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FIRST CIRCUIT COURT  
STATE OF HAWAII  
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S. TAMANAHA  
CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

RENE UMBERGER, MIKE NAKACHI,  
KAIMI KAUPIKO, WILLIE KAUPIKO,  
CONSERVATION COUNCIL FOR  
HAWAI'I, HUMANE SOCIETY OF THE  
UNITED STATES, and CENTER FOR  
BIOLOGICAL DIVERSITY,

Plaintiffs,

v.

DEPARTMENT OF LAND AND NATURAL  
RESOURCES, STATE OF HAWAI'I,

Defendant.

) Civil No. **12-1-2625-10 PWB**  
)  
) (DECLARATORY JUDGMENT)  
)  
) COMPLAINT FOR DECLARATORY  
) JUDGMENT AND INJUNCTIVE RELIEF;  
) SUMMONS

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

I do hereby certify that this is a full, true, and  
correct copy of the original on file in this office.

Clerk, Circuit Court, First Circuit

# COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

## I. INTRODUCTION

By this Complaint, plaintiffs Rene Umberger, Mike Nakachi, Kaimi Kaupiko, Willie Kaupiko, Conservation Council of Hawai‘i, the Humane Society of the United States, and the Center for Biological Diversity (“the Center”) seek to compel defendant Hawai‘i Department of Land and Natural Resources (“DLNR”) to comply with the environmental review procedures mandated by the Hawai‘i Environmental Policy Act (“HEPA”), Haw. Rev. Stat. ch. 343, prior to issuance and renewal of aquarium collection permits allowing fish collection on the State’s lands. Specifically, DLNR approved more than 50 aquarium collection permits in the 120 days before this complaint was filed without the required HEPA review.<sup>1</sup>

The State of Hawai‘i is the largest exporter in the United States of species intended for the aquarium trade. The aquarium collection industry primarily targets herbivorous fish and invertebrate species that inhabit coral reefs. According to DLNR data, approximately 75% of the state’s aquarium fish catch comes from the west coast of the island of Hawai‘i (“west Hawai‘i”), and 99% of all invertebrates caught in the state come from O‘ahu’s nearshore waters.

DLNR regulates the removal of marine species from state waters for the aquarium trade. The Hawai‘i Division of Aquatic Resources (“DAR”) is the division within DLNR responsible for evaluating applications for collection permits. Because collection permits require the use of

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<sup>1</sup> The aquarium collection permits that DLNR has approved in the last 120 days, triggering HEPA, are permit numbers 1001, 1426, 1728, 1766, 2365, 2751, 3046, 3071, 3210, 3279, 3310, 3479, 3481, 3504, 3663, 3739, 3746, 3903, 4911, 6510, 6554, 6662, 6775, 6979, 7840, 7931, 7947, 8777, 9287, 10671, 11551, 11642, 11724, 17575, 17967, 18960, 19612, 19802, 19828, 20131, 20709, 22207, 22320, 22868, 23850, 25753, 26252, 26253, 26997, 27076, and 27164. In addition to these named permits, plaintiffs believe that DLNR has granted additional aquarium collection permits, and this complaint challenges the aforementioned numbered permits and any other aquarium collection permits renewed or granted by DLNR in the 120 days prior to the filing of this complaint.

State lands, which include the State's waters, approval of collection permits is subject to HEPA, which mandates a specific process whereby DLNR must require a thorough study of the potential impacts of collection permitting, as well as available alternatives and mitigation, before approving or renewing the challenged collection permits.

DLNR has never examined under HEPA the impacts of issuing permits allowing fish and invertebrate collection for the aquarium trade on the scale that has been occurring, yet in its 1998 State of the Reefs Report, the agency admitted that, "studies to characterize the effects of removal of reef fish on the coral reef ecosystem are necessary if this activity is to continue." Studies that have generally addressed the role of herbivorous fish and invertebrates on coral reefs have determined that these species are important to reef health because they help to control algal growth and occupy numerous unique niches within the ecosystem. Removal of these herbivores can cause shifts from coral-dominated to algae-dominated reef ecosystems, as well as decreases in reef ecosystem biodiversity. The selective removal of herbivorous marine life impairs and burdens reef ecosystems that are already under stress from climate change, ocean acidification, and pollution.

One of HEPA's main purposes is to "alert decision makers to significant environmental effects which may result from the implementation of certain actions." Haw. Rev. Stat. §343-1. The Hawai'i State Legislature has also determined that "public participation during the [HEPA] review process benefits all parties involved and society as a whole." Id. HEPA's implementing regulations require that DLNR "consider the sum of effects on the quality of the environment, and . . . evaluate the overall and cumulative effects of an action" as well as "the expected consequences, both primary and secondary." Haw. Code R. §§ 11-200-12(a)-(b). DLNR's issuance of the aforementioned aquarium collection permits without HEPA review subverts the statute's purpose by precluding informed agency decision-making and the opportunity for public

participation, and puts plaintiffs and the public at risk from the lack of proper review.

Accordingly, plaintiffs seek declaratory and injunctive relief to remedy defendant's HEPA violations.

Plaintiffs complain of defendant as follows:

## II. JURISDICTION AND VENUE

1. This lawsuit is based on violations of the Hawai'i Environmental Policy Act ("HEPA"), Haw. Rev. Stat. ch. 343. This Court has jurisdiction over this matter pursuant to Haw. Rev. Stat. §§ 603-21.5, 632-1, and article XI, section 9 of the Hawai'i Constitution.

2. Venue properly lies in this judicial circuit pursuant to Haw. Rev. Stat. § 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

3. Plaintiff Rene Umberger is a Hawai'i resident and an avid scuba diver. Ms. Umberger has scuba dived over 10,000 times in Hawai'i and enjoys observing marine life on Hawai'i's reefs, including the reefs in west Hawai'i. Ms. Umberger is harmed by DLNR's failure to assess the environmental effects of issuing the challenged permits on either the collected species' populations or their coral reef habitats under HEPA. During her thousands of dives in Hawai'i over the years, Ms. Umberger has observed changes in the State's reefs. Specifically, she has observed areas open to collection where species targeted by the aquarium collection trade, formerly present on the reef, have been completely eliminated from the reef habitat.

4. Ms. Umberger has provided testimony to the Governor, State legislature, Board of Land and Natural Resources (“BLNR”), and numerous other agencies about the need to increase regulation of the aquarium trade. Ms. Umberger’s recreational and aesthetic interests are harmed by DLNR’s failure to assess the environmental effects on the State’s reefs of issuing the challenged permits because she has noticed fewer individuals and a decreasing variety of fish species that are collected for the aquarium trade on reefs where she dives, and she has observed a decline in the health of reef ecosystems in areas that are open to collection.

5. 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 26 years in many areas around the state, including in the offshore waters of west Hawai‘i and O‘ahu, which have allowed him to observe changes in aquarium species’ populations and reef conditions on the State’s reefs over time. Mr. Nakachi frequently sees aquarium collectors harvesting fish during his scuba diving trips.

6. 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 in west Hawai‘i and throughout the state for decades. Mr. Nakachi’s aesthetic and recreational interests are harmed by DLNR’s failure to comply with HEPA and examine the effects on the State’s reefs of issuing the challenged aquarium collection permits because he has noticed a decline in the number of fish of the species collected for the aquarium trade on reefs in west Hawai‘i and in other areas of the state, as well as a decline in reef health in areas open to collection. His economic interests are also harmed by the decreasing number of fish and decline in reef health in areas where there is aquarium collection because it makes the

reefs less attractive to his customers, who go on scuba dives expecting to see vibrant, healthy reefs full of colorful fish.

7. Plaintiff Kaimi Kaupiko is a resident of Miloli'i in west Hawai'i. Mr. Kaupiko is a Native Hawaiian practitioner and subsistence fisherman. 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 issuing the identified aquarium collection permits on abundance of these fish species and on reef health in west Hawai'i.

8. Mr. Kaupiko has seen aquarium collectors collecting fish while he has been diving and fishing. Mr. Kaupiko has presented testimony to the Governor, BLNR, and Hawai'i County Council urging increased regulation of the aquarium collection trade in Hawai'i. His aesthetic, recreational, and subsistence interests are adversely affected by the State's approval of the challenged collection permits without the required HEPA review because he has noticed that there are fewer numbers of fish on the reefs of the type that are collected by the aquarium trade that he fishes for, particularly the paku'iku'i (Achilles tang) and kole (goldring surgeonfish), and a decline in reef health in areas that are open to collection, which he is concerned has effects throughout the ecosystem.

9. Plaintiff Willie Kaupiko is a resident of Miloli'i in west Hawai'i. Mr. Kaupiko is a Native Hawaiian practitioner and fisherman. Mr. Kaupiko frequently sees aquarium collectors out when he goes fishing, sometimes collecting from the same location over and over again, and he has noticed a change in the condition of the reefs and a decline in aquarium fish populations in many places in west Hawai'i over the past decade. He is concerned about the protection of coral reef resources for future generations.

10. Mr. Kaupiko is a former member of the West Hawai'i Fisheries Council, and has been involved in efforts to regulate the aquarium trade for decades. He has provided testimony to BLNR and to the Governor regarding the need for better understanding of the environmental impacts of the aquarium trade. Mr. Kaupiko's recreational, aesthetic, and subsistence interests are harmed by DLNR's failure to do a HEPA review and assess the environmental impacts of collection under the challenged aquarium collection permits because he has noticed 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), and because he has observed a decline in reef health over the past several decades in areas that are open to aquarium collection.

11. Plaintiff Conservation Council for Hawai'i ("CCH") is a non-profit citizens' organization based in Hawai'i with approximately 5,500 members in Hawai'i, the United States mainland, and foreign countries. CCH is a Hawai'i affiliate of the National Wildlife Federation, a non-profit membership organization with over 5.8 million members and supporters nationwide.

12. CCH's mission is to protect native Hawaiian species and to restore native Hawaiian ecosystems for future generations. In this capacity, CCH and its members frequently testify at the state legislature on various bills relating to protection of the environment, testify before administrative agencies on proposed regulations relating to species and habitat conservation, communicate with Hawai'i's natural resources, participate in service projects to protect native species and ecosystems, prepare educational materials, including an annual wildlife poster featuring the native Hawaiian flora and fauna, and publish a periodic newsletter (Kolea, News from the Conservation Council for Hawai'i) discussing Hawaiian environmental issues.

13. CCH members, both in Hawai'i and on the mainland, enjoy recreating in and studying Hawai'i's natural areas, including coral reef ecosystems and the wildlife that inhabit them. CCH and its members' are harmed by DLNR's issuance of the challenged permits without HEPA review because it threatens to impair their aesthetic and recreational interests in using, enjoying, and protecting the State's reefs.

14. Plaintiff Humane Society of the United States is a national, non-profit organization dedicated to the protection of wildlife and habitat. HSUS has 11 million members and supporters in the United States, including over 55,000 in Hawai'i. HSUS members are harmed by DLNR's failure to assess the ecological effects of the removal of fish from the State's reefs for aquarium collection. HSUS members are additionally harmed by aquarium collection practices, such as finning, flogging, and starvation, that are associated with the harvesting and shipment of fish collected under the challenged permits because these practices can cause the collected animals bodily harm, and in some cases, death.

15. HSUS members scuba dive, snorkel, and swim in reef areas around Hawai'i, including those in the waters offshore of O'ahu and west Hawai'i. HSUS members have observed collectors harvesting fish and invertebrates from reefs while the members have been scuba diving, snorkeling, and swimming.

16. HSUS members have presented testimony to the Governor, DLNR, and to the State legislature on the necessity for HEPA review of fish collection permitting, as well as the need for increased regulation of the aquarium trade in the state. HSUS members' aesthetic and recreational interests in healthy reefs are harmed by DLNR's failure to comply with HEPA prior to issuing the challenged collection permits because they have noticed a decline in the number of fish on the reefs of species collected for the aquarium trade, and a decline in the health of the



reefs where they dive, snorkel, and swim that are open to collection. HSUS brings this action on behalf of itself and its adversely affected members.

17. Plaintiff Center for Biological Diversity 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 the State of Hawai'i. The Center's members regularly use Hawai'i's coastal waters for recreation, aesthetic enjoyment, observation, research, and other educational activities.

18. The Center's members snorkel, scuba dive, and swim in reef areas throughout the state, including those in the nearshore waters of west Hawai'i and O'ahu, and enjoy observing healthy reefs and marine life. DLNR's issuance of the challenged permits without HEPA review threatens to impair the Center's members' aesthetic and recreational interests in using, enjoying, and protecting the State's reefs. The Center brings this action on behalf of itself and its adversely affected members.

19. Defendant's failure to comply with HEPA prior to issuance of the challenged permits and subsequent failure to provide opportunities for public review of the permitting process, impairs plaintiffs' interests in using, enjoying, and protecting the ecological and cultural resources in Hawai'i's sensitive marine environment. Plaintiffs' and plaintiffs' members' environmental, aesthetic, recreational, educational, cultural, and economic interests are harmed by issuance of the challenged permits in violation of HEPA and the resulting removal of aquarium species from reefs around the state where plaintiffs live, work, 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

20. Defendant Department of Land and Natural Resources, State of Hawai'i is the State agency responsible for managing, administering, and exercising control over water resources, ocean waters, and coastal areas, Haw. Rev. Stat. § 171-3, including the State's aquatic life and aquatic resources, *id.* §§ 187A-2(1), -5, and has the authority to issue and renew permits for aquarium collection, *id.* §§ 188-31(a), -53.

IV. LEGAL FRAMEWORK: THE HAWAI'I ENVIRONMENTAL POLICY ACT

21. Haw. Rev. Stat. ch. 343, known as the Hawai'i Environmental Policy Act ("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.

22. HEPA establishes a framework for environmental review of five categories of actions, including those actions that "[p]ropose the use of state or county lands or the use of state or county funds." *Id.* § 343-5(a)(1). HEPA defines "action" to mean "any program or project to be initiated by any agency or applicant." *Id.* § 343-2.

23. Whenever any person (termed an "applicant") requests approval of any covered action, the agency (termed the "agency" or "approving agency"), upon receiving the request, must, at a bare minimum, require the applicant to prepare an Environmental Assessment ("EA") "at the earliest practicable time to determine whether an environmental impact statement shall be required." *Id.* §§ 343-5(e), -2. However, "if the agency determines, through its judgment and experience, that an environmental impact statement is likely to be required, the agency may authorize the applicant to choose not to prepare an [EA] and instead prepare an environmental impact statement . . . ." *Id.* § 343-5(e).

24. The EA is a “written evaluation to determine whether an action may have a significant effect” that “shall contain, but not be limited to,” information such as: (1) identification of the applicant; (2) identification of the approving agency; (3) identification of agencies, citizen groups, and individuals consulted in making the assessment; (4) general description of the action’s technical, economic, social, and environmental characteristics; (5) summary description of the affected environment; (6) identification and summary of impacts and alternatives considered; and (7) proposed mitigation measures. *Id.* § 343-2; Haw. Code R. §§ 11-200-2, -10.

25. 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 Environmental Impact Statement (“EIS”). Haw. Rev. Stat. § 343-5(e)(3); Haw. Code R. § 11-200-11.2(a)(1) (emphasis added). 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.” Haw. Rev. Stat. § 343-2.

26. In determining whether the proposed action may have a “significant effect” on the environment, thereby requiring an EIS, the agency must consider the “sum of effects on the quality of the environment,” encompassing “every phase of a proposed action, the expected consequences, both primary and secondary, and the cumulative as well as the short-term and long-term effects of the action.” *Id.*; Haw. Code R. § 11-200-12(b). An action “shall be determined to have a significant effect on the environment if it . . . [i]s individually limited but cumulatively has considerable effect upon the environment.” Haw. Code. R. § 11-200-12(b)(8). “Environment” means “humanity’s surroundings, inclusive of all the physical, economic,

cultural, and social conditions” of the affected area. Id. § 11-200-2. “Effects” or “impacts” include ecological, aesthetic, historic, cultural, economic, social, or health impacts, including those resulting from actions that the agency believes will be beneficial. Id.

27. The environmental review process affords multiple important opportunities for information gathering and public input and participation. “[A]t the earliest practicable time,” the agency must “[r]equire the applicant . . . to seek the advice and input of the lead 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 which the approving agency reasonably believes to be affected.” Id. § 11-200-9(b)(1).

28. If a finding of no significant impact is anticipated, “a draft [EA] shall be made available for public review and comment.” Haw. Rev. Stat. § 343-5(e)(1). The applicant must also respond in writing to any comments on the draft and prepare a final EA so the agency can determine if an EIS is required. Id. § 343-5(e)(3).

29. After reviewing the final EA, if the agency “finds that the proposed action may have a significant effect on the environment,” then the applicant must undertake a more detailed review that 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. Id. § 343-5(e); see also Haw. Code R. §§ 11-200-15, -21, -22, -23.

30. Process is the bedrock principle underlying HEPA. The legislature recognized this in enacting HEPA, finding that through the environmental review process, “environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.”

Haw. Rev. Stat. § 343-1. Likewise, the HEPA regulations recognize that the concern lies not in mere “preparation of a document,” but in the “entire process of research, discussion, preparation of a statement, and review,” which must involve, “at a minimum: identifying environmental concerns, obtaining various relevant data, conducting necessary studies, receiving public and agency input, evaluating alternatives, and proposing measures for avoiding, minimizing, rectifying or reducing adverse impacts.” Haw. Code R. § 11-200-14. Thus, an EIS alone is “meaningless without the conscientious application of the EIS process as a whole.” *Id.*

31. Timing is critical to the environmental review process. HEPA mandates preparation of the EA “at the earliest practicable time.” Haw. Rev. Stat. § 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.*; Haw. Code R. § 11-200-23(d). An EIS must be prepared “at the earliest opportunity in the planning and decision-making process,” 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.” Haw. Code R. § 11-200-14.

## V. BACKGROUND FACTS

### A. Aquarium Collection in Hawai‘i

32. DLNR is statutorily authorized to exercise its discretion to issue aquarium collection permits in Hawai‘i. Haw. Rev. Stat. § 188-31. Permits “may” be “issued only to persons who can satisfy the department [of land and natural resources] that they possess facilities to and can maintain fish and other aquatic life alive and in reasonable health.” *Id.* § 188-31(a).

33. An aquarium collection permit allows the permittee “to use fine meshed traps, or fine meshed nets other than thrownets, which are otherwise prohibited, for the collection of

aquarium fish.” Id.; Haw. Code R. § 13-75-14(4). Permittees may harvest aquarium fish anywhere in Hawai‘i, except in designated areas where collection is prohibited, like Marine Protected Areas (“MPAs”) or Fish Replenishment Areas (“FRAs”).

34. Aquarium collection permits are issued for “not longer than one year in duration.” Haw. Rev. Stat. § 188-31(a).

35. DLNR issues both recreational and commercial aquarium collection permits. Recreational collectors are limited to “a combined total of five fish or aquatic life specimens per person per day.” Haw. Code R. § 13-75-14(4). There is no limit on the number of fish or invertebrates that can be harvested under a commercial aquarium collection permit, nor is there a limit on the number of commercial collection permits that DLNR can issue. Currently, DLNR administers approximately 160 commercial aquarium collection permits.

36. Commercial aquarium collectors are required to submit monthly catch reports to DLNR detailing the type and quantity of fish collected.<sup>2</sup> Haw. Rev. Stat. § 189-3. DLNR is required to “adopt rules in accordance with chapter 91 to monitor the aquarium fish catch report and fish dealer’s report for export of aquarium fish taken from waters of the State for aquarium purposes” and “a monthly count of the quantities taken . . . shall be reported to the board.” Id. § 188-31.5. The last status report on aquarium fish catch that DLNR provided to BLNR contained details of the aquarium fish catch for the period 1995-1999, but the agency has failed to submit a report since then.

37. Self-reported catch data is the only source of information that DLNR has for quantifying aquarium catch in the state.

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<sup>2</sup> Specific information in the catch report about the quantity and type of marine life taken by a particular permittee is considered confidential. Haw. Rev. Stat. § 189-3(a). However, DLNR “may release or make public any of the information in the aggregate or summary form which does not directly or indirectly disclose the identity of any person who submits information.” Id. § 189-3(b).

38. In a 2004 report, DAR stated, “[g]iven that there are indications of underreporting . . . catch numbers and dollar amounts should be regarded as minimum and not absolute values” and the agency acknowledged that “[a]t present there is no provision for verification of submitted reports.”

39. DLNR’s compilation of self-reported catch data reveals that in 2011, the aquarium trade in Hawai‘i caught 721,177 animals.

40. Currently, approximately 75% of the state’s total aquarium fish catch comes from west Hawai‘i and 99% percent of the invertebrate aquarium catch, largely comprised of hermit crabs and featherduster worms, is collected from the waters around O‘ahu.

41. Over 200 species of fish and invertebrates are collected by the aquarium trade throughout the state. According to DLNR records from 2005-2009, the ten most popular fish species harvested in west Hawai‘i were the yellow tang (*Zebrasoma flavescens*), goldring surgeonfish (*Ctenochaetus strigosus*), Achilles tang (*Acanthurus achilles*), clown tang (*Naso lituratus*), black surgeonfish<sup>3</sup> (*Ctenchaetus hawaiiensis*), forcepsfish (*Forcipiger flavissimus*), multiband butterflyfish (*Chaetodon multicinctus*), brown surgeonfish<sup>4</sup> (*Acanthurus nigrofuscus*), ornate wrasse<sup>5</sup> (*Halichoeres ornatissimus*), and orangeband surgeonfish<sup>6</sup> (*Acanthurus olivaceus*).

42. Of those popular species, yellow tang and goldring surgeonfish consistently represent more than 60% of the total west Hawai‘i aquarium catch.

43. Aquarium fish collection in Hawai‘i was centered on O‘ahu until the 1980s. After a major hurricane in 1982 severely damaged coral reefs on the leeward side of the island, subsequent overfishing of popular aquarium collection species contributed to a decline in aquarium fish populations in frequently-collected areas around leeward O‘ahu.

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<sup>3</sup> The black surgeonfish is also known as the “chevron tang.”

<sup>4</sup> The brown surgeonfish is sometimes referred to as “lavender, forktail tang.”

<sup>5</sup> The ornate wrasse is sometimes referred to as “pinkface” or “Christmas” wrasse.

<sup>6</sup> The orangeband surgeonfish is sometimes referred to as “orange shoulder” surgeonfish.

44. This led to a shift in the aquarium fish trade from O‘ahu to west Hawai‘i. As a result, while aquarium fish collection still occurs in the waters around O‘ahu, DLNR’s current data reveals that the focus of the O‘ahu trade has shifted towards the collection of invertebrates, which, according to DAR, has experienced a “noteworthy,” “substantial increase” in the past several years.

45. DLNR’s 2011 self-reported aquarium catch data reveal that 83,822 hermit crabs and 25,133 featherduster worms were removed from the waters around O‘ahu.

46. A report by the Marine Aquarium Council in 2007 found that “[t]he specific catch areas targeted most frequently around O‘ahu by the marine aquarium ornamentals industry are not known to the State of Hawai‘i and are not monitored for impact,” resulting in “no active area-based monitoring of [the] industry’s impact on Oahu’s coral reef fishery resources and the reef ecosystem.”

47. Due to the shift in aquarium fish collection activities from O‘ahu to west Hawai‘i in the 1980s, DLNR data shows that the total reported aquarium fish catch in west Hawai‘i increased 813% between 1983 and 2003. A study conducted in west Hawai‘i in the late 1990s found that aquarium collectors had significant effects on the populations of 7 of the 10 aquarium collection fish species examined.

48. In 1998, public concerns about aquarium collection in west Hawai‘i led to legislation that created nine FRAs along 27.8% of the west Hawai‘i coast, in which aquarium collection is prohibited. These FRAs, when added to the pre-existing MPAs in west Hawai‘i, closed 35% of the coast to aquarium collection. While studies that have been conducted subsequent to the creation of the FRAs have shown that there have been increases in certain aquarium collection species’ populations within these areas (relative to the populations at the time of FRA closure), studies have also shown that there have been substantial declines in



frequently-collected fish populations in the 65% of the coast that has remained open to collection.

49. A 2010 DLNR report on west Hawai‘i aquarium collection found “an increase in the number of aquarium collectors and collected animals” over the past decade had contributed to “[t]he decrease of yellow tang in open areas [non-FRAs] to below baseline levels.” DLNR reported that “[t]he continuing decline of yellow tang in areas open to collection has prompted several additional proposed management actions including restricting which species can be collected . . . and the establishment of a limited entry program for the fishery.” As of the time this complaint was filed, these proposed management actions have not been implemented.

50. The report estimated that between 2006 and 2010 in the 65% of the west Hawai‘i coastline open to collection, almost 80% of the total population of Achilles tang, 60% of the total population of yellow tang, and 46% of the total population of Chevron tang were taken annually by aquarium collectors.

51. Defendant DLNR found that in addition to the aquarium collection impacts on popular collection species, “a number of reef fish species are particularly vulnerable to depletion because they may be naturally uncommon or rare but command high prices in the aquarium trade and are thus highly sought after by collectors.”<sup>7</sup> Defendant concluded that “there is considerable anecdotal evidence that some of these [uncommon or rare] species have declined in recent decades” and that “[i]t’s also clear from a number of our long term studies . . . that a number of fairly conspicuous species have likewise declined in abundance over time—most obviously several species of butterflyfish and, in particular, the bandit angelfish.” In the report, DLNR discussed the “attractive but uncommon” flame angelfish, which is “highly desirable in the aquarium trade,” reporting that “[d]emand far exceeds the supply Hawai‘i can provide,” without

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<sup>7</sup> These include species such as the dragon moray, Tinker’s butterflyfish, flame angelfish, and the bandit angelfish.

any discussion of the effect of the species' removal from the ecosystem. Defendant must comply with HEPA and evaluate the environmental effects of allowing continued removal of these animals from the State's reefs.

52. In the same 2010 report, the agency cited concerns about the "continued expansion of the [west Hawai'i] fishery (up 25% in the last decade) and harvesting effects in the open areas (65% of the coast)."

53. A 2011 study examining aquarium collectors' removal of fish from west Hawai'i concluded that "[t]he significant decline in abundance of yellow tang over the past 12 years in areas open to fishing despite closing ~35% of the coastline to fish harvesting, and the +75% greater abundance of yellow tang inside the [FRAs] vs. outside underscores the fact that the fishery is having a strong effect on its resource." Stevenson et al., Fisher Behavior Influences Catch Productivity and Selectivity in West Hawaii's Aquarium Fishery, 68 International Council for the Exploration of the Sea Journal of Marine Science 813, 820 (2011).

54. The information that DLNR has gathered about the trade affirms that it should have concerns about the environmental effects of removing these herbivorous fish and invertebrates from Hawai'i's reefs.

55. In 2010, defendant DLNR made recommendations to the State legislature regarding the west Hawai'i FRAs, among which were establishment of a "limited entry aquarium fishery . . . in West Hawaii at the earliest possible date," an overhaul of "[t]he existing aquarium catch report system . . . to improve accuracy, remove ambiguities in fishing effort and provide for verification of catch," and the establishment of "species-specific harvesting limitations" in areas open to collection, among others. All of these recommendations reveal that defendant acknowledges the significant adverse environmental effects of aquarium collection.

B. The Importance of Marine Herbivores for Coral Reef Health in Hawai'i

56. Defendant DLNR acknowledged in its 1998 State of the Reefs report that “removal of significant numbers of these [aquarium collection] species could result in an increase in algal growth, due to a lack of grazers to keep the algae in check, and a corresponding decrease in coral cover.” In its 2010 Report to the Hawai'i State Legislature, it further recognized the “multiple values” and “fundamental biodiversity and ecosystem functions” of coral reefs.

57. Researchers have concluded that a greater distribution of herbivorous grazer species contributes to coral reef response diversity, which is defined as the diversity of species' responses to stresses or disturbances of the reef. Human removal of those species tends to reduce coral reef resilience to stresses or disturbances, which is particularly important as reefs come under increasing pressure from other global influences.

58. A recent study examining the environmental effects of invertebrate aquarium collection in Florida has also found that the removal of herbivorous invertebrates “decreases the resilience of a reef ecosystem, thereby reducing its ability to withstand a phase-shift from a coral to an algal-dominated state as well as decreasing the potential for subsequent phase-shift reversals.” Andrew Rhyne et al., Crawling to Collapse: Ecologically Unsound Ornamental Invertebrate Fisheries, 4 PLoS ONE 1, 5 (2009).

59. The same study noted that herbivorous invertebrates are prized by the aquarium trade for the same reason they are valuable to reef ecosystems—“because they serve a key ecological role in home aquaria by controlling algal growth.” Id.

60. HEPA review of the challenged aquarium collection permits is necessary because, as DLNR itself concluded over a decade ago in its 1998 State of the Reefs report, “[m]any coral reef fish and invertebrates have complicated relationships to the overall ecology of the reef.

Their removal may [a]ffect the long-term stability of these ecosystems.” The same report also revealed that aquarium collection was one of the main causes of Hawaiian coral reef degradation with major impacts on O‘ahu and Hawai‘i as well as impacts on Maui.

61. The Stevenson study, referenced above, provides further evidence to support the need for the agency to conduct a HEPA review of aquarium collection, concluding that “species-specific fisheries have greater potential to impact ecosystem functioning than fisheries with a more diverse exploitation strategy,” and that, “[t]he increasing trend towards selecting herbivorous reef fish to accommodate coral-friendly home aquarium tanks is potentially problematic . . . particularly in Hawaii where low abundance of herbivorous reef fish coupled with increased anthropogenic nutrient inputs can facilitate ecological phase shifts.” Stevenson, supra, at 17.

C. DLNR’s Duty to Review Issuance of the Aquarium Collection Permits Under HEPA

62. Requests for permit approval are applicant actions that require the use of State lands. Haw. Rev. Stat. § 343-5(a)(1), (e).

63. In addition to using State lands, defendant’s issuance of the aquarium collection permits required agency “approval[,]” defined as “discretionary consent required from an agency prior to actual implementation of an action.” Id. §§ 343-2.

64. Beyond DLNR’s discretionary authority to issue aquarium collection permits set forth in Haw. Rev. Stat. § 188-31, the agency also has powers and duties established by State statute that require it to “[m]anage and administer the aquatic life and aquatic resources of the State,” as well as “adopt, amend, and repeal rules for and concerning . . . conservation and allocation of the natural supply of aquatic life in any area,” which may include location, size, or species restrictions for the take of aquatic species. Id. §§ 187A-2(1) & -5.

65. Defendant is further empowered to “prohibit activities that may disturb, degrade, or alter the marine environment,” and is required to “adopt rules governing the taking or conservation of fish, crustacean, mollusk, live coral, algae, or other marine life as it determines will further the state policy of conserving, supplementing and increasing the State's marine resources.” Id. § 190-3. This includes the ability to “establish open and closed seasons, designate areas in which all or any one or more of certain species of fish or marine life may not be taken, [and] prescribe and limit the methods of fishing” in order to “regulate the fishing and taking of marine life either generally throughout the State or in specified districts or areas.” Id.; see also id. § 188-53 (giving DLNR the authority to “make, adopt, and amend rules and . . . issue permits as it deems necessary for managing the fishing reserves, refuges, public fishing areas, and other waters or lands under the jurisdiction or control of the State”).

66. DLNR has also been expressly authorized to adopt rules to fulfill the purpose of the statute governing aquarium collection permits under Hawai‘i Revised Statutes, chapter 91 (setting forth administrative rulemaking procedures). Id. § 188-31(c).

67. Because defendant DLNR has discretionary authority over aquarium collection permitting, and because “significant environmental effects [] may result” from the approval of the challenged aquarium collection permits, the agency has a duty to require the applicants to prepare EAs under HEPA for the aforementioned permitting decisions to “ensure that environmental concerns are given appropriate consideration in decision making.” Id. § 343-1. If DLNR “finds that the proposed action may have a significant effect on the environment” after reviewing the EAs, then it must require the applicants to prepare EISs. Id. § 343-5(e).

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

CLAIM FOR RELIEF

(Violation of HEPA)

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

70. DLNR's issuance and renewal of the challenged permits required discretionary agency approval to allow the applicants to use State lands—the State's waters—to collect fish and invertebrates for the aquarium trade. See Haw. Rev. Stat. § 343-5(a)(1).

71. DLNR has violated its obligations under HEPA to require the applicants to prepare EAs, as well as to engage in the related process of consultation, information gathering, and public review and comment. Haw. Rev. Stat. § 343-5(e); Haw. Code R. § 11-200-9(b)(1).

72. Absent full compliance with the HEPA process, the approvals of the named aquarium collection permits are null and void.

73. An actual controversy exists between plaintiffs and defendant concerning DLNR's duties to comply with HEPA prior to approving the challenged aquarium collection permits. The controversy between plaintiffs and defendant extends to the validity of existing and future aquarium collection permits absent such compliance.

WHEREFORE, plaintiffs respectfully request that the Court:

1. Issue a declaratory judgment that:
  - (a) DLNR is in violation of HEPA, Haw. Rev. Stat. ch. 343, for failing to complete the mandated HEPA review process prior to approving the challenged aquarium collection permits.
  - (b) DLNR's issuance and renewal of these challenged aquarium collection permits without complying with HEPA is invalid and illegal.

3. Issue a prohibitory injunction enjoining collection under the named aquarium collection permits until defendant fully complies with HEPA.
4. Issue a prohibitory injunction enjoining DLNR from approving, renewing, or issuing any aquarium collection permits prior to completing a HEPA review of issuance of the challenged permits.
5. For the Court to retain continuing jurisdiction to review defendant's compliance with all judgments and orders entered herein.
6. For such additional judicial determinations and orders as may be necessary to effectuate the foregoing.
7. For the costs of suit herein, including reasonable expert witness and attorneys' fees; and
8. 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, October 24, 2012.

Respectfully submitted,



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