

## THE RISKS INVOLVED WITH TRANSACTIONS

Companies today are aware that environmental issues can affect the risks of all types of transactions, including mergers and acquisitions, securities issuances, lending transactions and real estate transactions. Environmental investigation and remediation costs can sometimes far exceed the value of a transaction and environmental regulations may negatively impact the ability of a business to operate, as well as its bottom line. Bick Law helps companies arrive at realistic assessments of environmental liability risks and compliance issues. In addition, our California environmental attorneys help craft transaction structures and deal terms that provide reasonable resolutions of those issues for our clients.

In assessing the environmental issues that may be relevant to a transaction, our California environmental attorneys bring a wealth of experience from many transactions and from assisting clients with compliance and enforcement action in the normal conduct of their businesses. We also bring insight from our litigation and enforcement experience from other liability issues we have seen in past business dealings for clients, which informs our work on the transactional side. We also cooperate closely with a number of skilled consultants who bring added value to deal work. For example, we have served clients in transactions involving multi-site manufacturing operations, agricultural operations, oil and gas operations, landfills and facility siting. In structuring transactions, our lawyers are skilled at developing creative business approaches and agreement terms to allow the transactions to proceed as the environmental issues are identified and managed.

### **Key Environmental Considerations in Contract Negotiations**

From a liability perspective, there are certain key provisions that can create unnecessary exposure for companies that fail to comprehensively address the environmental considerations involved in their deals. Environmental representations, warranties and indemnities must be fully negotiated, and companies must make sure to add all necessary language to their contracts in order to mitigate their risk and apportion liability appropriately. Some of our attorneys' top priorities in negotiating contracts

for our clients include:

- Obtaining appropriate representations and warranties from counterparties regarding environmental law compliance and the processes and chemicals to be used
- Limiting our clients' representations and warranties while ensuring adequate disclosures
- Negotiating indemnity provisions that work with the included representations and warranties to adequately mitigate our clients' risk
- Negotiating sunsets, caps and other unique indemnity provisions when necessary
- Addressing climate change control costs and other unique and developing environmental law considerations

With respect to environmental issues, much of the focus in contract negotiations is on determining which party (or parties) will be liable in **litigation**. In transactional matters, our goal is to mitigate our clients' potential liability as much as possible while also helping ensure that their business relationships provide a stable foundation for long-term growth and profitability.

## **Our Experience with Transactions**

Our California environmental attorneys have experience working on the "deal" itself, including the terms, timing and profitability of real estate or commercial transactions, alongside in-house corporate and real estate lawyers and collaborating law firms. We have advised clients on real estate and commercial transactions – the terms and documents of the deal – and on how the transactions are affected by and should incorporate environmental and land-use considerations, future regulatory compliance and risk allocation through insurance policies and recovery.

We identify environmental issues, potential liabilities and operational constraints in real estate and corporate transactions, including the merger, acquisition, ownership, disposition or financing of impacted real estate or businesses involving manufacturing or chemical usage. We provide guidance for compliance with federal and state environmental requirements to protect our clients' business objectives.

Our California environmental attorneys have broad experience in the negotiation of transaction terms and financial assurance mechanisms to protect purchasers and lenders from unresolved environmental problems, such as escrow accounts, payment holdbacks and environmental insurance. We also have worked within the complex interaction of bankruptcy and environmental laws to shield our clients from potentially limitless future liability. We routinely negotiate provisions to control future cleanup costs and to place incentives on all parties to achieve economic and efficient solutions to environmental issues that may have to be dealt with after a transaction has closed.

We also have experience with federal and state “Brownfields Initiatives,” which encourage the productive use of existing, contaminated industrial properties. These Brownfields initiatives include “prospective purchaser agreements,” which we have negotiated in the past. Other aspects of the Brownfields initiatives we have used include lender liability regulatory actions and efforts to streamline remediation and liability allocation efforts.

In all transactions, our California environmental attorneys believe that responsiveness is key. Our role is to help complete a business transaction utilizing the best information available, not to conduct an academic exercise or to raise problems without suggesting solutions. In short, we help our clients close deals, while helping protect them from secondary environmental risks.