

Significant Legal and Legislative Activities

Prepared for the NSPE-PEPP Professional Liability Committee
September 24-25, 2009 – Chicago, IL

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

New Jersey Society Protects PE Role in Site Remediation – The New Jersey Society of Professional Engineers has gained protection for the PE license by successfully lobbying for changes to legislation designed to speed up site remediation.

The legislation (S. 1897/A.2962), introduced last June, would establish a licensing program for professionals performing site remediation. The legislation's intent is to deal with permit backlogs and streamline the permitting process by prequalifying individuals to prepare and submit plans to the New Jersey Department of Environmental Protection. The legislation was passed by both houses on March 16 and was signed into law by Governor John Corzine on May 7.

In testimony to the Senate Environment Committee and the deputy commissioner of NJDEP, New Jersey Society Legal Counsel Lawrence Powers and other society representatives called for a bill that protects the public by adhering to the state's engineering practice statute, which limits who can provide remediation services. According to Powers, the original bill language would have created a class of quasi-engineering professionals who could prepare and submit permit applications and site remediation plans without being licensed PEs.

The New Jersey Society persuaded legislators to amend the bill by adding language that would prohibit a licensed site professional from practicing engineering, and professional engineers who want to be a licensed site professional would be required to take only the technical engineering portion of the proposed site professional licensing exam. Powers says that NJDEP wanted a demonstration of competence by PEs that would be acting on behalf of the department in pre-approving site remediation plans under the program.

Bill to Protect Homeowners Puts Design Professionals at Risk – Washington design professionals are speaking out against legislation aimed at protecting homebuyers because they say the bill will result in unfair liability for architects and engineers.

The bill (H.B. 1393), introduced in January, aims to protect consumers from poor residential construction. The bill would, among other things, establish worker certification standards and establish a home construction board to handle disputes related to residential construction.

"There's an issue where there has been shoddy construction by the contracting industry for some time, particularly on residential construction," says Ken McGowan, P.E., who represents the Washington Society of Professional Engineers on the Architects & Engineers Legislative Council.

"Some homeowners have moved into their new home only to discover after two years that there are infiltration issues, mold issues, and differential settlement of the foundation. Usually the homeowner has no remedy if a small contractor is involved."

The council is a lobbying coalition that includes the American Society of Civil Engineers, the American Society of Landscape Architects, IEEE, the Land Surveyors Association of Washington, as well as the Washington chapters of the American Council of Engineering Companies, the American Institute of Architects, and the Structural Engineers Association.

The council is concerned that the bill would expose design professionals to unfair litigation and financial strain. "Design professionals that continue to do residential [work] would have to do so without professional liability coverage," says McGowan. "Their only alternative would be to get out of the residential design practice, and if that's their primary source of income, they would be in deep trouble."

Liability Exposure Concerns New Hampshire PEs – New Hampshire PEs are opposing a bill that would change the way juries assess damages in civil cases because of concern that the bill would increase engineers' liability exposure.

The bill (H.B. 197), introduced on January 7, allows a jury to allot responsibility for damages only to parties that remain before the court at the conclusion of a trial. Matthew Low, P.E., president of the New Hampshire Society of Professional Engineers, says that the organization is not opposed to fair compensation of victims in civil lawsuits but believes there should be a sense of fairness when determining who pays what portion of the damages. Similar legislation introduced two years ago was vetoed by Governor John Lynch. "The bill language has been simplified. It looks very innocent, but it carries a big stick," Low says. "The business community got caught off guard before, but this time we were ready."

Low expressed the New Hampshire Society's concern about the bill. In a March 25 letter to Lynch, Low wrote that the bill "will significantly increase liability exposure of professional engineers without limits even where the design professional is found only partially at fault." He added: "This additional exposure to liability in New Hampshire will negatively impact engineering firms across the state, making each potentially liable for 100 percent of damages despite the level of actual responsibility."

Low pointed out that the increased risk of unfair awards will force engineers to settle cases, even if they are not at fault and will negatively effect the engineering profession. "At a time when more engineers are needed to meet increasing infrastructure and societal needs and fewer people are entering the engineering profession, we should be improving the conditions in which engineers practice, not creating unnecessary risks for them," he wrote.

Low also mentioned that the legislation could raise engineers' insurance premiums, and the added costs would be passed to public and private clients.

The New Hampshire chapters of the American Council of Engineering Companies and the American Society of Civil Engineers, as well as the Business and Industry Association of New Hampshire, are also opposed to the legislation.

Again, Licensing Law Reform Moves Forward in California – California legislators and engineering groups are once again trying to change the state's PE licensing system to make it similar to the licensing systems in most other states.

The legislation (S.B. 275), introduced on February 24, would reform California's licensing law to allow anyone licensed as a PE to practice engineering in the field or fields in which he or she is competent. The bill is supported by the California Legislative Council of Professional Engineers, which includes the California Society of Professional Engineers and 12 other engineering groups.

California's current licensing system runs counter to NSPE's support for the concept of licensure of engineers only as "professional engineers," not by designated branches or specialties. The system is a complicated mix of "practice act" disciplines (civil, electrical, and mechanical engineering) and nine "title act" disciplines (agricultural, chemical, control system, fire protection, industrial, metallurgical, nuclear, petroleum, and traffic engineering).

Anyone, licensed or not, is permitted to practice in the title act disciplines. Licensees, however, are the only ones allowed to use the titles on business cards, on stationery, and in advertisements. Title act licensees are permitted to use the title "professional engineer," but they are not permitted to practice civil, electrical, or mechanical engineering, as defined by California law.

In the practice act disciplines of civil, electrical, and mechanical engineering, only licensees are permitted to practice in these areas and use the titles.

The system has negative consequences for engineering practice. It creates confusion over the kinds of work each PE is allowed to perform, and it creates an environment in which practice overlap and turf battles are common.

Attempts to change California's licensing law have been going on for years. In the 1990s, the state licensing board was unable to end discipline-specific licensure, and in 2002 it published a study calling for practice protection for all disciplines. The study was followed in 2005 by legislation that would have enacted the board's recommendations, but the bill never made it out of committee.

Bob Katin, P.E., president of the California Legislative Council of Professional Engineers, is hopeful that the new legislation will become law. "The bill is sponsored by users of engineering services, and they are saying that the law is broken, so fix it," he says. "It's costing industry and ultimately taxpayers more to follow this law."

Katin also believes that a new licensing law will help Governor Arnold Schwarzenegger meet his goal of bringing 20,000 new engineers into the state's workforce.

A public hearing on S.B. 275 was scheduled by the Senate Business, Professions, and Economic Development Committee for April 20.

FEDERAL LEGISLATIVE/REGULATORY MATTERS

Stimulus Funds Flow to Water Infrastructure Projects – With national stimulus funds working to pump life and dollars into the economy, construction projects have moved to the forefront as politicians try to create jobs as quickly as possible. The latest area of focus is water and wastewater infrastructure, which is getting \$7 billion in federal money for upgrades and changes.

For years, engineers have tried to raise awareness about the dire need to revitalize the nation's water infrastructure. Crumbling sewers, outdated control systems, and hazardous water treatment plants are the focus of hundreds of small projects across the country.

The U.S. Bureau of Reclamation has earmarked \$1 billion in stimulus funds for water infrastructure projects, including major work in Arizona and the lower Colorado River region. The Pima-Maricopa Irrigation Project on Arizona's Gila River Indian Reservation will get more than \$36 million to build 10.5 miles of canals as part of a larger system to deliver water to the area.

Other water delivery systems will receive about \$36 million around Yuma, Arizona, to repair pumps and equipment along 23 miles of canals and replace numerous walls and dams along the Colorado. Nearly \$12 million will go toward overhauling systems in the San Carlos Irrigation and Drainage District south of Phoenix, which could save more than 8.1 billion gallons of water a year.

The Environmental Protection Agency has divided nearly \$2 billion in stimulus funding among the state's for their Drinking Water State Revolving Loan programs, which provide communities with low-interest loans for water infrastructure upgrades. States that have received the largest grants are California (\$159 million) and Texas (\$160.7 million).

The money is already being put to work. In Maine, for example, groundbreaking is expected to begin no later than August 1 on a project to upgrade a water treatment plant that serves two towns in the southern part of the state. Governor John Baldacci expects that the approximately \$19 million for drinking water will help create jobs, improve public health, and promote economic development.

The EPA has also awarded about \$4 billion for wastewater infrastructure projects across the country, including \$430 million to New York State. EPA received the money under the American Recovery and Reinvestment Act, and New York's Environmental Facilities Corporation will disperse the funds to local governments.

Council Begins Development of Code for Green Building – The International Code Council announced in April that it plans to create a green building code to regulate commercial structures. The council hopes the new code will become the measuring stick for green building worldwide.

"It has become clear to us that to advance the goal of achieving more sustainable building performance, some regulatory framework is needed for areas where market forces are not enough," says Code Council CEO Richard Weiland. "We face challenges not only with new construction, but with existing buildings and how we can increase their levels of safety and sustainability over time."

ICC began developing green building standards in the 1970s with the International Energy Conservation Code, which sprang from the oil-shortage crisis of the time. The Green Building Code will be designed to provide criteria for environmentally-conscious construction of traditional and high-performance buildings.

"We have arrived at an opportune time to build on the information and resources available to us to design a useable code as a model for green building programs," says Code Council President Adolf Zubia. "We plan to use the same principles that have made the Code Council family of codes so successful, which is the development of model regulatory material that is consistent, coordinated, and developed in a consensus process."

More recently, ICC signed a memorandum of understanding with the U.S. Green Building Council to continue supporting environmentally conscious construction. ICC has also created professional training and certification programs in green system practice and has established the Sustainable Building Technology Committee, a Code Council Board initiative.

The council plans for the new code to address the complete carbon footprint of new buildings, including energy efficiency, water efficiency, conservation of materials, and indoor air quality.

ICC says the new code will focus on commercial building and not residential construction. The council already uses a residential building code, known as the National Green Building Standard (ICC 700), which it developed in partnership with the National Association of Home Builders.

The development of a new code coincides with some states' decision to focus on enforcing current energy-efficiency regulations. Maryland officials are hoping to secure a \$52 million stimulus fund grant from the U.S. Department of Energy, but DOE has made it clear that states must employ stricter enforcement of regulations to get the funds.

Many of ICC's codes are adopted by city, county, and state governments, although many are altered to apply locally. ICC hopes its new Green Building Code will become a baseline for commercial green building worldwide.

ICC plans to get input on the code from a wide variety of officials, architects, and engineers who can help make the code universal.

Panel Urges New Approaches To Critical Infrastructure – The U.S. must make a paradigm shift in the way it treats critical infrastructure, says a recent report from the National Research Council. Although the deteriorating state of U.S. infrastructure has been a hot topic for years, the report explains that the discussion has failed to recognize two important elements: the link between infrastructure and other important national issues and the interdependency of systems.

The report grew out of a workshop with 50 experts from government, academia, and the private sector held May 7–8, 2008, at the National Academies in Washington, D.C. A committee within NRC's Board on Infrastructure and the Constructed Environment had been charged with identifying challenges in "moving toward critical infrastructure systems that are physically, socially, economically, and environmentally sustainable," the report says.

After the data-gathering workshop, the workshop committee developed its report, describing a framework to help the country renew critical infrastructure in ways that address other 21st century challenges. David Nash, P.E., an NSPE member who served as director of the Iraq Reconstruction Management Office, was chair of the workshop committee. In the report's preface, he writes that critical infrastructure renewal can help meet such challenges as economic competitiveness, climate change, national security, energy independence, and disaster resiliency.

For instance, Nash explains that power, transportation, water, and telecommunications systems enable the production and delivery of goods and services that are vital to economic competitiveness, emergency response, and quality of life. In addition, those systems make up 69% of the country's energy use and more than 50% of the greenhouse gas emissions tied to climate change.

But local, regional, and national policies, processes, and practices currently treat critical infrastructure systems as individual units when, in fact, they are interdependent, the report says. Without an overall strategy for infrastructure renewal and by focusing on one system, issue, or problem at a time, the U.S. risks wasting scarce resources and creating new problems, writes Nash.

Thus, the report outlines the following necessary components for developing short- and long-term solutions:

- A broad and compelling vision that will inspire people and organizations to pull together to meet the challenges;
- A focus on providing essential services versus upgrading physical facilities in order to foster innovative thinking;
- Recognition of the interdependencies among critical infrastructure systems to enable the achievement of multiple objectives and avoid narrowly focused solutions;
- Collaborative, systems-based approaches to leverage resources and provide cost-effective solutions; and
- Performance measures for greater transparency in decision making.

"What we...hope the report does is to begin the dialogue," says Nash. The approach the committee took was to ask, "Can we frame the question so that we can begin to look for the solution?" he adds.

The report, Sustainable Critical Infrastructure Systems: A Framework for Meeting 21st Century Imperatives, is available at www.nap.edu.

COURT DECISIONS

Witt v. LaGorce – In the *Witt v. LaGorce* (3rd DCA Case No. 3D08-1812), the Florida 3rd District Court of Appeals has ruled that pursuant to *Moransais v. Heathman*, 744 So.2d 793 (Fla. 1999), and the Florida Statute licensing Geologists, even if an individual professional is specifically referenced in a limitation of liability provision, "such a limitation would be unenforceable as a matter of law."

If the Court's Decision herein becomes the law of Florida, individual professionals (except lawyers, who can limit their liability in accordance with the Rules regulating the Bar) and doctors (who can limit their liability pursuant to Florida Statutes) will face unlimited personal exposure to clients whether they operate those corporations or not. Further, this case may bring into question whether individual professionals can lawfully enforce a contractual indemnification provision.

The Florida Engineering Society and other design professional and related groups are filing a friend of the court brief in this matter before the Florida Supreme Court.

* * *