

December 28, 1993

Honorable Max Black
Idaho House of Representatives
3731 Buckingham Drive
Boise, ID 83704

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Dear Representative Black:

You have asked the Attorney General's Office to provide legal guidance regarding the scope of the regulatory powers of the Idaho Board of Registration of Professional Engineers and Professional Land Surveyors insofar as the board regulates the practice of engineering. Specifically, you ask:

Could the Board of Professional Engineering interpret the activity of in-house engineers, working on their own equipment, as falling within the [purview] of "wherein the public welfare or the safeguarding of life, health, or property is concerned or involved, when such service is rendered in a professional capacity and requires the application of engineering principles and data"?

The quotation is from the statutory definition of the "practice of engineering," Idaho Code § 54-1202(c), and your question, in effect, asks whether the board may deem in-house engineers to be engaged in the "practice of engineering" whenever their work impacts "the public welfare or the safeguarding of life, health, or property." So stated, the answer to the question does not address your announced concern, which is "the certification of in-house engineers." We have, therefore, taken the liberty of rephrasing your question as follows:

Does the activity of an in-house engineer who is engaged in the "practice of engineering" as that term is defined in Idaho Code § 54-1202(c) constitute the "practice of professional engineering" as that term is defined in Idaho Code § 54-1201 and therefore subject the engineer to the board's registration requirements?

Our conclusion is that the statute is ambiguous and that plausible arguments can be made to support or to reject the board's authority to regulate all those engaged in the "practice of engineering" in an in-house capacity. Our further conclusion is that because a statute with criminal sanctions must be construed narrowly and, because the better arguments support the conclusion that the board may regulate only the "practice of

professional engineering," the board does not have authority to require registration by in-house engineers who are engaged in the practice of engineering but who do not hold themselves out to be "professional engineers."

ANALYSIS

A. Statutory Construction

Chapter 12 of title 54 of the Idaho Code creates the Board of Registration of Professional Engineers and Professional Land Surveyors, defines its jurisdiction and powers, and prescribes standards and qualifications for, among other things, the practice of "professional engineering" in the State of Idaho. At the outset, the "Declaration of Policy" states that it is:

[U]nlawful for any person to practice or offer to practice professional engineering . . . in this state, or to use in connection with his name or otherwise assume, use or advertise any title or description tending to convey the impression that he is a registered or licensed engineer . . . unless such person has been duly registered

Idaho Code § 54-1201. Thus, it is clear that no one may engage in the practice of professional engineering in Idaho without being duly registered by the board. Unfortunately, the term "practice of professional engineering" is not included in the "definitions" section of the statute. However, the term "practice of engineering" is defined:

The term "practice of engineering" within the intent of this act shall mean any service or creative work, such as consultation, investigation, evaluation, planning, designing, teaching upper division engineering design subjects, and the supervision of inspection observation of construction [*sic*] in connection with any public or private utilities, structures, buildings, machines, equipment, processes, works, or projects, wherein the public welfare or the safeguarding of life, health, or property is concerned or involved, when such service is rendered in a professional capacity and requires the application of engineering principles and data. A person shall be construed to practice or offer to practice engineering within the meaning and intent of this act who practices any of the branches of the profession of engineering or who, by verbal claim, sign, advertisement, letterhead, card, or in any other way represents himself to be a professional engineer or through the use of some other title implies that he is a professional engineer or that he is registered under this act, or holds himself out as able to perform or who does perform any engineering service or work or any other service designated by the practitioner which is recognized as engineering.

Idaho Code § 54-1202(c).

The fundamental ambiguity of the statute is its use of the terms "engineering" and "professional engineering." If the Idaho Legislature intended that the two terms be used interchangeably, then everyone who practices "engineering" in the State of Idaho must be registered or licensed by the Board of Registration of Professional Engineers and Professional Land Surveyors. If the two terms are intended to carry distinct meanings, as they must under basic principles of statutory construction, then it is only "professional engineers" who must be registered, not everyone who engages in the "practice of engineering."

As noted, a plausible argument can be made that the Idaho Legislature intended the board to regulate all those who engage in "the practice of engineering," regardless of whether they are employed by an engineering firm, a private corporation, or a governmental entity. The announced purpose of the statute is "to safeguard life, health and property." As a matter of public policy, it can therefore be argued that the board should be authorized to regulate all those who apply their training in engineering principles to projects of such magnitude that "the public welfare or the safeguarding of life, health, or property is concerned or involved." Idaho Code § 54-1202(c).

Such a reading, however, violates the basic principles of statutory construction. The meaning of a statute must be determined from a literal reading of the statute as a whole without separating one provision from another. George W. Watkins Family v. Messenger, 118 Idaho 537, 539-40, 797 P.2d 1385, 1387-88 (1990). Taken as a whole, it appears clear that the Idaho Legislature intended to distinguish between "engineering" and "professional engineering" and that only the latter is subject to the board's registration requirements.

The fact that the Idaho Legislature intended to distinguish between the terms "engineering" and "professional engineering" is best appreciated against the background of the amendments to this statute in 1986. Prior to 1986, the definition quoted in your question read:

(c) Practice of Engineering and Professional Engineering. The terms "practice of engineering" and "professional engineering" include . . .

(Emphasis added.) Thus, prior to 1986, the two terms were used interchangeably and synonymously. In 1986, however, the legislature struck the underlined words, thereby driving a wedge between the term "practice of engineering" and the term "practice of professional engineering." The purpose of the amendments, among other things, was to "redefine who may practice engineering . . . and under what conditions." Statement of Purpose, S.B. 1386 (RS 12421)(1986).

As a result of these amendments, the statute now provides a narrow definition of the term "professional engineer" as "a person who has been duly registered or licensed as a professional engineer by the board under this act." Idaho Code § 54-1201(b). By contrast, an "engineer" is not one who is registered or licensed, but is broadly defined as anyone "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 professional education and engineering experience." Idaho Code § 54-1202(a). The separate definitions for the terms "professional engineer" and "engineer" would have no purpose if the legislature intended no significance in the use of the modifying word "professional." In arriving at a determination of legislative intent, every word and provision must be given effect if possible. Matter of Permit No. 36-7200, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992).

The remainder of the statute makes it clear that the Idaho Legislature consistently distinguishes between a "professional engineer," who must be registered or licensed, and an "engineer," who need not be so registered. A "consulting engineer," for example, must be a "professional engineer." Idaho Code § 54-1202(d). The board itself has four members who must be "registered as professional engineers." Idaho Code § 54-1203.

The examination and licensing of "professional engineers" is spelled out in detail, as is that of "engineers-in-training." Idaho Code § 54-1212. Noteworthy is the fact that a minimum of eight years of progressive experience in engineering work is required before one is qualified to be a "professional engineer." Similarly, an "engineer-in-training" must have four years of "progressive experience in engineering work of a grade and character satisfactory to the board and indicating that the applicant is competent to enroll as an engineer-in-training." *Id.* An engineer-in-training is forbidden from practicing as a "professional engineer." Idaho Code § 54-1215(4). Thus, the statute requires four years of "engineering work" even before one is qualified to enroll as an engineer-in-training en route to becoming a registered professional engineer. The entire system, in short, appears to envision years of actual work as an engineer prior to qualifying for even the lowest certification the board can bestow.

The Idaho Legislature has not short-changed the public safety and health by requiring registration only of those who hold themselves out as professional engineers. The statute makes it very clear that only a "professional engineer" is qualified to receive a "certificate of registration" and a "seal" demonstrating that status. Idaho Code §§ 54-1215(1) and (3). The professional engineer's "seal and signature must be placed on all specifications, land surveys, reports, plats, drawings, plans, design information and calculations, whenever presented to a client or any public or governmental agency." Idaho Code § 54-1215(3)(b). All governmental entities are strictly forbidden to "engage in the construction of any public work when the public health or safety is involved unless

the plans and specifications and estimates have been prepared by, and the construction reviewed by a registered professional engineer." Idaho Code § 54-1218.

Further protection of the public safety and health is provided by the requirement, again and again, that the planning, construction and inspection of significant projects be under the control of a registered professional engineer. See, for example, Idaho Code § 31-4407A (solid waste disposal facilities); Idaho Code § 39-118 (sewage treatment plants); Idaho Code 39-118A (ore-processing by cyanidation); Idaho Code § 39-7403 (solid waste facilities); Idaho Code §§ 42-217a and 42-1712 (dams and reservoir sites); Idaho Code § 42-1721 (tailing impoundment structures).

The legislature also knows how to insist that a given governmental position be filled by a licensed, registered professional engineer when it so intends. For example, the legislature expressly mandated, in creating the "office of the chief engineer" of the Idaho Department of Transportation that "the chief engineer shall be a registered professional engineer, holding a current certificate of registration in accordance with the laws of this state." Idaho Code § 40-503.

In sum, the statutory analysis demonstrates that, in Idaho, the requirement of registration does not apply to all those who engage in "the practice of engineering" but only to those who hold themselves out as "professional engineers" and thus are able to perform those functions that only professional engineers may perform.

B. Other Considerations

Several other considerations bolster the conclusion from the above statutory analysis that the Idaho Legislature intended that only "professional engineers" need be registered by the board.

First, it is common knowledge that numerous unlicensed engineers work in-house throughout Idaho in private corporations and in state and local governmental entities. The board has worked within the confines of this system for many years without taking action against any of these engineers. Thus, the agency's interpretation of its own organic statute is that a license is required only when engaging in the type of conduct statutorily specified as limited to registered professional engineers. A reviewing court would give credence to long-established agency practice in construing its own statute. Simplot v. Idaho State Tax Com'n, 120 Idaho 849, 820 P.2d 1206 (1991).

Second, violations of the Professional Engineers and Professional Land Surveyors Act are criminal in nature. Such statutes are narrowly construed so that clear notice is given to those who must comply with them and inadvertent violations do not occur. State v. Thompson, 101 Idaho 430, 437, 614 P.2d 970, 977 (1980).

Finally, it is also noteworthy that the board attempted to amend its statute during the 1993 legislative session. The proposed amendments to Idaho Code § 54-1201 would have deleted the word "professional" from the Declaration of Policy and made it unlawful for **anyone** to engage in the practice of engineering without being licensed and registered by the board. Similarly, the definition of "practice of engineering" would have added the term "engineer" alongside the term "professional engineer" each time the latter term is used, thus making the two terms interchangeable. Idaho Code § 54-1202(c). Further, the penalties section of the statute would have been amended to delete the word "professional" and thus make it a misdemeanor for anyone to "practice engineering" without being registered by the board. For the reasons outlined above, it was proper for the board to seek legislative approval before embarking upon such a major expansion of its regulatory powers and such a major departure from its own prior practice. However, the 1993 legislature did not see fit to approve the proposed amendments.

CONCLUSION

It is the conclusion of this office that the Idaho Board of Registration of Professional Engineers and Professional Land Surveyors Act, taken as a whole, cannot be read to impose registration requirements and criminal sanctions for violations thereof on in-house engineers who are engaged in "the practice of engineering" as that term is defined in Idaho Code § 54-1202(c). The registration requirements apply only to those who hold themselves out as "professional engineers" as that term is defined in Idaho Code § 54-1201 and who wish to exercise the powers and privileges that "professional engineers" alone possess under Idaho's statutory scheme. It is only a violation of the latter provisions that subjects a person to the criminal sanctions of Idaho Code § 54-1218.

Very truly yours,

JOHN J. MCMAHON
Chief Deputy