

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING
COMMITTEE WHITE PAPER**

FINAL

NOVEMBER 2, 2007

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

Table of Contents:

Forward and Committee Composition	3
Mandates	4
Definitions	4-5
Mandate Item 1A	6 - 14
Mandate Item 1B	15 - 17
Mandate Item 2	18 – 24
Mandate Item 3	25 - 37
Committee Recommendations	38
Appendix A	39 – 41
Appendix B	42 – 44
Appendix C	45 – 49
Appendix D	50 – 54
Appendix E	55 –64
Appendix F	65 –69

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

FORWARD:

In a June 15, 2006 letter the Virginia Department of Transportation (VDOT) requested the Department of Professional and Occupational Regulation (DPOR) to address VDOT's interpretation of Virginia Code Article 54.1-402.1. VDOT's letter inquired whether employees of VDOT who are licensed as professional engineers and/or land surveyors are required to seal and sign their work or if they are exempt from doing so until June 30, 2010. DPOR provided its response to VDOT with a letter dated September 8, 2006 (Appendix A) stating that professionals employed by VDOT were not exempt from complying with the Board's Regulations. With this interpretation and ruling, VDOT's Chief Engineer, Mr. Malcolm Kerley, formed the Professional Licensure Sealing and Signing Committee, known hereafter as the Committee.

COMMITTEE COMPOSITION:

Sponsor: Malcolm T. Kerley, PE – Chief Engineer

Chairman: Kendal R. Walus, PE – Division Administrator, State S&B Engineer

Members:

William D. Arel, PE – Section Manager, C. O. Location and Design Division;
Larry C. Caldwell, PE – Asst. Division Administrator, Traffic Engineering Division;
Robert Cary, PE, LS – Preliminary Engineering Manager, Salem District;
Emily S. Elliott – Assistant Division Administrator, Human Resource Division;
Robert W. Hofrichter – Asst. Division Administrator, Asset Management Division;
Adam J. Jack, PE – Preliminary Engineering Manager, Hampton Roads District;
John D. Lynch, PE – District Location and Design Engineer, NOVA District;
David D. Nuckols, PE – Assistant Division Administrator, S&B Division;
Matthew Shiley, PE – Regional Traffic Engineer, Northwestern Traffic Operations;
Kenneth J. Shirley, PE – District Construction Engineer, Culpeper District;
Jim Smith – Central Region Operations Director;
Nancey Widgen Woodson, PE – District S&B Engineer, Salem District; and
Michael W. Zmuda, PE, LS – State Survey Engineer, Location and Design Division

The selection of the committee membership was selected to ensure representation from the preliminary engineering, surveying and construction disciplines. The members represent considerable tenure in their respective disciplines. The committee was tasked with three mandates.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

MANDATES:

1. A) The Committee will determine what technical documents developed by VDOT will require sealing and signing by a professional (Professional Engineer (PE), Licensed Surveyor (LS), Landscape Architect (LA)).
1. B) The Committee will determine the global impact to VDOT's staffing as a result of this requirement.
2. The Committee will review and determine the requirements created by the revisions to the DPOR's regulations dated February 1, 2007.
3. The Committee will review and highlight existing liability insurance coverage and address liability concerns.

DEFINITIONS AS DEFINED BY THE CODE OF VIRGINIA ARTICLE 54.1-400:

"**Certified landscape architect**" means a person who, by reason of his special knowledge of natural, physical and mathematical sciences, and the principles and methodology of landscape architecture and landscape architectural design acquired by professional education, practical experience, or both, is qualified to engage in the practice of landscape architecture and whose competence has been attested by the Board through certification as a landscape architect.

The "**practice of landscape architecture**" by a certified landscape architect means any service wherein the principles and methodology of landscape architecture are applied in consultation, evaluation, planning (including the preparation and filing of sketches, drawings, plans and specifications) and responsible supervision or administration of contracts relative to projects principally directed at the functional and aesthetic use of land.

"**Land surveyor**" means a person who, by reason of his knowledge of the several sciences and of the principles of land surveying, and of the planning and design of land developments acquired by practical experience and formal education, is qualified to engage in the practice of land surveying, and whose competence has been attested by the Board through licensure as a land surveyor.

The "**practice of land surveying**" includes surveying of areas for a determination or correction, a description, the establishment or reestablishment of internal and external land boundaries, or the determination of topography, contours or location of physical improvements, and also includes the planning of land and subdivisions thereof. The term "planning of land and subdivisions thereof" shall include, but not be limited to, the preparation of incidental plans and profiles for roads, streets and sidewalks, grading, drainage on the surface, culverts and erosion control measures, with reference to existing state or local standards.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

"Professional engineer" means a person who is qualified to practice engineering by reason of his special knowledge and use of mathematical, physical and engineering sciences and the principles and methods of engineering analysis and design acquired by engineering education and experience, and whose competence has been attested by the Board through licensure as a professional engineer.

The **"practice of engineering"** means any service wherein the principles and methods of engineering are applied to, but are not necessarily limited to, the following areas: consultation, investigation, evaluation, planning and design of public or private utilities, structures, machines, equipment, processes, transportation systems and work systems, including responsible administration of construction contracts. The term "practice of engineering" shall not include the service or maintenance of existing electrical or mechanical systems.

"Responsible charge" means the direct control and supervision of the practice of architecture, professional engineering, or land surveying.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

MANDATE 1A **The Committee will determine what technical documents developed by VDOT will require sealing and signing by a professional (Professional Engineer (PE), Licensed Surveyor (LS), Landscape Architect (LA)).**

The Committee established a recommended list of technical documents requiring the sealing and sealing by a professional by the following process:

1. Committee members individually generated technical documents within each discipline which were then combined into a consolidated technical document list to be reviewed and voted on by the entire Committee.
2. Each document was reviewed and through consensus the Committee decided which would require a professional seal and signature.
3. Both lists of those documents requiring and not requiring sealing and signing are provided.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

Traffic Engineering

The Committee determined that the following Traffic Engineering related documents will be required to be sealed and signed by a Professional Engineer.

1. Traffic Engineering Studies and Recommendations
 - a. Speed Limit Studies
 - b. Signal Warrant Studies
 - c. Traffic Impact Analysis conducted by VDOT
2. Advertised Construction Plans
 - a. Pavement Marking Plans
 - b. Sign Plans
 - c. Reports for Maintenance of Traffic plans (per IIM 241.1; for both Construction and Maintenance projects)
 - i. Includes changing speed limit for Work Zones
3. Traffic signal design or modification
 - a. New signal phasing and changes to signal phasing
 - b. New signal timing (*changes to yellow/all red clearance time that deviates from methodology given in TE 306 requires PE seal*)
4. Road safety audit reports, safety studies requiring detailed engineering* and/or detailed accident analysis or corridor traffic safety studies
5. Guardrail recommendations.
6. Design of structures supporting ITS equipment (ITS components-signs, cameras and supporting electrical equipment/communication infrastructure does not require PE seal)
7. Through Truck Restriction Studies and Recommendations**
8. Operational / Capacity Analysis***
9. Traffic Standards (i.e. Traffic Control Devices)

* A review of crash data and the physical characteristics of the roadway that includes an evaluation of potential engineering countermeasures (physical roadway improvements and/or use of traffic control devices) to reduce the potential for crashes at that location or along that section of road. The resulting product (may be a simple design sketch) shall be sealed and signed.

** Through truck restriction studies and recommendations respond, according to law, to a formal request by a local governing body to restrict a particular roadway to through truck traffic. Studies involve a review of crash and traffic data and the physical characteristics of both the roadway requested to be restricted to through truck traffic and the identified alternate route, as well as public comments received as required by law, and the criteria adopted by the Commonwealth Transportation Board (CTB). The study includes a recommendation to the CTB or designee to approve or deny the formal request for a through truck restriction on that particular roadway.

*** A review of the volume and types of traffic and the physical characteristics of the roadway that includes capacity analysis or traffic flow simulation and considers potential roadway or traffic control improvements to improve traffic flow through the location or section of roadway.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

Traffic Engineering (Continued)

The Committee determined that the following Traffic Engineering related documents will **NOT** be required to be sealed and signed.

1. Pedestrian / Bicycle Facility studies
2. Street Lighting Warrant studies
3. Investigations and field reviews resulting in sign and/or pavement marking installation following established policy and standards, i.e. warning signs, guide signs, route shields, edgeline, centerline, pavement messages, etc.
4. Planning level studies (i.e. Feasibility Studies, Small Urban Plans, State Highway Plans, Regional Long-Range Plans, Corridor Studies)
5. Maintenance of Traffic plans that only reference the Work Area Protection Manual.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

Structure and Bridge

The Committee determined that the following Structure and Bridge related documents will be required to be sealed and signed by a Professional Engineer.

1. Advertised Construction Plans
 - a) New Bridges
 - b) Superstructure replacement projects
 - c) Repair/rehabilitation projects (for detail sheets that require engineering)
 - d) Deck replacement projects
 - e) Bridge widening projects
 - f) Bridge-only projects
2. Bridge Standard Sheets (for sheets that require engineering, they will be sealed by Central Office S&B Engineering Services program area staff. If the standard sheet is modified during project development, the project designer modifying the standard sheet, or supervisor, shall sign and seal the modified standard sheet).
3. Bridge Design Exceptions
4. Bridge Design Guidelines (guidelines generated by the Central Office S&B Engineering Services staff and used as a default in lieu of special design, such as deck slab reinforcing steel tables).
5. Bridge Live Load Ratings
6. Bid Documents for No-Plan Bridge Projects (only for detail sheets that were engineered)
7. Geotechnical Reports and Recommendations
8. Revisions of Construction Plans
9. Non-Standard Special Structure Plans (i.e., Sign, High-Mast Light, Bridge Sign Attachment, Foundations, Retaining Walls, etc.)

The Committee has determined that the following Structure and Bridge related documents will **NOT** be required to be sealed and signed.

1. Bridge Postings (the act of and interoffice paperwork required to get a bridge posted does not require the seal and signature of a professional engineer, however, the live load ratings generated in making this determination require the seal and signature of a professional engineer.)
2. Bridge Safety Inspection Reports
3. Bridge Feasibility Reports

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

Location and Design

The Committee has determined that the following Location and Design related documents will be required to be sealed and signed by a Professional Engineer. In addition, the list includes documents that require the signature and seal of a Landscape Architect or Licensed Surveyor.

1. Advertised Construction Plans
 - a. Roadways (pavement/alignments/enhancements)
 - b. Drainage plans
 - c. Utility Relocation plans
 - d. Traffic plans (signals/ITS/MOT/lighting/signs/pavement markings)
 - e. Non-Standard Special Structure Plans (i.e. signs, foundations, retaining walls, etc.)
 - f. Landscape Architecture plans (landscaping, wetland mitigation) – to be signed by a Landscape Architect or licensed professional
 - g. Minimum roadway Plan and No Plan projects
 - h. Approach plans for bridge projects (for detail sheets that require engineering, includes bridge maintenance projects, etc.)
2. Hydraulics and Hydrologic Analyses
 - a. Recommendations and Reports
 - i. Includes hydraulic analysis and reports for CLOMR (conditional letter of map revision), CLOMR-F (conditional letter of map revision fill), LOMR (letter of map revision), and LOMR-F (letter of map revision fill)
 - b. Drainage and Storm Water Management Calculations and Computations
3. Interchange Justification Reports and Interchange Modification Reports
4. Right-of-Way Plans - to be signed by a Licensed Surveyor
5. Revisions of Construction Plans
6. Design Exceptions
7. Location and Design Standard Sheets. (If the standard sheet is modified during project development, the project designer modifying the standard sheet, or supervisor, shall seal and sign the modified standard sheet).

The Committee has determined that the following Location and Design related documents will **NOT** be required to be sealed and signed.

1. Scoping Report
2. Preliminary Field Inspection Plans
3. Public Hearing Plans
4. Field Inspection Plans

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

Survey

The Committee has determined that the following survey related documents will be required to be sealed and signed by a Licensed Surveyor.

1. Plats
 - a. Final plats – plats that represent a final or completed survey
 - b. Plats showing Right-of-Way takes
 - c. Plats prepared to show areas of condemnation
 - d. Plats prepared to obtain easements (drainage, utilities, access, etc.)
 - e. Oyster lease plats
 - f. Final Right-of-Way plats performed post-construction
 - g. Letterform documents or plats used for RADAR, LADAR or VASCAR calibration ranges.
 - h. U.S. Corps of Engineer (COE) plats
 - i. Department of Conservation and Recreation (DCR) plats
2. Surveys
 - a. Topographic surveys
 - b. Wetland mitigation site surveys
 - c. Complete Survey for Design
 - d. Bridge and large drainage structure stakeout surveys (see Road and Bridge Spec. 105.10)
3. High water information or data to be used in FEMA or FIRM studies
4. Geodetic control data
5. Reports or documents establishing control for aerial photography to assure standards compliance.
6. FEMA flood plain revisions (Letterform), would include the following:
 - a. CLOMR (conditional letter of map revision)
 - b. CLOMR-F (conditional letter of map revision fill)
 - c. LOMR (letter of map revision)
 - d. LOMR-F (letter of map revision fill)
7. Wetland permit sketches
8. Right-of-Way Plans

The Committee has determined that the following Survey related documents will **NOT** be required to be sealed and signed.

1. Asset management surveys (Inventory Surveys)

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

Scheduling and Contract

The Committee has determined that the following Construction related documents will be required to be sealed and signed by a Professional Engineer.

1. In-field design changes or plan revisions accompanying work orders (includes significant material modifications)
2. Specification revisions/additions via work order
3. Within the contract assembly, a title sheet with seal approving the chosen Standard Specifications, Special Provisions, Special Specifications, Copied Notes, General Notes and pertinent design data/details.

The Committee has determined that the following Construction related documents will **NOT** be required to be sealed and signed.

1. Technical Reports (non-engineering) that support schedule work
2. Environmental Permit Sketches/Plans in the Contract (see Hydraulic Analyses)
3. Force Account Authorization
4. Final Acceptance letters
5. Borrow or Waste Area sketches
6. Pre-Ad documents that are not technical in nature or intended to be a part of the contract (i.e. standard forms with project data, permits, etc.)
7. Work Order form
8. Final records (i.e. Project Diary, Workbook/Final Summary, General Notes, PA Worksheets, Transaction Report, C-79, Certifications, Tickets, Materials Documents)
9. Review of Bridge Stakeout Notes
10. Claims Pre-litigation Package, Analysis of Claims, etc.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

Materials

The Committee has determined that the following materials related documents will be required to be sealed and signed by a Professional Engineer.

1. Geotechnical Reports and Recommendations (such as soil surveys)
2. Pavement Reports
 - a. Design Reports requiring investigation (beyond windshield survey), pavement structural analysis, structural design, etc.

The Committee has determined that the following Construction related documents will **NOT** be required to be sealed and signed.

1. Pavement Reports
 - a. Technical Reports (i.e. windshield surveys) supporting schedule work not requiring further investigation, pavement structural analysis, structural design, etc.

Residency

See applicable documents listed under each discipline.

Right-of-Way / Utility

The utility relocation/adjustment plans included in the VDOT contract are the only documents identified as needing to be sealed and signed under the utility discipline. The utility relocation and adjustment plans are indicated under the Location and Design discipline section of this task.

Environmental

National Environmental Policy Act (NEPA) documents are products of regulations prescribed by the President's Council on Environmental Quality, the US Department of Transportation and the Federal Highway Administration. None of these agencies, nor their regulations require or suggest Professional Engineer (PE) approval. A PE approval could be in conflict with the intent of NEPA and would have to first be approved by an array of state and federal agencies.

The Commonwealth Transportation Board (CTB), in accordance with the Virginia Administrative Code (VAC), selects locations for roads. Through the NEPA process that decision becomes a preferred alternative. The FHWA approves project location when they approve the NEPA document.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

Environmental (Continued)

NEPA studies and documents are spatial in nature. General corridors of not-more-than 10 to 20 percent concepts are used to define a general footprint to assess maximum impacts to natural and cultural resources. These 1000 to 4000 foot wide corridors contain a potential footprint of 250 to 300 feet width representing the impact area for a project. This footprint can later be shifted 500 feet laterally during the design phase while staying within the NEPA area studied. The merits or justification for a project (at this point) are usually based on environmental impacts, preliminary costs, public opinion and local government preference.

For smaller studies, such as those cleared by Categorical Exclusions and Environmental Assessments, we use preliminary information provided by the Project Manager to assess environmental impacts and obtain approvals.

In conclusion, a Professional Engineer's approval (seal and signature) is not needed for NEPA documents.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

MANDATE 1B The Committee will determine the global impact to VDOT's staffing as a result of this requirement.

The November 21, 2000 letter (Appendix B) from Mr. James A. Browder, Jr. initiated the identification of positions within VDOT requiring Professional Surveying registration. The October 7, 2002 letter (Appendix C) from Mr. Claude D. Garver, Jr. initiated the identification of positions within VDOT requiring a Professional Engineer's license. In addition, an October 10, 2003 Human Resource Division Memo HRD 2900 (Appendix D) required employees in the role of Architect/Engineer I with a SOC code of Landscape Architect to have a Virginia Landscape Architect Certificate.

VDOT updates the lists of required positions periodically; the current version is dated August 1, 2006. As of August 1, 2006, VDOT designates thirty-six (36) Land Surveyor positions, three (3) Landscape Architect positions and two-hundred seventy one (271) Professional Engineer positions. The tables illustrated on the following pages reflect the positions requiring professional licensure and certifications by discipline and location.

In determining the impact of the signing and sealing recommendations on the established list of positions outlined in the August 1, 2006 tables, the Committee forwarded the draft list to the affected Central Office Division Administrators and District Administrators. The results of their input are listed in the July 1, 2007 tables.

There is a formatting change in the July 1, 2007 table, as a result of the creation of the Regional Operations Centers. The Operations/Traffic line item has been removed and a new table has been created reflecting required positions by Regional Operation Center rather than by District. In addition, a separate line item for Landscape Architects has been added.

The change in the number of positions requiring professional licensure in comparison to the August 1, 2006 list is a net increase of three (3) licensed surveyor positions and eighty-two (82) professional engineer positions. No additional Landscape Architects positions were reported.

The resulting increase in professional licensure positions will affect certain disciplines more than others. These disciplines will have approximately three (3) years (July 2007 to July 2010) to promote, hire or transition existing non-professionals into other roles in order to meet the requirements of Article § 54.1-402.1 of the Virginia Code.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE WHITE PAPER**

VDOT REQUIRED PROFESSIONAL ENGINEERING POSITIONS - AUGUST 2006											
Location of Personnel	Central Office	Bristol	Culpeper	Fredericksburg	Hampton Roads	Lynchburg	NOVA	Richmond	Salem	Stuanton	Totals
Administrative Services	1	0	0	0	0	0	0	0	0	0	1
Commissioner's staff	1	0	0	0	0	0	0	0	0	0	1
Land Development	0	0	1	0	0	0	4	0	0	0	5
Location and Design	24	2	2	2	4	3	6	6	2	3	54
Maintenance	0	0	0	0	1	0	0	0	0	0	1
Materials	14	1	1	1	1	1	1	1	1	1	23
Operations/ Traffic	7	1	1	0	5	1	2	1	3	3	24
PE Manager	0	0	1	1	1	0	1	1	1	0	6
Project Management	0	0	0	0	4	1	4	1	0	0	10
Research Council	15	0	0	0	0	0	0	0	0	0	15
Residency	0	0	0	0	0	0	0	8	4	1	13
ROW & Utilities	1	0	0	0	0	0	0	0	0	0	1
Scheduling and Contract	4	6	3	4	6	4	8	8	7	7	57
Structure and Bridge	27	3	3	4	3	6	5	3	3	3	60
SUBTOTALS =	94	13	12	12	25	16	31	29	21	18	271

VDOT REQUIRED LANDSCAPE ARCHITECT POSITIONS - AUGUST 2006											
Location of Personnel	Central Office	Bristol	Culpeper	Fredericksburg	Hampton Roads	Lynchburg	NOVA	Richmond	Salem	Stuanton	Totals
Landscape Architects	2	0	0	0	0	0	1	0	0	0	3

Licensed Surveyors - August 2006	
Location of Personnel	Number Required
Bristol	5
Culpeper	2
Fredricksburg	2
Hampton Roads	4
Lynchburg	5
NOVA	4
Richmond	4
Salem	4
Staunton	3
Central Office	3
TOTALS =	36

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE WHITE PAPER**

VDOT REQUIRED PROFESSIONAL ENGINEERING POSITIONS - JULY 2007												
Location of Personnel	Central Office	Bristol	Culpeper	Fredericksburg	Hampton Roads	Lynchburg	NOVA	Richmond	Salem	Stuanton	Totals	Net Change
Administrative Services	1	0	0	0	0	0	0	0	0	0	1	0
Commissioner's staff	1	0	0	0	0	0	0	0	0	0	1	0
Land Development	0	0	1	0	0	0	4	0	0	0	5	0
Location and Design	24	4	4	4	6	4	7	7	5	5	70	16
Maintenance	0	0	0	0	1	0	0	0	0	0	1	0
Materials	14	2	2	2	2	2	2	2	2	2	32	9
PE Manager	0	0	1	1	1	0	1	1	1	0	6	0
Project Management	0	0	0	0	4	1	4	1	0	0	10	0
Research Council	15	0	0	0	0	0	0	0	0	0	15	0
Residency	0	6	4	4	3	5	0	8	6	5	41	28
ROW & Utilities	1	0	0	0	0	0	0	0	0	0	1	0
Scheduling and Contract	6	6	3	4	6	4	8	8	7	7	59	2
Structure and Bridge	30	5	5	4	3	6	6	5	7	4	75	15
SUBTOTALS =	92	23	20	19	26	22	32	32	28	23	317	70
Location of Personnel	Central Office	South Western Region	Central Region		Eastern Region		Northern Region		North Western Region		Totals	Net Change
Operations/Traffic	7	7	5		7		5		5		36	12
Grand Total =											353	82

VDOT REQUIRED LANDSCAPE ARCHITECT POSITIONS - JULY 2007												
Location of Personnel	Central Office	Bristol	Culpeper	Fredericksburg	Hampton Roads	Lynchburg	NOVA	Richmond	Salem	Stuanton	Totals	Net Change
Landscape Architects	2	0	0	0	0	0	1	0	0	0	3	0

Licensed Surveyors - July 2007		
Location of Personnel	Number Required	Net Change
Bristol	4	(1)
Culpeper	3	1
Fredericksburg	3	1
Hampton Roads	5	1
Lynchburg	4	(1)
NOVA	4	0
Richmond	5	1
Salem	5	1
Staunton	3	0
Central Office	3	0
TOTALS =	39	3

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

MANDATE 2 The Committee will review and determine the requirements created by the revisions to the DPOR's regulations dated February 1, 2007.

Revisions to the DPOR Regulations

The Committee has reviewed the Regulations from the DPOR's Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Decorators and Landscape Architects. The Regulations were last updated on February 1, 2007. The following items summarize significant changes to the regulations:

- Numerous clarifying changes including amendments to clarify the Board's requirements relating to "responsible charge" and "direct control and personal supervision."
- Require applicants for any of the Board's licenses or certificates to demonstrate awareness of relevant regulatory and statutory issues by taking and passing an examination on the Board's regulations and statutes (see 18 VAC 10-20-85).
- Repeal the requirement that applicants for architect licensure be enrolled in the National Council of Architectural Registration Board's (NCARB) Intern Development Program (IDP) for at least one year prior to submitting an application for original licensure (see 18 VAC 10-20-120).
- Update the reference to the most recent edition of the *NCARB Handbook for Interns and Architects*, 2006-2007 (see 18 VAC 10-20-120).
- Change the limit for the minimum amount of acceptable experience from 10 weeks to eight weeks to match the current NCARB IDP standards (see 18 VAC 10-20-120).
- Add language to state that passing scores for divisions of the ARE will be retained in accordance with NCARB procedures (due to the five-year rolling clock that went into effect on January 1, 2006) and modifying this language to say that Virginia will accept divisions that "were taken and passed in accordance with national standards" to match the changes being made to 18 VAC 10-20-140 C for the five-year rolling clock (see 18 VAC 10-20-140).
- Update references to FIDER so that the references read: the Council for Interior Design Accreditation/CIDA (formerly known as the Foundation for Interior Design Education Research/FIDER) in Part VII.
- Require that responsible persons for registered professional corporations, registered professional limited liability companies, and other registered business entities notify the board in writing of any changes in their employment status

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

within 30 days of such change (see Parts VIII, IX, and X).

- Eliminate certain requirements when using electronic seals and signatures (see 18 VAC 10-20-760).
- Add a seal design for certified interior designers (see 18 VAC 10-20-760).

What the new Regulations mean to VDOT

The changes of significant interest to VDOT rest in the first item, entitled “Numerous clarifying changes including amendments to clarify the Board’s requirements relating to “responsible charge” and “direct control and personal supervision.” Definitions pertinent to the Committees task include the following:

1. The definition for Professional has been amended to include the underlined portion.

"Professional" means an architect, professional engineer, land surveyor, landscape architect or interior designer who is licensed or certified, as appropriate, pursuant to the provisions of this chapter and is in good standing with the board to practice his profession in this Commonwealth.

2. The Board removed the definition of “Responsible Charge”. The definition had been:

“Responsible charge” means there shall be a professional in direct control and exercising personal supervision of each professional service offered or practiced. Direct control and personal supervision requires more than reviewing the work prepared by another person.

3. A definition for “Responsible Person” has been added to the Regulations as follows:

“Responsible person” means the individual named by the entity to be responsible and have control of the regulated services offered, or rendered, or both, by the entity.

4. The Regulations add considerable clarifying language to the definition of “direct control and personal supervision” and are underlined in the following excerpt:

"Direct control and personal supervision," shall be that degree of supervision by a person overseeing the work of another whereby the supervisor has both control over and detailed professional knowledge of the work prepared under his supervision and words and phrases of similar import mean that the professional shall have control over the decisions on technical matters of

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

policy and design, and exercises his professional judgment in all professional matters that are embodied in the work and the drawings, specifications, or other documents involved in the work; and the professional has exercised critical examination and evaluation of a(n) employee's, consultant's, subcontractor's, or project team members' work product, during and after preparation, for purposes of compliance with applicable laws, codes, ordinances, regulations and usual and customary standards of care pertaining to professional practice. Further, it is that degree of control a professional is required to maintain over decisions made personally or by others over which the professional exercises direct control and personal supervision. "Direct control and personal supervision" also includes the following:

1. The degree of control necessary for a professional to be in direct control and personal supervision shall be such that the professional:
 - a. Personally makes professional decisions or reviews and approves proposed decisions prior to their implementation, including the consideration of alternatives, whenever professional decisions that could affect the health, safety, and welfare of the public are made; and
 - b. Determines the validity and applicability of recommendations prior to their incorporation into the work, including the qualifications of those making the recommendations.
2. Professional decisions which must be made by and are the responsibility of the professional in direct control and personal supervision are those decisions concerning permanent or temporary work that could affect the health, safety, and welfare of the public, and may include, but are not limited to, the following:
 - a. The selection of alternatives to be investigated and the comparison of alternatives for designed work; and
 - b. The selection or development of design standards and materials to be used.
3. A professional shall be able to clearly define the scope and degree of direct control and personal supervision and how it was exercised and to demonstrate that the professional was answerable within said scope and degree of direct control and personal supervision necessary for the work for which the professional has signed and sealed; and
4. No sole proprietorship, partnership, corporation, limited liability company,

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

joint venture, professional corporation, professional limited liability corporation, or other entity shall practice, or offer to practice, any profession regulated under this chapter unless there is a resident professional for that service providing direct control and personal supervision of such service in each separate office in which such service is performed or offered to be performed.

Article 18 VAC 10-20-760, entitled “Use of seal”; paragraph “A” clearly identifies under what conditions a professional shall apply his/her professional seal. Paragraph “A” is provided below. The underlined portions of the text highlight the changes to the Regulations.

A. *The application of a professional seal shall indicate that the professional has exercised direct control and personal supervision over the work to which it is affixed. Therefore, no professional shall affix a name, seal or certification to a plat, design, specification or other work constituting the practice of the professions regulated which has been prepared by an unlicensed or uncertified person unless such work was performed under the direct control and personal supervision of the professional while said unlicensed or uncertified person was an employee of the same firm as the professional or was under written contract to the same firm that employs the professional. If the original professional of record is no longer employed by the regulant or is otherwise unable to seal completed professional work, such work may be sealed by another professional, but only after a thorough review of the work by the professional affixing the professional seal to verify that the work has been accomplished to the same extent that would have been exercised if the work had been done under the direct control and personal supervision of the professional affixing the professional seal.*

The changes to the Regulations are further clarifications to the responsibilities of the professional. These clarifications have not changed the responsibilities of the professional as they relate to the profession and the language is being used to assist VDOT in being able to correctly identify at what level within the organization professionals are required to seal generated work.

The wording of “direct control and personal supervision”, as defined above, clearly states that those individuals within VDOT making professional decisions or reviews and approvals of proposed decisions shall be the individual sealing the work generated.

Exempt structures as defined by the Code of Virginia

Article 18 VAC 10-20-760 paragraph B.4, provided below, discusses the application of a professionals seal to exempt work. This should not be construed as work developed by an exempt employee as designated in Article 54.1-402.1 of the Code of Virginia. Article 54.1-402 of the Code of Virginia is referring to types of structures exempted from requiring a professional to design them. Paragraph B.4 is stating that if a professional

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

designs one of these exempted structure types that professional is required to seal the plans he/she developed.

B.4 The seal of each professional responsible for each profession shall be used and shall be on each document that was prepared under the professional's direction and for which that professional is responsible. If one of the exemptions found in § 54.1-402 of the Code of Virginia, as amended, is applicable, a professional licensed or certified by this board shall nevertheless apply his seal to the exempt work.

Who is considered to be an exempt employee

The Code of Virginia Article 54.1-402.1, noted below, defines those individuals who are exempt until July 1, 2010. Based on this Article of the Code, an individual is considered to have the exempt status if he/she meets the following three criteria:

- The individual was employed by the Commonwealth on March 8, 1992.
- The individual was engaged in the practice of engineering (held an engineering position) on March 8, 1992.
- The individual has been continuously employed by the Commonwealth since March 8, 1992.

§ 54.1-402.1. State and local government employees; license exemptions for persons employed prior to March 8, 1992.

Any person engaged in the practice of engineering, architecture, or land surveying as those terms are defined in § 54.1-400 as a regular, full-time, salaried employee of the Commonwealth or any political subdivision of the Commonwealth on March 8, 1992, who remains employed by any state agency or political subdivision shall be exempt until June 30, 2010, from the licensure requirements of § 54.1-406 provided the employee does not furnish advisory service for compensation to the public or as an independent contracting party in this Commonwealth or any political subdivision thereof in connection with engineering, architectural, or land surveying matters. The chief administrative officer of any agency of the Commonwealth or political subdivision thereof employing persons engaged in the practice of engineering, architecture, or land surveying as regular, full-time, salaried employees shall have the authority and responsibility to determine the engineering, architecture, and land surveying positions which have responsible charge of engineering, architectural, or land surveying decisions.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

Requirement for the professional to be at the workplace where the work is being developed

Regulation Article 18 VAC 10-20-780 entitled “Professional required at each place of business” is provided below. The underlined portions of the text highlight the changes to the Regulations.

Any legal entity or professional maintaining a place of business from which the entity or professional offers or provides architectural, engineering, land surveying, certified landscape architectural, or certified interior design services in Virginia shall name for each profession offered or practiced at each place of business a resident, responsible person. The named resident, responsible person must hold a current valid Virginia license or certificate in the profession being offered or practiced.

Each named professional shall exercise direct control and personal supervision of the work being offered or practiced at the place of business for which he is named. Each named professional shall be responsible for only one location at a time. A named professional may be responsible for more than one location provided that he is resident at the place of business during a majority of the hours of operation at each location.

This article indicates that the professional must hold a valid Virginia license and be present at the location the work is being performed a majority of the hours of operation. Therefore, district work generated will need to be sealed by a district professional and Central Office work generated will need to be sealed by a Central Office professional.

The loss of a professional/exempt engineer during the development process

Although the DPOR Regulations are clear that the professional is required to be in direct control and provide personal supervision, Article VAC 10-20-760 paragraph A allows a professional to seal another professional’s work if he/she are no longer with the firm as long as the professional verifies “*that the work has been accomplished to the same extent that would have been exercised if the work had been done under the direct control and personal supervision of the professional affixing the professional seal.*” This can be interpreted to state that a professional or exempt employee, within the current chain of command, not directly involved in the development of the work product can seal/sign it if he/she performs due diligence in their review of the work.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

Designated Professional Engineer Positions

In accordance with Article 54.1-402.1 of the Code of Virginia, the Commissioner can designate positions within VDOT requiring a professional engineer's license. The Commissioner has currently designated 271 positions to hold this title. These 271 positions currently require a professional or an exempt employee to hold these positions.

Article 54.1-406 paragraph D, provided below, provides some assistance to agencies where filling the designated position is extremely difficult. The Code allows the Commissioner to fill the position with an unlicensed person after a reasonable and unsuccessful search for a licensed professional has occurred. This will only be considered on very rare occasions.

§ 54.1-406. License required.

D. Notwithstanding these provisions, any state agency or political subdivision of the Commonwealth unable to employ a qualified licensed engineer, architect, or land surveyor to fill a responsible charge position, after reasonable and unsuccessful search, may fill the position with an unlicensed person upon the determination by the chief administrative officer of the agency or political subdivision that the person, by virtue of education, experience, and expertise, can perform the work required of the position.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

MANDATE 3 The Committee will review and highlight existing liability insurance coverage and address liability concerns.

The Commonwealth of Virginia's Department of the Treasury, Division of Risk Management issued a certificate of coverage (See Appendix E) to the Department of Transportation and All Interested Parties effective on March 9, 2001. The coverage period is considered to be "Continuous". The purpose of the certificate is "Verification of insurance coverage for authorized activities of employees using a professional seal". The limit of the coverage is \$2,000,000 - Tort claims against persons.

Coverage:

The Commonwealth's self insurance provides the coverage for the professional under item I.A outlined in a portion of the Risk Management Plan provided below. This paragraph is stating that if an individual is an employee of the Commonwealth of Virginia and performing within the scope of employment, the individual is covered by the Commonwealth's insurance.

I.A. The Plan will pay all sums, except as herein limited or limited by the Code of Virginia, which the Commonwealth of Virginia, its departments, agencies, institutions, boards, commissions, officers, agents, judges or employees; local soil and water conservation districts, their directors, officers, agents or employees; electoral boards, members or general registrars and local school board selection commissions or local school board commission members, shall be obligated to pay by reason of liability imposed by law for damages resulting from any claim arising out of acts or omissions of any nature while acting in an authorized governmental or proprietary capacity and in the course and scope of employment or authorization.

Limits of Liability:

The Limits of Liability is covered under Items II.A and B provided below. The \$100,000 limit is set forth in the Code of Virginia and covers all cases as outlined in the Code of Virginia. The \$2 million dollar limit is to cover such situations that are specifically not covered by the Code of Virginia. For example, employment practice issues, Federal lawsuits (since the Commonwealth's sovereign immunity does not exist in Federal lawsuits) and for when the lawsuit occurs in another State (car accident involving a State vehicle while working in another).

II.A. The amount of recoverable by a claimant with respect to the Commonwealth of Virginia, its departments, agencies, institutions, boards or commissions; local soil and water conservation districts; electoral boards or local school board selection commissions; or any director, officer, employee or agent thereof, shall not exceed seventy-five thousand dollars (\$75,000) per claim for events occurring prior to July 1, 1993. For events occurring on or after

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

July 1, 1993, the limit is one hundred thousand dollars (\$100,000) per claim. These limits shall not be applicable to any claim or causes of action other than those established by Virginia Law, the amount recoverable shall not exceed two million dollars (\$2,000,000) per claim.

II.B. The amount recoverable by any claimant with respect to officers, employees and agents of the Commonwealth of Virginia; local soil conservation district directors, officers, employees and agents; general registrars; electoral board members and local school board selection committee members shall not exceed \$2,000,000 per claim.

Exclusions:

Exclusions affecting the professional are covered under Items III.D, E, F and G as follows:

III.D. Liability assumed under any written contract or agreement.

III.E Any claim by a person entitled to coverage under this Plan who has (1) gained any profit or advantage illegally, (2) acted in a fraudulent or dishonest manner, or (3) committed a willful and wanton act. The Plan will defend when a claim contains allegations thereof except when a court or other trier of fact shall have determined that (1), (2) and/or (3) have occurred.

III.F Liability for punitive damages or liability in any suit or action in which by judgment or final adjudication it is determined that such liability was incurred by reason of (1) acts of fraud or dishonesty, (2) acts of intentional, malicious or willful and wanton misconduct, or (3) any claim in which a covered person has gained any profit or advantage not otherwise legally entitled. The Plan may provide coverage for such acts or punitive damages if the Attorney General and the Governor determine that such coverage is in the public interest.

III.G Liability for the return of any remuneration paid if the payment of such remuneration shall be held to be in violation of the law by a court of competent jurisdiction.

Coverage Period:

The coverage period is indicated in item IV.A as follows:

IV.A This Plan, except for medical malpractice, applies only to a claim, suit, action or other proceeding arising on or after the Governor or his designee

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

approves and signs this Plan, provided the acts or omissions which give rise to such claim, suit, action or other proceeding did not occur prior to that approval and signature.

Other Insurance or Self-Insurance:

Item IV provided below indicates that the Commonwealth will not reimburse other insurance companies or the professional who is self insured for any loss due to a claim, suit, action or other proceedings against the professional.

IV. If at the time of loss, claim, suit, action or other proceeding there is insurance or self-insurance available to any organization or individual covered by this Plan, or which would have covered such loss, claim, suit, action or other proceeding but for the existence of this Plan, the Plan shall not be liable for any amount collectable under such other insurance or self-insurance.

Defense:

Items VII A, B and C, provided below, indicate that the Commonwealth will provide legal representation.

VII.A. The Plan will defend any claim, suit, action or other proceeding relative to any loss or other occurrence that may be covered under this Plan. Defense is provided under § 2.1-37.1 et. seq. of the Code of Virginia. Unless otherwise approved in accordance with §§ 2.1-121 or 2.1-122 of the Code of Virginia, the Office of the Attorney General shall provide defense.

IV.B As a condition of coverage, any organization or individual covered by the Plan agrees to promptly notify the Division of Risk Management of any claim, suit, action or proceeding and cooperate fully and completely in the investigation and defense of such claim, suit, action or other proceeding that may be covered by this Plan. Failure to promptly notify the Division of Risk Management or to cooperate may, at the Division's option, result in termination of coverage.

IV.C Settlement of any claim, suit, action or other proceeding involving the interests of the Commonwealth shall be subject to § 2.1-127 of the Code of Virginia. The Division of Risk Management must approve all settlements.

The Code of Virginia references provided in items VII.A and VII.C above, are old references and have since been updated. The new Articles are provided below. These Articles are provided below for the reader's information.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

<u>Old Reference</u>	<u>New Reference</u>
§ 2.1-37.1	§17.1-900
§ 2.1-121	§ 2.2-507
§ 2.1-122	§ 2.2-510
§ 2.1-127	§ 2.2-514

Article §17.1-900 Definitions and application of chapter

As used in this chapter, unless the context requires a different meaning:

"Commission" means the Judicial Inquiry and Review Commission provided for in Article VI, Section 10 of the Constitution of Virginia.

"Judge" means a justice of the Supreme Court, judge of the Court of Appeals, judge of a circuit or district court, member of the State Corporation Commission, or a member of the Virginia Workers' Compensation Commission and includes (i) persons who have been elected or appointed to be judges but have not taken the oath of office as judge as well as persons who have taken such oath, (ii) judges designated under § 17.1-105, (iii) judges under temporary recall under § 17.1-106, (iv) judges pro tempore under § 17.1-109 and (v) special justices appointed pursuant to § 37.2-803, all of whom shall be subject to investigations and proceedings under the provisions of this chapter.

"Term" means (i) the period of time between either election or appointment of service as a judge and the first taking of the oath of office, (ii) each period of time for which the person was either elected or appointed as a judge, and (iii) any period of time after retirement during which the person hears cases as a retired judge.

(1971, Ex. Sess., c. 154, § 2.1-37.1; 1984, c. 703; 2001, cc. 113, 844; 2004, c. 363.)

§ 2.2-507 Legal service in civil matters

A. All legal service in civil matters for the Commonwealth, the Governor, and every state department, institution, division, commission, board, bureau, agency, entity, official, court, or judge, including the conduct of all civil litigation in which any of them are interested, shall be rendered and performed by the Attorney General, except as provided in this chapter and except for any litigation concerning a justice or judge initiated by the Judicial Inquiry and Review Commission. No regular counsel shall be employed for or by the Governor or any state department, institution, division, commission, board, bureau, agency, entity, or official. The Attorney General may represent personally or through one or more of his assistants any number of state departments, institutions, divisions, commissions, boards, bureaus, agencies, entities, officials, courts, or judges that are parties to the same transaction or that are parties in the same civil or administrative proceeding and may represent multiple interests within the same department, institution, division, commission, board, bureau, agency, or entity. Upon request of the local

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

attorney for the Commonwealth, the Attorney General may provide legal service in civil matters for soil and water conservation district directors or districts.

B. The Attorney General may represent personally or through one of his assistants any of the following persons who are made defendant in any civil action for damages arising out of any matter connected with their official duties:

- 1. Members, agents or employees of the Alcoholic Beverage Control Board;*
- 2. Agents inspecting or investigators appointed by the State Corporation Commission;*
- 3. Agents, investigators, or auditors employed by the Department of Taxation;*
- 4. Members, agents or employees of the State Mental Health, Mental Retardation and Substance Abuse Services Board, the Department of Mental Health, Mental Retardation and Substance Abuse Services, the State Board of Health, the State Department of Health, the Department of General Services, the State Board of Social Services, the Department of Social Services, the State Board of Corrections, the Department of Corrections, the State Board of Juvenile Justice, the Department of Juvenile Justice, the Virginia Parole Board, or the Department of Agriculture and Consumer Services;*
- 5. Persons employed by the Commonwealth Transportation Board;*
- 6. Persons employed by the Commissioner of Motor Vehicles;*
- 7. Persons appointed by the Commissioner of Marine Resources;*
- 8. Police officers appointed by the Superintendent of State Police;*
- 9. Conservation police officers appointed by the Department of Game and Inland Fisheries;*
- 10. Third impartial panel members appointed to hear a teacher's grievance pursuant to § 22.1-312;*
- 11. Staff members or volunteers participating in a court-appointed special advocate program pursuant to Article 5 (§ 9.1-151 et seq.) of Chapter 1 of Title 9.1;*
- 12. Any emergency medical service agency that is a licensee of the Department of Health in any civil matter and any guardian ad litem appointed by a court in a civil matter brought against him for alleged errors or omissions in the discharge of his court-appointed duties; or*
- 13. Conservation officers of the Department of Conservation and Recreation.*

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

Upon request of the affected individual, the Attorney General may represent personally or through one of his assistants any basic or advanced emergency medical care attendant or technician possessing a valid certificate issued by authority of the State Board of Health in any civil matter in which a defense of immunity from liability is raised pursuant to § 8.01-225.

C. If, in the opinion of the Attorney General, it is impracticable or uneconomical for such legal service to be rendered by him or one of his assistants, he may employ special counsel for this purpose, whose compensation shall be fixed by the Attorney General. The compensation for such special counsel shall be paid out of the funds appropriated for the administration of the board, commission, division or department being represented or whose members, officers, inspectors, investigators, or other employees are being represented pursuant to this section. Notwithstanding any provision of this section to the contrary, the Supreme Court may employ its own counsel in any matter arising out of its official duties in which it, or any justice, is a party.

(Code 1950, § 2-87; 1958, c. 542; 1966, cc. 222, 677, § 2.1-121; 1974, cc. 44, 45, 432; 1975, c. 372; 1976, cc. 580, 726; 1978, c. 96; 1979, c. 450; 1980, c. 255; 1981, c. 427; 1982, c. 636; 1984, cc. 703, 742; 1987, c. 326; 1988, c. 435; 1989, c. 733; 1990, cc. 637, 752, 791; 2001, c. 844; 2005, c. 236; 2007, cc. 248, 595.)

§ 2.2-510 Employment of special counsel generally

No special counsel shall be employed for or by the Governor or any state department, institution, division, commission, board, bureau, agency, entity, official, justice of the Supreme Court, or judge of any circuit court or district court except in the following cases:

1. When the Governor determines that, because of the nature of the legal service to be performed, the Attorney General's office is unable to render such service, then the Governor shall issue an exemption order stating with particularity the facts and reasons leading to the conclusion that the Attorney General's office is unable to render such service. The Governor may then employ special counsel to render such service as he may deem necessary and proper. The compensation for such special counsel shall be paid out of the funds appropriated for the administration of the board, commission, division, or department to be represented or whose members, officers, inspectors, investigators, or other employees are to be represented pursuant to this section.

2. In cases of legal services in civil matters to be performed for the Commonwealth, where it is impracticable or uneconomical for the Attorney General to render such service, he may employ special counsel whose compensation shall be paid out of the appropriation for the Attorney General's office.

3. In cases of legal services in civil matters to be performed for any state department, institution, division, commission, board, bureau, agency, entity, official, justice of the

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

Supreme Court, or judge of any circuit court or district court where it is impracticable or uneconomical for the Attorney General's office to render such service, special counsel may be employed but only as set forth in subsection C of § 2.2-507, upon the written recommendation of the Attorney General, who shall approve all requisitions drawn upon the Comptroller for warrants as compensation for such special counsel before the Comptroller shall have authority to issue such warrants.

4. In cases where the Attorney General certifies to the Governor that it would be improper for the Attorney General's office to render legal services due to a conflict of interests, or that he is unable to render certain legal services, the Governor may employ special counsel or other assistance to render such services as may be necessary.

5. In cases of legal services in civil matters to be performed by the Virginia Office for Protection and Advocacy pursuant to Chapter 8.1 (§ 51.5-39.1 et seq.) of Title 51.5.

(Code 1950, § 2-88; 1966, c. 677, § 2.1-122; 1975, c. 372; 1976, c. 726; 2001, c. 844; 2002, c. 572; 2007, c. 248.)

§ 2.2-514 Compromise and settlement of disputes

A. Except as provided in this section or subsection B of § 23-38.33:1, the Attorney General may compromise and settle disputes, claims and controversies involving all interests of the Commonwealth including, but not limited to the Virginia Tort Claims Act (§ 8.01-195.1 et seq.), and may discharge any such claims, but only after the proposed compromise, settlement or discharge, together with the reasons therefor, have been submitted in writing to the Governor and approved by him. Where any dispute, claim or controversy involves the interests of any department, institution, division, commission, board, authority or bureau of the Commonwealth, the Attorney General may compromise and settle or discharge the same provided the action is approved both by the Governor, as provided in this section, and by the head, or his designee, of the department, institution, division, board, authority or bureau that is interested. However, when any dispute, claim or controversy arises under the Virginia Tort Claims Act (§ 8.01-195.1 et seq.) or otherwise involves the interests of any department, institution, division, commission, board, authority or bureau of the Commonwealth, and the settlement amount does not exceed \$250,000, the Attorney General or an assistant Attorney General assigned to such department, institution, division, commission, board, authority or bureau, or such other designee of the Attorney General, may compromise and settle or discharge the same provided the action is approved by the head, or his designee, of the department, institution, division, board or bureau whose interests are in issue. When the dispute, claim or controversy involves a case in which the Commonwealth has a claim for sums due it as the result of hospital, medical or dental care furnished by or on behalf of the Commonwealth, the Attorney General or such assistant Attorney General may compromise and settle and discharge the same when the settlement amount does not exceed \$250,000.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

B. No settlement under subsection A shall be made subject to a confidentiality agreement that prohibits the Commonwealth, a state agency, officer or employee from disclosing the amount of such settlement except where such confidentiality agreement is imposed by a court of competent jurisdiction or otherwise is required by law.

C. No settlement under subsection A shall be made subject to a confidentiality agreement if such settlement requires that a matter or issue shall be the subject of (i) regulatory action pursuant to Article 2 (§ 2.2-4006 et seq.) of Chapter 40 of this title, or (ii) legislation proposed to be introduced in the General Assembly.

(Code 1950, § 2-92; 1956, c. 387; 1966, c. 677, § 2.1-127; 1973, c. 219; 1979, c. 266; 1986, c. 180; 1989, c. 75; 1995, cc. 359, 384; 2001, cc. 118, 844; 2004, c. 729; 2007, c. 217.)

Frequently Asked Questions:

What is a licensed professional's ultimate risk (professionally, personally and monetarily)?

The ultimate risk to a professional is the loss of their license to practice engineering. The loss of license and the failure to be reinstated by DPOR could entail the inability to obtain future employment in the engineering field by the public and private sector.

Do employee's who are exempt by the Code of Virginia until July 1, 2010 have the same risk as a professional?

Yes, an exempt employee has the same personal and monetary risks as that of a colleague who holds a professional licensure.

How might a licensed practitioner's error, negligence, or gross negligence be addressed within our disciplinary process?

VDOT has an established Code of Conduct and any errors, negligence or gross negligence will be processed through these established procedures.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

Should state employees, who are licensed professionals, hold their own liability insurance? If purchased, will this expense be reimbursed?

The purchasing of a liability insurance policy to protect oneself is a personal decision. VDOT will not make this decision for the professional. The Commonwealth provides liability coverage for its professional employees, whether they are doctors, lawyers, engineers, architects, accountants, professional social workers, psychologists, etc. The limits are \$2 million per occurrence with no aggregates to limit the coverage.

It is important to note, that the Commonwealth's liability coverage **only** covers the work performed while serving in the role for which you were hired. Therefore, if you decide to provide part-time engineering services for a land developer or provide structural repair plans for your church, the work performed is **not** covered by the Commonwealth's liability coverage.

If the professional decides to purchase personal liability insurance the Commonwealth will not reimburse them for the cost of the insurance.

Will VDOT provide a blanket policy for licensed professional who sign and seal work? If yes, will this be in addition to or as substitute for the Commonwealth's coverage?

No, VDOT will not be providing additional liability insurance for licensed professionals.

If it is the licensed professional's job to sign and seal work, the Commonwealth's Risk Management Plan (See Attachment E) will provide full coverage as a part of its overall program. The use of seals or other certifications does not alter the coverage.

If a licensed professional holds personal liability insurance, is the individual more vulnerable to being sued?

Lawsuits follow where the money is located. Therefore, the plaintiff's lawyers will determine where they will most likely receive the largest amount of settlement and include those individuals, agencies, etc. into the lawsuit.

Having a personal liability insurance policy will not necessarily make you more vulnerable. That will depend on the strength or weakness of the claim. Having two sources of insurance coverage may cause some additional discovery and negotiations, and may affect who will provide the primary coverage and the legal defense. The strength and quality of your insurer and legal defense will do much to determine any vulnerability.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

Does the Commonwealth provide legal representation to the employee when named in a lawsuit (when the state is also subject to the suit and when the state is not party to the lawsuit)?

Yes, The Plan, as established by the Division of Risk Management (See Appendix E), Item VII entitled Defense, Assistance and Cooperation indicates the Office of the Attorney General shall provide defense.

In the event the Office of the Attorney General has a conflict of interest, the Governor's office will be asked to appoint counsel.

In what situations might representation not be provided to the licensed professional?

The Commonwealth's program will not provide coverage in cases of malicious, willful, wanton or criminal acts (Item III entitled Exclusions, see Appendix E). However, legal defense may be provided to the point where a court or other trier of fact determines that the covered party engaged in any of the aforementioned acts.

For those employees who have a professional seal that does not meet the recent changes outlined in the DPOR regulations do we need to purchase a new seal?

Yes, in order to be compliant with DPOR regulations you are required to have a stamp meeting the new requirements.

Will VDOT reimburse me for the purchasing of a professional licensure stamp?

Yes, VDOT will reimburse you for the purchase of a professional licensure stamp. This is similar to how it currently reimburses you for keeping your license current.

I am a professional engineer who currently holds a position that is not one of the designated PE positions. I would like to know what the resulting liability impact to me is when my position is designated as being required to seal and sign technical documents.

There is no change in liability. You are just as liable for the work you create or supervise today as the day your position becomes designated to sign and seal technical documents.

Will my salary be increased with the change in licensure requirements?

No, similar to the response to the liability question above, you are currently being recognized and compensated for the expertise and responsibility you are providing.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

I understand that the Commonwealth of Virginia no longer enjoys the sovereign immunity it once did. How does that affect me as an employee of the Commonwealth?

That's correct; the Virginia Tort Claims Act waived sovereign immunity for the Commonwealth. However, it preserved sovereign immunity for employees of the Commonwealth. It is also important to note the sovereign immunity does not, and has never, protected employees in cases of gross negligence or intentional acts. Further explanation can be found in Appendix F.

POSSIBLE SCENARIOS:

Scenario 1: Three teenagers run off a recently constructed stretch of road and are seriously injured. Alcohol and excessive speed are determined not to be factors. The victims' families retains an attorney who files a lawsuit stating that the project design Engineer is at fault and guardrail should have been installed at this location. AASHTO Green Book standards indicate that the lawsuit has merit. Will the State provide legal representation to the Engineer as long it was determined Gross Negligence (i.e. the Engineer blatantly did not review the plans et al.) was not the issue.

Response 1:

Yes, the Commonwealth will provide legal defense for the engineer.

The Commonwealth understands errors do occur and therefore the need for liability coverage. Professionals who work within the scope of their job requirements and who make a mistake will be covered.

Legal defense will be provided up to the point where a court or other trier of fact determines that the covered party engaged in any of the aforementioned acts. For example, if in the above scenario it were to be determined in court that this Engineer had been informed on his/her past eight projects that guardrail is required in this type of situation and he/she chose to ignore this requirement the Commonwealth would have the right to no longer represent this individual.

Scenario 2: I am the designer of a bridge on Route 601 over Sandy Creek, and I sealed and stamped the plans. During construction, the contractor noticed that 20,000 pounds of epoxy reinforcing steel was inadvertently left off the Reinforcing Steel Schedule. The reinforcing steel was also omitted from the Estimated Quantities. The contractor is requesting an additional \$12,000 to purchase and place the omitted reinforcing steel. This was an omission on the plans and not an error in design. Will I be responsible for paying for the additional construction cost?

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
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Response 2: No, you will not be expected to pay for the additional construction costs since the project requires this material. The issue of quality control should be reviewed with the designer's supervisor. Disciplinary actions may result if this continues to be a consistent issue.

Scenario 3: As the District Structure and Bridge Engineer, I performed a cursory review of the bridge plans on Route 732 over Broad Run before they were submitted for construction. Because I am the Responsible Charge Engineer, I sealed and signed the plans. After the girders were fabricated, the inspector noticed that the length of the girders in Span A as shown on the plans was 15 inches too long. The contractor estimated that it would cost the fabricator an additional \$22,000 to make the corrections to the girders. Even though I did not design or check the plans, I did review them and my PE stamp is on the drawings. Am I liable for the additional cost?

Response 3: No, you are not liable for the additional construction costs associated with making the necessary corrections. The issue of quality control should be reviewed within the District Bridge Program Area and remedial corrections should be made to ensure this does not occur in the future. Disciplinary actions should be considered if quality control issues are a consistent issue.

Scenario 4: I am the Consultant Coordinator for a bridge designed by ABC Engineers. The plans were sealed and signed by the Designer of Record for ABC Engineers. I reviewed, but did not check the plans before they were advertised for construction. During construction, the contractor noticed that the elevations shown for the Pier 1 footing were 5 feet too low. He has filed a claim for \$15,000 to correct the error. The Designer of Record for ABC Engineers stated that because I reviewed the plans and I am in a Responsible Charge Position, I should be liable for 50% of the claim. Will I have to pay for the damages?

Response 4: No, the consultant is responsible for the information provide in the construction plan set. The consultant is the Engineer of Record.

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Scenario 5: I have a personal liability insurance policy (for professional services coverage) in the amount of \$100,000. My position has been designated as a Responsible Charge Position and I have been told that I will be sealing and signing contract documents. Does the fact that I have a personal policy have any impact on whether I will be more vulnerable to legal actions filed against me if I make errors or omissions on plans?

Response 5: The fact is that lawsuits follow where the money is located. Therefore, the plaintiff's lawyers will determine where they will most likely receive the largest amount of settlement and include those individuals, agencies, etc. into the lawsuit.

Having a personal liability insurance policy will not necessarily make you more vulnerable. That will depend on the strength or weakness of the claim. Having two sources of insurance coverage may cause some additional discovery and negotiations, and may affect who will provide the primary coverage and the legal defense. The strength and quality of your insurer and legal defense will do much to determine any vulnerability.

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Committee Recommendations:

The following recommendations are made as a guide to VDOT to meet the requirements of the Code of Virginia and the DPOR:

1. The technical documents recommended by this Committee as listed on pages 6-13 should be sealed and signed by a professional or an exempt employee.
2. VDOT should designate to the highest level of responsible charge that still meets the requirement of direct supervision outlined in the DPOR's Regulation.
3. Exempt employees shall sign the work they produce or supervise until July 1, 2010. In addition to the Exempt employees signature the following wording shall accompany the signature "Exempt by Code Article 54.1-402.1".
4. An implementation plan should be effective as soon as possible in order for VDOT to be in compliance with DPOR's September 8, 2006 ruling.
5. The Central Office Location and Design Division, in cooperation with other Preliminary Engineering Divisions, should develop the standard practice by which the recommended technical documents will be sealed and signed. The standard practice should include the electronic sealing requirements, a decision of whether all technical document sheets should be sealed and signed, the location of where seals and signatures are required, exempt employee signature location if different from a professionals, location of where all original sealed and signed plan title sheets will be stored, etc.
6. Training should be provided for all affected employees indicating who is exempt, what it means to be in a responsible person position, what are the facts about liability coverage, what documents require signing and sealing and how changes in plan documents should be handled during construction.
7. The Human Resource Division should perform an analysis of the proposed new licensure positions in order to determine if the existing incumbents in these positions have a professional license or are exempt by Code. Agency guidance on how to handle (transfer of duties, movement of incumbents, no action, etc.) those without a license or not exempt by Code needs to be developed.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
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APPENDIX A

VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
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COMMONWEALTH of VIRGINIA
DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL REGULATION

3600 West Broad Street, Richmond, Virginia 23230-4917
Telephone: (804) 367-8500 TDD: (804) 367-9753
<http://www.dpor.virginia.gov>

JAY W. DEBOER
DIRECTOR
DAVID B. ASHR
CHIEF DEPUTY

DEPUTY DIRECTORS:
KAREN W. O'NEAL
Licensing & Regulation
NICK A. CHERSTNER
Compliance & Investigations
STEVEN L. ARTHUR
Administration & Finance

September 8, 2006

Mr. Malcolm T. Kerley, P.E.
Chief Engineer
VDOT
1401 East Broad St.
Richmond, VA 22319-2000

Dear Mr. Kerley:

Thank you for your letter of June 15, 2006, inquiring whether employees of VDOT who are licensed as professional engineers and/or land surveyors are required to seal and sign their work or if they are exempt from doing so until June 30, 2010, pursuant to the provisions of § 54.1-402.1 of the *Code of Virginia*. The Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects (APELSCIDLA Board) briefly discussed this issue at its meeting on June 15, 2006, and again at its meeting on September 7, 2006.

After discussion, the Board determined that the provisions of § 54.1-402.1 exempt individuals from having to be licensed under certain circumstances; however, the statute does not exempt those individuals who are licensed as a professional engineer, architect, or land surveyor and in a responsible charge position from complying with the Board's regulations. This interpretation is further reinforced by the provisions of § 54.1-401, which exempt certain actions of regulants of the Board, under certain circumstances, from the Board's purview. Section 54.1-401 of the *Code of Virginia* exempts the "Practice of professional engineering, architecture or land surveying solely as an employee of the United States" but does not contain a corresponding exemption for employees of various state agencies and political subdivisions.

Finally, the General Assembly removed the exemption previously contained in § 54.1-401 -- to exempt the work of employees of various state agencies and political subdivisions who were licensed as a professional engineer, architect, or land surveyor and in a responsible charge position from complying with the Board's regulations -- in its 1992 session (see Chapter 780 of the *1992 Acts of Assembly*), at the same time the provisions of § 54.1-402.1 were added to the *Code*. The language deleted from § 54.1-401 in 1992 is as follows:

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
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Mr. Malcolm T. Kerley, P.E.
September 8, 2006
Page 2

"6. Practice of professional engineering, architecture or land surveying as a regular full-time, salaried employee of the Commonwealth or any political subdivision thereof; provided that such person does not furnish advisory service for compensation to the public or as an independent contracting party in this Commonwealth or any political subdivision thereof in connection with engineering, architectural or land surveying matters "

Once again, thank you for your letter and please feel free to contact me should you require any additional information.

Sincerely,

APELSCIDLA BOARD



Mark N. Courtney
Executive Director

C: Jay W. DeBoer
Director

MNC

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
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APPENDIX B

VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
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COMMONWEALTH of VIRGINIA

DEPARTMENT OF TRANSPORTATION
1401 EAST BROAD STREET
RICHMOND, 23219-2000

CHARLES D. NOTTINGHAM
COMMISSIONER

J. G. BROWDER, JR.
CHIEF ENGINEER

November 21, 2000

MEMORANDUM

To: Mr. Charles D. Nottingham
Subject: Positions Requiring Professional Surveying Registration

In accordance with Sections 54.1-400, 54.1-401, 54.1-402.1, 54.1-406, and 54.1-410, certain surveyors within VDOT must be licensed as Professional Surveyors by June 30, 2010 to be in compliance with the Code of Virginia. I have reviewed these requirements with the Location and Design division administrator and I have determined the appropriate positions that will require licensing as registered Professional Surveyors.

The Location and Design division positions that require registration by June 30, 2010 are listed below. It is essential that these be identified now so that as positions become vacant, they can be filled with the most fully qualified surveyors.

Location and Design Division (Central Office)

All surveying positions, Transportation Engineer and higher.

- Transportation Engineer
- Transportation Engineer Senior
- Transportation Engineer Program Supervisor

Location and Design Section (Districts)

- Residency Survey Supervisor
- District Survey Manager

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Mr. Charles D. Nottingham
Page Two
November 21, 2000

For your use, I have attached a copy of the Code of Virginia (2000) – Title 54.1, Professions and Occupations.

I am requesting your concurrence in the above so that this can be sent to the division and district location and design sections. This will put VDOT in a posture to be in compliance with the Code of Virginia by June 30, 2010 in the division and district sections for which the Chief Engineer has overall responsibility regarding the surveying discipline.


J. G. Browder, Jr.
Chief Engineer

JGB:jw
Attachment:
Cc: Mr. Claude D. Garver, Jr.

I concur (or non-concur) in the above request.



Charles D. Nottingham, Commissioner



Date

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PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
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APPENDIX C

VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
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COMMONWEALTH of VIRGINIA

DEPARTMENT OF TRANSPORTATION
1401 EAST BROAD STREET
RICHMOND VIRGINIA 23219-2000

PHILIP A. SHUCET
COMMISSIONER

CLAUDE D. GARVER, JR.
DEPUTY COMMISSIONER

October 7, 2002

MEMORANDUM

TO: Commissioner's Staff 
FROM: Claude D. Garver, Jr., Deputy Commissioner
SUBJECT: Professional Engineer Required Positions

As you are aware, the department has been involved in a one-year process to identify core VDOT positions required to hold a Professional Engineer (PE) license. The Commissioner's Staff met on September 23rd to make the final decisions regarding those positions that are required to hold a PE license. This study is complete and the Commissioner's Staff has finalized these decisions. The previously distributed list of 272 positions has been approved and the positions contained within will be required to hold PE licenses.

The establishment of this list equates to the following:

- All incumbents within the 272 positions will be required to obtain a PE license by July 1, 2010 if they remain in the designated position
- All vacancies involving the 272 positions will be required to hold a PE license or be exempt from the PE requirement until July 2010 based upon the Code of Virginia (i.e. have held engineering position(s) with VDOT or the state consistently since March 8, 1992)

The decisions recently finalized complete Phase I of the PE issue: the core list of PE required positions is complete.

Phase II of the PE issue involves:

- Review of EWP's for all Transportations Engineer Senior, Transportation Engineering Program Supervisor, Assistant Division Administrator, and Division Administrator positions for engineering responsibilities
- Those positions that complete engineering work will be added to the PE required list and must obtain a PE license by July 2010

RECEIVED

OCT 09 2002

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- Positions that do not have engineering responsibilities as part of their EWP will be retitled to omit the term "engineer" from their titles

The deadline to complete the work associated with Phase II will be established by Human Resources in the near future.

Phase III of this process will involve the retitling of those positions determined not to be responsible for engineering work. The retitling process will be completed by July 1, 2003.

In order to assist individuals to qualify and prepare for the PE exam, HR is in the process of researching appropriate materials to be utilized. The division will be contacting you in the future regarding details about these offerings.

If you have any questions regarding the PE required positions, please contact your HR Manager. If you have questions related to the PE study, you may contact Lynne Wasz at 804-786-8281.

CC: HR Managers

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**POSITIONS TO BE CONSIDERED AS
PE REQUIRED**

Vacancies - All vacancies within PE required positions shall be:

- Advertised as requiring a current PE license or
- Exempt from this requirement until July 1, 2010, based on the provisions of the Code of Virginia (i.e., has held an engineering position with the state consistently prior to March 8, 1992)

Residencies:

- A position with the responsibility for the construction or land development activities at each residency will require a PE license

Districts:

- All District Construction Engineers positions will require a PE license
- All District Maintenance Engineers EWP's will be evaluated as to their engineering responsibilities in order to determine if a PE license is required
- All Transportation Engineer Senior and Transportation Engineer Program Supervisor positions under the engineering functions of Location & Design, Structure & Bridge, and Materials
- All Transportation Engineer Senior and Transportation Engineer Program Supervisor correlate positions below the Chief of Operations shall be required to hold a PE license (e.g. Transportation Engineer Program Supervisor in Mobility Management and the District Traffic Engineer in the districts)
- The senior position responsible for the Utilities program will require a PE license if the individual is qualified for an upgrade to Transportation Engineer Senior based upon their engineering responsibilities within the EWP

Research Council:

- The Director will determine the positions* that require a PE license based upon the Code of Virginia requirements

Chief of Operations:

- All positions with the title of Transportation Engineer Senior, Transportation Engineer Program Supervisor, Assistant Division Administrator, and Division Administrator* shall be required to obtain a PE license
- Any necessary review of EWP's shall take place concurrently with reorganization and shall be completed by December 1, 2002

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
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2

Chief Engineer for Program Development:

- Within the divisions of Location & Design, Structure & Bridge, Materials, and Scheduling & Contract Development, all positions with the titles of Transportation Engineer Senior, Transportation Engineer Program Supervisor, Assistant Division Administrator* and Division Administrator
- In the Right of Way & Utilities division, only the position of State Utilities Engineer will require a PE license

Commissioner's Staff:

- Chief Engineer
- Chief of Operations

VDOT Statewide:

- All positions with the title of Transportation Engineer Senior, Transportation Engineer Program Supervisor, Assistant Division Administrator, and Division Administrator that do not perform engineering work as reflected in their EWP will not be required to hold a PE license
- Positions within this category shall be appropriately retitled without using the term "engineer" - these determinations will be completed by December 1, 2002
- The reclassification into a non-engineering titles will be completed no later than July 1, 2003

*The position's EWP will be the basis for all decisions regarding the PE license requirement. If a position's responsibilities include engineering work, a PE license will be required. Positions, which do not conduct engineering work, will not be required to hold a PE license. For example, a position involving only administrative duties would not require the license.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
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APPENDIX D

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
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HUMAN RESOURCES MANAGEMENT MEMO		HRD # 2900
Subject:	Positions Requiring a Virginia Landscape Architect Certificate	
Issued Effective:	10/10/03	Revised Effective:
Supercedes:		Rescinded:

To ensure consistency throughout the Department, clear guidance on the Virginia Landscape Architect (LA) Certificate requirements for VDOT positions is hereby provided. The practice of landscape architecture is defined within the code as “any service wherein the principles and methodology of landscape architecture are applied in consultation, evaluation, planning (including the preparation and filing of sketches, drawings, plans and specifications) and responsible supervision or administration of contracts relative to projects principally directed at the functional and aesthetic use of land.”

These guidelines have been developed to comply with the requirements established by Chapter 4 of Title 54.1 of the *Code of Virginia*. The Chief Engineer for Program Development is responsible for agency compliance.

VDOT is requiring the Virginia LA Certificate for employees in the Role of Architect/Engineer I with a SOC Code of Landscape Architect. This requirement is applicable to positions in the Central Office Location and Design Division and all Districts.

The District/Division Administrators are delegated authority to establish additional Virginia LA Certificate required positions within their respective districts provided they do so in accordance with the *Code of Virginia* and applicable Human Resources policies. Considerations should be based on organization structure, position duties and responsibilities as evidenced in the Employee Work Profile, and business need.

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PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
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Recruitment: When recruiting for a position that requires a Virginia LA Certificate, the Employee Work Profile (EWP) and the advertisement (RECRUIT, internal job posting, and media ad) must include language to indicate such requirement.

The EWP (Part II, #20, Education, Experience, Licensure, Certification required for entry into position) shall include the notation: Virginia Landscape Architect Certificate required. HR is responsible for ensuring the position record in PMIS reflects "LA" in the optional position data field for the position (spaces 19 and 20).

The ad statement should read as: Landscape Architect Certificate required.

HR will use as a screening criteria "LA Certificate." Applicants who possess a LA Certificate (Virginia or other state/country) will be credited with meeting this requirement for the position.

If the selected candidate's certification is a Virginia LA Certificate, the offer letter shall read, "the position for which this offer of employment is made requires that you maintain a valid Landscape Architect Certificate in the Commonwealth of Virginia. Your employment is contingent upon your retaining this license." HR staff must ensure that the LA Certificate number and expiration date are entered into Pathlore.

If the selected candidate's certification is not a Virginia LA Certificate, an offer of employment may be made contingent upon the selected candidate submitting a copy of their application for a Virginia LA Certificate on or before the first day of work. The offer letter shall read, "The position for which this offer of employment is made requires that you obtain a valid Landscape Architect Certificate in the Commonwealth of Virginia prior to commencement of such practice. A copy of your submitted application for the certificate must be provided to (insert name – HR or hiring manager) on or before your first day of work." HR staff must ensure that the LA Certificate and issuing state is entered into Pathlore. This information must be updated when the Virginia LA Certificate is issued.

Positions designated as requiring a Virginia LA Certificate may only be filled with licensed incumbents.

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PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
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Incumbents in positions designated as requiring a Virginia LA Certified must maintain a valid Virginia LA Certificate. District/Division Administrators, District/Central Office HR Managers, and Section Managers are responsible for ensuring that the employee in such a position maintains a valid Virginia LA Certificate. The certificate number and expiration date must be maintained in Pathlore.

Failure to maintain a required Virginia LA Certificate may result in a management initiated demotion (performance or disciplinary), removal through Standards of Conduct, or reassignment.

Notification to Employees in Designated Positions: Incumbents currently holding positions designated as requiring a Virginia LA Certificate will be notified by Human Resources of the certification requirement in writing using the memorandum below. This memorandum will be signed by the District/Central Office Human Resources Manager with copy to the District/Division Administrator or Section Manager.

Each incumbent must sign and date a copy of the memorandum. The signed and dated copy of the memorandum is to be maintained in the employee's personnel file. All employee notifications must be completed prior to October 30, 2003. Incumbents hired after October 30, 2003, will be notified in their offer letter according to the guidelines stated within.

Emily S. Elliott

Emily S. Elliott
Compensation Initiatives Manager

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PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
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#2900 HR Mgmt. Memo - EMPLOYEE NOTIFICATION MEMORANDUM

DATE

Name
Location
Position #
Role Title

Dear Mr./Ms. NAME:

This letter serves to provide you with information regarding the on-going review of Chapter 4 of Title 54.1 of the *Code of Virginia* relating to Landscape Architect certification. Based on the requirements outlined in the Code, VDOT has established a Landscape Architect Certificate requirement for selected positions engaged in the practice of landscape architecture.

You are currently in a position that has been determined to require a Landscape Architect Certificate from the Commonwealth of Virginia. Our records indicate that you currently hold a valid Landscape Architect Certificate in the Commonwealth of Virginia. Your certificate number is (number) with an expiration date of (date). Your continued employment in this position is contingent on your retaining this license.

Please sign, date, and return the attached copy of this letter to verify that you have read and understand this notice. We are here to assist you with any questions. Please do not hesitate to call or schedule an appointment with your HR representative.

Sincerely,

District/Central Office HR Manager

Attachment

cc: District/Division Administrator or Section Head

VDOT Human Resources Division

Page 4 of 4

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
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APPENDIX E

VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
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COMMONWEALTH of VIRGINIA

Department of the Treasury

JODY M. WAGNER
TREASURER OF VIRGINIA

DIVISION OF RISK MANAGEMENT
P.O. BOX 1879
RICHMOND, VIRGINIA 23218-1879
(804) 786-3142
ADMINISTRATION FAX (804) 371-8430
CLAIMS FAX (804) 371-2142

CERTIFICATE OF COVERAGE

ISSUED TO: Virginia Department of Transportation,
and All Interested Parties

INSURER: COMMONWEALTH OF VIRGINIA

AUTHORIZATION: Risk Management Plan and the **Code of Virginia**, §2.2-1837 and
§2.2-1840

COVERAGE PERIOD: Continuous

PURPOSE: Verification of insurance coverage for authorized activities of
employees using professional seals.

COVERAGES: Tort Liability

LIMITS: \$2,000,000 - Tort claims against persons

ADMINISTRATOR: Division of Risk Management
P.O. Box 1879
Richmond, VA 23218-1879

This is for information only. It does not alter any provisions of the Risk Management Plan nor
the **Code of Virginia**.

VERIFIED BY:  State Official's Name: Joyce E. Palmer, CPIW
Title: State & Local Government Program Specialist
Date: June 3, 2003



**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
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COMMONWEALTH OF VIRGINIA

RISK MANAGEMENT PLAN

Administered by

Department of the Treasury
Division of Risk Management

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
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**Commonwealth of Virginia
Risk Management Plan**

The Commonwealth of Virginia, Department of the Treasury, Division of Risk Management, in accordance with §§ 2.2-1837 and 2.2-1838 of the *Code of Virginia*, as amended ("*Code*"), with the approval of the Governor, hereby establishes the terms and conditions of this Risk Management Plan (hereafter referred to as the "Plan") for the benefit of parties specified by statute.

The Division of Risk Management (DRM) is not an insurance company and this Plan is not insurance, as those terms are defined in §38.2-100 of the *Code*. DRM is, instead, a division of a state agency, the Department of the Treasury, that finds its authority to act from the statutory provisions of the *Code*.

DRM shall have final responsibility for interpretation and determination of coverage under the Plan.

I. COVERAGE

- A. This Plan will pay all sums, except as herein limited, or limited by the *Code*, that covered parties shall be obligated to pay by reason of liability imposed by law for damages resulting from any claim arising out of acts or omissions of any nature while acting in an authorized governmental or proprietary capacity and in the course and scope of employment or authorization.
- B. Coverage applies to incidental medical payments arising out of the official activities of any authorized volunteer in an amount not to exceed ten thousand dollars (\$10,000) per incident. This coverage does not increase the limits in Section II, Limits of Liability.

II. LIMITS OF LIABILITY

- A. The amount recoverable by any claimant with respect to the Commonwealth of Virginia, its departments, agencies, institutions, boards or commissions; local soil and water conservation districts; electoral boards or local school board selection commissions; or any director, officer, employee or agent thereof, shall not exceed seventy-five thousand dollars (\$75,000) per claim for events occurring prior to July 1, 1993. For events occurring on or after July 1, 1993, the limit is one hundred thousand dollars (\$100,000) per claim. These limits shall not be applicable to any claim or causes of action other than those established by Virginia law. For claims or causes of action other than those established by Virginia law, the amount recoverable shall not exceed two million dollars (\$2,000,000) per claim.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
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- B. The amount recoverable by any claimant with respect to officers, employees and agents of the Commonwealth of Virginia, including students while participating within the authorized scope of a clinical, internship, externship, or other educational program in order to meet pedagogical requirements; local soil and water district directors, officers, employees and agents; general registrars; electoral board members and local school board selection committee members shall not exceed two million dollars (\$2,000,000) per claim.
- C. For any claim against a health care provider as defined in §8.01-581.1 of the *Code*, the amount recoverable involving an act or acts of medical malpractice shall be limited to the amount provided in §8.01-581.15) of the *Code*.
- D. For any uninsured/underinsured motorist claim, the amount recoverable shall be limited to the amounts stated in §46.2-472 of the *Code*.
- E. Coverage applies to incidental medical payments in a motor vehicle accident in an amount not to exceed five thousand dollars (\$5,000) per person.
- F. Recovery is limited for loss of use of a motor vehicle to the limits provided in §8.01-66 of the *Code*.
- G. In the event the State Insurance Reserve Trust Fund is rendered or becomes insolvent, neither the Commonwealth of Virginia, the General Assembly of Virginia, nor any department, agency, institution, board, commission, official, agent or employee thereof shall be liable for any claim that would have been covered under this Plan but for such insolvency. The establishment of this Plan does not and shall not be deemed or construed to pledge or obligate the full faith and credit of the Commonwealth of Virginia.

III. EXCLUSIONS

This Plan does not cover:

- A. Health care providers eligible to charge through the University of Virginia Health Services Foundation or other similar or like organization.
- B. Health care providers eligible to charge through the Medical College of Virginia Associated Physicians, the Medical College of Virginia Authority or the Virginia Commonwealth University Health Systems Authority, or their successors.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
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- C. Any obligation for which a covered organization or individual or any insurance company thereof may be held liable under any workers' compensation, unemployment compensation, disability benefits law or any similar law.
- D. Liability assumed under any written contract or agreement.
- E. Any claim arising from malicious, willful, wanton, or criminal acts. In addition, the Plan will not defend a covered party where a court or other trier of fact has determined that the covered party has engaged in any of the aforementioned acts.
- F. Claims, demands or other actions seeking relief or redress in any form other than monetary damages, including, but not limited to injunctive relief (subject to the provisions of §2.2-1837 A. 4. of the *Code*). For the purposes of this exclusion, monetary damages does not include (1) costs due or alleged to be due, including interest, solely on account of goods or services contracted for or allegedly contracted for, or (2) expenses associated with complying with any injunction, or (3) salaries, wages or employment benefits owed or (4) any combination of (1), (2) or (3).
- G. Liability for punitive damages or liability in any suit or action in which by judgment or final adjudication it is determined that such liability was incurred by reason of (1) acts of fraud or dishonesty, (2) acts of intentional, malicious, willful or wanton misconduct, (3) criminal acts, or (4) any claim in which a covered party has gained any profit or advantage to which they are not otherwise entitled. The Plan may provide coverage for such acts or punitive damages if the Attorney General and the Governor determine that such coverage is in the public interest.
- H. Liability for the return of any remuneration paid if the payment of such remuneration shall be held to be in violation of the law by a court of competent jurisdiction.
- I. Indemnification on behalf of any judge that the Supreme Court of Virginia determines should be censured or removed from office pursuant to Section 10 of Article VI of the Constitution of Virginia or statutes enacted pursuant thereto.

IV. COVERAGE PERIOD

- A. This Plan, except for medical malpractice, applies only to a claim, suit, action or other proceeding arising on or after the time that the Governor or his designee approves and signs this Plan, provided the acts or omissions

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

which give rise to such claim, suit, action or other proceeding did not occur prior to that approval and signature.

- B. Medical malpractice coverage applies to a claim, suit, action or other proceeding arising on or after the time that the Governor or his designee approves and signs this Plan, provided the acts or omissions which give rise to such claim, suit, action or other proceeding occurred subsequent to June 30, 1975.

V. OTHER INSURANCE OR SELF-INSURANCE

If at the time of loss, claim, suit, action or other proceeding there is insurance or self-insurance available to any organization or individual covered by this Plan, or which would have been available to cover such loss, claim, suit, action or other proceeding but for the existence of this Plan, the Plan shall not be liable for any amount collectable under such other coverage or self-insurance.

VI. NOTICE OF OCCURRENCE, CLAIM OR SUIT

A. All Claims Other Than Motor Vehicle

1. When an occurrence takes place which an organization or individual has reason to believe may result in a claim, suit, action or other proceeding, notice shall be given immediately to DRM. Failure to provide such notice will constitute a material breach of the Plan and could result in denial of coverage.
2. The affected employee shall immediately notify his or her agency of any accident or loss and forward all notice or legal papers received. The agency shall immediately notify and forward all information and documents to DRM or to the DRM designated and authorized third party claims administrator.
3. No person shall, except at individual expense, voluntarily make any payments, assume any obligation or incur any costs.
4. Notice shall be given immediately after the organization or individual has knowledge of the occurrence. It shall include all reasonably obtainable information about the time, place and circumstances of the occurrence as well as the names, addresses, telephone numbers and other pertinent information of all individuals involved.
5. If a claim, suit, action or other proceeding is made against an organization or individual, every demand, notice, summons or other process shall be immediately forwarded to DRM.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

B. Motor Vehicle Claims

1. The vehicle operator must comply with state travel regulations, notify the State Police or other authorized law enforcement organization as well as the authorized claims administrator, and cooperate fully in the investigation, defense or settlement of any claim or suit. Failure to provide such notice or to comply with state travel regulations will constitute a material breach of the Plan and could result in denial of coverage.
2. The vehicle operator shall immediately notify his or her agency of any accident or loss and forward all notice or legal papers received. The agency shall immediately notify and forward all information and documents to the authorized third party claims administrator.
3. Such notice shall be given immediately after the organization or individual has knowledge of the occurrence. It shall include all reasonably obtainable information about the time, place and circumstances of the occurrence as well as the names, addresses, telephone numbers and other pertinent information of all individuals involved.
4. No person shall, except at individual expense, voluntarily make any payments, assume any obligation or incur any costs.
5. If a claim, suit, action or other proceeding is made against an organization or individual, every demand, notice, summons or other process shall be immediately forwarded to DRM.

VII. DEFENSE, ASSISTANCE AND COOPERATION

- A. Defense for claims, suits, actions or other proceedings covered by this Plan is provided under §2.2-507 *et al* of the Code. Unless otherwise approved in accordance with the Code, the Office of the Attorney General shall provide defense.
- B. As a condition of coverage, any organization or individual covered by the Plan must promptly notify DRM of any claim, suit, action or other proceeding and cooperate fully and completely in the investigation and defense of such claim, suit, action or other proceeding that may be covered by this Plan. Failure to promptly notify DRM or to cooperate, may, at the option of DRM, result in termination of coverage.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
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- C. Settlement of any claim, suit, action or other proceeding involving the interests of the Commonwealth shall be subject to §2.2-514 of the *Code*.

VIII. APPEALS

In the event an organization or individual elects not to appeal a judgment, DRM may elect to make such appeal at its own cost.

IX. SUBROGATION

The Plan shall be subrogated to all of an organization's or an individual's rights of recovery against any person or organization. Those organizations or individuals covered by the Plan shall fully cooperate with DRM to secure such recovery.

X. ACTION AGAINST THE PLAN

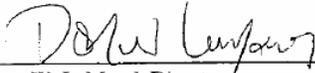
No action shall lie against the Plan or the Commonwealth of Virginia or any agency thereof, unless as a condition precedent thereto the covered organization or individual shall have fully complied with all terms, conditions and procedures of the Plan and until the amount of any obligation to pay shall have been finally determined either by judgment or written agreement.

XI. DEFINITIONS

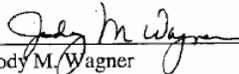
All terms, phrases and definitions used in the Plan shall be those used in the *Code*.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

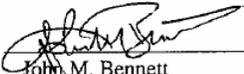
IN WITNESS THEREOF the Department of the Treasury, Division of Risk Management, with the approval of the Governor, has executed this Plan to be effective immediately upon the signature of the Governor or his designee.

BY: 
Don W. LeMond, Director
Division of Risk Management

APPROVED

BY: 
Jody M. Wagner
State Treasurer

APPROVED

BY: 
John M. Bennett
Secretary of Finance

APPROVED BY THE GOVERNOR



DATE: 1/6/05

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

APPENDIX F

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
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Attorney/Client Privileged Communication

MEMORANDUM

To: Emily S. Elliott
Assistant Division Administrator
Human Resources Division
Department of Transportation

From: Todd E. LePage
Senior Assistant Attorney General

Re: Sovereign Immunity for Design Professional Engineers

Date: July 31, 2007

As a result of John Beall's meeting with you and several of VDOT's professional engineers, I have been asked to provide you with legal advice concerning application of the doctrine of sovereign immunity.

Question Presented

Would VDOT's professional engineers be protected by the doctrine of sovereign immunity from lawsuits alleging they committed simple negligence while designing construction projects?

The Virginia Tort Claims Act

Since the early 1980s, *the Commonwealth's* sovereign immunity has been partially waived by the Virginia Tort Claims Act ("the Act"). § 8.01-195.3 of the Code of Virginia. While the Act waived *the Commonwealth's* sovereign immunity for claims of simple negligence by state employees, § 8.01-195.3 specifically preserved the sovereign immunity of state employees that existed prior to the Act. Accordingly, while the Act waived the Commonwealth's sovereign immunity to allow certain claims to be asserted against *the Commonwealth*, it did not waive sovereign immunity to permit any additional claims to be asserted against the Commonwealth's *employees*. Irrespective of the Act, therefore, VDOT's professional engineers continue to enjoy the same level of sovereign immunity protection from claims of simple negligence that they possessed prior to the Act's passage by the General Assembly.

**Applicability of the Sovereign Immunity Doctrine
to Designs by VDOT's Professional Engineers**

The Supreme Court of Virginia has developed a test that considers 4 factors in determining whether a state employee is covered by sovereign immunity against claims

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

of simple negligence. Those 4 factors are: 1) the nature and extent of the function performed by the employee; 2) the extent of the state's interest and involvement in the function; 3) the degree of control and direction exercised by the state over the employee; and 4) whether the act complained of involved the use of judgment and discretion. *Messina v. Burden*, 228 Va. 301, 313 (1984). The Court has indicated that if the function a state employee negligently was performing is essential to a governmental objective and the government has a great interest and involvement in that function, those factors weigh in favor of the state employee's claim of sovereign immunity, but that if the function has only a marginal influence upon a governmental objective, and the government's interest and involvement in that function are slight, these factors weigh against granting sovereign immunity to a state employee. *Lohr v. Larsen*, 246 Va. 81, 85 (1993). Further, the Court has indicated that a "necessary part of an immunity analysis is the level of discretion required of a government employee in performing his job and whether the employee is exercising that discretion in the discharge of his duties when the allegedly negligent act occurred." *Id.* at 87. While an inherent conflict might appear to exist between the 3rd and 4th factors of the test, the Court has reconciled them by holding that "when a government employee is specially trained to make discretionary decisions, the government's control must necessarily be limited in order to make maximum use of the employee's special training and subsequent experience." *Id.* at 88.

The Supreme Court of Virginia has considered 2 cases which involved the applicability of the sovereign immunity doctrine to VDOT employees. In both cases, the Court held that the doctrine covered the VDOT employee. I will describe the facts and the holding in each case.

In *Bowers v. Commonwealth of Virginia, Department of Highways and Transportation, et al.*, 225 Va. 245 (1983), Bowers leased certain property that accessed a secondary highway by a driveway across a stream. At the time Bowers leased the property, the driveway contained a one-pipe culvert that was constructed by the landlord to accommodate the flow of the stream. VDOT's Resident Engineer received complaints that the one-pipe culvert was causing flooding on the secondary highway and he made plans to improve the secondary highway. As part of that improvement project he planned to upgrade the culvert on the property Bowers was leasing. The Resident Engineer received a donation of land from the landlord necessary to upgrade the culvert and, as part of the roadway improvement project, installed a new culvert consisting of two parallel concrete pipes, a covering of gravel, and "aggregate bag head walls". During a subsequent heavy rainfall, Bowers attempted to cross the culvert and it collapsed under the weight of his pickup truck. When Bowers exited the truck, he was injured when he "went right straight down" through the gravel. Bowers then sued both the landlord and VDOT's Resident Engineer alleging simple negligence on the ground that the accident allegedly would not have occurred if the Department had installed concrete headwalls rather than "aggregate bag head walls" when it planned and constructed the culvert.

Applying the above-specified test, the Supreme Court held that the Resident Engineer was protected by sovereign immunity and dismissed the action against him.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
WHITE PAPER**

The Court noted that the state's interest in the project was substantial. *Id.* at 251. The Court also held that while the Resident Engineer had broad discretion in the planning and construction of the project (including the new culvert) he also was a subordinate employee of the Department and subject by law to the direction and control of the Commonwealth Transportation Commissioner. *Id.* at 253. This combination of state interest in the project, vesting of discretion in the Resident Engineer, and retention of direction and control by the Commissioner, led the Court to conclude that the Resident Engineer was protected by the sovereign immunity doctrine from allegations that he committed simple negligence in the planning and construction of the culvert.

The second case in which the Supreme Court held that the sovereign immunity doctrine prevented a claim of simple negligence against a VDOT employee was *Hinchey v. Ogden*, 226 Va. 234 (1983). Hinchey was injured when a motorcycle on which she was a passenger was involved in a head-on collision on the Norfolk-Virginia Beach Expressway. The motorcycle was in the eastbound lane of the Expressway when a westbound automobile crossed into the eastbound lane and the head-on collision occurred. Hinchey sued Ogden, who was Superintendent of the Expressway, alleging that he breached his official duty to provide barriers and other traffic control devices sufficient to prevent vehicles from entering the wrong lane of travel on the Expressway. Because construction, improvement, operation and maintenance of the Expressway was the exercise of a governmental function, and because Ogden was a state employees who had been sued for the actions which were within the scope of the discretionary duties delegated to him, the Court held that he was protected from the suit by sovereign immunity. *See id.* at 238.

The above two cases, particularly *Bowers*, suggest it is highly likely that the sovereign immunity doctrine will protect VDOT's professional engineers from suits alleging that they committed simple negligence in the design of construction projects. The state has a substantial interest in these projects. The professional engineers' special training requires them to exercise substantial discretion in their designs but, like the Resident Engineer in *Bowers*, they are subordinate employees of VDOT that are by law subject to the direction and control of the Commonwealth Transportation Commissioner. This is precisely the set of circumstances that led to Court in *Bowers* to conclude that the Resident Engineer was protected by sovereign immunity from allegations of simple negligence. There is no rational reason to think that the Court would not similarly rule if VDOT's were alleged to have committed simple negligence in drafting their designs.

**Sovereign Immunity has Never Protected State Employees from
Allegations Asserting Gross Negligence or Intentional Acts**

The doctrine of sovereign immunity never has protected state employees from suits alleging that they committed intentional torts or acts of gross negligence; the doctrine only protects state employees from allegations of simple negligence. Gross negligence is an utter disregard of prudence amounting to complete neglect of the safety of another that constitutes the absence of slight diligence or the want of even scant care.

**VIRGINIA DEPARTMENT OF TRANSPORTATION
PROFESSIONAL LICENSURE SEALING AND SIGNING COMMITTEE
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See Chapman v. City of Virginia Beach, 252 Va. 186 (1996); *Frazier v. City of Norfolk*, 234 Va. 388 (1987). As long as VDOT's professional engineers meet this extremely low standard in drafting their designs, and as long as they do not intentionally draft a faulty design, they should not have liability for their designs.

A plaintiff may allege both simple and gross negligence when he or she sues. Because of the extremely low standard of care necessary to avoid a claim of gross negligence, however, a plaintiff likely will have a difficult time prevailing on a gross negligence claim. Accordingly, there is a remote likelihood that VDOT's professional engineers would have any liability for claims that they were grossly negligent in drafting designs for construction projects.

Conclusion

VDOT's professional engineers should have sovereign immunity protection against suits alleging that they committed negligence when designing VDOT construction projects. As long as they exercise even minimal care in drafting their designs, they should have a remote likelihood of liability for claims that their designs constitute gross negligence. Of course, I assume they would never intentionally draft a faulty design, so they should have no liability for a claim alleging an intentional tort. Overall, therefore, there appears to be a small likelihood that a VDOT professional engineer would be found personally liable for a design of a construction project.

5:36