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July 11, 2023

Gregory P. Barbour
Executive Director
Natural Energy Laboratory of Hawaii Authority

Via email: gregory.p.barbour@hawaii.gov

Re: Request for Termination of Rental Agreement of Kanaloa Octopus Farm

Dear Mr. Barbour:

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 alert the Natural Energy Laboratory of Hawaii Authority (NELHA) to apparent violations of Hawaii's aquatic resources law by 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 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 at NELHA's Hawaii Ocean Science & Technology (HOST) Park using dozens of wild-caught animals to entertain out-of-state tourists while making demonstrably incorrect claims that 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 large scale.² If successful, this business plan could 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 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—yet KOF has never obtained a permit to do so from the Division of Aquatic Resources (DAR) of the Hawaii Department of Land and Natural Resources (DLNR).⁴ In acquiring cephalopods, KOF may have also violated laws related to the taking aquatic life for commercial purposes.⁵ In January, DAR ordered KOF to cease and desist from violating the law.⁶ The Farm has since applied for an aquaculture facility license to allow it to possess undersize day octopus.⁷ We have requested that DAR refuse to issue any license or permit to KOF, investigate its apparent violations of the law, and hold facility accountable to the fullest extent of the law.

Under the terms of KOF's rental agreement with NELHA, the Farm "shall observe and comply with all laws, ordinances, rules and regulations of the federal, state, municipal or county governments . . . affecting the premises."⁸ Likewise, tenants "shall obtain and be responsible for all required species importation permits and copies of all permits shall be submitted to NELHA prior to introduction of any species to the premises."⁹ A breach of the law "shall be deemed a material default" of the rental agreement, which "NELHA may, in its sole and absolute discretion elect to terminate."¹⁰ KOF's very reason for existence at HOST Park—day octopus aquaculture—is premised on its possession of undersize specimens, which it has *never* been authorized to possess. The Farm's longstanding, unpermitted possession of undersize day octopus demonstrates that it has not observed and complied with all applicable laws and is grounds for terminating its rental agreement.

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."¹¹ 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."¹² 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 NELHA must seek to avoid in accordance with its public trust duties.

Finally, state agencies "may not act without independently considering the effect of their actions on Hawaiian traditions and practices."¹³ 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. NELHA does not appear to have considered these impacts.

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 Ex. 1, Letter from Brian Neilson, DAR Administrator, to Jacob Conroy, Kanaloa Octopus Farm (Jan. 6, 2023); Ex. 2, 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 NELHA Rental Agreement with Kanaloa, RA-0005 ¶ 10 (Aug. 20, 2015).

⁹ *Id.*

¹⁰ *Id.* ¶¶ 10, 38(A)(9); see also *id.* ¶ 42 (requiring tenant to "comply with all applicable federal, state and county permitting requirements").

¹¹ Haw. Const. Art. XI, § 1.

¹² *Id.*

¹³ *Flores-Case 'Ohana v. Univ. of Hawai'i*, 526 P.3d 601, 607 (Haw. 2023) (cleaned up).

For all the reasons detailed here and in the accompanying appendix, we respectfully request that NELHA terminate its rental agreement with KOF. Could you please inform us of NELHA's decision? We 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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Enclosures

Appendix

I. Kanaloa Octopus Farm's Petting Zoo Operations

FatFish Farms, LLC, has operated under the trade name Kanaloa Octopus Farm¹⁴ on ceded land since August 2015. It is a tenant of NELHA's HOST Park in Kailua-Kona, located on the west coast of the Big Island, directly adjacent to the West Hawaii Regional Fishery Management Area.¹⁵ Jacob Conroy owns and operates FatFish Farms, and Dan Jackson manages KOF.¹⁶ FatFish Farms has registered the additional trade names "Kanaloa Octopus Research and Education Center" and "Kanaloa Octopus Research Center."¹⁷

Since its inception, KOF has primarily operated as a for-profit day octopus petting zoo catering to out-of-state tourists.¹⁸ As of 2019, the facility reportedly received 2,000 visitors per month, with annual revenues from ticket and merchandise sales exceeding \$500,000.¹⁹ By 2022, its gross revenues exceeded \$1.5 million.²⁰ Guests could book a private tour for groups of five or more at \$250 per person, or a Farm tour at \$50 per person.²¹ On these tours, KOF encouraged guests to handle the day octopuses. Photos and videos posted online show day octopuses confined to shallow, barren plastic tanks, without meaningful ability to avoid the gaze and hands of human visitors.²² As discussed in more detail below, the Farm also actively breeds day octopus as part of a grandiose plan to sell cephalopods to the food, research, and aquarium trade. However, day octopus have never

¹⁴ See Haw. Dep't of Commerce & Consumer Affs., Bus, Registration Div., FatFish Farms, <https://hbe.hawaii.gov/documents/business.html?fileNumber=130248C5> (last visited July 5, 2023).

¹⁵ The West Hawaii Regional Fishery Management Area is "bounded by the west coast of Hawai'i Island, from Ka Lae, Ka'u (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).

¹⁶ 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>.

¹⁷ See Haw. Dep't of Commerce & Consumer Affs., Bus, Registration Div., FatFish Farms, <https://hbe.hawaii.gov/documents/business.html?fileNumber=130248C5> (last visited July 5, 2023).

¹⁸ Kanaloa Octopus, Frequently Asked Questions, <https://www.kanaloaocotopus.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."); 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.").

¹⁹ NELHA Meeting Minutes, *supra* note 18, at 11.

²⁰ KOF 2023 Business Plan, *supra* note 2, at 16.

²¹ 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.kanaloaocotopus.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).

²² 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/>.

been successfully reared in captivity, and KOF has never been able to keep day octopus offspring alive.²³

Despite its thriving business, KOF also solicited donations to fund the upkeep of the octopuses.²⁴ 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").²⁵ 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 2021.²⁶ KOF also is not registered as a charitable organization in Hawaii.²⁷

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," and apply for the relevant permits or licenses.²⁸

Despite receiving this letter, KOF continued to operate.²⁹ 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.³⁰ 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."³¹

On January 23, KOF announced on Instagram that it would be "closed for the next few weeks as we do facility maintenance and repairs."³² On February 9, it published a similar post on Facebook.³³ Mr. Conroy also stated publicly that KOF would refocus its breeding efforts on bobtail squid because he believed they are "unregulated."³⁴

²³ 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>.

²⁴ 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 June 7, 2023).

²⁵ Haw. Dep't of Commerce & Consumer Affs., Bus. Registration Div., Hawaii Cephalopod Foundation, <https://hbe.ehawaii.gov/documents/business.pdf?fileNumber=299360D2> (last visited July 5, 2023); Kanaloa Octopus Farm, Commercial or Non-Profit Preliminary Proposal, Response to RFI-19-03-NELHA (June 14, 2019) [hereinafter "KOF 2019 Business Plan"].

²⁶ IRS, *Tax Exempt Organization Search*, <https://apps.irs.gov/app/eos/> (last verified June 7, 2023).

²⁷ Haw. Att'y Gen., Tax & Charities Div., *Hawaii Charities Search*, <https://charity.ehawaii.gov/charity/search.html> (last verified June 7, 2023).

²⁸ Letter from Brian Neilson, DAR Administrator, to Jacob Conroy, Kanaloa Octopus Farm (Jan. 6, 2023).

²⁹ 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.").

³⁰ Letter from Brian Neilson, DAR Administrator, to Jacob Conroy, Kanaloa Octopus Farm (Jan. 18, 2023).

³¹ *Id.*

³² @kanaloa_octopus_farm, Instagram (Jan. 23, 2023), <https://www.instagram.com/p/CnxSb0dykr/>.

³³ Kanaloa Octopus Farm, Facebook (Feb. 9, 2023), <https://www.facebook.com/KanaloaOctopus/videos/1126107705456974/>.

³⁴ 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/>.

By letter dated January 26, NELHA informed KOF that its lease in HOST Park requires full compliance with the law.³⁵ 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."³⁶ 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."³⁷ 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.³⁸ The business plan contends that the animals are "sourced locally" from East Hawaii waters but does not provide evidence that they were lawfully caught.

KOF applied to DAR for an aquaculture facility license on January 23, 2023.³⁹ The only species listed in the license request is day octopus.

II. NELHA should terminate or refuse to renew KOF's rental agreement.

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. Moreover, as discussed below, instead of dealing honestly with DAR's inquiries about KOF, Mr. Conroy gave the agency conflicting, misleading, and false information about KOF's activities.

We respectfully request that NELHA work with DAR to investigate these apparent violations and terminate or refuse to renew its rental agreement with KOF.⁴⁰

A. Longstanding Unlawful Possession of Undersize Day Octopus

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

³⁵ Letter from Gregory P. Barbour, NELHA, to Jacob Conroy, KOF (Jan. 26, 2023).

³⁶ KOF 2023 Business Plan, *supra* note 2, at 6.

³⁷ *Id.* at 3.

³⁸ *Id.* at 9.

³⁹ FatFish Farms, LLC, Aquaculture Facility License Application no. 36385 (Jan. 17, 2024).

⁴⁰ See NELHA Rental Agreement with Kanaloa, RA-0005 ¶¶ 10, 38(A)(9), 42 (Aug. 20, 2015).

aquarium markets,"⁴¹ 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."⁴² Likewise, in a business plan submitted to NELHA in 2019, the Farm wrote, "Kanaloa Octopus continues captive breeding research of various commercially important Hawai'ian 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."⁴³ The Farm's reproductive "efforts" involving he'e are also the focus of its tours and social media posts.⁴⁴ 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.**⁴⁵

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."⁴⁶ 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."⁴⁷ 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."⁴⁸ 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."⁴⁹ (Later, NELHA Executive Director Gregory Barbour used nearly identical language in an email to the L.A. Times.⁵⁰)

On its Instagram page, KOF has posted the following images and videos going back as far as 2016⁵¹:

- 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!"⁵²
- On February 14, 2022, it posted a photo of its "current mating pair" Apollo and Phoenix.⁵³

⁴¹ NELHA Meeting Minutes, *supra* note 18, at 11; Kanaloa 2019 Business Plan, *supra* note 25, 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").

⁴² NELHA Rental Agreement with KOF, RA-0005 4 (Aug. 20, 2015).

⁴³ Kanaloa 2019 Business Plan, *supra* note 25, at 5.

⁴⁴ Ex. 3, 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.").

⁴⁵ *See* Haw. Admin Rules § 13-95-55.

⁴⁶ 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/>.

⁴⁷ 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/>.

⁴⁸ Jacob Conroy, Letter to the Editor, West Hawaii Today (May 12, 2016).

⁴⁹ Letter from Jacob Conroy, Kanaloa Octopus Farm (Mar. 1, 2022).

⁵⁰ *See* 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").

⁵¹ The following Instagram posts are compiled into a single PDF and attached as Ex. 4.

⁵² @kanaloa_octopus_farm, Instagram (Mar. 20, 2022), <https://www.instagram.com/p/CbV4-rdP2rW/>.

⁵³ @kanaloa_octopus_farm, Instagram (Feb. 14, 2022), <https://www.instagram.com/p/CZ-arWDvAf9/>.

- On February 13, 2022, it posted an image of "octopus paralarvae aka baby octopuses that just hatched out this morning!"⁵⁴
- On January 27, 2022, it posted an image of two octopus paralarvae.⁵⁵
- On January 10, 2022, it posted a video of two day octopuses with the caption "It's another #matingmonday at #kanalaoctopusfarm."⁵⁶
- 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."⁵⁷
- On September 21, 2021, it posted a photo of two he'e with the caption "Mating 🐙❤️🐙."⁵⁸
- 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!"⁵⁹
- On May 26 and 27, 2020, it posted images showing an estimated 2,687 live octopus paralarvae in a beaker.⁶⁰
- On May 25, 2020, it posted a video of a male day octopus mating with a female.⁶¹
- 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.⁶²
- On April 7, 2018, it posted an image of an octopus paralarvae.⁶³
- On April 6, 2018, it posted a boomerang video⁶⁴ of a tank containing octopus paralarvae.⁶⁵
- 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."⁶⁶ *Tako* means "octopus."
- On July 22, 2017, it posted a boomerang video showing numerous paralarvae with the caption "Special delivery! 🐙🐙 Octobabies! 🐙"⁶⁷
- On July 16, 2017, it posted a photo of an octopus with the caption "The farm stud."⁶⁸
- On July 28, 2016, it posted a video of an octopus, referring to her as a "pregnant female."⁶⁹
- On July 15, 2016, it posted a photo of an octopus with the caption "Broodstock."⁷⁰
- On July 15, 2016, it posted an image of octopus paralarvae with the caption "Octopus cyanea paralarvae."⁷¹

⁵⁴ @kanalao_octopus_farm, Instagram (Feb. 13, 2022), <https://www.instagram.com/p/CZ8PNzmFjQ/>.

⁵⁵ @kanalao_octopus_farm, Instagram (Jan. 27, 2022), <https://www.instagram.com/p/CZPzHI8AUZU/>.

⁵⁶ @kanalao_octopus_farm, Instagram (Jan. 10, 2022), <https://www.instagram.com/p/CYkguSwlzOU/>.

⁵⁷ @kanalao_octopus_farm, Instagram (Dec. 27, 2021), <https://www.instagram.com/p/CYAZ1l-lsSq/>.

⁵⁸ @kanalao_octopus_farm, Instagram (Sept. 21, 2021), <https://www.instagram.com/p/CUF-cKNPZ7C/>.

⁵⁹ @kanalao_octopus_farm, Instagram (June 16, 2020), <https://www.instagram.com/p/CBglhCSjezc/>.

⁶⁰ @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/>.

⁶¹ @kanalao_octopus_farm, Instagram (May 25, 2020), <https://www.instagram.com/p/CAosTfUADEFX/>.

⁶² @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/.

⁶³ @kanalao_octopus_farm, Instagram (Apr. 7, 2018), <https://www.instagram.com/p/BhSs6IxABMZ/>.

⁶⁴ "Boomerang" refers to an effect on Instagram in which a short video clip repeats indefinitely.

⁶⁵ @kanalao_octopus_farm, Instagram (Apr. 6, 2018), <https://www.instagram.com/p/BhP2nKdDB995/>.

⁶⁶ @kanalao_octopus_farm, Instagram (Aug. 13, 2017), <https://www.instagram.com/p/BXv2mZYg5gp/>.

⁶⁷ @kanalao_octopus_farm, Instagram (July 22, 2017), <https://www.instagram.com/p/BW1ogoJAKjq/>.

⁶⁸ @kanalao_octopus_farm, Instagram (July 16, 2017), <https://www.instagram.com/p/BW0UJgPAFhT/>.

⁶⁹ @kanalao_octopus_farm, Instagram (July 28, 2016), <https://www.instagram.com/p/BiBiLmWA8zZ/>.

⁷⁰ @kanalao_octopus_farm, Instagram (July 15, 2016), <https://www.instagram.com/p/BH5fbDqAn8e/>.

⁷¹ @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!"⁷²
- On July 10, 2016, KOF posted a photo of a small octopus with the caption "Baby He'e."⁷³

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."⁷⁴

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."⁷⁵ A photo from the tour depicts a calendar indicating that the "hatch widow" for Calypso would run from November 13-26.⁷⁶ 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."⁷⁷ Mr. Teague concluded, "they definitely seem to be focusing on (*O. cyanea*) for their propagation work."⁷⁸ Another photo from the tour depicts a beaker full of eggs.⁷⁹

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.⁸⁰ When she visited again on August 12, 2022, she was told there was one female day octopus on eggs scheduled to hatch August 20, 2022.⁸¹ 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)."⁸² Conveniently, although there are restrictions on taking and selling all aquatic life for commercial purposes, DAR has no regulations specifically addressing possession of the latter two species.⁸³

⁷² @kanaloa_octopus_farm, Instagram (July 10, 2016), <https://www.instagram.com/p/BHrIWv3A6QW/>. Notably, Instagram user, @jo.n.kea.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.

⁷³ @kanaloa_octopus_farm, Instagram (July 10, 2016), <https://www.instagram.com/p/BHrG27nAqcv/>.

⁷⁴ KOHN2 News, *Living808: Kanaloa Octopus Farm*, YouTube (May 8, 2017), <https://www.youtube.com/watch?v=2CrBp-N3cco> (1:45-2:39).

⁷⁵ Email from Christopher Teague, *supra* note 44.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Ex. 5, Email from Inga Gibson, Pono Advocacy, to Brian Nielson, DAR (Aug. 2, 2022, 8:25 AM).

⁸¹ Ex. 5, Email from Inga Gibson, Pono Advocacy, to Brian Nielson, DAR (Aug. 16, 2022, 12:57 PM).

⁸² Ex. 6, Letter from Jacob Conroy, Kanaloa Octopus Farm, to Cathy Gewecke, DAR (July 25, 2022) [hereinafter "Conroy Letter (July 25, 2022)"].

⁸³ *See, e.g.*, Haw. Rev. Stat. § 189-2(a) ("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."); *see also* Email from Rep. Nicole Lowen, Haw. House Dist. 6, to Brian Nielsen, DAR (Aug. 1, 2022) ("These seem like awfully convenient answers").

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."⁸⁴ 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.⁸⁵

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."⁸⁶ 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.'"⁸⁷ Likewise, when DAR's Christopher Teague visited KOF on November 8, 2022, he saw only one crescent octopus, Goliath.⁸⁸

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."⁸⁹ Yet on July 30, a tour guide told Ms. Gibson that there were two female day octopuses caring for eggs at the Farm.⁹⁰ Likewise, on August 15, 2022, Mr. Conroy stated that "there are no paralarvae [or eggs] of any species on-site."⁹¹ Yet on August 12, a tour guide told Ms. Gibson there was one female day octopus caring for eggs scheduled to hatch August 20, 2022.⁹²

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 § 13-95-55.⁹³

⁸⁴ Ex. 7, Letter from Jacob Conroy, Kanaloa Octopus Farm, to Cathy Gewecke, DAR (Aug. 15, 2022) [hereinafter "Conroy Letter (Aug. 15, 2022)"].

⁸⁵ See generally Ex. 4.

⁸⁶ Conroy Letter (Aug. 15, 2022), *supra* note 84.

⁸⁷ @kanaloa_octopus_farm, Instagram (Apr. 9, 2020), <https://www.instagram.com/p/B-x-DeXDfQy/> (emphasis added).

⁸⁸ Email from Christopher Teague, *supra* note 44 ("The vast majority of octopuses present were day octopus," and "There was one crescent octopus.").

⁸⁹ Conroy Letter (July 25, 2022), *supra* note 82.

⁹⁰ Email from Inga Gibson, Pono Advocacy, to Brian Nielson, DAR (Aug. 2, 2022, 8:25 AM).

⁹¹ Conroy Letter (Aug. 15, 2022), *supra* note 84.

⁹² Email from Inga Gibson, Pono Advocacy, to Brian Nielson, DAR (Aug. 16, 2022, 12:57 PM).

⁹³ 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." Haw. Rev. Stat. § 187A-3.5. 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." *Id.* § 187A-6(b).

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.⁹⁴ The vast majority are day octopus,⁹⁵ but the facility has also held crescent or Hawaiian octopus (*Octopus hawaiiensis*) and Hawaiian bobtail squid (*Euprymna scolopes*).⁹⁶

Because day octopuses have exceedingly short natural lives and their offspring do not survive in captivity,⁹⁷ 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.⁹⁸ 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.⁹⁹

KOF's website self-servingly asserts that the octopuses it uses are "rescued."¹⁰⁰ But on tours, its employees have stated that the octopuses are caught especially for KOF in local Kona waters by "octopus whisperers" who "know exactly where they will be and when they will be there."¹⁰¹ 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."¹⁰²

⁹⁴ NELHA Meeting Minutes, *supra* note 18, at 13; Conroy Letter (July 25, 2022), *supra* note 82.

⁹⁵ Rust (Dec. 20, 2022), *supra* note 1; Email from Christopher Teague, *supra* note 44 ("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>.

⁹⁶ NELHA Meeting Minutes, *supra* note 18, at 13; Conroy Letter (July 25, 2022), *supra* note 82; KOF 2023 Business Plan, *supra* note 2, at 3, 6, 8, 11.

⁹⁷ 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 . . .").

⁹⁸ Herwig, et al., *supra* note 97, at 3, Fig. 1.

⁹⁹ Ex. 8, @kanaloa_octopus_farm, Instagram, Posts Introducing New Octopuses.

¹⁰⁰ Kanaloa Octopus Farm, *Our Commitment to Ethical Research*, <https://www.kanaloaoctopus.com/blank-4> (last visited July 5, 2023).

¹⁰¹ See Ex. 9, 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-cess-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 16 (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 44.

¹⁰² Conroy Letter (July 25, 2022), *supra* note 82 (emphasis added).

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 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."¹⁰³ 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."¹⁰⁴ 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'."¹⁰⁵

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."¹⁰⁶ "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."¹⁰⁷

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.¹⁰⁸ "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."¹⁰⁹ West Hawaii aquarium permits *do not* authorize the collection of cephalopods.¹¹⁰ Thus, it is unlawful to collect cephalopods for aquarium purposes in West Hawaii waters unless exempted by a special activity permit.¹¹¹ Moreover, following a series of court rulings, DAR has prohibited nearly *all* aquarium collection.¹¹²

¹⁰³ Ex. 10, Email from Rep. Nicole Lowen, Haw. House Dist. 6, to Gregory Barbour, NELHA (Jan. 26, 2023, 8:53 AM).

¹⁰⁴ Ex. 11, Email to Brian Nielsen, DAR (Feb. 9, 2023, 11:14 AM).

¹⁰⁵ Ex. 12, Email from Rep. Nicole Lowen, Haw. House Dist. 6, to Gregory Barbour, NELHA (Jan. 26, 2023, 11:55 AM).

¹⁰⁶ Haw. Rev. Stat. § 189-2(a).

¹⁰⁷ *Id.* § 187A-1. "Take" is not defined.

¹⁰⁸ Haw. Admin R. § 13-60.4-4(3)(B).

¹⁰⁹ *Id.* § 13-60.4-3.

¹¹⁰ *Id.* § 13-60.4-7(a)-(b). West Hawaii aquarium permits only authorize the collection of species appearing on the Aquarium Species White List.

¹¹¹ *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 . . .").

¹¹² 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 *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

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."¹¹³ 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. Moreover, since November 2020, all commercial marine licenses have included "a condition prohibiting the taking of marine life for aquarium fishing purposes."¹¹⁴ Thus, KOF could not have lawfully obtained octopuses from a commercial marine licensee. This raises serious doubts about whether KOF has lawfully obtained cephalopods.

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*,¹¹⁵ 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

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/>.

¹¹³ Haw. Admin. R. § 13-60.4-3.

¹¹⁴ 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).

¹¹⁵ *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)).

intake pipes.¹¹⁶ Likewise, the crescent octopus Waldo, discussed above, "was found in a neighbor's filter bag in September of 2019."¹¹⁷ 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!"¹¹⁸ In October 2017, KOF posted a video of a pelagic octopus "saved from a NELHA intake pipe."¹¹⁹

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 have asked DAR to thoroughly investigate the provenance of KOF's cephalopods, which we suspect could not have been acquired lawfully.

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."¹²⁰

"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."¹²¹ 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."¹²² 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."¹²³

According to the business plan submitted to NELHA in February 2023, KOF contends 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.*"¹²⁴ 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

¹¹⁶ Cruz, *supra* note 16.

¹¹⁷ Ex. 13, @kanaloa_octopus_farm, Instagram (Apr. 9, 2020), <https://www.instagram.com/p/B-x-DeXDfQy/>.

¹¹⁸ Ex. 13, @kanaloa_octopus_farm, Instagram (June 29, 2020), <https://www.instagram.com/p/CCB6Gzgjzdp/>.

¹¹⁹ Ex. 13, @kanaloa_octopus_farm, Instagram (Oct. 4, 2017), <https://www.instagram.com/p/BZ0Hyp9geEF/>.

¹²⁰ Haw. Rev. Stat. § 187A-1.

¹²¹ *Id.* § 189-10(a).

¹²² Haw. Admin. R. § 13-74-46.

¹²³ *Id.*

¹²⁴ KOF 2023 Business Plan, *supra* note 2, at 16 (emphasis added).

formerly offered day octopus for sale on its website for \$199.99 each.¹²⁵ According to archived sales pages on its website, the animals were "wild caught" but "to [sic] small for our breeding program."¹²⁶

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 II.B above, a commercial marine license was likely required to take the animals from the wild.¹²⁷ Accordingly, we have asked DAR to 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.¹²⁸

III. KOF's operations are inconsistent with NELHA's mission.

NELHA's purpose is "to facilitate research, development, and commercialization of natural energy resources and ocean-related research, technology, and industry in Hawaii and to engage in retail, commercial, or tourism activities that will financially support that research, development, and commercialization at a research and technology park in Hawaii."¹²⁹ To that end, NELA's mission statement reads, "To develop and diversify the Hawai'i economy by providing resources and facilities for energy and ocean-related research, education, and commercial activities *in an environmentally sound and culturally sensitive manner*."¹³⁰ NELHA's master plan, adopted in 2011, explains the agency's desire to "become a Center of Excellence for Energy and Ocean Research" starting with "attracting top notch researchers."¹³¹

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. This is not consistent with NELHA's vision of excellence in developing ocean-related research, education, and commerce in an environmentally sensitive manner. 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. As Carmelle Joyner, 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."¹³² Mr. Jackson also explained, "the paralarvae are just such a mystery that nobody really knows exactly what they need to survive."¹³³ Reportedly, KOF has "been

¹²⁵ Ex. 14, 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. 15, 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. 16, 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).

¹²⁶ *Id.*

¹²⁷ See Haw. Rev. Stat. § 189-2.

¹²⁸ See Haw. Admin. R. § 13-74-46.

¹²⁹ Haw. Rev. Stat. § 227D-2(a).

¹³⁰ Master Plan for Natural Energy Laboratory of Hawaii Authority 1-2 (2011), https://nelha.hawaii.gov/wp-content/uploads/2013/05/NELHA_Master_Plan_Final_Nov11.pdf [hereinafter "NELHA Master Plan"] (emphasis added).

¹³¹ *Id.* at 4-5, 4-6.

¹³² Cruz, *supra* note 16.

¹³³ *Id.*

able to keep the paralarvae alive for only 13 days post hatching."¹³⁴ In other words, KOF has been mating octopuses with full knowledge that their offspring will starve to death.

Whether this breeding mission is aimed at conservation or aquaculture, it has not been successful and does not represent the "world-class research" that NELHA hopes to attract.¹³⁵ At best, KOF *is trying to figure out how* to farm cephalopods, without success, and its research has not led to any meaningful scientific findings published in peer-reviewed scientific journals.¹³⁶ 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[.]"¹³⁷

A. Animal Welfare and Environmental Harm

There are 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.¹³⁸ 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."¹³⁹

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.¹⁴⁰ 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.¹⁴¹ For these reasons, Professor Peter Godfrey-Smith has written that this taxon represents "an island of mental complexity in the sea of invertebrate animals."¹⁴²

Octopuses were also included in The Cambridge Declaration on Consciousness, signed by a prominent international group of neuroscientists.¹⁴³ According to this Declaration, "non-human animals, including . . . octopuses, also possess these neurological substrates [that generate consciousness.]"¹⁴⁴ In addition, several recent scientific articles focusing on octopuses' complex nervous systems have shown that cephalopods have the capacity to feel pain.¹⁴⁵

¹³⁴ *Id.*

¹³⁵ NELHA Master Plan, *supra* note 130, at 4-6. (emphasis added).

¹³⁶ 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 Hawaiianensis*, for the first time in history." Kanaloa 2019 Business Plan, *supra* note 25, at 5. There are no publications substantiating this claim.

¹³⁷ Email from Christopher Teague, *supra* note 44.

¹³⁸ 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>.

¹³⁹ 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)"].

¹⁴⁰ 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.

¹⁴¹ *Id.* at 11.

¹⁴² Peter Godfrey-Smith, *The Mind of an Octopus*, *Sci. Am.*, Jan. 1, 2017, <https://www.scientificamerican.com/article/the-mind-of-an-octopus/>.

¹⁴³ Philip Low, *The Cambridge Declaration on Consciousness* (July 7, 2012), <https://fcmconference.org/img/CambridgeDeclarationOnConsciousness.pdf>.

¹⁴⁴ *Id.*

¹⁴⁵ Lara, *supra* note 140, at 14.

Little is known about cephalopods' complex welfare needs and suffering in captivity.¹⁴⁶ However, the uniqueness and intelligence of cephalopods have led numerous prominent scholars to publicly oppose their farming.¹⁴⁷ 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.¹⁴⁸

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.¹⁴⁹ As sentient and curious animals who like to explore, manipulate, and control their environment, octopuses are susceptible to boredom in captivity.¹⁵⁰ 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."¹⁵¹ 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."¹⁵² 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."¹⁵³ 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."¹⁵⁴ Likewise, "[h]andling and other human interactions should be monitored and recorded, as the frequency and nature of the interactions can influence behavioural performance of individual animals."¹⁵⁵ 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

¹⁴⁶ *Id.* at 6.

¹⁴⁷ 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>.

¹⁴⁸ Lara, *supra* note 140, at 26-31; see also Aquatic Life Institute, *Nueva Pescanova: Prioritizing Profits and Polluting Las Palmas* (June 2023), <https://t.ly/yOW1>.

¹⁴⁹ Lara, *supra* note 140, at 36.

¹⁵⁰ *Id.* at 31.

¹⁵¹ Neilson (Sept. 2019), *supra* note 139, at 2.

¹⁵² Graziano Fiorito et al., *Guidelines for the Care and Welfare of Cephalopods in Research -A consensus based on an initiative by CephRes, FELASA and the Boyd Group*, 49 *Lab Animal* 1, 20 (2015), <https://journals.sagepub.com/doi/10.1177/0023677215580006>.

¹⁵³ 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>.

¹⁵⁴ Fiorito et al., *supra* note 152, at 19.

¹⁵⁵ *Id.*

engineering."¹⁵⁶ 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.¹⁵⁷

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.¹⁵⁸ Nor are they covered by the Public Health Service Policy on Humane Care and Use of Laboratory Animals.¹⁵⁹ 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."¹⁶⁰

B. Lack of Scientific or Educational Value

KOF's activities lack any meaningful 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 captive display of octopuses does 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.¹⁶¹ 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."¹⁶² There is no evidence that KOF has designed a rigorous educational curriculum, and the facility lacks the appropriate infrastructure and capacity to

¹⁵⁶ See David Scheel, Peter Godfrey-Smith, & Matthew Lawrence, *Octopus Tetricus (Mollusca: Cephalopoda) as an Ecosystem Engineer*, 78 *Scientia Marina* 521 (2014); see also Neilson (Sept. 2019), *supra* note 139, at 2 (releasing captured octopuses back to the ocean will "benefit the local population").

¹⁵⁷ See generally NOAA, *Aquatic Food Webs*, <https://www.noaa.gov/education/resource-collections/marine-life/aquatic-food-webs> (last visited July 5, 2023).

¹⁵⁸ 7 U.S.C. § 2132(g).

¹⁵⁹ 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/CephalopodLetterandPetition.pdf>.

¹⁶⁰ 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.

¹⁶¹ Lara, *supra* note 140.

¹⁶² Notice of Intent to Propose Rule: Captive-Bred Wildlife Regulation, 57 Fed. Reg. 548-01, 551 (Jan. 7, 1992).

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 meaningful 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.

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

Continuing to rent space to KOF 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 NELHA'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. NELHA must evaluate the impacts of KOF's operations 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."¹⁶³

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."¹⁶⁴ 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 "affirmatively find that there is no harm to the trust resource or that potential harm is justified."¹⁶⁵ "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."¹⁶⁶

¹⁶³ *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, & 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).

¹⁶⁴ *In re Maui Elec. Co.*, 506 P.3d at 201 (cleaned up).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

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]." ¹⁶⁷ It also "requires planning and decisionmaking [sic] from a global, long-term perspective." ¹⁶⁸

Finally, although "[a]n agency's constitutional public trust obligations are independent of its statutory mandates," they "operate in tandem." ¹⁶⁹ "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." ¹⁷⁰

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." ¹⁷¹ Agencies must therefore use a "higher level of scrutiny . . . when considering proposals for private commercial use." ¹⁷² "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." ¹⁷³

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 level. ¹⁷⁴ It is also critical to consider the precedent set by authorizing an octopus petting zoo to operate at NELHA, which could inspire copycat operations seeking to cash in on tourist dollars.

The species possessed by KOF have a short lifespan of up to a year and are semelparous (females die after reproduction). ¹⁷⁵ 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

¹⁶⁷ *In re Water Use Permit Applications*, 9 P.3d 409, 455 (Haw. 2000) [hereinafter "*Waiahole I*"].

¹⁶⁸ *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).

¹⁶⁹ *In re Maui Elec. Co.*, 506 P.3d at 202.

¹⁷⁰ *Id.* (citations omitted).

¹⁷¹ *Kauai Springs*, 324 P.3d at 983.

¹⁷² *Id.*

¹⁷³ *Waiahole I*, 9 P.3d at 454.

¹⁷⁴ 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 140.

¹⁷⁵ Lara, *supra* note 140, at 8.

scale as KOF envisions, *increases* pressures on the species used to feed them—which are also protected by the public trust doctrine.¹⁷⁶ This ongoing conduct inflicts a twofold harm upon Hawaii's aquatic life: 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.

NELHA cannot "affirmatively find that there is no harm to the trust resource or that potential harm is justified."¹⁷⁷ KOF does not conduct or publish valuable research in furtherance of conservation, if it conducts any research at all.¹⁷⁸ 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 2021,¹⁷⁹ 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,¹⁸⁰ yet derive no benefit from the harm KOF inflicts on Hawaii's natural resources.

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."¹⁸¹ The fact that NELHA takes a cut of the profits, and 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."¹⁸²

As explained above, "[a]n agency must perform its statutory function in a manner that fulfills the State's affirmative constitutional obligations."¹⁸³ NELHA's mission is "[t]o develop and diversify the Hawai'i economy by providing resources and facilities for energy and ocean-related research, education, and commercial activities *in an environmentally sound* and culturally sensitive manner."¹⁸⁴ Continuing to lease space to KOF would allow the exploitation and abuse of Hawaii's natural resources for private gain, and could have long-term, large-scale environmental consequences; NELHA must prevent this harm to Hawaii's aquatic life.

¹⁷⁶ Jacquet, et al., *The Case Against Octopus Farming*, *supra* note 174.

¹⁷⁷ *In re Maui Elec. Co.*, 506 P.3d at 201 (cleaned up).

¹⁷⁸ *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).

¹⁷⁹ See DAR, Commercial Marine Landings Summary Trend Reports (1997-2022), *available at* <https://dlnr.hawaii.gov/dar/fishing/commercial-fishing/>.

¹⁸⁰ See *Ching v. Case*, 449 P.3d 1146, 1150 (Haw. 2019).

¹⁸¹ *Waiabole I*, 9 P.3d at 450.

¹⁸² *Id.*

¹⁸³ *In re Maui Elec. Co.*, 506 P.3d at 202.

¹⁸⁴ NELHA Master Plan, *supra* note 130, at 1-2 (emphasis added).

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."¹⁸⁵ 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."¹⁸⁶

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."¹⁸⁷ Agencies "**may not act without independently considering the effect of their actions on Hawaiian traditions and practices.**"¹⁸⁸ There is no evidence that NELHA has conducted any cultural consultation or made any specific findings regarding KOF's impacts on the traditional and customary rights of Native Hawaiians.¹⁸⁹ Because "article XII, section 7 protects the broadest possible spectrum of native rights and was not intended to be narrowly construed,"¹⁹⁰ we urge NELHA to conduct a *Ka Pa'akai* Analysis to consider how the operation of an extractive octopus farm and petting zoo at HOST Park impacts Native Hawaiian traditions and practices. This would also be consistent with NELHA's mission statement, which endeavors "[t]o develop and diversify the Hawai'i economy by providing resources and facilities for energy and ocean-related research, education, and commercial activities *in an environmentally sound and culturally sensitive manner.*"¹⁹¹

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.¹⁹² "Kanaloa and the ocean are one and the same," and "it is from Kanaloa that the creatures and characteristics of the ocean emerge."¹⁹³ 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."¹⁹⁴ 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.¹⁹⁵ 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

¹⁸⁵ *Ka Pa'akai O Ka'Aina v. Land Use Comm'n, State of Hawai'i*, 7 P.3d 1068, 1084 (Haw. 2000), *as amended* (Jan. 18, 2001).

¹⁸⁶ *Flores-Case 'Ohana v. Univ. of Hawai'i*, 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).

¹⁸⁷ *Flores-Case 'Ohana*, 526 P.3d at 607.

¹⁸⁸ *Id.* (emphasis original) (cleaned up).

¹⁸⁹ *See, e.g.*, NELHA Meeting Minutes, *supra* note 18, at 10 (approving in concept Kanaloa's expansion without considering cultural impacts); NELHA, Board of Directors Meeting Minutes 3-6 (Aug. 26, 2019), https://nelha.hawaii.gov/wp-content/uploads/2019/11/2019Aug26-BOD-Meeting-Minutes-FinalFor_WebPosting.pdf (granting final approval of Kanaloa's expansion without considering cultural impacts).

¹⁹⁰ *Flores-Case 'Ohana*, 526 P.3d 608 (cleaned up).

¹⁹¹ NELHA Master Plan, *supra* note 130, at 1-2 (emphasis added).

¹⁹² 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).

¹⁹³ *Id.* at 1-2.

¹⁹⁴ Jane Au, *He Huliko'a Kanaloa: Seeking the Depths of Kanaloa* 50-51 (Dec. 2018) (M.A. thesis, University of Hawaii)

¹⁹⁵ Kanahale, *supra* note 192, at 6-7.

away. To invoke the he'e is to invoke Kanaloa, giving him a function in healing illness."¹⁹⁶ The he'e is also the 'aumākua of some Native Hawaiian families.¹⁹⁷ A "symbiotic relationship" exists between humans and these "[f]amily or personal gods, deified ancestors," who assume the shape of octopuses or other animals.¹⁹⁸ Importantly, "mortals did not harm or eat 'aumākua."¹⁹⁹ Likewise, "animals that are commonly hunted and eaten are not considered [Kanaloa's] manifestations."²⁰⁰

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).²⁰¹ 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.²⁰² 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.

By allowing KOF to operate an octopus farm at HOST Park, NELHA has failed to fulfill its mission statement and constitutional duty to protect customary and traditional Native Hawaiian rights. We respectfully request that NELHA immediately engage in *Ka Pa'akai* Analysis and mitigate KOF's impacts on the customary and traditional rights of Native Hawaiians by terminating KOF's tenancy at HOST Park.

VI. NELHA must determine whether KOF's project is subject to environmental review under HEPA.

KOF's rental agreement requires it to "comply with all applicable federal, state and county environmental impact regulations, including but not limited to Chapter 343, Hawaii Revised Statutes, as amended."²⁰³ Chapter 343, the Hawaii Environmental Policy Act (HEPA), requires environmental review of actions that "[p]ropose the use of state or county lands," or that "[p]ropose any use within any land classified as a conservation district."²⁰⁴ An action initiated by an applicant must undergo environmental review if it has not been declared exempt under Haw. Rev. Stat. § 343-

¹⁹⁶ Au, *supra* note 194, at 39-40 (internal quotation and citation omitted); Kanahale, *supra* note 192, at 7-9.

¹⁹⁷ Telephone interview with Mike Nakachi, Moku O Keawe Cultural Practitioner (June 22, 2023).

¹⁹⁸ Mary Kawena Pukui & Samuel H. Elbert, *Hawaiian Dictionary* 32 (Univ. of Haw. Press 1986), *available at* <https://wehewehe.org/>.

¹⁹⁹ *Id.*; *see also* Au, *supra* note 194, at 46 (nothing that historically, he'e "were eaten, but not by women or devotees of Kanaloa").

²⁰⁰ Au, *supra* note 194, at 51.

²⁰¹ Telephone interview with Mike Nakachi, Moku O Keawe Cultural Practitioner (June 22, 2023).

²⁰² *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/>.

²⁰³ NELHA Rental Agreement with Kanaloa, RA-0005 ¶ 44 (Aug. 20, 2015).

²⁰⁴ Haw. Rev. Stat. § 343-5(a)(1)-(2).

6 and "requires approval of an agency."²⁰⁵ KOF's business occupies ceded lands and its rental of space at HOST Park requires agency approval.

Whenever an applicant proposes an action subject to HEPA, the agency processing the request "shall require the applicant to prepare an environmental assessment of the proposed action at the earliest practicable time to determine whether an environmental impact statement shall be required."²⁰⁶ An "environmental assessment" is "a written evaluation to determine whether an action may have a significant effect."²⁰⁷ "Significant effect" means "the sum of effects on the quality of the environment, including actions that irrevocably commit a natural resource, curtail the range of beneficial uses of the environment, are contrary to the State's environmental policies or long-term environmental goals as established by law, or adversely affect the economic welfare, social welfare, or cultural practices of the community and State."²⁰⁸

There is no evidence that KOF has fulfilled the term of its rental agreement requiring HEPA compliance.²⁰⁹ We request that NELHA assess whether the activities outlined in KOF's business plan are subject to HEPA's environmental review provisions, and if so, require such review before authorizing KOF to continue to operate at HOST Park. Indeed, an environmental assessment *requires* applicants to include a "[l]ist of all required permits and approvals" and identify "which approval necessitates chapter 343, HRS, environmental review."²¹⁰ Had KOF complied with the terms of its rental agreement when it first applied for tenancy at NELHA, it may have avoided the legal troubles that it now faces.

VII. Conclusion

We respectfully request that NELHA work with the DLNR to thoroughly investigate KOF and Mr. Conroy for the apparent violations of Hawaii law discussed in this Complaint. KOF has failed to deliver on its aquaculture promises, failed to comply with Hawaii's environmental laws, insulted Native Hawaiian culture, and in the process exploited dozens of cephalopods for human entertainment.

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

²⁰⁵ *Id.* § 343-5(e).

²⁰⁶ *Id.* § 343-5(e).

²⁰⁷ *Id.* § 343-2.

²⁰⁸ *Id.*

²⁰⁹ Three Environmental Impact Statements (EIS) from the 1970s and 1980s addressed NELHA's environmental impacts, but *not* the impacts of its tenants. A 1976 EIS assessed the impacts of the development of NELHA's support facilities, noting that "[f]uture major energy programs at the NELH will each require an Environmental Assessment/Impact Statement." R.M. Towill Corp., Environmental Impact Statement for the Natural Energy Laboratory of Hawaii at Ke-Ahole Point, Hawaii 11-8 (1976). A 1985 EIS related to the development and operation of HOST Park. Traverse Group, Inc., Final Environmental Impact Statement High Technology Development Corporation (1985). This EIS discussed the possibility of aquaculture of algae, crustaceans, clams and oysters, and fish, but includes no discussion of the environmental impacts related to the large scale production of cephalopods. It noted, "Although the EIS is intended to cover both planned and future projects at each facility, if a new activity emerges with unique requirements that may increase the magnitude of the impacts presented in the EIS, an environmental assessment will be made." *Id.* at I-9. A 1987 Supplemental EIS related to seawater return flow disposal. MCM Planning, Final Supplemental Environmental Impact Statement Alternative Methods of Seawater Return Flow Disposal (1987). As the Intermediate Court of Appeals for Hawaii held, these statements do not cover all activities of NELHA's tenants. '*Obana Pale Ke Ao v. Haw. Bd. of Agric.*, 188 P.3d 761, 773 (Haw. Ct. App. 2008) ("It is clear from the EISs that as the nature and details of individual projects to be conducted at either park became known, further HEPA review was expected.").

²¹⁰ Haw. Code R. §11-200.1-18.

without any meaningful justification. Holding octopuses captive harms individual animals, and it harms the population of Hawaii's octopuses, which in turn affects the entire ecosystem of aquatic life. KOF is unable to maintain day octopuses alive and in good health at all times, and its activities lack scientific or educational value. KOF's private commercial gain does not justify these harms.

We further request that NELHA terminate KOF's rental agreement, which the Farm has breached. Should NELHA continue to lease space to KOF, it must first conduct an environmental review in accordance with the public trust doctrine and a *Ka Pa'akai* Analysis.