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April 12, 2017

Lilian S. Dorka
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RE: State of Hawai'i Agribusiness Development Corporation's Response to the Environmental Protection Agency External Civil Rights Compliance Office's Acceptance of Administrative Complaint

EPA File No. 45RNO-16-R9

Dear Director Dorka,

This letter is in response to the investigation that the Environmental Protection Agency External Civil Rights Compliance Office ("EPA") has initiated regarding an administrative complaint filed by Earthjustice ("Earthjustice Complaint"). The Earthjustice Complaint generally alleges that the State of Hawai'i Department of Agriculture ("HDOA") and State of Hawai'i Agribusiness Development Corporation ("ADC") discriminated against farm workers and residents of West Kaua'i and Moloka'i, on the basis of race and/or national origin, in violation of Title VI of the Civil Rights Act, and EPA's implementing regulation. Earthjustice alleged that the ADC has violated Title VI by: (1) failing to have a Title VI compliance program,

(2) leasing land without a policy to restrict pesticide use further than the legal standard set by state and federal law, and (3) operating a drainage ditch without an NPDES permit.[1]

The EPA sent ADC and HDOA a notice of acceptance of administrative complaint 44RNO-16-R9 and 45RNO-16-R9 on March 9, 2017 ("EPA Notice"). In the Notice, the EPA determined that it had jurisdiction to accept the investigation. To have jurisdiction, the complaint must (1) be in writing, (2) allege that discrimination occurred in violation of EPA regulations, (3) allege discriminatory acts happened within 180 days, and (4) be filed against an applicant for, or recipient of, EPA financial assistance.[2] However, as will be discussed below, the ADC is not an applicant for, or recipient of, EPA financial assistance. Consequently, the EPA does not have jurisdiction to conduct such an investigation.

The Earthjustice Complaint sets forth several broad and ambiguous allegations, but the EPA noted that it will only investigate the following:

(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 Kauai and Molokai, 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 Title 40, Part 7, Subpart D of the *Code of Federal Regulations* ("CFR"), which require recipients of EPA financial assistance to have specific policies and procedures in place to comply with their non-discrimination obligations.

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[1] *See* Earthjustice Complaint, pp. 7-15.
[2] EPA Notice, pp. 1-2.

While the scope of the EPA investigation is narrower than the Earthjustice Complaint, the lack of specificity in what kind of actions are being investigated makes it difficult to comprehensively respond. HDOA and ADC are separate entities with distinct powers and authority, and so this response will be tailored only to what is relevant to the ADC as a land manager. With that in mind, the ADC will fully comply with the investigation and will supply any additional information that the EPA believes would be informative but is left out of this response.

The ADC denies any allegations of discrimination of any type. The tenants Earthjustice complained of were inherited by the ADC with the land. The ADC requires any pesticide use on its land to be within legal limits, and there is no evidence of adverse disparate impacts that would constitute discrimination.

1. **The EPA does not have jurisdiction.**

While the HDOA receives funds from the EPA, the ADC does not receive any such funding either directly or indirectly. The ADC is not a subunit of HDOA, and any EPA funding HDOA receives should not be attributed to it. The ADC is a public corporation established by statute, and an instrumentality and agency of the State separate and distinct from the HDOA. It is attached to the HDOA only for limited administrative purposes. Hawai'i Revised Statutes ("HRS") § 163D-3(a) states:

> There is established the agribusiness development corporation, which shall be a public body corporate and politic and ***an instrumentality and agency of the State***. The corporation shall be headed by a board of directors. The corporation shall be placed within the department of agriculture for administrative purposes, but the corporation may later incorporate as a nonprofit corporation if this proves desirable to further its objectives ....

(emphasis added).

Courts have analyzed whether a particular non-recipient state entity, attached to a larger recipient department, is sufficiently independent of the larger department to fall outside of federal regulations enacted pursuant to Title VI.[3] Those cases have focused on whether the entities, "though part of the same branch of government, have distinct funding sources and administrative apparatuses."[4]

The ADC is a separate entity and not simply a subunit of the HDOA. The ADC possesses distinct statutory powers, exercises its authority through a board largely independent of the HDOA, and is funded by separate and distinct funds. While the ADC is attached to the HDOA for administrative purposes, the HDOA lacks the substantive power to supervise or control the board or commission in the exercise of its functions, duties, and powers.[5]

a. ADC's funding sources are separate and distinct from HDOA.

The ADC receives funding through appropriations made by the Legislature[6] and user-supported revolving funds.[7] Pursuant to HRS § 26-35(a), the ADC administratively submits its

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[3] In *Sharer v. Oregon*, the Ninth Circuit held that Oregon's Public Defense Services Commission, while administratively attached for some purposes to Oregon's Judicial Department, was sufficiently independent so that federal financial assistance received by the Judicial Department was not attributed to the Commission. *Sharer v. Oregon*, 581 F.3d 1176, 1179-80 (9th Cir. 2009)

[4] The *Sharer* court found that even though the two entities were attached for some administrative purposes, they were financed by distinct funding sources, and the administrative head of the Judicial Department had considerably less statutory authority over the Commission. Specifically, it was noted that the Chief Justice was authorized to appoint the seven members of the Commission, and serve as a nonvoting, ex officio member, but aside from that the Commission was not subject to the exercise of administrative authority and supervision. *Id.*

[5] *See* HRS § 26-35(a)(8) ("Except as set forth hereinabove, the head of the department shall not have the power to supervise or control the board or commission in the exercise of its functions, duties, and powers.")

[6] *See* Exhibit "A" showing the ADC specific appropriations from the legislature for the past two years. While administratively put into the HDOA budget, the appropriations are specifically for the ADC and its projects.

legislative budget requests through the HDOA, but ADC does not receive funds from HDOA or any revolving funds that support HDOA. Conversely, the revolving funds that support ADC operations do not support HDOA operations. *Compare* HRS § 163D-15.5 (establishing the Waiahole water system revolving fund which is administered by the ADC; moneys in the fund are to be used for purposes unique to the ADC); HRS § 163D-17 (establishing the Hawai'i agricultural development revolving fund; moneys in the fund are to be used for purposes unique to the ADC) *with* HRS § 141-2.7 (establishing the aquaculture development fund within the state treasury; moneys in the fund shall be used to "[i]mplement the aquatic disease management programs and activities of the department," among other things).

Consequently the ADC and HDOA are financed through entirely separate and distinct funds.

b. ADC has its own administrative structure and statutory authority.

The ADC has a board of directors of eleven members, eight of which are appointed by the governor.[8] The remaining three are ex-officio, voting members, and consist of the director of business, economic development, and tourism, the chairperson of the board of agriculture, and the chairperson of the board of land and natural resources.[9] ADC's executive director is appointed by the board, has their salary set by the board, and cannot be the chairperson for the

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[7] *See* Exhibit "B" showing the user generated revenue, which goes into an ADC special fund.
[8] HRS § 163D-3(b).
[9] *Id.*

board of agriculture.[10] Therefore, the HDOA chair has very little control or influence over ADC board decisions.

The ADC has enumerated powers, separate and distinct from the powers of the HDOA, including the power to sue and be sued, make and alter bylaws for its organization and internal management, make and execute contracts, acquire or contract to acquire by grant or purchase real, personal, or mixed property, carry out specialized programs designed to develop new markets for Hawai'i agricultural products, and accept gifts or grants in any form from any public agency or any other source.[11]

While the ADC is placed within the HDOA for administrative purposes, the corporation has the option to later incorporate as a nonprofit corporation.[12] The chairperson of the board of HDOA has limited statutory authority relating to ADC, which includes communicating with the governor or legislature on behalf of ADC, including ADC's financial requirements in HDOA's budget, approving ADC employment decisions, approving purchases of supplies, and allocating space available to the HDOA for the ADC board. However, "[a]ny quasi-judicial functions of the board or commission **shall not be subject to the approval, review, or control of the head of the department** . . . and . . . [e]xcept as set forth [in HRS § 26-35(a)], the head of the department **shall not have the power to supervise or control the board or commission in the exercise of its functions, duties, and powers.**"[13] Finally, the ADC explicitly "**shall be**

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[10] *Id.*
[11] HRS § 163D-4.
[12] HRS § 163D-3.
[13] HRS § 26-35(b) (emphasis added).

considered an arm of the State and shall enjoy the same sovereign immunity available to the State."[14]

As the ADC has separate funding sources, statutory powers distinct from HDOA, and exercises its authority largely independent of the HDOA, it is a state entity separate and distinct from HDOA and any federal funding received by HDOA should not be attributed to the ADC. Therefore, the EPA lacks jurisdiction to pursue this investigation against ADC. Despite not receiving any federal funds, out of an abundance of caution the ADC will address the substantive issues outlined in the EPA Notice.

2. **ADC does not discriminate in its land management practices.**

The EPA noted it will investigate into "[w]hether 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 Hawaiian) 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."[15] As ADC does not administer the pesticides program, this response will be limited to the administering, leasing, and licensing of state land managed by ADC in Kekaha, Kaua'i.

In their initial complaint, Earthjustice alleged that:

> ADC is violating Title VI by leasing or licensing state lands in a manner that fails to protect nearby communities, including Native Hawaiians, from heavy pesticide use . . . ADC has failed to adopt

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[14] HRS § 26-35(b) (emphasis added).
[15] EPA Notice, p. 1.

> or implement *any* limits on its leasing and licensing program to protect health and the environment from heavy pesticide use. Instead, ADC leases or licenses the majority (64%) of the thousands of acres it manages in West Kaua'i to pesticide-intensive seed companies, without any meaningful restrictions. By failing to adopt or implement measures to limit leasing or licensing to pesticide-intensive operations or prevent resulting harm to nearby communities, ADC is violating Title VI.

Earthjustice Complaint, p. 13.

First, it should be noted that ADC did not, in fact, lease any lands in West Kaua'i to seed companies. In 2001, ADC was issued a land lease from the Hawai'i Department of Land and Natural Resources ("DLNR") for the agricultural land at issue in Kekaha, Kaua'i.[16] These lands came to ADC already encumbered by revocable permits to, among other entities, Syngenta Seeds, Pioneer Hi-Bred Intl, and CEATECH (assigned to BASF).[17] Those companies continue to be the only seed companies on the ADC's Kekaha properties. Therefore, ADC did not specifically choose the property at issue for pesticide use, and did not intentionally discriminate in accepting land with seed companies as tenants.

Furthermore, in converting the existing revocable permits to licenses, the ADC made sure to include terms requiring the licensee to comply with all federal, state and county laws,[18]

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[16] *See* Exhibit "C", the land was eventually set aside to the ADC in 2003 via Executive Order No. 4007.
[17] *See* Exhibit "D".
[18] LICENSEE shall comply with the requirements of all federal, state, and county authorities and observe all federal, state, and county laws, ordinances, and rules pertaining to the Premises which are now in force or later may be in force. Exhibit "D", p. 22.

including environmental regulations[19] and anti-discrimination laws.[20] Therefore, ADC requires its licensees to comply with all applicable laws regulating the use of pesticides.

This is not a situation where ADC is deliberately placing pesticide users in an area for discriminatory purposes. Nor is this a situation where ADC is granting entities special permission to use pesticides above the legal limit, or approving the use of pesticides in anyway. Instead, Earthjustice alleges that not restricting a licensee's rights further than the standards set by federal and state law causes adverse disproportionate impacts upon the native Hawaiian community in Kekaha.[21]

The EPA has proposed policy concerning how compliance with environmental health-based standards relates to whether a specific impact is adverse in Title VI investigations.[22] In 2000, the established policy was to create a rebuttable presumption if a recipient's actions were within EPA guidelines. [23] The EPA proposed a new policy in 2013, which abrogated the presumption but maintained that "[e]nvironmental health-based thresholds are set at levels

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[19] LICENSEE shall comply with all applicable federal, state, and county environmental impact regulations, including but not limited to Chapter 343, Hawai'i Revised Statutes, as amended, and rules governing historic preservation. LICENSEE shall be responsible for obtaining all necessary federal, state, or county clearances. *Id.*
[20] LICENSEE shall not use the Premises, nor permit the Premises to be used in support of, any policy that unlawfully discriminates against anyone based upon creed, color, national origin, sex, or a physical handicap. LICENSEE shall not practice any unlawful discrimination based upon creed, color, national origin, sex, or a physical handicap. Exhibit "D", p.12.

[21] We note that the Supreme Court has held that Title VI prohibits only intentional discrimination, and therefore a plaintiff must allege more than a disproportionate effect. *See Alexander v. Sandoval*, 532 U.S. 275, 280 (2001). Courts are split over whether a regulation alone can create an enforceable federal right. *Compare South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, 274 F.3d 771 (3d Cir.2001); *and Loschiavo v. City of Dearborn*, 33 F.3d 548, 551 (6th Cir.1994). Therefore, we will address the disparate impact allegation but reserve the right to challenge jurisdiction on this point.
[22] Federal Register / Vol. 78, No. 81 / Friday, April 26, 2013, p. 24741.
[23] *Id.*, at p. 2742.

intended to be protective of public health. While compliance with such thresholds does not guarantee no risk, such compliance strongly suggests that the remaining risks are low and at an acceptable level for the specific pollutant(s) addressed by the health-based threshold."[24]

ADC requires all licensees to be in compliance with federal and state regulations regarding pesticides, which are health-based standards.[25] As both the EPA and the state of Hawai'i regulate such pesticide use, it must be shown that other factors outweigh the legal use that ADC is allowing. Such factors could include "the existence of hot spots, cumulative impacts the presence of particularly sensitive populations that were not considered in the establishment of the health-based standard, misapplication of environmental standards, or the existence of site-specific data demonstrating an adverse impact despite compliance with the health based threshold."[26]

To substantiate its allegations, Earthjustice cited to the May 25, 2016 Findings and Recommendations of a Joint Fact Finding Study Group, Pesticide Use by Large Agribusinesses on Kaua'i ("JFF Study Group"). However, the JFF Study Group concluded that there was little reliable data available to study, and what data was available did not support the conclusion that the Kaua'i Westside population was suffering from environmental harm. The JFF Study Group's Executive Summary on health impacts provides an informative synopsis of its findings:

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[24] *Id.*
[25] If compliance with these standards no longer creates a presumption of no violation, it should still be afforded adequate weight. As a non-regulating state entity, it is important for the ADC, and state agencies in general, to be able to rely upon such regulations to determine the relative public safety, as well as legality, of their actions.
[26] *Id.*

> Currently there is not enough information to conclude if pesticide use by the seed companies plays any role in the health of Kaua'i's residents. The JFF Study Group reviewed approximately 20 health conditions in the international literature that are associated with exposure to various types of pesticides. Comparable data for Kaua'i was found for only 11 of these conditions. Five of these conditions – Developmental Delay, Attention Deficit Hyperactivity Disorder (ADHD), Renal Disease, Diabetes, and Obesity – appeared somewhat elevated on the Westside compared to the rest of the island.
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> It is important to note that an association is not proof of causation. Further, due to small population numbers on the Westside, most of these measures cannot be considered statistically significant. We also note that Westside communities have worse health statistics for certain conditions that are not directly associated with pesticides. These conditions include higher incidences of overall mortality from cancer and stroke, infant mortality, admissions for pneumonia, and asthma or COPD in the elderly. These conditions have rates among the highest in the state.

See Findings and Recommendations of a Joint Fact Finding Study Group, Pesticide Use by Large Agribusinesses on Kauai, p. 8.

In October 2014, Kaua'i residents requested the United States Department of Health & Human Services, Division of Community Health Investigations, Agency for Toxic Substances and Disease Registry ("ATSDR"), to evaluate whether agro-chemical practices were affecting the health of their communities. A study was conducted and in August of 2016 a report was generated. That report concluded with the observation that "ATSDR is not able to demonstrate

scientifically whether people near agricultural fields in Kaua'i west side communities are being exposed to pesticides at levels of health concern."[27]

3. ADC has specific non-discrimination policies and procedures.

The EPA also noted it will investigate into "[w]hether 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."[28]

The State of Hawai'i Department of Human Resources Development maintains the Policies and Procedures Manual that is issued for Executive Branch Civil Service.[29] ADC, being a part of the Executive Branch, is covered by these Policies and Procedures; notably Policy No. 601.001.[30] Policy No. 601.001 specifically states that "[t]he State and its appointing authorities are required to and will take appropriate action when discrimination, harassment or retaliation is based on a person's protected class. . . . Every State employee is responsible for assuring that work in the executive branch is conducted in an atmosphere that respects the dignity of every State employee, and people with whom the State conducts business." Policy No. 601.001 contains reporting procedures and also provides information on the Hawai'i Civil Rights Commission and the Equal Employment Opportunity Commission.

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[27] *See* Exhibit "E", p. 5.
[28] EPA Notice, p.1.
[29] *See* Exhibit "F".
[30] *See* Exhibit 7 attached to the Earthjustice Complaint.

The Hawai'i Civil Rights Commission ("CRC") is a state agency dedicated to enforcing state laws prohibiting discrimination. The CRC was created by Act 219, 1988 Haw. Sess. Laws 387, and codified as HRS chapter 368. The CRC was established "to provide a mechanism that provides for a uniform procedure for the enforcement of the State's discrimination laws."[31] The CRC has jurisdiction over HRS chapter 368, part I of HRS chapter 378, part I of HRS chapter 489, and HRS chapter 515.[32] HRS chapter 378 addresses discriminatory employment practices; HRS chapter 489 addresses discrimination in public accommodations; and, HRS chapter 515 addresses discrimination in real property transactions.

As ADC is organized under the executive branch, the non-discrimination policies and procedures in place covering the entire executive branch also cover the ADC. Therefore, should ADC be considered a recipient of federal funds, it 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.

4. **The NPDES permit issue is being litigated and should not be considered here.**

While not mentioned in the EPA Notice, Earthjustice originally alleged that ADC violated Title VI by not having an NPDES permit. Specifically:

> ADC is violating Title VI by discharging pollutants without the requisite National Pollutant Discharge Elimination System (NPDES) permit, to the detriment of Native Hawaiians in West

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[31] HRS section 368.1.
[32] *See* HRS section 368-11(a).

> Kaua'i . . . These unregulated and unmonitored discharges are of particular concern since Native Hawaiians gather limu and fish in these areas. The open ditches are not fenced off or marked with warning signs to prevent children from playing in them. The outfalls funnel polluted waters into areas popular for fishing surfing, swimming, and boating. ADC's unpermitted drainage ditch system in the heart of Kekaha and the surrounding recreational areas has a discriminatory effect on Native Hawaiians and therefore violates Title VI.

Earthjustice Complaint, p. 15.

However, Earthjustice has filed a separate action in federal court asking for a determination on whether ADC is required to obtain an NPDES permit for the action complained of.[33] As the EPA did not mention the issue in its administrative complaint, and the EPA has a policy of dismissing complaints "if the issues raised in the complaint are the subject of either ongoing administrative permit appeals or litigation in Federal or state court," [34] the ADC will not address the NPDES permit unless specifically requested to do so.

5. Conclusion.

As the ADC is not a recipient of EPA financial assistance, there is no jurisdiction to pursue this investigation. If it is determined jurisdiction exists, the allegations made by Earthjustice are not substantiated, even by their own evidence. There is no conclusive evidence of an adverse disparate impact due to ADC not restricting pesticide use on its land further than standards set by federal and state law. Also, the ADC would be in compliance with Title VI as it can make use of the Title VI policy in place for the entire Executive Branch. Accordingly, ADC

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[33] *See Na Kia'i Kai, et. al. v. State of Hawai'i Agribusiness Development Corporation, et. al.*, civil no. 16-00405 DKW-RLP.
[34] Federal Register / Vol. 65, No. 124 / Tuesday, June 27, 2000 / Notices, p. 39673.

respectfully requests that the EPA-ECRCO investigation into the merits of the Earthjustice allegations be terminated.

Sincerely,

Andrew Goff
Deputy Attorney General
State of Hawai'i