

**Significant Legal/Legislative Policies/Activities**  
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*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**

**NSPE and PSPE Urge Repeal of Pennsylvania Industrial Exemption** – Both NSPE and the Pennsylvania Society of Professional Engineers have urged the Pennsylvania House Committee on Professional Licensure to repeal the state's industrial exemption as part of a bill that was scheduled for a public hearing in October. Pennsylvania House Bill 1447, introduced by Rep. Marc Gergely in May 2013, provides an opportunity to amend the state's Engineer, Land Surveyor, and Geologist Registration Law to remove exemptions from licensure and regulation for individuals practicing engineering in industry. The work of engineers in industry can impact the safety of the public and employees, "yet there are no established minimum standards for the competency of the engineers performing the design, maintenance, and operation of industrial properties," PSPE President Eric Tappert, P.E., testified before the Committee on Professional Licensure in October. "It is left to the corporation owning such properties to decide whether or not their employees are competent and adhering to the code of ethics contained in [the law]." Tappert used a local tragedy as an example of how placing public trust in corporations can endanger the public. The 1999 Concept Sciences Inc. plant explosion in Allentown, Pennsylvania, killed five people, including the supervisor of an adjacent business, and it's likely even more lives would have been lost had the explosion not occurred after 8 p.m. "There were no professional engineers working for Concept Sciences in this facility; the operation was supervised by a person with a chemistry degree," Tappert said. "Established standards, which are part of every professional engineer's tool box, were ignored and the public was put at serious risk. This entire incident could have been avoided if a competent professional engineer had been in responsible charge." In a letter to the Committee on Professional Licensure, NSPE President Harve Hnatiuk, P.E., F.NSPE, explained that NSPE believes all state laws should require PEs to be in responsible charge of the practice of engineering that potentially impacts the public health, safety, and welfare. "All licensed professional engineers must meet rigorous education, examination, and experience standards," Hnatiuk wrote. "In addition, all licensed professional engineers in Pennsylvania are subject to disciplinary action by the state engineering licensure board and must complete mandatory continuing education requirements in order to maintain their professional engineering license."

**New Jersey Good Samaritan Law Ups PE Protections** – Legislation giving licensed design professionals increased immunity from personal liability when they volunteer their services in response to natural disasters and declared emergency situations was signed by New Jersey Governor Chris Christie in September. The New Jersey Society of Professional Engineers was a driving force behind the introduction of the legislation, which will help state officials respond effectively to large-scale events such as Superstorm Sandy. The New Jersey Society worked with Assembly Majority Leader Lou Greenwald to sponsor the bill and garnered the backing of the Association of Trial Lawyers of America–New Jersey, which proved critical to its unanimous passage, says NJSPE Executive Director Joseph A. Simonetta, CAE. The legislation (A. 2025), introduced in January, provides immunity from personal liability for PEs and licensed architects for specific volunteer and pro bono professional services provided at the request of public safety officials during and for a set period following a declared emergency. Volunteers will be given immunity from personal liability for any personal injury, wrongful death, property damage, or other loss caused by an act, error, or omission. The immunity is extended under the New Jersey Tort Claims Act by considering the professional performing the practice of architecture or engineering as an employee of the public entity benefiting from the service. In order to receive the immunity under the public employee status, the voluntary service must be performed without compensation at the scene of a declared national or state emergency caused by a major earthquake, hurricane, tornado, fire, explosion, collapse, or similar catastrophic event within 90 days following the emergency. If needed, the time period can be extended

by an executive order from the governor. Under the Tort Act, a licensed engineer or registered architect will not be considered an employee of the public entity or have immunity protection if the professional has certain contractual relationships with the public entity requesting the disaster relief services or if an act or omission by the professional involves fraud, actual malice, willful misconduct, or intentional wrong doing. NSPE supports the adoption of Good Samaritan laws that provide immunity from liability for any personal injury, wrongful death, property damage, or other loss caused by a professional engineer's acts, errors, or omissions in the performance of voluntary engineering services. These laws eliminate the liability deterrent that may inhibit engineers from providing voluntary services. In addition, Good Samaritan laws allow states and localities to factor in voluntary engineering assistance when planning for disasters.

**North Carolina Bolsters PE Requirement and Title Protection—New Law Also Clarifies Industrial Exemption** – North Carolina Governor Pat McCrory signed a regulatory reform bill in September that requires public entities engaged in the practice of engineering to do so under the direct supervision of a PE and clarifies license exemptions. The legislation (S.B. 734), introduced in May, states that employees of counties, cities, towns, and other public entities can't engage in the practice of engineering or land surveying involving both public and private property if the safety of the public is directly involved. Engineering projects must be carried out with the direct supervision of a PE or a licensed professional land surveyor on surveying projects. The law previously specified that a licensed engineers' supervision would be tied only to the preparation of plans and specifications for the engineering projects. The legislation also addresses the use of the engineer title by employees of the Department of Transportation, the Department of Environment and Natural Resources, and other regulatory agencies that provide permits and licenses to the public. These agencies must evaluate the job titles of employees who review regulatory submissions and eliminate the use of the title "engineer" for individuals who are not licensed engineers. This change was supported by the Professional Engineers of North Carolina. The new law maintains a license exemption for the engineering and surveying activities connected to manufacturing, processing, producing, or delivering a product that is connected with the primary services performed by an individual as long as the activity is not provided to the public. The legislation lists the following as primary and reasonable services: Installation or servicing of the person's product by employees of the person conducted outside the premises of the person's business. Design, acquisition, installation, or maintenance of machinery or equipment incidental to the manufacture or installation of the product performed by employees of the person upon property owned, leased, or used by the person. Research and development performed in connection with the manufacturing processing, or production of the person's product by employees of the person. NSPE policy states that all engineers who are in responsible charge of the practice of engineering as defined in the National Council of Examiners for Engineering and Surveying's Model Law and Rules in a manner that potentially impacts the public health, safety, and welfare should be required by all state statutes to be licensed professional engineers.

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

**Republican Victory May Mean Changes for Engineering Profession** – The morning after the midterm election, one fact was certain: Republicans had a huge night. With the GOP reclaiming the Senate by a wider-than-expected margin, picking up over a dozen seats in the House and making sweeping gains in gubernatorial races and state legislatures, the political landscape will be markedly different than it was in the 113th Congress. Simply put, this election was a blowout at both the federal and state levels, and there will be major repercussions. With the dust still settling, there are almost as many questions as there are answers. The one certainty is that both chambers of Congress will experience major changes, especially in the Senate. The new Senate Majority Leader come January, Mitch McConnell (R-KY), has clearly stated that energy-related topics will be a top priority. With Republicans controlling both chambers of Congress, the appropriations process will once again likely change. Committees of interest to NSPE, with jurisdiction over energy, procurement, and infrastructure issues, will undergo fundamental change. For example, Senator Jim Inhofe (R-OK) takes over the reins from his ideological opposite Senator Barbara Boxer (D-CA) on the Senate committee responsible for overseeing major infrastructure authorizations that need to be completed in 2015. After more than five years without movement, the Keystone pipeline has a filibuster-proof majority. Expect this legislation to be one of the

first agenda items in the 114th Congress. Also expect major efforts from the GOP to stall and reverse the slew of recent EPA regulations. This could mean positive changes for PEs, particularly reduced compliance requirements.

### **NCEES Takes a New Look at Education Requirement for PEs—Council Also Amends Qualifications for PE Exam**

– The member licensing boards of the National Council of Examiners for Engineering and Surveying have decided to change their approach to requiring education beyond a bachelor’s degree for licensure as a PE. In August, the council voted to remove from the Model Law and Rules a requirement calling for licensure candidates to earn a master’s degree or its equivalent prior to being awarded a PE license. The language was added to the Model Law and Rules in 2006 and intended to take effect in 2020. The council voted to remove the requirement to end confusion and to avoid barriers to comity licensure but plans to work on the specifics of the requirement, said NCEES Chief Executive Officer Jerry Carter. “The language about requiring additional education beyond the bachelor’s degree was inserted in the NCEES model governance documents to reflect the belief of the council that significant revisions are needed in the education of engineers to ensure that they are prepared to enter the professional practice of engineering,” he said in a statement. “Because the language had been incorporated into the Model Law and Model Rules, but had not yet been adopted by an individual licensing board, it was causing confusion among students, educators, and professional engineers.” Another key issue was the effect on the NCEES Records program, which is used by PEs to facilitate comity licensure. “For those who meet the Model Law Engineer or Model Law Structural Engineer standard, many states expedite a comity licensure application. In 2020, the MLE and MLSE standards would have required a master’s degree or the equivalent,” said Carter. “If no state requires a master’s, most licensees would no longer meet the MLE and MLSE standards, which would have slowed comity licensure. NCEES is dedicated to facilitating licensure among states, so it wants to avoid this impediment.” NCEES will continue to support improving education standards, said Carter, to better prepare individuals to enter the profession. A committee will develop a position statement to establish support of additional education for initial engineering licensure and the council will consider adopting the statement during next year’s annual meeting. NSPE supports the establishment of additional academic requirements beyond the bachelor’s degree, such as a master’s degree or equivalent, as a prerequisite for licensure and practice of engineering at the professional level as outlined in NSPE Professional Policy No. 168, adopted in 2002. Early PE Exam in August, NCEES also removed from the Model Law a requirement that licensure candidates must earn four years of experience before taking the PE exam. The change paves the way for states to allow candidates to take the PE exam any time after they pass the FE exam. The Model Law still requires licensure candidates to gain at least four years of experience in addition to passing the PE exam before receiving a license. NSPE has urged NCEES and state licensing boards to allow licensure candidates to take the PE exam if they have met the educational requirements for licensure and passed the FE exam. The Society also believes that the four years of progressive engineering experience indicated in the Model Law should remain unchanged, and candidates who pass the PE exam early need to gain four years of documented acceptable progressive engineering experience before becoming licensed.

**Civil PE Exam Gets Update** – The National Council of Examiners for Engineering and Surveying has released new specifications for the Principles and Practice of Engineering (PE) Civil exam, which will take effect with the April 2015 exam administration. The specifications have been updated for the five civil exam module options: construction, geotechnical, structural, transportation, and water resources and environmental. The exam specifications indicate knowledge areas to be tested and their relative weights of emphasis. NCEES periodically conducts surveys of licensed engineers who work in industry, government, private practice, and academia to determine the knowledge and skills required of professionals in a particular discipline to update its exam specifications. “Our licensing exams need to reflect current professional practice, and these surveys help us determine what an engineer intern with four years of experience should be expected to know to protect the public,” said Tim Miller, P.E., the director of exam services at NCEES.

## **COURT DECISIONS**

**Whitener & Jackson v. Heritage Fellowship Church** – Responsibility for a manufacturer’s product representation rests with the Contractor under the standard AIA and EJCDC contract documents. In a recent ruling, a Virginia trial court imposed that responsibility on the engineer. Several professional societies are currently considering participating on a “friend of the court” brief to urge the Virginia Supreme Court to grant the appeal because (1) the trial court clearly erred in interpreting the relevant contract and (2) the trial court applied an erroneous unworkable standard regarding a design professional’s ability to reasonably rely on the representations of a product manufacturer. If left in place, the trial court’s ruling could threaten great harm to design professionals throughout the Commonwealth.

**NCEES Weighs In on Supreme Court Case** – The National Council of Examiners for Engineering and Surveying recently filed a “friend of the court” brief with the Supreme Court in a case that could have significant implications for state licensing boards. The case began with a complaint filed against the North Carolina Board of Dental Examiners by the Federal Trade Commission for sending cease-and-desist letters to unlicensed teeth whitening providers. The board claims to be acting as a state regulatory body, ensuring patient safety; the FTC claims the board, comprised mostly of dental professionals competing against unlicensed teeth whitening providers, is 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. As a result, the implications of the case have expanded beyond the question of whether it is legal for the board to shut down nonlicensed teeth whitening providers when six of its eight members are dentists, especially after the Fourth U.S. Circuit Court of Appeals agreed with the FTC.

The North Carolina Board of Dental Examiners appealed the court’s decision to the US Supreme Court. “NCEES is concerned that the position adopted by the FTC and the Fourth Circuit in this case, if affirmed, will subject its member licensing boards to second-guessing by federal antitrust regulators, impeding the boards’ ability to effectively carry out their state-appointed task of regulating the engineering and surveying professions and protecting the general public,” the NCEES brief to the Supreme Court reads. “To lose immunity to federal antitrust law is to lose a basic protection that enables state licensing boards to fully function as delegated state agencies.” If affirmed, the position adopted by the FTC and the Fourth Circuit would leave states with only three options, the brief explains. All would harm states’ and licensing boards’ ability to regulate professions that impact public health, safety, and welfare. By retaining the status quo—i.e., keeping market participants on their boards—states will expose the boards to the risk of antitrust liability for just doing their jobs. This would harm the ability of states to recruit and maintain well qualified members of the professions to serve part-time on licensing boards and would chill the boards’ ability to make tough calls. Thus, states would lose many of the benefits they sought when they delegated legislative authority to licensing boards, and included on those boards the very people who were most qualified to understand the needs and concerns of the professions they are charged with regulating.” “To the extent States can only preserve their boards’ immunity by instituting ‘active supervision’ that the FTC or federal courts may deem sufficient (but which the states had not deemed necessary), states would be forced to engage in expensive, wasteful institutional experiments, with little assurance that the supervision would reflect adequate subject-matter knowledge or satisfy any particular tribunal. Adding a layer of bureaucracy would complicate and alter the state-designed decision-making process while still subjecting boards and their members to a continued risk of liability.” “States may feel it necessary to legislatively eliminate market participants from their licensing board altogether in order to avoid antitrust liability. But when a decision has such coercive effect, it creates serious federalism concerns. The decision...substitutes the FTC or the courts’ determination that action of a state agency is ‘private’ over the State’s own demonstrated intent to delegate regulation of professions as a sovereign state activity. This contravenes this Court’s pronouncements that antitrust law should not nullify the States’ democratic processes for regulating their economies and protecting the public welfare.” Oral arguments before the Supreme Court were conducted on October 14 and a decision is expected in early June 2015.

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