

December 11, 2011

Chair and OPM Task Force,

I would like to comment on things said during the November 16, 2011 OPM (Office of Pest Management) Task Force meeting. For your convenience, you will find a video of the meeting at:

<http://its-our-turn.com/>

under the OPM Task Force button and I will reference the time stamps in the video so you can conveniently go back and listen to everything that was said.

Will Rousseau is valiantly trying to understand the role of a QP (qualifying party) at 0:27:05. At 0:28:10, Jack Peterson states: "In order to have a business license you must have a qualifying party." David Burns says at 0:28:25: "The qualifying party - that license - is the person that is responsible for running of the business." However, ARS 32-2313(G) states: "Each branch office of a business licensee shall be supervised by a licensed applicator or qualifying party who is licensed in all categories in which the branch office operates." I interpret these words to mean that NO qualifying party is required to have a business license as long as there is a licensed applicator at the (branch) office who is licensed in the required categories. Since this is in law, it cannot be superseded by rule.

According to ARS 32-2314(G): "A person acting as a qualifying party shall: 1) Be active in the management of the business licensee by being present at the business office location each month to review pesticide use, storage and disposal and by ensuring the supervision and training of the employees of the business and 2) During normal business hours, be readily available to the licensed applicators and employees of the business licensee."

The law clearly states that the QP is only responsible to REVIEW what has happened once a month. I interpret the paragraph above to include the REVIEW of policies and procedures pertaining to pesticide use, storage and disposal. The paragraph goes on to add responsibility for ENSURING supervision and training of the employees of the business, which is not the same thing as performing the training and supervision. After all, how much training and supervision can you do by showing up once a month? Finally, the QP must be "readily available" during normal business hours - presumably by phone to answer any questions that might come up between visits.

The QP has no authority to manage the business. None. The QP has no authority to look at the books. The QP has no authority to make any financial decisions. The QP has no authority to keep records. The QP has no authority to set company policy. The QP has no authority to enforce any company policy. The QP has no authority to discipline an applicator. The QP has no authority to hire or fire an applicator. The QP has no authority to directly supervise or train the employees - only to ensure that they

are supervised and trained. But with no authority to control a company's finances and no requirement to show up more than once a month, how can a QP "ensure" anyone does anything?

Notice that the QP is an employee. An employee cannot be held liable for providing insurance, transportation, equipment, facilities, supplies and other things needed to perform the day-to-day work - things that only the business entity can take responsibility for. The business itself - the business license holder - owns the assets, controls the bank accounts and decides where to spend the money. The business must take ultimate financial responsibility for the actions of the employee licensed applicator or a supervised unlicensed employee applicator.

The State issued the license and also bears responsibility for a licensed applicator. If a licensed applicator acts outside the limits of the license, the State has responsibility to determine if the act was accidental or intentional. If accidental, the State should see what can be done to prevent another similar accident - perhaps through improving training. However, if the act was intentional and beyond a de minimis violation, then the license applicator can be fined, the license can be revoked or the individual can be prosecuted by the State's Attorney General.

However, this is a two way street. A business may try to pressure a licensed applicator into violating the applicator's license for financial gain. Remember, the licensed applicator is an employee and the business may directly or indirectly threaten the employee. The first example that comes to mind is asking the licensed applicator to dilute pesticide rates to save on pesticide costs. There are many ways for a company to cut corners and to apply pressure to an employee to reduce costs.

Let me give you an example of how things can get out of hand. You have a large termite pretreatment company and the company pre-mixes the 1500 gallons of insecticide for the next day's pretreatment the night before. The company also fills out the paperwork and tags so everything is ready when the licensed applicator shows up for work in the morning. The business has separate people performing those tasks. If automated mixing equipment is being used, it is possible that the mixing equipment was not set properly or is not functioning correctly - by accident, neglect or intention. Since the State rarely checks what is being applied, the licensed applicator can be spraying plain water without knowing it. However, everything has the appearance of being above board.

There needs to be a system put in place that will allow a licensed applicator to register a complaint against business practices that make it difficult for the licensed applicator to follow the license requirements. The licensed applicator must understand that he is both responsible for following the license requirements and for reporting a business that encourages the licensed applicator to violate the license requirements.

ARS 32-2308 covers the question of distributed liability.

In regard to training, a licensed applicator is presumed to be properly trained in all categories in which the applicator holds a license. After all, the purpose of a license is to show minimum competency. The State issued a license saying the applicator has sufficient skills to perform applications in the categories licensed. So the only other training the applicator needs is in company policies and procedures. That has nothing to do with pest control and therefore does not require a QP. If the company wanted to provide additional training to improve the skills of the applicator, why should there be any legal requirement to use a QP to arrange for training?

The applicator may pay for his own classes to improve his skill level and command a higher salary. Or the applicator may pay for his own classes to accumulate the required continuing education units (CEUs) required to maintain his license. On the other hand, the employer may be willing to pay the applicator to take classes as a benefit of the job. In any case, you don't need a QP to sign up the applicator for a class.

At 0:45:23 Kevin Ethridge said the handyman exemption was \$750 annually, and made a point that it was per year and not per job. He even said he wanted that to be noted. So we checked. The handyman exemption is covered by ARS 32-1121 and in all cases the exemption is for amounts less than \$1000 per job. Why was this even brought up? Because the pest control industry has a yardman exemption and the big pest control companies want to get rid of it.

At 0:46:52 Kevin Ethridge said he wanted the financial responsibility moved from the business to the QP. This is simply not possible legally as the QP is an employee and an employer cannot force an employee to be personally liable for things only the employer has authority over. The company holds all of the authority and thus the company must also take the responsibility.

Then Kevin Ethridge goes on to say at 0:47:05 that OPM and the Department of Agriculture is a consumer protection agency, whether you like it or not and that financial stability was required for consumer protection. The Department of Agriculture is actually an environmental protection agency. Moving financial responsibility away from the business to the QP will not increase financial stability. Kevin runs Contractors - one of the larger termite pretreat companies in Arizona. Shifting liability from the business to the QP would allow Kevin to shed his corporate responsibility and liability. This would limit his company's responsibility and liability. This would protect Kevin's company and limit the consumer's ability to recover damages from large companies.

At 0:48:10 Kevin Ethridge says that QPs should not need to hold any application licenses - but somehow must still have the knowledge. So the QP is now an advisor with no required experience? No demonstrated ability? And in Kevin's world, somehow this person is going to do the training? Would you want your doctor being trained by someone who has no medical experience?

And then to top things off, Kevin Ethridge reiterated his protectionist attitude at 0:49:25

saying he still wants at least 3000 hours (or even 4000 hours) of experience to be licensed. Remember that Kevin is a member of AzPPO Board of Directors, Member of the AzPPO Legislative Affairs Committee and a member of the OPM Advisory Committee and owns one of the larger termite companies in Arizona. He has a vested interest in minimizing competition.

OPM Task Force member David Burns at 0:51:35 - another AzPPO member, and owner of Burns Pest Elimination - one of the larger pest control companies in Arizona - agreed with Kevin in trying to shift blame from the corporation to the QP. As was pointed out above, shifting liability from a business to a QP would benefit Burns' company by limiting his company's liability and providing him with a scapegoat.

As Will Rousseau points out at 0:53:55 and others also point out at other times during the meeting, laws do not stop people bent on breaking the law from breaking the law. A business that wishes to skirt the laws can and will skirt the laws. You cannot legislate morality. The best that can be done is to set up a low overhead structure to make it easier to go after the guilty party - whether the guilty party is a business or a licensed applicator.

In any case, the QP is a redundant position and should not be a position mandated by law.

We now turn the discussion to TARFs (Termite Action Report Forms).

At 2:19:00, Dave Burns says that there may be a need to keep TARF (Termite Action Report Forms) information because "some people just are deathly afraid of Cloridane or a chlorinated hydrocarbons, or a chlorpyrifos or Diazinon or Dursban product." Note that these products were banned for structural applications over a decade ago - being banned starting in 1985 to 2001. These products can still be used for some outdoor applications, such as golf courses and some crop applications - but not structural applications. And no one is worrying about telling consumers their crops or golf courses were sprayed with these chemicals. As with structural fumigation, the AzPPO members continue to mention obsolete structural technologies to generate fear, uncertainty and doubt.

One suggestion made at 2:18:35 by Ken Fredrick was to place a sticker in the electrical box listing the company, date and pesticide used for each application - ostensibly for termites. With today's improved unrestricted technologies, the same pesticide may be used for termites, ants, crickets, roaches, spiders and other crawling arthropods. And since you are not recording all crawling arthropods treatments, it makes little sense to record termite treatments using the same unrestricted pesticides.

With today's improved unrestricted technologies, people rarely ask what pesticides are being used because there is no longer a need to ask. The environmentally hazardous pesticides that scared people are no longer being used. There are now proven alternatives to applying hundreds of gallons of insecticides in the soil under and

around someone's house.

Sincerely,

Phyllis M. Farenga
Its-Our-Turn.com