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Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

WILLIE KAUPIKO, KA'IMI KAUPIKO,) CIVIL NO.
MIKE NAKACHI, FOR THE FISHES,) (Environmental Court)
CENTER FOR BIOLOGICAL DIVERSITY,)
AND KAI PALOA,) COMPLAINT FOR DECLARATORY
Plaintiffs,) AND INJUNCTIVE RELIEF; EXHIBIT A;
) SUMMONS
)
v.)
)
BOARD OF LAND AND NATURAL)
RESOURCES, STATE OF HAWAI'I AND)
DEPARTMENT OF NATURAL)
RESOURCES, STATE OF HAWAI'I,)
)
Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Willie Kaupiko, Ka‘imi Kaupiko, Mike Nakachi, For the Fishes, Center for Biological Diversity, and Kai Palaoa (collectively, the “Kaupiko Hui” or “Hui”) complain of Defendant Board of Land and Natural Resources, State of Hawai‘i (the “Board”) and Defendant Department of Land and Natural Resources, State of Hawai‘i (“DLNR”), collectively “Defendants”, as follows:

I. INTRODUCTION

1. On September 6, 2017, the Hawai‘i Supreme Court held in *Umberger v. Department of Land & Natural Resources*, 140 Hawai‘i 500, 403 P.3d 277 (2017), that commercial aquarium collection under permits issued pursuant to Hawai‘i Revised Statutes (“HRS”) § 188-31 is subject to the environmental review requirements of the Hawai‘i Environmental Policy Act (“HEPA”), HRS chapter 343. On October 27, 2017, this Court invalidated all unexpired commercial aquarium permits and enjoined DLNR from issuing or renewing further commercial aquarium permits until further order of the Court, *i.e.*, pending proper completion of HEPA review. Exhibit A: *Umberger v. Dep’t of Land & Natural Resources*, Civil No. 12-1-2625-10 JPC, Order After Remand, Regarding Commercial Aquarium Collection Permits (Oct. 27, 2017).

2. Following the *Umberger* rulings, DLNR allowed commercial collection to continue statewide under commercial marine licenses DLNR issued pursuant to HRS § 189-2, so long as collectors claimed not to use fine-meshed nets to collect the fish. On January 28, 2021, this Court entered judgment that DLNR’s issuance of HRS § 189-2 commercial marine licenses for aquarium collection also violated HEPA. *Kaupiko v. Dep’t of Land & Natural Res.*, Civil No. 1CCV-20-0000125 (JPC), Judgment (Jan. 28, 2021), JEFS Document Number (“Dkt. No.”) 196. As with the aquarium permits addressed in *Umberger*, this Court invalidated all unexpired

commercial marine licenses to the extent they allow commercial aquarium collection and enjoined further issuance of commercial marine licenses for commercial aquarium collection pending proper completion of HEPA review. *Kaupiko v. Dep't of Land & Natural Res.*, Civil No. 1CCV-20-0000125 (JPC), Order Granting Plaintiffs' December 16, 2020 Motion to Enforce (Jan. 21, 2021), JEFS Dkt. No. 178; *Kaupiko v. Dep't of Land & Natural Res.*, Civil No. 1CCV-20-0000125 (JPC), Stipulation and Order Re: Newly Issued or Renewed Commercial Marine Licenses (Jan. 26, 2021), JEFS Dkt. No. 190.

3. Despite DLNR's post-*Umberger* illegal exemption for alternative collection methods, the West Hawai'i Regional Fishery Management Area ("WHRFMA") remained closed to aquarium collection because DLNR's administrative rules for that area unambiguously prevent any collection in the WHRFMA, regardless of collection gear type. Haw. Admin. R. ("HAR") § 13-60.4-4(3); *see also id.* § 13-60.4-3. Since legal commercial collection in the WHRFMA halted in 2017, many fish populations targeted by the aquarium trade have enjoyed a marked rebound.

4. Beginning in 2018, trade group the Pet Industry Joint Advisory Council ("PIJAC") orchestrated preparation of environmental review documents on behalf of a group of commercial collectors, including a draft environmental assessment ("DEA"), final environmental assessment ("FEA"), draft environmental impact statement ("DEIS"), and final environmental impact statement ("FEIS"). In May 2020, the Board voted unanimously to reject PIJAC's initial FEIS, enumerating 14 reasons for non-acceptance.

5. On February 23, 2021, the State of Hawai'i Office of Environmental Quality Control ("OEQC") published PIJAC's revised draft environmental impact statement ("RDEIS"). The Kaupiko Hui submitted detailed written comments, highlighting the insufficiency of data

and analysis in the RDEIS, and indicating several ways in which the RDEIS failed to correct the errors and omissions for which the initial FEIS was rejected.

6. PIJAC’s revised final environmental impact statement (“RFEIS”) was published on June 8, 2021. The RFEIS repeated or exacerbated many errors in the initial FEIS, and was largely dismissive of public comments by the Kaupiko Hui, biologists, and cultural practitioners, as well as other opposing viewpoints in peer-reviewed studies.

7. At the Board’s June 25, 2021, public meeting, three Board members again voted to reject the RFEIS for failure to satisfy HEPA’s legal requirements, recognizing that the RFEIS included many of the same flaws as the RDEIS and the initial FEIS before it. Three other board members, however, reversed field from their reasoning and decisions regarding the initial FEIS in 2020 and proclaimed that the RFEIS met HEPA’s legal requirements. One Board member was absent. Because there was no majority vote to accept the RFEIS, the RFEIS was deemed accepted by operation of law pursuant to HRS § 343-5(e), on July 8, 2021.

8. The Board’s failure to reject the RFEIS violates HEPA for the following reasons:

a. The RFEIS does not meet HEPA’s content requirements for an environmental impact statement, as defined in HRS § 343-2 and described in HAR §§ 11-200-16, -17 and -18;¹ and

b. The RFEIS repeats inadequacies that the Board identified in its decision to reject the initial FEIS, in violation of HAR § 11-200-23(3) (the revised EIS “shall fully address the inadequacies of the non-accepted EIS”).

¹ Although new rules implementing HEPA, HAR ch. 11-200.1, went into effect on August 9, 2019, the old rules, HAR ch. 11-200, apply to PIJAC’s RFEIS because DLNR’s August 8, 2018 Notice of Determination was published before the new rules were adopted. *See* HAR § 11-200.1-32(b)(2).

II. JURISDICTION AND VENUE

9. This Court has jurisdiction over this matter pursuant to HRS §§ 343-7, 603-21.5, 603-21.9, 604A-2, HRS ch. 632, and article XI, section 9 of the Hawai'i Constitution.

10. Venue properly lies in this judicial circuit pursuant to HRS § 603-36(5) because the claims for relief arose in this circuit and because it is the location where the Defendants are domiciled.

III. PARTIES

A. Plaintiffs

11. Plaintiff Willie Kaupiko is a resident of Miloli'i in West Hawai'i. Mr. Kaupiko is a Native Hawaiian cultural practitioner and subsistence fisher. Commercial extraction of aquarium fish threatens Mr. Kaupiko's ability to exercise his traditional and customary subsistence fishing rights because of the damage such practices cause to reef health and aquatic life populations. Mr. Kaupiko's interest in ensuring sustainable reef fish populations for present and future generations is harmed by the Board's failure to reject PIJAC's RFEIS because of the large numbers of immature fish that will be removed from the reef by commercial aquarium collectors under the permits and licenses proposed in the RFEIS, which, without adequate environmental review, may severely reduce reproductive opportunities for already dwindling fish populations. Mr. Kaupiko is concerned about the protection of coral reef resources for future generations both in his West Hawai'i home and throughout the Hawaiian Islands. Mr. Kaupiko's cultural interests are harmed by commercial aquarium collection because such activity directly contradicts and undermines Native Hawaiian values of taking only what one needs to feed one's family, and leaving the remainder of the resource to replenish itself for the benefit of other fishers and future generations.

12. Mr. Kaupiko is recognized in his community as a konohiki (“caretaker/steward”) to the fisheries fronting Miloli‘i Village. Mr. Kaupiko is a former member of the West Hawai‘i Fisheries Council and has been involved for decades in efforts to regulate the aquarium trade. He has provided testimony to the Hawai‘i State Legislature, the Board, and Governor regarding the need for better understanding and disclosure of the environmental impacts of the aquarium trade. Mr. Kaupiko has observed firsthand the declining numbers of fish on the reefs, particularly those that he fishes for and are also gathered by the aquarium trade, like the paku‘iku‘i (Achilles tang) and kole (goldring surgeonfish). He has also observed firsthand the decline in reef health over the past several decades in areas that have been open to aquarium collection, and where aquarium collection has continued illegally.

13. Mr. Kaupiko’s recreational, aesthetic, and subsistence interests are harmed by Defendants’ failure to ensure full disclosure of commercial aquarium collection’s harmful impacts in PIJAC’s RFEIS, because commercial collection could be allowed to resume without open consideration of environmental and cultural effects.

14. Plaintiff Kai‘mi Kaupiko is a resident of Miloli‘i in West Hawai‘i. Mr. Kaupiko is a Native Hawaiian cultural practitioner and subsistence fisher. Mr. Kaupiko fishes for certain species of fish that are also collected for the aquarium trade, including paku‘iku‘i (Achilles tang), manini (convict surgeonfish), and kole (goldring surgeonfish), and he is harmed by Defendants’ failure to adequately assess the environmental effects of commercial aquarium collection on the abundance of these fish species and on reef health in Hawai‘i. Mr. Kaupiko’s cultural interests are also harmed by the Board’s failure to reject PIJAC’s RFEIS because commercial aquarium collection activity directly contradicts and undermines the Native Hawaiian value of taking only

what one needs to feed one's family, and leaving the remainder of the resource to replenish itself for the benefit of other fishers and future generations.

15. Mr. (Kai'mi) Kaupiko has seen aquarium collectors extracting fish while he has been diving and fishing. He has presented testimony to the Hawai'i State Legislature, Governor, the Board, and Hawai'i County Council urging increased regulation of the aquarium collection trade in Hawai'i. Mr. Kaupiko has noticed that there are fewer numbers of fish on the reefs of the type that were collected by the aquarium trade and that he fishes for, particularly the paku'iku'i (Achilles tang) and kole (goldring surgeonfish). He has also noticed a decline in reef health in areas open to collection and is concerned about the long-term effects throughout the ecosystem and the future health and viability of these public marine resources.

16. Mr. Kaupiko's aesthetic, recreational, and subsistence interests are harmed by Defendants' failure to ensure full disclosure of commercial aquarium collection's harmful impacts in PIJAC's RFEIS because commercial collection could be allowed to resume without open consideration of environmental and cultural effects.

17. Plaintiff Mike Nakachi is a resident of West Hawai'i, where he is a cultural practitioner, recreational scuba diver, and small business owner. Mr. Nakachi leads scuba diving trips to reef areas throughout the Hawaiian Islands for his scuba diving business. Mr. Nakachi has done thousands of scuba dives in Hawai'i over the past 33 years in many areas around the state, including in the offshore waters of East Hawai'i, West Hawai'i, and O'ahu, which have enabled him to observe changes in aquarium species' populations and reef conditions on the state's reefs over time. Mr. Nakachi exercises mālama 'āina in his business and personal endeavors by promoting and encouraging sustainable use and enjoyment of Hawai'i's reefs and discouraging over-extraction of the state's endemic reef animals. Mr. Nakachi regards all ocean

life as either kinolau (physical manifestations) of the Hawaiian ocean deity Kanaloa, or as ‘aumākua (transmuted ancestors).

18. Mr. Nakachi is a former member of the West Hawai‘i Reef Fish Working Group, as well as the West Hawai‘i Fisheries Council, and has been actively involved in efforts to regulate the aquarium trade throughout the state for decades. Through his decades of direct experience, Mr. Nakachi has seen a decline in the number of fish of the species collected for the aquarium trade on reefs off the island of Hawai‘i and in other areas of the state, as well as a decline in reef health in areas open to collection. The decreasing number of fish and decline in reef health in areas subject to aquarium collection makes the reefs less attractive to his customers, who go on scuba dives expecting to see vibrant, healthy reefs full of colorful fish.

19. Mr. Nakachi’s aesthetic and recreational interests, as well as his economic interests in environmentally and culturally responsible business practices, are harmed by Defendants’ failure to require full disclosure of commercial aquarium collection’s harmful impacts in PIJAC’s RFEIS, because commercial collection could be allowed to resume without open consideration of its environmental and cultural effects.

20. Plaintiff For the Fishes (“FTF”) is a Hawai‘i-based non-profit organization committed to the protection and restoration of Hawai‘i’s coral reef wildlife and ecosystems through research, outreach, education, and advocacy. FTF’s staff and supporters use coastal areas around the state for snorkeling, SCUBA diving, swimming, and reef surveys. FTF has been deeply involved in efforts to restore and protect Hawai‘i’s reef ecosystem through working to reduce or eliminate extraction of reef animals for sale in the national aquarium pet trade, and by supporting efforts to complete a comprehensive environmental review of commercial aquarium collection under HEPA. FTF conducts education and outreach to consumers of marine

aquarium fish via its website and the web application “Tank Watch,” which provides tools for consumers to evaluate sourcing of available marine aquarium fish, encourages purchase of aquacultured aquarium fish rather than wild-caught specimens taken from Hawai‘i’s reefs, and strives to reduce consumer demand for such wild-caught aquatic life.

21. FTF and its staff have participated extensively in past efforts to minimize or eliminate the harmful effects of commercial aquarium collection. FTF has educated Hawai‘i officials about the urgent need to address marine aquarium trade impacts, documented that a majority of Hawai‘i’s public want to see an end to commercial aquarium collection in the state, and submitted extensive comments on the several environmental review documents that have been prepared as a result of the *Umberger* ruling and subsequent circuit court orders. FTF continues to conduct outreach, education, and advocacy in its efforts to reduce or eliminate the harmful impacts of the commercial aquarium trade on Hawai‘i’s reef ecosystems, by publishing articles in the print media, conducting outreach events, and continuing to communicate with Hawai‘i lawmakers and leaders in the executive branch, including advocacy at the Hawai‘i State Legislature.

22. Defendants’ failure to ensure adequate disclosure of commercial aquarium collection’s environmental impacts undermines the interests of FTF and its staff and supporters in protecting coral reef wildlife and restoring coral reef ecosystems. Defendants’ failure to reject PIJAC’s RFEIS has required FTF to divert the organization’s limited resources toward further legislative, administrative, and judicial efforts to seek better protections and oversight over reef wildlife and ecosystems.

23. Plaintiff Center for Biological Diversity (“the Center”) is a non-profit corporation dedicated to preserving, protecting, and restoring biodiversity, native species, ecosystems, and

public lands. The Center has over 84,000 members, many of whom reside in Hawai‘i. The Center’s Hawai‘i members include Native Hawaiian subsistence practitioners who depend on healthy, biodiverse reef ecosystems for the exercise and perpetuation of their traditional and customary fishing practices. The Center’s members regularly use Hawai‘i’s coastal waters for recreation, aesthetic enjoyment, observation, research, and other educational activities, as well as the exercise of traditional and customary subsistence rights.

24. The Center’s members snorkel, scuba dive, swim, and fish in reef areas throughout the state, and enjoy observing healthy reefs and marine life. Defendants’ failure to ensure adequate disclosure of the environmental impacts of commercial aquarium collection by rejecting PIJAC’s RFEIS impairs the Center’s and its members’ aesthetic, recreational, and cultural interests in using, enjoying, and protecting the State’s reefs.

25. Kai Palaoa is an unincorporated association of Native Hawaiian religious and cultural practitioners that practice, preserve, and perpetuate Hawaiian religious beliefs and practices associated with the ocean deity Kanaloa. Kai Palaoa’s members and many other Native Hawaiians regard the ocean’s inhabitants as kinolau (physical manifestations) of Kanaloa, or ‘aumākua (transmuted ancestors). All ocean life is sacred to Kanaloa practitioners; thus, Kai Palaoa has an interest in the long-term health and viability of marine ecosystems.

26. Kai Palaoa’s practitioners and members regularly conduct religious ceremony, fish, gather, and swim in the WHRFMA, and enjoy observing healthy reefs and marine life. Defendants’ failures to ensure disclosure and mitigation of commercial aquarium collection’s biological, socioeconomic, and cultural impacts, and Defendants’ failures to require adequate disclosure and mitigation of impacts to traditional and customary Native Hawaiian rights caused

by commercial aquarium collection, harm Kai Palaoa's members' ability to protect and defend those rights.

27. The Board's failure to reject PIJAC's RFEIS and ensure adequate disclosure of commercial aquarium collection's harmful environmental and cultural impacts impairs the Kaupiko Hui's individual and organizational interests in using, enjoying, and protecting the ecological and cultural resources in Hawai'i's sensitive marine environment. Defendants' failure to adequately assess the environmental impacts of commercial aquarium collection could result in removal of aquarium species from reefs around the state where the Hui and their members live, work, fish, and play. Defendants' failure to comply with its legal obligations deprives the Hui and the general public of the information that would be generated through a properly conducted HEPA process, and could potentially lead to the recommencement of commercial collection in the WHRFMA without adequate review of environmental and cultural impacts.

B. Defendants

28. Defendant the Department of Land and Natural Resources, which is headed by Defendant Board of Land and Natural Resources, is responsible for managing, administering, and exercising control over the State's water resources, ocean waters, and coastal areas, including the State's aquatic life and aquatic resources. HRS §§ 171-3, 187A-2(1), 187A-5.

29. Defendants are the accepting authority for PIJAC's RFEIS pursuant to HRS § 343-5.

30. Defendants are also responsible for issuing aquarium permits pursuant to HRS § 188-31, commercial marine licenses for aquarium collection pursuant to HRS § 189-2, and West Hawai'i aquarium permits pursuant to HAR ch. 13-60.4.

31. Under article XI, sections 1 and 6 of the Hawai‘i Constitution, Defendants have public trust duties to conserve and protect the state’s natural resources, including the nearshore ocean waters, seabed, and marine resources, for present and future generations.

32. Under article XII, section 7 of the Hawai‘i Constitution, Defendants are “obligated to protect customary and traditional rights to the extent feasible.” *Public Access Shoreline Haw. v. Haw. Planning Comm’n*, 79 Hawai‘i 425, 437, 903 P.2d 1246, 1258 (1995); *Ka Pa‘akai o ka ‘Āina v. Land Use Comm’n*, 94 Hawai‘i 31, 35, 7 P.3d 1068, 1072 (2000) (“*Ka Pa‘akai*”).

IV. LEGAL FRAMEWORK

33. HEPA is the cornerstone of the State’s statutory environmental protections. Its fundamental purpose is to ensure that State agencies fully and publicly examine the environmental impacts of certain actions before those actions proceed.

34. HEPA establishes a framework for environmental review of nine categories of actions, known as “triggers,” including those actions that propose the “use of state . . . lands,” or “any use within any land classified as a conservation district . . . under [HRS] ch. 205.” HRS § 343-5(a)(1), (2).

35. HEPA defines “action” to mean “any program or project to be initiated by any agency or applicant.” *Id.* § 343-2.

36. Whenever any person (termed an “applicant”) proposes a covered action that requires agency “approval,” the agency (termed the “agency” or “approving agency”), upon receiving the request, must, at a bare minimum, require the applicant to prepare an environmental assessment (“EA”) “at the earliest practicable time to determine whether an environmental impact statement [(“EIS”)] shall be required.” *Id.* §§ 343-2, -5(e).

37. If the EA indicates that the proposed action “*may* have a significant effect on the environment,” the agency *must* require that the applicant prepare an EIS. *Id.* § 343-5(e)(3) (emphasis added).

38. The EIS is an informational document discussing, among other things: “the environmental effects of a proposed action, effects of the proposed action on the economic welfare, social welfare, and cultural practices of the community and State, . . . measures proposed to minimize adverse effects, and alternatives to the action and their environmental effects.” *Id.* § 343-2.

39. The process for conducting an EIS includes consultation with concerned agencies and citizens, circulation of a draft EIS, written responses to comments, submission of a final EIS for agency acceptance, and a formal agency decision to accept or reject the EIS. *Id.* § 343-5(e). An EIS must “assure an early, open forum for discussion of adverse effects and available alternatives, and that the decision-makers will be enlightened to any environmental consequences of the proposed action.” HAR § 11-200-14.

40. *Process* is the bedrock principle underlying HEPA. The Legislature recognized this in enacting HEPA, finding that through the environmental review process, “environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.” HRS § 343-1. The EIS process “involves more than the preparation of a document; it involves the entire process of research, discussion, preparation of a statement, and review.” HAR § 11-200-14. An EIS is “meaningless without the conscientious application of the EIS process as a whole, and shall not be merely a self-serving recitation of benefits and rationalization of the proposed action.” *Id.*

41. *Content* requirements inform the substance of an EIS and are set forth in HAR §§ 11-200-16, -17, and -18. An EIS generally must contain “an explanation of the environmental consequences of the proposed action,” as well as “responsible opposing views, if any, on significant environmental issues raised by the proposal.” *Id.* § 11-200-16. An EIS must discuss “significant . . . adverse impacts,” including cumulative impacts and secondary impacts, as well as proposed mitigation measures and alternatives considered. *Id.* §§ 11-200-17(b)(2), (3), (4). “Impacts” may include “ecological effects (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic effects, historic effects, cultural effects, economic effects, social effects, or health effects.” *Id.* § 11-200-2. “Cumulative impact” is defined as “the impact to the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” *Id.*

42. *Timing* is critical to the environmental review process. HEPA mandates preparation of the EA “at the earliest practicable time.” HRS § 343-5(e). It also dictates that acceptance of a required EIS is a “condition precedent” to approval of the action by the agency. *Id.*

43. Within 30 days of receiving a final EIS, the accepting agency must notify the applicant of the acceptance or nonacceptance of the final EIS. *Id.* If the accepting authority fails to accept or reject a final EIS within the 30-day period, the final EIS “shall be deemed accepted” by operation of law. *Id.*

44. A non-accepted EIS may be revised by the applicant, but any revised EIS “shall fully address the inadequacies of the non-accepted EIS.” HAR § 11-200-23(e).

V. BACKGROUND FACTS

A. PIJAC’s Initial FEIS and the Board’s Rejection Thereof

45. OEQC published PIJAC’s DEA on April 8, 2018. In its cover letter transmitting the DEA to OEQC, DLNR expressed “several concerns” with the DEA and PIJAC’s proposed finding of no significant impact and called for analysis of the significance criteria outlined in HAR § 11-200-12. The Kaupiko Hui submitted written comments on the DEA, highlighting the inadequacy of the data and analysis and identifying multiple studies and reports documenting the trade’s harms to West Hawai‘i marine life.

46. On August 8, 2018, OEQC published PIJAC’s FEA and DLNR’s environmental impact statement preparation notice (“EISPN”), in which DLNR determined that commercial collection “may have significant impact on the environment,” thus warranting a full environmental impact statement. DLNR’s EISPN detailed the information and analysis required in PIJAC’s DEIS. Among other things, the EISPN called for analysis of cumulative impacts over time, a scientific basis for claims of trade sustainability, and analysis of enforcement and compliance issues, including proposal of enforcement measures. The Kaupiko Hui again submitted written comments.

47. OEQC published PIJAC’s DEIS on November 23, 2019. The Hui submitted written comments, again discussing PIJAC’s failure to conduct a scientifically objective analysis of the trade’s impacts and providing several examples of studies and reports documenting those impacts.

48. OEQC published PIJAC’s initial FEIS on April 23, 2020.

49. At a hearing held on May 22, 2020, the Board unanimously voted to reject PIJAC's initial FEIS for failure to comply with HEPA's legal requirements.

50. On May 30, 2020, the Board issued its decision rejecting the initial FEIS on numerous grounds, including:

1. In order to properly assess the likely impact of the proposed take of the aquarium fish, the FEIS should contain a reasonably reliable estimate of the amount of future take.

...

8. In order to assess the likely impact of take, the FEIS should adequately analyze the sustainable level of take. The FEIS relies on Ochavillo and Hodgson (2006) for the proposition that 5-25% of a population is a sustainable level for annual take. The FEIS has an inadequate justification for the reliance on this publication as the best available science. The FEIS does not provide data for nor statistically analyze the sustainability of that level of take for each type of fish, given each fish species' life span, population size, reproductivity rates and age at first reproduction.

...

10. The FEIS has an inadequate discussion of the role of herbivores. Many of the "White List" species are herbivores.

11. The FEIS does not adequately discuss relevant negative findings, for example, the reduced numbers of aquarium fish at collection sites found by Tissot and Hallacher (2003). The FEIS need not agree or disprove the negative findings, but it should discuss them.

12. The extreme threat of climate change on our reefs warrants extreme caution in reviewing activities that may affect them. The FEIS should further discuss potential effects of present and future levels of climate change including ocean warming, ocean acidification, coral bleaching, extreme storms, and resulting reef destruction and algae growth, and the potential for mitigating harm (i.e. further regulation) if the proposed fishery has unanticipated or greater negative effects with climate change.

13. The FEIS failed to sufficiently consider cultural impacts. The FEIS improperly concluded that the impacts to cultural resources under any of the proposed alternatives would be less than significant based on the flawed premise that cultural impacts would only occur if the proposed action would cause a significant decline in the population of a White List Species considered to be a cultural resource. A number of testimonies expressed misgivings from a cultural standpoint with the proposed activity itself, regardless of impact on resources, and this was not adequately considered in concluding no significant impact.

51. PIJAC appealed the Board's rejection to the State of Hawai'i Environmental Council ("Council"), which denied a motion to intervene from the Kaupiko Hui before affirming the rejection of the FEIS. In doing so, the Council reversed the Board's finding that the initial FEIS failed to adequately discuss "relevant negative findings," *i.e.*, the negative environmental impacts of commercial aquarium collection.

52. The Hui appealed to this Court, challenging the Council's denial of intervention and its finding and conclusion that the Board's insistence on adequate discussion of "relevant negative findings" was arbitrary and capricious. This Court reversed the Council's denial of intervention, vacated the Council's finding and conclusion regarding "relevant negative findings," and remanded to the Council for further proceedings.

53. PIJAC, the Board, and the Kaupiko Hui argued the merits on remand to a Council hearings officer on June 29, 2021, and the hearings officer took the matter under advisement.

B. PIJAC's RDEIS

54. Following the Council's affirmance of the Board's rejection of the initial FEIS, and despite the pendency of the appeal regarding "relevant negative findings," PIJAC, on behalf of seven anonymous collectors, proceeded with preparation of the RDEIS, which OEQC published on February 23, 2021.

55. The RDEIS, like the initial FEIS, cited a Philippines-based, non-peer reviewed field manual (Ochavillo and Hodgson (2006)) for the proposition that catching 5% to 25% of fish populations is "sustainable."

56. Contrary to the Board's express directives in rejecting PIJAC's initial FEIS, the RDEIS failed to conduct any statistical analyses of "sustainable" levels of take based on the species' life span, population size, reproductivity rates, and age at first reproduction.

57. Instead, the RDEIS proposed quotas that lacked any scientific basis and were based on historical catch levels, *i.e.*, market demand for the fish, but without any regard for impacts to the individual fish species.

58. The proposed quotas included higher than historical levels of catch for Potter's angelfish and Thompson's surgeonfish, again without providing any scientific basis for the claim that such elevated take levels are sustainable.

59. The quotas proposed in the RDEIS apply to the entire WHRFMA, presenting the possibility that the entire quota for a given species could be extracted from a single, targeted, smaller area within the WHRFMA. Meanwhile, DLNR requires aquarium collection catch reports to correspond with one of eight specific "AQ Zones" in which the fish were taken; the agency also prohibits combining catch numbers from multiple zones.

60. Some areas in the WHRFMA designated as "open" to aquarium collection under valid permits and licenses are near communities that rely upon nearshore fishes for subsistence fishing and other traditional and customary purposes.

61. The RDEIS did not consider potential localized impacts or propose place-based or zone-based quotas.

62. Like the initial FEIS, the RDEIS assessed impacts against depleted fish populations that have been subject to decades of extraction, rather than assessing the trade's cumulative impacts over time.

63. The RDEIS stated that commercial collection has been "part of the baseline condition of these resources since the late 1940s" and, therefore, concluded that PIJAC "does not anticipate a significant change in the current baseline condition of these resources." Thus, the

RDEIS failed to consider or acknowledge how further collection will perpetuate an already degraded state in the WHRFMA.

64. Contrary to the Board's express instructions in rejecting the initial FEIS, the RDEIS again flatly ignored multiple "relevant negative findings" disclosing the aquarium trade's harmful effects, including Tissot and Hallacher's 2003 finding that intensive commercial collection had drastically reduced targeted fish populations in West Hawai'i, as well as other more recent studies also illustrating the trade's harmful cumulative impacts.

65. Rather than adequately analyzing cultural impacts as the Board instructed in rejecting the initial FEIS, the RDEIS again fixated on the fishes' cultural importance only as a subsistence food source and omitted disclosure of the trade's other known cultural impacts. Instead, the RFEIS declared such impacts "unknown," despite acknowledging that commercial collection's cultural harms were discussed at length in the Cultural Impact Assessment prepared for inclusion with the initial DEIS, and which was reproduced wholesale in the RDEIS.

66. The RDEIS failed to adequately assess the economic impacts of the alternatives presented. Rather than present a forthright assessment of the potential costs and benefits to the people and State of Hawai'i of the various proposed alternatives, the RDEIS primarily discusses the potential benefits to collectors and other industry participants, particularly with regard the preferred alternative.

67. As a proposed enforcement measure for its preferred new quota system, the RDEIS suggested implementing a "Certificate of Origin," whereby permitted collectors would be issued a carbon copy booklet to generate triplicate receipts to be held by the collector, aquarium fish dealers, and DLNR.

C. The Kaupiko Hui's RDEIS Comments

68. The Kaupiko Hui collectively submitted detailed written comments on the RDEIS on April 9, 2021.

69. In their comments, the Hui raised multiple issues with the RDEIS, including but not limited to the document's:

- a. Lack of scientific basis for the claim that proposed take levels are sustainable;
- b. Failure to analyze cumulative impacts over time;
- c. Failure to analyze environmental consequences at sites where collection would occur, instead applying proposed take quotas only to the WHRFMA generally;
- d. Failure to analyze environmental consequences in the context of larval dispersal patterns;
- e. Failure to analyze cumulative impacts of commercial aquarium take when combined with existing take for subsistence, recreational, and other commercial purposes.
- f. Failure to adequately assess and mitigate impacts to cultural resources;
- g. Failure to provide sufficient analysis of each of the alternatives presented;
- h. Failure to analyze impacts of collection practices harmful to coral;
- i. Failure to adequately plan for and mitigate climate change;
- j. Reliance on inaccurate, misleading, and incomplete data, including the RDEIS's application of a faulty environmental baseline that assumes decades of extraction;
- k. Failure to propose and analyze measures mitigating the environmental consequences of commercial aquarium collection;
- l. Failure to adequately incorporate input from experts, affected citizens, Native Hawaiians, and consulted parties;
- m. Proposal to increase take of certain species of fish, without providing any scientific basis for the sustainability of elevated take levels;
- n. Omission of multiple peer-reviewed studies directly disclosing the environmental consequences of commercial aquarium take; and

- o. Failure to adequately address socioeconomic impacts, including failure to disclose and discuss a recent peer-reviewed cost-benefit analysis of the Hawai'i-caught aquarium pet market.

70. The Kaupiko Hui questioned the efficacy of the RDEIS's proposed "Certificate of Origin" enforcement measure but did not suggest that discussion of enforcement proposals be omitted altogether.

71. In their comments, the Hui referenced over 50 peer-reviewed studies, government reports, and other documents containing data the Hui allege was not adequately disclosed or discussed in the RDEIS.

72. The Hui appended several such studies and documents to their comment letter, including the Tissot and Hallacher 2003 study given as an example of "relevant negative findings" in the Board's rejection of PIJAC's initial FEIS.

73. The Hui also appended summaries of available data clearly demonstrating commercial collection's environmental consequences; a detailed discussion of issues left unresolved following the HEPA-mandated consultation process; and a copy of a cost-benefit analysis of the trade published in the Marine Policy journal in February 2021.

D. PIJAC's RFEIS, DLNR Staff's Recommendation to Accept, and the Board's "Acceptance" by Operation of Law.

74. OEQC published PIJAC's RFEIS on June 8, 2021. The RFEIS seeks coverage for seven anonymous commercial aquarium collectors who, to commence extraction in the WHRFMA, must obtain from Defendants aquarium permits pursuant to HRS § 188-31, commercial marine licenses for aquarium purposes pursuant to HRS § 189-2, and West Hawai'i aquarium permits pursuant to HAR ch. 13-60.4.

75. Most comment "responses" appended to the RFEIS dismissively stated: "Your comment has been forwarded to the decision makers."

76. None of the various additional data the Kaupiko Hui presented in their RDEIS comments were incorporated into, discussed, or meaningfully addressed in the body of the RFEIS itself.

77. The RFEIS contained the same flaws as those in the RDEIS described in paragraphs 55 through 66, *supra*, and also omitted any proposal of enforcement measures.

78. The Board included the RFEIS in the public notice of its June 25, 2021 meeting agenda.

79. DLNR's Division of Aquatic Resources ("DAR") staff submittal recommended acceptance of the RFEIS even though it expressly recognized the RFEIS's failure to adequately assess commercial collection's impacts to coral and failure to assess the environmental consequences of increased take of the Potter's angelfish and Thompson's surgeonfish (a species of kala). Staff nevertheless recommended that these environmental impacts be left undisclosed and unaddressed until after acceptance of the RFEIS, to be considered only at the permitting stage.

80. During public testimony, the Kaupiko Hui and their counsel described the RFEIS's many flaws and failures in addressing omissions and errors in the initial FEIS, and pointed out DAR staff's legal error in recommending acceptance of an impact statement despite the plain acknowledgment that environmental impacts were not fully disclosed and discussed.

81. Following public testimony, Board discussion, and a lengthy executive session, a motion was made to accept the RFEIS, and the motion was seconded. Three Board members voted to reject the RFEIS for many of the same reasons the initial FEIS was rejected.

82. Three other Board members, who had each vocally supported rejection of the initial FEIS in 2020, reversed course and this time voted to accept, without giving any valid

justification for voting to accept an RFEIS that repeated substantially the same errors and omissions in the version previously rejected.

83. Because the seventh Board member was absent, there was no tie-breaker to either carry or defeat the motion to accept. Thus, the 3-3 Board vote resulted in the Board taking no action on the RFEIS.

84. HRS § 343-5(e) provides that an environmental impact statement not formally acted upon by the accepting agency is deemed accepted 30 days after publication in OEQC's Environmental Notice. Because the RFEIS was published on June 8, 2021, and the Board did not reach a majority vote to accept or reject it, the RFEIS was deemed accepted by operation of law on July 8, 2021.

CLAIM FOR RELIEF

(Violation of HEPA)

85. The Kaupiko Hui reallege and incorporate herein by reference each and every allegation contained in the preceding paragraphs of this complaint.

86. The Board's failure to reject the RFEIS violates HEPA because the RFEIS does not satisfy HEPA's content requirements under HRS § 343-2 and HAR §§ 11-200-16, -17, and -18. These deficiencies include, but are not limited to, the failure to disclose, assess, mitigate, consider alternatives, and consider reasonable opposing views regarding:

- a. Localized impacts of PIJAC's proposed catch quotas in individual aquarium catch zones;
- b. Sustainable levels of take based on species' life span, population size, reproductivity rates, and age at first reproduction;
- c. Impacts from exceeding historical levels of catch for some species;

- d. Cumulative impacts by comparing fish populations in collected areas to areas closed to the aquarium trade;
- e. Cultural impacts to Native Hawaiians; and
- f. Economic impacts to affected stakeholder groups beyond the collectors themselves.

The Hui raised all of these issues during the public comment process for the RDEIS, in addition to raising many of these concerns throughout the initial environmental review process for the aquarium trade in the WHRFMA.

87. The Board’s failure to reject the RFEIS further violates HEPA because the RFEIS repeats inadequacies that the Board identified in its decision to reject the initial FEIS. *See* HAR § 11-200-23(3) (the revised EIS “shall fully address the inadequacies of the non-accepted EIS”).

88. An actual controversy exists between the Kaupiko Hui and the Board concerning the Board’s failure to reject the RFEIS. The controversy between the Hui and Defendants extends to the acceptability and validity of the RFEIS absent legally adequate environmental review, and Defendants’ ability to proceed with approving, renewing, or issuing aquarium permits pursuant to HRS § 188-31, commercial marine licenses for aquarium collection pursuant to HRS § 189-2, and West Hawai’i aquarium permits pursuant to HAR ch. 13-60.4, in light of these deficiencies.

PRAYER FOR RELIEF

WHEREFORE, the Kaupiko Hui respectfully ask:

A. That this Court issue a declaratory judgment that:

(1) The RFEIS fails to comply with HEPA's content requirements under HRS § 343-2 and HAR §§ 11-200-16, -17, -18;

(2) The RFEIS fails to fully address the inadequacies that the Board identified in its decision to reject the initial FEIS, in violation of HAR § 11-200-23(e);

(3) The Board is in violation of HEPA, HRS ch. 343, for failing to reject the RFEIS;

(4) The July 8, 2021, acceptance of the RFEIS by operation of law is invalid, illegal, null and void;

B. That this Court issue or maintain appropriate injunctive relief, including, but not limited to, a prohibitory injunction that enjoins Defendants from approving, renewing, or issuing any aquarium permits pursuant to HRS § 188-31, commercial marine licenses for aquarium purposes pursuant to HRS § 189-2, or West Hawai'i aquarium permits pursuant to HAR ch. 13-60.4, to collectors seeking coverage under the RFEIS unless and until legally adequate environmental review has been completed;

C. That this Court retain continuing jurisdiction to review Defendants' compliance with all judgments and orders entered herein;

D. For such additional judicial determinations and orders as may be necessary to effectuate the foregoing;

E. For the cost of the suit herein, including reasonable expert witness and attorneys' fees; and

F. For such other and further relief as the Court may deem just and proper to effectuate a complete resolution of the legal disputes between the Kaupiko Hui and Defendants.

DATED: Honolulu, Hawai'i, July 13, 2021.

/s/ Mahesh Cleveland
ISAAC H. MORIWAKE
KYLIE W. WAGER CRUZ
MAHESH CLEVELAND
EARTHJUSTICE

Attorneys for Plaintiffs
Willie Kaupiko, Ka'imi Kaupiko,
Mike Nakachi, For the Fishes, Center for
Biological Diversity, and Kai Palaoa

CIRCUIT COURT
 STATE OF HAWAII
 ISSUED
 1:53 o'clock P M.
OCT 27 2017
 R. Fisher
 Clerk

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

RENE UMBERGER, ET AL,)	CIVIL NO. 12-1-2625-10 JPC
)	
Plaintiff(s))	
)	
v.)	ORDER AFTER REMAND, REGARDING
)	COMMERCIAL AQUARIUM COLLECTION
DEPARTMENT OF LAND AND)	PERMITS
NATURAL RESOURCES, ET AL,)	
)	
Defendant,)	
and)	Trial Date: None Set
)	Hearing Date: October 27, 2017 (9:00 a.m.)
PET INDUSTRY JOINT ADVISORY)	
COUNCIL,)	
)	
Intervenor-Defendant.)	
)	
_____)	Judge: Jeffrey P. Crabtree

ORDER AFTER REMAND,
REGARDING COMMERCIAL AQUARIUM COLLECTION PERMITS

Following the remand of this case to this court, various issues arose regarding what order the circuit court should enter. *See* this court's Order (1) Granting Motion For Summary Judgment With Respect To Commercial Aquarium Collection Permits, And (2) Setting A Process And Schedule Regarding The Issues Of Declaratory And Injunctive Relief As To Commercial Aquarium Collection (filed October 18, 2017). Following submission of various requests and memoranda, an hour-long hearing was held on October 27, 2017. The court issued a verbal order at the hearing, and hereby issues its written order.

PURSUANT TO:

- (1) the September 6, 2017 opinion issued by the Hawai'i Supreme Court; and
- (2) the Judgment on Appeal filed by the Hawai'i Supreme Court on September 19, 2017;

IT IS HEREBY ORDERED:

1. As to commercial aquarium collection pursuant to permits issued under HRS § 188-31, Plaintiffs' Motion for Summary Judgment filed February 5, 2013 is granted in part and Defendant's Motion for Summary Judgment filed February 4, 2013 is denied in part;
2. Defendant's practice of issuing commercial aquarium collection permits under HRS § 118-31 without the environmental review necessitated by the Hawai'i Environmental Policy Act, HRS chapter 343, violates the Act;
3. Any and all existing aquarium fish permits Defendant issued or renewed to commercial collectors to date pursuant to HRS § 188-31 are illegal and invalid;
4. Defendant is enjoined from issuing or renewing aquarium fish permits to commercial collectors pursuant to HRS § 188-31 until further order of this Court;
5. This Court retains continuing jurisdiction to review Defendant's compliance with the orders entered herein.

Respectfully, this order does not make or rely on any findings pursuant to HRCP Rule 65, for reasons stated at the hearing.

Dated: Honolulu, Hawai'i, October 27, 2017.



JEFFREY P. CRABTREE
Judge of the Above-Entitled Court

Umberger v. Department of Land and Natural Resources, Civ. No. 12-1-2625-10 (JPC);
First Circuit Court; ORDER AFTER REMAND, REGARDING COMMERCIAL AQUARIUM
COLLECTION PERMITS

STATE OF HAWAII CIRCUIT COURT OF THE FIRST CIRCUIT	SUMMONS TO ANSWER CIVIL COMPLAINT	CASE NUMBER
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PLAINTIFF WILLIE KAUPIKO, KA'IMI KAUPIKO, MIKE NAKACHI, FOR THE FISHES, CENTER FOR BIOLOGICAL DIVERSITY, AND KAI PALOA	VS.	DEFENDANT(S) BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAII AND DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAII
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PLAINTIFF'S NAME & ADDRESS, TEL. NO.

ISAAC H. MORIWAKE
 KYLIE W. WAGER CRUZ
 MAHESH CLEVELAND
 EARTHJUSTICE
 850 Richards Street, Suite 400
 Honolulu, Hawai'i 96813 (808) 599-2436

TO THE ABOVE-NAMED DEFENDANT(S)


You are hereby summoned and required to file with the court and serve upon


Isaac H. Moriwake
 Kylie W. Wager Cruz
 Mahesh Cleveland

plaintiff's attorney, whose address is stated above, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

THIS SUMMONS SHALL NOT BE PERSONALLY DELIVERED BETWEEN 10:00 P.M. AND 6:00 A.M. ON PREMISES NOT OPEN TO THE GENERAL PUBLIC, UNLESS A JUDGE OF THE ABOVE-ENTITLED COURT PERMITS, IN WRITING ON THIS SUMMONS, PERSONAL DELIVERY DURING THOSE HOURS.

A FAILURE TO OBEY THIS SUMMONS MAY RESULT IN AN ENTRY OF DEFAULT AND DEFAULT JUDGMENT AGAINST THE DISOBEYING PERSON OR PARTY.

The original document is filed in the Judiciary's electronic case management system which is accessible via eCourt Kokua at: http://www.courts.state.hi.us	Effective Date of 28-Oct-2019 Signed by: /s/ Patsy Nakamoto Clerk, 1st Circuit, State of Hawai'i	
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	In accordance with the Americans with Disabilities Act, and other applicable state and federal laws, if you require a reasonable accommodation for a disability, please contact the ADA Coordinator at the Circuit Court Administration Office on OAHU- Phone No. 808-539-4400, TTY 808-539-4853, FAX 539-4402, at least ten (10) working days prior to your hearing or appointment date.
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