



### III. GOVERNING LAW

8. Section 17(c) of FIFRA, 7 U.S.C. § 136o(c), and regulations promulgated at 19 C.F.R. part 12 pursuant to section 17(e) of FIFRA, 7 U.S.C. § 136o(e), by the secretary of the treasury in consultation with the EPA Administrator govern the importation of pesticides into the United States.
9. 19 C.F.R. § 12.112 provides that “[a]n importer or the importer’s agent desiring to import pesticides or devices into the United States must submit to the Administrator, prior to the arrival of the shipment in the United States, a Notice of Arrival of Pesticides and Devices.”
10. Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines a “person” as “any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.”
11. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines a “pest” as “any insect, rodent, nematode, fungus, weed, or any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other microorganism (except viruses, bacteria, or other living microorganisms on or in living man or other living animals) which the Administrator declares to be a pest under section 25(c)(1) of FIFRA, 7 U.S.C. § 136 w(c)(1).”
12. Section 2(h) of FIFRA, 7 U.S.C. § 136(h), defines a “device” as “any instrument or contrivance (other than a firearm) which is intended for trapping, destroying, repelling, or mitigating any pest or any other form of plant or animal life (other than man and other than bacteria, virus, or other microorganism on or in living man or other living animals); but not including equipment used for the application of pesticides when sold separately therefrom.”
13. Section 2(p)(1) of FIFRA, 7 U.S.C. § 136(p)(1), defines the term “label” as “the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.” Section 2(p)(2)(A) of FIFRA, 7 U.S.C. § 136(p)(2)(A), defines the term “labeling” as “all labels and all other written, printed, or graphic matter...accompanying the pesticide or device at any time.”
14. Section 2(q)(1) of FIFRA, 7 U.S.C. § 136(q)(1), provides that a pesticide is misbranded if . . . “(D) its label does not bear the registration number assigned under section 136e of this title [section 7 of the Act] to each establishment in which it was produced; . . . (F) 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, together with any requirements imposed under section 136a(d) of this title [section 3(d) of the Act], are adequate to protect health and the environment; [or] (G) the label does not contain a warning or caution statement which may be necessary and if complied with, together with any requirements imposed under section 136a of this title [section 3(d) of the Act], is adequate to protect health and the environment.”
15. 40 C.F.R. § 152.500(b)(1) states, in pertinent part, that “a device is subject to the requirements set forth in FIFRA section 2(q)(1) and 40 C.F.R. part 156, with respect to labeling.”
16. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines the term “distribute or sell” to mean “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.”

17. Section 12(a)(1)(F) of FIFRA, 7 U.S.C. § 136j(a)(1)(F), provides that it shall be unlawful for any person to distribute or sell to any person any device that is misbranded.
18. Section 12(a)(2)(N) of FIFRA, 7 U.S.C. § 136j(a)(2)(N), provides that it shall be unlawful for any person who is a registrant, wholesaler, dealer, retailer, or other distributor to fail to file reports required by this Act.
19. The Administrator of EPA may assess a civil penalty of up to \$20,528 against any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of FIFRA for each offense that occurred after November 2, 2015. See section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1); 40 C.F.R. part 19; and the Civil Monetary Penalty Inflation Adjustment Rule at 85 Fed. Reg. 83818 (December 23, 2020).

#### **IV. ALLEGATIONS OF FACTS AND LAW**

20. At all times relevant to this consent agreement final order, Respondent was a corporation and therefore a “person” as defined in section 2(s) of FIFRA, 7 U.S.C. § 136(s).
21. Respondent imported two shipments containing the following products: 14 AiroCide Aria units, 60 boxes of APS-200pm2.5 RCK UV Lights, and 99 boxes of APS-200 RCK UV Lights associated with entry numbers 8EJ-00011239 and 8EJ-00011379, which entered the United States at the Port of Salt Lake City, Utah, from China on September 23, 2021, and October 14, 2021.
22. As the importer of the two shipments listed in paragraph 21 and by doing business in the United States, Respondent is subject to the requirements of FIFRA and its implementing regulations.
23. Respondent is and was at all times relevant to the allegations herein, an “importer” as that term is defined in 19 C.F.R. § 101.1 and was the importer of record for all of the unlawful imports alleged herein.
24. Based on their content, intended use, and the claims on their labels, the AiroCide Aria units, the APS-200pm2.5 RCK UV Lights, and the APS-200 RCK UV Lights are “devices” pursuant to section 2(h) of FIFRA, 7 U.S.C. § 136(h).
25. The labeling of the AiroCide Aria units, the APS-200pm2.5 RCK UV Lights, and the APS-200 RCK UV Lights did not bear a registration number assigned under section 7 to the establishment in which it was produced.
26. The labeling of the AiroCide Aria units, the APS-200pm2.5 RCK UV Lights, and the APS-200 RCK UV Lights did not contain directions for use necessary to make the product effective and to adequately protect health and the environment.
27. The labeling of the AiroCide Aria units, the APS-200pm2.5 RCK UV Lights, and the APS-200 RCK UV Lights did not contain a warning or caution statement adequate to protect health and the environment (precautionary statements).

28. Because of the absent EPA establishment registration number, directions for use, and caution or warning statements on its label or labeling, the AiroCide Aria units, the APS-200pm2.5 RCK UV Lights, and the APS-200 RCK UV Lights were misbranded pursuant to sections 2(q)(1)(D), (F) and (G) of FIFRA, 7 U.S.C. §§ 136(q)(1)(D),(F), and (G), 40 C.F.R. § 152.500(b)(1).
29. Each shipment of the AiroCide Aria units, the APS-200pm2.5 RCK UV Lights, and the APS-200 RCK UV Lights is a distribution or sale pursuant to section 2(gg) of FIFRA, 7 U.S.C. § 136(gg).
30. Respondent's importation of two shipments of the following pesticidal devices: AiroCide Aria units, the APS-200pm2.5 RCK UV Lights, and the APS-200 RCK UV Lights, through the Salt Lake City, Utah, Port of Entry constitutes violations of section 12(a)(1)(F) of FIFRA, 7 U.S.C. § 136j(a)(1)(F), which provides that it is unlawful for any person to distribute or sell to any person a device that is misbranded.
31. Respondent failed to file a Notice of Arrival of Pesticides and Devices with EPA for each pesticidal device in each shipment of AiroCide Aria units, the APS-200pm2.5 RCK UV Lights, and the APS-200 RCK UV Lights as required by 19 C.F.R. § 12.112.
32. On January 03, 2022, based on its reason to believe that Respondent had distributed, by import, misbranded pesticides in violation of section 12(a)(1)(F) of FIFRA, EPA issued a Stop Sale, Use or Removal Order (SSURO) to Respondent under the authority in section 13(a) of FIFRA. 7 U.S.C. §§ 136j(a)(1)(A), 136k(a).
33. The SSURO required Respondent to cease selling and distributing all misbranded AiroCide Aria units, APS-200pm2.5 RCK UV Lights, and APS-200 RCK UV Lights associated with entry numbers 8EJ-00011239 and 8EJ-00011379, which entered the United States at the Port of Salt Lake City, Utah, from China on September 23, 2021, and October 14, 2021.
34. The SSURO also provided for the movement of subject products for the purpose of relabeling at Respondent's registered establishment.

## **V. ALLEGED VIOLATIONS OF LAW**

35. Based on the facts set forth in section IV of this Agreement, EPA finds Respondent violated FIFRA section 12(a)(1)(F), 7 U.S.C. § 136j(a)(1)(F), because Respondent distributed or sold misbranded devices.
36. Based on the facts set forth in section IV of this Agreement, EPA finds Respondent violated FIFRA section 12(a)(2)(N), 7 U.S.C. § 136j(a)(2)(N), because a registrant, wholesaler, dealer, retailer, or other distributor failed to file reports required by the Act.

## **VI. TERMS OF AGREEMENT**

37. For the purposes of this proceeding, as required by 40 C.F.R. § 22.18(b)(2), Respondent
  - a. admits EPA has jurisdiction over the subject matter alleged in this Agreement;

- b. neither admits nor denies the alleged statement of facts or violations of law stated above;
- c. consents to the assessment of a civil penalty as stated below;
- d. consents to the conditions specified in this Agreement;
- e. waives any right to contest the alleged violations of law set forth in section V of this Agreement; and
- f. waives its rights to appeal any final order which approves this Agreement.

38. For the purposes of this proceeding, Respondent

- a. agrees this Agreement states a claim upon which relief may be granted against Respondent;
- b. acknowledges this Agreement constitutes an enforcement action for purposes of considering Respondent's compliance history in any subsequent enforcement actions;
- c. waives any and all remedies, claims for relief and otherwise available rights to judicial or administrative review that Respondent may have with respect to any issue of fact or law set forth in this Agreement;
- d. consents to personal jurisdiction in any action to enforce this Agreement in the United States District Court for the District of Colorado; and
- e. waives any rights it may possess at law or in equity to challenge the authority of EPA to bring a civil action in a United States district court to compel compliance with the Agreement and to seek an additional penalty for such noncompliance and agrees that federal law shall govern in any such civil action.

39. Section 14(a) of FIFRA, 7 U.S.C. § 1367(a), in conjunction with the Debt Collection Improvement Act of 1996, authorizes EPA to assess a civil penalty in this matter. The maximum amounts have been adjusted for inflation under 40 C.F.R. part 19.

40. Having considered the appropriateness of the assessed penalty to the size of business of Respondent, the effect on Respondent's ability to continue in business, and the gravity of the violation, as required by section 14(a)(4) of FIFRA, 7 U.S.C. § 1367(a)(4), the Complainant has determined the civil administrative penalty amount agreed upon below is appropriate to settle this matter.

41. Penalty Payment. Respondent agrees to

- a. pay a civil penalty of **\$21,064** (EPA penalty) within 30 calendar days of the effective date of this Agreement;

- b. pay the civil penalty using any method provided on the following website <https://www.epa.gov/fmancial/makepavment>;
- c. identify each payment with the docket number that appears on the final order; and
- d. within 24 hours of payment, email proof of payment to Christine Tokarz at [tokarz.christine@epa.gov](mailto:tokarz.christine@epa.gov) (whom the Complainant designates for service of proof of payment) and the regional hearing clerk for EPA Region 8 at [Haniewicz.melissa@epa.gov](mailto:Haniewicz.melissa@epa.gov). “Proof of payment” means, as applicable, a copy of the check, confirmation of credit card or debit card payment, confirmation of wire or automated clearinghouse transfer, and any other information required to demonstrate payment has been made according to EPA requirements, in the amount due, and identified with the docket number that appears on the final order.

42. If Respondent fails to timely pay any portion of the penalty assessed under this Agreement, EPA may

- a. request the attorney general to bring a civil action in an appropriate district court to recover: the amount assessed; interest at rates established pursuant to 26 U.S.C. § 6621(a)(2); the United States’ enforcement expenses;
- b. refer the debt to a credit reporting agency or a collection agency, 42 U.S.C. § 7413(d)(5), 40 C.F.R. §§ 13.13, 13.14, and 13.33;
- c. collect the debt by administrative offset (i.e., the withholding of money payable by the United States to, or held by the United States for, a person to satisfy the debt the person owes the government), which includes, but is not limited to, referral to the Internal Revenue Service for offset against income tax refunds, 40 C.F.R. part 13, subparts C and H; and
- d. suspend or revoke Respondent’s licenses or other privileges or suspend or disqualify Respondent from doing business with EPA or engaging in programs EPA sponsors or funds, 40 C.F.R. § 13.17.

43. Consistent with section 162(f)(1) of the Internal Revenue Code, 26 U.S.C. § 162(f)(1), Respondent will not deduct penalties paid under this Agreement for federal tax purposes.

44. This Agreement applies to Respondent and its officers, directors, employees, agents, trustees, authorized representatives, successors, and assigns. Respondent must give written notice and a copy of this Agreement to any successors-in-interest prior to transfer of any interest in the facility. Any change in ownership or corporate control of Respondent, including but not limited to, any transfer of assets or real or personal property shall not alter Respondent’s responsibilities under this Agreement.

45. The undersigned representative of Respondent certifies he or she is fully authorized to execute and enter into the terms and conditions of this Agreement and has the legal capacity to bind the party he or she represents to this Agreement.
46. Except as qualified by paragraph 42 above, each party shall bear its own attorneys' fees, costs, and disbursements incurred in this proceeding.
47. The parties consent to service of this Agreement and any final order approving it by email at the following valid email addresses: [tokarz.christine@epa.gov](mailto:tokarz.christine@epa.gov) (for Complainant), and John Hayman, III, [jhayman@kesscience.com](mailto:jhayman@kesscience.com) (for Respondent).

## **VII. EFFECT OF AGREEMENT**

48. In accordance with 40 C.F.R. § 22.18(c), completion of the terms of this Agreement resolves only Respondent's liability for federal civil penalties for the violations and facts specifically alleged herein.
49. The terms of this Agreement may not be modified or amended except upon the written agreement of both parties, and approval of the regional judicial officer or regional administrator.
50. This Agreement constitutes the entire agreement and understanding of the parties and supersedes any prior agreements or understandings, whether written or oral, among the parties with respect to the subject matter hereof.
51. Nothing in this Agreement shall relieve Respondent of the duty to comply with all applicable provisions of FIFRA and other federal, state, or local laws or statutes, nor shall it restrict EPA's authority to seek compliance with any applicable laws or regulations, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit.
52. If and to the extent EPA finds, after signing this Agreement, that any information provided by Respondent was materially false or inaccurate at the time such information was provided to EPA, EPA reserves all its legal and equitable rights.

## **VIII. EFFECTIVE DATE**

53. This Agreement shall become effective on the date the final order is filed by the regional hearing clerk.

Consent Agreement In the Matter of KES SCIENCE & TECHNOLOGY, INC

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8**

Date: \_\_\_\_\_

By: \_\_\_\_\_

David Cobb, Section Chief  
Toxics and Pesticides Enforcement Section  
Enforcement and Compliance Assurance Division  
For the Complainant

**KES SCIENCE & TECHNOLOGY, INC  
Respondent**

Date: 2/3/22

By: 

Printed Name: John J. Hayman III