

Joint Compliance Committee Meeting Summary
December 15, 2009
Oregon State Board of Examiners for Engineering and Land Surveying (OSBEELS) &
Oregon State Board of Geologist Examiners (OSBGE)
Approved 8/17/10

A meeting of the Joint Compliance Committee (JCC) was called to order at 8:00 a.m. in a conference room at The Association Center, Salem, OR.

Board Members Present

OSBGE: Rodney Weick, RG, CEG

Gary Peterson, RG, CEG,

Appointed by OSBGE Chair

OSBEELS: Grant Davis, Chair, SE

John Seward, PE

Staff Present

Susanna Knight, Administrator (OSBGE)

Mari Lopez, Executive Secretary (OSBEELS)

Jennifer Gilbert, Executive Assistant (OSBEELS)

James R. (JR) Wilkinson, Investigator (OSBEELS)

Allen McCartt, Investigator (OSBEELS)

Introduction

After introductions, and prior to a review of the agenda and approval of minutes of the Joint Compliance Committee (JCC) meeting on November 14, 2007, there was an open discussion about communications between the Oregon State Board of Examiners for Engineering and Land Surveying (OSBEELS) and the Oregon State Board of Geologist Examiners (OSBGE). There was agreement that the Boards need to communicate with each other before distributing documents to the public that include statements about registrants of the other Board and about the limits of their respective practices. Seeking the other Board's input would reduce confusion about the overlap between the practices of engineering and geology. Since this topic was an agenda item, there would be further discussion.

In addition, there was a general question about engineers working outside their area of competence. The OSBEELS has Oregon Administrative Rule (OAR) 820-020-0020 that allows an engineer to undertake assignments when qualified by education or experience. The individual professional engineer makes this determination. However, the JCC members discussed an instance where a mechanical engineer undertook geotechnical work and, based on his final report it appeared he was not qualified for the assignment. While it was not an automatic violation under OSBEELS rules for the mechanical engineer to complete a geotechnical report, a complaint should be submitted for OSBEELS to investigate and determine whether the individual was competent to undertake the assignment.

Review of JCC Minutes

Rodney Weick, RG, CEG, did not suggest any changes to the JCC minutes from November 14, 2007, but observed that the three questions in the minutes set the criteria for evaluating a case. He noted three questions that get to the issue of the overlap of practices:

1. Is the person being complained about practicing within their area of competence and the scope of their license?
2. Is the quality of work up to accepted professional standards of the licensed profession?
3. Does the practice of the person being complained about jeopardize the safety or welfare of the public?

Weick continued that as far as defining the limits of the respective practices of engineering and geology, it must be done by the JCC on an individual case basis using the three questions to help define the areas of knowledge and expertise.

Based on the last meeting and the OSBEELS Law Enforcement Complaint Process Flow Chart, OSBGE now handles law enforcement cases through a Compliance Committee. Complaints received by OSBGE are directed to their Compliance Committee, which includes their Assistant Attorney General (AAG). The public member of the OSBGE Board is the head of the Committee. Once the Committee has vetted the complaint, the OSBGE Board reviews the results and the Committee recommendations. OSBGE Board members who are the professionals decide the case and are not involved until that point. In response to a question about conflict of interest, OSBGE Administrator Suzanna Knight stated the professional OSBGE Board members are experts who might be called for a hearing. She added that OSBGE is now involving their AAG at an earlier stage to retain attorney-client privilege during the investigation process and using reviewers who are practicing geologists to review technical matters. OSBGE will be eliminating a rule that allowed a complainant to petition the Board to be a party to the investigation, which can bias the results. Weick concluded that the new process is working well.

The JCC can handle cases in three ways, including referral to the OSBGE Compliance Committee, the OSBEELS Law Enforcement Committee, or the JCC as a joint investigation. Weick said if a case is referred to one of the Boards, then the case upon completion of the investigation should come back to the JCC. If it was a joint investigation, the Boards would work as a team and make recommendations to their respective Boards. John Seward, PE, suggested it should be called a concurrent investigation, so that each Board can pursue its own investigation processes.

Gary Peterson, RG, CEG, noted that the Memorandum of Understanding (MOU) was written to recognize the lead Board, which is the Board that holds the registrant's license and has the power for enforcement. He added that it gets messy when one Board tries to sanction the other Board's registrant. Rather than have OSBEELS sanction a geologist for practicing outside their area of expertise, let OSBGE conduct enforcement. He encouraged input and if an engineer is practicing outside their area of expertise in disregard for public safety then OSBEELS would take the lead.

Mari Lopez (OSBEELS Executive Secretary) stated that OSBEELS does not have the authority to sanction an engineer for the unlicensed practice of geology. This is similar, for example, to sanctioning an engineer for the unlicensed practice of architecture. Only the Oregon Board of Architect Examiners (OBAE) can define architecture and can sanction someone for unlicensed practice of architecture. Grant Davis, SE, commented that the lead Board language solves the problem and makes it easier for enforcement.

As an example of the overlap and enforcement dilemma, Knight brought up the Brookings retaining wall case involving a C.E.G.. She contended that OSBEELS should provide input to OSBGE on the case and allow them to take action. Lopez suggested that OSBGE could not sanction him for the unlicensed practice of engineering, only OSBEELS could by way of statute. Knight responded that if he practiced engineering the OSBGE could sanction him for practicing outside his area of expertise. Lopez answered that OSBEELS has not taken that approach. For example, in cases that involve an engineer practicing architecture, OSBEELS would refer the case to the OBAE for investigation and sanctioning. The OBAE would determine if the

individual was practicing unlicensed architecture. Likewise for an architect practicing engineering, they are referred to OSBEELS.

Seward clarified there is an overlap in the professions and if an engineer is practicing negligent geology, then they are subject to review by the JCC. Peterson remarked that the JCC should meet and discuss poor practice, public safety, and engineers doing geology. The JCC would identify cases of negligent practice. In one JCC case OSBEELS investigated, it was dismissed because OSBEELS does not regulate geology. However, the case did not come back to JCC to talk about the decision. He added that the Boards need to work on communicating, so when a decision is reached there are no surprises.

Weick returned to the November 2007 meeting minutes, including a discussion on an OSBGE letter to the City of Brookings and the term “design.” He emphasized that a certified engineering geologist (CEG) can design earth-related work, but not civil structures such as retaining walls or foundations such as the structural design of the wall or foundation, or into buildings where the CEG is determining what concrete and steel to use. That is the practice of civil engineering. He added that CEGs will look at natural materials and consider geologic factors that affect planning, design, and construction and maintenance of civil design works.

Peterson asserted, however, that CEGs design construction works like rock walls, rock cuts, earthworks, landslide repairs, and subsurface designs. These can be submitted for public bid. He recognized there was significant design work related to geotechnical engineering, but added that the interaction with civil engineering comes when working on deep foundations. A CEG may provide written analysis, computational numbers, or design plans, and it appears that problems with engineers arise when providing hard numbers.

The discussion turned to clarifying overlap in “design” in geotechnical works. Weick added to Peterson’s list of CEG activities to include slope parameters, cut slopes with unstable conditions, and providing parameters for civil engineers. In the Brookings retaining wall design example, The CEG went beyond the scope of a CEG and designed a retaining wall. Weick asked whether the highway was the civil engineering work or was the cut slope for the highway since Oregon Revised Statute (ORS) 672.505(3) reads, “*geologic factors affecting planning, design, construction and maintenance of civil engineering works are properly recognized and utilized.*” Davis responded that as a structural engineer he would not expect hard structural data from a CEG. Peterson commented that data can be interpreted “up to the structure.” Weick added that a CEG can provide soil strengths, for example, but a geotechnical engineer would take the information and provide recommendations on precast type, the number and size of rebar, what concrete to use, and sand/water ratio for strength.

Peterson used his firm as an example where as a CEG he works with civil engineers to design the exploration needs, conduct the exploration, and write a report up to the engineering section. He would lay out subsurface cross-sections and data and point out geology issues to engineers in the final design for construction. The final report is usually dual stamped by the respective professionals. He emphasized that JCC complaints are those individual practitioners who are without the two disciplines. They tend to push the boundaries in their recommendations to a client, such as pile design; the Brookings retaining wall case is a prime example.

Weick moved to accept the minutes. Upon further review, a discussion occurred regarding a statement for when a CEG should stamp an engineering document. Weick then stated that the whole paragraph appears out of context. After discussion and consensus, portions of two paragraphs were struck from the draft minutes. Peterson noted that a CEG is providing information that supports engineering works, but are not designing the engineering work. Seward seconded the motion to accept the amended minutes. The motion passed unanimously.

Draft JCC Operational Flow Chart

A draft JCC Operation Flow Chart was distributed to members for their discussion (copy attached). The members discussed that a complaint was not received from Brookings retaining wall case; rather, it was an inquiry to OSBGE that lead to the finding of potential violations. As a result, the Chart box for OSBEELS/OSBGE “complaint received” was changed to “complaint initiated.” Lopez added that OSBEELS opens law enforcement cases when violations are found from inquiries.

As a guide, the Chart is useful, but Weick remarked that JCC involvement is needed earlier in the process. The JCC should meet to discuss a complaint before a full investigation begins. The Brookings case CEG appeared to do engineering work, added Peterson, but his complaint was against the City of Brookings. Davis replied that it was a joint concern that did not involve a specific complaint or respondent at the beginning. It was an inquiry. He suggested “concurrent investigations.” Then the JCC can meet to discuss the overlap and decide what action should be taken. An OSBGE determination brought Brookings case to the JCC because he provided additional information.

Peterson added that the limits of the practice will be defined by cases. Rather than trying to articulate those limits, which is problematic, each case will help define the limits. The JCC effort will clarify the boundary. Seward agreed saying the sooner the two Boards communicate about cases the better the outcome.

Weick commented that the Chart is correct. If it involves a geologist, as does the Brookings case, it would come through OSBGE. If it involves an engineer, it would come through OSBEELS. He read a portion of the OSBGE acknowledgment letter to CEG that stated if he was practicing outside the limits of a geologist he may be contacted by the JCC or OSBEELS. The OSBGE evaluated the Brookings case information and determined that engineering work took place. Knight perceived that OSBGE conducted a preliminary investigation as the Chart shows.

OSBEELS Investigator James R. (JR) Wilkinson described that a preliminary investigation involves a vetting of the received information to determine the bounds of the investigation. For example, if interviews are needed or if additional plans or calculations are required in order to conduct a more thorough investigation. Importantly, it would identify the reasons that an investigation should not proceed, as in the case of an exempt structure. The LEC would review a preliminary investigation report to determine whether or not to open a case. The Chart showed that after a preliminary investigation by one of the JCC Boards, the JCC would determine the steps prior to a full investigation. Seward acknowledged the Chart is an idealized pattern for how the process should work. The sooner the JCC is involved in process the better.

Lopez brought up another OSBEELS case that involves both a geotechnical engineer and a CEG. The case started from an investigation on the *Street of Dreams* where the allegations against a geotechnical engineer were determined to be unfounded because he was not the individual who conducted site work. As a result, a case was opened that would be referred to the JCC since it involves registrants from both Boards. This case will provide the JCC a better opportunity to evaluate the representativeness of the Chart.

After additional discussion regarding a feedback loop for the JCC to review the other Board's determinations and an illustration for concurrent investigations, the JCC concurred with the Operational Flow Chart given the modifications.

Evaluating the Brookings Retaining Wall Design by a CEG (Brookings case) Allegation

Seward started the discussion by observing that the Brookings case involves both an enforcement issue and a policy issue. What started the review was that the City of Brookings was restricting the practice of geology, but what came to light was that the CEG's work appeared to cross the geology line into the practice of engineering, which was the enforcement concern.

Weick explained that OSBGE received a letter from the CEG on April 30, 2009, expressing his concern that CEGs were being discriminated against by City of Brookings Municipal Code 17.100.070(B). The code restricted the preparation of site preparation plans to an Oregon licensed civil engineer, but did not recognize a CEG. The CEG in the Brookings case wrote that he offered the City Engineer and City Manager help to clean-up the language using the example that civil engineers are not qualified to provide bearing pressures for gazebos. Weick commented that the gazebo development plan involved engineering works.

The Brookings case CEG also provided design plans to OSBGE. When Weick reviewed the Retaining Wall Design Report that the CEG stamped, there was a test pit log, which provides basic soil parameters and all the design parameters that a wall would need to withstand. However, the CEG then designed the footing for the retaining wall that was approximately 35 ft long and ranged in height from 8 ft to 12 ft. He also showed standard details include rebar. He was doing engineering work that he sealed with a CEG stamp. His work on subsurface investigations including bearing capacities was within the scope of his CEG registration. These were input values into the civil engineering work, which was the retaining wall. The design of the retaining wall is the point where it should have been handed off to a civil engineer.

Peterson agreed and discussed a 10 ft bearing wall for a portion of the house designed by H.M. Hansen, who was a structural engineer in Brookings. The Brookings case CEG showed design and handwritten calculations for concrete rebar and tiled wall drainage, but there was no engineer stamp. There was speculation that it was borrowed from Hansen. Davis stated that an engineer would size pipe for wall. Weick replied that a CEG can do that, but that was the gray area. He added that the wall itself needs a civil or structural engineer stamp and without Hansen's stamp it places Hansen at liability. Hansen may not have concurred or reviewed the design for this specific application. Peterson explained that site excavation, soils analysis, retaining wall design, and drainage are in the overlap between a PE and a CEG. He questioned whether the Brookings case CEG was competent in this area and if there were public safety issues in what he did.

Peterson observed that the bearing capacity for the gazebo was very low and conservative. He did not think there is any violation of public safety. However, the retaining wall was another question. Seward added that Brookings CEG used a software program to generate his numbers.

The JCC members then discussed next steps. Seward asked if OSBGE would sanction him for unlicensed practice of engineering. Lopez suggested this should be a concurrent investigation. Davis added that if the OSBGE needed input as to the safety of the wall that OSBEELS could provide whatever information they may need. Peterson was of the opinion that OSBEELS would look at the safety and design aspect and the unlicensed practice of engineering. Seward concurred adding that this case was unique in the aspect that Brookings case CEG was practicing engineering and was not in the overlap area. Peterson agreed noting this was a case where the facts are used to determine the limits of the practice. There was no question that he is practicing engineering.

Knight summarized that his engineering geology appeared fine and his practice appropriate, but he was practicing outside the scope of his CEG registration. The OSBGE action would be that the retaining wall design was civil engineering and was outside the license of a CEG. A question of possible negligence or incompetence was discussed by the JCC members, Weick commented design parameters appeared reasonable suggesting negligence or incompetence was not an issue. The committee discussed possible findings, which may include no negligence to a finding of gross negligence. The issue appears to be more a question of practice that may not be within the scope of a CEG license. Peterson commented that a concurrent investigation would address the scope of practice under his CEG license.

The City of Brookings was not recognizing the role of a CEG, which Weick stated was the Brookings case CEG's objection to the Brookings code where the code allows an RG to conduct a geologic hazards investigation for a development. Weick explained that under OSBGE rules the City was incorrect in designating a geologist to prepare a geologic hazard investigation or development of properties. Such work requires a CEG.

The JCC next discussed the timeline. Peterson predicted that an investigation should not take long since it was clear what happened. Lopez stated that OSBEELS prioritizes cases with life and safety issues and this appears to be a case with those questions. The members agreed to begin planning in May for a June meeting to review the results of concurrent investigations. Once the JCC meets in June to discuss the outcomes, then the respective Boards can take action. If this was the only issue, then a conference call may expedite resolution.

OSBGE Letter to City of Brookings

This lead into a discussion about OSBEELS concerns with the OSBGE letter to the City of Brookings. The OSBGE wrote to outline their perspective regarding revisions to the City of Brookings code on August 28, 2009. The letter stated, "*under Oregon law geotechnical engineers are not allowed to complete geologic investigations and reports unless they are an Oregon Registered Geologist (RG) or working under a Registered Geologist.*" Davis asked if this was a correct statement. Weick and Peterson both agreed that a geotechnical engineer could perform such work within the scope of their licenses.

The JCC members discussed JCC review and communication process on joint compliance cases. Weick and Davis agreed that each Board should be notified when the other Board gets inquiries that fall within overlap areas of practice. The JCC members acknowledged there was reluctance to send drafts for review, but neither Board should define the practice of the other Board's registrants. That was the message that should be consistent. There is an overlap and the JCC deals with the overlap.

Along that line, the JCC members discussed how the Boards can work together to clarify the roles and responsibilities so they are accurately reflected in local ordinances. Davis replied that the JCC could send a letter to building officials. Lopez also recommended something similar to the *Reference Manual for Building Officials: the Architects' Law & the Engineers' Law*, which is jointly published with OBAE. The JCC members agreed this is something that should be further explored. Such a *Manual* would be a great way to help building officials and others with the four overlapping professions practices. Lopez suggested that a starting point might be to invite representatives from the Department of Environmental Quality (DEQ), building code officials, and local jurisdictions to discuss issues that could be included in the *Manual*.

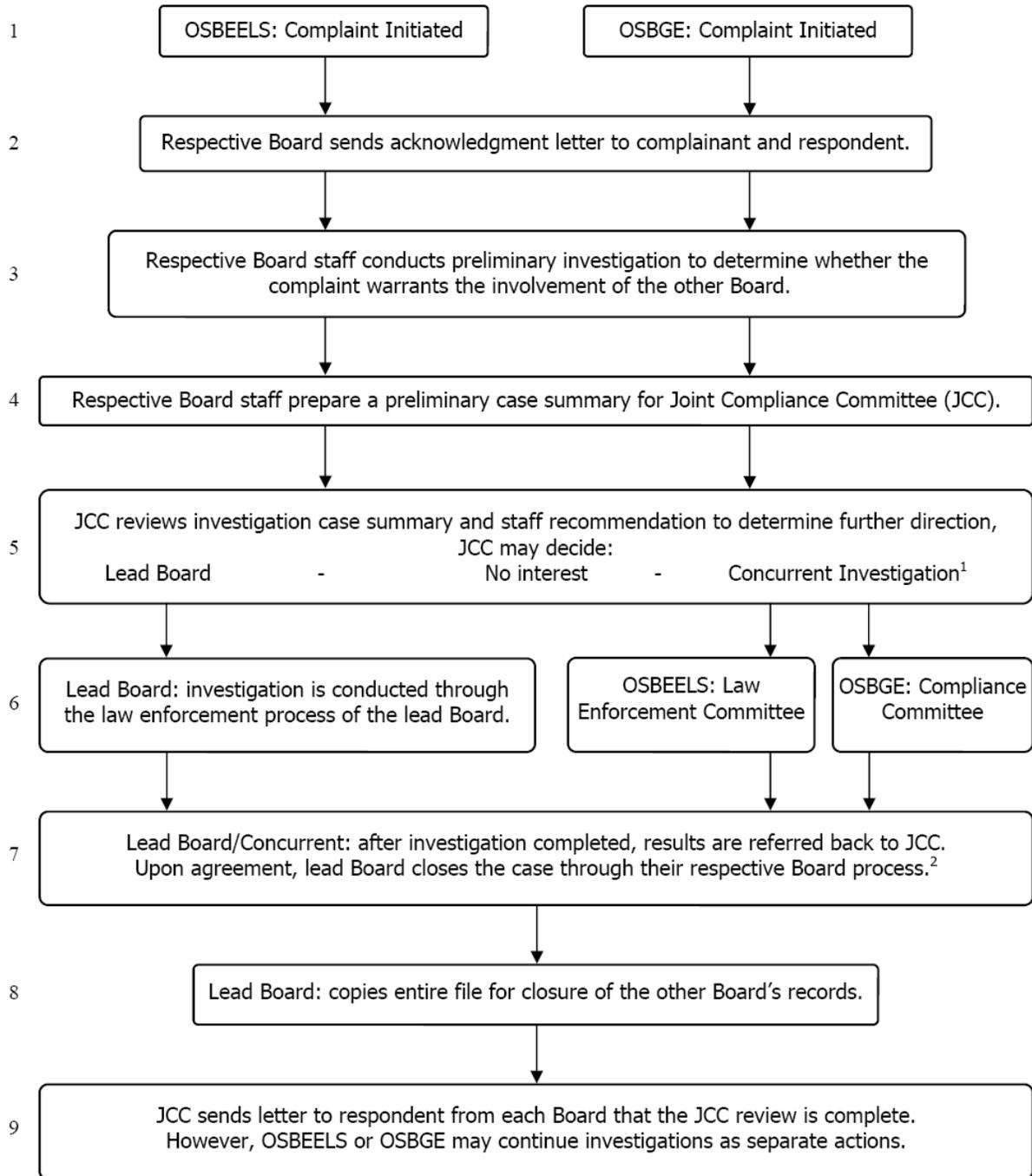
Peterson pointed out that the JCC was not formed as a professional practices committee, but to deal with law enforcement cases and the overlap of practices. Cases build toward that goal, but the *Manual* discussion should be passed on to each Board for their decision. This group could raise issues for the *Manual*. Seward added that OSBEELS and OBAE jointly attended a building official meeting as an outreach venue. Perhaps their meetings would provide an additional opportunity to solicit ideas.

The JCC discussed next steps beginning with each Board reviewing its options and deciding who should be the lead person. Right now, OSBEELS is the lead agency on this year's revision to the *Manual*. The two Boards exchange lead on yearly revisions. Knight noted one subject that should be addressed is stream restoration. It is a difficult issue to talk about regulating. In addition, landscape contractors are adding their voice to the stream restoration and watershed debate.

The JCC would schedule its next meeting prior to June 11, 2010. Peterson announced that the JCC had completed its agenda.

The meeting adjourned at 11:00 a.m. A copy of the digital recording for this meeting can be requested from either Board office.

Joint Compliance Committee: Operational Flow Chart
Oregon State Board of Examiners for Engineering and Land Surveying (OSBEELS)
Oregon State Board of Geologist Examiners (OSBGE)



1. Concurrent Investigation: at the conclusion of concurrent, but independent investigations, the JCC will discuss further the investigation findings, any overlap, and prepare a case summary to be used for both Boards to resolve the case — even if one Board proceeds to a sanction while the other Board does not. Note: findings of Boards may differ because of each Board's unique statutes and rules.

2. For OSBEELS as Lead Board, a case summary would be reviewed by the Law Enforcement Committee. For a concurrent investigation, the case summary would be provided directly to the OSBEELS Board.