



AN ORDINANCE AMENDING CHAPTER 14 OF THE HAWAI'I COUNTY CODE 1983 (2005 EDITION, AS AMENDED), BY ADDING A NEW ARTICLE RELATING TO PROHIBITION OF GENETICALLY MODIFIED ORGANISMS.

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

SECTION 1. Findings and purpose. The Hawai'i County Council, desiring to protect our agricultural heritage, our natural environment, our public health, and our inalienable constitutional rights, finds it necessary to prevent the introduction of transgenic, genetically modified crops, plants, seed, trees, fish, livestock, and other organisms into the County. The Council feels compelled to take such action for the following reasons:

- (1) The United States government has failed to establish adequate protocols and safeguards for the research, testing, and monitoring of genetically modified transgenic crops, fish, trees animals, and other organisms. None of the three federal agencies charged with protecting our agriculture, ecosystems, and public health - the United States Department of Agriculture, the Environmental Protection Agency, and the Food and Drug Administration - have required sufficient basic scientific review of transgenic technologies to assure no harm will occur. None of these agencies have required adequate public research or testing, peer review of industry claims of safety, or multi-generational studies of the impacts on public, environmental, or agricultural health from long-term exposure to transgenic organisms;
- (2) The State of Hawai'i has no regulatory structure in place to monitor where or which transgenic crops are grown, or what their short- or long-term impacts on public, environmental or economic health might be;
- (3) While there are times when it is preferable that agricultural and environmental policy be controlled at the state and federal levels, in lieu of meaningful protections from either, the Council, with this ordinance, is implementing its responsibility of protecting the present and long-term health and welfare of our people, farms, environment, and economy. A decision to release transgenic organisms into our farms, ecosystems, and economy must not be made by just a few private biotechnology corporations, but instead must be a public decision, decided after rigorous public scientific review and extensive opportunity for public debate within the impacted communities;

- (4) The United Nations Biosafety Protocol, with 85 signatory nations, became international law on September 11, 2003. This protocol, not signed by the United States, regulates the transboundary movement of transgenic organisms. At the core of this Protocol is the “Precautionary Principle,” which requires that when a new technology poses threats of damage to human or environmental health, the burden of proof is on the promoter of the technology to prove scientifically that the technology is safe, not on the public or governments to prove that the technology is unsafe. The Council chooses, by way of this ordinance, to implement the Precautionary Principle regarding the introduction of transgenic technologies into our farms and environment;
- (5) The Council believes that unless a particular agricultural product is shown to be in imminent danger of extinction without gene interference, that our natural produce and environment should be supported and conserved;
- (6) The Council believes that whereas the government is generally responsive to acute problems, we must be mindful as leaders in our community to also be on guard against the cumulative negative impact of the overall increase in toxins on ourselves, our children, and on future generations, that may well have a long-term impact on the health of our people and our environment;
- (7) The Council believes that pursuing this agricultural policy that promotes local non-transgenic produce is consistent with the Hawai‘i County General Plan, which provides as one of its economic goals (Economic policies 2.2(h)): “Promote and develop the island of Hawai‘i into a unique scientific and cultural model, where economic gains are in balance with social and physical amenities. Development should be reviewed on the basis of total impact on the residents of the County, not only in terms of immediate short run economic benefits.”;
- (8) The Council seeks to prevent national and international market losses for products from Hawai‘i County’s farms and fisheries, which would likely result from genetic contamination by transgenic organisms of our fresh produce, fruit crops, wild caught fish, and our value-added agricultural products such as coffee, kalo, juices and processed foods;
- (9) The Council seeks to protect the right to farm, so that those farmers who choose to farm without transgenic crop varieties can do so without having their crops and seed stocks genetically contaminated by pollen or seed brought by wind, insects, birds, animals, water, trucks or farm machinery from neighboring farms with transgenic varieties. If transgenic varieties of crops are introduced into the County, those farmers who choose not to use transgenic varieties will in time, very likely suffer genetic contamination of their crops and seed stocks, and suffer loss of their markets for non-transgenic products. For the many certified organic producers in the County, such contamination may result in a loss of organic certification, and loss of premium sales for organic products. Given the high risk of contamination by transgenic varieties on this island, time is of the essence in passage of this general prohibition aimed at preventing agricultural and environmental contamination from genetically modified (transgenic) organisms;

- (10) The Council seeks to protect public and private property owners from expensive eradication and environmental clean-up associated with decontamination of their land from transgenic organisms brought by pollen, or seeds brought by wind, insects, birds, animals, water, trucks or farm machinery;
- (11) The Council seeks to protect public and private property owners from the liability associated with their land or animals becoming contaminated with transgenic organisms, which may then become vectors to contaminate neighboring land or livestock through cross pollination or seed dispersal (in plants or trees) or interbreeding (in animals, insects or fish);
- (12) The Council seeks to protect the ocean fisheries and ecosystems of the Pacific Ocean from contamination by transgenic varieties being developed for private “fish farms.” Because past and current “fish farms” in the United States of America have often accidentally - and illegally - released large amounts of farmed fish into our public rivers and oceans, it is a reasonable assumption that new transgenic varieties in “fish farms” will inevitably escape into our public rivers and ocean;
- (13) The Council seeks to protect the public health from any negative impacts from exposure to poorly tested transgenic organisms. Such exposure might occur through transgenic pollen inhaled or eaten, or by increased exposure to increasingly toxic herbicides and pesticides used to kill “super weeds” and “super bugs” - those farm pest species which quickly evolve and develop herbicide tolerance or pesticide resistance due to continuous exposure to transgenic crops bred to express an herbicide tolerance or a pesticide; and
- (14) The Council seeks to protect Hawai‘i County’s extraordinary diversity of native ecosystems - and the plants, fish, trees, and soil flora and fauna found within - from the possibility of irreversible genetic contamination by species-related transgenic organisms. Such “back-crossing” of transgenic DNA from a transgenic crop to a native relative of the domesticated crop has already been observed in corn, cotton, and canola.

The authority to impose long-term health and environmental sustainability standards is granted to counties by:

- (1) The Hawai‘i Revised Statutes, Section 46-1.5(13), which 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.”;
- (2) The Hawai‘i State Constitution, Article XI, Section 9 “Environmental Rights,” which states: “Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.”;

- (3) The Hawai‘i State Constitution, Article XI, Section 1 “Conservation and Development of Resources,” which states: “For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii'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.”;
- (4) The Charter of the County of Hawai‘i, Article XIII, Section 13-29 - “Conservation of Natural and Cultural Resources” - underscores our public trust obligation to conserve and protect our natural environment on this island, and reads: “For the benefit of present and future generations, the county shall conserve and protect Hawai‘i’s natural beauty and all natural and cultural resources, including but not limited to land, water, air, minerals, energy sources, wahi pana, surf spots, historic sites, and historic structures, 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 county. All public natural and cultural resources are held in trust by the county for the benefit of the people.”;
- (5) Consistent with our constitutional and Hawai‘i County Charter public trust obligations, the precautionary principle is the guiding principle with regard to protection of our natural environment. The “Precautionary Principle” mandates that in the case of uncertainty, the government must favor caution and conservation in the event of uncertainty of the impact on the human and natural environment;
- (6) The United States Constitution, and the 9th Amendment to the United States Constitution, which recognize and secure the fundamental and inalienable right of people to govern themselves; and
- (7) The 14th Amendment to the United States Constitution, which states in part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”

SECTION 2. Chapter 14 of the Hawai‘i County Code 1983 (2005 Edition, as amended) is amended by adding a new article to be appropriately designated and to read as follows:

“Article __. Genetically Modified (Transgenic) Organisms Prohibited.

Section 14-__. Definitions.

As used in this article, unless otherwise specified:

“DNA” means deoxyribonucleic acid.

“Director” means the director of the department of environmental management.

“Organism” means any living thing.

“Person” includes natural persons, partnerships, joint ventures, societies, associations, clubs, trustees, trusts, or corporations or any officer, agent, employee, factor, or any other personal representative thereof, in any capacity, acting either for himself or for any other person, under personal appointment or pursuant to law.

“Physically contained” means following USDA protocols and guidelines at the BSL-3-Ag Containment Level or greater as outlined in USDA Departmental Manual No. 9610-001: “USDA Security Policies and Procedures for Biosafety Level-3 Facilities.”

“Transgenic manipulation” means the extraction of DNA from an organism (the “donor organism”) followed by its introduction into the same or a different organism (the “recipient organism”) in such a manner that the introduced DNA can be transmitted through the reproduction of the recipient organism. “Transgenic manipulation” does include methods utilized to reduce the viability or fertility of the recipient organism as a means of “biological containment,” including but not limited to so-called “genetic use restriction technologies” or “terminator technology.” “Transgenic manipulation” does not include traditional breeding, conjugation, traditional fermentation (such as in the making of beer, wine, bread and yogurt), hybridization, in-vitro fertilization, or tissue culture.

“Transgenic organism” means an organism whose DNA is modified by transgenic manipulation. Such organisms are sometimes referred to as “genetically engineered organisms” (“GE organisms”) or “genetically modified organisms” (“GMOs”).

Section 14-__ . Prohibitions.

- (a) No person shall engage in the propagation, cultivation, raising, growing, sale or distribution of transgenic organisms.
- (b) A violation of this article is declared to constitute an imminent endangerment of agricultural health and environmental health and as such is declared a public nuisance.

Section 14-__ . Exemptions.

- (a) Nothing in this article shall make it unlawful for a person to purchase, sell, distribute, or use human food or animal feed which contains transgenic ingredients (transgenic corn, soy or cotton seed, or their derivatives).
- (b) Nothing in this article shall make it unlawful for state or federally licensed medical or agricultural research institutions, medical or agricultural laboratories or medical or agricultural manufacturing facilities in the County to conduct licensed medical or agricultural research or production involving transgenic organisms whose reproduction in the environment can be physically contained, as defined herein.
- (c) Any person using transgenic organisms in the production of agricultural produce or the raising livestock of any kind prior to the effective date of this article under the exemption allowed in subsections (b) and (c) is exempt from the prohibition set forth above in section 14-__ (a), provided documentation of the usage, the defined location and the extent thereof, is submitted to the department of environmental management, along with proof that all transgenic organisms are physically contained, as defined herein. The proof submitted, such as by way of a description written by the person seeking the exemption accompanied by photographs, shall also include a sworn statement that the containment facilities shall be maintained in good condition. The exemption shall be valid in the location of its reported usage, provided an updated report is submitted on an annual basis.

Section 14-__. **Administration; enforcement.**

- (a) The director shall administer and enforce this article and shall exercise such powers as legal and necessary to carry out and effectuate the purposes and provisions herein.
- (b) Within ten business days of having reason to suspect that a violation of the this article has occurred, the director shall give written notice to the suspected person that any organisms in violation of this article constitute a public nuisance and are subject to confiscation and destruction, and that a violator is subject to the administrative and abatement costs and the civil penalties set forth in this article.
- (c) Any person who receives notification under subsection (b) shall respond within ten business days with evidence that such organisms are not in violation of this article, or that such organisms have been destroyed or entirely removed from the County.
- (d) Within ten business days of receiving notification under subsection (b), the notified person may submit additional information and request of the director reconsideration of whether a violation has occurred. The director shall respond to the request for reconsideration within thirty days.
- (e) Within twenty business days of providing written notice to a person pursuant to subsection (b), the director shall determine if the organisms are in violation of this article, and whether any subject organisms have been destroyed or entirely removed from the County. The director shall consider evidence submitted under subsections (c) and (d), and any other evidence presented or which is relevant to the determination of such violation.
- (f) Upon making a determination that a violation of this article exists, the director shall thereafter promptly take all actions necessary to ensure that such organisms are confiscated and destroyed or arrangements made for removal from the County.
- (g) The director shall submit an annual report to the council describing all complaints received and enforcement actions taken under this article, including information regarding the types and amounts of organisms in violation of this article, the locations of any violations, and the steps that have been taken to destroy or remove such organisms. The report shall include a list of all persons who have sought and received exemptions to the prohibitions of this article, as allowed herein. This report shall be made available to the public by the council. This subsection shall not have effect in cases of violations, or suspected violations, of this article where the director is bound by a court order or by state law to not disclose facts in an ongoing investigation.
- (h) The prohibitions of this article on engaging in the propagation, cultivation, raising, growing, sale or distribution of transgenic organisms shall supersede any privileges and immunities set forth in this Code which may exempt agricultural or other activities from nuisance abatement.

Section 14-__. **Penalties.**

- (a) Any person who knowingly violates this article shall be held responsible for administrative and abatement costs associated with actions taken by the director, including but not limited to the:
 - (1) Costs of investigation;

- (2) Costs of removing and destroying transgenic organisms, and of cleanup and restoration of the environment;
 - (3) Cost of County employee enforcement time;
 - (4) Court and legal costs; and
 - (5) Costs of monitoring compliance.
- (b) Any person who knowingly violates this article shall be fined \$1,000 for each violation payable to the director of finance.
 - (c) Unless allowed by exemption as provided in this article, persons who possessed transgenic organisms prohibited by this article prior to its effective date shall be in violation of this article, and are subject to the enforcement provisions herein. Such persons, however, shall not be assessed the administrative and abatement costs in subsection (a), nor fined as provided in subsection (b), provided that person report to the director the fact of that person's possession of such prohibited transgenic organisms within sixty days of the effective date of this article, and can demonstrate to the director's satisfaction that such prohibited transgenic organisms have been destroyed or removed from the County.
 - (d) The provisions of this article are cumulative, and nothing in this article affects any other remedies any individual or government entity may have against any person resulting from a violation of this article.

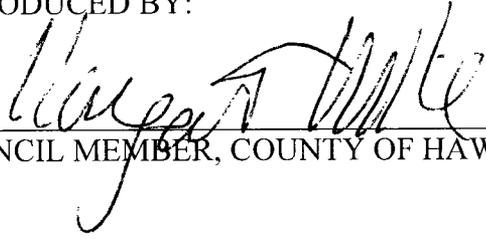
Section 14-__. **Citizen suits.**

- (a) This article hereby creates and vests a right in all citizens of the County to sue the County to compel compliance with this article. All actions shall be filed in the Third Circuit Court, County of Hawai'i.
- (b) At least thirty days prior to the filing of any citizen suit, the prospective citizen-plaintiffs shall provide written notice to the director of their intent to sue. The director shall initiate the enforcement of this article within ten business days of receipt of the notice. Action by the director to initiate enforcement of this article following the notice by a citizen-plaintiff shall supplant the citizen-plaintiff's right to file a citizen suit.
- (c) If the action by the director does not demand injunctive relief and damages for a violation of this article, the right of the citizen-plaintiffs to initiate a suit shall not be impaired by the actions of the director.
- (d) To the extent a citizen-plaintiff is successful in finding a violation of this article, the Court may award reasonable attorneys fees in addition to the fines payable to the director of finance."

SECTION 3. If any provision of this ordinance, or the application thereof to any person or circumstance is held invalid, such invalidity shall 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 declared to be severable.

SECTION 4. This ordinance shall take effect upon approval.

INTRODUCED BY:



COUNCIL MEMBER, COUNTY OF HAWAII

_____, Hawai'i

Date of Introduction:

Date of 1st Reading:

Date of 2nd Reading:

Effective Date:

REFERENCE **Comm.** 271