

**Electronically Filed
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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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WILLIE KAUPIKO; KA'IMI KAUPIKO; MIKE NAKACHI; FOR THE FISHES;
CENTER FOR BIOLOGICAL DIVERSITY; and KAI PALAOA,
Plaintiffs-Appellants/Cross-Appellees,

vs.

BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAI'I; and
DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAI'I,
Defendants-Appellees/Cross-Appellants,

and

PET INDUSTRY JOINT ADVISORY COUNCIL,
Defendant-Intervenor-Appellee/Cross-Appellee.

SCAP-22-0000557

APPEAL FROM THE ENVIRONMENTAL COURT OF THE FIRST CIRCUIT
(CAAP-22-0000557; 1CC1-21-0000892)

AUGUST 28, 2024

CONCURRING AND DISSENTING OPINION OF MCKENNA, J.

I generally concur in Sections II, III, and IV.A and IV.B of the majority opinion. I respectfully dissent from Section IV.C for the following reasons.

In 2017, in Umberger v. Department of Land & Natural Resources, 140 Hawai'i 500, 403 P.3d 177 (2017), we held that aquarium collection is not exempt from HEPA environmental review because, as a matter of law, a permit for "the extraction of an unlimited number of aquatic life annually" cannot be said to constitute only a "[m]inor alteration" in the condition of state waters and submerged lands. 140 Hawai'i at 524-25, 403 P.3d at 301-02. We noted the harmful impacts of the aquarium trade in Umberger, in which we considered some of the possible environmental effects of commercial aquarium collection. 140 Hawai'i at 518-19, 403 P.3d at 295-96.

The significant effects of aquarium fishing on the abundance of targeted fishes cannot be considered merely "flyspecks" because the anticipated impacts of aquarium collection on Hawai'i's reef ecosystem and cultural landscape are the very basis for HEPA review. See Habitat Edu. Ctr., Inc. v. U.S. Forest Serv., 673 F.3d 518, 528 (7th Cir. 2012) (finding that deficiencies under the "rule of reason" cannot be "merely flyspecks" but "significant enough to defeat the goals of informed decision making and informed public comment").

There are drastic differences in aquarium fish species abundances between open areas (sites open to collection) and protected areas (control sites where collection is prohibited),

which shows that aquarium collection is removing and having a detrimental effect on species that play important ecological roles in Hawai'i's reef ecosystems. Umberger, 140 Hawai'i at 506, 403 P.3d at 283. We have noted that the aquarium industry typically targets juvenile fish because they are "smaller and more aesthetically pleasing and thus popular to customers," thereby reducing the number of fish that reach reproductive maturity. 140 Hawai'i at 507, 403 P.3d at 284.

Under this backdrop, I disagree with the majority that the Revised Final Environmental Impact Statement ("RFEIS") complied with the Hawai'i Environmental Policy Act ("HEPA"). The sufficiency of an EIS is a question of law because the only question presented is whether the EIS complies with applicable mandates, such as Hawai'i Revised Statutes ("HRS") chapter 343 and Hawai'i Administrative Rules ("HAR") chapter 11-200 (now 11-200.1). Price v. Obayashi, 81 Hawai'i 171, 182, 914 P.2d 1364, 1375 (1996). An environmental impact statement ("EIS") shall only 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. Here, the Environmental Court of the First Circuit ("environmental court") relied on appended comments in holding

that the Pet Industry Joint Advisory Council ("PIJAC") met HEPA content requirements.

In my opinion, however, the RFEIS is inadequate because it fails to (1) sufficiently address the Board of Land and Natural Resources' ("BLNR") reasons for non-acceptance regarding relevant negative findings; and (2) fails to include adequate mitigation measures required by HAR § 11-200-17(b)(3) and -17(m) (eff. 1993) (repealed 2019).

To comply with HEPA, an EIS must provide adequate disclosure of all identifiable environmental effects of a proposed action. HRS § 343-2 (2010). HEPA requires that an EIS "discuss all relevant and feasible consequences" of an action, including "responsible opposing views" on any "significant environmental issues raised by the proposal." HAR § 11-200-16 (eff. 1993) (repealed 2019). HEPA's administrative rules provide specific requirements for EISs that are revised after being initially rejected. See HAR § 11-200-23 (eff. 1993) (repealed 2019). HAR § 11-200-23(e) expressly mandates that a revised EIS must "fully address the inadequacies of the non-accepted EIS." (Emphasis added.) Thus, under the plain language of HEPA and its administrative rules, the acceptance of a revised EIS is evaluated "on the basis of whether it

satisfactorily addresses the findings and reasons for nonacceptance." Id. (emphasis added).

BLNR rejected PIJAC's FEIS on May 30, 2020 and subsequently provided fourteen reasons for nonacceptance. BLNR rejected the FEIS in part due to a failure to discuss the harmful impacts of aquarium collection, for example, the reduced numbers of aquarium fish at certain collection sites noted in a 2003 study. Of relevance here, BLNR determined that:

11. The FEIS does not adequately discuss relevant negative findings, for example, the reduced numbers of aquarium fish at collection sites found by Tissot and Hallacher (2003). The FEIS need not agree or disprove the negative findings, but it should discuss them.

In 2003, Tissot and Hallacher sought to quantitatively estimate the effects of aquarium collection on fish populations in West Hawai'i through a comparison of differences in fish abundance between open areas (sites open to collection) and protected areas (control sites where collection is prohibited). The study ultimately found that "aquarium collectors have a significant effect on the abundance of targeted fishes on the Kona coast of Hawai'i."

The environmental court concluded "there was sufficient information regarding impacts of aquarium fishing on the fish species proposed for collection and the RFEIS adequately disclosed facts to allow the agency to render an informed decision." In so ruling, the environmental court relied in part

on representative excerpts from the RFEIS that discuss yellow tang populations at open area collection sites. Tables within the RFEIS show, however, that yellow tang populations in open areas plummeted down to a quarter or less than populations in protected areas. Notably, the gap between yellow tang populations in open areas versus protected areas only began to close in 2017, when collection in the West Hawai'i Regional Fishery Management Area ("WHRFMA") was halted by this court in Umberger and by subsequent environmental court orders. Nevertheless, the RFEIS asserts that higher levels of yellow tang collection is sustainable because "[their] populations have been increasing even under higher levels of historic collection since establishment of the WHRFMA."

The environmental court relied in part on appended public testimony to find that the RFEIS contained sufficient information regarding impacts of aquarium fishing on the fish species proposed for collection. A former Department of Aquatic Resources ("DAR") biologist submitted a declaration (the "Walsh declaration") describing the overall effectiveness of West Hawai'i fishery management. The Walsh declaration does not, however, address HEPA's requirement that the RFEIS discuss collection's significant impacts to fish populations. The environmental court's reliance on appended public comments to

fully address the inadequacies of the non-accepted EIS also frustrates HEPA's purpose that agencies do not merely rely on the public to disclose and analyze possible environmental impacts.

Despite BLNR's specific instructions to "discuss relevant negative findings," including "the reduced numbers of aquarium fish at collection sites found by Tissot and Hallacher (2003)," the RFEIS lacks any discussion of the significant differences in fish abundance in open areas versus protected areas. Further, the RFEIS fails to provide any meaningful comparison between open areas and protected areas to disclose the cumulative impacts of aquarium collection required under HEPA. See HAR § 11-200-2 (eff. 1993) (repealed 2019) ("Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."). To the contrary, the RFEIS selectively uses open area population data from 2017 and 2018 to evaluate its proposed catch quotas.

Thus, the RFEIS lacks HEPA's required discussion of "relevant negative findings" regarding the aquarium trade's harmful impacts, because it fails to analyze and disclose relevant negative findings that show "aquarium collectors have a significant effect on the abundance of targeted aquarium fishes."

The RFEIS also does not comply with the HEPA requirement that an EIS discuss mitigation measures. The Office of Environmental Quality Control's HEPA Citizen's Guide (2014) "indicates that an EIS needs to consider all mitigation measures to avoid, minimize, rectify, or reduce adverse impacts." PIJAC relies on this to argue that "mitigation is only considered for alternatives with a significant adverse impact." The RFEIS itself contains no other discussion or information on mitigation measures.

In its appeal to the environmental court, the Hui pointed to localized take limits that could mitigate harms from aquarium fishing by preventing concentration of species extraction in certain areas as an example of mitigation measures. Rather than assessing whether the RFEIS discussed mitigation measures generally, the environmental court solely assessed whether the RFEIS sufficiently analyzed reporting catch data by smaller local areas (versus zones, which are larger areas). The environmental court relied on the Walsh declaration to find that the RFEIS disclosed information to BLNR that fishery management areas appear to be working well based on extensive fish population data obtained through thousands of surveys at more than two dozen sites. The Walsh declaration says that fishery management areas have established a successful way to monitor

population decades ago and have successfully driven the increase of yellow tang in both Marine Protected Areas and the entire West Hawai'i coast.

HEPA, however, requires that an EIS consider "mitigation measures" to "avoid, minimize, rectify, or reduce impact, including provision for compensation for losses of cultural, community, historical, archaeological, fish and wildlife resources." HAR § 11-200-17(b)(3), -17(m). The Walsh declaration might demonstrate that BLNR and the environmental court had adequate information to understand that fishery management areas have established a successful way to monitor fish populations decades ago; however, it does not explain how PIJAC will mitigate any future harm to fish populations as a result of their proposed take. Simply because a current management method has proven effective for monitoring fish populations does not mean that there will not be impacts requiring mitigation as a result of PIJAC's proposed take. Furthermore, the onus is on PIJAC to demonstrate that they adequately included mitigation measures along with all other HEPA requirements in the RFEIS.

PIJAC improperly relied on a citizen's guide to state that mitigation measures need only be considered "for alternatives with a significant adverse impact" when HEPA actually requires

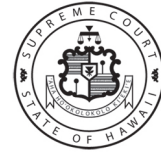
that EISs consider mitigation measures to "avoid, minimize, rectify, or reduce impact" generally. See HAR § 11-200-17(m). The RFEIS may make various estimates as to how PIJAC's proposed take may impact the fish populations, but PIJAC offers no mitigation measures for those potential impacts on fish populations, the natural environment of WHRFMA, cultural impacts, or any other potential impacts that may arise out of their take from WHRFMA. Nor does the RFEIS include any provision or discussion on compensation for losses of cultural, community, and fish resources. The RFEIS therefore fails to meet HEPA's requirement to include mitigation measures. Applying the "rule of reason" without fully enforcing HEPA's applicable statutory mandates frustrates the informed and deliberate decision-making process that HEPA requires.

In my opinion, for these reasons, the RFEIS here fails on the merits. PIJAC has failed to include sufficient information explicitly required by HEPA and the accompanying administrative rules. I therefore respectfully dissent from the majority's opinion in Section IV.C.

In conclusion, if BLNR begins issuing commercial aquarium permits in West Hawai'i, I hope the DAR will carefully monitor

fish populations to determine whether annual permits should be renewed or whether catch quotas need to be modified.¹

/s/ Sabrina S. McKenna



¹ HRS § 188-31 regarding "Permits to take aquatic life for aquarium purposes," provides:

(a) Except as prohibited by law, the department, upon receipt of a written application, may issue an aquarium fish permit, not longer than one year in duration, to use fine meshed traps, or fine meshed nets other than throw nets, for the taking of marine or freshwater nongame fish and other aquatic life for aquarium purposes.

(b) Except as prohibited by law, the permits shall be issued only to persons who can satisfy the department that they possess facilities to and can maintain fish and other aquatic life alive and in reasonable health.

(c) It shall be illegal to sell or offer for sale any fish and other aquatic life taken under an aquarium fish permit unless those fish and other aquatic life are sold alive for aquarium purposes.

The department may adopt rules pursuant to chapter 91 for the purpose of this section.

(d) For the purposes of this section:

(1) "Aquarium purposes" means to hold salt water fish, freshwater nongame fish, or other aquatic life alive in a state of captivity as pets, for scientific study, or for public exhibition or display, or for sale for these purposes; and

(2) "Aquarium fish permit" means a permit issued by the board for the use of fine mesh nets and traps to take salt water fish, freshwater nongame fish, or other aquatic life for aquarium purposes.