



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY BEFORE THE ADMINISTRATOR

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IN THE MATTER OF LIPHATECH, INC., RESPONDENT.

DOCKET NO. FIFRA-05-2010-0016

ORDER ON PREHEARING MOTIONS AND ORDER POSTPONING HEARING

On October 6, 2011, the parties in this matter filed Joint Stipulations and Joint Motion to Admit Certain Exhibits Into Evidence ("Joint Motion" or "Jt. Mot.") in which the parties agree that certain enumerated proposed exhibits are admissible and should be moved into the record prior to hearing. Jt. Mot. at 17. The parties jointly agree that the enumerated exhibits are true and accurate copies of the original documents, that they are authentic, and that all objections to the their admissibility are waived. The enumerated exhibits are found in the Joint Motion at pages 18 - 23. While the parties also submitted stipulations regarding the authenticity of the remaining proposed exhibits, those exhibits are not the subject of this Order.

Section 22.22(a)(1) of the Rules of Practice states that, with the exception of evidence related to settlement negotiations, the "Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . ." 40 C.F.R. § 22.22(a). The parties have stipulated in good faith to these proposed exhibits and there is nothing in the record to suggest that they suffer from any of the infirmities contemplated in Section 22.22(a)(1). Accordingly, the Joint Motion is GRANTED and the exhibits identified in the Joint Motion as admissible are hereby admitted into the record. The offering party should mark these documents as admitted when using or referring to them at hearing.

On October 7, 2011,<sup>1</sup> the undersigned received Respondent's Motion for Telephonic Prehearing Conference ("Respondent's Motion" or "R's Mot.") in which Respondent, inter alia, requests that the Presiding Officer require the parties to exchange written notices of the order in which each party intends to present its witnesses at the hearing within three (3) days of such witness's testimony. R's Mot. at 1-2. During a conference call held on October 17, 2011, Respondent reiterated its request that the undersigned consider Respondent's Motion. The parties were asked to confer separately and determine whether a voluntary agreement could be reached on this issue. By email notification to the undersigned's staff attorney, the parties indicated that no agreement could be reached and that Respondent renews its Motion. Respondent stated in that communication that although Complainant indicated its amenability to a simultaneous exchange, Respondent asserts that it cannot fairly be required to notify Complainant of Respondent's order of witness presentation until after Respondent knows which

<sup>1</sup> Respondent's Motion comes five weeks after the August 31, 2011, deadline established in the Order Scheduling Hearing, issued June 20, 2011. While it would be sufficient to deny the motion as untimely, there are other reasons to deny Respondent's request.


of Complainant's witnesses have testified at hearing and the substance of their testimony.

On October 19, 2011, Complainant filed a Response in Opposition to Respondent's Motion for Telephonic Prehearing Conference ("Response") in which Complainant notes that no provision is made in the Rules of Practice for such contingency and Respondent has cited no authority to support its proposition. Response at 2. Additionally, Complainant argues that the arrangement suggested by Respondent would benefit only Respondent. *Id.* In its Initial Prehearing Exchange, Complainant indicated that it required four days to present its case-in-chief. If Respondent's renewed Motion were granted, Complainant would be forced to present significant testimony and exhibits without the benefit of Respondent's litigation plan in hand, a benefit that Respondent would enjoy exclusively. Because Respondent's Motion was untimely filed and because the Motion seeks relief that would unfairly benefit one party to the detriment of another, Respondent's Motion is **DENIED**. The parties will litigate their respective cases-in-chief with the same amount of advanced notice as any other party would have when appearing before this Tribunal pursuant to the Rules of Practice.

The hearing in this matter was scheduled to commence on October 31, 2011, in Milwaukee, Wisconsin. On October 17, 2011, the parties participated in a prehearing conference call conducted by the undersigned's staff attorney. The parties were directed to inform this Tribunal of any emergencies that would prevent counsel, parties, or witnesses from attending the hearing as scheduled. On October 19, 2011, co-counsel for Respondent, Mr. Mark Cameli, informed the undersigned's staff attorney that lead counsel for Respondent, Mr. Jeffrey Clark, had suddenly developed health related issues that precluded him from continuing as lead counsel. Mr. Cameli stated his intent to assume the role of lead counsel, but requested postponement of the hearing in order to permit him sufficient time to prepare. Mr. Cameli stated that an additional three weeks would suffice for preparation. However, as discussed during the October 17th conference call, counsel for Complainant and several of Complainant's witnesses were unavailable after November 10, 2011. In one case, the witness would be unavailable again until February 2012. Complainant stated a strong preference for continuing the hearing as scheduled.

The Complaint in this matter was filed on May 14, 2010, and assigned to a litigation judge on June 29, 2010. The allegations in the Complaint concern actions alleged to have occurred as early as 2007. It is imperative that this proceeding reach a resolution as soon as possible. Nevertheless, the sudden health complications experienced by Respondent's former lead counsel are a serious consideration and are certainly outside the parties' own control. In the interests of justice, the hearing in this matter is therefore **POSTPONED** and all arrangements are **SUSPENDED**.

The parties are directed to notify the undersigned's staff attorney of possible new dates for hearing between January 3, 2012, and April 13, 2012. The parties are directed to confer as necessary with all proposed witnesses and submit these proposed dates no later than **November 4, 2011**. An order rescheduling the hearing will be issued shortly thereafter.

  
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Susan L. Biro  
Chief Administrative Law Judge

Dated: October 20, 2011  
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 Prehearing Motions And Order Postponing Hearing**, dated October 20, 2011, was sent this day in the following manner to the addressees listed below.

*Maria Whiting-Beale*

Maria Whiting-Beale  
Staff Assistant

Dated: October 20, 2011

Original And One Copy By Pouch Mail To:

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

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Copy By Regular Mail To:

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