

BEFORE THE WEST VIRGINIA STATE BOARD
OF REGISTRATION FOR PROFESSIONAL ENGINEERS

RECEIVED

NOV 16 2012

IN RE: **WILLIAM L. TONEY, JR.**
 ENGINEERING & TESTING 2000, INC.

WV PE BOARD
C2012-09

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 William L. Toney, Jr. (hereinafter "Respondent"). 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 is a licensed professional engineer in the State of West Virginia holding license number 011844.
3. Respondent is the sole engineer in Engineering and Testing 2000, Inc. (hereinafter at times ET2000), which holds Certificate of Authorization (COA) #C01051.
4. This complaint relates to Respondent's hydrological study on private property in Kanawha County (known as a Hydrologic Engineering Centers River Analysis System, or HEC-RAS) and revisions of same which were submitted to the

county planning commission but were later found by an independent engineering company retained by the county to be incomplete or otherwise inadequate.

5. This disciplinary action for certain actions of Respondent, as the only licensed engineer practicing engineering at ET2000, and therefore the Board finds his firm an unnecessary party and dismisses Engineering and Testing 2000, Inc., as a Respondent to the Complaint.
6. The Board finds that the violations of the Rules of Professional Conduct set forth below do not rise to the level of negligence, incompetence or an act of misconduct in the practice of engineering, and therefore, while this disciplinary action is still proceeding under the general provisions of W. Va. Code § 30-13-21(a), the specific allegation in the Complaint that W. Va. Code § 30-13-21(a)(2) was violated is dismissed.
7. Complaint C2012-09 was initiated by the Board and filed and served on February 21, 2012.
8. Respondent timely requested and received an extension of time to respond to the Complaint and filed a timely response on April 5, 2012.
9. Respondent listed a number of HEC-RAS reports he had prepared during the prior three years and, while admitting that standard practices require an engineer “to perform the analysis on the areas above and below the effect area”, Respondent stated that “to save on copies” he “only included pertinent information where the disturbance was to occur on the stream.”
10. Respondent stated this approach was preferred by the planning offices in Kanawha, Greenbrier and Summers counties “because it was easier for them to

see the area that were [sic] affected and didn't get lost in all the other information." This statement is incorrect at least as to the Kanawha County Planning Commission.

11. An independent engineering review obtained by the Board concurred with the opinion of the independent engineering company retained by the county that Respondent's model development approach was not in full compliance with applicable requirements for the National Floodplain Insurance Program (NFIP), that certain important supporting backup data was either missing or incomplete, and that the HEC-RAS models needed to be revised.
12. The primary issue raised by the two independent engineering firms that reviewed Respondent's submissions related to the need for an existing conditions model and other relevant support data to justify or validate ET2000's "zero-rise" statements regarding fill placement.
13. 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 Respondent 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, while the Board was not provided with evidence that the public has or may be harmed, the Board finds that any floodplain analysis that does not conform to accepted engineering standards and does not include all relevant and pertinent

information is not in the interest of the public and may impact the public welfare;

- d. that Respondent has no previous history of violations in this State;
 - e. Respondent's cooperation in providing information to the Board; and
 - f. other appropriate matters.
14. The Board incurred substantial administrative costs in the investigation and prosecution of this Complaint in an amount in excess of \$ ^{DJ}7500, but in its discretion agrees to assess only those administrative costs incurred in connection with the review prepared for the Board by an independent professional engineer.

CONCLUSIONS OF LAW

15. 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.
16. The Board, in its discretion, is authorized to take disciplinary action against any person 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 licensee who has been 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).
17. 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).

18. 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).
19. A professional engineer’s obligation to society requires the professional engineer to 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).
20. A professional engineer’s obligation to society requires the professional engineer to include all relevant and pertinent information in reports ...” W. Va. Code R 7-1-12.3(d).
21. 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).
22. A violation of the Rules of Professional Responsibility is an action that could subject Respondent 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.
23. 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.

24. 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 RESPONDENT

William L. Toney, individually, by affixing his signature hereon, agrees to the following:

25. Respondent is aware of his right to be represented by counsel and is aware of his option to pursue this matter through appropriate administrative and/or court procedures and Respondent intelligently and voluntarily waives his right to do so.
26. Respondent admits he violated the Rules of Professional Responsibility in connection with the HEC-RAS reports submitted to a local planning agency by
- (1) performing engineering services outside his areas of competence which did not conform to current standards of technical competence in violation of W. Va. Code R 7-1-12.3(b) and
 - (2) not including all relevant and pertinent information in the HEC-RAS reports in violation of W. Va. Code R 7-1-12.3(d).

27. Respondent accepts the findings set forth above and consents to the entry of this Consent Order freely and voluntarily and without duress, restraint or compulsion.
28. Respondent acknowledges that the Board may reject this proposal and may hold a hearing to impose such sanctions of a disciplinary nature as it deems appropriate.
29. Respondent acknowledges 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 C2012-12. This paragraph is binding on Respondent even in the event that the Board does not approve this Consent Order.
30. This Consent Order is executed by Respondent for the purposes of avoiding further administrative action with respect to this Complaint. In this regard, Respondent authorizes the Board to review and examine all investigative file materials concerning the Respondent prior to or in conjunction with consideration of this Consent Order.
31. 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 Respondent. This paragraph is binding on Respondent even if the Board does not approve this Consent Order.

32. Respondent acknowledges that this Consent Order, the underlying Complaint, his submissions to the Board, the independent engineering reports, and the public records of the local planning agency 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.
33. Respondent agrees 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).
34. Respondent acknowledges this Consent Order constitutes a full and final settlement of this matter and that he 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.
35. Respondent acknowledges 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 Respondent by the Board, and the addition of any other charges which may arise or ensue from Respondent's non-compliance with this Consent Order.
36. Respondent acknowledges 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 C2012-12, the summary suspension or revocation of any license or certificate of authorization issued to the Respondent, 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.

37. 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 this Complaint pursuant to West Virginia Code § 30-13-22(b).
2. The Board REPRIMANDS Respondent for his violations of the Rules of Professional Responsibility admitted to herein which require all professional engineers in this State to perform engineering services only within their areas of competence and in conformity with the current standards of technical competence and to include all relevant and pertinent information in any reports and statements.
3. The Board **ORDERS** Respondent not to perform any hydrological or hydraulic engineering services, including flood plain analyses, HEC-RAS reports, or other hydrological or hydraulic services until such time as he successfully demonstrates to the Board that such services are within his area of competence and done in conformity with the current standards of technical competence.
4. Respondent's ability to resume performing hydrological or hydraulic engineering services must be set forth in writing by the Board, and the Board will not issue written approval until the administrative costs agreed to herein are paid in full.


5. The Board, in its discretion, agrees to resolve this matter without the payment of a civil penalty but ORDERS Respondent to pay administrative costs in the amount of Five Thousand Four Hundred Dollars (\$5400.00).
6. The administrative costs agreed to herein in the total amount of Five Thousand Four Hundred Dollars (\$5400.00) must be paid within six months 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 payable to the W. Va. P.E. Board.
7. 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.
8. 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 grounds for further disciplinary action by the Board.
9. 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 which may arise as between the Respondent and the Board.
10. If the 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 payment agreed to herein of Five Thousand Four Hundred Dollars (\$5400.00), 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.

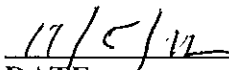
11. This matter shall be closed upon execution of this Consent Order by both parties, the full payment of the administrative costs agreed to herein, and the proof of successful completion of the additional Board-approved training as agreed to herein.

12. 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:



WILLIAM L. TONEY
Respondent



DATE

ENTERED into the records of the West Virginia State Board of Registration for
Professional Engineers this 16TH day of NOVEMBER, 2012.

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

By: 
EDWARD L. ROBINSON, P.E.
BOARD PRESIDENT

11/14/12
DATE