



Arctic Offshore Oil and Gas Guidelines White Paper No. 3

Northern Communities - Participation in Decision Making in the United States and Canada

The Arctic Council¹ endorsed the latest version of the Arctic Offshore Oil and Gas Guidelines (AOOGG) in April 2009. The AOOGG were prepared by the Protection of the Marine Environment Working Group (PAME) and are “intended to define a set of recommended practices and outline strategic actions for consideration by those responsible for regulation of offshore oil and gas activities” in the Arctic.

As active participants in the Arctic Council, the United States and Canada have the potential to demonstrate model practices for offshore oil and gas development in the Western Arctic, especially as each country reviews its procedures in light of the fatal Deepwater Horizon explosion in the Gulf of Mexico in April 2010. This paper outlines national laws and regulations existing at the time of the accident and how both countries, as they revisit these, can use Arctic Council guidelines to more effectively incorporate participation by “Arctic indigenous communities” (the term used by the AOOGG) in decision making related to offshore development. This series focuses on the Western Arctic because both the United States and Canada have jurisdiction over marine areas there and share a maritime boundary in the Beaufort Sea.

For a survey of the offshore permitting process in each country, a list of references, and a description of this White Paper Series please refer to the Overview accompanying this White Paper No. 3, also available at www.vermontlaw.edu/energy/news.

¹ The Arctic Council was established in 1996 as a “high level intergovernmental forum” to promote cooperation, coordination and interaction among the eight Arctic states (Canada, Denmark/Greenland, Finland, Iceland, Norway, Sweden, the Russian Federation and the United States) with significant involvement from Arctic indigenous communities and other Arctic inhabitants.

I. Arctic Indigenous Communities - Participation in Decision Making in the AOOGG

The Arctic Council Guidelines, or AOOGG, invoke public participation or the interests of northern and indigenous peoples and communities in many contexts, but Chapter 2 focuses on the heart of the matter. The chapter opens by asserting that offshore oil and gas activity should be conducted to avoid adverse impacts on “Arctic indigenous communities,” a term that this White Paper adopts. Section 2.2 provides “In planning and executing offshore oil and gas operations, necessary measures should be taken, in consultation with neighboring indigenous communities, to recognize and accommodate the cultural heritage, values, practices, rights and resource use of indigenous residents.” Under Section 2.4 Arctic states “should pursue regulatory and political structures that allow for participation of indigenous people and other local residents in the decision making process as well as the public at large” and ... “improve cross-cultural communication methods to ensure full and *meaningful* participation of indigenous residents including procedures to incorporate local knowledge” (emphasis added).

Elsewhere in the Guidelines, the Goals for Environmental Protection (Part 1.2) include planning and conducting oil and gas activities to avoid:

- (i) “adverse effects on livelihoods, societies, cultures and traditional lifestyles for northern and indigenous peoples”; and
- (ii) “adverse effects to subsistence hunting, fishing and gathering.”

AOOGG General Principles (Part 1.3) include Sustainable Development, under which Arctic governments “should be mindful of their commitment” to, inter alia, “integration of environmental and social concerns into all development processes” and “broad participation in decision making.” Under Institutional Strengthening in the Regional Context (Part 1.6), the Guidelines identify the need for mechanisms to “enable government agencies, local communities and non-governmental organizations to participate as appropriate in environmental management” and for “[e]fforts to establish effective communication with local residents for all processes involved in oil and gas activities,” including “adequate advance notice ... of public consultation meetings that take into account local communities harvesting, hunting and fishing annual schedules.”

Section 3.6 of AOOGG, Environmental Impact Assessments, emphasizes the ongoing nature of consultation, which “in general ... should commence at the planning stage and continue throughout the lifetime of a project.” States should “consult and cooperate with the indigenous peoples concerned through their own representative institutions in order to understand and integrate their needs and concerns with any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources, such as oil and gas.

II. Arctic Indigenous Communities - Participation in Decision Making in the U.S.

Of the several U.S. federal laws governing offshore oil and gas development, the Outer Continental Shelf Lands Act (OCSLA)² is the most broadly applicable. The following discussion also refers to other federal rules on a selected basis but does not cover State law.³ Multiple federal agencies are involved in permitting offshore activity in the Arctic. As of July 14, 2010, the Department of the Interior (DOI) delegates OCSLA responsibilities formerly handled by the Minerals Management Service (MMS) to three newly established Interior agencies: the Bureau of Ocean Energy Management, Bureau of Safety and Environmental Enforcement, and Office of Natural Resources Revenue.⁴ The Alaska Region office is responsible for regulating offshore oil and gas activity in the U.S. Arctic. Among the agencies and acts involved, the DOI's Fish and Wildlife Service (FWS) splits oversight of authorizations under the Marine Mammal Protection Act (MMPA)⁵ with the National Marine Fisheries Service (NMFS), which is in the Department of Commerce under the National Atmospheric and Oceanic Administration (NOAA). The Environmental Protection Agency (EPA) oversees permitting under the Clean Air Act (CAA), and the Clean Water Act (CWA).⁶ State and federal agents interact under the Coastal Zone Management Act (CZMA),⁷ while federal activities are the primary focus of the various Executive and Secretarial Orders discussed below with the Alaska Native Claims Settlement Act (ANCSA) and the Alaska National Interest Lands Conservation Act (ANILCA).⁸

Outer Continental Shelf Lands Act (OCSLA)

Provisions specific to Alaska Natives do not appear in the regulations for "Oil and Gas and Sulphur Operations in the Offshore," 30 CFR Part 250, implemented under OCSLA before the Deepwater Horizon incident. However, the Director of MMS (and, presumably, its successor agencies), acting for the Secretary of the Interior, is to regulate all operations under OCSLA to "(d) [c]ooperate and consult with affected States, local governments, other interested parties, and relevant Federal agencies." 30 CFR § 250.106(d). OCSLA itself provides for comments from the public as part of developing the draft and final five-year lease programs mandated for all lease areas as a whole. Public comment is also solicited on the Environmental Impact Statement (EIS) conducted as part of required scoping of federal projects under the National Environmental Protection Act (NEPA). NEPA's implementing regulations require the lead agency on a project to invite comment from "Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons." 40 CFR § 1501.7. Such comments are also required for subsequent lease sales of individual and grouped blocks as they are leased under the five-year plan. Under OCSLA, developers

² OCSLA, 43 USC § 1331 et seq.

³ See Overview accompanying this White Paper No. 3, available at www.vermontlaw.edu/energy/news for an introduction to the federal U.S. and Canadian offshore regulatory processes.

⁴ DOI Secretary Salazar "ordered the restructuring of the Minerals Management Service on May 19, 2010, separating the agency's resource management, safety and environmental oversight, enforcement and revenue-collection responsibilities and reassigning those functions to three newly established Interior agencies... These three new entities will replace the Bureau of Ocean Energy Management, Regulation and Enforcement (BOEM). In June, Salazar renamed the Minerals Management Service to be BOEM." DOI Press Release July 14, 2010. See also DOI Secretarial Order 3302, June 18, 2010.

⁵ MMPA, 16 USC § 1361 et seq.

⁶ CAA, 42 USC § 7401 et seq.; CWA, 33 USC § 1251 et seq.

⁷ CZMA, 16 USC § 1451 et seq.

⁸ ANCSA, 43 USC § 1601 et seq.; ANILCA, 16 USC § 3120 et seq.

Implementing the Arctic Offshore Oil and Gas Guidelines in the United States and Canada

submitting individual Exploration Plans (EP) and Development and Production Plans (DPP) must submit environmental impact analysis (EIA) information, which is to include a list of agencies and persons with whom they have consulted or will consult regarding potential impacts associated with the proposed activities. 50 CFR § 250.221 and § 250.261. For more on environmental considerations, see White Paper No. 2 “Environmental Monitoring” in this series, available at www.vermontlaw.edu/energy/news.

Marine Mammal Protection Act (MMPA)

The MMPA regulations authorize two tools involving consultation with local communities about potential impact of offshore activity on wildlife: i) Incidental Harassment Authorizations (IHAs) for nonlethal harm over a one-year period and ii) Incidental Take Authorizations/Letters of Authorization (LOA) for anticipated lethal, unintentional taking of small numbers of marine mammals over a five year period. These are exempted from public notice and comment, but applicants must consult with subsistence communities to discuss potential conflicts with subsistence hunting and respond to any concerns in a Plan of Cooperation (POC).⁹ Authorizations are issued only on showing of a negligible impact on the mammals and a not unmitigable impact on subsistence. Regulations for such take must effect the least practicable adverse impact. IHAs or LOAs must be provided in connection with plans to conduct specific exploration activities.

Individual OCSLA lease sales contain both “Stipulations” and “Information to Lessees” that are specific to the lease area, requiring consultation parallel to MMPA regulations, e.g. with “potentially affected communities and appropriate subsistence user organizations” to discuss proposed operations and avoidance and mitigation measures.¹⁰ FWS and NMFS regulations require operators to design and implement a POC to mitigate the potential for conflicts between traditional subsistence activities and the proposed operator activity. 50 CFR § 18.124(c)(4) and 50 CFR § 216.104(a)(12). NMFS administers IHA and LOAs for whales, sea lions and seals, and the FWS does so for polar bear and Pacific Walrus.

In addition, MMPA Section 119, added by amendment in 1994, allows the relevant department Secretary to “enter into cooperative agreements with Alaska Native organizations to conserve marine mammals and provide co-management of subsistence use by Alaska Natives.”¹¹ In 2006, the Indigenous Peoples Council for Marine Mammals and the two federal agencies administering the MMPA (FWS and NMFS) entered into an umbrella agreement on how to negotiate these section 119 cooperative agreements.¹²

Clean Air Act (CAA) and Clean Water Act (CWA)

Developers of offshore projects must demonstrate compliance with all permitting requirements under the CWA and CAA. Interested parties can comment on every permit required under the CWA National Pollutant Discharge Elimination System for all facilities that discharge pollutants from any point source into waters of

⁹ 50 CFR § 18 (6)(i) Community Consultation.

¹⁰ 50 CFR § 18.118(6)(i).

¹¹ 16 USC § 1388(a).

¹² MEMORANDUM OF AGREEMENT FOR NEGOTIATION OF MARINE MAMMAL PROTECTION ACT SECTION 119 AGREEMENTS among U.S. Department of Commerce National Marine Fisheries Service, U.S. Department of Interior Fish and Wildlife Service and Indigenous Peoples Council for Marine Mammals, October 30, 2006. The Alaska Native Organizations covered by the umbrella agreement include but are not limited to “Alaska Native Tribes, and tribally authorized co-management bodies.”

Implementing the Arctic Offshore Oil and Gas Guidelines in the United States and Canada

the United States. Public comments on the draft permit may or may not affect the final permit, which the EPA develops to document the process and decisions for the administrative record.¹³ Similar rules apply to public participation in commenting on permits issued under the Clean Air Act. No specific CWA or CAA provisions exist for public comment by Alaska Natives as an identified group. The issuance of CWA and CAA permits may be appealed to the EPA Environmental Appeals Board.

Coastal Zone Management Act (CZMA)

The federal CZMA, which NOAA administers, provides for public participation in such matters as federal review of a coastal state's performance in carrying out coastal zone management (CZM) plans adopted by the state or by communities in the state.¹⁴ Recent amendments to the State of Alaska's CZM program (ACMP), and concerned reactions from northern districts, led NOAA to encourage the Alaska Coastal Management Program "to improve communication with coastal districts to rebuild relationships and support their participation in the Program"¹⁵ and Alaska legislators to introduce bills addressing the situation.¹⁶

Alaska-specific Federal Legislation; Executive and Secretarial Orders

Under two federal acts, the 1971 Alaska Native Claims Settlement Act (ANCSA) and the 1980 Alaska National Interest Lands Conservation Act (ANILCA), the scope of Alaska Native subsistence rights on the OCS, which is under federal jurisdiction, remains unresolved.¹⁷ While neither Arctic- nor OCS-specific, several Executive Orders and Memoranda create obligations for those acting on behalf of the federal government in their interactions with Alaska Natives. The Orders cover Consultation and Coordination with Indian Tribal Governments, Indian Sacred Sites, and Environmental Justice.¹⁸ Under the Consultation and Coordination order each federal agency "shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications"¹⁹ and consultation is to occur "early in the process of developing the proposed regulation."²⁰ One result of the Environmental Justice order, which requires agencies to consult with tribal leaders on steps taken thereunder, is that all federal agencies must gauge the potential impact of Outer Continental Shelf (OCS) exploration, extraction, and transport activities on vulnerable populations. Department-level Secretarial orders also play a role, for example, under the 1995 American Indian and Alaskan Native Policy of the US Department of

¹³ 40 CFR § 124 et seq.

¹⁴ 16 USC § 1455 & 1458. (Section 312).

¹⁵ NOAA, Office of Ocean and Coastal Resource Management, National Ocean Service, Final Evaluation Findings 2002-2007, Alaska Coastal Management Program Evaluation July 2008, 12, 27.

¹⁶ See, e.g. Alaska, 26th Legislature (2009-2010), SB 4 Senate Bill 4 and HB House Bill 74, "An Act relating to the Alaska coastal management program; and establishing the Alaska Coastal Policy Board" (introduced in January 2009).

¹⁷ See *People v. Gambell v. Clark*, 746 F.2d 572 (9th Cir. 1984) (Gambell I), *People v. Gambell v. Hodel*, 774 F.2d 1414 (9th Cir. 1985) (Gambell II), *People of Gambell v. Hodel*, 869 F.2d 1273 (9th Cir. 1989)(Gambell III), *Village of Gambell v. Babbitt*, 999 F.2d 403 (9th Cir. 1993)(Gambell IV), and *Energy, Economics and the Environment* (3d ed.), Fred Bosselman, Jim Rossi, David Spence, Joel Eisen and Jacqueline Lang Weaver (Foundation Press, forthcoming 2010), 300 ff.

¹⁸ Executive Order 13175 of November 6, 2000, on Consultation and Coordination with Indian Tribal Governments; Executive Order 13007 of May 24, 1996, on Indian Sacred Sites, and Executive Order 12898 on Environmental Justice, February 11, 1994. See also the (Clinton) Presidential Memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments, Federal Register, Vol. 59, No. 85, p. 22951, and (Obama) Presidential Memorandum of November 5, 2009, Memorandum for the Heads of Executive Departments and Agencies, Tribal Consultation, Federal Register, Vol. 74, No. 215, p. 57879.

¹⁹ Federal Register, Vol. 65, No. 218, Thursday, November 9, 2000, 67249, Section 5(a).

²⁰ Id. Section 5(b)(2)(A).

Implementing the Arctic Offshore Oil and Gas Guidelines in the United States and Canada

Commerce (where NOAA resides), the Department will “consult and work with tribal governments before making decisions or implementing policy, rules or programs that may affect tribes to ensure that tribal rights and concerns are addressed.”²¹ The general pattern across these orders, memoranda and acts is one of giving the initiative to the government to solicit input and begin consultation rather than to Alaska Native groups to request participation or begin consultation.

III. Arctic Indigenous Communities - Participation in Decision Making in Canada

The federal government is responsible for offshore oil and gas development in Canada’s North. The Department of Indian Affairs and Northern Development (DIAND) and the National Energy Board (NEB) have independent but complementary roles. DIAND administers the rights to oil exploration and the NEB authorizes drilling on the OCS. While the same rules apply across the Canadian Arctic, this white paper series focuses on the Western Arctic, where both Canada and the United States have jurisdiction.²² The 1984 Inuvialuit Final Agreement,²³ a negotiated agreement between representatives of the Inuvialuit and the Government of Canada, establishes environmental impact screening structures that provide for Inuvialuit input into development decisions. Two important pieces of federal legislation for this White Paper are the Canada Petroleum Resources Act (CPRA)²⁴ and the Canada Oil and Gas Operations Act (COGOA)²⁵ and their regulations; the Canada Environmental Assessment Act (CEAA)²⁶ and Oceans Act²⁷ are also each discussed briefly. Finally, Section 35 of the Constitution Act²⁸ and subsequent case law regarding the governmental fiduciary relationship to and duty to consult with Aboriginal peoples bear mention but, given the complexity of this evolving area of the law, are not dealt with in detail.²⁹

Inuvialuit Final Agreement (IFA)

Inuvialuit representatives provide input regarding offshore oil and gas development decisions on federal Crown Lands in the Inuvialuit Settlement Region (ISR), even though under the IFA the Inuvialuit ceded their

²¹ Secretary of the Department of Commerce, American Indian and Alaskan Native Policy of the US Department of Commerce, March 30, 1995 (DOC Order), “Policy Principles” 5. See also, e.g., Secretaries of the Department of Commerce and Department of Interior, ORDER NO. 3225, January 19, 2001, Endangered Species Act and Subsistence Uses in Alaska (Supplement to Secretarial Order 3206), which references the 1995 DOC Order.

²² The Yukon’s oil and gas powers under the Yukon Act generally do not include the offshore so they are not discussed further here. See Overview accompanying this White Paper No. 3, available at www.vermontlaw.edu/energy/news for an introduction to the federal U.S. and Canadian offshore regulatory processes.

²³ Inuvialuit Final Agreement between The Committee for Original Peoples’ Entitlement and the Government of Canada, June 5, 1984, as amended January 15, 1987. Implementing legislation: Western Arctic (Inuvialuit) Claims Settlement Act, S.C. 1984, c. 24.

²⁴ R.S.C. 1985, c. 36 (2nd Supp.)

²⁵ R.S.C. 1985, c. 0-7.

²⁶ S.C. 1992, c. 37.

²⁷ S.C. 1996, c. 31.

²⁸ Canada Constitution Act, pt. II § 35, 1982, Schedule B to the Canada Act ch. 11 (U.K.) 1982: “(1) The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, ‘Aboriginal peoples of Canada’ includes the Indian, Inuit and Métis peoples of Canada. (3) For greater certainty, in subsection (1) ‘treaty rights’ includes rights that now exist by way of land claims agreements or may be so acquired.”

²⁹ For an introduction to these issues see, e.g., Mary C. Hurley, The Crown’s Fiduciary Relationship with Aboriginal Peoples, Library of Parliament, Law and Government Division, 10 August 2000, Revised 18 December 2002.

Implementing the Arctic Offshore Oil and Gas Guidelines in the United States and Canada

rights in the offshore areas adjacent to the NWT and in the NWT itself.³⁰ The submarine areas of the ISR are federal Crown lands, to which the Crown holds surface and sub-surface rights.³¹ Under IFA section 11.(1), development in the ISR is subject to environmental impact screening if requested by the Inuvialuit. “Development” includes “[a]ny commercial or industrial undertaking, including support and transportation facilities related to the extraction of non-renewable resources from the Beaufort Sea, other than commercial wildlife harvesting.”³² In addition, section 7.(82) of the IFA calls for an area-specific land-use planning group for the ISR and mandates that native and Inuvialuit participation shall be equal to government participation. Aspects of the relationship between land claims agreements and the governmental duty to consult remain unresolved and the Supreme Court of Canada is currently considering related questions.³³

Canada Petroleum Resources Act (CPRA)

The CPRA applies to on- and offshore areas in the Inuvialuit Settlement Region (ISR), which covers the Canadian waters of the Beaufort Sea. The Northern Oil and Gas Directorate of DIAND bears primary responsibility for administering CPRA in the Northwest Territories (NWT). The first step in issuing and managing oil and gas interests involves a call for nominations of lands to be included in a bid. At this stage, “it is the practice of DIAND to consult with the Inuvialuit, other northerners, and the government of the Northwest Territories.”³⁴ Requirements arising from any relevant land claims agreements are specified in the call for bids.³⁵ In the past, co-management councils created by the IFA have provided grounds for support or non-support of a development. For example, based on the Beluga Management Plan³⁶ and pending “further work on Marine Protected Area Planning ... the Inuvialuit Game Council [IGC] and Inuvialuit Regional Corporation [IRC] adopted in 2001 an interim position opposing hydrocarbon exploration or development within Beluga Management Zone 1a”³⁷ (covering 1,716 km² in the Mackenzie Bay, Kendall Island and Kugmallit Bay areas). Procedures do not appear designed to address requests received independently of the standard statutory leasing process, such as that of the Inuvialuit Regional Corporation for a delay in the

³⁰ The Inuvialuit ceded all aboriginal rights to “adjacent offshore areas ... within the sovereignty or jurisdiction of Canada,” IFA s. 3.(4), but the ISR itself is defined to include the Beaufort Sea. See also The Regulatory Roadmaps Project, Oil and Gas Approvals in the Northwest Territories - Inuvialuit Settlement Region, 2001, A Guide to Regulatory Approval Processes for oil and natural gas exploration and production in the Inuvialuit Settlement Region, June 2001, at 9-2: In 1987 the IGC gave DIAND formal notice “that all developments in the ISR offshore on Crown lands within the ISR shall be submitted for Screening to the EISC.”

³¹ Regulatory Roadmaps Project NWT-ISR, note 30, above, at 9-1.

³² IFA, s. 2(a).

³³ See, e.g., Case Summary, Supreme Court of Canada, David Beckman, in his capacity as Director, Agriculture Branch, Department of Energy, Mines and Resources, et al. v. Little Salmon/Carmacks First Nation, et al, Docket No. 32850, available at <http://www.scc-csc.gc.ca/case-dossier/cms-sgd/sum-som-eng.aspx?cas=32850>: “Whether there is a duty to consult and, where possible, accommodate First Nations’ concerns and interests in the context of a modern comprehensive land claims agreement.” See also the August 8, 2010, Decision issuing an injunction against marine seismic activity in *Qikiqtani Inuit Association v. Canada (Minister of Natural Resources) et al*, Nunavut Court of Justice, Docket No. 08-20-42-CVC, available at <http://www.canlii.org/en/nu/nucj/doc/2010/2010nucj12/2010nucj12.html>, 2010 NUCJ 12 (CanLII).

³⁴ S. Carpenter, C. Low, J. Olynyk, *Oil and Gas Development in Western Canada in the New Millennium: The Changing Legal Framework in the Northwest Territories, The Yukon, and Offshore British Columbia*, 39 *Alberta L. Rev.* 1 (2001-2002), 7.

³⁵ According to Carpenter et al, id. at 7.

³⁶ See, e.g. North/South Consultants and Inuvialuit Cultural Resource Center, *Ecological Assessment of the Beaufort Sea Beluga Management Plan - Zone 1(a) as a Marine Protected Area of Interest*, prepared for the Beaufort Sea Integrated Management Planning Initiative Working Group, July 2003.

³⁷ The Regulatory Roadmaps Project, note 30, above, at 12-7.

Implementing the Arctic Offshore Oil and Gas Guidelines in the United States and Canada

issuance of exploration licences pending a NEB review of offshore drilling in the Arctic following the Deepwater Horizon incident.³⁸

Under CPRA § 78(5), a member of the public may be appointed to the Environmental Studies Management Board, which also includes government and industry representatives. Current members include a representative of the Joint Secretariat Inuvialuit Renewable Resource Committee. The Board oversees the Environmental Studies Research Fund (ESRF) to establish guidelines and procedures for determining environmental studies to be conducted and to select the contractors.³⁹ The ESRF is funded through levies on oil and gas companies and others for the use of frontier lands.

Canada Oil and Gas Operations Act Drilling and Production (COGDP) Regulations

The COGDP Regulations⁴⁰ that came into effect in December 2009 are just one set of regulations implementing COGOA.⁴¹ As part of the process to amalgamate and modernize offshore regulation, information on the COGDP Regulations was provided to “potentially interested Aboriginal groups in the Frontier areas” and meetings were held with interested Aboriginal groups, Aboriginal land claim organizations and co-management boards in the Northwest Territories.⁴² The information provided stated that “[o]n a project-by-project basis, potential impacts on land use and resources would continue to be identified during the application approvals process, which would include any environmental assessment requirement. These requirements would not change with the proposal” to amend the regulations.⁴³

Canada Environmental Assessment Act (CEAA)

The CEAA came into effect in 1995, after the 1984 IFA and its implementing legislation, rendering coordination and consultation on all environmental requirements even more important. “The IFA was explicit (IFA, s. 11(32)) that nothing would restrict the power of the Government to carry out environmental impact assessment and review under the laws and policies of Canada,” the CEAA sets out “requirements for Environmental Screening and Review that must be met in addition to the requirements under section 11 of the IFA.”⁴⁴

Canada Oceans Act

The Canada Oceans Act requires the Minister of Fisheries and Oceans to collaborate “with affected aboriginal organizations, coastal communities and other persons and bodies, including those bodies established under land claims agreements” as well as other government ministries and bodies to develop “plans for the integrated management of all activities or measures in or affecting estuaries, coastal waters

³⁸ See, e.g. DIAND, Results of the 2009-2010 Call for Bids: Beaufort Sea/Mackenzie Delta, August 4, 2010, at <http://www.ainc-inac.gc.ca/nth/og/rm/ri/bsm/bsm10/index-eng.asp> and Inuvialuit Regional Corporation Press Release on Offshore Drilling, May 19, 2010, at <http://www.itk.ca/media-centre/media-releases/national-inuit-leader-says-canada-should-invoke-temporary-moratorium-off>.

³⁹ ESRF website http://www.esrfunds.org/mancon_e.php.

⁴⁰ Canada Gazette Part II, Vol. 143, No. 25 (2009), 2306 ff.

⁴¹ For information on other regulations implementing COGOA see White Paper No. 1 in this series, Operating Practices, available at www.vermontlaw.edu/energy/news.

⁴² Canada Gazette Part II, Vol. 143, No. 25 (2009), 2345.

⁴³ Canada Gazette Part II, Vol. 143, No. 25 (2009), 2345.

⁴⁴ Regulatory Roadmaps Project NWT-ISR, note 30, above, 6-2.

and marine waters that form part of Canada or in which Canada has sovereign rights under international law.”⁴⁵

IV. Observations and Conclusions

Both Canada and the United States require the federal government and developers of offshore oil and gas projects in the Western Arctic to consult with or consider the input of the local subsistence users and other members of potentially affected Arctic indigenous communities *at some point* in the leasing, exploration and development phases. Neither system reflects clearly the ongoing and continuous nature of environmental consultation recommended in the Arctic Council AOOGG (section 3.6, see Part I, above). Rather, indigenous participation is provided for by statute and agreement at individual steps in the process, but not necessarily every step. A more general obligation to consult provides the broader context in which individual national rules about participation operate; rules specific to Arctic indigenous communities and rules for input by the general public in review and comment procedures. Each national system has its own history and interpretation of what is required for meaningful consultation and participation in decision making by indigenous populations, rendering this area of law a less likely candidate for harmonization than other areas covered by the AOOGG (see, e.g. White Paper No. 2, Environmental Monitoring).

Regulators in both systems have considerable discretion in how they incorporate input of Arctic indigenous communities into their decisions, whether input comes from direct consultation with the communities or from public participation through general public comment procedures. Both countries involve multiple actors in the various stages of offshore oil and gas decision making, increasing the room for agency discretion and the related potential for lack of predictable or consistent outcomes (a problem that the AOOG Guidelines do not address).

In Canada’s Western Arctic, indigenous community input occurs in part under the Inuvialuit Final Agreement (IFA), a negotiated instrument that relies on Inuvialuit representatives sitting in equal numbers on the boards that provide input about potential impacts of oil and gas activity. By contrast, Alaska Native participation in offshore oil and gas decisions occurs through a patchwork of numerous legislated acts. This results in a role for each U.S. federal agency in determining how concerns of Alaska Natives will be considered both in consultation or public comment on offshore oil and gas development in the Arctic. For example, notwithstanding the central coordinating role of the MMS (now BOEMRE), the FWS and the NMFS each administer take authorizations under the MMPA according to their own agency cultures and procedures. The U.S. system supplements its patchwork of legislation with subsequent Executive Orders, Presidential Memoranda and Secretarial Orders regarding government-to-government consultation and related matters.⁴⁶ The phenomenon of multiple agency influence on indigenous community participation certainly exists in the Canadian system, but appears less marked. This may result in part from some input being filtered through

⁴⁵ IFA, s.31, see also Preamble and ss. 29, 32 and 33.

⁴⁶ See note 18, above.

Implementing the Arctic Offshore Oil and Gas Guidelines in the United States and Canada

the co-management and impact screening structures established by the IFA. The IFA provisions for Inuvialuit representatives to initiate review and input contrast with the general pattern of government-initiated interactions in the United States.

Finally, Canadian regulations regarding participation of indigenous parties in offshore development decisions focus more on addressing the effects of oil and gas activity on human communities and interest groups. In this way, the rules address concerns beyond those of subsistence activities. In the United States, legislated rules deal less with effects on human communities and more with effects on individual animal species, as used for subsistence by the interest groups involved. However, the U.S. Executive Orders and memoranda on environmental justice and government-to-government consultation expand the issues on which participation is called for beyond questions of subsistence.

For a survey of the offshore permitting process in each country, a list of references, and a description of this White Paper Series please refer to the letter and Overview accompanying this White Paper No. 3. Three additional White Papers are being published in this series, one per week: 1. Operating Practices and 2. Environmental Monitoring are already posted at the URL below; 4. Decommissioning is forthcoming.

The Overview and all four white papers will be posted at <http://www.vermontlaw.edu/energy/news> as each is distributed.

IEE Work Product Disclaimer: *The work of the IEE Research Team is intended to assist and expedite professional assessment. It does not purport to be, and is not the equivalent of, the work of a licensed professional with expertise in this area. Before making significant decisions based on this work, it would be appropriate to consider consultation with a licensed professional with expertise in this field.*

Institute for Energy and the Environment, Vermont Law School Chelsea Street, Box 96 South Royalton, VT 05068-0906 T +1-802-831-1270 BBAKER@vermontlaw.edu