

# Retreat Minutes of the Oregon State Board of Geologist Examiners

Paul Hoobyar, Facilitator

**Attendees:** Steve Taylor, RG, Chair; Susanna Knight, Administrator; Richard Heinzkill, Public Member; Chris Humphrey, RG, CEG, Vice Chair; Vicki McConnell, RG, State Geologist; Rodney Weick, RG, CEG; Mark Yinger, RG

The Board convened on Saturday, January 10, 2009, at the Gentle House in Monmouth. From 10 AM to 4 PM, Facilitator Paul Hoobyar directed discussion of agenda items about facets of the complaint process. The agenda items were those that had been chronically tabled by the Board over the past couple years during quarterly meetings as it dealt with more pressing issues. A Board retreat was deemed the solution for acting on these long-term organizational needs for the complaint process.

The following questions were used to frame the retreat discussion:

- How is a complaint processed when it arrives at the Board office?
- Should the Board develop a standard complaint form?
- How and when should the Board engage Technical Reviewers?
- What information should be provided to Technical Reviewers?
- Should Technical Reviewers be compensated for their efforts?

## **Board Actions:**

**1. Revise OAR 809, Division 55, Compliance:** The Board agreed (unanimously) that the Rules Advisory Committee would develop a revised DRAFT of OAR 809-055 based on a Compliance Flow Chart (CFC) created at the retreat (see Appendix/pdf), and an outline created by the Board as guidance (pg. 3)

**2. Revised Complaint Process:** The Board agreed (unanimously) that the Compliance Committee will review the complaint process and make recommended revisions to the Rules Advisory Committee. It was confirmed that the Board's Assistant Attorney General (AAG) will become involved earlier in the complaint process as needed and as represented in the CFC. Any input from the AAG will be presented to the Board in an attorney-client document. (pg. 4)

**3. Standard Complaint Form:** The Board agreed (unanimously) that the Public Member and Administrator shall draft a standard "complaint form" using models of complaint forms from other states. The form should be reviewed by the Board's attorney, and the full Board should approve the final form. (pg. 5)

**4. Reviewer Guidance:** The Board agreed (unanimously) that the Board Chair will revise the *draft* TECHNICAL REVIEWER'S GUIDANCE DOCUMENT (TRGD) using general guidelines identified at the retreat. The revised *draft* will be provided to the full Board prior to the March Board meeting. The Board will review the TRGD at its March meeting. The TRGD will come under a separate cover (pg. 5)

**5. Consistency in Penalties:** The Board agreed to the following actions to address consistency in penalties:

- a) The Board will continue to address/use “Level I” and “Level II” in Humphrey’s *draft* Uniform Penalty delineation (pg. 23 of the Board Packet);
- b) The Board will review the Administrator’s compliance spreadsheet that lists final actions in compliance cases as background and context before the Board takes any final action. This will help to establish consistency in actions, including any penalties, of the Board.
- c) Decisions about complaint outcomes including civil penalties do not have to undergo any legislative oversight. The Board is currently empowered to issue a civil penalty up to \$1000. Should the Board wish to increase this amount, a Legislative Concept would be required.

## **Agenda Items**

### **I. OAR 809-055-0000 DRAFT Revisions**

#### **Discussion**

The meeting began with the Board Administrator explaining the purpose of the proposed revisions to the OAR. The revisions are intended to help clarify the process and timing of the review of a complaint case.

Board discussion began with a suggestion to have a professional Board member enter into the complaint review process at an earlier stage than outlined in the Draft revisions of the OARs dated January 5, 2009.

Some members think that a professional Board member should be involved before the initial review by the “technical reviewer.” Board members noted that one challenge of the current complaint process is the lack of a “time limit” for when responses are expected of a Board member assigned to a technical review of a compliance case. Members noted that the “lag time has been too great” currently for the professional Board members to provide the Compliance Committee with assessments or full technical reviews in a timely fashion.

Members noted that the intent of the Compliance Committee’s initial assessment is to determine whether a complaint is valid or not. The Compliance Committee currently consists of the Public Member (as Chair), the Administrator, and one professional Board Member. The proposed revisions to the OARs include eliminating the professional Board member as a member of the Compliance Committee. This change is intended to eliminate “bias” in the complaint process. However, some Board members think that a professional Board member with the requisite technical skills should be involved in this initial stage to assess whether the complaint merits further review.

The Public Member/Compliance Chair Heinzkill questioned when the full Board should become involved in the complaint process. The Public Member sees validity in having a professional Board member involved early in the process in order to provide technical assessments of the merits or validity of a complaint. Heinzkill shared examples of how other states address complaints directed to the Board (e.g. Delaware), and that these examples indicated that a

technically competent Board member became involved earlier in the complaint process than the proposed OAR revisions would allow for OSBGE.

Other Board members were initially “ambivalent” on when a professional Board member should become involved in the complaint process. One suggestion was to leave the current language in Section 1(a) in the OAR “as is,”-- i.e. “ The Board has established a Compliance committee chaired by the Board’s public member *and one other professional member* to be selected on an issue-by-issue basis....” (emphasis added).

Under this scenario, the suggestion was to also clarify that a professional member’s “review” at this initial stage of the complaint process would *not* be a “full review” which could include a review of all pertinent documents. Instead, this initial review would be considered a “first cut,” or “preliminary screening” to determine whether the complaint was

- a “process” complaint (e.g. did the respondent have a Certified State “Stamp” to practice as a professional geologist?), or
- a “competency” or “technical complaint” with an assessment of whether the complaint was valid and warranted further review.

Another question raised by Board members was if a professional Board member becomes involved at an early stage of a complaint case, will he or she then need to “recuse” him- or herself should the complaint be contested or go to court. This would create additional challenges for the Board, since the Board consists of only five professional members, and recusal of one professional member would result in an increase in the remaining Board members’ workload. (It was suggested that “recusal” would only occur if the case was legally challenged).

Currently, the complaint process follows these general guidelines:

1. Administrator reviews a complaint initially with the Public Board member to determine if this is a valid complaint and whether it is a “process” or technical/competency” issue.
2. If the Administrator and Public member decide that the complaint is valid, the complaint then proceeds to the “investigative stage” of the review process. This is where the Compliance Committee which could include both a technical reviewer(s) and the Board’s AAG become involved in the case for an “in-depth” review.
3. Once the Compliance Committee completes its review, the case is forwarded to the full Board for a response, usually with a recommendation for come type of Board action.

**Board Action:** The Board agreed (unanimously) that the Rules Committee will develop a revised *draft* of the OARs based guidance from a Flow Chart created at the retreat (see Appendix), and the following outline created by the Board:

- I. Preamble Statement
- II. Definitions
  - Complaint
  - Respondent
  - Compliance Committee
- III. Procedure for Filing Complaint (see Flow Chart)
- IV. Board procedures for processing complaint

## **Board Agreement on Preliminary Screening Process:**

Further, the Board agreed on the following guidelines for how a professional member's involvement will be limited during the "preliminary screening" of a complaint:

1. A professional Board member will be involved in the "preliminary screening" of a complaint.
2. The professional Board member's involvement in this preliminary screening will be informed by the following guidelines:
  - Read the Complaint (on the Complaint Form or in a letter)
  - Assess what potential ORS or OAR violation has occurred
  - Discuss the Complaint with the Compliance Committee
  - Assess what type of potential violation is involved (i.e. is it a "process" or "technical/competency" violation?)
  - Assess need for involving a technical reviewer(s) and further action (i.e. is this a valid complaint warranting further action?)

## **Public Record Concerns**

Another concern raised by Board members is that the complaint documents currently become part of the public record early in the complaint review process. This may inhibit the Board from being able to explore a full range of issues, concerns, and potential responses.

The Board identified generally the stages of the current complaint process including:

1. A complaint is filed.
2. Compliance committee review occurs.
3. The Respondent makes a response to the complaint.
4. A technical review(s) is completed (if warranted).
5. The investigative process is completed (if warranted);
6. The attorney-client document is returned by the Board's attorney after his or her review of the legal considerations of the case.

The Board agreed that Steps 1 and 2 of the process should stay as part of the public record, but some members wanted subsequent steps of the process removed from the public process during deliberation of the complaint and until a Board determination is made.

One suggestion for how to prevent the entire complaint file becoming part of the public record while the Board is deliberating on a case is by engaging the Board's attorney earlier in the process. An attorney-client document for concluding the complaint case can be presented to the Board. That attorney document and all subsequent deliberations and documents in the case would then be protected under "attorney-client" privileges until such time as final action occurs.

**Board Action:** The Board agreed that the Rules Committee will

- review the complaint process;
- make recommended revisions to have the Board's attorney review the complaint earlier in the process; and
- establish an attorney-client relationship with the complaint case.

### Standardized Complaint Form:

Heinzkill requested that a standardized “Complaint Form” be developed for use when a complaint is directed to the Board. In addition, as the Public Member, he suggested that the standardized complaint form include a “sworn to” statement that would make the complainant responsible for his or her information. The Board discussed the format for a standardized complaint form and agreed that

- the form should be in a “PDF” format which can be downloaded from the Board’s website;
- a signature line should be included; and
- the complainant must sign the sworn to statement before mailing the information to the Board.

**Board Action:** The Board agreed (unanimously) that the Public Member and Administrator should *draft* a standard “complaint form” using models of complaint forms from other states, if needed. The form should also include language that indicates a letter from a complainant will also be accepted by the Board as long as the letter includes the items identified on the standard complaint form. The Public Member and Administrator should then send the *draft* complaint form to the Board’s attorney for his review. Once the attorney’s review is complete, the proposed complaint form should be sent to the full Board for review and final approval at a future Board meeting.

## II. Standardized Reviewer Guidance

Board members Humphrey and Taylor brought *draft* language and guidance forms for the full Board to review and discuss. The Board members had a chance to review Humphrey’s *draft* guidance as part of the Board packet sent out prior to the Board retreat. However, Board Chair Steve Taylor brought materials that he wanted the Board to consider in addition to the Humphrey *draft*.

Currently the technical reviewers are not paid for their time and the process is somewhat ad hoc with the Administrator calling potential reviewers as needed and asking them to become Technical Reviewers of complaint cases for the Board.

**Board Action:** After discussion of both the Humphrey and Taylor *draft* guidance materials, the Board made several suggestions for revising the *drafts*. The Board subsequently agreed (unanimously) that the Board Chair will revise the TRGD document and bring the revised *draft* to the full board for review at the March Board meeting using the following general guidelines:

1. The Board needs to make the technical reviewer process more formal by
  - ✓ establishing a process for acceptance of technical reviewers for the Board and
  - ✓ drafting a standard, formal solicitation letter for potential reviewers.
2. The Board wants to establish a pool of reviewers that can be called on, and Board members should call on colleagues as potential reviewer candidates.
3. The developed standard application form should include both the candidate’s resume and amount of experience.
4. Include as part of the Board’s budget a line item for Technical Reviewer stipend.

5. Establish a more professional process and approach to soliciting, managing, and retaining Technical Reviewers (e.g. see model of OSBEELS).
6. A method for establishing the technical competency of the reviewers (for legal purposes) is needed.
7. The Board needs to ensure that an “immunity clause” is passed in this 2009 Legislative session.
8. A method of formally acknowledging those technical reviewers who have provided input to the Board should be developed—e.g. create Certificates for Participation.

### **III. Uniform Penalties**

The Board had reviewed the *draft* uniform penalties paper developed by Chris Humphrey and included in the Board packet. One Board member noted that guidance is needed in the OARs to establish some consistent penalties or consequences for violations, and he thought the Humphrey *draft* was a beginning to establishing those consistent penalties or consequences.

It was noted that the Board currently use a “letter of concern” to respondents when a complaint case is closed to alert the respondent of the violation. However Board members acknowledge that a “letter of concern” is not a disciplinary action and thereby has no obligation for a hearing attached to it.

A suggestion was made to change the “letter of concern” to a “warning letter,” which may have more legal authority. However, a warning letter may invoke the opportunity for the respondent to have a Hearing (the Board directed that Counsel check on the meaning and legal implications of the use of a “warning letter” in a complaint case instead of a “letter of concern.”)

The Board then discussed the need for uniform penalties and whether, instead of uniform penalties, what is really needed is *consistency* in penalties. There was unanimous agreement by the Board that consistency in penalties is what is really needed. Therefore the Board agreed on the need to:

#### **Board Action:**

1. Develop a process for creating consistent penalties under the OAR.
2. The Board will continue to address “Level I” and “Level II” in Humphrey’s *draft* Uniform Penalty delineation (pg. 23 of the Board Packet);
3. The Board will review the Administrator’s spreadsheet that lists all actions in closing cases as background and context before the Board takes any final action of establishing consistency in penalties.

The Board also wanted language considered that addressed recurring violations by the same party and “recalcitrant” registrants.

The Board agreed that Humphrey’s *draft* and any subsequent Uniform Penalty *draft* would be used as an internal guidance document for the Board and/or its Compliance Committee.

The minutes of the January 10, 2009 Board retreat were approved at the March 5, 2009 quarterly meeting of the Board.

Respectfully submitted by Susanna R. Knight, Administrator

# OSBGE Complaint Process Flow Chart

