

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR



IN THE MATTER OF )  
 )  
BEHNKE LUBRICANTS INC. ) DOCKET NO. FIFRA-05-2007-0025  
 )  
 )  
RESPONDENT )

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ADMINISTRATIVE

PREHEARING ORDER

As you previously have been notified, I have been designated by the June 27, 2007 Order of the Chief Administrative Law Judge to preside in the above captioned matter.<sup>1/</sup> This proceeding arises under the authority of Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), as amended, 7 U.S.C. § 1361(a), and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-.32. The parties are advised to familiarize themselves with both the applicable statute(s) and the Rules of Practice.

United States Environmental Protection Agency ("EPA") policy, found in the Rules of Practice at Section 22.18(b), 40 C.F.R. § 22.18(b), encourages settlement of a proceeding without the necessity of a formal hearing. The benefits of a negotiated settlement may far outweigh the uncertainty, time, and expense associated with a litigated proceeding.

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<sup>1/</sup> In response to an inquiry from this office, Complainant declined to participate in the Alternate Dispute Resolution ("ADR") process offered by this office. Respondent did not respond to the inquiry, which is deemed to be a declination of its participation in ADR.

There is no indication in the file that settlement discussions have been held in this matter.<sup>2/</sup> The parties are directed to hold a settlement conference on this matter on or before **August 17, 2007**, to attempt to reach an amicable resolution of this matter. See Section 22.4(c)(8) of the Rules of Practice, 40 C.F.R. § 22.4(c)(8). Complainant shall file a status report regarding such conference and the status of settlement on or before **August 31, 2007**.

In the event that the parties fail to reach a settlement by that date, they shall strictly comply with the requirements of this order and prepare for a hearing. The parties are advised that extensions of time will not be granted absent a showing of good cause. See Section 22.7(b) of the Rules of Practice, 40 C.F.R. § 22.7(b). The pursuit of settlement negotiations or an averment that a settlement in principle has been reached will not constitute good cause for failure to comply with the prehearing requirements or to meet the schedule set forth in this Prehearing Order. Of course, the parties are encouraged to initiate or continue to engage in settlement discussions during and after preparation of their prehearing exchange.

The following requirements of this Order concerning prehearing exchange information are authorized by Section 22.19(a) of the Rules of Practice, 40 C.F.R. § 22.19(a). As such, it is directed that the following prehearing exchange takes place:

1. Each party shall submit:
  - (a) the names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of each witness's expected testimony, or a statement that no witnesses will be called; and
  - (b) copies of all documents and exhibits which each party intends to introduce into evidence at the hearing. The exhibits should include a curriculum vitae or resume for each proposed expert witness. If photographs are submitted, the photographs must be actual unretouched photographs. The documents and exhibits shall be identified as "Complainant's" or "Respondent's" exhibit, as appropriate, and

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<sup>2/</sup> Complainant filed a Notice of Complainant's Request for Voluntary Production of Information on June 21, 2007.

numbered with Arabic numerals (e.g., "Complainant's Exhibit 1"); and

- (c) a statement expressing its view as to the place for the hearing and the estimated amount of time needed to present its direct case. In the Complaint, Complainant alleges that Respondent is a Wisconsin corporation located in Menomonee Falls, Wisconsin. Complaint at ¶ 3. In its Answer, Respondent admits that it is a Wisconsin corporation located in Menomonee Falls, Wisconsin. Answer at ¶ 3. In accordance with the Supplemental Rules Governing the Administrative Assessment of Civil Penalties Under the Federal Insecticide, Fungicide, and Rodenticide Act, 40 C.F.R. § 22.35(b), the hearing shall be held in the county, parish, or incorporated city of the residence of the Respondent, unless otherwise agreed in writing by all parties. Thus, Respondent should state whether it wishes the hearing to be held in Menomonee Falls, Wisconsin or Milwaukee, Wisconsin, and/or otherwise the parties should designate the city as the place of hearing of this matter.

See Sections 22.19(a), (b), (d) of the Rules of Practice, 40 C.F.R. §§ 22.19(a), (b), (d); see also Section 22.21(d) of the Rules of Practice, 40 C.F.R. § 22.21(d).

2. Complainant shall submit a statement explaining in detail how the proposed penalty was determined, including a description of how the specific provisions of any Agency penalty or enforcement policies and/or guidelines were applied in calculating the penalty.
3. Respondent shall submit a statement explaining why the proposed penalty should be reduced or eliminated. If the Respondent intends to take the position that it is unable to pay the proposed penalty or that payment will have an adverse effect on its ability to continue to do business, Respondent shall furnish supporting documentation such as certified copies of financial statements or tax returns.
4. Complainant shall submit a statement regarding whether the Paperwork Reduction Act of 1980 ("PRA"), 44 U.S.C. §§ 3501 et seq., applies to this proceeding, whether there is a current Office of Management and Budget control number involved herein and whether the provisions of Section 3512 of the PRA are applicable in this case.

See Section 22.19(a)(3) of the Rules of Practice, 40 C.F.R. § 22.19(a)(3).

The prehearing exchange delineated above shall be filed in *seriatim* manner, according to the following schedule:

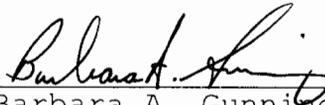
- October 12, 2007 - Complainant's Initial Prehearing Exchange
- November 12, 2007 - Respondent's Prehearing Exchange, including any direct and/or rebuttal evidence
- November 26, 2007 - Complainant's Rebuttal Prehearing Exchange (if necessary)

In its Answer to the Complaint, Respondent exercised its right to request a hearing pursuant to Section 554 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554. If the parties cannot settle with a Consent Agreement and Final Order, a hearing will be held in accordance with Section 556 of the APA, 5 U.S.C. § 556. Section 556(d) of the APA provides that a party is entitled to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Thus, Respondent has the right to defend itself against Complainant's charges by way of direct evidence, rebuttal evidence, or through cross-examination of Complainant's witnesses. Respondent is entitled to elect any or all three means to pursue its defense. If Respondent elects only to conduct cross-examination of Complainant's witnesses and to forgo the presentation of direct and/or rebuttal evidence, Respondent shall serve a statement to that effect on or before the date for filing its prehearing exchange. Each party is hereby reminded that failure to comply with the prehearing exchange requirements set forth herein, including a Respondent's statement of election only to conduct cross-examination of Complainant's witnesses, can result in the entry of a default judgment against the defaulting party. See Section 22.17 of the Rules of Practice, 40 C.F.R. § 22.17.

The original and one copy of all pleadings, statements and documents (with any attachments) required or permitted to be filed in this Order (including a ratified Consent Agreement and Final Order) shall be filed with the Regional Hearing Clerk, and copies (with any attachments) shall be sent to the undersigned and all

other parties. The parties are advised that E-mail correspondence with the Administrative Law Judge is not authorized. See Section 22.5(a) of the Rules of Practice, 40 C.F.R. § 22.5(a). The prehearing exchange information required by this Order to be sent to the Presiding Judge, as well as any other further pleadings, shall be addressed as follows:

Judge Barbara A. Gunning  
Office of Administrative Law Judges  
U.S. Environmental Protection Agency  
Mail Code 1900L  
1200 Pennsylvania Ave., NW  
Washington, DC 20460-2001  
Telephone: 202-564-6281

  
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Barbara A. Gunning  
Administrative Law Judge

Dated: June 27, 2007  
Washington, DC

**In the Matter of Behnke Lubricants, Inc., Respondent.  
Docket No. FIFRA-05-2007-0025**

CERTIFICATE OF SERVICE

I certify that the foregoing **Prehearing Order**, dated June 27, 2007, was sent this day in the following manner to the addressees listed below.



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Mary Angeles  
Legal Staff Assistant

Original and One Copy by Pouch Mail to:

Sonja Brooks-Woodard  
Regional Hearing Clerk  
U.S. EPA, Region V, MC-13J  
77 West Jackson Blvd., 13<sup>th</sup> Floor  
Chicago, IL 60604-3590

Copy by Pouch Mail to:

Nidhi O'Meara, Esq.  
James J. Cha, Esq.  
Associate Regional Counsel  
U.S. EPA, Region V, C-14J  
77 West Jackson Blvd., 13<sup>th</sup> Floor  
Chicago, IL 60604-3590

Copy by Regular Mail to:

Bruce A. McInay, Esq.  
Linda S. Isnard, Esq.  
Elizabeth M. Roat, Esq.  
McInay & Button, Ltd.  
1150 Washington Street  
Grafton, WI 53024

**Dated: June 27, 2007  
Washington, D.C.**

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U.S. EPA REGION V  
CHICAGO, IL