

NOAA's Proposed Chumash Heritage National Marine Sanctuary Rulemaking is a Significant Regulatory Action under Executive Order 12866

Background

The International Connectivity Coalition (“ICC”), on behalf of its members,¹ requests that the Office of Information and Regulatory Affairs (“OIRA”): (i) deem the National Oceanic and Atmospheric Administration’s (“NOAA”) proposed regulations related to the Chumash National Marine Sanctuary (“NMS”) to be a “significant regulatory action” as defined by Executive Order (“EO”) 12866; (ii) find NOAA’s cost-benefit analysis with respect to the proposal’s impacts on the subsea cable industry specifically insufficient for purposes of satisfying EO 12866’s requirements with respect to significant regulatory actions; and (iii) return NOAA’s proposal to the agency for further consideration and a sufficient cost-benefit analysis that meets EO 12866’s requirements and addresses the issues/concerns raised here and in ICC members’ comments with respect to the proposal’s impact on the subsea cable industry.

Pursuant to EO 12866, OIRA is required to review NOAA’s proposal before it takes effect to determine if the regulations therein are deemed a “significant regulatory action” under the EO. If OIRA determines the proposed rules are significant, OIRA thereafter must determine whether NOAA’s proposal meets the EO’s requirements with respect to significant regulatory actions (*i.e.*, by including with its proposal a sufficient cost-benefit analysis that meets the EO’s requirements). If OIRA determines the proposal does not meet the EO’s requirements, EO 12866 instructs OIRA to return the proposal to NOAA for further consideration with a written explanation for such return, setting forth the pertinent provisions of the EO upon which it is relying.

A “significant regulatory action” is defined as any regulatory action that is likely to result in a rule that may:

- (i) have an annual effect on the economy of \$200 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (ii) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (iii) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; *or*

¹ ICC is comprised of a group of companies with substantial investments in subsea cable networks that enable people, companies, governments, and institutions to communicate and transact business oceans and between continents in near real time. Its members include Astound, Ciena, HMB Solutions, Meta, PC Landing Corp., and Verizon.

- (iv) raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the EO.

NOAA’s Proposed Chumash NMS Regulations Constitute a Significant Regulatory Action

While NOAA believes its proposal does not constitute a significant regulatory action, extensive evidence in the administrative record shows that NOAA’s proposed Chumash NMS clearly constitutes a significant regulatory action under *all four* of the factors identified in EO 12866.

Annual Effect of \$200M-Plus/Material Effect on Subsea Cable Industry. In finding that its proposed regulations do not constitute a significant regulatory action, NOAA states that “the estimated annual effect is less than \$200 million, and the action would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.”² NOAA’s proposal, however, will have a significant effect on the economy generally – and the subsea cable industry and ancillary sectors, specifically – and, at a minimum, NOAA has not performed the analysis necessary to conclude that the proposal’s impact on the economy will be less than \$200 million annually or not have a material adverse effect on any economic sectors.

In particular, NOAA’s cost-benefit analysis is based solely on the “government cost,” and completely ignores the costs of its proposed regulations on the subsea cable industry and related sectors.³ In addition, NOAA limited its adverse material effects analysis to “the effects of the proposed sanctuary on offshore oil and gas, commercial fishing, recreational fishing, and non-consumptive recreation (*e.g.*, snorkeling and scuba diving) sectors.”⁴ This completely ignores material adverse effects on the subsea cable industry, whose cables landing in the footprint of the proposed Chumash NMS represent a capital investment of approximately \$3.5 billion and approximately 71 percent of the transpacific subsea cable communications capacity between the U.S. and California (and 40 percent of said capacity from the entire U.S. West Coast).⁵ Similarly, NOAA’s cost-benefit analysis does not account for the proposal’s impact on ancillary subsea cable-related sectors, including the maintenance, repair, construction, and operations sectors – all of which directly support the subsea cable industry and would be adversely affected by the proposed regulations.

Additional facts that NOAA’s cost-benefit analysis fails to account for are as follows:

² 88 Fed. Reg. 58123, 58138 (Aug. 25, 2023).

³ See NOAA, *Proposed Chumash Heritage National Marine Sanctuary – Draft Environmental Impact Statement*, App. D at 319 (Cost-Benefit Analysis Prepared to Support Proposed Regulations) (Aug. 2023) (“DEIS”), <https://sanctuaries.noaa.gov/media/chumash/2023-proposed-chumash-heritage-nms-deis.pdf>.

⁴ See *id.* at 314. See also generally *id.* at 310-25.

⁵ It is well documented that international submarine cables carry approximately 99 percent of all international communications traffic. See Congressional Research Service, *Protection of Undersea Telecommunication Cables: Issues for Congress*, at 1 (Aug. 27, 2023), <https://sgp.fas.org/crs/misc/R47648.pdf>.

- Using prior NMS designations and corresponding regulations as a reference point, it is clear that NOAA’s proposal will create a *de facto* exclusion zone for new subsea cables landing at Grover Beach and Moro Bay because ***not a single commercial cable has been installed in an existing NMS since 2000*** – thereby showing that aggressive NMS regulations with respect to cable permitting here would be an impediment to future cables that would otherwise land in this area.
- To date, ICC members have invested approximately ***\$2.5 billion*** dollars in the subsea cable infrastructure existing in the proposed Chumash NMS, and have an additional ***\$1 billion*** earmarked for new subsea cable capital projects with Chumash NMS boundaries that are currently in the permitting and construction phase. In addition, there is and will be significant investments in landing infrastructure such as conduit systems to cable landing stations, cable landing stations themselves (including expansions of existing cable landing stations and construction of new stations), and associated equipment and facilities, as well as in backhaul infrastructure connecting cable landing stations to inland telecommunications hubs in San Francisco, Silicon Valley, and Los Angeles.
- Regulations requiring Special Use Permits (“SUPs”) for new cable installations would be prohibitively costly, requiring applicants to pay a fair market value (“FMV”) estimated to be between \$68,000 to \$170,000 ***per mile, per year*** based on NOAA’s FMV methodology for a 5-year Special Use Permit with only discretionary renewals. So, for example, a single cable system with two segments landing in Grover Beach, each traversing 20 miles in the NMS, ***would have an annual FMV fee of approximately \$2.8 million to \$7 million.*** When these FMV fees are considered alongside the significant time and resources needed to apply for an SUP and other pre- and post- permit authorization obligations (such as additional cable burial verification surveys), an overall annual effect of \$200 million-plus across the various entities who route cable systems through the proposed Chumash NMS becomes a very easy-to-reach figure.
- NOAA’s proposed authorization and SUP processes for subsea cables traversing any part of the proposed Chumash NMS will create a “no-go zone” for future subsea cables. As noted, this has been the case since 2000, where of the 50-plus new commercial subsea cables landing in the United States, not a single new cable has routed through an NMS. NOAA has failed to consider the environmental costs and impacts of subsea cable operators avoiding landing stations within the proposed sanctuary in favor of new landing areas outside the sanctuary, which will necessitate extensive construction of new landing infrastructure, and result in efficiency losses associated with the inability to use the robust infrastructure already present in the Central Coast California landing areas.
- Given that each SUP is only for a 5-year term and renewed on a discretionary basis, for projects that have a minimum life and investment horizon of a minimum of 25 years, there is significant risk of sunk costs through SUPs that are initially approved but then not renewed.

Inconsistency & Interference with Other Agency Rules. By requiring SUPs for new cable installations and a yet-to-be-specified form of authorization for cable maintenance/repair, NOAA's proposal will undermine and interfere with other state/federal agencies' oversight of subsea cables and add a further and unnecessary environmental review to an already complex and comprehensive state/federal permitting process:

- Use of a SUP would add a further and unnecessary federal environmental review to an existing comprehensive state and federal permitting process that has developed and been refined over a 25-plus-year period by agencies that have extensive experience with subsea cable permitting, including the California Coastal Commission and California State Lands Commission (at the state level) and the FCC, NTIA, DHS, and DOJ (at the federal level).
- SUPs have a five-year term, while other types of project permits generally extend for the life of the project (which is at least 25 years). NOAA exercises its discretion when issuing renewals, which is unsuitable for an infrastructure investment that has a minimum 25-year useful life and significant upfront capital investment (as detailed above).
- The use of SUPs for maintenance activities would create significant and untenable delays for critical subsea cable repairs, when, for example, under FCC rules, cable operators are now required to provide expedited online notification of cable outages within **4 hours** of learning of an outage event.
- As a condition of receiving a SUP, NOAA could potentially require additional cable burial verification surveys beyond those already required by California permits, at an approximate current cost of \$1 million to \$2 million each, as well as seabed and marine community recovery surveys over the life of the project, which are not currently required by state permits and unnecessary given the extensive evidence in the record on seabed and marine community recovery following installation, which involved studies of cables installed in existing marine sanctuaries.

Material Impact on Subsea Cable Operating Costs & NOAA Resources. If adopted as proposed, the NMS designation and corresponding regulations will have a materially adverse impact on the subsea cable industry and ancillary sectors, impose undue and unnecessary burdens on an already overworked NOAA Sanctuary Office, and create significant cost and resource constraints on all parties involved:

- As noted above, NOAA's proposal will create a *de facto* exclusion zone for new subsea cables landing at Grover Beach and Moro Bay, meaning cable operators will either have to take a risk in being the first cable operator to obtain SUP approval for routing through an NMS since 2000 or else look elsewhere (and, very likely, outside of the United States) for routing and landing of their cable networks.
- As also noted above, use of a SUP would provide NOAA with the discretion to impose a significant annual FMV for a SUP, currently estimated, based on NOAA prior releases and

guidance, to be in the range of \$68,000 to \$170,000 *per mile, per year*, or for example, ***\$2.8 million to \$7 million annually*** for a single cable system with two cable segments each traversing 20 mile routes through the sanctuary.

- As a condition of approving a SUP, NOAA could potentially require additional cable burial verification surveys beyond those already required by California permits, at an approximate current cost of \$1 million to \$2 million each, as well as seabed and marine community recovery surveys over the life of the project, which are not currently required by state permits, and unnecessary given the extensive evidence in the record on seabed and community recovery following installation.
- The use of SUPs would create an unnecessary burden on already constrained NOAA Sanctuary Office resources necessary to manage and implement a separate SUP application, review, and certification process, for numerous existing and potential new subsea cables landing in the sanctuary footprint – which is in contrast to the efficiency of relying on the existing comprehensive work of other agencies, including the California Coastal Commission and California State Lands Commission (at the state level) and the FCC, NTIA, DHS, and DOJ (at the federal level).

Inconsistency with President’s Priorities. In addition to being in conflict with other federal agency priorities and policies with respect to subsea cables, NOAA’s proposal also implicates and would negatively impact policy decisions and guidance laid out in recent Presidential directives:

- In February 2024, President Biden issued an [Executive Order](#) expanding the scope of EO 13873 (Securing the Information and Communications Technology and Services Supply Chain) and EO 14034 (Protecting Americans’ Sensitive Data from Foreign Adversaries). Aimed at ensuring the protection of Americans’ data security and safeguarding against the large-scale transfer of or improper access to Americans’ personal and commercial data to countries of concern, the EO, *inter alia*, directs the “Team Telecom” agencies (DOJ, DHS, DOD, NTIA) to consider the threats to Americans’ sensitive data as it relates to the transmission of said data over subsea cables and other communications facilities and to ensure such data is protected through its review of subsea cable and domestic/international Section 214 licenses. If cable operators are forced to look elsewhere (and, very likely, outside of the United States) for routing and landing their cable networks because of NOAA’s harsh permitting processes, such a move would impact existing subsea cable and related Section 214 licenses and lead to new considerations regarding the security of Americans’ data that travels through these cables and other communications facilities.
- In June 2022, President Biden [announced](#) a new initiative formed at the 2021 G7 Summit to launch the Partnership for Global Infrastructure and Investment (“PGII”), an infrastructure investment program intended to mobilize hundreds of billions of dollars for “infrastructure that makes a difference in people’s lives around the world, strengthens and diversifies our supply chains, creates new opportunities for American workers and businesses, and advances our national security.” Significant PGII resources are dedicated to subsea cable initiatives. Again, if the routing of current or new subsea cables had to be

altered/redirected to avoid the Chumash NMS and instead land in other foreign countries, such a scenario – and its downstream effects – would be contradictory to President Biden’s priorities set through the PGII initiative – *i.e.*, to “create new opportunities for American workers and businesses, and advances our national security.”

Issues/Concerns with NOAA’s Draft Environmental Impact Statement

As noted above, NOAA’s draft cost-benefit analysis does not address ICC’s concerns with respect to the proposal’s impact on subsea cables, and its draft Environmental Impact Statement (the “Draft EIS” or “DEIS”) similarly fails to evaluate the extensive use of subsea cables within the proposed Chumash NMS boundaries and the role these cables serve for the world’s information exchange, particularly for this location along the California central coast, which serves as a hub for several major transpacific cable systems. The Draft EIS is conclusory in its treatment of existing and planned subsea cables, dismissing the significant impacts the proposed Chumash NMS regulations would have on such existing and future critical telecommunications infrastructure.

The Draft EIS also fails to address and consider the vast extent of existing federal and state regulations governing the siting, installation, and ongoing operation of subsea cables, including the maintenance and repair of said cables. Furthermore, the Draft EIS’s justification for an overly complex and strict regulatory scheme with respect to subsea cables routed through the NMS is premised on wholly unsupported statements that contradict the underlying record. For example, while NOAA concludes in the Draft EIS that “there can be considerable seafloor disturbance, impacts on fishing, and other threats from repair and replacement of seafloor fiber-optic cables,”⁶ evidence submitted by ICC’s members – as well as studies previously conducted by NOAA⁷ and third parties⁸ – document the lack of impacts from subsea cables and associated repair/maintenance on the seabed and benthic environment.

⁶ Draft EIS at 50.

⁷ For example, in terms of impacts of PC-1’s installation on the seabed of the Olympic Coast National Marine Sanctuary (“OCNMS”), a 2018 Office of National Marine Sanctuaries Conservation Series report concluded based on the report’s review of PC-1 survey data from 2000 to 2004 that, “[i]n general terms, the physical habitat within OCNMS had returned to pre-installation conditions within five years of cable installation.” Antrim, L., Balthis, L., & Cooksey, C., Marine Sanctuaries Conservation Series ONMS-18-01, *Submarine Cables in Olympic Coast National Marine Sanctuary: History, Impact, and Management Lesson* at 42 (2018). In addition, the report concluded that in terms of “impacts from undersea cables, benthic communities along the cable route in [OCNMS] were indistinguishable from those in control areas during the post-installation surveys.” *Id.* at 43. In addition, a January 2023 Condition Report on the OCNMS concluded, in terms of human activities and stressors, that submarine cables are categorized on a scale together with increased visitation and research activities. *See* Condition Report at 3.

⁸ A 2020 report prepared by the Monterey Bay Aquarium Research Institute (“MBARI”) on the potential seabed and benthic environmental impacts of the Monterey Accelerated Research System (“MARS”) – a 32-mile undersea fiber optic cable traversing the seabed in Monterey Bay – concluded that “the MARS cable has had little detectable impact on seabed geomorphology, sediment qualities, or biological assemblages.” MBARI, *Potential Impacts of the Monterey Accelerated Research System (MARS) Cable on the Seabed and Benthic Faunal Assemblages* at i (2020), available at https://sanctuariesimon.org/regional_docs/monitoring_projects/100391_MBARI_MARS_2020_report.pdf.

And while NOAA proclaims that obtaining “a sanctuary general permit, ONMS authorization, or certification ... [would] ensure the sanctuary superintendent can review and take action to adopt mitigations for any repair and replacement activity to be approved,”⁹ NOAA fails to recognize the preexisting state and federal agencies that are already performing these same mitigation functions prior to cable repairs. NOAA also acknowledges in the Draft EIS that it *could* authorize subsea cable repairs/maintenance via its more streamlined “general permit, ONMS authorization, or certification” processes;¹⁰ however, it outright rejects its own acknowledgement in its proposed rules, instead permitting repairs and maintenance only upon the much more rigorous (and far less certain) SUP process. Finally, NOAA asserts that its “experience successfully permitting fiber-optic cables via these same permit mechanisms through several national marine sanctuaries”¹¹ justified its proposed approach requiring subsea cable operators to obtain special use permits for the continued presence of existing subsea cables and any new subsea cables to be installed post-designation; however, as noted above, this approach has been entirely *unsuccessful*, with *zero* commercial cables being installed in existing sanctuaries since 2000.

These are only a handful and sampling of ICC’s issues and concerns with the Draft EIS. A more fulsome summary of ICC’s members’ concerns can be found in the comments and evidence they filed in response to NOAA’s NPRM.

Conclusion

Given the above, and the additional record evidence submitted to NOAA by ICC members and other parties, it is clear that NOAA erred in failing to classify its proposed rules as a “significant regulatory action” subject to EO 12866’s requirements, and, regardless, has done no analysis supporting that conclusion. Accordingly, ICC requests that OIRA: (i) deem NOAA’s proposed Chumash NMS designation and regulations to be a “significant regulatory action” as defined by EO 12866; (ii) find NOAA’s cost-benefit analysis with respect to the proposal’s impacts on the subsea cable industry specifically insufficient for purposes of satisfying EO 12866’s requirements with respect to significant regulatory actions; and (iii) return NOAA’s proposal to the agency for further consideration and a sufficient cost-benefit analysis that meets EO 12866’s requirements and addresses the issues/concerns raised here and in ICC members’ comments with respect to the proposal’s impact on the subsea cable industry.

⁹ Draft EIS at 50.

¹⁰ *Id.*

¹¹ *Id.* at 182.