

**BEFORE THE WEST VIRGINIA STATE BOARD
OF REGISTRATION FOR PROFESSIONAL ENGINEERS**

**IN RE: MARK D. SMITH
 NAVITUS ENGINEERING, INC.**

C2013-05

CONSENT ORDER

Comes now the West Virginia State Board of Registration for Professional Engineers (hereinafter "Board"), by Edward L. Robinson, P.E., its President, and its attorney, Debra L. Hamilton, Deputy Attorney General for the State of West Virginia, for the purpose of agreeing to disciplinary action to be taken against Respondents Mark D. Smith ("Respondent Smith") and Navitus Engineering ("Respondent Firm"), together "Respondents". As reflected in this document, the parties have reached an agreement concerning the proper disposition of the above-referenced matter, and the Board, upon approval of such agreement, does hereby **FIND** the following:

1. The matters set forth herein are within the jurisdiction of the Board, which is the state entity with the power and duty to regulate the practice of engineering in the State of West Virginia.
2. Respondent Smith is a licensed professional engineer in the State of West Virginia holding license number 11709.
3. Respondent Smith is the owner of Navitus Engineering, Inc., which is organized under the laws of the State of Virginia with its principal place of business in Winchester.
4. Respondent Firm applied for and was issued Certificate of Authorization (COA) #C04277 activated on April 23, 2012.

5. This complaint relates to Respondents' Floodplain Study Computations prepared in connection with the permitting of horizontal wells in Doddridge County, West Virginia which is referred to herein as the "Doddridge County Floodplain proceeding" (hereinafter at times referred to as the "original floodplain analysis").
6. This Complaint was initially brought on October 22, 2012, by a third-party intervener in the Doddridge County Floodplain proceeding against only the Respondent Firm, but the Board considers it necessary to also bring disciplinary action against Respondent Smith, who sealed the original computations, and therefore includes him as a named Respondent.
7. The Complaint was served on October 29, 2012, alleging that Respondents performed work (relevant to and reviewed in the Doddridge County Floodplain proceeding) at a time when they did not have a COA and also alleging that two independent engineers found the work to be inaccurate and incomplete.
8. Respondent Smith filed a timely response on November 26, 2012, which addressed only the aspect of the complaint relating to practicing without a COA, explaining that he was also the owner of another company which had a COA and that this work occurred during a transition period when its oil and gas business was being transitioned to Respondent Firm.
9. The Board was provided documents regarding the Doddridge County Floodplain proceeding from several sources as part of its investigation of the Complaint, including "THE DODDRIDGE COUNTY FLOODPLAIN APPEAL BOARD FINAL DECISION IN EQT'S FLOODPLAIN PERMIT #0444 entered on October 5, 2012, which found, among other things, that on the whole the ground survey and studies performed by Respondents were insufficient to support the overall opinions they espoused due to an

insufficient number of cross sections and area of land and that tributaries to the main stream of the subject floodplain, had they been included, would have impacted Respondents' base floodplain evaluation.

10. This Order was appealed and on December 17, 2012, the Circuit Court of Doddridge County held that the Doddridge County Floodplain proceeding was moot (thereby voiding the Appeal Board's decision) since constitutionally necessary parties had not been provided due process and the Court had no jurisdiction regarding the permit based on the unconstitutionality of Doddridge County's Floodplain Ordinance.
11. In March of 2013 Respondents provided the Board with a revised floodplain analysis, including additional cross sections and concluded: "Once all adjustments were made, we ... found that the proposed pad area would in fact cause a greater increase in water surface elevations and would be more than a foot higher than what we had initially modeled in our original study."
12. Respondent Smith, in part due to the instant Complaint, subsequently initiated communications with one of the opposing experts in the "Doddridge County Floodplain proceeding" which were provided to the Board, and the Board notes that the opposing expert also modified his conclusions regarding offsite impact.
13. Respondents admit that all work conducted by Respondent Firm prior to April 23, 2012, including the original floodplain analysis, was done without the required COA, in violation of West Virginia engineering law.
14. Respondents admit that the original floodplain analysis violated the Rules of Professional Responsibility in that the services were not in accordance with current standards of technical competence, did not conform to accepted engineering standards, may have

impacted the life, health, property and welfare of the public, did not include all relevant and pertinent information, and was founded upon an inadequate knowledge of the facts and evaluation of the subject matter.

15. The Board has taken the following factors into consideration in determining the appropriate discipline agreed to herein, including the amount of civil penalty:
 - a. requiring an amount that will alleviate any economic benefit gained by Respondents as a result of the non-compliance and be a substantial economic deterrent to future violations;
 - b. the circumstances leading to the violation;
 - c. the interest of and risk of harm to the public, on which point the Board finds that while the floodplain analysis may have posed a potential risk of harm, there was no such risk in that no permit was issued;
 - d. that Respondents have no previous history of violations in this State;
 - e. Respondents' cooperation in providing information to the Board; and
 - f. other appropriate matters.
16. While Respondent Smith has admitted to violations of several Rules of Professional Responsibility, all the violations are encompassed in the one original floodplain analysis and the Board, in its discretion, has treated this as a single violation of the Rules of Professional Responsibility for the purpose of determining the appropriate discipline agreed to herein.
17. The Board incurred substantial administrative costs in the investigation and prosecution of this Complaint in an amount in excess of \$4,000.00.

CONCLUSIONS OF LAW

18. The Board is a state entity created by West Virginia Code § 30-13-1 *et seq.* and is empowered to regulate the practice of professional engineering in the State of West Virginia.
19. The Board, in its discretion, is authorized to take disciplinary action against any person or firm found to be in violation of West Virginia engineering law and may suspend or revoke or refuse to issue, restore or renew a license, impose a civil penalty upon or reprimand any person or firm who has failed to comply with any of the provisions of W. Va. Code § 30-13-1 *et seq.* or any of the rules promulgated under that article. W. Va. Code § 30-13-21(a)(4).
20. West Virginia engineering law allows a firm to practice or offer to practice engineering only upon the issuance of a certificate of authorization by the Board. W. Va. Code § 30-13-17.
21. The rules promulgated under W. Va. Code § 30-13-1 *et seq.* include the Rules of Professional Responsibility, which are binding on every professional engineer, which each professional engineer must be familiar with, and which delineate specific obligations each professional engineer must meet. W. Va. Code R 7-1-12.2 and 12.2(a).
22. The Rules of Professional Responsibility require that a professional engineer exercise the privilege of performing engineering services “only in the areas of their competence according to current standards of technical competence.” W. Va. Code R 7-1-12.2(b).
23. A professional engineer’s “Obligations to Society” requires the professional engineer to:
 - a. “approve and seal only those design documents that conform to accepted engineering standards and safeguard the life, health, property and welfare of the public.” W. Va. Code R 7-1-12.3(b).

- b. include all relevant and pertinent information in reports ..." W. Va. Code R 7-1-12.3(d).
 - c. express a professional opinion publicly only when it is founded upon an adequate knowledge of the facts and a competent evaluation of the subject matter." W. Va. Code R 7-1-12.3(e).
24. The Board is authorized to assess civil penalties against any person who violates any provisions of this article or any rule promulgated by this Board for each offense in an amount determined by the Board. W. Va. Code § 30-13-21(b); *see also* W. Va. Code § 30-13-21(d)(4).
25. Practicing or offering to practice engineering, as defined by W. Va. § 30-13-1 et seq., without a valid Certificate of Authorization is an action that may subject a firm to discipline by the Board, including a civil penalty up to Five Thousand Dollars (\$5000.00). W. Va. Code R. § 7-1-15.1.
26. A violation of the Rules of Professional Responsibility is an action that could subject Respondents to discipline by the Board, including a civil penalty up to \$5,000.00 for each offense. W. Va. Code R. § 7-1-15.1.
27. Each day of continued violation may constitute a separate offense. W. Va. Code R. § 7-1-15.3.
28. The Board, in its discretion, may assess administrative costs incurred in the performance of its enforcement or investigatory activities against any person or entity who violates any provision of West Virginia engineering law, which costs shall be paid to the West Virginia State Board of Registration for Professional Engineers by check or money order within a period of thirty (30) days from the date of the order entered by the Board. W. Va. Code R § 7-1-14.4.

29. In determining the amount of a civil penalty to be assessed, the Board may consider such factors as:

- (a) Whether the amount imposed will be a substantial economic deterrent to the violation;
- (b) The circumstances leading to the violation;
- (c) The nature and severity of the violation and the risk of harm to the public;
- (d) The history of previous violations;
- (e) The extent to which the cited person or firm has cooperated with the Board and the Board's investigation;
- (f) The economic benefits gained by the violator as a result of the noncompliance;
- (g) The interest of the public; and
- (h) Other matters as may be appropriate.

W. Va. Code R § 7-1-15.4.

CONSENT OF RESPONDENTS

Mark D. Smith, individually and as the owner of Navitus Engineering, Inc., by affixing his signature hereon, agrees to the following:

- 30. Respondents are aware of their right to be represented by counsel and their option to pursue this matter through appropriate administrative and/or court procedures and Respondents intelligently and voluntarily waive their right to do so.
- 31. Respondents admit that they practiced and offered to practice engineering in West Virginia without the required COA, in violation of West Virginia engineering law.
- 32. Respondent Smith admits he violated the Rules of Professional Responsibility in connection with the original floodplain analysis by (1) performing engineering services which did not conform to current standards of technical competence in violation of W. Va. Code R 7-1-12.2(b); (2) approving and sealing design documents that did not conform to accepted engineering standards and thus may have impacted the life, health, property and welfare of the public in violation of W. Va. Code R 7-1-12.3(b); (3) not

including all relevant and pertinent information in the original floodplain analysis in violation of W. Va. Code R 7-1-12.3(d); and (4) expressing a professional opinion publicly that was not founded upon an adequate knowledge of the facts and a competent evaluation of the subject matter in violation of W. Va. Code R 7-1-12.3(e).

33. Respondents accept the findings set forth above and consent to the entry of this Consent Order freely and voluntarily and without duress, restraint or compulsion.
34. Respondents acknowledge that the Board may reject this proposal and may hold a hearing to impose such sanctions of a disciplinary nature as it deems appropriate.
35. Respondents acknowledge that entering into the negotiation of this Consent Order constitutes a waiver of any and all objections regarding the timeliness of Board action on Complaint Number C2013-05. This paragraph is binding on Respondents even in the event that the Board does not approve this Consent Order.
36. This Consent Order is executed by Respondents for the purposes of avoiding further administrative action with respect to this Complaint. In this regard, Respondents authorize the Board to review and examine all investigative file materials concerning Respondents prior to or in conjunction with consideration of this Consent Order.
37. Should the Consent Order not be accepted by the Board, it is agreed that presentation to and by the Board shall not unfairly or illegally prejudice the Board or any of its members from further participation, consideration or resolution of these proceedings and that any knowledge obtained by the Board shall not form the basis of any objection to any Board member serving on the hearing panel in the event this matter goes to hearing, any such objection being knowingly waived by Respondents. This paragraph is binding on Respondents even if the Board does not approve this Consent Order.

38. Respondents acknowledge that this Consent Order, the underlying Complaint, their submissions to the Board, and the public records of the Doddridge County Floodplain proceeding provided to the Board are public records which must be made available upon legal request in accordance with the West Virginia Freedom of Information Act.
39. Respondents agree that the sum and substance of the Complaint and this agreement in part or in their entirety will be set forth in Board publications and on the Board website, as well as other appropriate placements, including the non-public enforcement exchange database administered by the National Council of Examiners for Engineering and Surveying (NCEES).
40. Respondents acknowledge this Consent Order constitutes a full and final settlement of this matter and that they cannot appeal or bring any other civil or administrative action regarding the circumstances of same except an action to enforce the terms of this Consent Order.
41. Respondents acknowledge that non-compliance with this Consent Order may result in the rescission of this agreement, the reinstatement of the Complaint, the summary revocation of any license or certification which may be issued to Respondents by the Board, and the addition of any other charges which may arise or ensue from Respondents' non-compliance with this Consent Order.
42. Respondents acknowledge that proof of any misstatement or misrepresentation made in connection with this matter will result in the rescission of this agreement, the reinstatement of Complaint C2013-05, the summary suspension or revocation of any license or certificate of authorization issued to the Respondents, and the addition of any

other charges which may arise or ensue from providing false information to the Board in violation of West Virginia engineering law.

43. Any violation of the terms of this Consent Order shall be immediate cause for further disciplinary action by the Board.

ORDER

1. On the basis of the foregoing the Board hereby **ORDERS** that this Consent Order shall serve as an informal settlement of Complaint #C2013-05 pursuant to West Virginia Code § 30-13-22(b).
2. The Board **ORDERS** Respondent Firm to pay a civil penalty in the amount of Two Hundred Fifty Dollars (\$250.00) for practicing and offering to practice engineering in West Virginia without a certificate of authorization.
3. The Board **REPRIMANDS** Respondent Smith for his violations of the Rules of Professional Responsibility admitted to herein.
4. The Board **ORDERS** Respondent Smith to pay a civil penalty of Four Thousand Dollars (\$4,000.00) for violating the Rules of Professional Responsibility admitted to herein.
5. The Board **ORDERS** Respondents to pay administrative costs in the discounted amount of Two Thousand Dollars (\$2,000.00).
6. The administrative costs agreed to herein must be paid within thirty (30) days from the date of the Board's entry of this Consent Order evidenced by the date of the President's signature, such payment to be made payable to the W. Va. P.E. Board.
7. The civil penalties agreed to herein in the total amount of Four Thousand Two Hundred Fifty Dollars (\$4,250.00) must be paid within sixty (60) days from the date of the Board's entry of this Consent Order evidenced by the date of the President's signature, such

payments to be made separately from the administrative costs and payable to the W. Va. P.E. Board for transfer to the general fund of the State of West Virginia upon receipt.

8. The sum and substance of the Complaint and this agreement in part or in their entirety shall be set forth in Board publications and on the Board website, as well as other appropriate placements, including the non-public enforcement exchange database administered by NCEES.
9. Any violation of the terms of this Consent Order shall be immediate cause for summary suspension or revocation of Respondent's professional engineering license and Respondent Firm's certificate of authorization and grounds for further disciplinary action by the Board.
10. This Consent Order constitutes a full and final settlement of this matter, and nothing in this Consent Order or the circumstances giving rise to same may be the subject of any appeal or other civil or administrative action by Respondent, although either party may bring an action to enforce the terms of this Consent Order and the Board may take this disciplinary action into consideration as may be relevant to future issues regarding Respondents which may arise.
11. If the civil penalties and administrative costs agreed to herein are not timely paid, this Consent Order may be summarily enforced in the Circuit Court of Kanawha County without further notice to Respondent upon application by the Board for the entry of a Judgment Order for the total amount of the payments agreed to herein of Six Thousand Two Hundred Fifty Dollars (\$6,250.00) that remain unpaid, together with pre-judgment interest from the date of the President's signature hereon, post-judgment interest from the

date of entry of the Judgment Order, and all costs of any enforcement action(s), which judgment shall be fully executable in accordance with applicable law.

12. This matter shall be closed upon execution of this Consent Order by both parties and the full payment of the civil penalties and administrative costs agreed to herein.

13. This Consent Order relates solely to matters within the jurisdiction of the West Virginia Board of Registration for Professional Engineers and does not evidence compliance with any other laws of the State of West Virginia or its political subdivisions, nor should any such compliance be implied.

AGREED TO BY:



MARK D. SMITH

Individually and as Owner of Navitus Engineering, Inc.

11.25.13

DATE

ENTERED into the records of the West Virginia State Board of Registration for

Professional Engineers this 6th day of December, 2013.

**WEST VIRGINIA STATE BOARD OF
REGISTRATION FOR PROFESSIONAL ENGINEERS**

By: 

**EDWARD L. ROBINSON, P.E.
BOARD PRESIDENT**

12-6-13

DATE