



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

2011 OCT 19 PM 12:36

REPLY TO THE ATTENTION OF:  
C-14J

*Via UPS Overnight Delivery and Facsimile*

October 19, 2011

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

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

Dear Judge Biro:

Enclosed please find a copy of Complainant's Response in Opposition to Respondent's Motion for a Telephonic Prehearing Conference, which was filed on October 19, 2011, in the above-referenced matter.

Sincerely,

Gary E. Steinbauer  
Assistant Regional Counsel

Enclosures

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

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR**

**In the Matter of:** )  
 )  
**Liphatech, Inc.** ) Docket No. FIFRA-05-2010-0016  
**Milwaukee, Wisconsin** )  
 ) Hon. Susan L. Biro  
 )  
 )  
**Respondent.** )  
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**COMPLAINANT’S RESPOSNE IN OPPOSITION TO RESPONDENT’S  
MOTION FOR TELEPHONIC PREHEARING CONFERENCE**

Complainant, the Director, Land and Chemicals Division, Region 5, United States Environmental Protection Agency (EPA or Complainant), through its undersigned attorneys, hereby files this Response In Opposition to Respondent’s Motion for Telephonic Prehearing Conference pursuant Section 22.16(b) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules), codified at 40 C.F.R. § 22.16(b).

On October 6, 2011, Respondent served its Motion for Telephonic Prehearing Conference (“Motion”), in which Respondent requests, among other things, that “the Presiding Officer require the parties to provide to each other and to the Presiding Officer a written notice of the order in which each party intends to present its witnesses at the hearing within three (3) days of such witness’s testimony.”<sup>1</sup> Respondent contends that its request is intended to “assist the parties with preparation for the hearing.”

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<sup>1</sup> Respondent’s Motion also requested that the Presiding Officer hold a telephonic prehearing conference to discuss the Presiding Officer’s operating protocol and preferences on a number of topics. These topics were discussed in the telephonic prehearing conference held on October 17, 2011. Therefore, this portion of Respondent’s Motion should be denied as moot.

During a telephonic prehearing conference that was held with the Presiding Officer's staff attorneys and the parties' counsel on October 17, 2011, counsel for the parties agreed to discuss Respondent's Motion and attempt to reach an agreement with respect to Respondent's request. Counsel for the parties discussed Respondent's request for such an order by telephone on October 18, 2011, and were unable to reach an agreement.

Respondent's Motion should be denied. Nothing in the Consolidated Rules requires the parties to provide the written order in which they intend to present their witnesses at hearing within three (3) days of such witness's testimony.<sup>2</sup> Not surprisingly, Respondent cites no authority supporting its request. In addition, the conditions suggested by Respondent in its Motion are inequitable and inure only to Respondent's benefit. Assuming it will take Complainant four days to present its case-in-chief (*see* 7/18/2011 Status Report), Complainant will not receive written notice of any of Respondent's witness's until it is in the midst of presenting its own witnesses. Thus, Respondent's requested order would assist Respondent, not Complainant, with preparation for the hearing.<sup>3</sup>

In the event that the Presiding Officer believes that Respondent's requested order would somehow benefit both parties, Complainant respectfully requests that any such order be granted under the following conditions: (1) that both parties be ordered to provide a list of the witnesses they intend to proffer at hearing, in writing, identifying each witness by name, and stating whether each identified witness will provide oral or written direct examination testimony, by 5:00 p.m. central time on October 28, 2011 (the "List"); (2) absent unforeseen circumstances,

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<sup>2</sup> Consolidated Rule 22.19(a) requires each party's prehearing exchange to include "[t]he names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony . . ." 40 C.F.R. § 22.19(a). Complainant's prehearing exchange contains this information.

<sup>3</sup> It is worth noting that Respondent's Motion was filed after the August 31, 2011 motion deadline imposed pursuant to the Presiding Officer's June 6, 2011 order. Ironically, the August 31, 2011 motion cut-off deadline was Respondent's sole objection in its response in opposition to Complainant's motion recent motion to supplement its prehearing exchange, which Respondent filed three days before filing the Motion at issue here.

each party must present the witnesses in the List; (3) in the event that unforeseen circumstances require a party to modify its List in any way, the party seeking to modify its List must provide written notification to the Presiding Officer and the opposing party immediately upon learning of such unforeseen circumstances and shall be required to explain such unforeseen circumstances in this written notification; and (4) each party reserves the right to call rebuttal witnesses.

Respondent has asserted that it should not be required to provide a List at the same time as Complainant, because “Complainant bears the burdens of presentation and persuasion, and Respondent cannot fairly be required to notify Complainant of Respondent’s order of witness presentation until after Respondent knows which of Complainant’s witnesses have testified at the hearing and the substance of their testimony under direct examination and cross-examination.” (10/18/2011 Email chain including messages from Mr. Steven Sarno, Mr. Jeffrey P. Clark, and Mrs. Nidhi O’Meara).

During the telephonic prehearing conference held on October 17, 2011, however, Respondent stated that it intends to present one or more of its listed witnesses by proffering written testimony in lieu of oral testimony.<sup>4</sup> If Respondent intends to present one or more of its listed witnesses in this manner, it likely knows who it will make available for cross-examination at hearing and will procure such written testimony in advance of the hearing. Respondent’s stated intention to provide written testimony in lieu of oral testimony for one or more of its listed witnesses, coupled with the fact that it seeks an order from the Presiding Officer requiring Complainant to divulge its List prior to the hearing while Respondent would only be required to divulge its List during Complainant’s presentation of its case-in-chief, makes it clear that Respondent is requesting an order that provides it, and only it, with a tactical advantage.

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<sup>4</sup> During this telephonic prehearing conference, Respondent’s counsel also was instructed by the Presiding Officer’s staff attorney to provide such written testimony to the Presiding Officer and counsel for Complainant as soon as possible.

For all of the foregoing reasons, Complainant respectfully requests that the Presiding Officer issue an order denying Respondent's Motion in its entirety.

Respectfully submitted,



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Erik H. Olson  
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Gary E. Steinbauer  
Assistant Regional Counsel  
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*Attorneys for Complainant*

*In the Matter of Liphatech, Inc.*  
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 Response in Opposition to Respondent's Motion for Telephonic Prehearing Conference* 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 facsimile to:

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

Sent via UPS overnight delivery and 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 19 day of October, 2011.



Patricia Jeffries-Harwell  
Legal Technician  
U.S. EPA, Region 5  
Mail Code C-14J  
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(312) 353-7464