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ATTACHMENT B
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Board of Agriculture
Honolulu, Hawaii

HEARING OFFICER'S REPORT AND RECOMMENDATION ON PROPOSED AMENDMENTS TO CHAPTER 4-72, (HAR), ENTITLED "PLANT AND NON-DOMESTIC ANIMAL QUARANTINE PLANT INTRASTATE RULES", AMONG OTHER THINGS: IMPLEMENT QUARANTINE RESTRICTIONS ON THE COCONUT RHINOCEROS BEETLE (CRB) AND CRB HOST MATERIALS WITHIN THE STATE; IMPLEMENT FEES FOR INSPECTIONS AND THE PROCESSING AND ISSUANCE OF PERMITS; ESTABLISH AUTHORITY TO PROHIBIT THE MOVEMENT OF INFESTED MATERIALS WITHIN THE STATE; INCLUDE PENALTIES FOR NON-COMPLIANCE; AND MAKE OTHER CHANGES FOR CLARITY OR SIMPLIFICATION AND OTHER NON-SUBSTANTIATIVE CHANGES CORRECTING GRAMMAR, PUNCTUATION, OR TYPEFACE.

I. Notice of Public Hearings

Pursuant to section 4-1-28, Hawaii Administrative Rules (HAR), I am filing the Hearing Officer's Report on the proposed amendments to Chapter 4-72, HAR, that will, among other things: clarify that infested post host material or pests may not be transported between or within islands of the State unless treated and that the inspectional requirements and prohibitions not apply in certain circumstances; establishes quarantine restrictions on coconut rhinoceros beetle (CRB) and CRB host material, including designating the entire island of Oahu as infested; includes fees for inspections and permits; and clarifies penalties for violations.

Please note, the original hearings officer Mrs. Carol Okada left the department in June. As a result, Plant Quarantine Branch Manager Jonathan Ho was appointed as the hearing officer to complete the rule amendment process.

On February 28, 2023, the Board of Agriculture (Board) preliminarily approved these proposed amendments. Following the Governor's preliminary approval to proceed to public hearing on the proposed amendments, a Notice of Public Hearing was published on December 27, 2023, in the Honolulu Star-Advertiser, The Garden Island, Hawaii



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Tribune-Herald, West Hawaii Today, and The Maui News for statewide circulation to the City and County of Honolulu, County of Kauai, County of Hawaii, and County of Maui. A notice of public hearing was also posted on the Hawaii Department of Agriculture's (HDOA) website.

The Notice of Public Hearing stated that HDOA would accept written testimony on the proposed rule amendments until 11:59 PM on January 30, 2024 via postal mail to the Plant Quarantine Branch at 1849 Auiki Street, Honolulu, HI 96819, via FAX at (808) 832-0584, or via e-mail at hdoa.pq.testimony@hawaii.gov, and that attendance at the public hearing was not required to submit testimony.

One public hearing to take in-person testimony on the proposed amendments to 4-72, HAR was held as follows:

January 30, 2024, 6:00 PM – 8:00 PM
Plant Quarantine Branch Conference Room
1849 Auiki Street
Honolulu, Hawaii 96819

The public hearing notice also included the ability to attend virtually through Zoom videoconferencing and provided instructions on how to participate virtually.

II. Hearing Results and Summary of Testimonies

Testimony relevant to the proposed amendments to chapter 4-72, HAR, are summarized below. There were a multitude of comments received from the public on the proposed rule amendments to chapter 4-72, HAR, expressing support of the proposed amendments, voicing concerns about the introduction and spread of pests and invasive species, and increasing the HDOA's ability to control the movement of pests and invasive species. There were also comments requesting clarification of the rules regarding which pests were included, how farms will be affected by the proposed amendments, and how the SPRO is selected.

A. ORAL TESTIMONY

Oral testimony received during the public hearing is summarized in the hearing minutes included as Appendix A.

Twenty-four (24) persons attended the public hearing in person and sixty-seven (67) persons attended virtually. Of the ninety-one (91) persons present, twenty-four (24) provided oral testimony.

Of the twenty-four (24) oral testimonies received, twenty-three (23) testifiers were in strong support of the proposed rule amendments and one (1) testifier supporting the

intent of rules with questions regarding how enforcement on the transportation of pests would be implemented, particularly as they pertain to those that are widespread. Many testifiers expressed their opinion that more should have been done sooner for pests in general, including little fire ant (LFA), CRB and coqui.

Two (2) testifiers also included concerns about sections 4-72-4 and 4-72-5, HAR that allowed the movement of infested materials under certain circumstances and that those provisions should be removed.

One (1) testifier also suggested the use of Chapter 329, Hawaii Revised Statutes (HRS), the Uniform Controlled Substances Act, to enable inspections of properties.

2. WRITTEN TESTIMONY

In total, there were two hundred and sixty-nine (269) written testimonies received (see attachments #1 - #269). All were received via email. Of the written testimonies received, two hundred and fifty-one (251) were in support of the proposed amendments, three (3) were in opposition, fifteen (15) supporting the intent of the rules in seeking to find a way to manage the spread of pests but requested various clarifications on specific portions of the rules, and one (1) with comments only. Note: many of the in-person testifiers also submitted written testimony.

Support:

Two hundred and fifty-one (251) written testimonies were in support of the rule changes, the majority emphasized the devastating effects pests and invasive species have on agriculture, environment, food security, Hawaiian culture and quality of life. Some specific pests mentioned in testimonies include: LFA (154 times), CRB (138 times), coqui frog (24 times). Other pests such as coffee berry borer and two-lined spittle bug were also mentioned. Invasive plants such as miconia, albizia, and gorse were mentioned, along with diseases such as Rapid Ohia Death. The testimonies were supportive of the amendments that will enable HDOA to act much more quickly to prevent the sale and movement of certain invasive species and infested commodities intra and inter island.

Two (2) testifiers stated that the rules will better align Hawaii's rules with other states.

One (1) testifier detailed the need to rename section 4-72-5, HAR to "Authority to Quarantine Infested Merchandise" because the chapter now gives authority to stop the sale of products.

One (1) testifier suggested changes to section 4-72-1, HAR because HDOA is required to eradicate pests. This testifier also suggested deleting sections 4-72-4 and 4-72-5(b)3(B), HAR as both sections appeared to contradict HRS 141-3.5, which authorizes the control and eradication programs of HDOA.

One (1) testifier suggested stopping the importation of Christmas trees because of the potential risk of bringing new invasive species into the State.

One (1) testifier suggested banning the importation of ornamental plants, including the creation of a commission to oversee its implementation.

One (1) testifier suggested adding a section specifically for LFA, including LFA hosts, requiring permits for LFA host materials, and identifying all LFA infestations statewide.

One (1) testifier suggested inspection and certification for all growers or sellers of plants and mulch.

Three (3) testifiers in support stated the rules were confusing. They indicated a desire to comply, however did not know what was needed to do so.

Four (4) testimonies suggested implementing New Zealand's biosecurity systems.

Opposition:

Three (3) testifiers were in opposition and requested deferral of decision making by the Board until additional discussion with agricultural producers could be conducted. They raised concerns about how or when a quarantine would be implemented; which pest pests would trigger a shutdown of a business; and a need for addressing the possibility that a site could be quarantined indefinitely. These testimonies had issues with the changes from chief to SPRO, including the concern the designation of the SPRO can eliminate HDOA's regulatory oversight; what were the qualifications to be designate as the SPRO; and no justification indicating a need to change the decision-making authority from the Chief to the SPRO.

One (1) testifier was concerned about the criminalization of a violation. They were concerned that the SPRO had a lot of discretionary decision-making ability, but there was no way to know what credentials or experience would qualify someone to be the SPRO. They were concerned that the fees could put smaller producers out of business and that a cost analysis be conducted to determine the costs to carry out the task and cost to the industry. They also felt that the examples of regulated pests needed to be reviewed and updated periodically.

Supporting Intent:

There were fifteen (15) testifiers in support of the proposed rule's intent to increase biosecurity and address the spread of pests, but all had additional concerns about the rules. Five (5) testimonies stated that HDOA needs to be properly funded to conduct the tasks that are stated in the proposed rules, including providing support and advisement from HDOA to properly manage pests and diseases to prevent spread. Six (6) testimonies questioned the potential for criminal liability should a pest be discovered on their property or in their plants. Ten (10) testimonies requested clarification on the length of quarantine. Ten (10) testimonies had references to the SPRO including requesting clear requirements to be the SPRO; how to ensure the SPRO remains within HDOA; or concerns that the SPRO could be a designee as opposed to a permanent Hawaii State employee.

One (1) testifier stated some of the changes will weaken HDOA by handing more responsibility to outside organizations.

One (1) testifier stated the rules may be too rigid to manage living organisms which constantly evolve.

One (1) testifier felt the current version is a good start but is not adequate for implementation.

One (1) testifier requested implementation of a tiered system for pests with appropriate responses corresponding to each tier.

Three (3) testifiers requested clarification on definitions, specifically SPRO, transport, and harboring.

Comments only:

One (1) testifier commented that 4-72-9 is incorrect because the State did not prevent the spread of pests, farmers should not be responsible for the costs to deal with those pests. They also believed that for 4-72-23 to be effective, inclusion of the impacts to cultural practices should also be included.

C. Department Analysis and Response to Public Testimony and Comments

The majority of the testimony received on the proposed amendments to chapter 4-72, HAR were in support. However, the public raised comments and questions regarding the clarity on quarantines, decision making authority (SPRO vs. chief) to effectuate

chapter 4-72, HAR, and whether the rules were sufficient to prevent the movement of pests into and between islands, including within an island.

Regarding testimony proposing to disallow all movement of untreated infested material in section 4-72-4, HAR, removing this section would entail significant additional cost to HDOA in areas where a particular pest is widespread, potentially significantly impeding commerce. Removal of this section would also preclude HDOA's ability to conduct diagnostics or research on pests, including similar work done by other government agencies such as the University of Hawaii. The SPRO's discretion to allow movement of infested pest host material to an island or location where the pest is known to be established pursuant to section 4-72-5(b)(3)(B), HAR is intended to manage situations where movement of an infested item is necessary for the application of an appropriate treatment or to safely quarantine a commodity in a different location until final disposition can be made.

HDOA is committed to clarifying its policies and procedures as authorized under the rules. The intent of these proposed rule amendments is to provide HDOA with the ability to take swift regulatory action to prevent the spread of a pest, particularly in instances where the pest is not known to occur in the state or geographic area when discovered, or in instances where there are incipient pest infestations in a particular area. As the individual circumstances around pest infestations can be highly variable, ensuring the rules have the flexibility to allow HDOA to take decisive action was necessary. HDOA understands the concerns raised by agricultural producers on how these rules are currently drafted. However, HDOA has and will always be committed to working with affected industry members.

HDOA engaged the industry via different venues requesting feedback. Segments of the industry did offer similar concerns as stated in written testimony, specifically the rules being too vague. Agricultural producers had significant concerns with the SPRO being a designee, as opposed to being the Chief, in addition to the fact that there are no listed qualifications or requirements to be the SPRO. The designation of SPRO is made by the Board Chairperson and has historically been the Plant Industry Division Administrator. However, there are no requirements that Board Chairperson select the Plant Industry Division Administrator. HDOA is deleting the proposed definition of SPRO; reinstating the definition of chief, reverting all existing references from SPRO to chief, and changing all references of SPRO to chief in the proposed amendments to chapter 4-72, HAR.

In response to testimony regarding the criminalization of violations of chapter 4-72, HAR, HDOA was already able to utilize criminal penalties via section 150A-14, HRS prior to the proposed changes made to these rules. This section is clarifying that violations of this section could result in criminal penalties that were already in existence.

Regarding comments about the examples of regulated pests including species that are widespread or different tiers of pests, HDOA is working on clarifying a centralized location for all pest designations.

Regarding testimony on the use of chapter 329, HRS as a means of inspecting sites for pests is not applicable. Chapter 329, HRS is the Controlled Substances Act and chapter 329-52, HRS Administrative inspections, allows the Department of Law Enforcement to inspect controlled premises for controlled substances.

Regarding testimony suggesting the creation LFA regulations and permitting, LFA have been found on a wide variety of non-regulated commodities and the proposed rules enable HDOA to take regulatory action on infested commodities.

The proposed prohibitions on the importation of Christmas trees or plants for horticulture are beyond the scope of the chapter 4-72, HAR amendments.

The implementation of New Zealand's biosecurity systems is not applicable to these proposed rules because many of the changes necessary to mirror their system require significant changes, including significant increases in funding and resource allocation that are outside the scope of these proposed rules.

III. Analysis and Response to Public Testimony and Comments

The majority of the testimony received on the proposed amendments to chapter 4-72, HAR were in support. However, the public raised comments and questions regarding the clarity on quarantines, decision making authority (SPRO vs. chief) to effectuate chapter 4-72, HAR, and whether the rules were sufficient to prevent the movement of pests into and between islands, including within an island.

Regarding testimony proposing to disallow all movement of untreated infested material in section 4-72-4, HAR, removing this section would entail significant additional cost to HDOA in areas where a particular pest is widespread, potentially significantly impeding commerce. Removal of this section would also preclude HDOA's ability to conduct diagnostics or research on pests, including similar work done by other government agencies such as the University of Hawaii. The discretion to allow movement of infested pest host material to an island or location where the pest is known to be established pursuant to section 4-72-5(b)(3)(B), HAR is intended to manage situations where movement of an infested item is necessary for the application of an appropriate treatment or to safely quarantine a commodity in a different location until final disposition can be made.

HDOA is committed to clarifying its policies and procedures as authorized under the rules. The intent of these proposed rule amendments is to provide HDOA with the ability to take swift regulatory action to prevent the spread of a pest, particularly in instances

where the pest is not known to occur in the state or geographic area when discovered, or in instances where there are incipient pest infestations in a particular area. As the individual circumstances around pest infestations can be highly variable, ensuring the rules have the flexibility to allow HDOA to take decisive action was necessary. HDOA understands the concerns raised by agricultural producers on how these rules are currently drafted. However, HDOA has and will always be committed to working with affected industry members.

HDOA engaged the industry via different venues requesting feedback. Segments of the industry did offer similar concerns as stated in written testimony, specifically the rules being too vague. Agricultural producers had significant concerns with the SPRO being a designee, as opposed to being the Chief, in addition to the fact that there are no listed qualifications or requirements to be the SPRO. The designation of SPRO is made by the Board Chairperson and has historically been the Plant Industry Division Administrator. However, there are no requirements that Board Chairperson select the Plant Industry Division Administrator. To ensure consistency with existing rules, HDOA is deleting the proposed definition of SPRO; reinstating the definition of chief, reverting all existing references from SPRO to chief, and changing all references of SPRO to chief in the proposed amendments to chapter 4-72, HAR. The definition of "chief" is in the current version of 4-72, HAR and this change is a reversion to the existing language.

In response to testimony regarding the criminalization of violations of chapter 4-72, HAR, HDOA was already able to utilize criminal penalties via section 150A-14, HRS prior to the proposed changes made to these rules. This section is clarifying that violations of this section could result in criminal penalties that were already in place.

Regarding comments about the examples of regulated pests including species that are widespread or different tiers of pests, HDOA is working on clarifying a centralized location for all pest designations. The proposed new examples of regulated pests included are of concern to agricultural crops and not widespread throughout the state.

Regarding testimony on the use of chapter 329, HRS as a means of inspecting sites for pests is not applicable. Chapter 329, HRS is the Controlled Substances Act and chapter 329-52, HRS Administrative inspections, allows the Department of Law Enforcement to inspect controlled premises for controlled substances.

Regarding testimony suggesting the creation LFA regulations and permitting, LFA have been found on a wide variety of non-regulated commodities and the proposed rules enable HDOA to take regulatory action on infested commodities.

The proposed prohibitions on the importation of Christmas trees or plants for horticulture are beyond the scope of the chapter 4-72, HAR amendments.

The implementation of New Zealand's biosecurity systems is not applicable to these proposed rules because many of the changes necessary to mirror their system require significant changes, including significant increases in funding and resource allocation that are outside the scope of these proposed rules.

IV. Hearing Officer's Recommendation

The public comments were mostly supportive of the proposed amendments to 4-72, HAR, with all testifiers recognizing the intent of the proposed changes to minimize the spread of pests throughout the State. Despite the questions raised, HDOA believes that the rules as drafted provide the flexibility to enable quick regulatory action and is committed to continuing to work with affected parties to take actions that are reasonable and achievable, while simultaneously implementing needed permanent restrictions, such as those regarding CRB host material to minimize the likelihood of CRB spreading to uninfested areas in the State.

As the appointed public hearing officer, I recommend adoption of the proposed amendments to chapter 4-72, HAR, entitled "Plant and Non-Domestic Animal Quarantine Plant Intrastate Rules," as presented at the public hearings, with the following changes: deletion of the proposed definition of SPRO; reinstatement of the definition of chief; and changing all references from SPRO to chief.



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