

U.S. Environmental Law Overview

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Environmental Enforcement

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U.S. Environmental Requirements for Exploration and Production

- Background for liability – tort laws (nuisance, trespass) still important
- Federal statutes
 - Clean Water Act
 - Oil Pollution Act
 - Clean Air Act
 - Resource Conservation and Recovery Act
 - Comprehensive Environmental Response, Compensation & Liability Act
 - National Environmental Policy Act
 - Endangered Species Act
 - Civil and Criminal Enforcement
- Most states have parallel laws



2013

CFR 20 Part 201 Index Employees' Benefits 2013

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Clean Water Act





Clean Water Act

- Earlier version – Rivers & Harbors Act of 1899
- Clean Water Act first passed in 1972; last major amendments in 1977
 - Extremely ambitious
- Covers direct discharges, indirect discharges, storm water, large sewer systems. Does not regulate non-point sources.
- Also protects wetlands



- Katy Prairie
- 1,000 sq miles
- Major migratory bird flyway
- “Prairie Potholes”



Federal Clean Water Act - implementation

- State delegation for implementation and enforcement, with EPA oversight
- Citizen suits (section 505)
- Nonpoint source pollution planning requirements

Federal Clean Water Act - results



- Much cleaner waterways in the United States
 - Discharge of organic wastes from POTWs reduced by almost half
 - Industry discharges of organic wastes down 98 percent
 - Rate of wetlands loss declined by 90 percent since 1970s
- But many water quality issues remain



Oil Pollution Act

- Response to Exxon Valdez spill in 1989
- Establishes few operational requirements, primarily for shipping and Alaskan pipeline
- Key impact: damages and penalties for spills
 - Removal costs
 - Damages
 - Tort recoveries
 - Civil and criminal penalties
- Liability caps



Resource Conservation & Recovery Act

- National law for hazardous waste management
- Complex definition of "solid waste" and "hazardous waste"
- Strong regulation of facilities that treat, store or dispose of hazardous waste
 - More lenient with generators and transporters
 - Key requirements – corrective action, land ban, financial assurance
- Key factor for RCRA and oil and gas: exempts exploration and production wastes from definition of "hazardous waste"



Comprehensive Environmental Response, Compensation & Liability Act (CERCLA)

- Also known as "Superfund" – designed to deal with abandoned hazardous dump sites, but has evolved into broader program
- Relies on liability to change behavior
- Primary engine: if a release of a hazardous substance has caused someone to incur response costs at a facility, that person can recover their costs from:
 - The owner or operator
 - A past owner or operator
 - A person who arranged for treatment or disposal of the hazardous substance

CERCLA



- EPA can undertake cleanup, or force responsible parties to conduct response actions
- For oil and gas operations, CERCLA has a vital provision: the petroleum exclusion
 - Applies to petroleum and petroleum-based fuel products
 - But not to chemical products refined from petroleum (e.g., benzene)
- Solely federal program, but states have their own versions



Clean Air Act

- Extremely complex – actually several different acts under one label
- Ones that matter most to oil & gas exploration and production:
 - Ambient air quality standards (NAAQS)
 - Air toxics
 - Greenhouse gas regulations
 - Title V permits
- Key battles – aggregation of sources, designation of hazardous air pollutants (for example, hydrogen sulfide)



National Environmental Policy Act

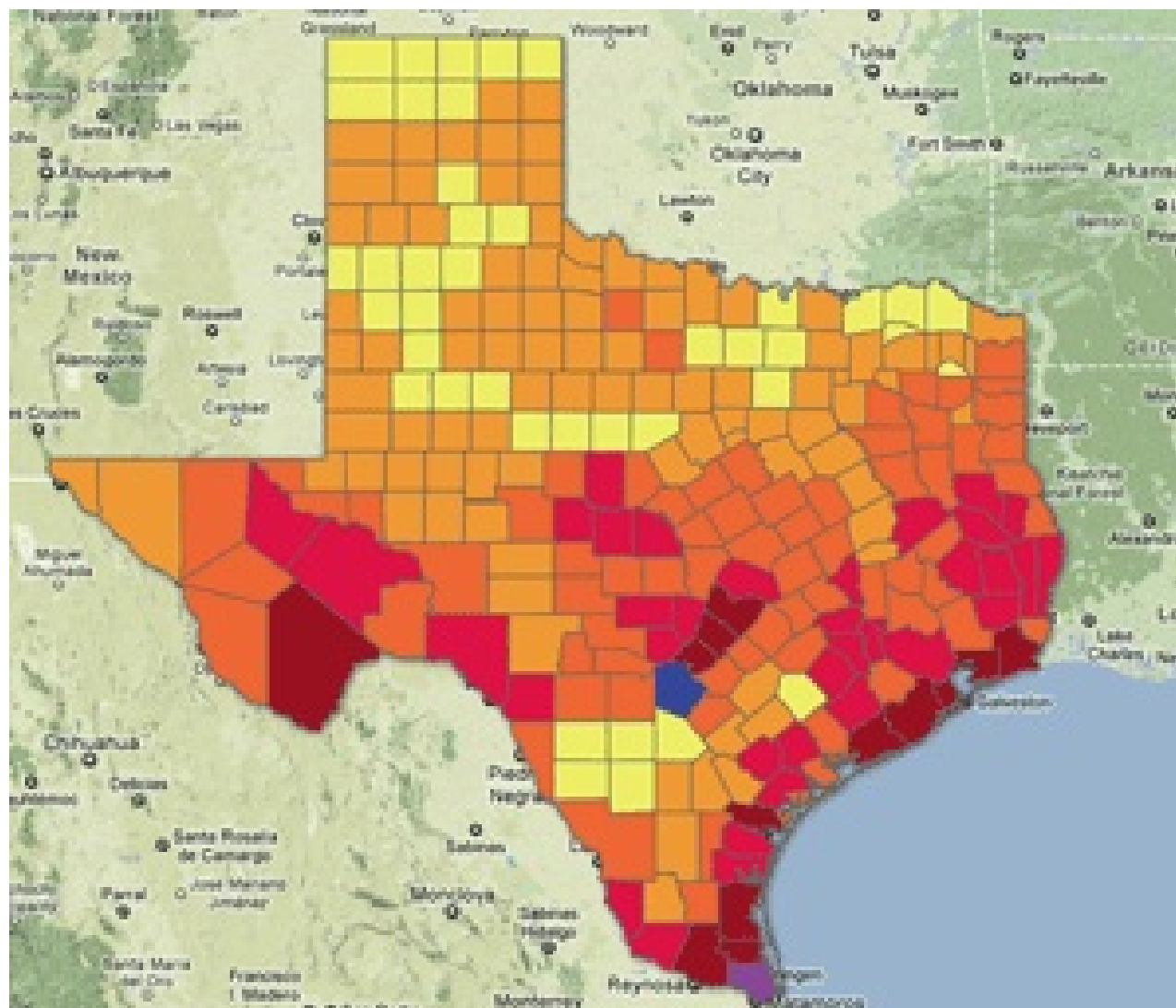
- One of the first modern federal environmental statutes
- No substantive requirement – simply requires a "close look"
- Process:
 - Major federal action significantly affecting quality of human environment
 - Environmental assessment
 - Categorical exclusions
 - Finding of No Significant Impact
 - Environmental Impact Statement
- Judicial review – remedy is to force agency to reconsider



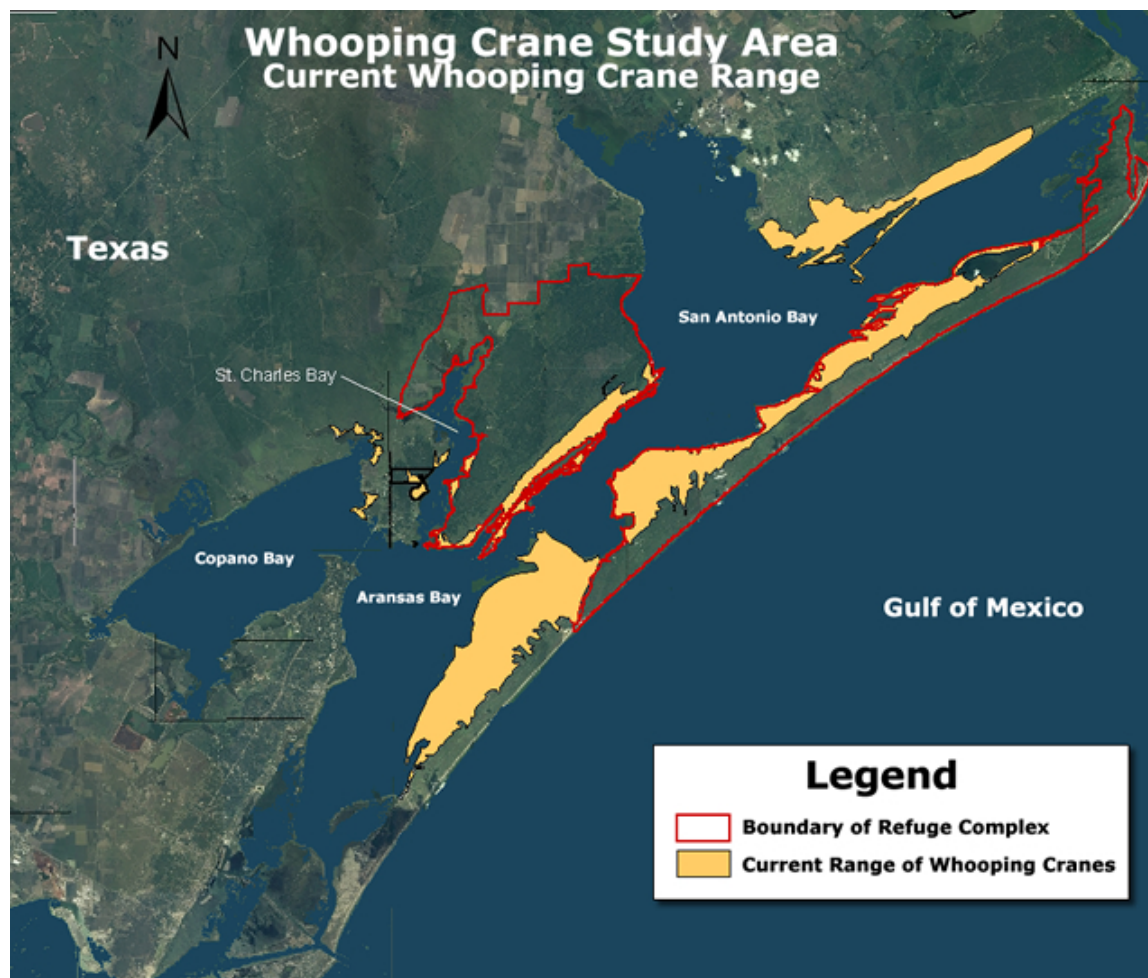
Endangered Species Act

- One of the most powerful federal environmental laws
- Process:
 - Section 4 – listing of endangered species
 - Section 7 – consultation and "no jeopardy" requirement for federal action
 - Section 9 – prohibition on "taking" of protected species
- Application to oil and gas exploration?











Environmental Enforcement -- Civil and Criminal

- Civil penalties –
 - Usually \$37,500 per day per violation
 - Liability frequently strict
 - Enforcement actions can rely on self-reporting required by federal law (monthly discharge reports, Title V permits)
 - Citizen suits – enormously important tool
- Criminal liability
 - All federal statutes include criminal liability provisions
 - Standard of mental intent can be lower
 - Strict criminal liability possible (MBTA)
 - Simple negligence can trigger criminal liability
 - "Knowing" defined broadly and not limited to specific intent



Environmental Enforcement - Emergency Response Authorities

- Numerous federal statutes allow the government to issue emergency administrative orders or seek injunctive relief
 - CERCLA 106
 - Treble damages + daily penalties
 - No judicial review
 - Can only refuse to obey if "sufficient cause"
 - RCRA 7003
 - Clean Water Act/Oil Pollution Act 311



Example: Fracking

- Sources of pollution: air, water, noise, solid waste
- Primary issue for public concern: water pollution and disposal
 - Return waters
 - Contamination of aquifers
- Unexpected risks – seismic disturbances
- High profile for federal civil and criminal environmental enforcement. But how?



Fracking Environmental Enforcement

- Federal statutory exemption specifically for fracking materials injected into the ground (but diesel not protected)
- Safe Drinking Water Act – potential contamination of drinking water sources
- Clean Water Act – discharge of produced water into publicly owned treatment works (or to nearby intakes)
- *Range Resources* enforcement action - dismissed