UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
FMC Corporation	)	DOCKET NO: FIFRA-03-2015-0248
1735 Market Street	)	
Philadelphia, PA 19103	)	
	)	
Respondent	)	

Complainant's Reply to Respondent FMC Corporation's Opposition to Complainant's Motion for Partial Accelerated Decision as to Liability for Violations 1-12,273 of the Complaint

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I. Introduction

Complainant, the Director of the Land and Chemicals Division, United States Environmental Protection Agency, Region III ("Complainant") has met its burden for Partial Accelerated Decision as to Respondent FMC Corporation's ("Respondent") liability for violations 1 through 12,273 of the Complaint. Specifically, Complainant has met its burden of production as the moving party by citing to Respondent's admissions in its Answer to the Complaint; other materials in the record, including admissions and documents submitted by Respondent, and the affidavit of Christine Convery, which show that no genuine dispute of material fact exists as to Respondent's liability for the 12,273 violations of Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), alleged in the Complaint concerning Respondent's illegal advertisements of its restricted use pesticide ("RUP") *F9047-2 EC Insecticide,* EPA Reg. No. 279-9545. Memorandum of Law in Support of Complainant's Motion for Partial Accelerated Decision as to Liability for Violations 1-12,273 of the Complaint ("Complainant's Memo"). Contrary to the assertions in Respondent FMC Corporation's Opposition to Complainant's Motion for Partial Accelerated Decision as to Liability for Violations 1-12,273 of the Complaint ("Respondent's Opposition"), Respondent has failed to meet its burden as the non-moving party to cite to materials in the record or show that the materials cited by EPA do not establish the absence of a genuine dispute with regard to any of the facts material to either party's theory of liability under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), with respect to those 12,273 violations.

For the reasons set forth in Complainant's Memo and herein, Complainant has established that it is entitled to judgement as a matter of law and seeks an Order granting partial accelerated decision in its favor, in full or in part, as to liability for the 12,273 violations of Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), alleged in the Complaint.

II. Standard of Review for Accelerated Decision: Burdens of Moving and Non-Moving Parties

Section IV. of Complainant's Memo addresses the standard of review for accelerated decision. Complainant's Memo at 8-10. As described therein, the standard for motions for accelerated decision under 40 C.F.R. § 22.20 of the Consolidated Rules of Procedure is similar to the standard for motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"). *Id.* Consistent with Rule 56 jurisprudence, Complainant – as the moving party - bears the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *In re Clarksburg Casket*, 8 E.A.D. 496, 501–502 (EAB 1999) (citing *In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 793 (EAB 1997)). In order to do so, Complainant must first meet its burden of production by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the . . . presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *In re Aylin, Inc.*, 2016 EPA ALJ LEXIS 39, at *12-13 (Order Denying Complainant's Motion for Partial Accelerated Decision) (quoting FRCP(c)(1)). After Complainant has satisfied this burden of production, the burden shifts to the Respondent – the nonmoving party - to show that a genuine dispute of material fact exists by similarly "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence . . . of a genuine dispute or that an adverse party cannot produce admissible evidence to support the fact." *Id.* Though the ultimate burden of persuasion remains with the movant, the Environmental Appeals Board ("EAB") has noted "neither party can meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence" and further that "parties opposing summary judgement must provide

more than a *scintilla* of evidence on a disputed factual issue to show their entitlement to a trial or evidentiary standard of the case." *In re BWX Technologies, Inc.*, 9 E.A.D. 61, 75-76 (EAB 2000).

The Consolidated Rules of Practice further provide:

> If an accelerated decision . . . is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted. The partial accelerated decision . . . shall specify the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed." 40 C.F.R. § 22.20(b)(2).

Under 40 C.F.R. § 22.24(b) of the Consolidated Rules of Procedure, "[e]ach matter of controversy shall be decided by the presiding Officer upon a preponderance of the evidence." 40 C.F.R. § 22.24(b).

III. Complainant is Entitled to Partial Accelerated Decision as to Liability for Violations 1 through 12,273 of the Complaint

A. There Are No Genuine Issues of Material Fact and Complainant is Entitled to Judgement as a Matter of Law that Respondent's Direct Mail, Print and Website Materials Constituted "Advertisements" and that Respondent's Conduct with Regard to Such Material Constituted "Advertising"

Section V.B. of Complainant's Memo sets forth the facts that underly Complainant's position that Respondent's direct mail, print and website materials constitute "advertisements" under 40 C.F.R. § 152.168, and that Respondent's conduct in regard to such materials constituted "advertising" under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E). Complainant's Memo at 11-13. Such facts include legally binding admissions in Respondent's Answer, admissions and supporting documentation provided by Respondent outside the pleadings, and information obtained through EPA's investigation. Complainant's Memo at 11-13. Respondent has raised no genuine issue with respect to any of these underlying facts.

Complainant submits that the undisputed facts in the record are sufficient for the determination of whether Respondent's direct mail, print and website materials are regulated "advertisements" and that proposed testimony suggested by Respondent is neither required nor appropriate. EPA's 40 C.F.R. § 152.168 advertising regulations were promulgated in their current form in May 4, 1988 and contain no definition of the term "advertisement." 53 Fed. Reg. 15986 (May 4, 1988). In cases such as this where there is no governing legal definition of a particular term, the EAB has held that such term should be readily defined based on its "ordinary, contemporary, common meaning" and often relies on dictionaries in interpreting regulatory language. *In re Chase*, 2014 EPA App. LEXIS 29, at *24 (EAD, Aug. 1, 2014)(quoting *In re Mayes*, 12 E.A.D. 54, 86 (EAB 2005) (uses various dictionary definitions for guidance to define the term "annual")); *In re Carbon Injection Sys.*, LLC, 2016 EPA App. LEXIS 7, 47-48 (EAD, Feb. 2, 2016). Though there are many sources to choose from[1], Complainant submits that Respondent's direct mail, print and website materials at issue in this case fall under common dictionary definitions of "advertisements", and more importantly when analyzed more closely are clearly of a nature that were intended to be regulated under 40 C.F.R. § 152.168. Because neither "advertisement" nor "advertise" are terms of art or complex

[1] *See e.g.,* "Advertisement" is defined as: "1. the act or process of advertising; 2. a public notice, especially one published in the press or broadcast over the air" (http://www.merriam-webster.com/dictionary/advertisement); "[a] notice or announcement in a public medium promoting a product, service, or event or publicizing a job vacancy" (http://www.oxforddictionaries.com/us/definition/american_english/advertisement); "a paid notice that tells people about a product or service" (http://dictionary.cambridge.org/us/dictionary/english/advertisement).

scientific terms, Respondent's intention to call its expert witness Mr. George Orme to offer testimony as to what these terms mean is inappropriate. Respondent's Opposition at 5-6; Orme Declaration at ¶7; *See In re: Carbon Injection Systems, LLC*, 2016 EPA App. LEXIS 7, at *45 (E.A.D. Feb. 2, 2016)*(*finding that "the ALJ erred by relying on an industry expert's testimony concerning the common, ordinary meaning of the regulatory term "energy" given the general presumption against expert testimony on legal questions in judicial proceedings"); *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997); *Ways v. City of Lincoln*, 206 F. Supp. 2d 978, 991 (D. Neb. 2002) *aff'd*, 331 F.3d 596 (8th Cir. 2003) (holding that "expert testimony that purports to *explain the legal meaning of a term* is forbidden * * *, but testimony *defining a term of art* [in an ordinance] as it is used within a given field may be allowed").

Further, while Respondent's Opposition argues for "a case-by-case inquiry based on factual evidence outside of the evidence included in the pre-hearing submissions," it fails to identify the additional factual evidence it would seek to introduce. Respondent's Opposition at 7-8. Accordingly, Respondent has not met its burden to show that a genuine dispute of material fact exists as a party opposing a motion for summary judgement "may not raise an issue of fact by merely referring to the proposed testimony of possible witnesses. . . . An affidavit stating what the attorney believes or intends to prove at trial is insufficient to comply with the burden placed on a party opposing a motion for summary judgment under [FRCP] 56." *In the Matter of Chase*, 2012 EPA ALJ LEXIS 18, at *53-54 (ALJ, June 21, 2012) (Order on Complainant's Motion for Partial Accelerated Decision) (quoting *King v. National Industries, Inc.*, 512 F.2d 29, 33-34 (6th Cir. 1995)).

Complainant's "ad-hoc" analysis in Section V.C. of Complainant's Memo of Respondent's direct mail, print and website materials shows, by the preponderance of the evidence, that each of

these materials constitute "advertisements" under 40 C.F.R. § 152.168, and that Respondent's conduct in regard to such materials constituted "advertising" under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E). Complainant's Memo at 15-25. Certainly, not all communications from pesticide registrants conveyed by brochure, pamphlet, broadcast media or other form specified 40 C.F.R. § 152.168 are regulated "advertisements" (e.g., SEC-required communications and Material Data Safety Sheets (MSDS)). Respondent's Opposition at 6; Orme Declaration at ¶7. The fact that the direct mail, print and website materials at issue in this case were each in a form specified in 40 C.F.R. § 152.168 was but one of several bases, in addition to an analysis of their content, context, and use, supporting Complainant's position that they constitute regulated "advertisements". Complainant's Memo at 15-25.

Contrary to Respondent's assertion, no factual inquiry must be made as to whether the direct mailers were "offered to purchasers." Respondent's Opposition at 7. Respondent has admitted in its Answer that it "caused direct mailer(s) about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to be sent to individuals associated with various agricultural farms ("farm/grower consumers") in March 2012," and that it "caused direct mailer(s) about *F9047-2 EC Insecticide*, EPA Reg. No. 279-9545 to be sent to individuals associated with retailers in Respondent's product distribution chain ("retail purchasers") in March 2012." Complaint and Answer at ¶¶ 22 and 32. As there can be no question that farm/grower consumers or retail purchasers are potential purchasers (versus stockholders, first responders, etc.), this issue has been determined conclusively and requires no further evidence. Additionally, as previously noted in these proceedings, 40 C.F.R. 152.168(b) is an inclusive – not exclusive – list, and therefore not all "regulated" advertisements are explicitly listed. *See* Complainant's Rebuttal PHE at 3.

Respondent misconstrues Complainant's view as to the significance of FMC's responses to EPA's Request for Information letters. Unlike admissions in Respondent's Answer to the Complaint - which are legally binding, the information provided by FMC in its answers to EPA's Information Request letters are viewed as evidence to be considered and weighed by the trier of fact, akin to party admissions. As shown in Section C. of Complainant's Memo, FMC's initial identification of its direct mail, print and website materials as being responsive to EPA's request for "promotional and advertising materials" is just one of several bases, including an analysis of the content, use and form of each of the materials themselves, that support Complainant's argument that such materials constitute "advertisements" under 40 C.F.R. § 152.168[2]. Complainant's Memo at 15-25.

Respondent implies that FMC may not have been clear as to the purpose of EPA's Information Request Letters or as to the scope of "promotional and advertising" information requested at the time of its responses. Respondent's Opposition at 9. Complainant notes, however, that at no time did FMC ask EPA for clarification on either of these issues, nor did it provide caveats in any of its responses to reflect such uncertainty. *See* Cx25, and CX27. Even after receiving EPA's May 7, 2014 "Show Cause" letter advising FMC of suspected violations of Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), FMC failed to revise its previous July 18, 2013 response and used the following language to describe its direct mail and print materials in a July 15, 2014 response:

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[2] In fact, several of the materials identified by FMC as being responsive to EPA's request for "promotional and advertising materials" which also did not include the RUP classification were not included in the Complaint. *See* Convery Declaration at 3, fn 1.

a. **F100-22694-01_Stallion_DM-Vs3-X1A.pdf** was a print advertisement that was mailed to growers in March 2012;
b. **F100-22694-02_Stallion_DM-Retailers-X1A.pdf** was a print advertisement that was mailed to retailers in March 2012;
c. **F100-22333-1_Stallion_PrintAd_ProgressiveForageGrower-X1A.pdf** was a print advertisement that appeared in the April, May and June 2012 editions of *Progressive Forage Grower* magazine; and
d. **F100-22333-1_Stallion_PrintAd_Sunflower-X1A.pdf** was a print advertisement that appeared in the March and April 2012 editions of *The Sunflower* magazine.

Convery Declaration at ¶¶ 8 and 10; CX25 at EPA 0681- EPA 0682; CX27 at EPA 0755-EPA 0756; *See also* Convery Declaration at ¶ 14; CX29 (describing direct mailers as "advertisements" in its July 21, 2015 response).

This conduct suggests that Respondent did not believe at the time that it 'cast too broad of a net' in responding to EPA's Information Request letters, and Complainant wholly rejects Respondent's contentions that it should have instead "unilaterally defined EPA's terms and fought production" or that it is being unfairly "punished" for cooperating with EPA's compliance investigation – *rather than for its own violative conduct*. Respondent's Opposition at 10-11.

Respondent's defenses do not bar entry of a judgement for Complainant. Respondent's Opposition raises for the first time affirmative defenses on due process/First Amendment/fair notice grounds in regard to EPA's failure to define the terms "advertisement" and "advertising." Respondent's Opposition at 11-13. Respondent's defense(s) were not timely raised and should be denied on procedural grounds. As the Consolidated Rule of Practice require Respondent in its Answer to state "[t]he circumstances or arguments which are alleged to constitute the grounds of any defense," Respondent waived such defenses by failing to raise them in its Answer or Pre-Hearing Exchange, or to move to amend its Answer to include them. 40 C.F.R. § 22.15(b). *J. Phillip Adams*, 13 E.A.D. 310, 326 n. 19 (EAB 2007) ("Although the Federal Rules do not themselves clearly address the question of waiver, the courts have found that because the rules are clear in terms of when defenses must be asserted, courts have the authority to treat untimely

defenses as waived."); *In re Lazarus, Inc.*, 7 E.A.D. 318, 331 (EAB 1997) ("The general rule is that failure to include an [affirmative] defense in the answer constitutes a waiver of that defense" (citing *Charpentier v. Godsil*, 937 F.2d 859, 863 (3d Cir. 1991) and *Simon v. United States*, 891 F.2d 1154, 1157 (5th Cir. 1990))).

Respondent's due process/First Amendment/fair notice defenses should fail on substantive grounds as well. EPA's 40 C.F.R. § 152.168 advertising regulations have been promulgated in their current form since May 4, 1988. 53 Fed. Reg. 15986 (May 4, 1988). Though the regulations do not include a definition of "advertisement," the term itself is a not a technical term or a term of art and its general meaning and ubiquitous manifestations are so widely understood and recognized that Respondent should have been easily able to understand the conduct that was prohibited, particularly with respect to its direct mailers and magazine print ads (i.e., violations 1-12,271 of the Complaint). To the extent Respondent had any uncertainty about the applicability of EPA's 40 C.F.R. § 152.168 regulation as to its advertising activities, it had over 25 years to inquire and seek clarification from the Agency. Indeed, Respondent was put on further notice of EPA's interpretation of "advertisements" and "advertising" on May 14, 2010 (*i.e.*, well before the first advertising violation alleged in the Complaint), the date on which EPA filed a complaint against *Liphatech, Inc.*, for similar advertising violations of Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E). *See In re Liphatech, Inc.*, Docket No.: FIFRA-05-2010-0016, 2014 EPA ALJ LEXIS 12 (ALJ, March 12, 2014).

Moreover, Respondent's "adequate notice" argument is specious and belied by its own history. Respondent's Opposition at 12-13. A review of the materials submitted as part of FMC's July 18, 2013 response, as well as publically accessible advertisements for other FMC RUPs, show that FMC clearly considered the very same type of direct mail and print

"communications" as those at issue in violations 1-12,271 of the Complaint to be regulated "advertisements"[3].

B. There Are No Genuine Issues of Material Fact and Complainant is Entitled to Judgement as a Matter of Law Finding that Respondent Did Not Include the RUP Classification in its Direct Mail, Print and Website Materials

Respondent's Opposition raises no issues of fact concerning whether its direct mail, print and website materials included the required RUP classification. Respondent essentially reprises and expands the *legal* argument included in its prehearing exchange that it constructively complied with 40 C.F.R. § 152.168 . . . because all its "communications contained 'a statement of' the restricted use classification by referring the reader to the product label." Respondent's Opposition at 14. *See also* Respondent's PHE at 19. As previously argued by Complainant, this argument is without merit and should be dismissed on the same grounds as the Chief Administrative Law Judge did in the *Liphatech* case. *In re Liphatech, Inc*., Docket No.: FIFRA-05-2010-0016, 2011 EPA ALJ LEXIS 5, at *27-31 (ALJ, May 6, 2011) (Order on Motions for Accelerated Decision Regarding Alleged Violations of FIFRA § 12(A)(2)(E)), *See* Complainant's Memo at 27-29; Complainant's Rebuttal PHE at 4-5. Respondent argues that Complainant's reliance on this case is misplaced because some of the advertisements at issue

[3] *See e.g.,* CX25 at EPA 0697 and EPA 0699 (2013 print ads, "Stallion is a restricted use pesticide" along left-hand side of page); EPA 0706-EPA 0707 and EPA 0708-EPA 0709 (2013 direct mailers, "Stallion is a restricted use pesticide" on back side along bottom). *See also* http://mydigimag.rrd.com/publication/?i=141748 (January 2013 issue of *Citrus and Vegetable* Magazine, page 24, "Mustang, Chariot, and Gladiator are restricted use pesticides" along right-hand side of page); http://mydigimag.rrd.com/publication/?i=200828 (March 2014 issue of *Citrus and Vegetable* Magazine, page 5, "Mustang is a restricted use pesticide" along right-hand side of page); http://www.progressiveforage.com/digital_edition/2013/02/ (February 1, 2013 issue of *Progressive Forage Grower* magazine, page 12, "Stallion is a restricted use pesticide" along left-hand side of page); http://soygrowers.com/wp-content/uploads/2013/01/americansoybean_fall2013_fnl_web.pdf (Fall 2013 issue of American Soybean, page 2, "Hero Insecticide and Capture LFR are restricted use pesticides" along bottom of page). Note: for convenience, print copies from these websites are attached (Attachment 1).

were radio broadcasts in which the audio references to the label (on which was included the RUP statement) were "fleeting." Respondent's Opposition at 14. However, Complainant notes that the regulatory required language is virtually identical for printed materials as for broadcast advertising:

> 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 of the spoken words "*Restricted use pesticide* [sic]," or a *statement of the terms of restriction*. 40 C.F.R. § 152.168(c) (emph. added).

Therefore the *Liphatech* analysis is clearly applicable to the instant facts despite the different advertising media at issue. Moreover, even assuming, *arguendo*, that Respondent did constructively comply by "cross-referencing," Complainant contends that the miniscule font size of its "cross-reference" is analogous to the "fleeting" references in Liphatech's radio advertisements.

C. There Are No Genuine Issues of Material Fact and Complainant is Entitled to Judgement as a Matter of Law Finding that Respondent Committed 12,273 Individual Acts of Advertising

Contrary to Respondent's assertion, there is no dispute as to the material facts for determining the number of violations of Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), alleged in the Complaint. Section V.F. of Complainant's Memo sets forth facts in the record showing that Respondent caused the following acts of advertising: 9,645 direct mailers sent to individual farm/grower consumers, 2,622 direct mailers sent to individual retail purchasers, ads printed in three (3) issues of *Progressive Forage Grower* magazine, an advertisement printed in a single issue of *The Sunflower* magazine, a testimonial sell sheet posted on Respondent's website on the product's webpage, and an article posted on the *PRWeb* online news distribution and publicity website. Complainant's Memo at 31-37. These are the facts that are material to

Complainant's legal position as to the number of advertising violations, and Respondent has raised no genuine issue with respect to any of these facts.

Alternatively, Respondent posits based on these same undisputed facts (assuming advertising is proved) that there are only *four* violations: "one violation for FMC's decision to cause the Stomp Plate to be included in periodicals, one violation for FMC's decision to cause the Stomp Plate to be included in the direct mailer, and two violations associated with FMC's decision to cause the two website communications to be posted." Respondent's Opposition at 4. Other than to assert that all of its direct mail and magazine advertisements "involve[d] a single design "plate" . . . that displayed a horseshoe imprint on soil and stated "stomp more" insects (the "Stomp Plate")," Respondent provides no statutory basis or argument for its legal position on the number of violations. Respondent's Opposition at 1.

Section V.E. of Complainant's Memo describes how FIFRA's statutory provisions, purpose and recent case law[4] indicate that the 'unit of violation' under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), ought to be based on each individual act of advertising. Complainant's Memo at 29-30. Not only does Respondent's position miss the mark as to the relevant act that determines the unit of violation Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), which is *to advertise*, it is wholly inconsistent with the consumer protection goals of FIFRA's advertising provisions as it would permit 12,267 individual acts of violative advertising through direct mail –

[4] In a similar case involving violative radio and magazine advertisements, the Respondent proposed basing the "unit of violation" under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), on the number of different radio stations and publications that contained or aired the advertisement (i.e., 10), the failure to include RUP language in advertising generally (i.e., 1), the number of versions of violative radio and print ads (i.e., 6), the number of States the violative advertisements were broadcast or distributed (i.e., 6), and the medium the advertisement was run (i.e., 2) but the Chief Administrative Law Judge found "no indication in the statutory language that unlawful advertisements should be grouped on anything less than a per advertisement basis." *Liphatech,* 2014 EPA ALJ LEXIS at *220.

each failing to state the pesticide product's RUP classification and thus communicate the risks and limitations inherent with its purchase and use to potential purchasers – to be penalized as a single decision[5]. Though Complainant disagrees with Respondent's creative construction as to the number advertising violations, the facts on which this number of violations is based are not in dispute.

Respondent accuses Complainant of "inexplicably ignor[ing] facts already in the record about returned and duplicative direct mailers." Respondent's Opposition at 4. Complainant asserts that these facts have been thoroughly considered and simply found to be irrelevant to its legal position as to the number of advertising violations for *purposes of liability*, which is based on the number of individual acts of advertising (i.e., the number of instances Respondent caused a direct mailer to be sent to an individual farm/grower consumer (i.e., 9,645) or an individual retail purchaser (i.e., 2,622)). Complainant's Memo at 31-35. Though Complainant maintains that liability attached at the time each direct mailer was sent, it notes that the direct mailers Respondent represents as being "returned" (as reflected in Rx061, and referenced in Rx076) have been specifically excluded for *purposes of penalty*. Complainant's Rebuttal PHE at 10. Respondent represents that "after removing mailers that were sent to one or more individuals associated with the same agricultural farm and returned direct mailers," there were 6,379 intended agricultural farm recipients; and that "after removing direct mailers that were sent to one or more individuals associated with the same retailer as well as returned direct mailers,"

[5] In addressing this very issue, the Chief Administrative Law Judge in *Liphatech* noted "[i]f this tribunal were to find that each advertisement did not constitute a separate violation of FIFRA section 12(a)(2)(E), that interpretation would not deter a party who unlawfully advertises a registered pesticide once from continuing to publish or broadcast the unlawful advertisement as many times as it desires because the penalty would remain the same." *Liphatech*, 2014 EPA ALJ LEXIS at *251

there were 346 intended retailer recipients, and refers to the removed mailers as "duplicates[6]." Respondent's Opposition at 4-5. After completing this exercise, however, Respondent provides no statutory basis or legal argument for using only this subset of violative mailers to determine the number of advertising violations and thus also appears to "ignore" these facts about returned and duplicative direct mailers. Complainant submits that to the extent this subset of violative mailers have any relevance, it would be for purposes of penalty only, not liability.

As Complainant does not dispute Respondent's factual representations described above, there is no need to call its expert witness Mr. George Orme "to offer testimony on the reduction in numbers due to the returned and duplicate mailers." Respondent's Opposition at 5; Orme Declaration at ¶8. Likewise, there is no need for this Court to consider Respondent's expert's proposed testimony "about the other factors that typically are taken into account, such as mail that is not delivered, mail that is not read, and the different ways that mail is read or potentially

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[6] As noted in its Rebuttal Prehearing Exchange, Complainant finds Respondent's use of the term "duplicates" to be both erroneous and misleading. *See* Rebuttal PHE at 2. Respondent identifies as "duplicates" mailers sent to all individuals, beyond the first individual, that are associated with the same agricultural farm or the same retailer (i.e., the names of the individuals whose names have been shaded in grey or yellow on the "Retailer List" in Tab A and "Grower List" in Tab C" in RX061.) In counting only the mailer sent to the first individual associated with a grower or retailer regardless of how many mailers were actually sent, Respondent is essentially counting the number of growers and retailers.

By way of example, Respondent would identify as duplicates and remove the three (3) direct mailers sent to: Moe Smith associated with Red Grower Farm, Jack Doe associated with Red Grower Farm, and Alice Doe associated with Green Retailer in the table below notwithstanding the fact that direct mailers that failing to state the pesticide product's RUP classification were sent to all six (6) potential purchasers:

	COMPANY_NAME	FIRST_NAME	LAST_NAME
1	Red Grower Farm	Many	Jones
2	Red Grower Farm	Moe	Smith
3	Red Grower Farm	Jack	Doe
4	Blue Retailer	Bob	Smith
5	Green Retailer	Ted	Jones
6	Green Retailer	Alice	Doe

used" as such testimony does not bear on any genuine issue of material fact under either party's theory of liability[7]. Respondent's Opposition at 5; Orme Declaration at ¶8.

Though Respondent asserts that the number of violations alleged by EPA is "internally inconsistent, unreasonable, arbitrary and capricious," Sections V.E. and F. of Complainant's Memo clearly show that the number of violations alleged in the Complaint is consistent with applicable law and policies, and directly corresponds with the evidence. Respondent's Opposition at 3; Complainant's Memo at 29-37. It is well settled that the number of violation with which an agency chooses to charge a Respondent in a particular matter is within its prosecutorial discretion. *See Martex Farms, S.E.*, 13 E.A.D. 464, 488 (EAB 2008) (citing *B&R Oil Co.*, 8 E.A.D. 39, 51 (EAB 1998) ('[C]ourts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against who, to undertake enforcement action.")) Here, Complainant exercised prosecutorial discretion in alleging the number of violations for the magazine advertisements based on the particular issues of *Progressive Forage Grower* and *The Sunflower* magazines and not the individual copies of each issue that were likely circulated to subscribers[8]. Despite any perceived "internal inconsistencies" by Respondent, the number of violations alleged in the Complaint for Respondent's direct mailers advertisements is consistent with applicable law and policies; directly corresponds with the

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[7] As discussed in Section V. F. of Complainant's Memo, Complainant maintains that liability under Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), attached at the time each direct mailer was sent (i.e., the time it committed the unlawful act). Complainant's Memo at 31-37. Though arguably possibly relevant for purposes of penalty, expert testimony as to the rate direct mail is generally delivered, read or used is not probative to the determination of liability, and hence, irrelevant to Complainant's Motion.

[8] According to https://lists.nextmark.com/market;jsessionid=1B3716C365F97DEB13FD6FF969EF4F1A?page=order/online/ datacard&id=308822, *Progressive Forage Grower* magazine has over 37,000 subscribers, consisting of farmers, hay and silage producers, alfalfa growers, and mid-level managers that plant, manage, and harvest a variety of grasses, silage, and hay products for livestock feed. According to https://www.sunflowernsa.com/magazine/Advertising/, *The Sunflower* magazine goes to over 20,000 readers, 92% of which are sunflower growers.

evidence, taking into account the volume, breadth and uniquely direct and personalized nature of the direct mailer advertisements; and is within Complainant's prosecutorial discretion.

IV. Conclusion

Respondent has not satisfied its burden under the Consolidated Rules of Practice to defeat Complainant's fully supported Motion for Partial Accelerated Decision because it failed to identify any facts that are in dispute – or substantially controverted – regarding the violations of Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), alleged in the Complaint.

As explained in Complainant's Memo and herein, the facts are undisputed as to the elements Complainant must prove as part of its *prima facie* case for the alleged advertising violations. There is no factual dispute – only a legal dispute – whether Respondent's direct mail, print, and website materials constitute "advertisements" within the meaning of Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), and 40 C.F.R. § 152.168. Similarly, there is no factual dispute that each of Respondent's direct mail, print, and website material failed to bear "Restricted Use Pesticide" or a statement of the terms of restriction, only a legal dispute as to whether such materials otherwise complied with the requirements of 40 C.F.R. § 152.168 and Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E).

There is also no factual dispute as to the number of individual acts of advertising – even as to the direct mailers, which are based on Respondent's own statements and documentation. As matter of law, this Court should find that Respondent violated Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), by illegally "advertising" its restricted use pesticide *F9047-2 EC Insecticide* EPA Reg. No. 279-9545 on 12,273 occasions. To the extent any consideration is given to the number of so-called "duplicate" or returned mailers, it should be deferred to the penalty phase of this matter as such facts do not in any way bear on liability.

The issues before this Court are clearly questions of law appropriate for accelerated decision. Convening a liability hearing on these issues would elicit no material facts and would unnecessarily expend the resources of this Court and the parties.

For the foregoing reasons, Complainant is entitled to judgement as a matter of law and seeks an Order granting partial accelerated decision in its favor, in full or in part, as to liability for the 12,273 violations of Section 12(a)(2)(E) of FIFRA, 7 U.S.C. § 136j(a)(2)(E), alleged in the Complaint.

Respectfully submitted,

SEP 16 2016

DATED: _____

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Counsel for Complainant

ATTACHMENT 1

UF breeder takes local approach to lettuce development

Consolidated citrus BMPs remain flexible

Foliar, soil fertility programs help fight HLB in grove

CITRUS+ VEGETABLE

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PROFITABLE STRATEGIES FOR FLORIDA GROWERS

New viruses crop up in tomato, pepper fields

ALL-SEASON CITRUS SOLUTIONS.

INSECTS ★ MITES ★ BROADLEAF WEEDS

MUSTANG® INSECTICIDE

The economical standard for superior control of Asian citrus psyllid with low volume application flexibility.

CHARIOT® INSECTICIDE

For powerful knockdown and long-lasting protection, Chariot™ insecticide provides another economical solution for controlling Asian citrus psyllid and other key citrus insect pests.

Aim® EC HERBICIDE

Take control of broadleaf weeds with the herbicide that's perfect when glyphosate just isn't enough. It acts fast on a wide range of broadleaf weeds such as dayflower, balsamapple and morningglory.

GLADIATOR®

Introducing a new, uniquely formulated, all-season insecticide/miticide. For quick knockdown of nymph and adult Asian citrus psyllids, leafminers and citrus rust mites.

FIND OUT MORE ABOUT HOW TO CHOOSE THE RIGHT PROTECTION FOR YOUR CITRUS CROP. TALK WITH YOUR FMC STAR RETAILER, CALL 888-69-FMC-AG OR VISIT FMCCROP.COM

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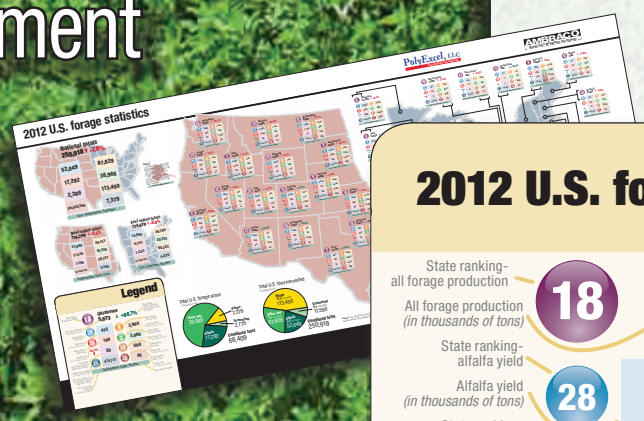
February 1, 2013 | VOL. 14 ISSUE 2

Yield and profit potential

Effective alfalfa management practices are vital. PG. 5



Plus

Dollars to density

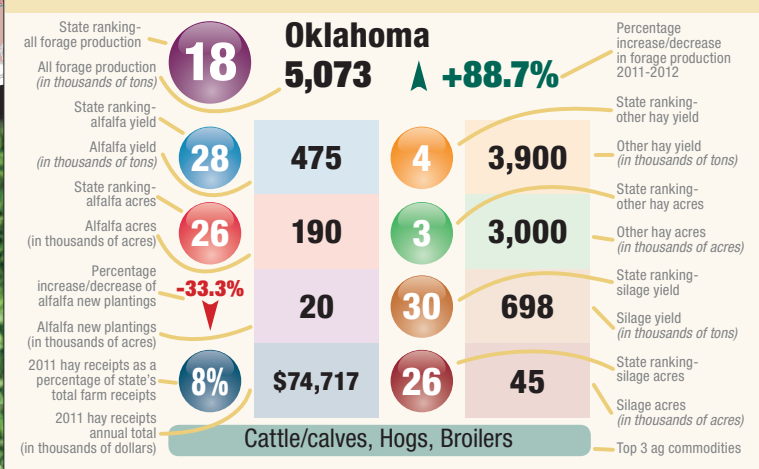
Substantial monetary gains are possible when silage packing densities are improved. PG. 24

Graze among the trees

Silvopasture requires a successful integration and knowledge of both pastures and woods. PG. 30

Find your free copy of this 6-page, pull-out forage stats poster in the center of this issue.

2012 U.S. forage statistics inside!



Aim for the moon, cont'd from page 9

night and left the hay tinder-box dry. One of the growers who understood alfalfa hay arrived on the scene early one morning to find that his custom harvesting crew had baled all night in too-dry conditions. He fired them on the spot. "But we have to bale every night to keep up," was the excuse. The grower countered that they had just turned early-cut, high-test dairy alfalfa into junk feeder hay.

There are times custom operators are available who will do a quality harvesting job, and there are times they are not. This is a consideration to make when looking at the purchase of haying machinery. This is a heartbreaker for someone just getting into the hay-growing business. If custom operators are not willing to take the time to make your hay top-quality, there is another option. That is to sell it either standing or in the windrow. This option usually is less lucrative than having a whole stack of super-premium hay to sell, but you do not take the risk of too-dry baling conditions or of a rainstorm reducing the quality of your hay. In most areas, this option is available either with or without a "rain" clause. Rain insurance is also available, at least in central Washington State. This cuts down on the sales of Tums and Rolaids during the hay-making time of the year.

In "aiming for the moon" as to hay quality, it helps to understand what the markets are for premium hay of the kind you grow. This can be a moving target, and it can be a case of "in the eye of the beholder." If the top-dollar hay in your area goes to a dairy, a feed store, an exporter or to a feedlot, ask those people what they want. It may surprise you to learn that with corn and soybean prices going up, feedlot operators will gladly pay more for hay higher in protein than hay that is just a roughage filler. To hit a target, you need to know where the target is and its distance from you.

Every person I have ever known who is involved in any way with buying hay will take the time to answer one question from any hay grower. That question is, "What do I need to do to make my hay worth more money?" Then listen to the answers, don't make excuses, don't get mad and try not to argue too much.

My answers to the above question over the years have been some of these:

- "Your hay needs to be more uniform. In the same stack, you have premium and feeder hay and everything in between."

- "When you think your hay is ready to bale, go fishing for a day or two instead. You are baling it with too much stem moisture."

- "You need to cut it by the maturity of the plant and not by the number of days since the last cutting. If the weather is 105 degrees and windy, the alfalfa will mature faster than in cool weather."

- "You need to watch the dew moisture closer at baling so you get the leaves inside the bale – and even better, all still attached to the stem. If the stems are dry, you can bale at a higher total moisture than if you are trying to bale with stem moisture."

- "You need to improve your stack yards or hay barns. Elevate the base of the stack area and cover it with coarse drain rock. That will keep most of the bottom bales dry most of the time. Hay trucks need to be able to get in and out of your hay storage area most of the year."

I fully realize that neither you nor I can control the weather. I fully realize there are times when you must bale too wet or too dry. I hope you don't ever need to bale too wet and too dry at the same time; if you do, fire insurance would be a better buy than rain insurance. There is a reason why the "5 percent" hay is only that small a percentage of all production. I have a gut feeling that if more growers understood what it took to make the "5 percent" hay, there could easily be more of it. **FG**

> "I have a gut feeling that if more growers understood what it took to make the '5 percent' hay, there could easily be more of it."

FALL 2013

AMERICAN soybean

Vol.1, No.2

People. Policy. Profitability.

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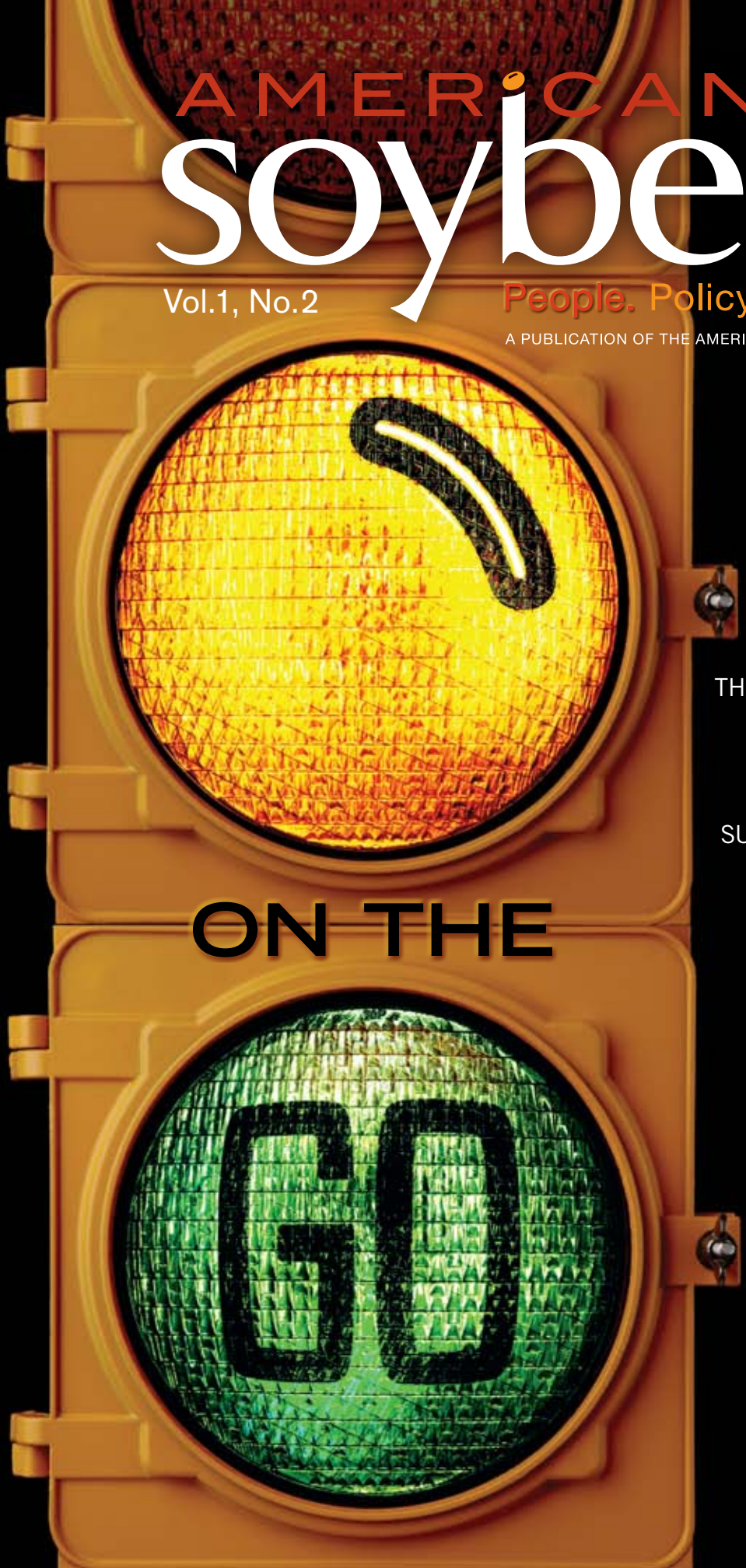

ON THE

THE ROAD TO RECOVERY
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Making Ownership Transition Easier

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Senate Agriculture Committee Chair Debbie Stabenow

SOY FORWARD
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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTATOR

In the Matter of:	)	Docket No.: FIFRA-03-2015-0248
	)	
FMC Corporation,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that, on the date below, copies of COMPLAINANT'S REPLY TO RESPONDENT FMC CORPORATION'S OPPOSITION TO COMPLAIANT'S MOTION FOR PARTIAL ACCELERATED DECISION AS TO LIABILITY FOR VIOLATIONS 1 THROUGH 12,273 OF THE COMPLAINT were served upon the persons listed in the manner indicated.

Original and one copy via the OALJ E-filing System

Sybil Anderson, Headquarters Hearing Clerk

One copy via the OALJ E-filing System

Christine Coughlin, Administrative Law Judge

One copy via UPS Next Day Air

Kathryn E. Szmuszkovicz
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Beveridge & Diamond PC
1350 I Street, N.W., Suite 700
Washington, DC 20005-3311

SEP 16 2016

Date

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U.S. EPA, Region III