

**Law 271.4 Sec. 001– Environmental Transactional Law
Fall 2019**

Instructor Information

Instructor: *Stefanie Gitler, Michael Saretsky and Paul Tanaka*
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Office: Café Zeb, Tuesdays from 5 - 6 pm

Course Information

Meetings: *6:25pm - 8:15pm, Tuesday evenings.*

Location: *Room 130*

Prerequisites or Co-requisites: *None*

Credit Hours: *2.0*

Course Materials

- Readings will be posted on bCourses.

bCourses Website: <https://bcourses.berkeley.edu/courses/XXXXXX>

Course Description

Environmental issues often play a critical role in business and corporate transactions. This class provides practical skills development focusing on the environmental aspects of transactions, with a core emphasis on the identification, management and allocation of environmental liability risks in many different types of transactions. The class will use simulated assignments and activities so that students will have the opportunity to study legal principles and practical methods as they are embodied in the potential transactions of hypothetical clients. The course will include the following skills-based activities: (i) the essential methodology for conducting due diligence to identify environmental liabilities; (ii) providing legal advice to clients; (iii) best practices in reviewing, negotiating and drafting transactional documents for environmental matters; (iv) retaining and working with expert environmental consultants; (v) use of various environmental risk management tools; and (vi) addressing post-closing and other special considerations.

Learning Outcomes

Berkeley Law Learning Outcomes

Students in the course will be expected to achieve the following Berkeley Law Learning Outcomes:

- Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context;
- Exercise of proper professional and ethical responsibilities to clients and the legal system; and
- Other professional skills needed for competent and ethical participation as a member of the legal profession.

Course-Specific Learning Outcomes

This class is intended to help you develop practical skills and knowledge that can be applied in an environmental legal practice that includes transaction-oriented work. By the end of this class, students should be able to:

- Use due diligence methods to identify key types of legal and technical environmental risks that may impact a business transaction;
- Critically evaluate the transactional implications of environmental risks and mitigation options;
- Negotiate favorable transactional outcomes to allocate environmental risks; and
- Prepare key documents used in environmental transactional practice, including due diligence materials and various types of commercial agreements.

Assignments/Exams/Experiential Exercises/Papers/Projects

The assignments in this class are meant to be indicative of the work that environmental transactional attorneys prepare on a daily basis in their practice. We will be working on a mock transaction throughout the entire course, the details of which will be provided on the first day of instruction.

- Diligence Request List: You will draft a list of due diligence requests to be shared with a target Company at the outset of a diligence process. This list will include the standard information requested in order to properly assess environmental liabilities of the business conducted by a target and will be based on information already provided in a data room prepared for the mock transaction.
- Due Diligence Memorandum and Client Download: You will write a memorandum summarizing the findings of your environmental diligence for your client, identifying any material environmental health or safety issues that you have identified. You will then participate in a conference call with your “client” (i.e., a professor) and orally share the results of your diligence.
- Markup of Purchase Agreement: You will review and mark up the environmental provisions of a Purchase Agreement on behalf of your client.
- Markup of Credit Agreement: You will review and mark up the environmental provisions of a Credit Agreement on behalf of your client.
- Indemnity Claim Letter: You will draft a claim for indemnification by the seller for environmental matters identified during the course of your diligence.

These assignments will be provided consistently throughout the course. **There will be no final exam.**

Grading/Evaluation

- Written Assignments: The written assignments described above will all be graded and account for the following percentage of your final grade:

- Diligence Request List: 15%
 - Due Diligence Memorandum: 25%
 - Markup of Purchase Agreement: 20%
 - Markup of Credit Agreement: 15%
 - Indemnity Claim Letter: 15%
- Client Teleconference: The client telephone conference will account for 10% of your final grade.
 - **Class Participation: Class attendance is mandatory.** If you need to miss a class, please e-mail the instructors ahead of time. We expect each student to be prepared to participate in discussions of the relevant topics each day, and anticipate lively and diverse class participation. The goal is to provide students the opportunity to share thoughts and opinions and not to intimidate or embarrass anyone. Everyone is encouraged to volunteer answers, participate in discussions and ask questions throughout class. Sometimes, we will need to postpone answers to questions for timing and other reasons, but you should feel free to raise any questions that were not answered in class during office hours. **Class participation will be used in determining a tiebreaker for students at grade borderlines.**

Course Policies

To ensure a successful semester for you and your peers, we expect the following of every student:

- Attendance at every class is required. Absences will be excused only with advance notice to the professors in cases of illness or personal/family necessity. The professors may request proof of the need for such absence.
- Students are expected to come to each class meeting prepared to participate. Failure to come prepared to a class is a serious issue. Per the course grading/evaluation policy, lack of participation in classes may impact your grade.
- Students will complete assigned tasks and fulfill responsibilities in a reliable and timely manner.
- Students will establish rapport and relate well to their peers and the faculty in a learning environment. Students will maintain honesty, contribute to an atmosphere conducive to learning, and resolve conflicts in a dignified manner.
- Students may use a laptop or other device to take notes and/or access course-related materials during class. However, accessing the internet (or apps) during class should be limited only to course purposes. You cannot check Facebook or Instagram and successfully follow, or make meaningful contributions to, class.

Course Schedule

Note: Readings are subject to change; Please check the syllabus on a weekly basis, and we will let you know in class of any changes.

Class Date	Topic	Reading and Other Assignments (to be completed prior to the class identified in the first column)	Relevant Learning Outcome
Week 1	Introduction and Overview of Select Environmental Laws	<p><i>Reading:</i></p> <ul style="list-style-type: none"> Walter Lohmann, Environmental Transactional Practice -- Its Origins, Its Evolution and (Hopefully) its Future (2014). U.S. EPA, Office of Solid Waste and Emergency Response, <i>Superfund: 20 Years of Protecting Human Health and the Environment</i> (Dec. 2000) U.S. EPA, Office of Enforcement and Compliance Assurance, Landowner Liability Protections Overview <i>New York v. Shore Realty Corp.</i>, 759 F.2d 1032 (2d Cir. 1985) U.S. EPA, Office of Solid Waste, 25 Years of RCRA: Building on Our Past to Protect our Future Skim: U.S. EPA, Office of Solid Waste and Emergency Response, <i>RCRA Training Module: Introduction to Generators (40 C.F.R. Part 262)</i>, Chapter 3 - Regulations Governing 	<ul style="list-style-type: none"> Explain and understand the basics of key environmental laws addressing liability for the treatment, storage, disposal and release of hazardous substances that are frequently considered in the context of business transactions.

		Hazardous Waste Generators (Sept. 2005)	
Week 2	Corporate Legal Framework Governing the Transfer and Assumption of Liabilities	<p><i>Reading:</i></p> <ul style="list-style-type: none"> Edwin L. Miller Jr., MERGERS AND ACQUISITIONS: A STEP-BY-STEP LEGAL AND PRACTICAL GUIDE ["Miller M&A"], Select Segments of Chapters 1 - Structuring Fundamentals (pgs. 13-16 only), and Chapter 3 - Corporate (Non-Tax) Structuring Considerations (pgs. 86-87; 116-118 only) (Oct. 2015) <i>United States v. Bestfoods</i>, 524 U.S. 51 (1998) <i>United States v. Carolina Transformer Company</i>, 978 F.2d 832 (4th Cir. 1992) 	<ul style="list-style-type: none"> Explain the process by which environmental liabilities may be transferred or assumed by various legal entities through transactional arrangements and operation of law Demonstrate a basic understanding of the treatment of environmental liabilities in a transactional context
Week 3	Due Diligence to Identify Environmental Liabilities	<p><i>Reading:</i></p> <ul style="list-style-type: none"> Annemargaret Connolly and Thomas D. Goslin, LexisNexis Practice Advisor, Environmental Due Diligence and Risk Allocation in M&A Transactions (Section I only) (2015) Miller M&A, Chapter 2 - The Acquisition Process (pgs.23-31; 49-51 only) Articles re <i>Invista v. Dupont</i>. 	<ul style="list-style-type: none"> Demonstrate an understanding of the key steps in the transactional due diligence process Identify and evaluate key methods of due diligence to identify environmental liabilities and risks Scope out an appropriate environmental due diligence review
Week 4	Working with Technical Environmental Experts	<i>Assignment:</i> Prepare diligence request list based on contents of data room.	<ul style="list-style-type: none"> Describe and define the role that technical environmental experts play in the environmental

		<p><i>Reading:</i></p> <ul style="list-style-type: none"> • Fox Rothschild LLP, Attorney's Guide to Using Environmental Consultants as Experts • Ramboll Environ Standard Phase I Terms and Conditions • EPA All Appropriate Inquiry Rule • Sample Phase I/LECR Report 	<p>due diligence process and the legal implications of their services</p> <ul style="list-style-type: none"> • Evaluate and explain the considerations in retaining and working with environmental consultants and experts
Week 5	Phase I Environmental Site Assessment Site and Limited Environmental Compliance Review Visits	<p><i>Reading:</i></p> <ul style="list-style-type: none"> • Skim: Ramboll Draft Phase I ESA and LECR (September 2019) • Kirkland Form Retention Letters 	<ul style="list-style-type: none"> • Demonstrate an understanding and describe the basic components of a Phase I Environmental Site Assessment and Limited Environmental Compliance Review
Week 6	Attorney-Client Relationship Management; Conflicts of Interest	<p><i>Reading:</i></p> <ul style="list-style-type: none"> • Raymond L. Sweigart, Attorney-Client Privilege: Pitfalls and Pointers for Transactional Attorneys (ABA Business Law Today, Volume 17, Number 4, March/April 2008) 	<ul style="list-style-type: none"> • Identify the unique aspects of attorney-client relationships in the transactional context for different types of clients • Explain how such relationships may differ from those in other types of legal work
Week 7	Environmental Considerations in Stock Purchase Agreements	<p><i>Assignment:</i> Prepare due diligence memorandum insert for practice transaction.</p> <p><i>Reading:</i></p> <ul style="list-style-type: none"> • Abbi Cohen, Lydia Duff, Jeff Gracer, Betty Moy Huber and Larry Nettles, Current Environmental 	<ul style="list-style-type: none"> • Identify the key risk-allocation components of a stock purchase agreement from an environmental perspective • Review and comment on such provisions from a

		Considerations in Business Transactions with Sample Contract Language (ABA Section of Environment, Energy, and Resources, Abstract from 23rd Fall Conference) (2015)	pro-buyer and pro-seller perspective
Week 8	Environmental Considerations in Asset Purchase Agreements	<i>Assignment:</i> Prepare for and participate in due diligence download teleconference with client regarding practice transaction.	<ul style="list-style-type: none"> Identify the key differences between an asset purchase agreement and stock purchase agreement from an environmental risk-allocation perspective Review and comment on environmental provisions in an asset purchase agreement from a pro-buyer and pro-seller perspective
Week 9	Indemnification Claims and Procedures	<i>Reading:</i> <ul style="list-style-type: none"> Select materials on environmental indemnification claims and procedures 	<ul style="list-style-type: none"> Evaluate and analyze the applicability of environmental indemnity claims depending on timing, process and limitations Demonstrate an understanding of the typical indemnification claim process
Week 10	Environmental Risk Management	<i>Assignment:</i> Prepare markup of purchase agreement related to practice Transaction <i>Reading:</i> <ul style="list-style-type: none"> Ann M. Waeger, Greenbaum, Rowe, Smith & Davis LLP, Current 	<ul style="list-style-type: none"> Evaluate and determine the applicability of key risk management tools that can mitigate risks of environmental liabilities in connection with transactions

		<p>Insurance Policies for Insuring Against Environmental Risks, Sections I-VI; Skim Sections VIII and IX.</p> <ul style="list-style-type: none"> • CDC ELT Case Studies 	<ul style="list-style-type: none"> • Identify issues associated with environmental policy coverage and language and negotiate appropriate environmental insurance coverage • Respond to inquiries and diligence requests from third-party insurance underwriters or government with respect to underlying environmental risks.
Week 11	Environmental Considerations in Credit and Lease Agreements	<p><i>Reading:</i></p> <ul style="list-style-type: none"> • Annemargaret Connolly and Matthew Morton, Lender Liability Under Environmental Laws in Real Estate Transactions 	<ul style="list-style-type: none"> • Identify the key risk-allocation components of credit agreements and lease agreements from an environmental perspective • Review and comment on such provisions from differing perspectives
Week 12	Negotiating Environmental Aspects of Transactions	<p><i>Assignment:</i> Prepare markup of credit agreement related to practice transaction.</p> <p><i>In-Class Exercise:</i> Issue Spotting and Negotiation of Disputed Contract Language.</p>	<ul style="list-style-type: none"> • Spot and analyze issues arising in a markup by opposing counsel of purchase or credit agreements • Negotiate in person with a counterparty to reach a commercial resolution • Memorialize an agreement in writing for the client or deal team
Week 13	Post-Closing Action Items and Permit Transfers	<p><i>Reading:</i></p> <ul style="list-style-type: none"> • Select materials on environmental permit transfer requirements • Select materials on EPA's Interim Approach to 	<ul style="list-style-type: none"> • Describe the competing considerations in investigating and addressing environmental issues identified in due diligence after closing of a transaction

		Applying the Audit Policy to New Owners	<ul style="list-style-type: none"> • Demonstrate an understanding of issues and timing involved with transferring environmental permits • Evaluate and analyze the most effective methods and processes to set up a client for a successful exit and sale
Week 14	Other Special Environmental Issues	<p><i>Assignment:</i> Draft environmental indemnity claim letter.</p> <p><i>Reading:</i></p> <ul style="list-style-type: none"> • Select materials on New Jersey Industrial Site Recovery Act and emerging environmental issues 	<ul style="list-style-type: none"> • Determine the applicability of transaction-triggered environmental laws in connection with different types of transactions • Explain the reasoning and key issues behind the growing trends in environmental regulation and emerging environmental issues