RESTORATION OF OIL FIELD SITES

REMEDIATION REQUIREMENTS FOR MAJOR OIL AND GAS PRODUCING JURISDICTIONS

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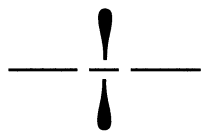
Chapter Seven
Oil Field Site Restoration in Kansas

David E. Pierce



What must be done in oil field site restoration?

The lease operator must plug all wells; remove all equipment, structures, and pits (surface ponds); and grade the soil to return the surface of the land to the same condition that existed before development. If the Kansas Corporation Commission finds that a "nuisance" condition exists on the property, or that materials left on-site pose a "health or environmental hazard" or "threatens to cause pollution of the land, air, or waters," the commission can issue a site-specific cleanup order.

What is the cleanup standard?

Wells must be plugged following well-specific plugging instructions; grading of the well site surface to its predevelopment condition must be done to the extent "practicable." Specific tasks for the closure of pits are detailed by regulation with the surface of the soil to be returned to its predevelopment condition to "the greatest extent possible." For cleanup orders issued by the Corporation Commission the cleanup standard will be established on a case-by-case basis as necessary to abate the "nuisance" or address the condition that presents the "health or environmental hazard" or "threatens to cause pollution."

Who must perform the restoration?

The lease operator is responsible for plugging, pit closure, and surface grading. For site-specific remediation required by the Corporation Commission, the owner of property where a "nuisance" exists can be ordered to remove it; in all other cases where materials left on-site pose an environmental problem, the person(s) "responsible" for either the materials, or their presence at the site, can be ordered to conduct the remediation.

Who must pay for the restoration?

The lease operator is responsible for paying plugging, pit closure, and site restoration costs. If the current operator is unable to pay for the plugging, the

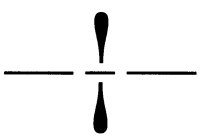
original and previous operators, and the operator of a waterflood or other pressure maintenance program contributing to pollution from the unplugged well, can be required to remedy the situation. The landowner or surface owner cannot be held responsible unless he or she operated or produced the well, deliberately altered or tampered with the well thereby causing the pollution, or agreed by contract to be responsible. Kansas has initiated a modest plugging bond requirement. Kansas maintains a state fund to plug wells when a responsible party cannot be found. For site-specific remediation required by the Corporation Commission, the person "responsible" for the condition is required to pay for the remediation.

When must the restoration be performed?

Spills must be remediated within ten days of spill notification. Fluids contained in an emergency pit or diked area must be removed within 48 hours after their discovery. Plugging must take place within ninety days after operations cease unless temporary abandonment status has been granted for the well. Working and reserve pits must be closed within 365 calendar days after the spud date of the well. All other pits must be closed "[u]pon permanent cessation of the flow of fluids or emplacement of solids" into the pit. Well site restoration must be completed within six months from the date the well is abandoned. For site-specific remediation required by the Corporation Commission, the relevant order will establish the remediation schedule.

What agencies have jurisdiction?

The Corporation Commission has exclusive jurisdiction over the "abandonment and postabandonment" of oil and gas wells and the "prevention and cleanup of pollution of the soils and waters of the state from oil and gas activities." County regulation that duplicates commission regulation is prohibited by statute.



Introduction

This chapter examines how the state of Kansas approaches environmental problems associated with the exploration and development of oil and gas. The problem areas discussed include surface disruption and surface restoration, unplugged and improperly plugged wells, and remediation of operating areas.

Allocation of Regulatory Authority

In 1995, all authority concerning the exploration and production of oil and gas, and the prevention and cleanup of pollution associated with oil and gas

activities, was consolidated in the Kansas Corporation Commission (KCC). The relevant statute provides that

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

Surface Disruption and Restoration

Kansas does not have a statutory regime governing the relationship between surface owners and oil and gas developers. To the extent that the parties have not expressly addressed the surface use issue in a mineral deed, oil and gas lease, or other agreement, the developer will be authorized to make "reasonable use" of the surface to develop the granted minerals.[2] Kansas appellate courts have not yet decided whether a developer, absent an express contractual provision, is obligated to pay for surface disruption when making reasonable use of the surface.[3]

Kansas Statutes Annotated § 55-177 requires the lease operator to remove, within six months of abandoning an oil or gas well

> [A]ny rig, derrick or other operating structure, and all abutments and other obstacles of every kind or size used in the operation of such oil or gas lease, from the land upon which the well was theretofore operated, and shall grade the surface of the soil in such manner as to leave the land, as nearly as practicable, in the same condition after the removal of such structures, equipment and obstacles as it was before such structures and abutments were placed thereon, unless the owner of the land and the abandoning party have entered into a contract providing otherwise.[4]

Section 55-171 gives the KCC authority to regulate the use of surface ponds associated with oil and gas activities.[5] The term "surface pond" is defined by the KCC to include "any constructed, excavated or naturally occurring depression upon the surface of the earth."[6] Surface pond is a generic term used

1. KAN. STAT. ANN. § 74-623(a) (Supp. 1997).
2. *See* Mai v. Youtsey, 646 P.2d 474 (Kan. 1982).
3. David K. Pierce, *Toward a Functional Mineral Jurisprudence for Kansas*, 27 WASHBURN L.J. 223, 240-44 (1988).
4. KAN. STAT. ANN. § 55-177(a) (1994).
5. KAN. STAT. ANN. § 55-171 (1994).
6. Kan. Admin. Reg. § 82-3-101(82) (1997).

to identify several different types of "pits" used in oil and gas development and production activities.[7] Pursuant to Section 82-3-602, the operator of any surface pond must conduct its closure in the proper manner. Closure can include removal and disposal of the pond's contents. Subsection (f) of Section 82-3-602 also provides that

> Upon abandonment of any surface pond, the operator shall grade the surface of the soil as soon as practicable or as required by the commission. To the greatest extent possible, the surface of the soil shall be returned to the same condition as existed prior to the construction of the surface pond.[8]

Well Plugging Obligations

Operators are required to provide the KCC with advance notice before plugging a well, and the KCC is authorized to conduct on-site inspections of any plugging operation.[9] If the owner of the surface where the well is located has filed a statement with the KCC requesting notification of the operator's application for abandonment, the KCC will mail a copy of the operator's abandonment notice to the surface owner.[10]

The operator has ninety days after operations cease on any well to either plug the well or file an application for temporary abandonment.[11] If the KCC approves the temporary abandonment application, the well can remain in that status for one year, at which time either the well must be plugged or a new application made for temporary abandonment. Temporary abandonment status can be denied if the well may cause pollution of fresh and usable water resources.[12]

Kansas Statutes Annotated § 55-178 gives the landowner, other interest owners, and the KCC the ability to focus the KCC's attention on an abandoned well that "is causing or is likely to cause the pollution of any usable water strata or supply or the loss of any usable water."[13] The KCC must investigate the complaint and, if warranted, order the well plugged by the "legally responsible" person. Kansas Statutes Annotated § 55-179 creates the following presumption: "[A]ny well which has been abandoned, in fact, and has not been plugged pursuant to the rules and regulation in effect at the time of plugging such well shall be and is hereby deemed likely to cause pollution of any usable water strata or supply."[14] Therefore, once an abandoned well is

7. Kan. Admin. Reg. § 82-3-101(8) (burn pit), (31) (emergency pit), (68) (reserve pit), (84) (treatment pit), (93) (workover pit) (1997).
8. Kan. Admin. Reg. § 82-3-602(f) (1997).
9. KAN. STAT. ANN. § 55-159 (1994).
10. KAN. STAT. ANN. § 55-173 (1994).
11. Kan. Admin. Reg. § 82-3-111(a) (1997).
12. Kan. Admin. Reg. § 82-3-111(b) and (c) (1997).
13. KAN. STAT. ANN. § 55-178 (1994).
14. KAN. STAT. ANN. § 55-179(d) (Supp. 1997).

found, the burden of proof concerning its pollution status shifts to the person or persons "legally responsible" for the well.

The legally responsible persons are defined by Kansas Statutes Annotated § 55-179 as follows:

> (b) [A] person who is legally responsible for the proper care and control of an abandoned well shall include, but is not limited to, one of more of the following: Any operator of a waterflood or other pressure maintenance program deemed to be causing pollution or loss of usable water; the current or last operator of the lease upon which such well is located, irrespective of whether such operator plugged or abandoned such well; the original operator who plugged or abandoned such well; and any person who without authorization tampers with or removes surface equipment or downhole equipment from an abandoned well.
>
> . . .
>
> (e) [T]he person legally responsible for the proper care and control of an abandoned well shall not include the landowner or surface owner unless the landowner or surface owner has operated or produced the well, has deliberately altered or tampered with such well thereby causing the pollution or has assumed by written contract such responsibility.[15]

In regard to a bonding requirement to secure an operator's obligation to plug and abandon wells properly, a new plugging bond system took effect January 1, 1998.[16] The new system imposes relatively modest bonding obligations on the industry and provides a number of options to comply with the requirement, including payment of a fifty-dollar annual fee when the operator "[h]as an acceptable record of compliance, as demonstrated during the preceding 36 months, with commission rules and regulations regarding safety and pollution...."[17]

Remediation of Operating Areas

Perhaps the greatest environmental risk associated with the oil and gas industry is the potential that an operating area must be cleaned up. Remediation of contamination associated with oil and gas operations can be technically, and economically, challenging. Cleanup liability is often based on a party's status relating to the property where the contaminant is found or on the party's status relating to the contaminant. For example, past and present owners

15. KAN. STAT. ANN. § 55-179(b), (e) (Supp. 1997).
16. 1998 Kan. Sess. Laws ch. 61, § 2(d) (to be codified at KAN. STAT. ANN. § 55-155(d)).
17. 1998 Kan. Sess. Laws ch. 61, § 2(d)(3) (to be codified at KAN. STAT. ANN. § 55-155(d)(3)).

and operators of the property where the contaminant is found may be required to engage in a cleanup. The generator of the contaminant, or someone who arranged for its disposal or who transported it, may also be required to engage in a cleanup.[18] The situation can also be aggravated by a lack of standards to be applied when evaluating a site to determine whether a cleanup will be required.

Clean versus Dirty

When is something "dirty"? This basic question is at the heart of many transactions in which a party is contemplating becoming a surface owner, mineral owner, lessee, farmee, operator, unit operator, producing property owner, easement owner, or similar interest owner. Since the prospective owner or operator might be liable for a cleanup if a site is contaminated, the million-dollar question becomes, is any part of the site "dirty"? For most oil and gas operating sites, the determination of "clean" versus "dirty" involves a qualitative judgment concerning contaminants found at the site. The problem is whether the presence of the contaminants requires a cleanup, considering all the surrounding circumstances of the site. One triggering mechanism that tends to distinguish the clean from the dirty is the obligation to report the presence of a contaminant.

Reporting Obligations

If the presence of a contaminant triggers a reporting obligation, this obviously makes the contaminant a matter of concern for the parties. However, reporting obligations typically do not coincide with a clean-versus-dirty analysis. For example, under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the mere presence of benzene in the soil will not trigger a reporting obligation unless it is associated with a known release of benzene in excess of the designated reportable quantity.[19] The mere presence of benzene, however, can trigger a cleanup obligation under CERCLA.[20]

Cleanup Obligations

Even though the situation may not require reporting, it may create cause for concern because cleanup obligations are not tied to merely reportable events. Nonreportable events can give rise to cleanup obligations; similarly, reportable events may or may not give rise to cleanup obligations. Therefore, the

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18. *See generally* David E. Pierce, *Structuring Routine Oil and Gas Transactions to Minimize Environmental Liability*, 33 WASHBURN L.J. 76, 79-80 (1993); David E. Pierce, *The Emerging Role of "Liability-Forcing" in Environmental Protection*, 30 WASHBURN L.J. 381 (1991).
19. CERCLA § 103(a), 42 U.S.C. § 9603(a) (1994).
20. CERCLA § 106(a), 42 U.S.C. § 9606(a) (1994) (EPA may issue cleanup orders when there "may be an imminent and substantial endangerment to the public health or welfare or the environment"); CERCLA § 107(a), 42 U.S.C. § 9607(a) (1994) (liability to clean up release of hazardous substance which "causes the incurrence of response costs").

cleanup statutes and regulations must be examined to determine whether the situation is likely to trigger a cleanup.

Spills

The same KCC regulations that impose a reporting obligation for spills also impose a cleanup obligation. Sections 82-3-604 and 605 require removal of "fluids" from an emergency pit or diked area within forty-eight hours after discovery of the fluids, "or as authorized by the appropriate [KCC] district office."[21] For spills that are not contained within an emergency pit or diked area, Kansas Administrative Regulations § 82-3-603(b) states, in part: "Each operator shall clean up a spill according to the proposed cleanup method or as modified by the district office. The cleanup shall be completed within 10 days of the spill notification or within a time period as prescribed by the district office."[22]

Surface Pond Closure and Well Abandonment

In addition to the spill cleanup requirements, the KCC administers additional cleanup programs relating to surface pond closure and abandonment of wells. Pond closure is governed by Section 82-3-602, which requires the operator of any surface pond to dispose of pond contents properly and to remediate the site by grading and returning the surface of the soil "to the same condition as existed prior to the construction of the surface pond."[23] As discussed earlier, under Kansas Statutes Annotated § 55-179, if the KCC finds that an "abandoned well is causing or likely to cause . . . pollution or loss," the responsible persons may be required to take action to remedy the situation.[24]

Kansas Statutes Annotated § 55-180 provides the KCC with general remedial authority over "any pollution problem related to oil and gas activity."[25] The KCC may "require or perform the testing, sampling, monitoring or disposal of any source of groundwater pollution related to oil and gas activities."[26] Subsection (c) provides the KCC and third parties who act to "plug replug or repair any abandoned well" with a cause of action against persons responsible for the "proper care and control of such well."[27]

New KCC Cleanup Authority

On July 1, 1995, the KCC was given the exclusive authority to require the cleanup of the soil and waters of the state in relation to oil and gas activities, relying on KCC authority and on Kansas Department of Health and Environment (KDHE) authority in existence as of July 1, 1995 (Kan. Stat. Ann. § 74-623 (Supp. 1997)).

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21. Kan. Admin. Reg. §§ 82-3-604 & 605 (1997).
22. Kan. Admin. Reg. § 82-3-603(b) (1997).
23. Kan. Admin. Reg. § 82-3-602(f) (1997).
24. KAN. STAT. ANN. § 55-179(a) (Supp. 1997).
25. KAN. STAT. ANN. § 55-180(b) (Supp. 1997).
26. *Id.*
27. *Id.* at § (c).

Perhaps the broadest KDHE "cleanup" statute is Kansas Statutes Annotated Section 65-159, which gives the KDHE (and now the KCC for oil and gas activities) authority to "order . . . the owner [of private property] . . . to remove . . . [a] nuisance."[28] The qualitative judgment is identifying a "nuisance" that will support a cleanup order. The KCC is given the authority to prevent and clean up "pollution" of the soil and waters of the state from oil and gas activities.[29] Subsection (c)(1) of Section 65-171d defines pollution as:

> Such contamination or other alteration of the physical, chemical or biological properties of any waters of the state as *will or is likely* to create a nuisance or *render such waters harmful, detrimental or injurious* to public health, safety or welfare, or to the plant, animal or aquatic life of the state or to other designated beneficial uses.[30]

The net result is a qualitative basis for triggering a cleanup. It will occur when the presence of the substance creates, or is likely to create, a "nuisance" or is otherwise "detrimental" to humans or the environment. Although the statute refers to contamination of "waters of the state," soil contamination that is "likely" to find its way into surface water or groundwater would also be covered—assuming its presence in the waters of the state would result in a nuisance or have detrimental effects on humans or the environment.

The soil nexus, and cleanup obligation, are addressed directly in Section 65-171v, which provides, in part, the following:

> Whenever a *water or soil pollutant* is discharged intentionally, accidentally, or inadvertently and the secretary of health and environment . . . *determines that the discharged material must be collected, retained, or rendered innocuous*, and if *a discharger* refuses to undertake cleanup operations or if the responsible discharger is unknown at the time, the secretary . . . may enter into an agreement with a person to conduct the necessary cleanup operations with payment for such cleanup work to be provided from the pollutant discharge cleanup fund. *Any person responsible for or causing the discharge of materials which are determined necessary to cleanup under the provisions of this act shall be responsible for repayment of the costs of the cleanup work.*[31]

To trigger a cleanup under Section 65-171v, there must first be a water or soil "pollutant." This again incorporates the qualitative analysis provided for in the Section 65-171d(c) definition of pollution. In addition, the cleanup obligation attaches only to persons responsible for the "materials" discharged or those "causing the discharge." The definition of discharge found in Section 65-161(b)

28. KAN. STAT. ANN. § 65-159 (1994).
29. KAN. STAT. ANN. § 74-623(a) (Supp. 1997).
30. 1998 Kan. Sess. Laws ch. 143, § 1(c)(1) (to be codified at KAN. STAT. ANN. § 65-171d(c)(1)) (emphasis added).
31. KAN. STAT. ANN. § 65-171v (1992) (emphasis added).

requires that the person be "causing or permitting" the material to escape. Mere ownership of the site of the discharge, without more, would not appear to give rise to a cleanup obligation under Section 65-171v.

Cleanup of Hazardous Substances

Kansas Statutes Annotated § 65-3453, which addresses the cleanup of hazardous substances, grants the secretary of the KDHE (and, after July 1, 1995, the KCC for oil and gas activities) authority to

> (1) Determine that the clean up of a site is necessary to protect the public health or the environment;
>
> . . .
>
> (3) Issue clean-up orders to persons responsible for the health or environmental hazard created by the hazardous substance;
> (4) Recover moneys from persons responsible for the health or environmental hazard created by the hazardous substance. . . .

The qualitative cleanup triggers include situations in which the hazardous substance creates a "health or environmental hazard" and it is necessary to address the situation to "protect the public health or the environment." The term "hazardous substance" includes substances defined as hazardous under CERCLA.[32]

Unlike CERCLA, the Kansas statutes impose cleanup liability only on persons "responsible for the discharge, abandonment or disposal of hazardous substances."[33] Although these statutes do not define "responsible party," they are similar to the language used to impose cleanup liability under Section 65-171v, which equates the "person responsible" to the "discharger," stating: "Any *person responsible for or causing the discharge* of materials which are determined necessary to cleanup under the provisions of this act shall be responsible for repayment of the costs of cleanup work."[34] No cases have interpreted the scope of responsible party liability, but it seems evident that some level of causation will be required for cleanup liability to attach under the Kansas statutes.

Cleanup of Solid and Hazardous Wastes

If the activity can be characterized as engaging in either a solid or hazardous waste disposal activity, the secretary of the KDHE has the authority to order a cleanup under either Section 65-3411 (solid waste) or Section 65-3443 (hazard-

32. KAN. STAT. ANN. § 65-3452a (1992).
33. KAN. STAT. ANN. § 65-3455 (1992) ("If remedial action is required to protect the public health and environment, the costs of that remedial action shall be borne by the responsible party").
34. KAN. STAT. ANN. § 65-171v (1992) (emphasis added).

ous waste) of the statutes. Each of these sections provides for KDHE action in the event that the "generation, accumulation, management or discharge [or disposal]" of a solid waste or hazardous waste "threatens to cause pollution of the land, air or waters of the state, or is [or threatens to become] a hazard to property in the area or to public health and safety." In the case of a hazardous waste, the secretary can order the person to "modify the generation, accumulation, management or disposal of the hazardous waste or to provide and implement procedures as will prevent or remove the pollution or hazard or take any other action deemed necessary."[35] In the case of a solid waste, the secretary can order the person to "alter the generation, accumulation or management of the solid waste or to provide and implement such solid waste management system as will prevent or remove pollution or hazards."[36]

Each of the statutes governing solid waste and hazardous waste provide that "title" to the waste, and therefore liability for its management, or mismanagement, will pass to the owner of the waste management facility where the waste is disposed of *if* it has been "transported, stored, treated or disposed of in accordance with the provisions of this act" *and* the parties have not entered into a contractual arrangement altering their liability.[37] However, if the waste is not disposed of properly, the waste will "remain the property of the generator and the generator is liable for removal of the waste, restoration of the area in which the wastes were disposed and the disposal of the waste in accordance with this act."[38] One difference between the two statutes is that for hazardous waste the generator can be relieved of liability once it is tendered to "a hazardous waste transporter for transport to an approved hazardous waste facility."[39] If the waste is nonhazardous solid waste, "It shall not constitute a defense to the generator that the generator acted through an independent contractor in the transportation or disposal of the solid waste."[40]

At this time, it is uncertain how the KCC will employ the KDHE authority it obtained as a result of the July 1, 1995 consolidation into the KCC of all oil and gas-related cleanup authority. However, it is likely that the KCC will attempt to define some numerical quantitative cleanup guidelines in the future.

Private Cleanup Remedies

Private cleanup remedies in Kansas can be pursued under traditional common-law causes of action and specialized statutory causes of action.

35. KAN. STAT. ANN. § 65-3443 (1992).
36. KAN. STAT. ANN. § 65-3411 (1992).
37. KAN. STAT. ANN. § 65-3442 (1992) (hazardous waste). *See also* KAN. STAT. ANN. § 65-3418 (1992) (similar provisions concerning solid waste).
38. KAN. STAT. ANN. § 65-3442 (1992) (hazardous waste). *See also* KAN. STAT. ANN. § 65-3418 (1992) (similar provisions concerning solid waste).
39. KAN. STAT. ANN. § 65-3442(b) (1992).
40. KAN. STAT. ANN. § 65-3418(a) (1992).

Traditional Causes of Action

The litigator's nonstatutory arsenal for pursuing private cleanup remedies includes causes of action for trespass, negligence, nuisance, and strict liability. None of these, however, are designed to force a cleanup. Instead, a party's potential liability for a site can prompt that party to take remedial action to either avoid or to mitigate potential damages.

Trespass

The trespass theory has been used to impose liability for saltwater flowing over lands.[41] It has also been used to address subsurface trespasses that damage oil and gas reserves.[42] The typical remedy for trespass is damages. Where appropriate, the trespass can be enjoined. Damages can be awarded for the immediate loss suffered and all injury "naturally and fairly" resulting from the trespass.[43] If the trespasser is guilty of "malice, wantonness, or oppression," punitive damages can be awarded.[44] In Kansas, however, punitive damages are now regulated by statute.[45]

Negligence

Litigants have frequently relied on a negligence theory to address contamination caused by saltwater and other substances associated with oil and gas development.[46] Punitive damages have been awarded to injured parties in appropriate cases.[47]

However, contemporary environmental litigants in Kansas have found the negligence theory to be of limited value when the same conduct would support a strict liability or nuisance claim. One of the state's leading environmental litigators provided the following commentary on the current efficacy of negligence for environmental claims:

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41. Miller v. Cudahy Co., 592 F. Supp. 976, 1005-06 (D. Kan. 1984), *aff'd in part, rev 'd in part*, 858 F.2d 1449 (10th Cir. 1988) (awarding damages for various trespasses).
42. Tidewater Oil Co. v. Jackson, 320 F.2d 157 (10th Cir. 1963), *cert. denied*, 375 U.S. 942 (1963) (awarding $620,700 in damages for lost profits from estimated producible oil but reversing award of $25,000 in punitive damages since the lessee's activities were sanctioned by Corporation Commission order).
43. Ultimate Chem. Co. v. Surface Transp. Int'l, Inc., 658 P.2d 1008, 1011 (Kan. 1983).
44. *Ultimate Chem.*, 658 P.2d at 1012 (upholding jury award of $102,000 in actual damages and $227,000 in punitive damages).
45. KAN. STAT. ANN. §§ 60-3702 & 60-3703 (1994).
46. *See, e.g.*, Coffman v. Harris, 358 P.2d 673 (Kan. 1961); Corwine v. Maracaibo Oil Exploration Corp., 334 P.2d 419 (Kan. 1959).
47. *See, e.g.*, Jensen v. Sierra Petroleum Co., 370 P.2d 425 (Kan. 1962); Donley v. Amerada Petroleum Corp., 106 P.2d 652 (Kan. 1940). *See generally* John Lungren, *Liability for Escape of Salt Water Oil or Refuse in Kansas Drilling Operations*, 51 J. KAN. B. A. 307 (1982); John Lungren, *Landowner's Remedies for Property Damage by Oil and Gas Lease Operators*, 50 J. KAN. B. A 200 (1981).

> There are no Kansas cases grounded solely on negligence for environmental damage claims. There is good reason for this, especially with the advent of comparative negligence. With the availability of strict liability, both in nuisance and for abnormally dangerous activities, it seems senseless to fight the customary negligence battles involving comparative fault of the plaintiff, phantom defendants, and questions concerning duty owed. Even if the defendant's conduct is such that strict liability does not apply, nuisance grounded upon negligence is still preferable to a pure negligence action in light of the damages available under a nuisance theory.[48]

Nuisance

The private nuisance theory also has been successfully used to address environmental problems associated with oil and gas development. In *Helms v. Eastern Kansas Oil Co.*, 169 P. 208 (Kan. 1917), the court stated the basic nuisance rules as follows:

> An owner of property, although conducting a lawful business thereon, is subject to reasonable limitations. He must use his property so as not to unreasonably interfere with the health or comfort of his neighbors or with their right to the enjoyment of their property.
>
> If he makes an unreasonable or unlawful use of it, so as to produce material injury or great annoyance to his neighbor, he will be guilty of a nuisance to his neighbor, and the law will hold him responsible for the consequent damage. . . .
>
> It is, of course, not necessary that the use to which property is put shall be unlawful in itself in order to constitute its nuisance in the eye of the law. . . .
>
> Nor will the fact that the business is carried on carefully and in accordance with the ordinary methods employed in such a business relieve one from liability to a neighbor if the use is unreasonable and such act constitutes a nuisance.[49]

The nuisance theory allows the injured party to attack conduct that, although not negligent, unreasonably interferes with the injured party's rights. Using nuisance as a basis for recovery may also avoid statute of limitations, assumption of risk, and comparative fault problems associated with negligence actions.[50]

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48. Randall K. Rathbun, *Representing the Plaintiff in Environmental Litigation* 14-4, KANSAS ENVIRONMENTAL LAW HANDBOOK (KBA 1992).
49. Helms, 169 P. at 209 (citations omitted).
50. *See generally* Miller v. Cudahy Co., 858 F.2d 1449 (10th Cir. 1988) (addressing "continuing nuisance" theory and the distinction between temporary and permanent damages in affirming a $3.06 million actual damage award and $10 million punitive damage award associated with saltwater contamination). *See also* Randall K. Rathbun,

Strict Liability

Damage arising from certain oil and gas activities can give rise to strict liability. For example, in *Berry v. Shell Petroleum Co.*, 33 P.2d 953 (Kan. 1934), the lessees permitted saltwater to be discharged in such a manner as to damage lands owned by Berry. The petition did not allege negligence; the court held negligence was not required, since the activity came within the rule of strict liability as stated in *Rylands v. Fletcher*. The court noted that the *Rylands v. Fletcher* rule imposes strict liability on any party who "has brought something on its own property which was not naturally there, harmless to others so long as it is confined to its own property but which it knows to be mischievous if it gets on its neighbor's."[51] Summarizing the effect of the rule, the court noted: "It must be remembered that negligence is not a necessary element of the right of recovery in a case like this. The right to recover results from the company having the harmful substance on its land and permitting it to escape to the damage of plaintiff."[52]

With regard to "abnormally dangerous" activities, Kansas has adopted the *Restatement (Second) of Torts* approach, relying on *Restatement* Sections 519 and 520.[53] In *Williams v. Amoco Production Co.*, natural gas had apparently seeped from casing in gas wells and made its way to the plaintiff's irrigation wells. Applying a strict liability standard, the trial court held Amoco liable for the escaping gas, implicitly finding that Amoco had engaged in an abnormally dangerous activity. The Kansas Supreme Court reversed the trial court and held that the drilling and operating of natural gas wells in the area was a common, accepted, and natural use of the land and was "not an abnormally dangerous activity in relation to the type of harm sustained by appellees."[54]

Distinguishing the *Berry* case, the court in *Williams* observed:

> Unlike the salt water which escaped from the defendant's well in *Berry*, natural gas is not a "harmful agent" once it is raised to the surface of the earth. Nor does natural gas ruin drinking water, destroy vegetation, or injure livestock. Moreover, natural gas is not a substance which is known to be "mischievous" if it gets on the property of others.[55]

The court remanded the case to the trial court for a new trial on the issue of Amoco's negligence.[56]

Representing the Plaintiff in Environmental Litigation 14-4 to 14-5, KANSAS ENVIRONMENTAL LAW HANDBOOK (KBA 1992).

51. Berry, 33 P.2d at 957.
52. Berry, 33 P.2d at 957.
53. Williams v. Amoco Production Co., 734 P.2d 1113 (Kan. 1987).
54. Williams, 734 P.2d at 1123.
55. *Id.*
56. *Id.*

Statutory Causes of Action

In addition to the various federal statutory causes of action under the environmental laws, the Kansas plaintiff can rely on Kansas Statutes Annotated Section 55-172, which provides that

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

A similar version of Section 55-172 was applied by the court in *McAlister v. Atlantic Richfield Co.*, 662 P.2d 1203 (Kan. 1983), in which a landowner asserted that a number of oil and gas operators had allowed saltwater to escape, resulting in the destruction of the landowner's water well. The trial court granted summary judgment to the operators because the landowner could not demonstrate which operators had caused the actual damage and the landowner had not alleged negligence or other grounds for recovery besides the statute.

Reversing the trial court, the Kansas Supreme Court made the following comments regarding the statute:

> If any of the defendants violated K.S.A. 55-121 [now 55-172] and caused plaintiff's pollution, they are civilly liable to plaintiff. . . .
>
> The plaintiff in this case need not show negligence, nor need he pinpoint what a particular defendant did or did not do to cause his pollution; this is not an issue. All he need prove is violation of K.S.A. 55-121.[57]

Conclusion

State regulatory cleanup requirements concerning past and present oil and gas operations are to be administered by the KCC. Although the commission has adopted specific guidelines for plugging wells, addressing spills, and closing surface ponds, guidelines governing the general remediation of production sites have not been established. Statutory surface restoration requirements are limited to the removal of operating structures and surface grading. It is likely that most oil and gas site remediation in Kansas will be driven by the risk of liability under federal environmental statutes and state tort law.

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57. McAlister, 662 P.2d at 1208, 1209. *See* Reiserer v. Murfin, 331 P.2d 313 (Kan. 1958). *See generally* John Lungren, *Liability for Escape of Salt Water, Oil or Refuse in Kansas Drilling Operations*, 51 J. KAN. B. A. 307 (1982).