

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

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

INITIAL DECISION

Pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), as amended, 7 U.S.C. § 136l(a), Respondent Behnke Lubricants, Inc. is assessed a civil administrative penalty of \$55,055 for violations of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A).

Issued: December 30, 2008

Before: Barbara A. Gunning
Administrative Law Judge

Appearances:

For Complainant: Nidhi K. O’Meara
James J. Cha
Erik H. Olson
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago IL 60604

For Respondent: Bruce A. McIlnay
Linda S. Isnard
Joseph F. Kirgues
McIlnay & Button
1150 Washington Street
Grafton, WI 53024

I. PROCEDURAL HISTORY

This civil administrative penalty action arises under the authority of Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), as amended, 7 U.S.C. § 136l(a). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (“Consolidated Rules”), 40 C.F.R. part 22.

On May 7, 2007, Complainant United States Environmental Protection Agency (“the EPA”), Region V (“Complainant” or “the Region”), filed an eleven-count Complaint and Notice of Opportunity for Hearing (“Complaint”) against Behnke Lubricants, Inc. (“Respondent” or “Behnke”) pursuant to Section 14(a) of FIFRA. The Complaint alleges that on eleven different occasions, Respondent distributed, offered for sale, or sold various unregistered pesticides in violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A). The Region proposes a civil administrative penalty of \$50,050.

On June 8, 2007, Respondent filed its Answer and Request for a Hearing (“Answer”). Respondent listed what it identifies as seven affirmative defenses in its Answer, claiming: (1) Behnke’s products are not “pesticides” within the meaning of 7 U.S.C. § 136(u); (2) Behnke’s products do not contain a “pesticide” as defined by 7 U.S.C. § 136(u); (3) Behnke’s products are not “antimicrobial pesticides” within the meaning of 7 U.S.C. § 136(mm); (4) Behnke’s products are not “pesticide chemicals” within the meaning of 21 U.S.C. § 321(q)(1)(A); (5) Behnke’s products are “food additives” pursuant to 21 U.S.C. § 321(s) that are approved as lubricants with incidental food contact pursuant to 21 U.S.C. § 178.3570, a regulation promulgated pursuant to 21 U.S.C. § 348(a), and as such Behnke’s products are strictly regulated by the Food and Drug Administration (“FDA”) pursuant to Section 409 of the Federal Food, Drug and Cosmetic Act (“FFDCA”); (6) the intended use of Behnke’s products is to protect components of equipment in food and beverage manufacturing plants from wear, corrosion, oxidation, and heat, so Behnke’s products are formulated to protect themselves, by resisting internal degradation, from contaminants found in food processing environments; and (7) Behnke’s products are not intended for a pesticidal purpose as set forth in 40 C.F.R. § 152.15, because a “pest” as defined in 40 C.F.R. § 152.5 does not include the microorganisms on or in processed food to which Behnke’s products are exposed. Answer at 27-28.

Pursuant to the undersigned’s Prehearing Order, entered June 27, 2007, Complainant submitted its Prehearing Exchange on October 9, 2007, Respondent submitted its Prehearing Exchange on November 15, 2007, and on November 19, 2007, Complainant submitted its Rebuttal Prehearing Exchange. Respondent filed a Supplemental Prehearing Exchange on December 17, 2007, and Complainant filed its Supplemental Prehearing Exchange on December 26, 2007. Complainant filed its Third Supplemental Prehearing Exchange on February 27, 2008 and its Fourth Supplemental Prehearing Exchange on March 12, 2008 and Respondent filed its Second Supplemental Prehearing Exchange on March 13, 2008. Finally, Complainant’s Fifth Supplemental Prehearing Exchange was filed on March 19, 2008.

On January 16, 2008, Complainant filed a Motion to Strike Affirmative Defenses and Motion to Compel Discovery (“Motion to Strike” and “Motion to Compel”). On February 5, 2008, Respondent filed Respondent’s Response to Complainant’s Motion to Strike and Motion to Compel (“Response to Motion to Strike and Compel”). On January 22, 2008, Complainant filed a Motion for Accelerated Decision on Liability and on Affirmative Defenses (“Motion for Accelerated Decision”). On February 21, 2008, Respondent filed a Response to Complainant’s Motion for Accelerated Decision. On March 5, 2008, this Tribunal entered an Order Denying Complainant’s Motion to Strike Respondent’s Affirmative Defenses; Order Granting, In Part, and Denying, In Part, Complainant’s Motion to Compel Discovery; Order Denying Complainant’s Motion for Accelerated Decision on Liability and on Affirmative Defenses. The March 5, 2008 Order is incorporated herein by reference (Attachment A).

On March 7, 2008, the parties filed a set of Joint Stipulated Facts (“Joint Stipulations”).

On March 31, 2008, this Tribunal presided over a four day evidentiary hearing in this matter in Waukesha County, Wisconsin. Both parties were present at the hearing and had an opportunity to put forward evidence and cross-examine witnesses.

Complainant filed a Post-Hearing Brief on June 25, 2008 and Respondent filed its Post-Hearing Brief and Respondent’s Proposed Findings of Fact and Conclusions of Law on June 26, 2008. Complainant’s Reply to Respondent’s Post-Hearing Brief was filed on July 14, 2008 and Respondent’s Reply Brief was filed on July 16, 2008.

All Orders previously entered in this proceedings are incorporated by reference into this Initial Decision. For the reasons previously stated and discussed below, having fully considered the record in the case, the arguments of counsel and Respondent, being fully advised, I find Respondent to be in violation of FIFRA and its implementing regulations as alleged in Counts 1 through 11 of the Complaint. For these violations, Respondent shall pay a civil administrative penalty in the amount of \$ 55,055.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is a “person” as defined at Section 2(s) of FIFRA, 7 U.S.C. § 136(s).
2. Behnke is a corporation organized under the laws of the State of Wisconsin with a place of business located at W134 N5373 Campbell Drive, Menomonee Falls, Wisconsin 53051.
3. Eric J. Peter is the president of Behnke.
4. Behnke manufactures JAX® branded lubricants for industrial uses and employs approximately 50 people.

5. A significant percentage of Behnke's business is the sale of lubricants deemed acceptable by NSF International ("NSF") as lubricants with incidental food contact (H1) for use in lubricating and protecting mechanical equipment used in the food processing and bottling industries.

6. For food grade applications, Behnke's lubricant formulations must be FDA compliant for incidental food contact. This requires that the additives and chemistry of the finished product be within the tolerances required under 21 C.F.R. § 178.3570. Behnke must then certify this compliance directly to the customer or through a third-party laboratory, such as NSF.

7. On August 3, 2006, Mr. Jeffrey Saatkamp, an inspector employed with the Wisconsin Department of Agriculture, Trade and Consumer Protection ("WDA") conducted an inspection under FIFRA at Respondent's Menomonee Falls establishment to inspect and collect samples of any pesticides packaged, labeled, and/or released for shipment by Respondent and to collect samples of any containers, labeling and/or advertising literature for such pesticides as authorized under Sections 8 and 9 of FIFRA, 7 U.S.C. §§ 136f and 136g.

8. During the August 3, 2006 inspection, Mr. Saatkamp collected physical samples of JAX Poly-Guard FG-2 and JAX Halo-Guard FG-2, which were packaged, labeled, and ready for shipment or sale.

9. During the August 3, 2006 inspection, Mr. Saatkamp also collected sample literature for the following products: JAX Poly-Guard FG-2, JAX Poly-Guard FG-LT, JAX Halo-Guard FG-2, JAX Halo-Guard FG-LT, and JAX Magna-Plate 74.

10. During the August 3, 2006 inspection, Mr. Saatkamp also collected invoices showing the shipment of JAX Poly-Guard FG-2, JAX Poly-Guard FG-LT, JAX Halo-Guard FG-2, JAX Halo-Guard FG-LT, and JAX Magna-Plate 74, which were offered for sale by Respondent.

11. Respondent's literature obtained by the inspector on August 3, 2006, for JAX Poly-Guard FG-2 stated, among other things:

A. "Since June 1, 2001, JAX Poly-Guard FG contains Micronox®, providing antimicrobial protection for the product. Jax Micronox® has proven especially effective in protecting JAX Poly-Guard Greases against Listeria (*Listeria monocytogenes*), E. coli (*Escherichia coli*) and Salmonella (*Salmonella typhimurium*) over extended lubrication intervals."

B. "Powerful Antimicrobial Performance"

C. "Added Step in Microbial Protection Programs"

D. The literature also included the Respondent's contact information such as phone number, facsimile number, and Internet address.

12. The label on the JAX Poly-Guard FG-2 container, observed, and collected by the inspector on August 3, 2006, states: “Advanced, Anti-Wear NSF H1, Food Machinery Grease with PTFE and Micronox Antimicrobial,” “The bonus is an H1 lubricating grease with Micronox®, JAX exclusive antimicrobial chemistry possessing true knockdown capabilities,” “powerful antimicrobial performance” and “added step in microbial protection programs.”
13. Respondent’s literature obtained at the August 3, 2006 inspection claims, states or implies that JAX Poly-Guard FG-2 is a pesticide.
14. Respondent’s literature for JAX Poly-Guard FG-2 constitutes an advertisement as referenced in 40 C.F.R. § 168.22(a).
15. The label on the JAX Poly-Guard FG-2 container claims, states or implies that JAX Poly-Guard FG-2 is a pesticide.
16. JAX Poly-Guard FG-2 is a pesticide as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. § 152.15(a)(1).
17. JAX Poly-Guard FG-2 is not registered as a pesticide under Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).
18. On or about March 3, 2006, Respondent distributed or sold JAX Poly-Guard FG-2 to Perlick Corporation (“Perlick”) located in Milwaukee, Wisconsin.
19. On or about June 15, 2006, and on or about September 18, 2006, Respondent distributed or sold JAX Poly-Guard FG-2 to Badger Plastics & Supply, Inc. (“Badger”) located in Plover, Wisconsin.
20. On or about August 3, 2006, Respondent distributed or sold JAX Poly-Guard FG-2 by having JAX Poly-Guard FG-2 packaged, labeled, and ready for shipment or sale at its location of W134 N5373 Campbell Drive, Menomonee Falls, Wisconsin.
21. Respondent’s literature obtained by the inspector on August 3, 2006, for JAX Poly-Guard FG-LT stated, among other things:
 - A. “Since June 1, 2001, JAX Poly-Guard FG contains Micronox®, providing antimicrobial protection for the product. JAX Micronox® has proven especially effective in protecting JAX Poly-Guard Greases against Listeria (*Listeria monocytogenes*), E. coli (*Escherichia coli*) and Salmonella (*Salmonella typhimurium*) over extended lubrication intervals.”
 - B. “Powerful Antimicrobial Performance”
 - C. “Added Step in Microbial Protection Programs”

D. The literature also included the Respondent's contact information such as phone number, facsimile number and Internet address.

22. Respondent's literature obtained at the August 3, 2006 inspection claims, states or implies that JAX Poly-Guard FG-LT is a pesticide.

23. Respondent's literature for JAX Poly-Guard FG-LT constitutes an advertisement as referenced in 40 C.F.R. § 168.22(a).

24. JAX Poly-Guard FG-LT is a pesticide as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. § 152.15(a)(1).

25. JAX Poly-Guard FG-LT is not registered as a pesticide as required by Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).

26. Respondent's literature obtained by the inspector on August 3, 2006, for JAX Halo-Guard FG-2 stated, among other things:

(A) "JAX Halo-Guard FG greases incorporate JAX new, proprietary antimicrobial additive technology, Micronox®, to provide antimicrobial protection for the product. A first in food-grade lubricants JAX Micronox® has proven especially effective in protecting JAX Poly-Guard Greases against Listeria (*Listeria monocytogenes*), E. coli (*Escherichia coli*) and Salmonella (*Salmonella typhimurium*) over extended lubrication intervals."

(B) The literature also included the Respondent's contact information such as phone number, facsimile number, and Internet address.

27. The label on JAX Halo-Guard FG-2 container, observed and collected by the inspector on August 3, 2006, stated: "JAX Halo-Guard FG-2 provides Micronox® microbial knockdown performance."

28. Respondent's literature obtained at the August 3, 2006 inspection, claims, states or implies that JAX Halo-Guard FG-2 is a pesticide.

29. Respondent's literature for JAX Halo-Guard FG-2 constitutes an advertisement as referenced in 40 C.F.R. § 168.22(a).

30. The label on the JAX Halo-Guard FG-2 container claims, states or implies that JAX Halo-Guard FG-2 is a pesticide.

31. JAX Halo-Guard FG-2 is a pesticide as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u) and 40 C.F.R. § 152.15(a)(1).

32. JAX Halo-Guard FG-2 is not registered as a pesticide under Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).

33. On or about August 3, 2006, Respondent distributed or sold JAX Halo-Guard FG-2 by having JAX Halo-Guard FG-2 packaged, labeled and ready for shipment or sale at its location of W134 N5373 Campbell Drive, Menomonee Falls, Wisconsin.

34. Respondent's literature obtained by the inspector on August 3, 2006, for JAX Halo-Guard FG-LT stated, among other things:

A. "JAX Halo-Guard FG greases incorporate JAX new, proprietary antimicrobial additive technology, Micronox®, to provide antimicrobial protection for the product. A first in food-grade lubricants JAX Micronox® has proven especially effective in protecting JAX Halo-Guard Greases against Listeria (*Listeria monocytogenes*), E. coli (*Escherichia coli*) and Salmonella (*Salmonella typhimurium*) over extended lubrication intervals."

B. The literature also included the Respondent's contact information such as phone number, facsimile number, and Internet address.

35. Respondent's literature obtained at the August 3, 2006 inspection claims, states or implies that JAX Halo-Guard FG-LT is a pesticide.

36. Respondent's literature for JAX Halo-Guard FG-LT constitutes an advertisement as referenced in 40 C.F.R. § 168.22(a).

37. JAX Halo Guard FG-LT is a pesticide as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. § 152.15(a)(1).

38. JAX Halo-Guard FG-LT is not registered as a pesticide under Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).

39. On or about June 27, 2006, Respondent distributed or sold JAX Halo-Guard FG-LT to Jennie-O Turkey Store ("Jennie-O") located in Willmar, Minnesota.

40. Respondent's literature obtained by the inspector on August 3, 2006, for JAX Magna Plate 74 stated, among other things:

A. "JAX Magna-Plate 74 incorporates JAX new, propriety antimicrobial additive technology, Micronox®, for enhanced antimicrobial protection for the product against a wide variety of microbial agents, including yeasts, molds, and gram-positive and gram-negative bacteria. A first in food-grade lubricants, JAX Micronox® has proven especially effective in protecting the product against Listeria (*Listeria monocytogenes*), E. coli (*Escherichia coli*)

and Salmonella (Salmonella typhimurium).”

B. “JAX Magna-Plate 74 provides three major benefits to food and beverage processing plants...Micronox® anti-microbial technology to provide antimicrobial protection for the product...”

C. “Powerful Antimicrobial Performance”

D. “Added Step in Microbial Protection Programs”

E. The literature includes container sizes and part numbers in addition to Respondent’s contact information which includes a phone number, facsimile number, and Internet address.

41. Respondent’s literature obtained at the August 3, 2006 inspection claims, states, or implies that JAX Magna-Plate 74 is a pesticide.
42. Respondent’s literature for JAX Magna-Plate 74 constitutes an advertisement as referenced in 40 C.F.R. § 168.22(a).
43. JAX Magna-Plate 74 is a pesticide as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. § 152.15(a)(1).
44. JAX Magna-Plate 74 is not registered as a pesticide under Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).
45. On or about March 3, 2006, Respondent distributed or sold JAX Magna-Plate 74 to American Foods Group (“American”) in Green Bay, Wisconsin.
46. On March 8, 2007, the EPA conducted an investigation at American, located at 544 Acme Street, Green Bay, Wisconsin.
47. During the March 8, 2007 investigation, American gave the inspector copies of two purchase orders showing that American had ordered JAX Halo Guard FG-2 and JAX Magna-Plate 78 from the Respondent, dated December 19, 2006 and March 3, 2006.
48. On March 16, 2007, the EPA inspector received two pieces of literature by mail from American that previously were given to American by Respondent.
49. The first piece of literature was entitled “American Foods Group, JAX Lube-Guard Program” and included, among other things, the following language:
 - A. The packet included literature for Magna-Plate 78 Fluids, which states, among other things: “Antimicrobial Performance: Both products

incorporate JAX new, proprietary antimicrobial additive technology, Micronox™, for enhanced product protection against a wide variety of microbial agents, including yeasts, molds, gram-positive and gram-negative bacteria. A first in food grade lubricants, JAX Micronox™ provides significant knockdown performance and has proven especially effective against lysteria (*Listeria monocytogenes*), E. coli (*Escherichia coli*) and salmonella (*Salmonella typhimurium*) on contact and over extended lubrication intervals.”

B. This literature included Respondent’s contact information such as a phone number, facsimile number, and Internet address.

C. The packet also included literature for Magna-Plate 74, which states among other things: “Antimicrobial Performance: JAX Magna-Plate 74 incorporates JAX new, proprietary antimicrobial additive technology, Micronox®, for enhanced antimicrobial protection against a wide variety of microbial agents, including yeasts, molds, and gram-positive and gram-negative bacteria. A first in food-grade lubricants, JAX Micronox® provides significant knockdown performance and has proven especially effective against lysteria (*Listeria monocytogenes*), E. coli (*Escherichia coli*) and salmonella (*Salmonella typhimurium*) on contact and over extended lubrication intervals.”

D. This literature included Respondent’s contact information such as a phone number, facsimile number, and Internet address.

E. The packet also included literature for Halo-Guard FG which states, “JAX Halo-Guard FG provides Micronox® microbial knockdown performance.”

50. The second piece of literature was entitled, “JAX Lubricant Guide for Food, Beverage and Drug” and included, among other things, the following language:

A. A cover letter addressed to the customer which states: “First and foremost is Micronox®, JAX advanced microbial technology that provides immediate and significant knockdown performance on a wide spectrum of microbial contaminants. This development alone is providing HACCP programs a powerful new weapon in their ongoing battle against microorganisms.”

B. The packet also included a sheet entitled “JAX Micronox® Technologies,” which describes in detail the enhanced antimicrobial capabilities of the Micronox® additive system including a graph comparing Poly-Guard FG with competitors in efficacy against *Listeria*, *E. coli*, and *Salmonella*.

C. The literature also included Respondent's contact information such as phone number, facsimile number, and Internet address.

51. Respondent's literature received by the EPA from American on March 16, 2007, claims, states or implies that JAX Halo-Guard FG-2 is a pesticide.

52. Respondent's literature received by the EPA from American on March 16, 2007, claims, states or implies that JAX Magna-Plate 74 is a pesticide.

53. Respondent's literature received by the EPA from American on March 16, 2007, claims, states or implies that JAX Magna-Plate 78 is a pesticide.

54. Respondent's literature received by the EPA from American on March 16, 2007, claims, states or implies that JAX Poly-Guard FG-2 is a pesticide.

55. On March 29, 2007, the EPA inspector received another piece of literature from American, that previously was given to American by the Respondent.

56. This literature was entitled "Technology Focus, JAX Micronox™ Technology, Introducing Micronox™ Technology in JAX Food-Grade Lubricants for Microbial Knockdown Performance against Listeria, E.coli, Salmonella and other microorganisms" and includes, among other things:

A. A letter from the Behnke Technical Director entitled: "What is JAX Micronox™ Technology: Re: Antimicrobial Usage in JAX Food-Grade Products."

B. Literature for Poly-Guard Greases.

C. Literature for Magna-Plate 78.

D. Literature entitled "Plant Microbial Knockdown Results" which includes references to JAX Poly-Guard FG-2.

E. Literature entitled "Major Food Processor Lab Test Results" which also makes references to JAX Poly-Guard FG-2.

F. Literature entitled "Independent Lab Results" which also makes references to JAX Poly-Guard FG-2.

G. Literature entitled "Food Industry Firsts" that states, among other things: "The first effective food-grade antimicrobial additive for lubricants with knockdown capabilities, effectively partnering lubricants into plant sanitation programs."

H. The literature also included contact information for Respondent, including

Respondent's phone number, facsimile number, Internet address, distributor information, and product ordering options.

57. Respondent's literature received by the EPA from American on March 29, 2007, claims, states or implies that JAX Halo-Guard FG-2 is a pesticide.
58. Respondent's literature received by the EPA from American on March 29, 2007, claims, states or implies that JAX Magna-Plate 78 is a pesticide.
59. Respondent's literature received by the EPA from American on March 29, 2007, claims, states or implies that JAX Poly-Guard FG-2 is a pesticide.
60. Respondent's literature found at American for JAX Magna-Plate 74 constitutes advertisements as defined in 40 C.F.R. § 168.22(a).
61. Respondent's literature found at American for JAX Magna-Plate 78 constitutes advertisements as defined in 40 C.F.R. § 168.22(a).
62. Respondent's literature found at American for JAX Poly-Guard FG-2 constitutes advertisements as defined in 40 C.F.R. § 168.22(a).
63. JAX Magna-Plate 78 is a pesticide as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u) and 40 C.F.R. § 152.15(a)(1).
64. JAX Magna-Plate 78 is not registered as a pesticide under Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).
65. On or about December 19, 2006, Respondent distributed or sold JAX Halo-Guard FG-2 to American in Green Bay, Wisconsin.
66. Respondent distributed, offered for sale, or sold JAX Poly-Guard FG-2 on or about August 3, 2006, in violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A).
67. Respondent distributed, offered for sale, or sold JAX Halo-Guard FG-2 on or about August 3, 2006, in violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A).
68. Respondent distributed, offered for sale, or sold JAX Magna-Plate 74 on or about March 3, 2006, to American in violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A).

69. Respondent distributed, offered for sale, or sold JAX Halo-Guard FG-2 on or about December 19, 2006 to American, in violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A).
70. On or about December 19, 2006, Respondent distributed or sold JAX Magna-Plate 78 to American in Green Bay, Wisconsin.
71. Respondent distributed, offered for sale, or sold JAX Magna-Plate 78 on or about December 19, 2006 to American, in violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A).
72. On or about March 5, 2007, Respondent distributed or sold JAX Magna-Plate 78 to American in Green Bay, Wisconsin.
73. Respondent distributed, offered for sale, or sold JAX Magna-Plate 78 on or about March 5, 2007 to American, in violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A).
74. On or about March 3, 2006, Respondent distributed or sold JAX Magna-Plate 78 to American in Green Bay, Wisconsin.
75. Respondent distributed, offered for sale, or sold Magna-Plate 78 on or about March 3, 2006 to American, in violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A).
76. On March 8, 2007, the EPA conducted an investigation at Badger, located at 3451 Johnson Avenue, Plover, Wisconsin.
77. During the investigation on March 8, 2007, the EPA inspector was taken to a supply area by Badger employees where he observed four boxes, each containing ten 14-ounce cartridge tubes of JAX Poly-Guard FG-2.
78. The inspector viewed a single tube from each of the four boxes in the storage room.
79. All four cartridge tubes bore the same language: “Advanced, Anti-Wear NSF H1, Food Machinery Grease with PTFE and Micronox® Antimicrobial,” “The bonus is an H1 lubricating grease with Micronox®, JAX exclusive antimicrobial chemistry possessing the true knockdown capabilities,” “powerful antimicrobial performance” and “added step in microbial protection programs.”
80. The four tubes of JAX Poly-Guard FG-2 observed by the inspector at Badger were identical to the physical sample of JAX Poly-Guard FG-2 that was obtained on August 3, 2006 during the Behnke inspection.

81. During the visit on March 8, 2007, Badger also provided the inspector with a brochure that previously was given to Badger by Respondent.
82. The brochure was entitled “Food Grade Lubricants with Micronox™.”
83. The brochure included a document entitled “What is JAX Micronox™ Technology? Re: Antimicrobial Usage in JAX Food-Grade Products” and described the antimicrobial capabilities of the Micronox technology found in Respondent’s food grade lubricants.
84. The brochure also included tables and a graph illustrating the “antimicrobial properties” of Poly-Guard FG-2 “antimicrobial grease” and its efficacy against Listeria, E.coli, and Salmonella.
85. The literature also included contact information for Respondent including Respondent’s phone number, facsimile number, Internet, distributor information and product ordering options.
86. Respondent’s literature found at Badger claims, states, or implies that JAX Poly-Guard FG-2 is a pesticide.
87. Respondent’s literature found at Badger for JAX Poly-Guard FG-2 constitutes an advertisement as referenced in 40 C.F.R. § 168.22(a).
88. During the March 8, 2007 investigation, Badger gave the EPA inspector a copy of a shipping record from Respondent to Badger for JAX Halo-Guard FG-2 and JAX Poly-Guard FG-2, with a shipment dates of June 15, 2006 and September 18, 2006.
89. On or about June 15, 2006, Respondent distributed or sold JAX Halo-Guard FG-2 to Badger in Plover, Wisconsin.
90. On or about September 18, 2006, Respondent distributed or sold JAX Poly-Guard FG-2 to Badger in Plover, Wisconsin.
91. Respondent distributed, offered for sale, or sold JAX Poly-Guard FG-2 on or about June 15, 2006 to Badger, in violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A).
92. Respondent distributed, offered for sale, or sold JAX Poly-Guard FG-2 on or about September 18, 2006 to Badger, in violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A).
93. On March 7, 2007, the State of Minnesota Department of Agriculture conducted an inspection at Jennie-O Turkey Store (Jennie-O”), located 1530 30th Street SW, Wilmar, Minnesota.

94. During the March 7, 2007 inspection, the Minnesota inspector viewed and photographed a cartridge tube of JAX Halo-Guard FG-LT.
95. The labeling on the tube stated “JAX Halo-Guard FG-LT provides Micronox® microbial knockdown performance.”
96. During the investigation, Jennie-O confirmed that the JAX Halo-Guard FG-LT was ordered on or about June 2006.
97. On or about June 27, 2006, Respondent distributed or sold JAX Halo-Guard FG-LT to Jennie-O in Wilmar, Minnesota.
98. Respondent distributed, offered for sale, or sold JAX Halo-Guard FG-LT on or about June 27, 2006 to Jennie-O, in violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A).
99. On March 7, 2007, the EPA conducted an investigation at Perlick, located at 8300 West Good Hope Road, Milwaukee, Wisconsin.
100. During the investigation on March 7, 2007, the inspector viewed a 14-ounce cartridge of Jax Poly-Guard FG-2.
101. The cartridge included the following language: “Advanced, Anti-Wear NSF H1, Food Machinery Grease with PTFE and Micronox® Antimicrobial,” “The bonus is an H1 lubricating grease with Micronox®, JAX exclusive antimicrobial chemistry possessing true knockdown capabilities,” “powerful antimicrobial performance” and “added step in microbial protection programs.”
102. The cartridge of JAX Poly-Guard FG-2 observed by the inspector at Perlick was identical to the physical sample of JAX Poly-Guard FG-2 that was obtained on August 3, 2006 during the Behnke inspection.
103. On or about March 3, 2006, Respondent distributed or sold JAX Poly-Guard FG-2 to Perlick.
104. Respondent distributed, offered for sale, or sold JAX Poly-Guard FG-2 to Perlick on or about March 3, 2006, in violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A).
105. On November 17, 2006, Respondent’s internet site at www.jax.com stated, among other things:
- A. “With the added benefit of Micronox®, Jax exclusive anti-microbial chemistry which independent testing has proven to be the most effective in the industry,

plants can achieve an extra degree of sanitation protection.”

B. “JAX Poly-Guard FG grease contains Micronox® the only truly effective, active bacteria control agent in the food grade lubricant industry.”

C. “JAX Poly-Guard FG and Halo-Guard FG greases contain Micronox®, the only truly effective, active microbial control agent in the food grade lubricant industry.”

D. “Now contains Micronox® anti-microbial for true ‘knockdown’ performance against a broad spectrum of microbial contaminants.”

E. “The introduction of JAX exclusive Micronox® Anti-Microbial Technology gives plants in search of tools for added micro-organism control a powerful, extra weapon in their arsenal of protection!”

F. “As of May 1, 2002 every food grade lubricant in the JAX line incorporates our exclusive Micronox® Anti-Microbial Technology, providing true ‘knock-down’ performance against a wide range of bacteria and other micro organisms.”

106. Respondent’s internet site on November 17, 2006 at www.jax.com claims, states, or implies that JAX Poly-Guard FG-2 is a pesticide.

107. Respondent’s internet site on November 17, 2006 for JAX Poly-Guard FG-2 constitutes an advertisement as referenced in 40 C.F.R. § 168.22(a).

108. Respondent’s internet site on November 17, 2006 at www.jax.com claims, states, or implies that JAX Poly-Guard FG-LT is a pesticide.

109. Respondent’s internet site on November 17, 2006 for JAX Poly-Guard FG-LT constitutes an advertisement as referenced in 40 C.F.R. § 168.22(a).

110. Respondent’s internet site on November 17, 2006 at www.jax.com claims, states, or implies that JAX Halo-Guard FG-2 is a pesticide.

111. Respondent’s internet site on November 17, 2006 for JAX Halo-Guard FG-2 constitutes an advertisement as referenced in 40 C.F.R. § 168.22(a).

112. Respondent’s internet site on November 17, 2006 at www.jax.com claims, states, or implies that JAX Halo-Guard FG-LT is a pesticide.

113. Respondent’s internet site on November 17, 2006 for JAX Halo-Guard FG-LT constitutes an advertisement as referenced in 40 C.F.R. § 168.22(a).

114. Behnke's products are required to be registered under FIFRA because they do not fall under the exemption defined in 40 C.F.R. § 152.5(d) which applies to products that are directly added to or placed onto the food to kill or mitigate microorganisms.

115. An appropriate and reasonable civil administrative penalty for Respondent's violations of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A), is \$55,055.

III. DISCUSSION

A. Statutory and Regulatory Background

Section 3(a) of FIFRA, 7 U.S.C. § 136a(a), and 40 C.F.R. § 152.15 state, in pertinent part, that no person in any state may distribute or sell to any person any pesticide that is not registered under FIFRA. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), states that it is unlawful for any person in any state to distribute or sell to any person any pesticide that is not registered under Section 3 of FIFRA.

The regulation at 40 C.F.R. § 152.15(a)(1) states that a substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration under FIFRA, if the person who distributes or sells the substance claims, states, or implies (by labeling or otherwise) that the substance can or should be used as a pesticide. The regulation at 40 C.F.R. § 168.22(a) states:

FIFRA Sections 12(a)(1)(A) and (B) make it unlawful for any person to "offer for sale" any pesticide if it is unregistered, or if claims made for it as part of its distribution or sale differ substantially from any claim made for it as part of the statement required in connection with its registration under FIFRA section 3. EPA interprets these provisions as extending to advertisements in any advertising medium to which pesticide users or the general public have access.

Section 2(s) of FIFRA, 7 U.S.C. § 136(s) defines a "person" as any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), and 40 C.F.R. § 152.3, in pertinent part, define "distribute and sell" as to "distribute, sell, offer for sale, hold for distribution, hold for shipment, or receive and (having so received) deliver or offer to deliver." Section 2(u) of FIFRA, 7 U.S.C. § 136(u) and 40 C.F.R. § 152.3, in pertinent part, define "pesticide" as any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest. Section 2(t) of FIFRA, 7 U.S.C. § 136(t) and 40 C.F.R. § 152.5(d), define "pest" as "any fungus, bacterium, virus, or other microorganisms, except for those on or in living man or other living animals and those on or in processed food or processed animal feed, beverages, drugs (as defined in FDCA sec. 201(g)(1)) and cosmetics."

B. Burden of Proof

The Rules of Practice governing this administrative proceeding with respect to the burden of proof provide that the “complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate.” 40 C.F.R. § 22.24(a). The EPA must prove its prima facie case by proving each jurisdictional element and the factual allegations supporting the violations charged. Under a preponderance of the evidence standard, the Complainant must show that the evidence as a whole proves that the facts sought to be proven are more probable or likely than not to have occurred. *In the Matter of Standard Scrap Metal Co.*, 3 E.A.D. 267, *12 (EAB Aug. 2, 1990).

C. Elements of Proof

Complainant has alleged that, on eleven different occasions, Respondent distributed, offered for sale, or sold unregistered pesticides in violations of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S. C. §§ 136a(a) and 136j(a)(1)(A).¹

In its Answer, Behnke admits that it is a corporation organized under the laws of the State of Wisconsin. Answer ¶ 3. Respondent further admits that it is a “person” as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s). Answer ¶ 13. Respondent also admits that it distributed or sold its lubricants on the dates and to the customers alleged in each of the eleven counts of the Complaint. It is undisputed that: (1) On August 3, 2006, Respondent distributed or sold JAX Poly-Guard FG-2 by having the lubricant packed, labeled, and ready for shipment or sale. Answer ¶ 30, Joint Stip. ¶ 3; (2) On August 3, 2006, Respondent distributed or sold JAX Halo-Guard FG-2 by having the lubricant packed, labeled and ready for shipment or sale. Answer ¶ 54, Joint Stip. ¶ 3; (3) On December 19, 2006, Respondent distributed or sold JAX Halo-Guard FG-2 to American. Answer ¶ 101, Joint Stip. ¶ 30; (4) On December 19, 2006, Respondent distributed or sold JAX Magna-Plate 78 to American. Answer ¶ 102, Joint Stip. ¶ 31; (5) On March 5, 2007, Respondent distributed or sold JAX Magna-Plate 78 to American. Answer ¶ 103, Joint Stip. ¶ 32; (6) On March 3, 2006, Respondent distributed or sold JAX Magna-Plate 78 to American. Answer ¶ 104, Joint Stip. ¶ 33; (7) On March 3, 2006, Respondent distributed or sold JAX Magna-Plate 74 to American. Answer ¶ 105, Joint Stip. ¶ 21; (8) On September 18, 2006 Respondent distributed or sold JAX Poly-Guard FG-2 to Badger. Joint Stip. ¶ 45; (9) On June 15, 2006, Respondent distributed or sold Jax Poly-Guard FG-2 to Badger. Answer ¶ 124, Joint Stip. ¶ 10; (10) On June 27, 2006, Respondent distributed or sold JAX Halo-Guard FG-LT to Jennie-O. Answer ¶ 130, Joint Stip. ¶ 18; (11) On March 3, 2006, Respondent

¹Complainant has proffered evidentiary material of additional sales in its Post-Hearing Brief. Specifically, Complainant has presented information that Respondent sold JAX Magna-Plate 74 to Sara-Lee on or about July 11, 2006 and JAX Halo-Guard FG-2 to Seneca on or about July 14, 2006. C’s Ex. 11; C’s Ex. 1; C’s Post-Hearing Brief, pp. 22-23. However, I do not need to reach a decision on the alleged additional sales, and this decision is limited to allegations raised in the Complaint.

distributed or sold JAX Poly-Guard FG-2 to Perlick. Answer ¶ 136, Joint Stip. ¶ 9. It is also undisputed that the products distributed or sold by Respondent were not registered as pesticides under FIFRA. Answer ¶¶ 27, 38, 50, 62, 75, 100, Joint Stip. ¶¶ 8, 14, 17, 20, 29.

The only remaining element of proof that Respondent has not admitted or stipulated to in its pleadings is whether JAX Poly-Guard FG-2, JAX Halo-Guard FG-2, JAX Magna-Plate 78, JAX Magna-Plate 74, JAX Poly-Guard FG-LT, and JAX Halo-Guard FG-LT (“Behnke’s lubricants”) are pesticides, as that term is defined under FIFRA and its implementing regulations.

D. Arguments

Behnke’s lubricants are pesticides as defined by FIFRA

Section 2(u) of FIFRA, 7 U.S.C. § 136(u) and 40 C.F.R. § 152.3, in pertinent part, define “pesticide” as any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.

a. Behnke’s lubricants target “pests”

Section 2(t) of FIFRA defines “pest,” in pertinent part, as any form of virus, bacteria, or other microorganism (except viruses, bacteria, or other micro-organisms on or in living man or other living animals). The term “pest” is qualified by 40 C.F.R. § 152.5(d) that provides that an organism is declared to be a pest under circumstances that make it deleterious to man or the environment, if it is “any fungus, bacterium, virus, or other microorganisms, except for those on or in living man or other living animals and those on or in processed food or processed animal feed, beverages, drugs...and cosmetics...” Respondent asserts that the intended use of its lubricants fits within the “on or on processed food” exemption found at 40 C.F.R. § 152.5(d).²

My own review of the labels on the tubes of lubricant for the lubricants, the literature, and Respondent’s website³ lead me to conclude that JAX Poly-Guard FG-2, JAX Halo-Guard FG-2, JAX Magna-Plate 78, JAX Magna-Plate 74, JAX Poly-Guard FG-LT, and JAX Halo-Guard FG-LT (“Behnke’s lubricants”) are pesticides as defined under FIFRA. One of the several pieces of Respondent’s literature that was given to American and entered into evidence states, pertinent part:

²This argument will be addressed later in the decision.

³Although the EPA proffered documents from www.meatandpoultry.com as additional evidence, I need not reach a conclusion as whether Respondent has control of this site to the extent that Respondent made pesticidal claims. I do not reach a conclusion as to whether the EPA has established a sufficient nexus between this website and Respondent so as to sustain any charges of liability based on any pesticidal claims made in this linked site.

JAX Micronox™ provides significant knockdown performance and has proven especially effective against listeria (*Listeria monocytogenes*), *E. coli* (*Escherichia coli*) and salmonella (*Salmonella typhimurium*) on contact and over extended lubrication intervals.

Joint Stipulated Facts ¶ 25 (“Joint Stip.”); Complainant’s Exhibit 8c (“C’s Ex.”). Also entered into evidence was a brochure given to Badger by Respondent which was entitled “Food Grade Lubricants with Micronox.” The brochure described the antimicrobial capabilities of the Micronox technology found in Respondent’s food grade lubricants and included tables and a graph illustrating the “antimicrobial properties” of Poly-Guard FG-2 “antimicrobial grease” and its efficacy against *Listeria*, *E.coli* and *Salmonella*. Joint Stip. ¶¶ 42-43; C’s Ex. 8b.

The documentary evidence introduced at the hearing shows that Behnke’s advertising and marketing claims consistently stated that its lubricants were intended to mitigate, destroy or control such microorganisms as *Listeria*, *E. coli* and *Salmonella*, which are bacteria known as pests. The regulations state that “an organism is declared to be a pest under circumstances that make it deleterious to man or the environment, if it is...any fungus, bacterium, virus or other microorganisms, except for those on or in living man or other living animals and those on or in processed food...” 40 C.F.R. § 152.5(d). *Listeria*, *E.coli* and *Salmonella*, as bacteria, fit the definition of “pest” as set forth in the regulation (except where they are present “on or in living man or other living animals” or “on or in processed food”).

One of the EPA’s witnesses present at the hearing was Dr. Tajah Blackburn. Dr. Blackburn is employed by the EPA as an Efficacy Evaluation Team Leader in the Product Science Branch of the Antimicrobial Division of the Office of Pesticide Programs and holds a Ph.D. in Biomedical Sciences, with a concentration in Microbiology and Immunology. Transcript (“Tr.”) April 1, pp. 449-459. Dr. Blackburn testified, among other things, that bacteria in general, but specifically *Listeria*, *E.coli* and *Salmonella*, are considered pests as defined by FIFRA. Tr. April 1, p. 432. Dr. Blackburn testified as to the dangers of *Listeria*, *E.coli* and *Salmonella*, explaining that these bacteria can cause gastroenteritis, gram-negative pneumonia, meningitis, septicemia, mastitis, and urinary tract infections and spontaneous abortions. In some cases, these diseases can lead to death. Tr. April 1, pp. 470-473. Dr. Blackburn’s testimony demonstrates that these bacteria can be very dangerous to humans.

The EPA also called Mr. Dennis Edwards, Chief of the Regulatory Management Branch in the Antimicrobials Division of the Office of Pesticides Programs at the EPA. Mr. Edwards was established to have extensive knowledge and experience regarding the pesticide registration process. Over the course of his 30 year career, Mr. Edwards has implemented and applied FIFRA, its implementing regulations, and EPA’s policies. Tr. April 1, pp. 234-265. Mr. Edwards testified that in his opinion, “based on the claims on the labels and the associated literature, the products should be registered as pesticide products.” Tr. April 1, p. 235. Mr. Edwards also testified that *Listeria*, *E.coli* and *Salmonella* are considered pests as defined by FIFRA. Tr. April 1, p. 432.

I find both Mr. Edward's and Dr. Blackburn's testimony credible and un rebutted by Respondent. Additionally, the Environmental Appeals Board ("EAB") has previously found that E.coli and Salmonella are microorganisms infectious to man. See *In re Microban Products Company*, 11 E.A.D. 425 (EAB 2004); *In re Sultan Chemists, Inc.*, 9 E.A.D. 323 (EAB 2000), *aff'd Sultan Chemists, Inc. v. U.S. EPA*, 281 F.3d 73 (3rd Cir. 2002). It is my conclusion that Listeria, E.coli, and Salmonella are pests.

b. Behnke's intended use of the lubricants is that of a pesticide

FIFRA regulations make "intent" an element in determining whether a product is a pesticide requiring FIFRA registration. 40 C.F.R. § 152.15 states:

A pesticide is any substance (or mixture of substances) intended for pesticidal purpose, i.e., use for the purpose of preventing, destroying, repelling, or mitigating any pest or use as a play regulator, defoliant, or desiccant. A substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if:

- (a) The person who distributes or sells the substances claims, states, or implies (by labeling or otherwise): (1) That the substance (either by itself or in combination with any other substance) can or should be used as a pesticide; or (2) That the substance consists of or contains an active ingredient and that it can be used to manufacture a pesticide...

The EPA asserts that Behnke's labeling, advertising and marketing claims make implicit and explicit pesticidal claims. Complainant's Post-Hearing Brief, ("C's Post-Hearing Brief") p. 65.

Respondent provided American with literature that stated:

If a bacteria, yeast, or mold colony is already established, FDA/USDA/NSF-approved competitor lubricants will inhibit the growth of the colony, but to actually kill the colony will require a sanitization process, or the use of JAX food-grade lubricants which incorporate Micronox technology.

C's Ex. 8b. I find that the use of the terms such as "kill" and "sanitization" in regard to bacteria clearly signal that Behnke intended their lubricants to be used for pesticidal purposes. After reviewing Behnke's labeling, advertising, and marketing claims, Mr. Edwards testified, "based on the claims being made, it's – these are pesticide claims, so the intent is that it be used as a pesticide product." Tr. April 1, p. 318.

Mr. Joshua Rybicki of the Inventory Control Division of American testified that his company bought JAX lubricants, including JAX Poly-Guard FG-2 with Micronox®, based on the antimicrobial claims made in literature supplied by Behnke. Mr. Rybicki stated that his

company had been using another brand of lubricant that worked, but switched to JAX lubricants despite the 20% to 30% higher price because of the antimicrobial claims. Tr. March 31, pp. 88-90. Mr. Rybicki described some of the literature given to him by a Behnke salesperson (C's Ex. 8b), "it told me that if I was to use this product in my production facility, that it would help inhibit the growth of the bacteria within the grease or the oils and anyplace - on any of the machinery that we use this on." Tr. March 31, p. 95. Although Respondent's cross-examination of Mr. Rybicki elicited testimony that he was not responsible for purchasing lubricants at American, such does not disturb Respondent's representations that are deemed to be pesticidal claims. Tr. March 31, p. 99.

The word "Micronox®" is a pesticidal claim

The EPA asserts that the trademarked name "Micronox" is itself a pesticide claim.⁴ Respondent uses this name throughout its labeling, making such statements as, "JAX Micronox provides significant knockdown performance and has proven especially effective against lysteria (*lysteria monocytogenes*), E.coli (*escherichia coli*) and salmonella (*salmonella typhimurium*) on contact and over extended lubrication intervals" and "Micronox will supply immediate and significant knockdown capabilities." C's Ex. 8a; C's Ex. 8c.

During the hearing, Mr. Edwards testified, "I would interpret Micro to be microorganisms, and I would interpret the nox to be knockdown. So I consider that to be a pesticide claim." Tr. April 1, pp. 419-420. Mr. Edwards explained the term "knockdown" leads him to the opinion that the lubricant is a pesticide because, "if I'm knocking down microorganisms, I'm in some way inhibiting, I'm killing, I'm doing something to that organism. I'm mitigating it, you know, repelling it, doing something in context of what a pesticide is." Tr. April 1, p. 419-420.

The dictionary defines "knockdown" as "[f]orceful enough to knock down or overwhelm: Powerful. An act of knocking down. An overwhelming blow." Webster's II New Riverside University Dictionary (1994). Respondent's use of the word "nox" with its suggestion of the word "knockdown" in its advertising give the strong impression that the product is used for the purpose of preventing, destroying, repelling, or mitigating microorganisms. I find that the name "Micronox" clearly implies that the product is a pesticide.

Based on the foregoing discussion, I find that the EPA has established by a preponderance of the evidence that Behnke's lubricants are pesticides. The EPA has sustained its burden of showing that the lubricants are a pesticide subject to FIFRA. Respondent does not argue that Behnke's lubricants do not target bacteria. The question of whether an exemption from FIFRA applies is addressed next.

⁴Although Respondent has not submitted any proof that Micronox has been trademarked, it has used the trademarked and registered trademarked term throughout its documents. Based on Respondent's representations, I will identify Micronox as a registered trademark product.

E. Defenses

In its Answer, at the hearing, and its Post-Hearing Brief, Respondent argues that it is exempt from FIFRA for a number of statutory and regulatory reasons.

Following complainant's establishment of a prima facie case, "respondent shall have the burden of presenting any defense to allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defense." 40 C.F.R. § 22.24(a). By seeking to invoke exemptions to the FIFRA regulations, Respondent is raising affirmative defenses and therefore bears the initial burden of production and the ultimate burden of persuasion for each affirmative defense. *In re Norman C. Mayes*, RCRA (9006) Appeal No. 04-01, 12 E.A.D. 54, slip op. at 48 n. 28 (EAB, March 3, 2005), *aff'd Norman C. Mayes v. Environmental Protection Agency*, 2008 U.S. Dist. LEXIS 700 (E.D. Tenn. January 4, 2008). See *In re New Waterbury, Ltd.*, TSCA Appeal No. 93-2, 5 E.A.D. 529, 540 n.20 (EAB, Oct. 20, 1994); *In re Standard Scrap Metal Co.*, 3 E.A.D. 267, 272 n.9 (EAB, Aug. 2, 1990); *U.S. v. First City National Bank of Houston*, 386 U.S. 361, 366 (1967) ("the party that claims the benefits of an exception to the prohibition of a statute carries the burden of proving that it falls within the exception."). Accordingly, Respondent must prove by a preponderance of the evidence each regulatory exemption raised.

In its Answer, Respondent lists seven interrelated "affirmative defenses." In particular, Respondent asserts the following: (1) Behnke's products are not "pesticides" within the meaning of 7 U.S.C. § 136(u); (2) Behnke's products do not contain a "pesticide" as defined by 7 U.S.C. § 136(u); (3) Behnke's products are not "antimicrobial pesticides" within the meaning of 7 U.S.C. § 136(mm); (4) Behnke's products are not "pesticide chemicals" within the meaning of 21 U.S.C. § 321(q)(1)(A); (5) Behnke's products are "food additives" pursuant to 21 U.S.C. § 321(s) that are approved as lubricants with incidental food contact pursuant to 21 U.S.C. § 178.3570, a regulation promulgated pursuant to 21 U.S.C. § 348(a), and as such, Behnke's products are strictly regulated by the Food and Drug Administration ("FDA") pursuant to Section 409 of the Federal Food, Drug and Cosmetic Act ("FFDCA"); (6) the intended use of Behnke's products is to protect components of equipment in food and beverage manufacturing plants from wear, corrosion, oxidation, and heat, so Behnke's products are formulated to protect themselves, by resisting internal degradation, from contaminants found in food processing environments; and (7) Behnke's products are not intended for a pesticidal purpose as set forth in 40 C.F.R. § 152.15, because a "pest" as defined in 40 C.F.R. § 152.5 does not include the microorganisms on or in processed food to which Behnke's products are exposed. Answer at 27-28.

Respondent did not directly pursue most of these defenses at the hearing or in its post-hearing brief, choosing to focus on the affirmative defense that its products target microorganisms on or in processed food, making it exempt from FIFRA regulation. Although

Respondent's Post-Hearing Brief focuses on "on or in processed food", its other defenses are addressed nonetheless.⁵

Behnke's lubricants are "pesticides"

Respondent's first argument contends that it is that it is not subject to FIFRA because JAX Poly-Guard FG-2, JAX Halo-Guard FG-2, JAX Magna-Plate 78, JAX Magna-Plate 74, JAX Poly-Guard FG-LT, and JAX Halo-Guard FG-LT ("Behnke's lubricants") are not pesticides, as that term is defined under FIFRA and its implementing regulations. Answer p. 27. As discussed above, I find that Behnke's lubricants are pesticides and therefore subject to FIFRA.

Behnke's lubricants contain a "pesticide"

Respondent asserts that Behnke's lubricants do not contain a "pesticide" as defined by 7 U.S.C. § 136(u). Answer p. 27. As discussed above, Respondent's lubricants are pesticides. Therefore, they contain a pesticide. This argument has no merit.

Behnke's lubricants are not exempt as "antimicrobial pesticides" under Section 2(mm) of FIFRA

Respondent's third argument is that Behnke's products are not "antimicrobial pesticides" within the meaning of 7 U.S.C. § 136(mm) and are therefore exempt from FIFRA registration. Answ p. 27. Respondent renewed this argument in its Post-Hearing Brief after the evidentiary hearing. Respondent's Post-Hearing Brief, ("R's Post-Hearing Brief") pp. 8-9.

Complainant argues that Section 2(mm) does not exempt Behnke's lubricants from FIFRA registration. The definition of "antimicrobial pesticide" found in Section 2(mm) of FIFRA, 7 U.S.C. 136(mm), was added to FIFRA as part of the Food Quality Protection Act of 1996 ("FQPA"). In passing the FQPA, Congress added a special provision, now known as Section 3(h) of FIFRA, 7 U.S.C. § 136a(h), which was designed to establish deadlines for the registration of antimicrobial products that met the definition of "antimicrobial pesticide" set forth in Section 2(mm). The term "antimicrobial pesticide" does not appear in any other section of FIFRA except Section 2(mm) (where the term is defined) and Section 3(h) (which describes the registration process). Section 2(mm) does not limit the scope of FIFRA's regulatory coverage, nor does it affect the broad definition of "pesticide" set forth in Section 2(u) of FIFRA, 7 U.S.C. § 136(u). Section 2(mm) was established merely to create an expedited process for the EPA's review of FIFRA registration applications for certain antimicrobial products. C's Motion to Strike and Compel pp. 14-20 and 26-29. Mr. Edwards testified that "2(mm) is simply to define

⁵Respondent's arguments were difficult to isolate and seemed to change in emphasis as the hearing progressed.

what applications that we receive are subject to the time frames in Section 3(h) of FIFRA...there is no other purpose behind it.” Tr. April 1 p. 336.

I find the EPA’s argument persuasive. There is no merit to the argument that Section 2(mm) provides an exemption from FIFRA registration. The plain reading of the regulation and the legislative history clearly shows that Section 2(mm) only affects the time frame in which FIFRA registration of antimicrobial pesticides must be completed. Accordingly, I reject this defense.

Behnke’s lubricants not exempt under 21 U.S.C. § 321(q)(1)(A)

Respondent’s fourth affirmative defense makes the argument that Behnke’s lubricants are not “pesticide chemicals” within the meaning of 21 U.S.C. § 321(q)(1)(A). Answer p. 27. This statutory provision is part of the Federal Food, Drug and Cosmetic Act (“FFDCA”). As pointed out by Complainant, the definition of “pesticide chemical” cited by Respondent was added to the FFDCA as part of the Antimicrobial Regulation Technical Corrections Act of 1998 (“ARTCA”), Pub.L. 105-324, §2(a). ARTCA only amended the FFDCA and did not amend any section of FIFRA. C’s Motion to Strike and Compel, pp. 21-24.

The EPA asserts that whether or not Behnke’s lubricants are “pesticide chemicals” under the FFDCA is irrelevant for this matter. Complainant asserts that the EPA’s jurisdiction under the FFDCA is separate and distinct from the EPA’s jurisdiction under FIFRA. Under the FFDCA, if a substance is a “pesticide chemical” then the EPA is authorized to modify or revoke a tolerance for residues of that substance in or around food. If the substance is deemed a “food additive” instead, then FFDCA regulatory coverage belongs to the FDA. However, the EPA has jurisdiction over any substance that is a “pesticide” as defined in Section 2(u) of FIFRA, 7 U.S.C. § 136j(u). The FDA has no part in the enforcement of FIFRA and FDA regulations have no effect on whether a substance is a “pesticide” under FIFRA. Therefore, even if Behnke’s lubricants are not “pesticide chemicals” within the meaning of 21 U.S.C. § 321(q)(1)(A), it has no bearing on whether the lubricants are “pesticides” under FIFRA. C’s Motion to Strike, pp. 22-23. *See also* C’s Ex. 19. In support of this contention, Complainant points to language in the ARTCA which provides, “[w]ith respect to the definition of the term ‘pesticide’ that is applicable to the Federal Insecticide, Fungicide, and Rodenticide Act, this clause does not exclude any substance from such definition.” 21 U.S.C. § 321(q)(1).

Respondent’s argument has no merit. Whether a substance is a “pesticide chemical” under 21 U.S.C. § 321(s) of the FFDCA has no effect on whether the substance is a “pesticide” subject to the statutory coverage of FIFRA and its implementing regulations.

Behnke’s products are “food additives” pursuant to 21 U.S.C. § 321(s) but are still regulated by the EPA

Respondent asserts that Behnke’s products are “food additives” pursuant to 21 U.S.C. § 321(s) and are approved as lubricants with incidental food contact pursuant to 21 C.F.R. §

178.3570, a regulation promulgated pursuant to 21 U.S.C. § 348(a). Respondent states that it is anticipated that such products will be subject to incidental food contact and ingestion. Therefore, Respondent argues, its lubricants are strictly regulated by the FDA pursuant to the Section 409 of the FFDCA. Answer p. 28. Respondent also points out that its lubricants are sold only to the food and beverage processing industries. R's Post-Hearing Brief, p. 12.

The EPA contends that statutory citation of FFDCA cited by Respondent in support of its defense has no impact on the EPA's regulation of pesticides under FIFRA. C's Motion to Strike, p. 26. In support of this argument, the EPA points to a FDA guidance document introduced by Respondent which states:

It is important to note that, depending on the proposed use, an antimicrobial food additive may also be a pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). As such, it may be subject to registration as a pesticide by the EPA as well as regulation as a food additive.

R's Ex. 53 at II, C. *See also* C's Post-Hearing Brief, p. 79.

The EPA makes a compelling argument. Respondent has not provided any probative evidence that shows that if a product is a "food additive" it is exempt from regulation as a pesticide under FIFRA. From my reading of the regulations, it is clear that a product could be regulated both by the EPA as a "pesticide" under FIFRA and by the FDA as a "food additive" under the FFDCA.

Expanding on this argument in its Post-Hearing Brief, Respondent also states that its products are not subject to FIFRA regulation because its lubricants fall within the regulatory definition of "food." 21 C.F.R. § 170.3(m) states that "[f]ood includes human food [and] substances migrating to food from food-contact articles." Based on this definition, Respondent asserts that "the Lubricants are indeed edible food articles and *are not*, therefore, subject to the same FIFRA registration as floor cleaners or wall sanitizers." R's Post-Hearing Brief, p. 11. In support of this argument, Respondent claims that testimony from witnesses provides evidence that Behnke's lubricants become part of processed foods. R's Post-Hearing Brief, p. 11.

While it is true that Behnke's lubricants may come in contact with processed food, in his testimony, Mr. Peter, the President of Behnke, stated that the lubricants are not designed to be applied onto or added into the processed food under the FDA. Tr. April 2, p. 718. This was further illustrated by the testimony of Mr. Rybicki, Inventory Control for American Foods Group, who testified that at the meat packing plant where he works, if the lubricant gets on the meat, "the meat is retained, shown to a USDA inspector. They will cut, like, the area or part of that the oil is on and then they will inspect it again. And then the USDA will either say yes or no if we can put it back onto production or if we have to condemn the carcass or piece of meat." Tr. March 31, p. 119. Carter Anderson, Respondent's witness and a Behnke salesman, testified, "[m]any types of lubricant come in contact with the food product. Everybody does everything they can to prevent that from happening." Tr. April 3, p. 874. It is clear from this testimony that

the lubricants and greases used on the food processing plant machinery are not “food.” I find that the Respondent’s argument is without merit and that Behnke’s lubricants are not “food” exempt from FIFRA regulation.

Behnke’s lubricants protect only themselves from environmental contaminants

In its sixth defense, Respondent asserts that the intended use of Behnke’s antimicrobial lubricants is simply “to protect components of equipment in food and beverage manufacturing plants from wear, corrosion, oxidation and heat. Behnke’s products are formulated to resist internal degradation from contaminants found in food processing environments. As such, the products protect themselves, and only themselves, from such environmental contaminants.” Answer p. 28. Respondent appears to be arguing that its lubricants are “treated articles or substances” as described in 40 C.F.R. § 152.25(a) and, therefore, are not required to be registered under FIFRA.

To qualify for the “treated articles or substances” exemption, the substance must meet the regulatory definition: “[a]n article or substance treated with, or containing, a pesticide to protect the article or substance itself (for example, paint treated with a pesticide to protect the paint coating, or wood products treated to protect the wood against insect or fungus infestation), if the pesticide is registered for such use.” 40 C.F.R. § 152.25(a). As Complainant points out, this exemption only applies if Behnke’s lubricants were treated with a pesticide that has been registered under FIFRA for use in protecting the lubricant. Respondent has failed to produce any evidence that the lubricants at issue contain or were treated with a pesticide registered with the EPA under FIFRA for use as an antimicrobial. C’s Motion to Strike, pp. 29-30.

I find that Respondent’s argument that its products fall within the “treated articles or substances” exemption has no merit.

Behnke’s lubricants are not exempt from FIFRA under the “on or in processed food” exemption

Respondent’s main argument is that its lubricants are not pesticides because they are not intended for preventing, destroying, repelling, or mitigating any “pest” within the meaning of FIFRA, because Behnke’s lubricants target microbes “on or in processed foods” which are not “pests” within the meaning of FIFRA. Answer p. 28, R’s Reply Brief, pp. 1-5. Mr. Peter testified that Behnke developed the antimicrobial lubricants in response to a problem faced by a large food company in its food processing facilities. Apparently, the company was concerned that the ball bearings in its equipment were transferring microbes to its processed food. Tr. April 2, pp. 585-592. Respondent argues that “Behnke never intended the Lubricants to target microbes in general, but only those of concern when the Lubricants became an incidental part of the processed foods or beverages.” R’s Reply Brief, p. 2.

Mr. Peter and Mr. Paquette, the technical director at Behnke, both testified that the lubricants are not intended to be applied directly to the food. Tr. April 2, p. 718; Tr. April 3, p.

806. Larry Cooper, Industrial Maintenance Mechanic at Quaker Oats, testified that they discarded food that had grease on it. Tr. April 3, p. 852. Certainly, none of the lubricants' labeling instructed users to apply the lubricant directly to food. Respondent argues that "although Behnke's Lubricants may not be specifically designed to become part of the processed food, the reality is that contact between the Lubricants and processed foods is an unavoidable and expected part of the lubricating process." R's Reply Brief, pp. 4-5.

Complainant argues that the plain language of 40 C.F.R. § 152.5(d) clearly states that the "on or in processed food" exemption only applies to products that are directly added to or placed onto the food to kill or mitigate microorganisms. C's Post-Hearing Brief p. 58.⁶ Complainant states "for an antimicrobial product to be exempt from FIFRA regulation by virtue of its targeting only microorganisms that are 'on or in processed food,' the antimicrobial product has to be intended for application directly onto 'food that has undergone processing and is intended to be consumed immediately or after some further processing or preparation' - i.e., 'edible food articles.'" C's Post-Hearing Brief, p. 59. Therefore, antimicrobial substances used in food contact items such as paper or paperboard are considered to be "pesticides" under FIFRA by the EPA. C's Ex. 19. Complainant points out that the evidence produced at the hearing demonstrates that none of Behnke's lubricants are intended to be applied directly to food. The EPA argues that if the lubricants are not intended to be applied directly to processed food, the lubricants are not exempt from FIFRA under the "on or in processed food" exemption. C's Post-Hearing Brief, p. 59; C's Ex. 19.

Based on his 32 years experience at the EPA, Mr. Edwards testified that, in his opinion, the exemption does not apply to Behnke's lubricants. He came to this opinion after reviewing Behnke's literature and noting that none of the directions require the lubricant to be applied directly to, in, or on processed food. Mr. Edwards noted that the lubricants are intended to lubricate machinery, and only become part of the processed food through incidental contact. Tr. April 1, p. 329.

To help clarify our understanding of the "on or in processed food" exemption in 40 C.F.R. § 152.5(d), Mr. Edwards gave an example of a product where the "on or in processed food" exemption does apply. He named a Proctor & Gamble product called Fit which was applied to lettuce, tomato, and other items in restaurants' salad bars. According to Mr. Edwards, this antimicrobial product was used to prevent spoilage and bacteria. He noted that it was applied directly to the food and not to the counter or any other surface. Tr. April 1, pp. 322-324.

⁶The EPA cites to the "Legal and Policy Interpretation of the Jurisdiction under the Federal Food, Drug, and Cosmetic Act of the Food and Drug Administration and the Environmental Protection Agency Over the Use of Certain Antimicrobial Substances," 63 Fed. Reg. 54533 (October 9, 1998), which was jointly issued by the FDA and the EPA for the definition of "processed food" used when applying this exclusion. EPA interprets "processed food" "as they are commonly understood—food that has undergone processing and is intended to be consumed immediately or after some further processing or preparation." C's Ex. 19.

From this example, it is clear that Behnke's lubricants do not fall within the "on or in processed food" exemption as they are not applied directly to processed food.

As the Complainant persuasively points out, this matter is analogous to that faced by the federal court in *Kenep v. American Edwards Laboratories*, 859 F. Supp. 809 (E.D. PA 1994). C's Post-Hearing Brief, pp. 56-57. The court in *Kenep* was faced with the question of whether an antimicrobial product that targeted the Human Immunodeficiency Virus Type 1 ("HIV") on hospital instruments was a pesticide under FIFRA. The court found that the antimicrobial products were indeed pesticides within the meaning of FIFRA. Although the targeted microorganisms originates from a human being, it does not mean that the microorganism is always considered "on or in living man." Thus, when HIV contaminates a hospital instrument the microorganism is no longer "on or in a living man" and a product intended to kill the microorganism on the instrument is a pesticide requiring FIFRA registration. *Kenep v. American Edwards Laboratories*, 859 F. Supp. 809, 816, n. 4(E.D. PA 1994).

Similarly, if a microorganism such as E.coli originates from processed food, and contaminates the machinery or the lubricant on that machinery, it is no longer "on or in processed food" and an antimicrobial product (such as Behnke's lubricants) that targets that microorganism on the machinery and/or in the lubricant is considered a pesticide under FIFRA. C's Post-Hearing Brief, pp. 56-57. Clearly, the antimicrobial lubricants were intended to protect the lubricants themselves and the equipment they touched, therefore preventing cross-contamination within the food processing facility.

Respondent's "on or in processed food" argument fails on another ground as well. Complainant has produced evidence that the microbes meant to be mitigated by Behnke's lubricants, E.coli, Listeria, and Salmonella, do not necessarily originate in processed food nor may they be found solely on processed food. Dr. Blackburn testified that E.coli, Listeria and Salmonella can enter food processing facilities on the workers themselves. Additionally, in a food processing facility such as a cattle slaughter house, the animals track in fecal matter, or are covered in fecal matter, which has bacteria in it. The equipment in these facilities may become contaminated through the aerosolization of the microbes via blood splatter or fecal splatter. Within other food processing facilities, vegetables can become contaminated with microbes through manure used to fertilize the plants, from untreated water, and from the workers who handle the vegetables. Tr. April 1, pp. 476-480. Thus, the record shows that microbes can enter food processing facilities in a variety of ways, and then cross contaminate. There are microbes that do not originate "on or in processed food" and can be found elsewhere in the food processing facility. Therefore, Behnke's lubricants are not exempt under 40 C.F.R. § 152.5(d).

I find Complainant's argument persuasive for the reasons stated above and that Respondent's argument is without merit. Behnke's lubricants do not fall under the "on or in processed foods" exemption. The evidence itself clearly reflects that the intended use of the lubricants was not limited to mitigating bacteria on or in processed food. It is clear that the antimicrobial properties of the lubricants are intended to function on the lubricant itself, and on the equipment in the food processing facilities. Further, I find that the language used in the

labels and advertising by Behnke clearly makes pesticidal claims not exclusively limited to a “on or in processed food” exception.

Behnke’s lubricants are not exempt under a “reasonable consumer within the context of the market” argument

Respondent also argued at the hearing and in its Post-Hearing Brief that Behnke only markets and sells its lubricants for use by the food and beverage processing industry. Respondent claims Behnke’s customers are aware that lubricants used in their plants will inevitably come into contact with their food and that Behnke’s customers are sophisticated enough to know that Behnke’s antimicrobial claims apply only to controlling microbes in or on processed foods. Therefore, Respondent claims, the lubricants are not pesticides. R’s Post-Hearing Brief pp. 10-14.

In support of this argument, Respondent cites to *In the Matter of Caltech Indus., Inc.*, Docket No. 5-FIFRA-97-006 (ALJ June 9, 1998), which involved the sale and distribution of an unregistered pesticide in violation of FIFRA. Respondent argues that the ALJ concluded that the “intended use” of the product (in this case, Hospital Cleaning Towels with Bleach) must be considered applying the “reasonable consumer” objective standard and that the “reasonable consumer” must be understood within the context of the market for the product, such as the health care industry in *Caltech*. Respondent claims that a reasonable consumer in the food and beverage processing industry is concerned with microbes contaminating processed food, of which the lubricants may become a part. R’s Post-Hearing Brief pp. 15-16.

I find Respondent’s reliance on *Caltech* as support for its “reasonable consumer” argument misguided. While the Respondent in *Caltech* made a similar “reasonable consumer within the context of the market” argument, the ALJ denied the Complainant’s motion for accelerated decision without addressing the merits of the parties’ arguments. The ALJ noted in his order that the arguments of the parties could only be properly evaluated after an evidentiary hearing. *Caltech* eventually settled without an evidentiary hearing and without a final ruling on the respondent’s “reasonable consumer” argument. Therefore, *Caltech* is not controlling in this matter. *In the Matter of Caltech Indus., Inc.*, Docket No. 5-FIFRA-97-006 (ALJ June 9, 1998). Finally, while I respect my colleagues’ opinions, I am not bound by their decisions.

The EPA argues that Respondent’s contention that Behnke’s lubricants are sold to sophisticated food and beverage processing customers is irrelevant to a determination of whether Behnke’s lubricants are “pesticides” under FIFRA. Complainant contends that there is no exemption for registration of pesticides under FIFRA based on the customer to which the pesticide is sold. C’ Reply Brief, p. 2. Even assuming that there was an exemption for products sold to a certain market, Complainant argues that there is nothing that limits the sale and use of Behnke’s lubricants to the food processing industry. The EPA points to testimony from Mr. Peter, in which he stated that the lubricants could be sold to customers outside of the food and beverage processing industry. C’s Post-Hearing Brief, pp. 85-87. Under questioning by EPA counsel, Mr. Peter admitted that he would sell the lubricants to whoever wanted to buy them. Tr.

April 2, p. 645.

I find that even if Behnke's lubricants are sold exclusively to the food and beverage processing industry, FIFRA and its implementing regulations do not include a pesticide registration exemption for instances when a product is being sold exclusively to a particular industry. FIFRA requires registration of pesticides regardless of the identity of the buyers. Having sophisticated customers does not absolve Respondent from meeting the regulatory and statutory requirements.

IV. PENALTY

Penalty Criteria

The Consolidated Rules of Practice govern the assessment of civil administrative penalties in this proceeding. Section 22.27(b) of the Consolidated Rules of Practice provides in pertinent part:

[i]f the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based upon the evidence in the record and in accordance with any civil penalty criteria in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act...If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

40 C.F.R. § 22.27(b). The Complainant bears the burdens of presentation and persuasion to show that the relief sought in this case is "appropriate." 40 C.F.R. § 22.24(a).

In regard to any relevant "civil penalty criteria in the Act," Section 14(a) of FIFRA, 7 U.S.C. § 136l, governs the assessment of civil penalties for violations of Sections 3(a) and 12(a) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j (distribution or sale of unregistered pesticides). Section 14(a)(1) of FIFRA authorizes the assessment of civil administrative penalties of up to \$ 5,000 per offense. 7 U.S.C. § 1361(a)(1). The Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and its implementing regulations at 40 C.F.R. part 19, increased the statutory maximum penalty to \$6,500 for each violation of FIFRA that occurs on or after March 15, 2004.⁷ 31

⁷Pursuant to section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, each federal agency is required to issue regulations adjusting for inflation the maximum civil monetary penalties that can be imposed pursuant to such agency's statutes. The purpose of these adjustments is to maintain the deterrent effect of federal civil penalties and to further the policy goals of the laws. U.S. EPA publishes inflation-adjusted maximum penalties pursuant to the Debt Collection Improvement Act under 40 C.F.R. part 19.

U.S.C. § 3701; 40 C.F.R. § 19.4.

Section 14(a)(4) of FIFRA further provides in pertinent part that:

In determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to:

[1] the size of the business of the person charged,

[2] the effect on the person's ability to continue in business, and

[3] the gravity of the violation.

7 U.S.C. § 136l(a)(4) (numeration added).

To assist enforcement officials in taking the above factors into consideration when assessing penalties under FIFRA specific to any given case, on July 2, 1990, the EPA's Office of Compliance Monitoring, Office of Pesticides and Toxic Substances issued an Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act ("the ERP"). C's Ex. 33. The ERP sets forth a "five stage process" for computing a penalty in consideration of the three statutory penalty criteria set forth in Section 14(a)(4) of FIFRA. C's Ex. 33 at 18. The ERP is a guidance document intended to provide a rational, consistent and equitable calculation methodology for applying the statutory factors to particular cases. Compl. p. 39. While the ERP is not binding on Administrative Law Judges, the EAB has emphasized that the Agency's penalty policies should be applied whenever possible. *In re Carroll Oil Co.*, RCRA (9006) Appeal No. 01-02, 10 E.A.D. 635, 656 (EAB, July 31, 2002). However, a penalty policy is not unquestioningly applied as if the policy were a rule with "binding effect." *Employers Insurance of Wausau and Group Eight Technology, Inc.*, TSCA Appeal No. 95-6, 6 E.A.D. 735, 755-762 (EAB, Feb. 11, 1997). The ALJ is required to consider the civil penalty guidelines but may give specific reasons for deviating from the amount of the penalty proposed by the Complainant. 40 C.F.R. § 22.27(b).

Discussion of Penalty Criteria

In the Complaint filed against Respondent and at the hearing, the EPA proposed a total civil penalty of \$ 50,050 for the violations of FIFRA cited in Counts 1 through 11. Complainant argues that it properly applied the FIFRA statutory penalty factors and the ERP, it has met its burdens, and the imposition of a penalty of \$50,050 is appropriate in this case. Mr. Robert Bonace, a Life Scientist with the EPA, testified that he calculated this penalty for the EPA utilizing the ERP. Tr. March 31, p. 186. Complainant also hired an outside consultant on financial analysis, Mr. Mark Ewen of Industrial Economics, to help calculate the proposed penalty. C's Post-Hearing Brief, p. 109. *See also* C's Ex. 32.

Respondent argues that the penalty proposed by the EPA is excessive and that the

appropriate penalty is \$0, or at most, \$2,275 per violation. Resp's Post-Hearing Brief p. 17.

Size of the Business

The EPA first considered the appropriateness of the proposed penalty by examining publicly-available financial information on Behnke. Relying upon a Dun & Bradstreet report (C's Ex. 14b), which reflected that Respondent had annual gross sales in the amount of \$7,900,000, Mr. Bonace determined that the penalty was appropriate for a business this size. Tr. March 31, p. 189; C's Post-Hearing Brief, p. 109. Respondent has explicitly waived any challenge to the proposed penalty based on the size of business. R's Post-Hearing Brief pp. 16-17.

The Effect on the Person's Ability to Continue in Business

The EPA stated that it considered the effect of the proposed penalty on Respondent's ability to continue in business. In doing so, Complainant hired an outside consultant in financial analysis, Mr. Mark Ewen of Industrial Economics. Mr. Ewen was hired to review several different items of publicly-available information regarding Behnke's financial condition. C's Post-Hearing Brief, p. 109; C's Ex. 32.

However, Respondent admitted in its prehearing exchange that it would be able to pay the total penalty proposed in the Complaint and specifically waived any objection to the proposed penalty based on its inability to pay or the effect on Behnke's ability to continue in business. R's Resp. To Mot. To Strike and Compel at 24. Moreover, in Respondent's Post-Hearing Brief, Respondent again waived any challenge to the proposed penalty based on inability to pay. R's Post-Hearing Brief, pp. 16-17. *See also* Tr. March 31, p. 190. Respondent has also declined to provide any evidence concerning its financial condition, which would be necessary in order to support an inability to pay claim. *In re New Waterbury*, 5 E.A.D. 529, 541-542 (EAB 1994).

Gravity of the Violation

Complainant contends that the proposed penalty of \$50,050 is appropriate in light of the "gravity" of the violations. Complainant argues that Respondent's violations of FIFRA present a potential danger to public health, and therefore involve substantial gravity. Complainant notes that Respondent's violations involve the distribution or sale of unregistered pesticides. Respondent claimed that these pesticides would be effective against harmful bacteria such as *Listeria*, *E. coli*, and *Salmonella* but failed to submit their products to the EPA's efficacy evaluation process. Complainant argues that Behnke introduced into commerce products that made antimicrobial claims, but that had never been proved to be effective under the strict EPA efficacy evaluations in controlling microorganisms to the extent that Behnke claimed in its labeling and advertisements. C's Post-Hearing Brief, pp. 110-111.

Potential Harm to the Public

Dr. Blackburn testified about the importance of EPA's efficacy evaluations in order to ensure that antimicrobial products are as effective as advertised. As discussed above, Behnke's lubricants at issue were labeled as targeting bacteria such as Listeria, E.coli, and Salmonella. Dr. Blackburn testified that advertising claims that mention such bacteria are "public health claims" and therefore very important to the EPA. Tr. April 1, p. 485. Dr. Blackburn stated that efficacy evaluations of antimicrobials are:

critical because these organisms are public health organisms. We know that they directly impact man, are infectious to man, they're pathogenic towards man. And it's important that we have the confidence that these products will work against these pathogenic organisms before they're registered by evaluating the data that's generated.

Tr. April 1, p. 496.

Dr. Blackburn testified that she considered efficacy evaluations always important, but that they are especially important when the product is meant to be used in hospitals and food processing areas. *Id.* Dr. Blackburn explained:

Well, in the food processing establishment your end product is going to be something that's going to be ingested, and it's important that proper products are used to mitigate public health organisms from getting in the food, from causing the diseases associated with food and by addressing the efficacy at the beginning of the process and knowing that the products that are to be used in these facilities are indeed efficacious, you can mitigate a lot of these infections or these pathologies.

Tr. April 1, pp. 496-497. As Respondent has pointed out, their lubricants are directed towards the food processing industry, and have been used by several large companies, including Kraft and Quaker Oats. R's Reply Brief, pp. 2-3.

Mr. Edwards also testified to the importance of efficacy testing of antimicrobial products. He stated that if a product did not live up to its claims, "then at the very least you could end up with cross-contamination, with whatever the public health organism is, going from one site to the other. And then the worst, you could end up with somebody at some point getting sick." Tr. April 1, p. 250. Dr. Blackburn testified as to the serious illnesses associated with Listeria, E.coli, and Salmonella that could occur if food contaminated with the bacteria was consumed by humans. Salmonella causes gastroenteritis, which in some instances, can result in death for the elderly, infants, immunocompromised, and immunosuppressed individuals. Tr. April 1, p. 470-471. Dr. Blackburn explained that E.coli can also cause gastroenteritis, as well as gram-negative pneumonia, meningitis, septicemia, mastitis, and urinary tract infections. Septicemia can also cause death. Meningitis is the inflammation of the brain lining, and can also cause death. *Id.* at 472-473. Listeria also causes gastroenteritis, septicemia, meningitis, and spontaneous abortions. *Id.* at 474. Dr. Blackburn's testimony as to the deadly effect of these bacteria demonstrates the

importance of regulatory oversight of antimicrobial products in order to evaluate the truth of their antimicrobial claims, thereby preventing exposure of the public to the risk of disease.

In support of a lower penalty, Respondent states that Behnke has always sold its antimicrobial lubricants in compliance with FDA requirements under the FFDR, and argues that therefore, the potential harm to the public was nominal. R's Reply Brief, p. 12. Respondent's argument ignores the fact that the FDA and EPA have different goals and requirements. While Behnke's lubricants are food additives within the FDA's regulations, this does not mean the lubricants were tested under EPA efficacy evaluation standards for their effect on bacteria. In fact, Dr. Blackburn testified that the FDA's guidance document (R's Ex. 53) could not serve as a substitute for the EPA guidelines on efficacy evaluations. Tr. April 2, p. 538. Dr. Blackburn points out that the FDA's guidance document does not have a set performance standard or go into the level of detail regarding testing requirements that the EPA does. *Id.* While Behnke's lubricants may be safe as food additives under the FDA, they still ran the risk of not living up to their bacteria-killing claims and thus exposing the public to deadly bacteria.

Respondent contends that Behnke and other third parties (such as Kraft) tested the lubricants to determine the efficacy of the lubricants in targeting microbes. R's Reply Brief, p. 12; Tr. April 3, pp. 775-778. Dr. Blackburn reviewed the lab test results on JAX Poly-Guard FG-2 published by Respondent in some of its promotional material (C's Ex. 8c). Dr. Blackburn testified that the information provided was insufficient to evaluate the efficacy of the antimicrobial properties of the lubricant. Tr. April 2, p. 515. Dr. Blackburn noted that:

[T]he data is silent on what test was actually conducted to generate the data. It's silent on the conduct, the study conduct, were the necessary controls present, what the contact time was for the products to be in contact with the surface, exposure time, the actual test organisms...I don't know what yeast colonies, what mold colonies they're referring to, what test organisms were tested. And the test method against is not present on any of these documents. The study conduct is missing as well.

Tr. April 2, pp. 515-516. Because of the missing information, Dr. Blackburn did not consider the data reliable. Tr. April 2, p. 516.

Therefore, I find that Respondent's argument that the potential harm to the public was nominal unpersuasive. Complainant has carried its burden of persuasion that the proposed penalty is appropriate in light of the gravity of the violation and the potential harm to the public.

The ERP

Under the ERP, the penalty is determined in a five stage process in consideration of Section 14(a)(4) criteria. These five steps are:

1. Determination of the gravity or “level” of violation using Appendix A of the ERP;
2. Determination of the size of business category for the violator, found in Table 2 of the ERP;
3. Use of the FIFRA civil penalty matrix found in Table 1 of the ERP to determine the dollar amount associated with the gravity level of the violation and the size of the business category of the violator;
4. Further Gravity Adjustments of the base penalty in consideration of the specific characteristics of the pesticide involved, the actual or potential harm to human health and/or the environment, the compliance history of the violator, and the culpability of the violator, using the “Gravity Adjustment Criteria” found in Appendix B of the ERP; and
5. Consideration of the effect that payment of the total civil penalty will have on the violator’s ability to continue in business, in accordance with the criteria established in the ERP.

C’s Ex. 33 at 18.

In order to determine of the final gravity of the violation under the ERP, a two part process is followed. First, the appropriate gravity “level” of the violation is determined. Second, the base penalty figure is adjusted, as determined from the gravity “level,” to consider the actual set of circumstances that are involved in the violation. C’s Ex. 33 at 21.

Base Gravity Level

Under Appendix A, the FIFRA ERP classifies a violation of 12(a)(1)(A) (distribution or sale of an unregistered pesticide) as a “Level 2” violation. C’s Ex. 33 at A-1. I find that Complainant has correctly assigned a Level 2 violation to each of the 11 illegal distributions alleged in the Compliant.

Size of Business Category

As discussed above under the statutory factor, Complainant obtained a Dun & Bradstreet Report, printed June 6, 2006, that indicated that Behnke Lubricants Inc. had a sales volume of over \$7,900,000. C’s Ex. 14b. Complainant correctly placed Respondent in “Business Category I” as a respondent who is alleged to have violated Section 14(a)(1) of FIFRA and whose gross revenues/sales exceed \$1 million.⁸ C’s Ex. 33 at 20; C’s Post-Hearing Brief, p. 123. As

⁸ERP Table 2 divides FIFRA Section 14(a)(1) violators (registrants, wholesalers, distributors) into three business size categories. Category I are businesses with over \$1,000,000 in gross revenues in the prior calendar year, Category II applies to businesses with prior year gross revenues from \$300,001 to \$1,000,000, and Category III are businesses with gross

previously stated, Respondent does not challenge this aspect of the penalty calculation. R's Post-Hearing Brief pp. 16-17.

Civil Penalty Matrix

The EPA used the ERP's Civil Penalty Matrix to assign a base penalty relative to the gravity of the violation and the size of the business. Each cell of the Civil Penalty Matrix represents the Agency's assessment of a penalty, within the statutory maximum considering each level of gravity of the violation and each size of the business category. Under the ERP, the base penalty assigned to a violation with a Level 2 Base Gravity Level and Business Category I is \$5,000 (the original statutory maximum). Finally, following the Debt Collection Improvement Act of 1996, 40 C.F.R. part 19 and the EPA memorandum, "Penalty Policy Supplements Pursuant to the 2004 Civil Monetary Penalty Inflation Adjustment Rule," the EPA arrived at an adjusted base penalty of \$6,500 per violation. C's Post-Hearing Brief, p. 124.

Gravity Adjustment Criteria

Next, the EPA applied the Gravity Adjustment Criteria to the base penalty of \$6,500. The ERP lists gravity adjustment criteria for each violation relative to the specific characteristics of the pesticide involved, the harm to human health, and/or harm to the environment, compliance history of the violator, and the culpability of the violator. The gravity adjustment values from each gravity category from Appendix B are added together (up to a maximum total value of 21) and based upon Table 3 in the ERP, the gravity based penalty is either assessed as is, raised, or lowered. If the sum of the adjustment factors is 7 or below, the penalty is reduced or possibly eliminated. If the sum of the adjustment factors is between 8 to 12, the base penalty is assessed, and if the sum of adjustments is 13 or higher, the penalty is increased. C's Ex. 33, Appendix B, Table 3.

The ERP provides two choices for toxicity, either "1" or "2". Pesticides rating a "1" are those in Toxicity Categories II through IV, pesticides assigned the signal word "warning" or "caution" and those with no known chronic health effects. Pesticides rating a "2" are Toxicity Category I pesticides, pesticides requiring the signal word "danger", restricted use pesticides, pesticides that are flammable or explosive, or that cause chronic health effects. C's Ex. 33, Appendix B. Complainant has assigned a "pesticide" toxicity value of "1", based on the labels and advertisements, as the products were thought to be "food grade" and not toxic in themselves. C's Post-Hearing Brief, p. 125.

The EPA has also assigned a value of "1" to "harm to human health." C's Post-Hearing Brief, p. 125. The value of "1" means that the product represents "minor potential or actual harm to human health, neither serious nor widespread." C's Ex. 33 at B-1. Complainant has assigned a value of "1" to "harm to the environment." C's Post-Hearing Brief, p. 125. The value of "1"

revenues at or below \$300,000. C's Ex 33 at 20; Tr. March 31, p. 189.

means the violations' potential for harm to the environment was minor, neither widespread nor substantial. C's Ex. 33 at B-1. These assignments were made at the initial filing of the Complaint. Based on testimony at the hearing, especially Dr. Blackburn's testimony, the EPA believes it could justify a higher assessment, but has elected not to depart from its original calculation. C's Post-Hearing Brief, p. 125.

Gravity of Misconduct includes "compliance history" and "culpability." C's Ex. 33, Appendix B. The EPA has assigned "compliance history" a value of zero, based on the absence of any record of any prior FIFRA violations by Respondent. C's Post-Hearing Brief, p. 126. I find that a "compliance history" value of zero is appropriate in this matter.

The EPA assigned "culpability" a value of "2", based on unknown culpability of the Respondent. Complainant believes that testimony adduced at the hearing would support a higher "culpability" level, but chooses to keep its original penalty calculation. C's Post-Hearing Brief, p. 126. Complainant points to the testimony regarding Respondent's communications with the NSF, in which the NSF told Respondent to register their product with the EPA as evidence that the violation was knowing and willful. Tr. March 31, pp. 190-195. The EPA also cites Respondent's continued violations even after the filing of the Complaint. C's Post-Hearing Brief, p. 126.

Respondent argues that the level "2" culpability assigned to it is incorrect. Instead, Respondent states that it should receive a level "0" culpability level. R's Post-Hearing Brief, p. 17. A level "0" culpability level is appropriate when "the violation was neither knowing nor willful and did not result from negligence. Violator instituted steps to correct the violation immediately after discovery of the violation." C's Ex. 33, at B-2. Respondent asserts that it attempted to comply with the EPA and NSF recommendations to the best of its ability. Respondent also stated that "it was only when Behnke believed that NSF and EPA's requests went too far that Behnke objected by asserting its legal rights." R's Reply Brief at 13. In regard to the violations committed after the Complaint was filed, Respondent argues that it should not be penalized for what it describes as "defending its good-faith interpretation of the law." R's Reply Brief, p. 13.

At the hearing, Mr. Bonace testified that in order to earn a culpability value of "0", the Respondent "would have had to taken steps to correct the violation and not - and the violation could not have been knowing." Tr. March 31, p. 195. While I am not penalizing Respondent in any way for seeking to go to hearing in this matter, the record before me does not support the finding that Respondent took steps to correct the violation and that the violation was unknowing. Therefore, I find Respondent's argument for a "0" culpability level unpersuasive.

Complainant's Calculation of the Total Penalty

At the next step, the EPA added together the values it had assigned to the five adjustment factors of pesticide toxicity (1), human harm (1), environmental harm (1), compliance history (0), and culpability (2), and obtained a Total Gravity Adjustment Value total of "5" for each

violation. Under Table 3 of the ERP, a Total Gravity Adjustment Value of “5” means a reduction of the matrix value by 30 %. C’s Ex. 33, p. 22. As each violation was initially assigned a matrix value of \$6,500, the adjusted penalty for each violation is \$4,550. Multiplying \$4,550 by 11, the number of distributions, Complainant calculated a total proposed penalty of \$50,050. C’s Post-Hearing Brief, p. 126; C’s Ex. 14a.

Ability to Continue in Business

As discussed above, the EPA considered the effect of the proposed penalty on Behnke’s ability to continue in business through its financial analysis expert, Mr. Ewen of Industrial Economics. Mr. Ewen came to the conclusion, based on the available financial information, that Respondent could pay the proposed penalty. C’s Ex. 32. The EPA considered a Dun & Bradstreet Report and a Waukesha County Tax Bill for the Behnke facility. Based on this information, the EPA determined that no reduction in the proposed penalty was necessary in order for Respondent to continue in business. C’s Post-Hearing Brief, pp. 126-127. Again, Respondent waived any challenge to the proposed penalty based on ability to continue in business. R’s Post-Hearing Brief pp. 16-17. Accordingly, no facts, testimony, or exhibits were introduced at the hearing regarding Respondent’s inability to pay the proposed penalty of \$50,050 because Respondent has affirmed that he is so able to pay.

Discussions and Conclusions as to Methodology and Penalty Assessment

I find that Complainant has calculated the proposed penalty in accordance with the Enforcement Penalty Policy for FIFRA and has taken into consideration all necessary statutory factors. However, under 40 C.F.R. § 22.27(b) an Administrative Law Judge has discretion to assess a penalty different in amount from the penalty proposed by the complaint, setting forth in the initial decision the specific reasons for the increase or decrease based on the evidence in the record and in accordance with the penalty criteria set forth in the applicable Act. The final assessment of civil penalties is committed to the informed discretion of the court. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 87 (2nd Cir. 2006); *United States v. Gurley*, 384 F.3d 316, 324 (6th Cir. 2004); *reh’g denied* 2005 U.S. App. LEXIS 425 (6th Cir. January 6, 2005) (en banc).

Upon considering all the evidence, I find sufficient compelling reasons to depart from the EPA’s calculation of the penalty in this case under the ERP. I agree with the EPA that the evidence produced at hearing supports a culpability level of “4.”⁹ Although EPA has chosen to stay with a culpability level of “2” in this case, I find that a culpability value of “4” should be assigned. A culpability level of “4” is assigned when there is a “knowing or willful violation of the statute. Knowledge of the general hazardousness of the action.” C’s Ex. 33 at B-2. Although the EPA has chosen to stay with its original penalty calculation, I find that a culpability level of “4” is more appropriate in this case.

⁹The ERP provides culpability levels of 0, 2, and 4 only. C’s Ex. 33 at B-2.

Complainant has produced evidence that Respondent was warned by the NSF as early as 2003 that it was making antimicrobial claims that would require its products to be registered under FIFRA. C's Ex. 37; Tr. March 31, p. 194. Mr. Peter, the president of Behnke, admitted at the hearing in regard to Behnke's labeling, that NSF "conveyed that they thought that this would be - possibly run amuck of some EPA pesticide concerns." Tr. April 2, p. 599. Mr. Peter also testified that "I was approached with a concern about the language on our labeling by NSF." Tr. April 2, p. 599. Mr. Peter and Mr. Paquette both did some research into EPA and FIFRA regulations themselves. Tr. April 2, p. 654. Respondent clearly was aware that it might be subject to EPA regulations and made a decision to go forward without so much as checking with the EPA for clarification. At the hearing, Mr. Bonace, an experienced enforcement specialist with EPA, testified that he did not have this information when he originally calculated the penalty, and based on it, he would propose that the culpability level be changed to a "4." Tr. March 31, p. 197.

Behnke made a conscious business decision that it would go forward with its sale of the lubricants without registering with the EPA. Mr. Peter admitted at the hearing that "we did not want to be listed under FIFRA" (Tr. April 2, p. 653) and that "[w]e wanted to stay out of that bailiwick." Tr. April 2, p. 669. Mr. Peter testified that he did not want the lubricants to require FIFRA registration because of:

[T]he extensive and extremely expensive processes to go through to get these types of approvals and the subsequent possible state approvals, the different things there were needed. So we took the tact that we would, at all costs, do our best job to avoid language that would implicate us in FIFRA labeling and try and stay within the language that was given to us in the FDA guidelines.

Tr. April 2, p. 622. Mr. Peter also testified that having EPA registration would cause Behnke to lose its competitive edge over its competitors in the marketplace. Tr. April 2, p. 672. Mr. Peter admitted that selling its lubricants without EPA registration was a business decision. Tr. April 2, p. 673. He stated that he was willing to take the risk that EPA would eventually contact him in regard to the lubricants. *Id.*

Although the NSF pointed out that pesticidal claims on their lubricants could concern the EPA in 2003, Mr. Peter testified he did not contact the EPA to inquire if the lubricants needed to be registered with the EPA as a pesticide. Tr. April 2, p. 665. Mr. Peter attended a trade group annual meeting at which the EPA's Mr. Edwards gave a presentation on EPA registration of treated materials. Mr. Peter testified that he spoke with Mr. Edwards after the presentation but did not ask him any questions regarding Behnke's lubricants being subject to FIFRA registration. Mr. Peter also did not try to schedule a meeting with Mr. Edwards to clarify his understanding of EPA regulations. Mr. Peter testified that this was another business decision. Tr. April 2, pp. 686-694. After Mr. Saatkamp inspected Respondent's facility, Respondent still made a conscious business decision not to contact the EPA. Tr. April 2, pp. 673-674. Respondent's longstanding indifference to the applicable FIFRA regulations, given its long experience as a business operating in federally regulated arenas aggravates his culpability.

Even after the EPA filed a Complaint against Respondent, it continued to sell or distribute its unregistered pesticide products. Mr. Bonace testified that on the very first day of the hearing he checked Respondent's website and found that Behnke was still making pesticidal claims. Tr. March 31, p. 195. Almost one year after Respondent became aware of the Complaint and was notified that it was allegedly violating the federal regulations Respondent was still making pesticidal claims on its website. It was only after the first day of the hearing that Mr. Peter made sure that those claims were taken off of Behnke's website. Tr. April 2, p. 631. Respondent is culpable for avoiding its regulatory responsibilities under FIFRA, a behavior that is unacceptable and conflicts with the goals and undermines the purposes of the FIFRA. Based on the record before me, I find that a culpability level of "4" is appropriate in this matter.

Adding together the values assigned to the five adjustment factors of pesticide toxicity (1), human harm (1), environmental harm (1), compliance history (0), and culpability (4), I obtain a Total Gravity Adjustment Value total of 7 for each violation. Under Table 3 of the ERP, a Total Gravity Adjustment Value of "7" means a reduction of the matrix value by 10%. C's Ex. 33, p. 22. As each violation was initially assigned a matrix value of \$6,500, the adjusted penalty for each violation is \$5,850. Multiplying \$5,850 by 11, the number of distributions, the total penalty warranted is \$64,350. Nonetheless, I am capping the increase to 10% of the total proposed penalty, resulting in an assessed penalty of \$55,055.

Given the seriousness of these violations, I find a \$55,055 penalty reasonable and appropriate. This figure is deemed appropriate in light of the three statutory factors set forth in FIFRA Section 14(a)(4) and the ERP as discussed in more detail above.

ORDER

1. Respondent Behnke Lubricants, Inc. is assessed a civil administrative penalty in the amount of \$ 55,055.

2. Payment of the full amount of this civil administrative penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below.¹⁰ Payment shall be made by submitting a certified or cashier's check in the

¹⁰Alternatively, Respondent may make payment of the penalty as follows:

WIRE TRANSFERS:

Wire transfers should be directed to the Federal Reserve Bank of New York

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727

amount of \$55,055, payable to “Treasurer, United States of America,” and mailed to:

**U.S. Environmental Protection Agency
Fines and Penalties**

SWIFT address = FRNYUS33

33 Liberty Street

New York NY 10045

Field Tag 4200 of the Fedwire message should read “ D 68010727 Environmental Protection Agency ”

OVERNIGHT MAIL:

U.S. Bank

1005 Convention Plaza

Mail Station SL-MO-C2GL

St. Louis, MO 63101

Contact: Natalie Pearson

314-418-4087

ACH (also known as REX or remittance express)

Automated Clearinghouse (ACH) for receiving US currency

PNC Bank

808 17th Street, NW

Washington, DC 20074

Contact – Jesse White 301-887-6548

ABA = 051036706

Transaction Code 22 - checking

Environmental Protection Agency

Account 310006

CTX Format

ON LINE PAYMENT:

This payment option can be accessed from the information below:

WWW.PAY.GOV

Enter sfo 1.1 in the search field.

Open form and complete required fields.

**Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000**

3. A transmittal letter identifying the subject case title and EPA docket number (FIFRA 05-2007-0025), as well as Respondent's name and address, must accompany the check.

4. If Respondent fails to pay the penalty within the prescribed statutory period after entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 31 C.F.R. §§ 13.11, 901.9.

APPEAL RIGHTS

This Order constitutes an Initial Decision as provided in Section 22.17(c) of the Rules of Practice, 40 C.F.R. 22.17(c). Pursuant to Sections 22.17(c) and 22.30 of the Rules of Practice, 40 C.F.R. §§ 22.27(c) and 22.30, this Initial Decision shall become the Final Order of the Agency unless an appeal is filed with the Environmental Appeals Board within thirty (30) days of service of this Order, or the Environmental Appeals Board elects, *sua sponte*, to review this decision.

Copies of this Order, the Initial Decision, dated December 30, 2008, are being served on both parties, as well as the Regional Hearing Clerk, in accordance with 40 C.F.R. § 22.27(a). However, this Initial Decision is not being released or made available to the public at this time, but will be publicly released on January 14, 2009, barring any persuasive objections. If either party objects to the Initial Decision on the basis of containing confidential business information ("CBI"), such objection must be served on the undersigned no later than January 12, 2009. The parties are reminded that the delayed public release of this Initial Decision does not affect the appeal period specified in 40 C.F.R. § 22.30.

Barbara A. Gunning
Administrative Law Judge

Dated: December 30, 2008
Washington, D.C.