STATE OF FLORIDA
DEPARTMENT OF ENVIRONMENTAL PROTECTION

In re RULEMAKING TO ADOPT
CRITERIA FOR THE PLACEMENT OF
TELECOMMUNICATION LINES AND
CONDUITS ON SOVEREIGNTY SUBMERGED LANDS
AND ESTABLISH FEES FOR SUCH USE

Docket No. 01-10R

NORTH AMERICAN SUBMARINE CABLE ASSOCIATION PROPOSAL FOR LOWER COST REGULATORY ALTERNATIVE TO THE PROPOSED RULE

The North American Submarine Cable Association ("NASCA"), pursuant to Section 120.541, Florida Statutes, hereby submits a good faith proposal for a lower cost regulatory alternative to proposed rules of the Department of Environmental Protection ("DEP" or "Department") that were noticed in the *Florida Administrative Weekly* on January 3, 2003 ("the Proposal").

Introduction

The Department's proposed amendments to Rule 18-21, Florida Administrative Code, would establish for the first time specific criteria and fees for the installation in Florida territorial waters of international telecommunication facilities. More specifically, the Proposal would: (1) establish criteria for the crossing by telecommunication lines and conduits of sovereignty submerged lands; (2) establish fees for such crossings; (3) establish "need" criteria in order to obtain approval for installation of telecommunication facilities; (4) limit the amount of telecommunication landing infrastructure (cables and conduits) allowed at a particular landing site; (5) geographically restrict landing areas; and (6) enlarge and expand process requirements.

NASCA's Substantial Interest

NASCA is an association formed to address matters affecting industry members. NASCA's fifteen members are listed on the letter transmitting these comments.

A number of NASCA's members own, operate, or maintain submarine telecommunication cables that cross sovereignty submerged lands. A number of NASCA's members have an interest in landing additional international submarine cables at Florida, if and when market demand calls for the installation of additional such infrastructure. Such infrastructure must cross sovereignty submerged lands by necessity to bring international communication traffic into the domestic network in Florida. The Proposal would establish regulatory restrictions applicable to such potential future projects, imposing regulatory requirements and costs beyond those already imposed under existing statute and rules, particularly the Environmental Resource Permitting Program and the Sovereignty Submerged Lands rules. Thus, NASCA, its members, and others similarly situated are substantially affected by the Proposal.

This rulemaking is an outgrowth of an investigation by Department staff into the policy implications of establishing corridors and fees, as authorized by the Board of Trustees of the Internal Improvement Trust Fund ("Trustees"). NASCA and its members have participated in the policy investigation from its inception, repeatedly voicing their concern that certain aspects of this rulemaking will substantially adversely affect their interests.

Laws Being Implemented/Statutory Objectives

The Proposal has been noticed for adoption by the Department, as staff to the Trustees. The specific authority for the Proposal is identified as Section 253.03(7), Florida Statutes, and

the law implemented as Sections 253.002, 253.03, 253.034, 253.04, 253.115, 253.12 and 253.77, Florida Statutes. These statutory provisions authorize the Trustees to manage and dispose of state-owned lands "so as to insure maximum benefit and use," consistent with the Public Trust Doctrine.

NASCA here proposes in good faith a regulatory alternative that would achieve at lower regulatory cost the statutory objective that Department seems to be trying to advance. However, the Department has not in its January 3 publication expressly articulated what legitimate statutory objective it seeks to achieve through its proposal. NASCA's proposal here of a lower cost regulatory alternative therefore, by necessity, relies in good faith upon what NASCA has heard Department representatives say about its objectives, in proposing prior versions of this proposal over the past two years at public hearings and in meetings with NASCA. If and to the extent the Department objects that NASCA has not correctly inferred the legitimate statutory objective or objectives upon which the Department relies in constructing its proposal, then the Proposal should at a minimum be remanded to the Department for republication with a specific articulation of such legitimate statutory objective for another round of public notice and comment, to enable NASCA and others to avail themselves in a full and meaningful way of their rights under Section 120.541, Florida Statutes.

The No Action Alternative

The current Environmental Regulatory Permitting program established by Chapter 373, Florida Statutes, the Sovereignty Submerged Lands approval process set forth in Chapter 18-21, F.A.C., has adequately managed the use of sovereignty submerged lands by telecommunication facilities. For over thirty years, the existing process has insured that this important infrastructure

is installed with minimal environmental impact and virtually no conflict with other uses of sovereignty lands. Nothing has changed that would justify imposition of new regulatory criteria and the assessment of fees for the necessary crossing of Florida territorial waters by telecommunication facilities in order to reach the State of Florida from international destinations.

In particular, initial exaggerated fears of a "spider web of cables" voiced by some Department representatives have been shown to have no basis in fact. This showing was made in part by NASCA's submission of research by an independent industry expert, identifying the maximum rate at which additional international submarine cables could be expected to land in Florida. Subsequent market developments have confirmed that the conservative estimates of future cable laying submitted by NASCA were indeed very conservative; the well-publicized current "fiber glut" suggests that future cable laying will be well below the rate estimated by the independent expert and by NASCA in its earlier comments to the Department. As NASCA has shown in its prior comments, the existing regulatory scheme protects the environment so well that requiring or encouraging new cables to concentrate in areas selected by the state government will not substantially further reduce the already minor environmental impacts. The Proposal therefore does not advance statutory management objectives, yet they add regulatory costs. For the foregoing reasons, not adopting the Proposal would substantially achieve the statutory objective at a lower regulatory cost.

If the Proposal is nevertheless found to substantially advance some relevant statutory objective, NASCA here proposes specific lower cost regulatory alternatives that would substantially accomplish the apparent objectives of the Department.

Lower Cost Regulatory Alternatives

There are two main elements of the Proposal to which NASCA is proposing a lower cost regulatory alternative. The first element is the Department's proposal to identify five Special Consideration Areas and to create a potentially expedited approval process for projects designed to fall within those areas. The second element is the Department's proposed limits on installation of new conduits, based on demonstration of need. Each element and NASCA's corresponding proposed alternative is discussed separately below.

I. Special Consideration Areas

A. Description

The Department proposes adoption of "Special Consideration Areas." The primary defining characteristic of these areas is identified by the Department as a "gap" in the outer or "third" of the banks of hardbottom that typically parallel the shore in South Florida. International telecommunication landing facilities sited within these Special Consideration Areas would be treated differently than those outside the Special Consideration Areas. Specifically, projects outside Special Consideration Areas would be required to undergo review by the Trustees in order to obtain approval, whereas those inside would not, unless such review was requested by one of the Trustees.

B. DEP's Inferred Statutory Objective

Based on prior statements by DEP, NASCA infers that DEP has in mind one or both of the following two rationales. One possible rationale is that, to the extent that future applicants respond to the incentive created by the Proposal and choose to route cables through such "gaps" in the third reef, adverse impacts on hard-bottom areas such as breaking, abrading or shading of

hard corals and soft corals by the laying down of a cable will be minimized. The other possible rationale is that, to the extent that future applicants respond to the incentive created by the Proposal and choose to route cables through the five designated areas, future cables will tend to be clustered together in predicted locations more than they otherwise would be, and to the extent such clustering occurs, the potential conflicts with other uses of the seabed (such as sand extraction for beach replenishment) would be reduced.

C. Cost Analysis

NASCA understands from prior DEP statements that routing a new project through a Special Consideration Area would be an option rather than a requirement, and should make a difference only in the possibility of not having to get the Trustees' approval.[1] However, NASCA has previously expressed its concern that DEP staff might in addition treat a project not routed through a Special Consideration Area, for that reason alone, as less deserving of approval or of expeditious review.

If such a result occurred, the additional regulatory cost would be large. The first cost would be in the form of delay, if applications for projects outside of Special Consideration Areas were delayed by DEP staff disfavor, expressed for example in demands for additional studies before the application will be further considered. Such delay is harmful to these large, capital-intensive projects, and even more so when the delay is unexpected. Specifically, because such projects typically are designed based on the latest advance in the continually-advancing field of

[1] Until July 2000, all telecommunication facilities received public easements issued by District staff at District centers. Under an interim policy implemented by the Department since then, and applied to three applications for landing international cables subsequently approved, the Department has not issued such easements until approved by the Trustees. Requiring action by the Trustees typically adds at least several months to the approval process. Requiring Board approval for those facilities outside of Special Consideration Areas therefore will substantially increase regulatory costs. The additional months required to obtain approval and the expense of representation before the Board of Trustees substantially increases the cost to an international telecommunication cable project.

increasing the carrying capacity of an optical fiber, a project unexpectedly delayed by a year can thereby become technologically stale and economically non-viable.

To the extent applicants' reasonable fear of such delay leads them to plan projects only through Special Consideration Areas, that would impose different, and potentially very large, costs. One type of cost is the additional cost of terrestrial "backhaul" from the landing point driven by the use of a Special Consideration Area, to the point where the applicant actually wants the international fiber to connect to the terrestrial domestic network. Depending on the distance from the preferred or desired landing location, such additional backhaul costs could be in the millions of dollars annually. Second, additional backhaul distance also implies greater potential disruption of the natural and manmade environment (i.e., more miles of new trenching.). Third, costs for upland landing sites within Special Consideration Areas presumably will increase based upon the monopoly power created by the Department's identifying the areas as "Special Consideration Areas."

D. First Lower Cost Alternative

NASCA proposes that, to the extent that provisions regarding Special Consideration Areas are adopted, DEP clarify the Proposal by adding language such as the following (this would be added to Section 18-21.004(2)(l) following proposed subsection 6):

> 7. The use of special consideration areas is not a requirement for approval of activities on sovereignty submerged lands under Chapters 253.F.S or 258 F.S., an environmental resource permit or wetland resource (dredge and fill) permit under Chapter 373 F.S., or the rules implementing these statutes including, without limitation, Chapters 18-21 F.A.C., 62-313 F.A.C. and 62-330 F.A.C. The decision to use or not use a special consideration area is not to be used as a criterion for review, approval or denial under these statutes and rules, including any public interest assessment or avoidance and minimization analysis undertaken during such review.

The purpose of such additional language would be to confirm that routing a new project through a Special Consideration Area would be an option rather than a requirement, and should make a difference only in the possibility of not having to get the Trustees' approval. Assuming that is the intent of the Proposal, then adding this clarification would equally well achieve DEP's intended objective, at lower cost. Adding that clarification would reduce regulatory costs by (1) preventing the possible creation and implementation within DEP of an "unwritten rule" against cables outside of Special Consideration Areas, and/or (2) avoiding uncertainty among applicants about the possibility of such substantive bias, which uncertainty would lead to increased costs as described above.

E. Second Lower Cost Alternative

NASCA also proposes that, to the extent that provisions regarding Special Consideration Areas are adopted, DEP add language such as the following after its proposed new 18-21.004(2)(l) 6e:

> f. In addition, any route proposed for construction of a telecommunication landing facility which the applicant can demonstrate would have impacts on live hardbottom communities, including corals and sponges, no greater than if a similar route was chosen through one of the special consideration areas defined at 18-21.004(2)(l) 6.a through e above, shall be treated as if the route were through one of the special consideration areas defined at 18-21.004(2)(l) 6a through e above.

1. Substantially achieves inferred objective of minimizing environmental impacts

By definition, projects approved under this additional language would have no greater environmental impact than would the projects that the Proposal already intends to encourage. Therefore this language would equally achieve the Proposal's presumed statutory objective of minimizing environmental impacts. This language will reduce the costs of the Proposal by

providing project planners potentially additional flexibility to find other routes with (1) equally low (or lower) environmental impacts and (2) better proximity to desired terrestrial endpoints.

2. Substantially achieves inferred objective of minimizing seabed use conflicts

At times DEP representatives have tried to explain prior versions of the Proposal as based on a desire not only to further reduce environmental impacts from future cable-landing projects, but also to reduce potential conflicts among different uses of the seabed. In particular, reference has been made to extracting sand for beach replenishment projects, which extraction could be precluded in a particular area if a cable is already installed there.

However, the Proposal as modified by this lower cost alternative would still achieve to substantially the same degree such a goal of reducing potential seabed use conflicts, for the following reasons. First, seabed use conflicts can be adequately identified through project-specific review, which should for example be able to identify whether the proposed cable route would cross an active or planned sand extraction area. This alternative way of reducing seabed use conflicts would have lower regulatory cost than would the Proposal as it stands. Second, most sand extraction is done far offshore, not inshore of the so-called third reef, so the Proposal would have little impact on reducing potential conflict with sand extraction. Third, there is very little potential for such conflict inshore or offshore of the third reef, since as shown by previous NASCA submissions, additional cables will be laid at a slow rate, perhaps only a handful per decade. Each cable is only a few inches across. So with or without the Proposal, there will be no "spider web of cables" precluding any substantial portion of the seabed from other uses.

In short, the modest additional routing flexibility that NASCA proposes here will reduce costs to the cable industry and its customers (i.e., the citizens of Florida and the rest of the U.S.)

without substantially changing the Proposal's effect, if any, on reducing potential seabed use conflicts.

F. Third Lower Cost Alternative

For projects that are required by the final rule to get approval from the Trustees, a temporary consent of use should be provided to authorize construction, at the applicant's risk, between the time of staff recommended approval and Board of Trustees consideration, and also the time between approval by the Trustees and final execution of easement instruments by all parties. This tracks previous DEP practice and reduces regulatory cost, without conflicting with any of the Department's inferred objectives.

II. Limits on Installation of Telecommunications Infrastructure

A. Description

The Proposal invents a new prerequisite for approval of a submarine "telecommunications line", which is "satisfactory evidence of a need", and defines satisfactory evidence. Second, it limits the installation of conduits to one extra conduit per approved telecommunication line outside of Special Consideration Areas, and two within Special Consideration Areas. Third, it generally limits installations at individual landing sites to no more than six telecommunications lines and conduits.

B. DEP's Inferred Statutory Objective

NASCA has never heard DEP articulate a statutory objective served by these provisions. For purposes of this filing, NASCA's best good-faith inference is that DEP has an aversion to

what might be called excessive installation of conduits on a speculative basis. DEP may believe that each installation of a conduit brings with it some small additional risk of impact to the environment, or some small additional preclusion of other seabed uses, and that therefore to minimize such impacts and/or preclusion, conduits should only be installed if it is fairly certain that they will actually be used. From that objective might flow the desire to have some evidence of need for particular systems, and to limit the number of conduits that may be drilled beyond those to be used for those particular cable systems.

C. Cost Analysis

The proposed limitation would add substantial regulatory costs. It has been common industry practice in Florida and elsewhere, when doing directional drilling for conduits at a new cable landing site, to install conduits for at least several un-named future cable systems beyond the identified system or systems immediately expected to be pulled into the new conduits. There are several good reasons for this common industry practice. First, it is economically much more efficient to go through the permitting process and to mobilize a drill rig once, rather than several times, for the same number of conduits.

But more importantly, even aside from any such cost-saving, this common industry practice results in clustering of cables and reducing the number of separate landing sites that are developed, compared to if the Proposal was adopted. Once conduits have been drilled and cables pulled into those conduits at a particular landing site, there is a strong deterrence to later drilling additional conduits at the same site, because of the risk of the drill damaging one of the existing live cables. (The odds of doing so may not be high, but the impact would be catastrophic.)

Under existing industry practice, no conduit developed to date has remained empty for long. To illustrate how efficiently the market can respond, shortly after one NASCA member installed nine conduits in 1999 at a new beach landing in Hollywood, Florida, five were filled, including two by another NASCA member who leased and used two of them to land cables. Installed conduits get used, if not right away, then eventually, and we expect that pattern to hold true into the future.

However, the Proposal as drafted would result in new conduits being drilled two or three at a time as needed for a particular planned cable system, then another two to three conduits being drilled at a new location when the next planned cable system can be identified. Developing conduits six per landing instead of two or three per landing will not result in "wasted" empty conduits, since as noted above, installed conduits tend to get used. So under the Proposal, over the long run the same number of conduits will be drilled and used as in the absence of the Proposal, just spread out across more separate landing sites.

That result does not seem to advance any statutory goal, or any objective that we have heard DEP articulate. It seems instead contrary to the DEP objectives that we infer motivate this Proposal, specifically, minimizing disruption of the nearshore environment and/or clustering cables to reduce preclusion of other seabed uses.

D. Proposed Lower Cost Alternative

NASCA proposes that the Proposal be modified in two additional ways. First, it should add after new 18-21.004(2)(l) 1b a third alternative form of evidence, "a landing license issued by the Federal Communications Commission". Issuance of such a license indicates that the FCC has determined that particular proposed cable system would serve the public interest. Application

for and obtaining such a license provides substantial evidence that this is a system that is truly intended to be and likely to be built – at least as strong evidence as the criteria already used in 18-21.004(2)(l) 1 of the Proposal.

Second, NASCA proposes that an applicant that satisfies the "need" criteria at 18-21.004(2)(l) 1 of the Proposal for at least one new telecommunication line be entitled to install up to six conduits at a particular landing site, whether within a Special Consideration Area or outside of a Special Consideration Area.

Taken together, these two changes proposed by NASCA will reduce costs by allowing future installations to satisfy the market needs for additional cables and conduits by efficiently developing fewer separate beach landing sites. These proposed changes would also advance the Department's inferred objectives at least as well, and on net probably much better, than would the Proposal as presently written.

Request

For the reasons discussed above, NASCA respectfully requests that the Department (1) carefully evaluate the lower cost alternatives proposed here by NASCA; (2) prepare a Statement of Estimated Regulatory Costs as directed in Section 120.541, Florida Statutes; and (3) adopt the proposed lower cost regulatory alternatives.