INVASIVE SPECIES IN MAUI COUNTY:
LEGAL ISSUES & JURISDICTIONAL APPROACHES

I. OVERVIEW

Voluntary cooperation by private landowners and businesses is the preferable approach to invasive species detection and control on private land. Unfortunately, a few uncooperative individuals can undermine previous efforts, making eradication programs much more expensive and possibly futile.

Two principles guide this summary:

1. Regulations should be narrow, focusing only on those species that are highly invasive; pose a significant threat to the environment, economy, agriculture, human health, or quality of life; and feasible targets for eradication or control.
2. Private landowners and businesses should not be penalized for the presence of invasive species on their property so long as they take meaningful steps to (a) remove or assist in removing the pest species, which may include cooperating with County-sanctioned efforts; and (b) prevent their reoccurrence.

Two major issues affect the ability to make progress on invasive species in Maui County:

1. Uncooperative landowners - access to private property
2. Reintroduction of pest species from other islands

Legislative approaches to address these issues have been developed and implemented elsewhere in the United States. This summary provides background for each of these challenges, a description of current impacts on Maui County, example solutions from other jurisdictions, and a discussion of potential options moving forward.

II. UNCOOPERATIVE LANDOWNERS – ACCESS TO PRIVATE PROPERTY

A. Background: The introduction of Invasive species to Maui County can be intentional or accidental. Intentional introductions may be legal, such as miconia, which was not prohibited when it was imported, or they may be prohibited, such as snakes. Accidental introductions often occur as hitchhikers: fireweed in hydromulch or coqui frogs in nursery shipments. Regardless of how they got here, most invasive species that become targets of an eradication campaign started in someone's backyard – on private land.

At the state level, inspectors from the Hawai‘i Department of Agriculture have authority to enter public and private property for pest control/eradication. However, under current law, entry onto private land requires a court order. In practice, this authority has been rarely used, for example in response to a reliable report of a snake or other dangerous reptile.

B. Problem: The island-based Invasive Species Committees access private property only with the permission of the landowner. For the most part, landowners in Maui County have been very cooperative but there are always a few "recalcitrant" landowners or renters. The reasons given

for not allowing access or control include liking the aesthetics of the plant or the sound of the coqui, or concerns about use of chemicals. The inability to control a high-priority species at a single site can thwart years of effort or create the very real probability that overall efforts will fail.

Current examples include:

- Flowering **Pampas Grass** plants upcountry that disperse seeds into high elevation pristine forests. The costs of finding and controlling this species are exponentially greater and more dangerous once the plants have become established at higher elevations; helicopters and remote field camps are necessary to access remote and difficult terrain.
- **Coqui Frogs** easily spread from an uncontrolled site to another property or even onto a vehicle parked nearby, which can create a new infestation elsewhere on the island.
- **Little fire ants** are spreading mauka to makai in Nāhiku from an uncontrolled infestation; an infested vehicle has already been moved to two different locations on the island.

C. Legislative Approaches: Jurisdictions elsewhere in the United States have addressed this issue as follows.

1. Nevada

NRS § 527.180 provides that the State Forester shall serve notice upon all owners within an established zone to destroy certain forest pests. The Forester must publish a legal description of the infested area at least once a week for two consecutive weeks in local papers. NRS § 527.200 provides that after 30 days' notice as specified in NRS § 527.180, the Forester Firewarden may without further notice destroy those pests upon failure of the owner to do so. The costs of control measures are paid from the Forestry Account but such costs or portion thereof as determined by the Forester become a lien on all land of the owner within the infested area. Upon completion of control measures on private land, the Forester files a statement of work completed and submits costs with the County Board of Commissioners, which has the responsibility to collect payment from the landowner.

2. Minnesota

Minnesota has a similar expectation that certain designated invasive species will be controlled by the landowner, but provides more details about how notice to the landowner will be provided. See MS § 18.83.

3. North Dakota

North Dakota has a more complex system that creates county weed boards and allows the creation of city weed boards. The county weed board may notify a landowner of the presence of a noxious weed. The statute includes provisions to allow the landowner to appeal the requirement to control the species. Following proper notice and failure by the landowner to control the weed, the county officer may take control measures with costs to be levied against the landowner. See NDCC § 4.1-47.

4. Florida

Florida's approach for addressing invasive species on private land includes requiring removal of

certain designated priority invasive species before a Notice of Occupancy will be given for new construction. See Uniform Land Development Code Article 14(C) Section 12 (Removal of Prohibited Invasive Non-Native Vegetation).

5. Draft Maui County Ordinance

Around 2004, a class focused on invasive species at Maui Community College developed a draft ordinance to address the issue of recalcitrant landowners. The draft ordinance has the following components:

- Proposed as a new Chapter in Title 20 – Environmental Protection
- Defines Invasive Species Management Entity
- Defines Maui County Priority Pest Species
- Establishes landowner responsibility for removal of priority pest species
- Provides notice requirements to landowner if priority pest species are detected on property.
- Authorizes entry onto private land to control pests upon failure of landowner to do so.
- Provides for cost recovery and liens.

Discussion: These examples including the draft MCC Maui County ordinance are not intended to be exhaustive –many different states have similar provisions. The jurisdictions place primary responsibility for controlling pests that occur within a designated area on the landowner. A variation on this approach could be to (a) require control by the landowner OR require cooperation with a state/county-funded project (with no cost to the landowner), or (b) absent compliance with option (a) provide a mechanism for control by the county with cost recovery through assessment / liens on the property. Additionally, the Florida model could be followed to require removal of high priority pest species upon the sale or transfer of any property in addition to new construction sites.

As noted above, it may be important to consider a very narrow list of target species for initial implementation. Unresolved is the issue of preemption by state law as this could be construed to be an area currently regulated by the Department of Agriculture. A statute authorizing counties to regulate in this area might be necessary.

III. PREVENTING INTER- AND INTRA-ISLAND SPREAD OF INVASIVE SPECIES

A. Background: Hawai‘i lacks adequate regulatory authority and personnel capacity to stop the spread of invasive species between islands. While existing laws prohibit the intentional spread of invasive species, some high priority species are not currently regulated; for example, the State’s noxious weed law has not been updated since 1992 and even that law has limited applicability for stopping inter-island spread. The Hawai‘i Department of Agriculture Plant Quarantine Branch, whose inspectors are charged with stopping the movement of pests between our ports and harbors, is notoriously understaffed. They do an amazing job with the resources they have, but invariably, pests get through.

There are no effective penalties for the negligent movement of pests between islands, other than the risk of detection and rejection of the infested shipment. Repeat offenders, if caught, may be required to treat their plants before shipment, but plants are not the only way pests move and

some containers are "drop-shipped" directly from a seller to the buyer, without going through the harbor inspection system. Additionally, a seller of plants or other goods could know (or should have known) that a shipment had little fire ants; if those goods make it through quarantine and are later discovered to have been infested, no penalties accrue.

Similarly, once a pest has become established at a new location on Maui, there are no penalties for a landowner or business that knowingly moves or sells goods infested with invasive species to another location on the island ("intra-island" movement).

B. Problem: The islands of Maui County are routinely subjected to the introduction of invasive species from other islands, especially coqui frogs and little fire ants from the Island of Hawai'i. Maui bears the brunt of these introductions due to the much larger volume of goods brought in, although Molokai and Lāna'i have also experienced introductions of coqui frogs and for Lanai, little fire ants.

At least one business on Maui regularly receive goods from Hawai'i Island that are infested with coqui frogs. The Maui Invasive Species Committee (MISC) conducts repeat treatments for coqui frogs at this location, but cannot be at the site every time new shipments come in. Treatments by MISC invariably miss some frogs. Thus, coqui continue to be dispersed throughout the island.

C. Legislative Approaches: Maui County cannot regulate businesses in other counties, but presumably can regulate businesses within its boundaries for safety, health and welfare reasons.

1. Good Neighbor / Good Business Requirements

Best Management Practices (BMPs) may be voluntary or mandatory. MISC previously developed and implemented a voluntary Coqui-free Certification program for businesses that follow established BMPs to reduce the likelihood they have or are spreading coqui frogs. See www.coquifreemaui.org. In return for compliance with the program, participants receive free marketing to advertise that they are Coqui-free. Similar programs exist elsewhere in the world for plant industry businesses who agree not to sell certain invasive plants. Hawai'i has initiated a "Plant Pono" program that is based on BMPs. The limitation associated with voluntary BMPs is that not all businesses choose to participate. This has certainly been true on Maui.

An example of a mandatory health-industry BMP program is the State's recent adoption of the color-coded placard system for food establishment businesses. The system was designed to reduce the incidence of food-borne illness and inform the public of recent inspection results.

2. Draft Maui County Ordinance

The Office of County Councilmember Don Guzman previously explored the possibility of establishing mandatory BMPs for Maui County businesses that import goods from areas known to be infested with invasive species. Key components include:

- Businesses importing goods from infested areas will be subject to certification and inspection
- Business owner bears responsibility for control measures of invasive species
- Movement of infested nursery stock from one location to another on the island prohibited
- Certification standards

Discussion: A mandatory BMP program would require development of a considerable bureaucratic structure. The scope of businesses potentially subject to the requirements could be quite large; for example, little fire ants can move on many different items – equipment, plants, construction materials, etc. One option could be a scaled-back approach consisting of:

- Inspections of high-risk businesses to detect new infestations for high priority pests
- Mandatory BMPs for businesses that have multiple or ongoing incidents of infestation and which do not appear to be taking steps to address the problem

IV. SUMMARY

Maui County is a leader in supporting control of invasive species, not just within the state but nationally. Unfortunately, the considerable resources dedicated to the effort are not as effective as they could be due to gaps in the current regulatory system and capacity to stop the spread of pests both inter- and intra-island. Left uncorrected, such gaps could eventually make current efforts to stop the spread of little fire ants and coqui frogs futile. New approaches are needed to safeguard our islands' health, safety, economy and environment. Any new legislation should be narrowly focused to limit unnecessary economic impacts. At present, Maui County taxpayers are bearing the burden of the unchecked spread of invasive species. It is a policy decision of the County Council to determine how much of the burden should be shared by private landowners and businesses and under what circumstances.