FLORIDA DEPARTMENT OF AGRICULTURE AND
CONSUMER SERVICES

Division of Agricultural Environmental Services

FEASIBILITY ASSESSMENT REGARDING PROPOSED
NEGOTIATED RULEMAKING FOR CHAPTER 482.226,
FLORIDA STATUTES

CHAPTER 5E-14.142(2)(c) FLORIDA ADMINISTRATIVE CODE

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I. INTRODUCTION AND OVERVIEW

In November of 2003, the Department of Agriculture and Consumer Services asked the Florida Conflict Resolution Consortium (CRC), based at Florida State University, to conduct a feasibility assessment for utilizing negotiated rulemaking as a means for rule development pursuant to statutory authorities provided in Chapter 482.226, F.S. In particular, the Department asked the CRC to explore with affected interests the feasibility of a negotiated rulemaking to implement modifications to Chapter 5E-14.142(2)(c), FAC, Form 13645, Wood Destroying Organisms Inspections Reports and to explore such other related regulatory issues that stakeholders identify for rulemaking and/or a negotiated process.

The CRC’s South Florida Regional Director, Jeff A. Blair, conducted this independent feasibility assessment by conducting interviews with various interest groups and reviewing relevant documentation for consideration by the DACS relative to proposing changes to Form 13645 adopted by reference in Chapter 5E-14.142(2)(c), FAC.

The department is responsible for overseeing the pest control industry as regulated under Chapter 482, F.S. Further, Chapter 5E-14.142(2)(c), FAC requires that pest control licensees performing wood destroying organism reports for the purpose of real estate transactions shall report such findings on the Wood-Destroying Inspection Report prescribed by the Department and furnished by the licensee, DACS 13654, Rev. 3/04 incorporated by reference in the rule.

The department has desired, and the industry has requested, modifications to Form 13645 (Form). To date, there has not been a consensus on proposed modifications to the Form, and as a result, industry members have requested a negotiated rulemaking process to effect changes as agreed upon by the consensus of a representative stakeholder committee. To that end, this assessment and subsequent

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1. Negotiated rulemaking is a tool the legislature has authorized for use in agency rulemaking (Ch.120.54(2)(d) F.S.). The Department is the third state agency to actively consider its use. This tool has been successfully used by other states and by federal agencies as a cost-effective approach to rule development which requires the voluntary participation of the affected interests. As defined in Chapter 120, "negotiated rulemaking is a process that uses a committee of designated representatives to draft a mutually acceptable proposed rule." (See Appendices for the negotiated rulemaking statutory and rule language and for a description of the negotiated rulemaking process.)

2. When an inspection for wood-destroying organisms is made by a licensee for purposes of a real estate transaction and either a fee is charged for the inspection or a written report is requested by the customer, a wood-destroying organism inspection report shall be provided by the licensee or its representative qualified under this chapter to perform such inspections. The inspection shall be made in accordance with good industry practice and standards as established by rule and must include inspection for all wood-destroying organisms. The inspection findings shall be reported to the person requesting the inspection. The report must be made on a form prescribed by the department and furnished by the licensee. A copy of the inspection report shall be retained by the licensee for a period of not less than 3 years.
recommendations are designed to address the feasibility of a proposed negotiated rulemaking process. This report is based on interviews with the affected interests and a review of documentation.  

_We have concluded that the key interests affected by the use of Form 13645 are willing to participate in a negotiation over rule language to amend the Form. We believe that a negotiated rulemaking procedure focusing on the current Form adopted by reference in Chapter 5E-14.142(2)(c), FAC relating to amending the current version of Form 13645 and Guidelines is a viable option and path to seeking resolution of the issues and the promulgation of an amended rule._

II. THE FEASIBILITY ASSESSMENT PROCESS

The CRC’s objective was to conduct a time and resource-effective feasibility assessment for utilizing negotiated rulemaking as set forth in Chapter 120.54(2)(d) Florida Statutes, for rules published by the Department pursuant to Chapter 482, Florida Statutes, needed in conjunction with the operation of the Division of Agricultural Environmental Services.

Jeff Blair met initially with DACS administrators to discuss the process for moving forward with the feasibility assessment and to clarify the agency’s interest and stake in the issues. He conducted interviews with pest control operators and their various state associations, the real estate industry, the insurance industry, a legal specialist in WDO related claims, consumer interests, and the Department of Agriculture’s interests.

A. The Assessment/Facilitation Team

This assessment was conducted by the Florida Conflict Resolution Consortium, a center based at Florida State University. The Consortium’s mission is to bring Floridians together to learn to transform unproductive conflict into cost-effective, sustainable solutions. The assessment team included **Jeff A. Blair**, South Florida Regional Director for the Florida Conflict Resolution Consortium. The facilitation team will include **Robert M. Jones**, director of the Florida Conflict Resolution Consortium, and **Jeff A. Blair**. (See Appendix #1 for more information on the team).
B. Interview Participants

In conducting the assessment, the team sought individual and group interviews with those representing pest control operators and their various state associations, the real estate industry, the insurance industry, a legal specialist in WDO related claims, consumer interests, and the Department of Agriculture’s interests. Below is a list of persons participating in the interview process and their affiliations.

1. Pest Control Operators and Related Associations Interests
   - Norm Smith, Certified Pest Control Operators
   - Ray Capelouto, Florida Pest Management Association, and Certified Pest Control Operators
   - DR Sapp, Florida Pest Management Association
   - Tim Hulett, Florida Pest Management Association
   - Richard Burke, Florida Pest Management Association
   - Doug Vanderpoest, Florida Pest Management Association
   - Mike Beckers, Certified Pest Control Operators
   - Ed Miner, Certified Pest Control Operators
   - Mark Paul, Certified Operators of South West Florida
   - Pete Quartuccio, Certified Operators of South West Florida
   - Nick Libretto, Certified Operators of South West Florida
   - Ron Box, Fumigation Advisory Council, CPCO
   - Bob McGranahan, Florida Pest Management Association

2. Real Estate Interests
   - Trey Goldman, Florida Association of Realtors
   - Peter DiLavore, realtor member
   - Wendell Davis, Florida Association of Realtors

3. Insurance Industry Interests
   - David Haack, York Claims Service
   - Do Kim, Florida Building Commission’s insurance representative

4. Legal Specialist in WDO Related Claims Perspective
   - Mark Ruff, Alvarez, Sambol, Winthrop & Madson, PA.
5. Research Entomologist Perspective

- *Phil Koehler*, University of Florida research scientist

6. Citizens/Consumer Interests

- *Elizabeth Allen*, PCEAC member and consumer
- *Tim Loomer*, Loomer construction and DreamDwellings
- *Collier Black*, consumer

7. Agency Interests

- *Steve Rutz*, Division Director, Division of Agriculture Environmental Services, Department of Agriculture and Consumer Services
- *Steve Dwinell*, Assistant Division Director, Division of Agriculture Environmental Services, Department of Agriculture and Consumer Services
- *Phil Helseth*, Field Ops Manager, Director, Division of Agriculture Environmental Services, Department of Agriculture and Consumer Services
C. Interview Questions
   ▪ Are you aware of the proposed effort to change the WDO Inspection Report Form?
   ▪ What interests do you represent?
   ▪ How are your interests affected by the current form or any effort to change it?
   ▪ Is your interest represented by an association or organization; and if so, does it adequately/fairly represent your and the members interests?
   ▪ What are the key issues that need to be addressed in the form change?
   ▪ What are the obstacles to negotiating the form changes?
   ▪ Is the interest you represent willing to participate and negotiate in good faith in a negotiated rulemaking to change the WDO inspection reports Form (13645)?
   ▪ Are you aware/understand Florida’s Sunshine laws and how that affects communication in the negotiation process? As a result, is there a person who could represent and negotiate for your interests?
   ▪ What other interests may be affected by this effort and who else should I talk to?

III. Summary of Issues and Concerns Related to Amendments to Form 13645 Referenced in Chapter 5E-14.142(2)(c), FAC.

   A. Scope of Issues to Address

      1) Interested parties agreed that the Form should be user friendly, defined as clear and understandable to the consumer.

      2) Interests generally agreed that the Form should clarify the scope and purpose of WDO inspections, as well as clarify the intent of all disclosures and disclaimers.

      3) Industry and other interests expressed a need to establish a baseline for inspection standards relative to conducting WDO investigations that would provide clear expectations, consistent guidelines, and enforceable standards for conducting and reporting the results of WDO investigations.

      4) Interested parties expressed the desire to modify the “Guidelines for Use and Completion of the Form 13645, WDO Inspections Reports”, to correlate with
any changes to the form, and provide additional clarification relative to consistent inspection and reporting standards.

5) Some interests felt the definitions section should be reviewed and amended to provide clarity and consistency of interpretations.

B. Procedural Issues

1) The assessment team noted that a general concern was expressed among some PCO’s regarding non-industry interest groups participating in negotiations. This concern stems from the belief that non-industry stakeholders do not understand the complexity of issues and their potential affects to the Industry.

2) The issue of consumer representation was of particular concern to the assessment team, and a determination was made that representation would be best served by a consumer who has a broad understanding of issues related to the use of the WDO reporting form.

IV. Feasibility Assessment

The elements of a feasibility assessment for negotiated rulemaking are dependent on whether the issues are clearly identified and the interests are capable of being represented in a negotiation process. In this context, the assessment below addresses the guidelines and criteria for negotiated rulemaking established by 1996 amendments to the Florida Administrative Procedure Act, Chapter 120.54(2)(d), F.S. [FAPA], and the Uniform Rules, Section 28-103.003, adopted by the Florida Administration Commission that guides agency implementation of the Chapter 120 provisions. (See Appendix #2)

A. Complexity of Rules and Potential Opposition

Within the range of defining the scope of negotiations required to successfully amend the Form, the interviews revealed a wide range of potential and complex interrelated topics, ranging from how to correctly fill out and interpret the form, to what the Form is and is not intended to do and cover, to who is or is not a legitimate stakeholder in the process, to what the guidelines and standards should be relative to conducting and reporting the results of WDO inspections, and to how and if the Form should be amended.

Regarding the potential for opposition, the interviews revealed that matters of rule development under the Structural Pest Control Act have been frequent subjects for rule challenges and judicial appeals.
It is our opinion that a negotiated rulemaking format to amend the WDO Inspection Report Form 13645 is consistent with these FAPA considerations.

B. Can a balanced committee of interested persons who will negotiate in good faith be assembled?

Based on information and analysis of the interviews conducted and documents reviewed, it is our opinion that a balanced committee representing pest control operators and their various state associations, the real estate industry, the insurance industry, a legal specialist in WDO related claims, consumer interests, and the Department of Agriculture’s interests can be convened. With respect to negotiated rulemaking for amending Form 13645, we are satisfied that the consumers’ interests are adequately represented by the Agency and the consumer member, so long as there is recognition that more particularized interests—especially related to issues of disclosures in the Form—may emerge during detailed discussion of subject matter and issues.

The Chapter 120 procedure also provides for an opportunity after the Agency notices its proposal for negotiated rulemaking to review requests of individuals and organizations who do not believe their interests are adequately represented on the proposed committee. Further, the negotiated rulemaking process and sessions will be noticed and open to the public.

Although we will recommend a specific structure for representation in this report, we believe the Agency ought to consider a team approach for each of the identified interests that may be involved in this negotiated rulemaking. Observations by interviewees indicated that committee members would like to have the use of consultants to provide them with technical assistance and feedback during and after the sessions.

Based on information and analysis for all interviews, we conclude that the interested parties and the agency are prepared to negotiate in good faith.

C. Agency Support and Commitment to the Process

The agency has indicated its willingness to provide technical support and assistance to a negotiated rulemaking process to amend the WDO Inspection Report Form 13645, and to use the committee consensus as the basis for its proposed rule.

The definition of "consensus" will be an important organizational groundrule decision to be made at the outset of the process. In the over sixty examples of negotiated rulemaking by other states and at the Federal level,
consensus is understood as the concurrence among the interests represented on a negotiated rulemaking committee. There has been some variation in terms of whether formal votes are taken or agreement is determined informally, whether committee members all sign an agreement to signify the end product of the negotiations and whether the committee is aiming for agreement on specific rule language or agreement on general principles. The facilitation team will provide proposed procedural guidelines to address each of these issues at the Committee’s organizational meeting.

Agency representatives also indicated that selection of a negotiated rulemaking process for the rule to amend the WDO Inspection Report Form 13645 would not unreasonably delay any legislation, consistent with provisions of the Uniform Rule.

D. Willingness to Participate

All interests interviewed expressed a positive degree of willingness to participate in negotiated rulemaking to amend the WDO Inspection Report Form 13645 and would consider forming an appropriate negotiation team to effectively participate.

V. Suggested Structure for Negotiation

Our recommendation is that the agency consider appointing members for each of the interests (pest control operators, insurance industry, a legal specialist in WDO related claims, real estate industry, consumer interests, and the Agency) and work with the interests to identify those individuals who could serve on each team to best represent the broader interest. Further, it is recommended that consultants be identified to work with the interests committee members.

Following the notice of proposed negotiated rulemaking, we would recommend convening an organizational and orientation session to launch the negotiated rulemaking process that might include some orientation on interests-based negotiation and on rulemaking negotiations and should include objectives to agreeing on protocols and groundrules, on the scope of negotiation and the proposed schedule. The negotiation sessions should be designed to develop draft rule language within a reasonable amount of time. The interests are well briefed on relevant issues and this may enhance the ability to make progress and effectively use the time to craft creative solutions to different priorities and differences among the interests. The facilitator(s) should assist by drafting agendas, keeping meeting summaries, helping to develop text for negotiation and effectively moderating each of the negotiation sessions.
VI. Committee Membership Recommendations

Based on interviews with the interest groups we recommend the following members for participation on the negotiation committee:

1. **Pest Control Operators and Related Associations**  
   *Mike Beckers*, Certified Pest Control Operators  
   *Doug Vanderpoest*, Florida Pest Management Association  
   *Mark Paul*, Certified Operators of Southwest Florida

2. **Real Estate Industry Interests**  
   *Wendell Davis*, Florida Association of Realtors

3. **Insurance Industry Interests**  
   *David Haack*, York Claims Service

4. **Legal Specialist In WDO Related Claims**  
   *Mark Ruff*, Alvarez, Sambol, Winthrop & Madson, PA.

5. **Research Entomologist Perspective**  
   *Phil Koehler*, University of Florida research entomologist

6. **Consumer Interests**  
   *Collier Black*, consumer

7. **Agency Interests**  
   *Phil Helseth*, Division of Agriculture Environmental Services, Department of Agriculture and Consumer Services

VII. Conclusion

We have concluded that the key interests affected by an effort to amend Form 13645 adopted by reference in Chapter 5E-14.142(2)(c), FAC are willing to participate in a negotiation over rule language to effect amendments to the rule. We believe that a negotiated rulemaking procedure focusing on amending Form 13645, adopted by reference in Chapter 5E-14.142(2)(c), FAC, is a viable option and path to seeking resolution of the issues and the promulgation of a rule.
APPENDIX #1

Feasibility Assessment Team

WHAT IS THE CONSORTIUM?

"The purpose of the Consortium is to serve as a neutral resource to assist citizens and public and private interests in Florida to seek cost-effective solutions to public disputes and problems through the use of alternative dispute resolution and consensus building."

--F.S. 240.702

Our mission is to bring Floridians together to learn to transform unproductive conflict into cost-effective, sustainable solutions. The Consortium serves as a catalyst to create supportive policies and to help educate statewide on the appropriate use of mediation, facilitation and other collaborative problem-solving approaches to resolve a wide range of public policy issues.

With the support of Florida State University and the Florida Legislature, the Consortium provides dispute resolution service, education, training and research to build a broader understanding of the value of collaborative approaches and create a cadre of citizens, leaders, professionals and students skilled in using collaborative consensus building and conflict resolution processes.

The Consortium offers neutral technical assistance to a wide range of professionals, agency staff and private citizens and organizations engaged in public problems throughout Florida. We help to design and implement efforts for intergovernmental collaboration, community and public problem-solving, and land-use and environmental dispute resolution. We also provide referral services connecting stakeholders and potential users with trained dispute resolution professionals.
THE CONFLICT ASSESSMENT AND FACILITATION TEAM

Robert M. Jones, director of the Florida Conflict Resolution Consortium, is an attorney and has served as mediator and facilitator of over 100 public policy disputes. He served for eight years as a senior program officer at the National Institute for Dispute Resolution and as chair of the Society for Professionals in Dispute Resolution's Mediator Qualifications Commission.

Jeff Blair is South Florida Regional Director for the Florida Conflict Resolution Consortium. His work for the Consortium has included facilitation, process design, strategic planning, and consensus-building on multiple public policy initiatives. He has worked with state and local government representatives to design and implement collaborative approaches to planning, rule making, and dispute resolution with an emphasis on public participation in the design and implementation of policy. He has facilitated hundreds of rule development workshops and conducted negotiated rulemakings for various state agencies. In addition, he teaches numerous classes and conducts trainings in various dispute resolution topics for FAU, FIU, MDCCC, and various local governments. During the past five years he has served as the Consortium’s project director for the Florida Building Commission, a 23 member Governor appointed stakeholder group who successfully created, implemented, and maintains the new statewide Florida Building Code. Other ongoing projects include serving as facilitator and conflict resolution consultant for state agency stakeholder advisory boards such as the Pest Control Enforcement Advisory Council and the Florida Coordinating Council on Mosquito Control. Mr. Blair has provided facilitation, planning, and process design for numerous non-profit organizations since 1977.
APPENDIX #2—NEGOTIATED RULEMAKING PROCESS

I. AGENCY CONSIDERATION OF NEGOTIATED RULEMAKING

Agency Evaluation

Feasibility Assessment

- Review of Considerations Ch. 120.54 (2)(d)F.S. and Uniform Rule 28-103.003

Notice of Proposed Negotiated Rulemaking

- Sponsored by the Agency, conducted by a neutral organization/mediator
- Interviews with potential affected interests discussing the negotiated rulemaking process, possible issues, willingness to participate.
- Report to agency with recommendations on whether to process to use negotiated rulemaking and suggestions for how to structure the process.

II. NEGOTIATED RULEMAKING

ORIENTATION AND ORGANIZATIONAL MEETING

- Introduction of members and facilitator
- Orientation to regulatory negotiation
- Review, refinements and adoption of procedural guide-lines and protocols including defining consensus
- Agreement on substantive issues and negotiation plan, notice of meetings and deadlines

NEGOTIATIONS

- Review rulemaking issues
- Review information sources
- Review draft rules or proposals
- Establish committees as necessary
- Negotiate text or outline of proposed rule

RULEMAKING

- Negotiation concludes
  1) with consensus reached on language of rule- agency publishes consensus as draft rule
  2) with consensus reached on issues or outline- agency drafts proposed rule and publishes as a notice of proposed rulemaking
  3) with consensus not reached- agency proceeds with rulemaking using committee discussions as a guide; agency published notice of proposed rulemaking.
- Draft rule subject to public comments
- Committee notified of public comments and agency revises rule if necessary
- Agency publishes final rule
Chapter 120.54 (2)(d) F.S.  
Negotiated Rulemaking

1. An agency may use negotiated Rulemaking in developing and adopting rules. The agency should consider the use of negotiated Rulemaking when complex rules are being drafted or strong opposition to the rules is anticipated. The agency should consider, but is not limited to considering, whether a balanced committee of interested persons who will negotiate in good faith can be assembled, whether the agency is willing to support the work of a negotiating committee, and whether the agency can use the group consensus as the basis for its proposed rule. Negotiated Rulemaking uses a committee of designated representatives to draft a mutually acceptable proposed rule.

- An agency that chooses to use the negotiated rulemaking process described in this paragraph shall publish in the Florida Administrative Weekly a notice of negotiated rulemaking that includes a listing of the representative groups that will be invited to participate in the negotiated rulemaking process. Any person who believes that his or her interest is not adequately represented may apply to participate within 30 days after publication of the notice.

  All meetings of the negotiating committee shall be noticed and open to the public pursuant to the provisions of this chapter. The negotiating committee shall be chaired by a neutral facilitator or mediator.

- The agency's decision to use negotiated rulemaking, its selection of the Representative groups, and approval or denial of an application to participate in the negotiated rulemaking process are not agency action. Nothing in this subparagraph is intended to affect the rights of an affected person to challenge a proposed rule developed under this paragraph in accordance with s. 120.56(2).

Uniform Rule 28-103.003 Negotiated Rulemaking

(1) The agency may develop rules through negotiated rulemaking. Negotiated rulemaking is a process that uses a committee of designated representatives to draft a mutually acceptable proposed rule. The agency should consider the following factors in determining whether to use negotiated rulemaking:

  (a) Whether there is a need for a rule;
  (b) Whether there are identifiable multiple interests that will be affected by the rule;
  (c) Whether a balanced committee of interested persons who are willing to negotiate in good faith and who can represent identified interests can be assembled;
(d) Whether there is a reasonable likelihood that a committee can reach a consensus within a fixed period of time;
(e) Whether negotiated rulemaking processes will unreasonably delay implementing legislation;
(f) Whether the agency has resources, including technical assistance, to commit to support negotiated rulemaking;
(g) Whether the agency will use the consensus of the committee as the basis for proposing a rule, consistent with its statutory responsibilities.

(2) When the agency chooses to use negotiated rulemaking, it shall publish a notice in the Florida Administrative Weekly. The notice shall include:

(a) An announcement that the agency intends to convene a negotiated rulemaking proceeding;
(b) A description of the subject and scope of the rule to be developed;
(c) In addition to the requirements of Section 120.54(2)(d)2., F.S., a list of the rulemaking committee members, including their addresses and telephone numbers;
(d) A schedule for completing the work of the committee;
(e) A statement of how persons who believe that their interests are not adequately represented may apply to participate on the committee.

(3) The agency shall respond in writing to requests for membership setting forth reasons for granting or denying the requests.

(4) The negotiating committee shall be chaired by a neutral facilitator or mediator. The facilitator/mediator shall serve subject to the approval of the committee.

(5) The negotiating committee shall report the results of its deliberations to the agency within the time frame specified in the notice of negotiated rulemaking.

Specific Authority: 120.54 (5), F.S.
Law Implemented 120.54(2)(d) F.S.
History-New 4-1-97