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

The meeting was held on Thursday, February 19, 2009, at the Structural Pest Control Board, Lake Tahoe Room, 2005 Evergreen Street, Sacramento, California, commencing at 10:02 AM with the following members constituting a quorum:

Michael Katz, Chair  
Robert Baker (arrived at 10:18)  
Darrell Ennes  
Curtis Good  
Jonathan Kaplan (arrived at 10:47)  
Darren Van Steenwyk (arrived at 10:04)  
Cliff Utley  
Lee Whitmore

Board staff present:

Kelli Okuma, Executive Officer  
Dennis Patzer, Administration Analyst  
Ryan Vaughn, Administration Analyst

**I. ROLL CALL**

Ms. Okuma read the roll call.

**II. REVIEW AND DISCUSSION OF THE DECISION OF DISAPPROVAL OF REGULATORY ACTION TO AMEND TITLE 16 OF THE CALIFORNIA CODE OF REGULATIONS SECTION 1999.5 FALSE AND MISLEADING ADVERTISING**

Mr. Katz stated that the committee would rely on Ms. Okuma and Mr. Heppler to guide the committee on specific topics. He added that in reviewing the decision of disapproval, the Office of Administrative Law's (OAL) objections were primarily on the justifications and not the actual proposed language. He stated that the committee's task was not to redo the committee's past work but to correct the issues to comply with OAL's objections.

Mr. Heppler stated that the Board had submitted the rulemaking file to OAL who ultimately disapproved the proposed changes. The Board has requested an extension from OAL so that the committee could address their concerns and resubmit the rulemaking package. Their basis for disapproval concerned some of the proposed

language, a deficient initial statement of reasons, as well as a deficient final statement of reasons.

Mr. Katz stated that the committee would also have to incorporate by reference the proper Code of Federal Regulations (CFR) section as recommended by OAL.

Mr. Heppler stated when OAL notified the Board of its disapproval, the changes could have been addressed at the administrative level. The Board felt that because the committee had met several times and worked hard to formulate the proposed changes, it would be best to allow the committee to speak to the disapproval.

Mr. Katz asked about OAL's objection with the lack of detail in the minutes of the past committee meetings.

Mr. Heppler responded that the tapes of the meeting would have to be reviewed with the key information extricated to expand the minutes.

### **III. DISCUSSION AND DEVELOPMENT OF LANGUAGE CLARIFYING KEY TERMS AND PHRASES DEFINED IN TITLE 16 OF THE CALIFORNIA CODE OF REGULATIONS SECTION 1999.5 FALSE AND MISLEADING ADVERTISING**

Mr. Katz requested that Mr. Heppler guide the committee through the reasons for disapproval.

Mr. Heppler reported that the first item centered on a clarity issue with the word "requesting" in subsection (b) of the proposed amendment. OAL's objection was to whether the word requesting was intended to mean soliciting.

Mr. Katz concurred that the proposed amendment, which included the word requesting, was intended to mean soliciting.

Mr. Whitmore suggested that the first part of the proposed amendment could be removed as it is basically repeating itself. The phrase "for the purpose of requesting any work or services" is repetitive since the proposed amendment goes on to read "or for the direct or indirect purpose of performing or offering to perform services." He suggested removing the first portion of the proposed amendment.

Mr. Katz agreed that the phrase seems repetitive and by removing the first portion, it would remove the clarity issue that OAL had an objection with.

Mr. Whitmore moved and Mr. Ennes seconded to remove "for the purpose of requesting any work or services or" from the proposed language.

Mr. Heppler stated that for the purpose of adopting, the proposed change would be transmitted to the Board for approval. If the Board approved of the change, the Board would send out the 15-day notification of modified text.

Ms. Okuma asked whether this change would be considered non-substantive. She added that in the past, when a change was considered non-substantive, the changes would be returned to OAL without being presented to the Board. She stated that if Legal Counsel recommended that it be taken back to the Board then it should be.

Mr. Katz suggested taking the most conservative route with the changes. He added that he would not want a small omission to be the reason for the proposed amendment to be rejected.

Passed unanimously.

Mr. Heppler stated that the next issue centered on the incorrect reference to the CFR section in subsection (f)(6). He added that the proper motion would be to direct the language to be changed as recommended by OAL in its decision of disapproval.

Mr. Katz stated that the CFR section sets criteria as to how a claim can be interpreted and substantiated.

Mr. Ennes moved and Mr. Utley seconded to correct the reference to the CFR section as recommended by OAL.

Anna Folkins, Xtermite Inc., asked if the change was to update the reference to the CFR section.

Mr. Heppler responded that the change was to fix the incorrect incorporation by reference to the CFR section.

Passed unanimously.

Mr. Heppler directed the committee to the “additional corrections” portion of the disapproval by OAL.

Mr. Baker moved and Mr. Van Steenwyk seconded to make the corrections as recommended by OAL under the “additional corrections” section of its disapproval. Passed unanimously.

Mr. Heppler directed the committee to the initial statement of reasons that OAL deemed insufficient. He suggested having Board staff and himself correct the “specific purpose” section of the initial statement of reasons to clearly identify and explain each change to the language.

Mr. Whitmore asked if Board staff had prepared the initial statement of reasons.

Mr. Heppler responded that it had been.

Mr. Heppler stated that the past meeting minutes would have to be cited in the “factional basis/rational” section of the initial statement of reasons.

Mr. Katz stated that the proper motion would be to direct Board staff to correct the initial statement of reasons as recommended by OAL’s decision of disapproval. He asked if the committee could review the corrected document.

Mr. Heppler responded that the only problem is that a meeting would have to be publicly noticed for the committee to review and approve the document. He added that the meeting could be conducted via teleconference.

Mr. Katz requested that the updated initial statement of reasons be presented to the committee, the document be published on the website, and a teleconference call be set up to discuss the document.

Mr. Van Steenwyk moved and Mr. Whitmore seconded to direct staff to correct the initial statement of reasons, present the updated document to the committee and the public, and hold a teleconference call to review the updated document. Passed unanimously.

Mr. Heppler stated that OAL also had issues with the final statement of reasons. The Board has received a written comment requesting that the word “capable” be clearly defined. In its final statement of reasons, the Board simply rejected the comment. Mr. Heppler stated that there had been discussion concerning the word “capable” during a previous committee meeting and that the reasons for rejecting the comment would be found in the audio recording. The disapproval by OAL also called for some other changes to the final statement of reasons and a proper motion would be to amend the final statement of reasons with OAL’s suggested corrections.

Mr. Utley moved and Mr. Good seconded to direct Board staff to amend the final statement of reasons to address the concerns outlined in OAL’s decision of disapproval.

Michael Folkins, Xtermite Inc./XT-2000, asked who determines whether a product or service is “capable.”

Mr. Katz responded that he believed that the CFR section that is to be included in the amended regulation would indicate what could be considered capable.

Mr. Utley stated that the committee had determined that the term was clearly defined in the Board’s existing rules and regulations.

Mr. Folkins asked if the CFR section would be used if an operator were challenged.

Mr. Heppler responded that the section would be used if it were relative to the claim. If a formal disciplinary action is taken, an informal conference could be scheduled as well as a traditional Administrative Procedure Act hearing.

Mr. Katz stated that if a company makes a claim that a product can do “x” then it must be able to prove it.

Anna Folkins, Xtermite Inc., asked about the procedure if a product has already been proven to work.

Mr. Heppler responded that if the product has been proven to work then it would be fairly easy to resolve the issue should a company be challenged.

Ms. Folkins stated that 25b registered products with the Environmental Protection Agency (EPA) require efficacy studies when they are to treat for termites.

Mr. Baker stated that when the product is used outside the scope of the efficacy studies, the company would have to provide further proof to support its claim.

Ms. Folkins stated that EPA requires proof that the product kills drywood termites before it can be registered.

Mr. Katz responded that the question is not whether the product can kill drywood termites. The question is whether the claim can be made that orange oil can be used as a substitution for a whole-house treatment such as fumigation.

Mr. Folkins stated that his company does not advertise their product as being a whole-house treatment but rather offers customers whole-house warranties.

Mr. Katz stated that the changes should create a level playing field. He said you could say what you want as long as you can prove the product’s efficacy.

Nathan Coccozza, Planet Orange Termite Services, asked why the amendment states that the subsection (f)4 only applies to branch 3 companies. He stated that this contradicts the “level playing field” statement. He cited websites belonging to branch 1 companies that state that fumigation is the only way to kill all termites in a structure.

Mr. Whitmore stated that subsections f(4) and f(5) were marked for branch 3 companies because the subsections mention wood structures and accessible and inaccessible areas of a structure which are branch 3 terms.

Mr. Katz stated that subsection f(3) covers all three branches of pest control.

Mr. Coccozza stated that the reason for concern over subsection f(4) was that it goes into the comparison of products.

Mr. Van Steenwyk responded that subsection f(10) speaks directly to the comparison of products.

Mr. Heppler stated that subsections f(6), f(7), f(8), f(9), and f(10) apply to all branches of pest control. He suggested that any false or misleading advertising claims be referred to the Board.

Mr. Heppler added that the proposed changes discussed at the meeting will be available for a 15-day modified text. He stated that if the proposed language is adopted, concerned industry members could petition the Board to change the regulation.

Mr. Baker commented that the committee is not trying to better anyone's interest.

Mr. Folkins asked if he should forward the studies done on the orange oil product XT-2000 to the Board.

Mr. Heppler responded that the studies would be provided if the company was facing a formal disciplinary action.

Mr. Katz asked Mr. Heppler to read back the motion before the committee.

Mr. Heppler stated that the motion was to direct staff to address OAL's comments with the final statement of reasons.

Passed unanimously.

Mr. Heppler stated the next item for discussion is concerned with the situation if OAL does not grant the extension or if the amended rulemaking file is rejected. The process would have to start over. Mr. Heppler suggested a motion to recommend the new changes discussed as a starting point for the new committee.

Mr. Whitmore asked if there would be an opportunity for public comment.

Mr. Heppler responded that the process would start all over with a new 45-day comment period and public hearing.

Mr. Baker moved and Mr. Van Steenwyk seconded to recommend the amended changes to the language as the starting point should OAL not grant the extension or if the rulemaking file is rejected. Passed unanimously.

#### **IV. PUBLIC COMMENT ON ITEMS NOT ON THE AGENDA**

Mr. Heppler asked if there were any public comments.

Ms. Folkins asked if Board's staff is under the same regulations as the Board's licensees.

Mr. Heppler responded that Board staff is governed by their collective bargaining units. He suggested that she speak with him after the meeting to try to answer her question.

Ms. Folkins cited the Department of Consumer Affairs as well as the Governor's emphasis on protecting the environment and finding safe alternatives in eradicating structural pests. She stated that a recent study done by the University of California , Irvine found that sulfuryl fluoride is a 4000 times more potent gas than carbon dioxide. Ms. Folkins added that a fact sheet should be made available to consumers concerning sulfuryl fluoride.

Mr. Heppler responded that Ms. Folkins could submit copies of the study to himself or the Board.

## **V. ADJOURNMENT**

Mr. Katz adjourned the meeting at 11:21 AM.

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MICHAEL KATZ, Chair

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KELLI OKUMA, Registrar

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DATE