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# **The Troubling Trend of Extraterritorial Marine Protected Areas**

## **Recent North American Developments Affecting Submarine Cables in the Pacific and Atlantic Oceans**

26 April 2017

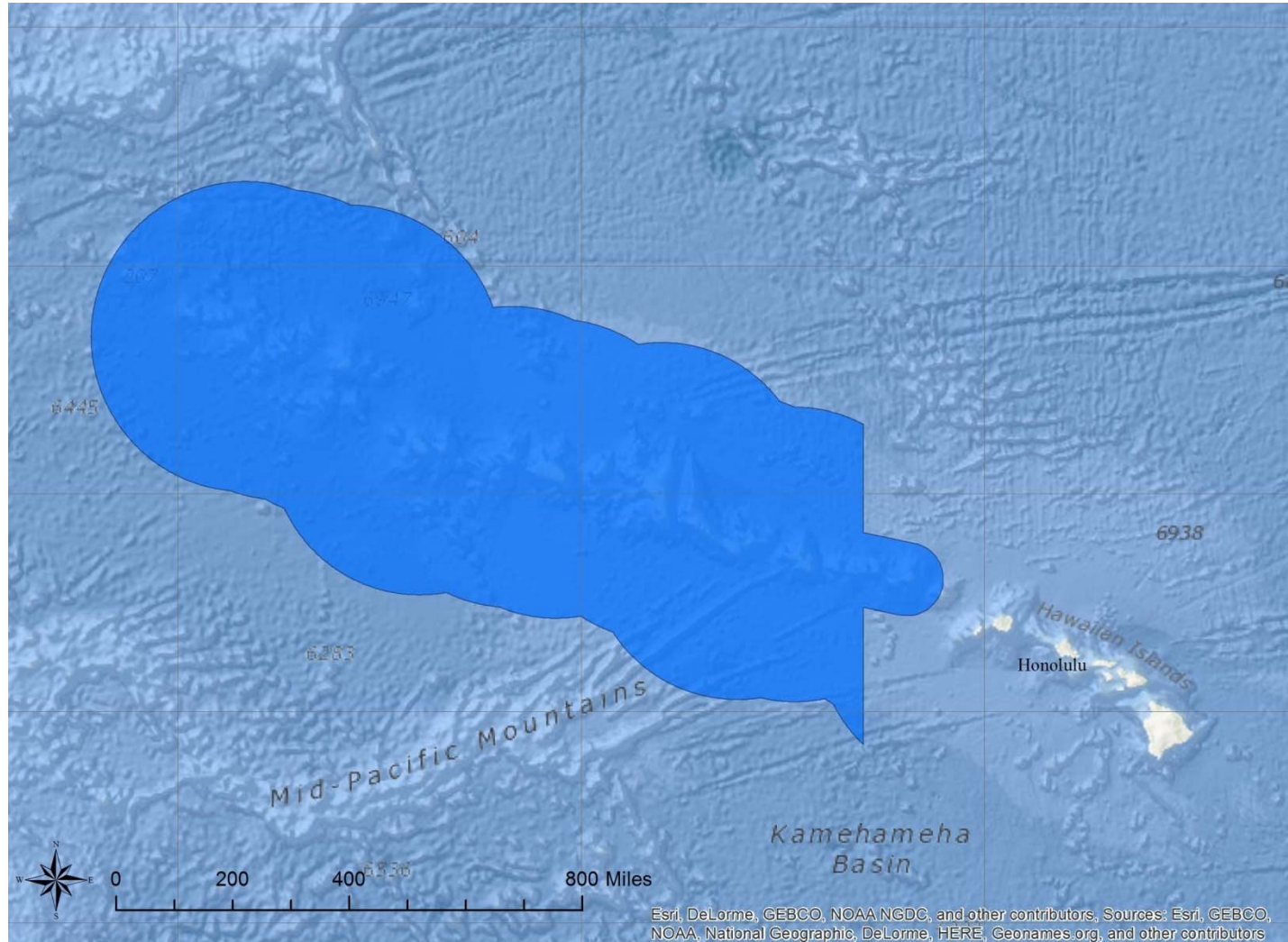
## The problem: extensive new extraterritorial marine protected areas

- In 2016, U.S. President Barack Obama established two new marine national monuments (“MNM”) covering portions of installed and planned trans-Pacific and trans-Atlantic submarine cables.
  - First, he designated the Expanded Papahānaumokuākea MNM, covering 1.5 million square miles of marine areas within the U.S. exclusive economic zone (“EEZ”) northwest of the main Hawaiian Islands.
  - Second, President Obama designated a new Northeast Canyons and Seamounts MNM in the U.S. EEZ east of Long Island, New York.
- These new MNMs, along with existing MNMs, cover vast ocean areas and threaten to impair submarine cable and maintenance activities occurring very far from the U.S. mainland.
- With other recent proposals and designations by the Canadian and Mexican governments for new marine protected areas (“MPAs”), these MNMs evidence a troubling trend among North American governments of expanding extraterritorial marine protected areas while giving little or no consideration to the ~~of~~ impacts on existing or future submarine cables.

## Expanded Papahānaumokuākea MNM

- On August 26, 2016, President Obama issued Presidential Proclamation 9478, extending the Papahānaumokuākea MNM.
- The expansion area is twice the size of all marine protected areas in the Northeastern Atlantic Ocean designated pursuant to the OSPAR Convention.
- One planned and two existing submarine cable systems transit this MNM.
- The existing regulations are geographically limited to the 2006 boundaries until those regulations are altered by the Secretaries of Interior and Commerce during the 3-year implementation period.
- Presidential Proclamation 9478 directs the Secretary of Commerce to treat the Expanded Papahānaumokuākea MNM as a national marine sanctuary, which means that the National Oceanic and Atmospheric Administration (“NOAA”) will likely seek to collect per-mile fees for portions of submarine cables within the Expanded Papahānaumokuākea MNM.
- There is no grandfathering provision in the proclamation for preexisting infrastructure, so the permitting, reporting, fee, and other requirements under new Interior/Commerce regulations would potentially apply to existing and new submarine cables, absent a carve-out in the management plan and/or regulations.

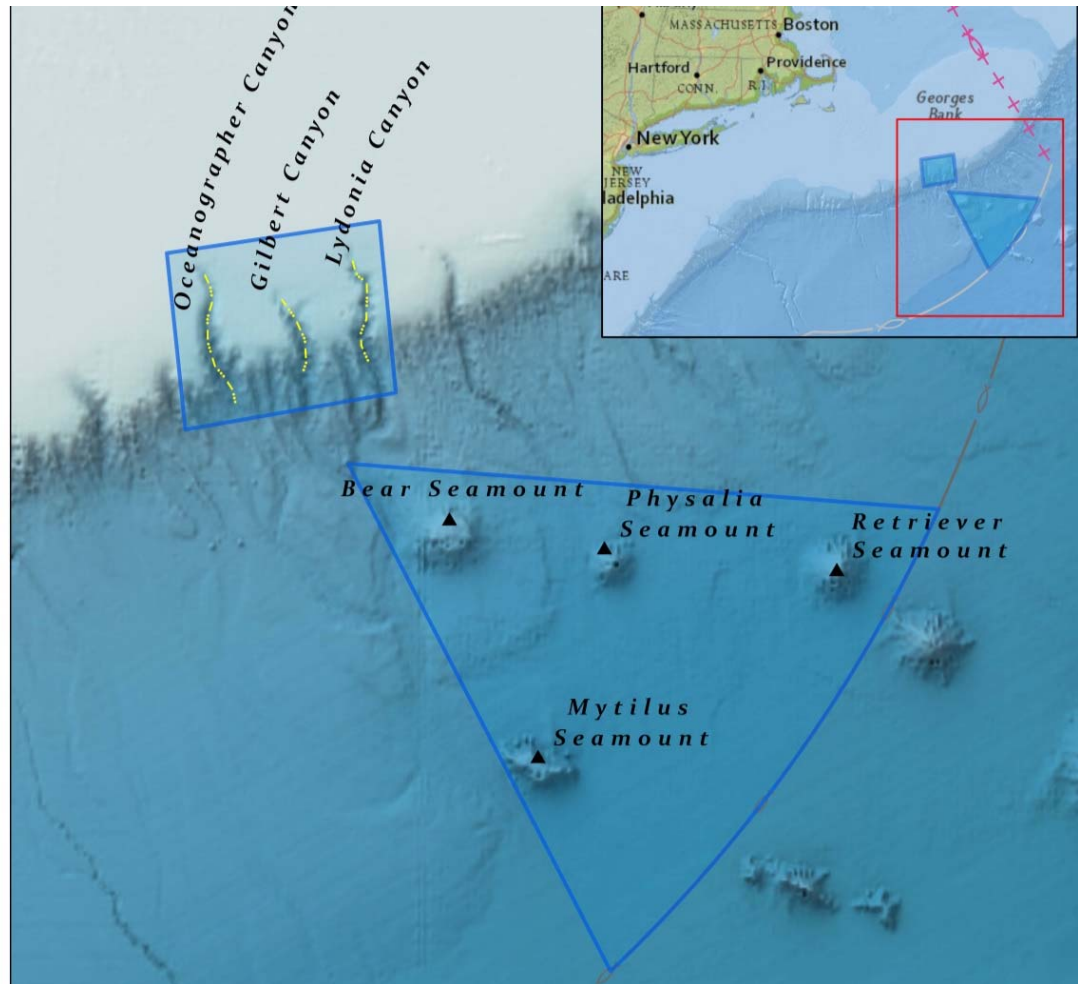
# Boundaries of the Expanded Papahānaumokuākea MNM



## Northeast Canyons and Seamounts MNM

- On September 15, 2016, President Obama issued Presidential Proclamation 9496, creating the Northeast Canyons and Seamounts MNM.
- Although small in area when compared to MNMs in the Pacific Ocean, this MNM covers key north Atlantic routes for submarine cables.
- Nine existing submarine cables abut or traverse this MNM.
- Unlike all other MNM designations, Presidential Proclamation 9496 expressly exempts submarine cable installation and maintenance from prohibitions on “drilling into, anchoring, dredging, or otherwise altering the submerged lands; or constructing, placing, or abandoning any structure, material, or other matter on the submerged lands.”
- This MNM will be jointly managed by the Department of the Interior and NOAA, with regulations to be developed during a 3-year implementation period.

# Boundaries of the Northeast Canyons and Seamounts MNM





## U.S. Presidential power under the Antiquities Act

- The Antiquities Act authorizes the President, in his discretion, to declare national monuments by public proclamation.
- The Antiquities Act was originally enacted in 1906 to protect Native American artifacts, but U.S. courts have upheld the use of its broad language to designate geographic features and vast land areas.
- The law does not provide for abolition of a previously-designated monument.
- In some cases, presidents have expanded or reduced the size of existing monuments.
- No party has ever succeeded in undoing a prior presidential designation of a national monument.
- The Antiquities Act gives the president extraordinary discretion to act without public notice or comment and without approval by the U.S. Congress or state or local governments.



## Antiquities Act controversies

- The Antiquities Act does not mention submerged lands or marine areas subject to U.S. jurisdiction.
- In 2000, the U.S. Department of Justice's Office of Legal Counsel issued an opinion finding that the President may use his authority under the Antiquities Act to:
  - Establish an MNM in both the U.S. territorial sea and EEZ in order to protect marine resources, and
  - To establish a national marine sanctuary in the same area.
- From the outset, presidential use of the Antiquities Act has proved controversial, with disputes over:
  - Monument size;
  - Establishment criteria;
  - Inclusion of non-federal lands;
  - Effects on land and ocean use; and
  - Consistency with other federal laws.



## MNMs significantly restrict commercial marine activities

- MNMs vary in terms of authorized and prohibited activities, including provisions relating to:
  - Placement or abandonment of structures or materials on the seabed;
  - Navigation, overflight, and uses consistent with international law;
  - Anchoring, dredging, or altering submerged lands;
  - Responses to emergencies threatening life, property, or the environment;
  - Activities necessary for national security or law enforcement;
  - Injury, disturbance, or removal of living or nonliving resources;
  - Resource extraction; and
  - Commercial fishing.
- Only the Northeast Canyons and Seamounts MNM expressly authorizes installation and maintenance of submarine cables.
- There is no grandfathering provision in the MNM proclamations for preexisting infrastructure.

## Overview of MNMs and activity restrictions

MNM	Sub Cables	Overflight, Navigation & Lawful Uses Under Int'l Law	Protection of Life, Property, or Environment	National Security or Law Enf.	Anchoring/ Dredging	Structures or Materials on Submerged Lands	Damage to Living or Non-Living Resources	Resource Extraction	Comm. Fishing	Sub Cable Systems that Traverse
Marianas Trench (2009)		✓	✓	✓			x	x	x	AAG, AJC, HANTRU-1, SEA-US, OOS
Northeast Canyons and Seamounts (2016)	✓	✓	✓	✓	x	x (except scientific insts)	x	x	x	FA-1 N, FA-1 S, TAT-14, OOS
Pacific Remote Islands (2009)		✓	✓	✓			x	x	x	AAG(?), SEA-US(?), OOS
Pacific Remote Islands Expansion (2014)		✓	✓	✓			x	x	x	AAG, SEA-US, SX Seg. D, OOS
Papahānaumokuākea (2006)		✓	✓	✓	x				Rest'd	OOS
Papahānaumokuākea Expansion (2016)		✓	✓	✓	x	x (except scientific insts)	x	x	x	AAG, JUSCN, SEA-US, OOS
Rose Atoll (2009)			✓	✓			x	x	x	

## Inconsistency with UNCLOS and international law

- To the extent the MNM proclamations and their management plans restrict submarine cable installation and maintenance in the U.S. EEZ, they are inconsistent with UNCLOS principles and customary international law.
- In the EEZ, UNCLOS article 58(1) provides that “all States . . . enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to those freedoms, such as those associated with the operation of ships, aircraft, and submarine cables and pipelines, and compatible with the other provisions of this Convention.”
- On the continental shelf, UNCLOS article 79 provides that:
  - “All States are entitled to lay submarine cables and pipelines on the continental shelf.”
  - “Subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines, the coastal State may not impede the laying or maintenance of such cables or pipelines.”

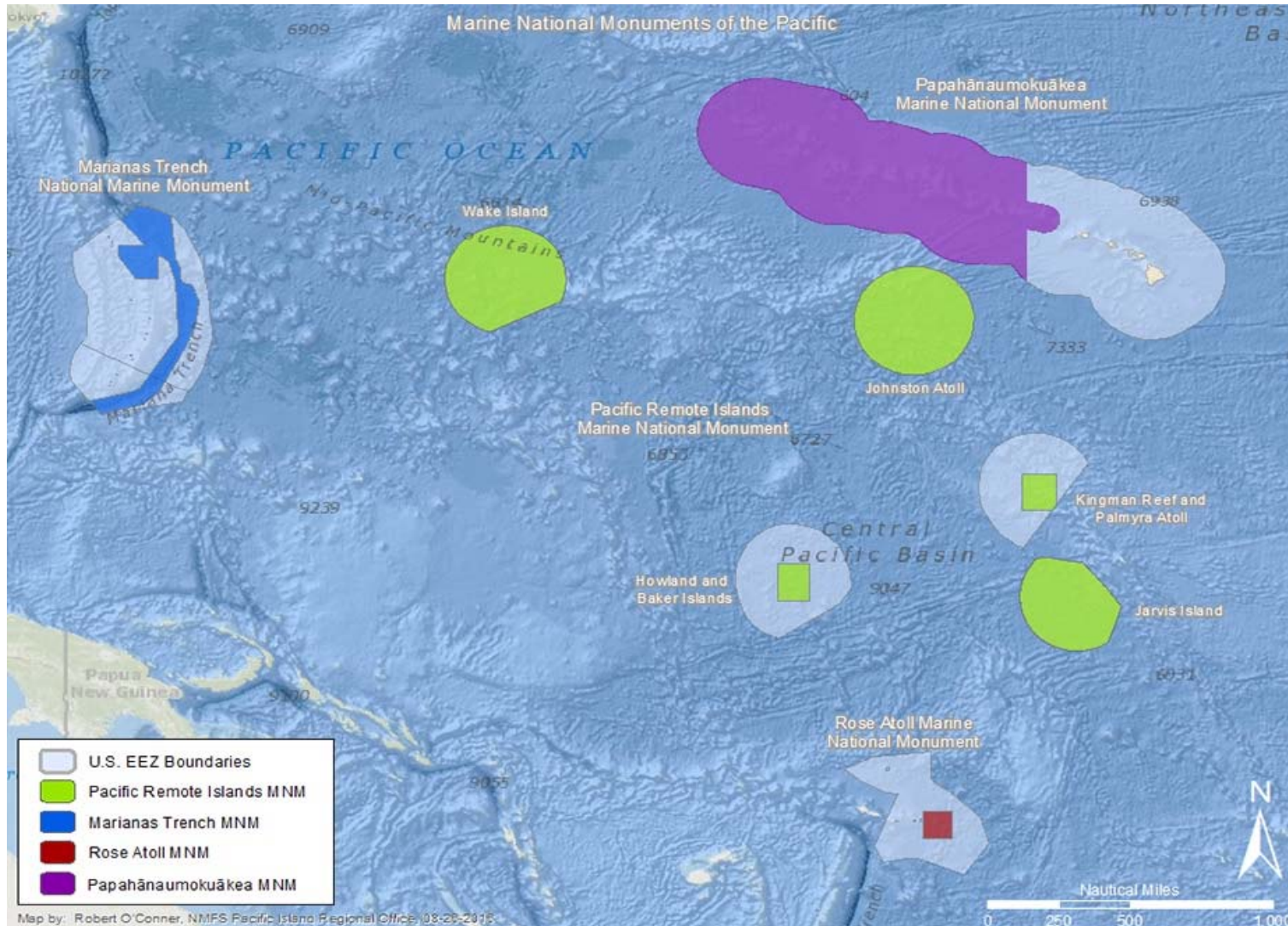
## Relationship with U.S. national marine sanctuaries

- The designation of an MNM differs significantly from the creation of a national marine sanctuary, for which NOAA must follow the laborious process established by the National Marine Sanctuaries Act, including extensive public consultation and stakeholder review.
- There are currently 13 national marine sanctuaries, with three submarine cables (Alaska United East, Hibernia Atlantic, and PC-1)-traversing a sanctuary.
- As administered by NOAA, national marine sanctuaries are subject to extensive national-level and sanctuary-specific regulations.
- To install and maintain a submarine cable in a national marine sanctuary, an operator must receive a special use permit and pay considerable “fair-market-value” easement fees currently ranging from \$40,000 to \$100,000 per mile.
- The proclamation for the Expanded Papahānaumokuākea MNM calls for NOAA to manage it as a national marine sanctuary.
- An NGO has also nominated most of the Marianas Trench MNM to become a national marine sanctuary.

## MNMs are not new

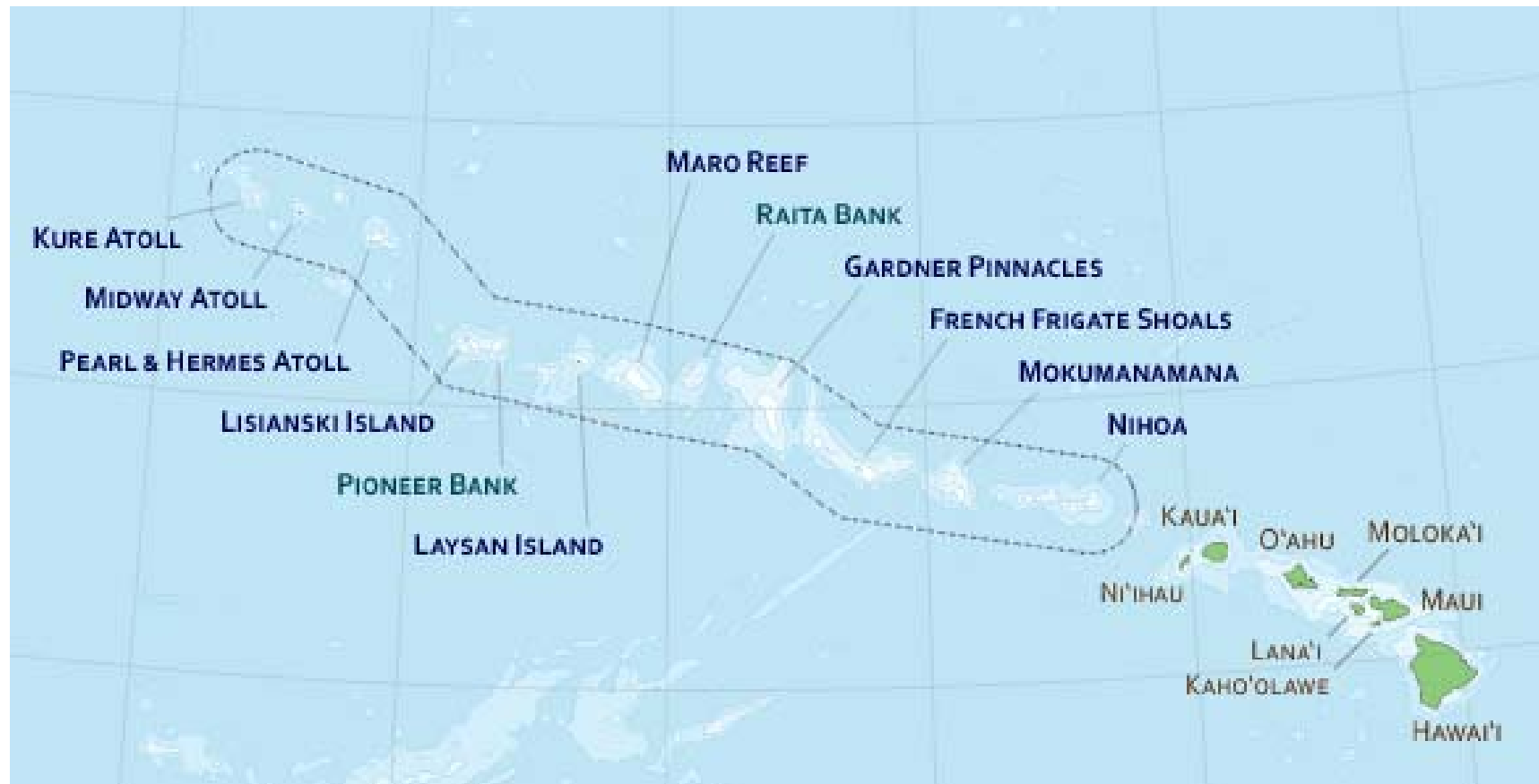
- The Expanded Papahānaumokuākea MNM and the Northeast Canyons and Seamounts MNM are not the first MNMs.
- It was President George W. Bush who first designated MNMs extending 50 miles seaward from U.S. land territory, including:
  - The original Papahānaumokuākea MNM, covering 360,000 square kilometers northwest of Hawaii (designated in 2006) prior to its quadrupling in size in 2016;
  - Rose Atoll MNM east of the main islands of American Samoa in the South Pacific Ocean, covering approximately 35,000 square kilometers (designated in 2009);
  - Marianas Trench MNM covering approximately 250,000 square kilometers (designated in 2009); and
  - The original Pacific Remote Islands MNM covering 215,000 square kilometers (designated in 2009) prior to its sextupling in size in 2014.

# U.S. MNMs in the Pacific Ocean

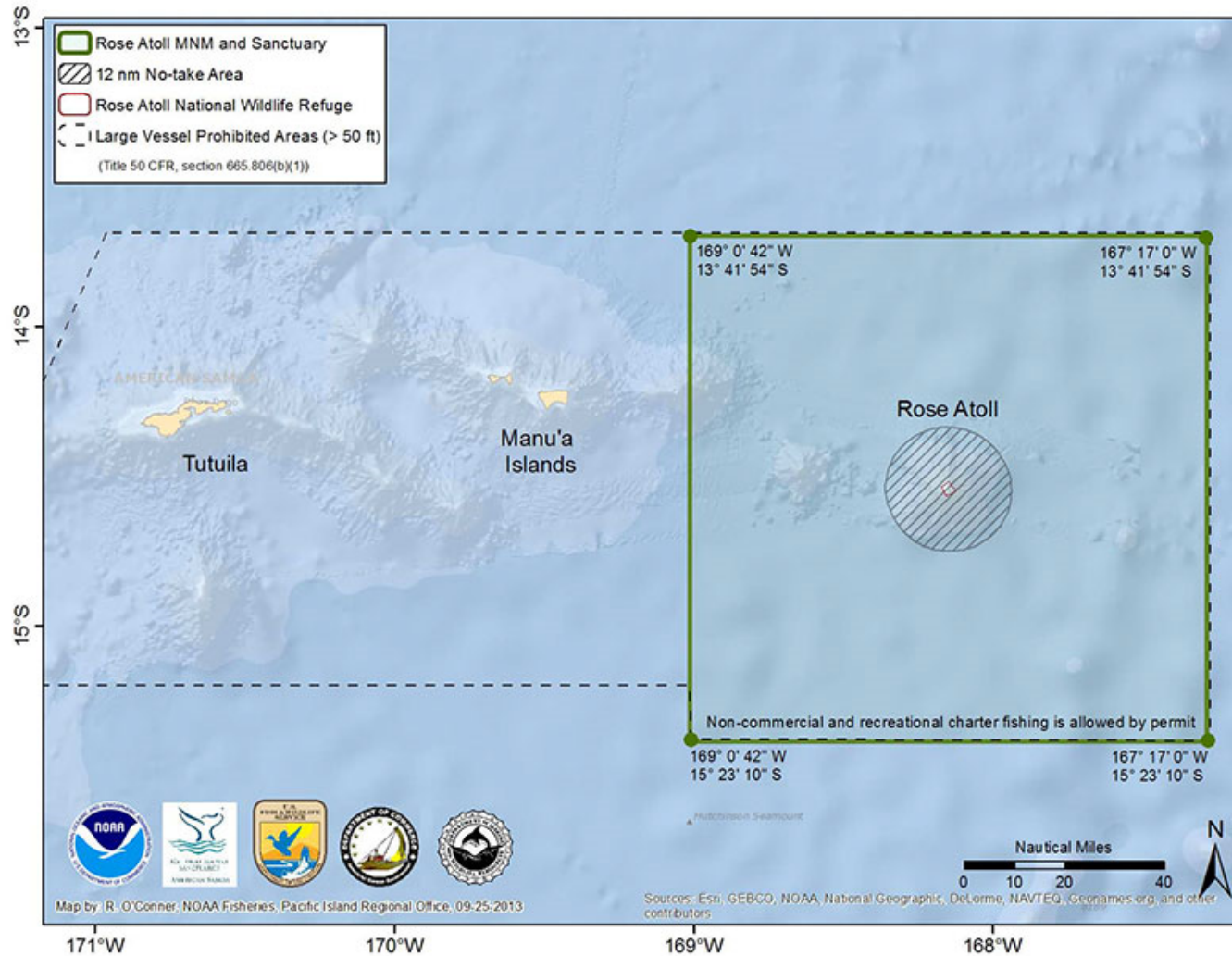




## Original Papahānaumokuākea MNM

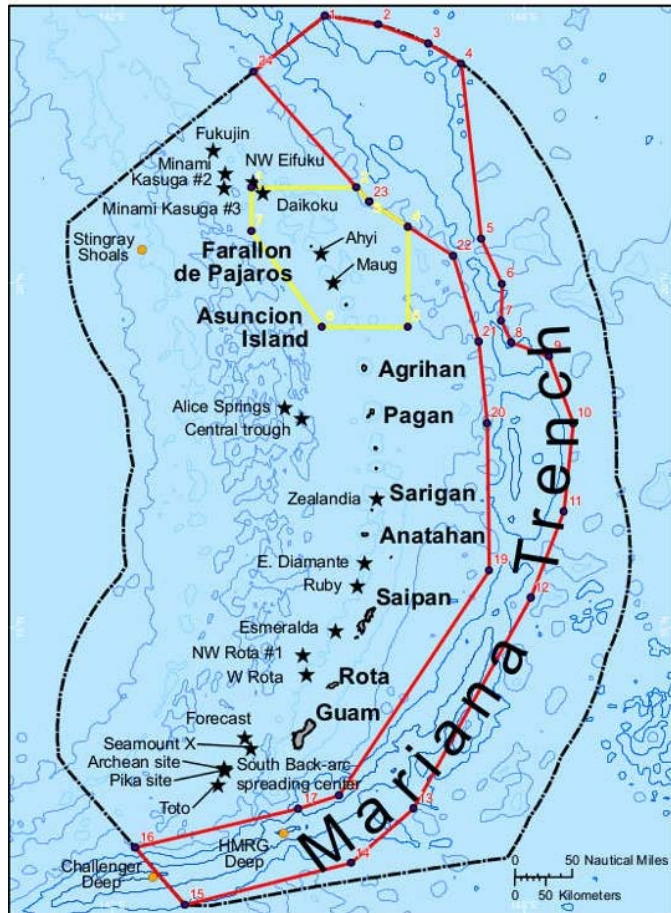


# Rose Atoll MNM

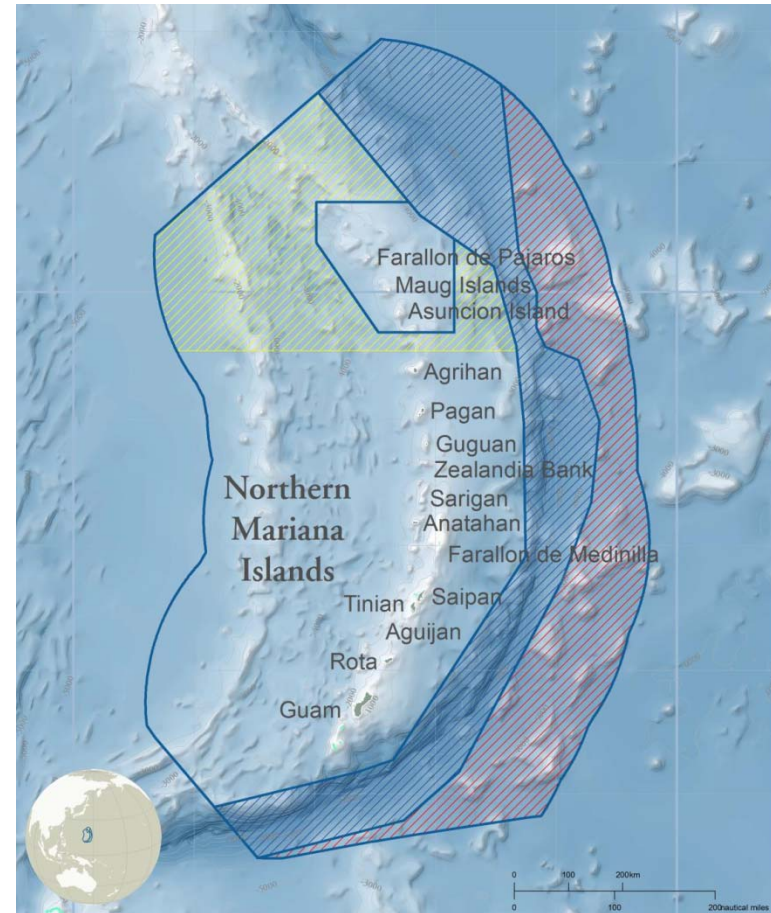


# Mariana Trench MNM

## Current

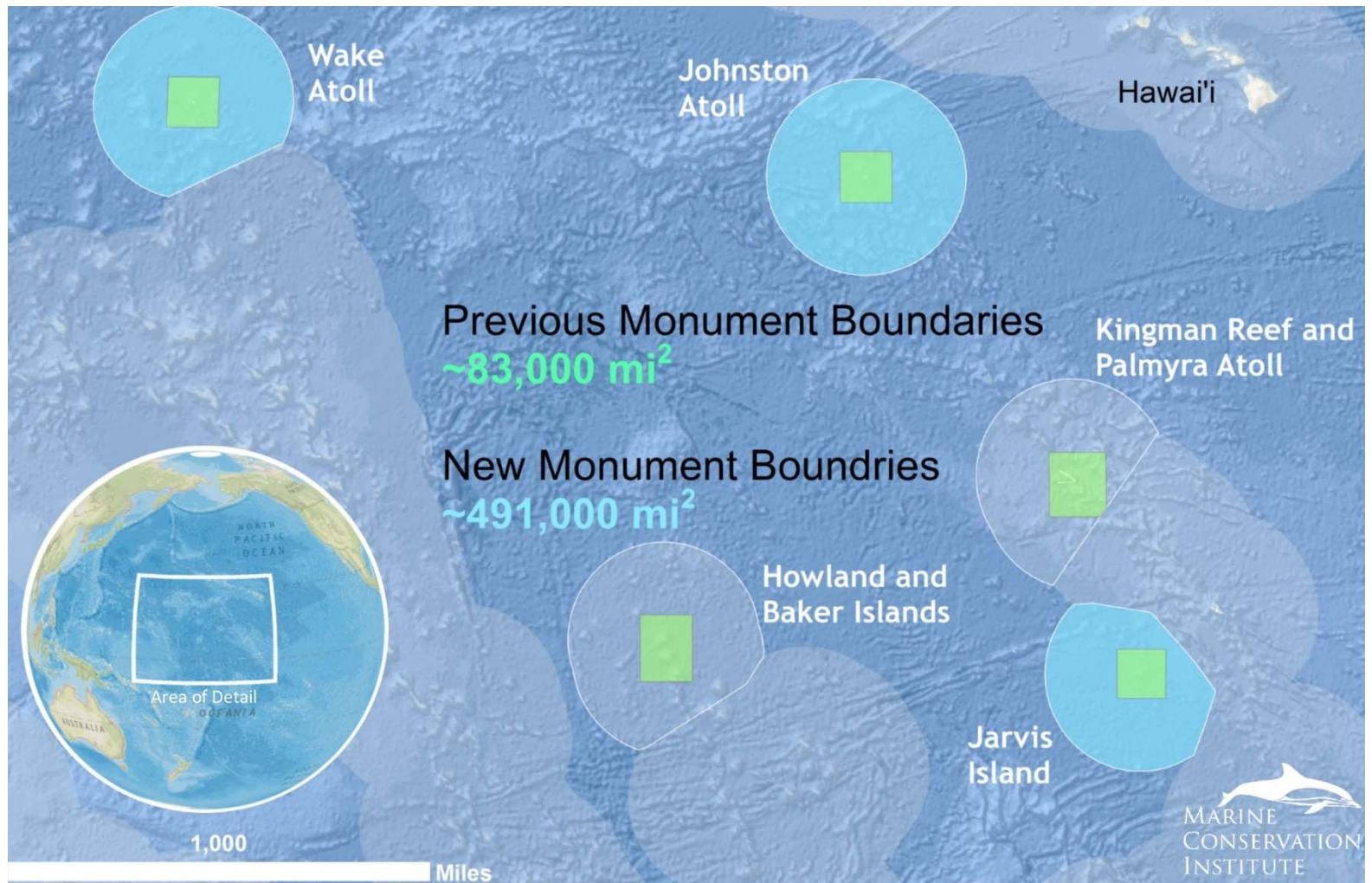


## Proposed





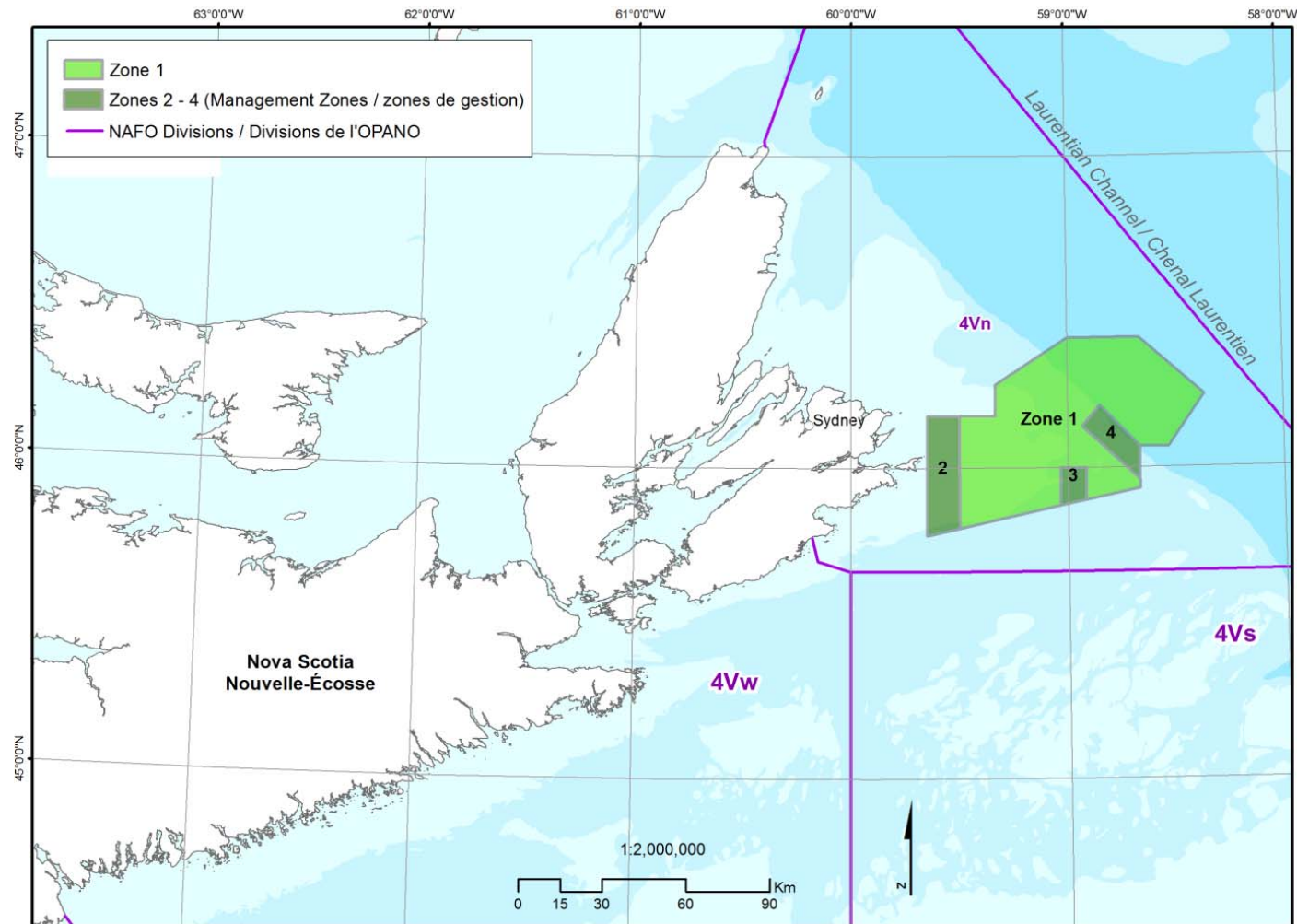
# Pacific Remote Islands MNM



## Canadian MPAs

- Under the Oceans Act, Canada's Department of Fisheries and Oceans ("DFO") has established a national framework for MPAs in 2011.
- DFO seeks to extend MPA protection to 5 percent of Canada's marine and coastal areas by 2017 and 10 percent by 2020, consistent with the target established in the Convention on Biological Diversity.
- DFO has proposed to create a new MPA at St. Anns Bank, off the northeast coast of Cape Breton Island in Nova Scotia, with comments on proposed regulations filed in January 2017.
- Boundaries of St. Anns Bank MPA may or may not include Eastlink's Persona cable.

# Canada: St. Anns Bank proposed MPA

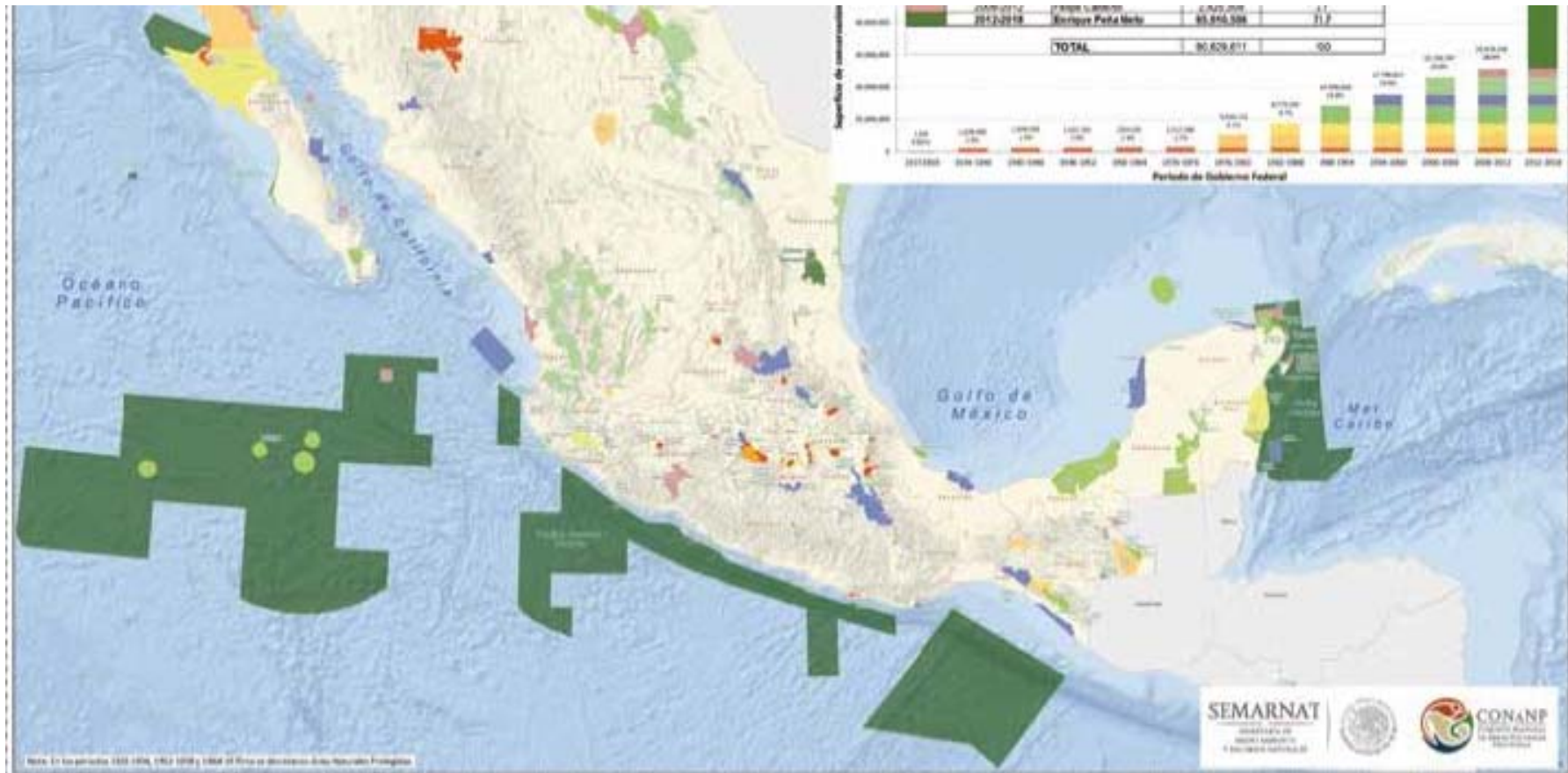




## Mexican marine biosphere reserves

- On December 7, 2016, Mexican President Enrique Peña Nieto issued decrees establishing four new marine biosphere reserves in the Pacific Ocean and Caribbean Sea.
- The reserves are administered by the Ministry of the Environment and Natural Resources, in cooperation with other Mexican Government agencies, including the Mexican Navy.
- The decrees authorize scientific, educational, and non-extractive activities.
- Consistent with the duties of the Mexican Navy, the decrees authorize infrastructure construction where required for external defense, internal security, or emergency response.
- The decrees authorize maintenance of existing fixed infrastructure, but do not include provisions authorizing installation of new submarine cables.
- A number of systems (including AMX-1, ARCOS, Maya-1, and SAm-1) transit the Caribbean biosphere reserve, while PAC transits one of the Pacific reserves.

# Mexico: new MPAs in the Pacific and Caribbean



## Industry call to action

- With the new U.S. MNM designations, the submarine cable industry has the opportunity to influence the rules that will govern activities in the monuments.
  - Each newly-designated monument is subject to a three-year implementation period, during which the U.S. Department of the Interior and NOAA must establish new management plans and regulations.
  - These implementation periods provide the submarine cable industry with the opportunity to enshrine rights and protections for existing and future submarine cables.
  - Submarine cable operators should be wary of NOAA's historical antipathy toward submarine cables.
  - As the rules will be developed during the Trump Administration, it's important for industry to consider what arguments are likely to succeed.
  - Arguments about overly-burdensome environmental regulation are likely to resonate, while international law-based arguments about UNCLOS and the limits of U.S. jurisdiction (although necessary) are unlikely to carry the day.
- Canada's DFO has developed an open process for consultations with stakeholders, providing further opportunities to influence Canadian MPAs.

## Continuing need for vigilance and promotion of cable awareness

- Creation of new marine protected areas by North American governments highlight the need for industry to continue to monitor the development of new marine protected areas and to participate consistently in proceedings regarding the creation and regulation of such areas.
- This is particularly true of MNMs by U.S. presidents, given the lack of public notice and consultation involved in MNM designation.
- As ever, governments need to understand the economic and national-security importance and pervasiveness of submarine cables.
- Industry also needs to continue to develop peer-reviewed research demonstrating the benign environmental characteristics of submarine cables.

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