

February 11, 2012

Chair and OPM Task Force,

I would like to comment on things said during the January 11, 2012 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/OpmTaskForce.html>

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

At 18:00, in reference to the December 14, 2011 AzPPO Town Hall meeting in Tempe Jack Peterson says "... the folks that were in attendance there were very supportive of continuing the qualifying party." This is a misrepresentation of what happened. While the AzPPO members were adamant about keeping the QP and the associated requirements, there were three people who spoke up against keeping QPs. During the AzPPO meeting, it was also noted that QPs as they currently exist in law are essentially redundant when compared to applicators as far as knowledge and testing goes. Jack failed to mention the expressed opposition. This seems to be a trend with Jack as this is not the first time he has failed to mention voiced opposition.

At 18:30 starts the discussion of the responsible party - who is responsible and when. There are only two people who are technically responsible - the licensed applicator is responsible for applying pesticides according to his license and the business who is the applicators employer and has ultimate financial responsibility. Although Arizona law creates a required QP position and requires 3000 hours of "field experience", there are essentially no additional knowledge requirements over that of an applicator. The QP as it currently exists is never required to visit any branch office and is not required to show up at the main business office more than once a month - i.e., walking in the door and walking back out satisfies the once a month requirement. How can someone who is not applying pesticides and is not required to be present and who has no financial authority within a business be anything other than a scapegoat? How does this improve the standards of the industry?

As Dave Burns points out at 20:40, at a branch office with an applicator, the applicator is essentially the responsible party - no QP is required. Dave Burns then goes on to suggest that certain financial responsibilities may be moved from the business license to the QP - which is insane. How can someone who does not control company assets or company finances be made financially responsible for a company? This is the height of irrationality.

The company has the assets and must take financial responsibility. Financial responsibility covers things like insurance, paying losses from a lawsuit, providing facilities, equipment and pesticides for applicators. Business must also keep records -

such as financial, tax, employee, client and pesticide applications. The applicator is responsible for the application of pesticides and maintaining his license and continuing education. This is essentially how commercial agricultural applicators are organized.

The reason why AzPPO is fighting so hard to keep QPs is because it allows them to keep the indentured servitude barrier to entry. This was stated during the December 14, 2011 AzPPO Town Hall meeting in Tempe many times. Without the QP, there is no hook to hang the indentured servitude requirements on and thus there is no way to justify the barrier to entry.

At 22:50 Vince Crag talks about his survey of states. According to Vince's handout from the November 16, 2011 OPM Task Force meeting, only 4 western states out of 12 states surveyed have something like a QP. Washington, Utah and Oregon - also western states but not surveyed by Vince have no QP requirements.

At 23:50, Kirk Smith suggests moving the business aspects of QP back to the business license so that the structure will work for government entities as well as private entities. This divides the responsibility between the applicator and the holder of the assets - a business or government entity. This logically gets rid of the QP.

The commercial agricultural applicators do not have the concept of a QP and long experience requirements. And they seem to function just fine without QPs when it comes to pesticide applications.

At 24:35 Philip Hemminghaus moved the conversation to discussing absentee owners. Perhaps the business owner lives out of state and has little to do with the day-to-day business operations. Or perhaps the business owner is a multinational corporation. It does not matter. The holder of the business license is still the business and the business still has ultimate financial responsibility. The business is still responsible for providing a facility, equipment, applicators, management, keeping records, paying bills and everything else that a business does. Although the business owner may not be physically present, the business will hire someone to be physically present and handle the day to day affairs of the business. The applicator is still responsible for applying pesticides in accordance with his license, no matter where in the world the owner is. There is no need to mandate how to run a business in law.

At 34:12, John Boelts correctly points out that an absentee QP cannot handle the day to day responsibility of ensuring that pesticides are stored, handled and applied properly and that there must be a responsible person at each location to handle these tasks. There is no reason why a licensed applicator cannot be assigned these responsibilities by the business and once that is done, there is no need for a QP.

At 42:10 the confusion about absentee owners returns and the two AzPPO members (Dave Burns and Ken Fredrick) work hard to say that there must be a QP to take responsibility so that OPM will know who to call if there is a problem within a company.

Any business has to have a responsible party - both by law and out of necessity. In a corporation you have the stock holders who elect a Board of Directors to run the company. A statutory agent is the registered contact person for the corporation. The Board hires officers to handle the day to day business. The officers may hire additional people such as managers, bookkeepers, applicators and others. In a very small corporation, the owner may be the only stock holder, the only Board member, the statutory agent, president, secretary, treasurer, bookkeeper, applicator, janitor, et cetera. It is simple enough to ask for the contact information of a responsible person - i.e., agent for a corporate business - for each office or branch office and to require a business to keep that information up to date for each business license. Again, there is no need for a QP to have a responsible party or to keep track of the responsible party at each business office or branch office.

Remember, AzPPO has stated their intent to keep the QP and barriers to entry. Even though the subject of absentee owners was discussed at 24:35, the subject was brought back at 42:10 by the two AzPPO OPM Task Force members to try and obfuscate the subject and justify their desire to keep QPs.

At 44:40 the discussion turns to the question of who can you go after to seek retribution if something goes wrong. You go after the business, of course. Not the stock holders of a corporation but the corporation itself. The corporation owns the assets, the corporation hires the employees and the corporation is the thing you sue. The corporation - is where the buck stops. It does not matter if the owner - or stockholder(s) - live in the same city, a different state or in a different country. The corporation must still exist in the USA and it can still be sued, whether by the Attorney General or the customer or some damaged third party. OPM can fine the business or the applicator, or both, as may be appropriate. Adding a QP to the mix does nothing to help an injured party or to prevent the problem in the first place. The QP only acts as a scapegoat by allowing the corporation - to pass blame and avoid fines. This trick has been used many times in the past and Ken Fredrick even provided an example of this happening.

At 52:50 John Boelts finds that the QP is strange and a barrier to entry. Then Philip Hemminghaus tries to figure out what if any legal requirements are imposed on a branch manager. Although a company may want a branch manager that they trust and will ensure applicators are doing their job, there are no statutory requirements to do so. As was pointed out during the discussion, the branch manager essentially does what a QP is suppose to do, but may not otherwise be qualified per statute to be a QP. Therefore, we have a good example where the QP is superfluous. John Boelts again says that the law should be changed to be practical and eliminate the barriers to entry. We agree.

At 1:10:55 John Boelts clearly states the need for a responsible party at each branch to oversee the safety, gear and storage of pesticides. We whole heartedly agree that there should be a responsible person who works out of each branch office who is responsible for the goings on at the branch office. The QP does not satisfy the need

for a responsible party because there is no requirement that the QP ever visit a branch office and there is no requirement that the QP do more than put in a token appearance at the main office than once a month.

Let's go through a scenario to see how things can work without a QP. As we have discussed above, there are always two responsible parties: the applicator and the business. In the event that something goes wrong, the State can always go after both responsible parties - either civilly or criminally. Let's assume for the moment that the State requires a "manager" at each main or branch office to oversee day to day office operations and has specified certain management responsibilities having to do with pesticides, equipment and applicators but has not specified any statutory qualifications for the job. Now let's say something bad happens - the applicator sprays something and the very expensive coy in the pond dies. The State can fine the applicator. The State can fine the corporation. The consumer can sue the corporation. We will assume that the applicator's transgression does not warrant criminal prosecution. But what of the manager at the office the applicator works out of? I submit that the State has no direct interest in the manager. However, the State does have an interest in the corporation. If the State finds that the manager has failed to manage, the State can and should fine (or prosecute) the corporation. It is the corporation's responsibility to ensure the manager is performing his job. The State can specify what the important duties are for the manager as far as pesticides are concerned, but the corporation must take responsibility for making sure their employee performs the work. Remember that only the corporation can supply the resources (financial, policies and procedures) needed to allow the manager to accomplish his job and so the corporation must be held responsible for the lack of action by the manager. If the manager is not performing his job, the corporation is responsible for providing remedial training or getting a new manager.

Note that the manager can be anyone. It can be an applicator. It can be a non-applicator. It is up to the corporation to pick an appropriate person who has the skills needed to accomplish the job. The corporation is on the hook for picking a qualified person. It is the corporation who will get fined (or sued) if something goes wrong. So the corporation has a vested financial interest in selecting a qualified person for the job.

At 1:16:20, Kelly Denny of Metro Institute says pest control is an art. Really? I thought pest control was based on science. And Metro is administering tests for the State? Kelly says the artistry of pest control is why QPs and 3000 hours are needed and why a competency test is not sufficient. If the test can not detect competency, perhaps a better and more comprehensive test should be used.

When Lin Evans probes how qualified an applicator really is at 1:18:15, Dave Burns finally admits that the applicator can handle 99.9% of all jobs independently and it is a rare situation where the applicator needs to perform further research before making an application. This research can be consulting with a more experience applicator or perhaps a pesticide distributor or manufacturer or even a known industry expert.

There is no need for a mandated QP.

At 1:23:07 Ken Fredrick says the 3000 hours is needed to ensure quality and public safety, but as Dave Burns just said, 99.9% of the time an applicator does the work independently. It is not the QP with 3000 hour who is diagnosing the problem and applying the pesticides, it is a regular applicator who has no statutory experience requirement. His argument would be valid only if the QP was the one performing the application. Ken also mentions a higher standard for business owners. But again, the (non-applicator) business owner is not the one diagnosing and applying pesticides - it is the applicator who is diagnosing and applying pesticides. Even though the business is required to have a QP, the QP is not the person doing the actual application work in the field, nor is the QP present in the field with the applicator.

Jimmy Fox at 1:35:15 talks about renting QPs to get around the barrier to entry issue. It was also noted that this is a common practice for golf courses and that they rarely if ever see their QPs. He goes on to say that in order to avoid being a barrier to entry, the only requirement should be a test.

Many others talked about keeping the hours just to keep new competitors from coming into the industry. They all expressed the opinion that it was too easy for a new business to get started - and that if they could (or had to) do the 3000 hours, so should everyone else.

The conversation then turned to TARF (Termite Action Report Forms) around 1:50:40. Jack Peterson noted that the database sees 400 inquires a day but there was no breakdown as to what those inquires were. Heidi Hawkins of 5-star noted that their primary use of the TARF database was for telling potential customers whether or not they were still under warrantee. When Dave Burns asked realtors, they used the TARFs to figure out who to talk to about the listed treatments. Phyllis Farenga of Its-Our-Turn.com spoke out against the TARF system.

At 1:53:15 the discussion returned to QPs. During the discussion, protecting the consumer came up several times. The primary protection for the consumer lies with the applicator - not the QP. As was noted earlier, applicators operate independently of the QP or other management for 99.9% of all applications. If you think you need higher standards, you should raise the testing standards for applicators. The QP does nothing to protect the consumer. The final protection for the consumer is the business itself, and the consumer's ability to sue the business.

At 2:21:30 John Tyler of Checklist Inspections talks about the quality of termite inspections and how he as a building inspector can provide a much better termite inspection as part of a general building inspection. As he points out a typical termite inspection from a pest control company for \$50 that take 20 minutes is less than thorough compared to his general building inspections. If you are interested in consumer protection, you should think about making it easier for building inspectors to perform termite inspections.

At 2:08:25 Will Rousseau talks about the fact that the OPM Task Force only exists because there is a big problem with the structural pest control industry. In that vain, Will, you cannot fix the structural pest control industry by keeping the status quo just because a room full of people hold up their hand and say they want the industry's structure to remain as is. You must show leadership and make basic and fundamental changes to the structure of the industry. We believe that the QP should be gotten rid of in favor of a structure much closer to the existing agriculture industry. We believe the TARF system should be gotten rid of because it does not accomplish it's intended purpose. We think other funding options exist to replace the TARF fees that fund most of OPM. We also think that increasing the testing requirements for applicators will serve the industry and public well without creating a barrier to entry. These fundamental changes must be made to solve the big problems in the structural pest control industry - which is why the OPM Task Force was created by the legislature.

Sincerely,

Phyllis M. Farenga  
Its-Our-Turn.com