UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

ORDER ON MOTIONS FOR ACCELERATED DECISION REGARDING ALLEGED VIOLATIONS OF FIFRA § 12(a)(2)(E)

I. PROCEDURAL HISTORY

The United States Environmental Protection Agency, Region 5 ("Complainant" or "EPA") initiated this action on May 14, 2010, by filing a Proceeding to Assess a Civil Penalty Under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136*l*(a), charging Respondent, Liphatech, Inc. ("Respondent" or "Liphatech"), with a total of 2,231 violations of FIFRA, arising from its allegedly improper distribution, sale, and advertisement of pesticides. The parties in this matter have filed multiple, competing, and overlapping motions for Partial Accelerated Decision on Liability covering virtually all of the alleged violations.[1] This Order addresses the following Motions, Responses, and Replies:

A. Motion of Respondent for Partial Accelerated Decision on an Issue of Liability in Favor of Respondent with Respect to the Alleged Violations of § 12(a)(2)(E) of FIFRA Set Forth in Counts 1 - 2,117 of the [Amended] Complaint (received

[1] A First Amended Complaint ("Compl." or "Complaint") in this matter was filed on January 7, 2011, and replaced the original Complaint filed on May 14, 2010. The Amended Complaint eliminated the content of certain paragraphs, but retained the original numbering sequence such that paragraphs 1-649 of the original Complaint correspond to paragraphs 1-649 of the Amended Complaint. On February 1, 2011, Respondent submitted an Answer to the First Amended Complaint ("Answer"), which replaced its Answer to the original Complaint filed on June 14, 2010. As with the Amended Complaint, Respondent retained the original numbering of the paragraphs. The amendment of the pleadings does not disturb the purpose, accuracy or content of the present Motions. Therefore, the Motions will be read as if they were filed under the amended pleadings. Any reference in this Order to the paragraphs in the pleadings will refer to the amended pleadings, but will also accurately reflect the location of the same paragraphs in the original pleadings to which the Motions might refer.

September 23, 2010) ("Respondent's Motion" or "R's Motion");

B. Complainant's Combined Motion for Accelerated Decision as to Counts 1 Through 2,140 of the [Amended] Complaint and Response in Opposition to Motion of Respondent for Partial Accelerated Decision on an Issue of Liability in Favor of Respondent with Respect to the Alleged Violations of § 12(a)(2)(E) of FIFRA Set Forth in Counts 1 - 2,117 of the [Amended] Complaint (both received October 4, 2010) ("Complainant's Motion" or "C's Motion");

C. Reply of Respondent to Response of Complainant in Opposition to Motion of Respondent for Partial Accelerated Decision on an Issue of Liability in Favor of Respondent with Respect to the Alleged Violations of § 12(a)(2)(E) of FIFRA Set Forth in Count 1 - 2,117 of the [Amended] Complaint and Memorandum of Law in Support And Response of Respondent to Combined Motion of Complainant for Accelerated Decision as to Counts 1 Through 2,140 of the [Amended] Complaint (both received October 18, 2010) ("Respondent's Response" or "R's Response"); and

D. Complainant's Reply to Respondent's Response to Complainant's Motion for Partial Accelerated Decision on Liability for Counts 1 Through 2,140 of the [Amended] Complaint (filed October 21, 2010) ("Complainant's Reply" or "C's Reply").

Counts 1 through 2,117 of the Complaint allege that Respondent violated Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), by advertising via 2,117 radio broadcasts a pesticide product without including its restricted use classification. Counts 2,118 through 2,140 of the Complaint allege that Respondent violated the same provision of FIFRA by advertising 23 times in print publications a pesticide product without including its restricted use classification. The remaining counts in the Complaint are not addressed in this Order.

II. STANDARDS FOR ACCELERATED DECISION

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination and Suspension of Permits, 40 C.F.R. Part 22 ("Rules"). Section 22.20(a) of the Rules authorizes the Administrative Law Judge to:

> render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a).

Motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). *See, e.g., In re BWX Technologies, Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Belmont Plating Works*, Docket No. RCRA-5-2001-0013, 2002 EPA ALJ LEXIS 65, at *8 (EPA ALJ Sept. 11, 2002); FRCP 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").[2] Therefore, federal court decisions interpreting Rule 56 provide guidance for adjudicating motions for accelerated decision. *See CWM Chem. Serv.*, 6 E.A.D. 1 (EAB 1995).

The burden of showing that no genuine issue of material fact exists is on the party moving for summary judgment. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). In considering such a motion, the court must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1985); *Adickes*, 398 U.S. at 158-59. Summary judgment is inappropriate when contradictory inferences may be drawn from the evidence. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002).

In support of or in opposition to a motion for summary judgment, a party must support its assertion "that a fact cannot be or is genuinely disputed by: (A) citing particular parts of materials in the record . . . or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." FRCP 56(c)(1)(A) and (B).

The fact that there are cross motions for summary judgment, or accelerated decision, "does not mean that the court must grant judgment as a matter of law for one side or the other . . . [r]ather, the court must evaluate each party's motions on its own merits, taking care to draw all reasonable inferences against the party whose motion is under consideration." *N. Kramer & Co.*, Docket No. RCRA-5-2000-014, 2001 EPA ALJ LEXIS 42, at *20 (EPA ALJ July 31, 2001) (citing *Taft Brad. Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991). Nevertheless, the court is "free to rely on the parties' representations that no genuine issues of material fact exist where the parties have stated agreement as to certain facts." *In re Rogers Corp.*, 9 E.A.D. 534, 558-59 (EAB 2000) (citing *Greer v. United States*, 207 F.3d 322, 326 (6th Cir. 2000) ("cross motions for summary judgment authorize the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties") (internal quotations omitted)).

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[2] FRCP 56 was amended effective December 1, 2010 (after the instant motions were filed). However, the substantive standard for summary judgment in federal court remains unchanged. *See Tropigas de Puerto Rico, Inc. v. Certain Underwriters at Lloyd's of London*, No. 10-1122, 2011 U.S. App. LEXIS 4964, *7 n.5 (1st Cir. Mar. 11, 2011) (citing FRCP 56 advisory committee's note).

III. RELEVANT STATUTORY AND REGULATORY PROVISIONS

Each party seeks accelerated decision in its favor on the issue of liability under FIFRA § 12(a)(2)(E), 7 U.S.C. § 136j(a)(2)(E), which makes it unlawful for any person:

> who is a registrant . . . to advertise a product registered under this subchapter for restricted use without giving the classification of the product assigned to it under section 136a of this title.

FIFRA § 12(a)(2)(E), 7 U.S.C. § 136j(a)(2)(E). The implementing regulations, found at 40 C.F.R. § 152.168, state in relevant part as follows:

> Advertising of Restricted Use Products.
> (a) Any product classified for restricted use shall not be advertised unless the advertisement contains *a statement of its restricted use classification.*
> * * * *
> (c) The requirement may be satisfied for printed material by inclusion of the statement "Restricted Use Pesticide," or the terms of restriction, prominently in the advertisement. The requirement may be satisfied with respect to broadcast or telephone advertising by inclusion in the broadcast of the spoken words "Restricted use pesticide," *or a statement of the terms of restriction.*

40 C.F.R. § 152.168(a), (c) (emphasis added).

IV. UNDISPUTED FACTS

1. Respondent Liphatech is a corporation with a place of business at 3600 West Elm Street, Milwaukee, Wisconsin ("Site"), and is a "person" as defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s). Compl. ¶¶ 22-23; Answer ¶¶ 22-23.

2. During the calendar years 2007 and 2008, Respondent was a "registrant" (as defined by FIFRA § 2(y), 7 U.S.C. § 136(y)) of "Rozol Pocket Gopher Bait II" ("Rozol"), assigned EPA Registration Number 7173-244. Compl. ¶¶ 24-25; Answer ¶¶ 24-25.

3. During the calendar years 2007 and 2008, Rozol was a "pesticide" as defined in Section 2(u) of FIFRA, 7 U.S.C. § 136(u). Compl. ¶¶ 32; Answer ¶¶ 32.

4. Upon registration of Rozol and at all times relevant to the Complaint, Rozol was classified as a "Restricted Use Pesticide" ("RUP") under Section 3(d) of FIFRA, 7 U.S.C. § 136a(d). Compl. ¶ 27; Answer ¶ 27.

5. Pursuant to 40 C.F.R. § 156.10(j)(2), as a result of its RUP classification, Rozol can only be sold to and be used by Certified Applicators or persons under direct supervision of a

certified applicator (as defined by FIFRA § 2(e), 7 U.S.C. § 136(e)) and only for those uses covered by the Certified Applicator's certification. Compl. ¶ 28; Answer ¶ 28.

6. During calendar years 2007 and 2008, Rozol was also registered for additional uses under the authority of Section 24(c) of FIFRA, 7 U.S.C. § 136v(c) to meet "Special Local Needs" to control black-tailed prairie dogs with supplemental labeling in the States of Kansas, Nebraska, Wyoming, Oklahoma, and certain counties in Colorado and Texas. Compl. ¶¶ 29-31; Answer ¶¶ 29-31.

7. On June 19, 2008, an inspector employed by the State of Wisconsin and authorized to conduct inspections under FIFRA went to the Site and collected documentary information from Respondent concerning Rozol. Compl. ¶¶ 34, 37, 38; Answer ¶¶ 34, 37, 38.

8. 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 Rozol, and transcripts of the radio announcements to be broadcast regarding Rozol. Compl. ¶¶ 39, 40; Answer ¶¶ 39, 40.

9. The transcripts included four different versions of the radio advertisement to be broadcast. Compl. ¶ 41; Answer ¶ 41.

10. All four versions of the transcript failed to include the words "restricted use pesticide." Compl. ¶ 42; Answer ¶ 42.

11. All four versions of the transcript included the following language: "APPROVED UNDER A SPECIAL LOCAL NEEDS 24C LABEL FOR THE STATES OF .... ALWAYS FOLLOW AND READ LABEL DIRECTIONS. SEE YOUR LOCAL AG CHEM DEALER." Compl. Attachments A-D; Answer ¶¶ 45, 47, 49, 50-55, 57, 58.

12. Respondent contracted with Golden Plains AG network to broadcast radio announcements regarding Rozol on 120 occasions during 2007, with Western Kansas Broadcast to broadcast radio announcements regarding Rozol on 229 occasions during 2008, with High Plains Radio to broadcast radio announcements regarding Rozol on 1,521 occasions during 2007. Complaint ¶¶ 44, 46, 48, and Attachments F, G, H; Answer ¶¶ 44, 46, 48.

13. The label for Rozol stated that it is a Restricted Use Pesticide and that Rozol could only be sold to and used by Certified Applicators or persons under their direct supervision and only for those uses covered by the Certified Applicator's certification. R's Motion at 7-8; C's Motion at 21-22.

14. Respondent contracted with six different cattle and livestock trade journals, namely *Cattle Guard, Kansas Stockman, Nebraska Cattleman, Oklahoma Cowman, The Cattleman,* and *Wyoming Livestock Roundup,* to print an advertisement for "Rozol"

during 2007 and 2008. Compl. ¶¶ 60, 64, 77, 93, 97, 110; Answer ¶¶ 60, 64, 77, 93, 97, 110.

15. The print advertisements were published in 23 separate issues of the cattle and livestock trade journals. Complaint ¶¶ 61-132; Answer ¶¶ 61-132.

16. The print advertisements did not contain the words "restricted use pesticide." Compl. ¶¶ 62-133; Answer ¶¶ 62-133.

17. The print advertisements appearing in *Cattle Guard, Kansas Stockman, Nebraska Cattleman, Oklahoma Cowman*, and *The Cattleman*, referenced in Counts 2118 through 2132, included the following phrases: "in order to use this product for the control of Black Tailed Prairie Dogs, you must have a 24(c) Prairie Dog Bait label in your possession" and "[a]pproved under Special Local Needs (SLN) 24(c) Prairie Dog Bait label for use in the states of Colorado, Kansas, Nebraska, Texas and Wyoming." Answer ¶¶ 67-109; C's Motion at 7, 25; Complainant's Prehearing Exchange Exhibits ("CX") 14a(3) (EPA 00286), 14a(4) (EPA 00290-93), 14a(5) (EPA 00295-99), 14a(6) (EPA 00301), and 14a(7) (EPA 00303-06).

18. The print advertisements appearing in the *Wyoming Livestock Roundup* (Counts 2,133-2,140) included a reference to the website: www.rodent-control.com. Answer ¶¶ 113-134; CX 14a(8) (EPA 00330).

V. <u>POSITIONS OF THE PARTIES</u>

The parties submit that the issues in their Motions present a question of law that can be dispatched by accelerated decision. C's Motion at 31-32; R's Response at 4. Specifically, the parties request a ruling on whether the language in the advertisements for Rozol, referring listeners to the product label, constitutes "a statement of the terms of restriction" in accordance with the requirements of FIFRA § 12(a)(2)(E), 7 U.S.C. § 136j(a)(2)(E), and the implementing regulation found at 40 C.F.R. § 152.168.

Respondent submits that the language "[a]pproved under a special local needs 24C label for the states of . . . always follow and read label directions" and "[s]ee your local ag chem dealer" meets the requirements of FIFRA because it directs the listeners to read and follow the label, which has been approved by EPA and includes all the necessary "terms of restriction" required for a Restricted Use Pesticide label. R's Motion at 4, 6, 8-9.
Respondent points out that the phrase "terms of restriction" appears in both the advertising regulation at 40 C.F.R. § 152.168(c) and the labeling regulation for Restricted Use Pesticides, 40 C.F.R. § 156.10(j)(2), but that neither provision defines the phrase. Respondent argues that there is no reason to presume that EPA intended the phrase in the advertising provision to have any meaning different than that for the same phrase in the labeling provision. R's Motion at 7-8. Respondent argues further that by alerting listeners to the restrictions on the label, Respondent

"informed listeners of the fact that the use of Rozol is restricted as set forth on the product label and that its use may not be appropriate for all individuals and for all applications as required by 40 C.F.R. § 152.168." *Id.* at 9. Respondent adds that the phrase "[a]pproved under a special local needs 24C label for the states of Colorado, Kansas, Oklahoma, and Texas" operates as a statement of the terms of restriction, as it puts the listener on notice that Rozol is not a typical product and is being sold subject to conditions of special registration, that the use is restricted to certain areas, and that additional, important information is on the label. R's Response at 5.

Next, Respondent argues that if it has reasonably interpreted FIFRA § 12(a)(2)(E) and the relevant regulations, then no penalty can be imposed because EPA failed to provide clear meaning to the phrase "terms of restriction" and therefore did not provide fair notice of its interpretation, and "an unclear and ambiguous regulation will not support a penalty." R's Motion at 10-11. Respondent argues that the due process principle is particularly applicable where Respondent was exercising its commercial free speech rights, citing to *Wisconsin Vendors, Inc. v. Lake County, Illinois*, 152 F. Supp. 2d 1087, 1094 (N.D. Ill. 2001) ("[A] law restricting free speech is impermissibly vague if it fails to provide fair notice to reasonable persons of what is prohibited . . . ."). *Id.*

Complainant, on the other hand, argues that an advertisement that merely refers the listener to the product label is contrary to FIFRA, the implementing regulations, various Federal Register notices, and publically available EPA documents. C's Motion at 12. According to Complainant, Section 156.10(j)(2)(B), 40 C.F.R. § 156.10(j)(2)(B), "floods additional light" on the issue of interpreting Section 152.168. C's Motion at 17. Section 156.10(j)(2)(B) states as follows, with respect to labeling:

> (2) Restricted Use Classification. Pesticide products bearing direction for use(s) classified restricted shall bear statements of restricted use classification . . . as described below:
>
> * * * *
>
> (B) . . . a summary statement of the terms of restriction imposed as a precondition to registration shall appear. If use is restricted to certified applicators, the following statement is required: "For retail sale to and use only by Certified Applicators or persons under their direct supervision and only for those uses covered by the Certified Applicator's certification." If, however, other regulatory restrictions are imposed, the Administrator will define the appropriate wording for the terms of restriction by regulation.

40 C.F.R. § 156.156.10(j)(2)(B).

Complainant notes that EPA has not imposed any such "other regulatory restrictions" for Rozol. C's Motion n.9. Furthermore, Complainant agrees with Respondent that there is no reason to presume that EPA intended the phrase "terms of restriction" in Section 152.168(c) to differ in meaning from the same phrase in Section 156.10(j)(2). C's Motion at 17. Complainant's conclusion, however, is that "a regulated entity can look to [§ 156.10(j)(2)],

should it have any doubt as to what 'terms of restrictions' [sic] means for the purpose of [§ 152.168.]." C's Motion at 17.

In addition, Complainant asserts that advertisements are required to contain either the words "Restricted Use Pesticide" or "For retail sale to and use only by Certified Applicators or persons under their direct supervision and only for those uses covered by the Certified Applicator's certification" as provided in 40 C.F.R. § 156.10(j)(2)(B). C's Motion at 15-17, 22, 24. Complainant acknowledges that there could be some variation from the latter language in that "words of similar import" could be used, but claims that the wording employed by Respondent in its broadcast advertisements "did not contain language that even resembled the terms of restriction for Rozol" and "did not come remotely close to satisfying" the statute or regulation. C's Motion at 24; C's Reply at 2. Complainant explains that the language in Respondent's radio transcripts "is an instruction not a restriction" and is not unique to RUPs but is applicable to all pesticides. C's Motion at 25.

For the print advertisements, Complainant points out that Respondent's statement "in order to use this product for the control of Black Tailed Prairie Dogs, you must have a 24(c) Prairie Dog Bait label in your possession" only concerns "Special Local Needs" ("SLN") pesticides that have supplemental labels for certain states. C's Motion at 13, 25. It does not indicate that the product is restricted for use by a certified applicator or someone under such applicator's direct supervision, Complainant argues, as there are SLN products on the market that are not RUPs. C's Motion at 25; C's Reply at 4. Complainant asserts that the small font of the administrative instruction for SLN products does not mitigate the hazards of Rozol. *Id.* at 25-26.

As to the Fair Notice defense raised by Respondent, Complainant asserts that the meaning of "terms of restriction" is clear, as Section 156.10 explains the meaning in no uncertain terms, and Respondent was well aware of the labeling regulation. *Id.* at 31. Furthermore, Complainant asserts that Federal Register notices, a Label Review Manual, a Pesticide Registration Notice 93-1, and a letter from EPA to Respondent, all discussing labeling requirements, also constituted notice to Respondent. C's Motion at 18-21, citing CX 83 (49 Fed. Reg. 37,960, Sept. 26, 1984); CX 1a, 86, 87.

Complainant argues further that Respondent's advertisement defeats the purpose of Section 12(a)(2)(E) by which Congress sought to minimize unreasonable adverse effects to the user and the environment by allowing EPA to take enforcement actions before, not after restricted use products enter the marketplace. C's Motion at 29. The purpose of Section 12(a)(2)(E) is to require notification of RUPs in the advertisements themselves, not merely on the label, and there is no exemption in Section 12(a)(2)(E) for incorporating the language of the label by reference. *Id.* at 27. Any such exemption would render Section 12(a)(2)(E) superfluous. Complainant infers from the legislative focus on advertisements of RUPs that Congress sought to ensure the safety of the consumer and the environment by allowing EPA to take enforcement actions before the RUPs enter the stream of commerce. C's Motion at 28-29. Complainant asserts that the consumer will not see the label until the point of sale. C's Reply at 4.

On the issue of the appropriate "unit of violation," Complainant cites *99 Cents Only Stores*, Docket No. FIFRA-09-2008-0027, 2008 EPA ALJ LEXIS 45 (EPA ALJ June 2, 2008), for the proposition that the number of violations is a relevant inquiry when considering penalty and not a basis for denying accelerated decision on liability only. C's Reply at 5-6. Complainant also cites *In re Chempace Corp.*, 9 E.A.D. 119 (EAB 2000), which holds that each separate sale or distribution of a pesticide is a unit of violation, for the proposition that each separate advertisement is an individual violation of FIFRA. *Id.* at 7. Complainant asserts that the fact that Respondent "advertised" is an element of proof on each count. Complainant urges that adoption of Respondent's view of the "unit of violation," *infra* at 9, would result in nominal penalties for repeat violators, would be inconsistent with FIFRA's plain language, and would contravene the consumer protection goals of FIFRA. *Id.* at 9-10.

In its Response, Respondent insists that there are no other regulations or publically available documents "which describe how 'a statement of terms of restriction' should be interpreted under 40 C.F.R. § 152.168" and that the exact meaning of that phrase 'for advertisement' is "uncertain." R's Response at 5-7. Respondent asserts that becausethe labeling regulations require *both* the words "Restricted Use Pesticide" *and* the terms of restriction, that the regulation for advertisements is "not as strict," as noted by Complainant. R's Response 7 (citing C's Motion at 20). Accordingly, Respondent argues, the requirements appearing in labeling regulations cannot be applied to advertisements.

Further, Respondent asserts that in the Federal Register notice proposing the advertising regulations, 49 Fed. Reg. 37,916, 37,927 (Sept. 26, 1984), EPA failed to specify what type of "statement" is necessary for the "terms of restriction" and since the advertising regulation was promulgated after the labeling regulation, EPA could easily have stated in Section 152.168 that the exact label language for "terms of restriction" is required for advertising. R's Response at 10-11.

Responding to Complainant's argument regarding frustration of Congress' intent, Respondent states that there is no requirement for EPA to pre-approve advertisements, argues that its interpretation would not preclude EPA from taking action against registrants that do not alert listeners to the terms of restriction in advertising before the product enters the stream of commerce, and claims that EPA can enforce the FIFRA § 12(a)(2)(F) prohibition on the sale of RUPs to unlicensed persons. R's Response at 8-9.

In addition, Respondent argues that Complainant has incorrectly determined the appropriate number of violations. Noting that FIFRA does not define what constitutes a "unit of violation," Respondent requests that "if the Presiding Officer does not dismiss Counts 1-2,117 of the Complaint, the Presiding Officer withhold decision on the appropriate 'unit of violation' until after the hearing." R's Response at 15. Respondent argues that accelerated decision cannot be granted in favor of Complainant regarding radio or print ads unless a determination is made that each print advertisement or broadcast constitutes the "unit of violation." That cannot be done, Respondent argues, where FIFRA, the regulations, the Enforcement Response Policy, and caselaw do not indicate what constitutes a single offense. *Id.* at 12. Respondent asserts that the

unit of violation could be determined instead by the number of days, number of radio stations, number of states, or number of different versions of the ad. It notes that in the original Notice of Intent to File a Complaint, EPA had calculated the units of violation as only 132, by using the number of days of advertising as the basis therefor. R's Response, Attachment A.

VI. DISCUSSION AND CONCLUSIONS

As indicated above, FIFRA § 12(a)(2)(E) makes it unlawful for person who is a registrant to advertise a registered pesticide "for restricted use without giving the *classification* of the product assigned to it under section 136a of this title." 7 U.S.C. § 136j(a)(2)(E) (italics added). *See also*, 7 U.S.C. § 136a(c)(E) (pesticide applications shall include "a request that the pesticide be *classified* for general use or for restricted use, or for both")(italics added). The regulation implementing that statutory provision, 40 C.F.R. § 152.168, gives two options for avoiding illegal advertising, either include the "statement 'Restricted Use Pesticide,' or the terms of restriction, prominently in the advertisement." 40 C.F.R. § 152.168(c).

The Undisputed Facts set forth above include all of the *facts* material to the issue of Respondent's liability for violating 7 U.S.C. § 136j(a)(2)(E) as alleged in Counts 1 through 2,140 of the Complaint. Specifically, Undisputed Facts 1 - 4, 8 and 12 (relating to the radio advertisements) and Undisputed Facts 1 - 4, 14 and 15 (relating to the print advertisements), establish as uncontroverted the fact that (1) Respondent is a person, (2) who is a registrant, (3) who advertised a product (Rozol) registered under FIFRA for restricted use. Further, Undisputed Facts 11 and 16-18 establish that there is no dispute as to the wording of the radio advertisements and print advertisements, and that neither included the phrase"Restricted Use Pesticide." Thus, the only issue remaining is a question of law, which is whether the wording of the advertisements met the requirements of 40 C.F.R. § 152.168(c) by including "the terms of restriction, prominently in the advertisement."

"When construing an administrative regulation, the normal tenets of statutory construction are generally applied. [] The plain meaning of words is ordinarily the guide to the definition of a regulatory term. Additionally, the regulation must, of course, be 'interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements.'" *In re Bil-Dry Corp.*, 9 E.A.D. 575, 595 (EAB 2001) (citations omitted). *See also*, *In re Howmet Corp.*, 13 E.A.D. 272, 282 (EAB 2007).

As part of the FIFRA registration process, pesticides are classified as being for general use, restricted use, or both. 7 U.S.C. §§ 136a (d), 136j (a)(1); 40 C.F.R. § 152.160. A pesticide is classified for "restricted use" if "the pesticide, when applied in accordance with its directions for use, warnings and cautions and for the uses for which it was registered . . . may generally cause, *without additional regulatory* *<u>restrictions</u>*, *unreasonable* adverse effects on the environment, including the applicator." 7 U.S.C. § 136a(d)(1)(C) (emphasis added); 40 C.F.R. § 152.170 (criteria for restriction to use by certified applicators). If a pesticide is classified as

"restricted use" then in all cases, by virtue of FIFRA, lawful use is only "authorized by" or restricted to "certified applicators," *i.e.*, those certified under FIFRA § 11. 7 U.S.C. 136i(a)-(c). EPA may further restrict a registered pesticide product's composition, labeling, packaging, uses, distribution and sale, etc., and restricted pesticides are required to "[b]ear an approved . . . label which contains the *terms of restricted use* imposed by the Agency." 40 C.F.R.§ 152.167(a)(i) (italics added); 40 C.F.R. § 152.160; 40 C.F.R. § 152.171 ("Restrictions *other than* those relating to use by certified applicator") (emphasis added).

As such, under FIFRA the phrase "restricted use pesticide" has become a term of art (a phrase that has a specific signification in a particular craft; a technical term), meaning that, by law, the pesticide's use is limited, at the very least, to those who are "certified applicators" or those under the supervision of certified applicators. Therefore, the plain meaning of the regulation's disjunctive phrase, set off by commas, requiring advertisements to include either the "statement 'Restricted Use Pesticide,' or the terms of restriction, prominently in the advertisement"is to require registrants to convey either through use of the term of art *or* other words or phrases that the lawful use of the pesticide is limited to certified applicators. *See Long v. Long*, 1983 Pa. Dist. & Cnty. Dec. LEXIS 82 *7 (Pa. C.P. 1983) (second word "use" in disjunctive phrase "interest for the loan or use of money" is synonym for the first word "loan"); *Whitaker v. Amer. Airlines, Inc.*, 285 F.3d 940, 946 (11th Cir. 2002) (reading a disjunctive term *in its context* as a synonym for the other term); *Cf. Collazos v. U.S.*, 368 F.3d 190, 199 (2d Cir. 2004) (the *absence* of commas to set off the second word or phrase in a disjunctive clause leads to the conclusion that the words convey *different* meanings).

In this case, the advertisements did not include a statement of the key "term" of restriction, that is that its use was by law limited to certified applicator or even that its use was "restricted." Rather, the radio advertisements merely stated "APPROVED UNDER A SPECIAL LOCAL NEEDS 24C LABEL FOR THE STATES OF . . . . ALWAYS FOLLOW AND READ LABEL DIRECTIONS. SEE YOUR LOCAL AG CHEM DEALER." Undisputed Fact 11. Such language does not convey even an inkling of a sense that there is a legally enforceable restriction as to who may use the product, as most all products have labels and directions, and suggesting such be followed is trite. Moreover, the word "approved" implies an incentive for broad purchase and use, not a constraint on it. Nevertheless, Respondent suggests in its Motion that such advertisements "by *referring* advertisement listeners to the pesticide label which *included* the restricted use classification of Rozol and the limitations upon its sale and use, Liphatech complied with 40 CFR 152.168." R's Motion at 4 (emphasis added). However, the erroneous nature of this argument is inherent in its very syntax, *i.e* that the label "included" the terms of the restricted use, where as the advertisement "referenced" such terms. To "include" means "to contain as part of something." Black's Law Dictionary 777 (8th Ed. 1999). To refer or a reference, on the other hand, means "[t]he act of sending or directing to another for information." *Id.* at 1306. Section 152.168(c) requires the "inclusion" of "the terms of restriction, prominently in the advertisement," in the ads for Rozol, not a mere reference to them. 40 C.F.R. § 152.168(c). Therefore, it is concluded that the reference to the label in the radio advertisements does not meet the requirements of Section 152.168 for radio broadcasts.

Similarly, the print advertisements patently lack inclusion of a statement of the restriction on the pesticide's use. Instead of merely advising that the product was a "restricted use pesticide," the print ads stated that "in order to use this product for the control of Black Tailed Prairie Dogs, you must have a 24(c) Prairie Dog Bait label in your possession;" and "[a]pproved under Special Local Needs (SNL) Prairie Dog Bait label for use in the states of . . . " or a reference to the website: "www.rodent-control.com." Undisputed Facts 17, 18. Again, reference to the need to have "in your possession" the product's label for use does not convey the concept that its use is limited, and the website reference by itself conveys nothing of significance.[3] Further, again, the statement of multiple governmental "approvals" of the product does not suggest a legal restriction on use, but quite the contrary.

Additionally, it is observed that Respondent's position, that a "statement" advising listeners to read the EPA-approved label is equivalent to including a "statement of" the terms of restriction, shoots wide of the mark and misses the protective intent of the relevant statutory provision and its implementing regulation. The statute and regulation governing advertising are clearly intended as prophylactic health and safety measures designed to communicate the risks inherent in the product's use and discourage even preliminary interest in the product by those who are not legally permitted to use it. The pesticide label, on the other hand, while indicating limitations on use, contains far more detailed information and is primarily intended to convey specific instructions on proper use by purchasers.

Finally, it is found that there is no need to refer to other sources to interpret Section 152.168. The law (as well as the product's approved label) clearly notified Respondent as to the terms of restriction which were required to be included in the advertisement, specifically that the product's lawful use was limited to certified pesticide applicators. Undisputed Fact 5, 13. Accordingly, Respondent's argument that it lacked fair notice is rejected.

In sum, Respondent's radio and print advertisements simply failed to include *any* language that could reasonably be construed as "the terms of restriction" as set forth in and required by 40 C.F.R. § 152.168.

Therefore, Respondent has failed to comply with the regulations as alleged in Counts 1-2,117. Accordingly, Complainant's Motion for Accelerated Decision as to Counts 1-2,117 is hereby **GRANTED**. Furthermore, Respondent has failed to comply with the regulations as

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[3] With respect to the print advertisements appearing in the *Wyoming Livestock Roundup* (Counts 2,133-2,140), only a reference to the website www.rodent-control.com is provided. Not only do these advertisements fail to include a statement of the terms of restriction, they do not even contain the reference to the SLN permit, which Respondent argues is the compliant language. Thus, even assuming, *arguendo*, that Respondent's reference to the registered label in other print advertisements was sufficient, such reference is absent from the *Wyoming Livestock Roundup* and therefore such advertisements could not constitute compliance with 40 C.F.R. § 152.168.

alleged in Counts 2,118-2,140. Accordingly, Complainant's Motion for Accelerated Decision as at to Counts 2,118-2,140 is hereby **GRANTED.**

VII. UNITS OF VIOLATION

The parties disagree as to the appropriate methodology for calculating the "units of violations" in this case. Further, Complainant asserts that this case represents the first time this Tribunal will hear a case involving a party alleged to have violated Section 12(a)(2)(E) of FIFRA. The amount of penalty at issue in this case is not relevant to the present determination of whether there are any contested issues of fact as to *liability* that would warrant expending resources to dispute at hearing. Therefore, I find that determination of the issue of the appropriate "unit of violation" should be deferred until after hearing.

ORDER

1. Respondent's Motion for Partial Accelerated Decision as to Liability on Counts 1 - 2,117 is **DENIED.**

2. Complainant's Motion for Partial Accelerated Decision as to Liability for the allegations of violation set out in Counts 1 - 2,140 is **GRANTED.**

3. Respondent is found liable for the violations alleged in Counts 1 - 2,140 of the Amended Complaint.

4. A hearing in this matter will be scheduled to take evidence and argument on the remaining counts and the issue of the appropriate penalty, if any, to be imposed against Respondent for, *inter alia*, the violations found herein.

Susan L. Biro
Chief Administrative Law Judge

Dated: May 6, 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 Motions For Accelerated Decision Regarding Alleged Violations of FIFRA § 12(a)(2)(E)**, dated May 6, 2011, was sent this day in the following manner to the addressees listed below.

Maria Whiting-Beale
Staff Assistant

Dated: May 6, 2011

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