

*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*

Significant Legal/Legislative Policies/Activities
Prepared for the Engineers Joint Contract Documents Committee
February 10, 2017
Phoenix, AZ

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).

FEDERAL AND STATE TRENDS FOR 2017

What are the legislative and regulatory threats professional engineers will be facing in 2017? Every year, PEs face challenges to the practice of engineering. And every year, in response, NSPE works to protect the PE license and promote continuous focus on the public health, safety, and welfare.

Scrutiny of Occupational Licensure – The debate over the role of government in regulating occupations and professions has recently come to the forefront. According to the Bureau of Labor Statistics, occupational licensing directly affects nearly 30% of US workers. Barbers, cosmetologists, florists, interior designers, naturopaths, manicurists ... and the list goes on. While the work of professional engineers—like that of doctors, registered architects, and attorneys—clearly affects the public health, safety, and welfare, it is not uncommon for policymakers to categorize highly educated and trained PEs with barbers and cosmetologists in the debate over eliminating occupational licenses. Federal and state elections have set the stage for a new era of deregulation. For the last several years, momentum to roll back occupational licensing has been growing. NSPE expects 2017 to be a watershed year for this issue.

Changes to Licensing Board Composition and Oversight – The 2015 US Supreme Court decision in *North Carolina Board of Dental Examiners vs. Federal Trade Commission* has led some states to consider changing the oversight and composition of their licensing boards to ensure compliance with the decision. An increasing number of states are expected to introduce legislation and regulations to ensure that states and state boards do not subject themselves to increased liability. These changes increase oversight and supervision of licensing boards, often by the state attorney general. They also, in some instances, change the composition of the state board to include non-active market participants.

Attempts to Erode Qualifications-Based Selection of Engineering Services – In 2016 there were several legislative and regulatory attempts to erode or eliminate qualifications-based selection of engineering services. In a political environment of deregulation, NSPE anticipates that there will be increased threats to QBS in 2017.

Weakening Licensure Requirements for Federal Engineers – The past year was an extraordinary one for strengthening requirements for licensure of federal engineers, a top and longstanding NSPE priority. Regulatory advocacy initiatives yielded strengthened requirements for professional engineers in engineering projects across the country, particularly in the Environmental Protection Agency and the Department of the Interior. The Trump administration and 115th Congressional leaders have pledged to deregulate and roll back many of these regulatory requirements, which has the potential to impact the strengthened requirements already enacted as well as prospects for further requirements in these and other federal agencies.

FEDERAL AND STATE LEGISLATIVE/REGULATORY MATTERS

EPA's New Emissions Rule Requires PEs – Environmental Protection Agency has issued a requirement for a licensed engineer in its final rule on emissions and compliance related to municipal solid waste landfills. The rule mandates that a state's plan must include a process for state review and approval of the site-specific design plan for each gas collection and control system. A professional engineer must prepare and approve the design plan.

*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*

In September 2015, NSPE submitted a public comment to the EPA, commending the agency for proposing new safety measures requiring a professional engineer to prepare site-specific gas collection and control system plans as part of the proposed rule.

The EPA's rule also finalizes two criteria that address when an affected source must update its design and when a plan should be submitted to the agency for approval. The revised plan must be submitted using the following timeline: (1) within 90 days of expanding operations to an area not covered by the previously approved design plan; and (2) prior to installing or expanding the gas collection system in a manner other than the one described in the previous design plan. The final rule continues to require landfill owners or operators to prepare both an initial and revised design plan.

[New York Society Praises Indictment for Falsified Hurricane Sandy Engineering Reports](#) – New York Attorney General Eric Schneiderman handed down a 50-count felony indictment in August against an unlicensed engineer and his former engineering employer for allegedly altering engineering reports detailing structural damages experienced by residences during Hurricane Sandy in 2012. The New York State Society of Professional Engineers praised the attorney general for taking strong actions against engineering malpractice.

According to a statement from the attorney general's office, HiRise Engineering, PC was hired to perform structural engineering assessments for residential properties covered by the National Flood Insurance Program, in order to help with evaluating coverage under the program. The firm hired licensed engineers to perform inspections and prepare engineering reports. It is alleged that the original reports authored by the professional engineers were altered by employees of HiRise under the direction of Matthew Pappalardo. These employees and Pappalardo, according to prosecutors, didn't inspect the damaged buildings and were not licensed to practice engineering in New York.

Schneiderman described the allegations as a "flagrant disregard for the well-being and safety of New Yorkers" that his office will not tolerate. Pappalardo and HiRise have been charged with 25 counts of forgery in the second degree. Pappalardo is also charged with 25 counts of the unauthorized practice of engineering. The attorney general's investigation also discovered evidence of crimes that are outside of the New York state jurisdiction and have been referred to the US Department of Justice.

[NSPE, Kentucky Society Repel Attack on QBS](#) – NSPE and the Kentucky Society of Professional Engineers have prevented the implementation of a proposed rule that would have rescinded regulations directing the Kentucky Transportation Cabinet to carry out qualifications-based selection.

NSPE and KSPE contacted transportation cabinet officials to emphasize the value of qualifications-based selection and the necessity of the regulations. As a result, the cabinet withdrew its proposed rule to eliminate the regulations.

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 Act of 1972, which requires federal agencies to use QBS procedures when procuring design services. The Brooks Act has served as a model for the implementation of QBS on the state and local levels.

COURT DECISION

[Balfour Beatty Infrastructure, Inc. v. Rummel, Klepper & Kahl, LLP](#) – ACEC, ASCE, AIA, NSPE, and other design professional organizations have filed a friend of the court brief in connection with an appeal to the Maryland Court of Appeals testing the economic loss doctrine. The case involves a suit originally brought by a construction contractor against a consulting engineering firm in which the contractor was not in contractual privity for purely economic damages in connection with a waste water treatment project for the city of Baltimore, Maryland. The trial court ruled in favor of the engineering firm and the contractor appealed. A decision is expected in late 2016 or early 2017.

In the case of *Balfour Beatty Infrastructure Inc. vs Rummel Klepper & Kahl LLP*, NSPE is asking the court to affirm the judgment of the Court of Special Appeals, which confirmed the significance of contracts to maintaining predictability and certainty in the allocation of risk in the construction industry. If the judgment is not affirmed, design

*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*

professionals would face a diminished ability to contractually manage and control project risks and face exposure to unlimited liability for all of the economic consequences of a negligent act. Costs associated with both public and private procurement would also increase.

The Court of Special Appeals considered whether the economic loss doctrine applies to shield an engineering firm from tort claims brought by a contractor seeking damages for economic losses suffered in consequence of relying on the firm's allegedly defective designs and projections. While the engineering firm and the contractor each had separate contracts with the government to perform work on the same design-bid-build construction project, there was no contract between the parties.

The Society argues in the brief that if the Maryland Supreme Court adopts the position advocated by the appellant, the scope of potential liability for design professionals, and by extension many other construction industry participants, would greatly and unnecessarily expand. Such a ruling would also undermine the ability of design professionals to enter into contracts in order to define their business relationships and apportion risk and responsibility for purely economic damages.

The economic loss rule encourages parties to allocate risk and responsibility to reflect the commercial realities of a construction project. The rule requires a direct relationship to recover economic loss damages to guard against the potentially limitless risk exposure, for purely commercial or economic damages, that would result in the absence of this requirement.

* * *