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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

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

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Willie Kaupiko, Ka‘imi Kaupiko, Mike Nakachi, For the Fishes, and Center for Biological Diversity (collectively, “Plaintiffs”) complain of defendant Department of Land and Natural Resources, State of Hawai‘i (“Defendant” or “DLNR”) 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 (or “aquarium permits”) is subject to the environmental review requirements of the Hawai‘i Environmental Policy Act (“HEPA”), HRS chapter 343.

2. On remand, this Court on October 27, 2017 issued an order that 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 completion of HEPA review. *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), attached hereto as Exhibit A.

3. Despite the courts’ directives to halt commercial aquarium collection until the environmental review process has been completed, DLNR has allowed such collection to continue unlawfully under commercial marine licenses (“CMLs”) issued pursuant to HRS § 189-2, based on a newfound and invalid legal position that such collection does not require an aquarium permit or HEPA review so long as it occurs without the use of fine-meshed gear.

4. Since October 2017, DLNR has logged a commercial take of at least 576,741 individual specimens of aquatic life extracted from Hawai‘i waters for aquarium purposes, based

on collectors' self-reported catch data. Fish extraction at these levels would be extraordinarily difficult or impossible without fine-meshed gear.

5. Since this Court's October 27, 2017 order, DLNR has issued or renewed at least 72 CMLs to commercial aquarium collectors, including at least 3 issued or renewed in the past 120 days, and at least 26 that are currently unexpired.

6. DLNR's policy of issuing CMLs to commercial aquarium collectors without requiring any environmental review flouts the Hawai'i Supreme Court's ruling in *Umberger* and violates state law for two independent reasons:

- a. Aquarium collection under HRS § 189-2 meets the exact same criteria triggering HEPA review as aquarium collection under § 188-31 and is equally subject to HEPA's legal requirements regardless of DLNR's chosen permitting methods; and
- b. HRS § 188-31 regulates all aquarium collection regardless of the types of gear used and, therefore, all aquarium collection requires an aquarium permit and is subject to HEPA.

7. DLNR is also violating its public trust duties under article XI, sections 1 and 6 of the Hawai'i Constitution by failing to reasonably monitor and regulate aquarium collection to ensure compliance with state laws and protection of marine resources for the benefit of present and future generations.

8. DLNR is also abrogating its duty to protect traditional and customary Native Hawaiian subsistence rights to the extent feasible under article XII § 7 of the Hawai'i Constitution by failing to investigate and make express findings regarding the protection of such rights.

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 Defendant is 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 unregulated and unmonitored commercial aquarium collection because of the large numbers of immature fish removed from the reef by such practices, which severely reduces 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 a former member of the West Hawai‘i Fisheries Council, and, for decades, has been involved in efforts to regulate the aquarium trade. He has provided testimony to the Hawai‘i State Legislature, Board of Land and Natural Resources (“BLNR”), 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 that 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. Mr. Kaupiko’s recreational, aesthetic, and subsistence interests are harmed by DLNR’s failures to assess the environmental impacts of commercial aquarium collection and to reasonably monitor and regulate the trade.

13. 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 DLNR’s failure to assess the environmental effects of commercial aquarium collection on the abundance of these fish species and on reef health in Hawai‘i, and failure to reasonably monitor and regulate the trade. Mr. Kaupiko’s cultural interests are also harmed by commercial aquarium collection because such 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.

14. 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,

BLNR, 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 are 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 that are 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. Mr. Kaupiko’s aesthetic, recreational, and subsistence interests are adversely affected by DLNR’s failures to assess the environmental impacts of commercial aquarium collection and to reasonably monitor and regulate the trade.

15. Plaintiff Mike Nakachi is a resident of West Hawai‘i, where he is a 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.

16. 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 where there is 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. Mr. Nakachi's aesthetic and recreational interests, as well as his economic interests in environmentally and culturally responsible business practices, are harmed by DLNR's failures to assess the environmental impacts of commercial aquarium collection and to reasonably monitor and regulate the trade.

17. 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.

18. 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 draft 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.

19. DLNR’s failures to assess the environmental impacts of commercial aquarium collection and to reasonably monitor and regulate the trade undermine the interests of FTF and its staff and supporters in protecting coral reef wildlife and restoring coral reef ecosystems. DLNR’s repeated and ongoing failures have 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.

20. 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 approximately 450,000 members and supporters, 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.

21. The Center's members snorkel, scuba dive, swim, and fish in reef areas throughout the state, and enjoy observing healthy reefs and marine life. DLNR's failures to assess the environmental impacts of commercial aquarium collection and to reasonably monitor and regulate the trade threaten to impair the Center's and its members' aesthetic, recreational, and cultural interests in using, enjoying, and protecting the State's reefs.

22. Defendant's failures to assess the environmental impacts of commercial aquarium collection and to reasonably monitor and regulate the trade impair Plaintiffs' individual and organizational interests in using, enjoying, and protecting the ecological and cultural resources in Hawai'i's sensitive marine environment. Plaintiffs' environmental, aesthetic, recreational, educational, cultural, and economic interests are harmed by Defendant's failures to assess the environmental impacts of commercial aquarium collection and to reasonably monitor and regulate the trade, and the resulting removal of aquarium species from reefs around the state where Plaintiffs and Plaintiff organizations' members live, work, fish, and play. DLNR's failure to comply with its legal obligations deprives Plaintiffs of both the information that would be generated through the HEPA process and the opportunity to participate actively in the process of environmental review.

B. Defendant

23. DLNR is the State agency responsible for managing, administering, and exercising control over water resources, ocean waters, and coastal areas, including the State's aquatic life and aquatic resources. HRS §§ 171-3, 187A-2(1), -5. DLNR has the authority to issue and renew licenses for commercial harvest of marine resources, *id.* § 189-2; *see also* Haw. Admin. R. ("HAR") §§ 13-74-2(4), 13-74-20, and to issue and renew permits for aquarium collection, HRS § 188-31.

24. Under article XI, sections 1 and 6 of the Hawai‘i Constitution, DLNR has 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.

25. Under article XI, section 7 of the Hawai‘i Constitution, DLNR “is 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

A. Hawai‘i Environmental Policy Act

26. 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.

27. 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).

28. HEPA defines “action” to mean “any program or project to be initiated by any agency or applicant.” *Id.* § 343-2. “Project” is defined as a “discrete, planned undertaking that is site and time specific, has a specific goal or purpose, and has potential impact to the environment,” and “program” is defined, in pertinent part, as “separate projects having generic or common impacts.” HAR § 11-200.1-2.

29. 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 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.” HRS §§ 343-2, -5(e).

30. HEPA defines “approval” as “a discretionary consent required from an agency prior to actual implementation of an action.” *Id.* § 343-2. HEPA defines “discretionary consent” as “a consent, sanction, or recommendation from an agency for which judgment and free will may be exercised by the issuing agency, as distinguished from a ministerial consent.” *Id.*

31. 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. HRS § 343-5(e)(3) (emphasis added); HAR § 11-200.1-22(c). 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.” HRS § 343-2.

32. The environmental review process affords multiple important opportunities for information gathering and public input and participation. The agency must “[r]equire an applicant to conduct . . . early consultation seeking, at the earliest practicable time, the advice and input of the county agency responsible for implementing the county’s general plan for each county in which the proposed action is to occur, and consult with other agencies having jurisdiction or expertise as well as those citizen groups and individuals that the . . . approving agency reasonably believes may be affected.” HAR § 11-200.1-18(a). The process for conducting an EIS includes consultation with the 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. HRS § 343-5(e); *see also* HAR §§ 11-200.1-23, -25, -26, -28.

33. *Process* is the bedrock principle underlying HEPA. The Legislature recognized that 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. HEPA review is “meaningless without the conscientious application of the environmental review process as a whole, and shall not be merely a self-serving recitation of benefits and rationalization of the proposed action.” HAR § 11-200.1-1(c).

34. *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 either approval of the action by the agency or commencement of the action by the applicant. *Id.*; HAR § 11-200.1-28(e). An EIS must be prepared “at the earliest practicable time,” in order to “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 *prior to* decision-making.” HAR § 11-200.1-1(b) (emphasis added).

B. Constitutional Public Trust Doctrine

35. Under article XI, section 1 of the Hawai‘i State Constitution, the State has public trust duties to “conserve and protect Hawai‘i’s natural beauty and all natural resources” for the “benefit of present and future generations”: “All public natural resources are held in trust by the State for the benefit of the people.”

36. Correlatively, article XI, section 6 of the Hawai‘i Constitution grants the State the power to “manage and control the marine, seabed and other resources located within the boundaries of the State.”

37. Article XI, section 1 adopts “the public trust doctrine as a fundamental principle of constitutional law in Hawai‘i.” *In re Waiāhole Ditch Combined Contested Case Hrg.*, 94 Hawai‘i 97, 132, 9 P.3d 409, 444 (2000). The public trust’s “basic premise” is “that the state has certain powers and duties which it cannot legislatively abdicate.” *Id.* at 130-31, 9 P.3d at 442-43. Thus, statutory enactments “do not override the public trust doctrine”; rather, the doctrine “inform[s] the [statute]’s interpretation, define[s] its permissible ‘outer limits,’ and justif[ies] its existence.” *Id.* at 133, 9 P.3d at 445.

38. The Hawai‘i Supreme Court has recognized that state marine waters and the submerged lands in which aquarium collection occurs are subject to DLNR’s constitutional and common law public trust duties. *Umberger*, 140 Hawai‘i at 521, 403 P.3d at 298; *see also* Haw. Const. art. XI, § 6.

39. Article XI, section 1 places upon state agencies “a fiduciary duty analogous to the common law duty of a trustee with respect to lands held in public trust.” *Ching v. Case*, 145 Hawai‘i 148, 170, 449 P.3d 1146, 1168 (2019) (citations omitted). This includes an “independent trust obligation to reasonably monitor the trust property” to ensure that it “not be permitted to fall into ruin on the trustee’s watch.” *Id.* (internal quotes and brackets omitted).

40. A state agency’s public trust obligations extend beyond simply issuing licenses and permits pursuant to statutory requirements, and include a duty to “ensure that the [statutorily] prescribed measures are actually being implemented.” *See Kelly v. 1250 Oceanside Partners*, 111 Hawai‘i 205, 231, 140 P.3d 985, 1011 (2006).

41. Based on the “principles and purposes of the public trust,” the Hawai‘i Supreme Court has stated “it is manifest that a government body is precluded from allowing an applicant’s proposed use to impact the public trust in the absence of an affirmative showing that the use does not conflict with those principles and purposes.” *Kaua‘i Springs, Inc. v. Planning Comm’n*, 133 Hawai‘i 141, 174, 324 P.3d 951, 984 (2014).

C. Duty to Protect Traditional and Customary Native Hawaiian Rights

42. Article XII, section 7 of the Hawai‘i Constitution protects “all rights, customarily and traditionally exercised for subsistence . . . purposes.” The Hawai‘i Supreme Court “has stressed that the rights of native Hawaiians are a matter of great public concern in Hawaii.” *Ka Pa‘akai*, 94 Hawai‘i at 42, 7 P.3d at 1079 (internal quotations omitted).

43. Article XII, section 7 confers upon DLNR “the *power* to protect [traditional and customary native Hawaiian] rights and to prevent any interference with the exercise of these rights,” together with “an *affirmative duty* . . . to preserve and protect” these rights. *Id.* at 45, 7 P.3d at 1082 (emphases added).

44. DLNR “may not act without independently considering the effect of [its] actions on Hawaiian traditions and practices.” *Id.* at 46, 7 P.3d at 1083.

45. DLNR “is obligated to protect customary and traditional rights to the extent feasible.” *Id.* at 35, 7 P.3d at 1072. To effectuate this obligation, DLNR must, at minimum, make express findings regarding: (1) the extent to which traditional and customary Native Hawaiian rights are exercised in the affected area; (2) the extent to which such rights will be affected or impaired by the proposed action; and (3) feasible action to be taken by DLNR to reasonably protect such rights. *Id.* at 46-47, 7 P.3d at 1083-84.

V. BACKGROUND FACTS

A. Pre-Umberger Aquarium Collection in Hawai'i

46. Prior to the Hawai'i Supreme Court's ruling in *Umberger*, DLNR authorized all aquarium collection via aquarium permits issued pursuant to HRS § 188-31. An aquarium permit for recreational purposes would authorize the collection of up to five specimens of aquatic life per person per day. *See* HAR § 13-75-14(4).

47. If a collector wished to sell collected aquatic life on the aquarium pet market, however, DLNR would require the collector to obtain a CML pursuant to HRS § 189-2 *in addition to* a § 188-31 aquarium permit. In contrast to recreational aquarium permits, there was no limit on the number of aquatic organisms that an individual collector could extract under a commercial aquarium permit, nor was there any limit on the number of commercial aquarium permits DLNR could issue.

48. Aquarium permits were issued for “not longer than one year in duration.” HRS § 188-31(a).

49. The statutory language, regulatory framework, and legislative history of § 188-31 indicate that the legislature intended the statute to regulate the aquarium trade to protect public resources, regardless of collection method. In 1953, the Territorial Legislature carved out a specific exemption to the blanket ban on fine-meshed nets and traps, to allow inroads into the national aquarium fish trade for local fishers, while requiring collectors to maintain extracted organisms “alive and in reasonable health” to safeguard against “abuse of the privilege” of taking marine life for commercial aquarium purposes. *See* H. Stand. Comm. Rep. No. 586, in 1953 House Journal, at 675; HRS § 188-31(b).

50. In 1992, the legislature made clear that § 188-31 governs collection methods beyond fine-meshed gear, by explicitly including “other aquatic life” in the operative permitting

section, and by amending the title of the statute from “Nets and traps for aquarium purposes” to “Permits to take aquatic life for aquarium purposes.” 1992 Haw. Sess. L. Act 96, § 2 at 146. The inclusion of “other aquatic life” in the permitting section acknowledged the breadth of aquarium collection to include, for example, invertebrates like sea cucumbers (which do not require fine-meshed nets for collection), while the title amendment evinced legislative acknowledgement of the purpose and practice of regulating the take of aquatic life generally, and not the equipment in particular.

51. For decades, DLNR has likewise recognized the broad scope of § 188-31, granting and administering § 188-31 aquarium permits for collection of fish, aquatic invertebrates such as sea cucumbers, and other aquatic life, regardless of whether capturing such organisms required the use of fine-meshed gear. *See, e.g.*, HAR §§ 13-86.1-1, -3, 13-60.4-7(a). DLNR has expressly acknowledged through rulemaking that aquarium collection is frequently accomplished with other equipment besides fine-meshed gear. *See* HAR § 13-60.4-3.

52. Catch numbers self-reported by commercial aquarium collectors show that the collectors extracted from Hawai‘i waters 721,177 fish and other aquatic organisms in 2011, and 766,650 in 2012.

B. The *Umberger* Rulings

53. In 2012, a coalition including the Plaintiffs in this action filed a lawsuit in this Court alleging that HEPA review was required for aquarium collection conducted pursuant to HRS § 188-31. *Umberger*, 140 Hawai‘i at 505, 403 P.3d at 282. The Court granted Defendants’ motion for summary judgment, determining that aquarium collection under § 188-31 permits did not constitute an “action” triggering HEPA review. *Id.* at 510, 403 P.3d at 287. The Intermediate Court of Appeals affirmed, and the Hawai‘i Supreme Court granted certiorari. *Id.* at 511-12, 403 P.3d at 288-89.

54. In its 2017 *Umberger* opinion, the Hawai‘i Supreme Court reversed, holding that commercial aquarium collection is an “action” subject to HEPA. 140 Hawai‘i at 514-15, 403 P.3d at 291-92. The Court further held that “aquarium collection . . . qualifies as a ‘use of state . . . lands’ and as a ‘use within . . . a conservation district.’” *Id.* at 523, 403 P.3d at 300.

55. The Court determined that HEPA review was required for commercial aquarium collection because of its “nature, magnitude, and scale,” and because it allows for the “*unlimited* collection of fish and other aquatic life.” *Id.* at 516, 523, 403 P.3d at 293, 300 (emphasis added).

56. The Court held that commercial aquarium collection is not exempt from HEPA review because “*extraction of an unlimited number of aquatic life cannot be said to constitute only a minor alteration in the condition of State waters and submerged lands.*” *Id.* at 524-25, 403 P.3d at 301-02 (internal quotes and brackets omitted) (emphasis added).

57. The Court held that § 188-31 aquarium permits were subject to DLNR’s discretionary consent because the use and juxtaposition of the words “may” and “shall” in the statute and implementing administrative rules subjected issuance of aquarium permits to DLNR’s discretionary consent. *Id.* at 526-27, 403 P.3d at 303-04.

58. On remand, this Court on October 27, 2017 issued an order that 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 completion of HEPA review. *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), attached hereto as Exhibit A.

59. On April 27, 2018, this Court issued an order that invalidated all unexpired recreational aquarium collection permits. *Umberger v. Dep’t of Land & Natural Resources*,

Civil No. 12-1-2625-10 JPC, Order Granting Plaintiffs’ Renewed Motion for Summary Judgment Re: Recreational Permits Filed February 5, 2019 (Apr. 27, 2018).

C. Post-*Umberger* Aquarium Collection Under Commercial Marine Licenses

60. Since the *Umberger* opinion and subsequent circuit court orders, DLNR has abruptly reversed its decades-old practice of requiring both a § 189-2 CML and a § 188-31 aquarium permit for commercial aquarium collection and, instead, has allowed such extraction to continue under CMLs alone, based on a newfound and invalid legal interpretation that such collection does not require an aquarium permit or HEPA review so long as it occurs without the use of fine-meshed gear.

61. DLNR has treated the West Hawai‘i Regional Fishery Management Area (“WHRFMA”) as a single exception to its newly manufactured loophole, based on its reading of its specific regulations for the WHRFMA. HAR § 13-60.4-3, -7(a). DLNR has thus prohibited all aquarium collection in the WHRFMA pending completion of HEPA review.

62. Meanwhile, HEPA review is underway for commercial collection in the WHRFMA and on O‘ahu, but the industry interests conducting this review have made clear that aquarium collection using non-fine-meshed gear has continued and will continue everywhere besides the WHRFMA without any environmental review.

63. HRS § 189-2(a) prohibits the taking of marine life for commercial purposes without first obtaining a CML. CMLs are administered under HAR ch. 13-74, pursuant to HRS § 189-2(c).

64. DLNR “*may* issue licenses and permits as authorized by law, and with such conditions necessary to manage, protect, and conserve aquatic life.” HAR § 13-74-2(4) (emphasis added).

65. A licensee “shall show the license . . . and confirming identification upon the demand of any officer authorized to enforce the fishing laws of the State.” *Id.* § 13-74-2(2). Failure to comply with such a demand “shall be prima facie evidence of violation of this chapter and sufficient cause for the immediate revocation of the license.” *Id.*

66. CMLs are valid for “not longer than one year.” *Id.* § 13-74-2(1).

67. DLNR’s website contains links to CML application and renewal pages.¹ Part of the application process involves indicating “Gear Preferences.” Among the available drop-down menu options under “Gear Preferences” is “Aquarium.” No further specificity is required.

68. As with the aquarium permits currently enjoined by this Court, there is no statutory or regulatory limit to the number of fish or other aquatic organisms that can be extracted under a CML, nor is there any limit to the number of CMLs DLNR can issue.

69. The CML statute and rules contain no requirement that collected organisms be kept alive and in reasonable health. *See* HRS § 189-2; HAR ch. 13-74.

70. Since this Court’s October 27, 2017 order, DLNR has issued or renewed at least 72 CMLs to commercial aquarium collectors, including at least 3 issued or renewed in the past 120 days, and at least 26 that are currently unexpired.

71. According to aquarium catch figures that collectors have self-reported to DLNR, there have been 576,741 specimens of aquatic life extracted from Hawai‘i waters for commercial aquarium purposes in the two years spanning October 2017 to October 2019: 372,769 fish and 203,972 invertebrates.

¹ Commercial Marine License application, State of Hawai‘i Division of Aquatic Resources, <https://dlnr.hawaii.gov/dar/licenses-and-permits/commercial-marine-license/> (last visited January 23, 2020).

72. Plaintiffs are informed and believe, and on the basis thereof allege, that actual commercial aquarium catch numbers are significantly higher than what has been self-reported by collectors.

73. Hawai‘i Department of Agriculture shipping records from 2018 and 2019 show that commercial aquarium collectors on the island of Hawai‘i have continued to export aquarium animals in high numbers, sometimes totaling hundreds or thousands per shipment.

74. Plaintiffs are informed and believe, and on the basis thereof allege, that extraction of such high numbers of aquatic organisms—in particular, hundreds of thousands of aquarium-sized fish—would be extraordinarily difficult or impossible without the use of fine-meshed gear.

75. Plaintiffs are informed and believe, and on the basis thereof allege, that commercial aquarium collectors continue to employ fine-meshed methods of collection illegally.

76. Plaintiffs are informed and believe, and on the basis thereof allege, that commercial aquarium collectors continue to operate in the WHRFMA, which is the only place where DLNR has currently prohibited aquarium collection pending HEPA review.

77. Plaintiffs are informed and believe, and on the basis thereof allege, that commercial aquarium collection has continued in some cases without even a CML.

78. Plaintiffs are informed and believe, and on the basis thereof allege, that DLNR does not reasonably monitor commercial aquarium collection to ensure compliance with even DLNR’s deliberately narrow interpretation of this Court’s injunction, including DLNR’s supposed prohibitions on collection using fine-meshed gear, collection in the WHRFMA, or commercial collection without a CML.

79. Plaintiffs are informed and believe, and on the basis thereof allege, that DLNR has never made any express findings regarding the impacts of commercial aquarium collection on traditional and customary Native Hawaiian rights.

80. As of the date this complaint was filed, DLNR has not issued any notice that it intends to require applicants to prepare an EA or EIS for issuance or renewal of any CMLs for commercial aquarium collection, or otherwise comply with HEPA.

81. As of the date this complaint was filed, DLNR has not issued any notice that it intends to require CML licensees engaging in commercial aquarium collection to obtain a HRS § 188-31 aquarium collection permit and comply with the Hawai‘i Supreme Court’s and this Court’s rulings requiring HEPA review, regardless of the types of gear or methods used.

CLAIM FOR RELIEF

(Violation of HEPA)

82. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in the preceding paragraphs of this complaint.

83. Requests for CMLs for commercial aquarium collection are applicant actions that require the use of state lands and conservation district lands and involve discretionary agency approval. HRS §§ 343-2, 343-5(a)(1), (a)(2), (e); *see Umberger* at 519-23, 403 P.3d at 296-300; *id.* at 525-28, 403 P.3d at 302-305. Thus, for the same reasons as the Hawai‘i Supreme Court already established in *Umberger*, DLNR’s issuance and renewal of CMLs for commercial aquarium collection are subject to HEPA’s environmental review requirements.

84. Because DLNR’s issuance and renewal of CMLs allow for the unlimited collection of fish and other aquatic life for commercial aquarium purposes, these actions cannot be exempt from HEPA. *See Umberger* at 523-26, 403 P.3d at 300-303.

85. DLNR has violated its obligations under HEPA to require the applicants to prepare, at minimum, EAs, as well as to engage in the related process of consultation, information gathering, and public review and comment. HRS § 343-5(e); HAR § 11-200.1-18.

86. Absent full compliance with the HEPA process, the approvals of CMLs for commercial aquarium collection are null and void.

87. An actual controversy exists between Plaintiffs and Defendant concerning DLNR's duties to comply with HEPA prior to approving CMLs for commercial aquarium collection. The controversy between Plaintiffs and Defendant extends to the validity of existing and future CMLs issued for commercial aquarium collection absent such compliance.

CLAIM FOR RELIEF

(Misinterpretation of HRS § 188-31, Violation of HEPA)

88. Plaintiffs reallege and incorporate by reference the allegations in the preceding paragraphs.

89. DLNR's interpretation of HRS § 188-31 so as to limit the scope of regulation under an aquarium permit to only collection using fine-meshed gear has resulted in the agency allowing the aquarium trade to extract more than half-a-million marine animals over the course of two years under CMLs without aquarium permits or the prerequisite environmental review ordered by the Hawai'i Supreme Court and this Court. *See Order After Remand, Regarding Commercial Aquarium Collection, Civil No. 12-1-2625-10 JPC (October 27, 2017).*

90. DLNR's newly created loophole in § 188-31 contradicts the statutory language and framework, legislative history, and decades of DLNR interpretation and practice and renders ineffective and superfluous the statutory requirement that collectors maintain extracted fish alive and in reasonable health.

91. Absent DLNR requiring and ensuring that commercial aquarium collectors with CMLs seek and obtain a HRS § 188-31 aquarium collection permit and fully comply with the HEPA process ordered by the Hawai‘i Supreme Court and this Court, the approvals of these CMLs are null and void.

92. An actual controversy exists between Plaintiffs and Defendant concerning DLNR’s interpretation of § 188-31. The controversy between Plaintiffs and Defendant extends to the validity of existing and future CMLs issued for commercial aquarium collection absent a valid § 188-31 aquarium permit and the required HEPA review.

CLAIM FOR RELIEF

(Breach of Constitutional Public Trust Duties)

93. Plaintiffs reallege and incorporate by reference the allegations in the preceding paragraphs.

94. DLNR’s continued allowance of commercial aquarium collection without valid aquarium permits or HEPA review is a breach of its constitutional public trust duties under article XI, §§ 1 and 6 of the Hawai‘i Constitution to regulate use of public natural resources in a manner consistent with resource conservation.

95. DLNR has unlawfully abdicated its constitutional public trust obligations under article XI, §§ 1 and 6 of the Hawai‘i Constitution by failing to reasonably monitor aquarium collection to ensure compliance with state laws and its own policies, including, but not limited to, the prohibition on the use of fine-meshed gear, the prohibition on all aquarium collection in the WHRFMA, and the prohibition on commercial aquarium collection without a CML.

96. An actual controversy exists between Plaintiffs and Defendant concerning DLNR’s public trust duties. The controversy between Plaintiffs and Defendant extends to

DLNR's failure to reasonably monitor and regulate to ensure compliance with state laws and policies and protection of marine resources for the benefit of present and future generations.

CLAIM FOR RELIEF

(Breach of Duty to Protect Traditional and Customary Native Hawaiian Rights)

97. Plaintiffs reallege and incorporate by reference the allegations in the preceding paragraphs.

98. DLNR's failure to independently consider the effects of its actions on traditional and customary Native Hawaiian rights by, at minimum, making express findings regarding the impacts on and feasible protection of such rights breaches DLNR's constitutional duty to protect traditional and customary Native Hawaiian rights to the extent feasible under article XII, § 7 of the Hawai'i Constitution.

99. An actual controversy exists between Plaintiffs and Defendant concerning DLNR's duty to protect traditional and customary Native Hawaiian rights. The controversy between Plaintiffs and Defendant extends to aquarium collection that DLNR has failed to examine and regulate to ensure compliance with state laws mandating protection of traditional and customary Native Hawaiian rights.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully ask:

A. That this Court issue a declaratory judgment that:

(1) DLNR is in violation HEPA, HRS ch. 343, for failing to complete the mandated HEPA process prior to approving CMLs for commercial aquarium collection;

(2) DLNR's issuance and renewal of CMLs for commercial aquarium collection without complying with HEPA is invalid and illegal;

(3) HRS § 188-31 requires aquarium permits, and the prerequisite HEPA review, for all aquarium collection, regardless of the gear types or methods used;

(4) DLNR's issuance and renewal of CMLs for commercial aquarium collection without also requiring an HRS § 188-31 aquarium permit and prior compliance with HEPA is invalid and illegal;

(5) DLNR is violating its public trust duties under article XI, sections 1 and 6 of the Hawai'i Constitution by failing to reasonably monitor and regulate aquarium collection to ensure compliance with state laws and protection of marine resources for the benefit of present and future generations; and

(6) DLNR is violating its duties under article XII, § 7 of the Hawai'i Constitution by failing to protect traditional and customary Native Hawaiian subsistence rights to the extent feasible;

B. That this Court issue a prohibitory injunction that:

(1) Enjoins commercial aquarium collection under CMLs until Defendant complies fully with HEPA;

(2) Enjoins commercial aquarium collection under CMLs until Defendant requires and ensures that licensees have also obtained an HRS § 188-31 aquarium permit based on proper compliance with HEPA;

(3) Enjoins DLNR from approving, renewing, or issuing any CMLs for commercial aquarium collection prior to completing HEPA review; and

(4) Enjoins DLNR from approving, renewing, or issuing any CMLs for commercial aquarium collection without also requiring and ensuring the applicant has obtained a

valid aquarium permit issued pursuant to HRS § 188-31, following the mandated HEPA review of § 188-31 permit applications;

C. That this Court issue a mandatory injunction that:

(1) Requires DLNR to develop a written plan to reasonably monitor aquarium collection in the state to ensure compliance with state laws and policies; and

(2) Requires DLNR to conduct the three-part analysis and make the express findings mandated in *Ka Pa'akai* to protect traditional and customary Native Hawaiian rights to the extent feasible;

D. That this Court retain continuing jurisdiction to review Defendant's compliance with all judgments and orders entered herein;

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

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

G. For such other and further relief as the Court may deem just and proper to effectuate a complete resolution of the legal disputes between Plaintiffs and Defendant.

DATED: Honolulu, Hawai'i, January 27, 2020.

/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, and Center for
Biological Diversity

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.

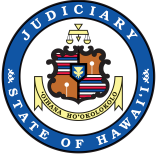

Respectfully, this order does not make or rely on any findings pursuant to HRCP Rule 65, for reasons stated at the hearing.

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 HAWAI'I CIRCUIT COURT OF THE FIRST CIRCUIT	SUMMONS TO ANSWER CIVIL COMPLAINT	CASE NUMBER
PLAINTIFF WILLIE KAUPIKO, KA'IMI KAUPIKO, MIKE NAKACHI, FOR THE FISHES, AND CENTER FOR BIOLOGICAL DIVERSITY		VS. DEFENDANT(S) DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAI'I
PLAINTIFF'S NAME & ADDRESS, TEL. NO. Isaac H. Moriwake #7141 Kylie W. Wager Cruz #10165 Mahesh Cleveland #11023 Earthjustice 850 Richards St., Suite 400 Honolulu, HI 96813		
<p>TO THE ABOVE-NAMED DEFENDANT(S)</p> <p>You are hereby summoned and required to file with the court and serve upon</p> <p>Isaac H. Moriwake Kylie W. Wager Cruz <u>Mahesh Cleveland</u> _____,</p> <p>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.</p> <p>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.</p> <p>A FAILURE TO OBEY THIS SUMMONS MAY RESULT IN AN ENTRY OF DEFAULT AND DEFAULT JUDGMENT AGAINST THE DISOBEYING PERSON OR PARTY.</p>		
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 	
 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.		