



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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REGIONAL HEARING CLERK U.S. ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF)
LIPHATECH, INC.,) DOCKET NO. FIFRA-05-2010-0016
RESPONDENT)

ORDER ON MOTIONS TO CONFORM THE TRANSCRIPT AND ORDER SCHEDULING POST-HEARING BRIEFS

The hearing in this matter was held in Milwaukee, Wisconsin, from February 7, 2012, through February 10, 2012. The transcript of that hearing was received by the Regional Hearing Clerk on March 5, 2012. Pursuant to 40 C.F.R. § 22.25, the parties filed a Joint Motion to Conform Transcript ("Joint Motion" or "Jt. Mot."), which included a table listing, by page and line, the corrections to the transcript that the parties agree will conform the transcript to the actual testimony presented at hearing. Jt. Mot. at 2. In addition, each party has filed its own motion to make additional corrections to the transcript.

On April 3, 2012, Complainant filed its Motion to Conform Transcript and Request Related to Schedule for Submission of Post-Hearing Briefs ("Complainant's Motion" or "C's Mot."), which included a table of proposed changes, at Exhibit 1, and also requested 60 days from the date of this order to file and serve its initial post-hearing brief. C's Mot. at 2. On April 11, 2012, Respondent submitted its Response in Opposition to Complainant's Motion to Conform Transcript and Request Related to Schedule for Submission of Post-Hearing Briefs ("Respondent's Response" or "R's Resp."). In its Response, Respondent disagrees with Complainant's assertion that good cause exists to make such changes and states that Respondent has "no independent memory of such testimony and cannot determine" that the transcript is inaccurate. R's Resp. at 1-2. With respect to Complainant's request for an extended briefing period, Respondent states that it does not oppose Complainant's Motion but requests an equal period of time to file and serve its response to Complainant's initial post-hearing brief. Id. at 2. On April 12, 2012, Complainant filed its Reply to Respondent's Response in Opposition to Complainant's Motion to Conform Transcript and Request Related to Schedule for Submission of Post-Hearing Briefs ("Complainant's Reply" or "C's Reply").

On April 3, 2012, Respondent submitted its Motion to Conform Transcript ("Respondent's Motion" or "R's Mot."), which included a table of proposed changes. R's Mot.

at 3. On April 5, 2012, Complainant filed a Response in Opposition to Respondent's Motion to Conform Transcript ("Complainant's Response" or "C's Resp."). On April 11, 2012, Respondent submitted its Reply to Complainant's Response in Opposition to Respondent's Motion to Conform Transcript ("Respondent's Reply" or "R's Reply").

A. Joint Motion to Conform

The Joint Motion states that there are typographical and transcription errors in the 1,112 type-written pages of testimony. Jt. Mot. at 1-2. The Joint Motion also includes eighteen (18) errata sheets, containing over 300 jointly proposed corrections. The Joint Motion is **GRANTED**, subject to the following conditions:

1. Testimony of Claudia Niess

- a. Page 27, second correction of the term "credentialed" is found at line 17, not 19.
- b. Page 65, line 3, the correction "Relabeling" to "relabeling" is rejected as the word is already lowercase in the transcript; however, the word is corrected to "relabeling" to comport with proper spelling.
- c. Page 85, lines 2-3, three corrections to the statutory citations to FIFRA are incorrectly identified as occurring on Page 84.
- d. Page 160, line 11, an additional correction is made to a 12(a)(1)(B) reference not identified in the Joint Motion.
- e. Page 163, the corrected 12(a)(1)(B) reference is found at line 14, not 12.
- f. Page 177, the corrected word "presumably" is found at line 14, not 15.
- g. Page 200, line 24, the addition of the phrase "Burrow Builder Formula" is not a conforming change, but a correction for incomplete testimony. The transcript will stand as it appears.

2. Testimony of Thomas Schmit

- a. Page 251, line 12, the word Deposition is properly stricken, but no word is substituted.
- b. Page 338, line 13, the correction of the phrase "safety specs" to read "fate and effects" is accepted, but the phrase "Fate and Effects" is capitalized for consistency.
- c. Page 452, line 17, the proposed insertion of a quotation mark before "This is a highly" is rejected as such change would introduce a quotation mark in the middle of an otherwise properly punctuated quotation.
- d. Page 452, line 18, the correction of the word "reasons" to the phrase "very reasons" must also include an introductory "the" in order to be grammatically correct.

B. Complainant's Motion to Conform

Complainant proposes one additional change to the transcript of Ms. Claudia Niess's testimony. On page 108, at line 4, Complainant suggests that the corrected sentence "So had I assigned a pesticide toxicity based on their harm to human health, that would accurately reflect the pesticide toxicity of these pesticides" be further corrected to negate the predicate and, thus, read: "So had I assigned a pesticide toxicity based on their harm to human health, that would not accurately reflect the toxicity of these pesticides." Complainant moves for this additional correction by separate motion.

This additional change comports with this Tribunal's recollection and notes from the hearing, as well as logic. In this portion of the testimony, related to penalty factors considered by Complainant, Ms. Niess explained that the pesticide Rozol was primarily considered hazardous due to its hazard to non-target organisms (such as birds). *See also* C's Reply at 2. Therefore, Ms. Niess testified, a penalty calculation that assigned a toxicity number based solely on harm to human health would *not*, in her opinion, accurately reflect Rozol's toxicity. Accordingly, the correction is accepted and Complainant's Motion is **GRANTED IN PART**.

Complainant also proposes several changes to the transcript appearing at pages 104-105 in the testimony of Dr. Thomas Steeger, but concerning only the arguments of counsel (examination of Dr. Steeger having stopped at page 101). On page 104, at lines 23-24, Complainant proposes to change the phrase "to violate a claim in correspondence" to the phrase "to show a nexus." C's Mot. at Ex. 1. While such a change might bring clarity to the intended meaning of the argument, such a wholesale change moves beyond mere correction of a transcription or typographical error. Moreover, these arguments were made in the context of an oral motion by Respondent that was denied. Therefore, changes to the transcript on this point will have no bearing on the factual evidence in the record. Complainant's proposed correction to Page 104 of the Steeger testimony is **rejected**.

Page 105, at lines 19-20, is a portion of counsel for Complainant's legal arguments in response to a motion by Respondent. Complainant suggests that the sentence "Actually, I think there's a bit of it right here" be altered to read "Actually, I think it's a bit of a red herring." C's Mot. at Ex. 1. These changes comport with this Tribunal's recollection and notes from the hearing. They also create a grammatically correct sentence. Complainant's proposed correction to Page 105, lines 19-20, of the Steeger testimony is **accepted**.

Complainant proposes one final change to the Steeger testimony on Page 105, at line 24. Again, the transcript follows an argument by Complainant's counsel and reads: "Is it what we said, they consider it an assigned label of." Complainant proposes the sentence to read: "Is it what he said, they consider on the label here." The original sentence is unclear and the proposed language does not significantly improve it. This Tribunal can find no support for any particular change in its notes or recollection. Respondent notes, in its Reply, that these proposed revisions are to an argument of counsel and Complainant will have adequate opportunity to clarify its

argument in the post-hearing briefs. Accordingly, Complainant's proposed correction to Page 105, line 24, of the Steeger testimony is **rejected**.

C. Respondent's Motion to Conform

Respondent proposes one additional change to the transcript of Mr. John Hebert's testimony. On Page 158, at line 22, Mr. Hebert is asked a series of questions on cross-examination related to the Enforcement Case Review ("ECR") initiated by the Region and issued by EPA's Pesticide Registration Division. Mr. Hebert was asked specifically about Complainant's Exhibits 18 and 19 before being asked the question at issue in Respondent's Motion, emphasized below. The original transcript reads:

Q: The OPP reviewed and responded to an ECR request involving the Respondent's research [bulletin]; isn't that correct?

A: Yes.

Q: That's found at Complainant's Exhibit [sic] 18 and 19; is that correct?

A: Okay.

Q: The OPP was asked to determine the following: Are the claims made in the research bulletin, specifically the comparative field trial and prairie dog bait comparison section, false and misleading. Isn't that correct? Why don't you refer to Document 410, EPA Document 410 of that Exhibit, 18.

A: Yes.

Q: OPP's answer to that question was, "If we received this research bulletin as labeling to accompany a product to control prairie dogs, we would consider the following claims, statements or drafts as," quote, "false or misleading," close quote, "for these reasons," isn't that correct? And I'll draw your attention to EPA Page 416 on Exhibit 19.

A: Yes.

Q: So OPP evaluated the research bulletin using the standard for pesticide labeling, correct?

A: The standard for pesticide labeling?

Q: Yes, the standard for registrations and revisions pesticide labeling.

A: Yes.

Q: Those statements in the ECR involve making a determination as to whether claims made in that research bulletin are, quote, "substantially different," close quote; isn't that correct?

A: It looks like, yes, that's correct.

Q: The false and misleading standards is really used to determine whether a pesticide is misbranded in violation of FIFRA [12(a)(1)(E)]; isn't that correct?

A: Yes.

Tr. 157-59. Respondent proposes to change the phrase "statements in the ECR involve making"

to “statements in the ECR do not involve making” thereby negating the question. R’s Mot. at 3. In its Response, Complainant asserts that it “consulted with Mr. Hebert about this proposed change and Mr. Hebert recalls the question being asked as originally transcribed.” C’s Resp. at 2.¹

The transcript is clear that this portion of cross-examination was aimed at exploring the intended purpose of the ECR as well as the Registration Division’s analysis of the request submitted by the Region. Questions by counsel for Respondent attempted to define the contours of that analysis, which he accomplished by asking questions about the precise wording of the ECR request. The focus of Respondent’s line of questioning appears to be the differentiation between claims that are “false and misleading” and claims that are “substantially different” from the registration statement. The question at issue (whether the ECR involved making a determination as to whether the claims were substantially different), as well as the structure of the preceding questions, appear to be intended to lead to an acknowledgment that the ECR does not support Complainant’s case. This logic is supported not only by the negative interrogatory form employed, which is common to focused cross-examination, but also the hesitant answer offered by Mr. Hebert, as indicated by the syntax on Page 159 at line 1. Such an outcome would logically flow only from the question if asked in the negative as Respondent now contends was the case at hearing. R’s Reply at 1 (noting that the ECR does not mention the words “substantially different”). Moreover, correcting the transcript to read “statements in the ECR do not involve making” comports with this Tribunal’s notes and recollection. Accordingly, Respondent’s proposed correction to Page 158, line 22, of the Hebert testimony is **accepted**.

Respondent proposes one other change to the transcription of Respondent’s opening argument, found at Page 23, line 21, of the testimony of Ms. Claudia Niess. Respondent proposes to strike the word “didn’t” from the phrase “because the complainant can’t show that the website didn’t offer to sell Rozol” thereby negating the statement. R’s Mot. at 3. As Complainant notes, such a correction would render the sentence grammatically incorrect. C’s Resp. at 2. Moreover, unlike other contested corrections that were accepted, this proposed correction involves the elimination of a word affirmatively recorded by the court reporter. Unlike the need to insert missing words, a common occurrence when dealing with human delay in live transcription, Respondent’s argument requires not only the conclusion that the court reporter made the effort to include a word that was unspoken, but that counsel for Respondent is more likely to have formed a grammatically incorrect sentence than a grammatically correct one. I also note that this portion of the transcript reflects arguments by counsel and contains no actual testimony by a witness. As Respondent notes with respect to some of Complainant’s proposed changes, Respondent “will have adequate opportunity to clarify its argument in post-hearing briefing.” R’s Resp. at 2. Accordingly, Respondent’s proposed correction to Page 23, line 21, of the Niess testimony is **rejected**.

¹ I note that the proposed correction is not to Mr. Hebert’s actual testimony. If it were, his recollection as reported by Complainant would lend more weight to Complainant’s argument.

D. Post-Hearing Brief Schedule

The parties' request for 60 days to draft their respective initial post-hearing briefs is **GRANTED**. The briefing schedule is as follows:

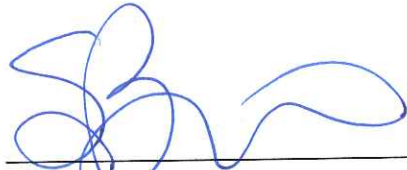
Complainant's initial post-hearing brief shall be filed **on or before June 15, 2012**.

Respondent's initial post-hearing brief shall be filed **on or before the 60th day after service of Complainant's initial post-hearing brief**.

Complainant's reply brief, or a statement that no reply brief will be submitted, shall be filed **on or before the 14th day after service of Respondent's initial post-hearing brief**.

If Complainant files a reply brief, Respondent's reply brief, or a statement that no reply brief will be submitted, shall be filed **on or before the 14th day after service of Complainant's reply brief**.

SO ORDERED.



Susan L. Biro
Chief Administrative Law Judge

Dated: April 16, 2012
Washington, DC

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

CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Motions To Conform Transcript And Order Scheduling Post-Hearing Briefs**, dated April 16, 2012, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: April 16, 2012

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