UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE
OFFICE OF GENERAL COUNSEL

INFORMAL RESOLUTION AGREEMENT
between the
HAWAI'I DEPARTMENT OF AGRICULTURE
and the
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
External Civil Rights Compliance Office

EPA COMPLAINT NO. 44RNO-16-R9 (HDOA)

I. PURPOSE AND JURISDICTION

A. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7 (Title VI), and other federal civil rights laws, and United States Environmental Protection Agency's (EPA) regulation 40 C.F.R. Parts 5[1] and 7, prohibit discrimination on the basis of race, color, national origin, sex, age and disability in any programs or activities receiving federal financial assistance.

B. The Hawai'i Department of Agriculture (HDOA) is a recipient of federal financial assistance from the EPA and is subject to the provisions of Title VI and 40 C.F.R. Parts 5[2] and 7.

C. On March 9, 2017, EPA's External Civil Rights Compliance Office (ECRCO) accepted for investigation an administrative complaint brought under Title VI and EPA's implementing regulation at 40 C.F.R. Part 7, Subpart D, which alleged that HDOA and the Hawaii Agribusiness Development Corporation (ADC) engaged in discrimination based on race, color and national origin. The complaint against HDOA was assigned EPA Complaint No. 44RNO-16-R9, and the complaint against ADC was assigned EPA Complaint No. 45RNO-16-R9.[3] EPA accepted for investigation the following issues:

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 Kaua'i and Moloka'i, in violation of Title VI of the Civil Rights Act, and EPA's implementing regulation; and

[1] A violation of 40 CFR Part 5 was not alleged as part of the original complaint filed with ECRCO.
[2] Ibid.
[3] EPA Complaint No. 45RNO-16-R9 is being resolved through a separate informal resolution agreement between EPA and ADC.

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2. Whether the HDOA and/or ADC is complying with the procedural safeguard provisions in 40 C.F.R. Part 7, Subpart D, which require recipients of EPA financial assistance to have specific policies and procedures in place to comply with their non-discrimination obligations.

D. During the course of EPA's investigation into EPA Complaint No. 44RNO-16-R9, HDOA and EPA agreed to enter into an Informal Resolution Agreement (Agreement).

E. This Agreement is voluntarily entered into by HDOA and EPA. This Agreement resolves EPA Complaint No. 44RNO-16-R9. It is understood that this Agreement does not constitute an admission of guilt, liability, or wrongdoing by HDOA. EPA is not making any finding of compliance or noncompliance with applicable federal non-discrimination laws and regulations, including 40 C.F.R. Parts 5[4] and 7.

F. HDOA continues to be committed to carrying out its responsibilities as a recipient of state and federal financial assistance in a non-discriminatory manner and in accordance with the requirements of Title VI, and any other federal and state non-discrimination laws.

II. BACKGROUND

A. As part of the informal resolution process, ECRCO and HDOA worked together to identify options in the development of this Agreement to resolve the Complaint.

B. "In 1978, Congress enacted Pub. L. 95-396 which contained numerous revisions to the Federal Insecticide, Fungicide Insecticide and Rodenticide Act (FIFRA) (7 U.S.C. 136 *et seq.*). One of the changes added two new sections of FIFRA, sections 26 and 27, U.S.C. 136w-1 and 136w-2, which together established a standard and procedures for according States the primary enforcement responsibility for pesticide use violations (primacy)."[5]

In 1978, EPA allocated funding to the State of Hawaii for the enforcement of FIFRA violations.

C. During the pendency of the Complaint investigation, Act 045, Session Laws of Hawai'i (2018)[6] was enacted into law. Through Act 045 the Hawai'i legislature amended H.R.S. Chapter 149A by adding a new part entitled "Pesticide Reporting

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[4] *See* fn. 1.

[5] Federal Register, Vol. 48, No. 3; 40 CFR Part 173[OPP 00159; PH-FRL 2215-3] Federal Insecticide, Fungicide, and Rodenticide Act, State Primary Enforcement Responsibilities.

[6] Available at https://www.capitol.hawaii.gov/advreports/advreport.aspx?year=2018&report=subject&strInput=act%20045&title=search%20results%20for:%20act%20045.

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and Regulation Program." Specifically, H.R.S. Chapter 149A[7] was amended to require:

> (a) Beginning January 1, 2019, every user of restricted use pesticides shall be subject to the requirement to submit to [HDOA], for departmental use, an annual report of all use of restricted use pesticides as provided in this section.
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> * * *
>
> (c) The department shall adopt rules pursuant to chapter 91 requiring that the annual reports include the following information:
>
> > (1) A listing, by federal and state registrations or permit numbers, commercial product names, and active ingredients, of all restricted use pesticides used;
> >
> > (2) The total quantities used for each restricted use pesticide;
> >
> > (3) A general description of the geographic location, including, at a minimum, the tax map key number, at which the restricted use pesticides were used; and
> >
> > (4) The date on which the restricted use pesticide application occurred.

H.R.S. § 149A-26 (Supp. 2018).[8]

The annual report is required to be submitted to HDOA no later than thirty days following the end of each calendar year, with the first annual report due to HDOA no later than January 30, 2020. *See* H.R.S. § 149A-26(b) (Supp. 2018)[9].

Following receipt of the annual report:

> The [HDOA] shall produce a summary, for public disclosure, by county, that includes:
>
> > (1) The total quantity used, by federal and state registrations or permit numbers, commercial product names, and active ingredients, for each restricted use pesticide used; and
> >
> > (2) The amount of area in the county in which the restricted use application occurred.

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[7] https://www.capitol.hawaii.gov/hrscurrent/Vol03_Ch0121-0200D/HRS0149A.htm and https://www.capitol.hawaii.gov/advreports/advreport.aspx?year=2018&report=subject&strInput=Act%20045&title=Search%20Results%20for:%20Act%20045.

[8] https://www.capitol.hawaii.gov/hrscurrent/Vol03_Ch0121-0200D/HRS0149A.htm and https://www.capitol.hawaii.gov/advreports/advreport.aspx?year=2018&report=subject&strInput=Act%20045&title=Search%20Results%20for:%20Act%20045.

[9] Available at https://www.capitol.hawaii.gov/hrscurrent/Vol03_Ch0121-0200D/HRS0149A/HRS_0149A-0026.htm

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H.R.S. § 149A-27 (Supp. 2018).[10]

Additionally, "[b]eginning January 1, 2019, no person shall apply a restricted use pesticide on or within one hundred feet of a school property during normal school hours[.]" H.R.S. § 149A-28 (Supp. 2018). Normal school hours are defined as "Monday through Friday from 7:00 a.m. until 4:00 p.m., excluding days when classes are not in session." H.R.S. § 149A-25 (Supp. 2018).

Finally, Act 045 amended H.R.S. § 149A-31 by adding a new subsection that prohibits the use or application of any pesticide containing chlorpyrifos between January 1, 2019 and December 31, 2022, without a temporary permit issued by HDOA. After December 31, 2022 all use or application of chlorpyrifos in the State is prohibited. H.R.S. § 149A-31 (7) (Supp. 2018).

III. SPECIFIC HAWAI'I DEPARTMENT OF AGRICULTURE COMMITMENTS

Unless otherwise provided in Section IV.B. and C., by signing this Agreement, the HDOA commits itself to perform the obligations recited in this Section pertaining to FIFRA 7 U.S.C. §136 et seq. (1996), Act 045, Session Laws of Hawai'i (2018), and H.R.S. § 149A, and accordingly, no further monitoring by EPA of these commitments is necessary.

A. Minimize Pesticide Exposure Statewide:

1. As an agency granted primacy for FIFRA enforcement, HDOA reaffirms its commitment to continue to regularly monitor, investigate, and enforce pesticide use and pesticide applications within the State of Hawai'i ("State" or "Hawai'i") to ensure use and applications are made in a manner that is consistent with the EPA approved label. *See* 7 U.S.C. § 136j (a)(2)(G) and H.R.S. § 149A-31.

2. As an agency granted primacy for FIFRA enforcement, HDOA reaffirms its commitment to continue to work with EPA to identify and review investigative resources, procedures, and periodic review to inform its decisions on the licensing of pesticide products for use in Hawai'i, and to ensure the pesticide products do not pose an unreasonable risk to humans or the environment when used according to label directions. *See* 7 U.S.C §§ 136-136y.

3. As an agency granted primacy for FIFRA enforcement, HDOA reaffirms its commitment to continue to work with and take direction from the Hawai'i Department of Health, the state department statutorily required to

[10] Available at https://www.capitol.hawaii.gov/hrscurrent/Vol03_Ch0121-0200D/HRS0149A/HRS_0149A-0027.htm

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ascertain whether exposure to pesticides presents a threat to public health. *See* H.R.S. §§ 321-311 and 321-312.

4. As an agency granted primacy for FIFRA enforcement, HDOA reaffirms its commitment to continue its efforts to create and implement a pesticide drift monitoring study. Recently, funds were appropriated, pursuant to 2018 Haw. Sess. Laws Act 045, §§ 4 - 5 at 145, for the development of a pesticide drift monitoring study to evaluate pesticide drift at three schools within the State. HDOA has identified Waimea Canyon Middle School, in West Kaua'i, as one of the three participating schools. To ensure that information on pesticide drift is gathered in a way that fairly represents the entire State, one school from Maui and one school from Oahu will also participate in the pesticide drift study. HDOA will prepare and submit a report of its findings and recommendations (report) to the legislature no later than twenty days prior to the convening of the regular session of 2020. The report to the legislature will be publicly available.

B. Minimize Harmful Pesticides in the Water:

1. As an agency granted primacy for FIFRA enforcement, HDOA reaffirms its commitment to continue to work with and take direction from the Hawai'i Department of Health, the state department statutorily required to enforce State Primary Drinking Water Regulations, to identify contaminants in the water systems, establish action levels, and prevent, control and abate water pollution in the State. *See* H.R.S. §§ 340E-21 to 340E-25, 342D-1 to 342D-71, and H.R.S. Chapter 342E.

2. As an agency granted primacy for FIFRA enforcement, HDOA reaffirms its commitment to continue to support surface water pesticide-monitoring programs in conjunction with the Hawai'i Department of Health and the United States Geological Survey. In the event that surface water pesticide levels are found to exceed existing Maximum Contaminant Levels (MCL) or human-health or aquatic life benchmarks established by EPA, HDOA will take direction from the Hawai'i Department of Health, and other agencies statutorily bound to address such contingencies, by assisting in the creation and implementation of an action plan.

3. As an agency granted primacy for FIFRA enforcement, HDOA's certified RUP applicator education programs will continue to stress pesticide use and pesticide application methods that address the impact of pesticides on water statewide, including in West Kaua'i and Moloka'i.

C. Follow-up on Pesticide Complaints from the Community:

1. As an agency granted primacy for FIFRA enforcement, HDOA reaffirms its commitment to continue to diligently respond, investigate, gather information/samples, create a record of the investigation, and send the

completed record to the HDOA main office for review by the case developers, and take appropriate enforcement action when necessary.

2. In 2015 procedures were implemented by HDOA for purposes of eliminating an approximately 700-case backlog. In June 2015, a deputy attorney general was specifically assigned to the pesticide branch, and deadlines were established for submission of investigative reports, case review, and enforcement actions. Several temporary workers were hired to review the backlog case files and take enforcement action when warranted. The backlog of cases awaiting case developer review and processing was eliminated by 2017. Since that time HDOA has demonstrated the ability to maintain submittal deadlines and has consistently closed the majority of investigative case files within sixty days.

   Therefore, as an agency granted primacy for FIFRA enforcement, HDOA reaffirms its commitment to continue to use its best efforts to process and resolve environmental complaint investigations within sixty days. HDOA commits that if a backlog reoccurs HDOA will reevaluate and amend procedures as necessary to prevent a reoccurrence of inspection files pending case developer review for more than sixty days.[11]

3. As an agency granted primacy for FIFRA enforcement, HDOA reaffirms its commitment to maintain current contact information on the HDOA website.

4. As an agency granted primacy for FIFRA enforcement, HDOA reaffirms its commitment to continue to provide contact information to complainants at the beginning of the investigation.

5. As an agency granted primacy for FIFRA enforcement, HDOA reaffirms its commitment to continue to notify complainants when the investigative reports are sent to the HDOA main office for review by the case developers.

6. As an agency granted primacy for FIFRA enforcement, HDOA reaffirms its commitment to continue to provide complainants with contact information for the case developers.

7. As an agency granted primacy for FIFRA enforcement, HDOA reaffirms its commitment to continue to notify complainants when the investigation is complete and advise complainants how to obtain copies of the case file.

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[11] The 2018-2021 Cooperative Agreement between EPA and HDOA includes the provision that upon completion of an investigation (including sample analysis) the HDOA will initiate enforcement actions in accordance with the Matrix of Enforcement Actions and Minimum State Actions, as follows:

a. Minor actions (warning letters, notices, etc.) will be initiated within 30 days.

b. Major actions (civil actions, formal hearings, license revocations, etc.) will be initiated within 60 days.

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8. As an agency granted primacy for FIFRA enforcement, HDOA reaffirms its commitment to continue to work with the INFOR database to complete the internet programming that will allow the public to access real time investigation information as soon as realistically possible. HDOA will continue to explore ways in which the INFOR database may be configured to provide the general public with easier access to posted information.

9. As an agency granted primacy for FIFRA enforcement, HDOA reaffirms its commitment, in conjunction with the Hawai'i Department of Health Hazard Evaluation and Emergency Response Office, to continue to follow established procedures that require timely response to complaints about pesticide exposure in the community.

D. Good Neighbor Program

1. As an agency granted primacy for FIFRA enforcement, HDOA reaffirms its commitment to monitor compliance by participating companies with the agreements established through the Good Neighbor Program, including the agreed upon one-hundred-foot buffer zone for pesticide application as measured from the outside perimeter of proposed treated areas up to the property line of an abutting school, medical facility, and residential property. Beginning January 1, 2019, HDOA will enforce one-hundred-foot buffer zone around school property during normal school hours in the same manner that HDOA enforces any other pesticide statute or rule by responding to pesticide use complaints as soon as possible, and monitoring compliance with the pesticide statutes or rules through investigative inspections.

2. As an agency granted primacy for FIFRA enforcement, HDOA reaffirms its commitment to continue to enforce buffer zones required by the pesticide product label and the Application Exclusion Zones requirement established by the federal Worker Protection Standard, 40 C.F.R. Part 170 *et seq.*

3. As an agency granted primacy for FIFRA enforcement, HDOA reaffirms its commitment to continue to compare RUP sales information against the RUP storage and use information obtained from participating agribusinesses statewide to determine if the RUP application information is generally reliable.

4. As an agency granted primacy for FIFRA enforcement, HDOA reaffirms its commitment to encourage all RUP applicators to be considerate of their neighbors through ongoing education and training programs.

5. As an agency granted primacy for FIFRA enforcement, HDOA reaffirms its commitment to ensuring that HDOA's certified RUP applicator educator programs will continue to stress drift management, through the use of best management practices, as instrumental in achieving good neighbor status.

6. HDOA will request the Environmental Mediation Center, or other similarly neutral entity, to conduct further analysis and review of the efficacy of the Good Neighbor Program. HDOA will request the reviewing entity to assess the success or failure of the program, offer suggestions for improving the program, and identify ways in which current agricultural pesticide best management practices can be incorporated into the Good Neighbor Program. HDOA will initiate this request for further analysis and review within one year. Any resulting report will be posted on HDOA's website.

E. 2018 Legislative Initiatives

1. HDOA will create form(s) for use by restricted use pesticide (RUP) applicators to report annual RUP use information as required by H.R.S. §§ 149A-26 and 149A-27 (Supp. 2018).

2. HDOA will summarize and post for public disclosure, by county, the total quantities used, by federal and state registrations or permit numbers, commercial product names, and active ingredients, for each restricted use pesticide used, and the amount of area in the county in which the restricted use application occurred as required by H.R.S. § 149A-27 (Supp. 2018). The summary will be posted on the HDOA website within sixty days following the close of the annual reporting period. The first annual reporting period closes January 30, 2020.

3. HDOA will post maps or if that is not feasible, it will provide a link to maps on the HDOA website by June 1, 2019 showing school locations and approximate area of school property subject to buffer zones for purposes of aiding HDOA enforcement efforts pursuant to H.R.S. § 149A-28 (Supp. 2018). HDOA will include an advisory with the maps as a reminder that the certified restricted use pesticide applicator is ultimately responsible for complying with the Hawai'i Pesticides Law, H.R.S. Chapter 149A, as amended. *See* § 4-66-61 (3), *Hawaii Administrative Rules* (the "certified applicator shall be responsible" for all violations of H.R.S. Chapter 149A and these rules).

4. HDOA will develop and implement a protocol for notifying the general public and members of the agricultural community of the pending prohibition of all pesticides containing chlorpyrifos as an active ingredient pursuant to section 149A-31(7), Hawaii Revised Statutes.

F. Non-Discrimination Procedural Safeguards[12]:

[12] As is ECRCO's practice, ECRCO reviewed all relevant elements of HDOA's nondiscrimination program in light of the EPA regulatory requirements at 40 C.F.R. Parts 5 and 7, such as its procedural safeguards and policies and procedures to ensure access for individuals with limited-English proficiency and individuals with disabilities. ECRCO also reviewed whether HDOA has in place a public involvement process that is available and accessible to all persons regardless of race, color, national origin, disability, sex and age.

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In light of ECRCO's review of HDOA's nondiscrimination program, HDOA has committed to take the following actions.

1. Notice of Non-Discrimination: Within four (4) months of the signing of this Agreement, HDOA will prominently post its Notice of Non-Discrimination on its website homepage, in general publications that are distributed to the public (e.g., notice for public hearings, entrances to public hearings, public outreach materials such as brochures, notices, fact sheets, or other information on rights and services, as well as in applications or forms to participate in or access to HDOA's programs, processes, or activities), and in HDOA's offices. To ensure effective communication with the public, HDOA will ensure that its Notice of Non-Discrimination is accessible to individuals with limited-English proficiency and individuals with disabilities.

2. Grievance Procedures: Within four (4) months of the signing of this Agreement, HDOA will prominently publish in print and on-line its grievance procedures to process discrimination complaints filed under federal non-discrimination statutes and will do so on a continual basis to allow for appropriate, prompt, and impartial handling of those discrimination complaints. HDOA will ensure that its Grievance Procedures are accessible to individuals with limited-English proficiency and individuals with disabilities.

G. Training:

1. HDOA reaffirms its commitment to continue to conduct nondiscrimination compliance training for all staff in coordination with the HDOA Non-Discrimination Coordinator. HDOA will continue to update its training materials and incorporate as appropriate.

2. HDOA will ensure that the topic of nondiscrimination compliance is included for presentation to HDOA staff at the annual pesticide workshops.

3. HDOA reaffirms its commitment to continue to implement its "Together We Farm" English language learner initiative, in West Kaua'i and Moloka'i. During Year 3 of the program (2020 to 2021), when a sufficient number[13] of fellow farmers have been trained to replicate and implement the program, farmers from West Kaua'i and Moloka'i who are interested in becoming a trainer will be given priority consideration for participation in Year 2 of the program (2019 to 2020).

IV. GENERAL

[13] Sufficient number will be determined by the number of farmers within a particular geographic area who express interest in being trained.

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A. In consideration of HDOA's ongoing commitments and actions described in this Agreement, EPA will end its investigation and consider resolved the Complaint in EPA File No. 44RNO-15-R9 (HDOA) and will not issue a decision on the merits of the Complaint.

B. EPA will monitor HDOA's ongoing efforts to ensure full compliance with its federal, non-discrimination procedural safeguards and access obligations in Sections III. F and G, and upon request, EPA will provide technical assistance to HDOA regarding those obligations.

C. With respect to the commitment in Section III.D.6, HDOA will report to EPA the progress of this commitment within six (6) months of the signing of this agreement. Within one (1) year, HDOA will confirm to EPA its initiation of the action specified in Section III.D.6.

D. Once these commitments are fully implemented, EPA will issue a letter to HDOA documenting completion of these commitments and closing the monitoring of Complaint No. 44RNO-16-R9.

V. COMPUTATION OF TIME AND NOTICE

A. As used in this Agreement, "day" shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or holiday (State or Federal), the period shall run until the close of business of the next working day that is not a Saturday, Sunday or holiday.

B. Service of any documents required by this Agreement shall be made personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery.

C. Electronic documents submitted by HDOA to EPA via email shall be sent to the following email address: Dorka.Lilian@epa.gov. Documents submitted by HDOA to EPA shall be sent to Lilian Dorka, Director, U.S. EPA External Civil Rights Compliance Office, Office of General Counsel (Mail Code 2310A), 1200 Pennsylvania Avenue N.W., Washington, D.C. 20460.

D. Documents submitted by EPA to HDOA shall be sent to Phyllis Shimabukuro-Geiser, Chairperson, Hawai'i Department of Agriculture, Office of the Chairperson, 1428 South King Street, Honolulu, Hawai'i 96814-2512.

VI. EFFECT OF INFORMAL RESOLUTION AGREEMENT

A. HDOA understands that, if necessary, ECRCO may visit HDOA, interview staff, and request additional reports or data as necessary for ECRCO to determine whether HDOA continues to meet its obligation to comply with the federal non-discrimination requirements set forth in 40 C.F.R. Parts 5[14] and 7.

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[14] *See* fn. 1.

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B. HDOA understands that a failure to maintain compliance with federal non-discrimination requirements may result in the EPA re-opening an investigation.

C. If either Party desires to modify any portion of this Agreement because of changed conditions making performance impractical or impossible, or due to material change to HDOA's program or authorities, or for other good cause, the Party seeking a modification shall promptly notify the other in writing, setting forth the facts and circumstances justifying the proposed modification. Any modification(s) to this Agreement shall take effect only upon written agreement of the Chairperson of HDOA and the Director of ECRCO.

D. HDOA acknowledges its continuing responsibility to comply with Title VI, 40 C.F.R. Parts 5[15] and 7, and other federal non-discrimination laws, along with its continuing responsibility to comply with State non-discrimination laws. HDOA further acknowledges EPA's ongoing obligations to investigate any Title VI or other federal civil rights complaints and to address any other matter not covered by this Agreement.

E. This Agreement constitutes the entire Agreement between HDOA and EPA regarding the matters addressed herein, and no other statement, promise, or agreement made by any other person shall be construed to change any commitment or term of this Agreement.

F. The effective date of this Agreement shall be the date by which both Parties have signed the Agreement. The undersigned representatives of the Parties certify that they are fully authorized to consent to the terms and conditions of this Agreement. Signature on a counterpart or authorization of an electronic signature shall constitute a valid signature.

On behalf of the Hawai'i Department of Agriculture:

Phyllis Shimabukuro-Geiser — 5-29-19

Phyllis Shimabukuro-Geiser, Chairperson
Hawai'i Board of Agriculture

DATE

On behalf of the U.S. Environmental Protection Agency:

May 29, 2019

Lilian S. Dorka, Director
External Civil Rights Compliance Office
Office of General Counsel

DATE

[15] Ibid.