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EARTHJUSTICE on behalf of MOMS ON A MISSION HUI, and PŌ'AI WAI OLA/WEST KAUA'I WATERSHED ALLIANCE,	EPA FILE NO. 44RNO-16-R9 (HDOA)
Petitioners, vs.	STATE OF HAWAI'I DEPARTMENT OF AGRICULTURE'S RESPONSE TO THE ENVIRONMENTAL PROTECTION AGENCY, EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE DECISION TO INITIATE INVESTIGATION INTO ALLEGATIONS OF DISCRIMINATORY ACTS; EXHIBITS A - G
STATE OF HAWAI'I, DEPARTMENT OF AGRICULTURE,	Director Lilian S. Dorka External Civil Rights Compliance Office Office of General Counsel, EPA
Respondent.	

STATE OF HAWAI'I DEPARTMENT OF AGRICULTURE'S
RESPONSE TO THE ENVIRONMENTAL PROTECTION AGENCY,
EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE DECISION TO
INITIATE INVESTIGATION INTO ALLEGATIONS OF DISCRIMINATORY ACTS

The STATE OF HAWAI'I, DEPARTMENT OF AGRICULTURE, ("HDOA"), by and through the State of Hawai'i Department of the Attorney General, does hereby submit this response to the Environmental Protection Agency ("EPA") External Civil Rights Compliance Office ("ECRCO") that has initiated an investigation into allegations by EARTHJUSTICE on behalf of Moms on a Mission Hui, and Pō'ai Wai Ola/West Kaua'i Watershed Alliance

(collectively "EarthJustice"). This response will address EarthJustice allegations of discriminatory actions by HDOA Pesticide Branch under 44RNO-16-R9 (HDOA). The Hawai'i Agribusiness Development Corporation ("ADC") will separately address issues raised by EarthJustice under 45RNO-16-R9 (ADC).

BRIEF BACKGROUND

By way of letter dated March 9, 2017, the EPA-ECRCO informed HDOA that it had accepted for investigation two (2) allegations from the September 14, 2016 EarthJustice "Complaint Under Title VI of the Civil Rights Act of 1964, 42 U.S.C section 2000d, 40 CFR Part 7 and 7 CFR Part 15" ("EarthJustice Complaint"). The EPA-ECRCO framed the allegations accepted for investigation as follows:

(1) Whether in administering the pesticides program and the leasing and licensing of the state land program, the HDOA and/or ADC discriminated on the basis of race and/or national origin (Native Hawaiians) against farm workers and residents of West Kauai and Molokai, in violation of Title VI of the Civil Rights Act, and EPA's implementing regulation; and

(2) Whether the HDOA and/or ADC is complying with the procedural safeguard provisions in Title 40, Part 7, Subpart D of the *Code of Federal Regulations* ("CFR"), which require recipients of EPA financial assistance to have specific policies and procedures in place to comply with their non-discrimination obligations.

HDOA received the EPA-ECRCO notice of acceptance of administrative complaint 44RNO-16-R9 (HDOA) and 45RNO-16-R9 (ADC) on Monday, March 13, 2017. Pursuant to 40 CFR section 7.120 (d)(1)(iii), the party complained against, in this case HDOA, may submit a response to the EPA-ECRCO administrative complaint within thirty (30) calendar days of receiving notice of acceptance. Accordingly, HDOA's response is due no later than April 12, 2017.

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ALLEGATIONS

HDOA received a copy of the September 14, 2016 EarthJustice Complaint on March 30, 2017. Based upon a review of the complaint and accompanying exhibits, HDOA understands the EarthJustice Complaint to be calling upon EPA-ECRCO and the United States Department of Agriculture ("USDA") Office of the Assistant Secretary for Civil Rights, to investigate HDOA and ADC to ensure compliance with Title VI of the Civil Rights Act of 1964. The EarthJustice Complaint cites the following actions as evidence that HDOA has discriminated against Native Hawaiians:

(A) Lack of Title VI programs;

(B) Failure to limit pesticide registration;

(C) Failure to require or implement protective buffer zones; and

(D) Failure to enforce federal and state pesticide laws.

See page 7 of the EarthJustice Complaint.

EarthJustice alleges that by failing to comply with Title VI and its implementing regulations, HDOA's actions as set forth above have had a disproportionate effect on Native Hawaiians living in West Kaua'i and the island of Moloka'i. *See* page 1 of the EarthJustice Complaint. Exactly how this disproportionate effect is being accomplished is not explained.

HDOA RESPONSE

As to the first item accepted for investigation by EPA-ECRCO, the allegation as reframed by EPA-ECRCO does not comport with the actual allegations contained in the EarthJustice Complaint. The EarthJustice Complaint alleges that ADC is leasing or licensing State Land without protecting communities from pesticides. *See* page 13 of the

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EarthJustice Complaint. The EPA-ECRCO administrative complaint expanded the scope of the EarthJustice Complaint by adding HDOA as an entity that, in administering the leasing and licensing of State Land, discriminates against Native Hawaiians, farm workers, and residents of West Kaua'i and Moloka'i. *See* page 2 of the EPA-ECRCO administrative complaint. Adding HDOA to the allegations made by EarthJustice against ADC broadened the scope of the EarthJustice claims without providing necessary supporting details. The illustrations attached to the EarthJustice Complaint as Figures 1 to 7, are general in nature, and fail to identify specific parcels, or owners of specific parcels, by anyone other than ADC. This lack of accurate information relating to non-ADC lands hampers HDOA's ability to properly respond to the administrative complaint.

HDOA strongly denies all allegations raised in the EarthJustice Complaint and the EPA-ECRCO administrative complaint.

A. HDOA has a Title VI Program.

HDOA is part of the State of Hawai'i Executive Branch. HRS section 26-4 (12). "Under the supervision of the governor, all executive and administrative offices, departments, and instrumentalities of the state government and their respective functions, powers, and duties shall be allocated among and within the following principal departments that are hereby established: . . . Department of agriculture (Section 26-16) . . ." *Id.* In performing its duties as part of the State of Hawai'i executive branch, HDOA has been tasked with the following responsibilities:

> (1) Promote the conservation, development, and utilization of agricultural resources in the State;
>
> (2) Assist the farmers of the State and any others engaged in agriculture by research projects, dissemination of information, crop and livestock reporting service, market news service, and any other means of improving the well-being of those engaged in agriculture and increasing the productivity of the lands;

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(3) Administer the programs of the State relating to animal husbandry, entomology, farm credit, development and promotion of agricultural products and markets, and the establishment and enforcement of the rules on the grading and labeling of agricultural products; and

(4) Administer the aquaculture program under section 141-2.5.

HRS section 26-16 (c). In an effort to fulfill its statutory mission, HDOA has sought and received funds from the EPA and USDA.

Pursuant to 40 CFR section 7.80 (a), HDOA submitted assurance to EPA that it provides notice that it does not discriminate on the basis of race, color, national origin, sex, age, or disability in its programs or activities. EPA has been satisfied with these assurances and has not requested any other information from HDOA on its non-discrimination program.

Pursuant to 7 CFR section 15.4, HDOA submitted assurance to USDA that any program or activity conducted by HDOA would be in compliance with Title VI of the Civil Rights Act of 1964. USDA has been satisfied with these assurances and has not requested any other information from HDOA on its non-discrimination program.

Within recent memory, it has been unnecessary for HDOA to make use of its non-discrimination program. HDOA staff does not remember anyone, including the EarthJustice complainants, contacting HDOA with accusations of discriminatory practices.

By way of a request to access a government record, EarthJustice asked HDOA to provide "a copy of any written material describing or documenting any Title VI compliance program(s) the Hawai'i Department of Agriculture has or is implementing to ensure that its actions do not involve discriminatory treatment and do not have discriminatory effects even when facially neutral[.]" *See* Exhibit 3 attached to the EarthJustice Complaint. EarthJustice sought access to this information claiming that the requested records were "not readily available in the public

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domain because [they] are not available on [H]DOA's website nor, to my knowledge, in any other publicly-accessible place." *See* page 3 of Exhibit 3 attached to the EarthJustice Complaint.

In response to this public record request HDOA provided EarthJustice with a copy of Policy No. 601.001, entitled the Discrimination/Harassment-Free Workplace Policy, and the HDOA Limited English Proficiency Plan. *See* Exhibits 6 – 8 attached to the EarthJustice Complaint. EarthJustice declined HDOA's offer to provide copies of contract provisions that require contractor's to comply with state and federal anti-discrimination laws. As explained in Exhibit 6 attached to the EarthJustice Complaint, "HDOA does not have a document specifically described as HDOA Title VI program." EarthJustice misinterpreted this statement as an assertion that no Title VI program exists at HDOA. *See* page 7 of the EarthJustice Complaint. Nothing could be further from the truth.

The HDOA website, which is accessible to the public, does provide access to non-discrimination information. The "jobs" link leads to an announcement from the State of Hawai'i Human Resources Development State Recruiting Office, which states:

> . . . As required by Federal and/or State laws, we do not discriminate on the basis of age, sex (including gender identity or expression), religion, race, color, ancestry, national origin, disability, marital status, veteran's status, sexual orientation, arrest or court record, citizenship, genetic information or any other protected characteristics. The State of Hawai['']i is an equal opportunity employer and complies with applicable State and Federal laws relating to employment practices.

See Exhibit A.

This announcement also contains steps to take for decision review. *See* Exhibit A. The HDOA website also provides a link to the USDA website, which contains a link to the USDA Non-Discrimination Statement. *See* Exhibit B.

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The State of Hawai'i Human Resources Development office maintains the Policies and Procedures Manual that is issued for Executive Branch Civil Service. *See* Exhibit C. HDOA, being a part of the Executive Branch, is covered by these Policies and Procedures; notably Policy No. 601.001. *See* Exhibit F. Policy No. 601.001 specifically states that "The State and its appointing authorities are required to and will take appropriate action when discrimination, harassment or retaliation is based on a person's protected class. . . . Every State employee is responsible for assuring that work in the executive branch is conducted in an atmosphere that respects the dignity of every State employee, and people with whom the State conducts business." *See* Exhibit 7 attached to the EarthJustice Complaint. Policy No. 601.001 contains reporting procedures and also provides information on the Hawai'i Civil Rights Commission and the Equal Employment Opportunity Commission.

The Hawai'i Civil Rights Commission ("CRC") is a state agency dedicated to enforcing state laws prohibiting discrimination. The CRC was created by Act 219, 1988 Haw. Sess. Laws 387, and codified as HRS chapter 368. The CRC was established "to provide a mechanism that provides for a uniform procedure for the enforcement of the State's discrimination laws." HRS section 368.1. The CRC has jurisdiction over HRS chapter 368, part I of HRS chapter 378, part I of HRS chapter 489, and HRS chapter 515. *See* HRS section 368-11(a). These Hawai'i statutes compliment the federal non-discrimination laws. HRS chapter 378 addresses discriminatory employment practices; HRS chapter 489 addresses discrimination in public accommodations; and, HRS chapter 515 addresses discrimination in real property transactions.

It is interesting to note that a quick internet search using the terms "State of Hawai'i", "discrimination policy", and "Title VI", will direct the user to the State of Hawai'i Department of Human Resources Development and CRC websites. As the attached exhibits demonstrate,

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HDOA does have specific policies and procedures in place to comply with its non-discrimination obligations. *See* Exhibits A to F. These policies and procedures are readily available to the public.

HDOA is mindful of its obligation under Article I, Section 5 of the Constitution of the State of Hawai'i, which provides that: "No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." (Emphasis added.) HDOA is charged with the responsibility of enforcing Hawaii's pesticide laws and it is a responsibility HDOA takes very seriously.

The EarthJustice Complaint accuses HDOA of failing to enforce Federal and State Pesticide laws. *See* page 12 of the EarthJustice Complaint. In 2015, HDOA began a concerted effort to bring its enforcement actions to top tier status. HDOA has eliminated the enforcement backlog. HDOA responds to pesticide complaints in a timely manner, generally within twenty-four (24) hours. Investigations are conducted in a thorough and professional manner. HDOA continues to conduct as many routine inspections as possible. HDOA has initiated changes to its education program to ensure applicators have the knowledge necessary to protect workers and the public from off-label pesticide use. Rules addressing activities related to the safe use of pesticides as set forth in Title 4, Chapter 66, *Hawai'i Administrative Rules*, have been updated and are currently awaiting public comment.

HDOA has successfully accomplished this increased performance despite limited resources; and, despite having these limited resources diverted to respond to public information requests and baseless allegations. Suffice it to say, when a violation of the pesticide laws is

found to have occurred within the State of Hawai'i, action commensurate with HDOA's power and abilities has been, and will continue to be, faithfully enforced.

B. HDOA only licenses pesticide products for use in Hawai'i that are deemed safe for use by the EPA when used according to label directions.

Section 136a of Title 7, *United States Code* ("USC") prohibits any person, in any State, from distributing or selling "any pesticide that is not registered" with the EPA. *Id.* The State's ability to license pesticide products is limited by 7 USC section 136v, which provides that: "A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter." *Id.* Thus, if a pesticide product has not been registered by EPA it may not be used or licensed by the State of Hawai'i, except under limited circumstances. *See* HRS section 149A-11 (a)(2) (it is unlawful for any person to distribute, sell, or use any pesticide unless a label bearing all information in section 149A-15 is affixed to the container); and HRS section 149A-15 (7) (each container must have a printed label attached that lists the "EPA registration and establishment numbers"); *See also* HRS section 149A-12 (lists exemptions to the prohibitions set forth in HRS section 149A-11 (a)).

The EPA has established a rigid protocol for registering pesticide products. *See* 7 USC section 136a (c). The EPA evaluates pesticide products for human and environmental risks. *Id.* The EPA reviews the pesticide label to ensure the directions are adequate, easy to understand, and appropriate to address safe use. 40 CFR section 156.10. The EPA reviews each pesticide registration at least once every fifteen (15) years. 7 USC section 136a (g). The EPA has the resources and expertise available to evaluate pesticides products for any risk to human health and the environment. Based upon this expertise, the State of Hawai'i relies upon the EPA's

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registration process and periodic review to ensure all pesticides licensed for use in the State are safe when used according to label directions.

Likewise, the EPA has used its expertise and resources to determine when application of certain pesticides require establishment of a buffer zone to ensure no unreasonable adverse effects result from the pesticide application. The buffer zone requirement is part of the product labeling. *See* label for Paladin Pic-21, EPA Reg. No. 55050-7 at www.epa.gov/soil-fumigants/soil-funigant-labels-chloropicrin (last visited April 11, 2017). HDOA takes enforcement action in instances where the applicator is found to have used a pesticide in a manner inconsistent with its label by failing to establish a buffer zone when required by the pesticide labeling. *See* HRS section 149A-31 (1). HDOA relies on EPA's superior ability to conduct scientific investigation into environmental effects of pesticides when determining the necessity of requiring a buffer zone.

All of the restricted use pesticides cited by EarthJustice as justification for its discrimination allegations, (Chlorpyrifos, Atrazine, Metolachlor, Bifenthrin, and Paraquat Dichloride), have been approved for use by the EPA. Before a pesticide product is given registration approval, the EPA must determine that the pesticide "will perform its intended function without unreasonable adverse effects on the environment" and the pesticide "when used in accordance with widespread and commonly recognized practice . . . will not generally cause unreasonable adverse effects on the environment." 7 USC section 136a (c)(5)(C) and (D) (emphasis added). The term "environment" is defined in 7 USC section 136 (j) and "includes water, air, land, and all plants and man and other animals living therein, and the interrelationships which exist among these." (Emphasis added.) The EPA has determined that Chlorpyrifos, Atrazine, Metolachlor, Bifenthrin, and Paraquat Dichloride, when used as directed,

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will not cause unreasonable adverse effects to the environment, including sensitive populations. It is incumbent upon the EPA to cancel a pesticide's registration should any evidence of unreasonable adverse effects develop. *See* 7 USC section 136d (b). EPA has the power to remove a pesticide from circulation when it is deemed unsafe. Again, until such time that EPA chooses to cancel a pesticide registration, HDOA will rely on EPA's superior ability to conduct scientific investigation into environmental effects of pesticides.

EarthJustice cited, as justification for its discrimination allegations, the May 25, 2016 Findings and Recommendations of a Joint Fact Finding Study Group, Pesticide Use by Large Agribusinesses on Kaua'i ("JFF Study Group"). However, what the JFF Study Group actually discovered was that little reliable data was available to study, and what data was available did not support the conclusion that the Kaua'i Westside population was suffering from environmental harm. A review of the JFF Study Group's Executive Summary provides an informative synopsis of its findings:

> Information was patchy and fragmented; incomplete proprietary data; small statistical samples; confounding demographic variables; lack of human and environmental health exposure data; no information on the location, times or volume of pesticide applications; pesticides discovered in trace amounts at levels below EPA action standards; no local data on pesticide effects on birds and bats; minimal data on pesticide effects on wildlife; no information to conclude pesticide use plays any role in the health of Kaua'i residents; small West Side population yields statistically insignificant results; no lifestyle or socio-economic data included; and, conflicting opinions of what caused evacuation incidents at Waimea Canyon Middle School.

See pages 6 to 9 of the Findings and Recommendations of a Joint Fact Finding Study Group dated May 25, 2016 available at www.accord3.com/pg1000.cfm (last visited April 11, 2017).

In October 2014, Kaua'i residents requested the United States Department of Health & Human Services, Division of Community Health Investigations, Agency for Toxic Substances and Disease Registry ("ATSDR"), to evaluate whether agro-chemical practices were affecting

the health of their communities. A study was conducted and in August of 2016 a report was generated. This report concluded with the observation that "ATSDR is not able to demonstrate scientifically whether people near agricultural fields in Kaua'i west side communities are being exposed to pesticides at levels of health concern." *See* page 5 of Exhibit G. EarthJustice's allegation that Native Hawaiians are disproportionately suffering adverse effects from pesticide use has not been proven.

The responsibility for safeguarding the public health has been delegated to the Hawai'i Department of Health ("HDOH"). "The department of health shall have general charge, oversight, and care of the health and lives of the people of the State, and shall pursue as a goal, the achievement of health equity." HRS section 321-1(a) (Supp. 2016). "The department of health shall maintain, as it deems advisable . . . , an environmentally-related human illness and injury surveillance system for conditions determined by the director to present a threat to public health in order to ascertain the incidence, distribution, and other epidemiological characteristics of these illnesses and injuries." HRS section 321-311. "Environmentally-related human illnesses or injuries are those designated acute or chronic adverse <u>health effects associated with exposure to pesticides</u>, lead, or other toxic substances determined by the director to present a threat to public health." HRS section 321-312 (emphasis added). "Nothing in [the Hawai'i Pesticides Law] shall be construed to amend or alter the functions, duties, and powers of the department of health relative to chapters 321, 322, 328, and 330." HRS section 149A-4. HDOH is the department statutorily obligated to investigate allegations of environmentally-related human illnesses.

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C. HDOA Leasing and Licensing of State Land.

As mentioned above, the EarthJustice Complaint limits the allegations of Title VI violations in the leasing and licensing of State land to ADC. However, in its investigation of the EarthJustice Complaint allegations, EPA-ECRCO has enlarged the scope of the EarthJustice Complaint to include HDOA leasing and licensing of State land on Moloka'i and West Kaua'i without any clear explanation or allegation about the HDOA lands. EPA-ECRCO has not provided a clear delineation on the exact area it considers to encompass "West Kaua'i". As such, HDOA has made a good faith effort to determine the area it believes to be West Kaua'i.

The HDOA Agricultural Resource Management Division currently oversees approximately twenty-four (24) leases over twenty-four (24) parcels of land (about 1,036 acres in total) on Moloka'i and approximately fourteen (14) leases over twenty-four (24) parcels of land in West Kauai (about 260 acres in total). Of these, only two (2) leases over two (2) parcels of land (about 95 acres) on Moloka'i and four (4) leases over four (4) parcels of land (about 98 acres) on West Kaua'i were found to be leased to seed companies.

These lands were transferred to HDOA from the Hawai'i Department of Land and Natural Resources with existing leases and lessees and/or revocable permits and permittees pursuant to Governor Executive Orders and HRS Chapter 166 (Agricultural Park Lands), or pursuant to HRS Chapter 166E (Non-Agricultural Park Lands). HDOA consents to assignments by lessees to assignees chosen by the lessees so long as the assignment and the assignees comply with any and all requirements under HRS Chapter 166 or Chapter 166E, as applicable, and with HDOA's related administrative rules. At least with respect to HDOA lands, the selection of tenants and lease terms were not selected by HDOA, and HDOA cannot be held responsible for circumstances outside of its control.

CONCLUSION

The allegations made by EarthJustice are nothing more than supposition and innuendo, not fact. HDOA does have a Title VI policy in place, along with the entire State of Hawai'i Executive Branch. EPA is the agency that oversees pesticide safety and use and HDOA defers to its knowledge and expertise in the field. No pesticide product is licensed in Hawai'i unless it is first registered with EPA. EPA has ratified HDOA's actions by approving the pesticides for registration in the first place. Accordingly, HDOA respectfully requests that the EPA-ECRCO investigation into the merits of the EarthJustice allegations be terminated.

DATED: Honolulu, Hawai'i, 4/12/2017.

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