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September 16, 2010

**REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY,**

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DELIVERED BY COURIER

Regional Hearing Clerk (E-19J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, IL 60604

Dear Regional Hearing Clerk:

Re: *In the Matter of Liphatech, Inc.*
Docket No. FIFRA-05-2010-0016

On behalf of Respondent, Liphatech, Inc., I enclose for filing an original and two copies of the following:

1. Motion of Respondent for Partial Accelerated Decision on an Issue of Liability in Favor of Respondent with Respect to the Alleged Violations of § 12(a)(2)(E) of FIFRA Set Forth in Counts 1-2,117 of the Complaint and Legal Memorandum in support thereof; and
2. Motion of Respondent to Partially Dismiss the Complaint or in the Alternative for Partial Accelerated Decision on an Issue of Liability in Favor of Respondent with Respect to the Alleged Violations of § 12(a)(1)(E) of FIFRA and Legal Memorandum and Affidavit of Alan Smith in support thereof.

Please file-stamp one of each of the enclosed copies and kindly return them to me in the enclosed postage prepaid envelope. Thank you for your assistance.

Respectfully submitted,

Jeffrey P. Clark

REINHART\4340778JPC:BJM

Encs.

cc Honorable Barbara A. Gunning (w/encs., by courier)
Ms. Nidhi K. O'Meara (C-145) (w/encs., by courier)
Mr. Carl Tanner (w/encs., by courier)

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In the Matter of:

**Liphatech, Inc.
Milwaukee, Wisconsin,**

Respondent.

RECEIVED

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REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

) **Docket No. FIFRA-05-2010-0016**

)
) **MOTION OF RESPONDENT FOR**
) **PARTIAL ACCELERATED**
) **DECISION ON AN ISSUE OF**
) **LIABILITY IN FAVOR OF**
) **RESPONDENT WITH RESPECT**
) **TO THE ALLEGED VIOLATIONS**
) **OF § 12(a)(2)(E) OF FIFRA SET**
) **FORTH IN COUNTS 1-2,117 OF**
) **THE COMPLAINT**


Respondent, Liphatech, Inc. ("Respondent"), respectfully moves, pursuant to Sections 22.16 and 22.20 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, codified at 40 C.F.R. Part 22, for the Administrative Law Judge to render a partial accelerated decision on an issue of liability in favor of Respondent with respect to the alleged violations of § 12(a)(2)(E) of FIFRA set forth in Counts 1-2,117 of the Complaint, as there is no genuine issue as to any material fact and Respondent is entitled to judgment in its favor on this issue as a matter of law.

This Motion is supported by the attached Legal Memorandum of Respondent.

Respectfully submitted this 16th day of September, 2010.

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In the Matter of:)	Docket No. FIFRA-05-2010-0016
)	
Liphatech, Inc.	)	LEGAL MEMORANDUM OF
Milwaukee, Wisconsin,	)	RESPONDENT IN SUPPORT OF
	)	ITS MOTION FOR PARTIAL
Respondent.	)	ACCELERATED DECISION ON
	)	ISSUE OF LIABILITY IN
	)	FAVOR OF RESPONDENT
	)	WITH RESPECT TO THE
	)	ALLEGED VIOLATIONS OF
	)	§ 12(a)(2)(E) OF FIFRA SET
	)	FORTH IN COUNTS 1-2,117 OF
	)	THE COMPLAINT

Introduction

In a stunning display of regulatory overzealousness, Complainant seeks to impose an unprecedented \$2,268,500 penalty on Respondent Liphatech, Inc. ("Liphatech") for running lawful advertisements that Complainant erroneously asserts violated § 12(a)(2)(E) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") because they did not give the classification of the pesticide. (Compl. ¶ 649). Under the applicable FIFRA regulation this requirement can be complied with by either stating the product is a "Restricted Use Pesticide" or including a statement of the "terms of restriction" of the pesticide. 40 C.F.R. § 152.168. Liphatech's answer asserted that it complied with this advertising requirement by directing its audience to always read and follow the product label. (*See e.g.* Answer to Compl. ¶ 43). Liphatech brings this motion

seeking a declaration that it complied with 40 C.F.R. § 152.168 and asking for dismissal of counts 1-2,117 of the Complaint as a matter of law.

Liphatech respectfully requests a partial accelerated decision in its favor on the issue of liability with respect to the alleged violations of § 12(a)(2)(E) of FIFRA as set forth in Counts 1-2,117 of the Complaint. The grounds for this motion are that there is no genuine issue of material fact concerning the actual content of the advertisements and, as a matter of law, all of the print and radio advertisements referenced in Counts 1-2,117 included a statement of the "terms of restriction" as required by FIFRA. Therefore, those Counts should be dismissed as a matter of law.

Background

The Complaint asserts that Liphatech advertised Rozol Pocket Gopher Bait II¹ ("Rozol") 2,140 times in purported violation of § 12(a)(2)(E) of FIFRA and proposes the draconian sum of \$2,268,500 in penalties for these alleged violations (Compl. ¶ 649). This motion covers Counts 1-2,117.

Rozol is a restricted use pesticide (Compl. ¶ 27; Answer to Compl. ¶ 27). As a result of its classification as a restricted use pesticide, Rozol can only be sold to and be used by Certified Applicators or persons under the direct supervision of Certified Applicators and only for uses covered by the Certified Applicator's certification. (Compl. ¶ 28; Answer to Compl. ¶ 28). In addition, advertisements for Rozol must comply with Section 12(a)(2)(E) of FIFRA.

¹ (Alternate Name: Rozol Pocket Gopher Bait Burrow Builder Formula), EPA Reg. No. 7173-244.

Section 12(a)(2)(E) of FIFRA requires that all advertisements for restricted use pesticides include the classification of the pesticide. For broadcast advertisements, which are the subject of this motion, the requirement may be satisfied by including in the broadcast the spoken words "Restricted Use Pesticide" or a statement of the "terms of restriction" of the pesticide. 40 C.F.R. § 152.168.

FIFRA § 12(a)(2)(E) was adopted as part of the 1972 Congressional amendments to FIFRA and the current version of 40 C.F.R. § 152.168 was promulgated in 1988. *See* Pesticide Registration Procedures; Pesticide Data Requirement, 53 Fed. Reg. 15951 (May 4, 1988). EPA comments accompanying the proposed rule that was ultimately adopted as 40 C.F.R. § 152.168 explain that it is a violation of section 12(a)(2)(E) of FIFRA to advertise a restricted use pesticide without giving its classification. The agency's comments also state: "First, the proposal would specify that the advertising limitations apply equally to printed, broadcast, and telephone advertising, and would further specify how the requirement could be satisfied for each of these media." Pesticide Registration and Classification Procedures, 49 Fed. Reg. 37916, 37927 (Sept. 26, 1984).

As such, 40 C.F.R. § 152.168 clarified that pesticide advertisers could comply with section 12(a)(2)(E) of FIFRA without including the words "Restricted Use Pesticide" in advertising. However, neither the regulation nor the agency's comments in promulgating the regulation define the phrase "terms of restriction."

Liphatech's radio and print advertisements referenced in the Complaint did not use the three words "Restricted Use Pesticide." However, they were not required to. Each radio script and each print advertisement covered by this motion included a statement of the "terms of restriction" of the pesticide in accordance with 40 C.F.R. § 152.168. More specifically with regard to Counts 1-2,117 of the Complaint, each of Liphatech's radio advertisements included the following:

"Approved under a special local needs 24C label for the states of...ALWAYS FOLLOW AND READ LABEL DIRECTIONS. SEE YOUR LOCAL AG CHEM DEALER." (Compl. at ¶ 41, Attachs. A, B, C, and D; Answer to Compl. at ¶ 41).

The label stated that Rozol is a Restricted Use Pesticide and included directions for using Rozol. The label also stated that Rozol could only be sold to and used by Certified Applicators or persons under their direct supervision and only for those uses covered by the Certified Applicator's certification. By referring advertisement listeners to the pesticide label which included the restricted use classification of Rozol and the limitations upon its sale and use, Liphatech complied with 40 C.F.R. § 152.168. Therefore, Liphatech is entitled to a partial accelerated decision on liability in its favor for all of the alleged violations of § 12(a)(2)(E) of FIFRA asserted by Complainant in Counts 1-2,117 of the Complaint.

Argument

Section 22.20(a) of the Consolidated Rules authorizes the Administrative Law Judge to "render an accelerated decision in favor of a party as to any or all

parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a).

Motions for accelerated decision under Section 22.20(a) are treated as motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *See In re Behnke Lubricants, Inc.*, FIFRA-05-2007-0025, 2008 WL 711033 (E.P.A. Mar. 5, 2008). A party moving for accelerated decision must establish the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law by a preponderance of the evidence. *Id.* at *18. "[A] party opposing a properly supported motion for accelerated decision must demonstrate the existence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence." *Id.*

Liphatech is entitled to partial judgment as a matter of law holding that it did not violate § 12(a)(2)(E) of FIFRA as alleged by Complainant in Counts 1-2,117 of the Complaint. This is because there is no genuine issue of material fact concerning what the advertisements said and, as a matter of law, each of Liphatech's radio advertisements referenced in Counts 1-2,117 of the Complaint included a statement of the "terms of restriction" of the pesticide in accordance with 40 C.F.R. § 152.168.

1. Liphatech complied with 40 C.F.R. § 152.168 by referring advertisement listeners to the requirements included on the product label.

Liphatech's radio advertisements incorporated the "terms of restriction" of Rozol according to 40 C.F.R. § 152.168 by alerting advertisement listeners to the "terms of restriction" on the product label. Hence, Liphatech did not violate FIFRA § 12(a)(2)(E).

Each of Liphatech's broadcast advertisements referenced in Counts 1-2,117 of the Complaint included the spoken words: "Approved under a special local needs 24C label for the states of...ALWAYS FOLLOW AND READ LABEL DIRECTIONS. SEE YOUR LOCAL AG CHEM DEALER." (Compl. at ¶ 41, Attachs. A, B, C and D; Answer to Compl. ¶ 41).

The same rules of interpretation that apply to statutes are applicable to administrative regulations. *Rucker v. Wabash R.R. Company*, 418 F.2d 146, 149-150 (7th Cir. 1969). "[It] is a cardinal rule of statutory construction that every term in a statute should be construed as having a meaning distinct in some way from the other terms, and that statutory interpretations that render language superfluous are to be avoided." *In re Firestone Pac. Foods, Inc.*, No. EPCRA-10-2007-0204, 2009 WL 801853 at *22 (E.P.A. Mar. 24, 2009) (citing, *inter alia*, 2A Sutherland Statutory Construction §§ 46:05, 46:06 (6th ed. 2000)). Statutes are read to avoid redundancy—no clause, sentence or word shall be rendered superfluous, void or insignificant. *Square D Co. & Subsidiaries v. Comm'r*, 438 F.3d 739, 745 (7th Cir. 2006).

When interpreting 40 C.F.R. § 152.168, the words "terms of restriction" must be given meaning independent of the phrase "Restricted Use Pesticide" in order to avoid an interpretation of the regulation that renders portions of it superfluous or insignificant. When EPA promulgated 40 C.F.R. § 152.168, it confirmed that pesticide advertisements did not need to include the words "Restricted Use Pesticide" in order to comply with section 12(a)(2)(E) of FIFRA. Instead, pesticide advertisers may comply with FIFRA by alerting listeners to the "terms of restriction" of the pesticide. This is what Liphatech did.

The Code of Federal Regulations uses the phrase "terms of restriction" under FIFRA in two locations—one in the advertising regulation and one in the labeling regulation. *See* 40 C.F.R. §§ 152.168(c), 156.10(j)(2). Neither regulation defines the phrase "terms of restriction." However, the labeling regulation, which was promulgated prior to the relevant advertising regulation, provides that if the use is restricted to Certified Applicators, the following statement is required on the label: "For retail sale to and use only by Certified Applicators or persons under their direct supervision and only for those uses covered by the Certified Applicator's Certification." 40 C.F.R. § 156.10(j)(2). This labeling regulation further states that if other regulatory restrictions are imposed, the U.S. EPA will define the appropriate wording for the terms of restriction by regulation. *Id.* Finally, the labeling regulation requires that both "terms of restriction" along with the words "Restricted Use Pesticide" be shown on the label. *Id.*

Liphatech complied with these labeling requirements and there is no allegation to the contrary contained in the Complaint. The EPA approved the legal sufficiency of the product label to satisfy all labeling requirements for a Restricted Use Pesticide when it granted Liphatech a registration under FIFRA. To approve a registration, EPA must find "that the labeling and other material required to be submitted comply with the requirements of [FIFRA]." FIFRA § 3(c)(5)(B). Moreover, as long as there is no cancellation proceeding in effect, FIFRA provides that "registration shall be prima facie evidence that the pesticide, its labeling and packaging comply with the registration provisions of [FIFRA]." FIFRA § 3(f)(2). Thus, since the applicable regulation requires that the label include the "terms of restriction," it must be presumed that the product label approved by EPA includes whatever information is needed to satisfy this requirement.

The advertising regulation at 40 C.F.R. § 152.168(c), which the Complaint alleges Liphatech violated and which was promulgated after the labeling regulation, (i) only requires that the advertisement contain either the words "Restricted Use Pesticide" or a statement of the "terms of restriction," not both and (ii) provides no further definition or explanation of the words "terms of restriction." There is no reason to presume that EPA intended the phrase "terms of restriction" to have a meaning under this regulation different than the meaning it intended for the same phrase in the labeling regulation. Therefore, it must be assumed that all "terms of restriction" referred to in the advertising regulation are included in the approved label for the product.

It is immaterial for purposes of this motion whether EPA deems the "terms of restriction" for Rozol to be limited to the mandatory label statement limiting sale and use of the product to Certified Applicators and persons under their direct supervision, or whether EPA would deem other language on the approved label for Rozol to be included within the "terms of restriction." In either case, each of the advertisements in question specifically directed the user to read and follow all label directions. By directing the advertisement listeners to read and follow the label, Liphatech instructed listeners to comply with each and every "term of restriction," and thus complied with any reasonable interpretation of this requirement.

This approach also matches the advice given by the EPA on its website: "the pesticide label is your guide to using pesticides safely and effectively. It contains pertinent information that you should read and understand before using a pesticide product." EPA, Read the Label First, Pesticides: Topical and Chemical Fact Sheets, <http://www.epa.gov/pesticides/label/> (last visited Sep. 15, 2010).

By alerting advertisement listeners to the restrictions included on the Rozol product label, Liphatech informed the listeners of the fact that the use of Rozol is restricted as set forth on the product label and that its use may not be appropriate for all individuals and for all applications, as required by 40 C.F.R. § 152.168. Hence, Liphatech complied with FIFRA.

2. If there is any reasonable doubt as to whether Liphatech complied with 40 C.F.R. § 152.168, as a matter of law, no penalty may be imposed on Liphatech.

If Liphatech reasonably interpreted section 12(a)(2)(E) of FIFRA and its relevant regulations as promulgated by EPA, no penalty may be imposed on Liphatech. Courts ordinarily defer to an agency's interpretation of its own regulations. However, where, as here, the imposition of penal sanctions is at issue, the Due Process Clause of the 5th Amendment to the U.S. Constitution "prevents that deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (citation omitted).

"If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not express." *Id.* (citation omitted); *In re CWM Chem. Servs., Inc.*, 6 E.A.D. 1, 1995 WL 302356 at *9 (EAB 1995) ("In other words, it is not enough that the [agency's] interpretation of the regulation be reasonable, the regulation itself must provide the regulated community with adequate notice of the conduct required by the agency").

This is particularly true where, as here, a business is exercising its commercial free speech rights. Courts have regularly applied this due process principle to cases implicating the First Amendment.

"[A] law restricting speech is impermissibly vague if it fails to provide fair notice to reasonable persons of what is prohibited, or if it fails to provide reasonably clear guidelines for law enforcement officials, resulting in a 'chilling' effect on speech protected by the First Amendment."

Wisconsin Vendors, Inc. v. Lake County, Ill. ("Wisconsin Vendors I"), 152 F. Supp. 2d 1087, 1094 (N.D. Ill 2001) (citation omitted).

It would be manifestly unfair to impose a monetary penalty on a company that fails to interpret a regulation in a manner identical to the agency's interpretation when the agency has failed to provide notice of its interpretation. An unclear and ambiguous regulation will not support a penalty. *In re Liberty Light & Power*, 1 E.A.D. 696, 1981 WL 27915 at *1 (EAB 1981).

Because the EPA allowed pesticide advertisers to comply with § 12(a)(2)(E) of FIFRA by including a statement of the "terms of restriction" of the pesticide in their advertisements, it was incumbent on EPA to provide clear meaning to those words by giving notice and an opportunity for comment to the regulated community in accordance with the Administrative Procedure Act. Since EPA failed to comply with this requirement, a company's reasonable efforts to comply with the regulation must prevail. *Satellite Broad. Co. v. Fed. Commc'n's Comm'n*, 824 F.2d 1, 3-4 (D.C. Cir. 1987) ("The Commission through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting Commission rules.")

Liphatech reasonably interpreted FIFRA when it concluded that it satisfied 40 C.F.R. § 152.168 by referring product advertisement listeners to the

pesticide label. The label stated that Rozol is a restricted use pesticide and that Rozol could only be sold to and used by Certified Applicators or persons under their direct supervision and only for those uses covered by the Certified Applicator's Certification. By approving the label for Rozol, EPA specifically determined that the label included all required "terms of restriction." Liphatech specifically instructed each of its listeners to read and follow the approved label. No penalty may be imposed on Liphatech under these circumstances because it reasonably interpreted 40 C.F.R. § 152.168.

Conclusion

For the foregoing reasons, Liphatech respectfully requests a partial accelerated decision on the issue of liability in favor of Liphatech because its Rozol advertisements included a statement of the "terms of restriction" of the pesticide in accordance with 40 C.F.R. § 152.168. As a result, Counts 1-2,117 of the Complaint should be dismissed as a matter of law.

Respectfully submitted this 16th day of September, 2010.


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