I. INTRODUCTION AND OVERVIEW

In February 2002, 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 the Chapter 487, F.S. In particular, the Department asked the CRC to explore with affected interests the feasibility of a negotiated rulemaking to implement provisions in a 2001 amendment requiring rulemaking to establish efficacy and performance standards for registering termiticides for use as a preventative treatment on new construction pursuant to §487.041 F.S. and to explore such other regulatory issues that stakeholders identify for rulemaking and/or a negotiated process.

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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. That language is as follows: 487.041 Registration.— (4) The department, in addition to its other duties under this section, has the power to:
   (e) Require data demonstrating the efficacy of pesticide products containing label statements that include directions for use as preventive treatments for termites for new construction. The department shall review the data and determine if the data supports label claims or termite prevention or protection from termite damage. Label claims for protection from damage must be supported by data that shows the product will prevent damage to a structure and its contents for a minimum of 5 years under Florida conditions. If the data does not support such label claims, then the product cannot be registered or reregistered. The department shall adopt rules specifying performance standards and acceptable test conditions for data submitted in support of an efficacy claim, or may reference such performance standards and test conditions established by the United States Environmental Protection Agency.
The CRC formed a team to conduct this independent feasibility assessment conducting interviews with various interest groups and reviewing relevant documentation for consideration by the DACS which implements Chapter 487, F.S.

The department is responsible for overseeing the registration of all chemicals registered in the State of Florida for use as preventive treatments for termites for new construction.

There are currently 33 chemicals registered with the department representing 21 chemical companies.

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 new "registration" statutory language are willing to participate in a negotiation over rule language to implement the provisions. We believe that a negotiated rulemaking procedure focusing on the 2001 provisions of Ch. 487.041 F.S. relating to establishing efficacy and performance standards for registering termiticides for use as a preventative treatment on new construction is a viable option and path to seeking resolution of the issues and the promulgation of a rule.

II. THE FEASIBILITY ASSESSMENT PROCESS

The CRC team’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 487, Florida Statutes, needed in conjunction with the operation of Division of Agricultural Environmental Services.

The CRC team 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. It conducted interviews with chemical company interests and their national association; pest control operators and their state and federal associations; homebuilders; building officials; insurance industry; and the agricultural extension service interests.
A. The Assessment/Facilitation Team

This assessment was conducted by the Florida Conflict Resolution Consortium, a publicly supported 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 Robert M. Jones, director of the Florida Conflict Resolution Consortium and Jeff Blair, South Florida Regional Coordinator for the Florida Conflict Resolution Consortium. (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 chemical company interests, pest control operators’ interests, homebuilders interests, building officials' interest, insurance industry interests, extension service and with the agency's interests. Below is a list of persons participating in the interview process and their affiliations.

1. Chemical Company Interests
   ♦ Mike Zucker, Senior Registration and Labeling Specialist, FMC Corporation
   ♦ Frank Gasperini, Director of State Issues, Responsible Industry for a Sound Environment (RISE)
   ♦ Ray Brinkmeyer, DOW Agroscience
   ♦ Joe Blake, Director, Regulatory Affairs, Control Solutions, Inc.
   ♦ Ann Tillman, Technical Director, United Phosphorus
   ♦ Vince Palmere, Executive Director, Novaguard Technologies (referred by Perma-Chink Systems, Inc.)
   ♦ Ednomd Cho, Marketing manager, LG Chemical America
   ♦ Larry Miller, Consultant for LG Chemical, Biologic Inc.
   ♦ Frank Sobotka, Regulatory Consultant to Gharda USA Inc., IPM Resources
   ♦ James Blasius, Vice President, In-Cide Technologies, Inc.
   ♦ Tarun Bhatia, Business Development manager, US Borax and Chemical Company
2. **Pest Control Operators Interests**
   ♦ Norm Smith, Certified Pest Control Operators
   ♦ DR Sapp, Legislative Affairs Director, Florida Pest Management Association
   ♦ Toni and Jack Caithness Executive Director, Florida Pest Management Association
   ♦ Bob Rosenberg Executive Director, National Pest Management Association
   ♦ Mark Paul, Certified Operators of South West Florida
   ♦ Ray Libretto, President, Certified Operators of South West Florida
   ♦ Cliff Killingsworth, Owner, Environmental Security

3. **Home Builders Interests**
   ♦ Jack Glenn, Technical Services Director, Florida Home Builders Association

4. **Building Officials Interests**
   ♦ John Barrios, President, Building Officials of Florida (BOAF)
   ♦ A. Roland Holt, Director of Building Division and Building Official, Palm Beach County Florida

5. **Insurance Industry Interests**
   ♦ Mike Beckers, Wilson and Schmidt Insurance

6. **Agricultural Extension Service Interests**
   ♦ Phil Koehler, Executive Director, University of Florida, Agricultural Extension Service

7. **Agency Interests**
   ♦ Steve Dwinell, Assistant Division Director, Division of Agriculture Environmental Services, Department of Agriculture and Consumer Services
   ♦ Dennis Howard, Chief Bureau of Pesticides, Department of Agriculture and Consumer Services
   ♦ Keith Palmer, Environmental Administrator, Department of Agriculture and Consumer Services
   ♦ Charlie Clark, Environmental Administrator, Department of Agriculture and Consumer Services
   ♦ Jack Crooks, Senior Attorney, Department of Agriculture and Consumer Services
C. Interview Questions

♦ What interests do you represent?

♦ Is your interest represented by an association or organization; and if so, does it adequately/fairly represent your and the members interests?

♦ What other interests may be affected by this rulemaking?

♦ What are the key issues that need to be addressed in order to promulgate the proposed rule as directed by Statute on establishing efficacy and performance standards for registering termiticides for use as a preventative treatment on new construction?

♦ What are the obstacles to negotiating the rule?

♦ Is the interest you represent willing to participate and negotiate in good faith in a negotiated rulemaking on efficacy standards?

♦ 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? How will your interests be represented in the process?

♦ What other related issues or rules are of concern to you?

2. Summary of Issues and Concerns Regarding "Registration" (Ch. 487.041 (4)(e)) under the Florida Pesticide Law

A. Scope of Issues to Address

1) The assessment team noted that most of the interests expressed a need to consider establishing separate efficacy and performance standards for liquid barriers, bait station systems, and borate systems.

2) Interested parties expressed the need to develop and establish realistic, accurate, consistent, and enforceable testing standards and protocols with corresponding efficacy requirements. It was further noted that the entire process for registering labels should be predictable.

3) Industry interests expressed concern that provisions should be considered for dealing with alternative and new technologies, and for special conditions.
B. Procedural Issues

1) All interests expressed similar concerns about getting all interests to the table interested in trying to negotiate solutions in good faith.

2) All of the interests indicated that there is a similar national effort to negotiate a rule for efficacy standards; and, that to the greatest extent possible efforts should be made to monitor and coordinate with the national effort.

3) For chemical company interests, establishing fair and effective representation for the 21 companies currently registered with the State was a concern. Particularly, related to representation for the three type of pretreat systems in use.

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 establishing efficacy and performance standards, the interviews revealed a wide range of potential and complex interrelated topics, ranging from identifying and agreeing on credible testing procedures and efficacy standards, to consideration of Florida specific standards, and issues related to different types of systems used in Florida.
Regarding the potential for opposition, the interviews revealed that matters of rule development under the Florida Pesticide Law have been frequent subjects for rule challenges and judicial appeals.

It is our opinion that a negotiated rulemaking format to address establishing efficacy and performance standards for registering termiticides for use as a preventative treatment on new construction 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 chemical company interests, pest control operators’ interests, homebuilders interests, building officials interest, insurance industry interests, extension service and agency interests. With respect to negotiated rulemaking for establishing efficacy and performance standards for registering termiticides for use as a preventative treatment on new construction on, we are satisfied that the association’s committee members adequately represent operators and chemical companies various interests, so long as there is recognition that more particularized interests—especially related to chemical companies issues—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 for establishing efficacy and performance standards for registering termiticides for use as a preventative treatment on new construction, 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.

Agency representatives also indicated that selection of a negotiated rulemaking process for the rule establishing efficacy and performance standards for registering termiticides for use as a preventative treatment on new construction would not unreasonably delay implementing 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 for the rule establishing efficacy and performance standards for registering termiticides for use as a preventative treatment on new construction” 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 (chemical company, pest control operators, homebuilders, building officials, insurance industry, extension service, and 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.
3. Committee Member Recommendation

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

Chemical Company interests
Frank Gasperini, Director of State Issues, Responsible Industry for a Sound Environment (RISE)

Pest Control Operators
Norm Smith, Certified Pest Control Operators
DR Sapp, Legislative Affairs Director, Florida Pest Management Association
Bob Rosenberg, Executive Director, National Pest Management Association

Home Builders interests
Jack Glenn, Technical Services Director, Florida Home Builders Association

Building Officials interests
A. Roland Holt, Director of Building Division and Building Official, Palm Beach County Florida

Insurance Industry interests
Mike Beckers, Loss Control Manager, Wilson and Schmidt Insurance

Agricultural Extension Service Interests
Phil Koehler, Professor, University of Florida Agricultural Extension Service

Agency Interests
Steve Dwinell, Assistant Division Director, Division of Agriculture Environmental Services, Department of Agriculture and Consumer Services

VII. Conclusion

We have concluded that the key interests affected by the new "registration" statutory language are willing to participate in a negotiation over rule language to implement the provisions. We believe that a negotiated rulemaking procedure focusing on the 2001 provisions of Ch. 487.041 F.S. relating to establishing efficacy and performance standards for registering termiticides for use as a preventative treatment on new construction 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 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, South Florida Regional Coordinator for the Florida Conflict Resolution Consortium. Mr. Jones is an attorney and has served as mediator and facilitator of over 100 public policy disputes and problems in Florida and contributed to the Administrative Procedures Act reforms dealing with dispute resolution. Mr. Blair represents the CRC in South Florida and has been a facilitator and process consultant for over twenty years. He has worked with various state agencies in successfully building consensus on public policy initiatives as well as facilitating over 100 rule development workshops for the design and implementation of policy decisions. Mr. Blair was the lead facilitator and process design consultant for the recent successful creation and implementation of the Florida Building Code.
APPENDIX #2—NEGOTIATED RULEMAKING PROCESS

I. AGENCY CONSIDERATION OF NEGOTIATED RULEMAKING

Agency Evaluation

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

Feasibility Assessment

- 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.

Notice of Proposed Negotiated Rulemaking

- Agency decision on whether to use negotiated rulemaking in light of feasibility assessment.
- Agency notice published including description of subject and scope; list of the rulemaking committee members, proposed schedule for completing work, and procedure for persons who believe their interests are not adequately represented may apply to participate on the committee and name of the
- Agency responds in writing to requests with reasons for granting or denying the requests.

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
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.

2. 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.

3. 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 negotiateing 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