

RECEIVED

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

JAN 17 2012

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

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

**RESPONDENT'S MOTION TO LIMIT TESTIMONY AT TRIAL BASED UPON
JOINT STIPULATIONS**

Respondent, Liphatech, Inc. ("Liphatech"), through its undersigned attorneys, hereby submits this Motion To Limit Testimony at Trial Based Upon Joint Stipulations pursuant to 40 C.F.R. Sections 22.16(a) and 22.22(a)(1). In order to conserve the resources of the parties and the Presiding Officer, Respondent respectfully requests a ruling on this motion in advance of hearing.

Few material facts, if any, remain in dispute. Moreover, Rule 22.22 bars "repetitious" evidence. To permit witnesses to testify to matters already in the record perpetuates an unnecessary expense on Respondent and wastes the public resources of the Complainant and this Court. Accordingly, Respondent requests that the Presiding Officer enter an order in advance of the hearing that conserves such resources.

I. COMPLAINANT'S PROPOSED TESTIMONY IS CUMULATIVE OF FACTS STIPULATED TO BY THE PARTIES

In its initial and supplemental prehearing exchanges, Complainant lists eighteen fact, hybrid and/or expert witnesses. A significant portion of the testimony proposed by Complainant is cumulative of facts stipulated to by the parties pursuant to the Joint Stipulations and Joint Motion to Admit Certain Exhibits Into Evidence dated October 15,

2011 (the "Joint Stipulations"). By limiting testimony at hearing to only those issues of material fact that are actually still in dispute, the Presiding Officer can streamline the hearing and conserve the resources of the parties and this tribunal.

Attached hereto as Exhibit A is a chart that compares portions of the proposed testimony of Complainant's witnesses as set forth in Complainant's initial, rebuttal and supplemental prehearing exchanges with certain facts stipulated to by the parties pursuant to the Joint Stipulations.¹ As a result of the Joint Stipulations, several of Complainant's witnesses are completely unnecessary and the testimony of Complainant's remaining witnesses should be strictly limited to those relevant issues of material fact that are still in dispute.

A. Stipulated Facts Regarding Violation of FIFRA § 12(a)(2)(E)

With respect to the violation of FIFRA § 12(a)(2)(E) for failure to adequately disclose the restricted use classification of Rozol Prairie Dog Bait in certain print and radio advertisements, Respondent has stipulated to, among other things: (a) the restricted use classification of Rozol Prairie Dog Bait (Joint Stipulations 26); (b) the content of its radio advertisements (Joint Stipulations 39-42); (c) the times and locations in which its radio advertisements were broadcast (Joint Stipulations 44, 46, 48, and 56); and (d) the publication dates for its print advertisements (Joint Stipulations 59, 60-62, 64-66, 68-72, 74-75, 77-79, 81-82, 84-85, 87-88, 90-91, 93-95, 97-99, 101-102, 104-105, 107-108, 110-112, 114-115, 117-118, 120-121, 123-124, 126-127, 129-130, and 132-133).

¹ The text set forth in the second column of the chart attached as Exhibit A is taken from Complainant's Initial Prehearing Exchange dated September 28, 2010, Complainant's Rebuttal Prehearing Exchange dated November 10, 2010 and Complainant's Fourth Supplemental Prehearing Exchange dated August 2, 2011.

Furthermore, pursuant to the Order on Motions for Accelerated Decision Regarding Alleged Violations of FIFRA § 12(a)(2)(E) (the "RUP Order"), the Presiding Officer previously determined liability with respect to the violations alleged in Counts 1-2140 of the First Amended Complaint, but reserved decision on the appropriate unit of violation and appropriate penalty to be imposed, if any.

B. Stipulated Facts Regarding Alleged Violation of FIFRA § 12(a)(1)(B)

With respect to the alleged violation of FIFRA § 12(a)(1)(B), Respondent has stipulated to, among other things: (a) the registration status of Rozol and Rozol Prairie Dog Bait at the time periods relevant to the First Amended Complaint (Joint Stipulations 24-32, 258-260, and 262-269); (b) the content of the product information upon which certain alleged violations of FIFRA § 12(a)(1)(B) are based (Joint Stipulations 140-146, 149, 152, 155, 158, 161, 164, 167, 167, 170, 173, 176, 179, 182, 185, 188, 191, 194, 199, 202, 275, 278, 281, 284, 287, 290, 293, 296, 299, 302, 305, and 308); (c) the majority of product shipments upon which Complainant counts the unit of violation for purposes of the violations alleged during the 2007-2008 time period (Joint Stipulations 213-215, 217-249, 251-255);² (d) that at all times relevant to the First Amended Complaint, Liphatech's website did not allow Rozol or Rozol Prairie Dog Bait to be purchased on its website (Joint Stipulations at 15); and (e) that at all times relevant to the First Amended Complaint, Liphatech's website did not contain product pricing information for Rozol or Rozol Prairie Dog Bait (Joint Stipulations at 15).

² Respondent has not stipulated to the shipments alleged in Paragraphs 216 and 250 of the First Amended Complaint because such shipments were to employees of Respondent.

C. Stipulated Facts Regarding Appropriate Penalty, If Any

The Joint Stipulations provide that Respondent has stipulated that it has waived any challenge, argument or objection to the penalty based on or otherwise relating to the penalty factors "the size of the business of the person charged" and the "effect on the person's ability to continue in business" set forth in Section 14(a)(4) of FIFRA. Joint Stipulations at 16. In addition, the Joint Stipulations provide that the parties have stipulated that under the FIFRA Enforcement Response Policy, the assigned Gravity Adjustment Level for the "Compliance History" component is 0. Joint Stipulations at 15.³

II. TESTIMONY AT HEARING SHOULD BE LIMITED TO REMAINING ISSUES OF MATERIAL FACT

The Joint Stipulations and prior orders on motions for accelerated decision issued by the Presiding Officer have narrowed the issues of material fact that must be determined at hearing. While several unresolved issues present mixed questions of law and fact, testimony at hearing should be limited to facts. *In Good Shepherd Manor Foundation, Inc. v. City of Momence*, 323 F.3d 557, 564 (7th Cir. 2003) ("expert testimony" on legal conclusions is inadmissible under the Federal Rules of Evidence); *In the Matter of Aquakem Carbie, Inc.*, 2010 EPA ALJ LEXIS 9, at *5-6 (ALJ 2010) (indicating that the Presiding Officer may look to the Federal Rules of Evidence for guidance on what evidence is admissible); *In the Matter of General Motors Automotive – North America*, Docket No. RCRA-015-2004-0001, 2005 EPA ALJ LEXIS 29, *12-13 (ALJ 2005)

³ Importantly, the FIFRA ERP is only non-binding agency guidance that the Presiding Officer may disregard in any particular case. *McLaughlin Gormley King Co.*, 6 E.A.D. 339, 350 (EAB 1996) ("While Agency penalty policies facilitate application of statutory penalty criteria, they serve as guidelines only and there is no mandate that they be rigidly followed.") "The matter of concern is . . . whether the penalty is appropriate in relation to the facts and circumstances at hand . . . even a penalty calculated according to the ERP can be excessive." *In re: 99 Cents Only Stores*, Docket No. FIFRA-09-2008-0027, 2010 WL 2787749, *28-29 (ALJ 2010) (internal citation omitted).

("testimony concerning only legal principles will not be admissible, but rather should be heard within the confines of the parties' legal briefs and opening and closing statements at the hearing").

A. Remaining Factual Issues Regarding Violation of FIFRA § 12(a)(2)(E)

As mentioned above, pursuant to the RUP Order, the Presiding Officer has determined the issue of liability for Counts 1-2140 of the First Amended Complaint. As a result, the only issues of material fact that must be determined at hearing include: (a) the appropriate unit of violation (a mixed question of fact and law) and (b) the appropriate penalty, if any, to be levied.

B. Remaining Factual Issues Regarding Alleged Violation of FIFRA § 12(a)(1)(B)

For purposes of the alleged violation of FIFRA § 12(a)(1)(B), testimony should be limited to: (a) whether there was a "distribution or sale" (including, without limitation, whether Respondent's website constitutes an offer for sale for purposes of the violations alleged during the 2009-2010 time period); (b) whether Respondent's statements constituted improper "advertising;" (c) whether those statements were "made for Rozol;" (d) whether those statements were made "as part of" the distribution and sale of Rozol; (e) what is the "statement required" by FIFRA Section 3 and did the claims made "substantially differ" from that statement; and (f) if Respondent is liable for any violation of FIFRA § 12(a)(1)(B), how many violations occurred (a mixed question of law and fact) and the appropriate penalty, if any.

III. SUMMARY OF CUMULATIVE TESTIMONY

When the proposed testimony of Complainant's witnesses disclosed in its prehearing, rebuttal and supplemental exchanges is compared to the Joint Stipulations, it

becomes clear that much of the proposed testimony is cumulative, unnecessary and/or irrelevant to the remaining issues of material fact in this case.

The proposed testimony of Complainant's witnesses Mr. Shawn E. Rich, Mr. Shawn Hackett, Mr. Mark Klapperich, Mr. Charles King and Mr. Arthur J. Fonk all relates to the investigation of the violations alleged in the First Amended Complaint. None of the testimony proposed for such witnesses has any bearing on the issues of material fact that remain in dispute and therefore the testimony of such witnesses would be unnecessarily cumulative. Likewise, the proposed testimony of Ms. Claudia Niess relating to the registration status of Rozol at various time periods, the investigation of the alleged violations, the content of Respondent's radio advertisements, and the content of Respondent's product information and website are cumulative in light of the Joint Stipulations. This testimony does not pertain to any factual issue remaining in dispute and therefore should be excluded.

Complainant proposes to have Mr. John D. Hebert, Dr. William W. Jacobs, Ms. Meredith F. Laws and/or Mr. Daniel B. Peacock testify regarding the legal standard used to determine if a violation of FIFRA § 12(a)(1)(B) occurred. The Presiding Officer has already determined that "nothing in 7 U.S.C. § 136a(c) requires claims about a registered pesticide to be affirmatively approved by the EPA" and that "Complainant's reliance on a legal theory that bases allegations of liability on the 'accepted label' is too narrow a formulation." Order on Motions For Accelerated Decision Regarding Alleged Violations of FIFRA § 12(a)(1)(B) dated June 24, 2011 (the "Differing Claims Order") at 24. Permitting Complainant's witnesses to testify at hearing regarding a legal standard that the Presiding Officer has already determined to be incorrect would be wasteful of the

tribunal's resources, nor is such testimony probative of the legal issue for the Presiding Officer to determine. Likewise, this is not an appropriate subject of "expert testimony" as contemplated by the Rules. *See* page 4 *infra*.

Complainant further proposes to have Dr. Thomas Steeger, Dr. William Allen Erickson and/or Mr. J. Andrew Shelby testify regarding the review conducted by the Environmental Fate and Effects Division of U.S. EPA during the registration of various Rozol products. Because the validity of the underlying Rozol registrations is not at issue and this case does not involve allegations of misuse of Rozol (use not in accordance with the product label), such testimony is irrelevant.

In addition, because Respondent has waived any challenge to the appropriate penalty based upon the size of the business of the person charged and the effect on the person's ability to continue in business, the testimony of Ms. Gail Coad is unnecessary.

When the relevant analysis concerning the appropriate penalty, if any, to impose on Respondent for any violations of FIFRA that occurred is put in proper perspective, it becomes clear that the testimony of Complainant's remaining witnesses does not bear on any relevant issue.

For purposes of the violation of FIFRA § 12(a)(2)(E), the Presiding Officer must determine the gravity resulting from the failure to adequately disclose the restricted use classification of Rozol in advertising when: (a) the product label and MSDS have always indicated that Rozol is a Restricted Use pesticide; (b) it is a separate violation of FIFRA to use a pesticide in a manner not in accordance with its label (no such violation is cited here); (c) it is a separate violation of FIFRA to sell a Restricted Use pesticide to an individual who is not a certified applicator (again, there is no such violation in this case);

(d) Rozol is a lawfully registered pesticide product; and (e) the general use Rozol product (EPA Reg. 7173-184) – for which no restrictions apply – is **identical** to the restricted use pesticide product.

For purposes of the alleged violation of FIFRA § 12(a)(1)(B), if any violation is actually found, the Presiding Officer must determine the gravity of making a claim in product information that differs from the registration statement when, among other mitigating facts: (a) Rozol is a lawfully registered pesticide product; and (b) it is a violation of FIFRA to use a pesticide in a manner not in accordance with its label (no such violation is cited here).

Mr. Dyer's opinion, as one of the drafter's of the FIFRA Enforcement Response Policy, is unnecessary and unreliable as Mr. Dyer does not appear to have any particular expertise regarding the gravity of the violations alleged in the First Amended Complaint nor is this testimony otherwise appropriate or probative as required under the Rules. Furthermore, none of the research and investigation conducted by Complainant's witnesses Dr. Nimish B. Vyas, Dr. Mark A. Kirms and/or Ms. Bonnie C. Yates has any bearing on the violations alleged in this proceeding.⁴ While such testimony could possibly be relevant to violations alleged regarding misuse of a pesticide containing Chlorophacinone or the sale of an unregistered pesticide containing Chlorophacinone, these types of allegations have not been alleged and, therefore, this information is not relevant to the alleged advertising violations pursuant to FIFRA § 12(a)(2)(E) or the alleged violation of FIFRA § 12(a)(1)(B).

⁴ Testimony regarding the effects of a particular pesticide may be more relevant in a proceeding where EPA alleges the sale and/or misuse of an unregistered pesticide.

IV. CONCLUSION


Permitting the Complainant to call multiple witnesses at hearing to testify with respect to matters that have been stipulated to by the parties would be unnecessarily cumulative and contrary to the intent of Rule 22.22. Accordingly, Respondent requests that the Court enter an order in advance of hearing that limits testimony at hearing to those relevant issues of material fact, if any, that remain in dispute.

Dated this 12th day of January, 2012.

Respectfully submitted,

Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 1700
Milwaukee, WI 53202
Telephone: 414-298-1000
Facsimile: 414-298-8097

Mailing Address:
P.O. Box 2965
Milwaukee, WI 53201-2965


Mark A. Cameli
WI State Bar ID No. 1012040
mcameli@reinhartlaw.com
Michael H. Simpson
WI State Bar ID No. 1014363
msimpson@reinhartlaw.com
Lucas N. Roe
WI State Bar ID No. 1069233
lroe@reinhartlaw.com
Attorneys for Respondent Liphatech, Inc.

8205816

EXHIBIT A

SEE ATTACHED COMPARISON OF PROPOSED TESTIMONY AND JOINT
STIPULATIONS

EXHIBIT A

<u>Complainant's Witness</u>	<u>Summary of Proposed Testimony Set Forth in Complainant's Initial, Rebuttal and/or Supplemental Exchanges</u>	<u>Admitted Facts From Joint Stipulations/Relevant Order(s)</u>
<p>Mr. Shawn E. Rich Field Investigator Kansas Dept. of Agriculture</p>	<p>Mr. Rich may testify that on November 9, 2007, he was asked to investigate a complaint, received by KDA's Topeka office, that Liphatech, Inc. was broadcasting radio advertisements for one of its pesticides without advertising that it was a "Restricted Use Pesticide." He may testify that the initial complaint originated from the Nebraska Department of Agriculture. He may testify that as a result of the complaint, he contacted Golden Plains Ag Network (Golden Plains), the radio network alleged to have broadcast the advertisements, in Garden City, Kansas on November 19, 2007. He may testify that on November 21, 2007, he met with Mr. John Jenkinson, the Farm Director of Golden Plains, at the Golden Plains office in Dodge City, Kansas. Mr. Rich may testify that Mr. Jenkinson informed him that Liphatech bought air time from Golden Plains. He may testify that Liphatech provided Mr. Jenkinson (Farm Director of Golden Plains Ag Network) with 30 second and 60 second digital audio files of advertisements to broadcast and promote its pesticide product, Rozol to control prairie dogs.</p> <p>He may testify that Mr. Jenkinson informed him that the radio network played the 30 and 60 second advertisements for Rozol twice a day at its Kansas and Colorado stations in accordance with a schedule worked out with Liphatech.</p> <p>He may testify that Mr. Jenkinson informed him that the network broadcast the 30 and 60 second advertisements for Rozol to control prairie dogs at its Kansas radio stations located in Goodland, Colby, Dodge City, Pratt and Great Bend and at its Colorado radio stations located in Wray, Yuma and Sterling.</p> <p>Mr. Rich may testify that he listened to both the 30 and 60 second audio files with Mr. Jenkinson and that Mr. Jenkinson informed him that the audio files that Liphatech provided to the radio network were not edited by the radio station and were broadcast on the radio unedited.</p> <p>Mr. Rich may testify that the 30 and 60 second audio advertisements did not state that Rozol was a "Restricted Use Pesticide" nor did they make a statement about any terms of restrictions.</p>	<p>38. On June 19, 2008, the inspector collected a written statement and documentary information regarding "Rozol," EPA Reg. No. 7173-244, from Respondent.</p> <p>39. The documentary information collected by the inspector on June 19, 2008 included invoices showing the purchase of radio broadcast time by Respondent for the advertisement of its product, "Rozol," EPA Reg. No. 7173-244.</p> <p>40. The documentary information collected by the inspector on June 19, 2008, also included the transcripts of the radio advertisements to be broadcast by each of the radio stations on behalf of Respondent.</p> <p>41. The transcripts of the radio advertisements included four different versions of the advertisement to be broadcast regarding "Rozol," EPA Reg. No. 7173-244. See Attachments A, B, C and D.</p> <p>42. All four versions of the radio advertisements to be broadcast regarding "Rozol," EPA Reg. No. 7173-244, failed to include the words "restricted use pesticide."</p> <p>44. Respondent contracted with Golden Plains AG Network to broadcast radio advertisements regarding "Rozol," EPA Reg. No. 7173-244, on the radio station, KXXX-AM in Colby, Kansas, on 120 occasions from on or about October 8, 2007 to on or about December 21, 2007 (see Attachment E).</p> <p>46. Respondent contracted with Western Kansas Broadcast to broadcast radio advertisements regarding "Rozol," EPA Reg. No. 7173-244, on the radio station, KBUF in Garden City, Kansas, on 229 occasions from on or about January 15, 2008 to on or about March 2, 2008 (see Attachment F).</p>

EXHIBIT A

<u>Complainant's Witness</u>	<u>Summary of Proposed Testimony Set Forth in Complainant's Initial, Rebuttal and/or Supplemental Exchanges</u>	<u>Admitted Facts From Joint Stipulations/Relevant Order(s)</u>
	<p>He may further testify that Mr. Jenkinson emailed him the Liphatech 30 and 60 second audio advertisements for Rozol after the meeting and that he then sent this email on to Mr. Shawn Hackett, a field staff supervisor for the KDA, so that Mr. Hackett could record the files on a compact disc.</p> <p>He may testify that he learned that the original sales records relating to the advertisements were kept at the radio station's main office, Rocking M Radio, located in Manhattan, Kansas, that he collected a statement from Mr. Jenkinson attesting to the facts Mr. Rich learned during the meeting and that he drafted a report documenting his investigation.</p>	<p>48. Respondent contracted with High Plains Radio to broadcast radio advertisements regarding "Rozol," EPA Reg. No. 7173-244, on the radio stations, KICX-FM, KBRL-AM, KRKU-FM and KJBL-FM, all in McCook, Nebraska; KFNF-FM in Oberlin, Nebraska, KADL-FM in Imperial, Nebraska and KSTH-FM in Holyoke, Nebraska, on 1,521 occasions from on or about September 26, 2007 to on or about December 31, 2007 (see Attachment G).</p> <p>56. Respondent contracted with KGNC-AM and KXGL-FM to broadcast these radio advertisements regarding "Rozol," EPA Reg. No. 7173-244, on the radio stations, KGNC-AM and KXGL-FM in Amarillo, Texas, on 247 occasions from on or about November 12, 2007 to on or about April 26, 2008 (see Attachment H).</p>
<p>Mr. Shawn Hackett Environmental Scientist III Kansas Dept. of Agriculture</p>	<p>Mr. Hackett may testify that he was contacted by Mr. Shawn Rich of the KDA regarding an investigation that Mr. Rich conducted at the Golden Plains office on November 21, 2007. He may testify that he agreed to follow up on Mr. Rich's investigation by conducting an investigation at Golden Plains' main office in Manhattan, Kansas... He may further testify that he received an email from Ms. Thomas on November 28, 2007, which contained a list of dates and stations that aired the Liphatech radio advertisements for its Rozol product to control prairie dogs.</p> <p>He may also testify that he received an email from Mr. Shawn Rich which contained audio files of the two radio advertisements that were being broadcast by Golden Plains and its affiliates. He may further testify that he transferred the audio files onto a CD on November 29, 2007 and completed a report to document his investigation.</p>	<p>Pursuant to the Order on Motions for Accelerated Decision Regarding Alleged Violations of FIFRA § 12(a)(2)(E) dated May 6, 2011, the Presiding Officer found Liphatech liable for the allegations of violation set forth in Counts 1-2140, but reserved decision on the appropriate "unit of violation" and the appropriate penalty, if any, to be imposed.</p> <p>Same as for Mr. Shawn Rich; Liphatech has stipulated to the content of its radio advertisements and the dates/times such advertisements were broadcast.</p>

EXHIBIT A

<u>Complainant's Witness</u>	<u>Summary of Proposed Testimony Set Forth in Complainant's Initial, Rebuttal and/or Supplemental Exchanges</u>	<u>Admitted Facts From Joint Stipulations/Relevant Order(s)</u>
<p>Mr. Mark Klapperich Agriculture Program Specialist Colorado Dept. of Ag.</p>	<p>Mr. Klapperich may testify that on December 4, 2007 he attended the Colorado Weed Management Association Fall Conference in Pueblo, Colorado. He may testify that he spoke with Mr. Nick Bryars, a Northern High Plains sales associate for Liphatech.</p> <p>He may testify that Mr. Bryars was advertising Rozol products at his booth. He may testify that he obtained a folder of information from Mr. Bryars' booth, which included: (1) Mr. Bryars' business card; (2) a Rozol Prairie Dog Bait special local needs label under FIFRA Section 24(c), 7 U.S.C. § 136v(e); (3) a Black Tailed Prairie Dog Control Research Bulletin dated October 17, 2007; (4) a pamphlet entitled "Understanding the true cost of treatment: Doing Prairie Dog Control Saves Time and Money" dated November 5, 2007; and (5) a copy of an article called "Are livestock weight gains affected by Black Tailed Prairie Dogs?" He may further testify that he took several photographs of Mr. Bryars' booth at the conference with his cell phone camera.</p> <p>He may further testify that he noticed both the informational packet and poster being displayed at the booth did not advertise Rozol as a "Restricted Use Pesticide Product" nor did the packet specify that Rozol could only be used in specific counties in Colorado. He may testify that he reported his observations to Ms. Laura Quakenbush, the pesticide registration coordinator for CIDA.</p>	<p>Liphatech has stipulated to content of the Black Tailed Prairie Dog Control Research Bulletin dated October 17, 2007 upon which Complainant bases certain alleged violations of FIFRA § 12(a)(1)(B) pursuant to Joint Stipulations 155, 158, 161, 164, 167, 170, 173, 176, 179, 182, 185, 188, 191, and 194.</p> <p>No violations in the First Amended Complaint are explicitly based on the information contained in the pamphlet entitled "Understanding the true cost of treatment: Doing Prairie Dog Control Saves Time and Money" dated November 5, 2007 or the article called "Are livestock weight gains affected by Black Tailed Prairie Dogs."</p> <p>Pursuant to the Order on Motions for Accelerated Decision Regarding Alleged Violations of FIFRA § 12(a)(2)(E) dated May 6, 2011, the Presiding Officer found Liphatech liable for the allegations of violation set forth in Counts 1-2140, but reserved decision on the appropriate "unit of violation" and the appropriate penalty, if any, to be imposed. None of the Counts alleging violations of FIFRA § 12(a)(2)(E) are based upon the informational packet and/or poster displayed in Mr. Bryars' booth.</p>
<p>Mr. Charles King Program Specialist Division of Agricultural Services South Dakota Dept. of Ag.</p>	<p>He may testify that in September of 2009, he was reviewing a registration application submitted by Liphatech for "Rozol Prairie Dog Bait," EPA Reg. No. 7173-286. As a result of reviewing the application materials, Mr. King went to Liphatech's website at www.liphatech.com and reviewed Liphatech's advertising material on its website. He may testify that one of the advertisements he reviewed on Liphatech's website was "Understanding the true cost of treatment: Proper Prairie Dog Management Saves Time and Money". He may testify that he identified potential violations of FIFRA in that advertisement for Rozol Prairie Dog Bait. He may testify that one of the violations he identified was that the advertisement compared the use of "Rozol Prairie Dog Bait" to zinc phosphide. He may also testify that he was also concerned because the advertisement promoted use of baiting equipment on an ATV despite that fact that</p>	<p>None of the alleged violations of FIFRA § 12(a)(1)(B) are based upon the document entitled "Understanding the true cost of treatment: Proper Prairie Dog Management Saves Time and Money."</p> <p>In addition, Respondent has stipulated to the content of the material that forms the basis of the alleged differing claims violations – see Joint Stips. 140-146, 149, 152, 155, 158, 161, 164, 167, 170, 173, 176, 179, 182, 185, 188, 191, 194, 199, 202, 211, 275, 278, 281, 284, 287, 290, 293, 296, 299, 302, 305, and 308.</p>

EXHIBIT A

<u>Complainant's Witness</u>	<u>Summary of Proposed Testimony Set Forth in Complainant's Initial, Rebuttal and/or Supplemental Exchanges</u>	<u>Admitted Facts From Joint Stipulations/Relevant Order(s)</u>
<p>Mr. Arthur J. Fonk Env. Enforcement Specialist State of Wisconsin Dept. of Ag., Trade and Consumer Protection</p>	<p>the label requires hand baiting. He may testify that he printed a copy of the advertisement and provided a copy to his supervisor, Mr. Brad Berven, and drafted a referral letter to U.S. EPA in fall 2009.</p> <p>Mr. Fonk may testify that on June 2, 2008 he conducted an inspection at Liphatech's facility located at 3600 West Elm Street, Milwaukee, Wisconsin. He may further testify that he issued a Federal Stop Sale, Use and Removal Order (SSURO) to Liphatech for Rozol, EPA Reg. No. 7173-244 for control of both pocket gophers and black tailed prairie dogs. He may further testify that he requested certain information relating to the Rozol product.</p> <p>Mr. Fonk may further testify that he returned on June 9, 2008. On that day, he met with Mr. Tanner, Ms. Callies and Mr. Schmit. He may testify that during that visit Mr. Schmit asked him to provide Liphatech with a written request of the information U.S. EPA was seeking. Mr. Fonk provided him with a written request and agreed to return on a subsequent date to collect the information that was requested. Mr. Fonk may further testify that he returned on June 19, 2008 to collect the information that he had requested. He may testify that on that day, he met with Mr. Schmit and Ms. Callies. He may testify that on that day, Mr. Schmit provided him with a number of documents, which included: (1) a written statement by Mr. Schmit regarding advertising and regulatory compliance; and (2) a three-ring binder containing information regarding Rozol for the control of both pocket gophers and black tailed prairie dogs, which included: information posted on Liphatech's website; information relating to its Direct Mail Packages for Rozol; information relating to radio advertisements for Rozol to control prairie dogs, including transcripts of the radio advertisements that were broadcast.</p>	<p>34. On June 2, 2008, an inspector employed by the State of Wisconsin, Bureau of Agricultural Management, Compliance Section, and authorized to conduct inspections under FIFRA, conducted an inspection at Respondent's place of business located at 3600 West Elm Street in Milwaukee, Wisconsin.</p> <p>35. The inspector issued a Federal SSURO pursuant to Section 13(a) of FIFRA, 7 U.S.C. § 136k(a), to Respondent regarding "Rozol," EPA Reg. No. 7173-244, during the June 2, 2008 inspection.</p> <p>37. On June 19, 2008, the inspector returned to Respondent's place of business located at 3600 West Elm Street, Milwaukee, Wisconsin, to collect documentary information from Respondent regarding "Rozol," EPA Reg. No. 7173-244.</p> <p>38. On June 19, 2008, the inspector collected a written statement and documentary information regarding "Rozol," EPA Reg. No. 7173-244 from Respondent.</p> <p>39. The documentary information collected by the inspector on June 19, 2008 included invoices showing the purchase of radio broadcast time by Respondent for the advertisement of its product, "Rozol," EPA Reg. No. 7173-244.</p> <p>40. The documentary information collected by the inspector on June 19, 2008, also included the transcripts of the radio advertisements to be broadcast by each of the radio stations on behalf of Respondent.</p> <p>41. The transcripts of the radio advertisements included four different versions of the advertisement to be broadcast regarding "Rozol," EPA Reg. No. 7173-244. See Attachments A, B, C and D.</p>

EXHIBIT A

<u>Complainant's Witness</u>	<u>Summary of Proposed Testimony Set Forth in Complainant's Initial, Rebuttal and/or Supplemental Exchanges</u>	<u>Admitted Facts From Joint Stipulations/Relevant Order(s)</u>
		<p>(Joint Stips. 40, 41, 42, 44, 46, 48 and 56 admit all the times the radio ads were broadcast on each radio station.)</p> <p>59. The documentary information collected by the inspector on June 19, 2008 included invoices showing the purchase of print advertising by Respondent for the advertisement of "Rozol," EPA Reg. No. 7173-244.</p> <p>(Joint Stips. 60-62, 64-66, 68-69, 71-72, 74-75, 77-79, 81, 82, 84-85, 87-88, 90-91, 93-95, 97-99, 101-102, 104-105, 107-108, 110-112, 114-115, 117-118, 120-121, 123-124, 126-127, 129-130, 132-133 collectively admit each time a print advertisement was published.)</p> <p>140. The documentary information collected by the inspector on June 19, 2008 included copies of Direct Mail Packages regarding "Rozol," EPA Reg. No. 7173-244, for the States of Colorado, Kansas, Nebraska, Texas and Wyoming.</p> <p>141. The Direct Mail Packages included cover letters, dated October 31, 2007, that were entitled "<i>SUBJECT - ROZOL</i> ® <i>POCKET GOPHER BAIT</i>."</p> <p>142. The cover letters, dated October 31, 2007, stated "Rozol," EPA Reg. No. 7173-244, was intended both "For Black - Tailed Prairie Dog (BTPD) Control" and "For Control of Pocket Gophers."</p> <p>143. The Direct Mail Packages also included sales literature regarding "Rozol," EPA Reg. No. 7173-244, entitled "<i>Black-tailed Prairie Dog Control - Research Bulletin</i>."</p> <p>144. The date on the sales literature entitled "<i>Black-tailed Prairie Dog Control - Research Bulletin</i>," regarding "Rozol," EPA Reg. No. 7173-244, was October 17, 2007.</p>

EXHIBIT A

<u>Complainant's Witness</u>	<u>Summary of Proposed Testimony Set Forth in Complainant's Initial, Rebuttal and/or Supplemental Exchanges</u>	<u>Admitted Facts From Joint Stipulations/Relevant Order(s)</u>
<p>Ms. Claudia Niess Enforcement Officer U.S. EPA, Region 5 Pesticides and Toxics Compliance Section</p>	<p>Ms. Niess may testify that in the early part of 2008, both Regions 7 and 8 contacted Region 5 to inform Region 5 of potential violations relating to Liphatech's product Rozol, EPA Reg. No. 7173-244, and in particular, for its special local needs use of the product to control black-tailed prairie dogs in certain States and counties within those states. She may also explain that in calendar years 2007 and 2008, Rozol, EPA Reg. No. 7173-244, was also registered under the authority of Section 24(c) of FIFRA to control black tailed prairie dogs under special local needs supplemental labels for the States of Kansas, Nebraska, Wyoming, Colorado, Texas and Oklahoma. She may testify that the Region 7 referral to Region 5 included a CD from KDA that contained copies of the Rozol advertisements broadcast by Golden Plains. She may testify that she listened to this CD and then she duplicated the CD for the enforcement file. She may also testify that she transcribed the audio advertisements on the CD for the enforcement file.</p> <p>She may testify that from January 23-January 24, 2008 she went to Liphatech's website and printed out a number of documents.</p> <p>She may testify that after reviewing the documentation that was sent to Region 5 from Regions 7 and 8, she requested that WDATCP conduct an inspection and issue a SSURO.</p>	<p>In addition, Respondent has stipulated to the content of the material that forms the basis of the alleged differing claims violations – see Joint Stips. 140-146, 149, 152, 155, 158, 161, 164, 167, 170, 173, 176, 179, 182, 185, 188, 191, 194, 199, 202, 211, 275, 278, 281, 284, 287, 290, 293, 296, 299, 302, 305 and 308.</p> <p>29. During calendar years 2007 and 2008, "Rozol," EPA Reg. No. 7173-244, was also registered 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" supplemental labels for the States of Kansas, Nebraska, Wyoming, Colorado, Texas and Oklahoma.</p> <p>See also Joint Stips. 30-31 for a list of certain counties where Rozol, EPA Reg. No. 7173-244, could be used to control black tailed prairie dogs.</p> <p>41. The transcripts of the radio advertisements included four different versions of the advertisement to be broadcast regarding "Rozol," EPA Reg. No. 7173-244. See Attachments A, B, C and D.</p> <p>Complainant has not alleged any specific violation of FIFRA § 12(a)(1)(B) based on this material. See First Amended Complaint ¶¶ 207-210.</p> <p>34. On June 2, 2008, an inspector employed by the State of Wisconsin, Bureau of Agrichemical Management, Compliance Section, and authorized to conduct inspections under FIFRA, conducted an inspection at Respondent's place of business located at 3600 West Elm Street in Milwaukee, Wisconsin.</p> <p>35. The inspector issued a Federal SSURO pursuant to Section 13(a) of FIFRA, 7 U.S.C. § 136k(a), to Respondent regarding "Rozol," EPA Reg. No. 7173-244, during the June 2, 2008 inspection.</p>

EXHIBIT A

<u>Complainant's Witness</u>	<u>Summary of Proposed Testimony Set Forth in Complainant's Initial, Rebuttal and/or Supplemental Exchanges</u>	<u>Admitted Facts From Joint Stipulations/Relevant Order(s)</u>
	<p>She may testify that she received and reviewed the information collected by the WDATCP inspector and created a list of dates that each radio station broadcast radio advertisements for Liphatech regarding Rozol. She may testify that she reviewed the transcripts of versions 1 through 4 of the radio advertisements and copies of the print advertisements that were provided by Liphatech in the documentation that WDATCP collected. She may also testify that she created a list of dates that each radio station broadcast radio advertisements for Liphatech regarding Rozol.</p> <p>She may further testify that she received a letter from Mr. Schmit dated August 5, 2008. She may testify that, with this letter, Mr. Schmit provided her with certain information which included: (1) a copy of all the "Rozol Prairie Dog Bait" special local needs labels; (2) a list of the companies that distribute Rozol to control prairie dogs; (3) a photograph of a draft revised poster; (4) examples of advertising that shows Rozol to control prairie dogs as a "Restricted Use Pesticide;" and (5) a list of radio stations that were broadcasting advertisements for Rozol.</p>	<p>Joint Stipulation 41 & Attachments A, B, C and D to the First Amended Complaint contain transcripts of the radio advertisements.</p> <p>Joint Stipulations 44, 46, 48, and 56 and Attachments E, F, G and H contain the number and dates of radio ads that were aired.</p> <p>Joint Stips. 40, 41, 42, 44, 46, 48 and 56 admit all the times the radio ads were broadcast and on what radio station.</p>
	<p>Ms. Niess may also testify that she submitted an enforcement case review (ECR) to the Office of Pesticides Program (OPP) at U.S. EPA's Headquarters in Washington D.C. She may explain the ECR process. In the ECR, she requested that OPP review Liphatech's advertising and marketing materials to opine as to whether or not Liphatech was making claims that were false or misleading. She may further testify that she received a response to her ECR request on October 16, 2008, in which OPP opined that a number of claims made in Liphatech's advertising and marketing materials were false and misleading.</p>	<p>The Enforcement Case Review examines the material under the false and misleading standard for purposes of FIFRA § 12(a)(1)(E). All such alleged violations have been removed from the First Amended Complaint.</p>
	<p>Ms. Niess may further testify that on August 22, 2008, Region 5 issued an amended Federal SSURO to Liphatech. The amended Federal SSURO allowed Liphatech to distribute or sell Rozol, EPA Reg. No. 7173-244, as long as the distribution and sale of the pesticide was in full compliance with the registration of the product under Sections 3 and 24(c) of FIFRA.</p>	<p>256. On August 22, 2008, EPA amended the Federal SSURO, dated June 2, 2008 "Rozol," EPA Reg. No. 7173-244.</p> <p>257. The amended Federal SSURO prohibited Respondent from distributing the following marketing materials or labeling for "Rozol," EPA Registration Number 7173-244: (1) the handout titled "Black-tailed Prairie Dog Control Research Bulletin;" (2) the handout titled "Understanding the True Cost</p>

EXHIBIT A

<u>Complainant's Witness</u>	<u>Summary of Proposed Testimony Set Forth in Complainant's Initial, Rebuttal and/or Supplemental Exchanges</u>	<u>Admitted Facts From Joint Stipulations/Relevant Order(s)</u>
		<p>of Treatment" by Ted Bruesch, National Technical Support Manager, Liphatech; (3) the booklet titled "Control Pocket Gophers & Black-Tailed Prairie Dogs;" and (4) any other similar technical labeling for "Rozol," EPA Registration Number 7173-244, that has not been subjected to a compliance review by U.S. EPA, until further notice from U.S. EPA.</p>
	<p>Ms. Niess may further testify that on November 18, 2008, she emailed a file to Mr. Schmit at Liphatech. She may testify that this email and the accompanying file highlighted claims in the Research Bulletin that OPP indentified as false or misleading.</p>	<p>All alleged violations of FIFRA § 12(a)(1)(E) have been removed from the First Amended Complaint.</p>
	<p>Ms. Niess may also testify that she received a letter from Mr. Schmit dated February 5, 2009 which included shipping records for Rozol 7173-244 from October 1, 2007 through June 2, 2008.</p>	<p>Joint Stipulations 213-215, 217-249 and 251-255 stipulate to the majority of this information.</p>
	<p>Ms. Niess may further testify that on September 18, 2009, US EPA issued a Notice of Intent to File an Administrative Complaint against Liphatech.</p>	<p>337. On September 18, 2009, Complainant issued a Notice of Intent to File an Administrative Complaint against Liphatech, Inc. to Respondent.</p>
	<p>She may further testify that on November 18, 2009, February 10, 2010, February 19, 2010 and February 23, 2010 she revisited Liphatech's website and printed out advertisements that she determined to contain violative claims. She may testify that she printed a number of advertisements she found on Liphatech's website on November 18, 2009, which included advertisements entitled: "Rozol Prairie Dog Bait" (2) "Understanding the True Cost of Treatment: Proper Prairie Dog Management Saves Time and Money;" and (3) "Control Range Rodents" and that she printed additional documents on February 23, 2010.</p>	<p>330. On February 10, 2010, Respondent's website at www.liphatech.com made the same claims as it did on November 18, 2009.</p>
		<p>332. On February 19, 2010, Respondent's website at www.liphatech.com made the same claims as it did on November 18, 2009.</p>
		<p>334. On February 23, 2010, Respondent's website at www.liphatech.com made the same claims as it did on November 18, 2009.</p>
		<p>None of the alleged violations of FIFRA § 12(a)(1)(B) are based upon claims made in the document "Understanding the True Cost of Treatment: Proper Prairie Dog Management Saves Time and Money." Joint Stipulations 275, 278, 281, 284, 287, 290, 293, 296, 299, 302, 305 and 308 admit to the inclusion of certain information on Liphatech's website.</p>

EXHIBIT A

<u>Complainant's Witness</u>	<u>Summary of Proposed Testimony Set Forth in Complainant's Initial, Rebuttal and/or Supplemental Exchanges</u>	<u>Admitted Facts From Joint Stipulations/Relevant Order(s)</u>
	<p>She may testify that after having contacted Liphatech about the violative language identified on Liphatech's website, EPA issued another SSURO.</p>	<p>346. On March 4, 2010, EPA issued another SSURO to Respondent regarding "Rozol," EPA Reg. No. 7173-244.</p> <p>347. The March 4, 2010 SSURO also addressed "Rozol Prairie Dog Bait," EPA Reg. No. 7173-286.</p> <p>349. EPA did not approve nor authorize the advertisements that were found on Respondent's website, www.liphatech.com, on November 18, 2009, February 10, 2010, February 19, 2010 and February 23, 2010 regarding "Rozol," EPA Reg. No. 7173-244.</p> <p>350. EPA did not approve nor authorize the advertisements that were found on Respondent's website, www.liphatech.com, on November 18, 2009, February 10, 2010, February 19, 2010 and February 23, 2010 regarding "Rozol Prairie Dog Bait," EPA Reg. No. 7173-286.</p> <p>351. EPA did not approve the distribution of any advertisements that were found on Respondent's website, www.liphatech.com, on November 18, 2009, February 10, 2010, February 19, 2010 and February 23, 2010 in the form of any literature, flyers, or advertisements to Respondent's distributor partners for either "Rozol," EPA Reg. No. 7173-244, nor "Rozol Prairie Dog Bait," EPA Reg. No. 7173-286.</p> <p>352. After the March 4, 2010 Federal SSURO was issued, Respondent sent letters to 48 of its distribution partners requesting that they each destroy/disregard "any and all literature, flyers, advertisements" regarding "Rozol," EPA Reg. No. 7173-244, and "Rozol Prairie Dog Bait," EPA Reg. No. 7173-286, including brochures entitled "<i>Control Range Rodents</i>," dated September 24, 2009 or older.</p> <p>"Liphatech stipulates that it has already waived any challenge, argument or objection to the penalty based on or otherwise relating to the factors 'the size of business of the person charged' and the 'effect on the person's ability to continue in business' set forth in Section 14(a)(4) of the Federal Insecticide,</p>
	<p>She may testify that again Liphatech told U.S. EPA that they would contact the distributors and request that the distributors each destroy/disregard any and all literature, flyers, and advertisements regarding its Rozol Products, EPA Reg. Nos. 717-244 and 7173-286, including brochures entitled "<i>Control Range Rodents</i>."</p>	
	<p>She may testify how she researched public records to determine Liphatech's size of business and ability to pay for the purposes of her calculations.</p>	

EXHIBIT A

<u>Complainant's Witness</u>	<u>Summary of Proposed Testimony Set Forth in Complainant's Initial, Rebuttal and/or Supplemental Exchanges</u>	<u>Admitted Facts From Joint Stipulations/Relevant Order(s)</u>
	<p>Ms. Niess may testify that on April 1, 2010, U.S. EPA issued an updated Notice of Intent to File an Administrative Complaint against Liphatech.</p>	<p>Fungicide and Rodenticide Act, as amended (FIFRA)." Joint Stipulations at 16.</p> <p>357. On September 18, 2009, Complainant issued a Notice of Intent to File an Administrative Complaint against Liphatech, Inc. to Respondent.</p> <p>358. On April 1, 2010, Complainant issued an Updated Notice of Intent to File an Administrative Complaint (Updated Notice) against Liphatech, Inc. to Respondent.</p>
<p>Mr. John D. Hebert Dr. William W. Jacobs Ms. Meredith Laws Mr. Daniel B. Peacock OPP Registration Division United States EPA</p>	<p>The OPP witness may testify regarding the registration process that took place when Liphatech registered its Rozol products under EPA Reg. No. 7173-184; EPA Reg. No. 7173-244 and EPA Reg. No. 7173-286.</p>	<p>25. During calendar years 2007 and 2008, Respondent was the registrant of "Rozol Pocket Gopher Bait II" (Alternate name: "Rozol Pocket Gopher Bait Burrow Builder Formula") (hereinafter, "Rozol"), EPA Registration Number (EPA Reg. No.) 7173-244.</p> <p>26. Upon registration of "Rozol," EPA Reg. No. 7173-244, and at all times relevant to the First Amended Complaint, "Rozol," EPA Reg. No. 7173-244, was classified as a restricted use product under Section 3(d), of FIFRA, 7 U.S.C. § 136a(d).</p> <p>28. As a result of its classification as a restricted use product, "Rozol," EPA Reg. No. 7173-244, can only be sold to and be used by Certified Applicators or persons under the direct supervision of Certified Applicators and only for users covered by the Certified Applicator's certification.</p> <p>29. During calendar years 2007 and 2008, "Rozol," EPA Reg. No. 7173-244, was also registered 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" supplemental labels for the States of Kansas, Nebraska, Wyoming, Colorado, Texas and Oklahoma.</p>

EXHIBIT A

<p><u>Complainant's Witness</u></p>	<p><u>Summary of Proposed Testimony Set Forth in Complainant's Initial, Rebuttal and/or Supplemental Exchanges</u></p>	<p><u>Admitted Facts From Joint Stipulations/Relevant Order(s)</u></p>
		<p>30. The use of "Rozol," EPA Reg. No. 7173-244, to control black-tailed prairie dogs was restricted to the following counties in Colorado: Adams, Arapahoe, Baca, Bent, Boulder, Broomfield, Cheyenne, Crowley, Denver, Douglas, El Paso, Elbert, Huerfano, Jefferson, Kiowa, Kit Carson, Larimer, Las Animas, Lincoln, Logan, Morgan, Otero, Phillips, Prowers, Pueblo, Sedgewick, Washington, Weld and Yuma.</p> <p>31. The use of "Rozol," EPA Reg. No. 7173-244, to control black-tailed prairie dogs was restricted in Texas counties located north and west of a line including the counties of Baylor, Brewster, Coke, Crane, Crockett, Fisher, Jones, Nolan, Presidio, Reagan, Schleicher, Shackelford, Sutton, Terrell, Throckmorton, Tom Green, Upton and Wilbarger.</p> <p>32. During calendar years 2007 and 2008, "Rozol," EPA Reg. No. 7173-244, was a "pesticide" as defined at Section 2(u) of FIFRA, 7 U.S.C. § 136(u).</p> <p>135. On or about March 2, 2005, Office of Pesticides Programs, Registration Division accepted a label ("accepted label") regarding "Rozol," EPA Reg. No. 7173-244, that was submitted by Respondent.</p> <p>258. During calendar years 2009 and 2010, Respondent was the registrant of "Rozol," EPA Reg. No. 7173-244.</p> <p>259. On or about May 13, 2009, Respondent registered "Rozol Prairie Dog Bait," EPA Reg. No. 7173-286.</p> <p>260. Prior to the registration of "Rozol Prairie Dog Bait," EPA Reg. No. 7173-286, on May 13, 2009, Respondent had registered "Rozol," EPA Reg. No. 7173-244, 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" supplemental labels.</p>

EXHIBIT A

<u>Complainant's Witness</u>	<u>Summary of Proposed Testimony Set Forth in Complainant's Initial, Rebuttal and/or Supplemental Exchanges</u>	<u>Admitted Facts From Joint Stipulations/Relevant Order(s)</u>
	<p>The witness may discuss changes to the accepted label for EPA Reg. No. 7173-286 updated September 10, 2010.</p> <p>The witness may testify that OPP received an ECR request from Region 5 on August 7, 2008. The witness may testify that OPP reviewed the request and responded to it in October 2008. The witness may testify that Region 5 requested OPP review Ljplatech's</p>	<p>262. During calendar years 2009 and 2010, Respondent was the registrant of "Rozol Prairie Dog Bait," EPA Reg. No. 7173-286.</p> <p>263. During calendar years 2009 and 2010, "Rozol Prairie Dog Bait," EPA Reg. No. 7173-286, was classified as a restricted use product under Section 3(d) of FIFRA, 7 U.S.C. § 136a(d).</p> <p>265. As a result of its classification as a restricted use product, "Rozol Prairie Dog Bait," EPA Reg. No. 7173-286, can only be sold to and be used by Certified Applicators or persons under the direct supervision of Certified Applicators and only for users covered by the Certified Applicator's certification.</p> <p>266. During calendar years 2009 and 2010, "Rozol," EPA Reg. No. 7173-244, was a "pesticide" as defined at Section 2(u) of FIFRA, 7 U.S.C. § 136(u).</p> <p>267. During calendar years 2009 and 2010, "Rozol Prairie Dog Bait," EPA Reg. No. 7173-286, was a "pesticide" as defined at Section 2(u) of FIFRA, 7 U.S.C. § 136(u).</p> <p>268. On or about May 13, 2009, the Office of Pesticides Program, Registration Division accepted a label regarding "Rozol Prairie Dog Bait," EPA Reg. No. 7173-286, that was submitted by Respondent.</p> <p>269. The "accepted label" and any subsequent amendments are a part of the claim required by Respondent in connection with its registration "Rozol Prairie Dog Bait," EPA Reg. No. 7173-286.</p> <p>These label revisions occurred subsequent to the violations alleged in the First Amended Complaint.</p> <p>The Enforcement Case Review examines the material under the false and misleading standard for purposes of FIFRA § 12(a)(1)(E). All such alleged violations have been removed from the First Amended Complaint.</p>

EXHIBIT A

<u>Complainant's Witness</u>	<u>Summary of Proposed Testimony Set Forth in Complainant's Initial, Rebuttal and/or Supplemental Exchanges</u>	<u>Admitted Facts From Joint Stipulations/Relevant Order(s)</u>
	<p>"Research Bulletin," which advertised its Rozol Product EPA Reg. No. 7173-244 for the control of black-tailed prairie dogs. The witness may testify that Region 5 was seeking OPP's expert opinion as to whether the advertisement made claims that were false and misleading. The witness may testify that OPP reviewed the information that was sent to it by Region 5. The witness may explain how the review was conducted.</p> <p>The witness may testify that the process for determining whether claims made in advertising are substantially different from claims allowed as part of the statement required by Section 3 of FIFRA is to compare the claims that are the subject of the inquiry with the accepted label and any subsequent amendments to the label.</p> <p>The witness may also testify that Liphatech did not submit any optional marketing claims, either at the time of the registration of its Rozol products or at any subsequent time.</p> <p>The OPP witness may also testify that in his or her expert opinion not only where these and many other statements in the advertisement were false and misleading.</p> <p>The witness may testify that after reviewing the print and radio advertisements found at CX 14 and 14a, it is his or her expert opinion that Liphatech failed to include restricted use language, as required by FIFRA, in its print and radio advertisements.</p>	
<p>Dr. Thomas Steeger (replaces Bailey) Dr. William Allen Erickson Mr. J. Andrew Shelby Office of Pesticide Programs EFED U.S. EPA</p>		<p>Pursuant to the Order on Motions for Accelerated Decision Regarding Alleged Violations of FIFRA § 12(a)(1)(B) dated June 24, 2011, the Presiding Officer determined: "Complainant's Reliance on a legal theory that bases allegations of liability on the "accepted label" is too narrow a formulation to justify a ruling in its favor." <i>Id.</i> at 24.</p> <p>Pursuant to the Order on Motions for Accelerated Decision Regarding Alleged Violations of FIFRA § 12(a)(1)(B) dated June 24, 2011, the Presiding Officer determined: "Nothing in 7 U.S.C. § 136a(c) requires claims about a registered pesticide to be affirmatively approved by EPA" <i>Id.</i> at 24.</p> <p>The false and misleading standard is used to determine a violation for purposes of FIFRA § 12(a)(1)(E). All such alleged violations have been removed from the First Amended Complaint.</p> <p>Pursuant to the Order on Motions for Accelerated Decision Regarding Alleged Violations of FIFRA § 12(a)(2)(E) dated May 6, 2011, the Presiding Officer found Liphatech liable for the allegations of violation set forth in Counts 1-2140, but reserved decision on the appropriate "unit of violation" and the appropriate penalty, if any, to be imposed.</p> <p>Each of the pesticides at issue in the case is a registered pesticide. The risk management decisions that occurred prior to the registration of the pesticide are not at issue in the case.</p> <p>25. During calendar years 2007 and 2008, Respondent was the registrant of "Rozol Pocket Gopher Bait II" (alternate name: "Rozol Pocket Gopher Bait Burrow Builder Formula") (hereinafter, "Rozol"), EPA Registration Number (EPA Reg.</p>

EXHIBIT A

<u>Complainant's Witness</u>	<u>Summary of Proposed Testimony Set Forth in Complainant's Initial, Rebuttal and/or Supplemental Exchanges</u>	<u>Admitted Facts From Joint Stipulations/Relevant Order(s)</u>
	<p>uses of the pesticide in question. These assessments are sent to the Registration Division which is then responsible for making the final risk management decisions on pesticides through the registration process. The witness may explain that the Registration Division consults with EFED on questions relating to environmental assessments and potential mitigation options once the risk assessments have been submitted to the Registration Division. The EFED witness may testify about the characteristics of Chlorophacinone and explain that it is an anticoagulant. The EFED witness may also explain the behavior patterns of the black-tailed prairie dog as they relate to Chlorophacinone exposure to non-target animals. The EFED witness may discuss certain risks associated with the use of Chlorophacinone.</p>	<p>No.) 7173-244.</p> <p>29. During calendar years 2007 and 2008, "Rozol," EPA Reg. No. 7173-244, was also registered 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" supplemental labels for the States of Kansas, Nebraska, Wyoming, Colorado, Texas and Oklahoma.</p> <p>258. During calendar years 2009 and 2010, Respondent was the registrant of "Rozol," EPA Reg. No. 7173-244.</p> <p>262. During calendar years 2009 and 2010, Respondent was the registrant of "Rozol Prairie Dog Bait," EPA Reg. No. 7173-286.</p> <p>"The undersigned counsel of record for Liphatech stipulates that it has already 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' set forth in Section 14(a)(4) of the Federal Insecticide Fungicide and Rodenticide Act, as amended." Joint Stipulations at 16.</p>
<p>Ms. Gail B. Coad Industrial Economics, Inc. 2067 Massachusetts Avenue Cambridge, MA 02140</p>	<p>Ms. Coad may also provide her expert opinions and conclusions as to Respondent's financial status, Respondent's ability to pay the penalty proposed in the Complaint and Respondent's size of business for the purpose of the FIFRA ERP.</p>	
<p>Mr. Bryan Dyer Environmental Protection Specialist Pesticides and Tanks Enforcement Branch Waste and Chemical Enforcement Division Office of Compliance and Assurance US EPA</p>	<p>Mr. Dyer may testify as to his role in the drafting and approval of the 2009 FIFRA ERP. Mr. Dyer may testify as to his opinion, as one of the authors of the 2009 FIFRA ERP, of Complainant's penalty calculation in this matter.</p>	
<p>Dr. Nimish B. Vyas Research Biologist United States Geological Survey Patuxent Wildlife Research Center</p>	<p>Dr. Vyas may testify as to his educational background and his work experience including but not limited to his work experience relating to pesticide exposure and in particular characterization of avian hazards relating to the use of Chlorophacinone, Rozol, for the purpose of prairie dog control. He may testify as to his current duties at the United States Geological Survey. Among other things, he may testify that he has conducted field work to determine hazards relating</p>	<p>Dr. Vyas' report was published in 2010 following the occurrence of the alleged violations of FIFRA § 12(a)(1)(B) set forth in the First Amended Complaint and is therefore not relevant to the determination of whether a violation of FIFRA § 12(a)(1)(B) occurred.</p>

EXHIBIT A

<u>Complainant's Witness</u>	<u>Summary of Proposed Testimony Set Forth in Complainant's Initial, Rebuttal and/or Supplemental Exchanges</u>	<u>Admitted Facts From Joint Stipulations/Relevant Order(s)</u>
	to the use of Rozol to control prairie dogs. He may testify in depth as to his observations and findings as a result of this field work relating the use of Rozol.	
Dr. Mark A. Kirms Senior Forensic Specialist (Chemistry) National Fish and Wildlife Forensics Laboratory United States Fish and Wildlife Service	Mr. Kirms may testify regarding how he analyzed the liver tissue of an adult bald eagle for the presence of anticoagulants.	The violations alleged in the First Amended Complaint are not violations regarding the use of the pesticide Rozol which caused the death of the eagle, therefore the analysis of the bald eagle carcass is not relevant to this proceeding.
Ms. Bonnie C. Yates Supervisory Senior Forensic Scientist/Mammal Unit Coordinator National Fish and Wildlife Forensics Laboratory United States Fish and Wildlife Service	Ms. Yates may testify regarding how she analyzed the stomach contents of an owl and a hawk.	The violations alleged in the First Amended Complaint are not violations regarding the use of the pesticide Rozol which caused the death of the hawk or owl, therefore the analysis of the two specimens is not relevant to this proceeding.

RECEIVED

JAN 17 2012

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

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

CERTIFICATE OF SERVICE

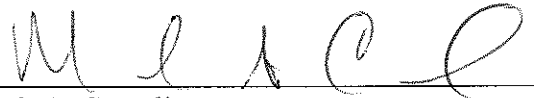
I, Mark A. Cameli, one of the attorneys for the Respondent, Liphatech, Inc., hereby certify that I delivered one copy of the foregoing by depositing it with a commercial delivery service, postage prepaid, at Milwaukee, Wisconsin, in envelopes addressed to:

Honorable Susan L. Biro
Office of the Administrative Law Judges
Franklin Court Building
1099 14th Street, NW, Suite 350
Washington, D.C. 20005; and

Ms. Nidhi K. O'Meara (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, IL 60604

I further certify that I filed the original and one copy of the Respondent's Motion To Limit Testimony At Trial Based Upon Joint Stipulations and the original of this Certificate of Service in the Office of the Regional Hearing Clerk, U.S. EPA, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, by depositing them with a commercial delivery service, postage prepaid, at Milwaukee, Wisconsin, on the date below.

Dated this 12th day of January, 2012.



Mark A. Cameli
One of the Attorneys for Respondent
Liphatech, Inc.