

January 7, 2020

Via First-Class Mail and Email

Suzanne Case, Chairperson, suzanne.case@hawaii.gov

State of Hawai'i Department of Land and Natural Resources

Brian Neilson, Administrator, brian.j.neilson@hawaii.gov

David Sakoda, Commercial Fisheries Program Manager, david.sakoda@hawaii.gov

Division of Aquatic Resources

Kalanimoku Building

1151 Punchbowl Street

Room 330

Honolulu, Hawai'i 96813

Re: Ongoing Illegal Aquarium Collection Under Commercial Marine Licenses and Request for Meeting

Dear Chair Case, Administrator Neilson, and Mr. Sakoda:

By this letter, Earthjustice, For the Fishes, Willie and Ka'imi Kaupiko, Mike Nakachi, and Center for Biological Diversity wish to raise for your immediate attention and corrective action the Hawai'i State Department of Land and Natural Resources' (DLNR's) ongoing unlawful practice of allowing commercial aquarium collection to continue without compliance with the environmental review requirements under the Hawai'i Environmental Policy Act (HEPA), Haw. Rev. Stat. (HRS) ch. 343. This practice flouts the Hawai'i Supreme Court's ruling in *Umberger v. Department of Land & Natural Resources*, 140 Hawai'i 500, 403 P.3d 277 (2017), that commercial aquarium collection requires HEPA review to address the impacts of the industrial-scale extraction of marine organisms for the aquarium trade on the marine environment.¹ DLNR, nonetheless, has chosen to disregard and circumvent the supreme court's ruling and the circuit court's subsequent injunction, allowing commercial aquarium collection to continue illegally under Commercial Marine Licenses (CMLs) issued pursuant to HRS § 189-2, without HEPA review or aquarium collection permits under HRS § 188-31.

Before the *Umberger* ruling, commercial aquarium collectors routinely obtained from DLNR both an aquarium permit under § 188-31, and a CML under § 189-2, regardless of the types of gear used. Despite the court injunction halting issuance of new commercial aquarium permits until the HEPA review process is complete, DLNR has since logged a statewide industry-reported commercial take of at least 372,769 fish and 203,972 aquatic invertebrates for

¹ *Umberger v. Dep't of Land & Natural Res.*, 140 Hawai'i 500, 506-10, 403 P.3d 277, 283-87 (2017).

aquarium purposes—totaling at minimum 576,741 individual animals.² DLNR has sought to justify this outcome by asserting that the court rulings only applied to the use of fine-meshed gear, and that any and all aquarium collection without the use of fine-meshed gear may continue without any aquarium permits or HEPA review.³

This ongoing end-run around the courts' rulings in *Umberger* violates state law and must immediately cease, for the following reasons:

- Aquarium collection under § 189-2 meets the exact same criteria triggering HEPA review as aquarium collection under § 188-31 and is equally subject to HEPA's legal requirements regardless of DLNR's chosen permitting methods;
- HRS § 188-31 regulates all aquarium collection regardless of the types of gear used, as confirmed by the statutory scheme and legislative history; therefore, all aquarium collection requires an aquarium permit and is subject to HEPA; and
- DLNR is failing to satisfy its public trust duties to reasonably monitor aquarium collection to ensure compliance with state laws and protection of public rights and resources.⁴

We also request a meeting with you as soon as possible to address this issue, and hopefully, reach a cooperative and productive resolution in the public interest and consistent with DLNR's public trust duties.

² Commercial aquarium catch data is self-reported by the collectors themselves, and thus may not accurately reflect the full amount of marine life taken. These numbers represent commercial aquarium catch data for October 2017 through October 2019. Extraction has presumably continued apace since then.

³ DLNR, Frequently Asked Questions – Aquarium Permit (HRS §188-31), https://dlnr.hawaii.gov/dar/files/2018/12/aquarium_permit_faq_rev6.pdf (last visited Jan. 5, 2020). DLNR recognizes West Hawai'i as a single exception to this loophole, since DLNR regulations require § 188-31 aquarium permits for all aquarium collection, regardless of the types of gear used.

⁴ In this context, DLNR has failed to monitor or enforce against poaching in express violation of the court's rulings. DLNR has also failed to take affirmative steps to ensure that collectors are, in fact, not using fine-meshed equipment, since extraction at the large scales being reported is likely infeasible or extraordinarily difficult with non-fine-meshed equipment.

Aquarium Collection Under Commercial Marine Licenses Requires HEPA Review.

In *Umberger*, the Hawai'i Supreme Court described commercial aquarium collection under HRS § 188-31 as the “systematic and deliberate extraction of aquatic life using procedures, equipment, facilities, and techniques authorized or required by [statute] and related administrative rules for the specific purpose of holding captive such aquatic life for aquarium purposes in order to earn profit” and determined that environmental review was required for such activity.⁵ Aquarium collection under a CML and HRS § 189-2 is indistinguishable in principle and result: aquarium collection gear⁶ is being used to systematically extract hundreds of thousands of fishes and marine organisms for profit, and there would be little point in collecting aquarium fish without facilities and equipment to keep specimens alive pending sale on the aquarium market.⁷ Further, the court described in detail why aquarium collection constitutes a “use” of “state land,” the analysis of which applies regardless of which statute purportedly authorizes it.⁸ Finally, the court’s analysis of “discretionary consent” under § 188-31 equally applies to collection under § 189-2 CMLs because DLNR likewise has discretion to issue them.⁹

Simply put, if commercial aquarium collection under HRS § 188-31 is subject to HEPA, that *same conduct* occurring under CMLs cannot evade environmental review. Indeed, it was the proposition of unlimited and unexamined commercial aquarium species extraction that

⁵ See *Umberger*, 140 Hawai'i at 514, 403 P.3d at 291.

⁶ Pursuant to its authority to administer CMLs under HRS § 189-2, DLNR authorizes non-fine-meshed gear for commercial aquarium purposes by offering “Aquarium” as an option on the “Gear Preferences” drop-down menu found on DLNR’s CML application/renewal webpage.

⁷ In addition to conforming with the *Umberger* court’s analysis of HEPA “action,” commercial aquarium collection under a CML would also constitute a HEPA “project” and “program” under the new HEPA definitions that went into effect in August 2019. See Haw. Admin. R. (HAR) § 11-200.1-2 (defining a HEPA “project” as a “discrete, planned undertaking that is site and time specific, has a specific goal or purpose, and has potential impact to the environment” and defining “program” generally as multiple projects with similar impacts).

⁸ See *Umberger*, 140 Hawai'i at 520-23, 403 P.3d at 297.

⁹ *Id.* at 525-27, 403 P.3d at 302-04; HRS § 189-2; HAR §§ 13-74-2(4), 13-74-3, 13-74-20.

spurred the court to require HEPA review—not the specific methods by which such collection was accomplished.¹⁰

HRS § 188-31 Applies Broadly to All Aquarium Collection, Regardless of the Types of Gear Used.

In response to *Umberger* and the circuit court's subsequent injunction against commercial aquarium permits until HEPA review is complete, DLNR has construed HRS § 188-31 to apply only to collection using fine-meshed equipment, and, based on this reasoning, has allowed commercial collection to continue under CMLs, purportedly using non-fine-meshed equipment. This cramped reading of the aquarium collection law is fundamentally flawed because it contradicts the statutory framework and legislative history and produces absurd results.

The underlying purpose for the enactment of the aquarium collection statute (which dates back to the 1950s) was threefold: (1) allowing inroads into the national aquarium fish trade for local fishers, by (2) carving out an exemption for the use of otherwise prohibited fine-meshed equipment, while (3) providing safeguards for the health and vitality of collected organisms.¹¹ This last requirement is unique to HRS § 188-31: while other statutes or administrative rules exempt uses like 'ōpae fishing from the fine-mesh prohibition, § 188-31

¹⁰ See *Umberger*, 140 Hawai'i at 506-09, 140 P.3d at 283-87 (reciting the factual bases for Petitioners' claim that aquarium collection should be reviewed under HEPA, including "disrupt[ion] of ecosystems," "marked difference[s] in the condition between those reefs that are open to collection and those that are not," "noticeable difference[s] in aquarium fish species' populations and coral damage" in areas open to collection, and impairment of overall reef ecosystem health due to removal of fish species "that serve a larger role in reef ecosystems"); *id.* at 516, 430 P.3d at 293 ("Given the nature, magnitude, and scale of aquarium collection . . . any environmental effects that aquarium collection may have falls squarely within the ambit of what HEPA's environmental review framework intends to integrate into governmental decision making"); *id.* at 523, 403 P.3d at 300 (holding that aquarium collection is a HEPA "use" of state lands and conservation districts because it entails the "*unlimited collection* of fishes and other aquatic life") (emphasis added); *id.* at 524-25, 140 P.3d at 301-02 (holding that commercial aquarium collection cannot be exempted from HEPA, in part because "*extraction of an unlimited number* of fish and other aquatic life annually" is not a "minor alteration" of public resources) (emphasis added).

¹¹ See H. Stand. Comm. Rep. No. 586, in 1953 House Journal, at 675.

alone includes the express requirement that collected animals be kept “alive and in reasonable health.” The statute was clearly intended to permit and regulate commercial aquarium collection, providing both a means to accomplish it efficiently and a caveat to control and prevent waste of aquatic resources.

Since its original enactment, § 188-31 has been amended to encompass aquarium collection comprehensively, and not just fine-meshed equipment. Most notably, legislative amendments in 1992 confirmed the broad scope of permitting authority, by adding the broad catch-all term “other aquatic life” to the operative permitting provision, which had previously referred to “marine or fresh water nongame fish.”¹² Along the same lines, the 1992 amendment clarified the title of the statute from “[n]ets and traps for aquarium purposes” to the more broadly expressed “[p]ermits to take aquatic life for aquarium purposes.”¹³ The inclusion of “other aquatic life” in the permitting section acknowledged the breadth of aquarium collection to include, for example, invertebrates like sea cucumbers, while the title amendment evinced legislative acknowledgement of the purpose and practice of regulating the take of aquatic life generally, and not the equipment in particular.¹⁴

Notwithstanding that the aquarium collection permitting statute has been in effect since the mid-1950s, DLNR now claims that an aquarium permit is unnecessary for any and all collection that does not use fine-meshed gear. This turns the statute on its head: instead of recognizing § 188-31’s original, fundamental purpose to permit and regulate aquarium collection activity and commercial industry, DLNR distorts the statute to allow widespread aquarium collection free from any regulation, including the requirement to keep collected fish alive and in reasonable health.

DLNR’s current reading of § 188-31, moreover, contradicts DLNR’s established interpretations via formal rulemaking, as well as its practice over decades, to regulate aquarium collection more broadly. For example, Haw. Admin. R. (HAR) ch. 13-86.1 regulates take of sea cucumbers, and requires a § 188-31 permit to collect sea cucumbers for aquarium purposes, even though such collection does not require traps or nets of any kind. HAR ch. 13-60.4 regulates take in the West Hawai’i Regional Fishery Management Area (WHRFMA) and defines “aquarium gear” as “*any* equipment or gear adapted, designed, or commonly used to collect, capture, or maintain aquatic life alive in a state of captivity”; thus, collection in the WHRFMA

¹² 1992 Haw. Sess. Laws Act 96, § 2 at 146. Previously, the term “other aquatic life” had been included only in the statute’s definitional sections. RLH § 21-64 (1955).

¹³ 1992 Haw. Sess. Laws Act 96, § 2 at 146.

¹⁴ *See id.*

requires both an aquarium permit and a WHRFMA permit.¹⁵ In sum, DLNR has consistently issued aquarium permits for collection with gear other than fine-meshed traps and nets. To now claim that aquarium collection permitting applies only to fine-meshed gear is disingenuous at best.

Finally, DLNR's restrictive interpretation of § 188-31 has led to the absurd and unjust result of large-scale extraction persisting without any environmental review under HEPA, despite the court's rulings and the agency's duties to conserve and protect public trust resources. This contravenes the fundamental rule that a statute should not be construed "to create an absurdity, or worse yet, to circumvent [an agency's] constitutional and statutory obligations."¹⁶

DLNR Must Proactively Monitor and Regulate Commercial Aquarium Collection to Fulfill Its Public Trust Duties.

As DLNR is well aware, conservation lands, which include all state marine areas, are public resources held in trust for the people of Hawai'i pursuant to article XI, § 1 of the Hawai'i Constitution.¹⁷ Conservation districts exist in part to conserve "indigenous or endemic plants, fish, and wildlife."¹⁸ Submerged lands and associated resources also are part of the public trust *res*.¹⁹ DLNR must ensure that these public natural resources are responsibly managed and conserved. DLNR's public trust duty to manage public resources extends beyond simply issuing licenses and permits, and includes a responsibility to reasonably monitor uses of public trust assets to ensure that measures prescribed by law to conserve and protect such resources

¹⁵ HAR § 13-60.4-3 (emphasis added).

¹⁶ *Morgan v. Planning Dep't, Cnty. of Kaua'i*, 104 Hawai'i 173, 185-86, 86 P.3d 982, 994-95 (2004).

¹⁷ *See In re Thirty Meter Telescope*, 143 Hawai'i 379, 400, 431 P.3d 752, 773 (2018); *see also* Haw. Const. art. XI § 6 (specifically granting the state power to manage "marine, seabed, and other resources within the boundaries of the State").

¹⁸ HRS § 205-2(e).

¹⁹ *See Umberger*, 140 Hawai'i at 521, 403 P.3d at 298.

are “actually being implemented.”²⁰ DLNR cannot “turn a blind eye to imminent damage, leaving beneficiaries powerless to prevent damage before it occurs.”²¹

The courts have already determined that the large-scale removal of marine life by commercial aquarium collectors threatens impacts to public trust marine resources.²² Yet, DLNR has allowed commercial extraction to continue at an alarming rate, without any oversight beyond administration of CML applications and renewals, and logging of catch reports. Commercial collection should only be allowed to resume if and when the long-term impacts have been fully vetted and a final determination is made that some level of continued take will not adversely affect public resources. Absent such an informed determination, DLNR should take the precautionary measure of declaring an immediate moratorium on all commercial aquarium collection, regardless of the types of gear used, rather than evade HEPA by allowing continued industrial-scale extraction.

In any event, the law requires DLNR, at minimum, to proactively monitor ongoing commercial collection to ensure that such extraction is, in fact, being conducted via the claimed methods. Fish extraction at the levels seen since *Umberger* would be likely infeasible or extraordinarily difficult without fine-meshed gear. In this context, particularly given the public resources at stake, DLNR cannot simply sit on its hands and assume compliance, but must instead take diligent action to monitor and enforce the fine-mesh ban.

Similarly, since the *Umberger* ruling, there have been multiple reports of poaching and illegal activity in the WHRFMA, where all aquarium collection is undisputedly prohibited until environmental review under HEPA is complete. Yet, DLNR has failed to meaningfully monitor, investigate, and take enforcement action against illegal collection in the WHRFMA.

We hope that DLNR will embrace its role as the public's trustee and responsibly manage our precious marine resources in compliance with the law and court rulings, rather than choose an oppositional course that may lead to needless legal action. We would welcome the opportunity to discuss and resolve this cooperatively with DLNR, and we request a meeting for this purpose as soon as possible, particularly before DLNR proceeds with issuing any further CMLs for aquarium collection purposes. Mahalo nui for your attention to and consideration of our request.

²⁰ *Ching v. Case*, 145 Hawai'i 148, 170, 449 P.3d 1146, 1168 (2019) (citing *Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 231, 140 P.3d 985, 1011 (2006)).

²¹ *Id.*

²² See *supra* note 10.

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Very truly yours,

A handwritten signature in dark ink, appearing to read 'Kylie W. Wager Cruz', with a long horizontal flourish extending to the right.

Kylie W. Wager Cruz
Mahesh Cleveland
EARTHJUSTICE

cc (via email):

Office of the Governor, State of Hawai'i

Linda Chu Takayama, Chief of Staff, linda.c.takayama@hawaii.gov

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