



# Environmental Issues in Transactions and Risk Management

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Environmental Practicum  
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# Announcements, and Looking Ahead . . . .

- Final speaker next week – Roger Haseman on Texas environmental criminal enforcement
  - Likely will NOT have projects for students
- Given circumstances, will likely not have in-class lecture next week on Texas criminal issues (except perhaps a brief overview of key differences from federal law)
- Focus on semester projects and remaining client projects instead. Will schedule one-on-one sessions to check on status and help.





## Transactions and Environmental Risk Allocation

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- Quick look back – types of environmental liabilities
  - CERCLA/asset liability
  - Operational liability
  - Compliance liability (including criminal)
  - Valuation liability (for public traded companies and debt)
- So how do you allocate liabilities in a corporate transaction that involves environmental risks?
  - Dictated by contract, with public policy limits
  - Key – creativity!
  - Operate within fundamentals of corporate limited liability and corporate forms (LLCs, LLPs, flexible purpose corporate forms)

# Corporate Transactional Basics

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- Typically, you're looking at corporate law, not environmental law. Overwhelmingly state law, not federal law, will govern.
- Key concepts
  - Limited liability
  - Stock v. asset transactions
  - Dissolution of corporations
  - Closely held v. publicly traded corporations
- Recurring questions:
  - Corporate successor liability
  - Piercing the veil, and direct liability (*Best Foods*)
  - Zombie corporations (after dissolution)
  - Suing widows and family members in closely held corporations





So How Do You Deal with the  
Black Box Transaction?



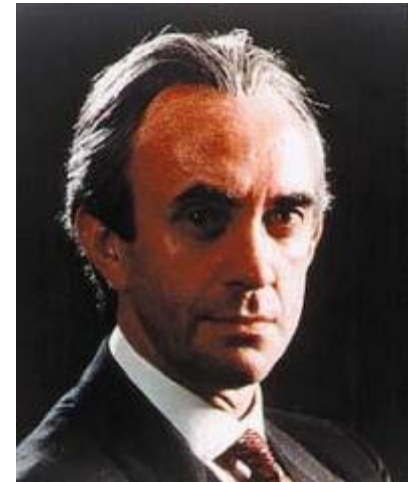
# Contract Tools

- Parties can freely allocate risks among themselves
  - CERCLA section 107(e)
  - Fraudulent conveyances
    - Kerr McGee-Tronox
    - Monsanto-Solutia
  - Fraudulent exclusion of assets
    - Refinery donut rings



## Typical contract tools

- “As is” clauses
- Releases from liability
- Representations and Warranties
- Indemnification
  - Beware the Express Negligence Rule
  - Duty to Hold Harmless, and to Defend



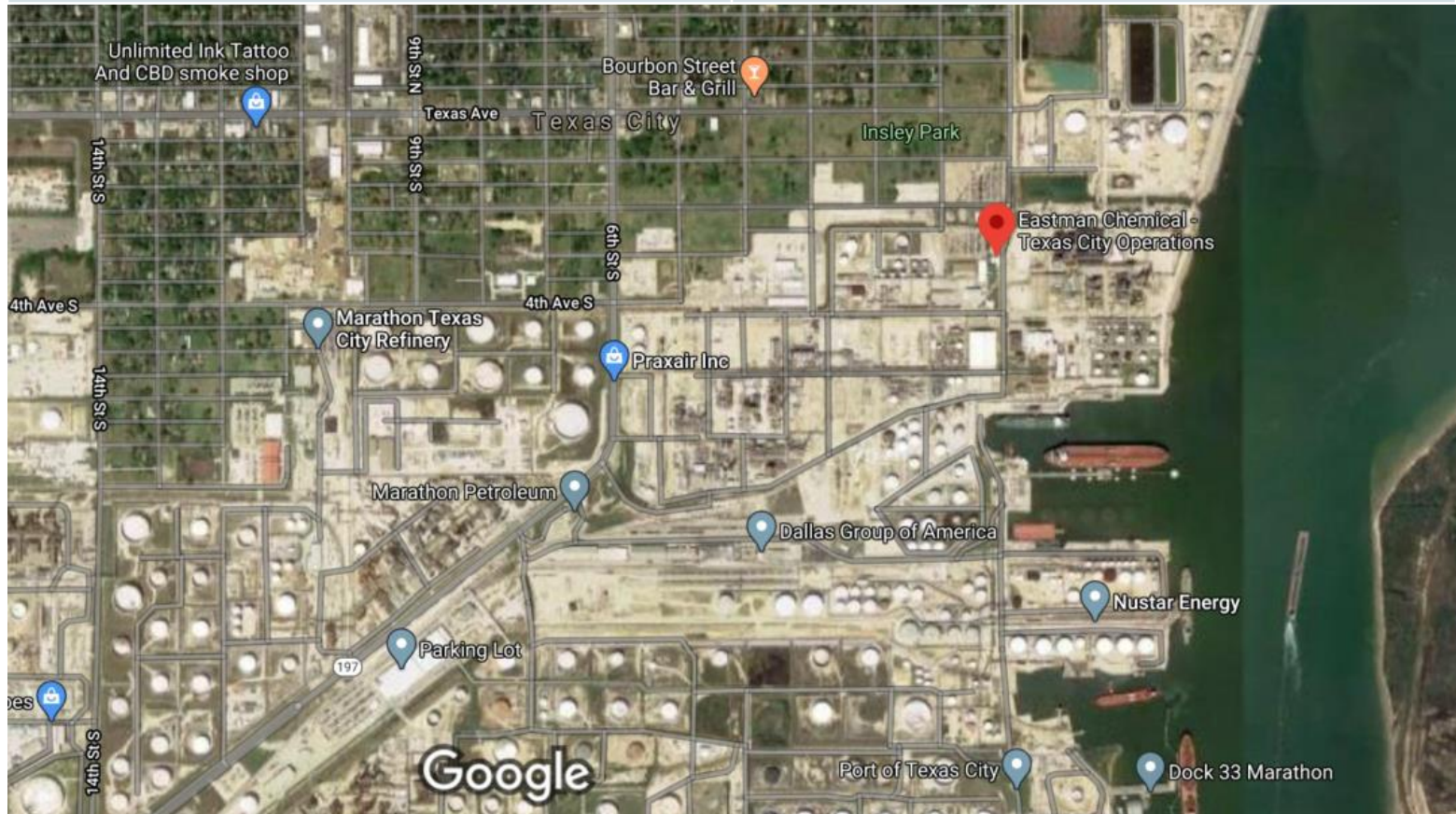
# Typical contract tools (cont'd)

Agreements to Remediate

Escrows, baskets, caps

Bright line agreements (pre- and post-closing liability)

Disclosures and Exceptions – the voluminous Exhibit





# Rules of Thumb

- Seller:
  - Limited warranties and representations - materiality, knowledge
  - Fixed duration of obligations
  - Broad disclosure of known impairments or conditions
  - Caps on indemnity liability, if any
  - Exclusion for future changes in law or standards
  - Indemnify seller for post-closing conditions
  - Choice of law, choice of venue, arbitration
  - Limited duty to cooperate prior to closing or afterward
    - Site access, operations disruption
- Buyer – just flip all of these presumptions
- How to escape the zero sum posture?

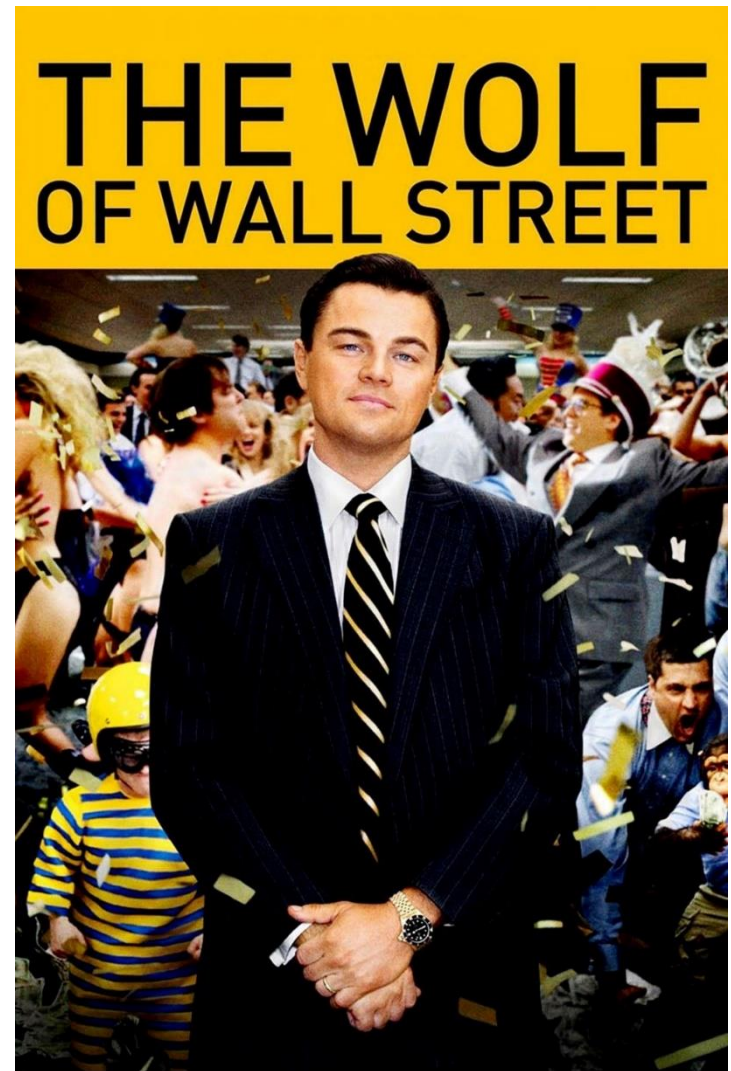
# So What About the Lawyer?

- Lawyer's role in transactions
  - Never lose sight of who's the client
  - Fiduciary duties
  - Diligence process
    - AAI for BFP or IOP
    - Permit compliance review
    - Past violations, especially criminal
  - Permit transfer strategies
  - Ongoing litigation
  - Working with the consultant
  - Privilege concerns and audit disclosures



## Additional issues for transactions

- Bankruptcy
  - Strategic option
  - Keep in mind scope of discharge
  - Bankruptcy bar
  - Qualified settlement trusts (468B)
- Insurance and commercial risk transfer products –
  - Synthetic Superfund Cashouts
  - Transactional insurance





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