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DEPT. OF LAND
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STATE OF HAWAII

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FOR THE FISHES
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BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

) Case No.
)
) PETITION OF KALANIHALE,
) KO'OLAUPOKO HAWAIIAN CIVIC
) CLUB, FOR THE FISHES, CHARLES K. H.
) YOUNG, AND MICHAEL NAKACHI FOR
) DECLARATORY RULING; EXHIBITS A –
) P; APPENDIX
)

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PETITION OF KALANIHALE, KO‘OLAUPOKO HAWAIIAN CIVIC CLUB, FOR THE
FISHES, CHARLES K. H. YOUNG, AND MICHAEL NAKACHI
FOR DECLARATORY RULING

I. INTRODUCTION

Pursuant to Hawai‘i Revised Statutes (“HRS”) § 91-8 and Hawai‘i Administrative Rules (“HAR”) § 13-1-27, Kalanihale, Ko‘olaupoko Hawaiian Civic Club, For the Fishes, Charles K. H. Young, and Michael Nakachi (collectively, “Petitioners”), through their counsel Earthjustice, hereby petition the Board of Land and Natural Resources (“Board”) for a declaratory ruling regarding the applicability of HRS §§ 190-3 and 188-31 and HAR § 13-74-2(4), in connection with the Board’s unanimous December 8, 2023 decision to approve a petition for rulemaking to prohibit commercial aquarium collection in the State of Hawai‘i. Petitioners request a hearing pursuant to HAR § 13-1-27(h) to enable the Board to address these issues on the record in an open public forum.

HRS § 190-3 expressly empowers the Department of Land and Natural Resources (“DLNR”) to adopt rules “prohibit[ing] activities that may disturb, degrade, or alter the marine environment,” and to “regulate the fishing and taking of marine life . . . generally throughout the State.” The Hawai‘i Supreme Court, moreover, has confirmed that the agency’s authority to issue HRS § 188-31 permits for aquarium collection with fine-meshed nets is “optional, permissive, or discretionary,” *Umberger v. Dep’t of Land & Natural Res.*, 140 Hawai‘i 500, 527, 403 P.3d 277, 304 (2017), and the same holds true for the Board’s commercial marine licensing authority under HRS § 189-2. *See* HAR § 13-74-2(4) (“[DLNR] *may* issue licenses and permits as authorized by law”) (emphasis added); *Umberger*, 140 Hawai‘i at 527, 403 P.3d at 304.

Despite these statutory mandates granting the Board (1) broad authority to adopt rules prohibiting commercial aquarium collection, and (2) discretion to deny aquarium collection permits and licenses, some Board members have made informal public statements that the Board

cannot do *either*. These statements have further suggested that the Board does not intend to move forward with the rulemaking that it has already unanimously approved and, instead, will proceed with permits and licenses based on the flawed assumption that it is compelled to issue one or more of them by law. Yet, at the same time, the Board's counsel has represented to the courts that, indeed, the Board *can* deny aquarium collection permits.

Because the Board members' errant statements questioning the Board's authority to deny or prohibit aquarium collection stand at odds with its enabling statutes and regulations, Petitioners request the Board to provide clarity to the public and issue a declaratory ruling that:

- (1) HRS § 190-3 authorizes rulemaking to prohibit commercial aquarium collection statewide; and
- (2) HRS § 188-31 and HAR § 13-74-2(4) provide for discretion to deny aquarium collection permits and related commercial marine licenses and also present no conflict with the Board's power to adopt rules under HRS § 190-3.

Petitioners further urge that, to avoid putting the cart before the horse, the Board must refrain from considering or issuing any permits or licenses for commercial aquarium collection until this petition is resolved and the Board's December 2023 rulemaking decision is implemented.

This petition addresses in turn the requirements of HAR § 13-1-27(b), as follows:

II. NAMES, ADDRESSES, AND TELEPHONE NUMBERS OF PETITIONERS

Petitioners' names, contact persons, addresses, and telephone numbers are included in the table, below. As represented parties, please note that Petitioners should be contacted only through their counsel.

| Petitioner | Contact Person | Address & Phone Number |
|---|-----------------------|---|
| Kalanihale | Ramona U'ilani Naipo | c/o: Earthjustice 850 Richards Street, Suite 400, Honolulu, Hawai'i 96813 (808) 599-2436 |
| Ko'olaupoko Hawaiian Civic Club | Bronson Kainoa Azama | c/o: Earthjustice 850 Richards Street, Suite 400, Honolulu, Hawai'i 96813 (808) 599-2436 |
| For the Fishes | Rene Umberger | c/o: Earthjustice 850 Richards Street, Suite 400, Honolulu, Hawai'i 96813 (808) 599-2436 |
| Charles K. H. Young, in his individual capacity | Charles K. H. Young | c/o: Earthjustice 850 Richards Street, Suite 400, Honolulu, Hawai'i 96813 (808) 599-2436 |
| Michael Nakachi, in his individual capacity | Michael Nakachi | c/o: Earthjustice 850 Richards Street, Suite 400, Honolulu, Hawai'i 96813 (808) 599-2436 |

III. NATURE OF PETITIONERS' INTERESTS AND REASONS FOR SUBMISSION OF THIS PETITION

A. Petitioners' Interests

Petitioners are Native Hawaiian organizations, cultural practitioners, and marine conservation advocacy organizations whose missions or lifeways depend upon Hawai'i's coral reef ecosystems, which provide recreational, cultural, educational, subsistence, and other social benefits, as well as ecological and structural protections against the effects of climate change. Petitioners, moreover, are beneficiaries of Hawai'i's constitutional public trust, which encompasses Hawai'i's coastal and marine resources. Petitioners also include lineal descendants of the aboriginal people who inhabited the Hawaiian Islands prior to 1778 and who engage in traditional and customary Native Hawaiian practices that are inextricably linked to nearshore marine ecosystems.

Kalanihale is a 501(c)(3) non-profit community organization based in Miloli‘i, Hawai‘i. Kalanihale’s mission is to improve the educational, environmental, and cultural well-being of community members in Miloli‘i and throughout the South Kona area. Kalanihale strives to protect and perpetuate Native Hawaiian traditional and customary practices, including but not limited to: lawai‘a pono (responsible fishing, *i.e.*, taking only what is needed to feed oneself and one’s ‘ohana), mālama ‘āina (caring for natural resources), ‘āina momona (promoting abundance in natural resources), kilo (astute observation of natural resources), ho‘okupu (ceremonial offerings), and konohiki practices. Kalanihale conducts educational programs to teach South Kona youth these values and how to perpetuate them. Kalanihale’s interests extend to the conservation, supplementation, and increasing of nearshore marine resources in Hawai‘i, the perpetuation of Native Hawaiian traditional and customary fishing practices, and the restoration of West Hawai‘i historic nearshore abundance for the benefit of present and future generations.

Ko‘olaupoko Hawaiian Civic Club (“KPHCC”) is a community organization established in August 1937 by kama‘āina residents in the Ko‘olaupoko community on the island of O‘ahu. KPHCC members include lawai‘a, kia‘i loko i‘a, cultural practitioners, and descendants of konohiki families with roots in the Ko‘olaupoko community dating back to time immemorial. KPHCC’s mission is to perpetuate and cultivate Native Hawaiian culture and values, including lawai‘a pono, mālama ‘āina, ‘āina momona, and aloha ‘āina (love and respect for the land and its resources as ‘ohana). KPHCC furthers its mission through advocacy, volunteerism, community engagement, and education. KPHCC strongly believes that commercial aquarium collection is a direct affront to the traditional and cultural values held by its members and is inconsistent with the values of its community. As such, ending commercial aquarium collection in Ko‘olaupoko (which includes Kāne‘ohe Bay, a collection hot-spot) has been a club priority for decades.

KPHCC and its members have actively engaged for years in legislative and administrative efforts to prohibit commercial aquarium collection statewide. KPHCC's interests extend to the conservation, supplementation, and increasing of marine resources in Ko'olaupoko and throughout Hawai'i.

For the Fishes ("FTF") is a Hawai'i-based nonprofit organization dedicated to protecting coral reef wildlife through education, outreach, and advocacy. FTF's board and staff include researchers, conservationists, and advocates who actively engage in efforts to reduce the amount of wild-caught Hawaiian reef animals traded on the international aquarium pet market. FTF's core goals are to reduce the needless death and suffering of coral reef wildlife, to enhance legal protections for such animals, and to increase, restore, and protect wild fish populations and coral reef habitat. FTF has advocated at the Hawai'i State Legislature for measures to protect reef fish and other wildlife, by lobbying in support of favorable proposals or against measures which would weaken protections already in place. At the local level, FTF successfully advocated for two measures of county legislation that effectively ended the capture of reef animals in the County of Maui for the aquarium pet trade.

FTF's executive director Rene Umberger was the lead plaintiff in *Umberger*, in which the Hawai'i Supreme Court held that commercial aquarium collection is subject to environmental review under the Hawai'i Environmental Policy Act ("HEPA"), HRS chapter 343. FTF was a plaintiff in the follow-up lawsuit, *Kaupiko v. Dep't of Land & Natural Res.*, Civil No. 1CCV-20-0000125 (JPC), which closed the loophole that effectively exempted from HEPA review commercial aquarium collection using gear other than fine-meshed nets and fine-meshed traps in areas outside of the West Hawai'i Regional Fishery Management Area. FTF was also an appellant in *Kaupiko v. Bd. of Land & Natural Res.*, SCAP-22-0000557, 2024 WL 3964270

(Haw. Aug. 28, 2024), in which the Hawai‘i Supreme Court recently held that opposing views and information attached to a final environmental impact statement (“EIS”) “should be considered part of a complete document” and enable “fully informed” agency decisions. *Id.* at *159.

Charles K.H. Young resides in the ahupua‘a of Kealia in West Hawai‘i. Mr. Young is a Native Hawaiian cultural rights advocate and practitioner who has spent decades striving to protect Hawai‘i’s cultural and natural heritage. Mr. Young is a lifelong freediver and fisherman and was taught from an early age how to select reef fish to harvest for food; that the health and vitality of the nearshore and offshore fisheries are inextricably connected; and that robust nearshore ecosystems directly support robust offshore ecosystems. Mr. Young has served on several community advisory boards and committees, including as current Hawai‘i Island Po‘o on the Aha Moku Advisory Committee, and as a member of the West Hawai‘i Fisheries Council. He is a founding member of Kama‘āina United to Protect the ‘Āina (“KUPA”) and the related organization KUPA Friends of Ho‘okena Beach Park, which were founded to preserve Hawai‘i’s natural and cultural resources, specifically in Ho‘okena and across West Hawai‘i. In his capacity as a member of KUPA and KUPA Friends of Ho‘okena Beach Park, Mr. Young is a member of Kua‘āina ‘Ulu Auamo, a coalition of community leaders and cultural experts formed in 2003 for the purpose of empowering communities to improve their quality of life through caring for their natural and cultural heritage. Moreover, Mr. Young is a long-time member of the organization Ka Pa‘akai o ka ‘Āina, which successfully litigated for recognition and protection of Native Hawaiian rights in agency decision-making. *See Ka Pa‘akai O Ka ‘Āina v. Land Use Comm’n*, 94 Hawai‘i 31, 7 P.3d 1068 (2000).

Michael Nakachi is a resident of Kailua-Kona in West Hawai‘i. He is a Native Hawaiian cultural practitioner whose ‘ohana maintains its long-held and close spiritual connection to marine life as kahu manō (caretakers of sharks). Mr. Nakachi was raised as a fisherman by his father, life-long fisher and waterman Ling Nakachi and is a member of the West Hawai‘i Fisheries Council. For decades, Mr. Nakachi has been a dive tour operator and has focused his business on educating his clients about the cultural and environmental importance of protecting and restoring Hawai‘i’s marine ecosystems. Mr. Nakachi has conducted thousands of dives along the West Hawai‘i coast and is intimately familiar with West Hawai‘i waters and reefs. Mr. Nakachi is committed to the protection of Hawai‘i’s public trust and cultural marine resources along the West Hawai‘i coast. Mr. Nakachi was a plaintiff in the *Umberger* and the *Kaupiko* lawsuits concerning environmental review of commercial aquarium collection permits and licenses.

Petitioners share the common goals of enhancing legal protections for marine wildlife, resources, and ecosystems against the aquarium pet trade, promoting abundant subsistence fisheries and community co-management of marine resources, and advocating for the restoration and protection of wild fish populations and coral reef habitat across Hawai‘i pae ‘āina. Petitioners have consistently and repeatedly engaged in efforts to reduce the amount of wild-caught Hawaiian reef animals traded on the international aquarium pet market and have advocated for the protection of reef wildlife and regarding the negative impacts of the commercial aquarium trade before the Hawai‘i State Legislature, state and federal agencies, and the courts.

All Petitioners—in their respective organizational capacities—were among the coalitions that, in late 2023, successfully petitioned the Board for rulemaking to prohibit commercial

collection statewide. Petitioners (with the exception of O‘ahu-based KPHCC) also requested a contested case hearing in August 2024 to challenge DLNR’s proposed terms and conditions for reopening West Hawai‘i to commercial aquarium collection. Both proceedings are discussed in further detail below.

B. Reasons For Submitting This Petition

Hawai‘i communities have long objected to the capture of wild reef fish for the aquarium pet industry. Commercial collectors target juvenile indigenous and endemic fish species and, in West Hawai‘i alone, seek to take anywhere from hundreds to hundreds of thousands of specimens of each species each year.¹ Left in the wild, these fish can live and reproduce for decades, in some cases (like the Yellow Tang) for more than 40 years. Exhibit “Ex.” A (Schemmel, *Size at maturity for yellow tang (Zebrasoma flavescens) from the Oahu, HI, aquarium fishery* (2021)) at 2. Peer-reviewed studies have shown that commercial aquarium collection significantly reduces fish populations in areas open to collection, as compared to control group populations in protected areas. West Hawai‘i EIS at pdf 523-532, 540. Because of its harmful effects on fish populations, reef ecosystems, and other community interests, aquarium collection has been the subject of numerous lawsuits and administrative proceedings.

Petitioners here seek clarification on the applicability of statutes and rules governing the Board’s authority over conservation rulemaking and commercial aquarium collection approvals

¹ May 26, 2021 Revised West Hawai‘i EIS, https://files.hawaii.gov/dbedt/erp/EA_EIS_Library/2021-06-08-HA-Revised-FEIS-Hawaii-Island-Commercial-Aquarium-Permits.pdf (last visited Oct. 9, 2024) (“West Hawaii EIS”), at portable document format page nos. (“pdf”) 52, 140, 142, 184. See *Botelho v. Atlas Recycling Ctr., LLC*, 146 Hawai‘i 435, 447 n.9, 463 P.3d 1092, 1104 n.9 (2020) (taking judicial notice of online government resources that are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned” (quoting Hawai‘i Rules of Evidence Rule 201)).

(i.e., permits and licenses). Given the contradictions and confusion among statements made by Board members and the Attorney General’s office, as described below, Petitioners and other members of the public are left to question whether these laws are being applied correctly and consistently. A declaratory ruling by the Board, with court review as necessary, would provide clarity and transparency in properly implementing these laws.

1. Rulemaking proceedings to prohibit commercial aquarium collection, and DLNR’s subsequent push to resume permitting.

On October 19, 2023, Kalanihale, KUPA Friends of Ho’okena Beach Park, Moana ‘Ohana, KPHCC, and FTF (“Rulemaking Petitioners”) submitted a formal request to prohibit commercial aquarium collection via administrative rule (“Rulemaking Petition”). Ex. B. The Rulemaking Petitioners asked the Board “to adopt rules to prohibit commercial aquarium collecting statewide” and provided draft administrative rules and rule amendments that would effectuate the proposed ban. Ex. B at 6, 11-13.

The matter was first placed on the Board’s November 9, 2023 agenda. Ex. C (November 9, 2023 Board Agenda) at 5. The DLNR Division of Aquatic Resources (“DAR”) had recommended rejecting the Rulemaking Petition because it had not taken the time to internally review the proposed rule, Ex. D (November 9, 2023 DAR Submittal F-3) at 2, but DLNR later cancelled the November 9 agenda.² Petitioners withdrew the Rulemaking Petition and resubmitted it on November 9, which effectively extended the 30-day deadline for the Board to render a decision. See HAR § 13-1-26(c). The matter was then placed on the Board’s December 8, 2023 agenda, with a substantially revised staff recommendation. Ex. E (December 7, 2023 DAR Submittal F-3). This time, DAR did not claim that there had been any lack of internal

² See “BLNR Meetings 2023,” <https://dlnr.hawaii.gov/meetings/blnr-meetings-2023/> (last visited Oct. 4, 2024).

review, and the revised recommendation contained no concerns or opinions about the Board’s authority to adopt the proposed rule. *See id.*

On December 8, 2023, the Board considered the Rulemaking Petition at its duly scheduled public meeting. Ex. F (December 7-8, 2023 Board Agenda) at 8. After extensive public testimony was received and a motion to approve the Rulemaking Petition was made and seconded, an executive session appears to have prompted the idea of an alleged conflict between the proposed rule and HRS § 188-31.³ This purported legal issue was missing from DAR’s submittals and, therefore, was not subject to any review or testimony by the public. As a result of this last-minute executive session, the Board instructed DAR to ensure that the new ban rule is “consistent with the statutory provisions,”⁴ before it unanimously approved the Rulemaking Petition, Ex. G at 17, with the Board Chair reiterating DLNR’s “mission . . . to preserve and protect natural and cultural resources.”⁵

Following the Board’s decision to grant the Rulemaking Petition, several collectors requested a contested case and followed with a written petition on December 12, 2023. Ex. H. In their contested case petition, the collectors requested that the Board reconsider its December 8 decision and prevent adoption of a rule that prohibits aquarium collection. Ex. H at 3.

³ December 8, 2023 Board video recording, <https://www.youtube.com/watch?v=V4xDtBo3ywU> (last visited Oct. 8, 2024), at 7:42:20, 8:03:45. BLNR’s meeting spanned December 7 and 8, 2023, thus, although the cited video recording is labeled “12.07.2023,” this portion of the meeting occurred on December 8.

⁴ BLNR December 8, 2023 video recording, <https://www.youtube.com/watch?v=V4xDtBo3ywU> (last visited Oct. 8, 2024), at 8:03:40; *see also* Ex. G (December 8, 2023 Board Minutes) at 17.

⁵ BLNR December 8, 2023 video recording, <https://www.youtube.com/watch?v=V4xDtBo3ywU> (last visited Oct. 8, 2024), at 7:37:19.

While the collectors' contested case request remained pending and unresolved, DAR requested clarification and further guidance on the Board's decision to grant the Rulemaking Petition. Ex. I (April 12, 2024 Board Agenda) at 4. The request was put on the Board's April 12, 2024 agenda as a "non-action item" that essentially proposed the same result the collectors had requested: to reject the proposed rule and rewrite it to authorize, rather than prohibit, commercial aquarium collection. Ex. H at 3 (¶23) (seeking reconsideration of the Board's December 8 decision and alternatively suggesting that the Board "separately institute rulemaking concerning aquarium collection"); *see also* Ex. J (April 12, 2024 DAR Submittal F-3) at 1-2 (suggesting to "incorporat[e] HRS § 188-31 into the proposed rules" by exempting § 188-31 permits from the prohibition). DAR's submittal provided no justification for advancing the industry's agenda in this way and, instead, directly contradicted both the Rulemaking Petition and the Board's unanimous December 8 decision granting it.

To date, there have been no agency efforts to move forward with rulemaking as the Rulemaking Petitioners proposed and the Board approved. Further, based on Board members' statements, it appears there will be no such efforts absent declaratory relief affirming the Board's authority.

Rather than proceed with rulemaking to prohibit commercial aquarium collection, DAR has instead pushed an agenda to resume authorizing it. On August 23, 2024, DAR staff presented for Board approval: a proposed statewide aquarium collection permit application form; proposed terms and conditions for West Hawai'i aquarium collection permits; and a request that the Board delegate authority to the Chair to review, approve, issue and renew up to seven West Hawai'i permits subject to those terms and conditions. Ex. K (August 23, 2024 DAR Submittal F-1) at 17.

After a motion to approve the West Hawai‘i permit terms and conditions in modified form was made and seconded, Charles K.H. Young orally requested a contested case opposing DAR’s proposed terms and conditions, on behalf of himself and a hui of Native Hawaiians and conservationists, including Kalanihale, For the Fishes, and Michael Nakachi.⁶ DAR’s request to delegate permitting authority to the Chair, which the hui had opposed, was withdrawn.⁷ This contested case request remains pending.

2. The Board’s confusion over its powers and duties regarding commercial aquarium collection.

Board member statements have varied widely on the Board’s authority to prohibit commercial aquarium collection and its discretion to grant or deny permits and licenses for the same. In some instances, these statements have directly contradicted on-the-record statements made by the Board’s counsel.

December 8, 2023: In accepting the Rulemaking Petition, it appeared that Board members’ opinions differed on the extent to which the Board is authorized to prohibit commercial aquarium collection. For example, after returning from executive session, Chair Dawn Chang stated:

There is a legal question of whether we can issue out a total ban. Although there are members of us who do read [HRS] 188-31 as permissive, it doesn’t say shall, it says may, but what we are going to instruct is to ask DAR to take the petition, to take in full consideration the petitioners’ request, and proceed with rulemaking consistent with the statutory provisions.⁸

⁶ BLNR August 23, 2024 video recording, <https://www.youtube.com/watch?v=GbTsSPFHtJM&t=28360s> (last visited Oct. 7, 2024), at 8:20:12; *see also* Exs. L, M, N, O (Sept. 3, 2024 contested case petitions).

⁷ BLNR August 23, 2024 video recording, <https://www.youtube.com/watch?v=GbTsSPFHtJM&t=28360s> (last visited Oct. 7, 2024), at 8:10:25.

⁸ BLNR December 8, 2023 video recording, <https://www.youtube.com/watch?v=V4xDtBo3ywU> (last visited Oct. 4, 2024), at 8:03:40.

April 12, 2024: In response to DAR’s request for clarification of the Board’s decision on the Rulemaking Petition, Chair Chang summarized the Board’s December 8, 2023 proceedings, stating, in relevant part:

In December, the Board originally received the petition which was to ban . . . commercial aquarium fish collection. The board action was to accept the [Rulemaking Petition] . . . DAR, their recommendation was not to take it, **but the Board said “no, we want you to adopt rules to ban it,” so the Board unanimously [accepted the petition]. And then we went into executive session and the Attorney General’s office informed us that we could not ban aquarium fish collection for commercial purposes because the statute permitted that.** So, I think we then came back out in open session and we made a motion something to the effect of “proceed with rulemaking consistent with the statute taking into consideration the Board and the communities’ comments.”⁹

August 23, 2024: In the agency’s more recent push to proceed with commercial aquarium collection permitting, Hawai‘i Island Board member Riley Smith, again following executive session, stated:

one of the restrictions we have on the Board is that the legislature has not allowed us to ban aquarium fishing. So, we have to operate under those parameters. So, **we have to allow aquarium fishing, and what we have control over is the total allowable catch.**¹⁰

The Board members’ statements run directly at odds with prior on-the-record statements by the Attorney General’s office regarding the Board’s authority to deny commercial aquarium collection permits. At the December 5, 2023 oral argument before the Hawai‘i Supreme Court in *Kaupiko*, SCAP-22-0000557, the deputy attorney general acknowledged that the Hawai‘i Supreme Court has “upheld [the] denial of permits, notwithstanding the existence of an accepted

⁹ BLNR April 12, 2024 video recording, <https://www.youtube.com/live/GeBFcLpUrxE?si=bcDz3sMvCMo4Gj2V> (last visited Oct. 7, 2024), at 2:23:52.

¹⁰ BLNR August 23, 2024 video recording, <https://www.youtube.com/watch?v=GbTsSPFHtJM&t=28360s> (last visited Oct. 7, 2024), at 8:19:50.

[EIS].”¹¹ The Court immediately sought clarification from the deputy attorney general, who noted her disagreement with the industry intervenor’s contrary position and reiterated that the Board “still has discretion to make an entirely independent decision based on the information in the EIS, and additional information should any come forward.”¹²

The agency, nonetheless, has continued to move forward with commercial aquarium approvals based on the flawed legal view that it is compelled to approve and issue them as a legal matter. Declaratory relief is necessary to avoid permitting and licensing decisions based on misinterpretations of the law.

IV. SPECIFIC PROVISIONS, RULES, OR ORDERS IN QUESTION

HRS § 190-3 provides that DLNR, headed by the Board (*see* HRS § 26-15(a)):

shall adopt rules governing the taking or conservation of fish, crustacean, mollusk, live coral, algae, or other marine life ***as it determines will further the policy of conserving, supplementing and increasing the State’s marine resources. The rules may prohibit activities that may disturb, degrade, or alter the marine environment***, 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, prescribe and limit the methods of fishing, including the type and mesh and other description of nets, traps, and appliances, ***and otherwise regulate the fishing and taking of marine life either generally throughout the State*** or in specified districts or areas. The rules shall upon taking effect ***supersede any state laws inconsistent therewith***.

(Emphases added).

HRS § 188-31, which governs permits to take aquatic life for aquarium purposes, provides in relevant part:

¹¹ Hawai‘i State Judiciary December 5, 2024 video recording, https://www.youtube.com/watch?v=mAo_hPtHeO0&t=379s (last visited Oct. 7, 2024), at 00:54:07.

¹² Hawai‘i State Judiciary December 5, 2024 video recording, https://www.youtube.com/watch?v=mAo_hPtHeO0&t=379s (last visited Oct. 7, 2024), at 00:54:13.

Except as prohibited by law, the department, upon receipt of a written application, *may* issue an aquarium fish permit, not longer than one year in duration, to use fine meshed traps, or fine meshed nets other than throw nets, for the taking of marine or freshwater nongame fish and other aquatic life for aquarium purposes.

HRS § 188-31(a) (emphasis added).

HRS § 189-2, governing commercial marine licenses, provides that “[n]o person shall take marine life for commercial purposes whether the marine life is caught or taken within or outside of the State, without first obtaining a commercial marine license as provided in this section.” HRS 189-2(a). The statute’s implementing rules state that “[t]he department or its agents *may* issue licenses and permits as authorized by law, and with such conditions necessary to manage, protect, and conserve aquatic life.” HAR § 13-74-2(4) (emphasis added).

At its December 8, 2023 meeting, the Board unanimously approved the Rulemaking Petition to prohibit commercial aquarium collection, on the “condition” that the rule be made “consistent with the statutory provisions.” Ex. G at 17.

V. POSITIONS OR CONTENTIONS OF PETITIONERS

The informal views expressed by Board members that the Board lacks authority to prohibit commercial aquarium collection, and that it *must* issue commercial aquarium collection permits and/or licenses, are invalid and must be corrected. Petitioners, therefore, request a declaratory ruling affirming the Board’s authority to: (1) prohibit commercial aquarium collection through rulemaking, and (2) deny commercial aquarium collection permits and licenses in its discretion.

With respect to the Board’s *rulemaking authority* to prohibit commercial aquarium collection:

- The Board has broad authority under HRS § 190-3 to adopt rules to conserve marine life, including the power to “prohibit activities” like commercial aquarium collection that “may disturb, degrade, or alter the marine environment”; and
- There is no conflict between the proposed rule to prohibit commercial collection and the Board’s discretionary power to grant fine-meshed net permits under HRS § 188-31.

With respect to the Board’s *permitting and licensing authority* for commercial aquarium collection, the Board has discretionary authority under HRS § 188-31, HRS § 189-2, and HAR § 13-74-2(4) to deny proposed permits and licenses.

Petitioners’ legal points are complementary and interrelated. In sum, the Board has the authority and discretion to prohibit commercial aquarium collection via rulemaking, as well as to deny permits and licenses for commercial aquarium collection in general.

VI. MEMORANDUM OF AUTHORITIES SUPPORTING PETITIONERS’ POSITIONS OR CONTENTIONS

The Board has broad powers to protect Hawai‘i’s reefs from the commercial extraction of native reef fish for the aquarium pet industry through both rulemaking and exercising discretion to deny permits and licenses.

- A. The Board Has Broad Rulemaking Authority To Prohibit Commercial Aquarium Collection.
 1. HRS § 190-3 Expressly Establishes The Board’s Authority To Adopt Rules Prohibiting Commercial Aquarium Collection.

HRS § 190-3 authorizes the Board to prohibit activities that harm the marine environment, including commercial aquarium collection, based on the statute’s express language. The statute charges the Board with adopting 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.* (emphasis added). The statute further defines the Board’s rulemaking authority as follows:

The rules may ***prohibit activities that may disturb, degrade, or alter the marine environment***, 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, prescribe and limit the methods of fishing, including the type and mesh and other description of nets, traps, and appliances, ***and otherwise regulate the fishing and taking of marine life either generally throughout the State*** or in specified districts or areas.

Id. (emphases added).

Thus, HRS § 190-3 plainly authorizes the Board to adopt rules prohibiting activities that “may disturb, degrade, or alter the marine environment,” including commercial aquarium collection “throughout the State,” for the purposes of “conserving, supplementing, and increasing the State’s marine resources.” *Id.*; *see also State v. Kalama*, 94 Hawai‘i 60, 64, 8 P.3d 1224, 1228 (2000) (In interpreting statutes, “the fundamental starting point is the language of the statute itself, and where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning.”) (cleaned up). Indeed, to adopt a rule prohibiting commercial aquarium collection, the Board need not determine that commercial aquarium collection *will* “disturb, degrade, or alter the marine environment,” since the statute specifically uses the term “may.” HRS § 190-3. Moreover, the Board may elect to adopt a ban rule to not only “conserv[e]” and maintain marine resources, but also to “supplement[] and increas[e]” them. *Id.*

The Rulemaking Petitioners proposed a ban on commercial aquarium collection to prevent disturbing, degrading, and altering the marine environment, with the goals of protecting Hawai‘i’s coral reef ecosystems from climate change by increasing herbivore abundance and promoting pono fishing practices that support sustainable fisheries and ecosystems. *See*

Rulemaking Petition at 2-4. In voting to initiate rulemaking for the proposed ban, the Board Chair reiterated DLNR’s “mission . . . to preserve and protect natural and cultural resources.”¹³ The Board has ample authority to prohibit commercial aquarium collection under these circumstances.

Even assuming for the sake of argument the existence of any ambiguity in HRS § 190-3’s already plain language, the statute’s legislative history reinforces the Board’s authority to prohibit commercial aquarium collection.¹⁴ The stated purpose of HRS chapter 190 when it was adopted in 1955 was “to institute a fish and marine life conservation program to be administered by the board.” S. Stand. Comm. Rep. No. 485, in 1955 Senate Journal, at 603. The legislature intended to “provide[] for a gradual and orderly transfer of the responsibility of regulating marine fisheries from the legislature” to the Board because Hawai‘i was “one of the few governmental jurisdictions where the legislature retains” such responsibility. *Id.* Through HRS § 190-3, the legislature intended to convey broad rulemaking power to the Board to regulate Hawai‘i’s marine fisheries. The view, suggested in passing by some Board members, that the legislature contrarily excluded aquarium collection from the Board’s power to prohibit harmful activities, nullifies the legislature’s indicated purpose for the statute.

In 1981, HRS § 190-3 was amended to include rulemaking authority to “*prohibit* activities that may disturb, degrade, or alter the marine environment” and protect a wider range of marine species including crustaceans and coral. 1981 Haw. Sess. Laws Act 16, § 2, at 35; *see also* S. Stand. Comm. Rep. No. 759, in 1981 Senate Journal, at 1232. The DLNR Chair at the

¹³ BLNR December 8, 2023 video recording, <https://www.youtube.com/watch?v=V4xDtBo3ywU> (last visited Oct. 4, 2024), at 7:37:19.

¹⁴ In interpreting ambiguous statutes, courts may “resort to extrinsic aids in determining legislative intent, such as legislative history.” *Jijun Yin v. Aguiar*, 146 Hawai‘i 254, 260-61, 463 P.3d 911, 917-18 (2020) (internal quotation marks omitted).

time testified in “strong[] support[]” of the 1981 amendments, which were intended to make HRS chapter 190 “consistent with [DLNR’s] current management needs and practices.” H. Stand. Comm. Rep. No. 133, in 1981 House Journal, at 999; *see also* S. Stand. Comm. Rep. No. 759, in 1981 Senate Journal, at 1232. The 1981 amendments, thus, further clarified the Board’s enumerated powers to expressly enable the agency to “prohibit” activities in line with the agency’s evolving management needs.

The Board has since utilized its powers articulated under the 1981 amendments by prohibiting, for example, the “take, break, or damage” of “stony coral” and “live rock” statewide. *See* HAR §§ 13-95-70(a)(1), 13-95-71(a)(1). Given the threats that commercial aquarium collection poses to Hawai‘i’s reef ecosystems and cultural practices, prohibiting commercial collection would likewise fall well within the Board’s authority under HRS § 190-3.

2. A Rule Prohibiting Commercial Aquarium Collection Would Not Conflict With HRS § 188-31’s Discretionary Permitting Provision.

Although an administrative rule “cannot contradict or conflict with the statute it attempts to implement,” *Asato v. Procurement Pol’y Bd.*, 132 Hawai‘i 333, 347, 322 P.3d 228, 242 (2014), the purported theory that the proposed ban rule conflicts with HRS § 188-31 is inapposite and unsupportable under the governing case law. Setting aside that the proposed ban rule in no way “attempts to implement” HRS § 188-31,¹⁵ there is no conflict with that statute.

Hawai‘i case law indicates that to rise to the level of a conflict, an agency rule would need to result in violating a statutory *requirement*. For example:

- In *Asato*, the Hawai‘i Supreme Court held that a rule allowing for government procurement after considering “less than three qualified persons” conflicted with a statute

¹⁵ As discussed *supra*, the proposed ban rule would implement HRS § 190-3. *See also* Ex. B at 5.

requiring a ranking of “a minimum of three persons.” *Asato*, 132 Hawai‘i at 347, 322 P.3d at 242. The Court reasoned that “the rule provide[d] for procurement to take place in a situation that the statute, by its plain language, would not allow.” *Id.* at 348, 322 P.3d at 243.

- In *Liberty Dialysis-Hawaii, LLC v. Rainbow Dialysis, LLC*, 130 Hawai‘i 95, 306 P.3d 140 (2013), the Court held that a rule prohibiting an agency official from participating in contested case proceedings conflicted with a statute *requiring* the agency official to so participate, *id.* at 106-08, 306 P.3d at 151-53.
- In *Capua v. Weyerhaeuser Co.*, 117 Hawai‘i 439, 184 P.3d 191 (2008), the Court held that a rule providing for waiver of vocational rehabilitation services conflicted with a statute *requiring* access to such services. *Id.* at 446-48, 184 P.3d at 198-200.

Here, the proposed ban rule presents no conflict with HRS § 188-31 because the statute does not *require* the Board to issue commercial aquarium permits. Rather, HRS § 188-31 explicitly states that the department “*may* issue” aquarium collection permits. *Id.* § 188-31(a) (emphasis added). It is well-settled that the use of the word “may” in HRS § 188-31(a) renders DLNR’s permitting authority “optional, permissive, or discretionary.” *Umberger*, 140 Hawai‘i at 527, 403 P.3d at 304. Thus, unlike the rules at issue in *Asato*, *Liberty Dialysis-Hawai‘i*, and *Capua*—which would have prevented compliance with non-discretionary statutory directives—prohibiting commercial aquarium collection fully aligns with the Board’s discretion to deny permits under HRS § 188-31. *See Council for Urological Interests v. Burwell*, 790 F.3d 212, 219 (D.C. Cir. 2015) (agency rule *prohibiting* a certain type of hospital equipment lease did not conflict with a statute affording agency *discretion* to allow or prohibit this type of lease).

Moreover, HRS § 190-3 specifically states that rules adopted pursuant to the statute “shall . . . supersede any state laws inconsistent therewith.” In adopting this “supersede” language, the legislature intended to “authorize[]” the Board “to make rules and regulations governing *all fish conservation matters* which shall supersede *all present territorial laws.*” H. Stand. Comm. Rep. No. 958, in 1955 House Journal, at 870 (emphases added). In 1981, HRS § 190-3 was amended to replace “territorial laws” with “state laws,” indicating the legislature’s intent to maintain the agency’s power to adopt marine conservation rules that “supersede” all existing laws. 1981 Haw. Sess. Laws Act 16, § 2, at 35. HRS § 188-31, granting discretionary authority to issue aquarium collection permits, was a law in existence at the time HRS chapter 190 was adopted in 1955 to allow the Board to supersede such laws through its rules governing marine conservation. *See* 1953 Haw. Sess. Laws Act 124, § 2, at 83; 1955 Haw. Sess. Laws Act 192, § 6, at 169-70. Thus, even *if* there were any conflict between HRS § 188-31 and a marine conservation rule promulgated under HRS § 190-3 (and, as discussed above, no such conflict exists), the rule would “supersede” any purported inconsistencies.¹⁶ *See Peer News v. City & Cnty. of Honolulu*, 138 Hawai‘i 53, 69, 376 P.3d 1, 17 (2016) (“The legislature is presumed to know the law when it enacts statutes[.]”). Applying HRS § 190-3’s “supersede” language here, indeed, would fulfill the legislature’s intent to “provide[] for a gradual and orderly transfer of the responsibility of regulating marine fisheries from the legislature” to the Board. S. Stand. Comm. Rep. No. 485, in 1955 Senate Journal, at 603.

Finally, the proposed prohibition would specifically apply to *commercial*—but not *recreational*—aquarium collection. Rulemaking Petition at 11-12. It would not restrict the

¹⁶ On the other hand, the agency could not adopt rules that are *less* protective in conserving marine resources than any laws the legislature has passed.

Board's authority to issue *recreational* aquarium permits pursuant to HRS § 188-31 and HAR § 13-75-14(a)(4). For this reason as well, there is no antithetical and irreconcilable "conflict" between the proposed prohibition of commercial aquarium collection and HRS § 188-31.

In sum, the purported theory of "conflict" between the Board's proposed rule and statutes fails. The Board should proceed with implementing its unanimous vote approving the Rulemaking Petition, *i.e.*, by initiating rulemaking procedures to prohibit commercial aquarium collection, "consistent with the statutory provisions." Ex. G at 17.

B. The Board Has Broad Authority To Deny All Proposed Commercial Aquarium Collection Permits and Licenses Under HRS §§ 188-31, 189-2, and HAR § 13-74-2(4).

No law *requires* the Board to issue permits and/or licenses for commercial aquarium collection. The legal authorities affirming the Board's powers to prohibit commercial aquarium collection also support its discretion to deny permits and licenses. As discussed above, the aquarium permitting statute explicitly states that the department "*may* issue" aquarium collection permits. HRS § 188-31(a) (emphasis added). The Hawai'i Supreme Court in *Umberger* confirmed that the use of the word "may" in the statute renders DLNR's permitting authority "optional, permissive, or discretionary," explaining:

[T]he fact that DLNR has chosen not to exercise its discretion under the plain and unambiguous language of HRS § 188-31 does not nullify the statute's clear directive that DLNR is given the authority to exercise discretionary consent. An agency may not defeat the express provisions of a statute simply by operating in a manner that does not comport with the legislature's grant of authority.

Umberger, 140 Hawai'i at 527, 403 P.3d at 304.

Further, HRS § 189-2 prohibits the take of marine life for "commercial purposes," including the aquarium trade, without first obtaining a commercial marine license. *Id.* § 189-2(a). As with HRS § 188-31, DLNR's implementing regulations plainly indicate—through the use of the term "may"—that such licensing authority is discretionary, stating: "[t]he department

or its agents *may* issue licenses . . . as authorized by law, and with such conditions necessary to manage, protect, and conserve aquatic life.” HAR § 13-74-2(4) (emphasis added). In a follow-up case to *Umberger*, the environmental court confirmed this discretion in holding that commercial aquarium collection licenses pursuant to HRS § 189-2 and HAR § 13-74-2(4), are discretionary agency approvals subject to HEPA’s environmental review requirements. Ex. P: *Kaupiko, et al., v. Dep’t of Land & Natural Res.*, Case No. 1CCV-20-0000125, Order Granting in Part and Denying in Part Plaintiffs’ Motion for Summary Judgment, at 1 (Dec. 8, 2020) (citing *Umberger*, 140 Hawai‘i at 512, 403 P.3d at 289).

Completing the environmental review process under HEPA, as the industry has done for West Hawai‘i commercial aquarium permits and licenses, does nothing to eliminate or diminish the agency’s discretion to deny permits and licenses for commercial aquarium collection. Indeed, at oral argument before the Hawai‘i Supreme Court, the agency’s counsel expressly “disagree[d]” with the industry intervenor’s characterization that once an EIS is accepted, there is no discretion to deny a permit.¹⁷ Instead, counsel correctly maintained, based on established case law,¹⁸ that an EIS’s acceptance “in no way constitutes an endorsement of the contemplated project”¹⁹ and “does not mean a project is going to happen.”²⁰ Specifically, an “EIS is merely an

¹⁷ Hawai‘i State Judiciary December 5, 2024 video recording, https://www.youtube.com/watch?v=mAo_hPtHeO0&t=379s (last visited Oct. 7, 2024), at 00:54:07.

¹⁸ *See, e.g.*, Hawai‘i State Judiciary December 5, 2024 video recording, https://www.youtube.com/watch?v=mAo_hPtHeO0&t=379s (last visited Oct. 7, 2024), at 00:54:15.

¹⁹ Hawai‘i State Judiciary December 5, 2024 video recording, https://www.youtube.com/watch?v=mAo_hPtHeO0&t=379s (last visited Oct. 7, 2024), at 00:52:55.

²⁰ Hawai‘i State Judiciary December 5, 2024 video recording, https://www.youtube.com/watch?v=mAo_hPtHeO0&t=379s (last visited Oct. 7, 2024), at 00:53:36.

informational document whose acceptance neither implies nor presumes approval of [a permit].” *Mauna Kea Power Co. v. Bd. of Land & Natural Res.*, 76 Hawai‘i 259, 265, 874 P.2d 1084, 1090 (1994); *see also Price v. Obayashi Haw. Corp.*, 81 Hawai‘i 171, 181, 914 P.2d 1364, 1374 (1996) (“[A]n ‘acceptance’ of the EIS is not an ‘approval’ of the project.”). Any notion that the Board is *required* to issue permits and licenses for commercial aquarium collection contradicts the law.

Tying the Board’s hands this way would ultimately run afoul of the constitutional public trust doctrine. Under well-settled, foundational case law on the State’s public trust duties under article XI, § 1 of the Hawai‘i Constitution, “[M]ere compliance by [agencies] with their legislative authority is not sufficient to determine if their actions comport with the requirements of the public trust doctrine. The public trust doctrine at all times forms the outer boundaries of permissible government action with respect to public trust resources.” *In re Waiāhole Ditch Combined Contested Case Hr’g*, 94 Hawai‘i 97, 132, 9 P.3d 409, 444 (2000) (citation omitted). Thus, the agency’s discretion to issue commercial aquarium permits and licenses must be interpreted and exercised in line with its public trust duties to “conserve and protect” natural resources. Haw. Const. art. XI, § 1. Conversely, compelling the Board to grant commercial aquarium collection permits and licenses would flip the law on its head and violate the constitutional public trust.

In sum, nothing in DLNR’s statutes or rules require the agency to issue commercial aquarium collection permits and licenses. Rather, the plain language and case law confirm the opposite—that the Board has broad powers to deny and prohibit them.

VII. CONCLUSION AND REQUEST FOR HEARING

There is no legal basis for blocking community-led, Board-approved efforts to prohibit commercial aquarium collection, while forcing approvals to allow it instead. For all of the

foregoing reasons, Petitioners respectfully request a declaratory ruling affirming the Board's authority to (1) prohibit commercial aquarium collection through rulemaking, and (2) deny commercial aquarium collection permits and licenses in its discretion. Accordingly, the Board should instruct DLNR promptly to proceed with its approved rulemaking to prohibit commercial collection and refrain from any consideration of collection permits or licenses in the meantime.

Finally, pursuant to HAR § 13-1-27(h), Petitioners request the Board promptly to set a hearing on this petition to ensure its "fair and expeditious" disposition. *Id.* § 13-1-27(h)(2). The issues regarding the Board's lawful powers to prohibit or deny commercial aquarium collection should be heard and discussed publicly in the interests of open, orderly, and transparent governance. A hearing is needed to resolve discrepancies between the Board's unanimous vote to approve the Rulemaking Petition and statements proffered by individual Board members, with an opportunity for meaningful and constructive discussion in a public forum and on the record. A hearing could also help to clarify the Board's plans for the still-pending Rulemaking Petition.

DATED: Honolulu, Hawai'i, October 10, 2024.



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