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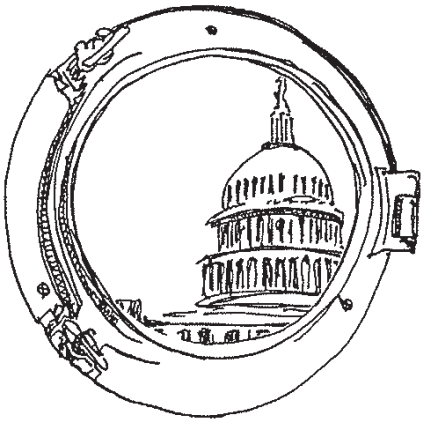

Arctic America

By Bryant E. Gardner

Increased activity in U.S. Arctic, particularly in connection with offshore oil and gas exploration, has bolstered the general perception that receding Arctic sea ice will create new opportunities and challenges in the Arctic over the coming years. Under pressure to prepare for these changes, both the White House and the U.S. Coast Guard have issued new plans outlining the nation's Arctic strategy. What is less clear, however, is the timetable for increased presence in the Arctic, which will likely be led first by commercial opportunity.

The United States is an Arctic nation, and the Arctic holds great promise. The state of Alaska boasts 44,000 miles of coastline, much of it above the Arctic Circle.[1] The U.S. Geological Survey reports that the Arctic continental shelves constitute the largest unexplored area for petroleum remaining on Earth, containing 13% of world's undiscovered oil reserves and 30% of undiscovered gas reserves.[2] While North Slope oil production has declined steadily since 1998, the Beaufort and Chukchi Seas hold over 23 billion barrels of technically recoverable oil and 23 trillion cubic feet of technically recoverable gas—over 89% of all oil and 82% of all gas estimated to be on Alaska's Outer Continental Shelf.[3]

Private energy companies have invested over $3.7 billion in offshore leases in the Chukchi and Beaufort Seas since 2005.[4] In many ways, Shell Oil Company's attempt to drill in the Arctic has epitomized the challenges that private energy companies face in the region. Shell gained permits for exploratory oil and gas drilling

[1] U.S. Gov't Accountability Office, GAO-10-870, Coast Guard: Efforts to Identify Arctic Requirements Are Ongoing, but More Communication about Agency Planning Efforts Would Be Beneficial (2010). There are various definitions regarding what it means to be "Arctic." The most commonly accepted definition means north of the Arctic Circle, which includes the northern third of Alaska and surrounding waters. However, the Arctic Research and Policy Act, Title I of Pub. L. No. 98-373 (July 31, 1984) also includes in its definition of Arctic lands north of the Yukon, Porcupine, and Kuskokwim Rivers and the Aleutian Islands.

[2] United States Coast Guard, Arctic Strategy 12 (May 2013) (citing U.S.G.S. Fact Sheet 2008-3049: Circum-Arctic Resource Appraisal: Estimates of Undiscovered Oil and Gas North of the Arctic Circle, *available at* http://pubs.usgs.gov/fs/2008/3049/) (hereinafter "U.S.C.G. Arctic Strategy").

[3] Interagency Working Group on Coordination of Domestic Energy Development and Permitting in Alaska, Managing for the Future in a Rapidly Changing Arctic 16 (Mar. 2013) (hereinafter, "Interagency Report").

[4] U.S.C.G. Arctic Strategy at 13.

permits in Chukchi and Beaufort Seas during the 2012 drilling season, and conducted some preliminary drilling operations although it did not reach hydrocarbon zones before encountering ice encroachment and regulatory difficulties. Despite investing more than $4.5 billion in preparation for Arctic drilling, Shell encountered harsher conditions than it anticipated, leading to various violations and accidents during 2012.[5] The Shell operation received adverse public attention and heightened regulatory scrutiny following reports that the Shell drillship KULLUK ran aground on the shoreline of Sitkalidak Island, Alaska on New Years' Eve 2012, summoning up memories of the EXXON VALDEZ and the DEEPWATER HORIZON in one fell swoop. Thereafter, Shell experienced further setbacks with Department of Interior scrutiny focusing on, *inter alia*, the ARCTIC CHALLENGER (an Arctic Containment System), which is a key component of its submitted drilling plan.[6] The timetable of any future drilling plans by Shell also hinges upon judicial proceedings it commenced against eleven environmental or Alaskan Native organizations to initiate the inevitable court review of Shell's Chukchi Sea oil spill response plan.[7] Shell has elected not to continue exploration during the 2013 drilling season, and it remains unclear when it will restart operations.[8]

ConocoPhillips and Statoil also hold leases in Chukchi Sea, and although ConocoPhillips previously announced plans to start operations as early as 2014, other leaseholders may see how Shell fares with its judicial and Interior challenges before proceeding.

In addition to oil and gas exploration on the Arctic continental shelf, receding sea ice opens the possibility of trans-Arctic shipping via Canada's Northwest Passage or the Northern Sea Route over Russia, potentially providing a shorter commercial trade route than the Suez for trade between the Pacific Rim and the Atlantic nations. These routes can cut the sailing distance between Europe and Asia by as much as 5,200 miles.[9] Furthermore, traffic through U.S. Arctic increased by 30% from 2008 to 2010 and Bering Strait transits increased 25% during the same period.[10]

Although trans-Arctic shipping routes hold promise, the number of transits is small in comparison to other routes. Moreover, Arctic shipping has been mostly regional and centered on the export of natural resources and the resupply of isolated communities and facilities focused upon extracting natural resources.[11] True development of these routes requires infrastructure investment, adoption of new polar practices, and new understanding about the risks and dangers of navigating in the uniquely harsh environment. In the Arctic, the ability to respond timely to search-and-rescue or pollution incidents is questionable at best, channel markers are non-existent or made impossible by shifting ice conditions, the presence of even small ice blocks can significantly slow down vessels and wreak havoc upon delivery time tables, vessel traffic schemes need development, ship to shore communication is lacking, most vessels in the trade are not ice-class (and if they were they would burn more fuel), and the skeleton ice breaker fleet lacks vessels wide enough to accommodate the massive containerships now dominating the transpacific trade. The U.S. Coast Guard stated in May that it does not expect any significant trans-Arctic shipping through either the Northwest Passage or the Northern Sea Route within the next 10 years, although Russia's ongoing promotion and development of the latter as a viable commercial alternative may prove otherwise.[12] Atomflot, the operator of Russia's nuclear icebreaker fleet, has not suggested that the Northern Sea Route

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[5] Jennifer Scholtes, *Learning to Sail Past Arctic Peril*, CQ News (June 17, 2013). The Coast Guard also recently suffered from the severe conditions of the Arctic when one of its newest and largest ships, the National Security Cutter, was partially flooded and experienced other problems as a result of the Arctic conditions off of Alaska. *Id.*

[6] Ronald O'Rourke, Cong. Research Serv., R41153, Challenges in the Arctic: Background and Issues for Congress 24 (2013).

[7] *Id.*; *Shell Alaska Lawsuit Preempts Environmental Challenge of Spill Response Plan*, Huffington Post (May 1, 2012). Under authority granted by the Oil Pollution Act of 1990 ("OPA 90"), federal offshore lessees must have approved oil spill response plans. Among other things, OPA 90 requires that the oil response plan "identify. . .private personnel and equipment necessary to remove to the maximum extent practicable a worst case discharge. . ." 33 U.S.C. § 1321(j)(5)(D)(iii). In addition, regulations promulgated pursuant to OPA 90 authority require that the oil spill response plan meet certain criteria. At the heart of the Shell litigation is whether Shell's oil spill response plan satisfies OPA 90 and accompanying regulations. *See* Alaska Wilderness League, et al. v. Dep't of Interior, Civ. No. 1:2012-cv-00010 (D. Ak. 2012).

[8] Interagency Report at 16.

[9] *Id.* at 17.

[10] *Id.* at 18.

[11] *Id.* at 17.

[12] U.S.C.G. Arctic Strategy at 13.

will at any point replace the Suez, but hopes it will serve as a seasonal complement, growing from 1.5 million tons this year to 40 million tons by 2021— in comparison to the 740 million tons transiting the Suez.[13] Challenges and risks notwithstanding, just the prospect of a change in trade routes has Asian exporter nations at attention. For example, the emergence of a commercially viable Northern Sea Route would put China at a geographic advantage, or at least inoculate it against time and distance advantages of emerging Southeast Asian and South Asian manufacturers such as Vietnam and India. As a consequence, China has taken the position that the Arctic should be treated as a "Global Commons" and key Asian exporters including China, South Korea, India, and Singapore have inserted themselves as observers at the Arctic Council, a group of eight Arctic Nations[14] joined together to set Arctic policy.

International Arctic policy has moved forward at a pace slightly less glacial than in the United States and for now the United States seems willing to let international institutions take the lead in many areas. In 2009, the International Maritime Organization ("IMO") issued Guidelines for Polar Operation, and agreed to develop a mandatory Polar Code to regulate vessel construction, operation, and environmental guidelines for Polar Regions.[15] The IMO forecasts that it will have the Polar Code operational by 2015 and implemented by 2016.[16] Although the Polar Code is an important step to helping ensure safe Arctic operations for vessels, be they involved in natural resource extraction or trans-Arctic trade, it has already been criticized by environmental groups such as Earthjustice for not going far enough on environmental and indigenous communities' protection, and for focusing too much on ship design. Moreover, the Arctic Council has begun issuing resolutions to establish coordinated Arctic policy, including a 2011 resolution regarding search and rescue and a 2013 resolution coordinating environmental response among members of the Council.[17] And for the first time, at the 2011 Council meeting in Nuuk, Greenland, the United States sent Secretary of State Clinton on behalf of the United States, signaling to the international community that the United States is ready to step up and assert itself as an Arctic nation.[18] Secretary Kerry continued this trend at the 2013 meeting, and the United States will chair the Council beginning in 2015.

The Alaskan senators, Mark Begich (D-AK) and Lisa Murkowski (R-AK) have been at the forefront of efforts to develop a coordinated national Arctic strategic policy. In 2012 they wrote to President Obama expressing concern with the proliferation of multiple and conflicting agency policies, roadmaps, and strategy documents since the Bush Administration's January 2009 Presidential Directive on Arctic policy,[19] and called upon the Obama Administration to put forward "an overall national U.S. strategy for the Arctic" in light of recent increases in petroleum exploration in Arctic waters and increased Bering Strait transits by cargo ships.[20] The Senators also called for United States' ratification of the United Nations Convention on the Law of the Sea ("UNCLOS").[21]

On the eve of the May 2013 meeting of the Arctic Council at Kiruna, Sweden, the President issued the National Strategy for the Arctic Region, building upon

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[13] Balazs Koranyi, *Arctic Shipping To Grow As Warming Opens Northern Sea Route for Longer*, Reuters (May 29, 2013).

[14] The Arctic Council includes the United States, Russia, Canada, Greenland, Iceland, Finland, Sweden, and Norway. Observer states include France, Germany, the Netherlands, Poland, Spain, the United Kingdom, China, Italy, India, Japan, South Korea, and Singapore. U.S.C.G. Arctic Strategy Appx. II.

[15] USCG Arctic Strategy at 15 (citing IMO, "Protecting the Polar Regions from Shipping, Protecting Ships on Polar Waters." *available at* http://www.imo.org/MEDIACENTRE/HOTTOPICS/POLAR/Pages/default.aspx.

[16] *Arctic Shipping Code Seen in Place by 2016*, Maritime Executive (June 5, 2013).

[17] Remarks of Admiral Papp, Commandant of the U.S. Coast Guard, before the Center for Strategic and International Studies (May 21, 2013); Remarks of Sen. Murkowski (R-AK), 158 Cong. Rec. S3541 (May 16, 2013).

[18] Remarks of Sen. Murkowski (R-AK), 158 Cong. Rec. S3541 (May 16, 2013).

[19] National Security Presidential Directive 66 / Homeland Security Presidential Directive 25 (Jan. 12, 2009).

[20] Letter from Sen. Begich & Sen. Murkowski to President Obama (July 11, 2012). *See also* Statements of Sen. Murkowski (R-AK), Senate Appropriations Comm. On Homeland Security, Hearing on President Obama's Fiscal 2014 Budget Proposal for the Homeland Security Department (Apr. 23, 2013) (pushing for increased icebreaker capacity and the issuance of a national Arctic policy); Statements of Sen. Begich (D-AK), Senate Homeland Security and Governmental Affairs Comm., Hearing on President Obama's Fiscal 2014 Budget Proposal for the Homeland Security Department (Apr. 17, 2013) (same).

[21] Letter from Sen. Begich & Sen. Murkowski to President Obama (July 11, 2012).

but not superseding the 2009 Presidential Directive.[22] Although the 2013 National Strategy document does not depart radically from the Bush Directive, it decidedly frames the priorities differently and in keeping with President Obama's very different governing style. The policy document strikes a cautious tone toward resource development, prioritizes environmental preservation, embraces climate change and multilateral institutions, and calls for a "science informed" approach.[23] The three main prongs or "lines of effort" of the Arctic strategy were previously set forth in the President's May 2010 National Security Strategy: (1) national security; (2) environmental stewardship; and (3) strengthened international cooperation.

Within the national security "line of effort", the Administration sets out a broad swathe of priorities, including the need to ensure freedom of navigation for vessels and aircraft, greater maritime domain awareness, and vessel traffic management systems.[24] The strategy document also signals that the Government will not lead the charge into the Arctic, but will gradually accompany private-led initiatives when it states that the United States will "intelligently evolve Arctic infrastructure and capabilities, including ice-capable platforms as needed" and "carefully tailor this regional infrastructure, as well as our response capacity, to the evolving human and commercial activity in the Arctic region."[25] And although this prong encompasses energy security which is defined as a "core component" of our national security strategy, it calls for a "disciplined" approach because "[a]n undisciplined approach to exploring new opportunities in this frontier could result in significant harm to the region, to our national security interests, and to the global good."[26]

The second prong of the strategy, "stewardship," highlights the President's environmental priorities in the Arctic with respect to both conservation of the natural environment and indigenous cultures, stating that "increased human activity demands precaution, as well as greater knowledge to inform responsible decisions."[27] To achieve this greater knowledge, the Administration intends to chart better the region, and also to understand climate change and its impacts upon the region, which understanding will be "based on a holistic earth system approach."[28] The strategy further acknowledges that there have been warming and cooling cycles in the Arctic over millennia, but opines that the current warming trend is "unlike anything previously recorded" with a reduction in sea ice that has been "dramatic, abrupt, and unrelenting."[29] In approaching the Arctic, the Administration intends to "emphasize science-informed decision making" while leveraging "traditional knowledge" which the document defines as "a body of evolving practical knowledge based on observations and personal experience of indigenous communities over an extensive, multigenerational period."[30] In summary, the strategy position represents a frank admission that there is a great deal we do not know about the sparsely populated U.S. Arctic, why or how the natural environment is changing in the Arctic generally, or how best to pursue natural resource development and other economic opportunities made possible there because of receding sea ice and technological developments.

The third and final prong of the President's new Arctic strategy calls for strengthened international cooperation and a multilateral approach working through the Arctic Council, and presumably also the IMO, and also calls for accession to UNCLOS. The campaign for ratification of UNCLOS is not new, and faces significant headwinds in the Senate, outspoken support of the Alaska delegation notwithstanding. Last Spring, Senator Kerry, as Chairman of the Senate Foreign Relations Committee, held a series of hearings with top Obama officials and business leaders in favor of the United States signing the 1982 convention. By July, 34 Republican senators had announced their opposition, dashing any chance of a two-thirds vote for ratification.

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[22] The White House, National Strategy for the Arctic (May 10, 2013), *available at* http://www.whitehouse.gov/sites/default/files/docs/nat_arctic_strategy.pdf. *See also* National Strategy for the Arctic Announced, The White House Blog (May 10, 2013), *available at* http://www.whitehouse.gov/blog/2013/05/10/national-strategy-arctic-region-announced; National Security Presidential Directive 66 / Homeland Security Presidential Directive 25 (Jan. 12, 2009). *See also* Ronald O'Rourke, Cong. Research Serv., R41153, Challenges in the Arctic: Background and Issues for Congress at 8 (2013).

[23] National Strategy for the Arctic at 4.

[24] *Id.* at 7.

[25] *Id.* at 2 & 7.

[26] *Id.* at 4.

[27] *Id.* at 7.

[28] *Id.* at 8.

[29] *Id.* at 4.

[30] *Id.* at 3 & n. 2.

Senator Murkowski (R-AK), ranking member on the Senate Energy and Natural Resources Committee, is the lone Republican senator supporting ratification, following the retirement of Senator Lugar (R-IN). While Senator Murkowki and other treaty supporters maintain that membership in the treaty is essential to filing the United States' claims for a greater share of Arctic seabed resources, opponents have expressed concern that the treaty would subject U.S. companies to unnecessary regulation and fees and otherwise undermine U.S. sovereignty. "We don't need the United Nations collecting a lot of money off minerals collected at the bottom of the sea to distribute around the world," said Senator Charles Grassley (R-IA), a lead opponent of the treaty.[31] Alaska's other Senator, Mark Begich (D-AK), has expressed his frustration with the status quo: "I think there are a few misguided souls here in the U.S. Senate that just don't understand the value of controlling our own sovereignty and destiny. And I think they're just stuck on this belief that somehow after we sign this everyone in America will be wearing blue United Nations hats. I can't even describe it; it makes no sense."[32] Even if the Administration pushes aggressively for ratification, this risks the danger of hardening an already partisan issue and galvanizing Republican opposition in the Senate. To move the needle, the Administration would be well-advised to recruit strong energy industry support for the treaty. However, this will in turn depend upon the Administration's willingness and ability to pave the way for Arctic subsea resource development.

Less than two weeks after the White House released its Arctic Strategy, the Coast Guard released its own on May 21, 2013, announced by Commandant Papp at the Center for Strategic and International Studies. Underscoring the importance of the Arctic, the Commandant noted the increasing interest in offshore Arctic hydrocarbon exploration, a 100% increase in Bering Strait traffic in the last three years, and the fact that more than half of America's fish stock comes from the Exclusive Economic Zone off Alaska.[33] Although the Coast Guard strategy tracks the White House document, it does include some additional focus and detail that help flesh-out what the proposal means for the maritime industry. The three core objectives of the Coast Guard proposal are improving maritime domain awareness, modernizing governance, and broadening partnerships.[34]

With respect to improving domain awareness, the Coast Guard strategy expresses the need for additional Arctic assets scalable to the degree of activity in the area. Currently, there is almost no landside infrastructure for the Coast Guard to rely upon and the distances between areas of human settlement or existing infrastructure are extraordinary. Dutch Harbor in the Aleutian Islands is the nearest deepwater port, roughly 1,000 miles from the northernmost Alaskan community of Barrow.[35] There are also no roads connecting Arctic Alaskan communities, the closest Coast Guard air station is 945 miles south in Kodiak, there are no places to refuel, the Coast Guard has very limited ice breaker capability,[36] and the only three commercial airports are at Nome, Barrow, and Deadhorse/Prudhoe Bay.[37]

Although the Coast Guard recognizes the importance of maintaining a presence in the Arctic to monitor risks posed by increased activity, assess changes in the physical environment, and assert sovereignty, in light of its limited resources and the tentative activity now occurring in the Arctic, the service appears to be taking a "wait and see" approach to the deployment of permanent infrastructure or costly mobile assets that could give it a year-round physical presence. Given the austere budget environment and the unlikelihood of additional assets in the near term, the Coast Guard's priority will be to deploy "mobile infrastructure" to ensure at least a seasonal presence in key locations

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[31] Jennifer Scholtes, *Law of the Sea Treaty May Get New Push, But Faces Same Old Problems*, CQ News (May 28, 2013).

[32] *Id.*

[33] Remarks of Admiral Papp, Commandant of the U.S. Coast Guard, before the Center for Strategic and International Studies (May 21, 2013).

[34] *Id.*; U.S.C.G. Arctic Strategy at 10.

[35] USCG Arctic Strategy at 14.

[36] The recent reactivation of the heavy non-nuclear icebreaker POLAR STAR this year brings the U.S. icebreaking fleet to two, together with the medium icebreaker HEALY, although the Coast Guard requires three heavy and three medium icebreakers just to fulfill its statutory missions. USCG Arctic Strategy at 36; Ronald O'Rourke, Cong. Research Serv., R41153, Challenges in the Arctic: Background and Issues for Congress at 40 (2013). For a more detailed discussion of the Coast Guard's icebreaker budgetary woes, see Bryant E. Gardner, Pirates, Adventures in the Arctic, and More: A Peak at the 11th Hour Maritime Legislation of the 112th Congress, Window on Washington, 10 Benedict's Mar. Bull. 170 (Fourth Quarter 2012).

[37] U.S.C.G. Arctic Strategy at 14.

Source:U.S. Coast Guard, Arctic Strategy, May 2013.

during the most active warmer weather periods. The Coast Guard strategy proposes an interdependent approach, including an "Arctic Fusion Center" to promote interagency cooperation and information sharing among the Coast Guard, Department of Defense, intelligence agencies, and others towards the goal of sustainable resource development and environmental protection.[38] Among other things, to augment its limited physical presence the Coast Guard would deploy "portable surveillance sensor packages" to be positioned at "critical geographic choke points," offshore drilling infrastructure, and on Coast Guard assets.[39]

The Coast Guard's second goal of "modernizing governance" puts further emphasis on the development of national and multinational Arctic-focused fora to develop and implement policy specifically for the Arctic. As part of this process, the Coast Guard advocates accession to UNCLOS on the grounds that current U.S. Outer Continental Shelf Claims extend out to 200 nautical miles but with accession to UNCLOS the United States could claim resource rich seabed out to 600 nautical miles, and other countries including Russia, Canada, Denmark, and Norway have already filed extended continental shelf claims while the United States sits idly by.[40] Notably, the United States is the only Arctic nation not belonging to the treaty. The Coast Guard also commits to work through its leading role at the IMO and through the Arctic Council to develop sound Arctic policies.

Along the same line, the third and final prong of the Coast Guard strategy, "broadening partnerships," restates much of what is set forth in the first legs of proposal, with respect to leveraging interagency resources and ensuring national and international coordination to more efficiently and effectively discover and oversee increased Arctic activity. Additionally, the Coast Guard plans to partner with indigenous communities, local industry, State government, and academic institutions to better develop an understanding of the Arctic, including a working sea ice atlas.[41]

Record low sea ice, new technologies, and rising energy prices have spurred plans for Arctic navigation and resource exploration, and prompted the issuance of the White House and Coast Guard strategies in May 2013. However, for the time being it appears that the commercial reality of trans-Arctic shipping remains far off, and the real driver for increased human presence in the harshest Arctic maritime areas will be hydrocarbon extraction. Environmental and regulatory challenges delayed the first forays into offshore exploration in the Chukchi and Beaufort Seas off of Alaska. As long as energy prices stay high enough, it stands to reason that private industry will develop offshore Arctic

[38] *Id.* at 23.

[39] *Id.* at 24.

[40] Remarks of Admiral Papp, Commandant of the U.S. Coast Guard, before the Center for Strategic and International Studies (May 21, 2013).

[41] U.S.C.G. Arctic Strategy at 31.

resources, and U.S. regulators will follow to provide support and oversight, calibrating the deployment of resources to keep pace with the increased commercial activity. Recent bounds forward with shale oil production in the lower 48 have many looking into their crystal balls about what this means for deepwater exploration and U.S. domestic energy flows more generally—it remains to be seen how such discoveries may impact forays into the wild unknowns of the Arctic seas.

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