

**Robinson+Cole**

**IDENTIFYING AND NEGOTIATING  
ENVIRONMENTAL, SAFETY & HEALTH  
RISK IN MERGERS AND ACQUISITIONS**  
*Moderated Peer Discussion*

**FEATURING:**

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## Please Note

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The presentations and discussions today are designed to provide accurate information about the subject matter. However, it only provides general information and does not constitute legal advice. No attorney-client relationship has been created. If legal advice or other assistance is required, let us know directly.

# Preliminary Considerations

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- This platform should not be used for activities prohibited by antitrust law.
- Avoid discussions leading to a restriction, or coordination, of competition between or among attendees.
- Attendees should not share information, have discussions, and/or make arrangements on, among other things, pricing, market conduct, terms of sale, individual manufacturing costs and costs of sale, output, or supplier or customer relations/allocation.

# Agenda

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- Managing ESH Risks in Mergers and Transactions
- Current Trends and Topics
  - PFAS
- Q&A / Discussion

# Environment, Safety & Health (ESH) Risks

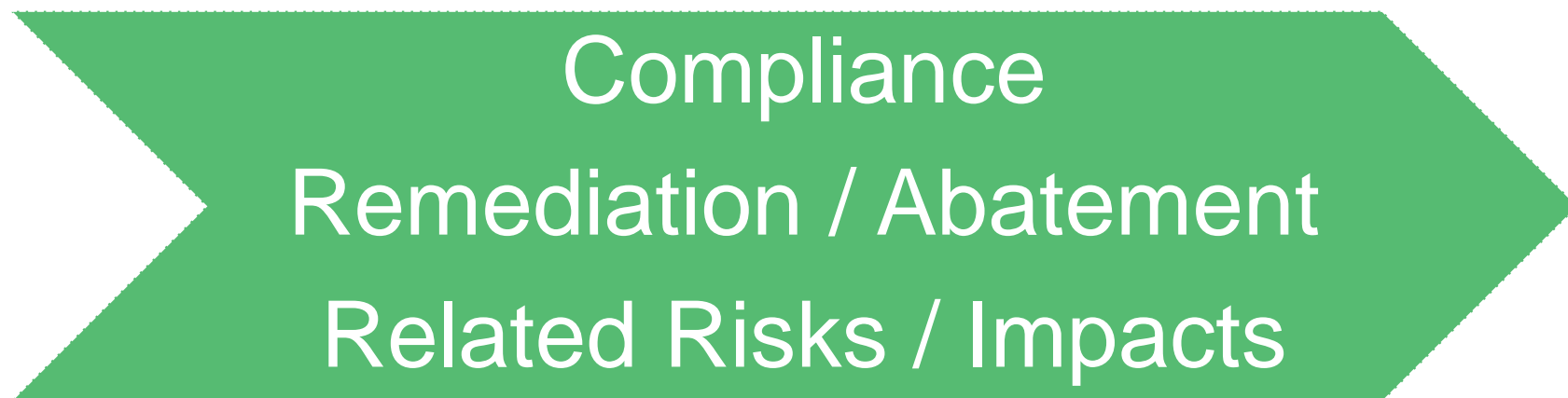
- Regulatory Compliance
- Site Remediation and Building Abatement
- Product and Workplace Conditions
- Related Risks of Enforcement/Litigation, Bad Publicity, Reputational Damage, and Market Impacts



**WARNING**  
This Facility Contains  
Chemicals Known To  
The State of California  
To Cause Cancer, and  
Birth Defects or Other  
Reproductive Harm.



# Opportunities to Manage ESH Risks



- Deal Planning and Preparation
- Due Diligence and Initial Terms
- Closing Conditions and Final Terms
- Post-Closing Covenants and Integration Efforts

# Deal Planning & Preparation



- **ESH Risk Effects on Company's Marketability**
  - What ESH risks are known or likely to be examined?
  - Quantified impact? Material? Easy/difficult to resolve?
- **Company's ESH Requirements, Liabilities and History**
  - Necessary permits, approvals, and rights?
  - Compliance history and status?
  - Legacy obligations and sites (Superfund or formerly-owned)?
  - Other risks from properties, operations and products?
  - Previous attempts to sell?
- **Options for Addressing/Allocating ESH Liabilities**
  - Seller just studies/quantifies prior to marketing business
  - Seller addresses prior to marketing business or as closing condition
  - Seller addresses as retained liability/covenant surviving closing
  - Buyer assumes and addresses post-closing

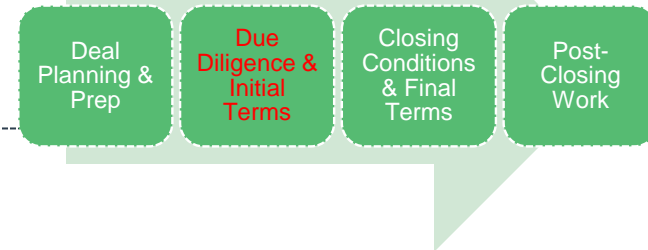
# Deal Planning & Preparation



- Effects of Deal Structure on ESH Risks
  - Asset Sale – Target company dissolves
  - Stock Purchase – Target company continues
  - Merger – Target company often survives
- Approvals/Notices for Permit/Order Compliance
  - Same permit/order holder?
    - Special permit or rule conditions, e.g., changes in control?
  - New permit/order holder?
    - Transferrable? Filing requirements/deadlines?
    - New permit application/registration required?
    - Special permit or rule conditions, e.g., changes in control?
- Brownfield/BFPP or other opportunities to separate new from prior Owner/Operator responsibilities

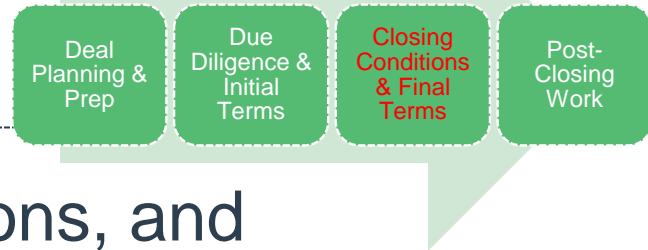


# Due Diligence (DD) and Other Initial Terms



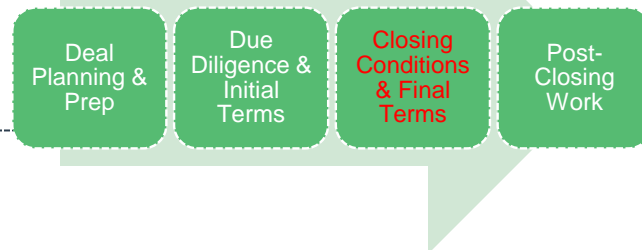
- LOI / Initial Contract
  - Reflect Seller's opening position(s) and concessions on ESH risks
  - DD: Buyer's opportunity to identify ESH defects/risks affecting how it values the company and whether/when it closes
- NDAs / Confidentiality and Access Agreements
  - Records and other non-invasive access?
  - Invasive testing access?
- Technical/Legal Teams
- Electronic Data Rooms
- Information/Document Requests
  - May include Phase I Questionnaires
  - Often tied to contract reps and warranties

# Closing Conditions and Other Final Terms



- “As Is” and DD Terms, ESH Definitions, and Reps/Warranties
  - Scheduled/Specified Exceptions
  - Materiality, Time and Other Limitations
- Excluded/Purchased Assets; Excluded/Assumed Liabilities
- Indemnification, Dispute Resolution, and Survival Terms
- Curing Defects and Meeting Closing Conditions
  - Permit Transfers and Other Govt. Authorizations/Filings
  - Remediation Work, Tank Removals, Asbestos/Lead Abatement Projects, etc.
  - Seller or Buyer Obligation? Performance and Financial Terms?

# Final Closing Terms – Insurance and Risk Transfer



- Reps & Warranties Insurance
- Pollution Legal Liability (PLL) and Cost Cap Insurance
- Environmental Risk Transfer (ERT) Deals
  - When? M&A examples include ...
    - Neither Buyer nor Seller want to assume environmental risk
    - Conservative investor or party
  - What?
    - Special purpose ERT entity assumes liability and remedial work obligations (including signature/compliance with permits, orders, etc.)
    - ERT indemnifies parties broadly ... possibly in perpetuity and covering known and unknown conditions located on-site at closing, as well as changes in law
    - Indemnity is strongly collateralized with multiple overlapping financial tools (e.g., Excess Indemnity Coverage, PLL Insurance, Fixed-Price Contracts, Escrow, Purchased Assets Pledge)

# Final Closing Terms – Post-Closing Work



- Performance / Control of Remediation
- Funding Obligations / Escrow and Reimbursement Terms
- Coordination of Remediation Work with Operations/Development Plans
- Long-Term Access and Rights ... Deed Reservations and Restrictions

# Post-Closing Cleanup Work

Deal  
Planning &  
Prep

Due  
Diligence

Closing  
Conditions

Post-  
Closing  
Work

- Ownership of Land/Buildings? Operations?
- Rights/Limits to Site Access and Cooperation
- Rights to Impose/Record Land Use Restrictions
  - Held/Enforced by Agency
  - Held/Enforced by Private Party



# Post-Closing Integration



- “Day 1” Teams and Other Integration Planning
- Tracking/Documenting Completion of ESH Action Items
- Divestitures and Other Governmental Approval Conditions

### Integration Management Tools Deployed

Detailed integration and synergies plans have been developed along with tools to track progress

- Daily / Weekly Issues Log and Status Tracker
- Integrated Travel Calendar
- Detail Work Plan by Function
- Synergy Plan / Tracker

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### Executive Summary

- Safety improvement
  - Mandatory locations
  - Comprehensive
  - Training
  - Regulatory
- Evaluating fire
- Evaluating
- Proceeding
- Conducting E
- Will use
- Continuing to

### EH&S Summary Status

**Owner:** John Peacock

**Overall Status:** ●

**Comments:** All key milestones on track

Sr Level EH&S position in business case. Plan is for entry level based at SFC, and Sr level to be responsible for IF-China and Tancang. Total cost same as original business case.

Capital expenditures for fire suppression and machine guarding in China are planned in accordance with business case.

Key Tasks	Owner	Current Status	Deadline
Regulatory notifications of change-of-control	J Peacock	<span style="color: green;">●</span>	Complete
On-site assessments	J Peacock	<span style="color: green;">●</span>	Complete
Machine guarding assessments	J Peacock	<span style="color: green;">●</span>	Complete
Fire suppression China	J Peacock, K. Shen	<span style="color: yellow;">●</span>	Q2 2014
Consolidate policies, procedures, metrics & reporting requirements	J Peacock	<span style="color: green;">●</span>	Q4 2014

**Net Synergy** (\$ million)

■ Business Case  
■ Latest Estimate

None identified

**Capital Expenditures**

2014: \$9.00, 2015: \$0.7, 2016: \$0.0

**Total Headcount (FTE)** (FTE of \$150k/yr)

2014: 0.5, 2015: 1, 2016: 1

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# Current Trends and Topics - PFAS

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- Identifying the risk:
- Manufacturers of PFAS-containing products
- But also:
  - PFAS in supply chain
  - PFAS in former products
  - Offsite waste co-mingled disposal facility with PFAS contamination
  - Contamination from nearby, unrelated facilities
  - Contamination in public water supply, public wastewater system
  - Potential worker exposure

# PFAS in Corporate Contracts

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- Representations and warranties
  - Are PFAS covered?
  - Relevant definitions:
    - Hazardous Materials
    - Hazardous Substances
    - Violations of Environmental Law
    - Environmental Conditions
- Liability for future conditions or violations of future laws
- Scope of indemnification

# Conclusion

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**Questions?**