

Before the
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE
Washington, D.C.

In the Matters of

Applicability of Special Use Permit
Requirements to Certain Activities Conducted
Within the National Marine Sanctuary System,

Docket No. 02322065-2065-01

Installing and Maintaining Commercial
Submarine Cables in National Marine
Sanctuaries,

Docket No. 000526157-0157-01

and

Fair Market Value Analysis for a Fiber
Optic Cable Permit in National Marine
Sanctuaries

Docket No. 010712175-1175-01

**COMMENTS OF
THE NORTH AMERICAN SUBMARINE CABLE ASSOCIATION**

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19 July 2002

SUMMARY

The North American Submarine Cable Association (“NASCA”) supports the efforts of the National Oceanic and Atmospheric Administration (“NOAA”) to adopt a more reasoned and systematic approach to regulation of submarine cables in national marine sanctuaries (“NMSs”). But NASCA remains concerned that NOAA has still not substantiated its regulatory and fee proposals as a matter of law or policy. NOAA’s recent public notice regarding special use permits reinforces concerns that NASCA and many of its individual members have expressed previously in proceedings regarding submarine cables in NMSs (the *ANPRM*) and fee assessments for special use permits issued to submarine cable operators (the *Revised FMV Analysis*). It also raises new concerns, as NOAA’s focus appears to have shifted somewhat from one (as expressed in the *ANPRM*) of streamlining NOAA’s regulatory approach, better coordinating that approach with other federal and state agencies, and tailoring it to the specific characteristics of individual NMSs, to one that could prohibit any and all submarine cable activity in NMSs.

NASCA’s members—submarine cable owners, submarine cable maintenance authorities, and prime contractors for submarine cable systems—have strong commercial incentives to avoid traversing NMSs at the outset, not least of all because the review process is time-consuming and expensive. In fact, only a handful of submarine cable systems have ever been proposed with routes through NMSs. But there are certain situations which favor or even require the routing of submarine cables through NMSs, both for commercial and public policy reasons. And in evaluating any proposed regulations or policies, NOAA must comport its regulatory approach with international and federal law, consider the public interest benefits of such proposals, and

scrutinize the factual basis—including evidence regarding environmental impacts, if any, and trends regarding new cable construction—for such proposals.

NASCA makes four principal points in its comments. *First*, NASCA discusses how submarine cables are uniquely protected under international law and provide unique public interest benefits. *Second*, NASCA argues that even apart from international law, NOAA has failed to make the legal and policy case for subjecting commercial submarine cables to special use permitting and related fees, distinguishing them from non-commercial submarine cables, or for generally prohibiting their deployment in NMSs. *Third*, NASCA urges NOAA to base any submarine cable regulations or policies on demonstrated facts and trends, including evidence that submarine cables are environmentally benign and that contrary to NOAA’s fear, there is no long-term upward trend in submarine cable deployment. *Fourth*, NASCA argues that NOAA’s analysis in the *Notice* with respect to the National Environmental Policy Act is flawed as a legal matter and demonstrates a continuing need for better coordination and consultation with other federal and state agencies involved in reviewing and authorizing submarine cable projects.

TABLE OF CONTENTS

	PAGE
I. Submarine Cables Are Unique as a Matter of International Law and Public Interest Benefits	4
A. International Law Guarantees Unique Freedoms with Respect to Submarine Cables	4
B. Submarine Cables Offer Important Public Interest Benefits Which NOAA’s Permitting Processes and Rulemakings Have Yet to Acknowledge	9
II. NOAA Has Failed to Make the Legal and Policy Case for Subjecting Commercial Submarine Cables to Special Use Permitting and Related Fees	14
A. Special Use Permits Are Neither Required Nor Appropriate for Submarine Cables	15
B. NOAA Has Failed to Justify Its Distinction Between Commercial and Non-Commercial Submarine Cables	18
C. NOAA Should Explain Its Suggestion that Commercial Submarine Cables Should Be Barred from NMSs	20
III. NOAA Must Base Any Submarine Cable Regulations or Policies Demonstrated Facts and Trends	21
A. Submarine Cables are Environmentally Benign	21
B. Any Fear of a Long-Term Upward Trend in Submarine Cable Deployment is Unfounded	24
IV. NOAA’s Approach to NEPA Compliance Is Flawed and Evidences Insufficient Inter-Agency Coordination	27
A. “Publicly Controversial Activities” that “Lack . . . Apparent Environmental Impacts” Do Not Meet NEPA’s Standard for “Significantly Affecting” the Human Environment	29
B. Coordination between NOAA and Other Federal and State Agencies Is Inadequate	32
Conclusion	36

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permits¹ reinforces concerns that NASCA and many of its individual members have expressed previously in proceedings regarding submarine cables in NMSs² and fee assessments for special use permits issued to submarine cable operators.³ It also raises new concerns, as detailed below, as NOAA's focus appears to have shifted somewhat from one (as expressed in the *ANPRM*) of streamlining NOAA's regulatory approach, better coordinating that approach with other federal and state agencies, and tailoring it to the specific characteristics of individual NMSs, to one that could prohibit any and all submarine cable activity in NMSs.

NASCA is a non-profit association of submarine cable owners, submarine cable maintenance authorities, and prime contractors for submarine cable systems.⁴ NASCA and its members have a strong interest in protecting the marine environment without unduly limiting

¹ *Notice of Applicability of Special Use Permit Requirements to Certain Categories of Activities Conducted Within the National Marine Sanctuary System*, Docket No. 02322065-2065-01, 67 Fed. Reg. 35,501 (May 20, 2002) (“*Notice*”).

² *Installing and Maintaining Commercial Submarine Cables in National Marine Sanctuaries, Advanced Notice of Proposed Rulemaking*, Docket No. 000526157-0157-01, 65 Fed. Reg. 51,264 (Aug. 23, 2000) (“*ANPRM*”).

³ *Fair Market Value Analysis for a Submarine Cable Permit in National Marine Sanctuaries, Notice of Availability*, Docket No. 010712175-1175-01, 66 Fed. Reg. 43,135 (Aug. 17, 2001) (“*Second FMV Notice*”); *Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries, Notice of Availability*, 66 Fed. Reg. 1092 (Jan. 5, 2001) (“*FMV Notice*”); Draft Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries (Aug. 2001), available at <http://www.sanctuaries.nos.noaa.gov/news/newsbboard/fairmarket.pdf> (“*Revised FMV Analysis*”).

⁴ NASCA's current members include: Alcatel Submarine Networks; AT&T Corp.; Gemini Submarine Cable System, Inc.; Global Crossing Ltd.; Global Marine Systems Limited; Global Photon Systems, Inc.; GlobeNet Communications Group, Ltd.; Level 3 Communications, LLC; New World Network, USA, Inc.; Southern Cross Cables Limited; Sprint Communications Corp.; Teleglobe, Inc.; 360networks, Inc., Tyco Networks (US) Inc.; WCI Cable, Inc.; Williams Communications, LLC; and WorldCom, Inc.

undersea cable infrastructure necessitated by consumer demand for bandwidth capacity. For decades, NASCA's members have worked with federal, state, and local government agencies, as well as other concerned parties—such as commercial fishermen and private environmental organizations—to ensure that submarine cables do not harm the marine environment or unreasonably constrain the operations of others in that environment.

NASCA's members have strong commercial incentives to avoid traversing NMSs at the outset, not least of all because the review process is time-consuming and expensive. In fact, only a handful of submarine cable systems have ever been proposed with routes through NMSs. But there are certain situations which favor or even require the routing of submarine cables through NMSs, both for commercial and public policy reasons. And in evaluating any proposed regulations or policies, NOAA must comport its regulatory approach with international and federal law, consider the public interest benefits of such proposals, and scrutinize the factual basis—including evidence regarding environmental impacts, if any, and trends regarding new cable construction—for such proposals.

NASCA's comments are divided into four parts. *First*, NASCA discusses how submarine cables are uniquely protected under international law and provide unique public interest benefits. *Second*, NASCA argues that even apart from international law, NOAA has failed to make the legal and policy case for subjecting commercial submarine cables to special use permitting and related fees, distinguishing them from non-commercial submarine cables, or for generally prohibiting their deployment in NMSs. *Third*, NASCA urges NOAA to base any submarine cable regulations or policies on demonstrated facts and trends, including evidence that submarine cables are environmentally benign and that contrary to NOAA's fear, there is no long-term upward trend in submarine cable deployment. *Fourth*, NASCA argues that NOAA's

analysis in the *Notice* with respect to the National Environmental Policy Act (“NEPA”) is flawed as a legal matter and demonstrates a continuing need for better coordination and consultation with other federal and state agencies involved in reviewing and authorizing submarine cable projects.

I. SUBMARINE CABLES ARE UNIQUE AS A MATTER OF INTERNATIONAL LAW AND PUBLIC INTEREST BENEFITS

Submarine cables are unique, as compared with the other categories of activities identified in the *Notice*, both in terms of the international legal protections they have been granted and the public interest benefits they confer. In adopting any regulations or policies governing the operation of commercial submarine cables in NMSs, NOAA must account for these unique legal protections and public interest benefits.

A. INTERNATIONAL LAW GUARANTEES UNIQUE FREEDOMS WITH RESPECT TO SUBMARINE CABLES

International law—as expressed through various treaties and customary international law—guarantees to all nations (and by extension, their citizens and companies) the unique freedom to lay, maintain, and repair submarine cables—freedoms not granted for any other activities, and certainly not for those other categories of activities enumerated in the *Notice*. And the National Marine Sanctuaries Act⁵ itself requires NOAA to act consistent with international law. While these requirements have no bearing on other activities in NMSs, they do restrict any regulation or permitting of submarine cables by NOAA.

⁵ 16 U.S.C. §§ 1431-1439 (“NMSA”).

The NMSA authorizes the Secretary of Commerce (“Secretary”) to designate as NMSs discrete areas of the “marine environment” that are “of special national significance” and to regulate certain activities within NMSs.⁶ The NMSA defines the “marine environment” as “those areas of coastal and ocean waters, the Great Lakes and their connecting waters, and submerged lands over which the United States exercises jurisdiction, including the exclusive economic zone, *consistent with international law.*”⁷

International law guarantees the freedom to lay, maintain, and repair submarine telecommunications cables, and restricts the ability of coastal nations to regulate them. On the high seas, various international treaties guarantee the freedom to lay submarine cables on the bed of high seas⁸ and to repair existing cables without prejudice.⁹ In coastal areas, these treaties grant the freedom to lay submarine cables on continental shelves—notwithstanding any claim of a 200-nautical-mile Exclusive Economic Zone (“EEZ”)—and to repair existing cables without

⁶ 16 U.S.C. § 1433(a). The Secretary has delegated this authority to NOAA. *See* S. Rep. No. 101-595, at 1-2, *reprinted in* 1988 U.S.C.C.A.N. 4387-88 (1988).

⁷ 16 U.S.C. § 1432(3) (emphasis added).

⁸ *See* International Convention for the Protection of Submarine Cables, March 14, 1884, 24 Stat. 989, 25 Stat. 1424, T.S. 380 (entered into force definitively for the United States on May 1, 1888) (“1884 Convention”); Geneva Convention on the High Seas, arts. 2 & 26.1, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82 (entered into force definitively for the United States on Sept. 30, 1962) (“High Seas Convention”); United Nations Law of the Sea Convention, arts. 79, 112, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force on Nov. 16, 1994) (“UNCLOS”). *See also* 47 U.S.C. §§ 21 *et seq.* (codifying the 1884 Convention). Although UNCLOS has not yet been ratified by the Senate, the United States has long taken the position that UNCLOS reflects customary international law to which the United States adheres. *See* 19 Weekly Comp. Pres. Doc. 383 (March 10, 1983).

⁹ *See* High Seas Convention, art. 26.3; UNCLOS art. 79.2.

prejudice.¹⁰ Within their territorial seas, coastal nations may impose reasonable conditions on submarine cables.¹¹ These treaty provisions are reflected in the official position of the United Nations' Office of Legal Affairs of the Division for Ocean Affairs and the Law of the Sea, which states that:

beyond the outer limits of the 12 nm territorial sea, the coastal State may not (and should not) impede the laying or maintenance of cables, even though the delineation of the course for the laying of pipelines [but not submarine cables] on the continental shelf is subject to its consent. The coastal State has jurisdiction only over cables constructed or used in connection with the exploration of its continental shelf or exploitation of its resources or the operations of artificial islands, installations and structures under its jurisdiction.¹²

Thus, according to the United Nations, a coastal nation must forbear from imposing any restrictions—including those premised on protection of the seabed or access to fish stocks—on the installation or maintenance of submarine cables unless those submarine cables themselves are used for natural resource exploration or exploitation. And commercial submarine

¹⁰ See Geneva Convention on the Continental Shelf, art. 4, April 29, 1958, 15 U.S.T. 471, T.I.A.S. 5578, 499 U.N.T.S. 311 (entered into force definitively for the United States on June 10, 1964) (“Continental Shelf Convention”); UNCLOS, arts. 58.1, 79.2 (providing that all nations may exercise high-seas freedoms in the EEZ, or on the continental shelf, of coastal nations—including the freedom to install, maintain, and repair submarine cables—provided they are exercised with due regard for the limited rights of a coastal nation to employ reasonable measures to explore and exploit its resources).

¹¹ 1884 Convention, art. 1; UNCLOS art. 79.4. See also Comments of General Communication, Inc., NOAA Docket No. 000526157-0157-01, at 3-5 (filed Dec. 11, 2000).

¹² “Maritime Space: Maritime Zones and Maritime Delimitations—Frequently Asked Questions” (Office of Legal Affairs, DOALS, U.N. Secretariat) (responding to Question #7, “What regime applies to cables and pipelines?”), available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/frequently_asked_questions.htm>.

telecommunications cables are not “constructed or used in connection with the exploration of [a] continental shelf or exploitation of its resources.”

Coastal nations also have obligations to prevent willful or negligent damage to cables.¹³ And all nations “shall have due regard for cables and pipelines already in position.”¹⁴ Submarine cables are thus afforded a great degree of protection from regulation or interferences by coastal nations, reflecting the vital role that submarine cables play in facilitating communications, commerce, and government.

By Presidential Proclamation, Presidents Reagan and Clinton expressly stated that the establishments of an EEZ and a contiguous zone, respectively, did not infringe on the high-seas freedoms to lay and repair submarine cables.¹⁵ And the U.S. Congress has never vested a federal agency or the states with any regulatory authority to suggest otherwise, as even the provisions of the NMSA make clear.¹⁶

Submarine telecommunications cables are not constructed or used to explore the continental shelf or to exploit natural resources on the continental shelf or in the EEZ. Unlike the presence and effect of facilities and personnel engaged in exploration and exploitation of oil and gas reserves, such as extraction and pipeline activity, the presence and effect of submarine cables on the continental shelf is incidental to the particular characteristics of the marine

¹³ UNCLOS, art. 113.

¹⁴ UNCLOS, art. 79.5.

¹⁵ *See* Presidential Proclamation No. 5030 (Mar. 10, 1983), 48 Fed. Reg. 10,605 (1983) (establishing the U.S. EEZ); Presidential Proclamation No. 7219 (Aug. 2, 1999), 48 Fed. Reg. 48,701 (1999) (establishing the U.S. contiguous zone).

¹⁶ *See* 16 U.S.C. § 1432(3).

environment. Submarine cables require only a transit path, as compared with minerals development (which involves extraction of part of the seabed in an NMS) or commercial fishing (which harvests fish stocks within an NMS). A coastal nation is therefore prohibited under international law from regulating such submarine cables beyond its territorial sea, unless they unreasonably interfere with the coastal nation's legitimate natural resource rights on the continental shelf or in the EEZ.

The existing NMSs extend far offshore, and certainly outside the U.S. territorial sea.¹⁷ As such, NOAA's regulation of commercial submarine cables traversing NMSs could infringe these rights in a number of ways:

- (1) If NOAA were to adopt an absolute prohibition on commercial submarine cables in NMSs—as NOAA suggests in its *Notice*,¹⁸
- (2) If NOAA assessed special use permit fees so as to preclude (as a financial matter) submarine cable installation, maintenance, or repair in NMSs;¹⁹

¹⁷ See, e.g., Introduction to the Olympic Coast NMS (noting that “[s]anctuary waters extend an average of 35 miles (30 nautical miles) offshore”), available at <<http://www.sanctuaries.nos.noaa.gov/oms/omsolympic/omsolympic.html>>; Introduction to the Cordell Bank NMS (noting that “[a]bout 52 miles (45 nautical miles) northwest of the Golden Gate Bridge, at the edge of the continental shelf, Cordell Bank rises from the seafloor”), available at <<http://www.sanctuaries.nos.noaa.gov/oms/omscordell/omscordell.html>>; Introduction to the Gulf of the Farallones NMS (noting that the Farallon Islands, which lie within the NMS, are located “30 miles (26 nautical miles) west of the Golden Gate Bridge in the south central part of the sanctuary”), available at <<http://www.sanctuaries.nos.noaa.gov/oms/omsfarallones/omsfarallones.html>>; Introduction to the Monterey Bay NMS (noting that the NMS “extends an average of 35 miles (30 nautical miles) offshore), available at <<http://www.sanctuaries.nos.noaa.gov/oms/omsmonterey/omsmonterey.html>>.

¹⁸ *Notice*, 67 Fed. Reg. at 35,504. This appears to contradict the approach taken in both the *ANPRM* and the *Revised FMV Analysis*. See part II.C. below.

¹⁹ See *Revised FMV Analysis*, at 14 (advocating fees based on “market data” showing a current trend value of \$120,000 per mile); Fair Market Value Analysis for a Fiber Optic Cable

[Footnote continued on next page]

- (3) If NOAA were to adopt cable corridors or preferred routes for multiple cables, which would not only constrain routing, but also impair maintenance efforts and quality of service (by impeding access and increasing the risk of damage to neighboring cables), and could impair competition (by artificially inflating the value of rights of way held by private landowners at the shore end of the corridor),²⁰
- (4) If NOAA were to adopt a time-consuming authorization process for special use permits or other regulatory prerequisites that precluded submarine cable operators from making timely installations or repairs.

In adopting rules, regulations, and policies, NOAA must ensure that it does not infringe these freedoms as guaranteed by international law.²¹

B. SUBMARINE CABLES OFFER IMPORTANT PUBLIC INTEREST BENEFITS WHICH NOAA’S PERMITTING PROCESSES AND RULEMAKINGS HAVE YET TO ACKNOWLEDGE

In considering the regulation of submarine cables, NOAA should acknowledge the important public interest benefits afforded by commercial submarine cables. It should also

[Footnote continued from previous page]

Permit in National Marine Sanctuaries (Dec. 2000) (“*FMV Analysis*”) (recommending fees of \$120,000 per mile). These fees are proposed in addition to in-kind mitigation and sanctuary support activities required by the PC-1 and 360atlantic special use permits. *See* Authorization/Special Use Permit OCNMS-01-99 (issued Nov. 24, 1999) (“PC-1 Special Use Permit”), *attached as* Exhibit 8 to the Comments of Global Crossing Ltd., NOAA Docket No. 010712175-1175-01 (Oct. 16, 2001) (“Global Crossing FMV Comments”); Authorization/Special Use Permit SBNMS-2000-001 (issued June 12, 2000) (“360atlantic Special Use Permit”).

²⁰ *ANPRM*, 65 Fed. Reg. at 52,169, part IV.10 (proposing “fixed-location lanes”); *id.*, app. A, § 2(c) (proposing to “direct cable installations into and out of landing stations in such a way as to minimize individual and cumulative environmental effects”).

²¹ *See also* Comments of the International Cable Protection Committee, NOAA Docket No. 000526157–0157–01, at 2-4 (filed Oct. 20, 2000) (advocating the same); Comments of Sprint Communications Company, L.P., NOAA Docket No. 000526157–0157–01, at 2-8 (filed Oct. 23, 2000) (advocating same).

consider whether the implementation of any of its proposals might unintentionally impair these public interest benefits.

Submarine cables are not merely commercial infrastructure that exist in the marine environment. And they do more than serve the worthy—but less critical—ends of recreation, tourism, entertainment, or fulfillment of a deceased’s last wishes which other activities cited in the *Notice*—such as public triathlons, the California Chocolate Abalone Dive, filming of motion picture special effects, or the disposal of cremated human remains—serve.²² Submarine cables play a critical role in ensuring that the United States can communicate with itself and the world, and in supporting the commercial and national security endeavors of the United States and its citizens. They support U.S.-based commerce abroad, and provide access to Internet-based content, of a substantial proportion of which is located in the United States, as evidenced by international bandwidth buildout.²³ Any curtailment of submarine cable installation, maintenance, and repair could impair the ability of submarine cables to serve those critical ends.

Contrary to the assumptions of many, submarine cables—and not satellites—carry the vast majority of the world’s telecommunications and Internet traffic, as well as the vast majority of the telecommunications and Internet traffic between the United States and international

²² See *Notice*, 67 Fed. Reg. at 35,502-03. Like submarine cables, commercial overflight serves the end of connecting the United States with domestic and international points, albeit physically.

²³ See PACKET GEOGRAPHY 2002, at 14, figure 1 (TeleGeography 2002) (noting that of the 220,662 Mbps of total global Internet bandwidth in 2001, 218,977 Mbps connects the United States directly with international points); “Numbering Cyberspace,” ITU INTERNATIONAL TELECOMMUNICATIONS INDICATORS UPDATE, ITU NEWS, No. 2 (2001) (noting the pre-eminence of the United States with respect to international Internet geography), available at <<http://www.itu.int/itunews/issue/2001/02/indicat.html>>.

points.²⁴ Federal Communications Commission (“FCC”) statistics show the following with respect to U.S. international carriers reporting data (as they are required to do): “By transmission type, of the total activated circuits, undersea cables increased from 60% in 1999 to 68% in 2000; terrestrial links decreased from 33% in 1999 to 26% in 2000; and satellites, decreased slightly from 7% in 1999 to 6% in 2000.”²⁵ Excluding traffic on the U.S.-Canada and U.S.-Mexico routes (*i.e.*, the terrestrial international traffic in the FCC’s statistics), submarine cables carry roughly 90 percent of telecommunications and Internet traffic between the United States and international points.

Within the United States itself, submarine cables play a critical role in connecting Alaska and Hawaii with the other 48 states, and also connect the various Hawaiian Islands with each other. Submarine cables also carry the bulk of telecommunications and Internet traffic between the United States and Puerto Rico, the U.S. Virgin Islands, and Guam.

Moreover, commercial submarine cables carry much of the federal government’s own telecommunications and Internet traffic. While the U.S. Government—particularly the Navy—owns and operates its own submarine cables to support its defense and national security objectives, the U.S. Government relies heavily on commercial submarine cables to connect its

²⁴ See “Telecom Networks and Cables,” Backgrounder for Telecom ’99 (ITU 1999) (noting as of 1999 that “[b]ecause of their lower cost and longer lifespan, undersea fiber optic cables have now largely taken over from satellites as the principal means of delivering international traffic.”).

²⁵ See FCC FY 2000 Status Report, *available at* http://www.fcc.gov/ib/pd/pf/csreport_2000.pdf The FY 2001 report has not yet been released.

civilian and military operations scattered around the globe.²⁶ Unsurprisingly, submarine cables comprise part of the nation’s critical infrastructure, as originally defined by President Clinton, and which President George W. Bush took additional steps to protect in the wake of the September 11th attacks in New York and Washington.²⁷

Beyond considering these demonstrable public interest benefits, NOAA should also consider how its various proposals might unintentionally impair the public interest benefits provided by submarine cables.

First, NOAA should ensure that any regulations and policies would not limit or deprive certain geographic regions of access to submarine cable capacity—and to the high-bandwidth applications (including the Internet) they support—by disfavoring cable routing and landing in those regions (under NOAA’s “preferred route” proposal), or limiting the number of cables that

²⁶ See, e.g., “DISA Targets Network Availability,” *Network World* (July 8, 2002) (noting that the Defense Information Systems Network “the Defense Department’s primary transport mechanism for voice, data and video” is “built almost entirely of commercial offerings.”)

²⁷ See Executive Order No. 13,010 (July 15, 1996) (establishing the Commission on Critical Infrastructure Protection), *as amended by* Executive Order No. 13,064 (Oct. 17, 1997); Executive Order 13,231, Critical Infrastructure Protection in the Information Age (Oct. 16, 2001) (stating that “[i]t is the policy of the United States to protect against disruption of the operation of information systems for critical infrastructure and thereby help to protect the people, economy, essential human and government services, and national security of the United States, and to ensure that any disruptions that occur are infrequent, of minimal duration, and manageable, and cause the least damage possible”). The National Communications System (“NCS”), a confederation of 22 federal departments and agencies responsible for assuring the survivability and interoperability of various components of government communications supporting national security and emergency preparedness, has retained the consulting firm of Booz Allen & Hamilton to assist NCS in assessing the security and vulnerability of commercial submarine cables and their cable stations.

could operate in a particular corridor (under NOAA’s “cable corridor” proposal).²⁸ This is of particular concern:

- In the Puget Sound/Seattle metropolitan area, which can be reached only through the Olympic Coast NMS;
- In California, much of the coast of which has been designated within NMSs; and
- In the Boston/Massachusetts Bay region, where seabed conditions are problematic for cables, fishing is heavy, and most potential access routes are covered by the Stellwagen Bank NMS.

Disfavoring certain routings or landings, or otherwise limiting the number of cables, would not serve the objectives of the Telecommunications Act of 1996 or the articulated policy goals of the FCC and the Department of Commerce’s National Telecommunications and Information Administration, all of which have sought to ensure access to telecommunications and advanced services, such as the Internet, for all Americans.²⁹

Second, NOAA should ensure that its rules, regulations, and policies do not inadvertently inflate construction costs and the ultimate prices paid by consumers for bandwidth. NOAA’s cable corridor and preferred route proposals, for example, would provide property owners on the shore end of the corridor or route with substantial leverage over submarine cable operators that

²⁸ See *ANPRM*, 65 Fed. Reg. at 52,169, app. A, § 2(c) (proposing preferred routes); *id.*, part IV.10 (proposing cable corridors).

²⁹ See Section 706(a) of the Telecommunications Act of 1996, *codified at* 47 U.S.C. § 157(a) (directing the FCC and state public utilities commissions to encourage “the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” by a variety of means, including “removal of barriers to infrastructure investment”); *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, First Report & Order*, 14 FCC Rcd. 4761 (1999); *Falling Through the Net II: Defining the Digital Divide*, Report of Department of Commerce/NTIA (July 8, 1998).

would not exist if operators were free to choose cable routing and landings.³⁰ This could raise the costs of cable station siting, rights of way, and backhaul access—all of which would translate into higher costs to consumers for bandwidth capacity.

Third, NOAA should ensure that its rules, regulations, and policies do not impede cable maintenance and quality of service. Any cable corridor and preferred route proposal, for example, would need to address the properties of submarine cables themselves, the nature of cable retrieval and repair operations, cable spacing requirements (including minimum separation distances and cable crossing standards³¹), and the increased risk of damage (from commercial fisherman, weather, or geological events) due to clustering of cables.³²

II. NOAA HAS FAILED TO MAKE THE LEGAL AND POLICY CASE FOR SUBJECTING COMMERCIAL SUBMARINE CABLES TO SPECIAL USE PERMITTING AND RELATED FEES

Even setting aside momentarily the legality of submarine cable regulations under international law—a subject that NOAA has never addressed in the *ANPRM, Revised FMV Analysis*, or the *Notice*—NOAA has failed to justify as a legal or policy matter its general

³⁰ See *ANPRM*, 65 Fed. Reg. at 52,169, app. A, § 2(c) (proposing preferred routes); *id.*, part IV.10 (proposing cable corridors).

³¹ See “Recommended Routing and Reporting Criteria for Cables in Proximity to Others,” International Cable Protection Committee Recommendation No. 2, Issue 6 (Jan. 15, 2001), available from the International Cable Protection Committee at <<http://www.iscpc.org/>>.

³² For a detailed technical discussion of these matters, see Supplemental Comments of Tyco (US) Inc. and Tyco Networks (US) Inc., NOAA Docket No. 000526157-0157-01 (filed Aug. 21, 2001). Tyco has proposed “exclusion zones” as an alternative to preferred routes and cable corridors. See *id.* at 11-12 (suggesting that NOAA designate certain areas within NMSs as “no-go” zones for submarine cables, while permitting submarine cables in other areas). See also Comments of the North American Submarine Cable Association, NOAA Docket No. 000526157-0157-01, at 3-6 (filed Oct. 23, 2000) (“NASCA ANPRM Comments”).

regulatory approach to commercial submarine cables and the special use permits and fees that it has granted and assessed to date for such submarine cables. NOAA is not required to issue special use permits for any activity in NMSs.³³ And it has failed to make the legal and policy case for subjecting commercial submarine cables to special use permitting, particularly when it does not impose such requirements for non-commercial submarine cables.

A. SPECIAL USE PERMITS ARE NEITHER REQUIRED NOR APPROPRIATE FOR SUBMARINE CABLES

Special use permits are neither required nor appropriate for submarine cables. The NMSA allows, but does not require, the Secretary to issue “special use permits” if the Secretary determines that such an authorization is necessary “to establish conditions of access to and use of any sanctuary resource” or “to promote public use and understanding of a sanctuary resource.”³⁴ NOAA’s regulations allow the conduct of activities unless prohibited or otherwise regulated in NOAA’s NMSA regulations.³⁵

NOAA has never made a general finding that commercial submarine cables should be subject to special use permitting, as it is now required to do following the November 2000 amendments to the NMSA.³⁶ And the general and sanctuary-specific regulations generally do

³³ See 16 U.S.C. § 1441(a).

³⁴ 16 U.S.C. § 1441(a).

³⁵ 15 C.F.R. § 922.42.

³⁶ 16 U.S.C. § 1441(b) (requiring that the Secretary “provide appropriate public notice before identifying any category of activity subject to a special use permit under 16 U.S.C. § 1441(a)”). This public notice requirement was added after NOAA issued the *ANPRM*, but before NOAA reached any public conclusions regarding the issues raised in the *ANPRM*. The *ANPRM* raised obliquely the general issue of whether special use permits should be required for commercial submarine cables traversing NMSs. *ANPRM*, 65 Fed. Reg. at 51,269 (stating that “[i]f NOAA decides to issue regulations or a policy statement which include a

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not mention submarine cables. (The sanctuary-specific regulations do restrict particular activities, such as dredging, drilling, and depositing of dredged material.³⁷) Instead, NOAA decided to require a special use permit for Global Crossing Ltd.’s PC-1 system in 1998, and subsequently required a special use permit for 360networks’ 360atlantic system in 1999.³⁸ And without directly addressing the issue, NOAA prematurely issued its *Revised FMV Analysis*,

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requirement for the issuance of a special use permit, NOAA will undertake another public process to establish, in light of the statutory elements stated in the white paper, the appropriate amount of the attendant fee”). In fact, NOAA did not wait for the issuance of any regulations or policy statement before proceeding with its *FMV Analysis*.

³⁷ See, e.g., 15 U.S.C. § 922.132(a) (prohibiting dredging, drilling, depositing of dredged material, and altering of the seabed within the Monterey Bay NMS unless NOAA specifically authorizes such activity, as it has done in certain situations—see part II.B below).

³⁸ In fact, NOAA has not always taken the view that submarine cables require special use permits. For the Alaska United submarine cable system—which connects Washington State with Alaska by traversing the Olympic Coast NMS—NOAA consulted with the U.S. Army Corps of Engineers (“Army Corps”), and issued an “authorization” that resembled a simple grant of consent—as is proper under international law. See Authorization OCNMS-16-98 to Conduct Activities in the Olympic Coast National Marine Sanctuary Under Department of the Army Permit #97-2-02150, attached as Exhibit 4 to Global Crossing FMV Comments. NOAA has never explained why it changed its interpretation of the NMSA and its authorization practices by subsequently requiring special use permits for PC-1 and 360atlantic. As such, NOAA’s actions are subject to challenge under federal administrative law, notwithstanding its attempts to preclude permittees from making such challenges, particularly regarding fee assessments. See, e.g., PC-1 Special Use Permit, at 7, special condition 4.C (providing that “[t]her permit holder waives any right to administrative or judicial review of the fee amount determined by the process specified herein”). “An agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.” *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

which is premised on the unstated finding that special use permits will be required for all commercial submarine cables traversing NMSs.³⁹

Although submarine cable construction, maintenance, and repair activities require access to NMSs, they do not “use” sanctuary resources. The NMSA defines “sanctuary resource” as “any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, educational, cultural, archaeological, scientific, or aesthetic value of the sanctuary.”⁴⁰ Submarine cable operations differ markedly from the activities cited by Congress in implementing the fee-related provisions of the NMSA. Congress intended those requirements to apply to commercial tourism activities, such as “glass bottom boats and diving trips,” and makes no mention of telecommunications facilities.⁴¹ In contrast to commercial recreation and tourism activities, submarine cables do not derive any particular benefit from protected sanctuary resources, as they merely traverse NMSs. Nor do they degrade, or impede access to, protected sanctuary resources.

Moreover, submarine cable operations do not fit well within the permitting scheme of the NMSA. The NMSA provides for permits of only a five-year term.⁴² But submarine cable projects may require up to five years from the initial planning stage to the operational stage, and are built for an operating life of at least 25 years. Although NOAA has improvised “automatic

³⁹ See also Comments of the North American Submarine Cable Association, Docket No. 010712175-1175-01, at 1-2 (Oct. 16, 2001) (“NASCA FMV Comments”).

⁴⁰ 16 U.S.C. § 1432(8).

⁴¹ See S. Rep. No. 100-595 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4387, 4290.

⁴² 16 U.S.C. § 1441(c)(2). By contrast, the FCC issues cable landing licenses for a term of 25 years. See 47 C.F.R. § 1.767(g)(14).

renewal” provisions for the PC-1 and 360atlantic special use permits,⁴³ it is clear that Congress did not contemplate the application of special use permits to long-lived infrastructure.

B. NOAA HAS FAILED TO JUSTIFY ITS DISTINCTION BETWEEN COMMERCIAL AND NON-COMMERCIAL SUBMARINE CABLES

In the *Notice*, as well as the *ANPRM* and *Revised FMV Analysis*, NOAA has failed to justify its distinction between commercial and non-commercial submarine cables. In each of these proceedings, NOAA has asserted potential environmental harms as the basis for imposing permitting requirements and fees on commercial submarine cables,⁴⁴ yet it has failed to address the fact that other (non-commercial) activities affect the marine environment in the exact same manner. In fact, NOAA should subject neither kind of submarine cable to special use permitting—both because of the requirements of international law, and because the distinction between commercial and non-commercial submarine cables is indefensible as a policy matter, as both kinds of cables are environmentally benign.

NOAA’s “environmental protection” rationale applies equally to commercial submarine cables and non-commercial submarine cables, which may be used for research, scientific, or other purposes. The non-commercial submarine cables are often manufactured and installed by the same companies that manufacture and install commercial submarine cables, and deployed in the same manner—trenching and burial—as commercial submarine cables.⁴⁵ Yet NOAA has not

⁴³ See, e.g., PC-1 Special Use Permit, at 8, special condition 10.

⁴⁴ See, e.g., *ANPRM*, 65 Fed. Reg. at 51,267-68; *Revised FMV Analysis*, at 3 (asserting that “some amount of harm may occur during cable installation”).

⁴⁵ See MARS: Test Bed for a High-Power, High-Bandwidth, Regional Cabled Observatory, at 1 (Feb. 2002) (“MARS Proposal”) (describing a research cable known as the Monterey

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even demonstrated that submarine cable construction and operation in NMSs pose a particular threat to sanctuary resources, or even a comparative threat vis-à-vis other commercial or recreation activities. NOAA has previously permitted research cable deployment in NMSs.⁴⁶ And NOAA has expressed an interest in using the MARS submarine cable—which will be trenched and buried in the seabed of the Monterey Bay NMS—to monitor activities in the sanctuary.⁴⁷

Instead, commercial submarine cables are distinguishable for their capability to generate fees for the National Marine Sanctuaries Program (“NMSP”). NOAA itself admits that it has issued special use permits for conducting operations—including installation of commercial submarine cables—that are “usually commercial” and “usually revenue-generating.”⁴⁸ But the fee-generating capability does not make an activity, such as submarine cable operation, more likely to cause an adverse environmental impact. And in any event, Congress intended the fee

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Accelerated Research System (“MARS”) and the use of commercial contractors, and noting that “[t]he system will make use of the tools, techniques, and products developed over the last several decades for high reliability submarine telecommunication and military systems to ensure that this system can operate over a 30-year lifetime with minimum life-cycle cost”).

⁴⁶ See, e.g., *id.* (noting that “much of the route falls within a no-trawl zone maintained by the Monterey Bay National Marine Sanctuary”), available at <<http://www.mbari.org/mars/pdf/files/MARSVers7.24.pdf>>; Draft MARS Desktop Study, at 42 (Fugro Seafloor Surveys, Inc., Dec. 21, 2001) (“MARS Desktop Study”) (noting that “[t]he Monterey Bay National Marine Sanctuary has recently issued a permit allowing Dr. Tim Stanton at the Navy Postgraduate School in Monterey to lay a cable in the shallow waters of the sanctuary for research purposes.”), available at <http://www.mbari.org/mars/DesktopStudy/Draft_MARS_DTS.doc>.

⁴⁷ See MARS Proposal, at 16 (noting that the Monterey Bay NMS is “hoping to use MARS capabilities as part of their monitoring program”)

⁴⁸ Notice, 67 Fed. Reg. at 35,502.

provisions of the NMSA to cover the cost of special use permits, not as a general NOAA funding mechanism.⁴⁹

NOAA's disparate treatment of commercial and non-commercial submarine cables is therefore inappropriate as a matter of federal administrative law. While an administrative agency need not regulate all aspects of a problem simultaneously,⁵⁰ it must provide a "concise general statement" of the regulation's "basis and purpose."⁵¹ The agency must also support and explain any distinctions that it makes.⁵² To date, NOAA has not provided such an explanation.

C. NOAA SHOULD EXPLAIN ITS SUGGESTION THAT COMMERCIAL SUBMARINE CABLES SHOULD BE BARRED FROM NMSS

In a proposal even more extreme than special use permitting, NOAA suggested in the *Notice* that it could prohibit all commercial submarine cable activity in NMSSs.⁵³ NOAA should clarify its suggestion, and reject any such blanket prohibition.

Apart from the legal and policy infirmities of such a position, as discussed above in parts I.A and II, this suggestion is also inconsistent with the more nuanced approach proposed in the *ANPRM*. In the *ANPRM*, NOAA proposed to create three categories of sanctuaries: (1) those

⁴⁹ 16 U.S.C. § 1441(d)(3) (providing that any fees collected from special use permit holders be spent only the National Marine Sanctuaries Program ("NMSP"), either "for issuing and administering permits" under the NMSA's special use permit provisions or "for expenses of managing national marine sanctuaries.").

⁵⁰ *Personal Watercraft Industry Association v. Dep't of Commerce*, 48 F.3d 540, 544 (D.C. Cir. 1995).

⁵¹ 5 U.S.C. § 553(c).

⁵² *National Wildlife Federation v. Costle*, 629 F.2d 118, 133-35 (D.C. Cir. 1980).

where “sanctuary size, unique characteristics . . . and existing regulations preclude the installation of submarine cables,” (2) those where “cable laying activities are not prohibited”, and (3) those where “proposals for installation and operation of submarine cables would be considered.”⁵⁴ While NASCA believes that the *ANPRM* proposals still require clarification and further explanation, as the proposed categories and characterizations are not based on categories contained either in NOAA’s general or sanctuary-specific regulations, NASCA believes such a nuanced approach is a more appropriate basis for any regulations or policies for submarine cables in NMSs.

III. NOAA MUST BASE ANY SUBMARINE CABLE REGULATIONS OR POLICIES DEMONSTRATED FACTS AND TRENDS

Before adopting any rules, regulations, or policies with respect to submarine cables that traverse NMSs, NOAA would need to ensure that those regulations and policies were based on demonstrated facts and trends. Most importantly, NOAA must ensure that any regulations or policies reflect the demonstrated environmental effects, if any, of submarine cables, and also trends in submarine cable deployment.

A. SUBMARINE CABLES ARE ENVIRONMENTALLY BENIGN

Submarine cables are environmentally benign both in terms of the processes used to install, maintain, and repair them and in terms of the materials of which they are composed. The

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⁵³ *Notice*, 67 Fed. Reg. at 35,504 (noting that NOAA will consider “whether the issuance of special use permits allowing the presence of submarine cables beneath or on the seafloor continues to be appropriate”).

⁵⁴ *See ANPRM*, 65 Fed. Reg. at 51,270, app. A, § 3(a), (b), (d).

FCC has long taken this view. In implementing NEPA, the FCC decided to exclude categorically all submarine cable landing license applications from its environmental processing rules, which implement NEPA.⁵⁵ In implementing NEPA, the FCC found:

Although laying transoceanic cable obviously involves considerable activity over vast distances, the environmental consequences for the ocean, the ocean floor, and the land are negligible. In shallow water, the cable is trenched and immediately covered; in deep water, it is simply laid on the ocean floor. In the landing area, it is trenched for short distance between the water's edge and a modest building housing facilities.⁵⁶

But the FCC is not unique in its conclusions, and has merely summarized what numerous other federal and state agencies have concluded over the years.

Of the recent commercial submarine cable projects for which environmental studies were completed, *all* have been deemed by the reviewing government agencies either to have no significant impact at the outset or to have no significant impact taking mitigation activities into account. In its comments on the *ANPRM*, NASCA submitted extensive documentation regarding the benign nature of submarine cables and their installation, maintenance, and repair.⁵⁷ These documents include environmental assessments, environmental impact reports, mitigated negative declarations, and essential fish habitat assessments (collectively, “studies”) that were certified, approved, and/or adopted by the relevant federal, state, or local government permitting agencies with respect to the China-U.S., Global West, Japan-U.S., PC-1, and Southern Cross submarine cable systems.

⁵⁵ *Implementation of the National Environmental Policy Act of 1969, Report & Order*, 49 FCC.2d 1313, 1321 (1974).

⁵⁶ *Id.*; *1998 Biennial Regulatory Review—Review of International Common Carrier Regulations, Report & Order*, 14 FCC Rcd. 4909, 4938 (1999).

Specifically, the studies—which are incorporated into these comments by reference, along with NASCA’s prior comments—demonstrate the following about submarine cables in the marine environment:

1. Impacts on biological resources would not be significant, as:
 - Neither threatened nor endangered species would be adversely affected;
 - The cable-laying process will not threaten marine mammals;
 - Prior monitoring confirmed no adverse effects of cable-laying on sea otters watching the operation;
 - There is no significant risk of whale entanglement from the proposed cables;
 - The impact of plow burial on benthic organisms will be so limited and temporary as to not be significant;
 - There will be no significant impacts from laying cable across hard-bottom areas (either because the project avoids those areas or because the impacts of such crossing will be less than significant); and
 - There will be no significant impacts on managed fish and invertebrate species or Essential Fish Habitat.
2. Air emission impacts will not be significant or will be so short-term and localized as to be acceptable to the local jurisdiction;
3. Water quality impacts will not be significant.
4. The risk of significant impacts to cultural resources can be avoided by pre-installation seafloor surveys and minor route adjustments if necessary.
5. Impacts on the commercial interests of fishermen could be mitigated so as to be less than significant through measures such as burial and/or route selection or adjustment based on discussions with those affected, and compensation for lost fishing gear.

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⁵⁷ See NASCA ANPRM Comments, at 8-9 and attachments 1-19.

6. These conclusions hold true equally even when the cumulative impacts were considered of five pre-existing cables plus ten new cables as part of six planned cable systems in the same area.⁵⁸

NOAA must take these findings into account with respect to any regulatory regime for submarine cables in NMSs.

The benign nature of submarine cable materials is further confirmed by their use in artificial reefs. Obsolete submarine cables have been used in numerous artificial reef projects, including the Great Eastern Artificial Reef (off the Maryland coast) and numerous artificial reefs off the coast of New Jersey. These deployments of obsolete submarine telecommunications cables have been approved by federal and state permitting authorities including, among others, the Army Corps and the New Jersey Department of Environmental Protection. Such use of submarine cables has also been encouraged by non-profit organizations, based on compatibility with the marine environment.⁵⁹

B. ANY FEAR OF A LONG-TERM UPWARD TREND IN SUBMARINE CABLE DEPLOYMENT IS UNFOUNDED

NOAA's *ANPRM* and the special use permits issued to date were premised in large part on NOAA's fear of an increasing and sustained proliferation of new submarine cables.⁶⁰ Those

⁵⁸ See NASCA ANPRM Comments at 8-10 and attachments 4, 8, 12, 13, 14, 16, 18, & 19.

⁵⁹ See Ocean City Reef Foundation: Statement of Purpose (noting that materials such as "former underwater communications cable" are used to form artificial reefs because they are non-toxic, durable, and stable), available at <<http://www.ocreeffoundation.com/about.html>>.

⁶⁰ See *ANPRM*, 65 Fed. Reg. at 51,264-65 (noting that because of increased bandwidth demand and congestion on terrestrial networks, "the number of project proposals and specific permit requests for laying cables in the marine and coastal environment is increasing at a tremendous rate"); Letter from Stephanie R. Thornton, Chief, Marine Sanctuaries Division,

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fears have proved unfounded, and should not serve as the basis for any regulatory proposals by NOAA, as there is no demonstrated long-term upward trend in submarine cable deployment generally or in NMSs in particular.⁶¹

It is true that there was a notable increase—peaking in 1998—in the number of new submarine cables proposed and deployed. More than anything else, this increase was spurred by trade liberalization in the 1997 World Trade Organization Basic Telecommunications Agreement, which eliminated the prior reciprocity-based licensing regime that had inhibited carriers from basing their submarine cable deployment decisions purely on responses to market demand.⁶² But after an initial burst of construction, which provided badly needed connectivity and capacity, the rate of authorization and deployment has slowed considerably, as demonstrated in Table 1 below.

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NOAA, to Neil Havig [sic], Tyco Submarine Systems Ltd., and Don McKinney, Global Crossing Ltd. (Oct. 20, 1999) (stating with regard to Global Crossing’s PC-1 system that “NOAA has received requests from four parties for permits to install submarine cables within national marine sanctuaries. This level of interest in conducting a commercial activity that may adversely affect the resources of several national marine sanctuaries has caused NOAA to being a careful review of all environmental and policy issues associated with laying, maintaining and removing telecommunications cables.”), *attached as Exhibit 7 to Global Crossing FMV Comments.*

⁶¹ *See also* NASCA ANPRM Comments, at 2.

⁶² *See* Fourth Protocol to the General Agreement on Trade in Services (WTO 1997), *reprinted in* 36 I.L.M. 354, 366 (1997) (incorporating WTO Basic Telecom Agreement into the General Agreement on Trade in Services).

TABLE 1 APPLICATION AND DEPLOYMENT RATES FOR SUBMARINE CABLES LANDING IN THE UNITED STATES, 1995-2002		
YEAR	NUMBER OF APPLICATIONS RECEIVED BY FCC* (AS COMPARED WITH NUMBER OF THESE SYSTEMS WHICH WERE ACTUALLY BUILT OR ARE PRESENTLY UNDER CONSTRUCTION)	NUMBER OF BUILT OR UNBUILT SYSTEMS ACTUALLY TRAVERSING AN NMS
1995	3 (1) [†]	0
1996	8 (5)	1
1997	4 (4)	0
1998	11 (10)	1
1999	7 (7)	1
2000	7 (5)	0
2001	1 (1)	0
2002	1 (0)	0
<p>* Based on “accepted for filing” date determined by FCC. Note that the Submarine Cable Landing License Act of 1921 does not require a cable landing license for submarine cables connecting points within the 48 contiguous United States. See 47 U.S.C. § 34.</p> <p>† For example, of the 3 systems for which FCC cable landing licenses were sought in 1995, only 1 of those three systems was subsequently constructed.</p> <p>Source: <i>Federal Communications Commission International Bureau Filing System</i>, available at http://svartifoss2.fcc.gov/prod/ib/forms/index.html</p>		

The data in Table 1 demonstrate that 1998—the year the WTO Basic Telecommunications Agreement became effective—was clearly an anomaly in terms of the number of systems proposed and built. Ironically, it was for a system announced in 1998—PC-1—that NOAA first decided to require a special use permit for a submarine cable traversing an NMS.

Moreover, the depressed state of the telecommunications industry, coupled with an excess of submarine cable capacity on almost all international routes and plunging bandwidth

prices have contributed further to a downward trend in submarine cable deployment.⁶³ This trend is further reflected in the reduction of manufacturing capacity that supports submarine cable deployment.⁶⁴

Even before the deployment uptick following the implementation of the WTO Basic Telecommunications Agreement and the subsequent telecommunications market collapse, however, the long-term, the long-term growth rate for submarine cable deployment was essentially flat.⁶⁵ And these numbers are consistent with NASCA's own estimates. NASCA estimates that in the coming years, submarine cable operators will install in the United States no more than one cable per year per region. While the amount of capacity on various international routes has increased exponentially over time, the growth rate in the number of submarine cables has not.

IV. NOAA'S APPROACH TO NEPA COMPLIANCE IS FLAWED AND EVIDENCES INSUFFICIENT INTER-AGENCY COORDINATION

In addressing its compliance with the National Environmental Policy Act ("NEPA"), NOAA presents an analysis in the *Notice* that is both flawed and insufficient. *First*, the *Notice* misstates the requirements for finding for an activity "significantly affecting the human environment" by suggesting that public opposition to a project is a sufficient condition for such a

⁶³ See SUBMARINE BANDWIDTH 2002, at 14-16 (TeleGeography 2002).

⁶⁴ *Id.*

⁶⁵ See, e.g., Terabit Consulting, Inc., *A Forecast of Submarine Cable Deployment in the State of Florida*, Florida Board of Trustees of the Internal Improvement Trust Fund Docket No. 01-10R, at 8, Figure 1.1 (Feb. 7, 2001) (forecasting a range for deployment of undersea cables in Florida, 2000-2009, and showing that the long-term deployment is essentially flat).

finding. *Second*, the *Notice* proposes minimal and inadequate coordination with other federal and state agencies that may have a regulatory or permitting role for a particular activity.

Under NEPA, federal agencies—including NOAA—must establish procedures to identify and account for the environmental impact of projects they undertake or authorize.⁶⁶ To that end, NEPA established the Council on Environmental Quality (“CEQ”), tasking it to oversee the programs and activities of the federal government in order to determine whether those programs and activities are contributing to the achievement of U.S. environmental policy.⁶⁷ The CEQ’s regulations “tell federal agencies what they must do to comply with the procedures and achieve the goals of [NEPA].”⁶⁸

The CEQ has established a three-tiered approach to NEPA implementation and compliance which applies to all federal agencies, including NOAA. *First*, for “major Federal actions significantly affecting the quality of the human environment,” NEPA requires agencies to prepare an environmental impact statement (“EIS”).⁶⁹ *Second*, for major actions that may significantly affect the quality of the human environment, the CEQ permits federal agencies to prepare an environmental assessment (“EA”) to determine whether an EIS is necessary.⁷⁰ *Third*, for activities that individually and cumulatively do not significantly affect the quality of the human environment and for which environmental analysis would be required only in extraordinary circumstances, the CEQ allows federal agencies to exclude categorically those

⁶⁶ 42 U.S.C. §§ 4321-4370e.

⁶⁷ 42 U.S.C. § 4344(3).

⁶⁸ 40 C.F.R. § 1500.1(a).

⁶⁹ 42 U.S.C. § 4332.

activities from evaluation under NEPA.⁷¹ The EA and categorical exclusion provisions of the CEQ’s regulations make plain that not every action of a federal agency is a “major” action with “significant”—or even certain—environmental effects.

A. “PUBLICLY CONTROVERSIAL ACTIVITIES” THAT “LACK . . . APPARENT ENVIRONMENTAL IMPACTS” DO NOT MEET NEPA’S STANDARD FOR “SIGNIFICANTLY AFFECTING” THE HUMAN ENVIRONMENT

In the *Notice*, NOAA erroneously asserts that “publicly controversial activities”—“despite the lack of apparent environmental impacts”—may constitute actions with a “significant effect, individually or cumulatively, on the human environment,” and may therefore require the preparation of an EA or EIS.⁷² To the contrary, an activity must have an apparent or hotly disputed environmental *effect* in order to be “highly controversial” within the meaning of NEPA. By itself, the magnitude or degree of opposition to an activity has no bearing on whether an activity may or will “significantly affect[] the human environment.” And the fact that NOAA has admitted that certain activities “lack . . . apparent environmental impacts”—and are not “expected to result in any destruction of, injury to, or loss of any Sanctuary resource”⁷³—means that by definition, they cannot be “highly controversial” as defined by NEPA.⁷⁴

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⁷⁰ 40 C.F.R. § 1508.9.

⁷¹ 40 C.F.R. § 1508.4.

⁷² *Notice*, 67 Fed. Reg. at 35,504.

⁷³ *See id.*

⁷⁴ For NEPA purposes, NOAA must therefore ignore the standard opposition to submarine cable projects *qua* submarine cable projects. It should be noted that a number of environmental organizations have expressed opposition to commercial submarine cables not because of their environmental effects, but instead because the projects are commercial in nature—a fact that has nothing to do with the environmental *effects* of submarine cables.

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Interpreting NEPA’s language regarding “major Federal actions significantly affecting the quality of the human environment,” the CEQ states in its implementing regulations—which NOAA must follow—that “[s]ignificantly’ as used in NEPA requires considerations of both context and intensity.”⁷⁵ The CEQ defines “intensity” as “the severity of impact” and states that a variety of factors should be taken into account in evaluating intensity, including “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial.”⁷⁶

The courts have consistently interpreted these regulations to require the existence of a substantive dispute about impact or effect. “The test is not how many groups express concern

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See, e.g., Neptune Technical White Paper #5: Environmental Considerations and Permits (noting with respect to the Neptune research cable that environmental organizations “expressed interest in NEPTUNE’s scientific implications for understanding fish stocks and habitat, with no concerns expressed about deleterious effects to the seafloor, water column, or marine organisms. The director of one NGO active in protecting fish stocks was so interested in the project’s science that he said his only concern about NEPTUNE ‘would be if the project’s organizers didn’t find the funding to do it.’ The general NGO impression of NEPTUNE seems to identify it as a useful scientific project – especially with regard to improving fisheries science—rather than as ‘a cable project.’”), *available at* <http://www.neptune.washington.edu/pub/n_white_paper/enviro.legal.html>. There is clearly an expectation that NOAA will approve scientific cables because they are non-commercial and therefore not controversial. *See* MARS Desktop Study, at 42 (noting that “[w]ith [the permit cable permit issued to Dr. Tim Stanton at the Navy Postgraduate School] as a precedent [the contractor for the study] recommends that the MARS project, because of its unique position as a research project with national interest, as opposed to a commercial entity, pursue permitting for their cable directly with the Monterey National Marine Sanctuary office.”). Such expectations and approvals have no foundation in environmental science.

⁷⁵ 40 C.F.R. § 1508.27(a). In requiring consideration of context, “the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action.” *Id.* § 1508.27(a).

about a project but rather if the effect on the quality of the human environment is likely to be highly controversial.”⁷⁷ The term “controversial” refers to the existence of a

substantial dispute . . . as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use. Otherwise, to require an impact statement whenever a threshold determination dispensing with one is likely to face a court challenge would surrender the determination to opponents of a federal action, no matter whether major or not, nor how insignificant its environmental effect might be.⁷⁸

And even if the effects of the activity were “highly controversial,” that controversy alone would be insufficient as a basis for concluding that it was “significantly affecting the human environment.” The CEQ’s implementing regulations require a balancing of ten factors in

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⁷⁶ *Id.* § 1508.27(b)(4); NOAA Administrative Order 216-6, § 6.01(b)(4).

⁷⁷ *Ocean Advocates v. U.S. Army Corps of Engineers*, 167 F. Supp. 2d 1200, 1214 (W.D. Wash. 2001) (upholding the agency’s finding that expressions of opposition or concern did not make a proposed dock “highly controversial” or “significant” within the meaning of NEPA or the CEQ’s implementing regulations, and that an EIS was therefore not required). *See also Northwest Environmental Defense Center v. Bonneville Power Administration*, 117 F.3d 1520, 1536 (9th Cir. 1997) (noting that “[c]ontroversy does not refer to the existence of opposition to a use,” and finding that the agency’s conclusion that most concerns about the effects of a water storage agreement with Canada has been addressed, that that an EIS was therefore not required, was not arbitrary and capricious); *Roanoke River Basin Association v. Hudson*, 940 F.2d 58, 64 (4th Cir. 1991), *cert. denied*, 502 U.S. 1092 (1992) (finding that “the existence of a disagreement as to whether an EIS should be commissioned is not by itself grounds for a court to require an EIS”); *North Carolina v. Federal Aviation Admin.*, 957 F.2d 1125, 1133-34 (4th Cir. 1992) (citations omitted) (finding that opposition does not make effects controversial because “[o]therwise, opposition, and not the reasoned analysis set forth in an environmental assessment, would determine whether an environmental impact statement would have to be prepared. The outcome would be governed by a ‘heckler’s veto,’ and upholding the agency’s decision not to require an EIS”).

⁷⁸ *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973) (upholding the Army Corps’ decision not to require an EIS as part of its permitting process for a proposed marina and piers, based on its assessment of the potential environmental impact).

evaluating the “intensity” of an activity.⁷⁹ In addition to “highly controversial” effects, these factors include, among others:

- “The degree to which the proposed action affects public health or safety.”
- “The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.”
- “Whether the action is related to other actions with individually insignificant but cumulatively significant impacts.”
- “The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.”
- “Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.”⁸⁰

NOAA may ultimately conclude that the NMSA allows it to require certain environmental studies for activities within the NMSA. But the nexus of NEPA and the NMSA does not expand NOAA’s jurisdiction. If NOAA does require such environmental studies, however, it must still consult and coordinate with other federal and state agencies to avoid duplicative regulatory requirements.

B. COORDINATION BETWEEN NOAA AND OTHER FEDERAL AND STATE AGENCIES IS INADEQUATE

In the *Notice*, NOAA states somewhat confusingly regarding NEPA that it “may, in certain circumstances, combine its special use permit authority with other regulatory authorities to allow activities not described above that may result in environmental impacts to NMS

⁷⁹ See *Ocean Advocates*, 167 F. Supp. 2d at 1211 (noting that “[t]here are certain factors that an agency must balance in determining whether a project will have a ‘significant’ impact,” and reciting the ten factors listed in 40 C.F.R. § 1508.27(b)).

⁸⁰ 40 C.F.R. § 1508.27(b).

resources and those require the preparation of an environmental assessment or environmental impact statement.”⁸¹ Far from expanding NOAA’s jurisdiction, NEPA requires NOAA to coordinate with other federal and state agencies and to avoid duplicating the efforts of those agencies. As NOAA recognized in its *ANPRM*,⁸² such coordination and consultation is of critical importance for submarine cable projects, which—unlike most other operations in NMSs—require numerous authorizations and approvals from a variety of federal, state, and local authorities.

To date, there has been little coordination between NOAA and the Army Corps, the FCC, or state agencies, all of which have statutory roles in permitting submarine cables that land in the United States. NOAA’s NEPA implementation guidelines themselves do not provide for adequate consultation with other federal agencies, as they suggest consultation may only be necessary with other offices in the Department of Commerce, the CEQ, and the Department of State when the proposed action or its environmental consequences “are likely to involve substantial policy considerations.”⁸³ These guidelines make no mention of the other federal agencies that play a key role in the permitting of almost every commercial submarine cable landing in the United States: the Army Corps and the FCC.⁸⁴ And they make no mention of state agencies, with which NOAA is also required to consult and coordinate under NEPA.

⁸¹ *Notice*, 67 Fed. Reg. at 35,504.

⁸² *See ANPRM*, 65 Fed. Reg. at 51,268, part IV.6.

⁸³ NOAA Administrative Order 216-6, § 7.01(d). *See also id.* § 5.04(c)(3) (providing for coordination with the Environmental Protection Agency).

⁸⁴ The Army Corps does issue an authorization for every submarine cable landing in the United States, pursuant to Section 10 of the Rivers and Harbors Act of 1899. *See* 33 U.S.C. § 403. The FCC issues a cable landing license for every submarine cable landing in the United

[Footnote continued on next page]

To ensure better coordination with other agencies, NOAA must make better use of the “lead agency” and “coordinating agency” provisions of NEPA.⁸⁵ NOAA must also cooperate with state and local agencies “to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless . . . specifically barred from doing so by some other law” including “[j]oint planning processes” and “[j]oint environmental assessments.”⁸⁶ NOAA should also continue to consider its proposal for a memorandum of understanding (“MOU”) with the Army Corps if such an MOU would streamline the environmental review and permitting processes for submarine cable activities. To be effective, the MOU would establish integrated timelines and deadlines—both for applicant submissions and decisionmaking by *all* agencies involved—and consolidate information requirements. Finally, NOAA needs to address the discrepancies between its regulatory approach and those of other federal and state agencies, including the FCC’s categorical exclusion granted for submarine cable landing licenses under NEPA.⁸⁷

NASCA urges NOAA to articulate measures to achieve better coordination with other federal and state agencies. *First*, NOAA should implement its approach through substantive, written regulations—whether in its general or sanctuary-specific regulations. Written “policies” or “principles” are insufficient, as they provide little certainty for the parties involved. *Second*,

[Footnote continued from previous page]

States, except for those connecting only points within the 48 contiguous states. 47 U.S.C. § 34; Executive Order No. 10,530, § 5(a), *codified at* 3 C.F.R. 189 (1954-1958), *reprinted in* 3 U.S.C. § 301 app. (1988).

⁸⁵ See 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1501.6, 1503.2, 1508.16.

⁸⁶ 40 C.F.R. § 1506.2(b).

⁸⁷ See part II.A above.

in any such regulations, NOAA should adopt timing deadlines to ensure prompt processing of authorization requests for submarine cables. *Third*, NOAA should make better use of the interagency coordination procedures established by NEPA, including the provisions for “lead agencies” and “coordinating agencies” and for elimination of duplicative documentation. *Fourth*, NOAA should establish additional formal coordination procedures—such as a memorandum of understanding with the Army Corps.⁸⁸ The adoption of such measures will ensure a more timely outcome in any particular authorization process, while reducing the burden on applicants and the staff of the authorizing agencies, including NOAA.

⁸⁸ *See, e.g.*, Comments of Tyco (US) Inc. and Tyco Networks (US) Inc., NOAA Docket No. 000526157–0157–01, at 33 (filed Oct. 23, 2000); Comments of Global Crossing Ltd., NOAA Docket No. 000526157–0157–01, at 11 (filed Oct. 23, 2000).

CONCLUSION

For the reasons stated above, the North American Submarine Cable Association urges NOAA to develop a more reasoned and systematic approach to submarine cable regulation in NMSs.

Respectfully submitted,

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19 July 2002

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I, Kent D. Bressie, do hereby certify that copies of the foregoing Comments of the North American Submarine Cable Association have been sent by first-class mail on this 19th day of July 2002, to the following:

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