

MINUTES OF THE  
SPECIAL MEETING OF THE  
STRUCTURAL PEST CONTROL BOARD  
April 16, 2009

The meeting was held on Thursday, April 16, 2009, at the Mission Valley Resort, 875 Hotel Circle South, San Diego, California, commencing at 8:03 a.m. with the following members constituting a quorum:

Cliff Utley, President  
Cris Arzate, Vice President  
Luis Agurto  
Jean Melton  
Bill Morris  
Mustapha Sesay

Board member Terrel Combs-Feirrer was not present.

Board staff present:

Kelli Okuma, Executive Officer  
Susan Saylor, Assistant Executive Officer  
Robert Lucas, Chief Enforcement Officer  
Ryan Vaughn, Administration Analyst

Departmental staff present:

Kurt Heppler, Legal Counsel

Board Liaisons Deputy Attorney General Christina Thomas and Rene Judkiewicz were also in attendance.

I. ROLL CALL

Ms. Saylor read the roll call.

IV. FLAG SALUTE

Ms. Melton led everyone in the flag salute.

V. APPROVAL OF MINUTES OF THE JANUARY 23, 2009, BOARD MEETING

Mr. Sesay moved and Ms. Melton seconded to approve the minutes of the special meeting of January 23, 2009. Passed unanimously.

VI. APPROVAL OF MINUTES OF THE FEBRUARY 20, 2009, TELECONFERENCE BOARD MEETING

Mr. Arzate moved and Mr. Sesay seconded to approve the minutes of the teleconference meeting of February 20, 2009. Passed unanimously.

VII. EXECUTIVE OFFICER'S REPORT

Ms. Okuma reported on the following:

- Robert Lucas was introduced as the Board's new Chief Enforcement Officer. Mr. Lucas started in March, has 20 years experience in the construction field, and has been attending various pest control seminars.
- Rene Judkiewicz was introduced as the Board's new Deputy Attorney General Liaison.
- Board staff is still required to take two furlough days a month. The Board is no longer closed on the first and third Fridays of the month and the furloughs are now self-directed. There is a new union contract waiting to be ratified which would decrease the furlough days required to one a month.
- Agency Secretary Rosario Marin resigned from her position. Fred Aguirre has been named the new Agency Secretary and Scott Reid has been appointed as Undersecretary.
- Director of the Department of Consumer Affairs (DCA) Carrie Lopez also resigned. Until her replacement is named, Patti Harris Acting Chief Deputy Director for DCA.
- The annual training for agricultural commissioners was held in Covina on March 16-18. The next training will be held in Dublin on April 20-21.
- The question was raised at a previous Board meeting whether a researcher was required to acknowledge the Board as the funding source. After review of the latest Request for Proposals and contracts, there is no language that mandates a researcher acknowledge the Board.

Ms. Saylor reported on the following:

- Licensing statistics, survey results, and the Regulatory Action Status were reviewed with the Board members.

Mr. Morris asked Ms. Saylor if there was an explanation for the discrepancy of the number of licenses that have been downgraded when compared to the last fiscal year.

Ms. Saylor responded that the Board's licensing database now automatically downgrades a license when a new license is issued and that it is no longer a manual process, which would explain the discrepancy.

Mr. Morris identified that the number of applicator licenses cancelled for the current fiscal year varied from the previous fiscal year.

Ms. Saylor stated that the Board did not have the authority to cancel delinquent applicator licenses until recently.

Mr. Morris asked why the number of pesticide usage stamps increased, given the economic hardships that the industry is enduring.

Ms. Saylor responded that an explanation for the increase in stamps sold could be that companies are expanding their service areas to more counties in order to find business.

Ms. Okuma added that through compliance inspections, specialists found some registered companies are not filing monthly use reports with each county. The increase could also be a result of the Board's enforcement efforts.

Mr. Morris asked if this was the same reason that the number of WDO filings have also increased.

Ms. Saylor responded that the increase could be due to the Board's enforcement efforts as well.

- Detailed examination results were reviewed with the Board members.

Mr. Sesay asked why the passing rates for the Branch 1 exams were so low.

Ms. Saylor responded that the Branch 1 exams are somewhat outdated and are currently in the process of being rewritten.

- The Board now offers a continuing education challenge exam for applicators. All applicators that renew on or after January 1, 2009, must complete continuing education. This exam, if passed, would be in lieu of completing the required hours.
- Matt McKinney has been hired as an Office Technician in the licensing unit. He will be responsible for the livescan/fingerprint processes and the continuing education audit.
- Lisa Esquivel has moved from the licensing unit to the administration unit to take over the desk formerly held by Pat Pendleton, the purchasing specialist.
- The Board was notified that there will be an hourly fee increase for the Attorney General attorneys from \$158 to \$170 per hour effective July 1, 2009.
- Based on advisement from the department, the Board did not submit any requests for out-of-state travel. The criteria for the requests were necessity and if the trip would affect on the entire nation.
- The Office of Administrative Law (OAL) recently approved a regulation package, which requires that all branch 2 and/or 3 licensees complete 2 hours of Integrated Pest Management (IPM) as part of his or her renewal beginning June 30, 2010.

Mr. Utley asked if the listing of courses on the Board's website will identify the IPM courses.

Ms. Saylor responded that the regulation update established a course classification code of (m) for the IPM courses and the listing will be updated.

Ms. Okuma reviewed pending legislation:

- Senate Bill (SB) 389 – would add boards to the retro-active fingerprint requirement.
- SB 599 – would require that each Board post each accusation, statement of issues, or disciplinary action on the Board's website within 10 days. DCA has notified the Board that the department has the capability and that some boards are currently posting the information.

Curtis Good, Pest Control Operators of California (PCOC), stated that PCOC is generally in favor of the bill but is in opposition to the posting of accusations.

Martyn Hopper, PCOC, stated that in speaking with the author of the bill, some amendments would be made which will address the concerns of PCOC.

- SB 638 – would abolish the Joint Committee on Boards, Commissions, and Consumer Protection. The bill would terminate the terms of office for each Board member. The bill is set for hearing on April 20, 2009.

Mr. Heppler stated that SB 389 would require that Board licensees complete the livescan/fingerprinting as a condition of their renewal.

Harvey Logan asked Ms. Okuma about what percentage of the industry has not completed the fingerprinting process.

Ms. Okuma responded that she would estimate 80% had not completed the requirement.

Mr. Logan stated that he would hope that the Board would allow people to continue to work while waiting for the results to be received by the Board.

Mr. Heppler stated that the bill is written to indicate that an individual must be able to certify that the process had been completed and thus could continue to work pending the results.

John Van Hooser, Van Hooser Enterprises Inc., stated that he believed that if a person completed the process with another agency, such as the Contractors State Licensing Board, that the process should have to be completed again.

Ms. Okuma responded that agencies can not share information and that each individual must complete the livescan/fingerprinting for the Board.

Mr. Good asked if the Board was going to review Assembly Bill 484. The bill would authorize the Franchise Tax Board to notify the Board to suspend licensees that owe back taxes. He added that PCOC is opposed to the bill.

## **VIII. DEPARTMENT OF PESTICIDE REGULATION UPDATE**

Mr. Utley stated that a representative from the Department of Pesticide Regulation was not present and that Ms. Okuma gave an update in her report.

## **IX. PRE-TREATMENT COMMITTEE UPDATE**

Kevin Etheridge, Contractors Termite & Pest Control and committee member, stated that the committee had recommendations for the Board to consider. The committee developed a definition for pre-treatment, a notice of preconstruction treatment that will notify the Board, tagging requirements, and notice of treatment. Legislative language was drafted to put the pre-treatment requirements into law. Mr. Etheridge stated that the committee will reconvene to develop regulations once legislative authority is established.

Mr. Heppler stated that the draft language is not fully developed but is an example to determine if the Board wished the committee to proceed.

Mr. Etheridge provided some possible opposition to the pre-treatment requirements. The first opposition may be why the requirements are necessary. Mr. Etheridge reported that several states have established pre-treatment guidelines and that California is behind as a result of not having them. He added that establishing the guidelines would create a level playing field. Another concern is the current state of the economy. Mr. Etheridge stated that now is a good time to establish the pre-treatment requirements so that when the housing and construction markets pick up, new constructions will have been properly pre-treated.

## **II. REINSTATEMENT HEARING**

The Board sat with Administrative Law Judge H. James Ahler and Deputy Attorney Generals Christina Thomas and Rene Judkiewicz to hear the Petition for Reinstatement of Don L. Wilkes, Sr., Field Representative's License No. FR 34973 and Frank Robles, Operator's License No. OPR 5832. The petitioners were informed that they would be notified by mail of the Board's decision.

## **III. PETITION FOR MODIFICATION / TERMINATION OF PROBATION**

The Board sat with Administrative Law Judge H. James Ahler and Deputy Attorney General Christina Thomas to hear the Petition for Modification/Termination of Probation of Cesar Lara, Field Representative's License No. FR 38391. The petitioner was informed that he would be notified by mail of the Board's decision.

## **IX. PRE-TREATMENT COMMITTEE UPDATE continued**

Mr. Etheridge stated that the committee is asking the Board to conceptually accept the committee's recommendations.

Mr. Sesay commented that the proposed definition was very general.

Mr. Etheridge responded that the committee had developed a broad definition to allow for future technology.

Mr. Morris asked for information about the jurisdictional issues regarding pre-treatment enforcement.

Ron Moss, Board Specialist and committee chair, responded that the jurisdiction would be between DPR and the Board. The Board has a contract with DPR for each county to have pesticide-use enforcement authority for Board licensees, however it was determined that the Board would be the lead agency for pre-treatment enforcement. Mr. Moss added the recommendations would not preclude any county from exercising its current pesticide-use enforcement authority when pre-treatments are performed.

Mr. Good reported that PCOC conceptually supports the proposed pre-treatment guidelines. PCOC suggests that the language be changed to involve the Contractors State Licensing Board. PCOC would also like more specific details of the method of notification and the fee requirement.

Joe Gatto, Clark Pest Control, thanked the committee for its work and the Board for supporting the proposed guidelines. He added that he fully supports the proposed guidelines.

Gary Woolery, Americana Termite Company Inc., asked how the tag would be posted for homes that are on a slab.

Mr. Etheridge responded that the tagging requirements will be outlined when the Board proposes regulatory changes. He suggested that the tag could possibly be posted on the conduit.

Mr. Etheridge stated that the fee for pre-treatment filings will mirror the inspection and completion fee. He added that the fee would likely be attached to the notice of completion. Mr. Etheridge reported that the committee had debated on the notification requirements and have proposed a two hour notification to the Board.

Ms. Okuma stated that she has spoken with DCA's Legislative Unit and they believed that the proposals are complex and that more details need to be developed. The Board will seek legislative amendments next year, once more details are developed.

Mr. Sesay moved and Mr. Arzate seconded to formally accept the proposed pre-treatment guidelines with the understanding that the legislative language will continue to be developed. Passed unanimously.

X. PROPOSED AMENDMENT OF SECTION 1997 OF TITLE 16 OF THE CALIFORNIA CODE OF REGULATIONS - WDO INSPECTION AND COMPLETION ACTIVITY FEE INCREASE

Ms. Saylor stated that the WDO fee is the primary source of revenue for the Board. The fee has historically been adjusted to maintain the proper level of funds in reserve. The last change to the fee occurred January 1997, when the fee was decreased from \$2.00 to \$1.50. Since the housing boom of 2004/2005, the Board's revenue has been declining gradually and is projected to be in the red by June 30, 2010. Board staff has created two fund conditions with two possible fee increases. By increasing the WDO fee to \$2.00, the Board would not be in the red until June 30, 2011. By increasing the WDO fee to \$2.50, the Board's budget would stabilize and the proper amount of reserves would be present for at least 3 years.

Mr. Van Hooser stated that the fee increase will really be an increase to consumers through the inspection fee. He suggested that the Board chose the \$2.00 fee since the housing market may rebound.

Mr. Morris stated his interest in keeping the Board out of the red and suggested that the Board consider the \$2.50 fee.

Mr. Heppler reported that the proper motion would be to set the matter for public hearing.

Greg Augustine, Harbor Fumigation, stated that the Board is no longer handling and processing the reports and that the fee used to cover Board staff labor. He suggested that the Board look at its revenue structure to determine if there are other means of increasing revenue and not leaning on the branch 3 companies.

Jack Launius, Borite Termite & Pest Treatments Corporation, agreed with Mr. Augustine.

Ms. Okuma reported that she does not disagree with Mr. Augustine but that the Board's legislative caps on fees for the other branches are close to being at max.

Mr. Woolery asked if other states require a fee for branch 3 activities.

Mr. Etheridge responded that in Arizona, there is an \$8.00 termite action report fee that is required for pre and post treatments. There is no fee for a company to perform an estimate.

Ms. Okuma stated that in the past, it has been determined that the Board charges far less than other states, including licensing and renewal fees.

Mr. Utley stated that he would recommend that the Board chose the \$2.00 fee and reexamine the issue in about 18 months.

Mr. Morris asked the industry for a dollar amount spent for companies that are paying the WDO fees.

Anna Folkins, Xtermite Inc., stated that her company pays approximately \$14,000 per year on WDO activities.

Mr. Utley reported that the majority of southern California companies do not charge for inspections.

Ms. Folkins stated that her company incurs the filing fee for inspections.

Ms. Melton stated that the decision to charge an inspection fee is up to the company.

Mr. Woolery stated that he used to charge inspection fees but currently, in southern California, companies are not charging inspection fees due to increased competition.

Mr. Morris stated that it appeared the \$2.50 fee could be a hardship to southern California companies and suggested that the Board choose the \$2.00 fee.

Mr. Morris moved and Mr. Sesay seconded to notice for public hearing to amend section 1997 to increase the WDO fee to \$2.00 and to review the fee and its impact on the Board's revenues once enacted. Passed unanimously.

Mr. Heppler asked about a possible effective date of the fee increase.

Ms. Okuma responded that the effective date will be July 1, 2010.

XI. PROPOSED AMENDMENT OF SECTION 1999.5 OF TITLE 16 OF THE CALIFORNIA CODE OF REGULATIONS REGARDING FALSE AND MISLEADING ADVERTISING; CONSIDERATION OF TASK FORCE RECOMMENDATIONS UPON DISAPPROVAL OF RULEMAKING BY THE OFFICE OF ADMINISTRATIVE LAW

Mr. Heppler stated that the Office of Administrative Law (OAL) disapproved the Board's rulemaking file concerning section 1999.5. The Board was granted an extension to bring the file into compliance and the False and Misleading Task Force met to address OAL's concerns.

Mr. Vaughn added that the Board needs to move for a 15-day modified text, as follows, as well as authorize Board staff to add the minutes of the February 19, 2009 minutes, the addendum to the final statement of reasons, and Code of Federal Regulations (CFR) section 260.5 to the rulemaking file.

Single underlined text indicates text originally added.

Single strikethrough means text originally deleted.

Double underline indicates text added for the 15-day review period

Double strikethrough indicates text deleted for the 15-day review period.



§1999.5. False and Misleading Advertising

It is the purpose of this regulation 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 the potential of these products and services to reduce impact to health or the environment.

(a) It is unlawful for any licensee, or any employee thereof, directly or indirectly to make, disseminate, represent, claim, state, or advertise, or cause to be made, disseminated, represented, claimed, stated or advertised by any manner or means whatever, any statement or representation concerning structural pest control, as defined in Business and Professions Code section 8505, which is unfair, deceptive, untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be unfair, deceptive, untrue or misleading.

(b) As used in this section, the terms "make," "disseminate," "represent," "claim," "state," or "advertise" and any of their variants include, but are not limited to any print communications (for example, telephone directories, newspapers, magazines or other publications or books, notices, circulars, pamphlets, letters, handbills, posters, bills, signs, placards, cards, labels, tags, vehicle or equipment signage, window displays, or store signs), electronic communication (for example, radio, television, audio or video tape, telephone, or the Internet), demonstration, direct person-to-person contact, or other means or methods now or hereafter employed to bring structural pest control services, methods, products, pesticides, or devices to the attention of the public. ~~for the purpose of requesting any work or services or for the direct or indirect purpose of to performing or to offering to perform services for which a license is required by section 8500 and following of the Code.~~

(c) As used in this section "the exercise of reasonable care" includes a duty to investigate the basis of any statement or representation to assure that the statement or representation is not unfair, deceptive, untrue or misleading. The making of a statement or representation without knowledge of its truthfulness breaches the duty to investigate.

(d) Violation of this section occurs at the time an unfair, deceptive, untrue or misleading statement or representation is made. Once a violation occurs, subsequent disclosures, caveats, disclaimers, or waivers cannot eliminate it.

(e) The remedies or penalties provided by this section are cumulative to each other and to the remedies or penalties available under all other laws and regulations of this State.

(f) Examples of direct or indirect statements or representations which are unfair, deceptive, untrue or misleading include, but are not limited to, the following:

- (1) any advertising in violation of Business and Professions Code sections 17200, and 17500;
- (2) any statement or representation that misrepresents or fails to disclose an important or necessary fact about a pest control service, method, product, pesticide or device;
- (3) any unfair, deceptive, untrue or misleading statement or representation about the effects of a pest control service, method, product or device;
- (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 (f)(4) shall only apply to Branch 3 activities;
- (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. This subsection (f)(5) shall only apply to Branch 3 activities;

(6) any statement or representation that a pest control service, product, pesticide, or device or combination thereof offers a general environmental protection or benefit unless the statement or representation can be substantiated within the meaning of section 260.5 of title 16 of the Code of Federal Regulations (2008), hereby incorporated by reference, ~~16 CFR, 260.5~~ and is limited to the specific nature of the environmental or health benefit being asserted, , 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”;

(7) any unfair, deceptive, untrue or misleading statement concerning the composition of a pest control service, method, product, pesticide or device;

(8) any unfair, deceptive, untrue or misleading statement concerning the effectiveness of a pest control service, method, product, pesticide or device;

(9) any unfair, deceptive, untrue or misleading statement about the value of a pest control product for purposes other than as a pesticide or pest control device;

(10) any unfair, deceptive, untrue or misleading comparison of pest control services, methods, products, pesticides or devices;

(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 of this type is permissible if specifically authorized by the Federal or State agency to which it refers.

(12) a statement which is literally true but is used in such a way as to give an unfair, deceptive, untrue or misleading impression to the consumer;

(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”;

~~(14) claims that the pesticides and other substances the licensee applies, the application of such pesticides, or any other use of them are comparatively safe or free from risk or harm;~~

(14) (14) claims regarding services and products for which the licensee does not have substantiation in the form of tests, analysis, research, studies, or other evidence that was conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in the profession or science to yield accurate and reliable results; and

~~(15) (15) any statement or representation concerning structural pest control that is conditioned or subject to any requirement, condition, limitation, disclaimer or waiver, that is not immediately followed by a clear and conspicuous statement of said requirement, condition, limitation, disclaimer or waiver.~~

NOTE: Authority cited: Section 8525, Business and Professions Code. Reference: Sections 8648, 17200 ~~et seq.~~ and 17500 ~~et seq.~~, Business and Professions Code; Section 260.5, title 16, Code of Federal Regulations (2008).

Mr. Sesay moved and Mr. Arzate seconded to distribute a 15-day notice of modified text and add the False and Misleading Advertising Task Force meeting minutes dated February 19, 2009, the addendum to the final statement of reasons, and CFR section 260.5 to the rulemaking file.

Elizabeth Cason, Foley & Lardner LLP., questioned why the addendum to the final statement of reasons already stated that the Board voted to distribute a 15-day modified text.

Mr. Heppler responded that the sentence in question was prepared prematurely.

Mr. Woolery stated that he "googled" the term orange oil and numerous companies exist that state that they use orange oil when the product they are using is only a small percentage of actual orange oil.

Ms. Okuma suggested that Mr. Woolery get the information to Mr. Lucas for his review.

Lee Whitmore, Beneficial Exterminating Inc., stated that the modified text before the Board was not exactly what the task force had agreed upon.

Mr. Sesay made a friendly amendment to his motion to correct the correct the language that the committee recommended as follows. Passed unanimously.

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(a) It is unlawful for any licensee, or any employee thereof, directly or indirectly to make, disseminate, represent, claim, state, or advertise, or cause to be made, disseminated, represented, claimed, stated or advertised by any manner or means whatever, any statement or representation concerning structural pest control, as defined in Business and Professions Code section 8505, which is unfair, deceptive, untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be unfair, deceptive, untrue or misleading.

(b) As used in this section, the terms "make," "disseminate," "represent," "claim," "state," or "advertise" and any of their variants include, but are not limited to any print communications (for example, telephone directories, newspapers, magazines or other publications or books, notices, circulars, pamphlets, letters, handbills, posters, bills, signs, placards, cards, labels, tags, vehicle or equipment signage, window displays, or store signs), electronic communication (for example, radio, television, audio or video tape, telephone, or the Internet), demonstration, direct person-to-person contact, or other means or methods now or hereafter employed to bring structural pest control services, methods, products, pesticides, or devices to the attention of the public. ~~for the purpose of~~

~~requesting any work or services or~~ for the direct or indirect purpose of performing or offering to perform services for which a license is required by section 8500 and following of the Code.

(c) As used in this section "the exercise of reasonable care" includes a duty to investigate the basis of any statement or representation to assure that the statement or representation is not unfair, deceptive, untrue or misleading. The making of a statement or representation without knowledge of its truthfulness breaches the duty to investigate.

(d) Violation of this section occurs at the time an unfair, deceptive, untrue or misleading statement or representation is made. Once a violation occurs, subsequent disclosures, caveats, disclaimers, or waivers cannot eliminate it.

(e) The remedies or penalties provided by this section are cumulative to each other and to the remedies or penalties available under all other laws and regulations of this State.

(f) Examples of direct or indirect statements or representations which are unfair, deceptive, untrue or misleading include, but are not limited to, the following:

(1) any advertising in violation of Business and Professions Code sections 17200, and 17500;

(2) any statement or representation that misrepresents or fails to disclose an important or necessary fact about a pest control service, method, product, pesticide or device;

(3) any unfair, deceptive, untrue or misleading statement or representation about the effects of a pest control service, method, product or device;

(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 (f)(4) shall only apply to Branch 3 activities;

(5) any representation that a service, method, product, pesticide, or device, or combination thereof, ~~that is not designed intended~~ 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.~~ This subsection (f)(5) shall only apply to Branch 3 activities;

(6) any statement or representation that a pest control service, product, pesticide, or device or combination thereof offers a general environmental protection or benefit unless the statement or representation can be substantiated within the meaning of section 260.5 of title 16 of the Code of Federal Regulations (2008), hereby incorporated by reference, 16 CFR, 260.5 and is limited to the specific nature of the environmental or health benefit being asserted, ; 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";

(7) any unfair, deceptive, untrue or misleading statement concerning the composition of a pest control service, method, product, pesticide or device;

(8) any unfair, deceptive, untrue or misleading statement concerning the effectiveness of a pest control service, method, product, pesticide or device;

(9) any unfair, deceptive, untrue or misleading statement about the value of a pest control product for purposes other than as a pesticide or pest control device;

(10) any unfair, deceptive, untrue or misleading comparison of pest control services, methods,

products, pesticides or devices;

(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 of this type is permissible if specifically authorized by the Federal or State agency to which it refers.

(12) a statement which is literally true but is used in such a way as to give an unfair, deceptive, untrue or misleading impression to the consumer;

(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";

~~(14) claims that the pesticides and other substances the licensee applies, the application of such pesticides, or any other use of them are comparatively safe or free from risk or harm;~~

~~(15)~~ (14) claims regarding services and products for which the licensee does not have substantiation in the form of tests, analysis, research, studies, or other evidence that was conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in the profession or science to yield accurate and reliable results; and

~~(16)~~ (15) any statement or representation concerning structural pest control that is conditioned or subject to any requirement, condition, limitation, disclaimer or waiver, that is not immediately followed by a clear and conspicuous statement of said requirement, condition, limitation, disclaimer or waiver.

NOTE: Authority cited: Section 8525, Business and Professions Code. Reference: Sections 8648, 17200 ~~et seq.~~ and 17500 ~~et seq.~~, Business and Professions Code; Section 260.5, title 16, Code of Federal Regulations (2008).

## **XII. DISCUSSION REGARDING REQUIREMENT TO POST LICENSEE EMPLOYMENT INFORMATION ON STRUCTURAL PEST CONTROL BOARD WEBSITE (BUSINESS AND PROFESSIONS CODE SECTION 27)**

Ms. Okuma stated that at the January Board meeting, legal counsel was directed to examine Business and Professions (B&P) Code section 27 regarding the requirement to post licensing information on the Board's website. In a letter prepared by the Board's legal counsel, the only solution would be to seek a legislative amendment to section 8567 and then make a regulatory change.

Mr. Van Hooser stated that his concern was over the number of "cancelled" licenses that remain on the website's License Look-up. He added that the cancelled licenses are no longer licensees and the Board should be allowed to remove them from the website.

Mr. Utey asked if it would be possible for licenses that have been cancelled due to the individual gaining a higher license be labeled as "upgraded" as opposed to "cancelled."

Ms. Okuma responded that the Board's database would likely not be able to indicate an upgraded license but that it could be possible to have DCA remove "cancelled" licenses from the Board's website.

Mr. Heppler stated that Board staff would report at the next Board meeting concerning the removal of cancelled licenses.

**XIII. CONSIDERATION OF PROPOSED LEGISLATION TO ALLOW A PEST CONTROL COMPANY TO CHANGE EMPLOYMENT HISTORY OF INDIVIDUAL LICENSEES**

Ms. Okuma reported that at the January Board meeting, the Board indicated that it would not seek legislation itself to allow a company to change licensee employment information. She asked if the industry had explored seeking an author for a legislative amendment.

Mr. Hopper responded that he recalled from the discussion that there might be a short-term fix.

Mr. Whitmore stated his concern with getting former employees, who are still active licensees working for other companies, removed from his company listing on the Board's website.

Mr. Good reported that individuals can be convicted of misdemeanors or felonies and that companies cannot remove them from the website.

Mr. Utey stated that he would like to see what Ms. Okuma can do about removing the cancelled licenses as discussed in agenda item XII. He also suggested that individuals could be disciplined if they have not completed the notice of dual employment.

Mr. Heppler stated that he would draft generic legislative language to explore a possible solution.

Mr. Utey suggested that, in the future, the Board lump agenda items XII. and XIII. together since they are related.

**XIV. PROPOSED AMENDMENT OF SECTION 8555 OF BUSINESS AND PROFESSIONS CODE – LICENSING EXEMPTION FOR THE LIVE CAPTURE, REMOVAL OR EXCLUSION OF MICE, RATS OR PIGEONS (MERRIFIELD V. LOCKYER)**

Mr. Heppler stated that the teleconference meeting held on February 20, 2009, was to discuss the settlement of Merrifield v. Lockyer in which the Board was sued and ultimately lost. Business and Professions Code section 8555 needs to be amended as the law has been determined to be obsolete. Mr. Heppler suggested two options: (1) amend 8555 to state that a license is not required for the live capture, removal, or exclusion of vertebrate

pests, or (2) amend 8555 to state that a license is required for the live capture, removal, or exclusion of vertebrate pests.

Eric Paulsen, Clark Pest Control, stated that he has been involved with the legislation since 1994. He recommended that option (2) that Mr. Heppler suggested would be better and stated that simply striking out subsection (g) would accomplish the task of requiring a license for live capture, removal, or exclusion of all pests.

Mr. Heppler stated that if subsection (g) was removed, the Merrifield case would have never happened.

Ms. Melton moved and Mr. Arzate seconded to seek a legislative amendment to strike out subsection (g) of B&P Code section 8555. Passed unanimously.

**XV. PROPOSED AMENDMENT OF SECTION 1971 OF TITLE 16 OF THE CALIFORNIA CODE OF REGULATION – REPEAL SECTION ALREADY INCLUDED IN CALIFORNIA FOOD AND AGRICULTURE CODE REGARDING GAS MASKS**

Ms. Okuma stated that with the repeal of B&P Code section 8515, the Board should repeal the subsection (b) mandating gas masks in CCR section 1971.

Ms. Melton moved and Mr. Sesay seconded to notice for public hearing to repeal subsection (b) of CCR section 1971. Passed unanimously.

**XVI. DISCUSSION AND CONSIDERATION OF A STRATEGIC PLANNING MEETING**

Ms. Okuma has met with DCA and staff is now available for strategic planning sessions. A facilitator is available and the Board should schedule the meeting in conjunction with the next Board meeting.

**XVII. FUTURE AGENDA ITEMS**

Mr. Good suggested that the Board consider making applicator licenses expire on June 30 much like the field representative and operator licenses. He also suggested another expiration date of December 31. Mr. Good stated that having applicator licenses expire on a specific date would help employers manage their applicators.

Ms. Okuma responded that the issue had been discussed before.

Mr. Utley stated that the item would be added to the agenda for the July meeting.

Ms. Cason stated that IPMCC had submitted a request for rulemaking to clarify B&P Code section 8666. Mr. Heppler responded that IPMCC has requested the Board to adopt a regulation and the item will be on the July meeting agenda.

#### **XVIII. BOARD MEETING CALENDAR**

Ms. Okuma stated that DCA is looking to hold a mini-summit in October in Riverside.

Mr. Morris suggested that the July meeting be held in Oakland.

Ms. Okuma stated that Board staff will try to secure a state location in Oakland for July 23 and 24, and that the strategic planning meeting will be included. The dates for the October meeting are unknown as the Board is awaiting more information from DCA concerning the mini-summit.

#### **XIX. SUMMARY OF ALL ACTIONS TAKEN BY THE STRUCTURAL PEST CONTROL BOARD AT THIS MEETING**

- The minutes of the January 23, 2009, meeting were approved.
- The minutes of the February 20, 2009, meeting were approved.
- The Board voted to accept the Pre-Treatment Committee's recommendations.
- The Board voted to notice for public hearing to increase the WDO filing fee by \$.50 to \$2.00.
- The Board moved to release a 15-day modified text for CCR section 1999.5 and to add the minutes of the February 20, 2009, Task Force meeting, the Addendum to the Final Statement of Reasons, and the CFR 260.5 section to the rulemaking file.
- The Board directed staff to inquire if the department can remove "cancelled" licenses from the Board's license look-up.
- The Board voted to seek a legislative amendment to strike out subsection (g) of B&P Code section 8555.
- The Board voted to notice for public hearing to amend section 1971 to remove the gas mask language.
- The July meeting date and location was set for July 23 and 24 in Oakland.
- To be added to the July agenda, examine the applicator expiration date and regulation clarification of B&P Code section 8666.

#### **XX. PUBLIC COMMENTS ON ITEMS NOT ON THE AGENDA**

Mr. Van Hooser asked about the test holes issue that had been discussed at prior meetings.

Ms. Okuma responded that the issue had been referred to the Technical Advisory Committee and that committee will meet on May 19, 2009.



Mr. Van Hooser stated that the Board defines "fumigant" in the Board's laws and regulations. He added that a gas is defined by the Environmental Protection Agency and others and does not make sense for the Board to define "fumigant."

Michael Cartwright Sr., Cartwright Termite & Pest Control Inc., submitted documents pertaining to the removal of bees.

Ms. Cason stated Foley & Lardner LLP submitted a letter to the Board in regards to a research project being conducted by Vernard Lewis of the University of California, Berkeley. The project is not using the orange oil product XT-2000 but rather a misbranded orange oil product. Ms. Cason requested that the Board review the contents of the letter and respond.

**XXI. 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.

**XXII. ADJOURNMENT**

Mr. Utley adjourned the meeting at 2:31 p.m.

Clifford J. Utley  
CLIFF UTLEY, President

Kelli Okuma  
KELLI OKUMA, Executive Officer

7-24-09  
DATE