

Joint Compliance Committee

Meeting Minutes

February 5, 2015

Location: Association Center, 707 13th St. SE, Conf. Rm. A, Salem, OR

OSBEELS Members Present:

Shelly Duquette
John Seward
Jason Kent (Alternate)

OSBEELS Staff Present:

Mari Lopez, Administrator
JR Wilkinson, Investigator
Katherine Lozano, AAG, DOJ

OSBGE Members Present:

Peter Stroud
Kenneth Thiessen
Bernard Kleustch (Alternate)

OSBGE Staff Present:

Christine Valentine, Administrator
Kyle Martin, AAG, DOJ

Welcome/Introductions

Stroud called the meeting to order at 1:09 PM. He called the role for the record.

Review of Agenda

Stroud asked if there were any comments or questions about the agenda. Valentine clarified that the anticipated adjournment time was 3 PM as stated in the public notice and not 4 PM as stated on the OSBGE agenda. There were no other comments offered.

Unfinished Business

Stroud opened discussion on the meeting summary for the October 2, 2014 JCC meeting. Seward noted an error on the bottom of page 3 where a statement made by Lopez was incorrectly attributed to Valentine. Lopez and Valentine confirmed that this would be corrected. Stroud asked for motion to accept the meeting summary with the one modification on page 3.

Seward moved to accept the summary. Thiessen seconded the motion. Stroud asked if there was any discussion. Hearing none, he called the vote, and all members approved.

Complaint Cases

Stroud opened discussion on complaint case updates. He asked OSBEELS staff for an update on its Law Enforcement Committee's (LEC) actions on the J. Proud complaints against OSBEELS registrants and an OSBGE registrant. Wilkinson stated that the LEC directed that investigations

be opened on the complaints against the engineers and land surveyor and that letters have been sent to these parties requesting responses to the allegations. The LEC did not direct that a case be opened against the Registered Geologist (RG) at this time due to the JCC discussion and instead supported referral of that complaint to OSBGE.

Stroud asked Valentine to summarize the OSBGE review to date of this OSBEELS complaint that was referred to OSBGE. She stated that the OSBEELS complaint against Garcia, RG, was shared with OSBGE at its December 4, 2014 meeting. The Board discussed whether Garcia had practiced engineering geology without the required certification in engineering geology. OSBGE decided that additional information was needed from Garcia about his exact role with the project. The Board did not open a formal investigation, instead directing the Chair and staff to prepare a letter to Garcia regarding his work. Valentine referred to the copy of this letter and Garcia's response letter as contained in the JCC meeting packet. She said the Board would review the new information and decide on next steps at its March 19, 2015 meeting.

Stroud stated that the primary issue addressed in the letter was the role of a RG vs. a Certified Engineering Geologist (CEG). Stroud asked if the OSBEELS LEC was concerned about whether Garcia practiced engineering. Wilkinson said the LEC has not reviewed the case at this point given the referral of the complaint to OSBGE.

Thiessen said that when he first read the letter from the RG to the landowner, he thought the RG was tasked to give some assurance about slope stability due to concerns from the nearby landowner. But then the RG went on to describe differential settling as related to the roadway in his letter. Thiessen felt the OSBGE letter clearly explained to the RG the line between RG and CEG work. He is not convinced that Garcia's response was satisfactory with respect to addressing possible practice of engineering geology. Stroud agreed that it does appear there could be an issue with RG vs. CEG overlap. He reiterated that the full Board would need to review the new information at its next meeting.

Action Items

Memorandum of Understanding: Stroud summarized the JCC's review of a draft memorandum of understanding (MOU) that took place at the October 2, 2014 meeting. The JCC recommended review of the MOU by the Department of Justice (DOJ) followed by JCC review of any input from counsel at the meeting today. He asked Lozano and Martin to present changes they have recommended for the MOU. Lozano took the lead for DOJ and walked the JCC members through the second revised draft section-by-section.

1. Parties. No changes to this section. OSBGE and OSBEELS are the parties to the MOU.

2. Agreement Period. No changes to this section. Lozano spoke to how automatic renewal is built in to the MOU.

3. Committee Establishment/Purpose. DOJ recommended that the MOU be used to ratify OSBGE and OSBEELS decisions to create the JCC. The JCC has existed for a long time, but the records on when it was established are not recent. The ratification via the MOU makes it clear that the Boards support the JCC.

4. Organization. Lozano noted that this section was important for the JCC to review as it covers membership, co-chairs, roles, quorum, # of meetings, etc. JCC members reviewed and discussed various issues under this section.

With respect to meetings, JCC members discussed whether the MOU should set a mandatory number of meetings as proposed under Subsection c. Members noted the language in this section that would allow for meetings to be convened in-person or by telephone. Ultimately, no changes were requested to the draft language.

JCC members discussed the proposal for a JCC meeting quorum to be defined as two members per board under Subsection d. while either Board could appoint additional members to the JCC. Lopez and Valentine noted that OSBGE had a concern about not having to appoint three board members since that would be a quorum of OSBGE. Duquette noted that OSBEELS initially wanted to have at least three JCC representatives not including an alternate as a way to provide continuity and cross training. Thiessen noted that OSBGE could appoint a third full-time member that is a registrant but not a Board member if OSBEELS wants three members. OSBGE would then have to find a registrant that could attend all meetings vs. only serving as an alternate.

Also discussed was the proposal to limit each board to two voting members. It was noted that the two voting member limit addresses OSBGE's concern about balance. OSBGE knows that OSBEELS has a greater ability to identify more JCC members given its larger pool of board members and registrants. Stroud and Thiessen agreed that OSBGE was not concerned about OSBEELS having more members or alternates given the proposal to restrict voting to two per board. Duquette reiterated that for OSBEELS the goal was to have continuity by keeping more individuals engaged and aware of the JCC. Duquette said that Jason was the alternate. Stroud indicated that OSBGE is ok with having only one alternate but does not want to restrict OSBEELS from designating more than one alternate. Duquette thought that OSBEELS would stick with one alternate for now.

The quorum discussion lead into a discussion about the role of JCC alternates. The language in the draft MOU under Subsection a. was discussed since it describes the alternate as a backup to the primary JCC members. Lopez asked if the language should be revised if alternates will participate in meetings regardless of the number of JCC representatives present. Valentine said her recollection was that the role of the alternate had not been discussed in great detail by the JCC. Valentine suggested that the JCC members should decide what makes the meetings most productive.

Lozano suggested that the language on alternatives be clarified to explain that an alternate does not vote unless filling in for a missing JCC member. She suggested an addition to subsection 4: The alternate may attend meetings and participate in deliberations but only vote as prescribed in Subsection e. The JCC members agreed with this revision. Seward asked for clarification about voting and whether it was for anything other than minutes. Lozano said that the JCC needs to vote on recommendations also.

Thiessen suggested that OSBGE could have more than two voting members if non-board members were allowed to vote. Duquette noted that OSBGE would need to always have a non-registrant member engaged. Thiessen said OSBGE could work on this if OSBEELS really wants

to have three voting members. Duquette said she thought OSBEELS was ok with going with two voting members as proposed. Ultimately, no changes in the meeting quorum and voting protocols were proposed to the MOU.

Stroud asked how the JCC might deal with participation by individuals that are not alternates but just interested public. Lozano explained that the public meetings law is a public attendance law and not a public participation law. She advised that unless a party is invited specifically to speak to the JCC, then her recommendation is to have public comment as part of a public comment agenda item. She said this would help to keep roles clear going forward. The JCC could also invite speakers as part of an agenda item. Martin asked if OSBGE was really indicating that they would like more than one alternate. Stroud said no that he was just thinking about public participation.

Lozano summarized Subsection f. regarding JCC authority. There were no comments or questions regarding this section.

Lozano next addressed Subsection g. regarding written recommendations. Lozano encouraged all to read the MOU language since the draft language identified JCC members as responsible for preparation of written recommendations. Seward raised a question about the timing of written recommendations and thought this would often have to occur after a meeting. Valentine suggested that perhaps the JCC co-chairs could review written recommendations and approve them. Seward noted that the draft MOU says that the JCC will ratify or modify written recommendations at its next meeting. Lozano said this could be changed to co-chairs instead of the full committee. Thiessen liked the idea of the JCC co-chairs reviewing and finalizing written recommendations and not having to bring them back to JCC. He thought this would streamline the process. Lozano clarified that while this could be the process, the recommendations would really not be committee recommendations. She suggested that based on the JCC history, it might be best to have the JCC look at the written draft recommendations and mentioned that this could occur by phone meetings. Duquette said the committee could approve as presented and make modifications. Valentine was concerned about written recommendations being finalized in a timely manner. Duquette suggested that this could be done via special meetings by telephone. Seward asked if individuals could respond to the co-chairs and the co-chairs finalize the recommendation based on that input. Martin and Lozano advised that this would be problematic. Valentine suggested that in some instances the JCC may be able to agree to specific language for a written recommendation quickly and capture this in the meeting minutes.

Seward and Lopez had questions about how these written recommendations would be different than meeting minutes. Lopez asked if a JCC recommendation needs to be something different than a recommendation captured in meeting minutes. She asked if a written recommendation is somehow more detailed or specific than meeting minutes. Stroud reminded the JCC members that OSBGE was interested in having the JCC provide written recommendations. Stroud explained the challenge that came up with a past meeting summary not having enough detail to fully explain the JCC recommendation to individuals involved in a complaint case. He said a written recommendation could be used to focus on the recommendation and might be easier for the individual boards to work with.

Kleutsch asked if the JCC can be used as a forum for policy discussions. Lozano said that the MOU and committee name imply that the JCC is only charged with discussion of complaint

cases. Lozano stated that as currently authorized by the Boards and addressed in the draft MOU the JCC is not identified as a forum for policy discussions. She also said the JCC could only make recommendations, not change or set policy. Lozano said that the two boards would need to expand the purpose of the JCC. Duquette said the boards can always work together on policy issues without needing to work through a joint committee. The option of establishing a joint work group or committee to address policy also might be an option.

The JCC returned to written recommendations with a suggestion by Seward that the MOU be revised to say that the JCC will approve written recommendations at its earliest convenience instead of at its next regularly scheduled meeting. Duquette further suggested that the language be changed to at or prior to the next meeting. All JCC members agreed to this change.

Stroud asked for discussion about meeting minutes vs. minute summaries. Lopez explained that OSBEELS view based on past legal advice is that if names are not included in the document then it does not meet the standard of meeting minutes. Valentine suggested for the JCC that it would be easiest to include names since the committee members refer to names and case numbers. Valentine explained that OSBGE shifted to referring to cases by numbers vs. names. Stroud said the Board primarily uses the case numbers in its discussions. Lozano stated that there is no specific requirement to put names in minutes, but names cannot be redacted from minutes if there is a public records request for the minutes because the names of Respondents are not confidential per OSBEELS or OSBGE statutes. There was discussion about how the best protocol may depend on how cases are discussed. If the JCC uses the names of respondents, complainants and other involved parties to refer to cases, then it makes sense to include that information in the minutes. The JCC discussed and decided that names and case #s would be included in the meeting minutes.

Thiessen asked if maintaining audio or written minutes is more burdensome. Lozano and Martin reviewed the requirements for maintaining audio of meetings vs. meeting minutes.

5. JCC, 6. OSBEELS, and 7. OSBGE. Lozano reviewed Sections 5, 6, and 7 of the draft MOU, explaining that these sections lay out the responsibilities of the JCC, OSBEELS, and OSBGE respectively. Seward recommended that the question drafted as 5(b)(1) be broken into two questions: one covering area of professional competence and the other covering scope of professional registration. He also recommended that question 5(b)(3) be clarified to explain what is meant by welfare of the public. His suggestion was to revise it to say “Does the practice of the respondent negatively impact the welfare of the public (i.e., life, health, and property.) There was support for these proposed changes.

The JCC discussed how the MOU addresses lead board and the fact that the new MOU does not include the concept of concurrent reviews that is found in the existing MOU. Lozano noted that the JCC recommends which board should be the lead board and that OSBGE and OSBEELS can proceed with independent investigations that may be running parallel. The investigations may or may not overlap depending on the specific case and what each board is specifically investigating related to its statutes and rules. The footnote about Lead Board was revised. It was noted that the footnote spacing needs to be fixed to move iii to a separate line.

8. Amendments. Lozano noted that the MOU would require any amendments be in writing. There were no comments or objections to this.

9. Disputes. Lozano stated that this section addresses possible disputes and asked the JCC members to look at this as it is a change from the dispute resolution process found in the existing MOU. The recommendation from DOJ is that the Board Chairs and Administrators be charged with dealing with any disputes. Requirements for mediation or arbitration are removed. The Boards never used mediation or arbitration in the past. Martin further added that the MOU is not really enforceable by either board and thus more detailed and costly dispute resolution techniques probably do not make sense in this context.

10. through 15. The JCC concluded the review by looking at various provisions at the end of the MOU. Counsel suggested that Sections 10 through 13 could be removed as not necessary for a MOU as these sections are terms more suitable for an enforceable contract with an individual or entity outside of state government. Lozano thought that Section 14 might be good to keep in the MOU. Thiessen asked if it helped to keep Section 15 in the MOU in case future legislative action changes the structures of the Boards, including funding. Lozano advised that the section was not really needed since this is an MOU and not a binding contract with a third party. To summarize, Stroud asked for clarification of which sections were being deleted. The JCC requested that Sections 10-13 and 15 be deleted and Section 14 kept but renumbered accordingly.

In closing, Lopez and Valentine said they would work on the requested revisions with the intent that the final draft MOU will be back before the JCC for a final review at its May 7, 2015 meeting. The expectation is that the JCC will make a recommendation at that time regarding MOU approval by the Boards.

1983 Opinion: Stroud summarized the last JCC discussion about a possible joint request to have DOJ review and issue an updated opinion. He noted that the Boards requested that the JCC discuss what questions would need to be asked today to help address practice overlap issues. He mentioned that the JCC even had some discussion about whether there were merits to requesting a new opinion. Key questions are can the committee resolve issues of practice of overlap without a new DOJ opinion, and what are the risks of another opinion not ultimately being helpful to the JCC or Boards. Lozano and Martin addressed the type of opinion that would be required and the anticipated expense for this.

Seward said he feared that a new opinion might take the approach of creating a laundry list of practices in an attempt to define what is engineering geology and what is engineering. He does not see that kind of outcome as helpful. He felt that a lot would depend on exactly how questions were asked in any request submitted by the Boards. He said he has mixed feelings and concerns about what result might come out of DOJ review. He suggested that perhaps the JCC really needs guidance on how to think about issues and how to evaluate practice overlap cases vs. getting specific guidance on what falls within each scope of practice.

Lozano noted that there is some new case law available that DOJ would consider in any new analysis. She confirmed that the legal basis for looking at whether work was incidental to a primary field (e.g., geology work that was incidental to engineering work) has basically gone away. Any new analysis would focus on what is the scope of practice of each registration and what is the allowed work under a license. Martin explained that this analysis would be based on the State of Oregon generally not requiring an individual to hold two different licenses. He also

noted that the courts have started to go back to when statutes were adopted to look at what was intended at that time. He was uncertain what that type of analysis would mean for the Boards since there was not a specific geotechnical engineering specialty when the OSBGE statutes were passed.

Valentine suggested that perhaps the JCC can recommend obtaining advice on legal questions outside of or in lieu of requesting a formal review of the 1983 opinion. She referred back to Seward's idea that the JCC might need advice on how to review cases. Lozano and Martin described how DOJ would handle such requests for advice. Lozano said she is not sure relooking at the 1983 opinion is ripe based on current issues. Stroud added that in 1983 OSBGE was a relatively new board, and he could see why practice overlap questions existed at the time and led to the opinion. He noted that the two professions and the Boards have evolved significantly since then.

Stroud stated a desire to see the JCC be able to contribute to education and outreach directed at cities and counties about requirements for the appropriate professionals to prepare reports and address other land use needs. Duquette and Lozano suggested that such outreach may be more appropriate at the Board level. The JCC could ask the Boards to weigh in on whether the JCC should undertake this type of work. There was a brief discussion about whether the JCC should propose a guidance document. Duquette suggested that dealing with requests as they are received may be the best approach. She noted that even if a guidance document were prepared, there would be no guarantee that people would read it.

Kleutsch thought it would be more interesting to know where is there no overlap between engineering geology and engineering than to know what is in the overlap. He noted that the 1983 opinion focuses more on what is within the overlap. Duquette referred to the geotechnical engineering rule as a definition of what is within the scope of practice. She offered that defining what is within a scope of practice can be a lot easier than defining what is not within that scope of practice. Lozano added that she believed Duquette was raising the issue that a non-engineer can work on engineering if that work is done under supervision of a PE. Kleutsch offered that the 1983 opinion says a PE can do geology work if competent by training and experience. Perhaps holding a geotechnical engineering (GE) specialty endorsement from OSBEELS proves in large part that the PE is competent to work in the overlap with geology. Lozano suggested this may not be the case given that the GE is not needed to practice geotechnical engineering. Only structural engineers have to hold a specialty certification to practice in that specialty. For all other OSBEELS registrants, the Board looks at whether the PE was competent to work in a specific area.

Stroud said the scope of practice discussion reminded him of discussion at the last JCC about OSBEELS work to define compliance terms such as gross negligence, negligence, and incompetence. Lozano said that work is not complete. Duquette said these issues may need to be defined via case decisions vs. in rule. There was no further discussion at this time.

Stroud asked if there was consensus to put the 1983 opinion on the shelf. Seward asked Lopez if OSBEELS already decided to pursue the review. Lopez said OSBEELS gave the OK to move forward with a request but first wanted JCC input and assistance in developing questions. Duquette said that she thought OSBEELS approval to proceed was dependent on what specific questions the JCC came up with and that the Board would not necessarily proceed if the JCC

recommended against it. Stroud said that OSBGE had a similar position, i.e., open to possibly requesting review but first wanting the JCC to discuss and propose questions. Thiessen noted that over the last year the JCC has been able to determine scope of practice questions without using the 1983 opinion. He has not found the 1983 opinion to be of any use in addressing current needs. He believes the new MOU will be more useful than an updated DOJ opinion and does not think DOJ opinion review is needed at this time. This sentiment was matched by the other JCC members. Kleutsch offered that JCC recommendations on cases can be used to guide the Boards and inform the public. He thought the reasoning behind these recommendations should be well documented.

Seward asked how much the JCC or boards are bound by the 1983 opinion. Lozano noted that much of the 1983 opinion is outdated. Martin said the Boards are bound by the opinion only to the extent it remains applicable. He offered that the way the 1983 opinion is written gives the JCC lots of flexibility to proceed as it currently is structured. In a new review, the Boards may get an opinion that is less helpful. Stroud noted that maybe future cases will drive more questions and result in this topic being revisited. For now, he felt that the JCC has been an example of a good working relationship between the Boards.

Wilkinson added that as an investigator, he is always looking for ways to determine if something is inside or outside the scope of practice. He wondered if the JCC can offer guidance over time so that investigators can better help to flush out whether there was work in or outside of the practice overlap. He encouraged the JCC to think about what type of tool could be prepared. Thiessen mentioned the OSBGE guidelines as best practices and suggested that it might be useful background. Kleutsch mentioned that the OSBGE guidelines have been very helpful to his work at ODOT. Valentine noted that the OSBGE guidelines are best practice and not minimum standards.

New Business

Seward asked about whether there is anything being proposed about combining boards. Thiessen said this is always in the back of his mind as proposals seem to continually come up but he was not aware of anything concrete. There was brief discussion about bills filed in the 2015 session that would propose sunset provisions for boards and commissions.

There were no public participants at the meeting and thus no public comment.

Stroud noted that the next meeting is May 7, 2015 and will be hosted by OSBEELS.

Adjournment

Stroud asked if there were any closing comments. Hearing none, he adjourned the JCC at 2:39 PM.