IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

WILLIE KAUPIKO, KA'IMI KAUPIKO, MIKE NAKACHI, FOR THE FISHES, AND CENTER FOR BIOLOGICAL DIVERSITY, Plaintiffs, vs. DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAI'I, Defendants.	CIVIL NO. 1CCV-20-0000125(JPC) (Environmental Court) MINUTE ORDER

MINUTE ORDER RE: ORDER GRANTING IN PART AND DENYING IN PART HEMIC'S MOTION TO INTERVENE (Motion filed 10/30/2020)

First Circuit Court, State of Hawai‘i

RE: Kaupiko, et al. v DLNR, et al; Civ. No. 1CCV-20-0000125 (JPC) (Environmental Court)

RE: Plaintiffs' Motion for Summary Judgment (motion filed 5/5/2020)

- - - - - - - - - - - - -

1. The above motion was heard on 6/24/20 by remote video hearing. The motion was taken under advisement, and the court now issues its ruling, conclusions and reasoning through this Minute Order. A formal order will be entered through the usual Rule 23 process.

2. Summary of the court's ruling. (Note: throughout this Minute Order, the court uses the words aquarium "fish" and aquarium "fishing" as shorthand. As used here, "fish" and "fishing" can include both aquarium fish and other marine life such as aquarium invertebrates which are also collected from the ocean as part of the practices at issue in this case.)

A. On the claim that all commercial aquarium fishing requires HRS 188-31 permits, Plaintiffs' motion for summary judgment is hereby DENIED as a matter of statutory interpretation.

B. As to Plaintiffs' constitutional claims based on a) public trust duties to protect marine resources, and b) duties to protect traditional and customary Native Hawaiian rights, Plaintiffs' motion for summary judgment is hereby DENIED without prejudice. These claims are not susceptible to summary adjudication on this record at this time.

C. As to Plaintiffs' claim that HEPA requires environmental review for commercial taking of aquarium fish pursuant to HRS 189-2 (Commercial Marine Licenses), Plaintiffs' motion for summary judgment is hereby GRANTED. Defendant DLNR's Rule 56(f) request for more time to present additional facts on this issue is hereby DENIED.

3. Background: the Supreme Court's Umberger decision, and orders entered by the Umberger trial court following remand. This case and this motion raise issues related to the Supreme Court's opinion in Umberger v. DLNR, 140 Hawai'i 500 (2017), and to the orders issued by the trial court following remand in Umberger. The result in Umberger was to void certain fishing permits issued under HRS 188-31, titled "Permits to take aquatic life for aquarium purposes." That statute and those permits had allowed the commercial collection of aquarium fish using fine-mesh traps or fine-mesh nets other than throw nets. The general context is that fine-mesh collection methods make it easier to collect more aquarium fish more quickly. The 188-31 permits were voided because they were issued without environmental review required by HRS Chapter 343, the Hawai'i Environmental Policy Act ("HEPA"). After remand, DLNR was enjoined from issuing or renewing commercial aquarium fish permits pursuant to HRS 188-31 until further order (see this court's order entered 10/27/17). All *recreational* aquarium permits issued under HRS 188-31 were also voided, by order entered 4/27/18. The end result: aquarium fish collection pursuant to permits issued under HRS 188-31 was prohibited absent the environmental review required by HRS Chapter 343.

4. After the Umberger rulings. It is undisputed that after Umburger voided permits issued under HRS 188-31, DLNR is still allowing commercial collection of aquarium fish. DLNR's rationale is that as long as the fine-mesh nets and traps allowed by HRS 188-31 are not used, commercial aquarium fishing is allowed using other collection methods pursuant to a different permit issued under a different statute, namely, Commercial Marine Licenses ("CMLs") issued under HRS 189-2.
HRS 189-2 provides that no person shall take marine life for commercial purposes without first getting a commercial marine license. HRS 189-2 is a generic statute that requires a permit in order to collect marine life commercially. It does not distinguish between aquarium fish and any other sea life, and unlike HRS 188-31, it does not discuss fine-mesh gear or any other specific method of taking any particular form of sea life.

5. Environmental review post-Umberger. As far as the court is aware, no environmental review for the commercial taking of aquarium fish has been accepted. On 6/26/18, DLNR rejected a proposal from commercial participants to resume fine-mesh fishing. That proposal was for an Environmental Assessment and a Finding of No Significant Impact. On 5/22/20, the BLNR rejected (by a 7-0 vote) a proposed EIS from ten aquarium fishers and amicus participant National Pet Industry Joint Advisory Council. BLNR gave numerous and specific reasons for not accepting the proposed Final EIS (see Exhibit X filed with Plaintiffs' Reply memo). BLNR's stated reasons for not accepting the EIS included:
/
/
/

a) no reasonable estimate of the amount of future take;

b) no limits on the annual take of the Achilles Tang;

c) insufficient analysis of the sustainable level of take;

d) inadequate discussion of the reduced numbers of aquarium fish at various collection sites;

e) inadequate discussion of the "extreme threat" of climate change on reefs warrants "extreme caution" in reviewing activities that may affect the reefs;

f) failure to consider cultural impacts, including the "flawed premise" that cultural impacts occur only if there is a significant decline in certain fish considered to be a cultural resource;

g) inadequate discussion of the impact of illegal aquarium fishing.

6. Aquarium fish collections post-Umberger. Exhibit 1 to DLNR's Memorandum in Opposition, and the Sakoda Declaration (also submitted by DLNR), show the following data for "Aquarium Catch (# of specimens kept)":

2017: 507,317 (the year Umberger was decided)
2018: 195,373
2019: 274,311
2020: 68,166 (this is a partial figure for 2020 because Exhibit 1 was filed May 29, 2020)

Adding up the aquarium catch for 2018, 2019, and for less than half of 2020 totals 537,850 aquarium specimens collected pursuant to CMLs issued under HRS 189-2. The data from public records requests and other sources submitted by Plaintiffs differs somewhat (see the Declaration of Ms. Umberger, and accompanying exhibits); however the relatively minor differences between the parties' numbers regarding the exact aquarium catch is insignificant and immaterial for purposes of this motion.

7. Plaintiffs' statutory argument is two-pronged:

A. All commercial aquarium fish collection requires a Section 188-31 aquarium permit, regardless of whether fine-mesh gear or any other type of equipment or method is used.

B. All commercial aquarium fish collection requires prior environmental review under HEPA, whether conducted under a 188-31 permit or a 189-2 permit.

8. Statutory construction and interpretation. Applicable but non-exclusive principles of statutory construction and interpretation include:

A. State v. Arceo, 84 Hawai‘i 1, 10 (1996). The interpretation of a statute is a question of law, and is reviewable de novo.

B. State v. Yakota, 143 Hawai‘i 200, 205 (2018). (Our first obligation is to determine and give effect to the intention of the legislature, which comes primarily from the statute's own text. Second, laws regarding the same subject shall be construed with reference to each other. Third, the legislature is presumed not to intend an absurd result, and laws will be construed to avoid contradiction, if possible.) (quotation shortened and citation omitted).

C. Richardson v. City & County of Honolulu, 76 Haw. 46, 55 (1994). (Where there is a plain conflict between a general and a specific statute on the same subject matter, the specific is favored. But where the statutes simply overlap in their application, both the general and the specific will be given effect if possible, as repeal by implication is disfavored)(citation omitted).

9. Summary of DLNR's position. DLNR argues:

A. Umberger and HRS 188-31 apply only to fine-mesh net fishing. Umberger distinguishes Commercial Marine Licenses ("CML") under HRS 189-2 from the fine-mesh permits under HRS 188-31.

B. Issuing CMLs for commercial aquarium fishing is not a HEPA "action," so no environmental review is required.

C. DLNR's discretionary consent in issuing CMLs per HRS 189-2 is different from the discretion discussed in Umberger, and therefore summary judgment is not appropriate at this time.

D. Alternatively, commercial aquarium fish collecting may be exempt under HEPA.

10. Summary Judgment Standard.

A. Summary judgment is a drastic remedy and must be cautiously invoked. Moving parties are generally entitled to judgment as a matter of law only if there is no genuine issue as to any material fact. Ralston v. Yim, 129 Hawai'i 46, 55–56 (2013). Evidence is to be viewed in the light most favorable to the non-moving party, and the court may not rely on any disputable inferences drawn against the non-moving party. Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 108 (1992).

B. Rule 56(f) requests. DLNR made a Rule 56(f) request for this motion. DLNR has the burden to show how the additional discovery it seeks would adduce material facts on dispositive issues. Exotics Hawaii-Kana, Inc. v. E.I. Du Pont Nemours & Co., 116 Hawai'i 277, 308 (2007).

11. Does all commercial aquarium fish collection require a HRS 188-31 aquarium permit, regardless of whether fine-mesh gear or some other type of equipment or method is used?

A. Plaintiffs argue that as between HRS 188-31 and 189-2, HRS 188-31 is a "aquarium collection" statute per its title and meaning, and not just a "fine-mesh" statute, and thus is controlling over HRS 189-2, which is a generic commercial licensing statute. DLNR argues that HRS 188-31 authorizes the use of fine-mesh nets and traps to capture aquarium fish, but that nothing in the statute states or implies that aquarium fish cannot be captured by other means.

B. The court agrees with DLNR's interpretation. It is clear from both a basic rule of fishing (it's easier to catch small fish with nets than by using line-and-hook) and from the legislative history that the Legislature wanted to encourage a commercial aquarium fishing trade. It is also clear the Legislature realized that aquarium fish commerce is easier for the fishers if otherwise prohibited fine-mesh nets and traps can be used. So the Legislature allowed use of fine-mesh nets or traps for commercial aquarium fishing. But both logically, and as a matter of law, allowing the more effective method of fine-mesh net fishing does not *per se* prohibit less effective methods. DLNR is right that HRS 188-31 does not expressly provide that it controls all commercial aquarium fishing. It simply allows fine-mesh methods if a permit is obtained. That special permit comes with added conditions, such as ability to keep the aquarium fish alive and healthy until sold. It is not for this court to read into the statute that *all* aquarium fishing, such as capturing fish by hand, requires a 188-31. If a fisher chooses to commercially capture aquarium fish without fine-mesh nets, and has a general license to do so, it is not prohibited by HRS 188-31. This does not lead to an "absurd" result for purposes of statutory construction. It simply leads to a result where fishers using the fine-mesh nets -- and presumably catching more aquarium fish because of it --

are subject to added conditions that they be able to maintain the life and health of their net-increased catch until the fish are sold. Plaintiffs argue that apparently nothing in the 189-2 permit process requires such a safeguard. This is discussed further, below, but for now, the court concludes the "keep the fish alive and healthy" safeguard in 188-31(b) does not mean the Legislature prohibited commercial catching of aquarium fish by less effective means than fine-mesh nets. Whether fish health safeguards are required for aquarium fishing pursuant to 189-2 is a separate issue from whether all aquarium fishing is subject to 188-31. To summarize, the court concludes the two statutes overlap but can be reconciled with each other without an absurd result. More specifically, the court concludes from the clear text of HRS 188-31 and by applying principles of statutory interpretation that 1) the Legislature did not intend that HRS 188-31 preclude or pre-empt less efficient aquarium fish catch methods, and 2) the Legislature did not intend that *all* aquarium fishing methods be subject to 188-31. The two statutes simply reflect a matter of degree: if the specific fine-mesh catch methods are used as allowed by 188-31, then protecting the increased catch via health safeguards is required as part of marine conservation. But other less-effective catch methods are not impliedly outlawed by 188-31. Finally, while the court agrees with Plaintiffs that the title of HRS 188-31 ("aquarium purposes") show it is focused on aquarium fish collection rather than fishing generally, that is not dispositive. As explained above, the fine-mesh catch method is clearly a primary focus of the statute. The court cannot read into the statute what Plaintiffs argue -- that the statute pre-empts the entire field of aquarium fishing to the exclusion of other statutes. That would be for the Legislature to decide, if it so chooses.

12. Does HEPA require environmental review of commercial aquarium fish collection pursuant to HRS 189-2?

A. Umberger summarized the HEPA analysis for commercial aquarium collection as four questions or conditions:

> (1) Is the proposed activity an "action" under HRS 343-2?
>
> (2) Does the action propose one or more of the nine categories of land uses enumerated in HRS 343-5(a)?
>
> (3) Is the action exempt pursuant to HRS 343-6(a)(2)?
>
> (4) Where, as here, the action is initiated by a private party for DLNR to approve, does the agency exercise discretionary consent in the approval process? (See HRS 343-5(e)).

Umberger, 140 Hawai'i at 512. Umberger re-visited the Legislature's findings and policy underpinnings for HEPA. The Legislature declared that HEPA's purpose is to

establish a system of environmental review to ensure environmental concerns receive appropriate consideration in decision making. HRS 343-5(e) provides this review must be done "at the earliest practicable time." This is so that environmental considerations are taken into account by planners and decision-makers before decision making, while there is still time and ability to adapt the project to valid environmental, historic, and cultural considerations. The Legislature has also found that environmental review fosters a holistic and thoughtful decision process that benefits all parties involved and benefits society as a whole. Given the breadth and importance of these principles, HEPA is not to be narrowly applied. Therefore, what constitutes an "action" for HEPA purposes should not be narrowly construed. Umberger, 140 Hawai'i at 515-516 (citations omitted).

B. The court agrees with DLNR that Umberger did not specifically address or resolve the issue of whether HRS 189-2 permits are an "action" for purposes of HEPA. In defining the "action," Umberger took pains to analyze the issue in the specific context of HRS 188-31, defining the activity as (1) extracting an unlimited number of fish annually; (2) through the use of fine-mesh nets or traps; (3) by individuals who can satisfy DLNR they can keep the fish alive and in reasonable health until sold; and (4) all for the purpose of holding the fish alive as pets, for study, public exhibition, or for sale. Umberger, 140 Hawai'i at 514. Some but not all of hese factors are present in HRS 189-2.

C. Despite the differences between 188-33 and 189-2, the court concludes that issuing CMLs pursuant to HRS 189-2 for commercial aquarium fish collection is an "action" for HEPA purposes. The material facts are not disputed. Commercial aquarium fishing is not some unintended byproduct of issuing CML permits post-Umberger. The CML application specifically allows for commercial aquarium fishing, as shown by the CML application options including "Aquarium" fishing (Exhibit O). The numbers of aquarium fish caught must be reported monthly as a condition of issuing the CML (Exhibit P). DLNR is aware (see its own Declarations on this motion) that commercial aquarium extraction methods include "sophisticated and advanced techniques" other than fine-mesh nets (Umberger, 140 Hawai'i at 514, note 22). These other collection methods include slurp guns, hard nets, larger opening nets, clear plastic barriers, hook-and-line, and more frequent night fishing (because it is easier to catch the fish when they are sleeping) (see DLNR's memorandum in opposition at page 10). The CML holder must allow his/her catch to be inspected by authorized officers, and DLNR may suspend the CML if necessary to protect and conserve marine life. Exhibit P. In sum, the CML and the criteria for their issuance and/or renewal, and the reporting and monitoring of aquarium catch results, are clearly part of a "project" and "program" as discussed in Umberger, 140 Hawai'i at 513-515. While Umberger also included the fine-mesh nets as a factor in applying HEPA, the opinion discussed other factors as well and did not require fine-mesh methods in order to find that commercial aquarium collection is an action for HEPA purposes. Based on but not limited to the above, the

court concludes there is no genuine issue of material fact on whether DLNR's issuance of CMLs pursuant to HRS 189-2 for commercial aquarium collection is an "action" for purposes of HEPA.

D. Does the "action" propose one or more of the nine categories of land uses enumerated in HRS 343-5(a)? Answer: yes, because collecting aquarium fish involves the use of state lands within a conservation district, per HRS 343-5(a)(1) and (2), and because aquarium fish collection impacts our reefs, and because the extraction is a substantial activity and is not merely hypothetical. See Umberger, 140 Hawai'i at 519-523. DLNR argues the post-Umberger collection methods are "far less efficient" without the benefit of fine-mesh nets. Facts differ as to how less efficient commercial aquarium collection is without using fine-mesh nets. However, the undisputed evidence that over a half-million aquarium fish have been collected in less than three years is essentially dispositive. A precise comparison and measurement of the difference between fine-mesh fishing and less effective methods is not particularly relevant or material. The court finds the current levels of commercial aquarium fish capture, as shown by DLNR's Exhibit 1 and other record evidence is far more than enough to meet the criteria for HEPA. DLNR also argues there are a limited number of fishers. But whether one uses Plaintiffs' characterization of 72 CMLs since this court's 10/27/17 order, or DLNR's number of 12 active licenses (see DLNR's memorandum in opposition at p. 16), the fact is even those relatively small number of aquarium CML licenses are resulting in hundreds of thousands of captured aquarium fish. Further, Umberger teaches us to look at the "outer limits of what permits allow and not only the most restrictive hypothetical manner in which the permits may be used." 140 Hawai'i at 517. Given the undisputed fact that over a half-million aquarium fish have been extracted after Umberger prohibited fine-mesh nets until the statutorily required environmental review was conducted, the court concludes there is no genuine issue of material fact on whether an actual and substantial use of state lands is occurring. This is further evidenced by BLNR's stated reasons for rejecting the Final EIS in May, 2020 (see Exhibit X filed with Plaintiffs' Reply memo, as summarized in part in paragraphs 5(a)-(g) above.)

E. Is the action exempt pursuant to HRS 343-6(a)(2)? Answer: no. This question was answered the same way in Umberger, and this court sees no material difference between the applicable facts in Umberger and the applicable facts here. Potentially unlimited extraction of aquarium fish does not meet any of the exemption categories. 140 Hawai'i at 524-525. Under the statutory criteria, exemptions are generally reserved for minor projects with minor impacts. Umberger makes clear that when defining the activity for purposes of HEPA analysis, the definition ". . . must encompass the outer limits of what the permits allow . . ." Umberger, 140 Hawai'i at 517. Here, it is undisputed that the CMLs allow unlimited collection of aquarium fish. Taking more than a half-million aquarium fish is not a minor impact, no matter how many or how few licenses are issued. (While not material to the court's

ruling, the court notes that the public records submitted for this motion show major increases in certain fish being captured in certain areas, post-Umberger, particularly the Yellow Tang. This could magnify the impact on those fish populations in those areas.) Since there is no limit on the number of licenses and no cap on what each license can capture, the "outer limits" are potentially unlimited, just as in Umberger. The difference between the number of fish extracted in Umberger and the number of fish extracted here is not materially different and does not create a genuine issue of material fact on any pertinent legal issue. The court concludes that as a matter of law, on this factual record, the CMLs issued pursuant to 189-2 are not exempt pursuant to HRS 343-6(a)(2).

F. Here, the action is initiated by a private party (license applicant) for DLNR to approve. The law therefore requires that the agency exercise discretionary consent in the approval process. (HRS 343-5(e)). Here, the text of HRS 189-2 does not have the same combination of "may" and "shall" as does HRS 188-31. DLNR argues this means there is no showing of discretionary consent in this case. That analysis does not go far enough. Umberger discussed the nature of discretionary consent, noting HRS 343-2 defines it as exercising judgment and free will rather than merely ministerial consent. 140 Hawai'i at 526. "The term "may" is generally construed to render optional, permissive or discretionary the provision in which it is embodied . . ." Umberger, 140 Hawai'i at 526, quoting State v Kahawai, 103 Hawai'i 462, 465 (2004) (further citation omitted).

G. Umberger also noted that administrative rules are part of DLNR exercising its independent judgment. 140 Hawai'i at 527. HRS 189-2(c) allows implementing regulations, and those regulations state that DLNR "may" issue licenses. HAR Section 13-74-2, **General License and Permit Conditions**, provides:

> "(4) The department or its agents **may** issue licenses and permits as authorized by law, and with such conditions necessary to manage, protect, and conserve aquatic life;" (emphasis added)

Further, Section 13-74-3, **Suspension, revocation and non-issuance of licenses and permit, generally,** provides:

> Except as may be otherwise provided, the board **may**:
> (1) **Suspend any and all licenses and permits issued pursuant to this chapter when such action is necessary for the protection and conservation of the aquatic life;** (emphasis added)
> (2) Revoke any license or permit issued pursuant to this chapter for any infraction of the terms and conditions of the license or permit and any person whose license or permit was revoked shall not be eligible to be issued another license or permit until the

expiration of one year from the date of revocation, unless another time period is specified;

(3) In any proceeding for the revocation of a commercial marine license issued pursuant to section 13-74-20, the licensee shall be given notice and opportunity for hearing in conformity with chapter 91, HRS. Upon revoking the license, the board may specify 74-7 §13-74-3 a period of time during which the commercial licensee shall not be eligible to be issued another license; provided that the period shall not exceed one year from the date of revocation; and

(4) Refuse to issue any license or permit to a person who is not legally admitted to the United States, who does not provide proper identification, who has unresolved violations of any license or permit issued pursuant to this chapter, or for other just cause. Should the department refuse to issue any license or permit, the department shall give the person notice and an opportunity for hearing in accordance with chapter 91, HRS.

The above regulations make clear that DLNR can exercise discretion regarding issuing, suspending, or renewing CMLs for various reasons. This court concludes that the "may" in HRS 189-2's implementing regulations should be interpreted the same way Umberger interpreted "may" in HRS 188-31 -- as optional, permissive, and discretionary. Moreover, as stated in the above regulations, DLNR's own exhibit (Sakoda Declaration) establishes that renewing CMLs can be withheld for cause, such as when a fisher does not comply with the monthly fish catch reporting requirements. Exhibit P, the General Terms and Conditions for a CML states DLNR "may" suspend the CML when necessary to protect and conserve wildlife (see 13-74-3 (1), above). In other words, obtaining, renewing, or suspending a CML is clearly not a ministerial function as simple as sending in the required fee along with a return envelope. Rather, DLNR has discretion in issuing and in renewing CMLs, and therefore the discretionary consent required for HEPA review is present. To the extent this finding includes facts, the court concludes there is no genuine issue of material fact. Finally, even if DLNR was not in fact exercising its discretion, that would not change the outcome under the record on this motion, for the reasons discussed in Umberger, 140 Hawai'i at 527.

13. Are the catch reports undercounting? The court notes that the catch numbers are from fishers' self-reporting as required by HRS 189-2 and its administrative regulations. Plaintiffs infer the actual number is likely much higher than what is officially reported. This may or may not be true, but it is speculative based on the record of this motion. The court notes it is a factual issue raised by Plaintiffs, but the court will not assume it to be true, and for purposes of this motion, the court has not made any inference that the actual numbers are likely higher than shown on Exhibit 1.

14. Are the fishers illegally using fine-mesh nets and traps? Plaintiffs argue it is virtually impossible for the permit holders to catch a half-million aquarium fish in less than three years without using fine-mesh nets. The court notes this is both disputed and the result of inferences. The court cannot and did not consider this question in ruling on this motion.

15. Plaintiffs' non-HEPA claims. Separate and apart from Plaintiffs' statutory arguments, Plaintiffs seek summary judgment that DLNR is violating its public trust duties under the Hawai'i Constitution, and violating its duty to protect traditional and customary Native Hawaiian rights under the Hawai'i Constitution. The court concludes these constitutional claims require examining whether DLNR/BLNR is adequately considering and balancing the potential impact of aquarium fish collecting. This involves weighing myriad facts including fish population, reef health, fishing policies, historical information, and personal, traditional and cultural practices. This complex analysis is not easily susceptible to summary judgment, and summary judgment as to those claims is hereby denied, without prejudice, on the limited record currently available. Specifically, but without limiting itself, the court finds the Sakoda, Walsh, Teague, and Ishida declarations submitted by DLNR raise genuine issues of material fact regarding, among other things, the size of fish populations, their sustainability, the impact of collection methods other than fine-mesh nets and traps, statistics and inferences concerning the impact of current collections, the viability of fishing for subsistence purposes, and the enforcement of marine protection laws for the benefit of Native Hawaiians.

16. HRS 188-31(b): requiring the fishers to be able to keep the fish alive and healthy until sold. HRS 189-2 does not have a similar requirement for its CML licenses. It is, however, within DLNR's discretionary consent pursuant to HAR Section 13-74-2(4), quoted above in paragraph 12 (G). Plaintiffs argue that all aquarium fish collection is covered by 188-31, including subsection (b), which requires the fishers to possess facilities to maintain fish alive and in reasonable health. But as discussed above, the court respectfully disagrees that 188-31 applies to *all* commercial aquarium collection. If the court is wrong as to what the Legislature intended, it is hopefully an easy matter for the Legislature to amend HRS 189-2 to add the language of 188-31(b). However, in the meantime, the issue is troubling. It would be counter-productive on many levels to allow aquarium fish capture pursuant to HRS 189-2, even by less efficient means, thereby reducing the total capture, but not at the same time require conservation and preservation as contemplated by 188-31(b). The court respectfully notes this is another reason why environmental review of HRS 189-2 is important. DLNR (or a private participant) can do an assessment of how many aquarium fish are dying or in bad health, if any, because the HRS 189-32 CML fishers are not required to show they have the necessary facilities and capacity, and amend its implementing regulations accordingly.

17. DLNR's Rule 56(f) request. The court spent considerable time evaluating this request, which was set forth both in DLNR's brief and through the "HRCP Rule 56(f) Declaration" DLNR's counsel filed 5/29/20. It is true it is early in the case. It is also true there is a substantial record on this motion, and of course the Umberger opinion provides much guidance. To the extent DLNR wishes to present more expert opinion testimony on the issues in this motion, extra time is often allowed since the expert disclosure deadline has not passed. But in carefully reviewing the specific requests made (see especially paragraphs 6-8 of the Rule 56(f) Declaration), the court ultimately concluded the request was futile. Even assuming DLNR did the work described, the court did not see how any of it creates a genuine issue of *material* fact. A single fact drives much of the court's factual analysis – the 537,850 aquarium specimens collected and kept pursuant to CMLs issued under HRS 189-2 in less than three years after Umberger stopped fine-mesh net fishing pending environmental review. DLNR asked for more time to provide a breakdown of the species taken, explain survey methods, interpret the data, and "extrapolate relevant conclusions", as well as provide an estimate of the difference in the potential take by collectors who do not use fine-mesh nets. The court recognizes these facts could likely be disputed. The court agrees expert testimony could help establish those facts. But the court just does not see how those facts are material to the instant motion in light of DLNR's own evidence of the 537,850 aquarium specimens caught and kept post-Umberger. That fact largely determines the court's factual analysis. What remains is applying facts to law. The inescapable facts are that the number of aquarium fish taken from state lands is both non-minor and uncapped. DLNR exercises or can exercise discretion concerning these takings. An environmental review is therefore required by law, and has not happened. Respectfully, the court sees no adequate explanation in the Rule 56(f) Declaration as to why the desired information could change these basic conclusions. The court independently tried to think of facts which could change the court's conclusions that HEPA requires an environmental review under the facts of this case. The court did not come up with any *material* facts which are remotely possible given the existing record.

18. THEREFORE, Plaintiffs' motion for summary judgment on its "Claim for Relief (Violation of HEPA)" is hereby GRANTED. The court will enter a declaratory judgment for the relief demanded in the Complaint, that:

A. DLNR is in violation of the Hawai'i Environmental Policy Act ("HEPA") HRS Chapter 343, for failing to complete the required environmental review process before approving or renewing CMLs for commercial aquarium fish collection; and

B. Based on the lack of the required environmental review, DLNR's issuance and renewal of Commercial Marine Licenses pursuant to HRS 189-2 for commercial aquarium collection is invalid and illegal.

19. Technically, Plaintiffs requested injunctive relief as part of this motion; however, it was a glancing request, and the criteria for injunctive relief were not adequately briefed or argued. The court therefore declines to issue an injunction at this time, without prejudice. Plaintiffs may file a further motion requesting injunctive relief if they so choose, but the court respectfully suggests the parties first confer on whether a court-issued injunction is necessary in light of the court's order granting summary judgment.

20. The court gave a lot of thought to this motion, and did not reach its conclusions lightly. The court knows from the Declarations submitted that this ruling will cause economic hardship to aquarium fishers, their families, employees, and vendors. That is truly unfortunate, especially during the hardships already occurring from the pandemic. But respectfully, the court is convinced that the rule of law requires an environmental assessment under the clear facts of this case.

21. Plaintiffs' counsel shall submit a proposed order per the usual Rule 23 process. If the parties cannot agree on an order, rather than spend limited time on resolving significant differences between the orders, the court prefers to sign a short form order that simply states the outcome, and adds language such as "for reasons including but not limited to those stated in the court's Minute Order dated November 27, 2020." Dated: November 27, 2020. /s/ Jeffrey.P.Crabtree.