Turning Lemons Into Lemonade: How to Remediate and Redevelop Underfunded Contaminated Sites, Including Formerly Used Defense Sites and Other Contaminated Former Military and Federal Facilities
SPEAKERS

• Mr. Timothy Rogers, A.A.E., Executive Director, Salina Airport Authority

• Mr. Jeffrey A. Bolin, M.S., CHMM, Vice President - Technical Operations, The Dragun Corporation

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• Mr. Chris Wendelbo, J.D., LL.M., The Session Law Firm
Presentation Organization

• Presentations and Panel Discussion
• Questions / Answers
• Discussion of Additional Successful Tactics
Presentation Objectives

• **Knowledge** – Identify remediation and financing techniques that work.
• **Control** – Discuss techniques to Assume gr.
• **Quality** – Achieve genuine environmental protection.
• **Efficiency** – Focus resources on relevant issues and avoid missteps.
• **Collaboration**– Session participants share other successful techniques.
Redevelopment of Former Federal Facilities
The Reason We Are Here
Redevelopment of Former Federal Facilities

• BRAC SITES
  – Status
  – Funding
  – Redevelopment momentum / Remediation

• FUDS SITES
  – Lack of funding
  – Site control issues
  – Inability to address residual contamination
Redevelopment of Former Federal Facilities

• Mixed BRAC / FUDS
  – Effective coordination among Federal Entities
  – Continuity of redevelopment with lack of ability to address FUDS environmental issues.

• Military Munitions
Case Studies: BRAC and FUDS Sites
Local Community Considerations

Timothy F. Rogers, A.A.E.
Executive Director
Salina Airport Authority
FORMER SCHILLING AIR FORCE BASE, SALINA, KANSAS
Schilling Air Force Base: Site Background

- SAC Base
- Operated from 1942 to 1965
- Conventional and Nuclear Weapons Systems
- Twelve (12) Nuclear Missile Silos
- Transferred to Salina Entities in 1965
- Current Uses Include:
  - Municipal Airport
  - University and Vo-Tech Facilities
  - Active Military Operations
  - Private Business/Light Industrial
Schilling Air Force Base: Site Background

- FUDS Site
- Significant Environmental Contamination, including VOCs, SVOCs, Metals, POL, Military Munitions/Lead, Landfills with Unknown Contents
- Groundwater Plumes On Base and Off-Site, Moving towards City’s Water Supply
- Currently negotiating with COE and DOJ for a compromised settlement with the United States
- Salina Entities would assume remedial tasks/obligations
Former Richards-Gebaur Air Force Base: Circa 1990
Richards-Gebaur: Site Background

- Former Air Force Base that has been conveyed to the City of Kansas City, MO and the Port Authority of Kansas City, MO over the last twenty years.
- Contains BRAC, FUDS and IRP
- Contamination includes: VOCs, SVOCs, landfills with unknown industrial contaminants, pesticides, POL and lead from skeet range operations.
- BRAC Sites are well characterized and remedies are in place and on-going.
- FUDS Sites have been characterized, but no funding for remediation now or in the foreseeable future.
- Strong team of property redevelopers, including:
  - Port Authority of Kansas City, MO
  - Kansas City Southern Railroad
  - CenterPoint Properties
  - Martin Marietta / Hunt Midwest Materials
Richards-Gebaur: Site Background

- Intermodal development – above ground and belowground development
  - Kansas City Southern Tracks in place on runway
  - CenterPoint Surface Phase I complete, infrastructure in place and ready for buildings
  - Martin Marietta / Hunt Midwest – Leased underground and preparing to proceed.
- FUDS Portion is interfering with the velocity of the redevelopment of the Site.
- Port Authority has placed the entire Site (BRAC and FUDS) into the Missouri Brownfields / Voluntary Cleanup Program
  - Goal of using Risk-based remedial standards
  - Allows for “phasing” remediation efforts to threats to health/environment and address those areas where the development will proceed before later phases of the project.
- Port Authority has proposed reaching a compromise settlement with the United States to assume remedial role using funds from United States.
Former Richards-Gebaur Air Force Base: Present
“Once we come to grips with the fact that the contaminants were moving toward our water supply, that cleaning the former Schilling Air Force Base was going to take at least 20 to 30 years, and realizing that we were going to have to compete with every other FUDS Site for funding each year, we knew that we had to take control of this process and be the ones who took responsibility for cleaning the Site.”

“We realized what an undertaking it was, but felt like there was no other way and when the Corps offered to settle the United States’ liability in exchange for our undertaking the remedial work, we began pursuing it.”

Tim Rogers, SAA
“Knowing that we had to take ownership of the Site and the remediation process to ensure the safety of the citizens of Salina and continue the redevelopment of the former Schilling Air Force Base, we decided that we had to assemble sufficient environmental technical and legal expertise and add that expertise to our existing team to ascertain:

(1) the full scope of the environmental contamination and an appropriate remedy;

(2) whether a negotiated settlement could be achieved with the United States; and

(3) what steps were necessary to implement the remedy.”

Tim Rogers, SAA
Tim Rogers’ Critical Thoughts

Key points that Tim wanted to convey:

- There are no shortcuts
- Use original source documents to learn the true nature of the past historic uses at the Site
- Engage in a more collaborative process with the United States, EPA and state regulators earlier in the process
- Essential to have a locally unified team
- Verification of environmental technical and legal requirements
Engineering Approach
What Do You Know...
Where Do You Go...??
Technical Understanding

Clarify
Quantify
Defend
Clarify...

- Historical Documents
- Previous Investigations
- Previous Work Plans
- Analytical Data
- Conclusions
- Calculations
- Basis for Conclusions
- Site Inspection
Clarify...

Conceptual Model

- Chemical Distribution
- Geology
- Hydrogeology
- Source Areas
Quantify...

Cross Sections

Soil Boring Logs, Monitoring Wells
Quantify…

Chemical Database
Soil Data, Groundwater Data, Exposure Pathway Analysis

Wells are not deep enough

Red numbers are TCE concentrations in groundwater in ug/L
Quantify...

Single or Multiple Plumes?
How Much $$$$$$ or “Cost to Complete”

- Data Gaps
- Additional Investigation
- Remedial Selection and Design
- Short and Long Term Monitoring
- Uncertainties and Unknowns
- Regulatory Interaction
- Implementation Schedule
Defend...

Document...
Check and Recheck
Document...
Check and Recheck
Document...
Check and Recheck
Defend...

Meet with Stakeholders

Meet with Regulators

• USEPA

• State Cleanup Programs
Financing the “Deal”
Financing Approaches

- Traditional
- Emerging/Novel
Traditional Financing

• BRAC/IRP Appropriations
  – Traditional Congressional Appropriations

• EPA Brownfields Program
  – Assessment, Cleanup, and Job Training Grants
  – Revolving Loan Funds

• Tax Incentives
EPA Brownfields Program

• **Brownfields Assessment, Cleanup and Job Training Grants**
  – Assessment grants provide funds to inventory, characterize, assess, and conduct planning and community involvement related to Brownfield sites
  – Cleanup grants provide funds to carry out cleanup activities at Brownfield sites
  – Job training grants provide funds to train residents in communities impacted by Brownfields
EPA Brownfields Program

- Revolving Loan Funds
  - Enable States, political subdivisions, and Indian tribes to make low interest loans to carry out cleanup activities at Brownfields properties
Tax Incentives

- Tax Credits (Federal, State and Local)

- Tax Increment Financing
Emerging/Novel Financing

• Environmental Services Cooperative Agreements ("ESCA")
  – Allows the LRA to have increased control of BRAC site and allows the military service to “outsource” environmental responsibilities in exchange for a military obligation to reimburse the LRA.

• National Defense Authorization Act of Fiscal Year 1993
  – DOD Indemnifies BRAC Facility Transferees from Liability for Contamination Resulting from DOD Activities
  – Includes duty to defend
Emerging/Novel Financing

• Stimulus Funds

• Public/Private Partnerships
  – Private Developer Funding Environmental Oversight & Assurance
  – Developer Assistance with Environmental Remediation costs
Emerging/Novel Financing

• Section 209 FLPMA
  – Allows for acquisition of subsurface mineral rights from United States.
  – Mineral leases to fund redevelopment
FUDS Negotiated Settlement

- FUDS Negotiated Settlement
  - In FY 2007, the estimated “cradle to grave” cost of the United States to address residual environmental contamination at FUDS sites was approximately $16.272 billion dollars. For FY 2007, Congress appropriated $262.1 million to address all FUDS sites for that year.

- United States Army Corps of Engineers
  - ER 200-3-1 Formerly Used Defense Sites (FUDS) Program Policy
  - Chapter 5 Potentially Responsible Party Process
• The process to achieve settlement with USACE is necessarily site-specific but some of the common steps for each site include:

– Identification of appropriate site for settlement;
– Negotiation of a preliminary pro rata percentage of responsibility between the parties based on equitable factors;
FUDS Negotiated Settlement

- FUDS Negotiated Settlement Process (Continued)
  - Development of a remedial approach, implementation plan and Cost-to-Complete;
  - Development of a Stakeholder Action Plan;
  - Technical discussions with the USACE District office regarding scope of any remaining investigation and remedial alternatives and their associated costs;
FUDS Negotiated Settlement

- FUDS Negotiated Settlement Process (Continued)
  - Settlement negotiations with the assigned Department of Justice Attorney and/or USACE District Counsel;
  - Referral of Settlement Demand by USACE chain-of-command;
  - Assignment of Department of Justice Attorney
  - Implementation of all or portions of Stakeholder Action Plan, as needed;
FUDS Negotiated Settlement

- FUDS Negotiated Settlement Process (Continued)
  - Finalization of Settlement in the form of a judicially ordered Consent Decree;
  - Finalization of state Administrative Orders on Consent;
  - Implementation of Cost-to-Complete;
  - Five-year reviews; and
  - Closure.
FUDS Cost Recovery Litigation

- FUDS Cost Recovery Litigation
  - CERCLA 107(a) Cost Recovery Claim
    - CERCLA 107(a) allows cost recovery by a private party that has itself incurred cleanup costs.
    - One PRP may sue another to recover response costs incurred in voluntary cleanup.
  - Site owners need not wait for EPA enforcement action to institute a CERCLA 113(f) Contribution Action
FUDS Cost Recovery Litigation

- Next step following unsuccessful FUDS Negotiated Settlement
- Litigation preparation
  - Remedial Determination / implementation schedule
  - Coordination with State and Federal Regulators
  - Demand on United States through COE
  - Assemblage of costs and evaluation of liability
FUDS Cost Recovery Litigation

• CERCLA 107(a) Cost Recovery Action
  – Elements
  – Defenses
  – Objectives/Goals
    • Recovery of past costs expended for necessary and consistent (NCP) response costs
    • Secure Judicial determination allocating CERCLA liability among the parties
    • If pre-ROD, secure judicial determination regarding the appropriate remedial approach
FUDS Cost Recovery Litigation

• Objectives/Goals (Continued)
  – Secure a judicial determination that remediation be transferred from FUDS to plaintiffs
  – Secure a determination that United States liable for pro rata share necessary future response costs
  – Possible secure a judicial determination for a lump sum payment of future response costs.
Monetary Damages for Future Response Costs

- Monetary Damages for Future Response Costs
  - Historic Court Interpretations
    - CERCLA 107(a)(4)(B)
    - *Burlington Northern & Santa Fe Railway Company v. United States.*
      - Argument that it allows for lump-sum payment of future response costs
Questions / Discussions
The End!
Questions Down the Road?

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