
Sunset Evaluation Update: Pest Control Operators

A Report to the
Governor
and the
Legislature of
the State of
Hawai'i

Report No. 90-14
December 1990



THE AUDITOR
STATE OF HAWAII

The Office of the Auditor

The missions of the Office of the Auditor are assigned by the Hawaii State Constitution (Article VII, Section 10). The primary mission is to conduct post audits of the transactions, accounts, programs, and performance of public agencies. A supplemental mission is to conduct such other investigations and prepare such additional reports as may be directed by the Legislature.

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OVERVIEW

THE AUDITOR
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Sunset Evaluation Update: Pest Control Operators

Summary

We evaluated the regulation of pest control operators under Chapter 460J, *Hawaii Revised Statutes*, and conclude that the public interest is best served by reenactment of the statute.

The State should continue to regulate pest control businesses because of the danger to health, property, and the environment posed by unskilled, negligent, or dishonest operators. The toxic materials used in pest control have great potential for harm and should be handled only by experienced persons aware of their properties and dangers.

The use of pesticides is governed by federal and state laws. The state Department of Agriculture enforces both the federal and state pesticide laws. It licenses pesticide products and routinely examines the application methods and equipment of pest control businesses. The Pest Control Board attached to the Department of Commerce and Consumer Affairs regulates pest control operators. It licenses the operators and enforces other provisions of the pest control operator law, Chapter 460J.

We concluded in our 1986 sunset report that coordination between the two agencies was inadequate and recommended that the pest control program be placed under the Department of Agriculture. However, we also suggested a number of improvements should the Legislature choose to continue regulation under the Pest Control Board--which is what it chose to do.

In the years since, a cooperative arrangement between the two departments has strengthened the regulatory program. Several areas, however, still need attention. Right now the board has no public members to represent consumer concerns. Some rules do not reflect recent statutory changes, and examinations have not kept pace with the industry. The statutes, we found, are not clear on the nature of the board's responsibility for the control of birds, and in two provisions regulating pest control businesses, the statutes have created unnecessary categories of licenses. We also found deficiencies in the termite inspection reports that highlighted a need for industry standards.

Recommendations and Response

The Legislature should amend Chapter 460J to include two public members on the board of pest control, to remove licensing distinctions among types of businesses, to include birds under the definition of "household pests," and to clarify that the director of the Department of Commerce and Consumer Affairs should approve general liability insurance policies for pest control businesses. The board should update its rules to reflect recent changes in the law, revise its examinations to reflect current practices and regulations, and reduce the types of licenses it issues. Finally, it should develop minimum standards for termite inspections and revise the inspection form.

We also recommended that the director of the Department of Commerce and Consumer Affairs should guide the board on the kinds of insurance carriers allowed to issue general liability insurance policies for pest control.

The board and the department concurred with most recommendations. The board, however, did not agree with our recommendation on its composition. Members believe the board needs expertise in the three areas of pest control that it licenses and that industry membership should not be limited to two. In reviewing our recommendations, the department noted that it has assisted the board in developing policies on insurance requirements and that the board recently adopted a policy allowing licensees to purchase insurance from non-admitted carriers through insurance agents licensed to sell surplus coverage.

Background

The practice of pest control is concerned with eradicating undesirable insects and animals from households and commercial premises. Pest control operators perform a variety of tasks--they inspect structures, locate infestations, prepare inspection reports, recommend appropriate remedies, and eliminate infestations.

The law divides pest control into three areas--fumigation pest control, general pest control, and fumigation termite control. For each area the licensing requirements are essentially the same, but applicants must have experience in the branch for which they are applying. The board issues operator licenses for each branch, licenses for responsible managing employees and field representatives, and a special Branch 1 "fumigator operator license." The board also licenses businesses. There are now about 270 licensees in pest control; most of them own or manage a pest control business.

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Submitted by

THE AUDITOR
STATE OF HAWAII

Report No. 90-14
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Foreword

Hawaii's Sunset Law, or the Hawaii Regulatory Licensing Reform Act of 1977, schedules regulatory programs for termination on a periodic cycle. Unless specifically reestablished by the Legislature, the programs are repealed. The auditor is responsible for evaluating each program for the Legislature prior to the date of repeal.

This report evaluates the regulation of pest control under Chapter 460J, *Hawaii Revised Statutes*. It presents our findings as to whether the program complies with policies in the Sunset Law and whether there is a reasonable need to regulate pest control to protect the health, safety, and welfare of the public. It includes our recommendation on whether the program should be continued, modified, or repealed. In accordance with Act 136, SLH 1986, the report incorporates in Appendix B the draft legislation intended to improve the regulatory program.

We acknowledge the cooperation and assistance of the Department of Commerce and Consumer Affairs, the Pest Control Board, and other officials and practitioners contacted during the course of our evaluation. We appreciate the assistance of the Legislative Reference Bureau, which drafted the recommended legislation.

Newton Sue
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December 1990

Table of Contents

Chapter 1 Introduction

Background on Pest Control and Its Regulation	1
1986 Sunset Evaluation	2
Current Regulation of Pest Control	3
Objectives of the Evaluation	7
Scope and Methodology	7

Chapter 2 Findings and Recommendations

Findings	9
Continued Regulation Is Needed.....	9
Rules and Examinations Are Outdated	11
Some Business Requirements Complicate Licensure	12
Board's Responsibility for Bird Control Needs Clarification	14
Termite Inspection Reports Highlight a Need for Standards	16
Insurance Problems Trouble the Industry	18
Recommendations	19

Notes	21
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Appendix A: Responses of the Affected Agencies	23
--	----

Appendix B: Proposed Legislation	29
--	----

List of Tables

Table 1.1: Pest Control Licenses and Licensing Requirements ..	5
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Chapter 1

Introduction

The Sunset Law, or the Hawaii Regulatory Licensing Reform Act, Chapter 26H, *Hawaii Revised Statutes*, repeals occupational licensing statutes according to a specified timetable. The law establishes policies for occupational licensing and directs the auditor to evaluate each licensing statute prior to its repeal to determine if the health, safety, and welfare of the public are best served by reenactment, modification, or repeal.

This report evaluates whether the regulation of pest control under Chapter 460J, *Hawaii Revised Statutes*, complies with policies in the Sunset Law.

Background on Pest Control and Its Regulation

Pest control seeks to eliminate, exterminate, control, or prevent infestations of fleas, ants, termites, cockroaches, rodents, and other undesirable insects and animals found in and around households. Pest control operators use a variety of techniques in their work. They inspect structures to identify infestations, prepare inspection reports and recommendations, and contract with customers to eliminate pests through the use of pesticides and other devices. Pesticides can be highly toxic and also hazardous to the environment. There is increasing federal and state regulation of both pesticide products and their users.

The U.S. Environmental Protection Agency (EPA) is the agency primarily responsible for federal regulation of pesticides. It implements the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). FIFRA sets standards for pesticides, oversees the marketing of pesticide products, and requires pesticide applicators to meet certain standards. Under FIFRA, all pesticides sold in the United States must be registered by the EPA. Each product sold must have an EPA-approved label that specifies the conditions for its use, handling, and disposal, and any necessary safety precautions.

All pesticides are classified by EPA for either general use or restricted use. Restricted use pesticides are those that may cause unreasonable, adverse effects on the environment. All restricted use pesticides must be applied by, or under the supervision of, certified applicators. Many of the chemicals used by pest control operators are restricted use pesticides.

The EPA enters into agreements with states to enforce FIFRA and administer certification programs for pesticide applicators. Under a cooperative agreement with the EPA, the state Department of Agriculture is responsible for enforcing FIFRA. The department trains and certifies the applicators of restricted use pesticides. To be certified, applicants must pass a two-part written examination on such subjects as pesticide labels, safety, and calibration of equipment. Applicators must be recertified every five years either by taking an examination or by taking a minimum number of training courses. The state has proposed to amend the rule to change the recertification period from every five years to every three years.

The Department of Agriculture is also responsible for implementing the Hawaii Pesticides Law, which mirrors many of the provisions of FIFRA. It licenses pesticide products for use in the state. It routinely inspects pest control businesses and examines application methods and equipment. The department investigates complaints relating to the use of pesticides. Complaints about business practices are referred to the Department of Commerce and Consumer Affairs (DCCA).

1986 Sunset Evaluation

We concluded in our 1986 sunset report on pest control that there was sufficient potential for harm from the activities of pest control operators to justify continued regulation. We also found that the regulatory program was inefficient and that coordination was inadequate between the Department of Commerce and Consumer Affairs and the Department of Agriculture. We therefore recommended that the licensing program be placed under the agriculture department in order to result in more efficient and effective regulation of pesticide use. Should the program remain with DCCA, however, we recommended that the board improve communications with other regulatory agencies and develop a reporting system for enforcement information.

We recommended amending the law to abolish unnecessary licensing requirements for financial statements and good moral character. We found the board's examination to be out of date and of questionable validity and we recommended that DCCA develop greater expertise in licensing examinations and that it work with the Department of Agriculture in developing valid examinations for pest control operators.

The Legislature elected to continue regulation and extend the statute to December 30, 1990. Instead of transferring the program from the Pest Control Board to the agriculture department, it required the board to report back in 1987 on its progress in implementing the recommendations in our 1986 report.¹ The Legislature also amended the law to carry out most of the remaining recommendations in the report.

Current Regulation of Pest Control

Pest control operators are regulated by a Pest Control Board attached to DCCA. The board consists of four licensed pest control operators and three ex-officio members from the Department of Health, Department of Agriculture, and the University of Hawaii Department of Entomology. The board grants, suspends, and revokes licenses; promulgates rules to carry out the purpose of the chapter; enforces the statutes and rules; provides for the development of an enforcement information reporting system; and disseminates information about pest control. The board may investigate, classify, and qualify applicants for operator's licenses.

The law defines pest control as: (1) identifying infestations, (2) making an inspection for the purpose of identifying infestations, (3) making inspection reports, recommendations, estimates, and bids with respect to infestations, and (4) making contracts, or submitting bids for the use of insecticides, pesticides, rodenticides, fumigants, allied chemicals, or mechanical devices, for eliminating, exterminating, controlling, or preventing infestations of pests.

The law divides pest control into three branches as follows:

- Branch 1. Fumigation--the control of household and wood-destroying pests by fumigation with poisonous or lethal gases.
- Branch 2. General Pest--the control of household pests, other than termites, excluding fumigation with poisonous or lethal gases.
- Branch 3. Termite--the control of wood-destroying pests by the use of insecticides and corrections, excluding fumigation with poisonous or lethal gases.

Licensing of individuals

Operator licenses are issued to individuals who own a fumigation, general pest control, or termite control business. The board issues operator licenses for each of the three branches: (1) *fumigation operator*, Branch 1; (2) *general pest control operator*, Branch 2; and (3) *termite control operator*, Branch 3. The board may issue a single license for more than one branch if an applicant meets the qualifications for the other branches.

For each of the three branches the board also issues licenses for *responsible managing employee* and *field representative*. Responsible managing employees manage a business. Field representatives solicit pest control work, identify infestations, make inspections, submit bids, or sign contracts on behalf of a licensed operator.

In Branch 1, the board also issues a *fumigator operator* (as opposed to *fumigation operator*) license to individuals who are employees or subcontractors of pest control businesses. Fumigator operators meet approximately the same requirements as *fumigation operators*. (See Table 1.1.)

According to the licensing records of DCCA, there are currently 271 licensees, both active and inactive, in pest control. Of these, 176 are owners of businesses and/or responsible managing employees, 30 are fumigator operators, and 65 are field representatives.²

Licensing requirements for the three branches are essentially the same. Table 1.1 summarizes these for each type of license and each branch. The distinguishing feature among the branches is that applicants must have experience *in the branch for which they are applying*. In each branch, applicants for licenses as operators or responsible managing employees must be at least 18 years old; have a history of honesty, truthfulness, financial integrity, and fair dealing; pass a written board examination; and be appropriately certified by the Department of Agriculture under the Hawaii Pesticides Law for at least one year prior to applying for a board license. In addition, they must have two years of experience in the branch for which they are applying, of which one year is in a supervisory capacity. During the two-year period, they must have participated in at least 100 jobs.

Applicants for a field representative license must be at least 18 years old; have a history of honesty, truthfulness, financial integrity, and fair dealing; pass a written board examination;

TABLE 1.1
Pest Control Licenses and Licensing Requirements

	BRANCH 1 Fumigation	BRANCH 2 General Pest Control	BRANCH 3 Termite Control
LICENSE TYPE	<u>Fumigation Operator</u> <u>Responsible Managing Employee</u> <u>Fumigator Operator*</u>	<u>General Pest Control Operator</u> <u>Responsible Managing Employee</u>	<u>Termite Control Operator</u> <u>Responsible Managing Employee</u>
	Eighteen years or more	Eighteen years or more	Eighteen years or more
	Pass written examination	Pass written examination	Pass written examination
	Certified applicator by DOA in fumigation pest control under Hawaii Pesticides Law for at least one year	Certified applicator by DOA in general pest control under Hawaii Pesticides Law for at least one year	Certified applicator by DOA in termite control under Hawaii Pesticides Law for at least one year
	Two years experience in Branch 1 of which one year shall be in supervisory capacity. During two-year period, participate in at least 100 jobs	Two years experience in Branch 2 of which one year shall be in supervisory capacity. During two-year period, participate in at least 100 jobs	Two years experience in Branch 3 of which one year shall be in supervisory capacity. During two-year period, participate in at least 100 jobs
LICENSE TYPE	<u>Field Representative</u>	<u>Field Representative</u>	<u>Field Representative</u>
	Eighteen years or more	Eighteen years or more	Eighteen years or more
	Pass written examination	Pass written examination	Pass written examination
	Six months experience in Branch 1 and participate in at least 25 jobs	Six months experience in Branch 2 and participate in at least 25 jobs	Six months experience in Branch 3 and participate in at least 25 jobs

*Fumigator operators do not take Part I or the legal portion of the written examination.

and have at least six months of experience in the branch for which they are applying. During the six-month period, the applicant must have participated in at least 25 jobs.

All applicants must take and pass a written examination developed and administered by the National Assessment Institute, a professional testing organization. The current examination has two parts. Part I tests applicants' knowledge of Chapter 460J; the board's rules; and state labor, workers' compensation, and unemployment laws. Part II tests applicants in a particular branch of pest control. Fumigator operators and field representatives take only Part II of the examination. The law requires applicants to have a general average of 70 percent in each part to pass the examination.

Licensing of businesses

Businesses must also be licensed. Corporations must be under the direct management of an officer with an appropriate operator license. Partnerships or joint ventures must have one member with an appropriate license who actively participates in the pest control business. In addition, applicants must submit:

- A current financial statement prepared by a registered certified public accountant or accountant service.
- A current workers' compensation insurance policy or a statement from the insurer that the policy is in force or, if self-insured, a copy of the "Order of Self-Insurance."
- A certificate from the Business Registration Division of DCCA showing that a corporation or partnership is properly registered.
- A certificate of insurance showing minimum general liability insurance of \$20,000 for any one claim and a minimum aggregate amount of not less than \$50,000 for all claims. In lieu of the general liability insurance policy, an applicant may submit either a \$50,000 cash bond or a financial statement verifying that the applicant's net worth is \$50,000 or more.
- A corporate resolution designating a responsible managing employee if the business is a corporation.
- Verification from the county building department that the place of business is in an area zoned for business.

Exemptions

Chapter 460J does not apply to officials of the federal government on military reservations; personnel of the U.S. Department of Agriculture, the U.S. Public Health Service; the State Department of Agriculture and the Department of Land and Natural Resources; qualified scientific personnel specially exempted by the board; and persons engaged in pest control for agricultural purposes.

Objectives of the Evaluation

This evaluation sought to determine whether the regulation of pest control operators complies with policies in the Sunset Law. Specifically, the objectives were to:

1. Determine whether there is a reasonable need to regulate pest control to protect the health, safety, and welfare of the public;
 2. Determine whether current regulatory requirements are appropriate for protecting the public;
 3. Establish whether the regulatory program is being implemented effectively and efficiently; and
 4. Make recommendations based on findings in these areas.
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Scope and Methodology

To accomplish these objectives, we reviewed the literature on pest control and its regulation. We examined current developments in federal and state regulation. We reviewed statutes and rules on pest control in Hawaii and the changes in these since our last sunset evaluation.

To determine the need for regulation, we reviewed complaints and other evidence of potential harm to consumers. We interviewed members of the Pest Control Board, practitioners in the field, personnel from the Department of Commerce and Consumer Affairs, the Department of Agriculture, and the Department of Health. At the Department of Commerce and Consumer Affairs, we reviewed correspondence and other material.

This evaluation examined regulatory activities since our last sunset evaluation in 1986, but it focused primarily on operations during FY 1989-1990.

Chapter 2

Findings and Recommendations

Improvements have been made in regulating pest control. A memorandum of understanding between the Department of Agriculture and the Department of Commerce and Consumer Affairs (DCCA) initiated a reporting system for enforcement information that improves departmental coordination and the exchange of information on violations by pest control operators. The board has moved to clarify ambiguities in the law. Improvements, however, are needed in such areas as rules, examinations, business licensing, and termite inspection reports.

Findings

1. The potential harm to the public health, safety, and welfare justifies continued regulation of pest control operators by the Pest Control Board. The placement of public members on the board would ensure consumer input in the regulatory process.
2. The rules and the examinations are out of date and in need of revision.
3. In the regulation of businesses, the licensing requirements based on form of ownership have resulted in some unnecessary licenses. The requirement for a financial statement is unnecessary.
4. The statute is not clear on whether businesses that do bird control are regulated by the Pest Control Board.
5. Termite inspection reports are subject to much controversy and litigation due in large part to the absence of industry standards and deficiencies in the report form.
6. The statutory language on liability insurance coverage is unclear.

Continued Regulation Is Needed

The state should continue to regulate pest control businesses. Unskilled, negligent, or dishonest pest control operators can seriously endanger the public health, damage the environment, and cause significant property damage and financial loss to consumers.

Regulation of pest control operators is necessary because they handle toxic materials which, if misused, can be harmful to humans, domestic animals, wildlife, and the environment. After chlordane and the related products of heptachlor, aldrin, and dieldrine were withdrawn from the marketplace, other phosphate or pyrethroid-based chemicals were substituted for the treatment or control of subterranean and ground termites. These chemicals, known as termiticides, are more expensive and must be applied more often. They include the trade names Demon TC, Dagnet FT, Dursban TC, Pryfon, Torpedo, and Tribute. Classified as restricted use chemicals, they only can be sold to, used by, and stored by certified pest control operators or certified applicators. Like chlordane, which they replaced, termiticides are poisonous to man, domestic animals, and wildlife. Unlike chlordane, however, they are also highly toxic to fish and aquatic organisms, and thus pose additional problems in terms of runoff into any body of water.

The number of consumer complaints has been substantial. From 1986 through 1989, there were a total of 61 complaints. The nature of some of the complaints has been serious. Three pest control operators were fined. Of these, two had their licenses revoked for the maximum two-year period for multiple violations. One whose license was revoked was found to have repeatedly committed acts of gross negligence. The other operator did not honor his warranty, charged customers a fee for reinspecting a house that was still under warranty, and improperly used registered and unregistered pesticides.

Need for public members

In reenacting the statute, the Legislature should consider placing public members on the board. The Pest Control Board is the only occupational licensing board in DCCA that does not include public members. Occupational licensing boards are frequently criticized for promoting the interests of licensees instead of those of consumers. This potential industry bias can be moderated by requiring boards to have public members. Public members offer a different perspective. In view of the potential for harm posed by the use of pesticides, consumers should have a voice in decisions on regulation.

The board currently consists of seven members. Four members are licensed pest control operators and the other three are ex-officio members from the Department of Agriculture, Department of Health, and the University of Hawaii. The composition of the board should be changed to

two licensed pest control operators, two public members, and three ex-officio members from the departments of agriculture and health and the University of Hawaii. The majority of occupational licensing boards at DCCA have at least two public members.

Rules and Examinations Are Outdated

The rules and examinations are not up to date. The rules need to be revised to reflect statutory changes and a recent change in licensing requirements made by the board. Examinations have not kept pace with changes in the industry.

The board's administrative rules were last revised in September 1985. Since then, Chapter 460J, HRS, has been amended three times, but the changes are not reflected in the rules. Section 460J-19 was amended in 1987 to delete references to "wood-destroying pest" and to substitute "termite" in their place; however, Subchapter 13 of the rules relating to this section still uses "wood-destroying pests." Similarly, the definition of *pest control* in Section 460J-1 was amended to delete the term "infections"; however, the rules still define "pest control representative" as someone who identifies infestations or infections.

The rules do not reflect an important change in one of the requirements for licensure. Under the current rules, the experience requirement for termite control operator and responsible managing employee includes experience with pre-slab treatment and remedial control of *subterranean termites*. At its meeting on April 30, 1990, the board was concerned that an out-of-state applicant for an operator's license lacked sufficient knowledge of *Formosan termites*, which are a variety of subterranean termites found in Hawaii. Although the rules do not specify experience with Formosan termites, the board decided that knowledge of this particular variety of termites was both necessary and appropriate. The board adopted, in its minutes, a policy that specified experience with Formosan termites. Based on its new policy, the board denied the license to the applicant.

Because the rules do not specify experience with Formosan termites specifically, the board's denial of the license and the basis for denial appear questionable. If the licensing requirement now is experience with Formosan termites, then the rules must be amended. At the next meeting of the board, the acting executive secretary recommended that the rules be revised. The board has decided to create a rule revision committee.

After our 1986 evaluation, the board moved to improve its licensure examinations by contracting with a professional testing agency to develop, administer, grade, and validate them. In November 1986, American Community Services, Inc., now known as National Assessment Institute (NAI), agreed to develop examinations for all three branches of pest control. Since that time, however, and despite numerous changes in the industry, the examinations have not been revised. For example, they still include questions on aldrin and chlordane--chemicals that are no longer available on the market.

In April 1990, NAI discussed with the board the need for revisions. In revising the examinations, the board should ensure that NAI keep abreast of proposed EPA regulations that establish levels of supervision in the application of restricted use pesticides and also specific training requirements for applicators of these pesticides.

Some Business Requirements Complicate Licensure

Two statutory provisions that create licensing distinctions based on the form of business ownership have resulted in unnecessary categories of licenses. In addition, the statutory requirement for financial statements is difficult to justify in light of the lack of criteria for reviewing them.

Section 460J-8 requires partnerships or joint ventures to have one licensed member who actively participates in the business. It also requires corporations to be under the direct management of an officer with an appropriate license. As a result, the board issues separate licenses to (1) sole proprietorships, (2) corporations, (3) partnerships, and (4) joint ventures. Based on these different forms of ownership, the board also issues (1) pest control operator licenses to sole proprietors of each of the three branches of pest control, (2) responsible managing employee licenses to those who have direct management responsibility for corporations in each branch of pest control, and (3) fumigator operator licenses for those in Branch 1 who meet basically the same requirements as owners or responsible managing employees but are neither of these.

Licensing distinctions

The licensing distinctions among sole proprietorships, corporations, partnerships, and joint ventures should be eliminated. The distinctions have little bearing on how pest control operations should be regulated to protect the public. Since the primary intent of the law is to ensure business

accountability, it could simply require all businesses to have a license to do business and to be under the direct management control of an appropriately licensed operator.

Simplifying the licensing of businesses would also simplify the licensing of individuals. In each of the three branches, the board now issues separate licenses for sole proprietors and responsible managing employees and in Branch 1 the board also licenses fumigator operators, who are employees or subcontractors of pest control businesses:

Branch 1: Fumigation Operator
Responsible Managing Employee
Fumigator Operator

Branch 2: Pest Control Operator
Responsible Managing Employee

Branch 3: Termite Control Operator
Responsible Managing Employee

Instead of issuing separate licenses in each branch for sole proprietors and responsible managing employees, the board need issue only a single operator license. Both licenses have the same requirements, making separate licenses unnecessary.

The board should not issue any new *fumigator operator* licenses for Branch 1. No one can explain why there is a special license in Branch 1 for fumigator operators. The license appears to be a holdover from the past. It has no basis in either the laws or rules. According to DCCA, the only distinction between a Branch 1 *fumigation* operator and a *fumigator* operator is that one owns a business and the other is an employee or subcontractor of the owner. Although no new licenses for fumigator operators should be issued, employees with current licenses should be allowed to be relicensed as *operators* in Branch 1.

Financial statements

We recommended in our 1986 sunset evaluation report that the requirement for applicants to submit financial statements be eliminated. We noted that the board had no review criteria and that without such criteria, the financial statements served no purpose. The Legislature amended the law in 1986 to remove the requirement for financial statements, but then reinstated the requirement in 1987 in Act 143. The board testified that a financial statement would show whether an individual had the capacity to effectively operate a business.

According to the board, an operator should have the financial capability and integrity to buy pesticides, obtain sprayers and other required equipment, and meet a payroll.³

We find the same problem with financial statements that we found in 1986. The board has not developed criteria for evaluating financial statements nor rules for assessing them. Consequently, the statements still serve no purpose.

Board's Responsibility for Bird Control Needs Clarification

The board's responsibility over bird control is not clear. Birds have not traditionally been included as pests in the definition of *household pests* in Section 460J as "those pests other than wood-destroying insects and microbes which invade households and other structures, including, but not limited to, rodents, vermin, and insects." However, bird control frequently involves the use of harmful pesticides, and pest control companies are called upon to deal with bird problems. Further, a recent verbal opinion by the attorney general indicates that the board should license pest control companies that perform this service.

Bird control generally comes under the purview of the Forestry and Wildlife Division of the Department of Land and Natural Resources. Section 183D-61, HRS, allows the department to adopt rules authorizing the capture and destruction of wild birds when they are destructive to crops or otherwise harmful to agriculture or constitute a nuisance or a health hazard. According to state biologists and entomologists, birds can be a problem, mainly because people feed them and feeding results in overpopulation.

Agents of the department investigate written complaints of nuisance or threat to human health or safety created by introduced birds. These birds include the bulbul, Brazilian cardinal, canary, house finch, mynah, meijiro, and house sparrow. Based on its investigation, the department issues permits for the destruction or control of birds. Permittees are required to submit monthly reports.

In the two years between FY 1989 and FY 1990, the Department of Land and Natural Resources issued 64 permits. Twenty-six of them, or 41 percent were issued to hotels that had a problem with feral pigeons. The remaining permits were issued to dairies, farms, businesses, and private homeowners. Hotels can use employees who have been certified by the Department of Agriculture, or they can hire pest control firms for bird control services.

Bird control techniques

Bird control can be a sensitive issue. Various techniques are used--entrapment, physical barriers to make areas inaccessible to birds, and pesticides. Avitrol and Ornitrol are the most commonly used pesticides for bird control. Both are, restricted-use pesticides that come under the regulation of the Department of Agriculture. They are hazardous to humans, domestic animals, and wildlife. They can be sold to or used only by certified applicators or people under their direct supervision.

The controversial chemical Avitrol takes the form of treated bait. Whole corn is used for feral pigeons. Pigeons that ingest the treated corn behave erratically, scare away other birds, and usually die. The treated bait cannot be applied where other types of birds are feeding because it can destroy them indiscriminately.

Ornitrol, which is a chemosterilant, is viewed more favorably by groups such as the Humane Society. It, too, takes the form of treated bait. However, Ornitrol has limitations. It is only effective on pigeons and has to be applied twice a year for best results. In addition, it causes birds to vomit, which can pose a sanitation problem because pigeons are often found in large numbers around outdoor eating areas where people feed them.

Board responsibility

In July 1989, the board was advised by a deputy attorney general that, as a general rule, birds are not covered under the pest control statute. However, birds could be considered other pests under the definition of pest control. The statute defines pest control as identifying infestations, inspecting premises, and using pesticides and other techniques for eliminating, exterminating, controlling, or preventing infestation of pests that invade households or other structures. The reasoning is that if birds invade households or other structures, and if pesticides are used for control, then the person using the chemicals should be licensed as a general pest control operator.

Since bird control can be hazardous and involves the use of restricted pesticides, Chapter 460J should be amended to include the regulation of persons who do bird control. Regulation by the board would ensure that pest control operators are aware of various bird control techniques and knowledgeable in applying Avitrol and Ornitrol. Hotel employees certified by Department of Agriculture to apply restricted bird control pesticides would be exempt from board regulation.

Should the board be given responsibility for bird control, it should revise the examinations to include questions on bird control. It should ensure proper coordination with the Department of Land and Natural Resources through a memorandum of understanding, as it has done with the Department of Agriculture. This would enhance regulation of bird control since investigators of the DCCA's Regulated Industries Complaints Office (RICO) would also become responsible for investigating complaints.

Termite Inspection Reports Highlight a Need for Standards

Pest control businesses conduct termite inspections of structures for a fee. The results of a termite inspection are reported on a form prescribed by the board. The statute has a number of requirements on how inspections are to be done and what information is to be reported. There are indications, however, that clearer inspection standards are needed and the form itself should be revised.

The termite inspection report is the subject of much controversy and litigation. Sixteen percent of all the consumer complaints filed at RICO from 1986 to 1989 involved termite inspections or the termite inspection report. The number of lawsuits stemming from the report has risen. Lawsuits are usually filed by buyers who find evidence of termite infestations shortly after they have moved into a new home. Complainants seeking large sums of money are apt to bypass RICO and file lawsuits. When disputes arise, pest control companies tend to use their own funds to settle out of court.

Need for industry standards

A termite inspection report is required by commercial lending institutions. The U.S. Department of Housing and Urban Development also requires a termite inspection report for loans backed by the Veteran's Administration and Federal Housing Authority.⁴ The standard sales agreement requires sellers of homes in Hawaii to provide buyers with a termite inspection report that the buyers must approve prior to the closing of a sale.

There currently are no industry standards for termite inspection reports. According to the Hawaii Association of Realtors, the real estate industry is concerned about the quality of termite inspection reports. There have been cases where new home owners find live termite infestations shortly after they purchase a house. Because the seller is obliged to correct a live infestation, the seller or the seller's agent must

then hire a pest control company to perform tenting or ground treatment, which are costly procedures. Inspection reports frequently are inconsistent; some are more detailed than others. In the absence of industry standards, realtors can select among pest control companies to get a report favorable to the seller.

Members of the pest control industry complain that sellers or their agents order the report only after a sale is assured. Pest control companies often have to conduct the inspection and complete the report in a hurry. If there is concealment on the part of sellers and agents (for example houses freshly repainted), proper inspection is more difficult. Price cutting reportedly is common--reports can cost from \$60 to \$500, depending on the company. Pest control companies say that realtors tend to shop around for the best price. Pest control companies are aware that sellers and realtors do not want termite problems noted in an inspection report; however, they also recognize that they will be sued if a report is not done properly.

Deficient termite inspection form

One of the purposes of the termite inspection report, or PC-9 form, developed by the Pest Control Board was to protect pest control companies doing inspections. Judging by the lawsuits, the form is not meeting this purpose.

At a workshop on June 27, 1990, sponsored by the Hawaii Pest Control Association, an attorney advised members of the industry of deficiencies in the PC-9 form. The form does not ask about an inspector's training, degree of experience, and the manner in which an inspection was performed. It does not establish a time limit on the reliability of the information in the report, nor does it prohibit the transfer of the report without authorization from the pest control company. In the absence of specific information, the real estate industry and the public have the impression the report is valid for 30 days although some industry members insist the report is good only for one day. Sometimes, when the first sale falls through, the same report is used for the second buyer, even though a few months may have lapsed since the report was made.

Clearly, the termite inspection form needs revision. The board should develop minimum standards for the conduct of termite inspections and incorporate these and other changes on the revised form.

Insurance Problems Trouble the Industry

The difficulty of obtaining insurance coverage from local companies has forced the pest control industry to deal with mainland companies which have not been approved to do business in Hawaii. Due to the risks associated with the use of pesticides, local insurance companies will not provide general liability insurance coverage for pest control businesses. The only pest control businesses who have coverage from local insurance companies are the handful which have dealt with the same companies for years. The majority are insured by companies on the mainland that deal specifically with high-risk businesses. These companies are "non-admitted" carriers that have not been approved to write up policies in Hawaii. It is not clear who should authorize these carriers to issue policies.

Section 460J-25, HRS, states that "no person shall engage in the business of pest control unless the person has filed with the *director of finance*, a general liability insurance policy approved by the *director* in the minimum amount of \$20,000 for any one claim and a minimum aggregate of not less than \$50,000 for all claims, and for fumigation work, in the minimum amount of \$50,000, for all claims arising during a policy term for one year. [Emphasis added.]" Although the statute says the *director* has authority to approve general liability insurance policies, it does not specify whether this should be the director of finance or the director of DCCA.

The indefinite reference is a problem because the board needs guidance on whether pest control businesses may use policies issued by non-admitted carriers to satisfy the licensing requirement. The board is not sure who has the approval authority. The DCCA director has told the board that although he prefers the use of policies issued by approved companies, he would give the board discretion to accept non-admitted company policies if the board were satisfied that: (1) a good faith effort had been made to secure insurance from an admitted carrier and (2) such insurance was either unavailable or unaffordable (within reasonable limits).⁵ At its regular meeting on May 21, 1990, the board decided to table further action until it receives further clarification on who has the authority to approve insurance carriers and what kinds of insurance policies are acceptable.

The statute should be amended to make clear that the director who approves general liability insurance policies is properly the director of DCCA. This would conform with Hawaii Insurance Law, which places the regulation of

insurance under the insurance commissioner in DCCA. The director should then provide the board with guidelines on the kinds of general liability insurance policies that can be accepted as satisfying the licensing requirement.

Recommendations

1. The Legislature should reenact Chapter 460J. In reenacting the statute, the Legislature should amend it to:
 - a. Change the composition of the board to include two licensed pest control operators, two public members, and three ex-officio members from the Department of Health, Department of Agriculture, and the University of Hawaii Department of Entomology.
 - b. Remove the licensing distinctions among sole proprietorships, corporations, and partnerships and joint ventures and require only that each business have a license to do business and that it be under the direct management of an appropriately licensed operator.
 - c. Amend the definition of "household pests" to include birds.
 - d. Clarify that it is the director of the Department of Commerce and Consumer Affairs who approves general liability insurance policies.
2. The board should update its rules to reflect recent amendments in the law. Until the rules are amended, the board should base its licensing decisions on grounds established by the current rules.
3. The board should issue an operator license to both operators and responsible managing employees. No new fumigator operator licenses should be issued, but the current licensees should be allowed to be relicensed as operators in Branch 1.
4. The board should update its examinations to reflect changes in federal and state regulations and industry practices relating to pesticides. Should the board be made responsible for bird control, the examinations should include questions relating to bird control.

5. The Pest Control Board should strengthen its termite inspection report form and develop minimum standards for the conduct of termite inspections.
6. The Director of the Department of Commerce and Consumer Affairs should develop guidelines for the board on the kinds of general liability insurance policies that may be used to satisfy the licensing requirement for pest control businesses.

Notes

Chapter 1

1. Senate Standing Committee Report 689 on House Bill 1908, Thirteenth State Legislature, 1986, State of Hawaii.
2. Hawaii, Department of Commerce and Consumer Affairs, *Geographic Report*, Honolulu, March 6, 1990.
3. Presentation of the Pest Control Board to the Senate Committee on Consumer Protection and Commerce on Senate Bill No. 1001, February 20, 1987.
4. Termite inspections for commercial lending institutions are recorded on a form prescribed by the Pest Control Board. The U.S. Department of Housing and Urban Development has its own form.
5. Memorandum to Trish Riley, Program Specialist, from Robert A. Alm, Director, Department of Commerce and Consumer Affairs, May 15, 1990.

Responses of the Affected Agencies

Comments on Agency Responses

We transmitted a draft of this Sunset Evaluation Update to the Pest Control Board and the Department of Commerce and Consumer Affairs on September 28, 1990. A copy of the transmittal letter to the board is included as Attachment 1 of this Appendix. A similar letter was sent to the department. The response from the board is included as Attachment 2. The department's response is Attachment 3.

The board agrees with most recommendations in the report. It agrees that the statute should be reenacted and amended to remove the licensing distinctions among sole proprietorships, partnerships, corporations, and joint ventures, to clarify the definition of household pests to include birds, to make clear that the director of the Department of Commerce and Consumer Affairs will approve general liability insurance, and to provide for public membership on the board. Instead of our recommendation that the board consist of two public members, two licensed pest control members, and three ex-officio members, the board says that at least one public member should be included but that the industry should not be limited to two licensed pest control members since the board licenses three branches of pest control and needs expertise in each area.

The board also agrees with our recommendation to update the rules and issue a single license to both operators and responsible managing employees. It agrees that no new fumigator operator licenses should be issued and sees no need to renew these licenses. (We concur that it is not necessary to renew their *fumigator operator* licenses. However, these practitioners should be allowed to practice as licensed *operators* in Branch 1. We have amended our draft to clarify this.) The board agrees to improve its examinations and the termite inspection form.

The department agrees that the statute should be amended to clarify that it is the director of the Department of Commerce and Consumer Affairs who approves general liability insurance. The department has been assisting the board in developing policies on insurance requirements. Recently the board adopted a policy allowing licensees to purchase insurance from non-admitted carriers but only through an insurance agent licensed to sell surplus lines.

JOHN WAIHEE
GOVERNOR



ROBERT A. ALM
DIRECTOR

NOE NOE TOM
LICENSING ADMINISTRATOR

PEST CONTROL BOARD

STATE OF HAWAII
PROFESSIONAL & VOCATIONAL LICENSING DIVISION
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
P. O. BOX 3469
HONOLULU, HAWAII 96801

November 1, 1990

RECEIVED

Nov 5 2 48 PM '90

OFF. OF THE AUDITOR
STATE OF HAWAII

Mr. Newton Sue
Acting Legislative Auditor
Office of the Auditor
465 South King Street, Room 500
Honolulu, Hawaii 96813

Dear Mr. Sue:

Thank you for the opportunity to comment on your draft report, Sunset Evaluation Update: Pest Control Operators.

The board agrees that the Legislature should reenact Chapter 460J, and that at least one public member should be appointed to the board. However, limiting industry members to two (out of the seven the board is currently entitled to) is too restrictive. The board licenses three branches of pest control operators--fumigation, termite, and general pest--and each industry member brings a different area of expertise to the board.

The board agrees that the licensing procedure should be streamlined, and that distinctions between sole proprietorships, corporations, partnerships and joint ventures are not necessary, and should be eliminated.

Historically, the board felt that bird control came under the jurisdiction of 460J, as bird control was categorized as Branch 2, general pests; however, the board agrees that the statute should be amended to clarify the definition of household pests to include birds.

The board agrees that the statute and rules need to clarify that liability insurance policies must be filed with the director of the Department of Commerce and Consumer Affairs, and that it is the director of the Department of Commerce and Consumer Affairs that approves the general liability insurance policy.

Page 2
Mr. Newton Sue
November 1, 1990

The board agrees that the rules need to be updated, and a committee has been appointed to review the rules and make recommendations to the board. In response to the report's finding that the board's denial of a license because of a lack of experience in Formosan termites may have been questionable, where the rules simply require experience in subterranean termites and not Formosan termites specifically, the board feels it was justified in its decision, as Formosan termites are the only subterranean termites found in Hawaii. Therefore, it could be construed that the rule's subterranean termite experience requirement was intended to indicate experience with Formosan termites. However, the board agrees that the rules should be amended to specify that experience with Formosan termites is required.

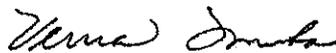
The board agrees that the licensing procedure would be simplified by issuing operators licenses to both operators and responsible managing employees. The board also agrees that the fumigation operator license is a holdover from the past, and that no new licenses should be issued. The board questions the recommendation to renew and maintain the fumigation operators license, where there is no need for this license, and there are no provisions for this category in the current statute or rules.

The board recognizes the need for relevant and current examinations, and will continue to work with the independent testing agency to meet this objective.

The board understands that there is a need to improve the termite inspection form and standardize termite inspections, and is currently researching this matter.

The board extends its appreciation for this opportunity to respond to your report. It was well done, and concluded with several valid and constructive recommendations.

Very truly yours,



for Thomas Nago, Chairman
Pest Control Board

JOHN WAIHEE
GOVERNOR



ROBERT A. ALM
DIRECTOR
COMMISSIONER OF SECURITIES

SUSAN DOYLE
DEPUTY DIRECTOR

STATE OF HAWAII
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1010 RICHARDS STREET
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HONOLULU, HAWAII 96809

November 1, 1990

RECEIVED

Nov 5 2 48 PM '90

OFF. OF THE AUDITOR
STATE OF HAWAII

Mr. Newton Sue
Acting Legislative Auditor
Office of the Auditor
465 South King Street, Room 500
Honolulu, Hawaii 96813

Dear Mr. Sue:

Thank you for submitting the draft of the Pest Control Operators Sunset Evaluation, and allowing us this opportunity for comment.

The Department of Commerce and Consumer Affairs recognizes the effort involved in compiling this report and appreciates the thoughtful assessment done by your staff.

We would like to comment on the recommendations directed to the department as follows:

"The Legislature should amend [the statute] to: Clarify that it is the director of the Department of Commerce and Consumer Affairs who approves general liability insurance policies."

The Department agrees that such statutory clarification would be in order.

"The Director of the Department of Commerce and Consumer Affairs should develop guidelines for the board on the kinds of general liability insurance policies that may be used to satisfy the licensing requirement for pest control businesses."

The Department has been assisting the board, through the Office of the Director, Office of the Attorney General, and the Insurance Division, in developing policies and procedures regarding the insurance requirements.

Mr. Newton Sue
November 1, 1990
Page 2

On June 26, 1990, the deputy attorney general, deputy insurance commissioner, and the executive secretary met with the director to discuss concerns regarding the kinds of insurance which would meet the requirements for pest control licensure. It was proposed that licensees would be able to obtain coverage from non-admitted carriers, with the stipulation that the licensee must purchase insurance through an insurance agent licensed in the state to sell surplus lines, thereby falling under the purview of Chapter 431, HRS (Insurance Law). The board was informed of this at its July 25, 1990 meeting, at which time it voted unanimously to adopt this policy.

We agree with the report's assessment that the statutes and rules relating to the insurance requirements need to be clarified, and the Department will continue to work with the board in this regard.

We appreciate your comments and recommendations.

Very truly yours,



Robert A. Alm
Director

VT:ln

HOUSE OF REPRESENTATIVES
SIXTEENTH LEGISLATURE, 1991
STATE OF HAWAII

H.B. NO.

A BILL FOR AN ACT

RELATING TO PEST CONTROL.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The purpose of this Act is to implement the
2 recommendations of the legislative auditor's sunset evaluation
3 report which reviewed state laws relating to pest control
4 operators. The legislature agrees with the auditor's finding
5 that the potential harm to the public health, safety, and welfare
6 requires continued regulation of pest control operators.

7 SECTION 2. Section 26H-4, Hawaii Revised Statutes, is
8 amended by amending subsection (b) to read as follows:

9 "(b) The following chapters are hereby repealed effective
10 December 31, 1991:

11 (1) Chapter 458 (Board of Dispensing Opticians)

12 [[2) Chapter 460J (Pest Control Board)]

13 [[3)] (2) Chapter 462A (Pilotage)

14 [[4)] (3) Chapter 468K (Travel Agencies)"

15 SECTION 3. Section 26H-4, Hawaii Revised Statutes, is
16 amended by amending subsection (h) to read as follows:

17 "(h) The following chapters are hereby repealed effective
18 December 31, 1997:

19 (1) Chapter 438 (Board of Barbers)

H.B. NO.

- 1 (2) Chapter 448 (Board of Dental Examiners)
- 2 (3) Chapter 455 (Board of Examiners in Naturopathy)
- 3 (4) Chapter 459 (Board of Examiners in Optometry)
- 4 (5) Chapter 471 (Board of Veterinary Examiners)
- 5 (6) Chapter 460J (Pest Control Board)"

6 SECTION 4. Section 460J-1, Hawaii Revised Statutes, is
7 amended by amending the definition of "household pests" to read
8 as follows:

9 "Household pests" means those pests other than
10 wood-destroying insects and microbes which invade households and
11 other structures, including, but not limited to, rodents, vermin,
12 [and] insects[.], and birds."

13 SECTION 5. Section 460J-2, Hawaii Revised Statutes, is
14 amended by amending subsections (a) and (b) to read as follows:

15 "(a) There shall be a pest control board of seven members.
16 Four members of the board shall be appointed by the governor,
17 pursuant to section 26-34[, and]; of which two shall have been
18 for a period of not less than five years preceding the date of
19 their appointment, licensed pest control operators actively
20 engaged in the business of pest control [with a pest control
21 contractors license.]; and two shall be public members. Three
22 members of the board shall serve on an ex officio voting basis:

H.B. NO.

1 the [director] chairperson of the [department] board of
2 agriculture or the [director's] chairperson's representative, the
3 director of [the department of] health or the director's
4 representative, and the [chairman] chairperson of the department
5 of entomology of the college of tropical agriculture and human
6 resources of the University of Hawaii or the [chairman's]
7 chairperson's representative. No two members of the board shall
8 be employed by or associated with the same business firm engaged
9 in pest control.

10 (b) Except for members of the board first appointed, no
11 one, except the ex officio and public members, shall be eligible
12 for appointment who does not at the time of the member's
13 appointment hold a valid and unexpired license to operate as a
14 pest control operator."

15 SECTION 6. Section 460J-6, Hawaii Revised Statutes, is
16 amended to read as follows:

17 "[[]§460J-6[[]] Licenses required. No person within the
18 purview of this chapter shall act or assume to act, or advertise,
19 as a pest control operator or fumigator or be engaged in the
20 business of pest control without a license previously obtained
21 under and in compliance with this chapter and the rules [and
22 regulations] of the board. No person required to be licensed

H.B. NO.

1 under this chapter shall be subject to chapter 444."

2 SECTION 7. Section 460J-8, Hawaii Revised Statutes, is
3 amended to read as follows:

4 "§460J-8 No license issued when. No license shall be
5 issued to:

6 (1) Any person unless the person has filed an application
7 therefor;

8 (2) Any person who does not possess a history of honesty,
9 truthfulness, financial integrity, and fair dealing;

10 [(3) Any partnership or joint venture unless one member of
11 the partnership or joint venture who actively
12 participates in the pest control business thereof holds
13 an appropriate license;

14 (4) Any corporation unless the pest control business
15 thereof is under the direct management of an officer
16 who holds an appropriate license;]

17 (3) Any partnership, joint venture, corporation or sole
18 proprietorship, unless it is under the direct
19 management of an operator with an appropriate license;

20 [(5)] (4) Any individual unless the individual is of the age
21 of eighteen years or more;

22 [(6)] (5) Any person unless the person submits satisfactory

H.B. NO.

1 proof to the board that the person has obtained
2 workers' compensation insurance or has been authorized
3 to act as a self-insurer as required by chapter 386."

4 SECTION 8. Section 460J-25, Hawaii Revised Statutes, is
5 amended to read as follows:

6 "§460J-25 Insurance. No person shall engage in the
7 business of pest control unless the person has filed with the
8 [director of finance,] director of commerce and consumer affairs
9 a general liability insurance policy approved by the director in
10 the minimum amount of \$20,000 for any one claim and a minimum
11 aggregate of not less than \$50,000 for all claims, and for
12 fumigation work, in the minimum amount of \$50,000, for all claims
13 arising during a policy term of one year. If a policy cannot be
14 obtained, the licensee may file with the director in lieu thereof
15 a verified statement providing proof satisfactory to the
16 director, of financial responsibility equivalent to that provided
17 for by any such insurance policy; provided that no employee of
18 any company need have such policy in effect with respect to work
19 covered by a policy of the company by which the employee is
20 employed. This section shall not apply to vault fumigation."

21 SECTION 9. This Act does not affect rights and duties that
22 matured, penalties that were incurred, and proceedings that were

1 begun, before its effective date.

2 SECTION 10. Statutory material to be repealed is bracketed.

3 New statutory material is underscored.

4 SECTION 11. This Act shall take effect upon its approval.

5

6

INTRODUCED BY: _____

