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CHAPTER 12
ENVIRONMENTAL CONSIDERATIONS IN THE OIL AND GAS INDUSTRY

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§12.1 SCOPE

This chapter highlights the impact of environmental laws on the exploration, development, and production of oil and gas. In addition to the federal environmental laws addressed in previous chapters of this book, the oil and gas industry is regulated by a number of industry-specific state laws designed to protect the environment. This chapter discusses how the state laws operate and explains how the federal laws apply to the oil and gas industry. Brief reference is also made to the environmental laws impacting mining industries in general.

Each step in the oil and gas development process involves varying degrees of environmental regulation. From exploration to refining, several state and federal environmental laws must be applied. The focus of this chapter will be primarily on "upstream" oil and gas activities such as exploration, well drilling and development, and production. "Downstream" activities, such as processing, transportation, refining, and retail distribution, are primarily regulated under the general federal environmental laws. However, some of the laws that apply to upstream operations have the same impact on downstream activities. For example, the Oil Pollution Act of 1990, 33 U.S.C.A. §§2701 to 2761 (West Supp. 1991), applies to oil discharges occurring at the well operation/prodution stage to the same extent as it does to processing, transportation, refining, and retail distribution activities.

§12.2 SURFACE AND SUBSURFACE WATER IMPACTS

§12.3 Clean Water Act


§12.4 Regulation of Point Sources Discharging into Navigable Waters

§12.5 Point Sources

A point source is defined as: "[A]ny discernible, confined and discrete conveyance, including . . . any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, . . . from which pollutants are or may be discharged." CWA §502 (14), 33 U.S.C. §1362(14) (1988). See §4.12 for further discussion of point sources under the CWA. The Act requires point sources of pollution to obtain a permit before they can discharge pollutants into "navigable waters." CWA §402(a), 33 U.S.C. §1312(a) (1988). Many oil and gas activities constitute point sources as defined by the Act. For example, during the production of oil and gas, often there are large volumes of water produced. Depending upon how this produced water is managed, it could become a point source. The issue then becomes whether the water is being discharged into "navigable waters."

§12.6 Navigable Waters

The Clean Water Act defines navigable waters as "waters of the United States, including the territorial seas." CWA §502(7), 33 U.S.C. §1362(7) (1988). The Environmental Protection Agency (EPA) has defined "waters of the United States" broadly to include even non-navigable intermittent streams and "wetlands" which are seldom filled with water. 40 C.F.R. §110.1 (1990). See §12.12. See also §4.12 for further discussion of the "navigable waters" requirement. Courts have generally interpreted "waters of the United States" as permitting the EPA to regulate to the extent permissible under the Commerce Clause. E.g., United States v. Texas Pipe Line Co., 611 F.2d 345, 347 (10th Cir. 1979). Therefore, a discharge in an area that may not appear to be near an existing water body might actually be considered a discharge into "waters of the United States."

QUERY: Could a discharge into groundwater be considered a discharge into "waters of the United States"?

COMMENT: The EPA abandoned pressing this issue once it obtained express authority under other statutes to address groundwater problems. However, most courts
addressing the issue have held EPA lacks CWA authority to control discharges into groundwater when the groundwater has no contact with surface water. Compare, e.g., Exxon Corp. v. Train, 554 F.2d 1310, 1329 (5th Cir. 1977) and U.S. v. GAF Corp., 389 F Supp. 1379 (D. Tex. 1975) (EPA lacks authority to regulate groundwater under the CWA), with United States Steel Corp. v. Train, 556 F.2d 822, 851-52 (7th Cir. 1977) (EPA has limited authority to regulate groundwater). This issue probably would have been resolved by the Supreme Court had the EPA not obtained the necessary authority to regulate groundwater issues through the Safe Drinking Water Act, 42 U.S.C. §§300f to 300j-26 (1988) (specifically Part C—Protection of Underground Sources of Drinking Water, establishing underground injection control programs) and the Resource Conservation and Recovery Act, 42 U.S.C. §§3001 to 3020 (1988). However, I predict the issue will soon be addressed in the context of the Oil Pollution Act of 1990 (OPA), 33 U.S.C.A. §§2701 to 2761 (West Supp. 1991), which allows public and private parties to seek damages and cleanup costs arising out of the discharge of oil “into or upon the navigable waters . . . .” OPA §1002(a), 33 U.S.C.A. §2702(a) (West Supp. 1991). The OPA defines “navigable waters” as “waters of the United States.” OPA §1001(21), 33 U.S.C.A. §2701(21) (West Supp. 1991). This issue is discussed at §12.19 of this chapter. In Kansas, the state water pollution statutes apply to the “waters of the state” which is defined to include “surface and subsurface waters within the boundaries of the state.” K.S.A. 65-161(a) (1985).

§12.7 Regulation of Produced Water

Production of oil and gas often requires the production of large volumes of water with high chloride concentrations, referred to as “brine” or “salt water.” As noted by the court in Natural Resources Defense Council v. U.S. E.P.A., 863 F.2d 1420, 1425 (9th Cir. 1988):

Oil production brings to the surface water which was originally trapped with oil or natural gas in a geological formation, as well as water and other fluids that have been mixed with oil or gas during the production process. These fluids are known as produced water.

The Clean Water Act prohibits discharge of any “pollutant” from a point source unless the discharger obtains a permit. CWA §301(a), 33 U.S.C. §1311(a) (1988). Section 402 of the Clean Water Act authorizes the Administrator to issue a permit to discharge pollutants; these are known as “National Pollutant Discharge Elimination System” permits or simply “NPDES” permits. CWA §402, 33 U.S.C. §1342 (1988). To qualify for a permit, the discharge must comply with effluent limitations designed to meet state water quality standards and technological requirements imposed by the Act. CWA §402(a), 33 U.S.C. §1342(a) (1988).

The term “pollutant” is defined by the Act to include any “industrial waste” discharged into water. CWA §502(6), 33 U.S.C. §1362(6) (1988). However, injection of produced water into a state-approved disposal well will not be considered a “pollutant”. CWA §502(6)(B), 33 U.S.C. §1362(6)(B) (1988). The same subsection exempts “water, gas, or other material which is injected into a well to facilitate production of oil or gas.” Therefore, injection of material to enhance oil or gas recovery, or the injection of “water derived in association with oil or gas production,” will not require a NPDES permit if the injection has been approved by the state and the state “determines that such injection or disposal will not result in the degradation of ground or surface water resources.” CWA §502(6) (B), 33 U.S.C. §1362 (6)(B) (1988). However, if the produced water is not going to be injected, an NPDES permit will be required.

The EPA, at 40 C.F.R. Part 435, has promulgated effluent limitations for the “Oil and Gas Extraction Point Source Category.” The industry category is divided into the following five subcategories:

1. Offshore
2. Onshore
3. Coastal
4. Agricultural and Wildlife Water Use
5. Stripper

The two subcategories that impact Kansas operations are onshore and stripper. The stripper subcategory applies to onshore facilities which produce “10 barrels per well per calendar day or less of crude oil and which are operating at the maximum feasible rate of production in accordance with recognized conservation practices.” 40 C.F.R. §435.60 (1990). The stripper subcategory applies only to oil wells; no stripper provision exists for gas wells.

The onshore subcategory establishes effluent limitations which are pretty straightforward: “there shall be no discharge of waste water pollutants into navigable waters from any source associated with production, field exploration, drilling, well completion, or well treatment (i.e., produced water, drilling muds, drill cuttings, and produced sand).” 40 C.F.R. §435.32(a) (1990). Essentially, the EPA has determined that the best practicable control technology available for such wastes is to inject them in such a manner that they will not be a “pollutant” under the Clean Water Act. Id. However, the onshore subcategory excepts wells that are included within the stripper subcategory—but to date the EPA has not specified any alternative control strategy for the stripper subcategory. 40 C.F.R. §435.30 (1990). Therefore, presently the only federal limit on stripper subcategory well discharges are those that violate state water quality standards. Additional state limits on such discharges are discussed at §12.27 of this chapter.

On February 25, 1991, Region VI of the EPA published final NPDES General Permits for the Onshore Subcategory for operations in Louisiana, New Mexico, Oklahoma, and Texas. Final NPDES General Permits for the Oil and Gas Extraction Point Source Category, Onshore Subcategory—States of Louisiana, New Mexico, Oklahoma, and Texas, 56 Fed. Reg. 7,698 (Feb. 25, 1991) [hereafter called General Permit]. Each permit prohibits any discharge of pollutants
from onshore oil and gas wells and facilities. The permits also narrow the stripper subcategory to exempt only wells that meet the stripper designation at the time the permit is issued. For example, if a well produces 11 barrels of oil per day and, after the permit takes effect production falls below the stripper well level, it will not be eligible for stripper subcategory treatment. General Permit, 56 Fed. Reg. at 7,703. The General NPDES Permit also incorporates best management practices imposed by the various states to ensure drilling fluids will be properly contained within a receiving pit to prevent a discharge or seepage. Id. at 7,704. Produced water is defined to include water from "well drilling, production or workover operations, as well as waste waters from storage tanks, separators, saltwater or brine pits." Id. The discharge of produced water is prohibited and best management practices specified by each state must be employed to ensure there will be no discharge or seepage of produced water. Id. Similar conditions are placed on drill cuttings, produced sand, deck or rig floor drainage, blowout preventer fluid, and fluids used for well treatment, completion, and workover. Id. at 7,704-05.

Under the general permit approach, individual well owners and operators do not need to apply for a permit; they are covered automatically. Id. at 7,699. However, the EPA Regional Administrator may require any discharger to obtain an individual NPDES permit if they fail to comply with the general permit. Id. at 7,703. It appears the general permit authorizes citizen suits to enforce a permitting noncompliance with state pit and pond regulations which are incorporated into the permit as "best management practices." The general permit states: "Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement actions and/or for requiring a permit to apply for and obtain an individual NPDES permit." Id. at 7,705. Although the permittee is not required to file monitoring reports, they are required to report any noncompliance with the permit "within 24 hours from the time the permittee becomes aware of the circumstances." Id. at 7,707.

COMMENT: As of January 1992, Region VII of the EPA has not proposed any sort of general permit for Kansas with regard to the Oil and Gas Extraction Point Source Category. It would appear that with the zero discharge effluent limitation on all onshore subcategory wells, there is little need for a permit, general or otherwise, to tell an operator they can't discharge. The primary benefit of a permit in such cases is to avoid prosecution for discharging without a permit, which is a distinct offense from having a discharge which violates the effluent limits imposed by a permit. E.g., K.S.A. 1990 Supp. 65-167 (discharge without a permit punishable by fine of not less than $2,500 and not more than $25,000).

Under the stripper subcategory, there is the possibility of a permitted discharge, and any operator desiring to dispose of produced water, by some means other than injection, would require a permit. Although K.S.A. 1990 Supp. 55-172 makes it unlawful for any person having possession or control of a well "to permit salt water, oil or refuse . . . to escape . . . from the vicinity of such well," this statute should not affect an intentional permitted discharge into waters of the State. Intentional discharges should be dealt with under K.S.A. 1990 Supp. 65-164(a), which requires a state permit. See §12.29 of this chapter. Recently the EPA approved a general permit for the stripper subcategory, submitted by the Pennsylvania Department of Environmental Resources, that will permit the discharge of produced water into streams following treatment.

COMMENT: Although federal law allows a state to permit surface discharges of produced water from stripper oil well operations, Kansas law generally requires that produced water be disposed of through underground injection. K.S.A. 1990 Supp. 55-904(a)(1) indicates that "salt water" produced in conjunction with oil or gas production will be disposed of in a manner approved by the Kansas Corporation Commission under K.S.A. 1990 Supp. 55-1003: typically, injection in a disposal well. "Salt water" is defined by 55-904(b) as "water containing more than 5,000 milligrams per liter chlorides." This suggests that produced water containing 5,000 milligrams per liter chlorides or less is not subject to the prohibition of 55-904(a)(1). However, K.S.A. 1990 Supp. 55-172 states: "It shall be unlawful for any person . . . to permit salt water, oil or refuse from . . . such well to escape . . . from the vicinity of such well . . . ." K.S.A. 55-172 does not place any chloride concentration limit on the term "salt water" and it would appear to encompass any produced water from an oil or gas well.

K.S.A. 1990 Supp. 55-904(c) authorizes:

[T]he spreading of salt water on road beds under construction or maintenance if such spreading of salt water is performed in compliance with rules and regulations adopted by the secretary of the department of health and environment.

The Kansas Department of Health & Environment (KDHE) is given authority to regulate the road-spreading of produced water. Id. KDHE's road-spreading regulations can be found at K.A.R. 28-47-1 to 28-47-7 (1989).

§12.8 Regulation of Storm Water Runoff

Section 402(p) of the Clean Water Act requires the EPA to establish NPDES permit programs for certain types of storm water discharges. CWA §402(p), 33 U.S.C. §1342(p) (1988). A "storm water discharge" consists of "storm water runoff, surface runoff . . . infiltration . . . and drainage related to storm events or snow melt." National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,995 (Nov. 16, 1990) [hereafter called Storm Water Regulations]. See also Storm Water Regulations, 55 Fed. Reg. at 48,065 (to be codified as 40 C.F.R. §122.26(b)(13)) (defining "storm water"). However, §402(l)(2) of the Act prohibits the EPA from requiring a permit:

[F]or discharges of storm water runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission
facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operations.

CWA §402(1)(2), 33 U.S.C. §1342(1)(2) (1988) (emphasis added); see also 40 C.F.R. §122.26 (1990). This exemption recognizes that often storm water is deliberately channeled around oil and gas and other mineral development operations to prevent contact with on-site contaminants. Storm Water Regulations, 55 Fed. Reg. at 48,029. Therefore, Congress concluded:

[T]hat operators that use good management practices and make expenditures to prevent contamination must not be burdened with the requirement to obtain a permit. Hence, section 402(l)(2) creates a statutory exemption from storm water permitting requirements for uncontaminated runoff from these facilities.


To implement the storm water discharge program, and the exemption for uncontaminated mining site runoff, the EPA has imposed a permit requirement for contaminated storm water discharges from oil, gas, and mining operations. However, even though the storm water discharge is contaminated, it will not be subject to NPDES requirements unless the discharge is into the “waters of the United States.” CWA §402(a), 33 U.S.C. §1342(a) (1988) (permit required “for the discharge of any pollutant”); CWA §502(12), 33 U.S.C. §1362(12) (1988) (“discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.”); Storm Water Regulations, 55 Fed. Reg. at 48,031 (EPA agrees with comment that “oil and gas exploration, production, processing, or treatment operations or transmission facilities must only obtain a storm water permit when a discharge to waters of the U.S. . . . is contaminated.”).

The operator of the site must determine, for all periods since November 16, 1987, whether they have had any discharge of storm water which caused the discharge of a reportable quantity (RQ) of oil or a hazardous substance, or which “contributes to a violation of a water quality standard.” Storm Water Regulations, 55 Fed. Reg. at 48,067 (to be codified as 40 C.F.R. §122.26(c)(1)(iii)). If they have not experienced such a discharge, they need not apply for a storm water discharge permit. If such a discharge has occurred, or occurs in the future, they will be required to apply for a permit. Id.

To determine whether there has been a discharge of a reportable quantity of oil the operator must use the “sheen test” provided for in 40 C.F.R. §110.3 (1990). Under the sheen test a discharge of oil that can “[c]ause a film or sheen upon or discoloration of the surface of the water . . .” constitutes a reportable quantity. 40 C.F.R. §110.3(b) (1990). See discussion at §12.11. To determine if there has been a discharge of a reportable quantity of a hazardous substance the operator must apply the RQs established under §311 of the Clean Water Act and §102 of the Comprehensive Environmental Response, Compensation, and Liability Act. See 40 C.F.R. §117.21 (1990) (CWA §311 hazardous substance RQs); 40 C.F.R. §302.6 (1990) (CERCLA §102 hazardous substance RQs). If a permit is required, the operator has until October 1, 1992 to file a permit application. National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges; Application Deadlines; Final Rule and Proposed Rule, 56 Fed. Reg. 56,548 (Nov. 5, 1991) (extending permit application deadline for individual permits from November 18, 1991 to October 1, 1992). The regulations also allow for “group” permits and “general” permits. Part 1 of the group permit application was due September 30, 1991 and Part 2 is due May 18, 1992. See 56 Fed. Reg. 12,100 (March 21, 1991) (amending the group application deadlines). However, the EPA has a proposed rule pending to extend the Part 2 application deadline from May 18, 1992 to October 1, 1992. National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges; Application Deadlines, 56 Fed. Reg. 56,555 (Nov. 5, 1991). If a new discharge is being proposed, the application must be submitted at least 180 days before the date on which the discharge is to commence. Storm Water Regulations, 55 Fed. Reg. at 48,062 (to be codified as 40 C.F.R. §122.21(c)).

§12.9 Oil Spills


§12.10 Section 311 of the Clean Water Act

§12.11 The “Harmful Discharge” Requirement

Section 311 provides, in part:

(3) The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, . . . or which may affect natural resources belonging to . . . or under the exclusive management of the United States . . . in such quantities as may be harmful as determined by the President under paragraph (4) of this subsection, is prohibited, except . . . [for certain discharges permitted under the Clean Water Act].
CWA §311(b)(3), 33 U.S.C. §1321(b)(3) (West Supp. 1991). Paragraph (4) of §311(b) authorizes the EPA to designate, by regulation, “those quantities of oil and any hazardous substances the discharge of which may be harmful to the public health or welfare or the environment of the United States . . . .” Pursuant to §311(b)(4), the EPA adopted the following regulation to determine when a discharge of oil “may be harmful”:

[D]ischarges of oil into or upon the navigable waters of the United States or adjoining shorelines in such quantities that it has been determined may be harmful to the public health welfare of the United States . . . include discharges of oil that:

(a) Violate applicable water quality standards, or

(b) Cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.

40 C.F.R. §110.3 (1990) (this is commonly known as the EPA’s “sheen test” for oil discharges). The EPA’s regulation deems this to be a “harmful” discharge which constitutes a violation of §311(b)(3) of the Act—even though no lasting damage is done to the environment.

Prior to 1978, various courts, including the Fifth Circuit Court of Appeals, would not permit a penalty if the defendant could prove that the spill was not harmful under the circumstances. See, e.g., United States v. Chevron Oil Company, 583 F.2d 1357 (5th Cir. 1978) (Chevron I). However, in 1978 Congress changed the §311 requirement of “harmful quantities” to “quantities which may be harmful.” Chevron, U.S.A., Inc. v. Yost, 919 F.2d 27, 30 (5th Cir. 1990). Only two courts have addressed the effect of the 1978 amendment to §311 with regard to the harm requirement and the imposition of civil penalties. In Orgulf Transportation Company v. United States, 711 F. Supp. 344 (W.D. Ky. 1989), the court held:

Congress chose to prohibit discharges which might not be harmful. Whether a spill resulted in actual harm to the environment is irrelevant to the determination of whether Section 311’s prohibition of discharges of oil in quantities which may be harmful has been violated. The only pertinent inquiry is whether the spill was in a quantity which may be harmful as determined by the EPA. Because EPA has determined that a spill of oil which creates a sheen is a quantity which ‘may be harmful,’ such spill is subject to the penalty provisions of 33 U.S.C. §1321 and 40 C.F.R Part 110.3.


§12.12 The “Navigable Waters” Requirement

The Act defines “ navigable waters” to mean “the waters of the United States, including the territorial seas.” CWA §502(7), 33 U.S.C. §1362(7) (1988). The EPA defines the term to include:

(a) All waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce . . . .
(b) Interstate waters, including interstate wetlands;
(c) All other waters such as intrastate lakes, rivers, streams, (including intermittent streams), mudflats, sandflats, and wetlands, the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) That are or could be used by interstate or foreign travelers for recreational or other purposes;
(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce;
(3) That are used or could be used for industrial purposes by industries in interstate commerce;
(d) All impoundments of waters otherwise defined as navigable waters under this section;
(e) Tributaries of waters identified in paragraphs (a) through (d) of this section, including adjacent wetlands; and
(f) Wetlands adjacent to waters identified in paragraphs (a) through (e) of this section . . . .


In United States v. Texas Pipe Line Co., 611 F.2d 345 (10th Cir. 1979), Texas Pipe Line Co. (TPL) owned a pipeline which ran through a farm in Oklahoma. TPL’s pipeline was damaged by a bulldozer operator working for the owner of the farm; 600 barrels of oil were released into “an unnamed tributary of Caney Creek, which discharges into Clear Boggy Creek, itself a tributary of the Red River.” Texas Pipe, 611 F.2d at 346-47. TPL reported the spill immediately and conducted a successful cleanup before the oil left the unnamed tributary. Even though the regulatory agencies commended TPL for its prompt and effective action to clean up the spill, TPL was assessed a $2,500 civil penalty. Texas Pipe, 611 F.2d at 347. In Texas Pipe the court upholds the penalty noting:
The Company contends that since the spill was confined to the unnamed tributary, no ‘navigable waters’ within the meaning of the FWPCA were involved. See 33 U.S.C. §1362(7). But we held in United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979), that Congress did not in this Act use the term ‘navigable waters’ in the traditional sense; Congress intended to extend the coverage of the Act as far as permissible under the Commerce Clause.

Texas Pipe, 611 F.2d at 347 (emphasis added). In Texas Pipe the court noted: “It makes no difference that a stream was or was not at the time of the spill discharging water continuously into a river navigable in the traditional sense.” Texas Pipe, 611 F.2d at 347. See also §12.5 and §14.12 for discussion of what may be considered navigable waters.

§12.13 Reporting Obligations
Section 311(b)(5) provides:

Any person in charge of . . . an onshore facility . . . shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such . . . facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge.

CWA §311(b)(5), 33 U.S.C. §1321(b)(5) (West Supp. 1991). Failure to comply with this reporting requirement is a crime punishable by fine and imprisonment for up to 5 years. Id. Therefore, a discharge of oil into the waters of the United States that meets the sheen test must be immediately reported to the “appropriate agency of the United States Government.” By regulation, the EPA requires that all oil spill reporting be made to the National Response Center by calling 800-424-8802. 40 C.F.R. §110.10 (1990). For other statutes that may impose a reporting obligation due to an oil spill, see §12.28, §12.29, and §12.41.

§12.14 Spill Prevention Requirements
As part of the government’s national response system, §311 requires the EPA to adopt regulations:

[W]hich require an owner or operator of a tank vessel or facility . . . to prepare and submit to the President a plan for responding, to the maximum extent possible, to a worst case discharge, and to a substantial threat of such a discharge, of oil or a hazardous substance.

CWA §311(j)(5)(A), 33 U.S.C.A. §1321(j)(5)(A) (West Supp. 1991). This requirement applies to an onshore facility that “because of its location, could reasonably be expected to cause substantial harm to the environment by discharging into or on the navigable waters . . . .” Id. at §(j)(5)(B)(iii). The “plan” required by the Act is commonly known as a “Spill Prevention Control and Countermeasure Plan” or simply the “SPCC Plan.” See 40 C.F.R. §112.3 (1990).

The existing regulations governing SPCC plans are in the process of being revised to reflect several significant changes required by the Oil Pollution Act amendments to §311 of the Clean Water Act. Oil Pollution Prevention; Non-transportation-related Onshore and Offshore Facilities, 56 Fed. Reg. 54,612 (Oct. 22, 1991) (proposed rule). The existing regulations are found at 40 C.F.R. §§112.1 to 112.7 (1990). For onshore operations, a plan is required only if the following criteria are met:

1. It is a “non-transportation-related” facility;
2. Engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, or consuming of oil or oil products; and
3. In an area geographically located so that it can “reasonably be expected to discharge oil,” applying the “sheen test,” into waters of the United States.

40 C.F.R. §112.1(b) (1990). Excluded from the requirement are partially buried storage tanks which have an underground capacity of not more than 42,000 gallons and unburied capacity of not more than 1,320 gallons. However, if any single unburied container has a capacity in excess of 660 gallons, it will trigger the SPCC plan requirements. 40 C.F.R. §112.1(d)(2) (1990).

The EPA, by regulation, states the items that must be addressed in the SPCC Plan. The general tenor of the plan requirements is revealed by 40 C.F.R. §112.7 which provides, in part: “The SPCC Plan shall be a carefully thought-out plan, prepared in accordance with good engineering practices, and which has the full approval of management at a level with authority to commit the necessary resources.” 40 C.F.R. §112.7 (1990). This section is followed by detailed practices which should be employed for various operations, such as “Oil production facilities (onshore).” Id. at §112.7(c)(5) (addressing details for handling onshore tank batteries). The requirements for preparing the SPCC Plan are found at 40 C.F.R. §112.3 (1990). One of the major requirements is found at §112.3(d), which provides, in part:

No SPCC Plan shall be effective to satisfy the requirements of this part unless it has been reviewed by a Registered Professional Engineer and certified to by such Professional Engineer. By means of this certification the engineer, having examined the facility and being familiar with the provisions of this part, shall attest that the SPCC Plan has been prepared in accordance with good engineering practices.

40 C.F.R. §112.3(d) (1990). A copy of the plan must be kept at the facility if it is normally attended at least 8 hours per day; if it is not, the plan should be kept at the nearest field office. 40 C.F.R. §112.3(e) (1990).

CAVEAT: Many new statutory requirements created by the Oil Pollution Act of 1990 are not reflected in the EPA’s SPCC regulations. The existing regulations will be heavily modified, to impose additional SPCC-related obligations, as the EPA works through its regulatory agenda. For a discussion of the regulatory future of SPCC planning, see Oil Pollution Prevention; Non-transportation-related Onshore and Offshore Facilities, 56 Fed. Reg. 54,612 (Oct. 22, 1991) (proposed rule).
§12.15 Penalties for Failure to Comply

Either the EPA Administrator, or the Secretary of the Coast Guard, can assess administrative penalties against "any owner, operator, or person in charge" of a facility from which there has been a discharge of oil. CWA §311(b)(6)(A), 33 U.S.C. §1321(b) (6)(A) (West Supp. 1991). The owner, operator, or person in charge can also be assessed a penalty for failing to comply with any regulation issued under §311(j) which concerns SPCC plans. A "Class I" civil penalty cannot exceed $10,000 per day for each day during which the violation continues, with a maximum limit of $125,000 for all violations. Class I penalties are subject to an abbreviated hearing procedure. A "Class II" civil penalty cannot exceed $10,000 per day for each day during which the violation continues, with a maximum limit of $125,000 for all violations. Class II penalties have a more elaborate hearing procedure. CWA §311(b)(6)(B), 33 U.S.C. §1321(b)(6)(B) (West Supp. 1991). The Class I and Class II civil penalties are issued as administrative actions within the adjudicatory machinery of the administrative agency. Although the agency's actions can be reviewed in court, the review will be of the administrative record to determine whether there is "substantial evidence in the record . . . to support the finding of a violation or . . . the assessment of the penalty constitutes an abuse of discretion . . . ." CWA §311(b) (6)(G), 33 U.S.C. §1321(b)(6)(G) (West Supp. 1991).

§12.17 Civil Penalties

Any discharge that violates §311 can give rise to a civil penalty up to $25,000 per day of violation, or an amount up to $1,000 per barrel of oil discharged. CWA §311(b)(7)(A), 33 U.S.C. §1321(b)(7)(A) (West Supp. 1991). If the discharge is found to be the result of "gross negligence or willful misconduct" the civil penalty can be an amount "not less than $100,000, and not more than $3,000 per barrel of oil . . . discharged." Id. at §(D). The penalty is assessed against any person "who is the owner, operator, or person in charge" of the facility. Id. at §(A). The major difference between this penalty procedure and the administrative penalties discussed in §12.16, is the requirement that civil penalties under §311(b)(7) must be sought through a court action. CWA §311(b)(7)(E), 33 U.S.C. §1321(b)(7)(E) (West Supp. 1991).

Civil penalties can also be imposed for failure to carry out a cleanup order issued under §311(c) or an abatement order issued under §311(e) (concerning an "actual or threatened discharge of oil"). The civil penalty can be up to $25,000 per day of violation "or any amount up to 3 times the costs incurred by the Oil Spill Liability Trust Fund" to conduct the cleanup. CWA §311(b)(7)(B), 33 U.S.C. §1321(b)(7)(B) (West Supp. 1991).

§12.18 Cleanup Liability

The "owner, operator, or person in charge" of the facility can be ordered to clean up the discharge. CWA §311(b)(7)(B), 33 U.S.C. §1321(b)(7)(B) (West Supp. 1991). The federal government can also respond to the discharge and seek reimbursement of cleanup costs from the "responsible party." CWA §311(c)(1), 33 U.S.C.A. §1321(c)(1) (West Supp. 1991). The owner or operator of the onshore facility is liable to the United States for cleanup costs unless it can be proven that the discharge was caused solely by: "(A) an act of God, (B) an act of war, (C) negligence on the part of the United States Government, or (D) an act or omission of a third party . . . or any combination of the foregoing clauses . . . ." CWA §311(f)(2), 33 U.S.C.A. §1321(f)(2) (West Supp. 1991).

Section 311 caps the owner or operator's cleanup liability for a single discharge from an onshore facility at $50,000,000. Id. The EPA can establish, by regulation, a lower level of liability, down to $8,000,000, for onshore and offshore facilities. CWA §311(q), 33 U.S.C.A. §1321(q) (West Supp. 1991). The EPA had previously established limits for onshore storage facilities with a fixed capacity of 1,000 barrels or less. Liability Limits for Small Onshore Storage Facilities, 40 C.F.R. Part 113 (1990). However, these regulations appear to have been superseded by the 1990 amendments to §311 which added the $8,000,000 limitation on the Administrator's discretion. Prior to the 1990 amendment, the Administrator had established liability limits as low as $4,000 for aboveground oil storage facilities of up to 10 barrels. 40 C.F.R. §113.4(a) (1990). However, no cap applies when the discharge "was the result of willful negligence or willful misconduct within the privity and knowledge of the owner . . . ." CWA §311(f)(2), 33 U.S.C.A. §1321(f)(2) (West Supp. 1991). The cap only applies to cleanup costs sought by the federal government under §311, it does not affect the rights of the federal government, state government, and other governmental and private parties to seek compensation under other laws. CWA §311(o), 33 U.S.C.A. §1321(o) (West Supp. 1991). The most notable law that can impose additional liability is the Oil Pollution Act of 1990, discussed at §12.19 of this Chapter.

§12.19 Oil Pollution Act of 1990

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) excludes from its coverage: "[P]etroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance . . . ." CERCLA §101(14), 42 U.S.C. §9601(14) (1988) (defining "hazardous substance"); CERCLA §101(33), 42 U.S.C. §9601(33) (1988) (defining "pollutant or contaminant"). See §1.02 for a detailed discussion of CERCLA. This is commonly called the "petroleum exclusion" and has been interpreted to apply "unrefined and refined gasoline even though certain of its indigenous components and certain additives during the refining process have themselves been designated as hazardous substances within the meaning of CERCLA." Wilshire Westwood Associates v. Atlantic Richfield Corp., 881 F.2d 801, 805 (9th Cir. 1989). The Oil Pollution Act of 1990 (OPA) establishes a CERCLA-like liability regime for oil to fill the void created by CERCLA's petroleum exclusion. The OPA/CERCLA connection is created by OPA §1001(23) which defines "oil" to include:
under CERCLA but the V.S.C.A. §2701(21) (West Supp. 1991). Presumably courts will interpret the phrase “waters of the United States” at least as broadly as the term has been interpreted under the Clean Water Act. See supra §12.12 and §4.12.

COMMENT: It is likely that private litigants will attempt to expand the definition of “waters of the United States” beyond the limits previously established by the EPA under the Clean Water Act. See Pierce, The Emerging Role of “Liability-Forcing” in Environmental Protection, 30 Washburn L. J. 381, 414-16 (1991). Section 1002(b)(1)(B) permits “any person” to recover their removal costs and §1002(b)(2) permits any person (“claimant”) to recover damages for injury to real or personal property, lost profits, and similar consequential damages. OPA §1002(b), 33 U.S.C.A. §2702 (West Supp. 1991). Therefore, private parties seeking reimbursement for their losses caused by a release of oil will surely attempt to employ an expansive definition of “waters of the United States.” This may federalize the management of oil and gas operations traditionally regulated by state agencies such as the Kansas Corporation Commission (KCC) and the Kansas Department of Health and Environment (KDHE).

EXAMPLE: Suppose there are a number of unplugged wells located on an active lease which the current operator refuses to plug, or they have been maintained in an unplugged status as “temporarily abandoned” under state law. See, e.g., K.A.R. 82-3-111 (Supp. 1991). The surface owner desires to have the wells plugged but the current lease operator refuses. The surface owner can complain to state agencies for possible state law violations, or the surface owner may decide to seek federal remedies that could include a damage award. Even though the unplugged wells are not currently discharging oil, the surface owner may argue the mere existence of the unplugged well “poses the substantial threat of a discharge of oil.” OPA §1002(a), 33 U.S.C.A. §2702(a) (West Supp. 1991). In Kansas, by statute, it is presumed that any abandoned and unplugged well is “deemed likely to cause pollution of any usable water strata or supply.” K.S.A. §55-179 (Supp. 1990). If the surface owner, the state, the EPA, or other interested parties plug the wells, they may be able to recover their costs from the “responsible party” under the OPA. In addition, they can also seek a broad menu of damages provided for in §1002(b)(2) of the Act. OPA §1002(b)(2), 33 U.S.C.A. §2702(b)(2) (West Supp. 1991). The responsible parties will include any person “owning or operating the [onshore] facility.” OPA §1001(32), 33 U.S.C.A. §2701(32) (West Supp. 1991). “Facility” is defined to refer not to an oil and gas lease area, but rather “any structure, group of structures, equipment, or device . . . used for . . . exploring for, drilling for, producing, storing, handling, transferring, processing, or transporting oil.” Id. at §(9). However, it is arguable that an oil and gas lessee is the “owner” of any oil and gas structures located on the leased area since they would typically have the exclusive right to use the structures.

The first major issue under this example is whether there is a discharge, or threat of a discharge, into “waters of the United States.” It is likely that the courts will take a broad remedial approach to the definition and include groundwater resources. But in any event a nexus with water must be established; it can be actual or “threatened.”
The second issue concerns the prospective nature of the OPA. The OPA only applies to "an incident occurring after the date of the enactment of . . . [the OPA]." Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484, 506 (1990) (OPA §1020). Section 1017(e) states:

Nothing in this title shall apply to any cause of action or right of recovery arising from an incident which occurred prior to August 18, 1990. Such claims shall be adjudicated pursuant to the law applicable on the date of the incident.

OPA §1017(e), 33 U.S.C.A. §2717(e) (West Supp. 1991). “Incident” is defined as “any occurrence or series of occurrences having the same origin . . . resulting in the discharge or substantial threat of discharge of oil.” OPA §1001(14), 33 U.S.C.A. §2701(14) (West Supp. 1991). This limits the OPA to incidents that occur after August 18, 1990. However, this should not limit action when the problem creating the threat of a discharge continues after the August 18, 1990 effective date. This same analysis could be applied to leaking underground storage tanks. Although they have leaked for several years before the August 18 effective date, this should not exempt the responsible party from liability for discharges—incidents—that occur after August 18. Also, with the leaking underground storage tanks there is a present “threat” of continuing discharges that can give rise to OPA cleanup actions.

Even though the required discharge, or substantial threat of a discharge, takes place after August 18, 1990, the statute limits the responsible party’s liability to removal costs and damages “that result from such incident.” OPA §1002(a), 33 U.S.C.A. §2702(a) (West Supp. 1991). This seems to impose a causation requirement for removal costs and damages. Therefore, a party claiming removal costs will have the burden of proof that such costs were in response to the discharge or threat. A party claiming damages will have the burden of proof that they resulted from the discharge or threat. However, this limited causation requirement does not alter the strict liability nature of the statute—it doesn’t matter why the discharge or threat occurred.

The OPA specifically defines the limited situations in which a discharge will not give rise to liability. OPA §1002(c) excludes discharges “permitted by a permit issued under Federal, State or local law” or discharges from a “public vessel” or an offsite facility subject to the Trans-Alaska Pipeline Authorization Act. OPA §1002(c), 33 U.S.C.A. §2702(c) (West Supp. 1991). The OPA also contains the same CERCLA-type defenses to liability when the discharge or threat, and the resulting costs and damages, were caused solely by an act of God, act of war, or an act or omission of an unrelated third party. OPA §1003(a), 33 U.S.C.A. §2703 (West Supp. 1991). Section 1009 authorizes contribution “against any other person who is liable or potentially liable under this chapter or another law.” OPA §1009, 33 U.S.C.A. §2709.


§12.20 Underground Injection Control

§12.21 Safe Drinking Water Act

The Safe Drinking Water Act (SDWA) establishes national drinking water standards by defining "maximum contaminant levels" (MCLs) for water delivered to any user of a public water system. 42 U.S.C. §300f(1) (1988). See §4.46 for additional discussion of the SDWA. A major component of the Act's regulatory focus is on preventing contamination of groundwater resources through the regulation of underground injection. Part C—Protection of Underground Sources of Drinking Water, 42 U.S.C. §§300h to 300h-7 (1988). Section 300h instructs the EPA to establish minimum requirements for state underground injection control programs, including prohibition of underground injection which "endangers drinking water sources." 42 U.S.C. §300h(b)(1) (1988). The states must prohibit underground injection unless a permit has been obtained and the state finds that the authorized injection will not endanger underground drinking water sources. Id. at §300h(b)(1)(A) & (B). The state programs must also include inspection, monitoring, recordkeeping, and reporting requirements. Id. at §300h(b)(1)(C). However, the statute provides that the EPA’s regulations for state programs:

[M]ay not prescribe requirements which interfere with or impede—

(A) the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production or natural gas storage operations, or

(B) any underground injection for the secondary or tertiary recovery of oil or natural gas, unless such requirements are essential to assure that underground sources of drinking water will not be endangered by such injection.

The EPA’s §300h regulations are found at 40 C.F.R. Part 144 (1990).

“Underground injection” is defined by the Act as “the subsurface emplacement of fluids by well injection” and excludes injection of natural gas for storage purposes. 42 U.S.C. §300h (d)(1) (1988). Section 300h also defines when
an underground source of drinking water may be “endangered” by providing:

Underground injection endangers drinking water sources if such injection may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system’s not complying with any national primary drinking water regulation or may otherwise adversely affect the health of persons.

42 U.S.C. §300h(d) (1988). The SDWA contemplates that each state will take the lead in developing and administering underground injection control (UIC) programs. The provisions of Part C are designed to establish the minimum requirements for the development of state programs. The EPA’s regulations also classify injection wells and provide varying degrees of regulation depending upon a well’s classification. 40 C.F.R. §144.6 (1990) provides for the following injection well classifications:

Class I. Hazardous waste and industrial and municipal waste disposal wells which inject fluids “beneath the lowermost formation, within one-fourth mile of the well bore, an underground source of drinking water.” 40 C.F.R. §144.6(a) (1990).

Class II. Oil and gas production waste, enhanced recovery, and hydrocarbon storage injection wells. 40 C.F.R. §144.4(b).

Class III. Solution mining injection wells. 40 C.F.R. §144.4(c).

Class IV. Hazardous waste and radioactive waste injection wells which inject waste “into a formation which within one-quarter (1/4) mile of the well contains an underground source of drinking water” or the waste is injected “above a formation which within one-quarter (1/4) mile of the well contains an underground source of drinking water.” This Class also includes any other hazardous waste injection wells that do not fit in the Class I or Class IV categories. 40 C.F.R. §144.4(d).

Class V. Any injection well that cannot be placed in Classes I through IV. 40 C.F.R. §144.4(e).

Most oil and gas operations will be governed by Class II requirements relating to the injection of produced water or injection to conduct enhanced recovery operations. However, if the waste to be injected is classified as a hazardous waste, it cannot be placed in a Class II well. For example, 40 C.F.R. §144.6(b)(1) provides that “waste waters from gas plants which are an integral part of production operations” can be placed in a Class II well “unless those wastes are classified as a hazardous waste at the time of injection.”

In addition to regulatory guidelines, Part C also encourages a modest degree of landuse planning and control by the designation of areas that have “an aquifer which is the sole or principal drinking water source for the area and which, if contaminated, would create a significant hazard to public health . . . .” 42 U.S.C. §300h-3(e) (1988). The goal is to have the states develop special programs that will protect the groundwater sources in “critical aquifer protection areas.” See generally 42 U.S.C. §300h-6(a) (1988). Another section of the Act requires states to develop programs to protect areas where water wells are located that supply public water systems. 42 U.S.C. §300h-7(a) (1988). The protected area is called a “wellhead protection area” and consists of “the surface and subsurface area surrounding a water well or wellfield, supplying a public water system, through which contaminants are reasonably likely to move toward and reach such water well or wellfield.” 42 U.S.C. §300h-7(e) (1988). Kansas has responded to the SDWA by passing several statutes and regulatory provisions to implement the program.

The state’s role under the Act is discussed in §12.22 and has a significant impact on the Kansas oil industry since the Clean Water Act essentially requires that all produced water from oil and gas operations be disposed of by injection. See §12.7.

§12.22 The Kansas UIC Program

K.S.A. 1990 Supp. 55-901 gives the owner or operator of an oil and gas well “the right to return such waters to any horizon from which such salt waters may have been produced, or to any other horizon which contains or had previously produced salt water or waters containing minerals in any appreciable degree . . . .” However, this “right” is not absolute; it is subject to the owner or operator applying for a permit which can be issued only after the Kansas Corporation Commission (KCC) investigates and determines injection will not cause pollution or endanger usable water resources. K.A.R. 82-3-400 and 82-3-401 (Supp. 1991). The KCC has established detailed regulations which govern underground injection for secondary recovery and disposal. K.A.R. 82-3-400 through 82-3-410 (Supp. 1991). See generally 2 D. Pierce, KBA Kansas Oil and Gas Handbook §13.70 through §13.88 (1989).

Pursuant to K.S.A. 1990 Supp. 55-1003, the KCC can determine that the “most feasible method for the prevention of pollution is by a disposal well . . . .” After hearing, the KCC can order the owner of any well producing oilfield or gasfield brines to provide an appropriate injection well system for their operations. K.S.A. 1990 Supp. 55-904(a)(1) provides that any disposal of salt water produced in conjunction with oil and gas activities must be disposed of in accordance with the KCC’s findings and regulations. Failure to dispose of salt water in accordance with 55-901 and 55-1003 is punishable by a fine from $500 to $5,000. A second or subsequent violation is a class E felony. K.S.A. 1990 Supp. 55-904(d). “Salt water” is defined as “water containing more than 5,000 milligrams per liter chlorides.” K.S.A. 1990 Supp. 55-904(b). However, it is still possible to dispose of salt water by spreading it on road beds under construction or for road maintenance—if done in compliance with regulations adopted by the Kansas Department of Health and Environment. K.S.A. 1990 Supp. 55-904; K.A.R. 28-47-1 to 28-47-7 (1989). See §12.7.

K.S.A. 1990 Supp. 55-1003 authorizes the owner of a well producing oilfield or gasfield brines to exercise the right of eminent domain “for the purpose of acquiring the necessary
rights-of-way and sites for the disposal of such brines and mineralized waters.” Although there are no reported cases interpreting this section, it is likely the courts will limit its scope to obtaining access across land for pipeline connections to an available disposal well. It is doubtful courts would permit it to be used to force access to an existing disposal well or to obtain the right to drill a disposal well without a landowner’s consent.

§12.23 State Regulation

§12.24 Allocation of Regulatory Authority

§12.25 Statutory Allocations

The regulation of surface and subsurface water impacts from oil and gas operations in Kansas is divided, by statute and agency agreement, between the Kansas Corporation Commission (KCC) and the Kansas Department of Health and Environment (KDHE). K.S.A. 1990 Supp. 74-623 gives the KCC “exclusive jurisdiction” to regulate “oil and gas activities” including:

1. All practices involved in the exploration for and gathering of oil and gas and the drilling, production, lease storage, treatment, abandonment, and postabandonment of oil and gas wells, except refining, treating or storing of oil or gas after transportation of the same; and
2. Prevention and cleanup of pollution from oil and gas activities, which jurisdiction shall be exercised in cooperation with the department of health and environment.

K.S.A. 1990 Supp. 74-623(a). The KCC is also given whatever authority the KDHE possessed over matters “relating to the protection of surface water and groundwater from oil and gas activities.” K.S.A. 1990 Supp. 74-623(d). The KDHE, in cooperation with the KCC, is given jurisdiction and authority relating to the cleanup of pollution from oil and gas activities. When the issue concerns the “prevention and cleanup of pollution from oil and gas activities,” the allocation of authority between the KCC and KDHE is governed by a 1988 “Memorandum of Understanding Between the Kansas Department of Health and Environment and the Kansas Corporation Commission” (MOU) which specifies each agency’s authority under various scenarios. K.S.A. 1990 Supp. 74-623(b); see also K.S.A. 1990 Supp. 55-185 and K.S.A. 55-163.

§12.26 Allocation by Agency Agreement

The MOU recognizes that the KDHE will have jurisdiction to regulate the cleanup of pollution resulting from oil and gas activities regulated by the KCC. MOU at 2. K.S.A. 1990 Supp. 65-171d(a)(1) (KDHE given authority to “[c]lean up pollution resulting from oil and gas activities” regulated by the KCC). If the oil and gas activity is not regulated by the KCC, the KDHE can act. MOU at 2. K.S.A. 1990 Supp. 65-171d(a)(2) (KDHE given authority to protect the environment from pollution caused by “oil and gas activities not regulated” by the KCC). The KDHE is also given authority to enter any property to clean up pollution resulting from oil and gas activities. K.S.A. 1990 Supp. 65-171d(g).

Jurisdiction under the MOU is divided according to whether the lease is “active” or “abandoned.” An abandoned lease is one where oil and gas activities “have ceased for a period of 90 days and no application to temporarily abandon has been filed with the KCC.” MOU at 2. An active lease is one where there are “oil and gas wells and auxiliary oilfield equipment and upon which oil and gas activities are currently being conducted.” MOU at 2–3. The KCC is given jurisdiction over the “prevention and cleanup of pollution resulting from oil and gas activities” on active leases; including planning and supervision of the cleanup operation. MOU at 3. The KDHE is responsible for the “cleanup of pollution resulting from oil and gas activities” on abandoned leases but the KCC retains authority over the plugging of abandoned oil and gas wells. The two agencies agree to share authority when there is pollution which travels beyond the boundary of an active lease. MOU at 3–4. The document that coordinates this shared authority is titled “KCC-KDHE Coordination Manual on Cleanup of Oil Field Related Contamination.” Pursuant to the MOU and the Coordination Manual, the description contained in the granting clause of the oil and gas lease defines the areal extent of the lease boundaries. MOU at 3; Coordination Manual at 2. The Coordination Manual expands the areal extent of the “lease boundary” for an active lease by including the area encompassed by a unitization agreement. Coordination Manual at 2. The Manual also expands the definition of an active lease by including “nonproducing operations where . . . KCC has a large number of abandoned wells and has initiated action toward an identified responsible party . . . .” Coordination Manual at 2.

§12.27 Discharges of Oil and Salt Water

§12.28 KCC-Administered Statutes

K.S.A. 1990 Supp. 55-172 makes it unlawful for any person having possession or control of a well “to permit salt water, oil or refuse . . . to escape by overflow, seepage or otherwise from the vicinity of such well . . . .” Violation of K.S.A. 55-172 can give rise to civil penalties in an amount up to $10,000 for each day the violation continues. K.S.A. 1990 Supp. 55-164(a). The Kansas Corporation Commission (KCC), attorney general, or county attorney can seek injunctive relief to ensure compliance with K.S.A. 55-172. K.S.A. 1990 Supp. 55-181. K.A.R. 82-3-603 (Supp. 1990) works in tandem with 55-172 by requiring each “operator” to notify the KCC within 24 hours of discovering a “spill” that is not confined to a “surface pond.” “Spill” is defined to include:

[A]ny escape of salt water, oil, or refuse by overflow, seepage or otherwise from the vicinity of wells, tanks, pipelines, dikes or surface ponds involved in the exploration for and gathering of oil and gas and the drilling, production, lease storage, treatment, abandonment and postabandonment of oil and gas wells.

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K.A.R. 82-3-101(a)(69) (Supp. 1990). If the spill reaches “flowing surface water” notice must be given to the KCC “immediately.” K.A.R. 82-3-603(a) (Supp. 1990). Reports should be made to the KCC district office having jurisdiction over the area. There are four KCC District Field Offices for the Oil & Gas Conservation Division:

District 1 - Dodge City (316) 225-6760
District 2 - Wichita (316) 263-8809
District 3 - Chanute (316) 431-6946
District 4 - Hays (913) 628-1200

Subsection (b) of K.A.R. 82-3-603 requires that the operator clean up the spill within 10 days or a period of time specified by the district office.

COMMENT: Upon reporting to the KCC district office, the personnel will provide instructions concerning response to the spill. These discussions should be carefully documented so the person making the report has a record of the time and date the report was made, the person they reported to, the content of the report, and any directions given by the KCC representative.

§12.29 KDHE-Administered Statutes

Under the water pollution laws of Kansas, it is unlawful to: “place or permit to be placed or discharge or permit to flow into any waters of the state any sewage” unless you obtain a permit. K.S.A. 1990 Supp. 65-164(a); see also K.S.A. 1990 Supp. 65-167 (discharge without a permit punishable by fine of not less than $2,500 and not more than $25,000). “Sewage” is defined to include “chemical or other wastes from domestic, manufacturing or other forms of industry.” K.S.A. 1990 Supp. 65-164(b). “Waters of the state” is defined broadly to include “all streams and springs, and all bodies of surface and subsurface waters within the boundaries of the state. K.S.A. 65-161(a) (1985). Salt water, oil, and other wastes generated by the oil and gas industry, would appear to be covered by K.S.A. 65-164. The permit requirement is policed in part by requiring the “owner or person responsible for the discharge of sewage or other materials detrimental to the quality of waters of the state” to report the discharge to the Kansas Department of Health and Environment. K.A.R. 28-16-27 (1989).

However, in Malone Oil Co. v. Department of Health & Environment, 234 Kan. 1073, 677 P.2d at 551. Perhaps in response to the Malone decision, the KDHE adopted K.A.R. 28-48-1 and 28-48-2 (1989) which imposes a broad reporting obligation in the following situations:

(a) The owner or person responsible for the discharge or escape of materials detrimental to the quality of waters of the state or pollution of the soil . . . shall report the discharge or escape to the [KDHE] . . .

(b) Emergency or accidental discharge of materials which are detrimental to the quality of waters of the state or tend to cause pollution of the soil shall be immediately reported to the [KDHE] . . . by the owner, owner’s representative, or person responsible.

See §12.24. In addition to state reporting obligations, there may be federal reporting obligations. See discussion at §12.13 of this Chapter.

§12.30 Private Rights and Remedies

K.S.A. Supp. 1990 55-172 states: “it shall be the duty of any . . . person [having possession or control of an oil or gas well] to keep such salt water, oil, or refuse safely confined in tanks, pipelines or ponds, so as to prevent the escape thereof.” K.S.A. 55-172 is a reenactment of K.S.A. 55-121 which the Kansas Supreme Court has held imposes strict liability on the oil and gas operator whenever salt water, oil, or refuse escapes and causes damage. McAlister v. Atlantic Richfield Co., 233 Kan. 252, 662 P.2d 1203 (1983). See 1 D. Pierce, KBA Kansas Oil and Gas Handbook §8.05 (1986). Kansas courts have also imposed strict liability on operators for salt water incidents employing common-law concepts. See, e.g., Berry v. Shell Petroleum Co., 140 Kan. 94, 33 P.2d 953 (1934). See also 1 D. Pierce, KBA Kansas Oil and Gas Handbook §8.04 (1986). Negligence, nuisance, and trespass have also been used to deal with the release of oilfield wastes. See generally 1 D. Pierce, KBA Kansas Oil and Gas Handbook §8.02 through §8.04 (KBA 1986). See also Chapter 14, Representing the Plaintiff in Environmental Litigation.

§12.31 Controlling the Development Process

§12.32 Drilling and Plugging Wells

The Kansas Corporation Commission’s Oil and Gas Conservation Division controls the oil and gas development process from the pre-drilling stage to abandonment. Each oil and gas contractor or operator must be licensed annually by the KCC. K.S.A. Supp. 1990 55-155; K.A.R. 82-3-120, 121, 122 (Supp. 1991). The licensing process is not designed to determine the licensee’s ability to operate or their knowledge of Commission regulations; filing an application, paying the $100 fee, and certifying payment of personal property taxes generally entitles the applicant to a license. However, the KCC can use revocation of a license as a remedy for violation of its regulations. K.S.A. 1990 Supp. 55-162(a)(4); see, e.g., K.A.R. 82-3-603(a), (b) (Supp. 1991) (spill notification and cleanup).

Before any well can be drilled, the operator must file with the KCC an application of an “intent to drill.” K.S.A. Supp. 1990 55-151(a). Drilling cannot begin until the KCC has approved the application. The KCC’s approval will specify
how the well should be constructed to protect usable waters; it will also specify plugging procedures. Id. See also K.S.A. Supp. 1990 55-159; 55-173. The KCC’s regulations governing this process are found at K.A.R. §82-3-103 through §82-3-119 (Supp. 1991).

§12.33 Pits and Ponds

K.S.A. Supp. 1990 55-171 prohibits storage of “salt water, oil or refuse” in “surface ponds” unless it is done pursuant to a KCC-issued permit. The KCC can deny or revoke a permit if it finds “such storage is causing or likely to cause pollution.” Id. The KCC has promulgated detailed regulations governing the permitting, construction, use, and closure of surface ponds. K.A.R. 82-3-600 through 82-3-606 (Supp. 1991); K.A.R. 82-3-101(7), (21), (27), (63), (76), (78), (86), (87).

§12.34 Abandoned Wells

Once a well is abandoned, K.S.A. 1990 Supp. 55-177 requires the operator to remove all equipment and structures from the well site and “grade the soil in such manner as to leave the land, as nearly as practicable, in the same condition ... as it was before such structures” were placed on the land. The operator must do this within six months after abandonment of the well; failure to do so is deemed to be a public nuisance. K.S.A. 1990 Supp. 55-177(a). K.S.A. 1990 Supp. 55-179 addresses wells that have been abandoned but have not been properly plugged. The statute contemplates the KCC will attempt to find all “legally responsible” parties and order them to properly plug wells that are “causing or likely to cause” pollution. K.S.A. 1990 Supp. 55-179(a). By statute, a well that has been abandoned, but not properly plugged, is “deemed likely to cause pollution of any usable water strata or supply.” K.S.A. 1990 Supp. 55-179(d). If the KCC cannot find a responsible party, the statute indicates the Commission “shall” plug the well and pay for it from the conservation fee fund. K.S.A. 1990 Supp. 55-179(a)(2).

Responsible party can include the following: operator of an enhanced recovery project which is causing pollution, the current or last operator “of the lease” where the unplugged well is located, and the original operator who plugged or abandoned the well. K.S.A. 1990 Supp. 55-179(b). However, responsible party:

[S]hall not include the landowner or surface owner unless the landowner or surface owner has operated or produced the well, has deliberately altered or tampered with such well thereby causing the pollution or has assumed by written contract such responsibility.

K.S.A. 1990 Supp. 55-179(e). Upon identifying one or more responsible parties the KCC can order them to plug the well. K.S.A. 1990 Supp. 55-162(a)(1); 55-179(c).

§12.35 AIR IMPACTS

Exploration and production facilities have generally escaped regulation as sources of air pollution. Even with the recent amendments to the Clean Air Act, oil and gas operations have, for the most part, escaped regulation. Clean Air Act Amendments of 1990 (CAAA), Pub. L. No. 101-549, 104 Stat. 2399 (1990). CAAA §819 contains a broad exemption for stripper wells. CAAA §819, 104 Stat. at 2698-99. Generally, this provision exempts stripper well operations from compliance with the nonattainment provisions of the Act. However, if the well is located in certain areas designated “Serious,” “Severe,” or “Extreme” for nonattainment, the exemption will not apply. Since Kansas does not fall into any of these categories of nonattainment, stripper wells in Kansas will not be subject to nonattainment regulation. The exemption applies to “the production of and equipment used in the exploration, production, development, storage or processing of” oil from a “stripper well property” and natural gas from a “stripper well.” Although the §819 exemption does not apply to hazardous air pollutants, as discussed below §301 of the CAAA will exempt most oil and gas wells from hazardous air pollutant provisions. CAAA §301, 104 Stat. at 2559–60 (adding 42 U.S.C. §112(n)(4)).

The portion of the CAAA that will impact the largest number of previously unregulated industrial activities is Title III concerning hazardous air pollutants. However, upstream oil and gas operations are again substantially exempt from regulation. CAAA §301 added 42 U.S.C. §112(n)(4) to the Act, which provides:

(A) Notwithstanding ... [the new definition of a major source and area source of hazardous air pollutants], emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources, and in the case of any oil or gas exploration or production well (and its associated equipment), such emissions shall not be aggregated for any purpose under this section.

(B) The Administrator shall not list oil and gas production wells (with its associated equipment) as an area source category ... [of hazardous air pollutants] except that the Administrator may establish an area source category for oil and gas production wells located in any metropolitan statistical area ... with a population in excess of one million ....

This means that air emissions from oil and gas operations will be unregulated in most cases. However, an air pollutant that may receive special attention at the federal level in the near future is hydrogen sulfide. The CAAA authorized EPA to study hydrogen sulfide emissions associated with the extraction of oil and gas; the Act also authorizes the Administrator to develop a control strategy for hydrogen sulfide to protect human health and the environment. CAAA §301, 104 Stat. at 2560 (adding §112(n)(5)).
§12.36 SOLID WASTE IMPACTS

§12.37 Resource Conservation and Recovery Act

Solid wastes produced in conjunction with oil and gas operations are generally exempt from regulation as a "hazardous waste" pursuant to §3001(b)(2)(A) of the Resource Conservation and Recovery Act (RCRA), which provides:

[D]rilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil or natural gas or geothermal energy shall be subject only to existing State or Federal regulatory programs in lieu of this subchapter [until the U.S. Environmental Protection Agency (EPA) completes a study on whether such wastes should be regulated as hazardous wastes].


EPA completed its study and in July 1988 announced its decision to exempt several exploration, development, and production wastes from regulation as a "hazardous" waste. Regulatory Determination for Oil and Gas and Geothermal Exploration, Development and Production Wastes, 53 Fed. Reg. 25,446 (July 6, 1988). The mining industry enjoys a similar exemption created by RCRA §3001(b)(3)(ii), 42 U.S.C. §6921(b)(3)(ii) (1988) (exempting solid waste from the "extraction, beneficiation, and processing of ores and minerals"). See Chapter 2 for a detailed discussion of RCRA.

Generally, exempt oil and gas wastes do not require special handling as a hazardous waste. Nonexempt wastes must be evaluated to determine if they are hazardous and, if so, dealt with as a hazardous waste. The EPA’s list of exempt and nonexempt wastes can be found at 53 Fed. Reg. 25,453 to 25,454. Exempt wastes listed by the EPA include:

1. Produced Water.
2. Drilling Fluids.
3. Drill Cuttings.
4. Rigwash.
5. Drilling fluids and cuttings from offshore operations disposed of onshore.
6. Well completion, treatment, and stimulation fluids.
7. Basic sediment and water and other tank bottoms from storage facilities that hold product and exempt waste.
8. Accumulated materials such as hydrocarbons, solids, sand, and emulsion from production separators, fluid treating vessels, and production impoundments.
9. Pit sludges and contaminated bottoms from storage or disposal of exempt wastes.
10. Workover wastes.
11. Gas plant dehydration wastes, including glycol-based compounds, glycol filters, filter media, backwash, and molecular sieves.
12. Gas plant sweetening wastes for sulfur removal, including amines, amine filters, amine filter media, backwash, precipitated amine sludge, iron sponge, and hydrogen sulfide scrubber liquid and sludge.
13. Cooling tower blowdown.
14. Spent filters, filter media, and backwash (assuming the filter itself is not hazardous and the residue in it is from an exempt waste stream).
15. Packing fluids.
16. Produced sand.
17. Pipe scale, hydrocarbon solids, hydrates, and other deposits removed from piping and equipment prior to transportation.
19. Pigging wastes from gathering lines.
20. Wastes from subsurface gas storage and retrieval, except for the listed nonexempt wastes.
21. Constituents removed from produced water before it is injected or otherwise disposed of.
22. Liquid hydrocarbons removed from the production stream but not from oil refining.
23. Gases removed from the production stream, such as hydrogen sulfide and carbon dioxide, and volatilized hydrocarbons.
24. Materials ejected from a producing well during the process known as blowdown.
25. Waste crude oil from primary field operations and production.
26. Light organics volatilized from exempt wastes in reserve pits or impoundments or production equipment.

EPA’s list of nonexempt wastes includes:

1. Unused fracturing fluids or acids.
2. Gas plant cooling tower cleaning wastes.
3. Painting wastes.
4. Oil and gas service company wastes, such as empty drums, drum rinsate, vacuum truck rinsate, sandblast media, painting wastes, spent solvents, spilled chemicals, and waste acids.
5. Vacuum truck and drum rinsate from trucks and drums transporting or containing nonexempt waste.
6. Refinery wastes.
7. Liquid and solid wastes generated by crude oil and tank bottom reclaimers.
8. Used equipment lubrication oils.
10. Used hydraulic fluids.
12. Waste in transportation pipeline-related pits.
13. Caustic or acid cleaners.
15. Boiler refractory bricks.
16. Boiler scrubber fluids, sludges, and ash.
17. Incinerator ash.
18. Laboratory wastes.
20. Pesticide wastes.
22. Drums, insulation, and miscellaneous solids.

It is likely the EPA will promulgate special handling requirements for exempt wastes under Subtitle D of RCRA which governs nonhazardous wastes. Kansas defines "hazardous waste" to expressly exclude the following:

(3) mining waste and overburden from the extraction, beneficiation and processing of ores and minerals, if returned to the mine site; (4) drilling fluids, produced waters and other wastes associated with the exploration, development and production of crude oil, natural gas or geothermal energy . . .

K.S.A. 65-3430(f) (1985). K.A.R. 82-3-606 (Supp. 1991) prohibits the release of any nonexempt oil and gas waste into surface ponds unless "the waste has become an integral part of the drilling return fluid or production waste stream." Although the waste may be exempt from hazardous waste regulation under RCRA, it can still be a hazardous substance under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). See §12.38.

§12.38 Comprehensive Environmental Response, Compensation and Liability Act

As discussed in Chapter 1, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§9601 to 9765 (1988), is designed to promote the cleanup of facilities where there has been a release, or threatened release, of a "hazardous substance." Instead of attempting to regulate the release or threatened release, CERCLA imposes liability on a broad group of past and present "owners and operators" plus anyone who arranged for disposal of wastes at the facility. CERCLA §107(a), 42 U.S.C. §9607(a) (1988). See generally Pierce, The Emerging Role of "Liability-Forcing" in Environmental Protection, 30 Washburn. L. J. 381 (1991). As the United States Supreme Court observed in Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989): "The remedy that Congress felt it needed in CERCLA is sweeping: everyone who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup." Id. at 19.

However, a few select substances are expressly excluded from the scope of CERCLA. CERCLA excludes from its broad definitions of "hazardous substance" and "pollutant or contaminant" the following substances: "[P]etroleum, including crude oil or any fraction thereof . . . and . . . natural gas, natural gas liquids, liquefied natural gas, or synthetic gas . . . . " CERCLA §101(14), (33), 42 U.S.C. §§9601 (14), (33) (1988). Commonly known as the "petroleum exclusion," it has been interpreted broadly to include "unrefined and refined gasoline even though certain of its indigenous components and certain additives during the refining process have themselves been designated as hazardous substances within the meaning of CERCLA." Wilshire Westwood Associates v. Atlantic Richfield Corp., 881 F.2d 801, 805 (9th Cir. 1989).

The existence of CERCLA's petroleum exclusion for production, and RCRA's exemption for associated exploration and production wastes, seem to suggest that the oil and gas industry need not be concerned with the hazardous waste laws. However, CERCLA has already had significant impact on the exploration and production segment of the industry and current legislative proposals to modify or eliminate the associated waste exemption under RCRA could eliminate a substantial segment of the industry.

COMMENT: CERCLA's impact on the oil and gas industry, like other industries, will be major. For example, during the past century, oil and gas exploration and production wastes have been disposed of at well sites, taken to landfills or other centralized disposal facilities, and spread on the ground and roads. Although such activities may have been, or still are, perfectly "legal," the scope and effect of CERCLA make them a lingering monetary risk of bankruptcy proportions. In the event there is a release or threat of a release of hazardous substances from an area, everyone potentially contributing to the hazardous substances can be named in a CERCLA action. Even though the concentration of hazardous substances contributed by your waste, and the volume, are quite low, you will still be subject to CERCLA liability. See generally Amoco Oil Co. v. Borden, Inc., 889 F.2d 664 (5th Cir. 1989) (CERCLA does not impose any quantitative requirement on the term hazardous substance.)

Wastes associated with oil and gas exploration and production contain many of the substances encompassed by CERCLA's broad definition of "hazardous substance." Many substances commonly found at active, inactive, and abandoned well sites will be hazardous substances. Therefore, the person who disposed of the wastes, or arranged for their disposal, will be liable under CERCLA. CERCLA §107(a)(3), 42 U.S.C. §9607(a)(3) (1988). This will include the operator of the well and other working interest owners who directed how the waste should be disposed; it could also bring in the drilling contractor and other contractors who participated in drilling and completing the well. All "owners" of the property at the time the waste was disposed will also be liable under CERCLA. This would include the landowner, the lessor, all lessees, and arguably anybody who had an ownership interest in the well, whether a working or non-working interest, at the time the disposal took place. CERCLA §107(a)(2), 42 U.S.C. §9607(a)(2) (1988). Also included will be the current owners and operators of the
affected area. This could include the present leasehold interest owners, landowners, and mineral interest owners. It could also include a contract operator who has no interest in the underlying property other than its service contract. CERCLA §107(a)(1), 42 U.S.C. §9607(a)(1) (1988).

In most of these CERCLA cases, it is unlikely courts will feel constrained to follow the carefully defined ownership and control distinctions that are generally recognized in the industry. Instead, the inquiry will be whether the interest holder benefited, or had the potential to benefit, from the oil and gas operations. If they did, they may be held to be an “owner” even though they only had a royalty interest, an override, or some other passive right to income from the leased land. Participating in a fieldwide unit may magnify your potential liability a thousandfold, since you in effect become the owner of a proportionate interest in every lease encompassed by the unit.

In an effort to avoid CERCLA liability for exploration and production wastes, litigants have attempted to rely upon the RCRA exemption as a shield against CERCLA liability. It is doubtful this will work. To date, the RCRA exemption defense, in other contexts, has failed in the courts. For example, in *B.F. Goodrich Co. v. Marinta*, 754 F. Supp. 960 (D. Conn. 1991), several cities argued that they could not be held liable under CERCLA for municipal wastes they deposited at area landfills. Pursuant to authority granted it by RCRA, the EPA has determined that “household wastes” are not hazardous and do not need to be administered as a hazardous waste under RCRA. 40 C.F.R. §261.4(b) (1990). Although the waste collected by the cities were “household wastes,” studies indicated that such wastes generally contain from 3% to 4% hazardous substances by weight. The court held that even though the cities’ wastes may qualify for the “household waste” exemption under RCRA, they can still be considered hazardous substances under CERCLA. In reaching this conclusion, the court notes that a similar rule has been applied to the “mining waste” exemption under RCRA, citing *Eagle-Picher Indus. v. EPA*, 759 F.2d 922 (D.C. Cir. 1985) (mining wastes and fly ash exempt from RCRA hazardous waste regulation are nevertheless hazardous substances under CERCLA). *B.F. Goodrich*, 754 F. Supp. at 965.

The court’s holding in *B.F. Goodrich* suggests that if presented with a similar set of facts concerning the oil and gas waste exemption under RCRA, it would not serve as a defense to cleanup liability under CERCLA. See *United States v. Hardage*, Case No. CIV-86-1401-W, Slip. Op. (W.D. Okla. April 15, 1991). Therefore, an oil and gas lessee, including operator and non-operator, overriding royalty owner, mineral interest owner, landowner, and royalty owner, could each be jointly and severally liable under CERCLA for the cleanup of oil and gas wastes which contribute to a release or threatened release of “hazardous substances.”

### §12.39 COMMUNITY RIGHT-TO-KNOW OBLIGATIONS

The Emergency Planning and Community Right-To-Know Act (EPCRA), 42 U.S.C. §§11001 to 11050 (1988), and its state counterpart, the Kansas Emergency Planning and Community Right-To-Know Act (KEPCRA), K.S.A. 1990 Supp. 65-5701 to 65-5710, as amended by 1991 Kan. Sess. Laws, ch. 202., impose certain reporting obligations on the oil and gas industry. The details of each Act are discussed at Chapter 8. This section addresses how the Acts can impact the exploration and production segment of the oil and gas industry.

Each of the Acts impose five basic requirements:

3. Listing of Hazardous Chemicals Maintained at a Facility. EPCRA §311.
5. Annual Reporting of Toxic Chemical Releases. EPCRA §313.


### §12.40 Emergency Planning Notification


**EXAMPLE:** Suppose you maintain a supply of acrolein, a listed “extremely hazardous substance,” at a lease site for use as a biocide. If, at any time, you have more than 500 pounds of acrolein at the site (the threshold planning quantity for acrolein), you must provide notice to the appropriate emergency response planning commissions. If you do not presently have an extremely hazardous substance, or the threshold quantity necessary to trigger reporting, but you subsequently bring such substances in the requisite quantities to a lease site, you have 60 days to comply with the reporting requirements. See 40 C.F.R. §355.30 (1990).
§12.41 Release Notification

The owner or operator of a facility from which there is a release of an extremely hazardous substance, or a CERCLA hazardous substance, must report the release to the appropriate state and local emergency planning commissions when: (a) The facility produces, uses, or stores a hazardous chemical; (b) the release exceeds the applicable reportable quantity; and (c) the release results in exposure to persons beyond the site or sites on which a facility is located. EPCRA §304, 42 U.S.C. §11004 (1988). Oil and gas operations will often be subject to this requirement since petroleum is a “hazardous chemical” as defined by the Act. See 40 C.F.R. §355.20 (1990) (defining “hazardous chemical”) and 29 C.F.R. §1910.1200(C) (1990) (establishing criteria for defining a “hazardous chemical”). See §12.42.

NOTE: Although the production of petroleum makes the facility subject to §304 emergency release reporting, a release of petroleum does not require reporting under §304 because it is neither an “extremely hazardous substance” nor a CERCLA “hazardous substance.”

CAVEAT: If the petroleum contains an extremely hazardous substance, it may require reporting under §304 when, after adjusting for the mixture, you exceed the established reportable quantity. For example, assume you produce oil which contains a minute amount of benzene. The percentage contribution of the benzene to the total weight of the oil spilled must be calculated to determine whether you exceed the one pound reportable quantity for benzene. With large volume oil spills, seemingly insignificant concentrations of extremely hazardous chemicals will require reporting, particularly those, like benzene, which have very low reportable quantities. Under CERCLA’s release reporting provisions, no report would be due because produced oil is encompassed by the CERCLA “petroleum exclusion.” See §12.38. However, the CERCLA petroleum exclusion does not limit the scope of EPCRA’s §304 reporting obligation. Similarly, the oil spill may escape reporting under §311 of the Clean Water Act because it is not into “waters of the United States.” See §12.9. However, for reporting under EPCRA §304, the release merely needs to travel beyond the boundaries of the facility, it need not enter “waters of the United States.”

EXAMPLE: At your oil production facility you store acrolein. During operations, a spill of acrolein occurs which has the potential for exposure to persons beyond the facility boundary. Since acrolein is listed as an extremely hazardous substance (it is also a listed CERCLA hazardous substance), it will be subject to the §304 reporting requirements if the release exceeds the “reportable quantity” for acrolein, which is one pound. If a spill of produced crude oil occurs at the same facility, it will not trigger reporting obligations under §304, subject to the Caveat noted above.

PRACTICE POINTER: When in doubt, report. If you fail to report, and guess wrong, you are subject to civil penalties of up to $25,000 for each day you fail to comply; for a “knowing” and “willful” failure to report you are subject to criminal fines up to $25,000 and two years in prison. EPCRA §325, 42 U.S.C. §11045 (1988) and K.S.A. 1990 Supp. 65-5708. There is no penalty for guessing wrong, other than some administrative scrutiny you might have otherwise been able to avoid.

Regardless of the nature of the substance spilled, or the amount spilled, if the release results in exposure to persons “solely within the boundaries of the facility” no report is required. 40 C.F.R. §355.40(a)(2)(i) (1990). Defining the boundary of the “facility” may be tricky for an oil and gas operation. The right-to-know program officials in Kansas recommend reporting oil and gas operations by “tank battery complex” or “free standing facility.” KDHE Compliance Reporting Guide for the Oil and Gas Exploration and Production Industry, 2 (KDHE Right-to-Know Program 1991) [hereinafter Reporting Guide]. “Tank battery complex” includes “the well or wells pumping into a tank battery and the tank battery itself.” Reporting Guide at 4. “Free standing facility” is defined as: “[A] well for which the drilling, completion, production, or workover operation meets a reporting threshold and the well has not been previously reported in a tank battery complex.” It can also include “a pump station, pipeline terminus, maintenance facilities, and underground containment . . . .” Id. In some situations workover operations may trigger a reporting threshold for chemicals used in the operations. If a tank battery complex report already exists for the well being reworked, the change can be reported as an update to the existing facility report. If the well has not been previously reported in conjunction with a tank battery, it should be reported as a free standing facility. Id.

The EPA’s facility definition is potentially broader than the KDHE’s and would focus on each “lease” as a facility. Id. at 2–3. Either method of reporting is acceptable. However, as a practical matter the owner/operator should select the definition that provides the information required, and the management flexibility needed, to effectively control the use and production of hazardous substances in the relevant area. The Reporting Guide indicates “[o]nce a company makes a decision regarding the facility definition they will apply, all Title III submissions (Sections 302, 304, 311, 312, and if applicable 313) should be submitted using this same facility criteria.” Reporting Guide at 5.

PRACTICE POINTER: For $10 you can purchase a copy of the Guide to Community Right-to-Know Compliance under Title III published by the Kansas Department of Health and Environment, Right-to-Know Program, Bureau of Environmental Health Services, 109 S.W. 9th, Suite 501, Topeka, Kansas 66612. Also ask for a copy of the Compliance Reporting Guide for the Oil and Gas Exploration and Production Industry, which will be provided as an industry-specific insert to the Guide. The KDHE has done an excellent job of assembling, in one book, the various documents needed to comply with the federal and state community right-to-know requirements.


\section*{Hazardous Chemical List Reporting}

The owner or operator of a facility who is required to comply with the hazard communication standards imposed by the Occupational Safety and Health Act of 1970 (OSHA) must prepare a list of "hazardous chemicals" present at the facility in excess of designated "threshold quantities." The list must be kept current and provided to the state and local emergency planning commissions and the local fire department. EPCRA §311, 42 U.S.C. §11021 (1988). If you are not subject to the OSHA hazard communication requirements, you are not subject to the reporting obligations of §311 or §312. The OSHA hazard communication requirements apply to "chemical manufacturers or importers." 29 C.F.R. §1910.1200(b)(1) (1990). "Chemical manufacturer" is defined as "an employer with a workplace where chemical(s) are produced for use or distribution." 29 C.F.R. §1910.1200(c) (1990).

Producers of oil or natural gas are subject to the OSHA hazardous communication requirements because oil and natural gas are defined as "hazardous chemicals" under OSHA regulations. Unfortunately, there is no "list" you can turn to under the OSHA regulations to determine if you are dealing with a hazardous chemical. Instead, OSHA generically defines hazardous chemical as "any chemical which is a physical hazard or a health hazard." 29 C.F.R. §1910.1200(c) (1990). "Physical hazard" includes "a chemical for which there is scientifically valid evidence that it is a combustible liquid, a compressed gas, explosive, flammable, ... ." Id. The definitions of "combustible liquid" and "flammable" encompass oil and gas. These substances can also be encompassed by the broad OSHA definition of "health hazard." Id.

In addition to being subject to the OSHA hazardous communication requirements, the facility must also meet or exceed designated threshold quantities before reporting is required. EPCRA §311(b), 42 U.S.C. §11021(b) (1988). The EPA has set the threshold quantity for "hazardous chemicals" at 10,000 pounds. The threshold for "extremely hazardous chemicals" is 500 pounds or the threshold planning quantity for the chemical, whichever is lower. See §8.06.

If you are subject to reporting under §311, the EPA and the KDHE have agreed to permit oil and gas operators to report, under §311 and §312, using a generic hazardous chemical category list and inventory developed by the American Petroleum Institute.

\textbf{Practice Pointer:} The American Petroleum Institute has prepared a publication that discusses the generic list and inventory and provides sample documents that can be used in complying with the requirements of §311 and §312. \textit{Bulletin on the Generic Hazardous Chemical Category List and Inventory for the Oil and Gas Exploration and Production Industry} (2d ed. Dec. 1990). Copies can be purchased from the API for $8 by writing to the American Petroleum Institute, Publications and Distribution Section, 1220 L Street, NW, Washington, DC 20005, or by calling the API at (202) 682-8375, and asking for Publication Order No. 811-11000.

\section*{Annual Hazardous Chemical Reporting}

The owner or operator of a facility required to prepare a §311 list of hazardous chemicals must submit, on or before March 1 of each year, a "hazardous chemical inventory form" to the state and local emergency planning commissions and the local fire department. EPCRA §312, 42 U.S.C. §11022 (1988). Therefore, if you are not subject to §311 reporting, either because you are not subject to the OSHA hazardous communication requirements or you do not meet the EPCRA threshold quantity requirements, you are not subject to §312 reporting obligations. See discussion at §12.41; see also §8.08.

\section*{Toxic Chemical Release Reporting}

The owner or operator of a facility must report certain "toxic chemicals" that were "manufactured, processed, or otherwise used" in specified threshold quantities, during the calendar year. EPCRA §313(a), 42 U.S.C. §11023(a) (1988). This reporting obligation only applies to facilities that: (a) have 10 or more full-time employees; (b) are covered by Standard Industrial Classification Codes 20 through 39; and (c) during a calendar year "used" 10,000 pounds or more of a toxic chemical at the facility or "manufactured or processed" 25,000 pounds or more of a toxic chemical. EPCRA §313(b), (f), 42 U.S.C. §11023(b), (f) (1988). A list of the §313 toxic chemicals can be found at 40 C.F.R. §372.65 (1990).

The exploration and production segment of the oil and gas industry falls under Standard Industrial Classification (SIC) Code "13 Oil and Gas Extraction" so the toxic release reporting requirements of §313 do not apply to upstream oil and gas operations. Downstream operations, such as "Petroleum Refining," fall under SIC Code 29 and can therefore be subject to the §313 reporting requirements. Also, the EPA has authority to expand the §313 reporting obligations by including additional SIC Codes. EPCRA §313(b)(1)(B), 42 U.S.C. §11023(b)(1)(B) (1988). For a detailed discussion of EPCRA and the Kansas EPCRA, see Chapter 8.

\section*{Wildlife Impacts: Migratory Bird Treaty Act}

The Migratory Bird Treaty Act (MBTA), 16 U.S.C.A. §§701 to 711 (West Supp. 1991), provides: "[I]t shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, ... any migratory bird ... ." MBTA, 16 U.S.C. §703 (1988). "Migratory bird" is defined by the U.S. Fish and Wildlife Service as including any bird specie listed at 50 C.F.R. §10.13 (1990). 50 C.F.R. §10.12 (defining "migratory bird"). Open pits and tanks at well sites can ultimately give rise to violations of the MBTA since migratory birds may land in the pits, become covered with oil or other refuse, and die. In such cases the oil and gas operator will be deemed to have taken, captured, or killed the migratory bird. See generally U.S. v. FMC Corp., 572 F.2d 902 (1st Cir. 1978) (chemical manufacturer failed to prevent pesticide from flowing into pond where migratory birds landed and became poisoned).
Violations of the MBTA are misdemeanors which carry fines up to $500 and six months imprisonment. 16 U.S.C. §707(a) (1988). However, under 18 U.S.C. §3559(a)(7) (West Supp. 1991) such a violation is classified as a Class B misdemeanor to which the federal Alternative Fines Act would apply. Under the Alternative Fines Act an "individual" violating the MBTA could be fined up to $5,000 and an "organization" up to $10,000. 18 U.S.C. §3571(b)(6) (individual) and §3571(c)(6) (organization) (West supp. 1991). Many states, including Kansas, have enacted state laws which parallel the MBTA. For example, K.S.A. 1990 Supp. 32-1008 adopts, as state law, the definition of "migratory birds" under the MBTA and provides: "It is unlawful to take . . . any migratory bird . . . in Kansas except as authorized and permitted by federal regulations . . . adopted pursuant to authority provided by the Migratory Bird Treaty Act." K.S.A. 1990 Supp. 32-1008(b). Violation of the state law is a class C misdemeanor. K.S.A. 1990 Supp. 32-1031. In Kansas the maximum fine for a class C misdemeanor is $500. K.S.A. 1990 Supp. 21-4503(c).

There are essentially two ways liability under the MBTA can be avoided: eliminate open pits and tanks or place netting over them to reduce the possibility that migratory birds will enter the pit or open tank. The MBTA applies to mining operations to the same extent as it applies to oil and gas operations. Any sort of pit, pond, or other place which may attract and capture a migratory bird can give rise to liability under the Act.

§12.46 LAND USE IMPACTS

§12.47 Surface Use and Reclamation: Oil and Gas

Although zoning and similar land use regulations may impact where oil and gas development takes place, the most common land use problems will concern private parties: the lessor and lessee. The land use issue typically concerns what the lessee can, or must, do with the surface of the land covered by the oil and gas lease. Defining the relative rights of the lessor and lessee requires an analysis of conveyances and contracts. See generally 1 D. Pierce, KBA Kansas Oil and Gas Handbook §12.06 (1986); see also Pierce, Toward a Functional Mineral Jurisprudence for Kansas, 27 Washburn L. J. 223, 238 (1988). The only statutory provision addressing these matters is K.S.A. 1990 Supp. 55-177 which is discussed at §12.34.

§12.48 Surface Use and Reclamation: Coal

CHAPTER 12 - SUPPLEMENT
ENVIRONMENTAL CONSIDERATIONS
IN THE OIL AND GAS INDUSTRY

By David E. Pierce

§12.14 Spill Prevention Requirements

[Replace material in text with the following:]

As part of the government's national response system, §311 of the Clean Water Act ("CWA") requires the EPA to adopt regulations to prevent discharges of oil and hazardous substances. Prior to amendment by the Oil Pollution Act (OPA), §311 required the President to promulgate regulations:

"(C) establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from vessels and from onshore facilities and offshore facilities, and to contain such discharges..."

CWA §311(j)(1)(C), 33 U.S.C.A. §1321(j)(1)(C) (West Supp. 1995). This served as the statutory basis for the EPA's Spill Prevention Control and Countermeasure (SPCC) Plan regulations adopted in 1973. Following amendment of §311 by the OPA, additional planning and prevention requirements were created for facilities and activities that pose a significant threat to the environment.

The OPA added subsection (5) to §311, which states:

"(A) The President shall issue regulations which require an owner or operator of a tank vessel or facility described in subparagraph (B) to prepare and submit to the President a plan for responding, to the maximum extent practicable, to a worst case discharge, and to a substantial threat of a discharge, of oil or a hazardous substance. (B) The tank vessels and facilities referred to in subparagraph (A) are the following:

(i) A tank vessel...

(ii) An offshore facility.

(iii) An onshore facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging into or on the navigable waters, adjoining shorelines, or the exclusive economic zone."

CWA §311(j)(5), 33 U.S.C.A. §1321(j)(5) (West Supp. 1994). The plan required by §311(j)(5) is now commonly referred to as a "response plan" which must be distinguished from the §311(j)(1) (C) "SPCC plan." A response plan is required for "any non-transportation facility that, because of its location, could reasonably be expected to cause substantial harm to the environment by discharging oil..." 40 C.F.R. §112.20 (1994). Generally, the "substantial harm" facilities requiring a response plan are those that have a total oil storage capacity of 1 million gallons or more, or have a capacity of 42,000 gallons or more and transfer oil over water to or from vessels. 40 C.F.R. §112.20(f)(1) (1994).

The existing regulations governing SPCC plans are in the process of being revised to reflect significant changes required by the OPA amendments to §311. Oil Pollution Prevention; Non-Transportation-Related Onshore and Offshore Facilities, 56 Fed. Reg. 54612 (Oct. 22, 1991) (proposed rule). The existing regulations are found at 40 C.F.R. §§112.1 to 112.7 (1994). For onshore operations, a SPCC plan is required only if the following criteria are met:

1. It is a "non-transportation-related" facility;
2. Engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, or consuming of oil or oil products; and
3. It is in an area geographically located so that it can "reasonably be expected to discharge oil," applying the "sheen test," into waters of the United States. 40 C.F.R. §112.1(b) (1994).

Excluded from the SPCC plan regulations is any above ground storage tank with an oil storage capacity of 660 gallons or less. However, if the above ground storage tank facility has a total oil storage capacity in excess of 1,320 gallons, it will be subject to the SPCC plan requirements regardless of the capacity of individual tanks comprising the facility. The SPCC plan requirements also apply to any underground storage tank which has a capacity in excess of 42,000 gallons. 40 C.F.R. §112.1(d)(2) (1994).

The EPA, by regulation, states the items that must be addressed in the SPCC plan. The general tenor of the plan requirements is revealed by 40 C.F.R. §112.7, which provides, in part: "The SPCC Plan shall be a carefully thought-out plan, prepared in accordance with good engineering practices, and which has the full approval of management at a level with authority to commit the necessary resources." 40 C.F.R. §112.7 (1994). This section is followed by detailed practices which should be employed for various operations, such as "Oil production facilities (onshore)." 40 C.F.R. at §112.7(c)(5) (addressing details for handling onshore tank batteries). The requirements for preparing the SPCC plan are found at 40 C.F.R. §112.3 (1994). One of the major requirements is found at §112.3(d), which provides, in part: "No SPCC Plan shall be effective to satisfy the requirements of this part unless it has been reviewed by a Registered Professional Engineer and certified to by such Professional Engineer. By means of this certification the engineer, having examined the facility and being familiar with the provisions of this part, shall attest that the SPCC Plan has been prepared in accordance with good engineering practices."

A copy of the plan must be kept at the facility if it is normally attended at least eight hours per day; if it is not, the plan should be kept at the nearest field office. 40 C.F.R. §112.3(e) (1994).

The existing regulations will be modified, to impose additional SPCC-related obligations, as the EPA works through its regulatory agenda. For a discussion of the regulatory future of SPCC
Environmental Considerations in the Oil and Gas Industry


§12.23 State Regulation

§12.24 Allocation of Regulatory Authority

§12.25 Statutory Allocations

In 1995, the Kansas legislature adopted major changes in the division of authority over the regulation and clean up of pollution associated with oil and gas activities. After July 1, 1995, regulation of the exploration and production of oil and gas, and the prevention and clean up of pollution associated with oil and gas activities, has been consolidated in the Kansas Corporation Commission (KCC). The relevant statute provides:

“(a) The state corporation commission shall have the exclusive jurisdiction and authority to regulate oil and gas activities. The state corporation commission’s jurisdiction shall include: (1) All practices involved in the exploration for and gathering of oil and gas and the drilling, production, lease storage, treatment, abandonment and postabandonment of oil and gas wells, except refining, treating or storing of oil or gas after transportation of the same; and (2) prevention and clean up of pollution of the soils and waters of the state from oil and gas activities described in (1).”


In addition to transferring exclusive jurisdiction to the KCC, the law also transfers to the KCC relevant Kansas Department of Health and Environment (KDHE) statutory authority. The statute provides, in part:

“(b) All jurisdiction and authority of the Kansas department of health and environment relating to the clean up of pollution of the soils and waters of the state from oil and gas activities described in subsection (a)(1) is hereby transferred to the state corporation commission.

“(c) The state corporation commission shall be the successor in every way to the powers, duties and functions of the Kansas department of health and environment relating to the clean up of pollution of soils and waters of the state from oil and gas activities described in subsection (a)(1). . . .

“(d) Whenever the Kansas department of health and environment, or words of like effect, is referred to or designated by a statute, contract or other document relating to the clean up of pollution of the soils and waters of the state from oil and gas activities described in subsection (a)(1), such reference shall be deemed to apply to the state corporation commission.

“(e) All rules and regulations of the secretary or health and environment which are in existence on July 1, 1995, and relate to the clean up of pollution of the soils and waters of the state from oil and gas activities described in subsection (a)(1) shall continue to be effective and shall be deemed to be the duly adopted rules and regulations of the state corporation commission until revised, amended, revoked or nullified pursuant to law.”


§12.26 Allocation by Agency Agreement

[Replace material in text with the following:]

The Memorandum of Understanding between the KDHE and KCC has been eliminated by the new statutory allocation of authority contained in 1995 Kan. Sess. Laws ch. 204, §14. See discussion at Supp. §12.25.

§12.27 Discharges of Oil and Salt Water

§12.28 KCC-Administered Statutes

[D]ue to the prior division of regulatory authority between the KCC and the KDHE, the discussion of “Discharges of Oil and Salt Water” was divided into two sections: §12.28 dealing with KCC-Administered Statutes and §12.29 dealing with KDHE-Administered Statutes. Following the enactment of 1995 Kan. Sess. Laws ch. 204, §14, the KCC obtained exclusive regulatory authority in this area and also obtained the power to enforce statutes and regulations previously administered by the KDHE. See discussion at Supp. §12.25. This section addresses the reporting obligations for discharges of oil, salt water, and other oilfield-related wastes, imposed by the KCC’s traditional regulatory authority.

Many accidental pollutant discharges will either occur in an “emergency pit” or a “dike”. “Emergency pit” is defined to mean:

 “[A] surface pond used to temporarily contain fluids resulting from oil and gas activities which were discharged as a result of unforeseen and unavoidable circumstances.”

14 Kan. Reg. 130 (Feb. 2, 1995), §82-3-101(31). “Dike” is defined to mean:

 “[A] permanent structure constructed at or above the surface of the earth totally enclosing production facilities or lease equipment which is used to temporarily contain fluids resulting from oil and gas activities which are discharged as a result of unforeseen circumstances.”


The KCC’s emergency pit and dike regulations require reporting of any oilfield-related discharge into an emergency pit or dike. As amended, K.A.R. 82-3-604 provides, in part:

“Each operator shall notify the appropriate district office within 24 hours of discovery of any oilfield-related discharge into an emergency pit.”


“Each operator shall notify the appropriate district office within 24 hours of discovery of any oilfield-related discharge into a diked area.”


For spills that do not take place within an emergency pit or diked area, the KCC employs an objective reporting obligation: any “spill which is not confined to a surface pond” must be reported. K.A.R. 82-3-603(a) (1995) (emphasis added). “Spill” is defined by K.A.R. 82-3-101(69) as:
"[A]ny escape of salt water, oil or refuse by overflow, seepage or otherwise from the vicinity of wells, tanks, pipelines, dikes or surface ponds involved in the exploration for and gathering of oil and gas and the drilling, production, lease storage, treatment, abandonment and postabandonment of oil and gas wells."

14 Kan. Reg. 132 (Feb. 2, 1995), §82-3-101(75). "Surface pond" is defined to mean "any constructed, excavated or naturally occurring depression upon the surface of the earth." 14 Kan. Reg. 132 (Feb. 2, 1995), §82-3-101(82).

Section 82-3-603(a) provides:

"Each operator shall notify the appropriate [KCC] district office within 24 hours of discovery of a spill which is not confined in a surface pond. If the spill has reached flowing surface water, each operator shall notify the appropriate district office immediately upon discovery of the spill."

K.A.R. 82-3-603(a) (1995). Although the regulations do not define the term "operator", K.S.A. 55-150 defines the term as "a person who is responsible for the physical operation and control of a well." K.S.A. 55-150(d) (1994).

The KCC reporting requirement does not depend upon anybody's subjective determination of harm associated with the spill nor does it depend upon any minimum volume of released material. The nexus of the spill to surface water only impacts the timing of the required report—"immediately" instead of "within 24 hours". The only qualitative determination is whether the release of "salt water, oil, or refuse" has left the "vicinity" of the operation generating the released material. 14 Kan. Reg. 132 (Feb. 2, 1995), §82-3-101(75) ("spill" means an escape "from the vicinity of wells, tanks, pipelines, dikes or surface ponds"). Regardless of the "vicinity" requirement, if the released substances reach "flowing surface water" it must be reported. For spills that do not reach surface water, they are reportable under §82-3-603 if they are not "confined in a surface pond" and the material has passed beyond the "vicinity" of the operation.

The "vicinity" language used in the KCC's regulation comes from K.S.A. 55-172, which states:

"It shall be unlawful for any person having possession or control of any well drilled or being drilled for oil or gas, either as contractor, owner, lessee, agent or manager, or in any other capacity, to permit salt water, oil or refuse from any such well to escape by overflow, seepage or otherwise from the vicinity of such well, and it shall be the duty of any such person to keep such salt water, oil or refuse safely confined in tanks, pipelines or ponds, so as to prevent the escape thereof."

K.S.A. 55-172 (1994) (emphasis added). The final clause of §55-172 may suggest a rather narrow reading of the "vicinity" requirement by imposing a "duty" on the operator to keep salt water, oil, and refuse "safely confined in tanks, pipelines or ponds". Prior to recent amendments to the KCC's regulations, the safe rule-of-thumb would be to report any release that was not confined to a KCC-approved surface pond or dike. K.S.A. 55-171 (1994) ("The storage or disposal of salt water, oil or refuse in surface ponds resulting from oil and gas activities shall be prohibited unless a permit...[is]...obtained from the commission."); K.A.R. 82-3-600(a) (1995) ("Surface ponds shall not be used to contain fluids resulting from oil and gas activities until approved by the commission."). However, the net effect of §§82-3-603(a), and 82-3-604 and 605 as amended, is that any release of salt water, oil, or other oilfield-related discharge, must be reported to the appropriate KCC district office within 24 hours of its discovery. If the spill reaches flowing surface water it must be reported immediately.

§12.29 KDHE-Administered Statutes

[Replace material in text with the following:]

Since the KCC now has exclusive jurisdiction over "prevention and clean up of pollution of the soils and waters of the state from oil and gas activities," the KCC will also have the power to rely upon the general environmental statutes to regulate the industry. 1995 Kan. Sess. Laws ch. 204, §14. See discussion at Supp. 12.25. This section considers the Kansas environmental statutes and regulations, previously administered by the KDHE, which the KCC may decide to employ in exercising its new authority to address the discharge, reporting, and clean up of oilfield wastes.

Under Kansas law, the KDHE reporting obligations are more qualitative than quantitative. The KDHE general reporting regulation is found at K.A.R. 28-48-2, which provides, in part:

"All sewage, substances, materials, or wastes, as set forth in 65-171d, regardless of phase or physical state, which are, or threaten to contaminate or alter any of the properties of the waters of the state or pollute the soil in a detrimental, harmful, or injurious manner or create a nuisance, shall be reported...." K.A.R. 28-48-2 (1995) (emphasis added). The problem is determining when the presence of a substance does one of the following:

1. Contaminates, alters, or threatens to contaminate or alter, any of the properties of the waters of the state.
2. Pollutes the soil in a "detrimental, harmful, or injurious manner".
3. Creates a nuisance.

"Waters of the state" is defined to mean "all streams and springs, and all bodies of surface or groundwater, whether natural or artifical, within the boundaries of the State." K.A.R. 28-48-1(c) (1995) (emphasis added). See also K.S.A. 65-161(a) (1992) ("Waters of the state' means all streams and springs, and all bodies of surface and subsurface waters within the boundaries of the state") (emphasis added). Section 65-171d(c) defines "pollution" as meaning:

"(1) Such contamination or other alteration of the physical, chemical or biological properties of any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to public health, safety or welfare, or to the plant, animal or aquatic life of the state or to other designated beneficial uses; or (2) such discharge as will or is likely to exceed state effluent standards predicated upon technologically based effluent limitations."


COMMENT: K.A.R. 28-48-2, when read in conjunction with its authorizing statute (K.S.A. 65-171d), appears to require reporting of a soil discharge whenever, considering the physical conditions of the site, the discharge is of such a volume and concentration that it is likely to be detrimental to plants, animals, or
humans. A discharge into surface or groundwater will require reporting under §28-48-2 whenever it is likely to be detrimental to plants, animals, or humans, exceeds state effluent standards, or impairs the ability to use the water for a designated beneficial use. However, this still leaves reporting to a highly site-specific qualitative judgment. For example, does the mere presence of detectable amounts of benzene in the soil require reporting? Is the presence of benzene at the site likely to be detrimental to plants, animals, or humans—i.e., is the site “dirty”? The underlying problem with such a qualitative reporting system is the obligation to report often cannot be determined until an agency official has exercised their judgment concerning whether the site is “dirty”. Without a clear trigger to discern the reportable from the non-reportable—the “clean” from the “dirty,” either over-reporting or under-reporting is certain to occur. It makes it very difficult to predict whether the presence of a substance is something the parties to a transaction need to worry about.

Assuming the qualitative reporting obligation has been triggered, the next issue concerns “who” must make the report. K.A.R. 28-48-2 requires that the “owner” of the facility, or the “person responsible for the discharge or escape” of the substance, must report “the discharge or escape” to the KDHE. K.A.R. 28-48-2(a) (1995). “Owner” is defined to include the person “financially responsible” for the “material or facility.” “Person responsible” is defined as the person “placed in control of the material or facility by the owner.” K.A.R. 28-28-1(a) (“owner”) and (b) (“person responsible”) (1995).

The KDHE is presently considering quantitative triggers for soil contamination. However, since these will be promulgated, if at all, after July 1, 1995, they will not become part of the KCC’s regulatory program for oil and gas activities. Although the KDHE currently has some internal numerical contaminant “guidelines” used to define its qualitative triggers, such “guidelines” will not become KCC law unless the KCC specifically adopts them. Therefore, the regulated community will have to wait and see what the KCC does with its new consolidated authority over the clean up of pollution from oil and gas activities.

§12.36 SOLID WASTE IMPACTS

§12.37 Resource Conservation and Recovery Act

[Add at the end of the text material.]

Under CERCLA, petroleum and natural gas are generally excluded from the definition of “hazardous substance.” CERCLA 42 U.S.C. §101(14) (1988). Therefore, clean up claims concerning oil spills and leaking underground petroleum storage tanks cannot be prosecuted under CERCLA. Litigants in recent years, however, have been relying upon the “citizen suit” provision of RCRA to require clean up of petroleum contamination that escapes CERCLA jurisdiction. For example, in KFC Western Inc. v. Meghrig, 49 F.3d 518 (9th Cir. 1995), cert. granted, the court held the purchaser of property contaminated with petroleum products could seek reimbursement of its clean up costs from the seller relying upon §7002 of RCRA. Section 7002(1)(B) is the “citizen suit” provision, which permits a private party to sue “any person” that:

“[H]as contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment....”

RCRA §7002 is in some ways much broader than CERCLA because a release of a “hazardous substance” is not required. Instead, the mere presence of a non-hazardous “solid” waste can trigger liability if the situation “may present an imminent and substantial endangerment to health or the environment.” It is broader than the Oil Pollution Act because it does not require any sort of nexus with “waters of the United States” nor is it limited to incidents occurring after August 18, 1990. See text §12.19. Therefore, RCRA §7002 may become the major federal regulatory device for dealing with petroleum clean ups; particularly since §7002(e) permits the award of attorney fees and litigation costs to “the prevailing or substantially prevailing party....”

Although the Ninth Circuit in KFC Western held §7002 authorized the recovery of clean up costs already paid by the plaintiff landowner, the United States Court of Appeals for the Eighth Circuit would limit the use of §7002 to seeking injunctive relief to force the seller, and other contributors to the problem, to conduct a clean up. It would not permit the current owner to clean up the site and then seek reimbursement of the costs from third parties. Furrer v. Brown, 1995 U.S. App. LEXIS 22010 (8th Cir. Aug. 15, 1995).

§12.38 Comprehensive Environmental Response, Compensation and Liability Act

[Add at the beginning of the text material.]

Perhaps the greatest environmental risk associated with the oil and gas industry is the potential that an operating area must be “cleaned up.” The remediation of contamination associated with oil and gas operations can be technically, and economically, challenging. Clean up liability is often based upon a party’s “status” with the property where the contaminant is found, or their status with the contaminant. For example, past and present “owners” and “operators” of the property where the contaminant is found may be required to engage in a clean up. The “generator” of the contaminant, or someone who “arranged for its disposal,” or someone who transported the contaminant, may all be required to engage in a clean up. See generally David E. Pierce, Structuring Routine Oil and Gas Transactions to Minimize Environmental Liability, 33 Washburn L. J. 76, 79-80 (1993); David E. Pierce, The Emerging Role of “Liability-Forcing” in Environmental Protection, 30 Washburn L. J. 381 (1991). The situation can also be aggravated by a lack of standards to be applied when evaluating a site to determine whether a clean up will be required: when is something “dirty”?

This basic question is at the heart of many transactions when a party is contemplating becoming a surface owner, mineral owner, lessee, farmee, operator, unit operator, producing property owner, easement owner, or similar interest owner. Since the prospective “owner” or “operator” might be liable for a clean up if a site is contaminated—“dirty,” the million-dollar question becomes, is any part of the site “dirty”? If the site is a seething toxic waste dump, the issue is a simple one—yes, it’s dirty. If the site is pristine, the issue is also a simple one—no, it is not dirty. Most oil and gas operating sites, however, fall within these two extremes and the determination of “clean” versus “dirty” involves
a qualitative judgment concerning contaminants found at the site. The problem is whether the presence of the contaminant, considering all the surrounding circumstances of the site, requires a clean up. One triggering mechanism that tends to distinguish the clean from the dirty is the obligation to report the presence of a contaminant.

If the presence of a contaminant triggers a reporting obligation, this obviously makes the contaminant a matter of concern for the parties. Reporting obligations, however, typically do not coincide with a clean-versus-dirty analysis. For example, under CERCLA the mere presence of benzene in the soil will not trigger a reporting obligation unless it is associated with a known release of benzene in excess of the designated reportable quantity. CERCLA §103(a), 42 U.S.C.A. §9603(a) (West 1983). The mere presence of benzene, however, can trigger a clean up obligation under CERCLA. CERCLA §106(a), 42 U.S.C.A. §9606(a) (West 1983) (EPA may issue clean up orders when there "may be an imminent and substantial endangerment to the public health or welfare or the environment"); CERCLA §107(a), 42 U.S.C.A. §9607(a) (West Supp. 1995) (liability to clean up release of hazardous substance which "causes the incidence of response costs").

[Add as a new section following 12.38.]
§12.38-A Oilfield Clean up Obligations and Liabilities

The administration of the environmental laws governing oil and gas activities is in a state of flux since all authority over such matters was transferred from the Kansas Department of Health and Environment (KDHE) to the Kansas Corporation Commission (KCC) effective July 1, 1995. In addition to transferring jurisdiction to the KCC, the KCC also succeeded to all statutory and regulatory authority previously possessed by the KDHE to regulate the environmental aspects of oil and gas activities. 1995 Kan. Sess. Laws ch. 204, §14. Perhaps the broadest KCC “clean up” statute is K.S.A. 65-159, which gives the KDHE (and now the KCC for oil and gas activities) authority to “order...the owner [or private property]...to remove...[a] nuisance.” K.S.A. 65-159 (1994). The qualitative judgment is identifying a “nuisance” that will support a clean up order. The KCC is given the authority to prevent and clean up “pollution” of the soil and waters of the state from oil and gas activities. 1995 Kan. Sess. Laws ch. 204, §14(a). Subsection (c)(1) of §65-171d defines “pollution” as: “Such contamination or other alteration of the physical, chemical or biological properties of any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to public health, safety or welfare, or to the plant, animal or aquatic life of the state or to other designated beneficial uses.” 1995 Kan. Sess. Laws ch. 204, §13(c) (emphasis added). The net result is a qualitative basis for triggering a clean up—it will occur when the presence of the substance creates, or is likely to create, a “nuisance” or is otherwise “detrimental” to humans or the environment. Although the statute refers to contamination of “waters of the state”, soil contamination that is “likely” to find its way into surface or ground water would also be covered—assuming its presence in the waters of the state would result in a nuisance or have detrimental effects on humans or the environment.

The soil nexus, and clean up obligation, are addressed directly in K.S.A. 65-171v, which provides, in part: “Whenever a water or soil pollutant is discharged intentionally, accidentally or inadvertently and the secretary of health and environment...determines that the discharged material must be collected, retained, or rendered innocuous, and if a discharger refuses to undertake clean up operations or if the responsible discharger is unknown at the time, the secretary...may enter into an agreement with a person to conduct the necessary clean up operations with payment for such clean up work to be provided from the pollutant discharge clean up fund. Any person responsible for or causing the discharge of materials which are determined necessary to clean up under the