



Foundations to Support Environmental Transactions: The Importance of Seeing the Forest (and Not Just the Tree)

Corporate mergers, asset acquisitions and divestitures often include a variety of environmental components or considerations – some of which can be nuanced – that can affect and can be affected by other non-environmental components. We offer six strategic considerations for businesses to successfully navigate the negotiation and execution of transactions involving industries or operations subject to significant environmental regulations.

1. Understand the business terms.

Understand where the market has been, where it is, and where it may go. Understanding the market also means understanding the regulatory landscape. It's critical for businesses to focus on how regulators may view these industries and operations, their related environmental regulatory liabilities, and how these may impact both the value of the transaction and the terms of the transaction.

2. Write the transaction terms down.

The second step to achieving a successful closing is to articulate the basic business terms – including consideration and allocation of risk. Word choice in structuring the underlying transaction will naturally uncover uncertainties, ambiguities, and disagreements, illuminating where the business deal stands. Rarely should you rely on a verbal agreement. A gentleman's handshake has its place in certain business transactions, but that gentleman's handshake must be translated to a written document before material resources are expended.

- a. Avoid reliance on verbal agreements. A "handshake agreement" has its place in certain business transactions, but before expending material effort, put a written document in place.

- b. "The best contract is a signed contract."
- c. **Begin with a non-binding Letter of Intent (LOI), Term Sheet, or Memorandum of Understanding (MOU).** Some sections of the LOI/Term Sheet/MOU should be binding (e.g., confidentiality and exclusivity). Utilize this drafting stage as an information-gathering tool (pre-due diligence period).
 - i. Consider when exclusivity may be appropriate.
 - ii. Use your form or template. See #6a (Battle of the Forms.)

3. Rely heavily on the due diligence process.

- a. Success is 90% preparation (*i.e.*, due diligence).
- b. Identify what due diligence must occur for both environmental and non-environmental (*i.e.*, other commercial) issues.
- c. Conduct an environmental assessment. Analyze whether a Phase I or Phase II assessment is appropriate.
- d. Begin thinking about how to allocate the risks discovered through the due diligence process.



4. Negotiate, Negotiate, and Negotiate.

- a. Negotiation throughout the entire process (*i.e.*, Throughout Tips 1 – 6.)
- b. Understand the other side's position *and* interests.
- c. Use the negotiation process as another way to gather additional information (*i.e.*, more due diligence.)
- d. Negotiate multiple issues at the same time. Do not address each issue in a vacuum.

5. Plan for the exit.

This is primarily relevant for M&A or investment transactions but is important for all transactions. Understand the business' end goal and the different pathways that might exist (both good and bad). Proactively address both – by outlining when the business

may want to divest itself of the target asset and how it can achieve that.

6. Memorialize the business and legal terms in a Definitive Agreement (and Ancillary Agreements).

- a. Battle of the Forms – using your form or template as the starting point can prove useful.
 - b. Set out consequences for each party if things go wrong. Consider indemnification requirements; insurance requirements; guarantees; termination rights, etc. See #5 (Plan for the exit).
 - c. Expressly set forth assumptions made by your client through the representations and warranties section(s).
 - d. Shape present and future behavior by including covenants.
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B&D's *Transactions and Due*

Diligence practice group

frequently helps clients structure and negotiate commercial transactions with an emphasis on mitigating both commercial risk and complex environmental issues.

Key Contacts



Eric Christensen
Principal
+1.206.620.3025
echristensen@bdlaw.com



Astrika Adams
Associate
+1.202.789.6063
aadams@bdlaw.com