DEAR MEMBERS: During the year we will continue to provide a variety of articles within our newsletter that we believe will benefit our membership. I invite any of you to contact the DAPL Publications Director if you have an article, paper, or topic you wish to submit for potential inclusion in future DAPL publications.
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**MARK YOUR CALENDARS**

**Tuesday, February 21st, 2017**  
**11:30 AM–1:00 PM**

Park City Club  
5956 Sherry Ln., Suite 1700  
Dallas, TX 75225

Heather DeShon, PhD., Associate Professor of Geophysics at SMU, will present “Earthquakes, Wastewater Injection, and North Texas.”

Additional information for the event can be found at [www.dapl.org](http://www.dapl.org).
LANDMEN AS INDEPENDENT CONTRACTORS: IS THE GOVERNMENT’S VOLUNTARY SETTLEMENT PROGRAM TOO GOOD TO PASS UP?

BY: MICHAEL KELSHEIMER & CHARLES SARTAIN

Originally published in Landman Magazine

THE DAYS OF THE LONE landman driving around the back roads taking leases and visiting courthouses are becoming a thing of the past. Though there are still a few independent landmen who fit this mold, clients have demanded change and consolidation. Now there are brokerage firms and other combinations of landmen. It is not a bad thing. It is just different.

The fly in the ointment is that the government views landmen who work for these companies as employees and not independent contractors.

WHY SHOULD YOU CARE?

Because the government cares. It might come as a shock, but independent contractors often do not report all of their income on their tax returns. This deprives the government of not only income tax revenue, but FICA and FUTA taxes as well. Unable to raise taxes or reduce the national debt, the Internal Revenue Service and Department of Labor are looking to squeeze tax dollars from any place they can find money. The “misclassification” of independent contractors is one place they are truly focused.

Hundreds of new investigators have been hired. Fines in this area are up 500 percent. The IRS has started using sophisticated new software programs that monitor businesses that fit a profile for misclassification. Among other things, the software analyzes businesses that have large numbers of IRS Form 1099-type payments to individuals over threshold amounts and 1099 payments to the same individuals year after year. And, to make matters worse, government agencies have started cooperating and sharing data on potential violators — making them easier to catch.

This means the IRS is looking for brokerage firms that are treating landmen as contractors when they should be employees. This means landmen who should be treated as employees by their brokerage firms may have a claim against the brokerage.

Now we have your attention, but you’re still not convinced. After all...

HOW BAD COULD IT BE?

In an IRS audit, the employer could be assessed half of back payroll taxes, penalties, interest and possibly the “contractor’s” half of back payroll taxes and the amount that “contractor” should have withheld for income tax purposes. In some cases, this number approaches 40 percent of the amount paid to each “contractor” over the last three years. If you are a brokerage firm with 10 landmen treated as contractors and you pay $75,000 per year, this could mean $900,000 in back taxes.
Of course, it probably will not end with the IRS. Because the agencies are sharing information, the IRS may now hand you off to the DOL, which will then come in and ask for two to three years of timesheets for those “contractors” who are now employees. Because you treated them as contractors, you will not have any timesheets, so the DOL will interview the landmen and ask how many hours of overtime they worked in the last three years. With a free pass to answer and no time records to dispute, the landmen can tell the DOL just about anything, and the DOL, in turn, will assess you for that overtime. Assuming those same 10 landmen say they worked two hours a week of overtime over the last three years, the DOL might assess you with as much as $182,799.60 in back overtime before penalties.

But it does not end there. The Texas Workforce Commission may then audit for unemployment benefits for terminated “contractors” who should have been treated as employees. And, once bitten by the IRS and DOL themselves, your competitors may decide that the best way to stay competitive is to turn in all of the other companies using the same approach. For this, they will receive up to 15 percent of the government’s recovery in addition to leveling the playing field. While there may be honor among oilmen in the patch, the opportunity to level the playing field and make some money may prove too tempting to pass up.

Now that we firmly have your attention, you might ask:

**WHAT IS THE TEST TO DETERMINE WHETHER SOMEONE SHOULD BE TREATED AS AN EMPLOYEE?**

As is often the case in the law, the answer is complicated. The IRS, DOL and TWC each have their own test. Thankfully, however, the general ideas are similar. The following questions assess the fundamental issues of the tests and should give you an idea of whether this may be a problem for your business:

1. Do you provide training — either initially or along the way — for your landmen?
2. Do you have set hours you expect your landmen to be working?
3. Do you instruct the landmen on the sequence in which they should perform tasks or do you leave it to them to figure out completely how to bring you a finished product?
4. Do your landmen work in your offices?
5. Have you taken away per diem payments because they just don’t make sense anymore?
6. Do you provide office supplies and/or computers to the landmen to perform their work?
7. Do you provide access to title information through a company system?
8. Do you pay landmen based on the hours worked or a set rate per day?
9. Do you not charge back your landmen for bad work if your client rejects their work or requires it to be redone?
10. Do your landmen get paid for all their time on a project rather than having the responsibility to complete a project in a certain time for a certain price?
11. Do you not have a written contract with your landmen setting out their relationship?
12. Do you not require landmen to work for you through an entity that they create and own?
13. Do your landmen work for you over a long period of time — or for years?
14. Do your landmen not work for any other companies or handle landmen services for other clients?
15. Do you expect the landman you assigned the work to complete it himself rather than hand it off to an assistant he might hire?
16. Do you provide health insurance or other benefits to one or more of your landmen?

If you answered “yes” or “correct” to any of the questions above, you could be a candidate for investigation. There is not a minimum number of positive answers to be at risk, but the more affirmative answers you gave, the more risk you have of being audited and your landmen being reclassified as employees.

**WHAT SHOULD YOU DO?**

For those of you who answered “yes” enough to become concerned, there are basically two
options: (1) take steps to reduce or eliminate the “yes” answers and hold onto the Section 530 Safe Harbor defense; and (2) take advantage of the very favorable settlement program now offered by the government to reduce your liability by as much as 95 percent and re-characterize the contractors as employees moving forward.

How you approach minimizing these risk factors will be different for every business, but you should start with these thoughts:

1. Put the landmen on a written contract that maximizes support for independent contractor status.
2. Require landmen to form entities that then contract with your business.
3. Provide no training or hire someone outside to train the landmen before they come to work for you.
4. Switch landmen to a project-based pay schedule that they invoice you for and move away from daily, weekly or hourly rates.
5. Create risk of loss for the landmen in each project. If they don’t do good work, reduce the amount they are paid.
6. Make the landmen responsible for their own place to work and their own supplies.
7. Work to reduce other risk factors from “yes” to “no” in the context of your business style and systems.

Though you may hate the thought of paying an attorney, the money you could ultimately save by engaging an attorney could be significant. For that reason, it makes sense to work with employment law counsel to help with this process to ensure the least possible risk moving forward.

WHAT IS THE SECTION 530 SAFE HARBOR DEFENSE?

Some landmen and brokerage firms are holding onto the idea that they can defeat the IRS misclassification argument using the Section 530 Safe Harbor defense, which relates to Section 530 of the Revenue Act of 1978. The idea behind the defense is that if everyone is doing the same thing, the IRS cannot declare a misclassification. While this may be true, it only has the potential to be successful against the IRS. Claiming Section 530 before the DOL or the TWC will fall on deaf ears because they are not subject to it.

WHAT IS THE SETTLEMENT PROGRAM AND WHY IS IT SUCH A GOOD DEAL?

Even with its new investigators, the government cannot catch all the violators. With that in mind, the IRS has offered a settlement that is primarily aimed to bring violators into the fold so that the government gets that tax revenue on a go-forward basis. In the example presented earlier where the employer could be exposed to as much as $900,000 in back taxes, their new liability could be less than $10,000.

To qualify, an employer must: (1) agree to treat contractors as employees going forward; (2) have timely filed all 1099s for contractors in years past; (3) be in compliance with all past audits; and (4) not be under audit presently. We do not know how long this program will be offered. It could be withdrawn next month, so there is significant risk associated with waiting to enter the program. Check with a lawyer specializing in employment law for more information.
Gray Reed & McGraw is equipped to provide legal counsel to a broad range of clients in the ever-evolving energy industry. In addition to acquisitions, divestitures, mergers, energy finance, litigation, restructuring and more, Gray Reed & McGraw’s title examination practice covers onshore properties in 10 states:

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ENERGY IN A TRUMP ADMINISTRATION

THE INCOMING PRESIDENT FAVORS ENHANCED E&P OF OIL AND GAS AS A TENET OF ENERGY, ECONOMIC, AND NATIONAL SECURITY POLICY

ENERGY WAS NOT A CENTRAL ISSUE in the 2016 Presidential Election. Voters' widespread recognition of the climate change challenge lacked the priority given to issues like the economy and immigration. And, to the extent energy played a role in the “Rust Belt Revolution” and knocking down “The Blue Wall,” it favored President-elect Trump with angst over jobs lost in the coal sector and unions let down by President Obama’s rejection of the Keystone Pipeline.

Candidate Trump's position of minimal regulation and robust support for domestic energy development proved effective in states like Pennsylvania, Ohio, and Michigan. Candidate Trump stated that he wants to encourage domestic energy development to avoid dependence on importing energy from the OPEC cartel or any nations hostile to our interest. He also pointed to the need for a reduction in regulations, the opening of onshore and offshore leasing on federal lands, and rescinding of President Obama’s executive actions on climate.

Without a robust campaign platform on energy and environmental matters, the task now is to develop a view into what President-elect Trump has in mind for the energy industry over the next four years. We are only few days past the election and no cabinet appointments have been made as we head to print, but below is an initial attempt to tease out what to look for on a few key energy and environmental issues as the Trump administration takes shape.

CLIMATE POLICY

On climate, Candidate Trump expressed a degree of skepticism towards man-made climate change. He suggested that more investigation of the phenomenon is appropriate and that resources might be better directed towards addressing other global challenges first, like disease or hunger. The Trump campaign said that the candidate does believe global temperatures are rising, as did Vice Presidential nominee Mike Pence.

While some see the recent Paris Climate Agreement as a likely first target, that agreement is not binding and it comes with no true legal hooks to mandate implementation. It is questionable what actually would be gained from withdrawing, especially when weighed against the political capital President-elect Trump would stand to lose internationally.

With respect to domestic efforts to combat climate change, President-elect Trump has indicated that he is no fan of the US Environmental Protection Agency or its proposed regulation of greenhouse gases, including the Clean Power Plan. Legal challenges to the CPP will still be underway even as the new President is inaugurated.
The CPP is currently being considered in the DC Circuit. Four judges hearing that case are potential candidates for a future appointment to the US Supreme Court. Those judges may therefore delay a decision as long as possible to avoid any recusal arguments if they become a new member of the Supreme Court that hears the case at some point. If the DC Circuit strikes down the rule, it is likely that the Trump administration simply will not appeal. If there is not a ruling soon enough or if the court upholds the rule, the Trump administration may seek to revoke the rule through a notice-and-comment regulatory process.

OTHER EPA REGULATORY INITIATIVES

President-elect Trump has set his sights on rolling back more than just the CPP. During the campaign, his handful of forays into environmental matters called out EPA regulations for damaging jobs and the economy. This past September, in Pennsylvania, he addressed a shale industry audience, stating “I’m going to lift the restrictions on American energy and allow this wealth to pour into our communities.”

Candidate Trump specifically mentioned eliminating the EPA’s new source standards for power plants, the Clean Water Act “waters of the United States” rule, and the Bureau of Land Management’s Hydraulic Fracturing rule. Each of these rules is bound-up in litigation at the moment. Candidate Trump also said he would “revoke policies that impose unwarranted restrictions on new drilling technologies,” which may be an oblique reference to new restrictions proposed on methane emissions from oil and gas production.

EPA transition chief Myron Ebell is viewed as intelligent and well-versed in EPA matters with a strong preference for a free-market approach. Candidate Trump has said he opposes “unnecessary” regulations of the energy industry and would support a moratorium on regulations not yet operational. Such a moratorium is not unusual when Presidential succession occurs across party lines. That said, the length and applicability of such moratoria can vary. An administration can have wide discretion in interpreting statutes, provided that the necessary notice and comment processes are followed under the Administrative Procedures Act. Organized and well-funded challenges to these changes will be mounted in the court system. It is not as simple as a stroke of the pen. And environmentalists have already promised to wage a strong fight.

While it may be counterintuitive to some, simply reducing the EPA’s budget might not be the best approach to reaching President-elect Trump’s goal of deregulation. To rollback regulations requires significant regulatory resources and a reduction in budget could make that a slower process. Likewise, reduced resources can threaten an agency’s ability to process the permits and authorizations that industry needs to do business. The next EPA Administrator may seek to reorganize the agency, which often yields a prolonged period of reduced efficiency as the organization reshapes itself.

ENERGY PROJECT DEVELOPMENT

A Trump administration is clearly in favor of enhanced exploration and production of oil and gas as a tenet of energy, economic and national security policy. Some of President-elect Trump’s key advisors—from Oklahoma oil producer Harold Hamm to North Dakota Congressman Kevin Cramer—have espoused a bullish posture on oil and gas and shale development in particular. Candidate Trump has said he would approve Keystone XL—for a share of the profits. TransCanada said it remains fully committed to building the pipeline and is looking at ways to engage a future Trump administration on the project’s benefits. The market sees potential here as shares of TransCanada rallied the Wednesday after the election in response to Trump’s win.

Between the Keystone XL pipeline and the Dakota Access pipeline, the environmental left has spent the past four years building up pipeline protests as ground-zero in the fight against fossil fuels. In many cases, these fights pitted the Democrat’s environmental and union bases against each other and may have contributed to union defections to Republicans in the 2016 election. For this reason, expect President-elect Trump’s domestic policy team to quickly make it clear that they intend to expedite approval of energy infrastructure such as pipelines. With a Republican Congress, bills that aim to do just that, like the Federal Land Freedom Act, might have a chance.

President-elect Trump plans to open onshore and offshore leasing on federal lands and waters. He also pledges an easier permitting process and to retract Obama policies that he says stalled such projects. Trump’s transition website explains, “We will streamline the permitting process for all energy projects, including the billions of dollars in projects held up by President Obama, and rescind the job-destroying executive actions under his administration.”
CONCLUSION

If we learned anything from the 2016 election cycle, it is to expect the unexpected, and that a Trump administration’s approach will be unconventional. While he is a political outsider, at least in these early stages of transition, it appears President-elect Trump is seeking experienced professionals to be a part of his administration, those that know energy, know the environmental issues, and know how to manage. The regulations that swept over the US domestic energy industry during the Obama administration will subside, but how quickly and effectively depends on the sophistication of those Trump taps to lead and the success of his opponents in using the judiciary to slow things down.

ABOUT THE AUTHORS

JASON HUTT (jason.hutt@bracewelllaw.com) is the head of Bracewell’s Environmental Strategies Group. He advises and defends clients in administrative, civil, and criminal enforcement actions (and internal investigations) related to the federal and state agencies, including EPA, DOI, DOE, CFPB, and DOJ. He counsels energy companies, manufacturers, project developers, investor groups, and financial institutions about current and upcoming regulatory and policy developments at the nexus of environment and energy policy.

MICHAEL WELLER (mike.weller@bracewelllaw.com) advises clients in the context of government investigations and enforcement actions, regulatory compliance and advocacy, litigation, permitting, and in quantifying and allocating liabilities during business transactions. He represents clients in the energy sector, including upstream oil and gas companies and pipelines, as well as industry trade associations, manufacturers, importers, and financial institutions in a wide range of environmental law and business matters.
## 2017 AAPL Education Calendar

<table>
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<tr>
<th>Date</th>
<th>Event Description</th>
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<tr>
<td>1/31/2017</td>
<td>WI/NRI Workshop</td>
<td>Oklahoma City, OK</td>
<td>6.00 CEU</td>
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<tr>
<td>2/2/2017</td>
<td>One Day JOA Workshop</td>
<td>Houston, TX</td>
<td>7.00 CEU</td>
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<td>2/10/2017</td>
<td>Landman 2.0 Series: Operations in a Low Priced Environment (webinar available)</td>
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<td>One Day JOA Workshop</td>
<td>Midland, TX</td>
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<td>3/28/2017-3/31/2017</td>
<td>Oil and Gas Land Review, CPL/RPL Exam</td>
<td>Lafayette, LA</td>
<td>17.00 CEU / 1.00 CEU ETHICS</td>
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<tr>
<td>4/4/2017</td>
<td>One Day JOA Workshop</td>
<td>Oklahoma City, OK</td>
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<tr>
<td>4/21/2017</td>
<td>Landman 2.0 Series: Workout, Workover &amp; DoOver (webinar available)</td>
<td>Fort Worth, TX</td>
<td>4.00 CEU</td>
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<td>4/28/2017</td>
<td>Due Diligence Seminar</td>
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<td>Pittsburgh, PA</td>
<td>17.00 CEU / 1.00 CEU ETHICS</td>
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<td>Surface Use and Access</td>
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<td>5.00 CEU / 1.00 CEU ETHICS</td>
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<td>6/9/2017</td>
<td>WI/NRI Workshop</td>
<td>Denver, CO</td>
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<td>6/2/2017</td>
<td>Landman 2.0 Series: The Exit: Cashing Out</td>
<td>Fort Worth, TX</td>
<td>4.00 CEU</td>
</tr>
</tbody>
</table>

Note: Dates are subject to change, please check the AAPL Website at www.landman.org for event details.

---

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**NEXT GENERATION LANDMEN**

Next Generation Landmen (“NGL”) is a group within the Dallas Association of Petroleum Landmen (“DAPL”) that promotes the development of young professionals in an educational and social setting. NGL is mostly comprised of DAPL members ranging from 0-15 years of experience, but all members of DAPL are encouraged to attend events. Throughout the year NGL hosts educational luncheons, happy hours, seminars, sports events and joint meetings with other local energy associations. Participating in Next Generation Landmen is free and allows DAPL members to get additional value out of their annual dues.

*NGL Connections* is a mentor program that connects interns and NGL’s with Senior Landmen to address the experience gap within our profession. *NGL Connections* is a great way for experienced Landmen to invest in the future of our business. A mentorship is so valuable to the NGL’s education; it adds a dimension of training not accomplished in the classroom. Participants arrange meetings based on their schedule and discuss important Land fundamentals, challenging work scenarios or current industry news.

Send an email to ngl@dapl.org to become more involved in NGL!

---

**DAPL’s NGL Director**

Ryan Boschetti started his career as a Land Intern at Southwestern Energy Company and joined J-W Energy after graduating from The University of Texas at Austin with a BA in Psychology in 2008. Mr. Boschetti managed Haynesville and Barnett assets during his 4 years at J-W and now works across multiple basins as a Senior Landman in U.S. Exploration at Hunt Oil Company. Ryan achieved his Registered Professional Landman certification in 2012. He also serves on the Dallas Young Professionals in Energy Board as Education Director. Ryan Boschetti has a passion for the oil and gas industry and serving his fellow energy professionals.

---

**AMBASSADORS OF THE OIL INDUSTRY • LAND IS THE BASIS OF ALL WEALTH**
**Newsletter and Website Advertisement Guidelines**

**Overview**
DAPL News is the Monthly newsletter of the Dallas Association of Petroleum Landmen. DAPL Newsletters are circulated from September through June to more than 500 members throughout the Dallas / Fort Worth area. Website ads run continuously throughout the year.

**Advertisement Specifications**
Advertisements must be submitted in static gif, jpg, png or pdf format (no animations, video or audio). Advertisements must conform to the dimensions specified on the chart below. Alternative text for website advertisements must not exceed 255 characters. Website advertisements will follow a URL of your choice in a new browser window.

**Newsletter Technical Specifications**
Color: CMYK color mode only
Resolution: 300dpi – 600dpi

**Advertisement Submissions**
Send to ads@dapl.org for information about how to get started. Deadline for artwork changes and new advertisements is two weeks prior to newsletter distribution date which is typically around the 1st of each month the newsletter is published. Advertisers are limited to one artwork change per plan year. All ads and advertisers are subject to DAPL Board approval.

Newsletters are distributed to its membership via email each month from September through June, and Website ads run throughout the year. Advertising Plan years run from September 1st through June 30th for Newsletters and September 1st through August 30th for Website ads. Artwork and payments are due by August 10th each year to ensure publication in the September newsletter. Website Advertisers will pay pro-rated amounts if renewed or commenced other than these times.

For general questions about advertising with DAPL, please contact (Advertising Director) at ads@dapl.org.

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**The prices shown below are effective June 18, 2014.**

**Newsletter Advertisements Dimensions and Price Sheet:**

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**Website Advertisements Dimensions and Price Sheet:**

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<td>120 x 640 pixels</td>
<td>20k</td>
<td>$610</td>
</tr>
</tbody>
</table>
Please accept my application for membership in the Dallas Association of Petroleum Landmen under the classification of membership I have checked below. I agree to be governed by the Constitution and Bylaws of the Association, including the Code of Ethics.

Check one of the following:

_____ ACTIVE Member ($150.00) – Active membership in the association shall be available to professional Landmen whose responsibilities primarily involve the negotiation for the acquisition and/or divestiture of mineral rights, negotiation of business agreements that provide for the exploration, trading and management of oil, gas and all other mineral estates in land in a non-administrative or clerical manner. An applicant for active membership must have the sponsorship of two (2) Active Members of the Association who know the applicant.

_____ ASSOCIATE Member ($150.00) – Associate membership in the Association shall be available to all persons who are directly, primarily and regularly engaged in performing services in the oil, gas and mineral industry. Associate Members shall have all the rights and privileges of Active Members except they may not hold office in the Association, vote in Association affairs or sponsor membership applications. An applicant for associate membership must have the sponsorship of two (2) Active Members of the Association who know the applicant.

_____ NON-RESIDENT Member ($40.00) – Non-Resident membership in the Association shall be available at the discretion of the Board to individuals residing at least seventy-five (75) miles from downtown Dallas. Non-Resident Members will pay reduced annual dues as set by the Board. Non-Resident Members will have all the rights of Active Members except they may not hold office in the Association, vote in Association affairs or sponsor membership applications, and they will pay their share of any and all activities attended. An applicant for Non-Resident membership must be sponsored by two (2) Active Members of the Association or two (2) non-member CPL’s. If the applicant is a CPL no sponsors are required.

_____ SENIOR Member ($40.00) – Senior membership shall be optional to those members who have reached the age of sixty (60) years, and have actively engaged as a Petroleum Landman for at least twenty (20) years, and an Active member of the Association (DAPL) for a period of at least five (5) years. A senior member shall be relieved of his obligation of paying full annual dues, without prejudicing his/her fair rights as an Active member of the organization; provided however, a Senior member shall pay his/her share of ANY and ALL activities attended, plus reduced annual dues which shall be fixed from time to time by the Board of Directors.

PLEASE PRINT CLEARLY

Full Name (please print) ____________________________ Preferred First Name ________________

Company Name ____________________________ Nature of Business ____________________________

(i.e., Production, Exploration, Brokerage, etc.)

Position Title ____________________________ Does this position, primarily involve Landman responsibilities (yes or no) ___________

Length of Experience as a Landman _______ Length of total energy industry experience _______

Office Address __________________________________________ / City ____________________________

Street ____________________________ Zip ____________ /________________________

Office Phone ______________________________ Cell Phone (optional) ____________________________

All DAPL news/information is sent via email. E-mail Address ____________________________

Are you a member of the AAPL? ______ (yes/no) Birth date ___/___/_____ (for AAPL purposes)

Are you a CPL? ___ RPL? ___ ESA? _____ Universities Attended ____________________________

Other industry associations/societies of which you are a current member ____________________________

Date ____________________________ Signature of Applicant ____________________________

The following two (2) ACTIVE Members in good standing have signed below as sponsors of this applicant. Associate Members may not sponsor.

Sponsor’s Signature ____________________________ Sponsor’s Signature ____________________________

Print Name Legibly: ____________________________ Print Name Legibly: ____________________________

Email Address: ____________________________ Email Address: ____________________________

Phone ____________________________ Phone ____________________________

MEMBERSHIP APPROVED: ____________________________ THE BOARD OF DIRECTORS

DATE ____________________________ President ____________________________

THIS APPLICATION MUST BE SUBMITTED TO THE ABOVE ADDRESS WITH A CHECK MADE OUT TO DAPL FOR ANNUAL DUES IN THE AMOUNT OF $150.00 IF ACTIVE OR ASSOCIATE, OR $40 IF NON-RESIDENT. 50% AFTER JUNE 1. RETURN TO ABOVE ADDRESS.