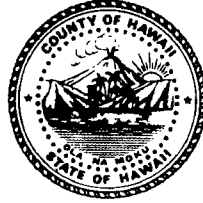


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HAWAI'I COUNTY COUNCIL

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TO: J Yoshimoto, Chair
and Members of the Hawai'i County Council

FROM:  Margaret Wille, Council Member

Date: May 28, 2013

Subject: Proposed Amendments to Bill No. 79; Relating to Genetically Modified Organisms

COUNTY CLERK
COUNTY OF HAWAII
MAY 28 PM 3:07

Please find attached a proposed Bill No. 79, Draft 2.

The proposed amendments to Bill No. 79 are significant in volume and meaning, and as such, are being offered by way of substitution per Robert's Rules of Order, which provides the following as a permissible form of amendment: "To substitute, that is in effect, to strike out a paragraph, or the entire text of a resolution or main motion, and insert another." (§12, page 129, Robert's Rules of Order, Newly Revised, 10th Edition)

Thank you.

MW/dh
att

Comm. No. 271.146
Ref. To: PIPSMTC
Ref. Date MAY 29 2013

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. 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-__ Findings and purpose. The council, desiring to protect our agricultural heritage, our natural environment, our public health, and our inalienable constitutional rights, finds it necessary to restrict the further introduction and use of transgenic, genetically modified crops, plants, seed, trees, fish, livestock, and other genetic organisms in Hawai'i County. The council feels compelled to take such action for the following reasons:

- (1) Conservation of public trust resources. Utilization of public trust resources –trust including water and land - is governed by the public trust doctrine. Pursuant to the precautionary principle of our State and its County subdivisions, natural resources are held in trust for the benefit of both current and future generations. The council chooses, by way of this ordinance, to implement the precautionary principle regarding the introduction of transgenic technologies into our farms and environment;
- (2) The Hawai'i State Constitution, Article XI, Section 1 “Conservation and Development of Resources,” 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.”;
- (3) The Charter of the County of Hawai'i, Article XIII, Section 13-29 - “Conservation of Natural and Cultural Resources” - likewise sets forth our public trust obligation to conserve and protect our natural environment on this island: “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.”;

- (4) The council acknowledges that inherent in the public trust doctrine is the precautionary principle. The precautionary principle mandates caution and conservation when information is uncertain or unknown, especially when there is a potential risk to long-term human and environmental health;
- (5) The Intermediate Court of Appeals in *Kaua'i Springs Inc. vs. Planning Commission of the County of Kaua'i*, dated April 20, 2013, as well as the Circuit Court of the Third Circuit in *Missler v. Board of Appeals of the County of Hawai'i*, dated April 15, 2013, both recently underscored the importance of the public trust doctrine and its corollary precautionary principle. In *Kaua'i Springs* the Intermediate Court of Appeals reaffirmed that the county government in its trustee capacity is subject to the precautionary principle and therefore must exercise a higher level of scrutiny in establishing reasonable measures and making appropriate assessments in order to avoid harmful impacts to our public trust resources. In both the *Missler* and the *Kaua'i Springs* case, the Court made clear that the public trust doctrine applies where activities aimed at economic commercial gain regardless of whether the property is public or private;
- (6) The United Nations Biosafety Protocol, with 85 signatory nations, became international law on September 11, 2003. This international protocol, though not signed by the United States, regulates the transboundary movement of transgenic organisms. This international protocol implements the "Precautionary Principle." In this context the Precautionary Principle requires that 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;
- (7) The council therefore recognizes the right of the people and their government to guard against the intrusion of potential contaminants without having to first wait for definitive science. As the United States Supreme Court made clear in *Maine vs. Taylor* (1986) "the constitutional principles underlying the commerce clause cannot be read as requiring the State . . . to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences";
- (8) The council believes the federal government has not required safeguards for the research, testing, use, and monitoring of genetically modified transgenic crops, fish, trees animals, and other organisms, and is concerned that federal agencies have allowed genetically modified crops and foods exemptions from scientific tests normally required in the case of products intended for human consumption;
- (9) The council believes that 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 to protect 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 public debate within the impacted communities;

- (10) The council is aware that the State of Hawai‘i has not established a regulatory structure in place to monitor where or which transgenic crops are grown, or what their short- or long-term impacts may be on public, environmental or agricultural economic health;
- (11) The council therefore 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. The council acknowledges that papaya was in imminent danger of extinction and for that reason genetically modified papaya were introduced;
- (12) The council is aware that the international demand for GMO papaya and other GMO crops is far more limited than in the case of non-GMO products;
- (13) 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;
- (14) The council believes that pursuing an agricultural policy that promotes local non-GMO produce provides a unique economic opportunity to capture a niche market for non-GMO produce and meats. Optimizing this opportunity 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.”;
- (15) 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;
- (16) 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, vehicles, farm machinery, clothing, or in any other manner 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 commonly recognized 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;

- (17) The council aims to protect public and private property owners from expensive eradication and environmental clean-up associated with decontamination of their land from transgenic organisms brought through no actions of their own;
- (18) 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);
- (19) The council seeks to protect the public health from any negative impacts caused by 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” - that are carried by the wind or otherwise. “Super weeds” or “Super bugs” are 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;
- (20) The council seeks to protect Hawai‘i County’s extraordinary diversity of native ecosystems from the possibility of irreversible genetic contamination by species-related transgenic organisms;
- (21) The council is also aware of the importance of promoting a close relationship with nature, and that which is natural, as part of the sense of place and cultural identity of this Hawaiian island as a place of healing and wellness;
- (22) 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 and elsewhere 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;

- (23) The council recognizes that supporters of the genetically modified related biotech industry seek to pass various federal and state bills to prevent the local regulation (“home rule”) of agriculture generally and in particular over agricultural use genetically modified organisms, but believes there is no current federal or state law that preempts this ordinance, and knows of no court case to the contrary;
- (24) The council is aware that the cultivation of genetically modified crops generally requires the application of significant amounts of herbicides, in particular glyphosate also known by its trade name Roundup, and that the use of glyphosate may be a source of water pollution. Round-up also degrades soil health, killing the microbial life of the soil, and is known to then release carbon from the soil into the air as those organisms die.; and
- (25) As discussed in the United States Department of the Interior technical announcement dated August 29, 2011 entitled “Widely Used Herbicide Commonly Found in Rain and Streams in the Mississippi River Basin”, glyphosate has been detected in surface waters, streams, rain, and even in the air in the areas were it is commonly used. Given the potential for water pollution by glyphosate as used in connection with the cultivation of genetically modified crops, and in light of the precautionary principle, the council finds any restriction on nuisance suits to be inapplicable.

Section 14-__ . Authority.

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 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

- (4) 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 14-__. **Definitions.**

As used in this article, unless otherwise specified:

“DNA” means deoxyribonucleic acid.

“Director” means the director of the department of research and development.

“Department” means the department of research and development.

“Genetically Modified Organism” (“GMO”) means an organism or microorganism whose genetic material has been altered by transgenic manipulation. Such organisms are sometimes referred to as “genetically engineered organisms” (“GE organisms”) or “transgenic organisms.”

“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 establishing a secure area that is: (1) identified with signage on the boundary of the secure area, such that the signage is visible at all entry points; and (2) separated by a buffer zone at least seven hundred-fifty feet wide from adjoining properties and water sources, and which buffer area is maintained as a GMO-free buffer or alternatively in which secure area all GMO are completely contained in greenhouses or other enclosed facilities. The signage shall include wording to indicate the presence of GMO or transgenic organisms. The buffer area separation to adjacent property may be reduced based on submission of sufficient information to demonstrate that there is no danger of contamination of adjacent properties or water sources by the genetically modified organism.

“Register” or “Registration” means registration of use of genetically modified organisms or transgenic manipulation, which shall include: the name of the owner of the property (TMK); the lessee or any other party in control of the GMO operation or usage; the type of genetically modified organism or transgenic manipulation used; the produce or products involved; the type, frequency, and customary amount of herbicides and pesticides used; a description of the containment methods employed; and relevant contact information.

“Transgenic manipulation” means the fabrication or alternation of DNA, or its extraction 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” includes 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.

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.
- (c) 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 from a violation of this article, such as by way of a suit for public nuisance or for a violation of the Hawai‘i State Constitution, Article XI, Section 9 “Environmental Rights.”

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) Horticultural exemption: Nothing in this article shall make it unlawful to cultivate genetically modified horticultural plants that are used solely for non-edible purposes.
- (c) Physically contained medical or agricultural facilities exemption: 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 and is physically contained and registered as defined herein;
- (d) Papaya exemption: Nothing in this article shall make it unlawful to cultivate genetically modified papaya, provided compliance with the registration requirements listed in section _____, and further provided that any cultivation or propagation locations have a minimum seven hundred-fifty foot buffer to any adjacent private property, or are otherwise sufficiently contained to prevent cross-pollination or wind drift pollution of GMO organisms on to non-GMO cultivated property.
- (e) Livestock exemption: Nothing in this article shall make it unlawful for those customarily engaged in the use of genetically modified feed for livestock to continue to use genetically modified feed, provided annual compliance with the registration requirements of this article listed in section _____. This exemption shall only apply to persons who are actively utilizing genetically modified feed as of the effective date of this article.

Section 14-__. **Administration.**

The director shall administer this article and shall exercise such powers as legal and necessary to carry out and effectuate the purposes and provisions herein.

Section 14-__. **Registration.**

- (a) All persons using genetically modified or transgenic manipulated produce or products of any kind shall register annually with the department, as defined in section ____, beginning within ninety days of the effective date of this article.
- (b) All persons using genetically modified organisms or transgenic manipulated produce or products shall be required to pay an annual registration fee of \$100 per location. All contiguous land shall be treated as a single location.

Section 14-__. **Enforcement.**

- (a) The director shall 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 this article has occurred, the director shall give written notice to the suspected person that a violation of this article constitutes a health hazard and that genetically modified crops and organisms are subject to confiscation and or 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 twenty business days with evidence that the subject crops or other organisms are not in violation of this article.
- (d) Within thirty business days of providing written notice to a person pursuant to subsection (b), the director shall determine if a violation has occurred, or alternatively the director may inform the person that additional time is needed to determine whether a violation has occurred, along with an estimate of the time that will be required to make the determination. Absent exceptional extenuating circumstances, all determinations of violations of this article shall be made within ninety days of the first notice of violation. In making a determination, the director shall consider all relevant evidence submitted.
- (f) Upon making a determination that a violation of this article exists, the director shall thereafter promptly issue an order of violation specifying the penalties due, and take all actions necessary to ensure that all such genetically modified crops and or other organisms are confiscated and destroyed or arrangements made for removal from the County, and that no further violation will occur.
- (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. 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) In the event that a person engaged in the cultivation or processing of genetically modified crops is found to violate this article on more than one occasion, that person may be required to obtain insurance to cover potential damages related to contamination of other properties and water sources.
- (i) Any person who has been found in violation of this article on more than one occasion shall be required to post a bond to ensure compliance with this article and ensure non-contamination of abutting properties.
- (j) 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 on that person's or another's property;
 - (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 location in violation. All abatement fees and fines shall be payable to the director of finance.
- (c) Any person who does not timely obey any order of violation, including relating to the confiscation or removal of the crops or other organisms found in violation, shall be additionally fined a minimum of \$500 per day for each location in violation.
- (d) 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 thereafter, 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), if that person reports to the director the fact of that person's possession of such prohibited transgenic organisms within ninety days of the effective date of this article, and demonstrates to the director's satisfaction that such prohibited transgenic organisms have been destroyed or removed from the County, and that the subject location will no longer be used for genetically modified crops or other genetically modified organisms.

- (e) 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) 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. 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, except as provided for in subsection (c).
- (c) If the action by the director does not demand appropriate 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 director’s actions or failure to act.
- (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 2. 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 3. This ordinance shall take effect upon approval.