



Oregon

**State Board of Examiners for
Engineering & Land Surveying**

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JOINT COMPLIANCE COMMITTEE

Summary of Meeting

October 24, 2013

OSBEELS members present:

John Seward

Carl Tappert

OSBGE members present:

Peter Stroud

Ken Thiessen

OSBEELS Staff present:

Mari Lopez, Executive Secretary

Jenn Gilbert, Executive Assistant

Jason Abrams

Joy Pariente

Monika Peterson

JR Wilkinson

OSBGE Staff present:

Christine Valentine, Administrator

Others present:

Katharine Lozano, Assistant Attorney General

Richard Heinzkill, OSBGE

Bernie Kleutsch, ODOT

The meeting of the Joint Compliance Committee meeting was called to order at 1 p.m. in the OSBEELS Conference Room at 670 Hawthorne Avenue SE, Suite 220, Salem, OR 97301. Members from the Oregon State Board of Examiners for Engineering and Land Surveying (OSBEELS) and the Oregon State Board of Geologist Examiners (OSBGE) were present.

Review of Agenda

There were no additions, subtractions or changes to the presented agenda.

Complaint Cases

Case #2725 - OSBEELS

The respondent, a Registered Geologist (RG) and Certified Engineering Geologist (CEG), was allegedly practicing outside the scope of engineering geology. In 2010, the JCC had agreed on another complaint case that the respondent went beyond the CEG scope by designing two retaining walls and by making plans and calculations for a gazebo. The JCC referred the case to the OSBEELS Law Enforcement Committee (LEC) for resolution with final notification sent to OSBGE.

At the December 12, 2010 OSBEELS LEC meeting, the committee discussed the excepted structure definition under ORS 672.060(10). Assistant Attorney General (AAG) Joanna Tucker-Davis reminded the LEC that even if the Building Codes Division (BCD) requires an engineer for an excepted structure, ORS 672.002 to ORS 672.325 do not apply to unlicensed persons. Since the respondent is not a professional engineer, he is considered unlicensed. The OSBEELS LEC narrowed the question to whether or not the respondent designed structures “used in connection with or auxiliary to a single family residence.”

Mr. Tappert observed that one of the retaining walls was a cantilever wall. He did not consider it an appurtenance, or “connected with or auxiliary” to a residence. He agreed a gazebo is an appurtenance, but, on the other hand, not all retaining walls are an accessory or “annexed or belonging legally to some more important thing.” There was further discussion about how the statute specifically noted garages, barns, and sheds and how retaining walls are different from occupancy structures. Some retaining walls are crucial to life, health, and property and are not auxiliary.

Brookings Ordinance Chapter 17.100.020D allows a qualified professional who is a “geologist or certified engineer” to prepare geologic reports under Chapter 17.100.060. The City of Brookings halted the respondent’s work once it was pointed out that a RG/CEG prepared engineering plans under Chapter 17.100.070, which requires a civil engineer to prepare engineering reports. The respondent argued with the City of Brookings that the Chapter 17.100.020D definition of qualified professional also allows him as a geologist to prepare engineering reports under Chapter 17.100.070. The respondent wrote that a “civil engineer is not qualified to provide bearing pressures for gazebos.” The LEC observed that a RG or CEG is not qualified as an engineer and that it was proper for the City of Brookings to stop the respondent from continuing his engineering work.

The respondent’s 2010 case was again discussed at the November 30, 2011 JCC meeting. Both Boards had issued Letters of Concern to close the 2010 case. The current case was also discussed at that meeting, recommending that OSBEELS proceed as the lead board. It was again determined that the issue was a practice overlap into engineering from engineering geology and OSBEELS should further investigate. Upon further review at the April 11, 2013 OSBEELS LEC meeting, it was determined the case should be addressed again by the JCC.

Mr. Tappert reasserted that the role of the JCC was to determine which Board’s rules were violated in order to forward the complaint to the appropriate Staff for investigation. Mr. Stroud asked for an overview of penalties associated with each Board’s rule violations. AAG Lozano explained that OSBEELS can penalize someone who is practicing engineering without a license and who is practicing outside their area of discipline. However, OSBEELS does not have an option for penalizing its registrants who practices within another profession. She further explained that OSBEELS has promulgated a rule defining the practice of geotechnical engineering and there has been a great deal of case law established since the 1984 advice both Boards have been relying on for guidance. In *Rosen v. the Bureau of Professional Affairs*, for example, it was determined that professions have circles of practice that, in some cases, might

overlap. This does not mean that just because an activity is considered to be part of one profession that it cannot also be part of another profession. She added that both cases being discussed by the JCC were large projects and recommended that each task performed by the respondents be reviewed to determine if it would be considered an activity within practice overlap or unlicensed practice.

Ms. Valentine brought up an additional issue regarding this case. She said OSBGE struggled with determining the overlap in this case because a professional engineer came forward and said he had been in responsible charge of the project. AAG Lozano said there are two issues to consider: First, were the activities undertaken by the respondent within the definition of engineering geology? If so, he could lawfully perform them even without supervision. Second, if they were not within the definition of engineering geology, but were the practice of engineering, was the professional engineer on the project actually exercising appropriate responsible charge? Mr. Wilkinson said the individual claiming to be the engineer of record did not seal or sign any of the work – the respondent did. Additionally, some of the activities in question were undertaken prior to the professional engineer being hired and were contractually separate from the tasks assigned to the engineer.

The Committee reviewed a document generated by AAG Lozano that identified each activity involved in the complaint with some accompanying methodology, for the Committee's discussion and determination of whether each activity involved in the complaint with some accompanying methodology, for the Committee's discussion and determination of whether each activity falls under the practice of engineering, the practice of engineering geology or both. The activities that were considered are as follows:

- Designed test to derive vertical load bearing pressure of driven steel piles using engineering formulas.
 - Mr. Tappert said that, as the respondent was not giving the strength of the piles, but rather, the load-bearing pressure of the soil under the pile. However, Mr. Thiessen said it appears that he did not use the proper measurement technique for this task. AAG Lozano asked if this would be included under the practice of geology. OSBGE members said yes, but it appears this task was done improperly.
- Submitted design plans, including strength, stability, loading etc. calculations, for roadway retention structures to expand an established RV park. Revised designs for excavation and layout for slope retention.
 - The JCC discussed how a number of these designs overstep the boundaries and venture into engineering work, however, the erosion control designs reviewed would still be considered under the purview of engineering geology. Conversely, the road structure work done, including changing the pile drive angle and orientation, would affect stability and would be considered engineering work. Mr. Stroud asked if these adjustments were made due to changes in the field following excavation. Mr. Wilkinson said the changes were made to ensure road stability during construction. Mr. Tappert said, regardless of whether the respondent was designing or revising designs, those are both tasks that fall under the practice of engineering. There was no disagreement from the OSBGE members.
- In response to the complaint, opined on an appropriate corrosion protection of pile connection cables.

- Mr. Thiessen pointed out that evaluating the strength of materials is an engineering task. Mr. Stroud agreed and added that this type of evaluation is a highly specialized engineering field. Mr. Tappert agreed and said he would consider this action as part of the design process for the retaining wall and include it as part of the same alleged offense.
- Tested helical anchor torque-penetration, evaluated adequacy of anchors for intended use.
 - Mr. Tappert asked if this was a task the respondent had actually done or if he had only made plans to do so. Mr. Wilkinson said the helical anchor torque-penetration was field tested and worked adequately, but there was no record of the respondent actually implementing his testing. This issue arose because the complainant discussed issues with this in his complaint to the Board. Mr. Tappert said if he was only testing, that would still be considered engineering geology. Mr. Stroud pointed out that if the respondent was analyzing the data from the tests, it would be considered the practice of engineering. There was no disagreement from the OSBGE members.
- Designed access road.
 - Mr. Seward said determining the geometric proportions of the design would still be considered engineering geology, however, the portion regarding material selection, analysis and use is engineering work. Mr. Tappert asked if an engineer had stamped any of these documents. Mr. Wilkinson said there were no stamps on any of the documents.

After discussion, **the Committee determined that OSBEELS should move forward with allegations against the respondent for unlicensed engineering.** Mr. Tappert asked that the Notice of Intent be prepared for review at the next OSBEELS Board meeting in November, rather than waiting until December for LEC review.

Mr. Stroud mentioned that he wasn't sure about the engineering aspect of this case initially and sitting down and discussing it in relation to OSBEELS rules and statutes helped clarify a number of issues. AAG Lozano said that factor is why the JCC is important. Mr. Thiessen asked if there is a difference, according to law, between faulty engineering and good unlicensed engineering. AAG Lozano said no, but that OSBEELS does have the authority to discipline negligent or incompetent licensed engineering. Mr. Tappert explained that incompetent engineering is one of the hardest cases to prosecute because you must prove the design would not work and is fundamentally flawed. AAG Lozano added that, in cases regarding incompetent engineering, it is not a question of whether the design could have been better, but of whether the engineer demonstrated minimum standards of competence.

Ms. Valentine asked about the engineer who claimed he was in responsible charge of the respondent's project. Specifically, when OSBGE closed the case against the respondent, it was stipulated that the case could be reopened and charges levied if additional evidence was discovered. If OSBEELS discovers that there was no supervision of the respondent by a professional engineer, the respondent could potentially face sanctions from OSBGE for practicing outside the discipline of his licensure by performing engineering work without licensed supervision. Ms. Valentine asked about an OSBEELS decision for its case #2726 against a professional engineer and what might happen if OSBEELS concludes he was not actually in responsible charge even though he claimed to be the project engineer of record. OSBEELS staff addressed that a decision had not been made in that case. Ms. Valentine also asked about how OSBEELS final decision in case #2725 would be provided. AAG Lozano said

OSBGE could use the final order from OSBEELS to the respondent to support OSBGE charges. Ms. Valentine asked if OSBGE members would be needed as witnesses or technical reviewers. AAG Lozano said yes, potentially.

Mr. Thiessen asked if the structure being discussed was still standing and Mr. Wilkinson said yes. AAG Lozano said actual or potential harm to public are both considered by OSBEELS when determining appropriate sanctions for violations. Ms. Gilbert asked if OSBEELS would like Staff to collect additional information regarding the logging roads the respondent allegedly designed. Mr. Tappert said yes. There was no further discussion.

Case #13-01-005 – OSBGE

OSBGE was seeking OSBEELS' opinion regarding Case #13-01-005. The complaint against an OSBEELS registrant alleges that this professional engineer engaged in the practice of geology by preparing, stamping and signing a report. The subject work allegedly goes beyond the scope of practice for an engineer with geotechnical certification. Mr. Seward mentioned that the case references a drywell and that there is a distinct geologic component incidental to the selection of a drywell location.

The Committee reviewed a document generated by AAG Lozano that identified each activity involved in the complaint with some accompanying methodology, for the Committee's discussion and determination of whether each activity might fall under the practice of engineering, the practice of engineering geology or both. The activities discussed were:

- Compile geologic information from published sources.
 - AAG Lozano pointed out that the individual cited a number of sources for his information. Mr. Stroud said there's no restriction on using references and knowledge to create a summary on a topic related to engineering or geology.
- Conduct a geologic reconnaissance.
 - Mr. Tappert said the investigation of the physical properties of earth materials was included under the definition of geotechnical engineering. AAG Lozano said, according to the plain text of the rule, it could be considered engineering. She then asked if storm water and flood water were included in the definition of groundwater, which was also taken into consideration during this geologic reconnaissance. Mr. Tappert and Mr. Seward said those are considered ground water. Additionally, they added that all those water systems are covered under the umbrella of the practice of engineering.
- Interpret geologic conditions to describe hydrogeological setting and surficial geology.
 - This included the evaluation of a man-made slope. Mr. Stroud pointed out that evaluating the physical properties of earth materials for permeability is considered the practice of geology.
- Interpret geologic conditions at known locations and correlate with geologic units.
 - The Committee discussed that the interpretation was acceptable for a geotechnical engineer, but the correlation portion falls under the practice of geology. AAG Lozano pointed out that there is no mention in rule of geotechnical engineers having the ability to determine and map borings, depths, etc.
- Investigate water well reports.
 - The Committee determined that investigating the well water reports is within the purview of a geotechnical engineer, but rewriting the reports is not.
- Interpret water well reports to delineate the tops and bottoms of geologic units.

- The Committee determined that interpreting the meaning of original geologic maps and placing one's own meanings on the units provided is within the practice of geology.

Additionally, the Committee further discussed the project in question. The respondent said his actions were to reduce the hazard of flooding from storm water, as allowed under OAR 820-040-0040. However, AAG Lozano pointed out that the mitigation of hazards reference in OAR 820-040-0040 is limited to mitigation of hazards that are revealed by evaluations of the performance of constructed civil engineering works and of the performance/stability of slopes. The Committee determined that the respondent's work was not covered as mitigation of hazards, as defined by OAR 820-040-0040. Mr. Tappert said that the issue wasn't researching and investigating to determine geologic factors, but making a new map and analyzing data, which is overstepping into the practice of geology.

After discussion, **the Committee determined that OSBGE should move forward with these allegations of unlicensed practice of geology.** Ms. Valentine mentioned that she thought OSBEELS would be able to sanction the respondent for practicing outside his professional licensure. AAG Lozano reminded OSBGE that OSBEELS does not have that authority under its rules or statutes. There was no further discussion.

OAR Chapter 629, Division 623 – Shallow, Rapidly Moving Landslides and Public Safety

Mr. Seward had submitted a question to the OSBEELS Professional Practices Committee (PPC), which was addressed during the April 12, 2013 PCC meeting. He asked if a person preparing a report presenting the results of the landslide evaluation of a proposed timber harvest unit is required to be licensed under Oregon Revised Statute (ORS) Chapter 672. He explained that the landslide evaluation report is covered under Oregon Administrative Rule (OAR) Chapter 629, Division 623, Shallow, Rapidly Moving Landslides and Public Safety, which sets certain requirements and potential restrictions on timber harvest and forest road building on state and private forest lands. The rule applies to proposed timber harvest and forest road building operations on steep, mountainous, landslide-prone terrain, where there are residences or high traffic volume roads downslope from the forest activity.

Mr. Seward said the task of the individual conducting the public safety review is to make a determination as to the "risk of serious bodily injury or death caused by shallow, rapidly moving landslides directly related to forest practices," which is described in OAR 629-623-0000(3). The rule requires the professional to make a determination of "impact rating," a term defined by the Oregon Department of Forestry as identifying "the relative risk of serious bodily injury or death due to rapidly moving landslide impact to structures or roads."

Mr. Stroud asked if geotechnical engineers are qualified to determine debris flow, as geotechnical engineering usually involves structures. AAG Lozano said this could be an example of where there is an area of overlap in practices. Mr. Thiessen said if the debris flow was posing a danger to roads or houses in its path, a geotechnical engineer could determine the danger to surrounding areas. He added that he thought both types of registrants would be necessary to address life, safety and welfare protection.

Mr. Seward asked the Committee to consider if these actions require the individual conducting the public safety review to be licensed. He said he wanted to make sure he was properly interpreting rules and statutes and was in compliance with both regulatory boards. Additionally, Mr. Seward mentioned that there has been occasional pushback from individuals trying to influence ODF and the organization would appreciate the support of the licensing boards to

strengthen the argument that a person needs to be an engineering geologist or a geotechnical engineer to complete the safety reviews.

Mr. Seward explained that there is currently a small community of licensed individuals who take care of these reviews. He said the determination regarding licensure requirements would also help small land owners avoid spending money on reports prepared by unlicensed individuals that would be rejected.

The Committee determined that an individual who is appropriately licensed under ORS Chapter 672 should be completing these reports. Mr. Seward asked the Committee if this decision could be put in writing for future reference by ODF. AAG Lozano said it is hard to generalize in a situation such as this and each situation should be evaluated on a case-by-case basis. Mr. Seward asked if he would have to wait until a case was resolved to set precedence on this issue. AAG Lozano said a final order could be used to set precedence. There was no further discussion.

Unfinished Business

Approval of JCC Meeting Summary – November 30, 2011

The Committee approved the November 30, 2011 meeting summary by consensus. There was no additional discussion.

Joint Board Action Items – October 10, 2013

Request update to 1984 DOJ opinion

AAG Lozano explained that the Boards could either request an update to this opinion to incorporate new case law and new rules enacted since 1984 or the JCC and individual Board AAGs could assist in implementing the new rules and case law through law enforcement cases, on a case-by-case basis. Mr. Tappert asked how much it would cost to get an update of the opinion and which Board would be responsible for payment. AAG Lozano said she wasn't sure of an exact number, but if both Boards asked for the update, then the Boards would split the costs. She also recommended the JCC come together to determine the questions to be addressed in the opinion, if they choose to update the document. Mr. Tappert pointed out that an opinion can stand the test of time after the current AAGs move to different positions. He said this would be valuable because he trusted AAG Lozano to provide thorough advice via an opinion rewrite. Mr. Seward asked if the new opinion would be clearer than the current opinion. AAG Lozano said it is possible as the new opinion will reference more recent rules and case law. Mr. Tappert pointed out that clarity might not matter as the opinion can still be interpreted and applied differently depending on the case in question. Mr. Wilkinson said it would still help investigators as an updated reference when working on cases.

Mr. Tappert asked if it was possible to define in the opinion what tasks each licensed field can and cannot perform. Ms. Valentine pointed out that former OSBGE board members have said the JCC was best utilized when reviewing issues on a case-by-case basis by determining competence and qualifications, then discussing practice overlap, rather than just making determinations based on an AAG opinion. Mr. Tappert said that approach would not be as effective as defining license overlaps. He explained that education and experience don't matter if a license is required to perform those tasks and the individual does not hold that specific license.

Mr. Stroud asked what information is used in the development of an AAG opinion. AAG Lozano said it is an analysis of Oregon rules and statutes and a consideration of national case law

trends regarding whatever issues are addressed in the opinion. Mr. Stroud pointed out that there are not many other states dealing with engineering geology and geotechnical engineering practice overlaps because engineering geology is not a licensed specialty. AAG Lozano said determinations made regarding overlaps between many professions could be taken into consideration in the opinion. The case law doesn't have to be specifically in reference geotechnical engineering overlapping with engineering geology.

Mr. Thiessen suggested reviewing the questions from the original opinion to evaluate if they're still necessary to address or if there are more currently pertinent questions that could be addressed by the AAG. Mr. Tappert suggested tasking the Boards to review the previous opinion and suggest questions to be reviewed by the JCC for necessity. Ms. Valentine asked about what happens if no changes are made to the opinion. AAG Lozano said some areas of the opinion would still be applicable, but some will be overridden by rule changes. She said it also will no longer serve as much of a purpose as solid guidance for case-by-case determinations because of the outdated content.

After discussion, **the Committee determined to send the issue of requesting an updated AAG opinion on the practice overlaps of engineering geology and geotechnical engineer to the full Boards for discussion.** AAG Lozano said she would provide both Boards with an estimated cost for the opinion process. There was no further discussion.

Approach to review/Updating of JCC procedures

The Committee discussed the current Memorandum of Understanding between OSBEELS and OSBGE. Mr. Tappert and Mr. Seward noted that two points of the MOU may need to be changed if the above referenced opinion is updated. Ms. Lopez added that the definition of "lead" Board was determined at the October 10, 2013 Joint Board Meeting. The "lead" Board is the Board that has disciplinary authority regarding the violations, not just the Board that has disciplinary authority regarding the individual's license.

Mr. Stroud said OSBGE's main concern regarding JCC procedures is the establishment of a timeline for JCC cases to expedite the process. Ms. Valentine agreed with the idea of streamlining cases that need to be seen by the JCC. Ms. Lopez said that one OSBEELS Staff member will handle all JCC cases and will prioritize those investigations to have the cases ready to present at the next scheduled JCC meeting.

Ms. Valentine also pointed out that the MOU is the only document that gives Staff of both Boards administrative directions regarding the JCC and she would like to see it updated. AAG Lozano said she thought it was unlikely that any Staff issues or case issues would arise from continuing with the current MOU in the meanwhile. Ms. Valentine asked if it was possible to get this direction in writing so the Board administrators could have something official indicating the Boards' intentions to follow the spirit of the MOU, rather than following it to the letter. AAG Lozano said that the Boards can discuss and include in their minutes and recordings, that the effort to revise the MOU is underway. The Boards can also vote to suspend the processes as outlined in the MOU while it is being redrafted. After discussion, **the Committee determined to inform the Boards that the JCC is going to wait and review Committee processes after a few meetings in order to get a better idea of what contributions are needed from each Board.**

JCC alternate members

After discussion, **the Committee determined that the Boards are responsible for determining alternate members of the JCC to ensure equal Board representation.**

Semi-annual meeting schedule

The Committee discussed the options of online meetings or teleconferences to reduce the travel requirements for Committee members. After discussion, **the Committee determined that they would meet three times per year – the first Thursdays in February, May and October from 1 p.m. until 4 p.m.** Meeting cancellations will be determined between the administrators, based on the necessity for the Committee to meet.

Public Comment

Mr. Kleutsch serves on an ODOT committee that handles licensure requirements for geology and hydrology within the agency. He said the meeting was very informative and he appreciated more direction from the Boards regarding the division between practices. He mentioned that geotechnical engineers and certified engineering geologists often work side-by-side on projects where the dividing line between authorized activities may not be clear.

Mr. Heinzkill said the meeting schedule was an excellent step forward for the Committee. He said the JCC is particularly necessary during administrative hearings where support and testimony is needed from other professions to explain violations. He added that OSBEELS may need to amend its investigation process for JCC cases, due to the time constraints on getting items to the JCC for review. In the interest of time, he suggested preliminary inquiries prior to presentation to the JCC, rather than full investigations.

The meeting was adjourned at 3:15 p.m.