UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE
OFFICE OF GENERAL COUNSEL

August 29, 2019

Return Receipt Requested
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In Reply Refer To:
EPA Complaint No: 45RNO-16-R9

Ms. Kylie W. Wager-Cruz
Earthjustice Mid-Pacific Office
850 Richard Street, Suite 400
Honolulu, HI 96813

Re: Resolution of EPA Complaint No. 45RNO-16-R9

Dear Ms. Wager-Cruz:

This letter is to inform you that the U.S. Environmental Protection Agency (EPA), External Civil Rights Compliance Office (ECRCO) is resolving this complaint based on the enclosed Informal Resolution Agreement (Agreement) entered into between EPA and the Hawai'i Agribusiness Development Corporation (ADC). On March 9, 2017, ECRCO accepted for investigation an administrative complaint brought under Title VI of the Civil Rights Act of 1964 (Title VI) and EPA's implementing regulation at 40 C.F.R. Parts 5 and 7, which alleged that the Hawai'i Department of Agriculture (HDOA) and ADC engaged in discrimination based on race and national origin. The complaint against HDOA was assigned EPA Complaint No. 44RNO-16-R9, and the complaint against ADC was assigned EPA Complaint No. 45RNO-16-R9.[1] Specifically, the issues accepted for investigation were:

1. Whether in administering the pesticides program and the leasing and licensing of the state land program the HDOA and/or ADC discriminated on the basis of race and/or national origin (Native Hawaiians) against farm workers and residents of West Kaua'i and Moloka'i, in violation of Title VI of the Civil Rights Act, and EPA's implementing regulation; and

2. Whether the HDOA and/or ADC is complying with the procedural safeguard provisions in 40 C.F.R. Parts 5 and 7 which require recipients of EPA financial assistance to have specific policies and procedures in place to comply with their non-discrimination obligations.

During the course of EPA's investigation, ADC agreed to enter into an Informal Resolution Agreement in order to resolve EPA Complaint No. 45RNO-16-R9. The enclosed Agreement is entered into by EPA pursuant to authority granted to EPA under the federal nondiscrimination

[1] EPA Complaint No. 44RNO-16-R9 has been resolved through a separate informal resolution agreement between EPA and HDOA.

laws, including Title VI and EPA's nondiscrimination regulation at 40 C.F.R. Parts 5 and 7. It resolves EPA Complaint No. 45RNO-16-R9. It is understood that the Agreement does not constitute an admission by ADC of any violation or a finding by EPA of compliance or noncompliance with applicable federal non-discrimination laws and regulation, including 40 C.F.R. Parts 5 and 7.

The enclosed Agreement does not affect ADC's continuing responsibility under Title VI or other federal non-discrimination laws, and EPA's regulation at 40 C.F.R. Parts 5 and 7, nor does it affect EPA's investigation of any Title VI or other federal civil rights complaints or address any other matter not covered by this Agreement. This letter sets forth EPA's disposition of the complaint. This letter is not a formal statement of EPA policy and should not be relied upon, cited, or construed as such.

EPA is committed to working with ADC as it implements the provisions of the Agreement. If you have any questions regarding the Agreement between EPA and ADC, please contact me at (202) 564-9649, by e-mail at dorka.lilian@epa.gov, or U.S. mail at U.S. EPA, Office of General Counsel, External Civil Rights Compliance Office (Mail Code 2310A), 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460.

Sincerely,

Lilian S. Dorka
Director
External Civil Rights Compliance Office
Office of General Counsel
U.S. Environmental Protection Agency

Enclosure

Cc: Angelia Talbert-Duarte
Acting Associate General Counsel
Civil Rights and Finance Law Office

Deborah Jordan
Deputy Regional Administrator
Deputy Civil Rights Official
EPA Region 9

Sylvia Quast
Regional Counsel
EPA Region 9

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE
OFFICE OF GENERAL COUNSEL

INFORMAL RESOLUTION AGREEMENT
between the
HAWAI'I AGRIBUSINESS DEVELOPMENT CORPORATION
and the
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
External Civil Rights Compliance Office

EPA COMPLAINT NO. 45RNO-16-R9 (ADC)

I. PURPOSE AND JURISDICTION

A. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7 ("Title VI") and United States Environmental Protection Agency's ("EPA") implementing regulation at 40 Code of Federal Regulations (C.F.R.) Parts 5 and 7 prohibit discrimination on the basis of race, color, national origin, disability, sex and age in any programs or activities receiving federal financial assistance from EPA.

B. The Hawai'i Agribusiness Development Corporation (ADC) is a state agency administratively attached to the Hawai'i Department of Agriculture (HDOA). HDOA receives federal financial assistance from EPA, and therefore is subject to the provisions of Title VI, and other federal nondiscrimination laws, and 40 C.F.R. Parts 5 and 7.

C. On March 9, 2017, EPA's External Civil Rights Compliance Office (ECRCO) accepted for investigation an administrative complaint brought under Title VI and EPA's implementing regulation at 40 C.F.R. Part 7, Subpart D, which alleged that HDOA and ADC engaged in discrimination based on race, color and national origin. The complaint against HDOA was assigned EPA Complaint No. 44RNO-16-R9, and the complaint against ADC was assigned EPA Complaint No. 45RNO-16-R9.[1] EPA accepted for investigation the following issues:

1. Whether in administering the pesticides program and the leasing and licensing of the state land program the HDOA and/or ADC discriminated on the basis of race and/or national origin (Native Hawaiians) against farm

[1] EPA Complaint No. 44RNO-16-R9 has been resolved through a separate informal resolution agreement between EPA and HDOA.

workers and residents of West Kaua'i and Moloka'i, in violation of Title VI of the Civil Rights Act, and EPA's implementing regulation; and

2. Whether the HDOA and/or ADC is complying with the procedural safeguard provisions in 40 C.F.R. Part 7, Subpart D, which require recipients of EPA financial assistance to have specific policies and procedures in place to comply with their non-discrimination obligations.

D. During the course of EPA's investigation of EPA Complaint No. 45RNO-16-R9, ADC and EPA agreed to enter into an Informal Resolution Agreement (Agreement).

E. This Agreement is entered into voluntarily by ADC and EPA and resolves EPA Complaint No. 45RNO-16-R9.[2] It is understood that this Agreement does not constitute an admission of guilt, liability, or wrongdoing by ADC. EPA is not making any finding of compliance or noncompliance with federal non-discrimination laws and EPA's regulation at 40 C.F.R. Parts 5 and 7.

F. ADC continues to be committed to carrying out its responsibilities in a nondiscriminatory manner consistent with the requirements of Title VI and the other federal non-discrimination laws and regulations as applicable. The activities detailed in this Agreement, which ADC has voluntarily agreed to undertake and implement, are in furtherance of this commitment.

II. BACKGROUND

A. Enacted by the Hawai'i State Legislature in 1994, ADC is a state agency administratively attached to the Hawai'i State Department of Agriculture. It has its own board of directors consisting of three ex-officio and eight private citizens appointed by the Governor.

B. ADC's mission is to acquire and manage, in partnership with farmers, ranchers and aquaculture groups, selected high-value lands, water systems and infrastructure for commercial agricultural use and to direct research into areas that will lead to the development of new crops, markets and lower production costs.

C. Currently, ADC has a total of 11 full-time employees.

III. SPECIFIC COMMITMENTS

A. *Non-Discrimination Procedural Safeguards*

[2] To the extent the complaint specifically alleges that ADC is not complying with the Clean Water Act by discharging pollutants in West Kaua'i, without the requisite National Pollutant Discharge Elimination System (NPDES) permit, it is ECRCO's understanding that there is pending litigation in federal court directly related to this issue.

As an agency that currently employs fewer than 15 employees,[3] ADC commits to implement the following non-discrimination program requirements.

1. *Notice of Non-Discrimination under the Federal Non-Discrimination Statutes*

   a. ADC will post a notice of non-discrimination on the ADCs website homepage and in its general publications that are distributed to the public. To ensure effective communication with the public, ADC will ensure that its notice of non-discrimination is accessible to individuals with limited-English proficiency and individuals with disabilities.

   b. This notice will contain, at a minimum, the following statements:

      i. ADC does not discriminate on the basis of race, color, national origin, disability, age, or sex in administration of its programs or activities, and, ADC does not retaliate against any individual because they have exercised their rights to participate in or oppose actions protected by 40 CFR Parts 5 and 7 or for the purpose of interfering with such rights. (As prohibited under Title VI of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975, Title IX of the Education Amendments of 1972; and Section 13 of the Federal Water Pollution Control Act Amendments of 1972 (hereinafter referred to collectively as the federal non-discrimination statutes)).

   c. It is understood by EPA that to comply with the above commitment, as an agency attached to the HDOA, ADC may elect to adopt HDOA's Notice of Nondiscrimination (including HDOA's translations of the Notice into other languages.)

   d. Within 120 days after the effective date of this Agreement, ADC will submit to EPA for review a copy of its notice of non-discrimination that is consistent with the requirements 40 C.F.R. Parts 5 and 7.

2. *ADC Plan to Ensure Access for Individuals with Limited-English Proficiency*

   a. ADC will provide, at no cost, meaningful access to individuals with limited-English proficiency and will develop, publicize, and implement a language access

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[33] *See* 40 C.F.R. 7.85(g) (designation of nondiscrimination coordinator) and 7.90(b) (adoption of grievance procedures.) ADC has informed EPA that Act 28, Session Laws of Hawaii 2019, has been signed into law providing funding to ADC for 10 additional full-time employees. Without admitting jurisdiction under title VI, ADC acknowledges that the requirements of 40 C.F.R. 7.85(g) and 7.90(b) apply to an agency employing 15 or more full-time employees. If, during the pendency of this agreement, ADC increases its staff to 15 or more employees, then ADC will notify EPA within 5 working days of such an increase and EPA will provide technical assistance to ADC so that it can take any necessary steps to implement a program that would be consistent with the requirements of 40 C.F.R. 7.85(g) (designation of nondiscrimination coordinator) and 7.90(b) (adoption of grievance procedures). It is understood by EPA that, as an agency attached to the HDOA, ADC may elect to adopt HDOA's grievance procedures and utilize its non-discrimination coordinator.

plan to ensure meaningful access to all ADC programs, activities and services for individuals with limited-English proficiency.

b. ADC will conduct the appropriate analysis described in EPA's LEP Guidance found at 69 FR 35602 (June 25, 2004) and http://www.lep.gov to determine what language services it may need to provide to ensure that individuals with limited-English proficiency can meaningfully participate in ADC programs, activities and services. ADC will develop a language access plan consistent EPA's LEP Guidance.

c. It is understood by EPA that to comply with commitments 2a and 2b above, as an agency attached to the HDOA, ADC may elect to adopt HDOA's analysis and language access plan for providing meaningful access for persons with limited-English proficiency to ADC programs, services and activities.

d. Within 120 days of the effective date of this Agreement, ADC will submit to EPA for review a final draft of its written language access plan to ensure meaningful access to all ADC programs, activities and services for individuals with limited-English proficiency.

3. *ADC Plan to Ensure Access for Individuals with Disabilities*

a. ADC will provide, at no cost, appropriate auxiliary aids and services, including but not limited to, for example, qualified interpreters to individuals who are deaf or hard of hearing, and to other individuals, as necessary, to ensure effective communication and an equal opportunity to participate fully in benefits, activities, programs, and services provided by ADC.

b. ADC will develop and implement a disability access policy/plan for providing individuals with disabilities the opportunity for meaningful access to all ADC programs, activities benefits and services.

c. It is understood by EPA that to comply with commitments at 3a and 3b above, as an agency attached to the HDOA, ADC may elect to adopt HDOA's plan for providing access to persons with disabilities to ADC programs, services and activities.

d. Within 120 days of the effective date of this agreement, ADC will submit to ECRCO for review a final draft of its disability access policy/plan to ensure meaningful access to all ADC programs, services and activities by individuals with disabilities.

4. *Plan to Ensure ADC's Public Involvement Process is Implemented Consistent with Federal Civil Rights Laws*

a. ADC will develop a plan to ensure that its public involvement process is accessible to all persons regardless of race, color, national origin, disability, sex and age, consistent with the federal civil rights laws.

b. It is understood by EPA that to comply with commitments 4a above, as an agency attached to the HDOA, ADC may elect to adopt HDOA's public involvement plan.

c. Within 120 days of the effective date of this agreement, ADC will submit to ECRCO for review a final draft of its plan to ensure that its public involvement process is available and accessible to all persons regardless of race, color, national origin, disability, sex and age, consistent with the federal civil rights laws.

5. *Training*

a. Within 120 days after finalizing the documents identified in this Agreement related to notice of nondiscrimination, and final LEP and disability plans, ADC will ensure that all appropriate staff has been trained on these plans, processes and procedures.

b. It is understood by EPA that to comply with commitments at 5a above, as an agency attached to the HDOA, ADC may elect to have its employees attend training sessions sponsored by HDOA, as appropriate, on these plans, processes and procedures.

c. Within 90 days after signing of this Agreement, ADC will have a plan in place to ensure that such training is a routine part of the on-boarding process for new employees and is given routinely as refresher training to all employees.

IV. GENERAL

A. In consideration of ADC's ongoing commitments and actions described in this Agreement, EPA will end its investigation and consider resolved EPA Complaint No. 45RNO-16-R9 and will not issue a decision on the merits of the Complaint.

B. EPA will, upon request, provide technical assistance to ADC regarding any of the civil rights obligations previously referenced.

C. Once these commitments are fully implemented, EPA will issue a letter to ADC documenting completion of these commitments and closing the monitoring of Complaint No. 45RNO-16-R9.

D. ADC understands that a failure to satisfy any term in this agreement may result in EPA re-opening the investigation.

E. EPA will review and provide feedback about any documentation submitted by ADC demonstrating completion of each commitment identified in Section III and will provide an assessment as to whether the documentation satisfies the commitment within 30 days of receipt of ADC's report.

V. COMPUTATION OF TIME AND NOTICE

A. As used in this Agreement, "day" shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or holiday (State or Federal), the period shall run until the close of business of the next working day that is not a Saturday, Sunday or holiday.

B. Service of any documents required by this Agreement shall be made personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery.

C. Electronic documents submitted by ADC to EPA via email shall be sent to the following email address: Dorka.Lilian@epa.gov. Documents submitted by ADC to EPA shall be sent to Lilian Dorka, Director, U.S. EPA External Civil Rights Compliance Office, Office of General Counsel (Mail Code 2310A), 1200 Pennsylvania Avenue N.W., Washington, D.C. 20460.

D. Documents submitted by EPA to ADC shall be sent to James Nakatani, Executive Director, Hawaii Agribusiness Development Corporation, Office of the Chairperson, 1428 South King Street, Honolulu, Hawaii 96814-2512.

VI. EFFECT OF INFORMAL RESOLUTION AGREEMENT

A. ADC understands that, if necessary, ECRCO may visit ADC, interview staff, and request additional reports or data as necessary for ECRCO to determine whether ADC continues to meet its obligation to comply with any applicable federal non-discrimination requirements.

B. If either Party desires to modify any portion of this Agreement because of changed conditions making performance impractical or impossible, or due to material change to ADC's program or authorities, or for other good cause, the Party seeking a modification shall promptly notify the other in writing, setting forth the facts and circumstances justifying the proposed modification. Any modification(s) to this Agreement shall take effect only upon written agreement of the Chairperson of ADC and the Director of ECRCO.

C. ADC acknowledges its continuing responsibility to comply with State non-discrimination laws, and its commitment to carry out its responsibilities in a nondiscriminatory manner that is consistent with Title VI, 40 C.F.R. Parts 5 and 7, and other federal non-discrimination laws as applicable. ADC further acknowledges EPA's ongoing obligations to investigate any Title VI or other federal civil rights complaints and to address any other matter not covered by this Agreement.

D. By entering into this agreement, ADC does not waive or otherwise lose any defense which it may now have or hereafter may have to any action.

E. This Agreement constitutes the entire Agreement between ADC and EPA regarding the matters addressed herein, and no other statement, promise, or agreement made by any other person shall be construed to change any commitment or term of this Agreement.

F. The effective date of this Agreement shall be the date by which both Parties have signed the Agreement. The undersigned representatives of the Parties certify that they are fully authorized to consent to the terms and conditions of this Agreement. Signature on a counterpart or authorization of an electronic signature shall constitute a valid signature.

On behalf of the Hawai'i Agribusiness Development Corporation,

August 28, 2019

James Nakatani, Executive Director
Hawai'i Agribusiness Development Corporation

DATE

On behalf of the U.S. Environmental Protection Agency,

August 28, 2019

Lilian S. Dorka, Director
External Civil Rights Compliance Office
Office of General Counsel

DATE