

**Significant Legal/Legislative Policies/Activities**  
Prepared for the Engineers Joint Contract Documents Committee  
February 7, 2014 – Tampa, FL

*The following is a summary of recent legal/legislative activities of interest to the Engineers Joint Contract Documents Committee collected from information provided by EJDC 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](mailto:aschwartz@nspe.org)).*

**STATE LEGISLATIVE/REGULATORY MATTERS**

**North Carolina Engineers and Architects Gain QBS Victory.** North Carolina design professionals gained a victory for supporters of qualifications-based selection with the enactment of a new law permitting all state and local government agencies to use design-build and enter into public-private partnerships on construction projects. The [Professional Engineers of North Carolina](#) worked with the American Institute of Architects to secure a QBS provision in the bill (H.B. 857). Under the new law, all state and local government units must announce all requirements for architectural, engineering, surveying, and construction services to firms qualified to provide services based on demonstrated competence without regard to fee, which will be negotiated with the best qualified firm. Although North Carolina requires the use of QBS in the procurement of design services, a legal loophole has allowed public entities too much flexibility to exempt themselves from using QBS criteria on projects, says PENC Executive Director Betsy Bailey. The new law changes the exemption, which can only be used for projects with estimated costs of \$50,000 or less. The legislation also permits local jurisdictions to use design-build methods and enter public-private partnerships for construction projects without being required to seek special legislative authorization for each project. The allowance for public-private partnerships will provide an alternative financial resource when the resources of the government entity are too limited to carry out a capital building construction project. Over the years, every piece of legislation submitted by a locality seeking approval for a design and construction project was a concern for PENC, particularly if the project didn't include the use of QBS as a vehicle for fair and open competition. The legislation, sponsored by State Representative Dean Arp, P.E., provided an opportunity for PENC to work with various stakeholders to strengthen QBS in the state. "This law married this effort with something that our local governments wanted, which is statewide design-build authority, and the public-private partnerships that our legislature wanted," says Bailey. "By putting all of these together, we were successful because every stakeholder got something out of it." NSPE strongly recommends that in any public sector design-build project, the procurement of design-build services always follows the two-phase selection process defined by the Federal Acquisition Reform Act of 1996. The Society also believes that qualifications should play a significant role in this selection process and that factors other than construction costs must be evaluated.

**Electronic Seals and Signatures Bill Headed for Michigan Senate.** A bill that would allow licensed architects, professional engineers, and professional surveyors to use electronic seals and signatures when filing plans, specifications, plats, or reports with a public authority has passed the Michigan House and is headed to the Senate. The [Michigan Society of Professional Engineers](#) which supports H.B. 4585, is currently making its case to senators and hopes the bill will be on Michigan Gov. Rick Snyder's desk for signature into law before Thanksgiving. The bill was sponsored by Republican House Rep. Rob VerHeulen.

*Reprinted by Permission of the National Society of Professional Engineers (NSPE).  
For more information about NSPE membership, products, and services, please visit [www.nspe.org](http://www.nspe.org)*

"MSPE, as part of the Architects, Engineers and Surveyors Legislative Committee, has been working with our legislators to introduce and move this bill forward since February 2013," says MSPE Executive Director Nancy McClain, P.E. "Prior to taking the request to the Michigan Legislature, [the American Institute of Architects] Michigan, also a member of the AESLC, was working with the Michigan Bureau of Construction Codes for several years on determining the best manner in which to implement electronic seals and signatures at all levels and sizes of municipalities." The Bureau of Construction Codes is poised to roll out a new process for accepting electronically submitted plans, permits, and other documentation. If passed, the bill would assist in the implementation of that process.

"The bill is intended to modernize the submission process and provide greater efficiency," McClain says. "It is common practice for plans and reports to be prepared electronically and allowing these professions to submit the plans using an electronic seal and signature, instead of requiring a handwritten signature and a seal affixed to a paper copy of the document, would modernize the business practices of many local units of government. Additionally, allowing the use of electronic seals and signatures would eliminate the need to store and maintain paper copies of documents and may lead to more efficient storage and retrieval of such documents." The bill would not require plans and other documentation to be submitted electronically. Local governments without the technology to accept and store documents electronically would be able to require paper copies be submitted. At press time, the bill was in the Senate's Regulatory Reform Committee, and a hearing date had not yet been set.

**Texas Expands Criminal Background Check for PEs.** The Texas legislature recently amended the state's PE Act to expand criminal background checks for licensees to increase public safety. Beginning on January 1, all new license applicants and professional engineers renewing their licenses with the Texas Board of Professional Engineers must submit fingerprints for a one-time background check in a national database. Currently, the board performs a background check through the Texas Department of Public Safety on new license applicants, using only a name and birth date. A criminal history check using a national database, overseen by the FBI, requires a fingerprint record. The change to the law will align the board with the model used by other Texas boards that license professionals, says Lance Kinney, P.E., executive director of TBPE. At least 14 agencies use fingerprint-based criminal background checks, including boards that regulate attorneys, dentists, insurance professionals, accountants, nurses, realtors, and physicians. Licensees are currently required to report a violation to TBPE within 30 days. The board will also be notified of any positive matches for future violations by the firm conducting the initial national background check.

TBPE will use the guidelines set in a state occupation code, which establishes how licensing boards can evaluate a criminal issue. If a violation occurs, the board will consider the severity of the violation, the time period in which the violation happened, and how it relates to the practice of engineering.

The PE Act was also modified to provide the board additional enforcement tools against unlicensed practice and outline how licensing fees are processed with the following key changes:

- Increases the maximum penalty from \$3,000 to \$5,000 per violation per day;
- Allows immediate suspension orders if there is an imminent threat to public safety;
- Provides cease-and-desist authority for unlicensed practice;
- Changes the fee structure for new applicants, allowing them to defer the \$200 professional fee until licensure is awarded; and
- Requires that all administrative penalties collected must be placed into the state's general fund.

**North Carolina Governor Signs Fast-Tracking Bill, But Protection from Lawsuits Will Have to Wait.** North Carolina Governor Pat McCrory signed legislation in August that will require a PE's review when fast-tracking the approval process for stormwater management system permits and erosion and sedimentation control plans. The [Professional Engineers of North Carolina](#) supported the legislation (H.B. 74), which allows for the approval of plans by the Department of Environmental and Natural Resources without a technical review when the plans are signed and sealed by a PE. PENC and the North Carolina Board of Examiners for Engineering and Surveying will be involved in a study to help the department develop minimum criteria for the evaluation of plans with the consultation of industry experts, environmental engineers, faculty members from the University of North Carolina system, and other stakeholders. The criteria will be established and reviewed by a commission in early 2014.

On the issue of frivolous lawsuits, during North Carolina's 2013 legislative session, legislators failed to pass a bill that would have increased protections for design professionals against frivolous lawsuits. PENC is working with the American Council of Engineering Companies to push for a reintroduced bill in 2014.

The legislation (H.B. 739) would have required a certificate of merit in civil actions or during arbitration proceedings that are brought against an individual or firm that provides architecture or engineering services. In such cases, the plaintiff's claim against the design professional or firm would have required a review by a licensed architect or licensed engineer who has the same type of license and specializes in the same area of practice as the design professional. The licensed professional would have been required to qualify as an expert witness and testify that the professional services provided by the defendant did not comply with the Protection.

## **FEDERAL LEGISLATIVE/REGULATORY MATTERS**

**Engineers Seek Clarification in Design-Build Legislation.** NSPE in July requested that lawmakers require the two-step/two-phase design-build selection process on all military construction projects. In a July 9 letter to House Appropriations Committee Chairman Hal Rogers (R-KY) and Ranking Member Nita Lowey (D-NY), NSPE's 2012-13 President Dan Wittliff, P.E., F.NSPE, urged the committee to carefully review, amend, and clarify ambiguous language in the House Report 113-90 on the Military Construction, Veterans Affairs, and Related Agencies Appropriations Act of 2014 (H.R. 2216). The bill does not address specific project delivery methods defined under current law, nor does it describe the strengths or weaknesses of either of the situations under which one may be preferable to the other. Under current federal law, there are two design-build selection processes—the two-step/two-phase process and the turn-key selection process. The two-step process, which follows the guidance laid out in the Federal Acquisition Reform Act as well as the Brooks Architect-Engineers Act of 1972, is preferred by the U.S. Army Corps of Engineers and is NSPE's preferred method for design-build procurements. The turn-key selection process is not preferred and does not provide the same quality considerations or efficiencies as the two-step process. "NSPE believes the two-step/two-phase selection process ensures that competent and qualified design professionals are initially involved in the procurement process so that quality-based design considerations are incorporated into the drawings, plans, and specifications consistent with the interests of the public health and safety," Wittliff wrote. He went on to request the House Appropriations Committee revise the bill to "unequivocally identify" that the two-step, qualifications-based selection process be followed on all military construction projects.

**Proposed Tunnel Inspection Rules.** A highway tunnel inspection rule proposed by the Federal Highway Administration would require professional engineers in two key positions. Under the proposed rule, a tunnel inspection program manager must, at a minimum, be a PE, have 10 years of tunnel or bridge inspection experience, and be a nationally certified tunnel inspector. Team leaders must also be PEs and nationally certified tunnel inspectors.

The Federal Highway Administration proposed the National Tunnel Inspection Standards in July 2010. However, this latest supplemental rulemaking was prompted by requirements in the new federal surface transportation law (MAP-21), enacted in July 2012.

According to the FHWA, most road tunnels were designed and constructed in the 1930s and 1940s as part of the public works programs associated with recovery from the Great Depression, or in the 1950s and 1960s, during the development of the Interstate Highway System. Most of these tunnels have exceeded their design service lives and need routine inspections. In addition to establishing a tunnel inspection program, the proposed rule would also create a tunnel inventory. FHWA has limited data on the number of tunnels in the U.S., the frequency of inspection, and the costs of inspection. The agency estimates that tunnels represent nearly 100 miles of interstates, state routes, and local roads. Among the rule's other proposals are training for inspectors and a national certification program for inspectors. It would also set a minimum inspection frequency of every 24 months.

**Engineers Support Water Infrastructure Bill.** NSPE is backing legislation that seeks to streamline the infrastructure project delivery process and strengthen the nation's water transportation networks. The Water Resources Reform and Development Act of 2013 (H.R. 3080), introduced in September, would ensure that the U.S. Army Corps of Engineers can conduct its mission to develop, maintain, and support national port and waterway infrastructure in addition to targeted flood protection and environmental needs. It would be the first authorization for the Corps in six years. Historically, Congress passes this type of legislation every two years. In a letter to the legislation sponsors Rep. Bill Shuster (R-PA), chair of the House Transportation and Infrastructure Committee, and Rep. Nick Rahall (D-WV), NSPE President Robert Green, P.E., F.NSPE, acknowledges that the WRRDA would overhaul and dramatically improve the process for federal water resources development. The legislation sets hard deadlines on the time and cost of studies, consolidates or eliminates duplicative studies and concurrent reviews that can hold up projects for years, and streamlines environmental reviews, he states. The WRRDA fully offsets new authorizations with deauthorizations and cancels \$12 billion of inactive projects that were approved prior to the 2007 version of the act. The legislation also maximizes the ability of nonfederal interests to contribute their own funds to move authorized studies and projects forward, while substantially reducing project backlogs.

**Engineers Gain Advice Exclusion from SEC.** Engineers will not have to register with the Securities and Exchange Commission as municipal advisors if they provide engineering advice such as feasibility studies, cash flow analysis, and similar activities related to the engineering aspects of a project, the agency announced on September 18. The regulation of municipal advisors began with the enactment of the Dodd-Frank Act of 2010 as a way to prevent problems such as "pay to play" practices and undisclosed conflicts of interest. The SEC unanimously approved the final municipal advisor registration rule, which requires advisors to permanently register with the agency. The final rule exempts engineers providing "engineering advice" from the municipal advisor definition. The commission made the decision after receiving comments that the engineering exclusion was too narrow and that activities such as cash flow analysis and feasibility studies represent an integral part of engineering services. An engineer can advise a municipal entity about whether a project could be safely or reliably completed with the available funds and provide engineering advice about other alternative projects, cost estimates, or funding schedules without engaging in municipal advisory activity. An engineering company that informs a

municipality or obligated person of potential tax savings, discounts, or rebates on supplies would be acting within the scope of the engineering exemption. The exemption doesn't apply if an engineer provides advice regarding financial products or the issuance of municipal securities. For example, an engineer who is engaged by a municipal entity or obligated person to prepare revenue projections to support the structure of an issuance of municipal securities would be providing advice outside of the scope of the engineering exclusion and would be considered to be engaging in municipal advisory activity.

**Engineers Urges Stronger Standards For Federal Engineering Positions.** In October, NSPE urged the Office of Personnel Management to strengthen its qualification standards for federal professional engineering positions by requiring a PE license.

“NSPE and OPM share a common mission to ensure that our engineers’ foremost priority is to protect the public health, safety, and welfare,” NSPE President Robert Green, P.E., F.NSPE, writes in a letter to OPM Deputy Associate Director for Recruitment and Hiring Kimberly Holden. “A PE’s rigorous training and demonstrated expertise is a prerequisite to meeting this goal.” Green strongly urged OPM to revise its qualification standards on behalf of NSPE in response to a recently proposed draft revision that would allow those with engineering technology bachelor’s degrees from ABET-accredited programs to qualify for federal professional engineering positions. Given that existing requirements for a professional engineering position in the federal government already fail to meet the requirements for PE licensure, NSPE took the opportunity to both oppose the further eroding of basic and long-standing standards for the practice of professional engineering and request the federal government’s standards be strengthened. “To qualify as a professional engineer in most states, one must earn a four-year bachelor’s degree in engineering from an ABET-accredited program, pass both the Fundamentals of Engineering and Principles and Practice examinations as prepared and administered by the National Council of Examiners for Engineering and Surveying, and obtain at least four years of professional experience,” Green writes. “At a time when the federal government is seeking to promote broad economic prosperity and to enhance our national security, all federal agencies must show leadership and establish and maintain high engineering qualifications and standards for employees in the federal workforce.” NSPE was not the only professional society to write Deputy Associate Director Holden in October regarding OPM’s recently proposed draft revision. The American Society of Civil Engineers also expressed its concerns in a letter from ASCE Executive Director Patrick Natale, P.E., F.NSPE. “ASCE has strong concerns regarding the inclusion of engineering technology degrees as qualifying for professional engineering occupations,” Natale writes. “The revisions will compromise assurance of minimum engineering competency. Recognizing the importance of professional licensure of engineers as an imperative element in the protection of the public health and safety, ASCE strongly supports a differentiation between the requirements of engineering professionals and engineering technologists.”

## COURT DECISIONS

***Mingo Logan Coal Company v. U.S. EPA*** – In this Clean Water Act (“CWA”) case, Mingo Logan is asking the Supreme Court to grant certiorari and reverse a D.C. Circuit decision holding that CWA section 404(c) authorizes EPA to nullify a CWA 404 permit issued by the Corps of Engineers years after the permit has been issued and despite the permittee’s Compliance with the permit. *Mingo Logan v. EPA*, 714 F.3d 608 (D.C. Cir. 2013). The D.C. Circuit’s decision has significant implications for anybody who seeks and must rely upon section 404 permits issued by the Corps of Engineers. In addition, because EPA interprets section 404(c) to allow it to address water quality issues within the purview of the States under the section 402, the decision has the potential to upset permits issued by the States under the NPDES program, as well as stormwater permits (also known as “MS4 permits”) held by municipalities.

Mingo Logan’s predecessor applied for a section 404 permit for the Spruce No. 1 coal mine in West Virginia in 1997. After 10 years of environmental review, in which EPA participated fully, EPA announced, “we have no intention of taking our Spruce Mine concerns any further,” and the Corps issued a permit. The permit noted specifically the Corps’s authority to revoke or modify the permit under 33 C.F.R section 325.7, but did not suggest in any way that EPA could alter or revoke it. Over the next two years, Mingo Logan spent several million dollars preparing the site and commencing operations in compliance with all requirements of the permit. Then, in 2009, claiming new information, EPA asked the Corps to exercise its revocation authority. The Corps reviewed the request in light of its longstanding regulatory criteria, and concluded that no new information justified revocation. The State of West Virginia also objected to EPA’s request.

A year later, in 2010, EPA took matters into its own hands, claiming that EPA’s “veto” authority under section 404(c) empowered it to modify or revoke an issued permit. Citing this purported authority, it issued a Final Determination revoking 88 percent of the mining activity the Corps had authorized in the permit. This was the first time since the CWA was passed in 1972 that the Agency attempted to use section 404(c) to revoke an active permit after it was issued.

Mingo Logan sued on several grounds, and on March 23, 2012, the U.S. District Court for the District of Columbia held that the “stunning power” claimed by the Agency “is not conferred by section 404(c)” and is “contrary to the language, structure, and legislative history of section 404 as a whole.” The court held that CWA section 404(c) does not authorize EPA to act after the permit has been issued. EPA must act, if at all, before the Corps issues the permit. *Mingo Logan v. EPA*, 850 F. Supp. 2d 133 (D.D.C. 2012).

On April 23, 2013, a panel of the United States Court of Appeals for the District of Columbia Circuit reversed the district court’s decision. The court held that the Act “imposes no temporal limit” on EPA’s authority to use its section 404(c) “veto” authority. Instead, EPA may modify or revoke a 404 permit “whenever” it determines that the Corps permit will have an “unacceptable adverse effect” – even, as here, years after the permit has issued, and despite the permittee’s compliance with the permit.

Mingo Logan petitioned for rehearing en banc, which the court denied at the end of July.

Mingo Logan is preparing to ask the Supreme Court to grant certiorari and review the D.C. Circuit decision on the merits. Lead counsel for Mingo Logan before the Supreme Court will be Paul Clement, a leading Supreme Court practitioner. Amici briefs in support of cert are also in the process of being filed by AGC, ACEC, and ASCE.

\* \* \*