Umberger: A Louder Voice for the Environment

Ryan McDermott[*]

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[*]Ryan D. McDermott University of Hawai'i at Mānoa William S. Richardson School of Law. Thank you to those who made this Comment possible.

I. INTRODUCTION

On May 8, 2014, Rene Umberger had the air supply ripped from her mouth while SCUBA diving fifty feet below the ocean surface.[1] Umberger claimed to be documenting damage to the coral reefs in Kona, Hawai‘i at the time of the incident.[2] Jay Lovell, an aquarium-fish collector, was the man who ripped the air supply from Umberger's mouth.[3] Lovell was spared prison time for his actions against Umberger that day; Lovell pleaded no contest to one count of second degree terroristic threatening, in violation of Hawaii Revised Statutes ("HRS") section 707-717(1), and received a six month suspended sentence.[4] This incident did not happen in isolation; tensions have been rising between aquarium-fish collectors and conservationists since the mid-1990s, with each side threatening the lives of the other.[5] These disputes led to the designation of certain areas of West Hawai‘i as off limits to reef fishing.[6] They also led to legislation prohibiting the harassment of fishers lawfully taking fish.[7]

Umberger is not just any diver. She is the lead plaintiff in a series of legal actions, which culminated in an October 27, 2017 court order enjoining the State of Hawai‘i Department of Land and Natural Resources ("DLNR") from issuing permits for the commercial collection of aquarium-fish from the reefs of Hawai‘i.[8] On October 24, 2012, Umberger, Mike Nakachi, Ka‘imi Kaupiko, Willie Kaupiko, Conservation Council for Hawai`i ("CCH"), Humane Society of the United States ("HSUS"), and Center for Biological Diversity ("CBD") (collectively, the "Plaintiffs") filed suit against DLNR for failure to comply with the Hawai‘i Environmental Policy Act ("HEPA").[9] The Plaintiffs sought an injunction enjoining collection of aquatic life under DLNR permits, until DLNR completed the

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[1] *Hawaii Aquarium Fish Collector Gets Suspended Sentence*, STAR ADVERTISER (Feb. 17, 2015), http://www.staradvertiser.com/2015/02/17/business/hawaii-aquarium-fish-collector-gets-suspended-sentence/.

[2] *Id*.

[3] *Id*.

[4] *Id*.

[5] Tim Sakahara, *Conflict Between Environmentalists and Reef Fisherman Runs Deep*, HAWAI'I NEWS NOW (May 9, 2014), http://www.hawaiinewsnow.com/story/25509765/conflict-between-environmentalists-and-reef-fisherman-runs-deep/.

[6] *Id.*

[7] HAW. REV. STAT. § 188-71 (2017).

[8] *See* Umberger v. Dept. of Land & Nat. Res., No. 12-1-2625-10 JHC, 2013 WL 12126206, at *1.

[9] *Id*.

proper environmental review process.[10] The Plaintiffs' complaint was summarily dismissed.[11] Undeterred, the Plaintiffs appealed to the Supreme Court of Hawai'i, which vindicated their claim.[12] On April 12, 2018, the Environmental Court of Hawai'i ordered all recreational permits for aquarium collection void as a matter of law[13] after having declared all commercial permits illegal the previous October.[14]

Although DLNR and the State of Hawai'i are the named defendants, the real targets of the complaint were aquarium collectors and other Hawai'i residents who sought to use the same natural resources as the Plaintiffs.[15] Hawai'i has a long history of natural resource management.[16] Various government actions demonstrate the value the State of Hawai'i places on the health of its environment and natural resources.[17] Moreover, many stakeholders compete for the use of Hawai'i's natural resources.[18] In 1998, DLNR produced a report articulating the need for more studies to determine the effects of the removal of reef fish on the ecosystem.[19] One of the objectives of HEPA is to alert decision makers to the impacts of actions that occur on State Lands.[20] This Comment discusses how Umberger used both HEPA and the court system to inject her concerns into the public conversation.

Part II of this Comment contemplates issues that arise when people pull fish from the sea, examining how this process was traditionally handled and how it has changed over time. It will discuss where and how this

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[10] Complaint at 12, Rene Umberger v. Dept. of Land and Nat. Res., No. 12-1-2625-10 (2012) [hereinafter Complaint].

[11] Umberger, 2013 WL 12126206, at *1.

[12] Umberger v. Dept. of Land & Nat. Res., 140 Haw. 500, 529, 403 P.3d 277, 306 (2017).

[13] HO'OHIKI, http://hoohiki.courts.hawaii.gov/#/case?caseId=1CC121002625, (last visited Apr. 21, 2018).

[14] Press Release, Center for Biological Diversity, Hawaii Court Voids All Existing Recreational Aquarium Collection Permits (Apr. 16, 2018), https://www.biologicaldiversity.org/news/press_releases/2018/hawaii-reef-fish-04-16-2018.php [hereinafter Press Release].

[15] *See* Complaint, *supra* note 10, at 12.

[16] *See, e.g.*, MARGARET TITCOMB, NATIVE USE OF FISH IN HAWAI'I 8-13 (2d ed. 1992).

[17] HAW. CONST. art. IX, § 1.

[18] Alohi Nakachi, *The Disconnect of Hawaiian Culture and Marine Management in West Hawai'i: A Case Study on the Aquarium Trade*, OPEN ACCESS THESES, 2016, http://scholarlyrepository.miami.edu/oa_theses/637.

[19] *See* Complaint, *supra* note 10, at 2.

[20] *See id.*

aquarium fishery developed and Hawai‘i’s stance on the environment and applicable regulations.

Part III considers the procedural history of the case and current developments, examining each step from the initial filing of the complaint to the Supreme Court, and back to the aftermath of the circuit court’s orders.

Part IV looks at useful principles to consider when evaluating environmental claims and analyzes the controversy using critical procedure.[21] This Comment uses critical procedure to highlight potential obstacles and strengths on each side of the controversy. It discusses how some of these principles apply to the issue and can be used to inform policy decisions going forward in Hawai‘i’s state waters.

II. BACKGROUND

A. *Here We Are in Hawai‘i*

The Hawaiian Islands are located in the North Pacific Ocean as one of the world’s most isolated archipelagoes.[22] Due to this extreme isolation, Hawai‘i has some of the highest levels of marine endemism recorded anywhere on the planet.[23] The archipelago stretches 2,500 km northwest from the Island of Hawai‘i to Kure Atoll, the northernmost atoll in the world.[24] The archipelago contains eight inhabited islands with a total population of approximately 1.4 million.[25] The majority of residents live on O‘ahu, which has a population of approximately one million.[26] In addition, 8.5 million tourists visit the islands every year,[27] with more than ninety percent participating in beach related activities.[28] Today, two-thirds of all people living in Hawai‘i engage in ocean recreation and as many as one-

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[21] Eric K. Yamamoto, *Critical Procedure: ADR and the Justices' "Second Wave" Constriction of Court Access and Claim Development*, 70 SMU L. REV. 765, 781 (2017) [hereinafter Critical Procedure].

[22] Alan Friedlander et al., *The State of Coral Reef Ecosystems of the Main Hawaiian Islands*, ECOLOGY PROJECT, 219, 222 (2005), https://www.ecologyproject.org/assets/docs/Sate_of_Coral_Reef_Ecosystems_of_the_Main_HI_Islands.pdf [hereinafter Friedlander].

[23] Friedlander, *supra* note 22 at 222.

[24] Friedlander, *supra* note 22 at 221.

[25] UNITED STATES CENSUS BUREAU 2016 https://www.census.gov/quickfacts/hi (last visited Dec. 16, 2018).

[26] DEP’T BUS. ECON. DEV. & TOURISM RES. & ECON. ANALYSIS http://dbedt.hawaii.gov/economic/databook/2016-individual/_01/ (last visited Apr. 21, 2018).

[27] *Id.*

[28] HAWAI‘I TOURISM AUTH. www.hawaiitourismauthority.org/default/assets/File/research/2013%20Visitor%20Activity%20Participation%20for%20HTA%20website.pdf (last visited Apr. 21, 2018).

third fish.[29] This intense concentration of people places pressure on Hawai'i's unique natural resources.[30]

B. *Aquarium Collection*

The State of Hawai'i is the largest exporter in the United States of animals intended for the aquarium trade.[31] The aquarium collection industry mainly targets herbivores and invertebrates inhabiting Hawai'i's coral reefs.[32] According to DLNR's data, roughly seventy-five percent of the State's aquarium-fish catch comes from the west coast of Hawai'i Island, and ninety-nine percent of all invertebrates caught in the State come from O'ahu's nearshore waters.[33]

DLNR is authorized by statute to issue aquarium collection permits at its discretion.[34] DLNR may issue permits only to those who possess the facilities and ability to keep fish and other aquatic life alive and in reasonable health.[35] In fact, the permit authorizes the use of fine mesh net traps or nets that would otherwise be prohibited, for the collection of aquatic life.[36] The permit does not allow collection in Marine Protected Areas ("MPAs") or Fish Replenishment Areas ("FRAs").[37] Aquarium collection permits are valid for one year.[38] "Aquarium purposes" means to hold saltwater fish, nongame freshwater fish, or other aquatic life alive in a state of captivity as pets, for scientific study, for public exhibition or display, or for sale for these purposes.[39] There are two types of permits DLNR issues: recreational and commercial.[40] The recreational permit limits collection to five animals per day (about 1,825 per year) and commercial permits allow

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[29] SCOTT ATKINSON, PEOPLE AND THE SEA: A REVIEW OF EXPERT OPINION OF WHAT IT WILL TAKE TO ENHANCE THE CONSERVATION OF MARINE RESOURCES IN THE MAIN HAWAIIAN ISLANDS, HAWAI'I COMMUNITY FOUNDATION 67 (2001) [hereinafter Atkinson].

[30] Friedlander, *supra* note 22 at 222.

[31] *See* Complaint, *supra* note 10, at 1.

[32] *Id.*

[33] *Id.*

[34] HAW. REV. STAT. § 188-31(a)

[35] HAW. REV. STAT. § 188-31(b).

[36] HAW. REV. STAT. § 188-31(a); *see also* HAW. ADMIN. RULES (HAR) § 13-75-14(4) (2007).

[37] *See* Umberger v. Dep't of Land & Nat. Res., 138 Haw. Ct. App. 508, 517, 382 P.3d 320, 329 (2016), *cert. granted*, No. SCWC-13-0002125, 2016 WL 7405763 (2016), and *aff'd in part, vacated in part*, 140 Haw. 500, 403 P.3d 277 (2017).

[38] HAW. REV. STAT. § 188-31(a).

[39] HAW. REV. STAT. § 188-31(d)(1).

[40] HAR § 13-77-2.

the collection of an unlimited number of animals.[41] There is no limit to the number of commercial permits DLNR can issue, but at the time of the complaint, there were 160 permits issued.[42]

Commercial collectors are required to submit a monthly report on the species and number of each animal collected to DLNR.[43] DLNR is required to make a report of the total catch to the Board of Land and Natural Resources ("BLNR").[44] In 2012, at the time of the complaint, the last report DLNR submitted to BLNR covered the years 1995 to 1999 with no later reporting.[45] All the data DLNR has compiled on the aquarium trade is based solely on self-reporting by the collectors.[46] A 2004 Division of Aquatic Resources ("DAR") report acknowledged there was no way to verify the accuracy of the data submitted.[47] The report also stated that because there are indications of underreporting of catch, the numbers the in the reports should be regarded as the minimum value of the catch, not the "absolute value."[48]

The most popular fish collected are: (1) Yellow tang; (2) Goldring surgeon fish; (3) Achilles tang; (4) Clown tang; (5) Black surgeonfish; (6) Forceps fish (7) Multiband butterfly fish; (8) Brown surgeonfish; (9) Ornate wrasse; and (10) Orangeband surgeonfish.[49] Yellow tang and Goldring surgeonfish make up sixty percent of the catch on the west side of the Island of Hawai‘i (West Hawai‘i).[50] The aquarium-fish-collection trade was centered in O‘ahu until Hurricane Iwa, after which the subsequent damage to the reefs on the leeward side[51] and overfishing shifted collection to West Hawai‘i.[52] This resulted in an 813 percent increase in catch in West Hawai‘i from 1983 to 2003.[53] A study in the late 1990s found significant effects on

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[41] HAR § 13-75-14(4).

[42] *See* Complaint, *supra* note 10, at 13.

[43] *See* Umberger, 138 Haw. at 516-17, 382 P.3d at 328.

[44] HAW. REV. STAT. § 188-31.5.

[45] Complaint, *supra* note 10, at 13.

[46] *Id.*

[47] *Id.* at 14.

[48] *Id.*

[49] *Id.* at 7-8.

[50] *Id.* at 8.

[51] OXFORD ENGLISH DICTIONARY (2018) (defining Leeward as on or towards the side sheltered from the wind.).

[52] Complaint, *supra* note 10, at 8.

[53] *Id.* at 15.

seven of the top ten aquarium fish species collected.[54] Public concern over aquarium collection at this time led to the introduction of FRAs in the area, in addition to the existing MPAs.[55] Studies have shown improvements in some of the aquarium collected species populations in the FRAs.[56] A 2010 DLNR report found that there was an increase in the number of collectors and animals collected in West Hawai‘i. This increased pressure leads to a decrease in the yellow tang in non-FRA areas. In West Hawai‘i in the non-FRAs collectors harvested eighty percent of the Achilles tang, sixty percent of the yellow tang, and forty-six percent of the Chevron tang populations.[57] A 2011 study showed that while the overall stock of yellow tang was significantly lower, the yellow tang inside the FRA was seventy-five percent more abundant than those on the open access reefs.[58] Regulation limiting the collection of certain species and entry into the fishery was proposed but not implemented at the time of the complaint.[59] Gail Grabowsky, Chaminade University's Environmental Studies Program Director, explains that along with the increased number of aquarium collectors there are also improvements in the technology that assist the aquarium collectors such as, SCUBA, camouflage, nitrox, GPS, scooters, etc.[60]

In its 1998 "State of the Reefs" report, DLNR noted that the "removal of significant numbers of these [aquarium collection] species could result in an increase in algal growth due to a lack of grazers to keep the algae in check and a corresponding decrease in coral cover."[61] The removal of these herbivores makes the coral reef more vulnerable to stress, which is of significant importance as global stressors on the reef are increasing.[62] Part of the value of these fish to aquarium collectors is their ability to control algal growth in the home aquarium.[63] The State of the Reefs report stated that the removal of species from the coral reef ecosystem might have long-term stability effects on the ecosystem.[64] Fisheries that are

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[54] *Id.*

[55] *Id.* Fish Replenishment Area ("FRA").

[56] *Id.*

[57] *Id.* at 16.

[58] Todd C. Stevenson et al., *Fisher Behavior Influences Catch Productivity and Selectivity in West Hawai'i's Aquarium Fishery*, 68 INT'L COUNCIL FOR THE EXPLORATION OF THE SEA J. OF MARINE SCI. 813, 820 (2011).

[59] *See* Complaint, *supra* note 10, at 9.

[60] Umberger v. Dep't of Land & Nat. Res., 140 Haw. 500, 506, 403 P.3d 277, 283 (2017).

[61] Complaint, *supra* note 10, at 18.

[62] *Id.*

[63] *Id.* at 10.

[64] *Id.*

species-specific, rather than one with diverse targets, have greater potential to impact ecosystem function.[65] In Hawai‘i, there is already a low abundance of herbivorous reef fish and an increasing anthropogenic nutrient load into the coastal waters; this can facilitate ecological phase shifts, from coral to algal cover.[66]

C. *Traditional Regulation and Use of Natural Resources*

The ancient Hawaiians long recognized the importance of their natural marine resources.[67] According to the Kumulipo, the ancient Hawaiian Creation Chant, the coral polyp was the first creature to emerge from the sea.[68] Hawaiians knew that the coral reefs were the building blocks of the islands and held coral in great esteem, featuring it prominently in religious ceremonies.[69]

Mālama ‘āina (caring for the land) is the name for the traditional concept of natural resource management in Hawai'i.[70] Hawaiians worshiped nature gods, and so religion and conservation Hawai‘i.[71] Hawaiians worshiped nature gods and so religion and conservation were woven into daily life.[72] Mālama ‘āina rooted in the practical aspects of living on an island, versus life on a continent, where food and other resources are seemingly endless.[73] Survival necessitated the sustainable use of these limited natural resources.[74]

Traditional Hawaiian fishery management had the same goals we have now: maintain stable stocks of fish in the ocean.[75] Fishing was regulated through the kapu system, which placed prohibitions on catching certain fish and fishing at certain times of the year.[76] Moreover, fishing seasons alternated. For example, when aku was kapu, ‘ōpelu was not; and

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[65] *Id.*

[66] *Id.*

[67] Friedlander, *supra* note 22 at 222.

[68] SAMUEL KAMAKAU, KA PO‘E KAHIKO 118 (1964).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

when ʻōpelu was kapu, aku was not.[77] White flags were used to mark kapu areas.[78] People that broke kapu could be punished by death.[79]

When a fisher would discover productive fishing grounds, those grounds would be cultivated.[80] Fishers would feed the fish on these grounds to ensure the stock remained in the area and would increase in both size and numbers.[81] Care was taken to not only preserve the stock but also to not take so many fish that the remaining fish would be alarmed and leave the area.[82] Mālama ʻāina was based on the belief that the Akua (gods) did not like greediness or waste. The Akua would take the fish away altogether if they saw such behavior.[83]

Unlike on the continents, where large land-based animals are the main protein source, island life traditionally relied on fish.[84] Traditional Hawaiians studied the movement, lifecycle, and habits of fish to predict their response to the tides, currents, and seasonal patterns.[85] Kānāwai was the name for the set of rules governing water use, and after Western contact, became the word for laws in general.[86] The ample food production created by this ancient resource management system is credited with allowing the Hawaiian Kingdom to live in relative peace, and that peace allowed for the Kingdom to devote resources to increase production.[87]

D. *Natural Resource Management Today*

1. The Constitution Creates a Duty to Protect Natural Resources

Hawaiʻi takes a strong stance in enforcing the public trust doctrine ("PTD").[88] Article IX of the Hawaiʻi Constitution provides that the State shall provide for the protection and promotion of the public health.[89] Article XI further states that Hawaiʻi's natural resources will be protected now and

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[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.* at 119.

[87] *Id.* at 119-20.

[88] *See* Kauai Springs, Inc. v. Planning Comm'n. of Kauaʻi, 133 Hawai'i 141, 172, 324 P.3d 951, 982 (1982) (holding that the planning commission properly denied water bottler's zoning permit application pursuant to public trust doctrine).

[89] HAW. CONST. art. IX, § 1.

for future generations, and all natural resources are held in trust by the State for the benefit of the people.[90] The Supreme Court upheld PTD in *Kauai Springs, Inc. v. Planning Comm'n of Kaua'i*, holding PTD applies to all water resources and embodies a dual mandate to (1) protect and (2) maximize reasonable beneficial use.[91] PTD articulates that the State has "the duty and authority to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses."[92] This duty extends to more than water rights as illustrated in the following quote from former Chief Justice of the Supreme Court of Hawai'i, William S. Richardson:[93]

> Hawai'i has a unique legal system, a system of laws that was originally built on an ancient and traditional culture . . . Western orientation and sensibility that was not a comfortable fit with Hawai'i's indigenous people and its immigrant population. . . . [W]e made a conscious effort to look to Hawaiian custom and tradition in deciding our cases -- and consistent with Hawaiian practice, our court, held that the beaches were free to resources could not be privately owned.

Native Hawaiians maintain gathering rights provided for under HRS section 7–1. This section was included at the behest of the King, noting that "little bit of land even with allodial title, if they [the people] be cut off from all other privileges would be of very little value."[94]

2. DLNR's Role

DLNR is responsible for "managing, administering, and exercising control over public lands, water resources, ocean waters . . . and all interests therein."[95] DLNR's jurisdiction encompasses State lands, beaches, coastal waters, and coastline; along with the aquatic life found within.[96] DLNR's jurisdiction also encompasses State sanctuaries, public fishing areas, boating, ocean recreation, and coastal programs.[97] DLNR defines its

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[90] HAW. CONST. art. XI, § 1.

[91] Kauai Springs, Inc., 133 Haw. at 172, 324 P.3d at 981.

[92] *Id.*

[93] William S. Richardson, Chief Justice, American Bar Association Spirit of Excellence Award Address (Feb. 10, 2007).

[94] Kalipi v. Hawaiian Tr. Co., 66 Haw. 1, 7, 656 P.2d 745, 749 (1982).

[95] DEPT. OF LAND AND NAT. RES. http://dlnr.hawaii.gov/about-dlnr/ (last visited Apr. 21, 2018).

[96] *Id.*

[97] *Id.*

objectives in its mission statement: "[E]nhance, protect, conserve and manage Hawai'i's unique and limited natural, cultural and historic resources held in public trust for current and future generations of the people of Hawai'i nei, and its visitors, in partnership with others from the public and private sectors."[98]

DLNR regulates the removal of aquarium species through DAR.[99] DAR manages the State's marine and freshwater resources through programs in commercial fisheries, aquatic resources protection, and recreational fisheries.[100] DAR has competing objectives. On the one hand, DAR promotes projects that aim to maximize commercial fishery productivity. On the other hand, DAR promotes projects that seek to protect native and resident aquatic species and their habitat.[101] In addition, DAR provides facilities and opportunities for recreational fishing.[102] DAR issues fishing licenses and permits for the removal of aquatic life.[103]

3. Hawai'i Environmental Policy Act

HEPA, pursuant to HRS section 343-5, is an important safeguard required before any project that may have an environmental impact can commence on Hawaiian State lands. The HEPA process requires that when a proposed activity is considered an "action,"[104] involves a listed land use,[105] and is not exempt under HRS section 343-6,[106] an environmental review must occur.[107] Article XI, section 1 of the Hawai'i Constitution provides:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai'i's natural beauty and all-natural resources, including of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

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[98] DEPT. OF LAND AND NAT. RES., http://dlnr.hawaii.gov (last visited Apr. 21, 2018).

[99] DEPT. OF LAND AND NAT. RES., http://dlnr.hawaii.gov/division-offices/ (last visited Apr. 21, 2018).

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] HAW. REV. STAT. § 343-2 (2017).

[105] HAW. REV. STAT. § 343-5(a).

[106] HAW. REV. STAT. § 343-6(a)(2).

[107] HAW. REV. STAT. § 343-2.

HEPA was enacted into law to "facilitate this constitutional mandate."[108] The Supreme Court has held the purpose of HEPA is to "ensure that environmental concerns are given appropriate consideration in decision making" such that "environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole."[109] HEPA grants procedural, but not substantive, rights and remedies. Thus, the only relief a successful HEPA challenge can achieve is a proper environmental review.[110] The Environmental Council ("EC") hears all complaints but does not have the authority to address complaints.[111] The EC can only write an advisory letter to the appropriate agency; since the goal of the HEPA process is to ensure the decision making agency is informed of the potential effects on the environment a project may have before approving any permits.[112]

When development projects are being proposed, this review process gives citizens a seat at the table to voice concerns regarding the environment.[113] On December 14, 2017, the Supreme Court of Hawai'i, in an opinion delivered by Justice Pollack, gave citizens standing to assert this right independent of HEPA.[114] The Supreme Court ruled that Article IX section 9 of the Hawai'i Constitution provides citizens with the right to a clean and healthful environment and citizens have the right to be heard on environmental cases before governmental bodies.[115] The property interest a

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[108] Unite Here! Local 5 v. City & Cty. of Honolulu, 123 Haw. 150, 180, 231 P.3d 423, 453 (2010) (citing Kahana Sunset Owners Ass'n v. County. of Maui, 86 Haw. 66, 70, 947 P.2d 378, 382 (1997)) (holding an old EIS was no long valid after a material change in circumstances); Citizens for the Protection of the N. Kohala Coastline v. County. of Hawai'i, 91 Haw. 94, 104 n.11, 947 P.2d 378, 382 (1999) (holding an EA should be done early in decision making process); Sierra Club v. Dep't of Transp., 115 Haw. 299, 327, 342, 167 P.3d 292, 320, 335 (2007) [hereinafter Superferry I].

[109] Unite Here! Local 5, 123 Haw. at 180, 231 P.3d at 453.

[110] Sierra Club v. Hawai'i Tourism Auth. ex rel. Bd. of Directors, 100 Haw. 242, 266, 59 P.3d 877, 901 (2002).

[111] *Id.* at 266, 59 P.3d at 901.

[112] *Id.*

[113] "NEPA is a seminal statute because it is that one place that ensures a democratization of decision-making. It is that one instrument through which the public and state and local governments have a seat at the table as decisions are made which affect them in a very real way." *Problems and Issues with the National Environmental Policy Act of 1969: Before the H. Comm. On Resources*, 105th Congress 12 (1998) (statement of Kathleen McGinty, Chair, Council on Environmental Policy).

[114] In re Application of Maui Elec. Co., Ltd., 141 Haw. 249, 271, 408 P.3d 1, 23 (2017) (concluding that the right to a clean and healthy environment is justiciable).

[115] *Id.*

citizen seeks to protect need not be tangible.[116] A party need only have "a legitimate claim of entitlement" to maintain a protected property interest.[117] Native Hawaiian water rights is an example of an intangible "property interest" the court will grant standing to protect.[118] As part of constitutional due process, "an agency hearing is . . . required where the issuance of a permit implicating an applicant's property rights adversely affects the constitutionally protected rights of other interested persons who have followed the agency's rules governing participation in contested cases."[119] The private interest of the right to a clean and healthful environment is such a right and can compel an agency to allow citizens to intervene, and be heard at a contested case hearing before permits can be issued.[120] This seat at the table is necessary because a belated, post-decision civil action for declaratory relief is not a replacement for participation in a hearing, and does not eliminate the risk of wrongful deprivation.[121] These due process requirements ensure that citizens have the "opportunity to be heard at a meaningful time in a meaningful manner."[122]

An Environmental Assessment ("EA") is required when a proposed activity is considered an "action,"[123] involves a listed land use,[124] and is not exempt under HRS section 343-6.[125] An EA must be prepared at the "earliest practicable time."[126] First, a Draft Environmental Assessment ("DEA") must be prepared.[127] A DEA is drafted by the agency or the applicant as defined in HRS section 343-2 and must describe the project in detail, evaluating direct, indirect, and cumulative impacts of the action.[128] The public has thirty days to comment from the date the DEA is published.[129]

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[116] *Id.* at 260, 408 P.3d at 12.

[117] *Id.* at 258, 408 P.3d at 10.

[118] *Id.*

[119] *Id.* at 258-59, 408 P.3d at 10-11. (quoting Pele Def. Fund v. Puna Geothermal Venture, 77 Haw. 64, 68, 881 P.2d 1210, 1214 (1994)).

[120] *Id.* at 260, 408 P.3d at 12-13.

[121] *Id.* at 267, 408 P.3d at 19.

[122] *Id.* at 270, 408 P.3d at 22 (quoting Freitas v. Admin. Dir. of Courts, 108 Haw. 31, 44, 116 P.3d 673, 686 (2005)).

[123] HAW. REV. STAT § 343-2 (2017); Superferry I, 115 Haw. at 307, 167 P.3d at 300.

[124] HAW. REV. STAT § 343-5(a).

[125] HAW. REV. STAT § 343-6(a)(2).

[126] Kahana Sunset Owners Ass'n. v. Cnty. of Maui, 86 Haw. 66, 71 (1997).

[127] Superferry I, 115 Haw. at 307, 167 P.3d at 300.

[128] *Id.*

[129] *Id.* at 307-308, 167 P.3d at 300-01.

The applicant or agency must then respond to all public comments and amend the DEA.[130] The amended DEA is then submitted for review to the relevant agency as a Final Environmental Assessment ("FEA").[131]

The agency must review the FEA and determine if "significant" environmental impacts are expected; if so, an Environmental Impact Statement ("EIS") must be prepared.[132] If no "significant" environmental impacts are expected, a Finding of No Significant Impact ("FONSI") is made, and the project may proceed with no further study.[133] A FONSI determination is not necessarily final and can be challenged.[134] HEPA provides opportunities for judicial review at various stages of the project, such as when: (1) no EA is prepared; (2) an agency determines that an EIS will or will not be prepared; or (3) an EIS is accepted.[135] In 2010, the Supreme Court of Hawai'i, in *Unite Here! Local 5 v. City & Cty. of Honolulu* (*Turtle Bay*), held that an EIS cannot remain "valid in perpetuity" and that doing so would undermine the HEPA process.[136] *Turtle Bay* added a new opportunity for judicial review: if there has not been substantial commencement on a project and conditions relating to the project have changed, a Supplemental Environmental Impact Statement ("SEIS") can be required.[137]

A citizen cannot challenge an EA or an EIS unless they registered a comment during the public comment period.[138] The HEPA process cannot compel an agency or applicant to take any action, but by commenting, a citizen preserves his standing to challenge HEPA violations.[139] HEPA provides no administrative process through which citizens can obtain relief. Therefore, a lawsuit is the only vehicle available to citizens to make a HEPA challenge, so preserving standing is critical.[140] HEPA only requires an agency take a "hard look" at the environmental factors addressed in the EA to ensure the approving agency is aware of the issues.[141] The U.S. Supreme

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[130] *Id.* at 308, 167 P.3d at 301.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.* (citing HAW. REV. STAT § 343-7(a)-(c)).

[136] 123 Haw. 150, 179, 231 P.3d 423, 452 (2010).

[137] *Id.*

[138] *Id.*

[139] HAW. REV. STAT. § 343-7(a)-(c).

[140] *See* HAW. REV. STAT. § 343-7(a).

[141] Superferry I, 115 Haw. at 342, 167 P.3d at 335.

Court opined that, pursuant to NEPA, the only role for a court is to ensure that the agency has taken a "hard look" at environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken."[142] The Supreme Court of Hawai'i adopted this position in regards to HEPA -- that is, the "court must ensure that the agency has taken a 'hard look' at environmental factors."[143]

The Supreme Court of Hawai'i has opined that HEPA challenges are of public interest and the Court is not inclined to foreclose challenges to administrative determinations; thus, HEPA challenges "warrant the lowering of standing barriers."[144] The Supreme Court went on to hold that "a member of the public has standing to sue to enforce the rights of the public even though his injury is not different in kind from the public's generally" as long as there was some injury in fact.[145] The requirement that a challenger must have been a participant during the comment period and the easing of standing requirements are an attempt to balance the interests of both the applicants and citizens. The HEPA process would not be fair if an applicant made a good faith effort to prepare an environmental review, only to be sandbagged with an issue of which it had no notice leaving them open to an endless string of litigation.

III. PROCEDURAL HISTORY

A. *Parties*

1. Plaintiffs

Umberger is a private citizen who enjoys SCUBA diving on the coral reefs in Hawai'i.[146] Umberger was joined by, Mike Nakachi, a SCUBA tour guide,[147] and the Kaupiko brothers are Native Hawaiian Practitioners, who are concerned future generations will be unable to access

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[142] Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976) (citing Nat. Natural Resources Res. Def. Defense Council v. Morton, 148 U.S.App.D.C. 5, 16, 458 F.2d 827, 838 (1972)).

[143] Price v. Obayashi Hawai'i Corp., 81 Haw. 171, 182 n.12 (1996) (quoting Stop H-3 Ass'n. v. Lewis, 538 F. Supp. 149, 159 (D. Haw. 1982).

[144] Superferry I, 115 Haw. at 312, 167 P.3d at 305 (citing Mottl v. Miyahira, 95 Haw. 381, 393 (2001)); Mahuiki v. Planning Comm'n., 65 Haw. 506, 512, 654 P.2d 874, 878 (1982)).

[145] *Id.* at 320, 167 P.3d at 313 (quoting Akau v. Olohana Corp., 65 Haw. 383, 388, 652 P.2d 1130, 1134 (1982)).

[146] Complaint, *supra* note 10, at 3 (aesthetic harm).

[147] *Id.* at 4 (economic harm).

the resources necessary for traditional practices.[148] These private citizens were joined by organizations, like CCH,[149] HSUS,[150] and CBD.[151]

2. Defendants

The State of Hawai‘i must protect natural resources under PTD. DLNR is the agency tasked by the State with the responsibility of managing, administering, and exercising control over water resources, ocean waters, and coastal area, [152] including the State's aquatic life and aquatic resources,[153] and has the authority to issue and renew permits for aquarium collection.[154]

The Pet Industry Joint Advisory Council ("PIJAC") represented the interests of the pet industry with a mission to (1) promote responsible pet ownership and animal welfare, (2) foster environmental stewardship, and (3) ensure the availability of pets.[155] PIJAC was not originally a party to the lawsuit, although they did file an amicus brief with the ICA.[156] PIJAC did not join the suit until after the Supreme Court remanded the case back to the Environmental Court.[157] PIJAC petitioned the Hawai‘i Environmental Court to intervene, asserting that it had interests at risk by this complaint apart from what DLNR was defending.[158]

B. *Procedural History*

1. Circuit Court Decision

On October 12, 2012, the Plaintiffs filed a declaratory complaint seeking to compel DLNR to comply with the environmental review

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[148] *Id.* at 5-6 (Native Hawaiian Rights and future harm).

[149] *Id.* at 6-7 (protect native Hawaiian species and to restore native Hawaiian ecosystems for future generations).

[150] *Id.* at 7-8 (protect animals from unnecessary harm).

[151] *Id.* at 8 (Preserve biodiversity and assert the right to the information a HEPA review would provide).

[152] HAW. REV. STAT. § 171-3.

[153] HAW. REV. STAT. §§ 187A-2(1)-(5).

[154] HAW. REV. STAT. §§ 188-31(a)-(53).

[155] Pet Industry Joint Advisory Council, https://pijac.org/who-we-are (last visited Apr. 21, 2017).

[156] Complaint, *supra* note 10, at 1.

[157] Press Release, *supra* note 14 (oral testimony of Intervenor) (on file with author).

[158] *Id.* (plaintiffs objected to PIJAC joining the case arguing that those same risks were present when the complaint was filed in 2012 and so PIJAC should have intervened back then, not five years later (on file with author)).

procedures mandated by HEPA before issuing or renewing aquarium collection permits in the State of Hawai'i.[159] The Plaintiffs asserted in their memo for declaratory judgment and injunctive relief that DLNR is the agency responsible for the regulation of the removal of aquarium species from the waters of the State of Hawai'i.[160] DAR is the division of DLNR that would regulate permitting of the collection of aquarium species.[161] The collection of aquarium species occurs in the State's waters which are part of the State lands; when an action occurs on or will impact State lands, HEPA is triggered.[162]

The Plaintiffs further asserted that in DLNR's own 1998 State of the Reef report, it agreed that "studies to characterize the effects of removal of reef fish on the coral reef ecosystem are necessary if this activity is to continue."[163] In spite of this acknowledgment DLNR still has not required an EA under HEPA to assess the impacts of issuing aquarium collection permits at the scale of the current activities.[164] One objective of HEPA is to "alert decision makers to significant environmental effects which may result from the implementation of certain actions."[165] HEPA requires that DLNR "consider the sum of effects on the quality of the environment, and . . . evaluate the overall and cumulative effects of an action" as well as "the expected consequences, both primary and secondary."[166] DLNR issuing permits without HEPA review subverts the intent of the statute and thereby causes harm to the public.[167]

DLNR argues that there has been no action that would trigger HEPA, but even if there is an action, it would trigger an applicant to conduct an EA, not any agency action.[168] DLNR contends if the Plaintiffs' definition of 'action' is accepted, the term would be so broad as to be rendered meaningless.[169] DLNR goes on to claim that they are not actually making approval of any permits because it has no discretion. DAR aquatic biologist, Alton Miyasaka, submitted a declaration in DLNR's Motion for Summary

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[159] Complaint, *supra* note 10, at 1.

[160] *See id.*

[161] *Id.*

[162] *Id.* at 1-2.

[163] *Id.* at 2.

[164] *Id.*

[165] HAW. REV. STAT § 343-1.

[166] HAR §§ 11-200-12(a)-(b).

[167] Complaint, *supra* note 10, at 1.

[168] Memorandum in Opposition, Rene Umberger, v. Dept. of Land and Nat. Res., No. 12-1-2625-10 JHC 2013 WL 12130279 [hereinafter DLNR Memo in Opp].

[169] *Id.* at 1.

Judgment (MSJ), averring that any applicant who agrees to the terms and pays the fees is issued a permit; therefore, DLNR has no discretion in permitting.[170] The Plaintiffs infer discretion in this decision because the statute uses the word "may," but without more context, such as a standard on which to base their decisions, DLNR claims that any denial would be seen as arbitrary and capricious.[171] DLNR goes on to cite Tai Kee for the proposition that in situations such as this, where there is no context for a decision making process, the word "may" can mean "shall."[172]

Miyasaka stated that DAR monitors the species that are subject to the aquarium collection trade and that the current stock size of the species is sustainable.[173] Miyasaka stated that O'ahu and Hawai'i are the main collecting islands, and even there, the collection areas are quite limited.[174] Miyasaka states that the ninety miles of Kona coast is 12.6 percent of the State's coastline, and thirty-five percent of this area is closed for fishing.[175] This area counts for nearly seventy percent of the total aquarium collection catch.[176] The top ten most popular collection sites account for ninety percent of the catch while representing less than twenty-two percent of the entire State coast, meaning the vast majority of the State's coastline is largely unfished.[177]

Miyasaka reports that the total catch from 1999 to 2010 ranged from 412,587 to 1,019,720 animals.[178] The ratio of invertebrates to fish ranged from fifty to ninety percent.[179] The significance of these statistics is that invertebrates breed to replenish their stock faster than the fish stocks can recover.[180]

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[170] Umberger v. Dep't of Land & Nat. Res., 140 Haw. 500, 505, 403 P.3d 277, 282 (2017).

[171] DLNR Memo in Opp. at 4-5.

[172] *Id.* (citing In re Tai Kee, 11 Haw. 57 (1897), where an applicant sought a lodging house license and the Minister of Interior denied the permit pursuant to a statute that provided: "The Minister of the Interior may, upon application of any person, issue to such applicant any license hereinafter enumerated, upon the terms and conditions hereinafter set forth.")).

[173] Umberger, 140 Haw. at 509, 403 P.3d at 286.

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.*

For HEPA to be applicable, there must be both an action and an approval; DLNR argued that neither were present in this case.[181] DLNR argued, furthermore, that their practice of not requiring an environmental review of applicants for aquarium collection permits is entitled to deference.[182] The Plaintiffs opposed DLNR's contention of deference, noting that the statutes are clear and not subject to agency interpretation.[183] The trial court held in favor of DLNR and, in a Minute Order, granted DLNR's MSJ and denied the Plaintiffs' MSJ.[184] The trial court concluded that the broad action of aquarium collection is neither a program nor a project as those terms are generally understood,[185] and aquarium collection is not an applicant action that would trigger HEPA.[186]

2. Intermediate Court of Appeals Holding

The Plaintiffs appealed the trial court's decision to the Intermediate Court of Appeals of Hawai'i ("ICA").[187] The Plaintiffs' appeal was based on a single point of error namely, that the trial court erred when it concluded that aquarium collection under an aquarium fish permit issued by DLNR is not an "applicant action" under HEPA.[188] The ICA noted that the Plaintiffs raised serious concerns about the potential for significant damage to the coral reef ecosystem by "allowing reefs to be stripped of an unlimited number of fish and other marine animals, without analyzing the impacts on the environment and without any regulation or oversight."[189] The ICA also noted that DLNR shares the same concerns.[190] The ICA declined to analyze the question of how much regulatory power DLNR should be required to exercise.[191] Instead, the ICA construed the question before them to be, whether each aquarium collection permit applicant shall be required to conduct an EA, go through the accompanying public review and commenting process, and then have DLNR review each EA before issuing an aquarium collections permit.[192]

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[181] DLNR Memo in Opp, *supra* n. 168 at 2.

[182] Umberger, 140 Haw. at 505, 403 P.3d at 282

[183] *Id.*

[184] *Id.* at 509.

[185] *Id.* at 511.

[186] *Id.*

[187] Umberger, 138 Haw. at 509-10, 403 P.3d at 286-87.

[188] *Id.* at 511

[189] *Id.* at 512.

[190] *Id.*

[191] *Id.*

[192] *Id.*

The ICA stated that for an "action" to fall under HEPA, the action must: (1) be initiated by a government agency or a private party who needs government approval of its action; (2) fall under one of the nine categories enumerated in HRS section 343-5; and (3 not be exempt under HRS section 343-6(a)(2).[193] The Plaintiffs allege the action at issue is the taking of aquatic life for aquarium purposes, which is initiated by an applicant's request for an aquarium collection permit.[194] The ICA determined that Plaintiffs sought an interpretation of HEPA that would apply to both commercial and recreational permits.[195]

Canons of statutory interpretation include, inter alia: (1) look to the language of the statute; (2) if the language is plain and unambiguous then all the court must do is give effect to the meaning; (3) the court must also give effect to the intention of the legislature; and (4) when the statute is ambiguous the court must examine the context of the ambiguous portion to ascertain the statutes meaning.[196] A rational, sensible, and practicable interpretation will be taken over an unreasonable interpretation under the presumption that the legislature did not intend an absurd result.[197] HEPA does not define program or project; therefore, the court "may resort to legal or other well accepted dictionaries as one way to determine the ordinary meaning."[198] The circuit court defined "program" as "a plan or system under which action may be taken toward a goal" and "project" as "a specific plan or design; scheme or planned undertaking."[199] Using these definitions, along with many other Hawai'i appellate court opinions on the subject,[200] the ICA held that it would be unprecedented to apply HEPA to require each and every Hawai'i citizen to conduct an EA, even for a parent who just wants to go net one or two fish from a stream for their child.[201] The ICA opined that Hawai'i courts had not construed "any program or project" to automatically be applied to each and every government-regulated activity..[202]

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[193] *Id.* at 512-13.

[194] *Id.* at 513.

[195] *Id.* at 514.

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.* at 515-516.

[201] *Id.* at 516.

[202] *Id.*

The ICA next considered the Plaintiffs' argument in light of related Hawai'i statutes and regulations.[203] The ICA stated that the Plaintiffs seemed to assert that the HEPA review of aquarium collection permits as the prime mechanism to protect marine life and the reef ecosystem while ignoring the many other regulations already in place, such as size restrictions on the mesh net; daily bag limits on Yellow Tang, [Goldring Surgeonfish], Moorish Idols, and other species; and size restrictions on specific species.[204]

Commercial collectors are also required to file reports with DLNR, and their licenses are subject to conditions that are "necessary to manage, protect, and conserve aquatic life."[205] DLNR also manages the FRAs, MPAs, and Marine Life Conservation Districts.[206] DLNR manages marine life within an entire system not just by the aquarium collection permit scheme.[207] PIJAC filed an amicus curiae with the ICA arguing that DLNR issues many permits for fishing, camping, and surf contests that are not subject to HEPA review.[208] The Plaintiffs do not offer any argument as to why aquarium collection permits are actions that should be bound by HEPA, but these other permits are not.[209] The ICA held that the Plaintiffs' definition of program or project was not reasonable and would create an absurd result.[210]

DLNR argues that even if aquarium collection were an applicant action, HEPA would still not be applicable because it has no discretion in the approval of aquarium collection permits.[211] The ICA held that this argument is without merit.[212] Discretionary consent is contrasted with ministerial consent.[213] Ministerial consent is when a "consent, sanction, or recommendation from an agency upon a given set of facts, as prescribed by law or rule without the use of judgment or discretion."[214] DLNR claims it has no discretion because the process occurs online and is completely

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[203] *Id.*

[204] *Id.*

[205] *Id.* at 516-17.

[206] *Id.* at 517.

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *Id.* at 517-18.

[212] *Id.* at 518.

[213] HAR § 11–200–2.

[214] *Id.*

automatic.[215] An applicant who correctly fills out the form, accepts its terms, and pays the fee, is issued a permit.[216] Nevertheless, there are requirements that the applicant must meet, for an applicant must "possess facilities to and can maintain fish and other aquatic life alive and in reasonable health."[217] Despite abrogating its discretion to an online forum, the DLNR's discretion authority remains.[218] The ICA found that HRS section 188-31 does vest within DLNR the discretionary power to issue aquarium collection permits.[219]

3. Hawai'i Supreme Court Opinion

The Plaintiffs appealed the ICA decision on four contentions: (1) the legislature did intend the words 'program' and 'project' to cover a broad variety of human activity; (2) HEPA applies to individuals but allows for exemptions and bundling of smaller groups together or to allow them to rely on previously approved environmental reviews; (3) the ICA's definition of program and project undermines DLNR's PTD mandates to conserve marine resources; and (4) other regulatory tools DLNR may use are not substitutes for HEPA and do not excuse HEPA violations.[220]

On September 6, 2017, Justice Pollack, writing for the majority of the Supreme Court, held that commercial aquarium collection is subject to HEPA's requirements, but the record was inadequate to make such a determination on recreational aquarium collection, and recreational aquarium collection may be exempt from HEPA.[221] Therefore, the Supreme Court remanded the issue of recreational aquarium collection back to the circuit court, where the Hawai'i Environmental Court can make a ruling on the issue.[222]

Agencies may consider previous determinations of whether a statement is required and previously accepted statements."[223] DLNR is similarly authorized to accept previous decisions and statements under HAR section 11-200-13(a).[224] This alleviates the concern that an EA would need to be prepared whenever an applicant applies for an aquarium

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[215] Umberger, 138 Haw. at 518, 382 P.3d at 330.

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.*

[220] Umberger v. Dep't of Land & Nat. Res., 140 Haw. 500, 513 (2017).

[221] *Id.* at 504-05.

[222] *Id.*

[223] *See* HAW. REV. STAT. § 343-5(g) (2012).

[224] HAR § 11-200-13(a).

collection permit.[225] Group of proposed actions may be handled by a single HEPA EA.[226] This can help ameliorate aquarium collectors' concerns about not having sufficient resources to comply with HEPA.[227]

The Supreme Court cites Grabowsky heavily, noting that there is increasing pressure on the aquarium collection fishery based on an increase in collectors and technology; [228] removing herbivores decreases the resilience of the coral reef ecosystems and increases the likelihood of an algal-dominated reef;[229] that rare species that DLNR list on its "Species of Greatest Conservation Need" are still being harvested by aquarium collectors without limits;[230] and that aquarium collectors focus on the more aesthetically pleasing juveniles resulting in an age distribution skewed toward older fish and leaving fewer juveniles to grow and reproduce.[231] Grabowsky concludes that aquarium collection has detrimental effects on fish populations and degrades the reef ecosystem, and further that FRAs and MPAs will help slow but not prevent this degradation, for the current system of permitting and protected areas is insufficient.[232] Miyasaka stated that the fishery was being managed sustainably, but this statement was based on DLNR studies that also recognized the detrimental effects of removing fish from the coral reef ecosystem and noted that some of the fish aquarium collectors target are particularly vulnerable to depletion.[233]

DLNR's report to the Twenty-Fifth Legislature noted that the aquarium collection trade in Florida has grown significantly and moved to invertebrates similar to the trade here and that the research in Florida determined "this intensive collecting of such species was ecologically unsound." [234] Miyasaka countered this narrative by asserting that the collectors in Hawai'i are highly discriminatory and do not take fish that are damaged or imperfect. Miyasaka further stated that unwanted fish are returned to the ocean, so there is little waste or bycatch in the trade. The Plaintiffs allege that the finding that the fishery is sustainable is based solely on Miyasaka's conclusory declarations.[235]

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[225] Umberger, 140 Haw. at 528, 403 P.3d at 305.

[226] HAW. REV. STAT § 343-6(a)(1) (2010).

[227] Umberger, 140 Haw. at 529, 403 P.3d at 306.

[228] *Id.* at 506, 403 P.3d at 283.

[229] *Id.*

[230] *Id.* at 506 n.9, 403 P.3d at 283.

[231] *Id.* at 507, 403 P.3d at 284.

[232] *Id.*

[233] *Id.* at 509-10, 403 P.3d at 286-87.

[234] *Id.* at 510, 403 P.3d at 287.

[235] *Id.*

The Supreme Court breaks down its analysis of whether the permits DLNR issues for aquarium collection require an environmental review under HEPA into five components: (1) Is Issuing a Permit for Aquarium Collection is a HEPA "Action"; (2) Does Aquarium Collection "Trigger" HEPA; (3) Is Aquarium Collection is Exempt from HEPA; (4) Does DLNR have Discretionary Consent; and (5) Summary Judgment.[236] If there is a genuine issue of material fact as to whether aquarium collection is an "action" under HEPA then the circuit court's summary judgment in favor of DLNR was in error.[237] If aquarium collection is found to be a HEPA "action," and is not exempt under HEPA and the issuance of permits requires DLNR discretion, the trial court's denial of the Plaintiffs' cross-MSJ is in error.[238]

a. HEPA's Purpose Casts a Wide Net for Actions

When DLNR issued permits to aquarium collectors, it was an "action" under HEPA.[239] HEPA defines an "action" as "any program or project to be initiated by any agency or applicant."[240] "Program" is generally defined as "a plan or system under which action may be taken toward a goal."[241] "Project" is defined as "a specific plan or design" or "a planned undertaking."[242] An important preliminary step in determining whether the activity authorized by a DLNR aquarium collection permit is a program or project is to properly define the activity.[243] Commercial and recreational aquarium collections are both programs or projects.[244] Such collection is a project because it is a planned undertaking to deliberately extract aquatic life using fine mesh net for aquarium purposes.[245] Similarly, such collection is a program because it purposefully extracts animals from State waters using fine mesh nets with the "desired goal" of capturing these animals for "aquarium purposes."[246]

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[236] *Id.* at 513-28, 403 P.3d at 290-305.

[237] *Id.* at 512-513, 403 P.3d at 289-90.

[238] *Id.*

[239] *Id.* at 514, 403 P.3d at 291.

[240] HAW. REV. STAT § 343-2.

[241] MERRIAM-WEBSTER, https://www.merriamwebster.com/dictionary/program (last visited April 21, 2018).

[242] MERRIAM-WEBSTER, https://www.merriamwebster.com/dictionary/project (last visited April 21, 2018).

[243] Superferry I, 115 Hawai'i at 306 n.6, 167 P.3d at 299.

[244] Umberger, 140 Haw. at 514, 403 P.3d at 291.

[245] *Id.*

[246] *Id.*

HEPA's purpose is to ensure environmental concerns are given appropriate consideration along with economic and technical concerns, thereby alerting decision makers to the environmental concerns and encouraging public participation in the process.[247] HEPA's scope is intended to be broad.[248] The wide range of activities to which HEPA has already been applied supports the conclusion that HEPA is not to be applied narrowly.[249] The commonality among all these activities was their potential to produce "environmental concerns," which is what HEPA wants to ensure become part of the thoughtful decision making process before an activity is permitted by a government agency.[250] The determination that an activity is an "action" is not dispositive on the determination that it will require HEPA environmental review, is but it is the first step.[251]

b. HEPA Requirements Cannot be Legislated Away

The ICA noted that other statutes and rules apply to aquarium collection, but this fact does not mean HEPA requirements can be avoided.[252] There is nothing inconsistent between HEPA and the existing regulatory scheme.[253] The purpose of HEPA is to make sure environmental concerns are considered during the decision-making process, not to defer to existing regulations that cover the activity.[254] The fact that DLNR administers the permits for aquarium collection is not what makes the activity an "action." As stated above, it is an action because it is a program or project initiated by an applicant[255] DLNR conceded that the "there is a use of state land" in this case and that, therefore, there is a HEPA "trigger."[256]

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[247] *Id.* at 515, 403 P.3d at 292.

[248] *See* Pearl Ridge Estates Cmty. Ass'n v. Lear Siegler, Inc., 65 Haw. 133, 140–41 (1982) (noting that HEPA's scope is wider "than the federal or the typical state analogue.") (quoting Molokai Homesteaders Coop. Ass'n v. Cobb, 63 Haw. 453, 465, 629 P.2d 1134, 1143 (1981)).

[249] Umberger, 140 Haw. at 516, 403 P.3d at 293.

[250] *Id.* 403 P.3d at 293.

[251] *See id.* (There are further steps to sort activities out that are not appropriate for HEPA review, this supports the conclusion that a wide range of activities are "actions.").

[252] *Id.* at 518, 403 P.3d at 295.

[253] *See id.*

[254] *See id.*

[255] *Id.* at 513-19, 403 P.3d at 293.

[256] *Id.* at 519-20, 403 P.3d at 296-97.

c. State Waters Equal State Lands

If there is a PTD duty to protect State lands, that duty also applies to the surrounding water.[257] HEPA does not define "land" but the definition in HRS section 171-1, the statute that created DLNR, includes all water connected to the land.[258] HRS section 171-2 defines "public lands" as including submerged lands.[259] Based on this definition, the marine waters and submerged lands where aquarium collection take place are included in the State's land.[260] If the State acts as a trustee over an area, that area is then considered State lands for HEPA purposes.[261] The Supreme Court has repeatedly held that PTD obligations apply to water resources.[262] This logic holds true for conservation districts,[263] which shall include areas necessary for "conserving indigenous or endemic fish and wildlife, including those which are threatened or endangered," or "would maintain or enhance the conservation of natural or scenic resources."[264] Aquarium collection that occurs within conservation districts is subject to HEPA requirements.[265]

d. Taking Fish From State Waters is a Use of State Lands

HEPA does not define "use."[266] The Supreme Court has previously articulated that "use" under the ordinary definition could be applied to any "use," but under HEPA, such a broad interpretation is not accepted, and the term "use" is "not unlimited in possibilities."[267] Whether an activity is a "use of State lands" is a function of the nature of the activity and the extent

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[257] *Id.* at 520, 403 P.3d at 297.

[258] *Id.*

[259] *Id.*

[260] *Id.* at 520-21, 403 P.3d at 297-98.

[261] *Id.* at 521, 403 P.3d at 298.

[262] *Id.*

[263] *Id.* at 522, 403 P.3d at 299.

[264] HAW. REV. STAT. § 205-2(e) (2012).

[265] Umberger, 140 Haw. at 522, 403 P.3d at 293.

[266] *Id.* 403 P.3d at 293.

[267] Nuuanu Valley Ass'n v. City & Cty. of Honolulu, 119 Haw. 90, 103, 194 P.3d 531, 544 (2008).

of involvement of State lands.[268] Permits for commercial aquarium collection allow for an unlimited collection of aquatic life and a recreational permit allows for almost 2,000 animals a year to be collected from "State lands."[269] This take uses "State lands" in an actual and substantial manner and cannot be said to fall within the narrow range of activity the Supreme Court has excluded from "use" under HEPA.[270]

e. Unlimited Removal of Animals Will not be Exempt from HEPA

HRS section 343-6 requires the EC to adopt, amend, or repeal rules that allow specific types of action to be exempt from HEPA because they will have minimal or no significant effect on the environment.[271] The EC under HAR section11-200-8(a) determined certain categories of "actions" may be declared exempt by the proposing or approving agency.[272] Examples of such exemptions are demolition, replacement, or repair of an existing structure, minor alterations to the land, water, or vegetation, basic research, or continuing of an administrative activity.[273] The EC declared through HAR sections 11-200-8(c)-(d) that each agency shall develop its own list of exempt activities consistent with the letter and intent of HEPA; however, the agency's authority in this capacity is limited.[274] An agency must first determine that the activity is a minor project with minimal to no significant environmental impact.[275] The listed as well as the individual exemptions must only be for activities with minimal to no significant environmental impact.[276]

The Supreme Court of Hawai'i, in *Superferry I*, decided the agency must first determine whether the action is part of a "group of actions" that must be "treated as a single action" under HAR § 11-200-7.[277] Then the agency must conduct a four-part test to determine if an activity is exempt under HEPA: (1) it is within the exempt class;[278] (2) it will not have a

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[268] Umberger, 140 Haw. 522-523, 403 P.3d at 299-300.

[269] *Id.* at 523, 403 P.3d at 300.

[270] *Id.*

[271] *Id.*

[272] HAR § 11-200-8(a) (1996).

[273] *See id.* § 11-200-8(a)(1)-(11).

[274] *Id.* §§ 11-200-8(c)-(d).

[275] Kahana Sunset Owners Ass'n v. County Cty. of Maui, 86 Haw. 66, 72, 947 P .2d 378, 384 (1997).

[276] Superferry I, 115 Haw. at 316, 167 P.3d at 309.

[277] HAR § 11-200-7; *see* Superferry I, 115 Haw. at 315-16.

[278] HAR § 11-200-8(a), (d) n.271-273; *see* Superferry I, 115 Haw. at 315-16, 167 P.3d at 310-11.

significant cumulative impact and will not impact a particularly sensitive environment;[279] (3) the agency has obtained advice from another agency or an individual with jurisdiction or expertise relevant to the exemption;[280] and (4) the action will probably have minimal or no significant environmental impact.[281] If an action fails to satisfy any of these four requirements it cannot be exempt from HEPA.[282]

As a matter of law, it cannot be concluded that commercial aquarium collection of an unlimited number of animals may be exempt from HEPA because it does not qualify for any of the listed exemptions.[283] The most relevant category is "minor alteration in the conditions of land, water, or vegetation." However, because the commercial permit allows for unlimited extraction of aquatic life, it cannot be said to constitute a "minor alteration."[284] Aquarium collection under a recreational permit is limited to 2,000 animals a year;, the record was not sufficiently developed to allow for a determination that recreational permits are exempt, so the issue is remanded to the Hawai'i Environmental Court.[285]

f. DLNR Cannot Negate its Own Discretion

DLNR created a system that removed its discretion to deny an applicant a permit. The power to deny an applicant was vested in DLNR by the Legislature. The fact that DLNR chose not to use its discretion does not mean its discretion did not exist. HRS section 188-31 expressly provides DLNR may issue an aquarium collection permit.[286] Therefore, if DLNR is not satisfied that a person has met the requirements, DLNR has the statutory discretion to not issue such person a permit.[287] The Supreme Court agreed with the ICA that DLNR has discretionary authority and just because DLNR

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[279] HAR § 11-200-8(b).

[280] *Id.* § 11-200-8(a).

[281] HAW. REV. STAT. § 343-6(a)(2); HAR § 11-200-8(d); *see* Superferry I, 115 Haw. at 322-23, 167 P.3d at 315-16 (2007).

[282] HAW. REV. STAT. § 343-6(a)(2); HAR § 11-200-8(d); *see* Superferry I, 115 Haw. at 322-23, 167 P.3d at 315-16.

[283] *Umberger*, 140 Haw. at 524-25, 403 P.3d at 301-02.

[284] *Id.* at 525, 403 P.3d at 302.

[285] *Id.*

[286] HAW. REV. STAT. § 188-31 (2011) (uses both "may" and "shall."); State v. Cornelio, 84 Haw. 476, 493, 935 P.2d 1021, 1038 (1997) (quoting Gray v. Admin. Dir. of the Court, 84 Haw. 138, 149, 931 P.2d 580, 591 (1997)) (When "may" (discretionary) and "shall" (mandatory) are used in the same statute this court infers that the legislature understands and intends this difference and "may" shall be understood as discretionary).

[287] *Umberger*, 140 Haw. at 527, 403 P.3d at 304.

choose to issue permits online, does not defeat the express discretionary authority the legislature gave to DLNR.[288]

4. Injunction Orders

On October 27, 2017, the Environmental Court, in the First Circuit State of Hawai'i, ordered Plaintiffs' MSJ granted in part and DLNR's MSJ was denied in part.[289] The court declared that DLNR violated HEPA by issuing permits without an environmental review.[290] Any and all commercial permits issued or renewed are illegal and invalid, and no new commercial permits may be issued until further order of this Court and the Court will retain jurisdiction to review DLNR's compliance with the order.[291] The Plaintiffs petitioned the Supreme Court to issue a writ of mandamus compelling the trial judge to invalidate the recreational permits as well.[292] The Supreme Court denied the petition.[293] On April 12, 2018, however, after hearing from counsel, the Environmental Court ordered all recreational permits void as a matter of law.[294]

IV. ANALYSIS

A. *Principles to be Considered in Environmental Protection*

> In the end we will conserve only what we love; we will love only what we understand; and we will understand only what we are taught.[295]

Constitutionally provided rights are the rights of the individual as well as the right of the entire collective.[296] No one citizen has the power to renounce their right to an ecologically balanced environment, for such a right does not belong solely to anyone.[297] This has implications for

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[288] *Id.*

[289] Press Release, *supra* note 14.

[290] *Id.*

[291] *Id.*

[292] Umberger v. Crabtree, No. SCPW-17-0000738, 2017 WL 5483192, at *1 (Haw. Nov. 15, 2017).

[293] *Id.*

[294] HO'OHIKI, http://hoohiki.courts.hawaii.gov/#/case?caseId=1CC121002625 (last visited Apr. 21, 2018).

[295] Baba Dioum, Director General of Water and Forestry, presentation at the General Assembly of the International Union for the Conservation of Nature and Natural Resources (1968).

[296] Honorable Justice Antonio Benjamin, Keynote Address at the Regional Judicial Colloquium for Latin America and the Caribbean (May 22, 2017).

[297] *Id.*

intergenerational equity, for people that are yet to be born are incapable of filing a complaint on their own behalf.[298]

A concept being cited in environmental cases is *in dubio pro natura*:, when there is doubt in an environmental issue, the doubt must be resolved in favor of the preservation of nature.[299] This concept is analogous to the presumption of innocence in criminal proceedings.[300] Just as the presumption of innocence does not prevent the conviction of a guilty defendant, neither does *in dubio pro natura* prevent any activity that may cause some harm to the environment.[301] *In dubio pro natura* stands for the proposition that when making decisions that will affect the environment, all necessary information and precaution should be used.[302] The right to a healthy environment[303] and the right of access to natural resources[304] can both be justiciable rights; so when a controversy arises where both of these rights are in play, the courts often have to choose the least harmful option.[305]

An aquarium collector may decide that removing a few fish and decreasing the health of the reef ecosystem by some amount is made up for by the money they gain by selling those fish, thereby waiving their right to a healthy environment. Nevertheless, because this is a right afforded to all in Hawai‘i, it is not clear that they have the right to make that decision to decrease the health of the environment for everyone. Because there is essentially only one environment, their decision infringes on the rights of everyone. Not letting the aquarium collectors take any fish infringes on their ability to earn a living. A court's decision in these type of controversies is going to be in some sense a lesser of two evils.

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[298] *Id.*

[299] Professor Nicholas Bryner, Keynote Address at the Regional Judicial Colloquium for Latin America and the Caribbean (May 22, 2017) (stating that *in dubio pro natura* is an extension of the precautionary principle).

[300] *Id.* (stating that the presumption of innocence is a counterweight to the interest of the state to avoid the risk of irreversible damage to human rights).

[301] *Id.*

[302] *Id.*

[303] HAW. CONST. art. XI, § 1.

[304] In re Water Use Permit Applications, 94 Haw. 97, 138, 9 P.3d 409, 450 ("The public trust has never been understood to safeguard rights of exclusive use for private commercial gain. Such an interpretation, indeed, eviscerates the trust's basic purpose of reserving the resource for use and access by the general public without preference or restriction.").

[305] J. Samy Barboso, Regional Judicial Colloquium for Latin America and the Caribbean: Constitutions, Environment and Human Rights Address (May 22, 2017).

B. *Impediments to Effective Fishery Management*

One of the most well-known obstacles in modern fishery management is the problem of the "Tragedy of the Commons."[306] In the concept of the "Tragedy of the Commons," people fear being the only one not exploiting a resource.[307] The fear is that while one is practicing self-restraint for the good of the fishery, others are out reaping the benefits. The fishery will eventually collapse, and one will have missed out on all the benefits; eliminating any incentive to self-regulate for the good of the resource to be protected.[308]

Others cite the lack of political will to establish conservation or environmental protection plans.[309] There is a sense among political decision makers that environmental efforts are at odds with economic goals, such as: (1) tourism; (2) coastal development; and (3) manufacturing and industry.[310] When the "environment does not have a seat at the table," awareness of environmental issues will be limited.

Another frequently cited concern in fisheries management is at the individual level, fishers find the regulatory scheme overly complex, with even responsible fishers intent on following the rules having a difficult time keeping up.[311] This assumes that the fishers are aware of the rules or are interested in learning of them.[312] The preconception that the regulations are too complex prevents some from seeking information, even if available.[313] The complexity of the regulations is compounded by the fact that the agency in charge of enforcement, Division of Conservation Area and Resource Enforcement ("DOCARE") is underfunded and understaffed.[314] This undermines DOCARE's credibility as an effective enforcement agency.[315] There is also a perception in the public that DOCARE agents are unlikely or unable to enforce fishing regulations even when violations are discovered.[316]

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[306] ATKINSON, *supra* note 29, at 22.

[307] Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1246 (1968).

[308] *Id.*

[309] ATKINSON, *supra* note 29, at 22.

[310] *Id.*

[311] *Id.* at 26.

[312] *Id.*

[313] *Id.*

[314] *Id.* at 28.

[315] *Id.*

[316] *Id.*

C. *Critical Procedure*

Critical procedure works with, but expands upon, traditional formal legal analysis, [317] becoming more valuable as the complexity of a controversy increases. It views the situation from the relatively disadvantaged party's perspective and asks, "what's really going on here?"[318] It analyzes changes in the litigation process in light of broader social and political contexts.[319] Critical procedure does not give answers; rather it provides the key questions to ask to get to the right answer.[320] The questions of critical procedure provide insight to: (1) power dynamics; (2) neutrality; (3) relative advantage; (4) articulating public values; and (5) political realities.[321] This Comment will focus on questions one and four.

1. Who is Winning?

The first inquiry critical procedure examines is power dynamics: who is benefitted and who is harmed by the allowance of aquarium collection of under DLNR permits. Umberger is not the typical example: two groups of private citizens battling over the proper utilization of natural resources. When aquarium collection is allowed, the beneficiaries are the aquarium collectors who are able to capture personal gain from the exploitation of a public good.[322] Aquarium collection is not subsistence fishing; it is not even fishing with a food purpose, as such this fishery is seen as particularly lacking in compassion and understanding towards the Hawaiian culture.[323] It is also significant to note that over 90 percent of the

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[317] *See* Critical Procedure, *supra* note 21, at 781.

[318] *Id.* ("[W]hat is really at stake, who benefits and who is harmed (in the short and long term), who wields the behind-the-scenes power, which social values are supported and which are subverted, how political [or economic] concerns frame the legal questions, and how societal institutions and differing segments of the populace will be affected by the court's decision[s].").

[319] *Id.* at 782.

[320] *Id.*

[321] *Id.* at 781-89.

[322] Carolyn Lucas, *Tropical Fish Dump Prompts Outrage*, WEST HAWAII TODAY (Jan. 29, 2010), https://snorkelbob.com/wp-content/uploads/2015/04/West_HI_Today_fishkill_Honokohau.pdf ("Many people feel we are granting (tropical fish collectors and exporters) a tremendous privilege by allowing them to make hundreds of thousands of dollars on our reefs and we're getting nothing in return.").

[323] Alohi Nakachi, The Disconnect of Hawaiian Culture and Marine Management in West Hawai'i: A Case Study on the Aquarium Trade (Dec. 8, 2016) (unpublished M.S. thesis, University of Miami) (on file with the University of Miami Library System).

fish caught by aquarium collectors on the Big Island are exported out of the state.[324]

The plaintiffs claim aesthetic harm, economic harm for non-extractive users, and assert the rights to access to the resource for future generations that are not here to assert their right.[325] Environmental review of the action benefits society as a whole; it enhances environmental awareness, and encourages public participation and cooperation. PIJAC could be viewed as group wielding power behind the scene, but they are an out-of-state organization with, at least as related to the aquarium collection industry, the seemingly conflicting goals of fostering environmental stewardship and ensuring the availability of pets.[326] PIJAC is conducting the environmental review that will allow fish to be removed from State waters and sold to customers outside the state.

Now that aquarium collectors are at least temporarily enjoined from removing fish, they have suffered economic harm. If this was a legislative decision to close the fishery, a buyback of the commercial permits holders or a phase out might have been appropriate as is done on the federal level.[327] The judicial decision offers no remedy, but it will be difficult for commercial collectors to argue they were without notice of this outcome, since the complaint was filed five years before the order came down. That should be sufficient time to develop a contingency plan for a foreseeable outcome. Aquarium collectors could have prepared alternate uses for their equipment and facilities as a hedge or used the time to prepare an EA; PIJAC submitted its DEA less than six months from the order enjoining the collection. PIJAC anticipates a FONSI. Such a result is not guaranteed, nor is it guaranteed that their FONSI will not be challenged.

This order can be viewed as a win for the plaintiffs. The Court halted unlimited collection until DLNR takes a "hard look" at the potential impacts on the environment that such extraction would cause. It strains credulity to assert that unlimited extraction could ever be approved after an environmental review occurs because by its nature it is authorizing the potential total elimination of a resource; however, this is what PIJAC's DEA proposes. HEPA and the precautionary principle intend to avoid this very result. If a DEA proposing no limit is accepted, this order could be seen as

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[324] Jan Dierking, *Socio-Economic Study of the Aquarium Fish Industry in West Hawai'i*, CESAR ENVIRONMENTAL ECONOMICS CONSULTING, at 10.

[325] Complaint, *supra* note 10, at 2-5.

[326] Pet Indus. Joint Advisory Council https://pijac.org/who-we-are (last visited April 21, 2018).

[327] 16 U.S.C. § 1854 (1993); 16 U.S.C. § 1861a (2007) (section 312(b) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) authorizes the National Marine Fisheries Service to conduct a fishing capacity reduction program if funds are provided and it is determined that such a program is necessary to prevent or end overfishing).

a paper tiger. The order forces PIJAC and DLNR to put its cards on the table; thus, any new challenges could confront the allowance of unlimited aquarium collection directly. DLNR has a PTD duty to protect the natural resources, so any legislation or rulemaking that would subvert this order would face a constitutional challenge.[328]

2. HEPA Amplifies the Environment's Voice

HEPA is a valuable arrow in the quiver of anyone seeking to use the courts as a site of cultural performance. If HEPA functions ideally, the agency or actor who seeks to use public land is compelled to disclose what impacts the project or program will have on the environment; it will have input from experts in the relevant area; the public will have the chance to have its concerns heard; and the deciding agency will make a fully informed decision. If the relevant agency fails to conduct an environmental review, or the environmental review is insufficient, HEPA provides the basis on which the public can obtain standing and create another opportunity for judicial review, creating the potential for those without a powerful voice to reshape the conversation that society and decision-makers have.

The fourth insight of critical procedure, articulating public values, demonstrates how courts can be used as the site of cultural performance.[329] The courts are used as more than just a site to resolve disputes.[330] The lesser advantaged party may lose but the court offers a platform for that party to assert their narrative.[331] Through the mechanism of discovery, lesser advantaged parties can use the power of the courts to obtain information from institutions they typically would not have a right to access.[332] The more high profile a case becomes, the more the information they discover and the issues in controversy become part of the public conversation.[333] In this way a claimant can lose the battle in litigation but still have a chance to win in the court of public opinion.[334]

Umberger used the courts to leverage her complaint into the public discourse; a simple Google search will show the aquarium collection controversy covered in all forms of media: local newspapers, national publications, television news, and various internet postings. Umberger's position is a counter narrative to the aquarium collectors, but it is not clear this position is the typical counter narrative considered in critical procedure.

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[328] Interview with Lance Collins, in Honolulu, Haw. (Apr. 9, 2018).

[329] Critical Procedure, *supra* note 21, at 786.

[330] *Id.* at 787-88.

[331] *Id.* at 787.

[332] *Id.*

[333] *Id.* at 788.

[334] *Id.*

Umberger does not seem disadvantaged, but the court did increase her platform none the less. The precedent that the *Umberger* opinion sets, opens the door wider for disadvantaged groups or people who wish to bring environmental challenges to other industries.[335]

3. The Industry's Environmental Review

PIJAC has prepared two DEAs for aquarium collection: one on O'ahu and one for aquarium collection on the Island of Hawai'i.[336] Both DEAs were published by the Office of Environmental Quality Control (OEQC) April 8, 2018. DLNR is the approving agency of the DEAs.[337] The DEAs make similar arguments, so this essay will focus on the O'ahu DEA.[338] The purpose of the DEA is to create a program under which DLNR can conduct a permitting process for aquarium collection.[339] This permitting process, if approved, will allow commercial aquarium collectors to continue in their chosen profession in compliance with applicable laws, rules, and regulations.[340] The DEAs provide DLNR with the necessary framework to review the applicant's action and determine the impact the action will have on the environment.[341] The HEPA review also provides an opportunity for the public to be involved in the DLNR's decision-making process.[342]

4. Aquarium Collectors Are Asking for Unlimited Collection

The DEA reveals what the commercial collectors are asking of the State, in terms of how much aquatic life they would like to be allowed to remove. The permit DLNR issues is valid for one year, so the DEA will use a one-year scope when looking at the impacts.[343] The DEA compared two alternatives: (1) No Action -- allow the collection injunction to remain in place; or (2) DLNR Resumes Issuing Collection permits -- collection continues subject to DLNR regulations. Alternative (1) meets DLNR's need to protect fish and habitat but eliminates the commercial industry.[344] Alternative (2) assumes collection will occur at the same levels as has been

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[335] Interview with Lance Collins, in Honolulu, Haw. (Apr. 9, 2018).

[336] Pet Indus. Joint Advisory Council, *Issuance of Commercial Aquarium Permits for the Island of O'ahu*, OFF. ENVTL. QUALITY CONTROL, (Apr. 8, 2018) [hereinafter O'ahu DEA].

[337] *Id.*

[338] *Id.*

[339] *Id.*

[340] *Id.*

[341] *Id.*

[342] *Id.*

[343] *Id.*

[344] *Id.* at 11.

previously reported.[345] The expectation is that if this DEA results in a FONSI, all commercial aquarium collectors can cite the FONSI in their application to DLNR for their commercial collection permit.[346] Unless there is a significant change in the amount of aquatic life collected or the stock size this FONSI would remain valid and environmental review would not be necessary each year.[347] This DEA does not propose a limit on the number of animals that a commercial collector could take.

A FONSI determination can be challenged.[348] This DEA has no upper limit but assumes the applicant will collect at a level consistent with the historic average. Applicants are, however, not required to limit collection to the historic average, or even estimate how much they intend to collect. DLNR would only find out the amount of catch and any damage an increase over historic average would cause until after the fact. DLNR has the authority to suspend any permit as necessary to conserve aquatic life wildlife under HAR 13-74-3(1).[349] A permit holder must be given notice and the opportunity for a hearing.[350] The DEA does not suggest a metric for determining how much over the historical average would result in the necessity of a new review.[351] These issues leave this anticipated FONSI vulnerable to a challenge.

5. What Does the Public Think?

A public hearing was scheduled for April 10, 2018, two days after the thirty-day public commenting period began.[352] The Council Chair canceled the hearing on this DEA the night before and was working to reschedule it for May 1, 2018, before the public commenting period ended.[353] As such it is unclear what concerns will be raised by the public and how PIJAC will respond. The public comment period can result in

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[345] *Id.* at 50-51.

[346] *Id.*

[347] *Id.* at 65.

[348] Superferry I, 115 Haw. at 308, 167 P.3d at 301.

[349] HAR. § 13-74-3(1).

[350] HAR § 13-74-3(3).

[351] O‘AHU DEA, *supra* note 336, at 65.

[352] Author email with OEQC Director (Apr. 9, 2018) (on file).

[353] Author email with OEQC Director (Apr. 9, 2018); Author email with Lance Collins (Apr. 9, 2018) (Umberger was planning to boycott the meeting because DLNR and PIJAC were permitted to make presentations at the hearing) (on file).

significant changes to a program or project.[354] If PIJAC adequately addresses the public's concerns potential litigation could be avoided.[355]

6. What Will Become of the Recreational Collectors?

Recreational permittees cannot profit financially from their aquarium collection. It therefore makes it unlikely that they will go through the expense of conducting an environmental review for recreational collection. Recreational permits have no catch reporting requirement, so data will be difficult to ascertain.[356] PIJAC is unlikely to conduct an environmental review for the recreational collectors as it did for the commercial collectors.[357] The recreational collectors could cite the commercial DEA in their application, which could result in another challenge by Umberger or a similarly situated citizen. This could encourage a recreational user to instead apply for a commercial permit, possibly resulting in a situation where permittees that previously had a catch limit, obtaining a permit with no upper bound on their collection.

7. Umberger Opening the Door Wider

Lance Collins is an attorney with a history of pursuing environmental claims with some success.[358] In response to the question of whether issuing a permit was the action HEPA intended to regulate, Collins responded stating this was an immaterial concern -- the *Umberger* opinion informs us what the law is now and how claims can be pursued moving forward.[359] Collins has cited the *Umberger* opinion in two lawsuits he has filed attempting to broaden the scope of what actions trigger HEPA review. The first challenges the permits DLNR has issued to tour boats on Maui without environmental review.[360] The second lawsuit challenges Syngenta Seeds for their failure to prepare an EA before conducting research and seed development operations on a State lands parcel in Kaua'i, and also challenges BLNR for the exemption from environmental review it issued to Syngenta Seeds for the use of the same parcel.[361] Collins also stated the *Umberger* opinion that State Waters are the equivalent to State lands for

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[354] Mamala Bay Seafood was forced to relocate their fish cages from the surface of the ocean to ten feet below the surface, drastically changing their proposed operating procedures, in response to concerns raised during the approval process of their DEA.

[355] *Id.*

[356] O'AHU DEA, *supra* note 336, at 60.

[357] *Id.*

[358] LANCE COLLINS HOMEPAGE http://lobsang.maui.net/news.html (last visited Apr. 21, 2018).

[359] Interview with Lance Collins, in Honolulu, Haw. (Apr. 9, 2018).

[360] *Id.*

[361] *Id.*

HEPA purposes might be applicable to challenge the Longline Fishing industry and the permits they use to dock their boats in State Waters.[362] The lawsuits are still in the early stages; if they are successful, then Umberger will have advanced environmental rights beyond her personal controversy.

On April 12, 2018, the Environmental Court heard from counsel before issuing a minute order voiding recreational permits.[363] Bill Wynhoff, Deputy Attorney General for the State of Hawai'i stated that the Supreme Court had decided issues that were not before their court in the *Umberger* decision.[364] Wynhoff disagreed with the decision that commercial permits were void, but would stipulate, that if commercial permits were void because no EA was conducted, recreational permits were void for the same reasons.[365] Wynhoff stated there have been no new applicants for recreational permits, and believed it was unlikely that there would be any applicants.[366] Wynhoff stated the applicant would be forced to do the EA or find a reason they should be exempted.[367] Now that the State knows the law, it will comply with the law and would not start accepting applications for permits tomorrow.[368] Summer Kupau-Odo, attorney for the plaintiffs, did not want to take the State's word they would not issue any more permits and wanted the Court to issue an order declaring permits that did not comply with HEPA were void.[369] The State appears to accept the decision in this specific case, but whether it will accept similar assertions remains to be seen.

V. CONCLUSION

The Supreme Court correctly applied the laws to the facts of the *Umberger* case. There are very real short-term impacts for the commercial collectors in the aquarium trade. They will be temporarily left without the ability to earn a living in their chosen profession. It is not clear that the aquarium collectors' right to work in their chosen profession takes precedence over everyone else's right to have our natural resources protected.

The DEA proposed by PIJAC leaves the amount of aquatic life that can be collected under DLNR's permits unlimited. A natural resource management scheme that potentially allows for all of its resources to be

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[362] *Id.*

[363] HOʻOHIKI, http://hoohiki.courts.hawaii.gov/#/case?caseId=1CC121002625 (last visited Apr. 21, 2018).

[364] Press Release, *supra* note 14.

[365] *Id.*

[366] *Id.*

[367] *Id.*

[368] *Id.*

[369] *Id.*

extracted hardly seems like a management scheme. It seems like PIJAC is asking DLNR to let the fox guard the henhouse. It is reasonable to use past catches as a guide for estimating the impact, but not putting an upper bound on future catch, when there is no accurate way to predict what future conditions will be, seems shortsighted.

Umberger, at some risk to her own personal safety, has effectively leveraged HEPA and the court system to amplify her concerns regarding the environment. It is said the only way to preserve a right is to assert it. Umberger is asserting her rights and in the process expanding the ways in which those rights can be asserted. The aquarium fishery was not in peril, but Umberger getting a victory here may lead to victories in other more vulnerable areas.