EARTHJUSTICE

OCT 25 2017

October 16, 2017

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

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State Capitol
Honolulu, HI 96813

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Board of Directors
Agribusiness Development Corporation
State of Hawai'i
State Office Tower
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RE: Notice of Intent to Bring Civil Suit For Violations of the Federal Clean Water Act

I am writing on behalf of Na Kia'i Kai, Surfrider Foundation, and Pesticide Action Network North America (collectively, the "Community Groups") to notify you of serious and ongoing violations of the federal Clean Water Act ("CWA" or "Act"), 33 U.S.C. §§ 1251-1388, at the Mānā Plain drainage canal system, including but not limited to the canals, two pumping stations, and seven drainage ditch outfalls in West Kaua'i ("System"). The purpose of this letter is to provide notice of the Community Groups' intent to file a civil action against the state Agribusiness Development Corporation ("ADC") Executive Director[1] and ADC Board of

[1] James Nakatani currently serves as Executive Director of ADC.

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Directors,[2] in their official capacities, for these violations, at least sixty days after the date of this letter, pursuant to section 505(b)(1)(A) of the CWA, 33 U.S.C. § 1365(b)(1)(A), which requires sixty days notice of alleged violations prior to commencement of a citizen suit.

It has come to our attention that at least since August 3, 2015, the ADC Executive Director and ADC Board of Directors, through ADC, have been continuously or intermittently discharging drainage waters at the System without a permit under the National Pollution Discharge Elimination System ("NPDES"). These unpermitted discharges are in direct violation of the CWA.

We hope that this letter will convince the ADC Executive Director and ADC Board of Directors to immediately investigate and correct these ongoing violations. To come into compliance with the CWA, the ADC Executive Director and ADC Board of Directors must, on behalf of ADC, acquire an NPDES permit for the point source discharge of pollutants to navigable waters. 33 U.S.C. § 1311(a). Until the ADC Executive Director and ADC Board of Directors, on behalf of ADC, obtain an NPDES permit, these violations subject them to civil penalties under the CWA.

I. IDENTITY OF PERSONS GIVING NOTICE AND THEIR COUNSEL

In accordance with 40 C.F.R. § 135.3, notice is hereby given of the Community Groups' names, addresses, and telephone numbers, as well as the full name, address, and telephone number of their legal counsel:[3]

Community Groups:

Na Kia'i Kai
P.O. Box 642
Kawai, HI 96765
(808) 651-5332

Legal Counsel:

Paul Achitoff
Earthjustice
850 Richards St., Ste. 400
Honolulu, HI 96813
(808) 599-2436

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[2] Letitia Uyehara (Chairperson), Lloyd Haraguchi (Vice-Chairperson), Yukio Kitagawa (Member), Douglas Schenk (Member), Sandra Kato-Klutke (Member), Margarita Hopkins (Member), Denise Albano (Member), Leilyn Koev (Member), Scott Enright (Ex-Officio Member), Luis Salaveria (Ex-Officio Member), and Suzanne Case (Ex-Officio Member) currently serve on the ADC Board of Directors. Plaintiffs have mailed a copy of this notice letter to each of these members at the ADC Board of Directors address listed above.

[3] Please note that the Community Groups are represented by the undersigned counsel in this matter. You are hereby requested to contact Paul Achitoff of Earthjustice if you would like to discuss the contents of this letter.

Surfrider Foundation
P.O. Box 6010
San Clemente, CA 92674-6010
(949) 492-8170

Pesticide Action Network North America
1611 Telegraph Ave., Ste. 1200
Oakland, CA 94612
(510) 788-9020

II. FACTUAL BACKGROUND

A. The Drainage Ditch System

In the early 1920s, the Kekaha Sugar Company ("KSC") systematically drained and filled low-lying lands on the Mānā Plain, located on the western leeward coast on the island of Kaua'i, to expand sugarcane production. KSC developed a complex drainage ditch system consisting of approximately forty miles of drainage canals and ditches, several storage reservoirs, and two pumping stations at Kawai'ele and Nohili to lower the water table below the sugarcane rooting depth.

In 2003, after KSC closed, management of approximately 12,500 acres of agricultural lands formerly in sugar cultivation was transferred by governor's executive order from the state Department of Land and Natural Resources to ADC. Although ADC leases some of these lands to members of the Kekaha Agricultural Association, which is primarily comprised of agrochemical companies growing genetically engineered seed, the ADC Executive Director and ADC Board of Directors, through ADC, operate and maintain the drainage canals, pumping stations, and outfalls. The Pacific Missile Range Facility, Sunrise Capital Shrimp Farm, Kekaha Landfill, former Kekaha Sugar Mill, Waimea Wastewater Treatment Plant, and Kaua'i Raceway Park also occupy Mānā Plain lands drained by the System.

The Kawai'ele and Nohili pumping stations pump drainage waters into the Kawai'ele and Nohili outfalls, which lead to the nearshore ocean waters. The drainage waters are subject to minimal treatment. At least five additional outfalls (the "Kekaha outfalls") are also part of the System and are located farther east along the shoreline. Sand berms at the mouth of each of the Kekaha outfalls are periodically opened, allowing untreated drainage waters into the ocean.

B. Pollutant Discharges From the Drainage Ditch System

After ADC became manager of the former sugar plantation lands, ADC assumed ownership and management of KSC's NPDES permit, HI0000086. The ADC Executive Director, on behalf of the ADC Board of Directors and ADC, last renewed the permit in February 2007, and the permit was set to expire on August 31, 2011. The permit allowed ADC to discharge pollutants from the Kawai'ele and Nohili outfalls (Outfalls Serial Nos. 002 and 003, respectively), the Kīkīa'ola Harbor Drain (Outfall Serial No. 004), the Cox Drain (Outfall Serial No. 005), First Ditch (Outfall Serial No. 006), and Second Ditch (Outfall Serial No. 007), into the nearshore ocean waters. The permit required ADC to monitor and report discharges for all six outfalls. A previous version of KSC's NPDES permit additionally regulated discharges from Kukai Ditch (Outfall Serial No. 001).

On February 25, 2011, the ADC Executive Director, on behalf of the ADC Board of Directors and ADC, filed an NPDES permit renewal application with the state Department of Health ("DOH"), and on August 31, 2011, DOH administratively extended the NPDES permit so that ADC could supply additional information to complete its application, pursuant to Hawai'i Revised Statutes ("H.R.S") § 342D-6(h).

On June 2, 2015, an ADC representative and ADC's NPDES permit consultant met with DOH representatives to discuss whether ADC would like to continue with processing its NPDES permit renewal application. According to minutes from the July 22, 2015 ADC Board of Directors meeting, DOH advised the ADC representative and ADC NPDES permit consultant that permitting requirements for minimum standards had evolved over time, and that should the permit be renewed, stricter limits and new parameters would be required. The new standards include lower total suspended solid limits, new nutrient discharge limits, and any pollutant that has a reasonable potential to exceed a Water Quality Standard, and new discharge limits for priority pollutants such as pesticides and herbicides. Also, the receiving waters would be various ditches and not the ocean as under the existing permit; therefore, the measurement of these limits would be taken at the outfalls rather than further out in the Zone of Mixing.[4]

Rather than comply with more protective water quality standards, the ADC Executive Director, on behalf of the ADC Board of Directors and ADC, withdrew the permit renewal application on August 3, 2015. Thus, the ADC Executive Director and ADC Board of Directors, through ADC, have been continuously or intermittently discharging pollutants at the System without an NPDES permit since at least August 3, 2015.

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[4] Minutes of the Agribusiness Dev. Corp. Bd. of Dir. Meeting, July 22, 2015, at 1-2.

C. Impact on the Offshore Environment

In May 2014, the DOH released the draft 2013-14 State Wide Pesticide Sampling Pilot Project Water Quality Findings, a joint investigation by DOH and the state Department of Agriculture ("DOA"). Data from the study provided preliminary information on the presence of pesticide residue in the state's surface waters. The draft study included atrazine, metolachlor, glyphosate, chlorpyrifos, and other pesticide sampling results from various locations throughout the state. Some samples were taken downstream of West Kaua'i agrochemical company operations, including from ditches near the Kawai'ele Pumping Station, the Kīkīa'ola Harbor Drain, and Second Ditch. DOH's sampling efforts showed the presence of atrazine and metolachlor at all three locations, glyphosate at the ditch near the Kawai'ele Pumping Station, and chlorpyrifos at Second Ditch, among other pesticides in the System. The atrazine and metolachlor samples from the Kīkīa'ola Harbor Drain exceeded aquatic life benchmarks.

Atrazine and metolachlor are restricted use pesticides, which 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 restricted use pesticides under federal law. Haw. Admin. R. ("H.A.R.") §§ 4-66-32(b), (e). Atrazine can cause reproductive difficulties and cardiovascular problems in humans. 40 C.F.R. Pt. 141, Subpt. O, App. A; H.A.R. § 11-20 App. A. According to the U.S. Department of Health and Human Services, Agency for Toxic Substances and Disease Registry ("ATSDR"), atrazine may affect pregnant women by slowing their babies' growth in the womb or by causing preterm births. In pregnant animals, exposure to atrazine decreases fetal growth and causes birth defects and fetus mortality. ATSDR warms that "[i]n areas of high atrazine use, individuals should avoid swimming in or drinking from contaminated water sources and may desire to have personal well water tested for the presence of atrazine," and that "[c]hildren should avoid playing in soils near uncontrolled hazardous waste sites where atrazine may have been discarded."[5]

Glyphosate is a broad spectrum herbicide, the active ingredient in the herbicide known as Roundup, which is used on glyphosate-resistant genetically engineered crops like those cultivated in West Kaua'i. Glyphosate can cause reproductive difficulties and kidney problems in humans. 40 C.F.R. Pt. 141, Subpt. O, App. A; H.A.R. § 11-20 App. A. In March 2015, the

[5] U.S. Department of Health and Human Services, Agency for Toxic Substances and Disease Registry, Atrazine CAS # 1912-24-9, Sept. 2003, at 2.

World Health Organization International Agency on Research on Cancer classified glyphosate as Group 2A carcinogen, meaning it is "probably carcinogenic to humans."[6]

Chlorpyrifos is a pesticide commonly used on corn fields that can overstimulate the nervous system, causing nausea, dizziness, confusion, respiratory paralysis, and death.[7] It is also a developmental neurotoxicant, exposure to which can cause structural abnormalities and persistent neurobehavioral deficits.[8] In November 2016, EPA found that based on current levels of allowed use, expected residues of chlorpyrifos on food crops and drinking water exposure to chlorpyrifos exceed safe levels.[9]

ADC's self-reported testing results submitted to DOH on November 28, 2011 showed the presence of nitrogen, phosphorus, chlorophyll, turbidity, suspended solids, pH, metals (arsenic, barium, cadmium, chromium, copper, lead, mercury, nickel, silver, zinc), phenols, sulfides, antimony, beryllium, selenium, and thallium at the Kawai'ele and Nohili outfalls, and bis-phthalate at the Kawai'ele outfall. Arsenic, cadmium, chromium, and beryllium are known human carcinogens; lead, nickel, and selenium are reasonably anticipated to be human carcinogens[10]; and bis-phthalate can cause gastrointestinal distress in humans.[11]

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[6] World Health Organization, International Agency for Research on Cancer, IARC Monographs Volume 112: evaluation of five organophosphate insecticides and herbicides, Mar. 20, 2015.

[7] U.S. Environmental Protection Agency, Related Topics: Ingredients Used in Pesticide Products, Chlorpyrifos, https://www.epa.gov/ingredients-used-pesticide-products/chlorpyrifos (last visited Oct. 16, 2017).

[8] Philippe Grandjean & Philip J. Landrigan, Neurobehavioural effects of developmental toxicity, The Lancet, http://www.thelancet.com/journals/laneur/article/PIIS1474-4422%2813%2970278-3/fulltext (last visited Oct. 16, 2017).

[9] U.S. Environmental Protection Agency, Related Topics: Ingredients Used in Pesticide Products, Revised Human Health Risk Assessment on Chlorpyrifos, https://www.epa.gov/ingredients-used-pesticide-products/revised-human-health-risk-assessment-chlorpyrifos#risk assessment (last visited Apr. 28, 2016).

[10] U.S. Agency for Toxic Substances and Disease Registry, http://www.atsdr.cdc.gov/ (last visited Oct. 16, 2017).

[11] U.S. Environmental Protection Agency, Health Effects Notebook for Hazardous Air Pollutants, https://www.epa.gov/haps/health-effects-notebook-hazardous-air-pollutants (last visited Oct. 16, 2017).

Further, in 2014, the DOH reported to the U.S. Environmental Protection Agency and the U.S. Congress that the water quality at sites offshore from the Kekaha and Nohili outfalls and Kekaha outfalls were not meeting state water quality standards for turbidity.[12]

The unpermitted and unmonitored discharge of these pollutants is particularly alarming since the canals carrying these toxic pollutants run through populated areas, and are not fenced off to keep children from playing in them or people from otherwise entering them. They are not even posted with warning signs. Moreover, the nearshore ocean waters adjacent to the outfalls are used extensively. The Kawai'ele and Nohili outfalls intersect a sandy stretch known as Barking Sands Beach that extends several miles on either side of the outfalls. The adjacent ocean waters are known as Majors Bay. The Kekaha outfalls are located farther east along the Kaumuali'i Highway near MacArthur Beach Park and Kekaha Town. Native Hawaiians fish and gather limu in these areas, which are popular for fishing, surfing, swimming, and boating. Without an NPDES permit, the ADC Executive Director and ADC Board of Directors' discharges, through ADC, expose residents, visitors, and their families to dangerous pollutants without regulatory oversight or monitoring.

D. Applicable State Water Quality Standards for the West Kaua'i Coast

Hawai'i law prohibits any person or public body from discharging pollutants to state waters except in compliance with the state's water pollution regulations. H.R.S. § 342D-50(a); H.A.R. § 11-55-03. Pursuant to the federal CWA, all waters must be assigned designated uses that water quality standards are designed to support. 33 U.S.C. § 1313. DOH, the state agency charged with setting state water quality standards, has designated the waters at the outfalls as Class A, open coastal marine waters. H.A.R. § 11-54-6(b)(2)(B). Protected uses in the area include aesthetic enjoyment and recreation. Id. § 11-54-3(c)(2). Any other use must be "compatible with the protection and propagation of fish, shellfish, and wildlife, and with recreation in and on these waters." Id. Class A waters "shall not act as receiving waters for any discharge which has not received the best degree of treatment or control compatible with the criteria established for this class." Id. H.A.R. § 11-54-4 contains numeric water quality criteria that are applicable to all waters.

Hawai'i law additionally sets forth water quality criteria for inland waters, including "man-made ditches and flumes that discharge into any other waters of the State." H.A.R. §§ 11-54-5.1(a)(1), 11-54-5.2. The H.A.R. § 11-54-4 numeric criteria apply to "ditches and flumes." Id. at 11-54-5.2(a).

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[12] Haw. State Dep't of Health Clean Water Branch, 2014 State of Hawai'i Water Quality Monitoring and Assessment Report: Integrated Report to the U.S. Environmental Protection Agency and the U.S. Congress Pursuant to §303(d) and § 305(b), Clean Water Act (P.L. 97-117), Sept. 2, 2014, at 21, 22.

The ADC Executive Director and ADC Board of Directors, on behalf of ADC, must obtain an NPDES permit to regulate and monitor its discharge of pollutants to these waters to end these violations of the CWA and applicable provisions of Hawai'i law. 33 U.S.C. § 1311(a).

III. VIOLATIONS OF THE FEDERAL CLEAN WATER ACT

The ADC Executive Director and ADC Board of Directors, through ADC, are discharging pollutants to navigable waters without an NPDES permit in violation of the CWA. Id. The CWA strictly regulates the discharge of pollutants into the waters of the United States by prohibiting "any addition of any pollutant to navigable waters from any point source" in the absence of an NPDES permit. Id. § 1362(12); see also id. §§ 1311(a), 1342. In the State of Hawai'i, the U.S. Environmental Protection Agency ("EPA") has delegated authority to DOH to issue NPDES permits pursuant to Section 402(b) of the Act. Id. § 1342(b); 40 C.F.R. § 123.24. DOH sets forth requirements for applying for and obtaining an individual NPDES permit in Hawai'i. H.A.R. § 11-55-04.

The discharged waters contain pollutants regulated under the CWA. The CWA broadly defines "pollutant" to include "chemical wastes" and "agricultural waste." 33 U.S.C. § 1362(6). Excess and residual pesticides constitute pollutants under the CWA. The discharged waters contain additional chemical and agricultural waste pollutants including nitrogen, phosphorus, chlorophyll, turbidity, suspended solids, pH, metals (arsenic, barium, cadmium, chromium, copper, lead, mercury, nickel, silver, and zinc), phenols, sulfides, antimony, beryllium, selenium, thallium, and bis-phthalate. See H.A.R. §§ 11-54-4 (containing numeric criteria for these pollutants).

The ADC Executive Director and ADC Board of Directors, through ADC, are discharging these pollutants into navigable waters. The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas," and defines "territorial seas" as "the belt of the seas measured from the line of the ordinary low water along that portion of the coast which is in direct contact and the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles." 33 U.S.C. §§ 1362(7), (8). The drainage ditches and the nearshore ocean waters in West Kaua'i constitute jurisdictional waters under the CWA.

The ADC Executive Director and ADC Board of Directors, through ADC, are discharging pollutants to navigable waters from point sources. Under the CWA, a "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit." 33 U.S.C. § 1362(14). Throughout the System there are several point sources, including but not limited to the canals, two pumping stations, and seven drainage ditch outfalls.

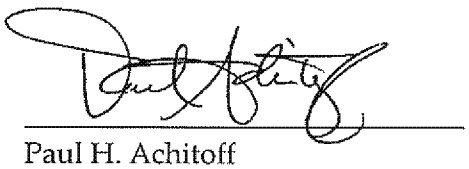
Therefore, the ADC Executive Director and ADC Board of Directors' unpermitted pollutant discharges, through ADC, at the System and nearshore ocean waters violate the CWA.

IV. NOTICE OF INTENT TO SUE FOR VIOLATIONS OF THE CLEAN WATER ACT

By this letter, pursuant to CWA section 505, 33 U.S.C. § 1365, the Community Groups hereby put you on notice that after the expiration of sixty (60) days from the date of service of this notice, the Community Groups intend to file an enforcement action in federal court against the ADC Executive Director and ADC Board of Directors, in their official capacities, to address their violations of the CWA. The Community Groups intend to seek civil penalties for past violations, injunctive relief to prevent further illegal discharges, and other relief as is permitted by law. 33 U.S.C. §§ 1365(a), (d). Pursuant to CWA section 309(d) and its implementing regulations, each of the above-described CWA violations subjects the ADC Executive Director and ADC Board of Directors, through ADC, to a penalty of up to $52,414 per day. Id. § 1319(d); 40 C.F.R. § 19.4.

The Community Groups are open to resolving this matter without the need for litigation. If you wish to pursue such discussions, we urge you to contact us promptly.

Sincerely,



Paul H. Achitoff
Attorney for the Community Groups