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Eliminating Toxic Waste Liabilities – A General Counsel’s Dream

The Editor interviews Marc Faecher, Senior Vice President and General Counsel for Real Estate, TRC Companies, Inc.

Editor: Please describe the general business areas in which TRC operates and some notion of its size in terms of revenues.

Faecher: TRC is an engineering, consulting, and construction management firm publicly traded on the New York Stock Exchange with annual revenue of approximately \$450 million per year. We operate across four industry sectors:

(1) *Energy.* TRC is number one in the United States in terms of providing services on pipeline infrastructure projects and also number one in LNG permitting. We currently have 34 ongoing LNG projects. TRC is in the top four providers of new electrical power plants and among the top five engineering service providers for the transmission, distribution and substation design sector. Nationally, we have approximately 600 professionals working on various energy-related projects.

(2) *Environmental.* We work on everything from initial Phase I’s to the most complex remedy design and implementation. TRC is a national leader in the EPA Brownfield Grant program to municipalities – we’re currently working on some of the largest Brownfield redevelopment projects in the country including the transformation of the former waterside generation plant in New York City, which is 10 acres of waterfront property – a billion dollar piece of real estate. Newport Center in Jersey City, a multi-billion dollar mixed use redevelopment, represents another example of a huge Brownfield project. TRC is the leader in air measurement consulting and permitting services. We are among the top five “building sciences” firms, i.e., building mold prevention and resolution of indoor air problems.

We are also number one in cultural and natural resources management, which entails identifying and developing strategies to properly preserve archeological artifacts recovered in the course of construction projects.

(3) *Infrastructure.* We cover a broad range of construction-related services including geotechnical engineering, construction inspection, land development, municipal engineering, public works, integrated security, transportation. *Engineering News* recently considered this group to be one of the eight foremost design firms.

(4) *Real Estate.* My group deals with all real estate and liability management related services for companies looking to divest themselves of single assets or portfolios of real estate that are impaired.

Editor: TRC has a unique product, Exit Strategy®. Please explain what this product does and why it is unique. What was the driver behind its development?

Faecher: The hallmark of TRC is that we spot client challenges and then develop solutions that align with their operational priorities. Exit Strategy is a product that we developed about ten years ago as an extension of our core risk management and business expertise. Just as the name implies, we offer an exit strategy for companies and owners of single real estate assets or portfolios of real estate assets by eliminating the environmental liability. Under the program TRC completely and perpetually assumes the clean-up liability and responsibility for a single, fixed price, with the TRC parent company giving back an indemnity that is perpetual. We become a statutory responsi-



**Marc
Faecher**

ble party for the liability – we will sign the oversight document intervening between the client and the governmental agency working on the clean-up, stepping into the client’s shoes. We also examine the full life cycle of costs – from the initial investigation phase to the hard remedy implementation to the assumption of all of the operation and maintenance obligations – so that from start to finish we deliver a solution for the full life cycle cost of the clean-up. Each solution is flexibly designed based on the customer’s situation. We are finding that owing to SOX and GAAP requirements, companies are becoming a lot more proactive in accurately stating what their environmental liabilities are. Exit Strategy represents a great way to permanently remove the liability from the balance sheet.

Editor: When TRC contracts to do all remediation, negotiate with government authorities and later monitor a site, how do you protect yourself from unintended and unforeseen consequences, such as a regulator’s failure to understand you have removed the liability?

Faecher: When TRC performs an Exit Strategy, we become the owner of that liability when we undertake to do a clean-up. Our area of expertise is in dealing with regulatory issues and overcoming obstacles. We deal with both known and unknown pre-existing pollution conditions, so anything that is discovered becomes our liability. We mitigate that risk through environmental insurance with an outside insurer that covers those unknowns. We use trusts and escrow accounts to supplement areas where insurance is inapplicable. We rely primarily on our own expertise in managing environmental risks which we have been doing successfully for 50 years as a company.

Editor: How does TRC’s Exit Strategy

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provide a means for expediting property transfers quickly at the time of property sales or mergers without using indemnification remedies?

Faecher: Environmental clean-ups have been and continue to be very complex and are variable liabilities that impact a company's balance sheet. Our Exit Strategy program eliminates this impediment so that when companies are looking to transfer real estate or plant assets a transaction can close more quickly. The evolution of environmental insurance has allowed this process to become a winning solution for many companies, not only when they contemplate a sale, but also in terms of just ridding the balance sheet of an unwanted liability.

Editor: What factors should a company consider when selecting a liability transfer firm?

Faecher: A company should look at that firm's experience. Have they successfully underwritten risk with the insurance markets? Are they flexible in how they structure the transaction? Do they charge a lump sum up front, or do they also have the flexibility to use progress payments? Will they undertake a full and complete transfer of the liability with a full indemnity or is it just an indemnity proffered by some single purpose entity in lieu of a parent-level indemnity? Are the clean-up items limited in scope? Are there exclusions? Is the indemnity limited to simply the insurance terms so that if it's not covered by the insurance, then the obligation is excluded? Are there some limits to regulatory objections in the terms of the contract so that if the agency changes its mind, this would be covered? Are agency re-openers covered? Will the firm be willing to put some equity participation into the transaction? All of these are factors that should be considered when looking for an agent to whom you can transfer the liability.

Editor: There have been several recent cases regarding sales of claims (e.g., recent Enron case) where certain claims following transfer of ownership were not held to be valid by the court. Have any of the liabilities TRC has undertaken been held to be invalid transfers?

Faecher: No, I don't believe that application of the law applies. All of the laws, such as federal and state superfund laws, contemplate the ability to contractually transfer clean-up liability, which we have been doing for ten years. As a matter of fact, the environmental agencies foster this ability to

transfer because some of the clean-ups we get involved with would not otherwise have the financial backing or insurance that we provide. We deal all the time with EPA and state DEP's, and we've never had one of these transactions questioned or been held invalid.

Editor: What types of clients do you work with?

Faecher: They really run the gamut from *Fortune* 500 companies down to smaller private companies. We've done a considerable amount of work with private equity firms, and with clients in the energy, real estate, finance, insurance, manufacturing, chemical and petrochemical industries. We have also worked with some government and quasi-governmental agencies, some of which were authorities set up to manage utilities or landfills. We have had many repeat customers.

Editor: Please discuss some examples of recent deals.

Faecher: We have \$520 million in aggregate clean-up obligations involving 98 sites within the Exit Strategy program. We have about \$1.25 billion in insurance coverage backing up those clean-up obligations. The value of the assets both at their impaired level and their later development value would be nearly \$6 billion that is entrusted to TRC. The types of transactions we work on are M&A related, real estate or Brownfield deals involving single sites or portfolios; Superfund or multi-party cost recovery litigation; discontinued operations; and bankruptcies.

A recent example in which we used Exit Strategy to help unlock asset value involved our client's acquisition of a large power plant belonging to a northeast utility faced with a clean-up obligation. In addition to the requirement to address the contamination, the client also needed to make significant capital improvements as part of the facility's Title V air re-permitting. Both the purchaser and its lenders/ equity sources were uncomfortable with undertaking the potentially unbounded clean-up obligation. TRC assumed that clean-up obligation for them and the transaction was able to close. Another example is the Mattiace Superfund site in EPA Region 2, which is a former solvent distribution and drum cleaning operation. There were over 80 responsible parties, enormous past EPA response costs, and both soil clean-up and long-term ground water treatment was required. This was the first time that the EPA has allowed a third party volunteer to step in and take

over the clean-up. We are the primary PRP; TRC signed the consent decree, including the resolution of natural resource damages, and the PRPs no longer have to deal with the expensive transaction costs attendant to Superfund site cleanups. In yet another situation, a redevelopment model, we undertook to clean up a former bankrupt manufacturing site in the middle of a residential neighborhood in northern New Jersey, where real estate value is very high. A real estate developer was looking to put up a luxury townhome community on the property, which had soil and ground water contaminated with solvents. However, the clean-up obligation was unknown and the pressure to reclaim the real estate was urgent given community and local governmental pressure. TRC structured an Exit Strategy transaction by taking an equity position through a joint venture and took title to the property; TRC will clean up the site and then sell it back to either that developer or another bidder. This is a land-banking model which gives the developer balance sheet liquidity while we transform the real estate from an industrial eyesore into a repositioned asset.

Editor: Do you have a portfolio of properties that TRC owns?

Faecher: We are beginning to take more equity positions, including sweat equity and capital contribution, in many of our projects. We are also involved in helping companies figure out how they can maximize the value in their real estate instead of mothballing it. There are ways we get involved in unlocking potential value in using land for perpetual conservation either by creating wetlands mitigation banks or using rehabilitated land to offset natural resource damage credits.

Editor: How have you made your very special service known to the legal community, especially those familiar with deal "snags" relating to assets involving property transfers?

Faecher: Our group routinely speaks nationally on risk management, and we regularly speak at continuing legal education seminars, ABA seminars and to state bar associations. We are the lead sponsor of the ABA Section on Environment, Energy, and Resources annual Keystone Conference in Colorado. We are also sponsors of the Environmental Law Institute. Also, word of mouth, repeat business from customers, and meetings with law firms, corporate legal departments or business executives help to spread our message.