Before the U.S. Department of Commerce

National Oceanic and Atmospheric Administration
("NOAA")

WASHINGTON, D.C.

Fair Market Value for a Submarine Cable Permit in National Marine Sanctuaries	))))	**NOAA Dkt No. 010712175-1175-01**

To the Director, Office of National Marine Sanctuaries of the National Ocean Service: submarine.cables@noaa.gov

Comments of Public Employees for Environmental Responsibility ("PEER") and its Amicus Vert ("Green Friends")

Daniel P. Meyer
Public Employees for Environmental Responsibility (PEER)
2001 S Street, N.W. — Suite 570
Washington, D.C. 20009

Tele: (202) 265.7337
E/ml: dmeyer@peer.org

Its General Counsel and Attorney
District of Columbia Bar No. 455369

October 16, 2001

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Pursuant to Title 15, Section 922.2(e) of the Code of Federal Regulations, Public Employees for Environmental Responsibility ("PEER") and its Green Friends, by and through counsel, respectfully comment on the need to collect fair compensation for, and to protect the environment from, private fiber optic cable laying through or near the National Marine Sanctuaries of the United States and their Territories. PEER and Professor Robin K. Craig of the Western New England College School of Law[1] join the California Coastal Commission, the Sanctuary Advisory Council for the Monterey Bay National Marine Sanctuary, and the coalition of the Center for Marine Conservation, Save Our Shores, and the Environmental Defense Center in criticizing the draft, "Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries" (hereinafter "Analysis").

[1] Professor Craig files these comments in her individual capacity; use of the College's name is for identification purposes, alone.

PEER and its Green Friends concur with the Center for Marine Conservation, Save Our Shores, and the Environmental Defense Center. "Many of the activities inherent to submarine cable installation, operation, repair, and removal are generally incompatible with the National Marine Sanctuary Program's statutory objective of resource protection." Letter, Kaitilin Gaffney, Ecosystem Program, Center for Marine Conservation to Matt Brookhart, National Marine Sanctuary Program, NOAA (March 21, 2001) at 7; see also 16 U.S.C. § 1441 et. seq. Therefore, we join those organizations' basic opposition to the laying of fiber optic cables in National Marine Sanctuaries. The proposed Analysis ignores the intrinsic value of National Marine Sanctuaries as pristine habitats and provides a windfall to businesses seeking to use National Marine Sanctuaries for their private gain. In short, the Analysis fails to establish sanctuary policy based on the statutory mandate creating the National Marine Sanctuaries and, instead, substitutes for that mandate a liberal application of the Telecommunications Act of 1996. Compare 15 C.F.R. § 922.2(3) with 47 C.F.R. § 1.1300 et. seq., and associated FCC practice.

For the past three decades, the Federal Communications Commission has conducted its environmental regulation under a premise that assumes there is nothing but mud "under the sea" and therefore the FCC's actions affecting marine ecosystems require no review and protection under the National Environmental Policy Act of 1969 ("NEPA"). Failing to conduct the required review, the FCC simply inserts the following boilerplate:

> **C. Environmental Impact**
>
> 13. The Commission has found that the construction of new **submarine cable** systems, individually and cumulatively, will not have a significant effect on the **environment** and therefore should be expressly excluded from our procedures implementing the National **Environmental** Policy Act of 1969. n47 Therefore, C&W USA is not required to submit an **environmental** assessment, and this application is categorically excluded from **environmental** processing.
>
> n47 *See* 47 C.F.R. § 1.1306 Note 1 (as amended 1999); *1998 Biennial Regulatory Review--Review of International Common Carrier Regulations*, IB Docket No. 98-118, Report and Order, 14 FCC Rcd 4909 at paras. 67-69 (1999).

In the Matter of CABLE & WIRELESS USA, INC.; Application for a License to Land and Operate a Private Fiber-Optic Cable System Between the United States, the United Kingdom, and France, *Cable Landing License* (June 8, 2001) at ¶ 13.

So while one hand of Federal authority (FCC) deems marine environmental resources to be only so much trash, another hand of Federal authority (NOAA) is properly reviewing its own actions to ensure sensitive environmental resources are not being damaged by its actions. NOAA must protect the resources under its own jurisdiction; its peer agencies — including the U.S. Army Corps of Engineers ("USACE") — have excepted resources such as coral reefs, giant kelp forests, abysmal banks, nearshore sandstone reefs, tidal flats and subtidal reefs, and marine species breeding shallows as categorically exempt from the rule of law passed as NEPA. The FCC embarked upon this strategy in the mid-1970s, and has held true to its initial precepts decided in an era it thinks accurately assessed the sea as a place without 'environmental resources'. Faulted as its policy is today, it was even faulted then:

> . . . if you had the opportunity to tow a fine-meshed net through the seemingly lifeless water and then to examine the washings of the net, you would find that life is scattered almost everywhere through the surface waters like a fine dust.
>
> RACHEL L. CARSON, THE SEA AROUND US 17 (Oxford, 1951).

Carson noted the existence of the sea's richness a quarter century before the FCC's policy was established, and yet that Commission still persisted in a environmentally-damaging course of rule-making. It is precisely because Agencies such as the FCC and the USACE have abandoned their responsibilities under NEPA that NOAA must draw a line in the sand around its National Marine Sanctuaries.[2] Indeed, through rulemaking subsequent to this public notice and hearing period, the National Ocean Service ought to solicit comments on the ability of NOAA to extend

[2] That NOAA finds itself in this position is interesting, especially given some of the more probative criticism the Administration has drawn from the ranks of the environmental movement. See OSHA GRAY DAVIDSON, FIRE IN THE TURTLE HOUSE: THE GREEN SEA TURTLE AND THE FATE OF THE OCEAN 162 (Public Affairs, 2001) ("There are precious few wildlife epidemiologists, and most of them have cobbled their training together with great difficulty, perseverance, and a healthy dollop of luck, since there are no formal programs in wildlife epidemiology . . . . we terrestrials know next to nothing about the mass mortalities that occur in the ocean . . . . It's no accident, after all, that NOAA, the U.S. government agency responsible for our oceans, is housed in the Department of Commerce.") See also, DAVID HELVARG, BLUE FRONTIER: SAVING AMERICA'S LIVING SEAS (Freeman, 2001) at 194-195.

its rules regarding the environmental review of cable laying activity beyond the bounds of National Marine Sanctuaries. If the FCC only has jurisdiction over the landing of cables, there may be room for NOAA to develop rules for cable laying outside the Sanctuaries but inside the territorial waters of the United States.

Should the Office of National Marine Sanctuaries choose to proceed with some fiber optic cable projects, it needs to tailor its rules in a manner consistent with its legislative mandate. 16 U.S.C. § 1441 et. seq. The comments cited supra make clear that the laying and maintenance of fiber optic cables will entail environmental disturbance and destruction, a fact that the Office of National Marine Sanctuaries has refused to factor into its cost calculations. Such habitat destruction undermines the very purposes of National Marine Sanctuaries and decreases the existence value of those sanctuaries. By following the lead of industry, the Office of National Marine Sanctuaries will sacrifice public resources for private gain. See Allen, Williford & Seale, Review and Comments: "Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries" (undated, unpaginated and no author denoted) ("The value described in the report is very similar to public interest value. Public interest value has been discussed extensively in appraisal literature and determined not to be market value by the Appraisal Institute.") To adopt these views is to allow the moneychangers back into the temple, or rather, Sanctuary.

Moreover, the history of public lands management has made clear that when the government makes public resources available to private interests at marked-down prices not reflective of their intrinsic environmental value, degradation and destruction of the public resource is the predictable result. Therefore, the price charged to companies laying such cables should fully reflect the fact that they are damaging public resources. In addition, the Office of National Marine Sanctuaries has a duty to protect the unique resources that National Marine Sanctuaries represent. Therefore, as the Center for Marine Conservation, Save Our Shores, and the Environmental Defense Center have persuasively argued, the price set for fiber optic cable easements should be deliberately high to discourage companies from rent-seeking over such routes through the Sanctuaries.

In addition, the Analysis fails to consider that the proposed rules for laying fiber optic cables in National Marine Sanctuaries require that there be ***no other route*** besides one through the sanctuary.[3] In other words, companies seeking to lay cables through a National Marine Sanctuary must have no other choice. In real-life bargaining situations, this fact would drive the price of the easement far above those of standard comparisons. This is a fact that the Office of National Marine Sanctuaries has refused to figure into its price calculation. Again, therefore, the Office of National Marine Sanctuaries should set the price of fiber optic cable easements high to reflect the true realities of the parties' respective bargaining positions.

Finally, PEER and its Green Friends question the Analysis's choice of comparisons. By relying on "comparable historical transactions" as the basis for determining "fair market value," the Analysis ignores three key points. First, to the extent that prior transactions on public lands are deemed relevant, the Analysis ignores a long history of the federal government selling rights to public lands at prices far below market value. Second, to the extent that the Analysis relies on transactions occurring more than five years ago, it ignores the facts that prices for fiber optic cable easements have been increasing markedly and that the bargainers have increasingly been using income-based approaches to evaluating price.

Third, and most broadly, to the extent that the Analysis posits that ***any*** relevant comparison exists for National Marine Sanctuaries, which exist to preserve and protect marine ecosystems specifically chosen because of their intrinsic value *as* ecosystems, and through which fiber optic cables may pass only as a last resort, it has undermined the unique status of these sanctuaries. Therefore, PEER and its Green Friends join the Center for Marine Conservation, Save Our Shores, and the Environmental Defense Center in recommending "that the recent California State Lands Commission transactions regarding cable easements for submerged lands (approximately $280,000 per mile) should be the starting point for assessing appropriate fee structures for undersea cables." Letter, Kaitilin Gaffney, Ecosystem Program, Center for Marine Conservation to Matt Brookhart, National Marine Sanctuary Program, NOAA (March 21, 2001) at 5.

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[3] 65 Fed. Reg. 51270 (Aug. 23, 2000).

NOAA's next step should be to convene a rule-making designed to produce a rule reflective of the intrinsic environmental value of the resources it has been entrusted to protect. PEER has categorized the thirteen (13) existing National Marine Sanctuaries (NMS) into three (3) categories. Using this categorization, the standards for permitting the presence of fiber optic cable can be mapped in an environmentally-friendly manner. See "PEER categorization of National Marine Sanctuary ("NMS") attributes", attached as Exhibit A.

The following criteria should be used to place each sanctuary into a rule-making category:

- wildlife/fisheries: some species (such as bottom-dwelling species) will be directly impacted by the installation/maintenance/presence of fiber optic cables. However, it is also important to consider species that will be indirectly affected, such as those that are dependent on the directly-affected species.

- geological significance: these concerns will include the fragility of the ocean floor and the presence of unique structures (such as corals).

Based on an analysis of each Sanctuary route reviewed under the criteria, supra, the potential cable routes through National Marine Sanctuaries themselves can be accordingly categorized:

- "No cables': this category is the most restrictive category. Routes through Sanctuaries placed in this category should not be permitted for the installation/presence of fiber optic cable, regardless of price. A sanctuary need not be high risk in both wildlife and geologic concerns in order to be placed in the most restrictive category ("No Cable")—some sort of sliding scale may be employed to balance the factors (strong concern for fisheries coupled with moderate geological concerns could be enough, and vice versa). An even more restrictive subcategory may exist that would prohibit fiber optic cables for a certain area surrounding the sanctuary; this subcategory would consist of sanctuaries that require such a buffer in order for the wildlife/geologic concerns to be properly protected.

- "Some Cable at a Public Interest Rate": This category differs from the least restrictive category in that it includes within the valuation of right-of-way rights the high cost of restoration value.

- "Cable at Market Rate": But even this category should include the costs of environmental mitigation in the assessment of the market rates.

Accordingly, NOAA should rule make to amend Title 15, Chapter IX, Part 922, Subpart E, Section 922.48 and thereby add a Section 922.48(g):

"(g) Permitting of submarine cable laying.

(1) The purpose of National Marine Sanctuaries is fundamentally at odds with uses such as submarine cable laying. As such, a presumption lies against permitting of submarine cable laying. The Applicant must show by a clear and convincing standard that the proposed route of, and operations laying out, submarine cables will not adversely impact identified environmental resources within the Sanctuary, or within areas utilized by marine species using the National Marine Sanctuary. This shall be conducted through an Environmental Impact Statement ("EIS") that incorporates an analysis of the cumulative impacts of cable laying on the identified resource or species.

(2) Permits for cable laying shall be reviewed, after public notice and hearing, and shall be analyzed to decide whether the proposed route and cable laying operation places the application in one (1) of three (3) categories:

a) Sanctuary Resources Present, which require No Cable Activity;
b) Sanctuary Resources Present, which allow some cable laying at Public Interest Rates;
c) Sanctuary Resources Not Present, and therefore permitting Cable Activity at Market Rates.

(3) The classification of cable activity shall proceed on a case-by-case basis, the category being determined after public notice and hearing on the issues determinative of those criteria which classify a proposed route under categories a), b), or c), in (g)(2).

The presence of fiber optic cables in National Marine Sanctuaries constitutes a continuing physical, ecological, and psychological violation of these nationally-protected marine habitats. Nevertheless, rather than make the private companies who will profit — enormously, if current trends continue — pay for the full costs of these invasions, the Office of National Marine Sanctuaries instead proposes to sell these highly valuable cable routes to companies at rates ***below*** fair market value. Even when measured by the only transactions involving similar values, or by what the companies ought to be willing to pay given the profits they stand to make, or by the limited availability of these routes, the resulting price is below the intrinsic value of the resource.

Valuing the Sanctuaries in the manner proposed thus far is to concur with the FCC that the sea floor is "mud" with salty water over it, a vast and barren desert not anticipated as an environmental resource to be protected by the NEPA. It is time to bring federal marine regulations to the state of terrestrial compliance achieved in the late 1970s. Unique public resources such as National Marine Sanctuaries should not be exposed to degradation, and destruction for anything less than a true calculation of fair market value that reflects both the damage to these public resources and a policy of discouraging cables within the sanctuaries. For the above reasons, we urge the Office of National Marine Sanctuaries to reconsider its Draft Analysis and to increase significantly the price charged to companies who propose to lay fiber optic cables through national marine sanctuaries. A Notice of Proposed Rulemaking should be issued to conduct public hearings on the proposals presented, supra.

Very respectfully,

Daniel P. Meyer
Public Employees for Environmental Responsibility (PEER)
2001 S Street, N.W. — Suite 570
Washington, D.C. 20009

Tele: (202) 265.7337
E/ml: dmeyer@peer.org

And as an Amicus Vert:

Robin Kundis Craig
Associate Professor of Law
Western New England College School of Law
1215 Wilbraham Road
Springfield, MA 01119
Acting in a Private Capacity

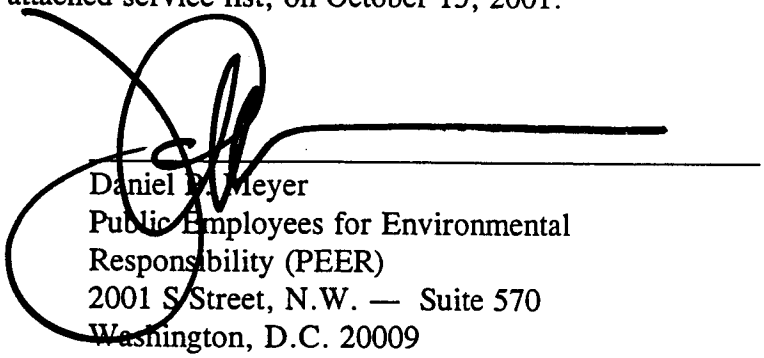
PEER Environmental Law Clerks, 2001-2002

Jennifer A. Bradley, Georgetown Law School (1L)
Phillip R. Bower, Georgetown Law School (1L)
Kelly Beth Kimble, Georgetown Law School (1L)

October 15, 2001

CERTIFICATE OF SERVICE

I hereby CERTIFY that a copy of these Comments and attachments was sent by U.S. Mail to each of the following, on the attached service list, on October 15, 2001.



Daniel P. Meyer
Public Employees for Environmental Responsibility (PEER)
2001 S Street, N.W. — Suite 570
Washington, D.C. 20009

Tele: (202) 265.7337
E/ml: dmeyer@peer.org

Its General Counsel and Attorney
District of Columbia Bar No. 455369

October 15, 2001

Service List: NOAA/NMS and FOCs

Helen Golde,
Chief, Conservation Policy and Planning Branch
National Marine Sanctuary Program
N/ORM6, 11th Floor
1305 East-West Highway
Silver Spring, MD 20910

Matthew Pickett
Sanctuary Manager
Channel Islands National Marine Sanctuary
113 Harbor Way, Ste. 150
Santa Barbara, CA 93109

Nancy Daschbach
Sanctuary Manager
Fagatele Bay National Marine Sanctuary
P.O. Box 4318
Pago Pago AS 96799

Billy Causey
Sanctuary Superintendent
Florida Keys National Marine Sanctuary
P.O. Box 500368
Marathon, FL 33050

Reed M. Bohne
Manager
Grays Reef National Marine Sanctuary
Georgia Marine Science Center
10 Ocean Science Circle
Savannah, GA 31411

Edward Ueber
Sanctuary Manager
Gulf of the Farallones, Monterey Bay (North), and
Cordell Bank National Marine Sanctuaries
Fort Mason Bldg, 201
San Francisco, CA 94123-1399

Allen Tom
Manager
Hawaiian Islands Humpback Whale National Marine
Sanctuary
726 South Kihei Rd.
Kihei, Maui, HI 96753

John Broadwater
Sanctuary Manager
Monitor National Marine Sanctuary
The Mariners Museum
100 Museum Dr.
Newport News, VA 23606-3759

William J. Douros
Superintendent
Monterey Bay National Marine Sanctuary
299 Foam St.
Monterey CA 93940

Carol Bernthal
Superintendent
Olympic Coast National Marine Sanctuary
138 W. First St.
Port Angeles WA 98362

Dr. Craig D. MacDonald
Sanctuary Manager
Stellwagen Bank National Marine Sanctuary
175 Edward Foster Rd.
Scituate, MA 02066

Ellen Brody
Project Coordinator
Thunder Bay National Marine Sanctuary and
Underwater Preserve
NOAA, 2205 Commonwealth Blvd.
Ann Arbor, MI 48105

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission ("FCC")
Portals II- Suite TW A 325
455 12th Street, S.W.
Washington, D.C. 20554

Michael K. Powell, Chairman
Federal Communications Commission ("FCC")
445 12th Street, S.W.
Washington, D.C. 20554

James Connaughton, Chair
Council on Environmental Quality ("CEQ")
722 Jackson Place, N.W.
Washington, D.C. 20503

Commissioner Kathleen Q. Abernathy
Federal Communications Commission ("FCC")
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Michael J. Copps
Federal Communications Commission ("FCC")
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Kevin J. Martin
Federal Communications Commission ("FCC")
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Gloria Tristani
Federal Communications Commission ("FCC")
445 12th Street, S.W.
Washington, D.C. 20554

Mr. Donald Abelson, Bureau Chief
International Bureau
Federal Communications Commission ("FCC")
445 12th Street, S.W.
Washington, D.C. 20554

Kathleen Collins, Esq.
Attorney Advisory IB-FCC
Federal Communications Commission ("FCC")
Washington, D.C. 20554

Troy F. Tanner, Esq.
Swidler Berlin Shereff Friedman LLP
The Washington Harbour
3000 K Street -- Suite 300
Washington, D.C. 20007-5116

Eric Chiapponi
Chief Appraiser
U.S. Fish and Wildlife Service
4401 N. Fairfax Dr.
MailStop 620ARLSQ
Arlington, VA 22203

Rick Etter
Federal Aviation Administration
Office of the Associate Administrator for Airports
Community and Environmental Needs Division
800 Independence Ave S.W. Room 600E
Washington, D.C. 20591

J. Mike Jones
Realty Specialist
Federal Highway Administration
Office of Real Estate Services
400 7th Street S.W.
Washington, D.C. 20590

Jaime C. Kooser, Ph.D.
Deputy Director
Energy, Ocean Resources and Water Quality
California Coastal Commission
45 Fremont St., Suite 2000
San Francisco, CA 94105-2219

Marina Cazorla
Environmental Specialist
Energy and Ocean Resources Unit
California Coastal Commission
45 Fremont St., Suite 2000
San Francisco, CA 94105-2219

Kaitilin Gaffney
Ecosystem Program
Center for Marine Conservation
55C Municipal Wharf
Santa Cruz, Ca 95060

Linda Krop
Chief Counsel
Environmental Defense Center
906 Garden St.
Santa Barbara, CA 93101

Vicki Nichols
Director of Policy and Research
Save Our Shores
2222 E. Cliff Dr. 5A
Santa Cruz, CA 95060

Amy Mathews-Amos
Vice President
Marine Conservation Biology Institute
1901 N. Fort Myer Dr., Suite 500
Arlington, VA 22209

Stephanie Harlan
Chair
Sanctuary Advisory Council
299 Foam Street
Monterey, CA 93940

Jeffrey A. June
Natural Resources Consultants, Inc.
1900 W. Nickerson, Suite 207
Seattle, WA 98119-1650

Eric Myers
Environmental Policy Analyst
Edison Electric Institute
701 Pennsylvania Ave N.W.
Washington, D.C. 20004-2969

Scott D. Bolton
Director, Government Affairs--The Americas
c/o Enron Broadband Services
2100 SW River Parkway, Suite 700
Portland, OR 97201

Salvatore Giuliano
Manager, Real Estate & Land Planning
Northeast Utilities
P.O. Box 270
Hartford, CT 06141-0270

Christy J. Wallace
Right of Way Acquisition
Williams Communications, LLC
One Williams Center, 26th Fl.
Tulsa, OK 74172

Connie W. Williford, MAI
Allen, Williford & Seale
14925 Memorial Dr. Suite 200
Houston, TX 77079

Roy L. (Bud) Anderson
Chairman, The Western Utility Group
c/o The Montana Power Company
40 E. Broadway
Butte, MT 59701

Wendy L. Boudreau
Senior Attorney--AT&T
Room 111512
295 North Maple Ave.
Basking Ridge, NJ 07920

Paul Shorb
Senior Attorney--AT&T
Room 111512
295 North Maple Ave.
Basking Ridge, NJ 07920

Exhibit A

Exhibit A: ***The following is a proposed means of addressing the issue before NOAA, and not a final analysis. It is suggested that it be circulated in conjunction with a Notice of Further Rulemaking.***

PEER CATEGORIZATION
OF NATIONAL MARINE SANCTUARY ("NMS") ATTRIBUTES

SANCTUARY	MARINE WILDLIFE CONCERNS	GEOLOGIC CONCERNS	MISCELLANEOUS CONCERNS	COMMENTS	CATEGORY
Channel Islands (Santa Barbara, CA)	- unique currents provide breeding ground - 27 species of whales and dolphins annually, including rare blue, sei, and humpback whales - birds living on local islands depend on marine life for food	Unknown	threatened by... - oil and gas development threatens the sanctuary - busy shipping lanes nearby - non-point source pollution - fishing	Sanctuary already violated by human presence and impact.	No Cable
Cordell Bank (Northern CA) 526 square miles	- lush feeding ground for marine mammals and seabirds - home to Dall's porpoises, albatross, shearwaters, and endangered humpback whales	- located at the edge of the continental shelf - topography contributes significantly to the biological activity	- not frequently visited due to location and depth	Proposed cables must be subject to a resource/species-specific, publicly-noticed EIS.	Some Cable

SANCTUARY	MARINE WILDLIFE CONCERNS	GEOLOGIC CONCERNS	MISCELLANEOUS CONCERNS	COMMENTS	CATEGORY
Fagatele Bay (Tutuila, American Samoa) .25 square miles	threatened or endangered species: - humpback whale - sperm whale - hawksbill turtle - green sea turtle	- only true tropical coral reef in the NMS program	- slopes surrounding the sanctuary include rare paleo-tropical rainforest - threatened by poaching and upstream sewage flow	None.	No Cable
Florida Keys	- marine life contributes to the fishing and tourism industries	- many existing threats to the health of the coral reef	many types of habitat: - hardbottom - softbottom - sand - seagrass - coral reef	Sanctuary already violated by human presence and impact.	No Cable
Flower Garden Banks (110 miles off coasts of TX and LA)	- coral reef habitat: dense school of tropical fish, manta rays, turtles, sharks - serves as reservoir of shallow water for Caribbean reef wildlife	- harbors the northernmost coral reefs in the U.S. - contains ancient drowned reefs, natural gas seeps, and a brine lake - the 3rd bank (Stetson Bank) is capped by eroded sandstone and claystone that provide habitat	- used frequently for recreational divers and scientific research	None.	No Cable

SANCTUARY	MARINE WILDLIFE CONCERNS	GEOLOGIC CONCERNS	MISCELLANEOUS CONCERNS	COMMENTS	CATEGORY
Gray's Reef (near Sapelo Island, GA) 17 square miles	- provides unique reef habitat for marine life	- one of the largest nearshore sandstone reefs in the southeastern US	- the ecosystem includes a solid base which allows species to attach and grow to the floor (a "live bottom habitat") - used frequently for recreational fishing and diving	None	No Cable
Gulf of the Farallones (near San Francisco, CA) 1,255 square miles	- provides resting and breeding sites for birds and marine mammals - home to largest concentration of breeding seabirds in the continental US	Unknown	- partially designated as national wildlife refuge - significant amount of public recreation land along shoreline - threatened by oil spills, sewage, chemicals, petroleum products, pesticides, and urban runoff	Proposed cables must be subject to a resource/species-specific, publicly-noticed EIS.	Some Cable
Hawaiian Islands Humpback Whale	- only place in US where humpbacks reproduce (two-thirds of entire N. Pacific humpback population; 4000-5000 whales) - breed, calve and nurse young here	Unknown	- Public was assured that the sanctuary would primarily deal with restrictions on approaching and harassing whales, discharging waste into the water, and alteration of the seabed	None	No Cable

SANCTUARY	MARINE WILDLIFE CONCERNS	GEOLOGIC CONCERNS	MISCELLANEOUS CONCERNS	COMMENTS	CATEGORY
Monitor Located 16 miles off coast of NC (one mile in diameter circle above wreck)	Unknown	Monitor rests on a sand-covered seafloor	Further deterioration of the wreck, recovery of artifacts, and protecting the wreck from damage by human activities are top concerns	This is both a marine and national sanctuary; commercial use would be both sacrilegious and an offense to veterans.	No Cable
Monterey Bay 5300 sq miles off coast of central CA	- Elephant seals - Migratory marine life - bountiful resident marine life	Unknown	Resource management issues include: - vessel traffic and impact on marine life and water quality - disposal of dredge material - land-based sources of water pollution - direct and indirect impacts of fishing - impacts of non-native invasive species	Proposed cables must be subject to a resource/species-specific, publicly-noticed EIS.	Some Cable
Olympic Coast Extends 35 miles offshore of WA and along 135 miles of coast	- habitat for one of most diverse marine mammal faunas in N. America - critical link in Pacific flyway	Unknown	- undeveloped shoreline - adjacent to wilderness beaches and Native American reservations - islands and rocks above high tide also protected in National Wildlife Refuge - Resource management issues include: -- vessel traffic -- spill prevention and response -- ecological impact of fishing	None.	No Cable

SANCTUARY	MARINE WILDLIFE CONCERNS	GEOLOGIC CONCERNS	MISCELLANEOUS CONCERNS	COMMENTS	CATEGORY
Stellwagen Bank At mouth of Boston Bay, MA	- critical nutrient area for phytoplankton which in turn feeds small animals (zooplankton) - zooplankton support a multi-layered food web that culminates with whales - huge fish population - migration and feeding area for endangered northern right whale and humpback whale	- gravel and sand bank - nutrient-rich waters from basin rise over bank supporting critical marine life	Resource Management issues: - commercial fishing - whale watching - pollutants from heavily developed coast - potential for offshore mineral and gravel mining - disposal of dredged materials - vessel traffic in endangered whale migration and feeding area - **decline in fish stock and destruction of their habitats**	None.	No Cable
Thunder Bay In Great Lakes	- fresh water habitat	- Great Lakes area	- 160 shipwrecks are located here	This is both a marine and national sanctuary; use of this site for commercial purposes would be sacrilegious.	No Cable