Before
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
Washington, D.C.

In the Matter of Notice of Modification to the Special Use Permit (SUP) Category for the Continued Presence of Commercial Submarine Cables within the National Marine Sanctuary System	Docket No. NOAA-NOS-2024-0089

COMMENTS OF
THE NORTH AMERICAN SUBMARINE CABLE ASSOCIATION

The North American Submarine Cable Association ("NASCA") submits these comments in response to the National Oceanic and Atmospheric Administration's ("NOAA") Notice of Modification to the Special Use Permit (SUP) Category for the Continued Presence of Commercial Submarine Cables Within the National Marine Sanctuary System.[1] In the SUP Notice, NOAA seeks comment on (a) the use of the SUP category for the continued presence of commercial submarine cables; (b) potential modifications to this SUP category; and (c) developing an updated policy and permit guidance document for submarine cable projects.[2] NOAA also indicates its intent to reassess its current fair market valuation to assess the SUP fee

[1] Notice of Modification to the Special Use Permit (SUP) Category for the Continued Presence of Commercial Submarine Cables Within the National Marine Sanctuary System, 89 Fed. Reg. 66689 (Aug. 16, 2024) ("SUP Notice").

[2] SUP Notice at 66689 & 66692; Policy and Permit Guidance for Submarine Cable Projects, https://nmssanctuaries.blob.core.windows.net/sanctuaries-prod/media/archive/library/pdfs/subcable_final_guidance_2011.pdf ("Permit Guidance").

in a new peer reviewed report that will be subject to comment when complete.[3] In these comments, NASCA addresses each of these issues, all of which must be considered together in updating NOAA's regulatory regime in order to appropriately protect the environment while ensuring that compatible uses of the marine environment that serve vital national economic and security interests with negligible environmental impact—such as the survey, installation, maintenance, repair, and decommissioning of fiber-optic submarine telecommunications infrastructure—are not unduly restricted or burdened, whether by outright restrictions, permitting delays, regulatory uncertainty, onerous conditions, or excessive fees.

To accomplish these goals, NASCA believes that NOAA should undertake a rulemaking, consistent with the Administrative Procedure Act[4] and subject to Office of Management and Budget ("OMB") review with the goal of altering its permitting, authorization, and fee practices for submarine telecommunications cables in national marine sanctuaries to avoid further distortions to the buildout of submarine cable infrastructure and to make that infrastructure more resilient. In spite of the proliferation of new submarine cable infrastructure connecting the United States since 1998, no new cables have been constructed within any existing national marine sanctuary in the past 20 years due to regulatory uncertainty, outright opposition from particular sanctuary leadership in contravention of the National Marine Sanctuaries Act ("NMSA"),[5] and excessive regulatory burdens and fees. This has resulted in the clustering of cables on routes and landings outside sanctuary boundaries that complicate installation and repair activities and greatly increase the likelihood that a single event—whether a storm or a malicious

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3 SUP Notice at 66690.

4 Administrative Procedures Act, 5 U.S.C. § 551 ("APA").

5 National Marine Sanctuaries Act at § 1433(b)(1).

attack—will damage multiple cables at once and thereby impair the U.S. economy and national security. NASCA believes that submarine cables are wholly compatible with national marine sanctuaries and have a negligible impact on the marine environment—far less on both spatial and temporal scales than that of activities that NOAA routinely permits or exempts from regulation, particularly commercial fishing. NASCA also believes that NOAA must coordinate and reconcile its national marine sanctuary program and activities with federal agencies responsible for telecommunications, critical infrastructure, and national security to serve U.S. interests.

I. SUBMARINE TELECOMMUNICATIONS CABLES ARE VITAL TO U.S. SOCIAL, ECONOMIC AND NATIONAL SECURITY INTERESTS AND ARE COMPATIBLE WITH NATIONAL MARINE SANCTUARY PROTECTION

A. NASCA Represents Significant Submarine Cable Infrastructure Landing in the United States

NASCA is the principal nonprofit trade association for submarine cable operators, submarine cable maintenance authorities, and prime contractors for submarine cable systems operating in North America.[6] NASCA serves both as an advocacy organization and a forum 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, including jobs in the New Blue Economy. NASCA's members currently own and operate submarine cables terminating on both coasts (including cables that land in existing and planned National Marine Sanctuaries) which provide essential connectivity between the United States

[6] NASCA's members include Alaska Communications System; Alaska United Fiber System Partnership; Alcatel Submarine Networks; AT&T Corp.; C&W Networks; Edge Network Services; EXA Infrastructure; Global Cloud Xchange; Global Marine Systems Ltd.; GlobeNet; Lumen Technologies UK, Ltd; OPT French Polynesia; PC Landing Corporation; Rogers Communications; Southern Caribbean Fiber; Southern Cross Cable Network; TampNet Group; Tata Communications (Americas); SubCom; Verizon; Vodafone; and Zayo Group Ltd. *See* Member Companies, North American Submarine Cable Association, https://www.n-a-s-c-a.org/member-companies/.

and the rest of the world.

B. Submarine Telecommunications Cables Are Critical Infrastructure

As NASCA has long argued and NOAA has finally acknowledged, submarine cables form the backbone of our modern digital infrastructure:

> Submarine fiber optic cables currently carry 99% of the world's international electronic communications, and have been recognized as essential, critical infrastructure that represent the backbone of the global digital communications system and global economy, and play an important role in national security (Department of Justice, 2022). Presidential Policy Directive 21 on Critical Infrastructure Security and Resilience prioritizes national efforts to strengthen and maintain secure, functioning, and resilient critical infrastructure, to include fiber-optic telecommunication networks.[7]

Activities that rely upon submarine cables span the full range of economic and social activities: submarine telecommunications cables enable Internet connectivity and electronic commerce, global payment networks, mobile wireless backhaul, government and military communications, telemedicine, research, distance education, entertainment, remote work and video conferencing, and communications with friends and family.[8] These activities not only support national interests broadly, but they also support specific National Marine Sanctuary program objectives, including cultural preservation, education, and research.[9] Indeed, there are many people that may be able to experience and learn about the ecosystems in National Marine Sanctuaries only

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[7] National Oceanic and Atmospheric Administration, Office of National Marine Sanctuaries, *Chumash Heritage National Marine Sanctuary, Final Environmental Impact Statement,* Volume I, p. 185 (2024) ("Chumash EIA").

[8] *See* International Cable Protection Committee, *ICPC Calls on Governments and Industry to Facilitate and Expedite Submarine Cable Installation and Repair During the COVID-19 Pandemic in Order to Protect Internet Connectivity and Critical Communications* 1 (Apr. 3, 2020), https://www.iscpc.org/documents/?id=3299.

[9] Comments of North American Submarine Cable Association, Docket No. NOAA-NOS-2023-0052 at 12 (filed Jun. 8, 2023) ("NASCA Proposed Pacific Remote Islands NMS Comments").

through streamed content delivered via fiber optics. The global nature of the Internet and the networks that operate over it mean that even communications within a domestic or local area (such as communications up and down the Eastern or Western seaboards) rely on submarine cable infrastructure to deliver communications and services. This reliance is growing—with more cables planned—as our cultural, social, economic, and national security institutions and activities increasingly depend on digital, cloud-based platforms. It is thus imperative that NOAA's National Marine Sanctuary regulations facilitate, rather than hamper, the deployment and maintenance of submarine telecommunication infrastructure, consistent with the National Marine Sanctuaries Act.[10]

C. Submarine Telecommunications Cables Are Compatible with the National Marine Sanctuaries Act's Environmental Protection Goals

As NASCA has repeatedly demonstrated, submarine telecommunications cables are compatible with the underlying environmental and cultural protection goals of the National Marine Sanctuaries Act.[11] Submarine telecommunications cables are:

- Designed to avoid sensitive ecosystems and archeological and cultural resources;
- Small, chemically inert objects that do not leach into sea water or generate harmful electromagnetic effects;
- Laid with minimal disturbances to the seabed and marine fauna;
- Mostly invisible in the marine environment;

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[10] 16 U.S.C. § 1433.

[11] *See generally* Comments of North American Submarine Cable Association, Docket No. 230807-0185 (filed Oct. 25, 2023) ("NASCA Proposed Chumash Heritage NMS Comments"); NASCA Proposed Pacific Remote Islands NMS Comments; and Comments of North American Submarine Cable Association, Docket No. NOAA-NOS-2022-0053 (filed Aug. 8, 2022) ("NASCA Proposed Hudson Canyon NMS Comments").

- Quiet, generating minimal underwater noise during installation and no noise during operation.[12]

Indeed, key overview reports have consistently concluded that the environmental impact of cables is very limited and outweighed by the economic, societal, and governmental benefits they provide:

- ***UNEP-WCMC-ICPC Report 2009***: "The weight of evidence shows the environmental impact of fibre-optic cables is neutral to minor."[13]
- ***U.N. Secretary General's UNCLOS Report 2015***: "Submarine cables themselves are considered to have a low-carbon footprint and a small relative impact on the environment . . ."[14]
- ***U.N. World Ocean Assessment 2016***: Submarine telecommunications cables "have very limited environmental impacts."[15] "A large body of knowledge already exists about the construction and operation of submarine communication cables, including how to survey environmentally acceptable routes and allow for the submarine geology."[16]

Other agencies have long recognized the negligible impact of submarine telecommunications cables. Under NEPA,[17] the Federal Communications Commission decided in 1974 that an application for a submarine cable landing license would be categorically excluded from scrutiny under the FCC's environmental processing, based on a finding that submarine cable installation

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12 *See* NASCA Proposed Chumash Heritage NMS Comments at 12.

13 L. Carter *et al.*, *Submarine Cables and the Oceans–Connecting the World*, 30 UNEP-WCMC Biodiversity Series, ICPC and the United Nations Environment Program-World Climate Monitoring Centre (2009).

14 U.N. Secretary-General, *Oceans and the Law of the Sea, Seventieth Session*, ¶¶ 53–55, U.N. Doc. A/70/74 (2015), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/093/76/PDF/N1509376.pdf?OpenElement.

15 U.N. Group of Experts on the Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socioeconomic Aspects, *World Ocean Assessment I: The First Global Integrated Marine Assessment*, pt. V, ch. 19 at 3–4 (2016).

16 *Id.* at 6.

17 National Environmental Policy Act, 42 U.S.C. §§ 4321–4347 ("NEPA").

was unlikely to have a significant environmental impact. Having inadvertently eliminated the categorical exclusion in 1986, the FCC reinstated it in 1999.[18]

While NOAA finally has begun to recognize the compatibility of submarine telecommunications cables with environmental protection goals—"Based on experience with submarine cables in national marine sanctuaries, NOAA concurs that cables can have relatively minor impacts on benthic habitats, for the most part[19]—it has not sufficiently taken into account the wealth of corroborating reports produced over the past decade. Indeed, its regime makes no distinctions between fiber optic telecommunications cables and other industries, such oil and gas development, with the potential for a much greater environmental impact: "[R]epair of existing submarine cables is treated the same as repair of existing oil and gas pipelines."[20] If NOAA is to truly support the New Blue Economy while stewarding vast swaths of coastal and OCS resources, it must revise its regulations consistent with the National Marine Sanctuaries Act to rationalize its permitting processes. These processes must be based on established science, take into account the existing legal framework regulating submarine telecommunications cable activities, and recognize that the nature of those activities does not require exhaustive, case-by-case permitting in most instances.

II. NOAA's PERMITTING AND FEE REGIME SHOULD BE CLARIFIED AND RATIONALIZED IN A FORMAL RULEMAKING

NOAA's permitting and fee regime for submarine telecommunications cables should be clarified and rationalized through a formal rulemaking. While NASCA welcomes NOAA's

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[18] 2016 CSRIC Working Group 4A Final Report – Interagency and Interjurisdictional Coordination "Categorical Exclusion from Environmental Processing" at 10-11 (June 2016).

[19] Chumash EIA, Appendix A at 62.

[20] *Id.* at 65.

initial steps to consider updating its approach to the telecommunications cable SUP and its Permit Guidance, it believes that review and revision of NOAA's permitting processes through a rulemaking that results in codified regulations, consistent with the APA and subject to OMB review is needed in order to comprehensively address the issues. Substantively, NASCA believes that NOAA's current SUP requirement for submarine telecommunications cables is unnecessary, as such cables have a negligible impact on the environment and do not "use" sanctuary resources in any meaningful way. In addition, NOAA's permitting processes, detailed in its Permit Guidance, include too many levels of review, each with its own layers of complexity, providing too many opportunities to delay permitting for routine activities, many of which are time sensitive and all of which are conducted pursuant to myriad environmental laws. Both the SUP and the Permit Guidance should be reevaluated together, with the goal of codifying streamlined permitting processes that accurately reflect (a) the compatibility of submarine telecommunications cables and submarine telecommunications cable activity with national marine sanctuary objectives; and (b) the extensive set of laws and regulations pursuant to which such activities are conducted. NOAA should also leverage interagency consultations and processes, consistent with NEPA, ensuring that all stakeholder agencies are involved in establishing the rules and regulations that not only protect environmental interests, but also have an impact on other national interests and priorities.[21]

A. The Use of the SUP Category for the Continued Presence of Commercial Submarine Telecommunications Cables Is Unnecessary

In the SUP FRN, NOAA notes that, since 2006, it has required SUPs for the "continued presence of commercial submarine cables beneath or on the seabed."[22] Yet as repeatedly

[21] NEPA, 42 U.S.C. § 4332.

[22] SUP Notice at 66690.

demonstrated by NASCA, installed submarine telecommunications infrastructure does not "use" significant sanctuary resources and has negligible environmental impact. Once installed, these cables are nearly invisible, do not consume sanctuary resources, do not impede other uses, and do not harm the environment. At the same, submarine telecommunications cables serve critical social, economic and national security interests, a number of which support long term sanctuary objectives, such as research and education. As the agency that oversees an ever-increasing amount of our ocean resources in an era of increasingly crowded oceans, NOAA has the responsibility to ensure that sanctuaries are accessible for compatible uses that support social, scientific, and economic interests. This is consistent with NOAA's obligation under the National Marine Sanctuaries Act to consider the socioeconomic impacts of a designation and related management plans.[23]

As NOAA separately requires permitting for submarine cable activities—installation, maintenance, and repair—the SUP on its own serves no rational purpose other than imposing administrative burdens and costs on submarine telecommunications owners and operators. SUPs are also ill-suited as a permitting mechanism for submarine telecommunications cables, as SUPs must be renewed every five years, which is incompatible with a project that has, at a minimum, a 25 year operational horizon.

B. If Retained, NOAA Should Modify the SUP for Submarine Telecommunications Cables

NOAA seeks comment on modification to the submarine cable SUP category. As stated above, NASCA believes the category is unnecessary for submarine telecommunications infrastructure and should be eliminated. However, if retained, the SUP regime should be

[23] National Marine Sanctuaries Act at § 1433(b)(1)(I).

activity-based and (as discussed further in Part C below) modified to apply to all submarine telecommunications cables, as a group, within sanctuary boundaries, similar to the Army Corps of Engineers nationwide permitting program, which permits specified activities that have been evaluated pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, subject to a set of standard conditions and pre-activity notification. Such an advance approval process could also be accomplished (and should be accomplished) through a revised process for issuing permits or other authorizations (or certifications).

C. The Current Submarine Cable Permit Guidance Must be Revised and Rationalized

The current Permit Guidance must be updated and permitting processes revised and rationalized. NOAA asserts that "[c]able construction projects have been proposed, approved by NOAA, and successfully built within national marine sanctuaries."[24] In its Chumash EIA, NOAA further asserts that:

> NOAA does not consider the administrative process of applying for a permit, *per se*, to have an adverse impact on a permit applicant or developer. NOAA disagrees that the regulations for CHNMS or for any other sanctuary create an explicit ban on future submarine fiber optic cables. At least 55 cables, including many telecommunications fiber optic cables, are presently on the submerged lands of national marine sanctuaries. Submarine cables are not "precluded" in national marine sanctuaries and NOAA does not have evidence that the existence of a sanctuary permitting process would constitute the dispositive factor in a cable siting decision.[25]

Yet as noted above, no new submarine telecommunications cable has been built within national marine sanctuary boundaries ***for the last 20 years***. This is not a permitting success story. It is a *de facto* ban. NOAA has indicated that it supports the need for rapid repairs and

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[24] SUP Notice at 66692.

[25] Chumash EIA, Appendix A at 63.

can issue an Office of National Marine Sanctuaries ("ONMS") authorization within days of any underlying approval from a partner agency.[26] However, relying on other agency approvals, *i.e.*, certifying an activity that has been authorized by a valid federal, state, or local permit, lease or other approval, is an imperfect process: local permitting would not cover OCS activity, and permits issued by the Army Corps of Engineers expire. This leaves many repair and maintenance activities without a path forward for certification.

More importantly, irrespective of the type of permit or authorization, the Permit Guidance details an exhaustive review, including: (a) technical evaluation (financial responsibility, appropriateness of methods, need for activity in sanctuary); (b) considering the effects of the project (to the extent the project will enhance or diminish the sanctuary's values, duration and effect of activity, cumulative impacts, or impacts on Indian tribes); (c) considering the end value of the activity to the sanctuary; (d) considering other factors, such as socioeconomic effects—to be followed by an assessment of regulatory thresholds and engaging in interagency consultation. Only then, if NOAA decides to issue a permit (with conditions) may the installation or repair proceed. It is notable that Appendix B advises permit applications to be submitted at least six months in advance.[27]

Such an extensive and convoluted process is unnecessary and serves as a deterrent to the deployment of submarine telecommunications infrastructure within national marine sanctuary boundaries. It is particularly unnecessary, given that submarine cable activities are subject to a wide variety of state and federal laws that ensure that cables are surveyed, installed, operated,

[26] *Id.* at 68.

[27] Permit Guidance, Appendix B, B-1.

repaired, and maintained consistent with environmentally sound practices.[28]

As NASCA has argued in numerous proceedings, the socioeconomic harm caused by NOAA's existing permitting regime—which effectively deters any new cable installations—is two-fold, and has not been appropriately assessed by NOAA in its designation processes.[29] First, it has resulted in the clustering of submarine cable landings in a few, heavily populated locations, increasing the risk that a single event, whether a ship dragging an anchor, a tsunami, earthquake, or a terrorist event could damage multiple cables in a confined area in a short period of time. This, of course, increases the amount of repair activity conducted in the marine environment. It also decreases the ability of submarine operators to re-route traffic along a different cable to maintain connectivity in the event of a cable fault. Second, it increases the underlying cost of connectivity, as some operators locate their cables far from population centers to avoid clustering, and must secure terrestrial connectivity from the landing sites to population centers. Such increased costs inevitably fall on consumers.

As stated above, NASCA believes that the permitting issues under consideration should be addressed through a formal rulemaking, consistent with the APA and subject to OMB review. Concerns expressed in this proceeding by both private and public stakeholders, should inform such a rulemaking and any NOAA-proposed regulations, the goal of which should be "finding a balance between maintaining or expanding cable systems with the conservation of important

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[28] Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–1891(d); Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended in scattered sections of 16 U.S.C.); Migratory Bird Treaty Act, 16 U.S.C. §§ 703–708, 711–712; Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. § 403 (amended by the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1333(e)) ("Rivers and Harbors Act"); NEPA, 42 U.S.C. §§ 4321–4347; Antiquities Act, 54 U.S.C. §§ 320301–320303.

[29] 16 U.S.C. § 1433(a)(3)–(4).

sanctuary resources."[30]

There are a number of permitting approaches that NOAA may consider in a rulemaking, but the critical element is to ensure a streamlined, readily comprehensible process with only necessary conditions. In most cases, there should be no need for case-by-case review. As noted above, the Army Corps of Engineers' nationwide permitting program may serve as a model, tailored, of course, for National Marine Sanctuary characteristics and boundaries. Advance authorizations should be available for installation, maintenance and repair, and removal activities subject to standard conditions applicable to a given sanctuary, such as avoiding specific sites or following specific rules related to any burial activity (if any). Notice and other communication requirements may also be appropriate, so that sanctuary superintendents are aware of an intended activity and when it begins and concludes. In addition, NOAA should consider ways to streamline application review for activities that may not fall within a pre-approved category. In all cases, regular consultations with key agencies, including those responsible for critical infrastructure and national security, should occur on an ongoing basis, and should not be tied to a case-specific review.

D. NOAA's Fair Market Value for Submarine Telecommunications Cable SUPs Is Neither Fair, nor Market-Based

While the SUP NPRM simply advises commenters that NOAA will be revisiting its fair market analysis for telecommunications cables and indicates that such updated analysis, when complete, will be peer reviewed and subject to comment,[31] NASCA takes this opportunity to stress that NOAA's existing SUP fee for telecommunications cables is neither fair nor market-based. As stated above, NASCA believes that there is no need for an SUP for installed

[30] Chumash EIA, Appendix A at 63.

[31] SUP Notice at 66690.

submarine telecommunications cables within sanctuary boundaries. Fees for submarine telecommunications cable activities within sanctuaries should be rationally-related to that activity. However, if the SUP is retained—with or without modification—NOAA's SUP fee analysis should be updated. NOAA's existing fee analysis sets a range of $40,000 to $100,000 per mile for a submarine cable, the size of a garden hose, to lay on the ocean floor.[32] Such a fee is not fair, as the activity in question is not "using" sanctuary resources or excluding other uses in any meaningful way. There is no environmental harm, and the cables do not interfere with any other use. At the same time, sanctuary boundaries—such as with the anticipated Chumash designation—are getting much larger, encompassing areas that previously were available for submarine cables without the additional fee. The fee is not market-based in that it simply does not reflect the hypothetical fee agreed upon by a willing buyer and a willing seller. Faced with a choice of deploying a cable within sanctuary boundaries and outside those boundaries, the rational actor will choose the latter, particularly when combined with NOAA's problem-riddled permitting processes. NASCA looks forward to NOAA's revised analysis.

[32] Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries, 67 Fed. Reg. 55201 (Aug. 28, 2002); Final Notice of Fee Calculations for Special Use Permits, 80 Fed. Reg. 72415 (Nov. 19, 2015).

CONCLUSION

For the reasons stated above, NASCA believes that NOAA should undertake a comprehensive review of its permitting processes pursuant to a rulemaking with the goal of streamlining and rationalizing the permitting process. Any such rulemaking should be (a) guided by the policy goal of balancing cable system deployment with the conservation of important sanctuary resources; and (b) informed by the evidence in the record that submarine telecommunications cables and submarine telecommunications cable activity are compatible with national marine sanctuary objectives and are already regulated by an extensive set of environmental laws and regulations.

Respectfully submitted,

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