

TESTIMONY OF  
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**DIRECTOR OF PRODUCT INTEGRITY**  
**BRUNSWICK BOAT GROUP**  
ON BEHALF OF  
**THE NATIONAL MARINE MANUFACTURERS ASSOCIATION**

BEFORE THE  
**U.S. ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD**  
REGARDING THE  
**AMERICANS WITH DISABILITIES ACT (ADA) ACCESSIBILITY GUIDELINES FOR PASSENGERS**  
**ADVANCED NOTICE OF PROPOSED RULEMAKING FOR SMALL VESSELS**  
**July 25, 2005**  
Washington, D.C.

Good morning, I am Dave Marlow, Director of Product Integrity of the Brunswick Boat Group and I offer these comments on behalf of the National Marine Manufacturers Association (NMMA).

I appreciate the opportunity to testify before the Architectural and Transportation Barriers Compliance Board (Access Board) on the Board's effort to develop guidelines which address accessibility under the American with Disabilities Act (ADA) to and within newly constructed or altered passenger vessels. My comments are directed to the Access Board's Advanced Notice of Proposed Rulemaking for passenger vessels which carry 150 or fewer passengers or 49 or fewer overnight passengers.<sup>1</sup> In addition, my comments address the Department of Transportation's request for comments in its Advance Notice of Proposed Rulemaking regarding Nondiscrimination on the Basis of Disability: Passenger Vessels.<sup>2</sup>

By way of background, Brunswick Boat Group, headquartered in Knoxville, Tennessee, is the country's largest manufacturer of recreational boats. The Boat Group makes Sea Ray, Bayliner, Maxum, Hatteras, Meridian and Sealine pleasure boats from 16 to 100 feet; Baja high-performance boats from 20 to 44 feet; Albermarle, Boston Whaler, Palmetto, Sea Boss, Sea Pro and Trophy offshore fishing boats from 13 to 33 feet; and Crestliner, Lowe, Lund, Princecraft and Triton fishing, deck and pontoon boats from 10 to 26 feet; Land 'N' Sea and Kellogg parts and accessories distribution, and Attwood, marine parts and accessories. Brunswick Boat Group is an active member of the National Marine Manufacturers Association (NMMA) serving on both the full NMMA Board of Directors and the Boat Manufacturing Division Board. In addition, I chair NMMA's Boat Industry Risk Management Council and am a member of the U.S. Coast Guard's National Boating Safety Advisory Council.<sup>3</sup>

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<sup>1</sup> Americans with Disabilities Act (ADA) Accessibility Guidelines for Passenger Vessels: Small Vessels, 69 Fed. Reg. 69,245 (Advanced Notice of Proposed Rulemaking, Nov. 26, 2004), and 70 Fed. Reg. 30,381 (May 26, 2005) (extending comment period to July 28, 2005).

<sup>2</sup> 69 Fed. Reg. 69,246 (Nov. 26, 2004).

<sup>3</sup> Established under 46 U.S.C. § 13110, the U.S. Coast Guard is required to consult with the National Boating Safety Advisory Council regarding regulations that will contribute to recreational vessel safety. 46 U.S.C. § 4302. Members are appointed by the Secretary of Homeland Security (previously the Secretary of Transportation).

NMMA is the nation's largest recreational marine industry association, representing more than 1,500 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, including boats, engines, and marine accessories and components. With 13 million registered boats and over 69 million boaters nationwide, the recreational boating industry is a \$33 billion industry and contributes over 400,000 jobs annually to our nation's economy.

### *Summary of Recommendations*

NMMA would like to leave this Board and the Department of Transportation with these four recommendations:

**First, any vessel guidelines developed by the Access Board must not conflict with any applicable ship or boating safety regulation (U.S. or international) or industry consensus standard.** The Access Board has a duty to work closely with the U.S. Coast Guard and standard setting bodies to ensure that the important goals of safety and access are reached in a mutually inclusive, rather than exclusive, manner. Safety must be the overriding consideration not only for new vessel guidelines but also for any required modification of existing vessels. There should be an express exemption from any accessibility requirement when that change would adversely impact vessel safety.

**Second, any vessel guidelines should be structured in the same manner that the shipping and boating industry are already organized.** In addition, thresholds that trigger additional accommodations should be based on the type of vessel and take into consideration the number of *passengers for hire* that a vessel is authorized by the U.S. Coast Guard to carry.<sup>4</sup>

**Third, these vessel guidelines should apply only to "inspected" vessels since these boats carry the majority of passengers, thus modifications to them will have the greatest impact on access while avoiding an undue burden on the smallest charter operations.**<sup>5</sup> Conversely, it is important for the Access Board and Department of Transportation to affirm that these guidelines do not apply to recreational boats, "uninspected" vessels, or bareboat charters.<sup>6</sup>

**Fourth, NMMA encourages the Board to build upon the work started by the Passenger Vessel Access Advisory Committee** in Chapter 12 of its 2000 Final Report which recommends new construction access specifications for small passenger vessels.

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<sup>4</sup> It is important that the guidelines specify *passengers for hire* rather than simply *passengers* since these are terms of art in the marine industry.

<sup>5</sup> Passenger vessels are regulated under Subchapter H, K, and T of Title 46 of the Coast Guard Regulations in the Code of Federal Regulations. Smaller inspected vessels include passenger ferries, excursion vessels, dinner boats and whalewatchers that are often called "T" Boats. 46 C.F.R. Subchapter T- Small Passenger Vessels.

<sup>6</sup> 46 C.F.R. Subchapter C – Uninspected Vessels. A bareboat charter is the rental of a recreational boat for pleasure where no crew is provided. This term can also include the rental of personal watercraft.

## ***Background on the Recreational Boating Industry***

Recreational boats come in all shapes and sizes, from a small two-seater personal watercraft to a family run-about, to even a 300 foot yacht.<sup>7</sup> More than 90 percent of recreational boats are less than 20 feet in length and ninety-five percent of all recreational boats are trailerable.<sup>8</sup> According to the U.S. Coast Guard, there are over 1,400 recreational boat manufacturers who have built at least one boat in the past two years. The majority of recreational boat builders are small businesses with less than 49 employees.<sup>9</sup>

Recreational boat manufacturers generally specialize in one of two broad categories, production line boats and custom to semi-custom boats. Production line boats are targeted to a specific market and are sold through a network of dealers nationwide. Custom to semi-custom boats are also generally sold through dealers or agents. My company, Brunswick Boat Group manufactures production line boats.

Recreational boats are built from a number of materials, including aluminum, fiberglass and inflatable products. A large percentage of recreational boats are made of fiberglass. These boat's hulls and decks are fabricated in pieces and then attached together. The designs for a boat and the "plugs" used to fabricate "molds" for these vessels are developed with a significant amount of research and development cost. In addition, after a prototype boat undergoes in water testing it may require changes to the design necessitating a whole new plug and mold be created. This process will typically cost half a million dollars. Once a design is perfected, the mold is used over and over again to manufacturer many boats. Thus, any design change to a fiberglass boat requires the development of a new design, plug and mold and conforming changes to all associated equipment and other attachments such as cabinetry and seating at a significant cost. By design, fiberglass hulls and decks are not easily altered once manufactured. For example, if a fiberglass boat owner wanted to make a larger transom opening this would involve cutting into the fiberglass (avoiding any components or systems that typically occupy this space) and fabricating a watertight seal. Such a change would void any warranty on the vessel.

## ***Recreational Boat Standards and Certification***

Partly because they are captained by amateurs, recreational boats are built to and operated under different standards and regulations than commercial passenger vessels. If a boat owner seeks to convert a boat manufactured under the recreational regulations to another use such as operating a charter, the U.S. Coast Guard will only allow this once the operator meets certain carriage and licensing requirements. In addition, under the uninspected vessel regulations, the Coast Guard dramatically limits the number of passengers for hire such a boat may carry to not more than six passengers. This is why you might see a larger charter boat only carrying a few passengers while a smaller water taxi can carry many more. Importantly, recreational boat manufacturers do not manufacturer our products with the intent for them to be repurposed to commercial duty. Indeed

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<sup>7</sup> For a glossary of the different types of recreational boats go to <http://www.discoverboating.com/glossary/>.

<sup>8</sup> See the attached excerpt from the *Boating Basics Handbook*, D.C. Metropolitan Police Department, Harbor Patrol that describes in detail the different types of recreational boats.

<sup>9</sup> See U.S. Dept. of Commerce, *Boat Building: 2002 Economic Census* at 4 (Jan. 2005).

my company, like most manufacturers, makes clear in our express warranties that commercial use will void the terms of our warranties.

The U.S. Coast Guard has specific regulations that apply to certain recreational boats -- generally to outboard powerboats under 20 feet. Many of the U.S. Coast Guard regulations apply only to the smaller vessels. Rather than always pursuing a regulatory approach to ensure boating safety, the U.S. Coast Guard works with independent standard setting bodies and manufacturers to develop “voluntary” standards that exceed U.S. Coast Guard requirements.<sup>10</sup> A few key organizations have developed extensive and specific standards for boats and associated equipment including the American Boat and Yacht Council (ABYC), the American Bureau of Shipbuilding (ABS), the Society of Automotive Engineers, and the National Fire Protection Association. The recreational boat industry works closely with these organizations. In fact, I serve as the Chair of the ABYC Technical Board.

In addition, NMMA has developed a rigorous certification program for boats where NMMA inspectors conduct yearly in-factory inspections.<sup>11</sup> NMMA certifies that the builder meets U.S. Coast Guard regulations, but most importantly that the builder meets the more comprehensive ABYC standards. I am proud that the recreational boating industry has made such a commitment to safety that NMMA certification, beginning in model year 2007, will be a condition of NMMA membership. NMMA estimates that currently 70% of all boats sold in the U.S. are NMMA Certified. NMMA expects that figure to grow to 80% after model year 2007.

NMMA members and my company are committed to safety because we recognize that driving a boat is not the same as driving a car. A boater may encounter many hazards while underway and if things go wrong, the passengers and skipper cannot simply walk home. Our business depends on boaters having a safe and fun boating experience. For these reasons, NMMA is particularly concerned that any accessibility guidelines for new or existing vessels be built on a foundation of safety.

**1. Any vessel guidelines developed by the Access Board must not conflict with any applicable ship or boating safety regulation (U.S. or international) or industry consensus standard.**

NMMA strongly urges the Access Board and the Department of Transportation to work closely with the U.S. Coast Guard and consensus standard organizations such as ABYC and ABS to develop compatible accessibility standards for both new and existing vessels. Taking this approach will ensure that the important goals of safety and access are reached in a mutually inclusive, rather than exclusive, manner. Indeed, the Supreme Court recently recognized that an accommodation to a vessel is not readily achievable under Title III of the Americans with Disabilities Act if it would threaten the safety of vessel.<sup>12</sup> Without entering into a consultation

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<sup>10</sup> While these standards may be voluntary they are viewed as an industry standard of care.

<sup>11</sup> More information about NMMA’s certification program can be found at: [http://www.nmma.org/certification/local/downloads/documents/cert\\_inserts.pdf](http://www.nmma.org/certification/local/downloads/documents/cert_inserts.pdf).

<sup>12</sup> *Spector v. Norwegian Cruise Line Ltd.*, No. 03-1388, 125 S. Ct 2169 (June 6, 2005) (Cruise lines would not have to remove obstructing barriers, such as coamings, if removal of those barriers would pose a “significant risk to the

process with the U.S. Coast Guard, industry, and standard setting organizations there is no way for this Board or the Department of Transportation to know if it has threatened the safety of others by mandating specific accommodations. In addition, these guidelines should include an express exemption from any structural accessibility requirement to a new or existing vessel when that change would adversely impact vessel safety.

**2. Any vessel guidelines should be structured in the same manner that the shipping and boating industry are already organized.**

In addition to understanding the way safety is assured on a recreational or commercial vessel, it is important for this Board and the Department of Transportation to understand and conform to the marine industry's classifications. NMMA strongly urges the Access Board to utilize the same demarcations that the U.S. Coast Guard uses when determining which regulations apply to a vessel. For example, whether the vessel is inspected or uninspected and whether it can carry *passengers for hire*. Using the established thresholds will simplify compliance by making it clear to the marine industry when new accommodation levels have been triggered. In addition, any thresholds this Board may establish that trigger additional accommodations should be based on the type of vessel and take into consideration the number of *passengers for hire* that a vessel is authorized by the U.S. Coast Guard to carry. It is important that the guidelines specify *passengers for hire* rather than simply passengers because these are terms of art in the marine industry. Only vessels that carry *passengers for hire* are covered by Title III of the ADA.

**3. These vessel guidelines should apply only to “inspected” vessels since these boats carry the majority of passengers, thus modifications to them will have the greatest impact on access while avoiding an undue burden on the smallest charter operations.**

The Access Board should focus its efforts on the vessel categories that carry the most passengers for hire. The Board should work diligently to complete the large vessel guidelines first and then turn its attention to the smaller vessel guidelines. Because of the significant differences between large and small vessels in size, material, type, and purpose it is not appropriate or in most cases even possible to apply the large vessel guidelines to small vessels.

The Access Board asked for commenters to address the point at which a vessel's size or passenger numbers render the draft guidelines infeasible. From our industry's perspective, it is infeasible to apply any accessibility guidelines to uninspected vessels (not more than 6 passengers for hire).<sup>13</sup> Vessels of this type vary widely and are exceedingly difficult to modify without sacrificing major functions of the vessel. In contrast, applying the guidelines to inspected vessels will have the greatest impact on access without placing undue burden on the

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health and safety of others,” thereby violating the safety requirements under the International Convention for the Safety at Sea).

<sup>13</sup> 46 C.F.R. Subchapter C –Uninspected Vessels. We defer to others for comment on infeasibility among inspected vessels.

smallest charter operations.<sup>14</sup> This is because these inspected boats, of the smaller passenger vessels, carry the majority of passengers.

It is important for the Access Board and Department of Transportation to be clear that these guidelines do not apply to recreational boats or bareboat charters.<sup>15</sup> A personal recreational boat like a personal car is not a “public accommodation” or “specified public transportation” under Title III of the ADA. However, to provide clarity and certainty to the many small businesses who manufacturer these products, this should be spelled out in the guidelines and implementing regulations. The recreational boating industry would like to emphasize that we stand ready to assist any customer who would like to purchase a modified recreational boat. Many manufacturers would be able and willing to make modifications to an existing design to improve the boat’s accessibility or to develop a completely custom design based on that particular customer’s needs.

In addition to noting that manufacturers of boats constructed as a recreational vessel are not covered by these guidelines, NMMA recommends that the Board and the Department of Transportation include specific language that excludes vessels that are operated as recreational vessels. For example, a vessel that is documented (with a “recreational endorsement”) or registered as a recreational vessel should be expressly excluded.<sup>16</sup>

#### **4. NMMA encourages the Board to build upon the work started by the Passenger Vessel Access Advisory Committee.**

The Passenger Vessel Access Advisory Committee in Chapter 12 of its 2000 Final Report recommends new construction access specifications for small passenger vessels. Many of these recommendations have merit. NMMA encourages the Board to build upon these recommendations in a collaborative process to develop more comprehensive guidelines for small vessels that take into account vessel safety, the variety of vessel types, and the number of passengers for hire a vessel is allowed to carry.

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<sup>14</sup> These boats include passenger ferries, excursion vessels, dinner boats and whalewatchers. The so called “T” Boats or larger. 46 C.F.R. Subchapter T- Small Passenger Vessels.

<sup>15</sup> A bareboat charter is the rental of a recreational boat for pleasure where no crew is provided. This term can also include the rental of personal watercraft.

<sup>16</sup> There are different documentation types depending on the use of the vessel. *See* 46 C.F.R. Part 67. A certificate of documentation may be endorsed for fishery, coastwise trade (i.e. trade or passenger vessel), registry (for foreign trade), or recreation. Any vessel of at least five net tons wholly owned by a citizen or citizens of the United States is eligible for documentation as a recreational vessel. A recreational endorsement allows a boat to be used for pleasure use only which includes a bareboat chartered only for recreational use. 46 C.F.R. § 67.23. Any documented vessel may be used for recreational purposes, regardless of its endorsement, but a vessel documented with a recreational endorsement only, may not be used for any other purposes. Certainly, not all vessels are documented so we would not expect this to be the sole criteria.

### *Conclusion*

The small vessel accessibility guidelines will be much more effective if this Board develops them with a mind toward safety, uses the current regulatory structure for the marine industry, and focuses on the vessels that carry the most passengers for hire. The Board can accomplish this by only applying these guidelines to inspected vessels and excluding recreational, uninspected, and bareboat charters. This approach will improve access for the most while avoiding placing an undue and unreasonable burden on the smallest charter operations.

I appreciate the opportunity to testify on this important undertaking and welcome any questions the Board may have for me. The National Marine Manufacturers Association offers to assist this Board and the Department of Transportation as you prepare the guidelines and conduct any subsequent rulemakings.