

## **Significant Legal and Legislative Activities**

Prepared for the Engineers Joint Contract Documents Committee (EJCDC)

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*The following is a summary of recent legal/legislative activities of interest to the Engineers Joint Contract Documents Committee collected from information provided by EJCDC member organizations 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**

**For Indiana City, Job Title Causes Legal Headaches** – A recent case in central Indiana that has captured the attention of authorities, serves as a reminder that it can be risky business for people to hold engineering job titles if they are not licensed PEs.

For more than a year, Franklin, Indiana's "Director of Engineering" served in that position without being licensed, a violation of state law, according to the Indiana Attorney General's Office.

The attorney general's office has asked the state Board of Registration for Professional Engineers to order Todd Wilkerson, the man in question, to cease and desist any practice of engineering. Board members were scheduled to hear Wilkerson's case November 17, says Christina Wisely, the board's director.

Franklin city officials acknowledge Wilkerson should not have held a title with the word "engineer" in it and changed that title in September 2010 after a city resident brought the issue to light, says city attorney Robert H. Schafstall. Once Wilkerson's title was changed, the city retained Indianapolis-based PE Trent Newport to act as city engineer and director of engineering. The city considers the matter closed from their perspective, Schafstall says.

"Within two days of the complaint, we changed [his title]," Schafstall says.

But the state's complaint goes beyond Wilkerson's title. In the complaint, filed October 13, the attorney general's office argues that, because Wilkerson oversaw and made specifications for several city projects, he was in fact practicing engineering. Practicing engineering without a license is a Class B misdemeanor in Indiana.

**New Mexico PEs Oppose Plans to End Licensing Board's Independence** – The New Mexico Society of Professional Engineers has notified Governor Suzanna Martinez of its opposition to her plans to change the state licensing board for PEs and surveyors from an independent agency to a state-administered agency.

New Mexico Society President Manuel Barrera, P.E., contacted Martinez in September to explain how critical it is for the licensing board to remain independent. The Regulatory and Licensing Department—the proposed home for the licensing board—contains several divisions: Alcohol and Gaming, Boards and Commissions, Construction Industries, Financial Institutions, Manufactured Housing, and Securities. The Boards and Commissions division regulates occupations such as barbers, cosmetologists, landscape architects, massage therapists, and social workers.

Barrera's letter to the governor stated that the New Mexico licensing board is structured as an independent agency, as is recommended by the National Council of Examiners for Engineering and Surveying. NCEES's Model Law calls for licensing boards to be independent agencies that can be fully supported by revenue collected through fees and other sources.

According to an NCEES survey of state licensing boards, 27 boards receive state appropriations and are part of a larger state agency. Boards in 17 states are independent entities that do not receive appropriations and are not part of a larger state agency.

Ending the board's independence, Barrera said, would result in unintended consequences that could present risks to public safety as well as create financial problems and conflicts of interest. Additionally, some expertise is needed to adequately run the licensing board. "It is extremely important to have all potential infractions reviewed by professional engineers, as they can ascertain the level of relevance to the safety of the public," he wrote. "This may not be inherently clear to an investigator with a nonengineering background, effectively placing the public at risk."

**Missouri Governor Rejects Peer-Review Bill** – Missouri Governor Jay Nixon vetoed legislation in July that would have established a project peer-review process for design professionals, citing that it would have given design professionals broad immunity from civil liability. The bill was supported by the Missouri Society of Professional Engineers.

Nixon issued a statement to Missouri Secretary of State Robin Carnahan on July 8 listing his reasons for rejecting the legislation (S.B. 220). He believes the act would have provided immunity to design professionals through a process that lacks transparency and presents potential conflicts of interests. "Approval of this bill would reduce public safety and diminish the accountability of design professionals while substantially denying access to the courts by individuals injured through the negligent acts of these professionals," he stated.

MSPE Executive Director Bruce Wylie says the Society is negotiating with Nixon's staff to reintroduce a bill next year with language that will save the peer-review process while addressing some of the governor's concerns over liability issues. MSPE leaders believe that it is important to allow design professionals to study project performance, engage in peer reviews, correct and improve designs, and conduct "lessons learned" from past projects in order to provide safer buildings, structures, and homes.

The Society is also seeking confidentiality protections for the information that is revealed during a peer-review process. These protections, MSPE says, would be the same protections that were granted by the state legislature in 1985 to the medical professionals in their peer-review processes. These protections were upheld by the Missouri Supreme Court in 1986.

The vetoed legislation would have allowed the creation of a peer-review process for professional engineers, architects, landscape architects, and professional land surveyors. According to the bill, participants in the peer-review process would have received immunity from civil liability as long as their actions were performed in good faith, without malice, and were reasonably related to the scope of inquiry of the review process. Participants in the review process would not have been required to disclose information learned during the review, and documents created during the review would have been privileged and not admissible in judicial or administrative action for failure to provide appropriate services. However, the legislation would not have prohibited state professional licensing boards from requesting and obtaining information from a peer reviewer.

**West Virginia City May Drop PE Requirement From Public Works Position** – West Virginia's second-largest city could be dropping the engineering license requirement for its public works director position.

According to the city's charter, both the Huntington city public works director and city engineer must hold a PE license, says city attorney Scott McClure. The public works director may also serve simultaneously as the city engineer, as is the current situation.

The city's budget concerns have raised the issue, McClure says: The city just can't offer a salary that's competitive with what PEs report they can earn elsewhere, making it hard to find interested candidates for the job.

"Our salary structure is so low you cannot attract someone who's a licensed engineer for the position," he says.

An attempt to remove the license requirement failed about three years ago, the last time the licensure issue was brought up during the city's charter review process, McClure says. At that time, opposition at a public hearing forced city officials to change the charter through referendum, a move that was abandoned for cost reasons.

The West Virginia Society of Professional Engineers is monitoring the proposal, says interim executive director C. Elwood Penn, P.E. He added that the head public works official in any city should be licensed.

"We feel it's in the best interest of the public to have a PE as the city engineer for the second-largest city in the state," Penn says.

A city council committee is reviewing the charter and receiving suggestions on what should be changed, if anything, McClure says

**Governor Signs Bills Backed by Maryland Society** – Maryland PEs gained an additional voice on the state licensing board after Governor Martin O'Malley signed legislation in May that increases engineer representation on the board from five to six. The law specifically states that the governor's selection for the new board spot must come from a list of three nominees recommended by the Maryland Society of Professional Engineers.

MSPE leadership believes that adding another board member will allow the agency to better work on behalf of a diverse and complex profession. The licensing board identifies and represents only four engineering disciplines—chemical, civil, electrical, and mechanical—while the U.S. Department of Labor identifies at least 14 engineering disciplines.

Additionally, since 1990, the number of engineers in Maryland has increased by 300%, to more than 27,500 engineers in the state, according to the society. So, too, has the diversity. "We felt that it was important to broaden the diversity in the types of engineers who serve on the board beyond the four disciplines traditionally represented," says David Thaler, P.E., past president of MSPE.

Thaler believes that MSPE's role in selecting a new board member is critical because it represents engineers of all disciplines in the state. However, he says, the MSPE will consult with other engineering organizations before providing a list of potential board members in September.

**Governor Perry Signs Texas Dams Bill** – Governor Rick Perry signed a bill on June 17 that reauthorizes the Texas Commission on Environmental Quality and reduces regulation standards for dams that are classified as low hazard and located on private property.

The bill (H.B. 2694) set off alarms among dam safety officials and engineers in April because an earlier version of the legislation included an amendment eliminating public safety requirements and evaluations of high-risk dams by licensed engineers.

The Association of State Dam Safety Officials launched a campaign to make sure that the amendment reducing safety standards for hazardous dams would not be included in the final version of a bill. ASDSO members sent a letter to members of the Senate Natural Resources Committee explaining that more than 700 dams are categorized as "high hazard potential" and 744 have "significant hazard potential," meaning that a failure could cause loss of life or serious economic damage. The new exemption will be reviewed for renewal or modification after four years.

**Connecticut Stormwater Licensure Bill Dies** – A bill seeking to create licensure for "stormwater professionals" failed to move out of a Connecticut House of Representatives committee on May 10. The Connecticut Society of Professional Engineers opposed the legislation (Substitute Bill No. 6400) because it would encroach on the practice of PEs and possibly put the public welfare at risk. The bill would have set questionable license requirements below the standards required to obtain a PE license and would have established a new board for stormwater professionals that would have overlap with engineering licensure board.

CSPE Executive Director Paul Brady says the Society is negotiating with the Home Builders Association of Connecticut, a bill proponent, to ensure that a new legislation will speed up the regulatory approval process for home construction and protect the environment without conflicting with PE licensure.

## **FEDERAL LEGISLATIVE/REGULATORY MATTERS**

**The federal government's preference for LEED certification has helped the sustainable brand grow** – Government officials see the U.S. Green Building Council's Leadership in Energy and Environmental Design standards as the next step in accounting for building operation costs in an era of ever-tightening budgets. LEED supporters see the U.S. military's embrace of LEED in construction as another move that will strengthen the brand as the economy struggles.

The U.S. Navy announced earlier this year that all future projects would be planned to attain LEED Gold certification, starting with FY 2013 projects. The Army Corps of Engineers uses LEED Silver, as does the rest of the Army. The Air Force has been incorporating some LEED standards, where applicable, since FY 2004. Outside the military, the General Services Administration, which is responsible for federal buildings and real estate, announced in October last year that it would be targeting LEED Gold for all new buildings.

The agencies cite LEED's sustainable and green construction methods as an efficient way to curb long-term building operation costs and to use sustainable materials. Both the Naval Facilities Engineering Command and the Corps of Engineers are monitoring their early LEED-certified projects to make sure planned energy and cost savings are maintained.

The Corps uses LEED Silver as its target standard but will try for LEED Gold if it fits within budget and time constraints, says Lloyd Caldwell, P.E., the Corps' chief of military programs integration. Since 2006, when LEED Silver became official Army policy, the LEED expertise of Corps' contractors has steadily improved.

"One of the things that we find as a construction agent is that when we establish standards...the industry will tend to step up to the bar and meet them," Caldwell says.

Joseph Gott, P.E., chief engineer and director of capital improvements at the Naval Facilities Engineering Command, says, while NAVFAC likely played a role in establishing LEED as a major standard by adopting it internally in 2007, market forces have also contributed to LEED's growth. More firms with LEED credentials bid for NAVFAC projects now on average than did when the command initially adopted LEED Silver as a standard, Gott adds.

As the firm behind NAVFAC's only LEED Platinum project to date, a quartering building at Camp Pendleton, California, Balfour Beatty Construction says the government's preference for LEED-recognized projects and expertise has driven development of the brand among general contracting and construction firms. When a large construction player like the federal government asks for something specific in their bids, the firms competing for the government's business have little choice but to include such expertise in their proposals and business plans.

**NSPE Declares Victory Over Unpopular Withholding Tax** – After a five-year battle, NSPE can declare victory over an onerous tax-withholding mandate that would have placed significant financial and administrative burdens on engineering firms that contract with the government. On November 16, the House approved H.R. 674, which would repeal Section 511 of the Tax Increase Prevention and Reconciliation Act of 2005 (PL 109-222), sending it to the president's desk for signature.

Section 511 of the Tax Increase Prevention and Reconciliation Act of 2005 (PL 109-222) would require federal, state, and certain local governments to withhold as tax 3% of all payments in excess of \$100 million made to government contractors. The withholding rule was intended to prevent government contractors from continuing to receive pay if they were delinquent in their taxes. It was a last-minute addition to the legislation, however, and was never open to congressional or public input. Since TIPRA's passage, NSPE has been working with groups, including the Government Withholding Relief Coalition and the U.S. Chamber of Commerce, to repeal the withholding mandate.

Because the withholding requirement was never open to debate or comment, it was rife with problems. Small businesses—like most engineering firms—would have suffered most because the profit margin on their government contracts is often less than 3%. This means the withholding mandate would have created cash flow problems, costing engineering firms the vital funds they need to conduct day-to-day business (including paying

subcontractors), and stymied their ability to create new jobs. Some firms may even have been forced to seek outside financing to complete contracts. Firms would eventually have been able to recoup their expenses, but not until the end of the tax year. Moreover, the withholding rule would have compelled firms to implement complex and costly accounting systems and required reporting every transaction covered by the mandate.

**Expect Less Money for Government Construction** – Top engineers from four federal agencies delivered a sobering message to hundreds of A/E firms and contractors gathered in Arlington, Virginia, this past August: When it comes to new projects, budget cuts will mean tough choices on what gets completed at the federal level.

"There will be reduction," said Lloyd Caldwell, P.E., chief of military programs integration for the U.S. Army Corps of Engineers.

"You may be hearing the term 'good enough,'" he added later.

Representatives from the General Services Administration, the Army Corps, the Naval Facilities Engineering Command (NAVFAC), and the Department of Veterans Affairs told attendees at the inaugural Federal Project Delivery Symposium of their own uncertainty stemming from two raucous Congressional budget battles in the past seven months. Because currently active budgets have been changed so much and President Obama's 2012 budget has been modified, agency officials can't say for sure which projects on the slate will be funded.

"The funds just aren't really there to continue this program in the near term," said GSA deputy commissioner Bill Guerin, referring to the agency's estimated \$9 billion–\$12 billion backlog of projects.

It's a refrain A/E and construction firms should get used to, says NSPE member Andy Herrmann, P.E., president-elect of the American Society of Civil Engineers. That could mean troubling markets in the months and years ahead. If the federal government can't guarantee what it will spend in the coming budget years, firms that rely on federal projects won't be able to plan accordingly for their own models, sending a ripple through the design and contracting markets, he says.

"I think the firms are very unsure of what's happening right now," Herrmann says. "That unsure feeling is keeping them from hiring new people or expanding."

**Coal Ash Rule Process Stalled** – It's been more than one year since the Environmental Protection Agency conducted its last public hearing on two proposed regulations to police coal combustion residuals, better known as coal or fly ash.

Now, in the face of mounting pressure on the agency and budgetary challenges, it might be some years before the EPA can adopt a rule regulating the potentially dangerous coal byproduct. A bill from Congress' lone PE might even take away the agency's ability to do so.

The coal ash rules originally were supposed to be adopted by the end of this year. Response has been so robust—there are more than 450,000 comments on two proposed rules for regulating the material—that agency officials postponed their initial timetable. EPA finished its slate of public hearings on the two proposed regulations in September 2010. No date has been set for a final release of the possible new rule.

Debate has vacillated between the possible economic effect of regulating coal ash and the effects the byproduct might have on the natural environment.

U.S. Rep. David McKinley, P.E., of West Virginia, wrote in the July 2011 issue of PE that he opposes EPA regulation of coal ash as a hazardous material. He said such regulation would stifle business and affect the myriad industries that rely on coal-produced electricity for their everyday function. He has introduced a bill (H.R. 2273) that would promote recycling of coal ash and prevent the EPA from labeling the material as a hazardous waste.

"Not only would the EPA's plan reduce demand for coal—by design, to be sure—but it would also increase costs for dozens of industries, having a ripple effect that would ultimately destroy jobs and raise electricity prices," he wrote.

### **COURT DECISIONS**

*OTAK Nevada, LLC v. Eighth Judicial District Court*, 127 Nev. Adv. Op. 53 (2011) – In a wrongful death and personal injury matter involving a car accident allegedly caused by a street improvement, the Nevada Supreme Court held that any complaint filed without a valid Certificate of Merit is *void ab initio* (meaning as if it never existed). Thus, any such complaint has no legal effect and cannot be cured by amendment.

Additionally, the Supreme Court held that each party that files a separate complaint must file its own Certificate of Merit. Other parties to the case cannot simply piggy-back off another party's Certificate of Merit. However, in a footnote, the Supreme Court stated it would not address whether claims of indemnity and contribution fall outside the scope of NRS 11.258(1).

The practical implication of this decision is that if a party sues a design professional without a valid Certificate of Merit, the trial court must dismiss that complaint and cannot permit an amendment. While that party can file a new complaint with a valid Certificate of Merit, if any statutes of limitation have run in the interim, those claims cannot be revived.

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