

Hawai'i's Fight for Protections from Pesticides and GE Crops

Decisions from the 9th Circuit Court of Appeals



BACKGROUND

The multinational pesticide-seed industry uses the Hawaiian Islands as an open-air experimental test site for new varieties of pesticide-promoting GE crops as well as breeding ground for pesticide-promoting commercial GE seeds.

There is significant scientific and medical evidence linking pesticide exposure with negative impacts on human health and the environment. In response to these threats, in 2013 and 2014, Kaua'i, Hawai'i, and Maui Counties passed ordinances regulating aspects of local pesticide use and GE crop cultivation.

Each of the counties took a distinct approach for regulating the activities of the pesticide-seed industry in Hawai'i:

- **Kaua'i's Ordinance 960** established mandatory pesticide disclosure and buffer zones requirements to protect communities from exposure to pesticides via drift aimed to increase transparency in the regulation of pesticides and GE crops, as well as establish greater protections for the public from potential exposure to pesticide drift. The ordinance also required disclosure concerning the cultivation and testing of GE crops on the island. Finally, the ordinance required a study of the impacts of pesticides and GE crop cultivation by a joint fact-finding group.
- **Hawai'i County Ordinance 13-121** banned both open-air testing/field trials of regulated GMOs as well as cultivation of commercialized/deregulated GMOs in the county, with exceptions grandfathering the existing GE crops, including GE papaya. This ordinance sought to protect the public health, unique environment, and natural resources of Hawai'i County by halting the future expansion of the industry.
- **Maui County Moratorium on GE Organisms** placed a temporary moratorium on the planting, cultivation, and testing of GE organisms. 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 residents and natural resources.

In an attempt to undermine the public will and the democratic process, the multinational pesticide-seed industry, including corporations such as Syngenta, Monsanto, DuPont Pioneer, and Agrigenetics (Dow Chemical), filed lawsuits against the counties alleging various constitutional, federal, and state challenges to the laws.

Center for Food Safety, Earthjustice, and attorneys representing the citizen-led SHAKA Movement stepped in to help communities and counties defend democracy and the people's right to protect their health and environment from the harms of pesticides and GE crops. Unfortunately, the pesticide-seed companies succeeded in persuading the lower court that the ordinances are preempted by state and/or federal laws. Community groups and counties, represented by the organizations, appealed these decisions with the U.S. Court of Appeals for the Ninth Circuit. The appeals were heard by the Ninth Circuit on June 15, 2016, in Honolulu, HI. **On November 18, 2016, the Ninth Circuit issued its decisions.**

WHAT DID THE NINTH CIRCUIT SAY?

Previously, the district court, in reviewing the Kaua'i Ordinance, held that the State of Hawai'i has the authority to regulate pesticides and GE organisms, finding that (1) the Hawai'i Pesticides Law, HRS Ch. 149A, impliedly preempts counties from regulating pesticides within its jurisdiction, and that (2) the State of Hawai'i's various plant pest and noxious weed statutes and their implementing regulations, impliedly preempt counties from regulating GMOs. **On the other hand, the district court held that federal law did not preempt states (or localities) from regulating the impacts of pesticide use within their jurisdiction. That victory was not appealed, and remains good law.**



Following the same logic of the Kaua'i district court ruling, the district court again held that the State of Hawai'i's various plant pest and noxious weed statutes and their implementing regulations, impliedly preempt counties from regulating GMOs. The district court also held that the federal Plant Protection Act and its regulations, which includes regulations governing field trials and deregulation of GE organisms under the United States Department of Agriculture's oversight, preempts local (county and state) regulation of field trials of regulated GMOs.

As with the previous district court decisions, the district court in the Maui case held that Hawai'i state law impliedly preempts local regulation of GMOs, and that federal law expressly preempts field trials of GMOs. The district court went even a step further, and found that federal law also impliedly preempts local regulation of commercialized/deregulated GMOs, a decision that, if upheld by the Ninth Circuit, would have had far-reaching impacts for other communities that have enacted county-wide GMO bans.

Unfortunately, the Ninth Circuit's decisions today affirmed the district court's prior decisions that took away Hawai'i counties' ability to take actions to protect its citizens from the harms of pesticides and GMOs.

Regarding the regulation of pesticides (concerning the Kaua'i opinion), the Ninth Circuit affirmed the district court's conclusion that the Hawai'i Pesticide Laws impliedly preempts Ordinance 960's pesticide provisions (notification and buffer zones). The Ninth Circuit also affirmed the district court's decision not to send the question to the Hawai'i Supreme Court.

Regarding the regulation of GMOs (concerning the GMO notification provisions of Kaua'i's Ordinance 960, the Big Island GMO ban, and the Maui GE Moratorium), the Ninth Circuit affirmed the district court's previous holding that the State's plant pests and noxious weed statutes impliedly preempt counties from regulating harmful plants, including GMOs. The Ninth Circuit also held that the federal Plant Protection Act expressly preempts counties and states from regulating field trials of GMOs that are plant pests. Finally, the Ninth Circuit held that Hawai'i's constitution does not give counties the ability to protect public trust resources in this circumstance.

However, the Ninth Circuit **reversed** the Maui district court's ruling that federal law also impliedly preempts state and county regulation of the cultivation and planting of deregulated/commercialized GE organisms. The Court went on to declare: "The regulation of commercialized crops, both of GE and traditional varieties, remains within the authority of state and local governments."

WHAT DOES THIS ALL MEAN FOR COMMUNITIES IN HAWAI'I?

While we are deeply disappointed by **the Ninth Circuit's decisions today, the Ninth Circuit's decision helps to pave a clear path forward for communities here in Hawai'i, specifically when it comes to the harmful impacts of pesticide practices by the agrichemical companies.** The Ninth Circuit's ruling makes clear that in its view, **the State of Hawai'i has the sole authority to require pesticide disclosure, impose buffer zones, and regulate pesticide use on the Islands.** It is settled law (and held by the district court in the Kaua'i case) that federal law does not preempt such state regulations of pesticides, so there will be no threat of industry litigation if the State is willing to pass legislation to regulate pesticides and require pesticide buffer zones.

Regarding GMOs, unfortunately, the Ninth Circuit affirmed the district court's decision that the federal government has the sole authority regulate field trials of GE crops. Hawaii hosts more field trials for new varieties of GE crops than any other state in the nation and the vast majority of these field trials are for herbicide tolerant varieties of corn and soy. However, the Ninth Circuit's opinion makes clear that **the State of Hawai'i has the authority to pass legislation to regulate the cultivation of deregulated/commercialized GE crops on the Islands. Importantly,** as part of the Court opinion, the Ninth Circuit did recognize the realistic threat facing farmers, residents, and the environment from the widespread planting of GE crops and the pesticide practices associated GE farming. The Court stated that "the cultivation and testing of GE plants raise several well-documented concerns." Notably the Court affirms, "transgenic contamination has previously caused significant economic impacts on farmers of conventional, non-GE crops." And that in addition to impacts on farmers, "the cultivation of GE crops also may raise environmental concerns, such as harm to beneficial plants and animals caused by the increased use of pesticides sometimes associated with testing and growing GE crops, the proliferation of 'superweeds' and other pests resistant to pesticides, and the reduction of biodiversity."

As disappointing as today's ruling might be, in reality, it marks the beginning of the next chapter in Hawai'i's struggle to free itself of the toxic impacts of pesticides and GMOs, and allows the movement to focus on different battlegrounds. **The Hawai'i Center for Food Safety and Earthjustice remain firm in their dedication to stand with the people. We will continue to fight for the people, with the people.**

