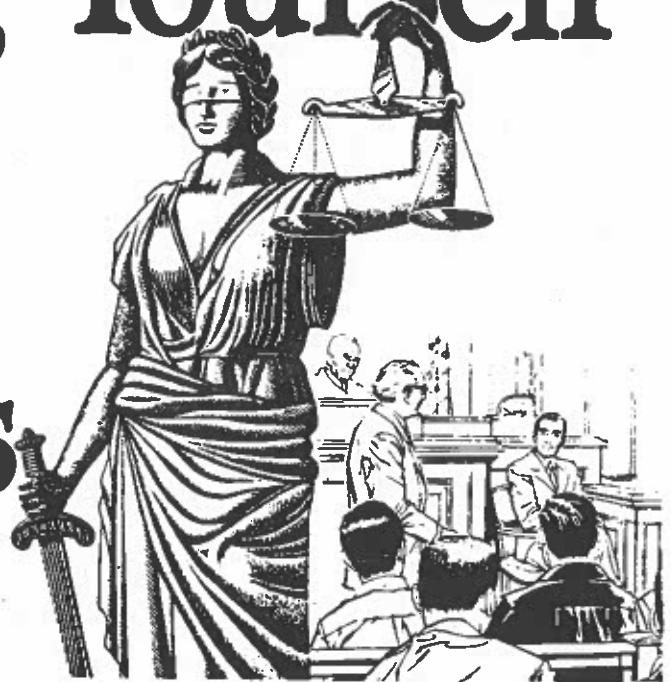


Defending Yourself Against the NAS Guidelines



How can a PCO fight back if he is faced with a lawsuit alleging violations of the NAS Guidelines?

by
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Pest-control operators are being hit with a growing number of lawsuits alleging personal injury and property damage as a result of "excess" airborne levels of termiticides in homes following application. Many of the homeowners who bring these suits accuse PCOs of negligence because indoor levels of chlordane, heptachlor or other termiticides are higher than the levels suggested by the National Academy of Science's 1982 "guidelines."

Reports of incidents involving treatments of military and civilian housing, a national radio broadcast on chlordane

Mr. Ebner and Ms. Kerester practice environmental law at McKenna, Conner and Cuneo in Washington, D.C. They wish to thank Phillip W. Gregory, president of Gregory The Service That Cares, Greenville, S.C., and Lt. Col. Robert W. Clegern, assistant executive director, Armed Services Pest Management Board, for their input on this article. Mr. Ebner will be speaking on the liability aspects of the NAS guidelines at NPCA's annual convention in Las Vegas, Nev. He is one of the panel members in the "Whose Lawyer" session on Tuesday, October 29.

"contamination" in houses treated for termites, and confusion about the NAS guidelines have sparked public fears about termiticides. This article traces the evolution of the controversy about the NAS guidelines and explains how PCOs can defend themselves when accused of violating them.

Roots of the Controversy

Damage from termites exceeds a billion dollars a year, and Americans spend an enormous amount on their continuing war against this pest. There are eight chemicals currently registered for control of subterranean termites: chlordane, heptachlor, aldrin, dieldrin, lindane, pentachlorophenol, chlorpyrifos and (most recently) permethrin. Chlordane is generally regarded as the termiticide of choice, and consequently has been the most widely used, followed by heptachlor and a chlordane-and-heptachlor mixture.

At the heart of the termiticide controversy is a 1982 NAS report ("An Assessment of the Health Risks of Seven Pesticides Used for Termite Control") recommending certain acceptable indoor air levels for chlordane and several other termiticides. NAS is a private, non-profit scientific organization which receives 90 percent of its funding through grants from Congress and various federal agencies. Although the NAS report on termiticides was merely in-

tended as interim guidance for the military, the report has been widely misinterpreted by over zealous personal injury lawyers and others as establishing "standards" for proper application of termiticides in private residences.

The NAS report was prepared at the request of the U.S. Air Force in response to several reports of adverse health effects involving families living in military housing which had been treated with termiticides years before. Initially, the Air Force felt that the problem was limited to the Wright-Patterson Air Force Base in Ohio, but similar complaints surfaced at other military bases around the country. Upon investigation, the Air Force discovered that the "contaminated" houses had been built on concrete slabs, without basements, and with heating and cooling ducts that were in or below the slabs. The Air Force theorized that chlordane applied around the bases of these houses had entered indoor living areas through the duct work, either through cracks in the concrete slabs or disruptions in the ducts. As a result of these findings, in 1978 the Air Force requested the NAS's National Research Council (the research arm of NAS) to review the toxicology data on chlordane and recommend an airborne concentration that could be used as a *guideline* in deciding whether *military housing* constructed on *concrete slabs* should be evacuated.

Upon completing this review in 1979, the NAS/National Research Council's Committee on Toxicology recommended in a "Chlordane in Military Housing" report to the Air Force that an airborne concentration of 5 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) be used as a guideline for relocation of families living in military housing treated with chlordane. As NAS subsequently stated in its 1982 report on termiticides, this 1979 guideline was "pragmatically determined" based on the known concentrations of chlordane in military housing, a review of the health complaints of persons living in such housing, and a comparison with the "acceptable daily intake" derived from long-term animal feeding studies. The committee qualified its recommendation with the explanation that further research needed to be done. Nevertheless, in May 1980 the Department of Defense banned further application of chlordane to military buildings constructed on concrete slabs. In June 1984 DOD revised its policy on termiticides to again permit the use of chlordane. Under this revised policy the construction of buildings on concrete slabs with duct work in or below the slabs is banned.)

In 1981, the Department of Defense initiated a general review of pesticide use on military bases and requested NAS to review the then seven registered termiticides—and the 1979 recommended guidelines for airborne concentrations of chlordane—to ascertain whether sufficient data existed to recommend indoor exposure limits.

In response to this request, in August 1982, NAS published a report entitled "An Assessment of the Health Risks of Seven Pesticides Used for Termite Control" in which the NAS/National Research Council's Committee on Toxicology concluded that there were no new data available that justified a change from its original recommended guideline of $5 \mu\text{g}/\text{m}^3$ for chlordane. The report also recommended levels for heptachlor ($2 \mu\text{g}/\text{m}^3$), aldrin ($1 \mu\text{g}/\text{m}^3$) and dieldrin ($1 \mu\text{g}/\text{m}^3$). NAS cautioned, however, that these levels were *not intended as standards*, but as *guidelines* for military housing:

"The airborne exposure limits suggested here are intended to provide *guidance* in estimating the health risks of the pesticides in military

housing. *These are not standards* like those suggested by the Occupational Safety and Health Administration, and they do not guarantee absolute safety." (Emphasis added.)

The NAS report went on to stress that not only was the recommended level for chlordane merely intended as "guidance," but that it was intended as *interim* guidance:

"Because of the *shortcomings of current data* and in view of the Committee's request that more definitive data be developed, the airborne concentration of $5 \mu\text{g}/\text{m}^3$ should be regarded as an *interim* guideline for exposures not exceeding 3 yr." (Emphasis in original.)

The committee also recommended that "more definitive human-health data be developed for a fuller assessment of

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the risks of exposure," including "long term animal inhalation studies, *airborne monitoring studies*, and epidemiological studies" (emphasis added). The NAS report was not made available for comment to the industry or the public prior to release.

Public Apprehension Grows

In September 1982, shortly after the NAS report was released, National Public Radio's "All Things Considered" broadcast a program entitled "Chlordane Contamination." The program implicated chlordane as the cause of serious health problems in people whose homes had been treated with the termiticide. Although the narrator conceded that there was no proof that chlordane was the cause of the health problems, he cautioned that anyone who had their home treated with chlordane was susceptible to poisoning. The broadcast

equated the NAS guidelines with "standards" and asserted that chlordane levels in the homes of persons who had suffered from adverse health effects exceeded these supposed "standards." Little if any information was provided in the program on the benefits of chlordane and other pesticides in protecting the nation's homes from devastating termite damage.

In the spring of 1983 a Long Island homeowner, acting on advice of his insurance company, had his home bulldozed because of aldrin "contamination" following the application of this termiticide.

Widespread publicity surrounding this incident led to thousands of calls from worried homeowners to local health authorities and the New York Department of Environmental Conservation. As a result, several hundred homes on Long Island were monitored to determine whether indoor air levels exceeded the NAS guidelines for chlordane and other termiticides. Homeowner suits against PCOs and chemical manufacturers followed. A "60-Minutes" broadcast on chlordane in April 1983 intensified public apprehension about the use of termiticides in the home.

The net impact of the military and civilian housing incidents, the NAS report, the National Public Radio and "60 Minutes" broadcasts, and other continuing adverse publicity has been increasing public apprehension about the safety of termiticides. This in turn has led to a large number of lawsuits against PCOs and chemical manufacturers by alleged "victims" of termiticides. Most of these suits seek enormous monetary damages on the theory that a PCO has been negligent in applying a termiticide if airborne concentrations in treated houses exceed the levels identified by NAS as "safe." In filing these suits, plaintiffs' attorneys invoke the NAS guidelines as if they were government-established standards for proper use of termiticides in private homes.

NAS Tries to Clarify its Report

One such suit involved Gregory The Service That Cares, a pest-control firm in South Carolina. In October 1982, the company treated the home of Rae and Louise Litaker for termites and other pests with Gold Crest Termide, manufactured by Velsicol Chemical

(Continued)

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Corp. The Litakers later brought suit against Gregory The Service That Cares, alleging that they had suffered severe and recurring health effects as a result of the termiticide application by the pest-control firm, that they could not inhabit their house for several months following the termiticide application, and that the house had depreciated in value as a direct result of chlordane contamination. Like many other such suits, the plaintiffs in this case claimed that the air levels of chlordane and heptachlor in their house exceeded the "NAS standards." This led to another claim—that the pest-control company had "misused" the pesticide and is guilty of negligence. Specifically, the Litakers alleged that:

"In failing to insure that the application of the chemicals was such that the primary components of said chemicals would not reach levels within the homeplace or upon personal property or food items considerably higher than ordinary and customarily *accepted national standards, specifically those standards for Heptachlor and Chlordane.*" (Emphasis added.)

Faced with an \$800,000 claim for damages based in large part on the misinterpretation of the NAS guidelines as standards, the pest-control company president, Phil Gregory, organized a task force of industry and regulatory representatives. This committee met with NAS to seek clarification of the 1982 report. The company, through the committee's efforts, succeeded in obtaining a letter from NAS clarifying the intent underlying the recommended indoor air levels. The NAS letter, dated October 18, 1984, stated as follows:

"1. *Reports of the National Research Council contain advisory informa-*

tion only and do not represent formal standards. Federal and state regulatory agencies may use our advice in establishing regulatory standards but will often incorporate other considerations such as technical feasibility or risk vs. benefit in applying our advice. The committee that authorized our report attempted to make this clear when it stated, '*These are not standards like those suggested by the Occupational Safety and Health Administration.*'

"2. The committee also clearly identified their suggestions as an '*interim guideline for exposure*' while awaiting the availability of additional data which might help in refining the number. It is important to recognize that the *committee found the data on chlordane to be scanty and relied on a 1979 NRC report (Chlordane in Military Housing) as a starting point for its deliberations. The 1979 report, that had originally suggested the exposure level, had derived the number 'pragmatically.'*" (Emphasis added.)

NAS concluded the letter by stating again that the guidelines were "not intended as standards. They are a best estimate based on available but insufficient data." Armed with this letter, Gregory was able to successfully settle the case. Unfortunately, the type of situation faced by Gregory's company keeps repeating itself as claims for damages based on alleged violations of the NAS guidelines continue to be filed against PCOs. (It has been reported that some state regulators are taking a new ap-

Guidelines do not carry the force and effect of law, and cannot be enforced.

proach. Unless a case involved blatant pesticide misuse, a regulator may request that a blood sample of the occupants be obtained to determine if there is a need for further investigation, e.g., sampling the building's air level.)

Guidelines vs. Standards

Because the NAS guidelines continue to play a major role in suits brought by persons alleging harm as the result of termiticide applications, it is important for a PCO confronted with this type of suit to understand the legal distinction between guidelines and standards.

Guidelines are just that; they simply are recommendations, and as in the case of the NAS guidelines, often are based on limited information. Guidelines do not carry the force and effect of law, and cannot be enforced. They do not constitute proof of how someone should or should not act. At most, guidelines represent a consensus of opinion about what may constitute an acceptable practice in a given situation. For example, many industries issue "industry guidelines," which are voluntary recommendations reflecting a consensus view about a particular practice. The National Pest Control Association issues "Good Practice Statements" which are general recommendations for the pest-control industry. NPCA explicitly prefaces these guidelines with the warning that they are not standards. While industry guidelines can be introduced in a court of law as a factor in deciding what the appropriate standard of conduct should be under a given set of circumstances, they are not in and of themselves determinative of proper conduct.

Standards, on the other hand, are promulgated for the purpose of establishing an objective definition of what constitutes an acceptable practice. Government standards are promulgated pursuant to express statutory or regulatory authority, and once issued, have the

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force and effect of law, i.e., they carry with them a legal obligation to comply that can be enforced in a court of law. Generally, factors such as benefits and technical feasibility, in addition to comprehensive health-related data, are examined in devising standards for use of hazardous chemicals.

Standards are issued by government agencies only after notice of the standard has been proposed, the public has had an opportunity to comment on the proposed standards, and the issuing agency has taken public comments into account in deciding what the final standard should be. Thus, the Occupational Safety and Health Administration (OSHA) is authorized by statute to establish certain standards for workplace safety, such as standards to limit the amount of dust or chemicals in the air in workplace environments. Similarly, the Environmental Protection Agency issues standards under many of the statutes it administers. For example, EPA has issued worker protection standards under the Federal Insecticide, Fungicide and Rodenticide Act for farm workers who come into contact with pesticides following applications in the field (40 C.F.R. pt. 170).

Defending Yourself

The distinction between guidelines and standards is critical in determining the potential liability of a PCO accused by a homeowner of exceeding the NAS levels. Homeowners often allege that PCOs are liable for negligence because they supposedly have "misused" a termiticide. As purported proof of misuse, these plaintiffs merely assert that indoor air levels were above the NAS "standards," even if there is no evidence that the PCO failed to follow EPA label direc-

tions. Fortunately, there are a number of ways a PCO can defend himself against such abuse of the NAS guidelines:

1. Attack the Plaintiff's Reliance on the NAS Guidelines.

PCOs should forcefully argue, as explained above, that NAS never intended its interim recommended termiticide

Clearly, exceeding the NAS guidelines is not proof of misuse.

guidelines for military housing to serve as general "standards" for private residences. NAS stressed this fact both in its 1982 report and in its clarifying letter to Gregory The Service That Cares.

PCOs also should argue that the recommended levels in the 1982 NAS report were merely a "best estimate" to be used in a limited situation, i.e., a recom-



mendation based on limited data to be used by the military in evaluating exposure of persons in certain types of military buildings until more complete information can be obtained. In addition, NAS acknowledged in its report that the recommended levels, particularly the level for chlordane, were based on limited information which were insufficient to establish anything more than *interim* guidelines. PCOs should argue that the recommended levels described in the report may no longer be current, as evidenced by the mass of new data EPA has been receiving in response to its February 1984 "call-in" for data on termiticide air levels and residues.

2. Establish That There Is No Proof of Product Misuse.

No matter what the indoor air levels may be, unless the plaintiff can prove that the PCO failed to apply the termiticide in accordance with EPA-approved label directions, there is a strong presumption that the product was not misused. Clearly, exceeding the NAS guidelines is not proof of misuse.

FIFRA has established the standard for misuse of a pesticide: it is unlawful to use a registered pesticide "in a manner inconsistent with its labeling." FIFRA § 12(a)(2)(G). In approving a pesticide label, EPA is required by law to ensure that use of the pesticide in accordance with label directions will not cause "unreasonable adverse effects" on

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human health or the environment. Thus, the standard of care established by law for termiticide applications is compliance with the EPA-approved label directions for the product being used. There can be no product "misuse" if the PCO has complied with the pesticide label. In addition to all their other limitations, the NAS guidelines are not government standards, and do not replace or supercede the standard of care reflected by the EPA-approved application directions.

Efforts to Obtain EPA Standards

An "NAS Review of Termiticide Airborne Levels" Committee was formed to address the overall problem with the NAS guidelines. Committee members are: Bob Russell, Orkin Exterminating Co., Atlanta; Phil Gregory, Gregory the Service That Cares, Greenville, S.C.; South Carolina regulators Neil Ogg, ASPCRO, and Dr. von McCaskill, AAPCO; Mark Weisburger, B.&D.A. Weisburger, White Plains, N.Y.; Tom Fortson, Terminix Services, Inc., Columbia, S.C.; and Dr. George Rambo, NPCA, Dunn Loring, Va. The committee has been meeting with EPA's Office

of Pesticide Programs in an attempt to induce the Agency to promulgate legally correct and scientifically sound standards for indoor air levels of termiticides based on the data EPA has obtained from the FIFRA data call-in.

Unless and until EPA promulgates such standards, PCOs are likely to continue to be harassed by irresponsible lawsuits accusing them of negligence and product misuse based on the NAS guidelines. Providing to the court a thorough explanation of what the NAS guidelines are and are not, however, should go a long way in helping PCOs and their attorneys mount an effective defense. ■



How to Fight Back

The following are practical suggestions for defending yourself against alleged violations of the NAS guidelines:

1. Find out who—or what "public interest" organization—might have induced the homeowner to sue.
2. Gather as much information as you can about similar suits filed by the homeowner or organization.
3. Determine what termiticides the homeowners may have applied (or misapplied) himself prior to engaging your services and under what circumstances.
4. Hire an expert to evaluate the homeowner's "proof" that air levels in his house exceeded the NAS guidelines and obtain the court's permission to conduct your own monitoring.
5. Have your lawyer explain to the court why the NAS guidelines are not "standards" and why there can be no product "misuse" under FIFRA if label directions were followed.

— Larry Ebner &
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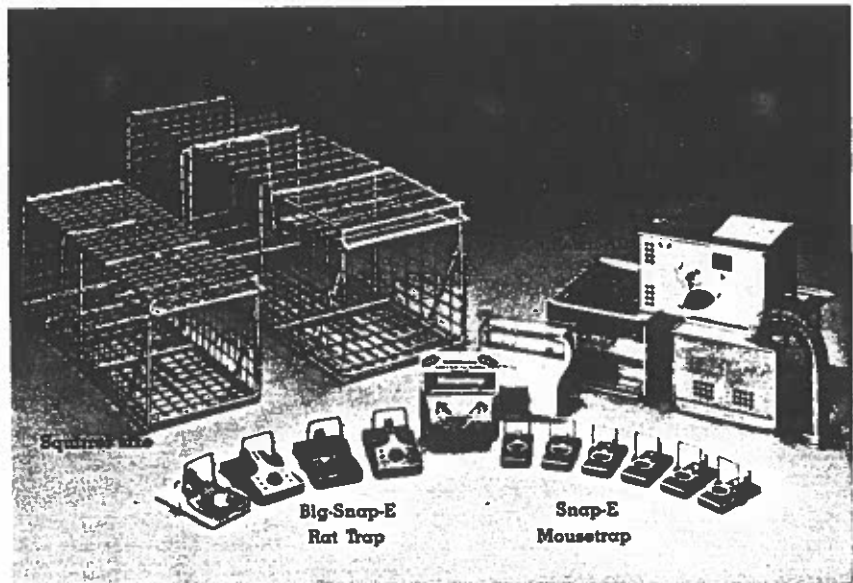
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