

November 10, 2007

**VIA FEDERAL EXPRESS**

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

Re: *EPA v. Behnke*; Case No. FIFRA-05-2007-0025

Dear Clerk:

Enclosed for filing are an original and one copy of Respondent's Initial Prehearing Exchange and Exhibits in the above-referenced matter. Copies of the Exhibits are also being filed electronically on the enclosed CD. Please file-stamp and return the extra copy to me in the enclosed, self-addressed envelope.

I certify that one copy of the Respondent's Initial Prehearing Exchange together with copies of the Respondent's Exhibits and the enclosed CD are being served today by Federal Express upon counsel for the Environmental Protection Agency and upon the Hon. Barbara A. Gunning.

Thank you for your assistance in this matter.

Very truly yours,



Bruce A. McIlnay

Enclosures  
BAM/dep

cc: Mr. Eric Peter  
Atty. Nidhi O'Meara (w/enclosures)  
Hon. Barbara A. Gunning (w/enclosures)

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

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**In the Matter of:**

**BEHNKE LUBRICANTS INC.  
MENOMONEE FALLS, WISCONSIN**

**Docket No. FIFRA-05-2007-0025**

**Respondent.**

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**RESPONDENT'S INITIAL PREHEARING EXCHANGE**

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In accordance with the June 27, 2007 Prehearing Order issued by the Court, Respondent Behnke Lubricants, Inc., through its undersigned attorneys, McIlroy & Button, Ltd., hereby files Respondent's Initial Prehearing Exchange as follows:

**I. The names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of each witness's expected testimony, or a statement that no witnesses will be called.**

**A. Fact Witnesses.**

Respondent may call the following individuals to testify as fact witnesses at the hearing in this matter:

1. Mr. Eric Peter  
President  
Behnke Lubricants, Inc.  
W134 N5373 Campbell Drive  
Menomonee Falls, WI 53051  
262-781-8850

Mr. Peter is the current president and a long-time employee of respondent Behnke Lubricants, Inc.

Mr. Peter may testify regarding respondent's history in the lubrication industry and its present business and provide context for this dispute. Mr. Peter may also testify generally about the history and development of food grade lubricants for use within food and beverage

processing plants, and the market demands for such products that were generated by U.S. Department of Agriculture regulations.

Mr. Peter may also testify regarding the development and marketing strategies for the products and technology at issue in this matter and, more specifically, the needs and concerns in the food and beverage industry that motivated the investment of time and resources to the development and implementation of said products and technology; namely, food and consumer safety.

2. Mr. Carter Anderson  
Vice President  
Behnke Lubricants, Inc.  
W134 N5373 Campbell Drive  
Menomonee Falls, WI 53051  
262-781-8850

Mr. Anderson is employed as the vice president of respondent and is responsible for overseeing respondent's marketing and customer relationships, especially in the food and beverage processing industry.

Mr. Anderson may testify that a substantial amount of his time is spent in the field assisting customers in developing and implementing solutions to their specific lubrication needs and applications. Mr. Anderson may also testify about the application of respondent's food grade products in the field and, in particular, the six products specifically at issue in this matter.

Mr. Anderson may also testify that, as a marketing professional, he is keenly aware of the customer's needs and wants from respondent's products and their motives in purchasing these products in particular.

3. Ms. Patty Riek  
Behnke Lubricants, Inc.  
W134 N5373 Campbell Drive  
Menomonee Falls, WI 53051  
262-781-8850

Ms. Riek is an employee of respondent and the person responsible for certification of respondent's products as NSF H-1 food grade lubricants.

Ms. Riek may testify regarding the NSF certification process, in general, and specifically regarding the certification process of the six products identified in the EPA's complaint. Ms. Riek may also testify regarding the history of NSF's interference with respondent's products labeling at the request of respondent's competitors.

4. Mr. Mike Keller  
Sales  
Behnke Lubricants, Inc.  
W134 N5373 Campbell Drive  
Menomonee Falls, WI 53051  
262-781-8850

Mr. Keller is an employee of respondent and, in particular, the salesperson primarily responsible for several of the customer accounts identified in the EPA's complaint.

Mr. Keller may testify regarding the company's sales efforts to market the six products identified in the EPA's complaint to these identified customers. Mr. Keller may also testify regarding the purchasing process utilized by respondent's customers, including the personnel responsible for making decisions regarding the purchase of lubrication products. Mr. Keller may also testify regarding his familiarity with the specific application and uses of the products identified in the EPA's complaint by the customers identified therein.

5. Josh Rybicki  
American Foods Group  
544 Acme Street  
Green Bay, WI

Mr. Rybicki is employed by American Foods Group at its Green Bay Dressed Beef facility, where he works in the Parts Inventory Control Division. He assists in the purchasing of day-to-day products, including greases and oils, for the facility.

Mr. Rybicki gave a sworn declaration to the EPA regarding this matter. Respondent intends to call Mr. Rybicki to put the statements contained in his declaration into appropriate context regarding the intended use of respondent's products in the plant for which he does purchasing, and the actual decision-making authority within his employer and bases for making a purchase of this type. He may testify that American Foods Group has experienced numerous recalls of bacterially-contaminated processed food in the past several years, hence, the company has heightened concerns over food security and sanitation in its processing facilities.

6. Mr. Larry Bradstreet  
Tyson Foods Inc.  
700 Wheeler Street  
Vernon, TX 76348

Mr. Bradstreet is employed by Tyson Foods, Inc. Mr. Bradstreet may testify regarding the actual intended use and application of respondent's products by Tyson Foods, the world's leading food processor, within its plants.

7. Mr. Mike Pike  
Quality Control Quality Assurance Mgr.  
Tyson Foods Inc.  
Wilkesboro, NC 28697  
(336) 516-5483 (Cell)

Mr. Pike is employed by Tyson Foods Inc. Mr. Pike may testify regarding the actual intended use and application of respondent's products by Tyson Foods, the world's leading

processor. More specifically, Mr. Pike may offer evidence of how the properties described in respondent's literature directly impacts the quality and safety of the processed foods produced by Tyson Foods and, ultimately, the health and safety of its consumers.

8. Mr. Bill Brown  
Anheuser-Busch Companies  
One Busch Place  
St. Louis, MO 63118  
(314) 577-3784

Mr. Brown is employed by Anheuser-Busch Companies. Mr. Brown may testify as to the actual use of food-grade lubricants within the bottling industry and that when in use they may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food.

9. Mr. Ken Derouin  
Plant Engineer  
American Food Groups  
544 Acme Street  
Green Bay, WI 54308

Mr. Drouin is the Plant Engineer for American Food Groups' beef processing plant in Green Bay, Wisconsin. He may testify as to the methods and practices for using the products identified in the EPA's complaint at the Green Bay plant, particularly the proximity of such applications to the processed foods within the plant.

10. Mr. Gary Hagerstrom  
Outside Sales  
Transmotion, LLC  
3333 Commodity Lane  
Green Bay, WI 54304

Mr. Hagerstrom is a sales representative who assisted in the sale of equipment to American Food Groups for use in its beef processing plant. Mr. Hagerstrom specified the lubrication needs for this equipment and is familiar with the application of respondent's lubricants on the

equipment used by American Food Groups. Mr. Hagerstrom worked closely with Shaun Beauchamp to install automatic lubrication systems to the equipment used by American Food Groups. He may testify as to the actual use of respondent's products in the field generally and specifically at the American Food Groups' beef processing plant in Green Bay, Wisconsin.

11. Mr. James Draheim (or other representative of Seneca Foods)

Seneca Foods  
640 Caughlin Road  
Clyman, WI 53016

Mr. Draheim was responsible for making the decision to purchase respondent's products for use in Seneca Foods' processing plant and may testify regarding the use Seneca makes for the products in Seneca's plant and the potential for such products to become a part of the processed foods.

12. Craig Hoffman  
Sara Lee (Hillshire Farm)  
New London Facility  
N3620 County D  
New London, WI 54961

Mr. Hoffman was responsible for the purchasing of respondent's lubricants for use in the Sara Lee New London facility and may testify regarding the use to which the same were put within that facility as well as the potential for the same to become part of the processed food.

13. Roger Nelson  
Badger Plastics & Supply Co.  
3451 Johnson Avenue  
Plover, WI 54467

Mr. Nelson is an outside sales representative with Badger Plastics & Supply Company. He was responsible for the Sara Lee New London facility account and may testify as to the use to which respondent's products were put within that facility.

14. Mr. Eddie Chancellor  
Tyson Foods Inc.  
P.O. Box 669  
Union City, TN 38261

Mr. Chancellor is a vice president of Tyson Food Inc. Mr. Chancellor may testify regarding the actual intended use and application of respondent's products by Tyson Foods, the world's leading food processor, within its plants.

**B. Expert Witnesses.**

Respondent may call the following individuals to testify as expert witnesses at hearing in this matter:

1. Mr. Troy Paquette  
Technical Director  
Behnke Lubricants, Inc.  
W134 N5373 Campbell Drive  
Menomonee Falls, WI 53051  
262-781-8850

Mr. Paquette is a chemist employed by respondent who was primarily responsible for the discovery and refinement of the properties of the technology which is the subject of the EPA's complaint. Mr. Paquette is expected to testify as both a fact witness and expert witness.

As a fact witness, Mr. Paquette may describe the general nature of the technology that results in the antimicrobial properties of the products at issue using ingredients and components that are usual lubricant additives and generally recognized as safe for food-grade applications. Mr. Paquette may also provide factual background regarding customer demands and requirements that lead to the investment in research and development of this technology including testing that demonstrated the antimicrobial properties of the additives.

Mr. Paquette may also provide opinion testimony regarding the source of the microbes affected by this technology coming from processed food as opposed to being inherent in the product or environment in general.

2. Mr. Shaun Beauchamp  
Director of Operations  
Xact Fluid Solutions  
W134 N5373 Campbell Drive  
Menomonee Falls, WI 53051  
262-781-8850

Mr. Beauchamp is an engineer employed by respondent who designs equipment for the physical application of the products identified in the EPA's complaint to lubricant points in the customers' plants and is knowledgeable about specific applications within the plants of some of the customers identified in the EPA's complaint.

Mr. Beauchamp may testify that in their intended use the six products identified in the EPA's complaint may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food.

3. Mr. Charles D. Goodale  
8437 Treybrooke Place  
Braeswood Trails  
O'Fallon, IL 62269  
618-628-2589

Mr. Goodale is a former employee of Anheuser-Busch Companies, Inc. and now an independent consultant to the bottling industry.

Mr. Goodale may testify that in their intended use respondent's products at issue in this matter may reasonably be expected to result, directly or indirectly, in their becoming a component or otherwise affecting the characteristics of the food. He may testify that, as a result, he was responsible for implementing the application of food-grade lubricants within Anheuser-Bush's bottling processes.

**II. Copies of all documents and exhibit s which each party intends to introduce into evidence at the hearing.** [The exhibits should include a curriculum vitae or resume for each proposed expert witness. If photographs are submitted, the photographs must be actual unretouched photographs. The docs shall be identified as "Respondent's" exhibit and numbered with Arabic numbers.]

<b>Respondent's Exhibit List</b>				
<b>Documents on CD</b>				
Folder	File	Description	Ex. No.	
AFG-MP78				
	Amerifoods Quote	Quote for Overhead Slide Chain Lubricating System in American Foods Beef Processing Plant in Green Bay, Wisconsin	RX	1
	Beef Processing	Video showing overhead slide chain system in operation and demonstrating application of Magna Plate 78 in beef processing environment	RX	2
	Conveyor System for Beef	Photograph of conveyor system to which Magna Plate 78 is applied in beef processing environment	RX	3
	Formal Quote Multi Chain System AMG	Email from Beauchamp to Gary Hagerstrom regarding sytem for chain lubrication within AFG processing plant in Green Bay, Wisconsin	RX	4
	Formal Quote for Buck Derouin at American Foods Group	Email from Beauchamp to Gary Hagerstrom regarding Jax lubricants for use in AFG processing plant in Green Bay, Wisconsin	RX	5
	Halo Guard FG	Product description and specifictions for Halo Guard Food Grade Greases from Jax	RX	6
	Halo Guard FG-2, Lt,00,MSDS 062707	Material Data Safety Sheets for Halo Guard product line	RX	7
	Magna Plate 74	Product description and specifictions for Magna Plate 74 Food Grade air line oil from Jax	RX	8
	Magna Plate 78	Product description and specifications for Magna Plate 78 Food Grade oil from Jax	RX	9
	MP 72, 74,76,78 MSDS 020207	Material Data Safety Sheets for Magna Plate product line	RX	10

<b>Respondent's Exhibit List</b>				
<b>Documents on CD</b>				
Folder	File	Description	Ex. No.	
	Overhead Chain Lubrication System	Product description for overhead chain lubrication system for Jax lubricants	RX	11
	Overhead Chain Lubrication System (email)		RX	12
	Overhead Chain Lubrication System (email2)		RX	13
	Union Chain	Product description for Union Chain system to which Jax lubricants are applied	RX	14
	X458 Fogger Success 112105	Correspondence from Beauchampt to Anderson regarding success of lubricating system within Tyson Beef Processing Plant	RX	15
	XeamOLS12N4XOTL	Quote for Overhead slide chain system	RX	16
	XEAMOLS14BRDSTM	Quote for DS Series Chain Lubrication package for use in AFG Beef Processing Plant in Green Bay, Wisconsin	RX	17
	XQ000061	Quote for Overhead Slide Chain Lubricating System in American Foods Beef Processing Plant in Green Bay, Wisconsin	RX	18
Bakery Chain Lubrication	BPinstallo	Photograph of installed chain application equipment	RX	19
	BPinstallq	Photograph of Chainlube applicator controls	RX	20
	Chainlube	Video of chain lubrication equipment in use.	RX	21
	IMG_0723	Photograph of chain lubrication equipment parts	RX	22
	Stewart-Demo-BETA	Brochure re chain lubrication application system demonstration	RX	23
	XEAMLS09BPTRAY-E	Brochure regarding Tray Oven Lubrication System	RX	24

Respondent's Exhibit List				
Documents on CD				
Folder	File	Description	Ex. No.	
General Chain Lubrication	EnclosedTrackLube	Brochure regarding track lube application system	RX	25
	FormingChainOiler	Brochure regarding forming chain oiler (air spray) system	RX	26
	Nozzle & Chain	Photograph depicting nozzle for application of lubricant on chain	RX	27
	Sniper Lubrication System	Product information for Sniper Lubrication system	RX	28
	Sniper Setup	Product information regarding Sniper Lubrication system depicting chain application	RX	29
	Spray2	Photograph depicting application of oil to chain showing some overspray	RX	30
Halo-Guard Application	AutoGrease	Brochure regarding grease application system	RX	31
	Bearingblock	Photograph of grease application system on bearing block	RX	32
	bearingblock2	Photograph of bearing block grease application system	RX	33
	Farmland Foods - Jim Thelen Success	Case study regarding implementation of lubrication system for Farmland Foods	RX	34
	FL23TMPP680	Schematic of installed grease lubrication system at Farmland Foods	RX	35
	FL23TMPP680Tech	Quick guide to specifications for grease application system	RX	36
	Roi	Return on investment analysis for implementation of grease application system	RX	37
	Xcessible Lubricator Install 020405	Brochure for Xcessible Lubrication system for application of greases	RX	38
	XQ00001	Correspondence to Farmland Foods regarding installation of grease application system	RX	39
Pork Processing	Farmland Foods - CreteNE102004	Trip report regarding visit to Farmland Foods processing plant to evaluate needs and solutions for lubricant application equipment	RX	40

Respondent's Exhibit List				
Documents on CD				
Folder	File	Description	Ex. No.	
	Hog-head	Photograph of hog's head on conveyor lubricated with respondent's lubricants	RX	41
	Hog-hook-wash	Photograph of washing apparatus for the conveyor hooks lubricated with respondent's products	RX	42
	Hog-hook-wash2	Photograph of washing apparatus for the conveyor hooks lubricated with respondent's products	RX	43
	Hog-process-chain	Photograph of hog processing chain in use.	RX	44
	J-Con(hotdog)Conveyor	Photograph of hot dog conveyor chain lubrication system	RX	45
	J-Con(hotdog)Conveyor2	Photograph of hot dog conveyor chain second application point on chain	RX	46
	J-ConBook	Brochure regarding J-Con Chain lubrication system	RX	47
	Tiromat	Specifications for grease application to Thermoforming machines	RX	48
	TiromatPowerPak680 Overview	Brochure regarding lubrication system for application of grease to Thermoforming machines	RX	49
Poultry Processing	HooksforBirds-just_below_oiler	Photograph of chain conveyor lubricated by respondent's products in poultry processing plant	RX	50
	InstructionCover	Photograph of trolley lubrication system for use in poultry processing	RX	51
	OverheadChainLubricatorX348	Photograph of overhead chain lubrication system for use in poultry processing plant depicting location of lubrication system relative to processed birds	RX	52
PS Misc.	FDA Guidance 10-01-07	FDA Proposed Guidance for Antimicrobial Food Additives published for comment 10-1-07	RX	53
	Food-Grade Booklet	Behnke Publication regarding food grade lubricant certification	RX	54

Respondent's Exhibit List				
Documents on CD				
Folder	File	Description	Ex. No.	
	fx110807 Goodale-EMR	CV of Charles D. Goodale	RX	55
	Sean Beauchamp	CV of Shaun Beauchamp	RX	56
	Troy Paquette	CV of Troy Paquette	RX	57
	NFS Classifications	List of NSF Classification including H-1	RX	58
	NSF Approval Letters	Correspondence from NSF to Behnke certifying six products as meeting H-1 specifications	RX	59

**III. A statement expressing its view as to the place for the hearing and the estimated amount of time needed to present its direct case.**

The parties agree that Respondent is a Wisconsin corporation located in Waukesha County, Menomonee Falls, WI. In accordance with 40 C.F.R. §22.35(b), therefore, the hearing should be held in Waukesha County or Menomonee Falls, WI.

The Court and Complainant suggest an alternate place of hearing of Milwaukee, WI. However, Respondent prefers Waukesha County or Menomonee Falls, WI as the location for the hearing for purposes of convenience and accessibility. The City of Milwaukee is currently undergoing major freeway construction and parking is both limited and costly in the downtown area. For this reason, Respondent respectfully requests that the hearing be held at a mutually agreeable location in Waukesha County or Menomonee Falls, WI.

Possible sites for the hearing include the Waukesha County Courthouse, Waukesha, WI, or the Menomonee Falls Public Library, Menomonee Falls, WI. Both facilities have conference rooms of varying sizes available for public usage.

**IV. Statement regarding proposed penalty.**

In its Complaint, Complainant proposes a total civil penalty against Respondent for the violations alleged in the Complaint of \$50,050 (i.e. \$4,550 for each Count I-XI). While Respondent contests whether, in fact, there has been any violation FIFRA, 7 U.S.C. §§136 *et seq.*, and, therefore, the appropriateness of the imposition any penalty at all in this matter, it does not contest whether it would be able to pay the proposed penalty or whether the payment would have an adverse effect on its ability to continue to do business.

Respondent hereby admits that it would be able to pay the proposed total civil penalty of \$50,050 and such a penalty would not have an adverse effect on its ability to continue to do business. For this reason, Respondent also expressly waives any objection to the proposed civil penalties based on its inability to pay or the effect of the penalty on Respondent's ability to continue in business.

Therefore, Complainant's Request for Voluntary Production of Financial Information is rendered moot.

**V. Designation of Agency Representative for Purposes of the Hearing.**

Respondent has no objection to complainant's request that all witnesses not designated as experts be excluded from the courtroom during the testimony of other witnesses, with the following exceptions:

1. Expert witnesses be allowed to remain in the courtroom at all times;
2. A witness designated by counsel for either party as a representative of a party

who is a non-natural person be allowed to remain in the courtroom at all times.

The undersigned designates Mr. Eric Peter as respondent Behnke Lubricants, Inc.'s representative for purposes of the hearing in this matter within the meaning of Fed. R. Evid. 615

(2). Respondent respectfully requests that Mr. Peter and its designated experts be allowed to remain in the courtroom at all times; i.e., during the testimony of complainant's witnesses, and during the testimony of respondent's witnesses.

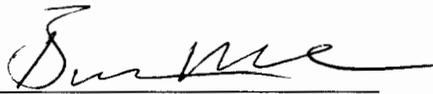
**VI. Reservation of Rights.**

Respondent reserves the right to supplement its witness list and/or designation of exhibits upon reasonable notice to complainant, or otherwise by Order of this Court.

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

Dated: November 10, 2007

McIlnay & Button, Ltd.  
Counsel for Respondent

By: 

Bruce A. McIlnay  
State Bar No. 1006609  
Linda S. Isnard  
State Bar No. 1000538  
Elizabeth M. Roat  
State Bar No. 1037779

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he/she has caused a true and correct copy of foregoing RESPONDENT'S INITIAL PREHEARING EXCHANGE and the Exhibits identified therein to be served upon the following on the date indicated below:

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

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

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

Dated November 10, 2007



Bruce A. McInay  
State Bar No. 1006609

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