

THE CERCLA PETROLEUM EXCLUSION¹

Congress studiously considered the need to include oil and gas operations within the scope of CERCLA. Ultimately, they opted to exclude petroleum from regulation under CERCLA because crude oil and/or refined product spills were covered by the Oil Pollution Act of 1990² and the underground storage tank remedial provisions.

The term “hazardous substance” is defined in CERCLA section 101(14). The definition excludes “petroleum, including crude oil or any fraction thereof,” unless specifically listed or designated under CERCLA. EPA interprets CERCLA section 101(14) to exclude crude oil and fractions of crude oil -- including the hazardous substances, such as benzene, that are indigenous in those petroleum substances -- from the definition of hazardous substance. Under this interpretation, petroleum includes hazardous substances that are normally mixed with or added to crude oil or crude oil fractions during the refining process. This includes indigenous hazardous substances, the levels of which are increased as a normal part of the refining process. However, hazardous substances that are added to petroleum or that increase in concentration as a result of contamination of the petroleum during use are not considered part of the petroleum, and are therefore regulated under CERCLA.

When Congress adopted the Resource Conservation and Recovery Act (“RCRA”) in 1976, the public hailed it as a major step in solving the nation's environmental problems. But in 1980, Hooker Chemical took its place in infamy with the tragedy of Love Canal. Suddenly, Congress realized that RCRA was a statute tailored for operating facilities. It provided no remedy for abandoned waste sites. Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA” or “Superfund”)³ to fill the gap left by RCRA, providing a 1.6 billion dollar cleanup fund endowed principally by industry taxes, with Congress increasing the fund to 8.5 billion dollars in 1986. EPA has used the fund to clean up orphan sites when potentially responsible parties cannot be identified or located, or when they fail to act. The program was funded by three Superfund taxes: a petroleum tax, a chemical feedstock tax, and a corporate environmental income tax. The taxes expired in 1995, and the fund was depleted in 2003. Since that time, cleanup has been funded out of the general revenues of the federal government. President Obama’s budget would reinstate the

¹ The USEPA’s website specifically discusses the scope of the Petroleum Exclusion under CERCLA. See http://www.epa.gov/swercepp/web/content/reporting/faq_subs.htm. [The **bold** introductory wording appearing at the beginning of this paper is drawn from the website. USEPA’s website contains substantial additional information which will be helpful to understanding EPA’s views relating to the Petroleum Exclusion.]

² 33 U.S.C.A. §2701 et seq.; *see also*, [Oil Pollution Prevention Regulation](http://www.epa.gov/osweroe1/content/lawsregs/opprover.htm) (overview) at <http://www.epa.gov/osweroe1/content/lawsregs/opprover.htm>

³ 42 U.S.C.A. §9601.

Superfund Taxes.⁴ Understanding the interplay between CERCLA and RCRA and the differences between the two statutes is a crucial part of practicing environmental law in the oil and gas industry.

- **Difference Between the RCRA E&P Waste Exemption and the CERCLA Petroleum Exclusion**

As environmental enforcement activities increased, the industry began to learn the differences between the RCRA E&P Exemption⁵ and the CERCLA Petroleum Exclusion: (1) the materials covered by each, and (2) the difference between an exclusion and an exemption. The differences between the Petroleum Exclusion and the E&P Exemption are significant in understanding why Congress provided two parts to the definition of “hazardous substance” bearing on the oil and gas industry. In one respect, Congress intended an outright exclusion for E&P Wastes, to the extent exempted under RCRA. In the other respect, Congress intended that petroleum, being sometimes different from E&P Wastes, be exempt only if not otherwise specifically listed under CERCLA.

It has been held that the Petroleum Exclusion covers crude oil, refined petroleum products, and additives indigenous to the refining process.⁶ Thus, the Petroleum Exclusion extends beyond the E&P Exemption by including refined petroleum products. However, the E&P Exemption includes many non-petroleum-based waste materials that would not be excluded under the Petroleum Exclusion, such as glycol filters, pipe scale, iron sponge, and cooling tower blow-down spent filters. The CERCLA legislative history indicates that Congress did not consider waste oils “petroleum” under the exemption.⁷ However, neither do waste oils have an exemption under RCRA.

The Petroleum Exclusion is a statutory creation which can be destroyed only by Congress. The E&P Exemption can be rescinded by EPA. When the reasons for the E&P Exemption no longer exist, or when public policy outweighs the presently valuable benefits afforded by the E&P Exemption, it likely will disappear.

While a distinction may exist between the Petroleum Exclusion and the E&P Exemption, a close reading of the legislative and regulatory history will disclose that insofar as the Petroleum Exclusion was concerned, the oil and gas industry was to have a very broad exclusion, similar to that of the E&P Exemption.

- **CERCLA's Two Exclusions**

Superfund pays only if there are no “responsible parties” who can foot the bill. Superfund provides for joint and several liability for the cleanup of designated hazardous waste sites.⁸ This means that any one responsible party can be liable for the full amount of the cleanup, even if there are others who can pay. The courts have construed this joint

⁴ <http://www.epa.gov/lawsregs/laws/cercla.html> and [TPC Tax Topics | 2010 Budget - Reinstate Superfund Taxes](#)

⁵ See EPA’s discussion and guidance at <http://www.epa.gov/epawaste/nonhaz/industrial/special/oil/oil-gas.pdf>

⁶ *Wilshire Westwood Associates v. Atlantic Richfield Corporation*, 881 F.2d 801 (9th Cir. 1989).

⁷ IOCC Report at 2.

⁸ *J.V. Peters & Co. v. E.P.A.*, 767 F.2d 263 (6th Cir. 1985); *U.S. v. ChemDyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1982).

and several liability to be strict in nature.⁹

Superfund loped through its early years, having no significant impact upon actual cleanup activities. However, in 1987 a court exposed a bank to liability for the environmental misdeeds of its borrower.¹⁰ From that point forward, Superfund's influence grew year by year. The retroactive liability imposed upon landowners and business operators for deeds perpetrated years ago has written a new verse in American jurisprudence.

CERCLA imposes liability upon four classifications of responsible parties:

1. The present owner(s) and/or operator(s) of a vessel/facility/site;
2. Past owners and/or operators of the facility/site who owned or operated while the facility/site was involved in hazardous substances management, or if they transferred the facility/site without disclosing their knowledge that the facility/site was contaminated;
3. Any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances; and
4. Any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person;

from which [facility(ies), vessel(s) and/or site(s)] there is a release, or a threatened release of a hazardous substance and which causes the incurrence of response costs.¹¹

There are four (4) defenses¹² available under CERCLA to persons, above, otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused by:

- (1) an act of God;
- (2) an act of war;
- (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to

⁹ New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985).

¹⁰ United States v. Maryland Bank, 632 F. Supp. 573 (D. Md. 1986).

¹¹ 42 U.S.C.A. §9607(a).

¹² 42 U.S.C.A. §9607(b).

the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that foreseeably could result from such acts or omissions; or

(4) any combination of the above.

CERCLA imposes liability on groups involved with hazardous substances. Although it is commonly believed that the Petroleum Exclusion is the sole exclusion provided in the statute, a careful reading of the legislative history reveals that in defining “hazardous substance” under CERCLA, Congress created two exclusions, not one.

In the final Senate Report on Superfund, Congress defined the term “hazardous substance” in two ways. The first definition creates an E&P Waste *Exclusion*; the second is commonly referred to as the Petroleum Exclusion:

CERCLA E&P Waste Exclusion:

The term “hazardous substance” means [. . .], (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act [42 U.S.C. §6921] (but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress), [. . .].

CERCLA Petroleum Exclusion:

The term [hazardous substance] does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).¹³

In the early days of CERCLA, the E&P industry believed that its waste was exempt from CERCLA jurisdiction, due to the legislative history. Although most of the attention has focused on the second quoted paragraph, the Petroleum Exclusion, the first paragraph is controlling for E&P Waste.

- **E&P Exempt Waste Excluded Under CERCLA E&P Exclusion**

Despite the legislative history that suggests that there were in fact two exclusions, many believe that E&P wastes are governed by CERCLA. Those advancing the position that E&P wastes are not excluded from CERCLA begin their argument with

¹³ 42 U.S.C.A. §9601(14).

a study of mining wastes and the manner in which they are governed under RCRA. The Bevill Amendment to RCRA created the E&P Exemption, as well as the mining exemption. These mining cases are thought by some to set the basis for E&P Waste being subject to CERCLA. However, the Bevill Amendment dealt with E&P Wastes in a separate section from mining wastes, leading others to argue that the mining cases are of little analytical value.

○ **The Mining Cases: Distinct Statutory Schemes**

Courts addressing the RCRA mining exemption have found that RCRA and CERCLA were separate statutes. For example, in *United States v. Metate Asbestos Corporation, et al.*¹⁴, a U.S. district court in Arizona held that the Bevill amendment indicated Congress's intent that mine and mill wastes remain regulated under other federal laws. The court based its decision on language in the amendment stating that “each waste listed below shall be subject only to regulation under applicable provisions of Federal or State law in lieu of this subchapter...”¹⁵ The rationale was that an exemption under one statute (RCRA) did not sustain an exclusion under the other (CERCLA). Hence, exempt mining sites were found subject to CERCLA and Superfund.¹⁶

In a conference sponsored by EPA, the author of the E&P Exemption concurred with the distinct statutory analysis:

In addition, certain oil and gas wastes are also controlled under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), known as “Superfund.” Because RCRA and CERCLA are closely related, it is important to remember that they are separate and distinct.

EPA may also respond under CERCLA to releases of non-petroleum hazardous substances (as defined under CERCLA) from exploration and production wastes ... and the RCRA exemption does not relieve the operator of liability under CERCLA.¹⁷

The author’s conference paper made EPA's current position unequivocal:

Non-exempt RCRA hazardous wastes are automatically hazardous substances under CERCLA, but some substances

¹⁴ 584 F. Supp. 1143 (D. Ariz. 1984).

¹⁵ 584 F. Supp. at 1147. See also, *American Iron and Steel Institute v. United States E.P.A.* 852 F.2d 1309 (D.C. Cir. 1988); *Environmental Defense Fund v. United States E.P.A.* 852 F.2d 1316 (D.C. Cir. 1988); *Hazardous Waste Treatment Council v. United States E.P.A.* 861 F.2d 277 (D.C. Cir. 1988); and *United Technologies Corp. v. United States E.P.A.* 821 F.2d 714 (D.C. Cir. 1987).

¹⁶ *Louisiana Pacific v. ASARCO*, 24 F.3rd 1565 (Ninth Circuit, 1994).

¹⁷ Mike Fitzpatrick, *Common Misconceptions About the RCRA Subtitle C Exemption for Wastes from Crude Oil and Natural Gas Exploration, Development and Production* (hereafter, “Common Misconceptions”) at p. 174, Proceedings of the First International Symposium on Oil and Gas Exploration and Production Waste Management Practices (September 10, 1990). Go to [USEPA Website](#) and do *advanced search* for “First International Symposium on Oil and Gas”, then go to Mr. Fitzpatrick’s paper in the symposium materials.

are hazardous under CERCLA for reasons other than being a hazardous waste. Some RCRA exempt wastes can be (and in fact already have been) contributing factors in the identification of Superfund sites. Therefore, improper management of RCRA exempt wastes may subject the operator to CERCLA.¹⁸

The principal analysis currently espoused by EPA of the RCRA/CERCLA interface therefore turns on the separate nature of the E&P Exemption and the Petroleum Exclusion. Although this argument is appealing, a closer review of the rulemaking history will question whether it was EPA's intent all along that the Petroleum Exclusion and the E&P Exemption be distinct provisions. Those who argue that CERCLA contains an exclusion for E&P waste consider this distinction irrelevant, and that the CERCLA E&P Waste Exclusion is created by the legislative history not by the transfer of an exemption under one statute to another.

There are some earlier Federal Register materials that might question the distinction between the coverages of the E&P Exemption and the Petroleum Exclusion. CERCLA §103 requires owners and operators of all non-RCRA regulated hazardous substance sites to give EPA notice of the sites:

(c) . . . Within one hundred and eighty days after December 11, 1980, any person who owns or operates or who at the time of disposal owned or operated, or who accepted hazardous substances for transport and selected, a facility at which hazardous substances are or have been stored, treated, or disposed of, shall, unless such facility has a permit issued under, or has been accorded interim status under, subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. §6921 *et seq.*] notify the Administrator of the Environmental Protection Agency of the existence of such facility. . . .¹⁹

CERCLA §103 also requires a person in charge of a vessel, offshore or onshore facility:

(a) . . . as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance ... in quantities equal to or greater than those determined pursuant to section 9602 of this title, immediately notify the National Response Center established under the Clean Water Act [33 U.S.C.A. §1251 *et seq.*] of such release.²⁰

The term “hazardous substance” is defined by referring to definitions from other environmental statutes, including the following caveat:

“. . . any hazardous waste having the characteristics identified under or listed pursuant to [RCRA] (but not including any waste the regulation of which [under RCRA]

¹⁸ Common Misconceptions at 176.

¹⁹ 42 U.S.C.A. §9603(c).

²⁰ 42 U.S.C.A. §9603(a).

has been suspended by Act of Congress).”²¹

A plain reading of this section suggests that the CERCLA term “hazardous substance” does not include E&P Waste because it is not a hazardous waste, and because regulation of E&P Waste was suspended by statutory fiat until otherwise regulated by EPA or changed by Congress.²² Indeed, subsequent legislative history confirms that it was special study wastes which were suspended from regulation.²³ The Bevill Amendment mining cases did not see it that simply. Yet, EPA in its early days of hazardous waste regulation expressed the clear intent that CERCLA's “hazardous substance” did not include E&P Waste when it addressed the final rule on notification of spills and releases under CERCLA § 103(a) and (b). CERCLA §103 requires notification of all non-RCRA hazardous substance sites. EPA stated in the preamble adopting the notification form:

Other petroleum wastes ... are not specifically listed in the RCRA regulations, but they may exhibit the characteristics of hazardous wastes and therefore be subject to full RCRA regulations. However, because these wastes are excluded from the definition of “hazardous substance” by the specific language of Superfund, regardless of their RCRA status, they are not hazardous substances for purposes of the notification requirement of Section 103(c). *Facilities containing only these exempted wastes are not required to notify.*²⁴

The CERCLA Notification Form promulgated in 1981 contained instructions which clearly excluded E&P Wastes from regulation as CERCLA hazardous substances:

The following wastes are not subject to notification under Section 103(c) of Superfund:

Solid wastes listed below not presently regulated as “hazardous waste” under RCRA.

Drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas, or geothermal energy.²⁵

Thus, even the EPA notification form acknowledged the CERCLA E&P Exclusion.

²¹ 42 U.S.C.A. §9601(14)(C).

²² 42 U.S.C.A. §9603(a).

²³ 42 U.S.C.A. §9601(14).

²⁴ 42 U.S.C.A. §6921.

²⁵ 131 Cong. Rec. 24099 (Sept. 24, 1985)

Comments of Sen. Simpson: In 1980, Congress suspended these wastes from regulation as hazardous wastes under RCRA, pending completion of studies by EPA to determine their potential adverse effects. Later in 1980, Congress also excluded these special study wastes from the definition of “hazardous substances” covered by Superfund.

One more look at the definition of “hazardous substance” will link the statutory language with the legislative history:

“[H]azardous substance” means ... (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 (§102) of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of [RCRA] (but not including any waste the regulation of which under [RCRA] has been suspended by Act of Congress)[.]²⁶

The reference to a substance designated pursuant to §102 is telling. The important Senate Report directly refuted the mining cases by suggesting that E&P Wastes are not designated pursuant to §102:

It should be noted that any substance or material for which regulation is specifically suspended by Act of Congress under the Solid Waste Disposal Act is excluded from designation as a hazardous substance for the purpose of S. 1480, notwithstanding the presence in such substance of any hazardous or toxic chemical.

Thus drilling muds and brines, which will have been excluded from regulation by the 1980 amendments to section 3001 of the Solid Waste Disposal Act, are not hazardous substances under S. 1480.²⁷

This bit of legislative history unequivocally states that E&P Wastes are to be excluded from CERCLA. CERCLA was passed in such a mad rush that there is very little legislative history. Congress saw fit to place in the Congressional Record only those items they deemed most important. It is hard to understand why the courts have chosen to disregard without comment this important piece of legislative history.

o **The Hardage Decision**

The mining cases were followed by the famous decision in *U.S. v. Hardage*,²⁸ which addressed the E&P Waste Exclusion under CERCLA. An E&P Exempt drilling waste site was the subject of an EPA CERCLA proceeding. The issue was whether the Superfund had jurisdiction over E&P Exempt waste. The court found that CERCLA jurisdiction attached, and that the E&P Exemption did not afford a defense. It is submitted that *Hardage* is an incorrect decision because it failed to consider the two aspects of the treatment of oil in the definition of “hazardous substance”:

(1) *Hardage* found that asbestos, lead and sodium hydroxide were CERCLA listed hazardous substances under CERCLA Table 302.4;

(2) Under CERCLA 40 C.F.R. §302.4, the exclusion

²⁶ 46 Fed. Reg. 22144, 22145 (April 15, 1981).

²⁷ 46 Fed. Reg. 22144, 22152-53 (April 15, 1981).

²⁸ 985 F.2d 1427 [see also (related): 982 F.2d 1436; 750 F.Supp. 1444 and 1460; 761 F.Supp. 1501; and 733 F.Supp. 1424].

language refers only to characteristic hazardous substances under subsection (b), not to listed hazardous substances in subsection (a);

(3) Thus, *Hardage* concluded that asbestos, lead and sodium hydroxide were listed hazardous substances for which NPL treatment was justified; and

(4) Congressional history indicates a clear intent that the rationale used by the *Hardage* court was for petroleum, not E&P Wastes. If a material is not a listed hazardous waste under RCRA, and if it is E&P Exempt Waste, then it cannot be a CERCLA listed or unlisted hazardous substance.

In *Hardage*, the federal judge bifurcated the trial in reverse order, trying the remedy selection before liability. However, The Hardage Steering Committee (HSC) stipulated to liability with EPA before the initial phase of the trial. The HSC then sued the non-stipulating parties for contribution. The opinion results from this part of the case. The court's findings addressed three issues: (1) the presence of listed hazardous wastes; (2) a waste oil analysis; and (3) the fact that CERCLA and RCRA are two separate statutory programs.

▪ **Presence of Listed Waste**

A CERCLA regulatory provision requires the finding of either a listed or characteristic waste under the regulations for NPL treatment:

- (a) *Listed Hazardous Substances.* The elements and compounds and hazardous wastes appearing in Table 302.4 are designated as hazardous substances under section 102(2) of the Act.
- (b) *Unlisted Hazardous Substances.* A solid waste, as defined in 40 C.F.R. 261.2, which is not excluded from regulations as a hazardous waste under 40 C.F.R. 261.4(b), is a hazardous substance under section 101(14) of the Act if it exhibits any of the characteristics identified in 40 C.F.R. 261.20 through 261.24.²⁹

This regulatory provision highlights the whole problem. In adopting these regulations, EPA ignored the legislative intent of CERCLA with respect to E&P Wastes - - even though it had given earlier credence to the Congressional intent in the Notification Form Rulemaking. EPA treated the exclusionary language as applying only to characteristic wastes. It allowed listing under CERCLA §302 without regard to the CERCLA E&P Exclusion. Under CERCLA, asbestos, lead and compounds, and sodium hydroxide are listed hazardous substances.³⁰

With respect to the presence of listed hazardous substances, the Court pointed to the existence of lead,³¹ sodium hydroxide,³² and asbestos³³ in the drilling wastes. The

²⁹ 40 C.F.R. §302.4(b).

³⁰ Table 302.4

³¹ Table 302.4 reflects that lead and lead compounds are taken from the Clean Water Act, §311(b)(2).

³² Table 302.4 shows sodium hydroxide is taken from the Clean Water Act, §311(b)(4).

³³ Table 302.4 shows that asbestos is taken from the Clean Water Act, §311(b)(4), and the Clean Air Act,

court felt that the three substances specifically were listed or designated as a hazardous substance, even though they might qualify as a petroleum fraction. The court explained:

Sodium hydroxide, asbestos and lead are specifically named in the list of Hazardous Substances *promulgated by the EPA, 40 C.F.R. §302.4, Table 302.4*, and therefore, qualify as hazardous substances under Section 101(14)(B) which reads: “any element, compound, mixture, solution, or substance designated pursuant to Section 102 of this Act.” 42 U.S.C. §9601(14)(b).

The emphasized portion of the decision relies upon listing under CERCLA, per 40 C.F.R. §302.4. *Hardage* referred only to the subsection (B) of the definition, and ignored the RCRA language that the Senate Report says is to apply to §302 designations. The CERCLA listing of asbestos, lead and sodium hydroxide was of no concern because they were wastes exempt from regulation under RCRA that were not specifically RCRA listed wastes.

In an early CERCLA preamble accompanying the Notice of Availability of Form 8900-1³⁴, EPA discussed the relationship of RCRA E&P Exempt Waste and the trigger term “hazardous substance” under CERCLA:

Wastes which are excluded from RCRA regulations are not subject to the notification requirement of Section 103(c) and sites which contain only these wastes are not required to notify.³⁵

Thus, EPA in this 1981 rulemaking was consistent with the concept that RCRA exempt waste would be CERCLA exempt. In 1981, EPA made no distinction between CERCLA listed hazardous substances and RCRA characteristic hazardous wastes.

The *Hardage* decision appears inconsistent with EPA's early intent and the Congressional history.

▪ **The Presence of Constituents**

In its findings of fact, the court stated that pipe dope and mud additives were the real culprits that justified CERCLA treatment. In other words, the court felt that, even if the materials were exempt or excluded, the offending constituents would not be exempt or excluded.³⁶ This stance is contrary to the legislative and rulemaking history.

§307(x).

³⁴ 46 Fed. Reg. 22144 (April 15, 1981).

³⁵ 46 Fed. Reg. at 22145 (April 15, 1981).

³⁶ The findings of fact state:

5. This is so because the drilling mud components, bentonite clay and fresh water, as well as the liquids drained from the reserve pits by Arrow Tank and transported to the *Hardage* site were in contact with hazardous substances, lead, asbestos and sodium hydroxide, the chemical identities of which were not altered during the drilling and completion operations. Thus, the waste transported by Arrow Tank would likewise contain these hazardous substances.

In Congressional debate on CERCLA amendments, Senator Simpson stated:

If, however, a special study waste at a particular site is not a RCRA waste because EPA has determined not to list it as a RCRA waste, and it does not fail any of the RCRA characteristics tests - then neither will it be considered a Superfund hazardous substance, *even if it contains hazardous constituents.*³⁷

Congress chose its words carefully. EPA promulgated Appendix VIII to 40 C.F.R. Part 261. Table 302.4 was derived from Appendix VIII. However, Appendix VIII is specified as “hazardous constituents,” not listed hazardous wastes.³⁸ Thus, merely because a waste, such as drilling mud, contained a hazardous constituent listed on Appendix VIII (and hence, Table 302.4), it was not to be considered covered by CERCLA.

A 1985 EPA rulemaking supports this Congressional intent. In discussing the notion of “hazardous substance” and the Petroleum Exclusion, EPA stated:

Some commenters raised questions about the limits of the exclusion of petroleum from the definition of hazardous substance. EPA interprets the petroleum exclusion to apply to materials such as crude oil, petroleum products, *even if a specifically listed or designated hazardous substance is present in such products.*³⁹

It is clear that the existence of a hazardous constituent is not the driving consideration in applying the Petroleum Exclusion. If the court intended to rely upon the constituent argument, it was in error.

▪ **The Waste Oil Comparison**

The court also referred to legislative history that used oil was not considered within the Petroleum Exclusion. The argument was that the oily material in an E&P Exempt waste site would be tantamount to used oil:

In reaching its conclusion, the Court has also considered the construction of this petroleum exclusion by the agency which is responsible for its administration. On July 31, 1987, the EPA issued a memorandum entitled “Scope of the CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2),” wherein EPA general counsel considered the issue of “whether used oil which is contaminated by hazardous substances is considered “petroleum” under CERCLA and thus excluded from CERCLA response authority and liability unless specifically listed under

³⁷ 131 Cong. Rec. 24099 (Sept. 24, 1985) (comments of Sen. Simpson).

³⁸ There are several types of hazardous wastes lists. The regulatory structure charges EPA with considering any substance containing an Appendix VIII material for possible listing as a hazardous waste. In making this consideration, EPA reviews the toxicity, acute toxicity, and other factors. 40 C.F.R. §261.

³⁹ 50 Fed. Reg. 13456, 13457 (April 4, 1985).

[SWDA] or some other statute.” The EPA determined: “that the contaminants present in used oil or any other petroleum substance are not within the petroleum exclusion.” The EPA concluded further that its current interpretation, under which “petroleum” includes hazardous substances normally found in refined petroleum fractions but does not include hazardous substances found at levels which exceed those normally found in such fractions, is most consistent with the statute and the relevant legislative history. Under this interpretation, the source of the contamination, whether intentional addition of hazardous substances to the petroleum or addition of hazardous substances by use of the petroleum, is not relevant to the applicability of the petroleum exclusion.

This analysis is the weak argument in the opinion. Used oils contain heavy metals generated by the piston engine. Even in the RCRA context used lubricating oils are not exempt. However, used oils in the down-hole processes are excluded, and should not be subjected to any analogous comparison to other types of used oils.

- **Distinct Statutory Schemes**

The *Hardage* court's analysis was similar to the approach taken in the mining cases:

The intent of Congress in incorporating the substances listed in other federal statutes was to include as many substances as possible within CERCLA's ambit, and to be hazardous, a substance need only be designated as hazardous under one of these referenced statutes. . . . To likewise incorporate the various exclusions found in these other statutes would defeat this purpose.

Thus, *Hardage* followed the mining cases in holding that the Petroleum Exclusion was distinct from the E&P Exemption, even though legislative history contains very strong contrary indications.

Hardage is a good example of EPA picking its early oil and gas test cases well. It involved an old site, which no doubt had a mixed bag of wastes. Many of the old sites do have materials that now are considered non-exempt. A well-controlled site might yield a different result from *Hardage*. The result was that *Hardage* held that the RCRA exemption afforded no protection under CERCLA -- consistent with the mining cases but inconsistent with Congressional intent.

- **Miscellaneous Problems with *Hardage***

In addition to missing a substantial body of legislative history, *Hardage* contained some very basic errors. The conclusions of law recited the definition of hazardous substance in CERCLA, which by the court's own pen included within the definition:

any hazardous waste having the characteristics identified

under or listed pursuant to section 3001 of the Solid Waste Disposal Act (*but not including any waste the regulation of which under the Solid Waste Disposal Act has been suspended by Act of Congress*)[.]

The very next conclusion of law conflicts with this language:

Although CERCLA incorporates substances listed or designated under other federal statutes including . . . the Solid Waste Disposal Act (SWDA) (also known as the Resource Conservation and Recovery Act), 42 U.S.C.A. §6921 . . . CERCLA does not refer to the exclusions contained in these other statutes.

While the court said that CERCLA did not refer to the “exclusions,” it overlooked the very exclusionary language written in the conclusion of law. Even more mysterious is the court's reference to 40 U.S.C.A. §6921. This section is not the definition statute of RCRA, but the E&P Exemption language!

The *Hardage* court cited with favor *Eagle-Picher Industries, Inc. v. U. S. E.P.A.*⁴⁰ Yet, Congress did not look with favor upon *Eagle-Picher*, viewing it as the very reason the amendment to the hazard ranking system (“HRS”) was necessary:

It was argued that until the HRS is revised to assure that the forgoing factors are weighed accurately, some high volume, low toxicity waste sites posing low risk might be listed on the NPL in preference to other, potentially more serious sites. This concern was underscored by the subsequent decisions by the U.S. Court of Appeals for the District of Columbia in the companion *Eagle-Picher* cases (No. 83-2259, et. (sic) seq.).⁴¹

In conclusion, it appears that *Hardage* missed the important legislative history and, because of that, yielded an incorrect result.

- **Is E&P Exempt Waste Excluded Under CERCLA's Petroleum Exclusion?**

In *Cose v. Getty Oil*⁴², the trial Court held that the Petroleum Exclusion covered crude oil tank bottoms, and therefore CERCLA/Superfund did not cover production tank bottoms. However, on appeal, the Ninth Circuit disagreed -- and, among its findings, are the following:

- Crude oil tank bottoms do not fall within the plain meaning of the definition of “fraction” or “petroleum.”
- Crude oil tank bottoms 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. Such tank bottoms accumulate naturally

⁴⁰ 759 F.2d 922 (D.C. Cir. 1985).

⁴¹ 131 Cong. Rec. 24079 (Sept. 18, 1985) (comments of Sen. Baucus).

⁴² 4 F.3d 700 (9th Cir. 1993).

before the crude oil even reaches the refinery [and] are not “one of several portions separable by fractionation” of crude oil, as required by our definition of “fraction.”

- [S]uch tank bottoms are not used “for producing useful products.” Rather, as evidenced [in this case], the substance is simply discarded waste.
- Accordingly, the definitions of “fraction” and “petroleum” as adopted by our court urge a conclusion that crude oil tank bottoms *do not* fall within CERCLA’s exclusion of “petroleum, including crude oil or a fraction thereof.”

The Ninth Circuit reversed and remanded the case -- holding that: “Because we conclude that the crude oil tank bottoms here at issue are not ‘petroleum’ and therefore not subject to CERCLA’s exclusion, the Chrysene found within the [site’s] environmental samples is properly viewed as an independent ‘hazardous substance,’ rather than as a component of petroleum. Liability is imposed under CERCLA *regardless of* the concentration of the hazardous substances present in a defendant’s waste, *as long as* the contaminants are listed ‘hazardous substances’ pursuant to 40 C.F.R. §302.4(a).

- **Wilshire Westwood v. ARCO**

The Ninth Circuit Court of Appeals rendered a guiding decision on the scope of the petroleum exclusion in *Wilshire Westwood Associates v. Atlantic Richfield Corp* [case was on appeal from Central Division of California]. Wilshire Westwood sued ARCO under CERCLA for response costs arising out of a leaking underground storage tank that held leaded gasoline. The court ruled that substances indigenous to crude oil were covered by the Petroleum Exclusion, as were substances added during the refining process:

Moreover, because all of the substances complained of herein and designated as hazardous pursuant to other statutes are indigenous to crude oil ... the construction advocated by plaintiffs would have the effect of rendering the petroleum exclusion a nullity because all crude oil, petroleum and petroleum fractions, unrefined or refined, would fall outside its ambit.⁴³

The court found an EPA guidance very helpful in arriving at its conclusion -- such guidance stating that “petroleum” included:

crude oil and fractions of crude oil, including the hazardous substances, such as benzene, which are indigenous in those petroleum substances. Because these hazardous substances are found naturally in all crude oil and its fractions, they must be included in the term “petroleum” for that provision

⁴³ 881 F.2d 801 [upholding lower court decision at 27 Env’t. Rep. Cas. (BNA) 2146 (C.D. Cal. 1988) in which lower court reversed its own, prior ruling at *Wilshire Westwood Associates v. Atlantic Richfield Corp.*, 27 Env’t. Rep. Cas. (BNA) 1800 (C.D. Cal. 1987)].

to have any meaning.⁴⁴

EPA continued the list of materials within the petroleum exclusion, stating:

“[P]etroleum” under CERCLA also includes hazardous substances which are normally mixed with or added to crude oil or crude oil fractions during the refining process. This includes hazardous substances the levels of which are increased during refining. These substances are also part of “petroleum” since their addition is part of the normal oil separation and processing operations at a refinery in order to produce the product commonly understood to be “petroleum.”⁴⁵

Thus, crude oil, fractions of crude oil, refined oil, and indigenous substances and additives are excluded under the Petroleum Exclusion. EPA noted that the mixing of excluded petroleum substances, such as fuel blending, would not be considered contamination by use. Hence, the mixed material would continue to be excluded from CERCLA.⁴⁶

EPA addressed those substances not covered by the Petroleum Exclusion as follows: Hazardous substances which are added to petroleum or which increase in concentration solely as a result of contamination of the petroleum during use are not part of the “petroleum” and thus are not excluded from CERCLA under the Petroleum Exclusion.

EPA explained that mixtures of oil and other toxic materials would not be excluded by the Petroleum Exclusion.⁴⁷ However, this discussion focused on other toxics, not E&P Waste. The legislative history on that point was not addressed.

o **Amendment Allowing Listing of Special Study Waste Sites**

It has been suggested that the amendment allowing EPA to list special study waste sites negates the need for any analysis of the Petroleum Exclusion and the E&P Exemption. Yet, the legislative history does not support this suggestion. The legislative history reveals that once EPA decided not to regulate the special study wastes as hazardous wastes under RCRA, these wastes were not to be included under CERCLA unless the wastes failed the characteristic tests.

RCRA treats E&P Wastes as “special study wastes.”⁴⁸ In the 1986 amendments to CERCLA,⁴⁹ Congress required EPA to consider certain factors before

⁴⁴ Memorandum, *Scope of the CERCLA Petroleum Exclusion Under Sections 101(14) and 104(a)(2)*, from Francis S. Blake, General Counsel, to J. Winston Porter, Assistant Administrator for Solid Waste and Emergency Response (July 31, 1987) [hereinafter, EPA CERCLA Guidance] <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/petro-exclu-mem.pdf>.

⁴⁵ EPA CERCLA Guidance at 6.

⁴⁶ EPA CERCLA Guidance at 7-8.

⁴⁷ Pub. L. 99-499, Title I, § 105, 100 Stat. 1625 (October 17, 1986). See also, 56 Fed. Reg. 13296 (March 31, 1989) (PAB NPL Update).

⁴⁸ 42 U.S.C.A. §6921(b)(2)(B) & §6982(m).

⁴⁹ See H.R. Conf. Rep. No. 962, 99TH Cong., 2ND Sess. 1986, H.R. CONF. REP. 99-962 (Leg.Hist.) [also cited as PL 99-499, 1986 HR 2005].

special waste sites could be listed on the National Priority List. Those factors included:

The extent to which hazard ranking system score for the facility is affected by the presence of any special study waste at, or any release from, such facility.

Available information as to the quantity, toxicity, and concentration of hazardous substances that are constituents of any special study waste at, or released from such facility, the extent of or potential for release of such hazardous constituents, the exposure or potential exposure to human population and the environment, and the degree of hazard to human health or the environment posed by the release of such hazardous constituents at such facility. This subparagraph refers only to available information on actual considerations of hazardous substances and not on the total quantity of special study waste at such facility.⁵⁰

E&P Wastes are high volume, low toxicity wastes. Legislative history indicates that Congress was concerned about EPA including high volume, low risk waste sites on the NPL.⁵¹ It was stated in the Senate:

EPA nonetheless has decided to consider sites containing these wastes as possible Superfund targets, based on the presence of trace hazardous constituents in the wastes. However, the hazard ranking system [HRS] used to rank sites for Superfund action exaggerates the potential harm from these high-volume, low-toxicity wastes. An amendment to the HRS is needed to prevent EPA from spending a substantial portion of the Fund on sites that simply do not pose anywhere near the environmental concerns posed by the estimated thousands of abandoned waste dumps that deserve priority attention.⁵²

The primary intent was to address abandoned mine drainage areas. The next bit of history drives this point home:

Finally, the amendment makes clear that once EPA completes its special waste studies on these wastes - and determines whether or not to list them as hazardous wastes under section 3001 of the Solid Waste Disposal Act, the waste streams which are not found to be hazardous - and the constituents of these waste streams - will not be treated as hazardous substances under CERCLA. *The only exception is for those wastes which flunk the characteristic tests listed or identified under section 3001 of the Solid Waste Disposal Act.*⁵³

⁵⁰ 42 U.S.C.A. §9605(g)(2).

⁵¹ 131 Cong. Rec. 24,078-79 (Sept. 18, 1985) (statement of Sen. Baucus).

⁵² 131 Cong. Rec. 24099 (Sept. 24, 1985) (comments of Sen. Simpson).

⁵³ 131 Cong. Rec. at 24079 (Sept. 18, 1985) (comments of Sen. Baucus). [See also 132 Cong. Rec. 14931 (Oct. 3, 1986) for an interesting dialogue which occurred between Senators Bentsen and Simpson regarding the effect of this provision on the coverage of the Petroleum Exclusion under CERCLA:

Thus, Congress indicated that once EPA opted not to regulate E&P Wastes under RCRA hazardous waste provisions, these wastes were not to be included in CERCLA unless the wastes failed a characteristic test.

- **Other Cases Analyzing the Petroleum Exclusion**

Several other cases have addressed the Petroleum Exclusion. In *City of New York v. Exxon Corp.*⁵⁴ the court was dealing with waste emulsion oils. The case was presented on cross motions for summary judgment by the City of New York and one defendant, Alcan Aluminum Corp. (“Alcan”). As an important starting point, the court noted that for CERCLA liability to attach, no minimum quantity of regulated hazardous substances is required. In seeking to impose liability, the City of New York argued:

According to the regulations, “[t]he elements and compounds and hazardous wastes appearing in Table 302.4 are designated as hazardous substances under section 102(a) of [CERCLA].” 40 C.F.R. § 302.4(a). Included in the table are “cadmium and compounds,” “chromium and compounds,” and “lead and compounds.” Based on this listing, and the listings in the other referenced statutes, the City argues that the “trace amounts,” as Alcan characterizes them, of cadmium, chromium and lead found in Alcan's waste are hazardous substances, regardless of their concentration or form.⁵⁵

The court agreed, holding:

We are satisfied that liability under CERCLA attaches regardless of the concentration of the hazardous substances present in a defendant's waste, so long as the defendant's waste and/or the contaminants in it are “listed hazardous substances” pursuant to 40 C.F.R. § Section (sic) 302.4(a). Numerous courts have held that Section 101(14) of CERCLA “requires only that a substance be designated as hazardous or toxic under one of the referenced statutory provisions to be a hazardous substance under CERCLA.”⁵⁶

Mr. Bentsen: I would like to ask a question with regard to the effects of this legislation. It is my understanding that these amendments would not diminish the scope of the present exclusion from liability for petroleum found in section 101(14) of the act. Is my understanding correct, Senator?

Mr. Simpson: Yes, the Senator from Texas is correct in his interpretation. This bill will not diminish the scope of the present petroleum exclusion. That provision, found in section 101(14) of the act, excludes from the definition of “hazardous substance” all types of petroleum, including crude oil, crude oil tank bottoms, refined fractions of crude oil, and tank bottoms of such which are not specifically listed or designated as a hazardous substance under the other subparagraphs of that provision. {emphasis added}]

⁵⁴ 744 F. Supp. 474 (S.D. N.Y. 1990).

⁵⁵ 744 F. Supp. at 483.

⁵⁶ 744 F. Supp. at 483.

[citations omitted].⁵⁷

Alcan continued its argument, pressing the reportable quantities as the statutory and regulatory threshold. However, the court felt that the statute did not expressly indicate a relationship between the reportable quantities provisions and the liability provisions of the act.⁵⁸

The next defense raised by Alcan was that not all forms or compounds of lead, chromium, and cadmium were intended to be hazardous substances. Alcan's argument was simple: the EP Toxicity test would not be necessary because the chemicals targeted by the test are all listed in 40 C.F.R. §302.4. The court agreed, stating:

If “chromium and compounds” included all chromium compounds, it would never be necessary to apply Section 302.4(b) to determine whether or not a waste is EP toxic for chromium. In other words, the reference in Section 302.4(b) to Table 1 and 40 C.F.R. §261.24 would be meaningless for any chromium-containing waste, as it would be for lead- and cadmium-containing wastes. Because we do not believe that the EPA intended to enact a meaningless regulation, we believe that not all chromium, lead, and cadmium compounds are “listed hazardous substances” under Section 302.4(a).⁵⁹

Because the City of New York failed to respond to this argument, more briefing was required as to the scientific nature of the waste.

The final argument addressed by the court was the Petroleum Exclusion. Alcan first observed that the concentrations of cadmium, chromium, and lead in the waste emulsion oil were less than those found in virgin oil. The court rejected the argument, taking a waste oil analysis:

In addition, the presence of cadmium, chromium, and lead present in Alcan's waste was not the result of Alcan's use of “virgin oil,” but rather of Alcan's industrial processes. In a report on the waste oil emulsion prepared by Alcan's Supervisor of Laboratories and Environmental Management, Alcan explains that:

The emulsions are prepared using deionized water. Makeup of losses due to evaporation is also accomplished using deionized water. *However, over a period of time, concentrations of some common metal (sic) do increase.*

Because the hazardous substances present in Alcan's waste emulsion were added during the production process, we believe that the petroleum exclusion should not apply to Alcan's waste.⁶⁰

⁵⁷ 744 F. Supp. at 483. 744 F. Supp. at 484. 744 F. Supp. at 488. 744 F. Supp. at 490-91.

⁵⁸ 744 F. Supp. at 484.

⁵⁹ 744 F. Supp. at 484.

⁶⁰ 744 F. Supp. at 490-491.

The court elaborated on the Petroleum Exclusion:

To the contrary, the primary purpose of the exclusion for petroleum, which is defined principally in terms of crude oil and crude oil fractions, was to exclude from CERCLA's coverage "spills or other releases strictly of oil," S. Rep. No. 96-848, 96th Cong., 2d Sess. 29-30 (1980), not releases of hazardous substances mixed with oil. This is confirmed by the congressional debates, which reveal members of Congress understood CERCLA to cover contaminated oil slicks, *see* 126 Cong. Rec. at H11798 (daily ed. December 3, 1980) (Rep. Edgar); *id.*, at S14963 (daily ed. November 24, 1980) (Sen. Randolph), PCB's in waste oil, *id.*, at S14974 (Sen. Mitchell), dioxin in motor fuel used as a dust suppressant, *id.*, and contaminated waste oil, *id.*, at S14980 (Sen. Cohen) Clearly, though Congress intended to exclude oil spills from the coverage of CERCLA, Congress did not intend to exclude waste oils such as Alcan's, which are by no means strictly "crude oil or any fraction thereof."

It is apparent from *City of New York v. Exxon* that the waste oil analysis is gaining a foothold on the Petroleum Exclusion. However, the waste oil analysis should apply to those materials akin to the waste oils which garner heavy metals from engines during use. Application of this doctrine to field and down-hole oil and gas exploration and production activities could frustrate the purpose of the exemption to encourage the domestic oil and gas industry.

Another important case is *United States v. Western Processing Company*,⁶¹ GATX, one of the defendants, sought summary judgment against the claim presented by Boeing, the federal contractor. The defense argued the Petroleum Exclusion, citing *Wilshire Westwood*.⁶²

The first argument addressed 67 drums of sludge which originated from tanks containing leaded gasoline and diesel fuel. The sludge was material which settles to the bottom of the tanks and is later removed. It contained a rust-like scale of corrosion products from the oxidation of steel inside the tanks. This oxidized matter consisted of chromium, nickel, and other metals. The court observed that gasoline rarely contains nickel, so "the sludge contained hazardous substances not normally found in refined petroleum fractions." The court's conclusion was direct:

The GATX tank bottom sludge is a contaminated waste product, and not a petroleum fraction, as that term is used in the statute.... GATX's tank bottom material was certainly "waste" as it was being hauled away for disposal, not for reuse. For whatever reason Congress may have elected to treat "petroleum" releases differently between releases of petroleum, products from tanker spills or from leaking

⁶¹ 761 F. Supp. 713 (W.D. Wash. 1991).

⁶² 881 F.2d 801 (1989).

storage tanks and the delivery of petroleum related waste material to a disposal or treatment facility. The former releases have unique characteristics, while in the latter case, the wastes are just one more waste product delivered to a facility where other such wastes accumulated from deliveries by others.⁶³

Western Processing presents an interesting discussion of meaning of “fraction” as used in the Petroleum Exclusion. GATX argued that its sludge and washwater were fractions of petroleum. The court felt “fractions” was a term of art for separated or refined products:

GATX's sludge cannot fall into this category, because the sludge is not a product of the fractional distillation process, but a result of contaminated scale from the tanks mixing with the unrecovered petroleum products stored in the tank. While it may be a natural process occurring in any steel storage tank, GATX still possessed this contaminated sludge and had to dispose of it.”

The court characterized the fractions argument as one of semantics.

An often cited but poorly reasoned case is *State of New York v. United States*. In that case, the product at issue was JP-4, or commonly known as jet fuel. JP-4 is a naphthalene derivative from refined crude oil. Over a period of years, JP-4 leaked from the defendants' facilities. The court applied the “specifically listed” analysis to defeat the Petroleum Exclusion defense. The JP-4 contained benzene, toluene, and xylenes.⁶⁴ Application of the specifically listed analysis to these facts makes the Petroleum Exclusion a nullity. Gasoline contains BTEXs,⁶⁵ and gasoline was intended to be within the Petroleum Exclusion.

However, the case does make one good point. In addition to the JP-4 and its indigenous additives, the defendants did dispose of some routine waste solvents. Clearly these waste solvents invoked CERCLA jurisdiction.⁶⁶

Despite the decision in *State of New York v. United States*, a Pennsylvania federal district court held that diesel fuel was within the Petroleum Exclusion.⁶⁷ The court relied heavily upon the EPA guidance referenced by the *Wilshire Westwood* court.

- **CERCLA Liability in the Oilfields**

An important aspect of CERCLA is whether mere ownership of the land overlying a producing mineral estate can yield CERCLA exposure. Landowners negotiating oil and gas leases are showing greater concern for this issue.

CERCLA is clear that the current owner of land is liable regardless of fault for

⁶³ 761 F. Supp. at 713. 761 F. Supp. at 722.

⁶⁴ 620 F. Supp. 374 (E.D. N.Y. 1985). 620 F. Supp. at 386.

⁶⁵ 620 F. Supp. 374 (E.D. N.Y. 1985). 620 F. Supp. at 386

⁶⁶ 620 F. Supp. at 386. See also, *State of Washington v. Time Oil Co.*, 687 F.2d 1032 (2^d Cir. 1985); *U.S. v. Argent Corp.*, 21 Env't Rep. (BNA) 1354 (D. N.M. 1984).

⁶⁷ *United States v. Carolawn Co.*, 14 Env't L. Rep. (Env't L. Inst.) 20,698 (D. S.C. 1984).

CERCLA covered waste management disposal problems occurring on the land.⁶⁸ This principle has been carried to the extreme where the officers and directors of a company effect a simultaneous transfer of title to their company. The court held the officers and directors liable. The New Mexico federal court held that an innocent landlord still had liability:

Defendant Bishop had no connection with defendant Argent Corp.'s business. [D]efendant Bishop argues that his mere ownership of the Rio Rancho land and building, without any attendant connection to the Argent Corp. business operated thereon, does not make him an "owner" within the contemplation of CERCLA.

Having carefully studied the plain language of the Act, the legislative history of the Act, and legal precedents construing the Act, the court finds as a matter of law that defendant Bishop, as the undisputed owner of the Rio Rancho land and building, is an owner susceptible to liability under CERCLA.

The court rejected Bishop's third party defense, finding that by virtue of the rental lease, Bishop was in a contractual relationship with Argent. The third party defense is not available to persons in contractual relationship with the third party.

Where does this leave the surface/mineral owner? If *Argent* is applied, it means that an oil and gas lessor/surface owner would have liability for Superfund sites arising out of oil and gas activities. However, landowner counsel should put this concern in context. Oil and gas sites typically are small operations. The type of CERCLA concern which would expose a landowner to liability would be presented by the government in a cost recovery action. Absent a centralized field activity, CERCLA involvement should be remote because it is unlikely that the agency would become involved in such a small controversy.

The remaining issue is the liability of the oil and gas lessee for the conduct of the surface owner. Courts have imposed liability on lessees as owners and operators.⁶⁹ The pivotal issue is whether the control exercised by a lessee was such that the lessee became an operator of the environmental aspect of the property. CERCLA defines the term as follows:

The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by

⁶⁸ 42 U.S.C.A. §9607(a)(2). See also, *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *United States v. Argent Corp.*, 21 Env't Rep. (BNA) 1354 (D. N. M. 1984).

⁶⁹ See, e.g., *United States v. A & N Cleaners & Launderers*, 788 F. Supp. at 1317, 1333 (S.D.N.Y.1992), in which it was held that the owner of a leasehold interest in a CERCLA facility may be liable as an owner of that facility, as long as the lessee exercised sufficient "site control" to "place[] it in the shoes of 'owners.'" [See, also, subsequent decision in same case at 854 F.Supp. 229, 38 ERC 2112 (S.D.N.Y. May 26, 1994) *U.S. v. A & N Cleaners and Launderers, Inc.*, which discusses, among other issues, the notions of "all appropriate inquiry" and "due care" associated with entering into lease arrangements and/or acquiring property with pre-existing lease arrangements in place.]

demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand.⁷⁰

Wording in the *Best Foods* case⁷¹ would seem more directly on point in regard to the potential liability under CERCLA of oil and gas lessees in its holding that:

[U]nder CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

Thus, IF AND TO THE EXTENT the oil and gas lessee (and/or sublessee, as the case may be) operates or otherwise exercises control over facility/site activities in a manner which causes or contributes to the environmental problem(s) associated with the facility/site, THEN (subject to any protections afforded by the *Petroleum Exclusion* and/or the *E&P Exemption*) said oil and gas lessee and/or sublessee should expect to be alleged to be in the *chain of CERCLA liability* of the owner/lessor (and/or sublessor, as the case may be).

⁷⁰ 42 U.S.C.A. §9601(20)(A).

⁷¹ *United States v. Best Foods*, 524 U.S. 51, 118 S.Ct. 1876, 141 L.ed.2nd 43 (1998).