

## **Significant Legal and Legislative Activities**

Prepared for the Engineers Joint Contract Documents Committee (EJCDC)

October 10-11, 2008 - Philadelphia, PA

*The following is a summary of recent legal/legislative activities of interest to the Engineers Joint Contract Documents Committee collected from information provided by EJCDC 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).*

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

**California Governor Puts Out Help Wanted Sigh for Engineers** – California Governor Arnold Schwarznegger has big plans to help boost the state’s economy and improve infrastructure, but the technical workers needed to move some of these projects forward are in short supply. To tackle this issue, Schwarznegger has proposed a plan to put 20,000 new engineers into the workforce by 2014. The California Labor and Workforce Development Agency estimates that the state will have a shortfall of 40,000 engineers by 2014, and within the next six years, there will be 12,600 openings for civil engineers; 7,400 for computer engineers; and 2,200 for environmental engineers. The agency projects that the state will need at east 20,000 to 24,000 engineers to meet the needs of both the private and public sectors.

**Connecticut PEs Oppose Exam Exemption** – The Connecticut Society of Professional Engineers testified in March against legislation that would exempt engineers and surveyors with at least 20 years of experience from licensing examinations. Connecticut’s current law give the licensing board flexibility and discretion to waive licensure exam requirements based on years of experience and demonstrated competence. When the state began licensing engineers, this “grandfather” provision was intended as a way to allow experienced engineers to become licensed. Recently, however, the board has moved away from this provision. Last June, the board established a policy that it will no longer waive the Fundamentals of Engineering Examination, regardless of the applicant’s years of engineering experience. Under the current state law, the board also has the flexibility to waive examination requirements for surveyors with at least 16 years of experience.

**NCEES Considers Computer-Based Exams** – As other professions move to computer based licensing exams, the National Council of Examiners for Engineering and Surveying (NCEES) is again looking into the possibility of a computer-based FE and PE exams. Last year, NCEES President Gene Corely, P.E., formed a task force to examine the issue after some NCEES member boards expressed concern that the engineering profession could be falling behind the curve. Among the professions that currently use computer-based licensing examinations are architecture, landscape architecture, accounting, medicine and veterinary medicine.

**Maryland PEs Oppose Geologist Licensing Bill** – Maryland legislators have rejected a bill that would have established the licensing of geologists. The legislation was opposed by professional engineers over concerns about practice overlap. At a march 6 hearing, Robert Mead, executive director of the Maryland Society of Professional Engineers, urged the Senate Education, Health, and Environmental Affairs Committee to oppose the legislation (SB 678/HB 870). Mead told the committee that the definition of the “practice of geology” was too close to the statutory definition of the “practice of engineering.” The definition, he said, would allow licensed geologists to perform work that falls within the domain of professional engineering, specifically work in connection with public or private utility structures, roads, and buildings.

**New York Buildings Department to Reform Professional Certification Program** – The New York City Department of Buildings is reforming a program that allows professional engineers and architects to “self-certify” building inspections, following the indictment of a licensed engineer for falsifying inspection reports. The department released a statement on March 3 addressing the indictment of a professional engineer and the department’s intentions to increase oversight of architects and engineers who professionally certify. “Architects and engineers must be held accountable when they fail to uphold their responsibilities that have serious implications for the safety of the public and our public servants” The professional engineer was indicted on three counts of perjury for allegedly falsifying a report that he provided the final building code inspection for a Bronx, NY store that collapsed during a fire in August 2006.

**DC Inspector General Raises Concerns Over PE Exemption** – A law that allows unlicensed engineers to be employed in critical positions within DC government agencies is raising concerns about public health and safety. In an April 14 letter, DC Inspector General Charles Willoughby informed Mayor Adrian Fenty that the exemption may raise significant liability issues for the city and provided details of ongoing reviews to address professional engineering shortages within DC agencies. According to interviewed employees of the DC Department of Consumer and Regulatory Affairs, many engineers work without the oversight of licensed engineers but are responsible for determining such things as structural safety and reviewing plans submitted by engineers who are required to be licensed. The interviewees and members of the licensure board said that many private sector professional engineers who submit plans to the agencies are not confident in the abilities of unlicensed government engineers to review plans adequately.

## **FEDERAL LEGISLATIVE/REGULATORY MATTERS**

**Science Funding Included in War Supplemental Appropriations** – The House and Senate completed work this week on the FY 2008 War Supplemental Funding bill, H.R. 2642, which included \$400 million in funding for scientific research. This additional funding restores some, but not all, research and development funding that was stripped out in the final stages of the FY 2008 appropriations process. The new bill would add \$62.5 million for the National Science Foundation, \$62.5 million for the Energy Department's Office of Science, \$62.5 million for the National Aeronautics and Space Administration, and \$150 million for the National Institutes of Health. The science funding in the final version of the bill represents about one-third of the amount that was in the original Senate draft supplemental. Congress and President Bush have called for an increase in science funding over 10 years, but appropriators have not matched those pledges. The President is expected to sign the supplemental appropriations bill soon.

**Corps Budget for 2009 Cut, Boosts for Energy Research** – The House Appropriations Committee approved a bill this week that would increase funding for energy research in Fiscal Year 2009 and cut the budget of the U.S. Army Corps of Engineers by five percent. The bill would provide the Corps with \$5.3 billion, down from almost \$5.6 billion in FY 2008. The committee approved \$27.2 billion, \$2.7 billion above FY 2008 and \$1.3 billion above the president's request, for the Department of Energy to finance "major new initiatives to address skyrocketing energy costs." "Compared to FY08, the [president's] FY09 budget request for energy conservation and renewable energy is actually down by 27.1 percent in the midst of an ongoing energy crisis with increased volatile costs for petroleum and natural gas, over reliance on imported oil, and growing emissions of greenhouse gases," the committee said.

**Building Code Grant Program Approved** – The House Financial Services Committee has approved H.R. 4461, the Community Building Code Administration Grant Act of 2007. The bill would authorize \$100 million over five years to fund a grant program to help local governments hire, train, and equip code officials, including building and fire inspectors. ASCE and NSPE worked with the International Code Council (ICC) and others to support this legislation.

**House Passes Bridge Reconstruction Bill** – The National Highway Bridge Reconstruction Act (H.R. 3999), passed the House of Representatives by a vote of 367 to 55 in July. The bill was originally put forward in the fall of 2007 to address the growing concern over bridge safety after the collapse of the I-35 W Bridge in Minneapolis last summer. The bill requires immediate updates of bridge inspection standards; strengthens training, certification, and qualifications standards for bridge inspectors; requires immediate inspection of all structurally deficient bridges; and requires states to calculate the load rating for structurally deficient bridges to ensure that maximum weight limits are properly posted. Additionally, the legislation implements a risk-based prioritization for reconstruction of structurally deficient bridges and asks the National Academy of Sciences to conduct an independent review of the Department of Transportation's method of assigning risk-based priorities. Finally, the bill requires that states implement Bridge Management Systems to improve inspection processes and data collection.

**Highway Trust Fund Fix Passes House** – The House approved H.R. 6532, legislation to fix the looming shortfall in the Highway Trust Fund, by a 387-37 vote. This vote total is significant not only because a two-thirds majority was necessary to pass the bill under "suspension of the rules", but also because the Bush Administration issued a veto threat. Pointing to the transfer of monies from the general fund, the administration charged that the measure would "unnecessarily increase the deficit" and set a "dangerous precedent that shifts costs from [highway] users to taxpayers at large." However, the \$8 billion is the same amount transferred from the Highway Trust Fund in 1998 when the firewalls were created.

## **COURT DECISIONS**

**Dorris v. Baxter & Woodman** – Groups within EJCDC along with AIA have filed a "friend of the court" brief in the Illinois case of *Dorris v. Baxter & Woodman* following an Illinois appellate court's decision to grant the societies motion to submit the brief. The case arose from an accident that occurred during the construction of modifications to the City of Woodstock's North Wastewater Treatment Plant. The plaintiff, an employee of a construction subcontractor, was injured during the construction of an air access bridge running from the outside perimeter to the center point of a deep concrete tank. Dorris sued the engineering firm that designed the improvement. The case involves the application and interpretation of the EJCDC document language relating to the role of the engineer during the construction phase and the contractual responsibility for construction site safety.

**Terracon Consultants v. Mandalay Resort Group** – The American Institute of Architects, AIA Nevada, AIA Las Vegas, The American Council of Engineering Companies, The American Council of Engineering Companies of Nevada, The Design Professionals Coalition of the American Council of Engineering Companies, The National Society of Professional Engineers, The Nevada Society of Professional Engineers, ASFE/The Best People on Earth, The American Society of Civil Engineers, and The Nevada Section of The American Society of Civil Engineers jointly filed a "friend of the court" brief in Nevada defending the application of the "economic loss doctrine" in a case involving the following issues: (1) Does the economic loss doctrine apply to contractors that solely provide services in construction defect cases?, and (2) Does the economic loss doctrine apply in construction defect cases to design professionals, such as engineers and architects, who solely provide services, regardless of whether the services are rendered before or during construction?

On February 5, 2008, Oral Argument was held. The good news is that the Nevada Supreme Court, sitting en banc, gave no indication during argument that it was inclined to deny design professionals the protections of the economic loss rule. The bad news is that the Court gave no indication that they thought design professionals ought to get the protections of the economic loss rule.

\* \* \*