



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
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CHICAGO, IL 60604-3590

U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION 5
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Via Facsimile and UPS Overnight Delivery

REPLY TO THE ATTENTION OF
C-14J

October 13, 2011

Honorable Susan L. Biro
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1099 14th Street, NW, Suite 350
Franklin Court
Washington, D.C. 20005

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

Dear Chief Judge Biro:

Enclosed please find a copy of *Complainant's Prehearing Brief*, which was filed on October 13, 2011, in the above-referenced matter.

Sincerely,

Gary E. Steinbauer
Assistant Regional Counsel

Enclosures

cc: Mr. Michael H. Simpson
Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 1700
Milwaukee, WI 53202
(*via Facsimile and UPS overnight delivery*)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

COMPLAINANT'S PREHEARING BRIEF

Complainant, the Director, Land and Chemicals Division, Region 5, United States Environmental Protection Agency (EPA or Complainant), through its undersigned attorneys, hereby files *Complainant's Prehearing Brief* pursuant to the Presiding Officer's June 10, 2011 Order Scheduling Hearing.

INTRODUCTION

This is a case about an advertising campaign by Liphatech, Inc. (Respondent) for restricted use pesticides that were registered to control black-tailed prairie dogs and pocket gophers. Respondent is a company that manufactures, markets and sells pesticides registered by EPA and/or by state agencies pursuant to the Federal Insecticide, Fungicide Rodenticide Act (FIFRA), 7 U.S.C. §§ 136a, 136v(c). During the registration process for the pesticides at issue in this lawsuit, EPA required Respondent to include detailed and specialized directions for use on the pesticides' labels, including application and reapplication directions and carcass search, retrieval and disposal instructions. EPA required Respondent to include these detailed and specialized directions for use on the final approved labels for Rozol black-tailed prairie dog bait and pocket gopher bait to mitigate the potential harm to human health and the environment.

Respondent's advertisements for the Rozol black-tailed prairie dog and pocket gopher pesticides violated FIFRA. In over 2,000 radio and print advertisements for Rozol, Respondent failed to state that Rozol black-tailed prairie dog bait is a restricted use pesticide or provide the terms of restriction, which prohibit the pesticide from being sold to, or used by, anyone other than a certified applicator or someone acting under their direct supervision. Respondent's failure to warn the public that Rozol black-tailed prairie dog bait is a restricted use pesticide increased the potential for this pesticide to cause harm to human health and the environment.

Respondent also distributed or sold Rozol black-tailed prairie dog bait and pocket gopher bait with claims made for the pesticides as part of their distribution or sale that substantially differed from claims Respondent was approved to make at the time of registration of these pesticides. In particular, Respondent made numerous claims in print advertisements for its Rozol black-tailed prairie dog bait and pocket gopher bait that it sent to its customers and included on its website (as well as its radio advertisements) that were substantially different from claims Respondent was approved to make in connection with the registration of these pesticides. Claims made in Respondent's advertisements contradicted and undermined the pesticides' final approved labels, increasing the potential hazard to humans and to non-target organisms from the use of Respondent's pesticides.

In accordance with the applicable FIFRA penalty policy, Complainant proposes a penalty of \$2,891,200 for Respondent's violations of FIFRA. This penalty was calculated by taking into consideration the facts and circumstances of Respondent's violations, including but not limited to the restricted use classification of Respondent's Rozol black-tailed prairie dog bait and pocket gopher bait and the potential harm to human health and the environment.

COUNTS TO BE TRIED

Complainant intends to present evidence for each and every claim alleged in the *First Amended Complaint* as follows:

I. Counts 1 through 2,140

On May 6, 2011, the Presiding Officer found Respondent liable for the violations alleged in Counts 1 through 2,140, in which Complainant alleged that Respondent violated FIFRA as a result of its widespread dissemination of radio and print advertisements that failed to inform potential customers that Rozol was a restricted use pesticide when used to control black-tailed prairie dogs. Complainant will move into the record all evidence that supports such a finding of liability for these counts. Complainant will also present evidence that the relief sought for the violations in Counts 1 through 2,140 is appropriate and warranted.

In particular, Complainant will present evidence that the use of Rozol to control black-tailed prairie dogs includes serious and often fatal risks to non-target species, including species protected by the Endangered Species Act and the Migratory Bird Treaty Act. Complainant will present evidence showing that to mitigate such risks to non-target species, EPA prohibited the sale of Rozol to or the use of Rozol by anyone other than a certified applicator or someone acting under the direct supervision of a certified applicator. EPA also required label language that includes specific application requirements for, among other things, baiting, carcass searches, and prohibitions on use near endangered species. Complainant will present evidence demonstrating that Respondent's violations of the statutory requirements for advertisements for restricted use pesticides increases the likelihood that the specific label requirements may not be followed and therefore increases the potential for harm to human health and the environment.

II. Counts 2,141 through 2,183

Complainant will prove that Respondent is liable for the violations alleged in Counts 2,141 through 2,183. In particular, Complainant will demonstrate, by the preponderance of the evidence, that on 43 separate occasions, Respondent violated Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136j(a)(1)(B). Complainant will also demonstrate that the relief sought for Counts 2,141 through 2,183 is appropriate and warranted, because Respondent's illegal advertisements for Rozol black-tailed prairie dog bait and pocket gopher bait undermined and/or contradicted critical information on the pesticides' final approved labels, exacerbating the potential for harm to human health and the environment. Pursuant to the Presiding Officer's *Order on Motions for Accelerated Decision Regarding Alleged Violations of FIFRA 12(a)(1)(B)*, Complainant will present evidence to further support and clarify the following topics:

A. Proper Baseline of Comparison

Complainant will present evidence that EPA's Office of Pesticides Program, Registration Division, has historically and consistently used the Notice of Pesticide Registration Notice, which includes the "accepted label" (with or without comments, whichever is applicable) as the baseline of comparison when determining whether a registrant has made a claim that substantially differs from the claims the registrant was approved to make at the time of registration of the pesticide. The evidence will show that the Notice of Pesticide Registration along with the "accepted" or approved label essentially contains all the claims that have been approved by EPA for a particular registered pesticide.

B. Respondent Distributed or Sold Rozol In Violation of FIFRA Section 12(a)(1)(B) As Alleged in Counts 2,144 and 2,178

With respect to the violations alleged in Counts 2,144 and 2,178, Complainant will demonstrate that the transactions at issue fit squarely within the broad definition of "to distribute

or sell” under FIFRA Section 2(gg), 7 U.S.C. § 136(gg). Neither the plain language of FIFRA Section 2(gg) nor FIFRA Section 12(a)(1)(B) in any way limits the definition of “to distribute or sell” or “person” in a manner that somehow allows Respondent to ship restricted use pesticides to sales representatives such as Mr. Knuth and Mr. Newman outside of FIFRA regulation. *See In the Matter of Sultan Chemists, Inc.*, 1999 EPA ALJ LEXIS 46, at * 10 (ALJ, Aug. 4, 1999) (holding that the respondent distributed or sold a pesticide within the meaning of FIFRA Section 2(gg) when it shipped products to its “salespeople for demonstration purposes only”).

The evidence will reveal the precise purpose of these shipments. Respondent’s shipment to Mr. Knuth was to be delivered to a resort in Jackson Hole, Wyoming. Respondent’s shipment to Mr. Newman was to be delivered to Helena Chemical, one of the distributors Respondent identified in the various iterations of its list of distributors.

III. Counts 2,184 through 2,231

In addition, Complainant will prove that Respondent is liable for the violations alleged in Counts 2,184 through 2,231 of the *First Amended Complaint*. In particular, Complainant will demonstrate, by the preponderance of the evidence, that on 48 separate occasions, Respondent violated FIFRA Section 12(a)(1)(B), 7 U.S.C. § 136j(a)(1)(B), by offering Rozol black-tailed prairie dog bait and pocket gopher bait for sale, through violative advertisements, which were made available to the public on its website and provided to at least 48 of its customers. The fact that Respondent sent its violative advertising to 48 of its customers to induce sales, in addition to making the same advertising materials available to the general public on its website, is sufficient to show that Respondent “distributed or sold” Rozol under the broad definition of “to distribute or sell,” which includes “offer for sale.” 7 U.S.C. § 136(gg); 40 C.F.R. § 168.22; *see also In re Sultan Chemists, Inc.*, 9 E.A.D. 323, 355-56, 2000 EPA App. LEXIS 24, at *74-75 (EAB 2000)

(noting the broad application of FIFRA's definition of "to distribute or sell"). Complainant will also present evidence that the relief sought for Counts 2,184 through 2,231 is appropriate and warranted, because Respondent's advertisements undermined and/or contradicted critical information on the pesticides' approved labels, exacerbating the potential for harm to human health and the environment.

IV. Conclusion

In sum, Complainant will present evidence demonstrating that Respondent is liable for each violation of FIFRA alleged in the *First Amended Complaint* and will show that the proposed penalty of \$2,891,200 is both warranted and appropriate under the facts and circumstances of this case.

Respectfully submitted,



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Docket No. FIFRA-05-2010-0016

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CERTIFICATE OF SERVICE

I hereby certify that the original and one true, accurate and complete copy of *Complainant's Prehearing Brief* were filed with the Regional Hearing Clerk, U.S. EPA, Region 5, on the date indicated below. True, accurate and complete copies also were sent to the persons listed and in the manner provided below on this date:

Sent via UPS overnight delivery and via facsimile to:

Honorable Susan L. Biro
Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1099 14th Street, NW, Suite 350
Franklin Court
Washington, D.C. 20005

Sent via UPS overnight delivery and via facsimile to:

Mr. Michael H. Simpson
Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 1700
Milwaukee, WI 53202

Dated in Chicago, Illinois, this 13 day of October, 2011.



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