

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

Received by
EPA Region VIII
Hearing Clerk

IN THE MATTER OF:)	
)	Docket No. FIFRA-08-2022-0021
KES SCIENCE & TECHNOLOGY, INC)	FIFRA SECTION 13(a)
)	
3625 Kennesaw North Industrial Parkway)	STOP SALE, USE, or
Kennesaw, Georgia 30144)	REMOVAL ORDER
)	
Respondent.)	
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I. AUTHORITY

1. This Stop Sale, Use, or Removal Order (Order) is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency by section 13(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA), 7 U.S.C. § 136k(a), which authorizes the Administrator of EPA to issue an order prohibiting the sale, use, or removal of any pesticide or device by any person who owns, controls, or has custody of such pesticide or device whenever there is reason to believe that the pesticide or device is in violation of any provision of FIFRA or the pesticide or device has been or is intended to be distributed or sold in violation of any provision of FIFRA.
2. The undersigned EPA official has been duly authorized to issue this Order.

II. GOVERNING LAW

3. Section 12(a)(1)(F) of FIFRA, 7 U.S.C. 136j(a)(1)(F), provides that it shall be unlawful for any person in any state to distribute or sell to any person any device that is misbranded.
4. Section 12(a)(2)(S) of FIFRA, 7 U.S.C. § 136j(a)(2)(S), provides that it shall be unlawful for any person to violate any regulation issued under section 3(a) or section 19 of FIFRA.
5. 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.”
6. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines “pest” in part, as any “form of terrestrial or aquatic plant or animal life or virus, bacteria, or other microorganism (except viruses, bacteria, or other microorganisms on or in living man or other living animals) which the Administrator declares to be a pest under section 25(c)(1).”
7. Pursuant to the authority in section 25(c)(1) of FIFRA, 7 U.S.C. § 136w(c)(1), the Administrator declared that a pest is “[a]ny fungus, bacterium, virus, prion, or other microorganism, except for

those on or in living man or other living animals and those on or in processed food or processed animal feed, beverages, drugs ... and cosmetics.” See 40 C.F.R. § 152.5(d).

8. Section 2(h) of FIFRA, 7 U.S.C. § 136(h), defines “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.”

9. EPA’s implementing regulations at 40 C.F.R. § 152.500(a) provides the following:

A device is defined as any instrument or contrivance (other than a firearm) intended for trapping, destroying, repelling, or mitigating any pest or any other form of plant or animal life (other than man and other than a bacterium, virus, or other microorganism on or in living man or living animals) but not including equipment used for the application of pesticides (such as tamper-resistant bait boxes for rodenticides) when sold separately therefrom.

10. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines “to distribute or sell” as “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.”

11. The regulation at 40 C.F.R. § 152.3 further defines the term “distribute or sell” as “the acts of distributing, selling, offering for sale, holding for sale, shipping, holding for shipment, delivering for shipment, or receiving and (having so received) delivering or offering to deliver, or releasing for shipment to any person in any state.”

12. Section 2(p) of FIFRA, 7 U.S.C. § 136(p), defines “label” as “the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers” and defines “labeling” in part, as “all labels and all other written, printed, or graphic matter (A) accompanying the pesticide or device at any time; or (B) to which reference is made on the label or in literature accompanying the pesticide.”

13. 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 7 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 3(d) of this 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 3(d) of this Act, is adequate to protect health and the environment.”

14. Section 17(c) of FIFRA, 7 U.S.C. § 136o(c), and the regulations implementing that provision set forth at 19 C.F.R. §§ 12.110 - 12.117, establish that importers of pesticides must submit to EPA, prior to the arrival of the shipment in the United States, a Notice of Arrival of Pesticides and Devices on U.S. Environmental Protection Agency Form 3540-1, or must file an electronic alternative to the Notice of Arrival with the filing of entry documentation via any CBP-authorized electronic data interchange system.
15. 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 FIFRA.

III. BASIS FOR THE ORDER

16. Respondent KES Science & Technology, Inc, (Respondent), is a limited liability company organized under the laws of the State of Georgia and is therefore a “person” as that term is defined by section 2(s) of FIFRA, 7 U.S.C. § 136(s), and subject to FIFRA and the implementing regulations promulgated thereunder.
17. 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.
18. As the importer of the two shipments listed in paragraph 17 and by doing business in the United States, Respondent is subject to the requirements of FIFRA and its implementing regulations.
19. 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.
20. An Intended Use Statement for the products indicated a pesticidal intent for AiroCide Aria units, stating: “This is to confirm that the intended use for AiroCide Aria Units is the purification of the air by pulling the outside air into the unit. The unit then uses a PCO process internally only that kills anything organic in the air (i.e. bacteria, mold, fungus, viruses, and VOC's).” Communications with Respondent confirmed that the APS-200pm2.5 RCK UV Lights and the APS-200 RCK UV Lights also indicated pesticidal intent.
21. Based on their content, labeling claims, and intended use, 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).
22. 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.

23. 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.
24. 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).
25. Because of the lack of an EPA establishment registration number, directions for use, and caution or warning statements on the 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).
26. 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).
27. 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 Salt Lake City, Utah, Port of Entry constitutes multiple 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.
28. Respondent failed to file a Notice of Arrival of Pesticides and Devices with EPA for each pesticidal device in each shipment of the 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.

IV. ORDER

29. Pursuant to the authority of section 13(a) of FIFRA, 7 U.S.C. § 136k(a), EPA hereby orders Respondent to immediately cease the sale, use, or removal of all AiroCide Aria units, APS-200pm2.5 RCK UV Lights, and APS-200 RCK UV Lights with entry numbers 8EJ-00011239 and 8EJ-00011379 under its ownership, control, or custody, wherever such products are located, except in accordance with the provisions of this Order.
30. The products shall not be sold, offered for sale, held for sale, shipped, delivered for shipment, received; or, having been so received, delivered, offered for delivery, moved, or removed, for any reason, other than in accordance with the provisions of this Order and any provisions of any written modifications to this Order.
31. Respondent has proposed to EPA that it be allowed to rework the products to make their sale or distribution compliant with FIFRA. Specifically, Respondent proposed that it be permitted to: consolidate the products at facilities it has designated and relabel the products in a section 7 registered producing establishment with FIFRA compliant labels and labeling. As part of the rework plan, Respondent proposed to send regular updates to EPA on the movements of products intended for rework and their status as it changes.

32. Pursuant to the terms of EPA's acceptance of Respondent's rework plan on January 3, 2022, the following provisions are established as part of this Order:
- a) All products in the United States that are owned by, are in the custody of, or are controlled by Respondent may be transported as necessary to consolidate them at the rework locations identified in Respondent's rework plan. No products shall be distributed except for the sole purpose of relocating them for inclusion in the rework plan.
 - b) Respondent will document such movements and rework activities and report to EPA in accordance with the terms set forth in the rework plan.
 - c) Products will be released for distribution in commerce on a rolling basis upon certification that the rework of those products, as specified in the rework plan, has been completed.
 - d) The distribution, sale and use of such products that have been reworked and released shall not be deemed a violation of this Order, provided the products are fully compliant with FIFRA.
33. All reporting to EPA provided by this Order and the rework plan shall be submitted to Christine Tokarz at tokarz.christine@epa.gov.

V. OTHER MATTERS

34. Respondent may seek federal judicial review of this Order pursuant to section 16 of FIFRA, 7 U.S.C. § 136n.
35. The issuance of this Order shall not constitute a waiver by EPA of its remedies, either judicial or administrative, under FIFRA or any other federal environmental law to address this matter or any other matters or unlawful acts not specified in this Order.
36. This Order shall be effective immediately upon receipt by Respondent or any of Respondent's agents.
37. Section 12(a)(2)(I) of FIFRA, 7 U.S.C. § 136j(a)(2)(1), provides that it shall be unlawful for any person to violate any order issued under section 13 of FIFRA.
38. This Order shall remain in effect unless and until revoked, terminated, suspended, or modified in writing by EPA.
39. If any provision of this Order is subsequently held to be invalid, illegal, or unenforceable, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby and they shall remain in full force and effect.

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY REGION 8**

Date: 1/31/2022

By: _____
David Cobb, Section Chief
Toxics and Pesticides Enforcement Section
Enforcement and Compliance Assurance Division