

Select Case Studies for Discussion

**OSC Negotiations Course
Module 4: Stump the Chump
October 8 & 20, 2010**

Case 1: Recalcitrant RP won't clean up

1. Who was involved?

RP - very manipulative and controlling

2. What was the situation?

Clean up partially demolished lumber drying kiln with commingled asbestos debris see photos. Low income houses with children 50' away with limited site control. Time Critical Removal action, at the "we should have had this cleaned up three months ago" stage.



3. What was the problem?

He would commit to do the clean up and then fail to meet any deadlines, then recommit and fail again. Because he was a business/con man and had a good line of bull. Management kept giving him extra strikes (7 strikes and you are out). I guess they thought that because he was under criminal indictment he might be more cooperative. When I asked him how concerned he was about exposing the residents to the asbestos he said he didn't think asbestos is that bad and why should they complain? The mill provided them with work before it shut down 10 years earlier.



4. What was the outcome?

Strike 7 and it became a fund lead removal (I only wanted to give him 3). During the clean up he became antagonistic and refused to observe the site boundaries until I had arranged with the local sheriff to arrest him for criminal trespass and only then did he fall into line.

His criminal trial is Jan 2011.

Case 2: State PM dissatisfied with removal action

1. Who was involved? OSC, State PM

2. What was the situation?

Removal Action at a Superfund site, where the state wanted to do additional work beyond the scope of EPA. A removal action contract was written by the OSC and signed by all parties prior to Action. The Action was being conducted for the EPA portion of the work, and then would begin the state portion (that the state was paying for) afterwards, because it took the state a long time to sign the Contract.

3. What was the problem?

The State PM did not agree with the cost or the strategy, even though the Action had already been initiated, the Contract signed, and the State PM could not direct the OSC's contractors. So, he was upset that he couldn't be left alone at the site without an OSC present, because he could not direct the operation.

During a calm work day, he just started ranting and losing it on the OSC stating, "This process isn't going to work. It's bogus. The operation is a sham. The contractor is terrible and will never do work for this state directly. This action is costing way too much and no one in the state understands why it costs so much for disposal of hazardous waste."



4. What was the outcome?

I leaned back in my chair and gave him my full attention as soon as he began ranting and being critical of the entire operation. I let him finish everything he needed to say and just listened. When he was done, I calmly just told him that, "the process has already worked to treat the EPA excavated soil. The final cost for the state will be lower than planned because the treatment works. Any additional work we do for the state is at the state's expense, that means, excavation hours, operator hours, equipment rental, etc. during the time that the site is working on state soil and the state action. The EPA does not have the funds to do this work for the state and the state only pay for disposal of the waste. When this Action is completed, you and your bosses will be pleased with the outcome."

When the project was complete, the OSC saved the state approximately \$225,000 dollars and completed the project ahead of schedule. The State PM thanked the OSC and apologized for his upset during the Action.

Case 3: “How can I help?” Confusion with Coast Guard

1. Who was involved?

EPA, County, State, Coast Guard

2. What was the situation?

An oily release from a broken pipe onto a beach. EPA was asked by the county and state to help them. I responded and after seeing the oil spreading on the beach, called the coast guard to determine if they thought it was their jurisdiction and were planning to respond.

3. What was the problem?

Later that day they called me back to say it was theirs. I asked what assistance they wanted from us as I was in the middle of placing booms and needed to know whether to continue or stop or do something different. The conversation I had with the petty officer went around in circles with him telling me what they planned to do (contact the RP and direct them to clean it up) and me asking what they wanted me to do about the work I had already started. He kept saying they couldn't order EPA to do anything and I kept trying to get them to see that I was offering assistance if they wanted it. It sounded to me like the petty officer was repeating a script of what they had decided to do and couldn't think outside those parameters. In the end I decided to stop work and pull out and wait and see. The problem I had with this scenario was that I envisioned EPA and USCG working cooperatively, even if it meant EPA didn't do anything except track what was happening. And I was confused that the USCG rep did not use any words that indicated what he saw our role to be. Even if he had said we don't need your help it would have been enough to satisfy me but it felt like he was continually skirting the issue.

4. What was the outcome?

I still don't know if they wanted us to pull out or not.



Case 4: Brownfields work railroaded by railroad

1. Who was involved?

This is a currently evolving situation with a Brownfields site (I act as a liaison between the Removal Program and our Brownfields Program). A Brownfields applicant would like to purchase an inactive railroad line and convert it to a "rails-to-trails" bicycle trail. EPA and its contractor would perform a Phase II environmental assessment along the railroad line prior to the purchase to assist the Brownfields applicant in meeting their due diligence requirements. This would also assist the applicant in knowing what environmental liabilities they might be acquiring.

2. What was the situation?

EPA and its contractor need an access agreement from the railroad to perform the Phase II sampling. The RR has provided a 10-page monster access agreement that has many terms that contravene EPA policies and laws, such as indemnification. The access agreement also places liability for "releases" of hazardous substances on the recipient of the access agreement, i.e., the applicant, EPA, and our contractor.

3. What was the problem?

In talking to some other EPA Regions, we are finding that few, if any, other projects have successfully gained access from the railroads for these types of projects. The railroads really have little incentive to cooperate because it doesn't benefit them if the Phase II identifies new contamination.

Since Brownfields is a cooperative program, and since the applicants are seeking to purchase the properties, it is totally at the Railroad's discretion whether they want to cooperate or not. We cannot really use our Superfund access authorities since we want to play nice in the sandbox. We could threaten to perform PA/SI assessments at these sites if the railroads don't cooperate, but that would probably poison the waters for future projects.

4. What was the outcome?

If we perceive any glimmer of cooperation on the railroad's part, we will attempt to negotiate with them and attempt to identify their "interests." Their interests might include unloading inactive or problematic property and contributing to a worthwhile community project. However, the possibility of identifying more contaminated land probably outweighs these interests. One additional possibility is that when the current railroad landowner purchased the line 30 years ago, they supposedly arranged for the previous railroad to retain all liability. Perhaps the current railroad owner will negotiate if they think the previous railroad is on the hook for all environmental liability!

Case 5: Stalemate with Tribe on acceptable remedies

1. Who was involved?

EPA OSC, Shoshone-Bannock Tribes and FMC Corp. (RP)

2. What was the situation?

Elemental phosphorus waste in RCRA-closed impoundments managed by RP generating phosphine gas. Site is on Tribal reservation fee land. Tribes insist on waste removal as only acceptable remedy. FMC says waste removal could cost \$1 billion, and could not be done safely anyway.

3. What was the problem?

Tribes don't trust FMC. FMC downplays risk and is not very forthcoming with information. From the Tribes' perspective, any remedy that is not removal of the waste (such as gas extraction and treatment) is a band-aid that only prolongs decision on what really needs to be done, and they don't support it.

4. What was the outcome?

Still working on it. Kind of stalemated at the moment.



Case 6: Community insists on local jobs with contractors

1. Who was involved?

EPA, the city, out-of-town contractors, local activist, and local residents.

2. What was the situation?

EPA continuously received complaints about large amounts of government dollars being spend on projects in a certain community. The community has a very low employment rate and has many individuals trained in the work being done.



3. What was the problem?

Activists want to know why EPA isn't **REQUIRING** the contractors receiving the contracts to hire locally. EPA's position is that contracts are written in a way to recommend/persuade local hiring, but by law cannot require it. It is extremely tedious to write contracts and restructuring the contracts is almost unrealistic. Thus, large amounts of funds and work are being done in an EJ community, while local, unemployed residents are not being able to capitalize on the benefits. While at the same time, they are the ones living throughout the contaminated areas. How do you please local residents and stay within your legal authorities with respect to the contract structure?

4. What was the outcome?

No resolution yet! Attempts have been made to address borderline issues (Ex. Highlighting dollars spent in the community on supplies, hotels, rental agreements, etc), but no real progress on local hiring **REQUIREMENTS**.

Case 7: One person is taking all my time!

1. Who was involved?

EPA, ERRS Contractor, Home Owner

2. What was the situation?

Removal Action - Residential Clean Up of 50+ homes in an EJ community, contaminants of concern were lead and PCB's. All conflicts evolved in the restoration phase.

3. What was the problem?

A particular resident insisted that he receive a new shed when there was no clean up action level basis for him to receive a new shed. He called and stopped by the work trailer continuously to animatedly discuss the matter, asked workers if they would bring him a new shed, tried to knock the shed down himself and blame it on EPA. It got to the point where I could not get my other site duties completed because I was dealing with this individual constantly. I had to tell him that he was no longer allowed to discuss the matter with anyone on the site and he was to stay away from the trailer at all times.



Like all residential sites, substitute fence, tree, grass, driveway, side walk, deck, for shed and that was the problem of each resident at the site. I was constantly negotiating trades, deals, allowances, replacements. Specific, constant, diligent documentation was my only friend. Friendly to not friendly interactions were 50/50.

4. What was the outcome?

Resident was banned from the area. Good for us, not so good for him and his shed.

5. What questions do you wish you'd had asked?

None. I knew more about this individual than anyone should know about someone you're not intimately involved with ... enough said.

Case 8: A low ball stonewall

1. Who was involved?

Two co-owners (PRPs) of a series of companies who are attorneys and also own a law firm, two PRP consultants, ERRD Branch Chief, ERRD Section Chief, ORC Branch Chief, ORC Section Chief, Site Attorney, DOJ Section Chief.

2. What was the situation?

Negotiate a settlement for penalties and past costs (oversight costs) regarding a PRP cleanup of a Superfund Site. This was the initial meeting to negotiate a settlement.

3. What was the problem?

- Too many senior managers working on the negotiation without enough preparation between all government participants to establish a cohesive strategy. The DOJ attorney (Section Chief) was introduced late in the process without enough familiarization of the facts.
- The PRPs are very experienced negotiators who basically have a business of negotiating real estate deals based on buying low and selling high. They came in with a low ball offer and were quite prepared to walk away from the table without a settlement. They had no concern of the issue going to court as the company owners were experience attorneys and owned their own law firm. They have used the strategy of keeping issues in the courts to wear down state and local government agencies.
- They would not consider raising their low ball offer so much as a dollar and the negotiation ended without resolution.

4. What was the outcome?

Counsel did not want to negotiate any further after the low ball offer and the PRP's indication that they were not going to even consider raising their offer. Counsel considered the offer insulting and as a result, the negotiation was terminated.



"Would everyone check to see they have an attorney? I seem to have ended up with two."

Again, the PRPs are very experienced at negotiating, especially with matters regarding money. I believe the PRP's strategy was to provide a low ball offer, not budge from it just to test whether the government would respond.

It ended up costing the PRPs much more in litigation.

Case 9: PRP Plays Politics

1. Who was involved?

- The Mayor (City is PRP)
- The Property owner (PRP)
- The Senators and Congresswoman
- The case team (case atty, Enforcement coordinator, OSC, section chief, congressional liaison)
- DEP, DPH

2. What was the situation?

The property owner, who is a friend of the Mayor, wants to continue to allow the tenants to use the storage yard which is contaminated, citing economic benefits. The property owner said that EPA pushes businesses onsite to close and causes unemployment. The Mayor fully supported his friend!

3. What was the problem?

Despite the contamination and the warnings from EPA and DEP, the property owner continued to allow usage of the contaminated areas by tenants. When EPA tried to enforce, the property owner went to his buddy the Mayor, who in turn went to the Senators and Congresswoman to complain. At times, the property owner tried to make things personal. The property owner alleged wrongdoing by, and made personal attacks on, the OSC.

4. What was the outcome?

The case team eventually used a mediator who tried to keep the discussion and situation under control. There was no one-on-one discussion between the OSC and the property owner due to concern over the false allegations put forward. All discussions have been conducted through lawyers and memorized in writing. We had to go to meetings with the property owner to let him "vent". I guessed we applied active listening. So far, active listening has worked in relation to dealing with the false allegations. However, we have not made much progress on the clean up. After a year, we're still talking but we're not on site to start the cleanup.

Case 10: The Chicken Lady

This was my first removal action as an OSC, and I was clearly overmatched. The first day of the response I arrived onsite to find that every TV station in LA (there are a lot of them) had a satellite truck onsite. This was a strong indication that I was in for a bad day.

By way of background, we had previously conducted a removal assessment in the backyards of a number of homes in Los Angeles that were located in close proximity to the Montrose Chemical Corporation. The Montrose facility had been the largest producer of DDT in the world. Although it was not clear to us at the start of the project, we eventually figured out that contaminated material from the facility had been used as fill during construction of the adjacent neighborhood.

During the removal assessment, EPA and START were hand augering in the backyards of homes. One skeptical resident, the chicken lady, video taped everything we did. As the hand auger was pulled out of the ground, it was clear that there were large white chunks of something. The chicken lady screamed DDT!. I patiently explained to her that there could not possibly be softball to bowling ball sized chunks of pure DDT in her backyard, and that the material was likely old concrete. Analytical results of course confirmed that she had large chunks of pure DDT present in her backyard. Score one for the chicken lady. The irony was that she was an organic gardener, and had a large garden and chicken coop in her backyard. She was not as organic as she thought.

Back to the first day of the removal action. The chicken lady showed up at my trailer with a large hefty bag. I was dumb enough to look inside the bag and found dead chickens. The chicken lady informed me that she would like to have EPA autopsy the chickens. I patiently explained to the chicken lady that I would do no such thing, and gave her a long list of reasons why it was not appropriate to do so. She left and fifteen minutes later I got a phone call from my Division Director telling me to have the chickens autopsied. I hadn't considered she wouldn't take no for an answer, and that she had the direct phone number for the Division Director.

The next week, the chicken lady returned with another hefty bag. This time I was smart enough to have the START contractors look inside the bag - a dead cat. The chicken lady informed me she would like to have EPA autopsy the cat. I patiently explained to her that I would do no such thing, and gave her my rationale. She left and fifteen minutes later I got a phone call from my Division Director telling me to have the cat autopsied.

One more week goes by and the chicken lady returns with yet another bag - this one smaller. This time she wanted me to autopsy her goldfish. Once again I refused. This time my Division Director finally backed me up.

I clearly did a lot wrong. I underestimated the will of the chicken lady and her persistence. Even if I thought logic was on my side, I didn't consider the perspective of the chicken lady and the emotional impact of this response on her life. I thought that the Division Director would back me up - wrong. Perhaps I was not seeing the big picture.

All is well that ends well. My boss, Terry Brubaker, dispatched a senior OSC to LA to buy me a beer and give me a little perspective. It helped. Despite a rocky start to my career as an OSC, I have been able to survive as an OSC for almost twenty years. The chicken lady's backyard was remediated.

Her home was eventually raided by police, and her husband served time in jail for producing meth in the home.