

NEW U.S. CORAL REEF PROTECTION REGIONAL PERMIT CONDITION AND ITS EFFECT ON CABLE REPAIRS

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Abstract: The U.S. Army Corps of Engineers (ACOE) Jacksonville District, which encompasses cable landings in Florida, the U.S. Virgin Islands and Puerto Rico, in 2004 adopted a Regional Condition that excludes work in areas of submerged aquatic vegetation, tidal wetlands and coral reefs from Nationwide Permit 3 (NWP-3). In 2005, the ACOE applied this Regional Condition to a submarine cable repair for the first time, which required a permitting effort similar to that required for a cable installation, and which took 169 days to complete. This paper will discuss NWP-3 and the Regional Condition; the permitting effort and its ongoing requirements; the repair; implications for other cable owners; and comments filed with the ACOE requesting modification of this Regional Condition.

1 INTRODUCTION

In 2004, the U.S. Army Corps of Engineers (ACOE) Jacksonville District adopted a Regional Condition that excludes work in areas of submerged aquatic vegetation, tidal wetlands and coral reefs from Nationwide Permit 3 (NWP-3). Prior to the adoption of this regional condition, repair of cables that had been installed pursuant to an ACOE permit was authorized in these areas under NWP-3 with only notification to the ACOE. The Jacksonville District encompasses cable landings in Florida, Puerto Rico and the U.S. Virgin Islands. The effect of this new Regional Condition is to require a cable owner with a landing in the Jacksonville District to obtain an individual permit for any work required in areas of submerged aquatic vegetation, tidal wetlands or coral reefs. The process for obtaining an individual permit can be lengthy and complex. This new Regional Condition had a detrimental effect on the timely repair of the Taino-Carib cable system in the waters off Puerto Rico. To our knowledge, this was the first time that an individual permitting effort (including consultation with other government agencies) has been required to repair a submarine cable anywhere in the United States. Obtaining the ACOE permit alone added 169 days to the duration of this repair.

2 NATIONWIDE PERMIT 3 AND REGIONAL CONDITION #4

NWP-3 authorizes the repair, rehabilitation, or replacement of any previously authorized, currently serviceable structure, provided that the structure is not to be put to uses differing from those uses specified or contemplated for it in the original permit or in the most recently authorized modification. Currently serviceable means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction.

Regional Condition #4 is specific to the Jacksonville District of the ACOE. It bars use of NWP-3 in areas of "submerged aquatic vegetation, tidal wetlands and/or

coral reefs." (A similar regional condition is attached by the Jacksonville District to some but not all of the other Nationwide Permits.). The intent of Regional Condition #4 is to protect areas that are spawning and nursery grounds for commercial and recreational fish.

3 THE PERMITTING PROCESS

In September of 2003 AT&T, on behalf of the Taino-Carib owners, requested and received authorization under NWP-3 from the ACOE to repair the Taino-Carib Segment E1 cable in the waters off of Puerto Rico. This authorization was received within three days.

However, on April 17, 2005 the Taino-Carib Segment E2 cable failed off of Puerto Rico

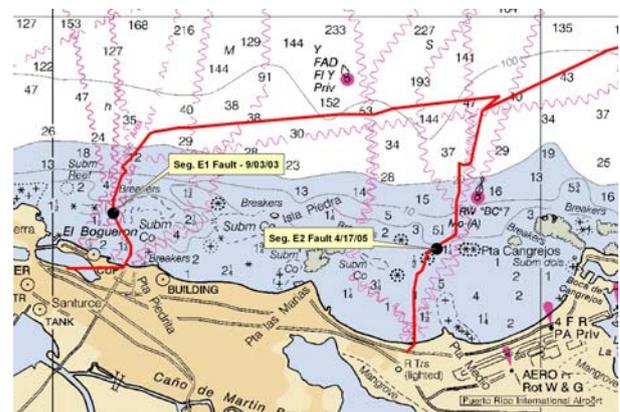


Figure 1: Location of the 2003 and 2005 Taino-Carib failures.

On April 27, the repair contractor for the owners of the Taino-Carib cable therefore sent a notice letter to the Army Corps indicating that a repair was planned on the cable and that the contractor believed that it qualified under NWP-3. The letter provided the location of the fault, the Method of Procedure for the repair, and efforts planned to minimize effect on the environment, especially corals. These planned efforts included:

- Using an independent environmental expert as an advisor and monitor
- Training ship personnel to avoid marine mammals and sea turtles
- Anchoring the repair vessel in a way to avoid damage to corals
- Dropping the repaired cable straight down to the bottom and avoiding lateral movement
- Post-repair inspection of hard bottom areas

Freeing soft corals trapped by the cable and reattaching any dislodged corals. On May 27, the ACOE advised that the planned repair did not qualify for NWP-3, for two reasons. First, the ACOE determined that the cable was not “currently serviceable”. Second, the ACOE indicated that Regional Condition #4 “clearly excludes NWP (3) from areas of submerged aquatic vegetation, tidal wetlands and or coral reefs”.

AT&T, acting on behalf of all of the Taino-Carib owners, immediately asked the ACOE to revise its decision. First, regarding “currently serviceable”, AT&T indicated that the repair would replace less than 1% of the cable in the system; that cutting out and replacing the faulted section of cable was the standard way the industry performed repairs; and that Taino-Carib Segment E1 was still carrying traffic to Puerto Rico. The ACOE therefore changed its position and agreed that the cable qualified as “currently serviceable”.

Second, AT&T argued that the area to be crossed by the repair segment should be not be classified as a “coral reef”, since the reef was not constructed of coral, but rather of a stony bottom dotted with only scattered small hard corals, totaling less than 1% coral cover along the planned repair route. However, the Jacksonville District determined that even this qualified as a “coral reef”, and therefore required the repair contractor to initiate the individual permit process, by filing a Joint Permit Application (JPA).

The repair contractor filed the JPA with the ACOE on June 17, 2005. During the review process the ACOE sought comments from the Puerto Rico Department of Natural Resources and the Environment, the U.S. Fish and Wildlife Service, the State Historic Preservation Office, the National Marine Fisheries Service, the Office of the Governor of Puerto Rico, and the Puerto Rico Environmental Quality Board. On September 21, the ACOE issued a Letter of Permission (LOP) that would allow the repair to begin. However, this LOP contained language (carried through verbatim from a comment by one of the agencies noted above) that would have required the cable to be placed on a route “devoid of coral heads”, indicating that the route chosen would have no coral present. However, since no such route had been proposed or was possible, the contractor

had to request changes to this language. Finally, on October 13, 2005, the ACOE issued a revised LOP, which allowed positioning of the cable “along the ocean floor, avoiding and minimizing to the maximum extent possible any damage to coral heads of sensitive benthic communities”. From the time of the first notification to the ACOE until the repair contractor received this ACOE approval, 169 days had elapsed.

The final LOP contained all the mitigation measures that had been proposed in the application, and in addition included the following special conditions:

- Avoiding inclement weather during the repair
- Post installation inspection of the vessel anchorage areas
- Periodic re-inspections at 6, 12 and 18 months after repair completion.
- Anchoring the cable to the bottom if cable movement was observed
- Removal of non-encrusted faulted cable, anchoring of coral encrusted faulted cable
- Reports on the re-inspections delivered to the ACOE 30 days after completion
- A detailed mitigation plan in the event more than minimal damage done to corals

This LOP was agreed to (including all of the special conditions) and the repair was commenced shortly after.

4 THE REPAIR

The repair cable was successfully placed on the seabed. The contractor complied with the special conditions of the LOP. Although a strong current on the day of the repair moved the cable somewhat west of its planned position when it was floated out from the repair ship, the cable was then placed straight down on the seabed without lateral motion that would harm corals. In addition, rather than waiting to see if the cable subsequently moved on the bottom after installation as contemplated by the LOP, the Taino-Carib cable was anchored to the sea bed at the outset, as a preventative measure.

As of the writing of this paper, the repaired section has been inspected twice, once immediately after the repair and once in October 2006. Those inspections found virtually no impacts on hard corals from the installation and no coral damage from subsequent cable movement. After the second inspection, the ACOE expressed its agreement that no significant adverse impacts had occurred (“impacts to the aquatic environment were discountable”). This experience confirms that a method of procedure such as followed for this repair is effective at minimizing impacts to corals.

5 IMPLICATIONS FOR CABLE OWNERS WITH CABLES IN THE ACOE'S JACKSONVILLE DISTRICT

As long as this regional condition and the ACOE's expansive interpretation of "coral reef" remains in place, submarine cable owners that need to repair their cables in the Jacksonville District can expect to encounter similar delays to those repairs. Probably many or most of the cables in the Jacksonville district cross some bit of hard bottom that contains some coral, or submerged aquatic vegetation or tidal wetlands. Even if the ACOE uses the LOP form of approval as here, rather than full individual permitting with a public notice period, this experience suggests that a repair delay of five months can result from that review process.

6 COMMENTS ON ACOE RULEMAKING REGARDING NEW NWPS AND REGIONAL CONDITIONS

In late 2006 the ACOE at the national headquarters level requested comments on a proposal to reissue and modify the nationwide permits, all of which are due to expire in March 2007. The ACOE proposal included a new NWP for emergency repairs. This headquarters proposal to reissue and modify the NWPs required the Jacksonville District to request comments on proposed new regional conditions for these re-issued NWPs, including NWP-3.

Seizing upon this opportunity, AT&T drafted comments that were approved and filed by the North American Submarine Cable Association (NASCA) in November 2006 with the ACOE headquarters and with the Jacksonville District. NASCA's comments to ACOE headquarters urged that NWP-3 remain available for use with cable repairs. NASCA's comments to the Jacksonville District requested that NWP-3 be available for use in areas where corals are present, as long as an

appropriate Pre-Construction Notification (PCN) was filed. Specifically, NASCA noted that a PCN could include all of the safeguards to protect sensitive resources that were included in the recent LOP, and which have been shown in that repair and elsewhere to be effective. There is enough track record now for the ACOE to recognize when a PCN contains conditions sufficient to protect the environment, and to then allow the repair to proceed under NWP-3 without additional multi-agency review. This process would allow a cable owner to repair its cable in a timely manner without sacrificing environmental protection.

As of the drafting of this paper, the ACOE has yet to issue its final determination on the new NWPs, nor has the Jacksonville District issued its new regional conditions.

7 CONCLUSION

There is no doubt that environmental protection is important. We agree with protecting the wild places of the Earth; places that serve as nurseries for important fish species; coral reefs; and even hard bottom areas that host scattered coral heads at only low density. The continued operation of the nation's undersea cable network also provides important benefits to all Americans. We believe that the ACOE can protect these special environmental resources without unnecessary permitting delays when the undersea network needs repair. This can be done by recognizing a standard set of conditions appropriate to protect the environment in the area of a submarine cable repair, so that a PCN that includes those conditions can be approved routinely and quickly under NWP-3.

8 ACKNOWLEDGEMENTS

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