

COMMENTS OF THE  
NORTH AMERICAN SUBMARINE CABLE ASSOCIATION  
ON THE PROPOSED COASTAL ZONE MANAGEMENT RULES  
PROPOSED JANUARY 7, 2002  
March 8, 2001

These comments on the above materials (“the Proposal”) are submitted on behalf of the North American Submarine Cable Association (“NASCA”). NASCA’s members are listed in Attachment 1. NASCA is a non-profit trade association formed to help those who own, install and maintain submarine cables that land in North America better address issues of common concern.

NASCA’s members include all of the owners of submarine cables that participated in the Submarine Cable Task Force described in the Proposal (360networks inc., Concert Global Networks USA LLC, Level(3) Communications Inc., Sprint Communications Corp., TyCom Networks (US) Inc., and WorldCom, Inc.<sup>1</sup>), and who previously have submitted written comments in connection with that process.<sup>2</sup> We would like to express our appreciation to NJDEP for convening the Task Force, which seemed to achieve consensus on a number of technical issues. We would like also to express our appreciation to NJDEP for adopting some of the language changes suggested in the May 2001 Comments and the September 2001 Comments. These comments necessarily focus on a few remaining issues that we believe have not been appropriately resolved.

To summarize, the main points made below are:

1. It is already standard practice, in the absence of regulations, to bury cables off the coast of New Jersey sufficiently to avoid interaction with fishing gear.
2. Neither New Jersey nor the U.S. Army Corps of Engineers may impose restrictions on telecommunication cables beyond three nautical miles from shore.
3. The proposed standards for submerged cables are not proper elements of a coastal zone management plan under the CZMA.
4. “Wet links” should not be discouraged.
5. NJDEP has not justified the requirement for payments of \$100 per meter for cable not buried to 0.6 meters.
6. The requirements for repeatedly re-inspecting a buried cable are excessive.
7. Several aspects of the Proposal should be clarified.

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<sup>1</sup> Asset Channels, Inc. also participated in the Task Force discussions, but has since filed for bankruptcy protection and has not installed a cable.

<sup>2</sup> Comments of Certain Cable Companies on the NJDEP April 20, 2001 Draft Summary and Rules Regarding Submerged Cables, May 18, 2001 (“May 2001 Comments”); Comments of Certain Cable Companies on the NJDEP July 6, 2001 Draft Rules and 8/8/01 Summary Language Regarding Submerged Cables, September 27, 2001 (“September 2001 Comments”).

I. It is already standard practice, in the absence of regulations, to bury cables off the coast of New Jersey sufficiently to avoid interaction with fishing gear.

Even if neither NJDEP nor the ACOE can impose burial or other conditions to a particular depth beyond three NM, cable companies nevertheless can be expected to continue to follow their existing practice of burying cables wherever they foresee potential interaction with fishing gear. The historical evidence shows that clambers and other fisherman have been repeatedly and frequently fishing over buried cables, yet there has never been a confirmed contact with a cable buried to 0.6 meters or greater, which has been the standard burial practice for some time.

We know of at least six cables that were installed off the coast of New Jersey with target burial of 0.6 meters: TAT-8 and PTAT in 1988; TAT-9 in 1992; TAT-11 in 1993; and BUS-1 and Gemini in 1997. The total length of such cables in the water depths reportedly worked by clambers (up to about 100 meters) is over 400 NM. As the cable companies pointed out repeatedly in the Task Force meetings, the evidence is that clambers frequently dredge over these cables.<sup>3</sup> Cables landed in New Jersey subsequent to these systems have targeted even deeper burial, typically 1.0 to 1.2 meters: CANUS-1 in 1995, TAT-14 and 360americas in 2000, and TGN North and TGN South in 2001. Yet despite so many miles of cables being clammed over for so many years, there is no confirmed instance of a cable buried to 0.6 meters or more being snagged by a clam dredge, scallop dredge or trawl, either in New Jersey or in other U.S. waters. Therefore, while we are not necessarily pleased that dredging is conducted over our buried cables, and maintain that if done it should be done carefully and at the vessels' risk<sup>4</sup>, the evidence is that cables buried to current voluntary practice do not keep clambers or other commercial fishers from fishing over them and do not have an economic impact on such fishers.

II. Neither New Jersey nor the U.S. Army Corps of Engineers may impose restrictions on telecommunication cables beyond three nautical miles from shore.

The Proposal seems to recognize the limits on New Jersey's jurisdiction over submerged cables. Specifically, the territorial seas and the coastal zone of the state of

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<sup>3</sup> Specifically, cable-protection over flights by maintenance authorities working for the owners of these cables have recorded hundreds of sightings of clamming vessels near active cables. In response to questions during the Task Force proceedings, the clamming representatives never denied that clam dredging is frequently conducted over these cables.

<sup>4</sup> Specifically, NASCA's members continue to believe that commercial fishers should be aware at all times of the actual location of active cables and the position of their vessel and of their gear relative to such cables. These cable companies also continue to believe that commercial fishers should exercise caution when fishing near such cables, bearing in mind that even buried cables may in special circumstances become less buried or even unburied. However, the cable companies have no legal authority to preclude anyone from fishing over cables at their own risk.

New Jersey extend only to three nautical miles (“NM”) from shore.<sup>5</sup> We understand the Proposal to say that the proposed rules for submerged cables would apply directly only within New Jersey’s coastal zone (but may apply indirectly through the coastal zone consistency determination process, described below).<sup>6</sup> However, we note that not all of the special areas identified in 7:7E-4.20, and which can in effect trigger the certain of the requirements in 7:7E-4.20, are clearly limited to the state’s coastal zone.<sup>7</sup> Any final rule should make clear that the requirements in 7:7E-4.20 apply directly (as opposed to through the CZMA process described below) only within New Jersey’s coastal waters. Otherwise such a final rule would clearly exceed the state’s jurisdiction.<sup>8</sup>

The Proposal indicates that the proposed new standards for submerged cables would, to the extent possible, be applied beyond the coastal zone as conditions of federal permits. In particular, under the federal Coastal Zone Management Act (“CZMA”), the U.S. Army Corps of Engineers (“ACOE”) cannot issue the permit needed to install a submarine cable unless New Jersey first issues a coastal zone consistency determination.<sup>9</sup> However, the Corps’ own permitting authority over submarine cables extends only to three NM.<sup>10</sup> Therefore, even invoking the CZMA cannot extend New Jersey’s ability to regulate the laying of cables beyond three NM.

Even if the ACOE or some other federal agency had authority to impose permit conditions on cable laying beyond three NM, that authority could not extend beyond twelve NM. Under international treaties, binding as federal law on New Jersey,<sup>11</sup> even the United States cannot regulate the laying of submarine cables beyond its territorial seas except to take reasonable measures for the exploitation of certain natural resources.<sup>12</sup>

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<sup>5</sup> See United States v. California, 332 U.S. 19 (1947); United States v. Maine, 420 U.S. 515 (1975).

<sup>6</sup> This understanding is based primarily on our reading of proposed 7:7E-1.2(b) and (e) and the discussion of it in the “Summary” section.

<sup>7</sup> The definition of “surf clam areas” in 7:7E-3.3(a) is limited to “coastal waters” which in turn are defined at 7:7E-1.2(b)(2) as extending seaward only three NM. However, the definitions of “marine fish” and “prime fishing areas” at 7:7E-8.2(a) and 7:7E-3.4, for example, are not limited to New Jersey’s coastal waters.

<sup>8</sup> See fn. 5.

<sup>9</sup> See 16 U.S.C. 1456(c)(3)(A).

<sup>10</sup> See 33 U.S.C. §403, 33 C.F.R. §329.12 (jurisdiction under the Rivers and Harbors Act is limited to the “navigable waters of the United States”, defined to end at three NM; 43 U.S.C. §1333(a) and (e), 33 C.F.R. §322.3(b) (power under Outer Continental Shelf Lands Act to require permits extends further only for “installations and other devices” that are those used for purposes of exploration, development, production, or transportation of natural resources – which clearly does not include cables used for telecommunications).

<sup>11</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAWS OF THE UNITED STATES §III, cmt. b; Westmar Marine Services v. Heerema Marine Contractors, S.A., 621 F.Supp. 1135, 1137 (N.D. Cal. 1985) (“once a treaty is ratified it is the law of the United States and is as binding as a federal statute.”)

<sup>12</sup> See the Geneva Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82 (“Geneva Convention”), at Articles 1, 2 and 26; and the United Nations Law of the Sea Convention (1982) (“UNCLOS”, at Articles 58.1, 79.2, 87.1(c), 112; although UNCLOS has not yet been ratified by the Senate, the United States has taken the position that UNCLOS reflects customary international law to which the United States adheres. 19 Weekly Comp. Pres. Doc. 383 (Mar 10, 1983).)

The territorial seas of the U.S. extend to twelve miles.<sup>13</sup> Attachment 2 shows the three-NM line and the twelve-NM line in comparison to the jurisdictional reach to depths of perhaps 120 meters that the Proposal seems to envision through the operation of the CZMA.<sup>14</sup>

Our comments below apply to the proposed standards for submerged cables wherever those standards might be applied, within or beyond three NM.

III. The proposed standards for submerged cables are not proper elements of a coastal zone management plan under the CZMA.

Even though the CZMA seems to allow a state to use its coastal plan to balance and resolve conflicts between competing uses in doing so, the CZMA seems to require a nexus to impact on coastal zone resources (16 USC 1451, 1452; see, e.g. 16 USC 1451(f) (“new and expanding demands...are placing stress on these areas”); 16 USC 1451 (h) (“In light of competing demands and the urgent need to protect and give high priority to natural systems in the coastal zone”). In other words, if and to the extent New Jersey could show that cable installation has some adverse impact on clam or fish populations or some other natural resource, that could justify it using CZMA authority to reduce such impacts or to require mitigation to offset those impacts. Such a showing of natural resource impact might even justify restrictions on development (e.g., minimum cable burial depth) or mitigation payments to reduce the impact upon another industry sector rather than redressing the impact on the natural resource itself. But with cables, the driving issue has never been that their installation or use harms clams or fish. Rather, the driving issue has been that, if anything, cables may protect clams or fish, by making it harder for fishers to get at their target species, if a cable either is unburied or inadequately buried and thus commercial fishing is deterred or impeded in that area.

This characterization applies to each and every element of the suite of submerged cable standards in the Proposal, from route planning to cable burial to cable reinspection to cable removal at end of life. None of them have to do with protecting a natural resource; all of them have to do with maximizing the profitability of another industry in its exploitation of that natural resource. They are in the nature of wealth re-distribution, like a taxation scheme. They are in the nature of economic planning, not coastal zone planning.

That does not imply that such standards cannot legitimately be imposed by New Jersey. To fairly balance the economic interests of two important industry sectors seems

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<sup>13</sup> Presidential Proclamation 5928, 54 F.R. 77, reprinted in 43 U.S.C. 1331.

<sup>14</sup> The discussion of 7:7E-4.20 in the Summary section says "Surf clams are generally found offshore in waters up to 60 meters deep. Ocean quahogs and sea scallops are harvested in waters up to 110 meters deep. Finfish are harvested in waters ranging from the nearshore out to 120 meters deep." Read in conjunction with the Summary discussion of 7:7E-1.2, the intent therefore seems to be to get some or all of the proposed standards for submerged cables applied via a federal permit to 60, 110, or even 120 meters deep.

like a legitimate role of state government. New Jersey may well have some statutory authority to impose the proposed submerged cable standards through rules and permit conditions. However, New Jersey may not properly make such rules part of its coastal zone management plan. If New Jersey nevertheless does so, the Secretary of the Department of Commerce should not approve such a plan. State economic planning may be valid, but when it is based solely on economic impacts to coastal resource users rather than on potential adverse impacts on coastal resources themselves, the federal government should not use the CZMA to back it.<sup>15</sup>

IV. “Wet links” should not be discouraged.

Many trans-Atlantic (and other trans-oceanic) fiber optic cable systems are designed as a “ring” system that forms an international loop; TAT-14 is a recent example. The purpose of the ring configuration is to allow the system to continue operating even if one segment is cut, such as accidentally by a vessel’s anchor. Such continuity of service is an important, highly desired aspect of modern super-capacity fiber-optic systems, often carrying crucial data transmissions for governments and private enterprises. Such ring systems landing in the U.S. typically have a submerged segment that links one landing in the United States to another landing in the United States. Such a U.S.-to-U.S. segment, such as the Manasquan-to-Tuckerton leg of the TAT-14 cable system, is often referred to as a “wet link”.<sup>16</sup>

A. The Proposal reserves the authority to essentially ban wet links

The Proposal states at 7:7E-4.20(c)(1)(i) that siting a cable in the Atlantic Ocean is “discouraged” if it is sited either within surf clam areas or areas where marine fish are harvested using mobile bottom-tending gear, unless “no prudent and feasible alternative exists” AND the cable follows the shortest route past such areas. It may not be practicable for a wet link to avoid crossing such areas, due to their breadth, so such a cable would have to overcome the “no prudent and feasible alternative” test to avoid being “discouraged”.

NJDEP has in the Proposal rejected our prior requests to replace the word “feasible” with the word “practicable”; although NJDEP has expressly declined to define either term in the Proposal, we fear that “feasible” will be taken to mean “capable of

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<sup>15</sup> To illustrate by analogy, the state may be able to set the terms by which state-regulated insurance companies provide insurance to commercial fishers (just as it does private automobile insurance). But even if the state’s purpose in doing so was to help keep commercial fishing going, with expected ripple effects to benefit other businesses located in the coastal zone, that would not make such regulation a proper element of the state’s coastal zone management plan to be approved by the Secretary of Commerce under the CZMA.

<sup>16</sup> The Proposal to “discourage” wet links would also apply to a coastal festoon system such as had been proposed by Asset Channels Inc. As noted above, Asset Channels is in bankruptcy, and the installation of a coastal festoon system such as Asset Channels was proposing seems unlikely at least in the near future. The discussion below therefore focuses on wet links as part of international cables, but many of the arguments would apply equally to non-international wet links or coastal festoons.

being done”, without regard to cost or other drawbacks. In general, linking two coastal New Jersey landing points with a dry link generally would be “feasible” in that sense, even if separated by many miles (such as in TAT-14) to maximize route diversity and thus overall system reliability. The problem is that, for the reasons discussed below, such a dry link typically would cost millions or tens of millions of dollars more than a parallel wet link, would take much longer to complete, would have more adverse environmental and social impacts, and after installation would be at a substantially greater risk of accidental cable cuts. (Experience shows that construction backhoes and other threats pose a much bigger threat of harm to buried terrestrial cables than fishing gear poses to buried submarine cables.)

Nevertheless, in that case a wet link in lieu of the dry link apparently would be “discouraged”. “Discouraged” is defined at 7:7E-1.5(c) to mean that:

“...a proposed use of coastal resources is likely to be rejected or denied as the Department has determined that such uses of coastal resources should be deterred and developers should be dissuaded from proposing such uses. In cases where the Department considers the proposed use to be in the public interest despite its discouraged status the Department may permit the use provided that mitigating or compensating measures can be taken so that there is a net gain in quality and quantity of the coastal resource of concern.”

It is not clear how NJDEP would apply this definition of “discouraged” when evaluating a proposed wet link. It could be applied in a way that would not hinder wet links. (If clam and marine fish populations are the relevant “coastal resource of concern”, they typically are not at all adversely affected by installation of a cable.) However, the Task Force discussions suggest that this language arises from a mindset within NJDEP that wet links should be avoided to minimize possible inconvenience to commercial fishers, without giving any considerations to the impacts of the terrestrial alternative. Our concern is that the proposed “may permit” language could leave NJDEP free to veto a wet link, even if (for the typical reasons discussed below) its impact on fish was zero, its impact on fishers was small, and its land-based alternative would be hugely more expensive, slow, and insecure.

#### B. Why wet links should not be discouraged

The problem with thus “discouraging” wet links can be illustrated by considering TAT-14 if the state had required it to have been built with a terrestrial cable route instead of a wet link connecting the cable landing stations at Tuckerton and Manasquan, NJ to complete the trans-Atlantic “ring”. To obtain the right to use cable conduits along the Garden State Parkway at that time would have cost almost \$1 million per year; such ducts are no longer available at any price, so new conduits would have to be installed in trenches to be dug along some north-south route. Obtaining the necessary rights-of-way to do so from the great number of different private and public properties to be crossed would take at least an additional year, which may make it difficult to deliver the service

timely in response to market demand. The additional costs of construction and acquiring rights-of-way would probably be tens of millions of dollars greater than for the wet link alternative. Because the sale of telecommunications services (except for local telephone service) is a highly competitive market, such additional costs inevitably would be passed on to the end-users, including New Jersey citizens, business, and government agencies.

Perhaps more significant to New Jersey citizens would be the environmental and social impacts of installing a new north-south terrestrial route. Such installation typically requires digging a trench in which to install cable conduits (in some cases directional drilling used to go under rather than across or through rivers or other special resources). In already-developed area that inevitably leads to construction noise and traffic impacts as the construction crosses or parallels roadways. Crossing natural or undeveloped areas inevitably has environmental impacts such as siltation of streams, impacting wetlands, and harming endangered and other species, even if appropriate steps are taken to minimize impacts. In general, a terrestrial fiber route usually can be designed and implemented so as to reduce such impacts and to a legally acceptable level. (Although it may not be feasible to get a permit to trench inland from the coast across the Pinelands area of New Jersey.) Our point is that the adverse environmental and social impacts of installing a wet link typically are even less: installation and operation of a buried cable virtually eliminates adverse impacts to fishers, and has no significant environmental impacts.<sup>17</sup>

This very issue has recently been considered for several projects by the California Coastal Commission, which through permitting decisions and other actions helps implement California's coastal zone management plan. In May of 2000, reviewing a proposed trans-Pacific ring system known as China-US, the Commission challenged the wet link proposed to run from San Luis Obispo, California to Bandon, Oregon. The Commission asked for a showing that the wet link would have less impact on California's coastal zone than would a parallel terrestrial link.<sup>18</sup> The applicant prepared such a study and the Commission accepted the conclusion that the wet link would have less impact than a terrestrial route on the coastal zone.<sup>19</sup> Shortly thereafter the Commission approved similar projects with wet links, without requiring independent site-specific analysis of the impacts associated with a terrestrial route.<sup>20</sup>

In short, the California Coastal Commission has accepted what seems commonsensical and what New Jersey should now conclude: that it is generally the case that less adverse impacts result from the proper installation and operation of a submarine cable than of a parallel terrestrial cable. Note that the Commission did not even weigh cost considerations in reaching that conclusion, but only various types of environmental

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<sup>17</sup> See section II, above.

<sup>18</sup> California Coastal Commission, CDP Application No. E-98-029, Final Approved Findings, pp. 26 – 27 (July 11, 2000).

<sup>19</sup> *Id.* at pp. 28 – 29.

<sup>20</sup> See *e.g.*, California Coastal Commission, CDP Application No. E-00-004, Staff Report, pp. 21 –25 (adopted September 12, 2000).

impacts to coastal zone resources. The Proposal's bias against wet links seems based on considering impacts to only one type of coastal zone "resource", the profitability of commercial fishing enterprises. To make this imbalanced approach into law would be arbitrary, capricious, and inconsistent with the Coastal Zone Management Act, as discussed further below.

C. The language conflicts with CZMA standards

The Proposal should be revised to preclude, rather than permit, making such an imbalanced decision. Otherwise, it would among other things be an improper element of a coastal zone management plan ("Plan"). Among other conflicts with the CZMA, a Plan containing such authority would preclude at least two of the findings the Secretary of Commerce must make before making grants to help a state manage its CZM program. Specifically, 16 USC 1455(d) (8) and (10) state that before approving such a program, the Secretary must find that it "provides for adequate consideration of the national interest...including the siting of facilities... which are of greater than local significance" and "contains a method of assuring that local land use and water use regulations within the coastal zone do not unreasonably restrict or exclude land uses of regional benefit".

International cables are super-high capacity systems whose telecommunications benefits therefore typically go to the entire region and nation, not just the county or state wherein they land. The national interest in the timely installation of such cables if and when the market demands them was recently underscored by the adoption of rule by the Federal Communications Commission to expedite approval of FCC license applications.<sup>21</sup> To effectively ban wet links would prevent certain systems from being landed in New Jersey. To do despite their zero impact on fish, small impact on fishers, and very problematic land-based alternative would "unreasonably restrict or exclude land uses of regional benefit" and would not provide "adequate consideration of the national interest".

D. Vetoing a wet link would conflict with FCC authority

If the Proposal language was applied so as to preclude the laying within the first three NM of a wet link that had been approved by a landing license issued by the Federal Communications Commission ("FCC"), it would be in conflict with federal law and therefore illegal. In particular, it would violate 47 USC 253(a), which says that no state law may have the effect of prohibiting "the ability of any entity to provide any interstate or intrastate telecommunications service." The state can not justify this aspect of the Proposal under 47 USC 253(b), which preserves a state's right to impose requirements "necessary to...protect the public safety and welfare." Since burial of submarine cables, including wet links, is sufficient to avoid adverse impacts to commercial fishers, New Jersey can not justify the banning or even "discouraging" of wet links as "necessary".

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<sup>21</sup> Review of Commission Consideration of Applications Under the Cable Landing License Act, IB Docket No. 00-106, November 8, 2001, by Report and Order (FCC 01-332).

E. Discouraging wet links would be bad for New Jersey

Even apart from conflicts with federal authority, either prohibiting or seeming to prohibit wet links would be bad state policy. Not all trans-Atlantic systems are designed as ring systems with wet links, but ring designs are expected to remain important, with wet links as a typically desired element. The Proposal describes at some length the economic importance to New Jersey of commercial fishing; it should give equal attention to the economic importance to New Jersey of high-capacity international telecommunications capacity. It would not be in the state's interest to discourage the siting of such projects in New Jersey.

F. "Infeasibility" should not be a prerequisite for a wet link

For the reasons outlined above, the state should not require that no "feasible" land-based alternative route exist, to avoid "discouraging" a wet link. The prerequisite should at least be reduced to "no prudent and practicable land-based alternative route exists", with "practicable" defined at VII.A below. The point of such a change would be to allow an applicant to show, for example, that even though terrestrial route could be constructed, the increased cost of doing so was disproportionate.<sup>22</sup>

V. NJDEP has not justified the requirement for payments of \$100 per meter for cable not buried to 0.6 meters.

If NJDEP is to impose a mitigation fee for inadequately buried cable, 0.6 meters is an appropriate minimum burial depth to avoid paying such fee, for the reasons expressed in the May 2001 Comments.<sup>23</sup> However, as noted in those comments, we know of no rational basis for the rate being set at \$100 per meter. That concern is again stated below.

NJDEP may not legally impose a mitigation requirement that either lacks a nexus with the project impacts in question or is disproportionate in amount to the impact being offset.<sup>24</sup> We know of no rational basis for requiring mitigation at a rate of \$100 per meter, even if a cable crossing or other cause of burial to less than 0.6 meters does preclude fishing near that "anomaly". Is a particular anomaly in an area that would otherwise be fished?<sup>25</sup> Even if yes, does effectively removing that area from fishing have an actual economic impact, in a year when all members of the clam fleet fill their quota

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<sup>22</sup> Even this formula may drive choices that are environmentally sub-optimal in some cases, for the reasons outlined at IV.B, above, but we offer it here as a compromise that might be sufficiently acceptable to all concerned.

<sup>23</sup> A copy of those comments, which are incorporated here by reference, are included here as Attachment 3.

<sup>24</sup> See, e.g., Divan Buildings v. Planning Bd. Tp. of Wayne, 66 N.J. 582, 600 (1975).

<sup>25</sup> We do not mean to concede that burial to less than 0.6 meters would in all cases present an actual risk of interaction with fishing gear, since that will depend on the stiffness of the seabed, among other factors.

anyway? More factual underpinning would seem to be necessary for this apparently arbitrary mitigation amount to survive legal scrutiny.

We also note that the Proposal already contains another mitigation requirement imposed to benefit fishers, the requirement at 7:7E-4.20(c)(4) to generally remove and dispose of at least a kilometer of out-of service cable whose path is to be crossed by a new cable. This breadth of removal is more than necessary to achieve the burial depth goal for the new cable; we understand it is intended instead to benefit fishers by gradually removing old out-of service cables. The value to fishers of this mitigation requirement should also be estimated in order to determine what if any additional mitigation fee is justified.

VI. The requirements for repeatedly re-inspecting a buried cable are excessive.

The Proposal would require that a newly-installed cable be inspected immediately following its installation; two years thereafter; every five years after the latter inspection; and whenever NJDEP chooses to require an additional inspection based on information in an annual report that the permittee must submit, describing any major storm events and reported hits to the cable.<sup>26</sup> If conducted to the 100-meter depth, as the Proposal seems to desire, each such inspection would cost on the order of \$1 million. For the reasons set out in the May 2001 Comments and again below, these repeated inspection requirements are excessive.

It is true that major storms events can change seabed levels in the surf zone (areas with water depth of 10 meters or less) by as much as a meter or more. However, modern practice is to directionally bore cable conduits well under and past the surf zone, or the “erosion envelope”, so that even storm action cannot unbury them. As to the possibility of unburying cables at greater water depths, the best evidence on this question is the lack of cable hits (see Section II, above) even with the passage of the “Storm of the Century” and other major storms off the coast of New Jersey in the past decade. Therefore, certainly after a cable already has been inspected twice, mandating inspections every five years is an unnecessary, unjustified burden.

In addition, the phrase “or is informed” in 7:7E-4.20(c)(8)(v) should be either be removed or clarified to mean “reliably informed”. For example, reinspection should not be required based solely on a report of a suspected cable hit from a fisher, because for the reasons outlined in the May 2001 Comments, such reports in most cases will not be from an actual cable hit. Similarly, in 7:7E-4.20(c)(8)(iv), the Department’s discretion to require an inspection should not be so unbounded, but rather should at least be limited to where the evidence reasonably suggests such additional inspection is necessary.

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<sup>26</sup> We assume that the reference to 7:7E-4.20(c)(9) in 7:7E-4.20(c)(8)(iv) is a typographical error; we believe that reference should be to 7:7E-4.20(c)(10) instead.

VII. Several aspects of the Proposal should be clarified.

Several aspects of the Proposal should be revised to clarify their intent, as noted below.

A. Clarify that “practicable” properly includes consideration of cost.

Cable companies participating in the Task Force process have previously requested, including in the September 2001 Comments, that the term “practicable” be defined. Again we suggest that it be defined consistent with the definition of the phrase “practicable alternative” utilized by NJDEP under the New Jersey Freshwater Wetlands Protection Act regulations (N.J.A.C. 7:7A-1.1 et seq.):

“Practicable” means capable of being carried out after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

The Proposal does not incorporate this suggestion from the September comments, but instead states at 7:7E-1.5 that “interpretations of terms, such as ‘prudent,’ ‘feasible,’ ‘minimal,’ ‘practicable,’ and ‘maximum extent,’ as used in a specific rule or combinations of the rules may vary, depending on the context of the proposed use, location, and design.” We do not see why it would be inappropriate or overly limiting to apply a definition such as in the indented quote above to 7:7E-4.20. If the state nevertheless declines to do so, then we request at least an explanation in the state’s response to these comments as to whether cost would be an appropriate factor to consider in determining what is “practicable” as that term is used in 7:7E-4.20. We believe that was jointly assumed when the Task Force agreed on the use of the term “practicable” in the provisions regarding burial. If “practicable” does not consider cost, then we would object to such proposed language as arbitrary and capricious, inconsistent with the CZMA, and otherwise unlawful.

B. Acceptable forms of financial assurance should be listed in the rule.

The Summary states that letters of credit, bonds and insurance are all acceptable forms of financial assurance. However, but the rule language in the Proposal is not so specific, leaving unclear whether the state would have authority to reject some of these instruments. Our concern is that such a range of instruments be allowed, and that permittees not be restricted to more expensive options such as a fully funded trust. Therefore we request that the following language be added after the first sentence of proposed 7:7E-4.20(c)7: "Acceptable forms of financial assurance shall include a letter of credit; surety bond; insurance; fully funded trust; and any other form of financial assurance acceptable to the Department."