



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD

CHICAGO, IL 60604-3590

FEB 09 2009

REPLY TO THE ATTENTION OF:

LC-8J

CERTIFIED MAIL

Receipt No. 7001 0320 0006 0183 0180

Gary W. Callahan P.C.
4550 Westridge Drive
Ft. Collins, CO. 80526

Consent Agreement and Final Order, Docket No. FIFRA-05-2009-0006

Dear Mr. Callahan:

Enclosed please find a copy of a fully executed Consent Agreement and Final Order concerning violations of the Federal Insecticide Fungicide & Rodenticide Act (FIFRA), 7 §§ U.S.C.136 et seq., in resolution of the above case. This document was filed on February 9, 2009, with the Regional Hearing Clerk.

The civil penalty in the amount of \$262,950 is to be paid in the manner described in paragraphs 69 and 70. Please be certain that the number **BD 2750945P003** and the docket number are written on both the transmittal letter and on the check. Payment is due by March 11, 2009 (within 30 calendar days of the filing date).

Thank you for your cooperation in resolving this matter.

Sincerely,


Terence Bonace
Pesticides and Toxics Compliance Section

Enclosures

cc: Marcy Toney, Regional Judicial Officer/C-14J (w/Encl.)
Andre Daugavietis, ORC/C-14J (w/Encl.)
Eric Volck, Cincinnati Finance/MWD (w/Encl.)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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FEB - 9 2009

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

In the Matter of:)
)
Nufarm Americas Inc.)
Burr Ridge, Illinois,)
)
Respondent.)
_____)

Docket No. FIFRA-05-2009-0006
Proceeding to Assess a Civil Penalty
Under Section 14(a) of the Federal
Insecticide, Fungicide, and Rodenticide
Act, 7 U.S.C. § 136l(a)

Consent Agreement and Final Order

Preliminary Statement

1. This is an administrative action commenced and concluded under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l(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.

2. The Complainant is the Director of the Land and Chemicals Division, United States Environmental Protection Agency (U.S. EPA), Region 5.

3. Respondent is Nufarm Americas Inc., a corporation doing business in the State of Illinois.

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).

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 the assessment of the civil penalty specified in this CAFO, and to the terms of this CAFO.

Jurisdiction and Waiver of Right to Hearing

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

8. 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.

9. Respondent certifies that it is complying with the herein cited sections of FIFRA, 7 U.S.C. §§ 136 to 136y.

Statutory and Regulatory Background

10. Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136j(a)(1)(B), states that it is unlawful for any person in any state to distribute or sell to any person any registered pesticide if any claims made for it at the time of its distribution or sale substantially differ from any claims made for it as part of the statement required in connection with its registration under Section 3 of FIFRA, 7 U.S.C. § 136a.

11. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136(j)(a)(1)(E) states that it shall be unlawful for any person in any state to distribute or sell to any person any pesticide that is misbranded.

12. Section 2(q)(1)(A) of FIFRA, 7 U.S.C. § 136(q)(1)(A), states that a pesticide is “misbranded” if its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular.

13. The term “distribute or sell” means “to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver.” 7 U.S.C. § 136(gg).

14. Under 40 C.F.R. § 152.132, a registrant may distribute or sell his registered product under another person's name and address instead of his own if, inter alia, the registrant has submitted to U.S. EPA for each product a statement signed by both the registrant and the distributor listing the names and addresses of the registrant and the distributor, the distributor's company number, the additional brand names to be used, and the registration number of the product.

15. 40 C.F.R. § 152.132 (b) further states that a condition of such distribution is that the label of the distributor product must be the same as that of the registered product, with some exceptions not relevant here..

16. Under 40 C.F.R. § 152.132, the distributor is considered an agent of the registrant for all intents and purposes under FIFRA, and both the registrant and the distributor may be held liable for violations pertaining to the distributor product.

17. A “pesticide” is, among other things, any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest. 7 U.S.C. § 136(u).

18. A “pest” is 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 which the Administrator of U.S. EPA declares to be a pest under Section 25(c)(1) of FIFRA. 7 U.S.C. § 136(t).

19. 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).

20. The Administrator of U.S. EPA may assess a civil penalty against any registrant, commercial applicator, wholesaler, dealer, retailer, other distributor who violates any provision of FIFRA of up to \$6,500 for each offense that occurred after March 15, 2004 pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), and 40 C.F.R. Part 19.

21. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), states that it is unlawful for any person in any state to distribute or sell to any person any pesticide that is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

Factual Allegations and Alleged Violations

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

23. Respondent is a “registrant” as defined at Section 2(z) of FIFRA, 7 U.S.C. § 136(z).

24. On September 14, 2005, inspectors employed by the U.S. EPA and by the New York Department of Environmental Conservation and authorized to conduct inspections under FIFRA conducted an inspection of the Topaz Turf Corporation facility at 130 Corporate Drive, Holtsville, New York.

25. During the September 14, 2005 inspection, the inspectors collected physical samples of Tri K 141, EPA Reg. No.228-181-69204, GK 2 + 2, EPA Reg. No. 228-227-69204, and Riverdale Triamine, EPA Reg. No. 228-178, from product that was packaged, labeled and released for shipment.

26. During the September 14, 2005 inspection, the inspectors also collected bin labels and shipping records for Tri K 141 and GK 2+ 2.

27. During the September 14, 2005 inspection, the inspectors also collected a label of

Riverdale Triamine and records of shipment of Riverdale Triamine from Respondent to Topaz Turf Company.

28. On or about December 14, 1999, Respondent submitted a "Notice of Supplemental Registration of Distributor," EPA Form 8570-5 (Form), to U.S. EPA, signed by representatives of Topaz Turf Corp and Respondent. The form identified Respondent as the Registrant of the basic registered product, Riverdale Triamine Lawn Weed Killer, and identified Topaz Turf Company as the distributor company whose distributor brand product name is Tri K 141.

29. Tri K 141 is a "pesticide" as that term is defined at Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

30. On or about July 7, 1999, Respondent submitted a "Notice of Supplemental Registration of Distributor," EPA Form 8570-5 (Form), to U.S. EPA, signed by representatives of Topaz Turf Corp and Respondent. The form identified Respondent as the Registrant of the basic registered product, Riverdale DiBro 2 + 2 and Topaz Turf Company as the distributor company whose distributor brand product name is Gk 2 + 2.

31. GK 2 + 2 is a "pesticide" as defined at Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

32. Topaz Turf Company is an agent for Respondent as a distributor or Respondent's pesticides, Riverdale Triamine Lawn Weed Killer and Riverdale DiBro 2 + 2 , as defined under 40 C.F.R. § 152.132.

Counts 1 to 35

33. Respondent's agent distributed or sold the pesticide Tri K 141, as indicated below:.

<u>Count</u>	<u>Invoice Number</u>	<u>Invoice Date</u>
1	14691	August 17, 2005
2	14737	September 13, 2005
3	14703	August 23, 2005
4	14718	August 29, 2005

5	14735	September 13, 2005
6	14650	July 27, 2005
7	14396	April 11, 2005
8	14192	December 6, 2004
9	13176	May 11, 2004
10	14328	March 8, 2005
11	13802	June 2, 2004
12	14629	July 20, 2005
13	14588	June 29, 2005
14	14635	July 21, 2005
15	14556	June 14, 2005
16	14500	June 24, 2005
17	14412	April 19, 2005
18	14267	January 31, 2005
19	13506	March 10, 2004
20	14013	August 27, 2004
21	13274	December 22, 2003
22	13126	October 28, 2003
23	13139	November 4, 2003
24	13283	December 29, 2003
25	13393	February 3, 2004
26	13973	August 5, 2004
27	13818	June 8, 2004
28	13927	July 23, 2004
29	13018	September 23, 2003
30	14051	September 15, 2004
31	14745	September 14, 2005
32	13023	September 24, 2003
33	14738	September 13, 2005
34	12997	September 12, 2003
35	Held at Topaz Turf Corporation on September 14, 2007	

34. The Tri K 141 label on the product sold on the dates listed in paragraph 33 above stated that the pesticide contained:

- Dimethylamine Salt of 2,4-Dichlorophenoxyacetic Acid.....4.55%
- Dimethylamine Salt of 2-(2-Methyl-4-Chlorophenoxy) Propionic Acid...4.58%
- Dimethylamine Salt of 2-(2,4-Dichlorophenoxy) Propionic Acid.....4.53%
- Inert Ingredients.....86.34%:

35. Respondent's label for Riverdale Triamine Lawn Weed Killer, submitted to U.S. EPA and dated May 13, 1999, and all subsequent modifications to this label submitted to U.S. EPA, state that the pesticide contains:

- Dimethylamine Salt of 2,4-Dichlorophenoxyacetic Acid*4.55%
- Dimethylamine Salt of (+) -R-2-(2-Methyl-4-Chlorophenoxy) propionic Acid**‡...2.30%
- Dimethylamine Salt of (+) -R-2-(2, 4-Dichlorophenoxy) propionic Acid***‡.....2.26%
- Inert Ingredients.....90.89%
- Isomer Specific Method, Equivalent to:
- *2,4-Dichlorophenoxyacetic Acid.....3,8%, 0.32 lbs./gal.
- **(+)-R-2-(2-Methyl-4-Chlorophenoxy)propionic Acid.....1.9%, 0.16 lbs./gal.
- ***(+)-R-2-[2,4-Dichlorophenoxy) propionic Acid.....1.9%, 0.16 lbs./gal
- ‡CONTAINS THE SINGLE ISOMER FORMS OF MECOPROP-p AND DICHLORPROP-p

36. Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136j(a)(1)(C) states that it is unlawful to distribute or sell any registered pesticide if any claims made for it as a part of its distribution or sale substantially differ from any claims made for it as a part of the statement required in connection with its registration under Section 3 of FIFRA, 7 U.S.C. § 136a.

37. Respondent's agent's label of Tri K 141 claimed a composition of ingredients on its label that differed substantially from the claim of composition in Respondent's label submitted in connection with its registration under Section 3 of FIFRA, 7 U.S.C. § 136a.

38. Respondent's agent's distribution or sale of Tri K 141, whose label claims differed, constitutes unlawful acts pursuant to Section 12(a)(1)(C) of FIFRA, 7 U.S.C. § 136j(a)(1)(C), for which Respondent bears legal responsibility.

Counts 36 to 45

39. Respondent's agent distributed or sold the pesticide GK 2 + 2, as indicated below:

<u>Count</u>	<u>Invoice Number</u>	<u>Invoice Date</u>
36	14517	June 1, 2005
37	14479	May 17, 2005
38	13612	April 6, 2004
39	13557	March 24, 2004

40	13482	March 4, 2004
41	13411	February 10, 2004
42	13438	February 18, 2004
43	13381	January 29, 2004
44	13350	January 17, 2004
45	13298	January 2, 2004

40. Section 2(q)(1) of FIFRA, 7 U.S.C. § 136(2)(q)(1), states that a pesticide is misbranded if the labeling accompanying it does not contain directions for use which are necessary for effecting the purpose for which the product is intended and if complied with are adequate to protect health and the environment.

41. Section 2(q)(1) of FIFRA, 7 U.S.C. § 136(2)(q)(1), states that a pesticide is misbranded if the label does not contain a warning or caution statement which may be necessary and if complied with is adequate to protect health and the environment.

42. The U.S. EPA informed Respondent in a letter dated July 31, 2003, that the restrictive or precautionary language referenced in paragraphs 43 to 46 below was required for new labels before the product was released for shipment.

43. Respondent's agent's label of the pesticide GK 2+ 2 did not bear the precautionary statement, "Harmful if absorbed through skin. Causes moderate eye irritation. Avoid contact with eyes, skin or clothing. Wash thoroughly with soap and water after handling."

44. Respondent's agent's label of the pesticide GK 2 + 2 failed to bear an application restriction limiting application of GK 2 + 2 to a maximum of 12 pounds of bromacil per year.

45. Respondent's agent's label of the pesticide GK 2 + 2 failed to bear an entry restriction for all granular, dust, or dry application of non-Worker Protection Standard products containing bromacil. The entry restriction was required to include the following statement: "Do not enter or allow others to enter the treated area until dusts have settled."

46 Respondent's agent's label failed to bear the following restrictive language, "Not

to be used in any recreational areas or in or around homes.”

47. Respondent’s agent’s label failed to contain a statement prohibiting aerial application or failed to contain an attached statement on spray drift management.

48. Respondent’s agent’s label, by lacking application limit information, spray drift management information, and entry restrictions is misbranded by not containing directions for use which are necessary for effecting the purpose for which the product is intended and if complied with are adequate to protect health and the environment.

49. Respondent’s agent’s label, by lacking precautionary language on skin and eye exposure, is misbranded by containing an incomplete caution or warning statement.

50. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136(j)(a)(1)(E), states that it shall be unlawful for any person in any state to distribute or sell to any person any pesticide that is misbranded.

51. Respondent’s agent’s distribution or sale of the misbranded pesticide GK 2 + 2, constitutes unlawful acts pursuant to Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136(j)(a)(1)(E)), for which Respondent bears legal responsibility.

Count 46

52. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136(j)(a)(1)(E), states that it is unlawful to distribute or sell a pesticide which is adulterated or misbranded.

53. Section 2(q)(1)(A) of FIFRA, 7 U.S.C. § 136 2(q)(1)(A), states that a pesticide is misbranded if its labeling bears any statement, design or graphic representation relative thereto or to its ingredients which is false or misleading in any particular.

54. Respondent’s agent’s label for GK 2 + 2, collected on September 14, 2005, stated that the product contained 2% diuron and 2% bromacil.

55. Analysis of the sample of GK 2 + 2 performed on January 12, 2006 by the New York State Department of Environmental Conservation found 2.0% of diuron and 2.56% bromacil.

56. Pursuant to the regulation at 40 C.F.R. 158.175, the actual percentage of bromacil is permitted to vary by plus or minus 5% of the nominal concentration of bromacil.

57. The concentration of 2.56% bromacil found in sample analysis exceeds the permitted upper limit of 2.1% and therefore the label claim of 2.0% bromacil is false and misleading.

58. Respondent's agent's sale and distribution of the misbranded pesticide GK 2 + 2, constitutes an unlawful act pursuant to Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), for which Respondent is liable.

Count 47

59. Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), states that it is unlawful to distribute or sell a pesticide which is adulterated or misbranded.

60. Section 2(q)(1)(A) of FIFRA, 7 U.S.C. § 136 2(q)(1)(A), states that a pesticide is misbranded if its labeling bears any statement, design or graphic representation relative thereto or to its ingredients which is false or misleading in any particular.

61. Respondent's agent's label for Riverdale Triamine collected on September 14, 2005, stated that the product contained 8.2% of dimethylamine salt of (+) -R-2-(2-methyl-4-chlorophenoxy) propionic acid and 8.1% of dimethylamine salt of (+)-R-2-(2,4-dichlorophenoxy) propionic acid.

62. Analysis of the sample of Riverdale Triamine performed on December 19, 2005 by the New York State Department of Environmental Conservation found 8.90% of

dimethylamine salt of (+) –R-2-(2-methyl-4-chlorophenoxy) propionic acid and 8.89% of dimethylamine salt of (+)-R-2-(2,4-dichlorophenoxy) propionic acid.

63. Pursuant to the regulation at 40 C.F.R. 158.175, the actual percentage of dimethylamine salt of (+) –R-2-(2-methyl-4-chlorophenoxy) propionic acid and of dimethylamine salt of (+)-R-2-(2,4-dichlorophenoxy) propionic acid is permitted to vary by plus or minus 5% of the nominal concentration.

64. The concentration of 8.9% dimethylamine salt of (+) –R-2-(2-methyl-4-chlorophenoxy) propionic acid exceeds the permitted upper limit of 8.6% and therefore the label claim of 8.2% dimethylamine salt of (+) –R-2-(2-methyl-4-chlorophenoxy) propionic acid is false and misleading.

65. The concentration of 8.1% dimethylamine salt of (+)-R-2-(2,4-dichlorophenoxy) propionic acid exceeds the upper limit of 8.5% dimethylamine salt of (+)-R-2-(2,4-dichlorophenoxy) propionic acid and therefore the label claim of 8.1% is false and misleading

66. Respondent's agent's sale and distribution of the misbranded pesticide Riverdale Triamine constitutes an unlawful act pursuant to Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E), for which Respondent is liable

Civil Penalty

67. Pursuant to Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), Complainant determined that an appropriate civil penalty to settle this action is \$262,950. In determining the penalty amount, Complainant considered the appropriateness of the penalty to the size of Respondent's business, the effect on Respondent's ability to continue in business, and the gravity of the violation. Complainant also considered U.S. EPA's *Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act*, dated July 2, 1990.

68. Complainant has determined the penalty amount in part based on information submitted to EPA by Respondent.

69. Within 30 days after the effective date of this CAFO, Respondent must pay a \$262,950 civil penalty for the FIFRA violations. Respondent must pay the penalty by sending a cashier's or certified check, payable to the "Treasurer, United States of America," to:

[for checks sent by regular U.S. Postal Service mail]
U.S. EPA
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

The check must note "Nufarm Americas Inc.," the docket number of this CAFO and the billing document number.

70. A transmittal letter, stating, Respondent's name, the case title, Respondent's complete address, the case docket number and the billing document number must accompany the payment. Respondent must send a copy of the check and transmittal letter to:

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

Terence Bonace (LC-8J)
Pesticides and Toxics Compliance Section
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

Andre Daugavietis (C-14J)
Office of Regional Counsel
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604]

71. This civil penalty is not deductible for federal tax purposes.

72. If Respondent does not pay the civil penalty timely, U.S. EPA may refer the matter to the Attorney General who will recover such amount by action in the appropriate United States district court under Section 14(a)(5) of FIFRA, 7 U.S.C. § 136l(a)(5). The validity, amount and appropriateness of the civil penalty are not reviewable in a collection action.

73. Pursuant to 31 C.F.R. § 901.9, Respondent must pay the following on any amount overdue under this CAFO. Interest will accrue on any amount overdue from the date payment was due at a rate established by the Secretary of the Treasury. Respondent must pay a \$15 handling charge each month that any portion of the penalty is more than 30 days past due. In addition, Respondent must pay a 6 percent per year penalty on any principal amount 90 days past due.

General Provisions

74. This CAFO resolves only Respondent's liability for federal civil penalties for the violations and facts alleged in the CAFO.

75. This CAFO does not affect the right of the U.S. EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

76. This CAFO does not affect Respondent's responsibility to comply with FIFRA and other applicable federal, state, and local laws.

77. This CAFO is a "final order" for purposes of U.S. EPA's Enforcement Response Policy for FIFRA.

78. The terms of this CAFO bind Respondent, its successors, and assigns.

79. This CAFO shall terminate upon payment of the required penalty amount as set forth above.


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

81. Each party agrees to bear its own costs and attorney's fees, in this action.

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

Nufarm Americas, Inc., Respondent

1/8/09
Date



Gary Barber
Vice President and Chief Financial Officer

1/8/09
Date


Geoff Quick
Vice President, Business Development

United States Environmental Protection Agency, Complainant

2/4/09
Date


Margaret M. Guerriero
Director, Land and Chemicals Division

In the Matter of:
Nufarm Americas, Inc.
Docket No. FIFRA-05-2009-0006

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PROTECTION AGENCY

Final Order

This Consent Agreement and Final Order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This Final Order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

2/6/09
Date

Walter W. Kovalutsky for
Bharat Mathur
Acting Regional Administrator
U. S. Environmental Protection Agency
Region 5

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CERTIFICATE OF SERVICE

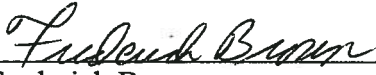
REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

I hereby certify that the original signed copy of the Consent Agreement and Final Order in resolution of the civil administrative action involving Nufarm Americas Inc., was filed on February 9, 2009, with the Regional Hearing Clerk (E-13J), U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, and that I mailed by Certified Mail, Receipt No. 7001 0320 0006 0183 0180, a copy of the original to the Respondents:

Gary W. Callahan P.C.
4550 Westridge Drive
Ft. Collins, CO. 80526

and forwarded copies (intra-Agency) to:

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



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

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