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Regular Highlight: Non-Confidential Enforcement:

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Administrative Law Judge Gunning Issues an Initial Decision on In the Matter of Behnke Lubricants, Inc and The Decision Will Not Be Appealed

On December 30, 2008, Judge Gunning of the Office of Administrative Judges issued an initial decision (43 pages) in In the Matter of Behnke Lubricants, Inc., FIFRA-05-2007-0025.

BACKGROUND:

On August 3, 2006, the Wisconsin Department of Agriculture conducted an inspection at Behnke Lubricants, Inc. (Behnke) Menomonee Falls, Wisconsin facility. During that inspection and numerous subsequent internet and customer site investigations, U.S. EPA, Region 5 found that Behnke sold or distributed five different unregistered pesticides, which were lubricants, on at least 11 different occasions, in violation of FIFRA. Behnke's labeling, advertising and marketing claims included public health pesticide claims.

AT HEARING:

On March 31, 2008, after extensive pretrial motions and briefings, a four day hearing on this matter commenced before Judge Gunning in Waukesha County, Wisconsin.

Respondent's basic defense was that the lubricants fell under the "on or in processed foods" exemption set forth in 40 CFR 152.5(d) and therefore were not subject to EPA's jurisdiction under FIFRA. Respondent also argued that the lubricants were already regulated by the FDA, therefore EPA could not regulate the lubricants.

THE DECISION:

Judge Gunning found Respondent to be in violation of FIFRA and its implementing regulations for all 11 counts alleged in the Complaint. Further, she ordered Respondent to pay a penalty in the amount of \$55,055, which is above our initial penalty demand of \$50,050.

HIGHLIGHTS:

Judge Gunning found that Behnke's products were required to be registered under FIFRA. She further found that Behnke's use of the word "Micronox" in describing the pesticidal technology placed into the lubricants clearly implied that the products were pesticides. She rejected Respondent's numerous defenses including:

- the definition of "antimicrobial pesticide" found in Section 2(mm) of FIFRA exempted Behnke's lubricants from FIFRA requirements,
- the lubricants are exempt from FIFRA because they are already covered by the FFDCAs,
- the lubricants are "food" thus exempting them from FIFRA,
- the lubricants fall under the "treated articles" exemption and
- the lubricants fall under the "on or in processed foods" exemption under 40 CFR 152.5(d).

Further, Judge Gunning increased the penalty above Region 5's penalty demand because she increased the culpability value from the "2" to "4" based on the ERP. At trial, EPA's witness, Mr. Bonace, testified that based on information he gathered after filing the Complaint, he

believed that a culpability value of "4" was justified rather than "2," which is the value he used when he initially calculated the penalty for the purpose of the Complaint. Additionally, Judge Gunning was struck by the testimony of Behnke's President and found the Respondent's attempts to avoid regulatory responsibility to be unacceptable. Therefore, she recalculated the penalty based on a culpability value of "4." The new penalty calculation amounted to \$64,350 but she decided to cap the increase to 10% of the total proposed penalty, resulting in an assessed penalty of \$55,055.

Benke did not appeal the initial decision, nor did the EAB choose to review the decision on its own initiative.

SIGNIFICANCE:

This case will prove helpful as we move forward throughout the country on future FIFRA enforcement. Judge Gunning clarified a number of issues that have not yet been ruled upon including:

- Section 2(mm) of FIFRA in no way limits FIFRA jurisdiction with regard to antimicrobial pesticides.
- It is entirely possible for both the FDA and EPA to have jurisdiction of the same product under the FFDCA and FIFRA.
- The "on or in processed food" exemption found at 40 CFR 152.5(d) only applies if the pesticide in question is added to the processed food or on the processed food directly.
- She even went so far as to say the Behnke's trade mark name "MICRONOX" (which it used to describe the pesticidal technology in its lubricants) was a pesticidal claim - an issue that the parties disputed over to the very end.

Behnke paid the penalty in full on March 2, 2009.

(Contact: Nidhi O'Meara, primary contact 312/886-0568; Terry Bonance, additional contact 312/886-3387.)

ENFORCEMENT MILESTONE FORM

** provide information as applicable and submit to *Carl Stimson* **

(Revised Feb.16 , 2000)

*****PLEASE ENTER DATA IN EACH BLOCK OR MARK N/A*****

CASE ATTORNEY: Nidhi O'Meara

PHONE: 6-0568

BRANCH: ORC MMB2

PROGRAM CONTACT: Terry Bonace

PHONE: 6-3387

CASE NAME: Behnke Lubricants, Inc.
CASE NAME ON APPEAL:

ORC DOCKET MATTER NO:

EPA Regional Hearing Clerk No.: FIFRA - 05-2007-0025

EPA EAB Clerk No.:

District Court Docket No.:

CASE SUMMARY: Respondent distributed or sold unregistered pesticides on 11 separate occasions.

FACILITY NAME: Same as above

ADDRESS: W134 N5373 Campbell Drive, Menomonee Falls, Wisconsin 53051

ZIP CODE:

PRIMARY NAICS / SIC CODE:

SECTOR:

DEFENDANTS OR RESPONDENTS (if other than case name):

NAMED IN COMPLAINT?

LAW/SECTION (statute and section which *authorize* action – not CFR): Section 14(a) of FIFRA

LAW/SECTION (statute and section *violated* or which provided requirement to be enforced – not CFR): Section 12 of FIFRA

POLLUTANT: pesticide

MULTI-MEDIA ACTION? NO

If yes, reason: M-M Inspection

M M
COMPLAINT

M-M
Settlement

SEP in Other Media

COMMUNITY/GEOGRAPHICALLY BASED INITIATIVE? NO.

If yes, describe:

ENVIRONMENTAL JUSTICE: NO.

If yes: Minority Population Low Income Both Other

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Is this a Self Disclosure? NO

If yes,

What is the disclosure date:

Was the Audit Policy Applied? YES NO

Comments:

Decision: 100% Mitigation through Audit

100% Mitigation through Compliance Management System

75% Gravity Mitigation

0% Gravity Mitigation

Was the Small Business Policy applied? YES NO

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ADMINISTRATIVE COMPLIANCE ORDER

Date of Issuance: None

Date Respondent Met All Order Requirements / Case Closed:

Brief Description of Basis for Closing Case:

XXX ADMINISTRATIVE ORDER FOR PENALTIES ONLY

Proposed Penalty: 50,050

Assessed Penalty: 55,055

Need Dates:

Complaint or Proposed Order Issued: May 7, 2007

Withdrawn/Dismissed:

ALJ Decision: 12/30/09

CACA/Final Order:

Appealed to EAB: None

EAB Decision: N/A

Penalty Paid in Full / Case closed: March 2, 2009

ADMINISTRATIVE ORDER FOR PENALTIES AND SEP OR INJUNCTIVE RELIEF

Proposed Penalty:

Assessed Penalty:

Need Dates:

Compliant or Proposed Order Issued:

ALJ Decision:

CACO/Final Order:

Appealed to EAB:

EAB Decision:

Penalty Paid in Full:

Respondent Met All Order Requirements / Case Closed:

Brief Description of Basis for Closing Case:

******Please make sure that copies of any ALJ or EAB orders awarding a penalty are provided to the program office and to the Comptroller Branch, RMD.***

JUDICIAL CASE

Judge:

Assessed Penalty Amount:

Need Dates

Complaint Filed:

Withdrawn/Returned to Region:

Settlement Lodged:

Consent Decree/Order Entered:

Re-referral:

Referral of Pre-referral Case:

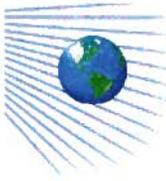
Penalty Paid in Full:

Defendant Met All Order Requirements / Case Closed:

Brief Description of Basis for Closing case:

******Please make sure that copies of any entered, modified, or amended decrees or court orders are provided to the program office and to the Comptroller Branch, RMD.***

Instructions/comments for data analyst...or additional relevant information:



Nidhi Omeara/R5/USEPA/US
08/31/2009 11:05 AM

To Ladawn Whitehead/R5/USEPA/US@EPA
cc
bcc
Subject Re: FIFRA- 05-200/-0025 Behnke Lubricants final war and case closed

Ladawn - No I did not file with the RHC. I am not sure what your process is to close the case out. Yes the penalty was paid in full and the ALJ initial decision is 12/30/09 but the it did not become final until the EAB appeals time lapsed. Thanks NKO

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Ladawn Whitehead/R5/USEPA/US



Ladawn Whitehead/R5/USEPA/US
08/31/2009 10:54 AM

To Nidhi Omeara/R5/USEPA/US@EPA
cc
Subject Re: FIFRA- 05-200/-0025 Behnke Lubricants final war and case closed

Was this document ever filed with the acting RHC to close the case from her records? Also, under Administrative Order For Penalties Only, was the case paid in full on March 2, 2009? And regarding the ALJ Decision there is a date of 12/30/09, is that correct?

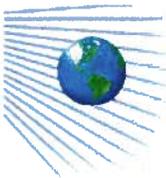
For the RHC database, I need to enter a filing date and a document date, what dates would you advise?

La Dawn Whitehead
Regional Hearing Clerk
Records Management Specialist
U.S. EPA - Region 5 (E-19J)
Office of Enforcement and Compliance Assurance
77 West Jackson Boulevard, Chicago, Illinois 60604-3590
Phone # (312) 886-3713
Fax # (312) 692-2405

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Nidhi Omeara/R5/USEPA/US



Nidhi Omeara/R5/USEPA/US
08/31/2009 06:51 AM

To Ladawn Whitehead/R5/USEPA/US@EPA
cc
Subject Re: FIFRA- 05-200/-0025 Behnke Lubricants final war and case closed

Here is the document I used to close the case out (same as in a CAFO). Thanks NKO

11:14:41 AM 08/31/2009 > Re: FIFRA- 05-200/-0025 Behnke Lubricants final war and ca



Enforcement milestone -final.doc

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Ladawn Whitehead/R5/USEPA/US



Ladawn
Whitehead/R5/USEPA/US

08/20/2009 09:10 AM

To Nidhi Omeara/R5/USEPA/US@EPA

cc

Subject FIFRA- 05-200/-0025 Behnke Lubricants final war and case closed

Hi,

I am told that this case should be closed. I have looked in the files and cannot find any documents stating closure. Perhaps I am looking at the wrong documents. I am familiar with CAFOs closing cases as well as other document but for cases that have gone to court, I am not aware. I need your help in providing me with information that I can understand how a case is closed via going to court.

Let me know when I should come to your office. Thank you.

La Dawn Whitehead
Regional Hearing Clerk
Records Management Specialist
U.S. EPA - Region 5 (E-19J)
Office of Enforcement and Compliance Assurance
77 West Jackson Boulevard, Chicago, Illinois 60604-3590
Phone # (312) 886-3713
Fax # (312) 692-2405

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----- Forwarded by Ladawn Whitehead/R5/USEPA/US on 08/19/2009 04:10 PM -----



Francene
Harris/R5/USEPA/US

08/19/2009 03:22 PM

To Ladawn Whitehead/R5/USEPA/US@EPA

cc

Subject Fw: Behnke Lubricants final war and case closed

This is the case that I was referring to: FIFRA-05-2007-0025

The program has closed it out in ICIS and the attorney has also created a milestone form.

11:14:41 AM08/31/2009> Re: FIFRA- 05-200/-0025 Behnke Lubricants final war and ca

Thanks!

Francene Harris
U.S. EPA-Region 5
Office of Enforcement and Compliance Assurance
(312) 886-3512

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----- Forwarded by Francene Harris/R5/USEPA/US on 08/19/2009 03:23 PM -----

Carl Stimson/R5/USEPA/US
03/17/2009 08:54 AM

To Francene Harris/R5/USEPA/US@EPA

To
cc

bcc

Fax to

Subject Fw: Behnke Lubricants final war and case closed

FYI

Carl K. Stimson
Management/Program Analyst
Office of the Regional Counsel
United States Environmental Protection Agency
Chicago, IL 60604
Region 5
(312)886-3507
Fax: (312) 692-2185
stimson.carl@epa.gov

Hi,

I need your help. I am told that this case is closed, yet I do not have any documentation stating its closure.

----- Forwarded by Carl Stimson/R5/USEPA/US on 03/17/2009 08:54 AM -----

From: Nidhi Omeara/R5/USEPA/US
To: Cheryl Klebenow/R5/USEPA/US@EPA, Carl Stimson/R5/USEPA/US@EPA
Cc: Deborah Garber/R5/USEPA/US@EPA, James Cha/R5/USEPA/US@EPA, Erik Olson/R5/USEPA/US@EPA, Eric Cohen/R5/USEPA/US@EPA, Leverett Nelson/R5/USEPA/US@EPA, Robert Kaplan/R5/USEPA/US@EPA, Mardi Klevs/R5/USEPA/US@EPA, Thomas Crosetto/R5/USEPA/US@EPA, Terence Bonace/R5/USEPA/US@EPA, Nidhi Omeara/R5/USEPA/US@EPA
Date: 03/16/2009 12:01 PM
Subject: Behnke Lubricants final war and case closed

Please see final war and enforcement milestone for this matter. Thanks NKO

11:14:41 AM08/31/2009> Re: FIFRA- 05-200/-0025 Behnke Lubricants final war and ca



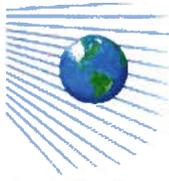
Behnke final war.doc Enforcement milestone -final.doc

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Nidhi Omeara/R5/USEPA/US
08/31/2009 11:05 AM

To Ladawn Whitehead/R5/USEPA/US@EPA
cc
bcc

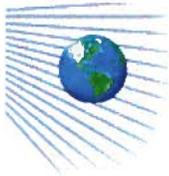
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Subject Fw: Behnke : Appeal status

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----- Forwarded by Nidhi Omeara/R5/USEPA/US on 08/31/2009 11:07 AM -----



Nidhi Omeara/R5/USEPA/US
02/18/2009 10:23 AM

To Deborah Garber/R5/USEPA/US@EPA, James
Cha/R5/USEPA/US@EPA, Erik Olson/R5/USEPA/US@EPA,
Eric Cohen/R5/USEPA/US@EPA, Leverett
Nelson/R5/USEPA/US@EPA, Terence
Bonace/R5/USEPA/US@EPA, Thomas
Crosetto/R5/USEPA/US@EPA
cc Nidhi Omeara/R5/USEPA/US@EPA

Subject Behnke : Appeal status

FYI: According to the Office of the ALJ, Behnke received the decision on January 2, 2009. Behnke has 30 days from the date the initial decision was served to appeal. The EAB can also decide to review the initial decision on its own initiative within 45 days after the initial decision was served on the parties. Apparently, the EAB puts cases up on its active docket during the time frame which the parties can file an appeal and during the time that the EAB can take the matter up sua sponte. Today is the 46th day. I checked the website today and the EAB has removed Behnke off its active docket. Therefore, I think it is safe to say that this case will not be reviewed by the EAB. Thanks NKO

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11:27:43 AM 08/31/2009 Fw: Behnke : Appeal status