

MINUTES OF THE
ANNUAL MEETING OF THE
STRUCTURAL PEST CONTROL BOARD
OCTOBER 7, 2005

The meeting was held on Friday, October 7, 2005, at the Wyndham San Diego at Emerald Plaza, 400 West Broadway, San Diego, California, commencing at 8:18 AM with the following members constituting a quorum:

Jean Melton, President
Michael Roth, Vice President
Cris Arzate
Mustapha Sesay
Ken Trongo

Board Member Bill Morris was not present

Board staff present:

Kelli Okuma, Executive Officer
Susan Saylor, Assistant Executive Officer
Barbara Howe, Administration Analyst

Departmental staff present:

Kurt Heppler, Legal Counsel

Board Liaison Deputy Attorney General Christina Thomas was also in attendance.

I. ROLL CALL

Ms. Saylor read the roll call.

II. REINSTATEMENT HEARING

The Board sat with Administrative Law Judge Stephen E. Hjelt and Deputy Attorney General Karen L. Gordon to hear the Petition for Reinstatement of Rodney Smallwood, Field Representative's License No. 22461. The petitioner was informed he would be notified by mail of the Board's decision.

III. FLAG SALUTE

Mr. Trongo led the flag salute.

V. APPROVAL OF JULY 15, 2005 BOARD MEETING MINUTES

Mr. Arzate moved and Mr. Sesay seconded to approve the minutes. Passed unanimously.

VI. EXECUTIVE OFFICER'S REPORT

Ms. Okuma reported on the following:

- Pursuant to the Department's audit, Board members had directed staff to conduct a detailed analysis of complaints to determine whether there were quality control workmanship issues. Because the Board's database only identified cases on a broad basis, staff was reviewing every file and compiling case numbers, company names, dates opened, referred and closed, reports of findings issued, available photographs, the case disposition, and whether or not building permits were pulled.
- Citation and Fine authority provided an informal conference as an appeal to a Citation and Fine, which by regulation was held with the Deputy Registrar or the Registrar and a member of the Structural Pest Control Board, historically at the Sacramento office regardless of where the licensee requesting the conference was physically located. Carl Smitley is located in Southern California so staff had begun conducting some informal conferences there. Although there had been some initial problems with adverse effects, staff was willing to continue in that effort.
- Three fumigation incidents had recently occurred in three different counties, which the Department of Pesticide Regulation and Agricultural Commissioner's Offices were currently investigating.
- Mr. Ron Moss, Board Specialist and Chairman of the Pre-Treatment Committee, recently attended the U.S. Environmental Protection Agency's Pesticide Inspection Residential Training Course, hosted by Virginia Polytechnic Institute and State University, in Blacksburg, Virginia, September 11-14. Rick Walsh from the San Diego County Agricultural Commissioner's Office and a representative from the Department of Pesticide Regulation were also in attendance. The course held a session on Termite Pre-and Post-Construction Treatment – What does it cost, and how to do it right, by Joe Wilson, Virginia Pesticide Control Board, and included team exercises on Termite Pre-Treatment Enforcement Strategies with Dr. Wayne Surles, Virginia Department of Agriculture and Consumer Services. Pursuant to the Board's direction to work directly with DPR and the county agricultural commissioner offices in developing regulations to address improved enforcement of pre-treatments, staff met with the California Agricultural Commissioners and Sealers Association (CACASA), and after hearing about the

training course in Virginia, CACASA encouraged them to return and continue working with them on the pre-treatment issue.

Ms. Saylor reported on the following:

- Licensing statistics and survey results were reviewed with the Board members.
- In response to the Department of Consumer Affairs' audit concern that bond and insurance amounts were currently inadequate, staff is still assessing the cost to companies per branch of licensure, and how much business they conduct.
- The research grant contracts had been sent to the four researchers awarded the contracts and were currently under review at either the Department or the University. Staff anticipated an effective date of November 1, 2005.
- To expedite the process of fingerprint background clearance checks, the live scan form was made available on the website for download and pre-printed with the Board's information.
- Effective July 1, 2006, Attorney General Costs would increase from \$146 to \$158 per hour. The Department was in the process of completing a Department-wide budget change proposal to increase Board spending authority to cover this increased cost.
- Sally Latham, who had been responsible for the Operator and Company Registration desk, left the Board on September 30, 2005. Interviews for that position would be conducted Tuesday, October 11, 2005 with the position being filled shortly after that.
- Interviews had been conducted in Riverside for the vacant Specialist position. A decision would be made next week, with an anticipated start date of November 1.
- Licensing renewals for 2005 had been completed. Staff processed just over 3,200 renewals for the 2005 renewal cycle.
- Over 700 licensees were audited for the 2004 renewal period, 75% of which complied by verifying their Continuing Education. Staff was still working on the remaining 25%.

IV. PUBLIC HEARING TO AMEND SECTIONS:

- A. AMEND SECTION 1922 - INCREASE THE MINOR, MODERATE, AND SERIOUS FINE RANGE IN ACCORDANCE WITH BUSINESS AND PROFESSIONS CODE SECTION 8617
- B. ADOPT SECTION 1923 - COMPLAINT DISCLOSURE PROCEDURES
- C. AMEND SECTION 1948 - ESTABLISH AN APPLICATOR LICENSE AND RENEWAL FEE AND DECREASE THE OPERATOR LICENSE AND RENEWAL FEE

Mr. Heppler announced for the record that this hearing was to consider the proposed amendments of sections 1922 and 1948 and the adoption of Section 1923 to Title 16 of the California Code of Regulations relating to the practice of structural pest control as outlined in the public notice. The hearing was being held pursuant to section 8525 of the Business

and Professions Code as well as the provisions of the Administrative Procedures Act as set forth in the Government Code. The hearing was open to take oral testimony and/or documentary evidence by any person interested in these regulations for the record, which was being made by tape recorder. All oral testimony and documentary evidence would be considered by the Board pursuant to the requirements of the Administrative Procedures Act before the Board formally adopted the proposed amendments to the regulations, or recommended changes that may evolve as a result of the hearing.

Mr. Heppler stated that if any interested person desired to provide oral testimony, he or she should stand or come forward, giving his or her name and address, and if he or she represented an organization, the name of such organization, and that persons offering oral testimony would not be cross-examined or sworn. These steps should be followed so that the Board would have a full record of all those who offered such testimony. He stated it was the desire of the Board that the record of the hearing be clear and intelligible and that the hearing itself be orderly, thus providing all parties with fair and ample opportunity to be heard. After all interested parties, if any, had been heard, the issue would stand submitted.

Mr. Heppler asked the audience if there were any questions concerning the nature of the proceedings or the procedures to be followed in today's public hearing. As there were none, he stated they would proceed in numerical order to consider the Board's proposed amendments and adoption to the regulations.

Proposed Amendment of Regulation Section 1922

Kathleen Boyle, Department of Pesticide Regulation (DPR), stated:

- She would encourage the Board to approve this as amended primarily from the standpoint of obtaining consistency throughout the state for both structural civil penalty fine levels and agricultural civil penalty fine levels.

Proposed Adoption of Regulation Section 1923

There were no public comments.

Proposed Amendment of Regulation Section 1948

There were no public comments.

There being no further public or written comments, Mr. Heppler concluded the regulatory hearing and opened up the proposals for Board consideration.

Proposed Amendment of Regulation Section 1922

Mr. Roth moved and Mr. Arzate seconded to adopt the proposed amendment to section 1922 of the California Code of Regulations as follows:

§1922. Civil Penalty Actions by Commissioners.

(a) When taking civil penalty action pursuant to section 8617 of the Business and Professions Code, county agricultural commissioners shall use the provisions of this section to determine the violation class and the fine amount.

(1) For purposes of this section, violation classes shall be designated as “serious,” “moderate,” and “minor.”

(A) “Serious”: Violations that are repeat violations of those in subparagraph (B) or violations which created an actual health or environmental hazard. The fine range for serious violations is ~~\$401-\$1,000~~ \$700-\$5,000.

(B) “Moderate”: Violations that are repeat violations of those in subparagraph (C) or violations which pose a reasonable possibility of creating a health or environmental effect. The fine range for moderate violations is ~~\$151-\$400~~ \$250-\$1,000.

(C) “Minor”: Violations that did not create an actual health or environmental effect or did not pose a reasonable possibility of creating a health or environmental effect. The fine range for minor violations is ~~\$50-\$150~~ \$400.

Passed unanimously.

Proposed Adoption of Regulation Section 1923

Mr. Heppler commented he had a concern with the language of the proposed regulation as he felt it was predicated towards healing arts, not structural pest control and that its immediacy was somewhat removed. He recommended the Board restructure the language into construction and service areas more befitting structural pest control situations.

Mr. Trongo moved and Mr. Roth seconded to not proceed with the adoption of section 1923. Passed unanimously.

Proposed Amendment of Regulation Section 1948

Mr. Roth moved and Mr. Arzate seconded to adopt the proposed amendment to section 1948 of the California Code of Regulations as follows:

§1948. Fees.

(a) Pursuant to the provisions of section 8674 of the code, the following fees are established:

- (1) Duplicate license. . . \$ 2
- (2) Change of licensee name. . . \$ 2
- (3) Operator's examination. . . \$ 25
- (4) Operator's license. . . ~~\$150~~ \$120
- (5) Renewal operator's license. . . ~~\$150~~ \$120
- (6) Company office registration. . . \$120
- (7) Branch office registration. . . \$ 60

- (8) Field representative's examination. . . \$ 10
- (9) Field representative's license. . . \$ 30
- (10) Renewal field representative's license. . . \$ 30
- (11) Change of registered company's name. . . \$ 25
- (12) Change of principal office address. . . \$ 25
- (13) Change of branch office address. . . \$ 25
- (14) Change of qualifying manager. . . \$ 25
- (15) Change of registered company's officers. . . \$ 25
- (16) Change of bond or insurance. . . \$ 25
- (17) Continuing education provider. . . \$ 50
- (18) Continuing education course approval. . . \$ 25
- (19) Pesticides use report filing. . . \$ 6
- (20) Applicator's license . . . \$ 10
- (21) Applicator's license renewal . . . \$ 10

(b) Pursuant to section 8564.5 of the code, the fee for examination for licensure as an applicator is \$15.00 for each branch in which an examination is taken.

(c) Pursuant to section 8593 of the code, the fee for the continuing education examination for operators is \$25.00, for each branch in which an examination is taken.

(d) Pursuant to section 8593 of the code, the fee for the continuing education examination for field representatives is \$10.00, for each branch in which an examination is taken.

Passed unanimously.

VII. PROPOSAL TO ESTABLISH A SUBCATEGORY BRANCH 1 FUMIGATION LICENSE TO ADDRESS FUMIGATIONS OF MULTI-UNITS

Ms. Okuma called the Board members' attention to a letter dated June 1, 2005, from Kathleen Thuner, Agricultural Commissioner for the County of San Diego, wherein she commented on a fumigation death that occurred on March 7, 2005, in San Diego County in a large multi-tenant building. In that letter she asked the Board to consider developing a second tier or subcategory of licensing for Branch 1 fumigation that would address multi-unit fumigations so as to avoid other such deaths in the future. Ms. Okuma then asked Simone Hardy, Deputy Commissioner in charge of the Pesticide Regulatory Program for the San Diego County Agricultural Commissioner's Office, to expand further on this matter.

Ms. Hardy stated that while conducting the investigation, questions about notification issues in multi-tenant buildings arose. Complaints had been received previously regarding the clearing of these types of buildings and in considering this case, Ms. Thuner felt if there were a subcategory of licensing which basically gave more education, consideration to notification, how a company would issue notification, etc., this event might have been avoided. She continued that Ms. Thuner's letter complimented the Structural Pest Control Board's excellent industry participation and that this death was not a normal occurrence; but, in light of the fact there had been a death, she hoped this should at least be a

consideration as to whether or not a different category of licensing might help prevent these kinds of events in the future.

John Van Hooser, Ultratech Division, commented that a sub-category of licensure would require a statute change. He suggested that training courses offered by the manufacturers of fumigants could place more emphasis on the fumigation of multi-unit structures.

Larry Musgrove, Western Exterminator Company, commented that he hoped the Board would not react too soon over this one incident. He felt everyone needed to wait for the final analysis of what the death incident before proceeding.

Mr. Trongo stated he agreed with Mr. Van Hooser and that he also felt Ms. Thuner had a legitimate concern. However, he thought the answer was neither in further licensing or subcategories of licensing. It was in education, in ensuring that all fumigators had the knowledge and the continuing education units in fumigation to do the right thing.

Mr. Roth agreed with Mr. Trongo and questioned if training was already available.

Larry Musgrove responded that manufacturing companies are very concerned about how fumigants are used and the safety aspects of the fumigation job, whether it was an apartment building, a small building or condominiums. All safety aspects of fumigations are covered in existing training offered by fumigant manufacturers.

Kathleen Boyle, DPR, commented that there was a product currently in the registration process in California, which was a competing fumigant to Vikane because it had the same active ingredient. There were concerns in terms of a potential change in product registration in California, but a more primary concern was that these new manufacturers would not focus on training as much as they would focus on getting their product into the system in a competitive market.

Eric Paulsen, PCOC, stated that currently there were two levels of specific training within the industry beyond continuing education. Dow AgroSciences had one training called the Environmental Stewardship Award Program that all licensees went through, together with a secondary, voluntary program that the vast majority, if not all, of the large companies participated in called the Commitment to Excellence Program for Vikane Gas Fumigant, which dealt specifically with fumigations in large complexes and required additional specific training, testing, equipment and a commitment that the company follow some additional higher standards and go above and beyond the law. Because a second manufacturer of a gas fumigant was shortly expected, PCOC had formed a task force to address the issue of the training already handled by Dow AgroSciences in an effort to establish specific standards and requirements that industry would adopt and then ask both manufacturers to adopt so there would be standardized training for the Stewardship and the Commitment to Excellence programs by both manufacturers.

Greg Augustine, Harbor Pest Control, stated that it seemed everyone was trying to apply the band-aid before really knowing where the wound was. The last time industry had a death was the Toluca Lake incident, and industry, DPR, Dow AgroSciences and the government had worked together at that time to come up with regulations and procedures that addressed specifically what happened at Toluca Lake to prevent it ever happening again. He felt we needed to wait to see what really had happened so we did not just encumber ourselves with additional licensing that might or might not address what took place. He asked to not be premature, as based on the previous track record, industry, regulators, DPR and Dow AgroSciences would all come together and produce fix-its.

Marie Evans, PCOC, stated that the Task Force for Stewardship had just been formed and they were meeting next week to address the program going statewide for any and all manufacturers.

Mr. Arzate mentioned he would like the Board to consider the fact that someone had died, regardless of the cause or motive of the individual or the circumstances involved, and that perhaps mandatory education should be considered for the companies that are large and specialize in multi-units. He did not think anyone in the room would like to see another person die.

Mr. Roth stated he agreed and asked if PCOC could report on the Task Force at each public meeting of the Board because he had the idea the Task Force might be able to make the Commitment to Excellence education something that could become an industry standard rather than something considered as “going above and beyond what one had to do.”

Mr. Arzate asked that the Task Force of PCOC send to the Board an internal report after their October 20, 2005 meeting, to arrive before the Board’s next meeting in January 2006.

Mr. Trongo moved and Mr. Sesay seconded to take no action at this time, but to place the issue on watch and to seek input from industry and those involved in the progress of the situation, and ask that they report back to the Board at various Board meetings.

Passed by majority (Aye – Arzate, Melton, Sesay, Trongo. No – Roth).

VIII. ANNUAL REVIEW OF BOARD’S PROCEDURES

Ms. Okuma reviewed the Board Procedures with the Board members and commented that staff had no recommendations for revisions at this time.

The Board took no action.

IX. REVIEW OF THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD – SAN FRANCISCO BAY REGION – PROPOSED BASIN PLAN AMENDMENT FOR POSSIBLE BOARD RESPONSE/POSITION

Ms. Okuma stated the Board had received a letter on August 15, 2005, from the California Regional Water Quality Control Board -San Francisco Bay Region, operating under the State Water Resources Control Board (SWRCB), a part of Cal EPA (Environmental Protection Agency), regarding the proposal of amendments to their Basin Plan. They asked the Structural Pest Control Board for relative comments because some items within the plan would affect the Board once it was incorporated by reference into the California Code of Regulations (CCR). SWRCB was currently undergoing a regulatory process on the proposal, so it had been placed on today's agenda. The opportunity for written comments lapsed September 19, 2005, but on October 19, 2005, SWRCB was holding a public hearing. If the Board had official comments to include in SWRCB's regulatory file as they applied to the adoption of the proposed amendments to the Basin Plan into the CCR, she would present them at that October hearing.

Bill Johnson, San Francisco Bay Region Water Quality Control Board, explained that each of the nine Regional Water Boards were responsible for implementing the Federal Clean Water Act in their jurisdictions and the San Francisco Bay Region held responsibility for about 100 cities and counties. They established water quality standards applicable to the region along with plans to implement them, which were then packaged into the Basin Plan. One of the standards was to not accept any toxic chemicals in water bodies at concentrations that caused toxicity. He stated that 37 creeks were already formally listed as impaired water bodies (officially designated by US EPA as water bodies that did not meet water quality standards), and the Clean Water Act mandated his Regional Water Board to procure new plans to attain required water quality standards. In the past, toxicity was often associated with Diazinon in the water column, but now Bifenthrin was increasing at approximately the same rate that Diazinon was decreasing. As Bifenthrin was a pyrethroid, the toxicity levels that were previously found in the water column with Diazinon were now being found in the sediment in the creeks, which created violations of water quality standards related to sediment toxicity. He stated Diazinon was toxic to the test organism *Ceriodaphnia dubia*, an organism that lives in water, while Bifenthrin was toxic to the test organism *Hyallela azteca*, a sediment-drilling organism.

The first of San Francisco Bay Region Water Quality Control Board's three-pronged approach strategy was proactive regulation, wherein the pesticide regulatory community and the water quality regulatory community would work more closely together to ensure the pesticides people used did not end up in creeks. The second was to promote education and outreach so as to discourage the use of pesticides in a manner that threatened water quality, and to encourage the use of pesticides when necessary in such a way there was no adverse effect. The third was to continue research and monitoring so as to fill in the information gaps, and to measure their progress and success. He said all these strategies were in the Basin Plan Amendment, which had been provided to the Board Members.

The San Francisco Bay Region Water Quality Control Board was here asking for the Structural Pest Control Board's help to encourage practices that resulted in discharges that complied with water quality standards, to consider working to enhance initial and continuing Integrated Pest Management (IPM) training for licensees, and to consider developing a mechanism through which consumers could determine which pest control providers were more protective of water quality than others, as they hoped a certification program for Integrated Pest Management would be developed so there could be substantiated claims about environmental benefits that trained service professionals could then provide.

Mr. Trongo commented that historically the California Public Interest Research Group (Calpirg) threatened the Board with a lawsuit relative to safe pesticide use claims made by pest control companies. Consequently, section 1999.5(f) was written and adopted. Calpirg then sued many pest control companies that advertised in telephone directory yellow pages because they used the words that referred to chemicals being safe. Calpirg's position was there is no safe chemical. Consequently, companies changed their advertising because they were forced to, although some went to court about it but lost. Now, the Water Quality Control Board was asking the Structural Pest Control Board to change its regulations so that IPM people could advertise safe chemical use. He questioned whether the Water Quality Control Board would be willing to pay for the lawsuits that would occur from people like Calpirg and whether they would be able to protect the Structural Pest Control Board and the pest control operators in California. This was the problem as he saw it, and he did not believe the Board could do what they were being asked to do. It was not a case of whether they would like to do this or not, it was a case of having people like Calpirg suing the Board.

Mr. Heppler commented that as the Board's attorney he would advise the Board there were conflicting messages within the plan itself and the supporting documentation as to what was mandatory or discretionary. He stated the Board also had a different statutory scheme set forth in the Business and Professions Code and that its primary obligation as dictated therein, was to value consumer protection first.

Mr. Roth moved to establish an ad-hoc committee to look at this issue in more detail.

Mr. Roth withdrew his previous motion.

Mr. Trongo moved and Mr. Roth seconded to take no action at this time.

Passed unanimously.

Mr. Roth moved and Mr. Arzate seconded that an ad hoc committee be established to advise the Board and monitor the issues dealing with Integrated Pest Management and environmental safety, including water quality.

Passed by majority (Aye – Arzate, Melton, Roth, Sesay. No – Trongo).

X. CONSIDERATION OF STAFF'S RECOMMENDATION TO DISCONTINUE THE BOARD'S WEB SITE SURVEY

Ms. Saylor reported that in November 2001 a survey had been recommended for the website due to the Strategic Plan. It had been in place about four years and during that time 116 responses had been received. Only 38 of those 116 responses included recommendations for improvements. The overall rating of the site was 4.1 on a rating scale of 1 to 7. Some recommendations were valuable and had been addressed, but based on the low response to the site, staff was recommending it be removed.

Mr. Sesay moved and Mr. Arzate seconded to remove the survey from the website.

Passed unanimously.

XI. RECOMMENDATION THAT THE BOARD CONSIDER A LEGISLATIVE AMENDMENT TO REPEAL REINSPECTION REQUIREMENT PER SECTION 8516

Ms. Okuma commented this issue was on the Board's last agenda, and Chuck Brasiel of Termite Consulting had spoken to the Board regarding his recommendation that the mandatory reinspection be stricken from law. After much discussion, the Board had deferred to PCOC to address this issue.

Marie Evans, Northstar Exterminators, President of PCOC, stated that the issue had been discussed up at the September meeting and the Board of Directors had voted to not support the repeal of legislative amendment section 8516 regarding reinspection requirements.

The Board took no action on this matter.

XII. BOARD MEETING CALENDAR

The next Board meeting will be held January 19 and 20, 2006, in Monterey. The meeting following will be held April 20 and 21, 2006 in Riverside. The Strategic Planning Meeting will be held January 19, 2006 in Monterey.

XIII. PUBLIC COMMENTS FOR ITEMS NOT ON THE AGENDA

Larry Musgrove, Western Exterminator Company, stated he had to leave the last Board meeting early, before a decision had been made regarding the Research Grants. At this time, he wished to thank the Board for its decision. He felt it was a very good one.

XIV. CLOSED SESSION

The Board adjourned to closed session to consider proposed disciplinary actions in accordance with subdivision (c)(3) of Section 11126 of the Government Code and pending litigation in the case of *Merrifield V. Lockyer, et al. MMC C040498* in accordance with subdivision (e) of Section 11126 of the Government Code.

Ms. Melton adjourned the meeting at 1:35 PM.

MICHAEL ROTH, President

KELLI OKUMA, Executive Officer

DATE