

# **BACKGROUND PAPER FOR THE STRUCTURAL PEST CONTROL BOARD**

**(Joint Oversight Hearing, March 17, 2014, Senate Committee on  
Business, Professions and Economic Development and the Assembly  
Committee on Business, Professions and Consumer Protection)**

## **IDENTIFIED ISSUES, BACKGROUND AND RECOMMENDATIONS REGARDING THE STRUCTURAL PEST CONTROL BOARD**

### **BRIEF OVERVIEW OF THE STRUCTURAL PEST CONTROL BOARD**

#### **History and Function of the Structural Pest Control Board**

In 1936, the Structural Pest Control Act (AB 2382, Chapter 823, Statutes of 1935) established the first Structural Pest Control Board (Board). Chapter 14 of the Business and Professions Code (BPC) was codified in 1941 and established the current version of the Board.

On October 23, 2009, the Board was transferred from the Department of Consumer Affairs (DCA) to the Department of Pesticide Regulation (DPR). Effective July 1, 2013, under the Governor's 2011-2012 Reorganization Plan (GRP) No. 2 and AB 1317, the Board returned to the DCA. AB 1317 (Frazier Chapter 352, Statutes of 2013) enacts the statutory changes necessary to reflect the changes in law made by the GRP No. 2, and would also make additional conforming name changes to properly reflect the assignment and reorganization of other functions of state government.

The Board issues three types of licenses for three different practice areas (branches) of pest control. The license types are Applicator, Field Representative, and Operator. The branches are fumigation, general pest, and termite (wood-destroying pests and organisms). Under the fumigation branch, the Board issues Field Representative Licenses and Operator Licenses. Under the general pest and termite branches, the Board issues all three licenses.

Each branch covers a distinct area of pest control:

**Branch 1.** Fumigation – Whole structure treatment with lethal gas.

**Branch 2.** General Pest – Ants, cockroaches, mice and rats.

**Branch 3.** Termite – Termites, wood boring beetles, dry rot, and fungus.

As of the FY 2012/2013 year, the licensee population included 5,051 Applicators, 10,549 Field Representatives, and 3,601 Operators. Each license has its own scope of practice, entry-level requirements, and education/examination requirements, with some overlap.

- **Applicator** – An entry-level license category issued in Branch 2 and 3 only. The Applicator is an individual licensed by the Board to apply a pesticide, or any other medium to eliminate, exterminate, control or prevent infestations or infections. Applicators cannot inject lethal gases used in fumigation.
- **Field Representative** – A full journey-level license. This individual secures work, makes identifications, makes inspections, submits bids, and contracts for work on behalf of a registered company.
- **Operator** – The highest level of license. Depending on the license category, the Operator must have at least two years’ or as many as four years’ qualifying experience. Only a licensed Operator may qualify a company for registration by assuming responsibility for the company and its employees as the company Qualifying Manager.

Each company and branch office must register with the Board (BPC § 8610). In the 2012/2013 year, there were 2,713 Principal Registrations and 437 Branch Office Registrations.

The current Board mission statement, as stated in its 2007 Strategic Plan, is:

*The Structural Pest Control Board’s highest priority is to protect and benefit the public by regulating the pest control industry.*

**Board Membership and Committees**

The Board is comprised of seven members: three professional and four public members. The three professional members are licensed Operators appointed by the Governor. The two public members are appointed by the Governor; one is appointed by the Senate Committee on Rules; and one member is appointed by the Speaker of the Assembly. Board members receive a \$100-a-day per diem. Pursuant to BPC § 101.7, all DCA regulatory boards are required to meet at least three times each calendar year. BPC § 8523 requires the Board to meet annually during the month of October, and provides that special meetings may be called at any time. Over the last four calendar years, the Board has had at least one annual meeting (October) and four special meetings each year. All Board meetings and Committee meetings are subject to the Bagley-Keene Open Meetings Act. There are currently no vacancies on the Board. The following is a listing of the current Board members and their background:

Name and Short Bio	Appointment Date	Term Expiration Date	Appointing Authority
<p><b>David Tamayo, President, Public Member</b>            Currently an Environmental Specialist with the Sacramento County Stormwater Program. Also serves as the County Integrated Pest Management coordinator, and is a member of the Sacramento-Yolo Mosquito and Vector Control Board of Trustees, the City of Sacramento Parks and Recreation Commission, DPR’s Pest Management Advisory Committee, US EPA’s Pesticide Program Dialogue Committee, and National Pest Management Association’s GreenPro Advisory Committee. Prior to working for the County, owned a wholesale seafood business and was an electrician and whitewater raft guide. Graduated from UC Berkeley with a BA in zoology and is currently a graduate student in entomology at the University of Florida.</p>	6/1/12	6/1/15	Speaker of the Assembly

<b>Curtis Good, Vice President, Professional Member</b> President of Newport Exterminating and owner since 1982. Member of the Urban Pest Management Center of California and the Pest Control Operators of California.	6/29/10	6/1/17	Governor
<b>Clifford L. Utley, Professional Member</b> President of Cliff's Pest Control, Inc., and has worked for the business since 1994. Previously a journeyman sheet metal worker and an apprentice sheet metal worker for the Santa Fe Railway from 1972 to 1992. Member of the San Bernardino, Highland, Redlands and Yucaipa Chambers of Commerce and serves on the Board of the California State University, San Bernardino Athletics Association.	6/1/12	6/1/15	Governor
<b>Ronna Brand, Public Member</b> Founder and owner of Brand Realty. State director for the California Association of Realtors since 2006. Was president of the Beverly Hills Greater Los Angeles Association of Realtors in 2007, and founder of Bicoastal Connections and owner from 1980 to 1984.	7/3/13	6/1/17	Governor
<b>Marisa Quiroz, Public Member</b> Manager of the San Diego Foundation's Environment Program. Has a Bachelor's Degree in Anthropology and Sociology from Mills College and a Master's in Nonprofit Leadership and Management from the University of San Diego.	8/15/12	6/1/16	Senate Rules Committee
<b>Naresh Duggal, Public Member</b> Manager for the Santa Clara County integrated pest management unit since 2002. Previously a quality assurance manager for the commercial division of Orkin Exterminating Inc. from 1999 to 2002. Served in multiple positions at Prism Professional Integrated Sanitation Management from 1994 to 1999, including technical support, quality assurance manager and staff entomologist.	7/3/13	6/1/17	Governor
<b>Mike Duran, Professional Member</b> Member and trustee for the Valley Sanitary District of Indio since 2003. Member and trustee of the Mosquito and Vector Control and Sanitary District in Coachella Valley from 2004 to 2008. Established the Pest Control Operators Palm Springs chapter and served as president from 2001 to 2004. Also served as a reserve police officer in the City of Indio from 1964 to 1967.	5/18/12	6/1/15	Governor

The Board has two committees designated by statute, the Disciplinary Review Committee (BPC § 8660) and the Research Advisory Panel (BPC § 8674). All other committees of the Board are formed as needed and its members are appointed by the Board president. The Board has not had any meetings that had to be canceled due to a lack of a quorum in the last four years.

### **Fiscal and Fund Analysis**

The Board receives its budget from special funds and is independent of the State General Fund. The Board is responsible for three special funds: 1) Structural Pest Control Professions and Vocations Fund (Support Fund), 2) Education and Enforcement Fund, and 3) Research Fund.

BPC § 8674 specifies that the Board shall maintain “a reserve in an amount sufficient to pay for costs arising from unanticipated occurrences associated with administration of the program.” There is no statute requiring the Board to maintain a minimum fund balance, however, a fund reserve of at least three months (maximum of six months) is considered fiscally prudent by the DCA. The Board’s FY 2012-13 ending fund balance of approximately \$1.362 million is equivalent to 4.6 months’ reserves.

## Support Fund

The Support Fund is the primary fund for the Board, accounting for approximately 75 % of the Board's annual budget. The Support Fund is mostly funded by Wood-Destroying Pests and Organisms (WDO) filing fees, rather than licensing fees. The WDO activity filing fee is \$2.50, and is assessed each time a pest control company inspects a property or completes work on a property. The Board has averaged approximately 106,400 WDO filings per month over the last 5 budget years (FY 2008-2012), averaging 1,276,800 filings every 12 months.

The average total revenues received for filings since the passage of the Board's fee increase of \$2.50 (formerly \$1.50), effective July 1, 2010, is \$3.192 million (increased from \$1.915 million before the increase). The increase helped stabilize the support fund due to a decrease in actual and projected revenues for budget years 2009, 2010 and 2011 and also from a decrease in the Board's license population by approximately 20 %, previously over 25,000 in 2008 down to approximately 19,000 in 2013. The Board believes that the decrease in the license population, specifically Applicator licenses, is due to the housing crisis (which the Board defines as issues relating to housing prices, the banking industry, and hardships resulting from the recession).

<b>Fund Condition</b>						
(Dollars in Thousands)	<b>FY 2009/10</b>	<b>FY 2010/11</b>	<b>FY 2011/12</b>	<b>FY 2012/13</b>	<b>FY 2013/14</b>	<b>FY 2014/15</b>
Beginning Balance	1631	744	703	1168	1362	1430
Revenues and Transfers	2501	3608	4060	3759	3773	3500
<b>Total Revenue</b>	<b>\$4132</b>	<b>\$ 4352</b>	<b>4763</b>	<b>4927</b>	<b>5135</b>	<b>4930</b>
Budget Authority	[4211]	[4215]	[4195]	[4265]	[4502]	[4397*]
Total Resources	4132	4352	4763	4927	5135	4930
Expenditures	3405	3649	3749	3565	3705	3705
Loans to General Fund	0	0	0	0	0	0
Accrued Interest, Loans to General Fund	0	0	0	0	0	0
Loans Repaid From General Fund	0	0	0	0	0	0
<b>Fund Balance</b>	<b>\$727</b>	<b>\$703</b>	<b>\$1014</b>	<b>\$1362</b>	<b>\$1430</b>	<b>\$1225</b>
<b>Months in Reserve</b>	<b>2.6</b>	<b>2.3</b>	<b>3.2</b>	<b>4.6</b>	<b>4.6</b>	<b>4.0</b>
* Projected Budget Authority						

The Board maintains a current contingent fund level of 4.6 months for economic uncertainties. The Board does not anticipate a budget deficit in the current year nor forecasts a budget deficit in FY 2013-14 or FY 2014-15. However, the Board states that it will be seeking legislation during the 2014 legislative session to increase examination fees to support computer based testing (CBT). The Board has approved pursuing a legislative proposal to increase to the current examination fee for each license type.

The Board also proposes to seek legislation in 2014 to establish a continuing appropriation to conduct CBT. In the interim, the Board, in a joint effort with the DCA, is planning a pilot CBT early in 2014 as part of its public policy analysis and review to substantiate operating expenses and the necessary equipment and staffing levels.

The Board believes that CBT will significantly reduce the risks of examination cheating. It also believes that it will provide a simplified approach to test validation, scheduling, and monitoring. There will be 17 CBT sites in California and 22 sites in other states. The Board currently has two examination sites, so the Board believes that CBT will improve testing availability and efficacy, particularly for out-of-state candidates who currently must travel to California to take an examination. The establishment of CBT is a part of the Board's 2007 Strategic Plan.

### **Education and Enforcement Fund**

The Education and Enforcement Fund is supported by a licensee's purchase of a pesticide use stamp. Funds derived from the pesticide use report filing fee and all proceeds from county agricultural civil penalties collected are deposited into the Education and Enforcement Account. The Board manages the account for the following:

- For the purposes of training as provided in BPC § 8616;
- For reimbursement to the DPR for work performed as the agent of the Board pursuant to BPC §§ 8616, 8616.4, 8616.5, and 8617 and the Food and Agricultural Code § 15202;
- For reasonable expenses incurred by the Disciplinary Review Committee. There is no reimbursement from this fund for inspections and routine investigations.

The cost of the pesticide use report filing fee \$4.00 is set in regulation while the statutory maximum is \$5.00 (BPC § 8674(r)). The majority of this fund supports the Memorandum of Understanding between the Board, the DPR and the County Agricultural Commissioners for pesticide use enforcement efforts.

The Education and Enforcement Fund is supported by pesticide use stamp fees and pesticide fines. Estimated revenues for stamp fees in FY 2013-14 and FY 2015-16 is \$240,000, respectively while pesticide fines are estimated at \$100,000.

### **Research Fund**

According to the Board, research serves as vital component of the pest control profession, particularly as it relates to continuing education and professional field practices. The Research Fund supports the research efforts of the Research Advisory Panel which consists of one member from Board, two representatives from the structural pest control industry, one representative from the DPR, and one representative from the University of California.

The panel reviews research proposals and recommends to the Board which proposals to accept. The research projects are funded by the Research Fund and information regarding the status of research is published on the Board's website.

An additional cost of \$2.00 per every pesticide use stamp purchased (BPC § 8674) supports the Research Fund. Revenues for FY 2012-13 were \$135,064. FY 2013-14 and 2015-16 revenue estimates are \$120,000 respectively.

## License Renewals

Field Representative, Applicator and Operator licenses must be renewed every 3 years. License fee changes occurring in the last 10 years are illustrated below.

- Operator Delinquent Renewal Fees decreased in 2006 from \$75 to \$60;
- Applicator examination/license fees increased in 2007 from \$0 to \$10 (and conforming reduction of the Operator examination fee from \$150 to \$120); and,
- Applicator Delinquent Renewal fee increased in 2007 from \$0 to \$5.

<b>Fee Schedule and Revenue</b> (Revenues listed in thousands)										
Fee	Fee	Fee Limit	FY 2009/10 Revenue	% of Total	FY 2010/11 Revenue	% of Total	FY 2011/12 Revenue	% of Total	FY 2012/13 Revenue	% of Total
<b>WDO Filing</b>	\$2.50	\$3.00	\$1,998	70%	\$3,057	75%	\$3,316	75%	\$3,155	74%
<b>Pesticides use report filing</b>	\$ 6	\$ 7	\$368	13%	\$368	9%	\$397	9%	\$403	10%
<b>Operator:</b>										
<b>Examination</b>	\$ 25	\$ 25	\$16	.5%	\$17	1%	\$17	1%	\$19	1%
<b>License</b>	\$120	\$150	\$24	.5%	\$21	1%	\$19	1%	\$19	1%
<b>Renewal</b>	\$120	\$120	\$131	4.5%	\$116	3%	\$13	1%	\$11	1%
<b>Field Representative:</b>										
<b>Examination</b>	\$ 10	\$ 15	\$40	1.5%	\$41	1%	\$48	1.5%	\$47	1.5%
<b>License</b>	\$ 30	\$ 45	\$38	.5%	\$39	1%	\$29	1%	\$26	1%
<b>Renewal</b>	\$ 30	\$ 45	\$81	3%	\$76	2%	<b>\$13*</b>	1%	<b>\$7*</b>	1%
<b>Applicator:</b>										
<b>License</b>	\$ 10	\$ 50	\$15	.5%	\$15	1%	\$17	1%	\$19	1%
<b>Renewal</b>	\$ 10	\$ 50	\$7	.5%	\$5	.5%	\$6	1%	\$6	1%
<b>Company office registration</b>	\$120	\$120	\$25	.5%	\$31	1%	\$29	1%	\$29	1%
<b>Branch office registration</b>	\$ 60	\$ 60	\$1	.5%	\$4	.5%	\$2	.5%	\$3	1%
<b>CE provider</b>	\$ 50	\$ 50	\$0.35	.25%	\$0.225	.25%	\$0.6	.25%	\$0.45	.25%
<b>CE course approval</b>	\$ 25	\$ 25	\$12	.5%	\$11	.5%	\$9	1%	\$12	1%

\* Note: The Board indicates that approximately 85 % of Field Representative renewal fees for FY 2011-12 and FY 2012-13 were allocated to a special revenue account administered by the Department of Pesticide Regulation when the Board was subject to its jurisdiction until July 1, 2013. The Board states that these funds will be adjusted and appropriately reflected as a line item in the Board's Support Fund by close of FY 2013-14.

## Expenditures by Program Component

The Board notes that in Fiscal Year 2009-10, expenditures decreased due to the Governor's Executive Order S-13-09, which required 3 day furloughs for a period of 18 months for state employees. In Fiscal Year 2012-13, expenditures decreased due to the Governor's Executive Order S-15-10, which required a 1 day Personal Leave Program, resulting in a one day reduction of state pay, for a period of 12 months for state employees.

<b>Expenditures by Program Component</b>								
(Dollars in Thousands)	<b>FY 2009/10</b>		<b>FY 2010/11</b>		<b>FY 2011/12</b>		<b>FY 2012/13</b>	
	Personnel Services	OE&E	Personnel Services	OE&E	Personnel Services	OE&E	Personnel Services	OE&E
Enforcement	692	443	800	750	840	524	794	490
Examination		151		163		133		128
Licensing	498	439	576	356	537	429	509	414
Administration *	443	255	512	284	604	293	572	306
DCA Pro Rata		393966		448068		389852		492046
<b>TOTALS</b>	<b>\$1,633</b>	<b>\$ 1,682</b>	<b>\$1,889</b>	<b>\$2,001</b>	<b>\$1,981</b>	<b>\$1,768</b>	<b>\$1,875</b>	<b>\$1,830</b>
*Administration includes costs for executive staff, board, administrative support, and fiscal services.								

### **Staffing Levels**

The Board's Executive Officer is appointed by the Board. The current Executive Officer, Susan Saylor, has served as executive officer since August 15, 2013, and previously served as Interim Executive Officer from October 2012. For FY 2013/14, the Board has a staff of 28, with 12 staff dedicated to enforcement, 7 in administration and 9 to licensing and examinations. There are also 3 vacancies.

The Board has had issues with recruitment, particularly with professional class positions. To deal with this issue, the Board is considering reclassifying certain positions as they become vacant to attempt to incentivize upward mobility and attract and retain the most qualified candidates. Although the Board admits workload issues, it believes that it has handled the issues successfully. The Board reports that it has utilized its existing staff and one part-time contract employee to complete the work.

### **Licensing**

The Board issues, on average, some 2,329 licenses each year; this number includes all Applicator, Field Representative and Operator licenses. The Board processes approximately 4,275 renewals each year. Licenses are valid in three-year cycles.

It is the Board's policy to process approximately 99 % of all applications received within a 6-month time period with approximately 74 % approved. An incomplete application over 6 months old (including failure to pass the pest control examination) is automatically voided and a new application is required. Applicants whose applications have been approved and who have successfully passed the examination have up to one year to complete their applications (BPC § 8651); beyond one year, the application is voided. While the Board's target is 30 days, a majority of applications are processed within 14 days from submission. The Board points out that, while processing delays are rare, they are usually a result of factors beyond the Board's or applicant's control (i.e. response to fingerprinting submissions provided by other agencies). Applicants are encouraged to begin the fingerprint background check as the first step in the examination/licensure process to minimize any delays.

<b>Licensee Population</b>					
		<b>FY 2009/10</b>	<b>FY 2010/11</b>	<b>FY 2011/12</b>	<b>FY 2012/13</b>
Applicator	Active	5,265	4,931	4,893	5,051
	Delinquent *				
Field Representative	Active	10,719	10,877	10,764	10,549
	Delinquent *				
Operator	Active	3,467	3,547	3,550	3,601
	Delinquent *				
Principal Registration	Active	2,513	2,575	2,629	2,713
	Delinquent *				
Branch Offices	Active	458	441	439	437
	Delinquent *				
* This data is not tracked by the Board					

### **Information Verification**

The Board requires certificates of course completion with an application for an operator's license. An application for licensure as a field representative and operator must also be accompanied by a Certificate of Experience, completed and signed under penalty of perjury by the licensed operator managing the company under which the applicant gained the required training and experience. Any discrepancies noted by staff during the application review process, as it relates to possible authenticity of the signature or experience qualifications, are researched further by contacting qualifying managers to confirm accuracy of the information. License files may be reviewed to confirm periods of employment. If experience is obtained from out-of-state employment, verification of licensure from that state regulatory agency is obtained.

### **Fingerprinting**

Since July 1, 2004, all license applicants must be fingerprinted for a criminal history background check through the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI). If convictions are reported, Board staff makes the determination to issue or deny the license. All license applications are screened through the Board's enforcement records to determine if the applicant has had any prior disciplinary actions or outstanding enforcement actions that may be grounds for denial of the application.

The Board's fingerprint legislation became effective on July 1, 2004. Because this law could not be enforced retrospectively, only applicants filing applications for licensure on or after July 1, 2004 and current licensees upgrading their licenses (i.e. upgrading a field representative license to an operator license) were subject to the requirements of this legislation. The DCA sought authority in FY 2007-08 to allow affected boards and bureaus to require all licensees who have not been previously fingerprinted to submit fingerprints as part of the renewal of their licenses. However, the legislation did not pass. Therefore, the Board is considering promulgating regulations to require licensees to submit their fingerprints as a condition of licensure renewal.



## **Primary Source Documentation**

The Board requires source documentation for all maintenance, issuance, or renewal of a license. Photo identification is mandatory for all examination applications, specifically at the examination sites. When Board investigators audit examination sites, they request and verify source documentation that the candidate is authorized to be at the examination site, usually valid photo identification and examination papers. Finally, the Board accepts source documents furnished by the applicant or licensee from current and previous employers and similar documents attesting to the experience, education and qualifications of the applicant or licensee.

## **Continuing Education**

Every three years, the Board requires licensees to complete continuing education specific to the technical branches they are licensed in. Continuing education requirements vary depending on the type of license and number of categories held by the individual licensee. The number of required hours varies from 12 to 24 hours in a three-year renewal period. The Board conducts random audits every renewal period to check for compliance with license renewal requirements.

The Board currently has 118 CE approved providers. While the Board does not conduct scheduled reviews of continuing education providers, Board staff evaluates and approves each course offering, including the course syllabus and curriculum. Board investigators periodically audit CE course providers to ensure compliance with Board requirements.

The Board conducts annual CE audits on all classes of licensees. The Board conducts audits following renewals to insure licensees are accurately reporting their continuing education. Audits are conducted by randomly selecting a percentage from the renewal pool and requiring those selected to provide proof of their completed CE. Audit percentages vary from year-to-year based on staff workload. The consequences for failing a CE audit depend on the severity of the failure. The penalties include citation, fine, suspension, and license revocation.

## **Enforcement**

From 2001 through 2004, the Board averaged 1,240 complaints annually. Since 2008, complaints fell to an all-time low of 377 in FY 2008-09 but have steadily increased from that point forward to 518 in FY 2012-13. Based on current intake, the Board estimates that complaints will increase to 600 by end of FY 2013-14. The Board believes that there are two issues affecting the intake of complaints. The first is the prevalence of “As-Is” sales, and the other is the underground pest control industry.

### **“As-Is” Sales**

The Board believes that the rising trend of “As-Is” sales are nullifying the need for WDO inspections. The Board notes that buyers, sellers, or lenders are waiving pest control contractual contingencies so that there are fewer requirements in the sale or purchase of a home. The Board believes that these waivers preclude the Board from maintaining substantive jurisdiction, even in cases where there may have been a WDO inspection performed. The Board believes that sometimes the buyer will correct any conditions that would otherwise prevent the sale of property as this action serves as an incentive to stimulate the purchase of the property. The Board believes that a pest control company performing an inspection, excluding treatment and/or repairs, cannot be administratively disciplined for any of its

findings or recommendations if the buyer or seller agrees in advance that they will not use the pest control report or if they agree to hold the pest control company harmless as a condition of sale. The Board believes that its only course of action is to hold the pest control company responsible for the content and format of the report, but that it cannot administratively assist the consumer if a financial dispute occurs. It believes that the consumer's only recourse would be to pursue the dispute in civil court.

### **Underground Pest Control Industry**

The underground pest control industry is composed of individuals or companies that fail to report income or taxes, such as unemployment tax. The underground economy includes licensed and unlicensed practitioners, an area of the industry that appears to be growing, especially in the past year.

The Board believes that it needs additional resources in order to appropriately combat these issues. In 2013, the Board began partnering with the Department of Industrial Relations, Division of Labor Standards Enforcement, and other agencies to battle the underground economy issues. Rather than relying on reactive investigations, the Board would like to initiate proactive investigations that would not rely solely on administrative or criminal sanctions, but would also, where appropriate, encourage and educate unlicensed practitioners on the virtues of securing licensure and likewise would incentivize currently unlicensed practitioners to satisfy any outstanding obligations.

The Board currently maintains a staff of 8 field investigators to investigate complaints and to enforce administrative or criminal actions. The Board plans to expand the scope of its field operations, to support the underground economy efforts and to address the provision of complaint intake and investigations, by seeking hiring authority for at least two additional field investigators in FY 2014-15 or FY 2015-16. The Board anticipates that it can recover underground economy outstanding liabilities greater than the amount to fund these positions, which the Board estimates will be at least two times the costs of the positions (approximately \$76,000, including salaries, wages and benefits per position times 2).

The Board also plans to intensify its office records check program with the addition of field investigators to promote these activities. An office record check is a field enforcement activity concerned with a licensee's record keeping. Licensees must keep all inspection reports, field notes, contracts, documents, and notices of work completed for a period of three years, in accordance with BPC § 8652. These records can sometimes reveal that a licensee may be operating without an insurance policy, surety bond or qualifying manager. In such cases, licensees may be treated as unlicensed practitioners, according to the Board.

### **Alternative Dispute Resolution**

Because the legislative intent regarding alternative dispute resolution (ADR) (BPC §§ 465, 465.5) encourages agencies to utilize ADR, the Board plans to research private mediation, conciliation, and arbitration programs. It would use these programs to supplement to traditional dispute resolution and to attempt to maintain the ability to follow-up on complaints, even for "As-Is" sales or when a purchase agreement contains waiver clauses.

The Board states that implementation of an alternative dispute resolution program, such as arbitration, could better serve the consumer, particularly if the financial disputed amount is outside of the small

claims court's jurisdiction. Arbitration is not the answer to all investigative matters, but is a program that might be used to resolve specific financial disputes. Boards such as the Contractors State License Board, successfully utilize an arbitration program. An arbitration program, when properly administered, could save investigative costs, fleet costs, attorney general costs and Office of Administrative Hearings costs. These costs are variable and can contribute to difficult budgeting and expenditure decisions. The Board indicates that the utility of an arbitration program is the control of expenses by having a fixed sum of monies, under contract, with a private vendor who takes on the responsibility of the administration of the hearings and decisions (or awards) under the final review and supervision of the Board.

### **Performance Targets**

The Board's performance target and expectations are based on the DCA's Consumer Protection Enforcement Initiative (CPEI). In addition, on a monthly basis the Board generates statistical reports to monitor the intake of complaints, the quality of mediation and investigations performed, and the life cycle or age of the complaints received. The Board tracks all cases settled, the number of cases receiving restitution and investigative cost recovery. Since FY 2009-10, the Board saved more than \$316,342.00 for consumers, recovered costs of \$86,218.00 and received restitution in the amount of \$17,617.00. The Board uses customer satisfaction surveys to monitor performance and to make any quality control improvements in the program, such as expanding its enforcement program by addressing issues in the underground economy.

Since its return to DCA in July of 2013, the Board has worked with DCA to establish performance measurements data to provide full transparency and to fully monitor its program and implement quality controls as needed. The Board anticipates that it will begin posting performance measurement data on the DCA website in the first quarter of 2014. Current data shows that the disposition of Attorney General cases still remains an issue. The Board indicates the performance timeframes and the adjudication of cases has been impacted by furloughs, budget challenges, and a decline in recruitment efforts statewide for virtually all state agencies. The Board will monitor case adjudication to ensure that cases continually move through the Attorney General's Office and through the Office of Administrative Hearings.

### **Enforcement Data Trends**

After the 2008 historic low number of 377 complaints, complaints have steadily increased. The Board's Intake and Investigation units have recorded a significant decrease in the average age of open complaints, 191 days in FY 2011-12 to 116 days in FY 2012-13, a 39% decrease. Overall complaint age and average days to close show improvement each fiscal year. The Board estimates that these numbers are likely to remain fairly static in the current year.

The Board does not foresee any performance barriers in its enforcement program. However, it would like to increase enforcement in the underground economy. To help with underground economy enforcement, the Board has established a relationship with the Department of Industrial Relations. The Board further states its intention to establish relationships with other agencies (i.e. Franchise Tax Board) to improve proactive investigations and also to provide public outreach and consumer education. The Board will be seeking position authority in FY 2014-15 or FY 2015-16 for at least two field investigator positions to support its underground economy efforts. In order to implement ADR,

the Board will seek legislation and additional budgetary authority in FY 2015-16 once the program concept is approved by the Board in upcoming board or committee meetings.

<b>Enforcement Statistics</b>			
	<b>FY 2010/11</b>	<b>FY 2011/12</b>	<b>FY 2012/13</b>
Complaints	464	480	518
Average Time to Close	164	191	116
Investigations Assigned	494	459	530
Average days to close	164	191	116
Desk Investigations			
Closed	291	260	333
Average days to close	51	51	46
Non-Sworn Investigations			
Closed	195	255	179
Average days to close	326	331	245
Sworn Investigations			
Closed	8	4	0
Average days to close	352	336	0
Accusations Filed	53	34	37
Average Days Accusations	489	600	674
Average Days to Complete Discipline	504	597	635
AG Cases Initiated	65	48	49
Revocation	27	44	43
Voluntary Surrender	3	4	6
Suspension	3	0	0
Probation with Suspension	5	15	1
Probation	6	14	23
Probationary License Issued	9	11	2
Cease & Desist/Warning	80	84	68
New Probationers	20	40	26
Petitions to Revoke Probation	6	6	3
Probations Revoked	2	7	4
Citations Issued	111	169	133
Amount of Fines Assessed	\$223,341	\$221,858	\$132,063
Fines Reduced/Modified Amount	\$35,990	\$38,068	\$18,285
Fines Withdrawn Amount	\$19,758	\$41,517	\$625
Fines Amount Collected	\$95,638	\$127,116	\$103,127

### **Disciplinary Action**

The statistics show that disciplinary actions have slightly decreased in recent years. The Board believes this is due to its use of citations. At times, the Board chooses to issue citations rather than impose the severe consequences associated with suspensions and revocations. The Board believes that citations improve compliance for lesser violations, which may be a benefit to consumers. The Board also notes that citations are cheaper than disciplinary actions, which allows them to focus on major violators.

Disciplinary actions vary over time as they are dynamic factors (numbers that cannot be controlled and are affected by various social, behavioral, and economic variables). The Board believes that decrease in enforcement actions is a possible indicator of strengths in other aspects of the Board's program, such as improved relevancy in examinations or continuing education subject matter, or perhaps more socially responsible licensees. The decline in the Board's licensing population may also be a contributing factor.

### **Case Prioritization**

Board states its case prioritization policy is consistent with DCA's guidelines. The Board pursues cases by level of priority: 1) Urgent, 2) High, and 3) Routine. Urgent priority cases include fumigation deaths, arrests or convictions, or unlicensed activity (elder abuse or significant financial damages). High priority cases include probation violations, unlicensed activity (moderate financial damages) or fraud. Routine cases include advertising violations, improper inspections or unlicensed activity (minor or no financial damages).

### **Mandatory Reporting Requirements**

The Business and Professions Code does not establish any mandatory reporting requirements for cities, counties, or cities and counties for pesticide use violations. However, county agricultural commissioners have ordinances or policies which vary from county to county regarding reporting pesticide use violations to the Board.

Liability insurance providers are required to notify the Board within 10 days of any change or cancellation of the liability policy of a registered company (BPC § 8690). There are no mandatory requirements for Courts to report licensee convictions to the Board.

### **Statute of Limitations**

All complaints against licensees or registered companies must be filed with the Board within two years after the act or omission has occurred. The "act or omission" is typically determined to be the actual date of inspection, contract, or when treatment or repairs ceased. In the case of fraud, a complaint must be made within four years after the fraudulent act. The Board is required to file a disciplinary action to suspend or revoke a license and/or registration, within one year after the complaint has been filed with the Board, except that an accusation alleging a material misrepresentation on an application (BPC § 8637) must be filed within two years after the discovery by the Board. (BPC § 8621)

### **Cite and Fine**

Rather than taking formal disciplinary action for small or moderate violations, the Board may issue a citation without a fine or a citation with a fine. They may also be used if a licensee has little or no history of past violations, and the violations must not involve fraud or misrepresentation, criminal acts, elder abuse, substantial financial damages, or other commonly recognized egregious violations if they are to be considered for the citation and fine process. The Board points out that a single case can result in multiple citations. It is common for a company to have multiple licensees inspecting a single property, so a single case could have a citation issued to each licensee, as well as to the company and the company's qualifying managers. Effective September 2013, the Board through regulations increased the maximum fine to \$5,000 (previously capped at \$2,500). (CCR § 1920)

Average Fine Pre Appeal			
2009-2010	2010-2011	2011-2012	2012-2013
\$1488	\$1983	\$1840	\$1008
Average Fine Post Appeal			
2009-2010	2010-2011	2011-2012	2012-2013
\$575	\$1,537	\$661	\$478

To date, the Board has not used Franchise Tax Board (FTB) intercepts to collect outstanding fines. However, the Board is considering the utility of using the FTB, the Board of Equalization, and private collection agencies for this purpose. The Board, when administratively feasible, will survey the costs of these programs to determine its best course of action and will attempt to implement a collection program as early as January 1, 2015.

Cost Recovery				
	FY 2009/10	FY 2010/11	FY 2011/12	FY 2012/13
Total Enforcement Expenditures	N/A	542558	391807	399636
Potential Cases for Recovery *	N/A	53	88	75
Cases Recovery Ordered	12	7	12	19
Amount of Cost Recovery Ordered	\$83,877.97	\$53,087.26	\$50,109.27	\$131,434.00
Amount Collected	\$48,171.40	\$58,721.21	\$25,774.20	\$31,421.25
* Cases in which disciplinary action has been taken based on violation of the license practice act.				

### Cost Recovery and Restitution

The Board seeks cost recovery on all accusation cases filed with the AG. An administrative law judge, based on court testimony and/or findings of fact, may or may not order cost recovery in a proposed decision. If the cost recovery order is contrary to the amount sought by the Board, the Board has no discretion to set aside the ALJ's decision unless it elects to non-adopt the proposed decision in its entirety. Historically, the Board has not attempted to set aside an ALJ proposed decision and issue its own decision if the issue is only cost recovery. Decisions that are set aside involve other matters of law.

When considering settlement or stipulation terms, the Board may waive or reduce cost recovery upon a respondent's showing of good cause. In general, good cause may exist if the cost recovery order is likely to inhibit the respondent's ability to comply with the order of restitution to the consumer. In addition, the Board may waive cost recovery if it results in the immediate surrender of a license (termination of the business) in the interest of justice.

Over the last three years, the Board's average cost recovery order, whether issued by an administrative law judge or by Board stipulation, is approximately \$1,282. This figure represents approximately one-third of the Board's disciplinary cases. Since FY 2010-11, the Board has averaged 38 revocations (revocations that are stayed with conditions and unconditionally) and 29 new probationers each year.

The Board's ability to recover costs is conditioned on the respondent's desire to restore or reinstate his/her license. Approximately 20.3 percent of probationers have their licenses fully restored, and approximately 6 percent of unconditionally revoked licensees have had their licenses reinstated.

## **Restitution**

The Board seeks restitution for consumers upon verification of damages stemming from structural pest control inspections, fumigations or other pest control activities. Restitution orders are based on rendered pest control services. They include monetary damages that may occur as a result of failures of a structural pest control company to properly repair or correct structural deficiencies to a building, omissions in an inspection report that results in additional costs, purchase agreements that may unlawfully impact the consumer, or improper mechanic's liens recorded against a consumer's property.

## **PRIOR SUNSET REVIEWS: CHANGES AND IMPROVEMENTS**

In November of 2013, the Board submitted its required Sunset Review Report to the Committees. In this report, the Board described actions it has taken since its prior review to address the recommendations of the Joint Committee on Boards, Commissions and Consumer Protection. According to the Board, the following are some of the more important programmatic and operational changes, enhancements and other important policy decisions or regulatory changes made.

- **Transfer of the Board from DCA to DPR.** Since the last review, ABX4, 20 (Strickland, Chapter 18, Statutes of 2009) transferred the Board to DPR. The Governor's 2011-2012 GRP No 2 and AB 1317 (Frazier, Chapter 352, Statutes of 2013) then returned the Board back to DCA.
- **Low passage rate for Board exams.** Since the last review, the Board has continued to monitor the pass/fail rates for its exams. In February 2013, the Board learned that its examination was compromised, and the investigation is ongoing. The Board continues to work with DCA's Office of Professional Examination to track of pass/fail rates and to compile the required data to update examination content and ensure examination security.
- **Use of academic research institutions for management of research projects.** The Board has established a successful request for proposal (RFP) process which complies with the State Contracting Manual and is approved through DCA and the Department of General Services.

## **CURRENT SUNSET REVIEW ISSUES FOR THE STRUCTURAL PEST CONTROL BOARD**

The following are unresolved issues pertaining to the Board, or those which were not previously addressed and other areas of concern for the Committees to consider along with background information concerning the particular issue. There are also recommendations that staff have made regarding particular issues or problem areas which need to be addressed. The Board and other interested parties, including the professions, have been provided with this Background Paper and can respond to the issues presented and the recommendations of staff.

## ADMINISTRATIVE ISSUES

### **ISSUE #1: (STRATEGIC PLAN) Should the Board update its 2007 Strategic Plan?**

**Background:** The Board's last Strategic Plan was approved in 2007. After being moved into the jurisdiction of the Department of Pesticide Regulation, the Board drafted a new Strategic Plan in 2011, but that plan was apparently never finalized.

While the numerous factors that come with transferring the Board back into DCA have no doubt been a factor in not having an updated Plan, it is important for the Board to carry out this essential task in a timely manner.

Within the DCA's administrative support functions, a training unit is available assist boards and bureaus with the Strategic Planning process. Board minutes from 2013 indicate that the Board and the DCA are both aware of the need to update and finalize a current Strategic Plan.

In light of the changes to Board's departmental alignment, and the current issues that it faces, the Board should make establishing a current strategic plan a clear priority in future months.

**Staff Recommendation:** *The Board should report to the Committees on the progress of updating its Strategic Plan.*

### **ISSUE #2: (IMPACT OF RESEARCH PROJECTS) What is the impact of research projects administered by the Board? Is the Board the appropriate entity to carry out such research projects?**

**Background:** As stated above, the Board approves various research projects through requests for proposals (RFPs). These research projects are funded by the research fund, and the results are posted to the Board's website.

The Board indicates that research serves as vital component of the pest control profession, particularly as it relates to continuing education and professional field practices. The Board administers a Research Fund (one of its three Special Funds) which supports the research efforts of the Board through its five-member Research Advisory Panel. (BPC § 8674 (t), California Code of Regulations (CCR) Title 16 § 1919).

The Research Fund is supported by an additional \$2.00 cost per every pesticide use stamp sold. (BPC § 8674(t)). Revenues for FY 2012-13 were \$135,064. FY 2013-14 and FY 2015-16 revenue estimates are \$120,000 respectively.

In its Sunset Review Report, the Board indicates that when particular issues occur in the profession requiring clarification, or when new issues arise, Board staff or the industry brings this information forward to Board members for consideration, or the members may also initiate research independently. The Board then identifies what elements of the research require specific attention. The research approval process is vetted through a RFP process or invitation for bids and is advertised on a national scale. After the research contract is awarded, information regarding the status of the research is published on the Board's website.



In its prior 2005 Sunset Review Report, the Joint Committee noted a setback in the Board's efforts to have an academic institution prepare its RFPs for grants from its Research Fund when UC Berkley's Forest Products Laboratory botched the RFP process, and budgetary issues required UC Berkeley to close the Forest Products Laboratory. Ultimately, the Board indicates that it has established a successful RFP process that is subject to the State Contracting Manual requirements and approved through the DCA and the Department of General Services.

***Staff Recommendation:*** *The Board should advise the Committees on the impact of the research results. For example, are the findings proscriptive or just informative for licensees? Is it appropriate for research to be a function of the Board or should this function be carried out by the pest control industry?*

---

**ISSUE #3: (STAFF VACANCIES) What is the status of staff vacancies and Board efforts to recruit and reclassify positions in order to fill vacant staff positions?**

**Background:** According to the Board's FY 2013/14 organizational chart, at the time the Sunset Review Report was filed, the Board had a staff of 28 with three vacant positions: two vacant Staff Services Manager positions, and one vacant Staff Services Analyst position. The Board states that it has difficulty in recruiting and retaining job candidates, specifically for professional class positions.

The Board indicates that it would like to reclassify certain positions as they become vacant in order to offer higher compensation and thereby to enhance recruitment and retention of employees. It would also like to turn some "specialist" class positions into "generalist" class positions, which would trim down the qualifications required for certain professional class positions.

***Staff Recommendation:*** *The Board should update the Committees on the nature of the staff vacancies (e.g. how long, for what reason). What are the Board's current efforts to recruit and fill the vacant positions? The Board should provide details as to specific requirements that would be trimmed down or changed by reclassifying vacant positions.*

---

**ISSUE #4: (ONLINE MEETING MATERIALS) Could the Board enhance public access and transparency by providing access to the materials for upcoming Board and Committee meeting and maintaining past materials on its Internet web site?**

**Background:** California law places a priority on the transparency of public agencies in carrying out their regulatory duties. As the use of the Internet has progressed by both government agencies and consumers, publication of information on board web sites has become an important and essential tool in informing and advising the public and licensees about a board's business.

Committee staff notes that while the Board continues to post Board meeting agendas and minutes on the website, it does not post the materials or hand-outs which are used in preparation for Board meetings, and are ultimately referenced in Board meetings. It is unclear whether there is a valid reason why board meeting materials are not published in advance on the Board's Internet web site.

If Board meeting materials were posted, then consumers, the industry and any interested party could have full access to the same public information that the members of the Board use in its public meetings. This would better enable interaction by those stakeholders at Board meetings.

Posting Board meeting materials would also serve as a publicly accessible archive of past Board meetings and the materials used by the Board in carrying out its business. This serves the public interest by promoting transparency and access to the operations of the Board.

***Staff Recommendation:*** *The Board should provide the Committees with the reasons why the Board does not post the materials online. The Board should additionally establish a plan to begin posting Board meeting materials on its Internet web site.*

---

**ISSUE #5: (WEBCASTING BOARD MEETINGS) Would public access to state government operations be enhanced by webcasting Board meetings?**

**Background:** Last year, the issue of sporadic webcasting was raised with the DCA. Webcasting, the delivery of live audio or video content through the Internet, is an effective tool in ensuring public access to publicly held meetings. However, the webcasting option is not chosen by some of the DCA boards, commissions and committees for their public meetings. While meetings are held at various locations throughout the state to allow for public participation and to ensure that public access is not hindered by geographical barriers, there is also significant benefit gained from providing consistent access to public meetings via the Internet.

Webcasting board meetings can also serve as a valuable publicly accessible archive, when the video or audio of the board meeting is posted online so that past meetings can be reviewed at any time. Webcasting and archiving board webcasts serve to enhance transparency and public access to the activities of the Board.

Webcasting board meetings was raised as a department-wide issue for DCA during last year's Sunset Review hearings. The DCA indicated that resources of both equipment and personnel are often a limiting factor in the Department's ability to provide webcast services for public meetings. DCA further stated that it was considering purchasing equipment that could be loaned to boards which would give greater access to webcasting.

It is unclear whether the Board has any plans at this time to begin webcasting its meetings. Webcasting board meetings can help provide access and transparency of the Board's operations to all stakeholders.

***Staff Recommendation:*** *The Board should advise the Committees on any progress it has made in working with the DCA to webcast its meetings. The Board should further establish a plan to begin webcasting Board meetings, and archiving the webcasts on its Internet web site.*

## **BUDGET ISSUES**

### **ISSUE #6: (INCREASING EXAMINATION FEES) What is the current status of the Board's proposal to implement CBT and to increase its examination fees?**

**Background:** In its Sunset Review Report, the Board states the intention to seek legislation to increase examination fees so that it can begin to implement Computer Based Testing (CBT).

The Board does not anticipate a budget deficit in the current year nor forecasts a budget deficit in fiscal years 2013-14 or 2014-15. However, the Board has indicated that it will be seeking legislation during the current Session to increase examination fees to support CBT. A proposal would increase the maximum fees that could be charged for the examinations, however, the actual fees for the examinations would be based on the actual costs to administer the examinations. According to the Board, the current cost to administer each examination is \$37.50 under the DCA contract with the outside CBT vendor. If legislation to increase fees is approved, the Board would finalize a cost analysis and subsequently promulgate regulations possibly through a legislative BCP to support the Board's fully loaded costs to administer the examination program.

The Board states that prior to the full implementation of CBT, the Board, in a joint effort with the DCA, is planning a pilot CBT offering in the early part of 2014 as part of its public policy analysis and review to substantiate operating expenses and equipment and personnel years. This will help the Board to understand the necessary levels at which the fees should be set, and further provide the justification for any BCPs related to the full implementation of CBT. The Board also indicates that it will continue to assess its fund condition to ensure that it does not operate in a deficiency during the CBT Pilot.

The Board states that CBT is a cutting-edge technology that is anticipated to significantly reduce the risks of examination subversion (cheating) while also enabling a more seamless and simplified approach to test validation, scheduling and monitoring for Board staff and examinees. There will be 17 CBT sites in the state of California and 22 sites in other states. The Board currently only has two examination sites and so CBT will be a major improvement in testing availability and efficacy, particularly for out-of-state candidates who will save on costs associated with airfare and other travel to California to take an examination. The establishment of CBT is an element of the Board's 2007 Strategic Plan.

Committee staff notes the recent introduction of AB 1685 (Williams) which would raise the maximum fees that the Board could charge for examinations as follows:

- Operator examination fee: increase from \$25 to \$100
- Field representative examination fee: increase from \$15 to \$75
- Applicator examination fee: increase from \$15 to \$60

At this point, the full impact of the proposed fee increases on licensing applicants is unknown.

**Staff Recommendation:** *The Board should advise the Committees on the current status of the CBT pilot. The Committees should also appropriately consider any legislative proposals and their impact*

*upon applicants, the pest control industry, and Board revenues. When does the Board anticipate that it will fully implement CBT?*

**ISSUE #7: (ALLOCATION OF LICENSE FEES TO A SPECIAL REVENUE ACCOUNT)**

**What are the reasons and authority for the allocation of field representative license renewal fees to a special revenue account in the Department of Pesticide Regulation?**

**Background:** In its Sunset Review Report, the Board notes that 85 % of the Field Representative renewal fees for FY 2011-12 and FY 2012-13 were allocated to a special revenue account administered by the Department of Pesticide Regulation when the Board was under its jurisdiction until July 1, 2013. It is unknown what the nature and authority is for this special revenue account. The Report further notes that the funds will be adjusted and appropriately reflected as a line item in the Board's Support Fund by the close of FY 2013-14.

It would be helpful for the Board to inform the Committees on the nature of the special revenue account, and what the account was used for and is the authority is for the account. What is the authority for allocating licensing revenue paid to the Board to a special revenue account under DPR? Since the Board also indicates that the funds will be returned to the Board's Support Fund during this fiscal year, the Board should also update the Committees on the current status of the return of these funds.

**Staff Recommendation:** *The Board should provide the Committees with more detail about this special revenue account. What is the purpose of the account? What is the authority for allocating licensing fees to an agency's special revenue account? Have all of the funds been returned to the Board? Has any interest been paid to the Board for those funds?*

**LICENSING ISSUES**

**ISSUE #8: (Fingerprinting) Should the Board adopt regulations to require that all licensees who have not previously been fingerprinted to be fingerprinted for the purpose of conducting criminal history record checks as a condition of license renewal?**

**Background:** The Board has not been able to fingerprint licensees with licenses from before the implementation of the fingerprinting program, it is has considered promulgating regulations requiring fingerprinting as a condition to renew a license.

Effective July 1, 2004, (SB 364, Figueroa, Chapter 789, Statutes of 2003) all license applicants must be fingerprinted for a criminal history background check through the Board's Criminal Offender Record Information program (CORI). Board staff reviews the criminal history record from the Department of Justice and the Federal Bureau of Investigation and makes the determination to issue or deny the license.

The Board states that since the enacted law only dealt with licensing applicants, the fingerprint requirement could not be enforced retrospectively. Only applicants filing applications for licensure on or after July 1, 2004, and current licensees upgrading their licenses (i.e. upgrading a field representative license to an operator license) are subject to the requirements of this legislation.

In 2008, the Los Angeles Times published a series of articles which found that licensees of other DCA boards who had prior criminal convictions and were still licensed by their respective licensing boards. DCA sought legislation (SB 389, Negrete McLeod, 2009) to provide authority for all boards and bureaus to require all licensees who have not been previously fingerprinted to submit fingerprints as part of the renewal of their licenses. However, SB 389 was ultimately not enacted. Since that time, other licensing boards and bureaus have successfully adopted regulations to require licensees not previously fingerprinted to be fingerprinted upon license renewal. Similarly, the Board is considering adopting regulations which would require all licensees who were not subject to the prior legislation, to submit their fingerprints as a condition of licensure renewal.

In the interest of consumer protection, the Board should move forward with regulations to require the fingerprinting of all licensees who have not previously been fingerprinted.

***Staff Recommendation:*** *The Board should advise the Committee on the status of this issue. The Board should additionally take steps to adopt regulations to require that all licensees, who have not previously been fingerprinted, to be fingerprinted for the purpose of conducting criminal history record checks as a condition of license renewal.*

#### **ISSUE #9: (Compromise of Examinations) How has the Board responded to the 2013 discovery that its licensing examinations had been compromised?**

**Background:** In February 2013, the Board learned that its examination was compromised, and as of November 1, 2013, the investigation was ongoing. The Board states that since that time it Board has been working with DCA's Office of Professional Examination Services to review the examination pass and fail rates on an ongoing basis to compile necessary data to update its examination content and to ensure examination security.

Board minutes since that time have noted that since the examinations were compromised, new field representatives were put in place in March 2013. However, the passing rate for the new examinations has been very low and the Board anticipated conducting examination question analyses each month until the passing rate improved.

The Board should report to the Committees on the nature of the examination compromise: which examinations were compromised, how they were compromised, and the effect has it had on the Board's examinations process. Has the Board has conducted a review of its examination security, and if so, what have been the findings? What is the status of the ongoing investigation and what are the findings of the investigation? How does the Board propose to prevent examination compromises in the future? What are the fiscal impacts to the Board of the compromised examination?

***Staff Recommendation:*** *The Board should report to the Committees on the nature of the examination compromise: Which examinations were compromised? How were the examinations compromised? What effect has it had on the Board's ability to conduct examinations? What is the status of the ongoing investigation? What steps has the Board taken to prevent future examination compromises? What is the fiscal impact of the examination compromise to the Board?*

## **ENFORCEMENT ISSUES**

### **ISSUE #10: (“AS-IS” SALES) Does the Board have adequate authority to take action against licensees for violations during “as-is” real estate sales?**

**Background:** The Board believes that it is unable to take administrative action against a pest control company in an “As-Is” sale of a property, specifically where the buyer agrees to waive liability on the part of the pest control company.

In its Sunset Review Report, the Board indicates that the issue of “As-Is” sales has affected the Board’s intake of complaints, and resulted in the dramatic downturn in complaints against licensees in the last few years. The Board believes that the rising trend of “As-Is” sales are nullifying the need for wood destroying organism (WDO) inspections. Specifically, the buyer, seller or lender is waiving pest control contractual contingencies so that there are fewer requirements in the sale or purchase of a home. The Board states that these waivers preclude the Board from maintaining substantive jurisdiction, even in cases where there may have been a WDO inspection performed.

The Board states that it is not uncommon in its experience for the buyer to correct any conditions that would otherwise prevent the sale of property as this action serves as an incentive to stimulate the purchase of the property from the seller, particularly in a declining market. In essence, a pest control company performing an inspection, excluding treatment and/or repairs, cannot be administratively disciplined for any of its findings or recommendations if the buyer/seller agrees in advance that they will not use the pest control report or if they agree to hold the pest control company harmless as a condition of sale. The Board states that its sole jurisdiction is to hold the pest control company responsible for the content and format of the report, but this does not administratively assist the consumer if a financial dispute occurs. The consumer’s only recourse in such a case would be to pursue the dispute in civil court.

Committee staff questions whether the Board is, in fact, precluded from maintaining jurisdiction when pest control contractual contingencies are waived, even in cases where there may have been a WDO inspection performed. If there are violations by the licensee, what is there that would make the Board unable to take action? Is it a matter of whether the Board is precluded from taking action, or is it a matter of Board policy?

Committee staff points out that recent legislation has been enacted which would prohibit any licensee, regulated by any DCA board, from including in a settlement agreement of a civil dispute a provision which prohibits the filing of a complaint with a Board (AB 2570, Hill, Chapter 561, Statutes of 2012). Although these agreements in “As-is” sales are not specifically the same as the settlement of civil suits, there are many similarities.

The Board should address whether it has adequate authority to exercise jurisdiction over a licensee when there is an “As-is” sale of a property.

**Staff Recommendation:** *The Board should inform the Committees whether a consumer can contract away the ability of the Board to discipline a licensee. The Board should speak to whether it is precluded from maintaining substantive jurisdiction when pest control contractual contingencies are waived. If there are violations by the licensee, what would make the Board unable to take*

*action? Is it a matter of whether the Board is precluded from taking action, or is it a matter of Board policy? Does the Board recommend any legislation to clarify the Board's ability to protect consumers in this area?*

### **ISSUE #11: (UNDERGROUND ECONOMY) Can the Board adequately address the Underground Pest Control Industry?**

**Background:** The Board has raised the issue of the underground pest control industry in its Sunset Review Report. Specifically the Board notes that individuals and companies that fail to report their work to avoid compliance with tax, licensing, and labor laws. The underground economy includes licensed and unlicensed practitioners, an area of the industry that appears to be growing, according to the Board, especially in the last year. The Board believes this rise is largely due to rising unemployment, a decline in savings and retirement, and the reduction of various income assistance programs (such as unemployment compensation).

The Board cites the California Employment Development Department, stating that:

*Reports on the underground economy [a ten billion dollar industry] indicate it imposes significant burdens on revenue needed to fund critical state programs and businesses that comply with the law. When businesses operate in the underground economy, they gain an unfair, competitive advantage over businesses that comply with labor, licensing, and payroll tax laws. This causes unfair competition in the marketplace and forces law-abiding businesses to pay higher taxes and expenses.*

The Board believes that in order to appropriately combat these issues, it must obtain the resources necessary to effect positive change. In 2013, the Board began partnering with the Department of Industrial Relations, Division of Labor Standards Enforcement, and other agencies to combat the underground economy. To further achieve successful results, the Board is endeavoring to initiate proactive investigations, as opposed to the traditional reactive investigations. Such investigations would not solely be based on administrative or criminal sanctions, but would alternatively, and where appropriate, encourage and educate unlicensed practitioners on the virtues of securing licensure, and likewise incentivize currently licensed persons to meet their tax, bonding, and licensing obligations.

The Board states that it currently has 8 field investigators (“Specialists”) to pursue complaints and carry out enforcement functions. The Board plans to expand the scope of its field operations, to address underground economy efforts, by seeking position authority for at least 2 additional field investigators in FY 2014-15 or FY 2015-16.

The Board believes that though it’s proposed underground economy enforcement efforts it can recover outstanding liabilities greater than the amount to fund these positions.

In addressing the underground pest control economy, the Board indicates that it has already established a relationship with the Department of Industrial Relations, and it anticipates establishing a working relationship as well with the Franchise Tax Board.

In addressing the range of underground economy issues, it may be appropriate for the Board to also seek the advice of the Contractors State License Board regarding its experience with battling the underground economy. The Board should also seek input from other regulators, such as the

Department of Pesticide Regulation and County Agricultural Commissioners on the underground economy.

***Staff Recommendation:*** *The Board should update the Committees on its attempts to study the actions of other agencies in this area, such as the Contractors State Licensing Board, the Department of Pesticide Regulation, and the County Agricultural Commissioners. The Board should seek the input and advice from other agencies that address issues regarding the underground economy so that it may most effectively pursue this enforcement issue.*

**ISSUE #12: (ALTERNATIVE DISPUTE RESOLUTION) Should the Board implement an alternative dispute resolution program or an arbitration program?**

**Background:** The Board has raised the issue of using alternative dispute resolution (ADR) strategies for resolving issues between structural pest control companies and consumers. The Board specifically indicates that it would like to research and implement ADR programs, such as mediation, conciliation, and arbitration. The Board also plans to submit a budget change proposal in either budget year 2014-15 or 2015-16 in order to develop an arbitration program specifically under. The Board anticipates that the program would be a consumer arbitration program, under the authority of BPC § 465 et seq.

The Board is looking at innovative ways to improve complaint responsiveness while improving customer service and minimizing state costs. The Board states that it plans to research private mediation, conciliation, and arbitration programs (or “alternative dispute resolution”) as an additional means to dispute resolution and to continue to maintain substantive jurisdiction on complaints.

The Board states that the implementation of an alternative dispute resolution program, such as arbitration, better serves the consumer, particularly if the financial disputed amount is outside of the small claims court’s jurisdiction. Although arbitration is not the answer to all investigative matters, the Board believes that it is a program that can be used to resolve specific financial disputes. Other jurisdictions, including the Contractors State License Board, have implemented an arbitration program and have enjoyed success. An arbitration program, when properly administered, can save investigative costs, fleet costs, attorney general costs, and Office of Administrative Hearings costs, which are variable costs and can contribute to difficult budgeting and expenditure decisions. The utility of an arbitration program is the control of expenses by having a fixed sum of monies, under contract, with a private vendor who takes on the responsibility of the administration of the hearings and decisions (or awards) under the final review and supervision of the Board.

The Board may refer consumers to community based programs as well, such as court mediation or conciliation programs. The Board would maintain contact with the consumer to ensure that the court-administered program is the best alternative.

The Dispute Resolution Program Act (DRPA) (BPC § 465 et seq.) was enacted in 1986 to provide a simple mechanism for funding community based dispute resolution programs. Each county has the ability to opt into the program by resolution of the Board of Supervisors, and each county sets the amount up to the maximum that will be assessed against each filing.

The DRPA was designed to support the provision of conciliation and mediation services to a wide cross-section of the population. The programs funded by DRPA work to settle disputes that divide neighbors, families, co-workers, and communities including disputes that can escalate to the point of



violence or community-wide strife. Conciliation and mediation is a process that brings people together to solve their disputes collaboratively, focusing on common interests rather than on adversity. Conciliation and mediation in general and community-based conciliation and mediation in particular, are an especially successful way for community members to solve problems. It is typical for programs to find that over 80% of conciliations and mediations result in a resolution and participants commonly give high marks for satisfaction with the process.

**Staff Recommendation:** *The Board should update the Committees on the status of its planned implementation of an arbitration program, and whether other boards are using a similar approach through the DRPA. The Board should also advise the Committees on whether it plans to implement the other types of ADR as indicated in its Report.*

**ISSUE #13: (DECREASE IN CITATIONS AND FINES) Why has there been a decrease in citations and fines in FY 2012/2013?**

**Background:** In the Sunset Review Report, the Board states that statistics show that disciplinary actions have slightly decreased due to the Board exercising its citation authority (Page 77). However the enforcement statistics in the report show a decrease in the citations and fines statistics in FY 2012/13. The chart below shows 133 citations were issued in FY 2012/13, compared with 169 issued the prior year. This is a 22% decrease in the number of citations. For the same period, the amount of fines assessed decreased 40% from \$221,858 in FY 2011/12 to \$132,063 in FBY 2012/13. During this same period, complaints increased from 480 to 518 an 8% increase.

<b>Citations and Fines</b>			
	FY 2010/11	FY 2011/12	FY 2012/13
Citations Issued	111	169	133
Amount of Fines Assessed	\$223,341	\$221,858	\$132,063
Reduced/Modified Amount	\$35,990	\$38,068	\$18,285
Withdrawn Amount	\$19,758	\$41,517	\$625
Amount Collected	\$95,638	\$127,116	\$103,127

The Board uses citations and fines to impose reasonable sanctions against licensees without the need to pursue formal discipline to suspend or revoke a license, thus saving the Board substantial costs associated with formal actions for lesser violations. A citation and fine is also used if a licensee has little or no history of past violations. The Board states that violations must not involve fraud or misrepresentation, criminal acts, elder abuse, substantial financial damages or other commonly recognized egregious violations if they are to be considered for the citation and fine process.

The Board should explain the reasons for the decrease in citations and fines in the FY 2012/13. Are there operational issues that have hampered its efforts? Are there staffing issues that have impeded its enforcement processes? Has a change in Board policy led to the significant decrease in the number of citations and fines?

**Staff Recommendation:** *The Board should advise the Committees on the reasons for the decrease in the number and amount of citations and fines in FY 2012/13.*

**ISSUE #14: (STATUTE OF LIMITATIONS) Are the current statute of limitations for filing complaints with the Board, and for the Board to file accusations against a licensee adequate? Should the timeframes be increased?**

**Background:** The law establishes a statute of limitations for actions under the structural pest control law. Complaints against licensees must be filed with the Board within two years after the act or omission occurs. In the case of fraudulent acts, a complaint must be filed within four years. The Board is required to file any accusation against a licensee within one year after the complaint has been filed with the Board. However, the Board has two years after discovery by the Board to file an accusation against a licensee who has made a material misrepresentation of fact on a licensing application. (BPC § 8621)

The Board states that for purposes of the above timeframes the time of the “act or omission” is typically calculated from the actual date of inspection, contract or when treatment or repairs ceased.

It does not appear that the Board states in its Sunset Review Report whether or not it has lost any cases due to the expiration of the statutes of limitations. It would appear that the requirement for the Board to file an accusation against a licensee within one year of the time the complaint is filed with the Board could easily lead to cases being dismissed due to the accusation not being filed within one year. In order for an accusation, to be filed, several procedural steps must occur which can greatly extend timeframes and threaten meeting the one year requirement. The Board must: 1) receive the complaint, 2) investigate the complaint, including developing the administrative case, and 3) refer the case to the Attorney General’s (AG) Office. After this, the case is with the AG and largely out of the Board’s hands. The AG must draft and file the accusation. This can be a time-consuming process.

Committee staff notes the vastly different statute of limitations between the Board and the Contractors State License Board (CSLB). BPC § 7091 provides that a complaint must be made against a licensee within four years after the act or omission alleged as the ground for disciplinary action. The CSLB must file the disciplinary action against the licensee within four years after the act or omission occurred or within 18 months from the date the complaint was filed with the CSLB, whichever is later.

Has the Board lost been unable to pursue any cases or had any cases dismissed because of the expiration of the statute of limitations? If so, what has prevented the action from taking place within the required timeframes? Are the time limitations for filing a complaint with the Board adequate? Does the Board have any information on whether any consumers have been turned away from filing complaints because it was beyond the 2-year limitation? Are the timeframes for the Board filing an accusation against a licensee adequate? In the interest of consumer protection, should the timeframes be increased more in line with those stated above for contractors?

**Staff Recommendation:** *The Board should report to the Committees on whether it has been unable to pursue any cases or has had any cases dismissed because of the expiration of the statute of limitations? If so, what has prevented the complaint or accusation from taking place within the required timeframes? Are the time limitations for filing a complaint with the Board adequate? Does the Board have any information on whether any consumers have been turned away from filing a complaint because the two year limit for filing a complaint has expired? Are the timeframes for the Board filing an accusation against a licensee adequate? In the interest of consumer protection, should the timeframes be increased more in line with the statute of limitations for contractors?*

**ISSUE #15: (RETENTION OF DOCUMENTS) Is the three year document retention period required of licensees adequate in light of the limitations for filing a complaint and taking disciplinary actions?**

**Background:** Under BPC § 8652, a licensee must retain all documents related to work performed for a period of three years after the completion of the work. Failure to keep all inspection reports, field notes, contracts, documents, notices of work completed, and records, for the required three years is grounds for disciplinary action.

The Board states in its Sunset Review Report that it will be intensifying its office records check program if its proposal for additional of field investigators is approved. The office record check focuses on the licensee's record keeping, and the records can sometimes reveal that a licensee may be operating without an insurance policy, surety bond, or qualifying manager.

It appears that there is an inconsistency in the law which could significantly impact enforcement efforts of the Board – especially in the case of fraud by a licensee. As described above, BPC § 8621 establishes a two year statute of limitations for filing a complaint, and expands that timeframe to four years in the case of fraud. The Board then has one year from the date of the complaint to file an accusation against a licensee. Since there is only a three year record retention requirement, a licensee could destroy relevant records before a fraud complaint is ever made, and prior to the Board serving an accusation on the licensee. This appears to be a major inconsistency in the law.

**Staff Recommendation:** *The Board should advise the Committee on whether this three year record retention period should be extended beyond the statute of limitations timeframe so that licensees will be required to maintain documents for investigatory purposes.*

**ISSUE #16: (EXEMPTION FROM LICENSURE) Should BPC § 8555 be amended as proposed by the Board to provisions which the Court held to be non-rational and unconstitutional?**

**Background:** The structural pest control law exempts from licensure and regulation by the Board, those people and businesses engaged in the live capture and removal or exclusion of certain vertebrate pests, bees, or wasps from a structure without the use of pesticides (BPC § 8555 (g)). However, the law further excludes mice, rats, and pigeons from the definition of “vertebrate pests.” This provision was added by AB 568 (Valerie Brown, Chapter 718, Statutes of 1995).

In 2008, BPC § 8555 (g) was held unconstitutional by the 9th circuit (*Merrifield v. Lockyer*, 547 F.3d 978, 990 (9th Cir. 2008)). Alan Merrifield, was an unlicensed operator of a pest control business and trade association. His business engaged in non-pesticide animal damage prevention and bird control. In 1997, he was sent a warning letter from the Board stating that his business activities require a license, because he advertised and conducted rodent proofing. Merrifield never applied for a license and claimed none was necessary for his business activity because he did not use pesticides.

In order to continue working without a license, he filed a lawsuit against the Board and other state officials, alleging a violation of Equal Protection, Due process, and Privileges or Immunities Clauses of the Fourteenth Amendment.

The 9th Circuit held that the application of the licensing exemption under BPC § 8555(g) for individuals performing the live capture of vertebrae pests, bees, or wasps without the use of pesticides violated the equal protection clause of the 14th Amendment under the U.S. Constitution. The Court found that the inclusion of certain animals within the definition of vertebrae pests (bats, raccoons, skunks, and squirrels) but not others (mice, rats, or pigeons), lacked a rational basis.

In the Board's Sunset Review Report, it states that it is currently proposing to rectify the licensing issue by deleting the provisions which the court held to be non-rational and unconstitutional.

***Staff Recommendation:*** *The Board should advise the Committee of: 1) The purpose for the initial exemption; 2) Whether there is in fact a reason for the distinction between certain vertebrae pests and others in the context of live capture without pesticide; 3) Which particular amendments does the Board propose to make to eliminate the provision found to be unconstitutional (e.g., just the definition of vertebrae pest?); 4) How the Board has enforced this provision since its enactment in 1995; and 5) If the Board proposes to maintain exemptions for live capture of certain pests without the use of pesticides.*

## **TECHNOLOGY ISSUES**

### **ISSUE #17: (BREEZE IMPLEMENTATION) What is the status of BReEZe implementation by the Board?**

**Background:** The BreEZe Project will provide DCA boards, bureaus, and committees with a new enterprise-wide enforcement and licensing system. BreEZe will replace the existing outdated legacy systems and multiple "work around" systems with an integrated solution based on updated technology.

BreEZe will provide all DCA organizations with a solution for all applicant tracking, licensing, renewal, enforcement, monitoring, cashiering, and data management capabilities. In addition to meeting these core DCA business requirements, BreEZe will improve DCA's service to the public and connect all license types for an individual licensee. BreEZe will be web-enabled, allowing licensees to complete applications, renewals, and process payments through the Internet. The public will also be able to file complaints, access complaint status, and check licensee information. The BreEZe solution will be maintained at a three-tier State Data Center in alignment with current State IT policy.

BreEZe is an important opportunity to improve the Board's operations to include electronic payments and expedite processing. Staff from numerous DCA boards and bureaus have actively participated with the BreEZe Project. Due to increased costs in the BreEZe Project, SB 543 (Steinberg, Chapter 448, Statutes of 2011) was amended to authorize the Department of Finance (DOF) to augment the budgets of boards, bureaus and other entities that comprise DCA for expenditure of non-General Fund moneys to pay BreEZe project costs.

The Board is in phase 3 of the BreEZe project, which at the time of the Sunset Review Report was anticipated to be released by September 2014. This system will be designed to accommodate, where feasible, stand-alone databases used by the various boards and bureaus, including the Board's WDO database. The Board's executive officer participates in monthly and quarterly meetings concerning the progress of the BreEZe implementation. The Board states that the cost of the system has been encumbered in the Board's FY 2013/14 budget.

The Board further notes in its Sunset Review Report that the accounting under the DCA's existing data base system (known as CAS) is unable to cross-reference probationary cases and cost payments that have overlapping progress payments from one year to the next. The Board should advise the Committee on whether this issue will be resolved by BreEze. It would be helpful to update the Committee about the Boards' current work to implement the BreEze project.

***Staff Recommendation:*** *The Board should update the Committee about the current status of its implementation of BreEze. What have been the challenges to implementing this new system? Will BreEze fix the reporting issues regarding cross-referencing cases which overlapping progress payments as noted in the Sunset Review Report? What are the costs of implementing this system? Is the cost of BreEze consistent with what the Board was told the project would cost?*

### **OTHER ISSUES**

**ISSUE #18: (TECHNICAL CLEANUP) Should the structural pest control law be amended to make technical, non-substantive, and conforming changes as proposed by the Board?**

**Background:** Separate from its Sunset Review Report, the Board has submitted to Committee staff a legislative proposal to clean up the existing laws governing the practice of structural pest control. The Board notes that existing law should be updated to recognize current technology. In addition, certain provisions in the SPCL are no longer applicable and must be deleted or clarified. Other provisions require updating in order to meet the statute's purpose. Still other provisions of the law contain similar or duplicative language causing inconsistencies in the interpretation or application of those provisions.

The Board's proposal would make technical or non-substantive changes to certain provisions of the structural pest control law, delete existing provisions from that law that are no longer applicable, and would delete or amend other provisions to support the legislative intent.

The Board should work with Committee staff to identify what update changes that should be made for inclusion in a legislative proposal. The Board should fully vet the proposed changes with all stakeholders so that there is no controversy surrounding the recommended amendments.

***Staff Recommendation:*** *The Board should work with staff to identify what updating changes should be made to the structural pest control law. The Board should assure the Committees that all concerned individuals and interested parties have had an opportunity to express any concerns regarding the proposed changes, and that the concerns have been addressed, to the extent possible, by the Board.*

### **CONTINUED REGULATION OF THE STRUCTURAL PEST CONTROL PROFESSION BY THE CURRENT STRUCTURAL PEST CONTROL BOARD**

**ISSUE #19: (CONTINUED REGULATION BY THE BOARD) Should the licensing and regulation of structural pest control be continued and should the profession continue to be regulated by the current Board membership?**

**Background:** The health, safety and welfare of consumers are protected by the presence of a strong licensing and regulatory Board with oversight over the structural pest control industry.

This Board has experienced significant transitions over the last five years. Specifically moving from DCA to DPR in 2009 and then moving back to DCA in 2013 has greatly disrupted many of the Board's licensing, regulatory and disciplinary activities. However, it appears that the Board has successfully traversed the transitions and is making progress as a regulatory agency.

The Board should be continued with a 4-year extension of its sunset date so that the Legislature may once again review whether the issues and recommendations in this Background Paper have been addressed.

**Staff Recommendation:** *Recommend that the licensing and regulation of structural pest control continue to be regulated by the current Board members of the Structural Pest Control Board in order to protect the interests of the public and be reviewed once again in four years.*