

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

In the Matter of

Office of National Marine Sanctuaries
Interim Policy and Permit Guidance for
Submarine Cable Projects

Docket ID NOAA-NOS-2009-0104

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

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The North American Submarine Cable Association (“NASCA”) urges the Office of National Marine Sanctuaries (“ONMS”) of the National Oceanic and Atmospheric Administration (“NOAA”) to reconsider and revise its proposed interim guidance governing undersea cables in National Marine Sanctuaries (“NMSs”).¹ While NASCA has long supported NOAA’s efforts to adopt a more reasoned and systematic approach to regulation of undersea cables in NMSs, NASCA has consistently raised concerns (in the underlying proceeding in 2000 and a related proceeding in 2002) that NOAA has not substantiated its regulatory and fee

¹ *Interim Policy and Permit Guidance for Submarine Cable Projects* (April 2009) (“*Interim Guidance*”); *Office of National Marine Sanctuaries Interim Policy and Permit Guidance for Submarine Cable Projects, Notice, Request for Public Comments*, Docket ID NOAA-NOS-2009-0104, 74 Fed Reg. 18,169 (2009) (“*Notice*”).

proposals as a matter of law or policy.² NASCA reiterates those concerns here. NASCA is further concerned that NOAA’s proposed permit application requirements in the *Interim Guidance* would be very burdensome and duplicative of the requirements of other federal and state agencies.

NASCA is a non-profit association of submarine cable owners, submarine cable maintenance authorities, and prime contractors for submarine cable systems.³ 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 years, 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

² See *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”); *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”); *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”); Draft Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries (Aug. 2001) (“Revised FMV Analysis”); *Notice of Applicability of Special Use Permit Requirements to Certain Categories of Activities Conducted Within the National Marine Sanctuary System*, Docket No. 020322065-2065-01, 67 Fed. Reg. 35,501 (May 20, 2002) (“SUP Notice”); Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries, Final Report (Aug. 2002) (“Final FMV Analysis”), available at <http://sanctuaries.noaa.gov/library/national/fmvfinalreport.pdf>. The SUP Notice and comments thereon are not referenced in the *Interim Guidance* or *Notice*, although NASCA believes they are relevant.

³ NASCA’s members include: Alaska United Fiber System Partnership; Alcatel-Lucent Submarine Networks; Apollo Submarine Cable System Ltd.; AT&T Corp.; Brasil Telecom of America, Inc. / GlobeNet; Columbus Networks; Global Marine Systems Limited; Hibernia Atlantic; Level 3 Communications, LLC; Southern Cross Cables Limited; Sprint Nextel Corp.; Tata Communications; Tyco Telecommunications (US) Inc; Verizon Communications, Inc.

organizations—to ensure that submarine cables do not harm the marine environment or unreasonably constrain the operations of others in that environment.

I. NOAA Should Refresh the Record in This Proceeding, as Its *Interim Guidance* Are Based on a Stale Record Developed More than Eight Years Ago and Otherwise Based on Non-Public Information

NASCA believes that NOAA should decline to proceed with its *Interim Guidance* or proposed application requirements without first refreshing and supplementing the record on which these materials are based. To do otherwise would be arbitrary, capricious, and not otherwise in accordance with law.⁴

First, the record in this proceeding is stale. As stated in the *Notice*, NOAA initiated this proceeding more than eight years ago.⁵ Since comments were filed by numerous industry parties, NOAA has not conducted any further public comment processes or fact-gathering exercises. Although NOAA conducted a related proceeding—with the *SUP Notice*—in 2002, that proceeding is not referenced in the *Interim Guidance* or *Notice*. Moreover, technology and industry practices continue to evolve, and those developments do not appear to be reflected in NOAA’s documents. NASCA and its members would welcome the opportunity to brief NOAA further on industry and technological developments, but also believe that NOAA should forbear from taking further regulatory action absent consideration of such information.

Second, NOAA appears to have based the *Interim Guidance* and proposed application requirements on information on which it has not sought public comment or input. NOAA states that “lessons learned from past direct experience related to cables installed in sanctuaries” were

⁴ 5 U.S.C. 706(2)(A).

factored into the *Interim Guidance*.⁶ Nowhere are these “lessons learned” described in the *Interim Guidance* or the *Notice*. NASCA asks that NOAA supplement the public record in this proceeding by sharing information about “lessons learned.”

II. NOAA Has Failed to Acknowledge or Address the Legal Limitations—Under U.S. and International Law—on Its Ability to Regulate Undersea Telecommunications Cables

In its *Interim Guidance*, NOAA has failed to acknowledge or address U.S. and international legal limitations on NOAA’s ability to regulate undersea telecommunications cables. Notwithstanding the extensive argumentation in the underlying record,⁷ the *Interim Guidance* makes no reference to treaties (other than those pertaining to Native American tribes) or the law of the sea generally.⁸ In fact, NOAA must read the NMSA consistent with U.S. treaty obligations and customary international law, which afford unique protections to undersea telecommunications cables. These treaty obligations and customary international law are binding on the U.S. Government, including NOAA. To ensure that NOAA’s guidance, rules, and application requirements are consistent with U.S. treaty obligations and customary international

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⁵ *Interim Guidance* at 4; *Notice*, 74 Fed. Reg. at 18,170.

⁶ *Interim Guidance* at 5.

⁷ *See, e.g.*, 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).

⁸ *See, e.g.*, *Interim Guidance* at 8, 16 (referencing treaty obligations between the United States and Native American tribes).

law, NASCA recommends that NOAA seek guidance or a legal opinion from the Legal Adviser of the U.S. Department of State.

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 *Interim Guidance* or proposed application requirements. And the National Marine Sanctuaries Act⁹ 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 undersea cables by NOAA.

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.¹⁰ 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.*”¹¹

Various international treaties dating back to 1884—to each of which the United States is a party—guarantee unique freedoms to lay, maintain, and repair submarine telecommunications

⁹ 16 U.S.C. §§ 1431-1439 (“NMSA”).

¹⁰ 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).

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

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 seas¹² and to repair existing cables without prejudice.¹³ 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 prejudice.¹⁴ Within their territorial seas, coastal nations may impose reasonable conditions on submarine cables.¹⁵

¹² 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).

¹³ See High Seas Convention, art. 26.3; UNCLOS art. 79.2.

¹⁴ 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).

¹⁵ 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).

Coastal nations also have obligations to prevent willful or negligent damage to cables.¹⁶ And all nations “shall have due regard [for] cables [and] pipelines already in position.”¹⁷ 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.¹⁸ 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.¹⁹ This holds true even though existing NMSs extend far offshore, and certainly outside the U.S. territorial sea.²⁰

¹⁶ UNCLOS, art. 113.

¹⁷ UNCLOS, art. 79.5.

¹⁸ 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), 64 Fed. Reg. 48,701 (1999) (establishing the U.S. contiguous zone).

¹⁹ See 16 U.S.C. § 1432(3).

²⁰ 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://oceanexplorer.noaa.gov/explorations/02quest/background/sanctuaries/sanctuaries.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://oceanexplorer.noaa.gov/explorations/02quest/background/sanctuaries/sanctuaries.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://oceanexplorer.noaa.gov/explorations/02quest/background/sanctuaries/sanctuaries.html>; Introduction to the Monterey Bay NMS (noting that the NMS “extends an average of 35

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Although these treaties permit coastal sovereign nations to take reasonable measures respecting natural resource exploitation on the Continental Shelf, they bar nations from taking such measures with respect to submarine telecommunications cables, the construction and repair of which are not undertaken for natural resource exploration or exploitation.²¹ 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.²²

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.

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miles (30 nautical miles) offshore), *available at* <http://oceanexplorer.noaa.gov/explorations/02quest/background/sanctuaries/sanctuaries.html>.

²¹ UNCLOS, art. 79.2; Continental Shelf Convention, art. 4. 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. *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), 64 Fed. Reg. 48,701 (1999) (establishing the U.S. contiguous zone).

²² “Maritime Space: Maritime Zones and Maritime Delimitations—Frequently Asked Questions” (Office of Legal Affairs, DOALS, U.N. Secretariat) (responding to Question #7,

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Undersea 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 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.

As NASCA indicated in a related NOAA rulemaking in 2002 regarding special use permits in NMSs²³—one which is not referenced in the *Interim Guidance* or the *Notice*—NOAA's regulation of undersea telecommunications cables traversing NMSs could infringe these treaty protections in a number of ways:

- (1) By prohibiting undersea cables from traversing NMSs;
- (2) By assessing special use permit fees so as to preclude (as a financial matter) submarine cable installation, maintenance, or repair in NMSs;²⁴

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“What regime applies to the cables and pipelines?”), *available at* www.un.org/Depts/los/LEGISLATIONANDTREATIES/frequently_asked_questions.htm.

²³ See Comments of the North American Submarine Cable Association, NOAA Docket No. 010712175-1175-01, at 8-9 (filed July 19, 2002).

²⁴ See *Final FMV Analysis*, at 24 (recommending fees in the range of \$40,000 to \$100,000 per mile, based on comparable transactions; *Revised FMV Analysis* at 14 (recommending fees of

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- (3) By adopting 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);²⁵
- (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 any guidance, rules, or application requirements, NOAA must ensure that it does not infringe these freedoms as guaranteed by international law.

III. NOAA Has Failed to Justify Its Conclusion that the Mere Intended Purpose of an Undersea Cable Dictates the Type of Authorization Required or the Fees to Be Paid

Even setting aside momentarily the legality of submarine cable regulations under international law, NOAA has failed to justify as a legal or policy matter its general 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.²⁶ And it has failed to make the legal and policy case for

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\$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”).

²⁵ *ANPRM*, 65 Fed. Reg. at 51,269, 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”).

²⁶ *See* 16 U.S.C. § 1441(a).

subjecting commercial submarine cables to special use permitting, particularly when it does not impose such requirements for non-commercial submarine cables.

A. NOAA Incorrectly Asserts that It Definitively Determined that Commercial Submarine Cables Are Subject to Special Use Permits

As an initial matter, NASCA must point out that NOAA incorrectly asserts in the *Interim Guidance* that it definitively determined that commercial undersea cables are subject to special use permits.²⁷ In fact, in its last public statement on the issue, NOAA indicated that it had deferred a final determination.

As stated in NOAA's May 20, 2002 Federal Register notice, NOAA is currently considering the continued appropriateness of issuing special use permits to allow the continued presence of commercial submarine cables on or beneath the seafloor of a NMS. *Depending on the outcome of this separate process*, NOAA may amend this notice, as appropriate. Until further notice, however, the continued presence of commercial submarine cables remains subject to the requirements of Section 310 of the NMSA.²⁸

NASCA therefore asks that NOAA make a final determination as to whether or not commercial undersea cables are subject to special use permits. Until such time, NASCA believes that it is inappropriate for NOAA to promulgate guidelines or application requirements premised on a final determination of the applicability of Special Use Permits to commercial undersea cables.

²⁷ *Interim Guidance* at 10 (stating that “[t]he notice specifies that the continued presence of commercial submarine cables beneath or on the seabed will be subject to the requirements of special use permits under Section 310 of the NMSA.”).

²⁸ *Final Notice of Applicability of Special Use Permit Requirements to Certain Categories of Activities Conducted Within the National Marine Sanctuary System, Notice*, 71 Fed. Reg. 4898, 4901 (2006) (“*SUP Final Notice*”) (emphasis added).

B. Special Use Permits Are Neither Required Nor Appropriate for Undersea Cables

Special use permits are neither required nor appropriate for undersea 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.”²⁹ NOAA’s regulations allow the conduct of particular activities unless prohibited or otherwise regulated in NOAA’s NMSA regulations.³⁰

NOAA has never made a general finding that commercial undersea cables should be subject to special use permitting, as it is now required to do following the November 2000 amendments to the NMSA.³¹ And the general and sanctuary-specific regulations generally do not mention submarine cables. (The sanctuary-specific regulations do restrict particular activities, such as dredging, drilling, and depositing of dredged material.³²) Instead, NOAA

²⁹ 16 U.S.C. § 1441(a).

³⁰ 15 C.F.R. § 922.42.

³¹ 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 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*.

³² See, e.g., 15 C.F.R. § 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).

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 1999.³³ And without directly addressing the issue, NOAA prematurely issued its *Final FMV Analysis*, which is premised on the unstated finding that special use permits will be required for all commercial submarine cables traversing NMSs.³⁴

Although undersea 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.”³⁵ Undersea cable operations differ markedly from the

³³ 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)).

³⁴ *See also* Comments of the North American Submarine Cable Association, Docket No. 010712175-1175-01, at 1-2 (Oct. 16, 2001) (“NASCA FMV Comments”).

³⁵ 16 U.S.C. § 1432(8).

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.³⁶ 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.³⁷ 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 renewal” provisions for the PC-1 and 360atlantic special use permits,³⁸ it is clear that Congress did not contemplate the application of special use permits to long-lived infrastructure.

C. NOAA Has Failed to Explain the Basis for Its Distinction Between Commercial and Non-Commercial Undersea Cables

In the *Interim Guidance*, as well as the *ANPRM*, *Final FMV Analysis*, *SUP Notice*, and *SUP Final Notice*, NOAA has failed to justify its distinction between commercial and non-commercial submarine cables. In earlier proceedings, NOAA has asserted potential environmental harms as the basis for imposing permitting requirements and fees on commercial

³⁶ See S. Rep. No. 100-595 (1988), reprinted in 1988 U.S.C.C.A.N. 4387, 4290.

³⁷ 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).

³⁸ See, e.g., PC-1 Special Use Permit, at 8, special condition 10.

submarine cables,³⁹ yet it has failed to address the fact that other (non-commercial) activities affect the marine environment in the exact same manner. In the Interim Guidance, it appears to have reasoned instead that the NOAA’s existing regulations governing “regulatory sanctuary permits” and “authorizations”—which of course NOAA has the authority to amend—would not cover commercial undersea cables.⁴⁰ 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.

To the extent NOAA is articulating a new rationale for distinguishing commercial undersea cables from non-commercial or research cables, NASCA believes that NOAA has not explained sufficiently (1) why commercial undersea cables are not eligible for “regulatory sanctuary permits” and “authorizations” or (2) why NOAA could not revise its regulations governing “regulatory sanctuary permits” and “authorizations” to cover commercial undersea cables. “Regulatory sanctuary permits” and “authorizations” appear nowhere in the NMSA, but were instead created by NOAA in implementing the NMSA.⁴¹ These categories of authorization therefore can and should be revised and rationalized both with the NMSA’s special-use permit provisions and with the various activities cited in the *Interim Guidance*. NASCA does not

³⁹ See, e.g., *ANPRM*, 65 Fed. Reg. at 51,267-68; *Final FMV Analysis*, at 4 (asserting that “some amount of injury may occur during cable installation”).

⁴⁰ See *Interim Guidance* at 6-11.

⁴¹ See 16 U.S.C. §§ 1431-1439.

believe that NOAA’s decision not to initiate a rulemaking should dictate the treatment of commercial undersea cables.⁴²

To the extent NOAA continues to endorse an “environmental protection” rationale, that rationale should apply 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.⁴³ Yet NOAA has not 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.⁴⁴ 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.⁴⁵

⁴² See *Notice*, 74 Fed. Reg. at 18,170.

⁴³ 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 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”).

⁴⁴ See, e.g., *id.* (noting that “much of the route falls within a no-trawl zone maintained by the Monterey Bay National Marine Sanctuary”); 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.”).

⁴⁵ See MARS Proposal, at 16 (noting that the Monterey Bay NMS is “hoping to use MARS capabilities as part of their monitoring program”)

Instead, commercial submarine cables are distinguishable for their capability to generate fees for the National Marine Sanctuaries Program (“NMSP”). NOAA itself has previously admitted that it has issued special use permits for conducting operations—including installation of commercial submarine cables—that are “usually commercial” and “usually revenue-generating.”⁴⁶ 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 provisions of the NMSA to cover the cost of special use permits, not as a general NOAA funding mechanism.⁴⁷

NOAA’s disparate treatment of commercial and non-commercial submarine cables is therefore inappropriate as a matter of federal administrative law. An administrative agency must also support and explain any distinctions that it makes.⁴⁸ To date, NOAA has not provided such an explanation.

IV. NOAA Has Failed to Explain How its Application Process Fits Within the NEPA Framework

In its *Interim Guidance*, NOAA has failed to explain how its application process fits within the framework established by the National Environmental Policy Act.⁴⁹ Instead, NOAA

⁴⁶ *SUP Notice*, 67 Fed. Reg. at 35,502.

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

⁴⁸ *National Wildlife Federation v. Costle*, 629 F.2d 118, 133-35 (D.C. Cir. 1980).

⁴⁹ 42 U.S.C. §§ 4321-4370e (“NEPA”).

discusses NEPA only in the briefest terms with respect to interagency consultation.⁵⁰

NOAA has not reconciled the proposed application requirements in Appendix B of the *Interim Guidance* with the typical environmental assessment (“EA”) or other agency submission requirements, particularly those of the U.S. Army Corps of Engineers.⁵¹ NOAA has also not addressed the matter of a “lead agency” for a project involving multiple federal agencies acting under NEPA. To ensure proper agency coordination, the CEQ’s NEPA regulations call for the selection of a “lead agency” to take primary responsibility for preparing the EIS.⁵² NEPA directs the responsible federal official (*i.e.*, the lead agency) to “consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.”⁵³ The CEQ’s implementing regulations direct that federal agencies with jurisdiction by law or special expertise “shall comment on [EISs] within their jurisdiction, expertise or authority [on an EIS].”⁵⁴ Assuming NOAA had the authority to require Special Use Permits for commercial undersea cables in NMSs—and NASCA does not concede this point—NOAA would need to address these NEPA requirements.

⁵⁰ *Interim Guidance* at 17 (stating that “[t]he information included by the applicant as part of a complete application will assist the ONMS in completing its NEPA responsibilities.”).

⁵¹ 40 C.F.R. § 1508.9.

⁵² 40 C.F.R. §§ 1501.6, 1508.16.

⁵³ 42 U.S.C. § 4332(2)(C).

⁵⁴ 40 C.F.R. § 1503.2.

V. NOAA Has Failed to Provide for Protection of Proprietary and Commercially-Sensitive Information

In its proposed application requirements, NOAA has requested the submission of proprietary and commercially-sensitive information, the disclosure of which could cause significant competitive harm to a cable owner, cable supplier, or their subcontractors. For example, Section A.7 would require submission of information about the funding source of the project. Sections D.1, D.3, and D.15 would require submission of information pertaining to a supplier’s methods of doing business—much of which particular suppliers consider proprietary. Finally, Section F.1 would require submission of project budget information, including “cost estimates for construction, installation, operations, monitoring and removal.” In many cases, suppliers, subcontractors, and owners do not share this information with each other, much less parties beyond a particular project.

Assuming NOAA had the authority to require Special Use Permits for commercial undersea cables in NMSs—and NASCA does not concede this point—NOAA would need to reconsider the purpose of such information, weighing its usefulness against the burden of collecting it and the risk that it might be disclosed. NOAA would also need to establish a process for withholding such information from public inspection, and even disclosure under the Freedom of Information Act.

VI. NOAA’s Proposed Application Requirements Would Be Extraordinarily Burdensome and Would Violate the Paperwork Reduction Act

Many of NOAA’s proposed application requirements would, if adopted, be extraordinarily burdensome and also violate the Paperwork Reduction Act, as implemented by the White House Office of Management and Budget (“OMB”). Specifically, NOAA has

proposed to require a variety of information, the purpose of which is unclear and the burden of gather of which is significant:

- Section A.7: Information about funding sources.
- Section B.4: Information about project supervisors, their qualifications, and evidence of their ability to perform project-related tasks.
- Section B.5: Identification of all applicant agents and consultants
- Section D.1: A detailed description of all elements of construction and installation (including pre-construction activities), the timing of these elements, and the overall project installation timeline.
- Section D.15: A work plan for construction during adverse weather conditions.
- Section F.1: Project budget.⁵⁵

NASCA urges NOAA to eliminate these requirements in the *Interim Guidance* due to their unclear purpose and burdensome nature.

NASCA also believes that such requirements would violate the Paperwork Reduction Act of 1995 (“PRA”).⁵⁶ NOAA cannot demonstrate that these requirements are the least burdensome way of obtaining the information, that they avoid duplicating other recordkeeping obligations, or that they have any demonstrable, practical utility.

The PRA, which Congress designed to eliminate costly recordkeeping and reporting obligations,⁵⁷ seeks to “minimize the paperwork burden . . . resulting from the collection of information by or for the Federal Government,”⁵⁸ while simultaneously “ensur[ing] the greatest

⁵⁵ See *Interim Guidance*, Appendix B.

⁵⁶ 44 U.S.C. §§ 3501–3520.

⁵⁷ See *id.* § 3501(3).

⁵⁸ *Id.* § 3501(1).

possible public benefit from and maximiz[ing] the utility of information created.”⁵⁹ OMB, which implements the PRA, has established a clear standard for determining whether a proposed recordkeeping or reporting rule violates the Act. According to OMB guidance, a proposed rule satisfies the PRA only if the sponsoring agency demonstrates that it possesses each of three characteristics. *First*, the proposed rule must be “the least burdensome way of obtaining information necessary for the proper performance of [the agency’s] functions.”⁶⁰ *Second*, the proposed rule must not duplicate other recordkeeping obligations.⁶¹ *Third*, the proposed rule must have “practical utility.”⁶² The application requirements in the *Interim Guidance* run afoul of the first two of these requirements.

First, as noted above, the proposed application requirements in the *Interim Guidance* would impose considerable burdens on cable landing applicants to obtain information that is unnecessary for the NOAA to perform its stated function. At the very least, NOAA must explain the intended purpose of such application requirements.

Second, the proposed application requirements duplicate existing information requirements. In particular, they would require duplicative submissions of information already

⁵⁹ *Id.* § 3501(2).

⁶⁰ Memo from John D. Graham, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, to Chief Information Officers, General Counsels and Solicitors, Attachment at 1 (Nov. 14, 2001) (“OMB PRA Memo”).

⁶¹ *Id.*

⁶² *Id.*

required by the Army Corps (under the Rivers and Harbors Act of 1899, the Clean Water Act, and—in cases where the Army Corps acts as the “lead agency”—NEPA), the FCC (under the Cable Landing License Act), and the states (under the consistency-certification process established by the Coastal Zone Management Act (“CZMA”)). In particular, the information requirements pertaining to environmental impact duplicate existing submission and review requirements under the Rivers and Harbors Act and the CZMA consistency certification process.

CONCLUSION

For the reasons stated above, the North American Submarine Cable Association urges NOAA to reconsider and revise its *Interim Guidance* and proposed application requirements for undersea cables in NMSs.

Respectfully submitted,

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