

SUSAN BRIGGUM

Industry Representative

Interview Date: July 21, 2005

Location: Silver Spring, MD

EPA Interviewer: OK, for the record, it's July 21, 2005, and we're interviewing for the 25th Superfund anniversary, and we have Sue Briggum. Sue, good morning.

Briggum: Good morning.

EPA Interviewer: Welcome.

Briggum: Thank you.

EPA Interviewer: Sue, can you tell us, just to get us started, about your current position with Waste Management. And tell us what you do there, how long you've been there, but with a special focus on Superfund.

Briggum: Sure. I'm the Director of Environmental Affairs for Waste Management. I've been with the company in the Washington office for nearly 18 years. I was hired to work on Superfund back when they were doing the NCP [National Contingency Plan] regs and a lot of regulatory activity, and I've covered the gamut of environmental issues for the company over the years. Before I joined Waste Management I was actually a Superfund litigator and regulatory attorney at a DC law firm. So I've been working on Superfund a very long time.

EPA Interviewer: I'm dying to hear more about your private practice litigation, but we'll stick with Superfund just a little bit longer and Waste Management. I know you've been with Superfund for a long time, but go back to December 11, 1980, and tell us what you were doing at that time, and how you got into Superfund.

Briggum: Well, actually I don't remember December 11, but I remember January 1981 when I came in and one of my assignments as a young associate was to write client letters explaining what this new legislation meant. Is it truly strict liability? Is it joint and several? So I was one of those low-level attorneys who grinded out the original memos that said, "Yes, indeed, this is a statute that all of our business clients must be highly aware of."

EPA Interviewer: And what result did you get from those client letters? Did that quell anybody's fear or did they just fan the flames?

Briggum: I think it took a while before people actually believed the statute was as broad as it was. There were debates, as you know. Well, there was litigation for several years determining whether, in fact, there was joint and several liability. You had to construe the



Clean Water Act, and extrapolate the legislative history, so there was a lot of pure legal work determining the original legislative intent. There was counseling and, of course, there were some cases pending that were filed under state law and the Clean Water Act that had Superfund causes of action joined. So we started with the case work trying to determine what the scope of liability would be, what the new cleanup standards would be. It was really a very open field, and a fun area to be a lawyer.

EPA Interviewer: I've read some law review articles by some people who were active in Superfund about some legislative horse trading on the issue, so I, obviously, wasn't following it at that time, but it appears to me that there was probably some language that didn't make it into the final bill.

Briggum: Well, my impression is, having unfortunately read the entire legislative history more than once, although I wasn't there, it was your classic situation where no one wanted to actually articulate joint and several, because that was a deal killer. So they did a cross-reference to the Clean Water Act, where it was quite clear that this would be joint and several liability. So the political compromise was to enact that obligation and not actually say it aloud.

EPA Interviewer: So the client letters did what?

Briggum: They told them what the statute didn't say, but what they would learn to their sorrow over the next several years.

EPA Interviewer: What fun. What fun. So early on, when you were working on Superfund issues, were you actually dealing directly with clients as a young associate, or were you more a back up or doing research?

Briggum: Oh, I worked my way into it. I started by doing research for memos to partners who were eminent in the environmental field. I worked with a number of the lawyers who were among the first Superfund litigators, you know, covering Love Canal, Stringfellow Acid Pits, all of the legendary early cases. And I would do discovery. I'd be one of those people in the bowels of the basement at a company going through records to determine exactly what we knew had happened back in 1956, when the company was alleged to have disposed of waste at a Superfund site. I eventually moved my way into representing clients in terms of the negotiations with the government and particularly with other PRPs [potentially responsible parties]. Remember in the early days, there was an enormous amount of transaction in terms of trying to get all the responsible parties to the table and their insurers to the table. So that was very labor-intensive, and I was one of the people that did the nitty-gritty early work.

EPA Interviewer: One of the little worker bees.

Briggum: Exactly.

EPA Interviewer: And what firm were you with at that time?

Briggum: Wald, Harkrader and Ross.

EPA Interviewer: Was that here in Washington?

Briggum: Yes, but it's no longer in existence. It's become the environmental practice now largely at Piper Rudnick.

EPA Interviewer: So, if you had to sum up your work on Superfund during that period of time, what was the most significant issue that you dealt with? If you could reduce it to the most significant issue?

Briggum: I think the most significant issue was how you would manage to organize the responsible parties into a sufficient critical mass to fund the cleanup. Given the nature of the statute, which says all you need is one responsible party and you can charge that company with a 100 percent. That was really unexpected. It was an innovation in environmental law. It took a long time for companies, and much longer for insurance companies, to recognize that this was the scope of the liability, and that we would all have to work as well we could to try to make it a little bit fairer so that you would get sufficient cooperative participation.

EPA Interviewer: And during those early days, did anybody give much thought to *de minimis* parties? Now, I'm very well aware that *de minimis* didn't actually show up until 1986, but still there were little guys even then.

Briggum: It was a huge problem, because the inclination—and you really can't blame the Justice Department and EPA—the inclination was to find a few large companies and then let them do the work.

EPA Interviewer: And the famous steering committee model.

Briggum: Exactly. The problem was if I represented companies who were almost never site owners, always transporters or generators. There was an enormous amount of animosity that five parties, out of hundreds that were known to have disposed at the site, would be expected to fund the entire cleanup. There was a lot of surprise and I think also resentment when smaller parties, and what one might call more politically popular parties like small businesses, municipalities, recyclers, were not pursued aggressively. If you're a company that believes in accountability, that made for very difficult litigation settings. You didn't have a lot of coercive power if you were a responsible party trying to get contribution according to your fair share from others without a lot of government support in the beginning. That's one of the reasons why these cases would drag on for years.

EPA Interviewer: My own perception during that period of time, especially in the mid-'80s, was that private parties didn't necessarily want the government to know about its administrative efforts, so that sometimes it was only maybe a more friendly private party who would actually talk about the administrative expenses that the steering committee would be expending just to try to get everybody to the table.

Briggum: I think that's true. Because a lot of the negotiations were under confidentiality agreements, the thought was that since we were spending the money it wasn't really the government's responsibility to participate, and therefore they didn't really need access to the information. And so there wouldn't be an awareness of how incredibly labor-intensive the process was.

EPA Interviewer: And a few times I can remember sitting in at a negotiation table and having the private party say, "If you think this is contentious, you know, with the government on one side and private parties on the other, you should see our steering committee meetings."

Briggum: Yes. And there would always be unique arguments, you know, people would say, "We have a Bevill Exemption¹, and therefore our wastes can't be considered hazardous substances." As you know, it took a while to get that resolved as a matter of legal principle, and so you would put that to the side. There would be active parties who acknowledged their accountability, usually those that were handling kind of obvious chemical materials, and then others would try to find arguments why they didn't need to respond. Frankly, it was also very difficult because one of the problems with Superfund is you send out your information letters, but there's not an enormous penalty for not being candid. So if you could assume by the nature of the company's operations they must have handled hazardous materials, they were pretty much dead to right. But you had a lot of small parties and even medium-sized businesses who simply would say they had no information and were able to lie in the weeds for years, and sometimes were rewarded by ultimately paying nothing. I think that was a stress on the system because it's really hard in the U.S. not to expect fundamental fairness in any legal process. That, I think, was a real handicap to the program.

EPA Interviewer: And as far as talking about the problem of getting all responsible parties to step forward, of course, in the very early days of the program EPA was in the process of sending out blanket special notice letters.

Briggum: Yes.

EPA Interviewer: And I can remember just the madness down at EPA because of course we never had enough clerical support to do anything, and we would be ready to send out a thousand special notice letters or even 25 special notice letters, it was like building the Panama Canal.

Briggum: Absolutely. Those were the PRP meetings in school auditoriums and things like that, and that was an unworkable system. But when you start out with a piece of legislation that really doesn't give you any guidance about how you're going to administer this at sites with hundreds, if not thousands, of parties in some cases, you just have to learn by trial and error.

EPA Interviewer: And at the same time, of course, the program, unlike any other regulatory program that EPA had in its arsenal at that time, had the Fund. And so sites were being cleaned up, not just emergency sites but big sites. And so in the early days, the government people hoped we would never get to the situation where all we would do would be cost-recover. Made the government people still want to do enforcement, but it was difficult in house to divvy them up, and figure out which sites really have a viable PRP community and which sites don't. So, do you think PRPs ultimately evolved systems that seemed to work from site to site?

¹ 3001(b)(3)(A)(i) of RCRA is often referred to as the Bevill Exemption, and exempts fossil fuel combustion wastes from hazardous waste regulations.

Briggum: Absolutely, absolutely. And I can think from my own career in my earliest representation, I spent a lot of time responding to notice letters and information requests, and arraying all of the legal arguments why there was no information that was suggesting accountability, and I made full use of all legal arguments available, as is your professional obligation. Relatively quickly, I had a large New Jersey practice, actually. There were a lot of early cases in New Jersey. We realized that this was extremely inefficient, and that we were getting nowhere. We needed to coalesce a group, and so they would become increasingly sophisticated—usually your Fortune 500 companies who recognized that we should be trying to save litigation costs. So we would come forward, acknowledge that we had responsibility, and try to take charge of the process. We began to organize steering committees. We began to think about coordinating counsel. We came up with kinds of rough principles of allocation based on fundamental ideas of fairness. You look at volume, you look at toxicity, you look at knowledge, and eventually you also evolve kind of the rough allocation principles: the owners and operators should, in most cases, pay at least 50 percent, the transporters a modest share, probably, around 10, and the generators 40, rough. I mean this was a general rule in my practice for a long time. When I moved to Waste Management, they were quite highly evolved because they recognized that, because we're a waste services company, we have a lot of experience with project management and municipal landfills. It made a lot of sense to be quite proactive, and be part of the steering committee and be part of the group that's discussing the appropriate remedy because we had the kind of technical expertise to bring to the table much more cost-effectively than waiting for a cost recovery case. So we often became very active in cases even if we thought our responsibility was relatively modest because we saw overall cost savings and, you know, frankly, the longer it takes to clean up, the more it costs. So if you can get to it, that's what we tried to do.

EPA Interviewer: It has been my experience that the companies that developed the expertise did just that. They stepped up. They joined the steering committee and helped move things forward. What would you say, if you looked back—what would you say the biggest mistake that the government made early on in Superfund enforcement? If there were mistakes that the government made, and if ultimately they corrected them or if those same sort of institutional problems exist even today.

Briggum: I think the biggest mistake was not to declare at the outset that the government's enforcement role would be to facilitate rough justice. The hands-off attitude to a lot of the responsible parties and to the recalcitrants—which has gotten better, but still hasn't left entirely—I think really degraded the approach to the system and the acceptance of Superfund as an important program within the business community. When you have companies that come to the table, and they often see competitors who are routinely recalcitrant and pay no penalty, sometimes you see that those who aren't forthcoming will be rewarded with a *de minimis* share because at a certain point everyone's tired and the government will settle for a few pennies on the dollar just to get some cash. That's very difficult for the responsible companies that have been proactive and have taken on the laboring oar and done the sweat equity to accept. I understand that there are only so many resources, but if the commitment to fundamental fairness had started earlier, and if it was constant, and if it was one of the continuing main focuses of Superfund, I really think you would find more corporate support for the program, and it would be easier to make sure that

everyone accountable does pay. There's still, within the minds of some groups, the sense that this is not really their problem.

EPA Interviewer: And what you say seems to me to also carry over to the later *de minimis* practices. What it arose, where the government early on started out by, in effect, using the same template for the *de minimis* parties that had been used for *de maximus* parties. And have you had much experience with *de minimis* parties, both early on before we sort of changed our direction and then after the administrative reforms?

Briggum: Well, I think *de minimis* has been kind of an evolution because PRPs were doing what essentially was *de minimis* practice before it became an official EPA policy by rounding up the small contributors, and making them an offer. The offer was usually roughly similar to the ultimate *de minimis* guidelines—that you should be paying for your volumetric share, there should be some kind of premium for the risk transfer, you're home free if there are cost overruns or new information that increases costs but doesn't trigger a reopener. I think that was a cooperative effort between the government and PRPs. As PRPs said, "You know when you have 500 parties, you're going to have to divvy them up depending on who are the big players and who are the small." It was very helpful actually to have this consolidated into a guidance document. The administrative reforms were really transformative to the program because that commitment to fairness, the commitment to recognize orphan share and to compensate it in some way. The streamlining of *de minimis* parties, but the rights of the larger parties to comment and make their case—all that improved the system enormously. And it was such a change.

I will never forget in the early '80s sitting at Clean Sites at a Superfund meeting when the head of enforcement, after hearing a number of companies talk about specific sites where something terribly unfair had happened, and he smiled and he said, "But Superfund isn't supposed to be fair." It was a breathtaking event that frankly a lot of us have never forgotten—commitment to change. That has really been beneficial, and I think that that's why you will see much more streamlined case settlement and why you see fewer transaction costs. It was a very important move by the government, and it continues to be an incredibly important administrative reform.

EPA Interviewer: Early on, we had all sorts of in-house constraints. For instance, early on we had an understanding that we would not allow a private party to do just an RI/FS [remedial investigation/feasibility study]. We would commit to do the entire remedy. At that time the program, of course, was very heavy on approvals at all levels. This case arose in New Jersey, nonetheless, once Region 2 had blessed it. Then Headquarters would have to bless it—not just in the program, but in the enforcement office as well. We would hear over and over that parties were not willing to sign a blank check to the government to commit to an RI/FS, and then commit to an unknown RD/RA [remedial design/remedial action] at some point in time. So it's not clear to me how these kinds of policies were familiar to the private parties or how they impeded the flow of activities towards settlement or whether that was just one more of the problems.

Briggum: I can recall those days. I'm not sure responsible parties were aware that was a universal policy. That was often very difficult to discern. I do know that it would be very difficult to counsel a client to sign onto the package RI/FS, RD/RA, unless you knew the

accountability was very substantial. It's one thing if you owned the site or if you knew you were one of the major generators. It's quite another if you were at a large multi-party site, and there are many parties, because then your share is so small—the size of the pie and the potential fallout—if for some reason most of the accountability can't be collected and you're stuck holding the bag. That was a big risk because corporations have to report to their shareholders as well. So you really had to look at the degree to which you could feel you were fairly accountable, and the risk of unfair accountability that you might trigger by signing something too early. That was unhelpful. So the shift to allowing a simple agreement for increments rather than the entire response action, I think, also really helped speed up the program, because then you didn't have the delay as you tried to envision all scenarios. You could say, "Well, anybody can pay the \$1 million for the RI/FS."

EPA Interviewer: And sort the rest of it out later. When did private parties just throw in the towel, and say, "You know what? We're going to bring in a whole bunch more parties because the government's not doing it." I still have memories of going out to Cleveland for status calls where there would be 200 black suits in the audience. Most of those would be representing third parties who had been brought in.

Briggum: I think as the practice evolved, we realized that every time you bring in a new lawyer who hasn't had a Superfund case before, you're going to have to spend three or four days educating them. And so people got more efficient. You would find the more significant and more sophisticated parties. You would have a steering committee. You tried to transfer to a paper practice where you would make offers. For example, you would use the facts of the site in terms of volume and toxicity, you would come up with estimates for particular kinds of parties, and you would make people offers. Sometimes they would accept them, and you could get the equivalent of a *de minimis* settlement, and other times you were just going to have to litigate. We spent years trying to get enforcement help, and sometimes it is forthcoming and that helps enormously. The companies respond differently when they see a letter from the government than from another company, and we eventually evolved the practice to the most efficient manner we could find.

EPA Interviewer: Speaking only for myself, I think that something that surprised us early on was the value of a letter from the government on the same issues that the big, powerful law firms were beating their heads against the wall over.

Briggum: It's absolutely remarkable. You [EPA] just have powers that you haven't really understood. That's a shame too, because I think if that had really been appreciated, probably we would have reformed the program and had different practices, and used the leverage of the government perhaps more effectively at an earlier stage.

EPA Interviewer: But do you think the taint of the sweetheart deals of the early '80s had any effect either on the private parties who thought you know, "Where's my sweetheart deal?" or the government who thought, "Oh my, we can't ever do that again."

Briggum: I never worked on a case that was considered a sweet...

EPA Interviewer: We were talking about the chilling effect that the government, at least, felt about the sweetheart deals.

Briggum: Yes.

EPA Interviewer: The charge that there had been sweetheart deals.

Briggum: Right.

EPA Interviewer: But I have a feeling it had an impact on the private community as well.

Briggum: You know, I'm not sure it did. I certainly don't know of a PRP group that expected to receive a sweetheart deal. If anything, there would be resentment that for some reason, someone got one once. But I don't think that PRPs really thought much about it because it seemed so unique and eccentric and out of their experience. So, frankly, they wouldn't be that sympathetic to the government response, which would be to become much more formalistic and require vast layers of kind of double-signing accountability. I don't think we even would have appreciated that as a motivation, actually.

EPA Interviewer: When they talk about the mistakes that the government made in the early days of Superfund enforcement, do you think the private parties made mistakes in the early days with Superfund enforcement? Were there things they could have done differently had they not just been reacting?

Briggum: Well, you know, I think probably we could have done a better job of educating the legal community on potential efficiencies in the process and less time talking about potential defenses. We were being lawyers, but we should have realized that none of the defenses were going to work, ultimately, so we spent an enormous amount of time and passion on issues that were completely irrelevant. You know, mechanisms to challenge the listing and the HRS [Hazard Ranking System] package. There were all kinds of issues that we spent a lot of time and wasted a lot of client money on. If we had been a little more realistic, recognized that this was a precedent-setting statute that had virtually complete control by the government, we could have really focused on coming up with more straightforward and cheaper ways of organizing groups according to accountability.

So I think there's an educational role we could have played. I don't think it's in the nature of legal training to necessarily think of that, and frankly I think one of the problems with the program has been it's been very lawyer-centric because of the liability issues. Site managers would have figured that out a decade before the legal departments did. It's also very difficult when you have a program that often involves multi-party sites. Usually in-house counsel won't run the case; it's outside counsel. Having played this game from all sides, you don't think primarily of efficiency and cost savings when you're outside counsel. You think, "What argument can I make to get my client the best deal possible," and that's not helpful. So I think there are structural problems in terms of where the accountability is that have made it very difficult to get to where we are now. Now, I think that at most sites, the program managers are in control. In my company, the program manager keeps a very tight control of all positions that the lawyers take, and it's much more efficient, and we waste no time on foolish arguments that we know will ultimately fail. We try to get to the cleanup and get to a fair assessment of what we're responsible for, but that's taken an evolution and there were counter pressures that have delayed it.

EPA Interviewer: Taken 25 years.

Briggum: Yes.

EPA Interviewer: And my impression during the early days was that you did have in-house counsel, but unfortunately you had outside counsel as well.

Briggum: They were the experts, too. For in-house counsel, it was very complex statute and so you would have Superfund specialists who were outside counsel. They were filled with ideas and arguments and things that worked, and they controlled the process. It took a long time for in-house counsel to assert themselves, but when they did, it was really beneficial, I think, both to the government in terms of their efficiency in moving forward and to the companies who were paying the bills.

EPA Interviewer: And the government often felt that it operated on the same template actually, with our outside counsel being our DOJ [Department of Justice] folks and in-house folks being the regional counsel attorneys.

Briggum: Yes.

EPA Interviewer: But we, just like a private party, had a lot of coordination to do to bring everybody to the table on the same page.

Briggum: Right. Well, I know you also had very complex issues at a lot of sites, because if you have other governments involved—if [the] local, state, in some cases the Federal Government was a PRP—that's enormously complex. The Justice Department has many hats in some of these cases.

EPA Interviewer: One hat.

Briggum: One hat, but several hearts, and those can be the most difficult cases. The cases that I've seen that often go for 20 years are those where the Federal Government refuses to step up to the plate and behave like a responsible party would, and as a consequence, you see no more irritation and bickering than when large companies see a Federal Government PRP refusing to pay its fair share. That just seems beyond the pale.

EPA Interviewer: It's the red flag.

Briggum: It is. It is. It makes it very emotional.

EPA Interviewer: Now, we talked a little bit about administrative reforms, and I think you actually were very pretty active in the Superfund things during administrative reforms.

Briggum: Yes.

EPA Interviewer: Were there specific things that you paid attention to?

Briggum: Well, I was very active in the early '90s when we talked about Superfund reform generally, and was on EPA's advisory committee, the NACEPT [National Advisory Council

on Environmental Policy and Technology] that came up with the foundations of a consensus bill. Then I was the staff to my CEO [Chief Executive Officer], who was on the National Commission on Superfund. Then I worked very actively with the stakeholder group that worked with Members of Congress to try to pass the consensus bill that had many of the ideas that eventually became administrative reforms. I worked on—primarily remedy selection was my primary driver—negotiating with NRDC [Natural Resources Defense Council] and others, but I also was very active in the liability section, community participation, a little bit on state role, didn't do much on the EIRF [Environmental Insurance Restoration Fund], the insurance agreement or NRD [Natural Resource Damages], but covered most of the other sections.

EPA Interviewer: And, of course, those administrative reforms were hand-in-hand with efforts to reauthorize Superfund.

Briggum: Yes.

EPA Interviewer: Of course, those were reauthorization efforts [that] just kept rising and falling.

Briggum: Well, I think it was heartbreaking when the consensus bill didn't pass. There were a number of us who really kind of devoted our lives for a couple of years to coming up with a consensus bill. It was quite remarkable, because we had large and small businesses, local governments, states, the major environmental groups, and environmental justice organizations, all on exactly the same page, lobbying together as colleagues for an enduring period. It was really kind of heartbreaking to see the bill not pass, and I remember two incidents that would explain why it didn't—which shows you kind of the capriciousness of life.

On the House side, we had negotiated and come up with what the Agency and we thought was a potential package that would represent a 35 percent cost savings on remedy selection, by looking at land use, and reopening old decisions that were wildly expensive and unnecessary. We had a good package, and we went to the House side and at the last minute the Transportation Committee added the Davis-Bacon² amendment that would require Davis-Bacon procedures and wage rates at any site in which any Superfund dollar whatsoever was expended. This meant, of course, that if you got a dollar in orphan-share compensation, the entire remedy selection savings were wiped out. As a consequence, the group said that, "It's not possible. We'll have to give up on the bill."

On the Senate side, there was one notable Senator who said to the business people who pleaded for this consensus bill, "I can appreciate the fact that you've negotiated this with the environmental groups, but frankly, we can do better for you next time around." Well, that promise never was fulfilled. Then we tried to pick up. I think when you have that much consensus and it fails, it's very difficult to continue on. Of course, there was the Gingrich revolution, and so there was Republican leadership, and I think that there were stellar efforts by [Representatives] Boehlert and Barcia and Dooley and a lot of members to try and

² The Davis-Bacon Act relates to the rate of wages for laborers and mechanics employed by contractors and subcontractors on public buildings.

reformulate to some extent, but still keep the essence of the good ideas for reforming the program. But the moment to actually pass the bill was lost.

EPA Interviewer: When you get to that point where consensus is achieved, but then everything falls away, then everybody starts to rethink things they have given up. And so it's worse than starting afresh.

Briggum: I think you're right.

EPA Interviewer: Because you've got all the old baggage running around.

Briggum: Well, it's also difficult because as time goes by, companies' postures change enormously. There are companies who largely paid their dues. They've done the cleanups. They've paid the money, and they feel that at this point the new sites coming on don't involve them. They, for example, would be highly resistant to the renewal of the Superfund tax. As time went by and there was consolidation in the chemical and oil industries, there would be companies paying an absolutely stupefying amount of excise tax. If they also had pretty much cleaned up their sites, you can imagine the level of resistance. So one of the fundamental components of a reauthorization package has always been how would we fund it. And as time went by, the old funding mechanism seemed less and less fair as well. And so support just pretty much dissipated for that.

EPA Interviewer: I want to shift focus just a little bit.

Briggum: Yes.

EPA Interviewer: I'm very much involved with the Brownfields amendment, and I'm wondering if it's had any impact on what you do? Or if you have any observations about the final reauthorization after all those years.

Briggum: Sure. Yes, we followed very attentively for two reasons. One, we're strong supporters of the Brownfields program, and EPA has done a very good job, I think, in a leadership role on that program in terms of encouraging redevelopment and revitalization. Sometimes the staff has been extremely helpful, and has resources under the program to make projects go forward. We're seeing a lot of terrific results in communities, so that was an excellent development and highly consistent with where the program was going and that was not really a Congressional initiative. EPA had recognized brownfields as an important issue and was already trying to move sites into productive use. The other component of that, of course, was the small business liability relief, and again I think that the Agency did a very good job of recognizing that this is obviously a very important constituency that Congress wanted to assist. But at the same time, the program needed to retain some basic fairness. So I give the people who worked on the bill, and who have worked on the regulation since then, a lot of credit for making sure that there was a lot of accountability and that the streamlining really reflected appropriate liability relief, and that it didn't destabilize the negotiations at sites with small and larger parties. So that continuing commitment to fairness has been very helpful. I see it also, for example, in regulatory efforts with regard to the recycler relief, which was another carve out. That also had the possibility to really destabilize the system, and the

Agency, I think, has worked very hard to assure that the likelihood that carve-outs result in cleanups not being done is minimized.

EPA Interviewer: When you worked on specific cases, did you have any specific experiences that had some impact on, or by, administrative reforms, or have you worked on anything since the Brownfields amendments? Where there's been any impact on that change in the law?

Briggum: Well, sure. At the company, I am not hands-on on cases, but I participate in a team on a number of cases, and I see enormous benefits from administrative reforms. You see sensible choices made in terms of remedy selection, in particular the groundwater policy that was part of the administrative reforms. Its phased approach, its scientific approach to monitored natural attenuation, [is] more scientific reality in terms of the benefits and limitations of technologies like pump-and-treat. I see a lot of good sense that's coming to the table. At a number of sites, we had old decisions that weren't informed by better technology and better understanding of approaches.

EPA Interviewer: Old RODs [Records of Decision]?

Briggum: Old RODs that have been revised under the re-look at existing decisions, administrative reform, that's been very helpful. There have been cases with orphan shares where that's been acknowledged in terms of past costs. That sometimes has made the deal go forward, and we've gotten critical mass in funding in a PRP group. We've had sites that have special accounts, where that money has been extremely important. It's always useful to remember that if there are *de minimis* settlements that go into a special account, the responsible parties who have fronted the money really think that money is theirs. They're not 100 percent accountable; that those who are also accountable also should be paying for the cleanup. We've had some disbursements, and that has helped a lot. Anything that makes the process something [that will make] your site engineer say, "Yeah, that's a solid approach. I mean it's conservative. We're being very protective. We might not have had to do everything, but this is pretty sound." Whenever the company says, "Well, we paid more than we should have, but you know, it's rough justice and they did their best to get everybody to the table and paying their fair share," that's when you feel really good about a site, and it goes forward, and the community gets the land back for beneficial use.

EPA Interviewer: We had some efforts after the SARA amendments [Superfund Amendments and Reauthorization Act of 1986] that didn't seem to go anywhere, at least from my perspective with EPA. I'm thinking of two in particular. We had a process for so-called "mixed funding" at sites.

Briggum: Right.

EPA Interviewer: And then we also had what we called by its acronym, NBARs (Non-Binding Allocations of Responsibility), just to pick a couple. Those were things that from my perspective sitting at the staff level in the Enforcement Office never went anywhere. I don't know whether it's because private parties just said, "Hey, we don't want the government doing non-binding allocations," or whether maybe Clean Sites happened upon the scene at about that time, and they started doing allocations, and it was never clear to me.

Briggum: Yes.

EPA Interviewer: Things just never took off.

Briggum: Well, I think it is difficult. By the time we were talking about NBARS, there were organizations like Clean Sites and others that had a lot of allocation experience and some rough principles and streamlined procedures, so PRPs saw the NBAR procedures as far more bureaucratic. And they thought they would take longer and be more costly, so I think you saw some problems there. There's also a problem whenever companies have a lot of sites. If you have one site where something went wrong, and you felt you were treated unfairly, and you felt that the Justice Department attorney really was not following the procedures, and his heart wasn't really in it in terms of making sure that people were treated, it makes you gun-shy otherwise. So I think that was a handicap to the people who tried in good faith to work on the NBAR. They had some baggage that they were carrying from other parties, and they had a learning curve. So it was a useful process to go through, but it's not surprising that it wasn't a big hit right off the bat.

EPA Interviewer: And how about mixed funding? Did you ever have any experience with that?

Briggum: Only in the theoretical sense. I didn't have a case with mixed funding that I recall. No.

EPA Interviewer: But these were efforts I would say in the mid '80s. The other day I did a Google search to see what Sue Briggum's been up to, and I see that she has had a lot of environmental justice activities. I wondered if you'd like to talk about that a little, especially with the Superfund focus.

Briggum: Sure. Well, I was in the National Commission on Superfund, and I remember most clearly the environmental justice issue emerging in that group. Charlotte Keys, who is a very eminent environmental justice advocate from Louisiana, and who was only in her mid-teens at the time, came in and gave a presentation of what it's like to live near a Superfund site. She talked about standing at the fence with school children and people her own age, teenagers, watching men in moon suits cleaning up the site and having no idea what's going on, but having this sinking sense that it was not a good thing to be standing there breathing everything if workers at the site had to have that full protection. And it really galvanized everyone because she really made the situation visual and authentic for everyone. People then talked about environmental justice both in terms of the way the program's run, assuring that you get at least equivalent cleanup, that you have further outreach because you know in environmental justice communities there may be a lot of other sources of potential health concern. So there is a special need to make sure that the cleanup is being most inclusive of and protective of the community. That became an important part of the Superfund debate, and was part of the consensus proposals and remains a commitment by the agency that when you have a cleanup in an environmental justice community, the community outreach is extremely open and active and flexible in terms of making sure that everyone's accommodated and it's clear exactly what's happening at the sites. I think that's been very beneficial to the program.

EPA Interviewer: Within your own corporate structure, what do you do vis-à-vis environmental justice, if anything? I mean is there some in-house approach to solving the same problems?

Briggum: Yes. We have what's called our strategic business framework, which are kind of the principles of the company. And equal to all others, including shareholders and employees, is community. We have a very extensive community relations department, and there are community relations trained personnel at our major facilities. We have policies with regard to full and open communication, open houses, community dialogue, community benefits, and mutual programs. We have a foundation that provides grants to community groups for projects where we can work together. So it's a very important issue for us. And we've been very, very active because when you talk about environmental justice, the issue of waste is always there. No one is very happy with the things that are thrown away, and they forget who threw it away. But those who take care of it and have to make sure that it is handled in a safe and protective fashion are always the subject of a lot of scrutiny and attention. So it is very important for us to understand environmental justice issues, and to respond and make sure we're doing everything we can to address community concerns.

EPA Interviewer: So let's look back just a little bit again to the beginning of Superfund when it looked like legislation was going to move forward. Was it even on your radar screen at that time that Love Canal sort of happened? People started talking about the problems of hazardous waste? Was this something that was on your mind at that time?

Briggum: Well, I was actually a summer associate. I was still in law school when the initial complaints were filed at Love Canal, and Wald, Harkrader was the law firm for the major PRP in that case. Some summer associates worked on the papers, I didn't. I worked on some civil rights litigation involving the people who built the subway system in DC for most of the summer, which was a terrific case to be on. But I was aware of it, and then when I joined the firm. I just wasn't on the Love Canal team. I worked primarily with utilities and pharmaceutical companies, and some automotive companies and Superfund.

EPA Interviewer: So during your tenure at Wald, Harkrader, you weren't necessarily doing Superfund stuff, at least not at the outset.

Briggum: I did Superfund counseling letters at the beginning. I was the coauthor of two books on RCRA and Superfund that the firm published, and then I increasingly had my own cases. So I worked on Superfund pretty much from '81 until the present.

EPA Interviewer: And when did you start with Waste Management?

Briggum: In 1987. And at Waste Management, it's primarily been legislative and regulatory and policy development, and then counseling where I can be helpful on individual cases. So I keep a pretty good eye on our pending cases, but I don't have any line authority.

EPA Interviewer: Do you have opinions about the way Superfund was originally funded? I know we sort of got into this a little bit ago and whether it was the right way to go. I mean the

tax is expired now. And Superfund—the mantra in house for the enforcement folks at EPA, of course, is that the polluter pays. But we all understand that that doesn't really...

Briggum: That's, I think, been very poisonous rhetoric, and I think that that's the reason why Superfund's appropriations are going down, frankly. Most people who have been involved with Superfund, including those in-house in the industries that paid the highest taxes—and that was by far the oil industry and then the chemical industry to the extent that they had particular substances that were highly taxed; there also are some that are taxed at a very low rate—accepted it in the beginning as a new large-company funded environmental program. And there was the expectation that the taxes would be passed on. For a lot of industry, the taxes were *de minimis*. There are companies that had no liability whatsoever who would pay \$1 million or \$2 million a year. But as the debate went on, and there would be attempts to reauthorize and it would be couched as a "polluter pays" tax, the disjunct between your accountability for creating Superfund sites, and your financial assessment under a tax system that really wasn't based on what you had done at particular sites, got more and more critical and created more and more animosity on the part of the high taxpayers.

There's one company that pays, I heard, about \$1 billion a year in taxes for activities that were undertaken by Joe down the street—somebody dumping his used oil. A lot of small businesses and a lot of large companies pay none or a little bit of tax. How can you expect the large taxpayer to react, when they hear, what seems to their perspective (and I think fairly outrageous rhetoric), about the polluters getting off the hook, especially since the accountability in terms of individual activity for large corporations has been relentless for 25 years. If you have any accountability at a site, or even, as one lawyer said to us once, "You're in the phone book as serving this area, you must have sent a truck or two here." If you're expected to come to the table with millions of dollars based on that kind of evidence, and you are paying for what you did—one time, two times, three times what would be any fair assessment—and then at the same time you hear in Congress and in the newspaper, the polluters are getting off the hook, what kind of support do you think you're going to provide to the political process? It comes as no surprise to me that the tax hasn't been reestablished, and it's really sad in many ways because I think if a different choice had been made—and I don't think this is EPA's choice, I think it's been a choice for others—if there had been a choice to talk straightforwardly about an environmental need and should it be satisfied by a corporate-based tax or individual taxes, we might have come to a sensible resolution. But because it's been characterized in these moralistic terms that don't have any relationship to actual individual accountability, I just think that the subject is doomed, that the taxes will never come up again because we've lost the opportunity for an honest conversation.

EPA Interviewer: Do you foresee a time when hazardous waste sites as we know them today will no longer need a Superfund program?

Briggum: I would say no. I think the need will become less over time. There have been really important developments in regulatory programs, and a lot of the activities that created the initial Superfund sites have now become very stringently regulated and those activities will be done protectively. But it hasn't been comprehensive. There are some kinds of activities that result in releases of pollution that have been less regulated than others, and those areas we may continue to create sites that will be unfunded. There are still activities that result in the placement of pollutants on the ground without the obligation for the usual liners and leachate

collection systems and air monitoring and financial assurance for corrective action. To the extent that the regulatory program hasn't come in to take care of that shortfall, I think we may still see Superfund sites. So I would be surprised in my lifetime to see the program disappear.

EPA Interviewer: Well, and I think everybody recognizes that there'll always need to be removal response authority.

Briggum: Right. There are accidents, there are spills, there's criminal activity that takes place, and that absolutely will have to be responded to as well. So I think it's a matter of perhaps reconfiguring the resources to focus on those activities where perhaps more could be done to head off sites of the future and to make sure that the staffing is appropriate for that—more focus perhaps on the removal program and those activities to streamline the approach to existing sites.

One thing that would be problematic: it's very hard when you have a large Agency. There are a lot of employees who are funded by Superfund and that's their job, and it's very difficult to be nimble and to realize, "I've handled my portfolio, it's time to move on." The tendency is to say, "Oh, but wait a second. You know, couldn't we do another five-year review? There must be another year's work here." It's very difficult to move on and focus on a higher risk priority, and so that's the challenge of a very decentralized agency. I'm eager to see Sue Bodine be confirmed, and have an opportunity again for a confirmed Assistant Administrator who can provide leadership.

EPA Interviewer: Well, it doesn't always translate into efficiency to have less money to work with.

Briggum: Oh, absolutely.

EPA Interviewer: It is true that the Fund...I mean we're not quite to the stage of having bake sales yet, but we're certainly at the point where getting volunteer work, for instance from bona fide prospective purchasers under the new Brownfields amendments...

Briggum: Yes.

EPA Interviewer: ...is a big component of what enforcement people are up to. So it remains to be seen whether lack of funds will translate into a more efficient, more streamlined way of looking at how we do what we do with what we've got.

Briggum: Yeah. I think we're in a very difficult transition phase at the moment because the lack of funds means that some things are going to get short shrift. And unfortunately, sometimes that can be things like pursuing the largest manageable number of parties, making sure that you're getting everyone to the table, spending the time that's necessary in order to get a site to conclusion, and to the extent that you see things like fairness principles being compromised. I think that's unfortunate in that it creates a difficulty for the program. So we seem to be...

EPA Interviewer: I guess what I'm really looking for is just any concluding remarks you want to make. You're an experienced practitioner. You've been doing Superfund practically since day one.

Briggum: Yes.

EPA Interviewer: I guess I'd like for you to just reflect upon where we'd be if Superfund hadn't been passed? Was it inevitable?

Briggum: You know, that's a very interesting question. I have felt for much of my career that Superfund was extremely important because of the loop holes, they often call them, in the regulatory system. It was extremely important to have a catchall that would assure that if you had an area that was contaminated and needed to be addressed, there would be a way to find the money in order to take care of the emergency, and the long-term need for environmental protection. I've seen it have a very beneficial effect on big business generally in that anyone who becomes involved with a Superfund site realizes the consequence of inappropriate waste and chemical materials handling. So you see a lot of innovations that have been very beneficial. People send materials, for example, to our facilities, our hazardous and solid waste facilities, when they're not required to bylaw because they don't want the long-term liability, and that's terrific. You get things in highly regulated contained facilities under a stringent system rather than simply dumped out on the ground. It's also clearly been a driver behind pollution prevention, and a reuse of materials for companies that have been touched by the program and are socially responsible. It's been a real incentive for pollution prevention and reduction and careful handling.

Where it has been less effective than I would have expected is in being universally cautionary. I don't think it's been effective in "incentivising" pollution prevention, waste minimization, proper handling for groups and sectors that have had relatively little experience with the program. If you have been one of the carve-out parties, or if you have been one of the parties who is too small or inaccessible to be held accountable at a Superfund site, I don't really think that there has been that incentive for better environmental practices. Sadly, because Superfund has been so helpful in grabbing people and addressing problems, there's been less development than you might have seen on the regulatory front. You know, we really haven't seen the emergence of strong protective new programs. As you know, [there are] non-RCRA [Resource Conservation and Recovery Act] facilities that don't need permits now. I don't see new permit programs. I don't see a lot of energy under non-point source pollution reduction and control. So there's probably been a downside, as well as an upside. But on the whole, certainly for the larger business community, it has been a real incentive to responsible environmental activities and responsible waste management. That's vitally important.

I think for communities, it's been extremely important to take these facilities and these sites and assure that people are protected and that exposure is eliminated and that the blight in the community is removed. It's been very satisfying at the sites where we've worked with EPA on brownfield sites. We've got sites where you've got beautiful landscaping, you have ball fields. You have the kinds of development that the community wants. To see one of those facilities going back into productive use, that's a real success.

EPA Interviewer: Any other parting comments?

Briggum: No. I think that's it.

EPA Interviewer: OK, Sue. I know you have some final comments you'd like to make, so let's go for it.

Briggum: Sure. It occurred to me that there are some recent initiatives at the Agency that I haven't mentioned that I think are very, very helpful and deserve to be recorded. We of course talked about brownfields, but another really important initiative has been Mike Cook's³ initiative to look at the "teenager" sites — those very complex, difficult sites that have pended for a long time and really need senior level management attention to get them to closure. I've been familiar with several of those, and it's made a real difference at sites that have been languishing for a long time. We've come to some decisions because we've been able to make use of Mike's understanding from decades of knowledge with the Water and Superfund programs of exactly what the best science and technology is and how to come to decisions. We expect to see some of our sites moving into beneficial redevelopment, and I really need to credit his initiative to say, sometimes we're going to have to look at the sites that seem to hold the most challenge and bring our best people to bear to come to closure. That's something that ought to have recognition. I think it's something that should be expanded, frankly.

There have been a lot of lessons learned from the program people and the enforcement people. It would make some sense maybe as a commemoration of the 25th if there were a way to capture those lessons learned and provide the information to the states and local governments and the business sector. There are a lot of good practices that deserve wide dissemination. If that were a new administrative reform initiative, putting out the best and most effective, up-to-date technologies and procedures, that would be a good way to go.

EPA Interviewer: I appreciate those comments, because [that's what] we're doing: "looking back," but also "charting the future." Thank you, Sue.

Briggum: Thank you.

³ Cook was Director of EPA's Office of Superfund Remediation and Technology Innovation.