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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 3, 2022

Ms. Mary Alice Evans, Director *via Email*
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

SUBJECT: **Notice of Statutory Acceptance**
Revised Final Environmental Impact Statement for the Proposed Issuance of Commercial Aquarium Permits and Commercial Marine Licenses for the West Hawai'i Regional Fishery Management Area

Dear Ms. Evans:

By letter dated May 26, 2021, applicant Pet Industry Joint Advisory Council ("PIJAC") submitted to the Department of Land and Natural Resources, Division of Aquatic Resources ("DAR"), its Revised Final Environmental Impact Statement ("RFEIS") to disclose the projected environmental impacts of the proposed issuance of commercial aquarium permits and commercial marine licenses for the West Hawai'i Regional Fishery Management Area. The RFEIS was published in the June 8, 2021 issue of The Environmental Notice.[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 RFEIS at its duly

[1]The RFEIS is publicly available online, at: https://files.hawaii.gov/dbedt/erp/The_Environmental_Notice/2021-06-08-TEN.pdf.

noticed sunshine meeting held on June 25, 2021.[2,3] PIJAC submitted testimony and appeared via Zoom videoconference. Numerous other persons submitted testimony for or against acceptance of the RFEIS and/or testified for or against acceptance of the RFEIS at the meeting.[4]

Board member Char was absent from the meeting, so there were six Board members present. Upon a motion to accept the RFEIS, three Board members voted in favor of the motion (to accept) and three members voted against the motion.[5] Therefore, the motion to accept the RFEIS failed.[6] The Board did not make any other determination of the acceptance or nonacceptance of the RFEIS.

Section 343-5(e), Hawaii Revised Statutes ("HRS"), states that "The final statement shall

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[2]The Agenda for the June 25, 2021 Meeting of the Board of Land and Natural Resources is publicly available online, at: https://dlnr.hawaii.gov/wp-content/uploads/2021/06/Agenda-210625.pdf.

[3]The Staff of the Division of Aquatic Resources of the Department of Land and Natural Resources' submittal memorandum for Item #F-3 on the Agenda for the June 25, 2021 meeting of the Board of Land and Natural Resources ("Staff Submittal") is publicly available online, at: https://dlnr.hawaii.gov/wp-content/uploads/2021/06/F-3-1.pdf.

[4]The summary minutes of the June 25, 2021 meeting of the Board of Land and Natural Resources are publicly available online, at: https://dlnr.hawaii.gov/wp-content/uploads/2021/06/F-3-1.pdf; the full-length Audio Recording of the Meeting of the Board of Land & Natural Resources (June 25, 2021) [hereinafter "Audio"] is also available online, at: https://files.hawaii.gov/dlnr/meeting/audio/Audio-LNR-210625-1.m4a.. Consideration of the RFEIS (Item #F-3) appears on the recording from approximately 1:01:00 to 6:27:02.

[5]Section 171-5, HRS, states that any Board action must be taken by the vote of a "simple majority of the members of the board." At the time *Hawaii Elec. Light Co. v. Dept. of Land & Nat. Res.*, 102 Hawai'i 257, 75 P.3d 160 (2003) [hereinafter *HELCO*], *as amended* was decided, the Board consisted of six members; today, the statute provides for seven. *See* Haw. Rev. Stat. § 171-4, *as amended* (2014). The *HELCO* court unequivocally held that a simple majority of that number—four—was the number of affirmative votes needed to pass a measure, no matter who was present at the meeting and/or the purpose of any board member's absence. 102 Hawai'i at 269, 75 P.3d at 172 ("[U]nless otherwise prescribed, the total number of members on a board is not reduced by an abstention, resignation, or vacancy[.]").

[6]Audio at 6:21:00–6:27:02 (discussing the effect of a tie vote).

be deemed to be accepted if the agency fails to accept or not accept the final statement within thirty days after receipt of the final statement; provided that the thirty-day period may be extended at the request of the applicant for a period not to exceed fifteen days." Here, the thirty-day statutory deadline was July 8, 2021. HRS § 343-5(e).

July 8, 2021 (30 days after receipt of the final statement) came and went before the Board's next meeting, and the, the Board did not take additional action to accept or not accept the RFEIS. PIJAC did not request to extend the thirty-day period. **Therefore, on July 8, 2021, the RFEIS was deemed accepted by operation of law under section 343-5(e), HRS**.

Within thirty days of the deemed acceptance—on July 13, 2021—a lawsuit was filed in the Circuit Court of the First Circuit, State of Hawai'i[7]—*Kaupiko, et al. v. Bd. of Land & Nat. Res.*, Civil No. 1CCV-21-0000892 (JPC)— to challenge the default acceptance of the RFEIS. PIJAC intervened as a Defendant, and the parties proceeded to briefing on Plaintiffs' Motion for Summary Judgment regarding the adequacy of the RFEIS.[8] A hearing on the Motion was held on May 18, 2022, after which the court took matters under advisement. On August 16, 2022, the Court denied the Motion, ruling that, "as a matter of law . . . the RFEIS provided sufficient information to enable the Board to make an informed and reasoned decision."[9]

The Order Denying [072] [Plaintiffs] Motion for Summary Judgment Filed February 18,

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[7]The Honorable Jeffrey P. Crabtree, presiding.

[8]*See Kaupiko*, Civil No. 1CCV-21-0000892 (Haw. 1st Cir. 2021) (JPC), at JEFS Dkts, 072–101 (Motion filed February 18, 2022); JEFS Dkts. 116–18 (Board's opposition) and 122–27 (PIJAC's opposition); and JEFS Dkts. 130 (Reply to Board) and 132 (Reply to PIJAC).

[9]*See Kaupiko*, Civil No. 1CCV-21-0000892, at JEFS Dkt. 145 (Ruling).

2022 and Final Judgment were each filed on September 12, 2022.[10, 11]

We request that the Environmental Review Program publish the notice of determination regarding the subject RFEIS—noting that acceptance occurred on July 8, 2021—in the next edition of *The Environmental Notice*.

DATED: Honolulu, Hawaii, October 3, 2022.

SUZANNE D. CASE
Chairperson
Board of Land & Natural Resources

[10]*See Kaupiko*, Civil No. 1CCV-21-0000892, at JEFS Dkts. 153 (Order) and 155 (Final Judgment).

[11]The *Kaupiko* Plaintiffs appealed from the determination upholding acceptance to the Intermediate Court of Appeals, State of Hawai‘i on September 21, 2022 as Civil No. CAAP-22-0000557. The fact that an appeal has been filed, by itself, does not affect the status of the RFEIS, which acceptance has been upheld by the Circuit Court of the First Circuit.

APPLICANT
PUBLICATION FORM

Project Name:	Issuance of Commercial Aquarium Permits and Commercial Marine Licenses for the West Hawai'i Regional Fishery Management Area
Project Short Name:	Revised FEIS WHRFMA Commercial Aquarium Permits
HRS § 343-5 Trigger(s):	Trigger 1 (use of state lands) and Trigger 2 (use of conservation districts)
Island(s):	Hawai'i
Judicial District(s):	Puna, South Hilo, North Hilo, Kau, Hamakua, South Kona, North Kona, South Kohala, North Kohala
TMK(s):	West Hawai'i Regional Fishery Management Area identified in Figure 1
Permit(s)/Approval(s):	Commercial Aquarium Fishing Permits issued pursuant to Hawaii Revised Statutes (HRS) § 188-31; Commercial Marine License issued pursuant to HRS §§ 189-2, -3; and West Hawai'i Aquarium Permit issued pursuant to Hawaii Administrative Rules (HAR) § 13-60.4
Approving Agency:	Department of Land and Natural Resources
Contact Name, Email, Telephone, Address	David Sakoda; david.sakoda@hawaii.gov, 808-587-0104, 1151 Punchbowl Street, Room 330, Honolulu, HI 96813
Applicant:	Pet Industry Joint Advisory Council (PIJAC)
Contact Name, Email, Telephone, Address	Jim Lynch; lynchjm.wa@gmail.com, 425.463.8396; 1615 Duke St., #100 Alexandria, VA 22314
Consultant:	Stantec Consulting Services Inc
Contact Name, Email, Telephone, Address	Terry VanDeWalle; terry.vandewalle@stantec.com; (319) 334-3755; 2300 Swan Lake Blvd., Suite 202 Independence, IA 50644

Status (select one)	**Submittal Requirements**
____ DEA-AFNSI	Submit 1) the approving agency notice of determination/transmittal letter on agency letterhead, 2) this completed OEQC publication form as a Word file, 3) a hard copy of the DEA, and 4) a searchable PDF of the DEA; a 30-day comment period follows from the date of publication in the Notice.
____ FEA-FONSI	Submit 1) the approving agency notice of determination/transmittal letter on agency letterhead, 2) this completed OEQC publication form as a Word file, 3) a hard copy of the FEA, and 4) a searchable PDF of the FEA; no comment period follows from publication in the Notice.
____ FEA-EISPN	Submit 1) the approving agency notice of determination/transmittal letter on agency letterhead, 2) this completed OEQC publication form as a Word file, 3) a hard copy of the FEA, and 4) a searchable PDF of the FEA; a 30-day comment period follows from the date of publication in the Notice.
____ Act 172-12 EISPN ("Direct to EIS")	Submit 1) the approving agency notice of determination letter on agency letterhead and 2) this completed OEQC publication form as a Word file; no EA is required and a 30-day comment period follows from the date of publication in the Notice.
____ DEIS	Submit 1) a transmittal letter to the OEQC and to the approving agency, 2) this completed OEQC publication form as a Word file, 3) a hard copy of the DEIS, 4) a searchable PDF of the DEIS, and 5) a searchable PDF of the distribution list; a 45-day comment period follows from the date of publication in the Notice.
____ FEIS	Submit 1) a transmittal letter to the OEQC and to the approving agency, 2) this completed OEQC publication form as a Word file, 3) a hard copy of the FEIS, 4) a searchable PDF of the FEIS, and 5) a searchable PDF of the distribution list; no comment period follows from publication in the Notice.
___ FEIS Acceptance Determination	The approving agency simultaneously transmits to both the OEQC and the applicant a letter of its determination of acceptance or nonacceptance (pursuant to Section 11-200-23, HAR) of the FEIS; no comment period ensues upon publication in the Notice.
__X__ FEIS Statutory Acceptance	The approving agency simultaneously transmits to both the OEQC and the applicant a notice that it did not make a timely determination on the acceptance or nonacceptance of the applicant's FEIS under Section 343-5(c), HRS, and therefore the applicant's FEIS is deemed accepted as a matter of law.

____ Supplemental EIS Determination	The approving agency simultaneously transmits its notice to both the applicant and the OEQC that it has reviewed (pursuant to Section 11-200-27, HAR) the previously accepted FEIS and determines that a supplemental EIS is or is not required; no EA is required and no comment period ensues upon publication in the Notice.
____ Withdrawal	Identify the specific document(s) to withdraw and explain in the project summary section.
____ Other	Contact the OEQC if your action is not one of the above items.

Project 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 8 aquarium fish species from nearshore habitats of the West Hawai'i Regional Fishery Management Area (WHRFMA), where collection is currently limited to 40 "White List" species of fish. The objective of the proposed action is for the Department of Land and Natural Resources (DLNR) to issue 7 Aquarium Permits and 7 corresponding Commercial Marine Licenses for the WHRFMA, revise the White List from 40 to 8 species, and implement individual catch quotas for the 8 species remaining on the proposed Revised 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.