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

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NSPE Contact: Committee on Policy and Advocacy
Professional Policy Supported: 07-Government

Position Statement: It is 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 requirements 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. In addition, the language in 44 CFR 65.10 should be amended to remove all references to the words “certify,” “certification,” “accreditation,” “guarantee,” “warranty,” 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 all professional engineers can follow a uniform and appropriate standard of care.

Background:
Recent natural events, particularly Hurricane Katrina, have prompted FEMA and the U.S. Army Corps of Engineers (USACE) to examine the 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). As recognized by FEMA, professional engineers have a crucially significant role in evaluating a levee for acceptability, however, they are typically not in a position of control to ensure their recommendations and requirements for acceptability are met to maintain the levee certification.

USACE estimates 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 historical records of the original design standards, construction methods, and maintenance activities be provided for review and analysis. Often, the documentation necessary to adequately perform the evaluation to meet FEMA’s certification requirements are not available to the professional engineer asked to provide this certification.

Of great concern to professional engineers are the professional liability exposure and the inability to acquire professional liability insurance coverage due to the
FEMA certification requirements placed on them. 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, such as providing certifications. Because the U.S. courts construed professional engineer certifications under the FEMA certification program as a guarantee or warranty of an engineer’s work, professional liability carriers are unable to offer affordable coverage to professional engineers and in many cases refusing to provide professional liability insurance to professional engineers performing work under the FEMA program.