

Significant Legal/Legislative Policies/Activities
Prepared for the Engineers Joint Contract Documents Committee
October 23, 2015
San Diego, CA

The following is a summary of recent legal/legislative activities of interest to the Engineers Joint Contract Documents Committee compiled from information provided from associations and other source material. For background material on each issue, please contact Art Schwartz, NSPE Deputy Executive Director & General Counsel (aschwartz@nspe.org).

STATE LEGISLATIVE/REGULATORY MATTERS

Indiana Society of Professional Engineers, with NSPE's Support, Defeats Misguided Effort to Eliminate Licensure - On August 20, as the result of extensive advocacy efforts by the Indiana Society of Professional Engineers and NSPE, the Indiana Job Creation Commission (JCC) rescinded its troubling recommendation to eliminate licensure of the Professional Engineer. The JCC, which was created in 2014 to examine the licensing of all of the state's professional boards, released its draft report on June 17 recommending elimination of the PE license in Indiana. The Indiana Society of Professional Engineers (ISPE) and National Society of Professional Engineers (NSPE) organized a swift, [coordinated response](#) to urge the JCC and Indiana Governor Mike Pence to reverse the recommendation. ISPE sent a letter to the JCC Chairman Nick Rhoad and Governor Pence's office on June 19 urging them to remove the recommendation.

State Societies Back NSPE Opposition to Federal Rule to Weaken PE Role - Three state societies have joined NSPE in opposition to a proposed rule that would weaken certain requirements for a professional engineer to oversee parts of the licensing process of deepwater ports.

The [Connecticut Society of Professional Engineers](#), the [Florida Engineering Society](#), and the [Virginia Society of Professional Engineers](#) recently submitted public comments to express their disapproval of the proposal. The proposed regulation, issued on April 9 by the Coast Guard of the Department of Homeland Security, includes two provisions that gravely concern the Society because of their tremendous impact on the public health, safety, and welfare: a change to allow unlicensed engineers from within the US, as well as foreign engineers, to perform engineering services that only a licensed PE can perform and a change to allow these unlicensed engineers to submit design and construction plans on behalf of the licensee.

In its response to the Coast Guard, NSPE submitted a public comment on April 21 urging that the final rule reflect the important role of the professional engineer "by maintaining the requirements for a professional engineer and not 'providing an alternative...[through] the use of foreign engineers who may not be registered professional engineers.'"

In its comment, the Connecticut Society emphasized that the public is best served by having qualified licensed professional engineers in responsible charge of the engineering services. Licensure as a professional engineer is the highest credential an engineer can attain, CSPE wrote. The equivalent education, examination, and experience requirements, if met, would result in licensure as a professional engineer. To encourage bringing in foreign engineers who lack these qualifications and are less familiar with local conditions, local building codes and standards, state environmental requirements, and statutes endangers the public health and safety.

FES stated that it has a long history of working with state and federal agencies on rulemaking through its Conservation and Environmental Quality Committee. Since the state is home to 15 designated deep water ports, the committee is concerned that the proposed added flexibility comes at the expense of protecting the public health, safety, and welfare. FES also stressed that the use of unlicensed personnel to perform services designated as professional engineering services goes against state law. Unlicensed individuals will be subject to investigation and possible discipline by the Florida Board of Professional Engineers.

The Virginia Society argues that there is simply no shortage of US-based licensed professional engineers to contract for these projects, and no grounds to attribute a shortage of qualified PEs to delays in completing deepwater ports. VSPE pointed out that infrastructure developed on federal installations are required to be designed and sealed by licensed professional engineers, and no building, utility, or structure can be constructed based on plans presented by unlicensed engineers or architects.

Texas Bill Reduces Liability Risk for PEs - Governor Greg Abbot signed legislation in June that will protect design professionals from a duty to defend government agencies for any liability other than that caused by or resulting from negligent acts. The legislation will become effective on September 1.

The bill (H.B. 2049), introduced in February, prohibits a government agency from entering a contract for design services that contains a provision requiring a licensed engineer or registered architect to indemnify, hold harmless, or defend the government agency against liability for damages. A licensed engineer or architect will be held only proportionally liable for damage caused by an act of negligence, intentional tort, intellectual property, or failure to pay a subcontractor or supplier.

The legislation also requires that a contract for design services must include the standard of care for a contractor's services. The contractor must perform services with the professional skill and care ordinarily provided by engineers or architects practicing in the same or similar locality and under similar circumstances. It also allows for contractual provisions authorizing the government agency to seek reimbursement of reasonable attorney's fees after a final adjudication determining that the contractor was liable due to an act of negligence or intentional tort.

The **Texas Society of Professional Engineers** supported the measure because previously some government agencies and entities were requiring engineers to defend the agency based simply on an allegation of negligence by the professional engineer. In a professional services contract, these types of provisions are typically uninsurable under a professional liability insurance policy, says TSPE. The legislation is also supported by the American Council of Engineering Companies, the Associated General Contractors, and the Texas Society of Architects.

Connecticut Governor Signs 10-Year Statute of Limitations Bill – Connecticut professional engineers are applauding Governor Dannel Malloy's approval of legislation that sets a 10-year statute of limitations on state-initiated claims relating to construction and design projects.

The **Connecticut Society of Professional Engineers** worked with design and construction associations to support the statute of limitations legislation, says CSPE Executive Director Paul Brady. The legislation was introduced in response to the 2012 Connecticut Supreme Court decision in *State of Connecticut v. Lombardo Brothers Mason Contractors Inc., et al.* The court concluded that no statute of limitations applied to claims made by the state.

The legislation (S.B. 1032), signed by Malloy on June 4, prohibits the state from attempting to recover damages related to construction work more than 10 years after the date of substantial completion of the improvement. Additionally, a claim for indemnity or contribution arising out of construction-related work cannot be made by the state 10 years after the date of substantial completion or no later than three years after the date of determination of the claim against the state or political subdivision that is seeking indemnification by judgment or settlement. The new statute of limitations will also be retroactive in nature, covering projects that have been previously completed as well as new projects.

The legislation does not bar an action or claim:

- When there is a written warranty, guarantee, or other agreement, including a tolling agreement, that provides for a longer effective period.
- When there is willful misconduct in the performance or furnishing of construction-related work.
- Under any environmental remediation law or related to a contract entered into by the state in carrying out its responsibilities under any environmental remediation law.
- Under contracts related to enclosure, removal, or encapsulation of asbestos.

CSPE Past President Donald Doeg, P.E., who is also an attorney, testified to the Senate Judiciary Committee, to explain complex legal and contractual issues to state agencies and legislators. He believes the legislation greatly diminishes risks to the construction industry when conducting business with the state. "It will also help make Connecticut a more business friendly state, decrease the costs of projects to everyone involved, and make the construction industry a more fair place to work," he says.

INTERNATIONAL/NATIONAL/FEDERAL LEGISLATIVE/REGULATORY/ASSOCIATION MATTERS

[Rep. Westerman, P.E., Asks EPA Why Licensed PE Was Not in Responsible Charge of Gold King Mine](#) - At a joint hearing of the House Committee on Natural Resources and the House Committee on Oversight and Government Reform held on September 17, EPA Administrator Gina McCarthy testified about the role of the EPA in the August 5 Gold King Mine blowout that resulted in a three-million gallon toxic spill into the Animas and San Juan rivers. Rep. Bruce Westerman, P.E., (R-AR), an NSPE member, [asked](#) McCarthy why a licensed professional engineer was not in responsible charge of the EPA's project at Gold King Mine, as required under Colorado statute. McCarthy declined to answer, but even she was surprised at how few qualified design professionals are employed by EPA in the affected Region 8. NSPE is working very closely on this issue with Westerman and his office, as well as several congressional committees. NSPE has urged EPA and all federal agencies to review their practices and requirements. On September 21, Rep. Bruce Westerman, P.E. (R-AR), an NSPE member, filed an official complaint with the Colorado Department of Regulatory Agencies, Division of Professions and Occupations, regarding the August 5, 2015, Gold King Mine disaster. In a September 17 congressional joint oversight committee hearing, Westerman asked Environmental Protection Agency Administrator Gina McCarthy why a licensed PE was not in responsible charge of the Gold King Mine project.

NSPE Urges EPA to Require Licensed Professional Engineers to Perform Audits At Municipal Solid Waste Landfills - On September 14, NSPE submitted a [public comment](#) to the Environmental Protection Agency (EPA) commending the agency for proposing additional safety measures requiring a professional engineer to prepare site-specific gas collection and control system (GCCS) plans as part of the proposed rule *Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills*. As part of the proposed rule, EPA requested comments regarding the appropriate professional and educational requirements for auditors. NSPE asserted that the auditing process is best performed by licensed professional engineers. EPA further inquired as to whether self-audits should be allowed in lieu of independent audits. NSPE strongly encouraged EPA to maintain the current system of independent third-party audits. However, should the EPA allow a self-auditing process, NSPE stated that the report must be prepared by a licensed professional engineer.

COURT DECISIONS

NSPE Takes Action in Virginia Supreme Court Liability Case - NSPE filed a “friend of the court” brief in July before the Virginia Supreme Court in support of an appeal of a lower court decision that would require a professional engineer to independently test and verify the accuracy of a product manufacturer’s representation to satisfy the professional standard of care. The Society believes that the ruling will place licensed engineers at serious legal risk if not reversed.

The case of *William H. Gordon Associates Inc. v. Heritage Fellowship, United Church of Christ, a/k/a Heritage Fellowship Church, et al.*, involves the installation and collapse of a rain tank stormwater management system in 2011. The brief argues that the trial court improperly shifted the risk of liability for product defects from those who manufacture and sell products to those who deploy them in engineering designs.

Professional engineers face a high but legitimate burden to ensure that the products they specify in their plans are appropriate for use, but the lower court ruling would, in effect, require engineers to independently test and verify all materials rather than rely on the specifications warranted by the manufacturer. The Society believes this is an unrealistic and inappropriate shifting of the burden and liability from the manufacturer to the engineer who reasonably relied on the manufacturer’s representations.

The brief also states that the Supreme Court doesn’t need to determine whether the appellant violated the standard of care to reverse the trial court’s judgment and that a design professional exercises due care when he or she reasonably relies on representations of product manufacturers. In addition, the circuit court failed to tie the statute of limitations accrual date to the date the plans were presented by Gordon and accepted by Heritage.

Requiring engineers to investigate the accuracy of a product manufacturer’s specifications will deter engineers from using newer innovative products and designs, according to the brief. This risk allocation also threatens to increase the cost of professional engineering services.

Also joining the brief were the national and local affiliates of the American Council of Engineering Companies and the American Society of Civil Engineers, the Engineers and Surveyors Institute, and the Virginia Association of Surveyors.
