MINUTES OF THE
1999.5 FALSE AND MISLEADING ADVERTISEMENT TASK FORCE
OF THE STRUCTURAL PEST CONTROL BOARD

The meeting of the 1999.5 False and Misleading Advertisement Task Force was held at the office of the Structural Pest Control Board at 1418 Howe Avenue, Sacramento, CA on June 28, 2007.

Chairman Michael Katz called the meeting to order at 0904.

Roll was called, and a quorum established.

Task Force Members Present:

Michael Katz, Chairman
Robert Baker
Darrell Ennes
Curtis Good
Jonathan Kaplan
Mark Rentz (arrived at 1015)
Darren Van Steenwyk
Cliff Utley
Lee Whitmore

Legal Counsel Kurt Heppler and board staff personnel Susan Saylor and Dennis Patzer were present at the meeting.

Chairman Katz asked if there were any changes to the minutes. Discussion ensued. Darrell Ennes made a motion to approve the minutes as written. Curtis Good seconded the motion. There was discussion. The minutes were approved unanimously.

Chairman Katz opened discussion on the “Purpose and Intent Statement” for Section 1999.5, agenda item III. Chairman Katz read the proposed language prepared by Kurt Heppler that read as follows:

> It is the purpose of these regulations to protect the public from false, misleading, deceptive, or unfair representations or claims concerning structural pest control while enabling the public to receive truthful and legitimate information about those structural pest control products and services including the effectiveness of those products and services, that offer a reduced environmental impact.

Kurt Heppler said that the language he had prepared was the jumping off point for discussion for the proposed preamble for Section 1999.5.

Vigorous discussion ensued for approximately 2 hours. Chairman Katz deferred discussion on the agenda item until later in the meeting and the task force moved on to the "WOOD DESTROYING PESTS AND/OR ORGANISMS" portion of agenda item III.

Chairman Katz opened discussion regarding Section 1999.5(f)(4) and its applicability to only Branch 3 operations and the methods to be used to determine compliance to the subsection.

Mark Rentz asked if 16 CFR, 260.5 could apply as a test for compliance with the section being discussed.

Kurt Heppler spoke to the task force on behalf of the board only as their legal counsel. Heppler stated that the board serves as the final adjudicator of a disciplinary action. If 16 CFR, 260.5 was required the board which is made up of public and industry members would have determine if competent reliable substantiation through tests, analysis, research, studies or other evidence based upon the expertise in the relevant areas had been conducted and evaluated in an objective manner by persons qualified to do so using procedures generally accepted in the profession to yield accurate and reliable results. Heppler stated that it seemed that the requirements of 16 CFR, 260.5 would be quite a burden to place on a board in the case of a 1999.5 claim that whoever conducted a test was competent and that they did it the right way and by professionals who were licensed or suitably qualified to do so.

Mark Rentz responded that the board could retain a neutral third party opinion as to the quality or reliability of a scientific claim, if a claim were deemed not to be valid in the investigatory process prior to the board's adjudication of the matter.

Chairman Katz said that one of legal counsels major concerns was the board not be put in a position of being asked to perform a task that it is not equipped to handle. Chairman Katz said that the board may have to depend on outside sources should a situation regarding inappropriate claims arise.

Jonathan Kaplan stated that subsection (4) and (5) should be limited to wood destroying pests and/or organism activities.

Cliff Utley made a motion to recommend to the board that the language of Section 1999.5(f)(4) be amended to state:

> (4) any expressed or implied statement or representation that one or a combination of pest control services, methods, products, pesticides, or devices is an alternative or substitute for, is comparable to, or is better than any other pest control service, method, product, pesticide, device, or combination thereof, if what is being compared provides different

treatment coverage of a structure, including but not limited to differences in the extent that accessible and inaccessible areas can ~~reasonable~~ reasonably be treated, unless said differences in treatment coverage are clearly and conspicuously stated. This subsection shall only apply to Branch 3 activities;

Darrell Ennes seconded the motion. Chairman Katz opened the proposed amendment to discussion. Discussion concluded. Chairman Katz called for the vote. The vote was unanimous.

Chairman Katz opened discussion regarding Section 1999.5(f)(5). The Chairman said that he had a concern with the portion of the existing regulation as it applied to whether a service, method, product, pesticide, or device, or combination thereof while being designed to effectively treat an infestation it may not achieve its effect because of an inability to get to the infestation to treat it.

Jonathan Kaplan made a motion to recommend to the board that the language of Section 1999.5(f)(5) be amended to state:

(5) any representation that a service, method, product, pesticide, or device, or combination thereof, ~~that is not designed~~ intended to treat ~~all potentially~~ infested wood in a structure, ~~both accessible and inaccessible~~ will be used to treat an entire structure for target pests if the service, method, product, pesticide, or device or combination thereof is not capable of treating all potentially infested wood in a structure including inaccessible areas.

Darrell Ennes seconded the motion. Chairman Katz opened the proposed amendment to discussion. Discussion concluded. Chairman Katz called for the vote. The vote was unanimous.

Chairman Katz opened discussion regarding Section 1999.5(f)(6). The Chairman read the proposed change to the section.

Discussion regarding conflicts between different studies regarding products, pesticides, or devices and the boards having to weigh the studies and reach a decision ensued.

Jonathan Kaplan said that there were two parts to the proposed language. One part of the section dealt with being able to back up a claim within the context of CFR 260.5 and the other that the statement has to be qualified as necessary to prevent deception.

Mark Rentz said that the board has staff and has the ability to seek a third party determination if necessary when a claim or representation is disputed.

Kurt Heppler said that the board does not have members that are scientifically trained to determine whether all claims are scientifically valid. The board can hire experts when it comes to disciplining a licensee a licensee. The licensee can obtain an expert for representation at a hearing to dispute the quality of any evidence submitted on behalf of the board's case. Heppler said that when the gives a decision it is based on the written record from the hearing and the board does not hear oral arguments. Heppler said there are some enforcement issues the task force needs to consider such as the enforceability of the section proposed.

Mark Retz said that he preferred the language of CFR 260.5 because debating whether one study is better than another puts the board in a very undesirable position. Rentz said the CFR 260.5 states that if a party wants to make a claim there must be a reasonable basis substantiating the claim. CFR 260.5 explains what is a reasonable basis for substantiating a claim and that basis is: Was there competent and reliable scientific evidence.

Jonathan Kaplan proposed that a guidance document be used to give examples of what is acceptable and what would not be acceptable regarding statements or representations.

Kurt Heppler said that in the federal system guidance documents are common. They are not so common in the State of California because of a specific statutory rule that says no guidelines, no bulletins, no manuals shall be used against a licensee or shall be enforced by the agency unless said manual, bulletin, guideline, newsletter adnauseam has been adopted by regulation.

Discussion ensued regarding the type of information that would be placed in the guidance document that would be placed in regulation.

A discussion regarding free speech ensued. Kurt Heppler explained about governmental control of certain types of speech.

Darrell Ennes made a motion to amend Section 1999.5(6) to read as follows:

> (6) any statement or representation that a pest control service, product, pesticide, or device <u>or combination thereof</u> offers a general environmental protection or benefit <u>unless the statement or representation can be substantiated within the meaning of 16 CFR, 260.5 and is limited to the specific nature of the environmental or health benefit being asserted and is consistent with document X*.</u> ~~, or that the pest control products, pesticides, or devices the licensee uses, the applications of such products, pesticides, or devices, or any of them, are "among the least toxic chemicals known," "relatively non-toxic," "pollution approved," " environmentally aware," "environmentally sensitive," "environmentally preferable," "environmentally benign," or "contains all natural ingredients";~~

- Document X to be a guidance document incorporated into the regulation

Cliff Utley seconded the motion. Chairman Katz opened the proposed amendment to discussion. Discussion concluded. Chairman Katz called for the vote. The vote was unanimous.

Chairman Katz opened discussion on proposed amendment to Section 1999.5(f)(7).

Jonathan Kaplan requested to withdraw his proposal for revision of Section 1999.5(f)(7).

Chairman Katz withdrew the proposal for revision of Section 1999.5(f)(7).

Chairman Katz opened discussion regarding opened discussion on the "Purpose and Intent Statement" for Section 1999.5, agenda item III. Katz said that Dave Tamayo had given him some language that for consideration that he felt was appropriate for consideration. Katz read the proposed language.

Cliff Utley made a motion to amend Section 1999.5(a) to read as follows:

> (a) <u>It is the purpose of these regulations to protect the public from false, misleading, deceptive, or unfair representations or claims concerning structural pest control while enabling the public to receive truthful and legitimate information about those structural pest control products and services and their potential to impact to health or the environment.</u>

Darrell Ennes seconded the motion. Chairman Katz opened the proposed amendment to discussion. Discussion concluded. Chairman Katz called for the vote. The vote was unanimous.

Chairman Katz opened discussion regarding amendment of Section 1999.5(f)(11). Discussion ensued.

Jonathan Kaplan said that the purpose of amending this section was that if the board developed a set of practices that it believes offers some environmental benefit it could be stated as approved.

Darrell Ennes made a motion to amend Section 1999.5(f)(11) to read as follows:

> (11) any statement or representation that a pesticide or device is certified, sponsored, recommended, endorsed, or approved by any agency of the Federal Government or the State of California, including but not limited to, "tested by the Department of the Interior," ""EPA approved," "EPA

registered," "approved by the Structural Pest Control Board," or "'recommended by the Structural Pest Control Board," except that a statement or representation is specifically authorized by the Federal or State agency to which it refers.

Jonathan Kaplan seconded the motion. Chairman Katz opened the proposed amendment to discussion. Discussion concluded. Chairman Katz called for the vote. The vote was unanimous.

Chairman Katz opened discussion regarding amendment of Section 1999.5(f)(13). Katz read the proposed language submitted. Discussion ensued.

Robert Baker said that a common language used in the food service industry is "Food Safety" and that currently a licensee is prohibited from using the term in advertisement under this section. Baker said that using the term would not imply that a licensee is making the food safe or safer and that the term is generic for use as a practice or process.

Robert Baker made a motion to amend Section 1999.5(f)(13) to read as follows:

> (13) claims ~~as to the safety of~~ that a pesticide application, a pesticide or pesticide ingredients are safe, including statements such as "safe," "nonpoisonous," "non-injurious," "harmless" or "nontoxic to humans and ~~pest~~ pets " with or without such a qualifying phrase as "when used as directed";

Curtis Good seconded the motion. Chairman Katz opened the proposed amendment to discussion. Discussion concluded. Chairman Katz called for the vote. The vote was unanimous.

Chairman Katz opened discussion regarding amendment of Section 1999.5(f)(14). Discussion ensued.

Robert Baker said that this section should include devices and this would address Vernard Lewis' concerns regarding the safety of devices used to control pests.

There was discussing to include reference to the guidance document referred to in Section 1999.5(f)(6).

Darrell Ennes made a motion to amend Section 1999.5(f)(14) as follows:

> (14) claims that the pesticides, devices and other substances the licensee applies, the applications of such pesticides, or any other use of them are comparatively safe or free from risk or harm unless the statement or representation can be substantiated within the meaning of 16 CFR, 260.5

and is limited to the specific nature of the environmental or health benefit being asserted and is consistent with document X*.

* Document X to be a guidance document incorporated into the regulation

Curtis Good seconded the motion. Chairman Katz opened the proposed amendment to discussion. Extensive discussion ensued. Chairman Katz put the motion in abeyance until the next meeting.

Chairman Katz scheduled the next meeting of the task force for July 26, 2007, at 1000, at 1418 Howe Avenue, Suite 18, Sacramento, CA.

The meeting adjourned at 1500.