

**State of California
Office of Administrative Law**

In re:)	DECISION OF DISAPPROVAL OF
Structural Pest Control Board)	REGULATORY ACTION
)	
Regulatory Action:)	
)	
Title 16, California Code of Regulations)	Government Code Section 11349.3
)	
Adopt sections:)	
Amend sections: 1999.5)	OAL File No. 2008-0911-01S
Repeal sections:)	
)	

DECISION SUMMARY

This regulatory action by the Structural Pest Control Board's ("Board") proposes to amend section 1999.5 of Title 16 of the California Code of Regulations ("CCR") relating to restrictions on false or misleading advertising concerning structural pest control pesticides, products, services, or practices (hereinafter "operations") by clarifying the circumstances under which claims of environmentally superior structural pest control operations may be legitimately made. Specifically, this action:

- 1) Adds an introductory purpose statement.
- 2) Clarifies that prohibitions on misleading advertising relate only to advertising for "the purpose of requesting any work or services or for the direct or indirect purpose of performing or offering to perform any [structural pest control operations]."
- 3) Limits prohibitions on claiming one operation is better than another if the operation offered does not cover all portions of the structure that can be reasonably treated to statements made regarding Branch 3¹ operations only.

¹ Business and Professions Code section 8560(a) defines the three branches of pest control practice:

§ 8560. (a) Licenses issued to operators, field representatives, or applicators shall be limited to the branch or branches of pest control for which the applicant has qualified by application and examination.

For the purpose of delimiting the type and character of work authorized by the various branch licenses, the practice of pest control is classified into the following branches:

Branch 1. Fumigation. The practice relating to the control of household and wood-destroying pests or organisms by fumigation with poisonous or lethal gases.

Branch 2. General pest. The practice relating to the control of household pests, excluding fumigation with poisonous or lethal gases.

- 4) Limits prohibitions on claiming an operation treats an entire structure when the operation is not capable of treating the entire structure (including inaccessible areas) to statements made regarding Branch 3 operations only.
- 5) Prohibits statements regarding a general environmental benefit of an operation “unless the statement or representation can be substantiated within the meaning of 16 CFR, 260.5 [sic] and is limited to the specific nature of environmental or health benefit being asserted.”
- 6) Limits the prohibition on statements such as “EPA approved” regarding operations to allow such statements if the statements are “specifically authorized by the Federal or State agency to which it refers.”

On October 24, 2008, the Office of Administrative Law (“OAL”) notified the Board of the disapproval of the above-referenced regulatory action. OAL disapproved the regulations for the following reasons: (1) failure to comply with the “Necessity” standard of Government Code section 11349.1, (2) failure to comply with the “Clarity” standard of Government Code section 11349.1, and (3) failure to comply with the Administrative Procedure Act (“APA”) procedural requirements.

DISCUSSION

Regulations adopted by the Board must generally be adopted pursuant to the rulemaking provisions of the Administrative Procedure Act (Government Code sections 11340 through 11361). Any regulatory action a state agency adopts through the exercise of quasi-legislative power delegated to the agency by statute is subject to the requirements of the APA, unless a statute expressly exempts or excludes the action from compliance with the APA. (See Government Code section 11346.) No exemption or exclusion applies to the regulatory action here under review. Consequently, before these regulations may become effective, the regulations and the rulemaking record must be reviewed by OAL for compliance with the procedural requirements and the substantive standards of the APA, in accordance with Government Code section 11349.1.

NECESSITY

Government Code section 11349.1(a)(1) requires OAL to review all regulations for compliance with the “Necessity” standard. Government Code section 11349(a) defines “Necessity” to mean that:

...the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this

Branch 3. Termite. The practice relating to the control of wood-destroying pests or organisms by the use of insecticides, or structural repairs and corrections, excluding fumigation with poisonous or lethal gases.

standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

Title 1 CCR section 10(b) provides that in order to meet the “Necessity” standard the rulemaking record must include:

- (1) A statement of the specific purposes of each adoption, amendment, or repeal; and
- (2) information **explaining why each provision** of the adopted regulation is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An “expert” within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question. [Emphasis added in bold].

Related to meeting the “Necessity” standard, the initial statement of reasons written in support of a rulemaking is required by Government Code section 11346.2(b)(1) to include the following: “A statement of the specific purpose of each adoption, amendment, or repeal and the rationale for the determination by the agency that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose for which it is proposed.”

The Board’s entire rationale in its initial statement of reasons for all of the amendments made in this rulemaking is as follows:

Factual Basis/Rationale

Claims have been made that the Board’s false and misleading advertising regulation was stifling structural pest control companies from making claims of legitimate, environmentally superior structural pest control alternatives as it relates to structural integrated pest management. Therefore the Board appointed a committee to review each section of the regulation. **The outcome of those committee meetings was to establish an introductory statement to the regulation and to make other clarity amendments throughout the regulations.** With the proposed amendments, Section 1999.5 will continue to prohibit general claims of environmental benefit, but will allow for specific, truthful, substantiated and non-misleading claims. [Emphasis added in bold].

The Board’s initial statement of reasons also states that the Board relied on no additional “supporting facts, studies, expert opinion” in adopting these amendments:

Underlying Data
None

The emphasized statement in the initial statement of reasons – “and to make other clarity amendments throughout the regulations” – is simply a conclusion and is insufficient to articulate “Necessity” for **each provision** of the regulation amended here pursuant to the requirements of Title 1 CCR section 10(b)(2).

And, because the Board did not identify and rely upon any reports or minutes of its advisory committee, the rulemaking record does not articulate the collective thought process or rationale of that committee in making the committee’s recommendations which form the basis for each provision of these amendments. These failures violate the “Necessity” standard of Government Code section 11349.1(a)(1) and the requirements of Title 1 CCR section 10(b)(2).

CLARITY

OAL must review regulations for compliance with the substantive standards of the APA, including the “Clarity” standard, as required by Government Code section 11349.1. Government Code section 11349(c), defines “Clarity” as meaning “written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.”

The “Clarity” standard is further defined in section 16 of Title 1 of the California Code of Regulations, OAL’s regulation on “Clarity,” which provides the following:

In examining a regulation for compliance with the “clarity” requirement of Government Code section 11349.1, OAL shall apply the following standard and presumptions:

- (a) A regulation shall be presumed not to comply with the “clarity” standard if any of the following conditions exists:
 - (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning; or
 - (2) the language of the regulation conflicts with the agency’s description of the effect of the regulation; or
 - (3) the regulation uses terms which do not have meanings generally familiar to those “directly affected” by the regulation, and those terms are defined neither in the regulation nor in the governing statute; or
 - (4) the regulation uses language incorrectly. This includes, but is not limited to, incorrect spelling, grammar or punctuation; or
 - (5) the regulation presents information in a format that is not readily understandable by persons “directly affected;” or
 - (6) the regulation does not use citation styles which clearly identify published material cited in the regulation.

- (b) Persons shall be presumed to be “directly affected” if they:
 - (1) are legally required to comply with the regulation; or

- (2) are legally required to enforce the regulation; or
- (3) derive from the enforcement of the regulation a benefit that is not common to the public in general; or
- (4) incur from the enforcement of the regulation a detriment that is not common to the public in general.

This regulatory action violates the “Clarity” standard because key terms and phrases are ambiguous and confusingly duplicative.

1. Proposed subsection 1999.5(b) is amended to read:

(b) As used in this section, the terms “make,” “disseminate,” “represent,” “claim,” “state,” or “advertise” and any of their variants include, but are not limited to any print communications (for example, telephone directories, newspapers, magazines or other publications or books, notices, circulars, pamphlets, letters, handbills, posters, bills, signs, placards, cards, labels, tags, vehicle or equipment signage, window displays, or store signs), electronic communication (for example, radio, television, audio or video tape, telephone, or the Internet), demonstration, direct person-to-person contact, or other means or methods now or hereafter employed to bring structural pest control services, methods, products, pesticides, or devices to the attention of the public for the purpose of requesting any work or services or for the direct or indirect purpose of performing or offering to perform services for which a license is required by section 8500 and following of the Code.

The word “requesting” in the initial clause added to describe advertising (and its variants) for purposes of this regulation – “. . . to bring structural pest control [operations] to the attention of the public for the purpose of requesting any work or services. . .” – is unclear because it is ambiguous and seems to duplicate the meaning of the following clause thus creating confusion as to any intended difference. Persons directly affected could read the first clause as referring to the licensee requesting work or services to be performed for the licensee’s benefit. OAL assumes, but is not certain because of the lack of “Necessity” discussing the rationale for this provision, that the Board intends “requesting” in this context to mean “soliciting” or “offering to perform work” or services for the public. If so, the first clause seems to duplicate the language of the second clause – “. . . or for the direct or indirect purpose of performing or offering to perform services for which a license is required by section 8500 and following of the Code.” If a distinction is intended between the clauses, the language should be rewritten to articulate the intended distinction in order to satisfy the “Clarity” standard.

INCORRECT APA PROCEDURES

1. Inadequate summary and response to public comment.

Government Code section 11346.9(a), provides that an agency proposing regulations shall prepare and submit to OAL a “final statement of reasons.” One of the required contents of a

final statement of reasons is a summary and response to all timely and relevant public comments. Specifically, Government Code section 11346.9(a)(3) requires the final statement of reasons to include:

A summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. This requirement applies only to objections or recommendations specifically directed at the agency's proposed action or to the procedures followed by the agency in proposing or adopting the action. . . .

The Board received several lengthy 45-day written comments and oral testimony at the public hearing on January 11, 2008, regarding the proposed regulations. As identified below, portions of those comments were inadequately summarized and/or responded to in the Board's final statement of reasons.

a. S. Wayne Rosenbaum of Foley and Lardner representing the Integrated Pest Management Control Council ("IPMCC") submitted a seven page letter objecting to the proposed amendments for a variety of reasons. Among his objections, Mr. Rosenbaum stated the following on pages 4-5 of his letter:

b. The Initial Statement of Reasons is inadequate.

California Government Code Section 11346.2 requires that any proposed regulation shall be accompanied by an initial statement of reasons for the proposed action. In relevant part, the initial statement of reasons is to include, but not be limited to: (1) a statement of the specific purpose of the amendment, (2) an identification of each technical, theoretical, and empirical study, report or similar document upon which the agency has relied, (3) a description of reasonable alternatives to the proposed regulation, and (4) facts, evidence, documents, testimony or other evidence on which the agency has relied to determine the action will not have a significant adverse economic impact on business. Section 11346.3 further requires an assessment of the potential for adverse economic impact on California businesses, avoiding the imposition of unnecessary or unreasonable regulations. To that end, the proposed amendment shall be based on adequate information concerning the need for, and consequences of, proposed governmental action, and a consideration of the proposal's impact on businesses in California, including the ability to compete with businesses in other states.

Even though it appears an attempt was made to address each of the required topics, **the Initial Statement of Reasons fails to provide the information required by the Government Code. The "Factual Basis/Rationale" section contains conclusory statements that the proposed amendments will further the purpose of the existing regulations but does not provide any supporting**

information. Indeed, the minutes of the task force meeting during which the amendments were discussed (which were provided by the SPCB as a supporting document for the amendments) note that “vigorous discussion ensued,” but fail to provide the substance of those discussions. **These empty words do not provide a sufficient basis upon which one could assess the Initial Statement of Reasons.** [Emphasis added in bold].

The Board’s summary and response to these objections, in pertinent part, is as follows:

IPMCC asserts that Board’s [sic] initial statement of reasons is inadequate.

The Board rejects this comment. In this rulemaking endeavor, perhaps the initial statement of reasons is not a treatise or an encyclopedia on structural pest control but the essential information is conveyed. It has provided the minimum information required. Although the statement of reasons did not provide any technical information or empirical data, section 11346(a)(2) [sic] of the Government Code does not require any if none is relied on by the agency. Secondly, the statement of reasons does explain the purpose of the proposed amendments.

The Board’s summary ignores the essence of Mr. Rosenbaum’s objections, namely, that the conclusory statements in the “Factual Basis/Rationale” section of the initial statement of reasons fails to provide the required rationale for each provision of the amendments. This is the second element required to demonstrate “Necessity” under Title 1 CCR section 10(b). In addition, the Board’s response, while correct in asserting that Government Code section 11346(b)(2) does not require any supporting “technical, theoretical, and empirical study, report, or similar document” in the rulemaking file to demonstrate “Necessity” if none is relied on, is incorrect in asserting the initial statement of reasons was adequate. The response similarly ignores the second “Necessity” element of a rationale for each provision as well as the further requirement of additional supporting facts, studies, or expert opinion when the explanation of a rationale is a “conclusion.” See, “Necessity” discussion, *supra*.

b. The Board’s summary and response to comments by Jim Gorman of Nisus Corporation is as follows:

10. Jim Gorman, Nisus Corporation, stated that he had submitted a written comment with concerns about the word “capable” as written in the proposed amendment. Mr. Gorman suggested that capable be defined in the regulation and offered language for that purpose.

The Board rejected this comment as no further definition is necessary.

While the Board accurately summarizes Mr. Gorman’s comments, the response is inadequate because it fails to articulate the Board’s reasons why “no further definition is necessary” and

why Mr. Gorman's suggested alternative language was rejected as required by Government Code section 11369.9(a)(3).

2. Failure to properly incorporate by reference provisions of the Code of Federal Regulations ("CFR").

Proposed subsection (f)(6) implicitly adopts the Federal Trade Commission's criteria or test for substantiating the validity of a claimed "environmental attribute of a product, package, or service" contained in 16 CFR section 260.5 without properly incorporating those Code of Federal Regulation provisions by reference into the regulation using the procedures specified in Title 1 CCR section 20. Proposed subsection (f)(6) states:

(6) any statement or representation that a pest control service, product, pesticide, or device or combination thereof offers a general environmental protection or benefit **unless the statement or representation can be substantiated within the meaning of 16 CFR, 260.5** and is limited to the specific nature of the environmental or health benefit being asserted. ~~, or that the pest control products, pesticides, or devices the licensee uses, the applications of such products, pesticides, or devices, or any of them, are "among the least toxic chemicals known," "relatively non-toxic," "pollution approved," "environmentally aware," "environmentally sensitive," "environmentally preferable," "environmentally benign," or "contains all natural ingredients";~~ [Emphasis added in bold].

Despite a lack of "Necessity" for this proposed amendment as discussed, *supra*, the Board's response to commenter S. Wayne Rosenbaum's objection to the Board's alleged improper reliance on Federal Trade Commission guidelines makes it clear that the Board intends to adopt the provisions of 16 CFR section 260.5 as part of this regulation. The Board states on pp. 9-10 of the final statement of reasons:

If the proposed amendments are adopted, and a licensee or registered company was cited or became the subject of a formal disciplinary actions [sic] as a result of an alleged violation of section 1999.5, **the licensee or registered company could offer substantiation as to their claim as a defense to the Board's action. In accordance with 16 CFR 260.5, the reasonable basis justifying a claim or representation must consist of competent and reliable evidence.** The Board asserts that an administrative tribunal is competent to make a determination about the scientific evidence, and accordingly, no over-reliance. Accordingly, the Board rejects this comment. [Emphasis added in bold].

Since the Board intends the provisions of 16 CFR section 260.5 be used as the test for substantiation of a licensee's environmental marketing claims, that CFR provision must be properly adopted as a regulation using the incorporation by reference procedures of Title 1 CCR section 20. Specifically, the Board must comply with the provision in Title 1 CCR section 20(c) which states:

(c) An agency may “incorporate by reference” only if the following conditions are met:

(1) The agency demonstrates in the final statement of reasons that it would be cumbersome, unduly expensive, or otherwise impractical to publish the document in the California Code of Regulations.

(2) The agency demonstrates in the final statement of reasons that the document was made available upon request directly from the agency, or was reasonably available to the affected public from a commonly known or specified source. In cases where the document was not available from a commonly known source and could not be obtained from the agency, the regulation shall specify how a copy of the document may be obtained.

(3) The informative digest in the notice of proposed action clearly identifies the document to be incorporated by title and date of publication or issuance. If, in accordance with Government Code section 11346.8(c), the agency changes the originally proposed regulatory action or informative digest to include the incorporation of a document by reference, the document shall be clearly identified by title and date of publication or issuance in the notice required by section 44 of these regulations.

(4) The regulation text states that the document is incorporated by reference and identifies the document by title and date of publication or issuance. Where an authorizing California statute or other applicable law requires the adoption or enforcement of the incorporated provisions of the document as well as any subsequent amendments thereto, no specific date is required.

The rulemaking file and regulation text do not comply with the requirements of Title 1 CCR section 20(c).

3. Regulation text not in compliance with Title 1 CCR section 8. The reference citation for the regulation text fails to comply with the requirements of Title 1 CCR section 8 because of underline/strikeout errors.

ADDITIONAL CORRECTIONS

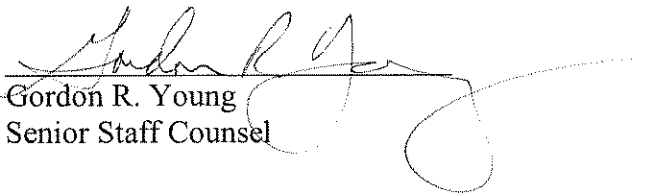
While not reasons for disapproval, OAL suggest the following corrections prior to resubmittal of this file:

1. OAL recommends adding “(f)(4)” or “(f)(5)” as appropriate, after the word “subsection” in the sentence “This subsection shall only apply to Branch 3 activities” in proposed (f)(4) and (f)(5). This addition will prevent any confusion over whether the limitation to Branch 3 activities in the sentence only applies to the subsections (f)(4) and (f)(5) and not the entire subsection (f).
2. Correct the format of the CFR citation in subsection (f)(6) to read “16 CFR section 260.5.”

CONCLUSION

OAL disapproved this regulatory action for the reasons set forth above. If you have any questions, please contact me at (916) 323-8916.

Date: October 31, 2008


Gordon R. Young
Senior Staff Counsel

For: SUSAN LAPSLEY
Director

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