COMMON LAW ENVIRONMENTAL ISSUES & LIABILITY FOR UNPLUGGED WELLS

Pollution of fresh water from oil and gas wastes is one of the main issues alleged in common law lawsuits involving oil and gas operations. In a 1985 study the EPA estimated that 361 million barrels of "drilling waste" was generated from about 70,000 crude oil and natural gas wells. Further, over 800,000 active production sites generated 20.9 billion barrels (including produced water injected for enhanced oil recovery (EOR) of "produced water" during that year. Associated waste, such as workover fluids and tank bottoms, were produced at the rate of around 11 million barrels per year.

These wastes create several major potential sources of fresh water pollution: (1) damage from produced water or produced water disposal or injection, (2) damage from production, workover, evaporation, or related pits and underground storage tanks, and (3) damage from unplugged or improperly plugged wells.

Prior to the numerous environmental statutes enacted after 1970 the "common law" was frequently used to address environmental problems. In a common law lawsuit the landowner generally asserts that the operator (1) has been negligent, (2) created a nuisance, (3) is using more of the surface than is reasonable, or (4) is trespassing. The landowner generally asks for monetary damages for the environmental problem, and rarely asks for specific performance to remediate the property. See: Marshall v. El Paso Natural Gas Co., 874 F.2d 1373 (10th Cir. 1989) ($5.4 million award for oil field pollution to lands in Beckham Co., Oklahoma); Fischer et.al. v. Atlantic Richfield, unreported (Woods County, Oklahoma, District Court) ($3.6 million for contamination from a 75 year old oil field).

Due to problems commonly encountered in a common law proceeding many times the landowner was unable to obtain a satisfactory remedy for pollution problems, and statutory provisions began to be adopted as well as regulatory controls from agencies such as the EPA.

1. COMMON ENVIRONMENTAL PROBLEMS

Produced Water. Damage to fresh water aquifers or to surface lands from produced water disposal, injection, or secondary recovery projects account for a large portion of current oil and gas environmental litigation.

While varying widely the elements found in produced water from oil and gas operations, as compared to seawater, can be summarized as follows:

CONCENTRATIONS IN PARTS PER MILLION ("ppm")
<table>
<thead>
<tr>
<th>CONTAMINANT</th>
<th>SEAWATER</th>
<th>DRINKING WATER(^1)</th>
<th>PRODUCED WATER</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sodium</td>
<td>10,600</td>
<td>-</td>
<td>12,000 to 150,000</td>
</tr>
<tr>
<td>Potassium</td>
<td>400</td>
<td>-</td>
<td>0 to 4,000</td>
</tr>
<tr>
<td>Calcium</td>
<td>400</td>
<td>-</td>
<td>1,000 to 120,000</td>
</tr>
<tr>
<td>Magnesium</td>
<td>1,300</td>
<td>-</td>
<td>500 to 25,000</td>
</tr>
<tr>
<td>Chlorides</td>
<td>19,000</td>
<td>250</td>
<td>20,000 to 150,000</td>
</tr>
<tr>
<td>Bromides</td>
<td>65</td>
<td>-</td>
<td>50 to 5,000</td>
</tr>
<tr>
<td>Iodine</td>
<td>0.05</td>
<td>-</td>
<td>1 to 300</td>
</tr>
<tr>
<td>Sulfate</td>
<td>2,700</td>
<td>250</td>
<td>0 to 3,600</td>
</tr>
<tr>
<td>Carbonate</td>
<td>0</td>
<td>-</td>
<td>0 to 1,200</td>
</tr>
<tr>
<td>TDS</td>
<td>34,500</td>
<td>500</td>
<td>50,000 avg.</td>
</tr>
</tbody>
</table>

("TDS" is total dissolved solids)

Source: 40 CFR Sec. 141.11; 10 CFR Sec. 143.3; Reid, Brine Disposal Treatment Practices Relating to the Oil Production Industry, Kerr Environmental Research Laboratory (1974).

Where fresh ground water has been contaminated the presence of bromides and iodines in water are an indication that the contamination originated from oil field activities. As can be seen from the chart, the average level of total dissolved solids in produced water from the mid-continent region is approximately twice that of seawater.

Produced water is generally not fit for consumption by either humans or animals. Fresh water fit for human consumption has been defined as having less than 250 parts per million ("PPM") chlorides, less than 250 parts per million sulfates, and in no event more than 500 parts per million total dissolved solids ("TDS"). In general, the upper limits of contamination are 2,500 parts per million for poultry, 4,300 parts per million for swine, 6,000 parts per million for horses, and 10,000 parts per million for cattle. See generally: Case, Water Problems In Oil Production, The Petroleum Publishing Co., (1971); Donaldson, Environmental Aspects of Enhanced Oil Recovery, presented to the Department of Energy's Environmental Control Symposium (November, 1978).

Salt is toxic to plant life, interfering with the ability of the plant to extract water from the soil. Plants differ in their ability to tolerate salts. Soils will also have an impact on whether a plant will be able to tolerate salt intrusions, with clay soils generally retaining more moisture which will dilute the salt concentrations making it easier for plants to survive. Sandy soils on the other hand retain little moisture, and are more difficult to re-vegetate. See: Ward, Reclamation of Saline Damaged Alkalid Soils, Oklahoma State University.
Salt water spills also affect the ability of the soil to resist erosion. Salt damaged soil can lose the ability to bind together, and is more susceptible to being eroded. The lack of plant life in damaged areas also contributes to the erosion potential. In older fields where salt water was diverted to nearby streams, aerial photographs will many times reveal severe erosion problems from the wellhead (or where the wellhead used to be located) to the nearest stream.

When reclaiming lands damaged by salt water, certain plants that are more salt tolerant can be used. In general, when water is less than 700 PPM TDS it will not harm plant life, between 700 PPM and 2,000 PPM TDS certain salt sensitive plants will be affected, and above 2,000 PPM TDS plant life will be adversely affected.

Once a fresh water aquifer is damaged, in most instances it is economically impossible to restore that aquifer to its original condition in any meaningful time period. Damages awarded for such contamination can therefore be substantial.

**Water Contamination from Pits, Underground Storage Tanks, and Aboveground Storage Tanks.** In some cases wastes or trash generated from pipeline, processing, or compression operations have in the past been legally disposed of in pits at or around the facilities. Prudent operators today would not dispose of such materials in this manner.

Underground storage tanks (UST's) utilized at compressor stations or drip stations to collect liquids can also be a source of concern; the EPA has estimated that around 33% of all underground storage tanks will leak at some point during their lives. In most cases it is the piping that causes the leak, or spillage from overflow.

Aboveground storage tanks (AST's) utilized in pipeline, production, or processing operations can corrode over time, and such equipment can allow the contained product to escape into the environment.

Depending on the soil composition and the location of the water table soluble elements contained in such pits may leach into underground water, rendering the water unfit for agricultural or household use. In addition product leaks in storage tanks can, over time, migrate into the water table again rendering the water unfit for use.

Many underground and above ground storage tanks associated with exploration and production and pipeline operations are not regulated under federal laws, and are subject to state regulation if regulated at all. As such, many of the more stringent monitoring requirements recently imposed by federal laws may not apply to storage tanks associated with pipeline, processing plant, or similar operations.
Historically pits have been used to dispose of produced water, although the practice was prohibited in Texas and Oklahoma in the early 1960's. Even so, liquids that were stored in such pits could migrate into the groundwater over time.

**Unplugged or Improperly Plugged Wells.** While obvious, damage from unplugged wells is often an overlooked environmental hazard, especially in older producing areas. All states have regulations requiring the operator to plug depleted wells, and some states also have regulations or statutes which hold non-operating working interest owners jointly and severally liable for the plugging of wells. Landowners may also be responsible for plugging abandoned wells on their property.

Even where wells have been plugged in accordance with regulations then in effect, wells plugged prior to 1960 may not have been plugged in a manner which isolates the fresh water zones thereby permitting salt water intrusion. Secondary recovery projects inject produced water at high pressures into the target formation, which can result in subsurface contamination as the injected water uses the unplugged or partially plugged well bores to migrate to fresh water zones. "Breakouts" of salt water, or a salt water spring, can occur on the surface around these older well bores.

**2. REMEDIATION OF DAMAGED LANDS**

**Spills of Produced Water.** At the present time there are no standard federal guidelines adopted by producing states as to how to clean up a produced water spill. In Oklahoma, Corporation Commission Guidelines require that soil samples be taken after a salt water spill. Flushing the surface with fresh water is appropriate in some situations, but normally is not considered an effective means of recovering contaminants by the Commission.

If total dissolved solids in the soil exceed 2,500 ppm, removal and restoration of the soil is required. Samples should be taken "towards the edge of the spill" and two or three samples should be taken near the center of the spill. The samples are to be analyzed by a "qualified laboratory" using chain of custody records. Backfilling with compatible soil and re-vegetation may be required by the OCC.

Historically, the regulatory agency would allow an operator to flush the surface with fresh water in an attempt to remediate the problem. While such flushing sometimes was effective enough to allow the surface to be re-vegetated, unfortunately that solution usually was short term. In many cases capillary forces pulled the salts to the surface, or worse the flushing water carried the contaminants into the underlying fresh water formations.

Other alternatives to remediate the surface where produced water has spilled include re-vegetating with salt resistant plants or grasses, mixing the soil with uncontaminated soils to reduce salt concentrations, adding clay soils which generally
allow plants to tolerate more salts, removing and replacing the contaminated soils, or placing a clay cap on the contamination and re-vegetating.

If groundwater has been contaminated by produced water very little can be done to remediate the fresh water. Reverse osmosis can be utilized on a small scale basis, or wells can be drilled to attempt to contain or direct the "plume" of contaminants. Otherwise the landowner usually must wait for nature to clean up the problem, a process that generally takes hundreds of years.

**Spills of Crude Oil.** Spills of crude oil or petroleum hydrocarbons usually have a much less severe impact on the environment. Where crude oil has been spilled around wellheads or tanks it generally can be dug out, removed, and placed on a pad where it can be bioremediated naturally or with purchased microbes. Such clean up is relatively inexpensive and effective.

The Texas Railroad Commission has adopted a final rule on oil spill clean up standards that applies to entities it regulates. See: 16 Tex. Stat. Sec. 3.91. The main points included in the rule are:

1. The rule does not apply to spills in "sensitive" areas, to spills before the effective date of the regulation (November 1, 1993), or to spills of condensate or liquids extracted from natural gas. What is a "sensitive" area will be determined on a case by case basis, and no general rules exist designating certain areas as "sensitive".

2. The contaminated soil must be remediated to a level of less than 1.0% total petroleum hydrocarbons (TPH) within one year. The rule does not expressly require testing to determine if the 1.0% level has been attained.

3. If the spill results in contamination above 5.0% TPH, to avoid storm water contamination the material must be mixed with clean dirt to concentrations below that level, or removed from the site. Any free oil on the surface must be immediately removed. Care should be taken to avoid contamination of stormwater runoff.

4. A report of the spill to the Railroad Commission must set out: (1) the area and volume of soil contaminated, (2) a signed statement that all soil contaminated above 1.0% TPH was brought to the surface for remediation, (3) a signed statement that all soil left in place is below 5.0% TPH, (4) a detailed description of the remediation method to be used, and (5) the estimated cleanup date for the site.
5. For crude oil spills above 25 barrels, an additional report must be submitted to the Railroad Commission with test results certifying that the site had been cleaned up.

6. Spills of less than 5 barrels of crude oil must be cleaned up to these standards, but are not required to be reported to the Commission.

7. Spills of condensate or natural gas liquids, or spills to "sensitive areas" will be cleaned up on a site by site basis with the assistance of Railroad Commission personnel.

Crude oil contaminated soils are usually remediated in place in Texas and elsewhere.

In Oklahoma, the Corporation Commission requires that any oil on the surface be immediately removed and that dikes and emergency pits be used to confine the spill. If in-situ bioremediation is the preferred option, the Commission suggests that the area should be disked to a depth of six inches and fertilized by applying 160 pounds of nitrogen, 40 pounds of phosphorous, and 40 pounds of potassium per acre. All affected areas must be restored to the level of productivity that existed before the spill occurred.

3. DUTY TO PLUG

The Interstate Oil and Gas Compact Commission completed a study in 1997 that indicated that there are around 285,000 idle wells in the United States - and around 5% of those are "orphan wells" for which no viable, responsible party can be identified as having plugging responsibility. The number of idle wells has increased significantly - up from 70,000 in 1992 according to the study.

Many wells that are idle remain unplugged for good reason - the operator may want to use the well in the future, may want to institute an enhanced recovery unit, the well may have shut in natural gas that cannot be marketed, among other reasons. Nonetheless, the average cost of plugging these abandoned wells is around $25,000, and from an environmental standpoint it can be argued that a party who does not plug a well causing environmental damage could be negligent as well as in violation of state regulations prohibiting pollution.

In many states the responsible party will post a "plugging bond" with the applicable state regulatory agency, and will be identified as the "operator" of a site or lease. Many states have regulations holding the "operator" of a site, as identified in the agency's records, responsible for plugging costs.
The plugging issue is therefore an important one, since the responsible party for plugging many times will also be one of the responsible parties for environmental damages which may be caused by an unplugged well.

a. General rules

In general most state statutes or regulations provide that the operator and working interest owners are liable for plugging costs, but absolve royalty, landowners with no interest in the well, and overriding royalty interest owners from liability for these costs. In many states plugging funds have been established and such funds can be used by the regulatory agency to plug wells that may be harmful to the environment. The following regulations are fairly typical of most states.

**Texas Statewide Rule 14 - Plugging.** Rule 14 addresses the plugging of wells, and the technical and reporting requirements associated with such plugging. Under Rule 14(b)(2) a well must be plugged if it has been inactive over one year. An exception to the plugging requirement can be obtained for good cause, and a bond or statement of financial security must be posted in order to get such an exception.

An exception to plugging will not be granted unless a completion report is on file with the TRRC, and the well must be in compliance with all TRRC rules and must not constitute a pollution hazard. The exception to plugging is good for a one year period, and no more than four one-year exceptions can be granted without a written application and a showing that the well poses no pollution threat.

All wells over 25 years old that have been inactive for over a year must be tested annually for pollution potential in order to qualify for an exception to plugging. Normally a fluid level measurement will suffice for this test. A well will be considered active, after being considered inactive, only after three consecutive months of production.

An intent to plug must be filed with the TRRC at least 5 days prior to plugging (Form W-3A). The operator must use an approved cementer and must give notice to the landowner, and must call the TRRC's District Office at least 4 hours prior to plugging.

The plugs must be set to protect or isolate all productive zones and all useable water zones. Prior to setting plugs the hole must be in static condition and must be full of mud. After plugging the casing should be cut off 3 feet below ground level, and the location should be cleared.

Plugging is the responsibility of the operator of the well. For purposes of plugging responsibility, the TRRC will presume that the operator identified in its records is the operator responsible for plugging (even if the well had been sold to a third party). For
this reason, when selling a well the seller should insure the TRRC's records reflect the change of operator.

b. Plugging Issues After Property Divestiture

Current common law environmental litigation involving oil and gas production activities tends to focus on groundwater pollution, and to a lesser extent surface damages. One major source of groundwater pollution is improperly or unplugged oil and gas wells that have been abandoned. Unplugged or improperly plugged wells can, in some situations, allow saltwater to migrate into fresh water zones or can allow saltwater to "break out" onto the surface.

Due to the environmental damage unplugged wells can cause, the responsible party can be held accountable for more than plugging costs. See: Fischer v. Atlantic Richfield, unreported (Woods County, Oklahoma, District Court) ($3.6 million for groundwater contamination from unplugged or improperly plugged wells in a 75 year old oil field); Cole v. Phillips Petroleum Co., Dist. Ct. of Harris Co., Texas, Case No. 90-17888 (landowners asking over $100 million in damages for groundwater contamination from improperly plugged wells and evaporation pits, case has not yet been tried).

Where producing properties are to be sold to a third party, the seller should insure that under the state laws or regulations it will not be responsible for plugging any wells on the leasehold after title has been conveyed. Should the seller be responsible for plugging, it could also be held responsible for any related environmental damage caused by the unplugged wells.

Texas

In Texas the Railroad Commission has by statute been granted the power to make and enforce rules regarding the plugging of oil and gas wells. Tex.Nat.Res.Code Sec. 89.041. By statute, the operator and the nonoperating working interest owners can be held responsible for plugging expenses. Tex.Nat.Res.Code Sec. 89.011, 89.012.

When an unplugged well is leaking saltwater, oil, gas, or other deleterious substances, or is causing surface or subsurface pollution to fresh water, the Commission may plug, repair, or replug that well, or order the responsible parties to plug such a well. Tex.Nat.Res.Code Sec. 89.041-89.043. If a party has a duty to plug the well under Texas law, it could also be held responsible for any subsequent environmental damage caused by the unplugged well under a nuisance or negligence theory.
An operator's duty to plug is set out by statute:

The operator of a well shall properly plug the well when required and in accordance with the commission's rules that are in effect at the time of plugging.

Tex.Nat.Res.Code Sec. 89.011. Should the operator fail to plug the well, the nonoperator is responsible:

If the Operator fails to comply with Section 89.011 of this code, each nonoperator is responsible for his proportionate share of the cost of the proper plugging of the well within a reasonable time, according to the rules of the commission on effect at the time the responsibility attaches.

An "operator" has been defined in the statutes as:

. . . a person who is responsible for the physical operation and control of a well at the time the well is about to be abandoned or ceases operation. (emphasis supplied)

Tex.Nat.Res.Code Sec. 89.002(a)(2). A nonoperator has been defined in the statute as:

. . . a person who owns a working interest in a well at the time the well is about to be abandoned or ceases operation and is not an operator . . . (emphasis supplied)

Tex.Nat.Res.Code Sec. 89.002(a)(3). Royalty or overriding royalty interests are not considered operators or nonoperators under the statute. Tex.Nat.Res.Code Sec. 89.002(b). In determining if an operator or nonoperator is liable for plugging costs, the key issue is whether the well "ceases operation" or is "about to be abandoned".

The term "ceases operation" is not defined in the statute, and no published case law on term exists under the provisions of this statute. Presumably a well would cease operations when it has been shut in permanently, or alternatively for a term longer than permitted by Texas Railroad Commission rules.

Under Statewide Rule 14(b)(2) plugging operations must be commenced within one year after drilling or operations have ceased, or an exemption to plugging can be obtained if the applicant demonstrates a viable plan for restoring the productive capacity of the well.

"Abandoned" has been defined by case law as the relinquishment of possession with the intent of terminating one's ownership or interest. Pearson v. Black, 120 S.W.2d 1075 (Tex.Civ.App. 1938). Non-use of a well, non-production, or the passage of time do not alone constitute abandonment in Texas. Morgan v. Fox, 536 S.W.2d 644 (Tex.Civ.App. 1976).
Under a Texas statute adopted to address this issue, an operator of a well who conveys that well to a third party is relieved of plugging liability once the party acquiring the well: (1) completes the necessary TRRC forms designating it as operator, (2) has a plugging bond on file with the TRRC, (3) is approved by the TRRC as the new operator, and (4) the well is operating in compliance with all TRRC regulations.

A party selling a well that has ceased operations has no duty to plug that well if the well at the time of sale is in compliance with all TRRC rules. Under Statewide Rule 14(b)(2) plugging operations must be commenced within one year after drilling or operations have ceased, or an exemption to plugging should be obtained. If required, under HB 2484 an exemption from plugging should be obtained before the sale of the inactive well. The purchaser of that well would acquire the plugging liability.

**Plugging Liability - Texas Cases**

In Railroad Commission v. Olin Corp., 690 S.W.2d 628 (Ct.Civ.App. 1985), the court held that a party that went "non-consent" under a 1977 A.A.P.L. Model Form Operating Agreement was still considered a "nonoperator" under the plugging statute due to the fact that a reversionary interest in the leasehold was retained.

In Railroad Commission v. American Petrofina Company of Texas, 576 S.W.2d 658 (Tex.Civ.App. 1978), the court held that a new assignee of an interest in a lease, where a well had ceased production and been abandoned by a prior operator, was not liable for plugging costs because it did not fall under the statutory definition of "operator".

Under the holding of the American Petrofina case an argument can be made that a new lessee or assignee in Texas is not responsible for any unplugged wells on the property left by a prior party, contrary to the law in states such as Oklahoma where each successive owner is responsible for abating a public nuisance.

Due to public policy arguments, increasing concern with environmental damage caused by unplugged wells, and the fact that an unplugged well may constitute a continuing public nuisance, it should not be assumed that under American Petrofina the Lessee or assignee will not be responsible for the cost of plugging previously abandoned wells in Texas.

**Conclusion - Texas**

An operator or nonoperator who has sold its interest to a third party in Texas may not be responsible for the cost of plugging a well or any subsequent environmental
damage from the unplugged well if, at the time of transfer, the wells on the leasehold had not (1) permanently ceased operations, (2) were not abandoned or about to be abandoned, (3) were operated in accordance with TRRC rules, and (4) the TRRC approves the transfer of ownership and the new operator.

As such, it is important that the owner selling the property conduct an environmental audit to determine if any well has permanently ceased operation or been abandoned on the property at the time of the transfer of ownership, and that no environmental damage had occurred as of the time of transfer. If a well on the leasehold has ceased operations, the seller should insure that a Railroad Commission exemption to plugging has been obtained and is effective at the date title is conveyed.

Further, where the seller transfers operations to the third party it should insure that the purchaser of the property qualifies as an operator under Texas Railroad Commission regulations, posts the appropriate plugging and operating bonds, and obtains the appropriate permits necessary to transfer ownership and operate the well (some permits, such as Rule 8 permits, are non-transferable by the operator). The seller should also insure that Commission records reflect the transfer of ownership.

**Oklahoma**

In Oklahoma the Corporation Commission has been granted the power to make and enforce rules regarding the plugging of oil and gas wells. 17 Okla. Stat. Sec. 53. Under Commission rules all working interest owners and the operator are jointly and severally liable for plugging expenses. OCC-OGR Rule 3-401.

When an unplugged well is leaking saltwater, oil, gas, or other deleterious substances, or is causing surface or subsurface pollution, the Commission may plug, repair, or replug that well, or order the responsible parties to plug such a well. 52 Okla. Stat. Sec's. 309, 310. If a party has a duty to plug the well under Oklahoma law it could be responsible for any subsequent environmental damage caused by the unplugged well under a nuisance or negligence theory. Magnolia Petroleum Co. v. Witcher, 284 P. 297 (Okla. 1929); Sheridan Oil v. Wall, 103 P.2d 507 (Okla. 1940).

If the environmental damage had occurred from the unplugged well prior to the transfer of ownership it could constitute a public nuisance under Oklahoma law. See: 82 Okla. Stat. Sec. 926.1 et seq. Under Oklahoma law every successor in title who neglects to abate a continuing public nuisance, even if created by the former owner, is liable for damages in the same manner as the one who first created it. See: 50 Okla. Stat. Sec 5; Fischer v. Atlantic Richfield Co., 774 Fed. Supp. 616 (W.D. Okla. 1989).

As such, an environmental audit at the time of divestiture should be conducted to determine that there are no abandoned and unplugged wells on the property, and it
should be documented that no environmental damage has occurred on the property at
the time of transfer.

Corporation Commission Rule 3-201.6 provides that before operations can be
transferred to a new operator, the operator must submit Form 1073 in which both
parties consent to the transfer. Further, the new operator must have on file with the
Commission a plugging bond or security sufficient to comply with Rule 3-201.1. The
Commission will notify the parties as to whether they accept the transfer of ownership
within 30 days.

The Supreme Court of Oklahoma has held that an operator is not relieved of its
obligations, including the obligation to plug, until it has been formally relieved by order
or consent of the Commission. Crest Resources v. Corporation Commission, 617 P.2d
215 (Okla. 1980). Under the Crest Resources holding, unless the Commission has
approved of the transfer of operations under Rule 3-201.6 the operator attempting to
transfer its interest may still be responsible for plugging costs. As such, it is important
that the seller insure that the proper forms are filed with the Commission and that the
Commission approves of the transfer.

**Transfer of Ownership of Wells - Cases**

In Amax Petroleum Corporation v. Corporation Commission, 552 P.2d 387 (Okla.
1976), the lessee shut in its wells then two years later assigned the leases and wells
back to the mineral owners. The mineral owners were elderly, did not produce the wells,
and were unable to plug the wells. The Court upheld the Commission order requiring
the original operator/lessee to plug the well. The Court stated that the duty to plug
arises at the time of abandonment, and that the lessee had abandoned the wells prior to
the assignment.

In Loriaux v. Corporation Commission, 514 P.2d 941 (Okla. 1973), the Court held
that where an owner and operator of a well ceased production for a period in excess of
the Commission prescribed time the well would be deemed abandoned pursuant to the
Commission's rules. As such, where abandonment and the corresponding duty to plug
arose prior to the assignment the assignor remains liable for the plugging of the well.

Under the current Commission rules, an operator must plug a well within one
year of cessation of production or obtain approval for a temporary exemption from
plugging. OCC-OGR Rule 3-401. Wells which have been shut in for lack of market, or
wells which are shut in that will produce in paying quantities, are exempt from the
plugging requirement of Rule 3-401. Using the rationale of the Loriaux court if a well
ceases production in excess of the one year period without an exemption and is not
shut in for a lack of market it may be considered abandoned, and the original
lessee/operator may be responsible for plugging it even after the lease had been
assigned.
In Gannon v. Mobil Oil Co., 573 F.2d 1158 (10th Cir. 1978), the court noted that in Oklahoma "all operators are responsible for proper plugging of abandoned oil and gas wells for the protection of the surface and sub-surface strata; that cessation of production with no intent to continue operations evidences abandonment". The Gannon court ordered the lessee to plug the abandoned wells on the property, even though the lessor wanted the leases to be reassigned to him and the wells to be left unplugged on the hope that higher oil prices in the future would make a re-entry operation feasible.

In addition to Commission regulations, Oklahoma has recognized a common law duty to plug. Sheridan Oil Co. v. Wall, 103 P.2d 507 (Okla. 1940). In Sheridan Oil the Supreme Court held that where the lessee had abandoned the property "he is in a position similar to a tenant who has surrender possession of the premises without making necessary repairs".

**Conclusion - Oklahoma**

An operator who has sold its interest to a third party in Oklahoma should not be responsible for the cost of plugging a well or any subsequent environmental damage from the unplugged well if, at the time of transfer, the well had not: (1) been abandoned, or (2) ceased to produce for a period in excess of one year with no exemption. Further, the Commission must approve of the transfer of operations or the original lessee/operator will still be responsible for plugging costs.

As such it is extremely important that the seller:

1. Insure that all necessary forms are filed and that the Commission approves of the transfer of operations.

2. Conduct an environmental audit to determine:

   (a) if any well has been abandoned on the property at the time of the transfer of ownership,

   (b) if any wells are on the property that have ceased to produce for over a one year period, and

   (c) that no environmental damage had occurred as of the time of transfer.

If there are no abandoned wells located on the property, and the Commission approves the transfer, the seller should not be liable for the cost of plugging any well or subsequent environmental damage after the transfer of title.

**Federal Leases Onshore**
To be recognized by the lessor, an assignment of an interest in a federal oil and gas lease is required to be approved by the Bureau of Land Management. 43 CFR Sec. 3106.1(b). Section 30A of the Mineral Leasing Act of 1920 (30 USCA Sec. 187a) provides in part:

Any oil or gas lease issued under the authority of this chapter may be assigned or subleased . . . subject to final approval by the Secretary . . .

Under the regulations found at 43 CFR Sec. 3106.7-5 entitled "Continuing Responsibility", the assignor of a lease "shall continue to be responsible for the performance of all obligations under the lease until a transfer of record title or operating rights (sublease) is approved by the authorized officer."

The statutory language also holds the assignor responsible until the BLM approves the transfer:

Until such approval, however, the assignor or sublessor and his surety shall continue to be responsible for the performance of any and all obligations as if no assignment or sublease had been executed.

Following such approval, the statute states that the "assignee or sublessee shall be bound by the terms of the lease to the same extent as if such assignee or sublessee were the original lessee, any conditions in the assignment or sublease to the contrary notwithstanding." 30 USCA Sec. 187a.

While no case law exists which is directly on point as to whether the original lessee is responsible for plugging costs after the sale and transfer of a federal lease to a third party, in Forbes v. U.S., 125 F.2d 404 (1942), the court upheld a rule which allowed the agency to plug any dry or abandoned wells on a federal lease at the expense of the lessee after 30 days notice to that lessee.

In Pan American Petroleum Corporation v. Gibbons, 168 F.Supp. 867 (1958), the court held that a lessee/assignor will be released of any further obligations which may arise under the lease by the act of the lessor accepting and substituting the performance of the assignee. On the other hand, the Gibbons court stated that the lessee/assignor was responsible for any breach that occurred prior to the date the assignment was approved by the BLM.

The operator will be responsible for any breach of lease or BLM regulation that occurs prior to the transfer according to the holding in Gibbons.

Under BLM regulations the assignor has the obligation to obtain approval if a well is temporarily abandoned:
No well may be temporarily abandoned for more than 30 days without the prior approval of the authorized officer. The authorized officer may authorize a delay in the permanent abandonment of a well for a period of 12 months. When justified by the operator the authorized officer may authorize additional delays . . . .

43 CFR Sec. 3162.3-4(b). Further, the operator "shall promptly plug and abandon" any well "no longer capable of producing oil or gas in paying quantities". 43 CFR Sec. 3162.3-4(a).

Under BLM regulations, the operator should obtain an exemption from plugging, or plug, any well it operates on the federal lease that ceases to produce in paying quantities.

**Conclusion - Federal Leases**

Because the federal lease and assignee must be approved by the BLM before the assignment is effective, a strong argument exists that on approval of the assignment the lessee/assignor is relieved of any further liability. On the other hand the lessee/assignor is responsible for all obligations arising under the lease during the term the lessee owned it, and if wells had been abandoned on the lease prior to the assignment the lessee/assignor could be responsible for plugging costs of these wells.

As such, it is important that the assignor conduct an environmental audit to determine if any well has ceased operation or been abandoned on the property at the time of the transfer of ownership, and that no environmental damage had occurred as of the time of transfer. If a well on the leasehold has ceased operations, the assignor should insure that a BLM exemption to plugging has been obtained and is effective at the date title is conveyed. The assignor should also insure that the BLM approves the assignment to the third party.

c. Abandoned Wells on Acquired Leasehold

In some cases abandoned wells once owned or operated by third parties will be located on leasehold which is acquired. An issue exists as to whether the new lessee is responsible for plugging such wells.

In *Railroad Commission v. American Petrofina Company of Texas*, 576 S.W.2d 658 (Tex.Civ.App. 1978), a well had ceased operation and had been abandoned by a prior operator. A new lease was obtained by a third party on the property, and the issue arose as to whether the new lessee was responsible for plugging the abandoned well. The Texas court held that because the new lessee was not an "operator" under the statutory definition in the Texas statute requiring oil and gas wells to be plugged, the
new lessee was not responsible for plugging the abandoned well. No published Oklahoma cases exist on this issue.

Although there is little case law on this issue Texas and Oklahoma courts have held that an oil and gas well can constitute a public nuisance. Magnolia Petroleum Co. v. State, 218 S.W.2d 855 (Tex. 1949); Goldsmith & Powell v. State, 159 S.W.2d 534 (Tex. 1942). While no court has so held, an argument can be made that the new lessee has a duty to abate a public nuisance on its leasehold even if that public nuisance was created by a prior owner. The success or such an argument is uncertain.

Both Oklahoma Corporation Commission and Texas Railroad Commission staff have indicated that from a regulatory standpoint they have not pursued leasehold owners for unplugged wells which were owned by a prior operator, and both agencies were uncertain as to whether they had the legal authority to do so.

From a legal standpoint there is little authority to hold a new lessee responsible for unplugged wells or damages caused by a previous operator, however a public nuisance argument can be made.

4. COMMON LAW LEGAL THEORIES

Even with all the statutes and regulations that have been adopted in the last two decades, common law claims of negligence, nuisance, trespass, and unreasonable use of the surface are commonly filed. One reason such claims are made is that the landowner is allowed to recover damages for environmental harm directly. Many statutes and regulations prohibit behavior adverse to the environment and may provide for the clean up of some environmental problems, but damages are never directly paid to the landowner under most of these statutes.

Negligence

Negligence, the failure to use such care as a reasonable and prudent person would in similar circumstances, is probably the most commonly asserted common law claim. Nuisance, an act which interferes with a party's enjoyment or use of land is also commonly claimed. Trespass, an invasion which interferes with a party's possessory interest in land is also claimed occasionally. An unreasonable use of the surface can also be claimed, since under oil and gas law the lessee/mineral owner has a right to use a reasonable amount of the surface to develop the underlying minerals, with what is reasonable determined on a case by case basis.

Under a negligence claim there is a duty on the part of one person to another, a breach of that duty that results in injury, and the act must be the direct cause of the injury incurred. With regard to environmental matters, the developing party has a duty to the landowner to act reasonably in protecting the environment, and if the developer
damages the property potentially they could be considered negligent if its actions were not reasonable. Note that what was "reasonable" practice in the industry in 1950 may not be "reasonable" today.

**Negligence Per Se**

Related to negligence is the theory of "negligence per se." Under this cause of action conduct which violates a law or regulation may be declared negligent as a matter of law, and the law or regulation defines the acceptable standard of conduct. For example, since regulations require a well to be plugged failure to plug that well would be considered negligent as a matter of law under the negligence per se theory.

With the large number of statutes and regulations that have been adopted protecting the environment some limitations apply to the negligence per se theory. First, statutes are narrowly construed and in some instances have been declared to be too broad to be used to set a standard of conduct. Second, some environmental statutes have been determined to be protecting the public in general, and cannot be used by a private party protecting private interests. Also, the statutes used to establish a standard of conduct only apply to the class and harm intended to be protected.

**Nuisance**

Nuisance is an unreasonable, unwarranted, or unlawful act by a person which interferes with the use, enjoyment, or possession of the property of another. Legal activities can be a nuisance, and the circumstances and surroundings can make a facility a nuisance in one place where it may not be one elsewhere. The person's intent and good faith is not an issue in determining if a nuisance exists, only the impact on the landowner's use and enjoyment.

By far, this cause of action tends to be the most popular in groundwater contamination cases simply because the plaintiff need not prove the defendant's negligence to recover damages. Instead, the plaintiff need only establish that the defendant has unreasonably interfered with the plaintiff's enjoyment of his or her property. *Manchester Terminal Corp. v. Texas Tx Marine Transp., Inc.*, 781 S.W.2d 646, 651 (Tex. App. Â Houston 1st Dist. 1989, writ denied).

"A nuisance does not rest on the degree of care used, but on the degree of danger or annoyance existing even with the best of care." In Texas, it is clear that a private nuisance claim can support an allegation of property damage and personal injury caused by pollution. *Stanolind Oil & Gas Co. v. Smith*, 290 S.W.2d 696 (Tex. Civ. App. Â Beaumont 1956, no writ).

Oilfield operations themselves, however, do not constitute a nuisance. There must be a material or substantial injury to a person of ordinary health and sensibilities in
that particular locale. Characterizing an oilfield operation as a nuisance typically results from the manner in which the activity is conducted.

Traditionally, the determination of nuisance turned in large part on whether the activity complained of was common to the area, as in the case of oil and gas exploration and production in a producing state like Texas. The more common the activity, the less likely it would be considered a nuisance. As the environmental movement grows and toleration of the oil and gas industry wanes, however, it is likely that yesterday's economic accommodation will become tomorrow's nuisance.

In addition to a claim of private nuisance, plaintiffs sometimes assert a claim of public nuisance. Plaintiffs usually find it difficult to sustain a claim of public nuisance because the act complained of must be shown to interfere with the right of the community at large. Where the plaintiff is able to sustain such a cause of action, however, he or she is able to avoid the potentially significant impact of the statute of limitations. Typically, public policy prohibits the applicability of the statute of limitations to a public nuisance.

Nuisance claims permit recovery of punitive damages, which may be limited in different ways from state to state. In Texas, a statute limits recovery to four times the actual damages or $200,000, whichever is greater, unless the plaintiff proves malice or an intentional tort, in which case no cap applies.

In Oklahoma, a punitive damage award may not exceed the amount of the actual damage award, unless the court finds clear and convincing evidence of wanton or reckless conduct, fraud, or malice on the part of the defendant, in which case there is no cap. In Colorado, a punitive damage award may not exceed the amount of the actual damage award, unless the act or conduct complained of is continuing, in which case the punitive damage award may be increased up to three times the amount of the actual damages. Nuisance claims also permit recovery of "soft" actual damages, such as inconvenience, annoyance and discomfort, which, after all, constitute the very nature of a nuisance claim.

**Trespass**

Trespass is an intentional invasion that interferes with the possession of another. One of the problems with asserting trespass is the intentional nature of the claim; in most cases environmental damage is not done intentionally.

**Strict Liability**
Common law strict liability, otherwise known as liability without fault, applies to lawful, as well as unlawful, activities because the level of care exercised by the defendant is irrelevant. If the activity poses an extraordinary risk and causes an injury to another, it is actionable, even if the defendant did everything he could to prevent the injury, no. This theory has been used with mixed success, depending on the jurisdiction.

In Texas, strict liability was generally rejected as an available theory of recovery for pollution cases in Turner v. Big Lake Oil Co. 128 Tex. 155, 166, 96 S.W.2d 221, 226 (1936). The Turner court held that where property is being put to its "natural" use, strict liability did not apply. In Turner saltwater damage to the surface of the plaintiff's property resulted from the "natural" use of the property, which apparently included the production of oil and gas. A similar injury in an area where oil and gas is not produced would presumably have had a different result. Turner was reaffirmed as good law in Atlas Chemical Industries, Inc. v. Anderson, 514 S.W.2d 309, 313 (Tex. Civ. App. Â Texarkana 1974), aff'd, 524 S.W.2d 681 (Tex. 1975).

Similarly, Oklahoma has rejected strict liability as a theory of recovery in this context. Sinclair Prairie Oil Co. v. Stell, 124 P.2d 255, 257 (Okla. 1942).

Kansas, however, has expressly adopted the doctrine of strict liability in an effort to regulate pollution. John T. Arnold Assoc., Inc. v. City of Wichita, 615 P.2d 814, 823Ä26 (Kan. Ct. App. 1980). Some unreported district court opinions in Colorado have also applied strict liability in cases involving environmental contamination. A Utah case, in which the defendant's adjacent oilfield operation contaminated the plaintiff's water well, found the defendant's operation to be abnormally dangerous and therefore an appropriate subject for strict liability. United States v. Colorado & E. R.R., No. 89ÄCÄ1786, 1993 WL 350171, at *2 (D. Colo., June 9, 1993). An oilfield case from Indiana held that a waterflood operation was an abnormally dangerous activity. Mowrer v. Ashland Oil & Ref. Co., 518 F.2d 659, 662 (7th Cir. 1975).

Unreasonable Use of the Surface

Last, an oil and gas lessee has the right to use a reasonable amount of the surface to develop the minerals. Much like a nuisance claim, if an unreasonable amount of the surface is used then the landowner can recover damages.

5. STATUTE OF LIMITATIONS AND THE MEASUREMENT OF DAMAGES

Temporary/permanent distinction of injury to lands
Where lands have been damaged, at common law the courts have developed an important distinction between "temporary" and "permanent" damage. The distinction is important because the classification of damage as either permanent or temporary will determine (1) the measure of damages as well as (2) the statute of limitation period.

Under the majority rule followed in Texas and Kansas, the court will look to both: (1) the source of pollution as well as (2) the injury itself to determine if the injury is permanent or temporary. McAllister v. Atlantic Richfield Company, 662 P.2d 1203 (Kan. 1983); Bayouth v. Lion Oil Co., 671 S.W.2d 867 (Tex. 1984). In Oklahoma, the courts only look to the injury to determine if the damage is permanent or temporary. Sunray v. Brown, 477 P.2d 67 (Okla. 1977).

Courts have noted that the permanent/temporary injury distinction is difficult to apply; for example the fact that a fresh water formation would naturally clean itself up in a period of not less than 150 years nor more than 400 years does not necessarily make the injury "permanent". See: McAllister v. Atlantic Richfield Company, supra. On similar facts courts have varied widely on their initial determination as to whether the injury is permanent or temporary. See: Note, 19 ALR4th 456, 460.

"Permanent" has been defined by the court in Texas as where the cause or result of the injury is fixed, and the property will always be subject to the damage. Id., Bayouth v. Lion Oil Co., 671 S.W.2d 867 (Tex. 1984). Texas courts have stated that the duration of the injury will not determine if an injury is permanent, but the key issue is whether the injury will continue indefinitely. Id.

**Statute of Limitations**

A property owner must assert his claim for common law relief within the applicable statute of limitation period. Where the statute of limitation period has run, the operator or working interest owner can assert this claim as a defense.

In general, the statute of limitations does not begin to run until a reasonable man would be aware that environmental damage has occurred. The statute of limitations does not commence until it is apparent and obvious that the damage to the property has occurred. Harper-Turner Oil Co. v. Humphrey, 158 P.2d 175 (Okla. 1957); Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967).

If damages are temporary, the landowner can recover for pollution damages which have occurred during the statutory limitation period but not for future damages. Atlas Chemical Industries v. Anderson, 524 S.W.2d 681 (Tex. 1975). For temporary damage, each day creates a new cause of action. Id.

If damages are permanent a party can recover all damages, past, present, and future, and the statute begins to run at the time the damage occurs. Id.
Cases have stated that damage is apparent to a "reasonable man" where such damage is "visible, ... readily understood, obvious, clear, [or] evident". Gouin v. Continental Oil Co., 590 P.2d 704 (Okla. App. 1979) quoting Continental Oil Co. v. Williams, 250 P.2d 439 (Okla. 1952). Other cases have stated that a party "is charged with such knowledge as ordinary intelligence or inquiry, if such facts are such as to put a person of ordinary intelligence on inquiry." Armstrong v. Maple Leaf Apts., Ltd., 436 F.2d 1125, a'ffd 622 F.2d 466 (10th Cir. 1979), cert. denied.

Due to a number of factors, the courts in some cases have limited the ability of a producer to assert the statute of limitations as a defense. First, if the injury has been concealed, it is possible that the statute of limitations will be tolled. Williams v. Borden, Inc., 637 F.2d 731 (Okla. Ct. Supp. 1980). Due to the fact that a producer generally attempts to clean up a site once a spill has occurred, to the extent this "conceals" the damage to the land or groundwater from the landowner the statute could be tolled.

Secondly, it is against public policy to allow a party to continue to pollute because the landowner has been deprived of a remedy due to the statute of limitations. Miller v. Cudahy, 567 F.Supp. 892 at 907 (10th Cir 1983). The Miller court recognized the rapid change in attitudes towards pollution of the natural environment witnessed by legislative actions. In essence, the court noted that the statute of limitations, if enforced, gives the polluter a right similar to an easement to continue polluting, therefore is against public policy.

Thirdly, pollution of water can be considered a public nuisance, and no statute of limitation runs against a party who is obligated to abate a temporary, continuing public nuisance. Abbott v. City of Princeton, 721 S.W.2d 872 (Tex. App. 1986), ref. n.r.e., appeal after remand 792 S.W.2d 161 error dismissed; 50 Okla. Stat. Sec. 50; 58 Am. Jur. 2d, Nuisances, Sec. 381. It has also been argued that the continuing nature of a temporary nuisance tolls the statute of limitations. Branch v. Mobil Oil Corp., 788 F. Supp. 531 (W.D. Okla. 1991); Fischer v. Atlantic Richfield, 774 F. Supp. 616 (W.D. Okla. 1989).

Fourthly, where certain representations are made by the party causing the damage that they will clean up the property when the operations are finished, the party may be stopped from claiming statute of limitation defense. Siegenthler v. Newton, 50 P.2d 192 (Okla. 1935).

Fifth, where the party causing the damage has a trustee or fiduciary type relationship with the landowner, the party must inform the owner of the damage. Kauffman v. McLaughlin, 114 P.2d 929 (Okla. 1941). If the landowner is not informed of the damage in this situation, the statute is tolled. Id., Caldwell v. Indian Territory Illuminating Co., 104 P.2d 237 (Okla. 1940).
The legislature of most states have adopted statutes which support a public policy of prohibiting pollution, and to the extent the courts follow the lead of the legislature and regulatory agencies the ability of the producer to effectively utilize the statute of limitation defense will continue to decrease.

**Measure of Damages**

The plaintiff has the burden of proving proximate cause of his injury and also has the burden of proving the correct measure of damages. *Carter Oil Co. v. Means*, 71 P.2d 705 (Okla. 1937). The measure of damages will be different for permanent versus temporary damages.

The general rule is that permanent damages are measured by the fair market value immediately before the permanent injury less the fair market value of the property after the injury. *Thompson v. Andover Drilling Co.*, 691 P.2d 77 (Okla. Ct. App. 1977). Temporary damages are measured as the cost of repairing or restoring the property to its original condition. Id.

In some jurisdictions older case law indicated that the damages awarded cannot exceed the diminution of the value of the land (the measure of permanent damages), essentially placing a cap on the damages that can be recovered at the fair market value of the land. See: *Peevyhouse v. Garland Coal Co.*, 382 P.2d 109 (Okla. 1962); *Corkin v. Ruth*, 581 P.2d 923 (C.A. Okla. 1976). More recent cases reject this "cap" for public policy reasons, and have allowed the landowner to recover the cost of restoration. *Rock Island v. Helmerich & Payne*, 698 F.2d 1076 (10th Cir. 1983); *Miller v. Cudahy*, 858 F.2d 1449 (10th Cir. 1988); *Jarrett v. Harper & Son, Inc.*, 235 S.E. 2d 362 (W.Va. 1977); *Briscoe v. Harper Oil Co.*, 702 P.2d 33 (Okla. 1985). The Rock Island court distinguished the *Peevyhouse* case by the fact that public policy had changed regarding the reclamation and restoration of the environment as reflected in the number of newly enacted statutes on these issues.

Recent arguments have been made by plaintiff's attorneys that by limiting the damages to the diminution of market value the courts are essentially giving the party causing the pollution the right to condemn the landowner's property, essentially forcing the landowner to sell his property at market value.

Court decisions that have capped liability for pollution damages at the fair market value of the land will be difficult for the defendant to rely on due to the trend of the courts to enforce the public policy if preventing pollution, and due to the fact that the courts can grant additional damages in the nature of punitive, nuisance, or other damages.

**6. RELEASE OF LIABILITY AND POLLUTION CLAIMS**
In some instances the producer will obtain a release of liability for any spills or leaks which have occurred on the property. These releases should be closely reviewed, and like the statute of limitations defense the courts are tending to avoid the effect of the releases.

The release of liability is a contract, and should be construed under the applicable principles of contract interpretation. Kay Pharmacal Co. v. Dalious Construction Co., 276 P.2d 756 (Okla. 1954); Crane Co. v. James McHugh Sons, Inc., 108 F.2d 55 (10th Cir. 1955). The paramount goal of the court in construing a contract is to determine the intent of the parties at the time the contract was made.

When interpreting a release it must be construed in light of the circumstances surrounding its formulation, and it should be interpreted to reflect the intentions of the parties. Sunlight Carbon Co. v. St. Louis & S.F.R.R. Co., 15 F.2d 802 (8th Cir 1926). Conduct of the parties can be used to construe the intent of the parties. Gilham v. Jenkins, 244 P.2d 291 (Okla. 1952).


Due to the number of arguments that can be used to invalidate a release, a producer should not rely on a release to avoid environmental common law liability. Where a release is used, it should be determined that the consideration is commensurate with the damage that was caused, and the release should specify exactly what claims were being released (including claims for pollution of ground water, erosion, hydrocarbon spills into the subsoil, etc.).

7. DUTY TO DISCLOSE POLLUTION TO PURCHASER OR OTHER PARTIES

With regard to common law environmental liability the doctrine of caveat emptor ("buyer beware") still has some applicability. In Philadelphia Electric Co. v. Hercules, Inc., 762 F.2d 303 (3rd Cir. 1985), cert. denied, 474 U.S. 980, a purchaser of property sought to recover damages incurred in cleaning up substances released onto the land by the seller.

The Hercules court noted that both parties knew the land was industrial in nature, both parties were corporations, both parties had roughly equal resources, and that fraud
and misrepresentation were absent. As such, the purchaser was subject to the doctrine of caveat emptor and had no remedy against the seller for the existing contamination. As discussed below, this doctrine has increasingly been subject to certain exceptions.

**(a) Fraudulent Inducement** The purchaser's use of the theory of fraudulent inducement to collect environmental damages from the seller is relatively rare with regard to oil and gas transactions. In *Gopher Oil Co. v. Union Oil Co.*, 955 F.2d 519 (8th Cir. 1992), the court of appeals upheld a verdict that Union Oil fraudulently induced Gopher to purchase a site contaminated with petroleum products. See also: *Sheehy v. Lipton*, 507 N.E.2d 781 (Mass. App. 1987); *V.S.H. Realty v. Texaco, Inc.*, 757 F.2d 411 (1st Cir. 1985). Damages awarded to Gopher exceeded $1.5 million.

Under the fraudulent inducement theory, fraud can be either active or passive, and an intentional misrepresentation of a known adverse condition on a property will constitute fraud. It is well recognized that a seller has a duty to disclose environmental defects if the buyer makes such inquiry, and few if any properties are sold today without some type of inquiry by the buyer on environmental matters.

In *Gopher Oil*, it was found that Union Oil concealed accumulated deposits of oil and chemicals by covering the areas with gravel. Even though the sale contract sold the property "as is", that clause would not allow the seller to circumvent fraudulent conduct.

To address this issue the seller may want to make a full disclosure of known contamination of the property being sold, or at least of publicly reported spills or releases as well as information in the company files. Disclosures and representations, or lack thereof, should be memorialized in the purchase and sale agreement.

For the purchaser, a written inquiry should be made as to the environmental condition of the property with special emphasis on known contamination, prior spills or releases, and the historical and current use of the property.

**(b) Duty to Warn & Strict Liability**

In Texas, as well as some other states, if the environmental problem creates a risk of injury there can be a duty to warn third parties about such danger. See: *American Cyanamid Co. v. Sparto*, 267 F.2d 425 (5th Cir. 1959); *Borel v. Fiberboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973). In *Sparto*, American Cyanamid discharged salts into the Trinity River upstream from lands irrigated by such water. The court noted that there was a duty to warn, and the failure to do so would constitute actionable negligence.

Recent trends in case law indicate that a seller is obligated to disclose "latent defects" of which the seller is aware. In *State Department of Environmental Protection v. Ventron Corp.*, 440 A.2d 455 (1981), aff'd in part 468 A.2d 150 (1983), the court held
that failure to disclose mercury contamination constitutes misrepresentation by non-disclosure.

In *Ventron*, it was noted that the use and storage of mercury on the property was an abnormally dangerous activity and subject to the doctrine of strict liability. The purchaser's ability to protect itself by inspecting the property did not absolve the seller of the lands of the strict liability due to the inherently dangerous nature of the contamination. Even with an "as is" clause in the purchase and sale agreement the seller remained liable for the remediation of the mercury contaminated lands.

A purchase and sale transaction can also be subject to Deceptive Trade Practices Acts. In Texas, the courts have determined that real estate transactions are subject to the Texas Deceptive Trade Practices and Consumer Protection Act ("DTPA"). See: *Anderson v. Havens*, 595 S.W.2d 147 (Tex. Civ. App. 1980); *Woods v. Littleton*, 554 S.W.2d 662 (Tex. 1977). Oil and gas leases are considered real property in Texas.

Some states have statutes requiring the seller to disclose the fact that hazardous substances have been deposited on property being sold. California, Pennsylvania, and Illinois have adopted such statutes. See: Cal. Health & Safety Code, Sec. 25359.7(c).

Where the buyer and seller are in a trustee or fiduciary type relationship, the seller will have a duty to disclose all relevant information, including all details regarding environmental matters. *Clover v. Neely*, 243 P.2d 758 (Okla. 1956).
Instructions and Questions  
For Continuing Education or Recertification Credits

This home study course has been designed to provide the reader with an understanding of the *Common Law Environmental Issues and Liability for Unplugged Wells*. Upon satisfactory completion of the following questions as determined by the AAPL Director of Education, the Registered Land Professional (RLP) or Certified Professional Landman (CPL) or Environmental Site Assessor (ESA), as the case may be, will be:

1. awarded four RLP continuing education credits or four CPL recertification credits or four CPL/ESA credits, or

2. notified he/she has not demonstrated an adequate understanding of the home study course materials.

If the RLP, CPL or CPL/ESA is notified of unsatisfactory completion of the following home study course questions, the AAPL Director of Education will request that the RLP, CPL, or CPL/ESA answer additional questions concerning the home study course materials.

In order to receive the four continuing education or recertification credits, the RLP, CPL or CPL/ESA will be required to satisfactorily complete the home study course questions within one year to the day AAPL ships the home study course to the participant. This date will be postmarked on the envelope in which the home study course materials will be shipped to the course participant. Continuing education credits will only be awarded to a RLP, CPL, or CPL/ESA who has purchased this home study course from the AAPL according to AAPL records.

On a separate sheet(s), please list each of the following eight questions with your corresponding answers. If possible, please use a computer or a typewriter for this assignment. However, if that is not possible, please write or print legibly. When you have completed the questions and answers to your satisfaction, please forward them with a short cover letter to the AAPL Director of Education, c/o AAPL, 4100 Fossil Creek Boulevard, Fort Worth, Texas 76137-2791. This home study booklet is yours to keep.

Upon receipt of the materials you have forwarded, the AAPL Director of Education will review them and make a determination whether or not you have demonstrated an adequate understanding of the home study course. You should be notified of his decision within two weeks of AAPL’s receipt of your materials.
Questions

1. Discuss the common environment problems covered in Section 1.

2. Discuss the remediation of damaged lands covered in Section 2.

3. Who is tagged with the duty to plug a well? Is Texas law different from Oklahoma law? How?

4. Does the common law apply to Federal onshore leases? How?

5. Briefly summarize the common law legal theories covered in Section 4.

6. Do statutes of limitation apply to environmental issues? How?

7. Can one obtain a release of liability under the common law? How does it work?

8. Discuss the duty to disclose as covered in Section 7.