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Significant Legal/Legislative Policies/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 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).

FEDERAL LEGISLATIVE/REGULATORY MATTERS

Society Fights to Keep PE Role in the Oil and Gas Sector - One of the professional engineer's federal roles is in jeopardy as the Environmental Protection Agency reconsiders a final rule requiring a PE to certify certain assessments related to emissions in the oil and gas industry.

On November 17, NSPE President Tom Roberts, P.E., F.NSPE, submitted a public comment to the EPA regarding its reconsideration of the requirements for PEs to certify closed vent system design and capacity assessments as well as technical infeasibility determinations related to controlling pneumatic pumps at well sites. The EPA is taking another look at the rule because the agency "acknowledges that it had not analyzed the costs associated with the PE certification requirement and evaluated whether the improved environmental performance this requirement may achieve justifies the associated costs and other compliance burden." The proposal to end the requirement also calls for a two-year phase-in period to examine the impact of the requirement and an increase in personnel needs.

In NSPE's public comment, Roberts explains the Society's concern. He writes that the EPA's final 2016 rule was carefully considered and included substantial public input. More than 7,000 public comments and 600 documents were submitted.

The EPA's 2016 rule, Roberts wrote, "recognized the unique qualifications, expertise, and the legal and ethical duty of professional engineers to hold paramount the public health, safety, and welfare in their designs, construction, and observations." He added: "With hundreds of thousands of PEs across the country, NSPE strongly believes that the existing requirements can be met."

The Society is urging the EPA to enforce the current requirements immediately. If a new rule is finalized, it should retain the provisions requiring a PE to be in responsible charge of all engineering projects.

NSPE Fights Dangerous Attempt to Roll Back Deepwater Horizon Safety Regulations - NSPE is pushing back against the Department of the Interior's proposed rollback of essential regulations implemented in response to the Deepwater Horizon disaster in 2010. The department finalized rules after a comprehensive multiphase rulemaking process in 2016. NSPE actively advocated for an enhanced role for professional engineers to protect the public health, safety, and welfare, and these provisions were included in the final 2016 rule. The department is now proposing to eliminate many of the provisions in the 2016 rule, including several specific requirements for professional engineers.

The Bureau of Safety and Environmental Enforcement's proposed revisions for the rulemaking (Oil and Gas and Sulphur Operations on the Outer Continental Shelf-Oil and Gas Production Safety Systems-Revisions) pose a grave risk to public safety. This proposed rule would amend and update the 30 CFR part 250, subpart H, Oil and Gas Production Safety Systems regulations, which were finalized in 2016, nearly six years to the day after the disastrous and tragic Deepwater Horizon explosion that killed 11 people and caused the biggest oil spill in US history.

After the explosion, the BSEE undertook a comprehensive and deliberative five-year process to create a new set of standards and regulations to ensure that the lessons learned from this tragedy would be applied to mitigate future catastrophes. All stakeholders, ranging from the public to private industry to environmental groups, were able to take part in this multiphase process. The finalized 2016 rules included both performance-based standards and prescriptive rules based on this extensive feedback from stakeholders and analysis.

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NCEES Reaches Settlement Over Alleged Misuse of Questions - The National Council of Examiners for Engineering and Surveying reached an \$800,000 settlement agreement with a test preparation company over allegations of the unauthorized use of copyrighted practice questions belonging to NCEES.

In addition to the payment, the test preparation company agreed to permanently remove the NCEES-owned material from its print and online materials on an agreed-upon schedule. Under the agreement, the company does not admit any guilt regarding copyright infringement or liability to NCEES, and NCEES will not disclose the company's identity.

NCEES produces licensing exams for engineering and surveying, including the FE and PE exams. The nonprofit organization also publishes study materials, including practice exams, to familiarize candidates with the format and content of the exams. NCEES alleged that the test preparation company used NCEES' copyrighted practice questions in its exam preparation materials without authorization.

"NCEES and its volunteers have literally thousands of hours invested in the development of high-quality examination items that assist licensing boards in performing their important work," says NCEES CEO Jerry Carter. "We will take whatever steps are required to protect our intellectual property."

STATE LEGISLATIVE/REGULATORY MATTERS

Wyoming, Nevada Ink Mobility Agreement - The Wyoming and Nevada licensing boards have signed a first-of-its-kind pact in which a PE in one state can be accepted as a PE in the other.

The boards signed the agreement in August at the annual meeting of the National Council of Examiners for Engineering and Surveying. Under the agreement, an NCEES Model Law Engineer who applies for licensure in either state can choose to be licensed in the other state. State-specific exams and respective fees will still be required, but an applicant must complete only one application to become licensed in either state. Wyoming and Nevada are the first two states to sign this kind of memorandum.

Corky Stetson, P.E., Wyoming board president, says that the memorandum is a great stepping stone toward improved mobility of the PE. It can be a long and trying process to become licensed in more than one state, he says, even if you regularly work in multiple states or just moved to a new state.

"It's so painful," says Stetson. "We've got to do something to make it easier. We just need to keep taking the steps to make mobility easier. We kept talking about it, but we needed to do something."

Patty Mamola, P.E., executive director of the Nevada board, points out that the new memorandum between Nevada and Wyoming benefits the states' economies: When engineers are quickly licensed, they can begin working and generating revenue in that state sooner.

"It saves time," says Mamola. "And since time is money, it provides a financial savings, too."

Mamola adds that several state boards have already asked the Nevada and Wyoming boards about the memorandum. She hopes the agreement encourages more states to adopt similar licensure mobility agreements.

"It's a matter of getting board members to think bigger and challenge the status quo," says Mamola. "We have to do something to improve mobility, and this is a step in that direction."

Obstacles to mobility and uncertainty associated with comity licensure are both persistent problems plaguing the PE license. In the early 1900s, when PE licensure began, it was rare for engineers to practice outside of their own states; with advancements in technology and transportation, it is now common.

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Becoming licensed in multiple states can be a complicated process, however. A PE licensed in one state may not even qualify for licensure in another state due to varying requirements in education and other areas.

According to the 2015 NSPE Engineering Outlook Survey, 50% of PEs, EIs, and students agreed and 38% strongly agreed that states should align licensing requirements to improve licensure mobility for PEs.

[Oregon Case Highlights Free Speech, Engineering Practice](#) - Oregon's attorney general ruled in December that the state engineering and surveying licensing board violated a man's free speech rights after the board fined him \$500 for the unlicensed practice of engineering.

The case began when Oregon resident Mats Järnlström's wife was mailed a \$150 fine for a driving violation at a camera-monitored intersection. Järnlström, who earned an engineering degree in Sweden but is not a PE, conducted his own study of the traffic light's timing and found the timing of the lights unfair. After sharing his finding with the media and state officials, including the engineering and surveying licensing board, he was fined by the board.

The case drew wide attention in the media as an example of government overreach and an infringement of free speech. For example, in June, nationally syndicated columnist George Will wrote, "If you find yourself in Oregon, keep your opinions to yourself, lest you get fined \$500 for practicing engineering without a license." He described the case as "symptoms of something sinister," and mocked the board for considering Järnlström to be, "like Jesse James, Al Capone, and John Dillinger, a dangerous recidivist."

For NSPE, the attention generated by the case put engineering licensure in a bad light. To clarify the need for licensing, then NSPE president Kodi Verhalen, P.E., Esq., F.NSPE, submitted a letter to the editor of the *Washington Post* explaining that the main distinction between an engineer and a licensed engineer is the legal and ethical duty of PEs. "It isn't a matter of one being superior or smarter than the other, the piece of paper you hold from your college or university, where you earned your degree, or the organizations you've joined," the letter stated. "It is a matter of meeting the legal prerequisites for carrying out the practice of engineering on projects that have public safety implications as defined by that state's laws and rules."

[NSPE, Nevada Society Stand Up for State Licensing Board](#) - NSPE and the [Nevada Society of Professional Engineers](#) are teaming up to combat yet another licensure threat to the state.

The Nevada State Board of Professional Engineers and Land Surveyors is currently under scrutiny by the Nevada Sunset Subcommittee of the Legislative Commission. The subcommittee is reviewing the board and 25 others to determine whether changes need to be made, including terminations, modifications, and consolidations.

"The Nevada Board of Professional Engineers and Land Surveyors is the mainstay of engineering licensure in the state and is critical to the protection of the public health, safety, and welfare; Nevada's economic competitiveness; and comity with all other states," NSPE President Tom Roberts, P.E., F.NSPE, and Nevada Society of Professional Engineers President Craig Sisco, P.E., wrote in a joint letter to the subcommittee chair. "We strongly urge the commission to recommend in its final report that no changes be made to the structure or status of the board."

NSPE and its state societies are combating licensure threats across the country. Just last year, Nevada officials attempted to pass a bill that sought to establish the "least restrictive means" of regulating an occupation, virtually eliminating licensure requirements for certain professions. Legislators dropped the bill after a coordinated response from NSPE and the Nevada Society.

NSPE is actively monitoring and responding to licensure threats. So far, the Society has identified 26 states where similar legislation, regulations, or executive orders have been introduced, signed, and/or passed. Although much of the legislation does not specifically target professional engineers, by opposing occupational licensure in general, the broad attacks sow confusion about the importance of engineering licensure and its role in protecting the public.

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COURT DECISIONS

California Court Upholds Certificate of Merit Law - California design professionals received some legal assurances from a state appeals court ruling in November that backed a longstanding protection against frivolous lawsuits. The case specifically addresses certificates of merit in negligence cases and the period in which they must be filed.

In the case of *Curtis Engineering Corp. v. Superior Court of San Diego County*, plaintiff George Sutherland sustained injuries while working as a crane operator on May 5, 2014, and filed a complaint on May 3, 2016. The complaint included an allegation of negligence against Curtis Engineering, which provided engineering services on the project. The original complaint did not include a certificate of merit, as required by law.

On December 1, 2016, Sutherland filed an amended complaint with the certificate. In response, Curtis Engineering cited that Sutherland didn't file the required certificate within the two-year limitations period. Sutherland contended that the certificate of merit he filed with the amended complaint related back to the filing of the original complaint because the original and amended complaints were the same. A trial court concluded that the amended complaint related to the date of the original complaint.

According to state statute, in an action for damages or indemnity relating to the professional negligence of a PE, architect, or land surveyor, the plaintiff's attorney must file a certificate of merit on or before the date the complaint is filed. The law allows a 60-day grace period in cases when an attorney can't file a certificate of merit before the two-year statute of limitations deadline. Curtis Engineering argued that Sutherland missed the grace period deadline, which should have expired on July 2, 2016.

The Court of Appeals agreed that the trial court decision would have essentially allowed a plaintiff an unlimited amount of time to seek a certificate of merit, which goes against the heart of the law.

Federal Court Protects Engineering Title In Mississippi Case - A federal district court recently upheld a Mississippi state law prohibiting the use of the engineering title by individuals and businesses that aren't licensed to practice engineering.

When Express Oil Change LLC changed the name of its tire sale and service center to "Tire Engineers" in 2015, the Mississippi Board of Licensure for Professional Engineers and Surveyors (MBLPES) notified the company of the violation of state law. The law prohibits any person or business from using the term "engineer" in a commercial identification, title, or name, unless the individual or company is licensed to perform engineering services by the state engineering licensing board.

Express Oil Change filed a lawsuit claiming that the licensing board misinterpreted its governing statutes and infringed upon the company's First Amendment rights by prohibiting its use of Tire Engineers. The Alabama-based company maintains nine service centers in Mississippi.

In 2017, the MBLPES commissioned a survey to determine if citizens were being misled by the company's use of the name Tire Engineers and bolster its argument in the lawsuit. The board also submitted evidence in the case that the term tire engineers is used by courts, universities, tire manufacturers, automobile manufacturers, general periodicals, specialized periodicals, and the public to refer to engineers who have expertise in the manufacture, selection, and repair of tires.

Although the company's website states, "Tire Engineers have tire engineers who are qualified to service customers tires," the district court concluded that the business name is likely to deceive and mislead consumers to believe that services are provided by tire engineers under the supervision of tire engineers. The use of the business name implies that a recognized group of qualified engineers working to design tires in the transportation industry are there to provide services. The court also rejected the free speech and trademark rights claims in the case.

Express Oil Change has appealed the court's decision. The Mississippi attorney general has requested that NSPE submit a "friend of the court" brief in the case. The Society believes that state licensing laws for design professionals are predicated upon and justified as a means to protect the public health, safety, and welfare. The public is best served by the licensure of all qualified individuals within the engineering profession.

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