

March 13, 2008

VIA FEDERAL EXPRESS

Judge Barbara A. Gunning  
Administrative Law Judge  
US EPA  
Mail Code 1900L  
1200 Pennsylvania Ave., NW  
Washington, DC 20460-2001

Re: *Behnke Lubricants, Inc.*  
*Docket No. FIFRA-05-2007-0025*

Dear Judge Gunning:

Enclosed please find a true and correct copy of Respondent's Second Supplemental Prehearing Exchange.

The original and one copy of Respondent's Second Supplemental Prehearing Exchange were delivered to the Regional Hearing Clerk, Region 5, U.S. EPA via overnight mail on March 13, 2008. A true and accurate copy of same was delivered to Nidhi O'Meara via overnight mail on March 13, 2008.

Kindly acknowledge receipt of the enclosed by date stamping the extra copy of this letter and forwarding same to the undersigned in the envelope provided.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,



Bruce A. McIlnay

BAM/dlp

Enclosures

cc: Regional Hearing Clerk, w/encl. (via federal express)  
Nidhi O'Meara, w/encl. (via federal express)  
Eric Peter, w/encl.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

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In the Matter of:

BEHNKE LUBRICANTS INC.  
MENOMONEE FALLS, WISCONSIN

Docket No. FIFRA-05-2007-0025

Respondent.

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RESPONDENT'S SECOND SUPPLEMENTAL PREHEARING EXCHANGE

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Respondent Behnke Lubricants, Inc., through its undersigned attorneys, McIlnay & Button, Ltd., hereby files the instant Respondent's Second Supplemental Prehearing Exchange pursuant to Section 22.19 of the *Consolidated Rules of Practice Governing the Administrative assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits* (Consolidated Rules), codified at 40 CFR § 22.19.

As the Court noted in its Order Scheduling Hearing dated January 14, 2008 and reiterated in its March 25, 2008 Order Denying Complainant's Motion to Strike, et al., both parties expressly reserved "the right to supplement their prehearing exchange and supplemental prehearing exchange." In this regard, the Court specifically stated that "documents or exhibits that have not been exchanged and witnesses whose names have not been exchanged at least fifteen (15) days before the hearing date [of March 31, 2008] shall not be admitted into evidence or allowed to testify unless good cause is shown for failing to exchange the required information."

In accordance with same, Respondent, therefore, timely makes the following supplemental prehearing exchanges. The additional witnesses and documentary evidence submitted are necessary to make the record in this proceeding complete and accurate, and are relevant to the issues presented in Complainant's Complaint and Respondent's Answer.

**I. Additional Witnesses.**

Respondent hereby supplements its Prehearing Exchange to add the following witnesses:

**A. Mr. James Leroux**  
**377 Rose Street**  
**Otterburn Park, Quebec CN J3H1M6**

Mr. Leroux has more than 30 years experience in Maintenance Management for Molson's Breweries in Montreal, Canada. Mr. Leroux has worked with Respondent's Lubricants at Molson's for the last 20 years. Mr. Leroux currently works for Mosure Machine Company, Mississauga, ON Canada, which is a seller of food processing machinery and related parts, accessories and supplies. In this capacity, Mr. Leroux must be knowledgeable about the lubrication of the equipment he sells, the intended purpose of the lubricants that he sells, and their qualification for use within an environment where they become, or may reasonably be expected to become, a part of the food being processed with the machinery that he sells.

Mr. Leroux' testimony will be relevant to the issues of the intended purpose of Respondent's lubricants, his experience in the use of those lubricants within the beverage and food processing industry and the history and role HACCP safety precautions within the food processing industry after 1999. Mr. Leroux may testify to his understanding that H1 lubricants *must be* used where incidental food contact of the lubricant, as used for its intended purpose, is reasonably foreseeable.

**B. Larry Cooper  
4775 Old Union Church Road  
Holladay, TN 38341**

Mr. Cooper is the present owner of Tri-Cities Supply. Between 1990 and 2006, Mr. Cooper was employed by Pinnacle Foods. For the seven years prior to his leaving Pinnacle, Mr. Cooper served as Mechanic Coordinator. In this position he implemented Respondent's products in coordination with the company's Food Safety Manager.

He may testify as to his first hand experience with Respondent's Lubricants and his implementation of usage of the Lubricants at Pinnacle. He may testify as to the actual use of food grade lubricants within the plant and that when in use the lubricants may become, or may reasonably be expected to become, a component or otherwise affect the characteristics of the food during processing. He may testify that, as a result of usage of Respondent's Lubricants, the bacteria counts in and around bearings was dramatically decreased.

Mr. Leroux and/or Mr. Cooper may be proffered in addition to or in lieu of industry professionals previously identified in Respondent's Initial Prehearing Exchange who are otherwise unavailable for hearing.

**II. Additional Exhibits.**

Respondent hereby supplements its Prehearing Exchange to add the following exhibits:<sup>1</sup>

RX 60 Declaration of Bruce A. McIlnay dated February 4, 2008 and attached exhibits.

RX 61 Declaration of Eric J. Peter dated February 19, 2008.

RX 62 Declaration of Troy F. Paquette dated February 19, 2008 and attached exhibits.

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<sup>1</sup> RX 60-66 have already been disclosed to Complainant in Respondent's response to Complainant's Motion for Accelerated Decision.

RX 63 Declaration of Bill Bayliss dated February 19, 2008.

RX 64 Declaration of William Barden dated February 18, 2008.

RX 65 Declaration of Tracey Huebner dated February 19, 2008 and attached exhibits.

RX 66 Registration Requirements for Antimicrobial Pesticide Products and Other Pesticide Regulatory Changes, 62 Fed. Reg. 50672 (September 17, 1999).

RX 67 Pages 37-40 of NSF International's White book @ listings showing Respondent's products complying with NSF Registration Guidelines (formerly USDA Guidelines for Obtaining Authorization of Compounds to be Used in Meat and Poultry Plants.

In compliance with the Court's Order Granting, in part, and Denying, in part, Complainant's Motion to Compel Discovery dated March 5, 2008, Respondent further supplements its Prehearing Exchange to add the following exhibits:

RX 68 A complete and accurate list of the chemical components of Behnke's Lubricants, by chemical name and C.A.S. number. **[Designated by Respondent as trade secrets or confidential business information pursuant to 7 USC §136h 40 CFR Part 2]**

RX 69 True, accurate and complete copies of all documents that specifically describe the intended uses of Benke's products.

RX70 Photographs of the front and back labels of Listerine Antiseptic.

RX71 Photographs of the front and back labels of Lysol Disinfectant All Purpose Cleaner.

### **III. Supplement Statement Regarding Proposed Penalty.**

In accordance with the Court's March 5, 2008 Order, Respondent makes the following supplemental statement with regard to Complainant's proposed penalties:

In its Initial Prehearing Exchange, Respondent specifically waived any objection to the civil penalties proposed in the Complaint based on its inability to pay the proposed penalty or the effect of the penalty on Respondent's ability to continue in business. Respondent specifically admitted it would be able to pay the proposed penalty and the penalty would not have an adverse

effect on its ability to continue to do business. At hearing in this matter, Respondent intends to challenge the remaining factor in Complainant's calculation of a proposed penalty; namely, "gravity of harm."

Section 14(a) of FIFRA, 7 USC §136l(a), provides the statutory criteria for calculating civil penalties for FIFRA violations. According to Complainant's FIFRA Civil Penalty Calculation Worksheet in this matter (CX 14), it has an assigned "Total Gravity Value Adjustment Value" of 5 to Respondent's purported violations, including a "2" Culpability value. Adding this to the other penalty calculation factors, Complainant reduced the Base Penalty by 30%.

Respondent takes issue with the "2" culpability level assigned by Complainant and maintains it should have been assigned a "0" culpability level. According to Complainant's documents, "culpability" was assigned a value of two "based on unknown culpability of the Respondent with respect to these violations." (CXA 14b: EPA 0344).

A "Level 2" culpability value is placed for "violation resulting from negligence" or "culpability unknown." A "Level 0" culpability, on the other hand, is assigned when "violation was neither knowing nor willful and did not result from negligence." As Respondent does not believe in the first instance its products constitute "pesticides" regulated under the Act, by implication any violation cannot be said to be knowing or willful or result from negligence. Under Complainant's position, ANY violation would automatically result in at least the assignment of a "Level 2" factor.

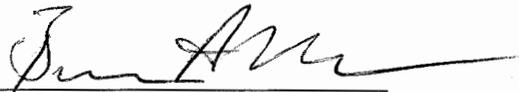
A Total Gravity Value of 3 or below the enforcement remedy is no action, a Notice of Warning or a 50% reduction of matrix value. Under Complainant's assessment of culpability, a Total Gravity Level of 5 resulted in a reduction matrix value of 30 %. The difference between

Complainant's culpability assessment and Respondent's, therefore, is a \$4550 vs. \$3,250/Count penalty or a total of \$50,050 vs. \$35,750. Complainant assigned a weighting factor of 2 (culpability unknown) at the time the Complaint was issued without consideration of the facts in this case and Respondent will argue, based on the testimony of its witnesses at hearing, that any violations were neither "knowing nor willful" or resulting from "negligence," but were based on a good faith belief that its products were not "pesticides" within the meaning of FIFRA.

Respondent's Second Supplemental Prehearing Exchange for *In the Matter of Behnke Lubricants, Inc.*, is hereby respectfully submitted.

Dated: March 13, 2008.

McInay & Button, Ltd.  
Counsel for Behnke

By:   
Bruce A. McInay  
Linda S. Isnard

McInay & Button, Ltd.  
1150 Washington Street  
Grafton, WI 53024  
(262) 376-1287  
(262) 376-1289 (fax)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has caused a true and correct copy of the foregoing RESPONDENT'S SECOND SUPPLEMENTAL PREHEARING EXCHANGE to be served upon the following on the date indicated below by overnight mail:

Regional Hearing Clerk (E-13J) (Original and one copy)  
U.S. Environmental Protection Agency, Region 5  
77 West Jackson Boulevard  
Chicago, IL 60604

Judge Barbara A. Gunning  
Office of the Administrative Law Judges  
U.S. Environmental Protection Agency  
Mail Code 1900L  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460-2001

Nidhi O'Meara (C-14J), Associate Regional Counsel  
U.S. Environmental Protection Agency, Region 5  
77 West Jackson Boulevard  
Chicago, IL 60604

Dated: March 12<sup>th</sup>, 2008

  
Bruce A. McIlroy

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