UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	DOCKET NO: FIFRA-03-2015-0248
	)	
FMC Corporation,	)	
	)	
Respondent	)	

COMPLAINANT'S MOTION *IN LIMINAE*

Pursuant to 40 C.F.R. §§ 22.19 and 22.22(a)(1) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders ("Consolidated Rules of Practice"), and to Administrative Law Judge Christine Coughlin's May 6, 2016 Prehearing Order ("Prehearing Order"), Complainant, the Director of the Land and Chemicals Division of U.S. EPA, Region III, submits this motion *in liminae* requesting the issuance of an Order excluding FMC Corporation's ("Respondent") exhibit Rx068 as well as any related testimony that attempts to draw in the penalty calculations, legal arguments, or holdings from previous cases. Respondent's exhibit Rx068 and related testimony about previous cases are irrelevant, immaterial, unreliable and of little or no probative value to the Presiding Judge for any purpose, and therefore inadmissible.

Pursuant to the Prehearing Order, counsel for Complainant has conferred with Respondent's counsel and represents that Respondent objects to relief sought in this motion.

I. Relevant Procedural Background

On September 24, 2015, Complainant filed an Administrative Complainant and Notice of Opportunity for Hearing commencing this matter. On November 20, 2015, Respondent filed an Answer and Request for Hearing. On May 6, 2016, following the termination of Alternative Dispute Resolution, Administrative Law Judge Coughlin issued a Prehearing Order setting forth prehearing procedures. On June 15, 2016, Complainant filed an Initial Prehearing Exchange. On July 8, 2016, Respondent filed a Prehearing Exchange, which included a seven-page exhibit entitled "Largest Civil and Criminal FIFRA Enforcement Cases and Settlements," identified as Rx068, FMC 002780-FMC 002786 ("Rx068"). On July 22, 2016, Complainant filed a Rebuttal Prehearing Exchange, in which it identified concerns about the appropriateness and relevance of Rx068. EPA Rebuttal PHE at 2-3. Though not required to do so, Respondent has not responded to these concerns in any of its subsequent filings in this matter.

II. Evidentiary Standard and Standard of Review

Pursuant to 40 C.F.R. § 22.22(a)(1) of the Consolidated Rules of Practice,

> [t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence (28 U.S.C.) is not admissible. 40 C.F.R. § 22.22(a)(1).

As the Consolidated Rules of Practice do not specifically address motions *in liminae*, federal court practice can be looked to for guidance as to the standard of review. In this regard, courts have found that though disfavored, motions *in liminae* can be granted if the evidence is clearly inadmissible for any purpose. *Royal Marco Point 1 Condo. Ass'n v. QBE Ins. Corp*., 2011 U.S. Dist. LEXIS 14521 (M.D. Fla. Feb. 2, 2011); *Stewart v. Hooters of America, Inc*., 2007 U.S. Dist. LEXIS 44056 (M.D. Fla. June 18, 2007); *Hawthorne Partners v. AT & T Technologies*, 831 F.Supp. 1398, 1400 (N.D. Ill.1993).

III. Rx068 and Related Testimony are Clearly Inadmissible for any Purpose

Rx068 is a seven-page exhibit entitled "Largest Civil and Criminal FIFRA Enforcement Cases and Settlements." Rx068 is in the form of a table and includes information under column headings "Date", "Company or Companies", "Settlement (Y/N, before/after complaint filed)", "ALJ Order (Y/N)", "Penalty Sought", "Type of Allegations", and "Outcome" for twelve FIFRA cases. A copy of Rx068 is attached to this Motion.

As an initial matter, Complainant notes that Rx068 is neither signed nor dated, and that it is not clear based on the descriptions in Respondent's Prehearing Exchange which of its seven identified witnesses Respondent intends to call to admit and/or testify about Rx068. Even if proper foundation is laid at the hearing to admit Rx068, none of Respondent's identified witnesses appear to have the requisite personal knowledge, legal expertise or FIFRA enforcement background to *reliably* testify as to the penalty calculations, legal arguments, or holdings in the cases in the table, let alone the characterization that they represent the "[l]argest" FIFRA cases and settlements.

Moreover, the Environmental Appeals Board ("EAB") has consistently held, on the basis of three foundational principles, that "penalty assessments are sufficiently fact and circumstance dependent that the resolution of one case cannot determine the fate of another." *In re Chem Lab Products*, 10 E.A.D. 711, 728 (EAB 2002)(vacating ALJs penalty assessment that was based on a comparison with a settled case); *quoting In re Newell Recycling Co.*, 8 E.A.D. 598, 642 (EAB 1999). As the first principle in support of its rejection of case comparisons, the EAB states that the uniqueness of the penalty inquiry is such that if the penalties assessed against two violators of the same statutory or regulatory provision are compared in the abstract simply as dollar figures, without any (or even with bits and pieces) of the unique record information that is so central to the penalty determination themselves, then meaningful conclusions regarding the comparative proportionality or uniformity or 'fairness" of the penalties cannot not be reasonably drawn. *Id.*

Consistent with authorities set forth at 40 C.F.R. §§ 22.4(a)(2) and (c)(10) in the Consolidated Rules of Practice for "*efficient,* fair and impartial adjudication of issues (emphasis added)," judicial economy is noted as a second rationale for the EAB's rejection of case comparisons in fear that adjudicators "would soon be awash in a sea of minutiae pertaining to other cases other than the ones immediately before them." *Chem Lab Products* at 729. Even assuming *arguendo* that Complainant's proposed penalty in this matter is disproportionately larger than penalties proposed, decided or settled in previous FIFRA cases, it cannot be rejected on this basis as the EAB has specified as its third foundational principle that "unequal treatment is not available as a basis for challenging agency law enforcement proceedings." *Id., quoting In*

re Spang & Co., 6 E.A.D. 226, 242 (EAB 1995) (citation omitted). With respect to administrative penalties, the U.S. Supreme Court has held that "[t]he employment of a sanction within the authority of an administrative agency is * * * not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases" and that "[o]nly if the remedy chosen is unwarranted in law or is without justification in fact should a court attempt to intervene in the matter." *Chem Lab Products* at 730, *quoting Butz v. Glover Livestock Comm'n Co*., 411 U.S. 182, 187 (1973) and *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 112 (1946)(citation omitted), respectively. Accordingly, the penalty in this matter should be determined based on the facts in the record and the applicable law irrespective of previous litigated or settled FIFRA cases.

Complainant further notes that ten of the twelve cases included in Rx068 are designated as settled cases. *See* Rx068, rows 1, 2, 3, 4, 6, 7, 8, 9, 10, and 11, FMC 002780-FMC 002786. Recognizing that settlements "necessarily involve some element of compromise" and that settling parties "give up something they might have won had the case been fully," the EAB has long held that comparing litigated cases with settled cases is particularly inappropriate and not just for the penalty amount but for all terms of the settlement. *In re Chem Lab Products,* 10 E.A.D. 711, 730-731 (EAB 2002) *quoting In re Briggs & Stratton Corp.* and *citing In re Chautauqua Hardware Corp.*, 3 E.A.D. 616, 626-27 (CJO 1991) (holding information about previous EPCRA cases does not have "significant probative value").

In a recent matter where a motion *in liminae* was filed to exclude a similar case compilation identified as an exhibit in a prehearing exchange, the presiding officer granted the motion to exclude the exhibit "as well as any testimony that attempts to draw in the penalty calculations, legal arguments, or holdings from past cases" finding them clearly inadmissible for any purpose. *In re Liphatech, Inc.*, Order on Complainant's Motion in Liminae to Exclude Testimony and Evidence, 2011 EPA ALJ LEXIS 7, at *38-40 (ALJ, June 2, 2011) (clarifying that "[t]he Presiding Judge will not consider penalties and sanction imposed in similar cases because penalty policies function to ensure that penalties are assessed uniformly for cases with similar basic facts, because the complexity of the additional fact considered and weighed in each penalty assessment is unique to each case, and because consideration of such additional facts in other cases would require additional time and effort on the part of the parties and the tribunal, which is inconsistent with the purpose of efficiency in administrative proceedings." *citing Valimet, Inc.*, Docket No. EPCRA-09-2007-0021, 2008 EPA ALJ LEXIS 38, at *32-33 (EPA ALJ Nov. 6, 2008)).

WHEREFORE, for the foregoing reasons, Complainant submits that Rx068 as well as any related testimony that attempts to draw in the penalty calculations, legal arguments, or holdings from previous cases would be irrelevant, immaterial, unreliable and of little or no probative value to the Presiding Judge for any purpose related to her adjudication of this matter, and respectfully requests that this Court issue an Order granting Complainant's motion *in liminae*.

Respectfully submitted,

MAR 3 1 2017

Date

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ATTACHMENT

Largest Civil And Criminal FIFRA Enforcement Cases and Settlements

	Date	Company or Companies	Settlement (Y/N; before/after complaint filed)	ALJ Order (Y/N)	Penalty Sought	Type of Allegations	Outcome
1.	09/07/12	Scotts Miracle-Gro Company	Y; before	N	Not available	EPA alleged Scotts submitted false registration documents to EPA, and distributed or sold canceled pesticides, pesticides for which compositions differed from those EPA approved, pesticides with claims that differed from those EPA approved, and misbranded pesticides with false or misleading statements, inadequate warnings or cautions, or inadequate placement of required information on its labeling. In addition, EPA alleged Scotts imported pesticides to the US without required documentation and that more than 100 Scotts' products were in violation of FIFRA.	$12.05 million ($6.05 million civil penalty; $2 million SEP; $4 million criminal fine)

	Date	Company or Companies	Settlement (Y/N; before/after complaint filed)	ALJ Order (Y/N)	Penalty Sought	Type of Allegations	Outcome
2.	03/29/16	Terminix, USVI Terminix LP	Y; plea agreement	N	Unknown	According to the plea agreement, Terminix, USVI and Terminix LP ("Defendants") violated FIFRA by using a registered pesticide in a manner inconsistent with its labeling. Specifically, Defendants knowingly improperly applied fumigants at a resort in the U.S. Virgin Islands ("USVI") to exterminate household pests on 2 occasions, the second of which resulted in a methyl-bromide based fumigant migrating from the application site in a building's lower unit to the upper unit, where a family of 4 was vacationing. The family suffered serious adverse health effects. The companies were also charged with improperly applying the pesticide in 12 residential units in the USVI between September 2012 and February 2015.	$10 million in criminal fines, restitution payments and community service payments. (Terminix USVI: $5 million in fines, 3-year probation term, and $1 million in restitution to EPA for response and clean-up costs incurred at the resort; Terminix LP: $3 million fine, 3-year probation term, and $1 million "community service payment" to National Fish and Wildlife Foundation to engage third party to provide training to pesticide applicators in the USVI)

	Date	Company or Companies	Settlement (Y/N; before/after complaint filed)	ALJ Order (Y/N)	Penalty Sought	Type of Allegations	Outcome
3.	07/30/13	EMD Millipore Corporation	Y; unclear	N	Not available	EPA alleged that EMD Millipore violated FIFRA on numerous occasions by producing, importing, distributing and selling pesticidal devices, which were used in laboratories for research, development and manufacturing purposes. The alleged violations included: importing regulated pesticide devices into the US for distribution or sale without submitting "Notices of Arrival" to EPA; selling misbranded pesticide devices that lacked label information about where they were made; producing pesticide devices in a then-unregistered establishment; and filing incomplete annual production reports with EPA by failing to list pesticide devices that were produced at a facility overseas and then imported into the US.	$2,681,500
4.	07/01/10	Monsanto Company	Y; before	N	Not available	EPA alleged Monsanto sold and distributed misbranded pesticidal cotton seed. EPA alleged 1,782 violations and required Monsanto to restrict the sale of the seed and to include planting restrictions in grower guides. EPA alleged grower guides accompanying the seeds at the time of sale and distribution did not contain required planting restrictions for 10 Texas counties.	$2.5 million

	Date	Company or Companies	Settlement (Y/N; before/after complaint filed)	ALJ Order (Y/N)	Penalty Sought	Type of Allegations	Outcome
5.	04/30/98	DuPont	N; N/A	Y	Not available	EPA alleged that DuPont sold and distributed 2 herbicides without the protective eyewear label warnings required by the Worker Protection Standard rule. DuPont sold these misbranded herbicides on 379 occasions after receiving a written Notice of Serious Error, which stated in bold upper case letters that DuPont "MUST NOT SELL OR DISTRIBUTE" the products.	$1.89 million
6.	09/15/14	DuPont	Y; before	N	Not available	EPA alleged that DuPont violated FIFRA by: (1) selling or distributing a misbranded pesticide product -- DuPont Imprelis TM Herbicide -- on 320 occasions in 2010 and 2011, resulting in death of many large old-growth trees; and (2) failing to timely submit 18 field study reports to EPA indicating potential adverse effects from the use of Imprelis.	$1,853,000
7.	12/19/13	Harrell's, LLC	Y; before	N	$2,491,800	EPA alleged Harrell's violated FIFRA by making over 350 illegal sales and distributions of misbranded pesticides (without labels or with illegible or inaccurate labels); producing pesticides in an unregistered establishment; and distributing or selling pesticides in violation of an EPA-issued Stop Sale, Use or Removal Order ("SSURO").	$1,736,560

	Date	Company or Companies	Settlement (Y/N; before/after complaint filed)	ALJ Order (Y/N)	Penalty Sought	Type of Allegations	Outcome
8.	12/21/06	Syngenta Seeds, Inc.	Y; unclear	N	EPA proposed a $6,071,500 unadjusted gravity-based penalty, the statutory maximum for 1,053 violations, but reduced it by 75% due to self-reporting under EPA's Audit Policy	EPA alleged Syngenta Seeds, Inc.: (1) sold or distributed on 1,037 separate occasions between February 2002 and June 2004 corn seed that contained an unregistered genetically engineered pesticide called Bt10; (2) on 7 occasions between March 2002 and March 2005 imported Bt10 to the US; (3) on 7 occasions failed to file reports under FIFRA Section 12(a)(1)(N); and (4) improperly exported Bt10 on 2 occasions between March 2002 and March 2005.	$1,517,875

	Date	Company or Companies	Settlement (Y/N; before/after complaint filed)	ALJ Order (Y/N)	Penalty Sought	Type of Allegations	Outcome
9.	05/28/13	Walmart	Y; before	N	Not available	EPA alleged Walmart violated FIFRA and RCRA. Alleged FIFRA violations included: (1) on at least 70 days from July 2006 to February 2008, Walmart sent about 2 million pounds of solid and liquid pesticides from Walmart Return Centers to a 3rd-party management company, Greenleaf -- Greenleaf was under contract with Walmart to receive, re-package and otherwise prepare certain household products, including registered pesticides for reuse and re-sale, but lacked necessary FIFRA registrations to mix, repackage, and relabel some of the pesticides; (2) Walmart repackaged or changed FIFRA-required labeling of at least 2 pesticide products handled at its Return Centers and shipped to Greenleaf on at least 70 occasions; and (3) this resulted in detachment and/or alteration of pesticide labels and, because of damage to the containers/labels, Walmart distributed misbranded pesticidal products.	$1,512,000 to resolve FIFRA violations; Injunctive relief; ($6,116,000 to resolve RCRA violations)
10.	04/03/91	DuPont	Y; after	N	$1.3 million	DuPont was made aware by grower complaints that a herbicide may have been inadvertently introduced into some batches of a DuPont fungicide during formulation at contractor sites. DuPont notified EPA that it was undertaking a voluntary recall of the suspect batches. EPA issued a stop sale order and a formal request for product recall.	$1 million

	Date	Company or Companies	Settlement (Y/N; before/after complaint filed)	ALJ Order (Y/N)	Penalty Sought	Type of Allegations	Outcome
11.	07/08/14	Zep Inc.	Y; after	N	Amount not specified	EPA alleged: (1) Zep Inc. sold and distributed an unregistered and misbranded pesticide ("Formula 165") as a supplemental distributor without first obtaining a supplemental distribution agreement with the registrant; (2) "Formula 165" was evaluated pursuant to EPA's antimicrobial testing program, which showed that, contrary to labeling claims, the product was ineffective against Mycobacterium tuberculosis and was therefore misbranded; and (3) Zep Inc. provided false certifications of compliance with FIFRA Good Laboratory Practices on documents associated with the registration of 3 pesticides in its line of Enforcer brand insecticides.	$905,000
12.	03/12/14	Liphatec, Inc.	N; N/A	Y	$2,891,200	EPA's original complaint alleged 2,231 violations: (1) 43 distributions or sales with claims that substantially differed from the claims provided as part of the registration process; (2) 48 offers for sale to distributor partners with claims that substantially differed from the claims on the approved labels; (3) 23 print publications without an RUP statement; and (4) 2,117 radio broadcasts without an RUP statement.	$738,000

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CERTIFICATE OF SERVICE

I hereby certify that, on the date below, copies of COMPLAINANT'S MOTION IN LIMINAE were served upon the persons listed in the manner indicated.

Original and one copy of Complainant's Motion in Liminae via the OALJ E-filing System

Sybil Anderson, Headquarters Hearing Clerk

One copy of Complainant's Motion in Liminae via the OALJ E-filing System

Christine Coughlin, Administrative Law Judge

One copy of Complainant's Motion in Liminae via UPS Next Day Air

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MAR 31 2017

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