



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

REPLY TO THE ATTENTION OF:
C-14J

Via UPS Overnight Delivery

April 12, 2012

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 Reply to Respondent's Response in Opposition to Complainant's Motion to Conform Transcript and Request Related to Schedule for Submission of Post-Hearing Briefs*, which was filed on April 12, 2012, in the above-referenced matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary E. Steinbauer".

Gary E. Steinbauer
Assistant Regional Counsel

Enclosures

cc: Mr. Steven Sarno
Office of Administrative Law Judges
U.S. Environmental Protection Agency
(*via Email*)

Mr. Mark A. Cameli
Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 1700
Milwaukee, WI 53202
(*via UPS overnight delivery and via Email*)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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In the Matter of:)
)
Liphatech, Inc.)
Milwaukee, Wisconsin)
Respondent.)
_____)

Docket No. FIFRA-05-2010-0016
Hon. Susan L. Biro

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**COMPLAINANT’S REPLY TO RESPONDENT’S RESPONSE IN OPPOSITION TO
COMPLAINANT’S MOTION TO CONFORM TRANSCRIPT AND REQUEST
RELATED TO SCHEDULE FOR SUBMISSION OF POST-HEARING BRIEFS**

Pursuant to 40 C.F.R. §§ 22.16(b) and 22.25 of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/ Termination or Suspension of Permits* (the “Consolidated Rules”), Complainant respectfully submits this Reply to Respondent’s Response in Opposition to Complainant’s Motion to Conform Transcript and Request Related to Schedule for Submission of Post-Hearing Briefs.

Contrary to Respondent’s assertions, when read in the proper context, and when read in tandem with Ms. Niess’s answers to similar questions posed later in the hearing during cross-examination, it is clear that the proposed change to page 108, line 4 of the transcript of Ms. Claudia Niess’s testimony on February 7, 2012 is necessary to conform the transcript to the actual testimony at hearing.

On page 107, lines 20-22 of the transcript of Ms. Niess’s testimony, she was asked on direct-examination the following question: “So why did you assign a pesticide toxicity value of three when the signal word on the various accepted labels is ‘caution?’” Ms. Niess’s answer, without the proposed change, reads:

A pesticide signal word is assigned based on its acute hazard to human health. And Rozol Prairie Dog Bait and Rozol Pocket Gopher Bait II have been classified as restricted use pesticides due to their hazard to non-target

organisms. So had I assigned a pesticide toxicity based on their [harm to]¹ human health, that would accurately reflect the pesticide toxicity of these pesticides.

(2/7/12 Niess Tr. at 107:23-25 – 108:1-5). The last sentence of Ms. Niess’s answer to this question should be corrected to read as follows: “So had I assigned a pesticide toxicity based on their [harm to] human health, that would **not** accurately reflect the pesticide toxicity of these pesticides.” (*Id.* (proposed change in bold)). This proposed change is consistent with Ms. Niess’s description of the reason she assigned a value of 3 for pesticide toxicity in her penalty narrative, which was admitted into the record. (CX55; EPA 1009). Furthermore, counsel for Respondent’s subsequent cross-examination of Ms. Niess demonstrates that Ms. Niess’s answer on pages 107 and 108 was inaccurately transcribed. (*Id.* at 196:15-25–197:1-20).²

¹ The bracketed addition in this block quote was stipulated to by the parties and included in the *Parties’ Joint Motion to Conform Transcript*, which was filed and served on April 3, 2012.

² The exchange between Ms. Niess and Respondent’s counsel during cross-examination is as follows:

Q. And so why don’t you look at 1(i), Pages 134 to 132. That’s a Respondent’s Exhibit 1(i), 134 to 132. Specifically why don’t you look at RX 140. And that shows that this is a product with the signal word “caution,” correct?

A. Yes.

Q. And that would trigger a gravity adjustment of a one, not the three that you gave it; isn’t that correct?

A. No.

Q. And why did you not do that in this instance?

A. Again, signal words are classified or assigned based on a pesticide’s acute toxicity to human health. These products have been classified as restricted use pesticides due to their hazard to non-target organisms.

And if you look at the wording in Appendix B, those categories are triggers for each level are listed as an “or,” it’s not an all inclusive category.

Q. And how is toxicity in any way relevant to advertising-relating violations?

A. Pesticide toxicity is a factor that is incorporated into every violation of FIFRA.

(2/7/12 Niess Tr. at 196:15-25 – 197:1-20).


With respect to the four changes Complainant proposed to the transcript of Dr. Steeger's testimony, all of which are on the pages transcribing arguments by Complainant's counsel in response to counsel for Respondent's mid-hearing oral motion, Respondent similarly contends that it has "no independent memory of" these statements. (Resp.'s Resp. at 2). Respondent's lack of "independent memory" notwithstanding, a quick reading of the pages and lines of the transcript in which these changes are proposed shows that, without these changes, the transcript will not accurately reflect the statements made by Complainant's counsel. (2/8/12 Dr. Steeger Tr. at 104:23-24, 105:19, 19-20, 24).

Respondent also misses the mark when it argues that these four proposed changes need not be made because "Complainant will have adequate opportunity to clarify its argument in post-hearing briefing." (*Id.*) The purpose of the portion of Consolidated Rule 22.25 that allows motions to conform is to create a complete and accurate transcript, not to leave disputed inaccuracies in the transcript unresolved. Nevertheless, if the Presiding Officer finds that the post-hearing briefing is the appropriate time and place to clarify the inaccuracies in this portion of the transcript, Respondent should be deemed to have waived the right to argue that the inaccuracies in these pages and lines of the transcript of Dr. Steeger's testimony somehow inure to the benefit of Respondent in any way.

For the foregoing reasons and the reasons stated in Complainant's motion to conform the transcript, Complainant respectfully requests that the Presiding officer enter an order granting Complainant's motion to conform the transcript.

[Signature page follows.]

Respectfully submitted,



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

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CERTIFICATE OF SERVICE

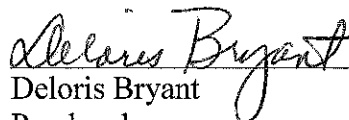
I hereby certify that the original and one true, accurate and complete copy of the *Complainant's Reply to Respondent's Response in Opposition to Complainant's Motion to Conform Transcript and Request Related to Schedule for Submission of Post-Hearing Briefs* were filed with the Regional Hearing Clerk, 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 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

Mr. Mark A. Cameli
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1000 North Water Street, Suite 1700
Milwaukee, WI 53202

Dated in Chicago, Illinois, this 12 day of April, 2012.


Deloris Bryant
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