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May 4, 2018

Lillian Dorka
Brittany Robinson
United States Environmental Protection Agency
Office of Civil Rights
1200 Pennsylvania Ave., N.W.
Mail Code 1210A
Washington, DC 20460

DELIVERED VIA E-MAIL

RE: EPA FILE NO. 44RNO-16-R9

Dear Ms. Dorka and Ms. Robinson:

The following information is provided for your consideration.

By way of Compliant dated September 14, 2016, EARTHJUSTICE represented to the United States Environmental Protection Agency ("EPA") that the Hawai'i Department of Agriculture ("HDOA") discriminated against Native Hawaiians based upon the following acts:

(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.

EPA accepted the EARTHJUSTICE Complaint for investigation and by letter dated March 9, 2017 notified HDOA that the investigation would focus on two issues:

(1) Whether in administering the pesticides program and the leasing and licensing of the state land program, the HDOA and/or Hawai'i Agribusiness Development Corporation ("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.

The HDOA-Pesticides Branch submitted its response to the EARTHJUSTICE Complaint on April 12, 2017. HDOA denied all allegations in the EARTHJUSTICE Complaint. HDOA has regulated, and continues to regulate its pesticides program in a manner that does not discriminate against any individual or community. HDOA's actions are guided by the EPA, in compliance with the Cooperative Enforcement Agreement, the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), Title 7, *United States Code* ("USC"), sections 136-136y, Title 40, *Code of Federal Regulations* ("CFR"), and Chapter 149A, *Hawai'i Revised Statutes* ("HRS").

Pursuant to EPA's request, on September 14, 2017 representatives of HDOA, ADC and EPA participated in a conference call. The purpose of the call was to discuss whether HDOA and ADC would be interested in pursuing an informal resolution in this matter. During this discussion HDOA asked EPA to identify the specific West Kauai and Molokai locations where the violations were alleged to have occurred. EPA was also informed that the Hawai'i Department of Health ("HDOH") was the entity responsible for determining whether pesticide exposure resulted in adverse health effects. *See* HRS sections 321-311 to 321-317. HDOH, and other health-related entities, have undertaken various studies on the issue. HDOA is of the belief that no definitive health related impacts from pesticide exposure has been found by HDOH.

EPA informed HDOA an investigation was underway that included interviews and communications with the Complainants. HDOA is unaware of any attempts by EPA to contact or interview anyone from HDOA. The sole input EPA received from HDOA was the April 12, 2017 response. Neither EPA nor EARTHJUSTICE have provided the information requested by HDOA on the specific West Kauai and Molokai locations where the alleged discriminatory conduct was to have occurred. No specific information on the allegations has been provided.

Pursuant to EPA's request, on May 1, 2018, representatives of HDOA, ADC and EPA participated in a conference call. The purpose of this call was to discuss concepts that EPA sought to include in an informal resolution agreement. HDOA raised concerns about the lack of transparency in the resolution process as it appeared that EPA was operating under the assumption that the allegations in the EARTHJUSTICE Complaint were true. EPA asked HDOA to commit to an agreement without actively pursuing input from HDOA and without providing the information necessary for HDOA to make an informed decision. Further discussion of the informal resolution agreement is scheduled for May 22, 2018.

First, it must be recognized that HDOA policy, regulatory authority, and enforcement actions are all dictated by state and federal law. HDOA must operate within the United States and Hawaii constitutions, FIFRA, the regulations contained in 40 CFR, which addresses

"Protection of Environment", the "Hawaii Pesticides Law" as set forth in HRS Chapter 149A, and any other state laws that effect agricultural operations. The pesticide rules adopted by the Hawaii Board of Agriculture ("HBOA") under Chapter 4-66, *Hawaii Administrative Rules* (2006) ("HAR"), are further limited by the rule enabling statutes, HRS sections 149A-19, 149A-22, and 149A-33.

The HDOA must also consider HRS Chapter 165, "The Right to Farm Act" in which the Hawaii legislature sought to limit circumstances under which farming operations may be deemed a nuisance:

> **HRS section 165-1 Findings and purpose.** The legislature finds that when nonagricultural land uses extend into agricultural areas, farming operations often become the subject of nuisance lawsuits that may result in the premature removal of lands from agricultural use and may discourage future investments in agriculture. The legislature also finds that under the Hawaii State Planning Act, it is a declared policy of this State to "foster attitudes and activities conducive to maintaining agriculture as a major sector of Hawaii's economy." Accordingly, it is the purpose of this chapter to reduce the loss to the State of its agricultural resources by limiting the circumstances under which farming operations may be deemed to be a nuisance.
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> * * *
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> **HRS section 165-3 Declaration of public purpose.** The preservation and promotion of farming is declared to be in the public purpose and deserving of public support.
>
> **HRS section 165-4 Right to farm.** No court, official, public servant, or public employee shall declare any farming operation a nuisance for any reason if the farming operation has been conducted in a manner consistent with generally accepted agricultural and management practices. There shall be a rebuttable presumption that a farming operation does not constitute a nuisance.
>
> **HRS section 165-5 Frivolous lawsuits.** Any nuisance action, found to be frivolous by the court, in which a farming operation is alleged to be a nuisance as defined in section 165-2, shall be governed by section 607-14.5.[1]
>
> * * *

HDOA asserts that the EARTHJUSTICE Complaint borders on being frivolous.

The general nature of the accusation contained in the EARTHJUSTICE Complaint is not supported by fact. As noted above, HDOA must presume that farming operations do not

[1] HRS section 607-14.5 addresses the Court's ability to assess costs and attorneys' fees where a party's claims or defenses are found to be frivolous.

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constitute a nuisance. HRS section 165-4. Where farming operations utilize pesticides in a manner that complies with FIFRA, HRS Chapter 149A, and the rules adopted by the HBOA under HAR Chapter 4-66, the HDOA is limited in its ability to require compliance with suggestions that have not been memorialized as law.

Pursuant to statute, HDOA "shall license" a pesticide product if the product meets the FIFRA labeling requirements and the composition of the pesticide is complete as to warrant the proposed claims made for it. HRS section 149A-13(d). EPA also "shall register" pesticide products that meet the standards imposed by EPA through the review process, which includes a determination that the pesticide "will not generally cause unreasonable adverse effects on the environment." 7 USC sections 136a (c)(5).

The term "unreasonable adverse effects on the environment" is defined in HRS section 149A-2 and HAR section 4-66-2 as "any unreasonable risk to humans or the environment, taking into account the economic, social, and environmental costs and benefits of the use of the pesticide." The EPA is required to make the determination that a pesticide product does not increase the risk of unreasonable adverse effects on the environment. *See* 7 USC sections 136a(c)(3)(B)(i)(I). "EPA conducts an analysis that considers the economic, social and environmental costs and benefits of the use of any pesticide." *Center for Biological Diversity v. U.S. EPA*, 847 F.3d 1075, 1085 (9th Cir. 2017) (internal quotation marks and citation omitted).

HDOA relies upon EPA's comprehensive investigative resources and procedures to determine whether a pesticide product meets the requirements established in HRS sections 149A-13 and 149A-14. This is because HDOA's ability to reject a pesticide licensing application is limited. HRS section 149A-14(a). HDOA may reject a licensing application in situations where the pesticide use would result in unreasonable adverse effects on the environment. HRS section 149A-14(a)(4). HDOA relies on EPA's findings to support its pesticide licensing decisions.

Once a pesticide product is licensed for sale or use in Hawaii, the HBOA Chairman may only cancel or suspend a pesticide or pesticide-use with the approval of the director of health. HRS section 149A-32.5. HRS sections 321-311 to 321-317, and HRS section 149A-19(a)(1), make it clear that HDOH is the entity responsible for identifying when environmentally-related illness and injury result from pesticide exposure, or if human health was affected by pesticide exposure.

HDOA would like to take this opportunity to provide comments regarding the itemized agenda topics EPA offered for consideration in resolving this matter.

A. Minimize Pesticide Exposure to Community

1. Use the Hawaii Good Neighbor voluntary standards and guidelines as a template to develop HDOA policy/develop ADC lease language.

The Good Neighbor Program ("GNP") was establishing in 2013 and implemented on Kauai beginning January 2014. The GNP asks large agricultural companies to voluntarily

provide restricted use pesticide ("RUP") pre-application notice to entities that register for this service; to voluntarily provide monthly RUP post-application information to HDOA, who will post the information on the HDOA website; to voluntarily establish buffer zones consistent with the Worker Protection Standards, 40 CFR Part 170; to voluntarily establish 100-foot buffer zones around schools, medical facilities, or residential property, even if not required by the label; and to voluntarily seek to improve community relationships through neighborhood outreach programs.

Currently, large scale agricultural establishments operating in the state are voluntarily participating in the GNP, including Hartung Brothers, Monsanto, DuPont Pioneer, Dow AgroSciences, Mycogen Seeds, and Beck's Superior Hybrids. The GNP voluntary participation continues to be very successful.

Absent violation of the law, HDOA is unable to compel all agricultural establishments to comply with the GNP until such time as the Hawaii legislature decides the GNP should be mandatory.

2. Require each pesticide applicator to develop a local/community communications plan. The goals of this plan are to improve communications and outreach within the neighboring communities and to prevent or minimize RUPs from impacting adjacent properties or environs.

HDOA can only compel RUP applicators to follow current statutes. The statutes the provide HDOA with its rule making authority do not give HDOA the power to require individuals to be considerate of others or to exact standards of certification beyond those established by FIFRA. HRS section 149A-33. Absent violation of the law, HDOA is unable to force individual pesticide applicators to be good neighbors through improved communication and outreach.

3. Voluntary RUP Notice through pre-application notification of RUPs and post-application reporting to HDOA.

HDOA attempts to instill respectful consideration of those entities that adjoin agricultural establishments through its education and training programs, and during pesticide use inspections.

If S.B. No. 3095, S.D.1, H.D.1, C.D.1 is enacted into law, HDOA will be authorized by statute to subject RUP users to annual RUP use reporting requirements. The information provided to HDOA will be summarized and posted on the HDOA website.

4. Establish buffer zones by requiring minimum 100-foot buffer zones near schools, medical facilities, and residential properties.

If S.B. No. 3095, S.D.1, H.D.1, C.D.1 is enacted into law, beginning January 1, 2019,

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HDOA will be authorized by statute to prohibit RUPs from being applied on or within 100-feet of school property during normal school hours.

HDOA does not have the authority to establish a one-size-fits-all buffer zone and would note that imposition of uniform buffer zones is not considered to be the most scientifically appropriate method for mitigating the risk of exposure to pesticide drift. *Pesticide Action Network North America v. U.S. EPA*, 654 Fed.Appx. 887 (9th Cir. 2016) (unpublished memorandum opinion).

Absent violation of the law, HDOA is unable to require individual pesticide applicators to completely forego use of their property in order to maintain a 100-foot buffer zone where that property abuts a school, medical facility or residence.

Buffer zones must maintain vegetative cover and/or screens (e.g., grasses, shrubbery, trees).

Requiring individuals to use his or her property and resources to maintain a buffer zone through landscaping may be viewed as a taking of private property for public purposes, for which compensation may be required. *See* Art. I, Sec. 20, *Hawaii State Constitution*, which states "Private property shall not be taken or damaged for public use without just compensation." *See also* Fifth Amendment to the *United States Constitution* (same).

HDOA is not authorized to compel individuals to take valuable property out of production to install and maintain "green screens." HDOA is not authorized to offer compensation to agricultural establishments for installing and maintaining "green screens." Removing agricultural land from production does not comport with the Right to Farm Act, and burdens farmers by reducing farmable acres, which on some small farms may constitute a substantial portion of the property.

Variable buffer zones based on technical data from the application.

The need for buffer zones established through the use of technical data would necessarily be discovered by EPA during the registration process and made a part of the label requirements under FIFRA. Label violations have been, and continue to be, enforced by HDOA.

Buffer zones required under the Worker Protection Standard, 40 CFR Part 170, have been, and continue to be, enforced by HDOA.

B. Minimize Harmful Pesticides in the Water

1. Develop mandatory best management practices by

a. Working with NRCS to identify appropriate conservation practices;

b. Share and discuss Agricultural Pesticide Best Management Practices Report, prepared by the University of California, Davis Agricultural GIS Laboratory, dated February 10, 2010, with HDOA.

The HDOH, not the HDOA, is responsible for enforcing State Primary Drinking Water Regulations, identifying contaminants in the water systems, and establishing action levels. *See* HRS sections 340E-21 to 340E-25. "Nothing in [chapter 149A] 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.

The HDOH, not the HDOA, is responsible for preventing, controlling and abating water pollution in the State. *See* sections 342D-1 to 342D-71, HRS and chapter 342E, HRS.

As a follow-up to the 2013-2014 Hawai'i surface water pesticide-monitoring program, the United States Geological Survey ("USGS") is currently conducting a pesticide-monitoring program. This monitoring program began in 2016 and was funded by HDOH and HDOA, with USGS providing the technical support.

In March 2018, the preliminary findings of the Oahu and Kauai water samples were published. Thirty-one sites on Oahu and Kauai were tested between November 2016 and April 2017. The samples were screened for two hundred twenty five different pesticides. Out of the two hundred twenty five pesticides screened, sixty-one pesticides were detected at least once. All pesticides discovered in the water samples were well below human-health benchmarks established by EPA. Three samples, all from Oahu, were found to exceed the lowest aquatic-life benchmark for imidacloprid, flubendiamides, and simazine.

2. Implement through ADC lease or HDOA regulation

HAR Chapter 4-66, the HDOA pesticide rules, has been under revision for nearly three years. This has been a massive undertaking. All entities concerned with pesticide licensing, distribution, and use have been consulted. These entities provided suggestions, criticisms, and comments. HDOA considered all feedback. The rule amendments received preliminary approval by the HBOA in February 2018, and are presently awaiting the governor's approval to hold public hearings. The rule amendments incorporate the stricter certification standards under 40 CFR Part 171 (scheduled to take effect 5/22/2018) and the stricter worker protection standards under 40 CFR Part 170. The proposed rule amendments try to strike a balance between all of the competing interests.

HDOA has no information to provide on ADC leases.

3. Discuss remedies developed as part of CWA Citizen law suit with HDOH and ADC

HDOA has no information to provide on this topic.

C. Follow-up on Pesticides Complaints from the Community

1. Develop SOP to respond to complaints that include follow-up with the complainant.

Inspections and investigations are conducted according to the FIFRA Inspection Manual and HDOA Standard Operating Procedures.

HDOA strives to respond to a complaint within 24 hours, depending upon when and how the complaint was initiated. HDOA inspectors also maintain an inspection schedule of agricultural establishments, structural and soil fumigant enterprises, market places, producing establishments, experimental use permits, imports, exports, certified applicators, and restricted use pesticide dealers.

Complainants are provided with inspector contact information at the beginning of the investigation, usually in the form of a business card.

After the investigation is complete a letter is sent to every complainant advising them that the investigation phase has been completed and the case file has been forwarded to the case developers for appropriate action. The letter provides the inspector's name, complaint number, and the name, address, and telephone number of the case developer. The letter also provides the complainant with information on how to obtain a copy of the report once the case is closed.

These enforcement practices have been in existence for years.

2. Enhance the enforcement database to provide non-confidential status updates, inspector's contact information, timeline, and closure reports.

HDOA is unable to provide information on active investigations via a publically available database. HDOA performs a law enforcement function. An investigative file is entirely comprised of confidential information. HRS section 92F-13(1)-(3). A complainant may request a status update by contacting the inspector through the information provided on the inspector's business card, or the case developer through information provided in the investigation completion letter.

HRS section 149A-21(c) provides: "The department shall, by publication in such manner as it may prescribe, give notice of all judgments entered in actions instituted under this chapter." Accordingly, the HDOA is limited to publishing judgments. Once the case is

closed the investigative documents become public records, which may be obtained through a public records request. The public records are subject to redaction of personal information. HRS section 92F-14.

D. Non-Discrimination Procedural Safeguards

1. Notice of Non-Discrimination under the Federal Non-Discrimination Laws and Regulations.

The HDOA website contains the following notice:

> HDOA is committed to maintaining an environment free from discrimination, retaliation, or harassment on the basis of race, color, sex, sexual orientation, religion, national origin, age, or disability with respect to any employment, program or activity.

Links to the USDA Non-Discrimination Statement, to Hawaii Department of Human Resources Development ("HDHRD"), the Hawaii Civil Rights Commission, and EPA Civil Rights Compliance Office are provided. HDOA believes that providing a link to HDHRD is appropriate as any alleged discriminatory conduct would necessarily occur in the course of employment. HDHRD accepts citizen complaints that result from interactions with State employees.

2. Grievance Procedures for Complaints filed under the Federal Non-Discrimination Laws and Regulations.

The HDOA website contains the following notice:

> Should you feel you have been discriminated against under any HDOA program or activity receiving federal assistance, please contact the HDOA Title VI Coordinator for information on how to file a complaint. The HDOA Title VI Coordinator may be reached at 1428 S. King Street, Honolulu, HI 96814, (808) 973-9560, or via e-mail at hdoa.info@hawaii.gov.
>
> Information on how to file a discrimination complaint is also available through the Hawaii Civil Rights Commission at http://labor.hawaii.gov/hcrc or the United States Environmental Protection Agency, Office of General Counsel, External Civil Rights Compliance Office at http://www.epa.gov/ocr.

3. Designation of a Non-Discrimination Coordinator.

The HDOA Compliance Officer is the individual designated as the Non-Discrimination Coordinator and is able to provide information on how to file a complaint.

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Going back at least 15 years, HDOA has not received a Title VI complaint, and this would include not receiving a complaint from EARTHJUSTICE, Moms on a Mission Hui, or Pō'ai Wai Ola/West Kaua'i Watershed Alliance.

The HDOA Supervising Case Developer has been designated as back-up to the Non-Discrimination Coordinator.

4. LEP Planning.

The HDOA website contains a link to the State accessibility policy.

The pesticide rules currently in effect provide certification procedures for non-English proficient private applicators.

The proposed rules have changed the section name to "Certification of private applicator under special circumstances," which broadens the certification procedure to include all persons who require some kind of accommodation.

5. Planning for Inclusion of Persons with Disabilities.

The HDOA website contains the following notice:

> To request language or accessibility assistance for HDOA programs or public meetings, please contact the Office of the Chairperson at the address, telephone number, or e-mail address listed above. Please allow sufficient time for HDOA to meet accommodation requests.

A similar advisory is printed on meeting notices, with the condition that requests for accommodations be made at least 48-hours before the meeting.

HDOA has entered into a memorandum of agreement with a service provider who will provide new farmers, and those farmers who are English-language learners, with training on pesticide safety and effective use of pesticides. This program is scheduled to run from May 1, 2018 to April 30, 2021.

E. Training of HDOA staff

1. How to implement Non-Discrimination Procedural Safeguards

State employees, including HDOA staff, receive annual training on how to avoid claims of discrimination, and procedural steps to take if a complaint is received.

Current work to Address Topics Listed Above

A. Status of CWA NPDES Citizen Suit Settlement

HDOA – Pesticides Branch has no information to provide on this topic.

B. Updates to Good Neighbor Program

Statewide voluntary cooperation continues to be successful.

C. HDOA's Action Plan: Case Development

There is no backlog. The HDOA Pesticide Branch is currently issuing enforcement actions for the fiscal year 2017-2018. Thirty-one Notices of Violation were generated for fiscal year 2016-2017; eleven Notices of Violation have been generated so far this fiscal year.

D. Other actions taken by HDOA – Pesticides Branch

HBOA has provided preliminary approval of the proposed pesticide rule amendments. HDOA is currently awaiting the governor's approval to conduct public hearings after the governor's review of the proposed rules.

If Senate Bill 3095, S.D.1, H.D.1, C.D.1 becomes law, the rule amendments may be delayed to address changes to the Pesticide Law that require rule preparation.

Other actions taken by ADC

HDOA has no information to offer on this topic.

Plaintiffs' must establish a prima facie case that demonstrates the defendant's facially neutral practice causes a disproportionate adverse impact on a protected class. *Darensburg v. Metropolitan Transp. Com'n*, 636 F.3d 511, 519 (9th Cir. 2011). EARTHJUSTICE has failed to establish a prima facie case that HDOA actions have created a disproportionate effect on Native Hawaiians living in West Kauai and/or Molokai.

Should you have any questions or concerns, I can be reached at (808) 586-0936 or via email at delanie.d.prescott-tate@hawaii.gov.

Sincerely yours,

Delanie Prescott-Tate

Delanie Prescott-Tate, Deputy Attorney General,
on behalf of the Hawai'i Department of Agriculture

cc: HDOA File

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