

US EPA ARCHIVE DOCUMENT

JEFF MILLER

Former EPA Director of
Superfund Enforcement

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EPA Interviewer: For the record, this is an interview with Professor Jeff Miller of the Pace University Law School, whose early career was with EPA in its Region 1 office in Boston in the early 1970s. We're conducting this interview on October the 27th for an oral history project in conjunction with the 25th anniversary of Superfund. Good morning, Jeff.

Miller: Good morning.

EPA Interviewer: Jeff, can you start out by telling us about teaching environmental law at Pace, including when you came to your current position? But if you could, give us any focus that you can on something or anything Superfund-specific.

Miller: OK, I came here in 1987, and I teach primarily environmental law. We have over 25 courses in various kinds of environmental law, and we have graduate students from all over the world. I teach a course in hazardous wastes, which is RCRA [Resource Conservation and Recovery Act] and CERCLA [Comprehensive Environmental Response, Compensation, and Liability Act], and I co-authored the casebook that we use with Craig Johnston, who is out at Lewis and Clark, and was with EPA in Region 1 after I was there.

EPA Interviewer: Since you've been away from EPA for a long time, a lot of what we are going to discuss today will go back to the very beginning—not just of EPA, but of the Superfund some 10 years later. Before we jump into Superfund, would you tell us a little bit about Region 1 at the beginning of your career and what specific programs you were involved with there?

Miller: I joined Region 1 in September of 1971 and EPA, as I recall, was put together in April of '71, so it was right at the beginning. I had been practicing law at a law firm, and I had been doing environmental projects for various people around the area, and I was asked to head the Enforcement Branch in Region 1, which I did. There were, as I recall, I think there were 12 people in it in the beginning. There were six lawyers and a couple of engineers and a couple of secretaries, and one or two other people. And at that point in time, we were developing cases under the Refuse Act. We were doing the old cumbersome administrative actions under the Water Act. We were the lawyers were working on the enforceability parts of the first round of SIPs [State Implementation Plans] under the Air Act, and we developed a bunch of criminal cases under FIFRA [Federal Insecticide, Fungicide, and Rodenticide Act] for marketing unregistered goods. It was a fun job, because we were doing most things pretty much for the first time.

EPA Interviewer: Pioneers?

Miller: And it was a bunch of young Turks—young lawyers. It was the young people versus the old fogies. Now I am an old fogey.

EPA Interviewer: Uh huh. Aren't we all? So we know that the Resource Conservation and Recovery Act was passed in 1976, and, no doubt, you were aware that hazardous wastes sites, abandoned ones in particular, were becoming known to EPA officials during that time during the late '70s, but give us a little pre-Superfund background into hazardous waste problems, whether we talk about the whole country or just talk about what you were aware of in Region 1.

Miller: Well, in terms of what we now think of as hazardous wastes sites, the closest that we got was dumps...

EPA Interviewer: Uh huh, landfills.

Miller: ...which had obviously both municipal and industrial wastes, and we had a lot of problems with dumps, with both water pollution and air pollution from open burning and we took a number of actions under the water pollution statutes and the Clean Air Act against dumps. Of course, hazardous waste is part of what is regulated normally under the Water Act and the Air Act, so a lot of the permit writing that we did and the enforcement actions that we did were directed against hazardous emissions and hazardous discharges.

EPA Interviewer: Uh huh, and to the air and to the water. RCRA was a little slow to get started.

Miller: Well, RCRA was slow to get started. When I was in Region 1, and we were taking actions against dumps, the biggest hurdle in taking an enforcement action against the dump was the Office of Solid Waste.

EPA Interviewer: How so?

Miller: Well, they didn't think that any enforcement action should be taken against the dump. They thought they should be providing technical assistance, and they fought it tooth and nail. But that wasn't unusual in EPA at the time. Enforcement had to overcome program office opposition, and many times it did. I think it was probably because the solid waste people had never been very important to the Agency. Nobody paid any attention to them, and they were kind of off on their own. They had never been involved in enforcement, and it was a new and threatening thing.

EPA Interviewer: So let's move forward to December 11, 1980—the date that Superfund was enacted. Give us some background now on Superfund-related activities, if any, that you were involved in at that point in time. Eventually you ended up at EPA Headquarters. When was that and in what capacity? So I'm sort of asking you to cover a timeframe now.

Miller: I went to Washington in 1975 and...

EPA Interviewer: In Water?

Miller: I was Deputy Assistant Administrator for Water Enforcement. I ran the Water Pollution Permitting and Enforcement Program and the Safe Drinking Water Act enforcement program. In 1979, the Deputy Administrator, Barbara Blum, asked me to chair a task force on hazardous waste enforcement, the purpose of which was to develop an enforcement program under RCRA, which was starting to get off of the ground, and in particular to do something about Love Canal and these other problems that were coming up.

EPA Interviewer: And apparently the Department of Justice under Anthony Roisman also had a task force that started at about that same time. Now did you have any...

Miller: Yeah. The Justice Department had a task force as well.

EPA Interviewer: And did we at the Agency interact much with that task force or at this point were they pretty much in separate...?

Miller: No, we interacted quite a bit. Actually, I should preface this by saying that I got involved in these affairs prior to the time that I headed the task force, because people were trying to figure out what to do, and the Water enforcement people had been more aggressive enforcers than the others. So they came to us and some of the problems, of course, were water-related. I remember in particular being called by Chris Beck, who was then the Regional Administrator in Region 1, describing this problem to me, which turned out to be Love Canal, and wanted to know what I could do about it. *[Laughing]*

EPA Interviewer: In other words, was he seeking some sort of enforcement approach? Sue somebody?

Miller: Oh yeah. What could we do to get Hooker to clean it up? And I for the life of me couldn't figure out a water connection to Love Canal. I spent some time on it, talking to him and to some of the people in his office, and then I got other calls from other places about similar problems, some of which had a water pollution connection, some of which didn't. But Love Canal sticks in my mind.

EPA Interviewer: Of course. Of course.

Miller: Going back then to the Justice Department. Tony Roisman headed that up, and Durwood Zaelke was one of the other people involved in that.

EPA Interviewer: At Justice?

Miller: Yeah. To some extent they were plowing the same ground that we were.

EPA Interviewer: Well, they must have been looking at the same question from Love Canal. What can we do?

Miller: Yeah, what legal tools do we have? Durwood came up with quite a long involved memorandum on that, and Jim Bunting on the task force did the same thing for EPA, and guess what? They both agreed. *[Laughing]*

EPA Interviewer: They both agreed that, what—we didn't have a lot?

Miller: Well, they both agreed on what we could do, and the limitations on that. We did have....

EPA Interviewer: Well, we had 7003 of RCRA, of course.

Miller: Yeah, we had the emergency provisions of all of the environmental statutes, and we had 311 of the Water Act for oil and hazardous material spills, or contamination of water with a very small fund that the government could use, and at the time we had federal common law of nuisance, which the Supreme Court knocked out in 1981. This precluded by the statutes. But until 1981, the Justice Department was filing complaints all over the place with common law abuses counts, so the Justice Department people and the EPA task force people were on the same track and working together and talking about what could be done in individual cases. The EPA people would work cases up, and send them over to Justice Department.

EPA Interviewer: Now I know you also gave some testimony before Congress during that period of time on the relocation of the residents of Love Canal. Do you have any recollection about what the issues were that you were testifying on?

Miller: I remember testifying several times basically on the need for Superfund legislation.

EPA Interviewer: So this is pre-Superfund?

Miller: Yes, because of the limitations in what we, the Federal Government, could do under existing legislation.

EPA Interviewer: Where we had to seek injunctive relief but couldn't do anything.

Miller: Well, it was not clear. The statutory authority that we had did not clearly enable us to seek remediation from responsible parties who were not present owners or operators of the facility.

EPA Interviewer: So those would definitely be the statutory limitations?

Miller: Yeah, that was arguable. Common law of nuisance probably was better, but there was a cloud over that because of the Supreme Court and the first Milwaukee vs. Illinois case. They commented that the common law road might go away because of comprehensive legislation, and of course we had comprehensive legislation, and the Fund that was available for the government to take action...

EPA Interviewer: Under the Water Act.

Miller: ...under the 311 of the Water Act was tiny and required water pollution to activate. So we had authorities that seemed pretty good in some cases, but we lacked authorities in a lot of cases, and we needed the Superfund legislation. I testified about that on

several occasions. Love Canal relocation. That was a major policy issue involving the White House and EPA and the Office of Management and Budget and...

EPA Interviewer: And was this the continuation of the Carter White House, or was this the beginning of the Reagan White House?

Miller: This was all Carter, and Congressman LaFalce from the Buffalo area was pushing relocation in the House. There was no particular relocation authority in any of the EPA statutes, and certainly nothing in the EPA budget that could be applied to it. It was a big policy question whether this was the kind of thing that the Federal Government should get involved with. What was the federal- or state-level responsibility, and what the extent of liability might be if the Federal Government started to do this? Those issues were fleshed out in the White House with a bunch of meetings that Stu Eisenstadt [domestic policy advisor] called, and I was the representative of the Agency at those meetings.

EPA Interviewer: And again, this was all pre-CERCLA?

Miller: This was all pre-CERCLA. This was one of the reasons that was given in the Congressional testimony and policy reasons for CERCLA is that in a situation where people are living in some place with green ooze coming up in their backyard and in the basement that was doing bad things to the kids, there had to be a way that the government could respond and help those people out and relocate them. That was one of the justifications that the Administration had for requesting Superfund legislation.

EPA Interviewer: Jeff, you mentioned Barbara Blum a couple of minutes ago, and I am not sure if she is connected to this question, but I've heard a variety of people talk about EPA's effort to identify hazardous waste sites and to set up a target number of cases to file, seeking injunctive relief. I've heard the number of 50 cases that were developed and all filed in pretty much the same timeframe, and that Barbara Blum was a big supporter of this effort to raise awareness of the hazardous waste problem throughout the country, and to show some action on the hazardous waste front. Do you have any recollection about any of this that you would like to talk about?

Miller: Doug Costle was the Administrator, Barbara was the Deputy. Between the two of them, Barbara was the one who took responsibility for the hazardous wastes problems and for developing the ideas for Superfund. She was the one who asked me to develop the hazardous waste enforcement task force, and I reported to her on that, so she took a very active role. And her personality and her management style were very different from Doug's. He was a very thoughtful person who was often slow to make decisions, cautious, and she had no problem in making decisions fairly quickly and could be quite aggressive, and so she was very well-suited to this particular problem that required really rather fast action and aggressive enforcement in the face of somewhat unknown law, and where you were often on the cutting edge of science, and this didn't trouble her at all.

It's a good thing she took control of it. She had known President Carter for years. She was from Georgia and had been an environmental activist there, so her ties to the White House were very important in developing what was a new field and reacting to problems that were very much in the news. Love Canal was on the front page of the New York Times, and

on Walter Cronkite day in and day out. For the most part the Federal Government was doing nothing, and was roundly criticized, so it was an important thing for the Administration. The whole relocation effort was something that she thought, number one, was needed, but number two, was a politically astute thing for the Administration to do, and an election was looming, so it did have political dimensions to it.

EPA Interviewer: So at some time, apparently, cases were filed, and as I understand it, I believe maybe some of these cases might even still be on an active docket someplace.

Miller: The EPA task force working with the Justice Department task force developed a number of cases, including Love Canal, pre-Superfund, using the emergency authorities of RCRA and the Water Act and the Air Act, and sometimes 311, and federal common law of nuisance, and we were working off of a—to some extent—working off of a list of sites that had been developed by Congressman Eckert. I can't remember which subcommittee Eckert headed, but he had a series of subpoenas to chemical companies, as I recall, asking them where they had dumped all of their wastes over several decades.

EPA Interviewer: Apparently there were people inside EPA at the same time who were helping develop this list—this comprehensive list, maybe 700 sites across the country. There was some number.

Miller: EPA developed its list based on EPA records in the solid waste program and the water pollution program, and the air pollution program, and the regions talked to people in all of the states to develop this list, so EPA had a list of what it thought were prime target sites, and Congressman Eckert came up with this list of sites in which the chemical companies had disposed of their wastes. There was a big coincidence between the two lists, and we got each of the regions to develop several cases, and we came up with a target of, my recollection is that we had an initial target of getting 60 cases ready to file, and I think almost all of those were filed before Superfund was enacted.

EPA Interviewer: So that later many of these were amended.

Miller: Yes. They were all amended later to add Superfund counts, and they became the first and second and third generations of Superfund judicial decisions. Yeah, and some of those are still around.

EPA Interviewer: And then we also had to deal with the issue of joint and several liability, which I understand did not—well, it never made it out of committees, prior to the law having been enacted—but it's my understanding that the Clean Water Act provided, if you will, a model for the way these arguments were going to be made once the Superfund law was enacted, so that even though we didn't have joint and several language in our new statute in 1980, nonetheless, the first arguments that the feds were making was that the liability was joint and several—and strict!

Miller: Yes, well that's an interesting chronicle.

EPA Interviewer: On which I'm hoping you'll shed some more light.

Miller: My recollection of the legislative history is a little hazy, but my recollection is that early drafts of the Senate legislation had joint and several liability in them. The House version did not, and they scrapped over that, and they took it out, and the Senate people claimed victory, saying there's joint and several, but we don't have to put it in, and the legislation defined liability under RCRA to be the same as liability under Section 311 of the Water Act. Jim Morman [at the Department of Justice], the Assistant Attorney General in charge of lands and natural resources, which included all of the EPA stuff, had one of the committees ask him what the liability regime was under Section 311 of the Water Act, and he wrote back saying that it was strict, joint, and several. Now, it was clear from a lot of case law that it was strict liability, but there was only one case...

EPA Interviewer: On the joint and several liability?

Miller: ...that said it was joint and several. Now it was a case called Bare Marine and, but hey, one's better than none, and one is better than saying there isn't any. So if you look at the liability definition and plug it into the legislative history, well, OK, joint and several was there. And the whole rationale for joint and several liability under tort law really applies, so it wasn't much of a stretch in any event.

EPA Interviewer: Now, certain ways of managing Superfund liability issues arose over time, once the law was in place and once cases were being filed. You have a sort of an interesting perspective because first, you were an enforcement official at EPA, and then following on the heels of that, you were representing private defendants in Superfund actions. So, if you will, and if it's not too awkward, I would like to hear you talk a little bit about early Superfund enforcement actions from the government perspective, and then if you want to switch hats, you know, put on your black hat, and talk about defending Superfund actions. Again, we're talking about the early '80s when law was being made.

Miller: Well, I find most hats are gray. [*Laughing*]

EPA Interviewer: Many hats these days are definitely gray. There's no question about that.

Miller: We were doing everything for the first time in 1979 and 1980, and we probably spent more time on the "How clean is clean?" issue than on anything else. We just had no idea what to do with it. How much cleanup are we talking about? And, at that time, also, there had not been very much cleanup experience, so the techniques and the effectiveness of the various techniques and cost of the techniques were to a great extent open to question. And almost every case, as we tried to negotiate a solution was a matter of first impression, perhaps legally, and often technically. So we would get in—many cases came to the attention of the top of the Agency or at least at the top of the enforcement office that would never have gotten up there today, wouldn't have gotten up there at the time, if they'd been air and water cases, but we had a lot of "scratch your head" cases.

EPA Interviewer: Well, you also had the problem of dealing with multiple sets of defendants. It wasn't like having one power company to go after or one any other kind of company—I mean you might have a hundred potential defendants, you might have a thousand potential defendants.

Miller: Well, that's true, but very early on, we recognized that we couldn't easily deal with that many defendants, and the joy of joint and several liability is you could go against one if you want to, and make that one your collection agent in essence with everybody else.

EPA Interviewer: Exactly.

Miller: So very early on it became our policy to look for half a dozen...

EPA Interviewer: Viable, liable...

Miller: ...PRPs [potentially responsible parties] that were more responsible than the others in terms of the volume of the waste or operation, or whatever, and also had the financial resources to deal with the problem, and also had the, or had access to, the kinds of technical resources that you needed to evaluate and remediate the problem. And those tended to be large companies that we had, [that] had a lot of enforcement activity within the past and other programs had developed some working relationships and some confidence in.

EPA Interviewer: So you sue your friends.

Miller: Well, the regulator has no friends. The enforcement officer has no friends, but if you want to negotiate a resolution, which is primarily what we wanted to do, you need to have as a negotiating partner somebody that you have some trust in, and in that situation a company that you thought was a rogue company was not a good target.

EPA Interviewer: Exactly. And so, looking back to those early efforts to enforce, of course the Agency was going through waves of sending out notice letters to groups of potentially responsible parties, holding large group meetings seeking to encourage the formation of a committee to deal with EPA, and were any of those kinds of process decisions being made by people in your position? In other words, where did this early way of managing these cases, this sort of steering committee model—where did that come from? Did it come from the ranks of people trying to deal with these enforcement issues, or were some of these strategic decisions being made higher up in the Agency?

Miller: I think that that was more of an organic growth than anything else. It is what happened in the cases, and it seemed to work, so it was something that the Agency thereafter encouraged.

EPA Interviewer: Anything that worked—keep on using it.

Miller: Yeah. Yeah. Now at the same time, the chemical industry, Chemical Manufacturers Association, CMA, had been the chief lobbyist against Superfund, and it got all kinds of really bad press, so once Superfund was enacted, CMA figured it had better do something to get on the right side of the equation, and it developed Clean Sites, Inc., which was a nonprofit corporation funded by the chemical industry whose aim was to get private industry to do cleanups.

EPA Interviewer: Yeah, to step up to the plate. To help organize.

Miller: To step up to the plate. To work with EPA, to act as a manager of cleanups, to...

EPA Interviewer: To do internal allocations of responsibility.

Miller: To negotiate among the PRPs and all of these kinds of things that needed to be done, so you had going on in the private sector a lot of trying to figure out how to make this work, at the same time that EPA was trying to make this work.

EPA Interviewer: Although I think of Clean Sites as not having really showed up on the scene until after the SARA amendments of 1986, when we were required by law at that point to do these nonbinding allocations of responsibility. Clean Sites, it seemed to me, stepped into that void, and it was one of the things that they were adept at was helping that.

Miller: I don't recall exactly when Clean Sites itself came on, but the efforts of CMA to get on the other side of the equations started very...it was definitely doing that in 1980. And so, industry was wrestling with these same problems of how to make this work, and the first 60 cases were a laboratory really for everybody.

EPA Interviewer: I'm sure of that.

Miller: And I think a lot of this was not policy decisions made at the outset by EPA about...

EPA Interviewer: But rather things that grew—

Miller: ...but developed and seemed to work, and the Agency thereafter said, "This is a good idea, let's encourage that."

EPA Interviewer: So when you started—well, you took off your gray enforcement hat and put on your gray defense bar hat, what kind of interaction at that point did you have with EPA?

Miller: Well, I didn't have any interaction with EPA for...

EPA Interviewer: Some period of time—

Miller: ...one year, two years. I don't remember what the conflict of interest provision was at that point, but I did get involved in a number of Superfund cases and RCRA enforcement cases over the next several years, and at least one of them was one of the first cases—one of the 50 or 60 cases that we'd worked on before Superfund. That was the Laskin Greenhouse case in Ohio.

EPA Interviewer: Oh, I am very, very familiar with Mr. Alvin Laskin and his tomato-growing greenhouse, which later evolved into, "Hey, I make more money picking up waste oil than I do burning it to grow tomatoes."

Miller: Yep. Yep. I got involved in another set of cases revolving around—what was the guy's name? Oh, gosh. Well, one of the cases was Butler Tunnel. Russ Mahler, that's who it was. He was an "oil recycler" in the northeast and had a number of sites, and he was ultimately convicted of environmental violations and was in jail for a couple of years.

EPA Interviewer: So, he was being tried criminally.

Miller: Yeah, but some of those sites were on the original list.

EPA Interviewer: Yeah, and the original list. You're now referring to the National Priorities List?

Miller: Ah, I'm referring to the...

EPA Interviewer: Oh, the big list.

Miller: ...to the 50 or 60 cases that EPA developed and filed prior to Superfund that were later amended to include Superfund counts.

EPA Interviewer: Yeah, those cases. OK.

Miller: It's my recollection is I had to check each one of those before I got involved to make sure that my...

EPA Interviewer: That you didn't have a conflict?

Miller: ...my fingerprints weren't on it somewhere.

EPA Interviewer: So, when you were advising clients, once your conflict of interest period expired, did you help evolve ways of dealing with the Agency that continued over time? In other words, it appears to me that early on there was a very adversarial relationship between the EPA enforcers and private industry, but that at some period of time, it didn't... I'm not suggesting the sweetheart deal issue at all, I'm just suggesting that the efforts between the enforcers and the enforced against became more cooperative, because people began to see how these cases evolved, and there seemed to be some patterns that were developing. So, I am wondering if any of your work in the private sector in any way paved the way for more cooperative ways of trying to get to resolution of liability issues?

Miller: Well, certainly in—I published a couple of articles early on, and I gave a lot of CLE [continuing legal education] talks to the effect that, in a typical Superfund case, there really weren't any legal issues for the PRPs to win on, and as long as the Agency had good evidence and could make out a case of endangerment, there probably weren't many technical issues. Although there might be a lot of dispute over what kind of remedy was justified, the Agency had a lot of discretion there, too. So that the way for the PRPs to minimize their liability wasn't to try to drag out disputes in court and to have the government do a cleanup and then charge back three times the exorbitant costs of the \$453 hammers, but to negotiate with the Agency to take over the operation at the earliest possible point, at the point of doing the RI/FS [remedial investigation/feasibility study], if possible, because that's where the PRPs might influence the outcome the most by doing a good job of determining both the extent of contamination and the possible remedies. Because that would be the point at which you, if you could demonstrate that the Chevrolet would do as well as a Cadillac, that's where it would be, and if you didn't take advantage of that you were going to be stuck with the Cadillac, and that I certainly wasn't the only person around giving that kind of advice or publicly saying that. And at that point in time, most of the large companies in the

country had fairly well-developed, fairly mature environmental offices, and most of them reached the same kind of conclusion. And once there was a critical mass of larger companies approaching things that way, it became the chief way of resolving, and what would get in the way of that would be PRPs that were not very sophisticated. But the lawyers would show up and say, "This is unconstitutional," and that's about as far as they wanted to go. And then rogues in EPA regional offices that didn't know what they were doing and were demanding completely unreasonable remedies [*laughing*], or remedies in unreasonable cases.

EPA Interviewer: Yup. If you had to sum up your work with Superfund while you were at EPA, would you be able to pick a most significant issue that you dealt with while you were there, and if so, tell us how you got into it and how you resolved it, if you did.

Miller: Well, the most intractable issue was "how clean is clean?" I got involved in that because right from the beginning the task force was looking at that issue, and the program office was looking at the issue, the Justice Department was looking at the issue. As we got into negotiations with PRPs, we were looking at that issue, and it didn't get resolved while I was there. [*Laughing*]

EPA Interviewer: Well, and we'll sort of touch back on that in a—

Miller: 121 of the statute added by SARA supposedly solved that issue but it's...

EPA Interviewer: No...

Miller: ...it's not in bed yet.

EPA Interviewer: And we'll get back to it in a minute when we talk about brownfields...

Miller: Yep.

EPA Interviewer: ...which is something nobody envisioned when Superfund was a baby, but we'll get into brownfields in a minute. But in the same vein, what's the biggest mistake that EPA enforcement made early on?

Miller: Well, one of the big problem issues in the enforcement—well the biggest problem in enforcement was again, "how clean is clean?" But another problem came right out of or was the flip side of the rather successful practice of suing small numbers of financially viable PRPs that you had some idea that you could successfully negotiate with or could successfully accomplish a remedy, because they very quickly recognized that they were getting fingered all over the place and resented the fact that the Agency kept looking at them rather than at other people, and they would call PRPs that EPA didn't sue, people who were lying in the weeds, hoping that the whole thing would go away and nobody would ever come after them, and EPA was not always cooperative in sharing its data on un-sued PRPs. EPA had statutory information gathering authority under Superfund and the other statutes that the PRPs lacked, so EPA really had an ability often to gather information on other PRPs that it was difficult and sometimes impossible for the targeted PRPs to collect. So to the extent that EPA had a successful effort in getting the most sophisticated companies to do a lot of the work, it didn't really have a counterpart program

to help those sophisticated and somewhat cooperative PRPs land participation or money from others. And I think that that would have—if EPA had developed that early on—it would have helped. And I think that the different EPA offices, regional offices around the country, had very different approaches to that, or even different individuals in the EPA offices had very different approaches to that.

EPA Interviewer: Well, there's always the personality issue. You know, some people want to be tough; others want to be conciliatory. And EPA was no different than any other group of people in that respect.

Miller: That wasn't really a measure of toughness, because toughness is in getting the people that you're after to do what you want them to do, and they were doing that, or headed toward doing that. This was an ancillary issue which could make life easier for them, but not make life worse for EPA. So, I don't think it was really a toughness issue.

EPA Interviewer: Jeff, as a law professor, I know you have made note, no doubt, of the Brownfields amendments to Superfund that occurred—the change in the law occurred in 2002. But no doubt, the whole phenomenon of brownfields and redevelopment of brownfields is something that you've been aware of for a much longer period of time, and I'm wondering if anything that you are teaching today's crop of law students touches on any of the issues of redeveloping contaminated sites and reclaiming areas that might have once been industrial but now can have some other kind of use, so maybe you'd like to just talk about brownfields in general.

Miller: Well, the brownfields issues started to come up almost immediately to a limited extent. When you think about the basic issue of, "How clean is clean?" that to some extent turns on what you want to use the site for after the cleanup.

EPA Interviewer: Absolutely. We used to joke about planting the roses on the capped landfill.

Miller: That's right.

EPA Interviewer: What else are you going to do with that landfill?

Miller: So to the extent that it made sense to use an area for industrial activity after cleanup, the extent of cleanup that was necessary seemed to many to be not as great as if you were going to use it for residential property, or park land, or whatever. So these brownfields questions surfaced early and particularly in regard to area, that were located in urban areas, in industrial areas that were not suitable for other uses, and in areas where unemployment was a problem and some kind of employment-based redevelopment seemed to be desirable for a lot of other reasons. So it wasn't a big consideration at the beginning, but the question was always lurking.

EPA Interviewer: Well, everybody knew that it was one thing to say we're going to clean this up down to bedrock, but then OK, now, are we really going to let another industrial polluter come right back onto that site? So even though we may have been thinking about it, the term certainly wasn't known, brownfields, and not until [the] mid-'90s, depending upon who you want to talk to, did it become sort of a common term. But I'm assuming that today when you

teach environmental law, especially when you're dealing with hazardous waste issues, certainly your students must have some better awareness of future land use and how the cleanup standards have some impact on the future land use.

Miller: Yeah. Well, I think that that discussion actually began in the late '80s, and the issue that it poses is the same issue that you run into under the other environmental statutes or the pollution control statutes. Where do you want to put a polluting facility? Do you want to put it someplace that's pristine? Or someplace that's already contaminated? Well, to put it someplace that's pristine doesn't seem to make a lot of sense, if you can put it someplace that's already degraded, as long as you don't degrade it much more, but then also as part of that discussion is the whole environmental justice set of questions, because the people that surround the contaminated sites are usually at the poor end of the scale economically and socially and have the least amount of health care, the most impaired immune systems, and therefore, are particularly sensitive to environmental insults. So, it's a difficult set of issues, but by no means confined to the cleanup sector. And those are the kinds of issues that you talk about with students, whether you are talking about looking at environmental policy or environmental law.

EPA Interviewer: And you say that here at Pace, you have some 25 courses in environmental law?

Miller: Oh yeah.

EPA Interviewer: Absolutely amazing. Let's go back again to the early days of Superfund. And this is really a different question, and that is: the original way that the Superfund was funded. Now, you know the tax expired in 1995, so funding these days is a lot different than in the early days of Superfund, but do you have any opinions on the original way the Fund received its—a lot of its money—not all of its money, and whether that was the right way to go?

Miller: What that tax did was to immediately give the Agency a large pot of money which enabled it to do removal actions, and to undertake remedial actions, and to give a credible threat of treble damages if PRPs didn't step up to bat and do the work. Without sufficient money to really undertake a significant amount of remedial actions, EPA's credibility for the treble damages is far less than it was, so I think it was a very important factor in EPA's ability to move ahead at the outset of the program, and EPA would have a lot more flexibility today if it had a significant fund as well. Well, how can you have a significant fund? Well, it's either out of general revenue or it's out of some kind a special tax, and the special tax here was—you know, based on the "polluter pay[s] principle." And that seems to be a good principle for environmental law, so it seems to me it was not a bad place to begin. Of course, the argument that the PRPs raised against it was that they were getting taxed twice; they got taxed in the first instance, and then they paid for the cleanups when they entered into settlements with EPA or got adverse judicial precedence. Of course, that's not quite right, because if you apply the "polluter pay[s] principle," the PRPs will end up paying for it no matter what the funding mechanism is, and there's only one set of cleanups to pay for. So there may be two routes to the payments; it's really not duplicative. So I think that was a good choice that Congress made, and I can't think of a better way to do it, and it is a choice that is a traditional one. The oil pollution cleanup fund under—originally under 311 of the

Water Act and later under the Oil Pollution Act—is based on the same principle, and many specialized funds are, so it seems to be pretty appropriate.

EPA Interviewer: Let's go back again to when Congress was about ready to pass Superfund. Just give me a flavor of the time. Did people inside EPA really believe it was going to happen, or was everybody guardedly optimistic, or what was the feeling about the chances of this new law actually ever seeing the light of day?

Miller: It was a frantic legislative effort.

EPA Interviewer: And were you involved in the language itself that made it into the final bill? Were you in a place where you were reviewing drafts of various proposals?

Miller: I reviewed language right at the end. I remember Bruce Diamond, who was with the General Counsel's office, came into me and said, "We're drafting this federally permitted release exemption missing the Water Act part of it," so I sat at the table and wrote that out in 10 minutes [*laughing*], so, yes, I—we were...

EPA Interviewer: So your fingerprints are on the original.

Miller: My fingerprints are there, but Carter had not been reelected, and it was... Who knows what was going to happen, as time went on...

EPA Interviewer: So it wasn't a slam dunk that this law was ever going to see the light of day?

Miller: It looked as though it was important that it be done now, and the legislative time was not great, and that's one of the reasons that you have all the criticism of the drafting of the statute, and I'm not sure the drafting would have been any better if it had taken longer, but maybe it would have been, but it was not a slam dunk.

EPA Interviewer: And then, I'm also told that once the Administration changed, there were many people who really believed that Superfund would have a very short life. That it would actually go away in a couple of years and all of this furor would die down. And do you have any recollection of any sense of that in the Agency when Superfund was still in its infancy?

Miller: Well, of course, that's the flip side of what we just talked about, the urgency for enactment was in anticipation of a change in the Administration which had a great change in political philosophy involved and one which was anticipated not to be favorable to Superfund. And, of course, as far as EPA was concerned, those predictions came true. The first couple of years of the Reagan Administration was a disaster for the Agency under the Gorsuch Administration of EPA, which they basically—one of the things they targeted was the enforcement office and pretty much took it apart. The filings of cases in those two years fell from somewhere between 200 and 300 cases a year to maybe 50, the original 50 or 60 cases that under CERCLA were all cases that had been filed at the end of the Carter years under the other statutes, and later amended to include CERCLA counts. There were virtually no CERCLA cases filed other than that until after Gorsuch was gone.

EPA Interviewer: And—

Miller: Now as it turned out, my guess is that the legislation would have passed anyway later on, even though there was a change of Administration, because Congress was very pro-environment.

EPA Interviewer: Well, their awareness had been raised by all the problems that had come up and the list of waste sites state by state, so now Congress knew there was this problem.

Miller: So I think part of the angst in EPA over whether Superfund would be enacted was angst about the change of the Administration, and I don't think the change of Administration would have led to the death of the legislation. I think the legislation would have passed, because Congress was poised to legislate.

EPA Interviewer: And in the early days of Superfund we had a lot of organizational chaos at Headquarters as well, with, as you mentioned about the enforcement people being reassigned. We had the situation where first you're in the enforcement office, then you're in the program office, now you're back in the enforcement office, and this was playing out in many regions as well.

Miller: Yeah. My recollection is that there was something like four reorganizations of the enforcement office in two years. There had been, during the first 10 years of EPA's life, there had been an enforcement division in every regional office except Region 1. And that was one of the reasons for the success of the enforcement program, because there was somebody in each region with a dotted line to the Assistant Administrator for Enforcement, and each of those regional offices had all the people that you needed to bring and prosecute an enforcement case, and they were all managed by people with enforcement mentalities. As soon as those offices were broken up, that changed radically.

EPA Interviewer: Do you foresee a future time when hazardous sites, as we know them today now we're 25 years down the road with Superfund, but when they'll all be cleaned up and Superfund as we know it, even today in 2005, will no longer be needed?

Miller: Well, I suppose that could happen, but not in my lifetime. You're talking about something that will take decades, I think. Hopefully, what we have done is to have greatly arrested the development of new Superfund sites.

EPA Interviewer: Well, probably, especially National Priorities List sites. I mean we'll always have emergencies that need to be addressed, no doubt.

Miller: Well, there will always be accidental releases, but hopefully, with the greater regulation under RCRA and better regulation under air and water, we won't turn a site now that is a pristine site into a Superfund site, and that's what we were doing for the first 250 years of our history. Hopefully, we're not doing that any more, so that we've got a limited inventory to chip away at. It will take a long time to eliminate that inventory. Hopefully, I mean, we've identified and are working on the worst of those sites, so it may well be that the need for a massive federal presence will decrease over the years.

EPA Interviewer: And perhaps devolve more to the states.

Miller: Yes, yeah.

EPA Interviewer: So if Love Canal had not really spurred Congress to act when it did, do you think Superfund was inevitable? In other words, some sort of statutory authority beyond what we had prior to Superfund, so that the momentum that we could then build up increased to the point where we did what we started doing after the revelations of Love Canal were known?

Miller: Well, Love Canal was a catalytic event, precipitating event—there's no doubt about that. But with most of the environmental programs and legislation there was a precipitating event—the Water Act was burning rivers; the Air Act was inversions in Donora, Pennsylvania, and killer smog in Los Angeles. But these precipitating events are a little deceptive, because they just arise out of overall trends, and if it's not one it's going to be another. If it wasn't Love Canal, it would have been Times Beach; if it wasn't Times Beach, it would have been Rocky Flats. We had reached the point that crisis was inevitable, and not just one place, but several. So I think that ultimately we would have had a Superfund without Love Canal, but there would have been something else that loomed as potentially dangerous as Love Canal did. But no doubt about it, Love Canal was a precipitating event.

EPA Interviewer: Jeff, would you like to add any concluding words of wisdom as somebody who has really dealt with environmental issues your entire career, both as an EPA person in a region, then at Headquarters, teaching environmental law, now what, nearly 20 years?

Miller: Almost.

EPA Interviewer: Almost?

Miller: Yeah.

EPA Interviewer: So it's obviously been something that you have been involved in most of your adult life, so if you have any parting words of wisdom, now is your chance.

Miller: Well, parting words of wisdom? Wisdom often escapes me, so I think I'll pass on that.

[Recording stopped]

Well, let's talk about enforcement a little bit more, because the role of enforcement and the program office was right from the beginning an uncertain arrangement. What was the role of the enforcement office as opposed to the program office? The problem of course was, in the beginning, before Superfund, the program office couldn't do a darn thing, and to the extent that anyone could do anything, it was the enforcement people. And, although their [the enforcement office's] legal tools were not 100 percent certain, they were 100 percent more effective than what the program office could do, because they [the program office] couldn't do anything. Then, of course, once the legislation was enacted and there was money for the program office to spend, it didn't want the enforcement people to do anything, but it just wanted to spend money. And it was used to spending money, because the people who came over to run the program office came right out of the construction grants program—sewage treatment construction grants program—and they were very experienced people, and good

people at managing engineering projects and at financing engineering projects. They really approached it as another construction grants-type program.

That was an interesting thing, because in my water pollution office, one of the disconnects in the water pollution program was that the industrial permitting people had been in the water pollution enforcement office all along, but the municipal permitting people had been in the program office all along. The municipal permitting people had been in the program office, because that's where the construction grants program was. And so we had a disconnect in the water pollution permitting program, and one of the things that I did was to work with Jack Rhett and Mike Cook over time to get the municipal permitting people in my office with the other permitting people, and at the same time to develop a permitting and construction grants strategy to make the two mutually reinforce each other rather than being disconnected and potentially at odds. And that seemed to work pretty well, once it got off the ground. It took a lot of effort, and I envisioned that we would end up doing the same kind of thing in the Superfund program. Looking at the situation, site by site, and trying to figure out whether this was a site that we really should march forward and spend a lot of federal money on up front and not worry much about enforcement, except developing a record to recover the money later on, or where it might be faster and more useful to take an enforcement approach. To do that, you had to have both sides, or both offices, working together in a cooperative manner to try to develop and implement a joint strategy.

EPA Interviewer: Yeah, because if you're going to force somebody to do a cleanup, first you had to know what it is you're trying to force them to do.

Miller: Yeah.

EPA Interviewer: Even if it's only at the outset, force them to study.

Miller: That's right.

EPA Interviewer: And of course, we had policies early on that said, we'll agree to let you do an RI/FS [remedial investigation/feasibility study], but if you do, we're going to force you to tell us even before you commence the RI/FS whether or not you'll perform the remedy, so some of our early enforcement policies...

Miller: That was a mistake. [*Laughing*]

EPA Interviewer: ...didn't prove to be the most viable ones.

Miller: One of the things that became clear very quickly, and could have been obvious—should have been obvious—was that it takes us a long time in the Federal Government to do things. Whether it's to let a contract to do an RI/FS, to oversee the RI/FS, whatever, and often times if you do the same thing by the private sector, it can be accomplished much more quickly. If that was obvious, well, that was more obvious to the enforcement people than it was to the program people. At the same time, the amount of time that it would take to do that kind of thing in the private sector, you'd have to add the time it takes to negotiate with somebody, and if that takes a long period of time, the timing advantages of doing it by using enforcement can be vastly eroded. So you've got a judgment call based on experience,

almost on a case-by-case basis, of what would be the most effective thing to do at this particular site at this particular time with these particular PRPs involved. And whenever you're making a judgment based on experience, there's a great potential for making different judgments depending on what office you come out of which, of course, played out differently region by region and in Headquarters. That's one of the disadvantages of having enforcement offices and program offices in different organizational locations.

The flip side of that is the enforcement offices, at least in the beginnings of these programs, are always much smaller than the program offices, and if they were in the program offices, they would have been in a very subordinate kind of a position. The enforcement mentality is a little bit different than the program mentality. So when you put all the enforcement people in one office, they can kind of feed off of each other and mutually encourage each other to develop an esprit and a more coherent, unified enforcement approach to things. I think that's really important in the hazardous waste and Superfund areas, because more than any other aspect of EPA, you're really crossing between all of the things that the Agency does. You're looking at contamination of all of the media, you're drawing on remedies, you're looking at consequences in all of the media, and the only commonality in all the media is enforcement. So the easiest place to develop some kind of coherence and some kind of unified approach to all of the Agency's programs has always been in the enforcement office, particularly where you're dealing with hazardous wastes and hazardous substances. "What's the greatest environmental priority? Where do we want contamination to end up? If it's got to end up somewhere, which media should it end up in, and what kind of ultimate disposition is the most desirable?" Why, the only place that you even ask that question is if you're doing some kind of multimedia work, and that happens in the enforcement office. It doesn't happen often in the media offices.

EPA Interviewer: That's right, because they're too focused on their specific media.

Miller: Yeah, yeah. So in terms of environmental policy, cross-cutting issues are dealt with by the enforcement office much more frequently than the other offices. From the overall Agency policy standpoint that's pretty important.

EPA Interviewer: So Jeff, how many years did you spend at Headquarters in enforcement?

Miller: I was four years in Region 1, and I was six years in Headquarters.

EPA Interviewer: And you left in '80...

Miller: '81. March of '81.

EPA Interviewer: Well, would you still like to be doing enforcement?

Miller: I think I would much rather have done enforcement when I did it than later. Because when I was doing it, we were doing so much for the first time, and it was considerably less bureaucratic than it is today. We didn't have as many layers to go through. The Administrations were encouraging of enforcement as well as environmental protection, and that hasn't always been the case since. The Nixon Administration gave birth to EPA, and

although the President vetoed the Water Act because he thought of it as a budget buster, once it came to administering it, they did a good job. John Quarles, who was the first Assistant Administrator for Enforcement, was a good enforcer, and I never saw what I thought of as a political fix in a case, or in the development of enforcement policies. The Carter Administration as well was very pro-environment and pro-enforcement, and so those were great days to be an enforcer.

EPA Interviewer: The glory days. You're not the first person to suggest it was more fun when the law was new, and more challenging.

Miller: OK, you said it. It was clearly more challenging because you were writing on a clean slate.