UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

C-14J

VIA POUCH MAIL

October 21, 2010

Honorable Barbara A. Gunning
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

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

Dear Judge Gunning:

Enclosed please find copies of Complainant's Reply to Respondent's Response to Complainant's Motion for Partial Accelerated Decision on Liability for Counts 1 through 2140 of the Complaint and Complainant's Reply to Respondent's Response To Complainant's Motion For Leave to Amend the Complaint, both filed on October 21, 2010, in the above referenced-matter.

Sincerely,

Erik H. Olson
Associate Regional Counsel

cc: Mr. Michael H. Simpson
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(*via UPS*)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
Liphatech, Inc.	)	Docket No. FIFRA-05-2010-0016
Milwaukee, Wisconsin	)	
	)	Hon. Barbara A. Gunning
Respondent.	)	
	)	
	)	

COMPLAINANT'S REPLY TO RESPONDENT'S RESPONSE TO COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION ONLIABILITY FOR COUNTS 1 THROUGH 2,140 OF THE COMPLAINT

I. Introduction

On September 16, 2010, Respondent Liphatech, Inc. (Respondent or Liphatech) filed, in addition to another motion, a Motion for Accelerated Decision on the issue of liability as to Counts 1 through 2,117 of the Complaint. On October 1, 2010, Complainant filed its Response to Respondent's motion and filed a Motion for Accelerated Decision on the issue of liability as to Counts 1 through 2,140. On October 13, 2010, Respondent filed its Reply regarding its own Motion for Accelerated Decision and its Response to Complainant's Motion for Accelerated Decision.

In large part, Complainant stands on its memorandum in law in support of Motion for Accelerated Decision as to Counts 1 through 2,140 and opposition to Respondent's Motion for Accelerated Decision as to Counts 1 through 2,117. This Reply will address the issue of liability in a limited manner and address Respondent's argument regarding the appropriate number of violations.

II. Complainant is Entitled to Accelerated Decision on Liability for Counts 1 through 2,140

A. Respondent's interpretation of 40 C.F.R. §152.168 is not reasonable

In addition to the arguments already presented in Complainant's Motion for Accelerated Decision, Respondent's "interpretation" of 40 C.F.R. § 152.168 is also not reasonable based on the plain reading of the regulation. As applicable here, 40 C.F.R. § 152.168 provides that the requirement that advertisements for restricted use pesticides must contain a statement of its restricted use classification may be satisfied "**by the inclusion**" of "the terms of restriction." 40 C.F.R. §§ 152.168(a) and (c) (emphasis added). In other words, 40 C.F.R. § 152.168 does not allow an advertisement to "refer to" or "alert a listener to" the restricted use product's approved label. Therefore, the foundation of Respondent's entire defense to liability for Counts 1 through 2,140 finds no support in 40 C.F.R. § 152.168, and thus, it cannot be considered "reasonable."

Further, Respondent is incorrect when its states that "Complainant argues that Respondent can **only** satisfy the option in 40 C.F.R. § 152.168(c) to include the 'statement of terms of restriction' by using the exact statement which Complainant excerpted from the language in 40 C.F.R. § 156.10(j)(2)" (Respondent's Reply and Response at 6 (emphasis added)). Contrary to Respondent's argument, Complainant's position is that had Respondent included the "terms of restriction" set forth in 40 C.F.R. § 156.10(j)(2), or words of similar import, it would have satisfied 40 C.F.R. § 152.168(c). In this case, however, the language used in Respondent's radio and print advertisements did not come remotely close to satisfying Section 12(a)(2)(E) and 40 C.F.R. § 152.168. Therefore, this argument is a red herring at best.

B. Despite Section 12(a)(2)(F), Respondent's interpretation of Section 12(a)(2)(E) defeats the purpose of the statute

Respondent misses the point when it states that U.S. EPA can still enforce violations under Section 12(a)(2)(F) of FIFRA. Once violations of Section 12(a)(2)(F) have occurred, the product has already entered the stream of commerce. Respondent's argument essentially insulates registrants, such as itself, from Section 12(a)(2)(E) as long as its advertisements "refers to" or "alerts a listener" to the a label, which the consumer will not see until the point of sale. As previously stated in Complainant's Motion for Accelerated Decision, referring consumers to a restricted use product's approved label does not meet the purpose of Section 12(a)(2)(E) of FIFRA because it does not notify the consumer of the restricted uses in the advertisements themselves.

C. Notifying the consumer that the product is a "Special Local Needs" product does not satisfy the requirements of Section 12(a)(2)(E)

Finally, in arguing that its radio advertisements somehow complied with Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), and 40 C.F.R. § 152.168, Respondent carelessly suggests that the words used in its radio advertisements[1] "put the listener on notice that this is not a typical product and that it is being sold subject to conditions of special registration," it "is restricted to certain areas, and that important additional information is contained on the label." (Respondent's Reply and Response at 5). This contention is without merit.

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[1] More specifically, Respondent refers to the following language in its radio advertisements:

> Approved under a special local needs 24C label for the states of Colorado, Kansas, Oklahoma and Texas. . . . ALWAYS FOLLOW AND READ LABEL DIRECTIONS. SEE YOUR LOCAL AG CHEM DEALER.

The fact that its radio and print advertisements stated that Rozol was "[a]pproved under special local needs 24C label" or that "you must have a 24(c) Prairie Dog Bait label in your possession" does not mean that the Section 24(c) registration process was unique or more thorough. Section 24(c) permits a State to register a federally registered pesticide for additional uses within the State to meet special local needs. 7 U.S.C. § 136v(c). As explained in Complainant's Memorandum, products registered under Section 24(c) of FIFRA need not be classified for restricted use. (Complainant's Memorandum at 25). Thus, a vague reference to a "24C label" or "24(c) Prairie Dog Bait Label" does not alert a listener or reader to the fact that Rozol is "not a typical product," nor does it alert the listener that Rozol is restricted for use by a certified applicator or someone under his or her direct supervision. Respondent's attempts to assign special significance to the fact that it registered Rozol under Section 24(c) for use in certain States for specific purposes, and its assumption that average listeners and readers would understand any such special significance, should not be countenanced.

III. The Amount of Penalty Is Not Relevant to the Issue of Liability

Respondent parses out the words of Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), and its implementing regulations with little care when arguing that its radio and print advertisements did not violate FIFRA, but with great care when arguing penalty issues. On the one hand, it fails to read the statute and regulations with any depth and argues that it did not understand what was meant by the language "terms of restriction." Respondent argues this even after it acknowledges that when comparing 40 C.F.R. §

(Respondent's Reply and Response at 5).

152.168 to 40 C.F.R. §156.10(j)(2), "[t]here 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." (Respondent's Motion at 7). On the other hand, it reads far too much into the statute when deciphering the act that is prohibited in the statute: "to advertise." Rather, Respondent suggests that the Court should find that the "unit of violation" should be focused on the act of ***creating*** an advertisement, not the act of broadcasting or circulating the advertisement. Respondent, however, fails to support its argument with any legal authority.

Respondent argues that Complainant is not entitled to accelerated decision until this Court makes a determination as to whether Complainant properly interpreted the "unit of violation" of FIFRA. (Respondent's Reply and Response at 12). This argument is without merit because it confuses issues of liability with that of penalty.

In *In re 99 Cents Only Stores*, FIFRA-9-2008-0027, 2008 EPA ALJ LEXIS 10 (EPA Chief ALJ, June 2, 2008), Chief Administrative Law Judge Biro rejected this very argument. In an Order on Motion for Partial Accelerated Decision and Request for Oral Argument, Chief Judge Biro stated it is "true that it is the responsibility of this Tribunal to rule on motions, avoid delay, and conduct efficient and fair proceedings. 40 C.F.R. § 22.4(c). The amount of penalty at issue here is simply irrelevant to a determination as to whether there are any contested issues of fact *as to liability* which would warrant both parties as well as this Tribunal expending their resources holding a hearing thereon. *See*, 40 C.F.R. § 22.20(a). Therefore, this issue alone does not justify denying Complainant's well founded motion." *99 Cents*, 2008 EPA ALJ LEXIS 10, at *54 (emphasis in original,

footnote omitted). Chief Judge Biro went on to grant Complainant's motion for partial accelerated decision on liability for all 166 counts alleged in the underlying complaint. *Id.* at *60. She further clarified that she was not making a finding as to the appropriate penalty for the violations. *Id.*

The circumstances in this matter are virtually identical to the circumstances before Chief Judge Biro when she ruled on the complainant's motion for accelerated decision as to liability in *99 Cents*. With respect to Counts 1 through 2,140 in this matter, the parties both agree that there is no genuine issue as to any material fact with respect to Respondent's liability. Indeed, Counts 1 through 2,140 are ripe for accelerated decision on the issue of liability. Respondent's arguments as to the amount of the proposed penalty, however, are a separate issue more appropriately addressed after hearing on the issue of penalty.

IV. Complaint Correctly and Consistently Interprets the Meaning of "Unit of Violation"

This is the first time a Court (administrative or judicial) will decide on a case where the respondent has been charged with violating Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E). Therefore, the issue of what a "unit of violation" is in the context of Section 12(a)(2)(E) has not previously been addressed. However, both the December 2009 Enforcement Response Policy for FIFRA ("ERP") (CX[2] 51) and administrative case law shed light on what constitutes a "unit of violation" in the context of FIFRA generally. When the ERP and the administrative case law are applied to the specific facts of this

[2] As used herein, "CX" refers to the exhibits included in Complainant's Initial Prehearing Exchange, which was filed and served on September 28, 2010.

matter, one can only conclude that a "unit of violation" for purposes of Section 12(a)(2)(E) is each and every separate act of illegally advertising a restricted use product.

In a section entitled "Independently Assessable Violations," the ERP states "[a] separate civil penalty, up to the statutory maximum, will be assessed for each independent violation of the Act. A violation is considered independent if it results from an act (or failure to act) which is not the result of any other violation for which a civil penalty is to be assessed or if at least one of the elements of proof is different from any other violation." (CX 51, ERP at 16).

Further, the Environmental Appeals Board ("EAB" or "Board") in *In re Chempace Corporation*, 9 E.A.D. 119 (EAB 2000), when addressing what constitutes "unit of violation" for purposes of Sections 12(a)(1)(A) and (E) of FIFRA, 7 U.S.C. §§ 136j(a)(1)(A) and (E), stated that "[t]he prohibited act is the sale or distribution of an unregistered, adulterated, or misbranded pesticide. Thus, under section 12(a)(1)(A) and (E), the 'unit of violation' is the sale or distribution. Each such sale or distribution of a pesticide to any person constitutes a distinct unit of violation, and thus is grounds for the assessment of a separate penalty. While Chempace argues that the FIFRA provisions in question 'merely state a general prohibition against the sale and distribution of unregistered or misbranded pesticides,' Chempace Br. at 22, the prohibitions are expressed in plain language making it unlawful to sell or distribute *any* unregistered or *any* misbranded pesticides to *any* person." 9 E.A.D. at 129-30 (emphasis in original, footnote deleted). As Chief Judge Biro stated in *99 Cents*, the Board in *Chempace Corp.* "set for the Agency the *upper limit* of the number of violations the Agency could charge

under FIFIRA." *99 Cents*, 2010 EPA ALJ LEXIS 10, at *108 (emphasis in original).

This same logic applies here and leads to the unassailable conclusion that each broadcast or circulation of a violative advertisement constitutes a distinct "unit of violation" for purposes of Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E). The plain language of Section 12(a)(2)(E) provides that it is unlawful for any person to **advertise** a restricted use product without giving the classification of the product. 7 U.S.C. § 136j(a)(2)(E) (emphasis added). Clearly, demonstrating that the respondent "advertised" is one element of proof that is different in each of the 2,140 counts. Respondent has admitted that it advertised Rozol[3] on 2,140 separate occasions. The record clearly demonstrates that each of these separate acts of advertising took place.

Further, Respondent has failed to provide any support for its assertion that the "unit of violation" should be less than the number of times it advertised the product. It simply suggests that the "unit of violation" should be based on one advertisement or four versions of its radio advertisements or the six States in which it advertised Rozol over the radio or the 11 radio stations through which it advertised its product. In rejecting the respondent's argument that a unit of violation was something less than each act of sale or distribution, the Board in *Chempace* made note of the respondent's failure to point "to anything in the language, legislative history, or context of section 12(a)(1)(A) and (E) that supports its position that the unit of violation in this case should be less than the number of individual sales or distributions." *Chempace Corp.*, 9 E.A.D. 130. Respondent's arguments here likewise lack such support.

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[3] For ease of reference, Complainant will use Rozol here to refer to "Rozol Pocket Gopher Bait II"

In addition to the lack of legal support for Liphatech's suggested interpretation, if adopted, Liphatech's interpretation would also frustrate the purpose of the statute. Congress could not have intended to create a law that allows for only a nominal penalty for repeat violators. In *Chempace Corp.*, the Court provided the following additional rationale in its decision to reject the respondent's unsupported limited interpretation of a "unit of violation:"

> [The respondent's] suggested reading of these FIFRA sections as treating a course of conduct involving multiple sales or distributions as a single violation not only fails to follow the plain language of the statute, but also undermines the deterrent purpose that civil penalties are intended to effectuate. For example, [the respondent's] interpretation results in charging a seller or distributor of unregistered pesticides with only one count of violating FIFRA section 12(a)(1)(A) with a resultant current maximum penalty of $ 5,500 regardless of whether that person sold or distributed all or part of his stock, and whether those sales or distributions were made to one or hundreds of customers. Thus, the potential liability for civil penalties would no longer provide an incentive to a seller or distributor of unregistered pesticides to refrain from continuing that unlawful activity after the first illegal sale or distribution.

Chempace Corp., 9 E.A.D. at 129-30. As the Board warned in *Chempace Corp.*, Liphatech's interpretation of what constitutes a "unit of violation" for purposes of Section 12(a)(2)(E) would mean that a registrant could broadcast countless illegal radio advertisement on every radio station in the United States, or could distribute countless illegal print advertisements in every periodical or other publication in the United States,

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(Alternative name: "Rozol Pocket Gopher Burrow Builder Formula"), EPA Registration Number 7173-244.

and the limit of its liability would be a maximum of $7,500.[4] Surely, Congress could not have intended such a result under Section 12(a)(2)(E) of FIFRA.

In sum, it is clear that each instant that Respondent advertised the product without complying with section 12(a)(2)(E) is a separate violation for which a separate penalty can be assessed. Any other conclusion would not only be inconsistent with FIFRA's plain language, it would also contravene "the consumer protection goals of FIFRA." *In re Microban Prods. Co.*, 11 E.A.D. 425, 447 (EAB 2004).

V. "Unit of Violation" and "Prosecutorial Discretion" Are Not the Same

Finally, Respondent argues that the Court could also count each day an advertisement was broadcast as a "unit of violation." It points out that this was the method used by Complainant prior to issuance of an updated prefiling letter (CX 33). In making this argument and interpreting *99 Cents,* Respondent muddles the difference between a "unit of violation" and Complainant's "prosecutorial discretion."

Clearly, Complainant "is vested with the discretion to determine the appropriate number of violations to pursue in an enforcement action." *99 Cents*, 2010 EPA ALJ LEXIS 10, at *104-105 (citing *B&R Oil Co.*, 8 E.A.D. 39, 1998 EPA App. LEXIS 106 (EAB 1998), *Microban Products Co.*, FIFRA Appeal No. 02-07, 2004 EPA App. LEXIS 13 n.20 (EAB 2004), *Chempace Corp.*, 9 E.A.D. 119, 127-31, 2000 EPA App. LEXIS 12 (EAB 2000)). Essentially, Respondent complains that Complainant did not exercise its "prosecutorial discretion" in this case because the Complaint alleges more counts than Respondent feels it should. The undisputed facts, however, are that Respondent violated

[4] At the time of the *Chempace* decision, the maximum penalty for each violation under Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l, adjusted for inflation, was $5,500. For violations after January 12, 2009, the

Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), on at least 2,140 occasions and Complainant calculated the penalty in accordance with the ERP for each of these counts. For the purposes of Complainant's Motion for Partial Accelerated Decision as to Liability for Counts 1 through 2,140, the amount of the proposed penalty is simply not relevant to the issue of liability.

VI. Conclusion

Based on the current pleadings, admissions, and declarations on file, there is no genuine issue as to any material fact regarding Respondent's liability for the alleged violations in Counts 1 through 2,140. Complainant is therefore entitled to judgment as a matter of law as to liability for Counts 1 through 2,140 alleged in the Complaint. Complainant respectfully requests that this Court GRANT Complainant's Motion For Partial Accelerated Decision On Liability For Counts 1 Through 2,140.

Respectfully submitted,

DATED: 10/21/10

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statutory maximum penalty for each offense is $7,500. See 40 C.F.R. § 19.4.

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

CERTIFICATE OF SERVICE

I hereby certify that the original and one true, accurate and complete copy of Complainant's Reply to Respondent's Response to Complainant's Motion for Partial Accelerated Decisions on Liability for Counts 1 through 2,140 of the Complaint, was filed with the Regional Hearing Clerk, U.S. EPA, Region 5, on the date indicated below, and that true, accurate and complete were served on the Honorable Barbara Gunning, Administrative Law Judge (sent via Pouch Mail), and Mr. Michael H. Simpson, Counsel for Respondent, Liphatech, Inc. (sent via UPS Overnight delivery), on the date indicated below:

Dated in Chicago, Illinois, this 21 day of October, 2010.

Patricia Jeffries-Harwell
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(312) 353-7464

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
Liphatech, Inc.	)	Docket No. FIFRA-05-2010-0016
Milwaukee, Wisconsin	)	
	)	Hon. Barbara A. Gunning
Respondent.	)	
	)	
	)	

Complainant's Reply to Respondent's Response To Complainant's Motion For Leave to Amend the Complaint

Respondent suggests that U.S. EPA left paragraph 208 of the Complaint untouched with an ulterior motive: "Complainant will undoubtedly raise the 'false' or 'misleading' allegations." (Respondent's Response, at 9). Respondent is incorrect.

The Complainant did not seek to remove paragraph 208 of the Complaint because paragraph 208 did not cite specifically to Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E). U.S. EPA will not present any evidence or testimony at the hearing to prove that Liphatech violated Section 12(a)(1)(E) of FIFRA.

DATED: 10/21/10

Respectfully submitted,

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Dated in Chicago, Illinois, this 21 day of October, 2010.

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