

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

In the Matter of

Endangered and Threatened Species:
Proposed Rule to Revise the Critical
Habitat Designation for the Endangered
Leatherback Sea Turtle

Docket No. 0808061067-91396-01
RIN 0648-AX06

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

As the National Oceanic and Atmospheric Administration (“NOAA”) seeks to designate additional areas as critical habitat for the leatherback sea turtle,¹ the North American Submarine Cable Association (“NASCA”) urges NOAA to clarify the effect of its regulations on undersea-cable operations. Without such a clarification, NASCA is concerned that the proposed critical-habitat designation would impose substantial additional permitting costs and delays on undersea cable operators without any corresponding increase in the protection of leatherback sea turtles. Not only would these costs and delays be unintended—indeed, NOAA’s economic analysis demonstrates that NOAA does not anticipate that its proposal would impose such costs or delays—but they would provide no benefit whatsoever because undersea-cable operations have

¹ *Endangered and Threatened Species: Proposed Rule to Revise the Critical Habitat Designation for the Endangered Leatherback Sea Turtle, Proposed Rule, Request for Comments, Docket No. 0808061067-91396-01, 75 Fed. Reg. 319 (Jan. 5, 2010) (“Leatherback Sea Turtle Proposed Rule”).*

no effect on the leatherback sea turtle or the proposed critical habitat. Accordingly, NOAA should clearly articulate its view that undersea-cable operations will not generally be affected by the proposed regulations.

NASCA is a nonprofit association of undersea-cable owners, undersea-cable maintenance authorities, and prime contractors for undersea-cable systems—many of which operate, install, and repair undersea cables in the areas that NOAA has proposed to designate as critical habitat.² NASCA and its members have a strong interest in protecting the marine environment without unduly limiting 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 undersea cables do not harm the marine environment or unreasonably constrain the operations of others in that environment.

NASCA is concerned that the proposed critical-habitat designation may have unintended effects on the ability of NASCA members to obtain permits necessary for undersea cable operations. Under the Rivers and Harbors Act of 1899,³ the Clean Water Act,⁴ and other environmental statutes, NASCA members often must obtain a variety of environmental permits before installing and repairing undersea cables within U.S. jurisdiction. NASCA is concerned that without clarification, the proposed critical-habitat designation may have unintended effects

² NASCA's members are Alaska Communications System, Alaska United Fiber System Partnership, Alcatel-Lucent Submarine Networks, AT&T Corp., Brasil Telecom of America, Inc. / Globenet, Columbus Networks, Global Marine Systems Ltd., Hibernia Atlantic, Level 3 Communications, LLC, Reliance GlobalCom, Southern Cross Cable Network, Sprint Communications Corporation, Tata Communications, Tyco Electronics Subsea Communications LLC (f/k/a Tyco Telecommunications (US) Inc.), and Verizon Business.

³ 33 U.S.C. § 401 *et seq.*

⁴ 33 U.S.C. § 1251 *et seq.*

on this permitting process—effects that would have no benefit on the leatherback turtle or its habitat and which NOAA has not considered in its economic analysis. Specifically, NASCA is concerned that without clarification, federal permitting authorities may believe—erroneously—that they must consult with NOAA under Section 7 of the Endangered Species Act before issuing permits for undersea-cable repair and installation within the critical habitat.⁵ As explained below, that would be a costly, unwarranted mistake: undersea-cable installation and repair would have no adverse effect on any essential feature of the proposed critical habitat; accordingly, agencies may issue permits for that activity without first initiating a Section 7 consultation.

I. NOAA Should Clarify That Undersea-Cable Repair and Installation Does Not Affect Critical Habitat and Therefore Does Not Trigger The Requirement for a Section 7 Consultation.

Under NOAA’s joint regulations with the U.S. Fish and Wildlife Service, federal agencies must initiate a consultation under Section 7 of the Endangered Species Act before taking any action—including issuance of a permit—that “may affect” an endangered species or its critical habitat.⁶ If NOAA designates additional critical habitat for the leatherback turtle, NASCA is concerned that some agencies may interpret this regulation—erroneously—to require a Section 7 consultation before issuing a permit for virtually any activity that occurs within the newly designated area. Not only would this interpretation be a distortion of the Endangered Species Act, but it would result in costly delays for numerous activities that have no adverse effect on the leatherback turtle or its habitat. To prevent these unnecessary delays, NOAA

⁵ See 16 U.S.C. § 1536(a)(2).

⁶ 50 C.F.R. § 402.14; see also 16 U.S.C. § 1536(a)(2) (requiring consultation before “action” that would harm critical habitat); 50 C.F.R. § 402.02 (action includes the grant of licenses or permits); *Turtle Island Restoration Network v. Nat’l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003) (same).

should clarify—as it has done in past critical-habitat designations—that a Section 7 consultation is necessary only if issuance of a permit would result in destruction of the “essential features” of the critical habitat.⁷ Because undersea-cable installation and repair would have no effect on the “essential features” of the proposed critical habitat, NOAA should also clarify that agencies may typically issue permits for these activities without first initiating a Section 7 consultation.

A. NOAA Should Reiterate That Section 7 Consultations Are Necessary Only For Activities That Would Impact “Essential Features” of a Critical Habitat.

Although NOAA has in the past clarified the standard for a Section 7 consultation, it would be worthwhile to reiterate the standard again in this proceeding to prevent any possibility of confusion. Under the Endangered Species Act, federal agencies must initiate a Section 7 consultation before taking “action”—including issuance of a permit—that would likely “result in the destruction or adverse modification of” critical habitat.⁸ Although NOAA’s implementing regulations suggest that a Section 7 consultation is necessary for any federal action that “may affect” critical habitat,⁹ that does not mean that a Section 7 consultation is necessary every time any permitted activity would occur within critical habitat. Rather, activity within a critical habitat triggers a Section 7 consultation only if it is likely to adversely impact “the critical habitat’s essential features,”¹⁰ in this case the occurrence of sufficient prey species and the

⁷ See *Endangered and Threatened Species; Critical Habitat for the Endangered Distinct Population Segment of Smalltooth Sawfish*, Final Rule, 74 Fed. Reg. 45,353, 45,359 Cmt. 15 (Sep. 2, 2009) (“*Smalltooth Sawfish Final Rule*”) (“The regulatory impact of the critical habitat designation, however, flows entirely from the requirement to consult on Federal actions that may affect the critical habitat's essential features.”).

⁸ *Id.* at 45, 367; see also 16 U.S.C. § 1536(a)(2) (requiring consultation before “action” that would harm critical habitat); 50 C.F.R. § 402.02 (action includes the grant of licenses or permits); *Turtle Island Restoration Network*, 340 F.3d at 974 (same).

⁹ 50 C.F.R. § 402.14.

¹⁰ See *Smalltooth Sawfish Final Rule*, 74 Fed. Reg. at 45,359 Cmt. 15.

availability of a safe migratory pathway to and from storage areas.¹¹ To avoid any possibility of confusion, NOAA ought to reiterate this point in issuing the current set of regulations.

B. NOAA Should Clarify That Undersea-Cable Operations Are Not Likely to Impact Essential Features of the Proposed Critical Habitat.

NOAA’s economists have already produced an in-depth analysis of the economic effects of the proposed regulations. As required by statute, that analysis listed in detail all activities that might “adversely modify” the proposed critical habitat or that otherwise “may be affected by such designation.”¹² NOAA made no mention of any undersea-cable-related activities and has therefore determined—implicitly—that undersea-cable operations are not likely to adversely impact the essential features of the proposed critical habitat. Nevertheless, NASCA is concerned that NOAA’s silence on this issue may lead to unnecessary confusion. NOAA should state explicitly, therefore, that undersea-cable installation and repair are not likely to adversely affect essential features of the proposed critical habitat.

1. Undersea-Cable Activities Have a Negligible Environmental Impact.

Lest there be any doubt, NOAA’s implicit conclusion about the effect of undersea-cable activities was the correct one: the installation and repair of undersea cables has virtually no environmental impact—and certainly would have no impact on either of the “essential features” of the proposed critical habitat. As the Federal Communications Commission has explained, the environmental effects of undersea-cable-related activities are “negligible”:

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

¹¹ *Leatherback Sea Turtle Proposed Rule*, 75 Fed. Reg. at 335.

¹² 16 U.S.C. § 1533(b)(8).

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.¹³

Not surprisingly, then, undersea-cable operations would also have negligible impact on the essential features at issue here. Under the proposed regulations, NOAA has designated two features as “essential”: (1) the occurrence of sufficient prey species and (2) the availability of a safe migratory pathway to and from storage areas.¹⁴ As explained below, undersea-cable installation and repair would have no effect on either activity.

To understand why not, it helps to understand some basics about what is involved in installing and operating an undersea cable. NASCA members engage in essentially two types of activities in the proposed critical habitat: installation of new cables and repair of existing cables. The process of laying new cables involves essentially two steps, neither of which has any significant environmental impact. First, a cable operator—working with its supplier—chooses an appropriate route, a process that requires extensive “desktop studies” to gather data about potential routes and landing points and a “route survey,” which uses state-of-the-art electronic survey equipment to map details of the route, including the nature and depth of sediment (rock/mud/coral, etc.), as well as detailed depth contours. Although this step takes significant time and money, it has little environmental impact because the engineers are simply gathering data about the proposed route. Second, a cable supplier commences installation activities, a process with a similarly minimal environmental impact. In many cases, cable installers—working from a cable ship on the surface—simply lay the cable under tension on the ocean floor, without any dredging. And because a typical cable is only the diameter of a garden hose—with

¹³ *Implementation of the National Environmental Policy Act of 1969*, Report & Order, 49 FCC.2d 1313, 1321 ¶ 17 (1974); *see also 1998 Biennial Regulatory Review – Review of International Common Carrier Regulations*, Report & Order, 14 FCC Rcd. 4909, 4938 (1999).

¹⁴ *Leatherback Sea Turtle Proposed Rule*, 75 Fed. Reg. at 335.

additional armoring in coastal areas to protect against risks from commercial fishing and anchoring—the cable itself is unobtrusive to surrounding ocean life; indeed, because cables do not move laterally, they are often found encrusted with corals and other sea life that flourish around it. Indeed, old undersea cables have been used in the construction of artificial reefs.¹⁵

In shallower areas with softer sea bottoms, it is sometimes necessary to bury the cable to protect from trawling and other bottom-fishing techniques, as well as anchoring. But even this process would have no impact on the leatherback turtle. To bury cable, the cable ship typically pulls an underwater plow that continuously cuts a furrow (usually only about a meter deep) and places the cable into the furrow, which quickly fills in due to natural forces.

The process of repairing cables is equally harmless. Typically, undersea cables do not need maintenance and require repairs only in the event of a fault. Faults may be caused by external or natural aggression. “External aggression”—fault-triggering events caused by third parties and their equipment—accounted for about three quarters of submarine cable system faults within recent years.¹⁶ Among these external aggression events, commercial fishing remains the major cause, and a cause increasing in proportion to other human activity factors, such as ship anchoring and dredging. “Natural aggression”—fault-triggering events caused by wear and tear resulting from abrasion and geological activity, and by component failure—account for the remainder of the faults.

To retrieve a damaged cable for repair, cable maintenance providers use grapnels or remote-operated vehicles (“ROVs”), depending on water depth. To repair cables in situations

¹⁵ See, e.g., Ocean City Reef Foundation, *About Us*, available at <http://www.ocreeffoundation.com/about.php>.

¹⁶ Maurice E. Kordahi et al., *Trends in Submarine Cable System Faults* (Submarine Cable Improvement Group, 2007), available at <http://www.suboptic.org/App/Uploads/Files/WeA1.2.pdf>.

where the cable is not buried, cable maintenance providers simply sever the cable. Otherwise, there is not sufficient slack to bring it to the surface. After the ends are repaired and tested, a section of cable must be spliced in between the two ends in order to have them meet at the surface and restore connectivity. This additional section is typically a length of two and a half times the depth of water. This length permits what was previously a cable lying flat on the sea floor to reach up to the cable ship, provide length for manipulation and repair activities on board, and reach back down to the sea floor.

This final configuration of repaired cable (known as the final bight) must be carefully placed back on the seabed. The ship uses additional rope to pull the bight in a direction perpendicular to the line of the original cable and then lower it to the seabed. Only with this careful placement can the cable ship have any chance of laying the cable flat. It is critical that the cable lay flat. If the cable has loops, the cable will again be exposed to the risk that caused the damage or fault in the first place. For buried cable, a loop makes reburial impossible. Reburial of repaired cables has an environmental impact, if any, similar to the original installation.

Thus, the environmental impact of undersea-cable installation and repair is negligible, and has no demonstrable effect on leatherback turtles. Consequently, NOAA should clarify that these activities are not likely to affect “essential features” in the proposed critical habitat.

2. NOAA Has Authority to Clarify That the Permitting Process for Undersea Cables Is Unlikely to Trigger the Need For a Section 7 Consultation.

Despite this negligible environmental impact, NASCA is concerned that NOAA’s silence on this issue may lead to unnecessary and expensive Section 7 reviews that NOAA neither anticipated nor intended. Such a result could be extremely expensive. Undersea-cable operations are often extremely time sensitive: millions of Americans—ranging from businesses

and consumers to civilian, governmental, and military users—depend on undersea cables (which carry more than 90 percent of U.S. international telephone and Internet traffic, contrary to popular perceptions about commercial satellites). When a cable is damaged, the country’s economic welfare and its national security demand a timely remediation. In this context, it would be negligent to leave any doubt about NOAA’s position on the Section 7 issue. To prevent any confusion, NOAA should clarify its view that undersea-cable operations would typically not be expected to adversely affect critical habitat — even when they occur within that critical habitat. As explained below, such a clarification is well within NOAA’s regulatory authority and is necessary to comply with NOAA’s regulatory obligations under both the Endangered Species Act and Executive Order 12,866.

First, the clarification is well within NOAA’s regulatory authority under the Endangered Species Act. As discussed above, the Act expressly authorizes—indeed, compels—NOAA to list those activities that would be affected by its designation of critical habitat; in doing so, NOAA must implicitly determine which activities would *not* be likely to affect the proposed habitat, and it is perfectly appropriate to articulate that determination.¹⁷ Even without such a clear statutory mandate, NOAA could make such a determination under its authority to issue “any proposed or final regulation which is necessary or appropriate to carry out the purposes of this Act,”¹⁸ a delegation that the U.S. Supreme Court has recognized as extremely broad.¹⁹

Second, such a clarification is necessary in order to comply with both the Endangered Species Act and Executive Order 12,866, both of which require NOAA to articulate the costs and

¹⁷ See 16 U.S.C. § 1533(b)(8).

¹⁸ *Id.*

¹⁹ *E.g. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708 (1995) (citing § 1533 and noting that “Congress delegated broad administrative and interpretive power to the Secretary”).

benefits of its proposed regulations. Under the Endangered Species Act, NOAA may designate an area as “critical habitat” only “after taking into consideration the economic impact...and any other relevant impact, of specifying any particular area as a critical habitat.”²⁰ Indeed, in deciding whether to exercise its discretion to exclude area as critical habitat, NOAA must determine whether “the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat.”²¹ Similarly, under Executive Order 12,866, agencies must “assess all costs and benefits of available regulatory alternatives” before regulating.²²

Unless NOAA makes a clear statement that Section 7 consultations are not necessary when agencies issue permits for undersea-cable operations, undersea-cable operators—and the millions of consumers, businesses, and governmental entities that depend on cables for telecommunications services—are liable to suffer great expenses from the delays caused by unintended Section 7 consultations. To comply with the Endangered Species Act and Executive Order 12,866, NOAA must either make a clear statement that consultations are not necessary or include the costs of these unintended consultations in its economic analysis.

Given the extreme time pressures involved with undersea cable projects, “time to market” is of utmost importance. Even the slightest delay has the impact to affect the timing and cost of deploying manufacturing resources, cable storage facilities, personnel, and cable ships. Moreover, initial delays create compound delays. Even assuming that adequate cable installation resources are available, initial delay due to an unnecessary Section 7 consultation could push

²⁰ 16 U.S.C. § 1533(b)(2); *see also* *Association of California Water Agencies v. Evans*, 386 F.3d 879, 884 (9th Cir. 2004) (quoting *Bennett v. Spear*, 520 U.S. 154, 172 (1997)) (“the categorical *requirement* to take into consideration the economic impact or any other relevant impact’ in the designation of critical habitat”).

²¹ 16 U.S.C. 1533(b)(2).

²² Exec. Order No. 12,866 § 1(a), 58 Fed. Reg. 51,735 (1993).

installation activities outside of acceptable weather or fishing-season timeframes, *e.g.*, winter sea conditions (which last from October to March in the Northern Hemisphere), hurricane season in the Caribbean and mid-Atlantic (which lasts from June through November), or various fishing seasons.

II. In the Alternative, NOAA Should Exercise Its Authority Under 16 U.S.C. § 1533(d) To Issue “Protective Regulations” For the Leatherback Turtle.

If NOAA determines that it lacks authority to clarify its regulations as requested, NASCA respectfully submits that NOAA ought not designate additional critical habitat at all. NOAA has not accounted for the costs that unintended Section 7 consultations would have on the undersea-cable industry, and these costs would likely outweigh the benefits of the proposed designation. Moreover, as explained below, NOAA could avoid these costs by issuing protective regulations rather than designating critical habitat.

Under 16 U.S.C. § 1533(d), NOAA is authorized to issue whatever “protective regulations” it “deems necessary and advisable to provide for the conservation” of a species, a power that the courts have unanimously found to apply to both threatened and endangered species.²³ Using this authority, NOAA could require the equivalent of a Section 7 consultation for those categories of activities that are a true threat to the leatherback turtle and its habitat,

²³ *E.g. Bender v. Gutierrez*, No. 03-519, 2006 U.S. Dist. LEXIS 96720, at *21 (E.D. Va. Sep. 19, 2006) (“The ESA permits the Secretary of Commerce to promulgate protective regulations for the benefit of threatened or endangered turtles.”); *Cayman Turtle Farm, Ltd. v. Andrus*, 478 F. Supp. 125, 130 (D.D.C. 1979) (“We therefore decline to further circumscribe the broad discretion which the Endangered Species Act of 1973 confers upon Secretaries who are responsible for promulgating protective regulations for threatened and endangered species.”); *Nat’l. Wildlife Fed. v. Mosbacher*, No. 89-2089, 1989 U.S. Dist. LEXIS 9748 (D.D.C. Aug. 11, 1989) (“Because the turtles in question are threatened and endangered species, the Secretary has a statutory duty under the Endangered Species Act to ‘issue such regulations as he deems necessary and advisable to provide for the conservation of such species.’”) (emphasis and citation omitted); *Louisiana ex rel. Guste v. Verity*, 853 F.2d 322, 325 (5th Cir. 1988) (affirming protective regulations for both endangered and threatened turtles).

while making exemptions for categories of activity that—like undersea-cable operations—pose no threat to the turtle. This option would achieve all the benefits of a critical-habitat designation without any of the costs of unnecessary Section 7 reviews. With this option available, NASCA respectfully submits that it would be an abuse of NOAA’s discretion to designate critical habitat without making clear that undersea-cable-related activities would not generally trigger a Section 7 review.²⁴

CONCLUSION

For the foregoing reasons, NASCA respectfully urges NOAA to clarify its regulations or to issue protective regulations instead of designating additional critical habitat.

Respectfully submitted,

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²⁴ See 16 U.S.C. § 1533(b)(2).