

Minutes of Special Board Meeting

OREGON STATE BOARD OF GEOLOGIST EXAMINERS

January 21, 2008

Sunset Center South, 1193 Royvonne Avenue SE, #24, Salem, Oregon

A special telephone meeting of the Board was called to order on Monday, January 21, 2008, at 5:11 PM by Chair Stephen Taylor. Oral role call was taken with the following

Board Members present via telephone conference call:

Chris *Humphrey*, RG, CEG, via telephone from Oregon City
Vicki *McConnell*, RG, State Geologist, via telephone from Portland
Allen *Morris*, Public Member via telephone from Canby
Stephen *Taylor*, RG, via telephone from Corvallis
Rodney *Weick*, RG, CEG, via telephone from Portland
Mark *Yinger*, RG, via telephone from Sisters.

Staff present at the Board office:

Susanna Knight, Administrator
Kyle Martin, Assistant Attorney General

Guests present:

David Carlson, Attorney
Nicholas Coffey
Susan Coffey
John Rehm, RG

After acknowledging that this was the first meeting for the newly appointed Board Member *Yinger*, Chair *Taylor* read the following statement:

“The Board will now meet in executive session for the purpose of reviewing documents that are exempt by law from public inspection under ORS 192.660(2)(f) and to consult with counsel regarding the pending appeal of Coffey v. OSBGE (CA A134310) under ORS 192.660(h). Representatives of the news media and designated staff shall be allowed to attend the executive session. All other members of the audience are asked to leave the room. Representatives of the news media are specifically directed not to report on any of the deliberations during the executive session, except to state the general subject of the session as previously announced. No decision will be made in executive session. At the end of the executive session, the Board may meet in public session to make a decision under ORS 183.482(6).”

The guests left the room at 5:13 PM.

At 6:05 PM, guests were invited back into the room.

Taylor moved to accept and approve the FINAL ORDER ON RECONSIDERATION as presented (and attached) in the matter of Nicholas Coffey, CC#03-03-002, CC#03-09-006; CC#04-07-004. *Weick* seconded the motion. Oral roll call was taken: *Taylor*, yes; *Humphrey*, yes; *Weick*, yes; *Morris*, yes; *Yinger*, abstain. *McConnell* stated that as an ex-officio member, she has no vote. *Taylor* reported that the motion carried.

Taylor thanked everyone for their efforts on this holiday and adjourned the meeting at 6:09 PM.

Respectfully submitted,

Susanna R. Knight, Administrator

The Minutes of the January 21, 2008, Board meeting were approved at the March 6, 2008, quarterly meeting of the Board convened in Salem, Oregon.
Respectfully submitted,
Susanna R. Knight
Administrator

**BEFORE THE
BOARD OF GEOLOGIST EXAMINERS
STATE OF OREGON**

IN THE MATTER OF: NICHOLAS W. COFFEY, Registered Geologist.	Agency Case Nos.: 03-03-002, 03-09-006, 04-07-004 FINAL ORDER ON RECONSIDERATION
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On October 20, 2006, the Oregon Board of Geologist Examiners (Board) issued a Final Order after having deliberated on the Proposed Order issued on August 8, 2006, and considered the record of this matter and Nicholas W. Coffey's (Licensee) exceptions to the Proposed Order filed on September 14, 2006. On December 18, 2006, Licensee filed a petition for judicial review. On November 12, 2007, the Board withdrew the Final Order for purposes of reconsideration, pursuant to ORS 183.482(6). On January 21, 2008, the Board reconsidered this matter and hereby issues the following Final Order on Reconsideration:

HISTORY OF THE CASE

On April 20, 2004, the Board issued a Notice of Proposed Disciplinary Action. On May 26, 2004, Licensee requested a hearing. On June 10, 2004, an Amended Notice was issued by the Board, correcting a statutory citation (Amended Notice). Licensee filed an answer to the Amended Notice on July 8, 2004, and requested a hearing. On July 22, 2004, Licensee filed an amended response to the Amended Notice. On August 9, 2005, the Board issued a second Amended Notice, adding an additional complaint against Licensee. Licensee again contested that Notice on August 31, 2005.

On September 22, 2005, the Board referred the hearing request to the Office of Administrative Hearings (OAH). A hearing was held on May 24 and 25, 2006, in Salem, Oregon. Administrative Law Judge (ALJ) Rick Barber presided at hearing. Licensee was present at the hearing and was represented by David Carlson, Attorney at Law. The Board appeared through Vicki McConnell, Ph.D., and was represented by Thomas Cowan, Assistant Attorney General. The Board called the following witnesses: Licensee, Dr. McConnell, Patrick Brady, Jonathan Sprecher, and Douglas Williamson. In addition to his own testimony, Licensee called John Rehm as a witness. The record closed on June 27, 2006, following receipt of the written submissions of the parties.

In accordance with ORS 183.650(2) and (3) and OAR 137-003-0665(3) and (4), the Board identifies and explains herein those modifications to the proposed findings of historical fact or that change the outcome or basis for the final decision in this case from that in the Proposed Order. The Board has made other changes to the Proposed Order to

fully, adequately, or correctly set forth the material evidence in the record, to clarify, correct, or amend the proposed findings of the ALJ, or to explain the Board's findings, conclusions, and opinion herein. The Board has also made changes to correct spelling, grammar, textual placement, and other similar errors.

ISSUES

1. Whether Licensee is subject to discipline for his actions as a Registered Geologist, as alleged in the three complaints filed against him.
2. Whether, if Licensee is subject to disciplinary action, license revocation or some other form of discipline is appropriate.

EVIDENTIARY RULINGS

Exhibits A1 through A44, including A23A and A30A (the Board's submission) and Exhibits 101 through 109 (Licensee's submission) were identified for the record at the outset of the hearing. Exhibit 109 was withdrawn by Licensee. Licensee objected to Exhibits A13, A15, A19, A22, A28 and A42; the objections were overruled for the reasons set forth on the record at hearing. During the hearing, Exhibits 110, 111, and 112 were offered and admitted into evidence (Exhibit 112 for demonstrative purposes only).¹ Thus, the admitted exhibits in the case are as follows: Exhibits A1-A44, A23A, A30A, 101-108, and 110-112. Those exhibits, along with the Pleading documents, comprise the documentary record of the hearing.²

FINDINGS OF FACT

1. Licensee is a Registered Geologist, holding registration number G997 with the Board. His registration was issued on May 20, 1988. Licensee practices geology under the name Coffey Geoscience, with its office located in Salem, Oregon. (Ex. A3).
2. In 2002, Licensee was approached by Dennis and Laura Nielsen, real property owners south of Salem, who wished to partition their property into two lots. The Niensens live in Spring Lake Estates, an area with variable water levels. Licensee was retained to perform a hydrogeology review of the Nielsen's land and the surrounding area to determine whether the partition would comply with Marion County's Sensitive Groundwater Overlay (SGO) Ordinance. Licensee drafted his report for the Niensens on September 29, 2002. (Ex. A7). Thomas Michalek of Newton Consultants, Inc.

¹ Licensee's exhibits did not follow the usual numbering convention of L1, L2, etc., but were numbered clearly enough to be distinguishable from those submitted by the Agency.

²The Pleading documents consist of the 14 documents provided by the Board in its Pleading Index, as well as the following documents: Licensee's Motion to Dismiss (P15); the Board's Response to Motion to Dismiss (P16); Licensee's Trial Memorandum (P17); the Board's Trial Memorandum (P18); a June 27, 2006 letter from Attorney Carlson (P19); and a June 28, 2006 letter from Attorney Cowan (P20).

performed a peer review of Licensee's report. Michalek was critical of portions of Licensee's review, but concluded that Licensee had addressed all of the SGO elements. (Ex. A18 at 3, 10-16). Samuel Allison, another geologist, issued a peer review of Licensee's work as well. Without addressing the actual findings in Licensee's report, Allison concluded that Licensee had addressed all of the SGO criteria. (*Id.* at 121).

3. Under the SGO, water recharge is one of the determining factors in the water use inventory, which is important regarding whether future growth is appropriate. At a certain point, when the water use index approaches 90 percent, a hydrogeologic study, as opposed to a review, would be necessary to determine whether there was enough water for additional homes. Hydrogeology studies are much more comprehensive and much more expensive for clients than are reviews. Determining the water recharge level requires data concerning, among other things, annual rainfall, the type of aquifers (marine sediment or basalt) in the area, the elevation of the property, and a history of the other wells in the area. (Ex. A6).

4. Many neighbors of the Niensens, including Laurel Hines, opposed the partition of Nielsen's property, and a hearing was scheduled to address the partition. After reviewing the submissions from Licensee (Ex. A18 at 111, Ex. A9), Hines filed a complaint with the Board, alleging misrepresentation and bad information in the content and quality of Licensee's review in the case. The complaint was filed on March 9, 2003. (Ex. A1). On March 21, 2003, the Marion County Hearing Officer issued a decision denying the partition, and the Niensens appealed. Licensee drafted the Nielsen's response on the initial appeal to the Marion County Commission. (Ex. A18 at 18). On April 30, 2003, the Marion County Commission remanded the case back to the Hearing Officer for another hearing. The second hearing was held on May 21, 2003; this time, the Hearing Officer granted the partition. (*Id.* at 23-50). The opponents appealed the Hearing Officer's decision to the Marion County Commission, which affirmed the decision granting the partition. (*Id.* at 21).

5. On April 16, 2003, the Board sent the Hines complaint to Licensee and asked for a response. (Ex. A10). Licensee sent two responses to the Board on May 13, 2003 and May 29, 2003. (Exs. A11, A12). The Board sent Licensee's initial report and further explanations to Jonathan Sprecher, a Registered Geologist from Central Oregon, for his review. Sprecher reviewed the initial report and several subsequent ones, authoring responses on June 16, 2003, September 7, 2003, and November 14, 2003. (Exs. A13, A15, A19).

6. Acting on the complaint by Hines and the concerns raised by Sprecher, the Board scheduled a meeting between Licensee, some board members, and Sprecher for September 8, 2003. (Ex. A14). At the meeting, the Board understood Licensee to say that he had revised the Nielsen report and would submit it to the Board to answer its concerns. When the Board did not have the revised report by October 17, 2003, Licensee was again asked to provide the revised report. (Ex. A26). Licensee did not immediately respond. On

November 24, 2003, the Board sent another letter to Licensee. He was given 30 days to provide the information he had promised. (Ex. A29). On December 29, 2003, 35 days later, Licensee wrote to the Board and asked for an extension of time because his attorney was out of town.

(Ex. A30). In his own response to the Board, Licensee alleged he was being harassed by Hines' complaints, and demanded that the Board only address sworn complaints as required by the statute. (*Id.*). Hines provided a sworn statement incorporating her previous written complaints on January 17, 2004. (Ex. A30A).

7. When preparing the information for his initial Nielsen review, Licensee did not research the well data in the area. Instead, he gave the Niensens the task of investigating the location of wells in the area. Licensee based his conclusions in the Nielsen review on their research, reporting the presence of 16 wells. (Ex. A7). Gathering well data and interpreting what it means for other property owners is a task for a geologist. (Test. of Sprecher, Brady). There are 35 to 40 residences in Spring Lake Estates, and there are 51 to 57 lots (including the residences) in the area. Licensee did not check the accuracy of the information eventually provided by the Niensens. Licensee did not check on the reasons for well deepening in the area. (Ex. A15 at 1). Oregon Water Resources Department (OWRD) maintains a record of wells drilled and deepened, and makes that record available to the public. (Test. of Sprecher, Brady). Licensee was aware of OWRD's well record and its availability. If Licensee was asked to undertake the Nielsen review today, he would do it differently, doing the well research himself and with more attention to detail. (Test. of Licensee).

8. Licensee was aware that he was required to supply a geologic map along with the Nielsen review. He provided a small map (provided by Marion County Planning) of the plat where the Nielsen property is located, with a few additional references to the geologic makeup of the underlying rock in the area. (Ex. A7 at 16). A geologic map generally includes more detail of rock makeup, elevation and descriptions of the type of rock found there, such as that presented in Exhibit A19 at 44. (Test. of Sprecher). Marion County accepted the map provided by Licensee. (Inference of the ALJ based upon the County's acceptance of the partition).

9. When a different geologist told DeHart, Nielsen's next-door neighbor, that he could not support the partitioning of DeHart's land due to problems with the water levels, DeHart was referred to Licensee as a geologist who might be able to come to a different conclusion. (Test. of Rehm). At DeHart's request, Licensee prepared a hydrogeology review for DeHart on December 11, 2002, and submitted it to Marion County on January 8, 2003.

(Ex. A20). On January 17, 2003, peer reviewer Thomas Michalek (the same person who had reviewed the Nielsen report), rejected Licensee's conclusions about the availability of water in the area. Michalek noted that Licensee's information about nearby wells was incomplete and that Licensee's figures, although based on an acceptable formula for determining water recharge, were distorted by inaccurate information. (Ex. A21). Marion County refused to approve DeHart's request to partition. (*Id.*).

10. The Board asked Sprecher to review Licensee's report in DeHart as well as those in Nielsen. Sprecher did so on December 16 and 17, 2003. Noting that Licensee's review in DeHart was based in major part on the same information in Nielsen, which Sprecher considered inaccurate and incomplete, Sprecher was again critical of Licensee's findings and conclusions. (Exs. A22, A23).

11. On March 8, 2004, Licensee drafted a hydrogeology review for Jim and Jayne Miller, addressing the Millers' concerns that a development nearby would effect the Millers' water supply. (Ex. A35). On July 1, 2004, the Millers filed a complaint against Licensee. (Ex. A32). Sprecher had later been hired by the Millers to provide a review, so the issue of reviewing Licensee's work on the Miller complaint was referred to Patrick Brady, another Registered Geologist. Brady reviewed the report submitted by Licensee on behalf of the Millers and concluded that the information was highly inaccurate. (Ex. A42). Brady testified that, if one of his geologists had brought such a report to him, he would tell the geologist to go back and start over. (Test. of Brady).

12. On April 20, 2004, the Board issued a Notice of Proposed Disciplinary Action on the Nielsen and DeHart matters, recommending that Licensee be suspended, fined, and placed on probation. (Doc. P1). On August 9, 2005, after the Miller matter had been investigated, the Notice of Proposed Disciplinary Action was amended and the Board sought revocation of Licensee's license. (Doc. P6).

CONCLUSIONS OF LAW

1. Licensee violated his duties as a Registered Geologist in all three instances for which complaints were filed.
2. The appropriate discipline is license revocation.

OPINION

The Board contends that Licensee should have his license revoked because of his actions with regard to all three complaints—Nielsen, DeHart and Miller. Licensee contends that he should not be disciplined because he did not violate his duties under the statutes and rules. Licensee also has moved to dismiss two of the three complaints, a matter which was raised shortly before hearing and taken under advisement at the time of the hearing. Before addressing the merits of the case, the Board will consider Licensee's motion as well as his argument about the burden of proof.

Motion to Dismiss. Licensee argues that the Nielsen and DeHart matters must be dismissed because the Board failed to comply with ORS 672.665, which states:

Any person may prefer charges of fraud, deceit, negligence, gross negligence, incompetence or misconduct against any registrant. Such charges shall be in writing and *shall be sworn to by the person or persons*

making them and shall be filed with the administrator of the State Board of Geologist Examiners.

(Emphasis added). Licensee contends that the complaints filed by Laurel Hines in the Nielsen and DeHart matters cannot be prosecuted because she did not initially provide a sworn statement with the charges. Although acknowledging that Hines later provided a sworn statement (Ex. A30A), Licensee argues that the Board's actions *before* receiving the sworn statement were without any authority.

Licensee's argument is premised on the position that the Board may only act to discipline its registered geologists if a member of the public prefers charges by filling out a sworn statement against the geologist. Under this interpretation of the statute, the Board cannot act without such a sworn statement. A Board member could file a complaint, as long as he or she filled out a sworn complaint against the geologist.

The problem with Licensee's argument is that it interprets ORS 672.665 in a vacuum and ignores the context and express language of the surrounding statutes. For instance, ORS 672.675 states:

The State Board of Geologist Examiners *has the power* to suspend, revoke or refuse to renew the certificate of registration of any registrant or reprimand any registrant who is found to have been involved in:

- (1) The practice of any fraud or deceit in obtaining a certificate of registration;
- (2) Any negligence, gross negligence, incompetence or misconduct in the practice of geology as a registered geologist;
- (3) Any felony; or
- (4) The commission of any unlawful act as set forth in ORS 672.505 to

672.705.

(Emphasis added). Although Licensee argues that ORS 672.675 is derivative of ORS 672.665—that is, that the Board may only act under 672.675 if there is a sworn statement under 672.665—the language of neither statute says so. There is no reference to ORS 672.665 in 672.675. The better interpretation is to read the statutes by their own terms, but in context. ORS 672.665 demonstrates how a member of the public can bring a matter to the Board's attention, while ORS 672.675 sets forth the parameters of how and when a geologist may be disciplined, and gives the Board the power to impose that discipline.

Nothing in the statute prevents the Board from acting on its own motion to police its registrants. In fact, such an interpretation would lead to the absurd result that the Board could not act unless a Board member masqueraded as a member of the public and provided a sworn statement against Licensee. The statutes do not require such absurdity. ORS 672.675 gives the Board the power to act when discipline of one of its registrants is needed, whether that matter is brought to its attention by a member of the public or through some other avenue.

Finally, even if Licensee was correct and only the sworn statement of a member of the public could cause the disciplinary wheels to start turning, there *is* a sworn statement in this case. Hines later provided a sworn statement. (Ex. A30A). Licensee provides no legal basis for his argument that any Board action before receiving a sworn statement would be a nullity. If Licensee's interpretation was correct, all that would happen is delay. The Board would not be precluded from simply issuing another Notice, and the same issues would be presented at a later time. In this case, there has been no real claim that the initial lack of a sworn statement caused hardship for Licensee.³ Licensee's Motion to Dismiss is denied.

Burden of Proof. Licensee contends that the Board has the burden to prove deceit, one of the allegations made in the Notice, by clear and convincing evidence. (Doc. P17 at 2). Licensee relies upon *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 737 P2d 595 (1987), arguing that the clear and convincing standard applies. However, as the Board correctly argues, *Riley Hill* involved a common law claim for deceit, not an administrative law action. The burden is different under the Administrative Procedures Act, as Judge Landau noted:

We have consistently held that, in the absence of an expressly contrary legislative directive, a preponderance standard of proof satisfies the requirements of ORS 183.450(5). Most recently, in *Gallant v. Board of Medical Examiners*, 159 Or. App. 175, 974 P2d 814 (1999), we examined the text and history of the statute in some depth to arrive at the conclusion that "in enacting ORS 183.450(5), the legislature intended to prescribe a standard of proof that corresponds to the preponderance standard." *Id.* at 183; *see also Sobel v. Board of Pharmacy*, 130 Or. App. 374, 379, 882 P2d 606 (1994), *rev den* 320 Or. 588 (1995); *OSCI v. Bureau of Labor and Industries*, 98 Or. App. 548, 555, 780 P2d 743, *rev den* 308 Or. 660, 784 P2d 1101 (1989).

Staats v. Newman, 164 Or App 18, 22 (1999). There is no statute or rule which sets forth a clear and convincing burden of proof for matters before the Board. Therefore, the Board concludes that a preponderance standard applies in this case.

On the Merits. The Board seeks license revocation as the appropriate discipline in the case. Specifically, the Board alleges that Licensee:

- Violated ORS 672.675(2) by committing negligence, gross negligence, incompetence or misconduct;

³ In an earlier letter, when Licensee was insisting that the complaints needed to be sworn, he stated it was for "perjury protection." (Ex. A30 at 2). Assuming this statement means he would have the ability to pursue an action against Hines for false statement, Hines' later adoption of what had been previously submitted in her sworn statement would give Licensee the "protection" he desired.

- Violated OAR 809-020-0006(5) by knowingly making a false statement or misrepresentation;
- Violated OAR 809-020-0025(1) by failing to meet the Board's 30-day deadline to respond to a communication from the Board; and
- Violated OAR 809-020-0001(1) by failing to be guided by appropriate ethics, honesty, integrity, fairness, personal honor and professional conduct.

(Doc. P6 at 5). The specific allegations are set forth in the Amended Notice, and summarized below. After reviewing the quality of work provided by Licensee in the Nielsen and DeHart hydrogeology reviews and their aftermath, and after reviewing the Miller matter, the Board concludes that Licensee is deserving of license revocation.

In the body of this decision, the Board discusses the errors in the three hydrogeology reviews which led to the three complaints, and then the Board will address its allegations concerning rule violation and appropriate discipline.

The Three Complaints

The Nielsen Matter. Licensee was hired by the Niensens to perform a Hydrogeology Review, and provided a 36-page report to them on September 29, 2002. The Board alleged the following deficiencies in the Nielsen report:

- The report should have, but did not include, a geologic map of the area;
- The report did not discuss publicly available geologic information related to the study area;
- The report did not consider all of the wells in the area;
- Licensee relied upon his client to gather well information without verifying the client's information;
- Licensee relied upon "inaccurate and unreasonable" precipitation values, affecting groundwater recharge and availability;
- Licensee "customized" his opinion, using information favorable to his client in an effort to avoid triggering a more extensive groundwater study;
- Licensee's report on Nielsen was biased.

(Doc. P6 at 2). The truth of these allegations by the Board is brought forth most prominently in the Nielsen matter, but are evident in the other matters as well. The greater level of discussion in this case will be incorporated in this Nielsen analysis and then by reference in the others.

Lack of geologic map. When Licensee was asked why he did not provide a geologic map with the Nielsen report, he testified that he did provide such a map, at page 16 of Exhibit A7. (Test. of Licensee). Jonathan Sprecher, a geologist who reviewed

Licensee's reports in the Nielsen and DeHart matters on behalf of the Board, disagreed that the map provided was a geologic map. He testified that a geologic map was one like the map found at Exhibit A19, page 44. He considered the map provided by Licensee to be little more than a subdivision plat map. (Test. of Sprecher). In fact, the map provided by Licensee was exactly that: a plat map, with the Nielsen's property shaded in, with a couple of notations indicating the presence of Marine Sediments.

We have deleted most of the discussion on this issue that appeared in the ALJ's Proposed Order and the Board's original Final Order because that discussion followed an incorrect legal analysis. We have replaced it with the following discussion.

OAR 809-003-0000(15) defines "negligence" as the "[f]ailure by a registrant to exercise the care, skill, and diligence demonstrated by a registrant under similar circumstances in the community in which the registrant practices." Thus, we first must determine the standard of care in the community at issue here: Marion County.

The ALJ's Proposed Order, and this Board's original Final Order, perceived a "dilemma" in choosing among (1) the written standards under Marion County's SGO ordinance; (2) the lax practice actually allowed by the Marion County Planning Commission; and (3) standards purportedly created by this Board. For the following reasons, that is a false "dilemma."

First, it is beyond the authority of Marion County in general, and of the Marion County Planning Commission in particular, to establish standards for the practice of geology. Those bodies have no legal responsibility or authority for the development of such standards. The legislature has specifically given that power to this Board. ORS 672.655.⁴ Additionally, the legislature has empowered this Board to discipline registrants for, among other things, "negligence * * * in the practice of geology as a registered geologist." Although the Board certainly has the power to establish statewide standards of care, as to which a registrant's failure to comply constitutes "negligence," the Board instead has defined "negligence" with reference to the standard of care exercised in the pertinent "community." Consequently, there is no applicable "board standard" here. Rather, the standard is established by expert testimony on a case-by-case basis. *See, e.g., Spray v. Bd. of Medical Examiners*, 50 Or App 311, 319, 624 P2d 125 (1980), *adhered to as modified*, 51 Or App 773, 627 P2d 25, *rev den* 291 Or 117 (1981) (whether licensed physician administered "inappropriate or unnecessary" treatment (ORS 677.188(4)(c)) "is to be determined through the testimony of qualified physicians as to just what is the norm

⁴ ORS 672.655 provides:

The State Board of Geologist Examiners shall cause to be prepared and shall adopt a code of professional conduct which shall be made known in writing to every registrant and applicant for registration under ORS 672.505 to 672.705. A copy of the code shall be provided to each successful applicant at the time of registration under ORS 672.585. The board may revise and amend this code of ethics from time to time and shall forthwith notify each registrant in writing of such revisions or amendments.

of treatment in the medical community in the particular case and whether the course of treatment actually followed deviates from the norm to the extent that the physician involved may be said to have used “inappropriate or unnecessary treatment”).

We find from the evidence that the professional standard of care in Marion County was to provide a geologic map such as the map found at Exhibit A19, page 44. Licensee failed to do so, and accordingly failed to “exercise the care, skill, and diligence demonstrated by a registrant under similar circumstances in the community in which the registrant practices.” OAR 809-003-0000(15). That failure, therefore, constituted “negligence” in the practice of geology as a registered geologist within meaning of that rule and of ORS 672.675(2).

Publicly available geologic information. Evidence at hearing indicated that “publicly available” did not become part of the standard until May 16, 2003, and that the previous standard was one of “existing” geologic information. The Board will not hold Licensee to a standard that did not exist at the time the documents were drafted.

Inclusion of wells. The Board considers Licensee’s mishandling of the well data to be the most serious charge against him in this case. Licensee examined only 16 wells as part of his evaluation in Nielsen. (Ex. A7 at 6). Every geologist who has examined Licensee’s report for content has noted that this number was too small for the area. Sprecher was blunt in his assessment:

The study area has between 35 and 40 residences. Each of these residences would have at least one well. While it is often not possible to find all of the wells in the area, locating such a low number of wells is unacceptable.

(Ex. A19 at 4). Whether the comparison standard is the 35 or 40 residences, or whether it is the number of wells one would expect with 51 to 57 lots in the area, it was clear even to the ALJ, a layperson, that 16 wells was not a representative sample for the area. Licensee was well aware of the availability of well information from Oregon Water Resources Department (OWRD), but did not obtain that information before rendering his opinion.

We add the following discussion so that the Final Order on Reconsideration explicitly sets forth the pertinent standard of care and how petitioner failed to meet that standard.

We find from the evidence that the pertinent standard of care in the circumstances in the community was for a registered geologist (1) to personally perform the survey of wells, using readily available information, including well information from OWRD, and (2) to obtain complete data for use in forming his or her opinion.

The evidence shows that Licensee failed to conform to this standard of care.

Instead of researching and relying upon the publicly available well log information, Licensee gave his clients, the Niensens, the task of tracking down well information from their neighbors. The Niensens had every reason to want to skew the sample in their favor.⁵ The Board accepts Licensee's statement that he gave them the assignment so they could save costs, but we cannot accept Licensee's failure to examine and correct the data provided to him, when it must have been evident to him that the data was incomplete. Licensee knew it was incomplete or, in the exercise of his professional skill as a geologist, should have known it.

Licensee does not appear to understand the importance of this failure. In fact, although relying on the data, Licensee does not consider himself bound by the investigation undertaken by his clients. In his initial arguments to the Board, Licensee stated:

Ms. Hines complains that we didn't use the neighborhood association map for locating lots. In preparing these reports we offer the client an opportunity to reduce costs by doing some of the work. *We have a disclaimer, at the end of our reports that some of the work is by others and we can't be responsible for that.*

(Ex. A11 at 5; emphasis added). While a disclaimer at the end of a report is nothing new (even Ms. Kupillas, another geologist often critical of Licensee, has a disclaimer about the work done by others), the only reasonable reading of the disclaimer is that errors in a map, a treatise, or other source of data would not be Licensee's responsibility. It was not reasonable for Licensee to fail to check on the accuracy of his client's work simply because it was "work by others" and he had a disclaimer.⁶

We insert the following discussion to add an important point concerning the significance of a disclaimer.

Such a disclaimer may or may not have significance as between a registrant and his or her client: for instance, in a malpractice claim brought by a client against a registered geologist arising from the contract for services. Such a disclaimer, however, does not allow a registered geologist to avoid professional responsibility to the rest of the world—specifically including this Board—for the quality of a geological report signed by the geologist in his or her professional capacity. *See* OAR 809-020-0006(3) ("A

⁵ The Board is not stating that the Niensens did skew the information, although it was certainly incomplete. The key here is Licensee's decisions, as a geologist, to give such an assignment and then to rely upon possibly slanted (and definitely incomplete) information.

⁶ Licensee's awareness of this problem is shown in his own words:

Former owners may be more reliable sources than current owners as current owners may be influenced by factors not related to the groundwater issue such as the desire for preserving open areas, concerns related to traffic, noise pollution, etc. * * *.

(Ex. A12 at 7). Licensee did not explain why his client would not be subject to the same tendency to be "influenced" by other matters, such as the desire to sell a portion of the property.

Registered Geologist shall sign and seal only professional work, including, but not limited to, maps and reports for which the geologist has direct professional knowledge, *and for which the geologist intends to be responsible for its accuracy and adequacy*” (emphasis added)).

A geologist has a responsibility to the public, and a responsibility to be scientific. In Spring Lake Estates, the ability of home owners to obtain water from their wells depends, in great part, on the accuracy of the geological opinions received before growth can take place. Licensee’s delegation of a geologist’s responsibility to his client, and his later reliance upon the unchecked data, constituted not merely negligence, but fell so far short of professional standards as to constitute gross negligence—that is, a “[r]eckless and wanton disregard for exercising care and caution.” OAR 809-003-0000(9).

Precipitation study. There is a difference of opinion about the figure used for yearly precipitation on the Nielsen’s property, but the evidence is clear that the number is a vital part of determining the water recharge rate and water use index for the area. Licensee used 60 inches in the Nielsen report, without giving much explanation. (Ex. A7 at 6). Sprecher pointed out, however, that the elevation map in NGS 1997 shows an average rainfall of 50 inches at the elevations pertinent to this case. (Ex. A19 at 3). The difference is important, as are all of the other factors that contribute to determining the water recharge rate. Without attempting to present a scientific explanation, suffice it to say that the numbers used in the recharge calculation will affect the recharge rate and the water use index, thereby either allowing or stopping further development in the area.

The data Licensee used to compute the recharge rate in the Nielsen matter was inaccurate. Licensee generally used 60 inches of rainfall without looking at the other factors affecting precipitation levels, such as elevation. Other geologists explained how setting a more exact precipitation rate was possible—by using the precipitation charts and comparing them to the actual elevation of the land. (Test. of Sprecher).

We add the following discussion so that the Final Order on Reconsideration explicitly sets forth the pertinent standard of care and how petitioner failed to meet that standard.

From the evidence, we find that the pertinent standard of care in the circumstances in the community was for a registered geologist to use all readily available information, including but not necessarily limited to precipitation charts and elevation maps, to determine yearly precipitation accurately. We also find that Licensee’s work failed to comport with that standard, because he failed to consider elevation in order to determine yearly precipitation accurately. That failure constitutes “negligence” within the meaning of OAR 809-003-0000(15).

Furthermore, Licensee’s inexact data tended toward lowering the water use inventory, thereby benefiting his clients who were seeking to further develop their land. The inaccuracy of his geologic work, as well as the way his inaccuracies supported the Nielsen’s position, led to the allegation that Licensee was, to use the words included in

Hines' complaint, an "opinion for hire." (Ex. A1 at 1). In other words, Hines perceived that Licensee was shifting the data to support the opinion of whichever client hired him. The Board will address that allegation after addressing the DeHart and Miller matters.

The DeHart Matter. The DeHarts live next door to the Niensens. After DeHart was told (by a different geologist) that water issues in the area would prevent him from partitioning his land, he was told that he might get a different opinion from Licensee. (Test. of Rehm). DeHart hired Licensee to do a hydrogeology review. Using the data prepared in the Nielsen review and a little more research by this client, DeHart, Licensee presented his findings to Marion County in support of the DeHart partition. In his report, as in Nielsen, he again indicated that the well information had been provided by the Niensens, along with DeHart. He again used 60 inches as the annual rainfall. (Ex. A20 at 5, 6).

When the peer reviewer for Marion County reviewed Licensee's submission on DeHart, he concluded that the information provided was inadequate for hydrogeology review. (Ex. A21 at 3). As with the Nielsen report, the most egregious lack of information concerned the lack of complete well information for the area. The reviewer, Thomas Michalek of Newton Consultants, Inc., noted that Licensee's recalculation of the water balance was an "issue of concern" because of the numbers Licensee assigned to marine sediments aquifer versus basalt:

While the concept of applying a different recharge rate to areas with different geology is valid and supported by the Manual, *the accuracy of the calculation is dependent on the accurate measurement of the surface acreage of each geology type.* [Licensee's] report calculates a water usage rate of 87.42% based on 85 acres of basalt aquifer and 189 acres of marine sediment aquifer. This usage rate is less than, but close to, the 90% threshold specified in the Ordinance. But if the acreage were changed by only about six acres in favor of marine sediments, the calculation would reach the threshold. *In my opinion, this situation requires strong documentation of the location of the contact line between the two aquifer types, upon which the calculation is based.*

(*Id.* at 6; emphasis added). Michalek left little doubt as to what he concluded about the accuracy of Licensee's report:

Newton concludes that *the cumulative effect of the discrepancies listed above result in inadequate support for the conclusion of [Licensee's] report that there is sufficient water in the area to support the proposed development * * *.*

(*Id.* at 5; emphasis added).

Michalek's peer review in this case is important. While he did not catch all of the inaccuracies in the Nielsen matter, he noted them in DeHart. He supported Licensee's

use of a combination ratio of the types of aquifers in the area to set the water balance, but he rejected the inaccurate data Licensee used in the ratio to reach his client's desired result. Michalek's review better follows Marion County's written "community" standard for hydrogeology reviews. Licensee's work was found incomplete and inaccurate.

Sprecher's review of Licensee's report in DeHart was likewise critical of Licensee's efforts and findings. Sprecher convincingly showed how Licensee's opinion in favor of the partition of DeHart's land was dependent upon his inaccurate rainfall number (60 inches per year) and an inaccurate determination of the ratio between the acres covered by basalts aquifers and marine sediment aquifers. If the acreage numbers used in the Soil Map, the 1982 geology map or the 1997 geology map are used in the ratio (as opposed to Licensee's numbers from an unknown source), the recharge level exceeds 90 percent—even using the 60 inches per year as the rainfall standard. If a more supportable 51 inches of rainfall is used, even Licensee's acreage numbers lead to a recharge rate higher than 90 percent. (Ex. A22 at 4).

We add the following discussion so that the final order on reconsideration explicitly sets forth the pertinent standard of care and how petitioner failed to meet that standard.

From the evidence, we find that the pertinent standard of care in the circumstances in the community was for a registered geologist to use all readily available information—including but not limited to geology maps—in order to determine the acreage of different aquifers accurately, in order to obtain an accurate determination of the recharge rate. We also find that Licensee's work failed to comport with that standard, because he failed to use all readily available information, and thus stated an inaccurate recharge rate with grossly insufficient evidentiary support. That failure constituted not merely "negligence" in the practice of geology as a registered geologist within meaning of OAR 809-003-0000(15) and of ORS 672.675(2), but fell so far short of professional standards as to constitute "gross negligence" within the meaning of OAR 809-003-0000(9).

The Miller Complaint. Patrick Brady, another Registered Geologist, was asked to review Licensee's work on the Miller matter.⁷ Brady concluded that Licensee's report was vague and broad, with no real stated purpose or scope of the review. He did not find the maps or diagrams helpful, and generally noted the lack of supporting information in the report. In addition to a lack of maps, there was no data to back up Licensee's reference to soil test pits, nor were there cited sources for Licensee's reference to a leach field. The cross section view of the topography used a symbol generally used for limestone, not basalt or marine sediments. Brady concluded that, if one of his geologists had presented such a report, he would make him go back and start over again. He noted that a geologist has a responsibility to be scientific, presenting both sides of the evidence.

⁷ The Board is not going to focus on Licensee's bizarre initial visit to the Miller home, and the apparent confusion about what Licensee was doing during that visit. The Board's focus is on the geologic work performed by Licensee.

A geologist who does not do so, according to Brady, is willing to “sell their stamp” to the highest bidder. (Test. of Brady). Licensee’s work on the Miller review was as poor as his work on the reviews for Nielsen and DeHart.

We add the following discussion so that the Final Order on Reconsideration explicitly sets forth the pertinent standard of care and how petitioner failed to meet that standard.

From the evidence, we find that the pertinent standard of care in the circumstances in the community was for a registered geologist to be scientific in preparing a report, analyzing—and thus necessarily first obtaining—all relevant and readily available evidence and setting forth the data and sources that support the geologist’s analysis. We also find that Licensee’s work failed to comport with that standard, because Licensee’s report in the Miller matter was not “scientific” in the ways noted just above. That failure constitutes “negligence” within the meaning of OAR 809-003-0000(15).

Was Licensee an “Opinion for Hire?” In all three cases where a complaint was filed against Licensee, there is a sense that Licensee’s work was performed with the end in mind. Hines considered Licensee an “opinion for hire.” (Ex. A1 at 1). Brady testified that there was a concern Licensee would “sell” his stamp to support the opinion of the client who hired him. The question arises as to whether Licensee’s actions were intentional—involving fraud and/or deceit—or whether Licensee was grossly negligent.

If the Board were to find that Licensee was intentionally an opinion for hire, then the large gaps in the quality of his work would necessarily lead to the conclusion that he has been manipulating the system (for his clients and against the public interest). However, the Board does not reach that conclusion. Instead, it finds that Licensee was grossly negligent in the way he performed his tasks as a geologist.

Addressing the Alleged Violations

In the Amended Notice, the Board alleged violations of four separate statutes or rules. Although the Board’s conclusions on most of them have been foreshadowed by the discussion above, it will address them in order now.

Violation of ORS 672.675. Based upon the facts found and the discussion set forth above, the Board concludes that Licensee’s geologic work in the Nielsen and DeHart matters was grossly negligent as that term is described in OAR 809-003-0000(9). Licensee’s work in the Miller case was incompetent, demonstrating negligence.

Violation of OAR 809-020-0006(5) (false statement). In reviewing the Amended Notice, the only allegation of a false statement concerned Licensee’s promise to provide the revised Nielsen report to the Board. There appears to have been some confusion on this point. The Board understood that a revised report had been written, as shown by the letters sent to Licensee. (Exs. A26, A29). However, the Board did not present testimony about Licensee’s specific statement that a revised report had been written, and Licensee

denied writing or promising a revised report in his testimony at hearing. (Test. of Licensee). The Board finds insufficient evidence of a false statement in this case.

Licensee's gross negligence in the Nielsen and DeHart reviews, and the sense that he was an opinion for hire, approaches the level where one could almost say his actions were intentionally deceitful but does not reach that point. The Board concludes that Licensee rendered his opinions in Nielsen and DeHart with reckless disregard for the truth but it does not find, on this record, sufficient intent to prove deceit or an intentionally false statement.

Violation of OAR 809-020-0025(1) (failure to respond). The Board mailed its request to Licensee on November 24, 2003; the letter specifically asked for a response within 30 days. Licensee did not seek an extension of time within the 30 days. Rather, he waited until five days after the time period had run to ask for an extension. Licensee violated the administrative rule.

Violation of OAR 809-020-0001(1). The ethical obligations of a registered geologist are referred to in the cited rule but found in OAR 809-020-0006, which states in relevant part:⁸

(3) A Registered Geologist shall sign and seal only professional work, including, but not limited to, maps and report for which the geologist has direct professional knowledge, and for which the geologist intends to be responsible for its accuracy and adequacy.

Licensee violated this rule with his substandard work on Nielsen, DeHart and Miller. Licensee's comment to the Board that he could not be bound by his client's data collection concerning the wells, (Ex. A11 at 5), was an attempt to shirk his responsibility under this rule.

Determining the Appropriate Discipline⁹

The Amended Notice proposed to revoke Licensee's registration to practice geology for having committed violations of ORS 672.675(2), OAR 809-020-0006(5), OAR 809-020-0025(1), and OAR 809-020-0001(1). The Proposed Order found Licensee committed violations of ORS 672.675(2), OAR 809-020-0025(1), and OAR 809-020-0001(1), but concluded there was insufficient evidence to establish Licensee had violated OAR 809-020-0006(5). The Proposed Order recommended that for these violations Licensee be suspended for a period of six months followed by three years of probation with certain conditions and pay civil penalties totaling \$2,500 [\$1,000 each for violating

⁸The Board on reconsideration has elected not to consider OAR 809-020-0006(2).

⁹The Board has deleted the ALJ's discussion of the appropriate discipline and the "Order" section of the Proposed Order, on pages 14-15 of the Proposed Order, because it is inconsistent with the Board's view of the appropriate discipline, as explained in the text of this Final Order on Reconsideration.

ORS 672.675(2) and OAR 809-020-0001(1) and \$500 for violating OAR 809-020-0025(1)].

The Board rejects the recommended sanction in the Proposed Order because the Board finds that Licensee's work in the Nielsen and DeHart cases so abjectly deficient that either case would support revocation of Licensee's registration. The negligent work in the Miller case further supports this conclusion. The anticipated use of Licensee's work product and the intended reliance by clients and Marion County constitutes an aggravating factor. The Board notes that Coffey was warned in direct terms regarding the failures in his practice in a letter of concern dated March 27, 2003. (Ex. A3.) This letter was the product of review of Licensee's work and a meeting with the Board's Compliance Committee on January 6, 2003, during which concerns regarding the nature of Licensee's practice were raised. That meeting pre-dated both the submission of the DeHart Hydrogeology Review report to Marion County (Ex. A20) and the work done for the Millers. The admonitions of the Board are neither reflected in Licensee's work nor in his positions taken at the hearing in this matter. For the above-cited violations and rationale, the Board finds that Licensee's registration should be revoked.

ORDER

Based upon the foregoing, the Final Order is affirmed as modified herein and Licensee's registration to practice as a Registered Geologist in the State of Oregon is hereby revoked effective October 20, 2006.

Dated and Issued this 22nd day of January 2008.

BOARD OF GEOLOGIST EXAMINERS
STATE OF OREGON

By:

Susanna R. Knight, Administrator

APPEAL RIGHTS

You have the right to appeal this Order to the Oregon Court of Appeals pursuant to ORS 183.482. To appeal you must file a petition for judicial review with the Court of Appeals within 60 days from the day this Order was served on you. If this Order was personally delivered to you, the date of service is the day you received the Order. If this Order was mailed to you, the date of service is the day it was *mailed*, not the day you received it. If you do not file a petition for judicial review within the 60-day time period, you will lose your right to appeal.