

State of Hawai'i  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Honolulu, Hawai'i 96813

May 22, 2020

Board of Land and Natural Resources  
State of Hawai'i  
Honolulu, Hawai'i

DETERMINATION OF WHETHER THE FINAL ENVIRONMENTAL IMPACT STATEMENT (FEIS) COMPLIES WITH APPLICABLE LAW AND ADEQUATELY DISCLOSES THE ENVIRONMENTAL IMPACTS OF PROPOSED ISSUANCE OF COMMERCIAL AQUARIUM PERMITS, COMMERCIAL MARINE LICENSES, AND WEST HAWAI'I AQUARIUM PERMITS FOR THE WEST HAWAI'I REGIONAL FISHERY MANAGEMENT AREA

**APPLICANT**

Pet Industry Joint Advisory Council

**LEGAL REFERENCE**

Hawaii Revised Statutes (HRS) Section 343-5(a) and Hawaii Administrative Rules (HAR) Section 11-200-23.

- (1) Propose the use of state or county lands or the use of state or county funds
- (2) Propose any use within any land classified as a conservation district

**LOCATION**

West Hawai'i Regional Fishery Management Area (WHRFMA), identified in Figure 1 of the Final Environmental Impact Statement (FEIS).

**ZONING**

Conservation District.

**CHARACTER OF USE**

Aquarium species collection inside the WHRFMA.

## **DESCRIPTION OF PROJECT**

The proposed project would allow commercial aquarium fish collection by 10 collectors for various fish species located in the nearshore habitats of the WHRFMA.

The subject of Item F-2 on the Board's May 22, 2020 meeting agenda is sufficiency of the full FEIS, which is available to the public online at:

[http://oeqc2.doh.hawaii.gov/EA\\_EIS\\_Library/2020-04-23-HA-FEIS-Hawaii-Island-Commercial-Aquarium-Permits.pdf](http://oeqc2.doh.hawaii.gov/EA_EIS_Library/2020-04-23-HA-FEIS-Hawaii-Island-Commercial-Aquarium-Permits.pdf)

## **PROPOSED ACTION**

The proposed action, as stated in the FEIS, is: "Collection of aquarium fish pursuant to the issuance of 10 Commercial Aquarium Permits under HRS § 188-31 and related permits ensuring lawful, responsible, and sustainable commercial collection of various aquarium fish species from nearshore habitats of the WHRFMA."

## **OBJECTIVE OF THE FEIS**

The objective of the FEIS is to comply with applicable law and provide information to the Board of Land and Natural Resources (Board) when it considers whether to issue 10 aquarium fish permits for the WHRFMA, along with the required CML and West Hawai'i Aquarium Permits, to allow these 10 commercial aquarium fishers to fish for aquarium fish. It is important to emphasize that issuance of the permits is not at issue in this submittal and will be addressed at a later date.

## **ALTERNATIVES CONSIDERED**

The FEIS considered five alternative courses of action: 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).

### **1. No Action**

Under the No Action Alternative, no aquarium fish permits would be issued for the entire island of Hawai'i, and the taking of aquarium fish or other aquatic life in the WHRFMA for commercial aquarium purposes would be prohibited. The collection of aquatic life for aquarium purposes elsewhere in the State would continue without the use of fine meshed nets.

### **2. Pre-Aquarium Collection Ban**

Under the Pre-Aquarium Collection Ban Alternative, DLNR would issue an unlimited number of aquarium fish permits as was done prior to the September 6, 2017 Supreme Court ruling, thereby allowing commercial aquarium fish collection using fine mesh nets

on the island of Hawai‘i, including within the WHRFMA, to resume. Under this alternative, upon issuance of an aquarium fish permit, a permit condition would be included in each permit limiting the geographic area covered by the permit to the island of Hawai‘i. Permittees would be required to abide by all existing rules and regulations set forth in HRS §§ 189-2, -3 (Commercial Marine License), HRS § 188-31 (aquarium fish permits), and would obtain a West Hawai‘i Aquarium Permit as required under HAR § 13-60.4. These rules and regulations include restrictions on equipment, restrictions on access to various areas, size and bag limits on various collected fish species, collection in the WHRFMA restricted to 40 White List Species only, and reporting requirements.

### **3. WHRFMA-Only Programmatic Issuance of Permits**

Under the WHRFMA-only Programmatic Issuance of Permits Alternative, DLNR would issue an unlimited number of aquarium fish permits for the WHRFMA, thereby allowing commercial aquarium fishers to use fine mesh nets within the WHRFMA. No aquarium fish permits would be issued for areas outside of the WHRFMA. As a result, aquarium collection using legal gear or methods other than fine-mesh nets could continue in East Hawai‘i, but the use of fine mesh nets would not be allowed. Under this alternative, upon issuance of an aquarium fish permit, a permit condition would be included in each permit limiting the geographic area covered by the permit to the WHRFMA. Permittees would be required to abide by all rules and regulations set forth in HRS §§ 189-2, -3 (Commercial Marine License), HRS § 188-31 (Permits to take aquatic life for aquarium purposes), and would obtain a West Hawai‘i Aquarium Permit as required under HAR § 13-60.4. These rules and regulations include restrictions on equipment, restrictions on access to various areas, size and bag limits on various collected fish species, collection in the WHRFMA restricted to 40 White List Species only, and restrictive reporting requirements.

### **4. Achilles Tang Conservation**

Under the Achilles Tang Conservation Alternative, which was the preferred alternative in the Final Environmental Assessment (FEA), DLNR would issue an unlimited number of aquarium fish permits, thereby allowing commercial aquarium fish collection using fine mesh nets on the island of Hawai‘i, including the WHRFMA. Permittees would be required to abide by all rules and regulations set forth in HRS §§ 189-2, -3 (Commercial Marine License), HRS § 188-31 (Permits to take aquatic life for aquarium purposes), and would obtain a West Hawai‘i Aquarium Permit, as required under HAR § 13-60.4. These rules and regulations include restrictions on equipment, restrictions on access to various areas, size and bag limits on various collected fish species, collection in the WHRFMA restricted to 40 White List Species only, and reporting requirements. In addition, under this alternative, the daily bag limit for commercial aquarium collection of Achilles Tang within the WHRFMA, with or without the use of fine-mesh nets, would be reduced from 10 fish per day to 5 fish per day.

## 5. Limited Permit Issuance (Applicant's Preferred Alternative)

Under the Limited Permit Issuance Alternative, DLNR would issue aquarium fish permits to the 10 aquarium fishers covered by the FEIS, thereby allowing these 10 individuals to resume commercial aquarium fish collection in the WHRFMA, including the use of fine mesh nets. No aquarium fish permits would be issued for areas outside of the WHRMA (in East Hawai'i, aquarium collection using legal gear or methods other than fine-mesh nets could continue, but the use of fine mesh nets would not be allowed). Under this alternative, upon issuance of an aquarium fish permit, a permit condition would be included in each permit limiting the geographic area covered by the permit to the WHRFMA. Permittees would be required to abide by all rules and regulations set forth in HRS §§ 189-2, -3 (Commercial Marine License), HRS § 188-31 (aquarium fish permit), which would allow the use of fine-mesh nets in covered areas, and would obtain a West Hawai'i Aquarium Permit as required under HAR § 13-60.4. These rules and regulations include restrictions on equipment, restrictions on access to various areas, size and bag limits on various collected fish species, collection in the WHRFMA restricted to 40 White List Species only, and reporting requirements. In addition, under this alternative, the daily bag limit for commercial aquarium collection of Achilles Tang within the WHRFMA would be reduced from 10 fish per day to 5 fish per day.

### **STANDARD FOR EVALUATING THE FEIS**

Pursuant to HAR Section 11-200-23(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.

The Board's decision regarding the acceptability of this FEIS is *distinct* from any management decisions that the Division of Aquatic Resources (DAR), the Department of Land and Natural Resources (DLNR), or the Board may make in the future regarding Hawai'i's aquarium fishery or the issuance of any aquarium fish permits, including to the 10 collectors covered by this FEIS.

Acceptability of the FEIS is based on the three criteria listed above. An Environmental Impact Statement (EIS) is not intended to resolve conflicts of opinion on the impacts of a proposed action. Rather, an EIS only intends to provide the relevant information to the

deciding agency. “[W]hether or not the parties disagree, or even whether there is authority which conflicts with the agency’s decision is not the yardstick by which the sufficiency of an EIS is to be measured. Rather it is whether the EIS as prepared permitted informed decision making by the agency.” *Price v. Obayashi Hawaii Corp.*, 81 Haw. 171, 182, 914 P.2d 1364, 1375 (1996).

In other words, an EIS need not be exhaustive to the

point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

*Id.* at 183 (citing *Life of the Land v. Ariyoshi*, 59 Haw. 156, 164–65, 577 P.2d 1116, 1121 (1978)).

## **DISCUSSION**

- 1. The procedures for assessment, consultation process, review and the preparation and submission of the statement, have all been completed satisfactorily as specified in HAR chapter 11-200.**

The Applicant initially prepared and submitted a Draft Environmental Assessment (DEA) on April 8, 2018, evaluating the impacts of issuance of aquarium fish permits on the island of Hawai‘i programmatically to any applicant over a 12-month analysis period. The DEA was circulated for public review and comment through publication in The Environmental Notice and was also distributed via copies or email to a variety of elected officials, federal agencies, state, county and local offices, and individuals and organizations. Public comments were accepted during a 30-day period following publication. A total of 836 responses were received. Comments received during the comment period were taken into account in assessing the impacts of the proposed action and resulted in some modifications in the FEA. After review of the FEA, DLNR determined on July 26, 2018, that preparation of an EIS was required.

A Draft Environmental Impact Statement (DEIS) evaluating the impacts of issuance of 14 Aquarium Permits for the West Hawai‘i Regional Fishery Management Area (WHRFMA) was published on November 23, 2019. The DEIS included copies of all written comments received during the 30-day public consultation period following issuance of the Environmental Impact Preparation Notice, as well as the Applicant’s written responses. Individuals who requested to be a Consulted Party during the 30-day consultation period were invited to provide input for DEIS development.

Applicant's FEIS was properly filed with the Office of Environmental Quality Control (OEQC) on April 13, 2020, and published in The Environmental Notice on April 23, 2020. Applicant's Distribution List was verified by OEQC, and copies of the FEIS were distributed accordingly. Appendix C of the FEIS includes all comments received on the DEIS during the 45-day public comment period, as well as the Applicant's response to each comment.

The Applicant has therefore satisfactorily complied with the procedures for assessment, consultation process, review, and the preparation and submission of the FEIS.

**2. The technical content requirements described in HAR chapter 11-200 have been satisfied.**

HAR § 11-200-18 establishes the technical content requirements of a final EIS:

The final EIS shall consist of:

- (1) The draft EIS revised to incorporate substantive comments received during the consultation and review process;
- (2) Reproductions of all letters received containing substantive questions, comments, or recommendations and, as applicable, summaries of any scoping meetings held;
- (3) A list of persons, organizations, and public agencies commenting on the draft EIS;
- (4) The responses of the applicant or proposing agency to each substantive questions, comment, or recommendation received in the review and consultation process[; and]
- (5) The text of the final EIS which shall be written in a format which allows the reader to easily distinguish changes made to the text of the draft EIS.

A review of the FEIS shows that all of the foregoing technical elements are properly included in the document.

An additional section, HAR § 11-200-16, sets forth the remaining content requirements for the sufficiency of a final EIS. Under that section, an FEIS must (1) contain an explanation of the environmental consequences of the proposed action; (2) fully declare the environmental implications of the proposed action and discusses all relevant and feasible consequences of the action; and (3) include responsible opposing views, if any, on significant environmental issues raised by the proposal.

The 2,304-page FEIS under consideration here explains the direct, indirect, and cumulative environmental consequences of the proposed action. It includes opposing views in Appendix C, which contains hundreds of comments in opposition to the proposed action.

DAR staff has carefully examined the FEIS to determine whether it fully declares all environmental implications of the proposed action and discusses all relevant and feasible consequences. This examination has identified the following potential concerns raised by the FEIS regarding the impacts of some or all of the proposed alternatives: A) potential impacts on coral; B) cumulative impacts on targeted species; and C) data used in analyses.

#### A. *Impacts on Coral*

Section 4.3.2 of the FEIS (p.34) describes a common collection method in which divers move in close proximity to live corals as they push fish into an awaiting monofilament barrier net, which is often at least thirty feet in length. This method is primarily employed in depths within recreational dive limits, often in areas of rich coral growth. A thirty-foot long net is unlikely to be placed in a manner where it will not come into contact with live coral, especially considering the complex coral reef habitat preferred by most White List species. Whether, and to what extent, the use of such methods results in coral damage is unknown. The FEIS also describes collection methods whereby divers chase fish into the nets using “poker sticks.” This method, which has been documented in photographs of pre-ban aquarium fish collection in the WHRFMA, poses a potential threat to live corals. Further, comments received from a former aquarium fish collector state that certain species of fish, such as hawkfishes, angelfishes, and wrasses, can only effectively be collected by breaking coral apart to gain access to the fish. The FEIS acknowledges that damage to coral is illegal and makes clear that any permitted aquarium collection activity covered by this FEIS will be required to comply with all laws. Nevertheless, these potential impacts must be carefully considered in any future management decisions.

The FEIS also cites a 2003 study by Tissot and Hallacher to describe coral cover in the project area and to discuss coral damage impacts due to aquarium fishing. While this paper doesn’t show any statistically significant differences between fished and unfished areas in terms of coral bleaching and acute damage, it is based on a small subset of WHRFMA sites and is from a period predating a broad-scale coral bleaching and habitat loss event occurring the State’s waters. The inclusion of this reference may be viewed as a good-faith effort by the applicant to disclose the effects of aquarium fishing on corals. However, since 2003 there have been multiple coral bleaching events within the WHRFMA, including a severely damaging event in 2015. Coral bleaching events have resulted in coral mortality and a resultant decrease in coral accretion rates. These effects increase the fragility of the reef structure and thereby increase the severity of damage caused by physical impacts.

### B. *Cumulative Impacts on Targeted Species*

To analyze the impacts of the proposed levels of harvest on populations of White List species, the FEIS refers to the 5–25% range established by Ochavillo and Hodgson (2006), referring to the percent of a population that can be sustainably harvested on an annual basis. The FEIS recognizes that this study was performed in the Philippines and focused on related, but non-White List, species. Due to the absence of species-specific literature from Hawai‘i, this arguably represents the best available science and was therefore a source of information to inform analysis set forth in the FEIS.

The FEIS also acknowledges that, if permits are issued, aquarium collection would not be the only lawful activity within WHRFMA that could impact fish populations. That is, other fisheries, as well as non-fishery influences, contribute to the health of fish stocks. Based on its cited sources, the FEIS asserts that a 5–25% take level for a specific population is generally considered sustainable, and that aquarium collection for all species under any of the proposed alternatives would fall below this threshold. However, the FEIS discloses that cumulative impacts will likely result in continued declines in at least some White List species. Therefore, species-specific harvest from all fisheries must be considered in future management decisions.

The FEIS acknowledges that poaching of aquarium fish could occur under any of the alternatives. DAR has received multiple reports of illegal activity regarding aquarium collection over the years. These activities, while outside the scope of the proposed action, have an impact on fish populations and must be considered when making management decisions.

### C. *Data Used in Analyses*

The FEIS provides historical species-specific harvest data in comparison to both WHRFMA-Open Area and Hawai‘i island-wide populations. Disclosure of these data sets provide conservative and liberal estimates of harvest rates. For management purposes, harvest rates should compare species-specific take with West Hawai‘i populations.

Despite these concerns, DAR concludes that the FEIS sets forth sufficient information to enable the Board to consider fully the environmental impacts of the proposed action and make a reasoned decision.

### **3. Comments submitted during the review process have received satisfactory responses and have been incorporated in the FEIS**

The environmental review process has provided information from both the Applicant and the public through the commenting process. As noted above, Appendix C of the FEIS includes all comments received on the DEIS during the 45-day public comment period, as well as the Applicant’s response to each comment. The Applicant has adequately



responded to all comments, and substantive comments have been incorporated into the FEIS where appropriate.

Upon review of the Applicant's DEIS, comments received on the DEIS, and the submitted FEIS, including the Applicant's response to all substantive comments received on the DEIS, the FEIS has properly complied with all required procedures and it adequately discloses the anticipated impacts of the proposed action.

### **ADDITIONAL COMMENTS**

*No decision or recommendation* on the action proposed by this FEIS (i.e., the potential issuance of applicable permits for aquarium fish collection in the WHRFMA) is being made at this time. The Board will need to make a separate determination at a later date regarding whether to issue any permits and what permit terms and conditions may be necessary to mitigate environmental impacts.

### **CONCLUSION:**

The FEIS sets forth sufficient information to enable the Board to make a reasoned decision regarding the proposed action (i.e., issuance of 10 aquarium fish permits). The Applicant has complied with all procedural requirements under HRS chapter 343 and applicable rules adopted thereunder.

**RECOMMENDATION:**

That the Board:

1. Determine that the Final Environmental Impact Statement complies with applicable law and adequately discloses the environmental impacts of the proposed issuance of commercial aquarium fish permits, commercial marine licenses, and West Hawai'i aquarium permits for the West Hawai'i Regional Fishery Management Area; and
2. Accept the Final Environmental Impact Statement regarding the Issuance of Commercial Aquarium Fish Permits, Commercial Marine Licenses, and West Hawai'i Aquarium Permits for the West Hawai'i Regional Fishery Management Area submitted by the Pet Industry Joint Advisory Council.

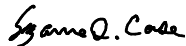
Respectfully submitted,



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Brian J. Neilson, Administrator  
Division of Aquatic Resources

APPROVED FOR SUBMITTAL



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Suzanne D. Case, Chairperson  
Board of Land and Natural Resources