

**Structural Pest Control Commission
9535 E. Doubletree Ranch Road
Scottsdale, AZ 85258**

**COMMISSION MEETING
FRIDAY, May 12, 2006, 9:00 A.M.
MINUTES**

I. Call to order, Commissioner roll call

Commissioners Present: Commissioners Paul Baker, Patrick Black, Dave Burns, Dan DeVere, Bert Putterman, and Debbie Runbeck

Commissioners Absent: One Vacancy

Staff Present: Eric Bauer, Vince Craig, Mike Francis, Lisa Gervase, Robert Tolton, and Assistant Attorney General Blair Driggs

II. Call to the public

None.

III. Communication with Commissioners

Commissioner DeVere stated that he heard from someone who had a question about the Commission's process of reviewing a request to renew a temporary QP license. He stated that he told the person to show up at today's Commission meeting.

Commissioner Baker stated that an industry member called him regarding the testing procedures, and he referred the industry member to staff.

Commissioner Black stated that he received a copy of letter about the insurance form.

IV. Summary of Current Commission Events, Activities, Notices

☞ Status of Proposed Law and Rule Changes. Also, watch web www.azleg.state.az.us and www.sb.state.az.us

Lisa Gervase stated that it looks like the three legislative bills, all of which that were proposed by others, will become effective. Two will become effective 90 days after

close of the legislative session (SB 1221 and SB 1388). One will become effective on 1/1/07 (SB 1350).

Lisa Gervase provided a status of the rule amendment process and progress. Commissioner Runbeck suggested having a separate Commission meeting to discuss the proposed rules changes.

✓Applicator License Renewal status - Renew Online Now www.sb.state.az.us.
About 3,500 of the over 7,000 applicators have renewed to date - about 3,000 of those were done on-line.

⇒ILT (Initial Licensure Training) courses posted on web site. Registration: 480-ILT-SPCC; ILT@sb.state.az.us

V. Consent Agenda

Commissioner Putterman expressed concerns about business applicants with names similar to existing businesses. After discussing the Commission's legal authority vis-a-vis approval of names, Commissioner Putterman asked if Commission staff researches companies for similar names. Robert Tolton stated that staff does, and any similar names would be included in the application cover sheet. Commissioner Putterman asked if the Commission notifies current similar name holders. Robert Tolton stated that we do not. Lisa Gervase stated that this is why they post items such as these on the public Commission meeting agenda. Also, applicants usually have gone through the Secretary of State or Corporation Commission process before coming to the Commission.

A. Applications for New Business License

Qualifying Party

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| 1. Gorsuch, Charles T. | Enviro Control, LLC. (Activating Qualifying Party for new business license in "B1" General Pest & Public Health, "B3" Right of Way & Weed Control and "B5" Turf & Ornamental Horticulture) |
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Mr. Gorsuch appeared.

Commissioner Putterman stated that he has no problem with Mr. Gorsuch but does have an issue with similar names. He asked if there is another name possible. Mr. Gorsuch stated that it is a very involved process to go through registration of a name, and he has already spent lots of time and incurred lots of expense. He stated that his company is limited and handles commercial properties and is not doing advertising for residential properties. The commercial work is in landscaping with an already established clientele. Commissioner Burns asked who their sister company is. Mr. Gorsuch stated that it is called Integrated Landscape. Commissioner Burns asked how many other pest control companies have "Enviro" in their names. Robert Tolton stated that currently there are three licensed businesses with "Enviro" in their names: Enviro Pro, Enviro-Safe, and Enviro-Tech. The Commissioners then discussed this issue further in agenda item V.A.5 and applied a similar analysis to the vote for this agenda item here (V.A.1).

MOTION: To approve the application for new business license in "B1", "B3" and "B5" by Commissioner Putterman.
Seconded by Commissioner Baker.

VOTE: 6-0 Motion carried.

2. **Bulkley, Kevin R.** **KB Pest Management (Activating Qualifying Party for new business license in "B1" General Pest & Public Health)**
3. **Dewitt, Christopher H.** **Brencon Pest Control Company (Activating Qualifying Party for new business license in "B1" General Pest & Public Health)**

Mr. Dewitt appeared.

Richard Lange, Jr., owner of Brencon Pest Control Company, appeared.

Commissioner Putterman asked if Mr. Dewitt lives in Arizona. Mr. Dewitt stated that he lives in New Mexico but will be moving to Arizona within the next few months. Commissioner Putterman asked if it is his intent to work full time for this company. Mr. Dewitt stated that it is. Commissioner Burns asked how Mr. Dewitt plans on managing the business from an out-of-state location such as New Mexico. Mr. Dewitt stated that he will be available around the clock to answer questions. Mr. Lange stated that Mr. Dewitt will travel to Arizona at least once a month, and more often if necessary. Commissioner Burns asked what their plan is for emergency

situations that could arise. Mr. Lange stated that he can pretty much take care of emergency situations on his own and can have Mr. Dewitt here in Arizona within 12 hours if necessary. Commissioner De Vere asked if Mr. Dewitt holds similar licenses in Texas and New Mexico. Mr. Dewitt stated that his license in Texas is inactive and that he will be leaving the family business from New Mexico. Commissioner Burns asked if this business is running as a branch. Mr. Lange stated that it is not and that it is separate. Commissioner Burns asked if this means that Mr. Dewitt will be qualifying two businesses. Mr. Dewitt stated that this will not be the case and that he is just working in New Mexico until he moves here. Commissioner Burns asked if Mr. Dewitt qualifies for a business in New Mexico. Mr. Dewitt stated that the rules are different there and that he doesn't run a business there. Commissioner Black asked how big of an issue it is for Mr. Dewitt to not be available for emergency situations. Commissioner Runbeck asked for clarification regarding whether the application meets the requirements for a new business license. Lisa Gervase stated that A.R.S. § 32-2314 addresses that question and indicates that a person acting as a QP shall be present at the business office location at least once a month and, during normal business hours, shall be readily available to the licensed applicators and employees of the business licensee. There is no requirement for Arizona residency. Robert Tolton added that the application does meet all of the statutory requirements for a new business license. The burden is on Mr. Dewitt to be present once a month. Commissioner Black asked if staff could monitor something like that. Lisa Gervase stated that staff can do inspections, just like staff would do on any business that has a QP who is Arizona resident. Lisa Gervase stated that staff can look for documentation that he was there at the office, and, if a complaint comes to staff, then we would look at his role in supervising and he could be subject to discipline if he did not properly supervise. Commissioner Black asked how many applicators the company has. Mr. Dewitt stated that there is only one. Commissioner Burns stated that in the last several months the Commission has come across out-of-state or out-of-office QPs, and it can become a problem when a "pseudo" business owner runs the business and the QP doesn't know what is going on. He stated that he wants Mr. Lange to know that he will watch very closely to see whether Mr. Dewitt is involved in the daily operations of the business and that Mr. Lange can't hide behind a QP. He stated that he doesn't believe that the public safety is at first thought here. Commissioner Runbeck stated that she believes that the Commissioners are justified in wondering about this situation, but legally there is no requirement that a QP has to live in Arizona. She stated that denying Mr. Dewitt's application would be like not giving someone a driver's license because we think that the person will break the law. Commissioner Putterman stated that we have had complaints regarding this issue in each of the four meetings to which he has been so far, and he acknowledged that the Commission is currently in the process of revamping its rules. He stated that the current system is ludicrous; the Commission is not being told how QPs are running

their businesses, and QPs simply put the standard law language on their application forms to answer that question. He stated that we need to revamp the process so it works for consumers and the people in the industry. Commissioner Burns agreed that he doesn't like the process but also stated that he hopes that Mr. Dewitt is very successful and that we don't see him involved in any complaints. Commissioner Baker stated that for years he has been railing against allowing out-of-state QPs, but acknowledged that the Commission is constrained by the law. Lisa Gervase added that the shoring up of what is required in daily management was one of the things that was in the proposed omnibus bill until the Commission withdrew its support of the bill. So now the Commission will be limited to regulate this issue in rule unless and until there is a future law change. Mr. Lange added that they will be going through the QP process and will be here for next month's meeting.

MOTION: *To approve the application for new business license in "B1" by Commissioner Baker.
Seconded by Commissioner Black.*

VOTE: *6-0 Motion carried.*

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| 4. Staron, Paul D. | Valley Building Inspections, Inc.
(Activating Qualifying Party for new business license in "B8" Wood-Destroying Insect Inspection) |
| 5. Snyder, Bryce | EnviroSystems Management, Inc.
(Activating Qualifying Party for new business license in "B3" Right of Way & Weed Control) |

Mr. Snyder appeared.

Robert Tolton stated that currently there are three licensed businesses with "Enviro" in their names: Enviro Pro, Enviro-Safe, and Enviro-Tech. Part of our rules says that a company must operate as registered with the Commission, and if it fails to do so, then it is a violation. Commissioner Putterman asked if there is another name that they could choose. What type of problem would that create? Mr. Snyder stated that EnviroSystems has been incorporated in Arizona for 6 years and so it would be difficult to make a change. He stated that they are an environmental consulting company. Commissioner Runbeck asked how similar does the name need to be in order for the Commission to not approve it? Commissioner Black stated that these proposed names are submitted to the Corporation Commission and they do research for similar names; that is why you submit three possible

names to them. He stated that it seems like we are adding another level of bureaucracy. He stated that he understands the concerns of his fellow Commissioners but asked if the issue regards who is "first in time" to claim a name? Commissioner Runbeck noted especially that they should consider that this company has been operating under its current name for 6 years. Commissioner Putterman acknowledged this but also noted that the company has not been operating for this long in the pest control industry. Similarly, there may be some other companies in other industries with "Arizona" in their names. A while ago there was another "Arizona" company that came into the pest control industry and competes in the same market as his company, Arizona Exterminating Co. He stated that his company gets half a dozen calls a week for the other company. We can prevent this from happening, and it is important that customers are not confused. He stated that it is just as easy to have a "dba" that handles this part of your business. Commissioner Black asked what kind of economic impact this would have for Mr. Snyder's company. Mr. Snyder stated that he would have to discuss this with the principal of the company, but he doesn't think it would fly. He stated that everything they use, including marketing tools, etc., say this name, and he doesn't think it's that confusing. He stated that he thinks that the Commission will see more companies in the future with "Enviro" in their names. Commissioner Putterman stated that there is zero economic impact because EnviroSystems is not yet in the pest control business. Blair Driggs stated that it is true that the Corporation Commission requires a name to be almost exact before it denies the name, so there is closer scrutiny here at the Commission level. According to A.R.S. § 32-2304(B)(18), the Commission may refuse to issue a business license in a name that is likely to be misleading or to imply any distorted representation about the business. The Commission is still bound by a very strict basis.

MOTION: To deny the application for new business license in "B3" because the proposed name is too close to the names of three other already-licensed pest control companies, by Commissioner Burns. Seconded by Commissioner Putterman.

VOTE: 0-6 Motion failed.

MOTION: To approve the application for new business license in "B3" by Commissioner Putterman. Seconded by Commissioner Baker.

VOTE: 6-0 Motion carried.

- 6. Pierce, Sr.; Jesse R. Valley East Pest Control, Inc. (Activating Qualifying Party for new business license in "B1" General Pest & Public Health, "B2" Control of Wood-Destroying Insects and "B8" Wood-Destroying Insect Inspection)
- 7. Frink, Clifford W. CareFree Weed Control (Activating Qualifying Party for new business license in "B3" Right of Way & Weed Control and "B5" Turf & Ornamental Horticulture)
- 8. Cervantes, Melanie D. Gothic Grounds Management, Inc. (Activating Qualifying Party for new business license in "B3" Right of Way & Weed Control and "B5" Turf & Ornamental Horticulture)

Ms. Cervantes appeared.

Commissioner Burns asked if her company is a California company. Ms. Cervantes stated that they have a branch office here in Arizona and that they do landscape maintenance. Commissioner Burns asked if the QP is involved in the day-to-day operations of the Arizona business. Ms. Cervantes stated that she is involved. Commissioner Burns asked if the QP is on site. Ms. Cervantes stated that she is.

MOTION: *To approve the application for new business license in "B3" and "B5" by Commissioner Burns. Seconded by Commissioner Baker.*

VOTE: *6-0 Motion carried.*

- 9. Winter, Alexander L. Sculptured Earth Resources, LLC. (Activating Qualifying Party for new business license in "B3" Right of Way & Weed Control)

B. Applications to activate Qualifying Party for Existing Business License

1. **Stewart, Charles B.** Advocate Pest & Wildlife Specialists (Activating Qualifying Party for existing business license in "B2" Control of Wood-Destroying Insects and "B8" Wood-Destroying Insects Inspection)
2. **Pannell, Shane D.** All Guard Pest Control, LLC. (Activating Qualifying Party for existing business license in "B1" General Pest & Public Health)
3. **Dobert, Gary K.** Terminix (Activating Qualifying Party for existing business license in "B1" General Pest & Public Health, "B2" Control of Wood-Destroying Insects, "B4" Fumigation and "B8" Wood-Destroying Insects Inspection)
4. **Donahue, John W.** Permaguard Termite & Pest Control (Activating Qualifying Party for existing business license in "B1" General Pest & Public Health, "B2" Control of Wood-Destroying Insects, and "B8" Wood-Destroying Insects Inspection)

Tabled.

C. Applications for Qualifying Party License

1. **Kimball, Matthew L.** "B3" (Right of Way & Weed Control) and "B5" (Turf & Ornamental Horticulture)
2. **Whitman, Adam M.** "B3" (Right of Way & Weed Control)
3. **Orr, Robert L.** "B1" (General Pest & Public Health)

4. Bearden, Jamie M. "B1" (General Pest & Public Health)

Mike Denny, General Manager from U.S. Pest Control, Inc., appeared.

Mr. Denny stated that Ms. Bearden is his daughter and she could not be here today because she is in labor. Commissioner Burns asked what experience Ms. Bearden holds in application and supervision of pesticides. He asked if her experience was in more than just sales. Mr. Denny stated that she is experienced in managing service technicians, identifying infestations, prescribing treatments. Commissioner Burns asked how she has supervised. Mr. Denny stated that she has directed people to put pesticides down. He added that if he did these things without a license, he would be asked to cease and desist, so these activities should count towards the 3,000 hours of practical experience required to test for a QP license. Commissioner Putterman stated that it says right on the form that sales is not practical experience, which he finds somewhat ludicrous. He asked if Ms. Bearden is visiting clients in their houses and doing more than just putting out flyers. Mr. Denny stated that she absolutely is and that she is also their office manager.

MOTION: *To approve QP testing in "B1" by Commissioner Putterman.
Seconded by Commissioner DeVere.*

VOTE: *6-0 Motion carried.*

5. Carey, Donald R. "B1" (General Pest & Public Health)

**6. Valencia, Randall S. "B1" (General Pest & Public Health)
and "B4" (Fumigation)**

Mr. Valencia appeared.

Commissioner Putterman noted that Mr. Valencia is applying for a fumigation license and pointed out that Mr. Valencia obviously has experience that is tangential to fumigation. It certainly demands training, but this license category would enable him to do more than just burrow fumigation; it would allow him to do structural fumigation. He stated that we should either separate burrow fumigation or add it to the B4 category. Mr. Valencia stated that this is the way it is in California.

MOTION: *To approve QP testing in "B1" and "B4" by Commissioner Putterman.
Seconded by Commissioner DeVere.*

VOTE: 6-0 Motion carried.

- 7. **Grab, Thomas S.** “B1” (General Pest & Public Health), “B2” (Control of Wood-Destroying Insects) and “B8” (Wood-Destroying Insect Inspection)
- 8. **Weber, Andrew M.** “B2” (Control of Wood-Destroying Insects) and “B8” (Wood-Destroying Insect Inspection)
- 9. **Stevens, David D.** “B3” (Right of Way & Weed Control)
- 10. **Harback, Anthony L.** “B3” (Right of Way & Weed Control) and “B7” (Fungi Inspection)

D. Business License Name Change Requests

- 1. **Valley East Pest & Termite Control, Inc. to A-Nother Pest Control, Inc.**
- 2. **Caseys’ Exterminators to Arrow Exterminators, Inc.**

Michael Derman, President of Arrow Exterminators, appeared.

Commissioner Putterman noted that there already is an Arrow Pest Control that has been licensed with the Commission for almost 10 years. Now we have a national company that wishes to infringe here in Arizona. Commissioner Runbeck also noted that another company named Arrowhead Exterminating Co., Inc. is licensed here in Arizona. Mr. Derman stated that they use their federally registered trademark, which is very distinctive and different from Arrow Pest’s trademark. Commissioner Runbeck asked if there has been any discussion with Arrow Pest or Arrowhead. Robert Tolton stated that there has not. Commissioner Putterman stated that he finds this name to be very similar to the names of the companies already in the industry here and that it is confusing to consumers. However, the fact that no one from those two companies is here to voice opposition leads him to believe that they don’t care. He stated that he thinks that staff should tell someone when their proposed name is “on top of” somebody else’s and should ask them to consider not using that name. He stated that he understands that this is a big company here, but from a goodwill standpoint clients look at it simply as “Arrow”.

MOTION: To approve the name change request by Commissioner Black.
Seconded by Commissioner Baker.

VOTE: 5-1 Motion carried (Commissioner Putterman opposed).

End of Consent Agenda

MOTION: By Commissioner Baker to accept Consent Agenda with the exception of the items pulled for discussion or tabled (A1, A3, A5, A8, B4, C4, C6, D2). Seconded by Commissioner Putterman.

VOTE: 6-0 Motion carried.

(Break from 9:55 A.M. to 10:05 A.M.)

VI. Applications not on Consent Agenda

A. Request for Temporary Qualifying Party License Renewals

1. Connors, Michael T. "B3" (Right of Way & Weed Control)

Mr. Connors appeared.

Commissioner Runbeck asked if staff is awaiting background information for Mr. Connors' QP license application. Robert Tolton stated that staff is and that we have no control over the DPS and FBI process, which can take 3-5 weeks. He stated, however, that he thinks that staff will have it in time to be on next month's agenda.

MOTION: To approve a 60-day temporary QP renewal by Commissioner DeVere.
Seconded by Commissioner Burns.

VOTE: 6-0 Motion carried.

2. Case, Eric L. "B5" (Turf & Ornamental Horticulture)

Mr. Case appeared.

Commissioner Runbeck asked if staff is awaiting background information for Mr. Case's QP license application. Robert Tolton stated that staff is and that he thinks they will have it in time to be on next month's agenda.

MOTION: To approve a 60-day temporary QP renewal by Commissioner Putterman.
Seconded by Commissioner DeVere.

VOTE: 6-0 Motion carried.

B. Applications to activate Qualifying Party for New or Existing Business License

None.

C. Applications for Qualifying Party License

None.

VII. Complaints

A. City of Avondale (Unlicensed) - Case # 2005-080

Commissioner Baker stated that he is extremely disappointed with how the Commission is legally limited in adjudicating this case because the City is a political subdivision. The City of Avondale has someone doing treatments and does not have to take responsibility. Commissioner Burns stated that under A.R.S. § 32-2311(4), employees of political subdivisions or their designated agents while performing emergency response or rescue services are not required to be licensed. Lisa Gervase stated, however, that under another statute it says that a person who does this type of work shall be licensed. The question then becomes: what is a "person"? According to the A.R.S. Title 1 definition of "person" in use now, political subdivisions are not persons. She stated that since she raised this issue in late 2003, one by one the political subdivisions have been coming in to the Commission and getting QP licenses and business licenses. There is a difference of legal interpretation, so we don't have much guidance. She stated that her personal opinion is that they have to be licensed. Staff is using its enforcement discretion to require licensed applicators but not QP or business licenses at this time; however, if there is a misuse then staff can investigate that for referral to the EPA or action against the licensed applicator. Commissioners Putterman and Burns expressed frustration about limiting the scope of people whom the Commission regulates. Commissioner Putterman stated that we are going to fall into regulating a smaller and smaller group of people. In this case here, an inmate of the jail was instructed

by a supervisor to make an application. He stated that the types of violations that the Commission deals with have become more and more extreme. He stated that it seems like it is the view of the legislators that we should not be allowed to regulate as much. Commissioner Runbeck noted a letter in the file indicating that the City of Avondale is currently contracting all spraying activity to a licensed business.

MOTION: To accept staff's recommendation to dismiss the complaint by Commissioner Putterman.
Seconded by Commissioner Black.

VOTE: 6-0 Motion carried.

B. Irvin D. Smith Pest Control (BL)/Irvin Smith (QP)/Kyle Josephson (APP) - Case # 2005-091

Mr. Smith appeared.

Mr. Josephson appeared.

Commissioner Putterman stated that it appears to him that Mr. Josephson concealed the fact that he hadn't renewed his applicator license. Mr. Smith stated that Mr. Josephson had worked for him for about 5-6 years and he asked Mr. Josephson to test and become licensed. So, he accepted partial responsibility for the violation because he incorrectly assumed that Mr. Josephson had renewed his license. Commissioner DeVere asked if Mr. Josephson still works for him. Mr. Smith stated that he does not. Commissioner Burns asked Mr. Josephson if he told Mr. Smith that he renewed his license. Mr. Josephson stated that he did tell Mr. Smith that he would take care of it but in fact he did not. He stated that he did not have the money to pay for continuing education units ("CEUs") and so he let his license lapse. He stated that at the time he didn't realize how serious it was, but now he does. Commissioner Burns questioned why we are going to ding the QP for something that is an applicator issue. Vince Craig stated that they are hearing a new story today. He stated that he and Inspector Hathon previously conducted a settlement conference, and this is completely the opposite of what was said during the conference. Commissioner Putterman stated that he doesn't know why Mr. Smith would accept an Administrative Warning for this case when, in the file, it says that Mr. Josephson lied to Mr. Smith. Commissioner DeVere noted that the file also says that Mr. Smith did not follow up on reminders. It says that Mr. Smith trusted his employees to stay on top of it; that's probably why an Administrative Warning was assessed. Commissioner DeVere asked if Mr. Josephson has the financial ability to take care of his fines. Mr. Josephson stated that he does.

MOTION: *To accept proposed resolution and if the Consent Agreement is not executed by the deadline stated in the Consent Agreement transmittal letter to send the case to the Office of Administrative Hearings, by Commissioner Baker.
Seconded by Commissioner DeVere.*

VOTE: 5-1 *Motion carried (Commissioner Burns opposed).*

C. Uni-Tech (BL)/Steven Wells (QP)/James Price (APP) - Case # 2005-092

Tom Tollison, son-in-law of the homeowners in this case and Arizona attorney, appeared.

Adam Kunz, attorney representing the business licensee and qualifying party, appeared.

Mr. Tollison stated that there were failed attempts to settle this matter with Uni-Tech. He asked the Commission to reject the proposed resolution in this case because he thinks it is light. He stated that the violations in this case were of the basics; it's like a doctor not properly diagnosing a cold. A \$100 fine and 1 hour of CE is not appropriate. He asked the Commission to consider probation, monitoring and oversight. He stated that if, as an attorney, he misses something like this, he will be fired or sued. Commissioner Runbeck stated that the Commission, in striving for consistency in disciplinary action among similar cases, does have a worksheet that we use for determining penalties, including aggravating and mitigating circumstances. She stated that the Commission is not in a position to vindicate the homeowner; that has to come through a separate lawsuit or some other medium. Mr. Tollison stated that he thinks that there is a public policy issue here. He stated that he may not have the patience or means to bring a separate lawsuit, and if he really was convinced that the courtroom is an adequate remedy, then he wouldn't be here today. Commissioner Runbeck asked if there could be any basis to increase the penalties. Vince Craig stated that there is not any basis consistent with their guidelines. He stated that staff considered that a home inspection, which is more thorough than a termite inspection, was also performed on the home and that inspection indicated that the homeowner might want to contact a pest control company regarding termite damage, etc. He added that some information about the status of the home, even if not all, was noted. Conditions conducive and excessive moisture were not noted, but termites were noted. Commissioner Black agreed with the homeowner, stating that more blame should be placed on the QP. He noted that the company used a preprinted Wood-Destroying Insect Inspection Report ("WDIIR") form and there also appeared to be lack of training, both of which should be considered aggravating circumstances. Mr. Kunz stated that it is not appropriate for the Commission to act as leverage between an unhappy homeowner and a pest

control company. He stated that the recommended settlement is appropriate. He stated that he doesn't think that it is appropriate to hear the case in this forum or to decide whether a civil cause of action exists or to see whether settlement attempts were made in good faith. Commissioner Runbeck stated that it is within the Commission's jurisdiction though to determine aggravators and mitigators. Commissioner Putterman acknowledged that this can become an emotional issue for people who have bought a house based on an incorrect wood report. He stated that if he was the consumer, his complaint would be that the company didn't reinspect and give an updated report after performing treatments. He stated that his company also does home inspections that can cover significantly different areas from those covered in the termite inspections, and the home inspectors tell the homeowners to get in touch with a pest control company. Homeowners often think that pest control companies should be able to predict when termites will occur in the future. He stated that he doesn't have a problem with staff's recommendation. Commissioner Black asked about the preprinted form issue, noting that it was not consistent with the form that should have been used. Vince Craig stated that the company is no longer using this form. Commissioner Black asked how the company used their name, stating that it seems that the QP was not familiar with the Commission's rules. Vince Craig stated that the WDIIR is the responsibility of the business licensee, and the name didn't seem to be confusing for the homeowner who had intentions of contacting Uni-Tech. Commissioner Black stated that when he looks at these little things in isolation they aren't a big deal, but when he puts them together a snowball effect happens. Vince Craig stated that during the course of staff's inspections, they perform office inspections and use enforcement discretion if they later fix the form. Commissioner Putterman stated that the investigation of the complaint revealed additional issues, but it was termite activity at the structure that generated the complaint; that is the main issue. Commissioner Burns stated that one of the problems with a consumer or layperson reading a WDIIR form is that they can't understand that pest management professionals can't see behind a wall and don't move refrigerators. He added that the preprinted information on the WDIIR form seems to be informative. As far as the name issue goes, he stated that he hopes that the Commission doesn't make an issue about someone not putting "exterminating" in there. The company is an LLC and is probably not necessarily trying to sway the consumer into believing something different. Commissioner Black asked, though, if the fact that the company prepared a bid without checking the site causes concern. Commissioner Burns stated that that, in itself does cause concern, but we need to look back at the statement of complaint, and it is about termites, not about information on a WDIIR. He stated that he doubts that the same company doing the home inspection and the WDIIR were trying to deceive the consumer. These two forms together should have lead the consumer to believe that there are problems with the house. Commissioner Black stated that it seems to him that he is the only one divorcing the regulatory

issues from the consumer issues. He added that he doesn't agree with the settlement terms.

MOTION: To accept proposed resolution and if the Consent Agreement is not executed by the deadline stated in the Consent Agreement transmittal letter to send the case to the Office of Administrative Hearings, by Commissioner Putterman.
Seconded by Commissioner Baker

VOTE: 5-1 Motion carried (Commissioner Black opposed).

D. Safeguard Pest Control, Inc. (BL)/Jason Workman(QP) - Case # 2005-070

David Poplin, from Safeguard Pest Control, Inc., appeared.

Commissioner Putterman noted that this case involves an out-of-state QP. Mr. Poplin stated that he is the general manager of the local operation and that when he first became involved with Safeguard, it was right after this incident, and they now have a QP who is actively involved. Commissioner Burns noted that Mr. Workman, the QP at the time of the complaint, is currently not active. He also noted that staff is not proposing any disciplinary action against him now and asked if Mr. Workman would have to deal with this if he chooses in the future to reactivate or reapply for his license. Lisa Gervase stated that he would, and that is why the recommendation is to dismiss the complaint against Mr. Workman without prejudice. Commissioner Putterman asked who Safeguard's QP is now. Mr. Poplin stated that it is Bill Watkins, and Mr. Watkins was not involved in this complaint. Commissioner Burns asked if Mr. Workman is a QP in Texas now and asked if Texas would want to know about this complaint. Commissioner Baker asked how often the Commission inquires for this type of information from other states. Lisa Gervase stated that there are no national databases and the Commission relies on people's disclosure on their application forms regarding past license/complaint history in other states. It is more efficient here to suspend his license than to go to hearing, where there is no guarantee that it will be suspended; and, even if Mr. Workman were to be hit with a civil penalty, we might not be able to collect it, and then the case will go to the Attorney General's Office for collections. It is up to other states to decide what they want to do. It is important for this Commission here in Arizona to be able to deal with this case later if necessary. If Mr. Workman applied for another license here, the information about this complaint would be in the database and have to be handled at that time.

MOTION: To accept proposed resolution for the business licensee and if the Consent Agreement is not executed by the

*deadline stated in the Consent Agreement transmittal letter to send the case to the Office of Administrative Hearings. To suspend the QP license of Jason Workman for non-payment of renewal fees with automatic revocation one year later, and to dismiss the complaint against Jason Workman without prejudice, by Commissioner Black.
Seconded by Commissioner Baker*

VOTE: 6-0 Motion carried.

VIII. Requests for Review or Rehearing of Previous Commission Decisions.

None.

IX. Review or Rehearing of Previous Commission Decisions.

None.

X. Consideration of Suspension of Business, Qualifying Party and/or Applicator Licenses for Non-payment of Civil Penalties and/or Nonpayment of Renewal Fees [Possible Dismissal of Cases without prejudice, if applicable].

None.

XI. Consideration of lifting Suspension of Business, Qualifying Party and/or Applicator Licenses.

None.

XII. Recommended Decisions and Orders of the Office of Administrative Hearings' Administrative Law Judges.

A. 5 Star Termite & Pest Control, Business License No. 4346- OAH Case # 2004A-121-SPC/SPCC Case # 2004-121

*Blair Driggs, Assistant Attorney General for the State of Arizona, appeared.
Adam Kunz, representing 5 Star Termite & Pest Control, Inc., appeared.*

Blair Driggs stated that after conversations with Assistant Attorney General Lisa Miles, he believes that the Findings of Fact and Conclusions of Law presented are appropriate. Adam Kunz stated that the Findings of Fact have an important piece missing. He stated that the Administrative Law Judge ("ALJ") read the statute

A.R.S. § 32-2324(C) too broadly, and as though the rest of the sentence, “as evidence of the presence or absence of infestation on the date of inspection.” was not there. Page 4, paragraph 4 of the ALJ’s Conclusions of Law says that the weight of the evidence is not sufficient in the Findings of Fact to establish the presence or absence of infestation on the day of inspection. Blair Driggs objected, stating that if the Commission wishes to consider other evidence or other documentation, it is not appropriate without reviewing the whole record. Commissioner Black asked if counsel for the respondent had an opportunity to file a brief to the ALJ after his Recommended Decision and Order and before it came to the Commission. Lisa Gervase stated that parties can always file post-hearing memos. Blair Driggs stated that if the Commission chooses to reopen this case, it would have to rehear the entire case. Commissioner Runbeck asked if these arguments regarding how the statute should have been read were made at hearing. Adam Kunz stated that he was not present at the hearing, but it is his impression that these arguments were made to the ALJ and that the ALJ did not understand them. Commissioner Runbeck stated that the Commission is not in a position to listen to all of this evidence and assume that the ALJ did not hear the evidence and law appropriately. Commissioner Putterman stated that he is not sure that the ALJ’s Findings of Fact, Conclusions of Law and Recommended Order are in a form commensurate with what the Commission is used to. Adam Kunz stated that based on the ALJ’s Findings of Fact, the Commission cannot accept the Conclusions of Law because there is not a violation of the statute. Lisa Gervase asked, given the Findings of Fact in the ALJ report, whether the law allows the Commission to amend the Conclusions of Law without rehearing the Findings of Fact. Adam Kunz noted that there was only one conclusion of law, only one charge. Commissioner Black recommended postponing consideration of this item until the next Commission meeting. Commissioner Runbeck asked what happens if the Commission decides to reject the ALJ’s Recommended Decision. Blair Driggs stated that it wouldn’t be a de facto dismissal; the Commission would have to make an affirmative decision to do this. Or, the Commission could remand the matter to the ALJ. Adam Kunz argued that he doesn’t think that the Commission has the authority to remand. He stated that he thinks that the Commission can either accept or reject and that rejection is akin to dismissal. If the Commission accepts, then we can get a rehearing. Lisa Gervase stated that the Commission has 5 days from today to inform the Office of Administrative Hearings (“OAH”) of the Commission’s decision on this matter; the ALJ’s decision will be certified if the Commission does not provide an answer, and then the respondent can ask for rehearing. Commissioner Runbeck asked if in some way the Commission would not be performing its duty if it takes no action. Adam Kunz stated that the respondent would allow the Commission to table this matter and open a hearing on this so that the Commission can review the ALJ’s decision and the transcript and see that the evidence does not add up to a violation. Blair Driggs objected, saying that the Commission needs to have available all of the information about this case. Also, a petition for rehearing

or review would probably put everyone in the same position here as they are asking for now. Lisa Gervase added that if no action is taken by the Commission, then in 5 days the ALJ's decision will be certified. Then it will be a final administrative decision, at which time the respondent will have 30 days to file to the Commission a petition for review or rehearing. Adam Kunz expressed a concern, however, that in such a case an "incorrect" ALJ decision could be interpreted as "correct" and have preclusive effect, thereby making it harder to have that decision overturned. He suggested that the Commission could reconvene on Monday and consider this then. Commissioner Runbeck disagreed that such inaction and certification of the decision would give it preclusive effect. Blair Driggs agreed with Commissioner Runbeck. He stated that it is not a final decision until the process is done after there is a petition for review. Lisa Gervase stated that the State, just like the respondent, has the option to file a petition for review or rehearing, if the Commission rejects the ALJ's decision. Adam Kunz stated that the dangerous jeopardy that the respondent would face would be that if the ALJ's decision is not rejected, then the complainant could go to another forum and use the ALJ's decision against them in civil court. Blair Driggs added that a rejection by the Commission does not by itself dismiss the case. The Commission would have to give additional instructions to OAH within 5 days. He stated that the Commission may want to ask for additional time to get factual information and transcripts; that is not the same as a request for a rehearing. In order to change the Findings of Fact, this is what the Commission would have to do.

MOTION: To enter Executive Session to obtain legal advice by Commissioner Putterman.
Seconded by Commissioner Burns.

VOTE: 6-0 Motion carried.

(Executive Session from 12:15 P.M. to 12:45 P.M.)

Adam Kunz stated that he is comfortable with the Commission making a motion to modify to give instructions to OAH to not have the decision certified as a final decision. Commissioner Runbeck stated that the Commission can vote to not take action, and then the decision will be certified within a week or two, but she doesn't think that there is a legal basis to instruct OAH to not certify the decision. Adam Kunz stated that the appropriate statute says that the Commission can accept, reject or modify, and he thinks that the "modify" option has flexibility. He stated that if the Commission doesn't agree, then he thinks it should reject the ALJ decision. Lisa Gervase stated that the analysis goes beyond statutory law; there is case law here also. The Commission needs to have read the transcript from the hearing before it can modify the facts.

MOTION: *To accept the ALJ's Findings of Fact, by Commissioner Burns.
Seconded by Commissioner DeVere.*

VOTE: 6-0 *Motion carried.*

MOTION: *To reject the ALJ's Conclusions of Law based on the fact that the Findings of Fact do not fit the Conclusions of Law, by Commissioner Black.
Seconded by Commissioner Burns.*

VOTE: 5-1 *Motion carried (Commissioner Baker opposed).*

MOTION: *To reject the ALJ's Recommended Order and dismiss the case, by Commissioner Black.
Seconded by Commissioner Burns.*

VOTE: 5-1 *Motion carried (Commissioner Baker opposed).*

B. Jordan Paul Dietz - OAH Case# 2006A-006-SPC/SPCC Case # 2006-006

Blair Driggs, Assistant Attorney General for the State of Arizona, appeared.

Blair Driggs stated that after conversations with Assistant Attorney General Lisa Miles and after reviewing the Findings of Fact and Conclusions of Law, he noted that Mr. Dietz's failed to disclose his felonies. The ALJ made an evaluation of his credibility. Blair Driggs asked that the Commission accept the Findings of Fact and Conclusions of Law and adopt the ALJ's Recommended Order rejecting Mr. Dietz's appeal of the license denial.

MOTION: *To accept the ALJ's Findings of Fact and Conclusions of Law, by Commissioner Baker.
Seconded by Commissioner Black.*

VOTE: 6-0 *Motion carried.*

MOTION: *To adopt the ALJ's Recommended Order, by Commissioner Putterman.
Seconded by Commissioner Baker.*

VOTE: 6-0 *Motion carried.*

C. Ronald Morales - OAH Case #2005A-043-SPC/SPCC Case # 2005-043

Blair Driggs, Assistant Attorney General for the State of Arizona, appeared.

Blair Driggs stated that he has reviewed the Findings of Fact and Conclusions of Law and asked that the Commission accept the Findings of Fact and Conclusions of Law.

MOTION: *To accept the ALJ's Findings of Fact and Conclusions of Law, by Commissioner Black.
Seconded by Commissioner Baker.*

VOTE: *6-0 Motion carried.*

Blair Driggs asked that the Commission adopt the recommendation that Assistant Attorney General Lisa Miles presented to the ALJ. Commissioner Putterman noted that this case involves a licensed applicator who did not have a QP license and continued to operate unlicensed. He asked if the \$5,000 civil penalty is within the Commission's statutory ability. Blair Driggs stated that it was presented as within the Commission's authority because it was assessed as the cumulation of multiple charges. The intent here is that there should be no profit from this unlicensed activity.

MOTION: *To adopt the ALJ's Recommended Order, by Commissioner Black.
Seconded by Commissioner DeVere.*

VOTE: *5-0 Motion carried (Commissioner Baker abstained because he was not present for the motion).*

XIII. Settlement Proposals [not part of Complaints agenda item].

None.

XIV. Consideration of Informal Settlement Conference proposed resolutions [for License Denial Applicants].

None.

XV. Reporting by Licensees on Probation.

None.

XVI. Applicants with Criminal Convictions.

A. O’Dea, Dennis R.

Mr. O’Dea appeared.

Commissioner Runbeck asked how long Mr. O’Dea has been with Sexton Pest Control. Mr. O’Dea stated that he has been with them since December and previously was an applicator in New York for 4 years. Mr. O’Dea stated that also he was on probation because of Proposition 200. He violated it by moving to New York, came back a year later and had to serve 30 days. He stated that he is completely outside the penal system now.

MOTION: *To approve by Commissioner Baker.
Seconded by Commissioner Putterman.*

VOTE: *6-0 Motion carried.*

XVII. Commission Updates and Reports; Miscellaneous Action Items.

A. Petition to Make Final Rule re: “New Construction Preventative Treatments” filed by Nisus Corporation - Commission’s consideration and ruling on Petition

*Jeff Lloyd, representing Nisus Corporation, appeared.
Mike Low, attorney representing Nisus Corporation, appeared.
Eric Ruden, Vice President of Northwest Exterminating Co., Inc., appeared.
Alan Head, Termite Supervisor from Pulte Building Systems, LLC, appeared.
Phil McNally, from Bayer Environmental Science, appeared.*

*Kevin Kirkland, President, Nisus, present.
Doug Wyly, Nisus, present.
Nate Scheer, attorney representing Nisus, present.*

The Commission reviewed all of the written materials submitted by Nisus Corporation before the Commission meeting. Mike Low addressed the Commission and asked for time to make a 20 minute power point presentation and 5 minutes to make comments.

MOTION: *To enter Executive Session to obtain legal advice by Commissioner Putterman.
Seconded by Commissioner Baker.*

VOTE:

6-0

Motion carried.

(Executive Session from 11:50 A.M. to 12:15 P.M.) (Commission returned to another agenda item from 12:15 - 12:50 P.M.)

Dr. Lloyd made a presentation from 12:50 - 1:17 P.M., and answered questions from 1:17 - 2:10 P.M.. The Commission heard comments from Messrs. Ruden, Head and McNally and deliberated on this matter from 2:10 - 2:34 P.M.

Dr. Lloyd began by stating that there is a lot of misinformation about the efficacy of Nisus's Boracare product. He stated that he has been working in the industry for nearly 20 years, working with Borates in the wood preservation field. He stated that he has done lots of specific termiticide efficacy research. He noted that there is no current requirement by the State of Arizona for termite treatments on new construction. He stated that the Environmental Protection Agency ("EPA") has approved the Boracare label, and that lots of specific data on Boracare was submitted to the Commission a number of years ago. He stated that Borates prevent termites from entering a house in two ways: they poison the wood and act as a barrier; 12 years of United States Department of Agriculture ("USDA") efficacy tests confirmed this. Termites cannot get past treated wood to get to the untreated wood. A test was also done at Louisiana State University ("LSU") and to a home in Georgia. The LSU study is more relevant to Arizona. He stated that a Boracare treatment is superior to soil treatment barriers and bait stations. It is a good supplemental treatment to stop termite tunneling and to treat straw bail construction. He stated that Paul Hardy with Orkin has had success with Boracare as a supplemental treatment. There have also been probably about 500 stand-alone Boracare treatments done in 2001-2002 and to this point we have not yet had any failures. Boracare is used in every state as a stand-alone treatment. A company in Florida has done soil treatments, bait stations and Boracare and has 10,000 Boracare warranties with no call backs in over 3 years of using Boracare. There have been call backs in the first year with the other treatments. We have treated 300,000 homes in the United States with no documented failures of the product. 2,300 homes have been treated in Arizona in the past 5 years with no known failures. Boracare has satisfied the requirements of the termiticide efficacy rule in Florida, the only state with a separate efficacy standard requiring 5 years of field test data and 90 percent success, and the product has been approved there for new construction treatments.

Commissioner Runbeck asked whether the species of termites in Arizona present special challenges for the Boracare product and whether any of the research data is specific to heterotermes. Dr. Lloyd stated that there are lots of different types of termites, including three types of subterranean termites, of which hetero is the desert termite. It is quite infamous for its ability to make mud tubes, but doesn't

cause as much damage as other types of termites. He stated that he worked with Dr. Susan Jones, who found borates in general to be very effective in killing heteroterms. Orkin has also had commercial success with Boracare. Commissioner Runbeck also asked what constitutes a "failure" of a product. Dr. Lloyd said that there is a difference between failure of a product and having an infestation. The infestation could be because of a lack of treatment in the area of infestation, as opposed to the product failing, so they wouldn't consider that a failure.

Commissioner Runbeck stated that the Commission's options are to either deny the petition, make a rule, or initiate a rule-making process. The Commission has to send any proposed rules to the Governor's Regulatory Review Council ("GRRC") for approval. The Commission has no statutory authority to say today that we adopt Nisus's proposed rule. Mr. Low stated that he doesn't disagree with Commissioner Runbeck's interpretation; what the Commission needs to do is, within a 60-day time frame, open a rule-making docket on this rule and forward it to the office of the Secretary of State; then set a date for public comment about this rule. The Commission will then either publish the rule or reject it. Commissioner Runbeck stated that she agrees that the Commission can initiate the rule-making process, and then there will be a year from the time of docket opening to address this rule before the docket expires; the rule may be modified in this time frame.

(Commissioner Baker left the meeting at 1:30 p.m.)

Commissioner Runbeck reiterated that the Commission can't make a rule today. Regarding comments about the Commission delegating authority to staff, she stated that there has not been a delegating of authority over the rule-making process. Commissioner Runbeck stated that if any public records have not been provided, they will be. But, the information complained about is not within the Commission's possession. She added that any decision today would not be folding Nisus' proposed rule into the current rule docket. Those rules are still in process. Mr. Low stated that he didn't disagree with Commissioner Runbeck, however, that he thinks that it is important that the Commission appoint the members of the work group and that, under the Administrative Procedures Act ("APA"), that it be disclosed who is on the committee. He stated that it is his understanding that Lisa Gervase unilaterally decided who would be on the committee. He stated that he also has concerns about statements and comments made by people on the work group that indicate bias against Nisus and the Boracare product. Commissioner Runbeck noted that the work group has been publicized enough for Mr. Low to know who is on it and that if there are only two members who have expressed opposition; it doesn't appear to be all tilted on one side. She also stated that there will still be a meeting for public comment on this rule. Mr. Low stated that this is their concern: the rule docket stays open for a year, it was opened in July 2005, and nothing

happened until March 2006 when Nisus filed the Petition to Make Final Rule. The docket expires in July 2006. He stated that if there are other rules that have been adopted, he is not aware of any. The reason that they filed this petition is because of the controversies over the years that seem to divert and distract the Commission from action. This petition requires the Commission to take action. He added that Dr. Lloyd also appeared before the Commission 3-4 years ago. He stated that they are here because they are concerned about the atmosphere that has poisoned this review. It is very unusual that Arizona is the only state taking the position that this product can't be used as a stand-alone, and it is very unusual to have stated opposition with competitive interests. He stated that the Commission is a consumer protection agency. He stated that he believes that today the Commission needs to approve the rule that Nisus requested in the petition and move forward. Or, if the Commission denies the petition in writing, then we will avail ourselves of remedies available.

Commissioner Runbeck asked if Arizona is the only state that doesn't allow Boracare as a stand alone. Lisa Gervase stated that it is not, and off the top of her head, that Louisiana, Mississippi, Oklahoma, Texas, and New York also don't, but she hasn't conducted a survey of all states. Dr. Lloyd stated that Louisiana has approved the product under a pilot program with independent review. Lisa Gervase stated that a pilot program or EUP is different from stating that a state allows use of a product as a standalone; and that Mississippi is undergoing the rule approval process to consider this situation but that it is not yet a standalone. Dr. Lloyd agreed that Boracare is not allowed as a standalone in Mississippi. Dr. Lloyd noted that Arizona and Oklahoma don't allow the product to be used as a pretreatment because they have specific laws about a pretreatment being a soil treatment, even though pretreatments are not required in Arizona. He stated that the product has been used in Arizona for five years though for other types of treatments. So, Dr. Lloyd revised the estimate to say that Boracare is approved for use in approximately 45 states as a stand alone treatment. Mr. Low stated that if they have mis-spoke, they have now corrected the record.

Lisa Gervase stated that the rules work groups are nothing more than more focused stakeholder meetings. The proposed rules changes item has been on nearly every Commission agenda since January 2005 for purpose of getting direction from the Commissioners. She stated that the Commission opened a docket in July 2005, then had a first stakeholder meeting January 2006. Then, in February 2006, the consensus at the Commission meeting was to separate the stakeholder meetings into three groups that would deal with specific topics/sections of rules. She stated that she asked for people to let her know if they wanted to participate. They are not committees, and there is no legal requirement to hold these meetings. But she stated that she feels that it is better to get all of this input now in the informal stakeholder process before filing the Notice of Proposed Rulemaking. We have

made progress, though painfully slow sometimes. The rules work group meetings are open to anyone and everyone. She stated that she does have some concern regarding statements attributed to some of these people in the work group that were taken out of context in Nisus' Supplement to the Petition to Make a Rule, and also regarding discrepancies with the exhibits to the Supplement. Regarding records requests, staff has provided everything that is public record. Nisus' Petition, received in March, and the Supplement, received in April, were hand-delivered to the Commissioners in April, 2006.

Lisa Gervase also questioned the statement in Nisus' written materials that 17,000 homes were treated in Arizona with Boracare, versus the statement today that it is 2,300 homes. Dr. Lloyd stated that the reference to 17,000 homes was a typographical error and referred to the number of homes treated in Texas, not Arizona. Nisus' written materials provided to Texas were amended to provide written materials to Arizona. Lisa Gervase stated that the written materials they submitted to Texas says 35,000 homes were treated in Texas, not 17,000. Lisa Gervase stated that she is not biased against the product in any way, as shown by having a open process of working with Nisus for over two years, but that it concerns her when there are factual discrepancies presented to the Commissioners for their review in making an informed decision. She asked if 2,300 homes is the fact on record that Nisus is purporting as the number of standalone Boracare treatments in Arizona. Dr. Lloyd stated that it is. He added that most states have a "label is the law" requirement. Some states have separate efficacy review processes. Commissioner Putterman noted that it actually appears to him that it's about 500 homes. Lisa Gervase asked Dr. Lloyd what he means by stand alone. Does this mean "not including the final grade treatment? Dr. Lloyd stated that it means treatment at the initial preventative stage. Lisa Gervase stated that a perimeter (final grade) treatment is required. Dr. Lloyd said that some Boracare treatments were done before they understood the requirement of a final grade. Mr. Gervase asked how many Arizona homes in the last five years was Boracare used in the initial stage as a preventative treatment, regardless of the final grade treatment. Dr. Lloyd stated 500.

Commissioner Black asked what the July 7 deadline means. Lisa Gervase stated that all that means is that if the Commission doesn't file a Notice of Proposed Rulemaking by then, then the docket dies. But then the Commission can just open a new docket and then file the Notice of Proposed Rulemaking.

Commissioner Burns stated that he feels that the stakeholder meetings are very valuable because they provide the opportunity to consider various points of view. Mr. Low stated that they are not objecting to the stakeholder meetings. Commissioner Burns disagreed, noting that Nisus blasted everyone in Nisus' written document. Mr. Low stated that it's not the stakeholders meetings themselves that

they object to, but when you have committees that consider rules, that is the problem. Commissioner Runbeck stated that the groups are meant to allow the stakeholders and anyone who cares to provide specific input. Staff is merely putting language together for the Commission to consider. Lisa Gervase stated that staff is coming up with a draft of proposed rules, not final rule language. There is no other way for rules to be drafted other than by staff. The Commissioners can't sit here for five hours at every meeting and draft the language. Commissioner Black added that everything that staff does is merely a recommendation to the Commissioners. Lisa Gervase agreed, noting that it's not a delegation. Commissioner Black asked if, once we get to a final draft, we can have time for public comment and/or opposition. Lisa Gervase stated that this is why staff has drafted and the Commission will have to consider Plan A and Plan B regarding new construction treatments. Then, there will be a public comment hearing prior to adopting final rules and filing the Notice of Proposed Rulemaking, and again after. Mr. Low stated, however, that even with the Plan A and Plan B proposals, there seems to be lack of direction from the Commissioners to staff as to where they want to go with this. The Commission should direct staff that they want to see a rule that addresses certain things. Commissioner Runbeck stated that she doesn't think that the Commission has been lax at providing direction to staff. And she stated that she thinks that drafting of the dual proposals is an effort to accommodate people like Mr. Low and groups like Nisus. She stated that the Commission wants to have Nisus at the meetings. She stated that she thinks that the concern is about Nisus asking the Commission to adopt its proposal as the final proposal. She stated that if anything, the Commission is being overly cautious. Lisa Gervase added that, in fact, three of Nisus's own exhibits to its Supplement today are evidence of staff getting the Commission's input on the rules.

Mr. Ruden stated that he was blasted pretty hard by Nisus and was completely mischaracterized regarding one of his comments. He stated that he has never said that consumers are being cheated by the Nisus product. He added that he doesn't think that he said that it is a bad product and that his comments were taken out of context. He stated that he is open-minded regarding integrated pest management ("IPM") and using less chemical. He also stated that Commissioners Burns and Baker have been involved with the stakeholder meetings, and that Nisus also has gotten their way because we have proposed creating a "new construction" category, and they could still possibly get into the market here. He also stated that staff and the stakeholders are not being preclusive against Nisus because critical areas are covered in their label. The process has taken a long time, but partly because the whole law package took so long. He asked that the Commission deny Nisus's petition.

Mr. Head stated that he works for a homebuilder and has no stake in anything. He stated that his company pretreats their own homes for termites with a chemical and

he hasn't had any call backs. He suggested having the University of Arizona do a study and see what they say.

Lisa Gervase had questions about the Florida efficacy review, dated January 2006 that Nisus submitted. The conclusion is that Boracare met the rule requirements. But, regarding the wood joist test, based on June 1996 evaluations, there was a discrepancy between the rate of attack on the stakes in the ground and the wood on top of the concrete blocks. She stated that it seems odd that the product passed the rule requirements but there was still concern about its efficacy as stated in the conclusion of the efficacy review. Dr. Lloyd stated that the stakes hammered in the soil have lots of moisture, but the bait wood on top of the untreated control is different. That explains the difference. Lisa Gervase asked, then, how good the protocol is. Dr. Lloyd stated that in Arizona, it would probably take a lot longer to get this level of damage. Commissioner Putterman stated that these observations about the stakes could be about any product. The issue is what is above the stakes. Lisa Gervase asked who did the pretreatments to the 2,300 structures in Arizona. Dr. Lloyd stated that Terminix did. Lisa Gervase asked why the two homes with infestation in Florida were taken out of the Florida study instead of just noted as failures. Dr. Lloyd stated that he doesn't know, as he didn't inspect them and couldn't tell if the label rate was applied. Lisa Gervase stated that he then doesn't know the cause of the failure. Dr. Lloyd stated that this is correct; the decision to withdraw was made by the Florida Department of Agriculture.

Mr. McNally, stated that his company makes Premise, a competitor product. He commented on testing protocols, stating that the protocol used for borates is different than for a liquid termiticide product. But, that BASF and Bayer do not use the above ground tests for all products.

Commissioner Runbeck asked if we have any type of experimental provision whereby the product can be used for 5 years. Lisa Gervase stated that the product is registered through the Department of Agriculture, and they need to review efficacy data. The Commission can ask the Department of Agriculture to obtain efficacy data, have the data reviewed, and if they are not comfortable with the data, then they can begin cancellation of the product. Another process is to ask for an EUP. Commissioner Runbeck asked if it really matters what the Department of Agriculture says when the Commission has separate requirements. Lisa Gervase stated that efficacy may not be really that relevant because the Commission can adopt rules that it sees necessary. The efficacy discussion has been brought up by Nisus. Dr. Lloyd stated that Nisus has a good level of trust with the state of Florida.

Lisa Gervase stated that the Nisus rule proposal would not subject Boracare to the 5-year retreatment rule, which only applies to pretreatments. Mr. Low stated that the intent was for them to be subject to the 5-year requirement. Lisa Gervase stated that this can be done voluntarily even if the rule doesn't require it. Commissioner Black stated that he would like to see the Commission try to get the rules package to where we can start voting on things. He stated that he is open to the product and would be open to a pilot program, but he would like to see options in the final rules package. Commissioner Burns stated that he believes that the direction we are taking will address the concerns. He added that there are other things on the horizon besides liquids and borates that will make the Commission adopt future rules.

MOTION: *To deny the petition because the Commission already has an open rules docket that encompasses this area and it would be duplicative to begin a new docket on a rule that can be dealt with under the current rulemaking, by Commissioner Putterman.
Seconded by Commissioner Burns.*

VOTE: 5-0 *Motion carried.*

(Commissioner Black left the meeting at 2:35 p.m.)

- B. None.**
- C. None.**
- D. Complaint Status Log** - written report to Commission
- E. Computer Based Testing "CBT" Status and Statistics** - written report to Commission
- F. Expenditure Report** - written report to Commission
- G. Case Status Report** - written report to Commission
- H. Investigating Inquiries and Complaints: compelling attendance at investigative interviews and cooperation with investigations**

Lisa Gervase stated that staff has had issues during investigations when a QP and/or business licensee has told an applicator not to cooperate with a Commission investigation, or for some other reason a Business, QP or Applicator licensee has

not cooperated, such as refusing to appear at an investigative interview. She stated that A.R.S. § 32-2304(B)(1) allows the Executive Director to issue an order to compel attendance of a witness concerning all matters coming within the Commission's jurisdiction. This is one of the powers/duties that the Commission has delegated to staff. She stated that she has not yet issued this type of order, but wanted to let the Commissioners know that it may be necessary to do so. The Commission had no questions or comments about this issue and the consensus was that if an order is necessary than so be it. Commissioner Runbeck expressed her appreciation to Lisa Gervase for making them aware of this.

XVIII. Approval of Minutes and Continuing Education Programs

A. April 14, 2006 (regular session) Minutes

Tabled.

B. March 10, 2006 (executive session) Minutes - separate handout

Tabled.

C. Continuing Education Program Applicants

MOTION: *To approve the Continuing Education Programs as noted in the C.E. Minutes by Commissioner Putterman.
Seconded by Commissioner Burns.*

VOTE: 4-0 *Motion carried.*

XIX. Scheduling of future meetings/agenda items.

Current Proposed dates

June 9, 2006

July 14, 2006

August 11, 2006

September 8, 2006

October 13, 2006

November 9, 2006 (Thursday)

December 8, 2006

January 12, 2007

XX. Adjournment - 2:45 p.m.

MOTION: *To adjourn by Commissioner DeVere.
Seconded by Commissioner Putterman.*

VOTE: 4-0 *Motion carried.*