

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

October 8, 2021

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 AND COMMERCIAL MARINE LICENSES FOR
THE ISLAND OF O‘AHU, FOR THE PURPOSE OF ACCEPTING THE FEIS

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

(1) Propose the use of state or county lands or the use of state or county funds

LOCATION

State waters (0-3 nautical miles from shore) surrounding the island of O‘ahu, identified in Figure 1. of the FEIS. This area includes Division of Aquatic Resources (DAR) reporting grid numbers 400-409, 412-414, 418, and 419. Excluded are existing Marine Life Conservation Districts (MLCDs) where all take is currently prohibited.

ZONING

Conservation District.

CHARACTER OF USE

¹ This FEIS 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 FEIS was published on August 8, 2018, prior to the adoption of chapter 11-200.1 in August 2019.

Commercial collection of marine vertebrates and invertebrates in state waters surrounding the island of O‘ahu for aquarium purposes.

DESCRIPTION OF PROJECT

The proposed project would grant permits to 15 commercial aquarium collectors to take limited numbers of 31 finfish and 4 invertebrate species in state waters surrounding the island of O‘ahu.

The subject of Item F-1 on the Board’s October 8, 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/2021-09-08-OA-FEIS-Oahu-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 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 FEIS is *distinct* from any management decisions that the DAR, the Department of Land and Natural Resources (DLNR), or the Board may make in the future regarding O‘ahu’s aquarium fishery or the issuance of any aquarium fish permits, including to the fifteen 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)).

PROPOSED ACTION

The proposed action, as stated in the FEIS, is: “Collection of aquarium fish pursuant to the issuance of 15 Commercial Aquarium Permits issued under HRS § 188-31 and 15 Commercial Marine Licenses under HRS 189-2,3, creation of a White List of aquarium fish species which may be collected, and implementation of species-specific catch quotas by fisher, ensuring lawful, responsible, and sustainable commercial collection of various aquarium fish species from nearshore habitats of O‘ahu.”

OBJECTIVE OF THE REVISED 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 15 commercial aquarium collection permits for state waters surrounding the island of O‘ahu. 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 six alternative courses of action: 1) No Action Alternative; 2) CML-Only Alternative; 3) Pre-Aquarium Collection Ban Alternative; 4) Expanded Waikīkī MLCD and Flame Wrasse Conservation Alternative; 5) Limited Permit Issuance Alternative; and 6) Establishment of a White List and limited Collection Alternative (Applicant’s preferred alternative).

1. No Action

Under the No Action Alternative, the court order would remain in place, and no Aquarium Permits would be issued for the entire island of O‘ahu and the taking of aquarium fish or other aquatic life for commercial aquarium purposes would be prohibited. In addition, the changes to CMLs would remain in place, and CMLs could not be used to collect aquarium fish for commercial purposes. Therefore, no commercial aquarium collection would occur on the island of O‘ahu under this Alternative.

2. CML-Only

Under the CML-only Alternative, the court order would remain in place and no Aquarium Permits would be issued for the state of Hawai‘i, including the island of O‘ahu. Under this Alternative, CMLs for commercial aquarium collection would be issued, and aquarium collection using legal gear or methods other than fine mesh nets would be allowed. Permittees would abide by all existing rules and regulations set forth in HRS 189-2,3 (Commercial Marine Permit).

3. Pre-Aquarium Collection Ban

Under the Pre-Aquarium Collection Ban Alternative, the DLNR would issue an unlimited number of Aquarium Permits and CMLs allowing commercial aquarium collection, as was done prior to the September 6, 2017 Supreme Court ruling, thereby allowing commercial aquarium fish collection using fine mesh nets (and other legal methods) on the island of O‘ahu. It is assumed that, upon issuance of an Aquarium Permit and CML, a permit condition would be included in each permit limiting the geographic area covered by the permit to the island of O‘ahu. Permittees would abide by all existing rules and regulations set forth in HRS 188-31, governing Aquarium Permit use and HRS 189-2,3, governing Commercial Marine Permit use. For the island of O‘ahu, these rules and regulations include restrictions on equipment, restrictions on access to various areas, bag limits on various collected fish species, and reporting requirements.

4. Expanded Waikīkī MLCD and Flame Wrasse Conservation Alternative

Under the Expanded Waikīkī MLCD and Flame Wrasse Conservation Alternative, the DLNR would issue an unlimited number of Aquarium Permits and CMLs, as was done prior to the September 6, 2017 Supreme Court ruling, thereby allowing commercial aquarium fish collection using fine mesh nets (and other legal methods) on the island of O‘ahu. It is assumed that, upon issuance of an Aquarium Permit and CML, a permit condition would be included in each permit limiting the geographic area covered by the permit to the island of O‘ahu. Permittees would abide by all existing rules and regulations set forth in HRS-188-31, governing Commercial Aquarium Permit use and HRS 189-2,3, governing Commercial Marine Permit use. For the island of O‘ahu, these rules and regulations include restrictions on equipment, restrictions on access to various areas, bag limits on various collected fish species, and reporting requirements.

In addition to the existing rules and regulations, a conservation measure in the Expanded Waikīkī MLCD and Flame Wrasse Conservation Alternative would add a permit condition that would prohibit commercial aquarium collection north from the existing Waikīkī MLCD to the southern

tip of DAR's Honolulu Harbor Kapālama Canal Fish Management Area. The current Waikīkī MLCD covers approximately 77.3 acres (31.3 hectares). The area proposed in the Expanded Waikīkī MLCD and Flame Wrasse Conservation Alternative expands this area by 740 acres (299.5 hectares) to 817.3 acres, more than 10.5 times the size of the current Waikīkī MLCD (though this additional area would only apply to commercial aquarium collection). In addition, the current Waikīkī MLCD is bordered to its south by the Waikīkī-Diamond Head Shoreline Fisheries Management Area (WDHSFMA) covering approximately 239 acres (96.7 hectares). The WDHSFMA is open to fishing (with restrictions) in even numbered years only. Within the expanded Waikīkī MLCD, no commercial aquarium fish collection would occur; however, no restrictions would be placed upon other fisheries (e.g., commercial, recreational).

An additional conservation measure in the Expanded Waikīkī MLCD and Flame Wrasse Conservation Alternative would limit the commercial aquarium collection of Flame Wrasse to 10 individual fish per day.

5. Limited Permit Issuance Alternative

Under the Limited Permit Issuance Alternative, the DLNR would issue Aquarium Permits and corresponding CMLs to 15 aquarium fishers in O'ahu, thereby allowing these 15 individuals to resume commercial aquarium fish collection on O'ahu. It is assumed that, upon issuance of an Aquarium Permit, a permit condition would be included in each permit limiting the geographic area covered by the permit to the island of O'ahu. Permittees would abide by all existing rules and regulations set forth in HRS-188-31, governing Commercial Aquarium Permit use. For the island of O'ahu, these rules and regulations include restrictions on equipment, restrictions on access to various areas, bag limits on various collected fish species, and reporting requirements.

In addition to the existing rules, under this Alternative, the daily bag limit for commercial aquarium collection of Flame Wrasse would be limited to 10 individuals per day, and the Waikīkī MLCD would be expanded northward to the southern tip of DAR's Honolulu Harbor Kapālama Canal Fish Management Area, as described in Section 3.3 of the FEIS.

6. Establishment of a White List and limited Collection Alternative (Applicant's preferred alternative)

Under the Establishment of a White List and Limited Collection Alternative, the DLNR would issue Aquarium Permits and CMLs to 15 aquarium fishers for the island of O'ahu, thereby allowing 15 individuals to collect commercial aquarium fish using only fine mesh nets (no other fish collection methods would be allowed) and to collect invertebrates. No Aquarium Permits would be issued for areas outside of O'ahu under this alternative. In addition to limited permit issuance, collection would be limited to 31 fish species (Proposed White List) and 4 invertebrate species permitted for aquarium take and individual catch quotas per species would be implemented. By limiting collection of aquarium fish to the use of fine mesh nets, all collection will need to follow the rules outlined in Section 1.2.4 of the FEIS.

It is assumed that, upon issuance of an Aquarium Permit and CML, permit conditions would be included in each permit limiting the geographic area covered by the permit to Oahu, limiting

collection to the 31 fish species and 4 invertebrates on the proposed White List, limiting the fish collection method to fine mesh nets, and implementing individual catch quotas by species for each of the 31 fish species and 4 invertebrate species on the proposed White List with the total across all 15 fishers not exceeding the maximum annual total allowable catch (TAC) shown in Table 3-2 of the FEIS. Permittees would abide by all rules and regulations set forth in HRS 189-2,3 (Commercial Marine Permit) and HRS-188-31 governing Aquarium Permit use. Existing bag and slot limits as set forth in HAR §13-77 would remain in effect in addition to the individual catch quotas per species.

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 O‘ahu 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 non-governmental 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 20 Aquarium Permits on the island of O‘ahu over a 5-year analysis period was published on May 8, 2020. 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 August 26, 2021 and published in The Environmental Notice on September 8, 2021. 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 question, 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 discuss all relevant and feasible consequences of the action; and (3) include responsible opposing views, if any, on significant environmental issues raised by the proposal.²

The 1,209-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 numerous 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

²HAR § 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.

consequences. This examination has identified the following potential concerns raised by the FEIS regarding the impacts of some or all the proposed alternatives: A) the Applicant's inability to provide population estimates for three of the finfish and four of the invertebrate species listed for take under the preferred alternative, and B) the Applicant's inability to provide thorough analysis of population trend data for the species proposed for take.

A. Lack of population estimates for certain species listed for take

Due to a lack of existing data, or in the case of flame wrasse, data that is suspected to be grossly unrepresentative due to the limitations of the survey techniques used, the Applicants could not quantify the potential impact of proposed take limits on Oahu populations for seven species. They include bandit angelfish (*Apolectichthys arcuatus*), flame wrasse (*Cirrhilabrus jordani*), crosshatch triggerfish (*Xanthichthys mento*), zebra hermit crab (*Clibanarius zebra*), Halloween hermit crab (*Calcinus elegans*), cleaner shrimp (*Lysmata amboinensis*), and feather duster worm (*Sabellastare sanctijosephi*). Whereas proposed annual take of other species included on the White List could be represented as a percent of the 2019 PIFSC-ESD island-wide population estimate, such consideration is lacking for these species.

B. Lack of population trend data

Ideally, the Applicants would be able provide some analysis of short- or long-term population trends for species proposed for take to ensure that none are in a marked persistent state of decline. The same PIFSC-ESD (formerly CREP) surveys used to calculate the 2019 population estimates were also conducted in previous years. This was noted in the comments submitted by Dr. Greg Asner and his colleagues in Appendix C of the FEIS. In response to these comments, the Applicants noted that the data offered by Dr. Asner and his colleagues was a comparison of species densities alone, and did not consider statistical significance, i.e., to what extent we can trust this data as an accurate reflection of population trends. In short, both are correct. Population trend data in terms of annual estimates of species density are available, yet drawing conclusions from these data alone without additional statistical analysis may be improper. All data reference by Dr. Asner and his colleagues are included in Appendix C. of the FEIS.

Despite the above 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. Where data is limited or lacking, the Applicants make the appropriate disclosures of such. Data-limited conditions do not disqualify the action from consideration. Instead, the approving agency should consider such data limitations when weighing the risks it is willing to incur during the permitting process and select approved actions accordingly. This may include, but is not limited to, prohibiting take of any or all species for which sufficient population data are lacking.

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.

CONCLUSION:

The FEIS sets forth sufficient information to enable the Board to make a reasoned decision regarding the proposed action (i.e., issuance of 15 aquarium collection 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 FEIS (i.e., the potential issuance of applicable permits for aquarium fish collection in the O‘ahu nearshore waters) 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:

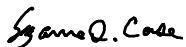
1. Determine that the Final Environmental Impact Statement complies with applicable law and adequately discloses the environmental impacts of the proposed issuance of commercial aquarium permits and commercial marine licenses for the island of O‘ahu; and
2. Accept the Final Environmental Impact Statement regarding the Issuance of Commercial Aquarium Permits and Commercial Marine Licenses for the Island of O‘ahu submitted by the Pet Industry Joint Advisory Council.

Respectfully submitted,



Brian J. Neilson, Administrator
Division of Aquatic Resources

APPROVED FOR SUBMITTAL



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