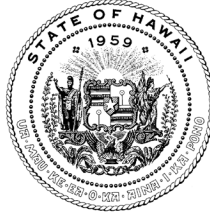


DAVID Y. IGE
GOVERNOR OF
HAWAII



SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
FIRST DEPUTY

M. KALEO MANUEL
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

October 11, 2021

Ms. Mary Alice Evans, Director
Office of Planning and Sustainable Development
c/o Environmental Review Program
235 South Beretania Street, 6th Floor
Honolulu, Hawaii 96813
Email: dbedt.opsd.erp@hawaii.gov

via Email

SUBJECT: Notice of Non-Acceptance and Findings and Reasons for Non-Acceptance
Final Environmental Impact Statement for the Proposed Issuance of Commercial
Aquarium Permits and Commercial Marine Licenses for the Island of O‘ahu.

Dear Ms. Evans:

By letter dated August 26, 2021, applicant Pet Industry Joint Advisory Council (“PIJAC”) submitted to the Department of Land and Natural Resources, Division of Aquatic Resources (“DAR”), its Final Environmental Impact Statement (“FEIS”) to disclose the projected environmental impacts of the proposed issuance of commercial aquarium permits and commercial marine licenses for the island of O‘ahu.¹

The approving agency is the Department of Land and Natural Resources through its Board of Land and Natural Resources (“Board”). The Board considered the FEIS at its duly

¹The FEIS is publicly available online, at: http://oeqc2.doh.hawaii.gov/EA_EIS_Library/2021-09-08-OA-FEIS-Oahu-Commercial-Aquarium-Permits.pdf.

noticed sunshine meeting held on October 8, 2021.^{2,3} Applicant submitted testimony and appeared via Zoom videoconference. Numerous other persons submitted testimony for or against acceptance of the FEIS and/or testified for or against acceptance of the FEIS at the meeting.⁴

Upon careful consideration, the Board voted on a motion to non-accept the FEIS, did not and does not accept the FEIS based on the following findings and determinations supported by the testimony and exhibits.

1. The FEIS for Proposed Issuance of Commercial Aquarium Permits and Commercial Marine Licenses for the Island of O‘ahu (“Proposed Action”) would allow for the issuance of 15 permits to aquarium fishers on the island of O‘ahu, but with an annual quota limiting their total catch.

2. Generally speaking, an FEIS is intended to provide decisionmakers with information about the projected impact of the proposed action. The Hawaii Supreme Court “use[s] the ‘rule of reason’ to determine whether [an] EIS is legally sufficient in adequately disclosing facts to enable a decision-making body to render an informed decision.” *Price v. Obayashi Hawai‘i Corp.*, 81 Hawai‘i 171, 182, 914 P.2d 1364, 1375 (1996) (emphasis added) (quoting *Life of the Land v. Ariyoshi*, 59 Haw. 156, 164, 577 P.2d 1116, 1121 (1978)). The

²The Agenda for the October 8, 2021 Meeting of the Board of Land and Natural Resources is publicly available online, at: <https://dlnr.hawaii.gov/wp-content/uploads/2021/10/Agenda-211008.pdf>.

³The Staff of the Division of Aquatic Resources of the Department of Land and Natural Resources’ submittal memorandum for Item #F-1 on the Agenda for the October 8, 2021 meeting of the Board of Land and Natural Resources (“Staff Submittal”) is publicly available online, at: <https://dlnr.hawaii.gov/wp-content/uploads/2021/10/F-1.pdf>.

⁴The official minutes of the October 8, 2021 meeting of the Board of Land and Natural Resources were not yet available at the time of drafting.

document “need not be exhaustive to the point of discussing all possible details bearing on the proposed action.” *Id.* at 183, 914 P.2d at 1376 (quoting *Life of the Land*, 59 Haw. at 164–65, 577 P.2d at 1121). Rather, an FEIS will be “upheld as an adequate disclosure document” if it was compiled in good faith; and it provides sufficient information to enable the decisionmaker to consider fully the environmental factors involved, make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, and make a reasoned choice between alternatives. *Id.* Although information need not be exhaustive, it is inadequate where the data and analysis (including as identified in these findings and reasons) is not able to be found in the FEIS. This baseline information should not be left for further review and analysis at the permitting stage.

3. The FEIS fails to provide sufficient information about the anticipated impacts to environmental resources from the Proposed Action, and where impacts are identified, it fails to set forth appropriate mitigation measures to avoid, minimize, rectify, or reduce those impacts.

a. The analysis is insufficient for many reasons, including its comparison of the Proposed Action with aquarium fishing for the past twenty years, rather than compared with no aquarium fishing, which would analyze impacts of the proposed action.

b. The annual catch limits proposed for each species are significantly higher than average take over the past twenty years. Public comment should be received on this proposal.

c. Three species of fish and four species of invertebrates are included in the proposed annual quota of allowed take, though they have no population data at all for Oahu, including two that are IUCN species of concern. There is thus no analysis of

impacts of those levels of take, how declines in whitelist species populations have or would be detected without population data, nor any explanation why they should be included in the proposed action when there is no analysis of impact.

d. Whether the data shows population trends over time in the various “White List” species *with available data* should also be discussed.⁵ If any changes are not statistically significant, or the data is inadequate to show trends, this should also be discussed.

e. The FEIS should include the NOAA data quality score categories as presented by NOAA, *i.e.*, “terrible” etc. The data confidence levels should be included.

f. The projected percentage of annual take is calculated as a percentage of the mean of the range of population estimated per White List species. *See* Table 5-5. To disclose the full range of estimated take, the projected percentage of annual take should show percentages of the low, mean and high estimates per White List species. This is especially important for the ten species where the lower range of the population estimate is given as zero in Table 3-2. The West Hawaii Aquarium Fish FEIS showed confidence intervals for at least some of the population data. In addition, the high uncertainty of the population estimates for certain species should be explicitly discussed.

g. If the FEIS is proposing that deep waters serve as refugia to repopulate shallower waters, it should include observations and data to support this.

4. The FEIS also insufficiently analyzes reasonable alternatives to the Proposed Action.

⁵“White List” is a reference to the FEIS’s preferred alternative, which was not included in the DEIS.

a. The applicant’s “No Action” alternative was insufficiently analyzed. The analysis should compare the proposed action with projections of fish populations if no permits are issued at all in order to provide a proper analysis of impacts of the proposed action. The FEIS should thus propose various methods or proxies for estimating what the fish species populations would be without the proposed aquarium fishing.

i. One method could be to compare the NOAA data for Oahu with the NOAA data for protected areas on Hawai‘i Island, to estimate what Oahu fish populations might be without aquarium fish harvesting.

ii. An additional method could be to request DLNR Division of Aquatic Resources fish biomass data by island, and estimate populations using a proportion of Oahu biomass compared to the high biomass island level. See, e.g., Friedlander AM, Donovan MK, Stamoulis KA, Williams ID, Brown EK, Conklin EJ, DeMartini EE, Rodgers KS, Sparks RT, Walsh WJ (2017) Human-induced gradients of reef fish declines in the Hawaiian Archipelago viewed through the lens of traditional management. *Aquatic Conservation* DOI: 10.1002/aqc.2832.

iii. A comparison of aquarium fish species inside versus outside protected areas on O‘ahu would also be informative. See, e.g., Unpublished Data (available from DAR on request, from: Mary K Donovan, Chelsie WW Counsell, Joey Lecky, Megan J. Donahue (2020) Estimating indicators and reference points in support of effectively managing nearshore marine resources in Hawai‘i. Report by Hawai‘i Monitoring and Reporting Collaborative (HIMAR)).

b. The final “Preferred Alternative” — “White List” with annual catch limits for each species—was not in the Draft Environmental Impact Statement (“DEIS”), hence public did not have a chance to comment on it.

c. The FEIS proposes annual quotas on an island-wide basis. The DEIS comments indicate particular areas get hardest hit, such as Kāne‘ohe Bay, and leeward areas which were previously heavily depleted by aquarium fishers following Hurricane Iwa in 1982. Because the catch data are reported to DAR on a zone basis, the FEIS should discuss alternatives of catch quotas by zone as a mitigation measure, to guard against overfishing and depleting particular areas. At a minimum, the FEIS should discuss whether having annual take limits based on a smaller area, such as a Fish Catch Report Area, is feasible or necessary.

d. Enforcement challenges associated with the proposed alternatives should be discussed in the FEIS.

5. The Board therefore finds and determines that, pursuant to Hawaii Administrative Rules (“HAR”) Section 11-200-23, the FEIS, in its completed form, does not “represent[] an informational instrument” that “adequately discloses and describes all identifiable environmental impacts” and satisfies the standard articulated in *Price v. Obayashi Hawai‘i Corp.*, 81 Hawai‘i 171, 914 P.2d 1364 (1996).

6. Minimum content requirements for this FEIS are set forth in HAR § 11-200-18, which provides that an environmental impact statement (“EIS”), if final, “shall consist of”:

a. The draft EIS revised to incorporate substantive comments received during the consultation and review processes;

b. Reproductions of all letters received containing substantive questions,

comments, or recommendations and, as applicable, summaries of any scoping meetings held.

c. A list of persons, organizations, and public agencies commenting on the draft EIS;

d. The responses of the applicant or proposing agency to each substantive question, comment, or recommendation received in the review and consultation processes.

e. 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.

7. The FEIS fails to satisfy these minimum content requirements in several respects.

a. The Board finds that the Cultural Impacts Analysis (“CIA”), for example, did not adequately review consistency of the proposal with published community-based management plans for Kāne‘ohe Bay.

i. The CIA states that most of north and northeast Oahu would be excluded from fish collection (FRCA 405, 406, 408, and 418) under the Proposed Action. *See p. 1, see also Fig. 1, p. 2.* Although the CIA was apparently done on this understanding, neither the DEIS for the Proposed Action nor the FEIS proposed this restriction. Although raised during the October 8, 2021 Board meeting, the discrepancy was not satisfactorily explained.

ii. This discrepancy between the CIA and the environmental impact statement may have caused inadequate consultation with communities in the excluded area.

iii. Further, the CIA did not adequately consult with well-known and

respected cultural experts from the Ko‘olaupoko district, which includes Kāne‘ohe Bay, an area of historically intense focus of aquarium fishing.

b. The FEIS discussion of economic impacts only discussed the economic benefits from aquarium fishing, which include direct revenues to fishers and local businesses which benefit fishers and local businesses individually, tax revenues to the State, and economic benefits to dealers outside Hawai‘i, which have no benefit to Hawai‘i at all. There have been studies about the economic benefits of leaving fish in the ocean, particularly for tourism business and revenues. These should be discussed, as negative economic effects of aquarium fishing.

8. The Board therefore finds and determines that, pursuant to HAR § 11-200-23(b), “[t]he procedures for assessment, consultation process, review, and the preparation and submission of the EIS,” have not “all been completed satisfactorily,” as specified in chapter 11-200, HAR, and the content requirements described in chapter 11-200, HAR, have not been satisfied.

9. In order to satisfy the Hawaii Administrative Rules, the FEIS must respond to comments submitted during the review process “satisfactorily.” Haw. Admin. R. § 11-200-23(a), including a “[p]oint-by-point discussion of the validity, significance, and relevance of comments” and “discussion as to how each comment was evaluated and considered in planning the proposed action,” Haw. Admin. R. § 11-200-22(c).

10. The Board finds that the substantive comments received during the review process have not received satisfactory responses and/or have not been incorporated into the FEIS. Examples include (but are not limited to) the following:

a. Numerous comments to the DEIS noted that the EIS gives the wrong

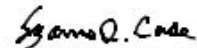
figure for the hard-bottom habitat on Oahu, but the incorrect figure remains in the FEIS on p. 47.

b. As previously noted, the final “Preferred Alternative”—“White List” with annual catch limits for each species—was not in the DEIS, hence public did not have a chance to comment on it at all.

11. Pursuant to Hawaii Revised Statutes (HRS) § 343-5(e) and Hawaii Administrative Rules (HAR) § 11-200-23(b), the Board therefore finds and determines that the FEIS is not acceptable.

The FEIS is therefore NON-ACCEPTED. Pursuant to Section 11-200-23, HAR, we request that the Environmental Review Program publish our determination regarding the subject FEIS in the next edition of *The Environmental Notice*.

DATED: Honolulu, Hawaii, October 11, 2021.



SUZANNE D. CASE
Chairperson
Board of Land & Natural Resources

From: webmaster@hawaii.gov
To: [DBEDT OPSD Environmental Review Program](#)
Subject: New online submission for The Environmental Notice
Date: Tuesday, October 12, 2021 11:39:25 AM

Action Name

Notice of Non-Acceptance of Oahu Aquarium FEIS

Type of Document/Determination

Final environmental impact statement (FEIS) acceptance or non-acceptance

HRS §343-5(a) Trigger(s)

- (1) Propose the use of state or county lands or the use of state or county funds
- (2) Propose any use within any land classified as a conservation district

Judicial district

O'ahu - multiple districts

Tax Map Key(s) (TMK(s))

Fishing areas around O'ahu identified in Figure 1 of the FEIS.

Action type

Applicant

Other required permits and approvals

Commercial Aquarium Fishing Permits issued pursuant to HRS §188-31, Commercial Marine License issued pursuant to HRS 189-2,3

Discretionary consent required

Commercial Aquarium Fishing Permits issued pursuant to HRS §188-31, Commercial Marine License issued pursuant to HRS 189-2,3,

Approving agency

Hawai'i Department of Land and Natural Resources

Agency contact name

David Sakoda

Agency contact email (for info about the action)

dlnr@hawaii.gov

Email address or URL for receiving comments

david.sakoda@hawaii.gov

Agency contact phone

(808) 587-0104

Agency address

1151 Punchbowl Street, Room 330
Honolulu, Hawaii 96813

United States
[Map It](#)

Accepting authority

Department of Land and Natural Resources

Applicant

Pet Industry Joint Advisory Council (PIJAC)

Applicant contact name

James Lynch

Applicant contact email

lynchjm.wa@gmail.com

Applicant contact phone

(425) 463-8396

Applicant address

1615 Duke St., #100
Alexandria, VA 22314
United States
[Map It](#)

Was this submittal prepared by a consultant?

Yes

Consultant

Stantec Consulting Services Inc

Consultant contact name

Terry VanDeWalle

Consultant contact email

terry.vandewalle@stantec.com

Consultant contact phone

(319) 334-3755

Consultant address

2300 Swan Lake Blvd., Suite 202
Independence, IA 50644
United States
[Map It](#)

Action summary

The purpose of the Applicant's action is to ensure that commercial aquarium fish collection allows for the lawful, responsible, and sustainable commercial collection of various fish species from nearshore habitats. The objective of the proposed action is for the Department of Land and Natural Resources (DLNR) to issue 15 Aquarium Permits and 15 corresponding Commercial Marine Licenses for the island of O'ahu, create a "White List" of 31 fish species and 4 invertebrates that can be collected, and implement individual catch quotas for the 35 species on the proposed White List. The need for the

Applicant's action is to allow for commercial aquarium collection in compliance with all applicable laws, rules, and regulations pertaining to the industry.

Attached documents (signed agency letter & EA/EIS)

- [FEIS_Oahu_08-20-2021_complete.pdf](#)
- [Oahu-FEIS-Notice-of-Non-Acceptance_10.11.2021_FOR-SIGNATURE-Final-for-TEN.pdf](#)

Action location map

- [Map-file.zip](#)

Authorized individual

David Sakoda

Authorization

- The above named authorized individual hereby certifies that he/she has the authority to make this submission.