



Arizona Department of Agriculture

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Meeting Minutes for the "Devices" Subcommittee of the Task Force on the Regulation of Structural Pest Management

The following minutes are for the meeting held on June 19, 2012 in Room 229 at 1688 West Adams Street, Phoenix, AZ 85007 (the Department of Agriculture Building)

The meeting minutes are as follows:

1. Roll Call – 10:10 A.M.

Present: Vince Craig, Subcommittee Chairman. Subcommittee Members Ken Fredrick, Harvey Logan, Larry Bard, Brett Cameron, and Staff and Industry Members

2. Approval of practice of Subcommittee members participating by telephone.

MOTION: Motion to approve members participating by telephone by Larry Bard

Second by Harvey Logan

VOTE: 5-0

3. Subcommittee procedures and expectations

Mr. Craig stated that his expectations were that the subcommittee members draft Rules and Statutes that would protect the Department of Agriculture from experiencing the same embarrassment the Structural Pest Control Commission experienced five years ago. He relayed how the SPCC was embarrassed via the media for investigating a 16 year old kid because of the agency's position on the use of "devices". He stated that the same thing happened less than a year later with a retired Sun City Police Officer who went from door to door installing wire mesh to keep out rodents. He asked the subcommittee members to put aside any personal issues regarding devices and do what was best for the agency. He asked that all those in attendance should expect him to ask "why" multiple times so that whatever was expressed by the members could be communicated in a way that the public would understand. He encouraged everyone to do the same.

Mr. Logan's position was that anyone using device for pest management, should only use devices that are efficacious.

Mr. Fredrick stated he hopes to come up with good practices in order to help an individual if a compliance issue comes up. He stated he feels the agency should be focused on compliance assistance. Mr. Bard and Mr. Cameron both agreed with Mr. Fredrick.

Mr. Kirk Smith, with Maricopa County Environmental Services, stated his concern is that there are companies that perform pest control work without the use of pesticides and their whole premise is using devices and other techniques. He stated the subcommittee needed to come up with a way to define the devices. He stated he is unsure of whether it needs to be put in rule or if a policy needs to be created that leaves it up to the discretion of the director to determine what is pest control and what is not.

4. Discussion of "devices" used in the business of structural pest control (review definition of the business of structural pest control under 32-2301) and OPM's current jurisdiction.

Mr. Craig read the definitions as they are currently written in A.R.S. § 32-2301.

Mr. Logan feels that the definitions for "business of structural pest control" and "devices" are right on. Mr. Fredrick agreed with Mr. Logan and stated he did not have a problem with the definitions.

Mr. Casey Cullings, Assistant Attorney General, stated the definition Mr. Craig provided is the definition in current statute, not the one that has been revised and discussed by the Task Force.

Mr. Craig stated his concern with the definition of "business of structural pest control" is part (c) of the definition. He stated the argument over the last few months is that dogs could be argued as a "device".

Mr. Bard stated dogs are absolutely a device. He explained they are a tool an inspector uses to help locate the pest. Mr. Jeff Kimmich, with Arizona Wings-N-Stings, stated it is just as if you were to hire another inspector. He stated the dog is inspecting, it is just a different form of inspecting. Mr. Cullings stated both in current and proposed statute in subsection (a) of the definition for "business of structural pest control" refers to identifying infestations and performing inspections regardless if a device, pesticide, or neither is being used. Mr. Craig asked if it is Mr. Cullings legal opinion that an inspection is included in the use of devices. Mr. Cullings stated it states in subsection (a) "identifying infestations or making inspections" and it does not state that it is only for the purposes of applying pesticides. Mr. Bard stated he felt that K9's applied to subsection (a). Mr. Smith stated when he thinks of the term devices he thinks of something other than a living organism. Mr. Logan stated that he agreed with Mr. Smith. Mr. Smith stated there is research being done now in using other animals besides dogs for the detection of termites and bed bugs. He stated that there needed to be a definition that would encompass future technology as well.

Mr. Fredrick stated he felt it just had to be put in rule that the director had the authority to make the decisions on what is or is not a device. Mr. Robert Tolton, OPM Licensing Supervisor, stated he felt if the word biological was added to the definition of device it would be covered. Mr. Logan agreed with Mr. Tolton. Mr. Gary Christian, Environmental Service Division Manager, stated biological would then include pesticides because there are many biological pesticides. Mr. Tolton stated that pesticides are already included. Mr. Kimmich stated that if the word biological were included that it would include the use of things like lady bugs or wasps used for pest management purposes. Mr. Smith, Mr. Tolton, and Mr. Kimmich agree that is not something they would want to include in the definition of "device". Mr. Smith stated that he has worked with many parts of the industry that mass produce parasites and give them to growers of agricultural crops. Mr. Cullings suggested first discussing the

concepts of what should be regulated and then it would be clearer as to how to define "device" to match what is trying to be regulated.

6. Discussion of what should and should not be regulated with regards to devices; discuss examples.

Mr. Craig stated he had discussions with 3 other states to determine what devices were being regulated and how. He explained that ever since the committees were formed he has heard numerous times from individuals asking "How is Texas is regulating things". He stated he contacted Texas, Indiana and Colorado. Mr. Craig read Colorado's language regarding devices, which stated, "The commissioner shall designate by rule which devices, when operated for hire, require the operator to be licensed as a commercial applicator. Licensure shall be required only for the use of those devices that, as determined by the commissioner, may constitute a significant risk to public health or safety." He stated he liked the language from Colorado, but he found it to be a little vague. He explained he agrees with a combination of the language of Colorado and Indiana. Mr. Craig read Indiana's law which said the following, "as used in this chapter, 'device' means any instrument or contrivance intended for trapping, destroying, repelling, or mitigating insects or rodents or destroying, repelling, or mitigating any pest. The term does not include:

- (1) equipment used for the application of pesticides when sold separately from the pesticides;
- (2) firearms; or
- (3) simple mechanical devices, including barriers, traps, or adhesives, or other simple contrivances that are not subject to this chapter as determined by the pesticide review board."

Mr. Craig read a portion of Texas law, which states the following, for individuals not required to be licensed:

"this chapter does not apply to the:

- (1) use of a raptor to control or relocate other birds;
- (2) physical removal of pests or the habitat of pests while cleaning a chimney;
- (3) use of a live trap to remove an animal from the premises of a residence, agricultural operation, or business structure;
- (4) removal by mechanical means of weeds or other obstructing vegetation from a sewer, drainage system, body of water, or similar area; or
- (5) installation, maintenance, or use of a nonpesticidal barrier to remove or prevent infestation by nuisance animals.

Mr. Jeff Kimmich, owner of Arizona Wings 'N Stings stated that implementing any of the regulations Mr. Craig read would result in the agency getting rid of the regulation of bird control. Mr. Craig stated that Mr. Kimmich was correct.

Mr. Craig explained why the agency originally started regulating bird control. Mr. Craig stated when looking at the cost of the job of bird control it makes more sense that companies installing bird spikes should be under the Registrar of Contractors (ROC). Mr. Kimmich stated the test at the ROC has nothing to do with bird control work. He stated if bird control was given to ROC to regulate there could be issues that come along with that. He stated he currently uses gels, netting, and spikes. He explained that if it was given to ROC to regulate he would need an ROC license to use netting and an OPM license to use gels. He stated he

also currently does bee removal. He stated his concern is that he would need a pest control license to perform the bee and part of his bird work and an ROC license to perform the other part of his bird control work. He feels bird control is best regulated under the OPM because birds are a pest and OPM regulates pests. He feels it should stay under OPM. Mr. Robert Tolton (OPM Licensing Supervisor) stated the ROC regulates structural modification. He stated ROC stated if a job costs more than \$1000.00 the individual performing the job would then need to be licensed with ROC anyway. He explained that would not apply to those using gels and other pesticide applications, just those modifying the structure such as bird spikes and netting. Mr. Tolton stated that the OPM explained to ROC that there was an exemption and regulation under structural pest control that allowed them to perform the work. Mr. Tolton asked how can the OPM regulate the use of spikes if there is no label for bird spikes therefore there is no misuse of a bird spike.

Mr. Craig stated the OPM exists because of the Environmental Protection Agency (EPA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). He explained there is a contractual agreement with FIFRA. He stated the federal government only requires licenses for those who use restricted use pesticides. He explained that each individual state can create laws on top of that and as a state it was decided that within the state of Arizona you must be licensed to even apply non restricted (general use) pesticides. He explained that pesticides whether restricted or general use can still be potentially harmful to the public and the environment. He stated that it was his opinion that the only devices that the OPM should regulate are those that can harm the public or environment or that can result in extreme cases of consumer fraud, such as bed bug heating machines. He stated the current position of the agency is that they do not want to regulate individuals who are just putting up spikes as there is no danger to a consumer's health or the environment. He stated he is specifically concerned with only those devices that fit into that category.

Mr. Fredrick stated if an individual is advertising they are performing pest control and they need to be licensed. He explained that he did not care if the pest control an individual was performing was putting up bird spikes or just sealing a house because it is still pest control. He stated that maybe there is something that can be said to an individual who is only doing those things in order to have them change their advertisements so they would not be required to obtain a license.

Mr. Craig stated previously there was a company by the name of "We Seal It" and that company sealed homes to control weather but also to keep out insects. He asked if that is something the OPM should pursue to regulate if they advertise that they "keep temperature down and also keep pests out". Mr. Fredrick stated he believed it should be left up to the discretion of the Director. Mr. Logan agreed with Mr. Fredrick. Mr. Craig stated there is a list of things the EPA regulates as a device and he discussed the issue in detail.

Mr. Logan stated he is concerned that a consumer could be hurt financially if a product is being used in their home that does not work. Mr. Kimmich asked about traps. Mr. Logan stated he believed traps worked very well, but that an individual using traps should not be required to be licensed with OPM for using them. Mr. Bard also stated he does not believe traps should be regulated by OPM. Mr. Fredrick stated if traps are being used for pest identification then the individual should be licensed.

Mr. Logan asked Mr. Craig if he considered "Termimesh" a device. Mr. Tolton stated that Termimesh is not recognized as a standalone treatment and that is why the company selling it has not been pursued by the agency. Mr. Craig indicated you could not misuse Termimesh because it was not a pesticide and could not endanger the public or the environment. Mr. Tolton explained that there could be no fraud involved in the use of the product because it must be used in conjunction with a pretreatment.

5. Discussion of OPM's Substantive Policy regarding devices.

Mr. Craig spoke about Substantive Policy 2007-001. He stated when the policy was drafted the SPCC staff focused on the things they felt EPA would be concerned about as well as how to protect the agency from public embarrassment. He stated the policy allowed individuals to advertise and use a device as long as the device was not used with a pesticide and the operator was not performing identifications or recommendations. Mr. Craig asked how the industry felt about individuals advertising if they are only using a device. Mr. Fredrick stated he felt if an individual is specifically advertising to control pests then they should be licensed. Mr. Brett Cameron stated that it sounded like the OPM was trying to regulate everyone. He stated he did not understand the need for OPM to regulate traps because if the agency really exists due to FIFRA then the agency should focus on regulating pesticides. Mr. Craig stated that some traps have a "substance" that is used to attract or control pests. Mr. Cameron stated if that is what the OPM regulates then a bee keeper should be regulated because bee keepers use pheromones to attract bees. Mr. Smith explained how pheromones are exempt. Mr. Logan and Mr. Fredrick both agree that bee keepers should not be regulated by OPM.

7. Drafting of language that will cover what devices the OPM shall regulate and what devices shall be exempt.

Mr. Craig stated the basis for the OPM's statute on devices should be based on the Department of Agriculture's definition. He indicated that he took a part of the language from Indiana as well. He stated the new definition he is proposing for device is "an instrument or contrivance intended for trapping, destroying, repelling, identifying, or mitigating insects or rodents; or any animal used as an aid in making identifications. The term does not include equipment used for the application of pesticides when sold separately from the pesticide, firearms, or simple mechanical devices including barriers, traps or adhesives; or other simple contrivances that are not subject to this chapter as determined by the director." Mr. Craig felt that the language of "any animal used as an aid in making identifications" could be removed because that is not in the EPA or the Department of Agriculture's definition of devices. Mr. Frederick stated that the definition was too long. Mr. Craig stated he would modify it and email the definition to those present.

Mr. Smith stated he was concerned with the identification portion of the proposed language. He indicated if that was going to be regulated it would negatively affect those doing cooperative extension at the university. Mr. Kimmich shared Mr. Smith's concerns. Mr. Tolton reviewed the current exemption in regards to educational institutions. Mr. Smith, Mr. Fredrick, and Mr. Logan stated they had no issue with the exemption for education institutions as it is

currently written. Mr. Tolton stated he felt the current exemption would cover the cooperative extension individuals.

Mr. Craig asked if this were five years earlier and the OPM was the Department of Agriculture and an individual was going from door to door putting screens on roofs to keep out rats, should he be licensed. Mr. Fredrick asked if that individual was advertising. Mr. Craig answered yes. Mr. Logan state if he is advertising he should be required to be licensed. Mr. Fredrick stated a solution could also be the director could talk to the individual who is advertising and inform them of a different way to advertise so they would not be required to be licensed. Mr. Craig and Mr. Tolton explained how a phone call was how the incident involving the 16 year old kid go started. Mr. Craig asked what the purpose was for requiring an individual like that to be licensed. Mr. Fredrick stated the Director should be given a way to help the individual so they are not falling under the definition of pest control. Mr. Smith question whether the Director could be given authority to review these issues on a case by case basis. Mr. Craig expressed concern with requiring a license simply because a person is advertising the use of a device. He states he is having trouble with trying to figure out where the environmental or public harm was in someone putting screens or a roof. Mr. Fredrick state there wasn't an environmental or public harm from that. Mr. Cameron stated that maybe adding a sales threshold where anyone who does sales that are more than a set amount of money should be required to be licensed. Mr. Logan stated he agreed with Mr. Cameron. Mr. Craig asked if the agency should be worried about more than what EPA is worried about, by requiring someone performing roof screening work to be licensed. Mr. Fredrick stated the OPM is already more concerned that EPA because OPM requires licenses for individuals performing pest control with general use pesticides. Mr. Kimmich agreed that such an individual at some point should be regulated by the OPM because they are preventing pests.

Mr. Cameron explained how he remembered stories regarding the SPCC and explained how the subcommittee should do all they could to steer clear from another incident.

Mr. Tolton stated if a consumer called with a complaint stating someone put up screens and they still have a rat problem the OPM cannot do anything to the individual performing the work. Mr. Kimmich stated it was OPM's job to regulate pests. He asked to what degree the agency regulates pests.

Mr. Craig stated he does not want people to focus on OPM's name. He stated he wanted to focus on why the OPM exists. He stated the OPM exists because of FIFRA, but the issues being discussed have nothing to do with FIFRA. He stated he felt the reasoning behind wanting to regulate devices is due to other motives. He explained that he needed legitimate reasoning to go beyond the regulation of FIFRA.

Mr. Smith asked if the Mormon church had an issue with rats and they chose to go down to a hardware store and put up screens on churches across the east valley would that need to be regulated. Mr. Kimmich stated they are not being paid so he does not believe it needs to be regulated. Mr. Smith stated that they were still performing pest control. Mr. Craig stated if the agency received such a complaint it would be ignored due to the substantive policy currently in effect. He explained that in Mr. Smith's scenario, the Church is not identifying the pest or using pesticides. Mr. Fredrick added that they would not be advertising. He stated he feels the key is if someone is advertising. He stated if an individual advertises that they are in

the business of sealing houses to keep roof rats out they should be licensed, but if the Director is able to call the individual to notify them if they advertise in a different way they would not have to be licensed. He stated he wanted to keep things simple and not make it a "public fiasco and keep things simple". [Ken Fredrick left the meeting]. Mr. Tolton explained a staff member called the home of the 16 year old and it resulted in an attorney getting involved because the actions of the SPCC were misinterpreted.

Mr. Craig stated he wants to make sure the proposed statute is economically feasible and that it is mirroring some other agency. He stated it seemed like the industry wants the OPM to regulate those using devices because they are competition and nothing more. He stated EPA is worried about the environment and the public. He indicated he would like the OPM to mirror the same concerns EPA has. He stated when he emails out all the information he wants to work on creating a definition that not only the subcommittee will accept but also that the Task Force and the agricultural industry will accept.

Mr. Logan stated whether the agency is standalone or integrated with the Department of Agriculture he feels that protecting the public goes beyond health concerns. He stated the public deserves to have someone looking out for their interest as it relates to fraud. He believes that is one of the key elements of OPM. He believes it is important to go beyond EPA's definition of actual physical harm. He stated he is concerned about fraud and financial harm. He stated that his point goes back to his original statement about efficacy.

Mr. Craig stated he agrees, however the OPM does not determine efficacy. Mr. Cameron stated that if we pursue this course part of the issue is the efficacy of the chemical but the other part is consumer protection. He explained if someone says they are going to do something that is going to prevent pests and it does not work, that it would fall back on OPM to regulate. Mr. Craig stated that is subjective because if someone puts wire mesh and it says it prevents pests, no one knows if it will or not because there are no standards. He asked if only devices that do have standards should be regulated or should every device be regulated. Mr. Cameron stated the agency should be concerned with consumer protection when it comes to whether the chemicals are being applied the proper way according to label directions. He explained that the consumers are going to look to the OPM to protect their interests. He stated the consumer is going to want to make sure the individuals being hired are regulated and if they do not perform their job properly that they have someone to file a complaint with. Mr. Craig stated Mr. Cameron was right, but the OPM can only regulate what is in writing and there is currently nothing in writing about wire mesh or bird spikes. He stated the agency is limited in what it can do. Mr. Craig stated he does not want to regulate people for the sake of competition reasons. Mr. Cameron stated it needs to be based on consumer protection and not competition. Mr. Logan agreed with Mr. Cameron. Mr. Tolton stated if a consumer calls and complains about a pesticide application, the agency can investigate the issue because the company must apply according to the pesticide label. However, if the consumer complained about wire mesh there are no label directions and the OPM could not assist the consumer; the only choice they have is to sue them civilly.

Mr. Cameron discussed how as issues evolve and new treatments become available regulatory agencies need to take all of that into account and be able to regulate it. He explained that only regulating devices or chemicals with EPA numbers on them does not protect the consumer. Mr. Logan agreed with Mr. Cameron. Mr. Cullings stated the current OPM

language over devices is very broad. He stated that it essentially covers everything currently, even something as simple as a garden hose. He stated that during his communications with Mr. Jack Peterson, OPM Acting Director, the device authority is too broad and should be narrowed. He stated we should consider what devices should not be covered. Mr. Logan stated he would like to see a lot of discretion given to the Director. Mr. Smith stated, on behalf of the Task Force, that they want to keep the language for devices as simplified as possible and that they did not want the law to micromanage what a device is. Mr. Craig stated he would be sending out information to all members of the subcommittee for further review.

Mr. Bard discussed Substantive Policy 2007-001. He stated the policy was originally confusing to him. He stated that he originally believed he did not need to be licensed because he uses a K-9 and he does not apply any pesticides. He explained there needs to be a revision to protect the consumers from fraud. Mr. Tolton explained that a license would be required with a K-9 because it was being used as a tool for identifying.

Regarding the issue of devices, Mr. Tolton stated the OPM should focus on what an individual says they are going to do, why they are doing it, and what is the potential personal, environmental, and economic harm.

[Havey Logan left the meeting]

Mr. Kimmich asked what would the OPM do if a consumer paid for a bird spike job that was under \$1000.00 and the consumer had a complaint. Mr. Craig stated the OPM could not do anything within current statute because it did not involve a pesticide and the OPM has no standards for installing bird spikes. And that the consumer would have the option of pursuing the matter legally.

Mr. Craig stated if a consumer tried to claim that they weren't given enough of a product he does not know of an agency that would investigate that. Mr. Kimmich explained how the OPM should regulated such issues. Mr. Cameron stated there is a general consumer fraud division with the Attorney General's Office. Mr. Tolton further explained how there is no way to gauge if an individual preformed the work correctly and therefore, the OPM can do little in the matter of consumer protection regarding the use of bird spikes.

Mr. Craig stated it is better if the OPM could list what the agency will not enforce so that consumers are not mislead into thinking the agency can help them in matters regarding certain devices.

8. Call to the Public (2 minute limit per speaker)

9. Set Next Meeting Date and Topic Discussion

Tuesday, June 26, 2012 2:00 P.M.

10. Adjourn – 12:00 P.M.

11. **MOTION:** Motion to adjourn by Larry Bard; Second by Brett Cameron

VOTE: 3-0