TRANSFERRING CONTAMINATED PROPERTY INTO THE PRIVATE SECTOR

MARK O'BRIEN

Marr McClenon

Taking federal contaminated property and transferring it into the private sector can be boiled down to one word--risk. How do you understand the risks? How do you quantify the risks? How do you shift liability? If you can look at it from the end user's perspective and consider not only the end user but the other stakeholders, you tend to have a great deal of success in moving very complex, environmentally contaminated properties. The property I am presenting is called FISCO, the Fleet Industrial Supply Center at Oakland. It was a former Navy site. From a historic review perspective, the military, like other governmental agencies, had been required to cleanup property prior to transfer. There was an amendment to CERCLA in 1996 that for the first time gave the federal government the ability to transfer contaminated property to the private sector. As far as DOD properties were concerned, whilst this amendment existed for many years, it was not actually used by the private sector because they were not comfortable in assuming the liability of the federal government. The reason they were not comfortable was nobody had really sat down and mathematically quantified risk. Not just environmental risk, what is a plume moving and at what rate, but how do you identify legal liability risk, how do you identify financial risk and how do you put it together in a program? This is a very complex set of transactions. This is not about finding environmental remedies. That is one part of a much larger program out there. There are hundreds and hundreds of pieces that come together to make these transfers possible. It is really much more of a real estate transaction or a real estate play, again of which the environmental piece is one piece of the transaction.

Since we have been able to get a better handle on the mathematical quantification of risk, we have had an exponential surge in the ability and properties that are interested in transferring contaminated properties to the private sector. The Fleet Industrial Supply Center really was the first transfer of this type and it is known as the finding of suitability for early transfer or a FOSET. Since we have begun that process, I am probably juggling anywhere up to a dozen bases at any one time inside of DOD, taking them through this early transfer process. We are just concluding a 5,000-acre transfer at Mare Island in California. We did three simultaneous transfers with three different developers.

We are currently working on the Oakland Army Base. This will be the first Army site that we have transferred under a FOSET. We are doing a FOSET transaction on BRAC property. We are doing the first non-FOSET transaction on non-BRAC property. We have Army Reserve property that will go through a private sale. So these sites tend to get very complex as you move through the process. This was originally the FISK site. It was a 600 acre site and with an unbelievable amount of foundation on that site. That translates from a risk perspective of how much can we really tell about that site. It had a variety of contamination problems. We had pH contamination in the offshore section of the site. We had a variety of hydrocarbon contamination and the rest was really clean. So this was a combination of both a FOSET and early transfer with the regular FAST approach the federal government had been using. It translates into a project whereby the federal government transferred $4.4 million to the end user, the Port of Oakland, and in the process saved $22 million. Why? Because we were able to work cleanup into the development. There was win-win for all the stakeholders involved in this transfer. It also equated into a billion dollars worth of revenue for the region three years ahead of schedule.

The problem that the Port of Oakland had in trying to gain title to this property was that the current FAST cleanup program would cause a three year delay to their development program. So we looked at the early transfer of the privatized cleanup approach as a way to resolve the time delay but in and of itself it creates other problems. And these problems all come back to risks. How do you get through some very complex real estate transactions? How do you get a handle on the legal liability issues? How do you control the environmental and regulatory risks associated with these sort of transfers? How do you move risks between entities? How do you transfer a liability? And, finally, how do you look at the remediation perspective from an end user? How can we word that re-use into the cleanup program?

The federal government had some major issues and problems concerning setting precedent on what they did on this site and how it would apply to another 300 sites around the country. The objective: get it out of DOD; get it into the private sector. We avoid problems of setting precedents by dealing with single sites. The other problems we had were dispute resolutions. Again, the federal government was prepared to take on the regulators, and the military was prepared to take on the regulators in a legal format to resolve issues. The private sector does not have time for that. The private sector where there is demand for use wants to get on and

redevelop the property. So what was the solution? The solution was to develop an integrated approach to include looking at the engineering options, the environmental planning approaches and the insurance options for shifting liability. There is a need to understand the financial analysis and modeling of these sites, to look at legal responsibilities associated with these transfers, and to look at from more of a stakeholders perspective; issues such as human health risks. If we are going to transfer contaminated property, there are sections in the private community out there that will say, "Oh, this is a dirty transfer." Why would we not want the federal government to stay on this site? To eliminate their obligation--cleanup. What are the associated risks with transferring property that you do not intend to cleanup to the same level the federal government was going to. So, again, if you can think back to the maritime development for the Port of Oakland, really they are able to web their engineering options into their development. They develop cut off walls. They develop sea walls as part of the building plan. That equates to containment. They raise grade. Obviously we put on a cap. They are going to do excavation. Millions of millions of cubic yards of excavation which in and of itself provided source removal. Obviously their general maintenance would take care of the environmental contingency issues and the environmental process.

What is an early transfer? Well, the top four lines represent the closure that the federal government was going through a FAST program for each of the four operable units on that site. These federal government sites are going through a FAST program which involves a remedial investigation phase, a feasibility study, a rapid remediation, then finally the property can be transferred. What's the difference between the FAST and FOSET process? You need to be able to reach a financial deal, in this case with the Navy. You need to actually understand and go through the very complex FOSET process. You need to understand things such as insurance coverage. And then, once you reach that point, transfer the property prior, in this case to even remedial investigation being undertaken. If you think about it that has some pretty incredible ramifications in the cleanup work and some of the insurance items. Some of you may be familiar with this. Some of you may not be. We put a PLL on that site, a pollution legal liability. That allowed the end user to be able to deal with unknown contamination. One of the things the end user did not want to do is end up in the FUDS program. They didn't want to start development of a site only to find additional contamination, have to stop their development, enter the Corps of Engineers' program, wait for the legal argument as to who put the contamination on the site and

then have money appropriated. There was no time for that. The development was the driver in this case. So through the pollution legal liability program we are able to place insurance for unknown contamination. It also gave us both first and third party coverage both on and off the site. So all of a sudden we are able to give a little protection to communities surrounding the site. The cleanup cost cap allowed us to cap out the ultimate financial liability the Port of Oakland was going to have. General contractors' pollution legal liability or pollution liability was placed on the site. Professional liability includes errors and admissions, and finally catastrophic conditions. It was an interesting scenario where the Navy wanted to hold the catastrophic liabilities. But when you actually went out into the marketplace and you priced it, it cost no more to get coverage on a policy that would cover catastrophic conditions if you included in the policy or as opposed to having the federal government hold that liability.

Obviously the end user is going to want to know what are the benefits from a fiscal perspective. The benefit is very simple. A billion dollars worth of revenue a year that we are going to miss out on for three years if you waited for the federal government to clean that property up. It is a no-brainer when you are dealing with a $4.4 million cleanup site. I am not going to walk you through all the pieces of this, but these models can get somewhat complex. Obviously you are going to be interested in overlay and a MPV type model to look at the cost of money at a time. And there is a legal process and a couple of the most crucial parts of pulling off an early transfer is a corporate agreement. Can the local reuse agency, can the Department of Defense or the federal government come to a fiscal arrangement? Can we agree on the extent of the contamination, especially when it may not have been fully characterized and can we put a price on that? There is also a consent agreement that needs to be entered into between the end user and the regulators. Can we come to an agreement on what is going to be needed to be done post transfer? Again, not knowing all the conditions that may exist on a site. You need to consider some of the stakeholders. And one of the things we have looked at was utilizing a fee based mass balance type model to look at and measure human health risks associated with transferring contaminated property and not clean it up to the same levels the federal government was going to.

We looked at four different transfer options. Obviously a no transfer option is where the property would sit idle for a number of years. We put a limit of ten years on that. We looked at the regular FAST transfer the federal government was going through. We looked at early transfer.

And then we compare it to an early transfer with institutional controls in place. From a carcinogenic risk approach looking at all the chemicals and concerns, the two population groups we found with the lowest risk were actually using an early transfer scenario. They were getting the property underway, getting it developed, putting caps on it. From a carcinogenic perspective this provided the least amount of risk. We found pretty much the same thing with neurotoxicological type risks with hazard risks. Again, for all the chemicals and concerns we are dealing with for our population groups an early transfer, or "dirty transfer", actually posed less risk to the local community and on site workers than waiting for the federal government over an extra three years to clean this property up. Sort of a no-brainer, but conceptually you have to be able to go in and you have to be able to make your case with the local community. You have to actually get a quantifier.

And, finally, you need to be able to develop option trees, risk management trees as we refer to them. You need to be able to explain to the end user what their risks are, whether they are environmental risks or legal risks or financial risks. You need to be able to take them through the process, at the end of the day. Let them look at their options and help them to mathematically quantify what those risks are.

So what are the benefits? Obviously there is the financial benefit to moving these properties early for both the federal government and the end user. All of a sudden the end user will have an increased value in their asset. Their assets will become automatically more attractive for development if you can put it on the fast track of transfer and whether you will cleanup in your redevelopment. In this case construction began early, the revenue flow began early, the construction in and of itself provided the environmental remedies. We avoided things like dispute resolutions. And, most importantly, in this case the Port of Oakland could take control of its own destiny.