

March 18, 2012

Chair and OPM Task Force,

I would like to comment on the proposed regulatory changes discussed at the March 14, 2012 OPM (Office of Pest Management) Task Force meeting. You will find a video of the meeting at:

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

although I will not specifically reference any portion of the video in these comments.

The glaring issues with the proposed regulations are:

- 1) The OPM Task Force has failed to show harm to the general public in order to justify the proposed laws and rules, and thus failed in its task to address the problems that caused the legislature to create the OPM Task Force in the first place.
- 2) The OPM Task Force has failed to differentiate between restricted and unrestricted pesticides, and the relative harm between the two classifications.
- 3) Most of the historic structure is retained and thus most of the status quo is maintained. Yes, there are many changes but the fundamental structures remain. This structure represents an unjustifiable barrier to entry, supports protectionism for the existing companies, prevents competition and drives qualified people from the industry and ends up hurting the very customers the regulations are supposed to be protecting.
- 4) By adding complexity and unreasonable regulation, you drive an ever increasing number of people underground. You will end up with hundreds if not thousands of individuals that you have no knowledge of and who will never cooperate with you.

Let's start with the first point - the OPM Task Force is proposing a complex regulatory system without justifying a need for those regulations. Today's pesticide technologies are much safer than they were just 30 years ago. Most of the pesticides used in structural pest control are UNRESTRICTED - deemed to have a low risk of harm by the Environmental Protection Agency (EPA) - the national standard - Code of Federal Regulation (CFR) Title 40, Chapter 1 (Protection of Environment), Subchapter E (Pesticide Programs), parts 150 - 189 are the rules that interpret the law governing pest control. Why invest in complex regulations and bureaucracy to stop significant harm when no significant harm is taking place? There is essentially only one reason - personal gain, i.e., profit. Any company (e.g., the members of AzPPO) will invest time, effort and resources if they see a return on investment. Investing in legislated advantage can provide significant financial returns to a company. Edward Prescott, a winner of the Nobel Prize in economics has addressed this problem in his book *Monopoly Rights: A Barrier to Riches*.

The EPA requires that all commercial pesticide applicators be certified. We have no problems with this requirement because of the volume of pesticides handled and the constant exposure of the pesticide applicator to pesticides.

Regulation is suppose to be for the common good, not for the financial reward of a few crony capitalist who have stated publicly they want to limit competition.

It is the existing structure that has caused problems in the past and that is the reason the legislature created the OPM Task Force. You may remember that all of the Ag groups convened a Summit about a year and a half ago to address the significant problems of OPM and agreed to the OPM Task Force as a way to address these issues. The legislature and the Ag groups wanted a new structure for structural pest control regulation put in place and will not take kindly to the OPM Task Force keeping the basic flawed structure - especially in the absence of a well reasoned arguments showing a need for that structure.

This process was hijacked from the beginning - giving two out of three seats on the OPM Task Force to AzPPO members - the third seat went to a government employee. AzPPO represents less than 1% of the pest control industry and the AzPPO members have consistently spoken for keeping the barriers to entry. And this somehow represents the pest control industry as a whole? It is more like asking the fox to watch over the hen house.

The OPM Task Force has not provided a well reasoned justification for the current set of proposals. The OPM Task Force has not provided a well reasoned justification for how restricted and unrestricted pesticides should be handled. The OPM Task Force has not provided a justification for retaining the existing inefficient system of regulations. The OPM Task Force has not started over with a clean sheet of paper and worked to build a streamlined set of regulations taking into account the current low risk unrestricted pesticides normally used by the industry - which would cover over 95% of all pesticide applications and 95% of all pesticide companies.

Instead, certain members of the OPM Task Force have engaged in obfuscation and fear mongering to influence the OPM Task Force into not addressing the basic fundamental issues: what needs regulation and why, and what is the most efficient way to regulate those items. Obviously, unrestricted pesticides need much less regulation than restricted pesticides. So why has the OPM Task Force consistently ignored the difference between restricted and unrestricted pesticides? And why don't the proposed regulations take these differences into account in the fundamental structure of the regulations?

The proposed new regulations keep the requirement for a qualified person. This person is still assigned responsibility even though that person has no authority. See our white paper entitled Responsible Parties in Pest Control. You will find it at:

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

For the sake of discussion, let's say that you require a very experienced person in a company - a qualifying person or QP. By definition, this person is an employee or a contractor and therefore has no inherent authority to accomplish anything. Legislating responsibility directly to this person makes no sense whatsoever. To accomplish the desired goal you have to mandate that the business license hire a QP and assign the QP certain responsibilities. The company is the only entity that has the authority to carry out the mandates and to take responsibility for accomplishing the mandates. You can never transfer the financial responsibility to the employee as some have suggested because an employee can never be held financially responsible when working for an employer - financial responsibility must always remain with the company.

The proposed regulations require a QP. The QP is supposed to be responsible for supervision but is not required to show up at branch offices. There is also no limit on how many people the QP can supervise. If a person is going to supervise, that person needs to be interacting with the subordinates on a regular basis. And if a person is going to be effective, there must be a limit on the number of people being supervised. To solve the supervision issue, it would be reasonable to say that every office must have a QP and that no QP may supervise no more than 10 people.

What happens to business if the QP dies? Or quits? Or fails to renew his license? More complexity with a temporary QP. Because the proposed regulations require a QP to operate the business, you have to add more regulations to handle the situation.

If you would like to become a QP, the proposed regulations require that you become a certified licensed applicator and then wait for 2 years before you can take the certified qualified license applicator test - or wait 1 year if you have enough college credits. The waiting requirement is arbitrary and clearly a barrier to entry as it serves no other purpose other than to prevent you from taking the certified qualified license applicator test. The waiting period should be eliminated. Let anyone take the test - you either pass or you don't pass. This is what Ag does.

But why do you even need this QP? An certified applicator has a significant amount of knowledge pertaining to CORE (general pesticide handling and pest management). A certified applicator is required by law to follow the Federal pesticide labels for any and all pesticides used. Finally, the certified applicator has specialized knowledge in each category that is specific to the pests covered by that category.

So what does a QP bring to the table? It has been argued that a QP is needed to keep standards high. But a QP cannot overcome a large company's policy to cut costs. And a QP that does not go into the field and check up on the work of an applicator will not be able to determine the quality of an applicator's work. The reality is that the QP under the proposed system - is ineffective and is little more than a serious barrier to entry and a company's scapegoat.

There are two large unlicensed and unregulated groups of people applying unrestricted pesticides on a regular basis: homeowners and yardmen. Both of these groups taken separately are larger than the entire structural pest control industry. There has been no significant harm to the general public that has resulted from either unregulated group. Today's pesticide technologies - the unrestricted pesticides available to anyone at the local do-it-yourself store, garden supply store and the internet - are considered to have a low risk of harm to the average person even though the average person has no pesticide or pest management training.

We submit that a certified licensed applicator is completely qualified to work for a company and do exactly the same task as a homeowner or yardman without the oversight of a QP. The EPA certainly thinks so and most of the other states think so. So why does Arizona think differently? After all, a certified licensed applicator is expected to handle over 99% of all field work by himself. Why should a company be required to have a QP to handle less than 1% of the potential jobs? A company may find it less expensive to refer the job to a friendly competitor.

The one place where something like a QP can be justified is when using RESTRICTED pesticides. The farmers have this concept in the Advisor license. Only the Advisor can recommend the use of restricted pesticides. We think using restricted pesticides SHOULD have a higher licensing requirement because of the increased risk of harm - both to the general public as well as to the applicator. Turning the QP into an restricted pesticide advisor is something we can agree with.

The proper way to improve standards is to improve education and improve the certification testing. The certified licensed applicator must have a substantial knowledge base so that you can trust the applicator in the field unattended. That requires detailed and thorough study materials and a comprehensive test. The Ag folks have an excellent set of study materials and those materials are probably a good starting point for the structural pest control industry.

We think a quality education is the right way to improve the quality of pest management. We think educational programs and work/study programs should be promoted by Department of Agriculture, the University Agriculture departments, researchers and other knowledgeable people.

We think that a company should be held responsible - both legally and financially - for the proper management of all certified licensed applicators under all circumstances. Although we expect a certified licensed applicator to work on his own most of the time, the company has a responsibility to check up on any employee and verify the employee is doing his job properly and efficiently. It is up to the company to hire appropriate qualified people to provide the supervision because the company is on the hook if anything goes wrong. The company can never be allowed to use their chosen supervisor as a scapegoat - the company is always responsible. And the State must always hold the company responsible.

Let's take a look at the proposed regulations for TARFs. There is not much change from the existing laws. The primary reasons given for keeping the TARFs are: money for OPM, consumer protection and fear of the legislature. So let's address these in order.

The OPM and its predecessors have been sucking on the TARF tit for years. 50 to 75% of OPM's revenues come from the TARF tit. So OPM obviously does not want TARFs to go away. What to do? Lower OPM expenses - further. Raise license fees - there are, after all, over 8000 licenses to amortize expenses over. Charge to retrieve data from the TARF database - but doing so will probably significantly reduce data retrieval. Just dump the TARFs.

The TARF database is supposed to offer some kind of consumer protection. But what kind of protection can it offer? And can the value of the consumer protection justify the cost of that protection? It is well known that the database data is incomplete and only marginally useful for most purposes. It is also well known that the database can be sequentially accessed to pull data from entire neighborhoods to allow companies to market to those with expiring warranties or a history of termites or if their neighbors have had termites - data mining is a privacy issue. The data can be used for "drive-by" termite inspections - a fraudulent use of the database - insurance companies are now offering insurance protection for this form of "passing paper." There is no longer an issue of the pesticides used because the older problematic pesticides that concerned consumers have been banned for the last decade. Then there is the public data showing how much work each company does - which allows your competition to spy on you. So where is the consumer protection? Perhaps looking up a home to see if it is still under warranty after the consumer loses the warranty paperwork. But can this possibly justify the paperwork and expense of the database? Not really.

Fear of the legislature is more like fear mongering. It is easy to present a well reasoned and well documented explanation of the pros and cons of the database and to show the legislature that the database is not cost effective and does not fulfill its intended purpose. It is simple enough to show the legislature that the database does more harm than good and that the best course of action is to drop the TARF database.

The proposed regulations are not efficient. They add needless complexity. They add arbitrary barriers to entry. Because the proposed regulations are not based on a well reasoned philosophy, the new regulations are conducive to creeping.

Sincerely,

Phyllis M. Farenga
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