COMMENTS OF CERTAIN CABLE COMPANIES
ON THE NJDEP APRIL 20, 2001 DRAFT SUMMARY
AND RULES REGARDING SUBMERGED CABLES
May 18, 2001

These comments on the above draft ("the Draft") are submitted on behalf of all of the owners of submarine cables[1] that participated in the Submarine Cable Task Force convened last year (360networks inc., Concert Global Networks USA LLC, Level(3) Communications Inc., Sprint Communications Corp., TyCom, Ltd., and WorldCom, Inc.), plus three other companies (Gemini Submarine Cable System (US) Inc., Southern Cross Cable Network, and its subsidiary Pacific Carriage Ltd.). These companies are collectively referred to here as "the Companies". We understand that some of the Companies are also submitting their own separate comments.

To summarize, the main points made below are:

1. The Draft should be revised to expressly limit its reach to the State's territorial sea.
2. "Wet links" completing an international loop should not be disfavored.
3. Payments of $100 per meter should not be required for cable not buried to 1.2 meters.
4. Cooperation with installers of subsequent cables regarding cable crossings should not require the initial installer to forfeit important legal rights.
5. Practicability should set a limit on the obligations imposed when crossing out-of-service cables.
6. Additional financial assurance mechanisms should be allowed.
7. The inspection requirements should be returned to those apparently agreed to at the last Task Force meeting. [2]

I. <u>The Draft should be revised to expressly limit its reach to the State's territorial sea</u>.

In the Task Force proceedings, the cable companies asserted their view that New Jersey lacked the legal authority to regulate submarine cables to the depths being discussed. This point was made for example at the July 27, 2000 meeting by Paul Shorb on behalf of the cable companies, who said that this legal issue probably could not be resolved in the context of the Task Force meetings, and therefore proposed that the issue be set aside for the purpose of the meetings, while expressly reserving the right to object to the proposed and final rules if NJDEP exceeds its jurisdictional limits. Since NJDEP

[1] Asset Channels, Inc. also participated in the Task Force discussions, but we understand it has not yet installed a cable, and has since filed for bankruptcy protection. The installation of a coastal festoon system such as Asset Channels was proposing seems unlikely, at least in the near future.

[2] The Companies reserve their rights to challenge any portion of the language in the Draft, if formally proposed or adopted as a final rule. The comments made in this document, and throughout the entire Task Force discussion process, are in the nature of settlement discussions and should not be construed as an admission or concession by any of the Companies in any subsequent proceeding.

has been gracious enough to provide this opportunity to comment on the Draft, we feel it is only fair for us to state clearly here our view on this jurisdictional point.

The limits on New Jersey's jurisdiction can be simply stated. Under international treaties, binding as federal law on New Jersey,[3] 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.[4] The territorial seas of the U.S. extend to twelve miles.[5] However, the jurisdictional reach of New Jersey is restricted further, ending three nautical miles ("NM") from the coastline, for two reasons. First, the territorial seas of the state of New Jersey clearly extend only to three NM.[6] Second, this jurisdictional reach is not extended by the federal Coastal Zone Management Act ("CZMA"). Under the CZMA, the U.S. Army Corps of Engineers cannot issue the permit needed to install a submarine cable unless New Jersey issues a coastal zone consistency determination.[7] However, the Corps' own permitting authority over submarine cables extends only to three NM.[8] Therefore, even invoking the CZMA cannot extend New Jersey's ability to regulate the laying of cables beyond three NM.

The Draft's requirements generally extend to either 110 meters water depth or to 1000 meters water depth off the coast of New Jersey. These depths are found at distances from shore ranging from about 60 to 80 NM and about 72 to 111 NM, respectively. Therefore most of the requirements of the Draft far exceeds New Jersey's jurisdiction, which ends at three NM. (See the following illustration, provided by TyCom Ltd.)

---

[3] 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.")

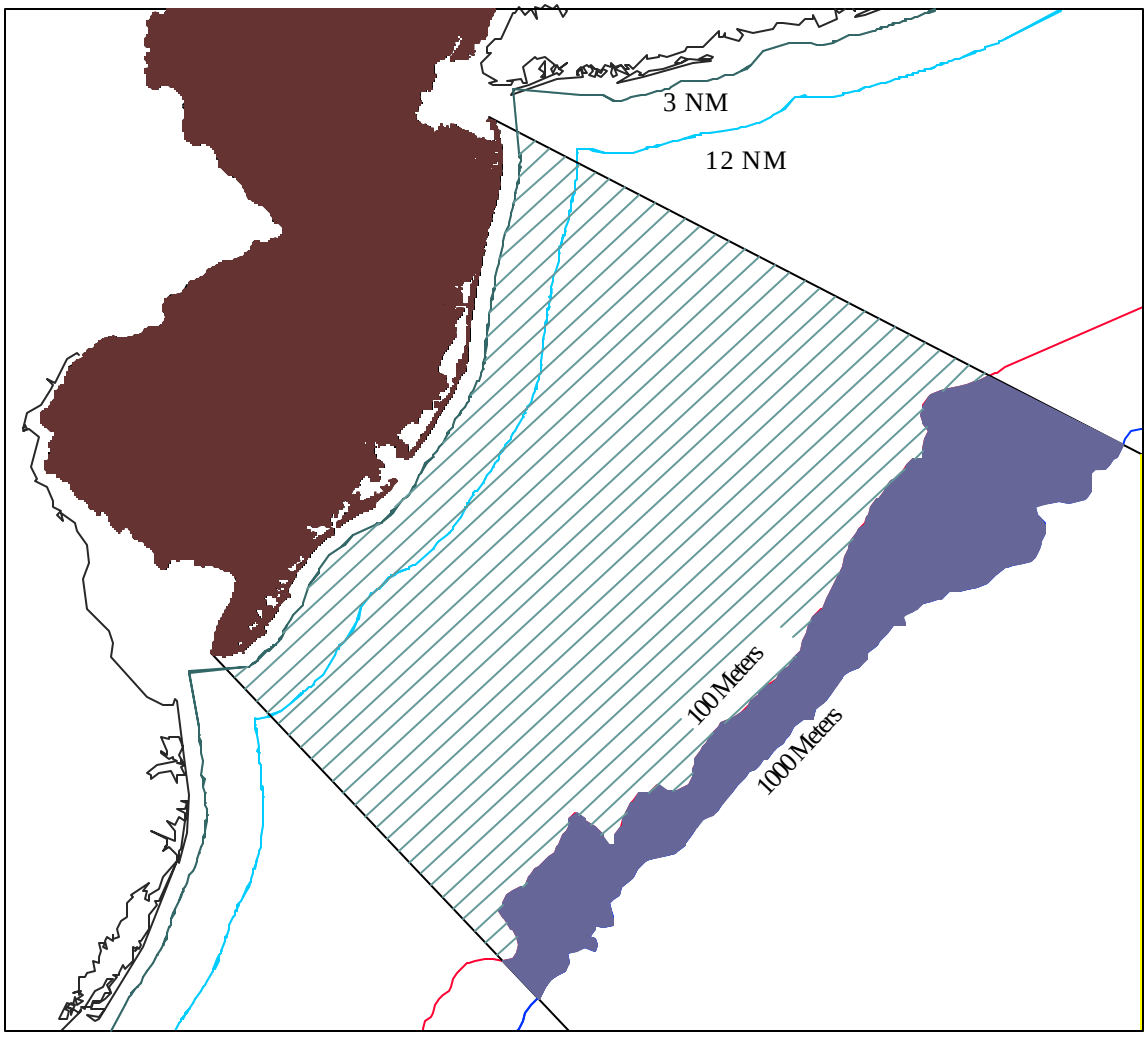
[4] See the Geneva Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82 ("Geneva Convention"), at Articles 1, 2 and 26; and the United Nations Law of the Sea Convention (1982) ("UNCLOS", at Articles 58.1, 79.2, 87.1(c), 112; although UNCLOS has not yet been ratified 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).)

[5] Presidential Proclamation 5928, 54 F.R. 77, reprinted in 43 U.S.C. 1331.

[6] See United States v. California, 332 U.S. 19 (1947); United States v. Maine, 420 U.S. 515 (1975).

[7] See 16 U.S.C. 1456(c)(3)(A).

[8] 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).



The Draft therefore should be amended by removing references to 110 meters and 1000 meters. Instead, the Draft and its summary should make clear that the Draft's requirements apply only within the territorial seas of New Jersey.

Note that making this change does not imply that cable companies will therefore not bury their cables beyond the three NM limit. Rather, cable companies can be expected to continue to follow their existing practice of burying cables wherever they foresee potential interaction with fishing gear. The cable companies 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. The 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. As the cable companies pointed out repeatedly in the Task Force meetings, the historical evidence shows that clammers 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. Therefore, if New Jersey does respect the limits on its jurisdiction as we suggest herein, it will not thereby cause any significant hardship to commercial fisherman.

II. "Wet links" completing an international loop should not be disfavored.

In the Task Force meetings we discussed what NJDEP's policy should be with regard to submarine cables that link one landing in the United States to another landing in the United States as part of a ring system that forms an international loop. Such a U.S.-to-U.S. segment in an international ring system, such as the Manasquan-to-Tuckerton leg of the TAT-14 cable system, is often referred to as a "wet link".

At the last meeting of the Task Force (January 18, 2001), the cable companies expressed concern about how the test of "no prudent and feasible alternative" would be applied to a future wet link. The representatives of the fishing industry at that meeting stated that their primary concern with such a wet link is that its north-south component may eventually be crossed by multiple subsequent cables, and that burial depth may be limited at such crossings. They indicated that they would not be concerned about such wet links if they were routed so as to run directly to at least 110 meters depth before turning parallel to the coast; then subsequent crossings of the north-south component would occur at depths that are not dredged or trawled. Our understanding from that meeting was that the draft language would be revised to make clear that the "no prudent and feasible alternative" test would not be applied to a wet link, so long as it ran as directly as practicable to at least 110 meters depth before turning parallel to the coast.

We are not sure how to interpret 7:7E-4.14(c) in the Draft. We are concerned that it may deviate from the understanding summarized above. Specifically, we are concerned that due to the breadth of the definition of Special Areas, which includes surf clam areas, it may not be practicable for a wet link to avoid passing through a Special Area on its way to deeper waters. If so, would 7:7E-4.14(c) as drafted preclude installation of the wet link unless the applicant could show that a "dry link" (i.e., installation on land instead) was not "prudent and feasible"? If yes, then would the fact that a dry link would cost millions or tens of millions of dollars more, delay system installation, and be at greater risk of accidental cable cuts suffice to show that it was not a "prudent and feasible alternative"? If the Draft 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.

To avoid these uncertainties, we suggest that the Draft be revised. Specifically, we suggest that the last "and" in 7:7E-4.14(c)(1) of the Draft be changed to "or". Doing so would clarify that if a wet link followed the shortest route practicable to waters deeper than 110 meters, it would not have to also meet a test of "no prudent and feasible alternative". As a matter of practical compromise, we would agree to such a provision, despite our general position that NJDEP has no authority to impose requirements beyond

3 NM. This revision would be consistent with the apparent agreement at the last Task Force meeting.

III. Payments of $100 per meter should not be required for cable not buried to 1.2 meters.

The requirement at (c)(12) of the Draft that the permittee pay into a special fund at the rate of $100 per meter of cable not buried to at least 1.2 meters is new language. It apparently grew out of the last Task Force meeting, when it was clear that the cable and fishing industries had not succeeded in negotiating a framework for determining how much mitigation, if any, cable installers should provide to offset alleged economic impacts of new cables on commercial fishers. NJDEP staffer Ruth Ehringer then suggested fixing a rate at which cable companies would pay for "anomalies" such as cable crossings where adequate burial was not achieved and an area of seabed was thereby effectively lost to some types of commercial fishing. At least one of the cable company representatives responded that this seemed a sound approach.

As Rick Kropp had explained at that meeting, 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.[9] Focusing on the extent to which a cable actually restricts fishing and thereby causes economic harm has the potential to satisfy these legal requirements, and we support that conceptual approach.

However, we have two main concerns about the particular measure used in the Draft. First, we do not believe that failure to achieve 1.2 meters should be the trigger for any mitigation requirement; instead, we believe that no mitigation payment should be required unless there is failure to achieve at least 0.6 meters burial. Second, we know of no rational basis for the rate being set at $100 per meter. These concerns are explained below.

The main reason that triggering mitigation for any burial less than 1.2 meters would be inappropriate is the lack of evidence that burial at between 0.6 and 1.2 meters causes commercial fishers any economic harm. We know of at least six cables that were installed off the coast of New Jersey with target burial of 0.6 meters, before deeper burial began to be targeted by subsequent systems: 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 clammers (up to about 100 meters) is over 400 NM. As we have previously reported to NJDEP, the evidence is that clammers frequently dredge over these cables.[10] 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 being snagged by a clam dredge or trawler, either in New Jersey or in other U.S. waters.

---

[9] See, e.g., Divan Buildings v. Planning Bd. Tp. of Wayne, 66 N.J. 582, 600 (1975).

[10] 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.

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, the evidence is that cables buried to at least 0.6 meters do not keep clammers or other commercial fishers from fishing over them and do not have an economic impact on such fishers.

We are not objecting to the burial standard at (c)(2) of the Draft, which essentially is 1.2 meters or as close thereto as practicable. Our concern is about the instances where burial to at least 1.2 meters is not practicable, whether due to stiffness of the seabed[11], the desire to avoid going deeper than 1.2 meters and thereby make the cable unrecoverable for repair, or for other reasons. In such instances, burial to for example 1.0 meter could comply with the burial requirement at (c)(2). Burial should not trigger a mitigation requirement unless the burial is so shallow that it may have an adverse economic impact on fishers.

As noted above, 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 reduced burial does preclude fishing near that anomaly. Is a particular anomaly in an area that would otherwise be fished? 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 anyway? More factual underpinning would seem to be necessary for this apparently arbitrary mitigation amount to survive legal scrutiny. We note that the Draft already contains another mitigation requirement imposed to benefit fishers, discussed at V, below. Nevertheless, as a practical matter we would consider not challenging such an arbitrary mitigation amount, if it was connected to a more reasonable trigger, such as burial to less than 0.6 meters, and only within the State's territorial waters.[12]

IV. Cooperation with installers of subsequent cables regarding cable crossings should not require the initial installer to forfeit important legal rights.

The language at (c)(3) regarding crossing of in-service cables is generally acceptable. However, we request a slight rewording of the provision at (c)(3)(iv) regarding cooperation with installers of subsequent cables.

The point of this provision, as we understood it from the Task Force meetings, was to help the installer of the crossing cable get it buried as deeply as practicable at the crossing and to try to avoid crossings in areas most used by commercial fishers. Note that in general, a cable owner has no legal right to prohibit someone else from subsequently crossing that cable with another cable. Instead, under international treaty, the installer of the initial cable is essentially limited to holding the subsequent installer

[11] During the Task Force discussions, the clamming representatives conceded that where the seabed is very stiff, the clam dredge also penetrates less deeply, and may not be used at all.

[12] 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 will depend also on the stiffness of the seabed, but we recognize that NJDEP may want to use a simple standard for ease of application.

liable after the fact, if he damages the initial cable.[13] As a matter of industry custom and practice, cable installers generally communicate with each other to share information that will result in the best crossing for both cables (for example, crossings at close to right angles and far from repeaters are preferred). Often these mutual resolutions are documented in a "crossing agreement". The International Cable Protection Committee ("ICPC") has adopted and published voluntary guidelines for crossings and crossing agreements.[14] Complying with the ICPC guidelines regarding joint planning will facilitate what the Draft is trying to accomplish in (c)(3)(iv).

Our concern is that the Draft's phrase "shall permit future crossing of the cable" at (c)(3)(iv) might be interpreted to require that the owner whose cable is being crossed give unconditional permission (such as through a crossing agreement) to any crossing, no matter how badly engineered, and thus relinquish his right to seek damages if that crossing harms his cable. This concern would be addressed if (c)(3)(iv) was revised to read "The cable company shall to the maximum extent practicable share information and otherwise cooperate with those responsible for any cables being crossed and with installers of subsequent cables crossing the subject cable, so as to reduce the impacts of cable crossings."

V. Practicability should set a limit on the obligations imposed when crossing out-of-service cables.

The language at (c)(4) regarding crossing of out-of-service cables is generally acceptable. We note that the requirement to remove a kilometer of the inactive cable being crossed far exceeds the removal that normally would be done for operational reasons. We understand that this provision is intended to help commercial fishers by removing, at the expense of the cable company installing a new cable, a significant portion of a pre-existing out-of-service cable.

However, we ask that a "practicability" standard be inserted in three places, as shown in the redlined text below. The cable companies requested such changes at the last Task Force meeting, and had the impression from that meeting that "practicable" was a term that NJDEP was comfortable using in regulations and applying in the permitting context.[15]

> 4. Where a submerged cable will cross an existing out-of service cable, and the water depth is less than 1000 meters, the cable company shall minimize the impact of cable crossings on commercial fishing and minimize the risks to the proposed and existing cables, as follows:
>
> i. Where the out-of-service cable is buried less than 0.6 meter, the out-of-service cable shall be cut, and recovered for proper disposal for a distance of at least 500 meters on each side of the selected cable crossing. For surface laid out-of-service cables, the ends of the remaining out-of-service cable shall be re-laid flat on the seabed to minimize

[13] See, e.g., UNCLOS Art. 114.
[14] International Cable Protection Committee, Recommendation No. 2, Recommended Routing and Reporting Criteria for Cables in Proximity to Others (Issue No. 7, May 8, 2001).
[15] "Practicable" here should be interpreted consistent with NJDEP's definition of "practicable alternative" at N.J.A.C. 7:7A-1.4 & 3.1.

problems for other seabed users. For buried out-of-service cables, the ends of the remaining out-of-service cable shall be re-buried as close as practicable to the original depth;

ii. Where the out-of-service cable is buried between 0.6 and 1.2 meters, the out-of-service cable shall, if ~~possible~~practicable, be cut and recovered for proper disposal for a distance of at least 500 meters on each side of the selected cable crossing. The ends of the remaining out-of-service cable shall be re-buried as close as practicable to the original depth. If the out-of-service cable can not be cut and recovered, the cable crossing shall comply with (c)4 above; and

iii. Where the out-of-service cable is buried more than 1.2 meters, the cable shall be laid over the out-of-service cable at the depth prescribed in (c)2 above.

VI. Additional financial assurance mechanisms should be allowed.

The Task Force discussions seemed to reach agreement on the general concept of requiring financial assurance for later removal of the cable being permitted. However, the specific language at (c)(7) is completely new. We request that the types of acceptable financial assurance mechanisms be broadened to include all those allowed by NJDEP at N.J.A.C. 7:26C-7.1, 7.7; we know of no reason why the program for submerged cables should be more restrictive.

VII. The inspection requirements should be returned to those apparently agreed to at the last Task Force meeting.

At the last Task Force meeting, NJDEP's 12/8/00 draft was the subject for discussion, which contained the following language regarding inspection to confirm that burial targets had been obtained and subsequently maintained:

4. After the cable has been installed, a long-term inspection and maintenance plan shall be implemented to insure that the cable remains at the authorized depth and location. The plan shall include an immediate post-lay inspection and an inspection 18 to 24 months thereafter as well provision for inspection after a major geologic event. The plan shall contain provisions to rebury the cable to the depth prescribed in (c)1 above to the maximum extent practicable in the event that it becomes uncovered or rises above the minimum authorized depth. The plan shall provide for such reburial within 90 days if practicable. In all cases, reburial shall be accomplished within 6 months after discovery by the permittee or after discovery by a third party is reported to the permittee.

5. A report containing the results of inspection and maintenance of the cable, a discussion of geologic and seismic events which could have affected the cable, and reported hits of the cable for the previous year shall be submitted to the Department in January of each year. The report shall also indicate when the cable becomes out-of-service.

We did not hear any objection to this language at the meeting. We therefore are puzzled by the changes made in (c)(8) and (c)(9) in the new Draft, which make it much more stringent. Our specific concerns are outlined below.

A. Initial reports should be submitted within six months.

The Draft specifies that when the initial burial inspection is performed immediately after the cable is installed, a written report of that inspection must be submitted to NJDEP within two months. Based on our experience, it will be very difficult to get our contractors to meet such a deadline, because of the practical difficulties of analyzing the large amounts of data that will be collected by the cable-laying ship. We request that deadline be set instead at six months after the completion of that inspection.

B. Inspections every five years are not necessary.

This was not required in the draft discussed at the last meeting. It does not seem a necessary addition to the other inspection requirements in that draft, for the reasons discussed at VII.C, below.

C. "Major storm events" should not trigger inspections.

The draft discussed at the last meeting instead referred to "major geologic events", which could expose a buried cable. 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 III, 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.

D. NJDEP should not mandate an inspection based on a fisher report of cable hit.

The draft discussed at the last meeting required that reports of cable hits be included in the annual report, but did not thereby trigger a duty to reinspect. DEP should not mandate reinspection based on a report of a suspected cable hit from a fisher, because such reports in most cases will not be from an actual cable hit. The cable companies have received many such reports that have turned out to be incorrect. That is likely to remain true in the future, for the following reasons. First, there are many causes of fishing gear snags other than cables. Second, it is highly unlikely that clammers or trawlers will be able to raise to the surface modern cables buried to the Draft's proposed standard (i.e., 1.2 meters or as close thereto as practicable), so visual confirmation will not be available. Third, many clammers apparently do not know with much accuracy their position relative to charted cables, so their gear when snagged actually may be some distance from a cable.

The Companies certainly do want to hear of suspected cable hits from fishers, even if most or all such reports turn out to be false alarms. The cable companies have a great incentive to reinspect and rebury cables, to protect their cables, if there is substantial credible evidence of a cable hit. DEP should allow permittees to use their own

judgment regarding when to reinspect, based on whether the available evidence suggests that an interaction occurred between a cable and fishing gear.

E. Annual reports should not be provided using LORAN coordinates.

We do not object to the new requirement that the annual report be submitted to certain fishing groups as well as to NJDEP. However, we object to a requirement to report using the outmoded and relatively inaccurate LORAN system. With the application of the appropriate corrections, the absolute accuracy of the LORAN system still varies between 0.1 and 0.25 nautical miles.[16] The LORAN system dates from the 1950's will likely be shut down because other, more accurate systems have become widely accepted.

We do not think that continued reliance on LORAN by fishers should be encouraged by NJDEP, at least for the purpose of captains determining where their vessel and gear is relative to a cable. For that purpose, fishers should make use instead of the more accurate, affordable navigational systems that use the global positioning system ("GPS"). In annual reports, permittees should instead provide location information as latitude and longitude coordinate pairs, in the WGS 84 (World Geodetic System 1984) datum, that were arrived at using GPS. Those still relying solely on LORAN can use those lat-long coordinates. But for us to first translate our coordinates into LORAN has the potential to create even more inaccuracy, because it introduces the potential for relative error (i.e., the difference between the LORAN of two different users).

[16] Defense Mapping Agency, The American Practical Navigator (1995), page 196. (Absolute accuracy is the accuracy of a position with respect to the geographic coordinates of the earth. Id.)