

Revision of Chapter 4-66, Hawaii Administrative Rules ("HAR")

Pursuant to comments received from members of the Hawaii Board of Agriculture at the January 23, 2018 Board Meeting, the Hawaii Department of Agriculture, Pesticide Branch, **withdraws** the following proposed definitions contained in HAR section 4-66-2 of the proposed rules provided for the Board's consideration on January 23, 2018:

On page 7:

"Fungicide" means a pesticide used to control or destroy fungi on food or grain crops.

On page 11:

"Tolerance" means the maximum pesticide residue limit that may legally remain in or on treated foods.

The Pesticide Branch proposes that the definition of "Fungicide" be returned to its 2006 version, except for the nonsubstantive changes made below for proper grammar, clarity and consistency throughout the rules.

The definition of "Fungicide" in HAR section 4-66-2 shall be replaced with the following:

"Fungicide" means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any fungus, bacterium, or virus. Fungicides include:

- (1) Products intended for use as seed or plant treatments to destroy or prevent fungus diseases;
- (2) Products intended for use in disinfecting, sanitizing, or sterilizing premises or other inanimate objects to prevent or destroy organisms which cause diseases of man or other animals;
- (3) Products for use in reducing bacterial counts in water or air; and
- (4) Products intended for use as wood preservatives which prevent rot or decay in wood by preventing or destroying organisms which cause decay or rot;

Products not considered fungicides include:

- (1) Products intended for use in preventing or destroying any fungus or virus on or in

living man or other animals and those on or in processed food, beverages or pharmaceuticals (the term processed foods includes processed animal feed and the term pharmaceuticals is intended to include cosmetics); and

- (2) Paints [~~which~~] that are treated to protect the paint itself and bear no claim for preventing or destroying fungi after application to any surface.

The Pesticide Branch proposes that the definition of "Tolerance" be removed from the proposed rules in its entirety.

The Pesticide Branch also **withdraws** the following reference to "Tolerance" in HAR section 4-66-43(c) of the proposed rules provided for the Board's consideration on January 23, 2018:

On page 50:

(c) The tolerances for residues set forth in title 40, part 180, Code of Federal Regulations, published by the Office of the Federal Register, as amended as of July 1, 2017, are incorporated and made a part of this section for enforcement purposes.

HAR section 4-66-43 shall be replaced with the following:

§4-66-43 Enforcement. (a) [~~The~~] As allowed by law, the head may enter any place or conveyance where pesticides or nonchemical pest control devices are manufactured, stored, packed, delivered for transportation, transported, offered for sale or sold, and may inspect and take samples of the pesticides and nonchemical pest control devices. An unbroken package [~~shall~~] may be taken as the official sample where the pesticide is packed in small bottles, or small packages. Where the pesticide is packed in large containers, the official samples [~~shall~~] may be a portion taken from one original unopened package in a lot. A chain-of-custody for each sample, from collection through analysis and final disposition, shall be maintained on forms prescribed by the head.

(b) As allowed by law, the head may enter any place or conveyance where pesticides are suspected of being applied on non-target sites or locations, or where pesticides are suspected of being applied in a manner

inconsistent with the pesticide label, and may inspect and take official samples where pesticide residue is likely to be present. A chain-of-custody for each sample, from collection through analysis and final disposition, shall be maintained on forms prescribed by the head.

~~[(b)]~~ (c) Methods of analyzing samples shall be those adopted and published by the Association of Official Analytical Chemists, ~~[Eighteenth (18th) edition]~~ Official Methods of Analysis of AOAC International (20th edition 2016), where applicable, and ~~[the]~~ other methods as may be necessary to determine whether the product complies with the Act or ~~[this rule]~~ these rules.

~~[(e)]~~ (d) A notice of ~~[apparent]~~ violation shall include:

- (1) If from an examination or analysis, a pesticide or nonchemical pest control device appears to be in violation of the Act or ~~[this rule]~~ these rules, a notice in writing shall be sent to the person against whom proceedings are contemplated, giving that person the opportunity to offer a written explanation. The notice shall state the manner in which the sample failed to meet the requirements of the Act or ~~[this rule]~~ these rules; and
- (2) Any person may, in addition to this written reply to the notice, file with the head within twenty days of receipt of the notice a written request for a hearing in connection therewith.

~~[(d)]~~ (e) The head may issue "stop sale" and "removal from sale" orders to vendors regarding any pesticide or nonchemical pest control device ~~[which]~~ that violates or fails to comply with the provisions of the Act or ~~[this]~~ these rules, and may place written or printed "stop sale" and "removal from sale" notices on any pesticide or nonchemical pest control device.

- (1) Upon receipt of the ~~[orders]~~ "stop sale" or "removal from sale" order, the vendors shall correct the violation and effect full compliance therewith. The articles shall not hereafter be sold, offered for sale, transferred or disposed of except upon authorization by the head; and
- (2) No person shall remove, deface or tamper with any "stop sale" and "removal from sale" notice issued by the head.

~~[(e)]~~ (f) The head may seize any pesticide or nonchemical pest control device that is distributed, sold, offered for sale, transported, or delivered for transportation in violation of the Act or ~~[this rule]~~ these rules. No notice or hearing shall be required prior to the seizure of a pesticide or nonchemical pest control device. [Eff 7/13/81; am and comp 12/16/06; am and comp] (Auth: HRS §§149A-11, 149A-20, 149A-21, 149A-33) (Imp: HRS §§149A-11, 149A-20, 149A-21, 149A-33)

Finally, the Pesticide Branch proposes that ", other than the research," be inserted in HAR section 4-66-47, item (3) to clarify the meaning of "benefit" and shall read as follows:

(3) ~~[from which the user does]~~ the research personnel conducting the tests do not expect to receive any benefit, other than the research, in pest control from ~~[its use]~~ the use of the substance or mixture of substances.

Dated: January 30, 2018

Respectfully submitted,

JOHN McHUGH, PhD
Pesticide Program Manager

BELOW PLEASE FIND REPLACEMENT PAGES FOR THE BOARD'S DRAFT COPY OF THE PROPOSED RULES.

From the pages that follow:

The first and second pages replace pages 7 & 8;

The third page replaces page 11;

The fourth and fifth pages replace pages 50 & 51; and

The sixth page replaces page 53.

the time of application or soon after, to any site other than the area intended.

"Enclosed space production" or "greenhouse production" means production of an agricultural plant indoors or in a structure or space that is covered in whole or in part by any nonporous covering and that is large enough to permit a person to enter.

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

"EPA" means the United States Environmental Protection Agency.

"FIFRA" means the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. sections 136 et[-] seq., as amended.

"Finished bait" means an end use bait product [~~which~~] that requires no preparation or mixing.

"Front panel" means that portion of the label of a pesticide product that is ordinarily visible to the purchaser under the usual conditions of display for sale.

"Fungicide" means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any fungus, bacterium, or virus. Fungicides include:

- (1) Products intended for use as seed or plant treatments to destroy or prevent fungus diseases;
- (2) Products intended for use in disinfecting, sanitizing, or sterilizing premises or other inanimate objects to prevent or destroy organisms [~~which~~] that cause diseases of [~~man~~] humans or other animals;
- (3) Products for use in reducing bacterial counts in water or air; and
- (4) Products intended for use as wood preservatives [~~which~~] that prevent rot or decay in wood by preventing or destroying organisms which cause decay or rot;

Products not considered fungicides include:

- (1) Products intended for use in preventing or destroying any fungus or virus on or in living [~~man~~] humans or other animals and those on or in processed food, beverages or

pharmaceuticals (the term processed foods includes processed animal feed and the term pharmaceuticals is intended to include cosmetics); and

- (2) Paints [~~which~~] that are treated to protect the paint itself and bear no claim for preventing or destroying fungi after application to any surface.

"Hazard" means a situation where there exists a possibility that a given pesticide will cause injury or have unreasonable adverse effects on the environment.

"Head" means the administrative head of the division of plant industry, Hawaii department of agriculture, or any officer or employee to whom authority has been duly delegated.

"Herbicide" means any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any weed including any algae or other aquatic weed, or any plant parts growing where not wanted.

"Insecticide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any insect. The term shall not include pharmaceutical products approved by the United States Food and Drug Administration for use, under prescription by a licensed physician on humans or by a licensed veterinarian on animals.

"LC₅₀" means a concentration of substance, expressed as parts per million parts of medium, [~~that~~] which is lethal to fifty per cent of the test population of animals under test conditions acceptable for registration under FIFRA.

"LD₅₀" means a single dermal or oral dose of a substance, expressed as milligrams per kilogram (mg/kg) of body weight, [~~that~~] which is lethal to fifty per cent of the test population of animals under test conditions acceptable for registration under FIFRA.

~~"License" [for the purposes of sections 4-66-52, 4-66-53 and 4-66-66 Hawaii Administrative Rules (HAR), means and is interchangeable with a permit under sections 149A-17 and 149A-18]~~ means the process of

against pest access, and that contain no toxicants, such as certain pruning paints to trees.

"Private pesticide applicator" or [~~private applicator~~] "private applicator" means a certified pesticide applicator who uses or supervises the use of any pesticide [~~which~~] that is classified for restricted use for purposes of producing any agricultural commodity on property owned or rented by the applicator or the applicator's employer or if applied without compensation other than trading of personal services between producers of agricultural commodities on the property of another person.

"Reasonable" means that which is appropriate, fair and sensible for a particular situation as understood by a person of average caution under the same or similar circumstances.

"Reentry" means the action of entering an area or site where a pesticide has been applied.

"Rodenticide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating animals belonging to the Order Rodentia of the Class Mammalia such as rats, mice, gophers, rabbits, hares, and closely related species.

"Runoff" means rainfall or snowmelt events that flow over land or impervious surfaces, such as paved streets, parking lots, building roof tops, and does not soak into the ground.

"Surface water" means water upon the surface of the earth in bounds created naturally or artificially including, but not limited to, lakes, rivers, ponds, streams, other watercourses, reservoirs, and coastal waters subject to the jurisdiction of the State of Hawaii. Water from natural springs is surface water when it exits from the spring onto the earth's surface.

"Under the direct supervision of a certified applicator" [~~means,~~] means that, unless otherwise prescribed by a pesticide's labeling, [~~that~~] a pesticide shall be considered to be applied under the direct supervision of a certified applicator if it is applied by

sample, from collection through analysis and final disposition, shall be maintained on forms prescribed by the head.

~~[(b)]~~ (c) Methods of analyzing samples shall be those adopted and published by the Association of Official Analytical Chemists, [~~Eighteenth (18th) edition~~] Official Methods of Analysis of AOAC International (20th edition 2016), where applicable, and [~~the~~] other methods as may be necessary to determine whether the product complies with the Act or [~~this rule~~] these rules.

~~[(e)]~~ (d) A notice of [~~apparent~~] violation shall include:

- (1) If from an examination or analysis, a pesticide or nonchemical pest control device appears to be in violation of the Act or [~~this rule~~] these rules, a notice in writing shall be sent to the person against whom proceedings are contemplated, giving that person the opportunity to offer a written explanation. The notice shall state the manner in which the sample failed to meet the requirements of the Act or [~~this rule~~] these rules; and
- (2) Any person may, in addition to this written reply to the notice, file with the head within twenty days of receipt of the notice a written request for a hearing in connection therewith.

~~[(e)]~~ (e) The head may issue "stop sale" and "removal from sale" orders to vendors regarding any pesticide or nonchemical pest control device [~~which~~] that violates or fails to comply with the provisions of the Act or [~~this~~] these rules, and may place written or printed "stop sale" and "removal from sale" notices on any pesticide or nonchemical pest control device.

- (1) Upon receipt of the [~~orders~~] "stop sale" or "removal from sale" order, the vendors shall correct the violation and effect full compliance therewith. The articles shall not

hereafter be sold, offered for sale, transferred or disposed of except upon authorization by the head; and

- (2) No person shall remove, deface or tamper with any "stop sale" and "removal from sale" notice issued by the head.

~~[(e)]~~ (f) The head may seize any pesticide or nonchemical pest control device that is distributed, sold, offered for sale, transported, or delivered for transportation in violation of the Act or ~~[this rule]~~ these rules. No notice or hearing shall be required prior to the seizure of a pesticide or nonchemical pest control device. [Eff 7/13/81; am and comp 12/16/06; am and comp] (Auth: HRS §§149A-11, 149A-20, 149A-21, 149A-33) (Imp: HRS §§149A-11, 149A-20, 149A-21, 149A-33)

§4-66-44 Notice of ~~[judgment.] enforcement action.~~

Publication of judgments of the courts in cases arising under the criminal or seizure provisions of the Act or ~~[this rule]~~ these rules, and any final order issued by the department for violation of the Act or these rules, may be made in the form of notices, circulars, or bulletins as the head may direct. [Eff 7/13/81; comp 12/16/06; am and comp] (Auth: HRS §§149A-21, 149A-33) (Imp: HRS §§149A-21, 149A-33)

§4-66-45 Experimental use permits; generally.

Experimental use permits may be issued for the intrastate shipment, delivery or use of a pesticide product ~~[which]~~ that is to be tested further to determine the scope and limitations of its usefulness and the effect of its use on humans and the environment. Permits may be issued for products for use in experimental programs under the supervision of applicators certified in demonstration and research pest control and broad scale testing under normal conditions of use. The head may require the information and data concerning the product and the proposed testing program ~~[which]~~ that is deemed necessary to make determinations on the merits of the proposals. [Eff 7/13/81; am and comp 12/16/06; am and comp] (Auth: HRS

being put through laboratory, [~~greenhouse~~] enclosed space production, or limited field trials of less than one-fourth acre, in which the [purpose is to determine its value] following three criteria have been met: (1) the purpose of the laboratory, enclosed space production, or limited field trials is to determine the value of a substance or mixture of substances as a pesticide or to determine its toxicity, or other properties[7]; (2) [where] the tests [are being] will be conducted by recognized research personnel; and (3) [from which the user does] the research personnel conducting the tests do not expect to receive any benefit, other than the research, in pest control from [its use] the use of the substance or mixture of substances.

[These] If these three criteria are met, the substances or mixture of substances are not considered to be pesticides within the meaning of the Act or [this rule] these rules. No State experimental use permit is required if an experimental use permit has been issued by the EPA for the proposed trial(s).

Written notification shall be submitted on forms prescribed by the head. [Eff 7/13/81; am and comp 12/16/06; am and comp] (Auth: HRS §§149A-19, 149A-22, 149A-33, 7 USC §136v (a)) (Imp: HRS §§149A-19, 149A-22, 149A-33)

§4-66-48 Experimental use permits; provisions for issuance. (a) A permit is required for a pesticide intended for experimental use [~~which~~] that is not exempt under section 4-66-47. If a pesticide is to be tested for a use, which is likely to result in a residue on or in food or feed, a permit for experimental use may be issued provided:

(1) A tolerance or exemption from the requirements of a tolerance has been established under section 408 of the Federal Food, Drug, and Cosmetic Act, section 346a of title 21, United States Code (2017); or a regulation established under section 409 of the Federal Food, Drug, and Cosmetic Act, section 348 of title 21, United States Code (2017); or

(2) The food or feed product derived from the experimental use permit shall be destroyed or