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# Oil, Gas & Energy Law Intelligence

## The Potential Effect of Environmental Regulations, Citizen Suits on the Costs of Doing Business in the Arctic:

### A Comparison of U.S. and Norwegian Approaches

by C.E. Dinkins, M.E. Peloso and H. Veselka Vizcarra

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# *The Potential Effect of Environmental Regulations, Citizen Suits on the Costs of Doing Business in the Arctic: A Comparison of U.S. and Norwegian Approaches*

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## **I. Introduction**

The Arctic Ocean is believed to have one of the largest remaining undeveloped reserves of oil and gas in the world.<sup>1</sup> Interest in Arctic offshore exploration and development has grown over the last few years, and several companies have significant plans for new activities in the Arctic.<sup>2</sup> While the Arctic holds significant promise for new oil and gas development, its harsh conditions and fragile environment pose a number of unique challenges to the exploration and production industry. As activities in the Arctic expand, one of the major hurdles that companies desiring to conduct offshore operations in the region will have to overcome is obtaining environmental approvals for their proposed activities. This Article compares the regulatory systems of the United States and Norway and the likelihood of citizen group challenges environmental decisions made by regulators.<sup>3</sup> Reflecting on recent litigation in the Chukchi Sea and the Gulf of Mexico, we highlight the significant uncertainties and delays that can be associated with citizen suits. Ultimately, we conclude that although there remain regulatory distinctions, post-Deepwater Horizon reforms are bridging the gap between the U.S. and Norwegian regulatory systems. However, companies engaging in new exploration and production activities in the Arctic may prefer to minimize their uncertainty and operate in the territory of those countries where participatory governance structures reduce the likelihood of citizen group challenges to regulatory decisions.

## **II. Challenges of Arctic Spill Response**

The Arctic environment itself poses unique challenges for oil and gas exploration and production. Among these are the harsh climate conditions and presence of ice, which lead to shorter working seasons. A staff working paper for the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling describing the difficulties of spill

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<sup>1</sup> In 2008, the U.S. Geological Survey estimated the Arctic's technically recoverable resources at 90 billion barrels of oil, 1,669 trillion cubic feet of natural gas, and 44 billion barrels of natural gas liquids with 84 percent expected to be offshore. *Circum-Arctic Resources Appraisal*, USGS Fact Sheet 2008-3049, 2008. *See also*, National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, "The Challenges of Oil Spill Response in the Arctic," Staff Working Paper No. 5 at 3, Updated Jan. 11, 2011.

<sup>2</sup> *See, e.g. Exxon, Rosneft hint at joint plans*, UPI, Sept. 14, 2011 (Exxon Mobil and Rosneft reportedly aim to outline plans for work in the Russian arctic by the end of the year), *Exxon Readies for Arctic Gushers With Rosneft Deal*, FORBES, Sept. 12, 2011 (Exxon Mobil and Rosneft plan to explore Russian Arctic with a \$2.2 billion deal and BP, Statoil, and Royal Dutch Shell are also looking to explore the Arctic), and *Statoil to drill off Alaska Coast in 2014*, HERALD NEWS SERVICES, Sept. 14, 2011.

<sup>3</sup> The Arctic coastal states include the United States, Canada, Russia, Denmark, and Norway. These states came together in 2008 in Illulissat, Greenland for the Arctic Ocean Conference, a ministerial level conference, to discuss issues of mutual concern. However, the Arctic Council, an intergovernmental forum for cooperation and coordination of the use of the Arctic among the Arctic states, was started in 1998 and also includes Iceland, Sweden, and Finland. Information about the Arctic Council is available at [www.arctic-council.org](http://www.arctic-council.org).

response in the U.S. Arctic explains that both the Chukchi and Beaufort Seas present environmental conditions that call into question the effectiveness of common response methods.<sup>4</sup> Temperature, winds, and wave action limit responder access and impact dispersion and degradation of oil; locating oil among or captured in ice floes can be difficult and dangerous; and ice poses a physical barrier to mechanical recovery technology such as skimmers and booms.<sup>5</sup>

Some methods of response proposed for use in the U.S. Arctic rely on strategies and technologies that are untested in Arctic conditions. A “leave-in-place” strategy that tracks oil incorporated into ice in order to recover it once the ice melts has not been used during an actual spill.<sup>6</sup> Additionally, in-situ burning, a response technique used in the Deepwater Horizon response, could require chemical herders<sup>7</sup> of which there are none currently approved for use in Arctic waters and for which studies on effectiveness of in-situ burning in an Arctic environment have yielded varying results.<sup>8</sup> Similarly, a 2001 study found chemical dispersant less than 10% effective on the Alaska North Slope.<sup>9</sup> Concerns about toxicity of dispersants and the lengthened time that dispersed oil would remain in the ecosystem in Arctic waters also persist.<sup>10</sup> In addition, the potential interactions between oil and sea ice are poorly understood,<sup>11</sup> making it difficult to develop effective spill response technologies.

Staging a spill response in the U.S. Arctic would be far more difficult than in more developed and less remote regions, such as the Gulf of Mexico. The U.S. Arctic currently lacks the support infrastructure needed to marshal an adequate response. The Coast Guard has only one operational polar icebreaker, the *Healy*,<sup>12</sup> and would need additional icebreakers to respond to spills or emergencies if major drilling began in the Chukchi Sea. The nearest Coast Guard operations base to the Chukchi is about 1,000 miles from leasing sites, making it difficult to conduct search and rescue operations.<sup>13</sup> As a result, initial emergency and spill response activities would likely fall to industry and contractors. Even in the Beaufort Sea, which is much closer to shore, there is limited response capability. The small communities in the area can not presently support the large number of response personnel required to respond to a major incident.<sup>14</sup> Oil spill response contractors, such as Alaska Clean Seas (“ACS”), have limited offshore response capabilities.<sup>15</sup> ACS was established as a non-profit response

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<sup>4</sup> National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, “The Challenges of Oil Spill Response in the Arctic,” Staff Working Paper No. 5, Updated Jan. 11, 2011.

<sup>5</sup> *Id.* at 10-13.

<sup>6</sup> *Id.* at 13.

<sup>7</sup> Chemical herding agents force the oil slick to contract, shrinking the surface area, making in-situ burning more efficient. See, Rachel Kaufman, 3 *Future Oil-Spill Fighters: Sponges, Superbugs, and Herders*, NATIONAL GEOGRAPHIC NEWS (May 11, 2010) available at <http://news.nationalgeographic.com/news/2010/05/100511-science-environment-gulf-oil-spill-cleanup-future/>.

<sup>8</sup> *Id.* at 14-15.

<sup>9</sup> Adam Moles, Larry Holland, and Jeffrey Short, *Effectiveness in the Laboratory of Corexit 9527 and 9500 in Dispersing Fresh, Weathered, and Emulsion of Alaska North Slope Crude Oil under Subarctic Conditions*, Auke Bay Laboratory, 2001, available at <http://www.pwsrcac.org/docs/d0001400.pdf>.

<sup>10</sup> *Id.* at 15-16.

<sup>11</sup> There is contradictory research regarding how oil is transported through the ice via brine channels. *Id.* at 14.

<sup>12</sup> *Id.* at 18.

<sup>13</sup> *Id.* at 19.

<sup>14</sup> *Id.*

<sup>15</sup> *Oil Spill Prevention and Response In the U.S. Arctic Ocean: Unexamined Risks, Unacceptable Consequences*, Pew Environment Group, Nov. 2010.

co-operative for the North Slope onshore operations. It is unlikely that the amount of resources marshaled in the Gulf of Mexico for the Deepwater Horizon spill could be gathered in the U.S. Arctic under current conditions. More than one hundred aircraft and helicopters were used during the Deepwater Horizon response for aerial surveillance and tracking.<sup>16</sup> It is generally understood that similar resources are not yet available for rapid response in the U.S. Arctic. Response resources in the U.S. Arctic are presently located hundreds of miles from the drilling area, whereas in the Gulf of Mexico, spill response equipment was available immediately.<sup>17</sup>

Although the Norwegian Arctic faces some similar environmental challenges as the U.S. Arctic, it has more robust response capabilities for offshore drilling and has characteristics that make such response capabilities easier to amass than in the U.S. Arctic. The Norwegian Arctic does not have the sea ice that greatly complicates operations in the U.S. Arctic. In addition, unlike the remote nature of the U.S. Arctic, the northern Norway is a populated area with a number of cities that have substantial transportation, housing, and economic infrastructure, including significant airports, that would make a Deepwater Horizon-level response in the Barents Sea easier to conduct. As for the governmental response capabilities, as was described above, the U.S. Coast Guard has limited response capabilities in the U.S. Arctic. By contrast, northern Norwegian municipalities, that also have responsibility for response within their jurisdictions, the Norwegian Coast Guard, and the Norwegian Coastal Administration have substantial offshore response capabilities with equipment located across the Norwegian coast.<sup>18</sup>

There are significant differences in the private sector response capabilities as well. While Alaska Clean Seas is geared mostly towards work on the North Slope, Norway's equivalent private sector association, the Norwegian Clean Seas Association for Operating Companies ("NOFO") has substantial experience in offshore spill response in open seas and coastal waters in the Arctic. It was created following a blowout in the North Sea in 1977.<sup>19</sup> The organization maintains five bases with twenty full time employees and fifty reinforcement personnel pledged by operators as well as eighty people hired to maintain and operate oil spill response equipment at the bases.<sup>20</sup> NOFO provides tactical and operational command of private sector response resources for oil companies in the event of a spill. As is described in more detail below, the company responsible for the spill has overall responsibility for spill response from offshore facilities under Norwegian law, with the governmental response and coordinating responsibilities falling to the Norwegian Coastal Administration. NOFO's response resources include oil recovery vessels, towing vessels, ocean-going mechanical oil recovery systems, large stocks of dispersion agent, agreements for remote sensing from radar satellites, aircraft, helicopters, vessels and installations, oil recovery equipment for coastal operations, and a specialized task force for organizing and

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<sup>16</sup> *Id.* at 98.

<sup>17</sup> *Id.* at 99.

<sup>18</sup> Norwegian Coastal Administration, Department for Emergency Response, Presentation titled "Organisation of the Norwegian preparedness against acute pollution," available at [http://ec.europa.eu/echo/civil\\_protection/civil/marin/reports\\_publications/prestige\\_workshop\\_catania\\_documents/session1/presentation\\_mr\\_bratfoss.pdf](http://ec.europa.eu/echo/civil_protection/civil/marin/reports_publications/prestige_workshop_catania_documents/session1/presentation_mr_bratfoss.pdf).

<sup>19</sup> English overview available at [http://www.nof.no/modules/module\\_123/proxy.asp?D=2&C=107&I=349](http://www.nof.no/modules/module_123/proxy.asp?D=2&C=107&I=349).

<sup>20</sup> *Id.*

conducting shoreline operations.<sup>21</sup> NOFO conducts more than 100 exercises and verifications annually, including oil-on-water R&D and training exercises.<sup>22</sup> NOFO's resources are dispersed throughout Norwegian coastal areas in order to quickly respond to spills.<sup>23</sup> As mentioned above, Alaska Clean Seas was developed primarily for onshore operations in the North Slope. While it has some response capabilities for offshore operations, Alaska Clean Seas' primary activity and the majority of its equipment remains geared towards the North Slope, near-shore, and onshore water bodies.<sup>24</sup> In addition, the oil companies themselves, that are required to provide for oil spill contingencies, have deposits of equipment in various coastal locations.<sup>25</sup>

## II. Comparison of U.S. and Norwegian Regulatory Regimes

Norway's regulatory regime governing offshore exploration and development is generally regarded as among the most stringent in the world, and, in the aftermath of Deepwater Horizon, requirements with regard to oil spill preparedness and clean-up in the United States have become more robust. However, there are still significant differences between the legal standards in the United States and Norway. In Norway, the requirements imposed upon operators of offshore exploration and development activities derive from both the Petroleum Activities Act and the Pollution Control Act. Together, these Acts create an affirmative duty of pollution response and cleanup. In contrast, while new regulations require that a party demonstrate it has adequate resources to clean up a spill, the United States' legal regime has traditionally been more focused on the imposition of financial liability for spill cleanup than on creating a structure that governs who will conduct the cleanup.

This Part provides a brief overview of the process by which entities may obtain rights to explore portions of the outer continental shelf and the environmental approvals associated with such activities. This Article then describes the spill response planning and demonstration of financial capacity to respond to a spill required for approval to drill offshore.

### A. *Offshore Leasing and Permitting in the United States*

The Submerged Lands Act established that all submerged lands and resources associated therewith between 3 and 200 nautical miles from shore are property of the United States while the coastal submerged lands belong to the States.<sup>26</sup> Leasing of offshore areas for

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Norwegian Coastal Administration, Department for Emergency Response, Presentation titled "Organisation of the Norwegian preparedness against acute pollution," available at [http://ec.europa.eu/echo/civil\\_protection/civil/marin/reports\\_publications/prestige\\_workshop\\_catania\\_document\\_s/session1/presentation\\_mr\\_bratfoss.pdf](http://ec.europa.eu/echo/civil_protection/civil/marin/reports_publications/prestige_workshop_catania_document_s/session1/presentation_mr_bratfoss.pdf).

<sup>24</sup> Alaska Clean Seas Yearbook 2011 available at <http://www.alaskacleanseas.org/wp-content/uploads/2011/02/new-year-book-info-1-28.pdf>.

<sup>25</sup> Norwegian Coastal Administration, Department for Emergency Response, Presentation titled "Organisation of the Norwegian preparedness against acute pollution," available at [http://ec.europa.eu/echo/civil\\_protection/civil/marin/reports\\_publications/prestige\\_workshop\\_catania\\_document\\_s/session1/presentation\\_mr\\_bratfoss.pdf](http://ec.europa.eu/echo/civil_protection/civil/marin/reports_publications/prestige_workshop_catania_document_s/session1/presentation_mr_bratfoss.pdf).

<sup>26</sup> 43 U.S.C. §§1301-1315 (2002).

energy development in the United States is governed by the Outer Continental Shelf Lands Act (“OCSLA”).<sup>27</sup> Leasing and development of offshore energy resources under OCSLA is carried out by the Bureau of Ocean Energy Management (“BOEM”), within the Department of the Interior.<sup>28</sup>

The leasing process begins with BOEM developing a 5-year leasing plan for a particular area.<sup>29</sup> Under the 5-year leasing plan, BOEM will describe which lease blocks it intends to offer at auction.<sup>30</sup> The five-year leasing plan is then carried out through a series of sealed-bid auctions in which an applicant may obtain the right to conduct exploration and development activities in certain portions of the Outer Continental Shelf. Once a lessee has successfully obtained a lease from BOEM, it typically provides a 10-year exclusive right to conduct exploration and development activities in a particular area. Upon discovery of oil or gas within the initial period of the lease, the lease is automatically extended for as long as the well is producing in paying quantities or the lessee is conducting approved drilling operations.

Before a lessee can undertake any exploration activities in a particular lease block, it must submit to the Bureau of Safety and Environmental Enforcement (“BSEE”) for approval a spill response and exploration plan. This exploration plan will be subject to review under the National Environmental Policy Act (“NEPA”), described in more detail below. In addition, if endangered or threatened species are present in the area, BSEE may be required to consult with the Fish and Wildlife Service or the National Marine Fisheries Service under the Endangered Species Act or the Marine Mammal Protection Act before approving the exploration plan. Similarly, when a project proceeds to the production phase, activity cannot begin until BSEE has approved a lessee’s development plan. The development plan will be subject to the same environmental reviews that apply to the exploration plan.

In the aftermath of the Deepwater Horizon incident, the Bureau of Ocean Energy Management, Regulation and Enforcement (“BOEMRE”), now the BSEE and BOEM,<sup>31</sup> added several new requirements that must be met for the approval of both exploration and development plans. Notice to Lessees NTL2010-06 requires that all exploration and development plans submitted for approval must describe the worst-case discharge scenario. NTL2010-06 also requires the applicant to describe proposed measures to prevent a blowout,

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<sup>27</sup> 43 U.S.C. §§ 1331 et seq. (1988).

<sup>28</sup> These duties previously fell to the Minerals Management Service (“MMS”). However, the Obama Administration eliminated MMS and created the Bureau of Ocean Energy Management, Regulation and Enforcement (“BOEMRE”) to house the leasing and enforcement operations as part of its reorganization of the agency. Director Michael Bromwich was appointed to lead and revamp the agency. DOI Secretarial Order No. 3302 (June 21, 2010). The Administration split the leasing and enforcement aspects into two agencies on October 1, 2011, the Bureau of Ocean Energy Management (BOEM) to manage the leasing operations and the Bureau of Safety and Environmental Enforcement (BSEE) to cover enforcement. *Hearing on FY2012 Budget Before Subcomm. on Interior, Environment and Related Agencies of the H. Comm. on Approps.*, 112th Cong. (March 17, 2011) (statement of Michael Bromwich, Director, Bureau of Ocean Energy Management, Regulation and Enforcement).

<sup>29</sup> 43 U.S.C. § 1344(a).

<sup>30</sup> *Id.*

<sup>31</sup> As noted *supra* in note 24, BOEMRE was split on October 1, 2011 into the Bureau of Ocean Energy Management (BOEM) to manage the leasing operations and the Bureau of Safety and Environmental Enforcement (BSEE) to cover enforcement.

reduce the likelihood of a blowout, and conduct effective early intervention in the event of a spill.<sup>32</sup> In addition, under NTL2010-10, BSEE will evaluate all applications to determine whether lessees have submitted information demonstrating that they can deploy adequate containment resources to respond to a blowout or loss of well control.<sup>33</sup> On December 13, 2010, BOEMRE issued additional guidance for deepwater operators on complying with NTL2010-10.<sup>34</sup> The guidance outlined what should be included in a containment plan prepared for the purpose of complying with NTL2010-10. Offshore activities are also subject to Clean Water Act (“CWA”) and Clean Air Act (“CAA”) regulations and permitting requirements governing their emissions and discharges. The CWA requires any discharges into navigable waters of the U.S. to be permitted. In the case of a prohibited discharge, such as a spill, reporting of the incident is required.<sup>35</sup> Likewise, the CAA requires operators to obtain air permits that have similar reporting requirements in the event of a non-permitted release.

### *B. Offshore Leasing and Permitting in Norway*

The National Petroleum Directorate (“NPD”) and the Petroleum Safety Authority of Norway (“PSA”) oversee the resource management and safety, respectively, of the petroleum industry in Norway in conjunction with various Ministries. Additionally, the Norwegian Pollution Control Authority and Norwegian Social and Health Directorate cooperate with PSA on regulating health, environment and safety for offshore operations.<sup>36</sup>

Offshore leasing and permitting in Norway is carried out under the authority of the Crown under the 1996 Petroleum Activities Act. Before new areas can be opened to petroleum activities, the Ministry of Petroleum and Energy must conduct an evaluation of the impact of new petroleum activities in the area on trade, industry, and the environment.<sup>37</sup> By regulation, the Ministry must create a draft impact assessment plan and make it available for public comments for a minimum of six weeks.<sup>38</sup> The impact assessment itself must describe the presumed impacts of opening the area to petroleum activities and the impact of future petroleum activities in the area.<sup>39</sup> Once the draft assessment has been prepared, it must be submitted to all concerned authorities and central industrial organizations and also posted for public comment.<sup>40</sup> At the conclusion of the public comment period, which will typically last three months and must be at least six weeks, the Ministry must decide if additional

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<sup>32</sup> NTL No. 2010-N06 (“Blowout Scenario NTL”), June 18, 2010.

<sup>33</sup> NTL No. 2010-N10, BOEMRE, Nov. 8, 2010.

<sup>34</sup> Approval Requirements for Activities That Involve the Use of a Subsea Blowout Preventer (BOP) or a Surface BOP On a Floating Facility, Appendix C, Dec. 13, 2010, available at <http://www.boemre.gov/ooc/PDFs/DeepwaterDrillingComplianceInfo.pdf>.

<sup>35</sup> See 40 C.F.R. §§ 10.6, 117.21. See also 40 C.F.R. § 1103.3 for a definition of prohibited discharges.

<sup>36</sup> As a result, the HES regulations are issued under various acts including the Petroleum Act, Pollution Act, Product Control Act, Health Personnel Act, Patients’ Rights Act, Communicable Diseases Control Act, and Health related and Social Preparedness Act. Ministry of Petroleum and Energy presentation prepared for seminar in Oslo on May 30, 2007, available at <http://www.regjeringen.no/en/dep/oed/whats-new/news/2007/Norwegian-model-for-petroleum-activity.html?id=469802>.

<sup>37</sup> Petroleum Activities Act § 3-1.

<sup>38</sup> Royal Decree on Petroleum Activities § 6b.

<sup>39</sup> *Id.* § 6c

<sup>40</sup> *Id.*

assessments are needed.<sup>41</sup> Once the Ministry has concluded all necessary assessments, the proposal to open the new area must be submitted to Parliament for approval.<sup>42</sup> In general, the Ministry will announce areas of production for which it will grant leases and provide a minimum of 90 days for the submission of applications.<sup>43</sup> Production licenses, granting exclusive rights for exploration and production, may then be granted to appropriately registered individuals.<sup>44</sup>

The Ministry announces blocks for which it will accept production license applications, companies submit their applications, and then after negotiations the licenses are awarded. This process can take approximately eighteen months.<sup>45</sup> In assessing the applications, the technical expertise of the applicant related to development, research, safety, and the environment, its financial capacity, geological understanding, and experience in the Norwegian Continental Shelf and other locations are all taken into account in granting licenses.

The Norwegian Petroleum Directorate (“NPD”) and State Pollution Control Authority must approve all exploratory drilling. Prior to starting exploration activities, licensees must submit information required under the Resource Management Regulations to the Norwegian Petroleum Directorate, the Directorate of Fisheries, the Institute of Marine Research, and the Ministry of Defence.<sup>46</sup> These regulations also include requirements applicable to the surveys and vessels involved in the exploratory activity. Prior to drilling an exploratory well, the licensee must receive a permit from the NPD. Before beginning development, licensees must submit plans for development and operation of the petroleum deposit to the Ministry of Petroleum and Energy and Ministry of Labour with copies to the NPD and NPS.<sup>47</sup> The Ministry coordinates the approval process. The plan must include an overall plan for drilling and well activities as well as a Plan for Development and Operation (“PDO”).<sup>48</sup> As part of this approval process, the licensee must undertake an environmental and socio-economic assessment (ESIA) that is subject to public hearings before governmental approval. The ESIA contains a detailed account of the impacts on the environment that are anticipated from the proposed exploration and development activities.<sup>49</sup>

Licensees are subject to the requirements of Norway’s Pollution Control Act.<sup>50</sup> Under the Pollution Control Act, all persons engaged in exploration and production have a duty to prevent pollution, and in the event of pollution in violation of the Act, the responsible party must stop the pollution and mitigate any resulting damage or nuisance.<sup>51</sup> The Pollution

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* § 6d.

<sup>43</sup> Petroleum Activities Act § 3-5

<sup>44</sup> *Id.* § 3-3.

<sup>45</sup> Ministry of Petroleum and Energy presentation prepared for seminar in Oslo on May 30, 2007, *available at* <http://www.regjeringen.no/en/dep/oed/whats-new/news/2007/Norwegian-model-for-petroleum-activity.html?id=469802>.

<sup>46</sup> Resource Management Regulations, Ch. 2, § 4.

<sup>47</sup> Petroleum Activities Act § 4-2.

<sup>48</sup> Resource Management Regulations, Ch. 3, § 8.

<sup>49</sup> Petroleum Activities Act *Id.*

<sup>50</sup> Pollution Control Act § 4.

<sup>51</sup> *Id.* § 7.

Control Act also establishes a Pollution Control Authority with broad regulatory powers. In the event that an activity, such as oil and gas exploration in the Arctic, is proposed at a new site and has the potential to involve serious pollution, the project developer must notify the Pollution Control Authority of its plans.<sup>52</sup> Upon receiving such notice, the pollution control authority must determine whether an environmental impact assessment is necessary before the project may be permitted.<sup>53</sup> If an environmental impact statement is required, it must be made public and the Pollution Control Authority must convene a public hearing before making a final decision.<sup>54</sup> Norway's Pollution Control Regulations establish that any applicant for a permit under § 11 of the Act, which would include operators of oil and gas exploration and development activities, conduct an environmental impact assessment and provide a description of all measures to control pollution in the permit application.<sup>55</sup>

### C. *Spill Response and Financial Responsibility Requirements*

In Norway, the requirements imposed upon operators of offshore exploration and development activities come from both the Petroleum Activities Act and the Pollution Control Act. Together, these Acts create an affirmative duty of pollution response and cleanup. In contrast, while the new NTL2010-10 requires that a party demonstrate it has adequate resources to clean up a spill, the United States' legal regime has traditionally been more focused on the imposition of financial liability for spill cleanup than on creating a structure that governs who will conduct the cleanup.

Norway imposes an obligation to respond to a pollution incident on all persons responsible for the incident as well as an obligation to provide assistance to the governmental response. Under Norway's Petroleum Activities Act, a licensee must maintain efficient emergency preparedness at all times.<sup>56</sup> In the event of a release, the licensee has primary responsibility to respond and return the environment to a state that is as close as possible to pre-spill conditions.<sup>57</sup> In addition, the Ministry is granted the authority to require other licensees to make available necessary contingency resources and take other measures to obtain spill response resources in the event of an emergency.<sup>58</sup> In addition, Norway's Pollution Control Act requires all permittees whose activities may cause acute releases to have an emergency response system.<sup>59</sup> To fulfill this requirement, the party must provide the necessary emergency response equipment to prevent, detect, stop, remove, and limit the impact of the pollution.<sup>60</sup> An emergency response system will be deemed adequate when it is determined to be in reasonable proportion to the probability of acute pollution and the extent of damage that may arise.<sup>61</sup> In addition, Norway requires that operators demonstrate that they have the financial capacity to carry out a response activity, should one be necessary. Finally,

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<sup>52</sup> *Id.* § 13.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Pollution Control Regulations § 36-2.

<sup>56</sup> Petroleum Activities Act § 9-2.

<sup>57</sup> *Id.* § 9-2.

<sup>58</sup> *Id.*

<sup>59</sup> Pollution Control Act § 40.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

Norway's Pollution Control Act does give third parties with a legal interest in the matter the right to file claims for restitution for losses resulting from a pollution event.

NOFO, described in an earlier section, is private industry's main coordinating association for its spill response in addition to capabilities of individual operators. The required private industry response and contingency system is complimented by a municipal contingency system to combat pollution that occurs within its jurisdiction but which is not covered adequately by the polluter's response. In addition, the Norwegian government has its own contingency system developed to respond to major incidents and to coordinate response by all entities involved via the Norwegian Coastal Administration. The Norwegian Coastal Administration coordinates the response according to the national emergency response system.

In contrast, prior to the Deepwater Horizon incident, the United States' legal regime was almost exclusively focused on establishing financial liability for the damages caused by a spill, rather than on creating a structure for spill response. Passed in response to the *Exxon Valdez* incident, the Oil Pollution Act of 1990 establishes that a responsible party will be liable for all costs associated with the removal of oil from the environment as well as all damages to natural resources, property, revenues, or public services.<sup>62</sup> However, a party's liability for damages to private parties, in addition to the cost of removal, under the Oil Pollution Act is capped at \$75,000,000 for an offshore facility unless the spill was the result of a violation of regulations.<sup>63</sup> In the event of a spill at an offshore facility resulting in a discharge into waters of the United States, the operator may also face liability under the Clean Water Act, including civil penalties of up to \$32,500 per day and natural resource damages.<sup>64</sup>

While the United States' system thus establishes financial responsibility in the event of a spill, it does not impose the responsibilities for actual spill response that exist in the Norwegian scheme. However, the BOEM requirement that applicants for new development permits must demonstrate comprehensive spill response capabilities is already having a practical impact on the U.S. permitting process. NTL2010-10 and the guidance issued for it require an operator to demonstrate that it has access to and can deploy surface and subsea containment resources to adequately respond to a blowout or loss of well-control.<sup>65</sup> This includes addressing capabilities for debris removal and access to subsea containment and capture equipment, subsea utility equipment, riser systems, Remotely Operated Vehicles ("ROVs"), capture and support vessels, and storage facilities.<sup>66</sup>

The requirement that applicants for new development permits must demonstrate spill response preparedness will be of particular importance to operators of new facilities in the U.S. Arctic because of the unique challenges of Arctic spill response, described above. Thus,

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<sup>62</sup> 22 U.S.C. § 2701.

<sup>63</sup> *Id.* § 2704(a)(3).

<sup>64</sup> 33 U.S.C. § 1319(g), 40 C.F.R. § 19.4.

<sup>65</sup> Approval Requirements for Activities That Involve the Use of a Subsea Blowout Preventer (BOP) or a Surface BOP On a Floating Facility, Appendix C, Dec. 13, 2010, available at <http://www.boemre.gov/oc/PDFs/DeepwaterDrillingComplianceInfo.pdf>.

<sup>66</sup> *Id.*

the need to demonstrate spill response capacity may become a significant hurdle that must be cleared in obtaining permits for Arctic exploration and development activities and certainly brings the U.S. legal requirements closer to those of Norway. Shell, the first company to receive approval for an exploration plan in the U.S. Arctic since the Deepwater Horizon blowout included in its plans special response vessels, a stand-by rig for relief well drilling, and other resources to provide rapid response in the case of a spill or blowout.<sup>67</sup> This level of preparedness may become a standard requirement for any operations in the U.S. Arctic, where response capabilities are currently much more limited than in the Gulf. That said, BOEM's and BSEE's resources have been called into question as to their effectiveness at evaluating operators' response capabilities and enforcement of the regulations on the books.

### III. Ability of Citizen Groups to Bring Challenges

The other major factor to be considered in evaluating environmental permitting for new Arctic exploration and development is the ability of citizen groups to bring legal challenges that can impose significant delays in the permitting process. As described in the sections below, the powerful citizen suit provisions of United States' environmental laws create an avenue for third parties to challenge permitting decisions and delay planned exploration and development. While both U.S. and Norway's systems provide for public hearings throughout the licensing and permitting process, the U.S. citizen suit provisions provide a much more potent opportunity for the individuals to voice their opposition to offshore development and halt such development despite a governmental approval. As the regulatory regime in the U.S. moves closer to the stringent requirements of Norway, the complications that arise from citizen suits could, on balance, render the U.S. a less attractive location for Arctic exploration and development. Given the sensitivity of the Arctic ecosystem, environmental groups have already begun and will certainly continue to bring legal challenges in an attempt to halt Arctic exploration and development. This Part describes the two main statutes under which citizen suit challenges have been brought and provides a discussion of ongoing suits. This Part then describes the more limited right of public challenge that is available under Norway's Public Administration Act.

In the United States, individual citizens or citizen groups may file citizen suits and act as "private attorneys general" to enforce environmental laws against both the federal government and private parties. Most major environmental laws contain a citizen suit provision that expressly authorizes suits against the federal government for failure to perform certain non-discretionary duties under the statute and against private parties for particular violations of the law or permits required thereunder.<sup>68</sup> The basic idea of the citizen suit is that private citizens may supplement agency enforcement where the government's resources are too limited to prosecute all violators of environmental laws.<sup>69</sup> Citizen suits have played a

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<sup>67</sup> Shell Offshore Inc., Beaufort Sea Regional Exploration Oil Discharge Prevention and Contingency Plan (January 2010) available at [http://alaska.boemre.gov/ref/ProjectHistory/2012Shell\\_BF/2012x.HTM](http://alaska.boemre.gov/ref/ProjectHistory/2012Shell_BF/2012x.HTM).

<sup>68</sup> See, e.g., Toxic Substance Control Act, 15 U.S.C. § 2619 (2010); Endangered Species Act, 16 U.S.C. § 1540(g)(2010); Clean Water Act, 33 U.S.C. § 1365 (2010); RCRA, 42 U.S.C. § 6972 (2009); Clean Air Act, 42 U.S.C. § 7604 (2009); CERCLA, 42 U.S.C. § 9659 (2009).

<sup>69</sup> Andrew J. Currie, *The Use of Environmentally Beneficial Expenditures in Lieu of Penalties as Settlement of Lawsuits: A "Win-Win" Solution?* 1996 DET. C.L. REV. 653, 655

significant role in environmental enforcement in the United States: reportedly seventy-five percent of all environmental civil suits filed between 1973 and 2002 were citizen suits.<sup>70</sup>

#### A. *National Environmental Policy Act*

The National Environmental Policy Act (“NEPA”) applies to all major federal actions significantly affecting the human environment.<sup>71</sup> Major federal actions include the issuance of federal permits, use of federal funds, and federal policy decisions that result in the irretrievable commitment of resources.<sup>72</sup> Therefore, NEPA applies not only to the creation of 5-year leasing plans but also to BOEM’s decisions to approve individual exploration and development plans. NEPA requires that the environmental impacts of a project and alternatives, including the no action alternative, must be evaluated, but it does not require the agency to take any particular course of action once the environmental impacts have been assessed.<sup>73</sup> For each action that may have a significant impact on the environment, the federal agency must conduct an environmental assessment. The outcome of the environmental assessment will either be a finding of no significant impact, allowing the agency to proceed to make its decision on the project, or a decision to undertake a full environmental impact statement. Should an environmental impact statement be required, it can take over a year to collect and assemble the requisite environmental data.

While NEPA does not have a citizen suit provision, an agency’s failure to follow NEPA’s required procedures can be challenged under the Administrative Procedures Act. A NEPA challenge typically alleges either that an agency opted for an environmental assessment when a full environmental impact statement was required or that the environmental impact statement (EIS) prepared by the agency was inadequate because it failed to fully consider all appropriate, relevant information. NEPA litigation can be a source of significant delays in the permitting process. The litigation itself causes delays, and furthermore, if the citizen-plaintiffs are successful in their suit, the court may choose to remand the decision to the agency for preparation of an EIS or supplemental EIS. While such additional analyses are ongoing, the agency cannot issue any permits that depend upon them.

An important example of NEPA litigation regarding oil and gas activities in the Arctic is *Native Village of Point Hope v. Salazar*.<sup>74</sup> The case concerns lease sale number 193, which was held by the Minerals Management Service (now BOEM and BSEE) in February 2008. In their suit, a coalition of native Alaskan groups and environmental groups challenged the adequacy of the environmental impact statement covering the 5-year leasing program for the Chukchi Sea. Plaintiffs alleged that the EIS was inadequate for a number of reasons, including a failure to include essential missing information about the Chukchi Sea and a failure to evaluate the lease sale’s impact in the context of a warming climate.<sup>75</sup> On July 21, 2010, the District Court of Alaska issued a preliminary decision remanding the EIS to

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<sup>70</sup> James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 8 (2003).

<sup>71</sup> 42 U.S.C. § 4332.

<sup>72</sup> 40 C.F.R. 1508.18.

<sup>73</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (“NEPA itself does not mandate particular results”).

<sup>74</sup> *Native Village of Point Hope v. Salazar*, 730 F. Supp. 2d 1009, 1019 (D. Ak. 2010).

<sup>75</sup> *Native Village of Point Hope v. Salazar*, 2010 WL 2943120 (D. Ak. July 21, 2010).

BOEMRE for the incorporation of additional public comment and analysis of a hypothetical very large oil spill scenario.<sup>76</sup> The court order further enjoined all activity under lease sale 193 until BOEMRE corrected the deficiencies in its EIS.<sup>77</sup> This injunction was limited by an August 5, 2010 order in which the court stated that the injunction “does not apply to activities outside of Lease Sale 193 or to organizations not a party to this lawsuit, nor does it preclude BOEM<sup>78</sup> from issuing permits under its permitting authorities to Statoil or others or prohibit routine paper transactions relating to Lease Sale 193.”<sup>79</sup> BOEMRE released a draft Supplemental Environmental Impact Statement (“SEIS”) in October 2010 for public comment and a revised version of the draft in May 2011.<sup>80</sup> The agency issued a final supplemental EIS on August 18, 2011, ahead of the court’s October 3<sup>rd</sup> deadline.<sup>81</sup> This suit resulted in an almost four-year delay from the time of the original sale.

Similar efforts to halt Shell’s exploration plans in the Beaufort Sea have begun as well. In September, certain environmental groups along with the Village of Point Hope filed a petition with the Ninth Circuit for review of Shell’s offshore exploration plan for the Beaufort Sea tentatively approved by BOEMRE on August 4, 2011.<sup>82</sup> The petition challenges this approval of the exploration plan under both NEPA and OCSLA.

#### B. *Endangered Species Act*

The Endangered Species Act (“ESA”) provides protection for species listed as endangered or threatened. Among these protections are the designation of critical habitat for all endangered species and the prohibition on take of species.<sup>83</sup> “Take” is broadly defined under the ESA and can include killing, harming, harassing, or even disrupting the habitat of a listed species.<sup>84</sup> The ESA requires that a federal agency considering an action that may impact an endangered or threatened species consult with either the U.S. Fish and Wildlife Service (“FWS”) or National Marine Fisheries Service (“NMFS”) before taking a final action.<sup>85</sup> If impacts are expected to be insignificant, such consultation may be informal. However, in most cases, the consultation will require FWS or NMFS to issue a biological opinion detailing the potential impacts of the proposed action on an endangered species and its designated critical habitat. The project may proceed only if the biological opinion concludes that the proposed action will not jeopardize the continued existence of the

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<sup>76</sup> *Native Village of Point Hope v. Salazar*, 730 F. Supp. 2d 1009 (D. Ak. 2010).

<sup>77</sup> 2010 WL 2943120 at \*7.

<sup>78</sup> The agency at the time was BOEMRE, BOEM did not yet exist. However, the court referred to the agency as BOEM.

<sup>79</sup> *Native Village of Point Hope v. Salazar*, 730 F. Supp. 2d 1009, 1019 (D. Ak. 2010).

<sup>80</sup> BOEMRE Press Release, “BOEMRE Releases Final Supplemental Environmental Impact Statement for Chukchi Sea Lease Sale 193,” Aug. 18, 2011, available at <http://www.boemre.gov/ooc/press/2011/press0818a.htm>.

<sup>81</sup> Final Supplemental Environmental Impact Statement, Chukchi Sea Planning Area, Oil and Gas Lease Sale 193, OCS EIS/EA BOEMRE 2011-041, Aug. 2011, available at [http://alaska.boemre.gov/ref/EIS\\_EA/2011\\_041\\_FSEIS/2011\\_041x.htm](http://alaska.boemre.gov/ref/EIS_EA/2011_041_FSEIS/2011_041x.htm).

<sup>82</sup> See, Greg Ryan, *Enviros to Challenge Shell’s Arctic Drilling Plan*, LAW360, Sept. 29, 2011.

<sup>83</sup> 16 U.S.C. §§ 1534, 1538.

<sup>84</sup> 16 U.S.C. § 1532(19).

<sup>85</sup> 16 U.S.C. § 1536.

species.<sup>86</sup> If a private party plans to engage in an activity that may result in the take of an endangered species, it must obtain an incidental take permit.<sup>87</sup>

The ESA has an express citizen suit provision that permits citizens to sue to enjoin any person from taking an endangered species or compel the United States to comply with the requirements of the Act.<sup>88</sup> Environmental groups have often filed ESA challenges to offshore oil and gas activities that will impact listed marine mammal species. In fact, several groups have filed a notice of intent to sue Interior, BOEMRE, the NMFS, and the FWS for violating the Marine Mammal Protection Act (“MMPA”) and the Endangered Species Act when approving ten projects in the Gulf of Mexico.<sup>89</sup> Plaintiffs allege that the agencies’ approval of these activities violated the ESA and MMPA because the approvals are agency actions that require consultation with NMFS under the ESA and results in a “take” of marine mammals without the authorization of the NMFS. In addition, the Southern Environmental Law Center filed a suit on behalf of Defenders of Wildlife challenging 221 drilling leases issued since the Deepwater Horizon incident because BOEMRE allegedly did not consider the impact of the spill in its environmental reviews of the leases.<sup>90</sup> They cite both NEPA and the ESA in that suit.

Given the significant number of endangered species in the Arctic, including the recently-listed polar bear, that are characterized as under threat from a number of other environmental stressors such as climate change, it is reasonable to expect numerous citizen suits will be filed with respect to the potential endangered species impacts of Arctic exploration and development. In addition, the other required procedures of the ESA may introduce additional delays in permitting. For example, Shell’s newly-approved exploration plan for the Chukchi Sea is a conditional approval that does not permit any exploration activities until critical habitat consultation for the polar bear is completed. Even after the critical habitat consultation is completed, there is a risk of a citizen suit challenge, in part because such lawsuits are so easy to file in the U.S.

### C. *Petitions for Review under Norway’s Public Administration Act*

In contrast to the citizen suit system in the United States, a citizen’s right to seek review in Norway is limited. Norway’s Public Administration Act provides certain limited rights for agency review and public challenge but not for judicial review. Review of Activities under the Pollution Control Act expressly arises under Norway’s Public Administration Act.<sup>91</sup> Given the structure of the Public Administration Act, it would also appear that decisions made under the Petroleum Industries Act could be challenged. The Public Administration Act permits individual administrative decisions to be appealed by a party or any other individual with a legal interest in the case.<sup>92</sup> The Act specifies that such

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<sup>86</sup> 16 U.S.C. § 1536(c).

<sup>87</sup> 16 U.S.C. § 1539.

<sup>88</sup> 16 U.S.C. § 1640(g).

<sup>89</sup> Notice of Intent to Sue, February 9, 2011, available at [http://www.biologicaldiversity.org/campaigns/ocean\\_noise/pdfs/NOI\\_letter\\_re\\_GOM\\_activities\\_Feb11.pdf](http://www.biologicaldiversity.org/campaigns/ocean_noise/pdfs/NOI_letter_re_GOM_activities_Feb11.pdf).

<sup>90</sup> *Judge rules environmental group can pursue lawsuit over oil drilling leases*, ASSOCIATED PRESS, May 24, 2011.

<sup>91</sup> See Pollution Control Act § 85

<sup>92</sup> Public Administration Act § 28.

appeals will be made to the next most senior agency.<sup>93</sup> In the case of the Pollution Control Act, decisions taken by the Pollution Control Authority may be appealed to the Ministry of the Environment.<sup>94</sup> Review of decisions by the National Petroleum Directorate under the Petroleum and Resource Management Regulations can be appealed to the Ministry of Petroleum and Energy.<sup>95</sup> Unless otherwise provided by the King, the Public Administration Act prohibits additional appeal beyond the first agency appeal, meaning that there is no right to judicial review of an agency decision made under the Act.<sup>96</sup>

As neither the Pollution Control Act nor the Petroleum Activities Act provides an independent means for citizens to seek judicial review, the right of citizens to challenge agency decisions related to exploration and development in the Arctic is limited to a single administrative appeal. Furthermore, the Public Administration Act requires that any such appeal be filed within three weeks of the date of notification of an administrative decision.<sup>97</sup>

Furthermore the most important aspect in shaping whether citizen suits will be filed may be the structure of Norwegian petroleum governance as a whole rather than the existence of legal means by which a challenge may be brought. In a recent presentation, the Norwegian Minister of Foreign Affairs highlighted Norway's leadership role in the development of ecosystem based management in the Arctic,<sup>98</sup> and that Norway views its participatory resource governance model as a major strategic resource to be exported.<sup>99</sup> Thus, it is possible that Norway's governance structure, which employs a system that evaluates competing uses and emphasizes public dialogue may result in regulatory decisions that are less likely to be challenged. Therefore companies wishing to pursue exploration and development in the Norwegian Arctic face a much lower risk of delay from citizen challenges.

#### **IV. Conclusions**

Norway has traditionally had a more stringent regulatory system governing offshore drilling and oil response responsibilities than the United States. However, changes to the permitting approval process in the U.S. post-Deepwater Horizon have made U.S. requirements tougher. Even so, the two systems differ in that Norway places primary legal responsibility for cleanup with the operators while the U.S. primarily places financial responsibility with the operators and responsibility for organizing the response with the government. As the two countries' regulatory requirements become more comparable, the differences in the possibility of facing citizen suits may become a more important distinction for operators. The long delays in obtaining clearance to drill that operators can face from citizen suits in the United States can make operating in the U.S. Arctic less predictable and thus less attractive than similar operations in Norway, which limits this type of challenge in

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<sup>93</sup> *Id.*

<sup>94</sup> Pollution Control Act § 85.

<sup>95</sup> See Preface of Resource Management Regulations, 18 June 2001.

<sup>96</sup> Public Administration Act § 28.

<sup>97</sup> *Id.* § 29

<sup>98</sup> Jonas Gahr Støre, The High North Visions and Strategies (2011), available at [http://www.regjeringen.no/upload/UD/Vedlegg/Nordområdene/UD\\_nordomrodene\\_innmat\\_EN\\_web.pdf](http://www.regjeringen.no/upload/UD/Vedlegg/Nordområdene/UD_nordomrodene_innmat_EN_web.pdf).

<sup>99</sup> Jonas Gahr Støre, Presentation to the Houston World Affairs Council (Jan. 6, 2012).

its system. Norway's lack of judicial review opportunities mean that permitting and licensing decisions do not face the possibility of such lengthy delays. In addition, questions of funding and resources continue to plague the U.S. system, limiting Coast Guard response capabilities and slowing down the permitting approval process. This uncertainty may also encourage operators to look to a more stable and established offshore regulatory system such as Norway's, particularly when paired with the limited ability to challenge governmental permitting and approval decisions. Additionally, environmental factors such as the greater accessibility and lack of sea ice in the Norwegian Arctic may make it a more inviting location within which to operate.

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