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March 13, 2008

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VIA E-Mail [jennifer.moore@noaa.gov] and Fax [(727) 824-5300]

Re: *Proposed Rule ESA §4(d) Rulemaking for Elkhorn and Staghorn Corals - Docket No. 071120724-7618-01*

Dear Ms. Moore,

The National Marine Manufacturers Association (NMMA) appreciates the opportunity to provide the National Marine Fisheries Service (NMFS) of the National Oceanic and Atmospheric Administration (NOAA) with comments regarding the Endangered Species Act (ESA) section 4(d) proposed rulemaking for elkhorn and staghorn corals. 72 Fed. Reg. 71,102 (Dec. 14, 2007).

By way of background, NMMA is the nation's largest recreational marine industry association, representing over 1,600 boat builders, engine manufacturers, and marine accessory manufacturers. NMMA members collectively produce more than 80 percent of all recreational marine products made in the United States. Recreational boating is a popular American pastime, with approximately 71 million boaters nationwide and over 13 million registered boats. Recreational boating and the marine industry are particularly important to the state most significantly impacted by the section 4(d) rulemaking, Florida. The Sunshine State presently ranks as the top state for boat registrations with over 1,000,000 boats registered.¹ Recreational boating annually contributes \$18.4 billion to Florida's economy, and the marine industry employs 220,000 Floridians.² Recreational boating is also extremely important to the economies of Puerto Rico and the U.S. Virgin Islands.

¹ Florida Department of Highway Safety and Motor Vehicles, *Annual Vessel Statistics by County*, (2007) at <http://www.flhsmv.gov/dmv/vslfacts.html>.

² Florida Office of Program Policy Analysis & Governmental Accountability, *Legislature May Wish to Consider Options for Enhancing Florida's Recreational Marine Industry*, Report No. 07-48 (Dec. 2007).

Given the vital importance of recreational boating to Florida, Puerto Rico and the U.S. Virgin Islands' economies and the vitality of the U.S. marine industry, NMMA is keenly interested in the impact the ESA section 4(d) rulemaking may have on boating and related recreational activities in the state and territories. NMMA recognizes that healthy coral reefs greatly enhance recreational enjoyment of Florida's waters and that coral systems must be protected in order to ensure the enjoyment of future generations of boaters. NMMA also recognizes, however, that regulatory efforts to protect and preserve elkhorn and staghorn corals must strike an appropriate balance with a need to maintain our coastal communities and public access to these systems for activities such as snorkeling, SCUBA diving, and fishing. Balancing these important objectives is especially critical in this case where NMFS has made the optional decision to apply the significantly more robust protections for endangered species to elkhorn and staghorn corals, which have only been designated as *threatened* species. 72 Fed. Reg. at 71,103. NMFS, according to its proposal, has taken this optional additional step in order to slow the species' rate of decline. NMFS has the authority to make exceptions to the effect of these additional measures. See 50 C.F.R. pt. 223 (referring to NMFS §4(d) rules).

NMMA offers the following comments regarding the section 4(d) rulemaking.

Public Education and Outreach is the Key Method to Limit the Potential for "Takes" Caused by Recreational Boating, including SCUBA Diving, Snorkeling, and Fishing

In NMMA's June 2, 2006 comment letter (attached) to NMFS regarding the first stage of the section 4(d) rulemaking, we offered to help NMFS perform public outreach and education efforts concerning ways recreational boaters can help protect elkhorn and staghorn corals. As noted in that letter, vessel groundings and other recreational impacts to corals often stem from a lack of public education and awareness regarding corals as opposed to a lack of regulations, because the vast majority of boaters seek to experience -- not harm -- these natural wonders. Also, widespread Federal and State of Florida recreational boating regulations concerning corals already exist, including prohibitions against damaging corals.³ In light of these considerations, NMMA believes that enhanced public outreach and education is the key to avoiding anthropogenic impacts to corals resulting from recreational activities. For instance, a targeted education initiative aimed at snorkeling and SCUBA operations in southeast Florida would help educate visitors, who are likely less knowledgeable and experienced in diving on coral reefs than locals, and could result in further reducing an already minor threat to Elkhorn and Staghorn corals.⁴

As one of the nation's premier representatives of boating interests, NMMA is in a unique position to aid NMFS in its public outreach and education efforts to ensure the protection of the threatened corals. NMMA stands ready to assist NMFS in connecting with the key boating constituencies in areas near the elkhorn and staghorn corals.

³ See, e.g. Fla. Stat. ch. 253.04(3), 258.083 (2007).

⁴ As noted in the Draft Environmental Assessment, there are no studies documenting the frequency of damage from SCUBA diving and snorkeling activities; however, there is likely some impact.

Recreational Boating Constitutes a Diminutive Fraction of the Multiple Stressors Contributing to the Species' Threatened Status

The relative insignificance of recreational boating as a threat to corals reinforces the conclusion that education and public outreach is the appropriate means to protect corals from this form of anthropogenic impact. NMFS specifically identifies disease “as the single largest cause of both elkhorn and staghorn coral mortality and decline.”⁵ The other two “major stressors” are elevated seas surface temperature and hurricanes.⁶ NMFS attributes the 97% decline in coral population levels to these three major stressors.⁷ Unfortunately, these major factors are not presently “manageable,” and thus in an effort to protect elkhorn and staghorn corals, NMFS can only regulate the myriad “lessor stressors,” only one of which is impacts from recreational boating. NMFS should not respond to this situation by over-regulating recreational boating, a far less significant, yet more manageable stressor, particularly when doing so restricts public access and reduces the economic contribution stemming from recreational boating, SCUBA diving, snorkeling, and fishing.

In addition to focusing on education initiatives, NMMA strongly urges NMFS to include exceptions for the unintentional take of the listed corals due to boating activities or for the maintenance of existing boating facilities. For example, a boat in a hurricane or severe storm may come loose from its moorings or be driven off course and the boat owner or operator would be unable prevent a grounding. It is unreasonable in this case to subject this boat owner to risk of enforcement under the ESA for such an unintentional act. In addition, the rebuilding, maintenance and expansion of existing boating facilities and infrastructure should be expressly exempted. In the case of a hurricane, the rebuilding of coastal communities and working waterfronts should not be unreasonably delayed due to a protracted consultation and permitting process.

Sustaining the Economic Benefits Associated with Elkhorn and Staghorn Corals Requires Sustaining the Corals and Sustaining Public Access

As repeatedly noted in NMFS’s Draft Environmental Assessment and Draft Economic Analysis documents, coral communities and coral reef ecosystems provide premier recreational boating destinations for SCUBA diving, snorkeling, and fishing. These activities substantially benefit southeast Florida’s economy. The following table, derived solely from the NMFS Draft Regulatory Impact Review (RIR) document, demonstrates the vital importance of coral reefs to the four Florida counties fronting waters containing elkhorn and staghorn corals:⁸

⁵ *Endangered and Threatened Species: Final Listing Determinations for Elkhorn Coral and Staghorn Coral*, 71 Fed. Reg. 26852, 26858 (May 9, 2004).

⁶ *Id.* at 26853.

⁷ *Endangered and Threatened Species; Conservation of Threatened Elkhorn and Staghorn Corals*, 72 Fed. Reg. 71102, 71103 (Dec. 14, 2007).

⁸ NMFS, *Draft Regulatory Impact Review and Initial Regulatory Flexibility Act Analysis For Proposed Endangered Species Act 4(d) Regulations for Threatened Elkhorn and Staghorn Corals*, A2-A19 (Sept. 2007).

Annual Recreational Boating-Related Economic Benefits (based on statistics from June 2000 – May 2001)				
County	Visitation of Artificial Reefs (Person-Days)	Reef-Related Expenditures: Sales	Reef-Related Expenditures: Income	Jobs Created
Palm Beach	4.24 million days	\$505 million	\$194 million	6,300 jobs
Broward	9.44 million days	\$2.1 billion	\$1 billion	36,000 jobs
Miami-Dade	9.2 million days	\$1.3 billion	\$614 million	19,000 jobs
Monroe	5.46 million days	\$504 million	\$140 million	10,000 jobs

These public usage, economic, and employment figures set recreational boating apart from the other so-called “lessor stressors” addressed by this rulemaking. Unlike urban stormwater runoff and other anthropogenic stressors, recreational access to areas containing elkhorn and staghorn corals actually creates an economic value in the coral system and thus financially motivates local governments to take actions that protect corals as an economic resource. Local governments are financially motivated to enhance pollution controls and support public education, because their economies need the billions of dollars and thousands of jobs created by the public’s enjoyment of coral systems through recreational boating, fishing, snorkeling, and SCUBA diving. On the flipside, regulatory actions that unduly impede public access and enjoyment of corals will reduce the economic benefits flowing to local governments from the unique recreational experiences only coral systems can provide and lessen the local governments’ economic incentives to protect and recover corals.

Thus, while the RIR assumes that protective regulatory measures implemented through ESA section 4(d) will enhance these economic benefits,⁹ the document should additionally recognize that increases in annual income to regional Florida economy requires the maintenance of recreational opportunities associated with corals and that sustaining recreational access maintains an economic incentive for local governments to act as responsible environmental stewards.

Further, efforts to avoid potential ESA section 9 prohibitions stemming from recreational boating should recognize the relationship between public access and these economic factors. NMFS lists “[a]ctivities conducted in shallow water coral reef areas, including boating, anchoring, fishing, recreational SCUBA diving, and snorkeling, that result in abrasion of or breakage to the listed corals” as a type of activity “that may be most likely to violate the prohibitions in section 9.”¹⁰ Again, as NMFS has stated, recreational boating represents a relatively minor stressor to elkhorn and staghorn corals when compared to disease, climate change, and hurricanes, and extensive regulations already exist that prohibit damage to corals from such recreational boating activities. Further, as pointed out in the Draft RIR and in this document, these activities create economic

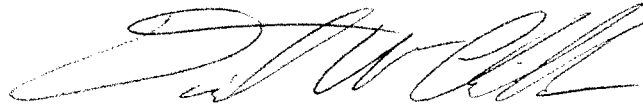
⁹ NMFS, *Draft Environmental Assessment: Proposed Endangered Species Act 4(d) Regulations for Threatened Elkhorn and Staghorn Corals*, 18 (Sept. 2007) (listing as a socioeconomic benefit of the preferred regulatory alternative, “[e]xpected increase in annual income to regional economies generated directly and indirectly from person-days of snorkeling, SCUBA diving, fishing and viewing elkhorn and staghorn reefs... .”)

¹⁰ 72 Fed. Reg. at 71108.

value in coral reefs and must be sustained in order to maintain the economic value. NMFS should be mindful of the unique station of recreational boating-related activities and avoid measures that improperly restrict public access of coral systems when applying the ESA section 9 prohibitions. Future ESA consultations concerning water access projects, such as marinas and single family docks, and the development of management plans for National Parks and National Marine Sanctuaries should recognize the public's right to enjoy these coral systems and should be mindful of the relationship between public access to corals and the economic benefits coral systems provide regional economies.

Again, NMMA appreciates the opportunity to comment on the on the ESA section 4(d) rulemaking elkhorn and staghorn corals. Please do not hesitate to contact David Childs, Esq. (850-222-7500; Davidc@hgslaw.com) or Cindy Squires, Esq, NMMA's Chief Counsel for Public Affairs and Director of Regulatory Affairs (202-737-9766; csquires@nmma.org) if you have any questions.

Respectfully submitted,



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Encl.: June 2, 2006 Comment Letter

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June 2, 2006

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Re: Final Rule to List Elkhorn and Staghorn Coral as Threatened Species under the Endangered Species Act (ESA) and Request for Information for ESA §4(d) Rulemaking and Critical Habitat Designation – Docket No. 050304058-6116-03

Dear Ms. Moore,

The National Marine Manufacturers Association (NMMA) appreciates the opportunity to present the National Marine Fisheries Service (NMFS) of the National Oceanic and Atmospheric Administration (NOAA) with comments on the forthcoming Endangered Species Act section 4(d) rulemaking and critical habitat designation for elkhorn and staghorn corals.

On March 18, 2005, NMFS determined that elkhorn and staghorn corals met the statutory definition of a threatened species.¹ This action was in response to a March 4, 2004, petition from the Center for Biological Diversity asking the agency to list elkhorn, staghorn, and fused-staghorn corals as either threatened or endangered under the ESA and to designate critical habitat. On May 9, 2006, NMFS issued its final rule to implement its determination to list elkhorn and staghorn corals as threatened. Further, NMFS asked for information from the public that may help the agency develop protective regulations and designate the critical habitat for these two species of coral. The agency announced that it will, pursuant to section 4(d) of the Endangered Species Act, issue regulations deemed “necessary and advisable to provide for the conservation of threatened species.”²

By way of background, NMMA is the nation’s largest recreational marine industry association, representing over 1,600 boat builders, engine manufacturers, and marine accessory manufacturers. NMMA members collectively produce more than 80 percent of all recreational marine products made in the United States. Recreational boating is a popular American pastime,

¹ *Endangered and Threatened Species: Final Listing Determinations for Elkhorn Coral and Staghorn Coral*, 71 Fed. Reg. 26,852 (May 9, 2004).

² 16 U.S.C. § 1533.

with almost 71 million boaters nationwide and over 13 million registered boats. In 2004, Florida ranked as the top state for boat registrations with over 946,000 boats registered. The recreational boating industry is a substantial contributor to the nation's economy with expenditures on recreational marine products and services of over \$37 billion in 2005 alone. In addition, the Florida Legislature recently determined that the annual economic impact of boating on the state of Florida was \$14 billion.

Coral communities and coral reef ecosystems provide premier recreational boating destinations for activities such as snorkeling, SCUBA diving, and fishing. NMMA understands that vibrant natural systems greatly enhance recreational enjoyment of Florida's waters and supports NMFS's environmental preservation efforts. NMMA offers its services to aid NMFS public outreach and education efforts regarding the protection of elkhorn and staghorn corals. NMMA also wants to ensure that the forthcoming regulations do not unduly restrict access and enjoyment of coral communities. To these ends, NMMA offers the following comments regarding the forthcoming Endangered Species Act section 4(d) rulemaking and critical habitat designation for elkhorn and staghorn corals.

A Partnership in Education, Outreach, and Enforcement

Vessel groundings and other recreational impacts to corals often stem from a lack of public education and awareness regarding corals as opposed to a lack of regulations, because the vast majority of boaters seek to experience, not harm, these natural wonders and widespread Federal and State of Florida recreational boating regulations concerning corals already exist. Thus NMMA believes that enhanced public outreach and education is the key to minimizing recreational impacts. As one of the nation's premier representatives of boating interests, NMMA is in a unique position to aid NMFS in its public outreach and education efforts to ensure the protection of the threatened corals. NMMA stands ready to assist NMFS in connecting with the key boating constituencies in the area near the elkhorn and staghorn corals.

A regulatory audit should precede new laws to avoid duplicative regulations and to utilize existing regulatory frameworks that protect corals

In the *Federal Register* notice, NMFS only specifically cites the "Fishery Management Plan for Coral and Coral Reefs of the Gulf of Mexico and South Atlantic" as a regulation that protects corals from human impacts.³ NMFS additionally notes that the "State of Florida and Commonwealth of Puerto Rico protect all corals to varying extents."⁴ This cursory treatment creates the impression that elkhorn and staghorn corals are only loosely protected; however, extensive international, federal, and state regulatory frameworks already address anthropogenic impacts to corals. In the international context, the Code of Conduct for Responsible Fisheries provides that coral protection is a principle of sustainable fisheries management.⁵ On the Federal

³ *Endangered and Threatened Species: Final Listing Determinations for Elkhorn Coral and Staghorn Coral*, 71 Fed. Reg. at 26,858. The agency states that "the regulation does not fully abate the threat from damaging fishing practices." *Id.*

⁴ *Id.*

⁵ Food and Agriculture Organization of the United Nations, Code of Conduct for Responsible Fisheries, Art. 6.8 (1995) at http://www.fao.org/documents/show_cdr.asp?url_file=/DOCREP/005/v9878e/v9878e00.htm (stating that reefs "should be protected and rehabilitated as far as possible and where necessary"); *see also* U.S. Department of

level, the U.S. National Park Service has developed extensive and effective vessel regulations aimed at protecting coral areas in the National Park System from potential groundings.⁶ The State of Florida, meanwhile, has implemented a body of law that comprehensively protects corals, including elkhorn and staghorn species.

Florida law explicitly protects elkhorn and staghorn coral from direct anthropogenic impacts, as Florida Fish and Wildlife Conservation Commission (FWC) rules provide that “no person shall take, attempt to take, or otherwise destroy, or sell, or attempt to sell, any...hard or stony coral (Order Scleractinia).”⁷ Other Florida coral regulations specifically apply to boating and related recreational activities. For example, damages to coral reefs in Florida state waters by a vessel may result in penalties of up to \$250,000.⁸ Florida law also disallows mooring over coral reefs as well as constructing boat houses or boat ramps over coral communities.⁹ FWC prohibits “possessing, moving, harvesting, removing, taking, damaging, disturbing, breaking, cutting, spearing, or otherwise injuring any coral” within various state waters of the Florida Keys National Marine Sanctuary.¹⁰ Further, fishing license fees are used in part to purchase and install vessel mooring buoys at coral reef sites.¹¹

Our brief survey of international, Federal, and particularly Florida state law thus reveals numerous regulations that already protect coral from direct anthropogenic impacts. A comprehensive regulatory audit would likely uncover additional regulations. NMMA thus strongly urges that prior to the section 4(d) rulemaking, NMFS perform a full regulatory audit of existing laws and regulations. In addition, NMFS should streamline its own elkhorn and staghorn rules by deferring to these laws and regulations to avoid needlessly duplicative measures that will not add any additional benefit to the species.

Regulatory measures aimed at boating and recreational impacts should be narrowly tailored to ensure that access and enjoyment are not unduly burdened

NMFS indicates that anthropogenic abrasion and breakage is a contributing stressor to elkhorn and staghorn corals.¹² NMMA recognizes that “human activity in coral reef areas” at times causes abrasion and breakage that may result in some habitat destruction.¹³ As indicated by the

Commerce, National Marine Fisheries Service National Oceanic and Atmospheric Administration, Implementation Plan for the Code of Conduct for Responsible Fisheries, at <http://www.nmfs.noaa.gov/sfa/international/code%20of%20conduct%20plan.htm>.

⁶ Dry Tortugas National Park, 71 Fed. Reg. 17777 (April 7, 2006) (to be codified 36 C.F.R. 7.27); Buck Islands Reef National Monument, 36 C.F.R. 7.73.

⁷ Fla. Admin. Code 68B-42.009(1).

⁸ Fla. Stat. 253.04(3); *see also* Fla. Stat. ch. 258.083.

⁹ Fla. Admin. Code 62-312.420(2)(e), 62-312.430(8) (prohibiting mooring over any coral reefs); Fla. Admin. Code 62-341.417(1)(m) (providing that with respect to boat ramps, “[n]o part of the accessory docks shall be located over submerged grassbeds or coral communities”); Fla. Admin. Code 62-341.427(2)(a) (providing that the “construction or extension of the boat house, boat shelter, boat lift, gazebo, or terminal platforms, shall not occur over...coral communities”).

¹⁰ Fla. Admin. Code 68B-6.003(1)(a).

¹¹ Fla. Stat. 370.06(2)(i)3.

¹² *Endangered and Threatened Species: Final Listing Determinations for Elkhorn Coral and Staghorn Coral*, 71 Fed. Reg. at 26857.

¹³ *Id.*

NMFS's final listing determination, however, recreation-based stressors constitute a small fraction of the multiple factors contributing to the species' threatened status. NMFS also notably attributes coral degradation to land development, land use, runoff,¹⁴ sewer outfalls, hurricanes, disease outbreak, climate variability, elevated sea surface temperature, algal competition, excessive nutrients, predation, contaminants, loss of genetic diversity, African dust, elevated carbon dioxide levels, sponge boring, natural abrasion, natural breakage, and sediment shading.¹⁵

Of these stressors, NMFS indicates that the major threats are "disease, hurricanes, and elevated sea surface temperature."¹⁶ NMFS specifically identifies diseases "as the single largest cause of both elkhorn and staghorn coral mortality and decline."¹⁷ The other two "major stressors" are elevated seas surface temperature and hurricanes.¹⁸ NMFS states that these major threats are currently "unmanageable;" however, management difficulties associated with major stressors should not translate into unduly burdensome regulations over far less significant, yet more manageable stressors, particularly when public access and the related economic contribution stemming from that access are at stake. NMMA thus requests that NMFS be mindful of the public's desire to experience these corals when it formulates its section 4(d) rule and avoid over-regulating vessel recreation and access simply because it is administratively convenient.

Again, NMMA appreciates the opportunity to comment on the on the forthcoming Endangered Species Act section 4(d) rulemaking and critical habitat designation for elkhorn and staghorn corals. Please do not hesitate to contact David Childs, Esq. (850-222-7500; Davidc@hgslaw.com) if you have any questions.

Respectfully submitted,



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¹⁴ It is a telling water quality statistic that 34 National Pollutant Discharge System (NPDES) stormwater permits have been issued in Monroe County, which includes the Florida Keys, while 405 NPDES stormwater permits have been issued in Miami-Dade County. See <http://www.dep.state.fl.us/water/wastewater/download.htm>.

¹⁵ *Endangered and Threatened Species: Final Listing Determinations for Elkhorn Coral and Staghorn Coral*, 71 Fed. Reg. at 26855 – 26858.

¹⁶ *Id.* at 26853.

¹⁷ *Id.* at 26858. An earlier publication by NOAA Fisheries indicated that coastal development and land-based runoff are likely contributors to coral diseases. See Andrew W. Bruckner, *Priorities for Effective Management of Coral Diseases*, NOAA Fisheries, 11, 14, 27 at <http://www.nmfs.noaa.gov/habitat/ead/ecosysdocs/ManagementPrioritiesforCoralDiseases.pdf>.

¹⁸ *Endangered and Threatened Species: Final Listing Determinations for Elkhorn Coral and Staghorn Coral*, 71 Fed. Reg. at 26853.