

REQUEST FOR LEGAL SERVICES

RECEIVED

By Dept. of The Corporation Counsel at 7:56 am, Feb 13, 2017

Date: February 8, 2017
From: Elle Cochran, IEM Committee Chair

TRANSMITTAL

Memo to: DEPARTMENT OF THE CORPORATION COUNSEL
Attention: Patrick K. Wong, Esq.

Subject: INTEGRATED PEST AND ENVIRONMENTAL MANAGEMENT ON COUNTY PROPERTY (IEM-9)

Background Data: Proposed bill to establish an integrated pest management program for County property to protect the public health and welfare and to minimize the potential pesticide hazard to people and the environment on County property.

Work Requested: FOR APPROVAL AS TO FORM AND LEGALITY
 OTHER:

Requestor's signature <i>Elle Cochran</i> Elle Cochran	Contact Person Gary Saldana (Telephone Extensions: 7134)
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ROUTINE (WITHIN 15 WORKING DAYS) RUSH (WITHIN 5 WORKING DAYS)
 PRIORITY (WITHIN 10 WORKING DAYS) URGENT (WITHIN 3 WORKING DAYS)

SPECIFY DUE DATE (IF IMPOSED BY SPECIFIC CIRCUMSTANCES): February 17, 2017
REASON:

FOR CORPORATION COUNSEL'S RESPONSE

ASSIGNED TO: RMT	ASSIGNMENT NO. 2017-0092	BY: kku
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TO REQUESTOR: APPROVED DISAPPROVED OTHER (SEE COMMENTS BELOW)
 RETURNING-PLEASE EXPAND AND PROVIDE DETAILS REGARDING ITEMS AS NOTED

COMMENTS (NOTE - THIS SECTION NOT TO BE USED FOR LEGAL ADVICE):

DEPARTMENT OF THE CORPORATION COUNSEL

Date: 2/24/2017

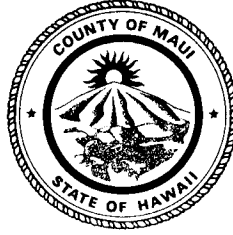
By: *R. Williams*

(Rev. 7/03)

iem:ltr:009acc01:ske

Attachment

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MEMO TO: Elle Cochran, Chair
Infrastructure and Environmental Management Committee

F R O M: Richelle M. Thomson
Deputy Corporation Counsel 

D A T E: February 24, 2017

SUBJECT: A BILL FOR AN ORDINANCE ESTABLISHING A NEW
CHAPTER 8.36, MAUI COUNTY CODE, RELATING TO
INTEGRATED PEST MANAGEMENT ON COUNTY PROPERTY
(IEM-9)

This memorandum is in response to your request dated February 8, 2017, and received February 13, 2017, requesting that the above-entitled ordinance be approved as to form and legality. As I advised staff on February 14, 2017, although I am unable to approve the ordinance as drafted, I offer the following considerations for revisions, as well as the comments noted in the attached redlined version.

Pursuant to Section 46-1(13), Hawaii Revised Statutes (HRS), 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. There are some provisions of the proposed ordinance that should be clarified in order that they are not "inconsistent" with state law, primarily Chapter 149A, HRS, the Hawaii Pesticide Law.

1. Definitions in state and/or federal law. I recommend a review of the Hawaii Pesticide Law and federal pesticide regulations to determine which terms should be included and/or modified to reflect the terms in state or federal law. The proposed ordinance incorporates by reference several federal laws and/or terminology; however, other portions of the ordinance that appear to refer to federal terms are unclear (e.g., the definition of “synthetic materials” does not refer to a federal definition, but the definition of “non-synthetic materials” does).

Additionally, many of the terms defined in the proposed ordinance are also listed in Chapter 149A, HRS. Query whether utilizing the state statute’s terminology would prevent confusion and avoid inconsistency. For example, Section 149A-2, HRS, defines “integrated pest management” as “a sustainable approach to managing pests by combining biological, cultural, physical, and chemical tools in a way that minimizes economic, health, and environmental risks,” which is defined somewhat differently in the proposed ordinance. Also as an example, the definition of “active ingredient” is included in both state and federal law. It appears that the proposed regulation should also include this definition, and there should also be clarification whether “active ingredient” is the same as “scientific name” (referred to in Section 8.36.050.B of the proposed ordinance). Respectfully, the definition of “pest” in the state law appears to be more comprehensive and less open to interpretation (the proposed ordinance refers to life forms “normally considered to be a pest”).

2. Effect on departmental operations and permit requirements. I recommend that the Committee consult with the departments that would be primarily affected by the ordinance regarding their current needs and practices related to pest control as well as their operating permits. For example, the Department of Water Supply uses certain chemicals that may be considered “pesticides” under the proposed ordinance within the water supply system (reservoirs, ditches, all of which would qualify as “non-enclosed county property” under the ordinance). Likewise, the Department of Environmental Management utilizes chemical treatment measures in the wastewater reclamation facilities and within the recycled water distribution system. These operational measures may be controlled or mandated under permits issued by the State Department of Health. Perhaps an exemption related to use of pesticide required by or necessary for compliance with operational permits could be considered.

3. “Non-enclosed county property.” The ordinance prohibits use of non-listed pesticides on county property that “is not enclosed by walls and a ceiling, and owned by or under the management or control of the county.” The new ordinance would not restrict usage of pesticides within County buildings,

presumably where human exposure to pesticides may be concentrated. The definition may also implicate, for example, mold and fungal controls to the exterior of County buildings (e.g., paint often includes fungicide) and some types of termite control. County pools would also fall into this definition, with the ordinance possibly restricting usage of some pool chemicals unless they were those listed as allowed on organic food crops or “minimum risk pesticides.”

4. Listed Pesticides. Two of the three types of authorized pesticides in the proposed ordinance relate to pesticides allowed under federal law to be used on organic food crops. The third category of allowable pesticides includes those determined by the EPA to be “minimum risk pesticides,” i.e., those that are exempt from registration under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).¹

There is a specific exception for use of pesticides on County property “while engaged in agriculture” (Section 8.36.050.B.2), which appears contrary to the intent of the proposed ordinance (human health impacts). Additionally, “agriculture” is not defined in this ordinance (limited to crops for human consumption or all types of ag?).

In a brief review of a few jurisdictions’ controls related to pesticide use, some have prohibited use of EPA’s Toxicology Categories I and II, as well as pesticides classified by the EPA as “known, likely, or possible carcinogen.”² If the aim of the ordinance is to prevent harm to human health, levels of toxicology may be relevant.

5. Definition of “pesticide.” The EPA references other categories of substances that it considers pesticides, including soil fumigants, rodenticides, biopesticides, plant-incorporated protectants, wood preservative pesticides, and antimicrobials.³

The proposed definition of “pesticide” excludes antimicrobial agents, such as disinfectant, sanitizer, or deodorizer used for cleaning that is not considered a pesticide under any federal or state law. However, according to the EPA, “antimicrobial pesticides” are “substances or mixtures of substances used to destroy or suppress the growth of harmful microorganisms such as bacteria, viruses, or fungi on inanimate objects and surfaces. Antimicrobial products contain about 275 different active ingredients and are marketed in many types of formulations including: sprays, liquids, concentrated powders, and gases.”⁴ Some antimicrobial pesticides are required to be registered, and based upon a review of available information, it is likely that such products

would be considered “pesticides” under federal law or guidance documents. I recommend reviewing the state and federal definitions of “pesticide.”

6. “Imminent threat to public health” and “emergency application.”
The proposed ordinance addresses such terms as they relate to threats to “public” health (including threats to human health from invasive species), but excludes threats to the natural environment. For comparison, see Section 149A-2, HRS, in which the definition of “environment” “includes water, air, land, and all plants and humans and other animals living therein, and the interrelationships which exist among these,” and “imminent hazard” as a threat to the environment.

The ordinance includes an exception related to use of larvicide and rodenticide based on state or federal “recommendations and guidance,” but other types of emergency situations are approved by the Managing Director. It’s unclear why federal or state guidance (or possibly mandates) would not be relevant in most or all emergency situations.

In summary, the proposed ordinance appears to be drafted in a more complex manner than may be necessary to achieve its goals, and is inconsistent internally and in some areas may be inconsistent with state or federal law. Also as noted previously, the potential unintended application to departmental operations (e.g., water or wastewater systems operation and maintenance) and effects on state permit requirements should be further vetted.

¹ 40 CFR 152.25(f). <https://www.gpo.gov/fdsys/pkg/CFR-2013-title40-vol25/xml/CFR-2013-title40-vol25-sec152-25.xml>

² <http://npic.orst.edu/factsheets/signalwords.pdf>

³ <https://www.epa.gov/pesticides>

⁴ <https://www.epa.gov/pesticide-registration/what-are-antimicrobial-pesticides>

ORDINANCE NO. _____

BILL NO. _____ (2017)

A BILL FOR AN ORDINANCE ESTABLISHING A NEW CHAPTER 8.36,
MAUI COUNTY CODE, RELATING TO INTEGRATED PEST MANAGEMENT ON
COUNTY PROPERTY

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. The purpose of this Ordinance is to establish an integrated pest management program for County property to protect the public health and welfare by minimizing and, where possible, eliminating the potential pesticide hazard to people and the environment on County property.

Commented [RT1]: The ordinance refers to harm to public health, but not to natural flora/fauna.

SECTION 2. Title 8, Maui County Code, is amended by adding a new chapter to be appropriately designated and to read as follows:

“Chapter 8.36

INTEGRATED PEST MANAGEMENT ON COUNTY PROPERTY

Sections:

- 8.36.010 Purpose.
- 8.36.020 Applicability and scope.
- 8.36.030 Definitions.
- 8.36.040 Integrated pest management on county property.
- 8.36.050 Prohibition for non-enclosed county property; requirements for exceptions.
- 8.36.060 Signage; reporting.
- 8.36.070 Penalties.

8.36.010 Purpose. The purpose of this chapter is to establish an integrated pest management program on county property to protect the public health and welfare and to minimize and, where possible, eliminate the potential pesticide hazard to people and the environment on county property, consistent with the public interest

in the benefits derived from avoiding hazardous pesticide use and adopting preventive and ecologically sensitive practices.

8.36.020 Applicability and scope. The provisions of this chapter shall govern the use of pesticides on county property.

8.36.030 Definitions. Whenever used in this chapter, unless a different meaning clearly appears from the context, certain words and terms are defined as follows:

“Department” means the department of public works.

“Director” means the director of public works.

“Emergency application” means a situation where reasonable alternative methods to pesticide use have been exhausted, and an application of a non-listed pesticide, as defined in this section, is necessary based on an imminent threat to public health.

“Inert ingredient” means any substance or group of substances with similar chemical structures designated by the U.S. Environmental Protection Agency as other than an active ingredient which is intentionally included in any pesticide product.

“Integrated pest management” means a decision making, record-keeping process for managing pests that uses monitoring to determine pest injury levels, and prioritizes biological, cultural, mechanical, and physical methods, “listed” substances as defined in this section, 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. This method uses extensive knowledge about pests, such as infestations, thresholds, life histories, environmental requirements, and natural control of pests. The method involves the use of non-chemical pest-control methods first, and the careful use of listed pesticides only after non-chemical methods have been exhausted or are not feasible.

“Imminent Threat to Public Health” means an unpredictable outbreak of a poisonous, stinging, or biting insect, or poisonous or stinging plant that threatens public health.

“Invasive species” means an animal pest or weed that does not arrive into an ecosystem through natural means, but rather through human-assisted activities, and negatively impacts indigenous species and ecosystems.

“Larvicide” means a pesticide designed to kill larval pests.

“Listed Pesticide” means a pesticide that is:

Commented [RT2]: Review definitions in HRS 149A-2 and federal law.

Commented [RT3]: Note that DEM's directive under the Charter is to "guide efforts to optimize environmental ... protection, sustainability, etc."

Commented [RT4]: See HRS 149A-2 definition of "environment" and "imminent hazard"

Commented [RT5]: Not defined; other references to "scientific name" in ordinance

Commented [RT6]: This is confusing. It reads that invasive species are only those that arrive into the ecosystem via human activities.

1. Made out of non-synthetic, natural materials, with the exception of prohibited non-synthetic materials listed under 7 CFR 205.602.
2. Made out of synthetic materials listed under 7 CFR 205.601 that is labeled for turf uses, subject to discretionary authority to require disclosure of inert ingredients.
3. A minimum risk pesticide listed under 40 CFR 152.25.

“Non-enclosed county property” means any real property that is not enclosed by walls and a ceiling, and owned by or under the management or control of the county.

“Non-synthetic materials” or “natural materials” means any substance that is derived from mineral, plant, or animal matter and does not undergo a synthetic process as defined in section 6502(21) of the Organic Foods Production Act (7 United States Code 6502(21)).

“Park” means a public park located in, owned, and operated by the county, including, but not limited to, any park, park roadway, parking area, playground, athletic field, beach right-of-way, or tennis court, and other recreational areas under the control, management and operation of the county.

“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 law.

“Pesticide” means a substance or mixture of substances intended or used:

1. To prevent, destroy, repel, or mitigate any pest;
2. As a plant regulator, defoliant, or desiccant; or
3. 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.

“Rodenticide” means a pesticide designed to kill rodents pests.

“Synthetic materials” means a substance that is formulated or manufactured by a chemical process or by a process that chemically changes a substance extracted from naturally occurring plant, animal, or mineral sources, except that such term shall not apply to substances created by naturally occurring biological processes.

Commented [RT7]: Unclear. Does this apply to the exterior of buildings, pools, etc.? Does it apply to ground or building treatment for termites? Exterior painting? If the intent is to prevent harm to public health, allowing pesticides within county buildings appears to be contrary.

Commented [RT8]: If the intent is that these are allowed under Listed Pesticides #1, then this definition should appear there along with the exception.

Commented [RT9]: See HRS 149A-2. Definition is clearer.

Commented [RT10]: This is confusing. Merriam-Webster defines adjuvant as “one that helps or facilitates: as an ingredient (as in a prescription or solution) that facilitates or modifies the action of the principal ingredient.”

Commented [RT11]: EPA references “antimicrobial pesticides”

Commented [RT12]: Should reference the federal statute referred to in the definition of “non-synthetic materials”

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

8.36.040 Integrated pest management on county property. A. Program. An integrated pest management program for the county is established within the department. The program shall be managed by the director, in consultation with the director of parks and recreation.

B. Duties. The pest management program shall:

1. Monitor county turf or landscapes for pests, as appropriate.

2. Evaluate county properties for any injury caused by a pest and determine an appropriate treatment plan by exhausting the list of all non-chemical methods and organic treatments available for the targeted pest before using any synthetic chemical or other treatments.

3. Maintain accurate records documenting each identified potential and actual pest problem, treatment plan, and implementation of treatment.

C. Management plan requirements. For each pest problem on county property, the treatment plan shall use only listed pesticides and methods that are the least hazardous to human health, the least damaging to the general environment, best preserves the natural ecosystem, and the most likely to prevent pest problems and produce long-term reductions in pest control requirements. The treatment plan shall minimize negative impacts to non-target organisms, be operationally feasible and cost-effective in the short- and long-term, and least disruptive of natural controls available. For non-enclosed county property, the treatment plan shall utilize only listed pesticides.

D. Safer Parks Program. The director of parks and recreation shall develop a safer parks program incorporating the requirements of the county’s integrated pesticide management program. The program shall include a publicly-available plan of pest control practices and procedures for county parks designed to eliminate the use of the most potentially hazardous pesticides and reduce overall pesticide use in parks. The director of parks and recreation shall make publicly-available on the department of parks and recreation’s website, information concerning the safer parks program. Signage including a reference to the safer parks program and website address for the department of parks and recreation shall be posted conspicuously at each park entrance.

E. Pesticide use on non-enclosed county property shall include only listed pesticides.

Commented [RT13]: Is this the same as “non-enclosed county property”

Commented [RT14]: All county property, or the subset called “non-enclosed”?

Commented [RT15]: Is this the same as “Listed Pesticides”?

Commented [RT16]: Query whether this is different than the definition of “integrated pest management plan”

F. Training. The department shall provide training in integrated pest management for county employees responsible for pest management.

8.36.050 Prohibition for non-enclosed county property; requirements for exceptions. A. Prohibition. Except as provided in section 8.36.050(B), a person shall not apply a non-listed pesticide to any non-enclosed county property.

B. Exceptions. The prohibition in section 8.36.050(A) shall not apply to:

1. Larvicide or rodenticide for 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 U. S. Environmental Protection Agency, or the State Department of Agriculture. Rodenticides shall be in a tamper-proof product, unless designed and registered for a specific environment inaccessible to humans and pets.

Commented [RT17]: Why is this limited to larvicide or rodenticide and not all pesticides?

2. Pesticide for pest control, while engaged in agriculture.

Commented [RT18]: Two categories of acceptable listed pesticides refer to those allowed by federal law on organic food crops. Unclear why agricultural use would then be exempted here. Note that this affects County agricultural parks.

3. Pesticide, if the managing director determines that an emergency application of a non-listed pesticide is necessary to prevent an imminent threat to public health, including damage from invasive species, and that no reasonable alternative is available.

Commented [RT19]: Again, the focus is on human health, not effects of pests on other flora/fauna. Is this the intent?

C. Requirements for exceptions.

1. Approval. Prior to the application of a pesticide to a non-enclosed county property as an exception to the prohibition under section 8.36.050(~~B~~)(3A) of this section:

Commented [RT20]: By definition, these "invasive species" are limited to those introduced by humans. Is that the intent?

a. The director or, the director of parks and recreation for all properties under the jurisdiction and control of the department of parks and recreation, shall make a written request to the managing director, including the common name of the pesticide; the intended location, date, time, and amount of the application; and the reason for its use; and

b. The managing director shall determine whether the pesticide application is warranted and maintain a record of the determination and the reasons therefor.

2. If a pesticide is applied to county property as an exception to the prohibition under section 8.36.050(~~B~~)(3A) of this section, the managing director shall, within 10 days after the date the pesticide is applied, submit a report to the council that includes the common name of the pesticide; the location

of the application; the date, time, and amount of the application; and the reason for its use.

3. The director shall make publicly available on the department's website, a list of the pesticides applied as an exception to the prohibition under section 8.36.050(B)(3A) of this section. The list, updated by the director at least monthly, shall include the scientific and common names of pesticides that are used, and the location and date of application for each pesticide.

Commented [RT22]: Is this the same as the "active ingredient"? Should be defined.

8.36.060 Signage; reporting.

A. Signage. 1. If a pesticide is applied to non-enclosed county property under section 8.36.050(B), signage shall be posted conspicuously at the property to inform the public of the application of the pesticide.

Commented [RT23]: Will this be required for all property or just county property that's open to the public?

2. Except where the director determines immediate application is necessary to protect human health or prevent significant economic damage, signage for each pesticide application under section 8.36.050(B) shall be posted at least 48 hours before and after its application. The signage shall include the common name of the pesticide, the location of the application, the date and time of the application, the reason for its use, and the department's website address for information concerning the pesticide and its application.

Commented [RT24]: This is the first time that "economic damage" is referenced in the ordinance.

B. Reporting. Not later than March 1st of each year, the director shall submit to the mayor and council a report of all applications of pesticides applied to county property under section 8.36.050(B) during the preceding year. The report shall include the scientific and common names of the pesticide; the location, date, time, and amount of the application; and the reason for its use.

Commented [RT25]: See #2 above. Reporting upon application and also 1x a year?

Commented [RT26]: same comment as above.

8.36.070 Penalties. Any person violating this chapter, upon conviction, shall be fined not less than \$150 and not more than \$500 for each violation."

Commented [RT27]: The practical impact of this would be to County employees or contractors, or possibly in limited circumstances to landowners of adjoining county property.

SECTION 3. This ordinance shall take effect 60 days after its approval.

APPROVED AS TO FORM AND LEGALITY:

Department of the Corporation Counsel
County of Maui

iem:misc:009abillo1:ske