

Before the
U.S. DEPARTMENT OF THE INTERIOR
Washington, D.C.

In the Matter of

Review of Certain National Monuments
Established Since 1996

Docket No. DOI-2017-0002

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

The North American Submarine Cable Association (“NASCA”) urges the Secretary of the Interior (the “Secretary”) to recommend pursuant to Executive Orders 13792 and 13795 that the President modify the designations for the Marine National Monuments (“MNM”) expressly to permit installation and repair of submarine telecommunications cables critical to the U.S. economy and U.S. national security.¹ Submarine cables—which have long been designated as critical infrastructure, as they carry almost all U.S. intercontinental telephone, data, and Internet traffic—traverse most MNMs. Nevertheless, all but one of the existing MNM designations fail to authorize expressly the installation, maintenance, and repair of submarine cables. The omission of such authorizations threatens to render much more expensive and even threaten the viability of new submarine cables due to the high equipment and installation service costs for routing around MNMs, some of which cover massive areas of the Pacific Ocean. That omission

¹ Department of the Interior, Office of the Secretary, Review of Certain National Monuments Established Since 1996; Notice of Opportunity for Public Comment, 82 Fed Reg. 22,016 (May 11, 2017) (“Notice”).

also threatens to render submarine cable repairs more expensive and less timely, thereby impairing the continuity of U.S. communications. Regardless of any changes in the MNM boundaries, NASCA urges the Secretary to recommend that the designations (other than that for the Northeast Canyons and Seamounts MNM) be modified expressly to permit submarine cable installation, maintenance, and repair.

I. BACKGROUND

A. Importance of Submarine Cables

Contrary to popular perception, approximately 99 percent of U.S. intercontinental telephone, data, and Internet traffic travels by submarine cable—a percentage that has increased over time. Submarine cables provide higher-quality, more reliable and secure, and less expensive communications than do communications satellites. Submarine cables also provide the principal connectivity between the contiguous United States and Alaska, Hawaii, American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands. The U.S. territorial sea, exclusive economic zone (“EEZ”), and outer Continental Shelf (“OCS”) contain significant existing submarine cable infrastructure, and more is planned. According to the Federal Communications Commission (“FCC”), 63 in-service submarine cable systems traverse these areas, and at least 9 more have been announced or are currently under construction.²

Submarine cables play a critical role in ensuring that the United States can communicate domestically and internationally, thus supporting the commercial and national security endeavors of the United States and its citizens. Because of their critical importance to U.S. economic and national security interests, submarine cables have long been designated as critical infrastructure

² See Federal Communications Commission, *Submarine Cable Landing Licenses at Licensed Cables*, <https://www.fcc.gov/research-reports/guides/submarine-cable-landing-licenses>

by the U.S. Government.³ Submarine cables support U.S.-based commerce abroad, and provide access to Internet-based content, a substantial proportion of which is located in the United States, as evidenced by international bandwidth buildout. The U.S. Federal Reserve estimates that submarine cables globally carry an excess of \$10 trillion a day in transactions, a significant portion of which are transactions occurring in the United States.⁴ Moreover, the Society for Worldwide Interbank Financial Telecommunication (“SWIFT”) network uses submarine cables to transmit financial data to more than 8,300 member financial institutions throughout the world.⁵ Many of these member institutions reside in the United States and are central parts of the U.S. economy, not to mention sizeable employers of U.S. residents. The European Central Bank noted in a recent report that:

Undersea fiber-optic cables provide a competitive advantage to financial centers located near oceans, like Singapore, because they are directly connected to the Internet backbone, at the expense of landlocked cities like Zurich. By one estimate, cable connections have boosted the share in global turnover of London, the world’s largest trading venue, by as much as one third.⁶

Submarine cables also carry the vast majority of U.S. Government traffic, as the U.S. Government does not generally own or operate its own submarine cable systems.

Submarine cables—which are the diameter of a garden hose—are laid and repaired by cable ships built specifically for cable-related operations. These ships use a variety of remotely-

³ See Presidential Policy Directive – Critical Infrastructure Security and Resilience, PPD-21 (Feb. 12, 2013), www.whitehouse.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil; See Department of Homeland Security, Communications Sector-Specific Plan (2010), www.dhs.gov/xlibrary/assets/nipp-ssp-communications-2010.pdf.

⁴ Michael Sechrist, *New Threats, Old Technology*, Harvard Kennedy School, 9 (Feb. 2012), <https://citizenlab.org/cybernorms2012/sechrist.pdf>.

⁵ *Id.* at 9-10.

⁶ European Central Bank, *The international role of the Euro*, at 37 (July 2017).

operated vehicles, sea plows, lines, and grapnels for manipulating cable and repeaters beyond the ship. In deep-sea areas, cable is typically surface-laid, resting on the seabed surface.

Although damage to submarine cables is rare, it is typically caused by commercial fishermen, vessel anchors, hurricanes, underwater landslides, and seismic events such as earthquakes. Timely repairs are critical given the economic and national-security significance of traffic carried by these cables. Consequently, maintenance providers and cable ships must be prepared to respond rapidly with continuously-qualified personnel, vessels on stand-by, and appropriate equipment.

Scientific research has long demonstrated that submarine cable installation and repair activities and submarine cable materials are environmentally benign.⁷ Damage to a submarine cable does not result in the release of harmful substances into the marine environment, as it carries light over glass fibers.

B. NASCA

NASCA is the principal non-profit trade association for submarine-cable owners, submarine-cable maintenance authorities, and prime contractors for submarine-cable systems operating in North America. NASCA's members include:

⁷ *Submarine Cables and the Oceans: Connecting the World*, United Nations Environment Programme World Conservation Monitoring Centre (UNEP-WCMC) Biodiversity Series No. 31, at 29-37 (UNEP-WCMC and ICPC, 2009) (“UNEPWCMC-ICPC Report”), available at <https://www.unep-wcmc.org/resources-and-data/submarine-cables-and-the-oceans--connecting-the-world>; Federal Communications Commission, *Implementation of the National Environmental Policy Act of 1969, Report & Order*, 49 FCC.2d 1313, 1321 (1974) (finding that “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.”); Federal Communications Commission, *1998 Biennial Regulatory Review—Review of International Common Carrier Regulations, Report & Order*, 14 FCC Rcd. 4909, 4938 (1999).

- Alaska Communications System
- Alaska United Fiber System Partnership, a subsidiary of General Communication, Inc.
- Alcatel Submarine Networks
- Apollo Submarine Cable Ltd., a subsidiary of Vodafone
- AT&T Corp.
- C&W Networks
- Global Cloud Xchange
- Global Marine Systems Ltd.
- GlobeNet Cabos Submarinos America, Inc.
- Hibernia Atlantic
- Level 3 Communications, LLC
- Office of Posts and Telecommunications French Polynesia
- PC Landing Corp.
- Rogers Communications
- Southern Cross Cable Network
- Sprint Corporation
- Tata Communications (America) Inc.
- Tyco Electronics Subsea Communications LLC
- Verizon Business

NASCA serves both as a forum and advocacy organization for its members' interests. NASCA's members own and operate the vast majority of active submarine cable systems landing in the United States, and support thousands of jobs in the United States.

II. ALL BUT ONE OF THE EXISTING MNM DESIGNATIONS FAIL TO ACCOUNT FOR SUBMARINE CABLES

Most MNM designations and implementing regulations fail to account for existing or future submarine cables. Although all MNM designations other than that for the Rose Atoll MNM permit navigation, overflight, and other lawful uses under international law, only the Northeast Canyons and Seamounts MNM expressly authorizes submarine cable installation and maintenance. The boundaries of the Northeast Canyons and Seamounts MNM, however, are not unique in encompassing active submarine cables. As shown in Table 1 below, active submarine

cables traverse most of the MNMs and provide critical connectivity between U.S. states and territories and between the United States and key trading partners and allies.

TABLE 1: Submarine Cables in Marine National Monuments

MNM	Name of Active Submarine Cable System Traversing the MNM	U.S. States and Territories and Countries Connected
Marianas Trench	Asia-American Gateway	California, Hawaii, Guam, Brunei, Hong Kong, Malaysia, the Philippines, Singapore, Thailand, and Vietnam
	Australia-Japan Cable	Guam, Japan, and Australia
	HANTRU-1	Guam and the U.S. Army Garrison Kwajalein Atoll in the Republic of the Marshall Islands
	SEA-US	California, Hawaii, Guam, the Philippines, and Indonesia
Northeast Canyons and Seamounts	Flag Atlantic-1 North	New York and England
	Flag Atlantic-1 South	New York and France
	TAT-14	New Jersey, Denmark, England, France, Germany, and the Netherlands
Pacific Remote Islands	Asia-American Gateway (possibly)	California, Hawaii, Guam, Brunei, Hong Kong, Malaysia, the Philippines, Singapore, Thailand, and Vietnam
	SEA-US (possibly)	California, Hawaii, Guam, the Philippines, and Indonesia
Expanded Pacific Remote Islands	Asia-American Gateway	California, Hawaii, Guam, Brunei, Hong Kong, Malaysia, the Philippines, Singapore, Thailand, and Vietnam
	SEA-US	California, Hawaii, Guam, the Philippines, and Indonesia
Papahānaumokuākea	none known	
Expanded Papahānaumokuākea	Asia-American Gateway	California, Hawaii, Guam, Brunei, Hong Kong, Malaysia, the Philippines, Singapore, Thailand, and Vietnam
	Japan-U.S. Cable Network	California, Hawaii, and Japan
	SEA-US	California, Hawaii, Guam, the Philippines, and Indonesia
Rose Atoll	none known	

Certain of the MNM designations also prohibit activities in which submarine cable operators engage or could be deemed to engage, including anchoring and dredging⁸ and placement of structures or materials (other than scientific instruments) on submerged lands.⁹

III. THE SECRETARY SHOULD RECOMMEND THAT THE PRESIDENT MODIFY THE MNM DESIGNATIONS EXPRESSLY TO AUTHORIZE SUBMARINE CABLE INSTALLATION, MAINTENANCE, AND REPAIR

Under criterion (vii) of Executive Order 13792 (“such other factors as the Secretary deems appropriate”), on which the Department of the Interior has sought comment in connection with the related review under Executive Order 13795 and consultation with the Department of Commerce,¹⁰ the Secretary should consider and find that the existing MNM designations (other than for the Northeast Canyons and Seamounts MNM) impair the ability of submarine cable operators to install and maintain submarine cables. The Secretary should recommend that the President modify the MNM designations expressly to authorize submarine cable installation, maintenance and repair.

A. Express Authorization of Submarine Cable Installation and Repair Would Serve U.S. Economic and National Security Interests

To avoid undue harm to U.S. economic and national security interests, NASCA urges the Secretary to recommend that the MNM designations (other than the one for the Northeast Canyons and Seamounts MNM) be modified expressly to permit submarine cable installation, maintenance, and repair. Specifically, the Secretary should recommend that the President

⁸ See Presidential Proclamation 8031 (Papahānaumokuākea MNM); Presidential Proclamation 9478 (Expanded Papahānaumokuākea MNM); Presidential Proclamation 9496 (Northeast Canyons and Seamounts MNM).

⁹ Presidential Proclamation 9478 (Expanded Papahānaumokuākea MNM); Presidential Proclamation 9496 (Northeast Canyons and Seamounts MNM).

¹⁰ Notice, 82 Fed. Reg. at 22,017.

modify the MNMs consistent with Presidential Proclamation 9496 and the language regarding prohibited activities in the with respect to the Northeast Canyons and Seamounts MNM, which prohibits in pertinent part:

Drilling into, dredging, or otherwise altering the submerged lands, or constructing, placing, or abandoning any structure, material, or other matter on the submerged lands, *except for* scientific instruments *and constructing or maintaining submarine cables*.

For new submarine cables, the existing MNM designations threaten to foreclose the most efficient and safest routes for new submarine cables. The cost of routing around an MNM such as the Expanded Papahānaumokuākea could impose tens of millions of dollars in additional equipment and installation services costs, thereby increasing the cost of connectivity to customers and, ultimately, consumers. Those costs could even render a new system entirely uneconomic.

NASCA further urges the Secretary to make such a recommendation in order to ensure the continuity and security of communications on submarine cables, as well as timelier repair and restoration. Prohibitions or restrictions on submarine cable repair could greatly impair connectivity within the United States and between the United States and the rest of the world.

B. The MNM Designation Language Regarding Lawful Uses Under International Law Is Insufficient

Although all of the MNMs other than the Rose Atoll MNM authorize navigation, overflight, and lawful uses under international law, those provisions provide insufficient protection for submarine cable installation and maintenance, as they could easily be interpreted to exclude submarine cable installation and maintenance. The fact that the Northeast Canyons and Seamounts MNM expressly authorizes submarine cable installation and maintenance while other others do not could be interpreted that such activities are prohibited in the other MNMs.

Moreover, the U.S. Government has a history of construing those international law protections to permit significant restrictions on submarine cable installation and maintenance in U.S. national marine sanctuaries beyond the U.S. territorial sea.

NASCA believes that U.S. treaty obligations and customary international law (as observed by the United States) guarantee the freedom to install and maintain submarine cables in the U.S. exclusive economic zone¹¹ and on the U.S. continental shelf.¹² To avoid any potential misinterpretation, NASCA also believes that the MNM designations should expressly permit submarine cable installation and maintenance.

¹¹ Law of the Sea Convention, Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force on Nov. 16, 1994) (“UNCLOS”), at art. 58(1) (“In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines.”). The United States, under President Reagan, recognized these freedoms starting in 1983, even though the United States has never ratified the UNCLOS (it signed only in 1994) and even though the Convention did not enter into force for those states that had ratified it until 1994. Presidential proclamations by 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 Proc. No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983) (“Pres. Proc. No. 5030”) (establishing the U.S. EEZ); Presidential Proclamation No. 7219, 64 Fed. Reg. 48,701 (Aug. 2, 1999) (establishing the U.S. contiguous zone).

¹² UNCLOS arts. 79(1) (“All States are entitled to lay submarine cables and pipelines on the continental shelf, in accordance with the provisions of this article”), 79(5) (“When laying submarine cables or pipelines, States shall have due regard to cables or pipelines already in position. In particular, possibilities of repairing existing cables or pipelines shall not be prejudiced.”); Geneva Convention on the Continental Shelf, Apr. 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) at art. 4 (“Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of submarine cables or pipe lines on the continental shelf.”). *See also* UNCLOS, art. 78(2) (“The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention.”).

CONCLUSION

For the reasons stated above, NASCA urges the Secretary to recommend that the MNM designations be modified expressly to permit installation and maintenance of submarine cables.

Respectfully submitted,



Kent D. Bressie
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street, N.W., Suite 800
Washington, D.C. 20036-3537
+1 202 730 1337
kbressie@hwglaw.com

*Counsel for the North American
Submarine Cable Association*

July 10, 2017