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CITIZENS' ADVISORY COUNCILS TO ENHANCE CIVIL SOCIETY OVERSIGHT OF RESOURCE INDUSTRIES

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I. Executive Summary

Effective democratic governance depends upon informed public participation, and several international conventions and policy guidelines call for enhanced public participation in environmental management. Yet, large-scale resource development projects generally receive insufficient oversight by, and engagement with, civil society. And in the absence of effective supervision and public engagement, corporate and government vigilance can weaken, complacency increases, environmental and social standards decline, and risks increase. Such insufficient oversight, lower standards, and complacency can result in acute and catastrophic damage, such as oil spills, chemical explosions, mine disasters, overharvest and stock collapse; long-term, chronic environmental degradation; and social tension, mistrust, litigation, and even violence between local people and industry.

To correct this problem, local civil society stakeholders need to be directly involved in the review and oversight of resource industry operations that potentially affect their lives, including extractive industries such as oil, gas and mining; and renewable industries such as agriculture, forestry, and fisheries. Local citizens have much at stake, and much to offer, in the safe and responsible conduct of resource development in their region. To be effectively engaged, citizen stakeholders need their own organization with sufficient funding, staff, authority, broad representation, and independence. It is proposed herein that governments facilitate the establishment of *Citizens' Advisory Councils* (CACs), to provide non-binding, informed public advice, oversight, and engagement with natural resource development. These citizen councils should be funded either from government resource revenues or directly by industry, and should provide advice on all aspects of resource industry projects. Citizen councils should be comprised of all major stakeholder constituencies potentially affected by a resource industry – e.g., indigenous peoples, fishing, farming, conservation, tourism, women, youth, science, and local communities. Properly structured, these CACs will become the *eyes, ears, and the voice* for local citizens regarding large-scale resource development projects

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that may directly affect them. The councils provide an on-going, structured mechanism for greater communication, collaboration, and trust between citizens, government, and industry, and should reduce industry's environmental impact, risk, and footprint. Citizen councils do not substitute for effective governmental oversight, but complement and enhance such. The establishment of such *Citizens' Advisory Councils* is fundamental to industry's "social license to operate," genuine corporate social responsibility, citizen empowerment, environmental justice, government legitimacy, and sustainable development. As such, citizen councils will provide long-term benefit to the public, government, and industry.

II. Introduction

The effective function of democratic governance depends in large part on *informed public participation*, yet even in mature democracies this is often not sufficiently developed. The relationship between government, industry, and civil society is often less than ideal, and if so, this can subvert the common public interest and delay sustainable development. Although government agencies and legislative bodies are entrusted to act in the highest and best interest of the public whom they serve, a large body of modern political and regulatory theory shows that actual practice can diverge from this ideal. For instance, industry can strategically manipulate government policy through legislative and administrative processes – a political dynamic called "regulatory capture" – while the public is marginalized and excluded from meaningful participation. Regulation, legislation, and oversight in such a situation tends to favor industry and disadvantage the public that it was supposed to protect.¹

This dynamic may be particularly evident in resource-rich failed states or in other states where government capabilities are limited, but it can occur in even the most sophisticated industrialized democracies. And such a situation can result in acute environmental damage, chronic degradation, and social unrest. Clearly, sustainable development would benefit from greater involvement by civil society in resource industry oversight. To receive and maintain its "social license to operate," a resource development company (e.g. oil, gas, mining, logging, etc.) must engage collaboratively, honestly, and fairly with civil society in the area of its projects.

Although much discussion in civil society has been devoted to the concept of *transparency*, it is important to distinguish *transparency* from the concept of *informed public participation*. As it is generally used, the term *transparency* simply implies that the public has significant access to government and industry information, and has literally a "clear view" of the workings of government and industry. However, transparency does not guarantee that the public has a formal, active voice in the operations of government and industry. It is entirely possible, indeed often the case, that even with substantial transparency, or passive access to information, the public remains largely uninvolved in many policy decisions that affect their lives.

For instance, even though government provides a significant level of public transparency in the U.S. — through the federal *Freedom of Information Act* (FOIA), state open meetings acts and public records disclosure acts, and other administrative disclosure instruments — there remains an unfortunate lack of informed involvement among much of the public in environmental policy formulation, particularly in resource development. Put simply, transparency is a *necessary but not sufficient* component of informed public participation in democracies. To have a legitimate, informed, and persuasive voice in complex resource industry projects, the public — or at least a representative body of the public — needs to have an active, formalized role in the oversight and liaison with industry and government.²

1 Owen, B.M.; R Breautigam, 1978. *The Regulation Game – Strategic use of the Regulatory Process*. Ballinger, Cambridge, MA.

2 Steiner, R. 2003. *Models of Public Oversight of Government and Industry*. In *Caspian Oil Windfalls: Who Will Benefit*, Open Society Institute, Caspian Revenue Watch.



While advisory committees and public consultation processes have existed for some time, the concept of independent, autonomous, well-funded and permanent *Citizens' Advisory Councils* (CACs) to provide civil society oversight of large-scale industrial projects is relatively recent, indeed still evolving. Three important distinctions between the traditional (and expert) advisory committees and the autonomous *Citizens' Advisory Council* discussed here, are that *traditional* advisory committees:

- Are appointed directly by government or industry, not by affected citizen stakeholders themselves;
- Seldom, if ever, have their own budget and staff sufficient to carry out their mandate; and,
- Do not operate autonomously, but at the direction and discretion of government or industry.

Together, these structural elements significantly limit the independence and capacity of traditional advisory groups to achieve the goal of effective public participation.

As well, the traditional *review-and-comment* model for government and industry to solicit public engagement in decisions regarding industrial development simply doesn't work effectively, for the following reasons:

- Members of the public often have insufficient time, financial ability, and technical expertise to engage effectively in complex resource development and policy issues.
- There can be an overwhelming amount of information available regarding a development project, much of it technical and unfamiliar, and even multiple projects and policy issues intersecting simultaneously, making it difficult for citizens to assimilate pertinent information and provide informed comment.
- Decisions are often made between industry and government in a less than transparent manner, without informed civil society participation.
- Officials generally solicit public participation late in the decision process, which by such time may have become adversarial.
- After a development project has been approved, industry and government may become less open to, or interested in, public engagement.
- While outside technical experts can conduct site-visits to provide their technical review and recommendations, if there is no standing citizen group to follow through on the recommendations, this process may have limited impact.

This situation is a recipe for distrust, a decline in vigilance, chronic environmental degradation, and even industrial disaster. A more effective paradigm for public participation in industrial/ environmental issues is necessary, as described below.

The modern concept of *Citizens' Advisory Councils* (CACs) began to evolve in the late 1970s, focused largely on the environmental risks of marine oil transportation. The oil port of Sullom Voe, in the Shetland Islands, Scotland, established the *Sullom Voe Oil Terminal Environmental Advisory Group* (SOTEAG) at the commencement of the Sullom Voe oil terminal in 1977.³ After the 1989 Exxon Valdez oil spill in Alaska, USA, two *Regional Citizens Advisory Councils* (RCACs) were established in Alaska by the U.S. Congress — the *Prince William Sound RCAC*⁴, and the *Cook Inlet RCAC*.⁵

3 SOTEAG, 2013. *Shetland Oil Terminal Environmental Advisory Group*. www.soteag.org.uk/

4 PWSRCAC, 2013. *Prince William Sound Regional Citizens' Advisory Council*. www.pwsrcac.org

5 CIRAC, 2013. *Cook Inlet Regional Citizens' Advisory Council*. www.circac.org



The primary purpose of the Alaska councils is to enhance environmental safety and to reduce the environmental risk and impact of oil industry operations within their regions. Subsequently, similar oil / environmental advisory councils were established in the U.S. coastal states of Maine, California, and Washington. More recently, a CAC has been proposed to provide oversight of all commercial activities in the rich offshore ecosystem of Mauritania, there are CACs in development in the Caspian region providing citizen oversight of revenue flows from Caspian oil, a CAC is proposed for deep sea hydrothermal vent mining off Papua New Guinea, and a CAC has been discussed in the politically volatile oil-producing region of Nigeria's Niger Delta. In 2009, an Arctic RCAC was proposed to enhance oversight of offshore oil and shipping in the Arctic Ocean off Alaska, and after the 2010 Deepwater Horizon drilling disaster in the U.S. Gulf of Mexico, there is a proposal to establish a Gulf of Mexico RCAC, to provide greater oversight of offshore oil and gas activities in the Gulf.⁶

It is important to note the diversity in scope of these citizens councils: they can either be focused narrowly on site-specific industrial projects — such as the councils in Alaska and Scotland focused on oil terminal and tanker environmental safety issues; or, they can be focused more broadly on particular industrial sectors across an entire region/country - such as the council proposed for all offshore oil and gas activities in the U.S. Gulf of Mexico, and the council proposed for all deep sea mining off Papua New Guinea; or, they can focus even more broadly on all industrial activities in a region/country — such as the council proposed for the Mauritania offshore ecosystem to oversee oil, fisheries, and shipping, or the council proposed for the U.S. Arctic, to oversee offshore petroleum development and shipping.

III. Supporting Policy Context

As the concept of *Citizens' Advisory Councils* has gained acceptance in recent years, several institutions have endorsed the concept. As well, the CAC concept is now seen as a mechanism to implement several important international conventions and intergovernmental guidelines pertaining to public access to information and involvement in policy decisions. A brief summary of these is presented here, in chronological order.

1. U.S. Oil Pollution Act of 1990: Federal legislation passed in the U.S. subsequent to the Exxon Valdez oil spill in 1989 (OPA 90), established the first political consensus in the U.S. Congress regarding the need for *Citizens' Advisory Councils*, and established the first two such regional councils in Alaska to operate for as long as the oil industry continues in the regions.⁷ It should be noted that today, over 24 years since the Alaska spill occurred, government science shows that most of the fish and wildlife populations and habitats injured by the spill have yet to fully recover⁸, underscoring the potential for serious long-term ecological impacts from industrial disasters.

Section 5002 of OPA 90, entitled "Terminal and Tanker Oversight and Monitoring", states, *inter alia*, the following:

The Congress finds that:

- a. *Many people believe that complacency on the part of the industry and government personnel responsible for monitoring the operation of the Valdez terminal and vessel traffic in Prince William Sound was one of the contributing factors to the Exxon Valdez oil spill;*

6 Steiner, Rick. 2010. *Establishing Citizens' Advisory Councils in the U.S. Arctic and Gulf of Mexico*. **Policy Matters**, V. 17, IUCN Commission on Environmental, Economic, and Social Policy. pp 92-95. October.

7 S. Oil Pollution Act, 1990. U.S. Government Printing Office.

8 EVOSTC, 2013. *Exxon Valdez Restoration Plan, 2010 Update: Injured Resources and Services*. Exxon Valdez Oil Spill Trustee Council, May 14, 43 pp. www.evostc.state.ak.us/



- b. One way to combat this complacency is to involve local citizens in the process of preparing, adopting, and revising oil spill contingency plans;
- c. A mechanism should be established which fosters the long-term partnership of industry, government, and local communities in overseeing compliance with environmental concerns in the operation of crude oil terminals;
- d. Such a mechanism presently exists at the Sullom Voe oil terminal in the Shetland Islands and this terminal should serve as a model for others;
- e. Because of the effective partnership that has developed at Sullom Voe, Sullom Voe is considered the safest terminal in Europe;
- f. The present system of regulation and oversight of crude oil terminals in the United States has degenerated into a process of continual mistrust and confrontation;
- g. Only when local citizens are involved in the process will the trust develop that is necessary to change the present system from confrontation to consensus;
- h. A pilot program patterned after Sullom Voe should be established in Alaska to further refine the concepts and relationships involved; and
- i. Similar programs should eventually be established in other major crude oil terminals in the United States because the recent oil spills in Texas, Delaware, and Rhode Island indicate that the safe transportation of crude oil is a national problem.

Shortly after the Alaska RCACs were formed, a senior official with the U.S Coast Guard lauded their effectiveness, as follows:

The Regional Citizens Advisory Council of Prince William Sound adds accountability on the part of regulators like me, and the government and industry. We have to operate in the open, and talk about things in the open, and take time to bring the citizenry along with us in the logical path to the solutions for our problems. It's an organized and disciplined way to get citizen involvement in what we do. I think that's good, because the system isn't really worth much unless citizens are involved with it.

Commander Ed Thompson
United States Coast Guard, 1992

A subsequent independent review of the two Alaska RCACs in 1993 by the U.S. Government Accounting Office (GAO) agreed with this assessment, as follows⁹:

The demonstration programs have substantially increased the level of citizens' involvement with the oil industry and with government regulators in the environmental oversight of oil terminal and tanker operations. Through various projects and activities, the citizen councils have provided extensive input into matters such as oil-spill contingency plans, tanker navigation and escort procedures, and oil terminal operations. Industry and government officials acknowledge that many of the councils' projects and activities have been helpful.

And a 1997 academic review of the Alaska RCACs¹⁰ concluded that:

Citizen Advisory Councils are capable of making important contributions to the production of new knowledge in the policy process...and research projects [that they have conducted] have played a central role in allowing the councils to generate new knowledge in a policy area involving complex questions of science and technology.

⁹ U.S. Government Accounting Office, 1993. *Report to Congress on the Alaska Regional Citizens' Advisory Councils*. GAO, Washington D.C., 33.

¹⁰ G.J. Busenburg, 1997. *Citizen Advisory Councils and Environmental management in the Marine Oil Trade*. Doctoral dissertation, University of North Carolina, Chapel Hill, NC. 78.



2. Aarhus Convention: *Citizens' Advisory Councils* provide an effective mechanism to implement the fundamental provisions of the 2001 UN ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, known as the "Aarhus Convention".¹¹ There are three pillars of the Aarhus Convention, and CACs are of particular relevance in implementing the first two pillars, as follow:

- A. **Access to information:** *any citizen should have the right to have access to a wide array of environmental information of potential relevance to their wellbeing. Public authorities must provide all the information required, and disseminate such in a timely and transparent manner. They may refuse to do so only under limited circumstances (such as national security).*
- B. **Public participation in decision-making:** *the public must be informed regarding all relevant projects, and it must have a legitimate opportunity to participate during the decision-making and legislative process. Decision makers should make use of local people's knowledge and expertise; this contribution is a good opportunity to improve the quality of environmental decisions and outcomes, and to guarantee procedural legitimacy.*
- C. **Access to justice:** *the public has the right to judicial or administrative recourse procedures in case a Party violates or fails to adhere to **environmental law** and the convention's principles.*

3. World Wilderness Congress: In October 2005, the 8th World Wilderness Congress held in Anchorage, Alaska, adopted a resolution calling for the establishment of Regional Citizens Advisory Councils wherever large-scale, extractive natural resource projects are located.

4. UNDRIP: The U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted by the U.N. General Assembly in September 2007, embodies the engagement principle underlying CACs in Articles 18 and 19, as discussed in the 10 December 2012 UNDRIP Business Reference Guide¹² :

Article 18 recognizes that indigenous peoples have a right to participate in decisions that would affect their rights. They must be able to participate through representatives who they choose. Indigenous peoples also have the right to form their own decision-making institutions, which States and other third parties should recognize.

Article 19 requires States to consult and cooperate with indigenous peoples through their own representative institutions, and to obtain their free, prior and informed consent before adopting or implementing legislative or administrative measures that may affect them.

5. IUCN: At its 2008 World Conservation Congress in Barcelona, the International Union for the Conservation of Nature (IUCN), also known as the World Conservation Union, adopted Resolution 4.089 supporting CACs (Appendix I); stating, *inter alia*, that:

The World Conservation Congress at its 4th Session in Barcelona, Spain, 5–14 October 2008:

CALLS ON the extractive industry to embrace and support the formation of local Citizens' Advisory Councils being comprised of representatives of civil society in the vicinity of extractive industry projects being undertaken in ecologically sensitive areas, and having the function to provide informed public oversight of these projects in order to minimize their environmental and social impacts.

¹¹ Aarhus, 2013. *Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters* ("Aarhus Convention"). June 1998. <http://www.unece.org/env/pp/introduction.html>

¹² UNDRIP, 2013. *U.N. Declaration on the Rights of Indigenous Peoples*. UN General Assembly Resolution, 61/295. September 13, 2007. www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf



And in 2012, IUCN included CACs in its overall *Business Engagement Strategy*, as follows:

IUCN believes that to achieve positive outcomes for both biodiversity and natural resource dependent communities, all stakeholders must participate. To that end, IUCN will develop platforms and dialogues that convene all relevant players, and support the establishment of Citizens Advisory Councils to provide a voice to affected communities.

6. UNEP Bali Guidelines: At its February 2010 meeting in Bali, the UNEP Governing Council adopted decision SSXII/5: *Guidelines for the Development of National Legislation on Access to Information, Public Participation, and Access to Justice in Environmental Matters*, also known as the *Bali Guidelines*. The Bali Guidelines were based on the three pillars of the Aarhus Convention (above). *Citizens' Advisory Councils* specifically support and implement many of these guidelines, in particular Guidelines 1 – 7, *Access to Information*; and Guidelines 8 – 14, *Public Participation* (Appendix II).

7. U.S. Oil Spill Commission: The 2011 *National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling: Report to the President*, recommended establishment of additional Regional Citizens Advisory Councils in the U.S. to provide effective civil society stakeholder engagement in oversight of offshore drilling, stating, *inter alia*¹³:

A mechanism should be created for ongoing local involvement in spill planning and response in the Gulf. In the Oil Pollution Act of 1990, Congress mandated citizens' councils for Prince William Sound and Cook Inlet. In the Gulf, such a council should broadly represent the citizens' interests in the area, such as fishing and tourism, and possibly include representation from oil and gas workers as ex-officio, non-voting members. The citizens' group could be funded by Gulf lease holders. The Commission further recommends that federal regulators 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 (either in industry or in government) declining the council's advice submit their reasons to the council in writing.

The oil spill commission also endorsed the previous call to establish a *Regional Citizens' Advisory Council* in the U.S. Arctic, as follows:

An Arctic Regional Citizens Council could help assure the active participation of the people who know this region the best in planning and response.

And in its 2013 *Assessment of Progress: Three Years After* review, the commission reiterated the need for the Arctic RCAC¹⁴:

Congress should provide for the Arctic regional citizens advisory council, in order to more effectively involve the people of the region in the decisions, preparations, and planning for the changes taking place in the Arctic.

8. Mining: The concept of CACs for mines was endorsed by the *Mining and Mining Policy in the Pacific* Conference in Noumea, New Caledonia in November 2011.¹⁵ And there is presently a tentative commitment from *Nautilus Minerals* to establish a CAC to engage coastal tribes in Papua New Guinea (PNG) to provide oversight of its planned deep-sea hydrothermal vent (seafloor massive sulphide) mining in the region. There is also a CAC now being discussed for Rio Tinto's *Oyu Tolgoi* copper and gold mine being developed in the South Gobi Desert in Mongolia.

13 U.S. Oil Spill Commission, 2011. *National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling: Report to the President*. Pp. 398. January. www.oilspillcommission.gov/

14 Oil Spill Commission Action, 2013. *Assessing Progress – Three Years Later*. 20 pp., April 17. oscaction.org/

15 SOPAC, 2011. *Mining and Mine Policy in the Pacific: History, Challenges, and Perspectives*. Noumea, New Caledonia. Nov. 21-25, 2011. IRD and Secretariat of the Pacific Community (SOPAC) www.spc.int/.



9. Secretariat of the Pacific Community (SOPAC): The 2012 *Regional Legislative and Regulatory Framework for Deep Sea Mining (DSM)*, conducted as a collaborative in the Secretariat of the Pacific Community (SOPAC), includes the following endorsement of CACs¹⁶:

16.5 The establishment of independent Citizens' Advisory Councils can be an effective means to provide legitimate, informed, effective citizen engagement and monitoring over the life of DSM projects in national waters.

These can provide an advisory function, with representatives (selected by the constituency, not by government or industry) of all major concerned and potentially affected citizen stakeholders (e.g. commercial fishing, tribal entities, tourism, women's groups, conservation organisations, local government and others). A Citizens' Advisory Council may even be able to play a role in contributing to, and informing, the State's function to monitor DSM activities (e.g. through involving members in an onboard observer programme).

10. U.K. Government: In 2012, the U.K. House of Commons Committee on Protecting the Arctic recommended establishment of CACs in all Arctic nations, to provide citizen engagement in Arctic oil development, as follows¹⁷:

The development of Citizens Advisory Councils to engage citizens in oversight of the Arctic oil industry should be part of the Government Strategy for the Arctic.

The January 2013 UK government (administration) response to the Parliamentary Arctic Committee conditionally endorsed the CAC concept, as follows¹⁸:

The Government fully recognises the need for those affected by developments to be able to make their views heard. Such contributions help ensure decisions are properly informed by local concerns. We would therefore welcome the use of Citizens Advisory Councils where these are appropriate to local circumstances.

IV. Structure and Function of a Citizens' Advisory Council

While there is no single model for the structure of a CAC that is applicable in all situations, all CACs should be structured to give local citizens a direct, informed voice in the corporate and governmental decisions that affect them and their communities. A CAC can be established by legislation, executive order, and/or through a private contract between industry and civil society stakeholders. Councils can provide oversight to extractive resource industries and/or renewable resource industries. And a CAC should be used only for *approved* resource development projects, and not in an attempt to justify approval of development that otherwise may not be permitted.

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