

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

June 25, 2021

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

DETERMINATION OF WHETHER THE REVISED FINAL ENVIRONMENTAL IMPACT STATEMENT (RFEIS) 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, FOR THE PURPOSE OF ACCEPTING THE RFEIS

**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.<sup>1</sup>

- (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 Revised Final Environmental Impact Statement (RFEIS).

**ZONING**

Conservation District.

**CHARACTER OF USE**

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<sup>1</sup> This RFEIS is governed by the old HEPA rules, HAR chapter 11-200. HAR § 11-200.1-32(b) provides in relevant part, "Chapter 11-200 shall continue to apply to environmental review of agency and applicant actions which began prior to the adoption of chapter 11-200.1." The EISPN for this RFEIS was published on August 8, 2018, prior to the adoption of chapter 11-200.1 in August 2019.

Aquarium species collection inside the WHRFMA.

### **DESCRIPTION OF PROJECT**

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

The subject of Item F-3 on the Board's June 25, 2021 meeting agenda is sufficiency of the full FEIS, which is available to the public online at:

[http://oeqc2.doh.hawaii.gov/EA\\_EIS\\_Library/2021-06-08-HA-Revised-FEIS-Hawaii-Island-Commercial-Aquarium-Permits.pdf](http://oeqc2.doh.hawaii.gov/EA_EIS_Library/2021-06-08-HA-Revised-FEIS-Hawaii-Island-Commercial-Aquarium-Permits.pdf)

### **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.

Under the rules,

“Acceptance” means a formal determination of acceptability that the document required to be filed pursuant to chapter 343, HRS, fulfills the definitions and requirements of an environmental impact statement, adequately describes identifiable environmental impacts, and satisfactorily responds to comments received during the review of the statement. Acceptance does not mean that the action is environmentally sound or unsound, but only that the document complies with chapter 343, HRS, and this chapter. A determination of acceptance is required prior to implementing or approving the action.

HAR § 11-200-2. Accordingly, the Board's decision regarding the acceptability of this RFEIS 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 seven collectors covered by this RFEIS.

Acceptability of the RFEIS 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)).

### **PROPOSED ACTION**

The proposed action, as stated in the RFEIS, is: “Collection of aquarium fish pursuant to the issuance of seven Commercial Aquarium Permits under HRS §188-31 and 7 Commercial Marine Licenses under HRS 189-2,3, and implementation of species-specific catch quotas, ensuring lawful, responsible, and sustainable commercial collection of 8 aquarium fish species from nearshore habitats of the West Hawai’i Regional Fishery Management Area.”

### **OBJECTIVE OF THE REVISED FEIS**

The objective of the RFEIS is to comply with applicable law and provide information to the Board of Land and Natural Resources (Board) when it considers whether to issue seven aquarium fish permits for the WHRFMA, along with the required CML and West Hawai’i Aquarium Permits, to allow these seven 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 RFEIS considered seven alternative courses of action: 1) No Action; 2) CML-Only; 3) Pre-Aquarium Collection Ban; 4) WHRFMA-Only Programmatic Issuance of Permits; 5) Achilles Tang Conservation; 6) Limited Permit Issuance; and 7) Revised White List and 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. In addition, CMLs could not be used to collect aquarium fish for commercial purposes elsewhere in the state. Therefore, no commercial aquarium collection would occur within the State of Hawai'i under this alternative

## **2. CML-Only**

Under the CML-Only 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. Under this alternative, CMLs for commercial aquarium purposes would be issued for fishers in East Hawai'i and aquarium collection using legal gear or methods other than fine-mesh nets would be allowed.

## **3. 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.

## **4. WHRFMA-Only Programmatic Issuance of Aquarium Permits**

Under the WHRFMA-only Programmatic Issuance of Permits Alternative, DLNR would issue an unlimited number of aquarium fish permits and CMLs 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, but an unlimited number of CMLs would be issued for fishers elsewhere in the state. As a result, aquarium collection using legal gear or methods other than fine-mesh nets could continue elsewhere in the state, 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.

## **5. 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 and CMLs, 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.

## **6. Limited Permit Issuance**

Under the Limited Permit Issuance Alternative, which was the preferred alternative in the April 2020 Final Environmental Impact Statement (FEIS), DLNR would issue aquarium fish permits and CML’s to the 10 aquarium fishers covered by the FEIS, thereby allowing these 10 fishers 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 WHRFMA. Therefore, no commercial aquarium collection would be allowed elsewhere in the state.

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.

## **7. Revised White List and Limited Permit Issuance (Applicant’s Preferred Alternative)**

Under the Revised White List and Limited Permit Issuance Alternative, DLNR would issue aquarium fish permits and CMLs to the seven aquarium fishers covered by the RFEIS, thereby allowing these seven 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 WHRFMA. Therefore, no commercial aquarium collection would be allowed

elsewhere in the state. In addition, the 40 White List Species would be reduced to eight species and each fisher would be allocated an individual catch quota for each species.

Under this alternative, upon issuance of an aquarium fish permit, permit conditions would be included in each permit limiting the geographic area covered by the permit to the WHRFMA, limiting collection to the eight species on the proposed Revised White List, and implementing individual catch quotas for each of those eight species. 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, and reporting requirements.

## **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.

The 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. After review of the FEIS, the Board decided on May 22, 2020 to not accept the FEIS.

A Revised Draft Environmental Impact Statement (RDEIS) incorporating the findings and reasons raised by the Board was published on February 23, 2021. The RDEIS 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 45-day period following publication. Comments received during the comment period were taken into account in assessing impacts of the proposed action and resulted in some modifications in this Revised FEIS.

The Applicant's Revised FEIS (RFEIS) was properly filed with the Office of Environmental Quality Control (OEQC) on May 26, 2021, and published in The Environmental Notice on June 8, 2021. Applicant's Distribution List was verified by OEQC, and copies of the FEIS were distributed accordingly. Appendix C of the RFEIS includes all comments received on the RDEIS 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 RFEIS.

**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 RFEIS 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.<sup>2</sup>

The 1,581-page RFEIS 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 RFEIS 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 and B) increase in proposed take of Potter's angelfish and Thompson's surgeonfish.

#### *A. Potential impacts on Coral*

Section 4.3.2 of the RFEIS (p.44) 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 generally around 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 RFEIS 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 RFEIS acknowledges that damage to coral is illegal and makes clear that any permitted aquarium collection activity covered by this RFEIS will be required to comply with all laws. Nevertheless, these potential impacts must be carefully considered in any future management decisions regarding the actions proposed in this RFEIS (e.g., a future decision by the Board whether to issue permits and what terms and conditions those permits would be subject to).

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<sup>2</sup>HAR § 11-200-2 provides in relevant part:

"Effects" or "impacts" as used in this chapter are synonymous. Effects may include ecological effects (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic effects, historic effects, cultural effects, economic effects, social effects, or health effects, whether primary, secondary, or cumulative. Effects may also include those effects resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

"Environment" means humanity's surroundings, inclusive of all the physical, economic, cultural, and social conditions that exist within the area affected by a proposed action, including land, human and animal communities, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance.



The RFEIS 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 sites in terms of coral bleaching and acute damage, it is based on a small portion of fished area relative to the broader WHRFMA. Additionally, the study was conducted during 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. Increase in proposed take of Potter's angelfish and Thompson's surgeonfish*

The Applicant's preferred alternative includes individual catch quotas for each of the eight species on their proposed Revised White List. These proposed quotas were based on either the 20-year historical average catch from the WHRFMA or 1% of the 2019 NOAA ESD WHRFMA population estimate. The RFEIS does not, however, clearly justify which species' catch quotas were based on historical catch and which were based on the population estimates. A comparison of the proposed individual catch quotas and the historical catch within the WHRFMA indicates that the quotas for two species: Potter's angelfish and Thompson's surgeonfish were based on 1% of the 2019 NOAA ESD WHRFMA population estimates and those of the remaining six species were set at or below historical average catch. Use of the 1% of the population estimate metric for Potter's angelfish and Thompson's surgeonfish leads to a proposed take that is 303% and 1008% higher than the historical average collection rates, respectively as well as 30% and 113% higher than historical maximum collection rates.

When discussing the direct impacts of the Applicant's preferred alternative in section 5.4.1.7, the RFEIS states "It is anticipated that population trends of the eight species on the Revised White List would remain stable or increase, as they have historically under commercial aquarium collecting pressure." Since this level of take is substantially beyond that which has occurred historically, it is not possible to assess whether or not past population trends will continue into the future under the proposed individual catch quotas. This uncertainty must be carefully considered in any future management decisions regarding the actions proposed in this RFEIS (e.g., a future decision by the Board whether to issue permits and what terms and conditions those permits would be subject to).

Despite these concerns, DAR concludes that the RFEIS 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 RFEIS**

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 RFEIS includes all comments received on the RDEIS 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 RFEIS where appropriate.

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

**CONCLUSION:**

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

**RECOMMENDATION:**

Recognizing that *no decision or recommendation* on the action proposed by this RFEIS (i.e., the potential issuance of applicable permits for aquarium fish collection in the WHRFMA) is being made at this time, and that 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, DAR recommends:

That the Board:

1. Determine that the Revised 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 Revised 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.

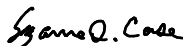
Respectfully submitted,



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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