



KAUA'I DISCLOSURE & BUFFER ZONE ORDINANCE LITIGATION: A BREAKDOWN

- **What does it do?**
 - The Ordinance required notification and disclosure of pesticide use to help residents avoid pesticide drift and to ensure better medical treatment to those exposed to pesticides, and creates buffer zones around sensitive locations, including schools, hospitals and waterways. The Ordinance also required annual reporting, in general terms, of the type and location of genetically engineered crops being grown in the county. Finally, the Ordinance required—and still requires—the completion of an Environmental and Public Health Impact Study (EPHIS) by the County assessing the numerous environmental and public health impacts of pesticide use and genetically engineered crop cultivation.
- **Why is it important?**
 - Because of the significant environmental, human health, socioeconomic risks associated with the commercial cultivation and testing of genetically engineered (GE) crops. The cultivation and testing of GE crops relies heavily on the input of toxic pesticides and other chemical inputs that have been linked to environmental contamination and negative human health harms. The cultivation and testing of GE crops may also injure the crops of nearby small family farmers. The residents of Kauai have a right to know when and where pesticides are being used and GE crops are being planted. A pesticide-free buffer zone between sensitive areas is also essential to reduce the impact of pesticide drift.
- **What's the current status of the Ordinance?**
 - The majority of the Ordinance was struck down by the federal district court's ruling in this litigation (which is currently under appeal before the Ninth Circuit Court of Appeals). The part of the Ordinance requiring that the County prepare an EPHIS was not addressed by the litigation, and in turn the County has partnered with the State Department of Agriculture to conduct a joint fact finding process to support collective fact-finding and evidence-based debate about the health and environmental impacts of pesticides.

TIMELINE

It passed!

- October 16, 2013: Kaua'i County Council adopted the final language of Ordinance 960 a six-to-one vote that took place at a hearing session that lasted more than eighteen hours.
- Oct 31, 2013: Kaua'i County Mayor Bernard P. Carvalho, Jr. vetoed its passage. Concurrent with public announcement of his veto, the County Mayor also released a confidential legal memorandum detailing the County Attorney's legal opinion regarding Ordinance 960, despite the existence of an attorney-client privilege between the County Attorney and the County Council, and the latter's objection to the memorandum's release.

- November 16, 2013: After an additional public hearing and a new appointment to fill an empty seat on the Council, the Council voted to override the mayoral veto and Ordinance 960 was passed! The language of the Ordinance provided that it would not go into effect until nine months later.

Chemical companies put on the brakes

- January 10, 2014: Chemical industry, Syngenta, Pioneer, and Agrigenetics (Dow), filed federal suit alleging a kitchen-sink of constitutional, federal, and state claims against the Ordinance's legality.
 - *Meaning: The chemical companies asked the Court to overrule the Ordinance in an attempt to stop it from going into effect.*

What happened in the district court?

- February 24, 2014: A coalition of community members and national organizations (the CFS coalition) moved to intervene to defend the Ordinance.
- April 23, 2014: The district court granted the CFS's coalition's motion to intervene.
 - *Meaning: The CFS Coalition was granted permission to defend the moratorium in court against the chemical companies as a full party.*
- August 25, 2014: After months of lengthy briefing and oral argument on summary judgment, the court issued its order.

What did the court order say?

- Unfortunately, the court ruled that Ordinance 960 was unlawful, finding that it was preempted by state law; in the court's view, the issues of GE crops and pesticides have to be addressed in Hawai'i at the state level, not the county level.
 - *Meaning: The court sided with the Industry's arguments and found that no county in Hawai'i can require pesticide disclosure and buffer zone (as required under Ordinance 960) and instead any regulation of local pesticide use must come from the state level. The court also found that the State's various statutes on plant pest, noxious weeds, and plant quarantine to control any regulation of local GE crop use and disclosure.*
- There were some positives in the court ruling as well, namely the court denied the chemical companies' claims that the county law was also contrary to or prohibited by federal law. The federal pesticide law and the federal plant law applied to GE crops did not prohibit county regulation.
 - *Meaning: The court held that the federal pesticide law did not preempt state or local pesticide disclosure and buffer zones, so the State of Hawai'i has legal authority to require statewide pesticide disclosure and impose pesticide buffer zones.*

What's next?

- CFS is currently appealing the decision to the United States Court of Appeals for the Ninth Circuit, with briefing that will continue through the spring of 2015, and oral argument before the Court of Appeals to be scheduled upon completion of briefing.

HAWAI'I ISLAND GE BAN ORDINANCE LITIGATION: A BREAKDOWN

- **What does it do?**
 - The Ordinance bans any open-air testing and cultivation of genetically engineered (GE) crops on the Hawai'i Island, with an exception grandfathering the existing and widespread growth of GE papaya. The Ordinance also required registration of any indoor testing of GE crops as well as testing of GE papaya (indoor or outdoor).
- **Why is it important?**
 - Because of the significant environmental, human health, socioeconomic risks associated with the commercial cultivation and testing of GE crops. The cultivation and testing of GE crops relies heavily on the input of toxic pesticides and other chemical inputs that have been linked to environmental contamination and negative human health harms. The cultivation and testing of GE crops may also injure the crops of nearby small family farmers.
- **What's the current status of the Ordinance?**
 - The Ordinance was struck down by the federal district court's ruling in this litigation (which is currently under appeal before the Ninth Circuit Court of Appeals).

TIMELINE

It passed!

- December 5, 2013: Hawai'i County Council passed Bill 133 (Ordinance 13-121).

Chemical companies put on the brakes in federal district court.

- June 9, 2014: Chemical industry, using various local trade associations as plaintiffs, filed federal suit alleging preemption under federal and state laws, as well as other constitutional law challenges.
 - *Meaning: The chemical companies asked the Court to overrule the Ordinance.*

What happened in the district court?

- August 1, 2014: a coalition of community members and national organizations (the CFS coalition) moved to intervene to defend the Ordinance.
- August 22, 2014: the district court denied the CFS coalition's motion to intervene; instead, the Court granted the coalition amicus status.
 - *Meaning: The CFS Coalition was granted permission to defend the moratorium in court, as a "friend of the court," with the right to file briefs and participate in oral argument. However, as a "friend of the court," the CFS Coalition was not a party to the case and would not have the right to appeal the outcome of the district court decision.*

- November 26, 2014: After months of lengthy briefing and oral argument on summary judgment, the court issued its order.

What did the court order say?

- Following the heels of the Kaua'i decision, Magistrate Judge Kurren struck down the Ordinance 13-121 as invalid, again concluding that the subject matter—GE crops— was one that must be regulated at the state level. The decision concluded that state “preemption” of the county ordinance is implied by state plant laws, despite the fact none of them even mention genetically engineered crops or were intended to regulate them.
 - *Meaning: The court sided with the Industry's arguments and found that state's various statutes on plant pests, plant quarantine, and noxious weeds, prevented any local/county ban of GE crops (whether commercial cultivation or GE crop experiments).*
- The court also refused CFS's request to send the state law question to the Hawai'i Supreme Court to decide, despite there being important state law questions of first impression.
- Finally, the Court's decision was not without its silver lining: The court rejected the chemical companies' arguments that county and state regulation of commercialized GE crops was prohibited by federal law; however, the court also concluded federal law did prohibit regulation of some, but not all, experimental plantings.
 - *Meaning: The court held that no federal law prohibit or preempts local regulation of commercialized GE crop cultivation (i.e. not GE crop experiments).*

What's next?

- The County of Hawai'i appealed the court's ruling to the Ninth Circuit. CFS and Earthjustice offered to represent the County pro bono. After months of procurement process, CFS and Earthjustice will represent the County pro bono to appeal the lower court's ruling before the Ninth Circuit Court of Appeals.

MAUI GE MORATORIUM: A BREAKDOWN

- **What does it do?**
 - When enforced, the initiative “A Bill Placing a Moratorium on the Cultivation of Genetically Engineered Organisms” will place a temporary moratorium (pause) on the planting, cultivation, and testing of Genetically Engineered (GE) Organism.
- **Why is it important?**
 - Because of the significant environmental, human health, socioeconomic risks associated with the commercial cultivation and testing of GE crops. The cultivation and testing of GE crops relies heavily on the input of toxic pesticides and other chemical inputs that have been linked to environmental contamination and negative human health harms. The cultivation and testing of GE crops may also injure the crops of nearby small family farmers. The County has not done the assessment to ascertain if living next to fields will permanently damage our agricultural systems or our bodies. We just want the science to be conducted demonstrating that we and our future generations won't be harmed.
- **Is it permanent?**
 - The moratorium can be lifted once an Environmental and Public Health Impacts Study (EPHIS) is completed proving that the testing and cultivation of GE organisms will benefit Maui and not harm our residents and resources. Once this study is completed, the moratorium can be lifted upon the approval of two-thirds of the County Council.

TIMELINE

It passed!

- November 4th, 2014: The people in the County of Maui made history by passing the first ever citizen's ballot initiative!
- November 12th, 2014: SHAKA filed suit in State Court seeking declaration that the ballot initiative is valid.

Chemical companies put on the brakes

- November 13th, 2014: Chemical industry, Monsanto and Dow, filed federal suit and concurrently filed a preliminary injunction to enjoin the County from enacting the ordinance.
 - *Meaning: The chemical companies were asking that (against the clear will of the voters) the initiative not be being enacted or enforced.*

Maui County decides not to enforce the initiative

- November 15th, 2014: Maui County attorneys did not oppose the injunction and filed a joint stipulation with Chemical Industry Plaintiffs.
 - *Meaning: Maui County decided not to defend the will of the people. Instead, they reached an agreement (stipulation) with the Chemical Industry to postpone enacting the ballot initiative until at least March 31, 2015.*

- The federal Court granted the injunction.
 - *Meaning: The Moratorium can't be enforced until March 31, 2015.*

Who is involved in the case now?

- December 15, 2014: Two groups sought to intervene in the federal suit (SHAKA and the Center for Food Safety Coalition consisting of farmers/mothers of Maui and Moloka'i). The Court granted intervention only to SHAKA. CFS has appealed that decision.
 - *Meaning: SHAKA was granted permission to defend the moratorium in court against the chemical companies as a full party while the CFS coalition was limited to amicus status.*
- The Court granted CFS Coalition, as well as the Biotech Industry Organization, which did not seek intervention, (trade organization for Monsanto) amici status.
 - *Meaning: These groups are considered "amici curiae," a.k.a. friends of the court. With this status they may each submit briefing to the Court, but are not considered parties to the suit nor can they appeal the outcome of the Court's final decision.*
- January 30th, 2014: Motion for Summary Judgment was filed and is ongoing, with both sides and amici having filed briefs, Maui County once again took no position in a one sentence "brief."
 - *Meaning: A Summary Judgment is the means by which the Court will determine the legality of the ballot initiative: in other words, whether the ballot initiative is preempted by state or federal laws and whether it is legal under the Maui County Charter. The injunction remains in place to postpone Maui County from carrying out the will of the people.*

What's next?

- **March 10, 2015 at 9am: Hearing on Summary Judgment is scheduled.**
 - Chief Judge Susan Oki Mollway will hear arguments from both sides at a hearing in the United States District Court of Hawai'i in Honolulu. CFS Coalition has requested that the court allows CFS Coalition participation in oral argument and is awaiting the court's ruling.

Please join our membership to keep updated with the litigation and learn how you can help.