

BILL 2491

ORDINANCE NO. _____

BILL NO. __2491_____

A BILL FOR AN ORDINANCE TO AMEND THE KAUA'I COUNTY CODE 1987, AS AMENDED, BY ADDING A NEW ARTICLE 22 TO CHAPTER 22,

RELATING TO PESTICIDES AND GENETICALLY MODIFIED ORGANISMS

BE IT ORDAINED BY THE COUNCIL OF THE COUNTY OF KAUA'I, STATE OF HAWAI'I:

SECTION 1. Chapter 22 of the Kaua'i County Code 1987, as amended, is hereby amended by adding a new Article 22 to read as follows:

"ARTICLE 22. PESTICIDES AND GENETICALLY MODIFIED ORGANISMS

Sec. 22-22.1 Findings.

(a) In order to establish provisions governing the use of pesticides and genetically modified organisms (GMOs), the Council finds that:

(1) Section 1, Article XI of the State Constitution states: "For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai'i's natural beauty and all natural resources, including land, water, air, minerals, and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people."

(2) The rapid, long-term, and unregulated growth of commercial agricultural entities engaged in the use and development of genetically modified organisms in the County of Kaua'i has created a unique situation unlike those facing any other county in the State of Hawai'i. The County of Kaua'i has limited infrastructure, and residents have no choice but to live, work, and commute daily in close proximity to areas where genetically modified organisms are developed, and where there is regular application of restricted use pesticides and general use pesticides.

(3) The people of the County of Kaua'i are growing increasingly concerned about the direct and long-term impacts of the large-scale use of pesticides, and the impacts that the experimentation and intense cultivation of genetically modified organisms have on the land, on the natural environment, and on their health.

(4) Hawai'i Revised Statutes Section 46-1.5(13) states: "Each county shall have the power to enact ordinances deemed necessary to protect health, life, and property, and to preserve the order and

security of the county and its inhabitants on any subject or matter not inconsistent with, or tending to defeat, the intent of any state statute where the statute does not disclose an express or implied intent that the statute shall be exclusive or uniform throughout the State.”

(5) The County of Kaua‘i, more than any other county in the State of Hawai‘i, has become a location of increasing commercial agriculture operations that utilize genetically modified organisms for the production of crop seed, field testing of new genetically modified organisms, and the development of experimental organisms not approved for human consumption or release into the open environment.

(6) Genetically modified plants will inevitably disperse into the environment of the County of Kaua‘i through pollen drift, seed commingling, and inadvertent transfer of seeds by humans, animals, weather events, and other means. Biological contamination of conventional and organic agricultural crops grown within the County of Kaua‘i, through the inadvertent pollen drift from genetically modified plants and material, can have devastating economic impacts.

(7) Records obtained from the State of Hawai‘i Department of Agriculture indicate that twenty-two (22) different restricted use pesticides, comprising 3.5 tons, are used annually on Kaua‘i by five (5) commercial agricultural entities and constitute approximately 99% of the restricted use pesticides utilized by agricultural operations on Kaua‘i.

(8) Many restricted use pesticides and their ability to contaminate groundwater, are often toxic to humans, animals, bees and other insects and are banned in other states across the nation and in many countries. Some of these restricted use pesticides are banned by the entire European Union.

(9) Pesticide-laden dust and drift from both restricted use pesticides and general use pesticides is inevitable and results in long-term exposure to toxic chemicals harmful to County of Kaua‘i residents, wildlife, and endangered species, and are sources of pollution to the natural environment of the County of Kaua‘i.

(10) Hawai‘i Revised Statutes Section 46-17 states: “Any provision of law to the contrary notwithstanding, the council of any county may adopt and provide for the enforcement of ordinances regulating or prohibiting noise, smoke, dust, vibration, or odors which constitute a public nuisance. No such ordinance shall be held invalid on the ground that it covers any subject or matter embraced within any statute or rule of the State; provided that in any case of conflict between a statute or rule and an ordinance, the law affording the most protection to the public shall apply. . .”

(11) The direct, indirect, and cumulative impacts on the County of Kaua‘i regarding the long-term intensive cultivation of genetically modified organisms and associated agricultural practices have not been properly or independently evaluated.

(12) Information pertaining to the intensive use of pesticides within the County of Kaua‘i, and the experimentation and growing of genetically modified organisms, is currently withheld from the public. Thus, the public is unable to evaluate the full extent of negative impacts accruing to the residents and environment of the County of Kaua‘i.

(13) In the interest of protecting the health of the people and fragile natural environment of the County of Kaua'i, the people of the County of Kaua'i have the right to know what pesticides and what genetically modified organisms are being used on a significant scale within the jurisdiction of the County of Kaua'i. The people of the County of Kaua'i have the right to know the potential impacts that these substances and the related agricultural practices are likely to have on their human health, and the health of their environment

Sec. 22-22.2 Purpose. The purpose of this Article is to establish provisions to inform the public, and protect the public from any direct, indirect, or cumulative negative impacts on the health and the natural environment of the people and place of the County of Kaua'i, by governing the use of pesticides and genetically modified organisms, and the penalties associated with any violation of this Article, or the laws, rules, or any other requirement that may be authorized by this Article.

Sec. 22-22.3 Definitions. When used in this Article, the following words or phrases shall have the meaning given in this Section unless it shall be apparent from the context that another meaning is intended:

“Active ingredient” means:

(1) In the case of a pesticide other than a plant regulator, defoliant, or desiccant, an ingredient which will prevent, destroy, repel, or mitigate any pest;

(2) In the case of a plant regulator, an ingredient which, through physiological action, will accelerate or retard the rate of growth or maturation or otherwise alter the behavior of ornamental or crop plants or the produce thereof;

(3) In the case of a defoliant, an ingredient which will cause the leaves or foliage to drop from a plant; and

(4) In the case of a desiccant, an ingredient which will artificially accelerate the drying of plant tissues.

“Ahupua'a” means a land division usually extending from the uplands to the sea.

“Agriculture” means the cultivation of crops, including crops for bioenergy, flowers, vegetables, foliage, fruits, forage, and timber; game and fish propagation; and the raising of livestock, including poultry, bees, fish, or other animal or aquatic life that are propagated for economic or personal use.

“Certified pesticide applicator” means any individual who is certified under Hawai'i Revised Statutes Section 149A-33(1) as authorized to use or supervise the use of any pesticide which is classified for restricted use.

“Commercial agricultural entity” means a firm, corporation, association, partnership, or any organized group of persons, whether incorporated or not, that is engaged in growing, developing, cultivating, or producing agricultural products.

“County” means the County of Kaua'i.

“Department” means the County of Kaua‘i Department of Public Works.

“DOA” means the State of Hawai‘i Department of Agriculture.

“Environment” includes water, air, land, and all plants and humans and other animals living therein, and the interrelationships which exist among these.

“EPA” means the United States Environmental Protection Agency.

“Experimental genetically modified organisms” means organisms that have not received final approval by the Federal Food & Drug Administration, United States Department of Agriculture, United States Environmental Protection Agency, or the appropriate federal regulatory body, for human consumption, release into the environment, or both.

“Experimental pesticide” means:

(1) All pesticides containing any active ingredient or combination of active ingredients that have not been included in any pesticide previously registered with the United States Environmental Protection Agency; and include registered pesticides for which a use, e.g., application to a particular crop, plant, or animal, is not registered with the United States Environmental Protection Agency.

(2) All pesticides shipped or used under an Experimental Use Permit (EUP) issued by the United States Environmental Protection Agency.

“FDA” means the Federal Food & Drug Administration.

“General use pesticide” means a pesticide other than one designated as a restricted use pesticide or an experimental pesticide.

“Genetically modified” means produced from an organism or organisms in which the genetic material has been changed through the application of:

(1) In vitro nucleic acid techniques, which include, but are not limited to: recombinant deoxyribonucleic acid (DNA) techniques; direct injection of nucleic acid into cells or organelles; encapsulation; gene deletion; and doubling; or

(2) Methods of fusing cells beyond the taxonomic family that overcome natural physiological reproductive or recombinant barriers, and that are not techniques used in traditional breeding and selection such as conjugation, transduction, and hybridization.

For purposes of this definition:

(3) “In vitro nucleic acid techniques” include, but are not limited to, recombinant DNA or RNA techniques that use vector systems and techniques involving the direct introduction into the organisms of hereditary materials prepared outside the organisms such as micro-injection, macro-injection, chemoporation, electroporation, micro-encapsulation, and liposomefusion.

(4) An animal that has not itself been genetically modified, regardless of whether such animal has been fed or injected with any food or any drug that has been produced through means of genetic modification, shall not be considered “genetically modified” for purposes of this Article.

“Genetically modified organism” means an organism or organisms whose genetic material has been genetically modified.

“Organism” means any biological entity capable of replication, reproduction, or transferring genetic material.

“Pest” means any insect, rodent, nematode, fungus, weed, or any other form of terrestrial or aquatic plant or animal life or virus, bacterium, or any other microorganism, except viruses, bacterium, or any other microorganisms on or in living humans or other living animals, which the Administrator of the United States Environmental Protection Agency determines to be a pest.

“Pesticide” means:

(1) Any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest; and

(2) Any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant.

“Restricted use pesticide” means:

(1) A pesticide or pesticide use classified by the Administrator of the United States Environmental Protection Agency for use by certified applicators or competent persons under their direct supervision and so designated on the label of the pesticide; or

(2) A pesticide or pesticide use classified by the Hawai‘i Board of Agriculture for use by certified applicators or competent persons under their direct supervision.

“Significant effect” means the sum of effects on the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the State’s environmental policies or long-term environmental goals as established by law, or adversely affect the economic welfare, social welfare, or cultural practices of the community and State.

“Stream” means a body of running water in a channel, bed, or watercourse, which is less narrow than a river.

“USDA” means the United States Department of Agriculture.

Sec. 22-22.4 Mandatory Disclosure of Pesticides, and Genetically Modified Organisms.

(a) It shall be mandatory for all commercial agricultural entities that annually purchase or use in excess of five (5) pounds or fifteen (15) gallons of restricted use pesticides, any amount of any experimental pesticides, or both, during any calendar year to disclose the use of all pesticides (restricted use, general

use, and experimental) during that same calendar year. Disclosure requirements include:

(1) Public posting of signs in the area in which pesticides are to be applied a minimum of seventy-two (72) hours prior to, during, and seventy-two (72) hours after the application of any pesticide.

(2) Disclosure information must be provided to any requesting property owner, lessee, or person otherwise occupying any property adjacent to the property where the pesticide was applied, or anticipated to be applied, within twenty-four (24) hours of receiving a written request.

(3) Annual public reports of all pesticides used during each calendar year shall be provided to the Department and shall be posted online on the County website. Direct notification to the Department documenting such disclosure shall occur no later than sixty (60) days following the end of each calendar year.

(4) Disclosure shall include a listing of all pesticides by federal and state registration or permit numbers, commercial product name and active ingredient, the total quantities used of each pesticide, and a general description of the geographic location including at minimum the Tax Map Key and ahupua'a where the pesticides were used.

(b) It shall be mandatory for all commercial agricultural entities that intentionally or knowingly possess any genetically modified organism to disclose the presence of said genetically modified organism, or organisms.

(1) Annual public reports of all genetically modified organisms intentionally or knowingly possessed during each calendar year shall be provided to the Department and shall be posted online on the County website. Direct notification to the Department documenting such disclosure shall occur no later than sixty (60) days following the end of each calendar year.

(2) Disclosure shall include a general description of each genetically modified organism, a general description of the geographic location including at minimum the Tax Map Key and ahupua'a where each genetically modified organism is being grown or developed, and dates that each genetically modified organism was initially introduced to the land in question.

Sec. 22-22.5 Pesticide Buffer Zones.

(a) Effective January 1, 2014 it shall be mandatory for all commercial agricultural entities that annually purchase or use in excess of five (5) pounds or fifteen (15) gallons of restricted use pesticides, any amount of any experimental pesticides, or both, during any calendar year to restrict the application of all pesticides (restricted use, general use, and experimental) in the following areas:

(1) No pesticide of any kind (restricted use, general use, or experimental) may be used within 500 feet of any school, hospital, residential area, or public roadway.

(2) No pesticide of any kind (restricted use, general use, or experimental) may be used within 500 feet of any stream, river, or shoreline.

(b) If this Section, or any part thereof, is determined to conflict with any labeling information pertaining to such pesticides (restricted use, general use, or experimental), the more restrictive and environmentally protective provisions shall apply.

Sec. 22-22.6 Prohibition of Open Air Testing of Experimental Pesticides.

(a) Effective January 1, 2014, it shall be unlawful to test or use any experimental pesticide, except for those fully contained within a laboratory, contained greenhouse, fermenter, or other contained structure.

(1) All such testing or use may only be conducted in a facility in which the experimental pesticide is contained within a structure designed to prevent the escape of said substance into the open environment, unless this provision is specifically prohibited by permit or other mechanism governed by federal or state authority.

Sec. 22-22.7 Moratorium.

(a) There shall be a temporary moratorium on the experimental use and commercial production of genetically modified organisms until such time as the County of Kaua'i has conducted a complete Environmental Impact Statement (EIS) on the health, environmental, and other effects of the production, propagation, or development of genetically modified organisms within the County. The moratorium will further continue until the County has developed and put into place a permitting process sufficient to protect the residents and environment of the County of Kaua'i from any significant effects that may be identified in the Environmental Impact Statement.

(b) The moratorium shall not apply to landowners, lessees, or licensees engaging in experimental use and commercial production of genetically modified organisms prior to the date that this proposed ordinance was first publicly noticed as a new agenda item for consideration by the Kaua'i County Council, provided that this exception shall not allow an increase of such use or production. To meet this exception, landowners, lessees, or licensees may be required to provide to the Department convincing proof of having been engaged in such use or production prior to the date that this proposed ordinance was first publicly noticed as a new agenda item for consideration by the Kaua'i County Council. Proof shall include explanation of the scope and scale of such use and production.

(c) No new permits, amendments to permits, or exemptions to permit requirements shall be issued by the Department during the moratorium period for any activity that will allow for new or expanded use or cultivation of any genetically modified organism after the date that this proposed ordinance was first publicly noticed as a new agenda item for consideration by the Kaua'i County Council, including but not limited to provisions contained within Kaua'i County Ordinance No. 808 pertaining to Grading, Grubbing, and Stockpiling.

Sec. 22-22.8 Environmental Impact Statement; Administration.

(a) The County of Kaua'i shall complete an Environmental Impact Statement in order to determine and evaluate significant effects of the production, propagation, or development of genetically modified

organisms within the County of Kaua'i, and the use of all pesticides (restricted use, general use, and experimental) associated with the production, propagation, or development of genetically modified organisms within the County of Kaua'i.

(b) The Mayor of the County of Kaua'i shall be the accepting authority as defined by Hawai'i Revised Statutes Chapter 343 and shall authorize the final acceptance acknowledging the completeness of the Environmental Impact Statement documents.

(c) In addition to requirements of the provisions contained within Hawai'i Revised Statutes Chapter 343 and the associated Hawai'i Administrative Rules, there shall be included in the Environmental Impact Statement provisions for the testing of soil, dust, water, air, and human resident volunteers as may be appropriate, measuring the presence of any pesticide or other related chemicals in order to further identify any potential health and environmental concerns, and to establish a baseline for future testing and studies.

(d) In addition to other funding sources, the County may pay for the Environmental Impact Statement process, the permitting process referenced in Section 22-22.9 of this Article, or other necessary mechanisms of this Article, from property taxes that are directly related to those operations engaged in the production, propagation, or development of genetically modified organisms, through new permit application fees, or both.

Sec. 22-22.9 Permitting.

(a) The Department shall develop and implement a permitting process that shall apply to all commercial agricultural entities that intentionally or knowingly possess genetically modified organisms. The permitting process shall include, but not be limited to, provisions that facilitate the elimination or mitigation of significant effects identified in the Environmental Impact Statement referred to in Section 22-22.8 of this Article.

(b) The development of the permitting process shall include, but not be limited to, the completion of the rulemaking process for Kaua'i County Ordinance No. 808 pertaining to Grading, Grubbing, and Stockpiling.

(c) Permit conditions allowing the release of genetically modified organisms into the environment shall include, but not be limited to, measures that shall effectively prevent cross-pollination of non-genetically modified crops, by wind, dust, insects, or other means.

(d) Permit conditions shall include, but not be limited to, provisions for periodic independent testing of soil, dust, water, air, and human resident volunteers as may be required to further identify health and environmental impacts as a result of the permitted activity. Such testing results shall be public information, except that personal identification information of resident volunteers shall be redacted.

(e) Permit conditions shall include, but not be limited to, provisions that limit pesticide-laden dust, dust

containing genetically modified plant residue, or both, from drifting into areas where residents reside or congregate

(f) Permit conditions shall include, but not be limited to, disclosure provisions contained within Section 22-22.4 of this Article.

Sec. 22-22.10 Prohibition of Open Air Testing of Experimental Genetically Modified Organisms.

(a) Effective January 1, 2014 and continuing during the moratorium period, it shall be unlawful to test or use any experimental genetically modified organism, except for those fully contained within a laboratory, contained greenhouse, fermenter, or other contained structure.

(1) All such testing or use may only be conducted in a facility in which any experimental genetically modified organism is fully contained within a structure designed to prevent the escape of said substance into the open environment.

(2) At the conclusion of the moratorium period, open air testing shall be governed by the permit requirements as promulgated in accordance with this Article.

Sec. 22-22.11 Penalties.

(a) Any person, firm, or corporation, whether as principal, agent, employee, or otherwise, violating or causing or permitting the violation of any of the provisions of this Article, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one-thousand dollars (\$1,000.00), or imprisoned not more than one (1) year, or both, for each offense. The continuance of any violation after conviction shall be deemed a new criminal offense for each day that the violation or violations continue.

(b) In addition to any penalty described in Subsection 22-22.11(a), any person, firm, or corporation, whether as principal, agent, employee, or otherwise, violating, causing, or permitting the violation of any of the provisions of this Article, shall be assessed a civil fine of \$10,000-\$25,000 per day, per violation.

Sec. 22-22.12 Rulemaking.

In order to effectuate all provisions of this Article, the Department shall engage in any rulemaking it deems necessary or proper, utilizing the provisions of Hawai'i Revised Statutes Chapter 91. Rulemaking shall include, but not be limited to, procedures necessary for: developing and implementing the permitting process, disclosure requirements, buffer zone requirements, monitoring compliance with this Article, and ensuring the process and imposition of penalties as allowed under federal and state laws."

SECTION 2. Severability Clause. If any provision of this ordinance or the application thereof to any

person, commercial agricultural entity, or circumstance is held invalid, the invalidity does not affect other provisions or applications of the ordinance which can be given effect without the invalid provision or application, and to this end the provisions of this ordinance are severable.

SECTION 3. New material is underscored. In printing this ordinance, the brackets, bracketed material, and underscoring need not be included.

SECTION 4. This ordinance shall take effect upon its approval.

Introduced by:

GARY L. HOOSER TIM BYNUM

DATE OF INTRODUCTION:

Līhu'e, Kaua'i, Hawai'i