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State of Hawaii
Department of Agriculture
Plant Industry Division
Plant Quarantine Branch
Honolulu, Hawaii

October 22, 2024

Board of Agriculture
Honolulu, Hawaii

Subject: Proposed amendments to chapter 4-72, Hawaii Administrative Rules:
(1) Request for Extension of Time for Submission of Hearing Officer's Report and Recommendation on Proposed Amendments to Chapter 4-72, Hawaii Administrative Rules (HAR), Entitled "Plant and Non-Domestic Animal Quarantine Plant Intrastate Rules", Including Amendments to Among Other Things: Implement Quarantine Restrictions on the Coconut Rhinoceros Beetle (CRB) and CRB host materials; 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; Make Other Changes for Clarity or Simplification and Other Non-substantive Changes Correcting Grammar, Punctuation, or Typeface;
(2) Submission of Hearing Officer's Report and Recommendation on Proposed Amendments to chapter 4-72, HAR;
(3) Request for Acceptance of Minutes of Public Hearings; and
(4) Request for Adoption of Proposed Amendments to chapter 4-72, HAR.

I. **Background:**

On February 28, 2023, the Board of Agriculture (Board) preliminarily approved the proposed amendments to chapter 4-72, HAR, entitled "Plant and Non-Domestic Animal Quarantine, Plant Intrastate Rules". The proposed amendments to chapter 4-72, HAR will, among other things, amend and add the following:

1. Amending the title of chapter 4-72, HAR by adding "and Pest Host Material". Chapter 4-72, HAR is amended by adding headings for "Subchapter 1 General Provisions" and "Subchapter 2 Intrastate Restrictions".
2. Amending section 4-72-1, HAR, Objective, to clarify that chapter 4-72, HAR is implementing Chapter 141, Hawaii Revised Statutes (HRS) and by deleting "their plant or commodity hosts" and adding "infested or infected pest host material" and references to insects and diseases.

3. Amending section 4-72-2, HAR, Definitions, as follows:
 - a. The definition "Board" is corrected.
 - b. The definition "Department" is moved to appear in alphabetical order.
 - c. The definition "Compliance agreement" is added.
 - d. The definition "Infested" is added.
 - e. The definition "Person" is added.
 - f. The definition "Pest" is added.
 - g. The definition "Pest host material" is added.
 - h. The definition "Restricted area" is corrected.
 - i. The definition "Soil" is added.
 - j. The definition "State " is added.
4. Amending section 4-72-3, HAR, Inspectional requirements. Adds "soil" to items required to be inspected by HDOA prior to being transported between the islands of the State, unless authorized by section 4-72-4(c), HAR. Clarifies that non-propagative plant parts may be inspected, at HDOA's discretion, when being transported between the islands of the State.
5. Amending section 4-72-4, HAR, Prohibited transportations, to:
 - a. Clarify that plants, propagative plant parts, and soil not inspected as required by section 4-72-3 may not be transported between islands of the State.
 - b. Add that pest host material that is infested or infected with an insect, disease, or pest, or that is itself a pest may not be transported between or within islands of the State unless it has been treated as approved by the chief or the transportation is authorized by the chief.
 - c. Add subsection (c) that the inspectional requirements and prohibitions on transportation do not apply to HDOA moving items for diagnostics, research, testing, or educational purposes or to items moved pursuant to a permit approved by the chief and issued to an institution approved by the Board, a government agency, or a university for diagnostics, research, testing, or educational purposes.
6. Amending and renumbering section 4-72-4.5, HAR, Designation of infested areas; expansion as section 4-72-10, HAR (see below for proposed changes).
7. Adds new section 4-72-5, HAR, Restrictions related to pest host material, available to the public which authorizes the chief to:
 - a. Quarantine or prohibit the movement of items that are for sale or otherwise available to the public, institutions, or government agencies, that are infested or infected with an insect, disease, or pest.

- b. Require treatment of an area where the infested or infected items are stored.
 - c. Determine the disposition of the infested or infected items.
8. Amending and renumbering Section 4-72-8, HAR, Restrictions on transport, harboring, rearing, or breeding of pests as section 4-72-6, HAR. The amendments allow the harboring, rearing, or breeding of a pest in the following instances:
- a. For diagnostics, research, testing, or educational purposes by HDOA, or for a government agency, or a university at sites approved by the chief.
 - b. By an institution approved by the Board, pursuant to a permit approved by the chief.
9. Adds new section 4-72-7, HAR, Permit and inspection fees, to establish fees as follows:
- a. The fee for a permit under chapter 4-72, HAR is \$20 per permit for a single shipment within one year and \$100 per permit for unlimited shipments within one year.
 - b. The fee for a site inspection is \$25 per site inspected, plus mileage reimbursement.
10. Adds new section 4-72-8, HAR, Inspection fees, to set fees plus mileage reimbursement pursuant to Act 173, SLH 2010 for:
- a. Inspections and other actions by HDOA carried out beyond regular work hours at \$50.00 per inspection, including applicable charges for overtime, fixed charges, and meals, as appropriate.
 - b. Inspections conducted away from a port or HDOA office at \$50.00 per hour.
11. Adds new section 4-72-9, HAR, Economic loss or damage, to clarify that the State is not responsible for economic loss or damages related to actions by HDOA in carrying out chapter 4-72, HAR.
12. Amending and renumbering section 4-72-4.5, HAR, Designation of infested areas; expansion as section 4-72-10, HAR to:
- a. Make technical amendments regarding press releases and written notices.
 - b. Delete "its plant or commodity hosts" and add "its pest host material".
 - c. Remove the requirement that the Board's action to expand an infested area occur on the island where a new infestation has occurred, following written notice to industry groups likely to be affected.

13. Adds new section 4-72-11, HAR, Penalties, to clarify that violations of chapter 4-72, HAR are subject to penalties pursuant to sections 150A-14 and 141-7, HRS.
14. Adds new section 4-72-12, HAR, Scientific and common names, to clarify that if a scientific or common name set out in chapter 4-72, HAR is changed to a new scientific or common name, the reference in the chapter shall be construed to refer to the new name.
15. Adds new section 4-72-13, HAR, Severability to clarify that if a provision of Chapter 4-72 is found to be unconstitutional or invalid, the other provisions of the chapter are not affected.
16. Amending and renumbering section 4-72-5, HAR, Examples of regulated pests, as section 4-72-15, HAR. Amendments are proposed to make technical changes, including updating scientific and common names, and to add new examples of regulated pests.
17. Amending and renumbering Section 4-72-6, HAR, Restrictions on sugarcane, as section 4-72-16, HAR. Amendments are proposed to make technical changes and add that a university or government agency may conduct research on sugarcane, pursuant to a permit.
18. Amending and renumbering section 4-72-7, HAR, Restrictions on soil, sand, and animal manure, as section 4-72-17, HAR. Amendments are proposed to make technical changes, delete "artificial" and add "soil-less", and add that an institution approved by the Board, university, or government agency is eligible for a permit for diagnostic purposes.
19. Amending and renumbering section 4-72-9, HAR, Restrictions on dasheen and taro, as section 4-72-18, HAR. Deletes "corms" from the heading and throughout the section.
20. Amending and renumbering section 4-72-10, HAR, Restrictions on papaya and cucurbit as section 4-72-19, HAR. Amendments make technical changes to scientific and common names.
21. Amending and renumbering section 4-72-11, HAR, Restrictions on banana as section 4-72-20, HAR. Amendments include adding restrictions for *Fusarium* tropical race 4 and make technical changes for clarity.
22. Amending and renumbering section 4-72-12, HAR, Restrictions on coffee, as section 4-72-21, HAR. Amendments make technical changes for clarity and

- allow coffee plants and plant parts for propagation to be quarantined at a facility approved by the chief.
23. Amending and renumbering section 4-72-13, HAR, Quarantine restrictions on ohia and soil from rapid ohia death infested areas, as section 4-72-22, HAR. Amendments make technical changes, including updating scientific names.
 24. Adds new section 4-72-23, HAR, Quarantine restrictions on CRB and CRB host material, to codify Plant Quarantine Interim Rule 22-1. The proposed section:
 - a. Designates the entire island of Oahu as the CRB infested area.
 - b. Prohibits a person from: transporting CRB host material from a CRB infested area to a CRB restricted area, or from transporting, receiving, processing, selling, bartering, donating, otherwise giving away, and exporting CRB host material within or from the CRB infested area except by HDOA; by permit for monitoring, control, eradication or scientific purposes approved by the chief; by permit for noncommercial activities subject to an appropriate treatment; pursuant to a compliance agreement issued by the chief, or directly exporting the material out of State.
 25. Other changes are proposed throughout chapter 4-72, HAR for clarity, simplification, or to correct format, grammar, punctuation, and typeface.

A copy of the proposed rules for adoption are included as Attachment A.

II. Request for Extension of Time to File Hearing Officer's Report and Recommendation

On January 30, 2024, a public hearing was held to afford interested persons an opportunity to submit testimony relevant to the proposed amendments to chapter 4-72, HAR. Pursuant to section 4-1-28(c), HAR of the Board's Rules of Practice and Procedure, the hearing officer's recommendation shall be filed with the Board not later than ten calendar days after the close of the public hearing or the expiration of any period for filing additional written submissions. In this instance, the Hearing Officer's report and recommendation should have been filed by February 9, 2024. The hearing officer's report was not completed and filed by the deadline due to the large volume of public testimony received, requiring more time to complete a sufficient review; the departure of the originally appointed hearing officer from the HDOA; and the Plant Quarantine Branch (PQB) Manager assigned to additional tasks related to little fire ants, coconut rhinoceros beetle, and coqui frogs prior to being delegated as the public hearing officer.

Pursuant to section 4-1-16, HAR, the Board is authorized to permit an act to be done after the specified deadline if the failure to meet the deadline is the result of excusable neglect. PQB submits that the circumstances listed above should be considered excusable neglect under section 4-1-16, HAR, and that an extension of time is appropriate.

III. Hearing Officer's Report on the Proposed Amendments to Chapter 4-72, Plant and Non-Domestic Animal Quarantine, Plant Intrastate Rules; Minutes of Public Hearing

Below is a summary of the hearing officer's report submitted to the Board on October 16, 2024, together with the minutes of the public hearing on the proposed amendments to chapter 4-72, HAR. The complete hearing officer's report is included as Attachment B. The minutes of the public hearing are included as Appendix A. Written Testimony received are included as Attachments #1 - # 269.

A. Notice of Public Hearings

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 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 PQB 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 chapter 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.

B. Hearing Results and Summary of Testimonies

The public comments were generally supportive of the proposed amendments to chapter 4-72, HAR, with all testifiers recognizing the intent to minimize the spread of pests throughout the State. 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.

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.

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.

C. Summary of 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 infested materials would entail significant additional cost to HDOA in areas where a pest is widespread. Removal would also preclude HDOA's ability to conduct diagnostics or research on pests, including other government agencies such as the University of Hawaii. Discretion to

allow movement of infested pest host material to an island or location where the pest is known to be established 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.

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. Individual circumstances can be highly variable, so 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 and is committed to clarifying its policies and procedures as authorized under the rules

Regarding concerns about the SPRO being a designee and the proposed rules not defining the qualifications or requirements to be the SPRO, HDOA recognizes those concerns. The designation of SPRO is made by the Board Chairperson and historically is the Plant Industry Division Administrator. However, there is no requirement to select the Plant Industry Division Administrator. To ensure consistency with other 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.

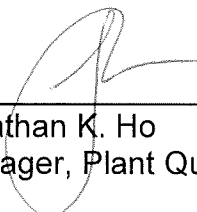
IV. Hearing Officer's Recommendation

Mr. Jonathan Ho, the appointed public hearing officer, recommended adoption of the proposed amendments to chapter 4-72, HAR, entitled "Plants and Non-Domestic Animal Quarantine, Plant Intrastate Rules," as presented at the public hearings and attached as Attachment A 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.

V. Staff Recommendation


Despite the questions raised, HDOA believes that the proposed rule amendments 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 un-infested areas in the State.

Having considered the public testimonies and comments received during the hybrid public hearing conducted in person and virtually via Zoom videoconferencing technology, and the recommendation of the hearing officer to adopt the proposed rules with the changes deleting the proposed definition of SPRO; reinstating the definition of chief; and changing all references from SPRO to chief, the PQB respectfully requests that the Board: (1) accept the hearing officer's report and recommendations; (2) accept the minutes of public hearing; and (3) approve the adoption of the proposed amendments to Chapter 4-72, HAR 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.




Jonathan K. Ho
Manager, Plant Quarantine Branch

CONCURRED:



Greg Takeshima
Acting Administrator, Plant Industry Division

APPROVED FOR SUBMISSION:



Sharon Hurd
Chairperson, Board of Agriculture