

Best Practice in Contract Drafting

By J. Lanier Yeates

INTRODUCTION

The purpose of this paper is to address a number of recommended practices for preparation of agreements typically utilized in the energy industry, with emphasis on structure, organization, standard and special provisions. This paper will provide a number of practical tips and suggestions, many of which have been suggested by authors identified as authorities in this paper.

I.

INITIAL OBSERVATIONS

A. General Principles. An essential part of the practice of law is document preparation.¹¹ Some would argue that writing and drafting are different. Here the argument is that briefs are written and documents are drafted. But contracts, legal theorists would maintain, should be differentiated from the written memorial of an agreement between the parties, the document that is intended to memorialize and include the understandings and undertakings of the parties that comprises the “contract” between the parties. These theorists and their followers are careful to speak of drafting documents rather than contracts. Since this paper is intended to provide suggestions for drafting documents that, despite distinctions in legal theory, in the energy industry, are commonly called contracts, the rigors of theoretical distinctions mentioned here will be left for others. This paper is concerned with drafting, whether the object is a document or contract. Other commentators assert that a point of beginning for significant numbers of lawyers who prepare any written material is a document with unknown or mixed pedigree, often called a form. Arguments against the use of forms sometimes include assertions that words that are old may not be precise just because of the fact that they have been utilized by lawyers in times past or found in a formulary prepared by authors who are no longer practicing or even living. Others would even state that writing is intertwined with notions of professionalism. The argument, here, is that the legal profession has generally acceptable levels of competence in matters such as writing. And the adherents of this argument would maintain that writing that does not meet the acceptable level of competence is unprofessional. Materials in the literature also address legal writing from the perspectives of quality and process. Many commentators stress clarity. Some commentators openly express disdain for the attributes of the dreaded term “legalese,” as they exhort writers of contracts to avoid usages that increase the difficulty in drafting, reading, and interpreting contracts to the level of an utter chore. Rather than attempt to identify in this paper the best practices in contract drafting, this paper will address recommended practices in drafting. Starting the process of writing with a form is one of them. Regardless of the starting point, two general rules are recommended: be consistent and utilize Standard English.

B. Where to Begin. Not unlike other industries or areas of business and commerce, many documents and agreements utilized in the oil and gas industry have become almost standard. Model forms of various agreements have been carefully prepared, adopted and promulgated by industry groups and associations. A variety of agreements are encountered in business or practice. These extend from the early forms of oil and gas leases to industry standard forms of drilling contracts, with model forms of both onshore and offshore operating agreements not to be overlooked, to any number of innominate documents. The reasons for the perpetuation of standard forms in the energy industry are many. Standard forms are often viewed by parties who are negotiating an agreement as representing a middle of the road approach at the beginning of negotiations, with a neutral bias. However, in the energy industry, standard forms also enjoy the reputation attendant to the process by which they are developed. Often, in the course of development of model forms in the energy industry, the product resulting from years of study and committee deliberations has come to be recognized for thoughtful consideration and analysis that generally is required to develop and adopt a

model form. It is widely recognized in the energy industry that the model form development process generally is one of participation and input by and from industry leaders and experienced members of the bar whose practice may be solely in the oil and gas field. Where industry standard model forms do not exist, however, the role of the form nevertheless occupies a paramount position in the drafting process that is followed by most lawyers in preparing documents. Several sources of forms are identified in the Authorities attached to this paper.

II.

PRECEDENT, FORMS. AND TEMPLATES

A. The Role of the Form. From inception of the request from a client for assistance for a document that will accomplish the client's goals and memorialize the agreements and undertakings of the parties, the drafter is faced with the question of how to proceed to convert the concepts and ideas presented by the client in preliminary discussions with the drafter (in the energy industry often called the terms of the "trade") into appropriate terms and provisions and prepare the documentation required in the particular transaction. Depending on the contemplated transaction, in the abstract, the drafter may be perfectly comfortable and have time to start drafting from scratch. However, in practice, the demands of time and the desire for efficiency will dictate that the drafter seek precedent or begin with an example of the particular document that has been prepared in the past by the drafter or a colleague or adopted by his or her practice group as an approved form. Usually, the best guidance for drafting is to utilize precedent.

D. Sources of Forms. A number of sources of precedent may be available to the drafter. Precedent may be an example of a document that was prepared by someone else, a colleague, an experienced practitioner, or someone in the organization who has worked on a similar transaction and has an exemplar commonly known as a form. Commercially published forms provide general guides to drafting, as well as other useful information or special provisions that are specific to the subject matter, type of agreement, and jurisdiction. Court- prepared forms that are standardized forms provided by the courts for frequently utilized pleadings or other procedural matters may be available locally. The firm or organization of the drafter may have an in-house form bank in which documents that are routinely prepared by lawyers or members of the organization have been archived as precedent. Colleagues may have suggestions about where to find forms or may have precedent from recent transactions to offer. The matter file may have precedent filed in it that could be useful precedent. Finally, based upon the premise that often one's own experience is the best experience, that the drafter should maintain a form file with electronic or paper versions that are stored in a manner that will enable the drafter to readily access the precedent in the future.

E. Considerations in Developing a Form of Agreement. With respect to commercial transactions, in instances in which neither a model form of agreement nor any commercially-prepared agreement is available for the document that the drafter is asked to prepare, moving from the starting point for drafting to the final document may be facilitated if a template of an agreement is available to the drafter. This shell structure may be readily adapted by the drafter for a particular transaction and may be viewed as beginning with a preamble or introductory paragraph and ending with a concluding paragraph, clause or provision. The body of the document may be pre-arranged with definition sections, terms of the agreement sections, and miscellaneous sections prepared with the format and structure established and only the specific terms of the agreement between the parties to be provided. A suggested template that may be adapted for any agreement is attached as Attachment I. A separate set of miscellaneous provisions with multiple options that may be appropriate depending on the type of document is another recommended form to maintain. From the set of miscellaneous provisions, one may copy particular provisions that are important for a particular transaction. Some practitioners maintain separate form documents from which they may select from appropriate precedent particular types of provisions, such as representations and warranties.

III.

ELEMENTS OF DRAFTING

A. The Beginning. Place the title of the contract at the top center of the first page and on a cover page if one is utilized. On the first page, the title should simply state, without any definite or indefinite article, the kind of agreement involved. Be concise in stating the title. Party names should not be in the title; however, party names and the date of the agreement are frequently placed along with the title of the agreement on any cover page that may accompany the agreement.

B. The Preamble or Introductory Clause. An introductory clause or preamble ordinarily follows the title to the agreement. From the example in Attachment I, it may be seen that the introductory clause states the name of the agreement, the date, the parties, their addresses and often includes defined terms. Often utilized throughout agreements as a capitalized term but one of the most frequently omitted definitions in agreements is the defined term this “Agreement.” From Attachment I, a convenient place to establish the definition of this “Agreement” is in the preamble. If the introductory clause or preamble is to be a sentence, the introductory clause or preamble will need a verb. Among the various means of establishing the date of the agreement, the word “dated” is simpler and clearer than “made” or is “entered into.” The date in the preamble will be the date of the contact unless the agreement states that it is effective as of a different date. The date stated in the preamble, whether the effective date or the date stated in the preamble, should be consistent with any reference to the date on which the agreement is executed or effective. If the agreement will be signed in counterparts, it may be useful to have the parties date their signatures but, if such convention is utilized, the agreement must clearly establish when the agreement becomes effective. Drafters of agreements in which the execution will be made by different parties over several days sometimes provide in the agreement that the agreement will become effective on the date the last party signs the document. Consideration should be given, in such case, to whether the agreement should state that each party is bound upon affixing its signature regardless of what date the last signature is affixed or whether all parties sign. If a date other than the date on which the parties sign is to be the effective date of the agreement, consideration should be given to provisions in the agreement that refer to the date of the agreement, such as representations that are expressed in terms of the date of the agreement or obligations that arise on, or to be performed on, the date of the agreement. Although, with respect to stating the parties to the agreement, commentators will take both sides in the debate on whether to utilize the preposition “between” in the introductory clause rather than “among,” whether “between” or “among” is utilized, has no effect on meaning. Although it is frequently asserted that one speaks of an agreement “between” two parties, the correct preposition to utilize in an agreement involving more than two parties is “among,” according to commentary citing *The Oxford New English Dictionary* and according to the *American College Dictionary* (with respect to related objects), the utilization of “between” with more ~~thfln~~ two parties is not only acceptable but is, in fact, preferable. Regardless of the preposition of choice, and it is a matter of style rather than substance, the parties to the agreement should be identified in the preamble or introductory clause. If a natural person is an appearer, identify the person by his or her full name. The law of certain states with respect to certain types of documents will require an identification of marital status of individuals and, in certain instances, taxpayer identification or employer identification by means of partial numbers, such as the last four digits, will be required of both natural and juridical persons in the instrument. If a juridical entity is an appearer, identify the entity by its correct legal name and state its jurisdiction of organization.

C. Recitals. Following the preamble and before the body of the agreement, a group of clauses known as “recitals” may appear that serve to state background information regarded as relevant by the parties and introduce the body of the agreement. Certain commentators suggest that the structure of recitals in the agreement should be that of conventional paragraphs with complete sentences rather than clauses ending in semicolons. The view of these commentators is that recitals with the heading of WITNESSETH are archaic and premised on the mistaken assumption that the word WITNESSETH is a command in the imperative mood, a remnant from an archaic formulary, such as “This document witnesseth that.

...” Likewise, the argument goes that recitals should not begin with WHEREAS since merely seeing the word suggests an archaic form. The same reasoning is urged with respect to utilizing NOW, THEREFORE at the conclusion of the recitals. The lead-in to the body of the agreement that some commentators suggest is: “The parties agree as follows.” However, the lead-in that typically follows recitals, the NOW, THEREFORE clause, contains a recital of consideration to the covenants and agreements made in the contract. Arguments may exist in certain jurisdictions and with respect to certain types of agreements regarding whether a recitation of consideration in agreements is effectual. My suggestion is to err on the side of substance rather than form. Regardless of whether recitals, such as in the structure as shown in Attachment I, are viewed in some circles as archaic, before abandoning the traditional recital structure, one should determine whether any concern for appearance outweighs any question of enforceability of the agreement. This question must be determined with respect to the type of agreement and the jurisdiction.

D. Definitions in the Preamble and Thereafter. As may be seen in Article I, Sections 1.01 and 1.02 of the template attached as Attachment I, any defined terms in the preamble may be referred to in a section of the agreement that contains all defined terms or refers to their location within the body of the agreement. To provide ease of locating a defined term within the text of a provision, the defined term should be placed in parentheses, and excluding “the,” if it is utilized, should be in quotation marks and underlined or placed in italics for emphasis. All-capitals in party names or other defined terms may make the agreement difficult to read. To further provide convenience in locating defined terms, with certain complex agreements, a schedule or index of defined terms that identifies their location by page and section of the agreement may be appropriate to attach at the end of the document, or if it has a cover page and a table of contents, immediately after the table of contents.

E. The Body of the Agreement. The body of the agreement contains the covenants and agreements of the parties. It also may contain representations and warranties and other provisions that impose or establish obligations for which the parties become responsible upon the occurrence of certain events, such as default, assumption, and indemnity provisions. Often, the body of the agreement is characterized as the operative part of the agreement; however, in terms of both contract construction (determining legal effect) and contract interpretation (determining meaning of words), with the entire agreement being part of any review, all parts of the agreement are important regardless of their placement within the structure of the agreement. The text of the body of the agreement should be formatted and arranged not only to enable the drafter to easily determine whether all provisions that are necessary and desirable have been included; moreover, the agreement should be structured for ease of reading it and to facilitate its navigation subsequent to execution when it is utilized as an aid to implementing its terms and provisions by the parties. Generally, the body of the agreement will follow the structure of the agreement as a whole in that, by custom and logic, it is generally organized in articles and sections. Terms of the trade or deal terms will determine both the types of provisions and their content in any agreement. Roman numerals for articles and Arabic numerals are commonly found in agreements, with the modern trend moving toward Arabic numerals in both articles and sections. Each article should be given a straightforward, all-encompassing heading. Since most drafters have access to text editors with automatic numbering features, formatting of each section and enumerated clause can be automatic. Another benefit of developing an agreement template, such as the example in Attachment 1, is that all of the formatting, style and other codes of the text editor can be established once and repeatedly utilized with each application of the precedent. For section numbers, the “first-line indent” method is recommended to avoid wasted space that can occur with the “hanging indent” layout. By giving each section a heading comprising an underlined word or a brief phrase, the headings of the agreement may serve as another aid to navigation through the different provisions of the agreement. Article names and section names can be utilized to create a table of contents of the agreement for ease of review. A feature of most text editors, with appropriate codes inserted to accompany the article and section names, allows the user to automatically generate a table of contents. If a sentence in a section contains enumerated clauses, parts of the sentence that are designated by a number or letter in parentheses, one issue that confronts

drafters is whether to utilize a colon to introduce them. Commentators will advise that a colon should be utilized when any set of enumerated clauses includes more than three lines on the page. This convention allows a reader to pause before attempting to read the next portion of text, the enumerated clause. Commentators will suggest that colons should be utilized only when the introductory statement preceding the colon is an independent clause. Any statement that precedes a colon and is not an independent clause may be rephrased and converted into an independent clause by adding words “the following” or “as follows.” For example, a colon should not be placed between a verb or proposition and its objects (as in Prior to the Effective Date, the Seller: (1) has not alienated, encumbered, or . . .). To conform to the suggestions of commentators on the utilization of colons to introduce enumerated clauses, the example may be converted to an independent clause (Prior to the Effective Date, the Seller had not done any of the following: (1) alienated, encumbered . . .). If a sentence contains items in a series that are long and complex or involve internal punctuation, for clarity, the items should be separated by semicolons; or if the items in a series are not long and complex and do not contain internal punctuation, separate them with commas. With either form of punctuation as a separator of items, the final enumerated clause should be preceded by “and” or “or” and with more than two items in any series, a semicolon or comma should be placed before the “and” and the “or” that connects the last item in the series. Utilize semicolons to separate enumerated clauses that are sufficiently lengthy or complex to warrant being separated by a colon. Conversely, if enumerated clauses are not preceded by a colon, utilize commas, not semicolons to separate them. However, perhaps more straightforward suggestions for consistency are to utilize a colon to precede all enumerated clauses, following the independent clause rule suggested above, and separate all enumerated clauses with semicolons and, when a series consists of more than two items, place a semicolon before the “and” and the “or” that connects the last item in the series. Some commentators suggest a hierarchy in enumerated clauses as follows: utilize the (1) series, followed by the (A) series for sub-clauses and the (i) series (sometimes called “romanette”) for sub-sub clauses. However, as a matter of preference, many drafters select their own hierarchy in enumerated clauses. As a matter of style, consistency in usage should be the guiding principle. Finally, with respect to the body of an agreement, the text may be arranged by means of utilizing the process of creating section and, if suitable, articles. This process is called “division” by commentators. The types of sections to be included in a contract are often determined by the type of contract. Whether sections should be grouped into articles depends on the length of the agreement. The text may be arranged by the process of “classification,” which commentators give as a name for the process of determining the section into which any particular provision should be included. Classification is a means of determining whether a particular provision of an agreement is in its proper place. The third means of arranging text of an agreement is by “sequence,” which is the manner of ordering of sections, and, if relevant, the manner of ordering of articles. Commentators suggest the following to arrange the text of an agreement by sequence: (i) general provisions take precedence in position over special provisions; (ii) the more important provisions should come before provisions of lesser importance; (iii) the more frequently utilized provisions should take precedence in position over the less frequently utilized provisions; (iv) permanent provisions should come before temporary provisions; and (v) miscellaneous provisions should be placed at the end of the body of the agreement. However useful such analysis may be to commentators, drafters should strike a balance between custom and logic when determining the sequence of arranging text within the body of the agreement.

F. The Remainder of the Agreement. Following the body of the agreement, in the traditional structure of an agreement are found the concluding clause or paragraph, places for the signatures of the parties, sometimes called the signature blocks, and acknowledgments, if any. As further discussed in Article V.C. of this paper, attachments to the agreement are generally attached following the signature blocks and any acknowledgments that may be included with the signatures affixed to the agreement. Attachments include exhibits and schedules and anything annexed to the agreement, such as an appendix, a schedule, or plat or other document intended to accompany the agreement and identified therein as being attached and called an “attachment.” Exhibits are generally numbered or lettered consecutively in the order in which they are first mentioned in the body of the agreement and marked with their designated number or letter at the top center or top right-hand

corner of their first page. With exhibits of more than one page, it is useful to add page numbers and paginate with both the letter or number of the exhibit followed by a hyphen and a page number for each page. With lengthy exhibits, some practitioners will paginate exhibits to indicate that each page is page one of the total number of pages, and repeat the numbering with increments until the final page is indicated as page “n” of “n” pages. Schedules may be numbered or lettered. If several schedules are attached, it is helpful to give each schedule the number of the section to which it relates. If the concluding paragraph of the agreement ends with insufficient blank space to add the signature blocks, or if the signature blocks are intentionally placed on separate pages for ease of counterpart execution by separate parties, it may be useful to add a notation at the end of the agreement: *[Signature Page Follows]* and add to each signature page a notation that states the name of the agreement, the date, and the parties, such as: *[Signature page to Development Agreement dated June 21, 2006, between First Energy and New Energy]*. Bottom of the page notations are useful when, the concluding paragraph and the signature blocks appear on more than one page.

IV.

DRAFTING TIPS

A. General Principles. In the foregoing sections, emphasis is placed on what is included in a document, how the document is organized, and the process of creating an agreement that is based upon the terms of the trade or the deal terms. Concurrently with the appropriate emphasis being placed on what should be said in a document, an all important and overarching integral part of drafting documents is how the document is written. “To learn to think more clearly, to speak and to write more efficiently, and to listen and to read with greater understanding — these are the goals of the study of language.”⁴¹ These are the goals of the study of recommended practices for contract drafting.

B. Specific Suggestions. Many of the words and expressions utilized by drafters and other usages may not contribute to goal of writing with clarity. Several are identified for your consideration:⁴²

1. “as such” — a connector that may be useful in persuasive and argumentative writing but, as a connector, should be avoided in drafting agreements
2. Pronouns — pronouns should not be utilized in an agreement in instances where a proper name, defined term or other antecedent may be substituted. Although intended antecedents may be clear to the drafter, if disputes over interpretation lead to litigation, others may urge an alternative interpretation. This suggestion is based on avoiding ambiguity, enhancing clarity, and eliminating the pitfalls of a confused antecedent or ambiguous reference.
3. “aforesaid,” hereinafter, hereby, hereof, and “herein” — Assuming that these words in context have meaning, because of the inherent problem with confusion over the intended reference, these words should be avoided. Utilization of the word “aforesaid” may be intended by the drafter to refer to a prior provision or section in the same document. The better approach is to make specific reference to the provision or section that is the intended reference or antecedent. Utilization of the word “hereinafter presents the same problems as utilization of the word “aforesaid.” Utilization of the word “hereby,” which may be intended to mean “by means of this agreement” or may signify an immediacy of taking effect as a result of the subject agreement, often is unnecessary and may be confusing. Again, with “hereby,” a question of reference is interjected into the document, that is, whether the intended reference is the entire agreement or a particular

provision. The meaning of the drafter is more clearly expressed by utilizing “the parties intend” rather than “the parties hereby intend. A miscellaneous provision that addresses the meaning of “herein,” “hereof,” “hereby,” “hereunder” and words of similar import is provided in this paper in Section V. A.

4. “forthwith” — Contrary to popular notions of the meaning of “forthwith” as “simultaneously” or “instantaneously”, case law suggests that the meaning is “diligently,” “without unreasonable delay,” “with all reasonable dispatch,” or, interestingly, “with all reasonable dispatch consistent with the circumstances.” Although there may be times when the drafter would prefer to employ the term and gain flexibility based upon its interpretation by the courts, in other instances, the drafter may desire to be specific and avoid utilizing a term that is indefinite and has been the subject of interpretation by the courts that may not be consistent with the objectives of the drafter.
5. “terms and conditions” — If the drafter intends to exclude provisions that may not be characterized as being “terms and conditions,” then reference to the “terms and conditions” of an agreement may not produce unintentional results. However, the question may be asked whether a “proviso” is a condition or is it another feature of an agreement. The drafter may desire to avoid any issue concerning whether a specific provision in an agreement is something other than a term or condition by utilizing the word “provision,” which encompasses all of the terms, conditions, and other provisions with legal significance in the agreement.
6. “said” — If for no other reason than for similarity to spoken English, the drafter may desire to substitute the word “such” for the word “said.” However, for clarity of reference, utilization of the word “said” should be avoided. Utilization of “said” by the drafter may or may not be intended to limit reference to a specific term, as it was utilized in an agreement, or limit reference to a specific document that was previously described in the document.
7. “any,” “all,” and “every” — Reported decisions indicate, contrary to what may seem reasonable, that, in a number of contexts, “any” generally means “all” or “every.” Authority exists in at least one decision, that the word “any” may be utilized to indicate “all” or “every” as well as “some” or even “one.” The drafter should carefully consider the context when utilizing the word “any.”
8. “shall” or “must” — Commentators suggest that utilization of the word “shall” should be avoided unless it is associated with the word “obligation,” as in “the Buyer shall be obligated.” If the intention is to be mandatory, the word “must” is recommended. If the intention is to be discretionary, the word “may” is recommended. Further, when the word “shall” is utilized, it is unclear whether the intention is to create a duty of future performance or to describe a current status.
9. “in order to” — Generally, the drafter should refrain from utilizing the words “in order to” and, instead, utilize the word “to.” Sentence construction utilizing “in order to” or “to” may produce a non sequitur — grammatically, a dangling modifier. Although it may be tempting

when describing legal requirements to begin a sentence with the words “in order to” or “to,” the drafter should check for continuity and consider alternatives rather than lead to a non sequitur. Sometimes, the drafter can write with clarity and avoid utilizing any “in order to” or “to” in the construction of a sentence. Generally, the drafter can recast a sentence to avoid the pitfall of a dangling modifier.⁴¹³

C. Sentences. Generally, longer sentences are more difficult to read and understand than shorter ones. If the meaning of a sentence is not clear when first read, the words may not be in sentence form, but may be a sentence fragment that begins with a capital letter and ends with a period. Such a putative sentence should be divided into fragments and each of the fragments should be revised to express a complete thought and consist of a subject and a predicate. The drafter will be better able to achieve clear meaning by constructing a sentence that does not express more than one idea. The drafter should avoid separating the noun from the verb or the verb from its object by means of unnecessarily inserting clauses or phrases. Likewise, rather than utilize abstract nouns at the expense of verbs, called by some commentators “burying the verbs,” the drafter should utilize action verbs rather than “weaker” verbs, including “is” and “has.” An example of a buried verb may be seen in the following: subsequent to the issuance of the bonds An active alternative is: after Ajax issues the bonds

D. Unnecessary Legalese and Terms of Art. Drafters should refrain from utilizing words and phrases that are at variance with Standard English. Drafters should avoid utilizing pompous phrases, overly formal words, and the sort of circumlocutions that have characterized, in the minds of many, legal writing generally.

E. Doctrine of the Last Antecedent. One of the basic rules of grammatical construction is the doctrine of last antecedent.⁴¹⁴ Under that doctrine, relative and qualifying phrases are to be applied to words or phrases immediately preceding them, unless to do so would impair the meaning of the sentence in which they appear. The rule has not been inflexibly applied by the courts nor has it been controlling in interpreting instruments, since the courts will apply the rule with due regard to the whole instrument. It is important to note that the relative or qualifying phrases may be extended, when the rule is applied, further than the nearest antecedent when the context clearly requires. Since courts may apply the doctrine of the last construction in their interpretation to avoid ascribing a vain and useless purpose to the words of an instrument, drafters should be aware of the importance of placement of dependent, non-restrictive adjective clauses in their agreements and provide the courts who may interpret the words of the agreement with ample opportunity to give effect to every word in the agreement in its plain grammatical manner.

F. Conjunctive and Disjunctive Connectors. In the energy industry, and not expectedly in others, documents are replete with connectors that are expressed in the form of two conjunctions, one is “and,” the other is “or,” separated only by a symbol, the slash, thus becoming the symbol or term, “and/or.” When drafting agreements, the drafter may tend to rely on the context to clarify the meaning of conjunctive and disjunctive connectors.⁴¹² Reported decisions by the courts suggest that the courts also may have been overly dependent on context for purposes of clarifying the meanings of conjunctive and disjunctive constructions. A recommended practice for contract drafting is that the drafter should understand what is intended when employing a connector:

1. “or” — as a disjunctive connector — is the “or” intended to be inclusive or exclusive? Generally, the word “or” is utilized to express an alternative or to provide a choice among two or more things; if it is utilized to clarify,

indefinite.”⁴¹⁸ The drafter would be well-advised to exercise care before selecting the “and/or” connector.

then its meaning may be “in other words,” “to-wit,” or “that is to say”; and in certain usages, the word “or” creates a multiple rather than an alternative obligation; courts have stated that where necessary in interpreting an instrument, “or” may be construed to mean “and.”⁶

2. “and” — a conjunction that is utilized to conjoin words, clauses, or sentences that has been defined to mean “along with,” “also,” “and also,” “as well as,” “besides,” and “together with.” The word is utilized to connect words or phrases expressing the idea that the latter is to be taken along with the first.^{4,7}

V.

SUGGESTED PROVISIONS

A. References and Titles. As an aide to construction of an agreement a recommended provision is a references and titles provision containing, for example, the following typical language: “The exhibits and schedules to this Agreement are an integral part of this Agreement, and any reference to this Agreement includes such exhibits and schedules. Unless otherwise expressly provided, all references in this Agreement to exhibits, schedules, articles, sections, subsections and other subdivisions refer to the exhibits, schedules, articles, sections, subsections and other subdivisions of this Agreement. Section and subdivision headings are for convenience only, do not constitute any part of such sections or subdivisions and shall be disregarded in construing the language contained in such sections or subdivisions. The words “this Agreement,” “this instrument,” “herein,” “hereof,” “hereby,” “hereunder” and words of similar import refer to this Agreement as a whole and not to any particular sections or subdivisions unless expressly so limited. The phrases “this section” and “this subsection” and similar phrases refer only to the sections or subsections hereof in which such phrases occur. The word “or” is not exclusive, and the word “including” (in its various forms) means “including, without limitation.” Pronouns in masculine, feminine and neuter genders shall be construed to include any other gender, and words in the singular form shall be construed to include the plural and vice versa, unless the context otherwise requires.”

B. Limitation on Damages: Survival. Provisions in an agreement that are intended to survive for a specified beyond “Closing” beyond termination of contractual relations of the parties are often identified in a survival provision. If the parties agree to limit damages and omit to include the limitation of damages provision in the enumeration of provisions that are intended to survive, problems can arise. A recommended practice is to include within the limitation of damages provision a separate statement concerning its survival. An example is: “Notwithstanding any other provision of this Agreement (or any other agreement related hereto) to the contrary, in no event shall either Party be liable to the other or entitled to recover incidental, consequential, special, indirect, multiple, statutory, exemplary or punitive damages. All exclusions or limitations of damages contained in this Agreement, including, without limitation, the provisions of this Section _____, shall survive its expiration or termination.” With a provision similar to the foregoing, if a separate survival clause is included in the agreement that identifies specific provisions that are intended to survive, it should be written to not only specify those provisions but the intent should be evidenced that the survival clause is not intended to be an exclusive enumeration by including language such as: “in addition to the specific provisions that survive pursuant to their own terms,” as a means of creating confusion over exactly which provisions are intended to survive.^{5,1}

C. Detailed Matters. Detailed matters, such as the types of insurance and amounts of coverage may be presented in tabular form by way of an exhibit, such as the sample insurance exhibit attached as Attachment II. Many agreements utilized in the oil and gas industry have lease descriptions attached as exhibits. The development of an exhibit containing lease descriptions may be

facilitated by development of a template such as the form attached as Attachment III.

VI.

DRAFTING AGREEMENTS WITH FORCE MAJEURE PROVISIONS

A. Force Maieure Provisions. Any number of innominate agreements included within the plethora of industry contracts may include force majeure provisions. As one may expect, force majeure provisions themselves vary not just from one type of agreement to another type of agreement, but widely differ within categories of agreements. The provision containing force majeure elements has been said to be “utterly dependent upon the terms of the contract in which it appears.”⁶¹ It may be important to gain an understanding of the intended operation of force majeure provisions, not from the standpoint that force majeure provisions are interchangeable but from an appreciation of the terms of the contract in which the force majeure provision is to be included and its intended effects in such context.

1. Unless Form of Lease. For example, to overcome what had been seen in the early days of oil and gas leasing activities of the seeming inequity of having an oil and gas lease terminate by operation of a special limitation under the “unless” type of lease when the failure to first obtain and then continue production could be caused by factors beyond the control of the lessee led to the inclusion of a form of force majeure provision in modern oil and gas leases.⁶² A typical force majeure provision, somewhat related to forfeiture and judicial ascertainment clauses⁶³ but excusing performance under specified circumstances by the lessee of its obligations and covenants, whether express or implied, under the lease, and found in such “unless” leases is:

All of lessee's obligations and covenants hereunder, whether express or implied, shall be suspended at the time or from time to time as compliance with any thereof is prevented or hindered by or is in conflict with Federal, State, or municipal laws, rules, regulations or Executive Orders asserted as official by or under public authority claiming jurisdiction, or Act of God, adverse field, market conditions, inability to obtain materials in the open market or transportation thereof, war, strikes, lockouts, riots, or other conditions or circumstances not wholly controlled by lessee, and this lease shall not be terminated in whole or in part, nor lessee held liable in damages for failure to comply with any such obligations or covenants if compliance therewith is prevented or hindered by or is in conflict with any of the foregoing eventualities. The time during which lessee shall be prevented from conducting drilling or rework operations during the primary term of this lease, under the contingencies above stated, shall be added to the primary term of the lease; provided, however, that delay rentals as herein provided shall not be suspended by reason of the suspension of operations and if this lease is extended beyond the primary term above stated by reason of such suspension, lessee shall pay an annual delay rental on the anniversary dates thereof in the manner and in the amount above provided. Lessor agrees that lessee or its assigns may include said land or any part thereof in any unit plan of development or operations which is approved by the Secretary of the Interior or to which lessee may voluntarily subscribe, and lessor agrees

to execute any such unit plan in order to make it effective as to the interests covered by lease. In such event, royalty will be paid to lessor at the rate set forth above, as to the land covered hereby and included in such unit, based upon the production allocated pursuant to the unit plan to said land; and the drilling or completion or continued operation of a well on any portion of the area included within such a plan shall be construed and considered as the drilling or completion or continued operation of well under the terms of this lease as to all of the land covered by the lease.⁶¹⁴

2. Or Form of Lease. Another typical form of force majeure provision found in “or” forms of modern oil and gas leases follows:

The obligations of the Lessee hereunder shall be suspended while the Lessee is prevented from complying therewith, in whole or in part, by strikes, lockouts, actions of the elements, accidents, rules and regulations of any Federal, State, Municipal or other governmental agency, or other matters or conditions beyond the control of the Lessee, whether similar to the matters or conditions herein specifically enumerated or not.⁶¹⁵

Note that the foregoing provision is intended to “suspend” performance under specified circumstances by the lessee of its obligations under the lease and, unlike the provision set forth above for the “unless” form of lease, does not specifically address covenants and does not specify whether the obligations that the parties to the lease agree may be suspended include only express obligations or if implied obligations under the lease are intended to be covered by the provision. Due to the nature of the agreement, both of the force majeure provisions typically found in the types of lease forms identified above only relieve one party of its obligations, however identified, under the agreement.

3. Drilling Contract. The following force majeure provision is taken from an industry standard, model form drilling contract⁶¹⁶

Except as provided in this [paragraph number omitted] and without prejudice to the risk of loss, release and indemnity obligations under this Contract, each party to this Contract shall be excused from complying with the terms of this Contract, except for the payment of monies when due, if and for so long as such compliance is hindered or prevented by a Force Majeure Event.

As used in this Contract, “Force Majeure Event” includes: acts of God, action of the elements, wars (declared or undeclared), insurrection, revolution, rebellions or civil strife, piracy, civil war or hostile action, terrorist acts, riots, strikes, differences with workmen, acts of public enemies, federal or state laws, rules, regulations, dispositions or orders of any governmental authorities having jurisdiction in the premises or of any other group, organization or informal association (whether or not formally recognized as a government), inability to procure

material, equipment, fuel or necessary labor in the open market, acute and unusual labor or material, equipment or fuel shortages, or any other causes (except financial) beyond the control of either party.

Neither Operator nor Contractor shall be required against its will to adjust any labor or similar disputes except in accordance with applicable law. In the event that either party hereto is rendered unable, wholly or in part, by any of these causes to carry out its obligation under this Contract, it is agreed that such party shall give notice and details of Force Majeure in writing to the other party, as promptly as possible after its occurrence. In such cases, the obligations of the party giving the notice shall be suspended during the continuance of any inability so caused except that Operator shall be obligated to pay to Contractor the Force Majeure Rate provided for in [numbered paragraph omitted] above.

The foregoing force majeure provision is intended to establish the means to provide a temporary excuse to any party to the drilling contract if and for so long as such compliance with the contract is hindered or prevented by a force majeure event; however, the provision states that such excuse shall be "without prejudice to the risk of loss, release and indemnity obligations" included in other provisions of the drilling contract.

4. Exploration Agreement. In the following force majeure provision found in an exploration agreement, upon written notice to the other parties, any obligations of any party to the agreement, excluding obligations to pay money, may be suspended during the period of the "force majeure," as defined in part (b) of the provision "as far as [the obligations of the party giving the notice] are *affected* by the force majeure" (emphasis added):

If any Party is rendered unable, wholly or in part, by force majeure to carry out its obligations under this Agreement, other than an obligation to make payments of money, such Party shall give to all other Parties prompt written notice of the force majeure with reasonably full particulars concerning it; thereupon, the obligations of the Party giving the notice, so far as they are affected by the force majeure, shall be suspended during, but no longer than, the continuance of the force majeure. The affected Party shall use all reasonable diligence to remove the force majeure conditions as quickly as practicable.

(a) The requirement that any force majeure shall be remedied with all reasonable dispatch shall not require the settlement of strikes, lockouts or other labor difficulties by the Party involved, contrary to its wishes; how any such difficulties shall be handled shall be entirely within the discretion of the Party concerned.

(b) The term "force majeure", as here employed, shall mean an act of God, natural disaster, strike, lockout or other labor disputes, act of the public enemy, including, without limitation, any act of terror by any Person or group, war, blockade, public riot, lightning, fire, storm,

flood, explosion, governmental action, governmental delay, restraint or inaction, unavailability of equipment and any other cause, whether of the kind specifically enumerated above or otherwise, which is not reasonably within the control of the Party claiming any such suspension of its performance or obligations under this Agreement.

In paragraph (a) of the foregoing provision, eliminated from the requirement that any event or cause constituting force majeure should be remedied “with all reasonable dispatch,” are any obligations on the part of the party claiming the benefits of the force majeure provision to settle the types of labor disputes or “difficulties” contrary to its wishes. Other agreements, such as master service agreements, that address the obligations of a party claiming force majeure approach the responsibility of that party from another perspective.

5. Master Service Agreement. The following force majeure provision is found in a fully integrated form of master service agreement:^{6,7}

[a] Either Party will be excused from complying with the terms and conditions of this Agreement and the applicable Order if, to the extent, and for as long as, such Party's compliance is delayed or prevented by a Force Majeure event. A Force Majeure event will not excuse making payments, performing indemnity obligations, or other duties not directly limited by the Force Majeure event.

[b] If a Party is rendered unable, wholly or in part, by a Force Majeure event to perform, that Party will give written notice detailing such Force Majeure event to the other Party as soon as possible, but no later than seventy-two hours after the commencement of such Force Majeure event. If a Force Majeure event continues without interruption for fourteen days (or such longer or shorter period of time as may be inserted in the following blank: _____ days), either Party may cancel the applicable Order by giving written cancellation notice to the other Party.

[c] “Force Majeure” includes acts of God, floods, blizzards, ice storms, and hurricanes; insurrection, revolution, piracy, and war; strikes, lockouts, and labor disputes (other than those strikes, lockouts and labor disputes of the Party claiming Force Majeure which are within such Party's reasonable control and may be resolved through reasonable efforts); federal or state laws; rules and regulations of any governmental or public authorities having or asserting jurisdiction over the premises of either or both Parties; inability to procure material, equipment, or necessary labor, despite reasonable efforts; or similar causes (except financial) beyond the control of the affected Party and which, through the exercise of diligent effort, such Party cannot overcome.

Notice that the foregoing definition of force majeure excludes labor disputes that are lockouts and

labor disputes of the party claiming force majeure and that are within such party's reasonable control and may be resolved through reasonable efforts.

B. Components of Force Majeure Provisions. While commentators would suggest that the object of force majeure provisions is to provide agreed upon excuses for nonperformance or delayed performance, it may be more accurate to consider the provisions as stipulations designed to permit the parties to suspend the performance of their respective obligations upon the occurrence of specified causes and events that the parties consider to be so uncontrollable that, when present, the parties are either prevented from performing or should not be required to perform their otherwise agreed upon obligations, whether in part or in full. The question of whether these stipulations will, in fact, provide such excuses, is one that will be answered by the courts. Guidance to the drafter has been judicially provided in a number of instances prior to recent events. However, not only will the drafter of force majeure provisions be well-advised to take into account prior judicial pronouncements, recent events unparalleled in this country's history will provide new drafting challenges to those who prepare agreements containing such stipulations that will require the drafter to anticipate causes and events perhaps never considered in the past. Even though the variations in force majeure provisions are limited only by the drafter's imagination, nevertheless a number of similar causes or events may be seen in the force majeure provisions set for the above, such as:

1. acts of God;
2. action of the elements, floods, blizzards, ice storms, and hurricanes;
3. insurrection, revolution, piracy, rebellions or civil strife, piracy, civil war or hostile action, terrorist acts, acts of public enemies, and wars (declared or undeclared);
4. riots, strikes, lockouts, differences with workmen, and labor disputes;
5. federal or state laws; dispositions or orders, rules and regulations of any governmental or public authorities having or asserting jurisdiction over the premises of either or both parties or of any other group, organization or informal association (whether or not formally recognized as a government);
6. inability to procure material, equipment, fuel or necessary labor in the open market, despite reasonable efforts; or
7. any other causes (except financial) beyond the control of the affected party and which, through the exercise of diligent effort, such party cannot overcome.

C. Common Concerns. Causes and events that could make performance impossible or impractical are chief among the components to be identified and included in a force majeure provision. By their choice of causes and events to include in a force majeure provision, the parties will determine whether the force majeure provision provides an excuse from the doctrine of strict performance or whether the provision will offer only a false promise. If the parties desire to displace applicable common law and statutes, when drafting the agreement, their intent should be clearly evidenced in the force majeure provision. After all other provisions of the agreement are drafted, when drafting the force majeure provision, it may be useful to consider it as the final piece of

the agreement. To that end, the drafter of the force majeure provision should consider the potential interplay of all other provisions in the agreement with the force majeure provision to avoid any unintended consequences of unwanted interaction, such as indemnity provisions, limitation of liability provisions, and survival provisions.

Although force majeure events may be readily identified and included in a carefully drafted force majeure provision, and their occurrence and, thus, the commencement of a force majeure event may be easily determined, questions concerning changed circumstances resulting from acts of God or acts of mankind that remain to be determined by the courts include:

1. what are the limits of force majeure, when does the excuse end?
2. will the courts allow a promisor to declare force majeure as an intended beneficiary or otherwise as a result of a contract to which it is not a party but in which a supplier, vendor, or other party in layers of underlying contracts declares force majeure and either ceases to supply or commences to ration services or goods that are necessary for the promisor to perform its obligations under independent contracts?
3. Is the answer different if the supplier is the sole source of supply of services or goods to the promisor?

The drafter of force majeure provisions should address the foregoing questions with contractual provisions that appropriately address the problem of changed circumstances in a manner that, upon the occurrence of a stated cause or event, the courts will find it to be positively unjust to hold the parties bound to their agreed upon performance.

VII.

CONCLUSION

Regardless of the type of agreement that is to be drafted, with a view toward writing with clarity, each drafter should revisit the acts of spotting, accepting, and resolving issues and expressing the terms of the trade or the deal terms while at the same time placing an appropriate emphasis on what should be said in a document. The drafter should recognize that an all important and overarching integral part of drafting documents is how the documents are written. By developing a consistent approach to drafting provisions that are produced for the unique needs of the parties to a specific contract, the drafter may clearly specify the intentions of the parties to the particular contract with the objective producing the desired legal effects while minimizing both the potential for judicial intervention and unanticipated and unwanted legal consequences.

AUTHORITIES

¹⁻¹ The principal sources for material in this paper are the sources listed below to whom all attribution is given without further citation. The author recommends the work of the authors identified in notes 1-5 to the reader and recommends that the reader consider their work as primary sources for this paper. Materials identified in notes 6-9 may have general utility for the drafter with respect to conforming to a uniform system of usage, style and editing and for providing initial points of reference in certain purchase and sale transactions.

1. KENNETH A. ADAMS, *LEGAL USAGE IN DRAFTING CORPORATE AGREEMENTS* (Quorum Books 2001, 206 pages).

2. KENNETH A. ADAMS, A MANUAL FOR CONTRACT DRAFTING (American Bar Association 2004, 253 pages).
3. WILLIAM P. BOYD AND RAYMOND V. LESIKAR, PRODUCTIVE BUSINESS WRITING (Prentice Hall 1959, 513 pages) [hereinafter cited as BOYD AND LESIKAR]
4. MARVIN GARFINKEL, AMERICAN LAW INSTITUTE-AMERICAN BAR ASS'N, REAL WORLD DOCUMENT DRAFTING - FORM, STYLE AND SUBSTANCE (American Law Institute - American Bar Association Course Book LZ66, April 27, 2006) [hereinafter cited as GARFINKEL].
5. S. I. HAYAKAWA AND ALAN R. HAYAKAWA, LANGUAGE IN THOUGHT AND ACTION (Harcourt, Inc. Fifth ed. 1990, 196 pages) [hereinafter cited as HAYAKAWA].
6. MANUAL ON USAGE, STYLE & EDITING (Texas Law Review, 9th. ed. 2002).
7. MODEL ASSET PURCHASE AGREEMENT (American Bar Association 2001).
8. MODEL STOCK PURCHASE AGREEMENT (American Bar Association 1995).
9. WILLIAM STRUNK, JR. & E. B. WHITE, THE ELEMENTS OF STYLE (The McMillan Company, 2d ed. 1972, 78 pages) (if a copy of the third edition (1979) is available, it is recommended. If not, the fourth edition (1999) which was produced after E.B. White's death in 1985, and is said by some not to be an improvement, may be available. An illustrated edition appeared in 2005 containing the same text as the fourth edition plus drawings). According to Professor Lee Dembart, in class syllabus *Legal Drafting: General Practice-*. (Spring 2006): "This is the single best book on English composition, bar none. To improve your writing - legal and otherwise - study this book, internalize it, and make it your own. One of the book's many strengths is that it is short, which is an example of its overarching principle: 'Make every word tell,'" *available at: <http://extranet.law.unlv.edu/firstAssignments/pdf7669-1-s.pdf>* (Last visited on May 7, 2006).

FORMS

General Formbooks:

AMERICAN JURISPRUDENCE LEGAL FORMS ("AMJUR LEGAL FORMS") (2d ed., 1971) transactional forms).

AMERICAN JURISPRUDENCE PLEADING AND PRACTICE FORMS ANNOTATED (companion set to AMJUR LEGAL FORMS; includes forms used in litigation)

WEST'S LEGAL FORMS (4th ed. 2003) (forms related to business and commercial issues).

NICHOLS CYCLOPEDIA OF LEGAL FORMS ANNOTATED (forms and secondary source information for commercial issues).

Subject Specific Forms:

FLETCHER CORPORATION FORMS, Annotated (4th ed. 1972).

UNIFORM COMMERCIAL CODE LEGAL FORMS (4th ed. 2003) (forms for states that have adopted the UCC).

Forms Online:

WashLaw Web Legal Forms (contains links to websites containing numerous forms, including state-specific and jurisdiction-specific forms), *available at*: <http://www.washlaw.edu/legalforms/> (last visited May 7, 2006).

Lectric Law Library Legal Forms (claims to be the “Net’s biggest collection of free legal forms.” Forms are available online by categories: Law Practice Forms, Business and General Forms, Premium Forms (state-specific forms of various kinds)), *available at*: <http://www.lectlaw.com/form.html> (last visited May 7, 2006).

FedForms (“one-stop shopping’ for the federal forms most used by the public”), *available at*: <http://www.forms.gov/bgfPortal/citizen.portal> (last visited May 7, 2006).

Findlaw Forms (access to state, federal and bankruptcy forms; includes “Form Finder,” a search feature that permits searching for forms of a particular jurisdiction), *available at*: <http://forms.lp.findlaw.com/> (last visited May 7, 2006).

⁴⁻¹ HAYAKAWA *supra* note 5, at xi.

⁴⁻² See generally, GARFINKEL *supra* note 4, at 122-32 and nn.386—409.

⁴⁻³ See generally, Kenneth F. Oettle, *To Write More Clearly, Avoid Using “In Order to,”* N.J. L. J., *available at* www.law.com/isp/tx/PubArticleTX.isp?id=1144414528942 (last visited on May 7, 2006) (requires subscription) or <http://www.law.com/isp/ni/index.isp>.

⁴⁻⁴ See *Stewman Ranch, Inc. v. Double M. Ranch, Ltd.* (No. 11-04-00258-CV Tex. App. Dist 11 04/13/2006). In the *Stewman Ranch* case (excerpts provided below without citation from pages of the slip opinion), the court construed a deed with the following reservation:

There is, however, excepted and reserved to the Grantors an undivided one-half (1/2) of the royalties to be paid on the production of oil, gas and other hydrocarbons from the described lands which are presently owned by Grantors for and during the lives of Helen A. Stewman and O. T. Stewman, Jr.; and, upon the death of the survivor of them, this retained royalty interest will vest in Grantee, its successors and assigns.

The difficulty presented by the doctrine of last antecedent the words: “which are presently owned by Grantors.” The court noted that if this clause modifies the preceding words: “the described lands,” then the reservation operates to reserve one-half of the total royalties. And the court continued by stating that if the clause modifies “royalties to be paid,” then the reservation means that the Stewmans retained only one-half of the royalty they owned at the time of the conveyance.

The court concluded that the clause, “which are presently owned by Grantors” is a restrictive dependent clause even though it begins with the word “which.” The court further noted that the clause is not set off by commas, as is the case with a nondescriptive or nonrestrictive clause. Although punctuation is not controlling in the interpretation of agreements, it does aid in the interpretation of an instrument.

The *Stewman* court held that the clause “which are presently owned by Grantors” refers to and defines “one-half (1/2) of the royalties” and that the Stewmans reserved a life estate in one-half of the royalties that they owned at the time of the conveyance, not one-half of the total royalties.

For a recent decision construing an interpretation of an insurance contract that includes several “and/or” conjunctive and disjunctive connectors, see *Texaco Exploration and Production, Inc.; Marathon Oil Co. v. AmClyde Engineered Products Co.* (No. 03-31208 U.S. C.A. 5th Cir. May 5, 2006, at p. 33—7).

⁴⁴⁵ See generally, GARFINKEL *supra* note 4, at pp. 69-71 and nn. 182-87.

⁴⁴⁶ Black’s Law Dictionary (5th ed. 1979) p. 97 (citing *Atchison v. City of Englewood, Colo.*, 568P.2d 13, 18).

⁴⁴⁷ *Id.* at p. 79.

⁴⁴⁸ One of the most complete discussions of the confusion that may exist when utilizing the term and/or is the treatment of the subject in GARFINKEL *supra* note 4, at pp. 69-71 and nn.82-87 reproduced in full, as follows:

CONJUNCTIVE-DISJUNCTIVE CONFUSIONS; “AND/OR”

Subconsciously, draftspeople become over dependent upon context to clarify the intended meaning of conjunctive and disjunctive constructions. The courts consciously do likewise. A primary rule of legal draftsmanship, to be sure that you understand what is intended, is most applicable to the use of the disjunctive “or.” Is the “or” intended to be inclusive or exclusive? The inclusive use of “A or B” is best expressed as “A and B or either of them.” The exclusive use of “or” is best expressed as “either A or B but not both.”¹⁸² Cases have construed “or” as conjunctive.¹⁸³

Many lawyers fortunately seem to be sensitive to the duality of meaning of the conjunctive “and.”¹⁸⁴ The word “and” may be intended to mean “several” or “joint” or may be intended to mean both “joint” and “several.” Although it is rare in financing transactions for lender’s counsel not to seek to impose both “joint” and “several” liability upon a borrower and its grantors, it is perhaps curious how this has often become more of a ritual than the result of a reasoned understanding of the duality of the conjunctive concept.

The term “and/or” has been referred to in Williston on Contracts as being
“purposely indefinite.”¹⁸⁵ It is noted that “Probably because of its ungainly appearance, indiscriminate misuse, and the difficulties it causes in construction, the term has provoked outbursts of invective which are somewhat disproportionate to the amount of harm it causes.” Williston concludes that when used in contracts the circumstances may be an aid to determining the proper interpretation of its meaning in a particular context.¹⁸⁶ One wonders whether a lawyer using “and/or”⁸⁷ always actually understands what she intends, or better yet, one may often wonder whether such lawyer has any clear intentions at all, other than to “cover all bases.” Most lawyers who regularly use “and/or” probably understand “and/or” to cover both the conjunctive and the disjunctive, that is “A and B or either of them.” So far, possibly, so good, but does that mean that a sentence containing “and/or” should first be read as if the word “and” was used, then read as if the word “or” was used, and then interpreted as

if both sentences were valid? It is submitted that oftentimes this just does not produce a rational result. The two sentences may be inconsistent and under such circumstances both sentences cannot be valid. If the draftsman's intention is to cover the associated items on a joint and several basis, a structure such as "A and B or either of them" is unambiguous and should be used.

It is surprising how often one encounters in a contract or a statute a provision, for instance, conditioned upon the occurrence of "A or B and C." The obvious question must arise whether the condition intended is the occurrence of A or B together with C or is it Either A or B and C together? With algebraic notations, the possibilities may be expressed as either "(A) or (B and C)" or "(A or B) and (C)." In legal drafting, the following construction may be used in place of the A or B and C instruction:

- [(a) Upon the occurrence of either of the
circumstances described in subsection (b) below,
the provisions of subsection (c) below shall be applicable;
- (b) "A or B and C"
- (c) The circumstances referred to in subsection (b) above are:
 - (i) 'A,' or
 - (ii) 'B' together with 'C'.]

182. See R. Dickenson, *The Difficult Choice Between "and" and "or,"* 46 A.B.A. Jr. 310 (March, 1960).

183. *Noell v. American Design, Inc. Profit Sharing Plan*, 764 F.2d 827 (11th Cir Ala. 1985); *Monroe M. Tapper & Ass. V. U.S.* 602 F.2d 311,315 (Ct. Cl. 1979); 221 Ct. Cl. 21, *Atchison v. City of Englewood*, 193 Colo. 367, 568 P.2d 13

184. In *Slodov v. U.S.*, 436 U.S. 238 (1978), the Court gave a disjunctive meaning to the word "and" in holding that notwithstanding that § 6672 of the Internal Revenue Code imposed liability on an individual whose duties required such individual to "collect, account for, and pay over" withholding taxes, it was sufficient that the individual had the duty to perform any one of these functions.

185. Other commentators and judges have not been as charitable as Williston. In *Tarjan v. Korwske*, 268 Ill. App. 232 (1932), the court in what was probably dictum disregarded certain findings of fact and conclusions of law that used the "symbol" "and/or" as not being in the English language in violation of the Constitution of Illinois. The court quoted several editorials and letters to the editor in the American Bar Association Journal including ones that Observed that "The use of this symbol arises in part from a doubt as to which the two words should be used. Is it any solution of this doubt to leave the question to be solved by construction at a later time? In short, we believe the symbol to be a device for the encouragement of mental laziness even in the drafting of private contracts. It is a bastard sired by Indolence (he by Ignorance) out of Dubiety. Against such let all honest men protest. The primary requisite of any juridical language necessarily is exactness. If a writer means to use the conjunctive he should employ the word 'and,' and if he means to express the disjunctive he should use the word 'or,' but to use this expression 'and/or' is indicative of confused thought, which should have no lace in either a statute or a legal document." In *Davison v. Woolworth Co.*, 168 Ga. 663, 198

S.E. 738 (Ga. 1938), the Supreme Court of Georgia construed “and/or” to mean “A and B or either of them” but only after quoting *Employers Mutual Liab. Ins. Co. v. Tollerfsen*, 219 Wis. 434, 263 N.W. 376 that “The expression ‘and/or’ has been before the courts a number of times and has been frequently criticized. In *Employers Mutual Liability Ins. Co. v. Tollefsen*, 219 Wis. 434 (265 N.W. 376), it was said: “We are confronted with the task of first construing ‘and/or,’ that befuddling nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of some one too lazy or too dull to express his precise meaning, or too full to know that he did mean, now commonly used by lawyers in drafting legal documents, through carelessness or ignorance or as a cunning device to conceal rather than express meaning with view to furthering the interest of their clients.” The following or among the cases in which the use of the term “and/or” has been condemned: *State v. Dudley*, 159 La. 872, *Lamborn v. National Park Bank of New York*, 208 N.Y.S. 428, *Preble v. Architectural Iron Workers’ Union of Chicago*, 260 Ill.App. 435, *Health Clubs, Inc. v. State of Florida*, 228 So. 2nd 1324 (Fla. Ct. App. 4th Dist. (1976) quoting *J.P. Cochrane v. Florida East Coast Railroad Company*, 109 Fla. 431, 145 So. 217(1932).

186. S. WILLISTON, *CONTRACTS* (4th ed. 1999) Sec. 30:11; *Hicks v. Haight*, 171 Misc. 151, 11 N.Y.S. 2d 912 (N.Y. Sup. Ct. 1939).

187. Note, “In Defense of ‘and/or’”, 45 YALE L.J. 918-919 (1936); “Words and Phrases Meaning of words ‘and/or’”, 20 MARQ. L. REV. 101, 102 (1936) or 10 J.S. B. CALIF. 77 (1935); “An an/or Symposium”, letters, 18 A.B.A.J. 574, 576 (1932); and Welch, “and/or”, 4.4 MASS. L.Q. 98 (1959). See also *DeSylvia v. Ballentine*, 351 U.S. 570, 573, 100 L.Ed. 1415, 76 S.Ct. 874, (1956) *rehearing denied*, 352 U.S. 859, 1 L.Ed. 2d 69, 77 S.Ct. 22 (1956).

⁵⁻ ¹ For a decision that discussed the consequences of including in an agreement a specific provision that specifically limited the parties’ liability for consequential damages in any form and failed to list, identify, or refer to the provisions that limited liability for consequential damages in the survival clause of the agreement, see *In re Scientific Components Corp. v. Raytheon Co.*, No. M 82(HB), 2005 WL 1561508 (S.D.N.Y. June 29, 2005). For an excellent discussion of drafting tips for limiting liability, see Donald P. Butler, *Drafting tips for Limitation of Liability Clauses and Indemnity Obligations in Business Agreements* (2003) (available from the author at: butlerd@srcx.com).

⁶⁻ ¹ *Sun Operating Ltd. P’ship v. Holt*, 984 S.W. 2d 277, 282-83, 142 O.G.R. 392 (Tex. App.—Amarillo 1998).

⁶² HOWARD R. WILLIAMS, RICHARD C. MAXWELL & CHARLES J. MEYERS, *CASES AND MATERIALS ON THE LAW OF OIL AND GAS*, The Foundation Press, Inc., 345 (3d ed. 1974) [hereinafter WILLIAMS, MAXWELL & MEYERS],

⁷⁰ For a discussion of “forfeiture” or “right to cure” or “judicial ascertainment” provisions, the substance of which are similar, see, e.g., 4 Howard R. Williams & Charles J. Meyers, *Oil and Gas Law* § 681, *et seq.* (2000); 4 Eugene Kuntz, *A Treatise on the Law of Oil and Gas* § 53.4(c) (1990); cf. *Wellman v. Energy Res., Inc.*, appeal

from Civil Action No. 98-C-429,

Cir. Ct. of Logan County (W. Va.), No. 28209 IQ3 (July 6, 2001), “‘judicial ascertainment’ clauses in oil and gas leases in West Virginia are void under the public policy of this State and do not preclude a court in which a controversy over an oil and gas lease is tried from rendering a final judgment and finally resolving that controversy” (citing Frick-Reid Supply Corp. v. Meers, 52 SW 2d 115, 118 (Tex.Civ.App. 1932)):

We think this stipulation [clause] is void. If its terms were observed, Meers and wife [the lessors] would be required to file a suit in the district court for the purpose of adjudicating the questions as to whether there had been a breach of any implied obligation and whether oil and gas was being produced in paying quantities. By the terms of the stipulation, that would end the suit, even though the facts should be determined against the lessees.

The court would be precluded from rendering judgment upon such findings. Except in certain instances prescribed by statute, courts do not try cases by piecemeal. Observance by the court of the terms of this stipulation would require a trial in which only the facts named in the stipulation could be judicially ascertained. Upon the determination of such facts, the lessee, according to the stipulation, is given a reasonable time thereafter to comply with his obligations or surrender the lease This would require at least two trials and two final judgments. It would require, ... a postponement of the rendition and entry of the judgment upon the facts ascertained, subject to the option and caprice of the lessee.

Agreements relating to proceedings in civil cases and involving and providing for anything inconsistent with the full and impartial course of justice therein are illegal. 2 Elliott on Contracts, 719.

Id.

In rendering its decision in Wellman, the following judicial ascertainment provision was examined:

This lease shall never be forfeited or terminated for failure of lessee to perform in whole or in part of its express or implied covenants, conditions or obligations until it shall have been first finally judicially determined that such failure exists, and lessee shall have been given a reasonable time after such final determination within which to comply with any such covenants, conditions, or obligations. (*citations omitted*).

Further, the court in the Wellman decision stated:

While both common-law and statutory arbitrations are favored by the courts, and questions of fact may be conclusively settled in that way, the parties cannot by original contract or otherwise convert the trial and appellate courts into mere boards of arbitration. States

which recognize that a lease may terminate automatically by abandonment, or by failure to pay delay rentals or by failure to produce oil and gas in paying quantities, have rejected the idea that the “judicial ascertainment clause” will prevent the termination of an oil and gas lease by abandonment. As stated in 4 Howard R. Williams & Charles J. Myers, Oil and Gas Law § 682.3 (2000):

A second objection to “judicial ascertainment” clauses is that often in the oil and gas lease situation, the landowner is a relatively small operator with limited resources and the lessee often has substantially greater resources. “Judicial ascertainment” clauses in such situations might enable the lessee to subject the lessor to needless and unfair pressure to obtain concessions. As stated in Melancon v. Texas Company, 230 La. 593, ____ , 89 So.2d 135, 146 (1956):

To hold as contended by counsel for defendant on this point would lead to an anomalous, if not ridiculous, situation, for the lessor would be at the mercy of the lessee; the latter might employ whatever tactics he saw fit to obtain concessions or alterations in connection with the lease, knowing it would never be declared canceled without his first being given the opportunity to comply after judicial proceedings. Finally, it has been broadly recognized that “judicial ascertainment” clauses do not affect termination of a lease by abandonment in those jurisdictions which, like West Virginia, are termination by abandonment states. *See* 4 Howard R. Williams & Charles J. Myers, Oil and Gas Law § 682.3 (2000); and Eugene Kuntz, A Treatise on the Law of Oil and Gas § 53.4(c)(1990). States which recognize that a lease may terminate automatically by abandonment, or by failure to pay delay rentals or by failure to produce oil and gas in paying quantities, have rejected the idea that the “judicial ascertainment clause” will prevent the termination of an oil and gas lease by abandonment. As stated in 4 Howard R. Williams & Charles J. Myers, Oil and Gas Law § 682.3 (2000):

In states which take the view that the interest of an oil and gas lessee is subject to abandonment, the question sometimes arises as to the effect on abandonment of a . . . judicial ascertainment clause in the lease. [In such states] [i]t has been held that abandonment may occur without. . . judicial ascertainment.

available at: <http://www.state.wv.us/wvsca/docs/spring01/28209.pdf> (last visited Feb. 5, 2006).

⁶⁴ Williams, Maxwell & Meyers *supra* note 12, at 854.
⁶⁻⁵ *Id.* at 859.

⁶⁶ International Association of Drilling Contractors, Drilling Bid Proposal and Daywork Drilling Contract - U.S. ^17 (revised April, 2003).

⁶⁷ Form of Master Service Agreement dated June 14, 2002, MSA Project Published Version 1, developed after months of deliberations by a distinguished committee formed by the Houston Chapter of the Association of Corporate Counsel under the dedicated and able leadership of Donald P. Butler, Senior Counsel, Seneca Resources Corporation.

ATTACHMENT I

TEMPLATE FOR AN AGREEMENT AGREEMENT

THIS AGREEMENT (this "Agreement") is effective as of the _____ day of June, 2006 (the "Effective Date"), and _____ is among OLD ENERGY, LLC, a Texas limited liability company, whose address is _____, represented herein by its undersigned, duly authorized representative ("Old Energy"). _____ SPECIAL OIL AND GAS, INC. ("Special"), corporation, whose address is _____, represented herein by its duly authorized officer, _____ and NEW ENERGY GROUP ("New Energy"), a Nevada corporation, whose address is _____, represented herein by its undersigned, duly authorized officer (sometimes herein Old Energy, Special, and New Energy are collectively called the "Parties" and individually called a "Party").

WITNESSETH:

WHEREAS, the Parties desire to _____ ;

WHEREAS, all _____ ;

WHEREAS, the _____ and

WHEREAS, _____ has agreed to _____ .

NOW THEREFORE, in order to comply with the terms and conditions of their mutual agreements, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby covenant and agree as follows:

ARTICLE I.

GENERAL TERMS

Section 1.01. Terms Defined Above. As used in this Agreement, the terms "Agreement," "Special," "Effective Date," "New Energy," and "Old Energy" will have the meanings indicated above.

Section 1.02. Additional Defined Terms.

(a) "Working Interest" or "WI" means: (i) with respect to a Lease, an interest owned in an oil, gas and mineral lease that determines the cost bearing percentage of the owner of such interest: (i) with respect to a Unit, an owner's share of the costs of operations conducted thereon; and (ii) with respect to a Well, an owner's share of costs of the operation thereof.

(b) "Net Revenue Interest" or "NRI" means: (i) with respect to a Unit, that interest in the applicable Hydrocarbons, as such term is defined herein, produced, saved and sold from such unitized area which is afforded to a Party by virtue of its ownership of the Leases included in whole or in part in such area after deducting all

burdens against the production therefrom; and (ii) with respect to a Well, that interest in the applicable Hydrocarbons produced, saved and sold from the Well which is afforded to an owner by virtue of its ownership of the Leases on which such Well is located after deducting all burdens against the production therefrom.

(c) “Well” means a well producing or capable of producing Hydrocarbons that shall be located in the Field and drilled pursuant to the terms of this Agreement.

ARTICLE II.

OWNERSHIP. EXPENSES. AND REVENUES

Section 2.01. Contribution by Special. Concurrently with the execution of this Agreement, Special agrees to _____ .

Section 2.02. Costs to be Borne by Special. Upon the terms and conditions of this Agreement, Special agrees to bear and pay for _____.

Section 2.03. Entitlement to Revenue of Special. Upon the terms and conditions of this Agreement, Special shall be entitled to _____.

ARTICLE III.

PAYMENTS. CREDITS AND OTHER RIGHTS AND BENEFITS

Section 3.01. Initial AFE. Pursuant to the terms of _____ .

Section 3.02. Payments and Credits. Within _____, Old Energy and New Energy shall

ARTICLE IV RIGHT OF FIRST REFUSAL

Section 4.01. Right of First Refusal. Subsequent to the designation and drilling of _____ .

Section 4.02. Payment for Infrastructure. At its option _____ .

ARTICLE V MISCELLANEOUS

Section 5.01. Notices. All notices given by any Party to any other Party under this Agreement shall be in writing and shall either be by Email with sender confirmation of receipt or by facsimile with sender confirmation of receipt or mailed by registered or certified mail with the U.S. Postal Service with return receipt requested, or delivered in person to the intended addressee. For purposes of such notice through the U.S. Postal Service, the addresses of the Parties shall be as set forth above. Each Party shall have the right to change its address for notice hereunder to any other location by the giving of written notice to the other parties in the manner set forth in this Section. The Email addresses and the facsimile numbers of the Parties are as follows:

Old Energy
Email address: _____
Facsimile no. _____
Attn: _____

Special.
Email address:
Facsimile no.
Attn:

New Energy
Email address:
Facsimile no.
Attn:

Section 5.02. Governing Law. THIS AGREEMENT SHALL BE GOVERNED AND INTERPRETED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS WITHOUT REGARD TO CHOICE OF LAW PRINCIPLES.

Section 5.03. Venue. ALL ACTIONS OR PROCEEDINGS WITH RESPECT TO, ARISING DIRECTLY OR INDIRECTLY IN CONNECTION WITH, OUT OF, RELATED TO, OR FROM THIS AGREEMENT OR ANY OTHER DOCUMENT REFERRED TO IN THIS AGREEMENT MAY BE LITIGATED, AT THE SOLE DISCRETION AND ELECTION OF ANY OF THE PARTIES, IN COURTS HAVING SITUS IN HOUSTON, HARRIS COUNTY, TEXAS. EACH PARTY HEREBY SUBMITS TO THE JURISDICTION OF ANY LOCAL, STATE, OR FEDERAL COURT LOCATED IN HOUSTON, HARRIS COUNTY, TEXAS, AND HEREBY WAIVES ANY RIGHTS IT MAY HAVE TO TRANSFER OR CHANGE THE JURISDICTION OR VENUE OF ANY LITIGATION BROUGHT AGAINST IT BY ANY PARTY IN ACCORDANCE WITH THIS SECTION.

Section 5.04. Entire Agreement. Taken together with the agreement _____, this Agreement contains the entire agreement between the Parties relating to the subject matter hereof. This Agreement may be amended, extended or changed by appropriate written instrument or instruments duly executed by each Party to this Agreement.

Section 5.05. Consultants and Attorneys Fees. Each of the Parties shall be responsible for and pay in their entirety its respective attorneys fees, auditors and consultant fees, costs and expenses in connection with the subject matter of this Agreement and any audit that may be conducted as a result of the transactions contemplated herein.

Section 5.06. Permitted Assigns. Any of the Parties may assign their rights under this Agreement without the consent of the other Parties; provided, however, no Party, by so doing, will be permitted to increase the obligations, economic or otherwise, of any other Party.

Section 5.07. Successors and Assigns. This Agreement and all of the terms, provisions and conditions hereof, shall be binding upon and shall inure to the benefit of the parties hereto, their respective their successors in title and in interest, legal representatives, _____ and permitted

assigns; provided, however, that nothing in this Section 5.07 shall be construed as an authorization or right of any Party to assign its rights and obligations under this Agreement except as provided in Section _____ of this Agreement.

Section 5.08. Execution of Agreement. This Agreement may be executed by signing the original or a counterpart thereof. If this Agreement is executed in counterparts, all counterparts taken together shall have the same effect as if all the Parties had signed the same instrument. A facsimile signature shall be treated as an original signature.

Section 5.09. Severability. Every provision of this Agreement or incorporated herein from other documents is intended to be severable. If any term or provision hereof or incorporated herein is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of this Agreement.

IN WITNESS WHEREOF, the Parties have executed this instrument on the dates set forth with the signatures of their duly authorized representatives to be effective on the Effective Date.

OLD ENERGY

Date: _____

By: _____
Printed Name: _____
Title: _____

SPECIAL

Date: _____

By: _____
Printed Name: _____
Title: _____

NEW ENERGY

Date: _____

By: _____
Printed Name: _____
Title: _____

EXHIBIT A TO

AGREEMENT

among OLD

ENERGY;

SPECIAL; and

NEW ENERGY

ATTACHMENT II

EXAMPLE OF INSURANCE EXHIBIT (FOR DISCUSSION PURPOSES ONLY)

EXHIBIT A INSURANCE COVERAGES

A. **Coverages.** The following coverages shall apply:

Worker's Compensation	\$1,000,000 CSL \$1,000,000 CSL \$1,000,000 CSL
Employer's Liability/Maritime: Employer's Liability	\$1,000,000 CSL \$1,000,000 CSL \$1,000,000 CSL
Commercial General Liability: Bodily Injury & Property Damage	\$1,000,000 CSL \$1,000,000 CSL \$1,000,000 CSL
Automobile Liability:	Vessel Value
Bodily Injury & Property Damage	\$1,000,000 CGL
Hull & Machinery	Statutory
P&I — Collision Towers	\$1,000,000 CSL
Cleanup Cost	\$1,000,000 CSL
Pollution Liability	
Aircraft Liability	\$1,000,000 CSL \$5,000,000 CSL \$1,000,000 CSL
EXCESS LIABILITY (excess of above limits)	

SPECIAL REQUIREMENTS:

— MINIMUM LIMITS---

Category #1 _____	Category #2 _____	Category #3 _____
Statutory	Statutory	Statutory

A. Contractors/Vendors employing Maritime workers and/or working over waters must obtain all applicable maritime coverages listed in this Article with limits of no less than those required in Category #3 herein.

- B. All questions concerning coverage on Contractor's Certificate of Insurance Form must be answered affirmatively. Items marked with an asterisk are required only for operations conducted over water, or involving maritime workers.
- C. Any policy containing a general policy aggregate limit must be modified so that the aggregate limit shall not apply to Company Parties.

TYPE OF CONTRACTORS/VENDORS:

	Category #1	Category #2 ____	Category #3
Aircraft/Helicopter Contractors Boat			X
and Barge Contractors Building			X
Construction, Major Maintenance Construction		X	
Carpenters Catering Services Cathodic	X		
Protection Communications Technician	X		
Contract Engineers Contract Geologists	X		
Contract Drilling Foreman Diving Contractors	X		
Electrical Contractors Hot Oil or Steamer	X		
Service Lease Operator) Individual Lease	X		
Operator) Through Contractors Mechanics	X		
Office Personnel Painting Contractors		X	
Pipeline Contractors Plumbing			X
Contractors Roustabouts Surveyors	X		
Transporters — Salt, Water & Mud		X	
Transporters - Oil, Gas & LPG & Chemicals		X	
Trucking — Oil Field		X	
Weed Killing	X	X	
Welding Contractors		X	
Well Service Companies — All		X	
Not	Otherwise		X
	Classified	X	
		X	
		X	
		X	
		X	
			X
		X	
			X
			X
			X

B. Scope of Coverages The following shall apply to each relevant policy:

A. Worker's Compensation and Employer's Liability, to include:

1. Statutory Worker's Compensation for state hire/operation
2. Employer's Liability
3. Other States Insurance
4. Voluntary Compensation
5. Alternate Employer/Borrowed Servant
6. U.S. Longshore and Harbor Worker's Compensation Act Coverage

** If any Worker is over water, required insurance shall include:

- ** 7. Outer Continental Shelf Lands Act
- ** 8. Gulf of Mexico Territorial Extension
- ** 9. Maritime Employer's Liability including Transportation, Wages, Maintenance and Cure
- ** 10. "In rem" endorsement
- ** 11. Death on the High Seas Act

B. Commercial General Liability. (Occurrence Form), to include:

1. Premises/Operations
2. Independent Contractors
3. Personal Injury
4. Products/Completed Operations
- *** 5. Blanket Contractual Liability
6. Blowout and Cratering
7. Explosion, Collapse and Underground
8. Sudden and Accidental Pollution Liability

** If any Work is Overwater, required insurance shall include:

- ** 9. Non-Owned Watercraft coverage without restrictions as respects operations and contractual liability
- ** 10. "In rem" endorsement

C. Comprehensive Automobile Liability, to include:

1. Owned vehicles
2. Non-Owned vehicles
3. Hired vehicles

D. ** Hull and Machinery, to include:

1. Vessels in value subject to AIHC form or equivalent
2. If towing vessel —full Tower's Liability

3. ny “as owner” clause and any other language which purports to limits coverage of an insured “as owner of the vessels” shall be deleted A
 4. ny language in any policy of insurance which limits coverage for Company in the event of the applicability of the Limitations Statute shall be deleted A
- E. **** Protection & Indemnity Insurance** (or equivalent) subject to:
1. SP-23 clauses or equivalent
 2. Any “as owner” clause and any other language which purports to limit coverage to liability of an insured “as owner of the vessels” shall be deleted
 3. ny language in any policy of insurance which limited coverage for Company in the event of the applicability of the Limitation Statute shall be deleted. A
 4. Cleanup per Water Quality Improvement Act as amended
 5. Third Party Bodily Injury and Property Damage Pollution Liability
- F. **Aircraft Liability, to include:**
1. Owned Aircraft
 2. Non-Owned Aircraft
 3. Hired Aircraft
 4. Passenger Liability
 5. Contractual Liability
 6. Fixed Wing/Rotary Aircraft
- G. **Excess Liability, (Occurrence Form)** excess of:
Following Terms and Conditions of below underlying coverages:
1. Employer's Liability and Maritime Employer's Liability
 2. Comprehensive General Liability
 3. Comprehensive Automobile Liability
 - ** 4. Vessels (P&I & Collision/Towers & Pollution Liability)
 5. Aircraft Liability
- H. **Contractor's Property,** including, but not limited to, property used in the course of construction, equipment, rigs, and specialty tools) to include:
1. All risk from (including transit)
 2. Replacement Costs valuation
 3. Co-Insurance Waiver
- I. **All policies of insurance** shall be placed with American Insurance Companies rated by A.M. Best Company B V or higher or with Underwriters at Lloyds of London or the Member Companies of the Institute of London Underwriters. No other insurer may be used without specific written authorization from Company.

Company reserves the right to require duplicate originals or certified copies of any or all policies. The above minimum insurance requirements are subject to change at the discretion of Company.

** Required for operations performed over water or involving maritime workers.

If the contract is held to be governed by Texas law, and if the contract contains a unilateral indemnity, the minimum limits for contractual liability insurance shall be no less than \$500,000.

EXHIBIT A INSURANCE COVERAGES

A. Coverages. The following coverages shall apply:

	— MINIMUM LIMITS -		
	Category #1	Category #2	Category #3
Worker's Compensation	Statutory	EXCESS	Statutory
Employer's Liability/Maritime: Employer's Liability		LIABILITY (excess of above limits)	Statutory
Commercial General Liability: Bodily Injury & Property Damage	\$1,000,000 CSL	\$1,000,000 CSL	\$1,000,000 CSL
Automobile Liability: Bodily Injury & Property Damage	\$1,000,000 CSL	\$1,000,000 CSL	\$1,000,000 CSL
Hull & Machinery	\$1,000,000 CSL	\$1,000,000 CSL	\$1,000,000 CSL
P&I — Collision Towers	Vessel Value	\$1,000,000 CGL	Statutory \$1,000,000
Cleanup Cost			CSL \$1,000,000 CSL
Pollution Liability	\$1,000,000 CSL	\$5,000,000 CSL	\$1,000,000 CSL
Aircraft Liability			

SPECIAL REQUIREMENTS:

A. Contractors/Vendors employing Maritime workers and/or working over waters must obtain all applicable maritime coverages listed in this Article with limits of no less than those required in Category #3 herein.

B. All questions concerning coverage on Contractor's Certificate of Insurance Form must be answered affirmatively. Items marked with an asterisk are required only for operations conducted over water, or involving maritime workers.

C. Any policy containing a general policy aggregate limit must be modified so that the aggregate limit shall not apply to Company Parties.

TYPE OF CONTRACTORS/VENDORS:

	Category #1 ____	Category #2	Category #3
Aircraft/Helicopter Contractors Boat and Barge Contractors Building Construction, Major Maintenance Construction		X	X X
Carpenters Catering Services Cathodic Protection Communications Technician	X X		
Contract Engineers Contract Geologists	X		
Contract Drilling Foreman Diving Contractors	X		
Electrical Contractors Hot Oil or Steamer Service Lease Operator) Individual Lease Operator) Through Contractors Mechanics	X X		
Office Personnel Painting Contractors		X	
Pipeline Contractors Plumbing			X
Contractors Roustabouts Surveyors	X		
Transporters — Salt, Water & Mud		X	
Transporters — Oil, Gas & LPG & Chemicals		X	
Trucking — Oil Field		X	
Weed Killing	X	X	
Welding Contractors		X	
Well Service Companies — All		X	
Not Otherwise Classified		X X X X X	X X X X

B. Scope of Coverages the following shall apply to each relevant policy:

A. Worker's Compensation and Employer's Liability, to include:

1. Statutory Worker's Compensation for state hire/operation
2. Employer's Liability
3. Other States Insurance
4. Voluntary Compensation
5. Alternate Employer/Borrowed Servant
6. U.S. Longshore and Harbor Worker's Compensation Act Coverage

** If any Worker is over water, required insurance shall include:

- ** 7. Outer Continental Shelf Lands Act
- ** 8. Gulf of Mexico Territorial Extension
- ** 9. Maritime Employer's Liability including Transportation, Wages, Maintenance and Cure
- ** 10. "In rem" endorsement
- ** 11. Death on the High Seas Act

B. Commercial General Liability, (Occurrence Form), to include:

1. Premises/Operations
2. Independent Contractors
3. Personal Injury
4. Products/Completed Operations
- *** 5. Blanket Contractual Liability
6. Blowout and Cratering
7. Explosion, Collapse and Underground
8. Sudden and Accidental Pollution Liability

** If any Work is Overwater, required insurance shall include:

- ** 9. Non-Owned Watercraft coverage without restrictions as respects operations and contractual liability
- ** 10. "In rem" endorsement

C. Comprehensive Automobile Liability, to include:

1. Owned vehicles
2. Non-Owned vehicles
3. Hired vehicles

D. ** Hull and Machinery, to include:

1. Vessels in value subject to AIHC form or equivalent
2. If towing vessel —full Tower's Liability
3. Any "as owner" clause and any other language which purports to limits coverage of an insured "as owner of the vessels" shall be deleted
4. Any language in any policy of insurance which limits coverage for Company in the event

of the applicability of the Limitations Statute shall be deleted

E. ** Protection & Indemnity Insurance (or equivalent) subject to:

1. SP-23 clauses or equivalent
2. Any "as owner" clause and any other language which purports to limit coverage to liability of an insured "as owner of the vessels" shall be deleted
3. Any language in any policy of insurance which limited coverage for Company in the event of the applicability of the Limitation Statute shall be deleted.
4. Cleanup per Water Quality Improvement Act as amended
5. Third Party Bodily Injury and Property Damage Pollution Liability

F. Aircraft Liability, to include:

1. Owned Aircraft
2. Non-Owned Aircraft
3. Hired Aircraft
4. Passenger Liability
5. Contractual Liability
6. Fixed Wing/Rotary Aircraft

G. Excess Liability, (Occurrence Form) excess of:

Following Terms and Conditions of below underlying coverages:

1. Employer's Liability and Maritime Employer's Liability
2. Comprehensive General Liability
3. Comprehensive Automobile Liability
- ** 4. Vessels (P&I & Collision/Towers & Pollution Liability)
5. Aircraft Liability

H. Contractor's Property, including, but not limited to, property used in the course of construction, equipment, rigs, and specialty tools) to include:

1. All risk from (including transit)
2. Replacement Costs valuation
3. Co-Insurance Waiver

I. All policies of insurance shall be placed with American Insurance Companies rated by A.M. Best Company B V or higher or with Underwriters at Lloyds of London or the Member Companies of the Institute of London Underwriters. No other insurer may be used without specific written authorization from Company.

Company reserves the right to require duplicate originals or certified copies of any or all policies. The above minimum insurance requirements are subject to change at the discretion of Company.

Required for operations performed over water or involving maritime workers.

If the contract is held to be governed by Texas law, and if the contract contains a unilateral indemnity, the minimum limits for contractual liability insurance shall be no less than \$500,000.

**EXHIBIT A
INSURANCE COVERAGES**

A.	Coverages.	The	following	coverages	shall	apply:
	Worker's Compensation		Statutory	Statutory	Statutory	
	Employer's Liability/Maritime: Employer's Liability		\$ 1,000,000 CSL	\$ 1,000,000 CSL	\$ 1,000,000 CSL	
	Commercial General Liability: Bodily Injury & Property Damage		\$1,000,000 CSL	\$1,000,000 CSL	\$1,000,000 CSL	
	Automobile Liability: Bodily Injury & Property Damage		\$1,000,000 CSL	\$1,000,000 CSL	\$1,000,000 CSL	
	Hull & Machinery				Vessel Value	
	P&I — Collision Towers				\$1,000,000	
	Cleanup Cost				CGL Statutory	
	Pollution Liability				\$1,000,000 CSL	
	Aircraft Liability				\$1,000,000 CSL	
	EXCESS LIABILITY (excess of above limits)		\$1,000,000 CSL	\$5,000,000 CSL	\$1,000,000 CSL	

SPECIAL REQUIREMENTS:

— MINIMUM

LIMITS—

Category	Category	Category
#1_____	#2_____	#3_____

A. Contractors/Vendors employing Maritime workers and/or working over waters must obtain all applicable maritime coverages listed in this Article with limits of no less than those required in Category #3 herein.

B. All questions concerning coverage on Contractor's Certificate of Insurance Form must be answered affirmatively. Items marked with an asterisk are required only for operations conducted over water, or involving maritime workers.

C. Any policy containing a general policy aggregate limit must be modified so that the aggregate limit shall not apply to Company Parties.

TYPE OF CONTRACTORS/VENDORS:

	Category #1	Category #2	Category #3
Aircraft/Helicopter Contractors Boat			X
and Barge Contractors Building			X
Construction, Major Maintenance Construction		X	
Carpenters Catering Services Cathodic	X		
Protection Communications Technician	X		
Contract Engineers Contract Geologists	X		
Contract Drilling Foreman Diving Contractors	X		
Electrical Contractors Hot Oil or Steamer	X		
Service Lease Operator) Individual Lease	X		
Operator) Through Contractors Mechanics	X		
Office Personnel Painting Contractors		X	
Pipeline Contractors Plumbing			X
Contractors Roustabouts Surveyors	X		
Transporters — Salt, Water & Mud		X	
Transporters — Oil, Gas & LPG & Chemicals		X	
Trucking — Oil Field		X	
Weed Killing	X	X	
Welding Contractors		X	
Well Service Companies — All		X	
Not Otherwise Classified			X
		X	
		X	
		X	
		X	
			X
		X	
			X
			X
			X

B. Scope of Coverages: The following shall apply to each relevant policy:

A. Worker's Compensation and Employer's Liability, to include:

1. Statutory Worker's Compensation for state hire/operation
2. Employer's Liability
3. Other States Insurance
4. Voluntary Compensation
5. Alternate Employer/Borrowed Servant
6. U.S. Longshore and Harbor Worker's Compensation Act Coverage

If any Work is over water, required insurance shall include:

- ** 7. Outer Continental Shelf Lands Act
- ** 8. Gulf of Mexico Territorial Extension
- ** 9. Maritime Employer's Liability including Transportation, Wages, Maintenance and Cure
- ** 10. "In rem" endorsement
- ** 11. Death on the High Seas Act

B. Commercial General Liability, (Occurrence Form), to include:

1. Premises/Operations
2. Independent Contractors
3. Personal Injury
4. Products/Completed Operations
5. Blanket Contractual Liability
6. Blowout and Cratering
7. Explosion, Collapse and Underground
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** If any Work is over water, required insurance shall include:

- ** 9. Non-Owned Watercraft coverage without restrictions as respects operations and contractual liability
- ** 10. "In rem" endorsement

C. Comprehensive Automobile Liability, to include:

1. Owned vehicles
2. Non-Owned vehicles
3. Hired vehicles

D. ** Hull and Machinery, to include:

1. Vessels in value subject to AIHC form or equivalent
2. If towing vessel —full Tower's Liability

3. Any "as owner" clause and any other language which purports to limits coverage of an insured "as owner of the vessels" shall be deleted
4. Any language in any policy of insurance which limits coverage for Company in the event of the applicability of the Limitations Statute shall be deleted

E. ** Protection & Indemnity Insurance (or equivalent) subject to:

1. SP-23 clauses or equivalent
2. Any "as owner" clause and any other language which purports to limit coverage to liability of an insured "as owner of the vessels" shall be deleted
3. Any language in any policy of insurance which limited coverage for Company in the event of the applicability of the Limitation Statute shall be deleted.
4. Cleanup per Water Quality Improvement Act as amended
5. Third Party Bodily Injury and Property Damage Pollution Liability

F. Aircraft Liability, to include:

1. Owned Aircraft
2. Non-Owned Aircraft
3. Hired Aircraft
4. Passenger Liability
5. Contractual Liability
6. Fixed Wing/Rotary Aircraft

G. Excess Liability, (Occurrence Form) excess of:
Following Terms and Conditions of below underlying coverages:

1. Employer's Liability and Maritime Employer's Liability
2. Comprehensive General Liability
3. Comprehensive Automobile Liability
- ** 4. Vessels (P&I & Collision/Towers & Pollution Liability)
5. Aircraft Liability

H. Contractor's Property, including, but not limited to, property used in the course of construction, equipment, rigs, and specialty tools) to include:

1. All risk from (including transit)
2. Replacement Costs valuation
3. Co-Insurance Waiver

I. All policies of insurance shall be placed with American Insurance Companies rated by A.M. Best Company B V or higher or with Underwriters at Lloyds of London or the Member Companies of the Institute of London Underwriters. No other insurer may be used without specific written authorization from Company.

*** If the contract is held to be governed by Texas law, and if the contract contains a unilateral indemnity, the minimum limits for contractual liability insurance shall be no less than \$500,000.

Company reserves the right to require duplicate originals or certified copies of any or all policies. The above minimum insurance requirements are subject to change at the discretion of Company.

CSL means: Combined Single Limit for Bodily Injury and Property damage or for either of them.

ATTACHMENT III

TEMPLATE FOR LEASE DESCRIPTION EXHIBIT [TABULAR]

LEASE SCHEDULE

<u>LEASE DATE LESSOR</u>	<u>LESSEE</u>	<u>RECORDATION</u>
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[FULL DESCRIPTIONS]

Leases [Texas]

1. Oil, Gas and Mineral _____ Lease dated _____, effective _____, by _____, et al, Lessors, in favor of _____, as Lessee, recorded in Volume _____ at Page _____ of the Records of _____ County, Texas.
2. Oil, Gas and Mineral Lease dated _____, effective _____, by _____, et al, as Lessors, in favor of _____, as Lessee, recorded in Volume _____ at Page _____ of the Records of _____ County, Texas.

Leases [Louisiana]

1. Oil, Gas and Mineral _____ Lease dated _____, effective _____, by _____, et al, Lessors, in favor of _____, as Lessee, recorded in Volume _____ at Page _____ under Entry No. _____ of the Conveyance Records of _____ Parish, Louisiana.
2. Oil, Gas and Mineral _____ Lease dated _____, effective _____, by _____, et al, Lessors, in favor of _____, as Lessee, recorded in Volume _____ at Page _____ under Entry No. _____ of the Conveyance Records of _____ Parish, Louisiana.

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Best Practice in Contract Drafting

J. Lanier Yeates

Author contact information:

J. Lanier Yeates

Gordon Arata McCollam Duplantis & Eagan, LLP
Houston, Texas

lveates@aordonarata.com

713-333-5505

3. “and/or” — the ungainly term has been referred to as “purposefully