts in all jurisdictions have experienced in devising an acceptable general test or standard that properly distinguishes employees from independent contractors is well documented. As the United States Supreme Court observed in *Board v. Hearst Publications* (1944) 322 U.S. 111, 121, 64 S.Ct. 851, 88 L.Ed. 1170: "Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing. This is true within the limited field of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction." (Fn. omitted.)

*****17** As the above quotation suggests, at common law the problem of determining whether a worker should be classified as an employee or an independent contractor initially arose in the tort context—in deciding whether the hirer of the worker should be held vicariously liable for an injury that resulted from the worker's actions. In the vicarious liability context, the hirer's right to supervise and control the details of the worker's actions was reasonably viewed as crucial, because " '[ ]he extent to which the employer had a right to control [the details of the service] activities was ... highly relevant to the question whether the employer ought to be legally liable for them ....' " (*Borello*, *supra*, 48 Cal.3d 341, 350, 256 Cal.Rptr. 543, 769 P.2d 399.) For this reason, the question whether the hirer controlled the details of the worker's activities became the primary common law standard for determining whether a worker was considered to be an employee or an independent contractor.

A. Pre-*Borello* Decisions

Prior to this court's 1989 decision in *Borello*, *supra*, 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399, California decisions generally invoked this common law "control of details" standard beyond the tort context, even when deciding whether workers should be considered employees or independent contractors for purposes of the variety of 20th century social welfare legislation that had been enacted for the protection of employees. Thus, for example, in *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 946, 88 Cal.Rptr. 175, 471 P.2d 975 (*Tieberg*), in determining whether a worker was an employee or independent contractor for purposes of California's unemployment insurance legislation, ***928** the court stated that "[ ]he principal test of an employment relationship is whether the ****15** person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." (See also *Isenberg v. California Emp. Stab. Com.* (1947) 30 Cal.2d 34, 39, 180 P.2d 11 (*Isenberg*); *Perguica v. Ind. Acc. Com.* (1947) 29 Cal.2d 857, 859-861, 179 P.2d 812 (*Perguica*); *Empire Star Mines Co. v. Cal. Emp. Com.* (1946) 28 Cal.2d 33, 43, 168 P.2d 686 (*Empire Star Mines*).)

In addition to relying upon the control of details test, however, the pre-*Borello* decisions listed a number of "secondary" factors that could properly be considered in determining whether a worker was an employee or an independent contractor. The decisions declared that a hirer's right to discharge a worker "at will, without cause" constitutes " '[s]trong evidence in support of an employment relationship.' " (*Tieberg*, *supra*, 2 Cal.3d at p. 949, 88 Cal.Rptr. 175, 471 P.2d 975, quoting *Empire Star Mines*, *supra*, 28 Cal.2d at p. 43, 168 P.2d 686.) The decisions also pointed to the following additional factors,

derived principally from section 220 of the Restatement Second of Agency: "(a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee." (*Empire Star Mines*, *supra*, 28 Cal.2d at pp. 43-44, 168 P.2d 686; see also *****18** *Tieberg*, *supra*, 2 Cal.3d at p. 949, 88 Cal.Rptr. 175, 471 P.2d 975; *Isenberg*, *supra*, 30 Cal.2d at p. 39, 180 P.2d 11; *Perguica*, *supra*, 29 Cal.2d at p. 860, 179 P.2d 812.)

Applying the control of details test and these secondary factors to the differing facts presented by each of the cases, this court found the workers in question to be employees in *Tieberg*, *supra*, 2 Cal.3d at pages 949-955, 88 Cal.Rptr. 175, 471 P.2d 975 [television writers] and *Isenberg*, *supra*, 30 Cal.2d at pages 39-41, 180 P.2d 11 [horse racing jockeys], and independent contractors in *Perguica*, *supra*, 29 Cal.2d at pages 860-862, 179 P.2d 812 [lather hired by farmer to work on newly constructed house] and *Empire Star Mines*, *supra*, 28 Cal.2d at pages 44-46, 168 P.2d 686 [lessees of remote mining shaft]. (See also *Tomlin v. California Emp. Com.* (1947) 30 Cal.2d 118, 123, 180 P.2d 342 [lessees who placed and serviced vending machines held to be employees]; *Twentieth etc. Lites v. Cal. Dept. Emp.* (1946) 28 Cal.2d 56, 57-60, 168 P.2d 699 [outside salesmen of advertising signs who were free to work for competitors held to be employees]; *Cal. Emp. Com. v. L.A. etc. News Corp.* (1944) 24 Cal.2d 421, 424-425, 150 P.2d 186 [deliverers of advertising circular held to be employees].)

929 B. *Borello

In 1989, in *Borello*, *supra*, 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399, this court addressed the employee or independent contractor question in an opinion that has come to be viewed as the seminal California decision on this subject. Because of the significance of this decision, we review the majority opinion in *Borello* at length.

The particular controversy in *Borello*, *supra*, 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399, concerned whether farmworkers hired by a grower to harvest cucumbers under a written "sharefarmer" agreement were independent contractors or employees for purposes of the California workers' compensation statutes. The grower contended that the farmworkers were independent contractors under the control of details test because the workers (1) were free to manage their own labor (the grower did not supervise the picking at all but compensated the workers based on the amount of cucumbers that they harvested), (2) shared the profit or loss from the crop, and (3) agreed in writing that they were not employees.

In rejecting the grower's contentions, the court in *Borello* summarized its conclusion in ****16** the introduction of the opinion as follows: "The grower controls the agricultural operations on its premises from planting to sale of the crops. It simply chooses to accomplish one integrated step in the production of one such crop by means of worker incentives rather than direct supervision. It thereby retains all necessary control over a job which can be done only one way. [¶] Moreover, so far as the record discloses, the harvesters' work, though seasonal by nature, follows the usual line of an employee. In no practical sense are the 'sharefarmers' entrepreneurs, operating independent businesses for their own accounts; they and their families are obvious members of the broad class to which workers' compensation protection is intended to apply." (*Borello*, *supra*, 48 Cal.3d at p. 345, 256 Cal.Rptr. 543, 769 P.2d 399.) On this basis, the court concluded the workers were employees entitled to workers' compensation as a matter of law. (*Id.* at p. 346, 256 Cal.Rptr. 543, 769 P.2d 399.)

In reaching these conclusions, the legal analysis employed by the *Borello* court is of particular significance. The court began by recognizing that "[ ]he distinction between independent contractors and employees arose at common law to limit one's *****19** vicarious liability for the misconduct of a person rendering service to him" (*Borello*, *supra*, 48 Cal.3d at p. 350, 256 Cal.Rptr. 543, 769 P.2d 399), and that it was in this context that "the 'control of details' test became the principal measure of the servant's status for common law purposes." (*Ibid*.) The court then took note of the prior California decisions discussed above, which generally utilized the common law control-of-details standard in determining whether workers were employees or independent contractors for purposes of social welfare legislation, but which also identified the numerous additional "secondary" factors ***930** listed above that may be relevant to that determination. (*Id.* at pp. 350-351, 256 Cal.Rptr. 543, 769 P.2d 399.) The court observed that " 'the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.' [Citation.]" (*Id*. at p. 351, 256 Cal.Rptr. 543, 769 P.2d 399.)

Crucially, the court in *Borello* then went on to explain further that "the concept of 'employment' embodied in the [workers' compensation act] *is not inherently limited by common law principles*. We have acknowledged that the Act's definition of the employment relationship must be construed *with particular reference to the 'history and fundamental purposes' of the statute*. [Citation.]" (*Borello*, *supra*, 48 Cal.3d at p. 351, 256 Cal.Rptr. 543, 769 P.2d 399, italics added.) The court observed

that "[ ]he common law and statutory purposes of the distinction between 'employees' and 'independent contractors' are substantially different" (*id.* at p. 352, 256 Cal.Rptr. 543, 769 P.2d 399), that "[f]ederal courts have long recognized that the distinction between tort policy and social-legislation policy justifies departures from common law principles when claims arise that one is excluded as an independent contractor from a statute protecting 'employees' " (*ibid.*), and that "[a] number of state courts have agreed that in worker's compensation cases, the employee-independent contractor issue cannot be decided absent consideration of the remedial statutory purpose." (*Id.* at pp. 352-353, 256 Cal.Rptr. 543, 769 P.2d 399.) The court in *Borello* agreed with this focus on statutory purpose: "[U]nder the Act, the 'control-of-work-details' test for determining whether the person rendering service to another is an 'employee' or an excluded 'independent contractor' *must be applied with deference to the purposes of the protective legislation. The nature of the work, and the overall arrangement between the parties, must be examined to determine whether they come within the 'history and fundamental purposes' of the statute.*" (*Id.* at pp. 353-354, 256 Cal.Rptr. 543, 769 P.2d 399, italics added.)

After identifying the various purposes of the workers' compensation act,[10] the court ****17** concluded: "The Act intends comprehensive coverage of injuries in employment. It accomplishes this goal by defining 'employment' broadly in terms of 'service to an employer' and by including a general presumption that any person 'in service to another' is a covered 'employee.' " (*Borello, supra*, 48 Cal.3d at p. 354, 256 Cal.Rptr. 543, 769 P.2d 399.) At the same time, the court acknowledged that "[ ]he express exclusion *****20** of 'independent contractors' [from the workers' compensation act (see Lab. Code, §§ 3353, 3357)] is purposeful ... and has a limited but important function. It recognizes those situations where the Act's goals are best served by imposing the risk of 'no-fault' work injuries directly on the ***931** provider, rather than the recipient, of a compensated service. This is obviously the case, for example, when the provider of service has the primary power over work safety, is best situated to distribute the risk and cost of injury as an expense of his own business, and has independently chosen the burdens and benefits of self-employment." (*Ibid.*) The court concluded: "This is the balance to be struck when deciding whether a worker is an employee or an independent contractor for purposes of the Act." (*Ibid.*)

10 The court stated in this regard that the workers' compensation act "seeks (1) to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society, (2) to guarantee prompt, limited compensation for an employee's work injuries, regardless of fault, as an inevitable cost of production, (3) to spur increased industrial safety, and (4) in return, to insulate the employer from tort liability for his employees' injuries. [Citations.]" (*Borello, supra*, 48 Cal.3d at p. 354, 256 Cal.Rptr. 543, 769 P.2d 399.)

Although the *Borello* opinion emphasized that resolution of the employee or independent contractor question must properly proceed in a manner that accords deference to the history and fundamental purposes of the remedial statute in question (*Borello, supra*, 48 Cal.3d at pp. 353-354, 256 Cal.Rptr. 543, 769 P.2d 399), the court at the same time made clear that it was *not* adopting "detailed new standards for examination of the issue." (*Id.* at p. 354, 256 Cal.Rptr. 543, 769 P.2d 399.) The court explained in this regard that "the Restatement guidelines heretofore approved in our state remain a useful reference. The standards set forth for contractor's licensees in [Labor Code] section 2750.5 ... are also a helpful means of identifying the employee/contractor distinction.[11] The relevant *****21** considerations may often ***932** overlap those pertinent under the common law. [Citation.] Each service arrangement must be evaluated on its facts, and the dispositive circumstances ****18** may vary from case to case." (*Borello, supra*, 48 Cal.3d at p. 354, 256 Cal.Rptr. 543, 769 P.2d 399.)

11 Section 2750.5, which addresses the employee or independent contractor question in the context of workers who perform services for which a contractor's license is required, provides: "There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license[,] is an employee rather than an independent contractor. Proof of independent contractor status includes satisfactory proof of these factors:
"(a) That the individual has the right to control and discretion as to the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for.
"(b) That the individual is customarily engaged in an independently established business.
"(c) That the individual's independent contractor status is bona fide and not a subterfuge to avoid employee status. A bona fide independent contractor status is further evidenced by the presence of cumulative factors such as substantial investment other than personal services in the business, holding out to be in business for oneself, bargaining for a contract to complete a specific project for compensation by project rather than by time, control over the time and place the work is performed, supplying the tools or instrumentalities used in the work other than tools and instrumentalities normally and customarily provided by employees, hiring employees, performing work that is not ordinarily in the course of the principal's work, performing work that requires a particular skill, holding a license pursuant to the Business and Professions Code, the intent by the parties that the work relationship is of an

> independent contractor status, or that the relationship is not severable or terminable at will by the principal but gives rise to an action for breach of contract.
> "In addition to the factors contained in subdivisions (a), (b), and (c), any person performing any function or activity for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code shall hold a valid contractors' license as a condition of having independent contractor status.
> "For purposes of workers' compensation law, this presumption is a supplement to the existing statutory definitions of employee and independent contractor, and is not intended to lessen the coverage of employees under Division 4 and Division 5."

The *Borello* court also took note of "the six-factor test developed by other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation." (*Borello*, *supra*, 48 Cal.3d at p. 354, 256 Cal.Rptr. 543, 769 P.2d 399.)[12] The court observed the similarity of many of those guidelines to the ones identified in prior California decisions, and stated that "all [of those factors] are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law." (*Borello*, *supra*, 48 Cal.3d at p. 355, 256 Cal.Rptr. 543, 769 P.2d 399.)

[12] In addition to the control of details factor, the other five factors included in the six-factor test are: "(1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business." (*Borello*, *supra*, 48 Cal.3d at pp. 354-355, 256 Cal.Rptr. 543, 769 P.2d 399.)

In sum, the *Borello* court concluded that in determining whether a worker should properly be classified as a covered employee or an excluded independent contractor with deference to the purposes and intended reach of the remedial statute at issue, it is permissible to consider all of the various factors set forth in prior California cases, in Labor Code section 2750.5, and in the out-of-state cases adopting the six-factor test.

The *Borello* court then turned to the question whether, applying the appropriate legal analysis, the cucumber harvesters at issue in that case were properly considered employees or independent contractors. The court concluded that "[b]y any applicable test" the farmworkers were employees *as a matter of law*. (*Borello*, *supra*, 48 Cal.3d at p. 355, 256 Cal.Rptr. 543, 769 P.2d 399; *id.* at p. 360, 256 Cal.Rptr. 543, 769 P.2d 399.)

In reaching this conclusion, the court first rejected the grower's contention that the control of details factor weighed against a finding of employment because the grower had contracted with the workers only for a "specified result" and retained no interest or control over the details of the harvesters' actual work. (*Borello*, *supra*, 48 Cal.3d at p. 356, 256 Cal.Rptr. 543, 769 P.2d 399.) In explaining its rejection, the court began by emphasizing that "Borello, whose business is the production and sale of agricultural crops, exercises 'pervasive control over the operation as a whole.' [Citation.]" (*Ibid.*) The court observed in this regard: "Borello owns and cultivates the land for its own account. Without any participation by the sharefarmers, Borello decides to grow cucumbers, obtains a sale price formula from the only available buyer, plants the crop, and ***933** cultivates it throughout most of its growing cycle. The harvest takes place on Borello's premises, at a time determined by the crop's maturity. During the harvest itself, Borello supplies the sorting bins and boxes, removes the harvest from the field, transports it to market, sells it, maintains documentation on the workers' proceeds, and hands out their checks. Thus, '[a]ll meaningful aspects of this business relationship: price, crop cultivation, fertilization *****22** and insect prevention, payment, [and] right to deal with buyers ... are controlled by [Borello].' [Citation.]" (*Ibid*., fns. omitted.)

Further, the court observed that "contrary to the growers' assertions, the cucumber harvest involves simple manual labor which can be performed in only one correct way. Harvest and plant-care methods can be learned quickly. While the work requires stamina and patience, it involves no peculiar skill beyond that expected of any employee. [Citations.] It is the simplicity of the work, not the harvesters' superior expertise, which makes detailed supervision and discipline unnecessary. Diligence and quality control are achieved by the payment system, essentially a variation of the piecework formula familiar to agricultural employment." (*Borello*, *supra*, 48 Cal.3d at pp. 356-357, 256 Cal.Rptr. 543, 769 P.2d 399.)

Thus, with respect to the control of details factor, the court concluded: "Under these ****19** circumstances, Borello retains all *necessary* control over the harvest portion of its operations. A business entity may not avoid its statutory obligations by carving up its production process into minute steps, then asserting it lacks 'control' over the exact means by which one such step is performed by the responsible workers." (*Borello*, *supra*, 48 Cal.3d at p. 357, 256 Cal.Rptr. 543, 769 P.2d 399.)

The *Borello* court then proceeded to discuss other factors that it found supported the classification of harvesters as employees. First, the court noted that "[ ]he harvesters form a regular and integrated portion of Borello's business operation. Their work, though seasonal in nature, is 'permanent' in the agricultural process. Indeed, Richard Borello testified that he has a permanent relationship with the individual harvesters, in that many of the migrant families return year after year. This permanent integration of the workers into the heart of Borello's business is a strong indicator that Borello functions as an employer under the Act. [Citations.]" (*Borello*, *supra*, 48 Cal.3d at p. 357, 256 Cal.Rptr. 543, 769 P.2d 399.)[13]

[13] In support of this point, the *Borello* court cited a passage from a leading national workers' compensation law treatise, stating: "The modern tendency is to find employment when the work being done is an integral part of the regular business of the employer, and when the worker, relative to the employer, does not furnish an independent business or professional service." (1C Larson, The Law of Workmen's Compensation (1986) § 45.00, p. 8-174.)

***934** The court next found that "the sharefarmers and their families exhibit no characteristics which might place them outside the Act's intended coverage of employees. They engage in no distinct trade or calling. They do not hold themselves out in business. They perform typical farm labor for hire wherever jobs are available. They invest nothing but personal services and hand tools. They incur no opportunity for 'profit' or 'loss'; like employees hired on a piecework basis, they are simply paid by the size and grade of cucumbers they pick. They rely solely on work in the fields for their subsistence and livelihood. Despite the contract's admonitions, they have no practical opportunity to insure themselves or their families against loss of income caused by nontortious work injuries. If Borello is not their employer, they themselves, and society at large, thus assume the entire financial burden when such injuries occur. Without doubt, they are a class of workers to whom the protection of the Act is intended to extend." (*Borello*, *supra*, 48 Cal.3d at pp. 357-358, 256 Cal.Rptr. 543, 769 P.2d 399, fns. omitted.)

*****23** Last, the *Borello* court rejected the growers' claim that the harvesters should be found to be independent contractors by virtue of their written agreement with the growers, which stated that they were not employees. The court explained: "[T]he protections conferred by the Act have a public purpose beyond the private interests of the workers themselves. Among other things, the statute represents society's recognition that if the financial risk of job injuries is not placed upon the businesses which produce them, it may fall upon the public treasury. ... [¶] Moreover, there is no indication that Borello offers its cucumber harvesters any real choice of terms." (*Borello*, *supra*, 48 Cal.3d at pp. 358-359, 256 Cal.Rptr. 543, 769 P.2d 399.)

On the basis of the foregoing reasons, the *Borello* court concluded that, as a matter of law, the farmworkers were employees for purposes of the workers' compensation act, and not independent contractors who were excluded from the coverage of the act. (*Borello*, *supra*, 48 Cal.3d at p. 360, 256 Cal.Rptr. 543, 769 P.2d 399.)

As this lengthy review of the *Borello* decision demonstrates, although we have sometimes characterized *Borello* as embodying the common law test or standard for distinguishing employees and independent contractors (see, e.g., *Ayala*, *supra*, 59 Cal.4th at pp. 530-531, 173 Cal.Rptr.3d 332, 327 P.3d 165), it appears more precise to describe *Borello* as calling for resolution of the employee or independent contractor question by focusing on the intended scope and purposes of the particular statutory provision or provisions at issue. In other words, *Borello* calls for application of a *statutory purpose* standard that considers the control of details and other potentially relevant factors identified in prior ****20** California and out-of-state cases in order to determine which classification (employee or independent contractor) best effectuates the underlying legislative intent and objective of the statutory scheme at issue.

***935** The *Borello* decision repeatedly emphasizes statutory purpose as the touchstone for deciding whether a particular category of workers should be considered employees rather than independent contractors for purposes of social welfare legislation. (See *Borello*, *supra*, 48 Cal.3d at pp. 351, 353-354, 357, 358, 359, 256 Cal.Rptr. 543, 769 P.2d 399.) This emphasis sets apart the *Borello* test for distinguishing employees from independent contractors from the standard embraced in more recent federal cases, which apply a more traditional common law test for distinguishing between employees and independent contractors for purposes of most federal statutes. Early federal cases interpreting a variety of New Deal social welfare enactments relied heavily on a statutory purpose interpretation in determining who should be considered an employee for purposes of those enactments. (See, e.g., *Labor Board v. Hearst Publications*, *supra*, 322 U.S. at pp. 124-129, 64 S.Ct. 851; *United States v. Silk* (1947) 331 U.S. 704, 711-714, 67 S.Ct. 1463, 91 L.Ed. 1757.) However, subsequent congressional legislation in reaction to such decisions has been interpreted to require that federal legislation generally be construed, in the absence of a more specific statutory standard or definition of employment, to embody a more traditional common law test for distinguishing between employees and independent contractors, in which the control of details factor is given considerable weight. (See, e.g., *Nationwide Mut. Ins. Co. v. Darden* (1992) 503 U.S. 318, 324-325, 112 S.Ct. 1344, 117 L.Ed.2d 581 (*Darden*).) Unlike the federal experience, however, in the almost 30 years since the *Borello* decision, the California

Legislature has not exhibited or registered any disagreement with either the statutory purpose standard adopted by *****24** the *Borello* decision or the application of that standard in *Borello* regarding the proper classification of the workers involved in that case. Instead, in response to the continuing serious problem of worker misclassification as independent contractors, the California Legislature has acted to impose substantial civil penalties on those that willfully misclassify, or willfully aid in misclassifying, workers as independent contractors. (See § 226.8, enacted by Stats. 2011, ch. 706, § 1; § 2753, enacted by Stats. 2011, ch. 706, § 2.)

C. *Martinez*

We next summarize this court's decision in *Martinez*, *supra*, 49 Cal.4th 35, 109 Cal.Rptr.3d 514, 231 P.3d 259. Although *Martinez* did not directly involve the issue of whether the workers in question were employees or independent contractors, it did address the meaning of the terms "employ" and "employer" as used in California wage orders, and the proper scope of the *Martinez* decision lies at the heart of the issue before our court in the present case.

In *Martinez*, *supra*, 49 Cal.4th 35, 109 Cal.Rptr.3d 514, 231 P.3d 259, the strawberry grower Munoz & Sons (Munoz) directly employed seasonal agricultural workers but failed to pay the workers the required minimum or overtime wages they had earned. Thereafter, the workers filed an action under section 1194 seeking to recover such ***936** wages not only from Munoz, but also from several produce merchants to whom Munoz regularly sold its strawberries. The workers contended that in an action for unpaid minimum or overtime wages under section 1194, the alternative definitions of "employ" and "employer" set forth in the applicable Industrial Welfare Commission wage order—there, Wage Order No. 14—constituted the applicable standards for determining who was a potentially liable employer. They further contended that under the wage order definitions, the produce merchants, as well as Munoz, each should properly be considered the workers' employer who was jointly liable for the workers' unpaid wages.

In discussing this question, the court in *Martinez* recognized at the outset that the workers' attempt in that case to recover unpaid wages "from persons who contracted with their ostensible employer raises issues that have long avoided the attention of California's courts." (****21** *Martinez*, *supra*, 49 Cal.4th at p. 50, 109 Cal.Rptr.3d 514, 231 P.3d 259.) The court noted that although section 1194 derived from legislation enacted in 1913 as part of the act that created the Industrial Welfare Commission (hereafter IWC), this court had considered how employment should be defined in actions under section 1194 in only one earlier case. The court further observed that although the phrases used in the applicable IWC wage order to define "employ" and "employer" dated from 1916 and 1947, "the courts of this state have never considered their meaning or scope." (*Id.* at p. 50, 109 Cal.Rptr.3d 514, 231 P.3d 259.)

In addressing these largely unexplored issues, the *Martinez* court turned initially to the language and legislative history of section 1194. The court noted that section 1194, by its terms, does not define the employment relationship or identify the entities who are liable under the statute for unpaid wages. After an extensive review of the statute's legislative history, however, the court concluded that "[a]n examination of section 1194 in its statutory and historical context shows unmistakably that the Legislature intended the IWC's wage orders to define the employment relationship in actions under the statute." (*Martinez*, *supra*, 49 Cal.4th at p. 52, 109 Cal.Rptr.3d 514, 231 P.3d 259; see *id.* at pp. 53-57, 109 Cal.Rptr.3d 514, 231 P.3d 259.)

*****25** The court in *Martinez* then considered how the IWC, utilizing its broad legislative authority (see Cal. Const., art. XIV, § 1; *Industrial Welf. Com.*, *supra*, 27 Cal.3d at p. 701, 613 P.2d 579), has defined the scope of the employment relationship through the provisions of its wage orders.[14]

[14] As explained in *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1102, footnote 4, 56 Cal.Rptr.3d 880, 155 P.3d 284: "The Industrial Welfare Commission (IWC) is the state agency empowered to formulate wage orders governing employment in California. [Citation.] The Legislature defunded the IWC in 2004, however its wage orders remain in effect. [Citation.]" The Legislature, of course, retains the authority to re-fund the IWC or to revise any provisions of the current wage orders through the enactment of new legislation.

***937** The court first observed that, beginning in 1916, the IWC's wage orders encompassed, as employers, those entities who "employ or suffer or permit" persons to work for them. (*Martinez*, *supra*, 49 Cal.4th at p. 57, 109 Cal.Rptr.3d 514, 231 P.3d 259, italics omitted.) The court noted that the "suffer or permit" language, now embodied in the definition of "employ" in the wage order at issue in *Martinez* (as well as in the transportation wage order at issue in this case and in all other wage orders), derived from statutes regulating and prohibiting child labor that were in use throughout the country in 1916, and which were based on model child labor laws published between 1904 and 1912. (*Id.* at pp. 57-58, 109 Cal.Rptr.3d 514, 231 P.3d 259.) The *Martinez* court observed that the suffer or permit to work language had been interpreted to impose liability upon an

entity "even when no common law employment relationship existed between the minor and the defendant, based on the defendant's failure to exercise reasonable care to prevent child labor from occurring." (*Id.* at p. 58, 109 Cal.Rptr.3d 514, 231 P.3d 259.) The court explained: "Not requiring a common law master and servant relationship, the widely used 'employ, suffer or permit' standard reached irregular working arrangements the proprietor of a business might otherwise disavow with impunity. Courts applying such statutes before 1916 had imposed liability, for example, on a manufacturer for industrial injuries suffered by a boy hired by his father to oil machinery [citation], and on a mining company for injuries to a boy paid by coal miners to carry water [citation]." (*Ibid.*)

The *Martinez* court then went on to observe that, in addition to defining "employ" to mean suffer or permit to work, all IWC wage orders also include a separate provision defining "employer" to include a person or entity who "employs or exercises control over the wages, hours, or working conditions of any person." (*Martinez, supra*, 49 Cal.4th at p. 59, 109 Cal.Rptr.3d 514, 231 P.3d 259.) With respect to this language, the court stated: "Beginning with the word 'employs,' the definition logically incorporates the separate definition of 'employ' (i.e., 'to engage, suffer, or permit to work') as one alternative. The remainder of the definition—'exercises control over ... wages, hours, or working conditions' "—has no clearly identified, precisely literal statutory or common law antecedent." ****22** (*Ibid.*) The court nonetheless made three observations about this language. First, the court noted that because the IWC's delegated authority has always been over wages, hours, and working conditions, it made sense to bring within the IWC's regulatory jurisdiction an entity that controls any one of these aspects of the employment relationship. (*Ibid.*) Second, the court explained that because this language, "phrased as it is in the alternative (i.e., 'wages, hours, *or* working conditions'), the language of the IWC's 'employer' *****26** definition has the obvious utility of reaching situations in which multiple entities control different aspects of the employment relationship, as when one entity, which hires and pays workers, places them with other entities that supervise the work." (*Ibid.*) Third, the court observed that "the IWC's 'employer' definition belongs to a set of revisions ***938** intended to distinguish state wage law from its federal analogue, the FLSA [Fair Labor Standards Act]" (*ibid.*), providing workers with greater protection than that afforded to workers under the FLSA as limited by Congress under the Portal-to-Portal Act of 1947. (*Id.* at pp. 59-60, 109 Cal.Rptr.3d 514, 231 P.3d 259.)

Finally, the court in *Martinez* held that the IWC wage orders, by defining "employ" to mean "engage" to work (as well as to "suffer or permit" to work), incorporate the common law definition of employment as an alternative definition. The court explained in this regard: "The verbs 'to suffer' and 'to permit,' as we have seen, are terms of art in employment law. [Citation.] In contrast, the verb 'to engage' has no other apparent meaning in the present context than its plain, ordinary sense of 'to employ,' that is, to create a common law employment relationship. This conclusion makes sense because the IWC, even while extending its regulatory protection to workers whose employment status the common law did not recognize, could not have intended to withhold protection from the regularly hired employees who undoubtedly comprise the vast majority of the state's workforce." (*Martinez, supra*, 49 Cal.4th at p. 64, 109 Cal.Rptr.3d 514, 231 P.3d 259, fn. omitted.)

The *Martinez* court summarized its conclusion on this point as follows: "To employ, then, under the IWC's definition, has three alternative definitions. It means: (a) to exercise control over the wages, hours or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship." (*Martinez, supra*, 49 Cal.4th at p. 64, 109 Cal.Rptr.3d 514, 231 P.3d 259.)

Moreover, the court in *Martinez* thereafter took pains to emphasize the importance of *not* limiting the meaning and scope of "employment" to only the common law definition for purposes of the IWC's wage orders, declaring that "ignoring the rest of the IWC's broad regulatory definition would substantially impair the commission's authority and the effectiveness of its wage orders. The commission ... has the power to adopt rules to make the minimum wage 'effective' by 'prevent[ing] evasion and subterfuge ....' [Citation.] ... [L]anguage consistently used by the IWC to define the employment relationship, beginning with its first wage order in 1916 ('suffer, or permit'), was commonly understood to reach irregular working arrangements that fell outside the common law, having been drawn from statutes governing child labor and occasionally that of women. [Citation.] ... To adopt such a definitional provision ... lay squarely within the IWC's power, as the provision has 'a direct relation to minimum wages' [citation] and is reasonably necessary to effectuate the purposes of the statute [citations]. For a court to refuse to enforce such a provision in a presumptively valid wage ***939** order [citation] simply because it differs from the common law would thus endanger the commission's ability to achieve its statutory purposes. [¶] One cannot overstate the impact of such a holding on the IWC's powers. Were we to define employment exclusively according to the common law in civil actions for unpaid wages we would render the commission's definitions effectively meaningless." (*Martinez, supra*, 49 Cal.4th at p. 65, 109 Cal.Rptr.3d 514, 231 P.3d 259, fn. omitted.)

*****27** The court in *Martinez* thus concluded, first, that the definitions of the employment relationship contained in an applicable wage ****23** order apply in a civil action brought by a worker under section 1194, and, second, that the applicable wage order sets forth three alternative definitions of employment for purposes of the wage order: "(a) to exercise control over the wages, hours or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law

employment relationship." (*Martinez, supra*, 49 Cal.4th at p. 64, 109 Cal.Rptr.3d 514, 231 P.3d 259.) The court then went on to determine whether, under the wage order's alternative definitions, the produce merchants in that case should properly be considered the employer of the agricultural workers and thus could be held liable for the workers' unpaid minimum or overtime wages. (*Id.* at pp. 68-77, 109 Cal.Rptr.3d 514, 231 P.3d 259.)

With respect to each of the produce merchants, the court in *Martinez* ultimately concluded that the merchants could not properly be found to be an employer under any of the wage order's alternative definitions.

First, in discussing the scope of the suffer or permit to work standard, the court stated generally: "We see no reason to refrain from giving the IWC's definition of 'employ' its historical meaning. That meaning was well established when the IWC first used the phrase 'suffer, or permit' to define employment, and no reason exists to believe the IWC intended another. Furthermore, the historical meaning continues to be highly relevant today: *A proprietor who knows that persons are working in his or her business without having been formally hired, or while being paid less than the minimum wage, clearly suffers or permits that work by failing to prevent it, while having the power to do so.*" (*Martinez, supra*, 49 Cal.4th at p. 69, 109 Cal.Rptr.3d 514, 231 P.3d 259, italics added.) Nonetheless, the court rejected the workers' contention that because the merchants knew the agricultural workers were working for Munoz and because their work benefitted the produce merchants, the merchants suffered or permitted the workers to work within the meaning of the wage order. The court explained that the fact the merchants may have benefitted from the workers' labor, "in the sense that any purchaser of commodities benefits," was not sufficient to incur liability for having suffered or permitted them to work. (*Id.* at p. 69, 109 Cal.Rptr.3d 514, 231 P.3d 259.) The workers' claim failed because they were not working in the produce merchants' businesses and the merchants lacked the power or authority to prevent the workers from working for Munoz. (*Id.* at p. 70, 109 Cal.Rptr.3d 514, 231 P.3d 259.)

***940** Second, applying the standard that looks to the exercise of control over wages, hours or working conditions, the court rejected the argument that the produce merchants, through their contractual relationships with Munoz, dominated the Munoz business financially, and thus could properly be found to exercise indirect control over the wages and hours of Munoz's employees. (*Martinez, supra*, 49 Cal.4th at pp. 71-77, 109 Cal.Rptr.3d 514, 231 P.3d 259.) The court found that contrary to the implicit premise of the workers' claim, the record indicated that the Munoz business was not a sham arrangement created by the produce merchants, but rather constituted "a single, integrated business operation, growing and harvesting strawberries for several unrelated merchants and combining revenue from all sources with a personal investment, in the hope of earning a profit at the end of the season." (*Id.* at p. 72, 109 Cal.Rptr.3d 514, 231 P.3d 259.) Further, the court additionally determined *****28** that "Munoz alone, with the assistance of his foremen, hired and fired [the workers], trained and supervised them, determined their rate and manner of pay (hourly or piece rate), and set their hours, telling them when and where to report to work and when to take breaks." (*Ibid*.) Although the workers pointed to several occasions in which field representatives of the produce merchants had spoken to individual workers about the manner in which strawberries were to be packed (*id*. at pp. 74-77, 109 Cal.Rptr.3d 514, 231 P.3d 259), the court concluded that the record did not indicate "the field representatives ever supervised or exercised control over [Munoz's] employees" (*id.* at p. 76, 109 Cal.Rptr.3d 514, 231 P.3d 259) or that the merchants had the right to exercise such control under their contracts with Munoz. (*Id.* at p. 77, 109 Cal.Rptr.3d 514, 231 P.3d 259.)

****24** With respect to the third alternative definition of an employment relationship, the common law standard, the *Martinez* court observed early in the decision that the workers disclaimed any argument that the produce merchants were their employers under common law. (*Martinez, supra*, 49 Cal.4th at p. 52, fn. 17, 109 Cal.Rptr.3d 514, 231 P.3d 259.)

In sum, although the *Martinez* court concluded that the wage order definitions of the employment relationship apply in civil actions for unpaid minimum or overtime wages under section 1194, the court ultimately affirmed the trial court and Court of Appeal decisions in that case rejecting the workers' claims that the defendant produce merchants were the workers' employers for purposes of section 1194. (*Martinez, supra*, 49 Cal.4th at p. 78, 109 Cal.Rptr.3d 514, 231 P.3d 259.)

D. *Ayala*

Four years after the decision in *Martinez, supra*, 49 Cal.4th 35, 109 Cal.Rptr.3d 514, 231 P.3d 259, we rendered the decision in *Ayala*, *supra*, 59 Cal.4th 522, 173 Cal.Rptr.3d 332, 327 P.3d 165. In *Ayala*, a wage and hour action had been filed on behalf of newspaper carriers who had been hired by the Antelope Valley Press (Antelope Valley) to deliver its newspaper. ***941** The carriers alleged that Antelope Valley had misclassified them as independent contractors when they should have been treated as employees. The trial court in *Ayala* had denied the plaintiffs' motion to certify the action as a class action on the ground that under the *Borello* test—which, at the trial level, both parties agreed was the applicable standard—common issues did not predominate because application of the *Borello* standard "would require 'heavily individualized inquiries' into Antelope Valley's control over the carriers' work." (59 Cal.4th at p. 529, 173 Cal.Rptr.3d 332, 327 P.3d 165.)

In reviewing the trial court's ruling in *Ayala*, this court noted that "[i]n deciding whether plaintiffs were employees or independent contractors, the trial court and Court of Appeal applied the common law test, discussed most recently at length in *Borello*, *supra*, 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399." (*Ayala*, *supra*, 59 Cal.4th at pp. 530-531, 173 Cal.Rptr.3d 332, 327 P.3d 165.) We pointed out that while the *Ayala* case was pending in our court "[w]e solicited supplemental briefing concerning the possible relevance of the additional tests for employee status in IWC wage order No. 1-2001, subdivision 2(D)-(F)." (*Id.* at p. 531, 173 Cal.Rptr.3d 332, 327 P.3d 165 [citing, inter alia, *Martinez*, *supra*, 49 Cal.4th 35, 109 Cal.Rptr.3d 514, 231 P.3d 259].) The court in *Ayala* explained that "[i]n light of the supplemental briefing, and because plaintiffs proceeded below on the sole basis that they are employees under the common law, we now *****29** conclude we may resolve the case by applying the common law test for employment, without considering these other tests. [Citation.] Accordingly, we leave for another day the question of what application, if any, the wage order tests for employee status might have to wage and hour claims such as these, and confine ourselves to considering whether plaintiffs' theory that they are employees under the common law definition is one susceptible of proof on a classwide basis." (*Id.* at p. 531, 173 Cal.Rptr.3d 332, 327 P.3d 165; see also *id.* at p. 532, fn. 3, 173 Cal.Rptr.3d 332, 327 P.3d 165.)[15]

[15] In resolving the case under the *Borello* standard applied by the trial court, the court in *Ayala* concluded that the trial court had erred in failing to focus upon potential differences, if any, in Antelope Valley's *right to exercise control* over the carriers, rather than relying on variations in how that right *was actually exercised* by Antelope Valley, and the court remanded the case for reconsideration by the trial court under the correct legal standard. (*Ayala*, *supra*, 59 Cal.4th at pp. 532-540, 173 Cal.Rptr.3d 332, 327 P.3d 165.) In the course of its discussion, the court in *Ayala* explained how the class action "predominance" requirement should generally be applied in this context, observing that under the *Borello* standard "[o]nce common and individual factors have been identified, the predominance inquiry calls for weighing costs and benefits. ... [¶] ... [T]hat weighing must be conducted with an eye to the reality that the considerations in the multifactor test are not of uniform significance. Some, such as the hirer's right to fire at will and the basic level of skill called for by the job, are often of inordinate importance. [Citations.] Others, such as the 'ownership of the instrumentalities and tools' of the job, may be of 'only evidential value,' relevant to support an inference that the hiree is, or is not, subject to the hirer's direction and control. [Citation.] Moreover, the significance of any one factor and its role in the overall calculus may vary from case to case depending on the nature of the work and the evidence. (*Borello*, *supra*, 48 Cal.3d at p. 354, 256 Cal.Rptr. 543, 769 P.2d 399.)" (*Ayala*, *supra*, 59 Cal.4th at p. 539, 173 Cal.Rptr.3d 332, 327 P.3d 165.)

****25** In the present case, we take up the issue we did not reach in *Ayala*, namely whether in a wage and hour class action alleging that the plaintiffs have been ***942** misclassified as independent contractors when they should have been classified as employees, a class may be certified based on the wage order definitions of "employ" and "employer" as construed in *Martinez*, *supra*, 49 Cal.4th 35, 109 Cal.Rptr.3d 514, 231 P.3d 259, or, instead, whether the test for distinguishing between employees and independent contractors discussed in *Borello*, *supra*, 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399 is the only standard that applies in this setting.

IV. WITH RESPECT TO THE CLAIMS RESTING ON DYNAMEX'S ALLEGED FAILURE TO FULFILL OBLIGATIONS IMPOSED BY THE APPLICABLE WAGE ORDER, DID THE TRIAL COURT PROPERLY DETERMINE CLASS CERTIFICATION BASED ON THE DEFINITIONS OF "EMPLOY" AND "EMPLOYER" IN THE WAGE ORDER?

As noted, the drivers' general contention in this case is that Dynamex misclassified its drivers as independent contractors when they should have been classified as employees and as a result violated its obligations under the applicable wage order and a variety of statutes. Most of the causes of action in the complaint rest on Dynamex's alleged failure to fulfill obligations directly set forth in the wage order—for example, the alleged failure to pay overtime wages or to provide accurate wage statements. Other causes of action include Dynamex's alleged failure to comply with statutory obligations that do not derive directly from the applicable wage order—for example, the obligation to reimburse employees for business-related transportation expenses such as fuel or tolls. (See § 2802.) As already explained, Dynamex's petition for *****30** review challenged only the Court of Appeal's conclusion that the trial court, in ruling on the class certification motion, did not err in relying upon the definitions of the employment relationship contained in the wage order with regard to those claims that derive directly from the obligations imposed by the wage order. Accordingly, we address only that issue.[16]

[16] A trial court order denying a motion to decertify a class is generally subject to review pursuant to an abuse of discretion standard. (See, e.g., *Duran v. U.S. Bank Nat. Assn.* (2014) 59 Cal.4th 1, 49, 172 Cal.Rptr.3d 371, 325 P.3d

916; *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326, 17 Cal.Rptr.3d 906, 96 P.3d 194; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435-436, 97 Cal.Rptr.2d 179, 2 P.3d 27.) The question of what legal standard or test applies in determining whether a worker is an employee or, instead, an independent contractor for purposes of the obligations imposed by a wage order is, however, a question of law (cf., e.g., *Martinez*, *supra*, 49 Cal.4th at pp. 57-60, 109 Cal.Rptr.3d 514, 231 P.3d 259), and if the trial court applied the wrong legal standard and that error affected the propriety of its class certification ruling, the order denying decertification would constitute an abuse of discretion. (See, e.g., *Duran v. U.S. Bank Nat. Assn.*, *supra*, 59 Cal.4th at p. 49, 172 Cal.Rptr.3d 371, 325 P.3d 916.)

As discussed above, in *Martinez*, *supra*, 49 Cal.4th 35, 109 Cal.Rptr.3d 514, 231 P.3d 259, this court clearly held that the IWC has the authority, in promulgating its wage orders, to define the standard for determining when an entity is to be considered an ***943** employer for purposes of the applicable wage order. (*Id.* at pp. 60-62, 109 Cal.Rptr.3d 514, 231 P.3d 259.) After examining the definitions of "employ" and "employer" set forth in the applicable wage order, the court in *Martinez* held that the wage order embodied three alternative definitions of "employ": "(a) to exercise control over the wages, hours or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship." (*Id.* at p. 64, 109 Cal.Rptr.3d 514, 231 P.3d 259.) The court in *Martinez* went on to consider each of these alternative definitions or standards in determining whether the produce merchants in that case should properly be considered the employers of the agricultural workers for purposes of the applicable wage order. We ultimately concluded that the produce merchants were not employers of the workers under any of the wage order's definitions.

In the present case, Dynamex argues that two of the three alternative definitions identified ****26** in *Martinez*—the exercise control over wages hours or working conditions standard and the suffer or permit to work standard—are applicable only in determining whether an entity is a joint employer of the workers. In other words, Dynamex maintains that whether a business exercised control over the workers' wages, hours, or working conditions, or suffered or permitted the workers to work are relevant inquiries only in circumstances in which the question at issue is whether, when workers are "admitted employees" of one business (the primary employer), a business entity that has a relationship to the primary employer should also be considered an employer of the workers such that it is jointly responsible for the obligations imposed by the wage order. According to Dynamex, neither of these wage order definitions of "employ" and "employer" applies when the question to be answered is whether a worker is properly considered an employee who is covered by the wage order or, rather, an independent contractor who is excluded from the wage order's protections. The latter inquiry, Dynamex asserts, is governed solely by the third definition identified in *Martinez*, the *Borello* standard.

For the reasons discussed below, we conclude that there is no need in this case *****31** to determine whether the exercise control over wages, hours or working conditions definition is intended to apply outside the joint employer context, because we conclude that the suffer or permit to work standard properly applies to the question whether a worker should be considered an employee or, instead, an independent contractor, and that under the suffer or permit to work standard, the trial court class certification order at issue here should be upheld. (See *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1032, 139 Cal.Rptr.3d 315, 273 P.3d 513 [when plaintiffs in a class action rely on multiple legal theories, a trial court's certification of a class is not an abuse of discretion if certification is proper under any of the theories].) As explained below, the suffer or permit to work standard has a long and well-established history, and in other jurisdictions has regularly been held ***944** applicable to the question whether a worker should be considered an employee or an independent contractor for the purposes of social welfare legislation embodying that standard. Accordingly, we confine the discussion of Dynamex's argument to an analysis of the scope and meaning of the suffer or permit to work standard in California wage orders.

A. Does the Suffer or Permit to Work Definition Apply to the Employee/Independent Contractor Distinction?

To begin with, although Dynamex contends that the suffer or permit to work standard should be understood as applicable only to the joint employer question like that involved in the *Martinez* decision itself, there is nothing in the language of the wage order indicating that the standard is so limited. As *Martinez* discussed, the suffer or permit language is one of the wage order's alternative definitions of the term "employ." (*Martinez*, *supra*, 49 Cal.4th at p. 64, 109 Cal.Rptr.3d 514, 231 P.3d 259.) On its face, the standard would appear relevant to a determination whether, for purposes of the wage order, a worker should be considered an individual who is "employ[ed]" by an "employer" (and therefore an employee covered by the wage order) or, instead, an independent contractor who has been hired, but not "employed," by the hiring business (and thus not covered by the wage order).

Moreover, the discussion of the origin and history of the suffer or permit to work language in *Martinez* itself makes it quite

clear that this standard was intended to apply beyond the joint employer context. As *Martinez* explains, at the time the suffer or permit language was initially adopted as part of a wage order in 1916, such language "was already in use throughout the country in statutes regulating and prohibiting child labor (and occasionally that of women), having been recommended for that purpose in several model child labor laws published between 1904 and 1912 [citation]." (*Martinez*, *supra*, 49 Cal.4th at pp. 57-58, 109 Cal.Rptr.3d 514, 231 P.3d 259, fn. omitted.) *Martinez* observed that "[n]ot requiring a common law master and servant relationship, the widely used 'employ, suffer or permit' standard reached irregular working arrangements the proprietor ****27** of a business might otherwise disavow with impunity. Courts applying such statutes before 1916 had imposed liability, for example, on a manufacturer for industrial injuries suffered by a boy hired by his father to oil machinery [citation], and on a mining company for injuries to a boy paid by coal miners to carry water [citation]." (*Id.* at p. 58, 109 Cal.Rptr.3d 514, 231 P.3d 259.) Thus, *Martinez* demonstrates that the suffer or permit to work standard does not apply only to the joint employer context, but also can apply to the question whether, *****32** for purposes of the obligations imposed by a wage order, a worker who is not an "admitted employee" of a distinct primary employer should ***945** nonetheless be considered an employee of an entity that has "suffered or permitted" the worker to work in its business.[17]

[17] Although the suffer or permit to work standard is not limited to the joint employer context, there is no question that the standard was intended to cover a variety of entities that have a relationship with a worker's primary employer, for example, a larger business that contracts out some of its operations to a subcontractor but retains substantial control over the work. (See generally Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment* (1999) 46 UCLA L.Rev. 983, 1055-1066 (*Enforcing Fair Labor Standards*).) It is important to understand, however, that even when a larger business is found to be a joint employer of the subcontractor's employees under the suffer or permit to work standard, this result does not mean that the larger business is prohibited from entering into a relationship with the subcontractor or from obtaining benefits that may result from utilizing the services of a separate business entity. Even when the subcontractor's employees can hold the larger business responsible for violations of the wage order under the suffer or permit to work standard, the larger business, so long as authorized by contract, can seek reimbursement for any such liability from the subcontractor. (See *id.* at pp. 1144-1145.)

Dynamex contends, however, that even if the suffer or permit to work standard can apply outside the joint employer context to circumstances like those in the early child worker cases cited in *Martinez*, that standard should not be construed as applicable to the question whether an individual worker is an employee or, instead, an independent contractor. Dynamex proffers a number of arguments in support of this contention.

First, Dynamex points out that the suffer or permit to work language has been a part of California wage orders for over a century and that since the *Borello* decision was handed down in 1989, California decisions have applied the *Borello* standard in distinguishing employees from independent contractors in many contexts, including in cases arising under California's wage orders. (See, e.g., *Ali v. U.S.A. Cab Ltd.* (2009) 176 Cal.App.4th 1333, 1347, 98 Cal.Rptr.3d 568; *Estrada v. FedEx Ground Package System, Inc.* (2007) 154 Cal.App.4th 1, 11-13, 64 Cal.Rptr.3d 327 (*Estrada*).) Dynamex asserts that there is no reason to interpret the *Martinez* decision as altering this situation. In further support of this position, Dynamex refers to several sections of the Division of Labor Standards Enforcement (DLSE) Enforcement Policies and Interpretations Manual that discuss the employee/independent contractor distinction and that indicate that the DLSE has in the past applied the *Borello* standard in determining whether a worker is an employee or independent contractor for purposes of a wage order. (See DLSE, 2002 Update of the DLSE Enforcement Policies and Interpretations Manual (rev. 2017), §§ 2.2, 2.2.1, 28, available at <www.dir.ca.gov/dlse/DLSEManual/dlse_enfcmanual.pdf> [as of Apr. 30, 2018] (DLSE Manual).[18] Dynamex emphasizes that ***946** the relevant sections of the DLSE Manual dealing with independent contractors make no mention of the suffer or permit to work standard.

[18] The DLSE is the administrative agency authorized to enforce California's labor laws, including applicable wage orders. (See, e.g., *Kilby v. CVS Pharmacy, Inc.* (2016) 63 Cal.4th 1, 13, 201 Cal.Rptr.3d 1, 368 P.3d 554.)

As our decision in *Martinez* itself observed, however, prior to *Martinez* no California decision had discussed the wage orders' suffer or permit to work language in any context. (*Martinez*, *supra*, 49 Cal.4th at p. 50, 109 Cal.Rptr.3d 514, 231 P.3d 259.) *****33** In *Martinez*, we applied the suffer or permit to work standard in determining whether the produce merchants should be considered joint employers of the farmworkers even though that test had not been applied in prior California decisions. (****28** *Id.* at pp. 69-71, 109 Cal.Rptr.3d 514, 231 P.3d 259.) Thus, the lack of prior case support does not distinguish the employee/independent contractor context from the joint employer context at issue in *Martinez*.

With respect to the effect of the DLSE Manual, the parties and supporting amici curiae have not cited any DLSE decision

since *Martinez* that has considered whether the suffer or permit to work standard should apply in resolving the employee/independent contractor question. Indeed, in a supplemental brief filed in response to a question posed by this court, the DLSE itself notes that the sections in the DLSE Manual that discuss independent contractors have not been revised since the decision in *Martinez*, and further states that "[ ]he lack of any mention of *Martinez* in Chapter 28 of the Manual [the section directly discussing the employee/independent contractor distinction] ... should not be interpreted as an expression of a view on the underlying question presented for review in this case." Moreover, our past cases explain that because the DLSE Manual was not adopted pursuant to the procedures embodied in the California Administrative Procedure Act, its provisions are not entitled to the deference ordinarily accorded to formal administrative regulations, and that this court must independently determine the meaning and scope of the provisions of an applicable wage order. (See, e.g., *Alvarado v. Dart Container Corp. of California* (2018) 4 Cal.5th 542, 554-561, 229 Cal.Rptr.3d 347, 411 P.3d 528; *Kilby v. CVS Pharmacy, Inc.*, *supra*, 63 Cal.4th at p. 13, 201 Cal.Rptr.3d 1, 368 P.3d 554; *Peabody v. Time Warner Cable, Inc.* (2014) 59 Cal.4th 662, 669-670, 174 Cal.Rptr.3d 287, 328 P.3d 1028; *Martinez*, *supra*, 49 Cal.4th at p. 63, fn. 34, 109 Cal.Rptr.3d 514, 231 P.3d 259; cf. *Tidewater v. Bradshaw* (1996) 14 Cal.4th 557, 569-570, 59 Cal.Rptr.2d 186, 927 P.2d 296.) Accordingly, we conclude that Dynamex's reliance on the DLSE Manual is not persuasive.

Second, Dynamex asserts that the *Martinez* decision itself indicates that the *Borello* standard, rather than the suffer or permit to work standard, applies in the wage order context to distinguish independent contractors from employees. Dynamex points to a passage in *Martinez* in which the court relied on a ***947** number of factors discussed in *Borello* in concluding that Munoz, the grower who employed the individual agricultural workers, was an independent contractor rather than an employee of the produce merchants. (*Martinez*, *supra*, 49 Cal.4th at p. 73, 109 Cal.Rptr.3d 514, 231 P.3d 259.) The grower in *Martinez*, however, operated a distinct business with its own employees and was not an individual worker like the delivery drivers at issue in the present case. In any event, the passage in question in *Martinez* makes it quite clear that the court was *not* deciding whether the *Borello* standard was the only applicable standard for determining whether a worker is an employee or independent contractor for purposes of an applicable wage order. (*Id.* at p. 73, 109 Cal.Rptr.3d 514, 231 P.3d 259 ["Assuming the decision in *S.G. Borello*, *supra*, 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399, has any relevance to wage claims, *a point we do not decide*, the case does not advance plaintiffs' argument" (italics added)].)

Third, Dynamex maintains that a number of Court of Appeal opinions decided after *Martinez* demonstrate that the *Borello* standard continues to control the determination *****34** of whether a worker is an employee or independent contractor for purposes of an applicable wage order. (See, e.g., *Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 586-588, 135 Cal.Rptr.3d 213; *Arzate v. Bridge Terminal Transport, Inc.* (2011) 192 Cal.App.4th 419, 425-427, 121 Cal.Rptr.3d 400.) None of the Court of Appeal decisions relied upon by Dynamex, however, refers to or analyzes the potential application of the suffer or permit to work standard to the employee or independent contractor question. By contrast, the Court of Appeal decision in the present case cited and discussed a number of post-*Martinez* Court of Appeal decisions recognizing that the definitions of "employ" and "employer" discussed in *Martinez* now govern the resolution of claims arising out of California wage orders, including whether a worker is an employee or independent contractor. (See, e.g., *Guerrero v. Superior Court* (2013) 213 Cal.App.4th 912, 945-952, 153 Cal.Rptr.3d 315; ****29** *Bradley v. Networkers Internat. LLC* (2012) 211 Cal.App.4th 1129, 1146-1147, 150 Cal.Rptr.3d 268; *Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4th 1419, 1429, 119 Cal.Rptr.3d 513.) In short, California decisions since *Martinez* do not support Dynamex's contention that the suffer or permit to work standard is not applicable to the employee/independent contractor determination.

Fourth, Dynamex contends that even if there is nothing in *Martinez* or subsequent Court of Appeal decisions that renders the suffer or permit to work standard inapplicable to the employee or independent contractor question, it would introduce unnecessary confusion into California law to adopt a standard for wage orders that differs from the *Borello* standard, which is widely utilized in other contexts for distinguishing between employees and independent contractors. The applicable wage order, however, purposefully adopts its own definition of "employ" to govern the application of the wage ***948** order's obligations that is intentionally broader than the standard of employment that would otherwise apply, and as our decision in *Martinez* emphasized, we must respect the IWC's legislative authority to promulgate the test that will govern the scope of the wage order. (*Martinez*, *supra*, 49 Cal.4th at pp. 60-62, 109 Cal.Rptr.3d 514, 231 P.3d 259.)

In its reply brief, Dynamex advances a variant of this contention, maintaining that a "two-test" approach to the employee or independent contractor distinction would invariably lead to inconsistent determinations for disparate claims under different labor statutes brought by the same individual. Any potential inconsistency, however, arises from the IWC's determination that it is appropriate to apply a distinct and particularly expansive definition of employment regarding obligations imposed by a wage order. Under *Martinez*, *supra*, 49 Cal.4th 35, 109 Cal.Rptr.3d 514, 231 P.3d 259, the potential inconsistent results to which Dynamex objects could equally arise in the joint employer context: a third party that has a relationship to a worker's primary employer could be found to be a joint employer for purposes of the obligations imposed by a wage order, even when the third party may not constitute a joint employer for other purposes.

Moreover, because the *Borello* standard itself emphasizes the primacy of statutory purpose in resolving the employee or independent contractor question, when different statutory schemes have been enacted for different purposes, it is possible under *Borello* that a worker may properly be considered an employee with reference to one statute but not another. (Accord *People v. Superior Court* (*Sahlolbei*) (2017) 3 Cal.5th 230, 235-245, 219 Cal.Rptr.3d 436, 396 P.3d 568.) Further, because the applicable federal wage and hour law—the Fair *****35** Labor Standards Act (FLSA) (29 U.S.C. § 201 et seq.)—contains its own standard for resolving the employee or independent contractor issue (see *post*, pp. 56-58, fn. 20, & pp. 61-62), an employer must, in any event, take into account a variety of applicable standards. Indeed, the federal context demonstrates that California is not alone is adopting a distinct standard that provides broader coverage of workers with regard to the very fundamental protections afforded by wage and hour laws and wage orders; like California wage orders, the FLSA contains a broader standard of employment than that generally applicable in other, non-wage-and-hour federal contexts. (See, e.g., *Darden*, *supra*, 503 U.S. at p. 326, 112 S.Ct. 1344.)

Finally, and perhaps most significantly, Dynamex argues that the suffer or permit to work standard cannot serve as the test for distinguishing employees from independent contractors because a literal application of that standard would characterize *all* individual workers who directly provide services to a business as employees. A business that hires any individual to provide services to it can always be said to knowingly "suffer or permit" such an ***949** individual to work for the business. A literal application of the suffer or permit to work standard, therefore, would bring within its reach even those individuals hired by a business—including unquestionably independent plumbers, electricians, architects, sole practitioner attorneys, and the like—who provide only occasional services unrelated to a company's primary line of business and who have traditionally been viewed as working in their own independent business. For this reason, Dynamex maintains that the *Borello* standard is the only ****30** approach that can provide a realistic and practical test for distinguishing employees from independent contractors.

It is true that, when applied literally and without consideration of its history and purposes in the context of California's wage orders, the suffer or permit to work language, standing alone, does not distinguish between, on the one hand, those individual workers who are properly considered employees for purposes of the wage order and, on the other hand, the type of traditional independent contractors described above, like independent plumbers and electricians, who could not reasonably have been intended by the wage order to be treated as employees of the hiring business. As other jurisdictions have recognized, however, that the literal language of the suffer or permit to work standard does not itself resolve the question whether a worker is properly considered a covered employee rather than an excluded independent contractor does not mean that the suffer or permit to work standard has no substantial bearing on the determination whether an individual worker is properly considered an employee or independent contractor for purposes of a wage and hour statute or regulation. (See, e.g., *Rutherford Food Corp. v. McComb* (1947) 331 U.S. 722, 729, 67 S.Ct. 1473, 91 L.Ed. 1772 (*Rutherford Foo*d); *Scantland v. Jeffry Knight, Inc.* (11th Cir. 2013) 721 F.3d 1308, 1311 (*Scantlan*d); *Brock v. Superior Care, Inc.* (2d Cir. 1988) 840 F.2d 1054, 1058-1059 (*Superior Care*); *Sec'y of Labor, U.S. Dept. of Labor v. Lauritzen* (7th Cir. 1987) 835 F.2d 1529, 1535-1539 (*Lauritzen*); see *id.* at pp. 1539-1545 (conc. opn. of Easterbrook, J.); *Silent Woman, Ltd. v. Donovan* (E.D.Wis. 1984) 585 F.Supp. 447, 450-452 (*Silent Woman, Ltd.*); *Jeffcoat v. State Dept. of Labor* (Alaska 1987) 732 P.2d 1073, 1075-1078; *Cejas Commercial Interiors, Inc. v. Torres-Lizama* (2013) 260 Or.App. 87, 316 P.3d 389, 397; *Commonwealth v. Stuber* (Pa. 2003) 822 A.2d 870, 873-875; *Anfinson v. FedEx Ground Package System* (2012) 174 Wash.2d 851, 281 P.3d 289, 297-299; see generally *****36** U.S. Dept. of Labor, Wage & Hour Div., Administrator's Interpretation letter No. 2015-1, The Application of the Fair Labor Standard Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent ***950** Contractors (July 15, 2015) available online at <http://www.blr.com/html_email/AI2015-1.pdf> [as of Apr. 30, 2018].)[19]

[19] The U.S. Department of Labor Wage and Hour Administrator's Interpretation No. 2015-1 was withdrawn by the Secretary of Labor on June 7, 2017. (See U.S. Dept. of Labor, News Release (Jun 7, 2017). <https://www.dol.gov/newsroom/releases/opa/opa20170607> [as of Apr. 30, 2018].) No new administrative guidance on this subject has been published to date.

As we explain, for a variety of reasons we agree with these authorities that the suffer or permit to work standard is relevant and significant in assessing the scope of the category of workers that the wage order was intended to protect. The standard is useful in determining who should properly be treated as covered employees, rather than excluded independent contractors, for purposes of the obligations imposed by the wage order.

At the outset, it is important to recognize that over the years and throughout the country, a number of standards or tests have been adopted in legislative enactments, administrative regulations, and court decisions as the means for distinguishing between those workers who should be considered employees and those who should be considered independent contractors.[20] ***951** The suffer or permit ****31** to work *****37** standard was proposed and adopted in 1937 as part of the FLSA, the principal

federal wage and hour legislation. One of the authors of the legislation, then-Senator (later United States Supreme Court Justice) Hugo L. Black, described this standard as "the broadest definition" that has been devised for extending the coverage of a statute or regulation to the widest class of workers that reasonably fall within the reach of a social welfare statute. (See *United States v. Rosenwasser* (1945) 323 U.S. 360, 363, fn. 3, 65 S.Ct. 295, 89 L.Ed. 301 (*Rosenwasser*).) More recent cases, in referring to the suffer or permit to work standard, continue to describe the standard in just such broad, inclusive terms. (See, e.g., *Darden*, *supra*, 503 U.S. at p. 326, 112 S.Ct. 1344 [noting the "striking breadth" of the suffer or permit to work standard]; *Zheng v. Liberty Apparel Co.*, *supra*, 355 F.3d at p. 69; *Lauritzen*, *supra*, 835 F.2d at p. 1543 (conc. opn. of Easterbrook, J.); *Donovan v. Dialamerica Marketing, Inc.* (3d Cir. 1985) 757 F.2d 1376, 1382.)

[20] The various standards are frequently described as falling within three broad categories. (See, e.g., Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities* (2017) 105 Cal.L.Rev. 65, 72.)

The first category is commonly characterized as embodying the common law standard, because the standards within this category give significant weight to evidence of the hirer's right to control the details of the work, which had its origin in the common law tort and respondeat superior context. These standards supplement the control of details factor with a variety of additional circumstances, often described as secondary factors. The United States Supreme Court's decision in *Darden*, *supra*, 503 U.S. 318, 112 S.Ct. 1344, in holding that this standard applies in interpreting the meaning of the term "employee" in federal statutes that do not otherwise provide a meaningful definition of that term, lists 12 secondary factors to be considered in addition to the right to control factor. (503 U.S. at p. 323, 112 S.Ct. 1344 [quoting *Community for Creative Non-Violence v. Reid* (1989) 490 U.S. 730, 751-752, 109 S.Ct. 2166, 104 L.Ed.2d 811].) The IRS has adopted a variation of this standard which lists 20 secondary factors (IRS, Revenue Ruling 87-41, 1987-1 C. B. 296, 298-299); the state of Kansas also has adopted a variation which lists 20 secondary factors, some but not all of which are similar to those applied in other jurisdictions. (See, e.g., *Craig v. FedEx Ground Package Sys.* (2014) 300 Kan. 788, 335 P.3d 66, 75-76.) Although this court's decision in *Borello* has sometimes been described as adopting the common law standard, as discussed above (*ante*, pp. 232 Cal.Rptr.3d at pp. 18-24, 416 P.3d at pp. 16-21), in *Borello* we explained that under California law the control factor is not as concerned with the hiring entity's control over the details of a worker's work as it is with determining whether the hiring entity has retained "*necessary* control" over the work, and *Borello* further made clear that consideration of all of the relevant factors is directed at determining whether treatment of the worker as an employee or an independent contractor would best effectuate the purpose of the statute at issue. (*Borello*, *supra*, 48 Cal.3d at pp. 356-359, 256 Cal.Rptr. 543, 769 P.2d 399.)

The second category is the "economic reality" (or "economic realities") standard that has been adopted in federal decisions as the standard applicable in cases arising under the FLSA. (See, e.g., *Goldberg v. Whitaker House Co-op, Inc.* (1961) 366 U.S. 28, 33, 81 S.Ct. 933, 6 L.Ed.2d 100 (*Whitaker House Co-op*); *Tony & Susan Alamo Foundation v. Sec'y of Labor* (1985) 471 U.S. 290, 301, 105 S.Ct. 1953, 85 L.Ed.2d 278 (*Alamo Foundation*).) These cases interpret the "suffer or permit to work" definition of "employ" in the FLSA (29 U.S.C. § 203(g)) as intended to treat as employees those workers who, as a matter of economic reality, are economically dependent upon the hiring business, rather than realistically being in business for themselves. In making this determination, lower federal court decisions generally refer to a list of factors, many that are considered under the common law standards, including "(1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business." (*Zheng v. Liberty Apparel Co.* (2d Cir. 2003) 355 F.3d 61, 67; *Superior Care*, *supra*, 840 F.2d at pp. 1058-1059; see generally Annot., Determination of "Independent Contractor" and "Employee" Status For Purposes of § 3(e)(1) of the Fair Labor Standards Act (29 U.S.C.A. § 203(e)(1)) (1981) 51 A.L.R.Fed. 702.)

The third category of standards is described as embodying the "ABC standard." This standard, whose objective is to create a simpler, clearer test for determining whether the worker is an employee or an independent contractor, presumes a worker hired by an entity is an employee and places the burden on the hirer to establish that the worker is an independent contractor. Under the ABC standard, the worker is an employee unless the hiring entity establishes *each* of three designated factors: (a) that the worker is free from control and direction over performance of the work, both under the contract and in fact; (b) that the work provided is outside the usual course of the business for which the work is performed; *and* (c) that the worker is customarily engaged in an independently established trade, occupation or business (hence the ABC standard). If the hirer fails to show that the worker satisfies each of the three criteria, the worker is treated as an employee, not an independent contractor. (See generally Deknatel & Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes* (2015) 18 U.Pa. J.L. & Soc. Change 53 (*ABC on the Books*).)

In addition to these three categories, the recent Restatement of Employment Law, adopted by the American Law Institute in 2015, sets forth a standard which focuses, in addition to the control of details factor, on the entrepreneurial opportunity that the worker is afforded. (See Rest., Employment, § 1.01, subds. (a), (b); see also

FedEx Home Delivery v. NLRB (D.C. Cir. 2009) 563 F.3d 492, 497.)

***952** The adoption of the exceptionally broad suffer or permit to work standard in California wage orders finds its justification in the fundamental purposes and necessity of the ****32** minimum wage and maximum hour legislation in which the standard has traditionally been embodied. Wage and hour statutes and wage orders were adopted in recognition of the fact that individual workers generally possess less bargaining power than a hiring business and that *****38** workers' fundamental need to earn income for their families' survival may lead them to accept work for substandard wages or working conditions. The basic objective of wage and hour legislation and wage orders is to ensure that such workers are provided at least the minimal wages and working conditions that are necessary to enable them to obtain a subsistence standard of living and to protect the workers' health and welfare. (See, e.g., *Rosenwasser*, *supra*, 323 U.S. at p. 361, 65 S.Ct. 295 [wage and hour laws are intended to protect workers against " 'the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health' "]; *Industrial Welf.Com.*, *supra*, 27 Cal.3d at p. 700, 166 Cal.Rptr. 331, 613 P.2d 579 [purpose of California wage orders is "to protect the health and welfare" of workers].) These critically important objectives support a very broad definition of the workers who fall within the reach of the wage orders.

These fundamental obligations of the IWC's wage orders are, of course, primarily for the benefit of the workers themselves, intended to enable them to provide at least minimally for themselves and their families and to accord them a modicum of dignity and self-respect. (See generally Rogers, *Justice at Work: Minimum Wage Laws and Social Equality* (2014) 92 Tex. L.Rev. 1543.) At the same time, California's *industry-wide* wage orders are also clearly intended for the benefit of those law-abiding businesses that comply with the obligations imposed by the wage orders, ensuring that such responsible companies are not hurt by unfair competition from competitor businesses that utilize substandard employment practices. (See § 90.5, subd. (a);[21] accord *Citicorp. Industrial Credit, Inc. v. Brock* (1987) 483 U.S. 27, 36, 107 S.Ct. 2694 ["While improving working conditions was undoubtedly *one* of Congress' concerns, it was certainly not the *only* aim of the FLSA. In addition to the goal [of establishing decent wages], the Act's declaration of policy ... reflects Congress' desire to eliminate the competitive advantage enjoyed by goods produced under substandard conditions"]; *Roland Co. v. Walling* (1946) 326 U.S. 657, 669-670, 66 S.Ct. 413, 90 L.Ed. 383 ["[The FLSA] seeks to eliminate substandard labor conditions ... on a ***953** wide scale throughout the nation. The purpose is to raise living standards. This purpose will fail of realization unless the Act has sufficiently broad coverage to eliminate in large measure ... the competitive advantage accruing from savings in costs based upon substandard labor conditions. Otherwise the Act will be ineffective, and will penalize those who practice fair labor standards as against those who do not"].) Finally, the minimum employment standards imposed by wage orders are also for the benefit of the public at large, because if the wage orders' obligations are not fulfilled the public will often be left to assume responsibility for the ill effects to workers and their families resulting from substandard wages or unhealthy and unsafe working conditions.

[21] Section 90.5, subdivision (a) provides: "It is the policy of this state to vigorously enforce minimum labor standards in order to ensure employees are not required or permitted to work under substandard unlawful conditions or for employers that have not secured the payment of compensation, and to protect employers who comply with the law from those who attempt to gain a competitive advantage at the expense of their workers by failing to comply with minimum labor standards."

Given the intended expansive reach of the suffer or permit to work standard as reflected by its history, along with the more general principle that wage orders are the type of remedial legislation *****39** that must be liberally construed in a manner that serves its remedial purposes (see, e.g., *Industrial Welf. Com.*, *supra*, 27 Cal.3d at p. 702, 166 Cal.Rptr. 331, 613 P.2d 579), as our decision in *Martinez* recognized, the suffer or permit to work standard must be interpreted and applied broadly to include within the covered "employee" category *all* individual workers who can reasonably be viewed as "*working in the [hiring entity's] business*." (*Martinez, supra*, 49 Cal.4th at p. 69, 109 Cal.Rptr.3d 514, 231 P.3d 259, italics added ["A proprietor ****33** who knows that persons are *working in his or her business* without having been formally hired, or while being paid less than the minimum wage, clearly suffers or permits that work by failing to prevent it, while having the power to do so" (italics added)].) Under the suffer or permit to work standard, an individual worker who has been hired by a company can properly be viewed as the type of independent contractor to which the wage order was not intended to apply only if the worker is the type of traditional independent contractor—such as an independent plumber or electrician—who would *not* reasonably have been viewed as working *in the hiring business*. Such an individual would have been realistically understood, instead, as *working only in his or her own independent business*. (See, e.g., *Allen v. Hayward* (Q.B. 1845) 115 Eng.Rep. 749, 755 [describing independent contractor as "a person carrying on an independent business ... to perform works which [the hiring local officials] could not execute for themselves, and who was known to all the world as performing them"]; *Enforcing Fair Labor Standards*, *supra*, 46 UCLA L.Rev. at pp. 1143-1144.)

The federal courts, in applying the suffer or permit to work standard set forth in the FLSA, have recognized that the standard was intended to be broader and more inclusive than the preexisting common law test for distinguishing employees from independent contractors, but at the same time, does not purport to render every individual worker an employee rather than an independent contractor. (See *Rutherford Food*, *supra*, 331 U.S. 722, 728-729, 67 S.Ct. 1473.) As noted above (*ante*, pp. 232 Cal.Rptr.3d at pp. 36-37 fn. 20, 416 P.3d at pp. 30-31, fn. 20), the federal courts have ***954** developed what is generally described as the "economic reality" test for determining whether a worker should be considered an employee or independent contractor for purposes of the FLSA—namely, whether, as a matter of economic reality, the worker is economically dependent upon and makes a living in another's business (in which case he or she is considered to be a covered employee) or, instead is in business for himself or herself (and may properly be considered an excluded independent contractor). (See, e.g., *Whitaker House Co-op*, *supra*, 366 U.S. 28, 33, 81 S.Ct. 933; *Alamo Foundation*, *supra*, 471 U.S. 290, 301, 105 S.Ct. 1953.) In applying the economic reality test, federal courts have looked to a list of factors that is briefer than, but somewhat comparable to, the list of factors considered in the pre-*Borello* California decisions and in *Borello* itself. (See, e.g., *Superior Care*, *supra*, 840 F.2d at p. 1059; *Lauritzen*, *supra*, 835 F.2d at pp. 1534-1535.) Furthermore, like *Borello*, federal FLSA decisions applying the economic reality standard have held that no one factor is determinative and that the ultimate decision whether a worker is to be found to be an employee or independent contractor for purposes of the FLSA should be based on all the circumstances. (*Rutherford Food*, *supra*, 331 U.S. at p. 730, 67 S.Ct. 1473; *Scantland*, *supra*, 721 F.3d at pp. 1312-1313; *****40** *Real v. Driscoll Strawberry Associates, Inc.* (1979) 603 F.2d 748, 754-755; see generally Annot., *supra*, 51 A.L.R.Fed. 702.)

A multifactor standard—like the economic reality standard or the *Borello* standard—that calls for consideration of all potentially relevant factual distinctions in different employment arrangements on a case-by-case, totality-of-the-circumstances basis has its advantages. A number of state courts, administrative agencies and academic commentators have observed, however, that such a wide-ranging and flexible test for evaluating whether a worker should be considered an employee or an independent contractor has significant disadvantages, particularly when applied in the wage and hour context.

First, these jurisdictions and commentators have pointed out that a multifactor, "all the circumstances" standard makes it difficult for both hiring businesses and workers to determine in advance how a particular category of workers will be classified, frequently leaving the ultimate employee or independent contractor determination to a subsequent and often considerably delayed judicial decision. In practice, the lack of an easily and consistently applied standard often leaves both businesses and workers in the dark with respect to basic questions relating to wages and working conditions that arise regularly, on a day-to-day basis. (See, e.g., *Hargrove v. Sleepy's, LLC* (2015) 220 N.J. 289, 106 A.3d 449, 465 (*Hargrove*) ["permitting ****34** an employee to know when, how, and how much he will be paid requires a test designed to yield a more predictable result than a totality-of-the-circumstances analysis that is by its nature case specific"]; accord *Lauritzen*, *supra*, 835 F.2d at p. 1539 (conc. opn. of Easterbrook, J.) ["People are entitled to know the legal ***955** rules before they act, and only the most compelling reason should lead a court to announce an approach under which no one can know where he stands until litigation has been completed. ... My colleagues' balancing approach is the prevailing method, which they apply carefully. But it is unsatisfactory both because it offers little guidance for future cases and because any balancing test begs questions about which aspects of 'economic reality' matter, and why"].)

Second, commentators have also pointed out that the use of a multifactor, all the circumstances standard affords a hiring business greater opportunity to evade its fundamental responsibilities under a wage and hour law by dividing its work force into disparate categories and varying the working conditions of individual workers within such categories with an eye to the many circumstances that may be relevant under the multifactor standard. (See, e.g., Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?* (1997) 22 N.Y.U. Rev. L. & Soc. Change 557, 568-569 ["[ ]he legal test for determining employee/independent contractor status is a complex and manipulable multifactor test which invites employers to structure their relationships with employees in whatever manner best evades liability"]; Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment* (2002) 43 B.C. L.Rev. 351, 419; Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying* (2001) 22 Berkeley J. Emp. & Lab. L. 295, 335-338.)[22]

[22] Some jurists and commentators have advanced broader criticisms of the "economic reality" standard as applied by federal decisions, suggesting that the various factors are not readily susceptible to consistent application and that the standard—originally formulated in decisions dealing with other New Deal labor statutes (see *Martinez*, *supra*, 49 Cal.4th at pp. 66-67, 109 Cal.Rptr.3d 514, 231 P.3d 259)—is not as expansive as the suffer or permit to work standard was intended to be. (See, e.g., *Lauritzen*, *supra*, 835 F.2d at pp. 1539-1545 (conc. opn. of Easterbrook, J.); *Enforcing Fair Labor Standards*, *supra*, 46 UCLA L.Rev. at pp. 1115-1123.)

*****41** As already noted (*ante*, pp. 232 Cal.Rptr.3d at pp. 36-37 fn. 20, 416 P.3d at pp. 30-31, fn. 20), a number of

jurisdictions have adopted a simpler, more structured test for distinguishing between employees and independent contractors—the so-called "ABC" test—that minimizes these disadvantages. The ABC test presumptively considers all workers to be employees, and permits workers to be classified as independent contractors only if the hiring business demonstrates that the worker in question satisfies *each* of three conditions: (a) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (b) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (c) that the worker is customarily engaged in an ***956** independently established trade, occupation, or business of the same nature as that involved in the work performed.[23]

[23] The wording of the ABC test varies in some respects from jurisdiction to jurisdiction. (See *ABC on the Books*, *supra*, 18 U.Pa. J.L. & Soc. Change, at pp. 67-71.) The version we have set forth in text (and which we adopt hereafter (*post*, pp. 66-77)) tracks the Massachusetts version of the ABC test. (See Mass.G.L., ch. 149, § 148B; see also Del.Code Ann., tit. 19, §§ 3501(a)(7), 3503(c).) Unlike some other versions, which provide that a hiring entity may satisfy part B by establishing *either* (1) that the work provided is outside the usual course of the business for which the work is performed, *or* (2) that the work performed is outside all the places of business of the hiring entity (see, e.g., N.J. Stat. Ann. § 43:21-19(i)(6)(A-C)), the Massachusetts version permits the hiring entity to satisfy part B only if it establishes that the work is outside the usual course of the business of the hiring entity. In light of contemporary work practices, in which many employees telecommute or work from their homes, we conclude the Massachusetts version of part B provides the alternative that is more consistent with the intended broad reach of the suffer or permit to work definition in California wage orders.
Many jurisdictions that have adopted the ABC test use the standard only in the unemployment insurance context, but other jurisdictions use the ABC test more generally in determining the employee or independent contractor question with respect to a variety of employee-protective labor statutes. (See, e.g., Mass.G.L. ch. 149, § 148B; Del. Code Ann., tit. 19, §§ 3501(a)(7), 3503(c); *Hargrove*, *supra*, 106 A.3d at pp. 462-465; see generally *ABC on the Books*, *supra*, 18 U.Pa. J.L. & Soc. Change, at pp. 65-72 [discussing numerous state statutes and judicial decisions].)

****35** Unlike a number of our sister states that included the suffer-or-permit-to-work standard in their wage and hour laws or regulations *after* the FLSA had been enacted and had been interpreted to incorporate the economic reality test, California's adoption of the suffer or permit to work standard predated the enactment of the FLSA. (See *Martinez*, *supra*, 49 Cal.4th at pp. 57-59, 109 Cal.Rptr.3d 514.) Thus, as a matter of legislative intent, the IWC's adoption of the suffer or permit to work standard in California wage orders was not intended to embrace the federal economic reality test. Furthermore, prior California cases have declined to interpret California wage orders as governed by the federal economic reality standard and instead have indicated that the California wage orders are intended to provide broader protection than that accorded workers under the federal standard. (See *Martinez*, *supra*, 49 Cal.4th at pp. 66-68, 109 Cal.Rptr.3d 514, 231 P.3d 259; accord *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 843, 182 Cal.Rptr.3d 124, 340 P.3d 355; *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 592, 94 Cal.Rptr.2d 3, 995 P.2d 139; *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 797-798, 85 Cal.Rptr.2d 844, 978 P.2d 2.)

*****42** We find merit in the concerns noted above regarding the disadvantages, particularly in the wage and hour context, inherent in relying upon a multifactor, all the circumstances standard for distinguishing between employees and independent contractors. As a consequence, we conclude it is appropriate, and most consistent with the history and purpose of the suffer or ***957** permit to work standard in California's wage orders, to interpret that standard as: (1) placing the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order's coverage;[24] and (2) requiring the hiring entity, in order to meet this burden, to establish *each* of the three factors embodied in the ABC test—namely (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed. (Accord *Hargrove*, *supra*, 106 A.3d at pp. 463-464[25]; ****36** see also Weil, ***958** The *****43** Fissured Workplace (2014) pp. 204-205 [recommending adoption of the ABC test]; *ABC on the Books*, *supra*, 18 U.Pa. J.L. & Soc. Change at pp. 61, 82-84, 101-102[26].)

[24] Even in the workers' compensation context in which the applicable California statutes contain a definition of "employee" that is less expansive than that provided by the suffer or permit to work standard (see §§ 3351, 3353), the accompanying statutes establish that "[a hiring business] seeking to avoid liability has the burden of proving that persons whose services [the business] has retained are independent contractors rather than employees." (*Borello*, *supra*, 48 Cal.3d at p. 349, 256 Cal.Rptr. 543, 769 P.2d 399, citing §§ 3357, 5705, subd. (a).) Moreover, the rule that a hiring entity has the burden of establishing that a worker is an independent contractor rather than an employee has

long been applied in California decisions outside the workers' compensation context. (See, e.g., *Robinson v. George* (1940) 16 Cal.2d 238, 242, 105 P.2d 914; *Linton v. DeSoto Cab Co., Inc.* (2017) 15 Cal.App.5th 1208, 1220-1221, 223 Cal.Rptr.3d 761.) Accordingly, the expansive suffer or permit to work standard is reasonably interpreted as placing the burden on a hiring business to prove that a worker the business has retained is not an employee who is covered by an applicable wage order but rather an independent contractor to whom the wage order was not intended to apply.

[25] In *Hargrove*, *supra*, 106 A.3d 449, the New Jersey Supreme Court was faced with the question of the proper standard to be applied in determining whether a worker should be considered a covered employee or an excluded independent contractor for purposes of two distinct New Jersey labor statutes, the New Jersey Wage Payment Law and the New Jersey Wage and Hour Law. Both statutes defined the term "employ" or "employee" to include "to suffer or to permit to work" (see N.J. Stat. Ann. § 34:11-4.1(b); N.J. Stat. Ann. § 34:11-56a1(f)), and the New Jersey Department of Labor, in applying the Wage and Hour Law, had utilized the ABC standard—a standard incorporated in the New Jersey Unemployment Compensation Act (N.J. Stat. Ann. § 43:21-19(i)(6)(A)-(C))—in determining whether a worker was an employee or independent contractor for purposes of the Wage and Hour Law. (See N.J. Adm. Code § 12:56-16.1.) In *Hargrove*, the New Jersey Supreme Court concluded that "any employment-status dispute arising under [either the New Jersey Wage Payment Law or the New Jersey Wage and Hour Law] should be resolved by utilizing the 'ABC' test ...." (106 A.3d at p. 463.)
In reaching this conclusion, the court in *Hargrove* recognized that both of the New Jersey statutes in question "use the term 'suffer or permit' to define those who are within the protection of each statute" and that such language had been interpreted in federal decisions to support the "economic reality" standard. (*Hargrove*, *supra*, 106 A.3d at p. 463.) Nonetheless, the court in *Hargrove*, in finding that application of the ABC test was appropriate, relied in part on the fact that "the 'ABC' test operates to provide more predictability and may cast a wider net than the FLSA 'economic realities' standard" and that "[by] requiring each identified factor to be satisfied to permit classification as an independent contractor, the 'ABC' test fosters the provision of greater income security for workers, which is the express purpose of both [statutes]." (*Hargrove*, *supra*, 106 A.3d at p. 464.)

[26] The recent *ABC on the Books* article, which comprehensively reviews recent legislative measures and judicial decisions on this subject, concludes that "case law suggests that thus far, the ABC test allows courts to look beyond labels and evaluate whether workers are truly engaged in a separate business or whether the business is being used by the employer to evade wage, tax, and other obligations." (*ABC on the Books*, *supra*, 18 U.Pa. J.L. & Soc. Change at p. 84.)

We briefly discuss each part of the ABC test and its relationship to the suffer or permit to work definition.

1. Part A: Is the worker free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact?

First, as our decision in *Martinez* makes clear (*Martinez*, *supra*, 49 Cal.4th at p. 58, 109 Cal.Rptr.3d 514, 231 P.3d 259), the suffer or permit to work definition was intended to be broader and more inclusive than the common law test, under which a worker's freedom from the control of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact, was the principal factor in establishing that a worker was an independent contractor rather than an employee. Accordingly, because a worker who is subject, either as a matter of contractual right or in actual practice, to the type and degree of control a business typically exercises over employees would be considered an employee under the common law test, such a worker would, a fortiori, also properly be treated as an employee for purposes of the suffer or permit to work standard. Further, as under *Borello*, *supra*, 48 Cal.3d at pages 353-354, 356-357, 256 Cal.Rptr. 543, 769 P.2d 399, depending on the nature of the work and overall arrangement between the parties, a business need not control the precise manner or details of the work in order to be found to have maintained the necessary control that an employer ordinarily possesses over its employees, but does not possess over a genuine independent contractor. The hiring entity must establish that the worker is free of such control to satisfy part A of the test.[27]

[27] In *Fleece on Earth v. Dep't of Emple. & Training* (2007) 181 Vt. 458, 923 A.2d 594, the Vermont Supreme Court held that the plaintiff children's wear company that designed all the clothing sold by the company and provided all the patterns and yarn for work-at-home knitters and sewers who made the clothing had failed to establish that the workers were sufficiently free of the company's control to satisfy part A of the ABC test, even though the knitters and sewers worked at home on their own machines at their own pace and on the days and at the times of their own

choosing. Noting that the labor statute at issue "seeks to protect workers and envisions employment broadly," the court reasoned that "[ ]he degree of control and direction over the production of a retailer's product is no different when the sweater is knitted at home at midnight than if it were produced between nine and five in a factory. That the product is knit, not crocheted, and how it is to be knit, is dictated by the pattern provided by [the company]. To reduce part A of the ABC test to a matter of what time of day and in whose chair the knitter sits when the product is produced ignores the protective purpose of the [applicable] law." (923 A.2d at pp. 599-600.) (See, e.g., *Western Ports v. Employment Sec. Dept.* (2002) 110 Wash.App. 440, 41 P.3d 510, 517-520 [hiring entity failed to establish that truck driver was free from its control within the meaning of part A of the ABC test, where hiring entity required driver to keep truck clean, to obtain the company's permission before transporting passengers, to go to the company's dispatch center to obtain assignments not scheduled in advance, and could terminate driver's services for tardiness, failure to contact the dispatch unit, or any violation of the company's written policy]; cf., e.g., *Great N. Constr., Inc. v. Dept. of Labor* (Vt. 2016) 161 A.3d 1207, 1215 [construction company established that worker who specialized in historic reconstruction was sufficiently free of the company's control to satisfy part A of the ABC test, where worker set his own schedule, worked without supervision, purchased all materials he used on his own business credit card, and had declined an offer of employment proffered by the company because he wanted control over his own activities].)

****37 ***44 *959** *2. Part B: Does the worker perform work that is outside the usual course of the hiring entity's business?*

Second, independent of the question of control, the child labor antecedents of the suffer or permit to work language demonstrate that one principal objective of the suffer or permit to work standard is to bring within the "employee" category *all* individuals who can reasonably be viewed as working "*in the [hiring entity's] business*" (see *Martinez*, *supra*, 49 Cal.4th at p. 69, 109 Cal.Rptr.3d 514, 231 P.3d 259, italics added), that is, all individuals who are reasonably viewed as providing services to the business in a role comparable to that of an employee, rather than in a role comparable to that of a traditional independent contractor. (Accord *Rutherford Food*, *supra*, 331 U.S. at p. 729, 67 S.Ct. 1473 [under FLSA, label put on relationship by hiring business is not controlling and inquiry instead focuses on whether "the work done, in essence, follows the usual path of an employee"].) Workers whose roles are most clearly comparable to those of employees include individuals whose services are provided within the usual course of the business of the entity for which the work is performed and thus who would ordinarily be viewed by others as working in the hiring entity's business and not as working, instead, in the worker's own independent business.

Thus, on the one hand, when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee. (See, e.g., *Enforcing Fair Labor Standards*, *supra*, 46 UCLA L.Rev. at p. 1159.) On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter ***960** be sold by the company (cf., e.g., *Silent Woman, Ltd.*, *supra*, 585 F.Supp. at pp. 450-452; accord *Whitaker House Co-op*, *supra*, 366 U.S. 28, 81 S.Ct. 933), or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes (cf., e.g., *Dole v. Snell* (10th Cir. 1989) 875 F.2d 802, 811), the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees. In the latter settings, the workers' role within the hiring entity's usual business operations is more like that of an employee than that of an independent contractor.

Treating all workers whose services are provided within the usual course of the hiring entity's business as employees is important to ensure that those workers who need and want the fundamental protections afforded by the wage order do not lose those protections. If the wage order's obligations could be avoided for workers who provide services in a role comparable to employees but who are willing to forgo the wage order's protections, other workers *****45** who provide similar services and are intended to be protected under the suffer or permit to work standard would frequently find themselves displaced by those willing to decline such coverage. As the United States Supreme Court explained in a somewhat analogous context in *Alamo Foundation*, *supra*, 471 U.S. at page 302, 105 S.Ct. 1953, with respect to the federal wage and hour law: "[T]he purposes of the [FLSA] require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act. [Citations.] Such ****38** exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses." (*Ibid.*)

As the quoted passage from the *Alamo Foundation* case suggests, a focus on the nature of the workers' role within a hiring entity's usual business operation also aligns with the additional purpose of wage orders to protect companies that in good faith comply with a wage order's obligations against those competitors in the same industry or line of business that resort to cost saving worker classifications that fail to provide the required minimum protections to similarly situated workers. A wage order's *industry-wide* minimum requirements are intended to create a level playing field among competing businesses in the same industry in order to prevent the type of "race to the bottom" that occurs when businesses implement new structures or policies that result in substandard wages and unhealthy conditions for workers. (Accord *Gemsco, Inc. v. Walling* (1945) 324 U.S. 244, 252, 65 S.Ct. 605, 89 L.Ed. 921 ["[I]f the [proposed restrictions on homeworkers] cannot be made, the floor for the entire industry falls and the right of the homeworkers and the employers to be free from the prohibition destroys the right of the ***961** much larger number of factory workers to receive the minimum wage"]; see generally *Enforcing Fair Labor Standards*, *supra*, 46 UCLA. L.Rev. at pp. 1178-1103.) Competing businesses that hire workers who perform the same or comparable duties within the entities' usual business operations should be treated similarly for purposes of the wage order.[28]

[28] If a business concludes that there are economic or noneconomic advantages other than avoiding the obligations imposed by the wage order to be obtained by according greater freedom of action to its workers, the business is, of course, free to adopt those conditions while still treating the workers as employees for purposes of the applicable wage order. Thus, for example, if a business concludes that it improves the morale and/or productivity of a category of workers to afford them the freedom to set their own hours or to accept or decline a particular assignment, the business may do so while still treating the workers as employees for purposes of the wage order.

Accordingly, a hiring entity must establish that the worker performs work that is outside the usual course of its business in order to satisfy part B of the ABC test.[29]

[29] In *McPherson Timberlands v. Unemployment Ins. Comm'n* (Me. 1998) 714 A.2d 818, the Maine Supreme Court held that the cutting and harvesting of timber by an individual worker was work performed in the usual course of business of the plaintiff timber management company whose business operation involved contracting for the purchase and harvesting of trees and the sale and delivery of the cut timber to customers. Rejecting the company's contention that the timber harvesting work was outside its usual course of business because the company did not currently own any timber harvesting equipment itself, the court upheld an administrative ruling that the harvesting work was "not 'merely incidental' to [the company's] business, but rather was an 'integral part of' that business." (714 A.2d at p. 821.) By contrast, in *Great N. Constr., Inc. v. Dept. of Labor*, *supra*, 161 A.3d at page 1215, the Vermont Supreme Court held the hiring entity, a general construction company, had established that the specialized historic restoration work performed by the worker in question was outside the usual course of the company's business within the meaning of part B, where the work involved the use of specialized equipment and special expertise that the company did not possess and did not need for its usual general commercial and residential work. (See also, e.g., *Appeal of Niadni, Inc.* (2014) 166 N.H. 256, 93 A.3d 728 [performance of live entertainers within usual course of business of plaintiff resort which advertised and regularly provided entertainment]; *Mattatuck Museum-Mattatuck Historical Soc'y v. Administrator, Unemployment Compensation Act* (1996) 238 Conn. 273, 679 A.2d 347, 351-352 [art instructor who taught art classes at museum performed work within the usual course of the museum's business, where museum offered art classes on a regular and continuous basis, produced brochures announcing the art courses, class hours, registration fees and instructor's names, and discounted the cost of the classes for museum members].)

*****46** *3. Part C: Is the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity?*

Third, as the situations that gave rise to the suffer or permit to work language disclose, the suffer or permit to work standard, by expansively defining who is an employer, is intended to preclude a business from evading ***962** the prohibitions or responsibilities ****39** embodied in the relevant wage orders directly or indirectly—through indifference, negligence, intentional subterfuge, or misclassification. It is well established, under all of the varied standards that have been utilized for distinguishing employees and independent contractors, that a business cannot unilaterally determine a worker's status simply by assigning the worker the label "independent contractor" or by requiring the worker, as a condition of hiring, to enter into a contract that designates the worker an independent contractor. (See, e.g., *Borello*, *supra*, 48 Cal.3d at pp. 349, 358-359, 256 Cal.Rptr. 543, 769 P.2d 399; *Rutherford Food*, *supra*, 331 U.S. at p. 729, 67 S.Ct. 1473.) This restriction on a hiring business's unilateral authority has particular force and effect under the wage orders' broad suffer or permit to work standard.

As a matter of common usage, the term "independent contractor," when applied to an individual worker, ordinarily has been understood to refer to an individual who *independently* has made the decision to go into business for himself or herself. (See, e.g., *Borello, supra*, 48 Cal.3d at p. 354, 256 Cal.Rptr. 543, 769 P.2d 399 [describing independent contractor as a worker who "has independently chosen the burdens and benefits of self-employment"].) Such an individual generally takes the usual steps to establish and promote his or her independent business—for example, through incorporation, licensure, advertisements, routine offerings to provide the services of the independent business to the public or to a number of potential customers, and the like. When a worker has not independently decided to engage in an independently established business but instead is simply designated an independent contractor by the unilateral action of a hiring entity, there is a substantial risk that the hiring business is attempting to evade the demands of an applicable wage order through misclassification. A company that labels as independent contractors a class of workers who are not engaged in an independently established business in order to enable the company to obtain the economic advantages that flow from avoiding *****47** the financial obligations that a wage order imposes on employers unquestionably violates the fundamental purposes of the wage order. The fact that a company has not prohibited or prevented a worker from engaging in such a business is not sufficient to establish that the worker has independently made the decision to go into business for himself or herself.[30]

[30] Courts in other states that apply the ABC test have held that the fact that the hiring business *permits* a worker to engage in similar activities for other businesses is not sufficient to demonstrate that the worker is " 'customarily engaged in an independently established ... business' " for purposes of part (C) of that standard. (*JSF Promotions, Inc. v. Administrator* (2003) 265 Conn. 413, 828 A.2d 609, 613; see *Midwest Property Recovery, Inc. v. Job Service of North Dakota* (N.D. 1991) 475 N.W.2d 918, 924; *McGuire v. Dept. of Employment Security* (Utah Ct.App. 1989) 768 P.2d 985, 988 ["the appropriate inquiry under part (C) is whether the person engaged in covered employment actually has such an independent business, occupation, or profession, not whether he or she could have one"]; see also *In re Bargain Busters, Inc.* (1972) 130 Vt. 112, 287 A.2d 554, 559 [explaining that under part C of the ABC test, " '[ ]he adverb "independently" clearly modifies the word "established", and must carry the meaning that the trade, occupation, profession or business was established, independently of the employer or the rendering of the personal service forming the basis of the claim' "].)

***963** Accordingly, in order to satisfy part C of the ABC test, the hiring entity must prove that the worker is customarily engaged in an independently established trade, occupation, or business.[31]

[31] In *Brothers Const. Co. v. Virginia Empl. Comm'n* (1998) 26 Va.App. 286, 494 S.E.2d 478, 484, the Virginia Court of Appeal concluded that the hiring entity had failed to prove that its siding installers were engaged in an independently established business where, although the installers provided their own tools, no evidence was presented that "the installers had business cards, business licenses, business phones, or business locations" or had "received income from any party other than" the hiring entity. (See also, e.g., *Boston Bicycle Couriers v. Deputy Dir. Of the Div. of Empl. & Training* (2002) 56 Mass.App.Ct. 473, 778 N.E.2d 964, 971 [hiring entity, a same-day pickup and delivery service, failed to establish that bicycle courier was engaged in an independently established business under part C of the ABC test, where entity did not present evidence that courier "held himself out as an independent businessman performing courier services for any community of potential customers" or that he "had his own clientele, utilized his own business cards or invoices, advertised his services or maintained a separate place of business and telephone listing"]; cf., e.g., *Southwest Appraisal Grp., LLC v. Adm'r, Unemployment Compensation Act* (2017) 324 Conn. 822, 155 A.3d 738, 741-752 [administrative agency erred in determining that hiring entity failed to establish that auto repair appraisers were customarily engaged in an independently established business based solely on the lack of evidence that appraisers had actually worked for other businesses, where appraisers had obtained their own independent licenses, possessed their own home offices, provided their own equipment, printed their own business cards, and sought work from other companies].)

It bears emphasis that in order to establish that a worker is an independent contractor under the ABC standard, the hiring ****40** entity is required to establish the existence of each of the three parts of the ABC standard. Furthermore, inasmuch as a hiring entity's failure to satisfy any one of the three parts itself establishes that the worker should be treated as an employee for purposes of the wage order, a court is free to consider the separate parts of the ABC standard in whatever order it chooses. Because in many cases it may be easier and clearer for a court to determine whether or not part B or part C of the ABC standard has been satisfied than for the court to resolve questions regarding the nature or degree of a worker's freedom from the hiring entity's control for purposes of part A of the standard, the *****48** significant advantages of the ABC standard—in terms of increased clarity and consistency—will often be best served by first considering one or both of the latter two parts of the standard in resolving the employee or independent contractor question. (See, e.g., *Awuah v. Coverall North America, Inc.*

(D.Mass. 2010) 707 F.Supp.2d 80, 82 [considering only part B of the ABC standard]; *Coverall N. America v. Div. of Unemployment* (2006) 447 Mass. 852, 857 N.E.2d 1083, 1087 [considering only part C of the ABC standard]; *Boston Bicycle Couriers v. Deputy Dir. of the Div. of Empl. & Training*, *supra*, 778 N.E.2d at p. 968 [same].)

***964** *4. Conclusion regarding suffer or permit to work definition*

In sum, we conclude that unless the hiring entity establishes (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact, (B) that the worker performs work that is outside the usual course of the hiring entity's business, and (C) that the worker is customarily engaged in an independently established trade, occupation, or business, the worker should be considered an employee and the hiring business an employer under the suffer or permit to work standard in wage orders. The hiring entity's failure to prove any one of these three prerequisites will be sufficient in itself to establish that the worker is an included employee, rather than an excluded independent contractor, for purposes of the wage order.

In our view, this interpretation of the suffer or permit to work standard is faithful to its history and to the fundamental purpose of the wage orders and will provide greater clarity and consistency, and less opportunity for manipulation, than a test or standard that invariably requires the consideration and weighing of a significant number of disparate factors on a case-by-case basis. (Accord *Hargrove, supra*, 106 A.3d at pp. 463-464 [interpreting suffer or permit to work definition of state wage law to permit application of the ABC test]; *Tianti v. William Raveis Real Estate* (1995) 231 Conn. 690, 651 A.2d 1286, 1290-1291 [same].)[32]

[32] In its briefing in this court, Dynamex contends that the suffer or permit to work standard, *if interpreted as the trial court and Court of Appeal determined*, would exceed the IWC's constitutional authority under article XIV, section 1 of the California Constitution to "provide for minimum wages and for the general welfare of *employees*" (italics added), by effectively treating as employees *all* independent contractors and thus expanding the reach of the wage order beyond constitutionally permissible limits. The interpretation of the suffer or permit to work standard adopted in this opinion, however, recognizes that the wage orders are not intended to apply to the type of traditional independent contractor who has never been viewed as an employee of a hiring business and should not be interpreted to do so.
Our decision in *Martinez* makes clear that the IWC, in defining the employment relationship for purposes of wage orders, was not limited to utilizing the common law test of employment (*Martinez*, *supra*, 49 Cal.4th at pp. 57-66 [109 Cal.Rptr.3d 514, 231 P.3d 259]), and Dynamex does not take issue with *Martinez*'s conclusion in this regard. Further, the ABC test for distinguishing employees from independent contractors provides a common and well-established test for distinguishing employees from independent contractors. Accordingly, although the constitutional argument set forth in Dynamex's briefing is not directed to the standard adopted in this opinion, to avoid any misunderstanding we conclude that application of the suffer or permit to work standard, as interpreted in this opinion, to determine whether a worker is an employee or independent contractor for purposes of a wage order does not exceed the IWC's authority under article XIV, section 1 of the California Constitution.

*****49 *965 B. Application of the Suffer or Permit to Work Standard in This Case**

We now turn to application of the suffer or permit to work standard in this case. As ****41** Dynamex points out, the trial court, in applying the suffer or permit to work definition in its class certification order, appears to have adopted a literal interpretation of the suffer or permit to work language that, if applied generally, could potentially encompass the type of traditional independent contractor—like an independent plumber or electrician—who could not reasonably have been viewed as the hiring business's employee.[33] We agree with Dynamex that the trial court's view of the suffer or permit to work standard was too broad. For the reasons discussed below, however, we nonetheless conclude, for two independently sufficient reasons, that under a proper interpretation of the suffer or permit to work standard, the trial court's ultimate determination that there is a sufficient commonality of interest to support certification of the proposed class is correct and should be upheld.

[33] As noted (*ante*, p. 232 Cal.Rptr.3d at p. 12, 416 P.3d at pp. 10-11), the trial court's certification order, in applying the suffer or permit to work standard, stated simply: "An employee is suffered or permitted to work if the work was performed with the knowledge of the employer. [Citation.] This includes work that was performed that the employer knew *or should have known* about. [Citation.] Again, this is a matter that can be addressed by looking at

> Defendant's policy for entering into agreements with drivers. Defendant is only liable to those drivers with whom it entered into an agreement (i.e., knew were providing delivery services to Dynamex customers). This can be determined through records, and does not require individual analysis."

First, with respect to part B of the ABC test, it is quite clear that there is a sufficient commonality of interest with regard to the question whether the work provided by the delivery drivers within the certified class is outside the usual course of the hiring entity's business to permit plaintiffs' claim of misclassification to be resolved on a class basis. In the present case, Dynamex's entire business is that of a delivery service. Unlike other types of businesses in which the delivery of a product may or may not be viewed as within the usual course of the hiring company's business,[34] here the hiring entity is a delivery company and the question whether the work performed by the delivery drivers within the certified class is outside the usual course of its business is clearly amenable to determination on a class basis. As a general matter, Dynamex obtains the customers for its deliveries, sets the rate that the customers will be charged, notifies the drivers where to pick up and deliver the packages, tracks the packages, and requires the drivers to utilize its ***966** tracking and recordkeeping system. As such, there is a sufficient commonality of interest regarding whether the work performed by the certified class of drivers who pick up and deliver packages and documents from and to Dynamex customers on an ongoing basis is outside the usual course of Dynamex's *****50** business to permit that question to be resolved on a class basis.

[34] In *United States v. Silk*, *supra*, 331 U.S. 704, 67 S.Ct. 1463, for example, the United States Supreme Court divided 5-4 on the question whether truck drivers who delivered coal for a coal company should properly be considered independent contractors or employees. (See *id.* at pp. 716-719, 67 S.Ct. 1463 [maj. opn., concluding truck drivers were independent contractors]; *id*. at p. 719, 67 S.Ct. 1463 (conc. & dis. statement of Black, J.; Douglas, J.; Murphy, J.) [concluding, on same record, that same truck drivers should be found to be employees]; *id*. at pp. 719-722, 67 S.Ct. 1463 (conc. & dis. opn. of Rutledge, J.) [advocating remand to lower courts in view of closeness of employee or independent contractor issue].)

Because each part of the ABC test may be independently determinative of the employee or independent contractor question, our conclusion that there is a sufficient commonality of interest under part B of the ABC test is sufficient in itself to support the trial court's class certification order. (See *Brinker Restaurant Corp. v. Superior Court*, *supra*, 53 Cal.4th at p. 1032, 139 Cal.Rptr.3d 315, 273 P.3d 513 [class certification is not an abuse of ****42** discretion if certification is proper under any theory].) Nonetheless, for guidance we go on to discuss whether there is a sufficient commonality of interest under part C of the ABC test to support class treatment of the relevant question under that part of the ABC test as well.

Second, with regard to part C of the ABC test, it is equally clear from the record that there is a sufficient commonality of interest as to whether the drivers in the certified class are customarily engaged in an independently established trade, occupation, or business to permit resolution of that issue on a class basis As discussed above, prior to 2004 Dynamex classified the drivers who picked up and delivered the packages and documents from Dynamex customers as employees rather than independent contractors. In 2004, Dynamex adopted a new business structure under which it required all of its drivers to enter into a contractual agreement that specified the driver's status as an independent contractor. Here the class of drivers certified by the trial court is limited to drivers who, during the relevant time periods, performed delivery services only for Dynamex. The class excludes drivers who performed delivery services for another delivery service or for the driver's own personal customers; the class also excludes drivers who had employees of their own. With respect to the class of included drivers, there is no indication in the record that there is a lack of commonality of interest regarding the question whether these drivers are customarily engaged in an independently established trade, occupation, or business. For this class of drivers, the pertinent question under part C of the ABC test is amenable to resolution on a class basis.[35]

[35] Because the certified class excludes drivers who hired other drivers, or who performed delivery services for other delivery companies or for their own independent delivery business, we have no occasion to address the question whether there is a sufficient commonality of interest regarding whether these other drivers are customarily engaged in an independently established trade, occupation, or business within the meaning of part C of the ABC test.

For the foregoing reasons, we conclude that under a proper understanding of the suffer or permit to work standard there is, as a matter of law, a ***967** sufficient commonality of interest within the certified class to permit the question whether such drivers are employees or independent contractors for purposes of the wage order to be litigated on a class basis. Accordingly, we conclude that with respect to the causes of action that are based on alleged violations of the obligations imposed by the wage order, the trial court did not abuse its discretion in certifying the class and in denying Dynamex's motion to decertify the class.

V. CONCLUSION

For the reasons discussed above, the judgment of the Court of Appeal is affirmed.

WE CONCUR:

CHIN, J.

CORRIGAN, J.

LIU, J.

CUÉLLAR, J.

KRUGER, J.

SIGGINS, J.*

All Citations

4 Cal.5th 903, 416 P.3d 1, 232 Cal.Rptr.3d 1, 168 Lab.Cas. P 61,859, 83 Cal. Comp. Cases 817, 27 Wage & Hour Cas.2d (BNA) 1271, 18 Cal. Daily Op. Serv. 3897, 2018 Daily Journal D.A.R. 3856

End of Document

VI. Administration

A. Fiscal Year 2017/18 Budget Status
B. Fiscal Year 2018/19 Budget Report

0770-Professional Engineers, Land Surveyors, and Geologists **Date Prepared:**
Financial Statement **4/2/19**

	FY 2017-18 Month 8 (7/17-2/18)	FY 2018-19 Month 8 (7/18-2/19)	% Change	FY2018-19 FM 1 Projections	FY2018-19 Updated Projections	% Change
Revenue						
Application/Licensing Fees	846,238	1,157,160	37%	1,643,000	1,735,740	6%
[1] Renewal fees	6,023,425	5,528,248	-8%	6,310,000	6,133,713	-3%
[2] Delinquent fees	61,115	49,772	-19%	90,000	74,658	-17%
Other	82,602	67,651	-18%	138,000	101,476	-26%
[3] Interest	0	0	0%	97,000	225,490	132%
Total Revenue:	**7,013,380**	**6,802,831**	**-3%**	**8,278,000**	**8,271,077**	**0%**
Expense						
Personnel Services:						
[4] Salary & Wages (Staff)	1,803,916	1,844,828	2%	2,707,527	2,810,320	4%
Temp Help	88,310	55,710	-37%	53,212	103,995	95%
Statutory Exempt (EO)	82,736	88,048	4%	134,037	129,072	-4%
Board Member Per Diem	3,400	6,600	94%	17,200	17,200	0%
Overtime/Flex Elect	172,787	14,020	-92%	27,866	21,029	-25%
Staff Benefits	950,469	1,057,898	11%	1,552,500	1,586,847	2%
Total Personnel Services	**3,101,618**	**3,065,103**	**-1%**	**4,492,342**	**4,668,463**	**4%**
Operating Expense and Equipment:						
General Expense	31,813	45,125	42%	72,905	67,592	-7%
[5] Printing	5,286	8,290	57%	120,505	16,580	-86%
Communication	15,527	15,352	1%	28,270	23,028	-19%
[6] Postage	28,856	0	-100%	42,948	20,000	-53%
Insurance	0	0	0%	19,373	0	-100%
Travel, In State	48,036	28,186	-41%	37,281	41,314	11%
Travel, Out-of-State	1,425	0	0%	0	0	0%
Training	145	465	221%	930	930	0%
Facilities Operations	243,903	260,344	7%	414,665	396,542	-4%
[7] C & P Services – Interdept.	185,871	484,964	161%	704,486	748,000	6%
[8] C & P Services – External	788,268	1,001,104	27%	1,677,814	1,823,143	9%
[9] DCA Pro Rata	1,180,191,	1,292,000	9%	2,009,000	1,938,000	-4%
DOI – Investigations	201,000	224,000	11%	336,000	336,000	0%
Interagency Services	0	10,659	100%	27,000	15,988	-41%
Consolidated Data Center	141	194	38%	22,000	272	-99%
Information Technology	6,764	5,786	-15%	7,961	6,360	-20%
Equipment	246	6,476	2532%	0	9,000	0%
Other Items of Expense	41	10,225	24838%	0	10,225	0%
Total OE&E	**2,737,242**	**3,393,166**	**24%**	**5,521,138**	**5,452,973**	**-1%**
Total Expense:	**5,838,860**	**6,458,269**	**11%**	**10,013,481**	**10,121,436**	**1%**
Total Revenue:	7,013,380	6,802,831		8,278,000	8,271,077	
Total Expense:	5,838,860	6,458,269		10,013,481	10,121,436	
Difference:	**1,174,519**	**344,562**		**(1,735,481)**	**(1,850,359)**	

Financial Statement Notes

1 **Renewal fees -** Internal tracking indicates $5.5 million in renewal fee revenue. Renewal fees are not collected equally throughout the year. On average, the Board collects 75% of its renewal fees revenue in the first half of the fiscal year.

2 **Delinquent fees -** Approximately 90% of delinquent fee revenue is collected in the second half of the fiscal year.

3 **Interest -** Includes income from surplus money investments earned on money in the Board's fund. The state treasury manages this money and the Board earns income based on the current interest rate. Line item projection was provided by the DCA Budgets office.

4 **Salary & Wages (Staff)** - The projected expenditure increase for salaries and wages is due to new hires. This expenditure line item was taken from the Februray 2019 Management Information Retrieval System (MIRS) reports. The Board has filled the following positions: SSA, PT II, 2.0 AGPA's and Senior Registrar - Civil.

5 **Printing -** Projections have decreased because of external tracking documents data**.** There are no large printing projects planned for this fiscal year. Printing was higher in previous fiscal years because of large one-time costs for plastic cards and college outreach publications.

6 **Postage -** Paid in advance and loaded in large increments to the Board's mailing machine. $20,000 was added in March 2019.

7 **C&P Services Interdepartmental** - Includes all contract services with other state agencies for examination services (Dept. of Conservation and Water Resources). This line item also now includes enforcement expenses for the Attorney General and the Office of Administrative Hearings.

8 **C&P Services External -** Includes all external contracts (examination development, exam site rental, expert consultant agreements, and credit card processing). Internal tracking documents identify $636,561 in external contracts. However, the Board is executing a civil exam development contract that is $502,857. Additional information indicates that subject matter expert agreements are projected to be $680,000 by year-end.

9 **DCA Pro Rata -** Includes distributed costs of programmatic and administrative services from DCA

0770 – Professional Engineer's, Land Surveyor's and Geologist's Fund **Prepared 3/27/19**
Analysis of Fund Condition
(Dollars in Thousands)

Governor's Budget	**PY 2017-18**	**CY 2018-19**	**Governor's Budget BY 2019-20**	**BY +1 2020-21**	**BY +2 2021-22**
BEGINNING BALANCE	$ 10,042	$ 7,965	$ 6,053	$ 3,823	$ -350
Prior Year Adjustment	-	-	-	-	-
Adjusted Beginning Balance	$ 10,042	$ 7,965	$ 6,053	$ 3,823	$ -350
REVENUES AND TRANSFERS					
Revenues:					
4121200 Delinquent fees	$ 88	$ 75	$ 88	$ 75	$ 89
4127400 Renewal fees	$ 6,851	$ 6,134	$ 6,891	$ 6,195	$ 6,960
4129200 Other regulatory fees	$ 124	$ 101	$ 109	$ 109	$ 109
4129400 Other regulatory licenses and permits	$ 1,643	$ 1,736	$ 1,646	$ 1,753	$ 1,662
4150500 Interest Income from interfund loans	$ 97	-	-	-	-
4163000 Income from surplus money investments	-	$ 212	$ 163	$ 180	$ 127
4171400 Escheat of unclaimed checks and warrants	$ 13	$ 13	$ 13	$ 13	$ 13
4172500 Miscellaneous revenues	$ 10	$ 1	$ 1	$ 1	$ 1
Totals, Revenues	$ 8,826	$ 8,272	$ 8,911	$ 8,327	$ 8,961
Transfers **from** Other Funds					
Revenue Transfer from Geology/General Fund	-	-	$ 1,134	-	-
FO0001 Proposed GF Loan Repayment per item 1110-011-0770, Budget Act of 2011	-	$ 800	-	-	-
Totals, Revenues and Transfers	$ 8,826	$ 9,072	$ 10,045	$ 8,327	$ 8,961
Totals, Resources	$ 18,868	$ 17,027	$ 16,098	$ 12,150	$ 8,611
EXPENDITURES					
Disbursements:					
1111 Department of Consumer Affairs (State Operations)	$ 10,214	$ 10,121	$ 11,250	$ 11,475	$ 11,705
8880 Financial Information System for CA (State Operations)	$ 15	$ 1	$ -3	$ -3	$ -3
9892 Supplemental Pension Payments (State Operations)	-	$ 98	$ 209	$ 209	$ 209
9900 Statewide Admin. (State Operations)	$ 684	$ 753	$ 819	$ 819	$ 819
Total Disbursements	$ 10,913	$ 10,973	$ 12,275	$ 12,500	$ 12,730
FUND BALANCE					
Reserve for economic uncertainties	$ 7,955	$ 6,053	$ 3,823	$ -350	$ -4,119
Months in Reserve	8.7	5.9	3.7	-0.3	-3.8

VII. Legislation

A. 2019 Legislative Calendar

B. Discussion of Legislation for 2019 (Possible Action)

AB 193 Professions and vocations.

AB 476 Department of Consumer Affairs: task force: foreign trained professionals.

AB 544 Professions and vocations: inactive license fees and accrued and unpaid renewal fees.

AB 613 Professions and vocations: regulatory fees.

AB 1522 Board for Professional Engineers, Land Surveyors, and Geologists

SB 53 Open meetings.

SB 339 Land surveyors.

SB 556 Professional land surveyors.

JANUARY						
S	M	T	W	TH	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

FEBRUARY						
S	M	T	W	TH	F	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28		

MARCH						
S	M	T	W	TH	F	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

APRIL						
S	M	T	W	TH	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30				

MAY						
S	M	T	W	TH	F	S
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

DEADLINES

Jan. 1 Statutes take effect (Art. IV, Sec. 8(c)).

Jan. 7 Legislature **reconvenes** (J.R. 51(a)(1)).

Jan. 10 Budget must be submitted by Governor (Art. IV, Sec. 12(a)).

Jan. 21 Martin Luther King, Jr. Day.

Jan. 25 Last day to submit **bill requests** to the Office of Legislative Counsel

Feb. 18 Presidents' Day.

Feb. 22 Last day for **bills to be introduced** (J.R. 61(a)(1)), (J.R. 54(a)).

Mar. 29 Cesar Chavez Day observed.

Apr. 11 **Spring recess** begins upon adjournment of this day's session (J.R. 51(a)(2)).

Apr. 22 **Legislature reconvenes** from Spring recess (J.R. 51(a)(2)).

Apr. 26 Last day for **policy committees** to hear and report to **fiscal committees fiscal bills** introduced in their house (J.R. 61(a)(2)).

May 3 Last day for **policy committees** to hear and report to the Floor **nonfiscal bills** introduced in their house (J.R. 61(a)(3)).

May 10 Last day for **policy committees** to meet prior to June 3 (J.R. 61(a)(4)).

May 17 Last day for **fiscal committees** to hear and report to the Floor bills introduced in their house (J.R. 61(a)(5)). Last day for **fiscal committees** to meet prior to June 3 (J.R. 61(a)(6)).

May 27 Memorial Day.

May 28-31 **Floor Session Only.**
No committees, other than conference or Rules committees, may meet for any purpose (J.R. 61(a)(7)).

May 31 Last day for bills to be **passed out of the house of origin** (J.R. 61(a)(8)).

*Holiday schedule subject to Rules committee approval.

JUNE						
S	M	T	W	TH	F	S
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30						

JULY						
S	M	T	W	TH	F	S
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30	31			

AUGUST						
S	M	T	W	TH	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

SEPTEMBER						
S	M	T	W	TH	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30					

Jun. 3 Committee meetings may resume (J.R. 61(a)(9)).

Jun. 15 **Budget Bill** must be **passed** by **midnight** (Art. IV, Sec. 12(c)(3)).

Jul. 4 Independence Day.

Jul. 10 Last day for **policy committees** to hear and report **fiscal bills** to **fiscal committees** (J.R. 61(a)(10)).

Jul. 12 Last day for **policy committees** to meet and report bills (J.R. 61(a)(11)). **Summer recess** begins upon adjournment of this day's session, provided Budget Bill has been passed (J.R. 51(a)(3)).

Aug. 12 **Legislature reconvenes** from Summer recess (J.R. 51(a)(3)).

Aug. 30 Last day for **fiscal committees** to meet and report bills to Floor (J.R. 61(a)(12)).

Sep. 2 Labor Day.

Sep. 3-13 **Floor Session Only.** No committees, other than conference and Rules committees, may meet for any purpose (J.R. 61(a)(13)).

Sep. 6 Last day to **amend bills on the floor** (J.R. 61(a)(14)).

Sep. 13 Last day for **each house to pass bills** (J.R. 61(a)(15)). **Interim Study Recess** begins upon adjournment of this day's session (J.R. 51(a)(4)).

*Holiday schedule subject to Senate Rules committee approval.

IMPORTANT DATES OCCURRING DURING INTERIM STUDY RECESS

2019

Oct. 13 Last day for Governor to sign or veto bills passed by the Legislature on or before Sep. 13 and in the Governor's possession after Sep. 13 (Art. IV, Sec.10(b)(1)).

2020

Jan. 1 Statutes take effect (Art. IV, Sec. 8(c)).

Jan. 6 Legislature reconvenes (J.R. 51 (a)(4)).

Introduced Legislation

AB 193 (Patterson R-Fresno)

Professions and vocations.

Status: 3/20/2019-From committee chair, with author's amendments: Amend, and re-refer to Committee on Business & Professions.
Location: 2/4/2019-Assembly Business & Professions
Amended: 3/20/2019

Desk	Policy	Fiscal	Floor	Desk	Policy	Fiscal	Floor	Conf. Conc.	Enrolled	Vetoed	Chaptered
1st House				2nd House							

Updated 3/21/2019
Staff Analysis: AB 193

Bill Summary: Would require the Department of Consumer Affairs (DCA), beginning on January 1, 2021, to conduct a comprehensive review of all licensing requirements for each profession regulated by a board within the department and identify unnecessary licensing requirements, as defined by the bill. The bill, beginning February 1, 2021, and every 2 years thereafter, would require each board within the department to submit to the department an assessment on the board's progress in implementing policies to facilitate licensure portability for active duty service members, veterans, and military spouses that includes specified information.

Staff Comment: This bill would require the DCA to begin a review process of all licensure requirements, and to start removing unnecessary and over-burdensome requirements. The Senate Committee on Business, Professions, and Economic Development and the Assembly Committee on Business and Professions conduct annual sunset review hearings that evaluate the operations and licensure requirements under the DCA. The Committees specifically analyze, among other things, whether license types under a specific board or bureau are unnecessary or no longer promote the health and safety of the public.

Staff Recommendation: No recommendation

Laws: An act to add Section 110.5 to the Business and Professions Code, relating to professions and vocations.

Introduced Legislation

AB 476 (Rubio D-Baldwin Park)

Department of Consumer Affairs: task force: foreign-trained

Status: 3/26/2019-From committee: Do pass and referred to Assembly Appropriations Committee
Location: 3/26/2019-Assembly Appropriations Committee
Last Amendment: 2/12/2019

Desk	Policy	Fiscal	Floor	Desk	Policy	Fiscal	Floor	Conf. Conc.	Enrolled	Vetoed	Chaptered
1st House				2nd House							

Updated 3/27/2019
Staff Analysis: AB 476

Bill Summary: Existing law provides for the licensure and regulation of various professions and vocations by boards within the Department of Consumer Affairs. Existing law establishes the Bagley-Keene Open Meeting Act, which requires state boards, commissions, and similar state-created multimember bodies to give public notice of meetings and conduct their meetings in public unless authorized to meet in closed session.

This bill, the California Opportunity Act of 2019, would require the Department of Consumer Affairs to create a task force, as specified, to study and write a report of its findings and recommendations regarding the licensing of foreign-trained professionals with the goal of integrating foreign-trained professionals into the state's workforce, as specified. The bill would authorize the task force to hold hearings and invite testimony from experts and the public to gather information. The bill would require the task force to submit the report to the Legislature no later than January 1, 2021, as specified.

The bill also would require the task force to meet at least once each calendar quarter, as specified, and to hold its meetings in accordance with the Bagley-Keene Open Meeting Act. The bill would require each member of the task force to receive per diem and reimbursement for expenses incurred, as specified, and would require the task force to solicit input from a variety of government agencies, stakeholders, and the public, including, among others, the Little Hoover Commission and the California Workforce Development Board.

Staff Recommendation: No recommendation

Laws: An act to add Section 110.5 to the Business and Professions Code, relating to professions and vocations.

Introduced Legislation

AB 544 (Brough R-Dana Point)

Professions and vocations: inactive license fees and accrued and unpaid renewal fees

Status: 3/21/2019 - Referred to Assembly Business & Professions. From committee chair, with author's amendments: Amend, and re-refer to Assembly Business & Professions. Read second time and amended.
Location: 3/21/2019- Assembly Business & Professions Committee
Amended: 3/21/2019

Desk	Policy	Fiscal	Floor	Desk	Policy	Fiscal	Floor	Conf. Conc.	Enrolled	Vetoed	Chaptered
1st House				2nd House							

Updated 3/22/2019
Staff Analysis: AB 544

Bill Summary: Existing law provides for the licensure and regulation of professions and vocations by various boards within the Department of Consumer Affairs. Existing law provides for the payment of a fee for the renewal of certain licenses, certificates, or permits in an inactive status, and, for certain licenses, certificates, and permits that have expired, requires the payment of all accrued and unpaid renewal and delinquent fees as a condition of reinstatement of the license, certificate, or permit.

This bill would limit the maximum fee for the renewal of a license in an inactive status to no more than 50% of the renewal fee for an active license. The bill would also prohibit a board from requiring payment of accrued and unpaid renewal and delinquent fees as a condition of reinstating an expired license or registration.

Staff Comment: Under current law, the Board's licensees must pay all accrued and unpaid renewal and delinquent fees to bring their expired license current. Since the renewal periods are for two years, if an individual's license is expired for more than two years, they must pay for all of the missed renewal periods to bring their license current. For example, if the license expired on December 31, 2016, and the individual wished to renew as of April 2, 2019, they would have to pay for two renewal and delinquency cycles to bring the license current to December 31, 2020. This bill would change the law so that the licensee would pay only the current renewal fee. Since the Board does not have an inactive status for any of its licenses, those provisions would not apply to the Board.

Staff Recommendation: No recommendation

Laws: An act to amend Sections 121.5, 462, 703, 1006.5, 1718, 1718.3, 1936, 2427, 2456.3, 2535.2, 2538.54, 2646, 2734, 2892.1, 2984, 3147, 3147.7, 3524, 3774, 3775.5, 4545, 4843.5, 4901, 4966, 4989.36, 4999.104, 5070.6, 5600.2, 5680.1, 6796, 6980.28, 7076.5, 7417, 7672.8, 7725.2, 7729.1, 7881, 7883, 8024.7, 8802, 9832, 9832.5, 9884.5, 19170.5, and 19290 of the Business and Professions Code, relating to professions and vocations.

Introduced Legislation

AB 613 (Low D)

Professions and vocations: regulatory fees.

Status: 2/25/2019-Referred to Assembly Business & Professions.
Location: 2/25/2019- Assembly Business & Professions.
Introduced: 2/14/2019

Desk	Policy	Fiscal	Floor	Desk	Policy	Fiscal	Floor	Conf. Conc.	Enrolled	Vetoed	Chaptered
1st House				2nd House							

Updated 3/21/2019
Staff Analysis: AB 613

Bill Summary: This bill would authorize each board within the department to increase every 4 years any fee authorized to be imposed by that board by an amount not to exceed the increase in the California Consumer Price Index for the preceding 4 years, subject to specified conditions. The bill would require the Director of the Department of Consumer Affairs to approve any fee increase proposed by a board except under specified circumstances. By authorizing an increase in the amount of fees deposited into a continuously appropriated fund, this bill would make an appropriation.

Staff Recommendation: No recommendation

Laws: An act to add Section 101.1 to the Business and Professions Code, relating to professions and vocations, and making an appropriation therefor.

Introduced Legislation

AB 1522 (Committee on Business and Professions)
Department of Consumer Affairs.

Status: 3/14/2019-Referred to Committee on Business & Professions.
Location: 3/14/2019-Assembly Business & Professions.
Introduced: 2/22/2019

Desk	Policy	Fiscal	Floor	Desk	Policy	Fiscal	Floor	Conf. Conc.	Enrolled	Vetoed	Chaptered
1st House				2nd House							

Updated 3/21/2019
Staff Analysis: AB 1522

Bill Summary: Existing law establishes the Board for Professional Engineers, Land Surveyors, and Geologists, which is within the Department of Consumer Affairs, to license and regulate professional engineers, land surveyors, geologists, and geophysicists and authorizes the board to appoint an executive officer. Existing law repeals these provisions on January 1, 2020.

This bill would extend the repeal date of the provision establishing the board and the board's authority to appoint an executive officer until January 1, 2024.

Staff Comment: Staff has advised the Committee staff that the section in the Professional Land Surveyors' Act (Section 8710) that also contains the sunset date was left out of the bill; we have been assured it will be added to the bill.

Staff Recommendation: Support

Laws: An act to amend Section 6710 and 6714 of the Business and Professions Code, relating to professions and vocations.

Introduced Legislation

SB 53 (Wilk R)

Open meetings.

Status: 3/12/2019 - Senate Appropriations Committees.
Location: 3/12/2019 - Senate Appropriations Committee
Amended: 3/5/2019

Desk	Policy	Fiscal	Floor	Desk	Policy	Fiscal	Floor	Conf. Conc.	Enrolled	Vetoed	Chaptered
1st House				2nd House							

Updated 3/21/2019
Staff Analysis: SB 53

Bill Summary: The Bagley-Keene Open Meeting Act requires that all meetings of a state body, as defined, be open and public and that all persons be permitted to attend and participate in a meeting of a state body, subject to certain conditions and exceptions.

This bill would specify that the definition of "state body" includes an advisory board, advisory commission, advisory committee, advisory subcommittee, or similar multimember advisory body of a state body that consists of 3 or more individuals, as prescribed, except a board, commission, committee, or similar multimember body on which a member of a body serves in his or her their official capacity as a representative of that state body and that is supported, in whole or in part, by funds provided by the state body, whether the multimember body is organized and operated by the state body or by a private corporation.

This bill would declare that it is to take effect immediately as an urgency statute.

Staff Comment: As originally introduced, this bill would amend Government Code section 11121 by adding the phrase "except as provided in subdivision (d)" to the end of the sentence in subdivision (c). The March 5, 2019, amendment simply replaces the gender-specific terms with gender-neutral language. This bill is identical to AB 85 (Wilk) from 2015 and nearly identical to AB 2058 (Wilk) from 2014, both of which were vetoed by then-Governor Brown. The Board opposed AB 85 and provided the following explanation in its opposition letter.

> Assembly Bill 85 proposes to amend the Bagley-Keene Open Meeting Act, specifically Government Code section 11121, relating to what constitutes a "state body" for purposes of compliance with the Act to conduct meetings in an open forum to allow for the public to participate. The author has indicated that the purpose of this bill is to clarify the Bagley-Keene Open Meeting Act regarding what constitutes a "state body" under its provisions. According to the author, there is an ambiguity in the current law regarding whether standing committees composed of fewer than three members must comply with the Act. The author contends that some state agencies interpret the law to allow standing committees that contain fewer than three members and do not vote on action items to hold meetings that are closed to the public. The author indicates that the amendment proposed by AB 85 is intended to clarify that standing committees, including advisory committees composed of less than three members, are subject to the Act and must allow for public participation at their meetings.
>
> The Board respectfully disagrees that there is an ambiguity in the current law and believes that the proposed amendment would, in fact, create an ambiguity regarding what constitutes an advisory body that does not have authority to act on its own. As Governor Brown said in his veto message of AB 2058 (Wilk), 2013-2014 Legislative Session, advisory committees do not have the authority to act on their own. They must present any findings or recommendations to the overall state body before formal action can be taken, and that state body must conduct its meetings in an open public forum and allow for public input before any action can be taken.

> The Board strongly believes in complying with the Bagley-Keene Open Meeting Act because of the importance of public participation and encourages members of the public to attend its meetings and address the Board. However, the Board cannot support AB 85 in its current form due to the ambiguity created by this proposed amendment.

Since SB 53 adds the same language to subdivision (c) that was proposed to be added by AB 85, the same ambiguity exists that concerned the Board with the previous bill. For this reason, staff recommends the Board oppose SB 53.

Staff Recommendation: Oppose

Laws: An act to amend Section 11121 of the Government Code, relating to state government, and declaring the urgency thereof, to take effect immediately.

Introduced Legislation

SB 339 (Jones R)

Land surveyors

Status: 3/25/2019-From committee with author's amendments. Read second time and amended. Re-referred to Business, Professions and Economic Development Committee. Set for hearing on April 22, 2019.
Location: 2/28/2019 - Senate Business, Professions and Economic Development Committee
Amended: 3/25/2019

Desk	Policy	Fiscal	Floor	Desk	Policy	Fiscal	Floor	Conf. Conc.	Enrolled	Vetoed	Chaptered
1st House				2nd House							

Updated 3/27/2019
Staff Analysis: SB 339

Bill Summary: The Professional Land Surveyors' Act provides for the licensure and regulation of land surveyors by the Board for Professional Engineers, Land Surveyors, and Geologists. The act requires a licensee to report to the board in writing the occurrence of specified events in relation to the licensee within 90 days of the date the licensee has knowledge of the event. Under the act, the failure of a licensee to report to the board in the time and manner required is grounds for disciplinary action. A violation of the act is a crime.

This bill would prohibit a licensee who is retained as an expert from entering into a nondisclosure agreement, or similar agreement, if the agreement prohibits the licensee from reporting the occurrence of any of those specified events. Because a violation of this prohibition would be a crime, this bill would impose a state-mandated local program.

This bill would provide that no reimbursement is required by this act for a specified reason.

Staff Comment: This bill is sponsored by the California Land Surveyors Association (CLSA). CLSA has indicated that licensees who serve as experts in civil matters must sign nondisclosure agreements that prohibit them from notifying the Board of suspected violations of the law by other licensees. CLSA indicates that the intent of this proposal is to allow licensees to report suspected violations to the Board, which they cannot do if they have entered into a nondisclosure agreement.

Staff Recommendation: No recommendation

Laws: An act to amend Section 8776 of the Business and Professions Code, relating to professions and vocations.

Introduced Legislation

SB 556 (Pan D)

Professional land surveyors

Status: 2/28/2019 - Referred to Business, Professions and Economic Development. Set for hearing on April 8, 2019.
Location: 2/28/2019 - Senate Business, Professions and Economic Development Committee
Introduced: 2/19/2019

Desk	Policy	Fiscal	Floor	Desk	Policy	Fiscal	Floor	Conf. Conc.	Enrolled	Vetoed	Chaptered
1st House				2nd House							

Updated 4/2/2019
Staff Analysis: SB 556

Bill Summary: This bill would amend Business and Professions Code (BPC) sections 8726 and 8729 and would add new Sections 8728.5, 8729.1, 8786, 8790.1, 8793, 14216, and 17910.6. It would also add new Sections 201.1, 15902.10, 16105.1, 16953.1, and 17702.08 to the Corporation Code (Corp. Code).

This bill would amend the definition of what constitutes the practice of land surveying (BPC 8726). It would also create a new certification program for land surveying businesses, as defined (BPC 8728.5, 8729, 8729.1, 8793, 14216, and 17910.6 and Corp. Code 201.1, 15902.10, 16105.1, 16953.1, and 17702.08). Additionally, the bill would require land surveyors to obtain professional liability insurance or advise their clients in writing that they do not carry such insurance (BPC 8729.1). Furthermore, the bill would require state and local agencies that receive land surveying documents, as defined, to notify the Board if any of those documents do not identify the person authorized to practice land surveying under whose responsible charge they were prepared (BPC 8786). It would also require the Board to provide a copy of all "valid complaints," as defined, to certain other state boards, as specified, so that the other state boards could conduct their own investigations (BPC 8790.1).

Staff Comment: This bill proposes to amend the Professional Land Surveyors' Act [PLS Act] in a variety of areas.

1. The definition of the practice of land surveying (BPC Sect. 8726) [Sec. 1, Pages 4-6 of the bill]
The bill proposes to amend subdivisions (a), (b), and (f) of Sect. 8726, regarding the definition of what constitutes the practice of land surveying.

- Staff has serious concerns with the amendments to subdivisions (a) and (b). These amendments would expand the scope of practice of land surveying by adding work done in relationship to electrical and mechanical engineering work (a) and work done using remote sensing (b). These are new elements not covered by current law. Additionally, the effect of amending Sect. 8726(a) and (b) without making the same amendments to Sect. 6731.1(a) and (b) is to expand the scope of practice of land surveyors while narrowing the scope of practice of civil engineers.
- Staff has no concerns with the amendments to subdivision (f), which simply clarify the definition of "geodetic surveying" as used in the PLS Act.

2. Creation of certification program for land surveying businesses (BPC Sect. 8728.5, 8793, 14216, and 17910.6 and Corp. Code Sect. 201.1, 15902.10, 16105.1, 16953.1, and 17702.08 [Sec. 2, Pages 6-7; and Sec. 8-15, Pages 13-14 of the bill]
The bill proposes to add sections to the Business and Professions Code and the Corporations Code to create a certification program for land surveying business.

- Staff has numerous concerns with this proposal, as outlined below.
  A. The types of business entities listed in proposed Sect. 8728.5 is not the same as the types of business entities listed in current Sect. 8729. There is no explanation for the differences, nor was it proposed

to amend the types of business entities in Sect. 8729, even though other amendments to that section are proposed in the bill.

B. Proposed Section 8728.5 lists certain information the Board is mandated to obtain during the application process and also mandates that the Board issue the certificate if all of the information is provided. However, the section also indicates that the Board may request additional information. This is contradictory: the Board cannot both have the discretion to request additional information before issuing the certificate and be mandate to issue the certificate if all of the information listed in statute is provided.

C. The listed requirements that the business must meet are inconsistent with other provisions in the laws; specifically, the laws that allow civil engineers licensed after January 1, 1982, to operate businesses that offer land surveying services that are incidental to their civil engineering projects and the laws that allow civil engineers licensed prior to January 1, 1982, to offer and practice land surveying as if they were licensed land surveyors. Additionally, the listed requirements are inconsistent among themselves; in one subsection, it requires a professional land surveyor to be in responsible charge (leaving out legally-authorized civil engineers), while in another, it requires a person legally authorized to practice land surveying to be in responsible charge (including legally-authorized civil engineers).

D. The business would be required to identify the "type of land surveying" performed. In California, there are not separate "types" or branches or disciplines or licenses for land surveying. Individuals licensed to practice land surveying in California are legally authorized to practice all aspects of land surveying covered in the definition. If a business is required to designate the "type" of land surveying they offer, or specialize in, would they be precluded from offering other "types" of land surveying that they did not designate?

E. The bill specifies that the application fee for the certificate is set at $200. This does not take into consideration that, as a Special Fund agency, the Board is to charge the amount that covers the cost to provide the service. Specifying a fixed amount does not allow the Board to determine what it will cost the Board to provide this service and charge the appropriate amount. What if it costs the Board less than $200 to process the application? What if it costs more? Additionally, there is no indication whether this is a one-time application fee or how often a business must "apply" for a certificate.

F. The bill requires the business to provide a statement of the land surveying experience for the preceding five years prior to application. This would prevent newly-licensed individuals from offering their services through a business entity since they would not have the required five years' worth of experience. Additionally, once a person meets all of the legal requirements and is issued a license, they may immediately start practicing and offering land surveying as the person in responsible charge; there is currently no requirement that they demonstrate additional experience after they become licensed before they are allowed to create a business entity through which to offer their services.

G. The bill includes a provision that any business that offers land surveying services without having a certificate shall pay a fine of a <u>minimum</u> of $20,000. There is nothing in the bill that indicates how it would be determined if the fine should be more than the minimum amount specified, nor is there anything that would tie this fine to the Board's citation regulations or the enabling statutes that allowed the Board to adopt the citation regulations. These statutes and regulations specify a <u>maximum</u> fine amount and what factors must be considered in determining the appropriate amount of the fine up to that maximum. They also provide the cited person with rights to appeal the citation. This proposal includes none of those provisions.

H. Sections would be added to the Business Rights and General Business Regulations divisions of the Business and Professions Code and to the Corporations Code that would prohibit the Secretary of State and county clerks from accepting and filing the required paperwork for businesses who use the words "engineer," "engineering," "surveyor," "surveying," "mapping," "aerial mapping," "photogrammetry," or any modification or derivation thereof in the business name unless the business has been issued a certificate as a land surveying business by the Board. This provision would preclude professional engineers the words "engineer" and "engineering" in their business names unless that business was also a land surveying business certified under the Professional Land

Surveyors' Act. It would also prevent certified engineering geologists and general engineering contractors from using the word "engineering" in their business name, unless the business was certified as a land surveying business.

I. The bill does not provide for a delayed implementation of this new certification program to allow the Board time to establish the program and notify licensees of the new requirement.

3. Professional liability insurance (Sect. 8729.1) [Sec. 5, Page 12 of the bill]
The bill would require land surveying businesses to obtain professional liability insurance or advise their clients that they do not have such insurance.

- While the bill provides the specific ways in which the business must advise clients that they do not have professional liability insurance, there is no requirement to advise their clients that they do have such insurance. Other professions, such as attorneys, require notice be provided to the clients regarding whether or not the licensee carries professional liability insurance, rather than simply requiring notice that they do not carry such insurance.

4. Requirement for certain government entities to refer certain matters to the Board (Sect. 8786) [Sec. 6, Page 12 of the bill]
The bill would add a section to the PLS Act requiring any state or local agency that accepts land surveying documents to report to the Board if any of those documents do not identify the person legally authorized to practice land surveying who was in responsible charge of the preparation of the documents.

- While it would be helpful for other government agencies to report suspected violations to the Board, staff questions whether they should be mandated to do so by the Board's licensing law. Additionally, there would be little recourse for the Board to enforce this section if the other government agencies did not report.

5. Requirement for the Board to refer "valid complaints" to other state boards (Sect. 8790.1) [Sec. 7, Pages 12-13 of the bill]
A section would be added to the PLS Act that would require the Board to provide a copy of a "valid complaint," as defined, upon receipt, to state boards that regulate the health, safety, wages, and other labor requirements of persons working on construction, building, or infrastructure projects. The bill defines "valid complaint" as one which the Board determines that a violation of the PLS Act may have or is likely to have occurred. The bill also includes a statement of Legislative intent that the enactment of this section is to ensure that the state boards are made aware of the possible need to investigate and regulate the cited businesses who have been issued a certificate to offer land surveying services.

- Staff has several concerns with this section, as described below.
  A. Without a definition of "state board," it is not clear if the intent is that the Board would provide a copy of the complaint only to an entity considered to be a board or if a broader interpretation should be applied to include any state agency.
  B. Based on the definition of "valid complaint," any complaint received by the Board that falls within the Board's jurisdiction would be considered a "valid complaint" even before an investigation has been conducted and a determination made as to whether a violation has actually occurred. There is no indication of whether the Board would need to notify the state board if it were to later determine that no violation had occurred. Additionally, there is nothing in the proposed language to tie the area of alleged violation to "construction, building, or infrastructure projects"; as such, the Board would be required to send complaints that may have nothing to do with such projects to state boards.
  C. The Legislative intent language could be interpreted to require the other state boards to conduct investigations, even if the complaints referred have nothing to do with the regulatory authority of the state boards.
  D. The Legislative intent language refers to "cited" business that has a certificate to offer land surveying services. This is the only reference to a land surveying business, as well as the only use of the term "cited." The use of the word "cited" seems to imply that an investigation has been conducted, and a citation has been issued to a business; however, that does not coincide with the definition of "valid complaint" provided in the section. Additionally, the reference to land surveying

businesses could be interpreted to mean that only complaints against businesses would be referred. There is no indication in the definition of "valid complaint" that it includes only those against businesses.

6. Changes to Section 8729(e)

This bill proposes to repeal the existing subdivision (e) of Sect. 8729 and replace it with a new version of subdivision (e). Currently, this subdivision allows an individual or business engaged in any other endeavor other than land surveying to employ or contract with an individual legally authorized to practice land surveying to perform land surveying services that are incidental to the conduct of the business. The new version would require an individual or business who is not licensed or certified to practice land surveying to employ or contract with an individual or business who is licensed or certified to perform any incidental land surveying services.

- Staff is concerned that this rephrasing could be interpreted to allow businesses to offer land surveying while simply employing or contracting with someone legally authorized to practice land surveying. The current interpretation and enforcement of the PLS Act, as a whole, requires any business offering land surveying services to have an owner, partner, or officer who is legally authorized to practice land surveying; it is not sufficient to simply employ or contract with a licensee. Additionally, the new version could be interpreted to mean that an unlicensed person, such as a consumer, who hires an unlicensed person to perform land surveying would be in violation of the laws.

General concerns:

- This bill sets up new certification program under only one of the three Acts regulated and enforced by the Board; it does not require certifications for engineering or geology or geophysics businesses. Furthermore, the bill requires only one of the professions the Board regulates to obtain professional liability insurance or provide notice to their clients that they do not carry it.
- As noted above, the wording is inconsistent between subsections and sections within the PLS Act, as well as between the different Acts under the Board's authority. The wording is also confusing and open to multiple interpretations.

Staff has met with representatives of the sponsors of the bill, the California & Nevada Civil Engineers and Land Surveyors Association Inc. (CELSA) and the Operating Engineers Local 3 and Local 12, and advised them of some of these concerns, while also advising that the Board has not yet considered the bill or taken a position on it. The sponsors have indicated they are interested and willing to work to clarify the language of the bill.

Staff Recommendation: Given the numerous concerns raised by this bill, staff recommends that the Board either oppose the bill in its entirety or oppose it unless it is amended to remove everything but the proposed amendment to subdivision (f) of Section 8726 relating to the definition of geodetic surveying.

Laws: An act to amend Sections 8726 and 8729 of, and to add Sections 8728.5, 8729.1, 8786, 8790.1, 8793, 14216, and 17910.6 to, the Business and Professions Code, and to add Sections 201.1, 15902.10, 16105.1, 16953.1, and 17702.08 to the Corporation Code, relating to professional land surveyors, and making an appropriation therefor.

VIII. Enforcement

A. Enforcement Statistical Reports

1. Fiscal Year 2018/19 Update

Complaint Investigation Phase

Number of Complaint Investigations Opened & Completed by Month
12-Month Cycle

Month	Complaint Investigations Opened	Complaint Investigations Completed
March 2018	46	29
April 2018	28	26
May 2018	64	33
June 2018	35	26
July 2018	36	34
August 2018	19	36
September 2018	28	21
October 2018	17	33
November 2018	51	18
December 2018	12	17
January 2019	39	28
February 2019	12	21

Complaint Investigations Opened and Completed
Total by Fiscal Year

Fiscal Year	Complaint Investigations Opened	Complaint Investigations Completed
2015/16	368	400
2016/17	353	323
2017/18	362	349
2018/19	214	208

Current Fiscal Year through February 28, 2019

Number of Open (Pending) Complaint Investigations
(at end of FY or month for current FY)

Fiscal Year	Number of Open (Pending) Complaint Investigations
2015/16	211
2016/17	237
2017/18	254
2018/19	260

Current Fiscal Year through February 28, 2019

Complaint Investigation Phase

Average Days from Opening of Complaint Investigation to Completion of Investigation (at end of FY or month for current FY)

Fiscal Year	Average Days
2015/16	237
2016/17	243
2017/18	238
2018/19	216

Current Fiscal Year through February 28, 2019

Outcome of Completed Investigations

Fiscal Year	# Closed	% Closed	# Cite	% Cite	# FDA	% FDA
2015/16	227	57%	133	28%	60	15%
2016/17	205	63%	97	30%	21	7%
2017/18	219	63%	93	27%	37	10%
2018/19	142	68%	50	24%	16	8%

Current Fiscal Year through February 28, 2019
Closed = Closed with No Action Taken, includes the categories listed on the next page.
Cite = Referred for Issuance of Citation
FDA = Referred for Formal Disciplinary Action

Complaint Investigation Phase

Aging of Open (Pending) Complaint Investigation Cases
12-Month Cycle

Month	0-30 Days	31-60 Days	61-90 Days	91-12 Days	121-180 Days	181-270 Days	271-365 Days	1-2 Years	2-3 Years
March 2018	46	10	15	23	40	38	22	18	0
April 2018	26	43	10	15	44	38	22	16	0
May 2018	63	23	39	9	35	43	22	11	0
June 2018	34	60	23	34	24	41	16	21	1
July 2018	35	32	51	26	33	47	17	14	1
August 2018	19	26	37	39	59	24	21	13	1
September 2018	28	17	24	35	63	39	27	12	1
October 2018	17	27	13	23	65	42	24	18	1
November 2018	47	16	24	12	57	65	15	26	1
December 2018	12	41	19	23	32	81	19	30	1
January 2019	32	11	34	20	32	78	31	30	1
February 2019	11	29	11	39	37	60	46	26	1

Citations (Informal Enforcement Actions)

Number of Complaint Investigations Referred and Number of Citations Issued

Fiscal Year	Complaint Investigations Referred for Issuance of Citation	Citations Issued
2015/16	113	78
2016/17	97	100
2017/18	93	83
2018/19	50	45

Current Fiscal Year through February 28, 2019

Number of Citations Issued and Final

Fiscal Year	Issued	Final
2015/16	78	83
2016/17	100	101
2017/18	83	91
2018/19	45	52

Current Fiscal Year through February 28, 2019

Average Days Between Date of Issuance of Citation and Date Citation Becomes Final

Fiscal Year	Number of Days
2015/16	222
2016/17	259
2017/18	164
2018/19	232

Current Fiscal Year through February 28, 2019

Average Days from Opening of Complaint Investigation to Date Citation Becomes Final

Fiscal Year	Number of Days
2015/16	635
2016/17	639
2017/18	495
2018/19	572

Current Fiscal Year through February 28, 2019

Formal Disciplinary Actions Against Licensees

Number of Licensees Referred for Formal Disciplinary Action and Number of Final Disciplinary Decisions

Fiscal Year	Number of Licensees Referred for Formal Disciplinary Action	Number of Final Disciplinary Decisions
2015/16	41	36
2016/17	36	41
2017/18	28	19
2018/19	26	21

Current Fiscal Year through February 28, 2019

Average Days from Referral for Formal Disciplinary Action to Effective Date of Final Decision

Fiscal Year	Number of Days
2015/16	623
2016/17	703
2017/18	585
2018/19	548

Current Fiscal Year through February 28, 2019

Average Days from Opening of Complaint Investigation to Effective Date of Final Decision

Fiscal Year	Number of Days
2015/16	1078
2016/17	1106
2017/18	825
2018/19	1015

Current Fiscal Year through February 28, 2019

IX. Exams/Licensing

X. Executive Officer's Report

A. Rulemaking Status Report
B. Update on Board’s Business Modernization/PAL Process
C. Personnel
D. ABET
E. Association of State Boards of Geology (ASBOG)
F. National Council of Examiners for Engineering and Surveying (NCEES)
    1. Informational Report related to significant structures and the Structural Engineering Licensing Coalition (SELC)
    2. Vote on Western Zone Secretary/Treasurer (Possible Action)
    3. Selection of Funded Delegates to Attend Annual Meeting – August 14-17, 2019 (Possible Action)
    4. Louisiana Board Nomination of Southern Zone Vice-President Christopher Knotts, P.E. for NCEES President-Elect (Possible Action)
G. The Saint Francis Dam National Memorial and National Monument (Public Law No. 116-9 (S. 47))

Rulemaking Overview

1. **Geology Education (3022, 3022.1, 3022.2, and 3031)**

   - Final rulemaking package submitted to Agency on March 28, 2019.
     - Submitted to DCA, Legal, and Budget Office on February 21, 2019.
     - Board adopted final rulemaking on February 21, 2019.
     - Regulatory hearing occurred on January 22, 2019.
     - 45-day comment period ended on January 14, 2019.
     - Office of Administrative Law (OAL) published rulemaking package on November 30, 2018.
     - Submitted to OAL for publication November 15, 2018.
     - Initial review completed on November 9, 2018.
     - Board approved revised text and directed staff to continue with the rulemaking process on November 1, 2018.

2. **Fees and Certificates (404, 410, 3005, and 3010)**

   - Reviewing modified text with DCA Legal for approval to submit initial rulemaking package.
     - Board directed staff to pursue initial rulemaking on November 1, 2018.

3. **Repeal Professional Engineer and Land Surveyor Appeals (443 and 444)**

   - Developing initial rulemaking package to submit to DCA, Legal, and Budget Office.
     - Board directed staff to pursue initial rulemaking on March 1, 2013.

4. **Definition of Traffic Engineering (404)**

   - Developing initial rulemaking package to submit to DCA, Legal, and Budget Office.
     - Board directed staff to pursue initial rulemaking on March 8, 2018.

5. **Definitions of Negligence, Incompetence, and Responsible Charge for Geologists and Geophysicists. (3003 and 3003.1)**

   - Developing initial rulemaking package to submit to DCA, Legal, and Budget Office.
     - Board directed staff to pursue initial rulemaking on September 6, 2018.

6. **Assembly Bill 2138 Conformance (416, 418, 3060, and 3061)**

   - Developing initial rulemaking package to submit to DCA, Legal, and Budget Office.
     - Board directed staff to pursue initial rulemaking on February 21, 2019.

Note: Documents related to any rulemaking file listed as "noticed" can be obtained from the Board's website at http://www.bpelsg.ca.gov/about_us/rulemaking.shtml.

LOUISIANA PROFESSIONAL ENGINEERING AND LAND SURVEYING BOARJ:

September 10, 2018

To: Southern Zone Members

From: The Louisiana Professional Engineering and Land Surveying Board

The Louisiana Board is honored to nominate Christopher P. Knotts, P.E., as the Southern Zone nominee for NCEES President Elect.

Chris, a member of the LAPELS board since 2013, is currently serving as our board chairman. During his time on the board, he has served on various board committees; testified before legislative committees concerning laws which would affect the professions of engineering and surveying; made numerous presentations on professional ethics; the laws and rules of the board; and student outreach at many Louisiana universities promoting the importance of licensure.

Currently, Chris is the NCEES Southern Zone Vice President, and the NCEES Board of Directors liaison to the MBA and Exam Audit Committees. His NCEES service also includes Southern Zone Secretary-Treasurer from August, 2015 to August 2017, Finance Committee and PE Civil Exam Committee. Employed with the State of Louisiana for the past 21+ years, he is the Chief Engineer at the Department of Transportation and Development. Chris has served in local and state leadership positions of the American Society of Civil Engineers and the Louisiana Engineering Society.

We look forward to seeing all of you at the joint Western/Southern Zone meeting next spring in Boise, ID. It is at the Boise meeting that we will elect a Zone Vice President, Assistant Zone Vice President and select our nominee for NCEES President Elect from the Southern Zone.

It has been a privilege to serve with Chris on the LAPELS board, and we respectfully ask for your support of him as the next NCEES President Elect. In the meantime, feel free to reach out to any of us and please feel free to contact Chris at chris.knotts@la.gov with your questions or comments about his willingness to serve you.

Sincerely,

Paul N. Hale, PhD., P.E.
Vice Chairman

i!9
Treasurer

Th
Secretary

D. Scott Phillips, P.E., P.L.S

Charles G. Coye, III, P.L.S.

Jeffrey A. Pike, P.E.

Christopher K. Richard, P.E.

p E.

Wilfred J. Fontenot, P.L.S.

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One Hundred Sixteenth Congress
of the
United States of America

AT THE FIRST SESSION
Begun and held at the City of Washington on Thursday,
the third day of January, two thousand and nineteen

An Act
To provide for the management of the natural resources of the United States,
and for other purposes.

Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the ''John D. Dingell, Jr. Conservation, Management, and Recreation Act''.

…

TITLE I—PUBLIC LAND AND FORESTS
Subtitle A—Land Exchanges and Conveyances

…

SEC. 1111. SAINT FRANCIS DAM DISASTER NATIONAL MEMORIAL AND NATIONAL MONUMENT.

(a) DEFINITIONS.—In this section:

(1) MEMORIAL.—The term ''Memorial'' means the Saint Francis Dam Disaster National Memorial authorized under subsection (b)(1).

(2) MONUMENT.—The term ''Monument'' means the Saint Francis Dam Disaster National Monument established by subsection (d)(1).

(3) SECRETARY.—The term ''Secretary'' means the Secretary of Agriculture.

(4) STATE.—The term ''State'' means the State of California.

(b) SAINT FRANCIS DAM DISASTER NATIONAL MEMORIAL.—

(1) ESTABLISHMENT.—The Secretary may establish a memorial at the Saint Francis Dam site in the county of Los Angeles, California, for the purpose of honoring the victims of the Saint Francis Dam disaster of March 12, 1928.

(2) REQUIREMENTS.—The Memorial shall be—

(A) known as the ''Saint Francis Dam Disaster National Memorial''; and

(B) managed by the Forest Service.

(3) DONATIONS.—The Secretary may accept, hold, administer, invest, and spend any gift, devise, or bequest of real or personal property made to the

Secretary for purposes of developing, designing, constructing, and managing the Memorial.

(c) RECOMMENDATIONS FOR MEMORIAL.—

(1) IN GENERAL.—Not later than 3 years after the date of enactment of this Act, the Secretary shall submit to Congress recommendations regarding—

(A) the planning, design, construction, and long-term management of the Memorial;

(B) the proposed boundaries of the Memorial;

(C) a visitor center and educational facilities at the Memorial; and

(D) ensuring public access to the Memorial.

(2) CONSULTATION.—In preparing the recommendations required under paragraph (1), the Secretary shall consult with—

(A) appropriate Federal agencies;

(B) State, Tribal, and local governments, including the Santa Clarita City Council; and

(C) the public.

(d) ESTABLISHMENT OF SAINT FRANCIS DAM DISASTER NATIONAL MONUMENT.—

(1) ESTABLISHMENT.—There is established as a national monument in the State certain National Forest System land administered by the Secretary in the county of Los Angeles, California, comprising approximately 353 acres, as generally depicted on the map entitled ''Proposed Saint Francis Dam Disaster National Monument'' and dated September 12, 2018, to be known as the ''Saint Francis Dam Disaster National Monument''.

(2) PURPOSE.—The purpose of the Monument is to conserve and enhance for the benefit and enjoyment of the public the cultural, archaeological, historical, watershed, educational, and recreational resources and values of the Monument.

(e) DUTIES OF THE SECRETARY WITH RESPECT TO MONUMENT.—

(1) MANAGEMENT PLAN.—

(A) IN GENERAL.—Not later than 4 years after the date of enactment of this Act, the Secretary shall develop a management plan for the Monument.

(B) CONSULTATION.—The management plan shall be developed in consultation with—

(i) appropriate Federal agencies;

(ii) State, Tribal, and local governments; and

(iii) the public.

(C) CONSIDERATIONS.—In developing and implementing the management plan, the Secretary shall, with respect to methods of protecting and providing access to the Monument, consider the recommendations of the Saint Francis Disaster National Memorial Foundation, the Santa Clarita Valley Historical Society, and the Community Hiking Club of Santa Clarita.

(2) MANAGEMENT.—The Secretary shall manage the Monument—

(A) in a manner that conserves and enhances the cultural and historic resources of the Monument; and

(B) in accordance with—

(i) the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1600 et seq.);

(ii) the laws generally applicable to the National Forest System;

(iii) this section; and

(iv) any other applicable laws.

(3) USES.—

(A) USE OF MOTORIZED VEHICLES.—The use of motorized vehicles within the Monument may be permitted only—

(i) on roads designated for use by motorized vehicles in the management plan required under paragraph (1);

(ii) for administrative purposes; or

(iii) for emergency responses.

(B) GRAZING.—The Secretary shall permit grazing within the Monument, where established before the date of enactment of this Act—

(i) subject to all applicable laws (including regulations and Executive orders); and

(ii) consistent with the purpose described in subsection (d)(2).

(4) NO BUFFER ZONES.—

(A) IN GENERAL.—Nothing in this section creates a protective perimeter or buffer zone around the Monument.

(B) ACTIVITIES OUTSIDE NATIONAL MONUMENT.—The fact that an activity or use on land outside the Monument can be seen or heard within the Monument shall not preclude the activity or use outside the boundary of the Monument.

(f) CLARIFICATION ON FUNDING.—

(1) USE OF EXISTING FUNDS.—This section shall be carried out using amounts otherwise made available to the Secretary.

(2) NO ADDITIONAL FUNDS.—No additional funds are authorized to be appropriated to carry out this section.

(g) EFFECT.—Nothing in this section affects the operation, maintenance, replacement, or modification of existing water resource, flood control, utility, pipeline, or telecommunications facilities that are located outside the boundary of the Monument, subject to the special use authorities of the Secretary of Agriculture and other applicable laws.

…

XI. Technical Advisory Committees (TACs)

A. Assignment of Items to TACs (Possible Action)
B. Appointment of TAC Members (Possible Action)
C. Reports from the TACs (Possible Action)

MOTION:

To recommend the individuals named below for reappointment to the Professional Land Surveyor Technical Advisory Committee (LSTAC) for 2 year appointments commencing July 1, 2019:

- Mr. David Ryan, P.L.S.
- Mr. Scott Tikalsky, P.L.S.

BACKGROUND:

Mr. Ryan and Mr. Tikalsky have considerable experience in both the private and public sectors and both are from the Northern California area, which helps to balance out current committee members who are from the Central Valley, Central Coast, and Southern California.

The LSTAC member appointments for the above individuals have been nominated by Steve Wilson. The reappointment of these candidates will help ensure the continuance, and enhancement of the professional land surveying expertise and advice provided by the LSTAC.

RECOMMENDATION:

Recommend that the Board consider and approve the aforementioned individuals to serve as members of the LSTAC for the terms requested.

XII. President’s Report/Board Member Activities

XIII. Approval of Meeting Minutes (Possible Action)

A. Approval of the Minutes of the December 13, 2018 and February 21, 2019 Board Meetings.

DRAFT

MINUTES OF THE BOARD FOR PROFESSIONAL ENGINEERS, LAND SURVEYORS, AND GEOLOGISTS

Department of General Services
3737 Main Street, Magnolia Room
Riverside, CA 92501

Thursday, December 13, 2018 beginning at 9:00 a.m.

Board Members Present:	Mohammad Qureshi, President; Fel Amistad, Vice President; Alireza Asgari; Kathy Jones Irish; Eric Johnson; Coby King; Asha Lang; Betsy Mathieson; Frank Ruffino; Jerry Silva; Robert Stockton; and Steve Wilson
Board Members Absent:	Duane Friel; Andrew Hamilton; and Natalie Alavi
Board Staff Present:	Ric Moore (Executive Officer); Nancy Eissler (Assistant Executive Officer; Tiffany Criswell (Enforcement Manager); Celina Calderone (Board Liaison); Dallas Sweeney (Senior Registrar); Reza Pejuhesh (Legal Counsel); and Michael Santiago (Legal Counsel)

I. Roll Call to Establish a Quorum

President Qureshi called the meeting to order at 9:01 a.m., and a quorum was established.

II. Public Comment for Items Not on the Agenda

Eric Nelson, CE, is employed by a major airport in southern California but represented himself. He believes it is important to create a specialized licensure category specific to airport engineering. He feels strongly about this issue and is willing to take the lead on this effort and understands that the request is complicated and will require legislation.

VIII. Executive Officer's Report

G. Update on Outreach Efforts

Dallas Sweeney, Senior Registrar Land Surveyor with the Board, reviewed prior Board action regarding Record of Survey requirements. From this action, the Board conducted its first workshop December 12. They discussed the PLS Act and the technical requirements of a Record of Survey and also covered the reviewing aspect. There were approximately 35 individuals from the surveying community who attended. The plan is to have six outreach sessions throughout California. Future possible locations include Burbank, Madera, San Jose, Santa Rosa, and Sacramento.

Mr. Moore added that another outreach session with the Los Angeles Department of Water and Power will be held January 16, 2019, from 10:00 a.m. – noon. Both Michael Donelson, Senior Registrar, and Natalie King, Senior Registrar, will be in attendance to discuss engineering licensure topics.

Coby King arrived at 9:17 a.m.

III. Consideration of Rulemaking Proposals

A. Proposed Amendments to Title 16, California Code of Regulations sections 416 and 3060 (Substantial Relationship Criteria) to Conform to Statutory Changes Made by AB 2138 (Chapter 995, Statutes of 2018) (Possible Action)

Over the past several months, the Board has discussed legislation that the Governor signed that makes changes to what the Board can consider related to criminal convictions to help determine whether or not to deny issuing a license. Based on the changes in statute that will go into effect July 1, 2020, the Board needs to make changes to some of the regulations. Section 416 applies to engineers and land surveyors, and Section 3060 applies to geologists and geophysicists. These regulations define the criteria that the Board must consider in determining whether the crime the person has been convicted of is substantially related to the qualifications, functions, and duties of the profession in which the person is seeking licensure.

Currently, the statute allows the Board to consider crimes or acts. The statute will be changing to indicate that the Board can consider crimes or acts underlying the conviction for that crime. Another provision requires the Board to deem whether a crime is substantially related by considering the nature and gravity of the offense, the number of years elapsed since the date of the offense, and the nature and duties of the profession.

Legal Counsel Michael Santiago explained that the Legal Affairs Division is currently working on a memo that is going to be released to all the boards, bureaus, and programs detailing the recommendations for model language pertaining to not only the substantial relationship criteria regulations but also the criteria for rehabilitation regulations. He suggested that it may help in drafting the notice and the Initial Statement of Reasons (ISR) so that it can be standardized.

Mr. King inquired whether the Board should wait until the model language is released to move forward. Mr. Santiago recommended waiting until the release of the model language.

President Qureshi concurred with Mr. King and Mr. Santiago. He added that the last sentence in 416 (a) needs to be clarified and modify the word “acts” with “underlying acts” or “acts underlying” to mirror the earlier language.

IV. Administration

A. Fiscal Year 2017/18 Budget Review

Mr. Moore reported that the Board did not receive any additional information from the DCA Budget Office to include in the Board materials. He is anticipating that a report will be available for the next Board meeting.

B. Fiscal Year 2018/19 Budget Status

President Qureshi requested an analysis to outline historical trends. Mr. Moore will work with Mr. Alameida to develop one for the next meeting.

V. Legislation

A. 2019 Legislative Calendar

Ms. Eissler reviewed the legislative calendar. She reported that the legislature started a new session last week and introduced bills that do not affect the Board.

She also reported that she, Mr. Moore, and Dr. Qureshi attended a meeting with DCA Executive staff and individuals from agency regarding the Board’s Sunset report. She does not foresee the need for any bills separate from the Sunset legislation and does not anticipate that the Board would need to try to find authors for any bills at this time.

VI. Enforcement

A. Enforcement Statistical Reports

1. Fiscal Year 2018/19 Update

Ms. Criswell presented the Enforcement Statistics. While she is seeing longer timeframes with the Attorney General’s Office and the Office of Administrative Hearings, she is also encouraged as cases are being assigned to new Deputy Attorneys General.

VII. Exams/Licensing

A. Update on 2018 Examinations

Mr. Moore reported that the NCEES results for the Fall 2018 paper-based PE examinations were released November 26. The structural engineering results were released earlier in the week. ASBOG has notified the Board that the national Fundamentals of Geology and the Professional Geologists results are ready to be delivered. The results for the Land Surveyor examination, Geotechnical Engineer examination, both State Civil Engineer examinations, Certified Engineering Geologist examination, Certified Hydrogeologist examination, and Professional Geophysicist examination were recently released. The California Specific Examination for Geologists and the traffic

engineer examination results are expected to be released next week. Mr. Kereszt is expected to provide a full report at the next meeting.

VIII. Executive Officer's Report (Cont.)

A. Rulemaking Status Report

Ms. Eissler reported that the geology education regulations have been officially noticed for public comment. The 45-day public comment period ends January 14, 2019, followed by a public hearing to provide oral testimony as well as written comments. She anticipates that the summary of comments and recommendations will be presented at the February meeting.

B. Update on Board's Business Modernization/PAL Process

Mr. Moore reported that Stage II Project Approval Lifecycle (PAL) document was delivered to DCA and has progressed to Agency. It is anticipated that it will proceed to the California Department of Technology. Several other boards and bureaus are close to completing their Stage II documents and have indicated interest in a similar software platform.

C. Personnel

Staff Civil Engineering Registrar Natalie King started working for the Board this month. Ms. Irish suggested meeting Board staff at a future Board meeting.

D. ABET

Mr. Stockton visited a school he had visited approximately six years ago. He added that upon reviewing transcripts, there was an anomaly between transfer students from junior colleges and how their courses were being reviewed and accepted.

Dr. Asgari also visited another university where they emphasized preparing their students for real world problems.

Mr. Ruffino reported on his visit and noted that he enjoyed his experience and felt very good about it. He went on to encourage others to attend.

E. Association of State Boards of Geology (ASBOG)

Ms. Mathieson attended the ASBOG examination development session in Monterey.

II. Public Comment for Items Not on the Agenda (Cont.)

Humberto Gallegos representing East Los Angeles College reported that they received a generous grant from the National Science Foundation (NSF) for their land surveying program and requested the Board's assistance in achieving their goals. Their objectives include to offer a career pathway to land surveying, host land surveying computer aid design events at the high school level, enhance the geospatial program at East LA College by developing manuals for software

technology, and help candidates prepare and pass the Fundamentals of Surveying and Professional Land Surveying examinations.

Mr. Moore reported that he and Mr. Sweeney are prepared to discuss the matter with Mr. Gallegos to see what the Board can do to help.

VIII. Executive Officer's Report (Cont.)

F. National Council of Examiners for Engineering and Surveying (NCEES)

Mr. Moore received notification from NCEES requesting whom the Board will designate as funded delegates for the NCEES Western Zone meeting, May 16-18 in Boise, ID. He sent an email to all Board Members in an effort to see who is interested. There are three funded delegate positions for Board Members and Staff. He advised those who are interested to please let him know within the next couple of weeks. He indicated that he has heard from Ms. Eissler, Mr. Alireza, and Ms. Irish. President Qureshi has requested to go as he is seeking to run for office for the Western Zone. Ms. Irish and Mr. Wilson indicated that they would step back in an effort to allow a new member the opportunity to attend as they have attended NCEES functions in the past.

Mr. Moore reported that NCEES provided member boards with a statement pertaining to a pipeline disaster that occurred in Massachusetts and a subsequent oversight report recommending that Massachusetts remove the industrial exemption for licensing individuals employed by large public utilities. He expects this to be a topic of discussion at the NCEES meetings. He will forward any more information he receives.

1. Nomination for Western Zone Secretary/Treasurer (Possible Action)

MOTION:	Mr. Stockton and Ms. Lang moved to nominate Mr. Moore as NCEES Western Zone Secretary/Treasurer.
VOTE:	12-0, Motion Carried

Member Name	Yes	No	Abstain	Absent	Recusal
Mohammad Qureshi	X				
Fel Amistad	X				
Natalie Alavi				X	
Alireza Asgari	X				
Duane Friel				X	
Andrew Hamilton				X	
Kathy Jones Irish	X				
Eric Johnson	X				
Coby King	X				
Asha Lang	X				
Betsy Mathieson	X				
Frank Ruffino	X				

Member Name	Yes	No	Abstain	Absent	Recusal
William Silva	X				
Robert Stockton	X				
Steve Wilson	X				

Vice-President Amistad will sign the letter on behalf of the Board.

H. Review of Procedures for Voting at Board and Committee Meetings

Mr. Moore advised that, at the last meeting, Mr. King inquired if it was permissible for the Board to forgo voting by roll call in situations where the members unanimously voted the same. Mr. Moore believes the voting requirements for open meetings are primarily intended to assist the public with clearly ascertaining how each member voted and explained that voting by roll call is the clearest way to indicate who voted and how. While it may appear clear to those present, it may be problematic to those individuals that regularly request audio recordings of the Board meetings. Mr. Moore indicated that by continuing with the current process, it not only ensures consistency but also that each member has indicated actual participation in the subject. Mr. Pejuhesh explained that the legal requirement is that you have to report publicly how each member voted. Mr. Santiago indicated that there are indeed multiple methods of voting; however, the clearest method is to vote by roll call.

Mr. Stockton and Mr. Wilson both indicated that they believed it would be best to continue with the Board's current method of voting by roll call.

Mr. King clarified his request by explaining that his concern was on a series of routine votes where it was clearly unanimous. He indicated that he wondered if the Board President would start by asking for abstentions or objections; if there were abstentions or objections, then a roll call would be required; however, if there were none, all those in favor would say, "aye".

Mr. Santiago clarified that there is a difference between approving an action by consensus versus through and motion and vote. He emphasized that approving an action by consensus is not a motion, and the Legal Office recommends that all actions taken by the board be done through a motion, which requires a vote.

After much discussion, it was determined that the Board would continue to follow its current process of taking action by making motions and voting by roll call with the Board Liaison or another staff member calling each Board Member by name and recording the vote.

IX. Technical Advisory Committees (TACs)

A. Assignment of Items to TACs (Possible Action)

No report given.

B. Appointment of TAC Members (Possible Action)
No report given.

C. Reports from the TACs (Possible Action)
No report given.

X. President's Report/Board Member Activities

President Qureshi reported on the meeting with Agency and DCA regarding the Board's Sunset review.

Mr. Ruffino reported he attended the inauguration activities for the Governor-elect. He also reported that there will be a reception for Governor appointees next week.

XI. Approval of Meeting Minutes (Possible Action)

A. Approval of the Minutes of the November 1, 2018, Board Meeting
There was a need for clarification on Items III. A and IV. B. Therefore, the November minutes will need to be brought back for approval at the February meeting.

XII. 2019 Board Meeting Schedule (Possible Action)

The June 6-7 meeting was moved to June 13-14.

XIII. Discussion Regarding Proposed Agenda Items for Next Board Meeting

No report given.

XIV. Discussion Regarding Recitation of the Pledge of Allegiance at Board Meetings (Possible Action)

Mr. Ruffino indicated that he feels strongly about reciting the Pledge of Allegiance at each Board meeting. Mr. Wilson and Mr. Stockton would support it if a flag were present. Mr. Ruffino suggested requesting a flag. Ms. Irish inquired whether the Board is required to recite the Pledge of Allegiance and if the Oath of Office serves as a testament of allegiance to the State and US Constitutions. Mr. Santiago explained that there is no requirement and the Oath of Office includes the laws of the constitution and the laws of the Board. In that respect, it is separate from the issue of reciting the Pledge. He only knows of a couple of boards that recite the Pledge and when circumstances dictate there is no flag you can logistically say the Pledge of Allegiance. It would need to be noticed on the Official Notice and Agenda.

Ms. Irish expressed that in respect to each member's vote, she would like to ensure that it does not create any divisiveness among Board members.

MOTION:	Mr. Ruffino and Vice-President Amistad move to begin all Board meetings with recital of Pledge of Allegiance.
VOTE:	8-0-4, Motion Carried

Member Name	Yes	No	Abstain	Absent	Recusal
Mohammad Qureshi	X				
Fel Amistad	X				
Natalie Alavi				X	
Alireza Asgari	X				
Duane Friel				X	
Andrew Hamilton				X	
Kathy Jones Irish			X		
Eric Johnson	X				
Coby King	X				
Asha Lang			X		
Betsy Mathieson			X		
Frank Ruffino	X				
William Silva	X				
Robert Stockton			X		
Steve Wilson	X				

II. Public Comment for Items Not on the Agenda (Cont.)

Mariam Madjlessi, PE, representing CALBO (California Building Officials), presented the Board with a letter from Jeff Janes, President of CALBO, in which they offered their services and an opportunity to collaborate with the Board.

XV. Closed Session – The Board will meet in Closed Session to discuss, as needed:

A. Personnel Matters [Pursuant to Government Code sections 11126(a) and (b)]
B. Examination Procedures and Results [Pursuant to Government Code section 11126(c)(1)]
C. Administrative Adjudication [Pursuant to Government Code section 11126(c)(3)]
D. Pending Litigation [Pursuant to Government Code section 11126(e)]
    1. Mauricio Jose Lopez v. Board for Professional Engineers, Land Surveyors, and Geologists, Department of Consumer Affairs, San Bernardino County Superior Court Case No. CIVDS1718786

II. Public Comment for Items Not on the Agenda (cont.)

Senator Roth stopped by the Board meeting and offered his support.

XVI. Open Session to Announce the Results of Closed Session

During Closed Session, the Board took action on two stipulations, one Default Decision, and two Proposed Decisions, and discussed litigation as noticed.

XVII. Adjourn

The Board adjourned at 2:11 p.m.

PUBLIC PRESENT

Rob McMillan, CLSA
Eric Nelson
Bob DeWitt, ACEC-CA

DRAFT

MINUTES OF THE BOARD FOR PROFESSIONAL ENGINEERS, LAND SURVEYORS, AND GEOLOGISTS

Department of Consumer Affairs
HQ 2 North Market Hearing Room
1747 North Market Boulevard, #186
Sacramento, CA 95834

Thursday, February 21, 2019, beginning at 9:00 a.m.

February 21, 2019

Board Members Present:	Mohammad Qureshi, President; Fel Amistad, Vice President; Alireza Asgari; Duane Friel; Andrew Hamilton; Kathy Jones Irish; Eric Johnson; Coby King; Asha Lang; Betsy Mathieson; Frank Ruffino; Jerry Silva; Robert Stockton; and Steve Wilson
Board Members Absent:	Natalie Alavi
Board Staff Present:	Ric Moore (Executive Officer); Nancy Eissler (Assistant Executive Officer; Tiffany Criswell (Enforcement Manager); Jeff Alameida (Administration Manager); Larry Kereszt (Examinations Manager); Laurie Racca (Senior Registrar); Natalie King (Senior Registrar); Celina Calderone (Board Liaison); Dallas Sweeney (Senior Registrar); Reza Pejuhesh (Legal Counsel); and Michael Santiago (Legal Counsel)

I. Roll Call to Establish a Quorum

President Qureshi called the meeting to order at 9:00 a.m., and a quorum was established.

II. Pledge of Allegiance

Mr. Ruffino led everyone in the recitation of the Pledge of Allegiance.

III. Public Comment for Items Not on the Agenda

President Qureshi welcomed new Board member Duane Friel.

Rob McMillian, representing the California Land Surveyors Association, wished the Board a happy Engineer's Week.

IV. DCA Executive Update

Dean Grafilo, Director of the Department of Consumer Affairs, recapped Department events that took place in 2018. These events promoted an open dialogue among the boards and bureaus and promoted collaboration to further the Department's mission in protecting California's consumers. He encouraged everyone to review the Department's 2018 Annual Report. He has met with the

Governor's transition team and added that the Department is looking forward to furthering the Governor's mission. He asked that we continue the service the Board has provided and added that they are currently working with the Governor's appointments office regarding vacancies and reappointments.

Director Grafilo advised that, on January 10, 2019, the Governor released his budget and fiscal priorities for FY 2019/2020. The Governor's budget proposes to pay down debt and its obligations to build up reserves while making significant investments.

On February 25, Mr. Grafilo will host the first 2019 Director's Quarterly meeting. At this meeting, DCA will provide an update on the Department's Regulations unit, the Executive Officer salary study, and several Division updates.

He reminded everyone that they need to complete the Mandatory Sexual Harassment Prevention training this year.

He reported that the Board is one of ten programs going through Sunset Review and offered the Department's support and assistance during the process.

V. Consideration of Rulemaking Proposals

A. Approval and/or Adoption of Proposed Amendments to Title 16, California Code of Regulations § 3022, 3022.1, 3022.2, 3031 (Professional Geologist License Qualification Requirements and Professional Geophysicist License Qualification Requirements.)

Ms. Jones Irish left the meeting at 9:18 a.m. and returned at 9:35 a.m.

MOTION:	Ms. Mathieson and Mr. Silva moved to adopt Title 16, California Code of Regulations sections 3022, 3022.1, and 3022.2, and to repeal and amend Title 16, California Code of Regulations section 3031 and direct staff to finalize the rulemaking file for submission to the Department of Consumer Affairs and the Office of Administrative Law.
VOTE:	13-0-1, Motion Carried

Member Name	Yes	No	Abstain	Absent	Recusal
Mohammad Qureshi	X				
Fel Amistad	X				
Natalie Alavi				X	
Alireza Asgari	X				
Duane Friel	X				
Andrew Hamilton	X				
Kathy Jones Irish			X		
Eric Johnson	X				
Coby King	X				

Asha Lang	X				
Betsy Mathieson	X				
Frank Ruffino	X				
William Silva	X				
Robert Stockton	X				
Steve Wilson	X				

MOTION:	Ms. Mathieson and Ms. Jones Irish moved to delegate authority to the Executive Officer to finalize the rulemaking file.
VOTE:	14-0, Motion Carried

Member Name	Yes	No	Abstain	Absent	Recusal
Mohammad Qureshi	X				
Fel Amistad	X				
Natalie Alavi				X	
Alireza Asgari	X				
Duane Friel	X				
Andrew Hamilton	X				
Kathy Jones Irish	X				
Eric Johnson	X				
Coby King	X				
Asha Lang	X				
Betsy Mathieson	X				
Frank Ruffino	X				
William Silva	X				
Robert Stockton	X				
Steve Wilson	X				

MOTION:	Ms. Mathieson and Ms. Lang moved to approve staff's responses to the comments received regarding the rulemaking proposal.
VOTE:	14-0, Motion Carried

Member Name	Yes	No	Abstain	Absent	Recusal
Mohammad Qureshi	X				
Fel Amistad	X				
Natalie Alavi				X	
Alireza Asgari	X				
Duane Friel	X				
Andrew Hamilton	X				
Kathy Jones Irish	X				
Eric Johnson	X				
Coby King	X				
Asha Lang	X				

Betsy Mathieson	X				
Frank Ruffino	X				
William Silva	X				
Robert Stockton	X				
Steve Wilson	X				

B. Proposed Amendments to Title 16, California Code of Regulations sections 416 and 3060 (Substantial Relationship Criteria) and sections 418 and 3061 (Criteria for Rehabilitation) to Conform to Statutory Changes Made by AB 2138 (Chapter 995, Statutes of 2018)

MOTION:	Mr. Ruffino and Dr. Amistad moved to approve the proposed amendments, to Title 16, California Code of Regulations sections 416, 418, 3060, and 3061 to conform the regulations to the statutory changes enacted by AB 2138 (Ch. 995, Stats. 2018) and direct staff to begin the rulemaking process so that the amendments will become effective on July 1, 2020, when the changes to the statutes become operative with the understanding that staff will make the changes discussed as well as any other grammatical or typographical changes. It will then go to the Department and Agency for the pre-notice review, and, if there are any substantive changes to the language, it will then be returned to the Board.
VOTE:	14-0, Motion Carried

Member Name	Yes	No	Abstain	Absent	Recusal
Mohammad Qureshi	X				
Fel Amistad	X				
Natalie Alavi				X	
Alireza Asgari	X				
Duane Friel	X				
Andrew Hamilton	X				
Kathy Jones Irish	X				
Eric Johnson	X				
Coby King	X				
Asha Lang	X				
Betsy Mathieson	X				
Frank Ruffino	X				
William Silva	X				
Robert Stockton	X				
Steve Wilson	X				

VI. Administration

A. Fiscal Year 2017/18 Budget Status

Mr. Alameida reviewed the Budget Status report and noted that, as reported in previous meeting materials, the Board received a letter from the Budget office in regards to the Fi$Cal year-end financial reports stating that a fiscal year wrap-up report is expected to be completed by DCA and provided to the Board by the end of March 2019.

B. Fiscal Year 2018/19 Budget Report

Mr. Alameida reported that he provided a new format for the financial statement, similar to one included in the meeting materials previously, after recent discussions with DCA's Budget Office on how to display information based on Fi$Cal's new reporting functions.

Karen Nelson, Assistant Deputy Director of Board and Bureau Services, acknowledged the work that the Board staff has done in creating the analysis and indicated that the DCA Budget Office was available to help present the fund condition as well as any statements to compliment Mr. Alameida's presentation. Mr. Alameida confirmed that the reports were developed in collaboration with the Board's DCA-assigned Budget Analyst.

Mr. Ruffino left the meeting at 10:50 a.m.

IX. Exams/Licensing

A. Examination Results for All 2018 Examinations

Mr. Kereszt presented the Board with a statistical report regarding the examinations administered during the second half of 2018.

B. Status of Occupational Analyses for all California State Examinations

After Mr. Kereszt provided a recap of recent test plans approved by the Board and introduced the two proposed plans for consideration, Ms. Mathieson offered to explain how an Occupation Analyses is developed and what it is used for. She explained that for the exams to remain relevant, periodically there is a survey of members of the profession to ask what they currently do in their occupation and how important these tasks are. The survey results are then compiled and used to develop new examination questions and the proportion of questions of different types so that the exams reflect what working engineers, land surveyors, and geologists actually do in their jobs.

C. Adoption of Test Plan Specifications

Julie Morby, representing Prometric, generally explained the development process towards preparing the proposed test plans for the Board.

1. Professional Geophysicist Examination (PGp)

2. California State Examination (CSE) – State Requirement for Professional Geologist License

MOTION:	Ms. Mathieson and Mr. Wilson moved to adopt both the proposed Test Plan to support the Professional Geophysicist Examination and the proposed Test Plan to support the California Specific Examination for the Professional Geologist Examination.
VOTE:	14-0, Motion Carried

Member Name	Yes	No	Abstain	Absent	Recusal
Mohammad Qureshi	X				
Fel Amistad	X				
Natalie Alavi				X	
Alireza Asgari	X				
Duane Friel	X				
Andrew Hamilton	X				
Kathy Jones Irish	X				
Eric Johnson	X				
Coby King	X				
Asha Lang	X				
Betsy Mathieson	X				
Frank Ruffino	X				
William Silva	X				
Robert Stockton	X				
Steve Wilson	X				

D. Presentation by Prometric, LLC

2. Surpass - Item Development and Maintenance Software for California Examination Items

Kathy Champagne, representing Prometric, provided a detailed presentation that explained that the Surpass item banking system is a solution for item authoring, test creation, test delivery, marking, and post exam services. One of the biggest advantages is examination and content security. All item authoring and test creation is done within a secure environment with controlled permissions.

The Board began using Surpass over the last two and a half years with positive results. Prometric is now providing assistance with training the examination staff on the item authoring process within Surpass.

She outlined the key features and benefits of the Surpass system. Prometric constantly works on product improvement and is always guided by client feedback.

1. Alternate Item Types for California State Examinations

Ms. Champagne explained that Surpass includes the ability for the Board to utilize alternate item development formats beyond just the traditional multiple choice – single response format, which can include item types starting with basic multiple choice – multiple response, hot spots, drag and drop, and tables. She demonstrated the various methods.

VII. Legislation

A. 2019 Legislative Calendar

Ms. Eissler reported that there are a few spot bills that have been introduced, but there are not yet any substantive bills that the Board needs to consider. She expects to have bills for the Board to consider at the next meeting.

VIII. Enforcement

A. Enforcement Statistical Reports

1. Fiscal Year 2018/19 Update

Ms. Criswell reviewed the Enforcement statistics.

She reported on the Expert Consultant training that was held the previous day. The Enforcement staff assembled a presentation for experts that covered various topics, such as report formatting, contract procedures, applying laws, and standard of care. The training was developed and conducted with support from Michael Franklin, Deputy Attorney General, who is very familiar with the Board's investigations. The intention is to host an annual presentation for newly contracted experts.

Mr. Ruffino returned at 1:33 p.m.

Mr. Stockton suggested development of a matrix to be used by the Enforcement staff to evaluate the Expert Consultant.

X. Executive Officer's Report

A. Rulemaking Status Report

Ms. Eissler reported that there are a few more rulemaking proposals the Board has already approved, but staff was waiting to begin the pre-notice review process for these proposals until the geology education regulations had gone through the process so that we would have a better understanding of how the new process works. She advised that staff will now begin submitting the other proposals for pre-review. A status report will be provided at the next Board meeting.

B. Update on Board's Business Modernization/PAL Process

Mr. Moore provided some history of the BreEZe project for the recently appointed Board Members and indicated that the Board did not participate in the implementation of BreEZe. The Board on its own decided to study its own business processes and requirements in preparation for the development of a new system. The Department of Technology (CDT) implemented the Project

Approval Lifecycle (PAL) process, which is intended by CDT to ensure that any new system being implemented is successful.

The Board has delivered a report to satisfy the second stage of the PAL process, which was approved by DCA and Agency and is now with the Department of Technology. The Department of Technology has indicated agreement with the Board's plan and has requested some minor clarifications. DCA's Office of Information Services (OIS) has collaborated with the Board during this effort and is assisting in the response to CDT.

Mr. Moore noted that the Spring Finance Letter received preliminary approval from DCA and Agency and is currently at Department of Finance for consideration for the May Budget revise.

C. Personnel
Mr. Moore introduced Natalie King as the new Staff Senior Registrar, Civil Engineer, who joined the Board on November 30, 2018.

D. ABET
No report given.

E. Association of State Boards of Geology (ASBOG)
Mr. Moore provided an update pertaining to the Texas Board of Geosciences facing elimination through the Sunset process. After the hearing was conducted, the determination was made not to deregulate.

Through this process, it was discovered that the Sunset Committee in Texas was also considering deregulating the Texas Land Surveyors Board and transferring all of that Board's responsibilities to the Texas Board of Professional Engineers.

Mr. Moore reported that there is also a deregulation effort in Florida. The Governor's Office tasked all licensing boards to come forward with recommendations on how to lessen regulations.

1. Nomination for ASBOG Secretary
Mr. Moore reminded the Board that he forwarded an email from ASBOG requesting participants for the nomination committee for selection of the ASBOG secretary. The criteria required the candidate be a licensed Geologist sitting actively on a current board. While Ms. Mathieson is eligible, she indicated that she is not interested in running nor being on the nominations committee.

F. National Council of Examiners for Engineering and Surveying (NCEES)
Mr. Moore reported there is a discussion related to how structural exams and licensing are referred to in the NCEES's Model laws and rules relative to licensure and comity. In some aspects, it is written as a mastery license, but in others, it appears to be grouped similar to a PE license. There is some confusion as there are different licensure philosophies amongst the member boards. This issue may be discussed at the upcoming Zone and Annual meetings. President Qureshi added that the State of New Jersey started the discussion as they do not recognize the Structural exam as a principles of engineering exam. The Board has responded to an inquiry from NCEES indicating that a structural license in California is considered an additional title authority by the Board's laws and would require the individual to first be licensed as a civil engineer.

Mr. Moore reported that Wyoming and Nevada had previously entered into a Memo of Understanding (MOU) agreement that essentially stated if you were licensed in one of those states, you can automatically become licensed in the other state. The Member Board Administrators (MBA) Committee at NCEES is currently discussing what they can do to possibly expand this on a nationwide basis. Mr. Moore noted that while the discussion is in its infancy, the MBA committee is looking to expand this thought process and develop a nationwide MOU to have all member boards' sign.

Additionally, Mr. Moore provided information on the situation that occurred in Massachusetts regarding a pipeline explosion and for which the NTSB investigated and sought input from NCEES along with other national organizations. Massachusetts is one of the states similar to California in that engineering work for certain types of organizations, such as utility companies, is exempt from licensure. This is commonly referred to as an industrial exemption. NTSB has recommended to the commonwealth of Massachusetts that they should remove the industrial exemption because they believe that proper design and oversight by licensed engineers could have avoided this explosion.

President Qureshi reported that a Western Zone Secretary/Treasurer nomination letter was prepared for Ric Moore, that Vice-President Amistad distributed to the member boards in accordance with the Board's motion and direction at the prior meeting. There is now a second candidate for this position from the State of Washington. President Qureshi indicated that the Board should discuss this at the next Board meeting and provide direction to its delegates on how they should vote at the upcoming Combined Southern and Western Zones Interim meeting.

The funded delegates for the upcoming Combined Southern and Western Zones Interim meeting in Boise are President Qureshi, Ms. Jones Irish, and Mr. Wilson.

President Qureshi reported that NCEES is part of the International Registry of Professional Engineers, which allows for licensed engineers to be considered a professional engineer in other foreign countries upon being qualified by the International Registry.

H. Sunset Review
Mr. Moore reported that the Board's Sunset hearing is scheduled for Tuesday, March 5, 2019, at 9:00 a.m. At the Assembly Business and Professions Committee staff's request, he and Ms. Eissler met with the Assembly Committee staff person and the Senate Business, Professions and Economic Development Committee staff person to discuss issues raised by the Board in its Sunset Review Report. President Qureshi will attend the hearing to provide an overview of the functions of the Board. Mr. Hamilton will attend and work with Mr. Moore and Ms. Eissler with drafting language and responses. President Qureshi and Mr. Hamilton will also review the Board's response to the Committees' Background Paper that will have to be submitted prior to the next Board meeting.

G. Update on Outreach Efforts
Mr. Moore reviewed the outreach report. He added that recently the Board worked with ASBOG to participate in a webinar hosted by the American Geosciences Institute (AGI). Ms. Racca worked with ASBOG on the webinar that had 1,076 registered attendees.

XI. Technical Advisory Committees (TACs)

A. Assignment of Items to TACs
No report given.

B. Appointment of TAC Members
No report given.

C. Reports from the TACs
No report given.

XII. President's Report/Board Member Activities

President Qureshi reported that he participated in the NCEES Committee for Examinations for Professional Engineers. Mr. Wilson reported that on January 26, he represented NCEES at the Future Cities competition in Antelope, California, and that he participated in the NCEES Committee on Examinations for Professional Surveyors . Mr. Stockton reported that the NCEES Finance Committee had a conference call to discuss some of the charges for the upcoming Annual Meeting. The next Finance Committee meeting will take place on March 7.

XIII. Approval of Meeting Minutes

A. Approval of the Minutes of the November 1, 2018, and December 13, 2018, Board Meetings

MOTION:	Mr. Wilson and Dr. Amistad moved to approve the November 2018 meeting minutes.
VOTE:	9-0-5, Motion Carried

Member Name	Yes	No	Abstain	Absent	Recusal
Mohammad Qureshi	X				
Fel Amistad	X				
Natalie Alavi				X	
Alireza Asgari	X				
Duane Friel	X				
Andrew Hamilton	X				
Kathy Jones Irish			X		
Eric Johnson			X		
Coby King	X				
Asha Lang			X		
Betsy Mathieson	X				
Frank Ruffino			X		
William Silva	X				
Robert Stockton			X		
Steve Wilson	X				

Ms. Mathieson requested that the wording in Item VI. Enforcement and Item VIII. H of the Executive Officer's Report of the December 13, 2018, minutes be clarified. President Qureshi requested that the statement in Item VIII. H. regarding the determination of the Board relating to voting procedures be confirmed. Staff will review the recording of the meeting and re-present the December 13, 2018, minutes for consideration at the next meeting.

XIV. Discussion Regarding Proposed Agenda Items for Next Board Meeting

Mr. Moore reminded the Board that several years ago, SEAOC was seeking to make changes in the Professional Engineers Act involving substantial structures. There is a national organization that has adopted a standard and Mr. Asghari has indicated an interest in a short presentation at a future Board meeting.

Mr. Johnson suggested discussing Continuing Education Units (CEU's) now that there is a new Governor. Mr. Moore indicated that the Board could consider it as a topic of discussion as questions regarding the Board requiring it often come up during outreach presentations and he explains that it is not an active topic that is being discussed by the Board. President Qureshi clarified Mr. Johnson's request by explaining that he is looking to see what is the Governor's position is on the issue. Mr. Stockton suggested gathering statistics of other boards within DCA and report back.

Ms. Jones Irish inquired as to how the Board publicizes outreach or training events that Board representatives participate in. Mr. Moore explained that the majority of

the events where Board representatives are requested to speak are coordinated and sponsored by the requesting organizations and not by the Board. Mr. Silva suggested that the Board could market these outreach events on its website. Mr. Moore expressed concern that the doing so could give the appearance that the Board is promoting the professional associations, and their events, or even favoring some associations over others, since they are not Board-sponsored events. Ms. Jones Irish indicated she was interested in discussing how the Board can promote more training and outreach. It was agreed that Ms. Jones Irish and Mr. Moore would discuss this matter further so that it can be included on a future agenda for discussion by the Board.

Bob DeWitt, representing ACEC, reported that the Monterey Bay ACEC Chapter, along with CLSA, met with some members of the Board. He appreciates the interactions with the Board. Mr. McMillian, representing CLSA, agreed.

Meredith Beswick, representing the Association of Environmental Engineering Geologists (AEG), indicated that AEG, along with the Earthquake Research Institute (ERI) and the American Society of Civil Engineers (ASCE) Geo institute, is planning a GEO symposium in late March.

XV. Closed Session – The Board will meet in Closed Session to discuss, as needed:

A. Personnel Matters [Pursuant to Government Code sections 11126(a) and (b)]
B. Examination Procedures and Results [Pursuant to Government Code section 11126(c)(1)]
C. Administrative Adjudication [Pursuant to Government Code section 11126(c)(3)]
D. Pending Litigation [Pursuant to Government Code section 11126(e)]
   1. Mauricio Jose Lopez v. Board for Professional Engineers, Land Surveyors, and Geologists, Department of Consumer Affairs, San Bernardino County Superior Court Case No. CIVDS1718786

XVI. Open Session to Announce the Results of Closed Session

During Closed Session, the Board took action on three stipulations and two default decisions and discussed litigation as noticed.

XVII. Adjourn

The Board meeting adjourned at 3:56 p.m.

PUBLIC PRESENT

Rob McMillan, CLSA
Bob DeWitt, ACEC - CA
Dean Grafilo, DCA

XIV. Discussion Regarding Proposed Agenda Items for Next Board Meeting

XV. Closed Session – The Board will meet in Closed Session to discuss, as needed:

A. Personnel Matters [Pursuant to Government Code sections 11126(a) and (b)]
   1. Executive Officer Performance Evaluation

B. Examination Procedures and Results [Pursuant to Government Code section 11126(c)(1)]

C. Administrative Adjudication [Pursuant to Government Code section 11126(c)(3)]

D. Pending Litigation [Pursuant to Government Code section 11126(e)]
   1. Mauricio Jose Lopez v. Board for Professional Engineers, Land Surveyors, and Geologists, Department of Consumer Affairs, San Bernardino County Superior Court Case No. CIVDS1718786

XVI. Open Session to Announce the Results of Closed Session

XVII. Adjourn