

NSPE Position Statement No. 07-1771—FEMA Levee Certification

Adopted: April 2014

Latest Revision: July 2018

NSPE Contact: Committee on Policy and Advocacy

Professional Policy Supported: 07-Government

NSPE commends FEMA for recognizing the crucially significant role of the Professional Engineer (PE) in evaluating a levee for certification. It is, however, the position of the National Society of Professional Engineers (NSPE) that the Federal Emergency Management Agency (FEMA) levee certification program places an unreasonable burden on professional engineers, exposing them to great legal risk. FEMA should revise its certification requirement to allocate the responsibility and liability to the parties in the best position to assume that responsibility and liability—the levee boards, owners, and operators.

Recent natural events, particularly Hurricane Katrina, have prompted FEMA and the US Army Corps of Engineers (USACE) to examine the current state of our nation's flood control system. As a result, FEMA has instituted a new requirement that all levees be certified by a professional engineer in order to be eligible for FEMA accreditation and meet the criteria for a moderate-risk area on a Flood Insurance Rate Map (FIRM).

USACE estimates that there are 15,000 miles of levees built under its flood control program. There are unknown additional miles of levees erected and maintained by states, localities, and private businesses. Evaluation of a levee system requires that historical records of the original design standards, construction methods, and maintenance activities be provided for review and analysis. Often, the documents necessary to adequately perform FEMA's certification are not available to the professional engineer asked to provide that certification.

Of great concern to professional engineers is the professional liability exposure the FEMA certification program places on them. Under the FEMA program, a PE is in many instances being asked to certify levees without the protection of professional liability insurance or other liability protections. Many qualified professional engineers have been advised by their professional liability insurance carriers that they will lose professional liability insurance coverage or have their professional liability insurance premiums substantially increased if their practice includes levee certification under the current FEMA program. Professional liability insurance carriers typically will not cover professional engineering services if those services require the professional engineer to perform services beyond the professional engineer's normal and customary standard of care.

Because the US courts have construed professional engineer certifications under the FEMA certification program as a guarantee or warranty of an engineer's work, professional liability insurance carriers are unable to offer affordable professional liability insurance to professional engineers and in many cases are refusing to provide professional liability insurance at all to professional engineers performing work under the FEMA program. As a result, many qualified professional engineers no longer offer services under the FEMA program out of concern that it would leave them and their firms vulnerable to potential lawsuits, burdensome attorneys' fees, and related costs.

The FEMA levee certification requirement currently shifts much of the legal risk to the professional engineer. However, those benefitting from the certification, such as the levee boards, owners, and operators, and those protected by the levees, are in a far better position to bear the risks than the professional engineer. Not only do those parties have the means to bear such a risk, but they are the ones that have the ability and responsibility to maintain and repair the levee systems to keep those living behind the system protected. These levee boards are typically funded by those whom the levee systems protect. Instead, the current levee certification requirement unfairly shifts risk to the professional engineer.

The current FEMA program fails to adequately protect the public. Instead it actually has the potential to endanger the public. Due to the elimination of many qualified PEs from the pool of engineers available for selection because of liability concerns, those willing to perform the services under the FEMA program may not be the most qualified to do the work.

Therefore, NSPE urges FEMA to revise its certification requirement to shift the responsibility and liability to the parties in the best position to assume that responsibility and liability—the levee boards, owners, and operators. In addition, the language in 44 CFR 65.10 should be amended to remove all references to the words “certify,” “certification,” “accreditation,” “guarantee,” “warranty,” “warrantee,” and similar words to prevent further misinterpretation by the courts. NSPE also strongly recommends and urges that the USACE expedite the final adoption of its key guidance, Certification of Levee Systems (USACE ETL 1110-2-570), so that all professional engineers can follow a uniform and appropriate standard of care.