

Significant Legal and Legislative Activities

Prepared for the NSPE-PEPP Professional Liability Committee
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The following is a summary of recent legal/legislative activities of interest to the NSPE-PEPP Professional Liability Committee collected from information provided by 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

Connecticut PEs Oppose Licensure of “Engineering Professionals” – Connecticut Legislators, under pressure from engineering groups, have agreed to rewrite a bill that would have created a parallel licensing system for engineers within the state Department of Economic and Community Development. In February, Connecticut Society of Professional Engineers Executive Director Paul Brady testified to the House Commerce Committee that the bill, if enacted, would lead to many negative consequences. The Connecticut chapter of the American Council of Engineering Companies, the Connecticut Society of Civil Engineers and the Connecticut Conference of Municipalities also opposed the bill. The intent of the bill (H.B. 5821) was to allow PEs to certify that economic development projects were designed and built to standards and to speed up the approval process for projects with funding from the Department of Economic and Community Development. The bill, however, also appeared to create a “licensed engineering professional” designation as well as a new licensing system with lower standards than the current PE licensing system. During his February 2009 testimony, Brady told the committee that the bill could pose a risk to public safety. “Having unqualified people designing or approving projects could be dangerous,” he said. “People could die or be injured in traffic accidents, buildings could collapse, and there could be environmental accidents.”

Michigan Teaches New Skills to Out-of-Work Engineers – To counteract the recent layoffs in the auto industry and prevent engineers from leaving the state, Michigan educators and companies are teaming up to help retrain engineers in new fields. Michigan Technological University in Detroit is offering a free class in hybrid and electrical vehicle development for out-of-work engineers. The school teamed up with the Engineering Society of Detroit and General Motors to create the class. The idea for the program came last year from GM Executive Director of Engineering Staffs Terry Wochowski, as automakers in Michigan began laying off experienced engineers to cut costs. At the same time, federal and state legislation created a demand for hybrid and high-mileage vehicles, and auto companies were searching for engineers to develop those cars. “This is the growth area in the auto industry,” Wochowski told the Detroit Free Press. “Giving engineers experience in this makes them more employable. We want to offer engineers who have invested their lives in the auto industry and this community a chance to contribute.”

Oregon PEs Oppose Rule of Design of Fire Protection Systems – A controversial rule change allowing certain licensed electricians and technicians to design and plan portion of fire protection systems has professional engineers in Oregon concerned about risks to the public. The rule, which took effect January 1, allows general supervising electricians, general journeyman electricians or class-A limited energy technicians to design, plan and layout the electrical portions of fire protection systems if they are employed by a licensed electrical contractor and acting as the contractor’s signing supervisor. The rule stems from legislation enacted in 2005. The Oregon State Board of Examiners for Engineering and Land Surveying has expressed concern about the rule. In December 2008, the board said that the state’s Building Codes Division should review and revise the rule because it may create a genuine risk to the public.

Michigan Increases Penalties for Illegal Practice – Michigan Governor Jennifer Granholm signed two bills in December that will increase penalties against individuals found guilty of practicing as a professional engineer, registered architect, or a professional surveyor without a valid license. The new penalties and guidelines include the following: (1) in the case of a first offense, a misdemeanor punishable by a fine of not less than \$5,000 or more than \$25,000 or imprisonment for no more than 93 days or both; (2) In the case of a second or subsequent offense, a misdemeanor punishable by a fine of no less than \$5,000 or more than \$25,000 or

imprisonment of no more than one year or both; (3) in the case of an offense that causes death or serious injury, a felony punishable by a fine of no less than \$5,000 or more than \$25,000 or imprisonment for no more than four years or both; (4) an individual who has use the services of a person engaged in unlicensed work may take legal action to gain a refund or compensation.

FEDERAL LEGISLATIVE/REGULATORY MATTERS

Recovery Legislation Signed by Obama - President Barack Obama signed the American Recovery and Reinvestment Act into law. The economic stimulus plan includes about \$100 billion in infrastructure investments. The public will be able to track the progress of the stimulus online at a new website: <http://www.recovery.gov>. The Office of Management and Budget issued a guidance memo outlining the procedures federal agencies must use to undertake stimulus projects. Among information that must be submitted to [recovery.gov](http://www.recovery.gov) are weekly status updates and monthly financial reports.

In an interview with *The National Journal* about his upcoming legislative priorities, President Obama signaled his intention to continue focusing on infrastructure policy. His plans for the upcoming surface transportation authorization include major program reforms and a new effort to reduce energy consumption. To finance new infrastructure projects, the president reaffirmed his support of the Infrastructure Bank Act, legislation that was originally introduced in the 110th Congress to create a government entity that loans funds for infrastructure projects of national significance. He went on to say, "The idea of an infrastructure bank I think makes sense -- the idea that we get engineers and not just elected officials involved in thinking about and planning how we're spending these dollars... I think there should be some way for us to just think about how we can rationalize the process to get the most bang for the buck, because the needs are massive and we can't do everything."

National Engineers' Week Honored by Congress - By a vote of 422-0, the U.S. House of Representatives approved House Resolution 117 in honor of National Engineers' Week. The resolution, sponsored by Rep. Daniel Lipinski (D-IL), states that the House of Representatives supports the goals and ideals of National Engineers' Week and its aims to increase understanding of and interest in engineering and technology careers and to promote literacy in math and science; and will work with the engineering community to make sure that the creativity and contribution of that community can be expressed through research, development, standardization, and innovation.

\$545 Billion Surface Transportation Bill Pushed by AASHTO - Testifying on behalf of the American Association of State Highway and Transportation Officials (AASHTO) before the House Budget Committee on Tuesday, Debra L. Miller, Secretary of the Kansas Department of Transportation, called on Congress to enact a \$545 billion surface transportation authorization bill before SAFETEA-LU expires at the end of September. She also urged Congress to reject the Administration's budget scorekeeping proposal which would eliminate contract authority and said that the Highway Trust Fund (HTF) could experience a cash flow crisis as early as July 2009. She urged Congress, if necessary, to provide interim funding in the second quarter of this year to assure that there is no interruption in the highway program in either FY 2009 or FY 2010.

Miller told the Committee that, "in order to sustain the federal highway and transit programs, restore their purchasing power, and begin needed investment in the national freight system network and in intercity passenger rail, Congress should

- fund the federal highway program at \$375 billion between 2010 and 2015; fund the federal transit program at \$93 billion between 2010 and 2015;
- fund the freight program at \$42 billion between 2010 and 2015 (from resources outside the Highway Trust Fund); and
- fund the intercity passenger rail program at \$35 billion between 2010 and 2015 (from resources outside the Highway Trust Fund)."

[Comprehensive Energy Plan a Major Priority for USDOT](#) - Testifying before the House Energy and Commerce Committee on Wednesday, U.S. Department of Transportation (DOT) Secretary Ray LaHood said that the Obama Administration “considers a comprehensive energy plan that will generate millions of clean energy jobs, reduce our reliance on oil, reduce pollution, create more livable communities, and attack climate change, a major priority,” and that DOT will be a full partner in all of these efforts. “This is essential,” LaHood said, “because transportation sources are a significant contributor of greenhouse gas emissions in the U.S. and must be part of the solution.”

LaHood appeared before the Committee during its second day of hearings on the American Clean Energy and Security Act of 2009, a 600-page draft cap-and-trade and energy bill proposed by Committee Chairman Henry Waxman (D-CA) and Energy and Environment Subcommittee Chairman Ed Markey (D-MA).

LaHood pointed to the administration's investment initiative in high speed rail and its efforts to transform the way transportation serves the American people by creating more choices and encouraging less carbon-intensive transportation as evidence of the administration's commitment. “We have long recognized the importance of transitioning away from fossil fuels, improving vehicle technologies, and optimizing the transportation network to reduce fuel-wasting activities like idling in traffic,” he said.

COURT DECISIONS

[Dorris v. Baxter & Woodman](#) – Groups within EJCDC along with AIA 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.

In December 2008, the Illinois Court of Appeals affirmed the adverse jury decision against Baxter & Woodman, including the trial court's exclusion of standard contract clauses regarding construction-phase responsibilities.

EJCDC and AIA continue to study the opinion regarding potential implications for EJCDC and AIA contract document language regarding 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.

On March 26, 2009, the Nevada Supreme Court held that the economic loss doctrine “bars professional negligence claims against design professionals who provide services in the process of developing or improving commercial property when the plaintiff's damages are purely financial.”

The opinion declined to create an exception to the economic loss doctrine for professional design services. To quote a paragraph destined for quotation in future briefs and opinions:

"We perceive no significant policy distinction that would drive us to permit tort-based claims to recover economic losses against design professionals, such as architects and engineers, who provided their professional services in the commercial property development and improvement process, when we have concluded that such claims are barred under the economic loss doctrine if brought against contractors and subcontractors involved in physically constructing improvements to real property. See *Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000).[9] The work provided by construction contractors or the services rendered by design professionals in the commercial building process are both integral to the building process and impact the quality of building projects. Therefore, when the quality is deemed defective, resulting in economic loss, remedies are properly addressed through contract law." (Opinion at pp. 17-18.)

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