

STRUCTURAL PEST CONTROL BOARD

FINAL STATEMENT OF REASONS

Hearing Date: No hearing was held or requested.

Subject Matter of Proposed Regulations: Disciplinary Criteria

Sections Affected: California Code of Regulations (CCR), Title 16, Division 19, Article 3, Sections 1936, 1936.1, 1936.2, 1937.1 and 1937.2.

Request for Early Effective Date

As the provisions of AB 2138 go into effect July 1, 2020, the Board requests an effective date of July 1, 2020 to coincide with statute.

Updated Information

The Initial Statement of Reasons is included in the file. The information contained therein is updated as follows:

The initial comment period for this rulemaking was from February 21, 2020 to April 6, 2020, during which no comments were received by the Structural Pest Control Board (Board).

The Board modified the proposed regulatory text as follows:

1. CCR, title 16, section 1937.1:
 - a. Subsection (a): Added reference to Business and Professions Code (BPC) section 8623, subdivision (c), which requires the Board, upon denial of a license for a prior criminal conviction, to state the justifications for its decision by stating the reasons why the prior conviction is substantially related to the qualifications, functions, or duties of a licensed structural pest control operator.

Added reference to BPC section 8649, which states a conviction of a crime substantially related to the qualifications, functions, and duties of a structural pest control operator, field representative, applicator, or registered company is ground for disciplinary action.

Added reference to BPC section 8655, subdivision (b), which states a plea or verdict of guilty or a conviction following a plea of nolo contendere

made to a charge substantially related to the qualifications, functions, and duties of a structural pest control operator, field representative, applicator, or registered company is deemed to be a conviction. This section also describes when a conviction is sufficiently final for the Board to take action on that conviction.

Added conforming changes to the grammar of proposed section 1937.1 by changing the phrase “section 141 or” to “section 141,” which allows for the above changes to be made in a grammatically correct fashion.

These additions ensure section 1937.1 completely enumerates the BPC sections in the relevant practice act that relate to the concept of substantial relationship.

- b. Subsection (b): Inserted “all of” before “the following criteria” to reflect the statutory requirement in Business and Professions Code (BPC) section 481, subdivision (b).
 - c. Subsection (b)(1) through (3): Made technical punctuation corrections.
 - d. Authority and Reference: Made minor revisions to delete inapplicable authority sections and added statutes relevant to substantial relationship criteria.
2. CCR, title 16, section 1937.2:
- a. Subsection (a): Added a new heading “Denial of a license” to clarify this subsection refers to criteria for rehabilitation applicable to license applicants.
 - b. Subsection (a)(1): Revised subsection numbering and made technical revisions. Revised the phrase “the applicant was convicted of a crime” to instead read “the applicant has been convicted of a crime” to conform the proposed regulation to the language used in BCP section 480, subdivision (a), as added by AB 2138. Struck “and is presently eligible for a license” because the meaning of the term “presently” was unclear to the regulated public and the phrase was determined to be unnecessary given the other clarifying modifications to the proposal.
 - c. Subsection (a)(1)(A) through (E): Made technical revisions to reflect the new subsection numbering and lettering scheme.
 - d. Subsection (a)(2): Revised subsection numbering and removed and restated the subsection to clarify that this subsection sets forth the

rehabilitation criteria the Board will apply to applicants with a criminal conviction who have not completed the criminal sentence without a violation of parole or probation, applicants with a criminal conviction who did not make a showing of rehabilitation under subsection (a), proceedings in which the denial is based on professional misconduct (as that term is used under new BPC section 480), and proceedings in which the denial is based on one or more grounds as specified in BPC section 8623, which authorizes the Board to revoke, suspend, or deny a license on any of the grounds listed for disciplinary action in BPC Division 3, Chapter 14 (“Structural Pest Control Operators”).

Subsequent to the comment period ending for the 15 Day Notice of Modified Text, a non-substantial change to the text was made to subsection (b)(A)(2) to correct a drafting error by clarifying that the rehabilitation criteria is based specifically on the criteria outlined in subsection (a)(1) rather than simply on subsection (a).

These clarifications are necessary to inform the public, applicants, and Board staff that rehabilitation criteria will be considered for all application denials, regardless of whether the grounds for denial stem from BPC section 480. The clarifications promote equity and fairness by ensuring all applicants will have the ability to submit rehabilitation evidence to the Board for its consideration, which is in keeping with the legislative intent of AB 2138. The clarifications also provide consistency with other DCA board regulations.

- e. Subsection (a)(2)(A) through (C): Added “professional misconduct” for consistent use with the term in CCR section 2655 and to differentiate “professional misconduct” as a ground for denial provided under new BPC section 480, subsection (a)(2), from other “acts” that are grounds for denial provided under BPC section 8623.

Subsequent to the comment period ending for the 15 Day Notice of Modified Text, a non-substantial change to the text was made to the phrase “subdivision (a)(1)(A-E)” by replacing it with “subdivision (a)(1)(A) through (E)” to more clearly articulate that the phrase refers to a series of subsections, all of which are applicable. Changing a hyphen to the word “through” shows the list is inclusive.

- f. Subsection (b): Added a new heading “Suspension or revocation of a license” to clarify this subsection refers to criteria for rehabilitation applicable to issued licenses.

- g. Subsection (b)(1): Clarified that this subsection sets forth the conditions for applying rehabilitation criteria for suspension or revocation of a license for criminal convictions pursuant to BPC section 490 (if the licensee completed the criminal sentence at issue without a violation of parole or probation), and struck “and is presently eligible for a license or registration.” The meaning of the term “presently” was unclear to the regulated public and the phrase was determined to be unnecessary given the other clarifying modifications to the proposal.
- h. Subsection (b)(1)(A) through (E): Made technical revisions to reflect the new subsection numbering and lettering scheme.
- i. Subsection (b)(2): Removed and restated subsection (d) as subsection (b)(2) and clarified that this subsection sets forth rehabilitation criteria the Board will apply to licensees with a criminal conviction who have not completed the criminal sentence without a violation of parole or probation, licensees with a criminal conviction who did not make a showing of rehabilitation under subsection (b)(1), proceedings in which the suspension or revocation is based on a disciplinary action as described in BPC section 141, and proceedings in which the suspension or revocation is based on one or more grounds specified in BPC section 8623, which authorizes the Board to revoke, suspend, or deny a license on any of the grounds listed for disciplinary action in BPC Division 3, Chapter 14 (“Structural Pest Control Operators”).

These clarifications are necessary to inform the public, licensees, and Board staff that rehabilitation criteria will be considered for all license suspensions and revocations, regardless of whether the grounds for discipline stem from BPC section 490. The clarifications promote equity and fairness by ensuring all licensees will have the ability to submit rehabilitation evidence to the Board for its consideration, which is in keeping with the legislative intent of AB 2138. The clarifications also provide consistency with other DCA board regulations.

- j. Subsection (b)(2)(A) and (C): Added “disciplinary action(s)” for consistent use of the term disciplinary action under BPC section 141 provided in subsection (b)(2) and to differentiate “disciplinary action” as a ground for revocation or suspension provided under BPC section 141, from other “acts” that are grounds for revocation or suspension.

Subsequent to the comment period ending for the 15 Day Notice of Modified Text, a non-substantial change to the text was made to the

phrase “subdivisions (b)(1)(A-E)” by replacing it with “subdivisions (b)(1)(A) through (E)” to more clearly articulate that the phrase refers to a series of subsections, all of which are applicable. Changing a hyphen to the word “through” shows the list is inclusive.

- k. Subsection (b)(2)(A) through (G): Made technical revisions to reflect the new subsection numbering and lettering scheme.
- l. Subsection (c): Made technical corrections to conform this subsection to the lettering changes in the other subsections.
- m. Authority and Reference: Minor technical revisions to add statutes relevant to rehabilitation criteria.

On March 12, 2020, the Board reviewed and approved the modifications to the proposed regulatory text.

On April 15, 2020, the Board issued a 15-day notice of availability of modified text, and the comment period closed on May 1, 2020.

Local Mandate

A mandate is not imposed on local agencies or school districts.

Small Business Impact

The proposed regulations may affect small businesses, who would otherwise not qualify for a permit, however, the Bureau is unaware of the number of potential small businesses that would be impacted by this regulatory proposal.

Economic Impact Assessment:

The Board currently licenses approximately 3,100 pest control businesses and 25,400 individuals in California and typically approves approximately 3,700 initial license applications per year.

To the extent a license applicant and/or licensee was convicted of a crime or was previously disciplined, the proposed regulations could impact individual licensees if they have met the rehabilitative criteria, and the criminal convictions are substantially related, as established in the regulatory proposal.

However, because the Board historically denies a minimal number (less than 5) initial applications per year, as specified, the Board does not anticipate an increase in the number of new initial licensees resulting from the proposed regulations

Fiscal Impact:

Because the Board historically denies a minimal number (less than five) of initial applications per year, no increase in the number of initial applications approved per year is anticipated. As a result, the proposed regulations are not anticipated to increase licensing and/or enforcement costs related to any expansion of the licensee population.

Anticipated Benefits of this Proposal

As specified in the legislative analyses of AB 2138, this proposal seeks to reduce barriers to licensure for individuals with prior criminal convictions, which may reduce recidivism and provide economic opportunity to California's residents. In addition, the proposal seeks to improve clarity, transparency, and consistency for applicants and licensees in the SPCB's use of their criminal histories. Further, by reducing barriers to licensure, the SPCB anticipates benefits to consumers who may have greater access to licensed professionals.

Alternatives Determination

No reasonable alternative to the regulatory proposal would be either more effective in carrying out the purpose for which the regulation is proposed or would be as effective or less burdensome to affected private persons than the proposed regulation, or equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the law being implemented or made specific.

Set forth below are the alternatives that were considered and the reason the alternative was rejected or adopted:

- Option 1: To pursue a regulatory change that requires the SPCB to find rehabilitation if the applicant or licensee completed the terms of their criminal probation or parole. Courts give little weight to the fact that an applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole since they are under the direct supervision of correctional authorities and are required to behave in an exemplary fashion. As such, the SPCB believes that reviewing each individual on the basis of multiple criteria is the better indicator whether individuals are rehabilitated and not a danger to the public's health, safety, and welfare. For these reasons, the Board rejected this option.
- Option 2: Do nothing, meaning the Board would not adopt the regulations. The Board opted not to pursue this option because per AB 2138, the Board is

mandated to adopt proposed regulations by July 1, 2020.

Summary of Comments Received During the 45-day Comment Period

The proposed text was made available to the public for comment from February 21, 2020 to April 6, 2020. No public comments, objections, or recommendations were received during this comment period. As noted below, one comment was received on April 15, 2020 after the end of the 45-day comment period and during the 15-day comment period.

Summary of and Responses to Comments Received During the 15-day Comment Period

One comment was received by the Board on April 15, 2020 from Ed Wilson. There were no further objections or recommendations regarding the proposed action.

Comment 1

Comment Summary: Mr. Wilson wrote he follows the Board's activities and was aware the Board's proposed language changed the word "will" to "shall." Mr. Wilson suggested the Board change the proposed word "will" to "must," unless "the intention is to allow the Board leeway to NOT maintain these records." Mr. Wilson provided also an internet link to the Federal Employment Law Training Group (<https://feltg.com/shall-will-may-or-must>).

Response: No response is necessary.

This comment was received outside the initial 45-day comment period for the proposed text, and during the 15-day comment period for the modified text. The Notice of Modified Text states:

Please note, comments should be restricted to the most recent modifications made to the proposed regulations. The Board is not required to respond to comments on other aspects of the proposed regulations received in response to this notice.

Further, Government Code section 11346.8(c) states, regarding changes requiring a 15-day comment period "Any written comments received regarding the change must be responded to in the final statement of reasons required by Section 11346.9"

There are no changes in the modified text necessitating the 15-day comment period that pertain to the use of "will" or "shall." Because this comment was not received during the initial 45-day comment period, and because this comment does not concern the

changes necessitating the 15-day comment period, no response to this comment is required.

Nonetheless, some recent case law on the issue has erred on the side of concluding the use of “shall” indicates mandatory action. The Supreme Court of the United States, in *Maine Community Health Options v. United States* (2020), 140 S.Ct. 1308, the Court reasoned the use of “shall” in a statute imposed a nondiscretionary obligation: “Unlike the word ‘may,’ which implies discretion, the word ‘shall’ usually connotes a requirement.” 149 S.Ct. 1308 at 1320, citing *Kingdomware Technologies Inc. v. United States* (2016), 136 S.Ct. 1969, 1977.

California statute has also treated the word “shall” as being mandatory. Government Code section 14, first enacted in 1943, states “‘shall’ is mandatory and ‘may’ is permissive.” Corporations Code section 15 states the same. No discernable definitional statutes appear to differentiate between “will” and “shall.”

The question of the intent of the word “shall” has been litigated extensively in California, most often hinging on the idea that “[t]he word ‘shall,’ when used in a statute, is ordinarily construed as mandatory or directory, as opposed to permissive, particularly when...the Legislature has used both the terms ‘shall’ and ‘may’ in the same statute.” (*Severson & Werson, P.C. v. Sepehry-Fard* (2019), 37 Cal.App.5th 938, 946, quoting *Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535, 551-552, further citations omitted). There also recent California case law in which the question of whether ‘shall’ is *always* mandatory has been considered. In *People v. Ramirez* (2019) 41 Cal.App.5th 923 for example, the Court noted that statutory interpretation begins with examining the intent of the drafters of the statute in question, noting “the fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law.” (41 Cal.App.5th at 931, quoting *People v Pieters* (1991) 52 Cal.3d 894, 896, additional citations omitted).

Thus, where ambiguity in mandate is present, the intent of the drafters should be considered. Here, the Board is changing the word “will” to “shall” to clarify an obligation that already existed. Even assuming the comment on this point to be timely, the Board is declining to change the language at this time. The intent of ‘shall’ is to direct mandatory action.

Nonduplication Statement - 1 CCR § 12

The proposed regulations partially duplicate or overlap a state or federal statute or regulation which is cited as “authority” and “reference” for the proposed regulations and the duplication or overlap is necessary to satisfy the “clarity” standard of Government Code section 11349.1, subdivision (a)(3).

Incorporation by Reference

CCR section 1936 incorporates the Board's Application for License for operators or field representatives, referred to as Forms 43L-1 and 43L-14. Section 1936.1 incorporates the Application for Company Registration Certificate, referred to as Form 43L-26. Section 1936.2 incorporates the form for an Initial Applicator's License, referred to as Form 43L-21.

The incorporation by reference of these applications is appropriate since publishing these documents in the California Code of Regulations would be cumbersome, unduly expensive, impractical and unnecessary. The applications amended by this rulemaking have were previously incorporated by reference. The changes made to them via this rulemaking eliminate questions affected by the implementation of AB 2138. The existing forms contain images, non-regulatory information, and graphical components that would be impractical to publish in the Code of Regulations because doing so would require extensive regulatory language explaining the components. Further, the forms contain hyperlinks that cannot reasonably be published as such in regulatory text.

If anyone should wish to examine the revised applications, they have been made available upon request from the Board.

Updated Informative Digest

No changes have been made that would warrant an update to the Informative Digest contained in the original Public Notice of this regulatory proposal.

Non-Substantive Changes Made to the Regulation Text During Office of Administrative Law Review

1937.1(a) – Removed the word “subdivision (c) of” because 8623 in whole applied and did not change the regulatory effect.

1937.2(a)(2) – Added the words “parole or” before the word “probation” to make consistent with other uses in the regulation text.

1937.2(a)(2)(A) – Changed the word “severity” to “gravity” to remain consistent with language used in BPC 481. Additionally the two words are synonymous and there is no material effect on the regulation.

Section 1937.2(a)(2)(B) – Added the words “professional misconduct” after the words “the acts” for consistency with similar uses of language throughout the regulation.

Section 1937.2(b)(2)(A) – Changed the word “severity” to “gravity” to remain consistent

with language used in BPC 481. Additionally the two words are synonymous and there is no material effect on the regulation.

For both sections 1937.1 and 1937.2 revisions were made to authority and reference citations. These changes had no regulatory effect.