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SUBMITTAL

TO: Co-chairs and Members
Hawaii Invasive Species Council
State of Hawaii

FROM: Joshua Atwood, Program Supervisor
Hawaii Invasive Species Council

SUBJECT: Requesting direction on the promulgation of administrative rules relating to the
Hawaii Invasive Species Council

Background

In 2003, the Hawaii Invasive Species Council (HISC) was established by the passage of Senate Bill 1505 and the signing of Act 85 by Governor Linda Lingle. Chapter 194, Hawaii Revised Statutes (HRS) describes the HISC's membership and provides certain authorities and responsibilities to the HISC, including the mandate to "identify and record all invasive species present in the State (HRS 194-2). At the HISC's first meeting in October 2003, the HISC voted to adopt three existing lists codified in Hawaii Administrative Rules (HAR) as an "initial list of invasive species" with the stated intent of producing a more comprehensive list at a later date. The three existing lists voted to be considered as "invasive" included:

- Species prohibited for import (HAR 71-6, Hawaii Department of Agriculture [HDOA])
- Noxious weeds for eradication or control (HAR 68, HDOA)
- Injurious wildlife (HAR 124, DLNR)

The HISC assigned the Established Pests Working Group to develop a method for updating the list, but no such method was produced.

In 2008, the DLNR Invasive Species Coordinator solicited assistance from attorney Justine Hura in analyzing the legal authorities and responsibilities assigned to the HISC by HRS 194. One of the outcomes of this legal review was the advice that the designation of species as "invasive" should be based on an administrative rule process, due to the relationship between the HISC's authority to designate invasive species and the authority to enter private property for the control or eradication of species identified by the HISC as invasive (HRS 194-5). In 2011, the HISC directed its support staff to begin drafting rules to this effect. Since 2011, HISC staff have worked with agency staff, the Department of the Attorney General, and other partners to explore options for administrative rule processes that would allow the HISC to maintain an official invasive species list.

Discussion

The maintenance of regulatory lists is generally accomplished pursuant to HRS 91, which describes the state's rulemaking process and public hearing requirements. Under this model of list maintenance, additions to or deletions from a list require the completion of the full rulemaking process described in HRS 91. For example, the list of injurious wildlife and the list of noxious weeds are incorporated into HAR 124 and HAR 68, respectively, and any updates to these lists require the formal rulemaking procedure described in HRS 91. As a result, these lists are updated infrequently or not at all.

An alternative model for list maintenance is utilized by the HDOA for the lists of animals that may or may not be imported into the state. Under this model, the HDOA may develop rules to describe the process by which these lists are updated, and then make additions to or deletions from the list by action of the Board of Agriculture. The authority to utilize this method is provided in statute:

HRS 150A-6.6: Import lists amendment. Without regard to the notice and public hearing requirements of chapter 91, the board may adopt rules to make additions to or deletions from the lists required to be maintained in sections 150A-6.1 through 150A-6.3; provided that the board shall adopt rules pursuant to chapter 91 to establish methods to obtain public input and notify the public of additions to or deletions from the lists required under sections 150A-6.1 through 150A-6.3.

The methods to obtain public input and notify the public are described in rule:

HAR 4-71-4.2: Public input and notification for listing. (a) By order, the board may adopt additions to or deletions from the lists of animals without regard to the notice and public hearing requirements of chapter 91, HRS, provided that thirty days or more prior to the effective date of the order, the department shall issue a press release and mail notices to the Office of Environmental Quality Control for publication and to all persons who have made a timely written request of the department for advance notice of the order or the department's rulemaking proceedings. The press release and the notice shall include:

(1) A statement summarizing the substance of the proposed order which may include examples of the kinds of animals being added to or deleted from the lists required under section 150A-6.2, HRS;

(2) A statement that a copy of the proposed order and the proposed exact changes will be mailed to any interested person who requests a copy upon payment in advance of costs for photocopying, preparing, and mailing the copy;

(3) A statement as to where to obtain a copy of the proposed order and the proposed exact changes for inspection, or for pick-up after payment in full of costs for photocopying and preparing; and

(4) A statement that the department is soliciting comments regarding the proposed order during the next thirty days, where comments may be forwarded to, and where the proposed order will be discussed.

(b) The department shall consider all oral and written comments and may incorporate the same in its review of the proposed order by the advisory committee on plants and animals in a noticed, public meeting.

(c) Upon approval by the board at a noticed, public meeting, the order to adopt additions to or deletions from the lists of animals shall take effect ten days after the department gives public notice of the order in a daily or weekly publication of statewide circulation or in separate daily or weekly publications whose combined circulation is statewide.

This model of list maintenance allows for public input and notification while greatly reducing the time and cost associated with rulemaking. This model could be utilized by the HISC to develop a relatively dynamic invasive species list that may be updated as species are introduced to or eradicated from the state. In order to utilize this model, HRS 194 would need to be amended to provide authorities similar to those found in HRS 150A-6.6.

Legal Authority

- HRS 194-2 (a)(6); directing the HISC to identify and record all invasive species present in the state
- HRS 194-7; authorizing the HISC to adopt administrative rules to effectuate HRS 194

Recommendations

That the Hawaii Invasive Species Council (HISC) direct staff to:

1. Work with the Department of Land and Natural Resources, as the administrative host of the HISC, to draft legislation for the regular legislative session of 2016 that would amend Chapter 194, Hawaii Revised Statutes (HRS), to authorize the HISC to adopt rules to make additions or deletions from the list of invasive species without regard to Chapter 91, HRS
2. Draft administrative rules, pursuant to Chapter 91, to establish methods to obtain public input and notify the public of additions to or deletions from the list.