UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
LIPHATECH, INC.,	)	**Docket No. FIFRA-05-2010-0016**
	)	
Respondent.	)	

INITIAL DECISION

FIFRA: Pursuant to section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136*l*(a)(1), Respondent Liphatech, Inc., is found liable and assessed an aggregate penalty in the amount of $738,000, for its 2,160 violations of FIFRA sections 12(a)(1)(B) and 12(a)(2)(E), 7 U.S.C. § 136j(a)(1)(B) and (a)(2)(e), resulting from its failure to include the requisite warning language in its advertisements and its distributions and/or sales of pesticides using claims that substantially differ from the statement of claims submitted in connection with its FIFRA section 3, 7 U.S.C. § 136a, registration.

DATE: March 11, 2014

PRESIDING OFFICER: Chief Administrative Law Judge Susan L. Biro

APPEARANCES:

For Complainant:
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I. PROCEDURAL HISTORY

This proceeding was initiated on May 14, 2010, by the Director of the Land and Chemicals Division, United States Environmental Protection Agency, Region 5 ("EPA," "Complainant," or "the Agency"), filing an Administrative Complaint pursuant to section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA" or "the Act"), 7 U.S.C. § 136*l*(a)(1), charging Liphatech, Inc. ("Liphatech" or "Respondent") with a total of 2,231 violations of FIFRA, arising from allegedly improper distributions, sales, and advertisements of registered pesticides between 2007 and 2010.

Specifically, Counts 1–2,117 of the Complaint allege that Respondent, a pesticide registrant, violated section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), via 2,117 radio broadcasts in 2007 and 2008 advertising its registered pesticide product "Rozol Pocket Gopher Bait II" (EPA Reg No. 7173-244) without giving its classification as a Restricted Use Pesticide. Initial Complaint ("IC") ¶¶ 369–401. Counts 2,118–40 allege that Respondent violated the same provision of FIFRA in 2007 and 2008 by advertising the same pesticide product 23 times in print publications without giving its classification as a Restricted Use Pesticide. IC ¶¶ 402–70. Counts 2,141–83 further allege that in 2007 and 2008 Respondent violated section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136j(a)(1)(B), by making 43 actual distributions or sales of that pesticide with claims made for the product as part of those distributions or sales that substantially differed from the claims approved in the pesticide's March 2, 2005 accepted label.[1] IC ¶¶ 471–642. Counts 2,184–2,231 allege that in 2009 and 2010 Respondent violated that same provision by offering for sale to 48 separate distributor partners that pesticide product and/or another, "Rozol Prairie Dog Bait" (EPA Reg. No. 7173-286), with claims made for the products that substantially differed from the claims approved in their respective March 2, 2005 and May 13, 2009 accepted labels.[2] IC ¶¶ 643–648. The Complainant proposed the imposition of an aggregate penalty in the amount of $2,941,456 for these 2,231 violations. IC ¶ 649.

On June 14, 2010, Respondent filed an Answer to the Complaint. In this Answer, Respondent admitted to contracting for radio and print advertisements of its registered pesticide product and that such advertisements failed to include the words "restricted use pesticide," but denied that any of its advertisements violated FIFRA. Initial Answer ("IA") ¶¶ 39–134. Further, it admitted to making certain distributions or sales and/or statements in direct mail packages, but denied that the statements were "claims" and/or were inconsistent with its registrations. IA ¶¶ 135–356. Respondent asserted in its Answer that it was in substantial compliance with

[1] Additionally or alternatively, those counts initially alleged the product was misbranded at the time of distribution or sale in violation of section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E). IC, *passim*.

[2] Additionally or alternatively, those counts initially alleged the product was misbranded at the time of offer for sale in violation of section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E). IC, *passim*.

FIFRA and the applicable regulations, raised various defenses to liability, and disputed the appropriateness of the proposed penalty. IA, *passim*.

By Order dated June 29, 2010, the Honorable Barbara A. Gunning was designated to preside over this case. Pursuant to the Prehearing Order issued by Judge Gunning on June 30, 2010, the parties filed their Prehearing Exchanges. Subsequently, Complainant supplemented its Prehearing Exchange five times, and Respondent twice. On February 7, 2011, this matter was redesignated to the undersigned in advance of Judge Gunning's anticipated retirement.

With permission of the Tribunal,[3] a First Amended Complaint (hereinafter "Complaint" or "Compl.") in this matter was filed on January 6, 2011. The Amended Complaint eliminated the content of certain paragraphs alleging false or misleading claims, but retained the original numbering sequence such that paragraphs 1–649 of the original Complaint correspond to paragraphs 1–649 of the Amended Complaint. In addition, the First Amended Complaint reduced the proposed penalty to $2,891,200 by eliminating the economic benefit component.[4] On February 4, 2011, Respondent filed an Answer to the First Amended Complaint (hereinafter "Answer" or "Ans."). As with the Amended Complaint, Respondent retained the original numbering of the paragraphs.

During the prehearing process, the parties filed multiple, competing, and overlapping motions for accelerated decision that covered all 2,231 counts in the Complaint. In addition, on January 6, 2011, pursuant to 40 C.F.R. § 22.11(b) of the Consolidated Rules, the undersigned received a motion from non-parties CropLife America and Responsible Industry for a Sound Environment, seeking leave to file a non-party brief opposing Complainant's construction of FIFRA section 12(a)(1)(B). The motion was opposed by Complainant. On May 4, 2011, the undersigned granted the non-parties leave to file their brief, provided they complied with the information disclosure requirements contained in Federal Rule of Appellate Procedure 29(c)(1).[5]

Subsequently, two Orders on Motions for Accelerated Decision were issued: The first Order on Motions for Accelerated Decision Regarding Alleged Violations of FIFRA section 12(a)(2)(E)[6] ("First MAD Order"), issued May 6, 2011, addressed Counts 1–2,140, while the

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[3] *Liphatech, Inc.*, EPA Docket No. FIFRA-05-2010-0016 (ALJ, Dec. 29, 2010) (Order on Prehearing Motions Related to Amending the Complaint), available at http://www.epa.gov/oalj/orders/liphatech-amd-cmplt-122910.pdf.

[4] In its Reply to Respondent's Memorandum Opposing Complainant's Motion for Leave to Amend Complaint (filed October 7, 2010) ("Reply to MtAmd"), Complainant stated that it lacked sufficient evidence to prove the alleged economic benefit and sought leave to remove it from the Complaint. Reply to MtAmd at 3–4.

[5] *Liphatech, Inc.*, EPA Docket No. FIFRA-05-2010-0016, 2011 EPA ALJ LEXIS 8 (ALJ, May 4, 2011) (Order on Motion of CropLife America and Responsible Industry for a Sound Environment for Leave to File a Non-Party Brief Opposing Complainant's Construction of FIFRA Section 12(a)(1)(B)).

[6] *Liphatech, Inc.*, EPA Docket No. FIFRA-05-2010-0016, 2011 EPA ALJ LEXIS 5 (ALJ, May 6, 2011) (Order on
(Footnote continued on next page.)

second Order on Motions for Accelerated Decision Regarding Alleged Violations of FIFRA section 12(a)(1)(B)[7] ("Second MAD Order"), issued June 24, 2011, addressed Counts 2,141–2,231. In the First MAD Order, Respondent was found liable on Counts 1–2,140, the violations relating to its radio and print advertisements, although the First MAD Order left open the question of the proper unit of violation and the appropriate penalty for those violations. The Second MAD Order on Counts 2,141–2,231, relating to claims made in connection with sales or offers, denied both parties' motions and deferred until hearing any determination of liability or the appropriate penalty for Counts 2,141–2,231.

On October 6, 2011, the parties filed "Joint Stipulations and [a] Joint Motion to Admit Certain Exhibits Into Evidence" ("Joint Stipulations" or "Jt. Stips.") in which the parties stipulated to 194 separate facts,[8] as well as the admissibility of over 100 exhibits and the authenticity of roughly 150 more. Jt. Stips. at 2–30. In addition, regarding the factors prescribed by FIFRA section 14(a)(4), 7 U.S.C. § 136*l*(a)(4), to calculate an appropriate penalty for violations of FIFRA, Respondent specifically "waived any challenge, argument, or objection to the penalty based on or otherwise relating to the factors 'the size of the business of the person charged' and 'the effect on the person's ability to continue in business.'" *Id.* at 16. By Order on Prehearing Motions and Order Postponing Hearing issued October 20, 2011 ("October 20th Order"), the exhibits for which the parties stipulated to admissibility were admitted into the record in anticipation of hearing.[9]

The hearing in this matter was held in Milwaukee, Wisconsin, from February 7, 2012, through February 10, 2012, and the transcripts thereof were received on March 28, 2012.[10] At the hearing, Complainant presented the testimony of four witnesses—Claudia Niess, John Hebert, Dr. Nimish Vyas and Dr. Thomas Steeger—and a total of 109 separately numbered exhibits (nos. 1–9, 12–34, 38, 42–53, 55, 60–61, 69–81, 83–85, 87–92, 95–102, 107–111, 114–116, 118, 121–127, 129–130, 132–133, 135–138, 140, 143, 145, 147–149 and 153) (hereinafter

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Motions for Accelerated Decision Regarding Alleged Violations of FIFRA § 12(a)(2)(E)).

[7] *Liphatech, Inc.*, EPA Docket No. FIFRA-05-2010-0016, 2011 EPA ALJ LEXIS 6 (ALJ, June 24, 2011) (Order on Motions for Accelerated Decision Regarding Alleged Violations of FIFRA § 12(a)(1)(B)).

[8] Many of those stipulated facts relate to Counts 1–2,140 and, to the extent that they were relevant only to issues of liability resolved by the First MAD Order, need not be repeated here. Relevant stipulations are set forth below in the Factual Background.

[9] *Liphatech, Inc.*, EPA Docket No. FIFRA-05-2010-0016, 2011 EPA ALJ LEXIS 22 (ALJ, Oct.20, 2011) (Order on Prehearing Motions and Order Postponing Hearing).

[10] The seven volumes of hearing transcripts in this case were produced in deposition format, rather than hearing format. Specifically, the volumes are divided and labeled by witness name and the pages of each such volume or volumes thereof are separately sequentially numbered. Therefore, the transcript will be cited herein by witness name and the page and line of testimony, such as: "Niess Tr. at 130:14–18."

cited as "CX __").[11] Respondent presented at hearing the testimony of one witness, Thomas Schmit, and introduced into evidence 58 partial or complete exhibits 1–29, 31, 33, 37–39, 50, 59–60, 62–63, 65–67, 70–76, 79–84, 89–90, 93 (hereinafter cited as "RX __").[12]

On April 3, 2012, Complainant and Respondent filed separate Motions to Conform Transcript, each of which included a table of their respective proposed changes. Both motions were fully briefed by April 12, 2012, and an Order on Motions to Conform the Transcript and Order Scheduling Post-Hearing Briefs was issued on April 16, 2012, reconciling the conflicting proposed changes and setting forth deadlines for post-hearing briefs. On June 18, 2012, Complainant submitted its Post Hearing Brief ("C's Post-Hrg. Br."). On August 14, 2012, Respondent submitted its Post Hearing Brief ("R's Post-Hrg. Br."). On August 27, 2012, Complainant filed its Reply Brief in Opposition to Respondent's Post-Hearing Brief ("C's Reply Br."). On September 5, 2012, Respondent submitted its Reply Brief ("R's Reply Br."), and with that filing the record closed.

II. RELEVANT STATUTORY AND REGULATORY PROVISIONS

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") regulates the manufacture, sale, distribution, and use of pesticides by means of a national registration system. 7 U.S.C. §§ 136–136y. Pesticides include "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest," with "pest" defined as "any insect, rodent, nematode, fungus, [or] weed." 7 U.S.C. § 136 (t), (u).

FIFRA section 3 provides the process for applying for pesticide registration, stating in pertinent part:

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[11] *See* October 20th Order; Niess Tr. at 9:5–8, 55:12–18, 65:20–66:23, 81:13–19, 82:17–18, 83:17–84:9, 86:18–87:17, 90:15–16, 96:18–19, 115:3–4, 126:22–127:1, 143:17–18; Hebert Tr. at 15:12–17, 24:13–26:11, 76:7–8, 127:10—11, 144:1–21, 145:19–20, 146:23–24; Steeger Tr.at 8:18–19, 40:19–20, 58:4–5, 71:10–11, 101:11–12; Vyas Tr. at 12:8–10, 15:9–10; Schmit Tr. at 455:13–14. Many of the exhibits admitted by both parties contain multiple, separate documents, identified by a single exhibit number and lower case letter, such as CX 1a through 1d. *See* October 20, 2011 Order at 18–21.

[12] *See* October 20th Order; Niess Tr. at 9:5–8, 150:21–23; Hebert Tr. at 138:10–11, 151:10–12, 152:16, 153:16–17, 154:5–6; Schmit Tr. at 43:6–17, 44:23–24, 45:21–22, 46:10–13, 52:3–4, 55:17–18, 144:21–22, 145:8–22, 164:14–16, 166:7–11, 177:13–14, 203:1–20, 204:20–21. In regard to Respondent's exhibits, in several instances only a part of a numbered exhibit was admitted. Partial admission is tracked either by sublevel identifiers (e.g., 5.a, 5.b, etc.) or by bates numbering (referred to by EPA and Respondent in their post-hearing briefs as RX_xx, but referred to in this decision as "LIxx" to avoid confusion between RX the exhibit and RX_ the bates number prefix). The following exhibits (or partial exhibits) were admitted at hearing as follows: RX 4, but not RX 4.c; RX 5, but not RX 5.b, 5.d, 5.e, 5.f, nor 5.p, only LI 294 from RX 5.c, only LI 319 from RX 5.j, only LI 336-37 from RX 5.o; RX 7, but not RX 7.b–7.h, 7.*l* –7.q, 7.s–7.u, nor 7.x, only LI 387–92 of RX 7.a, only LI 489-90 of RX 7.r; RX 8, but not RX 8.b–8.f, only LI 522-32 of RX 8.a; RX 9, but not RX 9.b–9.c, nor 9.g, only LI 602–08 of RX 9.a; RX 50, but not RX 50.c–50.d; only LI 3374–76 of RX 65.

(1) Statement required. Each applicant for registration of a pesticide shall file with the Administrator [of EPA] a statement which includes –

(A) the name and address of the applicant and of any other person whose name will appear on the labeling;

(B) the name of the pesticide;

(C) a complete copy of the labeling of the pesticide, a statement of all claims to be made for it, and any directions for its use;

(D) the complete formula of the pesticide;

(E) a request that the pesticide be classified for general use or for restricted use, or for both; and

(F) . . . if requested by the Administrator, a full description of the tests made and the results thereof upon which the claims are based, or alternatively a citation to data that appear in the public literature or that previously had been submitted to the Administrator and that the Administrator may consider in accordance with the following provisions . . . .

7 U.S.C. § 136a(c)(1)(A)–(F). FIFRA section 3(c)(5) states that:

The Administrator shall register a pesticide if the Administrator determines that . . .

(A) its composition is such as to warrant the proposed claims for it;

(B) its labeling and other material required to be submitted comply with the requirements of this subchapter;

(C) it will perform its intended function without unreasonable adverse effects on the environment; and

(D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

* * *

Id. § 136a(c)(5).

In addition, FIFRA section 24(c)(1) states that:

> A State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of this Act and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator. Such registration shall be deemed registration under section 3 for all purposes of this Act, but shall authorize distribution and use only within such State.

Id. § 136v(c)(1).

Finally, section 12(a)(1)(B) of FIFRA makes it unlawful for any person:

> (1) . . . to distribute or sell to any person –
>
> * * *
>
> (B) any registered pesticide if any claims made for it as a part of its distribution or sale substantially differ from any claims made for it as a part of the statement required in connection with its registration under [FIFRA section 3] . . . .

Id. § 136j(a)(1)(B). FIFRA broadly defines the phrase to "distribute or sell" as "to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver." *Id.* § 136(gg). In addition, EPA's regulatory definition of "[d]istribute or sell and other grammatical variants of the term such as . . . 'distribution or sale'" includes "the acts of distributing, selling, offering for sale, holding for sale [and] shipping . . . to any person in any State." 40 C.F.R. § 152.3.

FIFRA section 3(d)(1), 7 U.S.C. § 136a(d)(1), gives the Administrator of the EPA the authority to classify a registered pesticide as a Restricted Use Pesticide ("RUP") or a General Use Pesticide ("GUP"). An RUP is a pesticide that "when applied in accordance with its directions for use, warnings and cautions and for the uses for which it is registered . . . may generally cause, without additional regulatory restrictions, unreasonable adverse effects on the environment, including injury to the applicator . . . ." FIFRA § 3(d)(1)(C), 7 U.S.C. § 136a(d)(1)(C). An RUP must be applied by or under the direct supervision of a trained and certified applicator. FIFRA § 3(d)(1)(C)(i), (ii), 7 U.S.C. § 136a(d)(1)(C)(i), (ii). By contrast, a

GUP is a pesticide that generally will not cause unreasonable adverse effects on the environment. FIFRA § 3(d)(1)(B), 7 U.S.C. § 136a(d)(1)(B). GUPs are sold for use by the general public.

In regard to RUPs in particular, FIFRA section 12(a)(2)(E) makes it unlawful for any person –

> (E) who is a registrant, wholesaler, dealer, retailer, or other distributor to advertise a product registered under this subchapter for restricted use without giving the classification of the product assigned to it under [FIFRA section 3] . . . .

7 U.S.C. § 136j(a)(2)(E).

Regulations implementing FIFRA were issued by EPA in 1988 and are set forth in large measure in 40 C.F.R. Part 152. *See* Final Rule, Pesticide Registration Procedures; Pesticide Data Requirements, 53 Fed. Reg. 15,952 (May 4, 1988). The regulations implementing FIFRA section 3 address multiple aspects of the registration application, including the application form (provided by EPA), the identity of the applicant, identity of the product, data summary, draft labeling, packaging, tolerances, and fees. 40 C.F.R. § 152.50.

With regard to implementing FIFRA section 12(a)(2)(E)'s restriction on advertising, the regulations provide in pertinent part –

> (a) Any product classified for restricted use shall not be advertised unless the advertisement contains a statement of its restricted use classification.
>
> (b) The requirement in paragraph (a) of this section applies to all advertisements of the product, including, but not limited, to:
>
> (1) Brochures, pamphlets, circulars and similar material offered to purchasers at the point of sale or by direct mail.
>
> (2) Newspapers, magazines, newsletters and other material in circulation or available to the public.
>
> (3) Broadcast media such as radio and television.
>
> (4) Telephone advertising.
>
> (5) Billboards and posters.

(c) The requirement may be satisfied for printed material by inclusion of the statement "Restricted Use Pesticide," or the terms of restriction, prominently in the advertisement. The requirement may be satisfied with respect to broadcast or telephone advertising by inclusion in the broadcast of the spoken words "Restricted use pesticide," or a statement of the terms of restriction.

Id. § 152.168.

In furtherance of the implementation of FIFRA, in 1989 EPA promulgated an interpretive rule, codified as 40 C.F.R. § 168.22, that articulates the Agency's position with respect to FIFRA section 12(a)(1)(A) and 12(a)(1)(B), and provides in relevant part:

(a) FIFRA sections 12(a)(1) (A) and (B) make it unlawful for any person to "offer for sale" any pesticide if it is unregistered, or if claims made for it as part of its distribution or sale differ substantially from any claim made for it as part of the statement required in connection with its registration under FIFRA section 3. EPA interprets these provisions as extending to advertisements in any advertising medium to which pesticide users or the general public have access.

(b) EPA regards it as unlawful for any person who distributes, sells, offers for sale, holds for sale, ships, delivers for shipment, or receives and (having so received) delivers or offers to deliver any pesticide, to place or sponsor advertisements which recommend or suggest the purchase or use of:

* * *

(3) Any pesticide for any use authorized only by a FIFRA section 24(c) special local need registration, unless the advertisement contains a prominent notice of the limitations on use under the section 24(c) registrations.

* * *

(5) A registered pesticide product for an unregistered use, unless the advertisement is one permitted by paragraph (b)[](3) of this section . . . .

(c) For purposes of paragraph (b) of this section, a "prominent notice of the limitations on use" is one which sets forth the limitations on use in a manner reasonably likely to be understood by persons to whom the advertisement is addressed.

For printed advertising, this criterion will be met by a legend in 6-point or larger type.

Id. § 168.22.

III. FACTUAL BACKGROUND

Many of the relevant facts in this matter are not contested by the parties. Those Undisputed Facts ("UF") include the following:

1. Respondent is a pesticide manufacturing corporation with a place of business at 3600 West Elm Street, Milwaukee, Wisconsin ("Site" or "Facility"), and is a "person" as defined in section 2(s) of FIFRA, 7 U.S.C. § 136(s). Compl. ¶¶ 3, 22–23; Ans. ¶¶ 3, 22–23; Jt. Stips. at 2; R's Post-Hrg. Br. at 8.

2. On or about March 2, 2005, Respondent submitted, and EPA's Office of Pesticides Programs, Registration Division, accepted, a label for "Rozol Pocket Gopher Bait II (Alternate Name: Rozol Pocket Gopher Bait Burrow Builder Formula)" ("Rozol BB"), assigned EPA Registration Number 7173-244. Compl. ¶ 135; Ans. ¶ 135; Jt. Stips. at 7.

3. During the calendar years 2007 to 2010, Respondent was a "registrant," as that term is defined by FIFRA section 2(y), 7 U.S.C. § 136(y), of Rozol BB, EPA Reg. No. 7173-244. Compl. ¶¶ 24–25, 258; Ans. ¶¶ 24–25, 258; Jt. Stips. at 2, 12.

4. During the calendar years 2007 and 2008, Rozol BB was a "pesticide," as that term is defined in section 2(u) of FIFRA, 7 U.S.C. § 136(u). Compl. ¶ 32; Ans. ¶ 32; Jt. Stips. at 2.

5. During calendar years 2007 and 2008, Rozol BB was also registered for additional uses under the authority of section 24(c) of FIFRA, 7 U.S.C. § 136v(c), to control black-tailed prairie dogs under "Special Local Needs" ("SLN") supplemental labels in the States of Kansas, Nebraska, Wyoming, Oklahoma, as well as certain counties in Colorado and Texas.[13] Compl. ¶¶ 29–31; Answer ¶¶ 29–31; Jt. Stips. at 2.

[13] Although not relevant to the disposition of this case, it is worth noting in this section on "Undisputed Facts" that the Complaint, Answer, and Joint Stipulations actually conflict regarding the Texas counties in which Rozol BB was registered for additional uses. Complainant initially alleged that supplemental Rozol BB was "restricted to" 18 Texas counties. Compl. ¶ 31. Respondent denied that, clarifying that Rozol BB was "restricted to" not only those 18 Texas counties, but also all counties "north and west" of a line created by those 18 counties. Ans. ¶ 31. However, the Joint Stipulations stated that Rozol BB was "restricted *in*" the counties identified by Respondent, Jt. Stips. at 2 (emphasis added), which suggests the opposite of what was stated in both the Complaint and Answer.

6. On or about May 13, 2009, Respondent registered "Rozol Prairie Dog Bait" ("Rozol PD"), assigned EPA Registration Number 7173-286, and the EPA Office of Pesticides Program, Registration Division, accepted a label for Rozol PD that was submitted by Respondent. Compl. ¶¶ 259, 268; Ans. ¶¶ 259, 268; Jt. Stips. at 12–13.

7. The "accepted label" and any subsequent amendments are part of the statement required by Respondent in connection with its registration and identify the label language approved by EPA for Rozol PD. Compl. ¶¶ 269–70; Ans. ¶¶ 269–70; Jt. Stips. at 13.

8. During the calendar years 2009 and 2010, Respondent was a "registrant," as that term is defined by FIFRA section 2(y), 7 U.S.C. § 136(y), of Rozol PD, EPA Reg. No. 7173-286. Compl. ¶ 262; Ans. ¶ 262; Jt. Stips. at 12.

9. During the calendar years 2009 and 2010, Rozol BB and Rozol PD were both "pesticides," that term is defined in section 2(u) of FIFRA, 7 U.S.C. § 136(u). Compl. ¶¶ 266–67; Ans. ¶¶ 266–67; Jt. Stips. at 12–13.

10. Rozol BB, at all times relevant to the Complaint, and Rozol PD, during calendar years 2009 and 2010, were each classified as a Restricted Use Pesticide ("RUP") under section 3(d) of FIFRA, 7 U.S.C. § 136a(d), because of their potential secondary toxicity to non-target organisms. Compl. ¶¶ 26–27, 263–64; Ans. ¶¶ 26–27, 263–64; Jt. Stips. at 2, 12.

11. Pursuant to 40 C.F.R. § 156.10(j)(2), as a result of this RUP classification, Rozol BB and Rozol PD can only be lawfully sold to and be used by "Certified Applicators," as that term is defined by FIFRA section 2(e), 7 U.S.C. § 136(e), or persons under the direct supervision of Certified Applicators and only for those uses covered by the Certified Applicator's certification. Compl. ¶¶ 28, 265; Ans. ¶¶ 28, 265; Jt. Stips. at 2, 12.

12. During all times relevant to the Complaint, Respondent was also the registrant, as that term is defined by FIFRA section 2(y), 7 U.S.C. § 136(y), of "Rozol Pocket Gopher Bait" ("Rozol GUP"), EPA Reg. No. 7173-184, a "general use product." Jt. Stips. at 15.

13. On 41 occasions, starting on or about October 1, 2007, Respondent distributed or sold Rozol BB to various entities by physically shipping or moving the pesticide to the recipients. Compl. ¶¶ 213–15, 217–49, 251–55; Ans. ¶¶ 213–15, 217–49, 251–55; Jt. Stips. at 9–12.

14. On June 2, 2008, an authorized inspector employed by the State of Wisconsin, Arthur J. Fonk ("the inspector"), conducted an inspection pursuant to FIFRA of Respondent's Facility during which the inspector issued a Federal Stop Sale, Use, or Removal Order ("Federal SSURO") under FIFRA section 13(a), 7 U.S.C. § 136k(a), to Respondent regarding Rozol BB and the underlying SLN registrations. Compl. ¶¶ 34–35; Ans. ¶¶ 34–35; Jt. Stips. at 3, 15; CX 15.

15. After the Federal SSURO was issued, Respondent sent out letters entitled "EPA Literature Compliance-Rozol® Pocket Gopher Bait – Burrow Builder Formula / Prairie Dog Bait" to its distribution partners requesting that they each destroy any and all literature, flyers, and advertisements entitled: "Black-tailed Prairie Dog Control – Research Bulletin," dated October 17, 2007 ("Research Bulletin" or "Bulletin"); "Livestock Weight Gain and Prairie Dogs: ESA Frontiers in Ecology & the Environment," November 2006 Reprint ("ESA Frontiers Reprint"); and "True Cost of Treatment: Doing Prairie Dog Control Right Saves Time and Money," dated November 5, 2007 ("Whitepaper"). Jt. Stips. at 3; CX 17 at EPA 370–71, 378, 407–08 (Respondent's statement to Complainant including destroy letters and distributor list); CX 14a at EPA 163–68 (Whitepaper); CX 14a at EPA 175–80 (Research Bulletin).

16. On June 19, 2008, the inspector returned to the Facility and collected a written statement and documentary information regarding Rozol BB. Compl. ¶¶ 37–38; Ans. ¶¶ 37–38; Jt. Stips. at 3.

17. During the June 19, 2008 inspection, the inspector collected copies of Direct Mail Packages and cover letters ("Cover Letters") stating that Rozol BB was intended both "For Black – Tailed Prairie Dogs (BTPD) Control" and "For Control of Pocket Gophers" and which included the Bulletin. Compl. ¶¶ 140–44; Ans. ¶¶ 140–44; Jt. Stips. at 7.

18. Respondent sent the Direct Mail Packages to its distribution partners and/or customers to advertise Rozol BB. Jt. Stips. at 7.

19. The Cover Letters contained the following claims:

- "Provides the most control available in a single application."
- "Poses low primary poisoning potential to birds and other non-targets."
- "Both restricted-use and general-use Rozol products are formulated using proven anticoagulant chlorophacinone at 50 PPM (parts per million)—unlike other half-strength, diphacinone-based baits containing as low as 25PPM."

Jt. Stips. at 7.

20. The Bulletin contained the following claims:

- "Rozol consistently controlled Prairie Dog populations using a single application."
- "Conclusion: Rozol delivers proven single application effectiveness."
- "Secondary Hazard / Nearly all Prairie Dogs expired underground."
- "Conclusion: Above-ground exposure risk to non-targets from Rozol is insignificant."

- "Over all sites, 95% average population reduction was achieved as measured by the 'plugged burrow' census method."
- "Over all sites, 94% average population reduction was achieved when measured by the 'visual count' census method."
- "Comparative Toxicity Profile Overall Risk to Birds and Mammals / Rozol is ranked over 50% lower than zinc phosphide in the EPA's overall risk index and 1/3 lower than Diphacinone (Kaput-D).""Conclusion: Rozol - the lowest risk profile among Black Tailed Prairie Dog bait alternatives... Why risk potential harm to employees, livestock, birds, pets or other non-targets?"

Jt. Stips. at 7–8.

21. The Bulletin contained the following statements:

- "Traditional control products such as zinc phosphide or Diphacinone-based anticoagulants have not proven to effectively prevent population recovery, leading to the need to costly re-treatment."
- "Kaput-D Prairie Dog Bait (25 PPM) achieved only 53% to 56% control."
- "Rozol's active ingredient (chlorophacinone) is ten times (10X) less toxic to dogs as Kaput-D's (diphacinone)."
- "Chlorophacinone is over 100X more effective on mice than dipachinone [sic]."

Jt. Stips. at 8.

22. Respondent made the following claims in radio advertisements for Rozol BB that began broadcasting on or about September 26, 2007:

- "Rozol - proven single application effectiveness for the control of black-tailed prairie dogs."
- "Proven in university studies on over 10,000 burrows to get 94% control with a single treatment."

Jt. Stips. at 9.

23. On August 22, 2008, EPA amended the June 2, 2008 Federal SSURO to prohibit Respondent, until further notice from U.S. EPA, from distributing the following marketing materials or labeling for Rozol BB: (1) the Bulletin, (2) the handout entitled "Understanding the True Cost of Treatment" by Ted Bruesch, National Technical Support Manager, Liphatech, (3) the booklet entitled "Control Pocket Gophers & Black-Tailed Prairie Dogs," and (4) "any other similar technical labeling for Rozol BB, EPA

Reg. No. 7173-244, that ha[d] not been subjected to a compliance review by U.S. EPA." Jt. Stips. at 12; CX 21.

24. Respondent operates the website found at "www.liphatech.com," which it uses to advertise its pesticide products to the public. Compl. ¶ 273; Ans. ¶ 273; Jt. Stips. at 13.

25. Respondent's website included a link entitled "Contact Us - Sales Ag/Animal Health," which included a list of sales managers throughout the country and each manager's corresponding contact information (including phone number, mobile number, and e-mail information). Compl. ¶ 274; Ans. ¶ 274; Jt. Stips. at 13.

26. At all times relevant to the Complaint, Respondent's website did not allow Rozol BB or Rozol PD to be purchased on the website and did not contain product pricing information for either pesticide. Jt. Stips. at 15.

27. Between November 18, 2009, and February 23, 2010, Respondent's website contained electronically available documents that included the following statements regarding Rozol PD and Rozol BB, which were not approved or authorized by EPA:

- "**Proven Single Application Effectiveness** - When properly applied in all active burrows of a colony, control typically exceeds 85%, and can be as high as 100%."
- "**Low cost per acre** - Savings in time, labor and fuel exceed comparative total costs of other methods such as zinc phosphide, diphacinone, phos-toxin, and foam or propane-based systems."
- "**Superior Weatherability** – Rozol does not lose its effectiveness when wet. It outlasts Zinc Phosphide."
- "**Provides control, regardless** - With many alternative methods, if the target rodent is not in the burrow during application - success is reduced or control is lost altogether."
- "**Best Bait Acceptance & Favorable Toxicity Profile** - According to the EPA's overall risk assessment, Rozol offers lower overall risk than Zinc Phosphide or Diphacinone, And [sic] Prairie dogs will eat it in the burrow, so there is less risk to non-target wildlife."
- "**Lower Primary Poisoning Potential** – Rozol's toxicity to birds is 20X (times) less than for ZP. Rozol less [sic] toxic to dogs than ZP or Diphacinone."
- "**Outstanding Single Application Effectiveness**"
- "**Proven Reliability** - In university trials on over 11,400 burrows to provide over 94% control in one treatment (when properly and thoroughly applied to all active burrows in a colony)."
- "**Highly Palatable** - Food-grade winter wheat grain (10% protein) is a preferred feed

source for field rodents and provides excellent acceptance and control."

- "**Superior Weatherability** - Rozol does not lose its effectiveness when wet - it outlasts zinc phosphide and can be used under diverse weather conditions."
- "**Easy-to-Use/Less Work** - No need to pre-treat and less repeat applications."
- "**Lower Primary Poisoning Potential to Non-Target Birds and Livestock** – Rozol's primary toxicity to birds is much less than that of acute toxicants."

Compl. ¶¶ 275, 278, 281, 284, 287, 290, 293, 296, 299, 302, 305, 308, 349–51; Ans. ¶¶ 275, 278, 281, 284, 287, 290, 293, 296, 299, 302, 305, 308, 349–51; Jt. Stips. at 13–15.

28. Claudia Niess, Complainant's employee, reviewed the claims made on Respondent's website on November 18, 2009, and again on February 10, 19, and 23, 2010. The website made the same claims on the February 2010 dates as it did on November 18, 2009. Compl. ¶¶ 330, 332, 334; Ans. ¶¶ 330, 332, 334; Jt. Stips. at 14–15.

29. On March 4, 2010, EPA issued another SSURO to Respondent addressing Rozol BB and Rozol PD. Compl. ¶¶ 346–47; Ans. ¶¶ 346–47; Jt. Stips. at 14; CX 32.

30. After EPA issued the March 4, 2010 SSURO, Respondent sent letters to 48 of its distribution partners requesting that they each destroy/disregard "any and all literature, flyers, advertisements" regarding Rozol BB and Rozol PD, including brochures entitled "*Control Range Rodents*," dated September 24, 2009 or earlier. Compl. ¶ 352; Ans. ¶ 352; Jt. Stips. at 15; *see* Compl. Attach. I (full list of distribution partners); CX 50 (same).

While the parties did stipulate to many additional facts, most of these are relevant only to liability for Counts 1–2,140, which (having already been established in the First MAD Order) need not be restated here.

IV. FINDINGS OF FACT

In addition to the Undisputed Facts listed above, the following Findings of Fact ("FOF") are made based upon the record:

1. All allegations of violation in this matter involve Rozol BB and Rozol PD (the Restricted Use Pesticides), not Rozol GUP (the General Use Pesticide).

2. On or about May 13, 2009, upon or shortly after registration of Rozol PD, Respondent cancelled the SLN registrations for Rozol BB. RX 1.i at LI 135; Schmit Tr. at 244:14–

16. Thereafter, Rozol PD became the only Rozol pesticide product that could be used on black-tailed prairie dogs.[14]

3. The target species of Rozol BB is the pocket gopher.[15] The target species of Rozol PD, and the target species of Rozol BB when applied pursuant to the SLN registration, is the black-tailed prairie dog. *See, e.g.*, CX 1 at EPA 3 (Rozol BB); CX 2 at EPA 18–20 (SLN target); RX 1.b at LI 7 (Rozol PD).

4. The black-footed ferret, an endangered species, and black-tailed prairie dogs are known to inhabit the same grounds. Niess Tr. at 237:14–19

5. The active ingredient in Rozol GUP, Rozol BB, and Rozol PD is chlorophacinone. RX 1.i at LI 140; RX 2.h at LI 188; RX 3.g at LI 219. Each of the three products has an identical formula: 0.005% chlorophacinone.[16] Hebert Tr. at 133:19; RX 1.i at LI 140; RX 2.h at LI 188; RX 3.g at LI 219. Chlorophacinone is a first generation anticoagulant rodenticide. CX 38 at EPA 630.

6. Rozol's primary mode of action is as a chronic toxicant affecting the target species through repeated ingestion. Steeger Tr. at 66:11–21; Vyas Tr. at 26:17–27:15.

7. EPA considers treatment of prairie dogs to be a field use because prairie dogs live in communities that can cover hundreds of acres of open land. Hebert Tr. at 57:19–25.

8. In field use scenarios, Rozol persists in the carcasses of animals that have died and the amount of Rozol residue is enough to affect predators and scavengers feeding on those carcasses, in addition to a broader range of taxa than would typically be expected from this single mode of action. Steeger Tr. at 72:23–73:7.

9. Exposure to non-target species occurs mainly through secondary poisoning when a predator consumes all or part of a poisoned prairie dog. Exposure is considered chronic because prairie dogs die over the course of several weeks following treatment and there may be successive predation by the same predators on poisoned prairie dogs. Vyas Tr. at 27:17–28:19.

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[14] Black-tailed prairie dogs (*Cynomys ludovicianus*) are colonial, herbivorous, burrowing rodents which compete with livestock for forage on grassland. CX 12 at EPA 110.

[15] Western "pocket gophers" are also borrowing herbivorous rodents classified in the genus Thomomys and Geomyidea family. CX 1 at EPA 11.

[16] The mode of application is what differentiates the Rozol GUP from the Rozol RUP products. Neiss Tr. at 237:20–238:1.

10. Respondent paid to run two (2) different Rozol print advertisements ("Version A" and "Version B") in trade publications a total of 23 times. CX 14a at EPA 285–330.

11. Version A, which is composed entirely of text, appeared eight (8) times in *Wyoming Livestock Roundup*. Version A read: "**PRAIRIE DOG OR POCKET GOPHER PROBLEMS?** Tired of having to do it over again with ineffective products? Protect your range and farmland from damage with Rozol. Made with food-grade winter wheat, a preferred food source, to ensure quick rodent acceptance and control. No pre-baiting required. Proven in university trials on over 11,000 burrows to provide over 94% control in a single application. Low primary poisoning risk to non-target wildlife. **For info call: 800-351-1476 or visit www.rodent-control.com**." CX 14a at EPA 328–30.

12. Version B, which included graphics, pictures, and text, appeared 15 times in various trade publications. The text of Version B[17] read: "Put an end to Prairie [sic] dog damage with rozol® Rozol delivers: - Outstanding control, is - Easy-to-Use, and has - Low primary poisoning potential to non-target birds and livestock. Approved under Special Local Needs (SLN) 24(c) Prairie Dog Bait label for use in the states of Colorado, Kansas, Nebraska, Texas and Wyoming. In order to use this product for the control of Black-Tailed Prairie Dogs, you must have a 24(c) Prairie Dog Bait label in your possession. Liphatech Ph: 888-331-7900 • www.liphatech.com rozol® BURROW BUILDER Proven Single Application Effectiveness." *See, e.g.*, CX 14a at EPA 286.

13. Respondent paid to run four (4) different Rozol advertisements ("Version 1," "Version 2," "Version 3," and "Version 4") via radio broadcast a total of 2,117 times. CX 14a at EPA 331–62.

14. Versions 1 and 3 are identical except for the listing of states in which Rozol was approved for use on prairie dogs under SLN permits. Version 1 reads: "FARMER'S [sic] AND RANCHERS, IF YOU'RE LIVING IN THE STATES OF KANSAS, NEBRASKA, COLORADO OR WYOMING[18] AND YOU'VE GOT A PRAIRIE DOG PROBLEM.... WELL YOU DON'T ANYMORE BECAUSE ROZOL POCKET GOPHER BAIT, BURROW-BUILDER FORMULA FROM LIPHATECH IS APPROVED FOR CONTROL OF BLACK-TAILED PRAIRIE DOGS. THAT'S RIGHT GUYS, ROZOL, [sic] THIS FOOD GRADE [sic] WHEAT BAIT FLAT WORKS ON PRAIRIE DOGS. THESE FURRY LITTLE BUGGERS ACTUALLY EAT THIS STUFF IN THE BURROW. PROVEN IN UNIVERSITY STUDIES ON OVER 10,000 BURROWS TO GET OVER 94 PERCENT CONTROL WITH A

[17] Version B was modified to include "Oklahoma" in the list of 24(c)-approved states as well as the statement "Now approved for use in Oklahoma" after Respondent obtained an SLN permit in Oklahoma. *See* CX 14a at EPA 301.

[18] The list of states in Version 3 reads: "COLORADO, KANSAS, OKLAHOMA, or TEXAS. . . ." CX 14a at EPA 353.

SINGLE TREATMENT! ROZOL HAS BEEN USED ON OVER A HALF A MILLION ACRES WITHOUT A COMPLAINT, WITH THE EXCEPTION OF THE PRAIRIE DOGS OF COURSE. APPROVED UNDER A SPECIAL LOCAL NEEDS 24C LABEL FOR THE STATES OF KANSAS, NEBRASKA, COLORADO & WYOMING. Accept no substitutes. Don't risk having to do the job over again. ***Rozol "Proven Single Application Effectiveness" for the control of Black tailed*** [sic] ***Prairie Dogs***. ALWAYS FOLLOW AND READ LABEL DIRECTIONS. SEE YOUR LOCAL AG CHEM DEALER." CX 14a at EPA 352.

15. Versions 2 and 4 are also identical but for the same change in the list of approved states. Version 2 reads: "THIS ANNOUNCEMENT IS FOR YOU PRAIRIE DOGS LIVING IN THE STATES OF KANSAS, NEBRASKA, COLORADO or WYOMING. IF I WAS [sic] YOU I WOULD PACK MY BAGS AND GET MY FURRY LITTLE TAIL TO CALIFORNIA. WHY? WELL, BECAUSE ROZOL, POCKET GOPHER BAIT BURROW-BUILDER FORMULA FROM LIPHATECH IS APPROVED FOR CONTROL OF BLACK-TAILED PRAIRIE DOGS. THIS FOOD GRADE [sic] WHEAT BAIT FLAT WORKS ON THESE PRAIRIE DOGS. PROVEN IN UNIVERSITY STUDIES ON OVER 10,000 BURROWS TO GET OVER 94 PERCENT CONTROL WITH A SINGLE TREATMENT. APPROVED UNDER A SPECIAL LOCAL NEEDS 24C LABEL FOR THE STATES OF KANSAS, NEBRASKA, COLORADO & WYOMING. Accept no substitutes. Don't risk having to do the job over again. ***Rozol "Proven Single Application Effectiveness" for the control of Black tailed*** [sic] ***Prairie Dogs***. ALWAYS FOLLOW AND READ LABEL DIRECTIONS. SEE YOUR LOCAL AG CHEM DEALER." CX 14a at EPA 352.

16. Respondent published a brochure entitled "Control Pocket Gophers & Black-Tailed Prairie Dogs" on February 17, 2006. Respondent assigned this document the reference number 8001. CX 74. Complainant referred to this document as the "Slim Jim." Niess Tr. at 85:21–87:11 (referencing CX 74).

17. Respondent published a subsequent brochure entitled "Control Pocket Gophers & Black-Tailed Prairie Dogs" on August 27, 2007. Respondent assigned this document the reference number 8001-3. CX 14a at EPA 181–89 (with copies at EPA 200, 219, 238, 257, 276, and 308). The parties referred to this document as both the "Slim Jim" (Niess Tr. at 47:7–20; Schmit Tr. at 208:16–209:7), and the "Old Slim Jim" (Schmit Tr. at 210:23–211:2, 213:17–20).

18. Respondent published a brochure entitled "Control Range Rodents" on September 24, 2009. Respondent assigned this document the reference number 8001-6. CX 31 at 582–92. Complainant also referred to this document as the "Slim Jim" (Niess Tr. at 80:2) or

"similar" to the "Slim Jim" (Niess Tr. at 97:9-98:12) and sometimes the "New Slim Jim" (Schmit Tr. at 209:8–12; 213:8–12).[19]

V. RESPONDENT'S LIABILITY FOR ROZOL BB ADVERTISEMENTS LACKING RUP CLASSIFICATION IDENTIFICATION (COUNTS 1–2,140)

Counts 1–2,117 of the Complaint alleged that Respondent violated section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), by advertising via 2,117 radio broadcasts a pesticide product without including either its classification as a Restricted Use Pesticide or a statement of the terms of restriction. Compl. ¶¶ 369–401. Counts 2,118–40 of the Complaint allege that Respondent violated the same provision of FIFRA by advertising 23 times in print publications a pesticide product without including either its classification as a Restricted Use Pesticide or a statement of the terms of restriction. Compl. ¶¶ 402–470. In the First MAD Order issued on May 6, 2011, the Respondent was found liable for Counts 1–2,140.[20] As such, the only issue remaining here for determination is the assessment of the appropriate penalty for the violations, which is discussed below.

VI. RESPONDENT'S LIABILITY FOR CLAIMS MADE AS PART OF AN OFFER FOR SALE WHICH SUBSTANTIALLY DIFFER FROM CLAIMS MADE AS PART OF THE ROZOL BB & PD REGISTRATION STATEMENTS (COUNTS 2,184–2,231)

The violations set forth in Counts 2,184–2,231 of the Complaint are based on alleged "offers for sale" made primarily on Respondent's website (http://www.liphatech.com). Niess Tr. at 172:3–18; C's Post-Hrg. Br. at 24 (noting the basis of counts is that "Rozol sat on a 'virtual shelf'" in the marketplace). Specifically, those counts allege that Respondent violated FIFRA section 12(a)(1)(B) between November 18, 2009 and February 23, 2010, "by offering for sale, Rozol [BB and PD] to 48 separate distributor partners (*See* Attachment I), with claims made for the product as part of distribution or sale that substantially differed from the claims approved in [those products'] 'accepted label[s].'" Compl. ¶¶ 644, 646. Attachment I is entitled "List of Distributor Partners Receiving Advertisements Regarding 'Rozol [BB],' and 'Rozol [PD]'" and

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[19] For the sake of clarity, where the evidence or testimony is specific, this decision will refer to the Slim Jim by reference number as follows: the oldest version (published February 17, 2006) as the "Slim Jim 8001," the version published August 27, 2007, as the "Slim Jim 8001-3," and the version published September 24, 2009, as the "Slim Jim 8001-6."

[20] *Liphatech, Inc.*, EPA Docket No. FIFRA-05-2010-0016, 2011 EPA ALJ LEXIS 5 (ALJ, May 6, 2011) (Order on Motions for Accelerated Decision Regarding Alleged Violations of FIFRA § 12(a)(2)(E)).

consists of a two-page table with columns corresponding to Count Number, Name, and State. *See* Compl. Attach. I; CX 50 (copy of same). This document was created by EPA based on a list of distributors to whom Respondent acknowledged sending a "destroy/discard letter" regarding Rozol literature on March 9, 2010, after the SSURO was issued. CX 145; Niess Tr. at 81:23–83:16. In its Brief, Complainant asserts "Respondent's internet advertisements, which were reinforced by the direct mail packages [sent to those distributors on Attachment I] . . . show that offers for sale of Rozol were made in accordance with 40 C.F.R. § 168.22(a)." C's Post-Hrg. Br. at 24.

In regard to these counts, the parties dispute the threshold issue of whether the law and the evidence support a finding that Respondent made an "offer for sale" within the meaning of FIFRA, as well as whether substantially different claims were made therein. Relying upon 40 C.F.R. § 168.22, Complainant argues in its Post-Hearing Brief that the term "offer for sale" includes internet and direct mail advertisements such as Respondent's Product Information Sheets and the New Slim Jim. C's Post-Hrg Br. at 19–27. Respondent vigorously challenges the application of section 168.22 here on various grounds and affirmatively asserts in opposition that those documents, which it admits were present on its website, but does not admit were direct-mailed, do not constitute an "offer for sale," relying upon *Tifa, Ltd.* ("*Tifa*"), 9 E.A.D. 145 (EAB 2000), *et al.* R's Post-Hrg Br. at 25–45.

A. Analysis of Section 168.22

As indicated above, section 12(a)(1)(B) of FIFRA makes it unlawful for any person:

> (1) . . . *to distribute or sell* to any person–
>
> * * *
>
> (B) any registered pesticide if any claims made for it *as a part of its distribution or sale* substantially differ from any claims made for it as a part of the statement required in connection with its registration under [FIFRA section 3] . . . .

7 U.S.C. § 136j(a)(1)(B) (emphasis added).

The phrase to "distribute or sell" is defined under FIFRA section 2 as including an "offer for sale," but not to "advertise." 7 U.S.C. § 136(gg). Further, neither the term "offer for sale" nor the term "advertise" is defined in the statute, although the latter term appears in FIFRA section 12(a)(2)(E), 7 U.S.C. § 136j(a)(2)(E) ("It shall be unlawful for any person . . . who is a registrant, wholesaler, dealer, retailer, or other distributor to *advertise* a product registered under this Act for restricted use without giving the classification of the product assigned to it under [section 3]") (emphasis added).

On January 11, 1989, EPA promulgated a "Final Interpretive Rule" articulating, *inter alia*, that it deemed the prohibition in FIFRA section 12(a)(1)(B)—of "offers for sale" of

registered pesticides if any claims made for it as part thereof substantially differ—"as extending to advertisements in any advertising medium to which pesticide users or the general public have access." Advertising of Unregistered Pesticides, Unregistered Uses of Registered Pesticides and FIFRA section 24(c) Regulations, 54 Fed. Reg. 1122 (Jan. 11, 1989) (codified at 40 C.F.R. § 168.22 ("Final Rule")). Complainant relies on this regulatory provision for its enforcement action here in regard to counts 2,184–2,231. Specifically, Complainant states that the statutorily undefined term "offer for sale" was left open to Agency interpretation, and that "EPA has promulgated a rule interpreting 'offer for sale' in the context of FIFRA section 12(a)(1)(B)" to include advertisements, which is "consistent with FIFRA's remedial nature and its goal of protecting 'consumers from misrepresentations as to pesticides' efficacy, safety, or other qualities.'" C's Post-Hrg. Br. at 19 (quoting *Antkiewicz*, 8 E.A.D. 218, 242 (EAB 1997)). Further, Complainant asserts that 40 C.F.R. § 168.22(a) is unambiguous and that its plain meaning must be given effect. C's Post-Hrg. Br. at 19–20 (citing *Bil-Dry Corp.*, 9 E.A.D. 575, 595 (EAB 2001); *Arecibo & Aguadilla Reg'l Wastewater Treatment Plants*, 12 E.A.D. 97, 130 n.60 (EAB 2005); *Rochester Pub. Utils.*, 11 E.A.D. 593, 603 (EAB 2004)). Its meaning, Complainant suggests in sum, is that almost any pesticide "advertisement" in any medium is an "offer for sale," and that if such advertisement contains substantially different claims than those approved by EPA, those claims have been made "as part of a distribution or sale," in violation of FIFRA section 12(a)(1)(B). *Id.* at 19–22.

Respondent challenges EPA's application and interpretation of section 168.22 in this case on various grounds. At the outset, it asserts that section 168.22 is an "interpretive rule" and, as such, is "non-binding" and "not determinative of issues or rights addressed." R's Post-Hrg. Br. at 31 (citing *Vietnam Veterans of Am. v. Sec'y of the Navy*, 843 F.2d 528, 537 (D.C. Cir. 1988)); R's Reply Br. at 1–3 (citing in support, *inter alia*, *Yale Broad. Co. v. F.C.C.*, 478 F.2d 594, 599 (D.C. Cir. 1973) and *Batterton v. Marshall*, 648 F.2d 694, 702 (D.C. Cir. 1980)). The thinking underlying this claim is that: 1) section 168.22 is found in a part of the C.F.R. entitled "Statement of Enforcement Policies and Interpretations," 2) EPA characterized the section as an "interpretive rule," and 3) the section "does nothing more than offer the Agency's interpretation of the statute." *Id.* at 2–3.

In its reply, Complainant dismisses Respondent's argument, asserting that regardless of the "interpretive" label attached to it, the Final Rule was duly promulgated after notice and public comment and is binding because it sets forth the Agency's interpretation of congressional intent. C's Reply Br. at 1–2 (citing *Metro. Sch. Dist.* [*of Wayne Twp.*] *v. Davila*, 969 F.2d 485, 493 (7th Cir. 1992)); *see also* Pesticide Advertising, 51 Fed Reg. 24,393 (July 3, 1986) (Proposed Interpretive Rule).

While Respondent is correct that the section 168.22 is included in "Part 168" of the regulations, which is entitled "Statement of Enforcement Policies and Interpretations, that fact alone does not reduce its import. First, the process the Agency engaged in to promulgate 40 C.F.R. Part 168.22—a full notice and public comment and formal publication in the Federal Register—belies any purported intent that the Final Rule be merely advisory, particularly

because the pertinent statute, the Administrative Procedure Act, specifically excludes "interpretive rules" from the notice and comment procedures. 5 U.S.C. § 553(b)(3)(A). Indeed, publication of a rule in the Federal Register after notice and comment is one of the hallmarks that separates "interpretive," precatory (non-binding) rules from "substantive," legislative (binding) rules. *Davila*, 969 F.2d at 488–89; *Vietnam Veterans of Am. v. Sec'y of the Navy*, 843 F.2d at 536 (interpretive rules are akin to policy statements and do not require compliance with notice and comment). Tellingly, in all of the cases cited by Respondent, the courts were grappling with directives, memoranda, and letters that had *not* been subjected to notice and comment or published in the Federal Register. *See* R's Post-Hrg. Br. at 31 (citing *Vietnam Veterans*, 843 F.2d at 537); R's Reply Br. at 2 (citing *Davila*, 969 F.2d at 490–93; *Yale Broad. Co. v. F.C.C.*, 478 F.2d at 595–97; *Batterton v. Marshall*, 648 F.2d at 699–700).

Second, it is noted that in the background section set forth in the final published regulation, the Agency expressly stated that the regulation was being placed in a new Part 168, rather than in Part 153 where it was initially proposed to be placed because "Part 153 pertains to general statements of policy and interpretations under FIFRA," and "EPA intends to place enforcement policies in this new Part 168." Advertising of Unregistered Pesticides, Unregistered Uses of Registered Pesticides and FIFRA section 24(c) Regulations, 54 Fed. Reg. 1,122 (Jan. 11, 1989). Thus, the Agency thereby indicated that this section 168.22 was related to enforcement, not a mere general policy statement. In any case, whether the regulation is "binding" is not determinative here.

As a second line of attack against section 168.22, Respondent argues that Complainant's interpretation of the Final Rule here stretches the Agency's authority beyond the limits intended by Congress and beyond the scope contemplated by the regulation itself. R's Post-Hrg. Br. at 34–35. Respondent claims that the proposed regulation expressly acknowledged the Agency's limited authority by stating that the "proposed regulation would address only advertisements that, in EPA's view, make unlawful *offers to sell* . . . ." *Id.* at 35 (quoting CX 84 at EPA 1547) (emphasis added). Respondent also cites in support a 1973 memorandum opinion from the EPA's Office of General Counsel. *Id.* (quoting *Authority to Regulate Advertising of Pesticide Products*, 1 Op. Off. Gen. Counsel 439, 1973 WL 21961, at *1 (1973) ("1973 OGC Memo")).[21] The 1973 OGC Memo states that "EPA's authority to control advertising of pesticide products rests upon a weak (or perhaps non-existent) reed." *Id.* Respondent goes on to further quote the 1973 OGC Memo, which states:

[21] A copy of the 1973 OGC Memo was neither offered nor admitted into the record at hearing. However, a copy of the memorandum can be found in 1 Office of Gen. Counsel, United States Envtl. Protection Agency, *A Collection of Legal Opinions, December 1970–December 1973* 458 (1975), *available at* http://nepis.epa.gov (search for EPA publication number GC7501, and navigate to page 458). EPA did not raise an objection to Respondent's reliance on the Memo in its Post-Hearing Brief, but substantively responded to the arguments based upon it. C's Reply Br. at 2–3. Therefore, to the extent necessary, administrative notice is taken of the OGC Memo.

> Congress, however, used the words "distribution or sale" instead of the word "advertising" in Section 12(a)(1)(B). Section 12(a)(2)(E) provides that it is unlawful for any person . . . to *advertise* a pesticide product registered for restricted use without giving its classification. The negative implication of the use of the word "advertise" in one section and not in the other perhaps indicates that the words of art "distribution or sale" should be read more narrowly than advertising in general.

Id. at 36 (quoting 1973 OGC Memo, 1973 WL 21961, at *2). Respondent asserts that the Final Rule was the only FIFRA regulation related to advertising that was promulgated after the 1973 OGC Memo. *Id.* Respondent argues that, by issuing the Final Rule, EPA did not seek Congressional authority to clarify the Agency's jurisdiction over advertising and Complainant cannot now "radically" stretch the scope of 40 C.F.R. Part 168.22. *Id.*

Complainant, of course, disagrees, claiming instead that the regulatory history of section 168.22 "sheds additional light" when comparing the proposed version of the rule to its final version. C's Post-Hrg. Br. at 20 (citing CX 84 at EPA 1548). Complainant quotes the proposed interpretive rule:

> EPA interprets these provisions as making [sic] unlawful for any person who sells, holds for sale, or distributes any pesticide to place or sponsor *certain kinds* of advertisements in any advertising medium to which pesticide users or the general public have access.
>
> (b) *The kinds of advertisements* that EPA regards as unlawful under this interpretation are those which recommend or suggest the purchase of [five listed pesticides or pesticide registrations] . . . .

Pesticide Advertising, 51 Fed. Reg. 24,393, 24,395–96 (July 3, 1986); CX 84 at EPA 1548 (emphasis added). Complainant notes that, by contrast, the *final* language used in 40 C.F.R. Part 168.22(a) is not limited to "certain kinds of advertisements" and paragraph (b) does not use the phrase "kinds of advertisements" to refer back to paragraph (a). C's Post-Hrg. Br. at 20–21. Therefore, Complainant concludes that the "transformation" of Part 168.22(a) is "compelling and demonstrates that the Agency intended it to apply in proceedings such as this." *Id.* at 21.

However, it is observed that even in the Federal Register Notice for the Final Rule, the Agency made a distinction between advertisements generally and advertisements that contain offers for sale, noting:

> EPA believes that claims made in the *kinds of advertising* covered by this interpretative rule are "*part of [the] distribution or sale*" of the pesticide to which the advertising relates. The rule limits its

> coverage to advertisements that (1) are placed by persons who are in the pesticide business *and* (2) recommend or suggest the purchase of pesticides for certain purposes. FIFRA does not grant EPA plenary authority to regulate advertising as such, and *it is arguable that there can be advertising that is separate from and not a part of the distribution of [sic] sale of a pesticide* . . . . In this rule, EPA is not seeking to define the outer reaches of its FIFRA jurisdiction over advertising claims, but merely to state clearly its position with regard to claims in advertising that are made "to induce the * * * sale and use" of a pesticide and that therefore *are a part of the distribution or sale of the pesticide*.

Advertising of Unregistered Pesticides, Unregistered Uses of Registered Pesticides and FIFRA section 24(c) Regulations, 54 Fed. Reg. at 1,124 (emphasis added) (internal citations omitted); *accord* Restatement (Second) of Contracts § 26e cmt. b (1981) (advertisements of goods are not ordinarily intended or understood as offers to sell).

Further, the language employed by the Agency in paragraph (a) of the Final Rule is telling. *See supra* pp. 9–10 (full text of the Final Rule). After restating the prohibitions established by FIFRA sections 12(a)(1)(A) and 12(a)(1)(B), the Agency stated that it "interprets these provisions as *extending to* advertisements in any advertising medium to which pesticide users or the general public have access." 40 C.F.R. § 168.22(a) (emphasis added). Contrary to Complainant's assertion that the Final Rule "defined" advertisement *as* an offer for sale, the plain language of the regulation indicates the Agency's was merely interpreting its jurisdictional *reach* into the category of advertising. The phrase "extending to" suggests that the Agency viewed advertisement as a possible medium in which offers for sale might occur, thereby allowing the EPA to regulate certain (but not all) advertisements. Moreover, the Final Rule did not establish a definition of "offer for sale." The plural phrase "these provisions" refers not to the single term "offer for sale" but to two different sections of FIFRA, much broader statutory clauses in which the term "offer for sale" is not found. Had the Final Rule offered an interpretation of a definitional provision, Complainant's argument might be more persuasive. Regardless of the precise statutory sections identified in paragraph (a), however, the language of the Final Rule does not create a new definition of "offer for sale" that includes advertisements *per se*. Instead, it is clear that the Agency was merely clarifying that offers for sale of pesticides that occur in advertisements are fair game for regulation by it under FIFRA, a conclusion that this decision does not disturb. The 1973 OGC Memo, while not a standalone basis for reaching this conclusion, supports the notion that EPA's authority to regulate advertising is not plenary, but rather must be predicated on liability for one of the actions listed in, *inter alia*, FIFRA section 12(a).

With respect to Complainant's argument that the changes between the proposed and Final Rule indicate an effort by the Agency to reach *all* advertisements, it is important to note that the changes were not expansive in nature but instead reassigned the restriction from the type of

advertisement to the type of pesticide or pesticide registration. *See* 40 C.F.R. § 168.22(b) (identifying the five "kinds of advertisements covered by this interpretive rule" based on the registration status of the advertised pesticide or use). The Agency's evident drafting decision does not expand the scope of the Final Rule as Complainant argues. Indeed, the proposed rule clearly separates the unlawful triggering activity ("any person who sells, holds for sale, or distributes any pesticide") from the issue of advertising. Pesticide Advertising, 51 Fed. Reg. at 24395–96; CX 84 at EPA 1548.

Complainant also cites in support for its expansive reading of 40 C.F.R. Part 168.22, a footnote in the *Microban II* decision that, Complainant argues, specifically referred to 40 C.F.R. Part 168.22(a) and rejected that respondent's argument on the scope of EPA's authority to regulate advertising. C's Post-Hrg. Br. at 20 (citing *Microban Prod. Co. ("Microban II")*, 11 E.A.D. 425, 444 n. 26 (EAB 2004)). Respondent distinguishes *Microban II*, and argues that the EAB's footnote therein bore no applicability to the facts of that case and "was not necessary to support its decision." R's Post-Hrg. Br. at 37–38.

The relevant portion of the EAB's decision in *Microban II* focused on the respondent's argument that "when there is a sale and later shipments made pursuant to that sale, unless the unapproved claims are *attached* to the subsequent shipments, there can only be one violation of FIFRA—for the sale." *Microban II*, 11 E.A.D. at 444. Footnote 26 follows and discusses the assertion in the 1973 OGC Memo that unapproved claims must accompany a sale or distribution in order to support an independent violation of FIFRA section 12(a)(1)(B). The EAB found that the respondent misread the 1973 OGC Memo, which "was focused on EPA's authority to regulate the advertisement of pesticide products in light of the Federal Trade Commission's ('FTC') general advertising authority." *Id.* at 444 n.26. In *Microban II*, the EAB was addressing the physical proximity between the literature containing the "unapproved claims" (the advertisement) and *the shipment* of the pesticide necessary to establish whether unapproved claims were made "as a part of" a distribution or sale. The interpretation of 40 C.F.R. Part 168.22 in this case does not concern physical proximity of advertising material to the shipment of a pesticide, but is instead focused on the definition of "offer for sale." Thus, the EAB's holding in *Microban II* is not conclusive in the present inquiry.

In support of its reading of 40 C.F.R. § 168.22, Complainant also cites an unpublished Ninth Circuit decision involving an interpretation of "offer for sale" under the Endangered Species Act ("ESA") regulations. C's Post-Hrg Br. at 21 (citing *United States v. Snapp*, 423 Fed. Appx. 706 (9th Cir. 2011)). In that decision, the Ninth Circuit observed that the ESA regulations "assum[e] that most advertisements are 'offers for sale' under the Act." *Snapp*, 423 Fed. Appx. at 707 (citing 50 C.F.R. § 17.21(f)(2)). The court also relied on congressional intent that the ESA "sweep broadly in eliminating the extinction of endangered species." *Id.* at 707–08 (citations omitted). Complainant urges that a similar conclusion here would be consistent with FIFRA's goal of "protecting 'consumers from misrepresentations'" of pesticide efficacy and safety. C's Post-Hrg. Br. at 22 (quoting *Roger Antkiewicz & Pest Elimination Prods. of Am., Inc.*, 8 E.A.D. 218, 242 (EAB 1999)).

The persuasive force of the *Snapp* decision is suspect. The court's opinion, a mere five paragraphs, is an unpublished decision affirming a criminal conviction under the ESA. The only issue on appeal was whether the trial court abused its discretion by not instructing the jury that "offer for sale" was defined by the Restatement (Second) of Contracts. The court concluded that any error would have been harmless since the evidence supported conviction even under the defendant's proposed (and rejected) jury instructions. *Snapp*, 423 Fed. Appx. at 708. Furthermore, although the ESA and FIFRA are both remedial statutes intended to prevent harm to the environment, FIFRA was not intended to sweep as broadly as the ESA, a statute that the United States Supreme Court has described as "broad sweep[ing]" and "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180, 188 (1978). Moreover, the *Snapp* court did not hold that the term "offer for sale" means "advertisement." Rather, it observed that the ESA regulations themselves assumed that *most* advertisements are offers for sale. *Snapp*, 423 Fed. Appx. at 707.

Even if the *Snapp* court's opinion were not so limited in applicability, it would not be dispositive in this case. In order to reach Complainant's conclusion, the undersigned would have to assign an identical definition to the terms "offer for sale" and "advertisement." The merging of these definitions runs counter to the canons of statutory construction and is inconsistent with how other statutes and regulations treat these two concepts. Statutes and regulations routinely treat offers for sale as a subset of the larger concept of advertising. *See, e.g.*, 39 U.S.C. § 3008(a) (prohibiting "pandering advertisement which offers for sale" certain offensive material); 7 U.S.C. § 1575 (distinguishing between the act of advertising and the acts of transporting, selling, or offering for sale the product to which the advertisement relates); 16 C.F.R. § 238.1 ("No advertisement containing an offer to sell a product should be published when the offer is not a bona fide effort to sell the advertised product"). Moreover, statutes and regulations often list separately the terms "sell," "offer to sell," and "advertise," which conflicts with the assertion that there is no meaningful distinction among those terms. *See, e.g.*, 7 U.S.C. § 1611 (making it unlawful "to sell or offer for sale or advertise" certain uncertified seed); 15 U.S.C. § 45a (requiring any person who "sells, advertises, or offers for sale" products marked "Made in the U.S.A." to be consistent with Federal Trade Commission orders); 40 C.F.R. § 60.538(c) ("no commercial owner shall advertise for sale, offer for sale, or sell an affected facility . . ."); 7 C.F.R. § 3560.659(b)(1) ("The borrower must advertise and offer to sell the project . . ."). The repeated listing of each of these terms separately comports with the testimony by Ms. Niess, cited by Respondent in its Post-Hearing Brief, in response to questions by the undersigned. R's Post-Hrg. Br. at 32 (quoting Niess Tr. at 239:16—19) ("The Court: Okay, now, you would agree with me that an offer to sell would be a subset of advertising in general? The Witness: Yes.")

Additionally, it is noted that the FTC, the agency with overlapping jurisdiction to regulate pesticide advertisements, recognizes a distinction between the concepts of advertising and offers for sale. *See, e.g., Del Pharms., Inc. & Del Labs., Inc.*, File No. 972-3084, 1998 FTC LEXIS 105, at *14–15 (F.T.C., Sept. 18, 1998) (prohibiting respondents from taking certain actions "in

connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution" of an FDA-regulated pesticide); *Global Instruments Ltd. & Charles Patterson*, 136 F.T.C. 564, 608 (2003) (same with respect to electromagnetic pest-control products); *Pure Bamboo, LLC, and Bruce Dear*, Docket No. C-4274, 2009 FTC LEXIS 231, at *7 (F.T.C., Dec. 15, 2009) (same with respect to textile products). In discussing cases that deal with illegal "bait and switch" practices, the FTC has explained the evidentiary differences between proof of advertising that is a bona fide offer for sale and advertising that is not an offer for sale. *Household Sewing Mach. Co., Inc., et al.*, 76 F.T.C. 207, 1969 WL 101379, at *13 (Aug. 6, 1969) (quoting *Clarence Soles, d/b/a Midwest Sewing Ctr.*, 66 F.T.C. 1234, 1249-50 (Dec. 3, 1964) (noting that in past bait and switch cases, the FTC has "always found that the advertisement in question did not present a bona fide offer of sale of the product therein described").

Finally, the very language of the regulations at issue in *Snapp* differentiates between advertisements and offers for sale. 50 C.F.R. § 17.21(f)(2) ("An advertisement for the sale of endangered wildlife which [carries a particular warning] shall not be considered an offer for sale within the meaning of this section."). As such, Complainant's argument for reliance on *Snapp* is not persuasive.

Complainant asserts that a "narrower interpretation of 40 C.F.R. § 168.22(a) would create a large loophole in FIFRA's 'comprehensive regulatory scheme.'" C's Post-Hrg. Br. at 22 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984)). Specifically, Complainant notes that FIFRA section 12(a)(2)(E) explicitly requires advertisers of restricted use pesticides to indicate the classification or the terms of restriction in the advertisement:

> If Congress intended FIFRA § 12(a)(2)(E) to be the only provision in FIFRA § 12 to address advertising, it would send a conflicting message to the regulated community: FIFRA § 12 would make it illegal to advertise a restricted use pesticide without disclosing that it is a restricted use pesticide or its terms of restriction, but it would impose no sanction for advertising a pesticide using claims that substantially differed from "any claims made for it as part of the statement required in connection with its registration."

Id. at 22 (quoting 7 U.S.C. § 136j(a)(1)(B)). Congress, Complainant concludes, could not have intended such a result. *Id.*

In response, Respondent argues that "Congress's use of the word advertising in one other section of FIFRA [§ 12(a)(2)(E)] but omission of the word 'advertising' from the definition of 'to sell or distribute' suggests that Congress did not intend for EPA's authority to extend to all advertising." R's Post-Hrg. Br. at 32–33. This argument essentially mimics the arguments EPA's own OGC made in its opinion many years ago.

While acknowledging FIFRA's "comprehensive regulatory scheme," Complainant's preceding description of a potential loophole is found unpersuasive. First, the requirement in FIFRA section 12(a)(2)(E) to identify in an advertisement whether a pesticide is an RUP is not found in a provision governing the affirmative claims that can be made about a product. Instead, it imposes a duty to inform consumers of a regulatory category assigned to the product by the EPA, a category which limits its lawful purchasers. By contrast, FIFRA section 12(a)(1)(B) is violated only when the manufacturer or distributor makes *claims* about the product that substantially differ from the statement of claims required under FIFRA section 3. Second, Respondent does not argue that FIFRA section 12(a)(1)(B) does not apply to certain advertisements based on the claims made therein, but merely that the advertisement itself cannot, without more, be the "offer for sale" that establishes liability. *Id.* This point is underscored by the structure of section 12(a)(1)(B) itself, which makes it unlawful to distribute or sell any pesticide "if any claims made for it *as part of* its distribution or sale substantially differ from any claims made for it as part of the [registration statement]." 7 U.S.C. § 136j(a)(1)(B) (emphasis added).

In this case and in the theory presented by Complainant, the claims about the product are made in advertisements, such that the advertisements themselves are claims. If *any* advertisement alone could be treated as an offer for sale, then the phrase "as part of" would be rendered superfluous.[22] Such an outcome goes against the principles of statutory construction. *District of Columbia v. Potomac Elec. Power Co.*, 826 F. Supp. 2d 227, 235–36 (D.D.C. 2011) (citing *Nat'l Ass'n of Mortg. Brokers v. Bd. Of Govs. Of Fed. Reserve Sys.*, 773 F. Supp. 2d 151, 168 (D.D.C. 2011) (quoting *TRW, Inc. v. Andrews*, 534 U.S. 19, 21 (2001)). Instead, all the forgoing suggests that there must be some distinction observed between an advertisement and an advertisement containing an offer for sale as that term is used in FIFRA.

It is instructive, in this instance, to consider the prior version of the Final Rule, promulgated by the U.S. Department of Agriculture ("USDA"). In 1960, the USDA, then the federal agency charged with administering FIFRA, issued the following rule:

> (a) *Requirement of the act.* Section 3(a) of the act *prohibits shipment or distribution* of a[] [pesticide] *if* any of the claims made for it or any of the directions for its use differ in substance from the representations made in connection with its registration. It has been held that this includes any representations made by the manufacturer or registrant anywhere and by any means including periodical and radio advertising . . . .

[22] The EAB has held that the "as a part of" language in FIFRA § 12(a)(1)(B) "requires that a nexus exist between the unapproved claims and the distribution or sale of the pesticide." Microban Prod. Co. ("Microban I"), 9 E.A.D. 674, 688 (EAB 2001).

* * *

> (c) *Co-operation with Federal Trade Commission.* Advertising in periodicals or over the radio is also subject to the laws enforced by the [FTC]. It will be the policy to cooperate with the [FTC] to insure that [FIFRA] will be administered in a manner to result in reducing to the absolute minimum any possibility of conflict with, or overlapping of the administration of acts administered by the [FTC] . . . . In the application of the above policy it is to be understood, however that both agencies reserve the right to the full use of their respective powers when such use is necessary to protect the public interest.

7 C.F.R. § 362.107(a), (c) (1960) ("1960 Rule") (emphasis added). The 1960 Rule and EPA's Final Rule have substantially similar meanings, with the exception that the 1960 Rule specifically mentioned "periodical and radio advertising" and EPA's Final Rule "extend[s] to advertisements in any advertising medium . . . ." *Compare* 40 C.F.R. § 168.22(a), *with* 7 C.F.R. § 362.107(a), (c) (1960). Much of the text in the 1960 Rule is concerned with USDA's overlapping jurisdiction with FTC, but the first two sentences of the regulation are informative. Instead of expanding the definition of "offer for sale," the 1960 Rule addresses only the connection between inconsistent claims and their appearance in an advertising medium, leaving untouched the need for proof of an underlying "distribution or sale" that is separate from the advertising claims themselves. The Final Rule, issued 30 years later by EPA, does not change this proposition and Congress has taken no action to correct it. *See Black Citizens for a Fair Media v. F.C.C.*, 719 F.2d 407, 426 n.10 (D.C. Cir. 1983) (citing *Haig v. Agee*, 453 U.S. 280, 300 (1981); *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 381–382 (1969); *Zemel v. Rusk*, 381 U.S. 1, 11–12 (1965)).

For all these reasons, Complainant's contention that 40 C.F.R. § 168.22 requires "advertisement" and "offer for sale" to be read synonymously is rejected. Rather, 40 C.F.R. § 168.22 gives the Agency authority to consider unlawful "offers for sale" that are made through the medium of advertisement containing claims that substantially differ from claims made as part of registration under FIFRA section 3. Because the language of 40 C.F.R. § 168.22 does not resolve the question of whether the advertisements at issue in Counts 2,184–2,231 were offers for sale, it is necessary to develop a definition of "offer for sale" that comports with the statutory language of FIFRA and relevant case law.

B. Defining an Advertisement that constitutes an "Offer for Sale"

1. Whether *Tifa* applies in this case

In its Post-Hearing Brief, Complainant preemptively addresses Respondent's contention that the EAB's decision in *Tifa, Ltd.* ("*Tifa*"), 9 E.A.D. 145 (EAB 2000), sets forth the

controlling definition of "offer for sale" under FIFRA. C's Post-Hrg. Br. at 22–23. First, Complainant asserts that the EAB's examination of the definition of "offer for sale" was independent of the central issue in the case, i.e. whether the respondent had properly requested a hearing after receiving a suspension order. *Id.* Complainant goes on to argue that the precedential value of *Tifa* is limited for several reasons. First, because the parties in *Tifa* did not cite any relevant cases and the EAB did not have before it any illuminating legislative history. *Id.* at 23 (citing *Tifa*, 9 E.A.D. at 158–59). Second, because the EAB erroneously concluded that "[n]either FIFRA nor the underlying regulations define 'offer for sale'" despite the existence of 40 C.F.R. § 168.22. *Id.* (quoting *Tifa*, 9 E.A.D. at [158][23]).

Complainant argues that the EAB's holding in *Tifa* should not provide guidance as to the definition of "offer for sale" because the EAB stated that its decision was based solely on the authorities cited by the parties and "presumably [the EAB did not address the Final Rule] because the parties never brought the regulation to the Board's attention." *Id.* As a result, Complainant argues that *Tifa* should be limited to the specific facts presented in that case. *Id.* Complainant points to *Microban II* and *Sporicidin Int'l*, 3 E.A.D. 589, 605 (CJO, June 4, 1991), to support the proposition that advertising is an extension of distribution. C's Post-Hrg. Br. at 23–24.

Respondent rejects the Complainant's argument that the Final Rule displaces the holding in *Tifa*, asserting that it is Complainant's own misinterpretation of the Final Rule that leads to the improper rejection of the EAB's holding in *Tifa*. R's Post-Hrg Br. at 32–33. Respondent surmises in a footnote that because *Tifa* "did not involve the offer for sale of a pesticide that fell within one of the five categories of products or situations described in [the Final Rule,] it was not applicable to the facts of that case" and, therefore, the EAB did not consider the Final Rule in its analysis. *Id.* at 33 n.8.

On the issue of whether *Tifa* should be considered in determining whether an "offer for sale" has occurred under FIFRA, Respondent's argument is persuasive. Complainant's presumption that the EAB accidentally overlooked the Final Rule strains credulity. The *Sporicidin* decision, which Complainant cites to in its own brief, and citations to the Final Rule therein, demonstrates that the Chief Judicial Officer (the precursor to the EAB) was aware of the Final Rule as early as 1991. Respondent's position that the EAB simply deemed the Final Rule to be irrelevant in defining "offer for sale" has the twin benefits of being more consistent with the EAB's known body of legal research and the analysis of the regulation set forth in this decision. As a result, I decline to attribute the EAB's silence on the Final Rule in its *Tifa* analysis to ignorance. Instead, the *Tifa* analysis will be considered in determining whether the actions alleged in Counts 2,184–2,231 are properly characterized as "offers for sale" under FIFRA.

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[23] Complainant has included the wrong pinpoint citation for this particular point. The correct citation is included here in brackets.

2. Applying *Tifa*

In *Tifa*, the EAB determined, as a matter of first impression, whether the record evidence before it established an "offer for sale" under FIFRA. *Tifa*, 9 E.A.D. at 157. Finding no cases on point, no relevant regulatory guidance, or any helpful legislative history, the EAB turned for aid to general principles of contract law. *Id.* at 158–59.[24] As a general proposition, the EAB observed, "The determination of whether a given communication by one party to another is an operative offer, and not merely a step in the preliminary negotiations, is a matter of interpretation in light of all the surrounding circumstances." *Tifa*, 9 E.A.D. at 159 (citing 1 *Corbin, Contracts* § 2.2 (ed. rev. 1993)). The EAB further noted that "'an offer must be definite and certain, and must be made under circumstances evidencing the express or implied intent of the offeror that its acceptance shall constitute a binding contract.'" *Id.* (quoting *Maurice Elect. Supply Co., Inc. v. Anderson Safeway Guard Rail Corp.*, 632 F. Supp. 1082, 1087 (D.D.C. 1986)) (citations omitted). Key to the EAB's decision in *Tifa* was the generally accepted principle that a mere quotation of prices is not an offer because it "leaves unexpressed many terms that are necessary to the making of a contract." *Id.* (citing 1 *Corbin, Contracts* § 2.5 (ed. rev. 1993)); *see also White Consol. Indus., Inc., v. McGill Mfg. Co. Inc.*, 165 F.3d 1185, 1190 (8th Cir. 1999) ("Typically, a price quotation is considered an invitation for an offer, rather than an offer to form a binding contract."). Nevertheless, the EAB stated that a price quotation can sometimes constitute an offer to sell, referring to the *White Consolidated* decision where the Eighth Circuit found a valid offer in a price quotation that was "sufficiently detailed and explicitly provided that its offer was subject to immediate acceptance by the buyer." *Tifa*, 9 E.A.D. at 159 (citing *White Consol. Indus., Inc.*, 165 F.3d at 1190).

In *Tifa*, the respondent had stipulated for two counts that it had offered to sell pesticides to state agencies in Wisconsin and Iowa. *Id.* at 157. But for a third count regarding alleged offers for sale to a state agency in Missouri, the "only evidence offered by [the Agency] to support" finding an offer for sale, was a facsimile from the respondent's employee to an employee at the Missouri agency. *Id.* at 158. The facsimile contained the following statements: "Reference your telephone inquiry of yesterday afternoon regarding Rotenone. We are pleased to confirm our prices as follows," and that, "Prices are all delivered Missouri. Material in stock available prompt shipment." *Id.* (internal citations omitted). Finding nothing to suggest that

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[24] Many courts have relied on general contract law (including the Restatement of Contracts) and the Uniform Commercial Code ("UCC") to define the ordinary commercial meaning of terms used by market participants. *See, e.g., Mobil Oil Exp. & Producing Se. v. United States*, 530 U.S. 604, 607–08 (2000) (citing the Restatement of Contracts with approval and applying the general principles therein); *Group One, Ltd. v. Hallmark Cards, Inc.*, 254 F.3d 1041, 1047–48 (Fed. Cir. 2001) (looking to the UCC to determine whether communications rise to the level of a commercial offer for sale); *Enercon GmbH v. ITC*, 151 F.3d 1376, 1382 (Fed. Cir. 1998) (recognizing the UCC as a useful source in determining the ordinary commercial meaning of the term "sale"). *But cf. Poehl v. Countrywide Home Loans, Inc.*, 528 F.3d 1093, 1097 (8th Cir. 2008) (ignoring common law commercial definitions when the operative term is defined in the statute).

"assent to the price quote was all that was needed for the offer to evolve into a contract," the EAB concluded that the terms of the price quote were insufficiently definite and explicit to constitute an offer to sell. *Id.* at 160; *accord Day v. Amax, Inc.*, 701 F.2d 1258, 1263 (8th Cir. 1983); *Interstate Indus., Inc. v. Barclay Indus., Inc.*, 540 F.2d 868, 870–71 (7th Cir. 1976). Even where other courts have regarded a price quotation as an offer to sell, the emphasis has been on the presence of the price at which the described product can be purchased. *See, e.g., 3D Sys. v. Aarotech Labs., Inc.*, 160 F.3d 1373, 1379 (Fed. Cir. 1998) (patent law decision finding an offer to sell under a broad statutory definition where the letter conveyed the price and product description).

At hearing, in order to demonstrate that during the relevant period (November 18, 2009 and February 23, 2010), the Respondent's website included an offer to sell Rozol as alleged in Counts 2,184–2,231, Complainant offered at hearing hard-copy print-outs of documents Ms. Niess found on Respondent's website and her testimony in regard thereto. Those documents included the following:

1. Product Information pages for Rozol PD, Rozol, and Rozol BB (available using the following URLs):

    a. http://liphatech.com/Products/US/Rozol/prairieDogBait.html (corresponding to Rozol PD, 7173-286);

    b. http://liphatech.com/Products/US/Rozol/pocketGopherBait.html (corresponding to Rozol Pocket Gopher Bait, 7173-184); and

    c. http://liphatech.com/Products/US/Rozol/pocketGouperBaitBurrowBuilderFormula.html [sic] (corresponding to Rozol BB, 7173-244).

2. An Article entitled "*Understanding the True Cost of Treatment: Proper Prairie Dog Management Saves Time and Money*" by Ted Bruesch, National Technical Support Manager, Liphatech Inc., available in Portable Document Format at http://www.liphatech.com/literatureAgFieldOrchardUS.html, under the hyperlink titled "Rozol Black-Tailed Prairie Dog Whitepaper."

3. A Brochure entitled "*Control Range Rodents*," available in Portable Document Format at http://www.liphatech.com/literatureAgFieldOrchardUS.html, under the hyperlink titled "Rozol Pocket Gopher/Black-Tailed Prairie Dog Control Brochure."

CX 31 (documents printed from Respondent's website by Niess on February 23, 2010). *See also* CX 28–30 (substantially similar versions of the documents in CX 31 printed from Respondent's website on November 18, 2009, February 10, 2010, February 19, 2010, respectively); CX 52.[25]

[25] Unlike CX 28–31, which feature descriptive notes-to-file written by Ms. Niess explaining her actions and the contents of the exhibit, CX 52 lacks any explanatory material. Complainant referred to CX 52 only tangentially
(Footnote continued on next page.)

The three Product Information pages follow a similar format. The product is identified (using the official product name, a photograph of the packaging and bait granules and the specific product numbers). CX 31 at EPA 574 (Rozol PD); *id.* at EPA 593 (Rozol); *id.* at EPA 596 (Rozol BB). The Rozol PD page then features a large-print text box identifying the product as a Restricted Use Pesticide. *Id.* at EPA 574. Rozol BB is identified as an RUP within the general description text. *Id.* at EPA 596. All three product pages then feature a bullet list of each product's benefits, such as "Proven Single Application Effectiveness," "Outstanding Control," and "Value Price." *Id.* at EPA 574, 593, 596. Pages for Rozol and Rozol BB then offer "Helpful Application Tips & Tools," featuring illustrations and instructions. *Id.* at EPA 593–94, 596–97. Both pages end with the EPA Registration Number and a list of states for which use has been approved or not approved. *Id.* at EPA 594, 597. The Rozol PD page offers a list of "Steps to a Successful Black-tailed Prairie Dog Management Program" ("treat every active burrow," "discuss treatment practices with neighboring landowners," "think like a 'hunter'"). *Id.* at EPA 575. The Rozol PD page then ends with the RUP terms of restriction for use and a note about risks to endangered species, specifically the black-footed ferret. *Id.*

The Article entitled "*Understanding the True Cost of Treatment*" appears in the record as a photocopy of a six-page narrative comparing Rozol to other chemical and non-chemical alternatives to prairie dog management and touting the efficacy of Rozol. *Id.* at EPA 576–81. The final page of the document offers Respondent's corporate mission and a statement of its corporate commitment to good land stewardship and species conservation. *Id.* at EPA 581. The document ends with a large-print text box identifying the product as an RUP, a list of states in which it has been approved for use by state-certified applicators, corporate contact information, and footnote references to field studies. *Id.*

The Brochure entitled "*Control Range Rodents*" appears in the record as a photocopy of an 11-page informational brochure featuring a lengthy comparison of Rozol products with other prairie dog and pocket gopher baits. *Id.* at EPA 582–92. The brochure sets forth bulleted lists of various prairie dog and pocket gopher impacts, a table comparing Rozol's active ingredient with zinc phosphide and strychnine, tabular and graphical toxicity data attributed to the EPA, instructions for use, and the different package sizes available from Respondent. *Id.* at EPA 583–91. The final page includes the corporate mission and stewardship commitment, along with general corporate contact information. *Id.* at EPA 592.

In addition to these exhibits, Complainant offered CX 143, which appears to be 125 pages of hard-copy print-outs from various areas of Respondent's website (and may in fact constitute all printable pages from the website). *See* Niess Tr. at 88:8–90:6 (describing the structure of www.liphatech.com). Ms. Niess testified that she visited and printed these webpages

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when comparing the content to CX 152, an exhibit that was not admitted into evidence, and then only in the context of penalty calculations. Niess Tr. at 130:14–131:55; Schmit Tr. at 315:9–319:3.

in July 2011. *Id.* at 88:4–89:20. Few of the pages in CX 143 are relevant to this proceeding as they cover a broad range of products, pests, press releases, educational materials, and corporate contacts. CX 143 at 3352–3477. Assuming that no substantial changes were made to the website between the alleged period of violation (November 18, 2009 through February 23, 2010) and July 2011, there are some pages that may be relevant to determining whether the website made offers for sale. CX 143 features one page that appears to be a website information request submission form through which interested netizens can request specific information by clicking the appropriate checkbox next to their target subject matter. CX 143 at EPA 3471 (displaying the choices "Pest Management Information," "Ag/Field & Orchard Information," "Animal Health Information," "Slug & Snail Information," and "Send Me Email Updates/Newsletter"). In addition, sections titled "Ag/Animal Health," "Pest Management," and "Slug & Snail" each have their own "Contact Us - Sales" pages that correlate company sales managers (including the name, title, phone number, and email of each such manager) with specific geographic regions. *Id.* at EPA 3472–76. This comports with the parties' Joint Stipulations. *See* Jt. Stips. at 13 (referring to Respondent's previous admission that its website "advertised its pesticide products to the public" and "included a list of sales managers throughout the country with each manager's corresponding contact information").

Complainant offered substantial testimony through Ms. Niess describing the claims made on the website, the concerns the Agency had with the substance of those claims, and the conversations Ms. Niess and Mr. Schmit had with respect to their propriety. Niess Tr. at 68:18–69:22; 71:9–78:10. Ms. Niess also described the structure of the liphatech.com website and how she navigated through it. *Id.* at 87:20–90:6. Complainant offered no additional factual testimony or documentary evidence to support the proposition that the materials on Respondent's website constituted offers for sale because Complainant maintained that advertisements are, categorically, "offers for sale" under FIFRA. C's Post-Hrg. Br. at 24–27; *see* Niess Tr. at 154:18–155:4 (testifying that the Agency "found evidence of additional counts between November 18, 2009, and February 23, 2010" based on the website materials); *id.* at 170:5–12,171:17–172:13 (testifying that Counts 2,184–2,231 are not based on allegations of "actual sales or distributions," but rather on offers to sell found on Respondent's website); R's Reply Br. at 8 ("Complainant did not rebut the fact that Respondent's website is completely passive, that Rozol cannot be purchased on the website, that the website did not contain product pricing information, that the website did not contain any other relevant terms of sale . . . .").

The record clearly reflects that Respondent's website contained substantial information about its various products, the pests they are designed to eliminate, and the company employees with whom potential customers could make contact. In addition, much of the product-specific information presented on the website could properly be characterized as advertisements. *See* CX 31; *see also* Jt. Stips at 13–14. Complainant argues that under the Final Rule, 40 C.F.R. Part 168.22, this advertising constitutes an "offer for sale" and that "a contractual offer is not needed." C's Post-Hrg. Br. at 24. Having already rejected Complainant's interpretation of the Final Rule, I consider whether the website in question rises to the level of an "offer for sale" as that term was defined by the EAB in *Tifa*.

In *Tifa*, the determination of whether the respondent had engaged in activity rising to the level of an "offer for sale" turned on the precise information communicated to the potential buyer as well as the certainty of the terms conveyed. Regardless of whether a price quotation is a sufficient condition for finding an "offer for sale," the EAB's reasoning implies that it is certainly a necessary condition. *Tifa*, 9 E.A.D. at 159. Here, there is no evidence that product prices were ever conveyed through Respondent's website. Without that critical piece of information, it seems unlikely that any statement on the website could be sufficiently "definite and certain" that Respondent's potential customers could simply "accept" the offer. *Id.* (quoting *Maurice Elec. Supply Co.*, 632 F. Supp. at 1087). This is true, in part, because of the website structure and functionality that Respondent employs. The record evidence strongly indicates that Respondent's website is a "passive" one, containing static information that allows visitors to view the available products, but not to purchase them. CX 28–31, 52, and 143.

Complainant argues in its Post-Hearing Brief that "Rozol sat on a 'virtual shelf' for the taking—a simple phone call from a distributor or prospective customer to one of Respondent's sale [sic] managers, whose email addressed [sic] and mobile phone numbers were listed on several documents, could have been made to initiate the purchase of the product." C's Post-Hrg. Br. at 24 (citations omitted). The formulation of Complainant's argument, however, belies its conclusion. Unlike common, interactive web-commerce sites, such as Amazon.com, where priced products can be taken off the "virtual shelf," added to a virtual cart, purchased, and shipped to the buyer without any negotiation or resort to further contacting the seller, Respondent's website is a prime example of a passive website. Respondent's website contains no prices, has no e-commerce functionality, and cannot consummate a sale through its static pages. *See* CX 31; CX 143. This website design strongly indicates that Respondent did not intend the material on its website to be an "offer for sale." *See* Restatement (Second) of Contracts § 33(3) (1981) ("The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer . . . ."); *see also Canadian Nat'l. Ry. Co. v. George M. Jones Co.*, 27 F.2d 240, 242 (6th Cir. 1928) (inclusion of price term generally necessary for enforceable contract formation); *Hutner v. Greene*, 734 F.2d 896, 900 (2d Cir. 1984) (contracts normally unenforceable where lacking price term); *Pharr v. Olin Corp.*, 715 F. Supp. 1569, 1574 (N.D. Ga. 1989) (contracts lacking an agreement on price enforceable only where industry custom or other extrinsic arrangements readily supply a reasonable price).

Contrary to Complainant's contention, there was no "virtual shelf" from which Rozol could be taken. Indeed, the practical reality of the situation forces Complainant to use the awkward language "a simple phone call from a . . . *prospective* customer . . . could have been made *to initiate the purchase* of the product." C's Post-Hrg. Br. at 24 (emphasis added). It is a fundamental concept of contract law that the initiation of the sale or purchase of a product is consistently the act of an offeror, not the method by which a prospective customer *accepts an offer* to consummate the agreement. *See* Restatement (Second) of Contracts § 2 (1981) (the party manifesting the intention to act is the offeror and the person to whom it is addressed is the

offeree); 1-3 Corbin on Contracts § 3.2 (Matthew Bender & Co. ed., 2013) (explaining that only the offeree has the power to accept an offer); *Beaumont v. Prieto*, 249 U.S. 554, 556 (1919) (counteroffer by the offeree terminates the power of acceptance). Based on the evidence in the record, I find that the Respondent's website, www.liphatech.com, did not have the requisite content nor the necessary functionality to convert any of its informational advertisements into an "offer to sell" Rozol or any other product.

In regard to the allegations of offers for sale occurring via direct mail, Complainant relies upon a document found by Ms. Niess on Respondent's website on February 25, 2010, specifically a November 2009 letter from Respondent's district managers to "cattlemen, landowners, and farmers" that referenced an enclosed brochure entitled "Control Range Rodents" similar to the Slim Jim. Neiss Tr. at 77:10–19, 97:9–98:17. The letter, Ms. Niess testified, was similar to the cover letter to the direct mail packages that Respondent sent in November 2007. Tr. Neiss 77:15–19. Complainant further references in its Post-Hearing Brief, letters sent by Respondent on or around March 9, 2010 requesting that the 48 distributors destroy earlier Rozol advertisements. C's Post-Hrg. Br. at 79 (citing CX 53 at EPA 994, 996). Complainant suggests in its Post-Hearing Brief that the record contains "strong circumstantial evidence showing that Respondent disseminated [by direct mail] the New Slim Jim to a target audience of cattlemen, landowners, and farmers." *Id.* at 27. I think not. The circumstantial evidence Complainant cites does not establish by a preponderance of the evidence that Respondent actually distributed the New Slim Jim by direct mail in November 2007. In any case, as found above, the brochure lacks pricing information or other content supporting a finding that it was an "offer to sell" Rozol. Thus, neither in connection with the website, nor separately, has Complainant established the violations alleged.

Consequently, it is hereby found that no "offer for sale" occurred with respect to Counts 2,184–2,231, and therefore no distribution or sale has been proven to have taken place. This failure is fatal to the establishment of liability under FIFRA section 12(a)(1)(B). Accordingly, Counts 2,184–2,231 must be **DISMISSED**.

VII. RESPONDENT'S LIABILITY FOR CLAIMS MADE AS PART OF THE DISTRIBUTION OR SALE OF ROZOL BB WHICH SUBSTANTIALLY DIFFER FROM CLAIMS MADE AS PART OF REGISTRATION STATEMENT (COUNTS 2,141–83)

As noted above, Counts 2,141–83 allege that in connection with its distribution/sale of Rozol BB between October 1, 2007 and May 30, 2008, Respondent violated FIFRA section 12(a)(1)(B), which makes it unlawful for "any person . . . to distribute or sell to any person . . . any registered pesticide if any claims made for it as a part of its distribution or sale substantially differ from any claims made for it as a part of the statement required in connection with its registration." 7 U.S.C. § 136j(a)(1)(B).

The parties have stipulated to many of the facts relevant to these violations including that at the relevant time Respondent was a "person" under FIFRA section 2(s), 7 U.S.C. § 136(s); that Rozol BB was a "registered pesticide," that starting October 1, 2007 Respondent distributed and/or sold Rozol BB to various entities by physically moving and/or shipping the product to those entities; that Respondent sent out direct mail packages to its distribution partners and/or customers to advertise Rozol BB, and such packages included cover letters dated October 31, 2007 and sales literature which made a variety of statements and claims; and that Respondent ran radio and/or print advertisements for Rozol BB beginning on September 2007 through April 2008. UF 1–4, 9, 10, 18–23; Jt. Stips. at 2–4, 7–12.

As a result, the parties agree in their Post-Hearing Briefs that except in regard to Counts 2,144 and 2,178, the only "issue" remaining in regard to violations alleged in Counts 2,141–83 is whether the Respondent's acknowledged distributions or sales had "claims made for [the pesticide] as part of its distribution or sale [that] substantially differ from any claims made for [the pesticide] as part of the statement required in connection with its registration." C's Post-Hrg. Br. at 14–15 (quoting FIFRA section 12(a)(1)(B), 7 U.S.C. § 136j(a)(1)(B)); R's Post-Hrg Br. at 23–24. As to Counts 2,144 and 2,178, Respondent also disputes that the product was "distributed or sold within the meaning of FIFRA," given that those two shipments went to its own employees. R's Post-Hrg Br. at 23–25. This latter issue is addressed first.

A. Whether Respondent Distributed or Sold Rozol to "Any Person" as alleged in Counts 2,144 and 2,178

Count 2,144 of the Complaint alleges that "Respondent violated Section 12(a)(1)(B) of FIFRA . . . on or about October 29, 2007, by distributing or selling 'Rozol,' [BB], to Jim Knuth, located at 104 Applewood Court, Council Bluffs, Iowa." Compl. ¶ 484. Count 2,178 alleges that "Respondent violated Section 12(a)(1)(B) of FIFRA . . . on or about April 18, 2008, by distributing or selling 'Rozol,' [BB], to Mark Newman located at 6702 Silverbell Lane, Amarillo, Texas." Compl. ¶ 620. Unlike the other Counts for which the distribution or sale is demonstrated by a Bill of Lading, Complainant offers as evidence in support of these two Counts only "Liphatech, Inc. Customer Order Picklist[s]" ("Picklists").[26] C's Post-Hrg. Br. at 16 (citing CX 23 at EPA 491–92). Further, these Picklists identify the "sold to cust[omer] ID" as Messrs. Knuth and Newman, Respondent's employees, with their individual addresses in Iowa and Texas on the respective documents. Schmit Tr. at 204:23–205:17; CX 23 at EPA 491 (Mr. Knuth); *id.* at EPA 492 (Mr. Newman). However, both Picklists do indicate that Rozol was shipped via United Parcel Service, albeit to alternative recipients at alternative addresses. CX 23 at EPA 491–92.

[26] In the cover letter to CX 23, Respondents states that "[t]wo shipment [sic] were made by United Parcel Service ('UPS') for which there is no Bill of Lading. For these shipments, we attach a copy of the 'customer order picklist.' This document shows the quantity, date of shipment, and consignee of the shipment, and also contains the receipt printed by the UPS computer software." CX 23 at EPA 447.

Based upon the fact that the individual consignees named in the Complaint and on the Picklists are its employees, Respondent argues that they are part of the single corporate entity that is Liphatech, Inc., and that product transfers to employees, who are part of the same corporate "person" cannot be a violation of FIFRA section 12(a)(1)(B), which makes unlawful only those improper distributions or sales from "any person . . . to any person." R's Post-Hrg. Br. at 24 (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 770 (1984)).

In response, Complainant notes that the "ship to" address on the Picklist for the product "sold to' Mr. Knuth directed delivery to "Snow King Resort, 400 Snow King Ave., Jackson Hole, WY 83001" with the special instruction "Hold for arriving guest: Jim Knuth." CX 23 at EPA 491. Further, Ms. Niess testified that an internet search she conducted revealed that on or about November 5, 2007, a week after the October 29, 2007 shipment to Mr. Knuth, the Snow King Resort hosted the Wyoming Weed and Pest Conference. Niess Tr. at 60:21–61:13. Complainant asserts that because Mr. Knuth is one of Respondent's district sales managers, "undoubtedly . . . this shipment of Rozol [was] for demonstration purposes at this conference." C's Post-Hrg. Br. at 17. Complainant argues that shipments to a company's salespeople for demonstration purposes constitute a distribution or sale under FIFRA. *Id.* (citing *Sultan Chemists, Inc.*, Docket No. FIFRA-95-H-05, 1999 EPA ALJ LEXIS 46, at *10 (ALJ, Aug. 4, 1999)). In response to this claim, Respondent argues that reliance on *Sultan* is misplaced because the decision in *Sultan* was based in part upon the respondent's failure to cite to the record to support its position, and furthermore that the case lacks a discussion of whether or not shipments of the product at issue in *Sultan* were to actual employees or independent contractors. R's Post-Hrg. Br. at 24–25 (citing *Sultan*, 1999 EPA ALJ LEXIS, at *10). Respondent states that independent contractors would more likely fall within the scope of FIFRA. *Id.* at 25.

With respect to Count 2,178, where the "sold to" box on the Picklist listed Mr. Newman, Complainant notes that the "ship to" address directed delivery to "Helena Chemcial [sic] Co, Attn: Todd Martin, N. HWY 385/87, Hartley TX 79044." CX 23 at EPA 492. Complainant offered evidence that Mr. Martin is the Branch Manager of Helena Chemical Co., one of Respondent's authorized distributors for Rozol. CX 132 at EPA 3186; *see* Schmit Tr. at 194:21–25 (stating that CX 17 at EPA 378 represents the list of authorized distributors for Rozol PD under the 24(c) SLN registration). Complainant also asserted that Mr. Martin and Helena Chemical Co.'s Hartley, Texas location received six other shipments of Rozol on other dates. CX 23 at EPA 465–68, 470, 485.

In further support of these alleged violations having occurred, Complainant argues that Respondent admitted in its cover letter to CX 23, that *all* its shipments were distributions or sales under FIFRA. C's Post-Hrg. Br. at 18 (italics added). The cover letter to CX 23 (referring to the 42 pages of single-sheet bills of lading and Picklists that follow) states that for the period October 1, 2007, to June 2, 2008, Respondent:

> has no records of 'movement' of the product other than as shown on the documents provided to show 'delivery.' There is no

> 'movement' of the 'Rozol [BB]', other than for sale and shipping to customers. This product is manufactured at our Milwaukee, WI facility, and stored there. None of this product was moved or transferred to any other storage facility other than for the sale and shipping to customers.

CX 23 at EPA 448.

Finally, Complainant argues that regardless of whether Messrs. Knuth and Newman received the shipments as employees, the evidence shows that Rozol was shipped to Snow King Resort and Helena Chemical Co., both of which are "persons" as defined by FIFRA. C's Post-Hrg. Br. at 18; 7 U.S.C. § 136(s).

Discussion with respect to Count 2,144

With respect to Count 2,144, as indicated above, the violation alleged in the Complaint is that Respondent distributed or sold Rozol BB "on or about October 29, 2007," "to Jim Knuth, located at 104 Applewood Court, Council Bluffs, Iowa." Compl. ¶ 484. However, Complainant failed to introduce any evidence into the record that Respondent ever shipped Rozol to Mr. Knuth at the specific address identified in this Count of the Complaint or that Mr. Knuth ever received any shipment of Rozol at *any* address, and Respondent has not admitted these allegations. The significance of these shortcomings is made clear by the fact that Complainant attempts to paper over these deficiencies by altering its claim, or inserting into its proof in support thereof, that "Respondent shipped, and *therefore distributed or sold, Rozol to* the Snow King Resort in Jackson Hole, Wyoming." C's Post-Hrg. Br. at 17 (italics added). Unfortunately for Complainant, this rephrasing constitutes a wholly different violation. Had Complainant wished to amend the Complaint to add or substitute before hearing, or amend its pleadings to conform to the evidence after hearing, an allegation consistent with this new violation, it certainly could have moved to do so. *See* 40 C.F.R. § 22.14(c); *H.E.L.P.E.R., Inc.*, 8 E.A.D. 437, 449 (EAB 1999). However, it did not, nor would have doing so availed it of much benefit. The pick-list for this Count clearly shows that while the package was shipped to the Snow King Resort, it was sent there with explicit instructions to "Hold for arriving guest Jim Knuth." CX 23 at EPA 491. Short term acceptance of an unopened package addressed to another does not evidence knowledge of its contents or liability for its receipt. *Commonwealth v. Aguiar*, 350 N.E.2d 436, 442–43 (Mass. 1976). Thus, at best the evidence establishes only that Respondent "distributed or sold" Rozol BB to Mr. Knuth, its own District Manager, on October 29, 2007.

Further, while Complainant exhorts that this shipment to Mr. Knuth was "undoubtedly" for demonstration purposes at the Wyoming Weed and Pest Conference occurring at the Resort the following week (C's Post-Hrg. Br. at 17), it offered absolutely no evidence to substantiate this specific supposition, such as documentation that Mr. Knuth attended the conference or that Respondent touted or displayed its product at the conference. It did not even offer any

documentary support regarding Ms. Neiss's internet search and the results thereof evidencing the actuality of the conference itself.

Moreover, Complainant's argument that Respondent conceded that "all" shipments were solely for customers is also unpersuasive. *See* C's Post-Hrg. Br. at 18. Complainant bases this argument on the fact that Mr. Schmit, in his February 5, 2009 letter to Ms. Niess, stated that there was no "movement" of Rozol products "other than for sale and shipping to customers." *Id.* (quoting CX 23 at EPA 448). According to Complainant's logic, this is an admission that the shipment to Mr. Knuth was "to customers," or a customer, and not an employee. *Id.* However, despite the apparent breadth of Mr. Schmit's statement, the next two sentences of his letter clarify that he was speaking of the typical bulk shipments of Rozol to storage facilities. *See id.* ("None of this product was moved or transferred [from the Milwaukee manufacturing and storage facility] *to any other storage facility* other than for the sale and shipping to customers"). Accordingly, Mr. Schmit's statement does not establish that this shipment to Mr. Knuth was "to customers."

Thus, the facts of record at most show that Respondent shipped Rozol BB to Mr. Knuth, its own District Manager, in Jackson Hole, Wyoming on October 29, 2007. Whether the package was received and what purposes it was put to is not established.[27]

Still, because the product was shipped, it is necessary to determine whether, as a matter of law, a corporation's mere shipment of a pesticide to its own employee, ostensibly acting within the scope of that employee's duties,[28] can constitute a "distribution or sale" triggering FIFRA section 12(a)(1)(B). I find that it cannot.

Section 12(a)(1) of FIFRA, which prefaces the violation at section 12(a)(1)(B), makes it "unlawful for any person . . . to distribute or sell to any person" pesticides or devices under certain prohibited circumstances.[29] *See* 7 U.S.C. § 136j(a)(1). Despite use of the word "any," this language clearly contemplates the involvement of two different "persons" in an unlawful distribution or sale, as the EAB observed in *Microban II* - "the elements of a FIFRA section 12(a)(1)(B) violation are four-fold . . . '[t]hird, that person must have distributed or sold a registered pesticide *to another person*.'" *Microban II*, 11 E.A.D. at 440 (quoting *Microban Prods. Co.* ("*Microban I*"), 9 E.A.D. 674, 687 (EAB 2001)) (emphasis added).

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[27] The package appears to have consisted of only two units of product, with a total weight of 59 pounds, shipped at "service" charge of $36.40. CX 23 at EPA 491.

[28] There is no allegation or evidence in the record to suggest that Mr. Knuth acquired these products for his personal use or in his personal capacity.

[29] FIFRA section 2(s) defines "person" to mean "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not." 7 U.S.C. § 136(s).

The broad definition of "to distribute or sell" under FIFRA further bolsters the EAB's reading. Specifically, section 2(gg) of FIFRA defines "to distribute or sell" to encompass 11 actions: "to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver." 7 U.S.C. § 136(gg);[30] *see also* 40 C.F.R. § 152.3. This definition suggests that Congress intended for section 12(a)(1)(B)'s prohibition to apply when the respondent transfers possession or ownership of a pesticide to a third-party, or takes the final steps to effectuate such a transfer. Specifically, all definitional terms trace back to four methods of transferring pesticides—to "distribute," to "sell," to "ship," and to "receive and (having so received) deliver." *See* 7 U.S.C. § 136(gg). The remaining definitional terms apply to actions preceding those four types of transfers: In addition to "sell," the definition includes "offer for sale" or "hold for sale." *Id.* In addition to "ship," the definition includes "hold for shipment," "deliver for shipment," or "release for shipment." *Id.* And finally, in addition to "receive and (having so received) deliver," the definition includes "receive and (having so received) . . . offer to deliver." *Id.*

Given that the "from any person . . . to any person" language in section 12(a)(1) requires a transfer from one person to "another person" —a reading bolstered by the definition of "to distribute or sell" in section 2(gg)— in determining whether a distribution or sale has occurred "to any person," it is imperative to focus on the stage at which the respondent either transfers possession or ownership of the pesticide to another party, or makes the final steps teeing up such a transfer.

As a general proposition, the acts of corporate employees acting within the scope of their employment are imputed to the corporation. *See, e.g.*, *Barge v. Jaber*, 831 F. Supp. 593, 601 (S.D. Ohio 1993) (citing *Northside Realty Assoc. v. United States*, 605 F.2d 1348, 1353 n.9 (5th Cir. 1979)). In the context of conspiracies, for example, it is universally accepted that acts of the employee are the acts of the corporation and that a corporation cannot conspire with itself. *See, e.g.*, *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1953).

It is equally true, however, that the employee and the corporation can be "different 'persons' . . . [a]fter all, incorporation's basic purpose is to create a distinct legal entity . . . different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001) (citing *United States v. Bestfoods*, 524 U.S. 51, 61–62 (1998); *Burnet v. Clark*, 287 U.S. 410, 415 (1932); 1 W. Fletcher, Cyclopedia of the Law of Private Corporations §§ 7, 14 (rev. ed. 1999)). The above-cited case law suggests that determining whether employees and the employer-corporation should be

[30] This definition expressly "does not include the holding or application of registered pesticides or use thereof by any applicator who provides a service of controlling pests without delivering any unapplied pesticide to any person served." *Id.* § 136(gg).

treated as separate entities for liability may depend on the purposes behind the statute being enforced.[31]

In the instant case, however, construing FIFRA section 12(a)(1)(B) to apply to purely intra-corporate transfers such as this one would lead to absurd results, where any physical transfer of product from one employee to another—for example, from a warehouse employee unloading a truck to a forklift-operating colleague—would count as a distribution from "any person . . . to any person." *See* 7 U.S.C. § 136j(a)(1). It is not clear how regulating these types of purely internal transfers furthers the FIFRA's goal of "protect[ing] human health and the environment from harm from pesticides, and to that end the statute establishes a nationally uniform pesticide labeling system requiring the registration of all pesticides and herbicides *sold* in the United States and requiring users to comply with the national label." *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 531 (9th Cir. 2001). Rather, the most logical conclusion is that purely intra-corporate transfers of pesticide, with no evidence or allegation that the transfer occurred as specific preparation to transfer product to an another outside third-party, cannot constitute a sale or distribution under FIFRA section 12(a)(1)(B), 7 U.S.C. § 136j(a)(1)(B).

Accordingly, for the reasons stated above, Count 2,144 must be **DISMISSED**.

Discussion with respect to Count 2,178

With respect to Count 2,178, the Complaint alleges that Respondent sold or distributed Rozol to "Mark Newman, located at 6702 Silverbell Lane, Amarillo, Texas," on April 18, 2008. Compl. ¶ 620. Unlike with Mr. Knuth in Count 2,144, Respondent admitted in its Answer that its employee "Mark Newman, as a company representative, received the product." Ans. ¶ 250 Nevertheless, that is of little benefit to Complainant's cause in regard to proving this Count based upon the finding above that a purely intra-corporate transfer of a pesticide cannot constitute a sale or distribution under FIFRA section 12(a)(1)(B), 7 U.S.C. § 136j(a)(1)(B).

Similarly, Complainant is unaided in its proof by the evidence it offers showing that the shipment was directed on the Picklist to be shipped to Helena Chemical Co. in Hartley, Texas. *See* CX 23 at 492. Complainant has not alleged in this Count a violation based upon a sale or

[31] This is, in part, why Respondent's reliance on *Copperweld* is misplaced. In *Copperweld*, the Supreme Court was applying section 1 of the Sherman Antitrust Act, the purpose of which is to prevent or break-up commercial monopolies or conspiracies that restrain free competition. *Copperweld*, 467 U.S. at 768; 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."). The Court in *Copperweld* was focused on the impact of the "sudden joining of two independent sources of economic power previously pursuing separate interests" and the practical reality that a corporation and its wholly owned subsidiary *necessarily* pursue *common* interests. *Copperweld*, 467 U.S. at 770–71. Therefore, the Court concluded that divisions of a corporation could not act as market-manipulating conspirators *because* of their preexisting common interest. *Id.*; *but cf. Cedric Kushner*, 533 U.S. at 164–65 (noting that the history of RICO supports the conclusion that the statute requires only the "formal legal distinction between 'person' and 'enterprise' (namely, incorporation)").

distribution to Helena Chemical Co. and at this point this Tribunal will not amend the Complaint to do so, especially in light of Respondent's unchallenged contradictory admission regarding Mr. Newman having received the product.

Thus, despite the fact that the package was transported by UPS, Respondent is found not liable on Count 2,178. Accordingly, Count 2,178 is **DISMISSED**.

B. Whether Respondent Made "Claims"

1. Claims Made for Rozol

Respondent has admitted making several claims in its advertisements for Rozol. Jt. Stips. at 7–9, 13–14. Specifically, Respondent admits to including certain phrases that the parties later agreed were claims for Rozol in the following documents or media:

1. In cover letters, dated October 31, 2007, sent to a list of distributors. Ans. ¶¶ 146, 149, 152; Jt. Stips. at 7.

2. In the sales literature identified in UF 15 as the Research Bulletin. Ans. ¶¶ 155, 158, 161, 164, 167, 170, 182, 191; Jt. Stips. at 7–8.

3. In radio advertisements for Rozol. Ans. ¶¶ 199, 202; Jt. Stips. at 9.

4. On its website, www.liphatech.com, in a Product Information sheet for Rozol PD. Ans. ¶¶ 275, 278, 281, 284, 287, 290; Jt. Stips. at 13–14.

5. On its website, www.liphatech.com, in the brochure entitled "Control Range Rodents." Ans ¶¶ 293, 296, 299, 302, 305, 308; Jt. Stips. at 14.

Respondent, however, disputes that six statements that it admits making constitute "claims" for Rozol under FIFRA section 12(a)(1)(B). C's Post-Hrg. Br. at 29–30; Ans. ¶¶ 173, 176, 179, 185, 188, 194; Jt. Stips. at 8–9.

2. Comparative Statements

Respondent admits making the following six "statements" in its Research Bulletin:

1. "Rozol's active ingredient (chlorophacinone) is ten times (10X) less toxic to dogs as Kaput-D's (diphacinone)." Ans. ¶ 185; Jt. Stips. at 8.

2. "Chlorophacinone is over 100X more effective on mice than diphacinone." Ans. ¶ 188; Jt. Stips. at 8.

3. "Kaput-D Prairie Dog Bait (25 PPM) achieved only 53% to 56% control." Ans. ¶ 176; Jt. Stips. at 8.

4. "Kaput-D Pocket Gopher Bait* (50 PPM) 2X the rate of active ingredient, achieved only 56% to 57% control. *Not labeled for Black-Tailed Prairie Dog." Ans. ¶ 179; Jt. Stips. at 8.

5. "Traditional control products such as zinc phosphide or Diphacinone-based anticoagulants have not proven to effectively prevent population recovery, leading to the need to [sic] costly re-treatment." Ans. ¶ 173; Jt. Stips. at 8.

6. A table entitled "Compare the products for yourself - there are many differences" followed by a series of eight features or benefits and the corresponding rating for Rozol, Zinc Phosphide and Diphacinone (Kaput-D). Ans. ¶ 194; Jt. Stips. at 9; *see also*, CX 14a at EPA 179.

Complainant argues that what Respondent calls "statements" are actually "claims" for purposes of FIFRA because they make "affirmative representations about the effectiveness of" registered pesticides or their active ingredients. C's Post-Hrg. Br. at 30 (citing *Antkiewicz*, 8 E.A.D. at 242–43, and *Sporicidin Int'l*, EPA Docket No. FIFRA-88-H.02, 1988 EPA ALJ LEXIS 14, at *46 (ALJ, Nov. 1, 1988)). Complainant also argues that because the statements were made in the Research Bulletin and in the context of comparing prairie dog bait field trials and products, the statements are intended "to demonstrate to prospective users that Rozol is superior." *Id.* at 30–31 (citing CX 14a at EPA 178–79); *cf.* Schmit Tr. at 154:18–155:2 (stating with respect to the comparative statement in Compl. ¶ 173, "we are not only inferring about the efficacy of our product, but we are referring to the efficacy of the competing products."). Complainant asserts that a failure to apply FIFRA section 12(a)(1)(B) to comparative claims about a competitor's product would lead to "absurd results"—that a party could avoid liability by making only claims that compare their product to a competitor's product instead of making claims referencing only its own registered pesticide. C's Post-Hrg. Br. at 31–32.

Respondent, making an argument based on the precise syntax of the statute, asserts that the scope of FIFRA section 12(a)(1)(B) is limited "to claims made only for the registered pesticide itself." Respondent concludes that the comparative statements are not made for Rozol itself, so they cannot be "claims made for *it* as part of its distribution or sale," where "it" does not include other products. R's Post-Hrg. Br. at 45 (quoting FIFRA § 12(a)(1)(B), 7 U.S.C. 136j(a)(1)(B)) (emphasis by Respondent).

It is not essential, for purposes of liability, to determine whether the six statements set forth above constitute "claims" made for Rozol because Respondent has already stipulated that it made over two dozen other claims for Rozol. *See* Jt. Stips. 7–9, 13–14. Nevertheless, because the volume of claims can be relevant to penalty, the issue is discussed here. While Respondent

accurately quotes FIFRA, its argument is unavailing given the facts in this case. As Complainant notes, all the disputed statements occurred in advertisements, the primary purpose of which was to promote Rozol and diminish the appeal of competing products. *See generally* CX 14a. That Respondent has formulated six sentences in an entire document devoted to promoting its product without mentioning Rozol by name is not a sufficient basis to conclude that these claims were made without any intent to bolster the public's perception of Rozol's safety and efficacy. To the contrary, these statements—though crafted to place direct emphasis on competing products—are implicit claims for Rozol. *Microban Prods. Co.*, EPA Docket No. FIFRA 98-H-01, 1998 EPA ALJ Lexis 135, at *31 (ALJ, Sept. 13, 2002) ("the true inquiry is whether the unapproved claim is intended to persuade about the value of the product and to encourage its purchase and use") (citing *Sporicidin*, 3 E.A.D. at 603).

Comparative Statements 1 and 2 (as listed above) directly contrast the efficacy and toxicity of Rozol's active ingredient, chlorophacinone, with its competitor products. Compl. ¶¶ 185, 188. Statements touting the effectiveness of Rozol's sole active ingredient are implicitly statements that promote the product itself, particularly where these statements appear adjacent to a table comparing the toxicity of Rozol to Kaput-D and zinc phosphide. CX 14a at EPA 179. Comparative Statements 3 and 4 assert that Kaput-D "achieved only" middling percentage of control results. Compl. ¶¶ 176 and 179. The use of the word "only" in these statements clearly implies that the user would enjoy a level of control that was superior to these percentages by using Rozol, particularly given the fact that these statements immediately follow the claim "Rozol achieved over 20% more control than Kaput-D®" and precede the claim "Conclusion: Choose Rozol for proven single application effectiveness." CX 14a at EPA 178. Statement 5, with its emphasis on "the need for costly re-treatment," is another example of an implicit claim for Rozol's effectiveness, particularly given the fact that this statement is immediately followed by the statement "Rozol, made with food-grade grain and chlorophacinone combined the palatability [prairie dog]'s prefer with *the single application control* farmers & ranchers require." *Id.*(emphasis added). Statement 6, which is simply a tabular representation of many of the claims made in the Research Bulletin, is a "claim" for all the same reasons discussed above. Consequently, I find that Statements 1–6 are "claims made for" Rozol.

C. Whether the Claims Were Made As Part Of a Distribution or Sale

The EAB has held that the "as a part of" language in FIFRA section 12(a)(1)(B) "requires that a nexus exist between the unapproved claims and the distribution or sale of the pesticide." *Microban I*, 9 E.A.D. at 688. That nexus must be a "sufficiently close link" to warrant a finding of liability, though the claims and corresponding distributions or sales need not be contemporaneous in order to further the purpose of FIFRA. *Sporicidin*, 3 E.A.D. at 604. Reasoning that a "rigid test" was inappropriate, the EAB in *Microban I* directed the ALJ to consider the totality of the circumstances when determining whether a sufficient nexus existed. *Microban I*, 9 E.A.D. at 688 (specifying appropriate questions for the ALJ to resolve on remand).

As instructed by the EAB, the ALJ on remand considered the following factors in determining whether the claims were made as part of a distribution or sale:

1. When the documents containing the claims were provided to the purchaser;

2. Whether this was at a time before the respondent and purchaser entered into a supply agreement;

3. Whether the purpose of the documents was to induce the purchase of the product;

4. Whether the documents were ever provided to the purchaser during the course of the supply agreement;[32] and

5. Whether the documents ever physically accompanied the shipments of the product.

Microban Prods. Co., EPA Docket No. FIFRA 98-H-01, 2002 EPA ALJ LEXIS 59, at *8–9 (ALJ, Sept. 13, 2002). On remand from the Board in *Microban I*, the ALJ was unconvinced that the purpose of the documents was to induce purchase of the product or that the documents were created close in time to the shipments. *Id.* at *21–24. Therefore, in that case the ALJ concluded that the respondent was not liable because the complainant had failed to establish a nexus between any unapproved claim and a particular shipment. *Id.* at *34.

On the second appeal, *Microban II*, the EAB found that the ALJ had interpreted the "as part of" language too narrowly and proceeded to analyze the record itself. *Microban II*, 11 E.A.D. at 442–43. The EAB considered two claim-bearing communications, the "Hasbro Presentation" and both the Q&A Document and Microban's Draft Label, but eliminated other documents because there was no "time frame for establishing 'receipt' of the documents containing the unapproved claims" and they could have been received by the purchaser *after* the shipments at issue in the case. *Id.* at 443. In finding a sufficiently close link between the Hasbro Presentation and 32 subsequent shipments of product, the EAB noted that the Hasbro Presentation was intended to induce sales of the product, it was presented to the purchaser, and (subsequent to the claims made in the Hasbro Presentation) the respondent and purchaser entered into a "License and Supply Agreement" pursuant to which the 32 shipments occurred. *Id.* In finding a sufficiently close link between both the Q&A Document and the Draft Label, and later shipments of product, the EAB noted that the creation of these documents some time after some shipments had taken place did not render them insufficiently connected to later shipments. *Id.* at

[32] The existence of a supply agreement in *Microban I* and *II*, is specific to that case and is not relevant to the circumstances presented here.

450. Indeed, the EAB concluded that the documents, received by the purchaser and intended by the respondent to maintain an existing contractual relationship, provided an adequate basis for establishing the Section 12(a)(1)(B) nexus for subsequent shipments. *Id.*; *accord Sporicidin*, 3 E.A.D. at 603 (dissemination of a claim-bearing document to a purchaser amid purchaser's ongoing use of the product was intended to induce continued sales and was sufficiently linked to subsequent distributions of the product).

Whether Respondent in this case made claims for Rozol "as a part of" its distribution or sale (an issue alternatively referred to as the "nexus requirement") is an inquiry that varies by count or group of counts considered as the parties advance different arguments depending on chronology, the source of the allegedly violative claims, the purchasers of Rozol, and the alleged recipients of the claims. Because of the diversity of variables at play, each of the 42 counts still at issue must be examined separately in this section. To the extent that either party makes an argument specific to a particular count, that position is set forth immediately below.

Generally, Complainant asserts that the claims that are the subject of the alleged violations here were "included in direct mail packages that were sent by Respondent in a single mailing in November 2007 in the six different states in which Rozol was registered for use on black-tailed prairie dogs under FIFRA § 24(c)." C's Post-Hrg. Br. at 74 (citing CX 14a at EPA 150). Complainant also asserts that there is a sufficiently close link between the claims made in the radio advertisements (the subject of Counts 1–2,140) and two of the 42 shipments still at issue (Counts 2,142–43). *Id.* at 74–75 (citing CX 14a at EPA 331–61). Complainant then divides its argument between the three shipments still at issue that occurred before November 1, 2007 (Counts 2,141–43), and the 39 shipments that occurred after that date (Counts 2,145–83). *Id.* at 74–79.

1. Complainant's Arguments Regarding Shipments Before November 1, 2007

As to Count 2,141 (the October 1, 2007 shipment to United Suppliers Inc. in Eldora, Iowa), Complainant argues that, for any of the following reasons, there is a sufficiently close link between the shipment and violative claims made by Respondent:

1. An earlier advertising document published February 17, 2006 (Slim Jim 8001) "was circulating through the marketplace" on the date of the shipment;

2. The shipment to Eldora, Iowa "was to a different location of one of Respondent's 'authorized' distributors for Rozol" according to the distributor list found in CX 17 at EPA 378; or

3. The shipment occurred "during Respondent's radio advertising campaign."

C's Post-Hrg. Br. at 75–76 (citing Compl. ¶ 472; CX 17 at EPA 378; CX 23 at EPA 488; CX 74 at EPA 1188).

As to Counts 2,142 and 2,143 (shipments to Agriliance Service Center at, respectively, its Grant, Nebraska location on October 8, 2007, and at its Gering, Nebraska location on October 19, 2007), Complainant argues that there is a sufficiently close link between the shipments and violative claims because the shipments were sent to "Respondent's distributors in Nebraska during the time that Respondent was broadcasting its illegal radio advertisements in that State." C's Post-Hrg. Br. at 75 (citing Compl. ¶¶ 476, 480; CX 14a at EPA 348–49; CX 23 at EPA 486–87).[33]

2. Complainant's Arguments Regarding Shipments On or After November 1, 2007

Complainant's arguments regarding the 39 shipments occurring after November 1, 2007 (Counts 2,145–83) proceed through the various methods by which claims were allegedly made, as opposed to addressing the individual counts in order. Complainant asserts generally that the shipments in Counts 2,145–83 have a sufficiently close link to "substantially different claims" made in three distinct communications: "radio advertisements, direct mail package cover letters, and Research Bulletins . . . ." C's Post-Hrg. Br. at 76.

Complainant argues that 35 of these 39 shipments "were sent to distributors in Colorado, Nebraska, Oklahoma, and Texas after Respondent disseminated the direct mail packages in those states."[34] *Id.* at 78 (citing CX 14a at EPA 151; CX 23 at EPA 450–61, 463–80, 484–85, 489–90, and 492). This argument applies to Counts 2,145, 2,149–62, and 2,164–83.

Complainant then argues that 32 of these 39 shipments were sent to "13 companies and individuals *or affiliates of the companies* that were authorized by Respondent to distribute Rozol . . . ." *Id.* at 76–77 (citing Schmit Tr. at 194:21–25) (emphasis added). This argument applies to Counts 2,145–51, 2,153–61, 2,163–69, 2,171, 2,173–74, 2,176–77, 2,179, and 2,181–82.[35]

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[33] Although Complainant asserts that Agriliance Service Center is one of Respondent's distributors, Complainant cites no evidence for that proposition nor does the record offer any support. *Compare* CX 17 at EPA 378 (Respondent's list of Rozol PD distributors, which does not include Agriliance Service Center) *with* CX 23 at EPA 486–87 (bills of lading indicating shipments of Rozol to Agriliance Service Center).

[34] Only 34 of the 39 shipments were sent to distributors in the four states Complainant listed in this portion of its Post-Hearing Brief. However, a close examination of the Complaint and exhibits indicates that Complainant likely intended to include Kansas in this list of states. *Compare* C's Post-Hrg. Br. at 77 *with* Compl. ¶ 516; CX 14a at EPA 351; *id.* at EPA 289–93 (invoice from, and copies of advertisements placed in, the *Kansas Stockman*). Accordingly, I find that this argument applies to the Kansas shipment underlying Count 2,152.

[35] This argument appears to also apply to Count 2,152, but for reasons discussed in Part VII.C.4.i *infra* I find that there is insufficient evidence to tie this argument to that count.

Complainant asserts that of those 32 shipments, "[20] were sent to five of the authorized distributors that Respondent admits had access to the Research Bulletin": Arrow Seed Company (Broken Bow, Nebraska); Van Diest Supply Co. (McCook, Nebraska); Helena Chemical (Hartley, Texas); Estes Incorporated (Lubbock, Texas); and Pro Chem Sales (Amarillo, Texas). *Id.* at 77 (citing CX 23 at EPA 450–51, 454, 458, 460–61, 463–68, 470, 473, 475, 477–80, 485, 491; CX 17 at EPA 371, 378 and 407).[36] The documents cited by Complainant correspond to Counts 2,151, 2,153–56, 2,158, 2,160–61, 2,164–66, 2,168–69, 2,171, 2,173–74, 2,176–77, and 2,181–82. In Complainant's view, CX 17 demonstrates sufficient evidence that the distributors identified at EPA 378 received the Direct Mail Packages (including the Research Bulletin) before the shipments of Rozol were sent. *Id.*

Within this set of 20 counts, Complainant argues that at least three of the addressees were in "either managerial or sales positions" for the recipient companies. *Id.* at 78 (citing CX 17 at EPA 378; CX 132 at EPA 3185–86). Accordingly, Complainant continues, these "individuals were in positions that could influence sales at their respective locations and perhaps other locations of their companies" and, therefore, "it is reasonable to conclude that they contacted their respective company's other branches after receiving the direct mail packages from Respondent." *Id.* at 78. It appears that this argument could apply to all 25 counts involving shipments to Van Diest Supply Co., Helena Chemical Co., and Estes Inc., including: Counts 2,145–49, 2,151, 2,154–55, 2,157–58, 2,161, 2,163, 2,167–69, 2,173, 2,176–77, 2,179, and 2,181–82. However, Complainant seems to restrict this argument only to shipments sent to these companies that are also part of the 20 shipments set forth above (Counts 2,151, 2,153–56, 2,158, 2,160–61, 2,164–66, 2,168–69, 2,171, 2,173–74, 2,176–77, and 2,181–82).

Complainant also asserts that 11 of the 39 shipments were "sent to different locations of the companies authorized by Respondent to distribute Rozol [PD]." *Id.* at 77 (citing CX 17 at EPA 378; CX 23 at EPA 462, 481–83 (Van Diest Supply in Webster City, Iowa); *id.* at EPA 469, 484 (Helena Chemical Co. in Holdredge and Bridgeport, Nebraska); *id.* at EPA 472, 489 (Wilbur-Ellis Co. in Hereford and Frionia, Texas); *id.* at EPA 474, 476, 490 (Estes Inc. in Clinton, Oklahoma).[37] This argument applies to Counts 2,145–50, 2,157, 2,159, 2,163, 2,167, and 2,179.

Finally, Complainant argues that the "four shipments to Van Diest Supply in Webster City, Iowa, an affiliate of Van Diest Supply in McCook, Nebraska, an authorized distributor of

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[36] Complainant's Post-Hearing Brief mistakenly states that 21 of those shipments were sent to authorized distributors. The actual number is 20. Complainant appears to have cited CX 23 at EPA 491 as evidence of the additional shipment, which is the bill of lading for the shipment underlying Count 2,144 ("to Jim Knuth" at the Snow King Resort). That shipment occurred *before* November 1, 2007 and, in any event, was dismissed *supra*.

[37] Complainant cites CX23 EPA 490 as a bill of lading sending product to Estes Inc. in Clinton, Oklahoma, but EPA 490 states that the "Consignee and Destination" is Estes Inc. in Denver, Colorado.

Rozol (CX 17 [at] EPA 378), were sent after the radio advertisements for Rozol were broadcast on four different radio stations out of McCook, Nebraska." *Id.* at 78–79.

Complainant concludes that based on "the totality of the circumstances, this Tribunal should hold that a 'sufficiently close link' exists between the violative claims and the shipments at issue in Counts 2,145 through 2,183 of the Complaint." *Id.* at 78.

3. Respondent's Arguments

Respondent concedes that the link between the unapproved claims and the distribution or sale of the pesticide need not be contemporaneous, R's Post-Hrg. Br. at 38 (quoting *Microban I*, 9 E.A.D. at 688), but argues that the claims must still be an "integral element" of the distribution or sale. *Id.* at 38–39 (citing *Sporicidin*, 3 E.A.D. at 602). Respondent then focuses on *Microban II* and notes that the EAB in that case "'did not consider' a Microban brochure and a Microban fact sheet 'as part of' the sale or distribution of the product stating that 'there was insufficient evidence in the record establishing when Hasbro received [the documents].'" *Id.* at 39 (citing *Microban II*, 11 E.A.D. at 443). Respondent argues that the EAB was explicit in its requirement to establish that the claim-bearing documents were actually received by the purchaser before the shipments of pesticide. *Id.* at 39–40 (citing *Microban II*, 11 E.A.D. at 443, 450). Respondent concludes that Complainant has failed to establish that "each person to whom [Rozol] was sold or distributed actually received the literature containing the substantially different claim prior to the sale or distribution of the product." *Id.* at 39–40.

With respect to Counts 2,141–83, Respondent makes the preliminary argument that because the Rozol BB shipped in 2007 and 2008 could have been used on pocket gophers under the FIFRA section 3 permit or black-tailed prairie dogs under the SLN permit, Complainant must show that the substantially different claims were made for Rozol PD and that the product was purchased for use on black-tailed prairie dogs. *Id.* at 41 (citing CX 23 (simply indicating a shipment of EPA Reg. No. 7173-244)); Schmit Tr. at 23:11–24:13 (testifying that the ultimate use of the Rozol BB could have been for use to control pocket gophers or prairie dogs)).

Respondent then addresses the evidence that Complainant submits to demonstrate the requisite nexus for Counts 2,141–83. Respondent argues globally that Complainant has failed to show that "any person who purchased Rozol ever received Respondent's product literature or listened to one of its radio ads." R's Post-Hrg. Br. at 41. Respondent turns to Count 2,172 as an example. In Count 2,172, Complainant alleges that on March 24, 2008, Respondent distributed or sold Rozol to McCoy Farm. Compl. ¶¶ 596, 598. Respondent asserts that there is no evidence in the record to establish that either McCoy Farms received the material containing the substantially different claims prior to March 24, 2008, or that the material was an "integral part of the shipment."[38] R's Post-Hrg. Br. at 41.

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[38] Respondent continues to assert its position that Complainant must (but has failed to) show that both the claims made and the shipment of Rozol were for use specifically on prairie dogs. For reasons discussed below, this

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With respect to Counts 2,141–43 (shipments prior to November 1, 2007), Respondent argues that the record "is devoid of any evidence that any of the shipments [in Counts 2,141—43] were to persons who heard Respondent's radio broadcasts," let alone persons who heard the broadcasts "prior to receiving shipments of Rozol . . . ." *Id.* at 42. Consequently, Respondent continues, Complainant has "failed to show that the 'radio' broadcasts were an 'integral part' of the shipment of [Rozol]." *Id.*

With respect to Complainant's arguments attempting to link the Slim Jim 8001 to the Counts in the instant case, Respondent asserts that Ms. Niess admitted at hearing that none of Counts 2,141–83 are based on claims made in the 2006 Slim Jim 8001 version. *Id.* (citing Niess Tr. at 158:4–7). Respondent also cites *Microban II* for the proposition that only claims made in material referenced in the complaint can be considered to form the basis of a violation. *Id.* at 42-43 (citing *Microban II*, 11 E.A.D. at 450).

Respondent argues that Complainant has failed to provide any evidence that "any particular company in [states in which Direct Mail Packages were distributed] received the product information prior to being shipped the product . . . " or that "any of the 21 distributors ever received a direct mail package or heard a radio ad." *Id.* at 43 (citing C's Post-Hrg. Br. at 76–77). Respondent also dismisses as speculation Complainant's contention that any individuals "contacted their respective company's other branches after receiving the direct mail packages from Respondent." *Id.* at 43—44 (quoting C's Post-Hrg. Br. at 78).

4. Evidence of a Sufficient Nexus

The parties have stipulated that "Respondent sent the Direct Mail Packages to its distribution partners and/or customers to advertise 'Rozol,' EPA Reg. No. 7173-244." Jt. Stips. at 7; Ans. ¶ 145.[39] There is also no dispute as to the meaning and contents of the Direct Mail

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argument is rejected and consequently all other references to it are omitted from this recitation of Respondent's arguments.

[39] The Complaint alleged that "Respondent sent the Direct Mail Packages to its distribution partners and/or customers to advertise 'Rozol,' EPA Reg. No. 7173-244." Compl. ¶ 145. In its Answer to paragraph 145, Respondent stated:

> Admitted, except denied that Respondent sent the materials to any distribution partners. Respondent asserts that its distributors are independent of Respondent and are not under or subject to Respondent's control. Respondent further asserts that the sales literature entitled "Black-tailed Prairie Dog Control – Research Bulletin" was not sent to distributors until after October 31, 2007.

Ans. ¶ 145. As such, Respondent's answer created some ambiguity in that on the one hand Respondent states that the Research Bulletin was not sent to distributors *until after* October 31, 2007, which indicates that it was eventually sent. On the other hand, the first sentence of that paragraph states that Respondent does not admit that

(Footnote continued on next page.)

Packages sent by Respondent, which included Cover Letters, the Research Bulletin, and the Slim Jim 8001-3. Jt. Stips. at 7; Niess Tr. 37:3–15; CX 14a at EPA 150, 171–284. Nor is there any dispute that those items all contained claims that, Complainant argues, substantially differed from the statement of claims made in connection to Rozol's FIFRA section 3 registration. *See* Jt. Stips. at 7.

The material obtained from Respondent[40] in 2008 by the Wisconsin Department of Agriculture, Trade and Consumer Protection, which was forwarded to Complainant, contains a "Materials Submission Index" on Respondent's letterhead indicating that the Direct Mail Packages were distributed "in a single mailing done in November of 2007." CX 14a at EPA 150. This is consistent with the date of the Cover Letter itself, October 31, 2007. At hearing, Mr. Schmit testified that he knew nothing about the Direct Mail Packages or how they were distributed. Schmit Tr. at 225:18–227:4. Neither party called any other employees of Respondent to testify regarding the preparation, use, or distribution of the Direct Mail Packages. Respondent offered no evidence to contradict the claim that the Direct Mail Packages were distributed in November 2007. However, CX 14a itself does not contain any information identifying the recipients of those Direct Mail Packages.

Complainant offered some evidence that Respondent's "distributors" received literature related to Rozol, including the Direct Mail Packages. There is, however, some ambiguity as to identity of the "distributors" and what they received. Ms. Niess testified on direct examination that Respondent provided her with a list of its distributors who had received Respondent's request to destroy or discard Rozol advertising or literature in their possession. Niess Tr. at 82:3–83:12 (discussing CX 145); CX 145 at EPA 3522. This list identifies the distributors listed in Attachment I of the Complaint. Compl. Attach. I.[41]

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the materials were sent to *any distribution partners*. In order to read the Answer without any ambiguity, it is reasonable (given the intervening sentence) to interpret Respondent's language as an objection to the characterization of its distributors as "*partners*" and not an objection to the contention that it sent the Research Bulletin to its distributors after October 31, 2007. This is further consistent with paragraph 145 in the Joint Stipulations. Jt. Stips. at 7

[40] CX 14a; Schmit Tr. at 193:6–10.

[41] CX 145 is an email chain of correspondence between counsel for Complainant and counsel for Respondent and includes an attachment that Respondent identifies as "the list of distributors who received the 'destroy/discard' letter from [Respondent]." CX 145 at EPA 3516. The email was initiated on March 8, 2010, following Respondent's receipt of the March 4, 2010 SSURO. *Id.* at EPA 3519. CX 145 refers to a letter sent on March 8, 2010. *See* CX 53 at EPA 996. However, this letter identifies only the "Control Range Rodents" Brochure and the "Understanding the True Cost of Treatment" Whitepaper as the "literature . . . to which you and your sales representatives have access." In addition, the letter comes two years after the shipments at issue in Counts 2,141–83. For these reasons, this evidence does not support a sufficient nexus for the distributions or sales alleged in Counts 2,141–83. Rather, it relates to Counts 2,184–2,231.

However, this evidence does suggest a pattern of action by Respondent. In the email chain, CX 145, counsel for Respondent explains the plan to implement the 2010 SSURO by requesting that its distributors

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While Ms. Niess did not provide specific testimony regarding the list of distributors, she did note that Respondent employed the same approach used in 2010 in response to the June 2008 SSURO. Niess Tr. at 80:3–6. Mr. Schmit confirmed that the list of distributors to whom the 2008 "destroy letter" was sent is set forth in CX 17 at EPA 378. Schmit Tr. at 193:20–195:3 (noting that this captures the "universe of distributors" who were authorized to distribute Rozol pursuant to the SLN Permits in 2007 and 2008). The sample 2008 "destroy letter" found at EPA 407 identifies the recipient as John McKinney, Helena Chemical Company, 7137 Vista Drive, West Des Moines, Iowa. The letter requests recipients to discard certain materials "to which you or your sales representatives have access." CX 17 at EPA 407. The materials identified for discard are the Research Bulletin, the ESA Frontiers in Ecology & the Environment, and the Whitepaper. *Id.*[42]

There was no direct evidence adduced at hearing to establish that Respondent's distributors actually received the literature identified in the "destroy letters."[43] Rather, Complainant concluded that Respondent had actually sent its distributors the relevant literature because Respondent had subsequently sent them the "destroy letter." Niess Tr. at 164:11–17. As Ms. Niess testified on cross-examination, "[Complainant] relied on Respondent to identify the people that they sent those brochures to. We felt that in relying upon them to identify those people, that they were identifying the people that received the brochures." *Id.* at 166:7–11. As she subsequently conceded, there is no evidence that any individuals associated with a particular distributor ever actually received, read, or acted upon the literature at issue. *Id.* at 167:5–22.

Absent concrete evidence of this central issue, both parties urge opposing inferences. Complainant argues that because Respondent went through substantial effort to create the Direct Mail Packages, send them, contact their distributors, send the "destroy letter," and request

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destroy all Rozol-related advertisement and return a confirmation form once this has been accomplished. *See* CX 53 at EPA 994–97 (Respondent's communication to Complainant including a sample letter to distributors and confirmation form). Respondent's counsel states that in addition to sending letters to its distributors directing them to destroy all Rozol literature, Respondent "is also going to be placing calls to each of the distributors informing them that this letter is coming and the importance of destroying/discarding the Rozol literature immediately and returning the form that was attached to the letter." CX 145 at EPA 3516. Respondent's counsel goes on to note that Respondent "used this approach last year [i.e., in response to the June 2008 SSURO], and it only received confirmation copies back from 10–15% of the distributors." *Id.* at EPA 3518.

[42] The letter separates the Slim Jim 8001-3 and the MSDS for Rozol PD from the other materials, stating that the former need not be discarded because they contain "the necessary 'Restricted Use Pesticide' disclaimer . . . ." CX 17 at EPA 407.

[43] In its Third Motion for Accelerated Decision, Complainant asserted that "Respondent ha[d] not sent Complainant any returned or executed 'confirmation forms' despite repeated requests by Complainant to do so." C's 3rd Motion for Accelerated Decision at 8-9; *see also* Second MAD Order, *Liphatech, Inc.*, EPA Docket No. FIFRA-05-2010-0016, 2011 EPA ALJ LEXIS 6, at *24. No confirmations forms were produced at hearing and no explanation was offered by either party.

confirmation of destruction, it is more likely than not that the distributors actually had the literature to destroy. By contrast, Respondent (as suggested by counsel) sent the "destroy letter" to each of the parties who had distributed Rozol out of an abundance of caution and does not admit that any distributor actually received the Direct Mail Package. *See id.* at 166:12–20.

The distributor list in CX 17 at EPA 378 is not a particularly satisfying document, but it was produced by Respondent with the following statement:

> We are advising our distributor companies that all of the advertising and literature in their possession concerning Rozol [PD] must be destroy [sic], to be *replaced* with updated materials as soon as possible. Attached is a sample letter, which will be sent out to all of the distributor companies as shown in item 2 above [EPA 378]. This letter includes our request for the distributor to confirm his receipt of the request and destruction of the advertising and literature. This letter will be mailed this week.

CX 17 at 371 (emphasis added). According to Complainant, Respondent did not pursue the confirmations from the distributors. Respondent could have disputed the contention that these distributors in fact possessed the Direct Mail Packages, but it did not, despite repeated requests to do so from Complainant.

On balance, I find that Complainant has carried is burden of proof, if just barely, in establishing that Respondent's distributors, listed in CX 17 at EPA 378, received the Direct Mail Packages after they were sent out on November 1, 2007. Given the amount of effort Respondent underwent to in order to contact all of their distributors on several occasions and instruct them to destroy the documents, it is more likely than not that Respondent actually sent these distributors the Direct Mail Packages, containing the Cover Letter, Research Bulletin and Whitepaper. Further, the use of the term "replaced" in CX 17 at 371 in regard to the literature implies that the literature was in the distributors' possession in the first place. In addition, Respondent failed to produce any confirmation letters despite a stated intention (and apparent repeated requests by Complainant) to do so. Such letters would have provided direct evidence that the distributors had received the Rozol literature and their absence is telling. This silence is augmented by the statement from Respondent's counsel in an e-mail to Complainant that Respondent did, in fact, get a 10–15% response rate to the 2008 "destroy letter." CX 145 at EPA 3518. This conclusion is bolstered by the fact that Respondent received two separate SSUROs and responded to them in an identical manner, i.e., developing a list of distributors, crafting a letter explaining the issue, identifying specific documents by reference number, and requesting confirmation of destruction. This effort moves beyond any abundance of caution and supports the inference that the Direct Mail Packages were, in fact, received by the distributors listed in CX 17 at EPA 378.

There is indirect evidence to support a conclusion that the literature in the Direct Mail Packages contributed to the distributors' subsequent decision to purchase Rozol. Of the 43

shipments at issue here, the three shipments occurring in October 2007 (i.e., before the Direct Mail Packages were sent) were received by entities that were not listed as Rozol distributors. Counts 2,141–43; CX 23 at EPA 486–87, 491. One month after sending the Direct Mail Packages, during which no Rozol was shipped, Respondent's listed distributors started ordering Rozol almost weekly between December 2007 and May 2008. *See* Counts 2,145–83; CX 23 at EPA 450–85, 488–90, 492. Coupled with the finding that the distributors listed in CX 17 received the Direct Mail Packages before purchasing Rozol from Respondent, it is concluded that, at least to these distributors at the listed locations, the claims made in the Cover Letter, the Research Bulletin, and the Whitepaper were made "as part of" a distribution of Rozol. Whether these claims substantially differed from the statement required as part of the Section 3 registration is addressed in a subsequent section.

Finding that these claims were made to the CX 17 distributors is not the end of the nexus inquiry because not all the shipments at issue here were received by listed distributors. Due to the convoluted manner in which proof has been offered to demonstrate the requisite nexus between the claims and the shipments alleged, each count must be examined individually (or in small groups) in order to ensure clarity and comprehension.

a. Count 2,141

In Count 2,141, Complainant alleges that Respondent shipped Rozol to United Suppliers Inc., 30473 260th Street, Eldora, Iowa 50627, on October 1, 2007. Compl. ¶ 472. Complainant points to the shipping manifest as proof that this shipment occurred. CX 23 at EPA 488. As to the nexus, Complainant argues that claims made in the Slim Jim 8001 (dated February 17, 2006) were "in the marketplace" and Respondent was engaged in a "radio advertising campaign" at the time of this shipment. C's Post-Hearing Br. at 75–76.[44] Given Ms. Niess's admission at hearing that none of the allegations in this group of counts were based on claims made in the Slim Jim 8001 and the fact that this document was not alleged in the Complaint to be part of the bevy of claim-bearing documents, Complainant cannot now seek to establish liability based on the contents of a document not identified in the pleadings. Niess Tr. at 158:4–7; *see also Microban II*, 11 E.A.D. at 450. Second, Complainant has failed to establish a nexus between claims made in radio advertisement broadcasts in Nebraska and a shipment of product to Iowa. Complainant cites to no evidence that demonstrates that United Suppliers Inc. ever received communications containing substantially differing claims. Accordingly, Count 2,141 is **DISMISSED**.

[44] Complainant also argues that the fact that this United Suppliers, Inc. in Iowa is "a different location of one of Respondent's 'authorized' distributors for Rozol . . ." should be persuasive in establishing a link between the shipment at issue in Count 2,141 and the claims made in Respondent's advertisements. C's Post-Hrg Br. at 75. However, even if true that these entities are related, Complainant has not established that either location of United Suppliers, Inc.—in Iowa or Texas—ever received communications containing substantially differing claims before United Suppliers, Inc.'s purchase of Rozol on October 1, 2007.

b. Counts 2,142 and 2,143

In Count 2,142, Complainant alleges that Respondent shipped Rozol to Agriliance Service Center, E. Hwy 23 and 61, Grant, Nebraska 69140, on October 8, 2007. Compl. ¶ 476. In Count 2,143, Complainant alleges that Respondent shipped Rozol to Agriliance Service Center, 1250 Rundell Rd., Gering, Nebraska 69341, on October 19, 2007. Compl. ¶ 480. Complainant points to the shipping manifests as proof that these shipments occurred. CX 23 at EPA 486–87. As to the nexus, Complainant argues that these shipments occurred at the same time that Respondent was broadcasting radio advertisements for Rozol with substantially differing claims. C's Post-Hrg. Br. at 75–76. Complainant has failed to establish a nexus between the claims made in radio advertisements broadcast in Nebraska and the shipments of product to Agriliance Service Center. Complainant cites to no evidence that demonstrates that Agriliance Service Center ever received communications containing substantially differing claims. Accordingly, Counts 2,142 and 2,143 are **DISMISSED**.

c. Counts 2,162, 2,170, 2,172, 2,175, 2,180, and 2,183

These counts allege separate and solitary shipments of Rozol to various individuals or companies in Nebraska and Colorado between March 30 and May 30, 2008. However, these recipients are not identified as distributors and Complainant makes no arguments and offers no evidence to establish a nexus between the shipments and the communications containing substantially differing claims. Accordingly, Counts 2,162, 2,170, 2,172, 2,175, 2,180, and 2,183 are **DISMISSED**.

d. Counts 2,160, 2,166, 2,171, and 2,174

These counts allege a series of shipments of Rozol to Arrow Seed Company, 126 North 10th St., Broken Bow, Nebraska 68822, between February 15, 2008, and April 4, 2008. Compl. ¶¶ 548, 572, 592, 604. Count 2,160 corresponds to the bill of lading which specifies the destination as: ARRO[W] SEED, 126 N. 10TH, PH: 308/872-6826, BROKEN BOW, NE 68822 USA. CX 23 at EPA 450. Counts 2,166 and 2,174 correspond to the bills of lading which specify the destination as: (BR) ARROW SEED COMPANY(F), 126 NORTH 10TH, PHONE: 308/872-6826, BROKEN BOW, NE 68822 USA. CX 23 at EPA 454, 460. Count 2,171 corresponds to the bill of lading which specifies the destination as: ARROW SEED COMPANY, 126 NORTH 10TH, PHONE: 308-872-6826, BROKEN BOW, NE 68822 USA. CX 23 at EPA 458. The distribution list identifies as a Rozol distributor a Max Richeson, Arrow Seed Company, P.O. Box 722, Broken Bow[,] NE 68822. CX 17 at 378. Despite the inconsistency between the postal address in CX 17 and the physical address in CX 23, as well as the orthographic variations in the address label, it is reasonable to conclude that these shipments were sent to a distributor who had previously received the Direct Mail Packages. Indeed, it is likely that a distributor list would capture mailing information for purposes of contact whereas a bill of lading would naturally carry the physical destination address for purposes of delivery. Accordingly, I find that Complainant has established the requisite nexus between the claims

made in the Direct Mail Packages and the four shipments of Rozol to Arrow Seed Company, as alleged in the Complaint.

e. Counts 2,161, 2,165, 2,168, and 2,177

These four counts allege a series of shipments of Rozol to Van Diest, 71703 US Highway 83, McCook, Nebraska 69001, between March 6, 2008, and April 18, 2008. Compl. ¶¶ 552, 568, 580, 616. Count 2,161 corresponds to the bill of lading which specifies the destination as: VAN DIEST, 71703 US HIGHWAY 83, PHONE: 800/652 - 9306, MCCOOK, NE 69001 USA. CX 23 at EPA 451. Count 2,165 corresponds to EPA 463, Count 2,168 to EPA 461, and Count 2,177 to EPA 464. These three bills of lading specify the destination as: (MC) VAN DIEST SUPPLY CO. (F), 71703 US HIGHWAY 83, PHONE: 800/652-9306, MCCOOK, NE 69001-0410 USA. CX 23 at EPA 461, 463–64. The distribution list identifies Dann Watson, Van Diest Supply Co., North Highway 83, McCook, Nebraska 69001-0410 as a Rozol distributor. CX 17 at EPA 378. Despite the inconsistency in the company name and street address, it is reasonable to conclude that these shipments were sent to a distributor who had previously received the Direct Mail Packages. Indeed, the identity of the expanded Zone Improvement Plan ("ZIP") Codes in the bills of lading and the distribution list compensate for the lack of a street number in the distribution list. *Compare* CX 17 at EPA 378 *with* CX 23 at EPA 461. Accordingly, I find that Complainant has established the requisite nexus between the claims made in the Direct Mail Packages and the shipments of Rozol to Van Diest Supply Company in McCook, Nebraska, as alleged in the Complaint.

f. Counts 2,151, 2,154, 2,158, 2,173, 2,176, and 2,182

These counts allege a series of shipments of Rozol to Helena Chemical, North Highway 385/87, Hartley, Texas 79044 between December 19, 2007, and May 15, 2008. Compl. ¶¶ 512, 524, 540, 600, 612, 636. These counts correspond to the bills of lading in CX 23 at EPA 485, 467, 468, 470, 466, and 465, respectively, which specify the destination as either: HELENA CHEMICAL or (HAR6) HELENA CHEMICAL(F), NORTH HWY 385/87, PHONE:806/365-4433, HARTLEY, TX 79044 USA. CX 23 at EPA 465–68, 470, 485.[45] The distribution list identifies as a Rozol distributor a Todd Martin, Helena Chemical Company, N. Hwy 385/87, Hartley, TX 79044. CX 17 at EPA 378. Accordingly, I find that Complainant has established the requisite nexus between the claims made in the Direct Mail Packages and the shipments of Rozol to Helena Chemical Company in Hartley, Texas, as alleged in the Complaint.

[45] The bill of lading at EPA 465 lists the street address of NOTH [sic] HWY 385/87, but the address still clearly indicates a common destination with the other counts in this subsection.

g. Counts 2,155, 2,169, and 2,181

These three counts allege a series of shipments of Rozol to Estes, 4302 Locust Street, Lubbock, Texas 79404, between January 25, 2008, and May 9, 2008. Compl. ¶¶ 528, 584, 632. These counts correspond to the bills of lading in CX 23 at EPA 477, 475, and 473, respectively, which specify the destination as: (ELU) ESTES(F), 4302 LOCUST STREET, PHONE: 806/749-1999, LUBBOCK, TX 79404 USA. CX 23 at 473, 475, 477. The distribution list identifies as a Rozol distributor an Arnold Frost, Estes Incorporated, 4302 Locust Ave., Lubbock, TX 79404. CX 17 at EPA 378. Despite the inconsistency in the type of roadway listed, the addresses are substantially identical. Accordingly, I find that Complainant has established the requisite nexus between the claims made in the Direct Mail Packages and the shipments of Rozol to Estes Inc. in Lubbock, Texas, as alleged in the Complaint.

h. Counts 2,153, 2,156, and 2,164

These three counts allege a series of shipments of Rozol to Pro-Chem, 900 Ross Street, Amarillo, Texas 79404, between January 23, 2008, and March 10, 2008. Compl. ¶¶ 520, 532, 564. These counts correspond to the bills of lading in CX 23 at EPA 478–80, which specify the destination as either: (PAM) PRO CHEM-4056(F) or PRO CHEM-4056, 900 ROSS ST., AMARILLO, TX 79102 USA. CX 23 at EPA 478–80. The distribution list identifies as Rozol distributors both Kelly Venable and Garry Rich at the same address. CX 17 at EPA 378. Accordingly, I find that Complainant has established the requisite nexus between the claims made in the Direct Mail Packages and the shipments of Rozol to Pro Chem in Amarillo, Texas, as alleged in the Complaint.

i. Count 2,152

Count 2,152 alleges a shipment of Rozol to UAP Distribution North, 2025 South Old Highway 83, Garden City, Kansas 67846, on or about January 18, 2008. Compl. ¶ 516. This Count corresponds to the bill of lading that specifies the destination as: (GA) UAP DISTRIBUTION NORTH(F), 2025 SO. OLD HWY 83, PHONE: 620/275-4271, GARDEN CITY, KS 67846 USA. CX 23 at EPA 471. Complainant argues that this shipment was to a distributor in "one of the six states in which Respondent disseminated its direct mail packages in November 2007." C's Post-Hrg. Br. at 76, 78 (citing, *inter alia,* CX 23 at EPA 471). The distribution list does not identify a distributor by the name of UAP Distribution North in Garden City, Kansas. The distribution list does identify a distributor named Martin Paetzold, United [sic] Agri Products, P.O. Box 1837, Hereford, TX 79045, but there was no evidence adduced at hearing connecting this distributor with the recipient UAP Distribution North. With only the vague similarity of the former's name and the latter's leading acronym to connect them, I find that Complainant has failed to establish that UAP Distribution North was one of Respondent's distributors of Rozol and, thus, failed to produce sufficient evidence linking any claims made in the Direct Mail Packages, or otherwise, to the recipient UAP Distribution North. Accordingly, Count 2,152 is **DISMISSED**.

j. Counts 2,150 and 2,159

These two counts allege shipments of Rozol to Wilbur Ellis either at 2765 FM 2397, Frionia, Texas 79035 (Count 2,150) or Wilbur-Ellis at 1 Mile Southwest U.S. Highway 60, Hereford, Texas 79045 (Count 2,159). Compl. ¶¶ 508 and 544. These counts correspond to the bills of lading in CX 23 at EPA 489 and 472, respectively, which specify the destination for Count 2,150 as: WILBUR ELLIS, 2765 FM 2397 PHONE: 806-265-3271 FRIONIA, TX 79035 USA; and for Count 2,159 as: (HE) WILBUR-ELLIS(F), 1 MI. SW US HWY 60 PHONE:806/364-0712 HEREFORD, TX 79045 USA. CX 23 at EPA 472, 489. The distribution list identifies as a distributor Phil Sullins, Wilbur-Ellis Company/Southern Division, 512 Hall Avenue, Littlefield, TX 79339. CX 17 at EPA 378. Complainant argues that the recipients identified in Counts 2,150 and 2,159 are "affiliates of the distributors" listed on the distribution list, that the product was shipped after the Direct Mail Packages "were sent in the six SLN states" and "after Respondent's radio advertisements for Rozol were broadcast in Kansas, Nebraska, and Texas. C's Post-Hrg. Br. at 77 (citing CX 14a at EPA 331–61; CX 17 at EPA 378; CX 23 at EPA 472, 489).

One implicit purpose of FIFRA section 12(a)(1)(B) is to prevent a registrant from inducing a consumer to purchase a pesticide based, at least in part, on claims that have not previously been submitted to the EPA. In that vein, Complainant correctly notes in its Reply Brief that "direct evidence of actual reliance on the substantially different claims" is not a prerequisite to establishing such a nexus. C's Reply Br. at 3–4. For example, in *Sporicidin*, the EAB had no problem finding that promotional literature disseminated to a hospital contained claims made "as part of" the sale of that product to the hospital months later. 3 E.A.D. at 603–04. In that case, respondent's employee had brought literature to the hospital "on many occasions," where it was read by hospital staff who used that type of product, who "may have been influenced" by the claims about that product, and who still worked at the hospital when the hospital subsequently purchased that product. *Id.* at 604. Subsequent EAB decisions have similarly favored a holistic examination of "all the surrounding facts and circumstances" in determining whether a "sufficiently close link" exists between claims and a subsequent sale or distribution. *Microban II*, 11 E.A.D. at 441–42 (quoting *Microban I*, 9 E.A.D. at 688).

In the instant case, my examination of the facts and circumstances surrounding Counts 2,150 and 2,159 concludes that evidence of such a link is severely lacking. Complainant proffered no evidence that the radio advertisements broadcast by various local stations in states including Kansas, Nebraska, and Texas did reach or could possibly have reached those in charge of making purchasing decisions in either Frionia or Hereford, Texas. Nor did Complainant either identify any communication between the Littlefield location and the Frionia or Hereford locations, or provide any basis for drawing such an inference. Simply put, there is no evidence that the claims in the radio advertisements had any relationship to the shipments detailed in Counts 2,150 and 2,159. With respect to the Direct Mail Packages, evidence of a sufficiently close link cannot rest on the mere fact that the distribution of those packages in six states

occurred before the shipments detailed in Counts 2,150 and 2,159. Complainant's cursory assertion that the various locations associated with the company "Wilbur-Ellis" are affiliates of each other, even if correct, is insufficient to demonstrate that claims in the Direct Mail Packages received by one individual in Littlefield, Texas, likely precipitated the shipment of Rozol to other locations.

Given the dearth of evidence offered by Complainant to show any cause and effect such an overlap, I find no nexus between the claims made in the Direct Mail Packages and the shipment of Rozol to Wilbur Ellis either in Frionia or Hereford, Texas. Accordingly, Counts 2,150 and 2,159 are **DISMISSED**.

k. Counts 2,145, 2,149, 2,157, 2,167, and 2,179

Count 2,145 alleges a shipment of Rozol to Estes, Inc., 11333 East 55th Avenue, Unit C, Denver, Colorado 80239, on December 3, 2007. Compl. ¶ 488. This Count corresponds to the bill of lading that specifies the destination as: ESTES,INC, 11333 E. 55TH AVE. UNIT C PHONE: 303-371-5915 DENVER, CO 80239 USA. CX 23 at EPA 490. Counts 2,157 and 2,179 allege two shipments of Rozol to Estes, Highway 183, Route 1, Box 431, Clinton, Oklahoma 73601 on February 8, 2008, and April 25, 2008. Compl. ¶¶ 536, 624. These counts correspond to the bills of lading in CX 23 at EPA 474 and 476, respectively, which specify the destination as either: ESTES or (ECL) ESTES, HWY 183 RT1 BOX431, S.TO SMITH IND PKWY580323-2660 CLINTON, OK 73601 USA. CX 23 at EPA 474, 476. The distribution list identifies the following distributors: Arnold Frost, Estes Incorporated, 4302 Locust Ave., Lubbock, TX 79404; Jeff Wagner, Estes Incorporated, 1925 W. John Carpenter Freeway, Suite 525, Irving, TX 75063; and Estes Incorporated (without an associated individual) at the Irving, Texas location. CX 17 at EPA 378.

Count 2,149 alleges a shipment of Rozol to Helena Chemical, 425 Railroad Avenue, Bridgeport, Nebraska 69336, on December 7, 2007. Compl. ¶ 504. This Count corresponds to the bill of lading in CX 23 at EPA 484, which specifies the destination as: HELENA CHEMICAL, 425 RAILROAD AVE PHONE: 308/262-1253, BRIDGEPORT, NE 69336 USA. CX 23 at EPA 484. Count 2,167 alleges a shipment of Rozol to Helena Chemical, 601 West 1st Avenue, Holdrege, Nebraska 68949, on March 14, 2008. Compl. ¶ 576. This Count corresponds to the bill of lading in CX 23 at EPA 469, which specifies the destination as: (HOL) HELENA CHEMICAL(F), 601 WEST 1ST AVENUE PHONE: 308/995-4775, HOLDREGE, NE 68949 USA. CX 23 at EPA 469. The distribution list identifies the following distributors: Bob Stewart, Helena Chemical Co., 6409 Road 25, Goodland KS 67735; Todd Martin, Helena Chemical Company, N. Hwy 385/87 Hartley, TX 79044; Danny Pawlik, Helena Chemical Company, 4718 Hwy 84 Lubbock, TX 79416; and Dean Taake, Helena Chemical Co., 7137 Vista Drive West Des Moines, IA 50266. CX 17 at EPA 378.

Complainant argues that all of these shipments have sufficiently close links to the claims made in the Direct Mail Packages for three reasons. First, Complainant argues that these

shipments "to affiliates" of Rozol distributors were "sent to different locations of the companies authorized" to distribute Rozol PD. C's Post-Hrg. Br. at 77 (citing CX 17 at EPA 378; CX 23 at EPA 469, 474, 476, 484, 490). Second, Complainant asserts that these shipments were received after the Direct Mail Packages "were sent in the six SLN states" and after the Rozol radio advertisements were broadcast in Kansas, Nebraska, and Texas. *Id.* (citing CX 14a at EPA 331-61). Third, Complainant contends that the individuals listed as authorized distributors held managerial or sales positions in their respective companies (Todd Martin of Helena Chemical was the Branch Manager in Hartley, Texas, and Arnold Frost of Estes Inc. was the Manager in Lubbock, Texas). *Id.* at 78 (citing CX 17 at EPA 378; CX 132 at EPA 3185–86). With respect to this third argument, Complainant asserts that:

> Because these [ ] individuals were in positions that could influence sales at their respective locations and perhaps other locations of their companies, it is reasonable to conclude that they contacted their respective company's other branches after receiving the direct mail packages from Respondent.

Id.

Complainant proffered no evidence that the radio advertisements broadcast by various local stations in states including Kansas, Nebraska, and Texas did reach or could possibly have reached Colorado, Oklahoma, or either Holdrege or Bridgeport, Nebraska. There is no evidence that the claims in the radio advertisements had any connection to the shipments detailed in Counts 2,145, 2,149, 2,157, 2,167, and 2,179. The fact that the shipments occurred after the Direct Mail Packages were distributed in six states does not establish a link between those claims and the shipments detailed in these counts. The fact that several individuals across six states may have received three documents from Respondent in November 2007 does not create a blanket connection to all subsequent shipments of product to all other recipients in those states. Complainant's assertion that the various locations associated with "Estes" or "Helena Chemical" are affiliates of the listed distributor, even if correct, is insufficient to demonstrate a sufficiently close link between the claims made generally in the Direct Mail Packages received by one location and the shipment of Rozol to locations elsewhere.

Complainant's additional argument that individuals identified as distributors occupied positions of corporate power and "perhaps" could influence purchases at other locations is untenably speculative. Even if credited with feasibility, such an assertion would not strengthen the link between the claims made in the Direct Mail Packages and the shipments; rather these shipments would be more likely a consequence of the claims made by the *distributor* to his affiliate. Despite investigating the positions of certain listed individuals, Complainant produced no evidence that it contacted these companies and identified no communication between the distributor locations listed at CX 17 at EPA 378 and the locations identified in these counts. For these reasons, I find no nexus between the claims made in the Direct Mail Packages and the

shipments of Rozol alleged in Counts 2,145, 2,149, 2,157, 2,167, and 2,179. Accordingly, Counts 2,145, 2,149, 2,157, 2,167, and 2,179 are **DISMISSED**.

l. Counts 2,146, 2,147, 2,148, and 2,163

Counts 2,146, 2,147, 2,148, and 2,163 allege shipments of Rozol to Van Diest Supply, 1434 220th Street, Webster City, Iowa 50595, between December 4, 2007, and March 7, 2008. Compl. ¶¶ 492, 496, 500, 560. These counts correspond to the bills of lading in CX 23 at EPA 462 and 481–83, which specify the destination as: VAN DIEST SUPPLY, 1434 220TH STREET, PHONE: 800/779-2424, WEBSTER CITY, IA 50595-0610 USA. CX 23 at EPA 462, 481–83. Complainant argues that these shipments have sufficiently close links to the claims made in the Direct Mail Packages for several reasons. First, Van Diest has another location in McCook, Nebraska, which Complainant argues is also "the location of four radio stations that broadcasted Respondent's radio advertisements, and a state in which Respondent disseminated its direct mail packages." C's Post-Hrg. Br. at 76 (citing CX 14a at EPA 209–27 and 348–49). Second, these shipments "to affiliates" of Rozol distributors were "sent to different locations of the companies authorized" to distribute Rozol PD. *Id.* at 77 (citing CX 17 at EPA 378; CX 23 at EPA 462, 481–84). Third, these shipments were received after the Direct Mail Packages "were sent in the six SLN states" and after the Rozol radio advertisements were broadcast in Kansas, Nebraska, and Texas. *Id.* (citing CX 14a at EPA 331–61). Fourth, the individual listed as authorized distributor, Dan Watson, was "Vice President Specialty Division" at Van Diest in McCook, Nebraska. *Id.* at 78 (citing CX 17 at EPA 378; CX 132 at EPA 3185-86). With respect to this fourth argument, Complainant makes the same argument as it does in connection with the Estes and Helena Chemical shipments alleged in 2,145, 2,149, 2,157, 2,167, and 2,179.

With respect to the first argument, Complainant has not established that Respondent paid to run advertisements on the four different radio stations broadcasting from McCook, Nebraska. Even if Rozol ads ran on radio stations broadcasting from McCook, the connection between these broadcasts and the shipments to Webster City, Iowa would be too attenuated to withstand any reasonable scrutiny. For all these reasons, as well as the reasons set forth in Parts VII.C.4.j and k, *supra*, no sufficient nexus is found between the claims made in the Direct Mail Packages and the shipments of Rozol alleged in Counts 2,146–48 and 2,163. Accordingly, Counts 2,146, 2,147, 2,148, and 2,163 are **DISMISSED**.

D. Whether the Claims Substantially Differ From Any Claims Made As Part of the Statement Required in Connection With Registration Under Section 3

Section 3 of FIFRA sets out the general requirement that all pesticides, absent an exemption, must be registered before they can be sold or distributed. 7 U.S.C. § 136a(a). Section 3 also establishes the procedure for registration and delineates the "statement required" in connection with registration. 7 U.S.C. § 136a(c)(1). The "statement required" is comprised of several components listed in subsection (c)(1). Those components are:

(A) the name and address of the applicant and of any other person whose name will appear on the labeling;

(B) the name of the pesticide;

(C) a complete copy of the labeling of the pesticide, *a statement of all claims to be made for it*, and any directions for its use;

(D) the complete formula of the pesticide;

(E) a request that the pesticide be classified for general use or for restricted use, or for both; and

(F) except as otherwise provided in paragraph (2)(D), if requested by the Administrator, a full description of the tests made and the results thereof upon which the claims are based, or alternatively a citation to data that appear in the public literature or that previously had been submitted to the Administrator . . . .

7 U.S.C. § 136a(c)(1)(A)–(F) (emphasis added).

Further, as indicated above, FIFRA section 12(a)(1)(B) makes it unlawful for any person:

(1) . . . to distribute or sell to any person-

* * *

(B) any registered pesticide if any claims made for it as a part of its distribution or sale *substantially differ from any claims made for it as a part of the statement required in connection with its registration* under [Section 3] . . . .

7 U.S.C. § 136j(a)(1)(B) (emphasis added).

1. Complainant's Arguments

Rather than using the language precisely as it appears in the statute, the Complainant alleges that Respondent violated FIFRA section 12(a)(1)(B) by distributing or selling Rozol with "claims made for the product as part of distribution or sale that substantially differed from the claims approved in the March 2, 2005 'accepted label.'" *See, e.g.*, Compl. ¶¶ 472, 476, 480, etc. Complainant finds support for this reading of the statute from three sources: (1) the text of FIFRA itself and EAB and federal appellate court decisions interpreting FIFRA; (2) EPA's historical implementation of the registration provisions; and (3) publicly-available guidance documents. C's Post-Hrg. Br. at 37.

a. Complainant's Statutory Construction Arguments

Complainant's arguments with respect to the statement required for registration are set forth in the Second MAD Order and are not repeated here. *Liphatech, Inc.*, EPA Docket No. FIFRA-05-2010-0016, 2011 EPA ALJ LEXIS 6, at *32–39 (ALJ, June 24, 2011) (Order on Motions for Accelerated Decision Regarding Alleged Violations of FIFRA § 12(a)(1)(B)). In its Post-Hearing Brief, Complainant further develops this argument, asserting that the phrase "claims made for it" in FIFRA section 12(a)(1)(B) refers back to both the requirement in FIFRA section 3(c)(1)(C) that a registrant submit "a statement of all claims to be made for it" along with the registration statement *and* the mandate in Section 3(c)(5)(A) that EPA register the pesticide if, *inter alia*, "its composition is such as to warrant the proposed claims for it." C's Post-Hrg. Br. at 38 (citing 7 U.S.C. §§ 136a(c)(1)(C), (c)(5)(A), and 136j(a)(1)(B)). According to Complainant, the identical words used in the different provisions of the statute were intended to have the same meaning and "show that the onus is on the applicant to submit a statement of claims to be made for the pesticide at the time of registration should it wish to obtain EPA's approval of any submitted claims." *Id.* at 38. Complainant then cites *Sporicidin* for the proposition that claims must be "compared to the statements that were approved by EPA in the notice of pesticide registration" in order to determine whether the claims substantially differ. *Id.* at 38–39 (citing *Sporicidin*, 3 E.A.D. at 601).

b. Complainant's Historical Agency Practice Arguments

Complainant turns to testimony from Mr. John Hebert, a product manager in EPA's pesticide registration division, to bolster its reading of FIFRA. At hearing, Mr. Hebert described the complete registration application for a pesticide as consisting of: the application form, the "data comp" forms, the confidential statement of formula, the draft label, and any data (or citations to public data) that need to be submitted. Hebert Tr. at 16:14–22. Complainant asserts that the registration division "does not 'typically see a separate document in the registration package labeled statement of claims.'" C's Post-Hrg. Br. at 39 (quoting Hebert Tr. at 17:3–5). Mr. Hebert explained that if a separate statement of claims were submitted with the registration package, his team would review it for acceptability, but "ultimately we would tell the registrant that they need to include it on their draft label to be considered when we actually approve the product." Hebert Tr. at 18:6–10. This is so, according to Complainant's reading of Mr. Hebert's testimony, "because the label 'sets the basic parameters of what could be said about the product[. . .].'" C's Post-Hrg. Br. at 39–40 (quoting Hebert Tr. at 18:14–15).

Complainant, through Mr. Hebert's testimony, points to the parallel but separate "opportunity for applicants to submit . . . 'optional marketing claims'" for review. *Id.* at 40 (citing Hebert Tr. at 19:1–24). According to Mr. Hebert, this practice is common and while such optional marketing claims are typically submitted "on the label," if such claims were submitted separate from the label, he "would probably review it for acceptability, but we would tell the registrant, if you want those approved, accepted, they have to appear on the label" because the label establishes "what claims can be said about the product." Hebert Tr. at 19:13–20:13.

Referring to an example of an unrelated company that submitted optional marketing statements with its registration statement, Complainant argues that "the submission of 'optional marketing claims' . . . gives EPA the ability to review and, if necessary, reject unsupported claims before they are used in advertising." C's Post-Hrg. Br. at 40–41.

Complainant then goes on to discuss two prior instances where Respondent submitted optional marketing statements in connection with the registration of other products. *Id.* at 41. As this argument is more appropriate for the calculation of penalty by demonstrating Respondent's culpability in that Respondent knew of the opportunity to have the Agency review its statements prior to use in advertising and purposely did not avail itself of this opportunity, this argument is not addressed here. Complainant subsequently offers an extensive policy argument, again through the testimony of Mr. Hebert, to support the Agency's historical implementation of Section 3. *Id.* at 41–43 (quoting Hebert Tr. at 30:19–31:2, 35:12–36:18). According to Mr. Hebert, when asked to determine whether a claim substantially differs from "any claim that was accepted for the specific product in question," he looks to the accepted label, along with the Notice of Pesticide Registration or the accompanying letter that goes along with the accepted label. Hebert Tr. at 39:15–22. This common Agency practice, Complainant concludes, is "consistent with Complainant's position . . . that the Notice of Pesticide Registration, which includes the accepted label, is the proper baseline for comparison under FIFRA section 12(a)(1)(B)." C's Post-Hrg. Br. at 44.

c. Complainant's Agency Guidance Arguments

In order to bolster its conclusions, Complainant cites "several publicly-available EPA documents" including Chapter 12 of EPA's Label Review Manual. C's Post-Hrg. Br. at 44 (citing CX 88 at EPA 1572). That document summarizes FIFRA section 12(a)(1)(B), stating that "[a]dvertising and collateral literature or verbal claims for the product must not substantially differ from any claims made on the label or labeling." CX 88 at EPA 1572 (citing FIFRA § 12(a)(1)(B)). Complainant also cites a "Q&A" webpage stating that:

> If use of the term "safe" [for example] has not been allowed in labeling and use of the term hasn't been otherwise approved, use of "safe" in advertising the sale or distribution of a pesticide product would generally be considered to substantially differ from what was approved in the registration[,] and sale or distribution of the pesticide would be unlawful under section 12(a)(1)(B) of FIFRA.

CX 136 at EPA 3265 (quoted at C's Post-Hrg. Br. at 45). Complainant's other arguments regarding Respondent's involvement with a trade group and EPA's informational letters to that group are irrelevant for purposes of establishing liability under FIFRA.

2. Respondent's Arguments

Respondent initially cites the preamble to the Final Rule in which the Agency acknowledged its limited authority under FIFRA to regulate advertising. R's Post-Hrg. Br. at 45 (citing 54 Fed. Reg. at 1,124). Respondent then turns to its constitutional argument, asserting that, in the proposed version of the Final Rule, "EPA expressly acknowledged that restrictions on pesticide advertising must be scrutinized to determine whether they comply with the First Amendment." *Id.* at 46 (citing 51 Fed. Reg 24,393, 24,395 (July 3, 1986)). Respondent also cites the proposed version of the Final Rule to contend that EPA acknowledged that the Supreme Court's decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), would apply to any restrictions placed on pesticide advertising. *Id.* at 46–47 (quoting *Cent. Hudson Gas & Elec. Corp.*, 477 U.S. at 566 (setting forth the four-part constitutional test for the regulation of commercial speech)). Respondent then urges the undersigned to avoid the constitutional question by reading FIFRA section 12(a)(1)(B) narrowly, and describes what that narrow reading should be. *Id.* at 47 (citing *Microban II* and *Sporicidin* for the proposition that FIFRA is most concerned with limiting claims about a product's effectiveness against unapproved pests). Before turning to Complainant's direct arguments, Respondent asserts that "[n]o adjudicated decision has interpreted the scope of FIFRA section 12(a)(1)(B) as broadly as advocated by Complainant in the proceeding." *Id.* at 48 (incorporating by reference the arguments made in the non-party brief filed in connection with the Second MAD Order).

a. Respondent's Counterargument on the Statement Required

Respondent disputes Complainant's characterization of the "statement required," arguing that the statement required in connection with Section 3 must be broader than merely the Notice of Pesticide Registration or the accepted label. R's Post-Hrg. Br. at 49–50. Citing Mr. Hebert's testimony, Respondent asserts that even the Agency considers the efficacy data that may be submitted to be part of the "statement required." *Id.* at 49 (citing Hebert Tr. at 182:20–183:23, 189:19–25). Respondent argues that Mr. Hebert's testimony confirms that the "statement required" is not limited to the "pesticide label and a discrete affirmative statement of claims for the product . . . ." *Id.* at 50 (citing Hebert Tr. at 182:20–183:23; *Antkiewicz*, EPA Docket No. IF&R-V-002-95, 1998 WL 830758, at *11 (EAB, Nov. 20, 1998)[46] (the EPA Regional office noted "that it submitted into evidence the . . . label, which comprises at least one component of the product's registration statement"); Niess Tr. at 234:13—235:7)). Respondent then notes that the language in the Complaint measuring the claims against the 2005 accepted label is contrary to the statute and the Second MAD Order because the Complainant stated that the claims made for Rozol substantially differed from the "accepted label." *Id.* at 50.

[46] Respondent cited to the EAB opinion that had been superseded on reconsideration. *See Antikiewicz*, 8 E.A.D. 218 n.1 ("The Board's November 20, 1998 decision in this case . . . has no precedential value in this or any other case"). Nevertheless, the quoted material from the superseded opinion is identical to what appears in the final opinion.

With respect to the statutory language argument, Respondent notes that Section 12(a)(1)(B) specifically refers to "any claims made for it as part of the *statement required* in connection with its registration under section [3]," emphasizing the similarity between this language and the title of Section 3(c)(1) ("Statement required"). *Id.* at 51 (citing 7 U.S.C. §§ 136j(a)(1)(B) and 136a(c)(1)(A)–(G)). Respondent concludes that this wording indicates that Congress intended to "include all of the information set forth in subparts (A)–(G) [i.e., including the efficacy data submitted] as part of the statement and therefore the basis of comparison for determining if a differing claim was made." *Id.* Respondent also notes that I previously stated that "[n]othing in 7 U.S.C. § 136a(c) requires claims about a registered pesticide to be affirmatively approved by the EPA." *Id.* at 52 (citing *Liphatech, Inc.*, EPA Docket No. FIFRA-05-2010-0016, 2011 EPA ALJ LEXIS 5, at *57 (ALJ, May 6, 2011) (Second MAD Order)).

With respect to the historical agency practice argument, Respondent asserts that EPA practice "strain[s the] interpretation of the statute." *Id.* at 51 (citing C's Post-Hrg. Br. at 39–43). Citing Mr. Hebert's testimony, Respondent notes that EPA rarely sees a "separate document in the registration package labeled statement of claims," *id.* at 51–52 (citing Hebert. Tr. at 17:3–18:18), and does not "routinely review advertising." *Id.* at 52 (citing CX 88 at EPA 1572). Respondent argues that if EPA requires "all claims made for a pesticide to be included on the label" and limits the benchmark for determining whether claims substantially differ to "whether the claims appear on the approved label," the Agency's conduct "would directly contradict the statute." *Id.* at 52. Respondent goes on to assert that Complainant has relied on "a long-standing interpretation that is inconsistent with the statute or that is against the underlying policy behind the statute." *Id.* (citing *Horrer v. Jeffrey*, 823 F.2d 1521, 1531–32 (Fed. Cir. 1987); *Coco-Cola v. Atchinson, T. & S.F. Ry. Co.*, 608 F.2d 213, 222 (5th Cir. 1979)). Respondent dismisses Complainant's discussion of "optional marketing statements" as confusion between what can be said on the label (which Respondent concedes is controlled carefully by EPA) and what can be said generally about a product (which Respondent argues need only be consistent with the information submitted in the registration and can be based on efficacy data). *Id.* at 52–53. Respondent concludes that "submission of optional marketing claims for use on the label and the fact that a label can be amended have no direct relationship to what claims can be made in advertising." *Id.* at 53.

Respondent then raises a new argument regarding the violations related to the sales or distributions involving Rozol sold under the FIFRA section 24 SLN permits. According to Respondent, Counts 2,141–2,183 concern a special local needs use of Rozol Pocket Gopher Bait. *Id.* at 53–54. Respondent states that "EPA's role in the registration of SLN labels under FIFRA section 24(c) is extremely limited" because the statement required for SLN registration was submitted by Respondent to the individual states in which Respondent sought registrations pursuant to each specific state's requirements." *Id.* at 53. Respondent asserts that because Complainant has not offered any evidence as to the SLN registration process, Complainant "can't possibly show that the statements . . . 'substantially differ.'" *Id.* at 54.

With respect to the agency guidance arguments, Respondent argues that the EPA guidance documents cited by Complainant merely "confirm that EPA is attempting to apply the standards for pesticide labeling found at 40 C.F.R. § 156.10(a)(5) . . . to claims made as part of a sale or distribution of the product." *Id.* at 55. As evidence of this, Respondent points to e-mail correspondence between Ms. Niess and Mr. Schmit regarding which statements in Liphatech's advertising materials the EPA found objectionable. Ms. Niess appears to substitute the labeling standards for a determination of whether claims made on the label are substantially different from claims related to standards for substantially differing claims related to a sale or distribution, and materials from Complainant's Enforcement Case Review citing to 40 C.F.R. § 156.10(a)(5) for the conclusion that, "[i]f [EPA] received this Research Bulletin as *labeling* to accompany a product to control prairie dogs, [EPA] would consider the following claims, statements, or graphs as 'false or misleading' . . . ." *Id.* (citing CX20 at EPA 430; CX19 at EPA 416). As support, Respondent quotes *Sporicidin*, wherein the court noted that EPA counsel "obscur[ed] the distinction between sections 12(a)(1)(B) and 12(a)(1)(E)" of FIFRA. *Id.* at 56 (citing 3 E.A.D. at 601 n.25).

b. Respondent's Alternative Argument that Claims Are Not Substantially Different

Respondent makes the alternative argument that the claims it made were not substantially different under FIFRA section 12(a)(1)(B) even if the basis for this determination was limited to a comparison to the approved product label. R's Post-Hrg. Br. at 56. Respondent then goes on to describe the inconsistent nature of EPA's determinations of what claims may appear on a label, and questions whether a penalty may be assessed to a member of the regulated community without clearer guidance. *Id.* at 57. Respondent emphasizes that both EPA and Liphatech's Manager of Regulatory Affairs, Mr. Schmit, testified at hearing that in order to determine whether the claim in question is permissible, they decide whether that claim will contradict the language on the label. *Id.* at 58 (citing Hebert Tr. at 161:14–18; Schmit Tr. at 72:17–21). Respondent goes on to describe a chart, included as Exhibit A to its Post-Hearing Brief, that purports to include each alleged substantially different claim and materials that Respondent believes confirm those claims in an effort to prove that its claims are supported by scientific data. *Id.* at 62. Respondent concludes its arguments by discussing the validity of the scientific studies it relied upon in making its claims. *Id.* at 62–64.

3. Discussion

a. Part of the Statement Required in Connection With Registration under Section 3

In order to determine whether a violation of FIFRA section 12(a)(1)(B) has occurred in this case, it must first be established what, if any, claims were made by Respondent for Rozol as part of the statement required for pesticide registration. I will first evaluate whether the statutory language related to claims under FIFRA is clear as to what documents within the statement

required are the proper basis for comparison to the claims made as part of a distribution or sale. "The starting point in statutory interpretation is 'the language [of the statute] itself.'" *Microban I*, 9 E.A.B. at 682 (citing *U.S. v. James*, 478 U.S. 597, 604 (1986) (internal quotations omitted)). Other methods of interpretation should only be used where the intent of Congress is unclear. *Id.* (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). FIFRA section 3(a)(c)(1) provides the elements that an applicant for pesticide registration must include in the statement required. 7 U.S.C. § 136a(c)(1)(A)–(F). The Fourth Circuit has described the review of a statement required for pesticide registration under FIFRA as an "involved process of review by the EPA, culminating in approval of the label under which a product may be marketed." *Worm v. Am. Cyanamid Co.*, 5 F.3d 744, 747 (4th Cir. 1993). One element of the statement required is that the applicant must submit "a complete copy of the labeling of the pesticide, a statement of claims to be made for [the pesticide], and any directions for its use." 7 U.S.C. § 136a(c)(1)(C); *see also*, *Antkiewicz*, 8 E.A.D. at 234–35 (citation omitted).

FIFRA section 3 goes on to give the EPA the authority to request "a full description of the tests made and the results thereof upon which the claims are based, or alternatively a citation to data that appear in the public literature or that previously had been submitted to the [EPA] . . . ." 7 U.S.C. § 136a(c)(1)(F). Under this subsection, the applicant for pesticide registration is not required to submit tests as part of its statement required in order to have its pesticide registered unless the EPA requests the tests for the purpose of substantiating any claims made in the statement required. The language giving the EPA this authority also refers to "the claims," implying that the tests are not claims in and of themselves, but rather the tests provide a basis upon which the claims are made. In addition, FIFRA section 3(a)(c)(5) gives the EPA authority to "waive the data requirements pertaining to efficacy, in which event the [EPA] may register the pesticide without determining that the pesticide's composition is such as to warrant proposed claims of efficacy." 7 U.S.C. § 136a(c)(5). By granting the Agency the authority to register a pesticide without reviewing the data and leaving the decision of whether to consider data up to the Agency's discretion, the statutory language makes it clear that data is not a necessary component of a statement required for pesticide registration.

Conversely, the statute does not give the Agency discretion as to whether to request or consider a statement of claims submitted by an applicant for pesticide registration. 7 U.S.C. § 136a(c)(1)(C). The importance of the statement of claims becomes apparent in FIFRA section 12(a)(1)(B). FIFRA section 12(a)(1)(B) references the elements for a pesticide registration application as required in FIFRA section 3(c)(1)(C) by making it unlawful to distribute or sell "any registered pesticide if any claims made for it as a part of its distribution or sale substantially differ from *any claims made for it as a part of the statement required* in connection with its registration under [section 3] . . . ." 7 U.S.C. § 136j(a)(1)(B) (emphasis added). The EAB has stated that a sale, distribution or offer for sale of a registered pesticide is a violation of FIFRA section 12(a)(1)(B) where claims associated with that distribution or sale "substantially differ from claims accepted in connection with its registration." *Sporicidin*, 3 E.A.D. at 589 (footnote omitted). The EAB subsequently reiterated that, in order to establish a FIFRA section

12(a)(1)(B) violation, the comparison is between the claims made as part of the distribution or sale of a pesticide and "the approved claims under the product's registration." *Microban II*, 11 E.A.D. at 427–28. An ALJ has also stated that the "notice of pesticide registration represents the base line from which allegations of a Section 12(a)(1)(B) violation of FIFRA must be measured." *Microban Products Co.*, Docket No. FIFRA 98-H-01, 1998 EPA ALJ LEXIS 135, at*20–21 (ALJ, Sept. 18, 1998).

In other words, a person may avoid a violation of FIFRA section 12(a)(1)(B) if that person only makes claims regarding the pesticide as part of a distribution or sale that are reflected in the statement of claims made during registration and approved by the EPA at the time of registration.[47] This section does not reference data or studies included as part of the pesticide registration application as offering the same protection. Because the statement of claims is treated differently under the statute than data or studies submitted by an applicant for pesticide registration, the plain language of FIFRA does not allow for consideration of information contained in the data or studies as part of "the claims made for [the pesticide] as a part of the statement required in connection with its registration under [FIFRA section 3]." 7 U.S.C. § 136j(a)(1)(B).

Testimony at hearing by Mr. Hebert, a product manager in the Registration Division of EPA's Office of Pesticide Programs, confirmed this reading of the statute. His testimony showed that the submission of studies or data or citations to data by applicants for pesticide registration is not tantamount to submitting a statement of claims for purposes of the statement required. Mr. Hebert responded in the negative when asked by EPA counsel: "Are all the claims made in the underlying data automatically considered claims that have been accepted by EPA in connection with the registration of the pesticide?" Hebert Tr. 30:13–17. He stated two reasons for this:

> One, the data are sometimes not acceptable or partially acceptable. We could have problems with the data. There could be conflicting information, there could be problems with the way a study was conducted.
>
> And, secondly, studies do not typically list claims. They are scientific works, but they do not include lists of optional marketing claims or marketing claims.

[47] While a pesticide registration applicant may submit any claims it wishes as part of the statement required, it follows that only those claims that the EPA accepts or approves as legitimate claims regarding the pesticide subject to the application may be used for comparison with claims made as part of a sale or distribution. *See Sporicidin*, 3 E.A.D. at 589 (footnote omitted); *Microban II*, 11 E.A.D. at 427–28.

Id. at 30:19–31:2. The testimony of an agency employee who is responsible for reviewing applications for pesticide registration concurs with the statutory language states that studies or data concerning a pesticide are not considered part of the claims made for that pesticide as part of the statement required. Therefore, based on the statutory language and the testimony at hearing, Respondent's argument that the studies or data it submitted along with its application for pesticide registration should be considered part of the claims made for Rozol as part of the statement required is without merit.

As cited above, EAB precedent dictates that claims associated with a distribution or sale that are suspected of being in violation of FIFRA section 12(a)(1)(B) should be compared to those claims accepted or approved at registration. *Sporicidin*, 3 E.A.D. at 589 (footnote omitted); *Microban II*, 11 E.A.D. at 427–28. In *Sporicidin*, the ALJ looked to the approved labels for the disinfectant at issue to find that claims made as part of the distribution or sale regarding the effectiveness of the disinfectant were not approved by the EPA, a finding the EAB affirmed. *Sporicidin International*, EPA Docket No. FIFRA-88-H.02, 1988 EPA ALJ LEXIS 14, at *45 (ALJ, Nov. 1, 1988). In *Microban II*, the EAB found claims made as part of several distributions and sales to be unlawful by comparing those claims to claims made on the accepted label and the comments made by the EPA in the Notice of Pesticide Registration for the product at issue. *Microban II*, 11 E.A.D. at 428–29.

This ALJ and EAB precedent was echoed by Mr. Hebert at hearing. Mr. Hebert testified that when the Agency has reviewed a pesticide application and registered the pesticide, it "issue[s] a notice of pesticide registration along with a stamped accepted label." Hebert Tr. at 21:7–12. According to Mr. Hebert, the Notice of Pesticide Registration "will outline any conditions of registration that are associated with the registration, if there are any. And more importantly it will outline any kind of labeling changes or comments that we have that need to be implemented on that label before it is marketed." *Id.* at 22:8–13. Mr. Hebert stated that it is important that there are no marketing or advertising claims that undermine or contradict the accepted label because the label often "serves as the only reference that the user has . . . on how to safely and properly apply that produc[t]." *Id.* at 35:12–22. Because of the importance of the accepted labels, Mr. Hebert and his colleagues use the Notice of Pesticide Registration and the accepted label as a baseline for comparison when evaluating whether a FIFRA section 12(a)(1)(B) violation has occurred. *Id.* at 39:15–22.

Mr. Hebert further emphasized the importance of the accepted label when discussing "optional marketing claims." *Id.* at 18:17–21:6. Although optional marketing claims are not required by FIFRA, Mr. Hebert testified that applicants for registration submit these types of claims "quite often . . . more common than not" for professional-use consumer products. *Id.* at 19:14–21. Mr. Hebert described optional marketing claims as "claims that the registrant proposes to promote their products in some way" in advertising. *Id.* at 18:24–25. He refers to them as optional because they are not statutorily required and "the [applicant] has the option of actually including them on their final printed label or the label they actually market in the real world." *Id.* at 19:3–7. Mr. Hebert then testified that the EPA reviews optional marketing claims

the same way as the statement of claims: reviewing the claims for acceptability and instructing the applicant to include the claims on the label because the label "sets the basic parameters around what can be said about the product." *Id.* at 20:3–13.

Complainant presented evidence that another applicant for pesticide registration submitted optional marketing claims with their application as part of the proposed label. *Id.* at 24:13–26:24; CX 92 at EPA 1695. Mr. Hebert testified that one of the submitted option marketing claims, "Easy to use," was rejected by the EPA in the Notice of Pesticide Registration. Hebert Tr. at 26:25–27:6. This claim was clearly stricken on the draft label and the removal of this claim was noted in the conditions for registration. CX 92 at EPA 1689, 1695. Ms. Niess also testified that Respondent had previously submitted optional marketing claims for another pesticide product registration in 2007, indicating that Respondent was aware that the EPA reviews such claims. Niess Tr. at 123:22–125:6.

Respondent did not submit a separate statement of claims document or any optional marketing claims with either of its Rozol registration applications. RX1, RX at LI 3-22; RX2, RX at LI 152-58. In addition, Mr. Hebert testified that, at least for Rozol PD, Respondent did not seek input from the EPA as to any of the claims that are at issue in this case. Hebert Tr. at 79:5–24. The only documents submitted by Respondent that contain statements regarding Rozol that could be considered "claims" for the purposes of FIFRA were the draft labels for each pesticide. As such, the EPA was not aware of the claims Respondent subsequently made for its product and could therefore not curtail the risks to human health and the environment presented by the substantially different claims. The substantially different claims, if submitted to the EPA at the time of application, may have altered the EPA's determination that the performance of Rozol outweighs the "adverse effects on the environment" in accordance with FIFRA section 3(c)(5). 7 U.S.C. § 136a(c)(5). At the very least, the EPA may have determined that those claims were unacceptable, as it has done in the past for other pesticide products. *See e.g.*, CX 92 at EPA 1689, 1695. Respondent took the chance that its future claims as part of a distribution or sale would substantially differ from those claims submitted as part of the statement required by not making those claims available to the EPA for review in its statement required. Due to the limited material submitted by Respondent in its application for pesticide registration, and based on the statutory language, administrative precedent, and the Agency's common practice, the appropriate comparison in this case is one between the claims at issue and any claims made on the accepted labels for Rozol as edited in the Notices of Pesticide Registration.

As described above, Respondent raises an additional counterargument stating that because Complainant has not presented any evidence regarding the SLN registration process, any claims related to Rozol sold under the FIFRA section 24 SLN permits cannot be deemed substantially different from the statement required in connection with its registration. Respondent did not raise this argument prior to hearing, nor did it provide testimony at hearing. Complainant did not address this argument in its Reply Brief.

FIFRA section 24(c)(1) states that a state registration for a special local need "shall be deemed registration under section [3] for all purposes of this [Act] . . . ." 7 U.S.C. § 136v(c)(1). Under the regulations applicable to this statutory provision, the EPA has the right to disapprove of a state registration for several enumerated reasons. 40 C.F.R. § 162.154. Absent disapproval by the EPA, the product may be distributed and used in that state, subject to the limitations found in FIFRA section 12(a)(1)(A)–(E). 40 C.F.R. § 162.156(a)(i). Although a registration under Section 3 and a registration under Section 24(c) may differ in the additional uses for which that product is authorized in a specific state or states, how that product is regulated under FIFRA is the same. 7 U.S.C. § 136v(c)(1). Similar to the requirements of FIFRA section 3(c)(1)(C), the regulations state that states must require all applicants for registration for an additional use of a federally registered product to submit "[a] copy of proposed labeling, including all claims made for the product . . . consisting of . . . a copy of proposed supplemental labeling and a copy of the labeling for the federally registered product." 40 C.F.R. § 162.153(a)(3). The evidence in the record includes the packets of materials submitted to the EPA by each of the states that registered the SLN uses at issue in this case, all of which were admitted at hearing.[48] CX 2 at EPA 12 (Kansas); CX 3 at EPA 27 (Nebraska); CX 4 at EPA 35 (Wyoming); CX 5 at EPA 43 (Colorado); CX 6 at EPA 51 (Texas). Respondent's argument that Complainant submitted no evidence to support the FIFRA section 12(a)(1)(B) violations is therefore without merit.

b. Whether the Claims Substantially Differed

Having established the appropriate claims for comparison in this case, it is appropriate now to look at the claims allegedly made in violation of FIFRA section 12(a)(1)(B) and compare them to the terms of the EPA's registration approval for Rozol to determine if they substantially differ. As this tribunal has stated "[w]hile not every claim in the[] documents runs afoul of the terms of the EPA's approval, that is not the test of compliance. Rather the question to be posed is whether *any* of the claims run contrary to the terms of the registration approval." *Microban Products Co.*, 1998 EPA ALJ LEXIS 135, at*28–29. Examination of the materials distributed by Respondent in the Direct Mail Packages sent in November 2007 demonstrates that Respondent, despite arguments to the contrary, made claims that "substantially differed" from those approved with its registration, in contravention of FIFRA section 12(a)(1)(B).

The Research Bulletin and the Cover Letter contain several claims regarding Rozol that are substantially different from the approved label and the Notice of Pesticide Registration. Despite the EPA registering Rozol as an RUP because of its threat to non-target species, the Research Bulletin and the Cover Letter, which are clearly meant to promote the purchase of Rozol for the control of black-tailed prairie dogs, make statements that mitigate this threat. The Research Bulletin contains the following statements: "Conclusion: *Above-ground* exposure risk to non-targets from Rozol is insignificant," "Secondary Hazard / Nearly all Prairie Dogs expired

[48] The SLN Packet for the State of Oklahoma was not admitted at hearing, but no FIFRA § 12(a)(1)(B) counts involved sales in Oklahoma.

underground," "Comparative toxicity profile overall risk to birds and mammals / Rozol is ranked over 50% lower than zinc phosphide in the EPA's Overall Risk Index and 1/3 lower than diphacinone (Kaput-D)," "Rozol's active ingredient (chlorophacinone) is ten times (10X) less toxic to dogs as Kaput-D's (diphacinone)," and "Conclusion: Rozol – the lowest risk profile among BPTD [black-tailed prairie dog] bait alternatives . . . Why risk potential harm to employees, livestock, birds, pets or other non-targets?" CX 14a at EPA 176–79. The Cover Letter states that Rozol "[p]oses low primary poisoning potential to birds and other non-targets." CX 14a at EPA 172; Jt. Stips at 7.

Each of these statements goes beyond the boundaries of the approved label and its designation as an RUP due to its threat to non-target species. The label for Rozol clearly states that the product was designated as an RUP "due to hazard to nontarget [sic] organisms" or "due to potential secondary toxicity to nontarget [sic] organisms." CX 5 at EPA 50; CX 6 at EPA 52; CX 7 at EPA 57. The label repeatedly specifies how deep the Rozol must be placed in the burrows and that any Rozol on the surface or less than a certain depth in the burrows must be removed. CX 5 at EPA 50; CX 6 at EPA 52; CX 7 at EPA 57. The toxicity of Rozol and the resultant threat to non-target species is also reflected in the very specific requirements for post-application measures that must be taken, e.g. several return trips to the bait application area for carcass search and collection, removal of moribund prairie dogs and any bait that has surfaced, depth of burial requirements for carcasses "to avoid scavenging of non-target animals," and storage instructions. CX 5 at EPA 50; CX 6 at EPA 52; CX 7 at EPA 57.

The Research Bulletin also makes several claims regarding the Rozol's efficacy that minimize the label's post-application requirements and make efficacy claims that are not reflected on the label. The Research Bulletin touts Rozol's "single application effectiveness" and that "Rozol consistently controlled Prairie Dog populations using a single application." CX 14a at EPA176. The Cover Letter reflects these efficacy claims, stating that Rozol "[p]rovides the most control available in a single application." CX 14a at EPA 172. The Research Bulletin goes on to state that over all sites, Rozol achieves either "95% average population reduction . . . by the 'plugged burrow' census method" or "94% average population reduction . . . by the 'visual count' census method." CX 14a at EPA 176; Jt. Stips. at 8. The Bulletin offers specific comparison to a control product manufactured and sold by a competitor, Kaput-D Prairie Dog Bait, stating that Kaput-D "achieved only 53% to 56% control." CX 14a at EPA 178; Jt. Stips. at 8. The Research Bulletin also makes comparative claims to other control products "such as zinc phosphide or Diphacinone-based anticoagulants" stating that these other products "have not proven to effectively prevent population recovery, leading to the need for costly retreatment." CX 14a at EPA 178; Jt. Stips. at 8. The Cover Letter also compares Rozol to these other baits, stating that Rozol uses chlorophacinone at 50 ppm, while "other half-strength, diphacinone-based baits contain[] as low as 25PPM." CX 14a at EPA 172; Jt. Stips. at 7.

Rozol's label paints a different picture of the ease of achieving effective control with one application, providing for reapplication in the event that prairie dog activity persists. CX 5 at EPA 50; CX 6 at EPA 52; CX 7 at EPA 57; Hebert Tr. at 92:24–93:21. In addition to

reapplication, Rozol requires several return visits to the bait application site making the statements such as "easy-to-use" and "lowest total application cost" misleading given the time needed to follow the label requirements. *Compare* CX 14a at EPA 172 *with* CX 5 at EPA 50, CX 6 at EPA 52, *and* CX 7 at EPA 57. The percentages of effectiveness and other comparisons to competing products or ingredients are not reflected in the approved label language or the Notice of Pesticide Registration and compromise the secondary poisoning concerns that led to Rozol's classification as an RUP. There was testimony from employees of the EPA that percentages and comparisons to other products are generally not approved for inclusion on the label because those results are rarely achieved in actual use. Hebert Tr. at 108:7–10; 114:12–22. Taken together, it is clear that the above cited claims are all substantially different from those claims made for Rozol as part of the statement required in connection with its registration. Having already established that the statements made in the Direct Mail Packages were made as a part of the distribution or sale of Rozol, there are clearly grounds for finding violations of FIFRA section 12(a)(1)(B).

VIII. PENALTY

A. Penalty Criteria

The assessment of civil administrative penalties is governed by the Consolidated Rules of Practice ("Consolidated Rules"), which provide that a penalty should be "based on the evidence in the record and in accordance with any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). The Consolidated Rules also instruct the ALJ to "consider any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.27(b). However, such penalty guidelines "are not regulations and are not binding" upon the ALJ in making penalty determinations. *Rhee Bros., Inc.*, EPA Docket No. FIFRA-03-2005-0028, 2006 EPA ALJ LEXIS 32, at *33 (ALJ, Sept. 19, 2006) (quoting *Green Thumb Nursey, Inc.*, 6 E.A.D. 782, 802 n.38 (EAB 1997) (internal quotations omitted)). Complainant bears the burdens of presentation and persuasion to show that the relief sought in this case is "appropriate." 40 C.F.R. § 22.24(a).

With regard to any relevant "civil penalty criteria in the Act," FIFRA section 14(a)(1) provides that "[a]ny registrant . . . who violates any provision of this subchapter may be assessed a civil penalty by the Administrator of not more than $5,000 for each offense." 7 U.S.C. § 136*l*(a)(1). Pursuant to the Debt Collection Improvement Act of 1996, the maximum penalty for violations occurring after March 15, 2004, and until January 12, 2009, was adjusted upward to $6,500 per offense. 31 U.S.C. § 3701; 40 C.F.R. § 19.4. For each violation occurring after January 12, 2009, a maximum penalty of $7,500 may be assessed. 40 C.F.R. § 19.4.

FIFRA section 14(a)(4) further provides in pertinent part that:

> In determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to the size of the

> business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation. Whenever the Administrator finds that the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment, the Administrator may issue a warning in lieu of assessing a penalty.

7 U.S.C. § 136*l*(a)(4); *accord Tifa*, 9 E.A.D. at 161.

This Tribunal has previously stated that FIFRA provides the "upper limit of the number of lawful violations the Agency could charge under FIFRA," but FIFRA does not provide a minimum number of violations the Agency must charge. *99 Cents Only Stores*, Docket No. FIFRA-09-2008-0027, 2010 EPA ALJ LEXIS 10, at *108 (ALJ, June 24, 2010). Just as the number of violations with which an agency chooses to charge a respondent is within the realm of the prosecutorial discretion of enforcement officials,[49] the decision of whether to issue a warning under FIFRA section 14(a)(4) rather than a civil penalty assessment is "ordinarily [a] matter[] within the prerogative of the responsible enforcement officials." *Chempace*, 9 E.A.D. at 140 (citing *Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 799–800 (EAB 1997) ("FIFRA does not 'require the Agency to issue warnings instead of penalties, or to impose penalties of zero.'" In other words, even if the Administrator were to find that either of the requisite conditions for issuing a warning existed, the Administrator nevertheless "retains the discretion to assess a penalty."); *Wyoming Refining Company*, 2 E.A.D. 221, 223 (CJO 1986) ("The decision whether to issue a warning or a complaint is a matter within Complainant's enforcement discretion.")). Similarly, the decision of *when* to commence an enforcement action is also within the discretion of the enforcing agency. *Martex Farms, S.E.*, 13 E.A.D. 464, 488 (EAB 2008) (citing *N.J. Dep't of Envtl. Prot. v. Gloucester Envtl. Mgmt. Servs., Inc.*, 668 F. Supp. 404, 407 (D.N.J. 1987) ("The EPA's decision as to the timing of an enforcement action is one within its discretion.")).

On July 2, 1990, EPA's Office of Compliance Monitoring & Office of Pesticides & Toxic Substances issued the "Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)" ("the 1990 ERP"). CX 51 at EPA 937; *Tifa*, 9 E.A.D. at 161. In December 2009, EPA issued a new FIFRA Enforcement Response Policy ("the 2009 ERP") that superseded the 1990 ERP. CX 51 at EPA 934. The 2009 ERP sets forth a "seven-step process" for computing a penalty in consideration of the statutory penalty criteria. *Id.* at EPA 948. Those seven steps are:

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[49] *See Martex Farms, S.E.*, 13 E.A.D. 464, 488 (EAB 2008) (citing *B&R Oil Co.*, 8 E.A.D. 39, 51 (EAB 1998) ("[C]ourts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement actions."). In *Martex Farms*, the EAB disagreed with the undersigned's penalty assessment and on appeal significantly increased the penalty imposed. *Id.*

1. determine the number of independently assessable violations [Section IV.A.1. Independently Assessable Violations];

2. determine the size of business category for the violator, using Table 1 [Section IV.A.2. Size of Business];

3. determine the gravity of the violation for each independently assessable violation using Appendix A [Section IV.A.3. Gravity of Violation];

4. determine the "base" penalty amount associated with the size of business (Step 2) and the gravity of violation (Step 3) for each independently assessable violation, using the matrices in Table 2 [Section IV.A.4. Base Penalty Amount];

5. determine the "adjusted" penalty amount based on case-specific factors, using the Gravity Adjustment Criteria in Appendix B and Table 3 [Section IV.A.5. Adjustment for Case-Specific Factors];

6. calculate the economic benefit of noncompliance [Sections [sic] IV.A.6. Economic Benefit of Noncompliance]; and

7. consider the effect that payment of the total penalty amount plus economic benefit of noncompliance derived from the above calculation will have on the violator's ability to continue in business [Section IV.A.7 Ability to Continue in Business/Ability to Pay].

CX 51 at EPA 948–49 (brackets in original). The 2009 ERP provides that a "civil penalty may be further modified in accordance with," *inter alia*, "Section IV.B.1. Graduated Penalty Calculations." *Id.* at EPA 949.

As noted above, penalty policies do not bind the ALJ because policies of this type have not been subject to the rulemaking procedures of the Administrative Procedure Act and therefore lack the force of law. *M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 610 (EAB 2002) (citations omitted). Thus, the 2009 ERP is not binding on the penalty determination here. Still, by virtue of the Rules, the undersigned is required to consider the civil penalty guidelines in the penalty analysis and to give specific reasons for deviating from the amount of the penalty proposed by the Complainant. 40 C.F.R. § 22.27(b). In support thereof, the EAB has stated several times that "penalty policies serve to facilitate the application of statutory penalty criteria and, accordingly, offer a useful mechanism for ensuring consistency in civil penalty assessments." *CDT Landfill Corp.*, 11 E.A.D. 88, 117 (EAB 2003) (citing *Chempace*, 9 E.A.D. at 131; *Mobil Oil Corp.*, 5 E.A.D. 490, 514–15 (EAB 1994) (quoting *Great Lakes Div. Of Nat'l Steel Corp.*, 5 E.A.D. 355,

374 (EAB 1994)). Nevertheless, a penalty policy is not unquestioningly applied as if the policy were a rule with "binding effect." *Emp'r Ins. of Wausau and Group Eight Tech., Inc.*, 6 E.A.D. 735, 755–62 (EAB 1997).

B. Complainant's Penalty Calculation

Complainant seeks a civil penalty in this matter in the amount of $2,891,200. Compl. at 98. The components of Complainant's penalty analysis are set forth below.

1. Unit of Violation (Counts 1–2,140 only)

Noting that courts have yet to rule on what constitutes a "unit of violation" of FIFRA section 12(a)(2)(E), Complainant argues by analogy that the logic used by the EAB in *Chempace* should apply in this case. C's Post-Hrg. Br. at 109. In *Chempace*, the respondent was found liable for multiple violations of FIFRA section 12(a)(1)(A) and (E) for selling or distributing unregistered or misbranded pesticides. 9 E.A.D. at 131. The EAB held that the plain language of the statute made it "unlawful to sell or distribute *any* unregistered or *any* misbranded pesticides to *any* person." *Id.* at 129–30 (footnote omitted). The EAB concluded that the "unit of violation" under FIFRA section 12(a)(1), thus including FIFRA section 12(a)(1)(A), is the "prohibited act" itself (i.e., the improper sale or distribution of the pesticide) and therefore each "such sale or distribution . . . is grounds for the assessment of a separate penalty." *Id.*

In terms of the "prohibited act," Complainant argues here that 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." C's Post-Hrg. Br. at 109 (citing 7 U.S.C. § 136j(a)(2)(E)). Complainant then looks to the 2009 ERP for additional guidance regarding the appropriate unit of violation. The 2009 ERP contains a section entitled "Independently Assessable Violations" stating that –

> A separate civil penalty . . . 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 at EPA 949. Complainant notes that Respondent admits having advertised Rozol BB on 2,140 separate occasions. C's Post-Hrg. Br. at 110. Complainant asserts therefore that an independent "unit of violation" for Section 12(a)(2)(E) "is each separate act of illegally advertising a restricted use product" and that each broadcast of a Rozol BB advertisement or printed issue of a trade publication containing a Rozol BB advertisement is a "separate act." *Id.* at 108–10.

Complainant also responds to arguments made by Respondent with two notable points. First, Complainant asserts that, like the respondent in *Chempace*, Respondent here fails to point

"to anything in the language, legislative history, or context" of the applicable section of FIFRA in support of the proposition "that the unit of violation should be less than the number of individual" advertisements. C's Post-Hrg. Br. at 110 (quoting *Chempace*, 9 E.A.D. at 130). Second, Complainant argues that adoption of Respondent's interpretation—that violations should be based on something less than each advertisement such as each version of the advertisement, the number of broadcasters or publishers, the number of states where the advertising took place, etc.—would "frustrate the purpose of the statute" by allowing "for only a nominal penalty for repeat violators." *Id.* Drawing a parallel to *Chempace*, Complainant asserts that Respondent's theory of treating a broad advertising scheme as a single course of action and, therefore a single violation, would undermine the deterrent purpose of civil penalties and destroy any incentive for an advertiser to refrain from continuing the unlawful activity after the first illegal advertisement is broadcast. *Id.* at 110–11. Logically extended, according to Complainant, Respondent's argument would allow a registrant to "broadcast countless illegal radio advertisements on every radio station in the United States . . . and the limit of its liability would be a maximum of $7,500." *Id.* at 111.

2. Size of the Business of the Violator

Respondent waived any argument regarding the "size of business" factor. *See* Jt. Stips. at 16; R's Post-Hrg. Br. at 66. Nevertheless, the statute requires consideration of this factor and the 2009 ERP requires EPA to determine a respondent's Business Category in order to calculate a proposed penalty. CX 51 at EPA 948. In its Post-Hearing Brief, Complainant states that Respondent's parent company, DeSangosse SAS, reported annual sales for 2009 of € 272 million. C's Post-Hrg. Br. at 113 (citing CX 55 at EPA 1008, 1066). In accordance with the 2009 ERP, Complainant categorized Respondent's size of business as "Category I." CX 55 at EPA 1008; Niess Tr. at 101:14–16. There is nothing in the record to contradict the correctness of this categorization.

3. Gravity of the Violation

a. Base and Gravity Tables

Appendix A of the 2009 ERP categorizes violations of both Sections 12(a)(2)(E) and 12(a)(1)(B) as "Level 2" violations. CX 51 at EPA 962, 964. Therefore, Complainant assigned "Level 2" as the Gravity Level for each of the 2,231 counts set forth in the Complaint. Niess Tr. at 101:13–105:12. The 2006 Penalty Policy assigns a base penalty of $6,500 for Level 2 violations by a Category I entity occurring after March 15, 2004, and the Civil Penalty Matrix contained in the 2009 ERP assigns a base penalty of $7,150 for similar violations occurring after January 12, 2009. CX 55 at EPA 1048; CX 51 at EPA 969. According to the Complainant, the events underlying Counts 1 through 2,183 occurred prior to January 12, 2009, and are assigned the base penalty of $6,500 per violation. C's Post-Hrg. Br. at 114 (citing Niess Tr. at 101:18–105:22).

b. Gravity Factors and ERP Application

Complainant asserts that it has duly demonstrated the appropriateness of the proposed penalty based on the gravity of the violations. Specifically, Complainant argues that both the advertising violations and the substantially differing claims violations "undermine the statutory scheme at several levels" and "present a potential for serious or widespread harm to non-target species, including endangered species." C's Post-Hrg. Br. at 83–84. Complainant maintains that Respondent "mischaracterized Rozol's effectiveness and minimized Rozol's potential to cause harm to the environment, all to increase sales of Rozol." *Id.* at 84. Complainant then considers the five gravity adjustment factors established in the 2009 ERP.

i. Toxicity

Complainant assigned a value of three (3) for toxicity of the pesticide because the 2009 ERP dictates such a value for pesticides that are registered as Restricted Use Pesticides. CX 51 at EPA 967; Niess Tr. at 106:23–107:6.

ii. Harm to the Environment

Complainant assigned a value of three (3) for harm to the environment based on its assessment that the violations alleged in this case resulted in unknown harm to the environment or "potential serious or widespread harm to the environment." CX 55 at EPA 1010. The written explanation for this factor states:

> EPA has discovered evidence of the fatal secondary poisoning of non-target species from applications of Rozol. The extent of such incidents is not known to EPA at this time, nor is it known if this poisoning occurred due to improper sale or use of the product. However, EPA considers this to be an indication of the potential serious threat of harm to the environment of the product. Actions minimizing the toxicity or danger of the product (i.e.[,] not disclosing the product's restricted use classification or making false and misleading claims about the safety of the product) would reasonably create a false impression in consumers' minds, resulting in increased use/misuse of the product.

Id.

Complainant asserts that the classification of Rozol as an RUP and the specific instructions and warnings contained on the label were important measures taken by EPA to mitigate the danger of Rozol to non-target wildlife. C's Post-Hrg. Br. at 91–97; Hebert Tr. 36:19–38:16; CX 2 at EPA 19. Complainant argues that Respondent's failure to include the classification in its advertisements and the use of claims that "contradict and undermine the

protective measures included in the label language could result in serious and widespread harm to non-target wildlife." C's Post-Hrg. Br. at 123. At hearing, Ms. Niess testified that "[m]inimizing the [label] requirements, minimizing the toxicity of the product in terms of [environmental harm] would result in a greater risk." Niess Tr. at 118:18—119:7. In addition, Dr. Steeger testified that EPA believed it "essential that applicators adhere to instructions to conduct carcass searches periodically after baiting and to properly dispose of carcasses collected." Steeger Tr. at 34:20–35:2 (referring to CX 75); CX 75 at EPA 1204.

With respect to the advertisements, Complainant argues that by not including the RUP classification, Respondent "short-circuited" the protections contained in FIFRA. C's Post-Hrg. Br. at 97. In the first scenario Complainant describes:

> the potential customer who is not a certified applicator, [uninformed by Respondent's advertisement] of the restricted use status of [Rozol] . . . attempts to purchase the restricted use pesticide, and the store clerk sells [it] to the customer without requiring proof that [the customer] is a certified applicator.

Id. Complainant then cites CX 102 (an order issued by the Kansas Department of Agriculture to an individual who was not a certified applicator for purchasing Rozol BB and applying it for the purpose of controlling prairie dogs) for circumstantial evidence that this scenario in fact occurred in Colby, Kansas in March 2008. *Id.* at 97–98 (citing CX 102 at EPA 2472–73). Complainant notes that for a seven-month period prior to this sale, hundreds of violative advertisements (identified by Counts 1–671 and 1,350–1,488) were broadcast by KXXX radio in Colby, as well as several other radio stations between 50 and 100 miles from Colby, Kansas. *Id.* (citing CX 102 at EPA 2472–73; CX 47 at EPA 873–78). Complainant argues that this is merely one example of other potential situations and cites several other cases where restricted use pesticides were sold to unlicensed applicators. *Id.* at 98 n.29 (citing several cases).

In the second scenario, the customer who has heard or read the violative advertisement is sold Rozol GUP, not limited to certified applicators, and that customer uses it to control black-tailed prairie dogs "without ever being aware of prairie dog specific labeling . . . ." *Id.* at 98–99. Complainant argues that in this scenario, "the buyer may out of ignorance make no attempt to pick up spilled bait or collect carcasses, leaving the poison available to the full range of non-target wildlife." *Id.* at 99.

Complainant asserts that it is not required to prove certain environmental harm, only that the penalty is appropriate. *Id.* at 100–01 (citing *In re FRM Chems.*, 12 E.A.D. 739, 760 (EAB 2006) (finding a value of three for harm both to the environment and to human health where the risks to both were unknown and the violations were harmful to the regulatory program)). Complainant further explains why finding proof of environmental harm would be an arduous and unrealistic task in this case. *Id.* at 100 (Rozol applications would likely be on private land, over large acreages in remote locations, no authority would be monitoring the area, predators and

scavengers could feed and move on before dying leaving their carcasses unlinked to the application of Rozol, etc.); *see also* Vyas Tr. at 30:10–31:7.

Complainant concludes that the potential for harm to the environment clearly exists and Respondent's specific acts of advertising Rozol without stating its RUP classification circumvents FIFRA's protective intent by bypassing the certified applicator. C's Post-Hrg. Br. at 99–100. Complainant dismisses Respondent's reliance on the fact that FIFRA also prohibits the actual sale of RUP products to uncertified applicators, arguing that whenever "one piece of [the regulatory] scheme is bypassed, the scheme is weakened and is therefore less protective." *Id.* at 99.

iii. Harm to Human Health

Finding that the Rozol products presented "minor potential or actual harm to human health," Complainant assigned a value of one (1) under the 2009 ERP. CX 55 at EPA 1010. Complainant based this assessment, in part, on the label instructions "to wear chemical resistant gloves when handling the bait . . . to store the bait away from children and to keep people out of the application area" and on "the directions to perform carcass and bait searches." Niess Tr. at 109:8–19. Complainant concedes that Rozol BB and Rozol PD are classified as RUPs not because of their potential hazard to humans, but due to "a risk of potential poisoning to nontarget [sic] organisms." CX 55 at EPA 1010. Complainant alleges, however, that both the failure to disclose the RUP classification "and the sale and distribution of the products with false or misleading claims could reasonably create a false impression in consumers' minds, resulting in increased use/misuse of the product." *Id.*

At hearing, Ms. Niess testified that since her initial penalty calculation, she "learned of an instance in which an uncertified applicator was able to purchase and apply Rozol Prairie Dog Bait." Niess Tr. at 110:18–112:2; *see* CX 102. In addition, Ms. Niess identified Respondent's subsequent application for an SLN registration in Kansas for mechanical application of Rozol PD. The application included a letter of support from Respondent's listed expert Charles Lee, in which Mr. Lee stated:

> It seems incomprehensible that an agency with the stated purpose to "protect human health and the environment from unreasonable adverse effects associated with pesticides" would now require application of a toxicant by hand. . . . The mechanical dispensing devices commonly used to help manage prairie dogs allow more accurate placement of the bait, more accurate amount of the bait applied at each burrow and improved human safety.

CX 140 at EPA 3345. Further along the document reads: "Applicator safety will be jeopardized, as they will be forced into closer contact with the bait with hand application," and "Applicators will ignore the label and apply bait without regard to label language." *Id.* at EPA 3346.

Complainant concludes that the above reasons support a gravity adjustment of one for harm to human health. C's Post-Hrg. Br. at 120–21.

iv. Culpability

Complainant assigned a value of two (2) for culpability for all counts in the Complaint because Respondent's culpability was determined to be unknown or the violations to be a result of negligence. CX 55 at EPA 1011. With respect to the first 2,140 counts, Ms. Niess found in her evaluation of Respondent's culpability undertaken at the time of the Complaint that, after the issuance of the June 2008 SSURO, Respondent immediately made efforts to come into compliance. *Id.*; Niess Tr. at 213:21–24. In addition, her investigation revealed that the absence of the restricted use classification was not universal; some materials for Rozol PD stated the RUP classification while others did not. Niess Tr. at 122:13–123:10.

With respect to Counts 2,141–83, Complainant initially assessed Respondent 's culpability as "unknown," and assigned a value of two. *Id.* at 123:11–15. Subsequently, Ms. Niess testified that she discovered:

> a stamped accepted label for one of Respondent's other registrations that included optional marketing statements . . . [which] indicated to [her] that Respondent was aware that EPA will review and accept and approve and make comments on optional marketing claims and optional marketing statements. And [Respondent] could have submitted any of the claims in its advertising or on its website to EPA for review.

Id. at 123:22–124:8 (testifying about CX 137).

In its Post-Hearing Brief, Complainant offers additional justification for its culpability determination related to Counts 2,141–83. Complainant argues that Respondent's reliance on certain studies to support its advertising claims was, at best, misplaced and, at worst, misleading. C's Post-Hrg. Br. at 105. Citing testimony from Mr. Schmit that, in determining whether its advertising claims were true or supportable, Respondent relied on, at least, the Lee and Hyngstrom Study (RX 10), the Comparative Risk Assessment (CX 38/RX 12), the Boatman Study (RX 26), the Lee and LeFlore Study (RX 63), and the EPA's IRB Review (RX 72), Complainant refers to three arguments made earlier in its Post-Hearing Brief in order to explain why this reliance was flawed. *Id.* These arguments address the distinction between making claims that theoretically could be factually supported by scientific literature and making claims that substantially differ from the registration statement. *See id.* at 56–73. Without repeating its liability arguments, Complainant asserts that Respondent's "self-serving and inappropriate reliance on these studies is relevant" to culpability. *Id.* at 105. Complainant asserts that

Respondent continued to display unlawful advertising on its website as late as a month prior to hearing, as further evidence relevant to Respondent's culpability. *Id.* at 107.

v. Compliance History

Complainant found no evidence of prior violations during the relevant review period and accordingly assigned a value of "0" for compliance history. CX 55 at EPA 1011. This factor did not affect the proposed penalty and will be considered no further.

4. Graduation of the Penalty

In calculating the proposed penalty, Complainant states that it "used its prosecutorial discretion to apply the graduated penalty scheme" contemplated in the 2009 ERP "to the advertising violations in this matter, due to the large number of violations Respondent committed." C's Post-Hrg. Br. at 126 (citing CX 55 at EPA 1012). Based on Respondent's size of business (Category I), Complainant applied a 75% reduction in the gravity adjusted penalty for Counts 101–400[50], a 90% reduction in the gravity adjusted penalty for Counts 401–2,140, and no gravity adjusted penalty for Counts 2,141–83 because the violations in this group do not exceed 100. *Id.* at 126. Complainant states that absent this graduation, the proposed penalty would have been $13,910,000 instead of $2,891,200. *Id.* at 126–27.

5. Economic Benefit of Noncompliance

Although the initial complaint filed in this matter contained an economic benefit penalty component, that line item was removed upon filing of the Amended Complaint. As Complainant no longer seeks to capture any economic benefit of noncompliance, that factor is not considered in its penalty analysis or in this decision.

6. Ability to Continue in Business

Respondent waived any argument regarding the "ability to continue in business" factor. *See* Jt. Stips. at 16; R's Post-Hrg. Br. at 66. Nevertheless, the statute requires the undersigned to consider the effect of the proposed penalty on the respondent's ability to continue in business. In regard thereto, the 2009 ERP directs evaluation of the alleged violator's financial information. CX 51 at EPA 957. Using the same financial information relevant to Respondent's size of business, Complainant and the undersigned considered the effect the proposed penalty would have on Respondent's ability to continue in business, and found none. CX 55 at EPA 1008.

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[50] In its Post-Hearing Brief, Complainant states that the reduced proposed penalty for these counts would be $1,650. C's Post-Hrg. Br. at 126. In EPA's penalty calculation analysis, the per violation penalty for Counts 101–400 is listed as $1,625. CX 55 at EPA 1012. The latter figure comports with the working figure for total penalty sought.

C. Respondent's Penalty Arguments

Initially, Respondent notes that it does not dispute Complainant's application of the following ERP steps: determining the size of the business, identifying the "gravity" of the alleged violations in Appendix A of the ERP, determining the base penalty amount, calculating the economic benefit of noncompliance, or considering the effect that paying the penalty would have on Respondent's ability to continue in business. R's Post-Hrg. Br. at 88–89. Instead, Respondent addresses only two parts of Complainant's proposed penalty analysis: determining the adjusted penalty amount based on case-specific factors using the gravity adjustment criteria in Appendix B and considering further modifications in accordance with Section IV.B.1–3 of the 2009 ERP. *Id.* at 89. Respondent also offers arguments on the appropriate unit of violation, the overall harm stemming from the violations, Complainant's alleged lack of evidence, and the disproportionateness of the penalty.

1. Unit of Violation

a. Counts 1–2,140 (advertising)

Noting that no court has yet determined the proper unit of violation under FIFRA section 12(a)(2)(E), Respondent cites testimony by Ms. Niess in which she admits that there is no agency guidance that discusses how to calculate individual violations in the context of advertising. R's Post-Hrg. Br. at 81–82 (quoting Niess Tr. at 238:23–239:15). Respondent does not agree with Complainant that the *Chempace* decision is instructive regarding FIFRA section 12(a)(2)(E) violations, arguing that the statutory language in that case, FIFRA section 12(a)(1)(A), was sufficiently different that the analogy fails. Respondent asserts that the EAB concluded that the clause "to any person" required that each individual sale or distribution be a unit of violation. *Id.* at 83 (citing *Chempace*, 9 E.A.D. at 129–30). The 2009 ERP reflects this reading where it states that the EPA "considers violations that occur from each sale or shipment of a product (by product registration number, not individual containers) or each sale of a product to be independent violations" under Section 12(a)(1). *Id.* 82–83 (citing CX 51 at EPA 949). Respondent emphasizes that the phrase "to any person" is absent from Section 12(a)(2)(E), which states only that it is "unlawful for any person . . . to advertise a product registered under this subchapter for restricted use without giving the classification of the product . . . ." 7 U.S.C. § 136j(a)(2)(E). Consequently, Respondent argues, the analogy between Sections 12(a)(1) and 12(a)(2) is inaccurate and Complainant cannot rely on *Chempace* to provide guidance in determining the unit of violation for pesticide advertising. R's Post-Hrg. Br. at 83.

Respondent argues that because the 2009 ERP instructs EPA not to count "individual containers" in a sale or distribution as separate violations, "individual advertisements" should not be counted as separate violations either. *Id.* (citing CX 51 at EPA 949). Instead, Respondent proposes that the advertising "contract" would be most analogous to a "sale" or "distribution" and asserts that the maximum number of violations for the acts alleged in Counts 1–2,140 should be either one, two, six or ten, calculated as follows:

1. Ten (10) (for the four different radio stations or conglomerates and six different print publications that contained or aired the advertisements at issue);
2. One (1) (for the fact that Respondent failed to include the RUP classification in its advertising generally);
3. Six (6) (the number of versions of violative radio (4) and print (2) advertisements);
4. Six (6) (the number of states where violative ads were broadcast or distributed); or
5. Two (2) (for one print ad and one radio broadcast ad).

R's Post-Hrg. Br. at 83–84 (citing RX 81; CX 14a at EPA 285–360).

b. Counts 2,141–2,231

In its Post-Hearing Brief, Respondent only addresses the violations regarding the sale or distributions to two of their employees, one of which was dismissed *supra*, and Counts 2,184–2,231, which were also dismissed *supra*. With respect to Count 2,178, which was also dismissed, Respondent repeats its earlier arguments that sales or distributions to an employee cannot be counted as a separate violation, and that this count therefore cannot be included in the final number of violations. R's Post-Hrg. Br. at 87.

2. Gravity of Violation

Respondent does not dispute the base penalty, but it does submit arguments regarding the gravity adjustment criteria, except for compliance history. The majority of Respondent's penalty argument relates to the broad notion of harm (including potential and actual harm, and harm to both human health and the environment). Respondent argues that the gravity adjustment factors must relate to the harm caused by the violation, not to the actual or potential actions of third parties. R's Post-Hrg Br. at 73–79. Respondent also asserts that Complainant wrongly conflates the toxicity of the underlying pesticide with the harm of the alleged violations. *Id.* at 90.

a. Harm of the Violation

Respondent argues that the phrase "gravity of the violation" as used in FIFRA does not refer to "the inherent toxicity of the underlying pesticide or [its] chemical composition." R's Post-Hrg. Br. at 67. Respondent asserts that EPA was aware of the inherent risks of Rozol at the time the products were registered. *Id.* at 68–69 (citing RX 1.g at LI 111–14; Niess Tr. at 207:16–208:23). General information about the toxicity of chlorophacinone or Rozol, Respondent continues, is therefore not relevant to determining the environmental or health effects of advertising the product without properly identifying its classification. *Id.*

Respondent also argues that the gravity adjustment factors related to harm to human health and harm to the environment must be evaluated separately from the characteristics of the pesticide involved (i.e., its inherent toxicity) and instead must be grounded in the actions constituting the alleged violations. *Id.* at 90. Failure to do so, Respondent alleges, will lead to "double-counting." *Id.* At hearing, Ms. Niess testified that:

> The pesticide toxicity gravity portion is there to capture the inherent toxicity of a product. The remaining factors, harm to human health and harm to the environment, would take into account the action and in the instance of an unregistered pesticide or a pesticide that is intended to be used or sprayed on a person, I would take into account both the type of product and how it's being applied in the sense of harm to human health.

Niess Tr. at 241:15–24. Respondent interprets this testimony as Complainant's admission that "these two adjustment factors relate to the alleged violations (the 'action,' to use Ms. Niess' words) rather than to the underlying pesticide." R's Post-Hrg. Br. at 91. Having accepted this conclusion, Respondent argues that the 2009 ERP "would never permit an adjustment to the penalty based on the impact that the actual advertising words would have on harm to human health or the environment." *Id.* Respondent goes on to note that, by contrast, if these gravity adjustment factors relate to the pesticide itself, "then 'innocent' mistaken words used in advertising would be treated the same as 'deliberate' falsehoods." *Id.*

Moreover, Respondent notes that if these gravity adjustment factors are based on the underlying pesticide and its chemical formula, the 2009 ERP "would not permit the size of the market in which the advertisements were placed or the amount spent on advertising to be taken into account in determining the gravity of an advertising violation." *Id.* Respondent quotes testimony from Ms. Niess in which she stated that she did not consider the size of the audience that heard the advertisements. *Id.* at 92 (quoting Niess Tr. at 193:10–19; 194:25–195:11). Respondent then notes that the advertising campaign that is the subject of Counts 1–2,140 involved only $32,000 in expenditures. *Id.* at 92 (citing CX 14a at EPA 285–360). Respondent estimates that the proposed penalty is 90 times the cost of the advertising campaign. *Id.*

Respondent concludes that the 2009 ERP "must be construed to require that these two gravity adjustment criteria—harm to human health and harm to the environment—be evaluated based on the acts alleged to violate FIFRA, which, in this case, are the words Respondent used in advertising Rozol." *Id.* at 93.

b. Toxicity

Respondent argues that the value of three (3) assigned for the toxicity adjustment factor must be ignored for three reasons:

1. First, Ms. Niess admitted she lacks the qualifications to evaluate the toxicity of Rozol or chlorophacinone in any mode of application, R's Post-Hrg. Br. at 94–95 (quoting Niess Tr. at 133:17–19, 180:7–21, 237:20–238:22).

2. Second, the toxicity adjustment factor should not be applied to advertising violations because they are more akin to record keeping violations for which Appendix E (the Enforcement Response Policy for FIFRA Section 7(c) - Pesticide Producing Establishment Reporting Requirements) does not incorporate the toxicity of the underlying pesticide into the calculation of the penalty. *Id.* at 96–97.

3. Third, while the Rozol label identifies the product as a Restricted Use Pesticide, the label is only required to carry the warning word "caution," which corresponds to a toxicity value of one (1), thus creating ambiguity in the 2009 ERP, which ambiguity should be resolved in Respondent's favor. *Id.* at 97 (citing *Pepsi Bottling Grp., Inc. v. Thomas*, No. C10-54, 2010 WL 4622520, at *4 (W.D. Wash. Nov. 4, 2010)).

Respondent also asserts that Ms. Niess conceded that the toxicity assessment has nothing to do with the conduct at issue in this case. *Id.* at 72 (quoting Niess Tr. at 197:17–198:1). Respondent concludes that the adjustment factor for toxicity should not apply to words used in pesticide advertising, but, if the undersigned finds that it does, a substantially lower adjustment should be applied to this factor. *Id.* at 98.

c. Harm to Human Health

Quoting the EPA's Penalty Calculation Analysis, Respondent argues that EPA's assignment of one (1) for harm to human health lacks any basis in the record because there is no evidence that any harm to human health could have or did occur from the alleged acts. R's Post-Hrg. Br. at 98–99 (citing CX 55 at EPA 1010). Respondent asserts that the RUP classification is based on the risk of harm to non-target species, not to humans. *Id.* at 98 (citing RX 1, RX 2). Respondent notes that Rozol BB and Rozol PD can legally be sold only to certified applicators and "there is no allegation in the Complaint that any of the Rozol products were sold by Respondent to anyone other than to certified applicators . . . ." *Id.* at 99. According to Respondent, there is no evidence, aside from Ms. Niess's unsupported opinion, that the advertisements at issue resulted in any illegal sales or caused confusion in the marketplace. *Id.* Respondent also argues that there is no evidence in the record that "Rozol was ever misused, applied contrary to the label or to land other than what was allowed by the label which could have harmed human health as a result of any of Respondent's advertisements." *Id.* at 100; *see also id.* at 69–72 (citing several portions of the Niess Transcript in support).[51]

[51] Respondent dismisses Complainant's reliance on the letter of support written by Charles Lee (CX 140 at EPA 3345–46), arguing that the letter "indicates nothing about the actual potential for Rozol to cause harm to human health" and merely supports the general notion that "[l]ess human contact with a pesticide is always better . . . ." R's Post-Hrg. Br. at 99.

(Footnote continued on next page.)

Respondent states that an assignment of zero (0)—for "actual or potential harm which is insignificant [. . .] and has no lasting effects or permanent damage or monetary loss"—is more appropriate for this factor. *Id.* at 100 (quoting CX 51 at EPA 968 n.3) (citing *Martex Farms, Inc.*, EPA Docket No. FIFRA-02-2005-5301, 2007 EPA ALJ LEXIS 7 (ALJ, Jan. 19, 2007), *rev'd in part on other grounds* 13 E.A.D. 464, 2008 WL 429631 (EAB 2008), *aff'd Martx Farms, S.E. v. EPA*, 559 F.3d 29 (1st Cir. 2009)).

d. Harm to the Environment

Respondent repeats its argument that Complainant conflated the harm of chlorophacinone with the harm of the advertisements and allegedly differing claims, arguing that Complainant has simply restated the toxicity of Rozol and counted it again under this next criterion. R's Post-Hrg. Br. at 101 (citing CX 55 at EPA 1010); *see also id.* at 75 (rejecting, for purposes of gravity of the violation, Complainant's arguments at C's Post-Hrg. Br. at 84–97). Respondent argues that the EPA knew of the potential risk to non-target species when it registered Rozol[52] and has produced no evidence that the advertising violations led to the misuse or misapplication of Rozol, confusion in the marketplace, or even that sales of Rozol increased as a result of "these advertising words." *Id.* at 74, 101. Respondent argues that Complainant's assessment of potential harm assumes an intervening illegal sale or use by third parties, but asserts that Complainant has offered no evidence to support that theory. *Id.* at 73–74 (quoting Niess Tr. at 199:10–24).

According to Respondent, Complainant's argument that the failure to include the restricted use language in advertising undermines the protection of non-target wildlife is "overstated." *Id.* at 75 (citing C's Post-Hrg. Br. at 97). Respondent argues that the two scenarios of potential customer misuse are "pure speculation and assume without any proof that the people engaging in these acts will willingly violate FIFRA to obtain and use Rozol in a manner other than [as] set forth on its label." *Id.* at 75. Respondent notes that the actual sale of RUPs is "rigorously controlled" by FIFRA and state laws, which limit sales to certified applicators. *Id.* at 101–02. Respondent goes on to claim that there is no evidence that Rozol was ever sold by Respondent to unauthorized buyers and no evidence that the general public attempted to buy

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[52] Respondent also argues that the statements it made were truthful and supported by empirical research, including the Lee and Hyngstrom Study. R's Post-Hrg. Br. at 77 & n.24 (citing RX 10). Respondent notes that the EFED review that cast doubt on the Lee and Hyngstrom Study is dated September 2009, "well after the conduct occurred which forms the basis of Counts 2,141-2,183, and well after Rozol [PD] was registered . . . ." *Id.* at 77 n.24 Respondent goes on to argue that it is reasonable to assume that EPA reviewed the submitted studies at the time of registration and cannot now find fault with statement based on those studies. *Id.* at 77–78.

Rozol. *Id.* at 102. Respondent claims that "[g]iven the extensive recordkeeping for the sale of restricted use pesticides, Complainant could have readily produced evidence of whether Respondent's advertising words caused any potential harm to human health or the environment by simply canvassing some of these easily identified purchasers." *Id.* at 102 n.37.[53] Respondent states that this criterion should be assigned a value of zero (0). *Id.* at 102.

e. Culpability

With respect to Counts 1–2,140, Respondent asserts that the activities underlying all the advertising violations identified in the Complaint ceased before the first SSURO was issued. R's Post-Hrg. Br. at 102–03 (citing Compl. ¶¶ 369–470; Niess Tr. at 210:18–211:4). Respondent argues that this cessation demonstrates that Respondent took immediate "steps to correct the violation," which militates against an assigned value of two (2) for this factor. *Id.* at 103–04. In addition, Respondent argues that the advertising allegations based on activities occurring in 2009 and 2010 cannot be relevant to culpability for Counts 1–2,140. *Id.* at 104 (citing Niess Tr. at 210:3–211:4, 213:3–12). Respondent then argues that Mr. Schmit's testimony as Respondent's environmental compliance officer bears on the decision between a value of one (1) (for "negligence") and zero (0) (for "neither knowing nor willful"):

> Well, prior to this incident, we did not have . . . a formal review process . . . . . there was no requirement for the marketing department to pass their advertising in front of me. That being said, they normally did . . . [but] that was not a formalized process . . . .

Schmit Tr. at 66:6–21.

With respect to Counts 2,141–83, Respondent again argues that it took immediate steps to correct the alleged violations by sending a "please destroy" letter to its authorized distributors "regardless of whether they actually had received the sales literature." R's Post-Hrg. Br. at 104. At hearing Ms. Niess testified that she subsequently discovered evidence that Respondent had submitted optional marketing claims to EPA for other products and concluded that Respondent's failure to do so for Rozol was relevant to culpability. Niess Tr. at 122:13-124:8. Respondent asserts that the optional marketing claims to which she refers were "for use on the label," which Respondent agrees must be approved by EPA. R's Post-Hrg. Br. at 105 (citing Schmit Tr. at 76:2–5). However, pesticide advertising itself does not need to be submitted to EPA for approval and EPA has stated that it routinely does *not* review advertising. *Id.* (citing CX 88 at

[53] In response to the Withers case (CX 102), Respondent argues that Complainant's attempts to tie one isolated sale to Respondent (by suggesting that radio ads aired in the region could have influenced the purchase) is, again, "pure speculation" and that it would be improper to draw any particular inference based on the underlying facts because there are other plausible conclusions that could be drawn. R's Post-Hrg. Br. at 76 & n.23 (citing *Ford Motor Co. v. Mondragon*, 271 F.2d 342, 345 (9th Cir. 1959)).

EPA 1572). Respondent then argues that as between a value of one (1) (for "negligence") and zero (0) (for "neither knowing nor willful"), the fact that there are no guidelines on what constitutes "substantially different" claims and that Respondent has no prior FIFRA violations weigh in favor of a zero (0) value. *Id.* at 105–06.

3. Disproportionate Penalty

Respondent argues that the proposed penalty is "grossly in excess of what is warranted by this case" and the undersigned should disregard the 2009 ERP and "calculate a fair and equitable penalty for any FIFRA liability that is found." R's Post-Hrg. Br. at 79. Because the 2009 ERP "lacks the force of law," it is "'open to attack in any particular case.'" *Id.* at 66 (quoting *McLaughlin Gormley King Co.*, 6 E.A.D. 339, 350 (EAB 1996)). By its own terms, the goal of the 2009 ERP is "to provide fair and equitable treatment of the regulated community, predictable enforcement responses, and comparable penalty assessments for comparable violations." *Id.* at 110 (quoting CX 51 at EPA 937). Respondent argues that while the undersigned "generally cannot look at the penalty levied in other enforcement cases" for comparison, such comparison "may be appropriate where the complainant has misapplied the applicable penalty policy." *Id.* at 110–11 (citing *Chem. Lab Prods., Inc.*, 2002 WL 31474170, at *13 (EAB 2002); *Titan Wheel Corp. of Iowa v. U. S. E.P.A.*, 291 F. Supp. 2d 899, 918 (S.D. Iowa 2002)).

In the *Titan Wheel* case, the EAB stated that variations in the assessed penalty "do not, without more, reflect an inconsistency" with the ERP's goal of fairness and equity. *Titan Wheel*, 10 E.A.D. 526, 533 n.14 (EAB 2002). Respondent asserts that the "more" contemplated in *Titan Wheel* is present in the instant case because the proposed penalty is so far removed from past cases as to be "'in a league of its own.'" R's Post-Hrg. Br. at 111 (quoting *Monieson v. Commodity Futures Trading Comm'n*, 996 F.2d 852, 864 (7th Cir. 1993)). Otherwise, Respondent argues, one must conclude that the 2009 ERP is "so clear and is applied so uniformly and consistently" that widely disparate treatment of parties would be unimaginable. *Id.* Respondent, however, finds fault with the 2009 ERP and its application. Because the 2009 ERP gives EPA "significant latitude to charge whatever number of units of violation it cares to charge," there is the potential for such discretion to result in "a miscarriage of justice." *Id.* at 112 (citing *Rhee Bros., Inc.*, EPA Docket No. FIFRA-03-2005-0028, 2006 EPA ALJ LEXIS 32 (ALJ, Sept. 19, 2006) (where there are many units of violation, penalties may become out of proportion to the gravity of the offense)).[54]

Respondent argues that the undersigned should consider "fairness, equity and other matters as justice may require" in calculating an appropriate penalty here in light of the fact that "no harm to human health or the environment occurred as a result of Respondent's advertising,

[54] Respondent notes that it can find only three adjudicated enforcement cases, in the entire history of FIFRA, that exceed $200,000. R's Post-Hrg. Br. at 112. At hearing, Ms. Niess stated that, to her knowledge, the $2.9 million proposed penalty here would be the largest FIFRA penalty ever assessed. *Id.* at 113 (Niess Tr. at 138:7–12).

Respondent always acted in good faith, and no economic benefit was derived from the alleged violations." *Id.* at 66–67 (footnotes omitted). Respondent asserts that Complainant's application of the 2009 ERP results in a proposed penalty that "grossly overstates the gravity of the Respondent's conduct . . . ." *Id.* at 114. Because the proposed penalty is excessive, Respondent asserts that a new penalty must be calculated that "'is appropriate in relation to the facts and circumstances at hand.'" *Id.* (quoting *99 Cents Only Stores*, Docket No. FIFRA-09-2008-0027, 2010 WL 2787749, at *27–28 (ALJ, June 24, 2010)).

Respondent states that most of its reasoning set forth above applies equally to Counts 2,141–2,231. Respondent argues that "Complainant failed to show any link between the claims made by Respondent, even assuming they are substantially different, and any actual or potential damages to human health or the environment resulting from these advertising claims." *Id.* at 115. Respondent concludes that if liability for these counts is found, only a "minimal penalty is warranted." *Id.*

4. Graduation of the Penalty

Respondent raises a new argument in its Post-Hearing Brief, asserting that Complainant has "creatively interpret[ed] the 2009 ERP" by "arbitrarily substitut[ing] the term 'Number of Advertisements' in the first column of Table 4 . . . for the term 'Number of Distributions'" despite the fact that the 2009 ERP at Section IV.B.2. "does not once use the word 'advertising,' or reference the RUP classification" provision. R's Post-Hrg. Br. at 107–09 (quoting Niess Tr. at 214:12—215:8). After noting that the 2009 ERP does not specifically provide for discounting multiple advertising violations, Respondent contends that "[i]f the drafters of the 2009 ERP had considered the potential for FIFRA section 12(a)(2)(E) to result in thousands of violations based on individual radio broadcasts, it is quite possible that a more significant discount would have been applied." *Id.* at 108. Respondent concludes that Complainant has "selectively applie[d] its own 2009 ERP in order to achieve the result it desires rather than the result that is supported by the totality of circumstances of the case." *Id.* at 109.[55]

D. Penalty Discussion

1. Unit of Violation

a. Counts 1–2,140

[55] Respondent also argues that under Section IV.B.3 of the 2009 ERP, the penalty "should have been reduced another 20%" because Respondent "acted in good faith during the penalty discussions . . . ." R's Post-Hrg. Br. at 107 n.42. It is noted, however, that Section IV.B.3 of the 2009 ERP applies only to adjusting the proposed penalty as part of a settlement and thus is not applicable here. *See* CX 51 at EPA 960.

There is no judicial or administrative precedent on what constitutes the appropriate unit of violation under FIFRA section 12(a)(2)(E). The EAB has generally recognized that "whether alleged acts or omissions give rise to a single or, alternatively, multiple violations of a single statutory provision is a question of statutory construction." *Chempace*, 9 E.A.D. at 128 (quoting *Woodcrest Mfg., Inc.*, 467 U.S. 837, 842 (1984) (internal quotations omitted)). Statutory interpretation begins with the plain language of the statute. *Microban I,* 9 E.A.D. at 682 (citing *United States v. James*, 478 U.S. 597, 604 (1986) (internal quotations omitted)). A tribunal should use other methods of interpretation only where Congress's intent is unclear. *Id.* (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). The EAB has repeatedly looked to the language and structure of the provision at issue, as well as to statutory definitions, to ascertain the appropriate number of violations. *Id.* at 684.

The provision at issue in this case, including its leading phrase from FIFRA section 12(a)(2), reads:

> It shall be unlawful *for any person* . . .
>
> (E) who is a registrant, wholesaler, dealer, retailer, or other distributor *to advertise* a product registered under this subchapter for restricted use without giving the classification of the product assigned to it under section [3] of this [Act].

7 U.S.C. § 136j(a)(2)(E) (emphasis added). The relevant act, then, in determining the appropriate unit of violation is captured by the infinitive "to advertise." The crux of the Board's analysis of units of violation under subsections of FIFRA section 12 has previously turned on the specific act deemed unlawful in the statutory language. For FIFRA section 12(a)(1) violations under subsections (A) – (F), the Board has looked at the statutory language that made it unlawful for any person "to distribute or sell" to any person various types of pesticides to determine that the unit of violation must be based on "the number of proven distributions or sales" of the pesticide. *Microban I,* 9 E.A.D. at 684 (internal citations omitted); *see also*, *Chempace*, 9 E.A.D. at 130.

The Board and previous ALJs have previously addressed the units of violation under several subsections of FIFRA section 12(a)(2) in a similar manner. For FIFRA section 12(a)(2)(Q), which makes it unlawful for any person "to falsify all or part of any information relating to the testing of any pesticide . . . submitted to the Administrator . . . ." 7 U.S.C. § 136j(a)(2)(Q), the Board found that the unit of violation under this section, as applied to this case, was based on the *act of falsifying* a single compliance statement submitted to the EPA. *McLaughlin*, 6 E.A.D. at 346. Under FIFRA 12(a)(2)(B)(iii), which makes it unlawful for any person to refuse entry or inspection authorized under FIFRA, an ALJ summarily found that the unit of violation was based on the *act of refusal* of such an inspection. *Safe & Sure Prod. Inc.*, EPA Docket No. I.F. & R. 04-907003-C, 1998 EPA ALJ LEXIS 53, at *47–48 (ALJ, June 26, 1998). In addition, ALJs have limited violations by the specific act outlawed in FIFRA section

12(a)(2)(F) and (G). *Basin Co-op, Inc.*, EPA Docket No. IF &R-VIII-93-335-C, 1997 EPA ALJ LEXIS 178, at *8–10 (ALJ, February 26, 1997) (finding one violation of FIFRA section 12(a)(2)(F) based on respondent's sale of a restricted pesticide to an uncertified buyer); *Young*, EPA Docket No. IF &R VII-1073-C-91P, 1992 EPA ALJ LEXIS 863, at *3–7 (ALJ, Aug. 17, 1992) (finding one violation of FIFRA section 12(a)(2)(G) based on one aerial application of a registered pesticide on pasture land in a manner inconsistent with the pesticide's label). For violations of the subsections of FIFRA section 12, administrative precedent indicates that the unit of violation depends heavily on the action deemed unlawful by the applicable subsection of FIFRA section 12.

After the administrative tribunal has looked at the plain language of the statute, it often analyzes whether a proposed interpretation of the unit of violation is "fully consistent with the purpose of the statute." *Microban I* at 9 E.A.D. at 685–86. The EAB has emphasized that FIFRA is a remedial statute that "should be construed liberally so as to effectuate its purposes." *Microban II,* 11 E.A.D. at 444 (quoting *Sporicidin*, 3 E.A.D. at 604) (internal quotations omitted). With the purpose of FIFRA in mind, the Board has rejected an interpretation of the statute that would permit multiple sales to equal a single violation because it would impede Congress's intent that enforcement should act as a deterrent in order to discourage sellers from distributing unregistered pesticides. *Chempace*, 9 E.A.D. at 130. Specifically, the EAB observed that an interpretation of FIFRA which resulted in that multiple violative sales or distributions to be charged as less than one violation per sale or distribution would encourage a seller to sell as much of the illegal pesticide as possible after the initial illegal sale or distribution because the penalty would be the same regardless of the number of subsequent sales or distributions. *Id.*[56] In addition, the Board has noted that Congress intended FIFRA to protect consumers who are purchasing pesticides. *Microban I*, 9 E.A.D. at 686; *see also*, *Antkiewicz*, 8 E.A.D. at 242.

Where administrative tribunals, including the undersigned, have looked beyond statutory language and the purpose of FIFRA and evaluated arguments relying on the 1990 ERP, it has been noted that "it must be kept in mind that the ERP has never been put out for notice and comment, lacks the force of law and is merely 'a non-binding agency policy whose application is

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[56]"For example," the EAB continued:

> Chempace'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, 9 E.A.D. at 130 (footnotes omitted).

open to attack in any particular case,'" *Rhee Bros., Inc.*, 2006 EPA ALJ LEXIS 32, at *98 (citing *McLaughlin,* 6 E.A.D. at 350 (internal citation omitted).[57] The ALJ must consider the applicable penalty policy, but has discretion to deviate from the penalty policy in a particular case where there is a "compelling" or "persuasive and convincing" reason to do so. *Id.* at *99 (quoting *Chem Lab Prod., Inc.*, FIFRA App. No. 02-01, 2002 EPA App. LEXIS 17, at *40 (EAB, Oct. 31, 2002). Further, where the ALJ decides to deviate from the penalty proposed by complainant, "the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease." 40 C.F.R. § 22.27(b).

Turning to the violations at hand, Complainant has alleged that Respondent acted to advertise Rozol on 2,140 separate occasions (2,117 via radio broadcasts and 23 via publications in trade journals). Compl. ¶¶ 39–134. Respondent, in its Answer, admitted (and the First MAD Order found) that it had engaged in the particular activities alleged in Counts 1–2,140, but nevertheless argued strenuously in its briefs that a decision on the appropriate "unit of violation" for the radio broadcasts be deferred until after hearing. Respondent's Reply to Complainant's Response in Opposition to Respondent's First MAD at 15.[58] As a basis for this deferral Respondent argued that FIFRA, the relevant regulations, the 2009 ERP, and caselaw do not indicate what constitutes a single offense. *Id.* at 12–13. Although the First MAD Order found that Respondent engaged in all the activities alleged in Counts 1–2,140, Respondent was given the opportunity to present its arguments and evidence on this issue at hearing.

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[57] In *McLaughlin*, the EAB observed in response to EPA's argument that the ERP sets out the unit of violation for section 12(a)(2)(Q):

> Moreover, it is important to remember that the determination of whether an act of proscribed conduct constitutes multiple offenses under a statutory provision is *not* a matter of enforcement discretion; it is, rather, a matter of statutory interpretation. . . . That the Agency has articulated its statutory interpretation within a document that is otherwise devoted to issues committed to the Agency's enforcement discretion does not alter this conclusion. As a matter of statutory interpretation, the Agency's position is only entitled to as much deference as is normally owed to Agency interpretations of statutes. In this regard, we note that the Presiding Officer in the *Boehringer* case felt compelled to defer to the Agency's statutory interpretation under the *Chevron* standard. The Board, of course, is under no such obligation. *See In re Mobil Oil Corporation,* 5 E.A.D. 490, 509 n.30 (EAB 1994) ("Because the Board is the final decision maker for the Agency, the concepts of *Chevron* and *Skidmore* deference do not apply to its deliberations.").

McLaughlin, 6 E.A.D. at 350.

[58] The full name of the Response is "Reply of Respondent to Response of Complainant in Opposition to 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 Through 2,117 of the [Amended] Complaint and Memorandum of Law in Support And Response of Respondent to Combined Motion of Complainant for Accelerated Decision as to Counts 1 Through 2,140 of the [Amended] Complaint."

At hearing, Respondent asserted that Complainant opted to increase the number of counts related to violative advertising in retaliation for Respondent's decision not to settle. Niess Tr. at 146:16–149:16. Upon cross-examination, however, Ms. Niess testified that the initial 148 advertising counts were not the sum total of all possible advertising allegations, but represented the number EPA elected to pursue in the first Notice of Intent. *Id.* at 145:14–24; 153:3–16. Ms. Niess also noted that the initial Notice of Intent included a proposed penalty based on the 1990 ERP, but was recalculated after the issuance of the 2009 ERP. *Id.* at 153:17–21. Respondent offered no additional evidence, elicited no additional testimony, and posited no additional arguments on this issue at hearing. *See* R's Post-Hrg. Br. at 80–81 (asserting instead that the increased number of counts was improperly based on "subsequent conduct alleging violation of a different section of FIFRA"). The record indicates that between the issuance of the initial Notice of Intent and the filing of the initial Complaint, the facts on which Counts 1–2,140 rested did not change. *See* Niess Tr. at 154:14–155:4 (noting that the only change concerned Complainant's discovery of evidence suggesting subsequent violations).

It is well-established that "[p]rosecutors have broad discretion in framing charges." *Lewis v. United States*, 518 U.S. 322, 336 (U.S. 1996)(J. Kennedy, Bryer concurring) (upholding prosecutors right to charge multiple petty offenses rather than a single serious offense thereby preventing a defendant from obtaining a trial by jury while still obtaining the same punishment), *citing Ball v. United States*, 470 U.S. 856 (1985); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)("so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

Nevertheless, such discretion is not unlimited and it is improper for a prosecutor to select charges on the basis of vindictiveness for a defendant exercising an established right, such as to request a jury trial or appeal his conviction. *United States v. Wilson*, 262 F.3d 305, 314-316 (4th Cir. N.C. 2001) citing *United States v. Goodwin*, 457 U.S. 368, 372, (1982). To establish "prosecutorial vindictiveness," a defendant must show, through objective evidence, that (1) the prosecutor acted with genuine animus toward the defendant and (2) the defendant would not have been prosecuted but for that animus. *Id.*, citing *Goodwin*, 457 U.S. at 380 n.12 (noting that the charges must be brought "solely to 'penalize' the defendant and could not be justified as a proper exercise of prosecutorial discretion"), *United States v. Sanders*, 211 F.3d 711, 717 (2d Cir. 2000). However, it has been noted that "a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision" because "the prosecutor's assessment of the proper extent of prosecution may not have crystallized" until after a pretrial investigation of a case is fully completed. *United States v. Wilson*, 262 F.3d 305, 319 (4th Cir. N.C. 2001) citing *Goodwin*, 457 U.S. at 381 (upholding decision to add additional charges to an indictment was made before trial but after the defendant failed to plead as expected.). In this case, Respondent has proffered no evidence of actual animus and/or evidence that it would not have been prosecuted "but for" such animus. Before instituting this action, the Agency notified Respondent of the charges it then saw as viable.

Respondent met with the Agency, during which those charges and a settlement agreement in regard thereto was discussed. Respondent rejected any offer of settlement, putting the onus on the Agency to institute this action. In selecting its charges, the Agency at that point chose to charge Respondent with additional charges as to which it had gathered evidence during its pretrial investigation process. It was within its discretion to do so. As the Supreme Court has decided, "While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'-and permissible-'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.'" *Bordenkircher*, 434 U.S. at 364 (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973)). Respondent has not advanced any persuasive argument that Complainant abused its prosecutorial discretion to seek more counts in its Complaint than were indicated in the proposed penalty calculation sheet attached to the initial Notice of Intent. Thus, Respondent has failed to show any vindictiveness of the part of the prosecution, and its claim fails. As such, the inquiry then becomes one of statutory construction. *See Microban II*, 11 E.A.D. at 446–47.

As stated above, under the plain language of the statute, the triggering act of FIFRA section 12(a)(2)(E) is "to advertise." 7 U.S.C. § 136j(a)(2)(E). There is no indication in the statutory language that unlawful advertisements should be grouped on anything less than a per advertisement basis, and certainly not in any of the groupings proffered by Respondent. Therefore, without statutory language indicating differently,[59] I find that the unit of violation for this case should be based on each individual separate act of advertising. In fact, Respondent offers no statutory basis for its position that a unit of violation under FIFRA section 12(a)(2)(E) should be grouped by anything other than on a per advertisement basis. As noted above, in analyzing alleged FIFRA section 12(a)(1) violations, the EAB in *Chempace* noted similarly that "[the respondent] ha[d] not pointed to anything in the language, legislative history, or context of [the applicable statutory language] that supports its position that the unit of violation in this case should be less than the number of individual sales or distributions . . . ." 9 E.A.D. at 130.

Further, by not treating each advertisement as a separate violation of FIFRA section 12(a)(2)(E), a similar concern as troubled the EAB in *Chempace* would arise here. If this

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[59] In a survey of other statutes, and case law thereon, that govern the content of advertisements on television, radio or in print media, where the statutes allow for the grouping of violations by radio or television broadcaster, by edition of advertisement, or by days the advertisement was broadcasted, the statutory language clearly directs the enforcing agency to do so. *See* 15 U.S.C. § 45(*l*) ("Each separate violation of [a cease and desist order issued by the Federal Trade Commission] shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense"; *United States v. Reader's Digest Ass'n*, 494 F.Supp. 770, 773–75 (finding that each violation of the cease and desist order was a separate offense), *aff'd*, 662 F.2d 955, 966 (3d Cir. 1981); *United States v. Golden Fifty Pharmacy Co.*, 421 F.Supp. 1199, 1207 (N.D.Ill. 1976). *See also*, 47 U.S.C. § 503(b)(2)(A)-(C) (providing that the Federal Communications Commission ("FCC") may issue forfeiture penalties to broadcasters of obscene language, as governed by 18 U.S.C. § 1464, to individual broadcast stations, licensees, permittees, etc. for each violation or each day of a continuing violation).

tribunal were to find that each advertisement did not constitute a separate violation of FIFRA section 12(a)(2)(E), that interpretation would not deter a party who unlawfully advertises a registered pesticide once from continuing to publish or broadcast the unlawful advertisement as many times as it desires because the penalty would remain the same. Given the consumer protection goals of FIFRA, the remedial nature of the statute, and the deterrent purpose of civil penalties, FIFRA section 12 "should be construed liberally to effectuate its purposes." *Microban II*, 11 E.A.D. at 444 (citing *Sporicidin*, 3 E.A.D. at 604). *See also, Chempace*, 9 E.A.D. at 130.

The construction of the statutory language and the purpose behind FIFRA is consistent with the 2009 ERP, which provides general, and therefore helpful, language in addressing a unit of violation. This Tribunal has previously noted "that the ERP, the Agency's long-standing guidance document on assessing FIFRA penalties, provides no instructions or criteria to be used by the enforcement staff in determining the number of violations to be charged in a particular case." *99 Cents Only Stores*, 2010 EPA ALJ LEXIS 10, at *109. Nevertheless, in describing what constitutes an independently assessable violation, the 2009 ERP states that EPA considers a violation to be 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 at EPA 949. Respondent contracted with companies to air its radio advertisements on eleven (11) different local radio stations and to print its written advertisements in six (6) different trade publications. It is possible that the number of advertisements Respondent contracted for may differ from the number of advertisements actually run. In order to verify this, one must consult the evidence of Respondent's contractual agreements with its advertising intermediaries. Complainant's Exhibit 14a contains numerous invoices that itemize the precise advertising mechanisms for which Respondent was billed. CX 14a.

First, I address the radio broadcast advertisements, which are the subject of Counts 1–2,117. As noted in the First MAD Order, however, the content of these radio advertisements is not disputed, nor is the fact that the advertisements were in fact broadcast. *See* Jt. Stips. at 3–4. Unlike the print advertisements, Complainant has not provided any certified recordings of live radio broadcasts of the violative advertisements. Instead, Complainant provides invoices for each broadcast, demonstrating that Respondent entered into a contract with the radio stations to air the violative advertisements. The first invoice, corresponding to paragraphs 44–45 of the Complaint, indicates that Respondent paid $1,625.00 to Golden Plains Ag Network (operating station KXXX-AM in Colby, Kansas) to broadcast advertisements for Rozol on 39 occasions in October 2007. CX 14a at EPA 331. The invoice provides the precise time (within 15 minutes) that each of the 39 advertisements will be broadcast. The 39 broadcast slots are divided into three groups (early morning, 7:50am; late morning, 10:28am; and afternoon, 1:39pm). One broadcast from each group is then listed as occurring on a particular date. *Id.*

The second invoice, also corresponding to paragraphs 44–45 of the Complaint, indicates that Respondent paid $2,125.00 to Golden Plains Ag Network to broadcast an additional 51 radio advertisements on the same daily schedule but on different days in November 2007. *Id.* at EPA

332. The third invoice shows a similar purchase for 30 advertisements in December 2007. *Id.* at EPA 333. Together these three invoices show that Respondent purchased 120 separate radio broadcasts of its Rozol advertisement as alleged in Counts 1–120. *Id.* at EPA 331–33; *see also* Compl. ¶¶ 369–71. Similar evidence is provided for 229 radio advertisements on KBUF Radio in Garden City, Kansas, corresponding to Counts 121–349. CX 14a at EPA 334–47; *see also* Compl. ¶¶ 372–74. Further evidence is also provided for 188 radio advertisements on KGNC-AM and 59 radio advertisements on KXGL-FM, both in Amarillo, Texas, for broadcast between November 2007 and April 2008 (covering Counts 1,871–2,117). CX 14a at EPA 354–60, 362; *see also* Compl. ¶¶ 396–401.

An additional 1,521 broadcasts (Counts 350–1,870) are captured in four invoices from High Plains Radio and cover broadcasts from seven different radio stations (KICX-FM, KBRL-AM, KRKU-FM, KJBL-FM, KADL-FM, and KSTH-FM) all in Nebraska. CX 14a at EPA 348–51. While these invoices do not set forth specific broadcast time slots, they do itemize the particular station on which the advertisements aired, the date range for the advertising, and either the price per broadcast or the price of a particular package (which specifies how many 30- or 60-second advertisements are included). *Id.* For these 1,521 broadcast advertisements, Respondent paid High Plains Radio $13,770. *Id.* Again, Respondent's alternative suggestions for the maximum number of violations is unsupported by evidence or the statute. *See* R's Post-Hrg. Br. at 84 (suggesting, *inter alia*, four violations for the "number of versions" of radio advertisements, or one violation by characterizing the broadcasts as "one broadcast ad").

Next, I address the printed advertisements. The first invoice, corresponding to paragraphs 60 and 61 of the Complaint, indicates that Respondent paid $600.00 for a full-page, color advertisement in the October 2007 issue of *Cattle Guard*, a publication of the Colorado Cattlemen's Association. CX 14a at EPA 285. Respondent offers no reason why this should not be considered a separate violation of FIFRA section 12(a)(2)(E). The second invoice, corresponding to paragraphs 64 and 65 of the Complaint, indicates that Respondent paid $425.00 for a black-and-white, half-page advertisement in the October 2007 issue of *Kansas Stockman*, a publication of the Kansas Livestock Association. *Id.* at EPA 289. Exhibit 14a does not disclose any additional invoices for the November/December 2007, January 2008, or February 2008 issues, but it does contain photocopies of the advertisements themselves indicating that they appeared in these subsequent issues. *Id.* at EPA 291–93. Moreover, Respondent specifically stipulated to the fact that it "contracted with Kansas Livestock Association to print advertisements regarding 'Rozol,' EPA Reg. No. 7173-244, in its monthly publication of *Kansas Stockman* from October 2007 through February 2008." Jt. Stips. at 4. The same pattern is found with respect to advertisements in the *Nebraska Cattleman*, related to paragraphs 77–92 of the Complaint. *See* CX 14a at EPA 294–99; Jt. Stips. at 4–5. For all of the counts related to print advertising violations, Complainant has presented either evidence of a contract between Respondent and the advertising intermediary (Counts 2,118–19, 2,123, and 2,128–40), evidence that a violative advertisement appeared in the particular trade publication (Counts 2,120–22, 2,124–27, and 2,131–32), or Respondent itself has specifically stipulated to the existence of a contract and advertisements (Counts 2,118–40). *See* CX 14a at EPA 285–330; Jt Stips. at 4–7.

In each case of the print advertising allegations, Complainant has established individual violations, each of which has at least one element of proof that is different from any other violation (i.e., the date of the publication in which the violative advertisement appeared). Notably, Complainant has focused on the particular issue and not the individual copies of each issue that likely were printed and circulated to subscribers and other customers of the particular trade journal. Respondent's range of alternative suggestions for calculating the number of advertising violations are unsupported by either the plain language of the statute or evidence in the record. *See* R's Post-Hrg. Br. at 84 (suggesting, *inter alia*, one violation for the "single act" of failing to include the RUP classification in its advertising generally, two violations for the "number of versions" of print advertisements, or six violations for the six states in which the advertisements were distributed).

In addition, as discussed above, there is a certain logical problem with Respondent's arguments in support of a unit of violation that is less than each separate act of procuring advertising time or space. As Complainant notes, adoption of Respondent's interpretation would tend to frustrate the purpose of FIFRA. C's Post-Hrg. Br. at 110. Not only would such an approach create a gaping loophole in the regulatory scheme, but it would also make equitable application of the 2009 ERP significantly more difficult for EPA to achieve. Equitable application of the 2009 ERP and rational penalty calculations depend on the flexibility to distinguish between these two interpretations and require that the unit of violation for FIFRA section 12(a)(2)(E) be the individual advertising event effectuated by the respondent.

Accordingly, I reject Respondent's arguments and find Respondent liable for 2,117 separate violations of FIFRA section 12(a)(2)(E) by advertising Rozol via radio broadcast without giving the RUP classification. I also find Respondent liable for 23 separate violations of FIFRA section 12(a)(2)(E) by advertising Rozol in print publications without giving the RUP classification.

b. Counts 2,151, 2,153–56, 2,158, 2,160–61, 2,164–66, 2,168–69, 2,171, 2,173–74, 2,176–77, and 2,181–82

Respondent's arguments regarding the appropriate unit of violation for the alleged violations in Counts 2,151, 2,153–56, 2,158, 2,160–61, 2,164–66, 2,168–69, 2,171, 2,173–74, 2,176–77, and 2,181–82 are misplaced. Rather, these arguments go to whether Complainant established sufficient evidence to find liability in each case, a matter previously discussed in the liability section. Accordingly, I find that the proper unit of violation under FIFRA section 12(a)(1)(B) is the same as the unit consistently identified by the EAB for all Section 12(a)(1) violations. *Microban II*, 11 E.A.D. at 427; *Microban I*, 9 E.A.D. at 684 (citing *Chempace*, 9 E.A.D. at 129–30). In *Microban I*, the EAB found that the unit of violation for a FIFRA section 12(a)(1)(B) violation is the actual distribution or sale of a registered pesticide. *Microban I*, 9 E.A.D. at 685. The relevant language establishing the unit of violation is found in the text of the leading paragraph, Section 12(a)(1), which states that "it shall be unlawful for any person in any

State to *distribute or sell* to any person." 7 U.S.C. § 136j(a)(1) (emphasis added). The subsequent paragraphs merely define the types of pesticides or devices that cannot be distributed or sold. *Id.* § 136j(a)(1)(A)–(F).

Therefore, Respondent's arguments are without merit and I find Respondent liable for 20 separate violations of FIFRA section 12(a)(1)(B) for actual sales or distributions of Rozol with claims made for it that substantially differed from those made as part of the statement required in connection with its FIFRA section 3 registration.

2. Size of the Business of the Person Charged and Ability to Continue in Business

Complainant has submitted sufficient evidence to demonstrate that it has considered these factors in accordance with the statute and the 2009 ERP. Given that Respondent has waived all objection and argument as to these two factors, they cannot serve as a basis for adjusting the penalty and I do not address them here.

3. Gravity of the Violation

Complainant's primary justification for the entire proposed penalty is predicated on the assertion that Respondent's violative conduct (both its advertising and its substantially different claims) altered the body of common knowledge in the marketplace with respect to its Rozol products and created the potential for improper application of Rozol to control prairie dogs, and that this misuse carried a heightened risk of poisoning to non-target organisms. Complainant views this risk as a logical consequence of Respondent's failure to state that Rozol is an RUP in its advertisements and Respondent's inclusion of claims that, in some cases, undermine the mitigation instructions included in the label and, in other cases, improperly overstate Rozol's effectiveness and safety. In accordance with the terms of the 2009 ERP, Complainant calculated a proposed penalty of $2,891,200 for all violations alleged in the Complaint. Obviously, this total proposed penalty is no longer applicable due to the dismissal of numerous alleged violations as indicated above.

Before turning to the appropriate penalty, it is important to characterize these radio and print advertisements, as well as the Research Bulletin and Cover Letter, as publications meant to accomplish the goal of promoting the purchase of Rozol from Respondent. Although Respondent did include some non-promotional information in the materials at issue, specifically references to the 24(c) permits, the advertisement were clearly not primarily meant for informational purposes only. The inclusion of the words "restricted use" where appropriate is of utmost importance in providing the general public with a warning as to the level of vigilance that users need to employ when handling and using a particular pesticide. The very words "restricted use" are easily recognized by the general public to alert them that there are reasons that the use of the pesticide is restricted, whereas the 24(c) designation provides no indication of what that designation might mean in terms of practical impacts on human health or the environment. Further, the substantially different claims also create an impression that Rozol need not be

applied in a fastidious manner, one that is conscientious of the threat to non-target species and the requirements for post-application follow up as required by the label itself.

As such, Complainant has provided valid and convincing arguments for the gravity values it assigned to the violations at issue. The 2009 ERP provides three values for pesticide toxicity, depending on the toxicity of the pesticide. CX 51 at EPA 967. The value that is assigned to restricted use pesticides is a three (3). Complainant therefore assigned a pesticide toxicity value of three (3) to the pesticides at issue in this case. *Id*; CX 55 at EPA 1009; Niess Tr. at 106:23–107:6. Complainant provided adequate justification for finding that the gravity value for toxicity should be a three (3) at hearing. Niess Tr. at 106:23–107:6. Some confusion arose because a pesticide with the signal word "Caution" associated with it, as Rozol does, has a gravity value of two (2). However, Ms. Neiss explained that signal-word designations are based on a pesticide's acute hazard to human health, while the gravity value for Rozol was predicated on the fact that it is a restricted use pesticide due to its hazard to non-target organisms. *Id.* at 116:23–117:5. Accordingly, while Rozol does not present an acute hazard to human health and thus receives a signal word of lesser severity, it remains a restricted use pesticide. Therefore, Complainant's gravity value for toxicity is appropriate.

Complainant's gravity values for harm to human health and the environment also are appropriate. As noted by Ms. Niess at hearing, the Rozol labels clearly demonstrate that the pesticide presents some threat to human health. Specifically, Ms. Niess noted the information on the labels regarding the necessity "to wear chemical resistant gloves when handling the bait; as well as the instructions to store the bait away from children and to keep people out of the application area; as well as the directions to perform carcass and bait searches." Niess Tr. at 109:8–19. Ms. Niess also provided testimony regarding a documented instance of an uncertified applicator being able to purchase and apply Rozol PD, resulting in an enforcement action by the Kansas Department of Agriculture. *Id.* at 111:14–112:2; CX 102 at EPA 2472–73. Although no evidence was presented that the uncertified applicator had seen the advertisements without the RUP designation or the violative claims prior to his purchase, the use of Rozol for prairie dog treatment by an untrained applicator is the very danger that Complainant had hoped to ward off by designating Rozol as an RUP. It is indeed the very danger Congress had hoped to eliminate by providing that it is illegal to advertise an RUP without the appropriate designation. As such, there are clearly justifiable reasons for Complainant to designate the violations at a gravity value of one (1) since the nature of the violations minimizes the threat that Rozol presents to human health.

Regarding harm to the environment, Complainant assigned a gravity value of three (3) for the violations because it considered the harm to the environment as "unknown or potential serious or widespread harm." As noted by Ms. Niess at hearing, the failure to include the RUP designation in the advertisements and the violative claims that undercut the language on the label reduces the effectiveness of the specified measures that were necessary to protect the environment and other non-target species. Niess Tr. at 118:18–119:4. The evidence of occurrences of fatal secondary poisoning of non-target species provides further support for this

gravity value. CX 90 at EPA 1580; Niess Tr. at 120:3–16. Although the poisoning death cannot be directly attributed to an improper sale or use of Rozol, the investigators did find that the poisoning resulted from Rozol and that the application of Rozol had recently taken place nearby. CX 90 at EPA 1580. This death was exactly the outcome that the carefully worded label instructions and the RUP designation were meant to prevent. The lack of an RUP designation on the advertisements and the violative claims that undermine the label instructions clearly merit a gravity value of three (3).

As to culpability, Complainant assigned a gravity value of two (2), which is appropriate where culpability is "unknown or [a] violation resulting from negligence." CX 55 at EPA 1011; CX 51 at EPA 967. Respondent has asserted that consideration must be given to the fact that all of the violations warranting a penalty occurred prior to the first Stop Sale, Use, or Removal Order ("SSURO") issued to Respondent on June 2, 2008. CX 15 at EPA 363–68. As Respondent stated in its Post-Hearing Brief, once EPA issued the first SSURO, Respondent no longer sought to broadcast or print violative advertisements. R's Post-Hrg. Br. at 103. In addition, Mr. Schmit testified that prior to the issuance of the SSURO, Respondent did not have a formal review process whereby he, as the compliance officer, would review claims and labels to ensure that they were compliant with applicable laws and regulations. Schmit Tr. at 65:25–68:2. After 2007, Respondent "immediately put into place a formal requirement and process so that [Mr. Schmit] would review all of the written materials that are issued by the marketing department," in addition to radio advertisements and slideshows used for marketing or sales. *Id.* at 68:8–11, 69:2–7.

Although these steps are admirable and may lead to a reduction in gravity value for culpability in some cases, such an adjustment is not appropriate in this case. Respondent has operated within the strictures of FIFRA for a number of years without providing for a review of the legality of its advertising. Congress, through the statutory language, emphasized the importance of using appropriate claims when advertising pesticides and the clear marking of pesticide products where restricted use is appropriate. Respondent's limited efforts to ensure compliance with these provisions prior to 2007 was inadequate. In addition, Respondent selectively referred to information published in 2004 by the EPA in the Comparative Risk Assessment. This document describes the dangers of chlorophacinone, the active ingredient in Rozol, to non-target species and yet Respondent used it to support its claims downplaying Rozol's toxicity and primary and secondary poisoning threat to non-target species. Complainant detailed many shortfalls in the other studies Respondent relied upon to support their claims, but I did not see evidence in the record or at hearing that Respondent was aware of these shortfalls prior to the violations at issue in this case, especially where the EPA's Environmental Fate and Effects Division published its negative review of the Lee and Hyngstrom Study in 2009. As such, and after considering and rejecting Complainant's arguments that Respondent is more culpable because of the continued presence of offending literature on Respondent's website because the counts related to the Respondents have been dismissed, Complainant's gravity value for culpability will remain unchanged.

4. **Graduation of the Penalty**

Complainant states that absent graduation of the penalty for Counts 1–2,140, the proposed penalty would have been $13,910,000 instead of $2,891,200 for all of the counts alleged in the Complaint. C's Post-Hrg. Br. at 126–27. Complainant acknowledges that the 2009 ERP graduation provisions specifically contemplate application to violations involving the "sale and distribution" of pesticides, but nevertheless maintains that it acted reasonably in applying the same graduation process to the numerous advertising violations in this case. *Id.* at 126. Respondent does not suggest that Complainant's graduation of the penalty should be discarded, which would likely raise the proposed penalty by millions of dollars. Rather, Respondent argues that the absence of the term "advertising" in the 2009 ERP graduation provisions is implicit evidence that EPA never intended the unit of violation for FIFRA section 12(a)(2)(E) to be "individual radio broadcasts" and did not anticipate such violations would be so numerous as to warrant graduation. R's Post-Hrg. Br. at 108. Having determined that each individual radio broadcast and each instance of publishing an advertisement in a periodical is an individual violation of FIFRA section 12(a)(2)(E), I find Respondent's argument unpersuasive. As to the subsequent assertion that a steeper discount would have applied to advertising violations if such specific language had been included in the 2009 ERP, I find no basis for this assertion in the record.[60] Moreover, the graduation of the penalty benefits Respondent, not Complainant, and makes Respondent's objection here even more tenuous.

While the 2009 ERP does not require EPA to apply the graduated penalty method in every case, it is within the Complainant's discretion to apply it in cases "involving violations that present *potential* serious or widespread harm to human health or the environment . . . [if] appropriate based on the circumstances of the individual case." CX 51 at EPA 958. I find no deficiency in Complainant's application of the graduated penalty method here and choose to apply it in reaching the final penalty, as discussed below.

5. **Appropriateness of the Penalty**

Upon consideration of the three statutory factors, the parties' arguments and the evidence, I am not persuaded that Complainant has shown that a penalty of $2,398,500, as adjusted for the dismissed counts, is appropriate in this case, nor am I persuaded that Respondent's alternative methodology of grouping the advertising violations, yielding a significantly lower maximum penalty of $26,000 for Counts 1–2,140 is appropriate either.[61] While I generally choose to follow the framework of a penalty policy for penalty assessments, in my opinion Complainant

[60] As to the "sale and distribution" limitation posited by Respondent, the 2009 ERP specifically states that "[i]n cases involving similar product violations (for example, violations involving products that contain the same active ingredient and the same violative conduct on the part of the respondent), the Agency has the discretion to group together similar product violations for the graduated penalty calculation." CX 51 at EPA 958–59.

[61] Respondent does not offer an alternative penalty for Counts 2,141-2,183.

proposes a penalty of a magnitude disproportionate to the totality of the circumstances in this case. A penalty of this degree might be justified under certain circumstances in a FIFRA case, but I do not deem it warranted in this case.

As discussed in *Rhee Bros., Inc.*, the ERP is "inflexible" and can amplify a penalty to the point that it is no longer in proportion to the violations at issue. 2006 EPA ALJ LEXIS 32, at *101. Although Complainant has proposed a graduated penalty as applied to the violations, an effort that greatly reduces the overall penalty amount, Complainant affixes the maximum penalty to the first 100 FIFRA section 12(a)(2)(E) violations and then graduates the remaining violations from there. As I have previously said:

> the maximum penalty allowed by law [] should normally be reserved for the most horrific violator, who has committed the most horrific violations such as a respondent with a long history of committing serious FIFRA violations, who then commits other egregious violations, which were knowing and willful, involving a pesticide of the highest toxicity, and/or which caused *actual* serious or widespread harm to human health and the environment.

Id. at 101–02. Similar to *Rhee Bros, Inc.*, Respondent is not a "horrific violator" implicated by the above actions and Rozol is not a pesticide of the highest toxicity and has not caused "serious or widespread harm to human health or the environment," the deaths to a few protected aviary species notwithstanding. Even so, the large number of violations outweighs the factors favorable to Respondent, e.g. low danger to human health and no history of violations. Consequently, the proposed penalty far exceeds the amount necessary for the purpose of deterrence, as civil penalties are meant to effectuate. *Chempace*, 9 E.A.D. at 130. In *Rhee Bros, Inc.* I concluded that

> where the Agency chooses to charge a Respondent with a large number of violations which potentially yield in aggregate a correspondingly high maximum penalty, the amount of the penalty per violation must be determined with more flexibility than that strictly permitted by the ERP, so that the significance of the "gravity of the violations," in a particular case is not lost.

2006 EPA ALJ LEXIS 32, at *102–03.

Another shortcoming of the ERP is that it provides no guidance as to how a tribunal should address a penalty calculated under the direction of the ERP that is disproportionate to the circumstances of the case. *99 Cents Only Stores*, 2010 EPA ALJ LEXIS 10, at *134 (citing *Rhee Bros. Inc.*, 13 E.A.D. 261, 270–71 n.16 (EAB 2007). In addition, the EAB has stated that a tribunal should only deviate from a penalty policy where the justification for doing so is "compelling" or "persuasive and convincing." *Id.* (citing *Chem Lab Prod., Inc.*, FIFRA App.

NO. 02-01, 2002 EPA App. LEXIS 17, at *40 (EAB Oct. 31, 2002); *FRM Chem., Inc.*, FIFRA App. No. 05-01, 2006 EPA App. LEXIS 28 (EAB June 13, 2006), slip op. at 19–20.

The totality of the circumstances in this case provides a compelling reason to depart from the high penalty calculated under the ERP here. By exercising the limited discretion accorded a tribunal, the proposed penalty in this case for Respondent's FIFRA section 12(a)(2)(E) violations is hereby reduced to $2,000 for each of the first 100 violations, with the remaining violations graduated according to the ERP at $500 for each of the next 300 violations, and $200 for each of the remaining violations, for a total of $698,000. The penalty for Respondent's FIFRA section 12(a)(1)(B) violations is hereby reduced to $2,000 for each violation, for a total of $40,000. Therefore, the total penalty assessed to Respondent is $738,000. It is the opinion of this Tribunal that such penalty appropriately reflects the gravity of the violations, including the harm to the FIFRA regulatory program caused thereby, and will serve as a deterrent to Respondent and other companies committing similar violations in the future.

IX. CONCLUSION AND ORDER

1. For the 2,140 violations of FIFRA Section 12(a)(2)(E), 7 U.S.C. § 136j(a)(2)(E), found to have been committed, Respondent, Liphatech, Inc., is hereby assessed a civil penalty of $698,000. For the 20 violations of FIFRA Section 12(a)(1)(B), 7 U.S.C. § 136j(a)(1)(B), found to have been committed, Respondent is hereby assessed a civil penalty of $40,000. The total penalty is $738,000.

2. Payment of the full amount of this civil penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below. Payment shall be made by submitting a certified or cashiers' check(s) in the requisite amount, payable to the Treasurer, United States of America, and mailed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

3. A transmittal letter identifying the subject case and the EPA docket number, as well as the Respondent's name and address, must accompany the check.

4. If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Initial Decision, interest on the penalty may be assessed. *See* 31 U.S.C. § 3717 40 C.F.R. § 13.11.

5. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless: (1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties pursuant to 40 C.F.R. § 22.30(a); or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 22.30(b).

Susan L. Biro
Chief Administrative Law Judge

Dated: March 12, 2014
Washington, D.C.

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

CERTIFICATE OF SERVICE

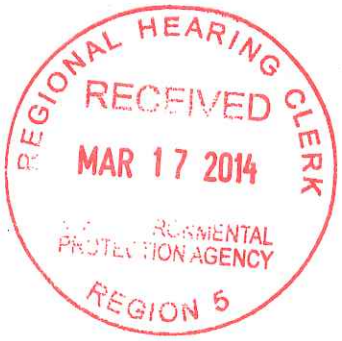
I certify that the foregoing **Initial Decision**, dated March 12, 2014, was sent this day in the following manner to the addressees listed below.

Maria Whiting-Beale
Staff Assistant

Dated: March 12, 2014

Original By Regular Mail To:

La Dawn Whitehead
Regional Hearing Clerk
U.S. EPA
Mail Code E-19J
77 West Jackson Boulevard
Chicago, IL 60604-3590



Copy By Regular Mail And E-Mail To:

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