

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Airspace Branch, 15000 Aviation Boulevard, Lawndale, California 90261. Communications must identify the docket number of this NPRM. Persons interested in being placed on a mailing list for future NPRM's should also request a copy of Advisory Circular No. 71-2A, which describes the application procedures.

The Proposal

The FAA is considering an amendment to 14 CFR part 71 by modifying the Class E airspace area at Willits, CA. A revision to the RNAV RWY 16 and RWY 34 SIAP at Ells Field-Willits Municipal Airport has made this proposal necessary. Additional controlled airspace extending upward from 1200 feet above the surface is needed to contain aircraft executing these RNAV approach procedures at Ells Field-Willits Municipal Airport. The intended effect of this proposal is to provide adequate controlled airspace for aircraft executing the RNAV RWY 16 and RWY 34 SIAP at Ells Field-Willits Municipal Airport, Willits, CA.

Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9G dated September 1, 1999, and effective September 16, 1999, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in this Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation—(1) is not a “significant regulatory action” under Executive Order 12866; (2) is not a “significant rule” under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9G, Airspace Designations and Reporting Points, dated September 1, 1999, and effective September 16, 1999, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

AWP CA E5 Willits, CA [Revised]

Ells Field-Willits Municipal Airport, CA
(Lat. 39°27'05" N, long. 123°22'20" W)

That airspace extending upward from 700 feet above the surface within a 6.3-mile radius of the Ells Field-Willits Municipal Airport and that airspace bounded by a line beginning at lat. 39°28'00" N, long. 123°30'15" W; to lat. 39°48'30" N, long. 123°42'00" W; to lat. 39°53'30" N, long. 123°28'30" W; to lat. 39°32'11" N, long. 123°17'27" W, thence clockwise along the 6.3-mile radius of the Ells Field-Willits Municipal Airport, to the point of beginning; and that airspace extending upward from 1,200 feet above the surface within a 38-mile radius of the Ells Field-Willits Municipal Airport.

* * * * *

Issued in Los Angeles, California, on August 8, 2000.

Dawna J. Vicars,

*Assistant Manager, Air Traffic Division,
Western-Pacific Region.*

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 922

[Docket No. 000526157–0157–01]

RIN 0648–AO36

Installing and Maintaining Commercial Submarine Cables in National Marine Sanctuaries

AGENCY: Marine Sanctuaries Division (MSD), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce (DOC).

ACTION: Advance notice of proposed rulemaking.

SUMMARY: Notice is hereby given that NOAA is evaluating whether changes to existing National Marine Sanctuary (NMS) regulations or some form of policy guidance is necessary to clarify NOAA's decision-making process regarding the installation and maintenance of commercial submarine cables within NMSs. If changes or additional guidance are appropriate, this notice requests comments on what the changes or guidance should contain. This notice also requests comments on proposed principles on the installation of commercial submarine cables within the marine and coastal environment as a whole.

DATES: Comments on this notice must be received by October 23, 2000.

ADDRESSES: Address all comments regarding this notice to Debra Malek, Conservation Policy and Planning Branch, National Marine Sanctuary Program, NOAA, 1305 East-West Highway, 11th Floor, Silver Spring, MD 20910; Attention: Submarine Cable FR Comments. Comments may also be submitted by e-mail to: submarine.cables@noaa.gov

FOR FURTHER INFORMATION CONTACT: Debra Malek, 301–713–3145 extension 162.

SUPPLEMENTARY INFORMATION:

I. Background

Through higher transmission capacity, decreased interruptions in service, greater security and cost efficiency, fiber-optic telecommunications cables are meeting demands for better productivity and quality in telephone, internet and data transmissions, education, and connectivity. In the face of this demand, global markets are expanding rapidly and domestic land-based cable routes

are becoming increasingly congested. For these and other reasons, the number of project proposals and specific permit requests for laying cables in the marine and coastal environment is increasing at a tremendous rate.

The increase in proposals for marine-based telecommunications cable projects strikingly highlights the Department of Commerce's (DOC) role as steward for both the nation's economy and the marine and coastal environment. For DOC, protecting the marine and coastal environment is as imperative as fostering the growth of telecommunications. Marine and coastal resources provide economic, cultural, and societal benefits to the nation. Yet, with the rapid growth and development of the coastal zone, many marine and coastal resources are at risk of degradation or loss. As a result, cumulative environmental impact evaluations need to be performed for cabling projects proposing transit through national marine sanctuaries, sensitive marine habitats outside of sanctuaries, submerged cultural resources, fishing zones, and areas of aesthetic value.

Federal, state, and local governments impose permitting requirements for all forms of development. The types of issues that are evaluated in seeking necessary permits for a proposed submarine cable project include, but are not limited to: cable route planning, cable installation (e.g., burial), operation, maintenance and repairs, and removal. Preparing an application for a permit, as well as the government review and authorization process, takes time and money.

II. Legal Framework

When considering a proposal to lay and operate commercial submarine cables in the marine and coastal environment, DOC must evaluate the industry's request relative to several statutes. These statutes provide the legal framework that governs decision-making. It is important to understand, however, that other federal, state, and local agencies have additional authorities that will govern the construction and operation of submarine cables.

The following describes the principal authorities governing this issue with which DOC must comply. Please refer to the full text of these laws for complete information.

National Marine Sanctuaries Act

The National Marine Sanctuaries Act (NMSA or Act), 16 U.S.C. 1431 *et seq.*, provides authority for the establishment of a unique network of marine protected

areas dedicated to the conservation of specially nationally significant areas of the marine environment. Within NOAA, the National Marine Sanctuary Program (NMSP or Program) is administered by the National Ocean Service's Marine Sanctuaries Division. The NMSP comprises 13 sanctuaries around the United States, including sites in American Samoa and Hawaii.

The primary objective of the NMSA is protection of sanctuary resources. Sanctuary resource is defined at 15 CFR 922.3 as:

Any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic value of the sanctuary, including but not limited to, the substratum of the area of the sanctuary, other submerged features and the surrounding seabed, carbonate rock, corals and other bottom formations, coralline algae and other marine plants and algae, marine invertebrates, brine-seep biota, phytoplankton, zooplankton, fish, seabirds, sea turtles and other marine reptiles, marine mammals and historical resources.

The NMSP manages sanctuaries on an ecosystem approach to protect sanctuary resources and sanctuary biological, physical, the chemical qualities. When a sanctuary is designated NOAA develops a comprehensive management plan and regulations for the sanctuary. Sanctuary regulations prohibit a range of activities to protect sanctuary resources and qualities.

Consequently, when a regulation prohibits a particular activity, a determination has been made, after public notice and comment, that such activity is generally incompatible with the resource protection mandate of the NMSA, and with the purposes for which the sanctuary was designated.

Relevant to submarine cables, each sanctuary has some type of regulation that prohibits installation of such cables. Such regulatory prohibitions include those against: drilling into, dredging or otherwise altering the seabed of the sanctuary; constructing, placing or abandoning any structure, material or other matter on the seabed of the sanctuary; injuring benthic invertebrates; moving or injuring historical resources; and discharging or depositing any material or other matter in the sanctuary.

Prohibited activities may be conducted under certain limited circumstances to the extent they are compatible with the resource protection mandate and meet regulatory and other requirements for a sanctuary permit or

other authorization. Sanctuary permits may be issued for research, education, management, or, in some instances, salvage activities. Some more recently designated sanctuaries have the authority to authorize another agency's permit for a specific activity, when such activity is compatible with resource protection and the purpose for which the sanctuary was designated. The NMSA also provides authority to issue special use permits for certain types of activities and NOAA may assess fees for the conduct of such activities.

Permits for commercial submarine cable projects would require applicants to adhere to certain conditions, including: collection and analysis of data on the environmental effects of cable installation, operation and maintenance. Those conditions would apply for the life of the permit. The project proponent would retain responsibility for any "out of service" cable that remains in the marine environment (e.g., if the cable is abandoned).

The NMSA also statutorily prohibits destroying, causing the loss of, or injuring any sanctuary resource managed under law or regulations for that sanctuary.

Section 304(d) of the NMSA section requires consultation on any Federal agency action internal or external to a national marine sanctuary, including private activities authorized by licenses, leases, or permits, that are likely to destroy, cause the loss of, or injure any sanctuary resources. Thus, for some proposed submarine cable projects that do not need a sanctuary permit or other sanctuary authorization but require another Federal agency's permit, consultation under the NMSA may be required.

The NMSA is applied in accordance with generally recognized principles of international law, and in accordance with treaties, conventions, and other agreements to which the U.S. is a party.

Endangered Species Act

The Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*, protects species of plants and animals that have been listed through regulations as threatened or endangered. A threatened species is any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. An endangered species is any species, other than some species of the Class Insecta, that is in danger of extinction throughout all or a significant portion of its range.

The ESA and its implementing regulations prohibit the "taking" of any

listed species, except under specified circumstances. A "take" is defined broadly and includes harassment, harm, pursuit, hunting, shooting, wounding, killing, trapping, capturing, or collecting, or attempting to engage in any of these types of conduct. The ESA includes civil and criminal penalties for violations. The Secretaries of the Departments of the Interior and Commerce may issue permits for the incidental take of listed species.

The National Marine Fisheries Service (NMFS) of NOAA has jurisdiction over cetaceans, pinnipeds (except walruses), commercially harvested estuarine molluscs and crustaceans, marine fish, anadromous fish, certain other species (e.g., Johnson's seagrass), and sea turtles in the water. The U.S. Fish and Wildlife Service of the Department of the Interior (FWS) has jurisdiction over all other species, including seabirds. The provisions of the ESA extend to actions within the territory of the United States, state of Federal waters, and by U.S. entities on the high seas. For example, NMFS must ensure that its authorization of the conduct of a fishery is not likely to jeopardize the continued existence of any endangered or threatened species.

After a species is listed as threatened or endangered, NMFS or FWS is required to designate critical habitat and develop and implement recovery plans for the listed species. Every Federal agency must ensure that any action authorized, funded or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of critical habitat. Federal agencies must consult with NMFS and FWS to avoid, minimize, or mitigate the impacts of their activities on listed species.

Submarine cable projects will trigger this consultation process whenever a federal permit, license, or other action is needed for an activity that may affect a listed species. If a protected species or its critical habitat is present in the vicinity of the cable laying project a Biological Assessment must be prepared by the permitting agency. The permitting agency must evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat. The agency then determines whether any such species or habitat is likely to be adversely affected by the action. If they believe there are no applicable alternatives to the project and that the project will jeopardize the continued existence of a protected species they

may apply to the Endangered Species Committee for an ESA exemption.

Marine Mammal Protection Act

The Marine Mammal Protection Act (MMPA), 16 U.S.C. 1361 *et seq.*, establishes a moratorium on the "taking" of marine mammals within U.S. waters or by U.S. citizens on the high seas. "Taking" is statutorily defined as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture or kill any marine mammal." Through NMFS, DOC has jurisdiction over all marine mammals with the exception of manatees and dugongs, walrus, polar bears and sea otters, which the Department of the Interior manages.

The MMPA allows the Secretaries to authorize the incidental taking of a small number of marine mammals by U.S. citizens who engage in a specified lawful activity within a specified geographical region, provided that the total number of takes will have no more than a negligible impact on affected species and will not have an unmitigable adverse impact on subsistence hunting.

Laying cable on the seabed and cable repair could potentially result in the incidental taking of marine mammals due to the elevated noise levels and vessel traffic associated with the laying of cable and entanglement of whales in the cable. NMFS regulations governing the small take authorization program are at 50 CFR 216.101 *et seq.* The regulations provide for expedited one-year authorizations for takes by harassment only and for five-year authorizations covering all forms of takes.

Magnuson-Stevens Fishery Conservation and Management Act

The Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA), 16 U.S.C. 1801 *et seq.*, administered by NMFS is the primary federal fishery management authority. The law established a national program to conserve and manage the nation's fishery resources and their habitats so the United States can achieve the full potential of its fishery resources. In addition to the law's focus on managing fishing activities, the most recent amendments in 1996 (Pub. L. 104-297) included language to protect "essential fish habitat" (EFH) for each of more than 700 species under federal authority. The new EFH mandate requires consultation with NMFS for any project that may adversely affect habitats of federally-managed species.

The regulations governing EFH consultations are found at 50 CFR part 600, subpart K. Where possible, EFH

will be implemented by using traditional environmental review processes associated with the National Environmental Policy Act, Fish and Wildlife Coordination Act, Endangered Species Act, or other laws, thereby eliminating the need for separate permit reviews or public comment periods.

Submarine cable projects will trigger this EFH consultation process whenever a federal permit, license, or other action is needed, if the proposed activity may adversely affect EFH. Except in rare situations, the EFH consultation will be conducted between field offices of the action agency and NMFS. Regional NMFS offices have maps, tables, and reports documenting areas designated as EFH and can work with the authorizing agency and industry to determine whether a submarine cable project affects EFH.

In combination with any documents associated with the traditional environmental review process (permit application, engineering plans, NEPA documents), an EFH Assessment must be prepared describing how the proposed project may affect EFH. The appropriate level of detail required in the consultation will depend on the proposed action and its potential impact on EFH.

Coastal Zone Management Act

States with coastal management programs approved by DOC pursuant to the Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.* (this includes all coastal states), have the authority to review federal activities affecting any land or water use or natural resource of the coastal zone for consistency with their approved state CZM program. This review authority includes the review of all federal agency permits (e.g., Army Corps of Engineers Section 10/404 permits and marine sanctuary permits). In the case of Federal permits, Federal agencies may not issue permits that are inconsistent with a state's approved program, unless, after an appeal by the applicant to DOC, an override decision is made based on certain criteria.

Companies with proposed submarine cable projects should contact the relevant state coastal management program agencies or NOAA's Office of Ocean and Coastal Resource Management, Federal Consistency Office, as early as possible in the federal application process.

National Environmental Policy Act

The National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4321 *et seq.*, is the foundation of modern American environmental protection in

the United States and its commonwealths, territories, and possessions.

NEPA requires that Federal agency decision-makers, in carrying out their duties, use all practical means to create and maintain conditions and fulfill the social, economic, and other needs of present and future generations of Americans.

NEPA provides a mandate and a framework for Federal agencies to consider all reasonably foreseeable environmental effects of their proposed actions and to involve and inform the public in the decision-making process.

NOAA's Administrative Order 216-6 (updated May 20, 1999) describes NOAA's policies, requirements, and procedures for complying with NEPA and the implementing regulations issued by the Council on Environmental Quality (CEQ) as codified in Parts 1500-1508 of Title 40 of the Code of Federal Regulations (40 CFR parts 1500-1508) and those issued by DOC in Department Administrative Order (DAO) 216-6, Implementing the National Environmental Policy Act.

NEPA applies to any proposed action for which a federal nexus exists, such as federal funding, permitting, or approval. Examples include ACOE 404 permits, ESA section 7 consultations for incidental take statements, or authorization for actions within a national marine sanctuary. Applicants for such permits or authorizations may be an individual, a private organization, or a Federal, state, tribal, territorial, or foreign governmental body. Based on the action and its impact on the quality of the human environment, a level of environmental review is required (*i.e.*, categorical exclusion, environmental assessment, or environmental impact statement).

NEPA documents may be stand-alone or combined with associated reviews such as those for state permits or Federal consistency certification. The latter, joint documentation, is preferred to reduce duplication and expedite review and clearance processes. When combined with other review processes, early coordination is essential to produce final documentation that is acceptable to all approving parties. NEPA documents are sometimes prepared by a contractor; in such cases, the documents must be cleared by the Federal agency prior to final action being taken.

For the purpose of a proposed submarine cable to transit the coastal zone including a portion of a national marine sanctuary, several permits or approvals may be required (*e.g.*, ACOE 404, NMSA permit or other

authorization, and state permits and Federal consistency certification), each requiring federal or state environmental review. After providing sufficient background information on the proposed action to the involved agencies, the requisite level of review is determined, and a NEPA document is prepared and circulated for public review as appropriate. Upon completion, final NEPA documents are cleared by the agency(s) and a determination is made on the applicable authorization(s) or permit(s). No final action by an applicant may occur prior to completion of the NEPA review process.

National Historic Preservation Act

The National Historical Preservation Act (NHPA), 16 U.S.C. 470 *et seq.*, directs federal agencies to develop programs to protect their cultural and historic properties. Section 106 of the NHPA directs that all federal or federally-funded undertakings, including federally permitted activities, be reviewed to ensure that no historic properties are negatively affected. The federal agency (in this case NOAA) must work in cooperation with states and the Advisory Council on Historic Preservation to minimize or prevent damage to the resources.

Submarine Cable Landing License Act

Pursuant to the Submarine Cable Landing License Act (47 U.S.C. 34-39) the President must grant permission to any entity planning to land a submarine cable in the United States. This statute requires an entity to get permission before it is allowed to land and operate a submarine cable "directly or indirectly connecting the United States with any foreign country, or connecting one portion of the United States with any other portion thereof" * * * except for any submarine cable "all of which, including both terminals, lie wholly within the continental United States." 47 U.S.C. 34.

In a related Executive Order (E.O. 10530) the President delegated authority to the Federal Communications Commission (FCC) to grant, deny, or condition submarine cable landing licenses, except that no license can be granted or revoked without the FCC first obtaining approval from the Secretary of State and advice from any executive department of the Government as the Commission may deem necessary. The National Telecommunications and Information Administration (NTIA), an agency within DOC, advises the Department of State and the FCC on all submarine cable landing license applications. The factors NTIA

considers in reviewing these applications involve competition issues and consumer matters.

III. Meetings

NOAA is evaluating whether changes to existing National Marine Sanctuary regulations or some form of policy guidance is necessary to clarify NOAA's decision-making process regarding the installation and maintenance of commercial submarine cables within NMSs. This evaluation is being undertaken in response to requests from the telecommunications industry to lay cables through many U.S. coastal and ocean areas, including NMSs, as well as in response to requests from various members of the fishing industry and the environmental community for more detailed information on the processes involved in the installation and maintenance of telecommunications cables and the possible impacts these processes have on the marine and coastal environment.

Within the overall marine and coastal environment, national marine sanctuaries have been established as special places set aside as protected areas of national significance. As such, they are afforded a higher level of protection. Within each sanctuary, certain types of activities, including activities inherent to laying, operating, repairing, and removing submarine cables, have been determined to be generally incompatible with the statutory objective of resource protection and are therefore prohibited by regulation. Under certain limited circumstances some prohibited activities may be allowed.

As applications were received by NMS offices for submarine cable installation, the NMSP began internal discussions on how to deal with such proposals. DOC, as part of its efforts to build productive partnerships among government, the telecommunications industry, and non-governmental organizations, convened a series of meetings to give stakeholders a chance to provide input into the Program's evaluation of the installation of commercial submarine cables in the marine and coastal environment. Many key issues were identified at these meetings.

From the business community, we heard the following:

- Submarine cables provide high-speed broadband connectivity and capacity for large geographic areas that are often important centers of trade and communication;
- Submarine cables alleviate existing capacity constraints and meet the demand for future growth;

- Submarine cables provide emergency routing alternatives to existing land-based telecommunication systems that are susceptible to earthquakes, flooding, storms, and other natural phenomena;

- Installation can be a low impact process, especially when compared to other commercial activities currently allowed in the marine environment (cables are small in diameter, the plow cuts a narrow trench, cable is buried to one meter, etc.);

- Submarine cables carry heavy international communication traffic without the transmission delays associated with satellites;

- Speed to market is critical and competition is fierce (200 new cable systems with over 1,000 shore landings are projected by 2003);

- A more succinct and clear policy for submarine cables would alleviate the current confusion over the approval of such projects.

From the environmental community, we heard the following:

- Little data exists on the cumulative environmental impacts associated with the installation, maintenance, operation, and repair of submarine cables;

- Sanctuaries and areas of sensitive habitat should be avoided, with some declared off limits;

- NOAA needs to develop policies and regulations for non-sanctuary waters as well;

- Additional information is needed on the immediate and long-term impacts of fiber optic systems;

- Fishing conflicts and gear issues must be resolved;

- Reassurance is needed to demonstrate that impacts are indeed low, as industry claims, and that submarine cables are and will remain buried;

- Regular monitoring of installed submarine cables should be mandatory, based on a set of baseline standards;

- A more succinct and clear policy for submarine cables would alleviate the current confusion over the approval of such projects;

- Technologies should be examined to determine methods of burial and retrieval that minimize disturbance to the benthos and associated water quality;

- Mechanisms should be developed to minimize the number of submarine cable corridors permitted, including requirements to utilize existing corridors whenever possible;

- Once a cable is no longer in use, cables should be removed and disposed of rather than abandoned in place;

- All cable proposals should be subject to rigorous environmental

review under NEPA including full discussion of cumulative impacts and serious consideration of alternatives;

- All monitoring of cable surveys, laying, repair, and removal should be subject to independent agency verification.

NOAA used the information obtained from these meetings to form the framework of a "white paper." This document identified the concerns and issues associated with such activities and led to the development of draft guiding principles to be applied as part of the project review. (See Appendix A).

IV. Workshop

On February 28 and 29, 2000, DOC convened a workshop involving representatives from the telecommunications and fishing industries, environmental and conservation organizations, and state agencies. The white paper was distributed at the workshop and was the focus of discussion.

Participants identified many key issues they felt NOAA should further address in the Principles section of the document. NOAA has developed some initial reactions to these issues and has developed some potential approaches or ways to resolve them. The key issues are listed below and are followed in brackets by NOAA's initial reactions.

1. *Be as explicit and comprehensive as possible in terms of criteria, legal standards, and rationale for NMSP decision-making.* [Within NMSs, NOAA could base its review of projects on ensuring resource protection. It is NOAA's view that sanctuary size, unique characteristics, (e.g., fragile habitats, cultural resources, etc.), and/or existing regulations would be important criteria in project review.]

2. *Clarify NOAA's regulatory roles outside NMSs.* [With regard to areas outside of NMSs, NOAA's participation could take the form of project review will be during consultation with other federal and state agencies that have direct permitting authority over activities in the marine and coastal environment, including, for example, U.S. Army Corps of Engineers (ACOE) and other federal agencies addressing such authorities as MMPA and ESA. Other criteria for consultation review could include preferred routes, alternative routes, landside connection, site characterization, cumulative impacts, sensitive habitats, and cable removal. NOAA would follow the established public review and comment process established under existing regulations when evaluating proposed projects.]

3. *Clarify NOAA's position on cable installation in NMSs when habitat outside of a NMS may be more sensitive than the proposed cable installation route inside the NMS.* [NOAA could provide basic information to help industry identify and locate sensitive habitats to be avoided.]

4. *Clarify NOAA's definition of "feasible alternative" to installing a cable in a NMS.* [NOAA could address this through the use of NEPA's definition of feasible alternative.]

5. *Give further attention to and explanation of the development of a Programmatic Environmental Impact Statement (PEIS) for cable installation.* [NOAA will consider whether a PEIS could and should be prepared for the proposed installation of submarine cables in marine sanctuaries and the marine environment as a whole. Such a document would clearly describe the potential impacts of cable projects within various habitat types and sanctuaries and would set forth project limitations. Should a PEIS be developed, environmental review documents for individual projects would be tiered off of the general document.]

6. *Recognize the value of coordination between DOC and other federal agencies when issues such as cable installation in the marine environment are concerned.* [NOAA could work with ACOE to develop a Memorandum of Understanding (MOU) that addresses consultation procedures for cable laying projects. NOAA could also coordinate necessary consultations under the ESA, MSFCMA (primarily Essential Fish Habitat), and NMSA. Consultations should be initiated at the earliest possible dates so potential impacts from each project and cumulative impacts of industry actions can be minimized.]

7. *Incorporate recognition of, and provide flexibility for, possible technological and environmental changes that may occur during the life of the cable.* [Although initially addressed in the Principles section of the White Paper, NOAA is looking for further guidance on this issue.]

8. *Recognize that pre-existing data on submarine cables is available and should be consolidated as much as possible for future reference.* [NOAA will continue to work with industry, environmental organizations, and other agencies (e.g., Navy, United States Geological Survey, ACOE) to collect information about existing submarine cable projects and the known environmental effects of installation and maintenance.]

9. *Recognize the fishing industry's role as a distinct, critical and interested*

party in submarine cable issues. [NOAA could accomplish this by strongly encouraging the cable industry to initiate negotiations and develop agreements with marine and coastal resource user groups before their applications for permits and licenses are deemed complete for public review. The cable industry could then negotiate agreements and/or directly consult with fishing, mining, aquaculture, whale watching, and other marine and coastal resources user groups to minimize disruptions to other marine and coastal activities during cable installation and thereafter.]

10. *Recognize the possibility of "cable corridors" (fixed-location lanes for multiple cables).* [Although initially addressed in the Principles section of the White Paper, NOAA is looking for further guidance on this issue.]

11. *Should elaborate further on NOAA's position on the issue of cable removal.* [NOAA could, in issuing any permits for submarine cable projects, require that permittees collect and analyze data on the environmental effects of cable installation, operation and maintenance. Those conditions would then apply for the life of the project. At the end of the cable's service, the permittee will be required to perform a survey of the cable route and provide a report describing the status of the cable (including burial depth) and benthic communities along the cable route. The permittee would then be required to prepare a thorough evaluation of leaving the cable in place vs. removal of the cable. For any "out of service" cable that is allowed to remain in the marine environment, the permittee would retain full responsibility for such cable in perpetuity. Periodic monitoring by the permittee would also be required.]

V. Action Requested From the Public

As it continues its evaluation, NOAA is seeking public comment on both the guiding principles in the Workshop white paper (attached as Appendix A) and NOAA's reactions to the workshop participants' key issues articulated above in Section IV. Comments received by NOAA will help to determine its next steps, i.e., whether the NMS regulations should be amended to clarify NOAA's decision-making process regarding the installation of commercial

submarine cables or if a DOC policy statement should be issued.

Regulations would be published in the **Federal Register** following appropriate National Environmental Policy Act (NEPA) and Administrative Procedure Act (APA) steps. Any proposed policy statement would be published in the **Federal Register**. It should be noted that while the white paper lists the statutory elements for imposing a fee for the issuance of a special use permit, the purpose of this request for comments does not include setting the amount for any such fee. Rather, as stated above, NOAA is seeking public input on whether it should amend its regulations or issue a policy statement. If 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.

Dated: August 17, 2000.

Ted I. Lillestolen,

Deputy Assistant Administrator for Oceans and Coastal Zone Management.

Appendix A

Principles Section from the Draft White Paper "Proposed Principles for Laying Submarine Cables in the Marine and Coastal Environment"

Proposed Principles

1. For business, environment, and government alike, accurate information about the environmental effects of submarine cables on the marine environment, expectations for completing permit reviews, project routing and implementation, and ongoing maintenance needs are vital. In some cases, such as the environmental effects, this information is lacking. What steps can NOAA take for better information gathering and information flow?

Implementation steps:

a. NOAA will continue to work with industry, environment, and other agencies (e.g., Navy, USGS, ACOE) to collect information about existing submarine cable projects and the known environmental effects of installation and maintenance.

b. NOAA permits for submarine cable projects will require that applicants collect and analyze data on the environmental effects of cable installation, operation and maintenance. Those conditions will apply for the life of the permit. For any "out of service" cable that remains in the marine environment, the project proponent must

retain responsibility for such cable (e.g., if the cable becomes unburied).

c. For those projects where NOAA does not have a permitting role, NOAA will work with other permitting agencies to ensure that its environmental concerns under ESA, MMPA, MSFCMA, NMSA, and other authorities are fully adopted or considered, where required or as appropriate.

d. NOAA will convene interested industry and environmental representatives from time to time to review new data and technologies, evaluate guidelines, and otherwise continue the sharing of information.

2. Industry has described "speed to market" as a driving force in the submarine cable business. As such, it has stated the importance of a timely and predictable review of projects, particularly where NOAA permits are required. In addition, it is in the best interest of effective management of the marine and coastal environment to be able to quickly and effectively determine the proper course of action for submarine cable projects, without compromising NOAA's trustee responsibilities. As the efficient review of proposed projects is in the best interests of all parties, what steps can NOAA take to aid in the timely and predictable review of proposed cable projects?

Implementation steps:

a. NOAA will consider whether it can as a general matter (legally and from a policy standpoint) approve projects when they are in the planning stages. NOAA would base such "planning approvals" on specific routes, technologies, monitoring and maintenance protocols, and other factors.

b. NOAA will coordinate necessary consultations under the ESA, MSFCMA, NMSA.

c. NOAA will consider the impacts and merits of establishing submarine cable "routes" that direct cable installations into and out of landing stations in such a way as to minimize individual and cumulative environmental effects.

d. NOAA will establish points of contact for submarine cable projects. These individuals will be responsible for coordinating reviews and outreach within the Department. In addition, NOAA will maintain records and data on submarine cable projects in order to further improve internal review and external compliance.

3. National marine sanctuaries are special places of the marine environment set aside as protected areas for their national significance. As such, they are afforded a higher level of protection.

Within each sanctuary certain types of activities, including activities inherent to laying, operating, repairing, and removing submarine cables, have been determined to be generally incompatible with the statutory objective of resource

protection and are therefore prohibited by regulation.

Under certain limited circumstances some prohibited activities may be allowed, but as a matter of policy laying of submarine cables within sanctuaries is discouraged. What steps can NOAA take when reviewing projects proposed within marine sanctuaries to ensure resource protection (particularly where uncertainty exists as to the extent of impact of a proposed project to the sanctuary environment)?

Implementation steps:

a. It is NOAA's review that sanctuary size, unique characteristics (e.g., fragile habitats, cultural resources, etc.) and existing regulations preclude the installation of submarine cables in the following marine sanctuaries:

- (1) Cordell Bank
 - (2) Channel Islands (within 2 nautical miles of the islands, as prohibited)
 - (3) Gulf of Farallones
 - (4) Fagatele Bay, American Samoa
 - (5) Gray's Reef
 - (6) MONITOR
 - (7) Flower Garden Banks
- b. Projects in those sites where cable laying activities are not prohibited (i.e., Channel Islands NMS outside of 2 nautical miles from the islands, Hawaiian Island Humpback Whale NMS, when conducted under valid State or Federal permit) are subject to the consultation provisions (sec. 304(d)) of the NMSA and will be evaluated by NOAA similarly to those projects requiring sanctuary approval.

c. NOAA will consider whether a programmatic environmental impact statement could be prepared for the proposed installation of submarine cables in marine sanctuaries. Such a document would clearly describe the permit limitations for projects in specific sanctuaries or habitat types.

d. Those sites where proposals for installation and operation of submarine cables would be considered are Monterey Bay, Olympic Coast, Florida Keys, and Stellwagen Bank sanctuaries. NOAA will identify fragile habitats and known archaeological sites wherein installation of submarine cables will be prohibited under any circumstances near the immediately surrounding area. These are expected to include the following:

- (1) Rocky, hard bottom areas (habitat where cable cannot be buried or covered) hard bottom limestone reef areas in particular;
- (2) Coral reef and associated hard bottom areas;
- (3) Sea grass areas;
- (4) Mangrove islands;
- (5) Areas likely to have cultural resources, such as historic shipwrecks;
- (6) Kelp forests;
- (7) Habitat for endangered or threatened species;
- (8) Areas set aside as "no take" zones or "marine or ecological reserves."

e. The following minimum criteria must be met for any submarine cable to be considered in a sanctuary:

- (1) There is no feasible alternative to transiting the Sanctuary;
- (2) Impacts to sanctuary resources, including impacts to cultural resources and cumulative impacts, from installation, maintenance, long-term operation, and removal, are determined to be negligible and short-term. This is determined within the context of the overall environmental analysis;
- (3) Appropriate mitigation, including monitoring of impacts of the activity, is included and paid for by the project proponent; and
- (4) The applicant agrees to remove all or part of the cable at the end of its life, if determined appropriate by NOAA.

f. A specific proposal will be considered following the applicable review and criteria unique to the specific sanctuary in which the application is submitted. Installation of a previous cable within any given sanctuary does not ensure installation of additional cables in that sanctuary or others in the system. Exact routes and alternatives, and cumulative impacts will be evaluated in the environmental analysis.

g. For every project considered, analysis must include, but is not limited to, the following topics:

- (1) Cumulative impacts;
- (2) Feasible alternatives to transiting the Sanctuary, including alternative routes over land;
- (3) Impacts to habitat from laying the cable (e.g., trenching) and long term placement of the cable in its location;
- (4) Potential for impacts on sensitive, threatened and endangered species and their habitats;
- (5) Potential impact to cultural resources, using remote-sensing survey, sonar and magnetometer;
- (6) Impacts of removing the cable at the end of its useful life; and
- (7) Impacts on other interests (e.g., fishing interests).

h. Pursuant to sanctuary regulations, a fee will be assessed for any approved project. This fee includes:

- (1) Costs incurred, or expected to be incurred, of issuing the permit;
- (2) Costs incurred, or expected to be incurred, as a direct results of the activities (including monitoring); and
- (3) The fair market value of the use of the sanctuary and a reasonable return to the U.S. Government.

4. The Department believes that just as the submarine cable industry is growing, the principles guiding its review of submarine cable proposals must also continue to evolve. What steps can NOAA take to aid in this evolution and craft the principles into a living document?

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NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

36 CFR Parts 1250 and 1254

RIN 3095-AA72

NARA Freedom of Information Act Regulations

AGENCY: National Archives and Records Administration.

ACTION: Proposed rule.

SUMMARY: NARA proposes to revise and reorganize its regulations that govern access to NARA's archival holdings and NARA's own operational records through the Freedom of Information Act (FOIA). This proposed rule combines FOIA procedures for NARA archival records currently in 36 CFR part 1254, with those for NARA operational records currently in 36 CFR part 1250.

This proposed rule also incorporates the changes resulting from the Electronic Freedom of Information Act Amendments of 1996 (EFOIA). The proposed rule will affect individuals and organizations that file FOIA requests for NARA operational records and archival holdings.

DATES: Comments must be received on or before October 23, 2000.

ADDRESSES: Send comments to Regulation Comment Desk, NPLN, Room 4100, National Archives and Records Administration, 8601 Adelphi Road, College Park, Maryland 20740-6001. You may also fax comments to 301-713-7270.

FOR FURTHER INFORMATION CONTACT: Nancy Allard or Shawn Morton at 301-713-7360.

SUPPLEMENTARY INFORMATION: As noted in the **SUMMARY**, our current FOIA regulations are contained in two separate CFR parts that address the requirements for submitting and NARA handling of requests for NARA's own operational records and records accessioned into the National Archives of the United States. Because the definitions and most of the procedures to be followed are the same for both types of requests, we are moving the current sections that contain the rules for FOIA requests for archival records,