# State and Local Regulation of Pesticides: What Does FIFRA Allow?


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| Table 1<br>FIFRA: Important Definitions | |
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| **Term** | **Definition (from 7 U.S.C. § 136)** |
| Environment | "water, air, land, and all plants and man and other animals living therein, and the interrelationships which exist among these." |
| Pest | "(1) any insect, rodent, nematode, fungus, weed, or (2) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism (except viruses, bacteria, or other micro-organisms on or in living man or other living animals) which the Administrator declares to be a pest…" under the terms of FIFRA. |
| Pesticide | "(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant, and (3) any nitrogen stabilizer." |
| Public health pesticide | "any minor use pesticide product registered for use and used predominantly in public health programs for vector control or for other recognized health protection uses, including the prevention or mitigation of viruses, bacteria, or other microorganisms (other than viruses, bacteria, or other microorganisms on or in living man or other living animal) that pose a threat to public health." |
| State | "a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa." |
| Unreasonable adverse effects on the environment | "(1) any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide, or (2) a human dietary risk from residues that result from a use of a pesticide in or on any food inconsistent with the standard under" section 408 of the Federal Food, Drug, and Cosmetic Act. |

## I. Introduction

Over the last year, there have been multiple reports about studies finding traces of glyphosate, the pesticide found in Roundup and which has been linked to cancer, in popular children's cereals like Cheerios.[1] Similarly, in May 2019, the California Environmental Protection Agency announced it was classifying chlorpyrifos, a pesticide that has been shown to cause developmental delays and neurological problems in children, as a toxic air contaminant.[2] As concerns about the potential negative health effects of pesticides continue to grow, county and local governments are increasingly passing legislation to restrict or outright ban the use of pesticides within their borders. For instance, citing scientific studies that have linked pesticides to a "plausible and significant risk of harm to health and the environment," Anchorage, Alaska passed a municipal ordinance regulating the use of pesticides on parks, public lands, and other public places like greenways (*see* Appendix).[3]

With the increasing amount of regulatory action on the local level, the question then becomes, what authority do county and local governments have to regulate? Unfortunately, the answer is: it depends. Under the Federal Insecticide, Fungicide, and Rodenticide Act, known as FIFRA, the federal and state governments have express authority to regulate pesticides. The U.S. Supreme Court has ruled that FIFRA does not prevent local regulation of pesticides, as long as local regulation is allowed by the state. Thus, while some states have specifically prevented county and local governments from regulating pesticides, other states have expressly allowed local pesticide regulation in certain situations. Murkiness emerges, however, when a state is silent on local authority to regulate pesticides. Recent cases in Maryland and Hawaii show how courts can come out on opposite sides of this issue.

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1 *See* Olga Naidenko & Alexis Temkin, *In New Round of Tests, Monsanto's Weedkiller Still Contaminates Food Marketed to Children*, ENVTL. WORKING GRP., June 12, 2019, https://www.ewg.org/childrenshealth/monsanto-weedkiller-still-contaminates-foods-marketed-to-children/.

2 Kerry Klein, *State Appoints Working Group to Help Growers Transition Away from Harmful Chlorpyrifos*, VALLEY PUB. RADIO, Aug. 20, 2019, https://www.kvpr.org/post/state-appoints-working-group-help-growers-transition-away-harmful-chlorpyrifos.

3 Louis A. Helfrich et al., *Pesticides and Aquatic Animals: A Guide to Reducing Impacts on Aquatic Systems*, VIRGINIA TECH, https://www.pubs.ext.vt.edu/420/420-013/420-013.html.

## II. Federal Framework

Congress passed FIFRA in 1947 to require the U.S. Department of Agriculture (USDA) to register pesticides sold in interstate commerce and establish labeling provisions. Once understanding of the potential negative effects of pesticides on humans, non-targeted species, and the environment began to grow, Congress amended the law in both 1972 and 2003 to strengthen FIFRA's provisions. In addition, once the U.S. Environmental Protection Agency (EPA) was created in 1970, responsibility for administering FIFRA shifted from the USDA to the EPA. EPA administers FIFRA through the Office of Pesticide Programs.[4]

Under FIFRA, the EPA is directed to establish programs for the labeling,[5] packaging,[6] and registration[7] of pesticides. FIFRA also bestows on EPA the authority to set standards for worker protection[8] and the use of restricted use pesticides,[9] as well as issue experimental use permits to determine if a pesticide should be registered.[10] FIFRA also authorizes EPA to set requirements for the storage, disposal, transportation, and recall of pesticides.[11] Finally, the EPA has the ability to exempt a federal or state agency from FIFRA's provision if the EPA determines that emergency conditions justify the exemption.[12]

FIFRA's primary purpose "is to ensure that, when applied as instructed, pesticides will not generally cause unreasonable risk to human health or the environment."[13] Several definitions under FIFRA, which can be found in full in Table 1, are important to understand what this phrase means.

Under FIFRA, a pesticide is a substance or mixture of different substances that are meant to prevent, destroy, repel, or mitigate a pest, or to use as "a plant regulator, defoliant, or desiccant."[14] In addition, pesticides include nitrogen stabilizers.[15] Certain items are expressly excluded from the definition of pesticide. Among these are new animal drugs[16] and animal feed[17] containing a new animal drug.

In determining whether a pesticide has "unreasonable adverse effects on the environment," the EPA is tasked with engaging in a balancing test. In considering whether a pesticide will have an "unreasonable risk to man or the environment," the EPA must take into account the social, economic, and environmental cost or benefits that the pesticide will have. In addition, the EPA must consider the

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4 *See Pesticide Contacts and Organizational Information*, U.S. Envtl. Prot. Agency, https://www.epa.gov/pesticide-contacts.
5 *See* 40 C.F.R. § 165.
6 *See id*. § 157.
7 *See* 7 U.S.C. § 136a.
8 *See* 40 C.F.R. § 170.
9 *See* 7 U.S.C. § 136i.
10 *See id.* § 136c.
11 *See id.* § 136q.
12 *See id.* § 136p; *see also* 40 C.F.R. § 166.
13 *Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and Federal Facilities*, U.S. Envtl. Prot. Agency, https://www.epa.gov/enforcement/federal-insecticide-fungicide-and-rodenticide-act-fifra-and-federal-facilities.
14 7 U.S.C. § 136(u).
15 *Id.*
16 As defined in 21 U.S.C. § 321(v).
17 *As defined in 21 U.S.C. § 321(w).*

human health risk of pesticide residue remaining on food from the use of a pesticide that is inconsistent with section 408 of the Federal Food, Drug, and Cosmetic Act.[18]

However, the EPA must consider and weigh the benefits and risks of "public health pesticides" differently than it does other pesticides. In this balancing test, the EPA must "weigh any risks of the pesticide against the health risks such as the diseases transmitted by the vector to be controlled by the pesticide."[19]

Further, with FIFRA, Congress designated certain acts as unlawful.[20] Some of these acts include:

- Selling or distributing an unregistered pesticide;
- Operating with a suspended or canceled registration;
- Detaching, defacing, or destroying required pesticide labeling;
- Failing to prepare, submit, or maintain required records; and
- Preventing entry, inspection, or copying of records, or preventing authorized sampling.

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18 7 USC § 136(bb).

19 *Id.*

20 *Id.* § 136.

## III. State Authority

While the EPA is tasked with administering FIFRA, state authority under FIFRA can be significant and is usually instituted by the state's Department of Agriculture. However, before discussing what powers states have under FIFRA, it is important to note what powers states do not have. FIFRA prohibits states from regulating the sale and use of pesticides in a way that permits any sale or use which is prohibited by FIFRA.[21] Additionally, states cannot institute labeling or packaging requirements that add to or are different than the EPA's requirements.[22]

However, FIFRA explicitly gives certain authority to states. In particular, states can institute their own requirements for the sale or use of pesticides within the state's borders.[23] Again, this power is limited by the fact that the state does not have the authority to allow something prohibited under FIFRA. It other words, federal prohibitions are the "law of the land." For example, under FIFRA a state can require a state-level registration of a pesticide, as well as revoke, suspend, cancel, or otherwise affect that state-level registration. States, therefore, can regulate or restrict the sale and use of a federally registered pesticide within their states. However, these actions by the state will not change the federal registration of the pesticide.

As part of its pesticide registration process, the EPA reviews a pesticide's label, the purpose of which is to clearly provide directions for the pesticide's use to maximize effectiveness while minimizing health and environmental risks. It is a violation of federal law to use a pesticide in a way that is inconsistent with its label, often referred to as an off-label use. However, the EPA can allow a state to permit an off-label use of a pesticide in a specific geographic area, as long as the use has not been previously disapproved, denied, or canceled by the EPA.[24] Similarly, the EPA can allow a state to permit an off-label use of a pesticide in a specific geographic area for a limited time to combat emergency pest conditions.[25]

Further, states can work with the EPA on the enforcement of FIFRA's provisions through cooperative agreements.[26] The EPA can also give a state primary enforcement authority, though the EPA retains the right to revoke the state's enforcement authority. The EPA can grant the state primary enforcement authority if the state has:

- Pesticide regulations that are at least as stringent as federal regulations;
- Adopted procedures to allow enforcement responsibilities to be carried out; and
- Keeps adequate records detailing enforcement actions.[27]

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21 *Id.*
22 *Id.*
23 *Id.* § 136v.
24 *Id.* § 136v(c).
25 *See id.* § 136p; *see also* 40 C.F.R. § 166.
26 7 U.S.C. § 136u.
27 *Id.* § 136w-1.

## IV. Local Governments

Local governments further state and federal objectives by helping enforce state and federal laws. The ability to regulate for the health, safety, and general welfare of one's residents is known as the police power, and pesticide regulation can fall within this power. For instance, Vermont's pesticide law gives to the state's Secretary of Agriculture:

> *responsibility for regulating and controlling the sale, use, storage, treatment, and disposal of pesticides and pesticide wastes, in order to promote the public health, safety, and welfare and protect agricultural and natural resources.*[28]

However, the power of a local government to exercise its police power is limited by the authority given to the local government by the state. Further, states cannot give powers to a local government beyond that which is given to the state under FIFRA. Thus, a local government's power to regulate pesticides is limited by what power the state has bestowed upon it. But, before turning to state authorizing language, a more fundamental question needs to be answered – does FIFRA itself limit the ability of local governments to regulate pesticides?

### A. Preemption Under Federal Law

FIFRA is silent as to the authority of local governments. This leaves open the question of whether any local regulatory action would be preempted under state or federal law. Preemption occurs when a higher level of government prohibits lower levels of government from passing laws that conflict with those passed by the higher level of government. Thus, the federal government can preempt conflicting state and local laws, while a state government can preempt local laws. While the higher level of government can explicitly state that preemption will occur, it need not do so. Preemption can also be implied when the higher level of government has acted in such a way that a court can imply it intended to occupy the field by being the sole regulator of the subject-matter of the law or regulation.[29]

The U.S. Supreme Court has found that FIFRA does not preempt the regulation of pesticides by a local government. In *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), a property owner claimed that a town ordinance that regulated pesticide use was preempted by state and federal law. The Court held that Congress failed to expressly manifest any intent for FIFRA to preempt local law, and that FIFRA does not provide any evidence that Congress meant to preempt local regulation by implication.

The Court found that local regulation was not preempted even though FIFRA only uses the term "state," the definition of which does not include political subdivisions or municipalities. In finding that silence is not enough to preempt state laws, the Court reasoned that political subdivision is not excluded because they are subordinate components of the term state.

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[28] Vt. Stat. Ann.. Tit. 6 § 1103.

[29] Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 604-05 (1991).

Further, the Court reasoned that FIFRA does not address all areas of pesticide regulation, showing Congress did not intend to occupy the field. The Court relied upon the fact that the 1972 FIFRA Amendments did not address many areas of the law, including the subject matter of the local ordinance. The Court also looked at the fact that FIFRA contemplates cooperation between the local, state, and federal governments. The court found that this cooperation would make little sense if the statute preempted local and state law.

In addition, the Court examined whether compliance with both FIFRA and the local ordinance was impossible and determined that it was not. Finally, the Court determined that state and local regulation of pesticides would not unduly burden interstate commerce. Therefore, the Court ruled that local governments may ban pesticides under FIFRA, so long as those local laws are not preempted or prohibited by state law.

### B. Preemption Under State Law

In the United States, only seven states do not provide for some type of preemption regarding pesticides within their laws: Alaska, Hawaii, Maine, Maryland, Nevada, Utah, and Vermont.[30]

Of the other 43 states, their preemption provisions vary. Some states have explicit preemption language, some have limited preemption, and others provide for the right of local governments to petition the state for the ability to regulate.[31]

#### *i. Explicit Preemption*

The American Legislative Exchange Council (ALEC) has written a Model State Pesticide Preemption Act (*see* Appendix), which was first introduced by ALEC in 1995, and reapproved in 2013 and 2017. Section 4 of the Model State Pesticide Preemption Act addresses state preemption, and the thirty states that explicitly preempt local regulation have similar language.[32] Thus, in these thirty states, local governments have no authority to regulate pesticides. The Model State Pesticide Preemption Act states:

> ***Section 4. {State Preemption.}*** *No city, town, county, or other political subdivision of this state shall adopt or continue in effect any ordinance, rule, regulation or statute regarding pesticide sale or use, including without limitation: registration, notification of use, advertising and marketing, distribution, applicator training and certification, storage, transportation, disposal, disclosure of confidential information, or product composition.*[33]

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30 Matthew Porter, *State Preemption Law: The battle for local control of democracy*, Beyond Pesticides (2013), https://www.beyondpesticides.org/assets/media/documents/lawn/activist/documents/StatePreemption.pdf.

31 *Id.*

32 *Id.* These states include: Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois (except Chicago), Iowa, Kansas, Kentucky, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, West Virginia, Wisconsin, and Wyoming.

33 American Legislative Exch. Council, State Pesticide Preemption Act (1995), https://www.alec.org/model-policy/state-pesticide-preemption-act/.

### *ii. Limited Preemption*

Thirteen states have limited preemption laws that apply to the local regulation of pesticides. In all of these states, the authority to regulate pesticides is delegated to a state commissioner or pesticide board, effectively preempting regulation by the local government.[34] This delegation has the same effect as the express preemption language discussed above. However, how the states delegate this regulatory authority has two varieties.

In eight states, local governments have no authority to enact pesticide-related rules – the power delegated to the commissioner or pesticide board is exclusive. These states include: Connecticut, Delaware, Massachusetts, Mississippi, New York, Rhode Island, South Carolina, and Virginia.[35] An example of a state with this type of language is Mississippi, which states in its Pesticide Law:

> *In order to eliminate inequitable application or establishment of opposing regulations, the authority to regulate any matter pertaining to the registration, sale, handling, distribution, notification of use, application and use of pesticides shall vest solely in the Commissioner of Agriculture and Commerce, except where other state agencies, including the Agricultural Aviation Board, exercise such regulatory authority under state law.*[36]

In five of the thirteen states with limited preemption, a local government can petition the relevant state agency for the ability to regulate pesticides. These states include: Indiana, Louisiana, Michigan, New Jersey, and Washington.[37] An example of this type of language is Louisiana's, which states:

> ***C. Any governing authority of a political subdivision may petition the commissioner for approval of an ordinance applicable to the distribution, sale, or application of pesticides, or the disposal of pesticide wastes. The procedure for obtaining such approval shall be as follows:***
>
> *(1) The governing authority shall transmit the proposed ordinance to the commissioner who shall refer the ordinance for hearing in accordance with R.S. 3:3224(B)(2) and (3).*
> *(2) Upon receipt of the recommendation of the commission, the commissioner shall approve or disapprove the proposed ordinance.*
> *(3) Both the commission and the commissioner shall be guided by the standards in R.S. 3:3224(B)(5) in making their respective determinations.*
> *(4) Any governing authority aggrieved by a final decision of the commissioner, shall have a right of judicial review of the administrative process pursuant to the provisions of the Administrative Procedure Act.*[38]

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34 *Id.*
35 Porter, *supra* note 30.
36 MISS. CODE ANN. § 69-23-109.
37 Porter, *supra* note 30.
38 LA. REV. STAT. ANN. § 3:3224.

### *iii. Local Authority Not Preempted by State Law*

The seven remaining states do not have any provisions regarding preemption of local government regulation of pesticides in their state laws. These states include: Alaska, Hawaii, Maine, Maryland, Nevada, Utah, and Vermont.[39] Some of these states, such as Maryland and Hawaii, are simply silent regarding local authority. Others have some regulatory provisions that reaffirm the authority of local governments.[40] For instance, in its pesticide storage facility regulations, Maine states that:

> *These regulations are minimum standards and are not meant to preempt any local ordinances which may be more stringent.*[41]

In these states with no preemption statutes, local attempts to restrict pesticides have had mixed success. Parties wishing to challenge the validity of pesticide ordinances based on preemption have the ability to file lawsuits. Such a challenge arose in Montgomery County, Maryland, where the county code was amended to restrict the use of pesticides on private and county-owned property.[42] A similar trio of lawsuits arose in Hawaii when multiple counties tried to regulate pesticides within their borders. These Maryland and Hawaii cases will be discussed in more detail below, as the Maryland courts allowed local regulation to move forward, while the Hawaii case took the ability of local governments to regulate away.

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39 Porter, *supra* note 30.

40 *Id.*

41 01-026-024 ME. CODE R. § 8.

42 Montgomery Cty. v. Complete Lawn Care, Inc., 240 Md. App. 664, 207 A.3d 695 (2019).

## V. Regulation in Montgomery County, Maryland

In 2013, the city of Takoma Park in Montgomery County, Maryland restricted the use of lawn care pesticides on both public and private property by adopting the Safe Grow Act of 2013.[43] After the Takoma Park ordinance was not challenged and was able to stand, in 2015 the County Council of Montgomery County, Maryland passed legislation (*see* Appendix) to regulate the use of certain pesticides on both private lawns and public property in the county. Among other things, the ordinance contains requirements for pesticide retailers and applicators, including requiring applicators to inform customers about what pesticides they are using and provide notice to the public after a pesticide application. Further, the county provided restrictions for pesticide applications on lawns, playgrounds, mulched recreation areas, and children's facilities, which includes buildings that are occupied on a regular basis by children under six years old, by limiting the types of pesticides that could be used.[44]

Pesticide companies and some local businesses and residents challenged the Montgomery County ordinance, claiming that is was preempted by state law, even though Maryland law does not explicitly preempt the local regulation of pesticides. In August 2017, the Montgomery County Circuit Court ruled that the county ordinance was preempted by state law, finding that the state's pesticides laws gave the Maryland Department of Agriculture sole authority to regulate pesticides.[45]

Montgomery County appealed the decision, and earlier this year, the Court of Special Appeals found that the county ordinance was not preempted by state law.[46] The court relied on several factors in its decision, including the fact that after *Mortier*, the state legislature at the behest of the pesticide industry failed three time in 1992, 1993, and 1994 to pass legislation that would explicitly preempt local pesticide regulations. In addition, after a 1985 state Attorney's General Opinion found that state law did not preempt local regulation, no subsequent amendments to Maryland's pesticide laws refuted this position.[47]

Further, although Maryland's pesticide law states that pesticide regulation should be uniform with federal law, the court found this language was only aspirational and not mandatory, especially since widespread variation already exists throughout the nation.[48] Moreover, the court was persuaded by the fact that Maryland explicitly allows some local regulation of pesticides under the Chesapeake and Atlantic Coastal Bays Critical Area Program. Under this program, multiple counties have passed pesticide regulations, including Baltimore, Dorchester, Harford, Prince George's, and Wicomico counties.[49]

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43 *About the Safe Grow Act,* City of Takoma Park, Maryland, http://takomaparkmd.gov/initiatives/safegrow/.

44 County Council for Montgomery County, Maryland, Bill No. 52-14 Concerning Pesticides- Notice Requirements – Cosmetic Pesticide Use Restrictions (2015).

45 Complete Lawn Care, Inc. v. Montgomery Cnty., 2017 WL 3332362 (Md.Cir.Ct. 2017).

46 Montgomery Cnty. v. Complete Lawn Care, Inc., 207 A.3d 695 (Md. App. 2019).

47 *Id.* at 704-705.

48 *Id.* at 717-720.

49 *Id.* at 720-721.

Finally, the court found that the state regulation of pesticides was not so comprehensive as to prevent local regulation.[50] At the end of the decision, the court noted that the factors which support its decision are: "repeated failures to preempt, a lack of comprehensiveness along the lines of FIFRA, no pervasive scheme of administrative regulation, no conflict through frustration of purpose, and General Assembly recognition of local regulation of pesticides."[51]

The court concludes its opinion with the following poignant statement: "Accordingly, we conclude that the citizens of Montgomery County are not powerless to restrict the use of certain toxins that have long been recognized as 'economic poisons' and which pose risks to the public health and environment."[52]

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50 *Id.* at 711.

51 *Id.* at 721.

52 *Id.*

## VI. Local Regulation in Hawaii

Due to its climate which allows a year-round growing season, Hawaii provides ideal conditions for testing and growing genetically engineered (GE) crops or genetically modified organisms (GMOs). GE crops and GMOs are engineered to have desirable traits, such as tolerance to pests, diseases, and pesticides. As a result, GE crops and GMOs play a large role in the nation's agricultural sector. For instance, about 90% of all the corn grown in the United States is grown from herbide-tolerant seeds that have been engineered to be resistant to potent pesticides like glyphosate.[53] In Hawaii, a variety of papaya was engineered to be resistant to the ringspot virus, which was decimating the state's papaya industry.[54]

With GE crops, there is always the concern of transgenic contamination- the mixing of GE and non-GE crops either through cross-pollination or mixing seeds unintentionally. However, there are additional environmental concerns, such as increases in the number of superweeds resistant to pesticides and reduced biodiversity. But there is another significant risk: the testing and eventual planting of GE crops is often associated with increased pesticide use in the area.[55]

### A. County Actions

Like Maryland, Hawaii law is silent as to whether local regulation of pesticides is preempted by state law. However, beginning in the early 2010s, county governments in the state began to take action to regulate pesticides and genetically engineered organisms, including in Kauai, Hawaii, and Maui Counties.

#### *i. Kauai County*

In 2013, the County of Kauai passed Ordinance 960 (*see* Appendix) "to establish provisions to inform the public, and protect the public from any direct, indirect, or cumulative negative impacts on the health and natural environment of the people and place of the County ... by governing the use of pesticides and genetically modified organisms."[56] The Ordinance contains a GMO notification provision that requires commercial agricultural entities "that intentionally or knowingly possess any genetically modified organism" to disclose that they grow GMOs by submitting and posting online annual reports to the County Office of Economic Development.[57] The reports must "include a general description of each genetically modified organism ..., a general description of the geographic location ... and dates that each genetically modified organism was first introduced to the land in question."[58]

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53 *Recent Trends in GE Adoption,* Econ. Research Serv., U.S. Dep't of Agric., https://www.ers.usda.gov/data-products/adoption-of-genetically-engineered-crops-in-the-us/recent-trends-in-ge-adoption/.

54 Atay v. Cnty. of Maui, 842 F.3d 688, 692 (9th Cir. 2016).

55 *Id.* at 693.

56 Syngenta Seeds, Inc. v. Cnty. of Kauai, 664 Fed.Appx. 669, 671 (9th Cir. 2016) (*quoting* Kauai County Code (KCC) § 22–23.2).

57 *Id.* (*quoting* KCC § 22–23.4(b)).

58 *Id.* (*quoting* KCC § 22–23.4(b)(2)).

### *ii. Hawaii County*

Also in 2013, the County of Hawaii passed an ordinance to ban the "open air testing of genetically engineered organisms of any kind" and "open air cultivation, propagation, development, or testing of genetically engineered crops or plants."[59] The county passed the ordinance to prevent the cross-pollination of genetically engineered (GE ) plants and non-GE plants, preserve the vulnerable ecosystems of Hawaii Island, and promote "the cultural heritage of indigenous agricultural practices."[60]

### *iii. Maui County*

On November 4, 2014, Maui County voters passed a ballot initiative to enact "A Bill Placing a Moratorium on the Cultivation of Genetically Engineered Organisms" (Maui ordinance).[61] The Maui ordinance's purposes include protection of both non-GE and organic farmers and the county's environment from pesticides and transgenic contamination, preservation of the right of county residents to reject GE agriculture, and protection of the County's indigenous cultural heritage and vulnerable ecosystems.[62]

The Maui ordinance enacts a "Temporary Moratorium" that makes it "unlawful for any person or entity to knowingly propagate, cultivate, raise, grow or test Genetically Engineered Organisms within the County of Maui…".[63] The "Temporary Moratorium" will continue in effect absent amendment or repeal, which can be done only with the completion of an Environmental and Public Health Impacts Study, a public hearing, and the approval of two-thirds of the County Council after finding that an amendment or repeal will not cause significant harm while also significantly benefitting the county.[64]

The terms of the Maui ordinance apply on their face to both commercial agricultural operations and individuals with GMO plants, with exceptions for "GE Organisms that are in mid-growth cycle," products for sale that contain GE organisms, certain academic research, and licensed health practitioners.[65]

## B. Court Challenges

The Kauai, Hawaii, and Maui ordinances were each challenged in the federal district courts. In a trio of cases decided by the U.S. Court of Appeals for the Ninth Circuit on the same day, the court found that all three ordinances were preempted under Hawaii law.[66] The Ninth Circuit's main opinion can be found in *Atay v. County of Maui*, 842 F.3d 688 (9th Cir. 2016). The other two opinions, *Syngenta Seeds, Inc. v. County of Kauai,* 664 Fed.Appx. 669 (9th Cir. 2016) and *Hawai'i Papaya Industry Association v. County of Hawaii*, 666 Fed.Appx. 631 (9th Cir. 2016) both refer to the *Atay* decision and find preemption.

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59 Hawai'i Papaya Indus. Ass'n v. Cnty. of Hawaii, 666 Fed.Appx. 631, 633 (9th Cir. 2016) (*quoting* Hawaii County Code (HCC) §§ 14–130, 14–131).

60 *Id.* (*quoting* HCC § 14–128).

61 Atay v. Cnty. of Maui, 842 F.3d 688, 694 (9th Cir. 2016).

62 *Id.* (*quoting* Maui Ordinance § 4).

63 *Id.* (*quoting* Maui Ordinance § 5(1)).

64 *Id.* (*citing* Maui Ordinance § 6).

65 *Id.* (*quoting* Maui Ordinance § 5(2)).

66 Syngenta Seeds, Inc. v. Cnty. of Kauai, 664 Fed.Appx. 669 (9th Cir. 2016); Hawai'i Papaya Indus. Ass'n v. Cnty. of Hawaii, 666 Fed.Appx. 631 (9th Cir. 2016); Atay v. Cnty. of Maui, 842 F.3d 688 (9th Cir. 2016).

In the *Atay* opinion, the Ninth Circuit found that the state's "legislature intended to create an exclusive, uniform, and comprehensive state statutory scheme," making the local ordinances beyond the authority of the three counties.[67] The court used Hawaii's "comprehensive statutory scheme test" to determine whether the local actions were preempted by state law.

Under this test, a court will consider whether the local law "covers the same subject matter embraced within a comprehensive state statutory scheme disclosing an express or implied intent to be exclusive and uniform throughout the state."[68] In other words, does the statutory scheme indicate an intent by the legislature to make the state legislation the exclusive law for the subject matter. Elements to this test, which can overlap, include whether:

- "the state and local laws address the same subject matter";
- "the state law comprehensively regulates the subject matter"; and
- "the legislature intended the state law to be uniform and exclusive."[69]

In finding preemption, the court was swayed by multiple provisions of Hawaii law that touch upon the same issues as the Maui ordinance. The provisions relied on by the court include:

- Haw. Rev. Stat. § 141-2, which authorizes the Hawaii Department of Agriculture (DOA) to make rules to regulate potentially harmful plants;
- Haw. Rev. Stat. § 141-3, which directs the DOA to designate by rule pests for control or eradication, including emergency rules for an "incipient infestation"; and
- Haw. Rev. Stat. § 141-3, which requires the DOA to develop a detailed program for the control or eradication of any pests designated by the DOA.

While no Hawaii law specifically mentions GE species, the court found that preemption could still be implied, since the DOA could still act if it finds the GE species could potentially harm either the environment or agriculture within the state.[70]

In addition to finding Hawaii law comprehensive as it relates to the powers of the DOA, it also found that Hawaii's statutory scheme shows a "clear inference" that the legislature intended that the DOA's oversight and regulatory authority "to be exclusive of supplemental local regulations."[71] In particular, the court relied on provisions that direct the DOA to coordinate with county governments, the USDA, and other agencies as evidence that the state wanted uniform rules throughout the state.

Thus, each of the *Syngenta Seeds, Inc., Hawai'i Papaya Industry Association*, and *Atay* cases held that the county governments did not have the authority to act, making their ordinances preempted.

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67 *Atay*, 842 F.3d at 710.
68 *Id.* at 706 (*quoting* Richardson v. City & Cty. Of Honolulu, 868 P.2d 1193, 2019 (Haw. 1994)).
69 *Id.*
70 *Id.* at 708.
71 *Id.* at 709.

### C. State Action

Even though these cases found that local regulation of pesticides is preempted under Hawaii law, in 2018 the state legislature passed legislation to further regulate pesticides within the state.[72] The legislation takes several actions that became effective on January 1, 2019, including:

- Making users of restricted use pesticides subject to a reporting requirement to the DOA; and
- Prohibiting during normal school hours the use of a restricted use pesticide on or within 100 feet of a school.

Notably, the legislation was the first in the country to ban the use of the pesticide chlorpyrifos. Those provisions include:

- Prohibiting the use of pesticides containing chlorpyrifos as an active ingredient; and
- Allowing the DOA to grant to any person a temporary permit allowing the use of pesticides containing chlorpyrifos through December 31, 2022.

[72] Hawaii Senate Bill 3095 (2018).

## VII. Conclusion

While FIFRA does not preempt the local regulation of pesticides, only seven states do not preempt local regulation under state law. As a result, there is not much regulatory activity on the local level because the authority to act is clear in most states – either action is preempted or the state expressly allows local action in certainty instances, such as in Maine. However, when state law is silent on preemption and a local government takes action, those actions are susceptible to court challenges, such as cases in Maryland and Hawaii.

However, it is important to remember the power of the states to regulate pesticide use under FIFRA. Eventhough the courts found that local governments could not regulate pesticides in Hawaii, the state legislature was able to take action to regulate pesticide use, including restricting use in the vicinity of schools and banning chlorpyrifos. Likewise, in California, where local regulation is expressly preempted, the state Environmental Protection Agency announced in May 2019 it was classifying chlorpyrifos as a toxic air contaminant, a step that allows the state Department of Pesticide Regulation to ban the use of chlorpyrifos the in the state.[73]

In conclusion, the local regulation of pesticides in the United States is limited greatly by state preemption. However, states have the authority under FIFRA to go beyond federal regulation and regulate the sale and use of pesticides, as long as its regulation does not permit any sale or use which is prohibited under the Act.

[73] Press Release, California Envtl. Prot. Agency, California Acts to Prohibit Chlorpyrifos Pesticide (May 8, 2019), https://www.cdpr.ca.gov/docs/pressrls/2019/050819.htm.

## Appendix

**American Legislative Exchange Council- Model State Pesticide Preemption Act**[74]

***Model Legislation***

**Section 1. {Short Title.}** This Act shall be known and may be cited as the State Pesticide Preemption Act.

**Section 2. {Legislative findings and declarations.}** The legislature finds and declares that:

*(A) The citizens of this state benefit from a system of safe, effective and scientifically sound pesticide regulation.*

*(B) A system of pesticide regulation which is consistent, coordinated, and comports with both Federal and state technical expertise, is essential to the public health, safety and welfare, and that local regulation of pesticides does not materially assist in achieving these benefits.*

**Section 3. {Definition.}** The following words and phrases when used in this act shall have the meaning given to them in this section unless the context clearly indicates otherwise.

*(A) "Pesticide." The term "pesticide" means (1) any substance or mixture of substance intended for preventing, destroying, repelling, or mitigating any pest, and (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant, except that the term "pesticide " shall not include any article that is a "new animal drug" within the meaning of section 321(w) of Title 21 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), that has been determined by the Secretary of Health and Human Services not to be a new animal drug by a regulation establishing conditions of use for the article, or that an animal feed within the meaning of section 321(x) of Title 21 (FIFRA) bearing or containing a new animal drug.*

**Section 4. {State Preemption.}** No city, town, county, or other political subdivision of this state shall adopt or continue in effect any ordinance, rule, regulation or statute regarding pesticide sale or use, including without limitation: registration, notification of use, advertising and marketing, distribution, applicator training and certification, storage, transportation, disposal, disclosure of confidential information, or product composition.

**Section 4. {Severability clause.}**

**Section 5. {Repealer clause.}**

**Section 6. {Effective date.}**

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[74] https://www.alec.org/model-policy/state-pesticide-preemption-act/

Submitted by: Assembly Chair Gray-Jackson
and Assembly Vice-Chair Traini
Prepared by: Assembly Counsel
For reading: March 21, 2017

**ANCHORAGE, ALASKA**
**AO No. 2017-59, As Amended**

**AN ORDINANCE OF THE ANCHORAGE MUNICIPAL ASSEMBLY AMENDING ANCHORAGE MUNICIPAL CODE CHAPTER 15.75 TO PROTECT THE HEALTH, SAFETY AND GENERAL WELFARE OF THE CITIZENS AND ENVIRONMENT OF ANCHORAGE BY ESTABLISHING PESTICIDE-FREE POLICIES AND RESTRICTIONS FOR PARKS, PUBLIC LANDS AND PROPERTIES.**

WHEREAS, the Municipality of Anchorage is concerned about the use of pesticides and the risk that pesticides may pose to the community and natural environment; and

~~[WHEREAS, scientific studies associate exposure to pesticides with asthma, cancer, developmental and learning disabilities, nervous and immune system damage, reproductive impairment, birth defects, and disruption of the endocrine system; and~~

~~WHEREAS, children are more vulnerable because of the sensitivity of their developing brains and nervous systems; and~~

~~WHEREAS, pesticides are harmful to pets, fish and wildlife including threatened and endangered species, soil microbiology, plants and natural resources; and~~

~~WHEREAS, runoff from pesticide applications pollute streams, lakes, drinking water sources, and salmon habitat; and~~

~~———~~]WHEREAS, the use of hazardous pesticides is not necessary to create and maintain green spaces, given the availability of viable alternative practices and products; and

~~[WHEREAS, people have a right not to be involuntarily exposed to pesticides in the air, water or soil that inevitably result from chemical drift and contaminated runoff; and~~

~~———~~]WHEREAS, sustainable land and building management practices that emphasize nonchemical methods of pest prevention and management and least-toxic pesticide use only as a last resort will mitigate, manage, and reduce, with the aim of eliminating, the use of and exposure to harmful pesticides while controlling pest populations; and

WHEREAS, implementing the precautionary principle is prudent because scientific investigation has found plausible and significant risk of harm to health and the environment; now therefore,

THE ANCHORAGE ASSEMBLY ORDAINS:

**Section 1.** Anchorage Municipal Code section 15.75.020 is hereby amended to read as follows (*language indicating no amendment is included for context only and other subsections not affected are not set out)*:

**15.75.020 - Definitions.**

The following words, terms and phrases, when used in this chapter, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

*Active ingredient(s) in pesticide* formulations mean(s) the portion of the formulation that will prevent, destroy, repel or mitigate a pest.

*Allowed pesticides* are those pesticides listed as "minimum risk pesticides" pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and listed in 40 C.F.R. § 152.25 (f)(1) or (2), as amended; or listed as "allowed" on the U.S. Department of Agriculture's National List of Allowed Substances.

*Antimicrobial pesticide* means a pesticide that is intended to disinfect, sanitize reduce or mitigate growth or development of microbial organisms; or protect inanimate objects, industrial processes or systems, surfaces, water or other chemical substances from contamination, fouling or deterioration caused by bacteria, viruses, fungi, protozoa, algae or slime.

*Application* means the placement for effect of any pesticide or herbicide at or on the site where pest control or other response is desired.

*Broadcast application or broadcast spray* means applying the pesticide in a way that brings it into contact with more than one targeted pest organism at a time.

*Department* means the Municipality of Anchorage Department of Health and Human Services **or designee**.

*Herbicide* means a pesticide designed to control or kill plants, weeds, or grasses.

*Inert ingredient(s) in pesticide formulations* mean(s) any substance or group of substances in the pesticide formulation, other than the active ingredient(s), that serve as surfactants, solvents, preservatives, among many other functions. An inert ingredient "may have biological activity of its own, it may be toxic to humans, and it may be chemically active (U.S. Environmental Protection Agency)."

*Invasive species* are plants or animals that are not native to a particular ecosystem and whose introduction is likely to cause environmental harm and/or harm to human health.

*Non-allowed pesticides* are any pesticides not on the allowed pesticide list as defined above and subject to restrictions on use in the municipality.

*Pesticides* are any chemical or biological agents that are released into the air or onto land or water for the purpose of preventing, destroying, defoliating, regulating, repelling, retarding, or mitigating plant or animal life, including insecticides, fungicides, rodenticides, herbicides, nematocides, and biocides.

(GAAB 16.75.010; AO No. 2004-100(S-1), §§ 1, 2, 1-1-05; AO No. 2005-38(S-3), § 1, 5-17-05)

**Section 2.** Anchorage Municipal Code chapter 15.75 is hereby amended by adding a new section 15.75.025 to read as follows:

**15.75.025. Pesticide-free program restrictions for municipal parks, public lands and properties.**

No person or entity shall apply pesticides within municipal parks, public lands, greenbelts, municipal properties that are open to the public, or rights of way, except in compliance with this section. The Municipality of Anchorage shall follow the precautionary approach to the use of toxic pesticides in order to prevent harm to human health and the environment.

A. *Allowed* pesticides may be used with no prior consultation or approval from the Department director or designee.

B. *Non-allowed* pesticides may be used only under the following circumstances in the determination of the Department director or designee, and then only as a last resort after non-pesticide means of control are deemed inadequate: (1) when pests present a health or safety hazard; (2) to treat invasive species that have potential for causing environmental harm; or (3) for a specific research purpose. The Department director or designee will respond to a completed request for the use of a non-allowed pesticide within 10 working days using these criteria:

1. *Non-allowed* pesticides shall not be used for aesthetic purposes.

   If *non-allowed* pesticides are necessary to meet a health or safety pest hazard, an invasive species problem, or for research purposes, the Department director or designee will make a written determination of exception approving the application and identifying the circumstances and failure of the non-pesticide means of control. For use of single application aerosol cans against biting or stinging insects when applied according to label directions, a written determination from the Department director is not required.

3. Any approved application will use the least toxic formulation at the recommended effective amount based on the product label and environmental conditions with the least potential for human exposure.

4. A *non-allowed* pesticide may not be applied within 150 feet of an anadromous or resident fish habitat or within 600 feet of a public or private water source that is used for human consumption unless:
   (a) conditions of 15.75.025 and 15.75.065 are met; and **(**b) the Department director or designee determines that the application will not harm anadromous or resident fish habitat and will not harm a public or private water source that is used for human consumption.

C. *Preventative methods* will be to address pest problems. Pest infestation and pest problems on municipal property shall be managed with an ecosystem-based integrated pest management strategy that focuses on long-term prevention of pests and their damage through a combination of techniques such as biological control, habitat manipulation, modification of cultural practices, and resistant varieties. Pesticides will only be used after monitoring indicates they are needed according to guidelines set forth in this section that meet pest management objectives and minimize environmental disturbances, exposure to pesticides, pesticide residues, human health and safety risks, and the health and safety of wildlife. It is the policy of the Municipality of Anchorage to take the following preventive measures to eliminate pest-conducive conditions and provide pest control on municipal public land, including but not limited to:

1. Lawn, turf, and landscape practices will foster healthy conditions that minimize pest problems. These can include lawn aeration, de-thatching practices that keep the grass less susceptible to insects, disease and weather stress, and maintaining a proper pH for the soils.

    a. Use of invasive plant species is prohibited in all planting projects on Municipal properties. Well-adapted, pest-resistant, and non-invasive grass and landscape plant varieties, identified as suitable for the Anchorage climate, will be used for future plantings to support pest mitigation.

    b. Soil sampling and analysis will be conducted to evaluate and assess the level of care needed to maintain healthy soil for a municipal facility's lawn, turf, or landscape.

    c. Use certified materials such as straw, gravel, and topsoil that are free of weeds, pests, and disease.

    d. Inspect all live plant materials in potting medium. If invasive plants, undesirable weeds, plant diseases, or insect pests are present, do not allow the planting of those plants.

    When a pest population is discovered, the population will be monitored to assess the population size, habitat, and whether or not a natural enemy population is nearby.

    a. Practices and decisions that could affect and deter pest populations will be identified using integrated pest management methods.

    b. Records will be maintained of monitoring, practices, and decisions.

3. The methods to prevent, control, and meet pest problems include but are not limited to:

a. *Cultural methods:* Cultural methods include, but are not limited to, selective pruning, appropriate watering, application of fertilizers free of non-allowed pesticides, and plant selection. Cultural methods of vegetation and pest control are preferred for prevention and will be employed first.

b. *Mechanical methods:* Mechanical methods include, but are not limited to, hand removal of pests and disease-infected plants, use of barriers and traps, hydro-axing and steaming. Mechanical methods of vegetation and pest control shall be employed to augment cultural methods when and where practicable.

c. *Biological methods:* Biological controls include, but are not limited to, the augmentation of insect predators, inoculation of bacterial agents, and conservation of naturally occurring predators. Biological methods of vegetation and pest control shall be employed to support cultural and mechanical methods when and where practicable.

**Section 3.** Anchorage Municipal Code section 15.75.065 is hereby amended to read as follows (*language indicating no amendment is included for context only)*:

**15.75.065 Notice of pesticide application by municipality.**

A. The municipality shall provide notice in the manner set forth in section 15.75.060 and this section before it applies in any manner any pesticide out of doors.

B. If the Department director or designee determines in writing that a non-allowed pesticide must be used as a last resort to meet a health and safety hazard or to treat an invasive species on municipal property, the municipality shall post notices to the public in the following manner:

1. Signs of a standard design and size, easily recognizable by the public and workers, shall be posted at the targeted area, at the public access points to the targeted area, and at intervals not fewer than 100 feet along a perimeter of any targeted sports playing field area if perimeter length exceeds 100 feet. **In park or greenbelt entrances within 1000 feet of the treated area will be posted and notification will be provided to each residential and commercial building located within 1000 feet of the treatment area. For pest control projects that may require multiple treatments per year, contiguous or adjacent properties only need to receive one notice per year as long as the possibility of multiple pesticide applications is explained and the treated area is posted each time as required by this section.**

a. Signs shall be posted 48 hours in advance of the application and remain in place for 72 hours following the application, or for the restricted entry interval specified on the product label, whichever is greater. The signs shall be displayed in a manner which is reasonably calculated to provide actual public awareness of pesticide application.

b. Signs shall contain the following information: Pesticide product name; active ingredient(s); inert ingredients if known; target pest; dates of anticipated pesticide application; the signal word that is used to describe the toxicity level of the product as indicated on the pesticide product label; name and contact information for the designated person.

[AT AREAS TREATED AS WELL AS AT MAIN ENTRANCES OF PUBLIC PARKS THAT HAVE BEEN TREATED AND AT INTERVALS NOT LESS THAN 100 FEET ALONG A PERIMETER OF A SPORTS PLAYING FIELD AREA TO BE TREATED IF PERIMETER LENGTH EXCEEDS 100 FEET AND IN A MANNER WHICH IS REASONABLY CALCULATED TO PROVIDE ACTUAL AWARENESS OF PESTICIDE APPLICATION.]

(AO No. 86-112; AO No. 2004-100(S-1), § 5, 1-1-05; AO No. 2005-38(S-3), § 4, 5-17-05)

C. The Department will publish a list of any approved application of non-allowed pesticides within municipal parks, public lands, greenbelts, or rights-of-ways during the previous year. The list will be made publicly available through the Municipal Open Data Portal and/or Municipal website.

**Section 4.** For purposes of this ordinance, municipal property includes all property under the control and maintenance of a municipal department or authority, or the Anchorage School District, including any municipal agency management designation under AMC 25.10.050.

**Section 5.** This ordinance shall become effective immediately upon passage and approval by the Assembly.

PASSED AND APPROVED by the Anchorage Assembly this 11th day of April, 2017.

_____
Chair

ATTEST:

_____
Municipal Clerk

Bill No. 52-14
Concerning: Pesticides – Notice Requirements – [[Non-essential Pesticides – Prohibitions]] Cosmetic Pesticide Use Restrictions
Revised: October 6, 2015 Draft No. 11
Introduced: October 28, 2014
Enacted: October 6, 2015
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

# COUNTY COUNCIL
# FOR MONTGOMERY COUNTY, MARYLAND

By: Lead Sponsors Council Vice President Leventhal and Councilmembers Elrich, Hucker, Riemer, and Navarro
Co-sponsor: Councilmember Floreen

**AN ACT** to:

(1) require posting of notice for certain [[lawn]] applications of pesticide;
(2) [[prohibit the use of certain pesticides on lawns]] [[require a Countywide pesticide use reduction plan]] prohibit the use of certain pesticides on lawns;
(3) [[require common ownership communities to take certain steps before the application of certain pesticides;
(4)]] prohibit the use of certain pesticides on playgrounds, children's facilities, and certain County-owned property;
[[(4)]][[(5)]] (4) require the County to adopt an integrated pest management program for certain County-owned property; [[and]]
[[(5)]][[(6)]] (5) require the Parks Department to take certain steps to reduce the use of certain pesticides; and
[[(7)]] (6) generally amend County law regarding pesticides.

By amending
Montgomery County Code
Chapter 33B, Pesticides
Sections 33B-1, 33B-2, 33B-3, 33B-4, 33B-5, 33B-6, and 33B-7

By adding
Montgomery County Code
Chapter 33B, Pesticides
Articles 2, 3, and 4[[, and 5]]
Sections 33B-8, 33B-9, 33B-10, 33B-11, 33B-12, [[and]] 33B-13, and 33B-14[[, 33B-15, 33B-16 and 33B-17]]

| | |
|---|---|
| **Boldface** | *Heading or defined term.* |
| Underlining | *Added to existing law by original bill.* |
| [Single boldface brackets] | *Deleted from existing law by original bill.* |
| Double underlining | *Added by amendment.* |
| [[Double boldface brackets]] | *Deleted from existing law or the bill by amendment.* |
| * * * | *Existing law unaffected by bill.* |

*The County Council for Montgomery County, Maryland approves the following Act:*

**Sec. 1. Sections 33B-1, 33B-2, 33B-3, 33B-4, 33B-5, 33B-6 and 33B-7 are amended, and Sections 33B-8, 33B-9, 33B-10, 33B-11, 33B-12, [[and]] 33B-13, and 33B-14[[, 33B-15, 33B-16 and 33B-17]] are added as follows:**

## ARTICLE 1. General Provisions

**33B-1. Legislative findings and purpose.**

(a) The County Council finds that:

(1) pesticides have value when they are used to protect the public health, the environment, and our food and water supply;

(2) pesticides, by definition, contain toxic substances, many of which may have a detrimental effect on human health and the environment and, in particular, may have developmental effects on children;

(3) exposure to certain pesticides has been linked to a host of serious conditions in children including pediatric cancers, decreased cognitive function, and behavioral problems such as ADHD, and the following conditions in adults: Parkinson's disease, diabetes, leukemia, lymphoma, lupus, rheumatoid arthritis, dementia, reproductive dysfunction, Alzheimer's disease, and a variety of cancers including breast, colon, prostate and lung cancer;

(4) clean water is essential to human life, wildlife and the environment, and the unnecessary use of pesticides and herbicides for cosmetic purposes contributes to the deterioration of water quality, as substantiated by several studies including the 2014 USGS study which found that 90% of urban waterways have pesticide levels high enough to harm aquatic life;

(5) bees and other pollinators are crucial to our ecosystem, and the use of neonicotinoid insecticides, which have been repeatedly and

strongly linked with the collapse of honey bee colonies, as well as harm to aquatic insects and birds, pose an unacceptable risk to beneficial organisms;

(6) there are non- and less-toxic alternatives and methods of cultivating a healthy, green lawn that do not pose a threat to public health, and that use of pesticides for cosmetic purposes is not necessary for the management of lawns, especially in light of the risks associated with their use;

(7) pesticide regulations at the federal and State level, and the risk assessments that inform them, do not mimic real world exposure scenarios and fail to account for synergistic or cumulative effects of multiple chemicals acting on the same pathway; do not include sufficient evaluation of a pesticide's "inert" ingredients and the pesticide formulations that are sold to consumers; and often fail to take sensitive populations like children and pollinators into account;

(8) in the absence of adequate regulation at the federal or State level, the County is compelled to act to protect the health of children, families, pets and the environment.

(b) The purpose of this Chapter is to protect the public health and welfare and to minimize the potential pesticide hazard to people and the environment, consistent with the public interest in the benefits derived from the safe use and application of pesticides. The goal is to inform the public about pesticide applications and minimize the use of pesticides for cosmetic purposes, while not restricting the ability to use pesticides in agriculture, for the protection of public health, or for other public benefit.

**33B-2. Definitions.**

In this [chapter] Chapter:

*Agriculture* means the business, science, and art of cultivating and managing the soil, composting, growing, harvesting, and selling sod, crops and livestock, and the products of forestry, horticulture and hydroponics; breeding, raising, or managing livestock, including horses, poultry, fish, game and fur-bearing animals; dairying, beekeeping and similar activities, and equestrian events and activities.

*Children's facility* means a building or part of a building which, as part of its function, is regularly occupied by children under the age of 6 years and is required to obtain a certificate of occupancy as a condition of performing that function. *Children's facility* includes a child day care center, family day care home, nursery school, and kindergarten classroom.

*Custom applicator* means a person engaged in the business of applying pesticides.

*Department* means the Department of Environmental Protection.

*Director* means Director of the Department of Environmental Protection[,] or the Director's designee.

*Garden* means an area of land used to cultivate food crops, flowers, or other ornamental plants.

[[*Integrated pest management* means a process for managing pests that:

(1) uses monitoring to determine pest injury levels;

(2) combines biological, cultural, mechanical, physical, and chemical tools and other management practices to control pests in a safe, cost effective, and environmentally sound manner that contributes to the protection of public health and sustainability;

(3) uses knowledge about pests, such as infestations, thresholds, life histories, environmental requirements, and natural control of pests; and

(4) uses non-chemical pest-control methods and the careful use of least-toxic chemical methods when non-chemical methods have been exhausted or are not feasible.]]

[[*Larvicide* means a pesticide designed to kill larval pests.]]

*Lawn* means an area of land, except agricultural land, that is:

(1) [Mostly] mostly covered by grass, other similar herbaceous plants, shrubs, or trees; and

(2) [Kept] kept trim by mowing or cutting.

[[*Lawn* includes an athletic playing field other than a golf course.]] *Lawn* does not include a:

(1) playing field;

(2) golf course; [[or]]

(3) garden; or

(4) tree or shrub..

[[*Lawn care pesticide* means a pesticide registered by the United States Environmental Protection Agency and labeled pursuant to the Federal Insecticide, Fungicide and Rodenticide Act for use in lawn, garden and ornamental sites or areas.]]

*Listed pesticide* means:

(1) a pesticide the active ingredients of which are recommended by the National Organic Standards Board (NOSB) pursuant to 7 U.S.C. § 6518, as amended, and published as the National List at 7 C.F.R. §§ 205.601 and 205.602; or

(2) a pesticide designated a "minimum risk pesticide" under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) § 25(b) and listed in 40 C.F.R. § 152.25(f).

*Mulched recreation area* means an area of land covered with natural or synthetic mulch or wood chips that is not a playground, but is open to the public for picnic or other recreation use.

*Neonicotinoid* means a class of neuro-active pesticides chemically related to nicotine. Neonicotinoid includes acetamiprid, clothianidin, dinotefuran, imidacloprid, nitenpyram, nithiazine, thiacloprid, and thiamethoxam.

[[*Non-essential pesticide* means a pesticide designated as a non-essential pesticide under Section 33B-4.]]

*Pest* means an insect, snail, slug, rodent, nematode, fungus, weed, or other form of plant or animal life or microorganism (except a microorganism on or in a living human or animal) that is normally considered to be a pest or defined as a pest by applicable state regulations.

*Pesticide* means a substance or mixture of substances intended or used to:

(1) prevent, destroy, repel, or mitigate any pest;

(2) be used as a plant regulator, defoliant, or desiccant; or

(3) be used as a spray adjuvant, such as a wetting agent or adhesive.

However, *pesticide* does not include an antimicrobial agent, such as a disinfectant, sanitizer, or deodorizer, used for cleaning that is not considered a pesticide under any federal or state law or regulation.

*Playground* means an outdoor children's play area that is on the premises of a children's facility, school, apartment building or complex, common ownership community, or park. *Playground* includes a mulched path that is used to enter a children's play area.

*Playing field* means:

(1) an athletic field maintained by the Montgomery County Department of Parks; or

(2) an area of land on private property maintained exclusively for sporting use.

*Private lawn application* means the application of a pesticide to a lawn on property owned by or leased to the person applying the pesticide. *Private lawn application* does not include:

(1) applying a pesticide for the purpose of engaging in agriculture; or

(2) applying a pesticide around or near the foundation of a building for the purpose of indoor pest control[[;

(3) applying a pesticide to a golf course or turf farm]].

*Registered pesticide* means a pesticide registered by the United States Environmental Protection Agency and labeled pursuant to FIFRA for use in lawn, garden and ornamental sites or areas.

[[*Restricted lawn care pesticide* means a pesticide designated as a restricted lawn care pesticide under Section 33B-4.]]

*Vector* or *disease vector* means an animal, insect, or microorganism that carries and transmits an infectious pathogen into another organism.

*Waterbody* means waters located within the County that are:

(1) subject to the ebb and flow of the tide; or

(2) free flowing, unconfined, and above-ground rivers, streams or creeks.

**[33B-4.] [[33B-2.]] 33B-3. Signs with retail purchase of pesticide.**

A person who sells at retail a pesticide or material that contains a pesticide must:

(a) make available to a person who buys the pesticide or material that contains a pesticide:

[[(a)]](1) [Notice] notice signs and supporting information that are approved by the [department] Department; [[and]]

[[(b)]](2) [The] the product label or other information that [the federal Insecticide, Fungicide, and Rodenticide Act] FIFRA [, 7 U.S.C. 136 et seq.,] requires for sale of the pesticide[[.]]; and

(3) materials approved or distributed by the Department that:

(A) explain the dangers of contamination that may occur from pesticide use; and

(B) inform buyers of the availability of alternative products; and

(b) display a sign or signs in each area of the retail establishment where registered pesticides are available to consumers, with language approved by the Department, that:

(1) informs buyers of the County law on the use of registered pesticides on lawns; and

(2) identifies pest control options that are permissible for lawn application under the law.

The Department must enforce this Section and must annually inspect each person who sells at retail a pesticide or material that contains a pesticide.

**[33B-5] [[33B-3.]] 33B-4. Storage and handling of pesticides.**

Any person who sells at retail a pesticide or material that contains a pesticide must:

(a) transport, display, and store each pesticide in a secure, properly labeled container that resists breakage and leakage, and promptly clean up and either repackage or properly dispose of any pesticide that escapes from its container;

(b) display and store each pesticide separately from any food, medicine, or other product that a human being or animal may ingest; and

(c) transport each pesticide separately from any food, medicine, or other product that a human being or animal may ingest unless the pesticide is in a secure container that resists breakage and leakage[[;

(d) offer to each buyer of a pesticide materials approved or distributed by the Department that:

(1) explain the dangers of contamination that may occur from pesticide use; and

(2) inform buyers of the availability of alternative products]].

The Department, the Health and Human Services Department, and any other agency designated by the County Executive, must enforce this Section.

**[33B-6] [[33B-4.]] 33B-5. Regulations.**

(a) The [County] Executive must adopt regulations to carry out this Chapter under method (2).

(b) The Executive must include in the regulations adopted under this [section] Section the minimum size or quantity, and type of pesticide subject to [section 33B-4] Section [[33B-2]] 33B-3.

(c) [[The Executive must include in the regulations adopted under this Section a list of]] [[non-essential]] [[restricted lawn care pesticides. The list of]] [[non-essential]] [[restricted lawn care pesticides must be based on an evaluation of all lawn care pesticides and must include:

(1)]] [[all pesticides]] [[each pesticide classified]] [[as "Carcinogenic to Humans" or "Likely to Be Carcinogenic to Humans"]] [[by the U.S. Environmental Protection Agency as:

(A) "carcinogenic to humans" (Group A);

(B) "likely to be carcinogenic to humans" (Groups B1 and B2):

(C) "suggestive evidence of carcinogenic potential" (Group C); or

(D) inadequate information to assess carcinogenic potential" (Group D);

(2)]] [[all pesticides]] [[each pesticide classified by the U.S. Environmental Protection Agency as a "Restricted Use Product";

(3)]] [[all pesticides classified as a "Class 9" pesticide by the Ontario, Canada, Ministry of the Environment]] [[each pesticide classified by the International Agency for Research on Cancer as:

(A) "carcinogenic to humans" (Group 1);

(B) "probably carcinogenic to humans" (Group 2A);

(C) "possibly carcinogenic to humans" (Group 2B); or

(D) "not classifiable as to its carcinogenicity to humans" (Group 3);

(4)]] [[all pesticides classified as a "Category 1 Endocrine Disruptor" by the European Commission]] [[each pesticide in the top quartile of toxicity for pesticides evaluated by the U.S. Environmental Protection Agency or other federal government authority for systemic non-carcinogenic human toxicity; and

(5)]] [[any other pesticides which the Executive determines are not critical to pest management in the County]] [[each pesticide in the top quartile of toxicity for pesticides evaluated by the U.S. Environmental Protection Agency for:

(A) chronic toxicity to fish: and

(B) chronic toxicity to aquatic invertebrates.

(d)]] The Executive must include in the regulations adopted under this Section a list of invasive species that may be detrimental to the environment in the County.

[[(e)]] (d) The Executive must review and update the [[lists]] list of [[non-essential]] [[restricted lawn care pesticides and]] invasive species designated under [[subsections]] subsection (c) [[and (d)]] by July 1 of each year.

**[33B-7] [[33B-5.]] 33B-6. Penalty for violating chapter.**

(a) Any violation of this Chapter is a class C violation.

(b) Each day a violation continues is a separate offense.

**ARTICLE 2. Notice Requirements.**

**[33B-2] [[33B-6.]] 33B-7. Notice about pesticides to customer [[; acknowledgement and direction by customer]].**

(a) In this [section] Section:

(1) Customer means a person who makes a contract with a custom applicator to have the custom applicator apply a pesticide to a lawn.

(2) New customer includes a customer who renews a contract with a custom applicator.

(b) A custom applicator must give to a new customer:

(1) [Before] before application, a list of:

[a.](A) [The] the trade name of each pesticide that might be used;

[b.](B) [The] the generic name of each pesticide that might be used; and

[c.](C) [Specific] specific customer safety precautions [[, including all potential health risks identified by the United

States Environmental Protection Agency and the World Health Organization]] for each pesticide that might be used; and

(2) [After] after application, a list of:

[a.](A) [The] the trade name of each pesticide actually used; and

[b.](B) [The] the generic name of each pesticide actually used; and

(3) [A] a written notice about pesticides prepared by the [department] Department under subsection (c) [of this section].

(c) The [department] Department must prepare, keep current, and provide to a custom applicator a written notice about pesticides for the custom applicator to give to a customer under subsection (b) [of this section].

(d) The notice prepared by the [department] Department under subsection (c) [of this section] must include:

(1) [Government] government agency phone numbers to call to:

[a.](A) [Make] make a consumer complaint;

[b.](B) [Receive] receive technical information on pesticides; and

[c.] (C) [Get] get assistance in the case of a medical emergency;

(2) [A] a list of general safety precautions a customer should take when a lawn is treated with a pesticide;

(3) [A] a statement that a custom applicator must:

[a.](A) [Be] be licensed by the Maryland Department of Agriculture; and

[b.](B) [Follow] follow safety precautions; and

(4) [A] a statement that the customer has the right to require the custom applicator to notify the customer before each treatment of the lawn of the customer with a pesticide.

[[(e) Before applying a pesticide to a lawn, a custom applicator must:

(1) inform a new customer of:

(A) the existence of other means of pest control without the use of restricted lawn care pesticides; and

(B) the practice of integrated pest management (IPM), including a description of the process of IPM that is consistent with that of the U.S. Environmental Protection Agency; and

(2) obtain from a new customer, in writing or other electronic format approved by the Director :

(A) acknowledgement that the customer received the information required under this subsection and subsection (b); and

(B) direction from the customer as to whether or not to use IPM practices.

(f) A custom applicator must retain a acknowledgement from a new customer obtained under subsection (e) for at least one year.]]

**[33B-3] [[33B-7.]] 33B-8. Posting signs after application by custom applicator.**

(a) Immediately after a custom applicator treats a lawn with a pesticide, the custom applicator must [post a sign on the lawn] place markers within or along the perimeter of the area where pesticides [[will be]] have been applied.

(b) A [sign posted] marker required under this [section] Section must:

(1) [Be] be clearly visible [from the principal place of access to] to persons immediately outside the perimeter of the property;

(2) [Be] be a size, form, and color approved by the [department] Department;

(3) [Be] be made of material approved by the [department] Department; [and]

(4) [Have] have wording with content and dimensions approved by the [department] Department[.]; and

(5) be in place on the day that the pesticide is applied.

**[[33B-8.]] 33B-9. Posting signs after application by property owner or tenant.**

(a) A person who performs a private lawn application treating an area more than 100 square feet, or an area of any size within five feet of a property line, must place markers within or along the perimeter of the area where pesticides [[will be]] have been applied.

(b) A marker required under this Section must:

(1) be clearly visible to persons immediately outside the perimeter of the property;

(2) be a size, form, and color approved by the Department;

(3) be made of material approved by the Department; and

(4) have wording with content and dimensions approved by the Department; and

(5) be in place on the day that the pesticide is applied.

**ARTICLE 3. [[Application restrictions.]] [[Pesticide use reduction.]] Application restrictions.**

**[[33B-9.]] 33B-10. [[Prohibited application.]] [[Countywide use reduction plan.]] Prohibited applications.**

[[A person must not apply a non-essential pesticide to a lawn.]]

[[(a) The Director must by July 1, 2016 provide a report to the County Executive and County Council that outlines options for:

(1) determining a baseline estimate of the use of restricted lawn care pesticides in the County; and

(2) measuring changes in the use of restricted lawn care pesticides in the County over time.

(b) The Director must then develop a restricted lawn care pesticide use plan, with a goal of reducing, by 2018, the use in the County of restricted lawn care pesticides other than in agriculture by at least 50% from the baseline established under subsection (a).

(c) If the reduction goal is not achieved, the Director must implement additional measures to further reduce the use of restricted lawn care pesticides.]]

(a) On County-owned property and private property, except as provided in subsection (b), a person must not apply a registered pesticide other than a listed pesticide to:

(1) a lawn;

(2) a playground;

(3) a mulched recreation area;

(4) a children's facility; or

(5) the grounds of a children's facility.

(b) A person may apply any registered pesticide to:

(1) control weeds as defined in Chapter 58, Weeds;

(2) control invasive species listed in a regulation adopted under subsection 33B-5(c);

(3) control disease vectors;

(4) control biting or stinging insects or stinging plants;

(5) control organisms that threaten the health of trees or shrubs;

(6) maintain property as part of efforts by a public utility to comply with applicable vegetation management provisions of any federal, state, or local law or regulation;

(7) control indoor pests, if applied around or near the foundation of a building;

(8) control pests while engaged in agriculture; and

(9) control a pest outbreak that poses an imminent threat to human health or prevent significant economic damage if a registered pesticide is not used.

(c) If a pesticide is applied under paragraph (b)(9) of this Section, the person applying the pesticide must:

(1) within seven days after a pesticide is applied on private property, notify the Department of the application and the reasons for the use of the pesticide; or

(2) within 30 days after a pesticide is applied on County-owned property, inform the Council of the application and the reasons for the use of the pesticide.

**[[33B-10.]] [[Exceptions and exemptions]] [[Playgrounds and Children's Facilities.]]**

**[[**(a) A person may apply a non-essential pesticide for the following purposes:

(1) for the control of weeds as defined in Chapter 58, Weeds;

(2) for the control of invasive species listed in a regulation adopted under Subsection 33B-4(d);

(3) for pest control while engaged in agriculture; and

(4) for the maintenance of a golf course.

(b) A person may apply to the Director for an exemption from the prohibition of Section 33B-9 for a non-essential pesticide. The Director may grant an exemption to apply a non-essential pesticide on property where application is prohibited under Section 33B-9 if the applicant shows that:

(1) effective alternatives are unavailable;

(2) granting an exemption will not violate State or federal law; and

(3) use of the non-essential pesticide is necessary to protect human health or prevent significant economic damage.

(c) A person may apply to the Director for an emergency exemption from the prohibition in Section 33B-9 if a pest outbreak poses an imminent threat to public health or if significant economic damage would result from the inability to use a pesticide prohibited by Section 33B-9. The Director may impose specific conditions for the granting of emergency exemptions.]]

[[(a) Except as provided in subsection (b), a person must not apply a restricted lawn care pesticide to a playground, children's facility, or the grounds of a children's facility.

(b) A person may apply a restricted lawn care pesticide to a playground, children's facility, or the grounds of a children's facility only to:

(1) control weeds as defined in Chapter 58, Weeds;

(2) control invasive species listed in a regulation adopted under subsection 33B-4(d);

(3) control disease vectors;

(4) control biting or stinging insects or stinging plants;

(5) control organisms that threaten the health of trees or shrubs; or

(6) control a pest outbreak that poses an imminent threat to human health or prevent significant economic damage if a restricted lawn care pesticide is not used.]]

**33B-11. Outreach and education campaign.**

(a) The Executive must implement a public outreach and education campaign before and during implementation of the provisions of this Article.

(b) [[This]] The outreach and education campaign [[should]] must include the provision of the following resources:

(1) the NOSB National List or the Organic Materials Review Institute (OMRI) listed products which are the NOSB National list products categorized by use;

(2) FIFRA § 25(b) minimum risk pesticides, listed in 40 C.F.R. § 152.25(f); and

(3) guidance on best practices for organic and pesticide-free lawn care.

(c) The outreach and education campaign should include:

[[(a)]] (1) informational mailers to County households;

[[(b)]] (2) distribution of information through County internet and web-based resources;

[[(c)]] (3) radio and television public service announcements;

[[(d)]] (4) news releases and news events;

[[(e)]] (5) information translated into Spanish, French, Chinese, Korean, Vietnamese, and other languages, as needed;

[[(f)]] (6) extensive use of County Cable Montgomery and other Public, Educational, and Government channels funded by the County; [[and]] and

[[(g)]] (7) posters and brochures made available at County events, on Ride-On buses and through Regional Service Centers, libraries, recreation facilities, senior centers, public schools, Montgomery College, health care providers, hospitals, clinics, and other venues[[; and

(h) a survey of pesticide use by County residents and custom applicators]].

**[[ARTICLE 4. Common Ownership Communities.**

**33B-12. Definitions.**

In this article the terms association document, common element, community association, owner, and unit have the meanings attributed to them in Section 10B-8.

**33B-13. Application of pesticide to individual units.**

(a) Beginning July 1, 2016, each year, a community association must provide owners an opportunity to decline to have a restricted lawn care pesticide applied to the owner's unit.

(b) If a unit owner declines to have a restricted lawn care pesticide applied, the community association or its agent must not apply the restricted lawn care pesticide to the unit.

**33B-14. Application of pesticide to common elements.**

(a) Beginning July 1, 2016, each year, the owners in a common ownership community must approve, by a majority of votes cast, in person or by proxy, the application of a restricted lawn care pesticide to a common element during the following year.

(b) A community association may apply to the Director for an emergency exemption from the prohibition or restrictions under this Section if a pest outbreak poses an imminent threat to public health or if significant economic damage would result from the inability to use a restricted

lawn care pesticide. The Director may impose specific conditions on each emergency exemption.

(c) A community association must post notice of each pesticide application to the common elements. The notice required under this subsection must consist of signs that:

(1) are clearly visible to persons immediately outside the perimeter of the property;

(2) are in place on the day that the pesticide is applied;

(3) are of a size, form, and color approved by the Department;

(3) are made of material approved by the Department; and

(4) have wording with content and dimensions approved by the Department.]]

**ARTICLE [[4.]] [[5.]] 4. County Property and Parks**

**[[33B-12.]] [[33B-15.]] 33B-12. [[Prohibition]] Neonicotinoid pesticides on County-owned property.**

(a) *Prohibition.* Except as provided in subsection (b), a [[person]] County employee or County contractor must not [[apply to any lawn]] use a neonicotinoid pesticide on property owned by the County[[:]]

[[(1) a]] [[non-essential]] [[restricted lawn care pesticide; or

(2) a neonicotinoid]].

(b) *Exceptions.*

(1) A [[person]] County employee or County contractor may use [[any larvicide or rodenticide on a lawn on property owned by the County as a public health measure to reduce the spread of disease vectors under recommendations and guidance provided by the Centers for Disease Control and Prevention, the United States Environmental Protection Agency, or the State Department of

Agriculture. Any rodenticide used must be in a tamper-proof product, unless the rodenticide is designed and registered for a specific environment inaccessible to humans and pets.]] a neonicotinoid pesticide on County-owned property to control pests while engaged in agriculture.

(2) [[A]] [[person]] [[County employee or County contractor may use a]] [[non-essential]] [[restricted lawn care pesticide or neonicotinoid on a lawn on property owned by the County for the following purposes]] [[set forth in Subsection 33B-10(a).]][[:

(A) for the control of weeds as defined in Chapter 58, Weeds;

(B) for the control of invasive species listed in a regulation adopted under Subsection 33B-4(d);

(C) for pest control while engaged in agriculture;

(D) for the maintenance of a golf course; and

(E) for the maintenance of medians and islands in County rights-of-way.

(3) A]] [[person]] [[County employee or County contractor may use a]] [[non-essential]] [[restricted lawn care pesticide or neonicotinoid on a lawn on property owned by the County if the Director determines, after consulting the Directors of General Services and Health and Human Services, that the use of the pesticide is necessary to protect human health or prevent imminent and significant economic damage, and that no reasonable alternative is available. If a pesticide is used under]] [[this paragraph]][[, the Director must, within 30 days after using the pesticide, report to the Council on the reasons for the use of the pesticide.

(4)]] This Section does not apply to County-owned property that the Parks Department operates or manages for the County.

**[[33B-13.]] [[33B-16.]] 33B-13. Integrated pest management on County property.**

(a) *Adoption of program.* The Department must adopt[[, by a method (2) regulation,]] an integrated pest management program for all property owned by the County.

(b) *Requirements.* Any program adopted under subsection (a) must require:

(1) monitoring the turf or landscape as appropriate;

(2) accurate record-keeping documenting any potential pest problem;

(3) evaluating the site for any injury caused by a pest and determining the appropriate treatment;

(4) using a treatment that is the least damaging to the general environment and best preserves the natural ecosystem;

(5) using a treatment that will be the most likely to produce long-term reductions in pest control requirements and is operationally feasible and cost effective in the short and long term;

(6) using a treatment that minimizes negative impacts to non-target organisms;

(7) using a treatment that is the least disruptive of natural controls;

(8) using a treatment that is the least hazardous to human health; and

(9) exhausting the list of all non-chemical methods and [[organic treatments available]] listed pesticides for the targeted pest before using any [[synthetic chemical]] other treatments.

(c) The Department must provide training in integrated pest management for each employee who is responsible for pest management.

**[[33B-17.]] 33B-14. County parks.**

(a) *Policy.* It is the policy of Montgomery County to promote environmentally sensitive landscape pest management in its parks by phasing out the use of the most hazardous pesticides and reducing overall pesticide use while preserving landscape assets, maintaining functionality of playing fields, and protecting the health and safety of the public and County employees. To carry out this policy, the Parks Department must, subject to appropriation, implement the provisions of this Section.

(b) *Pesticide-free parks.* The Parks Department must implement a pesticide-free parks program that, at a minimum, consists of:

(1) the maintenance of certain parks entirely without the use of [[restricted lawn care]] registered pesticides other than listed pesticides [[or neonicotinoids]];

(2) a program for reducing the use of [[restricted lawn care]] registered pesticides other than listed pesticides [[and neonicotinoids]] on playing fields that includes:

(A) a pilot program consisting of at least five playing fields maintained without the use of [[restricted lawn care]] registered pesticides other than listed pesticides [[or neonicotinoids]] that:

(i) is conducted in consultation with an expert in organic turf management, with experience in successful transitions from conventional to organic turf management; and

(ii) includes a publicly available plan describing the practices and procedures used; [[and]]

(B) maintenance of all other playing fields using an integrated pest management program; and

(C) a plan submitted to the Council by September 2019 for transitioning to maintenance of all playing fields without the use of registered pesticides other than listed pesticides by 2020; and

(3) a public communication campaign to inform the public of the existence and progress of the pesticide-free parks program.

(c) *Pesticide usage protocols.* The Parks Department must develop usage protocols which limit the use of **[[**restricted lawn care**]]** registered pesticides other than listed pesticides **[[**and neonicotinoids**]]** to the maximum extent possible and, subject to the exceptions in subsection (d):

(1) do not permit the use of **[[**restricted lawn care**]]** registered pesticides other than listed pesticides **[[**or neonicotinoids**]]** within 25 feet of a waterbody;

(2) **[[**do not permit the application of restricted lawn care pesticides or neonicotinoids to playgrounds in County parks; and

(3)**]]** except where immediate application is necessary to protect human health or prevent significant economic damage, include the posting of notice of each planned application of **[[**restricted lawn care**]]** a registered pesticide other than a listed pesticide **[[**or neonicotinoid**]]** on the appropriate Parks Department website and in the area where the pesticide is to be applied, from at least 48 hours before application through at least 48 hours after application, that includes:

(A) the common name of the pesticide;

(B) the location of the application;

(C) the planned date and time of the application; and

(D) the reason for the use of the pesticide[[.]]; and

(3) provide for pesticide application information required under paragraph (c)(2) to be made available to the public in real-time and in a manner consistent with the Montgomery County Open Data Act, Chapter 2, Article XIV of this Code.

(d) *Exceptions.* The pesticide-free parks program and pesticide usage protocols may generally permit the application of a [[restricted lawn care]] registered pesticide to:

(1) control weeds as defined in Chapter 58, Weeds;

(2) control invasive species listed in a regulation adopted under subsection [[33B-4(d)]] 33B-5(c);

(3) control disease vectors;

(4) control biting or stinging insects or stinging plants;

(5) control organisms that threaten the health of trees or shrubs;

(6) remove weeds as part of the renovation of a playing field;

(7) control pests while engaged in agriculture; and

[[(7)]] (8) otherwise protect human health or prevent significant economic damage.

(e) *Reporting requirement.* The Parks Department must submit [[a report]] semi-annual reports to the County Executive and County Council on or before January 15 and July 15 of each year that:

(1) [[details restricted lawn care]] detail registered pesticide [[and neonicotinoid]] usage, other than listed pesticide usage, in County parks during the preceding year, including:

(A) the common name of each [[restricted lawn care]] registered pesticide [[and neonicotinoid]] used;

(B) the location of each application;

(C) the date and time of each application; and

(D) the reason for each use of a [[restricted lawn care]] registered pesticide [[and neonicotinoid]]; [[and]]

(2) [[describes]] describe the status of the pesticide-free parks program implemented under this Section; and

(3) are available to the public in a manner consistent with the Montgomery County Open Data Act, Chapter 2, Article XIV of this Code.

**Sec. 2. Initial [[Lists]] List of [[Non-Essential]] [[Restricted Lawn Care Pesticides and]] Invasive Species.** The Executive must submit the [[lists]] list of [[non-essential]] [[restricted lawn care pesticides and]] invasive species required by [[Subsections]] Subsection [[33B-4(c) and (d)]] 33B-5(c) to the Council for approval by [[January]] March 1, 2016

**Sec. 3. Effective Date.** The [[prohibitions on]] [[requirements for the use of]] [[non-essential]] [[restricted lawn care pesticides in common ownership communities contained in]] [[Section 33B-9]] [[Sections 33B-12 and 33B-13, and the]] prohibitions and requirements related to the [[on]] use of [[non-essential]] [[restricted lawn care]] registered pesticides and neonicotinoids on County-owned property and in County parks contained in [[Section 33B-14]] Sections [[33B-15]] 33B-10, 33B-12, 33B-13 and [[33B-17]] 33B-14 take effect on [[January]] July 1, 2016; the prohibitions on the use of registered pesticides on private property contained in Section 33B-10 take effect on January 1, 2018.

[[**Sec. 4. Expiration.** This Act and any regulation adopted under it expires on January 1, 2019.]]

*Approved:*

George Leventhal 10/8/15

George Leventhal, President, County Council — Date

*Approved:*

Isiah Leggett, County Executive — Date

*This is a correct copy of Council action.*

Linda M. Lauer, Clerk of the Council — Date

**OFFICE OF THE COUNTY CLERK**

Ricky Watanabe, County Clerk
Jade K. Fountain-Tanigawa, Deputy County Clerk

Telephone (808) 241-4188
Fax (808) 241-6349
Email cokcouncil@kauai.gov

**Council Services Division**
4396 Rice Street, Suite 209
Līhu'e, Kaua'i, Hawai'i 96766

April 22, 2014

Attached hereto is Ordinance No. 960, which was adopted on November 16, 2013. For publication and citation purposes, effective April 22, 2014, and for all future use, Ordinance No. 960 will be codified and referenced as Kaua'i County Code 1987, as amended, Chapter 22, Article 23.

ORDINANCE NO. 960 BILL NO. 2491, Draft 2

# A BILL FOR AN ORDINANCE TO AMEND THE KAUA'I COUNTY CODE 1987, AS AMENDED, BY ADDING A NEW ARTICLE 22 TO CHAPTER 22, RELATING TO PESTICIDES AND GENETICALLY MODIFIED ORGANISMS

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

SECTION 1. Chapter 22 of the Kaua'i County Code 1987, as amended, is hereby amended by adding a new Article 22 to read as follows:

## "ARTICLE 22. PESTICIDES AND GENETICALLY MODIFIED ORGANISMS

### Sec. 22-22.1 Findings.

In order to establish provisions governing the use of pesticides and genetically modified organisms (GMOs) by large-scale commercial agricultural entities on Kaua'i, the Council finds that:

(a) Section 1, Article XI of the State Constitution states: "For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai'i'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."

(b) The growth of commercial agricultural entities engaged in the use and development of genetically modified organisms and the widespread use of pesticides in the County of Kaua'i has created a situation where residents live, work, and commute daily in close proximity to areas where there is regular application of restricted use pesticides and general use pesticides.

(c) There are increasing concerns about the direct and long-term impacts of the large-scale use of pesticides, and the impacts that the intense agricultural cultivation is having on the land, on the natural environment, and on human health.

(d) Hawai'i Revised Statutes Section 46-1.5(13) 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."

(e) The County of Kaua'i has become a location of increasing commercial agriculture operations that utilize genetically modified organisms for the production of crop seed and field testing of new genetically modified organisms.

(f) Genetically modified plants could potentially disperse into the environment of the County of Kaua'i through pollen drift, seed commingling, and inadvertent transfer of seeds by humans, animals, weather events, and other means. This could have environmental and economic impacts.

(g) Records obtained from the State of Hawai'i Department of Agriculture indicate that twenty-two (22) different restricted use pesticides, comprising approximately 5,477 pounds, and 5,885 gallons, were used during 2012 on Kaua'i by five (5) commercial agricultural entities, which constituted approximately 99% of the restricted use pesticides utilized by agricultural operations on Kaua'i.

(h) In 2012, restricted use pesticides were used on Kaua'i by agricultural operations (7,727 pounds and 5,892 gallons, or 13%), county government operations (28,350 pounds and zero (0) gallons of Chlorine Liquefied Gas for water and wastewater treatment, or 49%), and non-government operations for structural pest control termite treatment (25,828 pounds and 20 gallons, or 38%).

(i) Pesticides have the ability to contaminate groundwater, and are often toxic to humans, animals, bees, and other insects. Some restricted use pesticides are banned by the entire European Union.

(j) Dust and drift from both restricted use pesticides and general use pesticides sometimes travel beyond commercial agricultural operations. Dust, pesticide drift, and long-term exposure to toxic chemicals are potential sources of pollution endangering human health and the natural environment.

(k) Hawai'i Revised Statutes Section 46-17 states: "Any provision of law to the contrary notwithstanding, the council of any county may adopt and provide for the enforcement of ordinances regulating or prohibiting noise, smoke, dust, vibration, or odors which constitute a public nuisance. No such ordinance shall be held invalid on the ground that it covers any subject or matter embraced within any statute or rule of the State; provided that in any case of conflict between a statute or rule and an ordinance, the law affording the most protection to the public shall apply . . . ."

(l) The impacts on the County of Kaua'i of large-scale intensive cultivation and associated agricultural practices should be further evaluated.

(m) Information pertaining to the intensive use of pesticides within the County of Kaua'i, and the experimentation and growing of genetically modified organisms, is currently withheld from the public. Thus, the public is unable to evaluate the full extent of the impacts on the residents and environment of the County of Kaua'i.

(n) In the interest of protecting the health of the people and fragile natural environment of the County of Kaua'i, the people of the County of Kaua'i have the right to know what pesticides are being used on a significant

scale, and what genetically modified organisms are being grown within the jurisdiction of the County of Kaua'i. The people of the County of Kaua'i have the right to know the likely potential impacts on their human health, and the health of their environment.

(o) It is the intent of the County to collaborate with the State of Hawai'i Department of Agriculture to support the implementation and enforcement of this Article.

**Sec. 22-22.2 Purpose.**

The purpose of this Article is to establish provisions to inform the public, and protect the public from any direct, indirect, or cumulative negative impacts on the health and the natural environment of the people and place of the County of Kaua'i, by governing the use of pesticides and genetically modified organisms, and the penalties associated with any violation of this Article, or the laws, rules, or any other requirement that may be authorized by this Article.

**Sec. 22-22.3 Definitions.**

When used in this Article, the following words or phrases shall have the meaning given in this Section unless it shall be apparent from the context that another meaning is intended:

"Active ingredient" means:

(a) In the case of a pesticide other than a plant regulator, defoliant, or desiccant, an ingredient which will prevent, destroy, repel, or mitigate any pest;

(b) In the case of a plant regulator, an ingredient which, through physiological action, will accelerate or retard the rate of growth or maturation or otherwise alter the behavior of ornamental or crop plants or the produce thereof;

(c) In the case of a defoliant, an ingredient which will cause the leaves or foliage to drop from a plant; and

(d) In the case of a desiccant, an ingredient which will artificially accelerate the drying of plant tissues.

"Adult family boarding home" means any family home providing for a fee, twenty-four (24) hour living accommodations to no more than five (5) adults, unrelated to the family, who are in need of minimal protective oversight care in their daily living activities, in compliance with State of Hawai'i or County of Kaua'i licensing requirements, or both.

"Adult family group living home" means any family home providing twenty-four (24) hour living accommodations for a fee to five (5) to eight (8) elderly, handicapped, developmentally disabled, or totally disabled adults, unrelated to the family, who are in need of long-term minimal assistance and supervision in the adult's daily living activities, health care, and behavior management, in compliance with State of Hawai'i or County of Kaua'i licensing requirements, or both.

"Agriculture" means the breeding, planting, nourishing, caring for, gathering and processing of any animal or plant organism for the purpose of nourishing people or any other plant or animal organism; or for the purpose of providing the raw material for non-food products. For the purposes of this Article, "agriculture" shall include the growing of flowers and other ornamental crops and the commercial breeding and caring for animals as pets.

"*Ahupua'a*" means a land division usually extending from the uplands to the sea.

"Certified pesticide applicator" means any individual who is certified under Hawai'i Revised Statues Section 149A-33(1) as authorized to use or supervise the use of any pesticide which is classified for restricted use.

"Commercial agricultural entity" means a firm, corporation, association, partnership, or any organized group of persons, whether incorporated or not, that is engaged in growing, developing, cultivating, or producing agricultural products.

"County" means the County of Kaua'i.

"Crop" means a plant or product thereof that can be grown and harvested for subsistence, profit, or research.

"Day care center" means any facility where seven (7) or more children under the age of eighteen (18) are cared for without overnight accommodations at any location other than their normal place of residence, in compliance with State of Hawai'i or County of Kaua'i licensing requirements, or both. This term includes child care services and other similar uses and facilities consistent with this definition, and not covered by the "Family child care home" definition.

"DOA" means the State of Hawai'i Department of Agriculture.

"Dwelling" means a building or portion thereof designed or used exclusively for residential occupancy and having all necessary facilities for permanent residency such as living, sleeping, cooking, eating, and sanitation.

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

"EPA" means the United States Environmental Protection Agency.

"Experimental genetically modified organisms" means organisms that have not received final approval by the Federal Food & Drug Administration, United States Department of Agriculture, United States Environmental Protection Agency, or the appropriate federal regulatory body, for human consumption, release into the environment, or both.

"Family care home" means any care home occupied by not more than five (5) care home residents, in compliance with State of Hawai'i or County of Kaua'i licensing requirements, or both.

"Family child care home" means providing child care services and other similar uses consistent with this definition where six (6) or fewer children under the age of eighteen (18) are cared for in a private dwelling unit without overnight

accommodations at any location other than the children's normal place of residence, in compliance with State of Hawai'i or County of Kaua'i licensing requirements, or both.

"FDA" means the Federal Food & Drug Administration.

"General use pesticide" means a pesticide other than one designated as a restricted use pesticide.

"Genetically modified" means produced from an organism or organisms in which the genetic material has been genetically engineered through the application of:

(a) In vitro nucleic acid techniques, which include, but are not limited to: recombinant deoxyribonucleic acid (DNA) techniques; direct injection of nucleic acid into cells or organelles; encapsulation; gene deletion; and doubling; or

(b) Methods of fusing cells beyond the taxonomic family that overcome natural physiological reproductive or recombinant barriers, and that are not techniques used in traditional breeding and selection such as conjugation, transduction, and hybridization.

For purposes of this definition:

(c) "In vitro nucleic acid techniques" include, but are not limited to, recombinant DNA or RNA techniques that use vector systems and techniques involving the direct introduction into the organisms of hereditary materials prepared outside the organisms such as micro-injection, macro-injection, chemoporation, electroporation, micro-encapsulation, and liposomefusion.

(d) An animal that has not itself been genetically modified, regardless of whether such animal has been fed or injected with any food or any drug that has been produced through means of genetic modification, shall not be considered "genetically modified" for purposes of this Article.

"Genetically modified organism" means an organism or organisms whose genetic material has been genetically modified.

"Ground cover" means small plants such as salal, ivy, ferns, mosses, grasses, or other types of vegetation that normally cover the ground and includes trees and shrubs less than six (6) inches in diameter.

"Medical facility" means a facility licensed by the State of Hawai'i to provide medical services.

"Nurse practitioner" means a person licensed as an advanced practice registered nurse under Hawai'i Revised Statutes Chapter 457.

"Nursing home" means a facility established for profit or nonprofit, which provides nursing care and related medical services on a twenty-four (24) hour per day basis to two (2) or more individuals because of illness, disease, or physical or mental infirmity, in compliance with State of Hawai'i or County of Kaua'i licensing requirements, or both.

"OED" means the County of Kaua'i Office of Economic Development.

"Orchard" means the establishment, care, and harvesting of over twenty-five (25) fruit-bearing trees, including, but not limited to, banana, coffee, guava, papaya, or persimmon, for the purpose of selling the fruit to others.

"Organism" means any biological entity capable of replication, reproduction, or transferring genetic material.

"Park" means any park, park roadway, playground, beach right-of-way, or other recreational areas under the control, management, and operation of the County of Kaua'i or State of Hawai'i.

"Perennial waterway" means a natural waterway that has continuous flow in parts of its waterway bed year round during years of normal rainfall.

"Pest" means any insect, rodent, nematode, fungus, weed, or any other form of terrestrial or aquatic plant or animal life or virus, bacterium, or any other microorganism, except viruses, bacterium, or any other microorganisms on or in living humans or other living animals, which the Administrator of the United States Environmental Protection Agency determines to be a pest.

"Pesticide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, and any substance or mixture of substances intended for use as an attractant, plant regulator, defoliant, or desiccant. A product shall be deemed to be a pesticide regardless of whether it is intended for use as packaged, or as a dilution or mixture with substances such as carriers or baits. Products not considered pesticides include:

(a) Deodorants, bleaching agents, and cleaning agents for which no pesticidal claims are made or implied;

(b) Embalming fluids;

(c) Building materials which have been treated to protect the material itself against any pest and bear no claims for protection of other surfaces or objects;

(d) Fabrics which have been treated to protect the fabric itself from insects, fungi, or any other pests;

(e) Fertilizer and other plant nutrients; and

(f) Products intended only for use after further processing or manufacturing such as grinding to dust or other operations.

"Physician" means an individual authorized to practice medicine or osteopathy under Hawai'i Revised Statutes Chapter 453.

"Public roadway" means a roadway on which the public is allowed to generally travel in a vehicle without obtaining special permission, or providing advance notice.

"Registered beekeeper" means a person registered with the Hawai'i Apiary Program, through the State of Hawai'i Department of Agriculture.

"Residential care home" means any care home facility occupied by more than five (5) care home residents, in compliance with State of Hawai'i or County of Kaua'i licensing requirements, or both.

"Restricted-entry interval" means the time after the end of a pesticide application during which entry into the treated area is restricted, as contained within the Worker Protection Standard for Agricultural Pesticides regulation established by the Environmental Protection Agency, and specified on all agricultural plant pesticide product labels.

"Restricted use pesticide" means:

(a) A pesticide or pesticide use classified by the Administrator of the United States Environmental Protection Agency for use by certified applicators or competent persons under their direct supervision and so designated on the label of the pesticide; or

(b) A pesticide or pesticide use classified by the Hawai'i Board of Agriculture for use by certified applicators or competent persons under their direct supervision.

"School" means an institution with an organized curriculum offering instruction.

"Shoreline" means the upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves.

"Significant effect" means the sum of effects on the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the State's environmental policies or long-term environmental goals as established by law, or adversely affect the economic welfare, social welfare, or cultural practices of the community and State.

"USDA" means the United States Department of Agriculture.

"Worker protection standard" means the Worker Protection Standard for Agricultural Pesticides regulation established by the Environmental Protection Agency, which is aimed at reducing the risk of pesticide poisonings and injuries among agricultural workers and pesticide handlers, and contains requirements for pesticide safety training, notification of pesticide applications, use of personal protective equipment, restricted-entry intervals after pesticide application, decontamination supplies, and emergency medical assistance.

**Sec. 22-22.4 Mandatory Disclosure of Pesticides, and Genetically Modified Organisms.**

(a) It shall be mandatory for all commercial agricultural entities that purchased or used in excess of five (5) pounds or fifteen (15) gallons of any single

restricted use pesticide during the prior calendar year to disclose the use of all pesticides of any kind during the following calendar year. Disclosure requirements include:

(1) Worker Protection Standard. Posting of warning signs in the area in which pesticides are to be applied no sooner than twenty-four (24) hours before the scheduled application of any pesticide. Posting of warning signs during and after the application of any pesticide shall conform to the official label of the pesticide. Posting of warning signs at the time of application shall conform to the worker protection standard established by the Environmental Protection Agency (EPA), and shall remain posted until expiration of the applicable restricted-entry interval established by the EPA. The size of all signs, and the symbols and wording on all signs, shall conform to the worker protection standard established by the EPA. A posting notification area shall be provided daily for workers, and shall conform to the worker protection standard established by the EPA, and the State of Hawai'i.

(2) Pesticide Pre-Application "Good Neighbor Courtesy Notices." Pesticide pre-application notification must be provided to any of the following requesting persons within 1,500 feet from the property line of the commercial agricultural entity where any pesticide is anticipated to be applied: registered beekeeper, property owner, lessee, or person otherwise occupying property within 1,500 feet. Pre-application notification must also be provided to any revocable permit holder authorized to enter the property of the commercial agricultural entity. A mass notification list shall be established and maintained by each commercial agricultural entity, and shall include access to a legible map showing all field numbers and any key, legend, or other necessary map descriptions. Any interested person as described in this Section 22-22.4(a)(2) shall submit contact information to the relevant commercial agricultural entity. These interested persons may submit up to three (3) local telephone numbers, and two (2) e-mail addresses. All mass notification messages shall be sent via telephone, text message, or e-mail, with the method or methods of transmittal to be determined by each commercial agricultural entity. Each commercial agricultural entity shall provide an alternative method of transmittal for any recipient who does not have access to the technology necessary for the method or methods of transmittal selected by the commercial agricultural entity. Requests to be included on, or removed from, the mass notification list must be processed within three (3) business days. These "good neighbor courtesy notices" shall contain the following information regarding all anticipated pesticide applications: pesticide to be used, active ingredient of pesticide to be used, date, time, and field number.

(A) Scheduled Weekly Applications. Each commercial agricultural entity shall send regular mass notification messages at least once during every seven (7) day week period summarizing the anticipated application of any pesticide for the upcoming seven (7) day week.

(B) Unforeseen Pest Threat Necessary Applications. Whenever a pesticide application that was unforeseen and therefore not contained in the weekly "good neighbor courtesy notice" is deemed by the commercial agricultural entity to be necessary to alleviate a pest threat, an additional "good neighbor courtesy notice" shall be

generated to all recipients of the mass notification list within twenty-four (24) hours after the application.

(3) Pesticide Post-Application Weekly Public Disclosure. Each commercial agricultural entity shall submit regular public disclosure reports once during every seven (7) day week period compiling the actual application of all pesticides during the prior week. These weekly public disclosure reports shall contain the following information regarding all actual pesticide applications: date; time; field number; total acreage; trade name of pesticide used; EPA registration number; active ingredient of pesticide used; gallons or pounds of pesticide used; and temperature, wind direction, and wind speed at time of pesticide application. Each commercial agricultural entity shall submit all public disclosure reports to the County of Kaua'i Office of Economic Development (OED), and shall include online access to a legible map showing all field numbers and any key, legend, or other necessary map descriptions for all applicable commercial agricultural entities. All public disclosure reports shall be posted online, and available for viewing and download by any interested persons. OED shall develop a standardized reporting form.

(4) Pesticide Post-Application Urgent/Emergency Care Disclosure. Each commercial agricultural entity shall establish an emergency response hotline to be made available to any licensed physician or nurse practitioner practicing in association with a clinic, medical facility, or emergency center. Within six (6) hours of a request from any such licensed physician or nurse practitioner who provides a documented medical need, the commercial agricultural entity must provide the following information regarding all actual pesticide applications related to the alleged incident: date; time; field number; total acreage; trade name of pesticide used; EPA registration number; active ingredient of pesticide used; gallons or pounds of pesticide used; and temperature, wind direction, and wind speed at time of pesticide application.

(b) It shall be mandatory for all commercial agricultural entities that intentionally or knowingly possess any genetically modified organism to disclose the growing of said genetically modified organism.

(1) Annual public reports shall be provided to the Office of Economic Development and the State of Hawai'i Department of Agriculture (DOA), and shall be posted online on the County website. Direct notification to OED and DOA documenting such disclosure shall occur no later than sixty (60) days following the end of each calendar year, except that the first reports shall be due on the date this ordinance shall take effect.

(2) Annual public reports shall include a general description of each genetically modified organism (e.g., "GMO Corn" or "GMO Soy"), a general description of the geographic location including at minimum the Tax Map Key and *ahupua'a* where each genetically modified organism is being grown or developed, and dates that each genetically modified organism was initially introduced to the land in question.

## Sec. 22-22.5 Pesticide Buffer Zones.

(a) It shall be mandatory for all commercial agricultural entities that purchased or used in excess of five (5) pounds or fifteen (15) gallons of any single restricted use pesticide during the prior calendar year to restrict the growing of crops, except ground cover to which no pesticide is applied, and thereby restrict the application of all pesticides in the following areas:

(1) No crops may be grown within 500 feet of any adult family boarding home, adult family group living home, day care center, family care home, family child care home, medical facility, nursing home, residential care home, or school.

(2) No crops may be grown within 250 feet of any park, except that, regarding a mature orchard, the crops of which grow in a hedge-like manner creating a windbreak effect, if pesticide application occurs between crop rows from a source no higher than two (2) feet from the ground, for the purpose of eliminating weeds in the ground, then no crops may be grown within 75 feet of any park.

(3) No crops may be grown within 500 feet of any dwelling, unless:

(A) The commercial agricultural entity has an approved Soil and Water Conservation Plan that explicitly demonstrates no pesticide drift on the dwelling, then no crops may be grown within 100 feet of any dwelling; or

(B) The dwelling is owned by the landowner, and occupied by the landowner or a family member of the landowner, and there are no other dwellings occupied by third-parties within 500 feet of the landowner dwelling, then there shall be no pesticide buffer zone restricting growing of crops in proximity to the landowner dwelling; or

(C) Regarding a mature orchard, the crops of which grow in a hedge-like manner creating a windbreak effect, if pesticide application occurs between crop rows from a source no higher than two (2) feet from the ground, for the purpose of eliminating weeds in the ground, then no crops may be grown within 75 feet of any dwelling.

(4) No crops may be grown within 100 feet of any public roadway, except that pesticides may be used within 100 feet of any public roadway if the commercial agricultural entity posts notification signage on land that is adjacent to the public roadway no sooner than twenty-four (24) hours before the scheduled application. Roadway signs shall be located at the start and end of the field along the public roadway where application will occur, shall be of a size that is legible from vehicles traveling at the posted speed limit, and shall comply with all State of Hawai'i Department of Transportation requirements.

(5) No crops may be grown within 100 feet of any shoreline or perennial waterway that flows into the ocean. This provision shall not apply to any irrigation ditch or drainage canal that does not directly flow to the ocean.

(b) The provisions in Section 22-22.5(a) shall not apply to any specific instance where any County, State, or Federal government agency has authorized such pesticide use for public health or safety purposes.

(c) If this Section, or any part thereof, is determined to conflict with any pesticide labeling information, the more restrictive and environmentally protective provisions shall apply.

**Sec. 22-22.6 Environmental and Public Health Impacts Study (EPHIS).**

The County of Kaua'i shall complete an Environmental and Public Health Impact Study (EPHIS) through a two-part community-based process to address key environmental and public health questions related to large-scale commercial agricultural entities utilizing pesticides and genetically modified organisms. As determined by Council Resolution, the first part shall utilize a Joint Fact Finding Group (JFFG) convened and facilitated by a professional consultant to determine the scope and design of the EPHIS within twelve (12) months of the Notice to Proceed. In the second part of the process, the EPHIS shall be conducted by a professional consultant with oversight by the JFFG and shall be completed within eighteen (18) months of the relevant Notice to Proceed. The EPHIS may make recommendations that include, but are not limited to, possible actions the County may take in order to address any significant effects, public health impacts, or both.

**Sec. 22-22.7 Penalties.**

(a) Any person, firm, or corporation, whether as principal, agent, employee, or otherwise, violating, causing, or permitting the violation of any of the provisions of this Article, shall be assessed a civil fine of $10,000-$25,000 per day, per violation.

(b) In addition to any penalty described in Subsection 22-22.7(a), any person, firm, or corporation, whether as principal, agent, employee, or otherwise, violating or causing or permitting the violation of any of the provisions of this Article, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than two-thousand dollars ($2,000.00), or imprisoned not more than one (1) year, or both, for each offense. The continuance of any violation after conviction shall be deemed a new criminal offense for each day that the violation or violations continue.

**Sec. 22-22.8 Rulemaking.**

In order to effectuate all provisions of this Article, the Office of Economic Development may engage in any rulemaking it deems necessary or proper, utilizing the provisions of Hawai'i Revised Statutes Chapter 91. In so doing, OED is authorized to collaborate with the State of Hawai'i Department of Agriculture."

SECTION 2. Severability Clause. If any provision of this ordinance or the application thereof to any person, commercial agricultural entity, or circumstance is held invalid, the invalidity does 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 severable.

SECTION 3. New material is underscored. In printing this ordinance, the brackets, bracketed material, and underscoring need not be included.

SECTION 4. This ordinance shall take effect nine (9) months after its approval.

Introduced by: /s/ GARY L. HOOSER

/s/ TIM BYNUM

DATE OF INTRODUCTION:

**June 26, 2013**

Līhu'e, Kaua'i, Hawai'i
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CERTIFICATE OF THE COUNTY CLERK

I hereby certify that heretofore attached is a true and correct copy of Bill No. 2491, Draft 2, which was adopted on second and final reading by the Council of the County of Kauai at its meeting held on October 15, 2013, by the following vote:

| | | |
|---|---|---|
| FOR ADOPTION: | Bynum, Hooser, Kagawa, Nakamura, Yukimura, Furfaro | TOTAL – 6*, |
| AGAINST ADOPTION: | Rapozo | TOTAL – 1, |
| EXCUSED & NOT VOTING: | None | TOTAL – 0, |
| RECUSED & NOT VOTING: | None | TOTAL – 0. |

Līhu'e, Hawai'i
October 17, 2013

Ricky Watanabe
County Clerk, County of Kaua'i

*Pursuant to Rule No. 5(b) of the Rules of the Council of the County of Kaua'i, Councilmember Nakamura is noted as voting silent but shall be recorded as an affirmative vote for the motion.

ATTEST:

Jay Furfaro
Chairman & Presiding Officer

DATE OF TRANSMITTAL TO MAYOR:

October 17, 2013

Approved this _____ day of

_____, 2013.

Bernard P. Carvalho Jr.
Mayor
County of Kaua'i

CERTIFICATE OF THE COUNTY CLERK

I hereby certify that the attached Bill No. 2491, Draft 2, vetoed by the Mayor on October 31, 2013, was adopted by the Council of the County of Kaua'i at its meeting held on November 14, 2013 and continued on November 16, 2013 by the following vote, the veto of the Mayor to the contrary notwithstanding:

| | | |
|---|---|---|
| FOR VETO OVERRIDE: | Bynum, Chock, Hooser, Yukimura, Furfaro | TOTAL – 5, |
| AGAINST VETO OVERRIDE: | Kagawa, Rapozo | TOTAL – 2, |
| EXCUSED & NOT VOTING: | None | TOTAL – 0, |
| RECUSED & NOT VOTING: | None | TOTAL – 0. |

Līhu'e, Hawai'i
November 19, 2013

Jade K. Fountain-Tanigawa
Deputy County Clerk, County of Kaua'i

ATTEST:

Jay Furfaro
Chairman & Presiding Officer