

Environmental Liabilities in Business Transactions

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Who we are...



Patricia Lin

- 25+ years environmental law experience, including 18+ years in-house in manufacturing and oil and gas
- Regulatory compliance for operating assets
- Corporate environmental, safety, and ESG audit
- Environmental dispute resolution and litigation
- Superfund, petroleum storage tank, and brownfield remediation
- Corporate and real estate transactions
- Environmental and social impact assessment in project development
- Management of human rights issues related to involuntary resettlement and indigenous peoples
- Incident response and investigation

Who we are...



Erin Carter

- Represents clients in complex environmental litigation, with an emphasis on state-led and federal Superfund cost recovery, contribution actions, and natural resource damage actions.
- Assists clients in the management of environmental risks associated with acquisitions and divestitures in the waste, renewable energy, and manufacturing industries.
- Advises clients on permitting and regulatory matters, including Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, Toxic Substances Control Act, and California's Prop 65.
- Helps clients navigate emerging matters related to PFAS, including transactional considerations, environmental litigation, consumer products litigation, and counseling on supply chain risks and marketing materials.

Your client wants to...

...build a mixed-use development on vacant land in the center of town

...buy shares in a private real estate holding company

...convert a former airplane maintenance hangar into a brewery

...acquire a competitor that operates widget assembly plants in 5 states

...sell a subsidiary

...sell a scrap metal recycling facility

...exit a long-term lease in an industrial park

...unwind a joint venture dating back to the 1940s

...respond to eminent domain of a car wash property



How do you advise your client about environmental risks? What transactional positions do you recommend?

Environmental liabilities in business transactions...

...are triggered by traditional concerns about the condition of real and personal property and how they are managed:

- Hazardous materials management
- Impacts to soil and groundwater
- Deed restrictions
- Water and land use rights
- Waste generator accounts
- Air and wastewater discharge permits
- Equipment licenses and permits
- Protected flora and fauna

...can also be triggered by broader health, safety, and social concerns:

- Environmental justice and other social issues
- Supply chain management and disruptions
- Cumulative impacts
- Reputational concerns
- Cultural or archeological artifacts
- Political activity

Framing the Due Diligence

Understand the proposed transaction

- What is the transaction?
- Who is your client in the transaction?
- What are your client's objectives?
- How important are the physical assets relative to the intangible assets?
- What is your client's negotiating position?
- How much time/resources will be available for due diligence?

Understand the proposed deal points

- What obligations does your client currently have?
- What obligations is your client willing to take on after the transaction?
- How do the parties want to allocate environmental obligations?
- Are indemnities or insurance available?

Build a checklist that identifies the due diligence required to...

- Satisfy the All Appropriate Inquiry standard
- Develop an environmental baseline for the transaction
- Influence key negotiation points

Doing the Due Diligence

History of the Site or Asset

Title Search

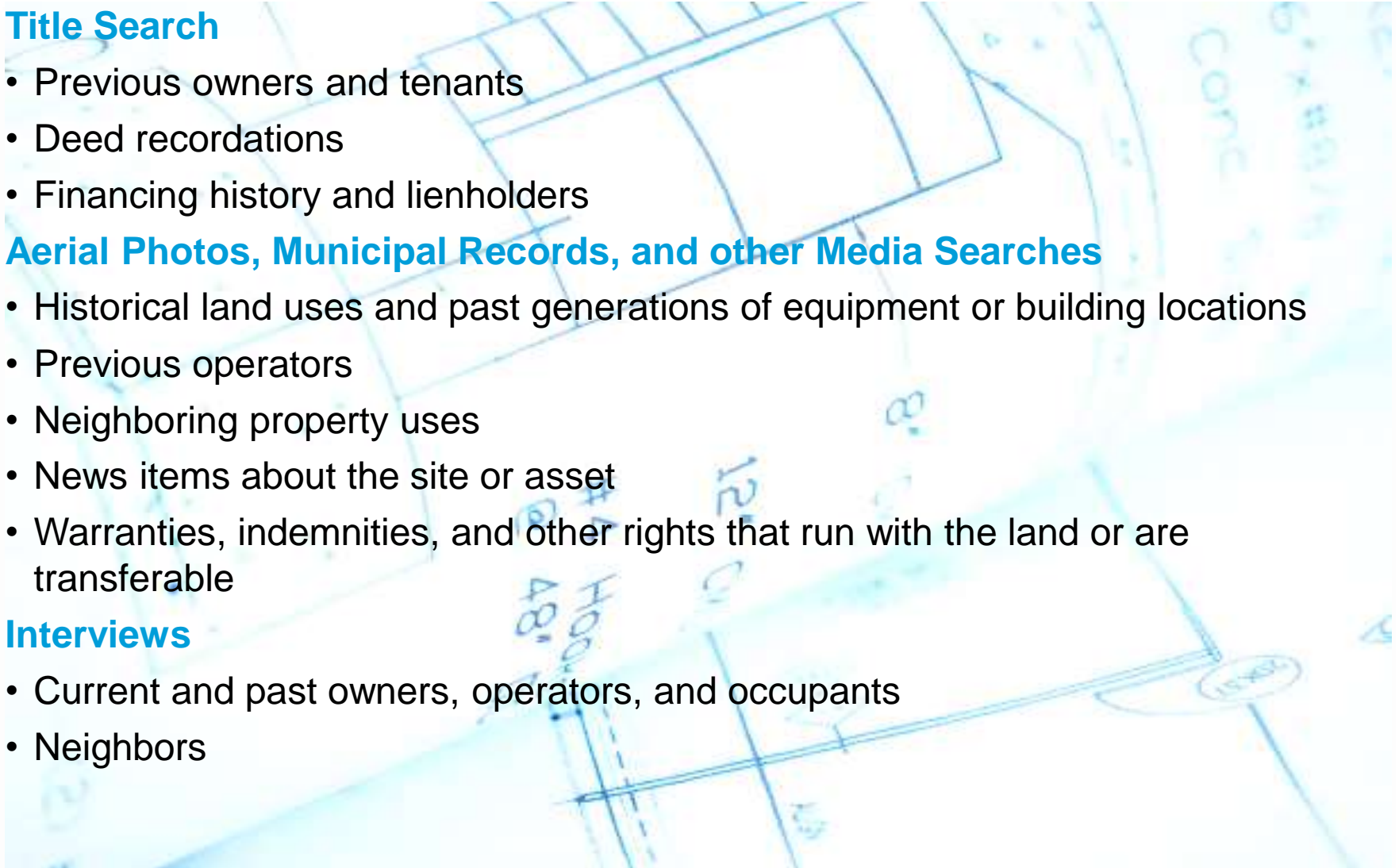
- Previous owners and tenants
- Deed recordations
- Financing history and lienholders

Aerial Photos, Municipal Records, and other Media Searches

- Historical land uses and past generations of equipment or building locations
- Previous operators
- Neighboring property uses
- News items about the site or asset
- Warranties, indemnities, and other rights that run with the land or are transferable

Interviews

- Current and past owners, operators, and occupants
- Neighbors



Doing the Due Diligence

Condition of the Site or Asset

Site Visits, Phase I Environmental Site Assessment, or other Non-Invasive Assessment

- Building and equipment siting and conditions
- Products, materials, and waste inventory
- Topographical features
- Migration pathways
- Location of utilities
- Visible ground surface and surface water anomalies
- Sensitive receptors and nearby protected areas
- Indications of upset conditions, fires, unauthorized waste dumping
- Biological/Natural resources assessment



Phase II Environmental Site Assessment and other Invasive Sampling

- Constituents of concern in soil and groundwater
- Presence of substances of particular concern in buildings and equipment

Per- and Polyfluorinated Substances (“PFAS”)

Forever Chemicals?

- “PFAS” is a category of 2,000+ per- and polyfluoroalkyl compounds including perfluorooctane sulfonate (“PFOS”) and perfluorooctanic acid (“PFOA”).
- Known as “forever chemicals” because of their strong chemical makeup and persistence in the environment.
- Federal & state laws/regulations are seeking to address PFAS in the environment and consumer products.
- Consideration in Phase Is and due diligence
- PFAS Red Flags:
 - Manufacture, supply, or disposal of products containing PFAS.
 - Use or manufacture of firefighting foam.
 - Manufacture or treatment of products to make them water or oil resistant (or the use of fabric protection products in large volume).
 - Use of fume suppressant in electroplating.
 - Landfill, airport, or military base.



Doing the Due Diligence

Regulatory Compliance History

Permits and Permit Histories

- Building permits and certificates of occupancy
- Resource use, discharge, waste management and disposal, and materials storage permits
 - Compliance history and reportable incidents
 - Transferability
 - Operational records and monitoring data
- Storage tank, pressurized vessel, piping, and other equipment records
- Pollution control systems records
- Noise limits

O&M and Remediation History

- Regulatory orders, NOVs, fines, penalties and other compliance documentation
- Environmental audits, self-reported conditions
- Materials management plans for hazardous and radioactive substances
- Contingency plans
- Equipment removal and other site cleanup documentation

Doing the Due Diligence

Health and Safety Review

Building Code and Emergency Systems

- Indoor air quality
- Fire and life safety systems
- Mechanical, electrical, utility systems
- Structural integrity of buildings or damage to structural elements and building components
- Tap water quality and sewage capacity
- Radon and sick building concerns
- Emergency plan and emergency response
- Building maintenance and hygiene



HES Management Systems

- ISO certification, consistency relevant regulatory or industry standards
- Policy, training, leadership, audit, and follow-through

Doing the Due Diligence

Legal Issues

Pre-Existing Obligations

- Consent Decrees or other obligations with priority
- Recorded covenants

Pending or Threatened Third Party Claims

Regulatory Matters

- Production capacities that are inconsistent with permit limitations
- Permit limitations that cannot be increased for facility expansion
- Potential curbs on production as penalty for past violations

Proposed Legislation and Pending Jurisprudence

- Pending appellate or supreme court decisions that could affect operations, permit availability, development plans, etc.
- Phase-out of feedstock and intermediate constituents or key supply chain components
- Legislation or agency rulemaking that could affect operations, permit availability, remedial status, supply chain, etc.

Doing the Due Diligence

Community and Other Stakeholder Concerns

Community Issues

- Demographics, existing community conditions, infrastructure (EJSCREEN)
- NGO interest
- History of community relations
- Site security and area security
- Noise, light, smells
- Cultural and anthropological issues

Political History and Involvement

- Governmental interest and political involvement in past decision-making

Other Stakeholder Concerns

- Supply chain issues, e.g., local sourcing of materials and services
- Local perceptions about the asset or the client



Doing the Due Diligence

Getting to Know the Other Party/Parties

Experience

- Familiarity with industry or equipment
- Reputation of party and its representatives (realtors, lawyers, environmental consultants, etc.)
- Financial position
- Local or regional political or commercial affiliations

Compliance History

- Compliance histories and ratings by regulatory agencies

History with the Site or Asset

- Investments made to date
- Benefits already realized

Doing the Due Diligence

Meeting the Transaction Objectives

HES Considerations

- Availability of waste disposal facilities and wastewater disposal or treatment capacity

Regulatory Considerations

- Project development issues
 - NEPA and other EIA requirements
 - Land use restrictions
 - Endangered species
 - Environmental permitting
- Ability to transfer and amend existing permits, change zoning designations, or expand use and discharge limits to accommodate client's objective
- Administrative framework considerations



Doing the Due Diligence

Meeting the Transaction Objectives (continued)

Community Considerations

- Ability of local infrastructure and public services to support client's objective without compromising community's use and access
- Changes to ecosystem services that provide community functions (e.g., flood control, erosion prevention, recreational resources)
- Cultural, historical, archeological and aesthetic implications
- Vulnerable groups and environmental justice concerns

Political Considerations

- Changes in government
- Changes in political activism



Doing the Due Diligence

Checklist Resources

Environmental Audit Tools

- ISO 14001 checklist templates
 - <https://safetyculture.com/checklists/iso-14001/> (free download)
 - <https://goaudits.com/checklist/iso-14001-self-assessment-checklist/928/10/> (free)
- Templates and guidance by environmental consulting firms

Business Guides

- EPA [Regulatory Information by Business Sector](#)
- National Small Business Environmental Assistance Program [SBEAP](#)
- Arizona [Permits by Business Type | ADEQ \(azdeq.gov\)](#)
- California [Environmental Permitting Guide - California Office of the Small Business Advocate \(CalOSBA\)](#)
- Utah [Utah DEQ Permit Guide](#)
- Washington [Online Permitting Assistance System - Office of Regulatory Innovation and Assistance](#)



Now that you know the environmental risks, how do you...

...help your client evaluate the risks and risk tolerance?

- Transaction objectives
- Materiality thresholds
- Cost estimates
 - P10, P50, P90 scenarios
 - NPV
- Risk management strategies and mitigation measures
- Benchmarking

...APPLY ATTORNEY-CLIENT PRIVILEGE to all aspects of valuing the due diligence findings and developing the strategic approach to the transaction's environmental elements.

...help your client manage and mitigate the risks through the transaction?

- Carve outs
- Regulatory programs
- Third party liability management
- Insurance
- Deal terms
 - Representations and Warranties
 - Covenants
 - Cost Sharing / Cost Allocation
 - Indemnities
 - Releases and Waivers of Claim
 - Dispute Resolution
 - Recorded Instruments and Deeds of Trust

Managing Environmental Risks in Transactions

CERCLA

CERCLA Defenses

- Innocent Purchaser
- Bona Fide Prospective Purchaser
- Contiguous Landowner

***Need a Phase I and, if necessary, a Phase II!**



Exemptions

- Secured Creditor Exemption

Managing Environmental Risks in Transactions

Regulatory Programs

Voluntary Cleanup Programs

- Allows environmental regulators to oversee clean-ups performed on a voluntary basis by parties, typically resulting in “site certification” or a “no further action” letter.

Underground Storage Tank Funds

- Provides a means for petroleum UST owners and operators to meet the federal and state requirements of maintaining “financial responsibility” to pay for any damages arising from their tank operations.
- UST funds provide reimbursement for expenses associated with the cleanup of leaking USTs. The funds also provide money to regional water boards and local regulatory agencies to abate emergency situations or to cleanup abandoned sites that pose a threat to human health, safety, and the environment, as a result of a UST petroleum release.

Managing Environmental Risks in Transactions

Insurance

What can we insure against?

- Discovery of previously unidentified contamination.
- Discovery of contamination of adjoining property.
- Third party claims alleging personal injury or property damage (i.e. toxic tort liability).
- Government reopeners.
- New impacts caused by business operations.

Negotiating and Drafting the Deal

Purchase Price

Due Diligence Period

Conditions to Closing

Representations and Warranties

Covenants

Indemnities

Releases and Waivers of Claim

Carve Outs



Post-Closing Considerations (That You Should Definitely Consider Before Closing)



- Remember reserves for environmental liabilities you know are coming.
- Does your client or a third party need access to a real property?
- Do permits need to be transferred?

To Transfer or Not to Transfer

(that is always the permit question)

- Do you have all the permits?
- Do they *need* to be transferred?
- *How* are they transferred?
- Timing of submittals
- Agency consultations
- Financial assurance
- Compliance disclosures



Summary and Wrap-Up

Understand what your client wants to do

Become familiar with the properties or assets at the center of the transaction

Identify the environmental risks systematically

Help weigh the environmental risks against your client's risk thresholds

Consider creative solutions for risk mitigation and risk management

Keep negotiations and agreements grounded on the big picture

Does the transaction enable what your client wants to do?