

**FRAC LAW: FROM LAND CONTRACT
NEGOTIATIONS TO ENVIRONMENTAL DISPUTES**

**ENVIRONMENTAL CONCERNS
AND REMEDIES**

**PRESENTED BY POLLY JESSEN AND LEE ZARZECKI
KAPLAN KIRSCH & ROCKWELL LLP**

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Presentation Objective

- Identify the common contamination risks in the hydraulic fracturing and oil and gas production process generally
- Explain the federal, state and local regulation of oil and gas operations
- Highlight landowner environmental liability concerns
- Identify legal recourse available to landowners
- Identify protective provisions to include in leases and surface use agreements



What are some common contamination risks associated with oil and gas development?

- Impacts on groundwater and surface waters
- Wastewater and Waste Management
- Trespass
- Hazardous Air Pollution
- Noise
- Spills



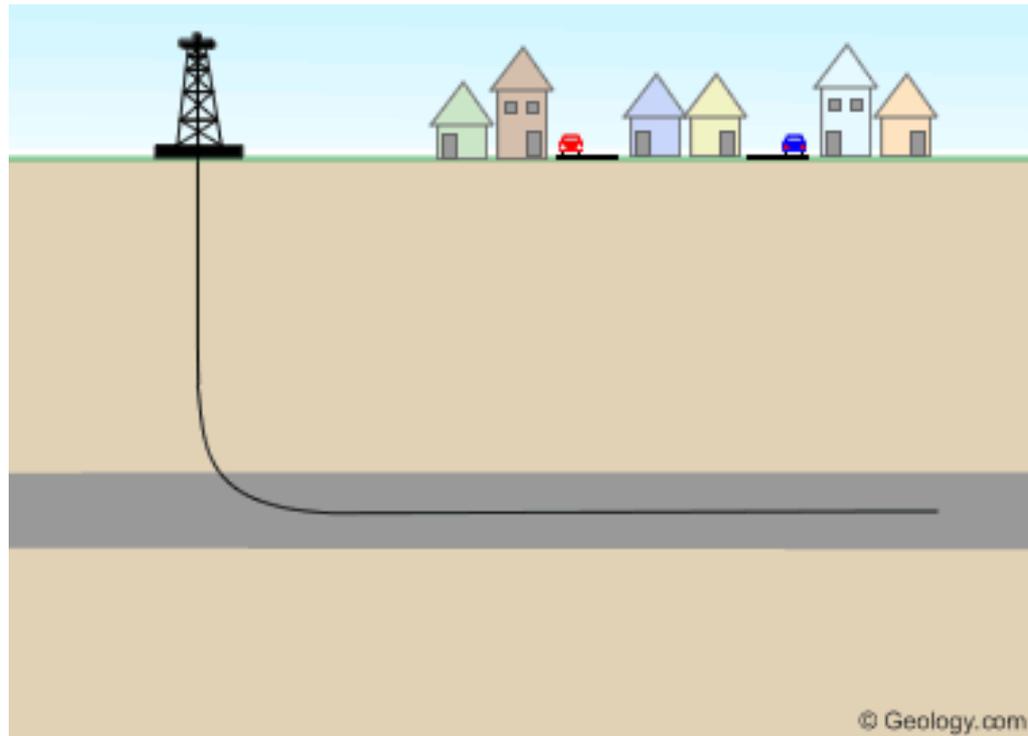
Common Contamination Risks: Impacts on Groundwater and Surface Waters



Common Contamination Risks: Wastewater and Waste Management



Common Contamination Risks: Trespass



Source: Geology.com



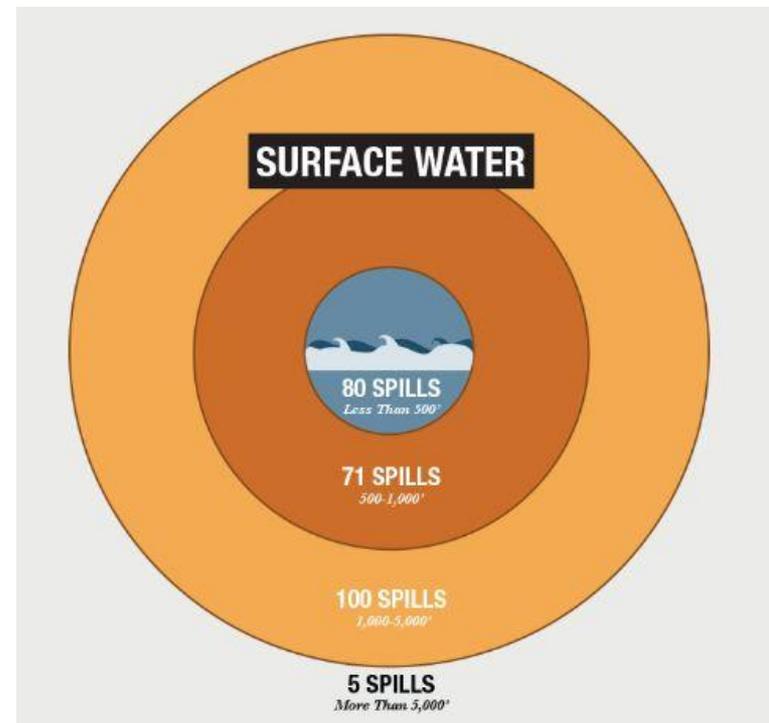
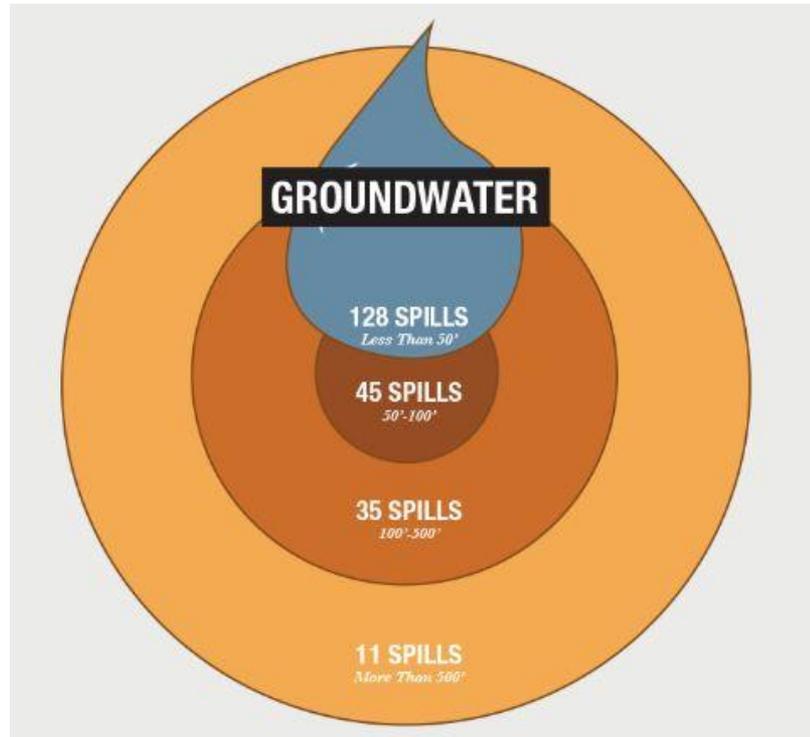
Common Contamination Risks: Hazardous Air Pollution



Common Contamination Risks: Noise



Common Contamination Risks: Spills



Source: Western Priorities Colorado

Federal Regulation

Federal Law	Applicable to Oil and Gas Development	Exemptions or Limitations	Source of Exemption Exemption or Limitation
Safe Drinking Water Act	<ul style="list-style-type: none"> Underground Injection Control Program Imminent and Substantial Endangerment Provision 	<ul style="list-style-type: none"> Hydraulic fracturing fluids other than diesel fuels do not require Underground Injection Control Permit 	Statutory – 2005 Energy Policy Act
Clean Water Act	<ul style="list-style-type: none"> National Pollutant Discharge Elimination System program Spill reporting and spill prevention and response planning requirements 	<ul style="list-style-type: none"> Federal stormwater permits not required for uncontaminated stormwater at oil and gas construction or well sites 	Statutory - 1987 Water Quality Act and 2005 Energy Policy Act
Resource Conservation and Recovery Act	<ul style="list-style-type: none"> Non-exempt wastes present at well sites may be regulated as hazardous Imminent and Substantial Endangerment Provision 	<ul style="list-style-type: none"> Oil and gas exploration and production wastes not regulated as hazardous waste 	1988 Regulatory/EPA decision
Comprehensive Environmental Response, Compensation, and Liability Act	<ul style="list-style-type: none"> Hazardous substance release reporting Imminent and Substantial Endangerment Provision for releases of a pollutant or contaminant 	<ul style="list-style-type: none"> Liability and reporting provisions do not apply to injections of fluids authorized by state law for production, enhanced recover, or produced water Petroleum releases not covered 	Statutory – 1980
Emergency Planning and Community Right-to-Know Act	<ul style="list-style-type: none"> Reporting on use, inventories, and releases into the environment of hazardous and toxic chemicals above threshold quantities 	<ul style="list-style-type: none"> Oil and gas well operations not required to report releases of listed chemicals to Toxics Release Inventory 	1997 Regulatory/EPA decision



Clean Air Act

- The Clean Air Act is the comprehensive federal law that regulates air emissions from stationary and mobile sources
- Pursuant to CAA §111 EPA must to identify categories of sources requiring emissions standards and set those standards
- Pursuant to CAA §112, EPA must list sources and set standards

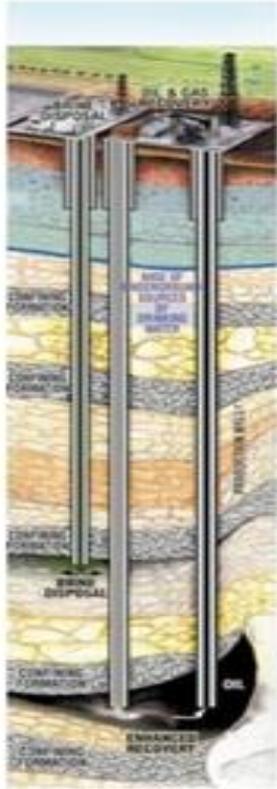


Clean Water Act

- SPCCP Regulations (40 CFR 112)
- NPDES Regulations (40 CFR 122-136 and 401-471)
- EPA Section 404 Wetlands Protection Regulations (40 CFR 230-233)/USACE Section 404 Wetlands Protection Regulations (33 CFR 323)



Safe Drinking Water Act



Class II Wells — *Injection wells associated with oil and gas production.*

Purpose: Regulate and manage safe injection (1) of fluid brought to the surface in connection with oil and gas production and some natural gas storage operations, (2) for enhanced recovery of oil or natural gas, or (3) for hydrocarbon storage operations. Prohibit movement of fluids into USDWs.

Examples of Fluids:

- Produced high salinity brine.
- Crude oil (for storage).
- Polymers and viscosifiers for enhanced recovery wells.
- Drilling fluids and muds.

Protective Requirements:

Construction and siting

- Cased and cemented to prevent movement of fluids into USDWs.
- Construction and design of well (casing, tubing and packer) varies.

Monitoring and Testing

- Internal/external mechanical integrity testing.
- Periodic monitoring and reporting.

Recordkeeping and Reporting

- Plan for safe plugging and abandoning of wells, including demonstration of financial responsibility.

Regulatory Citations:

- 40 CFR 144 Subparts A - E
- 40 CFR 146 Subparts A and C

Source: EPA Protecting Drinking Water Through Underground Injection Control: UIC Pocket Guide



CERCLA

- A CERCLA 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...and the term does not include natural gas.” 42 U.S.C. § 9601
- This exception is commonly referred to as the petroleum exclusion
- Not all oil and gas related releases are exempt



RCRA

- RCRA gives EPA the authority to control hazardous waste from “cradle-to-grave”
- This process includes the generation, transportation, treatment, storage, and disposal of hazardous wastes
- Drilling fluids, produced water, and other wastes associated with oil and gas exploration, development, and production are exempted
- RCRA solid waste requirements still apply



TSCA

- TSCA provides EPA with authority to require reporting, record-keeping, and testing requirements relating to chemical substances and/or mixtures



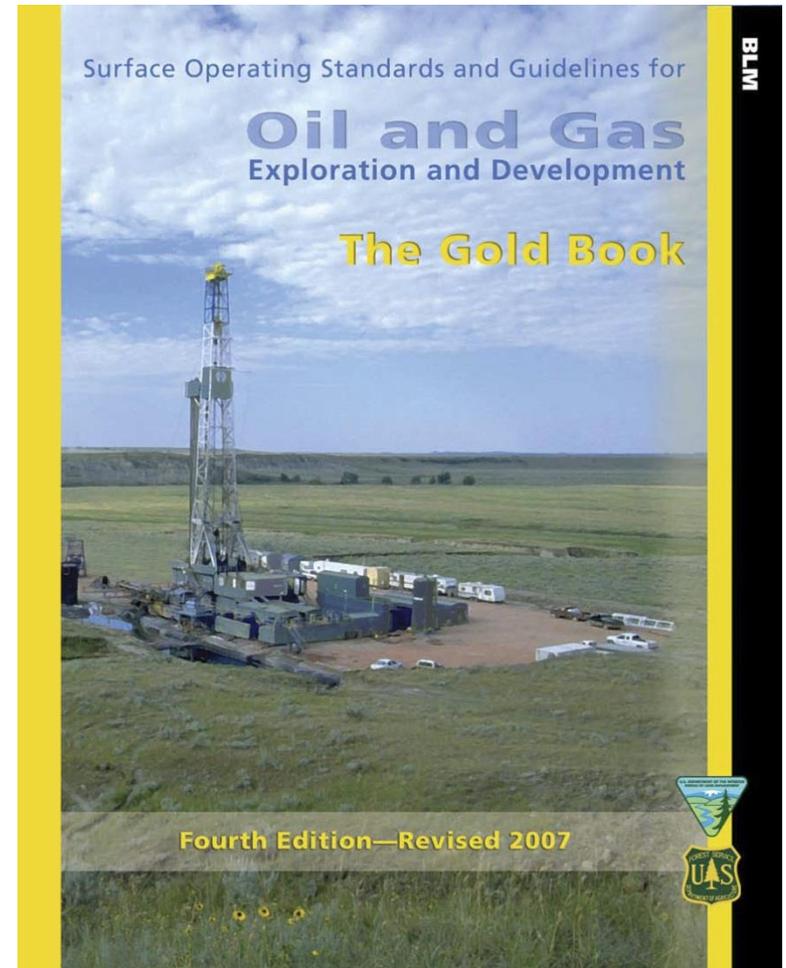
EPCRA

- EPCRA is designed to help local communities protect public health, safety, and the environment from chemical hazards
- EPCRA provides individuals and their communities with access to information regarding the storage or release of certain chemicals within their communities
- EPCRA also established the Toxics Release Inventory (TRI), a publically available database containing information about chemical releases from industrial facilities



Gold Book

- If an issue arises over exploration or development of federal minerals one should become familiar with the Gold Book



State Regulatory Authority

Oil and Gas Conservation Act

- Conservation Act requires operators to mitigate adverse environmental impacts from operations in violation of COGCC Rules



State Regulatory Authority

COGCC RULES

100 Series –Definitions

200 Series –General Rules

300 Series –Drilling, Development, Production and Abandonment

400 Series –Unit Operations, Enhanced Recovery Projects, and Storage of Liquid Hydrocarbons

500 Series –Rules of Practice and Procedure

600 Series –Safety Regulations

700 Series-Financial Assurance and Oil and Gas Conservation Environmental Response Fund

800 Series –Aesthetic and Noise Control Regulations

900 Series –E&P Waste Management

1000 Series –Reclamation Regulations

1100 Series –Pipeline Regulations

1200 Series –Protection of Wildlife Resources



State Regulatory Authority

- Solid and hazardous wastes disposal is regulated by CDPHE
- CDPHE point source and stormwater discharge permit requirements apply
- OPS regulates ASTs and USTs
- CDPHE imposes air quality rules
- CDPHE and CPW consult on drilling permits and certain other COGCC activities



Local Authority

- Common law police powers
- State enabling statutes
 - Land use and building code enabling statutes
 - Environmental and natural resource enabling statutes
 - Other



Colorado Preemption Law

- Oil and Gas Conservation Act and the COGCC Regulations do not entirely preempt local regulation of oil and gas
- Do local laws “materially impede or destroy” the interest of the state legislature?
- Local governments cannot
 - Totally ban oil and gas drilling
 - Impose technical or financial requirements that “go beyond” state requirements



Landowner Liability Concerns

CERCLA creates “land owner” liability for

1. All costs of removal or remedial action, natural resource damages, agency oversight of a release or threatened release of hazardous substances
2. Excludes substances covered by the “petroleum exclusion”
3. Will cover substances that are not part of the petroleum fraction sent for refinement or that are simply waste streams (drill cuttings, tanks bottoms, waste oil)



Sources of Potential Liability to the Surface Owner

RCRA

1. “Petroleum exclusion” excepts certain substances from hazardous waste requirements
2. Allows suits for injunctive relief by EPA or citizens against “any person” who contributed to or is contributing to management of solid or hazardous waste that may present “an imminent and substantial endangerment to health or the environment”
3. Surface owners may escape liability if they did not “contribute”



Sources of Potential Liability to the Surface Owner, cont.

Clean Water Act and the Oil Pollution Act

1. Owners and operators of facilities are liable for cleanup costs
2. Covers discharge or substantial threat of discharge of oil into waters of the United States
3. Case found property owner liable for releases from an historical pit of a former lessee



Sources of Potential Liability to the Surface Owner

State Statutes and Common Law

1. Statutory liabilities are not likely to be triggered without waste management by property owner or developer
2. Common law liability
 - a. Fraud or misrepresentation claims
 - b. Nuisance and trespass claims



Landowner Recourse

- CERCLA contribution claims
- RCRA Citizen Suit
- CWA Citizen Suit
- Statutory claims
- Tort and contract claims



CERCLA Contribution

- Under Section 107(a) of CERCLA, a landowner may recover from other responsible parties “necessary” response costs incurred “consistent with the national contingency plan”
- Under Section 113(a) of CERCLA, a landowner who is subject to EPA enforcement action or a suit for cost recovery by another party, may seek contribution from other responsible parties



RCRA Citizens Suits and Injunctive Relief

Section 7002 of the Resource Conservation and Recovery Act allows an action:

against any person ... and including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment.



RCRA Citizens Suits and Injunctive Relief, cont.

- The citizen suit provision is injunctive in nature, which can include an order that the defendant is responsible for site investigation, monitoring and testing costs as well as an order barring further endangerment



CWA Citizen Suit

Section 505 of the act allows any person “having an interest which is or may be adversely affected” to commence a civil action against any person for violation of any effluent standard, limitation, or order or against EPA for failure to perform a nondiscretionary duty



Colorado Oil and Gas Conservation Act

No private right of action is available; although the Act allows a suit by private parties for injunctive relief on behalf of the COGCC



Negligence, Nuisance and Trespass Claims

- Negligence – Operators who do not observe regulatory requirements may be found negligence and liable for associated cleanup costs
- Nuisance- Claims of air and water pollution may also constitute private nuisance actions
- Trespass- Operator’s excessive surface use that exceeds that which a reasonable and necessary to access the mineral estate may constitute a trespass



Contract Claims

Breach of lease or surface use provisions can give rise to contractual claims for damages



Preventive Contract Clauses

- Compliance with applicable law
- Environmental remediation requirements
- Bonding and insurance
- Notification
- Indemnification



QUESTIONS?

POLLY JESSEN AND LEE ZARZECKI
KAPLAN KIRSCH & ROCKWELL LLP

PJESSEN@KAPLANKIRSCH.COM

303-825-7000

