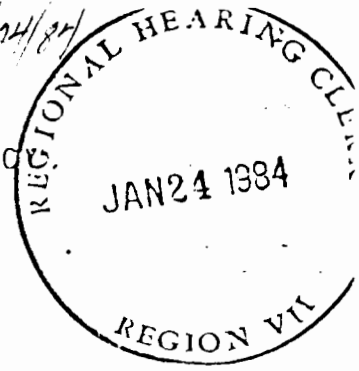


UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR



1/24/84

IN THE MATTER OF)
CHEMCO INDUSTRIES, INC.,)
Respondent)

Docket No. IF&R VII-501C-83P

1. Federal Insecticide, Fungicide and Rodenticide Act -
Evidence presented at an adjudicatory hearing wherein Respondent is charged with the sale of an unregistered and misbranded "pesticide" did not constitute substantial evidence that Respondent expressly or impliedly intended that the substances boric acid powder technical and diatomaceous earth were to be used as pesticides.
2. Federal Insecticide, Fungicide and Rodenticide Act -
Substantial evidence under FIFRA means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
3. Federal Insecticide, Fungicide and Rodenticide Act -
Where an announced Policy of the U.S. Environmental Protection Agency states that a material shall not be considered a pesticide simply because it may be used as such and that the intent of the user of the material shall not be a factor in determining whether a material is a pesticide under the Act, the determination of any intent found must be made from relevant

evidence bearing on the question of whether the manufacturer, seller or distributor expressly or impliedly intended that said material be used as a pesticide. Such objective intent can be determined affirmatively where the evidence shows that Respondent has made pesticidal claims on the product's label, or in advertising material pertaining to said product, or by other representations, oral or written, recommending its use for the preventing, destroying, repelling or mitigating any pest. Respondent's intent may be implied from substantial evidence showing those uses "to which a reasonable consumer will put its product" based on general public knowledge of the effectiveness of the product, whether the product is by Respondent "held out" to be a pesticide, and other relevant circumstances.

Appearances

For Respondent: Michael B. Rees, Esquire
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Lecompton, Kansas 66050

For Complainant: Rupert G. Thomas, Esquire
Office of Regional Counsel
United States Environmental Protection Agency
Region VII
324 East 11th Street
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INITIAL DECISION

Marvin E. Jones
Administrative Law Judge

In a Complaint filed by the Regional Administrator, United State Environmental Protection Agency, Region VII (hereinafter "Complainant," "the Agency" or "EPA"), on July 29, 1983, Respondent Chemco Industries, Inc., of Topeka, Kansas (hereinafter "Respondent" or "Chemco") is charged with the violation of Section 12(a)(1)(A), 1/ of the Federal Insecticide, Fungicide and Rodenticide Act (hereinafter "FIFRA" or "the Act") in that, on March 18, 1983, Respondent sold pesticides, to wit:

100 pounds of "Boric Acid, Powder Technical", and

50 pounds of "Diatomaceous Earth Powder"

to Emporia State University in Emporia, Kansas, "for the control of roaches". It is charged in Count I of said Complaint that said violation occurred by the sale of said products (alleged to be "pesticides") when said products "were not registered with the

1/ Said section is also cited and referred to in the case file as 7 U.S.C.A. 136j(a)(1)(A). Parallel citations of the sections of the Act and United States Code Annotated (U.S.C.A.) appear on Attachment No. 1 to this Decision.

Administrator pursuant to Section 3 of FIFRA. Count II of said Complaint charges a second violation for the reason that said products were misbranded in that they did not bear a label containing pertinent information as specified in Section 162.10 of 40 C.F.R. and, specifically, that information specified in 40 C.F.R. 162.10(h)(1)(i)(A) and 162.10(h)(1)(ii). For said violations alleged, EPA proposes to assess a single total civil penalty of \$2200. 2/

Complainant states the "basic issue" (TR. 93) as follows:

Whether or not boric acid (and) diatomaceous earth powder was sold by Chemco Industries, Inc., to Emporia State University for the purpose of being utilized for roach control or pesticide control.

Respondent states (TR. 5) that the issue is whether subject materials, sold either singly, individually or in combination, are pesticides, i.e., whether they were sold for that intended purpose, and urges application of the said definition of pesticides (in the Act, Section 3) to the facts of the sale as shown by the evidence.

An adjudicatory hearing was held in Room 480 of the U.S. Courthouse, in Topeka, Kansas, on November 8, 1983. Respondent admits the sale of the two items, namely, boric acid powder technical and diatomaceous earth, as alleged in the Complaint (TR. 5; Complainant's ["C"] Exhibit ["Ex"] -1; C-2). The only question

2/ As in Holmquist Grain and Lumber Co., Docket No. IF&R VII-457C-82P (May 12, 1983); it is recognized that though two violations are charged, they constitute a single offense, under Agency guidelines. The civil penalty proposed had since been reduced to \$550 since it is agreed that Respondent is in Category II (not V) under the guidelines for assessment of civil penalties (39 FR 27711, July 31, 1974).

for decision is whether said materials are "pesticides" and therefore subject to the sections of the Act requiring said registration and labeling (TR. 5). As discussed hereinbelow, a mixed question of law and fact is thus presented.

On the basis of the record herein and the findings of fact proposed by the parties, I make the following

Findings of Fact

1. Chemco Industries, Inc. is, and at all times relevant to these proceedings, a corporation, incorporated under the laws of the State of Kansas.
2. James Burlew is a chemist, and has been involved in selling chemicals and working in the capacity of a chemist for 35 years (TR. 59).
3. James Burlew is President of Chemco Industries, Inc., and Chemco is two years old (TR. 3; 59).
4. William Hartman, Director of Building Services, Emporia State University, on or about March 18, 1983, purchased 100 pounds of boric acid powder technical and 50 pounds of diatomaceous earth from Chemco (TR. 31; Ex. C-2).
5. The boric acid powder technical and diatomaceous earth powder so sold to Emporia State by the Respondent were not registered with the EPA (TR. 14).
6. Respondent does not deny its sale of boric acid powder technical and diatomaceous earth powder to Emporia State University (TR. 5).

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7. The Kansas Department of Agriculture maintains lists and schedules of pesticides and insecticides. Boric acid powder technical is not on any such list or schedule (TR. 45).
 8. Said purchase was made through a State Purchase Order which was submitted through the mails (TR. 32).
 9. In the first telephone call to Chemco, Hartman did discuss the purpose or use of the chemicals to be purchased: roach control (TR. 33, 40).
 10. William Hartman had two telephone conversations with Chemco in regard to the purchase; the discussion regarding the purposes to which the boric acid-diatomaceous earth mixture was to be used was in the first, and the actual order was made later (TR. 42; 69).
 11. In the first conversation with Chemco, William Hartman was looking for price information in order to save the university money (TR. 42).
 12. The boric acid-diatomaceous earth was entered on the state voucher as cleaning supplies (TR. 44, 45; Ex. C-2d).
 13. Chemco Industries, Inc., deals strictly in generic chemicals (TR. 60).
 14. Speciality chemicals are those that are sold without reference to the generic content at a price four to twenty times the price of the generic chemicals (TR. 62).
 15. Chemco sells no specialty chemicals (TR. 62).
 16. The chemicals Chemco receives come in industrial or bulk packaging (TR. 63).

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17. Chemco has a State Contract, Number 25277, with the State of Kansas, that lists 50-60 items, all generic chemicals, laboratory chemicals and reagents that it can sell to state universities (TR. 63, 64).

18. James Burlew received a telephone call from Hartman of Emporia State in which Hartman stated that he wanted an insecticide for use at the university (TR. 66).

19. Burlew told Hartman that Chemco did not sell insecticides; Hartman then asked for boric acid and Burlew told him that he could sell him boric acid but not for purposes of roach control (TR. 66, 67).

20. The first telephone call with Hartman also covered price and quantity of boric acid (TR. 67).

21. The first Burlew-Hartman telephone call also included a discussion of diatomaceous earth; Burlew advised Hartman that it was useful as an anti-caking agent (TR. 68).

22. The chemicals sold were sold from stock in their original unbroken packages, as received from wholesalers, and both contained their original generic labels; Chemco packaged them for shipment in shipping drums on which Chemco stenciled the same information that was on the original bags (TR. 72, 73; Ex. C-3).

23. Boric acid may be used for a multitude of purposes: wax on dance floors, fireproofing, as a cleaner, as an anti-rusting or anticorrosive agent, as a lavage, as an eye wash and as a soil additive and other uses identified in the Merck Index, Ninth Edition (TR. 75, 76, 77; Ex. R-2).

24. Diatomaceous earth is an inert substance used for swimming pool filters, a polishing agent and an anti-caking substance (TR. 78, 79, 87, 88).

25. The parties agree that Respondent's gross sales for the calendar year 1982 were \$160,000 to \$180,000 (TR. 60; Complainant's Brief, page 2).

26. Approximately 186 products that contain boric acid are registered as insecticides (TR. 91).

27. Diatomaceous earth is not a chemical but a material totally inert in substance (TR. 78).

28. Boric acid has very little toxicity; it is 2 1/2 times as toxic as table salt (TR. 89). It is not a contact poison nor an attractant (TR. 88).

29. Respondent's president testified that it was company policy not to make any reference or recommendation on the use of any (generic) material sold by it or to sell materials for any specified use (TR. 87).

30. The Merck Index, Ninth Edition, page 1350 (Ex. R-2), states the properties of boric acid, its toxicity and the suggested general use. Roach control is not one of the over 20 uses there listed (TR. 78).

31. Neither William Hartman, Complainant's witness, nor James Burlew, president of, and witness for, Respondent, could, because of the time which had elapsed, recount "word for word" the substance of said telephone conversations nor recall said conversations "in full detail" (TR. 36, 39, 40, 65-68).

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Discussion and Conclusions

The singular determination to be made herein is whether the products admittedly sold by Respondent are pesticides. If an affirmative finding is made as to either or both, then Section 3(a) of the Act clearly mandates registration. The statute defines pesticide:

— The term "pesticide" means (1) any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest . . . (Section 2(u)).

The Administrator of EPA has published regulations under FIFRA elaborating on the statutory definition. 40 C.F.R. 162.4 provides, in pertinent part:

(a) Determination of intent of use. A substance or mixture of substances is a pesticide under the Act if it is intended for preventing, destroying, repelling or mitigating any pest. (See Section 2(u) of the Act and §162.3(ff)). Such intent may be express or implied. If a product is represented in any manner that results in its being used as a pesticide, it shall be deemed a pesticide . . .

(b) Products considered to be pesticides. A product will be considered to be a pesticide if:

* * *

(2) Claims or recommendations for use as a pesticide are made verbally or in writing by representatives of the manufacturer, shipper, or distributor of the product;

(3) The product is intended for use as a pesticide after reformulation or repackaging; or

(4) The product is intended for use both as a pesticide and for other purposes.

On March 9, 1978, EPA issued a Policy and Criteria Notice Number 2050.1 ("PCN 2050.1") which states, in pertinent part:

According to FIFRA, a pesticide is one by intent, but whose intent is not specified. A manufacturer of kerosene may not produce his product intending to sell it as a pesticide, but the buyer may intend to use it as such.

The Office of General Counsel has issued an opinion that clarifies the EPA position on this matter, and it is adopted here as Registration Division policy.

POLICY:

A substance shall be considered a pesticide by the intent of the manufacturer, seller or distributor, as expressed or implied via labeling claims and recommendations, or in advertising material.

A solvent or other material shall not be considered a pesticide simply because it may be used as such. The intent of the user of the substance shall not be a factor in determining pesticide status under FIFRA.

Thus a solvent shall not be considered a pesticide until it is incorporated into a pesticide formulation, or unless the manufacturer distributes it with claims for efficacy or directions for use in the manufacture of pesticide products.

Although solvents are the prime example, the principle may be extended to any other truly multi-purpose ingredient, even a technical chemical with non-pesticidal uses.

In N. Jonas & Co., Inc. v. U.S. EPA, 666 F.2d 829, 1.c. 831, PCN 2050.1 was considered and the Court upheld, 1.c. 833, EPA's contention that PCN 2050.1 does not change the objective standard, to wit: "the company intends those uses to which the reasonable consumer will put its products." The Court further observed, 1.c. 833 (1):

An objective standard, by drawing on the reasonable expectations of potential users, balances a manufacturer's interest in not being held responsible for the unusual uses of its products with the need to protect the public.

In determining intent objectively, the inquiry cannot be restricted to a product's label and to the producer's representations. Industry claims and general public knowledge can make a product pesticidal notwithstanding the lack of express pesticidal claims by the producer itself. Labelling, industry representations, advertising materials, effectiveness and the collectivity of all the circumstances are therefore relevant.

Our task, then, is to determine what representation, if any, was made by Respondent and if, on the basis of all the evidence, Complainant has sustained its burden of proving by substantial evidence, that Respondent's sale was of products required to be registered.

Admittedly, there are no written pesticidal claims by Respondent relating to the said products, such as labeling or advertising materials. As to its effectiveness for the use contemplated by Mr. Hartman, who purchased said products in his capacity as Director of Building Services for Emporia State University, boric acid is of very low toxicity, characterized as 2 1/2 times as toxic as table salt, and is not an attractant. To be effective against roaches, it would have to be placed where roaches run so they would encounter it and then ingest it. It is a cumulative poison, lethal to roaches when ingested (TR. 89). Although there are 186 formulations containing boric acid which are registered with EPA as pesticides (TR. 91), the Merck Index does not list roach or pesticide control as one of the uses associated with the product, although over 20 other uses are there

listed (TR. 78; Ex. R-2). I do not find, on this record, that a prima facie case has been made that either of subject products will be considered by a reasonable consumer to be effective for the control of roaches. 3/ But even if we find that the evidence establishes beyond doubt that subject products here sold are not pesticides in fact, and will not effectively control roaches, the violation charged is present if said products were represented or "held out" by Respondent, under all the circumstances, as being an effective product which could be used for roach control. The "objective intent" is evidenced by what said product holds itself out to be. 4/

EPA's contention is that Respondent's products were pesticides because they were "recommended" by Respondent for roach control. Our inquiry, then, is whether said contention is supported by the testimony in this record. Witness William Hartman testified that, on or about March 14, 1983, he made the first of two or more telephone calls to Respondent. He "asked for a price of 50 pounds of diatomaceous earth and 100 pounds of boric acid" (TR. 32). He had obtained information from the Chemistry Department at Emporia State University that Chemco was a state-contracting agent (TR. 35). Said products were ordered on a subsequent date after another call or calls by telephone, and a State Purchase Order submitted to Chemco through the mail (TR. 32). He testified that the purpose

3/ N. Jonas & Co. v. U.S. EPA, supra.

4/ See U.S. v. 681 cases re "Kitchen Klenzer," where the product sold contained only inert ingredients but was a "fungicide" due to pesticidal claims made on the label. The Act includes all products objectively "intended to be used" as pesticides.

of said purchase was for "insect control" (TR. 33). Complainant's Exhibit 4 (C-4) is an inspection report completed March 24, 1983, signed by the EPA Inspector, Daniel Tuggle, and also by Mr. Hartman, stating: "The salesman recommended that the boric acid be mixed with diatomaceous earth for roach control" and "Products were sold to be used as pesticides." On March 28, 1983, Mr. Hartman signed an affidavit (Ex. C-5) which stated, in pertinent part: "I contacted Chemco Industries, Inc. . . . by telephone, in relationship to purchase a quantity of boric acid to be used for pesticidal purposes. The gentleman that I talked to said he did have boric acid that could be used for the same purposes as 'Roach Prufe.' He further stated that I should purchase a quantity of diatomaceous earth to mix with the boric acid to increase its pesticidal effectiveness . . ." Hartman's affidavit went on to state that the products (after mixing) were not used, but disposed of because EPA Inspector Tuggle informed him the products were not properly labeled and could not be used for pesticidal purposes. 5/ Upon cross-examination, Mr. Hartman stated he could remember "the gist" of the subject conversation with Chemco (its president, James Burlew), but could not remember "word for word" because of the length of time that has elapsed (TR. 39). He had

5/ This statement is inconsistent with Holmquist Grain and Lumber Co., Inc., supra, page 8, where EPA had conceded that it was not unlawful to formulate subject mixture for one's "own use." It was the sale of such mixture that was and is proscribed by the Act and regulations.

in mind a specific product, but not a definite amount, when he called. He stated (TR. 40): "I think the gist of the conversation is what I was doing with it, but we might have had some conversation regards to its other uses." At the time he called, boric acid had been used for some time at the university, in the form of Roach Prufe, and boric acid had been used for other purposes such as dance floor wax and cleaning (TR. 41). In the first conversation, he did mention "the purpose what we were using (boric acid) for." (TR. 41). It was during a subsequent telephone call when the subject products were ordered. The transcript (page 42) further reflects the following, respecting the first telephone call:

Q.: . . . would you be more specific about the assistance you requested?

A.: . . . the assistance was to give me prices on a product I was interested in buying.

Q.: How about quantities?

A.: . . . I can alter the quantity at the best unit price.

When questioned respecting the invoice listing subject products as "cleaning supplies", he stated (TR. 45):

We have to object code things so we know how much we bought of a given supply toward our budget. The state has classified that as a cleaning supply. . . and not as an insecticide. If Roach Prufe had been purchased it would have been coded as "Insecticide."

On redirect, the witness confirmed that he was using Roach Prufe and made a call to Chemco and explained to them the purpose which he "wanted to use the supply for." The witness (TR. 47) equivocated

when asked if Chemco suggested boric acid after he had asked for a substance to control roaches. His response was "Do you want me to tell you the conversation to the best of my recollection?" The product was ordered after a later telephone call and was never used because of Inspector Tuggle's recommendation (TR. 49).

James Burlew, the other party to the telephone conversations, is a chemist (TR. 59) and stated that Chemco deals strictly in generic chemicals and does not deal in specialty chemicals (TR. 62, 64). He remembers the subject sale of boric acid and diatomaceous earth but, like Hartman, does not remember subject conversation in full detail (TR. 65). He remembers that Mr. Hartman called and wanted an insecticide for use at Emporia State University. Burlew's response was that Respondent "does not sell insecticide" (TR. 66). Hartman asked for boric acid and was told that "we could sell him boric acid, but not for roach control use" (TR. 67). Hartman decided on the 100-pound package due to price difference per unit. Mr. Burlew thinks he might have suggested the diatomaceous earth, which was purchased, as an anti-caking agent, to prevent the boric acid from caking up. There was indication the large package of boric acid might be stored over a long period of time. Also, a mixture of the two products is used for cleaning stainless steel and is an excellent polish. He opined that the order for the product was placed after the first telephone call. Burlew believes he handled each of the two or-three calls from Hartman (TR. 84). He has

heard of "Roach Prufe" but has never seen, purchased or examined a package of it (TR. 84). As for using boric acid for roach control, he feels it is a poor choice, although he is aware it could be so used (TR. 85). His version of the "first call" from Mr. Hartman is that "he wanted boric acid" and suggested that "he wanted it for . . . roach control use." Burlew "referred to the fact that we can sell boric acid, but not for roach use" (TR. 86). He further stated (TR. 87):

. . . our policy is not to make reference (to) or a recommendation on the use of any material. That is up to the purchaser what they use those for . . . we don't sell any material for any specified use. That is strictly up to the buyer. We made no recommendations.

Burlew further advised that boric acid is not a contact poison and is not highly toxic; it is a cumulative poison, killing when ingested, and is 2 1/2 times as toxic as table salt (TR. 89).

From the foregoing, I find no substantial evidence supporting the claim that Respondent "recommended" or "represented" that the products sold should or could be used effectively for roach control. Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion - Gulf Oil Corp. v EPA, 548 F.2d 1228, 1.c. 1230(1), and cases there cited.

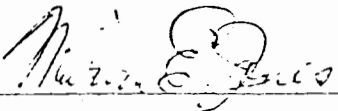
I further find that no actual intent existed on the part of Respondent that subject products be purchased or used for pesticidal purposes, and that no representation or statement made by Respondent supports the contention that such intent should or can be implied, 6/ and that the following FINAL ORDER should be issued:

6/ For the Court's comment on factors bearing on "implied intent," see Gulf Oil Corp. v. EPA, 548 F.2d 1228, 1.c. 1230, note 3.

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FINAL ORDER 7/

It having been determined that Respondent did not violate Section 12 of FIFRA, 7 U.S.C. 136(j), by the sale of boric acid powder, technical, and diatomaceous earth powder to Emporia State University on or about March 18, 1983, no civil penalty should be assessed and subject Complaint against Respondent, Chemco Industires, Inc., is hereby dismissed.

DATED: January 24, 1984



Marvin E. Jones
Administrative Law Judge

7/ Unless appeal is filed pursuant to Section 22.30 of the Consolidated Rules of Practice or the Administrator elects to review on his own Motion, this Initial Decision shall become the Final ORDER of the Agency (see 40 C.F.R. 22.27(c)).

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CERTIFICATION OF SERVICE

I hereby certify that, in accordance with 40 C.F.R. 22.27(a), I have this date forwarded to the Regional Hearing Clerk of Region VII, U.S. Environmental Protection Agency, the Original of the foregoing Initial Decision of Marvin E. Jones, Administrative Law Judge, and have referred said Regional Hearing Clerk to said section which further provides that, after preparing and forwarding a copy of said Initial Decision to all parties, she shall forward the Original, along with the record of the proceeding, to the Hearing Clerk, EPA Headquarters, Washington, D.C., who shall forward a copy of said Initial Decision to the Administrator.

DATED: January 24, 1984

Mary Lou Clifton

Mary Lou Clifton
Secretary to Marvin E. Jones, ADLJ

ATTACHMENT

Parallel Citations to Sections of FIFRA
in the Statutes at Large and in Title 7, United States Code,
Supp. V (1975)

<u>Statutes at Large</u>	<u>7 U.S.C.</u>	<u>Statutes at Large</u>	<u>7 U.S.C.</u>
Section 2	Section 136	Section 15	Section 136m
— 3	136a	16	136n
4	136b	17	136o
5	136c	18	136p
6	136d	19	136q
7	136e	20	136r
8	136f	21	136s
9	136g	22	136t
10	136h	23	136u
11	136i	24	136v
12	136j	25	136w
13	136k	26	136x
14	136 <u>l</u>	27	136y