

# **ENVIRONMENTAL CONSIDERATIONS IN INTERNATIONAL TRANSACTIONS**

**Ruth Ivory-Moore  
Exxon Mobil Corporation  
September 2, 2010**

# ENVIRONMENTAL CATEGORIES

---

- Initial Considerations
- Assessing Environmental Risks
  - Due Diligence
- Managing Environmental Liability

# INITIAL CONSIDERATIONS

---

- Who will be involved?
- What is the timeline for environmental issues.
- Will the land use or facility operations change significantly after closing?
- Who is the other party in the transaction?
- How much information is known about environmental aspects of the facilities or properties to be transferred?
- Who should be local counsel?
- Will a consultant be required?
- How is privileged maintained?
- What will be the governing law?

# EVALUATING ENVIRONMENTAL ASPECTS

---

- **The Nature of the Business Operations**
  - Operations and raw materials same pre- and post-closing?
  - How much SHE impact could the facility/business have?  
How complex is the operation?
  - What is facility's regulatory compliance posture?
  - Is there soil or groundwater contamination?
  - How many sites/facilities are involved in the transaction?
  - How expensive are SHE issues likely to be (compared to cash flow)?

# EVALUATING ENVIRONMENTAL ASPECTS

---

- **The Regulatory and Enforcement Climate in the Country or Region**
  - How sophisticated is the local regulatory regime, and what is the enforcement climate?
  - Are there significant regional variations?
  - Is significant change likely in the near future?
  - Will caps or limits on liability or other contractual allocations of SHE risk apply only between the parties?
  - Will international standards apply?

# EVALUATING ENVIRONMENTAL ASPECTS

---

## ■ The Nature of the Buyer and the Seller

- Do the Buyer and Seller have different perceptions of the magnitude of the SHE risks?
- How risk averse is your company/your legal department?
- Do Buyer and Seller have different corporate policies that will affect SHE spending?
- How financially stable are Buyer/Seller (How solid would an indemnity be?)
- Will Buyer and Seller have a continuing relationship (joint venture, supplier, customer, etc.)

# EVALUATING ENVIRONMENTAL ASPECTS

---

## ■ The Characteristics of the Deal

- How much time is available to assess/negotiate the SHE issues?
- What is the financial structure of the transaction?
- Who's negotiating the deal -- how much involvement will there be on each side by SHE technical experts? By SHE legal experts?
- At what stage is the deal? How much flexibility is left?

# DUE DILIGENCE

---

- **During the Due Diligence Process**
  - Calibrate the due diligence activities to the right “level of significance”.
  - Gain a reasonable and appropriate understanding of the SHE issues and risks.
  - Seek appropriate business consideration and full business-side understanding of the SHE risks.
  - Avoid inappropriate creation or acceleration of SHE liabilities.
  - Be aware of when the loyalty of employees at the acquired facility/business starts to shift to the new owner.



## DUE DILIGENCE (Cont'd)

---

- Determine successor liability for acquired assets.
- Perform per ASTM Innocent Landowner Defense, international requirements (ex. ISO 14000) and other standards.
- Evaluate potential for government and non-governmental third party claim.
- Review compliance with current potential future regulatory requirements.
- Review federal, state and local compliance/enforcement files.
- Review applicable environmental transfer laws.

# NEGOTIATION PERIOD

---

- Treat SHE indemnities and other SHE provisions as one more price term.
- Capture the “delta” between different perceptions about SHE risk.
- If the parties will have important future dealings make sure the relationship is not jeopardized by a contentious process or a one-sided deal.

# NEGOTIATION PERIOD (cont'd)

---

- Avoid being the deal breaker (unless the deal is really bad).
- Avoid being the critical path.
- Address SHE permitting and operational issues as well as soil and groundwater issues and offsite waste disposal liabilities; Understand the law that currently applies.

# MANAGING LIABILITY

---

- Allocation of liability and risk.
- Optimization of purchase/sells price.
- Minimize post-closing costs related to disputes.
- Do not “pay twice” for same liability.
- Keep appropriate nexus between “risk and reward”.
- Ensure that the environmental harm that may attributed by third parties is managed.

# OPTIONS FOR STRUCTURING ENVIRONMENTAL LIABILITIES AND INDEMNITIES

---

- 1. Seller retains pre-closing liabilities.
- 2. Seller Cash-Out.
- 3. Known/Unknown Split.
- 4. Declining Share of Known Liabilities.
- 5. Declining Share of All Pre-Closing Liabilities.
- 6. Declining Share of All Liabilities.
- 7. Cap.
- 8. Escrow Fund.
- 9. Insurance.