



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5  
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CHICAGO, IL 60604-3590

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U.S. EPA REGION 5

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Via UPS Overnight Delivery

REPLY TO THE ATTENTION OF:  
C-14J

September 29, 2011

Honorable Susan L. Biro  
Office of Administrative Law Judges  
U.S. Environmental Protection Agency  
Mail Code 1900L  
1099 14<sup>th</sup> Street, NW, Suite 350  
Franklin Court  
Washington, D.C. 20005

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

Dear Judge Biro:

Enclosed please find a copy of *Complainant's Motion for Leave to File Motion for Leave to File Sixth Supplemental Prehearing Exchange*, which was filed on September 29, 2011, in the above referenced-matter.

Sincerely,

Gary E. Steinbauer  
Assistant Regional Counsel

Enclosures

cc: Mr. Michael H. Simpson  
Reinhart Boerner Van Deuren s.c.  
1000 North Water Street, Suite 1700  
Milwaukee, WI 53202  
(via UPS overnight delivery)

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR**

<b>In the Matter of:</b>	)	
	)	Docket No. FIFRA-05-2010-0016
<b>Liphatech, Inc.</b>	)	
<b>Milwaukee, Wisconsin</b>	)	Hon. Susan L. Biro
	)	
<b>Respondent.</b>	)	
_____	)	

**COMPLAINANT'S MOTION FOR LEAVE TO FILE MOTION FOR LEAVE  
TO FILE SIXTH SUPPLEMENTAL PREHEARING EXCHANGE INSTANTER**

Complainant, the Director, Land and Chemicals Division, Region 5, United States Environmental Protection Agency (Complainant), through its undersigned attorneys, hereby files this *Motion for Leave to File Motion for Leave to File Sixth Supplemental Prehearing Exchange Instanter* pursuant to Sections 22.16, 22.19(f), and 22.22(a)(1) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), codified at 40 C.F.R. §§ 22.16, 22.19(f), and 22.22(a)(1). Copies of proposed versions of *Complainant's Motion for Leave to File Sixth Supplemental Prehearing Exchange Instanter* and *Complainant's Sixth Supplemental Prehearing Exchange*, along with Exhibit 150, are attached as Attachment A.

Complainant files this Motion seeking leave to file a motion for leave to supplement its prehearing exchange in light of the Presiding Officer's Order Scheduling Hearing, dated June 10, 2011 (Order). In the Order, the Presiding Officer required the parties to file all pre-hearing motions on or before August 31, 2011. Through this Motion and the attached proposed version of *Complainant's Motion for Leave to File Sixth Supplemental Prehearing Exchange Instanter*, Complainant seeks to supplement its prehearing exchange with one, four-page additional exhibit that will serve as a critical piece of evidence relating to Complainant's allegations and

Respondent's contentions regarding whether an "offer for sale" occurred "as part of the distribution or sale" of Rozol for purposes of Counts 2,184 through 2,231 of the First Amended Complaint. Without the additional exhibit Complainant now seeks to include in its prehearing exchange, the record will be inaccurate and incomplete. *See* 40 C.F.R. § 22.19(f).

On September 28, 2011, counsel for Complainant contacted counsel for Liphatech, Inc. (Respondent) via email providing the attached proposed version of *Complainant's Sixth Supplemental Prehearing Exchange* and seeking concurrence in the relief requested in this Motion. On September 28, 2011, counsel for Respondent indicated that Respondent opposed this Motion "as untimely and barred by the August 31, 2011 deadline in ALJ Biro's June 11, 2011 Order."

The additional exhibit in the proposed *Sixth Supplemental Prehearing Exchange* was not previously submitted due an inadvertent oversight by Complainant, despite its exercise of diligence in ensuring that its prehearing exchange is complete, accurate, and up-to-date. Complainant promptly filed this Motion upon its discovery of the oversight. While Complainant did not discover this oversight prior to the August 31, 2011 motion cut-off date as set forth in the Presiding Officer's Order, Complainant submits this Motion and the attached proposed motion for leave to supplement more than 15 days prior to the hearing. Therefore, pursuant to Consolidated Rule 22.22(a)(1), Complainant need not show good cause for failing to supply the documents sooner. *See* 40 C.F.R. § 22.22(a)(1).

Furthermore, there is no evidence of bad faith, delay tactics, or undue prejudice. *In re Service Oil, Inc.*, Docket No. CWA-08-2005-0010, 2006 EPA ALJ LEXIS 16, at\*9 (April 12, 2006). As demonstrated by Complainant's prior supplemental prehearing exchanges and the motions for leave to file the same, Complainant promptly supplements its prehearing exchange

as required by Consolidated Rule 22.19(f). This Motion is no exception. Therefore, this Motion clearly is not the product of bad faith or delay tactics. Finally, because the additional exhibit was created by Respondent, made available on its website, and there is ample time for Respondent to review the additional exhibit and prepare any rebuttal, there is no undue prejudice.

For all of the foregoing reasons, Complainant respectfully requests that the Presiding Officer grant it leave to file its *Motion for Leave to File Sixth Supplemental Prehearing Exchange Instantly* and *Complainant's Sixth Supplemental Prehearing Exchange*, along with Exhibit 150, all of which are attached in proposed form as Attachment A.

Respectfully submitted,



Nishi K. O'Meara  
Erik H. Olson  
Associate Regional Counsels  
Gary E. Steinbauer  
Assistant Regional Counsel  
United States EPA – ORC Region 5  
77 W. Jackson Blvd. (C14-J)  
Chicago, IL 60604  
(312) 886-0568  
*Attorneys for Complainant*

# **ATTACHMENT A**

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR**

<b>In the Matter of:</b>	)	
	)	Docket No. FIFRA-05-2010-0016
<b>Liphatech, Inc.</b>	)	
<b>Milwaukee, Wisconsin</b>	)	Hon. Susan L. Biro
	)	
<b>Respondent.</b>	)	
_____	)	

**[PROPOSED VERSION]**

**COMPLAINANT’S MOTION FOR LEAVE TO FILE SIXTH  
SUPPLEMENTAL PREHEARING EXCHANGE INSTANTER**

Complainant, the Director, Land and Chemicals Division, Region 5, United States Environmental Protection Agency (Complainant), through its undersigned attorneys, hereby files this *Motion for Leave to File Sixth Supplemental Prehearing Exchange Instanter* pursuant to Section 22.19(f) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules”), codified at 40 C.F.R. § 22.19(f). For the reasons set forth below, Complainant respectfully requests that the Presiding Officer grant this Motion and deem *Complainant’s Sixth Supplemental Prehearing Exchange* filed on the date of any order granting this Motion. Copies of Complainant’s proposed *Sixth Supplemental Prehearing Exchange* and proposed Exhibit 150 are attached hereto as Attachment A.

**I. Standard of Review**

The Consolidated Rule governing supplementation of prehearing exchanges is found at 40 C.F.R. § 22.19(f), which provides in pertinent part as follows:

(f) Supplementing prior exchanges. A party who has made an information exchange under paragraph (a) of this section [22.19], ... shall promptly supplement or correct the exchange when the party learns that the information exchanged ... is incomplete,

inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.

Motions to supplement a prehearing exchange should be granted unless there is evidence of bad faith, delay tactics, or undue prejudice. *In re Service Oil, Inc.*, Docket No. CWA-08-2005-0010, 2006 EPA ALJ LEXIS 16, at\*9 (April 12, 2006). Because Complainant submits this Motion more than 15 days prior to the hearing, which currently is scheduled to begin on October 31, 2011, it need not demonstrate good cause for failing to supply the documents sooner. *See* 40 C.F.R. § 22.22(a)(1).

**II. Complainant's Proposed Sixth Supplemental Prehearing Exchange**

Complainant's proposed *Sixth Supplemental Prehearing Exchange* includes the following additional exhibits:

CX No.	Title of Document	Date of Document	Bates No.
150	Materials discovered on Respondent's website on or about February 25, 2010	February 25, 2010	3568-3571

### **III. Discussion**

The additional exhibit that Complainant seeks to include in its prehearing exchange was discovered by Complainant on Respondent's website on or about February 25, 2010. The additional exhibit in the proposed *Sixth Supplemental Prehearing Exchange* was not previously submitted due an inadvertent oversight by Complainant, despite its exercise of diligence in ensuring that its prehearing exchange is complete. Complainant promptly filed this Motion upon discovering this oversight.

Without the additional exhibit Complainant now seeks to include in its prehearing exchange, the record will be inaccurate and incomplete. The additional exhibit and the individual documents in the exhibit go directly to Complainant's allegation that Respondent violated FIFRA Section 12(a)(1)(B), 7 U.S.C. § 136j(a)(1)(B), when it offered to sell Rozol<sup>1</sup> from November 2009 through February 2010 in certain advertisements made available on its website. (*See generally* Counts 2,184-2,231). This additional exhibit is a critical piece of evidence relating to Complainant's allegations and Respondent's contentions regarding whether an "offer for sale" occurred "as part of the distribution or sale" of Rozol for purposes of Counts 2,184 through 2,231.

Respondent created and made the additional exhibit available on its website. Therefore, it will not suffer any prejudice as a result of this supplemental prehearing exchange. Finally, given that the hearing is scheduled to begin on October 31, 2011, Respondent will have ample time to review the additional exhibit provided in the proposed *Sixth Supplemental Prehearing Exchange*, respond if necessary, and prepare any rebuttal testimony and exhibits.

---

<sup>1</sup> For purposes of this Motion,



**IV. Conclusion**

For all of the foregoing reasons, Complainant respectfully requests that the Presiding Officer grant it leave to file its *Sixth Supplemental Prehearing Exchange* and deem the *Sixth Supplemental Prehearing Exchange*, attached hereto as Attachment A, filed on the date any order granting this Motion is issued.

Respectfully submitted,

---

Nidhi K. O'Meara  
Erik H. Olson  
Associate Regional Counsels  
Gary E. Steinbauer  
Assistant Regional Counsel  
United States EPA – ORC Region 5  
77 W. Jackson Blvd. (C14-J)  
Chicago, IL 60604  
(312) 886-0568  
*Attorneys for Complainant*

# **ATTACHMENT A**

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR**

**In the Matter of:** )  
)  
**Liphatech, Inc.** ) Docket No. FIFRA-05-2010-0016  
**Milwaukee, Wisconsin** )  
) **Hon. Susan L. Biro**  
**Respondent.** )  
\_\_\_\_\_)

**COMPLAINANT'S SIXTH SUPPLEMENTAL PREHEARING EXCHANGE**

Complainant, the U.S. Environmental Protection Agency, Region 5 (Complainant), hereby files the instant *Complainant's Sixth Supplemental Prehearing Exchange* pursuant to Sections 22.16(a) and 22.19(f) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (Consolidated Rules), codified at 40 C.F.R. §§ 22.16(a) and 22.19(f).

**I. Additional Exhibit**

CX No.	Title of Document	Date of Document	Bates No.
150	Materials discovered on Respondent's website on or about February 25, 2010	February 25, 2010	3568-3571

**II. Reservation of Rights**

Complainant respectfully reserves the right to supplement its list of witnesses and/or its list of exhibits upon reasonable notice to the Tribunal and Respondent, or by order of the Presiding Officer, as allowed by the Consolidated Rules. Complainant

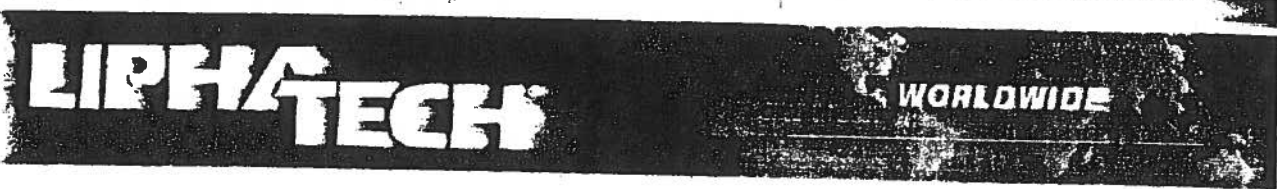
further reserves the right to call any of the witnesses listed in and documents provided with its prehearing exchange in its case in chief and/or in any rebuttal.

Respectfully submitted,

DATED: \_\_\_\_\_

\_\_\_\_\_  
Nidhi K. O'Meara  
Erik H. Olson  
Associate Regional Counsels  
Gary E. Steinbauer  
Assistant Regional Counsel  
United States EPA – ORC Region 5  
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*Attorneys for Complainant*

# **EXHIBIT 150**



[Pest Management](#)

[Animal Health](#)

[Dealer Products](#)

[AgrField & Orchard](#)

[Bug & Snail](#)

[MSDS/Labels](#)

[Literature](#)

[Education](#)

[Vet Guide](#)

[Partners](#)

## News

[No More Moldy Bait](#)

[Controlling Rodents & Protecting People](#)

## Press Releases

[Liphatech Launches 'Success Story Challenge' for FirstStrike™ Soft Bait](#)

[Liphatech Introduces Innovative FastDraw™ Soft Bait. Highly palatable, no-wax formulation rapidly draws in both mice and rats, this speeds rodent control results for integrators and livestock producers \(January 4, 2010\)](#)

[Rozol Prairie Dog Bait - Important News \(November 2009\)](#)

[Winners Show Skill, Learn Rodent Control Product Details on Liphatech's Rodent Rally Course at PestWorld 2009 \(November 19, 2009\)](#)

[Liphatech Introduces Video to Demonstrate Versatility of the Aegis-RP Rodent Bait Station \(June 1, 2009\)](#)

[Liphatech's Rozol® Prairie Dog Bait Issued Federal, Section 3 Registration; Eight States Already Approve for Management of Range Rodents \(August 11, 2009\)](#)

[Rodent Technology Leader Provides Success Tips when Locating Bait Stations \(May 27, 2009\)](#)

[Liphatech Describes How to Choose the Perfect Bait Station Based on Your Needs \(May 26, 2009\)](#)

[Liphatech Names Engle as Midwest Sales Representative \(May 15, 2009\)](#)

[Liphatech Rodent Rally Winners Learn About Products, Show Their Skills in Navigating Road Course \(January 9, 2009\)](#)

[Liphatech Introduces FirstStrike Soft Bait at PestWorld 2008 \(October 23, 2008\)](#)

[Liphatech CEO Carl Tanner Elected to Board of Directors for Industry Trade Association RISE \(October 6, 2008\)](#)

[Liphatech Shows How to Best Compare Rodenticides \(September 4, 2008\)](#)

[Liphatech Introduces Aegis-RP Gray Bait Station That's Inconspicuous for Humans, More Attractive to Rodents \(September 2, 2008\)](#)

[Liphatech Hires Southeast District Representative \(May 9, 2008\)](#)

[Liphatech Testing Unveils Best Practice in Adhering Bait Stations to Concrete \(May 9, 2008\)](#)

## Archives

[New Liphatech Brochure Details the Importance of Rodent Control in Biosecurity Programs for Livestock Production](#)

[New Liphatech Brochure Aids PMPs in Rodenticide Selection, Provides Insight into Real-world Rodent Control Results](#)

November 2009

**SUBJECT: ROZOL PRAIRIE DOG BAIT - IMPORTANT NEWS**

- **UPDATED LABEL & PACKAGING CHANGES**
- **NEW LITERATURE / UNIVERSITY FIELD TRIAL RESULTS**



"OUTSTANDING SINGLE APPLICATION EFFECTIVENESS"

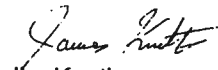
Dear Cattlemen / Farmers / Landowners:

Recently, your state registered Rozol Prairie Dog Bait, following the federal, EPA approval of a Section 3 registration (7173-258) - (see enclosed Specimen Label). This replaces Special Local Needs supplemental 24(c) labels which were previously used in conjunction with Rozol Pocket Gopher Bait - Burrow Builder Formula. Both products are restricted-use pesticides, but *only* Rozol Prairie Dog Bait can now be used to manage the Black-tailed Prairie Dog (BTPD).

**LABEL CHANGES** – Applications on BTPD's can begin October 1<sup>st</sup> and continue through March 15<sup>th</sup> or *spring green-up of prairie grasses, whichever occurs later*. The label also requires two carcass searches: the first 5-10 days after application, and the second 14-21 days after application. There is also a livestock grazing restriction until the second carcass follow-up and after no bait is found above ground.

**PACKAGING** – To minimize confusion vs. other Rozol products, Rozol Prairie Dog Bait can be identified by either a *bright green* lid (on the 30# pail), or green identifying rectangles (on the bag or tote labels).

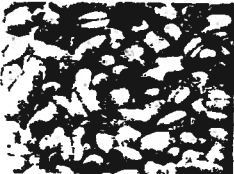
**LITERATURE** – Enclosed find our "Range Rodent Management" brochure that explains application tips in detail, and the benefits of Rozol versus other control methods. Also included is an article on the "True Cost of Control" discussing best baiting practices and including the latest field efficacy data including work conducted by Kansas State University extension wildlife specialist Mr. Charlie Lee, and other well-known custom applicators. Try Rozol and see for yourself that Rozol provides outstanding control, is easy to use, and is the best alternative for "PROTECTING YOUR LAND" against damage caused by range rodents. For more information, please contact:



Jim Knuth  
District Sales Mgr. –  
Northern High Plains (CO, KS, ND, NE, SD & WY)  
knuthj@liphatech.com  
Mobile: 712-310-0090



Mark Newman  
District Sales Mgr. –  
Southern High Plains (NM, OK, TX)  
newmanm@liphatech.com  
Mobile: 678-367-8271



Rozol 0.005% chlorophacinone  
food-grade, natural wheat grain bait



30 lb.



50 lb.

FOR IMMEDIATE RELEASE

***Liphatech®'s Rozol® Prairie Dog Bait Issued Federal, Section 3  
Registration: Eight States Already Approve for Management of Range  
Rodents***

Milwaukee, WI (August 11, 2009)— Rozol Prairie Dog Bait replaces Rozol Pocket Gopher Bait Burrow Builder Formula used for over five years on over a million acres under "Special Local Need" 24(c) state registrations. Rozol Prairie Dog Bait has a full Federal EPA, FIFRA Sec. 3 registration. The newly registered product will roll out with updated packaging distinguished by its bright green color scheme.

Rozol Prairie Dog Bait can be applied between October 1 and March 15, or until spring green-up (whichever comes later). It is a "Restricted Use Pesticide" requiring applicators to be appropriately licensed to purchase and apply product. New Mexico and North Dakota are the two newest states to approve the use of the product. The list also includes Colorado, Kansas, Nebraska, Oklahoma, Texas and Wyoming. A state application is pending in Montana and South Dakota.

This is a new tool that landowners, ranchers and custom applicators can use to manage infestations of black-tailed prairie dogs, a range rodent that consumes up to two pounds of vegetation every week. An active prairie dog colony can cut grazing capacity by over 50%, requiring ranchers to allocate up to 40 acres per steer, whereas uninfested rangeland can often carry a steer on only 10 acres. Pastures with 20% prairie dog occupancy reduced the estimated value of livestock weight gain by over \$14 per steer, while 60% occupancy reduced that value by \$37 or more per steer.

In addition, black-tailed prairie dogs are hosts for fleas, which are a vector for the plague, a disease that can be passed on to pets, livestock and humans.

Over the years Rozol Prairie Dog Bait has delivered outstanding *single* application effectiveness. Multiple field studies conducted by Kansas State University and the University of Nebraska on over 11,400 burrows achieved a control rate averaging 95%. No differences in efficacy were observed between fall, early winter and late winter applications.



-more-

## Rozol Prairie Dog Bait/Page 2

Landowners find that Rozol Prairie Dog bait is easy to use, with treatment involving the placement of ¼ cup of bait at least six inches down active burrows. There is no need to pre-treat, and its quick acceptance means less repeat applications, resulting in labor savings and a low applied cost per acre.

### **About Liphatech**

Headquartered in Milwaukee, Liphatech has a long history of advancing the science of rodent management through research and product innovation. Combining the most advanced technology available with the highest level of customer service and technical support, Liphatech delivers solutions that allow landowners and certified applicators to quickly achieve the cost-effective management of rodent populations.

Liphatech specializes in servicing agricultural and animal health markets, in addition to pest management professionals. Its product line includes rodenticides formulated on grain, manufactured mini-block, pellet and soft bait formulations as well as tamper-resistant bait stations. For more information about Liphatech and its comprehensive line of products, call 888-331-7900 or visit [www.liphatech.com](http://www.liphatech.com)

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

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**CERTIFICATE OF SERVICE**

I hereby certify that the originals and true, accurate and complete copies of *Complainant's Motion for Leave to File Motion for Leave to Sixth Supplemental Prehearing Exchange Instanter, Complainant's Motion for Leave to File Sixth Supplemental Prehearing Exchange Instanter, and Complainant's Sixth Supplemental Prehearing Exchange*, together with true, accurate and complete copies of Exhibit 150 thereto, were filed with the Regional Hearing Clerk, U.S. EPA, Region 5, on the date indicated below. True, accurate and complete copies were sent to Honorable Susan Biro, Administrative Law Judge (via UPS overnight delivery) at the following address:

Honorable Susan L. Biro  
Office of Administrative Law Judges  
U.S. Environmental Protection Agency  
Mail Code 1900L  
1099 14<sup>th</sup> Street, NW, Suite 350  
Franklin Court  
Washington, D.C. 20005

and to Mr. Michael H. Simpson, Counsel for Respondent, Liphatech, Inc., (via UPS overnight delivery), at the following address:

Mr. Michael H. Simpson  
Reinhart Boerner Van Deuren s.c.  
1000 North Water Street, Suite 1700  
Milwaukee, WI 53202

on the date indicated below:

Dated in Chicago, Illinois, this 29 day of September, 2011.



Patricia Jeffries-Harwell  
Legal Technician  
U.S. EPA, Region 5  
Mail Code C-14J  
77 West Jackson Blvd.  
Chicago, IL 60604  
(312) 353-7464