

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WA 98104-1158
T +1.206.623.7580 F +1.206.623.7022 klgates.com

March 16, 2015

James M. Lynch
D (206) 370-6587
F (206) 370-6295
jim.lynch@klgates.com

Mr. Lance Smith
Protected Resources Division
National Marine Fisheries Service
Pacific Islands Regional Office
NOAA Inouye Regional Center
1845 Wasp Blvd., Building 176
Honolulu, HI 96818

Ms. Stephania Bolden
Protected Resources Division
National Marine Fisheries Service
Southeast Regional Office
13th Avenue South
Saint Petersburg, FL 33701

Re: Comments regarding Advanced Notice of Proposed Rulemaking and Request for Information for the Issuance of Protective Regulations under Section 4(d) of the Endangered Species Act for the Conservation of Threatened Corals, Docket No. NOAA-NMFS-2014-0158

Dear Mr. Smith and Ms. Bolden:

We submit this letter on behalf of our client, the Pet Industry Joint Advisory Council (“PIJAC”), a non-profit trade organization that advocates for the pet industry, in response to the Notice of Proposed Rulemaking published by the National Marine Fisheries Service (“NMFS”).¹ PIJAC represents members involved in the collection, production, and trade of various aquarium species, including the majority of the coral species covered by the proposed listings. PIJAC offers these comments in the spirit of its ongoing collaboration with NMFS, and looks forward to additional opportunities to work on these matters with the agency.

As an initial matter, and as PIJAC has explained in its prior comments regarding these species, available scientific information indicates that the 22 coral species listed by

¹ See 80 Fed. Reg. 1616 (January 13, 2015).

NMFS as threatened under the Endangered Species Act (“ESA”) do not warrant listing.² The best available scientific information indicates these species are widely distributed, both geographically and spatially. Recent information shows that “tens of millions” of colonies of these species occur around the world. In addition, these species exhibit complex life history patterns that enable them to recolonize habitats quickly, and distribute widely across ocean areas. In view of these considerations, PIJAC believes it appropriate for NMFS to reconsider the listing of these species, and to avoid imposing regulations on the basis of these listings that will have detrimental impacts on ongoing marine conservation and education programs, or the use and enjoyment of these species in lawful commercial enterprises.

With this backdrop, PIJAC offers the following comments regarding NMFS’ request for public comments on the application of ESA Section 9 take prohibitions to these coral species. In summary, PIJAC concludes that adoption of Section 9 take prohibitions would be neither necessary nor advisable to provide for the conservation of the listed coral species. Implementation of take prohibitions in this case is rife with practical problems, including species identification questions, quantification issues, reporting uncertainties, and monitoring burdens that would discourage ongoing conservation initiatives. Such rules would likely discourage beneficial activities such as reseeded and mariculture operations. Even if NMFS determines that application of Section 9 take prohibitions would have some potential conservation benefit, such rules should contain broad exceptions for aquaculture activities in aquaria, laboratories, and ocean-based mariculture operations, and such rules should not prohibit import, export or interstate trade conducted in compliance with applicable federal laws.

I. Application of Section 9 of the Endangered Species Act to Threatened Species

Section 9 of the ESA imposes a blanket prohibition against the take of any endangered species.³ For species listed as threatened, however, ESA Section 4(d) directs that “the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. For threatened species, the Secretary may apply any or all of the Section 9 prohibitions, which apply automatically to endangered species.”⁴ Although the U.S. Fish & Wildlife Service (“FWS”) has adopted a regulation that applies Section 4(d) to threatened species automatically,⁵ NMFS applies the prohibitions on a case-by-case basis, by issuing species-specific 4(d) rules.

² PIJAC Comments on NOAA Final Rule Listing 22 Species of Coral as Threatened Under the ESA (Nov. 10, 2014).

³ 16 U.S.C. § 1538(a)(1).

⁴ 16 U.S.C. § 1533(d).

⁵ 50 C.F.R. § 17.31(a).

NMFS retains discretion to apply some or all of the Section 9 prohibitions to any given listed species.⁶ Therefore, if NMFS does choose to adopt a Section 4(d) rule, it may limit application of Section 9 to those sections necessary for conservation. In *Salmon Spawning*, the court considered whether NMFS properly implemented an exception to section 9 when it approved a resource management plan, finding that the plan would not “appreciably reduce the likelihood of survival” for the listed species.⁷ The court limited its inquiry to whether this determination was reasonable.⁸ This guidance demonstrates that NMFS may adopt a limited application of ESA Section 9, so long as those limits would not result in an appreciable reduction in the likelihood of survival of the species.

II. No 4(d) Rule is Necessary or Advisable

A 4(d) rule is necessary or advisable only if the rule would provide for the conservation of the listed species.⁹ In evaluating the advisability of a 4(d) rule, agencies consider whether such a rule would provide appreciable conservation benefits. In making this determination, the agency usually considers two types of factors: (1) whether activities prohibited by Section 9 are likely to affect species conservation, given the most significant threats to the species; and (2) whether such prohibitions will provide conservation benefits over and above those already provided by other legal schemes.

NMFS generally looks at the biological status of the species and the impacts of different activities on the species in determining appropriate regulations.¹⁰ In its final 4(d) rule governing take of threatened salmon and steelhead, NMFS found the 4(d) rule necessary and advisable because the primary threats to the species were the types of activities that would be curtailed by imposing the Section 9 take prohibitions.¹¹ In that rule, NMFS specifically found that, for activities that either increased or did not affect the conservation of

⁶ *Salmon Spawning & Recovery Alliance v. Lohn*, 2008 WL 782851, at *3 (W.D. Wash. March 20, 2008); *Wash. Env'tl. Council v. NMFS*, 32 Env'tl. L. Rep. 20 (W.D. Wash. Feb. 27, 2002).

⁷ 2008 WL 782851 at *5.

⁸ *Id.*

⁹ 16 U.S.C. § 1533(d).

¹⁰ See National Oceanic and Atmospheric Administration (NOAA), Endangered and Threatened Species: Final Rule Governing Take of 14 Threatened Salmon and Steelhead Evolutionarily Significant Units, 65 Fed. Reg. 42422, 42422 (July 10, 2000) [hereinafter “Salmon 4(d) Rule”].

¹¹ See Salmon 4(d) Rule at 42422-23.

the species, no take prohibitions were necessary or advisable.¹²

Consistently with the salmon 4(d) Rule, NMFS recently declined to adopt Section 9 prohibitions regarding activities related to certain distinct population segments (“DPSs”) of the bearded seal, listed as threatened.¹³ In the long term foreseeable future, the principal threat to those DPSs is habitat alteration stemming from climate change, while in the near-term, the seals’ abundance appeared to be sufficient to withstand year-to-year variations. Consequently, NMFS concluded that section 9 prohibitions would not improve the species’ outlook in the foreseeable future.¹⁴

For the listed corals, take prohibitions would not provide additional conservation benefits for the species. In its listing rule, NMFS found that the primary threats posing an extinction risk to corals (those of medium-high or greater importance) include ocean warming, disease, ocean acidification, and the trophic effects of fishing.¹⁵ Since the most serious threats occur indirectly via the cumulative effects of human activities and natural phenomena, the severity of these threats will not be mitigated by the imposition of Section 9 prohibitions. Other threats, including collection and trade of the listed species, are of much lower importance because they affect very limited geographic areas.¹⁶ Thus, prohibitions that curtail the lowest importance threats will have minimal effect on species conservation. In total, the application of Section 9 prohibitions to the recently listed coral species will provide no discernible conservation benefit. Conversely, failure to apply Section 9 prohibitions will not appreciably reduce the likelihood of survival of the listed species, as the most significant threats to survival cannot be controlled by such prohibitions.

In the case of certain recently listed DPSs of scalloped hammerhead sharks, NMFS declined to adopt a 4(d) rule because it concluded that there were “sufficient domestic and international management measures in place to protect the threatened populations.”¹⁷ Unlike

¹² *Id.* at 42423.

¹³ NOAA, Endangered and Threatened Species: Threatened Status for the Beringia and Okhotsk Distinct Population Segments of the *Erignathus barbatus nauticus* Subspecies of the Bearded Seal, 77 Fed. Reg. 76740, 76749 (Dec. 28, 2012) [hereinafter “Bearded Seal Rule”].

¹⁴ Bearded Seal Rule, at 76749.

¹⁵ NOAA, Endangered and Threatened Wildlife and Plants: Final Listing Determinations on Proposal to List 66 Reef-Building Corals Species and to Reclassify Elkhorn and Staghorn Corals, 79 Fed. Reg. 53852, 53886 (Sept. 10, 2014)[hereinafter “Corals Listing Rule”].

¹⁶ Corals Listing Rule at 53885.

¹⁷ NOAA, Endangered and Threatened Wildlife and Plants: Threatened and Endangered Status for Distinct Population Segments of Scalloped Hammerhead Sharks; Final Rule, 79 Fed. Reg. 38214, 38239 (July 3, 2014) [hereinafter Hammerhead Shark Rule”].

corals, the hammerhead shark's most significant threat was overfishing, with the sharks in the most affected DPSs listed as endangered. For the threatened DPSs, NMFS concluded that no 4(d) rule was necessary or advisable because management measures provided sufficient protection. In the U.S., shark fishermen are subject to permitting requirements and quota, bycatch, and monitoring measures, among others. Internationally, the listed sharks are listed under Appendix II of the Convention for International Trade in Endangered Species ("CITES"), which likewise imposes permitting and monitoring requirements to ensure that population levels remain sustainable. With these measures in place, NMFS determined that additional restrictions on U.S. trade in the sharks were unnecessary.¹⁸

Similarly, the listed corals are subject to sufficient domestic and international management measures. Like the scalloped hammerhead shark, the corals are listed under Appendix II of CITES, which requires export monitoring and permits. Domestic regions subject to coral collection require permits and other management measures. Corals will continue to be subject to section 7 consultation requirements under the ESA for any action that could result in species impacts. Since the most significant threat to the listed corals is climate change, not trade collection, no additional prohibitions on trade are necessary beyond these existing measures.

Finally, Section 9 take prohibitions are inappropriate because of the difficulties in identifying and distinguishing coral species. These difficulties will render application of Section 9 to the listed corals both administratively and practically burdensome. As NMFS has recognized, many of the listed coral species present unique identification and delineation challenges.¹⁹ Identification challenges make distinguishing between listed and unlisted coral species potentially time-consuming and prone to error. These identification difficulties will make enforcement of any Section 9 prohibitions ineffective, time-consuming, and vulnerable to legal challenge.

III. If Adopted, a 4(d) Rule Should Have Limited Application

For the reasons outlined above, including practical considerations, PIJAC strongly recommends that NMFS avoid applying ESA Section 9 take prohibitions to these coral species. As NMFS itself has recognized, application of Section 9 to species that are wide-ranging in the ocean, beyond the reach of most human activity, is unnecessary and not advisable. Regardless, if NMFS determines that application of Section 9 prohibitions is necessary or advisable, the agency should narrowly craft the rule to provide for broad exceptions for mariculture and international import and export activities.

NMFS previously has approved limited 4(d) rules that include exceptions for

¹⁸ See Hammerhead Shark Rule at 38239.

¹⁹ See Corals Listing Rule at 53876-78.

activities that enhance conservation of the species. For example, in its 4(d) rule for the original threatened listings of elkhorn and staghorn corals, NMFS included exceptions to Section 9 application for research and restoration activities.²⁰ In that rule, NMFS found that because the excepted activities work toward conservation of the listed corals, Section 9 application was not necessary or advisable.²¹ Similarly, in the salmon 4(d) Rule, NMFS found Section 9 prohibitions to be inapplicable to a certain subset of activities that contributed to the conservation of the listed species.²² If NMFS chooses to adopt a 4(d) rule for the recently listed coral species, it should include exceptions for aquaculture activities, whether conducted by government or private entities, that contribute to the survival and conservation of the listed coral species. The exception should encompass aquaculture that is performed in marine environments and also in aquaria and laboratories for scientific and research purposes.

Specifically, ocean-based mariculture operations should be permitted to continue because these activities contribute to the overall population increases of many of the listed coral species. Particularly those managed by state regulatory programs, such as in Florida, mariculture operations are appropriately distinguishable from take and possession of wild corals. In closely monitored mariculture operations, coral environments and growth are managed to ensure healthy coral populations. These operations do not impact external coral environments, and by culturing certain coral species, take of wild specimens of the same species may be avoided or mitigated.

We wish to point out again, however, the practical difficulties of implementing a 4(d) exception such as those outlined above. Prohibiting take assumes that species are identifiable and quantifiable in a biologically meaningful way. PIJAC is concerned in this case the burden of implementing, enforcing, and complying with Section 9 take prohibitions far exceeds the conservation benefits of such prohibitions, creating economic uncertainties that will harm its members.

PIJAC believes that far greater conservation gains will be made through collaborative working relationships between NMFS and the aquarium trade industry. To that end, PIJAC will continue to work with NMFS developing such conservation programs, including development of additional scientific data regarding these and other coral species.

IV. Summary

In summary, it is neither necessary nor advisable to adopt a Section 4(d) rule

²⁰ NOAA, Endangered and Threatened Species; Conservation of Threatened Elkhorn and Staghorn Corals, 73 Fed. Reg. 64264, 64271 (Oct. 29, 2008) [hereinafter “Elkhorn 4(d) Rule”].

²¹ Elkhorn 4(d) Rule at 64275.

²² Salmon 4(d) Rule at 42423.

National Marine Fisheries Service

March 16, 2015

Page 7

imposing Section 9 prohibitions on the listed coral species. Such a rule would not further conservational goals, and likely would be practically impossible to effectively implement. PIJAC stands ready to work with NMFS to develop collaborative programs that will benefit these and other aquatic species, and we will continue our discussions with the agency to do so.

Thank you for considering our comments, and please note that we may submit supplemental information as relevant.

Very truly yours,

K&L GATES LLP

A handwritten signature in black ink, appearing to read "James Lynch", written in a cursive style.

By

James M. Lynch

cc: Marshall Meyers, PIJAC