

will need to comply with these rules, or whether it is reasonable to assume that only a subset of them will be subject to these rules given that not all small businesses use the telephone for advertising purposes. After evaluating the comments, the Commission will examine further the effect any rule changes might have on small entities not named herein, and will set forth our findings in the final Regulatory Flexibility Analysis.

*Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities*

The *Do-Not-Call Registry NPRM* proposes to amend the National Do-Not-Call Registry rules to require telemarketers to honor registrations until consumers cancel their registrations. This proposed rule change will affect reporting, recordkeeping and other compliance requirements, as numbers currently registered will not be removed from the Registry after five years. However, as long as the FTC similarly changes its policies, we expect that telemarketers would continue to access the Registry and avoid calling numbers on the Registry as they are required to do so today.

*Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered*

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

The Commission is considering amending its rules to require telemarketers to honor national do-not-call registrations indefinitely and is seeking comment on this option. The alternative would be to not modify the rules and leave the registration period at 5 years. This would result is millions of national do-not-call registrations being removed from the registry in 2008 and leaving consumers without protection from unwanted telemarketing calls unless they take action to re-register. Small businesses, which believe the elimination of any date of expiration for

registrations would impact their business in a negative way, are requested to file comments and advise the Commission about such an impact.

*Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule*

The FCC's TCPA rules and the FTC's Telemarketing Sales Rule are duplicative in part. Should the Commission determine to amend its rules and there is no similar amendment made to the FTC's policies, the two sets of rules may be inconsistent.

**Ordering Clauses**

Pursuant to sections 1-4, 227, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151-154, 227 and 303(r); and § 64.1200 of the Commission's rules, 47 CFR 64.1200, the *Do-Not-Call NPRM* in CG Docket No. 02-278 is adopted.

The Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on the *Do-Not-Call Registry NPRM* on or before January 14, 2008, and reply comments on or before January 28, 2008.

**List of Subjects in 47 CFR Part 64**

Telecommunications, Telephone. Federal Communications Commission. **Marlene H. Dortch**, *Secretary*.

**Proposed Rule Changes**

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 64 as follows:

**PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS**

1. The authority citation for part 64 continues to read as follows:

**Authority:** 47 U.S.C. 154, 254(k); secs. 403(b)(2)(B),(c), Pub. L. 104-104, 110 Stat. 56. Interpret or apply 47 U.S.C. 201, 218, 222, 225, 226, 228, and 254(k) unless otherwise noted.

2. Section 64.1200 is amended by revising paragraphs (c)(2) introductory text and (c)(2)(i)(D) to read as follows:

**§ 64.1200 Delivery restrictions.**

\* \* \* \* \*

(c) \* \* \*

(2) A residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government. Any person or entity making telephone solicitations (or on whose behalf telephone solicitations are made) will not be liable for violating this requirement if:

(i) \* \* \*

(D) *Accessing the national do-not-call database.* It uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than 31 days prior to the date any call is made, and maintains records documenting this process; and

Note to paragraph(c)(2)(i)(D): The requirement in paragraph 64.1200(c)(2)(i)(D) for persons or entities to employ a version of the national do-not-call registry obtained from the administrator no more than 31 days prior to the date any call is made is effective January 1, 2005. Until January 1, 2005, persons or entities must continue to employ a version of the registry obtained from the administrator of the registry no more than three months prior to the date any call is made.

\* \* \* \* \*

[FR Doc. E7-24280 Filed 12-13-07; 8:45 am] BILLING CODE 6712-01-P

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 223**

[Docket No. 071120724-7618-01]

RIN 0648-AU92

**Endangered and Threatened Species; Conservation of Threatened Elkhorn and Staghorn Corals**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule; request for comments; notice of availability of a draft environmental assessment.

**SUMMARY:** We, NMFS, are proposing to issue protective regulations under of the Endangered Species Act (ESA) for two species listed as threatened, the elkhorn

coral and the staghorn coral. The proposed regulations would apply all the prohibitions enumerated in the ESA to these two coral species, with limited exceptions for two specified classes of activities that contribute to the conservation of the listed corals. In addition, we are announcing the availability of an environmental assessment (EA) that analyzes the impacts of promulgating these regulations. We are furnishing this notification to allow other agencies and the public an opportunity to review and comment on the proposed rule. All comments received will become part of the public record and will be available for review.

**DATES:** Comments on this proposal must be received by March 13, 2008.

**ADDRESSES:** You may submit comments, identified by the Regulatory Information Number (RIN) 0648-AU92, by any of the following methods:

- Mail: Assistant Regional Administrator, Protected Resources Division, NMFS, Southeast Regional Office, 263 13th Ave. South, St. Petersburg, FL 33701.

- Facsimile (fax) to: 727-824-5309.
- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal <http://www.regulations.gov>

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Moore or Sarah Heberling, NMFS, at the address above or at 727-824-5312; or Marta Nammack, NMFS, at 301-713-1401.

**SUPPLEMENTARY INFORMATION:**

**Background**

On May 9, 2006, we published a final rule listing elkhorn (*Acropora palmata*) and staghorn (*A. cervicornis*) corals as threatened under the ESA (71 FR 26852). The final listing rule describes the background of the listing actions for elkhorn and staghorn corals and provides a summary of our conclusions regarding the status of the listed corals. We have not previously proposed any

regulations pursuant to section 4(d) of the ESA for listed corals.

Section 4(d) of the ESA provides that whenever a species is listed as threatened, the Secretary of Commerce (Secretary) shall issue such regulations as the Secretary deems necessary and advisable to provide for the conservation of the species. Such regulations may include any or all of the prohibitions in ESA section 9(a)(1) that apply automatically to species listed as endangered. Those section 9(a)(1) prohibitions make it unlawful with limited specified exceptions, for any person subject to the jurisdiction of the United States to: “(A) import any such species into, or export any such species from the United States; (B) take any such species within the United States or the territorial sea of the United States; (C) take any such species upon the high seas; (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C); (E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species; (F) sell or offer for sale in interstate or foreign commerce any such species; or (G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 4 of this Act and promulgated by the Secretary pursuant to authority provided by this Act.” Section 11 of the ESA provides for civil and criminal penalties for violation of section 9 or regulations issued under the ESA.

Whether section 9(a)(1) prohibitions or other regulations are necessary and advisable to provide for the conservation of species depends in large part upon the biological status of the species, the potential impacts of various activities on the species, and on factors such as the existence and efficacy of other conservation activities. The two acroporid coral species have survived for millions of years through cycles in ocean conditions and climate. However, as a part of the listing process, we concluded their abundances have been dramatically reduced to less than three percent of former population levels by disease, elevated sea surface temperature, and hurricanes. Additionally, given the extremely reduced population sizes of these species, we determined that the following lesser stressors are contributing to the threatened status of the species: sedimentation, anthropogenic abrasion and breakage, competition, excessive nutrients, predation, contaminants, loss of genetic

diversity, African dust, elevated carbon dioxide levels, and sponge boring. We concluded that, within the jurisdiction of the United States, existing regulations have abated the threat posed by collection of the two species; however, existing regulatory mechanisms are inadequate to abate the myriad other threats causing the species’ status. Although elkhorn and staghorn corals are not currently endangered, they are likely to become so within the foreseeable future because of a combination of four of the five factors listed in section 4(a)(1) of the ESA, and this status is not being ameliorated by state or foreign government efforts to protect the species. Therefore, as discussed below, we have determined it is necessary and advisable in most circumstances to apply the section 9 prohibitions to both these threatened coral species, in order to provide for their conservation.

**Application of Section 9 Prohibitions to Listed Corals**

As discussed above, the two coral species have declined to less than three percent of their former abundances and are currently impacted by myriad stressors that are acting simultaneously on the species throughout their ranges. We determined the major stressors (i.e., disease, elevated sea surface temperature, and hurricanes) to these species’ persistence are severe, unpredictable, likely to increase in the foreseeable future, and, at current levels of knowledge, unmanageable. While the lesser stressors, enumerated above, have not been the primary causes of the species’ decline, managing them will contribute to the conservation of the two species by slowing the rate of decline and reducing the synergistic effects of multiple stressors on the species. Therefore, we believe that the ESA section 9(a)(1) prohibitions are necessary and advisable for the conservation of threatened elkhorn and staghorn corals, specifically to address the lesser stressors that are amenable to management. We believe that the prohibitions are not necessary and advisable in specific circumstances, and we are proposing specific exceptions for importation, exportation, and take, which are more fully described in the next section. Below is our discussion of the section 9 prohibitions which we are proposing to extend to the two listed corals.

Section 9(a)(1)(A) prohibits the importation and exportation of endangered species to or from the United States. We believe that it is necessary and advisable to extend this prohibition to elkhorn and staghorn

corals. Existing laws prohibit and restrict extraction and trade of live elkhorn and staghorn corals. International agreement restricts international trade of both elkhorn and staghorn corals (Convention on the International Trade of Endangered Species or CITES). Federal regulations prohibit harvest or possession of elkhorn or staghorn coral in Federal waters (e.g., Caribbean and Gulf of Mexico and South Atlantic Coral Fisheries Management Plans), and the Lacey Act prohibits trade of illegally obtained specimens. Sale of coral extracted from any waters is illegal in the U.S. Virgin Islands (U.S.V.I.), Puerto Rico, and Florida, except that the sale of live elkhorn and staghorn corals extracted from Florida waters or the Exclusive Economic Zone (EEZ) is legal when these corals are products of aquaculture (e.g., the corals have settled and grown on live rock products). Neither threatened coral species, however, is a product of commercial aquaculture anywhere within the United States, nor is there a directed market for either elkhorn or staghorn corals. More information on the specific Federal, state, and local laws and regulations concerning the import and export of corals is available in the *Atlantic Acropora* Status Review Document (BRT, 2005) or the Regulatory Impact Review for this proposed rule.

As discussed in the status review document, prior to listing the two species as threatened under the ESA, there was no evidence of extraction of live specimens from Federal or state waters, nor evidence of trade of live specimens taken from foreign waters and imported into the United States for aquaria or other uses. Lack of extraction and trade of live specimens prior to the listing of these corals can be attributed mostly to existing laws and regulations. However, it is possible that the ESA listing might encourage a black market for the trade of these species, as evidenced by the trade of other threatened and endangered species (e.g., sturgeon eggs, elephant ivory). The increased public exposure to these rare corals due to the ESA listing may make the two species more desirable for aquaria or other uses. Therefore, to prevent this activity and to support existing regulations concerning the import and export of these corals, we find it necessary and advisable to extend the ESA section 9(a)(1)(A) prohibition to elkhorn and staghorn corals in order to provide for the conservation of the two species.

Section 9(a)(1)(B) of the ESA prohibits the take of endangered species within the United States or the territorial sea of

the United States, and section 9(a)(1)(C) of the ESA prohibits the take of endangered species upon the high seas for any person subject to the jurisdiction of the United States. Take means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Activities that constitute harm may include significant habitat modification or degradation that actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns including breeding, spawning, rearing, migrating, feeding or sheltering (50 CFR 222.102). At the time of the drafting of the ESA, the high seas were defined as those waters not under any country's legal jurisdiction, and no country had yet designated an Exclusive Economic Zone (i.e., 200 nautical miles). Thus, "take on the high seas" is interpreted as take beyond any country's territorial seas, in the meaning of the ESA when it was first enacted. Based on available information, the territorial seas of countries within the range of the two threatened coral species end no more than 12 nautical miles NM (22.2 km) offshore (See, "Table of claims to maritime jurisdiction" as at December 29, 2006, at [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table\\_summary\\_of\\_claims.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/table_summary_of_claims.pdf)).

Take of the listed corals can result from numerous private and public activities, including recreational and commercial activities, by direct and indirect impacts, and intentionally or incidentally. Protecting listed corals from direct forms of take, such as physical injury or killing, whether intentional or incidental, will help preserve the species' remaining populations and slow their rate of decline. Protecting listed corals from indirect forms of take, such as harm that results from habitat degradation, will likewise help preserve the species' populations and also decrease synergistic, negative effects from other stressors. We therefore propose to extend the ESA section 9(a)(1)(B) prohibition to elkhorn and staghorn corals to manage for these threats. There are likely few locations where elkhorn and staghorn corals may possibly occur farther than 12 NM (22.2 km) from land, because typically the depth is too great. However, due to the dramatic decline in abundance and the myriad threats facing them, it is necessary and advisable for these species' conservation to protect the species from take everywhere they occur, including on the high seas, and thus we propose extending the ESA section 9(a)(1)(C)

prohibition to the listed corals. Ensuring that take is prohibited everywhere the corals may be found will also avoid difficulty in enforcing these regulations based on claims about the origin of coral specimens.

Sections 9(a)(1)(D), (E), and (F) of the ESA prohibit, among other things, the possession, sale, and transport of endangered species that are taken illegally or that are entered into interstate or foreign commerce. For the same reasons discussed above regarding the prohibition pursuant to ESA section 9(a)(1)(A), it is necessary and advisable to extend these prohibitions to the two corals. The ESA listing of these two species may make them a desirable commodity and encourage a black market. Therefore, the extension of these prohibitions will discourage the development of a black market and reinforce existing regulations on commercial activities involving corals.

Lastly, we are extending the section 9(a)(1)(G) prohibition against violating this and any other regulations we promulgate pertaining to these two corals.

#### Summary of Exceptions to Section 9 Prohibitions

The ESA allows for specific exceptions to the section 9 prohibitions through interagency consultation as prescribed by ESA section 7 or a permit issued pursuant to section 10. If this proposed rule becomes final and the section 9 prohibitions are extended to these two species, these exceptions would apply.

Section 7 of the ESA requires all Federal agencies to consult with us if actions they fund, authorize, or carry out may affect threatened corals or any other species listed under the ESA. We consult on a broad range of activities conducted, funded, or authorized by Federal agencies. These activities include, but are not limited to, national water quality standards and discharge permits, coastal and nearshore construction, dredging or discharge of fill material, navigation regulation, fishery regulation, and live-rock aquaculture. Incidental take of these two threatened corals that results from federally funded, authorized, or implemented activities for which section 7 consultations are completed, will not constitute violations of section 9 prohibitions against take, provided the activities are conducted in accord with all reasonable and prudent measures (RPMs) and terms and conditions contained in any biological opinion and incidental take statement issued by us.

Sections 10(a)(1)(A) and 10(a)(1)(B) of the ESA provide us with the authority

to grant exceptions to the ESA's prohibitions. Section 10(a)(1)(A) scientific research and enhancement permits may authorize exceptions to any of the section 9 prohibitions and may be issued to Federal and non-Federal entities conducting research or conservation activities that involve a directed take of listed species. A directed take refers to the intentional take of listed species. Section 10(a)(1)(B) incidental take permits may be issued to non-Federal entities performing activities that may incidentally take listed species in the course of an otherwise lawful activity; these permits provide an exception to the section 9(a)(1)(B) prohibitions.

We determined that in certain circumstances described below, extending the ESA section 9(a)(1)(A), (B), and (C) prohibitions to the two corals is not necessary and advisable. We are proposing exceptions to these prohibitions for two classes of activities that provide for the conservation of listed corals. Under specified conditions, (1) scientific research and enhancement activities conducted under six specific existing Federal, state, or territorial research permitting programs are exempt from the section 9(a)(1)(A), (B) and (C) prohibitions; and (2) restoration activities carried out by an authorized (under current laws) Federal, state, territorial, or local natural resource agency are exempt from the section 9(a)(1)(B) and (C) prohibitions. These exceptions are described in more detail in the following sections. These classes of activities are not excepted from the Section 9(a)(1)(D) through (F) prohibitions because allowing commercial activities does not provide for the conservation of the two species. The 9(a)(1)(G) prohibition will be applied to these activities so that it is unlawful to violate this rule or subsequent rules that we may promulgate under the ESA and pertaining to the corals.

#### *Exception to Prohibitions for Scientific Research and Enhancement Activities*

This exception would apply to both threatened corals covered by this proposed rule. In carrying out their resource management responsibilities, several Federal, state, and territorial natural resource management agencies permit scientific research and enhancement activities, including monitoring and other studies that are directed at, and occur within the geographic areas occupied by, the listed corals. Research or enhancement activities may involve collection of specimens from one location for study in another location, thus requiring an

exception to the import and export, as well as the take prohibitions. The following six agencies have permit programs that include corals, and we have evaluated and found that they provide for the conservation of the listed corals: National Ocean Service (National Marine Sanctuary Program), National Park Service, U.S. Fish and Wildlife Service (FWS), including CITES permit for research purpose only, Florida Fish and Wildlife Conservation Commission, Puerto Rico Department of Natural and Environmental Resources (DNER), and the U.S.V.I. Department of Planning and Natural Resources (DPNR). We compared each of these programs' substantive and procedural requirements to ESA section 10(a)(1)(A) scientific research and enhancement permit regulations. Review of the permitting process used by each of the six specific programs identified above revealed that each of these permit programs allow research activities that yield sufficient data to support the research objectives while limiting, to the maximum extent practicable, the amount of resources collected or impacted. We determined that the programs are restrictive enough to provide important conservation benefits to the listed corals without the additional requirements of section 10(a)(1)(A) scientific research permits. Additionally, we reviewed examples of the types of acroporid research that have been permitted in the past by these agencies (e.g., gene flow, disease etiology) and concluded that the continuation and future permitting of these types of research will provide for the conservation of these species by improving our understanding of the status and risks facing these threatened corals, and providing critical information for assessing the effectiveness of current and future management practices. Each of these programs has application requirements similar to those of the ESA section 10 permitting program. Each requires detailed background information, justifications, and descriptions of expected impacts prior to approval for all proposed scientific research. Additionally, each of these permitting programs has data reporting requirements and the ability to apply stringent terms and conditions on issued permits. If research directed at elkhorn and staghorn coral is in compliance with one of the permit programs listed above, any importation, exportation, or take that occurs under such a permit would not constitute a violation of the prohibitions, and an ESA section 10(a)(1)(A) permit would

not be required. The original of the issued permit must be carried and available for inspection during the research or enhancement activity.

#### *Exception to Prohibitions for Certain Restoration Activities*

This exception applies to both threatened corals and would except certain Federal, state, and territorial agency personnel, or their designees as applicable, from the prohibitions when they are performing specific restoration activities directed at the listed corals under an existing legal authority that provides for such restoration. For purposes of this exception, a "restoration activity" is the methods and processes used to provide immediate aid to injured individuals. For example, reattachment of colonies or fragments dislodged or broken by vessel groundings onto suitable hard substrates would be excepted from the prohibition when it is implemented under an existing legal authority. Thus, Florida Keys National Marine Sanctuary staff actions under the National Marine Sanctuaries Act's authority to undertake all necessary actions to prevent or minimize the destruction or loss of, or injury to, sanctuary resources, (16 U.S.C. 1443), would be excepted from the prohibitions when the restoration activity described in this prohibition is implemented for either of the two acroporid corals. Through this exception, we are not authorizing any activities which are not currently authorized under an existing statute, rather we are excepting these activities from the section 9(a)(1)(B) and (C) take prohibitions for the two listed corals. The activity which caused the injury is not excepted by this rule. Any person claiming this exception shall provide proof they are acting under the authority of the listed laws upon request by a law enforcement agent.

Several Federal, state, and territorial government agencies have authorization to engage in the specific type of restoration activities covered by this proposed exception. We have included response, removal, or remedial authority under several Federal statutes in this proposed exception, because one or more of these authorities have been interpreted to include the type of natural resource restoration activity described above; for example, actions required to respond to a substantial threat of a discharge may dislodge or break coral fragments, and reattaching those fragments are legitimate response activities. However, we are not including removal or remedial authority in state or territorial laws, because we are not aware that these authorities have

been interpreted to include restoration activities. For state and territorial authorities, the following table currently only includes those that expressly provide for direct restoration of natural resources including corals. We are specifically requesting the states and territories included in Table 1 to

comment on whether we have included all their authorities that could encompass the restoration activities proposed to be excepted from the prohibitions. The following table lists the authorizing statute, the specific provision, and specific agencies or offices authorized under existing

statutes to implement the coral restoration activities defined in this proposed exception. We are also requesting that the agencies listed ensure the rule correctly identifies the specific offices authorized to implement the statutory provisions.

TABLE 1. AGENCIES AND AUTHORIZING STATUTES WHOSE CORAL RESTORATION ACTIVITIES WOULD BE EXCEPTED FROM THE SECTION 9(A)(1)(B) AND (C) PROHIBITION BY THIS PROPOSED RULE IF FINALIZED.

FEDERAL:		
Agency/Person	Statute and Specific Provision(s)	Description of Authority
NOAA, National Ocean Service (NOS)	National Marine Sanctuaries Act 16 U.S.C. 1433	Authorized to conduct, among other things, all necessary actions to prevent or minimize actual or imminent risk of destruction or loss of, or injury to, Sanctuary resources.
NOAA NOS	Coral Reef Conservation Act, 16 U.S.C. 6406	Authorized to conduct activities to conserve coral reefs, including restoration.
Commandant, U.S. Coast Guard (USCG), Authorized representatives of States or Indian Tribes.	"Oil Pollution Act" 33 U.S.C. 2702	Authorized to conduct the removal of discharges of oil, including the prevention, minimization or mitigation of substantial threats of discharges.
Designated Federal, State or Indian tribal natural resources trustees, including NOAA, Department of Interior (DOI), Florida Department of Environmental Protection (FDEP), Puerto Rico DNER, and U.S. Virgin Islands DPNR.	33 U.S.C. 2706	Authorized to restore or rehabilitate trust natural resources injured, destroyed or lost as a result of discharges of oil, or substantial discharges of oil.
Administrator, Environmental Protection Agency (EPA) or Commandant, USCG; Authorized representatives of States.	"Clean Water Act" 33 U.S.C. 1321	Authorized to conduct removal of and mitigation or prevention of substantial threats of discharges of oil or hazardous substances to certain waters; protection, rescue, and rehabilitation of, and minimization of risk of damage to, fish and wildlife resources harmed by, or that may be jeopardized by, discharges;
Designated Federal, State or Indian tribal natural resources trustees, including NOAA, DOI, FDEP, DNER, and DPNR.		Authorized to conduct restoration or rehabilitation of public trust natural resources damaged or destroyed as a result of discharges.
Administrator of the EPA; States or Indian Tribes in cooperative agreements with EPA; Heads of other federal agencies where release is from vessel or facility solely under their control.	"Superfund Act" (CERCLA) 42 U.S.C. 9604	Authorized to conduct removal and other remedial action for releases or substantial threats of releases of hazardous substances into the environment.
Administrator of the EPA	42 U.S.C. 9606	Authorized to conduct abatement actions in response to imminent and substantial endangerment to the public health or welfare or the environment from actual or threatened releases of hazardous substances.
Designated Federal, State or Indian tribal natural resources trustees, including NOAA, DOI, FDEP, DNER, and DPNR	42 U.S.C. 9607	Authorized to conduct restoration and rehabilitation of natural resources injured, destroyed or lost as a result of actual or threatened releases of hazardous substances.
DOI, National Park Service (NPS)	Park System Resource Protection Act, 16 U.S.C. 19jj 16 U.S.C. 668dd-668ee (National Wildlife Refuge System)	Authorized to conduct all necessary actions to prevent or minimize actual or imminent risk of destruction, loss of, or injury to Park System resources, and to restore such resources.
DOI	National Wildlife Refuge System Administration Act, 16 U.S.C. 668	Authorized to administer refuges for the conservation of fish and wildlife within refuges.

TABLE 1. AGENCIES AND AUTHORIZING STATUTES WHOSE CORAL RESTORATION ACTIVITIES WOULD BE EXCEPTED FROM THE SECTION 9(A)(1)(B) AND (C) PROHIBITION BY THIS PROPOSED RULE IF FINALIZED.—Continued

FEDERAL:		
Agency/Person	Statute and Specific Provision(s)	Description of Authority
<b>FLORIDA:</b>		
The Board of Trustees of the Internal Improvement Trust Fund	State Lands; Board of Trustees to Administer FL Statute § 253.03	Authorized, among other things, to administer, manage, conserve, and protect all lands owned by the State or any of its agencies, departments, boards or commissions.
	Duty of Board to Protect, etc. FL Statute. § 253.04 FDEP	Authorized to protect, conserve, and prevent damage to state-owned lands; FDEP authorized to assess civil penalties for damage to coral reefs in state waters.
Governor and Cabinet; FDEP	Land Acquisition for Conservation or Recreation; Conservation and Recreation Lands Trust Fund FL Statute § 259.032	Authorized to use monies in the Fund to, among other things, promote restoration activities, and manage lands acquired under this section to protect or restore their natural resource values.
FDEP	Pollutant Discharge Prevention and Removal; Liability for Damage to Natural Resources FL Statute § 376.121	Authorized to recover the costs of restoration of state natural resources damages by pollution discharges, and to use funds recovered for, among other purposes, restoration of the damaged resources.
FDEP	Land and Water Management; Coral Reef Restoration FL Statute § 390.0558	Authorized to use monies in the Ecosystem Management and Restoration Trust Fund to restore or rehabilitate injured or destroyed coral reefs.
<b>U.S. VIRGIN ISLANDS:</b>		
DPNR	DPNR; Powers and Duties of Department 3 V.I.C. § 401	Authorized to undertake programs and projects for, among other things, the conservation of natural resources of the U.S.V.I., for the restoration and preservation of the scenic beauty of the U.S.V.I., and for the conservation, maintenance and management of U.S.V.I. wildlife, the resources thereof, and its habitat.
DPNR	Conservation; Croix East End Marine Park Established; 12 V.I.C. § 98	Authorized to protect territorially significant marine resources, including coral reefs, in the St. Croix East End Marine Park.
<b>PUERTO RICO:</b>		
DNER	Conservation; Protection, Conservation and Management of Coral Reefs 12 L.P.R.A. §§ 241-241g et seq.	Authorized to, among other things, take all measures needed for the protection, conservation and management of coral reefs and coral communities throughout the territorial waters of the Commonwealth of Puerto Rico.
DNER	Conservation; Natural Patrimony Program 12 L.P.R.A. § 1227	Authorized to acquire, restore and manage lands, natural communities and habitats identified as, among other things, deserving preservation for their natural resource values.
DNER	Conservation; Tres Palmas de Rincon Marine Reserve 12 L.P.R.A. § 5063	Authorized to administer, rehabilitate and conserve the reserve.

#### Identification of Those Activities That Would Constitute a Violation of Section 9 of the ESA

On July 1, 1994, NMFS and FWS published a policy (59 FR 34272) that requires us to identify, to the maximum

extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the ESA. The intent of this policy is to increase public awareness of the effect of a listing on proposed and ongoing activities within a species'

range. We must identify to the extent known, specific activities not considered likely to result in violations of section 9, as well as activities that will be considered likely to result in violations. We believe that, based on the available information, the following

actions will not result in a violation of section 9:

1. Collection, handling, and possession of listed corals that are acquired lawfully through an ESA section 10 permit or through one of the exceptions in this proposed rule; or

2. Activities that result in incidental take authorized by an incidental take statement issued through a biological opinion pursuant to section 7 or permitted through section 10 of the ESA.

Based on available information, we believe the following categories of activities are those most likely to result in a violation of the ESA section 9 prohibitions. We wish to emphasize that whether a violation results from a particular activity is entirely dependent upon the facts and circumstances of each incident. The mere fact that an activity may fall within one of these categories does not mean that the specific activity will cause a violation; due to such factors as location and scope, specific actions may not result in direct or indirect adverse effects on the species. Further, an activity not listed may in fact result in a violation. However, the following types of activities are those that may be most likely to violate the prohibitions in section 9, which would be extended to the listed corals through this rule:

1. Removing, damaging, poisoning, or contaminating elkhorn or staghorn corals.

2. Removing, poisoning, or contaminating plants, wildlife, or other biota required by listed corals for feeding, sheltering, or other essential behavioral patterns.

3. Removing or altering substrate, vegetation, or other physical structures that are essential to the integrity and function of listed corals' habitat.

4. Altering water flow or currents to an extent that impairs spawning, feeding, or other essential behavioral patterns of listed corals.

5. Discharging pollutants, such as oil, toxic chemicals, radioactivity, carcinogens, mutagens, teratogens, or organic nutrient-laden water, including sewage water, into listed corals' habitat to an extent that disrupts or prevents the reproduction, development, or normal physiology of listed corals.

6. Releasing non-indigenous or artificially propagated species into listed corals' habitat or locations from where they may access the habitat of listed corals.

7. Activities 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.

8. Interstate and foreign commerce dealing in listed corals, and importing or exporting listed corals.

9. Shoreline and riparian disturbances (whether in the riverine, estuarine, marine, or floodplain environment) that may disrupt or prevent the reproduction, settlement, reattachment, development, or normal physiology of listed corals (e.g., land development, run-off, dredging, and disposal activities that result in direct deposition of sediment on corals, shading, or covering of substrate for fragment reattachment or larval settlement).

10. Activities that modify water chemistry in coral habitat to an extent that disrupts or prevents the reproduction, development, or normal physiology of listed corals.

11. Activities that result in elevated water temperatures in coral habitat that cause bleaching or other degradation of physiological function of listed corals. For example, in our economic analysis on this rule, we identified discharges of cooling water effluent from power plants as an activity that may result in elevated sea surface temperature.

This list provides examples of the types of activities that could have a high risk of causing a violation, but it is by no means exhaustive. It is intended to help people avoid violating the ESA and to encourage efforts to recover the threatened corals addressed in this proposed rule.

Persons or entities concluding that their activity is likely to violate the ESA are encouraged to immediately adjust that activity to avoid violations and to seek authorization under: (a) an ESA section 10 incidental take permit; (b) an ESA section 10 research and enhancement permit; or (c) an ESA section 7 consultation. The public is encouraged to contact us (see **FOR FURTHER INFORMATION CONTACT**) for assistance in determining whether circumstances at a particular location, involving these activities or any others, might constitute a violation of this proposed rule if finalized.

In making a determination that it is not necessary and advisable to impose ESA section 9 take prohibitions on certain activities, we recognize that new information may require a reevaluation of that conclusion at any time. For any of the exceptions from the prohibitions described in this proposed rule, we will evaluate periodically the activity's effect on the conservation of listed corals. If we determine that it becomes necessary and advisable for the conservation of the species, we will impose take

prohibitions on the activities previously excepted through rulemaking.

#### Public Comments Solicited

To assist us in identifying appropriate prohibitions and exceptions identified in this proposed rule, we held seven public information-gathering workshops in Florida, Puerto Rico, and the U.S.V.I. in May 2006. Representatives from Federal, state, and territorial resource management agencies, non-governmental organizations, local fishing communities, academic and coral research institutions, and the general public attended the Acropora Conservation Workshops. The purpose of these workshops was to gather as much information as possible about activities and programs that affect the two threatened coral species, including information about the impacts of these activities and programs.

We are soliciting comments, information, and/or recommendations on any aspect of this proposed rule from all concerned parties (see DATES and ADDRESSES). We will consider all relevant information, comments, and recommendations received before reaching a final decision on ESA section 4(d) regulations for listed corals. If we determine it is necessary and advisable for the conservation of the species, we may add or remove prohibitions or exceptions on the basis of public comment.

#### Classification

We determined that this action is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management programs of Florida, Puerto Rico, and U.S.V.I.. This determination has been submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act.

Pursuant to E.O. 13132, the Assistant Secretary for Legislative and Intergovernmental Affairs will provide notice of the proposed action and request comments from the appropriate official(s) in the states and territories where the two corals occur.

This proposed rule has been determined not to be significant under Executive Order 12866.

We prepared an initial regulatory flexibility analysis (IRFA), pursuant to section 603 of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), that describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and its legal basis are included in the preamble of this proposed rule. Small entities may be affected if a project they seek to

implement requires ESA section 7 consultation and may adversely affect the listed coral species, requiring minor changes to the project to lessen impacts on the corals (RPMs). Reporting requirements of the rule would be solely associated with implementation of the required section 7 RPMs. No record keeping requirements are proposed. No existing Federal rules or laws duplicate or conflict with the proposed rule. Existing Federal rules and laws overlap the proposed rule only to the extent that they provide for the protection of natural resources or corals in general. A summary of the impacts analysis follows.

The IRFA found that a number of existing Federal, state, or local laws prohibit take, possession, or sale of, and/or damage to, corals. Puerto Rico and U.S.V.I. law prohibit the take and sale of elkhorn and staghorn corals. Florida law prohibits take of these corals, with an exception provided for corals that attach to rock placed by aquaculture operations (i.e. live rock) that have appropriate permits. Florida law allows sales of dead elkhorn or staghorn coral skeletons with proof that the specimens were not taken illegally. There is anecdotal evidence that Florida shell shops have sold dead specimens of these species, and this rule does not preclude sales of dead specimens obtained legally before listing. There is no historical evidence of any live rock operations selling live rock with these species attached in the past 10 years of observations reported by live rock producers. There is also no historical evidence of international trade of either of these species.

It is anticipated that, on average, approximately 44 non-Federal grantees or permittees, or their contractors, could be affected annually if the proposed rule is implemented. Historically, these projects have involved pipeline installation and maintenance, mooring construction and maintenance, dock/pier construction and repair, marina construction, bridge repair and construction, new dredging, maintenance dredging, National Pollutant Discharge Elimination System (NPDES)/water quality standards, cable installation, beach nourishment, shoreline stabilization, reef ball construction and installation, and port construction. Our database does not track whether applicants have been small entities, so it is impossible to determine the number of grantees, permittees, or contractors that may be small entities in the future. There is no indication that affected project applicants or their contractors would be

limited to, nor disproportionately comprised of, small entities.

The proposed rule will not result in an increase in the number of ESA section 7 consultations. Based on our experience with section 7 consultations for other species, incremental administrative costs of identifying RPMs will be negligible, compared to the analytical requirements and associated costs already required by the duty to consult to ensure the action does not jeopardize listed species. Hence, we have assumed there will be no administrative costs of consultation associated with the proposed rule. Though we have characterized the costs associated with individual types of project modifications for the projected future activities, no total cost of this rule can be identified; the lack of specific information on the design and location of projected future projects limits our ability to forecast the exact type and amount of modifications required. However, the majority of the project modifications that NMFS would always require for these actions are currently required by other regulatory agencies. In addition, current ESA regulations require that RPMs cannot alter the basic design, location, scope, duration, and timing of an action and may only involve minor changes.

We considered four alternatives for extending section 9(a)(1) prohibitions to threatened corals. These included a preferred alternative (i.e., this proposed rule), a no action alternative, and two additional alternatives. The no action alternative was not selected because it did not meet the conservation objectives of the proposed rule. The remaining two alternatives were not selected because they (1) were judged to have less conservation value for the corals, and (2) could result in smaller annual incomes generated by small businesses that rely on resident and visitor use of coral reefs.

This action does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act.

This proposed rule is consistent with E.O. 13089, which is intended to preserve and protect the biodiversity, health, heritage, and social and economic value of U.S. coral reef ecosystems and the marine environment.

#### List of Subjects in 50 CFR Part 223

Endangered and threatened species, Exports, Imports, Transportation.

Dated: December 7, 2007.

**William T. Hogarth,**

*Assistant Administrator for Fisheries,  
National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 223 is proposed to be amended as follows:

#### **PART 223—THREATENED MARINE AND ANADROMOUS SPECIES**

1. The authority citation for part 223 continues to read as follows:

**Authority:** 16 U.S.C. 1533(d).

2. In subpart B of part 223, add § 223.208 to read as follows:

##### **§ 223.208 Corals.**

(a) *Prohibitions.* (1) The prohibitions of section 9(a)(1) of the ESA (16 U.S.C. 1538(a)(1)) relating to endangered species apply to elkhorn (*Acropora palmata*) and staghorn (*A. cervicornis*) corals listed as threatened in § 223.102(d), except as provided in section 223.208(d).

(2) It is unlawful for any person subject to the jurisdiction of the United States to do any of the following:

(i) Fail to comply immediately, in the manner specified at § 600.730 (b) through (d) of this Title, with instructions and signals specified therein issued by an authorized officer, including instructions and signals to haul back a net for inspection;

(ii) Refuse to allow an authorized officer to board a vessel, or to enter an area where fish or wildlife may be found, for the purpose of conducting a boarding, search, inspection, seizure, investigation, or arrest in connection with enforcement of this section;

(iii) Destroy, stave, damage, or dispose of in any manner, fish or wildlife, gear, cargo, or any other matter after a communication or signal from an authorized officer, or upon the approach of such an officer or of an enforcement vessel or aircraft, before the officer has an opportunity to inspect same, or in contravention of directions from the officer;

(iv) Assault, resist, oppose, impede, intimidate, threaten, obstruct, delay, prevent, or interfere with an authorized officer in the conduct of any boarding, search, inspection, seizure, investigation, or arrest in connection with enforcement of this section;

(v) Interfere with, delay, or prevent by any means, the apprehension of another person, knowing that such person committed an act prohibited by this section;

(vi) Resist a lawful arrest for an act prohibited by this section;

(vii) Make a false statement, oral or written, to an authorized officer or to



the agency concerning applicability of the exceptions enumerated in paragraph (d) of this section relating to elkhorn and staghorn corals;

(viii) Make a false statement, oral or written, to an authorized officer or to the agency concerning the fishing for, catching, taking, harvesting, landing, purchasing, selling, or transferring fish or wildlife, or concerning any other matter subject to investigation under this section by such officer, or required to be submitted under this part 223; or

(ix) Attempt to do, solicit another to do, or cause to be done, any of the foregoing.

(b) *Affirmative defense.* In connection with any action alleging a violation of this section, any person claiming the benefit of any exception, exemption, or permit under this section has the burden of proving that the exception, exemption, or permit is applicable, was granted, and was valid and in force at the time of the alleged violation, and that the person fully complied with the exception, exemption, or permit.

(c) *Exceptions.* Exceptions to the prohibitions of section 9(a)(1) of the ESA (16 U.S.C. 1538(a)(1)) applied in paragraph (a) of this section relating to elkhorn and staghorn corals are described in the following paragraphs (1) through (5):

(1) *Permitted scientific research and enhancement.* Any import, export, or

take of elkhorn or staghorn corals resulting from conducting scientific research or enhancement directed at elkhorn and staghorn corals is excepted from the prohibitions in ESA sections 9(a)(1)(A), (B) and (C) provided a valid resource research or enhancement permit has been obtained from one of the following Federal or state agencies: NOAA National Ocean Service National Marine Sanctuary Program, National Park Service, U.S. Fish and Wildlife Service (including CITES permit), Florida Fish and Wildlife Conservation Commission, Puerto Rico Department of Natural and Environmental Resources, or the U.S. Virgin Islands Department of Planning and Natural Resources. The importation, exportation, or take must be in compliance with the applicable terms and conditions of the permit, and the permit must be in the possession of the permittee while conducting the activity.

(2) *Restoration activities.* Any agent or employee of certain governmental agencies may take listed elkhorn or staghorn corals without a permit, when acting in the course of conducting a restoration activity directed at elkhorn or staghorn coral which is authorized by an existing authority (see Table 1). Take of elkhorn or staghorn corals during such restoration activity is excepted from the prohibitions in ESA sections 9(a)(1)(B) and (C). An excepted

restoration activity is defined as the methods and processes used to provide immediate aid to injured individuals.

(d) *Section 10 Scientific and enhancement permits.* The Assistant Administrator may issue permits authorizing activities that would otherwise be prohibited under § 223.208(a) for scientific purposes or to enhance the propagation or survival of elkhorn or staghorn corals, in accordance with and subject to the conditions of part 222, subpart C- General Permit Procedures.

(e) *Section 10 Incidental take permits.* The Assistant Administrator may issue permits authorizing activities that would otherwise be prohibited under § 223.208(a) in accordance with section 10(a)(1)(B) of the ESA (16 U.S.C. 1539(a)(1)(B)), and in accordance with, and subject to the conditions of part 222 of this chapter. Such permits may be issued for the incidental taking of elkhorn and staghorn corals.

(f) *Section 7 Interagency consultation.* Any incidental taking that is in compliance with the terms and conditions specified in a written statement provided under section 7(b)(4)(C) of the ESA (16 U.S.C. 1536(b)(4)(C)) shall not be considered a prohibited taking of the elkhorn and staghorn corals pursuant to paragraph (o) of the same subsection (16 U.S.C. 1536(o)(2)).

TABLE 1 TO § 223.208. AGENCIES AND AUTHORIZING STATUTES WHOSE CORAL RESTORATION ACTIVITIES ARE EXCEPTED FROM CERTAIN PROHIBITIONS IN PARAGRAPH (A) OF THIS SECTION.

FEDERAL:	
Agency/Person	Statute and Specific Provision(s)
NOAA, National Ocean Service (NOS)	National Marine Sanctuaries Act 16 U.S.C. 1433
NOAA NOS	Coral Reef Conservation Act 16 U.S.C. 6406
Commandant, U.S. Coast Guard (USCG), Authorized representatives of States or Indian Tribes.	"Oil Pollution Act" 33 U.S.C. 2702
Designated Federal, State or Indian tribal natural resources trustees, including NOAA, Department of Interior (DOI), Florida Department of Environmental Protection (FDEP), Puerto Rico Department of Natural and Environmental Resources (DNER), and U.S. Virgin Islands Department of Planning and Natural Resources (DPNR)	33 U.S.C. 2706
Administrator, Environmental Protection Agency (EPA) or Commandant, USCG; Authorized representatives of States.  Designated Federal, State or Indian tribal natural resources trustees, including NOAA, DOI, FDEP, DNER, and DPNR.	"Clean Water Act" 33 U.S.C. 1321
Administrator of the EPA; States or Indian Tribes in cooperative agreements with EPA; Heads of other Federal agencies where release is from vessel or facility solely under their control.  Administrator of the EPA	"Superfund Act" (CERCLA) 42 U.S.C. 9604  42 U.S.C. 9606

TABLE 1 TO § 223.208. AGENCIES AND AUTHORIZING STATUTES WHOSE CORAL RESTORATION ACTIVITIES ARE EXCEPTED FROM CERTAIN PROHIBITIONS IN PARAGRAPH (A) OF THIS SECTION.—Continued

FEDERAL:	
Agency/Person	Statute and Specific Provision(s)
Designated Federal, State or Indian tribal natural resources trustees, including NOAA, DOI, FDEP, DNER, and DPNR	42 U.S.C. 9607
DOI, National Park Service (NPS)	Park System Resource Protection Act, 16 U.S.C. 19jj 16 U.S.C. 668dd-668ee (National Wildlife Refuge System)
DOI	National Wildlife Refuge System Administration Act, 16 U.S.C. 668
<b>FLORIDA:</b>	
The Board of Trustees of the Internal Improvement Trust Fund	State Lands; Board of Trustees to Administer FL Statute § 253.03  Duty of Board to Protect, etc. FL Statute. § 253.04 FDEP
Governor and Cabinet; FDEP	Land Acquisition for Conservation or Recreation; Conservation and Recreation Lands Trust Fund FL Statute § 259.032
FDEP	Pollutant Discharge Prevention and Removal; Liability for Damage to Natural Resources FL Statute § 376.121
FDEP	Land and Water Management; Coral Reef Restoration FL Statute § 390.0558
<b>U.S. VIRGIN ISLANDS:</b>	
DPNR	DPNR; Powers and Duties of Department 3 V.I.C. § 401
DPNR	Conservation; Croix East End Marine Park Established; 12 V.I.C. § 98
<b>PUERTO RICO:</b>	
DNER	Conservation; Protection, Conservation and Management of Coral Reefs 12 L.P.R.A. §§ 241-241g et seq.
DNER	Conservation; Natural Patrimony Program 12 L.P.R.A. § 1227
DNER	Conservation; Tres Palmas de Rincon Marine Reserve 12 L.P.R.A. § 5063

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