

State of Hawaii  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Division of Boating and Ocean Recreation  
333 Queen Street  
Honolulu, Hawaii 96813

May 25, 2012

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, HI

REQUEST FOR AUTHORIZATION TO AMEND THE MEMORANDUM OF AGREEMENT (MOA) THAT WAS APPROVED BY THE BOARD ON AUGUST 12, 2011 WITH THE DEPARTMENT OF TRANSPORTATION REGARDING THE MAINTENANCE, PLANNING, INSTALLATION, AND MONITORING OF TEN DAY USE MOORINGS IN HILO BAY AS WELL AS ANOTHER ONE HUNDRED DAY USE MORINGS STATEWIDE.

**BACKGROUND:**

The Department of Land and Natural Resources (DLNR), Division of Boating and Ocean Recreation (DOBOR), currently has a statewide day use mooring program in place for the purpose of providing mooring opportunities in areas where there is heavy vessel traffic in order to reduce damages to the natural resources caused by anchors being dropped and retrieved from vessels.

Currently, the Department of Transportation (DOT) has a project entitled H.C. 50006.1, Construction of Inter-Island Cargo Terminal Facility at Hilo Harbor, Hawaii. As a condition of the proposed project, the Army Corps of Engineers requires a 404 permit that includes a mitigation plan for the loss of corals due to the dredging operations.

For their mitigation plan, the DOT proposed to install up to ten new day use moorings in Hilo Bay as well as maintain, plan, install, and monitor at least 100 day use mooring buoys statewide. Since DLNR currently has a day use mooring program in place, DOT proposed to work with DLNR and fund the new moorings as part of the existing program.

The current MOA was based on a previous Department of the Army (DA) permit allowing for dredging work. The DA permit was revised to include a new mitigation plan which requires amendments to the MOA. The primary amendments are five day use moorings are to be installed, maintenance of the day use moorings for two years, and quantify the public natural resources protection values attributable to the day use moorings through biological monitoring. DOBOR has met with DOT and agrees to the conditions outlined in the attached MOA (see exhibit A). The hope is that if this

mitigation effort is successful then DOBOR could use a similar mitigation program to satisfy the 404 permit requirement for the new Kawaihae South Harbor project that has been delayed for over three and one half years due to permitting issues.

RECOMMENDATION:

That the Board authorize the Chairperson, subject to the review and approval of the Attorney General, to enter into the amended Memorandum of Agreement with the DOT for the maintenance, planning, installation, and monitoring of five day use moorings in Hilo Bay as well as another twenty day use moorings statewide.

Respectfully submitted,



Edward R. Underwood  
Administrator

APPROVER FOR SUBMITTAL



William J. Aila, Jr.  
Chairperson and Member

## AMENDED MEMORANDUM OF AGREEMENT

WHEREAS, a Memorandum of Agreement (MOA) was entered into between the STATE OF HAWAII, DEPARTMENT OF TRANSPORTATION (DOT) and the STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES (DLNR), on August 12, 2011 for mitigation of dredging impacts arising from the DOT's project in Hilo Harbor.

WHEREAS, that MOA was based on the previous Department of Army (DA) permit allowing the dredging work.

WHEREAS, the DA permit has since been revised to include a new mitigation plan, which requires amendments to the MOA.

NOW, THEREFORE, the Parties agree to amend the MOA by replacing the MOA in its entirety with the following:

This Amended Memorandum of Agreement (MOA) is entered into on this \_\_\_\_ day of \_\_\_\_\_, 2012, by and between the STATE OF HAWAII, DEPARTMENT OF TRANSPORTATION (HDOT), whose street address is 869 Punchbowl Street, Honolulu, Hawaii 96813 and the STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES (DLNR), whose street address is 1151 Punchbowl Street, Room 130, Honolulu, Hawaii 96813; who are collectively referred to herein as the "Parties."

### **Background Information:**

- A. WHEREAS, HDOT has a project entitled H.C. 50006.1: Construction of Inter-Island Cargo Terminal Facility at Hilo Harbor, Hawaii – Dredging;
- B. The project area is approximately 8 acres with about 165,000 cubic yards of material to be dredged creating an approach fairway at a depth of (-)25 feet Mean Lower Low Water (MLLW) west of Pier 3 to accommodate commercial ships berthing at the future Pier 4;
- C. HDOT applied for and obtained a DA permit from the U.S. Army Corps of Engineers Honolulu District (Corps) under authority of Section 10 of the Rivers and Harbors Act of 1899 and Section DA of the Clean Water Act;
- D. The DA permit included a mitigation plan to compensate for lost public resources due to the dredging work;
- E. It was later decided to revise the approved Corps mitigation plan and resubmit the DA permit application to the Corps with the new mitigation plan;
- F. HDOT coordinated with DLNR for the revised mitigation plan to include maintenance, planning, installation and monitoring day use mooring buoys (DMB);
- G. The mitigation plan abides by Hawaii Administrative Rules, Chapter 13-257, entitled "Day Use Mooring Rules."

**Agreement:**

1. NOW, THEREFORE, in consideration of the Parties' respective commitments and mutual understandings and promises described herein, the Parties acknowledge that HDOT shall ensure that conditions of the approved DA permit (based on revised mitigation plan) are satisfied and agree as follows:
2. This Agreement will be used to execute the following three conditions as approved in the DA permit:
  - i. Planning and installation of five (5) DMBs in the Hilo area.
    - a) DLNR manages fisheries resources and boating activities in Hilo Bay. DLNR will be expected to provide representation at public meetings and comment upon the meeting results as it relates to planning for the number and placement of buoys.
    - b) As part of site determination, DLNR will be expected to either conduct or review qualitative benthic surveys at specific proposed DMB placement sites and quantitative surveys at the five selected DMB sites.
  - ii. Support maintenance for the statewide DMBs
    - a) Maintenance includes upkeep and replacement of necessary components for at least 20 DMBs within a period of 2 years.
    - b) Materials may be stockpiled for future use.
    - c) Develop a DMB database to track repair history of buoys.
  - iii. Quantify the public natural resources protection values attributable to the DMBs through biological monitoring.
    - a) Coral and benthic substrate monitoring around 5 existing DMBs and a corresponding control sites.
    - b) The frequency and type of use around the 5 existing and 5 new buoys will also be monitored.
    - c) Impact of DMBs on fish and coral density and diversity
3. The above conditions will have a performance period that shall coincide with the DA permit and begin on February 9, 2012, the date the final mitigation plan approval.
4. DLNR shall be responsible for obtaining all permits necessary to perform the work as described under the Agreement. DLNR has committed to utilizing their established relationships with private parties such as Malama Kai Foundation (MKF) to manage the DMB program including permitting, installation, maintenance and monitoring of the day use mooring buoys.
5. All improvements performed under this MOA will be monitored by both DLNR and HDOT to ensure that work is proceeding in accordance with the approved DA permit. Upon satisfactory completion, HDOT and DLNR will accept the improvements. DLNR shall then assume maintenance and control of the improvements. The improvements are items listed under the AGREEMENT as items i, ii, and iii, above.

6. DLNR shall use funding to complete items i, ii, and iii, above. Remaining funds shall be used at the discretion of DLNR to fund other aspects of the DMB program.
7. Copies of all amendments, notices or other changes to this MOA shall be provided to the Corps (reference File No. POH-2006-00338) by email at CEPOH-EC-R@usace.army.mil.

**Payment:**

1. Upon execution of this MOA, DLNR shall submit a billing request to HDOT referencing the MOA. HDOT shall then transfer the amount of \$230,272.00 to DLNR. This figure represents the total amount necessary to complete the three conditions listed above and further detailed in the DA permit. DLNR will be responsible for properly managing the funds to ensure work proceeds in a timely manner and is accomplished by the end of the performance period.
2. DLNR shall be responsible for any and all additional funding required. HDOT's contribution is capped at \$230,272.00.
3. DLNR shall reimburse the HDOT the entire amount if conditions of the DA permit are not met by the end of the performance period. Reimbursement shall be made in its entirety within the following fiscal year.

**Deliverables:**

1. DLNR shall submit a report to document the planning process and final "as-built" locations of the five new DMBs.
2. DLNR shall revise/update and provide a copy of the DMB monitoring database. The database will be used to catalog inventory, record history and anticipate future maintenance.
3. DLNR shall submit monitoring reports quantifying the effects of installing DMBs. The reports will be used to justify installation of future DMBs as an option for compensatory mitigation.
4. DLNR shall submit an expenditure summary report that details tasks and associated costs as well as a full accounting of all expenditures and outstanding encumbrances, including but not limited to, supporting documents for expenditures made.
5. DLNR shall submit quarterly progress reports that provide sufficient detail regarding Agreement item 2(i), 2(ii), and 2(iii), above.
6. All deliverables shall be submitted to HDOT upon completion and no later than 30 calendar days beyond the performance period.

**General Provisions:**

1. Entire Agreement. This MOA constitutes the entire agreement between the Parties, as of the Effective Date, with respect to the subject matter of this MOA, and shall supersede any and


all previous agreements, oral or written, pertaining to the subject matter contained herein. The Parties have not entered into this MOA in reliance upon any oral or written representations or information provided to one party by any representative of the other Party. There are no conditions to the effectiveness of this MOA.

2. Amendments. This MOA cannot be changed or amended orally. Any modification of this MOA shall be effective only if made in writing and signed by duly authorized representatives of all Parties hereto. If the Parties agree upon any modification of any term or condition of this MOA, all other terms and conditions of this MOA which are not expressly modified shall remain in full force and effect.
3. Assignment. This MOA may be assigned if the other Parties provide written consent to such assignment.
4. Governing Law. This MOA shall be governed by the laws of the State of Hawaii.
5. Notices. All notices, requests, demands and other communications under this MOA must be in writing and will be deemed to have been given on the date of service if served personally on the party to whom notice is to be given, or on the third day after mailing, if mailed to the party to whom notice is to be given, by first-class mail, registered or certified, postage prepaid.
6. Further Assurances. The Parties shall work together in good faith, and take such further actions and execute such further instruments as may be reasonably necessary to carry out the intent of this MOA.
7. No Waiver. No waiver of any provision of this MOA shall be binding unless executed in writing by the party to be bound thereby. The failure of a party to insist upon strict adherence to any term or condition of this MOA on any occasion shall not be considered a waiver or deprive that party of the right thereafter to insist upon strict adherence to that term or condition or to any other term of this MOA.
8. Severability. The provisions of this MOA are severable. The invalidity, illegality, or unenforceability, in whole or in part, of any provision of this MOA shall not affect the validity, legality, or enforceability of any other of its provisions. If one or more provisions hereof shall be declared invalid, illegal, or unenforceable, the remaining provisions shall remain in full force and effect and shall be construed in the broadest possible manner to effectuate the purposes hereof. The Parties further agree to replace such invalid, illegal, or unenforceable provisions with provisions which will achieve, to the extent possible, the economic, business and other purposes of the invalid, illegal, or unenforceable provisions.
9. Counterparts. This MOA may be signed in any number of counterparts, each of which when executed and delivered shall constitute and be deemed an original and all of which together shall constitute one and the same agreement, with the same effect as if the signatures thereto and hereto were upon the same instrument, notwithstanding that all of the parties are not signatories to the same original or counterpart, or that signature pages from different counterparts are combined. The signature of any party to any counterpart shall be deemed to

be a signature to and may be appended to any other counterpart. Telecopy or facsimile copies of original signature pages shall be deemed to be originally signed signature pages for all purposes of this MOA.

10. Indemnification. Should DLNR require the services of subcontractors to perform work as described under this MOA, the subcontractor shall indemnify, defend and hold harmless the State and its officers and employees, from and against action, liabilities, claims, suits, damages, liens, judgments, attorney's fees and costs arising out of or resulting from the acts or omissions of the subcontractor, its officers, trustees, directors or employees occurring during or in connection with the performance of services and obligations under this MOA.


Department of Transportation

By:   
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GLENN M. OKIMOTO  
Director, Department of  
Transportation

Date: MAY 02 2012

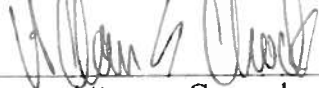
Approved by the Board of  
Land and Natural Resources  
at its meeting held on  
\_\_\_\_\_

Department of Land and Natural Resources

By:   
\_\_\_\_\_  
WILLIAM J. AILA, JR.  
Chairperson, Board of Land  
and Natural Resources

Date: 5/4/12

APPROVED AS TO FORM (HDOT):

  
\_\_\_\_\_  
Deputy Attorney General                      Date

APPROVED AS TO FORM (DLNR):

\_\_\_\_\_  
Deputy Attorney General                      Date