STATE OF HAWAI‘I, DEPARTMENT OF HEALTH

ENVIRONMENTAL COUNCIL

IN THE MATTER OF PET INDUSTRY JOINT ADVISORY COUNCIL, Applicant, v. BOARD OF LAND AND NATURAL RESOURCES, Respondent	Docket No. DOH-EC-20-001 THE ENVIRONMENTAL COUNCIL'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER CERTIFICATE OF SERVICE

CERTIFIED COPY OF THE ENVIRONMENTAL COUNCIL'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

I, Leslie Segundo, Environmental Health Specialist for the Office of Environmental Quality Control (OEQC), Department of Health, do hereby declare that the following document to be a true and correct certified copy of the Environmental Council’s Findings of Fact, Conclusions of Law, and Decision and Order for the above titled case, filed at the OEQC on August 13, 2020.

DATED: Honolulu, Hawai‘i, August 13, 2020.

Leslie Segundo
Environmental Health Specialist

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND DECISION AND ORDER

INTRODUCTION

This appeal involves the Pet Industry Joint Advisory Council's ("PIJAC") Final Environmental Impact Statement ("FEIS") for the Issuance of Commercial Aquarium Permits for the West Hawai‘i Regional Fishery Management Area situated in the West Hawai‘i Regional Fishery Management Area in the Puna, South Hilo, North Hilo, Ka‘ū, Hamakua, South Kona, North Kona, South Kohala, and North Kohala districts on the island of Hawai‘i. The EIS was published by the Office of Environmental Quality Control ("OEQC") in *The Environmental Notice* on April 23, 2020. At its regular meeting on May 22, 2020, the Board of Land and Natural Resources ("BLNR") rejected the EIS. PIJAC appealed the BLNR rejection to the Environmental Council ("Council").

The following Findings of Fact ("FOF"), Conclusions of Law ("COL"), and Decision and Order are based on the record provided to the Council by PIJAC and BLNR.

If any statement designated as a COL is more properly considered a FOF, then it should be treated as a FOF; and conversely, if any statement identified as a FOF is more properly considered a COL, then it should be treated as a COL.

I. THE PARTIES

1. PIJAC is the Applicant identified in the EIS. In this appeal, PIJAC was represented by K&L Gates LLP.

2. BLNR is the accepting authority for the EIS. BLNR is responsible for, among other things, issuing commercial aquarium permits.

II. PROCEDURAL HISTORY

3. On March 27, 2018, the DLNR submitted the applicant Appellant PIJAC's Draft Environmental Assessment and Proposed Finding of no significant impact (DEA-AFONSI) for the Commercial Aquarium Fishery in the Puna, South Hilo, North Hilo, Ka‘ū, Hamakua, South Kona, North Kona, South Kohala, and North Kohala Judicial Districts on the Island of Hawai‘i to OEQC for publication in the next available edition of the Environmental Notice. This DEA-AFONSI was submitted under the old HAR chapter 11-200 rules due to the fact that the new, superseding, HAR chapter 11 rules did not take effect until August 9, 2019.

4. On July 26, 2018, the DLNR submitted the PIJAC Final Environmental Assessment and Notice of Determination for the Commercial Aquarium Fishery in the Puna, South Hilo, North Hilo, Ka‘ū, Hamakua, South Kona, North Kona, South Kohala, and North Kohala Judicial Districts on the Island of Hawai‘i to OEQC for publication in the next available edition of the Environmental Notice, whereby the DLNR determined that the project may have significant impact on the environment, and requesting further analysis for eight (8) separate significant criteria under HAR § 11-200-12 for the issuing of PIJAC’s permits.

5. By letter dated November 12, 2019, PIJAC submitted its Draft Environmental Impact Statement (DEIS) for the Commercial Aquarium Fishery in the Puna, South Hilo, North Hilo, Kaʻū, Hamakua, South Kona, North Kona, South Kohala, and North Kohala Judicial Districts on the Island of Hawaiʻi to OEQC for publication in the next available edition of the Environmental Notice. This was submitted under the old HAR chapter 11-200 rules due to the fact that PIJAC had started the environmental review process by the submission of its DEA-AFONSI on March 27, 2018, which is prior to the new, superseding, HAR chapter 11 rules taking effect on August 9, 2019.

6. By letter dated April 13, 2020, applicant Appellant PIJAC submitted its FEIS to disclose the projected environmental impacts of proposed issuance of commercial aquarium fishing permits, commercial marine licenses, and West Hawaiʻi Aquarium permits for the West Hawaiʻi Regional Fishery Management Area.

7. On May 22, 2020, the Board of Land and Natural Resources ("BLNR") considered the FEIS at its duly agendized sunshine meeting. Applicant PIJAC submitted testimony and appeared, and numerous other persons submitted testimony for and against acceptance of the FEIS and/or testified at the meeting.

8. On May 30, 2020, BLNR issued its *Findings and Reasons for Non Acceptance Of Final Environmental Impact Statement (FEIS) Regarding Proposed Issuance of Commercial Aquarium Permits, Commercial Marine Licenses, and West Hawaii Aquarium Permits for the West Hawaii Regional Fishery Management Area* ("BLNR Decision")

9. On June 8, 2020 PIJAC filed its appeal with the Office of Environmental Quality Control ("OEQC") rather than with the Environmental Council, as required under HAR § 11-201-26.

10. On or about June 18, 2020, Council members Robin Kaye and Makaʻala Kaʻaumoana voluntarily recused themselves from the proceeding due to conflicts of interest.

11. On June 24, 2020, OEQC advised PIJAC that it did not have the authority to render decisions concerning the non-acceptance of the FEIS and that PIJAC should re-file the appeal with the Environmental Council.

12. On June 26, 2020, PIJAC re-filed its appeal with the Environmental Council. Council members Robin Kaye and Makaʻala Kaʻaumoana voluntarily recused themselves from the proceeding due to conflicts of interest.

13. On July 6, 2020, the Kaupiko Hui, represented by Earthjustice, filed a Motion to Intervene.

14. On July 7, 2020, the Environmental Council held a Pre-Hearing Conference with the parties to discuss the appeal. Several Council Members made voluntary disclosures of possible conflicts of interest. The parties and the Council agreed that the Council would render a decision within 45 days, rather than 30 days as provided under HAR § 11-201-30(g).

15. On July 7, 2020, BLNR filed Exhibit 2, the written testimony for the May 22, 2020 board meeting.

16. On July 8, 2020, the Environmental Council filed a Notice of Disclosure of Possible Conflicts by Three (3) Environmental Council Members: Ms. Mahina Tuteur, Mr. Ron Terry, and Ms. Stephanie Dunbar-Co [Minute Order No. 1].

17. On July 9, 2020, PIJAC filed its Motion to Disqualify Environmental Council Members Mahina Tuteur and Stephanie Dunbar-Co.

18. On July 9, 2020, Earthjustice, on behalf of the Kaupiko Hui (Wilfred Kaupiko, Ka‘imi Kaupiko, Michael Nakachi, For the Fishes, Center for Biological Diversity, and Kai Palaoa), filed an Objection to Council Member Ron Terry’s Participation in this Appeal.

19. On July 9, 2020, Member Ron Terry recused himself from participation in this appeal.

20. On July 13, 2020, the BLNR filed its Response to PIJAC’s Appeal of BLNR’s Decision.

21. On July 16, 2020, BLNR filed Exhibit 3 (transcript of May 22, 2020 meeting).

22. On July 16, 2020, the Environmental Council issued an Order Denying PIJAC’s Motion to Disqualify Environmental Council Member Mahina Tuteur [Minute Order No. 2] and an Order Denying PIJAC’s Motion to Disqualify Environmental Council Member Stephanie Dunbar-Co [Minute Order No. 3]. The Council found that Ms. Tuteur and Ms. Dunbar-Co did not have conflicts of interest pursuant to the applicable statutory and regulatory standards, HRS § 84-14(a) and HAR § 11-201-28(f)(1)(2). The Council also issued an Order Authorizing the Nine Current Environmental Council Members to be Designated the Council Members to Perform the Action of Reviewing and Deciding this Appeal [Minute Order No. 4]. Because the Council currently only consists of 12 appointed members rather than 15, and because 3 Council Members were recused from the Appeal, the Council elected to utilize HAR § 11-201-3(D) to address the issue of quorum. Thus, the Council unanimously authorized by concurrence of all 9 Council Members participating in the review of and decision-making on this appeal, that all of these same 9 Council Members be designated EC members to perform the action of reviewing and deciding the instant appeal.

23. On July 16, 2020, PIJAC filed its Reply in Support of the Appeal.

24. On July 20, 2020, the Council filed an Order Denying the Kaupiko Hui’s Motion to Intervene Into This Appeal [Minute Order No. 5]. The Council determined that neither HRS § 343-5(e) nor the EC Rules of Practice and Procedure, HAR Chapter 11-201, allows any intervention by any other party into the Applicant’s appeal to the Environmental Council.

25. On July 22, 2020, the Council filed a Stipulation Re Procedures and Timelines For Pet Industry Joint Advisory Council’s Appeal of BLNR’s Decision (Stipulation). The Stipulation stipulated that the issues presented in the appeal shall be those set forth in PIJAC’s Appeal of BLNR’s Decision. PIJAC’s appeal and Exhibits A through K were

received into evidence and would be considered by the Council. BLNR's response and its Exhibits 2 and 3 were received into evidence and would be considered by the Council. PIJAC's reply was received into evidence and would be considered by the Council. The Council will render its decision on or before close of business August 13, 2020. All filings would be made electronically, with copies to Bill Wynhoff, Geoffrey Davis, and Bill Cooper unless otherwise specifically ordered or agreed. All signatures on filings may be electronic. PJIAC and the Board waived any right either may have to call or cross-examine witnesses, present argument, or adduce exhibits except as stated herein. The Council reserved the right to ask for specific information, which information shall be provided orally or in writing at the Council's direction. The Council's decision will be based solely on these submissions except as otherwise ordered or agreed. Any proceedings in this matter will be conducted remotely via Zoom (or comparable virtual meeting software) presented and operated by the Hawai'i Office of Environmental Quality and Control (OEQC) with no physical presence on the island where the dispute arose, pursuant to the Office of the Governor's Ninth Supplementary Proclamation Related to the COVID-19 Emergency, addressing HRS Chapter 91, on pages 12-13 (Dated June 10, 2020). PIJAC and the Board waive closing argument, orally or in writing and waive submission of proposed findings, conclusions, and decision and order. Any orders entered herein may be signed by the Chair on behalf of the Council or by the full Council at its discretion.

26. On August 4, 2020, the Council met and deliberated, and came to a unanimous decision. The unanimous decision of the Council was that PIJAC failed to produce proof amounting to a preponderance of the evidence, that the BLNR was acting arbitrary and capricious in determining that the EIS needed more documentation and information in ten of the fourteen areas as noted in its May 30, 2020 Findings and Reasons for Non Acceptance of Final Environmental Impact Statement (FEIS) Regarding Proposed Issuance of Commercial Aquarium Permits, Commercial Marine Licenses, and West Hawai'i Aquarium Permits for the West Hawai'i Regional Fishery Management Area.

III. SCOPE OF REVIEW

27. Pursuant to the Stipulation, the Council's review of PIJAC's appeal is limited to the matters raised in PIJAC's appeal and BLNR's Decision. In its response to PIJAC's appeal, BLNR also confirmed that PIJAC complied with the procedural requirements for the EIS. The Council therefore has not reviewed the EIS in its entirety for sufficiency or compliance with procedural requirements.

28. Furthermore, the Council notes that while the BLNR Decision identified fourteen reasons for rejecting the EIS, the BLNR Decision does not specifically identify which of the HAR Title 11, Chapter 200 criteria have not been satisfied in the EIS. In the future, the Council would appreciate BLNR identifying which of the HAR or HRS Chapter 343 criteria that has not been met in the agency's view to aid the Council in its review and future applicants in addressing the reasons for non-acceptance should the applicant wish to submit a revised draft EIS. *See* HAR § 11-200-23(e).

IV. LEGAL FRAMEWORK

A. STANDARD OF REVIEW

29. PIJAC's appeal asserted that the "rule of reason" is the appropriate standard of review for this appeal. BLNR asserted that the Council should give deference to the BLNR's decision and overturn it only for an abuse of discretion or manifest error of law.

30. The standard of review applicable to the Council's review of the action of BLNR's denial of PIJAC's EIS is the "arbitrary and capricious" standard of review.

31. As stated by the Court in Unite Here! Local 5 v. City & Cnty. of Honolulu,

> Moreover, this court has recognized that "[a] court is not to substitute its judgment for that of the agency as to the environmental consequences of its action. Rather, the court must ensure that the agency has taken a 'hard look' at environmental factors," and, "[i]f the agency has followed the proper procedures, its action will only be set aside if the court finds the action to be 'arbitrary and capricious,' given the known environmental consequences."

123 Hawai'i 150, 171, 231 P.3d 423, 444 (2010) (citations omitted).

32. In Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., the U.S. Supreme Court stated:

The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."

463 U.S. 29, 43 (1983) (citations omitted).

B. BURDEN OF PROOF

33. The applicant, in this case PIJAC, has the burden of proof for meeting the EIS criteria set forth in the relevant statutory and regulatory authority. HRS section 343-6(a) gives the Council the authority to promulgate administrative rules to effect HRS Chapter 343. Pursuant to HRS section 343-6(a) these rules shall, among other things:

> . . . (1) Prescribe the contents of an [EIS]; . . .(3) Prescribe procedures for the preparation and contents of an environmental assessment; (4) prescribe procedures for the submission, distribution, review, acceptance or nonacceptance, and withdrawal of a statement; . . .(6) Establish criteria to determine whether a statement is acceptable or not . . .

34. HAR Title 11, Chapter 200 was promulgated, in part, pursuant to HRS section 343-6(a).

35. HAR Chapter 11-200, Subchapter 7, sections 11-200-14 to 11-200-22 establish the content requirements for an EIS. HAR section 11-200-23 sets forth the acceptability criteria for a final EIS. The burden is upon the applicant to meet these criteria.

36. HAR sections 11-200-23(a) & (b) state:

> (a) Acceptability of a statement shall be evaluated on the basis of whether the statement, in its completed form, represents an informational instrument which fulfills the definition of an EIS and adequately discloses and describes all identifiable environmental impacts and satisfactorily responds to review comments.
>
> (b) A statement shall be deemed to be an acceptable document by the accepting authority or approving agency ***only if all*** of the following criteria are satisfied:
>
> (1) The procedures for assessment, consultation process, review, and the preparation and submission of the statement, have all been completed satisfactorily as specified in this chapter;
>
> (2) The content requirements described in this chapter have been satisfied; and
>
> (3) Comments submitted during the review process have received responses satisfactory to the accepting authority, or approving agency, and have been incorporated in the statement. (Emphasis added).

37. The Hawai‘i Administrative Procedures Act, HRS Chapter 91, states that, "[e]xcept as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence." HRS § 91-10(5).

38. Thus, PIJAC has the burden of proof by a preponderance of evidence in showing that its FEIS met the necessary criteria and that BLNR acted arbitrarily and capriciously in rejecting the EIS.

C. STATUTE AND ADMINISTRATIVE RULES

39. HRS Chapter 343 governs environmental assessments and environmental impact statements.

40. Because the final environmental assessment/environmental statement impact preparation notice for the Proposed Action was filed on August 8, 2018 under HAR Title 11, Chapter 200 (the old rules), PIJAC's FEIS is reviewed under those rules. See HAR § 11-200.1-32(b)(2) (Retroactivity).

41. HAR §§ 11-200-16 through -18 set forth the content requirements for environmental impact statements.

42. HAR § 11-200-23 sets forth the acceptability criteria for a final EIS:

a. Acceptability of a statement shall be evaluated on the basis of whether the statement, in its completed form, represents an informational instrument which fulfills the definition of an EIS and adequately discloses and describes all identifiable environmental impacts ***and satisfactorily responds to review comments.***

b. A statement shall be deemed to be an acceptable document by the accepting authority or approving agency ***only if all*** of the following criteria are satisfied:

(1) The procedures for assessment, consultation process, review, and the preparation and submission of the statement, have all been completed satisfactorily as specified in this chapter;

(2) The content requirements described in this chapter have been satisfied; and

(3) Comments submitted during the review process have received responses satisfactory to the accepting authority, or approving agency, and have been incorporated in the statement.

(Emphasis added).

D. RELEVANT CASE LAW

a. Price v. Obayashi

43. In Price v. Obayashi, 81 Hawai‘i 171, 914 P.2d 1364 (1996), the Hawai‘i Supreme Court stated:

> Moreover, this court has recognized that "[a] court is not to substitute its judgment for that of the agency as to the environmental consequences of its action. Rather, the court must ensure that the agency has taken a ‘hard look’ at environmental factors," and, "[i]f the agency has followed the proper procedures, its action will only be set aside if the court finds the action to be ‘arbitrary and capricious,’ given the known environmental consequences.

Id. at 182 n. 12, 914 P.2d at 1375 n. 12 (relying on federal case law).

b. Ka Pa‘akai

44. In Ka Pa‘akai o Ka ‘Āina v. Land Use Comm’n, 94 Hawai‘i 31, 7 P.3d 1068 (2000) ("Ka Pa‘akai"), the Hawai‘i Supreme Court provided an analytical framework "to effectuate the State’s obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private interests[.]" Id. at 46-47, 7 P.3d at 1083-84.

45. Under Ka Pa‘akai, an agency, in order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible, must examine, and make specific findings and conclusions as to:

> (1) the identity and scope of "valued cultural, historical, or natural resources in the [application] area, including the extent to which traditional and customary native Hawaiian rights are exercised in the [application] area; (2) the extent to which those resources – including traditional and customary native Hawaiian rights – will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the [agency] to reasonably protect native Hawaiian rights if they are found to exist.

Id. at 47, 7 P.3d at 1084 (footnotes omitted).

46. A Ka Pa‘akai analysis may be conducted by an agency within the context of a contested case hearing. See generally, id.

E. THE PUBLIC TRUST DOCTRINE; NATIVE HAWAIIAN RESOURCES AND TRADITIONAL AND CUSTOMARY PRACTICES

47. The public trust doctrine has been adopted in Hawai‘i as a "fundamental principle of constitutional law." In re Water Use Permit Applications, 94 Haw. 97, 132, 9 P.3d 409, 444 (2000).

48. The Hawai‘i Supreme Court also adopted the precautionary principle as a corollary to the public trust, ruling that “the lack of full scientific certainty should not be a basis for postponing effective measures to prevent environmental degradation” and that “where [scientific] uncertainty exists, a trustee’s duty to protect the resource mitigates in favor of choosing presumptions that also protect the resource.” Id. at 154, 9 P.3d at 466 (quoting the Water Commission’s decision). The court determined that “at minimum, the absence of firm scientific proof should not tie the [agency’s] hands in adopting reasonable measures designed to further the public interest.” Id. at 155, 9 P.3d at 467.

49. In Kauai Springs, the Hawai‘i Supreme Court distilled six principles that agency officials and other decisionmakers must apply to fulfill the public trust in rendering determinations, most importantly here that decisionmakers need to “apply a presumption in favor of public use, access, enjoyment, and resource protection” and that the “If the requested use is private or commercial, the agency should apply a high level of scrutiny.” Kaua‘i Springs v. Planning Comm’n of the Cnty. of Kaua‘i, 133 Hawai‘i 141, 174, 324 P.3d 951, 984 (2014) (citations omitted). These principles establish “duties under the public trust independent of [any] permit requirements.” *Id.* at 177, 324 P.3d at 987.

50. Most recently in Ching v. Case, the Hawai‘i Supreme Court reaffirmed that “[u]nder the Hawai‘i Constitution, **all** public natural resources are held in trust by the State for the common benefit of Hawai‘i’s people and the generations to come.” 145 Hawai‘i 148, 152, 449 P.3d 1146, 1150 (2019) (emphasis added).

51. Under Article XII, section 7 of the Hawai‘i Constitution, the State must recognize and

protect native Hawaiian traditional and customary practices:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

52. In Ka Pa'akai o Ka 'Āina v. Land Use Comm'n, 94 Hawai'i 31, 7 P.3d 1068 (2000) ("Ka Pa'akai"), the Hawai'i Supreme Court provided an analytical framework "to effectuate the State's obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private interests[.]" Id. at 46-47, 7 P.3d at 1083-84. Under Ka Pa'akai, an agency, in order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible, must examine, and make specific findings and conclusions as to:

> (1) the identity and scope of "valued cultural, historical, or natural resources in the [application] area, including the extent to which traditional and customary native Hawaiian rights are exercised in the [application] area; (2) the extent to which those resources – including traditional and customary native Hawaiian rights – will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the [agency] to reasonably protect native Hawaiian rights if they are found to exist.

Ka Pa'akai, 94 Hawai'i at 47, 7 P.3d at 1084 (footnotes omitted).

53. This analytical framework ensures that a state agency properly effectuates its "obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private interests," and fulfills its duty "to preserve and protect customary and traditional native Hawaiian rights to the extent feasible[.]" *Ka Pa'akai*, 94 Hawai'i at 46-47, 7 P.3d at 1083-84.

F. JURISDICTION

54. This appeal is before the Council pursuant to HRS § 343-5(e) and HAR § 11-200-24.

55. Under HRS § 343-5(e), the Council shall hear appeals of any non-acceptance of an EIS.

56. HAR §11-200-24 Appeals to the Council provides:

> An applicant, within sixty days after non-acceptance of a statement by an agency, may appeal the non-acceptance to the council, which within thirty days of receipt of the appeal, shall notify the applicant of its determination. In any affirmation or reversal of an appealed non-acceptance, the council shall provide the applicant and the agency with specific findings and reasons for its determination. The agency shall abide by the council's decision.

57. Under HAR § 11-201-28(A) of the Council's procedural rules, appeals to the Council shall be held as Chapter 91 contested case hearings.

V. THE PROPOSED ACTION AND ALTERNATIVES

58. The proposed action, as stated in the FEIS Project Summary, is:

> Collection of aquarium fish pursuant to the issuance of 10 Commercial Aquarium Permits under HRS sec. 188-31 and related permits ensuring lawful, responsible, and sustainable commercial collection of various aquarium fish species from nearshore habitats of the WHRFMA.

59. Section 3.0 of the FEIS sets forth the five alternatives, including the preferred alternative (the "Proposed Action"). The five alternatives considered and analyzed by the FEIS were: 1) No Action; 2) Pre-Aquarium Collection Ban; 3) WHRFMA-Only Programmatic Issuance of Permits; 4) Achilles Tang Conservation; and 5) Limited Permit Issuance (Applicant's preferred alternative).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

60. Under HRS § 343-5(e), "[i]n any acceptance or nonacceptance, the agency shall provide the applicant with the specific findings and reasons for its determination." See also HAR § 11-200-24; HAR § 11-201-30(g).

61. The BLNR Decision sets forth 14 reasons for non-acceptance of the EIS each of which are addressed below. Upon careful consideration of the evidence in the record the Council makes the following findings of fact:

I. BLNR DID NOT ACT ARBITRARILY AND CAPRICIOUSLY IN NOT ACCEPTING THE EIS FOR REASON #1

62. BLNR's first reason for not accepting the EIS is:

> 1. In order to properly assess the likely impact of the proposed take of the aquarium fish, the FEIS should contain a reasonably reliable estimate of the amount of future take.

63. PIJAC's appeal states:

> 3. Failure to include a limit on fish collection in proposed action is not a basis for denial.
>
> The May 22 BLNR meeting transcript evidences that Ms. Case based her reasoning for the denial of the FEIS on the lack of proposed limits in the fishery. These statements outlined in Exhibit F clearly show that one or more BLNR members fail to understand HEPA's requirements and that the BLNR based its rejection on inapplicable legal standards. Failure to provide species-specific limitations on fish collection is not a valid basis for BLNR to deny the FEIS,

particularly when DAR staff recommended approval of the FEIS that same day. *See* Exhibit E. Moreover, Section 3.6 of the FEIS includes an explanation for why the creation of species-specific limits on all 40 White List fish species was considered and dismissed as an alternative:

> This alternative was dismissed because the best available data on what is considered to be sustainable reef fish harvest suggests that 5% to 25% of populations is sustainable for similar reef species (Ochavillo and Hodgson 2006). Based on historic collection rates, collection under any of the alternatives analyzed is below the lower end of this range (i.e., <5%) for all species except the Yellow Tang (see Section 5.5.1). Therefore, bag limits for species that do not already have bag limits do not appear to be warranted under any of the alternatives considered. Bag limits already exist for the top 3 collected species (Yellow Tang, Kole, Achilles Tang), and the Preferred Alternative includes a 50% reduction in the Achilles Tang bag limit from 10/day to 5/day. Furthermore, while Yellow Tang collection under some alternatives may be higher than 5%, Yellow Tang populations have significantly increased in all management areas (including those open to commercial aquarium collection) since establishment of the WHRFMA (DAR 2019a), suggesting that current management strategies for this species have been successful.[7]

Evaluation of BLNR's comment on species-specific limitations on fish collection within its May 30 Non-Acceptance Findings is similar to a determination of EIS sufficiency under HEPA: Decisions made by BLNR should be considered in light of previous determinations. When determining EIS sufficiency, review of an EIS is limited only to comments listed in response to the DEIS. *Price* at 184. Also, when such comments are addressed in the DEIS, an exhaustive analysis is not required to approve an FEIS. When addressing those comments, the rule of reason dictates the FEIS's discussion of a topic be in good faith and sets forth "sufficient information to enable the decision-maker to consider fully the environmental factors involved." *Id.* Employing the rule of reason, the FEIS adequately discusses the take limits in good faith and provides evidence allowing the approving agency to consider the issue.[8] The alternative of bag limits was adequately considered in the FEIS, so not ultimately including such limits on fish collection within the preferred alternative is not a basis for denying the FEIS under HEPA.

PIJAC Appeal at 10-12 (footnotes omitted).

64. In its Response to PIJCA's appeal, BLNR further stated:

> The action proposed by PIJAC is the issuance of permits that at least on their face would allow unlimited take of various species of fish. The Board members are well within their rights to take this fact into account in their decision making. PIJAC disagrees but nothing it its arguments show that the Board's decision is

wrong or an abuse of discretion.

BLNR Response at 7.

65. PIJAC further responds to BLNR in Appendix H to its Appeal as follows:

> As stated in the response to comments (Appendix C to the FEIS), "the FEIS uses the bet available data (past commercial aquarium collection) to predict the reasonable outcome of issuance of permits for five additional years and applies a reasonably foreseeable increase in collection each year of the analysis period." Section 5.4 of the FEIS summarized historic collection rates, including both average and maximum annual collection by species for all fishers and for the 10 fishers requesting permits under the Proposed Action, and also describes the annual growth rate applied (1.49%) based on growth of the fishery as reported by the DAR. Therefore, the FEIS acknowledges that catch can, and is expected to, change over the 5-year analysis period. The DAR acknowledges in their May 22, 2020 letter to the BLNR that the historical species-specific harvest data disclosed in the FEIS provide conservative and liberal estimates of harvest rates.

66. On pages 7-8 and footnote 3, PIJAC cites to FEIS Exhibit A, and FEIS Section 5.4.1.1 which "discusses why Marine Aquarium Trade Coral Reef Monitoring Protocol: Data Analysis and Interpretation Manual by D. Ochavillo and G. Hodgson (2006) represents the best available science for establishing a sustainable threshold." PIJAC further states on page 8 that "Most importantly, the DAR itself also acknowledged that this study represents the best available science in its Staff Recommendations to BLNR…"

67. As the court stated in Umberger:

> This analysis is flawed because the properly defined activity for the purposes of the HRS Chapter 343 analysis must encompass the outer limits of what the permits would allow and not only the most restrictive hypothetical manner in which the permits may be used. That is, as discussed, the analysis must proceed from the properly defined activity allowed under aquarium collection permits[.]

Umberger v. Dep't of Land & Nat. Res., 140 Haw. 500, 517, 403 P.3d 277, 294 (2017)

68. Further, HAR § 11-200-23(b) provides that an EIS may be accepted only if all of the acceptability criteria are met.

69. Prior to submission of the draft EIS, BLNR requested PIJAC to include a discussion of bag limits for each of the White List species. Ex. A (FEIS) at Appendix C, page 2 (Jan. 7, 2020 DLNR comments on the Draft EIS). As discussed below in Parts II and III, PIJAC did not propose bag limits for each of the White List species.

70. Although Applicant asserts that the annual estimated collection would be the "maximum" under the EIS, there is no commitment from the Applicant on its proposed maximum take. Without knowing what the proposed maximum take is for the Proposed Action, BLNR concluded that it could not determine the maximum impact of the Proposed

Action from the EIS. See, e.g., FEIS § 5.4; see also Ex. 3 (Transcript) at 52 (Chair Case noting that you cannot analyze impacts when you don't know how much fish will be taken out).

71. It seems that based on Stantec's response, Applicant felt a reasonable estimate was given based on historical collection rates. What is in dispute is the definition of "reasonable." Stantec also notes that DAR feels the historical species-specific data is conservative.

72. Given the lack of the bag limits for most of the White List species in DLNR's administrative rules, it is understandable that BLNR came to the conclusion that it could not issue permits with catch limits if it approved the EIS. A permit issued without catch limits would leave BLNR without the ability to enforce against permittees who may over-collect, causing impacts that were not analyzed by the EIS. It was also reasonable for BLNR to conclude that it could not determine the likely impact of the Proposed Action without bag limits for each species. The BLNR has articulated a satisfactory explanation for its action, and there is a rational connection between the facts found and the choice made, with the decision based upon consideration of the relevant factors involved. See FOF 32 (citing Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, (1983)).

73. Therefore, under the arbitrary and capricious standard, it was not arbitrary and capricious for the BLNR to reject the EIS where the decision maker determined that the EIS did not fully consider the impacts of the Proposed Action.

74. The Council is of the opinion that, had BLNR approved this EIS, BLNR could only have issued permits with catch limits that are within the limits proposed in the EIS. Furthermore, it is the Council's understanding that such permits are for a term of 1 year. It seems that, should impacts outside of those analyzed by the EIS occur after the first year of permitting, BLNR could conceivably refuse to issue the permits the following year. See discussion on page 25 of BLNR Ex. 3 (Transcript). However, at the May 22, 2020 BLNR meeting, Applicant took the position that BLNR could not issue permits with bag limits unless there is a rational basis for doing so, i.e., that the scientific information indicated a reason for it. Yet the Applicant felt that if that scientific information was not in the EIS and the BLNR tried to impose conditions such as an annual limit, such action could be considered to be arbitrary and capricious. BLNR Ex. 3 (Transcript) at 18 to 19 (discussion with James Lynch).

75. Further, recognizing the emphasis that BLNR placed on the importance of catch limits for all species in its decision making on the EIS, the Council discussed that BLNR could set such catch limits by administrative rule.

II. BLNR DID NOT ACT ARBITRARILY AND CAPRICIOUSLY WHEN IT DID NOT ACCEPT THE EIS FOR REASON #2

76. BLNR's second reason for non-acceptance of the EIS is:

> 2. Except for the paku'iku'i, or Achilles tang, the FEIS does not contain any daily bag limits on any of the "White List" species which the fishers are allowed

to take, and there are no annual limits on the take of any species except that the total take of paku‘iku‘i would be limited by the fact that only ten permits with a daily limit of five each would be allowed under the proposed action. In addition, there is no scientific basis provided for reducing daily take of paku‘iku‘i take from ten to five per permit, nor any analysis of the impact of that level of take on the population of paku‘iku‘i.

77. PIJAC's Appeal at 12-14, Section 3 titled "Failure to include a limit on fish collection in proposed action is not a basis for denial," claims that the BLNR failed to understand HEPA' requirements and that the BLNR based its rejection on inapplicable legal standards, and that failure to provide species specific limitations on fish collection is not a valid basis for BLNR to deny the FEIS. PIJAC cites Section 3.6 of the FEIS as the explanation for why the creation of species-specific limits on all White List fish species was considered and dismissed as an alternative. Section 3.6 of the FEIS states that the alternative was dismissed because the best available data on what is considered to be sustainable reef fish harvest suggests that 5% to 25% of population is sustainable for similar reef species citing (Ochavillo and Hodgson 2006).

78. PIJAC further responded to this point in Appendix H:

> As stated in the response to comments (Appendix C of the FEIS), "there is no annual take limit under any of the alternatives under consideration. However, bag limits exist for certain species (see Section 1.2.3.2 of the EIS), and would be reduced for the Achilles Tang to 5 per day." Section 3.6 of the FEIS includes the following explanation for why creation of species-specific bag limits for all 40 White List Species was dismissed as an alternative:
>
> a. "This alternative was dismissed because the best available data on what is considered to be sustainable reef fish harvest suggests that 5% to 25% of populations is sustainable for similar reef species (Ochavillo and Hodgson 2006). Based on historic collection rates, collection under any of the alternatives analyzed is below the lower end of this range (i.e., <5%) for all species except the Yellow
>
> Tang (see Section 5.5.1). Therefore, bag limits for species that do not already have bag limits do not appear to be warranted under any of the alternatives considered. Bag limits already exist for the top 3 collected species (Yellow Tang, Kole, Achilles Tang), and the Preferred Alternative includes a 50% reduction in the Achilles Tang bag limit from 10/day to 5/day. Furthermore, while Yellow Tang collection under some alternatives may be higher than 5%, Yellow Tang populations have significantly increased in all management areas (including those open to commercial aquarium collection) since establishment of the WHRFMA (DAR 2019a), suggesting that current management strategies for this species have been successful."
>
> Regarding the justification for the reduced bag limit on the Achilles Tang, Section 5.4.1.4 includes the following language in footnote 15 "a 50% reduction is

assumed, as collection decreased markedly from an average of 7,732 and a maximum of 13,615 per year prior to imposing the bag limit of 10. Since the bag limit of 10 was imposed, collection has stayed fairly constant, ranging from 5,473 to 5,757 per year (difference of 284 fish), suggesting that fishers may be collecting near the maximum allowed under the bag limit since there has been no growth in collection. Therefore, if fishers are currently collecting at or near the maximum allowed under the bag limit, it is reasonable to assume that reducing that bag limit by 50% would result in a 50% reduction in collection."

The impact of the collection of Achilles Tang on the population is provided for each alternative analyzed in the FEIS. Island-wide impacts are summarized in Table 5-14 in Section 5.5.1, and WHAP Open Area population impacts are included in Appendix B. These impacts include the reduced bag limit for the Achilles Tang Conservation Alternative (Section 5.4.1.4) and the Preferred Alternative (Section 5.4.1.5).

79. As discussed above in Part I, in BLNR's comments to the draft EIS, PIJAC was specifically asked by the agency to include bag limits for the white list species. Despite knowing that this was something that the agency was looking for to aid in its decision-making on the EIS, PIJAC took the position that bag limits were not necessary for nearly all of the White List species because (1) the populations of those species are increasing; and (2) the estimated take based on past take of 8 of the 10 permittees under the Proposed Action are within the sustainable take range discussed in the Ochavillo and Hodgson 2006 study from the Philippines.

80. Under HAR § 11-200-17, an EIS is required to describe the proposed action, including a "description of all irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented." HAR § 11-200-17(k). PIJAC's failure to include bag limits and maximum take estimates results in the Proposed Action not being sufficiently described and a potential that the scope of all impacts is not considered.

81. As recognized by BLNR, there are issues with relying on the Ochavillo and Hodgson 2006 study to determine what constitutes the sustainable reef harvest. While the species studied in Ochavillo and Hodgson were similar at genus level, they are not at a specific level. While there may be some similarities with the genre of species in Hawai‘i, there were not any or very few identical species. Furthermore, Hawai‘i is incredibly unique from an ecological standpoint. Therefore, there are concerns with using scientific data from the 14 year old Ochavillo and Hodgson 2006 study and several commenters questioned the use of this data. See, e.g., Ex. 3 (Transcript) at 26-29; FEIS at PDF pages 1681-82.

82. Given the lack of data to support the purported 5-25% sustainable take level in Hawai‘i, it was not arbitrary and capricious for BLNR to question this study as applied to the Proposed Action and the WHRMFA.

83. Furthermore, the proposal to reduce daily take of paku‘iku‘i by 50% seems arbitrary and

no scientific reason was given for this except what seems to be an attempt to accommodate BLNR's request for take limits by reducing an existing take limit rather than proposing bag limits for all White List species.

III. BLNR DID NOT ACT ARBITRARILY AND CAPRICIOUSLY WHEN IT DID NOT ACCEPT THE EIS FOR REASON #3

84. BLNR's third reason for non-acceptance of the EIS is:

> 3. The existing regulations of the WHRFMA do not contain any daily or annual bag limits other than for the paku'iku'i, a "slot limit" for yellow tang, and a limit on kole over 4" long. To project how many fish are likely to be taken, the FEIS relies completely on the historical catch records of these ten fishers for the forty "White List" species. See Tables 5-2 and 5-11. The FEIS concludes that 160,832 fish would be taken annually, based on the maximum number taken by the ten permittees in any year, during the 2000-2017 period. See §5.4.1.5. The assumption that historical catch records adequately predict the future take has a number of shortcomings.

85. Applicant's response in Appendix H to the Appeal states: "See Response to Comment #1. Chair Case did not elaborate on any specific shortcomings to using historic collection data."

86. Pages 27-28 of the EIS and Table 4.2, Section titled 10 Fishers who disclosed data, # permits reporting column of the EIS provides that historic take is estimated from 2 to 8 of the 10 fishers in 2000 to 2017.

87. While it is understandable for Applicant to have used historical records to estimate projected take under the Proposed Action, the overarching problem with the EIS remains that there is no upper limit on catch and therefore the maximum impact of the Proposed Action is not analyzed by the EIS.

88. Furthermore, the EIS does not use the historical catch records for all 10 fishers; rather, the EIS uses a subset of 2 to 8 for any given year. Had catch records from all 10 fishers been used, perhaps Applicant's argument that the estimates are conservative would be reasonable. However, given this information, it appears Applicant may have underestimated the take expected from all 10 fishers. There is no indication in the EIS that Applicant cushioned its estimate to account for the estimated take from all 10 permittees.

89. Thus, with the absence of bag limits, the potentially incomplete historic take based on only 2 to 8 of the 10 fishers, and unknown collection effort which would essentially allow unlimited take, it was not arbitrary and capricious for BLNR to reject the EIS on this point given the difficulty that leaves BLNR to gauge what impacts are going to result from the Proposed Action.

IV. BLNR DID ACT ARBITRARILY AND CAPRICIOUSLY WHEN IT DID NOT ACCEPT THE EIS FOR REASON #4

90. BLNR's fourth reason for non-acceptance of the EIS is:

> 4. It appears that no more than 8 of the 10 fishers were active in any previous year. See Table 4-2. It seems likely that all ten fishers will be active, given they had sufficient interest in the permits to fluid the EIS, and that they will have a monopoly on the use of fine-mesh nets to collect fish in the WHRFMA.

91. Applicant's response as provided in Appendix H:

> As stated in the response to comments (Appendix C of the FEIS), "the October 2017 supreme court ruling was that a HEPA review needed to be completed before Aquarium Permits could be issued. This EIS is fulfilling that requirement for 10 Aquarium Permits. Any additional permits requested would need to undergo their own HEPA review." Therefore, this action does not preclude others from getting permits or create a monopoly. The response to comments (Appendix C of the FEIS) also states "the Applicant does not have the authority to ban issuance of Aquarium Permits for any area."

92. As stated in the EIS, the EIS is intended only to consider the impacts of BLNR authorizing the proposed 10 Aquarium Permits.

93. Applicant is correct that BLNR has no legal authority to ban or prevent the issuance of Aquarium Permits.

94. There is no basis for BLNR to conclude that by approving the EIS, the 10 fishers that constitute the Applicant would have a monopoly on the use of fine-mesh nets to collect fish in the WHRFMA.

95. BLNR is responsible for issuing the necessary Aquarium Permits for the WHRFMA and controls who can fish in the WHRFMA, not the Applicant. Furthermore, there is nothing under *Umberger*, BLNR's rules or the HRS that would prevent BLNR from issuing Aquarium Permits to other applicants who completed the necessary HRS 343 review. Accordingly, it was arbitrary and capricious for BLNR not to approve the EIS on this point.

V. BLNR DID NOT ACT ARBITRARILY AND CAPRICIOUSLY WHEN IT DID NOT ACCEPT THE EIS FOR REASON #5

96. BLNR's fifth reason for non-acceptance of the EIS is:

> 5. The FEIS has no information about the level of effort of these 10 fishers in prior years, i.e. whether they collected 100, 200, or 300 days a year, for example, and the amount of time spent collecting. It is possible that they could significantly increase their collection efforts and total take.

97. Applicant's response:

> As stated in Section 4.1.1 of the FEIS, commercial aquarium fishers on the island of Hawai'i often perform day or short overnight trips and fish approximately 3-4 days per week (Stevenson et al. 2011). See also response to Comment #1 regarding why historic collection is the best predictor of future collection, including application of an annual growth rate based on historic growth of the fishery

98. For the reasons set forth in Parts I, II and III above, BLNR did not act arbitrarily and capriciously when it denied approval of the EIS based on the lack of information on Applicant's collection effort.

VI. BLNR DID NOT ACT ARBITRARILY AND CAPRICIOUSLY WHEN IT DID NOT ACCEPT THE EIS FOR REASON #6

99. BLNR's sixth reason for non-acceptance of the EIS is:

> 6. The fishers could also or alternatively change what species they target for collection and increase the impact on some species

100. Applicant's response:

> Because it is assumed that this is a market-driven fishery, and fishers may alternatively change which species they catch, the FEIS used 18 years' worth of historic collection data and included both average and maximum collection rates to analyze impacts in Section 5.4. Table 5-11 in the FEIS includes the average and maximum collection rates by species for all fishers, as well as for the 10 fishers who would be issued permits under the Preferred Alternative.

101. For the reasons set forth in Parts I, II and III above, BLNR did not act arbitrarily and capriciously when it denied approval the EIS based on the lack of information on Applicant's collection effort.

102. Some species are ecologically more important than others (i.e., certain herbivores). As recognized by Dr. Walsh in Ex. I to PIJAC's appeal, species are very nuanced in terms of their role in the ecosystem. Some species are of an upmost importance. Understanding that this is a market-driven industry, that necessarily means that certain species likely will be targeted more than others in any given year. Without bag limits for species ensuring that collection under the Proposed Action will not exceed the so-called sustainable reef take, again, there is no means to accurately assess the impacts of the Proposed Action.

VII. BLNR DID NOT ACT ARBITRARILY AND CAPRICIOUSLY WHEN IT DID NOT ACCEPT THE EIS FOR REASON #7

103. BLNR's seventh reason for non-acceptance of the EIS is:

> 7. The data in the FEIS show that these ten fishers take some species at a

very different rate than the fishery as a whole. For example, although the percentage taken of all species by the ten in the WHRFMA varies from a low of 7.0% in FY2000 (when only two were active) to 46.4% in FY2017 (Table 5-2), their percentage of take of individual species, at least in certain years, has been much higher. Table 5-11 gives the maximum catch in any one year for each of the "White List" species, and the maximum catch in any one year by the ten. The ten fishers took 83.7% of the lei triggerfish (252/301), 95.5% of the milletseed butterfly fish (402/421), and 89.2% of the Fisher's angelfish (257/288), and 54.6% of the kole (23,014/42,122.) On the other hand, they took only 9.1% of the ornate wrasse (1130/12,445). This demonstrates that collectors can, and do, selectively target some species more than others. (It is not clear whether the maximum year given for all collectors is the same year as that given for the maximum by the ten fishers. The basic point made here is valid in either case, however.)

104. Applicant's response in Appendix H to its appeal:

> See response to Comment #6. In addition, this is why the FEIS used data specific to the 10 fishers for analysis of the Preferred Alternative in order to account for any differing trends in collection.

105. For the reasons set forth in Parts I, II, and III above, BLNR did not act arbitrarily and capriciously when it denied approval the EIS based on the lack of information on Applicant's collection effort.

VIII. BLNR DID NOT ACT ARBITRARILY AND CAPRICIOUSLY WHEN IT DID NOT ACCEPT THE EIS FOR REASON #8

106. BLNR's eighth reason for non-acceptance the EIS is:

> 8. In order to assess the likely impact of the take, the FEIS should adequately analyze the sustainable level of take. The FEIS relies on Ochavillo and Hodgson (2006) for the proposition that 5-25% of a population is a sustainable level for annual take. The FEIS has an inadequate justification for the reliance on this publication as the best available science. The FEIS does not provide data for nor statistically analyze the sustainability of that level of take for each type of fish, given each fish species' life span, population size, reproductivity rates and age at first reproduction.

107. Applicant's response:

> As stated in Section 5.4.1.1 of the FEIS, "Ochavillo and Hodgson (2006) suggest collection of between 5% and 25% is sustainable for various reef species in the Philippines that are similar to those on the White List (e.g., tang, wrasse, butterflyfish, angelfish, triggerfish)" and "Similar data for the White List Species are not available to determine species-specific sustainable thresholds; therefore, this research represents the best available science." Mr. VanDeWalle also reiterated this in his testimony to the Board, stating "while the Final EIS acknowledges that the study was done in the Philippines and does not specifically

include the White List species, similar data do not exist for Hawai'i or the White list species and therefore the study represents the best available science." Most importantly, the DLNR itself also acknowledged that this study represents the best available science in their letter to the BLNR dated May 22, 2020 and approved by Chair Case.

Nonetheless, collection is anticipated to be largely below the lower end of this range. As concluded in Section 5.6 of the FEIS, under the Preferred Alternative "collection of the 40 White List Species represents less than 2% of each species' island-wide population when looking at average or maximum collection rates." In addition, when analyzed compared to WHAP Open Area population estimates, Appendix B of the FEIS states the following: "in conclusion, of the 36 White List Species for which Open Area population estimates exist, collection under the Preferred Alternative would result in collection of less than 5% of the Open Area population for 31 species. For the remaining five species for which collection would be above 5% of the Open Area population, four have had stable or increasing populations even under higher collection rates over the past 18 years, and it is anticipated that the lower collection rates under the Preferred Alternative would not result in decreasing population trends. The last species, the Achilles Tang, has had significant declines in areas both open and closed to aquarium collection, suggesting that aquarium collection is not driving the decline (DAR 2019a). Nevertheless, the Preferred Alternative would be anticipated to lessen the impact on the Achilles Tang by limiting the number of Aquarium Permits to 10, and by imposing a reduced bag limit of 5 Achilles Tang per day."

108. For the reasons set forth in Parts I, II and III above, BLNR did not act arbitrarily and capriciously when it denied approval the EIS based on Applicant's reliance on the Ochavillo and Hodgson (2006) study for the sustainable level of take in the WHRFMA and Applicant gives no adequate reason for relying on this data. While the Council recognizes that the Ochavillo and Hodgson (2006) study may be the "best available science" given that no studies in Hawai'i exist, the applicability of the study to Hawai'i and the WHRFMA is questionable given Hawai'i's unique resources. It is incumbent on the Applicant to make the agency comfortable with data.

109. Furthermore, the EIS does not define sustainable level of take for each of the White List Species individually or cumulatively.

IX. BLNR DID NOT ACT ARBITRARILY AND CAPRICIOUSLY WHEN IT DID NOT ACCEPT THE EIS FOR REASON #9

110. BLNR's ninth reason for non-acceptance of the EIS is:

> 9. In §5.4.1.5, the FEIS uses Table 5-11 to compare the take of various species to the CREP population estimates, to show that they are well below the claimed 5-25% sustainable level. In Table 4-5, however, the harvest/population ratios of four or five species (depending on the year) in the West Hawai'i open areas at 30'-60' depth exceeded 5% for several species, and are as high as 39.67%

for the paku‘iku‘i in 2017-2018. The West Hawai'i open area population estimates may be more relevant than the island-wide CREP data.

111. Applicant's response:

> Appendix B of the FEIS includes an analysis of collection compared to the WHAP Open Area population estimates. This Appendix was added in response to public comment on the DEIS.

112. Although the WHAP Open Area population estimates were added as an appendix to the EIS, it is unclear whether such data was incorporated into Table 5-11 to compare take on a population basis for each species. Furthermore, it appears that BLNR took issue with how the different data sets (CREP, WHAP and DAR) were extrapolated in the EIS and whether the CREP data was properly used in light of the WHAP data being available for the specific area of the Proposed Action.

113. Where there is a site-specific data set for where the action and impact is taking place, it is reasonable to conclude that greater emphasis would be given to such data.

114. Ultimately, the Council does not have the scientific expertise to determine whether or not such data was in fact improperly extrapolated and such determinations are well within the authority of the agency. Since the Council cannot conclude that BLNR did act arbitrarily and capriciously in its non-acceptance of the EIS, the Council defers to BLNR on this point.

X. BLNR DID NOT ACT ARBITRARILY AND CAPRICIOUSLY WHEN IT DID NOT ACCEPT THE EIS FOR REASON #10

115. BLNR's tenth reason for non-acceptance of the EIS is:

> 10. The FEIS has an inadequate discussion of the role of herbivores. Many of the "White List" species are herbivores.

116. Applicant's response in Appendix H:

> The FEIS discusses the importance of herbivores in Section 5.4.1.2 under the "Reef Habitat" subsection. The response to comments (Appendix C of the FEIS) states the following: "It is acknowledged that herbivore conservation is important; however, please note that as stated in the EIS the DAR (2019a) reported that herbivore biomass has not changed since 2003 in the open areas or FRAs and has increased by 30.8% in the MPAs. While there has been no significant change in Open Areas or FRAs, there has still been an increasing trend, with a 14.4% increase in herbivore biomass in FRAs and a 26.0% increase in herbivore biomass in Open Areas between 2003 and 2017 (DAR 2019a, Gove et al. 2019). These trends occurred even with the pressure of commercial aquarium collection, which was occurring over the same time period."

117. PIJAC further provided additional information describing the role of herbivores in

Appendix I to the Appeal, however, BLNR did not have this information available prior to making its decision on the EIS.

118. The EIS recognizes that 9 out of 10 or 98% of the total take is of herbivores. Notably, Appendix I recognizes that certain herbivores play a key role in overall health and subsequent recovery of coral reefs, however, the EIS does not include a discussion on or identify which herbivores on the White List are of more importance than others, or a discussion on the ecological role these species play.

119. Furthermore, as discussed in Parts I, II, and III above, because the EIS does not propose a maximum take of such species, the impacts to such species cannot be determined. Accordingly, BLNR was not arbitrary and capricious in not approving the EIS on this point.

XI. BLNR ACTED ARBITRARILY AND CAPRICIOUSLY WHEN IT DID NOT ACCEPT THE EIS FOR REASON #11

120. BLNR's eleventh reason for non-acceptance the EIS is:

> 11. The FEIS does not adequately discuss relevant negative findings, for example, the reduced numbers of aquarium fish at collection sites found by Tissot and Hallacher (2003). The FEIS need not agree or disprove the negative findings, but it should discuss them.

121. Applicant's response:

> While the FEIS does not discuss the findings on aquarium fish numbers by Tissot and Hallacher (2003), it does disclose more recent population trend data from Open Areas published by the DAR (2019a). Tissot and Hallacher (2003) was used as a reference for impacts on coral, however, the impact on aquarium fish numbers were not considered relevant for this EIS as the data were collected in 1997-1998, which was prior to establishment of the WHRFMA and the current existing regulations on aquarium fish collection. Therefore, more recent DAR (2019a) data were used to look at trends in the populations of the 40 White List Species.

122. The Council agrees with Applicant on this issue. The information related to population trend data was included on pages 117-18 of the FEIS. It was appropriate for the Applicant to use the more recent fish population data. The 2003 study (based on data collected in 1997 to 1998) does not reflect the fish population increases resulting from conservation efforts and predates establishment of the WHRFMA. As discussed on page 7 of the DAR Staff Report, the Tissot and Hallacher (2003) study was used for a limited purpose.

XII. BLNR DID NOT ACT ARBITRARILY AND CAPRICIOUSLY WHEN IT DID NOT ACCEPT THE EIS FOR REASON #12

123. BLNR's twelfth reason for non-acceptance of the EIS is:

> 12. The extreme threat of climate change on our reefs warrants extreme caution in reviewing activities that may affect them. The FEIS should further discuss potential effects of present and future levels of climate change including ocean warming, ocean acidification, coral bleaching, extreme stones, and resulting reef destruction and algae growth, and the potential for mitigating harm (i.e. further regulation) if the proposed fishery has unanticipated or greater negative effects with climate change

124. Applicant's response:

> On the topic of climate change, the intent of the FEIS was not to include an exhaustive discussion on climate change, but instead focuses on the contribution of commercial aquarium collection when added to the impacts of climate change. Specifically, in Section 5.4.3.5 of the FEIS, the following is stated related to aquarium collection's contribution to climate change impacts: "based on studies in the Great Barrier Reef, fishing pressure had minimal effect on bleaching (Hughes et al. 2017). On the island of Hawai'i, the total cover of hard coral decreased between 2003 and 2017 in MPAs, FRAs and in Open Areas, with the smallest decline seen in Open Areas, though all areas saw significant declines ranging from 48.7% in Open Areas to 57.8% in FRAs (DAR 2019a, Gove et al. 2019). Given that Open Areas did not see a more severe decline than areas closed to commercial aquarium collection, it is anticipated that commercial aquarium collection has a less than significant impact on coral declines."
>
> In addition, the FEIS states the following in the response to comments (Appendix C of the FEIS): "the EIS does not claim that climate change impacts, when combined with other cumulative impacts and the Preferred Alternative, will be less than significant. The EIS does say the following: "When the full range of impacts to White List Species are considered (e.g., recreational aquarium collection, non-aquarium commercial fishing, recreational fishing, tourism, climate change), there is a significant cumulative impact to some White List Species. However, the Preferred Alternative is not a significant contributor to the cumulative effect upon the environment." Collection under the Preferred Alternative is less than 2% of any population of White List Species."

125. While Section 5.4.3.5 of the EIS acknowledges that climate change is impacting the WHRFMA, it does not include a full discussion of the types of impacts that may occur to the White List species as a result of climate. Instead, Applicant focuses on the impacts to the reef itself and concludes that the Proposed Action is not a significant contributor to cumulative impacts. And while Applicant concludes that the Proposed Action will result in collection of less than 2% of any population of White List Species, there is no showing that take of 2% of the population would result in a less than significant impact. (As discussed above, there are serious questions as to the 5-25% sustainable level of take that Applicant has proposed under the Ochavillo and Hodgson 2006 study.)

126. BLNR concluded that such a discussion was not sufficient to determine the impacts from climate change, in combination with the cumulative impacts of the Proposed Action, and

such a conclusion is not arbitrary or capricious.

XIII. BLNR DID NOT ACT ARBITRARILY AND CAPRICIOUSLY WHEN IT DID NOT ACCEPT THE EIS FOR REASON #13

127. BLNR's thirteenth reason for non-acceptance of the EIS is:

> 13. The FEIS failed to sufficiently consider cultural impacts. The FEIS improperly concluded that the impacts to cultural resources under any of the proposed alternatives would be less than significant based on the flawed premise that cultural impacts would only occur if the proposed action would cause a significant decline in the population of a White List Species considered to be a cultural resource. A number of testimonies expressed misgivings from a cultural standpoint with the proposed activity itself, regardless of impact on resources, and this was not adequately considered in concluding no significant impact.

128. Applicant's response:

> As stated in Section 5.3.1 of the FEIS, "a full analysis of the cultural impacts of commercial aquarium collection is found in the Cultural Impact Assessment (CIA) located in Appendix A." The FEIS further acknowledges in this section that "many of the 40 White List Species have a cultural significance in Hawai'i, and there are distinct differences between the traditional Native Hawaiian approach to fish harvest and management and the western model approach." Nonetheless, the CIA concluded that cultural impacts would occur if issuance of Aquarium Permits under an alternative would cause a significant decline in the population of a White List Species considered to be a cultural resource, either directly through the collection of fish or indirectly through habitat impacts.

129. At the May 22, 2020 meeting, BLNR recognized that in many parts, the EIS was well done. Ex. 3 (Transcript) at 51. The Council also finds that while the Cultural Impact Assessment (CIA) appears to have been conducted in a thorough, respectful manner, recognition of the important cultural aspects are not reflected in the body of the EIS.

130. HAR section 11-200-17(m) requires that an applicant address and ". . . consider mitigation measures to avoid, minimize, rectify, or reduce impact, including provisions for compensation for losses of cultural, community, historical, archeological, fish and wildlife resources. . ."

131. In Ka Paʻakai, the Hawaiʻi Supreme Court articulated an analytical framework "to effectuate the State's obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private interests[.]" 94 Hawaiʻi at 46-47, 7 P.3d at 1083-84.

132. Under Ka Paʻakai, an agency, in order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible, must examine, and make specific findings and conclusions as to:

> (1) the identity and scope of "valued cultural, historical, or natural resources in the [application] area, including the extent to which traditional and customary native Hawaiian rights are exercised in the [application] area; (2) the extent to which those resources – including traditional and customary native Hawaiian rights – will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the [agency] to reasonably protect native Hawaiian rights if they are found to exist.

Id. at 47, 7 P.3d at 1084 (footnotes omitted).

133. Therefore, prior to making any decision that may impact native Hawaiian traditional and customary resources or practices, BLNR must be able to identify the practices or resources, understand the extent of the impact to those resources, and mitigate any potential impacts.

134. Although the EIS acknowledges generally that there is cultural importance of 33 of the 40 White List species to native Hawaiians and for what purposes, the analysis of the impacts to cultural practices and resources are observed through a purely ecological lens. The vast majority of those consulted for the CIA identified cultural impacts from the practice itself, in that the removal of these species for commercial purposes does not align with the Hawaiian worldview of caring for the ocean and its resources and is not a subsistence practice. CIA at 108-33. Many also expressed concern with the way in which these marine resources are extracted. CIA at 135.

135. Page 135 of the CIA further identifies several mitigation measures:

> No matter how or why these fish are extracted, their removal constitutes an irrevocable loss of bio-cultural resources that could potentially have an adverse effect on the overall health and sustainability of the fishery. In light of this, the authors recommend that PIJAC, and any commercial aquarium fishers who intend to conduct their operations within the WHRFMA, consider developing or partnering with governmental and/or local organizations to help improve the management and sustainability of the nearshore fishery as a means to not only sustain, but actually improve reef-fish populations in the take areas. Such marine management practices should be a part of all commercial marine endeavors, and not exclusively imposed on any one user group. To further limit the potential for cultural impacts (through the depletion of culturally significant fish species), it is recommended that the existing bag limits and no-take areas within the WHRFMA remain in-place, but be monitored and adjusted periodically in order to account for fluctuations in the local fish stocks. Furthermore, it is recommended that the applicant (PIJAC) continue to work with the approving agency (DLNR), and the various other user groups within the WHRFMA, to help improve the transparency of the accounting methods for fish takes, and the enforcement of the existing rules and regulations that govern those takes.
>
> With respect to limiting the potential for cultural impacts, DLNR-DAR plays a significant role in managing and enforcing the rules and regulations that are

intended to support the sustainability, viability, and fecundity of the WHRFMA. As voiced by many of the consulted parties, the lack of support and funding have hampered DLNR-DAR's ability to fulfill its fiduciary responsibility, namely to enhance, protect, conserve, and manage Hawai'i's unique and limited resources, which are supposed to be held in public trust for the current and future generations of the people of Hawai'i nei, and visitors alike. While achieving this goal is not an easy task, and it certainly cannot be achieved by any single means, DLNR-DAR should be proactive in seeking additional funding sources, and work with the various user groups who are most familiar with the WHRFMA, including the commercial aquarium fishers, to improve its enforcement capacity. As expressed by multiple community members, the lack of enforcement by DLNR-DAR has resulted in community members feeling the need to police their respective areas themselves, which ultimately diverts time and energy from their desire to educate the next generation of Hawai'i fishers and to perpetuate their own cultural practices. As part of improving enforcement, as expressed by some of the consulted parties, the DLNR-DAR should consider incorporating more traditional Hawaiian fishery resource management practices (as detailed above) into the management of the WHRFMA, and representatives from the aquarium fishing industry should continue to work with the other user constituencies (i.e., Native Hawaiian organizations) that maintain an interest in the WHRFMA.

136. However, because the EIS concludes that there will be no significant ecological impacts on the White List species, there will be no significant cultural impacts. EIS §§ 5.3.1 at 94, 5.3.3 at 95. Though some consulted individuals expressed specific cultural concerns with respect to the white-list species, others stressed the ecological importance of the fish, and the need for them to live out their life cycles in their natural habitats. CIA at 135. As mitigation, Section 5.3.3 of the EIS proposes to limit the number of Aquarium Permits issued, limit collection using fine mesh nets to the WHRFMA, and reduce the bag limit for Achilles Tang. Accordingly, the EIS does not propose or even discuss mitigation measures specific to reducing cultural impacts that are not ecological in nature.

137. As discussed above, the lack of data supporting the purported 5-25% sustainable take rate is concerning as to its applicability to Hawai'i and the WHRFMA. If that science is incorrect and significant impacts flow from a much lower level of take, there could be significant impacts to ecological resources and under the Applicant's logic, to cultural resources.

138. Recognizing that there could be significant impacts caused by the Proposed Action which are not measured on an ecological basis, and the uncertainty in the science supporting its no significant impact conclusion, it would have been appropriate for Applicant to include a discussion of mitigation measures to address those non-ecological impacts. Without such a discussion, BLNR could not properly perform the required Ka Pa'akai analysis. Accordingly, BLNR did not act arbitrarily and capriciously when it declined to approve the EIS on this basis.

XIV. BLNR ACTED ARBITRARILY AND CAPRICIOUSLY WHEN IT DID NOT ACCEPT THE EIS FOR REASON #14

139. BLNR's fourteenth and final reason for non-acceptance of the EIS is:

> 14. The FEIS does not adequately discuss the effect of illegal aquarium fishing on the numbers of projected sustainable take of fish species

140. Applicant's response as set forth in Appendix H:

> The cumulative impacts of illegal take (poaching or underreporting) are discussed in Section 5.4.3.6 of the FEIS, along with an explanation of how impact was analyzed based on the best available data. This section was added in response to comments on the DEIS.

141. The FEIS includes a separate and distinct section discussing the cumulative impacts of illegal take. See EIS Section 5.4.3.6. BLNR recognized that the Applicant cannot be at fault for not having the data to analyze the impact of illegal take.

142. EIS Section 5.4.3.6 provides (footnotes omitted):

> 5.4.3.6 Poaching and Underreporting
>
> It is acknowledged that poaching of aquarium fish could occur under any of the alternatives under consideration. For example, two fishers were cited in February 2020 for illegal harvesting of aquarium fish offshore of Kawaihae. An inspection of the vessel allegedly turned up aquarium fishing gear, including a small mesh net, and the hold contained 550 live tropical fish of various species. The two fishers were cited by DOCARE officers for violation of HAR 13-60.4.4(3). The boat, trailer, and various fishing gear were seized as evidence. While poaching does occur, there are no available data on the number of aquarium fish, and specifically White List Species, taken by poachers in a given year. However, we assume the impact of poaching would be the same under all alternatives under consideration.
>
> Analysis by the DAR (2014a) has shown that actual underreporting of catch is small, with a 3.5% difference between the number of animals reported caught and sold in 2010 and a 0.4% difference in 2014, which likely represent live releases and mortality. Therefore, it is anticipated that actual collection may be 0.4% to 3.5% higher than what had been reported prior to the October 2017 ban on fine-mesh nets, or 1,399 to 12,237 additional reef fish from the WHRFMA and East Hawai'i (based on 0.4% to 3.5% of the 349,620 average fish collected in a year). It is assumed that this rate of underreporting could occur under any of the alternatives under consideration (i.e., up to a 3.5% additional collection of any species). For example, under the Preferred Alternative, an additional 3.5% collection of the species with the highest collection of its population (Yellow Tang, at 1.93% of the population, see Table 5-14) would result in a collection of 2% of the population. All other species would have even lower rates of collection.

This 0.4% to 3.5% increase would also apply to the other alternatives under consideration.

143. It is unclear from BLNR's Decision what more Applicant could have done to expand on the discussion in this section of the EIS. Furthermore, the language in Section 5.4.3.6 of the EIS was added in response to comments on the EIS. See Appendix H.

144. Applicant cannot be at fault for not being able to provide information on illegal catch when that data is not know and no such mechanism is in place for measuring it. Furthermore, DLNR in the best position to determine such illegal take and to implement mechanisms for measuring such take and preventing it. This is an unfair burden to put on the Applicant and not a sufficient reason for BLNR not to accept the EIS. The Council did acknowledge, however, that the FEIS does not adequately define the phrase "sustainable take" even though it relies on that phrase in reaching certain conclusions (including in reference to the Ochavillo and Hodgson 2006 study).

XV. OTHER CLAIMS BY APPLICANT

A. BLNR FAILED TO JUSTIFY WHY ITS DECISION DIFFERED FROM THE DAR RECOMMENDATION

145. There is no statutory requirement to follow the report provided by an agency to an advisory board. Neither is there an obligation to justify whether such information and recommendations is deemed satisfactory or insufficient. Instead, the Board took the approach of citing the areas of insufficiency and inadequacy of the FEIS. As discussed above, the appellant and DAR felt the "rule of reason," could be applied to information and scientific studies in question, while the Board felt that data and conclusions fell short.

B. CHAIR CASE ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER BY SIGNING THE DAR REPORT, THEN VOTING AGAINST ITS RECOMENDATIONS

146. As Chair of DLNR, it is standard procedure for Ms. Case to sign reports such as the DAR provided to the BLNR. As Chair of the BLNR, she uses criteria for evaluating Board business that is not constrained by her role as Chair of DLNR. The appellant opines, without providing supporting evidence, that the inconsistency in the Chair signing the DAR report and thus approving it for placement on the BLNR agenda, and the BLNR Decision, must be arbitrary and capricious. There is no evidence in the record that Chair Case acted arbitrarily and capriciously on this point.

C. BLNR USED POST-HOC RATIONALIZATIONS IN ITS DECISION

147. The Merriam-Webster definition of post hoc rationalization is: "formulated after the fact."

148. There is no evidence in the record that BLNR used post-hoc rationalizations for its Decision.

149. The BLNR Response to PIJAC's Appeal of BLNR's Decision, Dated July 13, 2020, in Section V., Subpart 5., on page 8, is correct, and correctly addresses PIJAC's allegations that the BLNR used Post-Hoc rationalizations in its findings, and is hereby incorporated by reference in its entirety as the Council's response to PIJAC's allegation.

150. In this instant case, the BLNR's action of non-acceptance of the FEIS at the May 22, 2020 BLNR meeting, where environmental concerns were given appropriate consideration in the decision making, was on the record at the meeting. The BLNR does not put its decisions into written format in the middle of a meeting. The fact that the BLNR's decision was placed into a written format after the meeting, or includes additional and/or more specific reasons for its decision, does not make it a post hoc rationalization.

D. THE REJECTION WAS MOTIVATED BY POLITICAL PRESSURE

151. It is the belief of the Council that this allegation is purely speculative and Applicant identifies no evidence in the record supporting this claim.

152. The BLNR Response to PIJAC's Appeal, in Section V., Subpart 6., on pages 9-10 correctly addresses PIJAC's allegations that "Chair Case's decision" is invalid because of external political pressure, and is hereby incorporated by reference in its entirety as the Council's response to PIJAC's allegations.

153. There is a presumption that the BLNR upheld its duty without political pressure, and PIJAC's allegations did not overcome this presumption.

154. In the case In re Water Use Permit Applications, the governor made several general statements about his own views of the case. Although they related directly to the dispute before the Commission, the comments arose in public forums apart from the instant proceeding and reached the Commission indirectly. The Hawai'i Supreme Court found that in cases of alleged political pressure, evaluation of the pressure must focus on the *nexus* between the pressure and the actual decision maker, stating that:

> the proper focus is not on the content of . . . communications in the abstract, but rather upon the relation between the communications and the adjudicator's decision making process. In the absence of evidence of direct communication with the decision makers, as in this instant case, the allegation of political pressure fails to demonstrate the requisite "nexus between the pressure and the actual decision maker. . . . As a result, we have no choice but to presume that the Commission upheld its duty to decide the case without taking the governor's remarks into consideration. (Emphasis added).

In re Water Use Permit Applications, 94 Haw. 97, 123-25, 9 P.3d 409, 435-37 (2000) (internal quotation marks and citations omitted).

155. The speculative allegations of PIJAC fail to demonstrate or prove any direct communication with Chair Case placing political pressure on her. Thus PIJAC's allegations of political pressure fail to demonstrate the requisite nexus between the

pressure and the actual decision maker.

XVI. SUMMARY

156. For the reasons set forth herein and under the Council's standard of review, the Council finds that the BLNR's reasons #1-3, 5-10, and 12-13 for non-acceptance of the EIS were not arbitrary and capricious. However, BLNR's reasons #4, 11 and 14 for not accepting the EIS were arbitrary and capricious.

157. As stated above in FOF 75, recognizing the emphasis that BLNR placed on bag limits to its analysis for this EIS, the Council discussed that BLNR could evaluate its own administrative rules and the appropriateness of placing bag limits within the administrative rules or permitting.

DECISION AND ORDER

Based on the foregoing findings of fact and conclusions of law, the decision of the BLNR not to accept the EIS is hereby affirmed.

DATED: Honolulu, Hawai‘i, August 13, 2020.

Keith K. Kawaoka

COUNCIL MEMBER
Keith Kawaoka
Honolulu, Hawai‘i

Roy K. Abe

COUNCIL MEMBER
Roy Abe
Kane‘ohe, Hawai‘i

COUNCIL MEMBER
Mahina Tuteur
Honolulu, Hawai‘i

Mary Begier

COUNCIL MEMBER
Mary Begier
Hilo, Hawai‘i

COUNCIL MEMBER
Michael Tulang
Hilo, Hawai‘i

COUNCIL MEMBER
Robert Parsons
Wailuku, Hawai‘i

COUNCIL MEMBER
Stephanie Dunbar-Co
Honolulu, Hawai‘i

COUNCIL MEMBER
Tessie Kinnaman
Koloa, Hawai‘i

COUNCIL CHAIR PERSON
Puananionaona Thoene
Honolulu, Hawai‘i

APPROVED AS TO FORM:

WILLIAM F. COOPER
Deputy Attorney General
State of Hawai‘i

ENVIRONMENTAL COUNCIL, DEPARTMENT OF HEALTH

STATE OF HAWAI‘I

IN THE MATTER OF PET INDUSTRY JOINT ADVISORY COUNCIL, Applicant v. BOARD OF LAND AND NATURAL RESOURCES, Respondent	Case No. DOH-EC-20-001 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies that the above-referenced document was served upon the following parties by email unless indicated otherwise:

Pet Industry Joint Advisory Council, through its attorney,
Geoffrey M. Davis
Geoffrey.Davis@klgates.com

Board of Land and Natural Resources, through its attorney,
William J.Wynhoff
Bill.J.Wynhoff@hawaii.gov

DATED: Honolulu, Hawai‘i, August 13, 2020.

William Cooper

WILLIAM F. COOPER
Deputy Attorney General
State of Hawai‘i