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A Summary and Update of Oil & Gas Environmental Law

Presented by

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SUMMARY AND UPDATE OF OIL & GAS ENVIRONMENTAL LAW

by

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I. INTRODUCTION

A. The Realities of Oil & Gas Environmental Law

1. Oil and gas activities impact the environment.

2. All phases of oil and gas development are subject to extensive state and federal environmental requirements.

3. Current levels of compliance range from excellent to nonexistent.

4. Existing requirements will be the object of new enforcement efforts; new requirements will be imposed.

B. Regulatory Obligations and Liability

1. Two primary approaches to regulating oil and gas environmental impacts:
   a. Specific regulatory requirements.
      (1) Reporting obligations.
      (2) Performance, operation, and design obligations.

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1-1
b. Liability imposed to remedy an environmental problem.

(1) Ordered to clean up a problem (oil spill, hazardous substance release).

(2) Ordered to pay money to the government or private parties to reimburse them for cleanup costs.

(3) Ordered to pay for damages associated with the activity or condition.

C. Topics for Summary and Update

1. Emergency Planning and Community Right-to-Know Act
   a. Reporting obligations.
   b. The Kansas program.

2. Clean Water Act/Safe Drinking Water Act
   a. Managing produced water.
   b. Managing related development wastes.
   c. Oil spill reporting, cleanup, and prevention.

3. Oil Pollution Act
   a. Oil spill liability.
   b. Private right of action for damages.

   a. Cleanup liability.
   b. Avoiding liability in routine oil and gas transactions.
II. EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT (EPCRA) (SARA TITLE III)

A. The Basic Goals of the Act

1. Require state and local agencies, and private businesses that have hazardous materials on site, to plan for emergencies associated with the hazardous materials.

2. Require persons that have hazardous materials on site to provide information (reports) to the local fire department, local emergency planning agency, and state emergency planning agency, concerning the existence, location, and nature of the hazardous materials.

3. Require persons to provide immediate notification of certain releases of hazardous materials.

4. The program is the product of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. §§ 11001 to 11050 (1988) which comprised Title III of the Superfund Amendments and Reauthorization Act of 1986 (thus "SARA Title III").

5. Although it is a federal program, the Act relies upon the states for its basic administration.

B. The Program Players


   b. The Kansas statute authorizes the Commission:

      (1) To carry out "all requirements
(2) To provide assistance in coordinating state agency activities concerning "[c]hemical emergency training, preparedness, and response" and "chemical release reporting and prevention, transportation, manufacture, storage, handling, and use."

2. Each state commission is directed to create local emergency planning districts and appoint a local emergency planning committee to prepare and implement emergency plans for hazardous materials within the planning district. EPCRA § 301 (b), (c), 42 U.S.C. § 11001(b), (c) (1988).


   b. In Kansas each County is generally designated as the local emergency planning district.

C. Determining What's Out There: §§ 302/303

1. The owner or operator of certain defined facilities must notify the State Emergency Response Commission if they are currently, or subsequently become, subject to the emergency planning portion of EPCRA (§302).

   a. To come under the § 302 notification requirement the facility must:

      (1) Have a listed "extremely hazardous substance" at the facility;

      (2) In a volume equal to or in excess of a listed "threshold planning quantity" (TPQ).

   b. The list of extremely hazardous substances and their associated TPQs
are found at 40 C.F.R. Part 355, Appendix A (1992).

APPENDIX A TO PART 355—THE LIST OF EXTREMELY HAZARDOUS SUBSTANCES AND THEIR THRESHOLD PLANNING QUANTITIES—Continued

[Alphabetical Order]

<table>
<thead>
<tr>
<th>CAS No.</th>
<th>Chemical name</th>
<th>Notes</th>
<th>Reportable quantity (pounds)</th>
<th>Threshold planning quantity (pounds)</th>
</tr>
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<tr>
<td>7722-84-1</td>
<td>Hydrogen Peroxide (Conc &gt; 82%)</td>
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<td>1,000</td>
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<tr>
<td>7723-06-4</td>
<td>Hydrogen Sulfide</td>
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<td>1</td>
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<tr>
<td>123-31-8</td>
<td>Hydroquinone</td>
<td>i</td>
<td>1</td>
<td>500/10,000</td>
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<tr>
<td>12403-40-8</td>
<td>Iron, Pentacarbonyl</td>
<td>e</td>
<td>1</td>
<td>100</td>
</tr>
<tr>
<td>297-78-8</td>
<td>Isobornyl</td>
<td>e</td>
<td>1</td>
<td>100/10,000</td>
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<tr>
<td>78-82-0</td>
<td>Isobutyronitrile</td>
<td>e, h</td>
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<td>1,000</td>
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<tr>
<td>101-36-3</td>
<td>Isocyanic Acid, 2,4-Dichlorophenyl Ester</td>
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<td>900/10,000</td>
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<tr>
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<td>Isocyanuric Acid</td>
<td>e</td>
<td>1</td>
<td>100/10,000</td>
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<tr>
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<td>100</td>
<td>100</td>
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<td>118-35-0</td>
<td>Isopropylmethylypyrazoethyl Dimethylcarbamate</td>
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<td>Isosorbide</td>
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<td>216202-62-6</td>
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<td>Lindane</td>
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<td>198-77-3</td>
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<td>12106-15-3</td>
<td>Manganeses, Tricarbonyl Methylcyclopentadienyl</td>
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<td>900</td>
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<td>81-76-2</td>
<td>Methylchloranthene</td>
<td>e</td>
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<td>100</td>
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<tr>
<td>990-10-7</td>
<td>Methylchlorathene</td>
<td>e</td>
<td>1</td>
<td>800</td>
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<tr>
<td>1600-27-7</td>
<td>Mercaptoacetate</td>
<td>e</td>
<td>1</td>
<td>800/10,000</td>
</tr>
</tbody>
</table>

Excerpt from Exhibit A to Part 355.

2. Facilities reporting under § 302 must provide a representative who will participate in the emergency planning process with the local emergency planning committee and serve as a "facility emergency coordinator." EPCRA § 303(d)(1), 42 U.S.C. § 11003(d)(1) (1988).

3. Facility owner or operator obligated to inform the emergency planning committee of any relevant changes occurring at the facility as the occur or are expected to occur. EPCRA § 303(d)(2), 42 U.S.C. § 11003(d)(2) (1988).

4. Governor or State emergency response commission can designate additional facilities to be included in the § 302 planning process. EPCRA § 302(b)(2), 42 U.S.C. § 11002(b)(2) (1988).

5. If a facility is not currently subject to the reporting requirement (chemical not on the list or below TPQ), but
subsequently becomes subject to the requirement (chemical listed or exceed TPQ), the facility owner or operator has 60 days in which to report to the state commission and local committee. EPCRA § 302(c), 42 U.S.C. § 11002(c) (1988).


D. Determining What's Out There: § 311 List of Hazardous Chemicals on Site


a. To come under the § 311 reporting requirement the facility must:

(1) Be one for which the Occupational Safety and Health Act requires a MSDS for an OSHA "hazardous chemical;" and

(2) The hazardous material is present in a volume equal to or in excess of the following threshold levels:

(a) Hazardous chemical: 10,000 pounds;

(b) Extremely hazardous substance: 500 pounds or its TPQ--whichever is lower.


2. OSHA's MSDS requirement: 29 C.F.R.
§ 1910.1200(b)(1) (1992) provides, in part:

"This section requires . . . all employers to provide information to their employees about the hazardous chemicals to which they are exposed, by means of a hazard communication program, labels and other forms of warning, material safety data sheets, and information and training."

a. "Employer" is defined as "a person engaged in a business where chemicals are either used, distributed, or are produced for use or distribution, including a contractor or subcontractor." 29 C.F.R. § 1910.1200(c) (1992).

(1) "Chemical" means "any element, chemical compound or mixture of elements and/or compounds."

(2) "Distributor" means "a business, other than a chemical manufacturer or importer, which supplies hazardous chemicals to other distributors or to employers."

b. "Hazardous chemical" means "any chemical which is a physical hazard or a health hazard." 29 C.F.R. § 1910.1200(c) (1992).

(1) "Physical hazard" means "a chemical for which there is scientifically valid evidence that it is a combustible liquid, a compressed gas, explosive, flammable, an organic peroxide, an oxidizer, pyrophoric, unstable (reactive) or water-reactive."

(2) "Health hazard" includes "chemicals which are carcinogens, toxic or highly toxic agents, reproductive toxins, irritants, corrosives, sensitizers . . . and agents
which damage the lungs, skin, eyes, or mucous membranes."

c. Produced hydrocarbons (crude oil, natural gas, condensate) would seem to meet the definition of either a physical or health hazard and therefore be a "hazardous chemical" requiring a MSDS under OSHA's hazard communication standards.

(1) The API's standard reporting guide lists Produced Hydrocarbons as having the following Physical and Health Hazards: Fire and Sudden Release of Pressure Physical Hazards and Immediate (acute) and Delayed (chronic) Health Hazards.


3. Although the EPCRA incorporates the OSHA definition of "hazardous chemical", EPCRA specifically excepts the following from the definition (for EPCRA reporting purposes):

"(1) Any food, food additive, color additive, drug, or cosmetic regulated by the Food and Drug Administration.

(2) Any substance present as a solid in any manufactured item to the extent exposure to the substance does not occur under normal conditions of use.

(3) Any substance to the extent it is used for personal, family, or household
purposes, or is present in the same form and concentration as a product packaged for distribution and use by the general public.

(4) Any substance to the extent it is used in a research laboratory or a hospital or other medical facility under the direct supervision of a technically qualified individual.

(5) Any substance to the extent it is used in routine agricultural operations or is a fertilizer held for sale by a retailer to the ultimate customer."


4. Also excepted from the reporting obligations (§§ 302, 311, 312, & 313) are:

"[T]ransportation, including the storage incident to such transportation, of any substance or chemical subject to the requirements of this chapter, including the transportation and distribution of natural gas." EPCRA § 327, 42 U.S.C. § 11047 (1988) (does not exempt these activities from emergency release notification under § 304).


6. Note that the threshold quantity for a hazardous chemical or extremely hazardous substance is measured by the amount present at a "facility" at any time.

a. Designated facility will determine whether reporting is required and, if reporting is required, the scope of materials included in the report.

b. "Facility" defined by EPCRA as follows:
"[A]ll buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person (or by any person which controls, is controlled by, or under common control with, such person). For purposes of section 11004 of this title [release notification], the term includes motor vehicles, rolling stock, and aircraft."


c. The regulations define "facility" as above, but add the following:

"Facility shall include manmade structures as well as all natural structures in which chemicals are purposefully placed or removed through human means such that it functions as a containment structure for human use. . . . ."


d. How will facility be dealt with in the oil and gas context?

(1) Tank battery?

(2) Oil and gas lease?

(3) Operating Agreement "contract area."

(4) Pooled or unitized area?

(5) See The Kansas Emergency Planning and Community Right-To-Know Act Compliance Reporting Guide for the Oil and Gas Exploration and Production Industry, Kansas Department of Health & Environment.
THE KANSAS EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT

COMPLIANCE REPORTING GUIDE

FOR THE OIL AND GAS EXPLORATION AND PRODUCTION INDUSTRY
This guide to compliance reporting has been prepared specifically to assist the Oil and Gas Production Industry of Kansas in completing required reporting under the Kansas Emergency Planning and Community Right-to-Know Act (EPCRA) K.S.A. 65-5701 incl. 65-5710.

The Kansas EPCRA requires written notification to the State Emergency Response Commission (SERC) of all facility locations storing hazardous chemicals meeting specific reporting criteria.

Historically, confusion concerning the definition (and consequent reporting) of a facility has existed between the Kansas Department of Health and Environment's Community Right-to-Know Program, the Environmental Protection Agency, and the Kansas Oil and Gas Production Industry.

For purposes of emergency planning, response, and safety the Right-to-Know Program believes reporting by tank battery complex or free standing facility best fulfills this purpose. EPA's facility definition may expand beyond the tank battery or free standing facility in that EPA views each lease to be a separate site, which is one element of EPA's definition of a facility. The Industry, for the most part, has shown preference to report by "production foreman areas". Affecting the interpretation of each of these definitions has been the lack of a definitive response from EPA to questions raised by the Kansas Right-to-Know
Program concerning contiguous and adjacent sites as part of the location element within the Federal definition of a facility.

The Right-to-Know Program has progressed to a point at which further delay in reporting by the Oil and Gas Industry will have a detrimental affect on the intent of this program.

We are, therefore, providing the industry with alternative methods of reporting to satisfy compliance. Either method is acceptable, and depending on your specific operation, one method may be beneficially preferable over the other. The Kansas Right-to-Know Program prefers reporting by tank battery or free standing facility for the reasons stated above.

OIL & GAS EXPLORATION AND PRODUCTION INDUSTRY COMPLIANCE REPORTING

The oil and gas exploration and production industry faces a rather unique choice because of the definition of facility under the federal statute. This definition gives the industry a number of options to choose in how to structure their Title III reports. The definition of "facility" in Section 329 (4) of the act and regulations in 40CFR 355.20 and 370.2 contains three elements: a stationary item element ("all buildings, equipment, structures, and other stationary items"), a location element ("which are located on a single site or on contiguous or adjacent sites"), and a control element (which are owned or operated by the same person..."). The definition applies equally to surface and subsurface rights.
All three elements of the above definition are relevant in determining the appropriate reporting facility in general; and in clarifying reporting obligations to the oil and gas production areas in particular.

The State of Kansas considers a "facility" to be a "tank battery complex" or a "free standing facility." A "tank battery complex" consists of the well or wells pumping into a tank battery and the tank battery itself which meet a reporting threshold. The location of the tank battery must be given. This allows the tank battery and all wells connected to it to be reported as one facility. A "free standing facility" is 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. If a well which is connected to a tank battery is reworked and therefore meets the reporting thresholds for chemicals used during the rework, the rework chemicals must either be reflected on an update of the "tank battery complex" report or be reported as a "free standing facility." Other examples of "free standing facilities" could include a pump station, pipeline terminus, maintenance facilities, and underground containment if they meet notification requirements.

EPA has determined that each lease is a separate site, which may or may not meet criteria to become identified as a facility. EPA takes the position that oil and gas deposits are not "structures" under Title III. The subsurface mineral lease gives a leasee a property interest that may be broader than surface operations. Therefore, a report under Title III for a single facility may represent, geographically, a number of adjacent or contiguous leases that must have stationary structures and are owned or operated by the same company. Where
an undeveloped lease (no surface or subsurface stationary structures) intervenes between two developed leases, then those two developed leases must be reported separately since they are not "adjacent and contiguous". This facility definition may or may not be co-current with your actual operations be they managed by your company based upon well field, production management area, or some other company classification.

The Kansas Department of Health and Environment will allow oil and gas exploration and production industry companies to use either application in determining a reportable facility under Title III. For companies wishing to use the EPA facility definition in reporting, it will be necessary to provide, with the Title III submissions, supporting documentation sufficient to establish the three criteria (stationary surface or subsurface structures, location and control). Documentation to support these three elements will include maps, legal descriptions, and a current (annual) description of all surface and subsurface stationary structures and their locations relative to each individual lease which is agglomerated as part of a single facility submission.

Once 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. If, after initially reporting, a company wishes to change to the alternate facility definition a letter identifying that a change is being made and describing how the change has either increased the number of reportable facilities or decreased the number of reportable facilities must be sent to the SERC.
Be advised notifications and appropriate fees are currently due for the calendar years 1988, 1989, and 1990. It will be your responsibility to review your facility reporting records to determine current status for these years and submit any delinquent notifications and/or fees promptly to avoid pursuit of regulatory actions.

You must also be aware of legislative amendments made to the Kansas EPCRA which will affect reporting for the calendar year 1991, which will be due March 1, 1992. These amendments include: facilities regulated under Section 311 and Section 312 of the federal act shall submit lists of chemicals in lieu of material safety data sheets, and Tier II reports in lieu of Tier I reports (H.B. 2472). Additionally, reference should be made to EPA's Final Rule on Community Right-to-Know Reporting Requirements 40CFR Parts 350, 355, 370, and 372 Federal Register Vol.55, No.144, 30632 July 26, 1990 (subsurface operations).

Our goal is to bring your industry into compliance with EPCRA in as efficacious a manner as possible. If your facility has not previously reported under this Act, please contact this office so additional information and assistance may be provided.
E. Determining What's Out There: § 312 Annual Report of Hazardous Chemicals on Site

1. Apply same criteria as used under § 311 to determine whether facility is subject to reporting requirements of § 312. See 40 C.F.R. § 370.25 (1992).

2. Report to the same parties as under § 311.

3. Must report on or before March 1 for hazardous chemicals on site during the preceding calendar year.


5. Mixture reporting: If the material is a mixture containing one or more hazardous chemicals, the owner or operator may report under § 311 and § 312 by:

   "(1) Providing the required information on each component in the mixture which is a hazardous chemical;
   or
   (2) Providing the required information on the mixture itself . . . ."


6. Sample Tier II reporting forms are contained on the pages that follow.
**Oil and Gas Exploration and Production Industry**

**Generic Tier II Inventory of Hazardous Chemical Categories**

The Generic Tier II Inventory of Hazardous Chemical Categories may be used in complying with Safe Drinking Water Act Section 312. The generic report is comprehensive and lists the categories of hazardous chemicals rather than trade names and specific chemical names.

<table>
<thead>
<tr>
<th>Chemical Description</th>
<th>Physical and Health Hazards</th>
<th>Inventory</th>
<th>Storage Codes &amp; Locations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nitrogen</td>
<td>Free</td>
<td>E 1 1</td>
<td>DRILLING, PRODUCTION</td>
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<tr>
<td>Ammonia</td>
<td>Incompatible with strong acid</td>
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<tr>
<td>Ethylene</td>
<td>Inflammable</td>
<td>D 2 1</td>
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<td>Methane</td>
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<tr>
<td>Hydrogen</td>
<td>Flammable</td>
<td>D 2 1</td>
<td>DRILLING, PRODUCTION</td>
</tr>
</tbody>
</table>

**Oil and Gas Exploration and Production Industry**

**Generic Tier II Inventory of Hazardous Chemical Categories**

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<tr>
<th>Chemical Description</th>
<th>Physical and Health Hazards</th>
<th>Inventory</th>
<th>Storage Codes &amp; Locations</th>
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<tbody>
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<td>Scale inhibitors</td>
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<td>Single control additives</td>
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<td>D 2 1</td>
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<td>Silica</td>
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<td>Solvents</td>
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<tr>
<td>Spouting fluid</td>
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</tr>
</tbody>
</table>
F. Determining What's Out There: § 313 Annual Toxic Chemical Release Reporting

1. Must report on or before July 1 for toxic releases from the facility during the preceding calendar year.

2. Most oil and gas producers will not be subject to § 313 reporting requirements.

3. § 313 apply to the following facility owners and operators:
   a. Having 10 or more full-time employees;
   b. Facility falls within Standard Industrial Classification Codes 20 through 39 (exploration and production activities fall under SIC 13);
   c. Facility involved in the manufacturing, processing, or otherwise using a "toxic chemical";
   d. "Toxic chemical" must be on the toxic chemical list found at 40 C.F.R. § 372.65 (1992); and
   e. A listed toxic chemical must be at the facility in one of the following threshold amounts:
      (1) 10,000 pounds if it is "used" at the facility;
      (2) 25,000 pounds if it is "manufactured or processed" at the facility.

G. Emergency Notification: Spills and Releases


2. For an event to be subject to the § 304
notification requirement, the following must exist:

a. The facility must produce, use, or store a "hazardous chemical;"

b. Must have a "release" of an EPCRA "Extremely Hazardous Substance" of a CERCLA "Hazardous Substance;"

c. The release must exceed the regulatory "Reportable Quantity" for the substance;

d. The release must result in exposure to persons beyond the site or sites on which the facility is located.


4. Although petroleum is not an Extremely Hazardous Substance or a CERCLA Hazardous Substance, must consider whether it contains any hazardous substances in such concentration and volume so as to trigger reporting under § 304.


a. Who must the owner/operator report to?

(1) Community emergency coordinator for the local emergency planning committee of areas likely to be impacted by the release.

(2) State Emergency Response Commission for any state likely to be impacted by the release.

(3) Federal National Response Center (under CERCLA § 103).

(4) If the spill is the result of a transportation event, the
notice requirements can be met by dialing 911.

b. When must the notice be given? Immediately by telephone; follow-up in writing.

6. Penalties for failure to give immediate notice:

a. Civil penalties: $25,000 for each violation for each day it continues; second or subsequent violations $75,000 per day.

b. Criminal penalties: "knowingly and willfully" fails to give notice: $25,000 and 2 years prison for first offense; $50,000 and 5 years prison for second or subsequent convictions.

III. CLEAN WATER ACT

A. Regulation of Discharges

1. The Clean Water Act (CWA) provides that the "discharge of any pollutant by any person shall be unlawful" unless the discharge meets the requirements of the Act. CWA § 301(a), 33 U.S.C. § 1311(a).

2. The Act restricts a "discharge of a pollutant" which is defined as a "discharge" of a "pollutant" from a "point source" into "navigable waters." CWA § 502 (12), 33 U.S.C. § 1362(12).


b. Pollutant: "[W]aste discharged into water . . . [but excluding] (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well . . . is approved
by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources." § 502(6), 33 U.S.C. § 1362(6).

c. **Point Source:** "[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).


(1) The Environmental Protection Agency (EPA) has defined "waters of the United States" broadly to include even non-navigable intermittent streams and "wetlands" which may seldom fill with water. 40 C.F.R. § 110.1.

(2) 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).

(3) 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."

3. Any discharge of a pollutant is unlawful unless a permit for the discharge is obtained and the terms of the permit followed. CWA § 301(a), 33 U.S.C. § 1311
a. 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.

b. To qualify for a permit, the discharge must comply with "effluent limitations" designed to meet state water quality standards and minimum technological requirements imposed by the Act. CWA § 402(a), 33 U.S.C. § 1342(a) (1988).

4. The minimum technological requirements incorporated into the NPDES permit generally reflect varying levels of control based upon the nature of the pollutant, the age of the facility, and the level of control that is economically and technologically feasible. CWA § 502(11), 33 U.S.C. § 1362(11).

5. The four effluent limitations categories include BPT, BAT, BCT, and NSPS.


b. BAT: Best available technology economically achievable. CWA § 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A). This reflects a more demanding level of pollution control and applies to toxic and nonconventional pollutants.

Conventional pollutants include such things as suspended solids, pH, and oil and grease. See 40 C.F.R. § 401.16 (1992).

Generally the level of control under the BCT standard will be equal to, or more rigorous than, the BPT standard. However, it will usually be less rigorous than the BAT standard.


(2) This will generally reflect the highest level of control of all the standards.

(3) A "new source" means "any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance . . . applicable to such source . . . ." CWA § 306(a)(2), 33 U.S.C. § 1316(a)(2).

6. The Act contemplates that existing discharge sources will initially be regulated by applying effluent limitations which meet the BPT level of control.

a. Subsequently, higher levels of control will be achieved by employing BCT for conventional pollutants and BAT for toxics and nonconventional pollutants.
b. New discharge sources must meet the highest level of control since new plants can be designed to incorporate the necessary controls.

7. NPDES permits can require the discharger to monitor, collect samples, and report on its compliance status. CWA § 308(a), 33 U.S.C. § 1318(a).

B. Regulation of Produced Water: Introduction

1. Production of oil and gas often requires the production of large volumes of water with a high chloride concentration, referred to as "brine" or "salt water." As noted by the court in Natural Resources Defense Council v. U.S. E.P.A.:[1]

"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." Natural Resources Defense Council v. U.S. E.P.A., 863 F.2d 1420, 1425 (9th Cir. 1988).

2. The term "pollutant" is defined by the Act to include any "industrial waste" discharged into water.

a. 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).

b. The same subsection exempts "water, gas, or other material which is injected into a well to facilitate production of oil or gas."

c. Therefore, injection of material to

1863 F.2d 1420 (9th Cir. 1988).
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).

3. If the produced water is not going to be injected, a NPDES permit will be required—unless an alternative disposal technique is used that will not result in a discharge into "waters of the United States."

a. Alternative disposal techniques, if allowed by state law, could include: road spreading, evaporation pits, percolation pits, agricultural use, or discharge into a sewer system.

b. For an excellent collection of the various state regulatory alternatives for dealing with produced water and other oil and gas exploration and production wastes, see EPA/IOCC Project on State Regulation of Oil and Gas Exploration and Production Waste (December 1990), published and distributed by the Interstate Oil and Gas Compact Commission, 900 Northeast 23rd Street, P.O. Box 53127, Oklahoma City, Oklahoma 73152, (405) 525-3556.

4. The operator of the well might also contract with third parties to dispose of the water. The third party may then truck or pipe the water to a permitted injection well or dispose of it in some other authorized manner.

a. However, in a recently proposed NPDES General Permit the EPA stated that produced water given to a contractor for disposal is still the operator's "discharge" and if improperly
disposed the operator can be liable.

b. The proposed Permit prohibits permittees from "causing or contributing" to prohibited discharges.

c. The EPA stated:

"Causing or contributing to such a discharge includes contracting with another party which actually discharges the pollutants or transports them to a third party which actually discharges them. In addition, disposal contractors have been listed as a class of permittees under the proposed permits, a provision which will render operators and their disposal contractors jointly and severally liable for permit violations."

Proposed NPDES General Permits for Produced Water and Produced Sand Discharges from the Oil and Gas Extraction Point Source Category to Coastal Waters in Louisiana and Texas, 57 Fed. Reg. 60926, 60928 (December 22, 1992) (emphasis added).

C. Regulation of Produced Water: Effluent Limitations for the "Oil and Gas Extraction Point Source Category"

1. The EPA, at 40 C.F.R. Part 435, has promulgated effluent limitations for the "Oil and Gas Extraction Point Source Category."

2. The Oil and Gas Extraction Point Source Category is divided into the following subcategories:

   a. Stripper

   b. Onshore

   c. Coastal
d. Agricultural and Wildlife Water Use

e. Offshore

D. Regulation of Produced Water: Stripper Subcategory

1. 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.

a. "Facilities" includes "facilities ... engaged in production and well treatment in the oil and gas extraction industry." 40 C.F.R. §435.60.

b. "Onshore" includes "all land areas landward of the inner boundary of the territorial seas." 40 C.F.R. §435.61 (b).

c. "Territorial seas" is defined by the Clean Water Act as:

"[T]he belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contract with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles." CWA § 502(8), 33 U.S.C. § 1362(8).

2. The Stripper Subcategory applies only to oil wells; no special provision is made for gas wells.

3. A gas well is "any well which produces natural gas in a ratio to the petroleum liquids produced greater than 15,000 cubic feet of gas per 1 barrel (42 gallons) of petroleum liquids." 40 C.F.R. § 435.61 (d).

4. The EPA has not adopted specific effluent
limitations for the Stripper Subcategory, therefore, discharges must comply with state water quality standards and standards that reflect the permit writer's best professional judgment concerning the required level of control pending EPA's promulgation of standards.

5. However, as noted below, EPA's regulation of the Onshore, Coastal, and Agricultural and Wildlife Subcategories can impact stripper well operations which are also located within these Subcategories.

E. Regulation of Produced Water: Onshore Subcategory

1. The Onshore Subcategory applies to facilities located "landward of the inner boundary of the territorial seas . . . ."

2. However, any facility that is covered by the Coastal, Agricultural and Wildlife Water Use, or Stripper Subcategory is excluded from the Onshore Subcategory. 40 C.F.R. § 435.30.

3. The Onshore Subcategory establishes effluent limitations which are pretty straight forward: "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).

4. 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.

5. 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. 7698 (Feb. 25, 1991) [hereafter called General Permit].

a. Each permit prohibits any discharge of pollutants from onshore oil and gas wells and facilities.

b. 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 7703.

6. The General NPDES Permit 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.

a. 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."

b. The discharge of produced water is prohibited and best management practices specified by each state must be employed to minimize the chance of a discharge or seepage of produced water.

c. 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.

7. Under this general permit approach, individual well owners and operators do
not need to apply for a permit; they are covered automatically.

8. However, the EPA Regional Administrator may require any discharger to obtain an individual NPDES permit if they fail to comply with the general permit.

9. The General Permit authorizes citizen suits to enforce a permittee's noncompliance with state pit and pond regulations which are incorporated into the permit as "best management practices."

a. The General Permit states: "Any permit non-compliance constitutes a violation of the Clean Water Act and is grounds for enforcement actions and/or for requiring a permittee to apply for and obtain an individual NPDES permit."

b. 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."

F. Regulation of Produced Water: Coastal Subcategory

1. The Coastal Subcategory applies to facilities that are located in "any body of water landward of the territorial seas . . . or . . . any wetlands adjacent to such waters." 40 C.F.R. § 435.40, §435.41(e). Section 435.41(f) defines "wetlands." 40 C.F.R. § 435.41(f).

2. The current EPA regulations establish BPT limits and permit the discharge of produced water so long as the discharge does not have a daily oil and grease content in excess of 72 milligrams per liter (mg/l) and a monthly average of 48 mg/l. 40 C.F.R. § 435.42(a) (table).

3. The regulation also prohibits the release of oil, applying the sheen test, from
discharges of deck drainage, drilling
muds, drill cuttings, well treatment, and
sanitary waste. 40 C.F.R. § 435.42 (a)
(table).

4. Operations may become subject to a general
permit that imposes more demanding BCT and
BAT requirements.

a. For example, a recent proposed
General Permit for coastal waters in
Louisiana and Texas contains BCT and
BAT standards and imposes limitations
on stripper wells located within
coastal areas. Proposed NPDES
General Permits for Produced Water
and Produced Sand Discharges from the
Oil and Gas Extraction Point Source
Category to Coastal Waters in
Louisiana and Texas, 57 Fed. Reg.
60926 (December 22, 1992).

b. The proposed General Permit, if
issued as proposed, would:

"[P]rohibit discharges of
produced water and produced
sand derived from facilities in
the Coastal, Offshore, and
Stripper Subcategories to all
waters of the United States
shoreward of the inner boundary
of the Territorial Seas in
Louisiana and Texas. In
addition, the permits will
prohibit the discharge of
produced water and produced
sand derived from facilities in
the Coastal Subcategory to any
other water of the United
States."

G. Regulation of Produced Water: Agricultural
and Wildlife Water Use Subcategory

1. This subcategory applies to onshore
facilities located in the continental
United States and west of the 98th
meridian.
This generally includes areas west of the following cities:

- Ft. Ransom, North Dakota
- Mitchell, South Dakota
- Hastings, Nebraska
- Hutchinson, Kansas
- El Reno, Oklahoma
- New Braunfels, Texas

2. However, to qualify for this subcategory, the produced water must have a "use in agriculture or wildlife propagation . . ." 40 C.F.R. § 435.50.

3. "Use in agriculture or wildlife propagation" means:

"[T]he produced water is of good enough quality to be used for wildlife or livestock watering or other agricultural uses and that the produced water is actually put to such use during such periods of discharge." 40 C.F.R. § 435.51(c)

4. Whether the water meets the quality requirement will be determined in the permitting process.

5. The effluent limitations established for this subcategory limit oil and grease in produced water discharges to a daily maximum limit of 35 mg/l. 40 C.F.R. § 435.52(a)(2).

   a. Only produced water can be discharged.

   b. The effluent limitations provide:

      "There shall be no discharge of waste pollutants into navigable waters from any source (other than produced water) associated with production, field exploration, drilling, well completion, or well treatment (i.e. drilling muds, drill cuttings, and produced sands)." 40 C.F.R. § 435.52(a)(1).
H. Regulation of Produced Water: Offshore Subcategory

1. The Offshore Subcategory applies to facilities "seaward of the inner boundary of the territorial seas." 40 C.F.R. §435.10.

2. The current regulations reflect only a BPT standard. 40 C.F.R. § 435.12.
   a. The current regulations permit the discharge of produced water so long as the discharge does not have a daily oil and grease content in excess of 72 mg/l and a monthly average of 48 mg/l. 40 C.F.R. §435.12(b) (table).
   b. The regulation also prohibits the release of oil, applying the sheen test, from discharges of deck drainage, drilling muds, drill cuttings, well treatment, and sanitary waste. 40 C.F.R. § 435.12 (b) (table).

3. However, most operations are currently governed by a general permit issued by the EPA Regional Office having authority over the area. For example, Region VI recently issued a NPDES General Permit for the Western Gulf of Mexico which governs facilities in federal waters seaward of Louisiana and Texas. Final NPDES General Permit for the Western Gulf of Mexico Outer Continental Shelf, 57 Fed. Reg. 54642 (November 19, 1992).
   a. This General Permit includes BAT and BCT standards which reflect Region VI's best professional judgment concerning the required level of control pending EPA's promulgation of final BAT and BCT standards.
   b. The General Permit imposes several new requirements including new toxicity limitations and extensive
monitoring, testing, and reporting requirements.


   a. This new rule establishes the standards for BAT, BCT, and NSPS.

   b. The new rule does not change the existing BPT standards found at 40 C.F.R. § 435.12.

I. Regulation of Storm Water Runoff

1. 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).

2. A "storm water discharge" consists of "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(14).


4. "Associated with industrial activity" includes:

   "Facilities classified as Standard Industrial Classifications 10 through 14 (mineral industry) [Standard Industrial Classification 13 is "Oil and Gas Extraction"] including . . . oil and gas exploration, production, processing, or treatment operations, or transmission facilities that discharge storm water contaminated by contact with or that has come into contact with, any overburden,
raw material, intermediate products, finished products, byproducts or waste products located on the site of such operations . . . ." 40 C.F.R. § 122.26 (b)(14)(iii).

5. The oil and gas industry could also be affected by 40 C.F.R. § 122.26(b)(14)(x) which defines "industrial activity" to include:

"Construction activity including clearing, grading and excavation activities except: operations that result in the disturbance of less than five acres of total land area which are not part of a larger common plan of development or sale . . . ." 40 C.F.R. § 122.26(b)(14)(x).

a. However, in Natural Resources Defense Council v. United States E.P.A., 966 F.2d 1292, 1305-06 (9th Cir. 1992), the court struck down the EPA's exclusion of construction sites of less than five acres as being unsupported by the administrative record.

b. The EPA is in the process of reevaluating this exclusion. See National Discharge Elimination System: Storm Water Discharges; Permit Issuance and Permit Compliance Deadlines for Phase I Storm Water Discharges, 57 Fed. Reg. 60444, 60446 (December 18, 1992).

6. Drilling activities will trigger the construction subcategory of "industrial activity."

a. Depending upon the area impacted, a storm water discharge permit may be required.

b. Particularly if the EPA adopts its initial proposed exclusion limit of one acre instead of five acres. NRDC, 922 F.2d at 1305-06.
7. Section 402(1)(2) of the Act prohibits the EPA from requiring a permit:

"[F]or discharges of stormwater 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) (emphasis added). See also 40 C.F.R. § 122.26 (a)(2).

a. 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. National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47990, 48029 (November 16, 1990).

b. 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(1)(2) creates a statutory exemption from storm water permitting requirements for uncontaminated runoff from these facilities."

8. To implement the storm water discharge program, and the exemption for uncontaminated runoff, the EPA has imposed a permit requirement for contaminated storm water discharges
resulting from contact with the facility.

a. 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."

b. To determine whether a contaminated storm water discharge has occurred, the EPA employs the sheen test for oil and the § 311 reportable quantity requirements for hazardous substances.

c. The operator of the site must determine, for all periods since November 16, 1987, whether they have had any discharge of storm water from the facility 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."

d. 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.

9. 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.

a. 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.

b. 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

10. If a permit is required, the operator should have filed their permit application on or before October 1, 1992.

11. The regulations also allow for individual, group, and general permits.

12. The EPA has promulgated general permits for several states, territories, Indian lands, and federal facilities.


a. For operations in an area covered by a general permit, the regulated party must file a Notice of Intent (NOI) form with the EPA.

b. The general permits require development and implementation of storm water pollution prevention plans (SWPP Plans), site inspections, selective monitoring, and certain limitations.

14. If a new discharge is being proposed, a permit application must be submitted at least 180 days before the facility commences operations that may result in a discharge. 40 C.F.R. 122.21(c).

a. However, if the industrial activity is "construction" under 40 C.F.R. §122.26 (b)(14)(x), the application must be submitted at least 90 days before the date the construction is to commence.

b. The application date can be varied by a general permit. For example, under the EPA's September 9, 1992
general permits, "facilities that begin industrial activities after October 1, 1992, are required to submit an NOI at least 2 days prior to the commencement of the new industrial activity."

c. The EPA's general permits also provide that oil and gas operators who experience a contaminated storm water discharge after October 1, 1992 "are required to submit an NOI within 14 calendar days of the first knowledge of such release."

The following chart indicates the deadlines for permit applications, permit issuance, and permit compliance:

<table>
<thead>
<tr>
<th>Type of application/type of discharge</th>
<th>Permit application deadline</th>
<th>Permit issuance deadline</th>
</tr>
</thead>
<tbody>
<tr>
<td>Industrial</td>
<td></td>
<td></td>
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<tr>
<td>* Individual:</td>
<td></td>
<td></td>
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<tr>
<td>Existing facilities</td>
<td>October 1, 1992</td>
<td>October 1, 1993</td>
</tr>
<tr>
<td>Facilities rejected from a group application</td>
<td>October 1, 1992</td>
<td>October 1, 1993</td>
</tr>
<tr>
<td>New facilities</td>
<td>180 days prior to commencement of industrial activity which may cause a storm water discharge.</td>
<td>One year after receipt of complete permit application.</td>
</tr>
<tr>
<td>New construction facilities</td>
<td>90 days prior to commencement of construction</td>
<td>One year after receipt of complete permit application.</td>
</tr>
<tr>
<td>* Group:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>All industrial activities except those owned or operated by a municipality with a population of less than 250,000.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Industrial activities owned or operated by a municipality with a population of less than 250,000.</td>
<td></td>
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</tr>
<tr>
<td>Municipal</td>
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<tr>
<td>* Large Municipal Systems</td>
<td>September 30, 1991</td>
<td>October 1, 1992</td>
</tr>
<tr>
<td>* Medium Municipal Systems</td>
<td>November 18, 1991</td>
<td>November 16, 1992</td>
</tr>
</tbody>
</table>

J. Clean Water Act: Oil Spills

1. Oil spills can trigger reporting obligations, cleanup requirements, fines, and liability for damage to public and private interests.


3. Oil spills are regulated at the state level by statutes and traditional common law concepts of negligence, nuisance, strict liability, and trespass.

4. The "harmful quantities" requirement: §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]."

5. 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 . . . ."

6. 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
adjourning shorelines in such quantities that it has been determined may be harmful to the public health of 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 (this is commonly known as the EPA's "sheen test" for oil discharges).

7. 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.

8. The "navigable waters" requirement:


b. 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 . . . ." 40 C.F.R. § 110.1.

9. EPA's regulation creates an expansive definition of navigable waters.

10. Although the statute merely defines "navigable waters" to include "waters of the United States," cases defining the term "waters of the United States" support the EPA's broad definition. See generally United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (interpreting "waters of the United States" broadly in defining the scope of Army Corps of Engineers jurisdiction under § 404 of the Clean Water Act).

11. 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.

a. 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."

b. TPL reported the spill immediately and conducted a successful cleanup before the oil left the unnamed tributary.

c. 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.

d. In Texas Pipe the court upheld 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."

e. 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."
K. Clean Water Act: Reporting Obligations

1. 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).

2. Failure to comply with this reporting requirement is a crime punishable by fine and imprisonment for up to 5 years.

3. 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."

4. 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.

L. Spill Prevention Requirements; Above Ground Storage Tank Regulation

1. As part of the government's national response system, Section 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. § 1321(j)(5)(A).

2. This requirement applies to an onshore facility that "because of its location, could reasonably be expected to cause substantial harm to the environment by

3. 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).

4. 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.

a. The existing regulations are found at 40 C.F.R. §§ 112.1 to 112.7.

b. The EPA has proposed new regulations addressing these matters:


5. For onshore operations, under the existing regulations, a plan is required only if the following criteria are met:

a. It is a "non-transportation-related" facility;

b. Engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing, or consuming of oil or oil products; and

c. 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).

6. 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.

7. 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).

8. The EPA, by regulation, states the items that must be addressed in the SPCC Plan.

a. 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."

b. This section is followed by detailed practices which should be employed for various operations, such as "Oil production facilities (onshore)."

c. The requirements for preparing the SPCC Plan are found at 40 C.F.R. § 112.3.

d. 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."

e. 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).

f. 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).

9. Many new statutory requirements created by the Oil Pollution Act of 1990 are not reflected in the EPA's current SPCC regulations.

a. The existing regulations will be modified, to impose additional SPCC-related obligations, as the EPA works through its regulatory agenda.


M. Penalties for Failure to Comply

1. 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).

2. 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.

3. 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).

   a. 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."

   b. The penalty is assessed against any person "who is the owner, operator, or person in charge" of the facility.

   c. The major difference between this penalty procedure and the administrative penalties discussed in the previous section, is the requirement that civil penalties under § 311 (b)(7) must be sought through a court action.

4. 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").

   a. 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).

N. Cleanup Liability

1. The "owner, operator, or person in charge" of the facility can be ordered to clean up the discharge. CWA § 311(b)(7)
2. 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. § 1321(c)(1).

3. 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 . . . ." CWA § 311(f)(2), 33 U.S.C. § 1321(f)(2).

4. Section 311 caps the owner or operator's cleanup liability for a single discharge from an onshore facility at $50,000,000.
   a. 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. § 1321(f)(2).
   b. The cap only applies to cleanup costs sought by the federal government under Section 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).
   c. The most notable law that can impose additional liability is the Oil Pollution Act of 1990.
IV. OIL POLLUTION ACT OF 1990

A. The OPA/CERCLA Interface


2. This is commonly called the "petroleum exclusion" and has been interpreted to apply to "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).

3. 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.

4. The OPA/CERCLA connection is created by OPA § 1001 (23) which defines "oil" to include:

"[O]il of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include petroleum, including crude oil or any fraction thereof, which is specifically listed or designated as a hazardous substance under . . . [CERCLA]." OPA § 1001(23), 33 U.S.C. § 2701(23).

5. The scope of the CERCLA petroleum exclusion also defines the scope of the OPA.
a. If it is covered by CERCLA, by definition it is not covered by the OPA.

b. If it is not covered by CERCLA, and it meets the definition of "oil," it will be covered by the OPA.

B. Liability Under the OPA

1. Section 311 of the Clean Water Act addresses the government's cleanup concerns with regard to oil spills.

2. The OPA addresses who is ultimately liable for cleanup costs and damage caused by a spill.

3. Section 1002(a) of the OPA states:

"[E]ach responsible party for a vessel or a facility from which oil is discharged, or which poses a substantial threat of a discharge of oil, into or upon the navigable waters . . . is liable for the removal costs and damages specified in subsection (b) that result from such incident. OPA § 1002(a), 33 U.S.C. § 2702(a).

4. The "responsible party" for an onshore facility includes "any person owning or operating the facility" except for a governmental body that merely owns the facility and leases it to another person. OPA § 1001(32)(B), 33 U.S.C. § 2701(32)(B).

5. The term "discharge" includes "intentional or unintentional" emissions including "spilling, leaking, pumping, pouring, emitting, emptying, or dumping." OPA § 1001(7), 33 U.S.C. § 2701(7).

6. The OPA could apply to underground storage tanks which are "leaking." However, the discharge of oil must be into or upon the "navigable waters or
adjoining shorelines or the exclusive economic zone." OPA § 1002(a), 33 U.S.C. § 2702(a).

C. Navigable Waters

1. "Navigable waters" is defined as "the waters of the United States, including the territorial sea." OPA § 1001(21), 33 U.S.C. § 2701(21).

2. 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.

3. However, 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 D. Pierce, The Emerging Role of "Liability-Forcing" in Environmental Protection, 30 Washburn L. J. 381, 414-16 (1991).

4. Section 1002(b)(1)(B) permits "any person" to recover their removal costs and section 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. § 2702(b).

5. 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."

6. It is not clear whether any remediation work needs to be conducted in order to claim damages.

a. OPA § 1002 (a) provides "each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of
oil, into or upon the navigable waters . . . is liable for the removal costs and damages . . . ."

b. This means that the OPA may provide a landowner or lessor with a statutory right to recover for "[d]amages for injury to . . . real or personal property" because, for example, of the mere existence of an unplugged well which devalues their property [a "threat" of a discharge of oil into waters of the United States].

D. "Incidents" After August 18, 1990


2. 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. § 2717(e).

3. "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. § 2701 (14).

a. This limits the OPA to incidents that occur after August 18, 1990.

b. However, this should not limit action when the problem creating the threat of a discharge continues after the August 18, 1990 effective date.
c. This analysis could be applied to leaking underground storage tanks.

(1) 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.

(2) Also, with the leaking underground storage tanks there is a present "threat" of continuing discharges that can give rise to OPA cleanup actions.

E. Causation Requirement

1. 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. § 2702(a).

2. This seems to impose a causation requirement for removal costs and damages.

3. Therefore, a party claiming removal costs will have the burden of proof that such costs were in response to the discharge or threat.

4. A party claiming damages will have the burden of proof that they resulted from the discharge or threat.

5. 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.
F. Defenses

1. The OPA specifically defines the limited situations in which a discharge will not give rise to liability.

2. OPA § 1002(c) excludes discharges "permitted by a permit issued under Federal, State or local law" or discharges from a "public vessel" or an onshore facility subject to the Trans-Alaska Pipeline Authorization Act. OPA § 1002(c), 33 U.S.C. § 2702(c).

3. 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 or war, or an act or omission of an unrelated third party. OPA § 1003(a), 33 U.S.C. § 2703.

4. 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. § 2709.

5. Section 1017(f) of the OPA requires that actions to collect damages be brought within 3 years after "the date on which the loss and the connection of the loss with the discharge" are reasonably discoverable. OPA § 1017(f)(1)(A), 33 U.S.C. § 2717(f)(1)(A).

6. Actions to recover removal costs must be commenced within 3 years after completion of the removal action. § 1017(f)(2).

7. The OPA relies upon the National Contingency Plan to guide cleanup activities and establishes the procedures private parties must follow to recoup their cleanup costs. OPA § 1002(b)(1)(B), 33 U.S.C. § 2702(b)(1)(B).

8. The statute also creates a "superfund" for oil, called the "Oil Spill Liability Trust Fund." OPA § 1001(11), 33 U.S.C. § 2701(11).
V. LIABILITY ASSOCIATED WITH OWNING INTERESTS IN OIL AND GAS PROPERTIES

A. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)


2. Imposes liability on certain groups to "fix" an environmental problem.

3. Liability based upon party's "status" instead of fault, contribution, or causation.

4. The requisite "status" that can trigger CERCLA liability:

   a. Current "owners" of the place where hazardous substances are found (the "facility").

   b. Current "operators" of the place where hazardous substances are found.

   c. Owners and operators of the facility at any time when hazardous substances were disposed of at the facility.

   d. Persons who created (generated) a hazardous substance found at the facility.

   e. Persons who arranged for the disposal of a hazardous substance found at the facility.

   f. Persons who transported a hazardous substance and selected the facility as the disposal site.

   g. Persons who are not current owners, nor owners at the time of disposal, but an intermediate owner who obtained knowledge of prior disposal activities and failed to disclose it to a subsequent purchaser of the property. See CERCLA § 101(35)(C),
5. The CERCLA game is simple:

a. Try to avoid attaining the requisite status.

b. If you can't avoid the status, try to define the risk involved before attaining the status.

   (1) Define problems so the risk can be evaluated.

   (2) Remedy known problems before assuming the status.

c. Leverage the risk through contractual agreements with third parties.


a. However, the CERCLA petroleum exclusion does not offer any protection when the substance is used oil, contaminated petroleum ("mixed" with hazardous substances), or materials merely associated with oil and gas development.

b. The CERCLA-excluded petroleum may be subject to the Oil Pollution Act, 33 U.S.C.A. §§ 2701 to 2761 (West Supp. 1992).

c. The CERCLA-excluded petroleum may be subject to the Solid Waste Disposal Act (Resource Conservation and


B. Oil Pollution Act (OPA)

1. Imposes liability on the owner or operator of a facility from which there is a discharge, or substantial threat of a discharge, of "oil" into "waters of the United States." OPA § 1002(a), 33 U.S.C.A. § 2702(a) (West Supp. 1992).


a. NOTE: Reporting, cleanup, and penalty obligations can be imposed upon owners or operators of a facility under § 311 of the Clean Water Act (CWA) without regard to when the "incident" occurred. CWA § 311, 33 U.S.C.A. § 1321 (West Supp. 1992).

b. See generally Quaker State Corp. v. U.S. Coast Guard, 681 F. Supp. 280 (W.D. Pa. 1988) (surface owner held to be "owner" under the Clean Water Act and therefore responsible for cleanup of an oil containment pit).

3. If the incident occurs after August 18, 1990, and the requisite nexus with "waters of the United States" can be established, the actual, or threatened, discharge of oil will require the facility owner or operator to clean up the affected area and pay a broad range of damages provided by the Act.

1. Although the petroleum substance may be excluded from CERCLA, it may trigger hazardous waste regulation requirements under RCRA.

2. Courts have generally held that each of the environmental statutes, particularly CERCLA and RCRA, operate independently of one another.
   a. Exclusion under CERCLA does not necessarily exclude regulation of the waste under RCRA.
   b. Exemption under RCRA does not necessarily exempt the substance from CERCLA.

3. The waste, in any event, does not need to be classified as "hazardous" to be regulated under RCRA.
   a. RCRA's "imminent hazard" authority gives the Administrator of the EPA, and third parties, the ability to bring suit against any "past or present" generator or transporter, or any "past or present" owner or operator of a facility, who has contributed to disposal or handling of any "solid waste or hazardous waste," which "may present an imminent and substantial endangerment to health or the environment . . . ." RCRA §§ 7002(a) & 7003(a), 42 U.S.C. §§ 6972(a) & 6973(a) (1988).

VI. OWNERSHIP & OPERATION IN THE OIL AND GAS CONTEXT

A. The Niceties of Oil and Gas Law

1. When defining a party's "status" under CERCLA, OPA, CWA, and RCRA, will the courts honor the same distinctions that are recognized by traditional state oil and gas law concepts?
a. Will a nonexecutive mineral interest "owner" be treated differently from someone who owns the minerals in fee?

b. Will a nonparticipating royalty interest "owner" be an "owner" under CERCLA, OPA, CWA, or RCRA?

2. Members of the oil and gas bar may have to adjust to new policy-driven federal concepts of property, contract, and corporate law designed to promote environmental goals.

3. In the oil and gas context the term "owner" can include several classes of parties.
   a. Surface owners.
   b. Mineral owners.
   c. Lessees.
   d. Assignees.
   e. Interest owners in pooled or unitized areas.

4. In the oil and gas context the term "operator" can include several classes of parties.
   a. Operator designated under operating agreement.
   b. Nonoperators who conduct operations through their contractor--the operator.
   c. Drilling contractor and other contractors who exercise control over operations at various stages of development.

5. In the oil and gas context the "generator" or "arranger" of wastes that are disposed at a facility can include several classes of parties.
a. Operator.

b. Nonoperators.

c. Drilling and other contractors.

d. Mineral interest owner/lessor (is the lessee merely their contractor for development?).

B. The CERCLA "Owner"

1. CERCLA defines "owner or operator" to mean, in the case of a facility, "any person owning or operating such facility." CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A) (1988).

   a. Congress intended to give the terms their "ordinary" meaning. Edward Hines Lumber Co. v. Vulcan Chemicals Co., 861 F.2d 155, 156 (7th Cir. 1988).


2. In most situations, particularly in the oil and gas context, there will be the potential for multiple CERCLA "owners."

   a. Not limited to owner of the fee simple absolute.

   b. Any person holding one of the "sticks" in the "bundle" could attain the status of CERCLA owner.

   c. At a minimum, the "stick" will probably have to give the holder some interest in, or right of control over, the facility at issue.

(1) The right need not be exclusive.
(2) Need not entail control over the disposal activity.

VII. MINERAL INTEREST CONVEYANCES

A. Surface Owner Liability

1. A owns § 30 in fee simple absolute and conveys the "oil, gas, and other minerals in and under Section 30" to B.
   a. After the conveyance, A owns all the minerals in § 30 except those conveyed to B.
   b. B owns the oil and gas, and certain other minerals.
   c. B also has the right to make reasonable use of the surface of § 30 to explore, develop, and produce the granted minerals.

2. Following this conveyance, A, the surface and residual mineral owner, has the right to control and use all of § 30—subject only to B's right to make reasonable use of the surface and other formations to access and develop the mineral interest conveyed to B.

3. In the process of making "reasonable use" of the surface, B, or B's lessee, will bring substances onto § 30 that constitute CERCLA hazardous substances.
   a. If these substances are not properly managed, they may give rise to a "release" or "threat of a release" which can trigger CERCLA liability.
   b. Even though the substances are lawfully managed under RCRA, they may nevertheless give rise to CERCLA or other liabilities.

(1) For example, on-site disposal of "exempt" RCRA wastes
associated with exploration and production activities can nevertheless give rise to CERCLA liabilities.

(2) Disposal of petroleum substances on site may nevertheless give rise to liabilities under the OPA, CWA, or RCRA.

4. Query: Under existing conveyances would it be "reasonable use" to dispose of RCRA-exempt hazardous substances on the leased or granted premises when such activity could ultimately give rise to CERCLA liabilities?

5. If the mineral interest owner, or their lessee or other contractors, bring onto or create hazardous substances that are left on § 30, A, the surface owner, is an "owner" under the environmental laws that can be ordered to address a release or threatened release that may be occurring or that may occur in the future.

6. For future conveyances, the surface owner will want to do one of two things to deal with their potential CERCLA, RCRA, OPA, and CWA liability:

a. Eliminate the problem altogether by conveying the surface and any residual mineral interest before any development activities occur on the property.

b. Retain the surface interest and any residual mineral interest but try to leverage the risk by doing the following:

(1) Place restrictions on what can be done on the property.

(2) Have the grantee assume all liability associated with the environmental condition (now or in the future) of the property.
(3) Obtain adequate indemnity from the grantee.

7. See one possible drafting approach at Appendix A to this Outline.

B. Mineral Owner Liability

1. B owns the "oil, gas, and other minerals in and under Section 30."

2. As the mineral owner B has an easement to use so much of the surface of § 30 (and any minerals retained by A) to develop the oil, gas, and other minerals granted to B.

3. B therefore has an ownership interest in the entire areal limits of § 30 that gives B the right to control and use the area—when reasonably necessary to develop the granted minerals.

   a. B will be an "owner" of areas it (or its contractor/lessee) actually uses to conduct development.

   b. Query: Whether B's mere right to use the surface anywhere within § 30 will give rise to environmental "owner" status for areas B (or its contractor/lessee) never actually uses—even though they were prior oil and gas development sites.

4. B must also be concerned with the actions of A and other interest owners on the area in which B has an implied or express easement to conduct development.

5. How can B protect its interests?

   a. Avoid taking associated surface easement rights in areas where there are known or potential environmental problems.

      (1) Obtain the exclusive right to the mineral underlying the surface.
(2) Expressly disclaim any right to use the problem surface area to develop the mineral.

b. For areas where surface easement rights are taken, police surface and other owner activities to ensure they do not increase B's environmental liabilities as the owner of the surface easement.

(1) Review activities of other owners.

(2) Consider whether such activities are an unreasonable interference with the mineral interest owner's "ownership" interest in the property.

C. Forced Pooling of the Fee Simple Estate

1. It is possible that under some pooling statutes (e.g., Oklahoma and Louisiana) a landowner may be forced to permit development on their property even though they have not conveyed or leased the mineral interest.


2. One possible option: request provisions in the pooling order to limit or leverage some of the environmental risks.

   a. Limitations on surface use and permissible practices.

   b. Indemnity.

   c. Adequate security (bonding).
VIII. NONPARTICIPATING INTERESTS

A. Nonparticipating Royalty Conveyances

1. A conveys to C "one sixteenth of all the oil and gas produced and saved from Section 30."

2. No risk to the grantor since the grantee will have no right to do anything on the property.

3. Risk to the grantee?
   a. Are they an "owner" of a "facility"?
      (1) Can argue they only have an ownership right in the produced oil and gas.
      (2) State law may, however, classify the royalty interest as a real property interest in the oil and gas in place. This tends to look more like an ownership interest in the property from which the oil and gas is produced instead of merely an interest in the production.
      (3) May want to draft the grant so that the grantee has merely a right to a sum of money instead of a quantity of oil and gas. *E.g.*, A grants to B "a royalty on oil and gas produced from Section 30 equal to one-sixteenth of the amount of money: received for the sale of oil or gas produced from Section 30, or the current market value of the oil or gas,
whichever is greater. Title to all oil and gas produced from Section 30 shall be in A."

b. Has the royalty owner "arranged for disposal" of wastes associated with development of the property?

(1) Although the royalty owner may not have the ability to develop the property, to the extent they have the power to compel others to develop, they may be deemed to have "arranged for disposal".

(2) This could make them liable for off-site disposal of development wastes.

B. Nonparticipating Mineral Interests

1. Nonexecutive mineral interest analysis similar to nonparticipating royalty conveyance analysis.

2. Note that the right of a nonexecutive mineral interest owner to compel development is better developed than in the royalty area.


   b. The ability to compel development may give rise to "ownership" or "operator" liability.

   c. However, usually any obligation is merely to *lease* not necessarily to *develop*.

      (1) However, where there is active competition for the lease, it may be improper for the executive rights owner to agree to a deal that does not *require* immediate development by the lessee.
(2) If the lease requires the lessee to develop, it looks more like the lessee is merely functioning as a "contractor" for the mineral interest owner.

IX. OIL AND GAS LEASES

A. Lessor Concerns

1. Lessor's concerns similar to those of a fee simple absolute owner conveying a mineral interest to a third party.

2. In addition to liability as an "owner" of the property where lease operations take place, lessor may also incur liability for their lessee's off-site disposal.
   a. Arranging for disposal through lessee as the lessor's contractor.
   b. Argue that if the lease does not require the lessee to develop the property (merely gives them the option to develop), then the lessee is not the lessor's contractor for development.

(1) They each own separate property interests.

(2) The relationship is more like a conveyance instead of a development contract: Lessee holds its independent estate or license which the lessor is, to a large extent, powerless to direct.

B. Lessee Concerns

1. Lessee's concerns similar to those of a mineral interest owner.

2. Lessee will most likely be deemed a
CERCLA "owner" of the leased area.

a. Fee simple determinable vs. license.

b. Right to control vs. actual exercise of control?

3. Will the lessee (and mineral interest owner) be liable as an owner or operator for any environmental problem concerning the leased land—even though it is unrelated to the lessee's actual development of the land?

a. Prior oil and gas development sites.

b. Sites unrelated to oil and gas development.


a. Authority to control analysis.

b. "[T]he tenant defendants need not have exercised actual control in order to qualify as operators under • • • [CERCLA] so long as the authority to control the facility was present." Nurad, 966 F.2d at 842.

c. The "facility" in Nurad consisted of various underground storage tanks. Although all the fee owners were deemed "owners" of the tanks, their various tenants of the property overlying the tanks were not "owners" or "operators" because the court found their leases did not give them any right to control the tanks and they had not exercised any control over the tanks.

C. Lessee Strategy

1. Limit ownership and operating control over pre-existing contaminated or questionable surface locations.
2. Define in the lease (or assignment) more precisely the surface and subsurface rights that are being acquired.
   a. Goal is to leave the "right to control" the bad with the mineral interest owner or assignor.
   b. Take the "clean" assets; leave the "dirty" assets with the grantor.

3. The exclusive right to remove oil and gas does not require the right to use the entire surface area of the leased land.

4. See Appendix B for sample lease language designed to try and provide the lessee with the rights it needs while placing it in the most defensible position if a CERCLA issue arises.

D. Lessor Strategy

1. Restrict lessee activities that can give rise to liabilities on the leased land.

2. Granting Clause -- similar to surface owner protections noted previously and in Appendix A.

3. Royalty Clause -- avoid the right to take production in kind. Tends to look like the lessee is functioning as the lessor's development contractor.

4. Assignment Clause -- ensure the lessee remains liable for environmental problems even after the property passes from their ownership and control.

5. Indemnity -- obtain contractual indemnity from the lessee to try and leverage the loss and liability associated with environmental problems.
   a. Select a reputable lessee.
   b. Select a financially-sound lessee.
c. Keep the selected lessee on-the-hook for environmental liabilities.

6. See Appendix C for sample lease language designed to try and deal with the lessor's potential environmental risks.
APPENDIX A

Conveyances of Oil & Gas Interests
Environmental Check List

THE BASIC TASK:

When creating new rights in property, each party should consider how their environmental ownership risks can be magnified by the rights being granted or retained by the other party.

Matters that should be addressed in the mineral deed include:

[] 1. Restrict or limit the use of surface and subsurface water found on the property.

[] 2. Limit or prohibit development activities on the property that are likely to create environmental liabilities.
   
   (a) Restrict or prohibit the use of pits to support drilling, reworking, or production operations.
   
   (b) Require prompt cleanup and reclamation of all drill sites.
   
   (c) Restrict or prohibit the placement of oil storage tanks on the property.
   
   (d) Restrict or prohibit the placement of other production-related equipment on the property such as separators, heater-treaters, dehydrators, compressors, processing equipment, and similar equipment not required to bring production to the surface.
   
   (e) Restrict or prohibit the placement of any injection or disposal well on the property.
   
   (f) Prohibit the placement, disposal, or discharge of any waste material on the property, or on adjacent lands that may impact the property.
   
   (g) Prohibit the storage of pipe, chemicals,
equipment, or other material on the property that is not for immediate use.

(h) Remove all development structures and equipment and clean up and reclaim any production site within sixty days following the cessation of production operations associated with the site.

(i) Consider rigorous specifications for any flow lines, gathering lines, and other pipeline facilities associated with a well.

3. Manage risks associated with development activities that take place on the property.

(a) Require mineral grantee to assume all liability associated with any exploration, development, or production operations on the property.

(b) Require mineral grantee to indemnify grantor against any liability or loss the grantor may suffer due to any exploration, development, or production operations on the property.

(c) Prior to any exploration or development activity, require that a bond be posted, by the mineral grantee or their lessee, for a specified amount that is adequate to secure the proper plugging of wells and the cleanup and reclamation of exploration, development, and production operation sites on the property.

(d) Make any assumption of liability, and the obligation to indemnify, binding upon all of the mineral grantee's successors and assigns of any interest in the mineral estate--to include an oil and gas lessee.

(e) Avoid using defeasible term mineral interests which result in an automatic reversion of the interest to the grantor; if there is a desire to terminate the interest upon the occurrence of a certain condition, consider using a fee simple subject to a condition subsequent with a power of termination.

4. Manage risks associated with previous development activities on the property.

Appendix A - 2
(a) Require mineral grantee, upon accepting their grant, to assume all liability associated with any past exploration, development, or production operations on the property.

(b) Evaluate the environmental status of the property at the time the mineral interest is conveyed to identify a baseline for defining future contributions to environmental liabilities.
Applying the Check List to the Drafting Process

To properly articulate these concerns, and incorporate them into the conveyance document, the attorney will need to select the appropriate mix of conditions, covenants, allocations of liability, and indemnities.

For example, assume Doc Hillard is the owner of the property in fee simple absolute and he desires to convey the oil, gas, and similar hydrocarbon substances to Acme Oil Company. However, if Acme fails to comply with various financing requirements specified in the deed, Doc wants the mineral interest to revert back to Doc. Doc is advised that he does not want an automatic reversion but instead an option to terminate the interest. This will give Doc an opportunity to evaluate whether it would be better to maintain Acme's ownership status instead of terminating Acme's interest. Doc is also advised to include various covenants in the deed that restrict what Acme can do on the property being conveyed. The conveyance should also include a clear statement allocating environmental risks and provide for indemnity.

The general structure of the deed might look as follows:
MINERAL DEED
(the "conveyance")

Doc Hillard, a single person ("Doc"), for valuable consideration and subject to the terms and conditions contained in this Mineral Deed, grants and conveys to Acme Oil Company ("Acme"):

All the oil, gas, and similar hydrocarbon substances (excluding any gas and similar hydrocarbon substances produced from coal seams) in and under Section 30, Township 36 South, Range 10 East, in Eureka County, Texas (the "Conveyed Property"),

but on condition that Acme will pay to Doc, on or before the 10th day of January of each year, the sum of $5,000. In the event Acme fails to comply with this condition, Doc is given the power, at Doc's option, to re-enter the Conveyed Property and terminate Acme's estate. Doc's power of termination can be exercised by providing Acme with written notice stating the required payment was not made pursuant to the condition and that Acme's interest has terminated.2

For purposes of this conveyance, the phrase "area encompassed by the Conveyed Property" includes the surface and subsurface areas encompassed by the legal description defining the surface boundaries of the Conveyed Property.

This conveyance is made subject to the following terms:

1. NO WARRANTY. Doc is conveying only such right or title Doc may have in the Conveyed Property. Doc makes this conveyance without any warranty, express, implied, or statutory; Acme accepts the Conveyed Property AS IS, WITH ALLFAULTS.

2 This clause is included to demonstrate how a fee simple subject to a condition subsequent can be used instead of a fee simple determinable. For a helpful guide to drafting a fee simple subject to condition subsequent, see Restatement of Property § 44 (1936).
2. EXCEPTIONS TO THE GRANT. There is excepted from this conveyance, and reserved to Doc, the following property interests:

a. Doc's Surface Use--General. The right to construct any structure or improvement, at any location selected by Doc, anywhere on or in the area encompassed by the Conveyed Property. The rights granted by this conveyance will not restrict in any manner Doc's ability to use the surface of the Conveyed Property. Any activities by Acme must accommodate fully Doc's use of the area encompassed by the Conveyed Property, even though such uses are not commenced until some future date after the effective date of this conveyance.

b. Doc's Surface Use--Agriculture. The right to raise livestock and to initiate or continue irrigation and other agricultural activities on the area encompassed by the Conveyed Property. If Doc is currently using, or elects in the future to use, all or any part of the area encompassed by the Conveyed Property to raise livestock, Acme will construct the necessary fence gates and cattle guards, and fence all drill sites and other drilling or production facilities on the Conveyed Property, and otherwise adjust its operations to accommodate Doc's use of the Conveyed Property for raising livestock. If Doc decides to conduct agricultural activities on the area encompassed by the Conveyed Property, to include irrigation and recognized soil conservation practices, Acme will adjust its operations to accommodate Doc's agricultural use of the Conveyed Property.

c. Surface and Subsurface Use--Mining. The right to use the surface and subsurface rights associated with the Conveyed Property as may be reasonably necessary to explore for, extract, and market minerals (other than minerals conveyed to Acme by this conveyance) from the area encompassed by the Conveyed Property.

d. Water. The right to all water found on or in

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3Since the mineral conveyance creates an implied right to make reasonable use of the surface for mineral development, the grantor should consider excepting from the conveyance those surface rights which they may want to retain. This would include any activity by the grantor that may interfere with the grantee's implied easement rights.
the area encompassed by the Conveyed Property except for Produced Water. "Produced Water" means any water that is necessarily produced in conjunction with the prudent production of minerals conveyed to Acme by this conveyance. Title to Produced Water will be in Acme when removed from the oil or gas producing strata.

[additional exceptions to the grant]

3. RESTRICTIVE COVENANTS. Acme promises to comply with the following restrictions concerning the Conveyed Property, which shall be deemed covenants that run with the Conveyed Property:

a. Pits. No pits, ponds, or other surface impoundments will be used in developing or operating the Conveyed Property.

b. Production-Related Equipment and Storage Tanks. No above ground or underground storage tanks will be placed on the area encompassed by the Conveyed Property. No equipment designed to separate, treat, dehydrate, compress, or process the Conveyed Property will be placed on the area encompassed by the Conveyed Property.

Prohibiting the use of pits may be objectionable to the grantee. In such cases, the attorney may try to specify pit construction and lining parameters, or simply require compliance with the strictest level of protection required by state law. For example: "Any pits, ponds, or other surface impoundments used in connection with the development or operation of the Conveyed Property shall comply with all applicable local, state, and federal standards and in any case shall meet or exceed the standards for such structures located within a wellhead protection area as defined by the federal Safe Drinking Water Act or any state law counterpart."

If this is objected to by the grantee, the next step would be to identify the activities that are essential for location on site and then specify how those activities will be managed to minimize environmental concerns. There may also be new environmental risks created by a restriction. For example, if the grantee cannot locate oil storage tanks and treatment equipment near the well, they will have to transport production, by pipeline, off-site for treatment and storage. The pipeline would then

Appendix A - 7
c. Injection and Waste Disposal. No injection or disposal well will be placed on the area encompassed by the Conveyed Property. No solid, liquid, or gaseous waste will be stored or disposed of on the area encompassed by the Conveyed Property.

d. Hazardous Substances. No substance, defined as a "hazardous substance" (now or in the future) under the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), the Texas statutory counterpart to CERCLA, and any amendments or substitutions for CERCLA and its Texas counterpart, will be brought onto the area encompassed by the Conveyed Property.

e. Storage of Equipment or Material. No pipe, chemicals, or other material or equipment will be placed on the area encompassed by the Conveyed Property except items that are on-site for immediate use in operations. Equipment or material placed on site for longer than five consecutive days will be deemed not to be for immediate use in operations.

f. Restore Development and Production Areas. Within five days after a development or production operation is completed, all the associated development structures, equipment, and any other material brought to or generated at the site will be removed from the site. If any topsoil has been disturbed by the operation, the area will be graded to its original contour, and the topsoil replaced, properly seeded, fertilized, and maintained until the original cover in the affected area is reestablished.

g. Set-Back Requirements. No equipment, material, or operation site will be located within 300 feet of any house, garage, barn, stream, creek, pond, lake, or other structure, improvement, or water source located on the area encompassed by the Conveyed Property.

[additional covenants]

present a risk that may require attention in the conveyance.

6This may be unworkable since many commercial products that are brought to the drill site are "hazardous".

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Acme acknowledges that Doc may, in addition to damages and any other remedy at law or equity, obtain injunctive relief to enforce the covenants specified in this conveyance.

4. ACME'S ASSUMPTION OF LIABILITY. Acme assumes the following liabilities associated with the Conveyed Property:

a. Condition of the Area Encompassed by the Conveyed Property. Acme acknowledges that it is purchasing the Conveyed Property without relying on any representations by Doc concerning the condition, environmental or otherwise, of the Conveyed Property or the area encompassed by the Conveyed Property. Instead, Acme is relying solely upon its independent investigation to determine the status of the Conveyed Property and the area encompassed by the Conveyed Property. As partial consideration for this conveyance, Acme agrees to assume all liabilities it may incur as an owner or operator of the Conveyed Property and the area encompassed by the Conveyed Property, including any environmental cleanup obligations that may be imposed under any local, state, or federal law, including the common law. Acme further agrees to hold Doc harmless from any claim Acme may have or acquire, in contribution or otherwise, associated with the condition of the property or Acme's liability as an owner or operator. This includes, without limitation, any claim or cause of action Acme may have at common law or under any local, state, or federal statute such as CERCLA or a state or local counterpart.

b. Activities on the Area Encompassed by the Conveyed Property. Acme agrees to assume all liabilities associated with any activity conducted on the Conveyed Property or the area encompassed by the Conveyed Property, by Acme, its lessees, contractors, and any other person or entity exercising or purporting to exercise rights through Acme or on Acme's behalf. In addition to such liabilities, Acme will be strictly liable for any damage to: cultivated land, growing crops, pasture land, unimproved land, livestock, fences, roads, ditches, culverts, trees, turf, terraces, springs, water wells, groundwater, personal property, fixtures, and improvements located now or in the future on the area encompassed by the Conveyed Property.
5. ACME'S INDEMNITY OF DOC. Acme will protect, indemnify, hold harmless, and defend Doc against any claim, demand, cost, liability, loss, or damage suffered by Doc, including Doc's reasonable attorney fees and litigation costs, associated with or arising out of one or more of the following events:

a. Breach of Covenant. A breach of any restrictive covenant contained in paragraph numbered 3 of this conveyance.

b. Recognize Limits on the Interest Conveyed. A failure to recognize Doc's right of re-entry or any other right excepted by Doc in paragraph numbered 2 of this conveyance.

c. Assumption of Liability. Any matter encompassed by Acme's assumption of liabilities, including environmental liabilities, under paragraphs numbered 1 and 4 of this conveyance.

d. Specific Operations.

(1) Any activity expressly or impliedly authorized or required by this conveyance.

(2) Plugging and abandonment of producing wells, nonproducing wells, existing wellbores, or previously plugged wellbores.

(3) Management, use, and disposal of produced water and wastes or substances associated with the development or operation of the Conveyed Property.

(4) The generation, processing, handling, transportation, storage, treatment, recycling, marketing, use, disposal, release or discharge, or threatened release or discharge, of oil, natural gas, natural gas liquids, all other petroleum substances, any waste material, or any "hazardous substance" or "pollutant or contaminant" as those terms are defined (now or in the future) under the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), the Texas statutory counterpart to CERCLA, and any amendments or substitutions for CERCLA and its
Texas counterpart.

e. Other Matters. Any matter relating to Acme's ownership, use, or occupancy of the Conveyed Property or the area encompassed by the Conveyed Property.

[additional indemnities]

Although Acme may fail to meet the conditions to this conveyance, Acme's obligations to indemnify, hold harmless, and defend, as specified in this paragraph numbered 5, are continuing obligations which will be enforceable by Doc even after Doc exercises the right to re-enter and terminate Acme's estate.

6. BINDING EFFECT. This conveyance, and all its terms and conditions, are binding upon the heirs, personal representatives, successors, and assigns of Doc and Acme.

SIGNED AND DELIVERED _____ March 1993.

Doc Hillard
123 Mineral Lane
Oiltown, Texas 75275

SIGNED AND ACCEPTED _____ March 1993.

Acme Oil Company

by: Martha Rhodes, President
Acme Oil Company
456 Gusher Street
Oiltown, Texas 75275

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ACKNOWLEDGMENTS

_____________ County, Texas

This MINERAL DEED was acknowledged before me on March 1993 by Doc Hillard.

___________________________________________
Notary Public
My Commission
Expires:_______

_____________ County, Texas

This MINERAL DEED was acknowledged before me on March 1993 by Martha Rhodes as President of Acme Oil Company, a Texas corporation.

___________________________________________
Notary Public
My Commission
Expires:_______

Although the foregoing deed is drafted to maximize the grantor's position, the grantee must also be alert to its environmental risks. For example, if there are environmental problems on the surface of the property at the time of the conveyance, the mineral grantee may become liable since it owns an easement authorizing it to use the surface to conduct mineral operations. The grantee must therefore scrutinize the transaction, and negotiate for appropriate deed language, to minimize environmental risks associated with becoming an "owner" and "operator" of the property.

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One major oil company attempts to include the following paragraph in its deeds when granting a mineral interest or other real property interest:

[Grantors disclaim all representations and warranties, whether express, implied, or statutory concerning the property described herein. Grantee acknowledges and agrees that the property described herein is conveyed, and accepted by Grantee, in an 'as is' condition with all faults. Grantee has investigated and has knowledge of operative and proposed governmental laws and regulations (including, but not limited to, zoning, environmental, and land use laws and regulations) to which the Property is or may be subject and accepts the Property upon the basis of its review and determination of the applicability and effect of such laws and regulations. Grantee acknowledges that it is accepting this conveyance on the basis of Grantee's own investigation of the physical and environmental conditions of the Property, including its subsurface conditions. Grantee assumes the risk that adverse physical and environmental conditions may not have been revealed by its own investigation and agrees to indemnify and hold Grantors harmless against any claims, actions, causes of actions, demands, rights, costs, expenses or compensation whatsoever, direct or indirect, known or unknown, foreseen or unforeseen, arising out of the current or prior physical and environmental condition of the Property. Grantee further acknowledges that Grantors, their agents and employees and other persons acting on behalf of Grantors have made no representation or warranty of any kind in connection with any matter relating to the condition, value, fitness, use or zoning of the Property upon which Grantee has relied directly or indirectly for any purpose. Grantee hereby waives and releases Grantors, of and from any claims, actions, causes of actions, demands, rights, damages, costs, expenses or compensation whatsoever, direct or indirect, known or unknown, foreseen or unforeseen, which Grantee now has or which may arise in the future on account of or in any way growing out of or connected with the physical or environmental condition of the Property or any law or regulation applicable to it, including but not limited to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9601 et seq.]

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APPENDIX B

Consider the following "New Age" lease granting clause:

OIL & GAS LEASE
("Lease")

Doc Hillard and Maude Hillard, husband and wife ("LESSOR") and New Age Oil Company ("NEW AGE"), for valuable consideration, agree to the following:

LESSOR leases and conveys to NEW AGE, subject to the terms of this Lease, the rights described in SECTION 1.

SECTION 1. SCOPE OF GRANT

A. The "Leased Land".

For purposes of this Lease, the land described by SECTION 1.A.1. and A.2 will be collectively referred to as the "Leased Land."

1. Surface Boundaries of Leased Land. The surface boundaries of the Leased Land are described in EXHIBIT A attached to this Lease.

2. Depth Limitations on Leased Land. There are no depth limitations. This lease covers all depths within the surface boundaries of the Leased Land.

B. Granted Substances in the Leased Land.

Substances in the Leased Land which are subject to the terms of this Lease include: Oil, gas, and similar hydrocarbon substances. For purposes of this Lease, the listed substances will be referred to as the "Leased Substances." The term "Leased Substance" is used to identify any one of the listed substances.

C. Purpose of the Grant.

NEW AGE is given the exclusive right to explore for, extract, and market Leased Substances from the Leased Land, pursuant to the terms of this Lease.

Appendix B - 1
D. Surface Rights and Limitations.

1. LESSEE's Surface and Subsurface Rights.
Subject to the terms of this SECTION, NEW AGE is given the right to use so much of the surface and subsurface of the Leased Land as is consistent with the purposes stated in Subsection C. From the Effective Date of this Lease until it is terminated, LESSOR will not construct any structure or improvement, or pursue, permit, or authorize any activity on the Leased Land that restricts, impairs, or diminishes in any manner NEW AGE's ability to use the surface or subsurface as provided for in this Lease. For purposes of this subsection, any activity which may increase NEW AGE's potential environmental liability concerning NEW AGE's surface and subsurface rights will be deemed an impermissible act that "restricts, impairs, or diminishes" NEW AGE's ability to use the surface or subsurface as contemplated by this subsection.

2. LESSEE's Surface Limitations.

a. Existing Well Bores, Drilling and Operating Pits, and Other Development Facilities. NEW AGE shall have no right, title, ownership interest, operational control, or authority whatsoever over any well, well bore, drill site, pit, aboveground or underground storage tank, or other oilfield structure or facility that is located on or in the Leased Land as of the Effective Date of this Lease.

b. Defined Surface Right Area. NEW AGE's authority to exercise surface rights provided for in Subsection D.1. extends only to those areas in which NEW AGE declares a Surface Site pursuant to this subsection. In the event NEW AGE elects to exercise its rights under this Lease, it will notify LESSOR in writing of the proposed activity and define the surface area on the Leased Land it plans to use in conducting the activity. The surface area defined in the LESSOR notification will constitute the Surface Site for the proposed activity.

1Depending upon the circumstances, the lessee may want the option to use these areas or facilities by including them in a Surface Site designation provided for in subsection 2.b. However, to the extent the lessee has any option to control these areas it will make it easier for third parties to make a CERCLA owner/operator argument.
APPENDIX C

Limitation on Assignment and Surrender.
Regardless of the other provisions contained in this lease, LESSEE can assign or surrender all or any part of this Lease. However, as to the assigned or surrendered interest, Lessee will remain obligated for the proper performance of all express and implied Lease obligations. Lessee’s liability for the non-performance of lease obligations, including the obligation to indemnify Lessor, will be in addition to the liability of any assignee obtaining an interest through the Lessee or any assignee obtaining an interest through Lessee’s assignees.

Any person or entity obtaining an assignment of rights in the Lease: (1) Is deemed to have accepted liability for the non-performance of any express or implied Lease obligations, including the obligation to indemnify Lessor, accruing prior to the date of assignment; and (2) Is liable for the proper performance of express and implied lease obligations, including the obligation to indemnify Lessor, from and after the date of assignment. The liability of Lessee and all assignees transferred an interest in the Lease is joint and several. For purposes of this section the term "assign" means a written transfer of rights in the Lease, whether classified as an assignment or sublease.

1Pursuant to a broad environmental indemnity clause added to the oil and gas lease.
The foregoing assignment clause contemplates the lessor will negotiate a broad indemnity clause as part of the oil and gas lease. A rather simple indemnity clause might provide:

B. Indemnity by LESSEE.

LESSEE will protect, indemnify, hold harmless, and defend LESSOR against any claim, demand, cost, liability, loss, or damage suffered by LESSOR, including reasonable attorney fees and litigation costs, arising out of or associated in any way with the following activities conducted by LESSEE (or those having a contractual relationship with LESSEE) on or impacting the Leased Land:

1. Any activity expressly or impliedly authorized or required by this Lease.

2. Plugging and abandonment of producing wells, nonproducing wells, existing wellbores, or previously plugged wellbores.

3. Management, use, and disposal of produced water and wastes or substances associated with Lease activities.

4. The generation, processing, handling, transportation, storage, treatment, recycling, marketing, use, disposal, release, or threatened release, of oil, natural gas, natural gas liquids, all other petroleum substances, any waste material, or any "Hazardous Substance" or "Pollutant or Contaminant" as those terms are defined by the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) at CERCLA § 101 (14) and (33), 42 U.S.C. § 9601 (14) and (33) (1988).

5. Any failure by LESSEE to comply with an express or implied obligation created by this Lease.

LESSEE's indemnity also includes any environmental problem associated with oil and

Appendix C - 2
gas exploration, drilling, development, production, treating, storage, transportation, marketing, processing, abandonment, and related activities at any site existing on the Leased Land as of the Effective Date of this Lease.

LESSEE's obligations created by this SECTION are continuing obligations which will continue in effect, and be enforceable by LESSOR, even after the Lease terminates or otherwise ceases to burden the Leased Land.

In conjunction with the indemnity clause, the lessor should consider a general provision addressing the lessee's environmental responsibilities, such as: "Lessee agrees to conduct its operations in strict compliance with all federal, state, and local environmental, health, and safety laws." This would then become one of the express covenants of the oil and gas lease that upon breach would trigger the lessee's indemnity obligation under subsection B.5. of the indemnity clause.