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Harrison, Brenda

From: Julie Parks <jparks@earthjustice.org>
Sent: Wednesday, September 14, 2016 6:10 PM
To: Title VI Complaints; Daria Neal (daria.neal@usdoj.gov); Joe Leonard Jr. Ph. D (program.intake@usda.gov)
Cc: Paul Achitoff; Kylie Wager; Mccarthy, Gina; Tom Vilsack (tom.vilsack@usda.gov); Strauss, Alexis
Subject: Complaint Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, 40 C.F.R. Part 7, and 7 C.F.R. Part 15
Attachments: Title VI Complaint and Exhibits.pdf

Dear Acting Director Dorka, Assistant Secretary Leonard, and Deputy Chief Neal:

On behalf of Paul Achitoff and Kylie Wager of Earthjustice, please find The Moms On a Mission Hui and Pō'ai Wai Ola/West Kaua'i Watershed Alliance's Title VI complaint and exhibits, attached.

Sincerely,

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September 14, 2016

By email and certified mail

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Re: Complaint Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, 40 C.F.R. Part 7, and 7 C.F.R. Part 15

Dear Acting Director Dorka, Assistant Secretary Leonard, and Deputy Chief Neal:

The Moms On a Mission Hui (The MOM Hui) and Pō'ai Wai Ola/West Kaua'i Watershed Alliance (Pō'ai Wai Ola), collectively, "community groups," by and through their counsel Earthjustice, call upon the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR) and the U.S. Department of Agriculture (USDA) Office of the Assistant Secretary for Civil Rights (OASCR) to investigate and ensure the policies, programs, and activities of the Hawai'i Department of Agriculture (HDOA) and the Hawai'i Agribusiness Development Corporation (ADC) comply with Title VI of the Civil Rights Act of 1964 and EPA and USDA's implementing regulations, 50 C.F.R. Part 7 and 7 C.F.R. Part 15, respectively.

HDOA and ADC are failing to comply with Title VI and implementing regulations because their actions and failures to act have an unjustified disproportionate and adverse effect on Native Hawaiians in West Kaua'i and on Moloka'i. Community groups request that OCR and OASCR promptly and thoroughly investigate the allegations set forth in this complaint and

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take all actions necessary to ensure that the agencies comply fully with the law and provide equal protection for the people of Hawai'i.

I. PARTIES

A. Complainants

The MOM Hui is a grassroots group of forward-thinking mothers who advocate for protecting the health, safety, and well-being of all children, present and future. The MOM Hui was created on Moloka'i and has since expanded to Kaua'i, O'ahu, and Maui. The MOM Hui's primary concerns are food and health, with a specific focus on seed production and experimentation, and the correlative increases in pesticide use. The MOM Hui's members and their children are directly affected by heavy pesticide application to seed crops on Moloka'i. The MOM Hui also engages in educational and fundraising activities to promote healthy living and bring awareness to genetically engineered seed companies' impact on communities. The MOM Hui campaigned for the passage of a moratorium on genetically engineered crop production in Maui County and Kaua'i County and is involved in a lawsuit defending the moratorium. See Declaration of (b) (6) - Privacy ¶ 2-8 (attached as Ex. 1) (b) (6) - Privacy decl.); Declaration of (b) (6) - Privacy ¶ 3-8 (attached as Ex. 2) (b) (6) - Privacy decl.).

Pō'ai Wai Ola is a community-based organization established by Waimea watershed residents, farmers, and users, including Native Hawaiian cultural practitioners, to address water issues affecting West Kaua'i. Pō'ai Wai Ola members live, work, recreate, and practice their culture near large-scale pesticide spraying operations, and rely on, use, or seek to use the Waimea watershed and surrounding areas for a host of public trust uses including, but not limited to, fishing, agriculture, recreation, research and education, aesthetic enjoyment, spiritual practices, and the exercise of Native Hawaiian cultural rights and values. In a separate proceeding involving ADC and the Kekaha Agricultural Association's diversion of the Waimea River and its headwaters, Pō'ai Wai Ola has petitioned the Hawai'i Commission on Water Resource Management to restore these waters and cease water waste.

B. Recipients

HDOA is an agency of the State of Hawai'i charged with implementing and enforcing federal and state pesticides laws, among other responsibilities. Haw. Rev. Stat. (H.R.S.) § 26-16. HDOA's duties include licensing pesticides, *id.* pt. II, regulating pesticide use, *id.* pt. III, and investigating and resolving pesticide use complaints, Haw. Admin. R. (H.A.R.) § 4-1-37.

ADC is a state agency placed within HDOA, *id.* § 163D-3, charged with "mak[ing] optimal use of agricultural assets for the economic, environmental, and social benefit of the people of Hawaii," *id.* § 163D-1. ADC manages state agricultural lands, including approximately 12,500 acres on the Mānā Plain in West Kaua'i. *Id.* § 163D-4. ADC also operates

a 40-mile drainage ditch system that runs through these lands and populated areas before draining into the ocean.

II. JURISDICTION

Title VI of the Civil Rights Act of 1964 provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d. As explained below, both HDOA and ADC are a “program or activity” covered by Title VI and receive federal assistance from EPA and USDA. This complaint is timely and satisfies all other jurisdictional requirements.

A. HDOA and ADC are Programs or Activities Covered by Title VI.

A “program or activity” includes “all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government . . . any part of which is extended federal financial assistance.” 42 U.S.C. § 2000d-4a. If any part of an entity receives federal funds, the whole entity is covered by Title VI. *Ass’n of Mex.-Am. Educ. v. California*, 195 F.3d 465, 474-75 (9th Cir. 1999), *rev’d in part on other grounds*, 231 F.3d 572 (9th Cir. 2000) (en banc).

HDOA is a department, agency, and instrumentality of the State of Hawai‘i, H.R.S. § 26-16, and ADC is an agency and instrumentality of the state placed within HDOA, *id.* § 163D-3. Therefore, both HDOA and ADC’s operations must comply with Title VI.

B. HDOA and ADC Receive EPA and USDA Assistance.

EPA and USDA regulations define “recipient” to include any instrumentality of a state or state agency to which “Federal financial assistance is extended, directly or through another recipient.” 40 C.F.R. § 7.25; 7 C.F.R. § 15.2. As of August 15, 2016, EPA and USDA had awarded HDOA \$783,290 in federal funds for the fiscal year 2016, and more than \$20.2 million in federal funds since 2008.¹

¹ See USASpending.gov, <https://www.usaspending.gov/transparency/Pages/RecipientProfile.aspx?DUNSNumber=809935257> (last visited Aug. 15, 2016) (showing EPA and USDA awards to HDOA (DUNS No. 809935257) for the years 2008 to the present); USASpending.gov, <https://www.usaspending.gov/transparency/Pages/RecipientProfile.aspx?DUNSNumber=809935267&FiscalYear=2009> (last visited Aug. 15, 2016) (showing USDA awards to HDOA (DUNS No. 809935267) for the year 2009).

Tbl. 1. EPA and USDA Funding to HDOA

Year	EPA Funding	USDA Funding	Combined Total
2016	\$513,450	\$269,840	\$783,290
2015	\$184,213	\$1,071,755	\$1,255,968
2014	\$375,325	\$1,851,810	\$2,227,135
2013	\$397,925	\$799,752	\$1,197,677
2012	\$258,325	\$1,132,440	\$1,390,765
2011	\$308,125	\$3,066,353	\$3,374,478
2010	\$414,125	\$3,308,664	\$3,722,789
2009	\$349,725	\$4,564,558	\$4,914,283
2008	\$308,125	\$1,108,412	\$1,416,537
Total	\$2,863,213	\$16,375,569	\$20,282,922

C. The Complaint Is Timely.

EPA and USDA regulations generally require Title VI complaints to be filed within 180 calendar days of the alleged discriminatory act, but OCR and OASCR may waive these time limits. 40 C.F.R. § 7.120(b)(2); 7 C.F.R. § 15.6. In addition, OCR and OASCR have ongoing authority to review recipients' programs and activities for Title VI compliance. 40 C.F.R. § 7.115(a); 7 C.F.R. § 15.5(a). This complaint is timely because the discriminatory acts described herein are ongoing or within OCR and OASCR's investigatory authorities.

D. The Complaint Meets Other Jurisdictional Criteria.

This complaint satisfies all other jurisdictional requirements because it is in writing, describes the alleged discriminatory acts and is filed by an authorized representative with OCR and OASCR. 40 C.F.R. § 7.120; 7 C.F.R. § 15.6.

III. FACTUAL BACKGROUND

For centuries, the Native Hawaiian food system was rooted in the ahupua'a land management system, which organized natural resource use and access around land divisions that generally followed watershed boundaries from mauka (inland) to makai (sea). This system allowed optimal use of resources and ecosystem services over short distances, and many generations to survive and thrive.

Captain Cook's arrival to Hawai'i in 1778 ushered in a new era of agriculture focused on pesticide-intensive plantation crops for export, such as sugar and pineapple. This use depleted the soil, polluted water sources, and contributed to the decline of Hawai'i's food self-sufficiency.

As the plantation era declined in Hawai'i, seed crops grown for breeding rather than food increased. In 1966, seed firms planted 5 acres of test corn on Moloka'i, and by 1969, they had expanded winter seed corn operations to about 500 acres on Moloka'i, Maui, and Kaua'i. In the 1990s, the industry transitioned to genetically engineered crops, which now comprise the vast majority of seed crops in Hawai'i. Today, there are approximately 23,728 acres of genetically engineered seed crops on the islands of Kaua'i, Moloka'i, Maui, and O'ahu.

Hawai'i's seed corn cultivation is particularly chemical-intensive because corn requires more agrochemicals than other crops, seed corn requires still more chemical treatment because it is more susceptible to environmental stress and pests, and Hawai'i soils are not well-suited for corn to begin with. Moreover, many varieties of seed corn are now being developed specifically to resist the effects of particular pesticides, which are applied to these varieties during testing and production. Thus, it is no surprise that "there are likely an average of 30 or more spray operations most days of the year on Kaua'i."²

Although chemical and pesticide use poses health risks to communities throughout Hawai'i, seed operations are particularly pesticide-intensive, and are largely concentrated in West Kaua'i and Moloka'i, which have proportionately larger Native Hawaiian populations. For example, West Side communities from Kekaha to Hanapepe have among the greatest proportions of Native Hawaiians on the island, and the lion's share of Kaua'i's seed production. Moloka'i—where 2,342 acres of seed crops grow right in the center of the island—has more than three times the statewide percentage of Native Hawaiians and more than four times the statewide percentage of pure Native Hawaiians.

Pesticide companies have thus far successfully fought a county ordinance designed to require more transparency and protective measures for pesticide use. Regardless of this ordinance, HDOA and ADC have affirmative duties to ensure their programs and activities involving pesticides do not have discriminatory effects on people of color, including Native Hawaiians. HDOA and ADC are failing to fulfill these duties.

IV. LEGAL FRAMEWORK

Title VI of the Civil Rights Act of 1964 prohibits recipients of federal funds from discriminating against individuals on the basis of race, color, or national origin. 42 U.S.C. § 2000d. Title VI directs federal agencies granting federal assistance to issue regulations to achieve the statutory objectives. *Id.* § 2000d-1.

Acceptance of EPA or USDA assistance creates an obligation to comply with the agencies' respective Title VI regulations. 40 C.F.R. § 7.80(a)(1); 7 C.F.R. § 15.4(a)(1). EPA and

² Hawai'i Center for Food Safety, Pesticides in Paradise, Hawai'i's Health & Environment at Risk (May 2015) at 30 (CFS Report).

USDA's Title VI regulations contain a general prohibition against discrimination, 40 C.F.R. § 7.30, 7 C.F.R. § 15.3(a), as well as more specific prohibitions, 40 C.F.R. § 7.35, 7 C.F.R. § 15.3(b). These regulations prohibit programs or activities that have either a discriminatory purpose or a discriminatory effect.

Under EPA regulations:

(b) A recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin, or sex.

(c) A recipient shall not choose a site or location of a facility that has the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program or activity to which this part applies on the grounds of race, color, or national origin or sex; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of this subpart.

40 C.F.R. § 7.35 (emphases added).

USDA's regulations provide:

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.

(3) In determining the site or location of facilities, an applicant or recipient may not make selections with the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any of its programs or activities to which the regulations in this part apply, on the grounds of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act and the regulations in this part.

7 C.F.R. § 15.3 (emphases added).

V. DISCRIMINATORY ACTS

HDOA and ADC's discriminatory actions and failures to act include both HDOA and ADC's lack of a Title VI program; HDOA's failure to limit pesticide registration; HDOA's failure to require or implement protective buffer zones between pesticide use and communities; HDOA's failure to adequately enforce federal and state pesticide laws; ADC's leasing or licensing of lands without protecting communities from pesticides; and ADC's refusal to obtain a permit under the Clean Water Act for its drainage ditch system.

A. HDOA and ADC Lack Title VI Programs.

HDOA and ADC are violating Title VI because both agencies lack a Title VI compliance program. Their acceptance of federal assistance created an obligation to implement a Title VI compliance program:

In accepting this assistance agreement, the recipient acknowledges it has an *affirmative obligation to implement effective Title VI compliance programs and ensure that its actions do not involve discriminatory treatment and do not have discriminatory effects even when facially neutral*. The recipient must be prepared to demonstrate to EPA that such compliance programs exist and are being implemented or to otherwise demonstrate how it is meeting its Title VI obligations.³

On March 23, 2016, Earthjustice submitted public records requests to HDOA and ADC seeking materials documenting any Title VI compliance program they may have.⁴ On March 30, 2016, ADC responded to the public records request as follows:

[ADC] *does not have any Title VI compliance programs*, and therefore has no document responsive to this request.⁵

³ EPA General Terms and Conditions Effective March 29, 2016, ¶ 26.c.iii (emphasis added).

⁴ Request to Access a Government Record from Paul Achitoff, Earthjustice, to State of Haw. Dep't of Agric., Mar. 23, 2016 (attached as Ex. 3); Request to Access a Government Record from Paul Achitoff, Earthjustice, to State of Haw. Agribus. Dev. Corp., Mar. 23, 2016 (attached as Ex. 4).

⁵ Letter from James Nakatani, State of Haw. Agribus. Dev. Corp. to Paul Achitoff, Earthjustice, Mar. 30, 2016 (emphasis added) (attached as Ex. 5).

On April 27, 2016, HDOA responded to the request by acknowledging it “does not have a document specifically described as HDOA Title VI program.”⁶ Instead, it provided its “Discrimination/Harassment-Free Workplace Policy”⁷ and its “Limited English Proficiency Plan,”⁸ and mentioned a “standard contract provision requiring all contractors to comply with local, State, and federal laws or with the standard grant provision similarly requiring compliance with all federal laws.”⁹ These standard documents do not establish a Title VI program.

Because HDOA and ADC lack a Title VI program to ensure that the agencies’ actions “do not involve discriminatory treatment and do not have discriminatory effects”¹⁰ on communities of color, including Native Hawaiians, the agencies are violating Title VI and the terms of the agencies’ funding.

B. HDOA Has Failed to Limit Registration of Harmful Pesticides.

HDOA is violating Title VI by failing to place protective limits on pesticide registration, and thereby discriminating against Native Hawaiians. Under the Hawai’i Pesticides Law, H.R.S. Chapter 149A, “[a]ny pesticide which is received, used, sold, offered for sale, or distributed within this State shall be licensed by the board [of agriculture].” H.R.S. § 149A-13. HDOA may refuse to license a pesticide if the proposed use would “result in unreasonable adverse effects on the environment.” *Id.* § 149A-14(a). To protect health and the environment, HDOA may cancel a pesticide license after determining that continued use of the pesticide would “result in unreasonable adverse effects on the environment.” *Id.* § 149A-14(b). While cancellation proceedings are pending, HDOA may suspend a pesticide license “to prevent an imminent hazard.” *Id.* § 149A-14(c). Pesticide licenses are otherwise valid for three years. H.A.R. § 4-66-35(b).

HDOA has failed to place *any* limits on pesticide registration, despite discriminatory adverse effects on health and the environment. For example, on January 20, 2016, 10 fieldworkers for Syngenta Seeds, Inc. were exposed to pesticides and taken to Kaua’i Veterans

⁶ Email from Bryan Yee, State of Haw. Dep’t of Agric, to Paul Achitoff, Earthjustice, Apr. 27, 2016 (attached as Ex. 6).

⁷ State of Haw. Dep’t of Human Res. Dev., Policies and Procedures, Discrimination/Harassment-Free Workplace Policy, Policy No. 601.001, eff. Oct. 15, 2013 (attached as Ex. 7).

⁸ State of Haw. Dep’t of Agric., Department of Agriculture Limited English Proficiency Plan, July 1, 2013 (attached as Ex. 8).

⁹ Email from Bryan Yee, State of Haw. Dep’t of Agric, to Paul Achitoff, Earthjustice, Apr. 27, 2016.

¹⁰ EPA General Terms and Conditions Effective March 29, 2016, ¶ 26.c.iii.

Memorial Hospital.¹¹ The fieldworkers walked onto a field that had been sprayed with the neurotoxic organophosphate pesticide chlorpyrifos.¹² In 2006 and 2008, children and schoolteachers of Waimea Canyon Middle School, near more of Syngenta's agricultural fields, were taken to the hospital suffering symptoms of pesticide exposure.¹³ During the 2006 incident, 60 children and at least 2 teachers experienced headache, dizziness, nausea, or vomiting.¹⁴ At least 10 children were treated at an emergency room, several were put on a nebulizer to relieve respiratory distress, and one was given an anti-vomiting medication intravenously. Air samples collected at the school—an investigation not undertaken until years after these events—revealed the presence of chlorpyrifos, metolachlor and bifenthrin.¹⁵ Despite these incidents, HDOA has not limited registration of dangerous pesticides such as chlorpyrifos in any way, and therefore is violating Title VI.

C. HDOA Has Failed to Require Protective Buffer Zones Between Pesticide Use and Communities.

HDOA is violating Title VI by failing to require, implement, and ensure protective buffer zones for pesticides to prevent discriminatory effects on Native Hawaiians. With respect to all pesticides—both general use pesticides (GUPs) and restricted use pesticides (RUPs)—H.R.S. Chapter 149A authorizes HDOA to promulgate rules “[t]o establish limitations and conditions for the application of pesticides by aircraft, power rigs, mist blowers, and other equipment,” and “[t]o establish, as necessary, specific standards and guidelines which specify those conditions which constitute unreasonable adverse effects on the environment,” among other things. H.R.S. § 149A-33.

With respect to RUPs, HDOA may promulgate rules “establish[ing] fees, procedures, conditions, and standards to certify persons for the use of restricted use pesticides under section 4 of FIFRA.” *Id.* § 149A-33. RUPs are classified as such if they are “determined to be a health hazard,” “can be reasonably anticipated to result in contamination of groundwater or significant reductions in nontarget organisms, or fatality to members of endangered species,” have certain levels of toxicity, or are categorized as RUPs under federal law. H.A.R. § 4-66-32(b).

Although pesticide applications on Kaua'i and Moloka'i occur dangerously close to schools, residential areas, and surface waters, HDOA does not require protective buffer zones in

¹¹ Pesticide Use by Large Agribusiness on Kaua'i, Findings and Recommendations of The Joint Fact Finding Study Group (May 25, 2016) at 87 (JFF Report).

¹² *Id.*

¹³ *Id.* at 80-81.

¹⁴ See Declaration of [REDACTED] ¶ 6, *Syngenta Seeds v. Cnty. of Kaua'i*, No. 1:14-cv-00014 (BMK) (D. Haw. Feb. 17, 2014) (attached as Ex. 9).

¹⁵ JFF Report at 81.

its regulation of pesticides. In fact, HDOA has actively opposed proposed state legislation to require protective buffer zones. Some pesticide users in Hawai'i claim to use buffer zones for RUPs, but these zones are voluntary, unenforceable, and in any event inadequate to protect public health and safety. For example, the voluntary "Kaua'i Good Neighbor Program" establishes a mere 100-foot buffer zone between areas treated with RUPs and schools, medical facilities, and residential properties.¹⁶ Yet, among the nation's top 25 largest agricultural production counties, buffer zones between RUP application and schools are at least 200 feet, and some are 5,280 feet (1 mile).¹⁷ Fresno County, California, requires a buffer zone of 660 (1/8 mile) for all pesticides when school is in session.¹⁸ In these counties, buffer zones for bees range from 100 feet to 4.5 miles (23,760 feet).¹⁹ By failing to require, implement, and enforce *any* buffer zones whatsoever between pesticide application and Native Hawaiian communities, HDOA is violating Title VI.

¹⁶ Kaua'i Agricultural Good Neighbor Program: Voluntary Standards and Guidelines for RUP Use Reporting and Buffer Zones (Nov. 12, 2013).

¹⁷ JFF Report at 232-34.

¹⁸ *Id.* at 232.

¹⁹ *Id.* at 232-34.

Fig. 1. Proximity of Schools to RUPs on Kaua'i (Source: CFS Report)

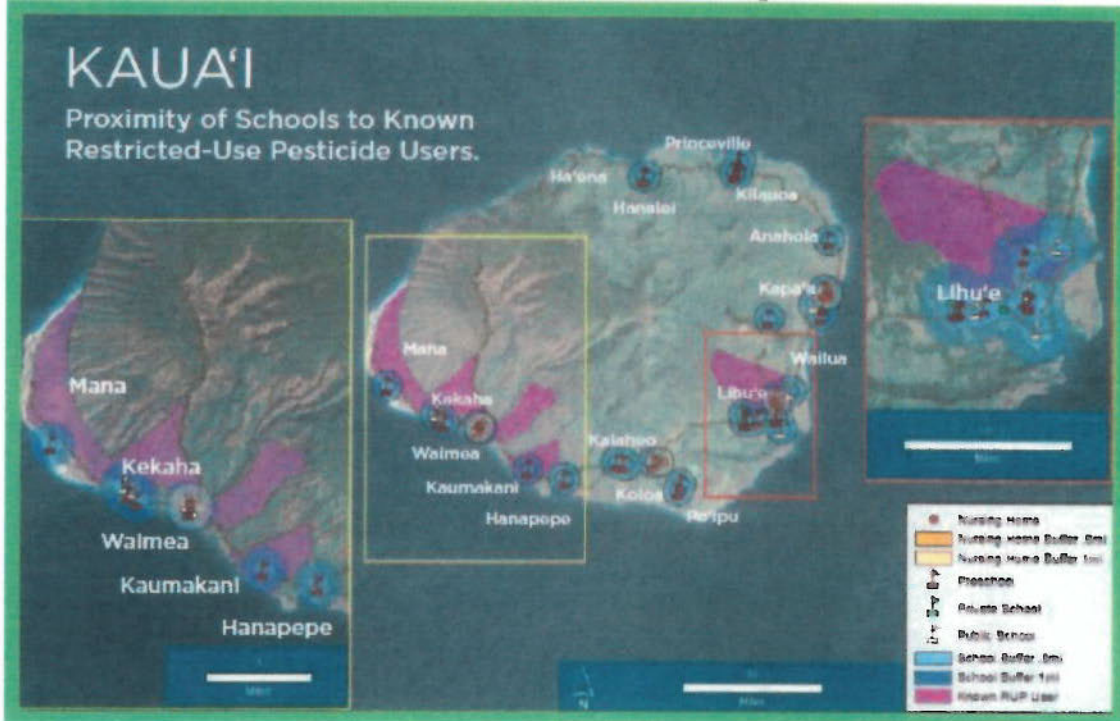


Fig. 2. Proximity of Schools to RUPs on Moloka'i and Maui (Source: CFS Report)

