

State of Hawaii
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Aquatic Resources
Honolulu, Hawaii 96813

May 11, 2012

Board of Land
and Natural Resources
Honolulu, Hawaii

SUBJECT: REQUEST APPROVAL FOR THE DLNR CHAIRPERSON TO AMEND AN AGREEMENT FOR THE EXCHANGE AND USE OF CONFIDENTIAL FISHERIES INFORMATION WITH THE NATIONAL MARINE FISHERIES SERVICE (NMFS) FOR FISHERIES MANAGEMENT PURPOSES

The Department of Land and Natural Resources (Department) collects commercial fish catch data as a requirement of its licensing and reporting program, and shares it with NMFS under an existing cooperative agreement executed in 1988 (attached). By statute, the information collected from commercial fishers is confidential, but also provides for the exchange of the information with the federal government (189-3, HRS) for management purposes.

Legal authorities for both federal and state fisheries programs have changed since 1988 and the existing agreement is in need of revision. Additionally, both NMFS and the Department have expressed interest in other fisheries data that is collected pursuant to other statutes, regulations and rules. NMFS and the Division of Aquatic Resources have been working to update and revise the agreement. A draft revision of this agreement is also attached. This updating effort includes legal review and approval by both NMFS General Counsel and the State Attorney General.

The Department looks forward to continued collaboration with the NMFS thru the exchange of fisheries information to the mutual benefit of both jurisdictions and the sustainability of the fishery resources.

RECOMMENDATION: That the Board grant approval for the DLNR Chairperson to amend an agreement for the exchange and use of confidential fisheries information with the NMFS for fishery management purposes.

Respectfully submitted,



FRANCIS OISHI
Program Manager

APPROVED FOR SUBMITTAL:



WILLIAM J. AILA, JR.
Chairperson, BLNR

Attachments (2)

ITEM F-1

DRAFT

MEMORANDUM OF AGREEMENT BETWEEN THE

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

AND THE

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES SERVICE

ON THE

EXCHANGE AND USE OF CONFIDENTIAL FISHERIES INFORMATION

I. PURPOSE OF THE AGREEMENT

A. Accurate and timely fisheries information is vital to scientific research, coastal and marine spatial planning, and marine resource conservation and management programs that must respond to increasingly complex fishery and ocean use problems.

B. The analysis and dissemination of required fisheries information often demand coordinated action among governmental agencies. Furthermore, efficient administration of research and management programs requires full utilization of information collected by these various governmental agencies. In recognition of these needs, and from a desire to operate efficiently and cost effectively, the State of Hawaii Board of Land and Natural Resources, through its Department of Land and Natural Resources, (DLNR) and the U. S. Department of Commerce National Oceanic and Atmospheric Administration's National Marine Fisheries Service, through its Pacific Islands Regional Office and Pacific Islands Fisheries Science Center, (NMFS) enter into this Memorandum of Agreement (MOA).

C. Specifically, the purposes of this MOA are as follows:

1. To develop and implement confidential fishery information exchange and use procedures to provide timely and accurate information, while safeguarding against unauthorized dissemination and use of confidential data;
2. To provide a management mechanism for the coordination of internal State and Federal information analysis and dissemination;
3. To develop and implement data entry, editing and updating procedures and software;

4. To maximize authorized government user access to timely and accurate fisheries information;
5. To establish and maintain cooperative fishery statistics reporting services for routine and special reports; and
6. To ensure the confidentiality of acquired confidential information is maintained, and to the extent information is disclosed pursuant to this agreement, such disclosure is done in accordance with applicable laws and regulations.

II. AUTHORITIES

Certain statutes and regulations establish the authority for the DLNR and NMFS to collect confidential fisheries information. Other statutes and regulations require that the information collecting agency maintain confidentiality of personal or proprietary business or trade secret information. These statutes and regulations include, but are not limited to:

A. State of Hawaii

1. Constitution of the State of Hawaii, Article XI, sections 1, 6, and 11
2. Section 189-2, Hawaii Revised Statutes (HRS), Commercial marine license
3. Section 189-3, HRS, Monthly catch report
4. Section 189-3.5, HRS, Catch report, shared jurisdiction of fisheries
5. Section 189-10, HRS, Commercial marine dealers
6. Section 189-11, HRS, Receipts in duplicate
7. Section 189-14, HRS, Rights of entry, penalties
8. Section 13-74-2, Hawaii Administrative Rules (HAR), Permits
9. Section 13-74-20, HAR, General license and permit conditions
10. Section 13-74-42, HAR, Special marine animal or product possession and sale license
11. Section 13-74-43, HAR, Aquaculture license
12. Section 13-74-44, HAR, License to sell reared species
13. Section 13-94-8, HAR, Bottomfish restricted fishing areas
14. Chapter 92F, HRS, Uniform Information Practices Act (as amended), and implementing regulations.

B. Federal Government

1. Agricultural Marketing Act of 1946, 7 U.S.C. 1621-1627
2. Agricultural Trade Development and Assistance Act of 1954, 7 U.S.C. 1704
3. Anadromous Fish Conservation Act, 16 U.S.C. 757-757f
4. Eastern Pacific Tuna Licensing Act of 1984, 16 U.S.C. 972-972h
5. Endangered Species Act, 16 U.S.C. 1531-1543
6. Farrington Act of 1947, 16 U.S.C. 758-758d
7. Fish and Wildlife Act of 1956, 16 U.S.C. 742(a) *et seq.*
8. Fish and Wildlife Coordination Act of 1934, 16 U.S.C. 661-666c
9. Fishery Market News Service Act of 1937; 50 Stat. 296

10. Fur Seal Act, 16 U.S.C. 1151-1175
11. Interjurisdictional Fisheries Act of 1986, 16 U.S.C. 4101 et seq.
12. Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.* and regulations, 50 CFR 600
13. Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.*
14. Marine Migratory Gamefish Act of 1959, 16 U.S.C. 760e;
15. South Pacific Tuna Act of 1988, 16 U.S.C. 973-973n
16. Tuna Conventions Act of 1950, 16 U.S.C. 951-961
17. Privacy Act of 1974, 5 U.S.C. 552a
18. Freedom of Information Act, 5 U.S.C. 552
19. Trade Secrets Law, 18 U.S.C. 1905

III. DEFINITIONS

As used in this agreement, unless the context indicates otherwise:

“Confidential” means information that is defined as confidential or sensitive personally identifiable information by law, regulation, or official written policy.

“Federal fisheries information” means confidential data collected, stored, used or disclosed under the Federal authorities listed in section II.B. above.

“Marine life” means any type or species of saltwater fish, shellfish, mollusks, crustaceans, coral, or other marine organisms, including any part, product, egg, or offspring thereof; or seaweeds or other marine plants, including any part, product, seed, or root thereof.

“State fisheries information” means confidential data collected, stored, used or disclosed under the State authorities listed in section II.A. above.

IV. RESPONSIBILITIES OF THE PARTIES

The DLNR and NMFS agree to maintain the integrity and security of their respective information systems for collecting confidential fisheries information, and assuring confidentiality to the providers of the information as authorized and necessary. It is expressly agreed that the parties have the authority and the responsibility to maintain the confidentiality of exchanged confidential information and will maintain such confidentiality from disclosure to unauthorized parties. The DLNR must have authority to protect the information from disclosure in a manner at least as protective as in the regulations implementing the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1801, et seq. and 50 CFR Part 600). Consistent with applicable law, DLNR and NMFS agree to exchange fishermen contact information such as names, mailing and email addresses, and telephone numbers, for the purposes of contacting Federal and/or State permitted fishermen to provide fisheries-related information and/or to facilitate State or Federal agency program inquiries (e.g., surveys) needed to assist DLNR and NMFS accomplish their respective goals and missions.

The DLNR and NMFS will assure through appropriate policies and procedures that unauthorized access, viewing, and extraction of confidential information will not occur, and will assure that such information will be accessed and used only by authorized users who understand and comply with requirements and policies to maintain the confidentiality of the information.

The procedures established herein are made to encourage the providers of confidential information to supply accurate and complete information to the DLNR and NMFS. The procedures will also facilitate full cooperative use of available fisheries information between the parties to support better fisheries management, marine life conservation and related scientific research, and coastal and marine spatial planning and management. In recognition of these principles and pursuant to the applicable law, statutes, and regulations, the following responsibilities are agreed to by the parties:

A. Department of Land and Natural Resources

The DLNR may receive, use, and store Federal fisheries information collected by and transmitted to it from NMFS on a case-by-case basis for fisheries and ocean resource management, scientific research, and conservation of marine life and related scientific research. Any such Federal fisheries information received by DLNR shall be maintained and treated as confidential in accordance with the authorizing statutes and regulations as cited in Section II above. All DLNR personnel who have access to Federal fisheries information shall sign a NMFS non-disclosure statement prior to receipt of NMFS data. The DLNR shall endeavor to improve its fisheries information processing systems and quality of fisheries information to the extent practicable, supplemented by technical assistance and funds provided by NMFS.

B. NMFS

The NMFS may receive, use, and store State fisheries information collected by and transmitted to it from DLNR on a case-by-case basis for fisheries management, conservation of marine life and related scientific research. Any such State fisheries information shall be maintained and treated as confidential in accordance with the Freedom of Information Act, the Federal Records Act, and other applicable Federal laws. The NMFS shall support the maintenance and improvement of the State's fisheries information system and quality of fisheries information through technical assistance, manpower, and financial support to the extent practicable and consistent with applicable law.

V. GUIDELINES FOR INFORMATION DISCLOSURE AND PUBLICATION

To the extent permitted by applicable law, each party has the sole right to make decisions regarding disclosure of information collected under its own authority. To the extent permitted by applicable law, neither party shall disclose to unauthorized person(s) information in its possession which was collected under the other party's authority without the other party's

written permission. Confidential information supplied by one agency to the other agency may be published by the receiving agency in aggregate or summary form, provided that the form does not directly or inadvertently disclose the identity or confidential information, whether business or trade secrets, of any person who or entity that submits such information. Published information should appropriately acknowledge the agency source of the information used.

Parties should also take into account whether publication of such information received under this agreement would, if disclosed, frustrate a legitimate governmental function, including the collection of further confidential fisheries information. The aggregate or summary of fisheries information shall comprise no less than three individuals or enterprises, and the aggregate shall apply to all record types including individual catch totals, areas fished, dates fished, etc. This is to ensure that a reported summary cannot be deciphered so as to elucidate or identify an individual effort which is considered to be confidential or proprietary.

VI. CHANGE IN THE AUTHORIZING STATUTES

This memorandum of agreement supersedes and replaces the prior "Cooperative Agreement Between the Board of Land and Natural Resources, State of Hawaii, and Southwest Region, Southwest Fisheries Center, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, on the Exchange and Use of Confidential Fisheries Information," signed and effective January 4, 1988.

Any change, amendment, repeal of any authorizing or reauthorizing statute or regulation cited in this agreement; any change in the policies affecting fisheries and vessel registration information collection of any of the parties identified, shall be grounds to reconsider, modify, or cancel this agreement. Each party shall endeavor to monitor for such changes, and to apprise the other party when such changes are implemented.

VII. DURATION, AMENDMENT AND TERMINATION OF THE AGREEMENT

This agreement will become effective when signed by the parties. The agreement will terminate five years from the date of the last signature, but may be amended at any time by mutual written consent of the parties. Each party may terminate its participation in the agreement, by giving thirty (30) days written advance notice of such termination. Such termination of the agreement shall not require mutual consent.

VIII. RESOLUTION OF DISAGREEMENTS

Should disagreement arise on the interpretation of the provisions of this agreement, or amendments and/or revisions thereto, that cannot be resolved at the operating level, the area(s) of disagreement shall be stated in writing by each party and presented to the other party for consideration. If agreement on interpretation is not reached within thirty days, the parties shall

forward the written presentation of the disagreement to respective higher officials for appropriate resolution.

IN WITNESS WHEREOF, the State of Hawaii, by its Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed, and these presents to be executed this _____ day of _____, 20__, and the United States Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, by its Pacific Islands Regional Administrator and its Pacific Islands Fisheries Science Center Director, has caused this Memorandum of Agreement to be executed this _____ day of _____, 20__, to be effective on the date when all signatures are obtained.

STATE OF HAWAII

By _____
Chairperson
Board of Land and Natural Resources

Approved by the Board of Land
and Natural Resources at its meeting
held on:

NATIONAL MARINE FISHERIES SERVICE

By _____
NMFS Regional Administrator

By _____
NMFS Fisheries Science Center Director

APPROVED AS TO FORM:

Deputy Attorney General
State of Hawaii

Dated: _____

COOPERATIVE AGREEMENT
BETWEEN THE
BOARD OF LAND AND NATURAL RESOURCES
STATE OF HAWAII
AND
SOUTHWEST REGION
SOUTHWEST FISHERIES CENTER
NATIONAL MARINE FISHERIES SERVICE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE
ON THE
EXCHANGE AND USE OF CONFIDENTIAL FISHERIES INFORMATION

This Cooperative Agreement between the State of Hawaii, through its BOARD OF LAND AND NATURAL RESOURCES, hereinafter called the "BLNR," and the National Marine Fisheries Service, through its SOUTHWEST REGION DIRECTOR AND SOUTHWEST FISHERIES CENTER DIRECTOR, hereinafter called the "NMFS," sets forth the terms for the exchange and use of confidential commercial fisheries information.

I. PURPOSE OF COOPERATIVE AGREEMENT

Fisheries information is vital to scientific research which is the basis for management, conservation, and development of the marine resources. The timely acquisition of fisheries information requires coordination among governmental agencies. The BLNR (Division of Aquatic Resources) is the agency responsible for maintaining confidentiality over commercial fisheries information. Furthermore, there has been a long precedent of cooperation and information sharing between the BLNR and NMFS. In recognition of the growing need to continue exchange and use of confidential commercial fisheries information and a desire to operate efficiently and cost effectively while ensuring the confidentiality of information obtained from the fishermen, the State of Hawaii, through its Board of Land and Natural Resources and the National Marine Fisheries Service, through its Southwest Region Director and Southwest Fisheries Center Director, enter into this Cooperative Agreement.

The purposes of this Cooperative Agreement are two-fold: (1) to achieve coordinated intergovernmental exchange and use of confidential fisheries information for scientific research and fisheries management and conservation efforts while eliminating duplication of data acquisition; and (2) to ensure the confidentiality of information provided by the fishermen in accordance with applicable laws and regulations.

II. REFERENCES AND AUTHORITIES

The BLNR and the NMFS are subject to laws and regulations relating to the authority for collection of certain data and for the exchange and use of the fisheries data. Certain laws and regulations also require that the collecting agency maintain confidentiality of the information. The primary authorities are contained in:

A. State

1. Public Records, Section 92-50, Hawaii Revised Statutes
2. Fair Information Practice (Confidentiality of Personal Record), Chapter 92E, Hawaii Revised Statutes
3. Commercial marine license, Section 189-2, Hawaii Revised Statutes
4. Monthly catch report, Section 189-3, Hawaii Revised Statutes
5. Commercial marine dealers to report, Section 189-10, Hawaii Revised Statutes
6. Receipts in duplicate, Section 189-11, Hawaii Revised Statutes

B. Federal

1. Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 et seq.; 50 C.F.R. 603.
2. 15 U.S.C. 1525 (Authority of the Secretary of Commerce to make special studies on matters within the authority of the Secretary of Commerce).
3. Reorganization Plan No. 4 of 1970, 84 Stat. 2090.
4. Tuna Convention Act of 1950, 16 U.S.C. 951 et seq.
5. Fish and Wildlife Act of 1956, 16 U.S.C. 742(a) et seq.
6. Atlantic Tunas Convention Act of 1975, 16 U.S.C. 971-971h.
7. Marine Mammal Protection Act of 1972, 16 U.S.C. 1361, et. seq.
8. Endangered Species Act of 1973, 16 U.S.C. 1531, et seq.
9. NOAA Directive 88-30, Confidentiality of Fishery Statistics

III. DEFINITIONS

- A. State fisheries information means confidential data collected, stored, used or disclosed by the BLNR (Division of Aquatic Resources) under authority of State of Hawaii laws and regulations contained in Section II.A above.
- B. Federal fisheries information means confidential data collected, stored, used or disclosed by NMFS under authority of the Federal laws and regulations contained in Section II.B above.

IV. EXCHANGE AND USE OF CONFIDENTIAL FISHERIES INFORMATION

This Cooperative Agreement provides the means by which the BLNR (Division of Aquatic Resources) and NMFS are able to exchange fisheries information for scientific research, resource management, conservation, and development programs, to the extent permitted by the laws and regulations listed in Section II above. Confidential information exchanged under this Cooperative Agreement shall not be used for enforcement purposes. However, information exchanged under this Cooperative Agreement may be used to investigate the effectiveness of enforcement efforts and used to redesign enforcement activities. This Cooperative Agreement does not limit the purposes for which data may be used by the original collecting party.

V. RESPONSIBILITIES OF THE PARTIES

It is agreed that the BLNR (Division of Aquatic Resources) and the NMFS will ascribe to maintaining the integrity and value of their respective systems for collecting confidential fisheries information obtained by assuring confidentiality to suppliers of the information to the extent authorized by laws and regulations listed in Section II above. It is specifically agreed that the parties have the authority and the responsibility to maintain the confidentiality of exchanged information and will keep the information confidential. These promises are made to encourage fishers to supply accurate and complete fisheries catch information to the BLNR (Division of Aquatic Resources) and NMFS and to facilitate full cooperative use of available fisheries information between the parties to better support fisheries management, conservation, and development efforts. In recognition of this principle and of legal requirements affecting relationships pursuant to stated laws and regulations, the following responsibilities are agreed to by the parties:

A. State of Hawaii

The BLNR (Division of Aquatic Resources) may exchange, receive, use, and store Federal fisheries information transmitted to it by the NMFS on a case-by-case basis for fisheries resource management, conservation, and development purposes. Such information shall be maintained as confidential in accord with Section 189-3, Hawaii Revised Statutes. BLNR (Division of Aquatic Resources) shall maintain and improve the commercial fisheries catch information system to the best of its available manpower and funding.

B. NMFS

The NMFS may exchange, receive, use, and store State fisheries information transmitted to it by BLNR (Division of Aquatic Resources) on a case-by-case basis for purposes of fisheries resource management, conservation, and development purposes. This information shall be kept confidential in accord with the requirements for confidential information set forth in NOAA Directive 88-30. The NMFS shall support the maintenance and improvement of the State's commercial fisheries catch information system through technical assistance and other resources to the best of its ability.

VI. GUIDELINES FOR DATA DISCLOSURE AND PUBLICATION

Each party has the sole right to make decisions regarding disclosure of data and information collected under its own authority. Neither party shall disclose data in its possession which were collected under the other party's authority without the other party's written permission. Fisheries data supplied by one agency to the other agency may be published by the receiving agency in aggregate or summary form which does not directly or indirectly disclose the identity or business of any person who submits such data, with an appropriate acknowledgment of the original source of the data.

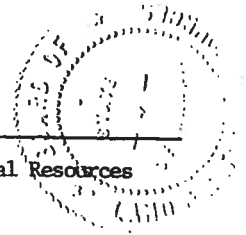
VII. TERMINATION

Upon written notice, given thirty (30) days in advance, this Cooperative Agreement may be terminated by mutual consent.

IN WITNESS WHEREOF, the State of Hawaii, by its Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and these presents to be executed this 4th day of January, 1988, and the National Marine Fisheries Service, by its Southwest Region Director and Southwest Fisheries Center Director, has caused this Cooperative Agreement to be executed this 4th day of January, 1988, effective as of the day and year first above written.

STATE OF HAWAII

By *Wesley*
Chairperson and Member
Board of Land and Natural Resources



Approved by the Board of
Land and Natural Resources
at its meeting held on

October 9, 1987

And By *[Signature]*
Member
Board of Land and Natural Resources

NATIONAL MARINE FISHERIES SERVICE

By *EC Jureston*
Director
Southwest Region

By *Rodney Bennett*
Director
Southwest Fisheries Center

APPROVED AS TO FORM:

Ronald G. Young
Deputy Attorney General
State of Hawaii

Dated: 12/31/87