

**Significant Legal/Legislative Policies/Activities**  
Prepared for the Engineers Joint Contract Documents Committee  
June 12, 2015  
Reston, VA

*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](mailto:aschwartz@nspe.org)).*

**STATE LEGISLATIVE/REGULATORY MATTERS**

**MnSPE Certification Bill Signed Into Law** – On May 8, Minnesota Governor Mark Dayton signed into law legislation which clarifies that no additional license or certification is required for licensed PEs to do work already covered under the scope of the Minnesota PE license. The new law takes effect August 1.

The bill (H.F. 288/S.F. 417), introduced in January, clarifies the licensure requirements in the state's professional engineers act. The language states that a person licensed as a PE will be required to obtain a license, certification, or other form of approval for a skill or service in addition to a PE license only if the state or political subdivision has determined the additional license or certification is necessary to safeguard life, health, or property, or promote the public welfare. The bill doesn't restrict the state or political subdivision from including additional requirements when soliciting public contracts for engineering services.

If the bill did not become law, there was a potential for state and local agencies to have varying standards and requirements for qualifying individuals to practice engineering. Requiring PEs to have additional licenses or certifications could also send a message to the public that the PE license is not an adequate standard and that individual state agencies can regulate the practice of engineering.

Additional certification requirements for professional engineers can cross the line into engineering practice. In 2012, the California legislature passed a bill designed to prevent state and local agencies from requiring certifications to provide design services that PEs are already qualified to perform. The bill, which was vetoed by Governor Jerry Brown, would have given the state PE board the sole authority to license and regulate the practice of engineering.

NSPE believes that professional engineering licensure is the only qualification for engineering practice. The Society and its state societies will actively oppose attempts to enact any local, state, or federal legislation or rule that would mandate certification in lieu of or beyond licensure as a legal requirement for the performance of engineering services. Following licensure as a PE, individuals may voluntarily have their expertise in a specified field of engineering recognized through an appropriate specialty certification program. Such certification, NSPE argues, must not imply that other licensed professional engineers are less qualified for practice in a particular field of specialty.

**Florida Society Backs 'Qualifications First' in Public-Private Partnerships** – The Florida Engineering Society is pushing for the inclusion of qualifications-based selection in legislation that seeks to change the proposal process for public-private partnership projects.

If it becomes law, the bill (H.B. 63) would create a Division of Public-Private Partnerships within the Department of Economic Opportunity and revise provisions for unsolicited proposals as well as add restrictions and requirements for financing agreements. The private partner's plan for a qualifying project must result in the timely acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, or operation of the project. The Florida Society is advocating for an amendment to the bill to

require public agencies to apply the Consultant's Competitive Negotiation Act when they solicit proposals. The act requires state government agencies, municipalities or subdivisions, school boards and schools districts to select a consulting firm based on qualifications rather than on a lowest bid basis. The law does allow price considerations for awarding a project to a firm, but only after the public agency has ranked proposals based on which firm is the most qualified to perform the work. The CCNA's procedures and documentation guidelines are designed to lessen improprieties and ensure an ethical process. The Florida Society is also supporting legislation (S.B. 224) that changes how a contractor must comply with state public records laws when under a contract with a public agency. The bill also specifies circumstances when a court can assess and award reasonable costs of enforcement against a public agency or contractor. FES believes that the changes outlined in the bill will mitigate engineering firms' exposure to litigation from deceitful requests for documents related to public agency clients.

**Maryland Bill Would Clarify PE Role in State Projects** – The Maryland Society of Professional Engineers is backing legislation in the state assembly that requires a licensed engineer to be in responsible charge of reviewing and approving engineering documents for state and local projects.

The legislation (H.B. 752/S.B. 738), introduced in February, requires that engineering documents associated with certain projects that require the skills of a professional engineer and are conducted by or under contract with the state or a political subdivision of the state should be signed, sealed, and dated by a PE. The requirement applies to all engineering documents prepared in connection with the alteration, construction, design, or repair of a building, structure, building engineering system and its components, machine, equipment, process, works, subsystem, project, public or private utility, or facility in the built or economic environment. If signed into law, the legislation will be effective on October 1.

NSPE President Harve Hnatiuk, P.E., F.NSPE, sent a letter to Delegate Dereck Davis and Senator Joan Carter Conway to express support for the legislation. NSPE believes that all engineers who are in responsible charge of the practice of engineering that potentially impacts the public health, safety, and welfare, should be required by all state laws to be licensed professional engineers.

In the letter, Hnatiuk stated that hearings on the legislation presented an opportunity to ensure that Maryland state law removes any implication that city or local government employees are exempt from the licensing requirement if they are practicing engineering. All licensed professional engineers are required by law to meet rigorous education, examination, and experience standards. In addition, all licensed professional engineers in Maryland must complete mandatory continuing education requirements in order to maintain their PE license. He emphasized that any licensed professional engineer in Maryland who violates the state's law and rules is subject to disciplinary action by the state engineering licensure board.

**New York Governor Signs Bill Licensing Geologists** – The practice of geology in New York is now a licensed profession, after Governor Andrew Cuomo's signing of legislation in November.

The New York State Society of Professional Engineers backed the legislation (A. 4753/S. 3810), which ensures that geologists can be licensed in the state without interfering with the practice of licensed engineers. The new law defines the profession of geology and establishes education, examination, and experience requirements for licensure. The New York State Board for Engineering and Land Surveying will expand to include oversight of the licensed practice of geologists. The board will have at least two members representing the geology profession.

The legislation was introduced because providing scientific expert opinion regarding geological conditions to state or local government agencies and the public can have significant impact on the state's environmental quality and on the safety, property, and well-being of citizens. Geologists regularly conduct

investigations and provide geologic services related to the development and protection of groundwater resources and the subsurface disposal of hazardous wastes, which has the potential for contamination to migrate. According to the legislation, 24 states require the licensing of geologists. The law will become effective in two years.

NYSSPE supported the licensure of geologists as long as it would not erode the practice of professional engineers. Geologists will be able to identify and quantify the constitute parts of the strata comprising the earth's crust and mantle, under the new law; however, geologists cannot practice professional engineering, which includes design work. Licensed engineers who are also proficient in geology are permitted to perform activities reserved for licensed geologists.

The law also permits licensed geologists to serve as principals in design firms along with professional engineers, architects, landscape architects, and land surveyors. Currently, a geologist is limited to holding a minority interest in a design professional service corporation, not exceeding 24.99% of the firm shares, according to NYSSPE.

## **INTERNATIONAL/NATIONAL/FEDERAL LEGISLATIVE/REGULATORY/ASSOCIATION MATTERS**

**Malaysia Plans to Upgrade Licensure of Professional Engineers** – The Board of Engineers Malaysia is creating a two-tiered system for licensing engineers to help improve public safety within the construction industry. The engineering licensing board, a Washington Accord member, will amend the country's registration law and implement new standards by the end of the year.

The BEM, established in 1972, regulates the professional conduct and practice of registered engineers. All engineers, both local and foreign, who provide professional engineering services must register with the board. A professional engineer in the first-tier category is eligible for employment with limitations on certain rights established under the Registration Act. A second-tier professional engineer with a certificate to practice will maintain all rights set in the law. Individuals must renew this certificate annually and fulfill continuing professional development requirements. For example, only a PE with a practice certificate can submit design plans to an authority and will be liable for the plans. A first-tier professional engineer will need to work under the guidance of a second-tier PE. All professional engineers will have to pass the board's Professional Competency Examination to ensure ability to practice in the country. Malaysia has approximately 8,700 professional engineers and 80,000 graduate engineers

The Washington Accord was established in 1989 with Engineers Australia, Engineers Canada, Engineers Ireland, the Institution of Professional Engineers New Zealand, the Engineering Council of United Kingdom, and the Accreditation Board for Engineering and Technology (ABET) in the US. An organization that wants to become a member of the accord must demonstrate that its accreditation standards, policies, and procedures are substantially equivalent to the other accreditation bodies. The applicant must also have the initial support of two signatories and will be required to hold a provisional status for at least two years. Final admission into the accord requires unanimous approval. The BEM joined the Washington Accord in 2009.

**New Law Takes Aim at Cyber Risks to Critical Infrastructure** – A new federal cybersecurity law authorizes the National Institute of Standards and Technology to facilitate the development of industry-led cyber standards and best practices for critical infrastructure and a cybersecurity workforce.

Under the Cybersecurity Act of 2014, signed by President Obama on December 18, NIST and other federal agencies and departments will be responsible for disseminating these cybersecurity standards and best practices that are usable by individuals, small to medium-sized businesses, education institutions, and state, local, and tribal governments. In addition, they must create an information campaign to increase public awareness of cybersecurity issues and cyber safety and ethics.

Within a year, NIST must submit a strategic plan to the Senate Committee on Commerce, Science, and Transportation and the House Committee on Science, Space, and Technology. The heads of relevant agencies and departments will be charged with building on existing programs and plans to develop this strategic plan to meet several objectives, including the following:

- How to design and build complex software-intensive systems that are secure and reliable when first deployed;
- How to test and verify that software and hardware is free of significant known security flaws;
- How to guarantee the privacy of an individual, including that individual's identity, information, and lawful transactions when stored in distributed systems or transmitted over networks;
- How to address the problem of insider threats; and
- How to protect information processed, transmitted, or stored using cloud computing or transmitted through wireless services.

The director of the National Science Foundation will be responsible for developing, evaluating, and integrating new cybersecurity practices and concepts into the core curriculum of computer science programs and other programs where graduates will have a strong probability of developing software as well as developing new models for professional development of faculty in cybersecurity education.

Leaders of the Department of Commerce, Department of Homeland Security, and the NSF will support competitions and challenges to identify, develop, and recruit individuals to perform duties that enhance the security of information technology at all government levels and within the private sector. They will also continue a federal scholarship for service programs to recruit and train information technology professionals, industrial control system security professionals, and security managers.

**New Mexico PE to Lead Bureau of Reclamation** – Estevan López, a licensed professional engineer, was named the 22nd commissioner of the Bureau of Reclamation in December. The New Mexico native was confirmed by the Senate in December after serving as the agency's principal deputy commissioner since October.

The bureau is the largest wholesale provider of water in the nation with a staff of 5,500 and is the second largest producer of hydroelectric power in the western US, with 53 power plants. The water management agency is responsible for providing water to more than 31 million people and provides one out of five farmers with irrigation water.

Recently, López issued the Climate Change Adaptation Strategy for Reclamation, which aligns with President Obama's climate action plan, a strategy that provides a framework in which reclamation managers can develop and adopt innovative solutions that provide a more reliable water supply in a changing climate. The strategy has four goals to improve the bureau's ability to consider climate change information in its decision making: increase water management flexibility, enhance climate adaptation planning, improve infrastructure resiliency, and expand information sharing.

López brings 25 years of public-sector experience to his current position. He was appointed to serve as New Mexico's director of the Interstate Stream Commission by Governor Bill Richardson in 2003, and he was reappointed by Governor Susan Martinez in 2011. As director, he managed the state's water resources and negotiations over interstate water issues. His tenure involved being the governor's representative to the Colorado River Compact and commissioner to the Upper Colorado River Compact and the Canadian River Compact Commissions. While at the ISC, he also served as the commission's deputy state engineer.

López previously served as the county manager and land use and utility department director for Santa Fe County and the public utility engineer for the New Mexico Public Utilities Commission. His private sector experience includes several years as an engineer for ARCO Alaska Inc. He has two bachelor's degrees from New Mexico Institute in chemistry and petroleum engineering and maintains an engineering license in the state.

**Federal Agencies Name Top Engineers** – NSPE's Federal Engineer of the Year Award honors achievement in government engineering. Ahead of this year's ceremony on February 26, NSPE has announced the 25 engineers representing 22 different federal agencies in the final selection process:

- Timothy Bayse, P.E., Department of the Navy, Naval Facilities Engineering Command
- Lieutenant Commander Keith Benson, E.I.T., Department of the Navy, Naval Facilities Engineering Command
- Megan Blucher, P.E., Marine Corps
- Ronald Daignault, P.E., Department of Veterans Affairs, Veterans Health Administration
- Commander David Allen Engelstad, P.E., Department of the Interior, National Park Service
- Lauri Hansen, National Aeronautics and Space Administration, Johnson Space Center
- Khamis Haramy, E.I.T., Department of Transportation, Federal Highway Administration
- Steven Hertz, P.E., Department of Health and Human Services, Food and Drug Administration
- Robert Hildale, P.E., Department of the Interior, Bureau of Reclamation
- John Hughes, P.E., Department of the Navy, Naval Undersea Warfare Center
- Lieutenant Commander Ryszard Kaczmarek, P.E., Department of the Navy, Naval Sea Systems Command
- Bradford Lytle, P.E., National Aeronautics and Space Administration, Kennedy Space Center
- David Mazurek, Ph.D., P.E., Department of Homeland Security, US Coast Guard Academy
- Lieutenant Colonel Patrick Miller, P.E., Air Force, 628th Civil Engineer Squadron
- Christopher Pan, Ph.D., Department of Health and Human Services, Centers for Disease Control and Prevention
- Jeffery Lee Phillips, P.E., Tennessee Valley Authority
- George Schmidt, Ph.D., P.E., National Aeronautics and Space Administration, Glenn Research Center
- Gabriel Taylor, P.E., Nuclear Regulatory Commission
- Alan Tolley, E.I.T., Department of the Navy, Naval Sea Systems Command
- Eric Warner, P.E., Air Force, 374th Airlift Wing
- Philip Weber, National Aeronautics and Space Administration, Kennedy Space Center
- Kathleen White, Ph.D., P.E., Department of the Army, Army Corps of Engineers
- Cyril Williams, Ph.D., P.E., Department of the Army, Army Research Laboratory
- Jesse Wilson, P.E., Department of Agriculture, Natural Resources Conservation Service
- CDR Shari Windt, P.E., Department of Health and Human Services, Indian Health Service

## **COURT DECISIONS**

**Federal Trade Commission v. North Carolina Board of Dental Examiners** – A U.S. Supreme Court ruling in an antitrust case on February 25 may jeopardize the enforcement role of state licensing boards across the nation. NSPE released a statement expressing its disappointment in the court decision and vowed to take action against efforts to weaken the regulatory and enforcement role of state engineering licensing boards, which protect the public health, safety, and welfare.

The case began with a Federal Trade Commission complaint against the North Carolina Board of Dental Examiners for sending cease-and-desist letters to nonlicensed teeth whitening providers. The board claimed to be acting as a state regulatory body, ensuring patient safety; the FTC claimed the board, composed mostly of dental professionals competing against nonlicensed teeth whitening providers, was exceeding its authority and violating antitrust law.

Following the FTC complaint, the board claimed as a defense the “state action doctrine,” which provides exemption from federal antitrust law for certain state-mandated activities. The Fourth US Circuit Court of Appeals, however, decided in favor of the FTC. As a result, the implications of the case go beyond the question of whether it is legal for the dental examiners board—whose eight members include six dentists—to shut down nonlicensed teeth whitening providers.

The North Carolina Board of Dental Examiners appealed the court’s decision to the U.S. Supreme Court, and oral arguments were presented in October. The National Council of Examiners for Engineering and Surveying filed a “friend of the court” brief expressing its concern. NCEES argued that the position adopted by the FTC and the Fourth Circuit would subject engineering licensing boards to second guessing by federal antitrust regulators and impede the boards’ ability to effectively carry out their state-appointed task of regulating the engineering and surveying professions to protect the public. To lose immunity to federal antitrust law, according to the NCEES brief, is to lose a basic protection that enables state licensing boards to fully function as delegated state agencies.

The Supreme Court affirmed the Fourth Circuit Court’s ruling, which is exclusively about immunity from antitrust challenges and the conditions that must be met for such immunity to be automatic. Immunity from antitrust law-based challenges to specific actions or decisions by a licensing board is not automatic; it depends on the degree of supervision by the state. The court also established a new, context-dependent test for determining when a state exercises sufficient supervision over a licensing board to confer automatic antitrust immunity.

Justice Anthony Kennedy delivered the Supreme Court’s opinion. He stated that the Sherman Antitrust Act doesn’t authorize the states to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies. The state must provide active supervision if it wants to rely on active market participants as regulators.

The decision doesn’t vacate any state licensing laws or displace the underlying powers or authority of a state board—even if it is made up entirely of market participants—to act under the authority granted to it by law. The decision also doesn’t require or compel the restructuring of any state board.

NSPE’s statement about the Supreme Court’s decision emphasizes that the vital public-interest role served by the licensure of professional engineers is clear: “Licensure ensures that the people who build our roads, buildings, and bridges; who design our vehicles and machinery to operate safely; and who we rely upon for the secure and environmentally sound operations of our pipelines and other utilities are not only competent to do so, but accountable to the public’s interest above all other considerations.”

The Supreme Court's decision, the Society says, will have the unintended consequence of discouraging highly competent licensed professional engineers from serving on state engineering licensure boards (as well as state engineering licensure board committees and task forces) due to personal liability uncertainty and concern. The decision also jeopardizes the role of state engineering licensure boards and their members in exercising technical and professional judgment and discretion in questions relating to the practice of professional engineering.

**Gordon v. Heritage Fellowship** – In an effort to prevent professional engineers from being placed at serious legal risk, NSPE has filed a “friend of the court” brief before the Virginia Supreme Court in support of an appeal of a lower court decision that, if affirmed, 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 case arose in connection with the installation and collapse of a rain tank storm water management system in 2011. NSPE's 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 the engineer to independently test and verify all materials rather than rely on the specifications warranted by the manufacturer. This is an unrealistic and inappropriate shifting of the burden and liability from the manufacturer to the engineer who reasonably relied upon the manufacturer's representations. The brief notes that this risk allocation threatens to increase the cost of professional engineering services and discourages the use of newer innovative products and designs.

The brief also disputes other issues in the appeal. For example, the trial court ruled that the statute of limitations for design defect claims against engineers is paused when there is a continuing relationship between the PE and the owner. NSPE contends that this ruling undermines the basic procedural protections afforded to design professionals. Earlier court decisions, NSPE notes, have determined that the statute of limitations begins to run as soon as plans are presented by the design professional and accepted by the owner, even if the design professional and owner have a continuing relationship.

The trial court, according to NSPE, also failed to enforce the contractor's obligations that are clearly defined in the contract documents and instead imposed liability on the professional engineer. By doing so, NSPE argues, the trial court undermines the commercial expectations of the parties and frustrates public policy interests that encourage commercial parties to assign risks and duties clearly, specifically and appropriately through standard contract forms.

NSPE President Harve Hnatiuk, P.E., F.NSPE, commented: “As licensed professionals, PEs are held to and exercise high levels of accountability to protect the public health, safety, and welfare. This includes exercising high standards of care in selecting the materials they use in their designs and the integrity of the plans they seal. However, this court ruling would make the PE accountable for defects or failure of products to perform to standards warranted by the manufacturer, for delays in the client's use of finished plans that are beyond the engineer's influence or control, and obviate the use of the very contractual instruments that were designed to maximize transparency and accountability. This would undermine, rather than enhance, the professional engineer's ability to honor his or her duties to the public.”

“NSPE's intervention in this court proceeding is just the latest step in the Society's 80-year history of actively advancing, promoting, and defending the meaning and efficacy of the professional engineer license in protecting the public that relies upon it for assurance that their welfare is served,” he added. Also joining the brief were the national and local affiliates of the American Council of Engineering Companies and the American Society of Civil Engineers.

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