



August 4, 2016

*VIA CERTIFIED MAIL
RETURN-RECEIPT REQUESTED
AND EMAIL*

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Re: **Complaint Under Sections 26 and 27 of the Federal Insecticide,
Fungicide, and Rodenticide Act, 7 U.S.C. § 136w-2, and 40 C.F.R. Part 173**

Dear Administrator McCarthy, Regional Administrator Strauss, and Director Johnson:

Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (FIFRA) and 40 C.F.R., Chapter 1, Subchapter E, Part 173, Earthjustice submits this complaint describing the Hawai'i State Department of Agriculture's (HDOA's) chronic failure to fulfill its statutory duties under FIFRA, and requests that the Environmental Protection Agency (EPA) notify HDOA of its failings, and if timely correction is not forthcoming, to rescind the State of Hawai'i's primary enforcement authority. EPA action in this matter is essential to protect agricultural workers and communities in Hawai'i from suffering health and safety harms caused by pesticide use violations and HDOA's failure to take enforcement action.

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I. LEGAL FRAMEWORK

FIFRA regulates pesticide distribution, sale, and use to the extent necessary to prevent unreasonable adverse effects on the environment. 7 U.S.C. § 136a. Although the EPA generally enforces FIFRA, 7 U.S.C. § 136w-1 allows the EPA to delegate primary enforcement responsibility to a state for pesticide use violations if the EPA Administrator determines that the state has: (1) adopted adequate pesticide laws and regulations; (2) adopted and is implementing adequate procedures for the enforcement of such state laws and regulations; and (3) adequate recordkeeping practices in place, or if the EPA and the state enter into a cooperative agreement. 7 U.S.C. § 136w-1. A state with primary enforcement authority must, among other requirements, have “sufficient manpower and financial resources ... available to conduct a compliance monitoring program” and “must implement procedures to pursue enforcement actions expeditiously....” 48 Fed. Reg. 404 (Jan. 5, 1983) (interpretative rule). The EPA gave the State of Hawai‘i primary authority for enforcement of pesticide use violations under FIFRA.

If the Administrator determines that a state having primary enforcement authority for pesticide use violations is not fulfilling its responsibilities, the Administrator shall notify the state of EPA’s intent to rescind that authority. 7 U.S.C. § 136w-2(b); 40 C.F.R. § 173.3. If the state fails to correct its deficiencies within 90 days after receiving such notice, the Administrator may rescind, in whole or in part, the state’s primary enforcement authority. 7 U.S.C. § 136w-2(b).

II. FACTUAL BACKGROUND

Since at least 2013, HDOA has not been carrying out its responsibilities to enforce pesticide use violations. HDOA has consistently maintained a substantial and growing backlog of investigation files and consequently, very few complaints and investigations have resulted in enforcement actions, been referred to the EPA, or been addressed in any meaningful way. This has only become worse as time has passed, despite EPA’s clear and repeated warnings that HDOA needs to improve.

A. HDOA Has Not Been Meeting its Responsibilities.

In EPA’s 2012 annual review of HDOA’s performance under the cooperative agreement between EPA and HDOA, it noted that HDOA had a backlog, but also that

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HDOA had seven federally credentialed inspectors, and had completed 440 inspections, 19 percent of which resulted in enforcement actions.¹ Overall, HDOA had issued 70 warning letters and assessed fines in two cases. It referred 11 inspection files to EPA for enforcement review. HDOA had conducted 41 WPS Tier 1 inspections at facilities throughout Hawai'i, which resulted in issuance of one civil complaint and three warnings.² The review recommended that HDOA hire an additional case development officer to assist with case file review.³

EPA's 2013 review observed that HDOA has a "backlog of inspection files that need review," and its recommendations for the following year focused on addressing that backlog, "revising policies, and especially the enforcement response policy, and increasing the number of WPS Tier 1 inspections to more closely match previous years' numbers."⁴ In 2013, HDOA completed 430 inspections—ten fewer than in 2012—and issued only 20 warning letters, down from 70 in 2012. HDOA assessed fines in three cases, and referred zero cases to EPA for enforcement review and possible development. The review attributed the large decrease in warning letters issued and inspection letters forwarded to EPA to the "extensive backlog of inspection files to be reviewed and processed by HDOA."⁵ EPA expressed significant concern regarding HDOA's backlog and decrease in enforcement activity, and recommended HDOA find ways to address them, including assigning inspection staff to review files or hire additional case developers.

In EPA's 2014 review, EPA's primary concern and focus of recommendations remained on "reducing a backlog of inspection files (several hundred) that need review[,] ... revising the enforcement response policy, and increasing the number of WPS Tier 1 inspections to more closely match numbers in previous years."⁶ In 2014, HDOA completed 388 inspections—42 fewer than in FY2013—and issued one civil

¹ U.S. Environmental Protection Agency, Hawaii Department of Agriculture FY2012 End-of-Year (EOY) Review at 3.

² *Id.*

³ *Id.* at 7.

⁴ U.S. Environmental Protection Agency, Hawaii Department of Agriculture FY2013 Draft (EOY) Review at 1.

⁵ *Id.* at 3.

⁶ U.S. Environmental Protection Agency, Hawaii Department of Agriculture FY2014 (EOY) Review at 1.

complaint, 42 warning letters, and assessed one fine.⁷ HDOA conducted only five WPS Tier 1 inspections, a decrease from ten in 2013 and 40 in 2012.⁸ It referred only eight inspection files to EPA for enforcement review and possible development.⁹ HDOA's inspection staff decreased from seven people to six.¹⁰ EPA consequently noted that it "continue[d] to have significant concerns with the backlog of inspection files to be processed, and the resulting lack of enforcement actions issued, as well as the lack of inspections forwarded to EPA for review/enforcement."¹¹

B. HDOA's Performance Deteriorated Even Further in FY2015.

In its 2015 review of HDOA's performance, EPA emphasized that HDOA *still* needed to reduce the large backlog of inspection files, improve the quality of its inspections and reports, revise its enforcement response policy, and forward more inspection files to EPA for review or follow up.¹² HDOA conducted 314 inspections—74 fewer than in FY2014—and issued only four civil complaints, 40 warning letters, and assessed a fine in only a single case. The number of federally-credentialed inspectors also decreased further, from six to four.¹³ HDOA referred 11 inspection files to EPA for review and possible development,¹⁴ and conducted 17 WPS Tier 1 inspections.¹⁵

Most notably, the 2015 review exposed the fact that at that time, there were approximately 700 *inspection files in need of review, some dating back to 2008*.¹⁶ EPA attributed delays in enforcement proceedings to this backlog of inspection files. Whereas federal inspection reports are to be referred to EPA quarterly, some had not been referred for years, if at all. Consequently, some cases eventually referred to EPA that would have qualified for enforcement action were closed because the statute of

⁷ *Id.* at 3.

⁸ *Id.* at 4.

⁹ *Id.* at 8.

¹⁰ FY14 EOY Review at 3; FY13 EOY Review at 5.

¹¹ FY14 EOY Review at 9.

¹² U.S. Environmental Protection Agency, Hawaii Department of Agriculture FY2015 Final (EOY) Review at 1.

¹³ FY15 EOY Review at 6; FY14 EOY Review at 5.

¹⁴ FY15 EOY Review at 3.

¹⁵ *Id.* at 5.

¹⁶ *Id.* at 7.

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limitations had expired.¹⁷ While some proposed enforcement actions were delayed with the State deputy attorney general, EPA pointed out that HDOA should have notified EPA when the attorney general fails to timely review cases.¹⁸ EPA further noted the declining quality of the few inspections and reports HDOA had managed to produce and recommended improvement in that area as well.¹⁹

In addition to noting the large number of inspection files in need of review, EPA also observed there had been a significant increase in the number of pesticide-related complaints HDOA had received from individuals and groups throughout Hawai'i.²⁰ The complaints focused primarily on the misuse of pesticides by large agrochemical companies as well as state and local departments of transportation using herbicides for roadside weed control. Other complaints focused on HDOA and its inadequate enforcement of state and federal pesticide regulations.²¹

III. HDOA IS VIOLATING FIFRA

A state with primary enforcement authority under FIFRA must *implement* adequate procedures for the enforcement of state laws and regulations, 7 U.S.C. § 136w-1, and 7 U.S.C. § 136w-2 requires the state also to adequately carry out its responsibility to enforce federal use violations. HDOA's severe and persistent backlog of inspection files that has led to remarkably few enforcement actions demonstrates HDOA is not adequately addressing the problems associated with pesticide use in Hawai'i and is not meeting its responsibilities under FIFRA.

The current backlog of hundreds of inspection files and consequent preclusion of enforcement by expiration of the statute of limitations evidences HDOA's failure to fulfill its primary enforcement authority obligations under 7 U.S.C. § 136w-1. The public has become increasingly aware of possible pesticide misuse and HDOA's enforcement failures,²² resulting in a loss of confidence. Additionally, although a backlog of pesticide use violation cases at the deputy attorney general's office had

¹⁷ *Id.* at 7.

¹⁸ *Id.*

¹⁹ *Id.* at 4.

²⁰ *Id.* at 3.

²¹ FY15 EOY Review at 3.

²² *See id.* at 3.

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existed for several years, HDOA failed to alert EPA of the delay and failed to elevate high priority cases to EPA for its review and determination of the appropriate enforcement response.²³

IV. HDOA'S FAILURES PERPETUATE PRACTICES THAT THREATEN HUMAN AND ENVIRONMENTAL HEALTH AND SAFETY

The impacts of HDOA's pattern of neglect transcend the stack of aging inspection files sitting on HDOA's desk, or the lack of specific enforcement actions. HDOA's lackadaisical approach to enforcement allows pesticide users to imagine that careless practices, or even knowing violations, have no consequences. The State of Hawai'i's refusal, year after year, to heed EPA's urgings, and its refusal to take seriously the effects of pesticides on health and the environment, also have created a crisis of confidence, with Hawai'i residents understandably convinced the foxes are guarding the henhouse.

HDOA's failure to responsibly investigate and enforce has allowed children to repeatedly be exposed to pesticides at school with no consequences, nor even any acknowledgement that pesticides likely were involved. On one day at Waimea Canyon Middle School, 60 students and two teachers were taken to the hospital. Several years later, when HDOA finally conducted an investigation, air samples revealed the presence of chlorpyrifos, metolachlor and bifenthrin, but HDOA refused to attribute the symptoms to pesticide exposure, instead supporting a risible theory about "stinkweed."

Agribusiness Development Corporation (ADC), a state agency attached to HDOA, manages some 40 miles of canals draining water from agricultural and nonagricultural lands in West Kaua'i. ADC treats it as an open sewer, daily dumping into the ocean millions of gallons of water containing such pesticides as atrazine, bentazon, propiconazole, fipronil, chlorpyrifos, metalochlor, and simazine, presenting a risk to the health of children and community members who play, swim, and fish in those waters as well to as the marine environment. ADC has abandoned compliance with the Clean Water Act, again leaving the community to fend for itself.

²³ *Id.* at 7.

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After a Joint Fact Finding Study Group prepared an extensive report on pesticide use by large agribusinesses on Kaua'i detailing, among other things, the State's lack of pesticide testing and monitoring, HDOA's Director declared the report's take-away was that evidence of harm was not statistically significant, and therefore any protective measures, such as the buffer zones the report recommended, are pointless.²⁴

After Kaua'i County passed an ordinance in 2013 to require additional pesticide protections, such as buffer zones and public notification, regulated companies sued to set the ordinance aside, arguing the ordinance's measures were preempted by Hawai'i pesticide law. Whether this is so currently is in the hands of the United States Court of Appeals for the Ninth Circuit, but one thing is clear: if HDOA does have the authority—and even exclusive authority—to provide such protections, it refuses to use that authority to do so. This is consistent with HDOA's perspective on pesticide regulation in Hawai'i: the less, the better.

V. RELIEF

The State of Hawai'i has been ineffective in enforcing violations, and the counties currently are not permitted to protect themselves. EPA action is necessary to properly enforce FIFRA and protect human and environmental health. Because HDOA has not been fulfilling its responsibilities to regulate and enforce pesticide use violations under FIFRA as illustrated above, EPA should immediately notify the State of Hawai'i of HDOA's failings. 7 U.S.C. § 136w-2(b); 40 C.F.R. § 173.3. In its notice, EPA should inform the State of the specific inadequacies of HDOA's enforcement program. *Id.* If HDOA fails to correct the deficiencies within 90 days, EPA should rescind the State's primary enforcement authority and replace it with EPA primary enforcement authority in Hawai'i to ensure that unreasonable and adverse effects on human health and the

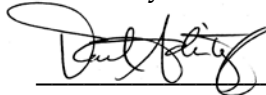
²⁴ See <http://www.civilbeat.org/2016/03/hawaii-seed-industry-slams-pesticide-reports-unsustained-fears/>

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environment from pesticide use are addressed and prevented to the maximum extent possible.

Thank you for your assistance.

Sincerely,



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