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July 11, 2023

Brian Neilson
Administrator, Division of Aquatic Resources
Hawaii Department of Land and Natural Resources

Via email: brian.j.neilson@hawaii.gov

Re: Request for Denial of Aquaculture Facility License to Kanaloa Octopus Farm

Dear Mr. Neilson:

We are writing on behalf of the Harvard Law School Animal Law & Policy Clinic, Native Hawaiian cultural practitioner Mike Nakachi, and Hawaii-based organizations For the Fishes and Pono Advocacy to request that the Division of Aquatic Resources (DAR) of the Hawaii Department of Land and Natural Resources (DLNR) deny an aquaculture facility license, special activity permit, or any other license or permit to Jacob Conroy and FatFish Farms, LLC, doing business as Kanaloa Octopus Farm (hereinafter "the Farm" or "KOF").

As detailed in the attached appendix, KOF is an octopus petting zoo that is operating in violation of laws protecting Hawaii's aquatic life, and its business model relies on the exploitation of the state's public trust resources for private gain. For years, KOF has operated a lucrative octopus petting zoo using dozens of wild-caught animals to entertain out-of-state tourists while making demonstrably incorrect claims that such tours support conservation of this species.¹ The Farm has justified its existence by claiming that it intends to "close the lifecycle" of the day octopus in captivity, with the goal of supplying captive-bred animals to the research, aquarium, and food industries at a large scale.² If successful, this business plan would be ecologically devastating and inflict unquantifiable suffering on the animals. However, to date, there is little evidence that KOF has made any progress towards this goal. It also readily admits that it does not know what to feed day octopus paralarvae, so the animals who hatch there die in a matter of days, evidently of starvation.³

¹ Susanne Rust, *Farm-bred Octopus: A Benefit to the Species or an act of Cruelty?*, L.A. Times (Dec. 20, 2022), <https://www.latimes.com/environment/story/2022-12-20/is-farm-breeding-octopus-an-act-of-cruelty> [hereinafter "Rust (Dec. 20, 2022)"].

² Ex. 1, Jacob Conroy, Business Plan for the Kanaloa Octopus Research and Education Center 16 (Feb. 6, 2023) [hereinafter "KOF 2023 Business Plan"].

³ See, e.g., Catherine Cruz, *Octopus Eco-tours and Conservation are the Focus of this Big Island Facility*, Haw. Pub. Radio (Jan. 13, 2023), <https://www.hawaiipublicradio.org/the-conversation/2023-01-13/octopus-eco-tours-and-conservation-big-island-facility>.

It is unlawful to possess day octopus under one pound, including eggs and paralarvae.⁴ KOF's reason for existence—day octopus aquaculture—is premised on its possession of undersize specimens, which it has *never* been authorized to possess. In acquiring cephalopods, KOF may have also violated laws related to the taking of aquatic life for commercial purposes.⁵ In January, DAR ordered KOF to cease and desist from violating the law, but as far as we have been able to ascertain, has not taken any further action against the facility.⁶ The Farm has since applied for an aquaculture facility license to allow it to possess undersize day octopus.⁷

Moreover, Hawaii's Constitution requires state agencies to "conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources" for the "benefit of present and future generations."⁸ Authorizing an octopus petting zoo and cephalopod research facility that seeks to create a new extractive market for Hawaii's aquatic life could have long-term, large-scale consequences that DAR must seek to avoid in accordance with this duty.

Finally, state agencies "may not act without independently considering the effect of their actions on Hawaiian traditions and practices."⁹ Kanaloa is of great spiritual and cultural significance to Native Hawaiian culture and religion. As one of Hawaii's primary male gods, he often takes the kinolau (physical form) of an octopus. KOF's commercialization of a Native deity and his kinolau is an offensive appropriation of Native Hawaiian culture, and its irresponsible extraction and holding of octopuses violates cultural fishing practices.

For all the reasons detailed here and in the accompanying appendix, DAR must fulfill its constitutional public trust duties to protect Hawaii's natural resources by refusing to issue any license or permit to KOF, investigating its apparent violations of law, and holding it fully accountable for any violations. Could you please confirm that DAR will do so? I look forward to hearing from you at your earliest convenience. Thank you for your time and attention to this important matter.

Very truly yours,



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⁴ See Haw. Admin. R. § 13-95-55.

⁵ See, e.g., Haw. Rev. Stat. §§ 189-2(a), 188-45; Haw. Admin R. § 13-60.4-7(a).

⁶ Letter from Brian Neilson, DAR Administrator, to Jacob Conroy, Kanaloa Octopus Farm (Jan. 6, 2023); Letter from Brian Neilson, DAR Administrator, to Jacob Conroy, Kanaloa Octopus Farm (Jan.18, 2023).

⁷ FatFish Farms, LLC, Aquaculture Facility License Application no. 36385 (Jan. 17, 2024).

⁸ Haw. Const. Art. XI, § 1.

⁹ *Flores-Case 'Ohana v. Univ. of Hawai'i*, 526 P.3d 601, 607 (Haw. 2023) (cleaned up).

Appendix

I. Legal Background

Hawaii's Constitution requires state agencies to "conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources" for the "benefit of present and future generations."¹⁰ The "development and utilization of these resources" must be done "in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State."¹¹ "All public natural resources are held in trust by the State for the benefit of the people."¹²

The DLNR is responsible for stewardship of Hawaii's marine public trust resources. Its duties include "[managing] and administer[ing] the aquatic life and aquatic resources of the State," and "[enforcing] all laws relating to the protecting, taking, killing, propagating, or increasing of aquatic life within the State and the waters subject to its jurisdiction."¹³ It must also "[g]ather and compile information and statistics concerning the habitat and character of, and increase and decrease in, aquatic resources in the State, including the care and propagation of aquatic resources for protective, productive, and aesthetic purposes, and other useful information, which the department deems proper."¹⁴ Cephalopods, including octopus, fall within the definition of "aquatic life," which includes, *inter alia*, "any type or species" of mollusk, invertebrate, or other animal that inhabits the marine environment, as well as "any part, product, egg, or offspring thereof."¹⁵ The administrator of aquatic resources also holds public trust duties and "shall have charge, direction, and control of all matters relating to aquatic resources management, conservation, and development activities."¹⁶

Pursuant to these duties, the DLNR has made it unlawful for "any person to take, possess, or sell any he'e less than one pound in weight."¹⁷ "He'e" means "any mollusk known as *Octopus cyanea*, *Octopus ornatus*, or any recognized synonym."¹⁸ *Octopus cyanea* is commonly known as the day octopus.

Additionally, "[n]o person shall take marine life for commercial purposes whether the marine life is caught or taken within or outside of the State, without first obtaining a commercial marine license."¹⁹ "Commercial purpose" means "the taking of marine life for profit or gain or as a means of livelihood where the marine life is taken in or outside of the State, or where the marine life is sold, offered for sale, landed, or transported for sale anywhere in the State."²⁰ The DLNR "may require a license of any commercial marine dealer to sell or offer for sale, to purchase or attempt to purchase, to exchange, or to act as an agent in the transfer of, any marine life taken within the jurisdiction of the State for commercial purposes."²¹ A "commercial marine dealer" is "any person who sells or

¹⁰ Haw. Const. Art. XI, § 1.

¹¹ *Id.*

¹² *Id.*

¹³ Haw. Rev. Stat. § 187A-2(1), (7).

¹⁴ *Id.* § 187A-2(6).

¹⁵ *Id.* § 187A-1.

¹⁶ *Id.* § 187A-4.

¹⁷ Haw. Admin. R. § 13-95-55.

¹⁸ *Id.* § 13-95-1.

¹⁹ Haw. Rev. Stat. § 189-2(a).

²⁰ *Id.* § 187A-1. "Take" is not defined.

²¹ *Id.* § 189-10(a).

exchanges, or who is an agent in the transfer of marine life obtained directly from a commercial marine licensee, or any commercial marine licensee who sells or exchanges marine life at retail."²² "It is unlawful for any commercial marine dealer to sell or offer for sale, to purchase or attempt to purchase, to exchange, or to act as an agent in the transfer of, any marine life taken within the jurisdiction of the State for commercial purpose, that is obtained from any person whom the department has required to have, but does not have, a valid commercial marine license," or other required license or permit.²³

The DLNR may issue an aquaculture facility license to "fish, possess, rear, and sell any aquatic life whose fishing, possession or sale is prohibited by closed season, minimum size, or bag limit" to a "qualified aquaculturist" who "rears or reared the aquatic life in an aquaculture facility."²⁴

Alternatively, the agency may issue a special activity permit "to take aquatic life, possess or use fishing gear, or engage in any feeding, watching, or other such non-consumptive activity related to aquatic resources, otherwise prohibited by law, in any part of the State, for scientific, educational, management, or propagation purposes."²⁵

Finally, while in the West Hawaii Regional Fishery Management Area,²⁶ it is unlawful to take or possess *any* specimen of aquatic life for aquarium purposes without a valid West Hawaii aquarium permit.²⁷ "Aquarium purposes" means "to hold aquatic life alive in a state of captivity, whether as pets, for scientific study, for public exhibition, for public display, or for sale for these purposes."²⁸ West Hawaii aquarium permits *do not* authorize the collection of cephalopods.²⁹ Thus, it is unlawful to collect cephalopods for aquarium purposes in West Hawaii waters unless exempted by a special activity permit.³⁰ Moreover, following a series of court rulings, DAR has prohibited for several years nearly *all* aquarium collection.³¹

²² *Id.* § 187A-1.

²³ *Id.* § 189-10(a).

²⁴ *Id.* § 187A-3.5.

²⁵ *Id.* § 187A-6(b).

²⁶ The West Hawaii Regional Fishery Management Area is "bounded by the west coast of Hawai'i Island, from Ka Lae, Ka'ū (South Point) to 'Upolu Point, North Kohala, and extending from the upper reaches of the wash of the waves on shore, seaward to the limit of the State's police power and management authority." Haw. Admin. R. § 13-60.4-2(a); *see* DAR, *West Hawaii Regional Fishery Management Area*, <https://dlnr.hawaii.gov/dar/regulated-areas/west-hawaii-regional-fishery-management-area/> (last visited July 5, 2023) (including a map of the West Hawaii Regional Fishery Management Area).

²⁷ Haw. Admin R. § 13-60.4-4(3)(B).

²⁸ *Id.* § 13-60.4-3.

²⁹ *Id.* § 13-60.4-7(a)-(b). West Hawaii aquarium permits only authorize the collection of species appearing on the "Aquarium Species White List."

³⁰ *Id.* § 13-60.4-7(a) ("No person, unless exempted from provisions of this chapter by the issuance and possession of a valid special activity permit under section 187A-6, Hawaii Revised Statutes, shall engage in aquarium collecting activities within the West Hawai'i regional fishery management area without first having been issued and possessing a West Hawai'i aquarium permit . . .").

³¹ Aquarium fish permits allow the "use [of] fine meshed traps, or fine meshed nets other than throw nets, for the taking of marine or freshwater nongame fish and other aquatic life for aquarium purposes." Haw. Rev. Stat. § 188-31. However, in 2017, Hawaii's First Circuit Court invalidated existing commercial aquarium permits and enjoined the issuance or renewal of all aquarium fish permits under Haw. Rev. Stat. § 188-31 until an environmental review could be completed under the Hawaii Environmental Policy Act (HEPA). Order After Remand Regarding Commercial Aquarium Collection Permits, *Umberger v. Dep't of Land & Natural Resources*, Civ. No. 12-2-2625-10-JPC (Haw. 1st Cir. Oct. 27, 2017); *see also*

II. KOF's Petting Zoo Operations

FatFish Farms, LLC, has operated under the trade name Kanaloa Octopus Farm³² on ceded land since August 2015. It is a tenant of the Hawaii Ocean Science & Technology (HOST) Park, run by the Natural Energy Laboratory of Hawaii Authority (NELHA) in Kailua-Kona, located on the west coast of the Big Island, directly adjacent to the West Hawaii Regional Fishery Management Area. Jacob Conroy owns and operates FatFish Farms, and Dan Jackson manages KOF.³³ FatFish Farms has registered the additional trade names "Kanaloa Octopus Research and Education Center" and "Kanaloa Octopus Research Center."³⁴

Since its inception, KOF has primarily operated as a for-profit day octopus petting zoo catering to out-of-state tourists.³⁵ As of 2019, the facility reportedly received 2,000 visitors per month, with annual revenues from ticket and merchandise sales exceeding \$500,000.³⁶ By 2022, its gross revenues exceeded \$1.5 million.³⁷ Guests could book a private tour for groups of five or more at \$250 per

Umberger v. Dep't of Land & Natural Resources, 403 P.3d 277 (Haw. 2017) (holding that DAR's issuance of permits to allow commercial aquarium collection using fine meshed traps or fine meshed nets other than throw nets is subject to environmental review under the HEPA). To implement the injunction, DAR announced that "*no aquatic life* may be taken for commercial aquarium purposes off West Hawai'i until an environmental review is completed." Press Release, DLNR, Hawai'i Supreme Court Decision Stops West Hawai'i Fishing Permits Pending an Environmental Review (Jan. 5, 2018), <https://dlnr.hawaii.gov/dar/announcements/update-of-supreme-court-ruling-regarding-aquarium-fishing/> (emphasis added). A subsequent order voided all recreational aquarium permits as well. Order Granting P.'s Renewed Mot. For Sum. Judg. Re: Recreational Permits, *Umberger v. Dep't of Land & Natural Resources*, Civ. No. 12-2-2625-10-JPC (Haw. 1st Cir. Apr. 27, 2018). The injunction remains in effect statewide, except for those seeking to fish in the West Hawaii Regional Fishery Management Area who have complied with HEPA. *See* DLNR, Updated on Aquarium Collecting, <https://dlnr.hawaii.gov/dar/announcements/update-on-aquarium-collecting/> (last visited July 5, 2023); Press Release, DLNR, Judge Lifts West Hawaii Aquarium Fish Injunction (Jan. 30, 2023), <https://dlnr.hawaii.gov/blog/2023/01/30/nr23-18/>. Despite these rulings, the DLNR continued to allow commercial collection of aquarium fish under a commercial marine license if fishers did not use fine-mesh nets and traps. In November 2020, Hawaii's First Circuit Court declared the DLNR to be in violation of HEPA for failing to complete an environmental review before approving or renewing commercial marine licenses authorizing commercial aquarium collection. *Kaupiko v. Dep't of Land & Natural Resources*, Civ. No. 1CCV-20-0000125(JPC) at *2 (Minute Order Nov. 27, 2020). Thereafter, all commercial marine licenses have included "a condition prohibiting the taking of marine life for aquarium fishing purposes." Press Release, DLNR, Update of Court Rulings Regarding Aquarium Fishing: Issuing and Renewing Commercial Marine Licenses Temporarily Suspended (Nov. 30, 2020), <https://dlnr.hawaii.gov/dar/announcements/update-of-supreme-court-ruling-regarding-aquarium-fishing/>.

³² *See* Haw. Dep't of Commerce & Consumer Affs., Bus, Registration Div., FatFish Farms, <https://hbc.hawaii.gov/documents/business.html?fileNumber=130248C5> (last visited July 5, 2023).

³³ Cruz, *supra* note 3.

³⁴ *See* Haw. Dep't of Commerce & Consumer Affs., Bus, Registration Div., FatFish Farms, <https://hbc.hawaii.gov/documents/business.html?fileNumber=130248C5> (last visited July 5, 2023).

³⁵ Kanaloa Octopus, Frequently Asked Questions, <https://www.kanaloaocopus.com/blank-2> (last visited July 5, 2023) ("How do you get your funding? We are privately owned, with the majority of our funding coming from our tours and our gift shop. We do occasionally apply for grants."); Ex. 2, NELHA, Board of Directors Meeting Minutes 15 (July 16, 2019), https://nelha.hawaii.gov/wp-content/uploads/2019/11/2019July16-BOD-Meeting-Minutes.Final_for_Web_Posting.pdf [hereinafter "NELHA Meeting Minutes"] ("Most guests are visiting from Canada, the mid-west and west coast.").

³⁶ NELHA Meeting Minutes, *supra* note 35, at 11.

³⁷ KOF 2023 Business Plan, *supra* note 2, at 16.

person, or a Farm tour at \$50 per person.³⁸ On these tours, KOF encouraged guests to handle the day octopuses. Photos and videos posted online show he'e confined to shallow, barren plastic tanks, without meaningful ability to avoid the gaze and hands of human visitors.³⁹ As discussed in more detail below, the Farm also actively breeds he'e as part of a grandiose plan to sell cephalopods to the food, research, and aquarium trade. However, day octopus have never been successfully reared in captivity, and KOF has never been able to keep day octopus offspring alive.⁴⁰

Despite its thriving business, KOF also solicited donations to fund the upkeep of the octopuses.⁴¹ Donations allegedly went to the Hawaii Cephalopod Foundation, a nonprofit corporation whose officers include Mr. Conroy, Mr. Jackson, and Mr. Conroy's father (whom KOF characterizes as a California-based "serial entrepreneur").⁴² It is unclear how much money the non-profit took in, as it never filed its Form 990 tax returns with the Internal Revenue Service, which for this reason revoked its federal tax-exempt status in May 2021.⁴³ KOF also is not registered as a charitable organization in Hawaii.⁴⁴

On January 6, 2023, DAR issued notice to Mr. Conroy and KOF that possessing and propagating day octopus less than one pound in weight (including newly hatched larvae) without a permit and capturing them for aquarium purposes within the West Hawaii Regional Fishery Management Area violates Hawaii Admin. Rules §§ 13-95-55 and 13-60.4-4(3)(B). The notice advised KOF to immediately cease and desist any unpermitted activities, dispose of any illegally held specimens,⁴⁵ and apply for the relevant permits or licenses.⁴⁶

³⁸ See Private Tour, <https://web.archive.org/web/20210805190356/https://fareharbor.com/embeds/book/kanaloa-octopus/items/201702/calendar/2021/08/?full-items=yes&flow=139391> (archived Aug. 5, 2021); Farm Tour, <https://web.archive.org/web/20210306121036/https://fareharbor.com/embeds/book/kanaloa-octopus/items/129417/calendar/2021/03/?full-items=yes&flow=139391> (archived Mar. 6, 2021) (stating that a Farm tour cost \$45 per person); Rust (Dec. 20, 2022), *supra* note 1 (stating that Kanaloa charged \$60 per person); Kanaloa Octopus Farm, Booking Information, <https://www.kanaloaoctopus.com/blank-1> (listing tours as \$60 per person) (last visited July 7, 2023); Personal Communication with Inga Gibson, Pono Advocacy (July 6, 2023) (confirming a tour cost \$50 in 2022).

³⁹ See, e.g., Laura Lee Cascada, *Investigation: The Murky Truth Behind Hawaii's Octopus Farm*, The Every Animal Project (Oct. 9, 2022), <https://www.everyanimalproject.com/2022/10/09/octopus-farming/>.

⁴⁰ Susanne Rust, *Hawaii Orders Facility to Stop Capturing and Keeping Octopuses*, L.A. Times (Feb. 15, 2023), <https://www.latimes.com/california/story/2023-02-15/hawaii-says-octopus-farm-operated-without-proper-permits>.

⁴¹ Kanaloa Octopus Farm, Donate, <https://web.archive.org/web/20230220172938/https://donorbox.org/covid-19-70> (archived Feb. 20, 2023); Donorbox, Kanaloa Octopus Farm, <https://donorbox.org/covid-19-70> (last visited July 5, 2023).

⁴² Haw. Dep't of Commerce & Consumer Affs., Bus, Registration Div., Hawaii Cephalopod Foundation, <https://hbe.hawaii.gov/documents/business.pdf?fileNumber=299360D2> (last visited July 5, 2023); Ex. 3, Kanaloa Octopus Farm, Commercial or Non-Profit Preliminary Proposal, Response to RFI-19-03-NELHA (June 14, 2019) [hereinafter "KOF 2019 Business Plan"].

⁴³ IRS, *Tax Exempt Organization Search*, <https://apps.irs.gov/app/eos/> (last verified July 5, 2023).

⁴⁴ Haw. Att'y Gen., Tax & Charities Div., *Hawaii Charities Search*, <https://charity.hawaii.gov/charity/search.html> (last verified July 5, 2023).

⁴⁵ It is puzzling that DAR instructed KOF to dispose of illegally possessed octopuses, which amounts to destruction of the agency's primary evidence against the facility.

⁴⁶ Letter from Brian Neilson, DAR Administrator, to Jacob Conroy, Kanaloa Octopus Farm (Jan. 6, 2023).

Despite receiving this letter, KOF continued to operate.⁴⁷ On January 18, 2023, DAR sent KOF another letter after Mr. Jackson admitted in a Hawaii Public Radio interview that KOF possessed day octopus paralarvae and had obtained juvenile octopuses (including one who weighed only 0.8 g) from NELHA's intake pipes, which bring in water from the West Hawaii Regional Fishery Management Area.⁴⁸ The letter reiterated that KOF should immediately cease and desist its unlawful activities and "dispose of any *Octopus cyanea* specimens less than one pound in weight."⁴⁹

On January 23, KOF announced on Instagram that it would be "closed for the next few weeks as we do facility maintenance and repairs."⁵⁰ On February 9, it published a similar post on Facebook.⁵¹ Mr. Conroy also stated publicly that KOF would refocus its breeding efforts on bobtail squid because he believed they are "unregulated."⁵²

By letter dated January 26, NELHA informed KOF that its lease in HOST Park requires full compliance with the law.⁵³ The letter stated that KOF's operations have changed significantly from its initial aquaculture research and development proposal and requested that it submit an updated business plan describing its activities. It also advised KOF to reapply for tenancy at HOST Park.

On February 6, 2023, Mr. Conroy submitted a new business plan to NELHA claiming that KOF intended to "pivot away from food production to focus on production for ornamental and research purposes in addition to its thriving ecotourism business. To that end, the company has rebranded itself as the Kanaloa Octopus Research and Education Center."⁵⁴ Echoing Mr. Conroy's public statements about switching species, the new business plan asserts—without substantiation—that KOF has "closed the lifecycle of the Hawai'ian bobtail squid, *Euprymna scolopes*," and "is poised to be the sole producer of this model organism for research laboratories around the world."⁵⁵ Therefore, its new stated goals suggest that it intends to use Hawaiian cephalopods (octopus and squid) for commercial purposes. It plans to (1) "market and sell cephalopods and their derivatives"—including crescent octopus and bobtail squid—to the ornamental, research, and aquarium market; (2) "educate the public" through its tours "and encouraging retail sales"; and (3) "conduct scientific research" on day octopus "if permitted" and "other native cephalopod species," including crescent octopus.⁵⁶

KOF has not applied for a commercial marine license to take these species for commercial purposes. The business plan contends that the animals are "sourced locally" from East Hawaii waters but does not provide evidence that they were lawfully caught.

⁴⁷ Timothy Hurley, *Octopus Farm is Ordered to Halt Illegal Activity*, Honolulu Star-Advertiser (Jan. 23, 2023), <https://www.staradvertiser.com/2023/01/23/hawaii-news/octopus-farm-is-ordered-to-halt-illegal-activity/> ("On Friday [January 20] the person who answered the phone at the farm said there was still space a space available for the afternoon tour. Online, reservations were still being accepted for weeks ahead.").

⁴⁸ Letter from Brian Neilson, DAR Administrator, to Jacob Conroy, Kanaloa Octopus Farm (Jan. 18, 2023).

⁴⁹ *Id.*

⁵⁰ @kanaloa_octopus_farm, Instagram (Jan. 23, 2023), <https://www.instagram.com/p/CnxSb0dyrkr/>.

⁵¹ Kanaloa Octopus Farm, Facebook (Feb. 9, 2023),

<https://www.facebook.com/KanaloaOctopus/videos/1126107705456974/>

⁵² Timothy Hurley, *Octopus Farm is Ordered to Halt Illegal Activity*, Honolulu Star-Advertiser (Jan. 23, 2023), <https://www.staradvertiser.com/2023/01/23/hawaii-news/octopus-farm-is-ordered-to-halt-illegal-activity/>.

⁵³ Ex. 4, Letter from Gregory P. Barbour, NELHA, to Jacob Conroy, KOF (Jan. 26, 2023).

⁵⁴ KOF 2023 Business Plan, *supra* note 2, at 6.

⁵⁵ *Id.* at 3.

⁵⁶ *Id.* at 9.

KOF applied to DAR for an aquaculture facility license on January 23, 2023.⁵⁷ The only species listed in the license request is he'e. As of April 20, 2023, it had not applied for a special activity permit.

III. KOF should not be granted any license or permit to take, possess, rear, or sell any cephalopod.

A person who violates the state's aquatic resources laws or regulations is subject to civil and criminal penalties for each violation and each specimen taken, killed, or injured in violation of the law.⁵⁸ Likewise, "[a]ny person who knowingly misrepresents any material fact or makes a false statement in any document required" by Hawaii's aquatic resources laws and regulations is guilty of a misdemeanor.⁵⁹ The DLNR may "[r]efuse to issue any license or permit to a person . . . who has unresolved violations of any license or permit issued pursuant to this chapter, or for other just cause."⁶⁰

As DAR's cease-and-desist letters acknowledge—and as further demonstrated below—KOF appears to have violated Hawaii law by routinely possessing regulated day octopus without a permit over the course of at least seven years. It may also have unlawfully obtained cephalopods for aquarium purposes from West Hawaii waters. As a result of these activities, KOF reportedly made millions of dollars and has been promoted by NELHA, allowed to occupy HOST Park's facilities, and sustained with seawater piped in for tenants' use. We respectfully request that DAR investigate these apparent violations and hold KOF, Conroy, and all responsible parties accountable to the fullest extent of the law.

These "unresolved" violations provide DAR ample "just cause" to refuse to issue an aquaculture facility permit to KOF. As discussed below, instead of dealing honestly with the agency's inquiries, Mr. Conroy has given DAR conflicting, misleading, and false information about KOF's activities. Accordingly, KOF is not qualified for an aquaculture facility license or other permit.

A. Longstanding Unlawful Possession of Undersize Day Octopus

Possession of undersize day octopus is an inherent feature of KOF's aquaculture experiment, yet it has never obtained a permit to hold these animals. Despite operating as a petting zoo, KOF asserts that its primary goal is to "establish a commercial facility with the aim to produce and sell cephalopods and related products . . . to the food and aquarium markets,"⁶¹ i.e., to breed octopuses for human consumption and entertainment. Indeed, according to its longstanding rental agreement with NELHA, KOF's purpose is "to investigate the commercial viability of creating and operating a cephalopod aquaculture production facility."⁶² Likewise, in a business plan submitted to NELHA in 2019, the Farm wrote, "Kanaloa Octopus Farm continues captive breeding research of various

⁵⁷ FatFish Farms, LLC, Aquaculture Facility License Application no. 36385 (Jan. 17, 2024).

⁵⁸ Haw. Rev. Stat. Ann. §§ 187A-12.5, 13.

⁵⁹ *Id.* § 187A-12.4.

⁶⁰ Haw. Admin. R. § 13-74-3(4).

⁶¹ NELHA Meeting Minutes, *supra* note 35, at 11; Kanaloa 2019 Business Plan, *supra* note 42, at 4 (stating that KOF aimed to "market and sell cephalopods and their derivatives (e.g., food products and ink) as a revenue-generating activity"); *but see* KOF 2023 Business Plan, *supra* note 2, at 6 (Kanaloa will "pivot away from food production to focus on production for ornamental and research purposes in addition to its thriving ecotourism business").

⁶² NELHA Rental Agreement with KOF, RA-0005 4 (Aug. 20, 2015).

commercially important Hawaiian cephalopods, most notably the day octopus, *Octopus cyanea*. Significant progress has been made on breeding this octopus in the lab; . . . Kanaloa Octopus Farm anticipates completing the entire lifecycle by the summer of 2020."⁶³ The Farm's reproductive "efforts" involving he'e are also the focus of its tours and social media posts.⁶⁴ However, as DAR's two cease-and-desist letters acknowledge, **KOF has never obtained an aquaculture facility license or special activity permit authorizing it to possess he'e less than one pound in weight, including paralarvae and eggs.**⁶⁵

Ample evidence demonstrates that KOF has actively bred day octopuses over the course of many years and repeatedly possessed octopus paralarvae. A 2016 news item on NELHA's website trumpeted KOF's "initial success with its breeding program of octopus" following the birth of "thousands of octopus."⁶⁶ An article in West Hawaii Today from the same time explained that a female "daytime" octopus "gave birth" unexpectedly to 10,000-20,000 larvae, and that four more were "likely pregnant."⁶⁷ Likewise, a May 2016 letter to the editor penned by Mr. Conroy refers to "the baby octopus that were hatched in my lab," documented by "pictures and videos we have in the lab."⁶⁸ Mr. Conroy also penned a letter in 2022 stating that "each day we keep an octopus paralarvae alive during its 30-day larval stage, is a celebration."⁶⁹ (Later, NELHA Executive Director Gregory Barbour used nearly identical language in an email to the L.A. Times.⁷⁰)

On its Instagram page, KOF has posted the following images and videos going back as far as 2016⁷¹:

- On March 20, 2022, it posted a photo of a day octopus guarding her eggs with a caption "Wish us luck in our upcoming paralarva [sic] trials!"⁷²
- On February 14, 2022, it posted a photo of its "current mating pair" Apollo and Phoenix.⁷³
- On February 13, 2022, it posted an image of "octopus paralarvae aka baby octopuses that just hatched out this morning!"⁷⁴
- On January 27, 2022, it posted an image of two octopus paralarvae.⁷⁵

⁶³ Kanaloa 2019 Business Plan, *supra* note 42, at 5.

⁶⁴ Ex. 5, Email from Christopher Teague to Catherine Gewecke KOF (Nov. 8, 2022, 2:50 PM) ("they definitely seem to be focusing on O. Cyanea [day octopuses] for their propagation work"); Rust (Dec. 20, 2022), *supra* note 1 (photo of bottle of eggs); Elementary Explorers, *Playing with Day Octopus!! - Kanaloa Octopus Farm - Cephalopod Research - Big Island, HI*, YouTube (Feb. 12, 2022), <https://www.youtube.com/watch?v=fBMxnX80dWk> (at 2:02, a tour guide states of day octopuses, "These guys are great for us to do our studies with because we're trying to complete that circle of life. We have successfully had mating and we've hatched the eggs, but the thing we're trying to work on right now is we can only get to day 13, we're trying to get to day 30. The problem we're running into is we can't see these out in the ocean, we don't know what they eat. We just have to make scientific guesses.").

⁶⁵ See Haw. Admin Rules § 13-95-55.

⁶⁶ Ex. 6, NELHA, *Thousands of Octopus Born at NELHA's Kanaloa Farm* (Apr. 25, 2016), <https://nelha.hawaii.gov/main/thousands-of-octopus-born-at-nelhas-kanaloa-farm/>.

⁶⁷ Ex. 7, Chelsea Jensen West, *Larvae reared at Kanaloa Octopus Farm*, West Hawaii Today (Apr. 22, 2016), <https://www.westhawaii.com/2016/04/22/hawaii-news/larvae-reared-at-kanaloa-octopus-farm/>.

⁶⁸ Ex. 8, Jacob Conroy, Letter to the Editor, West Hawaii Today (May 12, 2016).

⁶⁹ Ex. 9, Letter from Jacob Conroy, Kanaloa Octopus Farm (Mar. 1, 2022).

⁷⁰ See Ex. 9, Email from Gregory Barbour, NELHA, to Susanne Rust, L.A. Times (Nov. 14, 2022 2:51 PM) ("each day they keep an octopus paralarvae alive during its 30-day larval stage, is a celebration").

⁷¹ The following Instagram posts are compiled into a single PDF and attached as Ex. 10.

⁷² @kanaloa_octopus_farm, Instagram (Mar. 20, 2022), <https://www.instagram.com/p/CbV4-rdP2rW/>.

⁷³ @kanaloa_octopus_farm, Instagram (Feb. 14, 2022), <https://www.instagram.com/p/CZ-arWDvAf9/>.

⁷⁴ @kanaloa_octopus_farm, Instagram (Feb. 13, 2022), <https://www.instagram.com/p/CZ8PNzmFjQ-/>.

⁷⁵ @kanaloa_octopus_farm, Instagram (Jan. 27, 2022), <https://www.instagram.com/p/CZPzHI8AUZU/>.

- On January 10, 2022, it posted a video of two day octopuses with the caption "It's another #matingmonday at #kanalaooctopusfarm."⁷⁶
- On December 27, 2021, it posted a video of two octopuses mating with the caption "It's hard to see here, but the male has his mating arm (hectocotylus) in the female's mantle, indicating successful breeding."⁷⁷
- On September 21, 2021, it posted a photo of two he'e with the caption "Mating 🐙❤️🐙."⁷⁸
- On June 16, 2020, it posted a photo of jugs purportedly containing *Isochrysis* algae with the caption "Algae is the producer in our food chain for the paralarvae octopus. . . . [W]e feed the algae to zooplankton and gut load them to ensure that our zooplankton is nutritious as possible for the paralarvae!"⁷⁹
- On May 26 and 27, 2020, it posted images showing an estimated 2,687 live octopus paralarvae in a beaker.⁸⁰
- On May 25, 2020, it posted a video of a male day octopus mating with a female.⁸¹
- On May 23 and 24, 2020, it posted images of a female octopus "protecting her eggs in the top of her cave," as well as images of the eggs themselves.⁸²
- On April 7, 2018, it posted an image of an octopus paralarvae.⁸³
- On April 6, 2018, it posted a boomerang video⁸⁴ of a tank containing octopus paralarvae.⁸⁵
- On August 13, 2017, it posted a video of a small octopus—approximately the size of a tarantula—with the caption "Little guy gets a bigger crib! #movingonup 🐙 #newhome #tinytako."⁸⁶ *Tako* means "octopus."
- On July 22, 2017, it posted a boomerang video showing numerous paralarvae with the caption "Special delivery! 🐙🐙 Octobabies! 🐙"⁸⁷
- On July 16, 2017, it posted a photo of an octopus with the caption "The farm stud."⁸⁸
- On July 28, 2016, it posted a video of an octopus, referring to her as a "pregnant female."⁸⁹
- On July 15, 2016, it posted a photo of an octopus with the caption "Broodstock."⁹⁰
- On July 15, 2016, it posted an image of octopus paralarvae with the caption "Octopus cyanea paralarvae."⁹¹

⁷⁶ @kanalao_octopus_farm, Instagram (Jan. 10, 2022), <https://www.instagram.com/p/CYkguSwlzOU/>.

⁷⁷ @kanalao_octopus_farm, Instagram (Dec. 27, 2021), <https://www.instagram.com/p/CYAZ1l-lsSq/>.

⁷⁸ @kanalao_octopus_farm, Instagram (Sept. 21, 2021), <https://www.instagram.com/p/CUF-cKNPZ7C/>.

⁷⁹ @kanalao_octopus_farm, Instagram (June 16, 2020), <https://www.instagram.com/p/CBglhCSiezc/>.

⁸⁰ @kanalao_octopus_farm, Instagram (May 26, 2020), <https://www.instagram.com/p/CAqfDrUg3Br/>;

@kanalao_octopus_farm, Instagram (May 27, 2020), <https://www.instagram.com/p/CAs7rPjjqFx/>.

⁸¹ @kanalao_octopus_farm, Instagram (May 25, 2020), <https://www.instagram.com/p/CAosTfUADFX/>.

⁸² @kanalao_octopus_farm, Instagram (May 23, 2020), https://www.instagram.com/p/CAjmqzPDPz_/;

@kanalao_octopus_farm, Instagram (May 24, 2020), https://www.instagram.com/p/CAlnmsyD_Ug/.

⁸³ @kanalao_octopus_farm, Instagram (Apr. 7, 2018), <https://www.instagram.com/p/BhSs6IxABMZ/>.

⁸⁴ "Boomerang" refers to an effect on Instagram in which a short video clip repeats indefinitely.

⁸⁵ @kanalao_octopus_farm, Instagram (Apr. 6, 2018), <https://www.instagram.com/p/BhP2nKdB995/>.

⁸⁶ @kanalao_octopus_farm, Instagram (Aug. 13, 2017), <https://www.instagram.com/p/BXv2mZYg5gp/>.

⁸⁷ @kanalao_octopus_farm, Instagram (July 22, 2017), <https://www.instagram.com/p/BW1ogojAKiq/>.

⁸⁸ @kanalao_octopus_farm, Instagram (July 16, 2017), <https://www.instagram.com/p/BW0UJgPAFhT/>.

⁸⁹ @kanalao_octopus_farm, Instagram (July 28, 2016), <https://www.instagram.com/p/BlbiLmWA8zZ/>.

⁹⁰ @kanalao_octopus_farm, Instagram (July 15, 2016), <https://www.instagram.com/p/BH5fbDqAn8e/>.

⁹¹ @kanalao_octopus_farm, Instagram (July 15, 2016), <https://www.instagram.com/p/BH5AJllgfVX/>.

- On July 10, 2016, it posted a photo of two day octopuses with the caption "Mating time!"⁹²
- On July 10, 2016, KOF posted a photo of a small octopus with the caption "Baby He'e."⁹³

In a May 2017 interview with KHON2 News conducted at KOF, Mr. Conroy himself showed the reporter KOF's breeding tanks, octopus eggs, and paralarvae, explaining: "No one has figured out how to grow [octopuses] in captivity . . . so we're really trying to figure this out . . . and hopefully come out with a protocol to raise them efficiently . . . recently we just had some the [octopuses'] eggs hatch, and we have tens of thousands of little baby octopus paralarvae . . . this is where the research is focused on."⁹⁴

When DAR aquatic biologist Christopher Teague toured KOF on November 8, 2022, after Pono Advocacy and For the Fishes alerted DAR to the Farm's apparently unlawful possession of undersize he'e, he was told that the Farm was "expecting a hatch starting next week."⁹⁵ A photo from the tour depicts a calendar indicating that the "hatch widow" for Calypso would run from November 13-26.⁹⁶ Mr. Teague also observed "a male day octopus set aside in their mating tank," and when he asked which animals they intended to mate in the future, "the tour lead mentioned a couple of the day octopuses."⁹⁷ Mr. Teague concluded, "they definitely seem to be focusing on (*O. cyanea*) for their propagation work."⁹⁸ Another photo from the tour depicts a beaker full of eggs.⁹⁹

Likewise, when Inga Gibson, policy director of Pono Advocacy, toured KOF on July 30, 2022, she was told there were two female day octopuses on eggs at the Farm.¹⁰⁰ When she visited again on August 12, 2022, she was told there was one female day octopus on eggs scheduled to hatch August 20, 2022.¹⁰¹ She notified DAR of her observations following both visits.

When questioned by DAR, Mr. Conroy *denied* KOF's reproductive endeavors despite abundant publicly available evidence to the contrary. In a letter sent July 25, 2022, he explained that KOF has "no original [octopus] broodstock, as none have ever been propagated," yet he admitted "we have in the past and do *periodically* conduct hatching trials, paralarval feeding trials, etc. The rule was unclear for *Octopus cyanea* [day octopus] . . . and therefore we have focused our paralarvae rearing trials with species such as *Octopus hawaiiensis* (Hawaiian/Crescent octopus) and *Euprymna scolopes* (Hawaiian bobtail squid)."¹⁰² Conveniently, although there are restrictions on taking and selling all

⁹² @kanaloa_octopus_farm, Instagram (July 10, 2016), <https://www.instagram.com/p/BHrIWv3A6QW/>. Notably, Instagram user, @jo.n.ke.a.1—who is followed by KOF—commented on the post, "Aye bro.is this u,the guy i sold a bunch to.looking good bro." This appears to indicate that the user believed he had sold octopuses to Kanaloa.

⁹³ @kanaloa_octopus_farm, Instagram (July 10, 2016), <https://www.instagram.com/p/BHrG27nAqcv/>.

⁹⁴ KOHN2 News, *Living808: Kanaloa Octopus Farm*, YouTube (May 8, 2017), <https://www.youtube.com/watch?v=2CrBp-N3cco> (1:45-2:39).

⁹⁵ Email from Christopher Teague, *supra* note 64.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Ex. 11, Email from Inga Gibson, Pono Advocacy, to Brian Nielson, DAR (Aug. 2, 2022, 8:25 AM).

¹⁰¹ Ex. 11, Email from Inga Gibson, Pono Advocacy, to Brian Nielson, DAR (Aug. 16, 2022, 12:57 PM).

¹⁰² Ex. 12, Letter from Jacob Conroy, Kanaloa Octopus Farm, to Cathy Gewecke, DAR (July 25, 2022) [hereinafter "Conroy Letter (July 25, 2022)"].

aquatic life for commercial purposes, DAR has no regulations specifically addressing possession of the latter two species.¹⁰³

In another contradictory statement, Mr. Conroy wrote that KOF has had "O. Cyanea [day octopus] reproduce naturally within the lab, and the eggs have hatched," but KOF does not collect day octopuses' paralarvae, instead allowing them to "pass through our flowthrough systems, and into NELHA's seawater effluent system."¹⁰⁴ This directly contradicts the statements made in the business plans that KOF has submitted to NELHA, and is belied by multiple posts on KOF's social media depicting live paralarvae held in beakers and tanks at KOF.¹⁰⁵

When confronted with pictures of octopus paralarvae posted by KOF's own Instagram account on January 27, 2022, and February 13, 2022—the latter of which indicated that the paralarvae had just hatched that morning—Mr. Conroy was evasive, stating, "We are searching for more information . . . but staff seems to think photos #2 and #3 are O. hawaiiensis paralarvae."¹⁰⁶ Yet there is little evidence to suggest KOF is actively breeding this species. In an Instagram post from April 9, 2020, KOF explained that Waldo, the Farm's crescent octopus, "was found in a neighbor's filter bag in September of 2019," and that " *He's one-of-a-kind on the farm* because he is not a day octopus, he's a smaller nocturnal species, known as the Crescent Octopus or Hawaiian Octopus, 'Octopus Hawaiiensis.'"¹⁰⁷ Likewise, when DAR's Christopher Teague visited KOF on November 8, 2022, he saw only one crescent octopus, Goliath.¹⁰⁸

Mr. Conroy's statements to DAR also appear to contradict what tour guides told Ms. Gibson on her tours. On July 25, 2022, Mr. Conroy informed DAR, "At the moment, we do not have any offspring of any species."¹⁰⁹ Yet on July 30, a tour guide told Ms. Gibson that there were two female day octopuses caring for eggs at the Farm.¹¹⁰ Likewise, on August 15, 2022, Mr. Conroy stated that "there are no paralarvae [or eggs] of any species on-site."¹¹¹ Yet on August 12, a tour guide told Ms. Gibson there was one female day octopus caring for eggs scheduled to hatch August 20, 2022.¹¹²

KOF's very reason for existence—day octopus aquaculture—is premised on its possession of undersized he'e, which it has done for years without ever obtaining an aquaculture facility license or special activity permit, in apparent violation of Haw. Admin. Rules § 13-95-55.

¹⁰³ See email from Rep. Nicole Lowen, Haw. House Dist. 6, to Brian Nielsen, DAR (Aug. 1, 2022) ("These seem like awfully convenient answers").

¹⁰⁴ Ex. 13, Letter from Jacob Conroy, Kanaloa Octopus Farm, to Cathy Gewecke, DAR (Aug. 15, 2022) [hereinafter "Conroy Letter (Aug. 15, 2022)"].

¹⁰⁵ See generally Ex. 10.

¹⁰⁶ Conroy Letter (Aug. 15, 2022), *supra* note 104.

¹⁰⁷ @kanaloa_octopus_farm, Instagram (Apr. 9, 2020), <https://www.instagram.com/p/B-x-DeXDfQy/> (emphasis added).

¹⁰⁸ Email from Christopher Teague, *supra* note 64 ("The vast majority of octopuses present were day octopus," and "There was one crescent octopus.").

¹⁰⁹ Conroy Letter (July 25, 2022), *supra* note 102.

¹¹⁰ Email from Inga Gibson, Pono Advocacy, to Brian Nielson, DAR (Aug. 2, 2022, 8:25 AM).

¹¹¹ Conroy Letter (Aug. 15, 2022), *supra* note 104.

¹¹² Email from Inga Gibson, Pono Advocacy, to Brian Nielson, DAR (Aug. 16, 2022, 12:57 PM).

B. Potentially Unlawful Acquisition of Aquatic Life for Aquarium Purposes

According to Mr. Conroy, KOF generally holds 15 to 20 cephalopods at any given time.¹¹³ The vast majority are day octopus,¹¹⁴ but the facility has also held crescent or Hawaiian octopus (*Octopus hawaiiensis*) and Hawaiian bobtail squid (*Euprymna scolopes*).¹¹⁵

Because he'd have exceedingly short natural lives and their offspring do not survive in captivity,¹¹⁶ KOF's petting zoo requires a steady supply of new animals to be captured in Hawaii's waters. Day octopuses live only about a year and are generally five or six months old before they reach one pound, the size at which they can be legally taken, possessed, or sold.¹¹⁷ Therefore, assuming KOF is only obtaining animals of legal size, it must replace each octopus every 6 to 8 months. In other words, KOF would potentially need upwards of 40 wild-caught day octopuses a year. KOF's own social media posts support this. Between September 2021 and October 2022, it announced the arrival of 33 new octopuses on its Instagram page.¹¹⁸

KOF's website self-servingly asserts that the octopuses it uses are "rescued."¹¹⁹ But on tours, KOF's employees have stated that the octopuses are caught especially for the Farm in local Kona waters by "octopus whisperers" who "know exactly where they will be and when they will be there."¹²⁰ Mr. Conroy corroborated this when he told DAR that the cephalopods are "given to us by local bait fisherman [sic]," though he also claimed "[t]he divers . . . fish in accordance with DAR rules and regulations," and "started fishing on the Hilo [east] side due to the recent west Hawaii regulations."¹²¹

At least two former employees have alleged that KOF buys octopuses caught by fishers in West Hawaii waters. In an email to Representative Nicole Lowen, one whistleblower wrote: "We have

¹¹³ NELHA Meeting Minutes, *supra* note 35, at 13; Conroy Letter (July 25, 2022), *supra* note 102.

¹¹⁴ Rust (Dec. 20, 2022), *supra* note 1; Email from Christopher Teague, *supra* note 64 ("The vast majority of octopuses present were day octopus (*Octopus cyanea*). There was one crescent octopus (*O. hawaiiensis*; non-regulated) in a separate section, but the tour primarily focused on the day octopuses."); Elementary Explorers, *Playing with Day Octopus!! - Kanaloa Octopus Farm - Cephalopod Research - Big Island, HI*, YouTube (Feb. 12, 2022), <https://www.youtube.com/watch?v=fBMxnX80dWk>.

¹¹⁵ NELHA Meeting Minutes, *supra* note 35, at 13; Conroy Letter (July 25, 2022), *supra* note 102; KOF 2023 Business Plan, *supra* note 2, at 3, 6, 8, 11.

¹¹⁶ Jade N. Herwig, et al., *Using Age-Based Life History Data to Investigate the Life Cycle and Vulnerability of Octopus cyanea*, PLOS One, Aug. 2012, at 3, <https://doi.org/10.1371/journal.pone.0043679> (day octopus live approximately one year); William F. Van Heukelem, *Growth, bioenergetics and life-span of Octopus cyanea and Octopus maya* 12-13 (Aug. 1976) (Ph.D. dissertation, Univ. of Haw.) ("Attempts to rear the planktonic larvae of *O. cyanea* were made using larvae from 23 separate broods spawned at H.I.M.B. None of the attempts were successful or even promising . . .").

¹¹⁷ Herwig, et al., *supra* note 116, at 3, Fig. 1.

¹¹⁸ Ex. 14, @kanaloa_octopus_farm, Instagram, Posts Introducing New Octopuses.

¹¹⁹ Kanaloa Octopus Farm, *Our Commitment to Ethical Research*, <https://www.kanaloaocotopus.com/blank-4> (last visited July 5, 2023).

¹²⁰ Ex. 15, Jolanie Martinez, *Octopus Farm Accused of Offering 'Petting Zoo' Experience Shuts Down After Cease-and-Desist*, Hawaii News Now (Feb. 8, 2023), <https://www.hawaiinewsnow.com/2023/02/08/state-serves-kona-octopus-farm-with-cease-and-desist-order-lack-permits/> ("But a tour guide was caught on camera saying this, "All of our octopus are wild caught, they are local from out here in the Kona waters." The guide continued, "We have a gentleman go out and catch them for us and we love to call them the 'octopus whisperers.' They know exactly where they will be and when they will be there."); Cruz, *supra* note 3 (interview with Mr. Jackson who says that KOF gets "most" octopuses "from a gentleman who actually catches them for us," and also takes juvenile octopus who become caught in NELHA's filtration system, including one who weighed only 0.8 grams); Email from Christopher Teague, *supra* note 64.

¹²¹ Conroy Letter (July 25, 2022), *supra* note 102 (emphasis added).

definitely received octopuses under a pound and they are ALL from West Hawai'i. The adult octopuses are purposely caught for the farm and paid for by the manager."¹²² In a follow up to DAR administrator Brian Neilson, the whistleblower also wrote, "We have often times received octopuses under a pound and our manager would request that we do not put them on tour until they are [at least] a pound."¹²³ Another whistleblower wrote to Representative Lowen in reference to a news item about KOF: "The article quoted that octopus were not collected from West Hawai'i, which is a blatant lie. Kanaloa contracts a [fisher] to collect them from Kona to Waikoloa (paid 200/octopus). They were rarely 'donated'."¹²⁴

In Hawaii, "no person shall take marine life for commercial purposes whether the marine life is caught or taken within or outside of the State, without first obtaining a commercial marine license."¹²⁵ "Commercial purpose" means "the taking of marine life for profit or gain or as a means of livelihood where the marine life is taken in or outside of the State, or where the marine life is sold, offered for sale, landed, or transported for sale anywhere in the State."¹²⁶

Additionally, while in the West Hawaii Regional Fishery Management Area, it is unlawful to take or possess *any* specimen of aquatic life for aquarium purposes without a valid West Hawaii aquarium permit.¹²⁷ "Aquarium purposes" means "to hold aquatic life alive in a state of captivity, whether as pets, for scientific study, for public exhibition, for public display, or for sale for these purposes."¹²⁸ West Hawaii aquarium permits *do not* authorize the collection of cephalopods.¹²⁹ Thus, it is unlawful to collect cephalopods for aquarium purposes in West Hawaii waters unless exempted by a special activity permit.¹³⁰ Moreover, nearly all aquarium collection is prohibited throughout the state.¹³¹

Whether operating as a petting zoo or research facility, KOF holds aquatic life "alive in a state of captivity, . . . for scientific study, for public exhibition, [and] for public display," and thus for "aquarium purposes."¹³² However, it does not hold a special activity permit authorizing it to collect octopuses or squid in the West Hawaii Regional Fishery Management Area, and it has never claimed to obtain cephalopods from someone who holds a special activity permit. To the contrary, Mr. Conroy has admitted that KOF gets the octopuses from "local" bait fishers, KOF's tour script claims the animals were captured by "octopus whisperers" in Kona waters, and there is evidence that it obtains aquatic life directly from West Hawaii waters via NELHA's seawater intake pipes. Moreover, since November 2020, all commercial marine licenses have included "a condition

¹²² Ex. 16, Email from Rep. Nicole Lowen, Haw. House Dist. 6, to Gregory Barbour, NELHA (Jan. 26, 2023, 8:53 AM).

¹²³ Ex. 17, Email to Brian Nielsen, DAR (Feb. 9, 2023, 11:14 AM).

¹²⁴ Ex. 18, Email from Rep. Nicole Lowen, Haw. House Dist. 6, to Gregory Barbour, NELHA (Jan. 26, 2023, 11:55 AM).

¹²⁵ Haw. Rev. Stat. § 189-2(a).

¹²⁶ *Id.* § 187A-1. "Take" is not defined.

¹²⁷ Haw. Admin R. § 13-60.4-4(3)(B).

¹²⁸ *Id.* § 13-60.4-3.

¹²⁹ *Id.* § 13-60.4-7(a)-(b). West Hawaii aquarium permits only authorize the collection of species appearing on the Aquarium Species White List.

¹³⁰ *Id.* § 13-60.4-7(a) ("No person, unless exempted from provisions of this chapter by the issuance and possession of a valid special activity permit under section 187A-6, Hawaii Revised Statutes, shall engage in aquarium collecting activities within the West Hawai'i regional fishery management area without first having been issued and possessing a West Hawai'i aquarium permit . . .").

¹³¹ *See supra* note 31.

¹³² Haw. Admin. R. § 13-60.4-3.

prohibiting the taking of marine life for aquarium fishing purposes."¹³³ Thus, KOF could not have lawfully obtained octopuses from a commercial marine licensee. KOF's octopuses were likely captured in violation of law.

Mr. Conroy's bait fisher assertions also do not hold water. First, bait licenses—which are a kind of commercial marine license—do not authorize the collection of cephalopods *for aquarium purposes*,¹³⁴ so KOF's acquisition of octopuses and squid from bait fishers would not be lawful. Second, for several years, the DLNR has prohibited nearly all collection of aquatic life for aquarium purposes, including on the east side of the island. Third, there are no special restrictions on bait fishing in the West Hawaii Regional Fishery Management Area, so it would make little sense for Kona-based fishers to travel to the Hilo side of the island to collect octopuses for KOF, even if such collection were lawful. Finally, these assertions are contradicted by statements made by current and former KOF employees who allege the Farm buys octopuses from someone who catches them in West Hawaii waters.

There is also evidence that KOF has opportunistically taken aquatic life for aquarium purposes from NELHA's seawater intake pipes, which bring in water from the West Hawaii Regional Fishery Management Area. As mentioned above, Mr. Jackson admitted in a Hawaii Public Radio interview that KOF had obtained juvenile octopuses (including one who weighed only 0.8 g) from NELHA's intake pipes.¹³⁵ Likewise, the crescent octopus Waldo, discussed above, "was found in a neighbor's filter bag in September of 2019."¹³⁶ In a June 29, 2020, Instagram post, KOF reported finding a small juvenile octopus in its filter bag that it apparently intended to keep, explaining, "Sometimes critters crawl into the pipes that supply all of NELHA with sea water. This is why we use filter bags to catch anything that may come through. Typically we find nudibranchs, sea hares, and shells, but sometimes we have surprises like this little octopus!"¹³⁷ In October 2017, KOF posted a video of a pelagic octopus "saved from a NELHA intake pipe."¹³⁸

Given the high number of animals that KOF's petting zoo business model requires—as well as the facility's own tour script admitting to apparently unlawful collection practices—we respectfully request that DAR thoroughly investigate the provenance of KOF's cephalopods. Mr. Conroy's statements cannot be accepted at face value. This investigation should seek to determine who was capturing octopuses for KOF, where they were fishing, and whether they had the requisite permits.

¹³³ Press Release, DLNR, Update of Court Rulings Regarding Aquarium Fishing: Issuing and Renewing Commercial Marine Licenses Temporarily Suspended (Nov. 30, 2020), <https://dlnr.hawaii.gov/dar/announcements/update-of-supreme-court-ruling-regarding-aquarium-fishing/>; *Kaupiko v. Dep't of Land & Natural Resources*, Civ. No. 1CCV-20-0000125(JPC) at *2 (Minute Order Nov. 27, 2020) (declaring the DLNR to be in violation of HEPA for failing to complete an environmental review before approving or renewing commercial marine licenses authorizing commercial aquarium collection).

¹³⁴ See Haw. Rev. Stat. § 188-45 (DAR "may issue to commercial marine licensees, as defined in chapter 187A, licenses to take nehu, iao, or any other species *for use as bait only*" (emphasis added)).

¹³⁵ Cruz, *supra* note 3.

¹³⁶ Ex. 19, @kanaloha_octopus_farm, Instagram (Apr. 9, 2020), <https://www.instagram.com/p/B-x-DeXDfQy/>.

¹³⁷ Ex. 19, @kanaloha_octopus_farm, Instagram (June 29, 2020), <https://www.instagram.com/p/CCB6Gzgjzdp/>.

¹³⁸ Ex. 19, @kanaloha_octopus_farm, Instagram (Oct. 4, 2017), <https://www.instagram.com/p/BZ0Hyp9geEF/>.

C. Dealing of Aquatic Life

A commercial marine dealer is "any person who sells or exchanges, or who is an agent in the transfer of marine life obtained directly from a commercial marine licensee, or any commercial marine licensee who sells or exchanges marine life at retail."¹³⁹

"It is unlawful for any commercial marine dealer to sell or offer for sale, to purchase or attempt to purchase, to exchange, or to act as an agent in the transfer of, any marine life taken within the jurisdiction of the State for commercial purpose, that is obtained from any person whom the department has required to have, but does not have, a valid commercial marine license, commercial marine dealer license, or other license or permit authorizing such sale, purchase, exchange, or transfer for commercial purpose."¹⁴⁰ To this end, commercial marine dealers shall submit to the DLNR a weekly report of "of all marine life obtained, purchased, transferred, exchanged, or sold."¹⁴¹ These reports must include the "species, numbers, weights, and values of each of the varieties of marine life landed in the State that the dealer obtained, purchased, transferred, exchanged, or sold during the reporting period," as well as the "name and license number of the commercial marine licensee from whom the marine life was obtained or purchased."¹⁴²

According to the business plan submitted to NELHA in February 2023, KOF contended that "All of the broodstock animals (cephalopods) used in this project are (1) sourced locally (East Hawai'i only), and (2) native to Hawai'i. *We began with large-scale production and sales of the Hawai'ian bobtail squid, E. scolopes.*"¹⁴³ The plan provides no additional information, such as how many squid KOF has allegedly produced and whether the animals it has sold are wild-caught or captive-bred. Additionally, KOF formerly offered day octopus for sale on its website for \$199.99 each.¹⁴⁴ According to archived sales pages on its website, the animals were "wild caught" but "to [sic] small for our breeding program."¹⁴⁵

These statements and sales ads are evidence that KOF has acted as a commercial marine dealer. It has sold and offered for sale marine life at retail, and as discussed in Section III.B above, a commercial marine license was likely required to take the animals from the wild.¹⁴⁶ DAR should investigate whether KOF acted as a commercial marine dealer, and if so, whether it complied with the requirements that it only obtain aquatic life from licensed sources and that it report all purchases and sales on a weekly basis.¹⁴⁷

¹³⁹ Haw. Rev. Stat. § 187A-1.

¹⁴⁰ *Id.* § 189-10(a).

¹⁴¹ Haw. Admin. R. § 13-74-46.

¹⁴² *Id.*

¹⁴³ KOF 2023 Business Plan, *supra* note 2, at 16 (emphasis added).

¹⁴⁴ Ex. 20, Chelsea Jensen West, *Kanaloa Octopus Farm Looking to Rear Cephalopods Sustainably*, West Hawaii Today (Dec. 29, 2015), <https://www.westhawaii.com/2015/12/29/hawaii-news/kanaloa-octopus-farm-looking-to-rear-cephalopods-sustainably/>; Ex. 21, Kanaloa Octopus Farm, Hawaiian Day Octopus, <https://web.archive.org/web/20160616142401/http://www.kanaloaoctopus.com/collections/live-octopus/products/hawaiian-day-octopus-octopus-cyanea> (archived June 16, 2016); Ex. 22, Kanaloa Octopus Farm, Hawaiian Day Octopus, <https://web.archive.org/web/20151225212042/http://www.kanaloaoctopus.com/collections/live-octopus/products/hawaiian-day-octopus-octopus-cyanea> (archived Dec. 25, 2015).

¹⁴⁵ *Id.*

¹⁴⁶ *See* Haw. Rev. Stat. § 189-2.

¹⁴⁷ *See* Haw. Admin. R. § 13-74-46.

D. DAR has "just cause" to deny KOF an aquaculture facility license.

To be eligible for an aquaculture facility license, an applicant must be a "qualified aquaculturist" and must prove to the department that they are "able to maintain aquatic life . . . alive and in good health in an aquaculture facility *at all times* in accordance with industry-wide standards."¹⁴⁸ Interpreting an identical requirement in Haw. Rev. Stat. § 188-31, Hawaii's Supreme Court has stated that this language "explicitly allows DLNR to exercise its independent judgment" in determining whether the applicant complies or not with the provision.¹⁴⁹ In other words, the agency "has the statutory discretion not to issue" a permit when it concludes that the applicant would be unable to maintain aquatic life "alive and in good health" at all times.¹⁵⁰

Because Mr. Conroy is not a "qualified aquaculturist," and DAR cannot be satisfied that KOF is capable of maintaining aquatic life alive and in good health at all times, the agency has the requisite "just cause" to refuse to issue an aquaculture facility license to KOF.

1. KOF is a petting zoo, not a "qualified aquaculturist."

A "qualified aquaculturist" is "a person, or association of persons, actively engaged in aquaculture farming, aquaculture produce processing, or aquaculture product development activities."¹⁵¹

Despite the commercial and scientific goals that KOF has espoused to rent space at NELHA, in practice, it has mainly operated as a tourist attraction and petting zoo.¹⁵² Throughout its entire period of activity, KOF has not met any of its alleged aquaculture goals. It has not succeeded in its purported mission to "close the lifecycle" of day octopuses, i.e., to hatch and raise day octopuses in captivity, despite supposed ongoing attempts to do so. In fact, KOF has publicly stated that it has only been able to keep the octopuses' offspring (paralarvae) alive for 13 days post-hatching, as it does not know what food they should be fed.¹⁵³ Thus, with each hatching, the paralarvae evidently starve to death.

Additionally, KOF cannot be said to be "engaged in aquaculture farming." At best, it *is trying to figure out how* to farm cephalopods, without success. In addition, it appears that KOF's alleged research on octopuses has not led to any meaningful scientific findings published in peer-reviewed scientific journals.¹⁵⁴ As described by DAR's Christopher Teague: "it was definitely a full blown tour operation. It wasn't clear what research, if any, they conduct[.]"¹⁵⁵

¹⁴⁸ *Id.* § 13-74-43(A) (emphasis added). "Aquaculture" means "the propagation, cultivation, or farming of aquatic plants and animals in controlled or selected environments for research purposes, commercial purposes, or stocking purposes." Haw. Rev. Stat. § 187A-1. "'Aquaculture facility' means any farm, ranch, hatchery, pond, workplace, or place of business that is designed or intended for the rearing, breeding, or culturing of aquatic life or live rock in a controlled or managed salt, brackish, or freshwater environment." Haw. Admin. R. § 13-74-43(j).

¹⁴⁹ *Umberger*, 403 P.3d at 304.

¹⁵⁰ *Id.*

¹⁵¹ Haw. Rev. Stat. § 187A-1.

¹⁵² NELHA Meeting Minutes, *supra* note 35, at 15 ("most guests are from Canada, the mid-west or the west coast").

¹⁵³ *See, e.g.*, Rust (Dec. 20, 2022), *supra* note 1; Cruz, *supra* note 3.

¹⁵⁴ In a business plan submitted to NELHA in June 2019, Kanaloa claimed, "Under Jacob's scientific and managerial leadership, Kanaloa Octopus Farm completed the lifecycle of the Hawai'ian octopus, *Octopus Hawaiensis*, for the first time in history." Kanaloa 2019 Business Plan, *supra* note 42, at 5. There are no publications substantiating this claim.

¹⁵⁵ Email from Christopher Teague, *supra* note 64.

2. KOF cannot maintain aquatic life "alive and in good health" at all times in accordance with industry-wide standards.

KOF admits that it is unable to keep octopus paralarvae "alive and in good health at all times," as required by Haw. Admin. R. § 13-74-43(A). As Carmelle Joyner, Farm biologist and tour guide at KOF, contended, paralarvae hatchlings "really only like to eat live foods that are smaller than they are. And unfortunately, at this time, we haven't figured out exactly what that is."¹⁵⁶ Mr. Jackson also explained, "the paralarvae are just such a mystery that nobody really knows exactly what they need to survive."¹⁵⁷ Reportedly, KOF has "been able to keep the paralarvae alive for only 13 days post hatching."¹⁵⁸ In other words, KOF has been mating octopuses with full knowledge that their offspring will starve to death. Therefore, KOF is not capable of maintaining he'e paralarvae "alive and in good health" and is therefore not qualified to hold an aquaculture facility license.

There are also deep concerns with the welfare of the adult cephalopods held at KOF, particularly those used for tourist encounters. Today, there is scientific consensus that cephalopods—particularly octopuses—are extraordinarily intelligent and cognitively complex animals.¹⁵⁹ As described by DAR administrator Brian Neilson in a letter regarding a special activity permit issued to a different octopus research facility, "[c]ephalopods are among the most sophisticated in the animal kingdom with regard to intelligent behavior and learning capabilities."¹⁶⁰

There is scientific evidence of octopuses' substantial perceptual ability, pain and adrenal systems, emotional responses, long and short-term memory, complex cognition, individual differences, deception, tool use, and social learning.¹⁶¹ Moreover, cephalopods' unique features include extremely good eyesight, the ability to grow a new arm when one has been lost, and the capability to change the shape and color of their skin within seconds.¹⁶² For these reasons, Professor Peter Godfrey-Smith has written that this taxon represents "an island of mental complexity in the sea of invertebrate animals."¹⁶³

Octopuses were also included in The Cambridge Declaration on Consciousness, signed by a prominent international group of neuroscientists.¹⁶⁴ According to this Declaration, "non-human animals, including . . . octopuses, also possess these neurological substrates [that generate

¹⁵⁶ Cruz, *supra* note 3.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See generally New England Anti-Vivisection Society, et al., *Petition to Include Cephalopods as Animals Deserving of Humane Treatment under the Public Health Service Policy on Humane Care and Use of Laboratory Animals* (June 18, 2020), <https://animal.law.harvard.edu/wp-content/uploads/CephalopodLetterandPetition.pdf>.

¹⁶⁰ Brian Neilson, DAR Administrator, Declaration of Exemption from the Preparation of an Environmental Assessment, Silver Spiral Seas 2 (Sept. 24, 2019) [hereinafter "Neilson (Sept. 2019)"].

¹⁶¹ Dr. Elena Lara, Compassion in World Farming, *Octopus Factory Farming: A Recipe for Disaster* 12 (2021), https://www.ciwf.org.uk/media/7447198/161421_ciwf_octopus-report-21_aw_web_hybrid.pdf.

¹⁶² *Id.* at 11.

¹⁶³ Peter Godfrey-Smith, *The Mind of an Octopus*, *Sci. Am.*, Jan. 1, 2017, <https://www.scientificamerican.com/article/the-mind-of-an-octopus/>.

¹⁶⁴ Philip Low, *The Cambridge Declaration on Consciousness* (July 7, 2012), <https://fcmconference.org/img/CambridgeDeclarationOnConsciousness.pdf>.

consciousness.]”¹⁶⁵ In addition, several recent scientific articles focusing on octopuses' complex nervous systems have shown that cephalopods have the capacity to feel pain.¹⁶⁶

Little is known about cephalopods' complex welfare needs and suffering in captivity.¹⁶⁷ However, the uniqueness and intelligence of cephalopods have led numerous prominent scholars to publicly oppose their farming.¹⁶⁸ Farming octopuses raises major environmental, welfare, and health concerns; it is unsustainable ecologically and poses risks of infectious diseases and poor welfare conditions, prompted by confinement, lack of enrichment, and a high potential for injuries.¹⁶⁹

Such welfare issues are the same for holding octopuses in captivity for petting-zoo tourist attractions. Octopuses are undomesticated wild animals who are not biologically adapted to life in captivity.¹⁷⁰ As sentient and curious animals who like to explore, manipulate, and control their environment, octopuses are susceptible to boredom in captivity.¹⁷¹ As DAR's Brian Neilson explained, “[o]ctopuses are known for being extraordinarily 'sensitive' animals, therefore one of the most critical necessities is the ability to observe the animals in their most natural state possible and without stressors.”¹⁷² Likewise, guidelines on the welfare and care of captive cephalopods make clear that benthic cephalopods require “complex environments with suitable substrates (sand, gravel or pebbles) and dens.”¹⁷³ Yet, KOF holds octopuses in shallow, virtually barren plastic tubs, and fails to provide them with any meaningful level of environmental complexity.

KOF also subjects octopuses to the repeated stress of perceived predation. “It has been argued that handling of, especially non-affiliative, exotic, species has no natural counterpart except during predation. Therefore, many such animals may perceive their handler as a predator that has captured the individual, which would typically be an abnormal and stressful experience.”¹⁷⁴ This is particularly relevant to the success of KOF's purported research endeavors. According to international guidelines for the care and welfare of cephalopods in research, “[h]andling procedures should be carried out only by competent, trained personnel using techniques that minimise the potential for injury and reduce stress to the animals,” and “every effort should be made to minimise handling and removal of animals from the water.”¹⁷⁵ Likewise, “[h]andling and other human interactions should be monitored and recorded, as the frequency and nature of the interactions can influence behavioural

¹⁶⁵ *Id.*

¹⁶⁶ Lara, *supra* note 161, at 14.

¹⁶⁷ *Id.* at 6.

¹⁶⁸ See, e.g., Alexandra Schnell, Heather Browning, & Jonathan Birch, *Octopus Farms Raise Huge Animal Welfare Concerns – And They're Unsustainable Too*, *The Conversation* (Mar. 24, 2022), <https://theconversation.com/octopus-farms-raise-huge-animal-welfare-concerns-and-theyre-unsustainable-too-179134>.

¹⁶⁹ Lara, *supra* note 161, at 26-31; see also Aquatic Life Institute, *Nueva Pescanova: Prioritizing Profits and Polluting Las Palmas* (June 2023), <https://t.ly/yOW1>.

¹⁷⁰ Lara, *supra* note 161, at 36.

¹⁷¹ *Id.* at 31.

¹⁷² Neilson (Sept. 2019), *supra* note 160, at 2.

¹⁷³ Graziano Fiorito et al., *Guidelines for the Care and Welfare of Cephalopods in Research -A consensus based on an initiative by CepbRes, FELASA and the Boyd Group*, 49 *Lab Animal* 1, 20 (2015), <https://journals.sagepub.com/doi/10.1177/0023677215580006>.

¹⁷⁴ Clifford Warwick et al., *Mobile Zoos and Other Itinerant Animal Handling Events: Current Status and Recommendations for Future Policies*, 12 *Animals*, art. no. 214, at 24 (2023), <https://www.mdpi.com/2076-2615/13/2/214>.

¹⁷⁵ Fiorito et al., *supra* note 173, at 19.

performance of individual animals."¹⁷⁶ KOF ignores both of these best practices by allowing members of the public to handle octopuses.

Additionally, capturing octopuses—i.e. taking them from their natural habitat—can harm not only the octopuses themselves but their entire ecosystem, due to octopuses' trait of "ecosystem engineering."¹⁷⁷ Removing female octopuses from the wild is particularly harmful, as each individual lays hundreds of thousands of eggs; a fraction of hatched paralarvae grow into adults that sustain the population, while the remaining paralarvae are an important food source for animals who consume plankton.¹⁷⁸

Importantly, there is no federal oversight of KOF's exhibition or research involving cephalopods. Cephalopods are not protected by the federal Animal Welfare Act, which regulates businesses that exhibit animals or use them in research.¹⁷⁹ Nor are they covered by the Public Health Service Policy on Humane Care and Use of Laboratory Animals.¹⁸⁰ Disturbingly, KOF recently lobbied *against* a bill that would have added a modicum of oversight by requiring NELHA's Research Advisory Committee to include a member of the University of Hawaii's Institutional Animal Care and Use Committee (IACUC), a body tasked with reviewing and approving animal research protocols. KOF's lobbyist argued, "it is inappropriate and premature to have a representative from IACUC as a permanent member of the Research Advisory Committee to address concerns about invertebrates."¹⁸¹

E. DAR has "just cause" to deny KOF a special activity permit.

DAR may grant a special activity permit "to any person to take aquatic life, possess or use fishing gear, or engage in any feeding, watching, or other such non-consumptive activity related to aquatic resources, otherwise prohibited by law, in any part of the State, for scientific, educational, management, or propagation purposes."¹⁸² This permit would potentially allow KOF to take or possess he'e less than one pound in weight, to possess aquatic life collected from the West Hawaii Regional Fishery Management Area for aquarium purposes, or to engage in other "non-consumptive" activities otherwise prohibited by law. Apparently, KOF has not applied for a special activity permit, but should it do so, DAR has "just cause" to deny a permit for all the reasons discussed above.

¹⁷⁶ *Id.*

¹⁷⁷ See: David Scheel, Peter Godfrey-Smith, & Matthew Lawrence, *Octopus Tetricus (Mollusca: Cephalopoda) as an Ecosystem Engineer*, 78(4) *Scientia Marina* 521 (2014); see also Neilson (Sept. 2019), *supra* note 160160, at 2 (describing that releasing captured octopuses back to the ocean will "benefit the local population").

¹⁷⁸ See generally NOAA, *Aquatic Food Webs*, <https://www.noaa.gov/education/resource-collections/marine-life/aquatic-food-webs> (last visited July 5, 2023).

¹⁷⁹ 7 U.S.C. § 2132(g).

¹⁸⁰ Public Health Service Policy on Humane Care and Use of Laboratory Animals, NIH No. 15-8013, § III(A) (2015), <https://olaw.nih.gov/policies-laws/phs-policy.htm>; New England Anti-Vivisection Society, et al., *Petition to Include Cephalopods as Animals Deserving of Humane Treatment under the Public Health Service Policy on Humane Care and Use of Laboratory Animals* (June 18, 2020), <https://animal.law.harvard.edu/wp-content/uploads/CephalapodLetterandPetition.pdf>.

¹⁸¹ Testimony of Mihoko Ito, SanHi Gov't Strategies, on H.B. 913 (Mar. 21, 2023), https://www.capitol.hawaii.gov/sessions/session2023/Testimony/HB913_HD2_TESTIMONY_EET-HWN_03-21-23_PDF.

¹⁸² Haw. Rev. Stat. § 187A-6(B).

Moreover, KOF's activities lack any scientific, educational, management, or propagation value. As discussed above, despite presenting itself as a research facility, KOF has been operating for years as a commercial petting zoo, driven by profit rather than science. Aside from unsubstantiated assertions made in marketing materials and to NELHA, there is no evidence that KOF is engaging in any serious scientific study. Although it has been operating for years, KOF's activities have not resulted in any published scientific findings.

Similarly, KOF's collecting and captive display of octopuses do not serve an educational purpose. As discussed above, octopuses are solitary by nature and have been recognized as one of the most intelligent invertebrates, having a natural tendency to explore and manipulate their environment.¹⁸³ Captivity deprives them of the opportunity to express their natural behaviors, and KOF subjects them to being touched and handled by untrained, unfamiliar individuals. This exposes them to stress, fear, and physical injuries. It also limits the public's capacity to learn about their nature. As the U.S. Fish and Wildlife Service has explained, "Even with good material and a good faith effort at delivery by the exhibitor, there may be a limit to the amount of educational content a public which came (and paid) to be entertained will absorb. This is especially true for commercial exhibitors who have a limited amount of time to present their shows, or whose educational message is delivered in social settings where people may not be receptive."¹⁸⁴ There is no evidence that KOF has designed a rigorous educational curriculum, and the facility lacks the appropriate infrastructure and capacity to offer a rich educational experience that allows octopuses to thrive and the public to learn from them. KOF merely functions as an octopus petting zoo whose public interactions serve no scientific or educational goal.

Lastly, although KOF claims to be engaged in "conservation," it does the opposite. Its petting zoo business model requires it to remove dozens of animals from their natural habitat every year, thus harming the animals themselves and their ecosystem.

By contrast, DAR previously issued a special activity permit to Christine Zalewski, Ph.D., of Silver Spiral Seas, Octopus Research and Observation Center (also a tenant of NELHA), allowing her to take and possess day octopuses. A close reading of her permit further makes clear why KOF should not be issued one. First, unlike KOF, Silver Spiral is not a commercial facility; it is a research facility. Second, Dr. Zalewski is an experienced researcher.¹⁸⁵ Third, the permit requires the octopuses to be held in "tanks with realistic, benthic conditions resembling their natural environment."¹⁸⁶ Neilson's accompanying letter explains that such conditions "[do] not occur in typical aquariums, farms, or labs."¹⁸⁷ KOF, in contrast, holds octopuses in small, shallow, barren tanks, without any resemblance to their natural habitat or any suitable enrichment. Finally, the Dr. Zalewski's permit limits the number of octopuses that can be taken per year to 25 specimens, and provides detailed instructions

¹⁸³ Lara, *supra* note 161.

¹⁸⁴ Notice of Intent to Propose Rule: Captive-Bred Wildlife Regulation, 57 Fed. Reg. 548-01, 551 (Jan. 7, 1992).

¹⁸⁵ Dear Ocean, *Board of Directors*, <https://www.dearoccean.org/board-directors> (last visited July 5, 2023), ("Dr. Christine Zalewski obtained her Ph.D. at the University of Virginia and taught diagnosis, statistics, research methods, psychometrics, and cognitive assessment at the graduate level for over 20 years prior to transitioning to the private sector in 2014. Since that time, she has continued to apply her research background by providing statistical consultation for medical forensic accounting, consultation for educational and environmental organizations, and by contributing to a variety of marine science projects.").

¹⁸⁶ DLNR, Special Activity Permit No. 2020-57, Silver Spiral Seas, 5 (Sep. 24, 2019) [hereinafter "Silver Spiral Seas SAP"].

¹⁸⁷ Neilson (Sept. 2019), *supra* note 160160, at 2.

as to how to collect them, report their collecting details, and return them to the ocean after observation and behavior documentations.¹⁸⁸ Nothing close to such practices has been done by KOF in its past seven years of possessing he'e; KOF has never disclosed the number of octopuses it has had or their source, and it keeps them until they die instead of returning them to the ocean. Likewise, its business model requires it to collect 30 to 40 octopuses per year, which far exceeds the 25-specimen limit placed on Dr. Zalewski.

KOF's long-term apparent violations, alongside its commercial goals, lack of demonstrable educational and research objectives, and its inability to assure appropriate conditions to octopuses provide DAR the necessary just cause to deny KOF a special activity permit.

IV. KOF's activities unjustifiably harm public trust resources for private gain.

Issuing KOF any license or permit to facilitate its experiments and large-scale octopus farming ambitions would result in unjustifiable harm to Hawaii's public trust resources—its cephalopods and the ecosystems they inhabit—for the private gain of a single company. This would violate DAR's affirmative fiduciary duties under the public trust doctrine, which obligates the agency to protect and conserve the state's natural resources for the benefit of the public. Should DAR consider granting any such license or permit to KOF, it must first evaluate the impacts of its actions on trust resources.

A. The Public Trust Doctrine

Hawaii's Constitution expansively protects the state's natural resources by offering "vast and versatile public trust protections."¹⁸⁹

Article XI, § 1 provides:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

All public natural resources are held in trust by the State for the benefit of the people.

The Supreme Court of the State of Hawaii recently outlined the core constitutional principles guiding agencies' management of public trust resources: agencies must "assess and balance of protection and utilization of public trust resources."¹⁹⁰ When a proposed project "poses a *reasonable* threat to a public trust resource," the agency has a heightened duty to "further assess that threat" and

¹⁸⁸ Silver Spiral Seas SAP, *supra* note 186.

¹⁸⁹ *In re Maui Elec. Co.*, 506 P.3d 192, 200 (Haw. 2022), as corrected (Mar. 3, 2022); *see also* Ana Ching, *Charting the Boundaries of Hawaii's Extensive Public Trust Doctrine Post-Waiāhole Ditch*, 52 *Env'tl. L.* 115, 117 (2022); Erin Ryan, Holly Curry, and Hayes Rule, *Environmental Rights for the 21st Century: A Comprehensive Analysis of the Public Trust Doctrine and Rights of Nature Movement*, 42 *Cardozo L. Rev.* 2447, 2468 (2021).

¹⁹⁰ *In re Maui Elec. Co.*, 506 P.3d at 201 (cleaned up).

"affirmatively find that there is no harm to the trust resource or that potential harm is justified."¹⁹¹ "A 'reasonable' threat does not mean that there must be conclusive evidence of harm. But it means something more than vague and tenuous concerns about a project's surrounding environment; there must be tangible evidence that reasonably connects the threatened harm to the proposed project."¹⁹²

The public trust "compels the state duly to consider the cumulative impact of existing and proposed [actions] on trust purposes and to implement reasonable measures to mitigate this impact, including the use of alternative[s]."¹⁹³ It also "requires planning and decisionmaking [sic] from a global, long-term perspective."¹⁹⁴

Finally, although "[a]n agency's constitutional public trust obligations are independent of its statutory mandates," they "operate in tandem."¹⁹⁵ "An agency must perform its statutory function in a manner that fulfills the State's affirmative constitutional obligations. . . . At the same time, an agency's governing statutes and regulatory provisions provide the context for applying the broad principles of the public trust doctrine to the specific task faced by the agency."¹⁹⁶

B. KOF's private commercial use of cephalopods is not a justifiable use of public trust resources.

"Private commercial use is not protected by the public trust. . . . The very meaning of the public trust is to recognize separate and enduring public rights in trust resources superior to any private interest."¹⁹⁷ Agencies must therefore use a "higher level of scrutiny . . . when considering proposals for private commercial use."¹⁹⁸ "In practical terms, this means that the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust."¹⁹⁹

KOF's activities involve taking octopuses from their natural habitat in Hawaii's waters, possessing them in captivity in small tanks that fail to meet their complex needs, and encouraging them to reproduce even though KOF cannot keep the offspring alive. Its goal is to "close the lifecycle" of day octopus to create a captive-bred population of the species for large-scale commercial exploitation by various sectors, including for exhibition, research, and food. **It is critical to understand that no market for day octopus bred at commercial scale currently exists.** KOF aspires to *create* this market. From a "global, long-term perspective," KOF's plans to farm cephalopods—if successful—could be devastating at an ecological, species, and individual welfare

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *In re Water Use Permit Applications*, 9 P.3d 409, 455 (Haw. 2000) [hereinafter "*Waiahole I*"].

¹⁹⁴ *Id.*; see generally *Kauai Springs, Inc. v. Plan. Comm'n of Cnty. of Kauai*, 324 P.3d 951, 983-98 (Haw. 2014) (further describing an agency's procedural duties in conducting public trust review).

¹⁹⁵ *In re Maui Elec. Co.*, 506 P.3d at 202.

¹⁹⁶ *Id.* (citations omitted).

¹⁹⁷ *Kauai Springs*, 324 P.3d at 983.

¹⁹⁸ *Id.*

¹⁹⁹ *Waiahole I*, 9 P.3d at 454.

level.²⁰⁰ It is also critical to consider that issuing a permit or license to KOF could inspire copycat operations seeking to cash in on tourist dollars.

The species possessed by KOF have short lifespans of up to a year and are semelparous (females die after reproduction).²⁰¹ Hence, holding 20 octopuses at any given time requires ongoing capture of new animals from their natural habitat. Moreover, as explained above, the octopuses held captive at KOF reproduce, but their paralarvae—who would normally either grow into octopuses or feed other species in the open water—have never survived after hatching. Additionally, octopuses are carnivorous, eating crabs and other aquatic life. Maintaining them in captivity, particularly at large scale as KOF envisions, *increases* pressures on the species used to feed them—which are also protected by the public trust doctrine.²⁰² This ongoing conduct inflicts a twofold harm upon Hawaii's wildlife: on the one hand, it harms the individual octopuses physically and psychologically; on the other hand, it harms the octopus population, which in turn affects an entire ecosystem of aquatic life.

DAR cannot "affirmatively find that there is no harm to the trust resource or that potential harm is justified."²⁰³ KOF does not conduct or publish valuable research in furtherance of conservation, if it conducts any research at all.²⁰⁴ It does not contribute to either the aquaculture market or to the conservation of octopuses. In fact, KOF's ongoing extraction of octopuses from the wild, while knowing that their future hatchlings cannot survive in captivity, amounts to the exact opposite of conservation—it *reduces* Hawaii's octopus population. Although the Farm's activities are relatively small scale at this time, its impacts have the potential to compound exponentially if it achieves its vision of scaling up its cephalopod farming and distribution activities. It is notable that in the last decade, commercial marine landings of he'e have dropped precipitously—from over 39,000 lbs in 2013 to under 7,000 lbs in 2021,²⁰⁵ a possible indication that the species is declining in Hawaii waters and requires special protection.

Furthermore, the product currently offered by KOF—a petting zoo with tours—is designed to attract tourists from outside of Hawaii, rather than to benefit the people of Hawaii. Native Hawaiians and Hawaii residents are the beneficiaries of the trust resources under the public trust doctrine,²⁰⁶ yet derive no benefit from the harm KOF inflicts on Hawaii's natural resources.

²⁰⁰ See generally Jennifer Jacquet, Becca Franks, & Peter Godfrey-Smith, *The Octopus Mind and the Argument Against Farming it*, 26(19) *Animal Sentience* (2019), <https://www.wellbeingintlstudiesrepository.org/cgi/viewcontent.cgi?article=1504&context=animsent>; Jennifer Jacquet, et al., *The Case Against Octopus Farming*, *Issues in Science and Tech.*, Winter 2019, <https://issues.org/the-case-against-octopus-farming/>; Lara, *supra* note 161.

²⁰¹ Lara, *supra* note 161, at 8.

²⁰² Jacquet, et al., *The Case Against Octopus Farming*, *supra* note 200.

²⁰³ *In re Maui Elec. Co.*, 506 P.3d at 201 (cleaned up).

²⁰⁴ *Cf. Matter of Conservation Dist. Use Application HA-3568*, 431 P.3d 752, 775 (Haw. 2018), *as amended* (Nov. 5, 2018), *as amended* (Nov. 30, 2018) (upholding an agency decision to approve a permit for the University of Hawaii to build a telescope on public conservation district lands, reasoning that the telescope would provide scientific benefits to the state, and thus the benefits of the telescope outweigh the potential harm to the land).

²⁰⁵ See DAR, Commercial Marine Landings Summary Trend Reports (1997-2022), *available at* <https://dlnr.hawaii.gov/dar/fishing/commercial-fishing/>.

²⁰⁶ See *Ching v. Case*, 449 P.3d 1146, 1150 (Haw. 2019).

Only KOF and Mr. Conroy benefit from the Farm's activities, and "the public trust . . . in no way establish[es] private commercial use as among the public purposes protected by the trust."²⁰⁷ The fact that NELHA takes a cut of the profits, and that the state obtains some tax benefit from them, does not mean that the Farm's activities serve a public purpose. Furthermore, "no one could contend that the state could grant [natural resources] free of the trust because the grant served some public purpose, such as increasing tax revenue."²⁰⁸

As explained above, "[a]n agency must perform its statutory function in a manner that fulfills the State's affirmative constitutional obligations."²⁰⁹ Issuing a permit to KOF would allow the exploitation and abuse of Hawaii's natural resources for private gain, and could have long-term, large-scale consequences; DAR must prevent this harm to Hawaii's aquatic life.

V. KOF's activities harm customary and traditional Native Hawaiian rights.

Article XII, § 7 of Hawaii's Constitution requires the state to "protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes" by Native Hawaiians. This imposes an affirmative duty on state agencies to "preserve and protect customary and traditional native Hawaiian rights to the extent feasible."²¹⁰ Before agencies may act, they must engage in a "*Ka Pa'akai* Analysis," considering "(1) the identity and scope of Native Hawaiian traditional and customary rights affected by the [agency action], if any; (2) the extent to which Native Hawaiian traditional and customary rights will be affected or impaired by the [agency action]; and (3) whether the [agency action] reasonably protect[s] Native Hawaiian traditional and customary rights, if they are found to exist, as balanced with the State's own regulatory right."²¹¹

Thus far, the state Supreme Court has only considered the application of the *Ka Pa'akai* Analysis in the context of agency rulemaking and adjudication. However, it recently clarified that "[t]hese protections are flexible and must be adapted to the particular context or situation where they are implicated."²¹² Agencies "**may not act without independently considering the effect of their actions on Hawaiian traditions and practices.**"²¹³ Because "article XII, section 7 protects the broadest possible spectrum of native rights and was not intended to be narrowly construed,"²¹⁴ we urge DAR to conduct a *Ka Pa'akai* Analysis to consider how permitting the operation of an extractive octopus farm and petting zoo at HOST Park impacts Native Hawaiian traditions and practices.

He'e and Kanaloa are of great spiritual and cultural significance to Native Hawaiians. Kanaloa is one of Hawaii's primary male deities, described in the Kumulipo (creation chant) as being born in the form of an octopus.²¹⁵ "Kanaloa and the ocean are one and the same," and "it is from Kanaloa that

²⁰⁷ *Waiahole I*, 9 P.3d at 450.

²⁰⁸ *Id.*

²⁰⁹ *In re Maui Elec. Co.*, 506 P.3d at 202.

²¹⁰ *Ka Pa'akai O Ka'Aina v. Land Use Comm'n, State of Hawaii*, 7 P.3d 1068, 1084 (Haw. 2000), *as amended* (Jan. 18, 2001).

²¹¹ *Flores-Case 'Ohana v. Univ. of Hawaii*, 526 P.3d 601, 610 (Haw. 2023) (cleaned up); *see also Ka Pa'akai*, 7 P.3d at 1084 (setting out similar factors in the context of contested cases).

²¹² *Flores-Case 'Ohana*, 526 P.3d at 607.

²¹³ *Id.* (emphasis original) (cleaned up).

²¹⁴ *Flores-Case 'Ohana*, 526 P.3d 608 (cleaned up).

²¹⁵ Pua Kanahale, Edith Kanaka'ole Found., *E Mau Ana 'o Kanaloa, Ho'i Hou: The Perseverance of Kanaloa, Return! The cultural practices and values established at Kanaloa-Kabo'olawe, past and present* 12-13 (1993).

the creatures and characteristics of the ocean emerge."²¹⁶ Kanaloa takes many kinolau (physical forms), but most are animals who are "not normally eaten, found in deep water, associated with danger, elusive in habit."²¹⁷ One of the most important kinolau is the he'e, whose eight arms exhibit the eight directions of the wind, the compass, and ocean currents.²¹⁸ He'e and Kanaloa are both connected to healing. "[T]he he'e is used in various healing rituals and chants to cause illness to slip away. To invoke the he'e is to invoke Kanaloa, giving him a function in healing illness."²¹⁹ The he'e is also the 'aumākua of some Native Hawaiian families.²²⁰ A "symbiotic relationship" exists between humans and these "[f]amily or personal gods, deified ancestors," who assume the shape of octopuses or other animals.²²¹ Importantly, "mortals did not harm or eat 'aumākua."²²² Likewise, "animals that are commonly hunted and eaten are not considered [Kanaloa's] manifestations."²²³

KOF's exploitation of he'e perverts these Native Hawaiian cultural beliefs and practices. KOF captures elusive animals from the depths and makes a spectacle of them in barren shallow tubs. It harms and hunts animals considered to be ancestors and manifestations of a deity. It plans to take control of their reproduction in order to farm, harvest, and sell them like chattel. To Native Hawaiians, Kanaloa deserves reverence and honor. Commercializing his name and exploiting his kinolau for financial gain and entertainment erases his spiritual significance and is deeply disrespectful to Native Hawaiian culture.

Moreover, KOF violates pono (righteous) practice, the social code governing Native Hawaiian resource management. The three pillars of this traditional practice are aloha 'āina (love of for the earth), mālama 'āina (taking care of the earth), and 'āina momona (abundance of place).²²⁴ Together, these pillars require self-restraint, concern for future generations, and reverence for ancestors and sacred places. Fishers should only take enough to meet their present food needs.²²⁵ KOF has reduced a sacred animal to a petting zoo prop. Using he'e to turn a profit by allowing tourists to gawk at and grope these animals violates pono practice. Should DAR consider granting any license or permit to KOF, it must first engage in *Ka Pa'akai* Analysis.

VI. Conclusion

We respectfully request that DAR thoroughly investigate KOF and Mr. Conroy for the apparent violations of Hawaii law discussed in this Complaint and hold them accountable to the fullest extent

²¹⁶ *Id.* at 1-2.

²¹⁷ Jane Au, *He Huliko'a Kanaloa: Seeking the Depths of Kanaloa* 50-51 (Dec. 2018) (M.A. thesis, University of Hawaii)

²¹⁸ Kanahale, *supra* note 215, at 6-7.

²¹⁹ Au, *supra* note 217, 39-40 (internal quotation and citation omitted); Kanahale, *supra* note 215, at 7-9.

²²⁰ Telephone interview with Mike Nakachi, Moku O Keawe Cultural Practitioner (June 22, 2023).

²²¹ Mary Kawena Pukui & Samuel H. Elbert, *Hawaiian Dictionary* 32 (Univ. of Haw. Press 1986), available at <https://wehewehe.org/>.

²²² *Id.*; see also Au, *supra* note 217, at 46 (nothing that historically, he'e "were eaten, but not by women or devotees of Kanaloa").

²²³ Au, *supra* note 217, at 51.

²²⁴ Telephone interview with Mike Nakachi, Moku O Keawe Cultural Practitioner (June 22, 2023).

²²⁵ See The Kohala Center, *Pono Practices*, <https://kohalacenter.org/spawning-guide/culture-and-history/pono-practices> (last visited July 5, 2023); Kelson "Mac" Poepoe, *Respect, Learn from Indigenous Knowledge*, Honolulu Star-Advertiser (Feb. 8, 2023), <https://www.staradvertiser.com/2023/02/08/editorial/island-voices/column-respect-learn-from-indigenous-knowledge/>.

of the law.²²⁶ We note that persons who provide information leading to a conviction for violations of Hawaii's aquatic resources laws are entitled to receive one-half of the fine imposed and collected.²²⁷

These unresolved violations provide the agency ample "just cause" to deny KOF an aquaculture facility license or other license or permit. Further just cause includes the following:

- First, KOF's activities unjustifiably harm public trust resources. The public trust doctrine protects aquatic life—including octopuses—and KOF's activities harm these animals for private commercial gain without any meaningful justification. Holding octopuses in captivity harms individual animals, and it harms the population of Hawaii's octopuses, which in turn affects the entire ecosystem of aquatic life. Moreover, KOF's activities harm Native Hawaiian cultural beliefs and practices, which include reverence for the deity Kanaloa and his kinolau, including the he'e. KOF's private commercial gain does not justify these harms.
- Second, KOF does not satisfy the statutory and regulatory requirements for any license or permit to take or possess octopuses. KOF is unable to maintain day octopuses alive and in good health at all times, as required to obtain an aquaculture facility license. Also, KOF's activities lack scientific, educational, management, or propagation value, as is required to obtain a special activity permit. Lastly, it is currently unlawful to take aquatic life for aquarium purposes in most of Hawaii's waters.

DAR should not grant KOF any permit or license to take, possess, or rear octopuses. Should it consider granting any such license or permit, it must first conduct an environmental review in accordance with the public trust doctrine and a *Ka Pa'akai* Analysis.

²²⁶ Haw. Rev. Stat. §§ 187A-12.5, 13.

²²⁷ *Id.* § 187A-14.