REFERENCES:

I.1.	-	*Code of Ethics:*	*Hold paramount the safety, health and welfare of the public.*
II.1.	-	*Code of Ethics:*	*Engineers shall hold paramount the safety, health and welfare of the public.*
II.1.a.	-	*Code of Ethics:*	*If engineers' judgment is overruled under circumstances that endanger life or property, they shall notify their employer or client and such other authority as may be appropriate.*
II.1.b.	-	*Code of Ethics:*	*Engineers shall approve only those engineering documents which are in conformity with applicable standards.*
II.1.c.	-	*Code of Ethics:*	*Engineers shall not reveal facts, data or information without the prior consent of the client or employer except as authorized or required by law or this Code.*
III.4.	-	*Code of Ethics:*	*Engineers shall not disclose, without consent, confidential information concerning the business affairs or technical processes of any present or former client or employer, or public body on which they serve.*

SIGNING A CONFIDENTIALITY AGREEMENT – DUTY TO DISCLOSE DANGER TO THE PUBLIC HEALTH

FACTS:

Engineer A, a principal in ABC Engineering, an environmental engineering firm, submits qualifications and a proposal to a local municipality to be considered as the consultant for the research and analysis of a former dump site which is being considered for reclamation as a wetland. The dump has been closed for many years after being used for several decades for commercial waste disposal, possibly without any regulation or control. In a meeting with Engineer A, the municipality indicates the possibility that there could be hazardous and toxic wastes encountered in the dump. Upon being awarded the contract, Engineer A is informed by the city that, as part of the contract, a confidentiality clause must be signed which precludes Engineer A from disclosing any results or information concerning the project without the city's written permission. Engineer A signs the contract and the clause.

Preliminary research by Engineer A confirms that the dump site is not closed according to the hazardous and solid waste regulations of the state. Tests of the surface soils on the site are inconclusive but reveal a possibility that very high contaminant levels of hazardous and toxic waste could, over time, become exposed at the surface, due to erosion of the cover, and even washed into a river that flows immediately adjacent to the site. The city is considering plans to build a children's park, recreation and picnic area, bike/jogging trail, and parkway near the reclaimed areas, and the river is used for drinking water intake for cities on the other side of the river and downstream. Upon receiving the initial data, the city terminates the contract, saying that the development will be moved to another site, citing the political ramifications of revealing the findings and the economics of having to clean up the property as its reasons for not continuing. Engineer A responds that the city has a responsibility to the public to proceed to remediation, even if the development is moved elsewhere, but the city refuses and reminds Engineer A of its confidentiality clause and the legal consequences of going public with the confidential information.

QUESTIONS:

Question 1: Is Engineer A bound by the NSPE Code of Ethics to inform the appropriate regulatory agencies of Engineer A's findings and the potential dangers to the public health and the environment?

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Question 2: Did Engineer A behave ethically in signing the confidentiality clause restricting him from revealing information concerning dangers to the public health and the environment, after being informed by the city that there was a possibility that the site could contain hazardous and toxic wastes?

DISCUSSION:

The responsibility of engineers for the protection of the public health and safety is generally considered the most fundamental ethical principal related to the practice of engineering. The entire rationale and justification for engineering licensure stems from the notion that engineers are involved in a technical and specialized activity having a serious impact on the well-being of all members of the public, and therefore there is a need to have this activity regulated under the laws of each state. Increasingly, engineers are involved in new and complex activities requiring highly specialized knowledge and skill which often only engineers possess. To say the practice of engineering is a based upon a public trust is certainly no exaggeration of the role of engineers in our society.

However, the view that the engineers' highest ethical obligation is to protect the public health and safety is not universally shared within and outside of the engineering profession. Among the reasons cited by dissenters is the fact that engineers are generally employees or are retained by clients and that their most basic ethical obligation is to their employer or their client and not to the public.

The Board has considered several cases involving the protection of the public health and safety and also the duties of engineers in connection with hazardous waste material. For example, BER Case No. 92-6 involved Technician A serving as a field technician employed by a consulting environmental engineering firm. At the direction of his supervisor, Engineer B, Technician A sampled the contents of drums located on the property of a client. Based on Technician A's past experience, it was his opinion that analysis of the sample would most likely determine that the drum contents would be classified as hazardous waste. If the material was hazardous waste, Technician A knew that certain steps would legally have to be taken to transport and properly dispose of the drum, including notifying the proper federal and state authorities. Technician A asked his supervisor, Engineer B, what to do with the samples. Engineer B told Technician A only to document the existence of the samples. Technician A was then told by Engineer B that since the client did other business with the firm, Engineer B would tell the client where the drums were located but do nothing else. Thereafter, Engineer B informed the client of the presence of drums containing "questionable material" and suggested that they be removed. The client contacted another firm and had the material removed.

In considering whether it was ethical for Engineer B merely to inform the client of the presence of the drums and suggest that they be removed, and whether Engineer B had an ethical obligation to take further action, the Board noted that the extent to which an engineer has an obligation to hold paramount the public health and welfare in the performance of professional duties (See NSPE Code Section I.1.) overlaps the duty of engineers not to disclose confidential information concerning the business affairs, etc. of clients (See NSPE Code Section III.4.). With regard to Case No. 92-6, the Board noted, the unlike the facts in the earlier cases, Engineer B made no oral or written promise to maintain the client's confidentiality. Instead, Engineer B consciously and affirmatively took actions that could cause serious environmental danger to workers and to the public, and were a violation of various environmental laws and regulations. Under the facts, it appeared that Engineer B's primary concern was not so much maintaining the client's confidentiality as it was in maintaining good business relations with a client. In addition, it appeared that, as in all cases which involve potential violations of the law, Engineer B's actions may have had the effect of seriously damaging the long-term interests and reputation of the client. In this regard, the Board noted that, under the facts, it appeared that the manner in which Engineer B communicated the presence of the drums on the property must have suggested to the client that there was a high likelihood that the drums contained hazardous materials. The Board noted that this subterfuge is wholly inconsistent with the spirit and intent of the NSPE Code of Ethics, because it makes the engineer an accomplice to what may amount to an unlawful action.

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The Board noted that Engineer B's responsibility under the facts was to bring the matter of the drums possibly containing hazardous material to the attention of the client with a recommendation that the material be analyzed. To do less would be unethical. If analysis demonstrates that the material is indeed hazardous, the client would have the obligation of disposing of the material in accordance with applicable federal, state, and local laws.

In an earlier case, BER Case No. 89-7, an engineer was retained to investigate the structural integrity of a 60-year-old, occupied apartment building, which his client was planning to sell. Under the terms of the agreement with the client, the structural report written by the engineer was to remain confidential. In addition, the client made it clear to the engineer that the building was being sold "as is," and the client was not planning to take any remedial action to repair or renovate any system within the building. The engineer performed several structural tests on the building and determined that the building was structurally sound. However, during the course of providing services, the client confided in the engineer that the building contained deficiencies in the electrical and mechanical systems, which violated applicable codes and standards. While the engineer was not an electrical or mechanical engineer, he did realize that those deficiencies could cause injury to the occupants of the building and so informed the client. In his report, the engineer made a brief mention of his conversation with the client concerning the deficiencies; however, in view of the terms of the agreement, the engineer did not report the safety violations to any third parties. In determining that it was unethical for the engineer not to report the safety violations to appropriate public authorities, the Board, citing cases decided earlier, noted that the engineer "did not force the issue, but instead went along without dissent or comment. If the engineer's ethical concerns were real, the engineer should have insisted that the client take appropriate action or refuse to continue work on the project." The Board concluded that the engineer had an obligation to go further, particularly because the NSPE Code uses the term "paramount" to describe the engineer's obligation to protect the public safety, health, and welfare.

In BER Case No. 90-5, the Board reaffirmed the basic principle articulated in BER Case No. 89-7. There, tenants of an apartment building sued its owner to force him to repair many of the building's defects. The owner's attorney hired an engineer to inspect the building and give expert testimony in support of the owner. The engineer discovered serious structural defects in the building that he believed constituted an immediate threat to the safety of the tenants. The tenants' suit had not mentioned these safety-related defects. Upon reporting the findings to the attorney, the engineer was told he must maintain this information as confidential because it was part of the lawsuit. The engineer complied with the request. In deciding it was unethical for the engineer to conceal his knowledge of the safety-related defects, the Board discounted the attorney's statement that the engineer was legally bound to maintain confidentiality, noting that any such duty was superseded by the immediate and imminent danger to the building's tenants. While the Board recognized that there may be circumstances where the natural tension between the engineer's public welfare responsibility and the duty of nondisclosure may be resolved in a different manner, the Board concluded that this clearly was not the case under the facts.

The case presently before the Board is similar to each of these earlier case to some degree, and most probably closest to the situation faced by Engineer A in Case No. 89-7. Although the facts are somewhat different because Case No. 89-7 involved a building containing obvious fire code violations, which had an immediate impact on the building’s residents, the Board is convinced that the reasoning in Case No. 89-6 is applicable to this case. Despite a written agreement not to disclose confidential information, Engineer A is bound by the NSPE Code of Ethics and has a paramount duty in matters involving the public health and safety to notify the employer or client, and such other authority as may be appropriate, where the engineer’s professional judgment is overruled.

Under the facts, there is ample reason for Engineer A to conclude that a serious public health danger could occur if the project is permitted to proceed as scheduled without a remediation of the hazardous material on the site. Having already notified the client and been told that his services are no longer necessary, and that political considerations are deemed most paramount, Engineer A cannot remain a party to a “conspiracy of silence” against the public health and safety, but instead must identify the appropriate regulatory officials and come forth to explain his professional findings and recommendations.

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With regard to Engineer A's actions in signing a confidentiality agreement, while such agreements are relatively common and are usually consistent with NSPE Code Section III.4., the Board is deeply troubled with the fact that Engineer A agreed to sign the agreement knowing that there was a possibility that his professional services would encounter hazardous and toxic material. While the Board does not believe that a confidentiality agreement per se is inappropriate, a confidentiality agreement that "ties the hands" of an engineer to report dangers to the public health and safety is a clear violation of the NSPE Code of Ethics. This principle is the very basis of the NSPE Code of Ethics and should not be treated lightly. It provides engineers with the ability to exercise their judgment and discretion to disclose actions that endanger the public health and welfare. We believe Engineer A did not carefully think through his signing of the agreement and its possible implications and conclude, as a general matter, that the signing of such an agreement under these circumstances should be deemed a violation of the NSPE Code of Ethics.

CONCLUSIONS:

Question 1: Engineer A is bound by the NSPE Code of Ethics to inform the appropriate regulatory agencies of the engineer's findings and the potential dangers to the public health and the environment.

Question 2: Engineer A was not ethical in signing the confidentiality clause, restricting him from revealing information concerning dangers to the public health and the environment, after being informed by the city that there was a possibility that the site could contain hazardous and toxic wastes.

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Each opinion is intended as guidance to individual practicing engineers, students and the public. In regard to the question of application of the NSPE Code of Ethics to engineering organizations (e.g., corporations, partnerships, sole-proprietorships, government agencies, university engineering departments, etc.), the specific business form or type should not negate nor detract from the conformance of individuals to the NSPE Code. The NSPE Code deals with professional services -- which services must be performed by real persons. Real persons in turn establish and implement policies within business structures.

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