

Speaker	Dialogue
Sam Levy	<p>Hello everyone and welcome to this afternoon’s third installment of our BCLP Environmental Bulletin Series. Today’s session will look at environmental permits. I’m Sam Levy, from the BCLP Environmental Team and I’ll be asking today’s questions with answers coming from my colleagues Aidan Thomson and Isabelle Laborde.</p> <p>If anyone has any questions throughout the session then please do ask them in writing using the questions function which you should all see on your screens now. We’ll reply to these in writing after the session.</p> <p>Alright, let’s kick things off. So environmental permits. Lots of activities require one by law to be conducted lawfully, and they’re issued by the environmental agency or local authorities for certain lower tiered activities and installations.</p> <p>As to what activities require them, we’re talking here about waste management activities, water and flood risk related activities, industrial facilities like refineries and factories and also energy installations.</p> <p>But on top of that, we’re also talking about some much more run-of-the-mill activities as well. Discharges into water courses, storage, waste movements during property development, relatively common stuff.</p> <p>Now permits are full of conditions and they also give very wide powers of intervention to the regulator [inaudible 3:25:33]. In particular regarding investigation and clean-up. There are also criminal penalties and potentially high fines for anyone in breach.</p> <p>Very importantly, in the context of today’s session, they’re personal to the operator and not the site, and they can’t be easily transferred to others who want to take over the relevant activity, or that easily surrendered back to the regulator when the activities comes to an end and the permit is no longer needed.</p> <p>So Aidan, environmental permits can be issued in property transactions. What questions should you be asking yourself when acquiring a property that is subject to an environmental permit?</p>
Aidan Thomson	<p>Well Sam, there are four critical questions, really to ask yourself. First of all, do you need a permit for what you want to do? Second, if the answer to that is yes, is there one already in place with the current owner and can it be transferred to you. Third, if the permit with the current owner isn’t adequate for what you want to do, can you apply for a new one? And fourth, if you don’t need a permit for what you want to do, what’s going to happen to any that are held by the outgoing owner? Because they don’t just disappear of their own accord.</p>
Sam Levy	<p>Alright, so Isabelle, what’s the risk then if you acquire a property that’s subject to an environmental permit that you don’t actually need to operate that property?</p>
Aidan Thomson	<p>Well Sam, if the permit is transferred to you, you should be aware of the risk of environmental liability being attached to ownership of that permit. You should also be aware of the regulatory power of the environment agency.</p>

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Sam Levy	Hold on, you're telling me that just because I acquire a property that's subject to an environmental permit that I don't actually need, the environmental agency could still regulate the use of that property?
Aidan Thomson	That's correct Sam. Nothing should be done at the property that could result in a breach of the terms and conditions of the permit. And if the permit is varied, which the environmental agency can do at its own accord, the environment agency could impose new conditions, further restricting the use of the property.
Sam Levy	Alright, but then what happens if you do anything that does breach the terms of the environmental permit?
Aidan Thomson	Well then you will be committing a criminal offense. So if you acquire a property that is subject to an environmental permit, it is critical that you ensure that you can comply with this terms and conditions.
Sam Levy	But can't a permit be varied to make it more palatable, or surrendered back to the environmental agency, if it's not possible to comply with its terms and conditions?
Aidan Thomson	Well, yes you can apply to vary or surrender a permit, but you need to remember that the environmental agency will not necessarily agree to the variation or surrender, just because you need to vary or surrender your permit.
Sam Levy	Ok, so the message is don't have a permit transferred to you that you don't need or can't handle or could be a millstone around your neck. Alright so, what about from the seller's perspective then Aidan?
Aidan Thomson	Well, from a seller's perspective and primarily they want to be sure that after the transaction has gone through their responsibility under the permit has ended. And to do this, they either need to transfer the permit to their buyer or ensure that the permit gets surrendered back to the environment agency. A seller definitely doesn't want to end up holding a permit for a site that it no longer owns and no longer controls. That would be a very difficult situation for a seller to manage long-term.
Sam Levy	Ok, so arranging for transfer or surrender seems to be pretty key for the seller then? Looking specifically at transfer for a moment, I suppose if the seller wants to make sure that a permit is transferred and the buyer needs the permit to carry on the business of the site. The transfer should presumably be easy. What could go wrong then Isabelle?
Isabelle Laborde	Well first, the person seeking the transfer of the permit must meet the competence requirement. And you must also remember that the process to transfer a permit does not necessarily align with the transaction timeframe. You could therefore end up in a situation where the transfer of the permit is delaying a transaction. Or, where the permit is actually transferred before the transaction completes?
Sam Levy	How can you ensure that that doesn't happen?
Isabelle Laborde	Well, there is a two-month period for the transfer of an environmental permit. So the sooner you submit the application to transfer the permit, the better. In theory, the environmental agency should not transfer the permit without having first confirmed the date of the transfer with both the transferor and the transferee. This should allow the parties to align the transfer with the transaction timeframe.
Sam Levy	Ok, is there a way to avoid transaction being delayed by the transfer process?

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Isabelle Laborde	Yes there is. The transaction could be conditional upon the transfer of the permit. Or alternatively, both parties could enter into an agency agreement allowing the buyer to carry-out the regulated activities as agent of the seller until the permit is transferred, but that's quite complex.
Sam Levy	Yeah, yeah, that does sound like quite a complex process. So could you get environmental insurance to cover that risk?
Isabelle Laborde	Unfortunately Sam, the breach of the environmental permitting regulation is a criminal offense and this cannot be covered by insurance.
Sam Levy	Ok, ok, it sounds then, that when it comes to transfers signing has to be managed pretty carefully. So moving on, let's talk about surrenders for a moment.
Sam Levy	Aiden, is it difficult for an environmental permit to be surrendered?
Aidan Thomson	Well, it can be difficult and take a long time to surrender some permits where there are potential pollution problems with the site. So, and during the permit surrender phase the environment agency can require monitoring and potentially expensive works to be carried out before accepting the surrender because the environment agency does have to by law be satisfied that the necessary measures have been taken to return the site to a satisfactory state.
Sam Levy	So, surrender can take a long time and presumably that could hold the transaction up couldn't it, if the parties wanted the surrender done pre-completion?
Aidan Thomson	Yes, I mean, you know, you might need to make the transaction conditional on the surrender, you know, in principle, neither party is going to want a permit that nobody wants floating around unsurrendered after the sale.
Sam Levy	Ok, how, let's consider a scenario where an environmental permit is required for the site that's being purchased, but it's not already in place. How long does it take to obtain an environmental permit?
Aidan Thomson	Well, it takes three months assuming that you've submitted all of the necessary information on day one.
Sam Levy	Ok, but what if this is one of those transactions with very tight time scales?
Aidan Thomson	Well, if it's one of those transactions, then the completion may need to be conditional on the grant of the necessary permit. But of course, you've got to remember that if the buyer is proposing a change of the use in property and it's this change that is the thing that requires the environmental permit, then it's very unlikely that the seller will be happy to wait and delay the transaction.
Sam Levy	Alright, where is there anything else we should be worried about in a case like this Isabelle where a permit is needed, but there isn't one already in place?
Isabelle Laborde	Well the breach of the environmental permitting regulations which is what the fella might have done if it does not have a permit that it's supposed to have is a criminal offense. This requires the filling of a suspicious activity report which could delay the transaction and also raise the attention of the regulator.
Sam Levy	Ok, so a slight change of tact now, I know you've both been involved in a variety of situations involving permits. So let's look at a few of them now. Firstly, Aidan, we've been talking so far about the sale and purchase of properties. What about the sale and purchase of companies that own properties? Is there anything to briefly say about those situations?

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Aidan Thomson	<p>Yes, companies, if you're buying a company that has an environmental permit, then the permit is transferred with the shares unless the parties make specific arrangements otherwise. But most of the time that situation is absolutely fine, as the buyer needs the permit, and the seller wants rid.</p> <p>But very occasionally, you'll have these bespoke arrangements being entered into. It's also worth just remembering that even though when there's a sale of shares, the permit holder, the name on the permit doesn't change, the environment agency may want to know more about the change of company owner and want to know about you know, who is owning it now?</p>
Sam Levy	<p>Right, ok, ok, so on to the next question. What happens if you're acquiring a property as an investment and there's a tenant whose operation requires an environmental permit? I know we've advised on those situations in the past. Isabelle, is that your problem as the buyer?</p>
Isabelle Laborde	<p>Well, unfortunately Sam it's very much your problem as it is an offense to knowingly permit someone to carry out a regulated activity without, or in breach of an environmental permit.</p> <p>So, if you acquire a property or a company that owns a property where a tenant carries out a regulated activity without the necessary permit in place, then you could be liable for the breach. This means that if the tenant's lease requires the tenant to comply with the law or to hold all necessary consents, then you as landlord would need to enforce the lease to avoid liability.</p>
Sam Levy	<p>Ok, ok understood, so we've covered acquiring properties and acquiring companies, but what about financings? Are environmental permits at a relevance for financing transactions as well?</p>
Isabelle Laborde	<p>Absolutely, a number of points need to be considered in financing transactions. If there is an environmental permit, or if one is required.</p>
Sam Levy	<p>So what's a good example of a point that might be relevant in a financing context?</p>
Isabelle Laborde	<p>Well in financing transactions the borrower is often giving a certificate of title to the lender. In all circumstances, the borrower and the lender should agree as early as possible, whether environmental matters are being covered by the certificate of title. This way, the parties know whether environmental permitting issues need to be considered.</p> <p>This will definitely avoid delays down the line and if a regulated activity is being carried out at the property then the lender is likely to expect the certificate to cover off environmental permitting issues.</p>
Sam Levy	<p>Ok, Aidan, so another situation that we commonly encounter is where an environmental permit covers a wider site than the property which we're acquiring. So surrenders and transfers become much more complicated in those situations don't they?</p>
Aidan Thomson	<p>Oh yeah, very much so, you know, this sort of situation can be a real problem. You know, ideally, you shouldn't acquire a property that's subject to an environmental permit that's held by a third-party, but in these circumstances, you know, you simply might have to do so.</p>

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	<p>And where this happens it means that the third-party permit holder could be required to carry out works or operations on your property and you'll need to provide for that.</p> <p>And it also means that you know, you can't do anything on your own property which could potentially breach the terms of the environmental permit that's held by the permit holder third-party.</p>
Sam Levy	Aidan, so just to clarify, I purchased property, my ability to enjoy the property, my ability to enjoy the property is subject to someone else's environmental permit? That doesn't sound good at all.
Aidan Thomson	Yes but unfortunately, that's correct. I mean, it might be possible to have the permit varied so you remove, you're the property you've bought from the permit scope, but this is a mind field, and it's sometimes tempting just to accept this as a restriction, and concentrate on agreeing with the permit holder how, you know, the permit holder will go about exercising its responsibilities and managing things.
Sam Levy	<p>Ok, ok, that's really helpful. So we've worked through some of the big issues when environmental permits within both corporate and property acquisitions and we've touched on their relevance in the context of financing transactions as well. And I think that's all we have time for today. So the only thing left to me is to thank Aidan and Isabelle for their answers and also to thank all of you listening today.</p> <p>As I mentioned at the beginning, we'll come back to any questions in writing after today's session. I hope you will have a good afternoon and thanks again for attending today.</p>
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