



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

MAY 07 2007

REPLY TO THE ATTENTION OF:  
DT-8J

CERTIFIED MAIL  
RECEIPT NO. 7001 0320 0006 1562 3037

Eric J. Peter, President  
Behnke Lubricants Inc.  
W134 N5373 Campbell Drive  
Menominee Falls, Wisconsin 53051

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

Dear Mr. Peter:

I have enclosed the Complaint filed by the United States Environmental Protection Agency (U.S. EPA), Region 5, against Behnke Lubricants Inc. under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136l(a).

As provided in the Complaint, if you wish to request a hearing, you must do so in your answer to the Complaint. Please note that if you do not file an answer with the Regional Hearing Clerk (E-13J), U.S. EPA, Region 5, 77 West Jackson Blvd., Chicago, IL 60604 within 30 days of your receipt of this Complaint, a default order may be issued and the proposed civil penalty will become due 30 days later.

In addition, whether or not you request a hearing, you may request an informal settlement conference. If you wish to request a conference, or if you have any questions about this matter, please contact Nidhi O'Meara, Associate Regional Counsel at (312) 886-0568.

Sincerely,

A handwritten signature in black ink that reads "Mardi Klevs".

Mardi Klevs, Chief  
Pesticides and Toxics Branch  
Waste, Pesticides and Toxics Division

Enclosures

cc: Bruce McIlroy, Respondent's attorney

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**

In the Matter of:	)	
	)	
BEHNKE LUBRICANTS INC.	)	COMPLAINT AND NOTICE OF
MENOMONEE FALLS, WISCONSIN	)	OPPORTUNITY FOR HEARING
	)	
Respondent.	)	
	)	Docket No. <b>FIFRA-05-2007-0025</b>

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**COMPLAINT**

1. This is a civil administrative action instituted pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA), 7 U.S.C. § 136l(a), for the assessment of a civil penalty.

2. Complainant is, by lawful delegation, the Chief of the Pesticides and Toxics Branch, Waste, Pesticides and Toxics Division, United States Environmental Protection Agency (U.S. EPA), Region 5.

3. Respondent is Behnke Lubricants Inc. (Behnke), 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.

**STATUTORY AND REGULATORY BACKGROUND**

4. Section 3(a) of FIFRA, 7 U.S.C. § 136a(a), and 40 C.F.R. §152.15 state that no person in any state may distribute or sell to any person any pesticide that is not registered under this Act, except in certain circumstances which are not relevant to this case.

5. 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.

6. A substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, 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, 40 C.F.R. § 152.15(a)(1).

7. 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 on any advertising medium to which pesticide users or the general public have access.”

8. The term “person” as defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s) “means any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.”

9. The term “distribute or sell” is defined, in Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg) and 40 C.F.R. § 152.3, as “to distribute, sell, offer for sale, hold for distribution, hold for shipment, or receive and (having so received) deliver or offer to deliver.”

10. The term “pests” is defined in Section 2(t) of FIFRA, 7 U.S.C. § 136(t), and further defined in 40 C.F.R. § 152.5(c) ” as any insect, rodent, nematode, fungus, weed, or any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism...”

11. The term “pesticide” is defined at Section 2(u) of FIFRA, 7 U.S.C. § 136(u) and 40 C.F.R. § 152.3, and is generally regarded as any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.

12. Section 14(a) of FIFRA, 7 U.S.C. §136l(a), authorizes the Administrator to assess a civil penalty of up to \$5,500 for each violation of FIFRA that occurred from January 31, 1997 to March 15, 2004 and a civil penalty of up to \$6,500 for each violation of FIFRA that occurred after March 15, 2004 under Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), and 40 C.F.R. Part 19, as amended by 69 Fed. Reg. 7121 (Feb. 13, 2004).

### **GENERAL ALLEGATIONS**

13. Respondent is a "person" as defined at Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

### **August 3, 2006 Inspection at Behnke**

14. On August 3, 2006, an inspector employed by the Wisconsin Department of Agriculture conducted an inspection under FIFRA at Respondent's 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.

15. During the August 3, 2006 inspection, the inspector 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.

16. During the August 3, 2006 inspection, the inspector also collected sample literature for the following Behnke 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**.

17. During the August 3, 2006 inspection, the inspector 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.

***JAX Poly-Guard FG-2***

18. Respondent's literature that was obtained by the inspector on August 3, 2006, for **JAX Poly-Guard FG-2** states, 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.

19. On November 17, 2006, Respondent's Internet site at [www.jax.com](http://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 Mircronox®, the only truly effective, active microbial control agent in the food grade lubricant industry.

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

(E) “The introduction of JAX exclusive Mircronox® 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 Mircronox® Anti-Microbial Technology, providing true ‘knock-down’ performance against a wide range of bacteria and other micro organisms.”

20. 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 Mircronox® Antimicrobial,” “The bonus is an H1 lubricating grease with Mircronox®, JAX exclusive antimicrobial chemistry possessing true knockdown capabilities,” “powerful antimicrobial performance” and “added step in microbial protection programs”

21. Respondent’s literature obtained at the August 3, 2006 inspection claims, states or implies that **JAX Poly-Guard FG-2** is a pesticide.

22. Respondent’s literature for **JAX Poly-Guard FG-2** constitutes an advertisement as referenced in 40 C.F.R. § 168.22(a).

23. Respondent’s internet site on November 17, 2006 at [www.jax.com](http://www.jax.com) claims, states or implies that **JAX Poly-Guard FG-2** is a pesticide.

24. 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).

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

26. **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).

27. **JAX Poly-Guard FG-2** is not registered as a pesticide as required by Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).

28. On or about March 3, 2006, Respondent distributed or sold **JAX Poly-Guard FG-2** to Perlick Corporation (Perlick) located in Milwaukee, Wisconsin.

29. On or about June 15, 2006, Respondent distributed or sold **JAX Poly-Guard FG-2** to Badger Plastics & Supply, Inc. (Badger) located in Plover, Wisconsin.

30. 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.

***JAX Poly-Guard FG-LT***

31. Respondent's literature that was obtained by the inspector on August 3, 2006, for JAX Poly-Guard FG-LT states, 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.

32. On November 17, 2006, Respondent’s Internet site at [www.jax.com](http://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!”

33. Respondent's literature obtained at the August 15, 2006 inspection claims, states or implies that **JAX Poly-Guard FG-LT** is a pesticide.

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

35. Respondent's Internet site on November 17, 2006 at [www.jax.com](http://www.jax.com) claims, states or implies that **JAX Poly-Guard FG-LT** is a pesticide.

36. 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).

37. **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).

38. **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).

39. On or about February 11, 2005, Respondent distributed or sold **JAX Poly-Guard FG-LT** to Faribalt Foods located in Cokato, Minnesota.

40. On or about June 6, 2006, Respondent distributed or sold **JAX Poly-Guard FG-LT** to Pepsi Cola located in Sacramento, California.

***JAX Halo-Guard FG-2***

41. Respondent's literature that was obtained by the inspector on August 3, 2006, for **JAX Halo-Guard FG-2** states, 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.

42. On November 17, 2006, Respondent’s Internet site at [www.jax.com](http://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** and **Halo-Guard FG** greases contain Mircronox®, the only truly effective, active microbial control agent in the food grade lubricant industry.

(C) “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!”

43. The label on the **JAX Halo-Guard FG-2** container, observed and collected by the inspector on August 3, 2006, states: “JAX HALO-GUARD FG-2 provides Micronox® microbial knockdown performance.”

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

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

46. Respondent's internet site on November 17, 2006, at [www.jax.com](http://www.jax.com) claims, states or implies that **JAX Halo-Guard FG-2** is a pesticide.

47. Respondent's Internet site on November 17, 2006, for **JAX Halo-Guard FG-2** constitutes advertisements as defined in 40 C.F.R. § 168.22(a).

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

49. **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).

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

51. On or about March 14, 2006, Respondent distributed or sold **JAX Halo-Guard FG-2** to B-Way Corporation located in Sturtevant, Wisconsin.

52. On or about June 15, 2006, Respondent distributed or sold **JAX Halo-Guard FG-2** to Badger located in Plover, Wisconsin.

53. On or about July 14, 2006, Respondent distributed or sold **JAX Halo-Guard FG-2** to Seneca Foods (Seneca) located in Clyman, Wisconsin.

54. 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.

***JAX Halo-Guard FG-LT***

55. Respondent's literature that was obtained by the inspector on August 3, 2006, for **JAX Halo-Guard FG-LT** states, 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.

56. Respondent's Internet site on November 17, 2006, at [www.jax.com](http://www.jax.com) states, 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** and **Halo-Guard FG** greases contain Mircronox®, the only truly effective, active microbial control agent in the food grade lubricant industry.

(C) "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!"

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

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

59. Respondent's internet site on November 17, 2006, at [www.jax.com](http://www.jax.com) claims, states or implies that **JAX Halo-Guard FG-LT** is a pesticide.

60. 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).

61. **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).

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

63. On or about April 7, 2006, Respondent distributed or sold **JAX Halo-Guard FG-LT** to KHS, Inc. (KHS) located in Waukesha, Wisconsin.

64. 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.

#### ***JAX Magna Plate 74***

65. Respondent's literature that was obtained by the inspector on August 3, 2006, for **JAX Magna Plate 74** states, among other things:

(A) "JAX Magna-Plate 74 incorporates JAX new, proprietary 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.

66. Respondent’s Internet site on November 17, 2006, at [www.jax.com](http://www.jax.com) states:

(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) “As of May 1, 2002, every food grade lubricant in the JAX line incorporated our exclusive Micronox® Anti-Microbial Technology providing for true ‘knockdown’ performance against a broad spectrum of other micro organisms.”

(C) “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.”

67. An Internet site on June 23, 2006, at [www.meatpoultry.com](http://www.meatpoultry.com) features a promotional story on Magna Plate 74 which states, among other things:

(A) “In an effort to combat Listeria and other harmful microbial agents in air-operated equipment, Behnke Lubricants Inc/JAX has introduced Magna Plate-74 with Micronox®...”

(B) “Magna-Plate 74 contains JAX’s Micronox® technology, a revolutionary food-grade antimicrobial agent that provides unsurpassed protection against potentially deadly bacterial contamination such as E-coli, Listeria and Salmonella.”

(C) “Magna-Plate 74 provides various benefits to food and beverage processing plants, including: longer bearing and air operated equipment life; Micronox® antimicrobial technology to knockdown and prevent growth in the air system...”

(D) The article goes on to say: “JAX lubrication products are distributed worldwide. For information about JAX products, consumers can call toll-free 1-800-782-8850, or email requests to [info@jax.com](mailto:info@jax.com).”

68. Respondent’s literature obtained at the August 3, 2006 inspection claims, states or implies that **JAX Magna-Plate 74** is a pesticide.

69. Respondent’s literature for **JAX Magna-Plate 74** constitutes an advertisement as referenced in 40 C.F.R. § 168.22(a).

70. The Internet site on June 23, 2006, at [www.meatpoultry.com](http://www.meatpoultry.com) claims, states or implies that **JAX Magna-Plate 74** is a pesticide.

71. The June 23, 2006 Internet site at [www.meatpoultry.com](http://www.meatpoultry.com), for **JAX Magna Plate-74** constitutes an advertisement as referenced in 40 C.F.R. § 168.22(a).

72. Respondent's Internet site at [www.jax.com](http://www.jax.com), on November 17, 2006 claims, states or implies that **JAX Magna-Plate 74** is a pesticide.

73. The November 17, 2006 Internet site at [www.jax.com](http://www.jax.com), for **JAX Magna Plate-74** constitutes an advertisement as referenced in 40 C.F.R. § 168.22(a).

74. **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).

75. **JAX Magna-Plate 74** is not registered as a pesticide as required by Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).

77. On or about July 11, 2006, Respondent distributed or sold **JAX Magna-Plate 74** to Sara Lee Foods (Sara Lee) located in New London, Illinois.

78. On or about March 3, 2006, Respondent distributed or sold **JAX Magna-Plate 74** to American Foods Group (American) in Green Bay, Wisconsin.

#### **March 8, 2007 Investigation at American Foods Group**

79. On March 8, 2007, U.S.EPA conducted an investigation at American, located at 544 Acme Street, Green Bay, Wisconsin.

80. The purpose of the investigation was to verify if advertising and labeling claims were being made to American by the Respondent relating to Respondent's product **JAX Magna-Plate 74**.

81. 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.

82. On March 16, 2007, the inspector received two pieces of literature (via mail) from American which were given to American by the Respondent.

83. 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 (*Lysteria monocytogenes*), E. coli (*Escherichia coli*) and salmonella (*Salmonella typhimurium*) on contact and over extended lubrication intervals.”

(B) This literature also included the Respondent’s contact information such as 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 (*Lysteria monocytogenes*), E. coli

(Escherichia coli) and salmonella (Salmonella typhimurium) on contact and over extended lubrication intervals.”

(D) This literature also included the Respondent’s contact information such as 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.”

84. 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 antimicrobial 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 the Respondent’s contact information such as phone number, facsimile number and Internet address.

85. On March 29, 2007, the inspector received another piece of literature from American which was given to American by the Respondent.

86. 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** which makes many claims regarding its antimicrobial capabilities and performance due to Micronox™.

(C) Literature for **Magna Plate 78** which makes many claims regarding its antimicrobial capabilities and performance due to Micronox™.

(D) Literature entitled “Plant Microbial Knockdown Results” which includes references to **JAX Poly-Guard FG-2** and its antimicrobial features.

(E) Literature entitled “Major Food Processor Lab Test Results” which also makes references to **JAX Poly-Guard FG-2** and its antimicrobial features.

(F) Literature entitled “Independent Lab Results” which also makes references to **JAX Poly-Guard FG-2** and its antimicrobial features.

(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.

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

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

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

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

91. Respondent's literature received by U.S. EPA from American on March 29, 2007 claims, states or implies that **Halo-Guard FG-2** is a pesticide.

92. Respondent's literature received by U.S. EPA from American on March 29, 2007 claims, states or implies that **JAX Magna-Plate 74** is a pesticide.

93. Respondent's literature received by U.S. EPA from American on March 29, 2007 claims, states or implies that **JAX Magna-Plate 78** is a pesticide.

94. Respondent's literature received by U.S. EPA from American on March 29, 2007 claims, states or implies that **JAX Poly-Guard FG-2** is a pesticide.

95. Respondent's literature for **JAX Halo-Guard FG-2** constitutes advertisements as defined in 40 C.F.R. § 168.22(a).

96. Respondent's literature for **JAX Magna-Plate 74** constitutes advertisements as defined in 40 C.F.R. § 168.22(a).

97. Respondent's literature for **JAX Magna-Plate 78** constitutes advertisements as defined in 40 C.F.R. § 168.22(a).

98. Respondent's literature for **JAX Poly-Guard FG-2** constitutes advertisements as defined in 40 C.F.R. § 168.22(a).

99. **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).

100. **JAX Magna-Plate 78** is not registered as a pesticide as required by Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).

101. On or about December 19, 2006, Respondent distributed or sold **JAX Halo-Guard FG-2** to American in Green Bay, Wisconsin.

102. On or about December 19, 2006, Respondent distributed or sold **JAX Magna-Plate 78** to American in Green Bay, Wisconsin.

103. On or about March 5, 2007, Respondent distributed or sold **JAX Magna-Plate 78** to American in Green Bay, Wisconsin.

104. On or about March 3, 2006, Respondent distributed or sold **JAX Magna-Plate 78** to American in Green Bay, Wisconsin.

105. On or about March 3, 2006, Respondent distributed or sold **JAX Magna-Plate 74** to American in Green Bay, Wisconsin.

**March 8, 2007 Investigation at Badger Plastics & Supply Inc.**

106. On March 8, 2006, U.S. EPA conducted an investigation at Badger, located at 3451 Johnson Avenue, Plover, Wisconsin.

107. The purpose of the investigation was to verify if advertising and labeling claims were being made to Badger by the Respondent relating to Respondent's products **JAX Halo-Guard FG-2** and **JAX Poly-Guard FG-2**.

108. During the investigation on March 8, 2007, the inspector was taken to a supply area by Badger employees.

109. The inspector observed four boxes, each containing ten 14-ounce cartridge tubes of **JAX Poly-Guard FG-2** in the storage area.

110. The inspector viewed a single tube from each of the four boxes in the storage room.

111. 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 true knockdown capabilities,” “powerful antimicrobial performance” and “added step in microbial protection programs.”

112. 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.

113. During the visit on March 8, 2007, Badger also provided the inspector with a brochure that was given to Badger by Respondent.

114. The brochure was entitled “Food Grade Lubricants with Micronox™.”

115. 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.

116. The brochure also included tables and a graph illustrating the “antimicrobial properties” of **Poly-Gard FG-2** “antimicrobial grease” and its efficacy against *Listeria*, *E. coli* and *Salmonella*.

117. The literature also included contact information for Respondent including Respondent's phone number, facsimile number, Internet, distributor information and product ordering options.

118. Respondent's literature found at Badger claims, states or implies that **JAX Poly-Guard FG-2** is a pesticide.

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

120. During the March 8, 2007 investigation, Badger gave the 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 date of September 18, 2006.

121. On or about September 18, 2006, Respondent distributed or sold **JAX Halo-Guard FG-2** to Badger in Plover, Wisconsin.

122. On or about September 18, 2006, Respondent distributed or sold **JAX Poly-Guard FG-2** to Badger in Plover, Wisconsin.

123. On or about June 15, 2006, Respondent distributed or sold **JAX Halo-Guard FG-2** to Badger in Plover, Wisconsin.

124. On or about June 15, 2006, Respondent distributed or sold **JAX Poly-Guard FG-2** to Badger in Plover, Wisconsin.

#### **March 7, 2007 Inspection at Jennie-O Turkey Store**

125. On March 7, 2006, the State of Minnesota Department of Agriculture conducted an inspection at Jennie-O, located at 1530 30<sup>th</sup> Street SW, Wilmar, Minnesota.

126. The purpose of the inspection was to verify if advertising and labeling claims were being made to Jennie-O by the Respondent relating to Respondent's product **JAX Halo-Guard FG-LT**.

127. During the March 7, 2007 inspection, the inspector viewed and photographed a cartridge tube of **JAX Halo-Guard FG-LT**.

128. The labeling on the tube stated "JAX Halo-Guard FG-LT provides Micronox® microbial knockdown performance"

129. During the investigation, Jennie-O confirmed that the **JAX Halo-Guard FG-LT** was ordered on or about June 2006.

130. On or about June 27, 2006, Respondent distributed or sold **JAX Halo-Guard FG-LT** to Jennie-O in Wilmar, Minnesota.

#### **March 7, 2007 Investigation at Perlick Corporation**

131. On March 7, 2007, U.S. EPA conducted an investigation at Perlick, located at 8300 West Good Hope Road, Milwaukee, Wisconsin.

132. The purpose of the investigation was to verify if advertising and labeling claims were being made to Perlick by the Respondent relating to Respondent's product, **JAX Poly-Guard FG-2**.

133. During the investigation on March 7, 2007, the inspector viewed a 14-ounce cartridge of **JAX Poly-Guard FG-2**.

134. 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.”

135. 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 Benhke inspection.

136. On or about March 3, 2006, Respondent distributed or sold **JAX Poly-Guard FG-2** to Perlick in Milwaukee, Wisconsin.

#### **March 8, 2007 Investigation at Sara Lee Corporation**

137. On March 8, 2007, U.S. EPA conducted an investigation at Sara Lee, located at N3620 County Road D, New London, Wisconsin.

138. The purpose of the investigation was to verify if advertising and labeling claims were being made to Sara Lee by the Respondent relating to Respondent’ product **JAX Magna-Plate 74**.

139. During the investigation on March 8, 2007, the inspector viewed a 14-ounce cartridge of **JAX Poly-Guard FG-2**.

140. 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.”

141. The cartridge of **JAX Poly-Guard FG-2** observed by the inspector at Sara Lee was identical to the physical sample of **JAX Poly-Guard FG-2** that was obtained on August 3, 2006 during the Behnke inspection.

142. During the March 8, 2007 investigation, Sara Lee gave the inspector a copy of a purchase order from Sara Lee to Badger for the purchase of **JAX Poly-Guard FG-2**, with an order date of February 12, 2007.

#### **March 7, 2007 Investigation at Seneca Foods Corporation**

143. On March 7, 2007, U.S. EPA conducted an investigation at Seneca, located at 640 Caughlin Road, Clyman, Wisconsin.

144. The purpose of the investigation was to verify if advertising and labeling claims were being made to Seneca by the Respondent relating to Respondent's products **JAX Halo-Guard FG-2**.

145. During the investigation on March 7, 2007, Seneca provided the inspector with information sheets that Seneca had received from Behnke.

146. The first information sheet was entitled: "JAX MAGNA-PLATE 72, USDA H1-AUTHORIZED AIR LINE LUBE WITH ANTIRUST AND ANTIWEAR ADDITIVES NOW WITH MICRONOX® ANTIMICROBIAL TECHNOLOGY" and included the following language: "Antimicrobial Performance: JAX MAGNA-PLATE 72 incorporates JAX new, proprietary antimicrobial additive technology, Micronox®, for enhanced antimicrobial protection against a wide variety of microbial agents, including yeast, 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 (*Listeria monocytogenes*),

E. coli (Escherichia coli) and Salmonella (Salmonella typhimurium) over extended lubrication intervals.”

147. The second information sheet was entitled: “JAX MAGNA-PLATE 78 USDA H1-AUTHORIZED EXTREME - PRESSURE FOOD MACHINERY OIL WITH ENHANCED ANTIWEAR PROPERTIES NOW WITH MICRONOX® ANTIMICROBIAL TECHNOLOGY” and includes the following language “Antimicrobial Performance: JAX MAGNA-PLATE 78 incorporates JAX new, proprietary antimicrobial additive technology, Micronox™, for enhanced antimicrobial protection against a wide variety of microbial agents, including yeast, 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 (Listeria monocytogenes), E. coli (Escherichia coli) and Salmonella (Salmonella typhimurium) over extended lubrication intervals.”

148. The third information sheet was entitled: “HALO-GUARD FG GREASES” and included the following language: “JAX Halo-Guard FG provides Micronox® microbial knockdown performance.”

149. The final information sheet was entitled “JAX POLY-GUARD FG, A REVOLUTIONARY USDA-H1 FOOD-GRADE GREASE W/PTFE FOR LUBRICATION OF HIGH-SPEED/HIGH-TEMP FOOD AND BEVERAGE PROCESSING MACHINERY NOW WITH MICRONOX® ANTIMICROBIAL TECHNOLOGY” and included the following language: “Antimicrobial Performance: JAX POLY-GUARD FG incorporates JAX new, proprietary antimicrobial additive technology, Micronox®, for enhanced antimicrobial protection against a wide variety of microbial agents, including yeast, 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 Listeria (*Listeria monocytogenes*), *E. coli* (*Escherichia coli*) and Salmonella (*Salmonella typhimurium*) over extended lubrication intervals.”

150. On or about March 12, 2007, Seneca forwarded an electronic mail message to U.S. EPA, that had been sent to Seneca by Behnke on or about October 26, 2006.

151. The October 26, 2006 electronic mail message from Behnke to Seneca, which was entitled “Halo Guard and Poly Guard Data Sheets” had two data sheets attached to it for **JAX Halo-Guard FG Series** and **JAX Poly-Guard Series Greases**.

152. The first information sheet was entitled “HALO-GUARD FG GREASES” and included the following language: “Antimicrobial Performance: 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 FG Greases against Listeria (*Listeria monocytogenes*), *E. coli* (*Escherichia coli*) and Salmonella (*Salmonella typhimurium*) over extended lubrication intervals.”

153. The second information sheet was entitled “POLY-GUARD FG-LT, FG-2” and included the following language: “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.”

154. The literature at Seneca claims, states or implies that **JAX Magna-Plate 72** is a pesticide.

155. Respondent's literature for **JAX Magna-Plate 72** constitutes an advertisement as referenced in 40 C.F.R. § 168.22(a).

156. The literature at Seneca claims, states or implies that **JAX Magna-Plate 78** is a pesticide

157. Respondent's literature for **JAX Magna-Plate 78** constitutes an advertisement as referenced in 40 C.F.R. § 168.22(a).

158. The literature at Seneca claims, states or implies that **JAX Halo-Guard FG Greases** is a pesticide

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

160. The literature at Seneca claims, states or implies that **JAX Poly-Guard FG** is a pesticide

161. Respondent's literature for **JAX Poly-Guard FG** constitute an advertisements as referenced in 40 C.F.R. § 168.22(a).

162. During the March 7, 2007 investigation, Seneca gave the inspector copies of seven shipping records from Respondent to Seneca for **JAX Halo-Guard FG-2, JAX Halo-Guard FG-LT, and JAX Magna-Plate 78**.

163. On or about October 23, 2006, Respondent distributed or sold **JAX Halo-Guard FG-2** to Seneca in Clyman, Wisconsin.

164. On or about October 18, 2006, Respondent distributed or sold **JAX Halo-Guard FG-2** to Seneca in Clyman, Wisconsin.

165. On or about October 17, 2006, Respondent distributed or sold **JAX Halo-Guard FG-LT** to Seneca in Clyman, Wisconsin.

166. On or about September 29, 2006, Respondent distributed or sold **JAX Halo-Guard FG-LT** to Seneca in Clyman, Wisconsin.

167. On or about September 7, 2006, Respondent distributed or sold **JAX Halo-Guard FG-LT** to Seneca in Clyman, Wisconsin.

168. On or about September 7, 2006, Respondent distributed or sold **JAX Magna-Plate 78** to Seneca in Clyman, Wisconsin.

169. On or about August 18, 2006, Respondent distributed or sold **JAX Halo-Guard FG-LT** to Seneca in Clyman, Wisconsin.

**March 19, 2007 mailing from KHS, Inc.**

170. On March 19, 2007, U.S. EPA received a copy of a brochure from KHS located in Waukesha, Wisconsin.

171. The back cover of the brochure is marked "JAX Products Distributed by: Behnke Lubricants, Inc. - JAX" and included Respondent's phone and facsimile numbers in Menomonee Falls, Wisconsin and Sacramento, California.

172. The brochure is entitled "JAX: Lubricant Guide For Food, Beverage, Drug & Cosmetic Processing & Manufacturing."

173. The brochure includes a letter from Respondent to its customers which included the following language: "Micronox®, JAX advanced antimicrobial additive technology that provides

immediate and significant knockdown performance on a wide spectrum of microbial contaminants. This development alone is providing HACCP programs a powerful weapon in their ongoing battle against microorganisms.” “JAX Poly-Guard® FG is a new concept in food-grade greases, providing the highest level of antiwear performance of any competitor, and the benefits of Micronox®.”

174. The brochure included a table of contents which included a section entitled “Micronox® Antimicrobial Technology.”

175. The “Micronox® Antimicrobial Technology” section describes in detail the enhanced antimicrobial capabilities of Micronox® technology.

#### **Claims on the Internet**

176. On June 9, 2006, Respondent’s internet site at [www.jax.com](http://www.jax.com) stated, among other things:

(A) “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!”

(B) “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.”

(C) “As of May 1, 2002 every food grade lubricant in the JAX Line incorporates our exclusive Micronox® Anti-Microbial Tecnology, providing true ‘knock-down’ performance against a wide range of bacteria and other micro organisms!”

(D) “With the added benefit of Micronox®, JAX exclusive anti-microbial chemistry which independent testing has proven to be the most effective in industry, plants can achieve an extra measure of sanitation protection”

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

(F) “Poly-Guard FG-2, FG-LT... Now contains Micronox® anti-microbial for true ‘knock-down’ performance against a broad spectrum of microbial contaminants.”

177. On February 26, 2007, Respondent’s internet site at [www.jax.com](http://www.jax.com) stated, among other things, continued to make many of the same claims that were found on its website on June 9, 2006.

178. On March 21, 2007, the Internet contained many websites that continued to advertise JAX Micronox as having antimicrobial properties. These sites included, but are not limited to:

[www.uark.edu/depts/ifse/ofpa/exhibits.htm](http://www.uark.edu/depts/ifse/ofpa/exhibits.htm)

[www.allbusiness.com/management/business-support-services/669676-1.html](http://www.allbusiness.com/management/business-support-services/669676-1.html)

<http://milwaukee.bizjournals.com/Milwaukee/stories/2001/11/19/smallb1.html>

[www.jax.fr/pages](http://www.jax.fr/pages); [www.powercontrolresources.com/lub.html](http://www.powercontrolresources.com/lub.html)

<https://packexpo2006.bdmetrics.com/Portal/ViewCompany.aspx?id=1876571>

[www.foodproc.com/ad-jax.shtml](http://www.foodproc.com/ad-jax.shtml)

[www.ibtinc.com/primemover/archive/PM200507/lub01.html](http://www.ibtinc.com/primemover/archive/PM200507/lub01.html)

[www.lubrepolo.com/GGAlimenticio/](http://www.lubrepolo.com/GGAlimenticio/)

[www.jax.com/press release/pr>halo-fg.html](http://www.jax.com/press_release/pr>halo-fg.html)

[www.jax.com/press\\_releases/pr\\_bottom7.html](http://www.jax.com/press_releases/pr_bottom7.html)

[www.jax.com/fram\\_pr.html](http://www.jax.com/fram_pr.html)

[www.meatequip.com/supplierad/jax.htm](http://www.meatequip.com/supplierad/jax.htm)

[www.foodengineeringmag.com/CDA/Archives/543b8f4ab52f8010VgnVCM100000f932a8c0](http://www.foodengineeringmag.com/CDA/Archives/543b8f4ab52f8010VgnVCM100000f932a8c0)

[www.gissa.com/en/jax.htm](http://www.gissa.com/en/jax.htm)

[www.ahi.dk/jax/micronox.htm](http://www.ahi.dk/jax/micronox.htm)

[www.foodengineeringmag.com](http://www.foodengineeringmag.com)

[www.foodengineeringmag.com/FE/2006/10/Files/PDFs/FEX/006p\\_092.pdf](http://www.foodengineeringmag.com/FE/2006/10/Files/PDFs/FEX/006p_092.pdf)

[http://filesibnmedia.com/FE/Protected/Files/PDF/FEX1005p\\_110.pdf](http://filesibnmedia.com/FE/Protected/Files/PDF/FEX1005p_110.pdf)

[www.foodengineeringmag.com/FE/2005/06/Files/PDFs/behnke.pdf](http://www.foodengineeringmag.com/FE/2005/06/Files/PDFs/behnke.pdf)

[www.foodengineeringmag.com/FE/Home/Files/PDFs/FEX0107\\_149.pdf](http://www.foodengineeringmag.com/FE/Home/Files/PDFs/FEX0107_149.pdf)

[www.clfp.com/03EXPO/exhibit/CoDescriptions.pdf](http://www.clfp.com/03EXPO/exhibit/CoDescriptions.pdf).

179. All the internet sites listed in paragraph 178, above, claim, state or imply that Respondent's products containing Micronox® technology are pesticides.

180. All the internet sites listed in paragraph 178 above, constitute advertisements, as referenced in 40 C.F.R. § 168.22(a).

181. By letter dated December 22, 2006, Complainant issued to Respondent a Notice of Intent to File Civil Administrative Complaint against Behnke Lubricants, Inc.

182. In this Notice, U.S. EPA advised Respondent that it was planning to file an administrative complaint for civil penalties against Behnke Lubricants, Inc., for violations of FIFRA based on the distribution or sale of the unregistered pesticides.

183. A proposed penalty of \$50,050 was identified, although the letter specified that the notice was not a demand to pay a penalty.

184. Respondent was asked to present to U.S. EPA any information Respondent thought U.S. EPA should consider before issuing a complaint.

185. U.S. EPA further advised Respondent that, if Respondent believed that it would be unable to pay a penalty because of financial reasons, Respondent should submit the following specific financial documents: (1) certified financial statements for the past three years, including Income Statements, Balance Sheets, Statements of Cash Flows, CPA Audit Reports and CPA Notes to the Financial Statements; (2) Federal Income Tax Returns including all schedules for the past three years.

186. On or about February 1, 2007, Respondent submitted a memorandum in response to the Notice of Intent to File Civil Administrative Complaint referenced in paragraph 181, above.

187. In its reply to the Notice, Respondent provided a narrative response to the alleged violations.

188. In its reply, Respondent did not claim an inability to pay the proposed civil penalty of \$50,050, and Respondent did not provide any facts or other information concerning its ability to pay the proposed civil penalty of \$50,050.

189. On February 1, 2007, the U.S. EPA met with Respondent as a result of the Notice that was sent on December 22, 2006.

190. At that meeting, Respondent was given another opportunity to present any information that would demonstrate Respondent's inability to pay the proposed civil penalty of \$50,050.

191. During that meeting on February 1, 2007, Respondent declined to make any inability to pay claims.

192. Complainant obtained a Dun & Bradstreet, Inc., “Dun’s Market Identifiers” report for Behnke Lubricants Inc., dated March 30, 2006, which estimated annual sales of \$7,900,000.

#### Count I

193. Complainant incorporates by reference the allegations contained in paragraphs 1 through 192 of this Complaint.

194. 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).

195. Respondent’s violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A) subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty under Section 14(a) of the FIFRA, 7 U.S.C. §136l(a).

#### Count II

196. Complainant incorporates by reference the allegations contained in paragraphs 1 through 195 of this Complaint.

197. 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).

198. Respondent’s violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A) subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty under Section 14(a) of the FIFRA, 7 U.S.C. §136l(a).

### Count III

199. Complainant incorporates by reference the allegations contained in paragraphs 1 through 198 of this Complaint.

200. 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).

201. Respondent's violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A) subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty under Section 14(a) of the FIFRA, 7 U.S.C. §136l(a).

### Count IV

202. Complainant incorporates by reference the allegations contained in paragraphs 1 through 201 of this Complaint.

203. 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).

204. Respondent's violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A) subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty under Section 14(a) of the FIFRA, 7 U.S.C. §136l(a).

### Count V

205. Complainant incorporates by reference the allegations contained in paragraphs 1 through 204 of this Complaint.

206. 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).

207. Respondent's violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A) subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty under Section 14(a) of the FIFRA, 7 U.S.C. §136l(a).

Count VI

208. Complainant incorporates by reference the allegations contained in paragraphs 1 through 207 of this Complaint.

209. Respondent distributed, offered for sale, or sold **JAX Magna-Plate 78** on or about March 3, 2006 to American, in violation of Section Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A).

210. Respondent's violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A) subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty under Section 14(a) of the FIFRA, 7 U.S.C. §136l(a).

Count VII

211. Complainant incorporates by reference the allegations contained in paragraphs 1 through 213 of this Complaint.

212. 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).

213. Respondent's violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A) subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty under Section 14(a) of the FIFRA, 7 U.S.C. §136l(a).

Count VIII

214. Complainant incorporates by reference the allegations contained in paragraphs 1 through 216 of this Complaint.

215. 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).

216. Respondent's violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A) subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty under Section 14(a) of the FIFRA, 7 U.S.C. §136l(a).

Count IX

217. Complainant incorporates by reference the allegations contained in paragraphs 1 through 216 of this Complaint.

218. 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).

219. Respondent's violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A) subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty under Section 14(a) of the FIFRA, 7 U.S.C. §136l(a).

Count X

220. Complainant incorporates by reference the allegations contained in paragraphs 1 through 219 of this Complaint.

221. 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).

222. Respondent's violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A) subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty under Section 14(a) of the FIFRA, 7 U.S.C. §136l(a).

Count XI

223. Complainant incorporates by reference the allegations contained in paragraphs 1 through 222 of this Complaint.

224. Respondent distributed, offered for sale, or sold **JAX Poly-Guard FG-2** on or about March 3, 2006 to Perlick, in violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A).

225. Respondent's violation of Sections 3(a) and 12(a)(1)(A) of FIFRA, 7 U.S.C. §§ 136a(a) and 136j(a)(1)(A) subjects Respondent to the issuance of an Administrative Complaint assessing a civil penalty under Section 14(a) of the FIFRA, 7 U.S.C. §136l(a).

**PROPOSED CIVIL PENALTY**

The U.S. EPA Administrator may assess a civil penalty of up to \$5,500 for each offense of FIFRA that occurred on or after January 31, 1997 through March 15, 2004, and may assess a

civil penalty of up to \$6,500 for each offense of FIFRA that occurred after March 15, 2004, under Section 14(a) of FIFRA, 7 U.S.C § 136l(a), and 40 C.F.R. Part 19 (2005).

Complainant derived the proposed penalty by applying the factors enumerated in Section 14(a) of FIFRA, 7 U.S.C. § 136l(a), to the violations alleged in this Complaint. The reasoning for the assessment is explained in detail in the "Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act, July 2, 1990," a copy of which accompanies this Complaint. This Enforcement Response Policy provides a rational, consistent and equitable calculation methodology for applying the statutory factors to particular cases.

As stated in paragraph 181, above, by letter dated December 22, 2006, U.S. EPA advised Respondent that it was planning to file a civil administrative complaint against Respondent for alleged violations of FIFRA. U.S. EPA asked Respondent to identify any factors Respondent thought U.S. EPA should consider before issuing the complaint, and if Respondent believed there were financial factors which bore on Respondent's ability to pay a civil penalty, the U.S. EPA asked Respondent to submit specific financial documents. In responding to this letter, Respondent did not claim an inability to pay a penalty and has provided no facts or information which would indicate that the penalty should be adjusted for financial or other factors related to the alleged violation. Publicly available documents concerning Behnke Lubricants, Inc., indicate that Respondent has substantial annual sales of its products.

Based on the facts presented above, the gravity of the violations alleged herein, the size of Respondent's business, and Respondent's ability to continue in business in light of the proposed penalty, Complainant proposes that Respondent be assessed the following civil penalty for the violations alleged in this Complaint:

Count I

Distribution/Sale of Unregistered  
Pesticide Product. . . . . \$4,550

Count II

Distribution/Sale of Unregistered  
Pesticide Product . . . . . \$4,550

Count III

Distribution/Sale of Unregistered  
Pesticide Product. . . . . \$4,550

Count IV

Distribution/Sale of Unregistered  
Pesticide Product . . . . . \$4,550

Count V

Distribution/Sale of Unregistered  
Pesticide Product. . . . . \$4,550

Count VI

Distribution/Sale of Unregistered  
Pesticide Product. . . . . \$4,550

Count VII

Distribution/Sale of Unregistered  
Pesticide Product . . . . . \$4,550

Count VIII

Distribution/Sale of Unregistered  
Pesticide Product. . . . . \$4,550

Count IX

Distribution/Sale of Unregistered  
Pesticide Product . . . . . \$4,550

Count X

Distribution/Sale of Unregistered  
Pesticide Product . . . . . \$4,550

Count XI

Distribution/Sale of Unregistered  
Pesticide Product . . . . . \$4,550

**Total Proposed Civil Penalty . . . . . \$50,050**

Respondent may pay this penalty by certified or cashier's check payable to the "Treasurer of the United States of America," and remit the check to:

U.S. EPA, Region 5  
P.O. Box 371531  
Pittsburg, PA 15251-7531

A copy of the check shall also be sent to the Regional Hearing Clerk (E-13J) and to Terence Bonace (DT-8J) at:

U.S. EPA, Region 5  
77 West Jackson Boulevard  
Chicago, Illinois 60604.

A transmittal letter identifying the name and docket number should accompany both the remittance and the copies of the check.

### **OPPORTUNITY TO REQUEST A HEARING**

As provided in Section 14 of FIFRA, 7 U.S.C. § 136l(a)(3), and in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, Respondent has the right to request a hearing regarding the proposed Complaint, to contest any material fact contained in this Complaint, and/or to contest the appropriateness of the amount of the proposed penalty. Any hearing that Respondent requests will be held and conducted in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, and the "Consolidated Rules of Practice," 64 *Fed. Reg.* 40138 (July 23, 1999), a copy of which accompanies the Complaint.

If Respondent wishes to avoid being found in default, Respondent must file a written Answer to this Complaint with the Regional Hearing Clerk (address on page 41) within 30 days of service of this Complaint. The Answer must clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint with regard to which Respondent has any knowledge, or clearly state that Respondent has no knowledge as to particular factual allegations in the Complaint. The Answer should also state:

1. The circumstances or arguments that Respondent alleges constitute the grounds of defense;
2. The facts that Respondent disputes;
3. The basis for opposing the proposed penalty;
4. Whether Respondent requests a hearing.

Failure to deny any of the factual allegations in this Complaint constitutes admission of the undenied allegations.

A copy of this Answer and any subsequent documents filed in this action should be sent to Nidhi O'Meara (C-14J), Associate Regional Counsel at:

U.S. EPA, Region 5  
77 West Jackson Boulevard  
Chicago, Illinois 60604.

Ms. O'Meara can be reached at (312) 886-0568.

If Respondent fails to file a written Answer, with or without a Request for Hearing, within 30 days of receipt of this Complaint, the Regional Administrator or Presiding Officer may issue a Default Order. Issuance of a Default Order will constitute a binding admission of all facts alleged in the Complaint and a waiver of a right to a hearing under FIFRA. The civil penalty proposed in this Complaint shall then become due and payable without further proceedings 30 days after the Order is issued pursuant to 64 *Fed. Reg.* 40138 (July 23, 1999). Refusal to remit such penalty may result in the referral of this matter for collection to the United States Attorney. In addition, the default penalty is subject to the provisions relating to imposition of interest, penalty and handling charges set forth in the Federal Claims Collection Act of 1966, 31 U.S.C. § 3717. Interest will accrue on the default penalty at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. The U.S. EPA will impose a late payment handling charge of \$15 after 30 days, with an additional charge of \$15 for each subsequent 30 day period over which an unpaid balance remains. In addition, U.S. EPA will apply a 6 percent per annum penalty on any principal amount not paid within 90 days of the date the Default Order is signed by the Regional Administrator or Presiding Officer.



**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the original signed copy of the Complaint in resolution of the civil administrative action involving Behnke Lubricants Inc., was filed on May 7, 2007 with the Regional Hearing Clerk (E-13J), United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, and that I mailed by Certified Mail, Receipt No. 7001 0320 0006 1562 3037, a copy of the original to the Respondent:

Eric J. Peter, President  
Behnke Lubricants Inc.  
W134 N5373 Campbell Drive  
Menominee Falls, Wisconsin 53051

Respondent's Attorney:

Bruce McInay  
Maynard McInay Schmitt & Button, Ltd  
1150 Washington St.  
Grafton, Wisconsin 53204-2672

and forwarded copies (intra-Agency) to:

Marcy Toney, Regional Judicial Officer, ORC/C-14J  
Nidhi K. O'Meara, Counsel for Complainant/C-14J



Elizabeth Lytle  
Pesticides and Toxics Branch  
U.S. EPA - Region 5  
77 West Jackson Boulevard  
Chicago, Illinois 60604-3590

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

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MAILED  
U.S. EPA - REGION 5  
CHICAGO, ILLINOIS