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# FROM LAPDOG TO WATCHDOG: GIVING CITIZENS A VOICE IN MONITORING THE OIL INDUSTRY THROUGH RCACS

CHRISTINA MARSHALL SANTARPIO\*

**Abstract:** Regional Citizens' Advisory Councils in Alaska, created in the wake of the Exxon Valdez Oil Spill of 1989, have provided citizens in Prince William Sound and Cook Inlet with a meaningful role in oil spill prevention and cleanup plans. Although the history of these RCACs show that their formation left room for improvement, in the wake of the Gulf Oil Spill of 2010, it is clear that innovative and creative solutions involving those most affected by oil spills are desperately needed throughout the country to prevent such disasters in the future. Moving forward, future RCACs should be created that build on the successes of the existing Councils, while fixing their three primary shortfalls: (1) their reliance on the oil industry for funding; (2) their "advisory" function limitations; and (3) their lack of subpoena power.

## INTRODUCTION

On April 20, 2010, an explosion at the Macondo Well in the Gulf of Mexico killed eleven workers and led to the Deepwater Horizon Spill, the largest oil spill in the history of the United States.<sup>1</sup> Contractors for BP were cementing a newly dug well when a buildup in methane gas resulted in an explosion and fire that destroyed the drilling

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\* Managing Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2012-2013.

<sup>1</sup> NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING, REPORT TO THE PRESIDENT, at vi-vii (2011), [hereinafter GULF FINAL REPORT], *available at* <http://www.gpo.gov/fdsys/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf>. In a speech, President Barack Obama deemed the spill the "worst environmental disaster America has ever faced" just two months after the explosion and before the well was repaired and oil stopped gushing out of it. Address to the Nation on the Oil Spill in the Gulf of Mexico, 2010 DAILY COMP. PRES. DOC. 502 (June 15, 2010).

rig.<sup>2</sup> Responders were unable to fully seal the well for three months, during which time five million barrels of oil spilled into the Gulf.<sup>3</sup>

The media response to the Deepwater Horizon spill was instantaneous and strong.<sup>4</sup> The New York Times alone published almost one thousand articles mentioning the oil spill from April 2010 through March 2012.<sup>5</sup> At first, media outlets focused on the explosion itself and the resulting deaths.<sup>6</sup> As months passed, however, as became clear that original estimates of the extent of the spill were vastly underestimated, comparisons to the 1989 Exxon Valdez disaster began to surface.<sup>7</sup>

On March 24, 1989, a supertanker owned by Exxon Mobil Corporation (“Exxon”) grounded into a reef in Prince William Sound, Alaska.<sup>8</sup> The 900-foot tanker spilled eleven million gallons of crude oil, harming roughly 1300 miles of ecologically rich shoreline areas in the process.<sup>9</sup> The ramifications of the spill were severe and long-lasting: 250,000 seabirds, 2800 sea otters, 300 harbor seals, 250 bald eagles, 22 killer whales, and billions of salmon and herring eggs died as a result.<sup>10</sup> These deaths also severely harmed the economies of nearby towns, which relied primarily on commercial fishing and tourism.<sup>11</sup>

The Exxon Valdez disaster immediately resulted in a media frenzy, as citizens, interest groups, and the media tried to piece together the events and oversights that culminated in the destruction of a previously

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<sup>2</sup> Alyson C. Flournoy, *Three Meta-Lessons Government and Industry Should Learn from the BP Deepwater Horizon Disaster and Why They Will Not*, 38 B.C. ENVTL. AFF. L. REV. 281, 281 (2011).

<sup>3</sup> *Id.* at 281–82.

<sup>4</sup> See, e.g., *Gulf of Mexico Oil Spill (2010)*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/o/oil\\_spills/gulf\\_of\\_mexico\\_2010/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/o/oil_spills/gulf_of_mexico_2010/index.html) (last updated Apr. 24, 2012).

<sup>5</sup> See *id.*

<sup>6</sup> See, e.g., Campbell Robertson, *11 Remain Missing After Oil Rig Explodes Off Louisiana; 17 Are Hurt*, N.Y. TIMES, Apr. 22, 2010, at A13. Initially, officials believed that the resulting pollution would be minimal and that the fire from the explosion was burning most of the oil and gas. *Id.*

<sup>7</sup> See, e.g., Justin Gillis, *Doubts Are Raised on Accuracy of Government’s Spill Estimate*, N.Y. TIMES, May 14, 2010, at A1. BP admitted to Congress that their worst-case scenario envisioned sixty thousand barrels flowing out of the leak per day; this would approximate an Exxon Valdez-sized spill every four days. *Id.* at A13.

<sup>8</sup> Exxon Shipping Co. v. Baker, 554 U.S. 471, 476 (2008).

<sup>9</sup> *Id.* at 476, 478; *History of PWSRCAC and the Exxon Valdez Oil Spill*, PRINCE WILLIAM SOUND REGIONAL CITIZENS’ ADVISORY COUNCIL, [hereinafter *History of PWSRCAC*], <http://www.pwsrcac.org/about/history.html> (last updated Jan. 25, 2011).

<sup>10</sup> *History of PWSRCAC*, *supra* note 9. Moreover, not all of these species have fully recovered from the spill. *Id.*

<sup>11</sup> See *id.*

pristine natural setting.<sup>12</sup> Within sixteen months, Congress enacted the Oil Pollution Act of 1990 (OPA),<sup>13</sup> expanding the government's financial capacity to respond to oil spills, broadening requirements for government and oil industry contingency plans, and heightening fines for noncompliance with new regulations.<sup>14</sup>

Both spills resulted in the creation of a commission to investigate the events leading up to the disasters, and their long- and short-term effects on industry and the environment.<sup>15</sup> In Alaska, one long-lasting and meaningful result of the official report was the formation of two Regional Citizens' Advisory Councils (RCACs) in the Prince William Sound and Cook Inlet.<sup>16</sup> These councils have since provided an innovative check on the relationship between government and the oil industry in Alaska by bringing citizens—who stand to lose the most from future spills—into the decision-making process.<sup>17</sup> Although the Councils have not been as effective as they could feasibly become, they have improved the oil industry in Alaska since 1990.<sup>18</sup>

The BP Deepwater Horizon blowout similarly spurred the creation of a commission to investigate and provide suggestions to prevent future tragedies in the Gulf of Mexico.<sup>19</sup> Unlike the Exxon Valdez Commission, however, this commission's recommendations to create regional citizens' councils in the area have as yet gone unheeded.<sup>20</sup> This Note provides a framework for the successful implementation of RCACs beyond Alaska by comparing the two existing Councils and analyzing how they can improve.

Part I traces the development of RCACs in response to the 1989 Exxon Valdez oil spill.<sup>21</sup> Immediately following the spill, the oil industry

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<sup>12</sup> See Molly J. Walker Wilson & Megan P. Fuchs, *Publicity, Pressure, and Environmental Legislation: The Untold Story of Availability Campaigns*, 30 CARDOZO L. REV. 2147, 2201 (2009).

<sup>13</sup> Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (codified as amended at 33 U.S.C. §§ 2701–2762 (2006)).

<sup>14</sup> Wilson & Fuchs, *supra* note 12, at 2202; see *infra* notes 51–60 and accompanying text.

<sup>15</sup> See Exec. Order No. 13,543, 75 Fed. Reg. 29,397 (May 21, 2010); ALASKA STAT. § 01.10.070(c) (1989) (repealed 1990), available at [http://www.pwsrcaac.org/docs/pwsrcaacinfo/006.AOSC\\_Legislation.pdf](http://www.pwsrcaac.org/docs/pwsrcaacinfo/006.AOSC_Legislation.pdf).

<sup>16</sup> See 33 U.S.C. § 2732(d); Zygmunt J.B. Plater, *The Exxon Valdez Resurfaces in the Gulf of Mexico . . . And the Hazards of "Megasytem Centripetal Di-Polarity"*, 38 B.C. ENVTL. AFF. L. REV. 391, 395 (2011).

<sup>17</sup> See 33 U.S.C. § 2732(d); Plater, *supra* note 16.

<sup>18</sup> See *infra* notes 106–201 and accompanying text.

<sup>19</sup> Exec. Order No. 13,543, 75 Fed. Reg. at 29,397; The President's Weekly Address, 2010 DAILY COMP. PRES. DOC. 411 (May 22, 2010), available at [http://www.oilspillcommission.gov/sites/default/files/documents/osc\\_presidential\\_announcement.pdf](http://www.oilspillcommission.gov/sites/default/files/documents/osc_presidential_announcement.pdf).

<sup>20</sup> See *infra* notes 218–241 and accompanying text.

<sup>21</sup> See *infra* notes 29–111 and accompanying text.

in the Prince William Sound created a contract with citizens of the area to act as the first RCAC, an organization that was later codified by the OPA in 1990.<sup>22</sup> Part II describes the successes, failures, and limitations of the two most prominent RCACs in existence today: the Prince William Sound RCAC and Cook Inlet RCAC.<sup>23</sup> Although these councils have generally had a positive impact on local and federal government actions, their structure has imposed significant limitations on their effectiveness.<sup>24</sup> Part III first addresses why RCACs have not expanded significantly since 1990, and then examines the most recent meaningful attempt to create a new RCAC in the Gulf of Mexico following the Deepwater Horizon blowout in 2010.<sup>25</sup> Part IV analyzes and critiques the existing Alaska RCACs, and provides a framework for future citizens' councils that improves upon the existing configuration.<sup>26</sup> The three biggest limitations of the two Alaska RCACs all stem from their formation: lack of subpoena power, limited advisory function, and reliance on the oil industry for funding.<sup>27</sup> This Note argues that with the removal of these barriers, RCACs could play a significant role in monitoring the oil industry and ensuring that tragedies such as the BP Deepwater Horizon blowout and the Exxon Valdez oil spill never happen again.<sup>28</sup>

## I. THE DEVELOPMENT OF RCACs AS A RESPONSE TO THE EXXON VALDEZ SPILL

### A. *The State of Alaska Oil Spill Commission: Final Report*

Following the Exxon Valdez oil spill, the Alaska legislature created the Alaska Oil Spill Commission (the "Alaska Commission") to answer the prominent question of "how things went wrong."<sup>29</sup> The Alaska Commission comprised seven members, five of whom were citizens of

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<sup>22</sup> See *infra* notes 89–111 and accompanying text.

<sup>23</sup> See *infra* notes 112–201 and accompanying text.

<sup>24</sup> See *infra* notes 166–201 and accompanying text.

<sup>25</sup> See *infra* notes 202–241 and accompanying text.

<sup>26</sup> See *infra* notes 242–315 and accompanying text.

<sup>27</sup> See *infra* notes 245–276 and accompanying text.

<sup>28</sup> See *infra* notes 277–315 and accompanying text.

<sup>29</sup> ALASKA OIL SPILL COMM'N, SPILL: THE WRECK OF THE EXXON VALDEZ: IMPLICATIONS FOR SAFE TRANSPORTATION OF OIL, FINAL REPORT, at iii (1990), available at <http://www.washingtonpost.com/wp-srv/special/oil-spill/docs/alaska-commission-report.pdf>. The Act establishing the Commission stated its purpose was to "investigate the Exxon Valdez oil spill disaster and to recommend changes needed to minimize the possibility and effects of similar oil spills." ALASKA STAT. § 01.10.070(c) (1989) (repealed 1990), available at [http://www.pwsrca.org/docs/pwsrcainfo/006.AOSC\\_Legislation.pdf](http://www.pwsrca.org/docs/pwsrcainfo/006.AOSC_Legislation.pdf).

Alaska and all of whom had specialized knowledge about oil and the state itself.<sup>30</sup> After extensive research, the Alaska Commission submitted a report to the Alaska governor and legislature summarizing its analysis of the oil spill and proposing approaches to improve regulation of the oil industry and prevent future spills.<sup>31</sup>

Although the spill has been blamed on an alcoholic captain, Joseph Hazelwood,<sup>32</sup> the Final Report showed that circumstances surrounding the disaster were much more complicated.<sup>33</sup> The Alaska Commission concluded the spill was “the result of the gradual degradation of oversight and safety practices that had been intended, twelve years before, to safeguard and backstop the inevitable mistakes of human beings.”<sup>34</sup> To cut costs, Exxon had reduced drastically the number of crewmembers on tankers.<sup>35</sup> Although tankers transporting 6.3 million gallons of oil in the 1950s used a forty-member crew, the Exxon Valdez had only nineteen crewmembers and fifty-three million gallons of oil to transport.<sup>36</sup> It is perhaps not surprising that the officer on the

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<sup>30</sup> ALASKA OIL SPILL COMM’N, *supra* note 29, at ix. Walter Parker, the chair, was the former technical staff director of Alaska’s Office of Pipeline Coordinator and the current president of the Alaska Academy of Engineering and Sciences; Esther Wunnicke, the vice chair, was an attorney and the Commissioner of the Alaska Department of Natural Resources in the 1980s; Margaret Hayes was a geologist and former director of the Alaska Department of Natural Resources Division of Land and Water Management; Tim Wallis was president of a consulting firm and former state legislator; John Sund was a lawyer, former state legislator, and commercial fisherman; Edward Wenk, Jr. was a professor at the University of Washington and former advisor to three presidents and congress; and Michael Hertz was the director of the San Francisco Bay-Delta Preservation Association and monitored and studied previous oil and chemical spills. *Id.*

<sup>31</sup> *Id.* at 3–4.

<sup>32</sup> See *Baker*, 554 U.S. at 476–77. Evidence presented to blame Hazelwood included the following facts: Hazelwood had completed a twenty-eight day alcohol treatment program while employed by Exxon but did not attend the follow-up program or Alcoholics Anonymous meetings; Hazelwood had been seen drinking publicly and aboard Exxon tankers following his release from the program; members of Exxon management knew and drank with Hazelwood; Exxon did not monitor Hazelwood’s drinking on board; witnesses testified to seeing Hazelwood drink at least five double vodkas before leaving port on the night of the spill. *Id.*

<sup>33</sup> See ALASKA OIL SPILL COMM’N, *supra* note 29, at 7, 206.

<sup>34</sup> *Id.* at 7. Moreover, in evaluating the spill containment and response capability in Prince William Sound, the Commission found that both were “fundamentally flawed.” *Id.* at 167.

<sup>35</sup> See *id.* at 11–12.

<sup>36</sup> *Id.* at 11. The small crew of nineteen had been certified by the Coast Guard, but was later criticized—the Commission suggested that the small crew size may have contributed to crew fatigue. *Id.* at 11–12.

bridge at the time of the crash may have been awake and working for the preceding eighteen hours.<sup>37</sup>

The Alaska Commission further noted that observance of the rules established in 1977, when tanker operations began in Valdez, should have prevented an oil spill.<sup>38</sup> Due to oil industry lobbying and lawsuits, however, the state could not enforce these rules.<sup>39</sup> When shippers stopped following the rules, therefore, the Coast Guard could not and did not enforce them.<sup>40</sup> The present system did not provide a significant enough deterrent to prevent oil spills, and thus the Commission called for a complete reform.<sup>41</sup>

Fundamentally, the Alaska Commission found the spill was almost a certainty: “Success bred complacency; complacency bred neglect; neglect increased the risk—until the right combination of errors finally led to an accident of disastrous proportions.”<sup>42</sup> Although particular spills could be addressed individually, the Alaska Commission’s report called for a complete overhaul, aimed at the systemic reduction of risk, so that similar situations would not repeat and result in another spill.<sup>43</sup>

The Alaska Commission recommended citizen supervision of specific government agencies because failures in the oil transportation industry directly harm citizens.<sup>44</sup> In contrast, the oil industry primarily concerns itself with profitability and supports deregulation due to competition in the market, and thus often directly opposes environmental safety measures.<sup>45</sup> To that end, the Alaska Commission specifically recommended the creation of a citizens’ advisory council to supervise the transportation of oil, gas, and any other hazardous substance.<sup>46</sup>

<sup>37</sup> *See id.* at 11 (summarizing testimony before the National Transportation Safety Board). Hazelwood had gone to his cabin to do paperwork twenty minutes before the accident, and the third mate, Cousins, did not follow Hazelwood’s directive to return to tanker lanes. SHARON BUSHELL & STAN JONES, *THE SPILL: PERSONAL STORIES FROM THE EXXON VALDEZ DISASTER 22* (Ellen Wheat ed., 2009).

<sup>38</sup> *See* ALASKA OIL SPILL COMM’N, *supra* note 29, at iv.

<sup>39</sup> *See id.* In addition, these rules were “consistently violated . . . to insure that tankers passing through Prince William Sound did not lose time by slowing down for ice or waiting for winds to abate. Concern for profits in the 1980s obliterated concern for safe operations that existed in 1977.” *Id.*

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

<sup>41</sup> *See id.* at iv–v.

<sup>42</sup> *Id.* at 206. Furthermore, “[a]ll parties—the shippers, Alyeska, the Coast Guard and the State of Alaska—shared in the complacency that produced this result.” *Id.*

<sup>43</sup> *See id.* at 210.

<sup>44</sup> *See* ALASKA OIL SPILL COMM’N, *supra* note 29, at 131.

<sup>45</sup> *Id.* at 134 (“An industry ideology that regulation is a nuisance can drive an industry attitude that the objectives of regulation are also a nuisance.”).

<sup>46</sup> *Id.* at 139.

The Alaska Commission envisioned a council composed of a full-time director and staff, chosen from the citizenry of Alaska, to “provide focus to state oversight.”<sup>47</sup> It recommended the council have subpoena power to inspect, investigate, and collect information on facilities and the industry.<sup>48</sup> The Alaska Commission outlined nine duties of the council, all aimed at proper supervision of the “environmentally safe transportation of Alaska’s resources.”<sup>49</sup> The council would become a meaningful intermediary between the oil industry and the government, and ensure the involvement of individuals with the most knowledge and the most to lose from another disaster.<sup>50</sup>

## B. *The Oil Pollution Act of 1990*

### 1. An Overview of the OPA

Congress enacted the OPA in August 1990 to better enable the federal government to avoid and address oil spills.<sup>51</sup> Attempts at the federal level to enact such comprehensive legislation over oil control had failed in the past because of concerns over preempting existing state laws.<sup>52</sup> Some members of Congress wanted to impose uniform requirements for liability to “allow for quick and complete payment of reasonable claims without resort to cumbersome litigation.”<sup>53</sup> Other lawmakers called for a federal law that would merely establish the floor and permit states to set more stringent standards on the oil industry.<sup>54</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> *See id.*

<sup>49</sup> *See id.* at 139–40. The council was to advise government officials on environmental implications of transporting Alaskan oil, gas, and other substances; come up with initiatives for the state and federal government and represent state interests in developing treaties and compacts; identify any remaining issues and recommend ways to fix them; work toward the coordination of spill prevention and response programs; recommend budget and resource allocation changes; analyze existing programs; recommend changes based on new scientific findings; create advisory panels; and issue annual reports and safety assessments to the governor, including statistics on risks, performance, and improvements. *Id.*

<sup>50</sup> *See* ALASKA OIL SPILL COMM’N, *supra* note 29, at 139–40.

<sup>51</sup> Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (codified as amended at 33 U.S.C. §§ 2701–2762 (2006)); *Oil Pollution Act Overview*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/OEM/content/lawsregs/opaover.htm> (last updated Jan. 28, 2011).

<sup>52</sup> *See* George J. Mitchell, *Preservation of State and Federal Authority Under the Oil Pollution Act of 1990*, 21 ENVTL. L. 237, 237 (1991).

<sup>53</sup> *Id.* at 239 (quoting 135 CONG. REC. H8129 (daily ed. Nov. 8, 1989) (statement of Rep. Hammerschmidt)).

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



As passed, the OPA preserves the ability of states to enact laws for oil spill prevention and response.<sup>55</sup>

In addition to expanding the federal government's ability to respond to and assess damages for oil spills, the OPA ensures compliance and pre-spill safety measures through strict liability provisions.<sup>56</sup> The OPA imposes strict liability on polluters to pay for cleanup costs and damages resulting from spills in an effort to avoid passing these costs on to taxpayers.<sup>57</sup> The OPA also established the National Oil Spill Liability Trust Fund to compensate those harmed by oil spills quickly and completely.<sup>58</sup> Finally, the OPA imposed a three-level change to the existing National Oil and Hazardous Substances Pollution Contingency Plan (NCP), involving the federal government, Area Committees (made up of federal, state, and local officials), and owners and operators of the vessels themselves.<sup>59</sup> The NCP now requires oil companies to prepare individual response plans for spills and any other serious threat to the environment in concert with local government response plans, so that future oil spills can be dealt with more quickly and effectively.<sup>60</sup>

## 2. Regional Citizens' Advisory Councils

Congress divided the OPA into subchapters that each aim to improve the government's control over oil spills in different ways.<sup>61</sup> Subchapter II, Prince William Sound Provisions, establishes various monitoring and research institutes and committees whose purposes are to

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<sup>55</sup> 33 U.S.C. § 2718(a) ("Nothing in this Act . . . shall . . . affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to [oil pollution] . . ."); accord Mitchell, *supra* note 52.

<sup>56</sup> See 33 U.S.C. § 2702; Mitchell, *supra* note 52, at 251; Andrew F. Popper, *Capping Incentives, Capping Innovation, Courting Disaster: The Gulf Oil Spill and Arbitrary Limits on Civil Liability*, 60 DEPAUL L. REV. 975, 979–80 (2011).

<sup>57</sup> See Mitchell, *supra* note 52, at 251; Popper, *supra* note 56.

<sup>58</sup> *Oil Pollution Act Overview*, *supra* note 51. The Fund provides up to one billion dollars per spill if the responsible party cannot be identified or cannot pay for the cleanup. *Oil Spill Liability Trust Fund*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/OEM/content/learning/oilfund.htm> (last updated Jan. 27, 2011).

<sup>59</sup> *Oil Pollution Act Overview*, *supra* note 51.

<sup>60</sup> See *id.* The federal government directs public and private parties in carrying out these response plans. *Id.* For a discussion of government procedures regarding response plans for oil spills in general, see Christopher M. Iaquinto, *A Silent Spring in Deep Water?: Proposing Front-End Regulation of Dispersants After the Deepwater Horizon Disaster*, 39 B.C. ENVTL. AFF. L. REV. 419, 419–48 (2012).

<sup>61</sup> See Oil Prevention Act of 1990, 33 U.S.C. §§ 2701–2762 (2006).

research the prevention, control, and impact of Alaska oil spills.<sup>62</sup> In addition, Subchapter II called for the creation of two RCACs in Alaska, incorporating individual citizens into this new governmental framework of monitoring.<sup>63</sup> This innovative approach to future monitoring sought to incorporate Alaska residents into “watchdog councils” who could monitor the oil industry from a new and unique perspective—those who stood to be the most harmed by future oil spills.<sup>64</sup> The OPA authorized two RCACs: one for Prince William Sound, and one for Cook Inlet.<sup>65</sup>

The statutory authorization of the Councils provided legitimacy and attempted to guarantee that their work would be incorporated into the oil industry’s future decisions.<sup>66</sup> Moreover, the source of their funding—those corporations utilizing the Cook Inlet and Prince William Sound terminals for their oil tankers—guaranteed the RCACs sufficient funds to perform necessary research.<sup>67</sup> To ensure the RCACs’ survival, Congress mandated funding as a prerequisite for the validity of the oil industry’s contingency plans.<sup>68</sup> Congress reassesses funding for the RCACs on an annual basis.<sup>69</sup> The OPA provides that the Prince William Sound RCAC (PWSRCAC) may receive up to \$2 million per year, and the Cook Inlet RCAC (CIRCAC) may receive up to \$1 million per

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<sup>62</sup> See *id.* §§ 2731–2738. Although the OPA is a federal statute designed to cover oil spills throughout the United States, the Act devotes a significant portion of its text to provisions limited to Cook Inlet and Prince William Sound alone. See *id.*; *Oil Pollution Act Overview*, *supra* note 51. This geographical restriction may be at least partly attributed to Capitol lobbying. Plater, *supra* note 16, at 411.

<sup>63</sup> 33 U.S.C. § 2732(d).

<sup>64</sup> See *id.*; Plater, *supra* note 16, at 410–11. An illustration of the severe need for this new form of regulation can be found in the Exxon Valdez disaster itself. See Zygmunt J.B. Plater, *Facing a Time of Counter-Revolution—The Kepone Incident and a Review of First Principles*, 29 U. RICH. L. REV. 657, 699–700 (1995). After the tanker ran aground and began spilling out oil, Exxon took control of the response operation, but had no training in proper response techniques. *Id.* Officials did nothing for two days (during which, thanks to a fortuitous period of calm air, the oil could have been contained). *Id.* Finally, local fishermen insisted on attending an official meeting between Exxon, Alaskan state officials, and the U.S. Coast Guard, and were able to establish a “strategy for prioritizing the response efforts.” *Id.* With the help of private fishing boats, response efforts began the next morning. *Id.* Unfortunately at this point it was too late to save some islands. *Id.*

<sup>65</sup> 33 U.S.C. § 2732(d).

<sup>66</sup> See *id.*

<sup>67</sup> See Oil Pollution Act of 1990, 33 U.S.C. § 2732(k)(2)–(3) (2006).

<sup>68</sup> See *id.* § 2732(k)(1) (“Approval of the contingency plans required of owners and operators of the Cook Inlet and Prince William Sound terminal facilities and crude oil tankers while operating in Alaskan waters in commerce with those terminal facilities shall be effective only so long as the respective Association and Council for a facility are funded pursuant to paragraph (2).”).

<sup>69</sup> *Id.* § 2732(k).

year.<sup>70</sup> Because the PWSRCAC was established before the enactment of the OPA, its funding procedures differ and its contract with the Alyeska Pipeline provides a guaranteed yearly budget.<sup>71</sup> In contrast, the CIRCAC must negotiate with the oil industry for funding and has no set income.<sup>72</sup>

The OPA sets forth guidelines for the membership of each RCAC, ensuring that they will be made up of Alaska residents (with voting power) as well as nonvoting representatives from federal agencies.<sup>73</sup> The governor of Alaska appoints members from the general population, taking into account a need for “regional balance.”<sup>74</sup> The Council must have a representative for a variety of local interests, including local commercial fishing industry organizations; aquaculture associations, Alaska Native organizations, environmental organizations, recreational organizations, the Alaska State Chamber of Commerce, and nearby municipalities.<sup>75</sup> The nonvoting members are representatives of the EPA, U.S. Coast Guard, National Oceanic and Atmospheric Administration, U.S. Forest Services, Bureau of Land Management, Alaska Department of Environmental Conservation, Alaska Department of Fish and Game, Alaska Department of Natural Resources, and the Division of Emergency Services, Alaska Department of Military and Veterans Affairs.<sup>76</sup> The governor appoints each voting member of an RCAC to serve for three years.<sup>77</sup>

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<sup>70</sup> *Id.* § 2732(k)(2)–(3). Currently, the PWSRCAC has a budget of \$2.9 million per year, while the CIRCAC’s budget for 2012 is at least \$967,000 (the most recent budget contract set their 2010 minimum funding levels at \$967,000, to be adjusted upward for inflation in 2011 and increased by 2.2% in 2012). See Prince William Sound Regional Citizens’ Advisory Council (PWSRCAC) Charter Renewal, 76 Fed. Reg. 24,506, 24,506 (Dep’t of Homeland Sec. May 2, 2011); CIRCAC 2011 Recertification, Appendix B: Funding Contract, COOK INLET REGIONAL CITIZENS’ ADVISORY COUNCIL 3 (Aug. 12, 2009), <http://www.circac.org/documents/pdf/circac/Appendix%20B.pdf>.

<sup>71</sup> See *Contract Between Regional Citizens Advisory Committee and Alyeska Pipeline Service Company*, PRINCE WILLIAM SOUND REGIONAL CITIZENS ADVISORY COUNCIL 1 (Feb. 8, 1990), [hereinafter *RCAC Alyeska Contract*], <http://www.pwsrcac.org/docs/d0000100.pdf>; *infra* notes 97–101 and accompanying text.

<sup>72</sup> Naomi Klouda, *CIRCAC Removes Shavelson*, HOMER TRIB. (Sept. 8, 2010), <http://homertribune.com/2010/09/circac-removes-shavelson>.

<sup>73</sup> Oil Pollution Act of 1990, 33 U.S.C. § 2732(d)(2) (2006). The statute does not allow for oil industry representatives to participate in the membership of the councils, even in a non-voting capacity. See *id.* (listing members of the councils and notably leaving out oil industry representatives).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* § 2732(d)(2)(A).

<sup>76</sup> *Id.* § 2732(d)(2)(B).

<sup>77</sup> *Id.* § 2732(d)(3)(B). The only exception to the three-year rule was for initial appointments, which were staggered and shorter. *Id.* § 2732(d)(3)(C).

Each RCAC is statutorily authorized to exist for the life of the Trans-Alaska Pipeline System (and as long as oil is transported near Cook Inlet), ensuring that the oil industry in Alaska will always be subject to oversight.<sup>78</sup> The OPA allows the RCACs to self-govern: they may elect their own chairperson, hire staff members, and determine their own internal operating procedures following the initial formation meeting.<sup>79</sup> The statute also includes a conflict of interest prohibition: no member may simultaneously “be engaged in any activity which might conflict with such individual carrying out his functions as a member thereof.”<sup>80</sup>

The OPA outlines the duties of RCACs, which are generally to improve spill prevention measures and control the oil industry’s impact on the environment in the area.<sup>81</sup> The RCACs advise their Oil Terminal Facilities and Oil Tanker Operations Association (“Association”) on potential policies, permits, or regulations that could have an effect on the local environment.<sup>82</sup> In addition, RCACs monitor the environmental effects of terminal facilities, crude oil tankers, and the operation and maintenance of these facilities.<sup>83</sup> The RCACs also review prevention and response plans for Prince William Sound and Cook Inlet, and may make recommendations regarding permitting standards, facility operations, tanker operations, and prevention and contingency plans in order to improve safety.<sup>84</sup> If the Association does not adopt the recommendation of the RCAC, it must provide a reason for the rejection.<sup>85</sup>

The statute mandates federal agency cooperation with RCACs by requiring that agencies consult with the Councils about any potential agency action that could have an effect on permitting or certain regula-

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<sup>78</sup> See *id.* § 2732(d)(3)(A).

<sup>79</sup> Oil Pollution Act of 1990, 33 U.S.C. § 2732(d)(4) (2006).

<sup>80</sup> *Id.* § 2732(d)(5).

<sup>81</sup> Plater, *supra* note 16, at 412.

<sup>82</sup> 33 U.S.C. § 2732(c), (d)(6)(A). The Associations were also created by the OPA in order to “review[] policies relating to the operation and maintenance of the oil terminal facilities and crude oil tankers which affect or may affect the environment in the vicinity of their respective terminals.” *Id.* § 2732(c)(3). The Associations have four members each: a representative of the terminal facilities, a representative of the crude oil tankers, a representative of Alaska state government, and a representative of the federal government. *Id.* § 2732(c)(2).

<sup>83</sup> *Id.* § 2732(d)(6)(B)–(C).

<sup>84</sup> *Id.* § 2732(d)(6)(D)–(F).

<sup>85</sup> Oil Pollution Act of 1990, 33 U.S.C. § 2732(h) (2006) (“In the event that the Association does not adopt, or significantly modifies before adoption, any recommendation of the Council . . . the Association shall provide to the Council, in writing, within 5 days of its decision, notice of its decision and a written statement of reasons for its rejection or significant modification of the recommendation.”).

tions in Alaska.<sup>86</sup> The consultation must include allowing the RCAC to review the changes and make relevant recommendations.<sup>87</sup> However, in this relationship—as in their relationship with the Associations—the Councils’ roles are merely advisory.<sup>88</sup>

C. *The Contract Between Regional Citizens’ Advisory Committee and Alyeska Pipeline Service Company*

On February 8, 1990, one month after the publication of the Commission’s Final Report on the Exxon Valdez disaster, and before Congress enacted the OPA, the Alyeska Pipeline Service Company (“Alyeska”) signed a contract (the “Contract”) with a newly formed Regional Citizens Advisory Committee (the “Committee”).<sup>89</sup> The Contract authorized the Committee—an independent body—to monitor the oil industry, as called for by the Commission’s Final Report.<sup>90</sup>

Article I of the Contract establishes the Committee’s independence, and prohibits Alyeska from any leadership or controlling role within the Committee.<sup>91</sup> The Committee promised to advise Alyeska in return for the oil company’s unconditional grant of independence and pledge of permanent funding.<sup>92</sup>

The Contract provided that the Committee would perform essential services for the public and Alyeska.<sup>93</sup> In addition, the Contract incorporated Alyeska’s Prince William Sound Tanker Spill Prevention and Response Plan, about which the Committee was to provide recommendations to Alyeska regarding development, review, research projects, and any other important issues.<sup>94</sup> The Contract placed a significant limitation on the Committee after listing this relatively expansive

<sup>86</sup> *Id.* § 2732(g).

<sup>87</sup> *Id.*

<sup>88</sup> *See* 33 U.S.C. § 2732(g).

<sup>89</sup> *See* ALASKA OIL SPILL COMM’N, *supra* note 29; Klouda, *supra* note 72; *RCAC Alyeska Contract*, *supra* note 71.

<sup>90</sup> ALASKA OIL SPILL COMM’N, *supra* note 29, at 139–40; *RCAC Alyeska Contract*, *supra* note 71, at 1–2.

<sup>91</sup> *RCAC Alyeska Contract*, *supra* note 71, at 2. The Contract created the Committee as a nonprofit corporation, prohibited Alyeska from membership on the Committee and its board of directors, and contained a provision directing that it “shall be interpreted in such a way as to promote the independence . . . of the Committee.” *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *See id.* at 3. These services include: reviewing and monitoring oil spill prevention and response plans, educating the public about these response and prevention methods, advising Alyeska on the “environmental, social, and economic consequences” of oil-related projects and accidents, and researching mitigation methods for oil-related accidents. *Id.*

<sup>94</sup> *See id.* at 1, 4.

list of duties by stating that “[t]he function of the Committee under this Contract is not regulatory, but is advisory only.”<sup>95</sup> Therefore, despite the fact that Alyeska pledged to “respond in a timely manner” to the Committee’s recommendations, the Contract did not compel Alyeska to implement any of them.<sup>96</sup>

The Contract also outlined the funding procedures for the Committee.<sup>97</sup> Alyeska promised to fund the Committee with a minimum of two million dollars per year (adjusted for inflation in the future) for “operations, technical studies, and expert support.”<sup>98</sup> The Contract explicitly forbade the Committee from using its funding for any activities outside of those described by the Contract.<sup>99</sup> Although this permitted the Committee to use funds for studies of human impacts of future spills, it did not include “attorney’s fees, litigation consultants or witnesses, studies . . . expert witnesses, or other litigation costs in connection with litigation against Alyeska” or arising out of the Exxon Valdez disaster.<sup>100</sup> In addition, the Contract compelled the Committee and Alyeska to renegotiate funding amounts every three years.<sup>101</sup>

The Contract gave relatively broad access rights to the Committee.<sup>102</sup> It required Alyeska provide, upon request, any records and documents that the Committee considered “reasonably necessary” to “perform its duties.”<sup>103</sup> This right of access could not exceed that of the EPA and other government agencies with regulatory authority, and excluded confidential personnel data, anything protected by attorney-client privilege, and any confidential information of which competitor might take advantage.<sup>104</sup> Alyeska had to provide requested documents within a “reasonable” amount of time, but the subchapter did not define a timeframe.<sup>105</sup> In addition to documents and records, the Com-

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<sup>95</sup> *See id.* at 4–5.

<sup>96</sup> *See id.*

<sup>97</sup> *RCAC Alyeska Contract, supra* note 71, at 8.

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

<sup>99</sup> *Id.* at 2, 5. While the Committee can “engage in activities outside of its contractual obligations to Alyeska; . . . any such activities shall not be paid for by funds provided by Alyeska.” *Id.* at 2.

<sup>100</sup> *Id.* at 5.

<sup>101</sup> *Id.* at 8. These negotiations were to be conducted in “good faith” by both parties. *Id.* If they could not agree on an amount, the parties were to turn to a third-party arbitrator, who could not change the funding amount by more than fifty percent in either direction. *Id.* at 9.

<sup>102</sup> *See id.* at 10.

<sup>103</sup> *RCAC Alyeska Contract, supra* note 71, at 10.

<sup>104</sup> *See id.* If the Committee signed confidentiality agreements, however, they could access confidential information. *See id.* at 10–11.

<sup>105</sup> *See id.* at 10–11.

mittee could inspect Alyeska facilities as long as it provided advance notice, and could photograph or videotape such visits.<sup>106</sup> The Contract also allowed the Committee limited access in an environmental emergency, as long as it did not impede response efforts in the process.<sup>107</sup>

Finally, in anticipation of a potential statutory requirement for RCACs, the Contract included a stipulation that, should legislation be enacted for the formation of a citizens' advisory group, Alyeska would assist the Committee to qualify as such a group.<sup>108</sup> After Congress passed the OPA, the Committee did make such an effort and became certified as an alternative voluntary advisory group,<sup>109</sup> pursuant to the Act.<sup>110</sup> In the Committee's most recent Charter Renewal, dated May 2, 2011, the Coast Guard reiterated that, while the PWSRCAC predates the passage of the OPA, it is "operate[d] in a fashion that is broadly consistent with OPA" and still funded by Alyeska.<sup>111</sup>

## II. THE SUCCESSES AND LIMITATIONS OF EXISTING RCACs

### A. *Prince William Sound Regional Citizens' Advisory Council: Successes and Improvements to Oil Spill Prevention and Response*

The mission statement of the Prince William Sound Regional RCAC (PWSRCAC or "Prince William Sound Council") is for "citizens [to] promot[e] environmentally safe operation of the Alyeska Pipeline marine terminal in Valdez and the oil tankers that use it."<sup>112</sup> It considers the protection of the citizens of Prince William Sound the most im-

<sup>106</sup> *Id.* at 11–12.

<sup>107</sup> *Id.* at 12. Such emergencies included "oil spills, significant pollution incidents, or other actual or threatened major environmental harm." *Id.*

<sup>108</sup> *Id.* at 13–14.

<sup>109</sup> Certification of Alternative Advisory Group in Lieu of a Council, 57 Fed. Reg. 14,440, 14,440 (Apr. 20, 1992); see Guidelines for Recertification of Alternative Voluntary Groups in Lieu of a Council, 57 Fed. Reg. 62,600, 62,600 (Dec. 31, 1992).

<sup>110</sup> 33 U.S.C. § 2732(o) (2006) ("The requirements of . . . this section . . . are deemed to have been satisfied . . . [w]ith respect to the Prince William Sound Program, the Alyeska Pipeline Service Company or any of its owner companies enters into a contract for the duration of the operation of the Trans-Alaska Pipeline System with the Alyeska Citizens Advisory Committee in existence on August 18, 1990, or a successor organization, to fund that Committee or organization on an annual basis in the amount provided for by subsection (k)(2)(A) of this section . . .").

<sup>111</sup> Prince William Sound Regional Citizens' Advisory Council (PWSRCAC) Charter Renewal, 76 Fed. Reg. at 24,506.

<sup>112</sup> *About the Council*, PRINCE WM. SOUND REGIONAL CITIZENS' ADVISORY COUNCIL, <http://www.pwsrcac.org/about/index.html> (last updated Sept. 27, 2012).

portant aspect of its endeavors, and holds the prevention of future oil spills as paramount in its efforts.<sup>113</sup>

In 2009, twenty years after the Exxon Valdez disaster, the PWS-RCAC released a report outlining changes in the Prince William Sound and the oil industry, highlighting both improvements and factors that required further research and change.<sup>114</sup> The report organized the changes into three categories: prevention, response, and environment.<sup>115</sup>

Beyond this report and other material the PWSRCAC publishes on its website, there are limited in-depth analyses of the Prince William Sound Council's effectiveness since its inception in 1991.<sup>116</sup> One such analysis is a study written by George Busenberg, which investigated the effectiveness of both Alaska councils from 1990 through 2004.<sup>117</sup> Busenberg measured the councils' effectiveness based on their success in seeing policy changes from conception to implementation.<sup>118</sup> Expanded funding and technical assistance improves efficiency, as does the PWSRCAC's ability to work with other organizations to build support for their initiatives.<sup>119</sup> Busenberg identified six areas in which the PWSRCAC has initiated major projects: research on the environment, oil disaster response research, detection of ice, weather reporting, oil terminal and tanker fires, and tug escorts.<sup>120</sup>

## 1. Safety Improvements in Prince William Sound: Prevention and Response Measures

Acknowledging that “[t]he oil spill that never happens is the easiest to clean up,” the PWSRCAC identified new safety improvements aimed at reducing the risk of another oil spill.<sup>121</sup> The Prince William Sound Council highlighted industry-wide improvements such as reinforced, double-hulled tankers, an improved tug escort system, manda-

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<sup>113</sup> *See id.*

<sup>114</sup> PRINCE WILLIAM SOUND REG'L CITIZENS' ADVISORY COUNCIL, THEN & NOW: CHANGES IN PRINCE WILLIAM SOUND CRUDE OIL TRANSPORTATION SINCE THE EXXON VALDEZ OIL SPILL: 1989–2009, at 3 (2009), available at <http://www.pwsrcac.org/docs/d0064000.pdf>.

<sup>115</sup> *See id.* at 2.

<sup>116</sup> *See* Plater, *supra* note 16, at 411 & n.103.

<sup>117</sup> *See* George J. Busenberg, *Citizen Participation and Collaborative Environmental Management in the Marine Oil Trade of Coastal Alaska*, 35 COASTAL MGMT. 239, 240 (2007).

<sup>118</sup> *Id.*

<sup>119</sup> *See id.* These two theories, “resources hypothesis” and “collaborative capacity,” form the basis of Busenberg's analytical framework. *See id.*

<sup>120</sup> *Id.* at 242.

<sup>121</sup> PRINCE WILLIAM SOUND REG'L CITIZENS' ADVISORY COUNCIL, *supra* note 114, at 4.



tory alcohol tests for captains, limited work hours to reduce fatigue, and vastly improved monitoring equipment.<sup>122</sup> Although many of these changes can be attributed to the Oil Pollution Act of 1990's (OPA) heightened requirements,<sup>123</sup> the PWSRCAC contributed to the changes as well.<sup>124</sup> For example, the Prince William Sound Council worked with Congress and the U.S. Coast Guard to research and apply new double-hull requirements on tankers, as instructed by the OPA.<sup>125</sup> In addition, the PWSRCAC has recommended stricter requirements than statutorily mandated for various preventative schemes, with varying degrees of success.<sup>126</sup> Finally, the Prince William Sound Council helped fund a research project to identify and mitigate potential weather hazards to tankers.<sup>127</sup>

Ice is one of the most significant weather hazards to oil transportation in Prince William Sound. In fact, the Exxon Valdez diverted from its path to avoid hitting icebergs in the 1989 spill, and grounded on the reef because it did not return to its proper lane.<sup>128</sup> Through research gathered in 1993, the PWSRCAC determined that ice reporting needed improvement, in large part due to a glacier that generated icebergs that floated directly into tanker lanes in the Sound.<sup>129</sup> In 2002, the PWSRCAC implemented a new ice detection system with the help of the U.S. Coast Guard, the Army, the National Oceanic and Atmospheric Association, the Alaska Department of Environmental Conservation (ADEC), and other regional entities.<sup>130</sup> This project was so successful that a Coast Guard commander deemed the new system "the best internationally available ice detection technology in existence" in 2002.<sup>131</sup>

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<sup>122</sup> See *id.* at 4–8.

<sup>123</sup> See, e.g., 33 U.S.C. § 2734 (2006) ("Vessel traffic service system"); *id.* § 2735 ("Equipment and personnel requirements under tank vessel and facility response plans").

<sup>124</sup> See Joe Banta, 5 *Questions About Oil Spills*, SEA BRIEFS (Miss. Ala. Sea Grant Consortium), Summer 2010, <http://masgc.org/sbonline/summer10/10q.htm>

<sup>125</sup> See *id.*

<sup>126</sup> See PRINCE WILLIAM SOUND REG'L CITIZENS' ADVISORY COUNCIL, *supra* note 114, at 5–6.

<sup>127</sup> See *id.* at 8–9.

<sup>128</sup> See *id.*; Busenberg, *supra* note 117, at 244.

<sup>129</sup> Busenberg, *supra* note 117, at 244. A later study, in 1996, found that this glacier would likely produce even more marine ice for the next few years, and possibly for decades. *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* (quoting News Release, Prince William Sound Reg'l Citizens' Advisory Council, Prince William Sound Iceberg Radar Project Comes Online (Dec. 20, 2002), *available at* <http://www.pwsrcac.org/newsroom/021220.html>).

The PWSRCAC also contributed to improved response measures since 1990.<sup>132</sup> The Council helps in the development of Geographic Response Strategies, which are “map-based strategies that can save time during the critical first few hours of an oil spill response” by identifying environmentally sensitive areas.<sup>133</sup> In addition, the PWSRCAC performed extensive research about the pros and cons of existing response techniques such as dispersants and in-situ burning, or the burning of oil that is resting on the water.<sup>134</sup> Finally, the Council performed many research projects concerning contingency plans for first responders to use in the event of a future oil spill.<sup>135</sup>

## 2. Research Projects in Prince William Sound

The OPA mandated RCACs form environmental monitoring programs through the funding they receive from the oil industry.<sup>136</sup> Pursuant to this requirement, the PWSRCAC launched a long-term environmental monitoring program to compile important environmental data starting in 1993.<sup>137</sup> This project establishes baseline scientific data gathered at ten sites throughout the Sound that could be used to gauge the impact of future spills.<sup>138</sup>

Other Council-sponsored programs monitor the environmental impact of the daily use of oil tankers on the Prince William Sound at the port of Valdez.<sup>139</sup> In addition, the PWSRCAC has funded projects to determine if non-indigenous species pose a serious threat to the Sound.<sup>140</sup> In most of its research studies, the PWSRCAC collaborates

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<sup>132</sup> See PRINCE WILLIAM SOUND REG’L CITIZENS’ ADVISORY COUNCIL, *supra* note 114, at 10–18.

<sup>133</sup> *Id.* at 14.

<sup>134</sup> *Id.* at 16–18. The Council publicly advocated a ban on most uses of dispersants and in-situ burning pending future research on both activities because of their potential harmful effects on the environment and questionable benefits to the process of cleaning up oil after a spill. See *id.* at 18.

<sup>135</sup> See Busenberg, *supra* note 117, at 244. In addition, the Council is involved in reviewing such contingency plans under the OPA along with ADEC and the U.S. Coast Guard. *Id.* at 243.

<sup>136</sup> See 33 U.S.C. § 2732(b)–(c) (2006); Busenberg, *supra* note 117, at 242.

<sup>137</sup> Busenberg, *supra* note 117, at 242.

<sup>138</sup> PRINCE WILLIAM SOUND REG’L CITIZENS’ ADVISORY COUNCIL, *supra* note 114, at 19. The program tests the tissue of mussels from these areas, because they are “filter feeders and accumulate toxins from the water.” *Id.*

<sup>139</sup> See Busenberg, *supra* note 117, at 243.

<sup>140</sup> PRINCE WILLIAM SOUND REG’L CITIZENS’ ADVISORY COUNCIL, *supra* note 114, at 20–21.

with other entities such as the oil industry, U.S. Coast Guard, universities, and research centers to compile this information.<sup>141</sup>

### 3. The Tug Escort System

Shortly after its creation, the PWSRCAC began researching oil tanker transit and the tug escort system in Prince William Sound.<sup>142</sup> Tug escorts, newly mandated for oil tanker journeys from Port Valdez to the Gulf of Alaska, could assist disabled tankers and keep them from running aground.<sup>143</sup> The PWSRCAC became concerned with transit through narrow passages, especially in windy situations.<sup>144</sup> From 1992 to 1997, the Prince William Sound Council, oil industry, U.S. Coast Guard, and ADEC worked together to study the system in place and the potential introduction of tractor tugs.<sup>145</sup>

After the first study revealed that the tankers might run aground due to high winds in the Sound, the oil industry introduced changes to ameliorate this risk.<sup>146</sup> In addition, the study prompted the Coast Guard to issue a new rule that prohibited tankers from travelling in high wind and wave periods.<sup>147</sup> A second study in 1997 showed that tankers needed tug vessel assistance at the entrance to the Gulf of Alaska; the oil industry immediately complied with this request.<sup>148</sup> A subsequent study provided the governor of Alaska and ADEC with evidence that best available tug technology, as required by law, could be updated with the implementation of tractor tugs.<sup>149</sup>

#### B. Cook Inlet Regional Citizens' Advisory Council: Successes

The mission statement of the Cook Inlet RCAC (CIRCAC or "Cook Inlet Council") is to "represent the citizens of Cook Inlet in promoting environmental [sic] safe marine transportation and oil facility opera-

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<sup>141</sup> See Busenberg, *supra* note 117, at 243.

<sup>142</sup> *Id.* at 246.

<sup>143</sup> *Id.*

<sup>144</sup> See *id.*

<sup>145</sup> See *id.*

<sup>146</sup> See *id.* ("The oil industry reduced the speed of laden oil tankers in a narrow passage of the Sound, and tethered tug vessels to laden tankers in that passage to allow for swift assistance.").

<sup>147</sup> Busenberg, *supra* note 117, at 246.

<sup>148</sup> *Id.* (referencing an oil industry insider who stated that this action was taken directly because of the study).

<sup>149</sup> *Id.*

tions” in the area.<sup>150</sup> To that end, it established two committees: the Environmental Monitoring Committee (EMC) and the Prevention, Response, Operations & Safety (PROPS) Committee.<sup>151</sup> The EMC monitors Cook Inlet to detect environmental harm from oil industry operations in the region.<sup>152</sup> The PROPS Committee primarily researches methods to reduce future spills in Cook Inlet, and also reviews spill response plans and best available technologies.<sup>153</sup>

The CIRCAC divides its programs into nine main categories: biological and chemical monitoring, coastal habitat mapping, physical oceanography, oils fates and effects, technical review, geographic response strategies, prevention and response, risk assessment, and contingency planning.<sup>154</sup> The biological and chemical monitoring program first identified areas of Cook Inlet where oil industry operations were harming the ecosystem, and documented the extent of this damage.<sup>155</sup> The program led to the creation of a shoreline database, which compiled information on resources and beach characteristics, enabling CIRCAC to track its progress in improving the area.<sup>156</sup> The coastal habitat mapping program has a similar goal—to create a database of information about Cook Inlet that can assist in protecting the shore and reacting quickly and efficiently to future harmful change.<sup>157</sup>

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<sup>150</sup> *Mission Statement*, COOK INLET REGIONAL CITIZENS’ ADVISORY COUNCIL, [http://www.circac.org/index.php?option=com\\_content&view=article&id=60&Itemid=40](http://www.circac.org/index.php?option=com_content&view=article&id=60&Itemid=40) (last visited Jan. 17, 2013).

<sup>151</sup> *Volunteers*, COOK INLET REGIONAL CITIZENS’ ADVISORY COUNCIL, [http://www.circac.org/index.php?option=com\\_content&view=article&id=54&Itemid=37](http://www.circac.org/index.php?option=com_content&view=article&id=54&Itemid=37) (last visited Jan. 17, 2013).

<sup>152</sup> *Environmental Monitoring Committee*, COOK INLET REGIONAL CITIZENS’ ADVISORY COUNCIL, [http://www.circac.org/index.php?option=com\\_content&view=article&id=6&Itemid=14](http://www.circac.org/index.php?option=com_content&view=article&id=6&Itemid=14) (last visited Jan. 17, 2013).

<sup>153</sup> *See Prevention, Response, Operations and Safety Committee*, COOK INLET REGIONAL CITIZENS’ ADVISORY COUNCIL, [http://www.circac.org/index.php?option=com\\_content&view=article&id=7&Itemid=15](http://www.circac.org/index.php?option=com_content&view=article&id=7&Itemid=15) (last visited Jan. 17, 2013).

<sup>154</sup> *Programs*, COOK INLET REGIONAL CITIZENS’ ADVISORY COUNCIL, [http://www.circac.org/index.php?option=com\\_content&view=article&id=56&Itemid=4](http://www.circac.org/index.php?option=com_content&view=article&id=56&Itemid=4) (last visited Jan. 17, 2013).

<sup>155</sup> *Biological and Chemical Monitoring*, COOK INLET REGIONAL CITIZENS’ ADVISORY COUNCIL, [http://www.circac.org/index.php?option=com\\_content&view=category&layout=blog&id=10&Itemid=18](http://www.circac.org/index.php?option=com_content&view=category&layout=blog&id=10&Itemid=18) (last visited Jan. 17, 2013).

<sup>156</sup> *See id.*

<sup>157</sup> *See Coastal Habitat Mapping*, COOK INLET REGIONAL CITIZENS’ ADVISORY COUNCIL, [http://www.circac.org/index.php?option=com\\_content&view=category&layout=blog&id=18&Itemid=33](http://www.circac.org/index.php?option=com_content&view=category&layout=blog&id=18&Itemid=33) (last visited Jan. 17, 2013).

The Cook Inlet Council also devoted time to formulating and perfecting oil spill response plans.<sup>158</sup> The CIRCAC assisted in developing multiple geographic response strategies similar to those developed by the PWSRCAC.<sup>159</sup> These plans, which point the first responders towards sensitive areas and the best places for protection resources to be placed, can be critically important during the first few hours of spill response.<sup>160</sup> In 1996 and 2002, the CIRCAC worked on an “oil spill trajectory model,” which could predict the path of oil within Cook Inlet following a spill.<sup>161</sup> In addition, the CIRCAC and the PWSRCAC co-funded the development of other geographic response strategies in particularly sensitive areas in Alaska.<sup>162</sup>

Finally, in early 2008, both the CIRCAC and PWSRCAC prepared an appellate brief in support of levying punitive damages on Exxon Mobil Corporation in the wake of the Exxon Valdez disaster.<sup>163</sup> The Supreme Court ultimately reduced the punitive damages that the jury awarded to the plaintiffs, permitting punitive damages with a ratio of one-to-one to the awarded compensatory damages.<sup>164</sup> Although the RCACs were not completely successful in this case, their assistance to plaintiffs is one example of the potential impact RCACs can make beyond research and collaborative work effort.<sup>165</sup>

### C. Shortcomings, Limitations, and Failures of the PWSRCAC and CIRCAC

#### 1. Subpoena Power

The two councils have faced both internal and external limitations since their inception.<sup>166</sup> Although the OPA requires oil industry cooperation and funding of these councils, the statutory authorization of RCACs excluded some of the Alaska Oil Spill Commission’s (“Alaska

<sup>158</sup> *Geographic Response Strategies*, COOK INLET REGIONAL CITIZENS’ ADVISORY COUNCIL, [http://www.circac.org/index.php?option=com\\_content&view=article&id=26&Itemid=34](http://www.circac.org/index.php?option=com_content&view=article&id=26&Itemid=34) (last visited Jan. 17, 2013).

<sup>159</sup> Busenberg, *supra* note 117, at 248; *see supra* notes 133–134 and accompanying text.

<sup>160</sup> *Geographic Response Strategies*, *supra* note 158.

<sup>161</sup> Busenberg, *supra* note 117, at 248. Responders could then quickly attend to the most threatened areas, which would ideally significantly lower the total environmental harm. *See id.*

<sup>162</sup> *Geographic Response Strategies*, *supra* note 158.

<sup>163</sup> Brief for Prince William Sound Regional Citizens’ Advisory Council and Cook Inlet Regional Citizens’ Advisory Council as Amici Curiae Supporting Respondents at 9, *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) (No. 07-219) [hereinafter Brief of Amici Curiae].

<sup>164</sup> *See Baker*, 554 U.S. at 476, 515.

<sup>165</sup> *See* Brief of Amici Curiae, *supra* note 163; *Baker*, 554 U.S. at 476, 515.

<sup>166</sup> *See* Plater, *supra* note 16, at 413–15.

Commission”) recommendations that could have made them much more effective.<sup>167</sup> In addition, the OPA limited the Commission’s recommendation to create RCACs to the state of Alaska.<sup>168</sup>

The statute itself does not grant subpoena authority to either the PWSRCAC or CIRCAC.<sup>169</sup> Neither group can subpoena information and witnesses that could prove extremely important in supplementing state oversight.<sup>170</sup> Thus, the RCACs must trust in the oil industry’s inclination to cooperate with important information requests and cannot obtain testimony under oath.<sup>171</sup>

## 2. Funding Limitations Hinder Relationship with Oil Industry

Although the OPA provides funding for each RCAC, it does not guarantee any amount, and the CIRCAC must continually negotiate with the oil industry to maintain its budget.<sup>172</sup> A significant difference between the RCACs in Prince William Sound and Cook Inlet is their funding levels—while the PWSRCAC received \$15.1 million from 1990 through 1996, the CIRCAC received only \$3.47 million during that same time period.<sup>173</sup> In addition, the Cook Inlet Council is small, with

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<sup>167</sup> Compare ALASKA OIL SPILL COMM’N, *supra* note 29, at 139–40 (envisioning a citizens advisory council with subpoena power and extensive duties including advising the governor and legislature of Alaska on environmental risks), with 33 U.S.C. § 2732(d), (k) (2006) (notably failing to grant subpoena power to the councils and omitting any statutory relationship with the governor or legislature of Alaska), and RCAC *Alyeska Contract*, *supra* note 71, at 3–5, 10–12 (creating a duty to “the public and Alyeska” and not the Alaska government, and providing access rights to the RCAC falling short of subpoena power).

<sup>168</sup> See 33 U.S.C. § 2732(b), (d) (establishing Councils in Prince William Sound and Cook Inlet, but nowhere else); ALASKA OIL SPILL COMM’N, *supra* note 29, at 139–40. The Commission, in focusing on the Exxon Valdez oil spill, did not specifically advocate for a wider application of its recommendations. ALASKA OIL SPILL COMM’N, *supra* note 29, at 139–40. Had RCACs been expanded nationwide, a council in the Gulf of Mexico may have prevented or severely mitigated the harm from the BP Deepwater oil spill in 2010. See Zygmunt J.B. Plater, *Learning from Disasters: Twenty-One Years After the Exxon Valdez Oil Spill, Will Reactions to the Deepwater Horizon Blowout Finally Address the Systemic Flaws Revealed in Alaska?*, 40 *Envtl. L. Rep.* (Envtl. Law Inst.) 11,041, 11,046 (2010).

<sup>169</sup> See Plater, *supra* note 16, at 414 (suggesting this result may be the result of lobbying efforts in Congress).

<sup>170</sup> See *id.*; see ALASKA OIL SPILL COMM’N, *supra* note 29, at 139–40.

<sup>171</sup> Cf. Allison Fisher, *The Power of Subpoena*, CITIZEN ENERGY (Nov. 11, 2010), <http://publiccitizenenergy.wordpress.com/2010/11/11/the-power-of-subpoena> (discussing similar problems created by the BP Oil Spill Commission’s lack of subpoena power).

<sup>172</sup> See 33 U.S.C. § 2732(k); Plater, *supra* note 16, at 414.

<sup>173</sup> George Busenberg, *Citizen Advisory Councils and Environmental Management in the Marine Oil Trade 32* (1997) (unpublished Technical Report Based on Ph.D. dissertation, University of North Carolina at Chapel Hill), available at <http://www.circac.org/documents/pdf/emc/CACEnvironMg.pdf>.

only seven staff members.<sup>174</sup> These limited resources contribute to a significantly reduced track record of policy and governmental successes as compared to the PWSRCAC.<sup>175</sup>

Recent budgetary problems led to criticism of the programs, especially the CIRCAC.<sup>176</sup> In a 2010 quarterly meeting, residents of Cook Inlet testified to the CIRCAC and spoke of their disappointment in the CIRCAC's weak record of effecting substantive improvements.<sup>177</sup> The citizens recognized that the CIRCAC's one million dollar budget was the root of many problems, including a lack of oversight that resulted in recent close calls that could have led to more oil spill disasters.<sup>178</sup>

In addition, in 2010 the CIRCAC board fired a member, Bob Shavelson, after he publicly questioned the Cook Inlet Council's actions during a period of time in which they were re-negotiating their budget with oil companies.<sup>179</sup> Shavelson first raised concerns in a board meeting that a CIRCAC report regarding a crude oil tank farm failed to acknowledge the temporal connection to their negotiations with Chevron for funding.<sup>180</sup> After sending a public letter criticizing the CIRCAC for ignoring his objections, the board voted to remove him from office.<sup>181</sup> Shavelson and others have since accused the CIRCAC of being completely owned by and at the mercy of the oil industry, and he believes the CIRCAC system is "irreparably broken."<sup>182</sup> These concerned participants and observers suggest the only way to maintain the integrity of the RCACs is to completely sever their relationship with the oil industry, and have Congress mandate their funding from another

<sup>174</sup> See *Cook Inlet RCAC Staff Members*, COOK INLET REGIONAL CITIZENS' ADVISORY COUNCIL, [http://www.circac.org/index.php?option=com\\_content&view=article&id=3&Itemid=11](http://www.circac.org/index.php?option=com_content&view=article&id=3&Itemid=11) (last visited Jan. 17, 2013).

<sup>175</sup> See Busenberg, *supra* note 173, at 31, 38–39. Nevertheless, as Busenberg notes, the "[council] has used its limited resources to produce a substantial body of new knowledge on the environmental management of the marine oil trade in the Inlet." *Id.* at 38.

<sup>176</sup> See Naomi Klouda, *CIRCAC Castigated for 'Lap Dog' Role*, HOMER TRIB. (Sept. 29, 2010), <http://homertribune.com/2010/09/circac-castigated-for-lap-dog-role/>.

<sup>177</sup> See *id.*

<sup>178</sup> See *id.*; see Klouda, *supra* note 72 (covering the dismissal of "[a] board member who spoke out after a near catastrophe at the Drift River Oil Tank farm").

<sup>179</sup> Klouda, *supra* note 72.

<sup>180</sup> See *id.*; Joseph Horton, How a Conflict of Interest (COI) and "Whistleblower" Amendment in the Oil Pollution Act of 1990 (OPA-90) Would Insulate Regional Citizen Advisory Councils (RCACs) From Undue Political and Industry Pressure 3 (Nov. 23, 2010) (unpublished manuscript) (on file with author).

<sup>181</sup> See Horton, *supra* note 180. While the board found that Shavelson violated an internal policy banning directors from publicly criticizing the CIRCAC, Shavelson insisted the removal was "retaliatory in nature." *Id.*

<sup>182</sup> See Klouda, *supra* note 72.

source.<sup>183</sup> In the alternative, some environmentalists limit their criticisms to the municipalities in Cook Inlet that are especially tied to the oil industry, suggesting their voting rights alone should be limited.<sup>184</sup> Another suggested solution is to create whistleblower security for RCAC members who discover and wish to publicly publish documentation of any evidence of impropriety between the oil industry and RCACs.<sup>185</sup>

### 3. The RCACs' Advisory Authority Limitations and Failed Policy Proposals

In 1996, the CIRCAC proposed that the industry consider using a tug in the Cook Inlet to help guide disabled tankers.<sup>186</sup> This proposal came from the Cook Inlet Council alone, and the oil industry in the area opposed it, arguing that a sufficient response vessel that could respond to tankers in need already existed.<sup>187</sup> ADEC and the U.S. Coast Guard neither opposed nor supported the proposal; the Coast Guard did not possess the authority needed to require a tug, and neither party perceived the Inlet as a danger zone because of its small size as compared with Prince William Sound.<sup>188</sup> Without this political support, the Alaska legislature did not address the issue.<sup>189</sup> The CIRCAC did successfully “encourag[e] the local oil industry to test and improve the towing abilities of the response vessel stationed in the Inlet,” but no proposal exists for the development of a tug vessel in the Inlet.<sup>190</sup>

Both RCACs have experienced difficulty in implementing improved oil spill response systems.<sup>191</sup> The PWSRCAC reviews contingency plans for the Prince William Sound, which are used for oil spill prevention and response by the oil industry.<sup>192</sup> Under the OPA, every oil tanker operator must have a contingency plan if they intend to ship in the waters of Alaska.<sup>193</sup> In 1994, the PWSRCAC developed a “stan-

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<sup>183</sup> Klouda, *supra* note 176.

<sup>184</sup> See Horton, *supra* note 180, at 4. This calculation would be based on the proportion of the municipality's gross domestic product that comes from the oil industry. *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Busenberg, *supra* note 173, at 33.

<sup>187</sup> See *id.*

<sup>188</sup> *Id.* A study of the oil transportation system in Alaska revealed that oil trade in Cook Inlet amounted to six percent of the average yearly amount of oil transported in the Cook Inlet and Prince William Sound regions. *Id.*

<sup>189</sup> See *id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 31, 35–36.

<sup>192</sup> Busenberg, *supra* note 173, at 28.

<sup>193</sup> *Id.* In addition, “[c]ontingency plans are also held by state and federal agencies with responsibilities for the prevention of marine oil pollution in Alaska . . . .” *Id.*



dard protocol” for its review of contingency plans, and pursuant to this protocol, reviewed all existing plans that same year.<sup>194</sup> Despite this, the Prince William Sound Council “has faced a generally unfavorable political context in attempting to enhance the contingency plans for the Sound.”<sup>195</sup> Although the oil industry has improved their response plans since the Exxon Valdez spill, the PWSRCAC has lobbied for even more protections.<sup>196</sup> ADEC has not funded PWSRCAC’s proposals, and has merely approved preexisting oil industry contingency plans—without ADEC’s support, the PWSRCAC has not sufficiently persuaded the industry to enhance the plans.<sup>197</sup>

Similarly, the CIRCAC has tried and failed to improve oil spill response systems in Cook Inlet.<sup>198</sup> The CIRCAC, like the PWSRCAC, reviews all contingency plans for oil tankers in the region, and has developed standard reviewing protocols.<sup>199</sup> As a result of these reviews, the Cook Inlet Council has proposed various policy changes that both the ADEC and the oil industry have ignored.<sup>200</sup> Although the CIRCAC has called for more coordination between the government and oil industry in the planning process and the “incorporation of oil firefighting strategies into the contingency plans,” neither has supported the Council.<sup>201</sup>

### III. EXPANSION (OR LACK THEREOF) OF RCACs FROM 1990 TO 2012

#### A. *BP Deepwater Horizon Oil Spill*

In response to the 2010 BP Deepwater Horizon blowout, President Obama established a National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling (“BP Commission”) in May 2010.<sup>202</sup> President Obama directed the BP Commission to “examine the relevant facts and circumstances concerning the root causes of the Deepwater Horizon oil disaster” and “develop options for guarding against, and

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<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* In particular, the PWSRCAC has disagreed with the oil industry’s conception of their response plans’ “adequate margin of protection” should another disastrous spill occur in the Sound. *Id.*

<sup>197</sup> *See id.* at 29.

<sup>198</sup> Busenberg, *supra* note 173, at 36.

<sup>199</sup> *See id.* at 35. These protocols are designed for “consistency in the plan review process and to provide reviewers with a framework for gauging the adequacy of the plans.” *Id.*

<sup>200</sup> *Id.* at 36.

<sup>201</sup> *Id.*

<sup>202</sup> Exec. Order No. 13,543, 75 Fed. Reg. 29,397 (May 21, 2010).

mitigating the impact of, oil spills associated with offshore drilling.”<sup>203</sup> The BP Commission presented a Final Report to the President in January 2011.<sup>204</sup> The Final Report investigated the events surrounding the explosion and made recommendations for measures to prevent a future similar event.<sup>205</sup>

The BP Commission found that the Macondo well explosion could have been prevented, and the causes of the blowout “reveal[ed] such systematic failures in risk management that they [put] in doubt the safety culture of the entire industry.”<sup>206</sup> Specifically, the Final Report noted that, prior to the blowout, “neither industry nor government adequately addressed” the risks of offshore drilling, and “[a]bsent major crises, and given the remarkable financial returns available from deepwater reserves, the business culture succumbed to a false sense of security.”<sup>207</sup> Just as in Alaska in 1989, the citizens most harmed by the blowout—oyster farmers, fishermen, tourism proprietors, and oil-rig workers—had been excluded from the decision-making process that culminated in the blowout.<sup>208</sup>

Going forward, the Final Report called for increased regulatory oversight by the government and significant improvements in the oil and gas industries’ own safety practices.<sup>209</sup> In addition, the BP Commission emphasized the need to improve local coordination and involvement in spill response planning.<sup>210</sup> Using RCACs established in the Oil Pollution Act of 1990 (OPA) as a guide, the Final Report called on Congress to create a similar structure in the Gulf.<sup>211</sup> The BP Commission found that local officials’ exclusion from response planning had hampered the efficacy of the cleanup and led to citizen mistrust of the efforts.<sup>212</sup> Groups enabling citizens to become more involved in prevention and response planning could “prevent industry and government complacency, and increase public trust in response operations.”<sup>213</sup>

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<sup>203</sup> *Id.*

<sup>204</sup> GULF FINAL REPORT, *supra* note 1, at iii.

<sup>205</sup> *Id.* at vi–vii.

<sup>206</sup> *Id.* at vii. Moreover, the Final Report noted that “*complacency* . . . led to the accident in the first place” —the same word was used to describe the events leading up to the Exxon Valdez disaster. *Id.* at viii (emphasis added); *see supra* note 42 and accompanying text.

<sup>207</sup> GULF FINAL REPORT, *supra* note 1, at ix.

<sup>208</sup> *See id.* at x; *supra* notes 17, 44–50 and accompanying text.

<sup>209</sup> GULF FINAL REPORT, *supra* note 1, at vii.

<sup>210</sup> *Id.* at 268.

<sup>211</sup> *Id.* at 268–69.

<sup>212</sup> *See id.* at 268.

<sup>213</sup> *See id.*

The Final Report envisioned a Gulf council to “broadly represent the citizens’ interests in the area, such as fishing and tourism,” and contemplated the possible inclusion of oil industry representatives as non-voting members.<sup>214</sup> Those who held leases in Gulf offshore drilling would fund the group.<sup>215</sup> Instead of a pure advisory role, the BP Commission recommended that government officials “be required to consult with the council on relevant issues, that operators provide the council with access to records and other information, and that entities . . . declining the council’s advice submit their reasons to the council in writing.”<sup>216</sup> This would give the Gulf council a significant role in the future of offshore drilling practices.<sup>217</sup>

### B. *The Proposed Gulf of Mexico Independent Regional Citizens’ Advisory Counsel*

While calls to implement RCACs in the Gulf of Mexico in the wake of the BP Deepwater Horizon blowout resulted in their inclusion in proposed bills, Congress has not enacted such a bill.<sup>218</sup> Almost immediately following the Deepwater Horizon disaster, both Democrats and Republicans in the Senate introduced bills responding to the oil spill.<sup>219</sup> Both bills primarily addressed liability issues and what party should have to pay response costs in the event of an oil spill.<sup>220</sup> The Senate, however, was unable to agree on a final version of either bill and did not pass a law.<sup>221</sup> Representative Laura Richardson introduced a similar bill on December 20, 2011, entitled the Securing Health for Ocean Resources and Environment (SHORE) Act.<sup>222</sup> In January 2012 the House referred the

<sup>214</sup> *Id.* at 269.

<sup>215</sup> See GULF FINAL REPORT, *supra* note 1, at 269.

<sup>216</sup> *Id.*

<sup>217</sup> See *id.* at 268–69.

<sup>218</sup> See *infra* notes 219–223 and accompanying text. Less than one month after the blowout, the executive director of the PWSRCAC, Mark Swanson, called upon Congress to “mak[e] citizen oversight a key part of the system to ensure nothing like BP’s Gulf spill happens again.” Op-Ed. Submission, Mark Swanson, Exec. Dir., Prince William Sound Reg’l Citizens’ Advisory Council (May 18, 2010), available at <http://www.pwsrca.org/docs/d0082024.GOMNewsRls.pdf>.

<sup>219</sup> Katie Howell, *Moderate Senate Democrats Seek Compromise for Gulf Spill Bill*, N.Y. TIMES (Aug. 4, 2010), <http://www.nytimes.com/gwire/2010/08/04/04greenwire-moderate-senate-democrats-seek-compromise-for-42874.html>.

<sup>220</sup> See *id.*

<sup>221</sup> Robin Bravender & Katie Howell, *Fallout Begins After Senate’s Failure to Act on Energy, Oil Spill*, N.Y. TIMES (Aug. 5, 2010), <http://www.nytimes.com/gwire/2010/08/05/05greenwire-fallout-begins-after-senates-failure-to-act-on-54000.html?pagewanted=all>.

<sup>222</sup> See H.R. 3757, 112th Cong. (2011).

bill to the House Subcommittee on Energy and Environment, Subcommittee on Energy and Mineral Resources, and Subcommittee on Fisheries and Insular Affairs, but no action has since been taken.<sup>223</sup>

The SHORE Act includes a provision to create a Gulf of Mexico RCAC (GMRCAC or “Gulf Council”) analogous to the RCACs in Alaska by inserting a provision into the OPA.<sup>224</sup> Voting representatives of the states surrounding the Gulf of Mexico and nonvoting members from various government and maritime agencies would comprise the Gulf Council.<sup>225</sup> Citizen appointments would last for three years and the council would be self-governing.<sup>226</sup> In addition, the Gulf Council would have three primary duties: to monitor the oil industry in the Gulf of Mexico, make recommendations to research institutes and assist oil spill recovery efforts, and “conduct such other activities within the authority and scope of the Council as the Council considers appropriate.”<sup>227</sup>

The SHORE Act provisions contain a few significant departures from the OPA language.<sup>228</sup> First, while the SHORE Act would not explicitly grant the GMRCAC subpoena power, it would allow “access to oil and gas industry facilities and records that are relevant to the proper execution of the duties of the Council.”<sup>229</sup> In addition, although the SHORE Act would retain the oil industry as the Gulf Council’s source of funding, the budget would be capped at ten million dollars per year—more than three times the Prince William Sound RCAC’s (PWSRCAC or “Prince William Sound Council”) budget.<sup>230</sup> Moreover, the SHORE Act would grant the power to establish the budget to the “Secretary of the department in which the Coast Guard is operating” rather than the Gulf Council and the oil industry.<sup>231</sup>

Immediately following the initial introduction of the SHORE Act, a delegation of Gulf Coast residents met with the PWSRCAC members

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<sup>223</sup> See *Bill Summary & Status: 112th Congress (2011–2012): H.R. 3757: All Information*, LIBR. OF CONGRESS THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR03757:@@L&summ2=m&> (last visited Jan. 17, 2013).

<sup>224</sup> See 33 U.S.C. § 2732(d) (2006); H.R. 3757 § 210.

<sup>225</sup> H.R. 3757 § 210.

<sup>226</sup> *Id.*

<sup>227</sup> See *id.*

<sup>228</sup> See 33 U.S.C. § 2732(d); H.R. 3757, 112th Cong. § 210 (2011).

<sup>229</sup> See H.R. 3757 § 210; Plater, *supra* note 16, at 414.

<sup>230</sup> See H.R. 3757 § 210; Prince William Sound Regional Citizens’ Advisory Council (PWSRCAC) Charter Renewal, 76 Fed. Reg. 24,506, 24,506 (May 2, 2011) (stating the PWSRCAC’s current budget is \$2.9 million per year).

<sup>231</sup> See H.R. 3757 § 210; Klouda, *supra* note 72.

to learn about RCACs and how they work.<sup>232</sup> The oil industry, however, voiced concerns about the bill, stating that they already consult with citizens in the region, and were concerned about the exclusion of certain groups from the Councils, such as drilling rig workers.<sup>233</sup>

Senator Harry Reid proposed a similar bill on July 28, 2010, the Clean Energy Jobs and Oil Company Accountability Act of 2010 (“Clean Energy Jobs Act”), that never became law, and has not yet been reintroduced in the current session of Congress.<sup>234</sup> The Clean Energy Jobs Act also contained a provision establishing a citizens’ council in the Gulf of Mexico.<sup>235</sup> Instead of amending the OPA, the Clean Energy Jobs Act would have mandated the President establish a local RCAC within 270 days of the passage of the Act.<sup>236</sup> The council’s mission was to provide advice to federal agencies and the energy industry regarding offshore drilling in the Gulf of Mexico.<sup>237</sup> Requirements for membership were vague, providing only general guidelines to the President in choosing members.<sup>238</sup> In addition, under the Clean Energy Jobs Act, the President would have created a plan for the “operation of the Council,” including a description of its duties, the weight to be assigned to the council’s recommendations, and the source of its funding.<sup>239</sup>

More recently, on July 6, 2012, Congress enacted the Resources and Ecosystem Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act of 2012 (“RESTORE Act”) in direct response to the Gulf Oil Spill.<sup>240</sup> Despite the fact that many saw

<sup>232</sup> See Jim Carlton, *Bill Includes Citizens Oil Panel for Gulf, Arctic Coasts*, WALL ST. J. (Aug. 2, 2010, 10:09 AM), <http://online.wsj.com/article/SB10001424052748703292704575393492820269842.html>.

<sup>233</sup> *Id.*

<sup>234</sup> See S. 3663, 111th Cong. (2010); *Bill Summary & Status: 111th Congress (2009–2010): S.3663: All Information*, LIBR. OF CONGRESS THOMAS, <http://thomas.loc.gov/home/LegislativeData.php> (select “111” under “Select Congress”; and “Reid, Harry [D-NV]” under “Choose Senate Members”; and type “Clean Energy Jobs” in “Enter Search”; then follow “Search” hyperlink; then follow “All Information” hyperlink) (last visited Jan. 17, 2013).

<sup>235</sup> S. 3663 § 629.

<sup>236</sup> *Id.* § 629(a).

<sup>237</sup> *Id.* § 629(b).

<sup>238</sup> See *id.* § 629(c). Instead of identifying specific localities and sectors from which to select members, the Clean Energy Jobs Act merely instructed the President to “provide for the appropriate participation by relevant stakeholders located in the coastal areas of the Gulf of Mexico.” *Id.*

<sup>239</sup> *Id.* § 629(e).

<sup>240</sup> See Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, §§ 1321, 1601–1608, 126 Stat. 405 (2012). Congress passed the RESTORE Act as part of 2012 transportation and federal highway legislation. See *id.*; Megan Herzog & Jay Austin, *Detailed Analysis of The Restore Act*, ENVTL. L. INSTITUTE OCEAN PROGRAM (Oct. 5, 2012), <http://eli-ocean.org/gulf/wp-content/uploads/2012/10/RESTORE-Act-Analysis-Updated-Oct.-2012.pdf>.

the BP Deepwater Horizon blowout as “an opportunity” which would expose the “true costs of [America’s] energy policy,” the opportunity remains unrealized as the biggest policy change in the wake of the disaster focused exclusively on the past by creating a Gulf Coast Restoration Trust Fund to help restore the damaged areas.<sup>241</sup>

#### IV. APPLYING THE LESSONS FROM THE ALASKA RCACs TO THE REST OF THE UNITED STATES TO PREVENT FUTURE OIL SPILLS

A comparison of the two existing RCACs in Alaska illustrates the successes, shortcomings, and areas of improvement in this innovative method of citizen oversight.<sup>242</sup> Properly formulated and implemented, RCACs have the potential to become an integral part of environmental enforcement of the oil industry, and could potentially be expanded into many different areas of environmental law.<sup>243</sup> To do this, however, legislators must understand how to improve on existing citizens’ councils in the future by fully appreciating their successes and limitations.<sup>244</sup>

##### A. *What Works and What Does Not in Existing RCACs*

The successes and failures of the two Alaskan RCACs correlate strongly to their statutory formation, and what was ultimately included and excluded from the Oil Pollution Act of 1990 (OPA).<sup>245</sup> One of the most important attributes of the citizens’ councils is their autonomy from the oil industry despite the fact that it is the source of their funding.<sup>246</sup> The OPA addresses this problem by specifying the voting and nonvoting members of RCACs and thus prohibiting any representative of the oil industry from having an official role in either RCAC.<sup>247</sup> The OPA prohibits oil industry representatives from even being part of the nonvoting faction of the board of either council.<sup>248</sup> However, as Bob Shavelson’s removal from the Cook Inlet RCAC (CIRCAC or “Cook Inlet Council”) board in 2010 illustrates, this problem has not been ob-

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<sup>241</sup> See Moving Ahead for Progress in the 21st Century Act §§ 1601–1608; Bryan Walsh, *What Ever Happened to the Gulf Oil Spill?*, TIME (Dec. 20, 2010), <http://www.time.com/time/health/article/0,8599,2037876,00.html>.

<sup>242</sup> See *infra* notes 245–276 and accompanying text.

<sup>243</sup> See *infra* notes 277–303 and accompanying text.

<sup>244</sup> See *infra* notes 277–303 and accompanying text.

<sup>245</sup> See *supra* notes 61–111 and accompanying text.

<sup>246</sup> See Oil Pollution Act of 1990, 33 U.S.C. § 2732(k) (2006); Klouda, *supra* note 176.

<sup>247</sup> See 33 U.S.C. § 2732(d)(2).

<sup>248</sup> See *id.* § 2732(d)(2)(B) (excluding oil industry representatives from the “Nonvoting members” section of the Act).

viated through statutory construct alone.<sup>249</sup> Shavelson and others have accused the CIRCAC of being beholden to the oil industry in Cook Inlet, and allowing this to reduce its effectiveness at monitoring the industry.<sup>250</sup>

As Shavelson's experience with CIRCAC illustrates, the source of the oil industry's continuing impact—despite the existing statutory framework—might be the RCACs' funding sources.<sup>251</sup> As established by the OPA, approval of any National Contingency Plan (NCP) is contingent on “the owners or operators of terminal facilities or crude oil tankers” in the Prince William Sound and Cook Inlet funding each RCAC respectively.<sup>252</sup> The amount of funding, as established by the OPA, “may be adjusted periodically upon the mutual consent of the owners or operators of terminal facilities or crude oil tankers operating” in Prince William Sound and Cook Inlet, and the Councils of both areas.<sup>253</sup> Therefore, under the terms of the OPA, while funding is guaranteed, both RCACs must periodically renegotiate their funding amounts with the oil industry.<sup>254</sup> The Prince William Sound RCAC's (PWSRCAC or “Prince William Sound Council”) contract with Alyska Pipeline Service Company (“Alyeska”) (the “Contract”), which guarantees funding and does not contain a provision requiring the two parties to renegotiate the amount on a regular basis, supersedes this arrangement.<sup>255</sup> Therefore, the CIRCAC's reliance on renegotiations leaves that council's actions vulnerable to criticism, while the PWSRCAC's guaranteed funding avoids this problem.<sup>256</sup>

Another key provision of the OPA regarding RCACs is the list of each council's responsibilities.<sup>257</sup> While RCACs' duties are broadly defined and initially appear quite expansive, they are severely limited by the councils' advisory function.<sup>258</sup> The OPA directs each RCAC to monitor the oil industry, review prevention and contingency plans, and make

<sup>249</sup> See Klouda, *supra* note 72.

<sup>250</sup> See Klouda, *supra* note 176.

<sup>251</sup> See *id.* (describing testimony about individual “dissatisfaction with CIRCAC[.]” and desire to change funding rules so the CIRCAC can avoid suggestions that they are “in bed with the oil industry”).

<sup>252</sup> 33 U.S.C. § 2732(k) (2006).

<sup>253</sup> *Id.* § 2732(k)(2)(c), (3)(c). For Cook Inlet, adjustment of funding could also involve the consent of offshore facilities. *Id.* § 2732(k)(3)(c).

<sup>254</sup> See *id.* § 2732(k)(2)(c), (3)(c).

<sup>255</sup> See *RCAC Alyeska Contract*, *supra* note 71, at 8.

<sup>256</sup> See Klouda, *supra* note 72.

<sup>257</sup> See 33 U.S.C. § 2732(d)(6).

<sup>258</sup> See Oil Pollution Act of 1990, 33 U.S.C. § 2732(b)(2) (2006); *supra* notes 91–107 and accompanying text.

recommendations to modify and improve the existing infrastructure, yet the Act does not compel any government agency or corporation to actually follow this advice.<sup>259</sup> This has had a significant effect on the councils' successes and shortcomings since 1990.<sup>260</sup> Although the councils have been successful at implementing some policy goals since 1990, each example of a success involves collaboration with the industry or a government body, allowing the RCAC to extend beyond its advisory capacity.<sup>261</sup> When RCACs work alone, they are rarely as successful.<sup>262</sup>

Most, if not all, of the successes of RCACs have been directly tied to their ability to work with other organizations to accomplish their goals.<sup>263</sup> Many changes that the PWSRCAC takes credit for have come about through collaboration with the U.S. Coast Guard or the Alaska Department of Environmental Conservation (ADEC).<sup>264</sup> For example, when the PWSRCAC implemented a new ice detection system in 2002, they did so with the help of the Coast Guard, Army, National Oceanic and Atmospheric Association, and ADEC.<sup>265</sup> Similarly, improvements to the tug escort system through Prince William Sound, although supported by the PWSRCAC, were not fully implemented until the oil industry, the Coast Guard, and ADEC agreed to work with the Prince William Sound Council to produce a study.<sup>266</sup> In these and other examples, the PWSRCAC essentially used these collaborations to circumvent their advisory function to accomplish their regulatory goals.<sup>267</sup>

Many of the accomplishments of RCACs are directly related to amalgamating research on the effects of the Exxon Valdez oil spill and data to assist responders in the event of a future oil spill.<sup>268</sup> Although these efforts have improved the chances that the harm of future spills will be significantly mitigated, these research projects have no direct effect on the actions of the oil industry or on the prevention of future

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<sup>259</sup> See 33 U.S.C. § 2732(b)(2), (d)(6).

<sup>260</sup> See *supra* notes 112–201 and accompanying text.

<sup>261</sup> See *supra* notes 112–185 and accompanying text (summarizing each council's successful endeavors, each of which was supported by the oil industry or a government agency).

<sup>262</sup> See *supra* notes 186–201 and accompanying text (summarizing each Council's unsuccessful attempts at policy change; in each case, no government agency or oil company was willing to support the Council).

<sup>263</sup> See Busenberg, *supra* note 117, at 250 (“Collaborations have played a role in all of the eight project categories examined in this study.”)

<sup>264</sup> See *supra* notes 121–149 and accompanying text.

<sup>265</sup> See *supra* notes 128–131 and accompanying text.

<sup>266</sup> Busenberg, *supra* note 117, at 246.

<sup>267</sup> See *supra* notes 121–149 and accompanying text.

<sup>268</sup> See *supra* notes 132–149, 155–162 and accompanying text.



spills.<sup>269</sup> As federally created entities, they can and should focus their time and expertise on making concrete changes in legislation and the industry itself.<sup>270</sup>

A final important limiting characteristic of existing RCACs is subpoena power, a feature omitted from the OPA.<sup>271</sup> In its recommendation to create citizens' advisory councils, the Alaska Oil Spill Commission explicitly envisioned giving such councils subpoena power so they could effectively collect information about the oil industry.<sup>272</sup> Instead, the OPA merely directs RCACs to "monitor" and "review" the oil industry without providing them with a statutory means by which to access the industry's data.<sup>273</sup> The PWSRCAC secured some additional powers through its contract with Alyeska, which gave the Prince William Sound Council access to Alyeska's records and documents, and permitted members of the council to inspect Alyeska's facilities.<sup>274</sup> The Contract limited the PWSRCAC's access to those documents that the EPA and other agencies have access while simultaneously excluding confidential data in some situations.<sup>275</sup> The Contract severely hampered the PWSRCAC's inspection rights by requiring advance notice to Alyeska—essentially negating this mechanism's impact by providing the facility ample time to correct any violations.<sup>276</sup>

### B. *Three Primary Ways to Improve RCACs and Expand Them to the Gulf of Mexico and Elsewhere*

#### 1. General Solutions

Analyzing the Alaska RCACs' past performance through the lens of their statutory structure provides a clear view of a successful RCAC.<sup>277</sup> An effective citizens' group should have the ability to affect changes in the oil industry by providing a roadblock to the "complacent" relationship between the industry and government officials.<sup>278</sup> There are two primary ways in which a citizens' council can accomplish

<sup>269</sup> See *supra* notes 132–149, 155–162 and accompanying text.

<sup>270</sup> See *supra* notes 132–149, 155–162 and accompanying text.

<sup>271</sup> See Plater, *supra* note 16, at 414.

<sup>272</sup> ALASKA OIL SPILL COMM'N, *supra* note 29, at 139.

<sup>273</sup> See 33 U.S.C. § 2732(d)(6) (2006); Plater, *supra* note 16, at 414.

<sup>274</sup> RCAC Alyeska Contract, *supra* note 71, at 10–12.

<sup>275</sup> See *id.* at 10–11.

<sup>276</sup> See *id.* at 11–12.

<sup>277</sup> See *supra* notes 112–201 and accompanying text.

<sup>278</sup> See ALASKA OIL SPILL COMM'N, *supra* note 29, at 206.

this goal: either through directly proposing and implementing policy changes, or by producing public research to force the government and oil industry to improve existing law.<sup>279</sup> The PWSRCAC and CIRCAC have attempted both to some extent, and while the PWSRCAC has had some success, there are ways of improving both methods.<sup>280</sup>

To give RCACs a more authoritative voice in directly affecting policy changes, an improved statute must remove the advisory function limitation and replace it with actual decision-making power.<sup>281</sup> The current system severely handicaps the RCACs' ability to accomplish anything beyond research and gathering data, unless the councils are willing to work with other groups and those other groups are willing to cooperate.<sup>282</sup> The oil industry must fund the RCACs to obtain approval of their NCP;<sup>283</sup> requiring the industry to implement RCAC recommendations for NCP approval as well, would provide an effective way to force the industry to take note of RCACs. It is unlikely, however, that the oil industry would allow such a provision to pass in a federal statute.<sup>284</sup> A less extreme option would be to include a provision requiring the legislature and oil industry to provide compelling evidence in a written record any time it elected to ignore a recommendation from an RCAC.<sup>285</sup> The current system limits the powers of RCACs to the extent that the oil industry and government may completely ignore RCAC recommendations unless the political climate makes it favorable not to do so.<sup>286</sup> The most feasible way to avoid this pitfall is to force the oil industry and government to consider each recommendation from a RCAC and face tangible repercussions if they do not.<sup>287</sup>

RCACs must also be granted more autonomy from the oil industry through improved funding structures.<sup>288</sup> Independence is an essential

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<sup>279</sup> See *supra* notes 112–185 and accompanying text.

<sup>280</sup> See *supra* notes 112–185 and accompanying text.

<sup>281</sup> See Oil Pollution Act of 1990, 33 U.S.C. § 2732(b)(2) (2006); *RCAC Alyeska Contract*, *supra* note 71, at 5.

<sup>282</sup> See *supra* notes 263–267 and accompanying text.

<sup>283</sup> See 33 U.S.C. § 2732(k).

<sup>284</sup> Cf. Plater, *supra* note 16, at 414 (discussing the oil industry's successful blocking of the RCAC subpoena power).

<sup>285</sup> See 33 U.S.C. § 2732(h). Currently, the Oil Terminal Facilities and Oil Tanker Operations Associations, created by the OPA, must provide this compelling evidence if they do not implement the RCACs' recommendations, but there is no similar requirement for the oil industry. *Id.*

<sup>286</sup> See 33 U.S.C. § 2732(b)(2); *supra* note 162, 251–257 and accompanying text.

<sup>287</sup> See Oil Pollution Act of 1990, 33 U.S.C. § 2732(b)(2), (h) (2006); *supra* notes 162, 251–257 and accompanying text.

<sup>288</sup> See *supra* notes 251–256 and accompanying text.

part of RCACs, as their fundamental role is to provide a third source of input regarding the industry, not supplement an existing one.<sup>289</sup> This factor is perhaps the biggest distinction between the PWSRCAC and CIRCAC, and the best explanation as to their different accomplishments.<sup>290</sup> The OPA's mandate that the oil industry be removed completely from the RCACs' decision-making process is essentially negated by its provision that the two parties renegotiate funding on a regular basis.<sup>291</sup> As illustrated by the CIRCAC, this provision can force the Councils to cede to oil industry interests, especially during key negotiation periods.<sup>292</sup> This reduces the effectiveness of the RCACs, and destroys their public perception as a citizens' group.<sup>293</sup> In the future, provisions creating RCACs should include language akin to the funding provision in the PWSRCAC's contract with Alyeska, which has proven much more successful at creating and maintaining autonomy.<sup>294</sup>

In addition, another shortfall of the CIRCAC comes from its very members.<sup>295</sup> Unlike in Prince William Sound, many municipalities in Cook Inlet are almost completely dependent on the oil industry.<sup>296</sup> Therefore, the citizens who make up the voting portion of the board of directors are invariably beholden to the oil industry despite the OPA's attempt to sever these ties.<sup>297</sup> Analyzing which municipalities within the applicable region are especially beholden to the industry and removing their voting powers would avoid this problem.<sup>298</sup> For this reason, a whistleblower protection provision that would protect individuals who question the loyalty of board members is a necessary component of a future RCAC.<sup>299</sup>

The final essential element of the RCACs, which requires attention and improvement, is their lack of subpoena power over the oil industry.<sup>300</sup> Currently, the CIRCAC has no recourse to compel companies to provide it with paperwork or allow its members to inspect facilities, and the advance notice requirement significantly limits the PWSRCAC's

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<sup>289</sup> See *id.*; ALASKA OIL SPILL COMM'N, *supra* note 29, at 206.

<sup>290</sup> See Klouda, *supra* note 72; *supra* notes 186–201 and accompanying text.

<sup>291</sup> See 33 U.S.C. § 2732(d)(2), (k)(2)–(3).

<sup>292</sup> See Klouda, *supra* note 72.

<sup>293</sup> See *id.*; Klouda, *supra* note 176.

<sup>294</sup> See *RCAC Alyeska Contract*, *supra* note 71, at 8–9.

<sup>295</sup> See Horton, *supra* note 180.

<sup>296</sup> See *id.* at 4.

<sup>297</sup> See *id.*; 33 U.S.C. § 2732(d)(2) (2006).

<sup>298</sup> See Horton, *supra* note 180, at 4.

<sup>299</sup> See *id.* at 6–7.

<sup>300</sup> See Plater, *supra* note 16, at 414.

power as a watchdog.<sup>301</sup> As the Alaska Oil Spill Commission and National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling (“BP Commission”) (collectively, the “Commissions”) suggested, the subpoena power is an important and necessary part of a successful RCAC, and this power is one of the only ways the councils can actually influence the decisions of the oil industry.<sup>302</sup> Going forward, Congress must give RCACs power to compel oil executives to cooperate fully with their demands, especially because the Commissions cited this as one of the most prominent causes of both oil spills.<sup>303</sup>

## 2. Application to the Gulf of Mexico

Despite inclusion of RCACs in proposed bills, Congress has not authorized any RCACs since the BP Deepwater Horizon oil spill.<sup>304</sup> The text of the proposals would implement some of the improvements this Note suggests but ignores some shortcomings.<sup>305</sup>

The Securing Health for Ocean Resource and Environment (SHORE) Act maintains the broad access power called for by the BP Commission,<sup>306</sup> and thus provides a future Gulf of Mexico RCAC (GMRCAC or “Gulf Council”) with an important and influential position over the oil industry. In addition, rather than requiring a RCAC and its industry funders to negotiate over the budget, the SHORE Act would give this role to the U.S. Coast Guard instead.<sup>307</sup> This would reduce the likelihood of the Gulf Council becoming dependent on the industry and would increase the likelihood that it would maintain its independence.<sup>308</sup> This provision alone, however, would not automatically lead to an autonomous RCAC.<sup>309</sup> As in Cook Island, many residents of the states in the Gulf of Mexico are dependent on the offshore drilling industry, and giving voting power to representatives from these municipalities could lead to the same problems that exist in the CIR-

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<sup>301</sup> See *supra* notes 102–107, 169–171 and accompanying text.

<sup>302</sup> See ALASKA OIL SPILL COMM’N, *supra* note 29, at 139; GULF FINAL REPORT, *supra* note 1, at 269 (advocating that “operators provide the council with access to records and other information”).

<sup>303</sup> See ALASKA OIL SPILL COMM’N, *supra* note 29, at 206; GULF FINAL REPORT, *supra* note 1, at vii.

<sup>304</sup> See *supra* notes 218–237 and accompanying text.

<sup>305</sup> See *supra* notes 218–237 and accompanying text.

<sup>306</sup> See H.R. 3757, 112th Cong. § 210 (2011); GULF FINAL REPORT, *supra* note 1, at 268.

<sup>307</sup> See H.R. 3757 § 210.

<sup>308</sup> See *supra* notes 281–284 and accompanying text.

<sup>309</sup> See H.R. 3757 § 210.

CAC.<sup>310</sup> While the problem would likely not be as extreme in the Gulf because of the competing tourism industry, an act creating RCACs in the area should address this potential issue.<sup>311</sup> To do this, Congress could designate representatives from geographical areas carefully formed through research and designed to ensure that the oil industry is not the predominant employer in that area,<sup>312</sup> or simply include a provision in the statute conditioning funding on the RCAC's record of taking steps to protect the environment.

Finally, the SHORE Act designated the GMRCAC as purely advisory, similar to the PWSRCAC and CIRCAC.<sup>313</sup> To ensure that the RCAC can effectively monitor and change the oil industry's future actions in the Gulf of Mexico, the SHORE Act should instead implement the recommendations of the BP Commission and require federal regulators "to consult with the council on relevant issues," mandating that all entities that decline the "council's advice submit their reasons to the council in writing."<sup>314</sup> In this way, the efforts of the GMRCAC would be guaranteed to be considered in important policy decisions.<sup>315</sup>

#### CONCLUSION

The development and expansion of RCACs is a crucial next step that the federal government must take in the prevention and mitigation of future oil spills. The two existing RCACs in Alaska provide both a compelling argument for the potential of these innovative citizens' groups and a clear example of what steps must be taken to improve them.

Since the creation of RCACs in 1990, the two Alaska councils have collaborated in creating new policy guidelines and regulations for safe oil transport in the area, disseminated a significant amount of knowledge to the public about the oil industry in general, and become a significant source of research and information designed to address the threat of future oil spills. This structure, however, has the power to do more. It is clear from the recent BP Deepwater Horizon blowout in the

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<sup>310</sup> See Horton, *supra* note 180, at 4; *Offshore Drilling and Exploration*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/o/offshore\\_drilling\\_and\\_exploration/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/o/offshore_drilling_and_exploration/index.html) (last updated Sept. 17, 2012).

<sup>311</sup> See Horton, *supra* note 180, at 4; *Offshore Drilling and Exploration*, *supra* note 310.

<sup>312</sup> See *supra* notes 295–299 and accompanying text.

<sup>313</sup> See Oil Pollution Act of 1990, 33 U.S.C. § 2732(b)(2) (2006); H.R. 3757, 112th Cong. § 210 (2011); *RCAC Aleyska Contract*, *supra* note 71, at 5.

<sup>314</sup> See GULF FINAL REPORT, *supra* note 1, at 269.

<sup>315</sup> See *id.*

Gulf of Mexico that the systematic problems evident in the oil industry have not disappeared. Citizens have always played a role in environmental regulation and litigation, but through the inventive structure of RCACs they could have a much more meaningful role in monitoring the relationship between the oil industry and the government and ultimately protecting the environment.

If RCACs expand, Congress must make three significant changes to their structure to ensure their success moving forward. First, they must have subpoena power over the oil industry so they are not forced to rely on oil company cooperation. This check on the industry would enable the RCACs to make meaningful recommendations, perform important research, and create an incentive for the industry itself to self-police. Second, while funding for RCACs can and should remain the responsibility of the oil industry, the process of negotiating the amount of funding must be removed from the day-to-day operations of the RCACs. Otherwise, as illustrated by the Cook Inlet RCAC, there will be well-founded criticism of the councils' actions and general distrust of board members' motives. Finally, and most importantly, RCACs must be allowed to expand from their existing advisory function. Forcing the oil industry to heed their advice by conditioning acceptance of contingency plans on a system in which the oil companies review and respond to that advice is the only feasible way to ensure that these RCACs can accomplish their goal of preventing future oil spill disasters.

