

## PROPOSED COFFEE STANDARDS AMENDMENTS

### ADVERSE EFFECTS ON COFFEE FARMERS

#### BACKGROUND:

Passage of HB280 in 2012 eliminated mandatory inspection and certification of green coffee by the Hawaii Department of Agriculture (HDOA) and imposed Class C Felony penalties for mislabeling of green coffee. In response to the enactment of HB280, the HDOA has drafted and is seeking the adoption of proposed amendments to the current Coffee Standards in HAR Section 4-143.

At the request of HDOA, Kona Coffee Farmers Association (KCFA) representatives traveled to Honolulu to participate in two meetings to provide comments and input concerning changes to the Coffee Standards and concerning potential adverse impacts on coffee farmers.

HDOA has never followed up to substantively discuss coffee farmer concerns or discuss measures that would reduce adverse impacts of the amendments on farmers.

On October 10, 2013, HDOA held a hearing in Kona on the proposed amendments. Prior to the hearing and then again at the hearing, KCFA President Cecelia Smith provided HDOA with a list of “9 Questions and Observations” related to significant adverse effects of the proposed changes on coffee farmers. [Note: At the October 10 hearing there was no discussion, comment or answers to questions from HDOA as to farmer concerns. HDOA took the position that the hearing was only for taking testimony and no more.]

Neither at the October 10 hearing nor at anytime since has the HDOA provided response to, or indicated willingness to substantively discuss, coffee farmer concerns as to reducing adverse impacts.

At the October 10 hearing and in other subsequent communications to HDOA and members of the Board of Agriculture (BOA), KCFA requested information on the procedures to be followed in adoption of the amendments—and specifically prior notice of BOA consideration of the amendments.

No notice was provided. Only in late April did KCFA learn indirectly that the proposed amendments had been presented to the BOA on February 25, 2013.

On March 19, 2013, HDOA—as required by state law—presented the proposed amendments to the Small Business Regulatory Review Board (SBRRB) for review and approval. The statutory purpose of SBRRB review is for a determination whether “the proposed rules affect small business [for example, small coffee farms], and if so, the availability and practicality of less restrictive alternatives that could be implemented.” At the March 19 hearing there was no input from small businesses/coffee farmers. The KCFA, notwithstanding its requests to HDOA, was not given advance notice of the SBRRB hearing or an opportunity to participate. At the SBRRB hearing the HDOA summarily dismissed (or did not mention) adverse impacts identified in coffee farmers’ testimonies and communications. The minutes of the SBRRB hearing do not reflect any consideration of “less restrictive alternatives”—other than a statement that HDOA continues to work closely with the Attorney General’s Office on this issue, and with no indication that coffee farmers will participate in this process.

## **THE 9 QUESTIONS AND OBSERVATIONS:**

Below is a review of the issues raised in the 9/27/13 email to Russell Kokubun and provided to HDOA at the 10/10/13 hearing. Copies of the Kokubun email and the “9 Questions and Observations” are attached.

### **1—Adverse Affect on “Home Roaster” Sales**

The elimination of the “less than wholesale quantities” exemption creates the following potential adverse impacts: (1) The new burden of attaching a tamper-proof label meeting as yet unspecified requirements for that label. Depending on the requirements of the mandatory tamper-proof label, this new burden may be minor or significant—we don’t know; (2) The amended regulations require that all containers of green coffee (including quantities of 10 lbs. or less (which had previously exempted) be labeled with the “grade” and “geographic region”. The significant new burden is that farmers will now be required to grade all green sold (even quantities of 10 lbs or less)—and will be subject to potential Class C Felony penalties for mislabeling the grade. (3) The potential costs of grading and risks of mislabeling the grade are significant—and the only apparent “safe harbor” to potential liability appears to go through “voluntary” grading and certification by the HDOA @ \$48/hour in fees.

HDOA RESPONSE: HDOA’s statement that no exemption is needed because mandatory inspection and certification has been repealed is nonsensical. Removal of the exemption DOES subject small farmers to new burdens of attaching tamper-proof labeling; determining grade; incurring the costs of determining grade; and potential criminal liability. There is no evidence of consideration by the HDOA of less restrictive alternatives-- for example, continuing the less than wholesale quantity exemption. There is no evidence that there have been any problems of any type because of this exemption. Problems which may have been created by actions of large scale marketers should not result in placing unnecessary burdens on small farmers who have not been the source of problems.

The less restrictive alternative= continue the less-than-wholesale quantity exemption.

[The suggestion that burdens of grading can be avoided by just labeling green as “Kona Prime”, ignores the cost of effectively documenting that the “prime” standard has been met in order to avoid potential criminal liability—and ignores the association of farm-direct Kona coffee with the “Prime” grade that can be viewed (inaccurately) as an indication of low quality.]

### **2—Fees (Section 4-143-2 (k) and (l))**

In its submissions to SBRRB the HDOA wholly ignores the impact of an increase from \$1/page to \$48/page for facsimile copies. Is this merely a typo as to which HDOA has ignored repeated requests to address—or does the HDOA in fact intend to charge \$48/page?

With respect to setting coffee inspection fees at \$48/hour, HDOA has not addressed the KCFA suggestion that it could fully cover its inspection costs by charging an appropriate per pound fee for inspection—rather than adversely impacting small businesses/farmers with a fee system that results in grossly excessive per pound fees for inspection of small lots resulting from hourly fees. Although inspection and certification is now “voluntary”, many customers of small coffee farmers insist on the assurance of HDOA certification. In its Small Business Impact Statement to the SBRRB, with respect to a direct inquiry as to whether it had considered reducing the impact on small business through a “varying schedule for fees”, the HDOA responded “Not

applicable". There was no mention by the HDOA of the KCFA's of suggestion different fee schedule or nor any reason given by the HDOA in its SBRRB submissions for not considering or adopting that suggestion.

The less restrictive alternatives= a reasonable per page coping charge, and a reasonable per/lb inspection fee schedule.

### **3--Deceptive Coffee Grade Descriptions:**

Although the principal characteristic for determining Hawaii's "grades" for green coffee is bean size, there is no evidence that bean size correlates to quality of the taste of brewed coffee in the cup. "Prime" and "extra fancy" from the same farm and lot, prepared the same way, cannot be distinguished by professional tasters—including the HDOA's Kona inspector.

Most Kona small farms sell their coffee as "Estate Coffee"—indicating that it is not "graded" (that is, not sized). The HDOA has—as a matter of practice—has allowed this designation as long as the coffee met the standards of the lowest Kona "grade"—that is "Prime". If small farmers under the proposed regulations will be required to label the "grade"—the reputation of farm direct coffee from small farms will be adversely impacted to the extent that "Prime" may be viewed (wrongly) as indicating the lowest taste quality for Kona coffee. In fact, it is small Kona farms and their "Estate Coffee" that have consistently won coffee tasting competitions.

The suggestion of the KCFA (see the attachment) to the HDOA that the grade names be amended in a way reduce the adverse impact on small farmers by removing the "quality" implications of the names of the "grades" has not been discussed or in any way addressed in the HDOA submission to the SBRRB.

The less restrictive alternative=a new grading system with (1) a single maximum number of defects for all grades other than off-grade; and (2) grade names that let consumers know the grades are determined by bean size and not the flavor quality of brewed coffee.

### **4—Pinholes Caused by CBB:**

Section 4-193-6(i) of the proposed standards adds a new defect score for beans affected by pinholes caused by CBB. HDOA has been asked for, but has provided no data indicating that pinholes affect quality of the taste of brewed coffee. The adverse affect on coffee farmers is that the reputation of the taste of our "un-graded/Prime or better" coffee will be damaged without a reasonable basis.

The less restrictive alternative=eliminate this amendment unless there is evidence of a clear reduction in taste quality from pinholes; and if there is such evidence, apply the maximum level of defects to all of the size-based grades.

### **5—Non-Sale Transport of Coffee Within the Region:**

The application of Section 4-143-12 places a significant record keeping burden on small-scale farms with respect to transport within the region of cherry, parchment and green coffee in instances where no sales are involved. For example, many small farmers make many trips each year transporting cherry, parchment, and green to and from mills where the coffee is processed and then returned to the farm with no sale of the coffee involved. Why place this burden on small farmers when the HDOA has not provided any evidence of a problem involving small farmers engaged in this in-region transport? Nor has the HDOA provided a comprehensible explanation as to why these records are reasonably necessary.

The less restrictive alternative= an exemption for in-Region transport where no sale is involved.

## **6—HDOA Affidavit of Origin Form:**

Proposed changes to Section 1-143-1(a) add new language describing a “geographic region statement” which coffee farmers may use to document the origin of coffee. Despite requests to the HDOA to provide a copy of such a statement for review, none has been provided. Coffee farmers are not in a position to determine if such a statement will adversely impact them—nor are they in a position to suggest less restrictive alternatives to be considered.

The HDOA should make public their “geographic region statement” form so that “less restrictive alternatives” may be suggested for HDOA and SBRRB consideration, if such less restrictive alternatives are needed.

## **7—Entry of Public or Private Premises or Vehicles:**

Section 4-143-8 of the Coffee Standard submitted by HDOA states that HDOA inspectors may enter any public or private premises and any vehicle of transport. The section makes no reference to need for a warrant or probable cause. On its face this provision violates constitution protections against unreasonable search and seizure.

The HDOA’s response to this concern has been to state: “Entry into a premise without permission by the company to conduct enforcement investigation will still require a court ordered warrant.” However, the language of the rule does not contain these limitations. The proposed Coffee Standards do not advise either HDOA inspectors or the public of these legal/constitutional requirements.

The less restrictive alternative= expressly state in this section the legal/constitutional limitations that the HDOA has acknowledged in its submission to the SBRRB.

## **8—Certification of Origin Only:**

Over the years the HDOA has offered a cost-effective option used by many small farms for “certification of origin only” without costly express grade determination or cupping. Many customers of small farms want the assurance of HDOA certification—just as many customers of large coffee buyers often want the similar assurance of what is now a “voluntary” certification from the HDOA. Why is the HDOA offering HDOA certification procedures used primarily by large coffee buyers (now on a “voluntary” basis), but not similarly making available the less expensive service previously used primarily by small farmers?

The HDOA explanation (certification is no longer mandatory) makes no sense. On a voluntary basis and for a fee, the HDOA continues provide the more costly certification of specific grade and origin (for example, “Kona Extra Fancy”) typically used primarily by large coffee processors, but not the less costly certification typically used by small farmers. HDOA’s contention that it no longer certifies origin when it certifies green coffee for large coffee buyers is not correct. Geographic origin is an inseparable part of the grades in the proposed standards. Certification of the grade “Maui Extra Fancy”, for example, necessarily includes certification of origin.

The less restrictive alternative=amend the rules to continue to make available the service of “certification of origin only”.

## 9—Apply the Same Percentage of Defects to All Grades

In addition to changes of defect limits for other grades, the defect limit for the “Prime” grade is increased in the proposed amendments from 15% to 20%. The HDOA has been asked if it has data indicating whether or not increasing the defects limit to 20% affects the quality of the taste of brewed coffee in the cup? And whether similarly increasing the defect level for other grades would affect the quality of taste brewed coffee in the cup. HDOA has not answered these questions. HDOA’s Kona inspector, however, has told farmers that—based on his experience tasting coffee as part of his job—there is no quality difference between coffee brewed from “Prime” and other grades such as “Extra Fancy”—when brewed from different grades from the same the same farm. If that is true, then varied defect levels for various grades appear to be meaningless—as do the grade names that imply quality differences due to bean size.

The less restrictive alternative=determine if and at what level, the percentage of defects adversely affects taste and (1) set the maximum at that level for all grades; and (2) as indicated in paragraph 3, above, change the names of the grades to indicate size rather than “quality”.

### **Additional Issue: Geographically Identified Grade Standards for Coffee from Ka’u, Hamakua, and Other Regions:**

The proposed amendments fail to grant geographically identified grade standards to Ka’u, Hamakua and other coffee-growing regions of Hawaii County. No reasonable explanation is offered by HDOA for this failure.

The unfairness and confusion caused by this failure is illustrated by the following passage from the posted minutes of the March 19 SBRRB hearing:

*Mr. Takamine [SBRRB Member] thought it important to designate Ka’u coffee as “One Hundred Percent Ka’u/Hawaii Island Prime Coffee” because Ka’u Coffee is highly regarded in the world; Ms. Kahana [HDOA representative] responded that Ka’u is a recognized, designated geographic region for coffee. She explained that there is a grade standard and a geographic region and Ka’u has an identified region whereas, Kona has a designated grade and a region for coffee; Ka’u does not. She added that Ka’u coffee can be labeled “Hawaii Island, 100% Kona Coffee”, but it cannot be designated as “Ka’u extra fancy, one hundred percent Ka’u coffee”.*

The less restrictive alternative= allow each of the newer Hawaii coffee growing regions to use its regional name in the same way as other regions.