



Oregon

Kate Brown, Governor

**State Board of Examiners for
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**BEFORE THE OREGON STATE BOARD OF EXAMINERS
FOR ENGINEERING AND LAND SURVEYING**

In the Matter of:

Case No. 2697

DALE LA FOREST,

FINAL ORDER BY DEFAULT

Respondent.

On January 14, 2014, the Oregon State Board of Examiners for Engineering and Land Surveying (OSBEELS) properly served a Notice of Intent to Assess a Civil Penalty (Notice) on Dale La Forest (Respondent), in the amount of \$1,000 for violating ORS 672.045(1).

The Notice offered Respondent the opportunity for a hearing, if requested within 21 days of service, and specifically included the statement. The Notice designated the Board's file on the matter as the record for purposes of default. Respondent timely requested a hearing, but failed to appear for the hearing, which was scheduled for April 17, 2015.

NOW THEREFORE, after considering the relevant portions of the Board's file relating to this matter, the Board enters the following Order:

FINDINGS OF FACT AND APPLICABLE LAW

1.

LA FOREST is not now, and never has been, registered to engage in the professional practice of engineering in Oregon.

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On or about October 1, 2010, La Forest prepared for a client a report titled, *Noise Impacts of Biomass Power Plant, Use Permit Application by Biogreen Sustainable Energy Co., La Pine, Oregon* ("Noise Impacts"). La Forest detailed concerns regarding a proposed biomass power plant (Plant) designed to burn 200,000 pounds of wood debris an hour in a boiler to produce 25 megawatts of electricity on a 19.5 acre site in La Pine, OR. La Forest concluded "this wood-fired power plant's operations may generate potentially significant noise impacts on residential properties and their occupants if it is approved and constructed as proposed." He continued, "These noise impacts are more extensive than merely violating various noise laws applicable to this project," and opined that the project application "should be revised to include an extensive acoustical study and to describe the noise sources from the various equipment involved." An outline of his report included a Summary; Noise Descriptors; DEQ (Department of Environmental Quality) Noise Regulation; Ambient Noise Level Measurement and Analysis; Maximum Permissible Noise Level Exposure at Homes; Typical Noise Sources in Wood-Fired Power Plants – Mechanical Rappers, Exhaust and Intake Fans, Building Walls, Front-End Loaders, Back-up Beeper Alarms, Heavy Trucks and Chip Trucks, Cooling Towers, and Steam Turbine Generator; Combined Noise Levels; and Conclusion. The conclusions La Forest reported to his client were based on findings from a study La Forest prepared titled *Acoustical Study of Ambient Noise Levels in La Pine, Oregon neighborhood near existing homes, September 29-30, 2010* ("Acoustical Study") La Forest introduced his *Acoustical Study* as follows,

For this power plant Project to be compatible with its location and relevant regulatory requirements, its various noise emissions from its equipment and operations must not increase existing ambient noise levels at nearby residences by more than 10 dBA. To determine these ambient noise levels, long-term noise level measurements near the closest existing homes were obtained on September 29 and 30, 2010. These noise tests lasted for about 12 and 11 hours each

1 testimony as a “noise expert.” La Forest was critical of the noise study done for the Project by
2 Eli Lahav, PE, especially qualified as an acoustical engineer since January 29, 1991. La Forest
3 also submitted his *Noise Impacts* and *Acoustical Study* to the Deschutes County Planning
4 Department for inclusion into the Project record. Steele observed that the La Forest *Noise*
5 *Impact* report and the *Acoustical Study* appeared to be a noise study that constituted the practice
6 of engineering.

7 4.

8 Dale La Forest practiced acoustical engineering in his work on the La Pine Biomass
9 Power plant. He did so by applying special knowledge of the mathematical, physical, and
10 engineering sciences to such professional services or creative work as consultation, investigation,
11 testimony, in connection with public or private utilities, structures, buildings, machines,
12 equipment, processes, works and projects, and did so as follows:

13 4.1. Mr. La Forest provided engineering analysis and calculations consistent with
14 the practice of acoustical engineering;

15 4.2. Mr. La Forest conducted an extensive site noise measurement study, using
16 calibrated instruments used by acoustical experts, and submitted engineering
17 reports consistent with acoustical engineering practices in format and content;

18 4.3. Mr. La Forest specifically demonstrated his engineering calculations of the
19 effects of complex noise propagation, noise barriers, and building acoustics –
20 engineering and analysis typically performed by a PE in acoustics;

21 4.4. Mr. La Forest represented himself as a noise expert in public testimony and in
22 submitting an “Acoustical Study” and “Noise Impacts of Biomass Power
23 Plant” Report;

1 4.5. Mr. La Forest made assertions as to the engineering analysis faults of a
2 licensed acoustical engineer's report, based on La Forest's expertise in the
3 field and on La Forest's engineering calculations. Mr. La Forest made several
4 arguments as to the inaccuracy of the [Lahav] *AAcoustics* noise study
5 technical details, thus asserting himself as a more qualified expert in the field;
6 and,

7 4.6. Mr. La Forest interpreted and applied Oregon noise codes as a professional
8 opinion, based on his alleged expertise.

9 5.

10 Pursuant to ORS 672.005(1), applying special knowledge of the mathematical, physical
11 and engineering sciences to such professional services or creative work as consultation,
12 investigation, and testimony, in connection with public or private utilities, structures, buildings,
13 machines, equipment, processes, works and projects, is the practice of engineering in Oregon.

14 6.

15 ORS 672.045(1) prohibits the practice of engineering in Oregon without Oregon
16 registration as a Professional Engineer.

17 7.

18 Under ORS 672.325, the Board has the authority to assess up to \$1,000 per violation of
19 its statutes.

20 ANALYSIS

21 The legal arguments at issue in this case were raised by Respondent as affirmative
22 defenses in his answer and request for hearing. Each is addressed, in turn, below.

23 ///

First Affirmative Defense Raised – Respondent claimed that ne never called himself an engineer, so he is not violation of the Board’s laws or rules.

This argument of the Respondent is irrelevant. Nothing in the Board’s Notice of Intent to Assess a Civil Penalty, or in this Final Order by Default, issued against the Respondent alleges or finds a violation of the Board’s title act. It is true that under the Board’s statutes, a person is practicing or offering to practice engineering when that person uses the title (or similar designation/ implication) of engineer, purports to be an engineer, or offering work under the title (or similar designation/implication) of engineer. ORS 672.007(1)(a) and (b). However, Respondent is not alleged nor found to have done these things. What is relevant is that, under the Board’s statutes, a person is also practicing or offering to practice engineering when that person purports to be able to do or does engineering work. ORS 672.005(1) and 672.007(1)(c). It is the performance of engineering work, not the use of the engineering title, in which Respondent engaged. What the Respondent called himself while practicing unlicensed engineering is not at issue here.

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Second Affirmative Defense Raised – Respondent claimed that the Board misunderstands or mis-cites ORS 672.005(1)(b) because, he asserts, the entire second paragraph of the statute’s first subsection applies only to activities that occur “during construction, manufacture or fabrication,” and that because he did not assist with construction, manufacture or fabrication, and no construction, manufacture or fabrication was taking place at the time he provided reports and testimony, ORS 672.005(1)(b) does not apply to him.

Respondent has misread ORS 672.005(1)(b). The elements of ORS 672.005(1)(b), defining of the practice of engineering, are as follows:

- Applying special knowledge of the mathematical, physical and engineering sciences to such professional services or creative work as (“such * * * professional services * * * as” – denoting a list of multiple possible services or work):
 - a. Consultation,
 - b. Investigation,
 - c. Testimony,
 - d. Evaluation,
 - e. Planning,
 - f. Design and
 - g. Services during construction, manufacture or fabrication for the purpose of ensuring compliance with specifications and design
- In connection with any public or private utilities, structures, buildings, machines, equipment, processes, work or projects (purpose of the items in the preceding list of possible services).

It is true that, if Respondent had been offering professional biomass power plant design services³ or professional services during the construction of the proposed plant, to ensure compliance with specifications and design⁴, because it would have been done in connection with a public or private utility, he would have been practicing engineering. However, it is also true that, because Respondent offered professional consultation⁵ services, professional evaluation services⁶, and professional testimony⁷, in connection with the proposed biomass power plant – a public or

³ Category “f” in the paragraph’s elements as listed above.

⁴ Category “g” in the paragraph’s elements.

⁵ Category “a.”

⁶ Category “d.”

⁷ Category “c.”

1 private utility -- he did practice engineering. That he did so without the appropriate professional
2 license is how he violated ORS 672.045(1).

3 3.

4 **Third Affirmative Defense Raised – Respondent claimed he is exempt from engineering**
5 **licensure (registration) under the single-family residence exemption of ORS 672.060(10).**

6 Respondent has misread ORS 672.060(10). Respondent asserts that because his reports
7 and testimony were related to the noise impact he asserted would affect nearby, single-family
8 residences, his work falls under the single-family residence exemption from the Board's statutes,
9 under ORS 672.060(10). This assertion is incorrect. ORS 672.060(10) provides:

10 ORS 672.002 to 672.325 do not apply to the following:

11 * * * (10) A person making plans or specifications for, or supervising the erection,
12 enlargement or alteration of, a building, or an appurtenance thereto, if the building is to
13 be used for a single family residential dwelling or farm building or is a structure used in
14 connection with or auxiliary to a single family residential dwelling or farm building,
15 including but not limited to a three-car garage, barn or shed or a shelter used for the
16 housing of domestic animals or livestock. The exemption in this subsection does not
17 apply to a registered professional engineer.

18 The single family residential dwelling exemption applies only to "a person making plans or
19 specifications for, or supervising the erection, enlargement or alteration of a building or an
20 appurtenance thereto," when the building is, or is appurtenant to, and in connection with or
21 auxiliary to, a single family residential dwelling. While Respondent's work arguably may have
22 been "in connection with" several single family residences (the residences of the La Pine
23 neighborhood residents who were using Respondent's services), he was not making plans or

1 specifications for a single family residence or an appurtenance or auxiliary building to one (such
2 as a three-car garage or shed, as specified by ORS 672.060(10)). Nor was he supervising the
3 erection, enlargement or alteration of a single family residence, or of an appurtenance or
4 auxiliary building to one. Therefore, the exemption does not apply in this case.

5 4.

6 **Fourth Affirmative Defense Raised – Respondent claimed he did not practice engineering**
7 **because he fell within the exclusion of persons acting as scriveners. ORS 672.005(2)(h).**

8 Respondent has misread ORS 672.005(2)(h). The only reference to scriveners in ORS
9 chapter 672 is definitional and found under ORS 672.005(2)(h). This provision excludes the
10 work of a “scrivener,” but only from the definition of the practice of land surveying. It does not
11 exclude scriveners from any definition of the practice of engineering. As Respondent was
12 engaging in the practice of engineering, and not in the practice of land surveying, ORS
13 672.005(2)(h) does not apply to Respondent.

14 5.

15 **Fifth Affirmative Defense Raised – Respondent claimed that the Notice of Intent to**
16 **Assess a Civil Penalty was impermissibly vague.**

17 The Board is not persuaded by Respondent’s assertion. Unlike the sufficient particularity
18 requirements for civil pleadings, the Oregon Administrative Procedures Act requires only that a
19 Notice issued by an agency include, for purposes of the pleadings therein, “a statement that
20 generally identifies the issues to be considered at the hearing,” ORS 183.413(2)(c), “[a]
21 reference to the particular sections of the statutes and rules involved; * * * [and a] short and plain
22 statement of the matters asserted or charged.” ORS 183.415(3)(c) and (d). The Notice of Intent
23 to Assess a Civil Penalty issued by the Board against Respondent meets these requirements.

Sixth Affirmative Defense – Respondent claimed that ORS 672.005(1) does not apply here because: it would have applied only if he had provided his reports and comments to Biogreen Sustainable Energy Co. (Biogreen) as his client; and, only if his conduct had included both paragraphs (a) AND (b) of ORS 672.005(1); whereas, Respondent did not provide his reports and comments to Biogreen Sustainable Energy Co. as his client, and the Board’s expert reviewer cited and discussed only paragraph (b) in his expert’s report.

Respondent has mis-cited and misunderstood ORS 672.005(1).

First, Respondent argued that paragraph (a) and paragraph (b) of ORS 672.005(1) must exist conjunctively for there to be an incident of the unlicensed practice of engineering (ORS 672.045). Respondent did, in fact, apply the special math, science, and analysis of acoustical engineering in his reports, commentary and testimony, and also provided professional services and creative work requiring engineering education, training and experience in those same reports, commentary and testimony. However, even if Respondent had engaged in only the activities described in ORS 672.005(1)(a) or (b), he would still have practiced unlicensed engineering under Oregon law. Respondent inserts the conjunction “and” into ORS 672.005(1) where it does not actually appear in the statute’s text, and omits the word “any” from within the same statutory subsection. However, it is a rule of statutory interpretation in Oregon that we are “not to insert what has been omitted, or to omit what has been inserted.” ORS 174.010. What the text of ORS 672.005(1) provides is six independent paragraphs, each one offering a separate definition of the practice of engineering. There is no “and” between any of the paragraphs; they are to be read disjunctively, not conjunctively. To further clarify the individual nature of each definition, the text of ORS 672.005(1) specifies that the practice of engineering, “means doing any of the following” (emphasis added), before it lists each of the six examples. “Any,” in this context is a pronoun, used to distinguish one example of something, “* * * indiscriminately from

1 all those of a kind: * * * {promised not lose ~ of the books}. WEBSTER'S THIRD
2 INTERNATIONAL DICTIONARY , 97 (2002 ED.). Thus, each paragraph is, by itself, the practice of
3 engineering. Performing a professional service or creative work "requiring engineering
4 education, training and experience" is the practice of engineering (ORS 672.005(1) paragraph
5 (a)). Applying "special knowledge of the mathematical, physical and engineering sciences to
6 such professional services or creative work as consultation, investigation, testimony, evaluation,
7 etc., in connection with any public or private utilities, structures, buildings, machines,
8 equipment, processes, works or projects" is the practice of engineering. (ORS 672.005(1)
9 paragraph (b)). Likewise, specific types of surveying are also, in and of themselves, the practice
10 of engineering: surveying to determine area or topography is the practice of engineering (ORS
11 672.005(1) paragraph (c)); surveying to establish lines, grades, or elevations, or to determine or
12 estimate quantities of materials required, removed or in place is the practice of engineering (ORS
13 672.005(1) paragraph (d)); and, surveying required for design and construction layout of
14 engineering and architectural infrastructure is the practice of engineering too. (ORS 672.005(1)
15 paragraph (e)). Last, performing photogrammetric mapping is itself the practice of engineering.
16 (ORS 672.005(1) paragraph (f)).

17 Second, which subsections, paragraphs, or entire statutes that the expert reviewer cites in
18 his report is immaterial, with respect to Respondent's violation of ORS 672.045. The expert
19 reviewer's role in this case was to provide the Board with an expert opinion on why
20 Respondent's activities constituted the practice of acoustic engineering, or why they did not; it
21 was not to provide citations to the specific statutes implicated or violated. That the expert
22 reviewer happened to cite ORS 672.005(1)(b) in his report does not make Respondent having
23

engaged in the activity described in paragraph ORS 672.005(1)(a) – through the technical activities analyzed by the expert reviewer, any more or less likely.

Third, Respondent’s assertion that he would have had to have been providing his professional services to Biogreen is plainly incorrect. Nothing defining the practice of engineering in ORS chapter 672 specifies who the client must be. That Respondent was providing professional services for and through John Williams, Williams Research, and attorney Bruce White, Fred Boyd, Tony Conifer, a “quiet neighborhood” in La Pine, Oregon, and Concerned Citizens for Clean Air, but not providing them for Biogreen, is irrelevant.

7.

Seventh Affirmative Defense -- penalizing Respondent for providing the services he did in connection with the Biogreen biomass power plant application violates his right to free speech, under both the Oregon and United States Constitutions.

Neither the Oregon Constitution nor the Federal Constitution protects Respondent from a Board enforcement action for the unlicensed practice of engineering.⁸

Oregon Constitution

In determining whether a statute violates Article 1, section 8, it is necessary to identify within which “category” that statute fits under Oregon free speech jurisprudence. As explained in *State v. Rich*, 218 Or App 642, 646, 180 P3d 744 (2008):

Oregon free speech jurisprudence divides laws that might implicate expression into three categories: laws that explicitly and in terms prohibit speech itself, regardless of whether the speech causes or is an attempt to cause harm; laws that prohibit the accomplishment of, or attempt to accomplish, harm and specify that one way that the harm might be caused is by speech; and laws that, without reference to or specification of speech, prohibit the accomplishment of, or attempt

⁸ In this affirmative defense, Respondent references the case of *Mark Reed v. State of Oregon, Oregon State Board of Geologist Examiners, et al* (Lane County Circuit Court). However, the Reed case was based on a statute and rule with language different from that of ORS 672.045, never proceeded to judgment – even in circuit court – that could arguably control in this proceeding, and was based on a case where a private citizen was representing his own concerns, not one as here where the individual in question was providing professional services. Thus, the assertions Respondent raised regarding the Reed are inapplicable.

1 to accomplish, harm that, in some circumstances, could be caused by
2 speech. State v. Plowman, 314 Or 157, 163-64, 838 P2d 558 (1992), *cert den*,
3 508 US 974 (1993)). An example of the first kind of law is a statute prohibiting
4 obscenity. See State v. Henry, 302 Or 510, 732 P2d 9 (1987). Such laws are
5 facially unconstitutional “unless the scope of the restraint is wholly confined
6 within some historical exception that was well established when the first
7 American guarantees of freedom of expression were adopted and that the
8 guarantees then or in 1859 demonstrably were not intended to reach.” State v.
9 Robertson, 293 Or 402, 412, 649 P2d 569 (1982). An example of the second kind
10 of law is a statute prohibiting one person from using a verbal threat to coerce
11 another person into doing something she does not want to do. Id. at 415. Such
12 laws are presumptively constitutional unless they are incurably overbroad. Id. at
13 417–18. An example of the third type of law is a trespass statute that, although it
14 does not mention expressive activity, could be enforced against political
15 protesters engaging in political expression. See City of Eugene v. Lincoln, 183 Or
16 App 36, 50 P3d 1253 (2002). Such laws are facially constitutional; whether
17 applying them violates Article I, section 8, depends necessarily on the facts of a
18 particular case. Robertson, 293 Or at 417.

11 Accordingly, the Board will first address what “category” ORS 672.045(1)⁹ is. Under the
12 Robertson framework, ORS 672.045(1) falls within the “third” category. ORS 672.045(1)
13 provides:

14 A person may not:

15 (1) Engage in the practice of engineering, land surveying or photogrammetric
16 mapping without having a valid certificate or permit to so practice issued in
accordance with ORS 672.002 (Definitions for ORS 672.002 to 672.325) to
672.325 (Civil penalties).

17 In Oregon State Bar v. Smith, 149 Or App 171, 942 P2d 793 (1997), the Oregon Court of
18 Appeals applied the Robertson framework to a statute prohibiting the unauthorized practice of
19 law and found that merely because a profession may use speech as an “indispensable
20 component” of its practice, this fact does not implicate speech that would be protected in the first
21 Robertson category. The Court of Appeals then analyzed the case under the second Robertson
22 category and found it did not fall there either, as the statute did not refer to speech at all, but only

23 _____
⁹ As it is only the unlicensed practice of engineering that is at issue in this case, only an analysis of the statutory
prohibition against that practice is necessary here; the other subsections of ORS 672.045 do not apply.

1 to the “unauthorized practice of law.” The court found that the statute prohibiting the
2 unauthorized practice of law, therefore, fell into the third category. Similarly, nothing in ORS
3 672.045(1) mentions expressive activity, so it is facially constitutional. However, it could be
4 enforced against persons engaging in using the written or spoken word, because speech is an
5 “indispensable component” of the practice of engineering, as evidenced by several of the
6 definitions of the practice of engineering found under ORS 672.005(1).

7 In Oregon, attaching speech to conduct that is otherwise punishable does not shield that
8 conduct from its normal consequences. The message communicated by conduct, the reasons for
9 conveying the message in that way, and the words used in connection with that conduct do not
10 inherently transform the conduct into protected expression. “[A] person’s *reason for engaging in*
11 *punishable conduct* does not transform conduct into expression under Article I, section 8 . . .
12 [and] *speech accompanying punishable conduct* does not transform conduct into expression
13 under Article I, section 8.” *Huffman and Wright Logging Co. v. Wade*, 317 Or 445, 452, 857
14 P2d 101 (1993) (emphasis by the court). The Oregon Supreme Court has recognized that most
15 acts are motivated by a thought or belief of some kind and in some way express that thought or
16 belief. *See Huffman and Wright Logging Co.*, 317 Or at 449–50 (majority); *Huffman*, 317 Or at
17 471 (Unis, J., dissenting). To some degree, all acts are speech because they express the actor’s
18 thoughts or desires. Therefore, to prevent rendering the protection of speech meaningless by
19 applying to every conceivable activity, Oregon courts must determine whether a particular form
20 of conduct is protected expression. Some, they have decided, are. *See, e.g., State v. Ciancanelli*,
21 339 Or 282, 121 P3d 613 (2005) (nude dancing); *Sekne v. City of Portland*, 81 Or App 630, 726
22 P2d 959 (1986), *abrogated by City of Nyssa v. Dufloth*, 184 Or App 631, 57 P3d 161 (2002),
23 *rev’d*, 339 Or 330, 121 P3d 639 (2005) (same); *City of Erie v. Pap’s A.M.*, 529 US 277, 120 S Ct

1 1382, 146 L Ed 2d 265 (2000) (federal analysis); *Vannatta v. Keisling*, 324 Or 514, 931 P2d 770
2 (1997) (*Vannatta I*) (contributing to political candidates); *Buckley v. Valeo*, 424 US 1, 96 S Ct
3 612, 46 L Ed 2d 659 (1976) (federal analysis). Others, however, are not. For example, giving
4 gifts to public officials while lobbying is unprotected conduct, not a protected “contribution to a
5 political candidate,” *Vannatta v. Oregon Gov’t Ethics Comm’n*, 347 Or 449, 462–66, 222 P3d
6 1077 (2009) (*Vannatta II*), and a grocery store does not become a bookstore by selling the
7 *National Enquirer*, *City of Portland v. Tidyman*, 306 Or 174, 182, 759 P2d 242 (1988).
8 Similarly, while a private citizen providing public testimony to protest a power plant permit
9 application solely because of his personal thoughts and beliefs about power companies or power
10 plants being built in his neighborhood may be engaged in protected expression, a person
11 providing unlicensed professional services related to a power plant permit application, which
12 services include written and spoken words, may not hide his conduct behind claims of free
13 expression to evade consequences for his unlawful activity.

14 Relating specifically to statutes that prohibit the unlicensed practice of a profession, when
15 the carrying of that profession inherently involves the use of speech, Oregon courts have upheld
16 such statutes as surviving constitutional scrutiny. In *Oregon State Bar v. Smith*, the court opined:

17 Statutes in the third category “are analyzed to determine whether they violate Article I,
18 section 8, as applied.” *Miller*, 318 Or. at 488, 871 P.2d 454. Such statutes “are subject to
19 challenge * * * on vagueness grounds or on the ground that the statute’s reach, as applied
to defendant, extends to privileged expression.” *Stoneman*, 323 Or. at 543, 920 P.2d 535.
Oregon State Bar v. Smith 149 OrApp at 187.

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1 In *Oregon State Bar v. Wright*, 280 Or 693, 700–701, 573 P2d 283 (1977), and *Oregon*
2 *State Bar v. Smith*, both the Oregon Court of Appeals and Oregon Supreme Court concluded that
3 ORS 9.160, which is substantially equivalent to ORS 672.045(1), simply referencing law rather
4 than engineering, was not unconstitutionally vague.

5 Then, the court in *Oregon State Bar v. Smith* found that the statute's application to
6 defendant's activities was not impermissibly overbroad. In that case, it was an injunction, rather
7 than a civil penalty, that was issued, but the injunction in that case was issued with its breadth
8 limited to a, “prohibition [of] conduct, including communication, that pertains to representing
9 and counseling persons with regard to their particular legal matters. Such a prohibition does not
10 impermissibly burden protected expression for purposes of Article I, section 8.” *Oregon State*
11 *Bar v. Smith* at 188. Likewise, in the present case, the Board’s Notice proposes to assess a civil
12 penalty for Respondent’s specific conduct, including communication, that pertains to
13 professional reports, commentary, and testimony he provided for a group of persons to support
14 their objection to a particular biomass power plant application. Such a prohibition does not,
15 therefore, impermissibly burden protected expression for purposes of Article 1, section 8.

16 United States Constitution

17 Likewise, ORS 672.045(1) does not violate the First Amendment of the United States
18 Constitution. The First Amendment prohibits any law “abridging the freedom of speech.” The
19 practice of many professions necessarily involves communicative acts (like an attorney making a
20 closing argument). The Supreme Court has held that regulations on a profession, even if the
21 regulations affect the communicative acts that constitute the practice of that profession, do not
22 necessarily fall under the First Amendment. There must still be a rational basis for the
23 regulations, but not the heightened scrutiny under the First Amendment. *Lowe v. Securities*

1 *Exchange Commission*, 472 US 181, 228, 105 SCt 2557 (1985) citing *Schwartz v. Board of Bar*
2 *Examiners*, 353 US 232, 239 (1957). In a concurrence in *Lowe*, Justice White noted that the
3 police power to regulate professions is not lost whenever the practice of the profession entails
4 speech. The difference, he states, between conduct in a profession and protected speech is the
5 personal nexus between the professional and client, and that the professional is exercising
6 judgment on behalf of the client. *Id.* at 232. Applying this logic, Respondent's reports,
7 commentary, and testimony are clearly not protected speech: they were the practice of
8 engineering, as defined by statute, that happened to entail speech; they were provided
9 specifically on behalf of Respondent's clients, and they included the exercise of Respondent's
10 professional judgment – by his own claims and repeated assertions of reliable expertise therein.
11 ORS 672.045(1) and the Board's enforcement action against Respondent do not offend the
12 United States Constitution.

13 CONCLUSIONS OF LAW

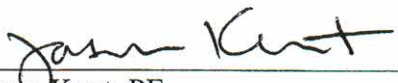
14 Respondent violated ORS 672.045(1) in each incident outlined in paragraph (4) of the
15 Findings of Fact and Applicable Law by applying special knowledge of the mathematical,
16 physical and engineering sciences to such professional services or creative work as consultation,
17 investigation, and testimony, in connection with public or private utilities, structures, buildings,
18 machines, equipment, processes, works and projects, without being registered as a Professional
19 Engineer in Oregon, thereby subjecting himself to assessment of civil penalties by the Oregon
20 State Board of Examiners for Engineering and Land Surveying. None of the Respondent's
21 affirmative defenses have merit.

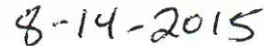
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1 **FINAL ORDER**

2 Based on the foregoing, it is HEREBY ORDERED that, pursuant to ORS 672.325, a civil
3 penalty is imposed against Respondent the amount of \$1,000 for the violations detailed above.
4 The civil penalty is due in full 70 days after the issuance of this Final Order. If Respondent fails
5 to pay any part of the civil penalty by the date it is due, the Board will assess a 9% interest rate
6 on any unpaid balance.

7
8 
9 Jason Kent, PE
10 Board President
Oregon State Board of Examiners for Engineering and
Land Surveying


Date

11 **NOTICE**

12 Civil penalties, if unpaid, may be recorded and filed with the county clerks as liens against
13 property 10 days after the expiration of the statutory appeals period (70 days after issuance of
14 this order). Make checks payable to the Oregon State Board of Examiners for Engineering and
Land Surveying.

15 **APPEAL RIGHTS**

16 You are entitled to judicial review of this order in accordance with ORS Chapter 183.482. You
17 may request judicial review by filing a petition with the Court of Appeals in Salem, Oregon
within 60 days from the date of service of this order.