Managing Environmental Liability When Acquiring Oil and Gas Properties

by Boyd A. Bryan

Introduction

The potential for environmental contamination is a concern at many oil and gas properties. Operations typically involve the use of materials such as drilling mud, pipe dope, heavy metals, biocides, Ph control additives and corrosion inhibitors. It can also cause the production of brine and naturally occurring radioactive materials (NORM), all of which may be considered "hazardous" or are otherwise regulated under various environmental laws. Contamination may be present in disposal pits, gas processing facilities, compressor stations, repair facilities, saltwater disposal wells and other facilities that are commonly included in sales of producing properties. As a result, a buyer of such properties may have significant exposure to environmental liability. This article reviews some of the legal bases of environmental liability and suggests ways to manage that liability when acquiring oil and gas properties.[1]

Legal Bases of Environmental Liability

CERCLA

One of the most significant sources of environmental liability for contaminated sites — potentially including oil and gas properties — is the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[2] commonly known as the federal Superfund statute.

CERCLA *Liability*

CERCLA imposes liability on certain categories of persons for the remediation of environmental contamination. CERCLA liability is retroactive in that it may result from past activities that were entirely legal when performed. It is strict, i.e., it is imposed without proof of negligence or fault.[3] It is also joint and several; one potentially responsible party (PRP) out of many may be liable for the entire cost of the cleanup unless it can prove that the harm is divisible.[4] PRPs may be liable for, among other things, cleanup and other "response costs," damages for injury to or loss of natural resources and the costs of health assessment or health effects studies.[5]

Potential Plaintiffs

CERCLA authorizes EPA to issue administrative orders requiring PRPs to clean up property or pay the costs of doing so,[6] or sue to recover its past and future cleanup and other response costs.[7] Private parties, including other PRPs, may also sue under CERCLA to recover their response costs.

Potential Defendants

The following categories of persons are considered PRPs under CERCLA: (1) the current owner or operator of the facility; (2) any person who owned or operated the facility at the time the disposal of hazardous substance occurred on the property; (3) any person who arranged for disposal, treatment or transport of hazardous substances it owned or possessed at or to the facility; and (4) any person who accepted hazardous substances for transport to a disposal or treatment facility selected by that person.[8]

The terms "owner" and "operator" are not separately defined under CERCLA, and the statute defines "owner or operator" simply as "any person owning or operating" any onshore or off-

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shore facility.[9] Thus, the job of determining the meaning of these terms essentially has been left to the courts. Unfortunately, there is little or no case law interpreting the terms "owner" or "operator" in relation to oil and gas properties. In light of the cases decided in other contexts, however, the term "owner" could reasonably include all "owners" of a producing property, such as surface owners, working interest owners, royalty interest owners and other mineral interest owners and, the term "operator" could reasonably include all operators of the producing property, including contract operators and service companies that perform work at the site.

Under certain circumstances, parent corporations and individuals such as shareholders, officers, directors and managers, may be personally liable for cleanup costs under CERCLA, even if the "corporate veil" cannot be pierced. These persons may be liable as "operators" if they manage, direct or conduct operations at the facility related to pollution, for example, operations having to do with the leakage or disposal of hazardous waste or decisions about compliance with environmental regulations.[10]

Hazardous Substances

The Petroleum Exclusion

PRPs are liable for cleanup costs, etc., under CERCLA only if the contamination consists of "hazardous substances" as defined in the statute. CERCLA's definition of "hazardous substances" is extremely broad, but specifically excludes:

> petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under [various environmental statutes], and . . . natural gas, natural gas liquids, liquified natural gas or synthetic gas useable for fuel (or mixtures of natural gas and such synthetic gas).[11]

The terms "petroleum" and "fraction" are not defined in the statute. Under EPA's interpretation, the petroleum exclusion (i) excludes from CERCLA's definition of hazardous substances crude oil, fractions of crude oil, even though they naturally contain substances (such as benzene, toluene and xylene), or contain additives (such as lead), that are otherwise specifically listed as hazardous substances under CERCLA, but (ii) does not exclude petroleum that has been mixed with or contaminated by hazardous wastes that are not indigenous to petroleum, or hazardous substances in petroleum that increase in concentration as a result of contamination during use.[12] The courts have generally upheld this interpretation.[13]

While the petroleum exclusion does limit the impact of CERCLA on oil and gas properties, operations commonly involve the use or disposal of substances that fall outside of the exclusion. Also, as discussed below, actions to require cleanup of petroleum that has been released into the environment often may be brought under the Resource Conservation and Recovery Act (RCRA),[14] which has no petroleum exclusion. Buyers, therefore, should recognize that oil and gas properties carry a risk of CERCLA liability notwithstanding the petroleum exclusion.

Exploration and Production Wastes

Certain oil and gas exploration and production (E&P) wastes are excluded from regulation as "hazardous waste" under the Subtitle C (hazardous waste) regulations promulgated under RCRA. It is important to note, however, that CERCLA does not contain an E&P waste exemption, and the courts have held that other RCRA-exempt wastes are "hazardous substances" under CERCLA.[15] Thus, contamination resulting from E&P wastes will likely give rise to CERCLA liability.

To the author's knowledge, EPA has not designated any oil and gas production site as a Superfund site under CERCLA. EPA, however, has placed several facilities that handled E&P wastes on the CERCLA National Priorities List, and has considered the companies whose wastes were disposed of at those facilities to be PRPs who are liable for the costs of cleaning up the sites.[16]

NORM

NORM can precipitate in the form of scale or mineral deposits onto tubing, pipe or other oilfield equipment,[17] and may be an issue at the wellsite, pipe yards, production pits, treater/disposal facilities, land farms, landfills and related locations. NORM likely qualifies as a hazardous substance under CERCLA. Radionuclides such as radium-226 and radon are typical daughter products of NORM, and radionuclides are hazardous substances that give rise to liability under CERCLA.[18]

The Innocent Landowner Defense

CERCLA provides a limited number of defenses to liability. One statutory defense of particular relevance when acquiring oil and gas properties is the "innocent landowner" defense.[19] This defense protects the buyer from CERCLA liability if it can establish that it acquired the property without knowing, or having any reason to know, of the prior disposal of any hazardous substances on the property and used due care with regard to the hazardous substances after they were discovered. In order for a buyer to establish that it "had no reason to know" of the contamination, it must show that prior to the acquisition it carried out "all appropriate inquiries" into the previous ownership and uses of the property.[20] How to satisfy the "all appropriate inquiries" test is explained below.

Bone Fide Prospective Purchaser Protections

CERCLA was amended in January 2002 to provide liability protection to certain buyers known as "bone fide prospective purchasers" (BFPPs).[21] A BFPP's CERCLA liability is limited to the amount of EPA's "windfall lien" on the property which covers the amount of any increase in the fair market value of the property attributable to a response (cleanup) action undertaken by EPA. The intent of these amendments is to remove a significant impediment — potential CERCLA liability — to the purchase of "brownfield" properties and thereby put them back into commerce.

A buyer may be considered a BFPP even if it acquires the property with

knowledge of existing contamination, provided it meets several statutory requirements at the time of and after the purchase. Paraphrasing the statutory language, to qualify as a BFPP, the buyer (i) must have acquired the property after the January 11, 2002, date of enactment of the amendments and after all disposal of hazardous substances at the property occurred, (ii) must have made "all appropriate inquiries" into the previous ownership and uses of the property (as under the "innocent landowner" defense), (iii) must provide all legally required notices with respect to the discovery or release of hazardous substances at the property, (iv) must exercise appropriate care by taking "reasonable steps" to stop continuing releases, prevent any threatened future release and prevent or limit human, environmental or natural resources exposure to any previously released hazardous substance, (v) must provide full cooperation, assistance and access to persons that are authorized to conduct response actions or natural resource restorations, (vi) must comply with any land use restrictions established or relied on in connection with a response action, (vii) must not impede the effectiveness or integrity of any institutional controls, (viii) comply with any CERCLA request for information or administrative subpoena, and (ix) must not be potentially liable or affiliated with any other person that may be potentially liable for response costs for addressing releases at the property.

Upon proper showing, EPA and/or the state environmental agency may agree to issue the prospective buyer a letter prior to the purchase of the property, acknowledging that the buyer's pre-closing environmental assessment satisfies the "all appropriate inquiries" requirement and that the post-closing activities proposed by the buyer will constitute "reasonable steps" to address releases of hazardous substances. However, the buyer must continue to satisfy the other statutory requirements after the closing to maintain its status as a BFPP.

State Law Counterparts to CERCLA

Many states have enacted statutes that impose liability schemes similar, but not always identical, to CERCLA. Examples include the Texas Solid Waste Disposal Act[22] and Chapter 12 of the Louisiana Environmental Quality Act.[23]

RCRA

RCRA Liability

RCRA is the primary federal statute regulating the management of hazardous and non-hazardous wastes "from cradle to grave," i.e., from generation to collection, transportation and disposal. EPA is authorized to issue compliance orders and civil or criminal penalties against violators of the RCRA requirements.[24] The statute also authorizes agency actions and citizen suits to require cleanup of contaminated properties that "may present an imminent and substantial endangerment to health or the environment."[25] Such "imminent hazard" cleanup actions may be brought against any past or present generator, transporter, owner or operator of the contaminated facility who has contributed or is contributing to the past or present handling, storage, treatment, transportation or disposal of the waste at the facility.[26]

The E&P Exemption

As stated, the RCRA regulations exempt certain E&P wastes from the Subtitle C hazardous waste management requirements. As a result, certain E&P wastes are not subject to the storage, manifesting, transportation, permitting, disposal and other requirements that are applicable to hazardous wastes. For several reasons, however, buyers of contaminated oil and gas properties may incur liability under RCRA notwithstanding the E&P exemption.

First, many wastes commonly associated with exploration and production activities are not exempt from regulation under the RCRA Subtitle C regulations. Exempt wastes include produced water, drilling fluids, drill cuttings, rig wash, geothermal production fluids, well completion, treatment and stimulation fluids and other materials. However, non-exempt wastes include the following: unused fracturing fluids and acids; gas plant cooling tower cleaning wastes; painting wastes; waste solvents; oil and gas service company wastes such as empty drums, drum rinsate, sandblast media, spent solvents, spilled chemicals and waste acids; vacuum truck and drum rinsate from trucks or drums transporting or containing non-exempt waste; refinery wastes; certain liquid wastes generated by crude oil and tank bottom reclaimers; used equipment lubricating oils; waste compressor oil, filters and lowdown; used hydraulic fluids; waste in transportation pipeline related pits;

caustic or acid cleaners; boiler cleaning wastes; boiler refractory bricks; boiler scrubber fluids, sludges and ash; incinerator ash; laboratory wastes; sanitary wastes; pesticide wastes; radioactive tracer wastes; and drums, insulation and miscellaneous solids.[27]

Second, to the extent non-exempt hazardous wastes are managed on-site, the facility may be subject to RCRA Subtitle C requirements. For example, if a mud pit is contaminated with hazardous wastes (e.g., by the placement of spent solvents in the pit), the entire contents of the pit may be considered hazardous wastes by virtue of the "mixture rule,"[28] in which case there may be a requirement to close the pit in accordance with the Subtitle C regulations. And if the pit is not clean-closed (by excavation of the pit contents and disposal in a RCRA-permitted facility), a post-closure care permit may be required which may trigger RCRA corrective action requirements. Notably, EPA has taken the position that it can require the present owner to undertake corrective action for wastes generated and managed by a former owner.[29]

Third, under its "imminent hazard" authority set out in the RCRA statute, EPA (and state agencies) may have the authority to issue mandatory cleanup orders to owners and operators of facilities contaminated with E&P wastes, even if those wastes fall within the E&P exemption under the RCRA Subtitle C regulations, if the contamination "may present an imminent and substantial endangerment to health or the environment."[30] This is because the definition of "hazardous waste" in the RCRA statute differs from the definition of the same term in the RCRA Subtitle C regulations, and the E&P exemption arguably applies only under the Subtitle C regulations.[31]

To recap, buyers of oil and gas properties should gain little comfort from either the petroleum exclusion under CERCLA or the E&P waste exemption under RCRA. Although "petroleum" is excluded from CERCLA regulation, it may give rise to enforcement and "imminent hazard" actions under RCRA if released to the environment. Similarly, although E&P wastes are excluded from regulation under the RCRA Subtitle C regulations, they are arguably subject to enforcement and "imminent hazard" actions under the RCRA statute and are likely subject to cleanup actions under CERCLA.

State Law Counterparts to RCRA

Most states, including Texas and Louisiana,[32] have enacted statutes and regulations that closely track federal law and subject buyers of oil and gas properties to potential liability similar to that under RCRA.

The Oil Pollution Act

OPA Liability

The Oil Pollution Act (OPA)[33] imposes liability for the discharge or substantial threat of discharge of oil into navigable waters and adjoining shorelines from any vessel or offshore or onshore facility.[34] Similar to CERCLA's liability scheme, the parties subject to liability under OPA include the owners and operators of offshore and onshore facilities.[35] Potential liability includes removal (cleanup) costs, property damage, natural resource damage and other damages.[36] The definition of "facility" includes any equipment used to explore for, drill for, produce, store, handle, transfer, process or transport oil.[37] Consequently, OPA may be an important source of potential liability for buyers of oil and gas properties adjacent to or containing "navigable waters."

State Law Counterparts to OPA

Texas and Louisiana both have statutes that closely correspond to OPA and impose similar liability, as do several other states. The Texas statute is the Oil Spill Prevention and Response Act which addresses discharges of oil into "coastal waters."[38] The Louisiana statute has an identical name and addresses discharges of oil into "waters of the state."[39]

State Regulation of Oil and Gas Operations

Texas regulates oil and gas operations primarily under the Natural Resources Code and corresponding regulations.[40] In Louisiana, the management of non-hazardous oilfield wastes is regulated primarily by the regulations of the Louisiana Department of Natural Resources, Office of Conservation, known as Statewide Order 29-B.[41] The requirements will apply to, and penalties for mismanagement of E&P wastes will normally be assessed against, the current owner or operator. As a result, a buyer of oil and gas properties will want to be satisfied that the operations are in compliance with these regulations.

Tort Claims

Environmental contamination can give rise to tort liability under various theories, including negligence, nuisance and trespass. The most likely plaintiffs in these types of claims are neighboring landowners. Property damages can include physical damage to property, diminution in value, loss of use and restoration costs. Personal injury damages may also be recoverable.

Restoration Obligations — The Corbello Decision

The Decision

Those involved in the oil and gas industry in Louisiana are probably familiar with the Louisiana Supreme Court's 2003 decision in *Corbello v. Iowa Production*.[42] Under *Corbello*:

- A party with a contractual obligation to restore a landowner's property to its original condition can be liable for damages equal to the full cost of restoration, even if those damages far exceed the market value of the property; and
- The landowner is not required to use the damages awarded to restore the property.

Corbello involved a surface lease that stated:

> Lessee agrees to indemnify and hold lessor harmless from any and all loss, damage, injury and liability of every kind and nature that may be caused by its operations

or result from the exercise of the rights or privileges herein granted. Lessee further agrees that upon termination of this lease it will reasonably restore the premises as nearly as possible to their present condition.

The plaintiffs/landowners alleged that the operations of Shell, the lessee, had contaminated the leased premises, and that Shell had breached its contractual obligation to restore the property to its original condition. The evidence indicated that the market value of the property fully restored to its original condition would be $108,000. The court nevertheless awarded the landowners restoration damages in the amount of $33 million — more than 300 times the market value of the property. In fact, $28 million of the $33 million damage award was to compensate the landowners for the cost of installing a groundwater recovery system to protect the Chicot Aquifer from contamination, even though under Louisiana law landowners do not own the groundwater beneath their property. Significantly, the court did not require the landowners to use the damages awarded to restore the property, i.e., they could pocket the money rather than spend it to clean up the property or install the groundwater recovery system.

Problems Presented by the Decision

From the standpoint of prospective for buyers of oil and gas properties, *Corbello* presents at least three potential problems whenever a contractual obligation to restore property exists:

- Obviously, potential liability for restoration damages that exceed the market value of the property.

- The risk of double payment. In many cases, parties other than the landowner, such as the regulatory agencies, neighboring landowners, and citizens groups, also have the right to sue the responsible party to require cleanup of the property, and in most cases their claims will not be affected by the prior payment of restoration damages to the landowner. Thus, if the landowner does not use the restoration damages to clean up the property, then the risk will remain that another party will bring an action and obtain a judgment ordering the responsible party to perform the cleanup.

- Encouragement for restoration damage lawsuits. *Corbello* provides an incentive to landowners, and their attorneys, to aggressively pursue restoration actions against past and future owners of oil and gas properties.

Legislative Protections

The Louisiana Oilfield Site Restoration Law, at La. R.S. 30:89.1 (which predates *Corbello*), provides some protection from double payment to those in the oil and gas industry. Section 30:89.1 provides that if the landowner is paid damages for injury to property resulting from oil and gas exploration, production or development activities, then in any subsequent action brought by the state of Louisiana or its agencies involving the same activities and site, the payer receives a credit for the amount paid to the landowner. This statute, however, is not a cure-all for the problem of double payment. First, it only applies if the claim involves an oilfield site. Second, it provides no protection if the site is contaminated by non-oil and gas activities. Also, it applies only in subsequent actions brought by the state or its agencies and is arguably inapplicable to subsequent claims brought by other parties — such as EPA, neighboring landowners or citizens groups.

Perhaps of greater importance is La. R.S. 30:2015.1, which was passed in response to *Corbello* and was signed into law on July 2, 2003. To summarize very generally, Section 30:2015.1 states that in suits alleging contamination of "usable groundwater" (as defined in the statute) (i) the Louisiana Department of Environmental Quality and the Louisiana Department of Natural Resources must be notified and may intervene, (ii) the court must adopt a plan for the evaluation or remediation required to protect groundwater, (iii) the estimated costs of implementation of the plan, and/or all damages awarded for evaluation or remediation of groundwater, must be deposited into the registry of the court and may be expended only for those purposes, and (iv) upon completion of the groundwater evaluation and remediation, any funds remaining in the registry of the court must be returned to the depositor. The statute provides that it applies retroactively to all cases

initially filed after August 1, 1993, but only certain requirements apply to cases filed after that date in which a judgment has been rendered but is not final, and it does not apply to cases settled prior to the statute's July 2, 2003, effective date.

Section 30:2015.1 is a significant step in the right direction but leaves some *Corbello* problems unresolved. Most importantly, it only addresses "usable groundwater" contamination. Damages awarded for the restoration of any other part of the property — such as soil, surface water or groundwater that is not "usable" — are to be paid directly to the landowner rather than into the registry of the court and do not have to be expended on cleanup.

Recent Developments

Corbello's application in differing factual scenarios is being worked out in the courts. Some of the more notable rulings include the following:

- As expected, *Corbello* has been held applicable to an oil and gas lease. In that case, the mineral lessee was ordered to pay $2 million as damages "for restoring the property," despite jury findings that the value of the property in an uncontaminated state was $304,000 and that there was not reason to believe the landowner would, in fact, restore the property.[43]

- A non-operating working interest owner has been held to be liable with the operator for restoration damages.[44]

- At least two trial courts have dismissed suits for restoration costs as premature on grounds that the mineral lease had not yet terminated.[45]

- Mineral lessees have been ordered to restore canals associated with drilling operations by filling in the canals notwithstanding the absence of any contractual obligation to restore the property and that backfilling canals exceeded industry custom. The court held that although the lease was silent as to restoration obligations, there is an implied obligation to restore the surface of the land under the prudent operator standard established by the Louisiana Mineral Code.[46] In that case, as in *Corbello*, the estimated cost of restoration far exceeded the estimated value of the property ($1.1 million estimated cost of restoration as compared to approximate $11,000 property value). However, the appellate court reversed the trial court's award of money damages and instead granted specific performance ordering the mineral lessees to actually perform the restoration.[47] This holding may support an argument in future cases that specific performance is the appropriate remedy, thereby preventing the landowner from receiving money damages and not performing the restoration. The Louisiana Supreme Court has agreed to review the decision and the appeal is presently pending before that court.

Because an acquisition of oil and gas properties commonly includes an assignment of mineral leases that require restoration, and restoration may be required by law even in the absence of a contractual obligation, potential restoration liability is a significant issue for the buyer.

Managing Environmental Liability

As shown above, an acquisition of oil and gas properties can expose the buyer to significant environmental liability. The question, then, is how to effectively manage that exposure.

An acquisition typically involves three stages: the execution of a purchase agreement; the buyer's pre-closing due diligence investigation; and the sale. Steps can be taken at each stage to address potential environmental liability.

The Purchase Agreement

The purchase agreement can include representations and warranties, indemnities and conditions on the buyer's obligation to close such as the buyer's right to investigate and be satisfied with the environmental condition of the property.

Representations and Warranties

Protections to the Buyer

Representations and warranties of the seller in the purchase agreement can provide the buyer some protection from environmental liability. First, they require the seller to inform the buyer of actual or potential environmental problems prior to closing of the transaction. Second, the buyer's obligation to close can be conditioned on the representations and warranties being correct at the time of execution of the purchase agreement and also at the time of closing. Thus, if an environmental problem is disclosed by the seller or discovered during the buyer's pre-closing due diligence investigation, the terms of the sale may be renegotiated or the buyer may be relieved of the obligation to close. Also, if the purchase agreement provides that the representations and warranties survive the closing, they can provide remedies to the buyer in the event they can be shown to have been incorrect when made by the seller.

Common Provisions

Common environmental representations and warranties by the seller include the following:

- **Compliance with environmental laws** — The seller has complied with all environmental laws and regulations in connection with its ownership of and operations on the property;

- **Environmental conditions** — Hazardous materials have not been generated, used, treated, recycled, stored on, transported to or from, or released, deposited, or disposed of on the property, except in compliance with environmental laws;

- **Environmental liabilities** — There are no pending or threatened environmental claims or actions with respect to the property;

- **Permits** — All necessary permits have been obtained and are being complied with, and are transferable to the buyer after giving notice to government authorities;

- **Environmental liens** — The assets being transferred are not subject to any state or federal environmental lien;

- **Impending environmental events** — There are no impending changes or events that will affect the ability of the facility to comply with environmental laws;

- **Accuracy of documentation** — All books, records, environmental studies and other documents provided by the seller in connection with the transaction are true, accurate and complete;

- **Miscellaneous environmental issues** — There are no underground storage tanks, asbestos-containing materials, waste drums, PCBs, etc. located on the property.

Any exceptions to the representations and warranties should be disclosed by the seller in schedules attached to the purchase agreement.

Survival and Term

The buyer will want representations and warranties that survive the closing of the transaction, with no time limitation on their survival. The seller, on the other hand, will want to limit the survival of warranties.

"Softening" of the Representations and Warranties

The seller may want to soften the representations and warranties in various ways. For example:

- **"Substantial" and "material" qualifications** — The seller may want to state only that it is in "substantial" compliance with all "material" environmental laws and requirements. The buyer should avoid use of these terms if possible. Their meaning is often ambiguous which limits their usefulness to the buyer.

- **Knowledge** — The seller may also want to limit its representations and warranties by stating that they are only based on "actual knowledge." For example, rather than provide an unqualified statement that it has complied with all environmental laws, the seller may want to state only that "to the seller's actual knowledge" it has complied or that the seller "has no reason to know" of any environmental violation. The "knowledge" provisions require particular attention when the seller is an entity as opposed to an individual. In such cases, the seller may want to limit the representations and warranties to matters within the personal knowledge of its officers or other persons in positions of management, whereas the seller will want them to include matters within the knowledge of any employee or representative of the seller.

Indemnities

Indemnity provisions in the purchase agreement can be used to shift environmental liabilities from one party to the other.

Preliminary Considerations

"As Is" Sales

Sellers in a strong bargaining position often want to include in the purchase agreement and in the sale document "as is" clauses, which provide that the buyer accepts the property in its present condition and waives any warranties as to the condition of the property.[48] Buyers should carefully consider this type of provision because it is fairly common in producing property transactions, and may effectively put almost all environmental risk on the buyer.

Some courts, however, have limited the effectiveness of "as is" provisions in shielding the seller from liability to the buyer based on environmental contamination. For example, in February 2004, a Texas appellate court addressed a sale of property that contained the following "as is" provision:

> Purchaser acknowledges that he has inspected all buildings and improvements situated on the property and is thoroughly familiar with their condition, and Purchaser hereby accepts the property and the buildings and improvements situated thereon, in their present condition, with such changes therein as may hereafter be caused by reasonable deterioration.

Environmental contamination was discovered on the property after the sale. The buyer sued the seller to recover cleanup costs under the Texas Solid Waste Disposal Act[49] (Texas' counterpart to CERCLA). The court held that in light of the statutory policies to encourage prompt cleanup and force those responsible for creating the environmental problems to bear the cost of their action, the buyer's statutory contribution claim against the seller was not barred by the "as is" provision in the sale.[50]

In similar fashion, it has been held that an "as is" clause does not shield the seller from environmental liability to the buyer unless the clause expressly states the relevant environmental condition.[51] Other courts have held that the clause simply disclaims warranties and only bars actions based on breach of warranty.[52]

Nevertheless, "as is" clauses together with other provisions in the sale agreement can effectively make the buyer responsible for the properties in their present condition, with the result that the buyer assumes almost all of the environmental risks.[53] Thus, if the assets are to be sold "as is," the buyer's pre-closing due diligence takes on particular importance.

Indemnity for CERCLA Liability

CERCLA recognizes the validity of indemnity agreements between private parties as to CERCLA liability.[54] But even though private parties can indemnify each other with respect to CERCLA liability, their indemnity agreements will not bind the federal government or third parties.[55] Moreover, even as between private parties, an indemnity from CERCLA liability (or liability under other environmental statutes) should specifically state the statutory liability at issue.

Texas' "Express Negligence" Rule

In 1987, the Texas Supreme Court adopted the "express negligence" standard which requires that "parties seeking to indemnify the indemnitee from the consequences of its own negligence must express that intent in specific terms."[56] The federal Fifth Circuit Court of Appeal has held that Texas' "express negligence" rule also applies to indemnification from claims based on the indemnitee's strict liability, including strict liability under CERCLA, even when the claim is "prospective" only, i.e., when the claim is based on pre-indemnity conduct but is not asserted until after the indemnity is entered into between the parties.[57] The same court has held that an indemnity provision that excludes claims arising from the indemnitee's gross negligence does not satisfy Texas' "express negligence" rule by implicitly including ordinary negligence within the indemnity obligation.[58]

Louisiana's "Clear and Unequivocal" Rule and Other Limitations

Louisiana courts examine agreements which purport to indemnify the indemnitee from the consequences of its own negligence under the "clear and unequivocal" rule,[59] which is only slightly less strict than Texas' "express negligence" rule. In addition, the Louisiana Civil Code nullifies any contractual clause that, in advance, excludes or limits the liability of one party for intentional or gross fault or for causing physical injury to the other party.[60]

Thus, to be effective under either Texas or Louisiana law as to liability under CERCLA and other environmental statutes, the indemnity provision should expressly identify the statutes at issue and include strict liability as well as negligence.

Key Provisions

The following are some of the most important issues to be considered when negotiating and drafting the indemnity:

- **Liabilities and Losses Covered** — The indemnity provision should be drafted to cover both "indemnity against liability," which is triggered when the liability of the indemnitee arises, regardless of whether he has made a payment or suffered actual loss, and "indemnity against loss," which does not render the indemnitor liable until the indemnitee makes payment or sustains a loss. Environmental liabilities could include fines and penalties, as well as diminution in the value of the property, loss of use of the property, inability to obtain financing collateralized by the property and exemplary damages. In appropriate cases, the indemnity provision should include all of these matters.

- **Substances and Conditions Covered** — Care should also be taken to ensure that all pertinent contaminants are covered under the indemnity. Normally, a broadly worded definition of hazardous substances, pollutants, contaminants is set out, followed by specific references to CERCLA, RCRA and other environmental statutes. Also, because some substances are excluded from regulation under particular statutes — such as the petroleum under CERCLA and E&P wastes under RCRA - it is advisable to specifically refer to petroleum, E&P wastes, NORM and other wastes (e.g. asbestos) as being within the scope of the indemnity.

- **Fitness for Intended Use** — Certain conditions of the property that do not directly involve environmental contamination could affect the operations on or development of the property. Of particular note are wetlands. The purchase agreement should allow the buyer to investigate the wetlands condition of the property and to forego closing on the transaction if it determines wetlands will prohibit its intended use of the property.

- **Presence Versus Release** — Hazardous materials are commonly used in oil and gas and other industrial operations, and the mere presence of such materials on site will not necessarily impose any environmental liability on the buyer. Rather, liability is generally triggered by a release or threatened release of hazardous materials or handling of such materials in violation of environmental laws or permits. The seller will not want to indemnify the buyer with respect to the presence of hazardous materials on the property unless the presence of such materials could actually result in the buyer's liability. The buyer, on the other hand, will want to avoid problems the materials may cause in the future, such as adverse impact on the conduct of the business or development of the property. A reasonable compromise may be for the seller to accept the risk of liability arising out of the pre-closing presence of hazardous materials but only to the extent such presence constituted a violation of, or created a cleanup obligation under, applicable law.

- **Changes in the Law** — Some conditions that may be lawful at the time of the purchase agreement or closing may thereafter become unlawful due to a change in the law. Both parties will likely want the other to provide indemnification for conditions that become environmental liabilities after the closing as a result of a change in the law, and both will probably be reluctant to give such an indemnity.

- **Floors and Caps** — The seller may want to impose a "cap" on its liability under the indemnification provision. In light of the unpredictability of the amount of environmental liabilities, the buyer should resist any type of cap. The seller may also attempt to negotiate a "floor" on liability providing that it will not provide indemnity for claims below a certain amount. If a floor is established, the buyer should negotiate a "basket" provision providing that claims will be accumulated to meet the "floor," similar to a deductible under an insurance policy.

- **Materiality** — Some indemnity provisions also provide that liability only exists only if the matter is "material." Materiality can be defined either quantitatively (i.e., by the dollar amount), or qualitatively (e.g., where the ability to conduct operations is affected). The buyer should be careful in agreeing to any qualitative definition of "materiality," because they could significantly weaken the indemnity requirement.

- **Voluntary Versus Mandatory Cleanup** — For various reasons, the buyer may seek the right to institute cleanup of the property even if it has not been mandated by the governmental authorities, such as where delay in cleanup may adversely affect operations at the site or present health hazards or exposure to toxic tort lawsuits. The seller typically will resist any obligation to indemnify for the costs of a voluntary cleanup. The applicable cleanup standard may also be the subject of heavy negotiation. Absent strong indemnity language to the contrary, the indemnity probably will not be construed to require the "best" cleanup for the buyer, but only one that satisfies applicable law or allows the property to be used as intended by the buyer.

- **Survivability and Term** — Typically, environmental risks are allocated between the parties as of the closing date. Under this scenario, the seller will indemnify the buyer with respect to claims, etc., that arise before the closing, and the buyer will indemnify the seller with respect to the same items arising after the closing. However, the question will remain as to how long the seller's indemnity for pre-closing matters will remain in effect. The seller may want to limit this time period, whereas the buyer should attempt to negotiate an indefinite indemnity. In other transactions, a reasonable rule of thumb may be to limit the indemnity period to the prescriptive period applicable to potential claims. However, in the environmental context, that logic may not suffice. Under CERCLA, the statute of limitations period generally does not accrue until the cleanup is either completed or initiated.[6]

- **Indemnity as the Sole Remedy** — A buyer may have many other remedies beyond those under the indemnity provision. For example, in the absence of contractual language to the contrary, it will be able to bring an action against the seller in the event of a breach of any representation or warranty. The buyer will also have statutory rights to bring a CERCLA response cost recovery action or contribution claim, or similar statutory claims, against the seller, in the event of contamination resulting from pre-closing activities or conditions. The buyer, therefore, will want to be sure that the sale agreement does not provide that its sole remedy is under the indemnity provision.

- **Defense Obligations and Attorney's Fees** — The buyer will want the indemnity provision to include a requirement that the seller also defend it in suits by third parties. Such provision would require the seller to pay the attorney's fees and expenses associated with the defense and can grant the buyer the right to retain attorneys of its own choosing to defend the suit.

- **Notice** — The purchase agreement should require the seller to immediately notify the buyer of any matters affecting the environmental condition of the property or potential environmental liability that arise prior to the closing. Such matters could include any spill or release of hazardous substances on the property or adjacent property; any notice or demands from any governmental agency or third party regarding environmental matters;

and any fact or change in circumstances that reasonably could be expected to cause any of the representations and warranties to cease to be true. Notice of these matters could affect the buyer's decision as to whether to go through with the closing, and notice after closing could allow it the opportunity to immediately demand the defense and indemnification from the seller, and also promptly address the issue and mitigate its damages. The seller may request similar notice in order to mitigate its potential legal and contractual liabilities.

- **Other Sources of Protection** — The buyer will want to avoid any provisions requiring that other sources of protection from liability — such as insurance coverage or contractual indemnities from other parties — are primary and must be pursued by the buyer before the seller's indemnification obligations arise. The buyer should attempt to negotiate a provision whereby it may pursue any or all sources of protection, although double recovery, of course, should not be allowed.

- **Indemnified Parties** — In light of the potential personal liability of shareholders, officers, directors, employees, agents and attorneys of the buyer, the indemnity should also extend to these parties. Further, to make the property marketable in the future, the indemnity should also extend to the buyer's assigns.

- **Financial Assurance for Performance of the Indemnity** — The value to the buyer of any indemnity provision is dependent on the financial ability of the seller to perform if called upon to do so. Various provisions may help ensure that the seller can meet its indemnity obligations, such as:

  — escrow of a portion of the purchase price for some period of time after the closing pending resolution of outstanding environmental matters;

  — a non-dissolution agreement and requirement that the seller maintain its financial status for some period of time after closing, including restrictions on dividends or other transfers of assets;

  — guaranties provided by the shareholders, parent corporation or other persons owning an interest in the seller or other third parties;

  — maintenance of financial guaranties by letters of credit;

  — insurance policies specifically insuring the indemnity agreement and naming the buyer as an additional insured;[62] and

  — perhaps other financial assurance mechanisms, such as those found in 40 C.F.R. §264.143, including a trust fund, a security bond or a financial assets test.

The Seller's Insurance Coverage

Another source of potential protection from environmental liability is insurance coverage under the seller's current or prior comprehensive general liability (CGL), property or environmental liability insurance policies.[63] Occurrence-based CGL policies historically have covered injury or damage that occurred during the policy period, even if the claim is not made until years after expiration of the policy period. Also, the absolute pollution exclusion was not introduced until the mid-1980s and, as a result, old CGL policies — particularly those issued in the 1960s and 1970s — may cover present and future environmental claims. Further, at least in Louisiana, the pollution exclusion in more modern policies may be inapplicable if a third party, as opposed to the insured under the policy, caused the contamination.[64]

The purchase agreement should require that the buyer be provided copies of all of the seller's old insurance policies, together with any "secondary evidence" of coverage, such as insurance certificates, partial policies, letters with policy numbers on them, financial ledger entries, umbrella and excess-policy schedules, correspondence to and from insurance agents and other documents that refer to coverage for particular time periods. Policy information may also exist in files maintained by insurance agents or brokers. Although the party claiming coverage has the burden of proving insurance coverage, the contents of a lost or missing policy may be proven indirectly through secondary evidence such as testimony or documents tending to support the substance of the policy.[65]

Assignment of Claims

The general rule under Louisiana law is that a buyer cannot recover from a third party for property damage that occurred prior to the sale. The right to assert a claim for damages to land is a personal right belonging to the owner of the land at the time the damages occurred. That right is not transferred to the buyer by a mere transfer of title to the land. Rather, there must be a specific assignment by the seller of the rights to the buyer.[66] Accordingly, the buyer should obtain from the seller a specific assignment of all known claims the seller might have against third parties for contamination or other property damage.

The Buyer's Pre-Closing Due Diligence Investigation

The pre-closing due diligence investigation should always include an environmental assessment of the property. The buyer may also want to conduct its own independent due diligence investigation, consisting primarily of obtaining information about the site from the seller and regulatory agencies.

The Environmental Assessment

Purposes of the Assessment

The environmental assessment can serve several purposes. First, it can help identify and quantify environmental risks before the closing, which, as discussed below, can affect the purchase price and other contract terms and, in some cases, result in certain properties being excluded from the transaction.

The assessment serves to memorialize the environmental conditions existing at the time of closing, thereby establishing a "baseline" against which future environmental problems can be evaluated and aid in subsequent disputes over whether contamination occurred before or after the sale. In addition, the assessment can help establish the buyer's "innocent purchaser" defense to liability under CERCLA.

The Innocent Landowner Defense Under CERCLA

The environmental assessment is conducted primarily to satisfy the requirements of the "innocent landowner" defense under CERCLA. As noted previously, this defense protects the buyer from CERCLA liability if it can establish that it acquired the property without knowing, or having any reason to know, that the hazardous substances were there and used due care with regard to the hazardous substances after they were discovered. To establish that it "had no reason to know" of the contamination, the buyer must show that prior to the acquisition it carried out "all appropriate inquiries" into the previous ownership and uses of the property.[67]

Revisions to the CERCLA statute in January 2002[68] and regulations enacted by EPA in May 2003[69] clarified the requirements for satisfying the "all appropriate inquiry" standard. Under current law, a buyer may satisfy the "all appropriate inquiry" requirement by having an environmental assessment conducted in accordance with either American Society for Testing and Materials (ASTM) Standard E 1527-97 (the 1997 standard) or ASTM Standard E 1527-00 (the 2000 standard).

Significantly, on August 26, 2004, EPA proposed new regulations that specify the requirements for the conduct of "all appropriate inquiry" assessments.[70] The proposed regulations differ in some respects from the ASTM standards; however, until EPA promulgates the final regulations, the ASTM standards continue to define the requirements for "all appropriate inquiries" under CERCLA.

An environmental assessment may consist of two, or even three, stages. The Phase I assessment typically involves a records review, a site reconnaissance (i.e., a walk through of the site), interviews with current owners and occupants and interviews with government officials. The Phase II assessment involves intrusive sampling of potential contamination at the property. The goal of the Phase II is to develop quantitative information regarding the horizontal and vertical extent of the contamination in soil and groundwater and can include testing of surface water, air and aboveground structures. If deemed necessary, additional sampling may be performed as part of a Phase III assessment.[71]

NORM and Wetlands Issues

It is important to note that environmental assessments performed in accordance with the ASTM standards are designed primarily to satisfy the "innocent landowner" defense under CERCLA and normally do not address contaminants or issues that are not within the purview of CERCLA. For example, the typical environmental assessment will not address NORM contamination or delineate wetlands on the property. When appropriate, separate evaluations should be requested to address NORM and wetlands issues.

Stale Assessments

The environmental assessment should be performed not more than 180 days prior to the date of the closing of the sale in order for it to remain valid for purposes of the "innocent landowner" defense.[72] An updated assessment should be obtained if more than 180 days has passed since the environmental assessment.

Hiring the Consultant

In selecting the consultant, the buyer should place particular emphasis on the consultant's education, experience and expertise in dealing with oil and gas properties, as well as its credibility and reputation in the industry and with the governmental authorities. The buyer should also be certain that the consultant is appropriately insured. Moreover, even though EPA's recently proposed regulations addressing the "all appropriate inquiries" assessment are not yet final, it is advisable the consultant qualify as an "environmental professional," as that term is defined in the proposed regulations.[73]

The Buyer's Independent Investigation

In appropriate cases, the buyer should consider conducting its own independent due diligence investigation. This investigation could include reviewing the seller's records and inquiring as to the history of operations at the site, the compliance history of the facilities, information regarding any outstanding violations and whether the site was ever used for the storage or disposal of hazardous substances. This information could be obtained through interviewing of the seller's employees and representatives. Records to be reviewed may include permit files, plant logs, enforcement documents, litigation files, insurance files, repair records, correspondence with regulatory agencies, waste handling documents, documentation of water consumption, corporate environmental policies, employee training procedures and contingency and spill response plans. In addition, information can be obtained from the relevant regulatory agencies through written requests made pursuant to the Freedom of Information Act.[74] It can also be helpful to discuss the subject property informally with regulatory agencies. Where possible, property adjacent to the subject property should be included

in the investigation. It should be remembered that the absence of agency information does not necessarily mean that no problems exist.[73]

The Sale

The discovery of contamination during the pre-closing investigation does not necessarily doom the transaction. The following are some options for addressing known contamination:

- Require the seller to clean up or otherwise resolve the contamination issues to the satisfaction of the buyer, and the regulatory agencies, prior to the closing. As explained, a party should not be subjected to environmental liability unless it acquires an interest in, or participates in operation of, the contaminated property. Therefore, a prospective buyer should be able to avoid environmental liability by requiring the seller to clean up the property prior to closing. This strategy may be unworkable in some situations because there may be significant delays before the cleanup is completed and approved by the regulatory agencies.

- Exclude from the transaction the properties or portions thereof that are contaminated. In some cases, contaminated properties may not be essential to the transaction. Where feasible, contaminated areas may be excluded and the buyer should thereby avoid environmental liability.

- Reduce, or hold back a portion of, the purchase price to account for the estimated cost of the cleanup and related actions. This option is not without its risks. First, it involves the purchase of contaminated property, which normally gives rise to environmental liability on the part of the buyer. Second, cleanup costs are very unpredictable and often underestimated. These problems, however, might be effectively managed in a number of ways. For example:

  — The seller could be required to purchase a remediation stop-loss/cost-cap insurance policy naming the buyer as the insured. This type of policy indemnifies the insured against unanticipated cleanup cost overruns. The policy will normally include a self-insured retention level. For example, an insured with expected cleanup costs of $1 million may carry a $250,000 buffer or self-insured retention and purchase a $2 million cost-cap policy. If the actual cleanup costs are $2 million, then when the costs exceed $1,250,000, the cost-cap policy would respond by paying the unanticipated $750,000. This coverage is designed to address the risks and uncertainty associated with environmental remediation projects.[76]

  — The seller could be required to indemnify the buyer from any environmental liability, specifically including any liability for cleanup costs that exceed the amount of coverage provided to the buyer under the a remediation stop-loss/cost-cap insurance policy. As explained above, in some situations the seller should be required to provide some form of financial assurance for its performance of the indemnity.

  — In appropriate circumstances, the buyer might attempt to qualify as a BFPP under CERCLA and state law. This may provide protection from CERCLA liability despite the fact that the buyer will acquire the property with knowledge of the contamination.

- Obligate the seller to clean up the property after closing. This may be the least feasible alternative, because the buyer normally will take on environmental liability when he becomes the owner. It is difficult to ensure that the seller will have the funds to fulfill its cleanup obligation, and the remedies for breach of the obligation may be inadequate.

It should also be noted that several states have enacted voluntary cleanup or remediation programs (VRPs) that typically exempt the buyer, and its successors, assigns and lenders, from liability to the state if, among other requirements, the cleanup is performed in accordance with an approved plan, and a certificate of completion is issued by the state agency.[77] Thus, whenever cleanup is required as part of a transaction, compliance with the VRP requirements might be considered by the parties. That said, there may be a question as to whether operating oil and gas properties are eligible under the particular state's VRP, in which case clarification should be sought from the appropriate state agencies.

Conclusion

The acquisition of oil and gas properties can expose the buyer to potentially significant environmental liability. That liability, however, can be effectively managed through careful planning, investigation and contracting.

Endnotes

[1] *See also Stanley A. Millan, Anne J. Crochet, & Roger A. Stetter, Louisiana Environmental Compliance §§ 9:12-9:43 (West, a Thompson Business 2003); R. Kinnan Golemon & Danny G. Worrell, Producing Property Conveyances and Environmental Liabilities: A Mine Field for the Unwary, Chapter 3, 43rd Annual Institute on Oil and Gas Law and Taxation (Matthew Bender 1992); and Penny L. Parker & John Slawich, Contractual Efforts to Allocate the Risk of Environmental Liability:*

Is there a Way to Make Indemnities Worth the Paper They Are Written On?, 44 Sw. L. J. 1349 (Spring 1991).

[7] *42 U.S.C. § 9601, et seq.*

[8] *United States v. R. W. Meyer, 889 F.2d 1497 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990).*

[9] *United States v. Bell Petroleum Services, Inc., 64 F.3d 202 (5th Cir. 1995).*

[10] *42 U.S.C. § 9607(a).*

[11] *42 U.S.C. § 9606.*

[12] *42 U.S.C. § 9607(a).*

[13] *Id.*

[14] *42 U.S.C. § 9601(20).*

[15] *United States v. Bestfoods, 524 U.S. 51, 66-67, 118 S. Ct. 1876, 1887, 141 L. Ed. 2d 43, 59 (1998); Browning-Ferris Industries of Illinois, Inc. v. Ter Maat, 195 F.3d 953 (7th Cir. 1999), on remand, 2000 U.S. Dist. LEXIS 16805 (N.D. Ill. 2000)(in CERCLA contribution action brought by a potentially responsible party, president and principal shareholder of corporations that operated landfill held personally liable as "operator" of landfill and jointly liable with corporations for cleanup costs).*

[16] *42 U.S.C. § 9601(14).*

[17] *Memorandum on "Scope of the CERCLA Petroleum Exclusion Under Section 101(14) and 104(a)(2)," by Francis S. Blake, (then) General Counsel of EPA, July 31, 1987.*

[18] *See, e.g., Tosco Corp. v. Koch Industries, Inc., 216 F.3d 886 (10th Cir. 2000)(petroleum exclusion inapplicable where hazardous wastes have commingled with petroleum products in the soil and are floating on the groundwater beneath a refinery; court noted that the petroleum exclusion was added to address oil spills, not releases of oil which has become infused with other hazardous substances); Cose v. Getty Oil Co., 4 F.3d 700 (9th Cir. 1993)(crude oil tank bottoms — which are comprised of water and sedimentary solids that settle out of the crude oil and create a layer of waste at the bottom of the crude oil storage tanks do not fall within the petroleum exclusion); United States v. Western Processing Co., Inc., 761 F.Supp. 713, 722 (W.D. Wash. 1991)(petroleum exclusion inapplicable to waste oil resulting from rinsing and cleaning oil tanks when hazardous substances from the tank's interiors were added to the waste oil during cleaning); Equitable Life Assurance Society of the U.S. v. Greyhound Corp., 31 Env't. Rep. Cas. (BNA) 1079 (Jan. 26, 1990) (diesel fuel falls within the exclusion); Wilshire Westwood Associates v. Atlantic Richfield Corp., 881 F.2d 801 (8th Cir. 1989)(leaded gasoline falls within the petroleum exclusion, and therefore is not subject to CERCLA, even though it contains hazardous constituents and additives).*

[19] *42 U.S.C. § 6901 et seq.*

[20] *Louisiana-Pacific Corp. v. Asarco, Inc., 24 F.3d 1565 (9th Cir. 1994)(slag waste, a by-product of smelting operations and exempt from the RCRA hazardous waste management standards in the same manner as E&P wastes, are "hazardous substances" under CERCLA); Eagle-Picher Industries Inc. v. U.S. Environmental Protection Agency, 759 F.2d 922 (D.C. Cir. 19985)(same regarding mining wastes).*

[21] *E.g., the D.L. Mud, Inc. Superfund (drilling mud facility), the Gulf Coast Vacuum Services Superfund Site (facility that primarily handled waste from oil and gas activities), and the PAB Oil & Chemical Service, Inc. Superfund Site (disposal facility for oil field waste), all located in Vermilion Parish, Louisiana.*

[22] *See, e.g., LAC 33:XV.1402, defining the terms "equipment," "location," and "site."*

[23] *AMOCO Oil Co. v. Borden, Inc., 889 F.2d 664, 668-69 (5th Cir. 1989).*

[24] *The "innocent landowner" defense arises from the definition of "contractual relationship" contained in 42 U.S.C. § 9601(35) for purposes of the third party defense under 42 U.S.C. §9607(b)(3).*

[25] *42 U.S.C. § 9601(35)(B)(i)(I).*

[26] *42 U.S.C. §§ 9601(40) and 9607(r).*

[27] *See, in particular, Tex. Health & Safety Code §§ 361.271 - 361.345.*

[28] *La. R.S. 30:2271-83, entitled "Liability for Hazardous Substance Remedial Action."*

[29] *42 U.S.C. § 6928.*

[30] *42 U.S.C. § 6972(a) and 6973.*

[31] *42 U.S.C. § 6972(a)(1)(B) and 6973(a).*

[32] *See, Regulatory Determination for Oil and Gas and Geothermal Exploration, Development and Production Wastes, 53 Fed. Reg. 25446 (July 6, 1998); Clarification of the Regulatory Determination for Wastes From the Exploration, Development and Production of Crude Oil, Natural Gas and Geothermal Development, 58 Fed. Reg. 15284 (March 23, 1993).*

CPL CERTIFICATION

The landmen listed below have applied to sit for the Certified Professional Landman examination and are published here simply to give AAPL members an opportunity to present objections to certification of the applicant(s). Publication does not represent acceptance or success in passing the examination. If no objections are presented within 45 days, it will be considered as approval by the membership. Objections must be written and signed and will be treated as confidential. For additional information on procedures, see Voluntary Certification Program in the *Landman's Directory & Guidebook.*

Mike Clearwood
Billings, MT

Sheldon F. Thomson
Fort Worth, TX

Craig A. Lamendola
Baton Rouge, LA

Daniel P. Wolcott
Lakewood, CO

Requests for Retired Life Membership Granted

The AAPL Board of Directors approved requests for Retired Life Membership at its quarterly meeting held in Chicago, Illinois, in September.

Retired Life Membership may be conferred, upon application to and approval by the AAPL Board of Directors, on any member who is at least 55 years of age, has had at least 25 years of active landwork, is fully retired from landwork and has been an active AAPL member for the five consecutive years immediately preceding the application process.

New Retired Life Members include:

R.F. (Buddy) Fort, CPL
Midland, TX

Ingle (Charles) Trimble Jr.
The Woodlands, TX

Patrick Smith
Montgomery, TX

Gary G. Wisener
Houston, TX

[28] 40 C.F.R. § 270.1(c).

[29] 50 Fed. Reg. 28702, 28714 (July 15, 1985).

[30] 42 U.S.C. § 6973 (enforcement by EPA); 42 U.S.C. § 6972(a)(1)(b)(citizen suit provision allowing enforcement by non-EPA parties).

[31] See Adam Babich, RCRA Imminent Hazard Authority: A Powerful Tool for Businesses, Governments, and Citizen Enforcers, 24 ELR 10122 (March 1994).

[32] Tex. Health & Safety Code Title 5, Subtitle B, Chapter 361; La. R.S. 30:2171-2206 and LAC 33:Part V.

[33] 33 U.S.C. § 2701 et seq.

[34] 33 U.S.C. § 2702(a).

[35] 33 U.S.C. §§ 2701(32), 2702.

[36] 33 U.S.C. § 2702(b).

[37] 33 U.S.C. §§ 2701(9).

[38] Tex. Natural Resources Code Title 2, Chapter 40, §§ 40.001-40.304.

[39] La. R.S. 30:2451-96.

[40] Tex. Natural Resources Code Title 2, Chapters 89 and 91, §§ 89.001-91.661; 16 TAC § 3.1 et seq.

[41] LAC 43:XIX.Subpart 1.

[42] 02-C-0826 (La. 2/25/2003), 850 So.2d 686.

[43] Hazelwood Farm, Inc. v. Liberty Oil and Gas Corp., 2002-266 (La. App. 3d Cir. 4/2/03), 844 So.2d 380, writ denied 2003-1585 and 2003-1624 (La. 10/31/03), 857 So.2d 2d 476.

[44] Simoneaux v. Amoco Production Co., 2002-1050 (La. App. 1st Cir. 9/26/03), 860 So.2d 560.

[45] Grand Lake Hunting Club v. BP America Production Co., Docket No. 2002-4112, 12th Judicial District Court, Avoyelles Parish, Louisiana, Judgment on Exceptions dated November 6, 2003; Doré Energy Corp. v. Carter-Langham, Inc., Docket No. 10-16202, 38th Judicial District Court, Cameron Parish, Louisiana, by Judgment dated January 29, 2004.

[46] La. R.S. 30:122.

[47] Terrebonne Parish School Board v. Castex Energy, Inc., 2001-2634 (La. App. 1st Cir. 3/19/04), 2004 WL 540521, writ granted, 2004-0968 (La. 6/25/04), 876 So.2d 816.

[48] It should be noted that, under CERCLA, the seller must disclose all known releases to the buyer in order for the seller to preserve its innocent landowner defense under CERCLA. 42 U.S.C. § 9601(35)(C).

[49] Tex. Health & Safety Code § 361.444.

[50] Bonnie Blue, Inc. v. Reichenstein, 127 S.W.3d 366 (Tx. App. Dallas 2/5/04).

[51] Amland Property Corporation v. Alcoa, 711 F.Supp. 784, 802 (DNJ 1989) ("as is" clause does not exclude liability for abnormally dangerous products such as asbestos).

[52] Mardan Corp. v. C.G.P. Music, Ltd., 600 F.Supp. 1049, 1055 (D. Ariz. 1984), modf'd on other grounds, 804 F.2d 1454 (9th Cir. 1986); Wiegmann & Rose International Corp. v. NL Industries, 735 F.Supp. 957 (N.D. Cal. 1990); Southland Corp. v. Ashland Oil, Inc., 696 F.Supp. 994 (DNJ 1988) ("as is" clause in purchase agreement precludes only claims based on breach of warranty by seller, but does not defeat buyer's claim for contribution under CERCLA).

[53] See, e.g., Western Ohio Pizza, Inc. v. Clark Oil & Refining Corp., 704 N.E.2d 1086 (Ind. App. 1999); Niecko v. Emro Marketing Co., 973 F.2d 1296 (6th Cir. 1992).

[54] 42 U.S.C. § 9607(a)(1).

[55] Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1457 (9th Cir. 1986).

[56] Ethyl Corp. v. Daniel Construction Co., 725 S.W.2d 705 (Tex. 1987).

[57] Fina, Inc. v. ARCO, 200 F.3d 266 (5th Cir. 2000)(Buyer's CERCLA claims against seller of refinery not barred by buyer's agreement to indemnify seller from "all claims . . . arising from the ownership of the Assets . . . and accruing from and after the Closing . . . except to the extent that any such claim . . . shall arise from the gross negligence of [seller]").

[58] Quorum Health Resources, L.L.C. v. Maverick County Hospital District, 308 F.3d 451 (5th Cir. 2002).

[59] Soloco, Inc. v. Dupree, 1999-1476 (La. App. 3rd Cir. 2/9/2000), 758 So.2d 851.

[60] La. Civ. Code art. 2004.

[61] 42 U.S.C. § 9613(g)(2)(For removal actions, the statute of limitations is three years after completion of the removal action; and for remedial actions, the statute of limitations is six years after initiation of physical onsite construction of the remedial action, except under certain circumstances).

[62] See, Insuring Contractual Indemnity Agreements Under CGL, MGL, and P&I Policies, 21 Tul. Mar. L.J. 359, 370-75 (1997).

[63] See, Todd S. Davis, Brownfields: A Comprehensive Guide to Redeveloping Contaminated Property, Chapter 13 entitled "Using Old Insurance Policies as Weapons" (American Bar Association 2d ed. 2002).

[64] Doerr v. Mobil Oil Corp., 2000-0947 (La. 12/19/2000), 744 So.2d 119; North American Speciality Insurance Co. v. Georgia Gulf Corp., 99 F.Supp.2d 726, 730-31 (M.D. La. 2000).

[65] Todd S. Davis, Brownfields: A Comprehensive Guide to Redeveloping Contaminated Property at 176.

[66] See, e.g., St. Jude Medical Office Building Limited Partnership v. City Glass and Mirror, Inc., 92-C-3066 (La. 5/24/93), 619 So.2d 529; Prados v. South Central Bell Telephone Co., 56,255 (La. 3/29/76), 329 So.2d 744. But see, Hopewell, Inc. v. Mobil Oil Co., 2000-3280 (La. 2/9/01), 784 So.2d 653 (buyer's claim against third party for restoration of property contaminated by oil and gas operations had been dismissed by lower court on grounds that there was no specific assignment of the claim to buyer; in a decision without a published opinion, the Louisiana Supreme Court reversed, distinguishing Prados on grounds that it involved rights arising under a lease).

[67] 42 U.S.C. § 9601(35)(B)(i)(I).

[68] Pursuant to the "Small Business Liability Relief and Brownfields Revitalization Act," Pub. L. 107-118, 115 stat. 2356.

[69] 68 Fed. Reg. 24888-901 (May 9, 2003).

[70] 69 Fed. Reg. 52541-81 (August 26, 2004).

[71] Erickson and Morrison, Environmental Reports and Remediation Plan: Forensic and Legal Review, §§ 3.5 and 3.6 (Wiley Law Publications 1995).

[72] ASTM Standard E 1527-00, Section 4.6.

[73] See 69 Fed. Reg. at 52552-55 (August 26, 2004).

[74] 5 U.S.C. § 552.

[75] Eastern Mineral Law Foundation, Proceedings of the Fourteenth Annual Institute, Section 24.02[6] (1993).

[76] See, Todd S. Davis, Brownfields: A Comprehensive Guide to Redeveloping Contaminated Property at 160.

[77] See, e.g., La. R.S. 30:2285-90, and LAC 33:VI.Chapter 9 (Louisiana); and Texas Health & Safety Code §§ 361.601-361.613, and 21 Tex. Reg. 3203 (Texas).