

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

### **STATE LEGISLATIVE/REGULATORY MATTERS**

**New Hampshire Adopts Law Protecting Good Samaritan PEs** – New Hampshire has become the latest state to enact a law that will give design professionals immunity when they volunteer during a natural or man-made disaster. Storms such as Hurricanes Irene and Sandy have shown how essential professional engineer expertise is to inspecting and repairing critical infrastructure in devastated communities. Yet, professional engineers who volunteer their services need added protections through Good Samaritan legislation.

The New Hampshire Society of Professional Engineers joined the state chapters of the American Council of Engineering Companies, the American Institute of Architects, and the American Society of Civil Engineers to advocate for Good Samaritan legislation. The law took effect in July. It offers civil immunity to licensed engineers and architects and licensed architectural and engineering firms providing assistance in an emergency in the absence of gross negligence or willful misconduct. Licensees must provide volunteer engineering and architectural services under the director of the division of homeland security and emergency management director, the state fire marshal, or a town or city emergency management director who is managing a natural or human-caused disaster, or other life-threatening emergency.

“Design professionals will benefit by being able to ‘do the right thing’ by volunteering their services during a disaster without the fear of civil liability that may otherwise prevent them from acting altruistically,” says Jason Beaudet, P.E., New Hampshire SPE past president. “The safety and welfare of the public will benefit from the expertise that professional engineers offer to emergency responders.”

NSPE believes that professional engineers who voluntarily assist their communities, states, and the nation in times of crisis when requested by the appropriate public official should be protected from liability exposure when performing these duties. During natural disasters or other catastrophic events, engineering expertise and skills are needed to provide structural, mechanical, electrical, or other engineering services and may be needed to determine the integrity of structures, buildings, piping, or other engineered systems. The Society backs the enactment of federal Good Samaritan legislation and has also developed a model Good Samaritan law for the state level. The model recommends 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 in times of crisis. The immunity applies only to a voluntary engineering service that occurs during the emergency or within 90 days following the end of the period for an emergency, disaster, or catastrophic event, unless extended by the governor’s executive order or under the governor’s emergency executive powers.

**NSPE Backs Michigan QBS Bill** – On February 1, 2015, NSPE President Tim Austin, P.E., F.NSPE, called on Michigan legislators to support Michigan House Bill 5238, the Local Government Professional Services Selection Act. If enacted, the legislation will set procedures for local governments to procure architectural, engineering, and land surveying services using a qualifications-based selection process. NSPE believes qualified professional engineers should be selected to perform all engineering services on the basis of design ability, experience, integrity, and other key professional factors—rather than price.

In a letter, Austin pointed out that NSPE has long supported the procurement of design professional services on the basis of qualifications and was instrumental in the enactment of the federal Brooks Architect-Engineer (A/E) Act (PL 92-582). The act requires federal agencies to use qualifications-based selection procedures when obtaining design professional services. The Society also strongly supports the adoption of “mini-Brooks” laws at the state and local level. Forty-seven states have implemented some form of QBS law, and numerous localities have also adopted laws modeled after the federal statute.

**Texas PEs Get a Financial Break** – Professional engineers licensed in Texas will get a tax break after the enactment of a bill to eliminate a licensure fee. The repeal of the fee, part of a fiscal package, is an attempt by the Texas legislature to reduce financial burdens on businesses and professionals.

The law, which became effective in September, eliminates an annual \$200 licensing fee that applied to 16 occupations licensed by the state. Professional engineers will have to pay only a \$40 renewal fee after the reduction. The repeal affects 400,000 professionals and also includes architects, attorneys, physicians, landscape architects, and land surveyors.

The fee was originally implemented when the state faced a budget shortfall. Its repeal is estimated to save businesses and professionals nearly \$250 million over the next two years.

In June, Governor Greg Abbott also signed legislation (H.B. 2358) that provides tax exemptions and eases licensure requirements for out-of-state businesses and professionals assisting with disaster relief. The Facilitating Business Rapid Response to State Declared Disasters Act seeks to help businesses and employees respond to disasters and assist with restoring critical infrastructure at the request of state and local agencies and jurisdictions.

A business will not be required to comply with any state or local occupational licensing requirements or related fees or pay a use tax associated with bringing equipment into the state for disaster or emergency work. This act also ensures that out-of-state employees are not required to file a tax report or pay taxes and fees to a locality or the state in addition to complying with licensing requirements.

The exemption period begins no more than 10 days prior to the declared emergency or disaster event and ends 60 days after the ending date of the disaster or emergency or on a later date determined by the secretary of state.

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

**NSPE Responds to Risk Potential in WFEO Model Code** – A potential liability risk to professional engineers has been removed from a new practice model document designed to address climate change and infrastructure resiliency.

According to NSPE, the World Federation of Engineering Organizations' practice model contained provisions that could have created a new standard of care for PEs that far exceeded their duties and responsibilities. Though NSPE believed the original model was a thoughtful document on an important issue—addressing the increasing challenges posed by climate change to infrastructure resiliency—it would have conflicted with existing law and standards, and exposed PEs to increased claims and litigation. The model's global scope and policy direction aimed at the highest management levels of public- and private-sector projects made the need for a revision even more important.

NSPE worked with other member organizations of the American Association of Engineering Societies to draft a document designed to advance awareness and discussion within the profession about climate change and infrastructure resiliency. The document also provides general guidance that can be adapted to the specific legal and regulatory environment that is unique to each nation, state, or municipality.

The revisions, which were approved by AAES and by the WFEO General Assembly in December 2015, will ensure that the document will not create a new standard of care that is unreasonable, nor claims and liability risk. To avoid the implication that the document is changing the standard of care, AAES recommended adoption of the document as a “white paper” rather than a “model code.” The revised document clarifies its limited intent, stating that the document is aspirational in nature and not intended to change the standard of care.

**New Education Law Includes Engineering Provisions** – On December 10, 2015, President Obama signed the Every Student Succeeds Act into law, replacing the No Child Left Behind Act of 2001. The new education law is significant because NSPE has long advocated key provisions of the Educating Tomorrow's Engineers Act, which are incorporated into the Every Student Succeeds Act. In particular, the bill includes a funding provision allowing states to refine their science assessments by integrating engineering design skills and practices for the first time. In addition, more flexible funding grants will allow states and school districts to utilize federal funds for teacher professional development and high quality instruction in engineering. NSPE commends Congress for acknowledging the need for more engineering instruction at all levels of education. The bill was passed in the House by a vote of 359 to 64 and was also overwhelmingly approved in the Senate by an 85 to 12 margin.

**First Long-Term Highway Bill In A Decade Signed Into Law** – On December 5, President Obama signed the Fixing America's Surface Transportation (FAST) Act into law. The conference report was approved overwhelmingly in the House of Representatives by a vote of 359-65 and an equally impressive tally of 83-16 in the Senate. A comprehensive five-year/\$305 billion surface transportation authorization, this law is the culmination of a decade of 36 short-term extensions. NSPE has long urged Congress to pass a long-term infrastructure bill. The passage of the FAST Act will enable PEs to properly plan, design, implement, construct, operate, and maintain our nation's infrastructure systems without lurching from one-short-term extension to another. NSPE lauds Congress for finally enacting a long-term bill that will benefit the public health, safety, and welfare.

**Abandoned Mine Projects Need Better Engineering Expertise, Report Says** – A federal report on the accidental release of three million gallons of toxic water from an abandoned Colorado mine provides an in-depth, technical look at the incident. It also provides irrefutable evidence that proper engineering expertise is needed to protect the public health, safety, and welfare, a core NSPE value.

The August 5 blowout at the Gold King Mine during a remediation project led by the Environmental Protection Agency highlighted flaws that are common in similar projects.

The technical evaluation was conducted by the Bureau of Reclamation and peer reviewed by the U.S. Geological Survey and the Army Corps of Engineers. According to the report, better engineering could have prevented the blowout. “Abandoned mine guidelines and manuals provide detailed guidance on environmental sampling, waste characterization, and water treatment, with little appreciation for the engineering complexity of some abandoned mine projects that often require, but do not receive, a significant level of expertise,” the report says.

Two of the three members of the evaluation and peer review teams were PEs.

The report lists six factors that contributed to the blowout. They were the absence of: 1) an understanding that water impounded behind a blocked mine opening can create hydraulic forces similar to a dam; 2) analysis of potential failure modes; 3) analysis of downstream consequences if failure were to occur; 4) engineering considerations that analyzed the geologic and hydrologic conditions of the general area; 5) monitoring to ensure that the structure constructed to close the mine portal continued to perform as intended; and 6) an understanding of the groundwater system affecting all the mines in the area and the potential for work on one mine affecting conditions at another.

The report also recommends the following “prudent engineering considerations” that the EPA and others should follow: 1) incorporate a potential failure modes analysis into project planning; 2) conduct a downstream-consequences analysis and consider the effects of an accidental release as well as prevention measures; 3) directly measure the water conditions in a blocked mine prior to opening it; and 4) obtain independent expertise to review project plans and designs prior to implementation when significant consequences of failure are possible.

Forty-three years before the Gold King Mine blowout, a similar mine failure led to the enactment of the Surface Mining Control and Reclamation Act, the report notes. On February 26, 1972, a coal slurry impoundment dam in West Virginia failed during heavy rains, causing the cascading failure of other impoundments below. Approximately 132 million gallons of liquefied coal mine waste created a flood wave that killed 125 people and destroyed more than 500 homes.

When the law was enacted in 1977, the new Office of Surface Mining Reclamation and Enforcement established a permitting process for coal mines that included professional engineering design and review for coal mine dams and waste impoundments.

## **COURT DECISIONS**

**Illinois Design Professionals Gain Lien Rights** – Illinois PEs have gained more rights to sue for unpaid services following a state Supreme Court decision. The court's November decision in favor of a Rosemont engineering firm came after years of dispute over payments for property improvement services.

The case, *Christopher B. Burke Engineering Ltd., Appellant, v. Heritage Bank of Central Illinois*, began in April 2008 when Burke Engineering established an agreement with Glen Harkins and his wife to survey a tract of land that they wanted to purchase. In addition, the firm was commissioned to draft and record a plat of subdivision for the property. The firm began work prior to the couple's purchase of the property and continued after the purchase.

After Burke Engineering recorded the final plat, conducted a wetlands survey, and provided services for planning roads, utilities, and sewers, Harkins stopped the work on the property in February 2009. The firm invoiced Harkins for \$109,549.69 but wasn't paid for the services. This resulted in the firm obtaining a mechanics lien on the property and suing to foreclose on the lien against Harkins and Heritage Bank, which provided financing. The suit also included a family that purchased the one home built on the property, but the firm reached a settlement with this family.

Heritage Bank filed a motion for a summary judgment, alleging that the lien didn't meet the requirements of the state mechanics lien act. The circuit court ruled that the lien didn't meet the requirements because it determined that the engineering firm's services didn't constitute an improvement to the property and the services were not prompted by the original property owners. In a deposition, the previous property owner stated that she didn't authorize the services, and the property didn't have any improvements six months prior to the sale to the Harkinses. Harkins testified that he was not given the authority to act on behalf of the previous owner, but that she was aware that he had entered into a contract for engineering services. The appellate court affirmed the circuit court's decision.

Burke Engineering took the case to the Illinois Supreme Court and argued that the circuit court should not have granted Heritage Bank a summary judgment. The court ruled that state statute provides for a lien if a professional's services result in an improvement or if the services are completed for the purpose of improving the property. The plaintiff's services were used to help Harkins develop the neighborhood on the property for the sole purpose of improving the property.

The court reversed both lower court decisions and determined that Heritage Bank isn't entitled to a summary judgment.

**Virginia Supreme Court Finds Engineer Liable for Failing to Meet Standard of Care for Design of Rain Tank** – The Virginia Supreme Court affirmed a lower court and ruled that an engineer's reliance on a manufacturer's literature, his failure to conduct due diligence on a rain water tank's location in view of the high water table constituted a failure to meet the standard of care and found the engineer liable.

NSPE had filed a "friend of the court" brief in July before the Virginia Supreme Court in support of the appeal of a lower court decision that 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 Society believed that the ruling will place licensed engineers at serious legal risk if not reversed.

The case of *William H. Gordon Associates Inc. v. Heritage Fellowship, United Church of Christ, a/k/a Heritage Fellowship Church, et al.*, involved the installation and collapse of a rain tank stormwater management system in 2011. The brief argued 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. The Virginia Supreme court's will, in effect, require engineers to independently test and verify all materials rather than rely on the specifications warranted by the manufacturer. The Society believes this is an unrealistic and inappropriate shifting of the burden and liability from the manufacturer to the engineer who reasonably relied on the manufacturer's representations.

The brief also states that the Supreme Court doesn't need to determine whether the appellant violated the standard of care to reverse the trial court's judgment and that a design professional exercises due care when he or she reasonably relies on representations of product manufacturers. In addition, the circuit court failed to tie the statute of limitations accrual date to the date the plans were presented by Gordon and accepted by Heritage.

Requiring engineers to investigate the accuracy of a product manufacturer's specifications will deter engineers from using newer innovative products and designs, according to the brief. This risk allocation also threatens to increase the cost of professional engineering services.

Also joining the brief were the national and local affiliates of the American Council of Engineering Companies and the American Society of Civil Engineers, the Engineers and Surveyors Institute, and the Virginia Association of Surveyors.

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