



STATE OF HAWAII  
BOARD OF LAND AND NATURAL RESOURCES

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PETITION FOR A CONTESTED CASE HEARING

DEPT. OF LAND  
& NATURAL RESOURCES  
STATE OF HAWAII

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No.	Division/Office

**INSTRUCTIONS:**

- File (deliver, mail or fax) this form within ten (10) days of the Board Action Date to:  
 Department of Land and Natural Resources  
 Administrative Proceedings Office  
 1151 Punchbowl Street, Room 130  
 Honolulu, Hawaii 96813  
 Phone: (808) 587-1496, Fax: (808) 587-0390
- DLNR’s contested case hearing rules are listed under Chapter 13-1, HAR, and can be obtained from the DLNR Administrative Proceedings Office or at its website (<http://dlnr.hawaii.gov/forms/contested-case-form/>). Please review these rules before filing a petition.
- If you use the electronic version of this form, note that the boxes are expandable to fit in your statements. If you use the hardcopy form and need more space, you may attach additional sheets.
- Pursuant to §13-1-30, HAR, a petition that involves a Conservation District Use Permit must be accompanied with a \$100.00 non-refundable filing fee (payable to “DLNR”) or a request for waiver of this fee. A waiver may be granted by the Chairperson based on a petitioner’s financial hardship.
- All materials, including this form, shall be submitted in **three (3)** photocopies.

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name Charles K.H. Young	2. Contact Person	
3. Address ██████	4. City ██████	5. State and ZIP ██████
6. Email ██████@██████.██	7. Phone ██████-██████	8. Fax

B. ATTORNEY (if represented)		
9. Attorney Name Kylie W. Wager Cruz (#10165), Mahesh Cleveland (#11023)	10. Firm Name Earthjustice	
11. Address 850 Richards Street, Suite 400	12. City Honolulu	13. State and ZIP Hawai'i 96813
14. Email	15. Phone	16. Fax

kwager@earthjustice.org, mcleveland@earthjustice.org	(808) 599-2436	
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**C. SUBJECT MATTER**

**17. Board Action Being Contested**  
 Request for Approval of the Application Form and Terms and Conditions for the State of Hawai'i Aquarium Fish Permit Pursuant to Hawai'i Revised Statutes Section 188-31; Request for Approval of Terms and Conditions for the West Hawai'i Aquarium Permit Pursuant to Hawai'i Administrative Rules Section 13-60.4-7; Request to Delegate Authority to the Chair to Approve, Sign, and Issue West Hawai'i Aquarium Permits and State of Hawai'i Aquarium Fish Permits authorizing limited commercial aquarium collection in the West Hawai'i Regional Fishery Management Area (WHRFMA) to Up to Seven Applicants That Meet Certain Criteria and Requirements.

<b>18. Board Action Date</b> August 23, 2024	<b>19. Item No.</b> F-1
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**20. Any Specific Statute or Rule That Entitles Petitioner to a Contested Case**  
 Please see attachment.

**21. Any Specific Property Interest of Petitioner That Is Entitled to Due Process Protection**  
 Please see attachment.

**22. Any Disagreement Petitioner May Have with an Application before the Board**  
 Please see attachment.

**23. Any Relief Petitioner Seeks or Deems Itself Entitled to**  
 Please see attachment.


**24. How Petitioner's Participation in the Proceeding Would Serve the Public Interest**  
 Please see attachment.

**25. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to Be a Party under Section 13-1-31, HAR**  
 Please see attachment.

Check this box if Petitioner is submitting supporting documents with this form.

Check this box if Petitioner will submit additional supporting documents after filing this form.

Kylie W. Wager Cruz  
Petitioner or Representative (Print Name)

  
Signature

Sept. 3, 2024  
Date

STATE OF HAWAI‘I

BOARD OF LAND AND NATURAL RESOURCES

**PETITION FOR A CONTESTED CASE HEARING: ATTACHMENT**

CHARLES K.H. YOUNG

September 3, 2024

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**20. Any Specific Statute or Rule That Entitles Petitioner to a Contested Case:**

Pursuant to Hawai‘i Administrative Rules (“HAR”) § 13-1-28(a), “[w]hen required by law, the board shall hold a contested case hearing upon . . . a written petition of . . . any interested person.” As detailed in the next section, Mr. Young is entitled to a contested case hearing as a matter of constitutional due process, based on numerous rights protected under the Hawai‘i Constitution, including the right to a clean and healthful environment under article XI, § 9, the right to exercise traditional and customary Native Hawaiian practices under article XII, § 7, and rights to conservation and protection of natural resources under the public trust doctrine established in article XI, § 1.

**21. Any Specific Property Interest of Petitioner That Is Entitled to Due Process Protection:**

Mr. Young is entitled to a contested case hearing in this proceeding under the due process clause of the Hawai‘i Constitution, article I, § 5, to protect his constitutional rights, including: his rights to a clean and healthful environment under article XI, § 9; his rights to exercise and preserve traditional and customary Native Hawaiian practices under article XII, § 7; and his rights related to public trust aquatic resources under article XI, § 1. All of these rights are “protectable property interests” that entitle Mr. Young to a contested case hearing.

Right to Clean and Healthful Environment: As the Hawai‘i Supreme Court has now repeatedly made clear, article XI, § 9’s substantive “right to a clean and healthful environment, as defined by laws relating to environmental quality, including . . . conservation, protection and enhancement of natural resources,” establishes a “protectable property interest” entitled to due process. *In re Maui Elec. Co.*, 141 Hawai‘i 249, 261, 264, 408 P.3d 1, 13, 16 (2017) (“*MECO*”) (quoting Haw. Const. art. XI, § 9). Statutes governing the state’s management of public natural resources<sup>1</sup> are undeniably “laws relating to environmental quality.” Thus, article XI, § 9’s right

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<sup>1</sup> As relevant here, such laws include, but are not limited to, Hawai‘i Revised Statutes (“HRS”) chs. 171 (general provisions governing the Board and Department of Land and Natural Resources), 187A (aquatic resources), 188 (fishing regulations), 188F (West Hawai‘i Regional

to a clean and healthful environment, as defined by the environmental benefits of the statutes governing the Board and Department of Land and Natural Resources, establishes a “substantive right . . . [and] legitimate entitlement to that benefit as defined by state law,” which constitutes a “property interest protected by due process.” *MECO*, 141 Hawai‘i at 264, 408 P.3d at 16.

Native Hawaiian Rights: The Hawai‘i Supreme Court has also established that “[t]he right to exercise Native Hawaiian customs and traditions is explicitly protected by article XII, section 7 of the Hawai‘i Constitution.” *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai‘i 376, 390, 363 P.3d 224, 238 (2015). The Court held that a contested case is “required as a matter of constitutional due process” to protect these rights, *before* issuance of permits. *Id.* In *MECO*, the Court confirmed that the rights “guaranteed by article XII, section 7 . . . are protectable interests under the due process clause.” 141 Hawai‘i at 264, 408 P.3d at 16.

Public Trust Rights: The Hawai‘i Supreme Court has also established that “the State marine waters and the submerged lands in which aquarium collection occurs are state lands,” and therefore subject to public trust rights, which apply to “all water resources without exception or distinction.” *Umberger v. Dep’t of Land & Natural Res.*, 140 Hawai‘i 500, 521, 403 P.3d 277, 298 (2017). The public trust has been established as a constitutional mandate in article XI, § 1. *See In re Waiāhole Ditch Combined Contested Case Hr’g*, 94 Hawai‘i 97, 132, 9 P.3d 409, 444 (2000) (“*Waiāhole*”). Among its core mandates, the public trust “requires the government of the State to *preserve [trust resources] for the use of the public,*” “*freed from the obstruction or interference of private parties.*” *Id.* at 136, 9 P.3d at 448 (emphasis in original). Public trust rights are widely recognized as a form of protected property right.<sup>2</sup> Like the other constitutional rights above, these public trust rights are also protectable interests requiring due process.

Petitioner’s Rights and Interests in This Proceeding: Mr. Young resides in the ahupua‘a of Kealia in West Hawai‘i. Mr. Young is a Native Hawaiian cultural rights advocate and practitioner who has spent decades striving to protect Hawai‘i’s cultural and natural heritage. Mr. Young is a lifelong freediver and fisherman, including nearshore spearfishing and “drop stone” ahi fishing (called “palu ahi” in Hawaiian), whereby fishers tie bait to stones in order to lower the bait to the depths where ahi aggregate near established ko‘a. Mr. Young was taught from an early age how to select reef fish to harvest for food, that the health and vitality of the nearshore and offshore fisheries are inextricably connected, and that robust nearshore ecosystems directly

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Fishery Management Area), 189 (commercial fishing), 190 (marine life conservation); HAR ch. 13-60.4 (West Hawai‘i Regional Fishery Management Area).

<sup>2</sup> *See, e.g., Ctr. for Biological Diversity, Inc. v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588, 596 (Cal. Ct. App. 2008) (“[T]he courts in this country have treated the public trust largely as a *public property right* of access to certain public trust natural resources for various public purposes.”) (emphasis added, quotation marks omitted); *Marks v. Whitney*, 491 P.2d 374, 380-82 (Cal. 1971) (en banc) (deeming the “public trust easement” a distinct “estate or interest in,” “burden,” and “servitude” on property); *Holman v. Renaud*, 125 S.W. 843, 845 (Mo. Ct. App. 1910) (“A public trust is one in which the public at large, or some undermined portion of it, have a direct interest or *property right.*”) (emphasis added).

support robust offshore ecosystems. Mr. Young believes strongly that protection of natural and cultural resources is how best to honor his heritage and obligations to his ancestors, while visualizing Hawai‘i’s future through the eyes and for the sake of his mo‘opuna and future generations. Mr. Young has served on several community advisory boards and committees, including the Hawai‘i Island Burial Council, and currently serves as Hawai‘i Island Po‘o on the Aha Moku Advisory Committee, and as a member of the West Hawai‘i Fisheries Council. Mr. Young is a founding member of Kama‘āina United to Protect the ‘Āina (“KUPA”) and the related organization KUPA Friends of Ho‘okena Beach Park, which were founded to preserve Hawai‘i’s natural and cultural resources, specifically in Ho‘okena and across West Hawai‘i. In his capacity as a member of KUPA and KUPA Friends of Ho‘okena Beach Park, Mr. Young is a member of Kua‘āina ‘Ulu Auamo, a coalition of community leaders and cultural experts formed in 2003 for the purpose of empowering communities to improve their quality of life through caring for their natural and cultural heritage. Moreover, Mr. Young is a long-time member of Ka Pa‘akai o ka ‘Āina (which successfully litigated for recognition of Native Hawaiian rights in agency decision-making<sup>3</sup>), and, in his capacity as a member of KUPA Friends of Ho‘okena Beach Park, was among the hui that successfully petitioned the Board for rulemaking to ban commercial collection statewide.<sup>4</sup>

Mr. Young is deeply concerned about the impacts the Department of Land and Natural Resources – Division of Aquatic Resources (“DAR’s”) proposal will have on public trust and Native Hawai‘i traditional and customary rights. Mr. Young is concerned that the removal of endemic and indigenous fish species *en masse* by the aquarium pet trade compromises and ultimately will irreparably destroy the historic vitality of these marine ecosystems that are found nowhere else in the world, and which are the basis for the unique cultural relationship Native Hawaiians maintain with the nearshore environment. Mr. Young is further concerned that DAR’s treatment of *Ka Pa‘akai* fails to uphold the agency’s obligations to identify and reasonably protect Native Hawaiian rights.

## **22. Any Disagreement Petitioner May Have with an Application before the Board:**

The Board should reject DAR’s proposed terms and conditions and confirm its discretion to deny aquarium permits (“AQ permits”). The Hawai‘i Supreme Court has made clear that the Board’s decision-making authority over AQ permits under HRS § 188-31, which includes the imposition of terms and conditions, is “optional, permissive, or discretionary.” *Umberger*, 140 Hawai‘i at 526-27, 403 P.3d at 303-304 (quotation marks omitted). Further, the Board has broad powers and duties to deny AQ permits, including any terms and conditions, to fulfill its constitutional and statutory mandates to protect marine and cultural resources. *See, e.g.*, Haw.

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<sup>3</sup> *See Ka Pa‘akai O Ka ‘Āina v. Land Use Comm’n*, 94 Hawai‘i 31, 7 P.3d 1068 (2000) (“*Ka Pa‘akai*”); *see also* ¶ 22, *infra*.

<sup>4</sup> Mr. Young orally requested this contested case on behalf of himself and a hui of Native Hawaiians and conservationists opposing DAR’s proposed terms and conditions, which includes (at minimum) Michael Nakachi, Kalanihale, and For the Fishes. *See* “08.23.24 BOARD OF LAND AND NATURAL RESOURCES MEETING” (video recording), <https://www.youtube.com/watch?v=GbTsSPFHtJM&t=28360s> (last visited Aug. 30, 2024), at timestamp 8:20:12.

Const. art. XI, §§ 1, 6; Haw. Const. art. XII, § 7; HRS §§ 26-15(b), 171-3(a), 187A-2, 190-1. The Board should reject DAR’s proposed terms and conditions and exercise its discretion to deny AQ permits because: (a) the terms and conditions proposed by DAR (and that the Board was poised to approve in modified form) fail to address and mitigate known harms of commercial collection, as presented in the industry’s West Hawai‘i environmental impact statement (“EIS”); and (b) DAR’s analysis of Native Hawaiian traditional and customary rights fails under the *Ka Pa‘akai* framework.<sup>5</sup>

Any Board decisions regarding AQ permits, including approval of terms and conditions, must consider concerns raised in the EIS process.

The Hawai‘i Supreme Court has made clear that an EIS “is merely an informational document whose acceptance neither implies nor presumes approval of [a permit].” *Mauna Kea Power Co., Inc. v. Bd. of Land & Nat. Res.*, 76 Hawai‘i 259, 265, 874 P.2d 1084, 1090 (1994); *see also Price v. Obayashi Haw. Corp.*, 81 Hawai‘i 171, 181, 914 P.2d 1364, 1374 (1996) (“[A]n ‘acceptance’ of the EIS is not an ‘approval’ of the project.”). The Court has affirmed permit denial where, despite an EIS’s acceptance, permit opponents offered sufficient information to rebut an EIS’s conclusions. *Mauna Kea Power Co., Inc.*, 76 Hawai‘i at 265, 874 P.2d at 1090. And most recently, the Supreme Court clarified that the full extent of the West Hawai‘i EIS includes both the document’s main conclusions and appended public comments, *Kaupiko v. Board of Land & Natural Res.*, SCAP-22-0000557 (August 28, 2024) (“*Kaupiko*”)<sup>6</sup>, Maj. Op. at 33, which together contain “information from both sides,” *id.* at 43; *see also id.* at 47, that is “sufficient for [the Board] to make an informed decision,” *id.* at 4. Thus, in considering AQ permits, including terms and conditions, the Board is **not bound** in any way by the West Hawai‘i EIS’s main conclusions or preferred alternative but instead must carefully consider opposing views, including those raised in the EIS process.

DAR’s proposed terms and conditions include catch limits equivalent to the collection levels that historically caused significant damage to fish populations and coral reefs. DAR’s proposed catch quotas, if approved, would authorize more than 90% of what commercial collectors proposed in the West Hawai‘i EIS, amounting to 224,166 annually, *i.e.*, over 1.12 million fish over five years.<sup>7</sup> This would be about equal to and even more than the annual

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<sup>5</sup> Petitioners further protest DAR’s dogged insistence on proceeding with commercial AQ permitting in direct contradiction to the Board’s December 2023 unanimous decision to ban commercial aquarium collection through rulemaking. Moreover, the Board has not yet addressed the pet industry’s December, 2023 contested case request objecting to the Board’s approval of the rulemaking petition. The Board must firmly rebuff DAR’s disregard for public process and insist that DAR begin the rulemaking process as proposed by petitioners and approved by the Board.

<sup>6</sup> The Hawai‘i Supreme Court’s majority opinion in *Kaupiko* is published online at <https://www.courts.state.hi.us/wp-content/uploads/2024/08/SCAP-22-0000557.pdf> (last visited Sept. 2, 2024).

<sup>7</sup> DAR’s August 23, 2024 Submittal F-1 (“F-1 Submittal”) at 3, <https://dlnr.hawaii.gov/wp-content/uploads/2024/08/F-1-1.pdf> (last visited Aug. 26, 2024).

reported catch in the early 2000s, which caused significant damage to marine resources. The harm is still observable today: fish populations in areas formerly open to collection remain noticeably less abundant than in protected areas. Public comments appended to the West Hawai‘i EIS include, among other information illustrating direct impacts, a peer-reviewed study comparing fish populations in areas open to aquarium collection with those in closed areas, and determining that collection severely reduced targeted fish populations, ranging from 14 to **97 percent** less fish than in neighboring protected areas.<sup>8</sup> But DAR’s F-1 Submittal and the West Hawai‘i EIS ignore this data and instead assess collection’s impacts only against depleted areas that have already been subject to decades of extraction.<sup>9</sup>

Along these same lines, DAR’s proposed catch quotas for the eight White List species continue to be based on market demand, referred to by the industry and DAR as “historic average annual catch” from 1998-2017, which is the level of take collectors reached before the *Umberger* decision prompting environmental review and before any catch limits were in place.<sup>10</sup> In rejecting the first EIS, the Board directed PIJAC to establish catch quotas based on a species-specific statistical analysis that accounts for “each fish species’ life span, population size, reproductivity rates and age at first reproduction.”<sup>11</sup> This science-based analysis appears *nowhere* in the West Hawai‘i EIS, much less in DAR’s proposal to issue AQ permits, which champions the aquarium industry’s interests while undermining the Board’s sound instructions, relevant science, and DAR’s kuleana to protect public resources. Although some Board members considered reducing the catch quota for lā‘īpala (Yellow Tang) during the August 23, 2024 Board meeting, this reduced quota would have, nonetheless, continued to lack any underlying scientific analysis.<sup>12</sup>

DAR’s proposed terms and conditions place no limits on the number of fish that may be taken from each of the West Hawai‘i Regional Fishery Management Area’s (“WHRFMA’s”) eight aquarium collection zones (“AQ zones”), even though DAR requires aquarium collection

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<sup>8</sup> PIJAC’s May 26, 2021 Revised EIS (“West Hawai‘i EIS”), [https://files.hawaii.gov/dbedt/erp/EA\\_EIS\\_Library/2021-06-08-HA-Revised-FEIS-Hawaii-Island-Commercial-Aquarium-Permits.pdf](https://files.hawaii.gov/dbedt/erp/EA_EIS_Library/2021-06-08-HA-Revised-FEIS-Hawaii-Island-Commercial-Aquarium-Permits.pdf) at portable document format page no. (“pdf”) 477; *id.* at pdf 523-32, 540.

<sup>9</sup> See West Hawai‘i EIS at pdf 381, 437-41.

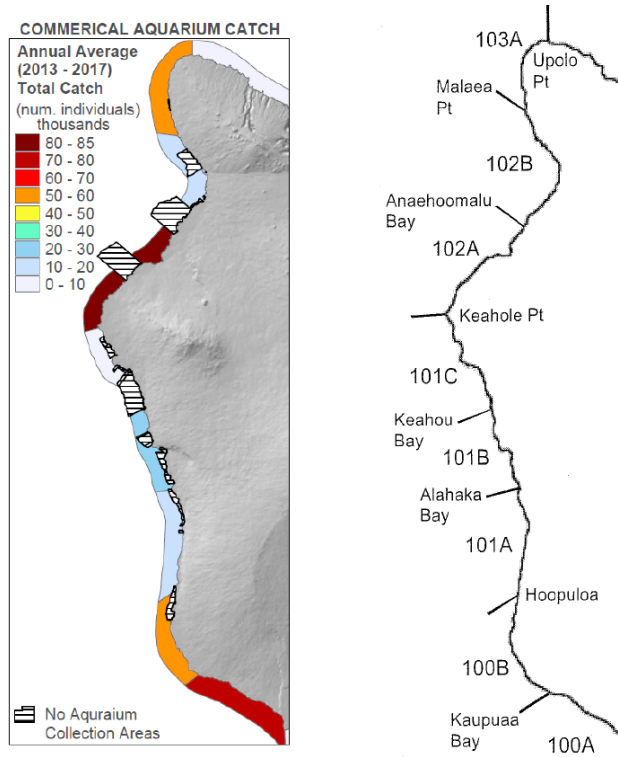
<sup>10</sup> F-1 Submittal at 16 n.75-76; West Hawai‘i EIS at pdf 51.

<sup>11</sup> BLNR’s May 30, 2020 Findings and Reasons for Non Acceptance (West Hawai‘i) at 4, [https://files.hawaii.gov/dbedt/erp/EA\\_EIS\\_Library/2020-06-23-HA-Non-Acceptance-Hawaii-Island-Commecial-Aquarium-Permits.pdf](https://files.hawaii.gov/dbedt/erp/EA_EIS_Library/2020-06-23-HA-Non-Acceptance-Hawaii-Island-Commecial-Aquarium-Permits.pdf) (last visited Aug. 21, 2024).

<sup>12</sup> On the other hand, completely eliminating species from the White List, including kole (Goldring Surgeonfish) and umaumalei (Orangespine Unicornfish), as some Board members considered, would have taken steps toward fulfilling the Board’s constitutional duties to protect public trust resources. See *In re Waiāhole Ditch Combined Contested Case Hrg.*, 94 Hawai‘i 97, 155, 9 P.3d 409, 467 (2000) (“[T]he lack of full scientific certainty does not extinguish the presumption in favor of public trust purposes or vitiate the [agency’s] affirmative duty to protect such purposes wherever feasible.”);



reporting by AQ zone. Instead, the proposed total allowable catch applies broadly to the entire WHRFMA, which spans 147 miles of coastline from ‘Upolu Point in the north to Ka Lae, Ka‘ū in the south. See HAR § 13-60.4-2(a). Without any restrictions on the amount of fish each collector may take from each AQ zone, collectors would be free to concentrate their catch anywhere they please, which could severely deplete or even wipe out local subpopulations of fish in heavily targeted areas. In fact, catch reports indicate that collection has indeed been concentrated more heavily in certain AQ zones, and substantially less in others. The maps below (from the comments appendix) show, on the left, the distribution of commercial aquarium catch from 2013 to 2017<sup>13</sup> and, on the right, the corresponding AQ zones.<sup>14</sup>



Moreover, nearly all species on the White List are herbivores, meaning they provide critical ecological services to the reef by eating algae off of the coral. Removing these important fish *en masse* from concentrated areas threatens to harm not only Hawai‘i’s precious coral reefs, but all the ecosystems dependent on them. This complete lack of place-based catch limits highlights the absence of measures in DAR’s proposed terms and conditions that would reasonably protect public natural resources from proven place-based impacts. Indeed, in rejecting the industry’s O‘ahu EIS, the Board rejected such broad regional catch quotas, noting that, “[b]ecause the catch data are reported to DAR on a zone basis, the [EIS] should discuss

<sup>13</sup> NOAA Pacific Islands Fisheries Science Center, “West Hawai‘i Integrated Ecosystem Assessment Ecosystem Status Report 2019,” West Hawai‘i EIS at pdf 767.

<sup>14</sup> This AQ zone map was formerly included in DAR’s “Aquarium Fish Trip Report Booklet.” West Hawai‘i EIS at pdf 521.

alternatives of catch quotas by zone as a mitigation measure, to guard against overfishing and depleting particular areas.”<sup>15</sup> Given that collection on Hawai‘i Island and O‘ahu is permitted under the same statute and that DAR requires reporting by AQ zone on both islands, this same reasoning should be applied to any take considered for West Hawai‘i, as a precautionary measure to prevent localized overfishing.

Petitioners here further note that DAR’s proposed terms and conditions would place no limits on the number of fish per species that each of the seven potential West Hawai‘i permit applicants may take. This contradicts DAR’s other permitting practices (such as for special activity permits) and illegally changes the nature and scope of the action proposed in the West Hawai‘i EIS,<sup>16</sup> which included catch limits for *each permittee*.<sup>17</sup> Under DAR’s new proposition to eliminate individual catch quotas for each permittee, there are zero measures in place for collectors to track their collection against overall catch quotas in real time to prevent exceedances. For example, multiple collectors could be in the water during the same time periods and simultaneously and collectively breach catch quotas by hundreds or thousands of fish. Individual permittee catch limits are further necessary to prevent a “race to the fish” phenomenon whereby collectors would rush to catch as much as possible before the overall quotas are full. Relatedly, DAR proposes applying annual catch quotas across the calendar year from January 1 to December 31,<sup>18</sup> even though AQ permits may be issued at any time during the year. This means that if permits are first issued toward the end of the year, collectors could catch up to the full quota in just a few months. The West Hawai‘i EIS did not propose or consider this degree of catch over a shortened time period of less 12 months. DAR’s proposal also lacks enforcement measures to monitor catch and prevent underreporting.

Without candid disclosure of impacts, science-based catch quotas, and related mitigation measures to prevent destruction of Hawai‘i’s reefs, the Board should reject DAR’s plan for reopening West Hawai‘i to commercial aquarium collection.

DAR’s *Ka Pa ‘akai* analysis is invalid.

DAR’s discussion of impacts to Native Hawaiian traditional and customary practices falls far short of the Board’s duties under article XII, section 7 of the Hawai‘i Constitution, which requires the State to protect the traditional and customary practices of kanaka maoli “ahupua‘a tenants.” Under bedrock precedent interpreting article XII, section 7, state agencies “*may not act* without independently considering the effect of their actions on Hawaiian traditions and practices.” *Ka Pa ‘akai*, 94 Hawai‘i at 46, 7 P.3d at 1083 (emphasis added). Agencies must specifically consider (1) the “identity and scope” of Native Hawaiian traditional and customary

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<sup>15</sup> BLNR’s October 11, 2021 Findings and Reasons for Non Acceptance (O‘ahu) at 6, [https://files.hawaii.gov/dbedt/erp/EA\\_EIS\\_Library/2021-10-23-OA-FEIS-Non-acceptance-Oahu-Commercial-Aquarium-Permits.pdf](https://files.hawaii.gov/dbedt/erp/EA_EIS_Library/2021-10-23-OA-FEIS-Non-acceptance-Oahu-Commercial-Aquarium-Permits.pdf) (last visited Aug. 21, 2024).

<sup>16</sup> HAR § 11-200.1-30(a) (“An EIS that is accepted with respect to a particular action is usually qualified by the size [and] scope . . . of the action”).

<sup>17</sup> West Hawai‘i EIS at pdf 52.

<sup>18</sup> F-1 Submittal at pdf 25.

rights affected by the action; (2) the extent to which Native Hawaiian traditional and customary practices will be “affected or impaired” by the action; and (3) “feasible [agency] action” to “reasonably protect” Native Hawaiian traditional and customary rights (the “*Ka Pa ‘akai* framework”). *Id.* at 47, 7 P.3d at 1084.

DAR’s discussion of the *Ka Pa ‘akai* framework fundamentally misapplies the first *Ka Pa ‘akai* prong, which bleeds into and infects the rest of the analysis. *Ka Pa ‘akai* requires at the outset that state agencies—*before issuing permits*—“make *specific findings and conclusions* as to . . . the identity and scope of valued cultural, historical, or natural resources . . . , including *the extent to which traditional and customary native Hawaiian rights are exercised*[.]” *Id.* (emphasis added). DAR instead makes zero “specific findings and conclusions” on the “identity and scope” or “extent” of traditional and customary practices in the WHRFMA, which broadly includes 147 miles of coastline and over seventy distinct ahupua‘a.<sup>19</sup> DAR merely reproduces limited information from the industry’s EIS regarding *impacts of aquarium collection* on select *species*, and then engages in a philosophical debate on whether Native Hawaiians support or oppose the aquarium collection industry,<sup>20</sup> all of which sidesteps entirely the first prong of the *Ka Pa ‘akai* analysis. No one is claiming (nor could they) that aquarium collection is a Native Hawaiian tradition or practice here. The sparse collection of statements DAR cites from individuals supporting the trade are entirely irrelevant in this context.

Under the second prong of the *Ka Pa ‘akai* framework, there can be no valid analysis of how cultural resources and practices are “affected or impaired” if they have not been properly identified in the first place. Flowing from DAR’s misapplication of the first *Ka Pa ‘akai* prong, DAR next baselessly asserts that cultural impacts can occur only when there has been a “significant impact to the populations of the proposed white list species.”<sup>21</sup> DAR parrots statements made by an O‘ahu-based industry supporter (*not* by any hoā‘āina of West Hawai‘i) that commercial aquarium collection would not impact traditional practices unless “species are *no longer available* for [such] practices.”<sup>22</sup> This absurd suggestion, that a species would need to be declining or extinct before there could be any impact to traditional and customary practices,

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<sup>19</sup> As its primary source of information on traditional and customary Native Hawaiian practices in West Hawai‘i ahupua‘a, DAR relied on the cultural impact assessment (“CIA”) attached to the pet industry’s West Hawai‘i EIS, which attempted to assess cultural impacts only for practices which *the industry* deemed “could be affected” by issuance of AQ permits. *See* F-1 Submittal at 7-8. This limited scope of analysis is not sufficient on its own to substantiate “specific findings and conclusions” regarding “the extent to which traditional and customary native Hawaiian rights are exercised” across West Hawai‘i ahupua‘a. *Ka Pa ‘akai*, 94 Hawai‘i at 47, 7 P.3d at 1084.

<sup>20</sup> DAR does acknowledge that the “concept of human ownership over marine life is in *direct conflict* with” the Hawaiian worldview regarding the relationship between kānaka and marine life; “aquarium collection *fundamentally conflicts* with core Native Hawaiian cultural values”; and “the concept of keeping fish in an aquarium goes against Hawaiian beliefs and values and *offends the Hawaiian consciousness*[.]” F-1 Submittal at 10-11.

<sup>21</sup> *Id.* at 12.

<sup>22</sup> *Id.* at 11.

must be roundly rejected. Indeed, in rejecting the first West Hawai‘i EIS, the Board expressly refused to accept the “flawed premise that cultural impacts would only occur if the proposed action would cause a significant decline in the population of a [species] considered to be a cultural resource.”<sup>23</sup>

DAR acknowledges that “aquarium fishing offends core Hawaiian values,” yet concludes that “issuance of these permits would not inhibit any person’s right to hold these beliefs.”<sup>24</sup> DAR’s logic not only further perverts the purpose of the *Ka Pa ‘akai* framework, but moreover is akin to saying that torturing cats is fine, so long as it would not prevent cat-lovers from thinking cat torture is wrong.

Finally, under the third *Ka Pa ‘akai* prong, without having first identified affected practices and impacts, DAR lacked threshold information for analyzing “feasible [agency] actions” to *protect* Hawaiian cultural rights. Accordingly, DAR proposes *no protections whatsoever*, recommending instead to authorize nearly the full extent of past take levels that the industry had sought in its West Hawai‘i EIS,<sup>25</sup> and proposing no place-based catch limits. This utter lack of even minimal protective measures is, again, based on DAR’s unfounded conclusion that traditional and customary rights are affected only if there are “significant declines” in species populations. Under this forcibly limited and oppressive worldview, DAR apparently believes there are no Native Hawaiian traditions or customs tied to West Hawai‘i reefs and aquatic life worth protecting.

Because DAR fails to provide a valid *Ka Pa ‘akai* analysis—a necessary prerequisite to AQ permitting, including as a basis for terms and conditions—DAR’s proposal to reopen West Hawai‘i commercial aquarium collection should be denied outright.

**23. Any Relief Petitioner Seeks or Deems Itself Entitled to:**

Petitioner requests that the Board reject DAR’s August 23, 2024 proposal F-1 in its entirety. Relatedly, Petitioner supports DAR’s decision to withdraw its request that the Board delegate authority to the Chair to issue AQ permits.<sup>26</sup>

**24. How Petitioner’s Participation in the Proceeding Would Serve the Public Interest:**

Mr. Young’s participation in this proceeding would serve the public interest by bringing his important perspective and expertise to bear on the important factual and legal issues related to DAR’s proposed terms and conditions, and by recognizing and upholding his constitutional

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<sup>23</sup> BLNR’s May 30, 2020 Findings and Reasons for Non Acceptance at 4-5.

<sup>24</sup> F-1 Submittal at 12.

<sup>25</sup> DAR’s nominal reductions of take limits for a few species had nothing to do with the protection of Native Hawaiian customary rights.

<sup>26</sup> See “08.23.24 BOARD OF LAND AND NATURAL RESOURCES MEETING” (video recording), <https://www.youtube.com/watch?v=GbTsSPFHtJM&t=28360s> (last visited Aug. 30, 2024), at timestamp 8:10:54.

rights to participate in this proceeding to that end. As discussed above, Mr. Young is a recognized community advocate on issues of marine conservation and protection of cultural resources in West Hawai‘i and statewide, with an established track record of engagement on these issues. Mr. Young is directly and personally familiar with the cultural precepts and rights at stake, as well as the background and purposes undergirding the Hawai‘i Supreme Court’s *Ka Pa ‘akai* framework. Not only does Mr. Young stand to be directly affected by DAR’s proposed terms and conditions, but based on his wealth of first-hand and community-based experience over many years, he is uniquely positioned to inform this proceeding regarding the real-world, on-the-ground impacts of commercial aquarium collection, and to offer corrections and improvements to mitigate or avoid these impacts.

Mr. Young can and will bring to this proceeding factual information and cultural insights that have been lacking in the development and discussion of AQ permitting, including terms and conditions. These may include, for example, historical, factual, and cultural background and documents, his own testimony, as well as legal expertise through his counsel Earthjustice, regarding the merits of DAR’s proposal and the activities it would authorize. Mr. Young’s participation in this proceeding will thus contribute to the development of a sound record for a decision on DAR’s proposal, which is also in the public interest.

DATED: Honolulu, Hawai‘i, September 3, 2024.



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