



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD

CHICAGO, IL 60604-3590

SEP 27 2007

REPLY TO THE ATTENTION OF:

CERTIFIED MAIL RECEIPT NO. 7001 0320 0006 0185 8436

Margaret McClain
McClain Properties
1115 Evergreen
Grand Rapids, Michigan 49597

Re: *In the Matter of McClain Properties, Inc., Docket No.* TSCA-05-2007-0021

Dear Ms. McClain:

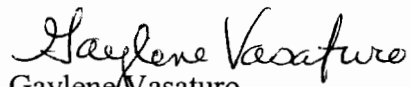
Enclosed please find one of two original signed copies of an issued Consent Agreement and Final Order ("CAFO") in resolution of the above referenced case. The other original was filed on September 27, 2007 with the Regional Hearing Clerk.

Within thirty (30) days of the effective date of this CAFO, McClain Properties must pay the civil penalty in the manner prescribed in the CAFO, and should reference the check with the number 2750747X020 for payment tracking purposes. Note, however, that as of October 1st, there is a new address for mailing of checks. Instead of the address specified in Paragraph 40, you should send your check to:

US Environmental Protection Agency
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

Thank you for your cooperation in resolving this matter. If you have any questions concerning this matter, please contact either Estrella Calvo at 312-353-8931 or me at 312-886-1811.

Sincerely


Gaylene Vasaturo
Associate Regional Counsel

Enclosure

cc: Patrick Lannen w/enclosure

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In the Matter of:

**McClain Properties, Inc.
Grand Rapids, Michigan**

Respondent.

) **Docket No. TSCA-05-2007-0021**
)
) **Proceeding to Assess a Civil Penalty**
) **under Section 16(a) of the Toxics**
) **Substances Control Act,**
) **15 U.S.C. § 2615(a)**

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**Consent Agreement and Final Order
Preliminary Statement**

1. This is an administrative action commenced and concluded under the authority vested in the Administrator of the United States Environmental Protection Agency (U.S. EPA) by Section 16 (a) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2615(a) and Sections 22.13(b) and 22.18(b)(2) and (3) of the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits” (Consolidated Rules) as codified at 40 C.F.R. Part 22 (2006).
2. The Complainant is, by lawful delegation, the Director of the Land and Chemicals Division, U.S. EPA, Region 5.
3. Respondent is McClain Properties, Inc. with a place of business at 1115 Evergreen Street S.E., Grand Rapids, Michigan.
4. Where the parties agree to settle one or more causes of action before the filing of a Complaint, the administrative action may be commenced and concluded simultaneously by the issuance of a Consent Agreement and Final Order (CAFO). 40 C.F.R. § 22.13(b) (2006).
5. The parties agree that settling this action without the filing of a Complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

6. Respondent consents to entry of this CAFO and the assessment of the specified civil penalty, and agrees to comply with the terms of the CAFO.

Statutory and Regulatory Background

7. Section 1018 of Title X, Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. 4852d, requires the Administrator to promulgate regulations for the disclosure of lead-based paint hazards in target housing which is offered for sale or lease.

8. Under 42 U.S.C. § 4852d, on March 6, 1996, U.S. EPA promulgated regulations at 40 C.F.R. Part 745, Subpart F, Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property (Disclosure Rule).

9. The Disclosure Rule implements the provisions of 42 U.S.C. § 4852d, which impose certain requirements on the sale or lease of target housing.

10. 40 C.F.R. § 745.103 defines “target housing” as any housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing) or any 0-bedroom dwelling.

11. 40 C.F.R. § 745.103 defines “owner” as any entity that offers target housing for lease, rent, or sublease, including but not limited to individual, partnerships, corporations, trust, government agencies, housing agencies, Indian tribes, and nonprofit organizations.

12. 40 C.F.R. § 745.103 defines “lessor” as any entity that offers target housing for lease, rent, or sublease, including but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations.

13. 40 C.F.R. § 745.103 defines “agent” as any party who enters into a contract with a seller or lessor, including any party who enters into a contract with a representative of the seller or lessor, for the purpose of selling or leasing target housing.

14. 40 C.F.R. § 745.103 defines “lessee” as any entity that enters into an agreement to lease, rent or sublease target housing, including, but not limited to individuals, partnerships, corporations, trusts, government agencies, housing agencies, Indian tribes, and nonprofit organizations.

15. 40 C.F.R. § 745.113(b)(1) of the Disclosure Rule requires the lessor to include, as an attachment or within the contract, a lead warning statement before a lessee is obligated under the contract to lease target housing.

16. 40 C.F.R. § 745.113(b)(2) requires the lessor to include, as an attachment or within the contract, a statement by the lessor disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing being leased, or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards.

17. 40 C.F.R. § 745.113(b)(3) requires the lessor to include, as an attachment or within the contract, a list of any records or reports available to the lessor pertaining to lead-based paint and/or lead-based paint hazards in the housing that has been provided to the lessee. If no such records or reports are available, the lessor must so indicate.

18. 40 C.F.R. § 745.113(b)(4) requires the lessor to include, as an attachment or within the contract, a statement by the lessee affirming receipt of the information set out in 40 C.F.R. § 745.113(b)(2) and (b)(3) and the Lead Hazard Information Pamphlet before a lessee is obligated under the contract to lease target housing.

19. 40 C.F.R. § 745.113(b)(6) requires the lessor to include, as an attachment or within the contract, the signatures of the lessor and the lessee certifying to the accuracy of their statements to the best of their knowledge along with the dates of signature before a lessee is obligated under the contract to lease target housing.

20. Under 40 C.F.R. § 745.100, a lessor of target housing must complete the specified disclosure activities before a lessee is obligated under any contract to lease target housing.

21. Under 42 U.S.C. § 4852d(b)(5) and 40 C.F.R. § 745.118(e), failure to comply with the Disclosure Rule is a violation of Section 409 of TSCA, 15 U.S.C. § 2689, which subjects the violator to civil penalties under Section 16(a) of TSCA, 15 U.S.C. § 2615(a), 40 C.F.R. § 745.118(f), and 42 U.S.C. § 4852d(b)(5).

Stipulated Facts

22. Between at least November 1, 2002 and February 3, 2006, Respondent owned residential rental properties located at the following addresses in Grand Rapids, Michigan: 210-212 Leonard N.E. and 507-509 Oakdale S.E. (referred to individually as “Residential Rental Property” and collectively as the “Residential Rental Properties”).

23. The Residential Rental Properties and each unit within the Residential Rental Properties referenced in paragraph 22, above, are “target housing” as defined in 40 C.F.R. § 745.103.

24. On the following dates, Respondent entered into the following 6 written rental agreements (Rental Contracts) with individuals for the lease of units in the Residential Rental Properties identified below:

Address	Unit	Date of Lease
210 Leonard N.E.		10/31/2003
210 Leonard N.E.	Down	02/03/2006
507 Oakdale S.E.		11/10/2002
507 Oakdale S.E.		05/04/2004
509 Oakdale S.E.		11/01/2002
509 Oakdale S.E.		06/17/2004

25. Each of the 6 Contracts, referenced in the table in paragraph 24, above, covered a term of occupancy greater than 100 days.

26. Between November 1, 2002 and February 3, 2006, the Respondent as the lessor of each Residential Rental Property, offered for lease units in its buildings, and individuals entered into contracts on the dates listed in paragraph 24, above, to lease those units.

27. Respondent is a “lessor,” as defined by 40 C.F.R. § 745.103, since it offered target housing referenced in paragraph 24, above, for lease.

28. Each individual who signed a lease to pay rent in exchange for occupancy of a unit at the Residential Rental Properties, became a “lessee,” as defined in 40 C.F.R. § 745.103, since he or she entered into a agreement to lease target housing.

29. On January 27, 2000, the Kent County Health Department Environmental Health Division notified the Respondent that its evaluation of 507 Oakdale S.E., Grand Rapids, Michigan, found peeling or chipping lead-based paint at various locations on the property. The Notification required Respondent to abate the lead hazard found on its property.

Alleged Violations

30. Respondent failed to include, either within the contract for the lease of the unit or as an attachment to the contract, a lead warning statement before the lessees at 509 Oakdale S.E., Grand Rapids, Michigan were obligated under the November 1, 2002 contract referenced in paragraph 24, above, as required by 40 C.F.R. § 745.100 and 40 C.F.R. § 745.113(b)(1).

31. Respondent failed to include, either within the contract for the lease of the unit or as an attachment to the contract, a statement disclosing the presence of known lead-based paint and/or lead-based paint hazards before the lessees at 507 Oakdale S.E. and 509 Oakdale S.E., Grand Rapids, Michigan, were obligated under the contracts referenced in paragraph 24, as required by 40 C.F.R. § 745.100 and 40 C.F.R. § 745.113(b)(2).

32. Respondent failed to include, either within the contract for the lease of the unit or as an attachment to the contract, a list of any records or reports available to the lessor that pertain to lead-based paint and/or lead-based paint hazard information, before the lessees at 507 Oakdale S.E. and 509 Oakdale S.E., Grand Rapids, Michigan, were obligated under the contracts referenced in paragraph 24, as required by 40 C.F.R. § 745.100 and 40 C.F.R. § 745.113(b)(3).

33. Respondent failed to include, either within the contract for the lease of the unit or as an attachment to the contract, a statement by the lessees affirming receipt of the information required by 40 C.F.R. § 745.113(b)(2) and (b)(3) before the lessees at 507 Oakdale S.E. and 509 Oakdale S.E., Grand Rapids, Michigan, were obligated under the contracts referenced in paragraph 24, as required by 40 C.F.R. § 745.100 and 40 C.F.R. § 745.113(b)(4).

34. Respondent failed to include either within the contract for the lease of the unit or as an attachment to the contract, the signatures of the lessor and the lessees certifying to the accuracy of their statements and the dates of such signature before the lessees at 210 Leonard N.E., 507 Oakdale S.E. and 509 Oakdale S.E., Grand Rapids, Michigan were obligated under the contracts referenced in paragraph 24, as required by 40 C.F.R. § 745.100 and 40 C.F.R. § 745.113(b)(6).

Penalty Calculation

35. Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d(b)(5), and 40 C. F. R. Part 745 Subpart F, authorize the assessment of a civil penalty under TSCA § 16 in the maximum amount of \$10,000 for each violation of Section 409 of TSCA. This maximum penalty amount has been adjusted to \$11,000 per each violation under the Civil Monetary Penalty Inflation Adjustment Act and Rule for violations occurring after July 28, 1997. 40 C. F. R. § 19.2 (61 Fed . Reg . 69361 [1996]).

36. In determining a civil penalty, the U.S. EPA has taken into consideration the nature, circumstances, extent and gravity of the violation alleged and, with respect to the violator, ability to pay, affect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other factors as justice may require.

37. Based on evaluation of the stipulated facts and the statutory factors enumerated above, U.S. EPA determined that the proposed civil penalty is \$15,454. In consideration of Respondent's cooperation and other factors as justice may require, U.S. EPA agrees to mitigate the proposed penalty from \$15,454 to \$12,363.

38. In consideration of Respondent's agreement to perform the Window Replacement Project specified in paragraphs 44 to 56, below, U.S. EPA agrees to further mitigate the penalty of \$12,363 to \$1,263.

39. Respondent shall pay the \$1,263 civil penalty by cashier's or certified check payable to the "*Treasurer, United States of America*," within 30 days after the effective date of this CAFO.

40. Respondent shall send the check to:

U.S. EPA, Region 5
P.O. Box 371531
Pittsburgh, Pennsylvania 15251-7531

41. Respondent shall accompany the payment with a transmittal letter, stating Respondent's name, complete address, the case docket number and the billing document (BD) number. Respondent shall write the case docket number and the BD number on the face of the check. The BD number may be found on the cover letter transmitting this CAFO. Respondent shall send copies of the check and transmittal letter to:

Regional Hearing Clerk, (E-13J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Estrella Calvo (DT-8J)
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Gaylene Vasaturo (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

42. If Respondent does not timely pay the civil penalty, or any stipulated penalties under paragraph 53, below, U.S. EPA may bring an action to collect any unpaid portion of the penalty with interest, handling charges, nonpayment penalties and the United States' enforcement expenses for the collection action. The validity, amount and appropriateness of the civil penalty are not reviewable in a collection action. TSCA Section 16(a)(4), 42 U.S.C. § 2615(a)(4).

43. Interest will accrue on any amount overdue from the date the payment was due at a rate established pursuant to 31 U.S.C. § 3717. Respondents must pay a \$15 handling charge each month that any portion of the penalty is more than 30 days past due. In addition, U.S. EPA will assess a 6 percent per year penalty on any principal amount not paid within 90 days of the date that this CAFO has been entered by the Regional Hearing Clerk.

Window Replacement Project and Lead Clearance Sampling

44. Within four months after entry of this CAFO, Respondent must complete a Window Replacement Project and lead clearance sampling designed to protect tenants from potential lead-based paint hazards by replacing windows in the rental property at 1610 SE Francis Avenue,

Grand Rapids, Michigan, and shall submit the reports required by paragraph 50 at the end of this four month period.

45. The Window Replacement Project must be conducted in compliance with the Department of Housing and Urban Development (HUD) Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing (June 1995), and executed by individuals certified to perform such work under state and local laws and regulations.

46. Respondent must perform standard lead clearance testing upon completion of the Window Replacement Project using HUD Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing (June 1995), and executed by individuals certified to perform such work under state and local laws, in the property listed in paragraph 44, above. The individual or company executing the standard lead clearance sampling must not be paid or employed or, otherwise compensated by the individuals conducting the Window Replacement Project.

47. Respondent must spend at least \$11,100 to complete the Window Replacement Project and lead clearance sampling.

48. Respondent certifies that Respondent is not required to perform the Window Replacement Project by any law, regulation, grant, order, or any other agreement, or as injunctive relief as of the date Respondent signs this CAFO. Respondent further certifies that Respondent has not received, and is not negotiating to receive, credit for the Window Replacement Project in any other enforcement action.

49. U.S. EPA may inspect the property at any time to monitor Respondent's

compliance with this CAFO's requirements. Any access to the buildings or units therein will be provided on reasonable notice to Respondent and Respondent will make good faith efforts to obtain tenant cooperation for such access.

50. Respondent must submit a Window Replacement Project report and lead clearance sampling report upon completion of the Window Replacement Project for the property listed in paragraph 44, above, within four months following entry of the CAFO. These reports must contain the following information:

- a. a description of the Window Replacement Project as completed at the property referenced in paragraph 44, above, which includes the sampling information contained in subparagraph b, below;
- b. a clearance sampling report for the property referenced in paragraph 44, above, giving sampling locations, sample results, and documentation of analytical quality assurance/quality control;
- c. itemized costs of goods and services used to complete the Window Replacement Project documented by copies of invoices, purchase orders, or canceled checks that specifically identify and itemize the individual costs of the goods and services; including receipts for the cost of the lead based paint inspection conducted to identify the lead-based paint and/or lead-based paint hazards in the building;
- d. itemized costs of services used to complete the lead clearance sampling documented by copies of invoices or canceled checks that specifically identify and itemize the costs of the services;
- e. provide documentation that the individuals who performed the Window Replacement Project and the lead clearance sampling are certified to perform such work in accordance with the state and local laws and regulations;
- f. certification that Respondent has completed the Window Replacement Project and the lead clearance sampling in compliance with this CAFO; and
- g. statement that no tax returns filed or to be filed by Respondent will contain deductions or depreciations for any expense associated with the Window Replacement Project and lead clearance sampling.

51. Respondent must submit all reports required by the CAFO by first class mail to Estrella Calvo, at the address in paragraph 41, above.

52. In each report that Respondent submits as provided by this CAFO, Respondent or Respondent's authorized representative must certify that the report is true and complete by including the following statement signed by the Respondent:

I certify that I am familiar with the information in this document and that, based on my inquiry of those individuals responsible for obtaining the information, the information is true and complete to the best of my knowledge. I know that there are significant penalties for submitting false information, including the possibility of fines and imprisonment for knowing violations.

53. If Respondent violates any requirements of this CAFO relating to the Window Replacement Project and sampling, Respondent must pay stipulated penalties to the United States as follows:

- a. If Respondent does not complete the Window Replacement Project and lead clearance sampling according to this CAFO, Respondent must pay a stipulated penalty of \$12,000;
- b. If Respondent satisfactorily completes the Window Replacement Project and lead clearance sampling according to this CAFO, but spends less than 90% of the amount of money which was required to be spent on the project, Respondent must pay a stipulated penalty of \$1500;
- c. If Respondent fails to ensure and document that lead clearance sampling work for the property listed in paragraph 44, above, is executed by individuals certified to perform such work in accordance with 40 C.F.R. Part 745 and applicable state and local laws and regulations, Respondent shall pay a stipulated penalty of \$5,000;
- d. If Respondent fails to ensure and document that the Window Replacement Project complies with the requirements of paragraphs 44 to 47, above, Respondent shall pay a stipulated penalty of \$5,000; and
- e. If Respondent fails to submit timely the Window Replacement Project completion report and the lead clearance sampling completion report addressing each of the requirements in paragraph 50, above, or if Respondent fails to satisfactorily address each requirement in the window replacement completion report paragraphs of the CAFO, Respondent must pay a stipulated penalty of \$50 for each day after the report was due until the report is submitted in its entirety, not to exceed \$10,000.

54. U.S. EPA's reasonable and good faith determination of whether the Respondent

satisfactorily completed the Window Replacement Project and lead clearance sampling and whether they made good faith, timely efforts to complete the Window Replacement Project and lead clearance sampling will bind Respondent for the purposes of this CAFO.

55. Respondent must pay any stipulated penalties within 15 days of receiving U.S. EPA's written demand for the penalties. All penalties shall begin to accrue on the first date of noncompliance, and shall continue to accrue through the date of completion. Respondent will use the method of payment specified in paragraphs 38 through 40, above, and will pay interest, handling charges, and nonpayment penalties on any overdue amounts.

56. **Force Majeure.** a. If any event occurs which causes or may cause delays in the completion of the SEP as required under this Agreement, Respondent shall notify Complainant in writing not more than 10 days after the delay or Respondent's knowledge of the anticipated delay, whichever is earlier. The notice shall describe in detail the anticipated length of the delay, the precise cause or causes of the delay, the measures taken and to be taken by Respondent to prevent or minimize the delay, and the timetable by which those measures will be implemented. The Respondent shall adopt all reasonable measures to avoid or minimize any such delay. Failure by Respondent to comply with the notice requirements of this paragraph shall render this paragraph void and of no effect as to the particular incident involved and constitute a waiver of the Respondent's right to request an extension of its obligation under this Agreement based on such incident.

b. If the parties agree that the delay or anticipated delay in compliance with this Agreement has been or will be caused by circumstances entirely beyond the control of Respondent, the time for performance hereunder may be extended for a period of no longer than

the delay resulting from such circumstances. In such event, the parties shall stipulate to such extension of time.

c. In the event that the U.S. EPA does not agree that a delay in achieving compliance with the requirements of this Consent Agreement and Final Order has been or will be caused by circumstances beyond the control of the Respondent, EPA will notify Respondent in writing of its decision and any delays in the completion of the SEP shall not be excused.

d. The burden of proving that any delay is caused by circumstances entirely beyond the control of the Respondent shall rest with the Respondent. Increased costs or expenses associated with the implementation of actions called for by this Agreement shall not, in any event, be a basis for changes in this Agreement or extensions of time under section (b) of this paragraph. Delay in achievement of one interim step shall not necessarily justify or excuse delay in achievement of subsequent steps.

Terms of Settlement

57. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO.

58. Respondent waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c), any right to contest the allegations in this CAFO, and its right to appeal this CAFO.

59. Respondent certifies that, as of the effective date of this CAFO, it is in full compliance with the requirements of 40 C.F.R. Part 745, Subpart F, and intends to continue to comply fully with 40 C.F.R. Part 745, Subpart F.

60. The parties consent to the terms of this CAFO.

61. This CAFO settles U.S. EPA's claims for civil penalties for violations the alleged herein.

62. Nothing in this CAFO restricts U.S. EPA's authority to seek Respondent's compliance with the Act and other applicable laws and regulations.

63. This CAFO does not affect Respondent's responsibility to comply with TSCA, the Lead-Based Paint Hazard Reduction Act and other applicable Federal, state and local laws and regulations.

64. The terms of the CAFO bind the Respondent and its assigns.

65. Each person signing this Consent Agreement certifies that he or she has the authority to sign this Consent Agreement for the party for whom he or she represents and to bind that party to its terms.

66. Each party agrees to bear its own costs and fees in this action.

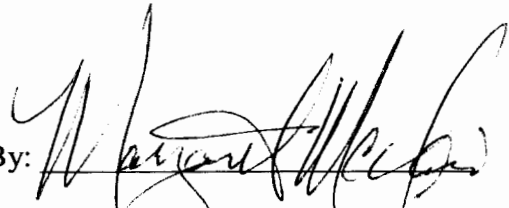
67. This CAFO constitutes the entire agreement between the parties.

68. This CAFO shall become effective immediately upon filing with the Regional Hearing Clerk, U.S. EPA, Region 5.

Consent Agreement and Final Order
In the Matter of: McClain Properties, Inc.


Docket No. TSCA-05-2007-0021

Date: 8/27/07

By: 
McClain Properties, Inc., Respondent

United States Environmental Protection Agency,
Complainant

Date: 9/21/07

By: 
Margaret M. Guerriero, Director
Land and Chemicals Division

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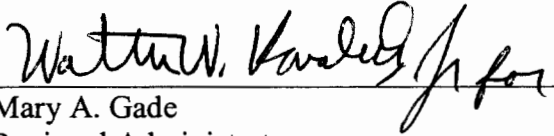
In the Matter of:
McClain Properties, Inc.

Docket No. TSCA-05-2007-0021

Final Order

This Consent Agreement and Final Order, as agreed to by the parties, will become effective immediately upon filing with the Regional Hearing Clerk. IT IS SO ORDERED.

Date: 9/24/07



Mary A. Gade
Regional Administrator
United States Environmental Protection Agency
Region 5

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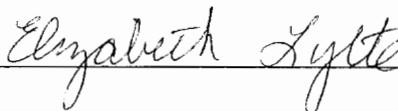
CERTIFICATE OF SERVICE

I hereby certify that a copy of the original signed copy of the Consent Agreement and Final Order in resolution of the civil administrative action involving McClain Properties, was filed on September 27, 2007, with the Regional Hearing Clerk (E-13J), United States Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604-3590, and that I mailed by Certified Mail, Receipt No. 7001 0320 0006 0185 8436, a copy of the original to the Respondents:

Margaret McClain
McClain Properties
1115 Evergreen
Grand Rapids, Michigan 49597

and forwarded copies (intra-Agency) to:

Marcy Toney, Regional Judicial Officer, ORC/C-14J
Gaylene Vasaturo, Counsel for Complainant/C-14J
Eric Volck, Cincinnati Finance/MWD



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

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