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AUSTRALIA COMMENTS ON VMS TEMPLATE VERSION 3

WCPFC-TCC7-2011-DP-12

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Paper prepared by Australia

Document 1

From: McGrath, Terri [<mailto:Terri.McGrath@daff.gov.au>]
Sent: Friday, September 16, 2011 11:25 AM
To: Glenn Hurry
Cc: Peter Flewwelling; Terri McGrath
Subject: VMS Template - comments by Australia [SEC=UNCLASSIFIED]

Dear Glenn

Thank you for sending through a revised draft of the VMS in-zone data template for our consideration.

Australia has a few comments on the draft. These are similar to comments we have provided previously, and are included in the attachment.

In addition to those comments, we note that this document uses language that is usually reserved for binding treaty-level documents (such as 'shall' and 'in force'), and is called an 'Agreement' (a term which is usually used in international law to refer to a treaty, convention or other legally binding instrument).

However, our understanding is that the intent of the document is not for it to be an independent treaty-level document under international law, but a statement recording a mutual understanding of existing obligations regarding access to Commission VMS data (which have already been established under other rules, standards, specifications and procedures) in a clear, transparent and accessible way.

In order to make this clear, we suggest that the following text be included as a new clause at the end of the Agreement:

*"This Agreement records the joint understanding of *Name of Commission Member* and the Western and Central Pacific Fisheries Commission regarding the application of the Commission VMS to waters under *Name of Commission Member's* national jurisdiction. It is not intended to be a legally binding instrument under international law."*

This will ensure that the nature and status of the Agreement is clear and that CCMs such as Australia, which has specific domestic ratification processes that apply in the case of legally binding international instruments, will not have to undergo domestic treaty ratification processes in order to sign the Agreement.

We look forward to discussing this issue further at TCC.

Kind regards

Terri

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AGREEMENT BETWEEN
NAME OF COMMISSION MEMBER
AND THE WESTERN AND CENTRAL PACIFIC FISHERIES COMMISSION (THE COMMISSION)
CONCERNING THE STANDARDS, SPECIFICATIONS AND PROCEDURES FOR THE APPLICATION OF THE
COMMISSION VMS TO WATERS UNDER THE NATIONAL JURISDICTION OF NAME OF COMMISSION
MEMBER
IN THE COMMISSION VESSEL MONITORING SYSTEM (COMMISSION VMS)
(Hereafter referred to as the "**NAME OF COMMISSION MEMBER**
/WCPFC VMS Agreement")

In accordance with Article 24(8) of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (the Convention), Conservation and Management Measure 2007-02, Standards, Specifications and Procedures adopted by the Commission and Rules of Procedure for access to Data and the WCPFC7 decision on application of the Commission VMS to national waters of CCMs, **Name of Commission Member** and the Western and Central Pacific Fisheries Commission (the Commission) have reached the following Agreement with the objective of fulfilling the request made by **Name of Commission Member** for the application of the Commission VMS to waters under **Name of Commission Member**'s national jurisdiction

Clause 1
Vessels to be covered

The application of the Commission VMS to the waters under the national jurisdiction of **Name of Commission Member** shall apply to all vessels subject to the Commission VMS that enter, transit through or occupy **Name of Commission Member** waters, for whatever purpose.

Clause 2
VMS Data Use

VMS data under this agreement shall be owned by the Commission and managed by the Secretariat in accordance with security and rules for data access. **Name of Commission Member** shall have access and use of the VMS data generated by the Commission VMS under this Agreement, relating to areas under their national jurisdiction within the Convention Area for monitoring, control and surveillance purposes, subject to the Commission's Rules and Procedures for the Protection, Access to and Dissemination of Data Compiled by the Commission and provided that any additional costs of such data are being borne by the **Name of Commission Member** in accordance with Clause 5.

Access to the VMS position data from vessels to be covered in accordance with Clause 1 shall only be granted to data acquired after the date of signing of Agreement, as determined in para. 4 of Clause 8.

Clause 3
VMS Data Access

Access to the VMS data from vessels to be covered in accordance with Clause 1 shall only be granted to the following entities:

Comment [A1]:

This should refer specifically to the title/s of the relevant rules and procedures so it is clear what the Secretariat is required to do. I assume these are:

1. *Information Security Policy (the ISP)*,
2. *Rules and Procedures for the Protection, Access to and Dissemination of Data Compiled by the Commission*
3. *The standards, specifications and procedures for the fishing vessel monitoring system (VMS) of the Western and Central Pacific Fisheries Commission (WCPFC) (the VMS SSPs)*

The Rules and Procedures for the Protection, Access to, and Dissemination of High Seas Non-Public Domain Data and Information Compiled by the Commission for the Purpose of Monitoring, Control and Surveillance (MCS) Activities and the Access to and Dissemination of High Seas VMS Data for Scientific Purposes only apply to **non-public domain data and information covering high seas fishing activities in the Convention Area**. As such, they wouldn't be relevant to this document. (see comments later in the document).

- **Authorised Personnel of MCS Entities notified to the WCPFC Secretariat in writing by the *Name of Commission Member*** in accordance with paragraph 20 of Section 4.4 of the Rules and Procedures for the Protection, Access to and Dissemination of Data Compiled by the Commission;
- The Executive Director and authorised staff at the WCPFC Secretariat;
- **Authorised Personnel of MCS Entities notified to the WCPFC Secretariat in writing by the flag Commission Member** in accordance with paragraph 20 of Section 4.4 of the Rules and Procedures for the Protection, Access to and Dissemination of Data Compiled by the Commission;

Clause 4
VMS Data Format

The VMS position data for waters under *Name of Commission Member*'s national jurisdiction is to be provided to the *Name of Commission Member* in a form other than a "read only" format that allows for the data to be managed.

Clause 5
VMS Costs and Payments

Any additional air-time costs for the transmission of all VMS data generated by the Commission VMS for vessels within the waters under the national jurisdiction of *Name of Commission Member*, and any additional programming costs associated with activating this Agreement within the Commission VMS that are required to meet special needs of this Agreement shall be borne by *Name of Commission Member*. Payments for air-time resulting from polling rates shall be made half yearly within 30 days of the receipt of invoice from the Commission Secretariat. Payment frequency for air-time costs will be reviewed periodically. Payment for any required additional programming changes to the current system will be made in advance following the receipt by the *Name of Commission Member* of a functional specification and associated costing from the WCPFC Secretariat. Failure to provide payment for the costs specified in this clause may result in the national jurisdiction of *Name of Commission Member* being removed from the Commission VMS within 14 days of notification of being in arrears.

Clause 6
Client Activation

Name of Commission Member will receive one (1) client-activation to be paid for by the Commission for access to high seas data for their fleets in accordance with WCPFC5. Any additional client-activation costs associated with Paragraph 6(c) of CMM 2007-02 for inclusion of waters under its national jurisdiction shall be borne by the requesting CMM. Additional client activations to access the system may be requested with costs associated with any additional activation to be borne by the *Name of Commission Member* at a current cost, which shall be determined by the Commission. The unit cost of client activations shall be annually reviewed to reflect the current policy of the Commission.

Comment [A2]: We are not sure what this refers to, perhaps it is the WCPFC/FAA VMS SLA that was adopted at WCPFC5, or perhaps it is meant to refer to a paragraph of the WCPFC5 record? Either way, this should be made clearer.

Clause 7
Roles and Responsibilities

Name of Commission Member

Name of Commission Member is responsible for managing the application of the Commission VMS to waters under its national jurisdiction. This responsibility will include the following:

- Nomination of authorised entities and personnel as per **clause 11** of the WCPFC Rules and procedures for the Protection, Access to, and Dissemination of High Seas Non-Public Domain Data and Information, **recognizing the rights of the WCPFC under Clause 11 of these Rules**

Comment [A3]: We would think that these would be the same people nominated under clause 3 of this agreement and, if that is correct, the two clauses should be consistent. We have made amendments to properly reflect the name of the high-seas data rules, but we aren't sure why there is a reference to these rules at all, given they only apply to high seas fishing activities and this is about in-zone VMS. We would have thought relevant references here would have been paragraphs 20 (nomination of representatives) and 21 (ensuring security and confidentiality) of the *Rules and Procedures for the Protection, Access to and Dissemination of Data Compiled by the Commission?*

Comment [A4]: We are not sure what the rights of the WCPFC are under clause 11 (although, as per above comment, we think this is the incorrect document to refer to).

Secretariat

The roles and responsibilities of the WCPFC Secretariat will be in accordance with the WCPFC VMS SSP, where relevant, and Clause 8 below. The Executive Director and authorised staff of the WCPFC Secretariat shall maintain the confidentiality and security of VMS data received through this agreement in a manner no less stringent than the security standards established by the Commission for the Secretariat in its Information Security Policy (ISP).

In addition, on execution of this Agreement, the WCPFC Secretariat will advise all CCMs that the **Name of Commission Member** has exercised the option to apply the Commission VMS to waters under its national jurisdiction. The WCPFC Secretariat will also maintain an updated list of all Commission Members that have access to Commission VMS data in their waters on the secure section of the WCPFC website.

Clause 8 **Standards, Specifications and Procedures (SSP)**

For application of the Commission VMS to the waters under the national jurisdiction of **Name of Commission Member** the current SSP for the Commission VMS shall apply, where relevant, with the following additional requirements under section 5 of the SSPs.

1. The Commission VMS shall include an automated alert to report when vessels enter or exit the **Name of Commission Member** EEZ. Vessels subject to the Commission's VMS must be reporting to the Commission VMS through automatic means upon entry into the **Name of Commission Member** EEZ and continue reporting while in waters under the national jurisdiction of **Name of Commission Member**.
2. While in waters under the national jurisdiction of **Name of Commission Member** vessels subject to the Commission's VMS must transmit automated position data to the Commission VMS according to the WCPFC VMS SSPs.
- 3.
4. **Name of Commission Member** shall provide to WCPFC Secretariat upon signature of this Agreement, its EEZ geographical coordinates, with the indication of any areas where the EEZ boundaries are not yet defined ("grey area")

Comment [A5]: We provided comments about this clause previously, and remain concerned about these paragraphs.

The VMS SSPs only require vessels to report while they are in the high seas. We still don't understand how a document agreed between a coastal State CCM and the Secretariat can require vessels flagged to other CCMs to transmit VMS data while in the EEZ of the coastal State CCM.

Article 24(9) obliges CCMs to require their fishing vessels that fish in the Convention Area in waters under national jurisdiction of another CCM to operate near real-time (VMS) in accordance with the SSPs determined by the coastal State.

We assume that it is up to each CCM to make sure its vessels know that they have to report while in the EEZs of relevant CCMs – I guess by actively ensuring they are informed. Vessel operators can't refer to the list of coastal State CCMs accessing EEZ data on the website since this is on the secure section.

WCPFC Secretariat shall within thirty (30) days of the conclusion of this Agreement, circulate the EEZ geographical coordinates submitted in accordance with sub paragraph 4 above to all Commission members.

Clause 9

Dispute Settlement

Any dispute arising from implementation of this Agreement shall be settled by negotiation between **Name of Commission Member** and the WCPFC. In the case that Parties are not able to settle the dispute within three (3) months, this Agreement shall terminate automatically.

Comment [A6]: Within 3 months of XXX?
Should this be 3 months from when one of the parties first notifying the other of a dispute? This should be clearer in the agreement.

Clause 10
Amendments

The Agreement may be amended in writing by the mutual consent of the Parties noted in Clause 9.

Clause 11
Termination

This Agreement shall remain in force until one Party gives written notice of its intention to terminate it, in which case this Agreement shall terminate one month after receipt of the notice of termination. The termination of this Agreement in accordance with this clause shall not affect liabilities incurred under the Agreement before its termination.

Clause 12
Authorities

Executed on behalf of the Government of **Name of Commission Member** by

Signed

Title
Government of **Name of Commission Member**

Date _____

Executed on behalf of the Commission by.....

Signed

Executive Director

Date _____

ANNEX 1

Name of Commission Member designated contact point and MCS Entity(ies)

For the purposes of administration of the *Agreement between Name of Commission Member and the Western and Central Pacific Fisheries Commission (the Commission) concerning the standards, specifications and procedures for the inclusion of the waters under the national jurisdiction of Name of Commission Member in the Commission Vessel Monitoring System (Commission VMS)* the following is the designated contact point and to be considered as an MCS Entity for access to non-public domain data in accordance with paragraphs 11 and 12 of the Rules and Procedures for the Protection, Access to, and Dissemination of High Seas Non-Public Domain Data and Information Compiled by the Commission for the Purpose of Monitoring, Control or Surveillance (MCS) Activities and the Access to and Dissemination of High Seas VMS Data for Scientific Purposes

Name of Commission Member

Name(s) _____

Position(s) _____

Phone Number (s):

Fax Number(s):

E-mail Address(s):