

Responsible Parties in Pest Control

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This paper will discuss the need for responsible parties in the pest control industry and how those parties should be licensed. We will discuss why certain parties must be held directly responsible. We look at the existing legal chain of responsibility that applies to all companies and why any licensing system should follow the existing legal chain of responsibility. We will discuss why certain parties cannot be held responsible in any meaningful legal way. The result of these discussions is a logically and legally consistent business model for regulating both restricted and unrestricted pesticides.

A brief introduction to current laws

Currently structural pest control statutes define licensing, responsibility and relationships for a business, a qualifying party (QP) and an applicator:

- 1) ARS 32-2313. Business license; renewal; financial security; definition.
- 2) ARS 32-2314. Qualifying party; license; examination; inactive status; temporary license.
- 3) ARS 32-2312. Applicator licenses; application; categories; renewal; inactive licenses

There are rules that add details to the statutes – see Rules Title 4 Chapter 29. However, these statutes are our primary concern.

The State and licensing – the two responsible party model

For the purposes of this first section, we are going to limit our discussion to UNRESTRICTED pesticides. We will discuss how to address restricted pesticides later in this paper.

The overwhelming majority of structural pest control is done using unrestricted pesticides. These pesticides are used for weed control, termite control, insect and other invertebrate pest control, rodent control and bird control. The whole science of pesticides has changed dramatically over the last few decades. Today's unrestricted pesticides work so well that they have made most restricted pesticides obsolete. Restricted pesticides are rarely used anymore.

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An unrestricted pesticide is a pesticide that the EPA (Environmental Protection Agency) has determined can be used by the average person with a low risk of harm. All unrestricted pesticides currently used by the pest control industry are available from garden shops, do-it-yourself stores and through the Internet – without restrictions. In other words, homeowners are using exactly the same unrestricted pesticides as the pest control industry.

All unrestricted pesticides come with a Federal label. The Federal pesticide label covers target pests, storage, mixing, application, safety equipment, environmental considerations, cleanup, disposal and warnings. The applicator – be it a homeowner or licensed applicator - is required by law to read and follow the Federal pesticide label.

It was pointed out during the January 26, 2012 Tucson Town Hall meeting that less than 17% of all pesticides are applied by the structural pest control industry. Agriculture has been estimated to use roughly 60% of all pesticides. Do the math – homeowners and other unlicensed applicators are estimated to be using roughly 23% of all pesticides – way more than the whole structural pest control industry.

Given the huge amount of unrestricted pesticides being used by unlicensed individuals, there are very few cases nation wide where a pesticide caused any harm to a consumer. In fact, the Office of Pest Management was not able to come up with a single case harm to a consumer caused by unrestricted pesticide use in the prior 3 years – as far back as they were willing to look – and they could not remember any cases in the last 10 years. So clearly, unrestricted pesticides used by unlicensed applicators are not causing significant harm to the public.

The State has an interest in licensing the commercial application of pesticides because of the volume of pesticides used and the resulting increased potential for harm. The increased potential for harm comes from the use of high volumes of concentrates, large quantities of mixed pesticides, high volume spray equipment used in the applications and the applicator's long-term exposure to pesticides. The State has no interest in licensing homeowners or people who perform minor pest control treatments that are secondary to their normal job function because there is a low potential for harm due to the unrestricted nature of the pesticides and the small quantities involved.

Regulation by definition limits business, but regulation should not be used to limit business – Joe Sigg.

The purpose of a license is to ensure that minimum standards are met and to provide recourse when minimum standards are not. In the case of a commercial applicator – the person handling and applying the pesticides – the applicator should

know and understand the National Pesticide Applicator Certification CORE Manual – published by National Association of State Departments of Agriculture (NASDA). Further, the applicator should know and understand the pests s/he will be dealing with and the recommended methods (i.e., industry best practices) for dealing with those pests. And of course, the applicator is expected to use pesticides in accordance with these standards and to follow the Federal pesticide label. In the case of a company, the company should ensure applicators are doing their jobs properly, keep appropriate pesticide-related records and perhaps show some minimum level of financial responsibility.

Whenever the State issues a license, the license is issued to a responsible party – by definition. The person or entity that the license is issued to is responsible for acting in accordance with the license. If the responsible party fails to abide by the terms of the license, the State can revoke the license, the State can fine the license holder or the State can bring a criminal or civil lawsuit against the license holder. All of these methods can be used to enforce a minimum standard by the State but the State must be willing to take action and actively enforce the standards. A damaged party can also bring a civil lawsuit against the license holder.

In the commercial pesticide industry – whether structural or agricultural – you need a minimum of two responsible parties. The first responsible party is a person – an applicator. The applicator is needed to apply the pesticide and therefore the applicator must be held responsible for the proper handling and use of the pesticide. The second responsible party is a person or legal entity – a company – that is in the business of applying pesticides. The company must accept financial responsibility for any damages caused to a customer or third party, whether accidental, intentional or through neglect. A company must also take responsibility for maintaining any required records. In a small company, the applicator and the company owner may be one and the same.

Let's start by looking at the applicator. The CORE manual, the Federal pesticide label and any pest-specific education required by a license classification sets forth a well-defined set of standards that the applicator is required to follow. If the applicator has any doubt about the correct course of action under a particular circumstance, the applicator can easily reference the CORE manual, pest-specific training materials and the Federal pesticide label(s). There are also other resources that can be consulted such as the Department of Agriculture, Office of Pest Management, one of the State Universities, local community colleges, pesticide distributors or industry specialists. There is simply no excuse for an applicator to not follow these standards and do the right thing.

Now let's move on to looking at the company that the applicator works for. Any company – regardless of industry – must take financial responsibility for the actions of its employees. If an employee is engaged in company business and causes

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damages, the company becomes liable for civil damages. In general, the employee cannot be held financially responsible for civil damages while performing work for an employer.

A company can be a sole proprietor, partnership, limited liability company (LLC) or a corporation. In the first two methods of business organization, the individuals that form the business have direct financial liability and are the responsible persons. In the remaining methods of business organization, LLCs and corporations are considered legal entities. With a legal entity, the legal entity is directly responsible and any liability stops with the legal entity – the people owning the legal entity are protected from liability. Therefore, the legal entity is considered the responsible person. The statutory agent is the person that represents the legal entity for the purposes of receiving service for a lawsuit. The president or other officer of the company or a member of the company's governing board will be the person authorized to sign any legal document or license. And it will be the same authorized person who will be initially contacted if there is a problem resulting from an activity associated with the license.

The State already licenses businesses. In general, nearly all businesses are required to hold some form of license, whether it is for retail sales, contracting, consulting, real estate or a professional trade. So licensing a pest control company is not unusual with respect to other businesses.

The applicator's employer – the company – has certain management and supervision responsibilities because the company has financial liability. The company should insist that the employee applicator adheres to the applicator's licensing and should take appropriate disciplinary action if the employee applicator is not following those standards. This should be supported by the employer's written policies and the day-to-day actions the employer. At the same time, the company should provide appropriate pesticides and equipment to the employee applicator so the employee can perform his job properly. How the company accomplishes this is up to the company. The State has no legitimate interest in dictating how a company should be managed. The State's only legitimate interest is in enforcing the terms of the licenses and prosecuting non-compliance.

A difficulty can arise when the employer company fails to support the license standards that the employee applicator is required to follow. This often happens for financial reasons – as a method to reduce costs and improve profits. This can happen through direct instruction from the employer company that is contrary to the licensing standards, though failure of the employer company to provide proper equipment needed to follow the standards or other methods. In this case, the employer company has become an impediment to the employee applicator following the standards and must be held in violation of the company's license and the employee applicator must refuse to work under the employer company-mandated

conditions. It is in the State's interest to provide a mechanism whereby a licensed applicator can report a company for impeding the employee applicator's ability to follow the standards required by the applicator's license.

You will notice we have not mentioned the QP. We will get to the QP later.

In the end, the employee applicator must take responsibility for complying with the applicator licensing requirements. However, if the employer company knew about the failures and failed to take any actions to correct them, or if the company acted to encourage the employee applicator to violate the license standards, the employer company must be held responsible in addition to holding the employee applicator responsible. One party should not be allowed to go free by blaming the other party. If both parties failed to live up to their licensing requirements, both parties must be disciplined appropriately.

The above holds for a single person company where the applicator and business owner are one and the same as well as for a multi-national company. In both cases, we end up with two responsible parties and a method to redress grievances.

The above can also work for municipalities and other political subdivisions. The political subdivision takes on the same role as the company – i.e., the political subdivision takes on financial responsibility and any record maintenance responsibilities. The licensed applicators working for the political subdivision are treated the same way they would be if they were working for a company.

The two responsible party model is simple and easy to understand. And it works.

The two responsible party model does make the following assumptions: 1) the applicator test is comprehensive – i.e., the applicator should show a reasonable depth and breadth of pesticide and pest control knowledge, 2) the applicator will be held responsible under all circumstances, 3) the company will be held responsible for records, pesticide storage, properly functioning equipment, reasonable procedures and their enforcement, supervision and financial liability and 4) the State will prosecute violations appropriately.

How agricultural pest control is organized in Arizona

The two responsible party model with the applicator and the company is how the agricultural industry is organized in the state of Arizona with respect to UNRESTRICTED pesticides. They have used this model successfully for years (decades). Again, the model includes a licensed applicator and a licensed company that the applicator works for. The licensed applicator is responsible for handling the pesticides and the licensed business is responsible for the financial liability and record maintenance.

The division of labor and supervision

The licensed applicator is generally expected to operate independently in the field without direct supervision. After all, the licensed applicator was required to demonstrate a detailed understanding of the contents of the National Pesticide Applicator Certification CORE Manual, the ability to read and follow the Federal pesticide label, an understanding of the pests from the licensing category and the best practices for handling those pests. If a company has special equipment and procedures, it is the company's responsibility to teach a new employee applicator those items before sending the employee applicator into the field without direct supervision.

It is perfectly reasonable – and expected – for a company to pair a newly hired licensed applicator with an experienced applicator for an appropriate probationary and training period. The combined probationary and training period ensures the new employee applicator is up to speed with the supplied equipment, company procedures, customer routes and local conditions – all of which have nothing to do with the applicator's license. The combined probationary and training period also allows the experienced person to evaluate the new employee applicator's performance.

A company may choose to have the employee applicator take care of paying for the applicator's own license and continuing education and keeping up with new industry developments. Or a company may choose to pay the applicator license fee and continuing education for the employee applicator as a benefit of the job. In any case, the employee applicator is – and must be – the sole owner of the applicator license and solely responsible for the maintenance of that license.

How the company organizes itself is to the company. How much supervision is needed and the structure of that supervision is the responsibility of the company and should be left to the discretion of the company. The State should set the minimum standards – i.e., use of licensed applicators and record maintenance – and then let the company figure out the best way to implement those standards.

The State should verify that the standards are being met in an unobtrusive way and take appropriate enforcement action when the State finds the company or the applicator have failed to meet the standards.

The branch office

It is common in the pest control industry for larger companies to have multiple offices – a main office and one or more branch offices. For a big company, the main office may have more staff, executive suites, additional accounting functions, sales

people, centralized customer services and perhaps no pesticide operations. A branch office may have some trucks and equipment, pesticide storage, an office manager, limited office staff and multiple licensed applicators.

Any responsible company will have a trusted person at each branch office to see after the day-to-day affairs of the office. That trusted person is the company's responsible person for the office and is there to act in the company's interests. Remember, the company has a vested financial interest in the success of the office and expects the office to be profitable.

For a small branch office, the trusted person may be the most experienced applicator. For a large branch office, the trusted person may be a non-licensed office manager. In any case, there will be an appointed person who is at the office on a regular basis – usually on a daily basis during regular business hours – and who will take responsibility for the activities of that branch office.

It is reasonable for the State to require the office location and the name of the responsible person for each office and to require that the company keep that information current. The State does not have any legitimate interest in a branch office beyond this. Remember, the company business license and each employee applicator's license already mandates standards that the company and employee applicators will be held to, regardless of the type of office.

Qualifying Party (QP) and the third license

The structural pest control industry currently has the concept of a third responsible party that necessitates a third required license. This is the qualifying party or QP license. The QP is an intermediary person who is given responsibility to oversee applicators – including their supervision and training, along with responsibility for records. The QP is required to have 3000 hours of experience in the category of interest. Finally, no company can be licensed without a QP.

Does the State have a legitimate reason to mandate a QP? Does the QP serve a legitimate function? Is the QP something more than a barrier to entry?

There are four primary problems with the concept of a QP.

The first problem is that the QP has no inherent authority to spend money or supervise anyone in the company – and thus no real authority to carry out any legislated mandate. While the QP is handed responsibility for the mandated functions, the QP has no inherent authority within a company to carry them out. There is no logic behind assigning responsibility to a position that has no authority to carry out the mandates. The only position that has the authority to spend money and provide supervision is the company itself. As we have discussed above, the

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company is the correct place to assign responsibility for accomplishing mandates because the company can spend money and provide supervision.

The second problem with the QP is that there is no actual requirement for the QP to do anything besides show up at the main office once every 30 days. Although the current law may state the QP is responsible for certain things, there are no actual requirements to do anything other than to show up at the main office once a month. The QP is not even required to visit a branch office.

The third problem with the QP is that the QP is used as a scapegoat when things go wrong and as a way for the company to avoid responsibility. If an applicator does something wrong, the State typically goes after the applicator and the QP and leaves the company alone. The company blames and perhaps fires the applicator and/or the QP to avoid responsibility. To further protect the company, some people have suggested trying to make the QP financially responsible. But that cannot work because the QP is an employee of the company and you cannot force financial responsibility onto an employee for legal reasons.

The fourth problem with the QP is the arbitrary 3000 hours of experience in category. This is clearly a barrier to entry. To put this in perspective, think about becoming a pilot. To become a commercial pilot carrying passengers for pay (commercial multiengine rating), you only need 250 hours of flight experience logged – pilots keep a log of hours flown in a personal logbook. Most small commercial airlines will hire you with only 1500 logged hours. If a plane crashes, people die. In the case of an airliner, lots of people die. Clearly, planes are not falling out of the sky and killing lots of people due to lack of experience. Likewise, there is no significant harm being caused by the use of unrestricted pesticides without a QP. We cover the many issues with experience requirements in a later section.

There are four large groups of people applying unrestricted pesticides without any requirements for a QP and without any significant documented harm to employees or the general public. These four groups are homeowners, yard workers, political subdivisions and farmers. As we discussed earlier, homeowners have no licensing requirements. The yard workers are allowed to spray weeds without any license if they comply with the terms of the yard worker's exemption. Political subdivisions apply pesticides to schools, parks, public facilities and other municipal areas using only licensed applicators. Finally, farmers spray the lion's share of pesticides using only licensed applicators – on both food and non-food.

The one group who has consistently fought for the QP over the last few decades is the "industry association" known as the Arizona Pest Professional Organization (AzPPO) – and their predecessors. AzPPO has roughly 65 paid members out of the 1250 licensed structural pest control businesses. The members of this organization

are mostly large pest control companies so they do not represent the typical small pest control business. This organization has consistently fought for increased regulation as a means to reduce competition and their members have publicly stated they want more barriers to entry – to reduce the competition and promote higher prices. The fact that homeowners, yard workers and political subdivisions have been successfully applying pesticides for years without harming themselves or the public and without QPs is an on-going embarrassment to AzPPO. Now that structural pest management has been moved under the Department of Agriculture, it is probably just a matter of time before AzPPO starts pushing for a QP requirement for all farmers.

Costs and benefits of regulation – uncompensated victims

The whole purpose of regulation is to set up a system of protections for the general public. Such a system of protections must provide sufficient benefits to justify the cost of the regulations. So it follows that any regulations that do not make a significant contribution to protecting the general public should be eliminated. A good regulation is one that provides significant benefits to the general public.

Regulations do not prevent crime – regulations just define what a crime is and how to punish it. Murder is illegal but it still occurs on a regular basis. Put another way, you cannot legislate morality. Further, regulations do not compensate victims for their losses. The regulations only allow for the prosecution of the crime.

There are numerous cases over the past 10 years where members of the public have been harmed by the actions of a pest control company and the OPM and its predecessors were essentially powerless to help the consumer recover any damages. In the pest control industry, the overwhelming cause of damages is from termite infestations that are not properly detected, reported or treated. In each case, the regulators were limited to fining a license holder, suspending a license or perhaps strong-arming a company into providing a new treatment in lieu of a fine. In the end, it was the victim who had to take the pest control company to court and sue for damages. In spite of the regulations, the regulators were powerless to compensate the victims whom they were supposedly protecting.

There is a second cost and benefit of regulation that should not be overlooked – that of prosecuting a "de minimis" violation. The guiding philosophy should be that the punishment should fit the crime. It is inappropriate to cripple or drive a company out of business for a violation that has no consequence.

There is also the issue of selective enforcement, where perhaps a large company is allowed a warning while a small company is given the maximum punishment. Selective enforcement is beyond the scope of this paper.

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The QP brings no regulatory protection to the general public and thus fails to provide any benefits that can be used to justify the corresponding regulations.

Restricted pesticides

Now let's turn our attention to RESTRICTED pesticides. Restricted pesticides are those pesticides that the EPA has determined pose a significant risk of harm and should be controlled. Due to the increase risk posed by restricted pesticides, the State has a legitimate interest in regulating restricted pesticides to a higher standard for both the applicator and the company.

In the agricultural industry, restricted use pesticides require a Pest Control Advisor (PCA). The PCA is required to make a diagnosis of the pest, make a determination that a restricted use pesticide is needed, specify the rate of application for the restricted use pesticide, provide notification of the application and take care of paperwork for the application. The PCA is not needed for the application of unrestricted pesticides.

Note that the standard applicator training covers all of the knowledge needed to safely apply restricted pesticides and thus a regular licensed applicator can be used to apply restricted pesticides after the PCA has written the restricted pesticide prescription.

We are in favor of adding a similar concept to structural pest control.

Although we are generally not in favor of a practical experience requirement for a license, in the case of restricted pesticides, a small practical experience requirement may be appropriate as long as it does not create an undo barrier to entry. Any such requirement should be no more than 50 hours and must be available to any qualified person without causing undue hardship. The experience can be logged in a private logbook and signed off by the supervising applicator.

The problem with experience requirements

Practical work experience requirements generally create a barrier to entry while providing little benefit to the consumer or the industry itself.

The first issue with practical work experience requirements is that in many segments of the industry there may not be enough work to gain any meaningful amount of practical experience in a reasonable period of time. For example, let's say you are trying to get experience in restricted use pesticides in the termite industry. Since restricted use pesticides are rarely used in the termite industry, there may only be a few such jobs done a year if you include all of the companies that perform this type of work. Even if you were present at all of them, it might

still take you a few years to gain the required experience.

Another issue is that if you already work for a company, expanding your applicator's license is very difficult if that company is not already performing the work you want to be licensed for. Essentially, you must quit the company you work for and go to work for another company to gain the experience. If you happen to be a company owner, you are essentially being required to close your company and go work for one of your competitors – and your competitors may have no interest in hiring you. The experience requirement limits the ability of a company to expand into other areas of pest control.

There has been an on-going problem with a company refusing to document an employee's work experience in order to prevent the employee from getting a new license and starting their own company.

The pest control industry also has a significant gender bias – it is a male dominated industry. There are very few female applicators and business owners. This makes it much more difficult for women to get hired and gain the required experience to expand their licenses.

One way to get around these issues is to allow classroom training to substitute for practical experience. There are community college classes, university classes, manufacturer's training classes (excluding infomercial classes) and other training opportunities. A reasonable ratio of classroom training should be allowed to substitute for field experience – say 2:1 or something similar.

The Department of Agriculture could assist this process by encouraging work-study programs. The student's field time would be free labor to allow the student to gain practical field experience and to encourage businesses to provide practical field opportunities to students. A benefit to cooperating businesses is that they have a well-trained pool of potential employees to select from. But the practical field requirements must be kept to a reasonably small value for this to work. The experience requirement cannot become a barrier to entry.

Conclusion

We have presented a logical basis for licensing applicators and companies and dividing the responsibility for safe pesticide application between them. This system provides a way for the State to discipline applicators and companies who fail to adhere to the required standards. This system provides the State as well as the consumer and unrelated third parties a method to redress their grievances. This system provides a streamlined regulatory process without creating any undo barriers to entry and provides equity between the large and small companies. This system is easy to understand, easy to implement and easy to administer.

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We have shown that the existing concept of a QP is logically flawed and not needed to regulate the industry. The QP position has been used to protect companies while creating a serious barrier to entry for new companies or companies wanting to expand into new categories. We think that the QP serves no legitimate purpose and should be eliminated.

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