

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

December 7, 2023

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

Kalanihale's, KUPA Friends of Ho'okena Beach Park's, Moana 'Ohana's, Ko'olaupoko
Hawaiian Civic Club's, and For the Fishes' Petition for Rulemaking to Prohibit the Take
of Marine Life for Commercial Aquarium Purposes (With Exemptions)

On November 9, 2023, Kalanihale, KUPA Friends of Ho'okena Beach Park, Moana 'Ohana, Ko'olaupoko Hawaiian Civic Club, and For the Fishes (Petitioners) submitted a petition to the Board of Land and Natural Resources (Board) seeking initiation of rulemaking to prohibit the take of marine life for commercial aquarium purposes (attached as **Exhibit 1**).

APPLICABLE LAW

Petitions for rulemaking are governed by Hawaii Revised Statutes (HRS) §91-6, which provides:

§91-6 Petition for adoption, amendment or repeal of rules. Any interested person may petition an agency requesting the adoption, amendment, or repeal of any rule stating reasons therefor. Each agency shall adopt rules prescribing the form for the petitions and the procedure for their submission, consideration, and disposition. Upon submission of the petition, the agency shall within thirty days either deny the petition in writing, stating its reasons for the denial or initiate proceedings in accordance with section 91-3.

The Board has adopted rules prescribing the requirements for rulemaking petitions. Hawaii Administrative Rules (HAR) §13-1-26 provides:

- §13-1-26 Petitions for adoption, amendment, or repeal of rules.**
- (a) Any interested person may petition the board for the adoption, amendment, or repeal of any rule.
 - (b) Petitions for proposed rulemaking shall set forth the text of any proposed rule or amendment desired or specifying the rule the repeal of which is desired and stating concisely the nature of the petitioner's interest

in the subject matter and the reasons for seeking the adoption, amendment, or repeal of the rule and shall include any facts, views, arguments, and data deemed relevant by petitioner. The board may require the petitioner to notify persons or governmental agencies known to be interested in the proposed rulemaking of the existence of the filed petitions. No request for the issuance, amendment, or repeal of a rule which does not conform to the requirements set forth above shall be considered by the board.

(c) Petitions for proposed rulemaking shall become matters of public record upon filing. The board shall within thirty days following the filing of the petition either deny the petition in writing or initiate public rulemaking procedures. No public hearing, oral argument, or other form of proceedings need be held on the petition. If the board determines that the petition discloses sufficient reasons in support of the relief requested to justify the institution of public rulemaking proceedings, the procedures to be followed shall be as set forth in section 91-3, HRS, §13-1-21 and §13-1-22. When the board determines that the petition does not disclose sufficient reasons to justify the institution of public rulemaking procedures, or where the petition for rulemaking fails in any material respect to comply with the requirements of these rules, the petitioner shall be notified and given the grounds for the denial. The provisions of this section shall not operate to prevent the board, on its own motion, from acting on any matter disclosed in any petition. [Eff 6/22/81; am and comp 2/27/09] (Auth: HRS §171-6) (Imp: HRS §§91-6, 92-16)

Pursuant to HRS § 91-6 and HAR § 13-1-26(c), the Board has thirty days (until December 9, 2023) to either deny the petition in writing or to initiate rulemaking proceedings pursuant to HRS § 91-3. For a petition to be considered, it must:

1. Set forth the text of any proposed rule or amendment desired or specifying the rule the repeal of which is desired;
2. State concisely the nature of the petitioner's interest in the subject matter;
3. Provide reasons for seeking the adoption, amendment, or repeal of the rule; and
4. Include any facts, views, arguments, and data deemed relevant by petitioner.

If the petition complies with these requirements the Board must determine whether the petition discloses sufficient reasons to justify the institution of rulemaking procedures.

DISCUSSION

The Petition before the Board appears to meet the minimum requirements of HAR §13-1-26 to be considered by the Board. However, there are a number of reasons that weigh against granting the Petition.

First, the Hawai'i State Legislature has considered a ban on the taking of marine life for commercial aquarium purposes before, most recently in 2023,¹ and has thus far declined to enact legislation that would prohibit this practice. Moreover, the Legislature has authorized the Department of Land and Natural Resources (Department) to issue permits to take aquatic life for aquarium purposes through statute,² suggesting Legislative support for aquarium harvest. The Legislature is primarily responsible for setting state policies through lawmaking. Executive agencies, such as the Department of Land and Natural Resources, implement these policies through administrative rulemaking. In the absence of specific policy direction from the Legislature, the Department manages aquatic resources for reasonable and sustainable use.

Second, Petitioners' reasons for requesting rulemaking do not justify the proposed rules. One of the primary justifications offered by Petitioners for banning all commercial aquarium collection is the critical need for herbivores. However, this does not justify a complete ban on all commercial aquarium harvest.

Not all species targeted by commercial AQ collectors are herbivores. Of the 231 different finfish species reported by the statewide aquarium fishery between 2008 and 2017, approximately 10% are herbivores. While herbivores make up a minority species harvested by the fishery, they compose the majority (approx. 90%) of total statewide finfish catch (number of pieces) during this period. This is mainly driven by the harvest of yellow tangs (*Zebrasoma flavescens*), which between 2008 and 2017 alone made up approximately 72% of the total statewide finfish aquarium catch.

The statewide Hawai'i Aquarium fishery is diverse, with some collectors specializing primarily in non-herbivores including deepwater finfish species. Contribution of total herbivore catch also varies by island. Whereas the West Hawai'i fishery is dominated by yellow tang and kole (*Ctenochaetus strigosus*) catch (approx. 83%), total O'ahu aquarium fishery catch is composed of approximately 50% herbivores. Non-herbivore species catch is economically important for the O'ahu aquarium fishery, contributing approximately 63% of its total ex-vessel value between 2008 and 2017.

The primary herbivore species that are targeted by the aquarium fishery (yellow tang and kole) are relatively abundant where they are harvested. DAR notes that where yellow tang and kole were most intensely harvested (West Hawai'i) both species remain abundant relative to other areas in the Main Hawaiian Islands. Though DAR acknowledges that aquarium collection can lead to reduced densities of these target species where harvested by the aquarium fishery, there has been no indication of widespread population decline or stock collapse associated with the aquarium fishery.

DAR also notes that in addition to the pre-existing West Hawai'i Regional Fishery Management Area (WRFMA) aquarium fishing restrictions (closed areas), creation of the Miloli'i Community Based Subsistence Fishing Area (complete aquarium fishing ban) has closed approximately 50% of West Hawai'i waters to commercial aquarium

¹ S.B. 505 and H.B. 910, 32nd Leg., Reg. Sess., 2023.

² Section 188-31, HRS (Permits to take aquatic life for aquarium purposes)

harvest. Protection of half of the West Hawai'i coast represents a substantial refuge for these species from aquarium harvest. Additionally, aquarium harvest of yellow tang and kole is overwhelmingly limited to smaller individuals and largely excludes adults. This is driven both by market preference and existing regulations for both West Hawai'i and O'ahu limiting the take of larger yellow tang and kole (HAR §13-60.4 and HAR §13-77). Spawning populations of both species are therefore well-protected from commercial aquarium harvest.

Yellow tang and kole have functional redundancy in their ecosystem services, unlike uhu which are being proposed for more restrictive statewide rules. As herbivores, yellow tang and kole do provide ecosystem services related to coral reef health. However, the urgency to provide additional protections to a species based on such ecosystem service is determined in large part by whether redundancy in this role exists. For example, DAR has prioritized large-bodied uhu species for regulation because they fill a unique ecological niche replicated by no other species in Hawai'i. Yellow tang and kole, though not negligible in their ecosystem role, have a higher degree of redundancy among the diverse surgeonfish species (*Acanthuridae*). This means that where aquarium harvest locally decreases their abundance, the likelihood of substantial impact to the ecosystem as a result is reduced by the presence of other species not targeted for aquarium harvest that fulfil the same, or similar role.

Some level of AQ harvest can be sustainable. A complete ban is not the only solution. DAR recognizes that there have been some ethical and cultural concerns regarding the practice of commercial aquarium harvest itself. However, from a fisheries management perspective alone we do not find that a total ban is necessary to maintain the sustainability of these species. To justify a complete statewide ban on the fishery, DAR would need clear evidence that the sustainability of all species harvested is threatened by the activity at all levels of take or that the practice itself is so harmful to the physical environment that it should be discontinued outright. Though DAR does believe that the fishery should be monitored, managed, and limited especially regarding the harvest of target species, the conclusion that no level of harvest is sustainable lacks sufficient scientific justification. Collection methods vary, and DAR acknowledges that some individuals have noted practices that are harmful to the environment. However, direct environmental harm is not a defining characteristic of the fishery with other known methods having relatively low impact on the surrounding environment.

Petitioners also assert that commercial aquarium collection conflicts with Native Hawaiian values, such as mālama 'āina and the practices involved in pono fishing. DAR acknowledges these views but notes that they are intertwined with a belief that all commercial aquarium collection is conducted purely for economic gain, that the taking of juvenile aquarium fish is unsustainable because they don't have a chance to reproduce, and that fish are treated inhumanely and go to waste. As noted above, the collection of juvenile aquarium fish species is not necessarily unsustainable and wasteful but must be understood in the context of existing regulatory protections and actual fishing practices.

Finally, Petitioners assert that rulemaking is necessary because the aquarium trade's environmental review under the Hawai'i Environmental Policy Act (HEPA) was inadequate. Based upon the ruling of the Hawai'i Supreme Court in *Umberger v. Department of Land and Natural Resources* (2017),³ (and later expanded upon in a ruling by the First Circuit Court in *Kaupiko v. Department of Land and Natural Resources* (2020)),⁴ aquarium collection pursuant to commercial and recreational permits issued by the Department is subject to environmental review under HEPA. Commercial aquarium collectors have engaged in the lengthy and extensive process of complying with HEPA by producing and submitting Environmental Assessments and Environmental Impact Statements to the Board. The Revised Final Environmental Impact Statement for aquarium collection in West Hawai'i has been deemed accepted as a matter of law.

Even if it were true that the HEPA environmental review was flawed, this would not necessitate rulemaking to prohibit commercial aquarium collection. There is currently no commercial aquarium collecting occurring anywhere in Hawai'i, and there has not been any commercial aquarium collecting since 2020. Regardless of the Hawai'i State Legislature's action (or inaction) on the commercial aquarium trade, no commercial aquarium collection can occur unless the Board issues permits pursuant to §188-31, HRS. The Board, in its discretion, could decide not to issue permits. Therefore, promulgating administrative rules to ban the take of marine life for commercial aquarium purposes is unnecessary.

ADDITIONAL CONSIDERATIONS

For rules affecting fishing practices, the Division of Aquatic Resources (DAR) typically holds pre-chapter 91 scoping meetings with affected stakeholders to solicit feedback and input on the proposed rules. This early stakeholder engagement is helpful in identifying potential issues, such as ambiguous language or unintended impacts of the proposed rules, and increases efficiency of the rulemaking process overall. Here, no scoping meetings have been conducted. If the Board is interested in considering a rule to prohibit commercial aquarium collection as contemplated by the Petition, the Board may instead consider directing DAR to initiate scoping meetings for this purpose.

However, DAR believes that allocation of additional time and resources to rulemaking to prohibit commercial aquarium harvest is currently unnecessary. First, as noted above, there is currently no commercial aquarium harvest occurring, nor could it occur unless authorized by the Board. Second, DAR is in the process of developing a detailed aquarium fishery management framework (Framework) that would provide the Board with guidance in considering limited commercial aquarium harvest through the future issuance of aquarium collection permits in geographic location(s) where HRS chapter 343 review is complete. When finished, DAR will provide a briefing to the Board to present the Framework and answer questions.

³ *Umberger v. Department of Land & Natural Resources*, 140 Hawai'i 500, 403 P.3d 277 (2017)

⁴ *Kaupiko v. Department of Land & Natural Resources*, 1CCV-20-0000125 (2020)

RECOMMENDATIONS:

1. That the Board deny “Kalanihale’s, KUPA Friends of Ho’okena Beach Park’s, Moana ‘Ohana’s, Ko’olaupoko Hawaiian Civic Club’s, and For the Fishes’ Petition for Rulemaking to Prohibit the Take of Marine Life for Commercial Aquarium Purposes” filed October 19, 2023; and
2. That the Board delegate to the Chairperson the authority to issue any additional documents necessary to comply with the requirements of section 13-1-26(c), Hawaii Administrative Rules.

Respectfully submitted,



BRIAN J. NEILSON, Administrator
Division of Aquatic Resources

APPROVED FOR SUBMITTAL



DAWN N. S. CHANG, Chairperson
Board of Land and Natural Resources

Attachments:

Exhibit 1 – Petition for Rulemaking

Item F-3, Exhibit 1

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Captain Cook, HI 96704

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PO Box 141
Honaunau, HI 96726

Moana 'Ohana
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Kailua Kona, HI 96745

Ko'olaupoko Hawaiian Civic Club
PO Box 664
Kaneohe, HI 96744

For the Fishes
PO Box 1894
Kihei, HI 96753

Before the Board of Land and Natural Resources

State of Hawai'i

Kalanihale's, KUPA Friends of Ho'okena) Petition
Beach Park's, Moana 'Ohana's,)
Ko'olaupoko Hawaiian Civic Club's, and)
For the Fishes' Petition for Rulemaking to)
State of Hawai'i Board of Land and Natural)
Resources)

KALANIHALE'S, KUPA FRIENDS OF HO'OKENA BEACH PARK'S, MOANA 'OHANA'S, KO'OLAUPOKO HAWAIIAN CIVIC CLUB'S, AND FOR THE FISHES' PETITION FOR RULEMAKING TO PROHIBIT THE TAKE OF MARINE LIFE FOR COMMERCIAL AQUARIUM PURPOSES (WITH EXEMPTIONS)

To ensure protection of public trust resources, Kalanihale, KUPA Friends of Ho'okena Beach Park, Moana 'Ohana, Ko'olaupoko Hawaiian Civic Club, and For the Fishes (hereinafter "Petitioners") hereby petition the Board of Land and Natural Resources (hereinafter "Board") to initiate rulemaking to prohibit the take of marine life for commercial aquarium purposes. This petition is filed pursuant to Article IX section 8, Article XI, §§ 1, 6 and 9 and Article XII, § 7 of the Hawai'i State Constitution; HRS §§ 91-6, 190-3, and 190-4; and HAR § 13-1-26.

I. Petitioners' Interests

Petitioners are comprised of native Hawaiian organizations and cultural practitioners, and non-profit environmental and marine protection organizations. Petitioners are among the 1.4 million Hawai'i residents whose way of life depends upon Hawai'i's coral reefs, which provide economic, structural/protective, educational, social, recreational, cultural, spiritual, physical, biological, and ecological benefits.

Petitioners include those who are descended from the aboriginal people that inhabited the Hawaiian Islands in 1778 and who engage in traditional and customary practices that are inextricably linked to coral reefs and their marine life, which are both a natural and a cultural resource. Commercial aquarium collection activities harm these Petitioners' ability to conduct these traditional and customary practices.

All Petitioners are beneficiaries of public trust resources, which government agencies and officials, including members of the Board, are obligated to protect.

Moreover, Petitioners are among the 83% of Hawai'i residents polled in 2017 who want to see an end to the destructive commercial take of marine life for aquarium purposes due to its negative environmental impacts and conflicts with cultural and local values.¹

Petitioners thus have significant interests in preserving and increasing the abundance of coral reef marine life for subsistence fishing, food security, native Hawaiian traditional and cultural practices, recreational use, and aesthetic value.

II. Reasons for Rulemaking

Hawai'i's way of life and food security are tied to coral reef health which is severely and imminently threatened by climate change.² The immediate need to mitigate against catastrophic climate change impacts on Hawai'i's coral reef ecosystems by increasing herbivore abundance is well understood and supported by the Board and by the Division of Aquatic Resources (DAR), as evidenced by DAR's December 2022 herbivore management rule proposal and presentation to the Board, and by the Board's vote to send those rules out for public hearings.³

Despite massive historical take (millions of herbivores removed to date) and proposed future take of herbivores for commercial aquarium trade purposes, however, the burden to increase reef herbivores in the proposed herbivore management rule proposal falls nearly entirely on Hawai'i's subsistence food fishers who rely upon coral reef fishes to feed their families and communities.

These food fishers are being asked to significantly reduce their take for the greater good of current and future generations who depend upon coral reefs, while under the aquarium pet trade's current proposals in their environmental impact statements (EISs), the trade would be subject to minor take reductions and would still be allowed to take more herbivores from West Hawai'i reefs than are taken by all food fishers, *combined*. See Section III, *infra*, for details.

Allowing commercial take of herbivores for the aquarium pet trade, which sends 99 percent of marine life out of the state, contradicts the Board's intent to protect herbivores for Hawai'i's reefs and people. Conversely, prohibiting the commercial take of herbivores and other marine

¹ Anthology Research [Hawaii Reef Fish Poll](#) (2017) at pg. 4

² DAR [Zoom presentation](#) to BLNR (Dec. 8, 2022) at 1:35

³ BLNR approval to hold public hearings on revised amendments to Chapter 13-95, Hawaii Administrative Rules, "Rules Regulating the Taking and Selling of Certain Marine Resources," May 12, 2023

fishes for aquarium purposes would firmly prioritize our marine life as essential natural and cultural resources, and prevent disposing of them as mere commodities for the profit driven aquarium pet trade, which sells the overwhelming majority of these important fishes outside of Hawai‘i.

Aquarium Collecting Conflicts with Native Hawaiian Values

The need for this rulemaking is further demonstrated by decades long and ever-increasing opposition to commercial aquarium collection within the native Hawaiian community. The opposition, in large part, stems from the trade’s irreconcilable conflicts with native Hawaiian values, traditions, customs, and practices. For example, the Hawaiian values of mālama ‘āina and the practices involved in pono fishing include asking permission prior to fishing, taking only what is needed for immediate personal and family use without compromising the ability of future generations to meet their needs, being accountable, and having respect for the sacredness of the process.⁴

The aquarium trade violates core principles of mālama ‘āina and pono fishing by taking juvenile fishes purely for economic gain and before they can reproduce. Fishes taken are then starved and shipped in plastic bags to the continent and beyond on a long journey that results in premature mortality and waste.⁵

DAR asserts its understanding of the importance of incorporating Hawaiian values and perspectives into marine management. For example, DARs Herbivore Management Plan also includes a pillar pertaining to native Hawaiian values. Entitled “Pono Practices,” the path laid out by DAR is summarized as follows:

“Pono Practices encourages responsible behavior guided by Hawaiian values and perspectives through. . . statewide rules. . .to encourage sustainable behaviors and practices in nearshore waters. The Pono Practices pillar is a call to action for resource users to interact with nearshore resources in a pono way.”⁶ .

Additionally, in response to legislation introduced to end the trade earlier this year, DLNR’s written testimony, while defending the aquarium trade, closed with the recognition that there may be reasons to “prohibit commercial aquarium collection based on cultural or social values.”⁷

Unfortunately, year after year and across numerous rule proposals, DAR has failed to apply the concepts contained within the Pono Practices pillar to its own internal policies by continuing to support commercial aquarium collection, despite decades of direct pleas from the native

⁴ Kohala Center, Uncle Mac Poepoe, [Spawning Guide/Pono Practices](#)

⁵ Tissot (2005). Integral Marine Ecology: [Community-Based Fishery Management in Hawai‘i](#), Washington State University at pdf. pg. 12

⁶ DAR [Sustainable Herbivore Management Plan](#) (2021)

⁷ DLNR [testimony on SB505 Relating to Environmental Protection](#) at pdf pg. 15

Hawaiian community and thousands of others to prioritize reefs and culture over the profits of the mainland aquarium pet trade.

In recent years, voices in opposition to the trade have grown even more. For example, in 2023, the Hawai‘i State Aha Moku Advisory Committee, representing all 46 moku statewide, strongly supported a legislative bill ending commercial aquarium collection.⁸ The Kāne‘ohe Bay Regional Council (chaired by DAR Administrator Nielson), the Kai Kuleana Network representing 15 communities working to restore coral reefs and fish populations on the west coast of Hawai‘i Island, the West Hawai‘i group Kalanihale, and other cultural practitioners from West Hawai‘i have all sent letters to DLNR urging statewide rulemaking to permanently end commercial aquarium collecting in Hawai‘i.^{9, 10} In addition, in 2023 the Association of Native Hawaiian Civic Clubs joined the Ko‘olaupoko Native Hawaiian Civic Club and the Kahalu‘u, Kāne‘ohe, Kailua and Waimānalo Neighborhood Boards (2021) in urging a prohibition on commercial aquarium collection.¹¹

Aquarium Trade’s HEPA Review Has Dismissed Public Input

Rulemaking is also necessary because environmental review under the Hawai‘i Environmental Policy Act (“HEPA”), HRS chapter 343, as undertaken by the aquarium pet trade, has grossly failed to disclose and analyze known environmental impacts and has moreover failed to address the vast majority of the thousands of public comments in opposition to virtually every aspect of the trade’s plans for reopening Hawai‘i’s reefs to collection. Significant comments related to the proposals’ scientific unsoundness, poor environmental stewardship, conflicts with Hawaiian traditional and customary practices, major enforcement challenges, unethical and inhumane treatment of marine life, and a cost/benefit analysis showing no benefits to the people of Hawai‘i from the trade, were for the most part ignored or dismissed in each of the *ten* rounds of early consultation and general public comments submitted thus far.

Furthermore, the trade minimized and dismissed important findings in the Cultural Impact Assessments (CIAs) it commissioned and included in the EISs for Hawai‘i Island and O‘ahu, such as the physical, cultural, and socio-economic connections between the unique places found throughout Hawai‘i.

Decades of aquarium collection have directly impacted more than 200 species and indirectly impacted an unknown number of additional vertebrate and invertebrate species found in Hawai‘i’s coral reefs, one of the most complex ecosystems on Earth, where the fate of each species is determined by the existence, abundance and diverse actions of a multitude of other species that inhabit or otherwise rely upon these unique places.

⁸ Aha Moku Council [testimony on SB505 Relating to Environmental Protection](#) at pdf pg. 1 – 7

⁹ Kāne‘ohe Bay Regional Council [letter to Chair Chang](#)

¹⁰ Additional examples of [letters to Chair Chang](#)

¹¹ Neighborhood Board [examples of resolutions urging aquarium trade ban](#)

The CIA provided an extensive history of native Hawaiians and their symbiotic relationship with the ocean and its animal inhabitants. The CIA also included summaries of interviews conducted with individuals from multiple user groups, all of whom “expressed some degree of ongoing cultural attachment to the ocean.” More than 80 percent of the interviewees noted how the trade both directly and indirectly impacts their cultural resources, beliefs, practices and values. Unfortunately, the CIA essentially dismissed those oral testimonies by concluding that commercial aquarium collection would result in a cultural impact *only* if the EISs biological assessments indicated significant depletion of species or habitat disruption.¹² Equating cultural impacts with fish population counts is a false equivalency which, when combined with the fatally flawed biological assessments contained within the EISs, ultimately served to silence the voices of all those who had voiced strong opposition to aquarium trade practices and impacts. *See* Section III, *infra*, for examples.

The public has not benefited from the aquarium trade’s HEPA review process, which the trade has twisted to serve and promote its own interests. A new public rulemaking process is required in order to promote and protect the *public’s* interests in restoring abundance of critically important fishes and finally addressing the cultural and ethical conflicts that are inherent in this trade.

Authority to Prohibit Commercial Aquarium Collecting

In 1955, the legislature constituted all of Hawai‘i’s waters as a marine life conservation area where, via rulemaking, DLNR can prohibit activities even *potentially* harming the marine environment.^{13, 14} Under HRS 190-3, the legislature empowered DLNR with the authority to prohibit via rulemaking any activity that *may* disturb, degrade, or alter the marine environment.¹⁵ Furthermore, the legislature provided that rules adopted under this statute “supersede any state laws inconsistent therewith.”¹⁶

Petitioners provide in Section IV, *infra*, examples of facts and data contained in peer-reviewed literature, and reports, including DLNR’s, describing the extent to which, from decades past to the present, aquarium collection *already has* disturbed, degraded, and/or altered the marine environment.

Petitioners note that this formal petition to the Board comes after years of good faith efforts to work directly with DAR to address aquarium trade impacts since at least 2008.¹⁷ Most recently, beginning in February of 2022, petitioner, For the Fishes, was asked by DAR to engage in

¹² PIJAC (2021). [Revised FEIS Hawaii Island Commercial Aquarium Permits](#) at pdf pg. 362

¹³ HRS §190-1

¹⁴ HRS §190-3

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ DAR (2009). [Report to the Legislature on the Progress for the Adoption of Rules to Regulate the Ornamental Reef Fish Fishery Industry in South Maui and Kaneohe Bay, Oahu, to Confer with Geographical Stakeholders, and to Propose Appropriate Legislation](#)

“informal communication directly with DAR” instead of via a formal petition to the Board to initiate rulemaking to prohibit commercial aquarium collection. Despite petitioners’ months long, good faith efforts at informal engagement, DAR inexplicably stopped responding, despite multiple requests to continue moving forward.

DAR’s often-used claim in the face of growing public opposition to commercial aquarium collection has been that the trade is “sustainable.” Yet, DAR biologists have described the activity as “a major cause of coral reef degradation,” as “having a major impact on yellow tang and Achilles tang,” and have reported depletion rates in excess of 80% in many collected areas, over many years.^{18, 19, 20}

Conclusion

Petitioners urge the Board to exercise its policy and rulemaking authority to adopt rules to prohibit commercial aquarium collecting statewide.

Petitioners have presented a sampling of existing evidence substantiating that commercial aquarium collection meets the threshold for an activity that may be prohibited by the Board under HRS 190-3 because it “may disturb, degrade, or alter the marine environment.”

The rulemaking sought in this petition is the *only* process that will provide the opportunity for the public’s long and strongly held thoughts and desires to be truly heard and ultimately integrated into marine management policy.

It’s time to right the imbalance in prior management decisions that put commercial interests before the public’s, and apply DLNR’s Hierarchy of Priorities adopted by the Board in 1998. That policy clearly states that when DLNR considers management actions, the highest priority goes to natural and cultural resources, and that commercial activities should be considered last, and only if they do not impinge on those resources.²¹

Petitioners have demonstrated the broad community support for prohibiting aquarium collecting statewide, and that rulemaking to prohibit commercial aquarium collecting benefits all of Hawai‘i. Petitioners further note that no one has *legally* taken fish for commercial aquarium purposes for nearly 6 years.

III. Supplemental Facts and Data Regarding Dismissal of Public Input in HEPA Review

- One community member interviewed on Hawai‘i Island for the West Hawai‘i CIA in 2019 identified himself as a former long-time aquarium collector.²² When asked whether aquarium

¹⁸ DLNR (1998). [Hawai‘i’s State of the Reefs, 1998](#), pg. 15

¹⁹ DAR (2010). [Long-Term Monitoring of Coral Reefs of the Main Hawaiian Islands Final Report](#) at pg. 112-113

²⁰ DAR (2013). [Long-Term Monitoring of Coral Reefs of the Main Hawaiian Islands Final Report](#) at pg. 64-65

²¹ DLNR Hierarchy of Use Policy (1998). [The policy](#) clearly states that when the Department considers management actions, the highest priority goes to natural and cultural resources, and that commercial activities should be considered only if they do not impinge on those resources.

²² PIJAC (2021). [Revised FEIS Hawaii Island Commercial Aquarium Permits](#) at pdf pg. 335, 336

collecting could result in cultural impacts, he responded that “aquarium collecting methods can have a damaging effect on the reef, which in itself, is considered a valued cultural resource.”²³ He then described the method used to capture and take certain fish species and eels, explaining that “these species often conceal themselves deep within the coral reefs and . . . removing them requires significant damage to the reefs.”²⁴

- Although this CIA was included in the trade’s draft, final and revised final EISs for West Hawai‘i, each of which included the proposed take of at least one of the species whose capture involves significant coral damage, in no version of the EISs did the aquarium trade include a discussion of these often used and destructive practices, nor propose any measures to mitigate the damage such practices cause.
- The trade’s EISs dismissed all cultural concerns, stating “[aquarium collecting] may impact cultural practices, but the extent of the impact is unknown,”²⁵ and in doing so, effectively dismissed the findings and purpose section of Chapter 343 which makes clear that environmental review necessitates integrating citizen concerns into the planning process.²⁶
- Despite the above, for each of three aquarium trade EISs brought to the Board for determination of adequacy and acceptability in 2020 and 2021, DAR made the recommendation that the Board accept them. In doing so, DAR continued its own decades-long dismissal of the strongly held and frequently voiced public concerns surrounding the take of Hawai‘i’s marine life for the mainland aquarium pet trade.

IV. Supplemental Facts and Data Regarding Degradation of the Marine Environment

- In a 1998 DLNR report, commercial aquarium collecting was shown to be among the main causes of Hawaiian coral reef degradation, with major impacts on O‘ahu and Hawai‘i Island.²⁷
- In the decade leading up to that report, the volume of marine fishes annually taken by the trade (i.e. the main cause of that coral reef degradation) closely resembled the volume proposed in the trade’s most recent EIS Preferred Alternatives for both O‘ahu and Hawai‘i Island.^{28, 29}
- From 1998 until aquarium collecting was shut down by court order in 2017, data shows continuing and, in some years, increasing degradation of reef fish assemblages in West Hawai‘i for many aquarium-targeted species, most of which are herbivores.³⁰ As recognized by scientists, DAR, and the Board, because herbivorous fishes are the primary factor

²³ Ibid.

²⁴ Ibid.

²⁵ PIJAC (2021). [Revised FEIS Hawaii Island Commercial Aquarium Permits](#) at pdf pg. 17, 202, 204,

²⁶ Hawaii Office of Environmental Quality Control (2012). [Guide to the Implementation and Practice of the Hawaii Environmental Policy Act](#), pdf pg. 10

²⁷ DLNR (1998). [Hawai‘i’s State of the Reefs, 1998](#), pg. 15

²⁸ PIJAC (2021). [FEIS Issuance of Commercial Aquarium Permits and Commercial Marine Licenses for the Island of O‘ahu](#) at pdf pg. 131-133

²⁹ PIJAC (2021). [Revised FEIS Hawaii Island Commercial Aquarium Permits](#) at pdf pg. 164-166

³⁰ DLNR (2019). [Findings and Recommendations of Effectiveness of the West Hawai‘i Regional Fishery Management Area \(WHRFMA\)](#) at pdf pg. 34, 36, 45, 56

determining algae cover on our slow-grown coral reefs, the abundance and diversity of the herbivore fish community is a critical factor determining the ability of Hawai‘i’s coral reefs to persist in our changing climate.^{31, 32}

- In most years from 2003 to 2017, the areas open to aquarium collecting, encompassing the majority of West Hawai‘i reefs, had the lowest herbivore biomass, the lowest coral cover, and the highest level of algal overgrowth.³³
- In 2000, on the West Hawai‘i reefs open to aquarium collecting, the most heavily collected herbivore, the lau‘īpala (yellow tang), was depleted by approximately 30%. By 2008, the level of depletion had increased to more than 120%.³⁴
- The level of depletion fluctuated from year to year, and in many years the depletion rate was upwards of 80%, including 2017, the last year legal aquarium collecting occurred in West Hawai‘i.³⁵
- Notably, 2017 was also the year in which the trade most recently reported taking a number of lau‘īpala (237,000) similar to the total catch proposed in their 2021 EIS (200,000) which was approved and supported by DAR and accepted-by-default by the Board in 2021.^{36, 37} **This alone reveals the inadequacy of HEPA analysis, as undertaken by the aquarium trade, in preventing degradation to Hawai‘i’s coral reefs, and underscores the urgent need for rulemaking.**
- Paku‘iku‘i (Achilles tang), another heavily targeted aquarium species, is also a favorite food fish. According to DAR, the aquarium trade had a major impact on the species, taking upwards of 80% of their populations on the majority of West Hawai‘i reefs (i.e. the areas open to aquarium collecting).^{38, 39}
- Since at least 2006, DAR documented paku‘iku‘i population declines due to aquarium impact but took no action to protect paku‘iku‘i for food fishers. It wasn’t until December 2022 that DAR finally took action to mitigate the severe paku‘iku‘i population decline. Unfortunately for local fishers, DAR waited until populations were so critically low that a complete prohibition that included food fishing was required. The mainland aquarium pet trade profited for decades, and now Hawai‘i reefs and residents, especially local fishers, pay the price.⁴⁰

³¹ DAR [Sustainable Herbivore Management Plan](#) (2021)

³² Asner et al. (2020). Analysis of the Draft Environmental Impact Statement Regarding Issuance of Commercial Aquarium Permits and Commercial Marine Licenses for the Island of O‘ahu Submitted by the Pet Industry Joint Advisory Council in PIJAC (2021) [FEIS Issuance of Commercial Aquarium Permits and Commercial Marine Licenses for the Island of O‘ahu](#) at pdf pg. 996

³³ Gove et. al (2019) West Hawai‘i integrated ecosystem assessment ecosystem status report at pg. 745, 750 in PIJAC (2021) [Revised FEIS Hawaii Island Commercial Aquarium Permits](#)

³⁴ DLNR (2019). [Findings and Recommendations of Effectiveness of the West Hawai‘i Regional Fishery Management Area \(WHRFMA\)](#) at pdf pg. 36

³⁵ Ibid.

³⁶ DLNR catch reports

³⁷ PIJAC (2021). [Revised FEIS Hawaii Island Commercial Aquarium Permits](#) at pdf pg. 52

³⁸ DAR (2010). [Long-Term Monitoring of Coral Reefs of the Main Hawaiian Islands Final Report](#) at pg. 112-113

³⁹ DAR (2013) [Long-Term Monitoring of Coral Reefs of the Main Hawaiian Islands Final Report](#) at pg. 64-65

⁴⁰ DAR (2022). [Board submittal requesting a 2-year moratorium of taking paku‘iku‘i across West Hawai‘i](#)

- The trade’s West Hawai‘i revised EIS, which is currently under review on appeal, proposed the take of nearly a quarter million fish annually from West Hawai‘i reefs, which would exceed the amount of reef fishes taken by all food fishers, *combined*, and would total 1.23 million fish over the five-year period covered under the revised EIS.^{41, 42}

| Average Reef Fish Catch Numbers 2008 - 2011 | | | | 2021 AQ EIS | |
|---|----------------|------------|----------------|----------------|-----------------------|
| | Non-commercial | Commercial | Total Non AQ | Aquarium | Proposed Total Annual |
| West Hawai‘i | 146,176 | 48,498 | 194,674 | 343,729 | 246,560 |

- For seven of the eight proposed catch quotas in that West Hawai‘i EIS, take levels are higher than in most of the last 20 years; and for Potter’s angelfish and Thompson’s surgeonfish, in particular, the proposed catch quotas represent three and ten times the average reported historical catch, respectively.⁴³
- Data from DAR and elsewhere show significant ongoing impacts on O‘ahu, as well. A white paper by DAR and UH researchers documents the devastating impacts of commercial aquarium collecting on vulnerable lau‘īpala populations between Honolulu Airport and Ka‘ena Point, and their subsequent collapse after Hurricane Iwa, which to this day, have not recovered.⁴⁴ The paper documents that “In the weeks following the storm, . . . many fish had migrated to areas that escaped major damage . . . With the loss of collecting habitat, collectors concentrated their efforts in those sites still economically utilizable . . .” “The net result was that storm effects combined with overfishing resulted in the collapse of the aquarium fishery along [the leeward] portion of the O‘ahu coastline.”⁴⁵
- As a result, collectors shifted their focus to invertebrates or to collecting in places such as to Kāne‘ohe Bay, which became the most heavily collected area, while others moved to Hawai‘i Island.⁴⁶
- Prior to 1983, aquarium collectors reported taking upwards of 23,000 lau‘īpala a year from O‘ahu’s leeward reefs. Within three years of Hurricane Iwa, reported catch had dropped by more than 90%. Since 1986 reported lau‘īpala catch from those areas has ranged from 2,000 – 6,000 per year.⁴⁷
- The lack of oversight by DAR, combined with constant collection pressure, has prevented any former abundance from returning to O‘ahu’s leeward coast, because aquarium collecting takes juvenile fish that are years from maturity. A sufficient number left on the reefs would have contributed to the repopulation of the lau‘īpala that were at least four times more

⁴¹ DLNR (2019). [Findings and Recommendations of Effectiveness of the West Hawai‘i Regional Fishery Management Area \(WHRFMA\)](#) at pdf pg. 73

⁴² PIJAC (2021). [Revised FEIS Hawaii Island Commercial Aquarium Permits](#) at pdf pg. 52

⁴³ PIJAC (2021). [Revised FEIS Hawaii Island Commercial Aquarium Permits](#) at pdf pg. 164-166

⁴⁴ Walsh et al. (2004) [The commercial marine aquarium fishery in Hawaii 1976-2003](#) at pdf pg. 11-14; DLNR catch reports

⁴⁵ Ibid. at pdf pg. 12

⁴⁶ Ibid. at pdf pg. 12-14

⁴⁷ Ibid. at pdf pg. 14; DLNR catch reports

abundant four decades ago, before commercial aquarium collecting nearly wiped them out completely.

- In areas long-protected from aquarium collecting, lau‘īpala are one of the most abundant herbivores on the reef. However, on O‘ahu reefs where collecting has occurred, research shows they are depleted by 93%.⁴⁸ Other heavily targeted aquarium species are harmed, as well: kole and umaumalei (orangespine unicornfish) are each depleted by 90%.⁴⁹
- Kāne‘ohe Bay has been particularly impacted. In 2008, 8,604 of the top four herbivorous surgeonfishes were taken by the trade.⁵⁰ In 2019, it had jumped to 25,745 of those same species.⁵¹ From 2000 - 2020, for the entire island of O‘ahu, the annual average reported aquarium catch was 71,983 fish, 29% - 60% of which was taken from Kāne‘ohe Bay, which had become the most heavily collected area in recent years.⁵²
- The O‘ahu EIS, which is currently being revised by the trade after having been rejected by the Board in October of 2021, proposed the take of more than 92,000 fish annually from O‘ahu’s reefs (totaling more than 460,000 fish over the five-year period covered under the EIS), an amount that is more than 20% greater than the average reported historical take of less than 72,000 fish annually.
- For 28 of the 31 proposed catch quotas, take levels are higher than the average reported historical levels, including for lau‘īpala (35% higher) and kole (18% higher).
- The EIS also proposed take of more than 200,000 invertebrates, e.g., hermit crabs, annually (totaling more than 1 million invertebrates over the five-year period covered under the EIS), substantially exceeds the average reported historical take of around 165,000 invertebrates annually.
- As discussed above, the take of several species involved the intentional destruction of coral in order to reach species known to seek shelter deep within the reef structure. One such species, the endemic Potter’s Angelfish, was taken by the trade in very high numbers with over 139,000 reported by O‘ahu aquarium collectors from 2000 – 2017.
- DAR has only recently begun taking seriously the coral damage done by the aquarium trade when collecting this species. In a Special Activity Permit to collect Potters angelfishes as broodstock for aquaculture, which was reviewed by the Board in June 2023, DAR included a permit condition requiring the videotaping of the collection of each and every fish to prove that no coral was damaged or broken when attempting to capture the animals.

V. Text of the Proposed Rule

Petitioners urge the Board to initiate rulemaking for a new section of the Department’s administrative rules to read:

⁴⁸ Grabowsky & Thornhill (2020). [Abundance of AQ-Targeted Fish on Oahu](#) at pdf pg. 20

⁴⁹ Ibid.

⁵⁰ DLNR catch reports

⁵¹ DLNR catch reports

⁵² DLNR catch reports

HAWAII ADMINISTRATIVE RULES

TITLE 13

DEPARTMENT OF LAND AND NATURAL RESOURCES

SUBTITLE 4 FISHERIES

PART IV FISHERIES RESOURCE MANAGEMENT

CHAPTER 78

COLLECTION OF MARINE LIFE FOR AQUARIUM PURPOSES

General Provisions

§13-78-1 Applicability and scope

§13-78-2 Definitions

§13-78-3 Exemptions

§13-78-4 Penalties

§13-78-5 Severability

§13-78-6 Prohibited activities

General Provisions

§13-78-1 Applicability and scope. This chapter shall apply to the collection of marine life for aquarium purposes. While governing the taking of marine life intended for live aquarium displays, this chapter shall not apply to the take of marine life for food, bait, or other consumptive purposes. (Auth: HRS §§187A-5, 188-31)

§13-78-2 Definitions. As used in this chapter unless otherwise provided:

"Aquarium purposes" means to hold marine fish, fresh water nongame fish, or other marine life alive in a state of captivity, whether as pets, for scientific study, for public exhibition, for public display, or for sale for these purposes.

"Commercial purpose" means the taking of marine life for profit, gain, sale, purchase, barter, exchange, to offer for sale, or upon any offer to purchase.

§13-78-3 Exemptions. (a) Notwithstanding the provisions of this chapter, the department may issue the licenses or permits which exempt persons from the provisions of this chapter.

(b) Section 13-75-14(7) exempts the use of small mesh hand nets or scoop nets to take fish or other marine life for non-commercial purposes. (Auth: HRS §§187A-3.5, 187A-6, 190-4)

§13-78-4 Penalties. A person violating any provision of this chapter shall be guilty of a petty misdemeanor and penalized as provided by section 187A-13, HRS. In addition to any criminal penalty, any violation of these rules shall also be subject to civil and administrative penalties, as provided by section 187A-12.5, HRS. (Auth: HRS §§187A-5) (Imp: HRS §§187A-12.5, 187A-13)

§13-78-5 Severability. The provisions of these rules are declared to be severable, and if any portion, or the application thereof, to any person or property is held invalid for any reason, the validity of the remainder of these rules or the application of the remainder to other persons or property shall not be affected. (Auth: HRS §§187A-5, 188-31)

13-78-6 Prohibited activities. (a) It is unlawful for any person to take marine life for commercial aquarium purposes.

VI. Proposed Amendments and Repeal

AMEND: §13-60.4 to read as follows:

§13-60.4-4 Activities prohibited within the West Hawai'i regional fishery management area. While within the West Hawai'i regional fishery management area, no person shall:

~~(4) Possess or use any net or container employed underwater to capture or hold aquatic life alive for aquarium purposes, that is not labeled with the commercial marine license number or numbers of the person or persons owning, possessing or using the equipment;~~

§13-60.4-6 Lay net registration and use requirements.

~~(g) This section shall not apply to panel mesh nets with a stretched mesh size of less than two and three-fourths inches that are marked with commercial marine license numbers as required under section 13-60.4-4(4), and permitted for use and possession under an aquarium permit and a West Hawai'i aquarium permit issued under section 13-60.4-7(a).~~

§13-60.4-7 Aquarium collecting permit and vessel registration requirements.

~~(d) Control date. A control date was established in August 1, 2005 to possibly limit participation in the West Hawai'i regional fishery management area commercial aquarium fishery. Persons who begin fishing in the West Hawai'i regional fishery management area commercial aquarium fishery on or after the control date will not be assured continued participation if the department establishes an aquarium limited entry program in the future.~~
~~(e) Nothing in this chapter shall prevent the department from establishing another control date.~~

AMEND: §13-75 to read as follows:

§13-75-14 Nets, generally. It is unlawful for any person to use nets made of or using netting with a stretched mesh of less than two inches, except that:

(1) Pond owners or operators who hold a valid license issued under section 13-74-40, may use nets of smaller mesh to take young mullet or pua for stocking their fish ponds;

(2) Commercial marine licensees who hold a valid bait license issued under section 13-74-22, may use nets of smaller mesh to take nehu, `iao, marquesan sardine, gold-spot herring, or any other species for which an open season may be declared by the department for use as bait;

(3) All persons may use nets of smaller mesh to take shrimp or `opae, `opelu, makiawa, or mikiawa;

~~(4) Aquarium fish collectors with a valid aquarium fish permit issued pursuant to section 188-31, HRS, may use traps and nets for aquarium fish and other aquatic life in conformance with the conditions of the permit, provided that non-commercial aquarium fish collectors shall be limited to a combined total of five fish or aquatic life specimens per person per day.~~

REPEAL IN ENTIRETY: §13-77 OAHU AQUARIUM LIFE MANAGEMENT

Respectfully submitted with a request for a public Board hearing to respond to this petition.

Dated: November 9, 2023



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