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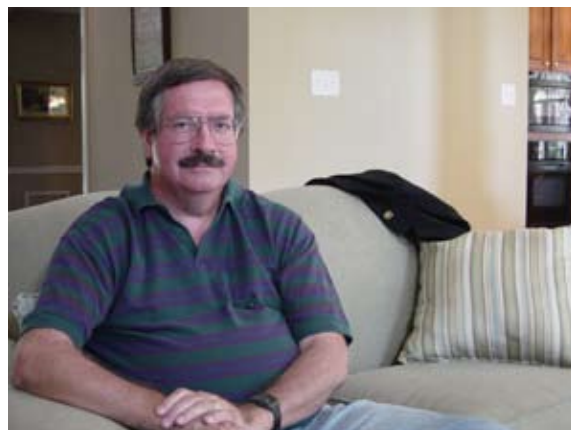
# PHIL CUMMINGS

Congressional Aide

**Interview Date: October 11, 2005**

**Location: Houston, TX**

EPA Interviewer: We are in Houston, Texas, at the home of Mr. Phil Cummings doing an oral history interview for the 25<sup>th</sup> anniversary of Superfund. We want to thank you again for agreeing to participate.



Cummings: Sure.

EPA Interviewer: To begin, I was hoping you could give us some of your educational background and what led you to working on the Hill.

Cummings: Those things are intertwined to some degree. When I was an undergraduate at Stanford University, Stanford had a program called “Stanford in Washington.” It was a student-run program to place students in intern positions mostly. I guess it was after my junior year, I had sought a position through the “Stanford in Washington” people, and the folks that came back to Washington to try to line up positions just happened to be standing in the office. I had an affiliation with West Virginia, and so that was something we were trying to play on. They were in the office of Senator Jennings Randolph trying to see if he might have an intern position available. When the new Staff Director of the Senate Public Works Committee—what it was called at that time—came in, Senator Randolph had just become Chairman.

EPA Interviewer: Of which committee?

Cummings: Senate Public Works Committee it was called. This is in 1966. Dick Royce, who was the new Staff Director, came in and he just said something like, “Well, I think we might have a position for a bright young person from Stanford.” That is just the way he talks. I had no previous connection to any political figures in West Virginia or in Washington. But, that is what I was interested in. I was studying political science at Stanford and interested in going to law school and coming to Washington. I came as an intern that summer and had the great fortuity of working with what was the beginning of one of the best staffs that has ever worked on the Hill.

Instead of giving me coffee delivery and messenger runs and things like that—common work for interns—they gave me substantive work writing. The first thing I worked on was some projects dealing with lead toxicity and assembling the evidence that previous hearings had led to, and setting up for some greater hearings to follow. It really captured my imagination. This is four years before Earth Day so this is not a widely popular area. In fact, I think it was about the year, I think the earliest years of the Subcommittee on Environmental

Pollution, which was the name of the subcommittee that Muskie<sup>1</sup> led. I worked a lot with the subcommittee and the staff from that subcommittee, especially Leon Billings. That experience led me to go back a couple more summers and then eventually to join the committee staff when I graduated from law school. I got there May of 1970 as a full-time employee. I had gone to Yale Law School. It's curious that a lot of people from my class and the class just before me were involved with the development of environmental law. Major environmental organizations sort of had their foundation then. I guess thinking about Earth Day, the public consciousness was greatly increased to the environmental risks and the possibility for solutions.

When I got there in May of 1970, we were working on the Clean Air Act. It's just like parachuting into one of the major watershed legislative activities of that century. Spoken by someone who was wide-eyed and happy to be there.

EPA Interviewer: Well, there was a lot of environmental legislation going on at that time.

Cummings: There was, but for a lot of reasons the 1970 Clean Air Act really was watershed. Pardon the mixed metaphor. There were several concepts that were enacted in that legislation that set the direction for environmental legislation for at least the decade during which most of the environmental legislation that now is applicable passed. A new direction was taken by the 1980 Superfund law. We'll talk about that eventually, I am sure. Anyway, that is sort of the educational background, and how I got there.

EPA Interviewer: So you worked on the Hill. What was your first exposure to Superfund or CERCLA [Comprehensive Environmental Response, Compensation and Liability Act], or how did it first come about that there was a need for CERCLA?

Cummings: Yeah. Like with most legislation, there were years of effort that went into it before it was enacted. Let me just try to put together a couple of strands that finally led to the enactment. One was the increased emphasis, understanding, attention to toxic substances of various kinds. The hazardous air pollutant provisions of the '70 [Clean Air] Act. The toxic pollutants provisions of the Clean Water Act and then the RCRA [Resource Conservation and Recovery Act] provisions enacted in '76, just being haltingly implemented in 1979 and '80.

EPA Interviewer: Were there specific sites like Love Canal, Times Beach, that came up that said we really have to start addressing this? Or was there some thought processes even before hand?

Cummings: Yes. The answer is yes to both of those questions. Let me give you a second strand, and then we'll go back to some historical events. The second strand has to do with oil pollution and the concept of a superfund. Section 311 of the Clean Water Act was actually enacted I think in the '69 amendments to the Clean Water Act. It was fairly revolutionary in its way, but it was always seen as insufficient. It did add to it an element for hazardous substances, but its two main deficiencies were very limited funding and very limited jurisdictional reach. It was only the navigable waters of the United States. During the early

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<sup>1</sup> Edmund Muskie, who served in the U.S. Senate from 1958 until he resigned in 1980.

'70s, I guess, the committee was working on legislation. This is something Muskie had been interested in all through his period of leadership of the Environmental Pollution Subcommittee, working on an oil superfund. Then in many of the drafts, as we understood that toxics were such a predominant interest, it shifted from sewage and water pollution to the aquatic toxicity and human toxicity. Health became a major focus for the committee's work. Then we started developing oil superfunds, and those were introduced and hearings were held. Some of those were oil and hazardous substance bills. Those had been under development in every Congress at least since 1974.

Then the news caught up with us. Love Canal is probably one of the best examples. The Congress' first reaction to things of that kind, as is often the case, is with site-specific legislation, provisions to provide federal funds to research or remediate or whatever. I guess using Love Canal as an example, that was locally famous before it was nationally famous and had drawn the attention of the New York delegation, who again focused first on site-specific attempts. On the committee staff, we began seeing patterns, and began collecting data and could see a need for legislation that was broader than anything we had worked on before.

EPA Interviewer: Were you seeing a pattern of sites across the country where this was coming up? What type of patterns?

Cummings: Yes. I have got files. A lot of material actually was put into the legislative record for the '80 [CERCLA] Act<sup>2</sup>, but I have files from sites of different types from all across the country. One of the other things that was important is from the beginning we saw this not just—remember this background from the oil spill legislation—as site legislation but as spill legislation. A lot of the incidents that I read about and clipped for my files and used to form the basis for the legislation were transportation spills of various kinds or plant discharges, leaks, and not what we now call legacies or historic spills or historic contamination, but contemporaneous things. They involved every media. They involved air as frequently as they had contaminated groundwater. In fact, what we now think of as Superfund is especially focused on remediating contaminated groundwater, but the extent of that wasn't known when the legislation was being developed. But because we saw lots of types of incidents as we were drafting, we drafted the various jurisdictional terms very broadly. Release into the environment, the key phrases, are as broad as possible and as broad as federal Constitutional jurisdiction would allow. There's first the process of perception by the Congressional bodies. What's the problem? What can be done about it? The second step in that is a process of building a case for legislation. Then there is a series of hearings. Have you looked at the legislative record by chance?

EPA Interviewer: I've skimmed it. I couldn't recall it from memory.

Cummings: That series of hearings included appearances from Love Canal. Lois Gibbs is one case. There were several sites, not just that one. Those were some of the most poignant. I have to say that those hearings almost invariably made me cry.

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<sup>2</sup> The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund) (P.L. 96-510).

EPA Interviewer: Really? I know Curtis Moore talked about a few things that were very emotional.

Cummings: Right. One of the things that, [*silent pause*]... Just for the listening audience, I am pausing with tears in my eyes now more than 25 years later just thinking about some of the testimony that we received, most of which was about children and the consequence of the children's exposure to toxic substances in their homes and playgrounds. I confess to it being powerful motivation for us—the staff and for our Members [of Congress] that we worked for—but I think it also built a strong case for legislative action.

It's amazing—given the difficulty in getting that legislation passed in 1980—the strength of the consensus for the program, and the demand that's persisted for the past 25 years for continued action and fairly high levels of expenditure of public/private funds and the continuing inventory that demonstrates the job's not done. So there was the phase of public information gathering and public developing a case for legislation, and I have to say that one of the targets—one of the beneficiaries of those hearings and the development of the case for legislation—were some of the members of the committee. They were not equally enthusiastic when the process started.

One of the things that troubled some of the Members—this is jumping ahead, we'll talk about this more I am sure—was the liability concepts involved, the necessity for strict liability for handling hazardous substances. Some of the hearing witnesses were chosen to demonstrate the common law context and precedents for this kind of liability as well as the precedent federal legislation. That's the standard of liability in Section 311 as I mentioned before. Then we got to the process of actually writing the legislation and taking it through the committee and the Senate floor and final enactment. We'll talk about that, and you can ask questions about that.

EPA Interviewer: [*Laughing*] Well, you can tell what you'd like.

Cummings: Just to recap on your initial questions. Sites were important. They weren't the only thing on our minds, and one of the things that I need to say is that a theme in the 1980s legislation was a major change in thinking, but it did reflect an earlier strand of law and the power of that law, and that's the ability to form these laws in terms of economic deterrence rather than just regulatory control.

EPA Interviewer: Which is part of the liability structure?

Cummings: Which is the heart of the liability structure, the intent of the liability structure. It has actually a double meaning or a double utility. The liability provisions of Section 311 were originally intended as a method of funding cleanup. That is, they were exclusively intended to cover costs and make casual handlers of oil, in that case, bear the cost to the environment. But what we learned over that decade was not only that that was a useful technique for minimizing the cost to the public recovering those costs, but it was also a fairly powerful incentive to care. There are some problems in the 311 structure that we tried to address, and they were eventually pretty persuasively addressed in OPA [Oil Pollution Act], the oil spill act, when it passed. We learned that deterrence was a philosophy that flowed from liability, not just cost recovery.

EPA Interviewer: When I was talking with Curtis Moore, he talked about especially initial meetings with the Senators, where the staff presented their staff drafts of the legislation, and I believe you had written quite a bit of those staff drafts in conjunction with Curtis. Do you remember some of those initial discussions and what some of the Senators thought when they first saw those drafts?

Cummings: Once again, even when the committee would consider legislation, there were usually at least two phases. There was a phase when a Subcommittee Chairman would put forward a proposal, usually an introduced proposal, not always. Sometimes the proposal would be taken directly to a committee meeting, not having been previously introduced but in practice that means if you are a staff person, you work for at least one Member and you have to have the backing of that Member to go forward. So the legislation that we were considering was legislation that some Members thought was valuable and important. I am using a vague general term “some Members,” because if you’ve looked at the history of the committee, that year in particular, there were some dramatic changes. For a number of reasons, some of which had to do with the jurisdiction aspects, the broad scope we were trying to address, and the way the committee’s subcommittees were set up in that Congress.

We, the Members and staff, had tried to put the legislative effort—the effort of developing Superfund law—together as a joint subcommittee proposal. I think it was called the Environmental Pollution Subcommittee in those days, and the Resource Protection Subcommittee. One of the principal sponsors of the legislation had been Senator Muskie, who in May of 1970<sup>3</sup> resigned from the Senate and became Secretary of State. I could tell you a lot of the history associated with that, but that’s not this oral history project, [*laughing*] that’s another one. It meant that the leadership suddenly shifted. [Senator] John Culver was the Chairman of the Resource Protection Subcommittee, and he had been interested and involved, and maybe not quite as enthusiastic, but interested and involved. [Senator] Mike Gravel became the Environmental Pollution Subcommittee Chair—Mike Gravel of Alaska. Then not very long after that, he was defeated in the Alaska Senate primary. He was still in Congress, but he was not active in the same way. Then before the point in the year when the bill was negotiated in its final form and passed in the Senate and in the House, John Culver had been defeated in his Senate race.

So the sponsorship for the legislation fell back on the people who had been enthusiastic supporters of it from the beginning. Bob Stafford and Jennings Randolph who had been—Jennings Randolph, the Committee Chair, and Stafford, the Ranking Minority Member—and they were preparing to reverse those roles in the November/December period when the bill was finally negotiated. Okay, that’s kind of the more enthusiastic Members. And I have to add to that two people who became extremely important later as the Congress worked on the success of the legislation and worked on the implementation, and that’s [Senator] George Mitchell, who was appointed to Muskie’s seat, and [Senator] John Chafee, who became Chair of what was then called the Environmental Protection Subcommittee.

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<sup>3</sup> Senator Muskie resigned from the Senate in 1980.

In 1981, the new Congress picked up the mantle, and whatever other image you want to supply. I have sort of described the cast of supporters, not entirely, not the entire cast of supporters, the people who had asked the staff to develop the legislation, pushed it, in some cases really really worked hard and were personally responsible for its enactment. I'll talk more about that when we get to that stage. At the beginning of the committee's process, there were some Members who were skeptical and particularly of the deterrence concept of the liability concept as a means of achieving that. When I think about that, I think especially of [Senator] Alan Simpson, who was one of the more outspoken of those Members. In those hearings and in those private committee meetings and things like that, he was just very sharply critical of the legislation, particularly of what he saw as the extreme liability provisions. The other part of it that he didn't like, first the liability as a general concept, strict joint and several liability in particular, and then the portions of the legislation as the committee was considering that dealt with the personal injury with compensation for health losses. Senator Simpson had been a trial lawyer in his pre-Senate days. I think his experience was domestic relations law, but he was skeptical of those of us on the committee staff who had not practiced law in the courtroom, and expressed his skepticism regularly and with great fervor.

The committee process led to a number of adjustments and refinements of the language. I believe—I didn't check the exact dates—it seemed to me the bill was ordered, reported by the committee, probably not unanimously, shall we say *[laughing]*, in late spring. During the summer recess, which was a party convention recess, in July, the committee staff worked on the report and filed it. This was one of the first bills that fit the pattern that Senator Simpson used to describe where the committee would put something out and then it would not be able to get through the floor because of controversy, and then compromises would have to be made. His theory was that the committee wasn't representative of the body as a whole, and even the Members on the committee with views similar to his were forced to vote for legislation that would not be viable on the Senate floor. He also used [it] a decade later in what became the 1990 Clean Air Act as an example of that problem. I am sure from his perspective that he was right. The process yielded legislation when the sponsors wanted to pass legislation.

I remember the committee process quite well. I have scars, physical and mental, *[laughing]* as a result of it. It was a rigorous testing of these propositions, propositions that became central to the legislation. The majority of the committee voted for the legislation in the fairly elaborate form—that fairly large sum of money that now seems like a pittance—but I think the committee bill reported had a fund of like \$6 billion, if I remember correctly. A drop in the bucket. There were those who didn't feel we had a record to justify that much.

EPA Interviewer: *[Laughing]* People have described the bills you wrote as pieces of artwork that should be hung in the Louvre, because you had to read it and reread it again and read it again and then maybe you'd understand it. Do you think that not only because these were new concepts that were being put forward in the whole liability scheme, and the fact that it was economic deterrence, but also because it was such complex language or complex legislation that made people say, "Wait a minute. Stop. I don't get this?"

Cummings: Yeah, no, I think the complexity of it is overstated by those who didn't want to implement it. It's really very simple concepts. Nobody has any trouble understanding it. That's

the problem—that it's very clear. Very clear. There are some parts in it at least Justice Scalia didn't find sufficiently clear, but who am I to second-guess the Supreme Court.

EPA Interviewer: Which ruling are you talking about?

Cummings: I am talking about the section dealing with preemption.

EPA Interviewer: Okay.

Cummings: I think either Justice Scalia understands or doesn't understand the necessities of legislative compromise. The central concepts of the bill were attacked as novel, when they actually go back to *Rylands v. Fletcher*<sup>4</sup>. They were attacks based on interest, not really on the difficulty of the concepts. Tax law is complex. Superfund law is simple. The hazardous waste laws are complex, but they are complex because of the 1984 amendments, which have to do with the attempts to reign in the excesses of the Reagan Administration in misapplying the law. Perhaps you can say that about some of the provisions in the 1986 Superfund amendments. The cleanup standards provisions, Section 121, and a couple other things where efforts were made to either correct problems of implementation or in some cases add new directions. But the original law was pretty simple and straightforward. I don't necessarily say that about the bill reported by the Senate Committee, but the bill that was passed by the Senate and then passed by the House and enacted was pretty simple.

EPA Interviewer: What were yours and your Senate Committee colleagues' main goals as you were creating the legislation?

Cummings: I am not ranking these, but they are related to each other. The first was deterrence, and the second was providing adequate funding for victims, including the environment—that being the remediation aspect—and the third one, which is an aspect of each of those, was creating a muscular plaintiff. One of the things we learned, speaking of Lois Gibbs, in those hearings was that the people who suffered and the communities who suffered usually could not stand up either economically or through the ability of the lawyers available to them or otherwise to the chemical companies and oil companies and transportation companies that caused their injuries. One of the purposes of the law was to create a muscular plaintiff to give real deterrence and to truly recover on behalf of injured citizens and on behalf of the damaged environment, as well as assuring that cleanup would take place, or in a perfect world that cleanup would never be necessary because care would be exercised in the handling of these materials.

Actually, looking back, the thing about the law, which makes me the most satisfied, has been the deterrence effect. The consequence that it really did change the way people handle hazardous materials. A great deal more care. In some cases giving them more incentive to hide their back-40 problem or their involvement with a disposal facility or whatever, but the provisions dealing with the selection of disposal, for example, not channeling liability the way some other legislative proposals have done but broadening it, involving everybody. I think they have had a lot of effect on the way materials have been

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<sup>4</sup> *Rylands v. Fletcher* is a 1868 landmark English case in which the Court of the Exchequer Chamber first applied the doctrine of strict liability for inherently dangerous activities.



handled. You mentioned [prior to the start of the interview] that this is a nice neighborhood. It is a nice neighborhood, but not two blocks from here there is a spot where the community had wanted to build a school and discovered that they could not because of contamination from tank farms previously on that site. If that doesn't sound like Love Canal.

EPA Interviewer: In a nice area of Houston. We've talked a lot about the committee and the Congress. What were some of the other stakeholders? I know what is now known as the Chemical Manufacturers Association was an outside player, as outside groups always are, as well as Lois Gibbs, and the Agency too had some input in there.

Cummings: They did. Two different stories just to illustrate that. Let me start with the Agency. EPA was not as involved in the preparation of this as they typically have been before and after. They were involved in a slightly different way. While we were working on the legislation, Tom Jorling, who was the Assistant Administrator for Air and Water and Solid Waste and everything else as far as I can see. Tom is a great guy. Tom worked on a lot of these concepts back before he left the Hill. He had been minority counsel in 1971 and earlier, and when he was in the academic sector before he came to EPA and he worked on these concepts. Not necessarily through the send up, the Congressional relations people, but since Tom was a personal friend, he worked directly with us. He also made available some of their top analytical people, who did a lot in helping us. The Agency during that period lent us Andy Mank, who was functioning as a liaison between the committee and the analytical and policy folks at the Agency. In that period when Tom had left, Andy was our link to EPA and we, on the Senate Environment Committee, had less contact with EPA during that part of the process.

EPA Interviewer: After the legislation had passed?

Cummings: No. During the period after Tom left EPA, and while the legislation was being considered. Andy's special area of expertise, what he worked on was the Fund and the funding mechanism. That's the area where we got the "How much do we need and how do we raise it?" piece. In later work we actually got the Finance Committee to get some serious work in themselves, but at that time we had to do all the work on our side. We didn't have regular contact with the Agency during the development of the legislation, except through Andy. I was reflecting on this recently. It's different from work we'd done on other legislation.

EPA Interviewer: Do you know why that occurred? Why it was different?

Cummings: No. I'm not sure. It may be that Andy just took all their calls or whoever was responsible on the other end. For example, do you know Swep Davis?

EPA Interviewer: I think I've met him once or twice. Lots of other people know him.

Cummings: Swep apparently was responsible for a large part of at least EPA's effort and maybe coordinating the Agency's effort on the legislation. I never met him until after the bill was passed as far as I can remember. I think he's a great guy. I spent time with him after that, but you know he just wasn't present directly in our part of the process.

Now I'll talk about CMA [Chemical Manufacturers Association]. I'm holding back a little bit, because I want to talk about the development of the legislation. There was a time when the Administration was very active. Again, its influence on the legislation was indirect. I can get to that by talking about the CMA involvement first.

EPA Interviewer: Whatever you prefer.

Cummings: The CMA had positioned itself as the major industrial opponent to the legislation. There were others, but they had organized opposition and were the main source of staffing the Members of the Senate that were opposed to the legislation. Fairly early in the process—as early as winter of 1980, maybe even earlier than that—we had started a dialogue with CMA, and we had regular meetings with them. These were meetings where Curtis [Moore] and I, and other members of the Senate staff, and then CMA and company representatives from most of the major companies. The rank of the company representatives varied. In one case, there was the general counsel of one of the companies who was present at almost every meeting. And not surprisingly, the other representatives, mostly their Washington lobbyists or CMA lobbyists, deferred to him. Those meetings were kind of fun. There were seminars on topics mostly dealing with the liability issues, and from my standpoint the legislation was considerably sharpened by those exchanges and by their challenges and the material and information they brought. All of which is identifiable in my files by the cream-colored paper that CMA always uses. Those meetings continued until early fall, I guess, and then the legislation still hadn't been on the floor, and then they tailed off. Well, I think what happened is that people began to think—the people attuned to what was happening electorally—began to think the Administration was going to change hands, and there was a good chance the Senate would change hands. There was disengagement.

In that period—I think it started in October; I wasn't invited, so it's hard to know exactly what had happened—there were the White House meetings the White House convened, and this is Swep's work I think, a series of meetings with stakeholders, and there were Members of the Senate whose representatives attended some of these meetings. They had not been among the primary sponsors of the bill, but they were there. Later when the judgment came to move the legislation forward, there were Members who believed a Superfund law was necessary and that a lame duck would be a time to enact it, not to wait. That it needed to be reformed from what the committee had reported but that it was worth doing. Then we began a series of discussions in which the staff of those Members came to me; they would not deal with Curtis, so there I am, I have my notebook, Lee Fuller had his notebook, and we negotiate back and forth.

EPA Interviewer: Are these Democrats? Republicans?

Cummings: Yes, they were both. I can tell you who they were. It was [Senators] Bentsen, Domenici, and Baker. I can tell you the staff names, too, if you want. Principally Lee Fuller who worked for Bentsen, Linda Findley who worked for Senator Domenici, and they, especially through Lee, he was sort of their lead spokesperson and he would come to my office and he would sit and say what they'd gone through in the White House meetings and say, "Could we do this? Could we do that?" That was how we negotiated what was in the package that was taken to the Senate, eventually, post-election. Then during that time, when I would talk to Curtis, we decided we had an outline, shall we say, and I undertook to

assemble the bill, and we would assign out amongst the four of us these pieces. They would bring me a piece, and I would rewrite it, or sometimes, mostly, always, nine times out of 10, they were cutouts from S.1480, the bill that had been reported by the committee, just smaller pieces. And sometimes they would give me something that I didn't like, and I would want to substitute it.

EPA Interviewer: For the record, S. 1480 was the Senate bill...

Cummings: As it had been reported by the committee. The expansive bill.

EPA Interviewer: You were reworking these post-election.

Cummings: Right. At the end of that process, we had a bill that we were ready to take to the Senate floor. The last, and it had the support of these key Senators who were both Democrats and Republicans, including Howard Baker who was the incoming Majority Leader. During the last part of that process, we had Member meetings in Baker's office in the Capitol, which were basically the people who were opposed to the bill, led by Senators Simpson and Jesse Helms, who was the spokesperson for the CMA, and Senator Stafford, who was the main advocate of the bill at that time because he was the incoming Chair. Senator Randolph was also present. Some of the floating cast of other people who had concerns would be there. Senator Bentsen was there fairly often. Senator Domenici would come. Some of their interests had been satisfied in private, individual meetings between Bentsen and Randolph and so forth, most of which I was present at. So the bill, in its final shape, some of the key things, and I do mean key, like the liability definition and the amount of money in the Superfund, were decided in Senator Baker's hide-away office in the Capitol at meetings that involved those people and me.

EPA Interviewer: We've talked about different stages of the development of the legislation. Do you think we need to talk about the development in general? What are we missing if we were going to put it down step-by-step?

Cummings: This part of the process we've just talked about is an example of that process that Senator Simpson has referred to many times. The committee prepares a bill that it thinks best, but that bill may not be acceptable to the Senate as a whole more, or particularly it may not be acceptable to enough Members of the Senate who raise objections and put holds on the legislation. Their concerns have to be dealt with before the legislation is brought to the floor, or finished on the floor maybe is more accurate. That is not a unique process to environmental legislation. That's the way most legislation happens now. If it's controversial at all, it may be up on the Senate floor. We are just talking about the Senate. The House has a totally different structure for dealing with legislation. If it's at all controversial, it may be up on the floor for a period of time, off-floor negotiations lead to a version, which gains enough acceptance to be enacted. Sometimes it's enough acceptance just to get it past closure and considered. You know you don't read about that step in *How a Bill is Made* or *How a Bill Becomes a Law* or whatever that pamphlet is, but that's an essential part of the process.

It also happens at the committee level. That was true to some extent for this bill, but it's definitely true of the legislation that finally became the 1990 Clean Air Act. It started work in 1981. Many times the committee would be stuck on an issue, and it would require private

negotiation as opposed to public debate in order to make the process necessary, the accommodations necessary. Sometimes that just dilutes or trivializes a piece of legislation; sometimes it makes it actively stronger. Seems to me if it makes a piece of legislation attractive enough to gain a majority vote, it's going to be stronger if it's enacted with broader support. I think that may be true with the Superfund legislation. I do know that between the bill that was introduced, and then the bill that was reported by the committee, and the bill that was finally enacted, the core concepts did not change and had not changed, at least the legislative concepts. There have been some problems of administrative implementation and judicial interpretation, but the core concepts have been both legislatively sustained and they have worked. There has been public support, and they have proved effective over the now 25 years.

EPA Interviewer: Do you remember who first came up with the idea of creating a superfund to pay for the orphaned sites originally? I have heard that states were enacting their own liability structures and...

Cummings: Yeah, they had. You have to remember the history with the oil superfund. The original superfund was an oil superfund bill. I do believe a state or two, after the Federal Government had wrestled with that concept and had not been able to legislate it to conclusion. Some states may have developed theirs. There was not a hazardous substance superfund at the state level before the federal Superfund was enacted. I think maybe the State of Washington had a fund for oil spills. To some extent that concept, the Fund, it seemed to me that it came from Senator Muskie. Although I do remember a point later in the process when he said, we had a bill that had an oil superfund of I think it was of \$200 million, and he said in a hearing or a markup, "\$200 million, that doesn't sound very super to me!" I have always associated that concept with him. The idea of a fund that would be able in some extent, the makings of that are in the Section 311 program. There it is seed money from federal appropriations, which is then replenished through the liability structure. It's not funded by a specific tax. It is now, but it wasn't in the early '70s. It's just a device though.

There's the concept that's associated with it—it doesn't have to be associated with it—called "polluter pays." The idea that you'd collect some kind of specialized fee or tax from a class, which is thought to have been created or contributed to the risk and use that as the seed for the remediation and compensation fund. But that's not essential to the concept of a superfund. It is, I think, a key part of the act, but it's not the only way you could think of developing the muscular plaintiff, the fund who had the resources. One of the other things that was really important in that legislation—it may have gotten out of control now—is the use of that fund and the dedicated revenues that it covered for the enforcement and oversight and ongoing functioning of a Superfund program. Without that, and particularly without the funding for the Justice Department arm of that, I don't think you ever would have seen the full promise of either deterrence or remediation realized. I think that use of the Fund has been key in building up the Agency's program, as well as the Justice piece. Anyway, that's something that dates from the efforts from '79 and '80 to get this legislation passed.

EPA Interviewer: Can you tell me what it was like especially in those months that you now know you're going to have a new Administration, and somewhere you found out that they want to pass this legislation. Can you tell me what it was like? You talked about how hard people worked. It must have been really insane at times.

Cummings: It required focused effort. The night of the election in 1980, and the day after the election, were probably the darkest days of my life. Having lived through that, and the next six years, I now think things are never quite as bad as they seem. It was a very instructive period for me. To pick ourselves up from that, and be able to go forward took a little extra effort. It became the only thing that I did from the day after Election Day until December 11, the only thing that I did. It happened because of names I've already mentioned. It happened because of [Senators] Bob Stafford and Howard Baker and on the Democratic side [Senator] Lloyd Bentsen. [Senator] Pete Domenici who said quite correctly that this is legislation that we need, we need to enact this and this is the time, let's get this done.

Lame ducks are not as unusual as they used to be, but they were unusual then, and often not thought to be productive, for controversial matters like this. Sometimes the air is cleared, but this had not been a political issue in the 1980 election. It wasn't like something that could now be handled that was too politically charged before. I'll be interested to read this oral history, and see other people's take on that question.

What happened to allow the legislation to go forward? The Member-to-Member conversations, that's how it happened. Their decision that this was worth doing, and let's make an effort. Certain people disappeared from the process.

EPA Interviewer: Such as?

Cummings: [Senator] John Culver. Those folks took the lead. The amount of energy, energy is not usually a word you think of with Bob Stafford because he is so laconic and New England, but the energy he put into it, and the push that he put into it.

Let me give you another person who I haven't mentioned yet because he wasn't on the committee, [Senator] Bill Bradley. He was a really important figure in this because he would push. He was on the Finance Committee and he pushed them. He pushed Russell Long every day, and he pushed the leadership every day for this legislation. That makes a big difference. You have somebody who is not a sponsor who is coming saying, "We need this. We've got to have this. When are you going to schedule it? When are you going to schedule it?" Every day. He didn't try to influence it. He wasn't trying to shape it, which he could have done. So that's the kind of thing that made the legislation go forward in that period.

EPA Interviewer: You also had a lot of different committees involved just on the Senate side, and then you had to go back to the House side and pull it all together.

Cummings: Yeah. I'll talk about that in a minute. On the Senate side, there were committees that should have been more involved that just made the job harder for us by not involving them or having to jump their process in a way. We had to get clearance from the Finance Committee obviously on the tax mechanism. They had to be at least technically and in the real sense involved in clearing legislation. They finally waived it.

The Appropriations Committee because we had provisions that were appropriative in nature. Some of these other things that were not seen as groundbreaking but were important parts of the process. And the Budget Committee. I had to get every one of those

people to sign off. Some I did personally, and some Stafford or Randolph did personally. A lot of them went to the Chairs, and the Chairs of those committees got their staff to back off, or be helpful.

EPA Interviewer: How did you get in the position where you were one of the key people who was the central focus? For example, you said you got some key Members to agree to certain things. How did you do that? What happened?

Cummings: I had been principal draftsman for the committee for at least the last half of the '70s. I had done what became the '77 Air Act and the '77 Water Act. I was, I guess, two things. I was the most visible staff person associated with this legislation, and maybe the most acceptable staff person associated with this legislation. The person who had been kind of "Mr. Environment" for years before, Leon Billings, had left in May with Muskie. He had become Chief of Staff at the State Department. So there wasn't another person to look to. Actually, Leon never thought that this legislation was any good. He had never worked on it. It had been my responsibility. The committee's process in the '70s had evolved from closed-door markup sessions, along with the rest of the Senate, to open markups. And that process, partially because of the way Muskie worked and partially the way other Members learned, too was often a dialogue amongst the Members and the staff. So the staff got a lot of credence. The key negotiations on the two key points on the legislation that I mentioned before—the liability standard and the amount of the Fund—were direct negotiations between other Members and me in a meeting setting, not just in a private room where just the two of us were present. It was our eyes meeting. I can't explain why that happened. This is not the only legislation in which it was. That's just how we worked in those days.

EPA Interviewer: Do you think we are at the appropriate point to talk about how you get the legislation out of the Senate? After talking with others, basically I think you had about a two-hour time frame where you had all the agreements you needed to get it on the floor. Is that an accurate portrayal?

Cummings: My recollection is that it was the day after Thanksgiving, right around that time. We had the last hang-up—was the oil spill title. We had an oil spill title still in the bill at that point. We were meeting with the Commerce staff, and they wanted impossible changes. We finally agreed to let it go. During that meeting, we were sitting in our committee room talking with them and, first, [Senator] Jennings Randolph came down from his office to see how it was going, to ask me how it was going. Then, [Senator] Bob Stafford came. It was an interesting and extremely valuable show of personal Member interest.

We finally decided to cut the oil spill title loose rather than make the changes they wanted. It complicated things a little bit, because one of the House bills had an oil spill title, the House Public Works bill, which complicated things on their side.

It really showed, here's Stafford publicly tapping his feet saying, "This is our window, we need to get this done. What are we going to do?" I think he may have even called [Senator Warren] Magnuson from that room or gone right back to his office. Then we took the package to the floor, and it passed.

EPA Interviewer: So the next step then was getting the House to agree.

Cummings: Oh, yeah [*sigh*].

EPA Interviewer: [*Laughing*] Talk about that process.

Cummings: That process involved, for me, one of the worst legislative mistakes I ever made, which we were able to cover at that moment, but it was just a really stupid mistake on my part. [Representative] Jim Florio had asked us for a letter. He was one of the leaders in the House of the effort to pass legislation.

Let me just take an aside, by the way, because this goes back to something that we talked about earlier and I neglected to mention, this has to do with sites and the background on why was this legislation right. Bob Eckhardt was a Congressman from Texas, from this area who had gotten a provision in some legislation earlier that required an inventory of all the sites where hazardous materials had been stored, handled, deposited, whatever. That produced an inventory. I think that came out in about May of that year; I can't remember the exact time. It was a huge list; it was like 20,000 sites. It was similar to the CERCLIS [Comprehensive Environmental Response, Compensation, and Liability Information System] list. In fact, it may have been used as the first iteration of the CERCLIS list. That helped create a case for the magnitude of the problem. That was used and debated and discussed in trying to figure out how much to put into the bill eventually.

Now, back to the House process. Florio asked for a letter basically expressing what we understood to be the truth, that we were not in the position to take the bill back to the Senate floor. That if it were amended by the House, we would probably not be able to get it out of the Senate. We had a "one-trip-only" window. So, we wrote such a letter, the Senate did, Stafford and Randolph signed that letter. The legislative mistake was that Florio was just a Subcommittee Chairman, and we should have written the letter to the Chair of the two committees involved and to Ranking Members and possibly to the House leadership. When we discovered, almost instantaneously, that they were furious. Florio was not real popular with those other folks. We covered it by sending an additional letter to all of them, but we almost lost the bill over that protocol mistake. I take full responsibility for that. I should have known better. The content of the letter was the truth. I don't think we could have brought the bill back to the Senate floor. It was just too shaky a deal. The changes that were likely to have been made by the House are changes that probably would have kept us from moving it.

So, the bill was put to the House as a motion to concur with the Senate bill. That led to a really interesting time, because there were a number of industrial interests who were lobbying against the bill in the House cloakroom and so forth. I was alerted to some of the problems by a lobbyist for another interest who brought me to the House and introduced me to, at that time, John Murtha, who was head of the Pennsylvania delegation, the Senior Member. I think he still is, but even then he was. Some of the steel lobbyists had been raising problems, and I was able to explain the true effects and what it really meant and satisfy the concern of the Members and that was one clutch of votes that we were able to bring back from the negative side to the positive side. The House did pass it.

That was a fairly quick process, too. That was just days after the Senate had passed it. Not a lot of time for development. One of the great difficulties of legislation like this—this goes

to this question about the complexity that you mentioned earlier— the process by which the final Senate version was developed and the process by which it was adopted in the House made the refinement of legislative history difficult. There is not as much legislative history— not as bad as in '86—but there's some intentionally contradictory stuff that was put in by Members not friendly to the legislation that made it really difficult, especially in the hands of an Administration that was intent on not administering it according to the law. A jerry-rigged process like that can sometimes have limitations beyond that reduce the value of the actually enacted legislation. But you work with what you've got.

EPA Interviewer: That's right. So December 11<sup>th</sup> came. Do you remember what that day was like when the legislation was signed?

Cummings: Oh, yeah. That was celebratory. That was nice. For me, it was a trip to the White House. I was still exhausted at that time. I was exhausted for a while after that actually, but that was really a great day. When that was done, there wasn't anything else that I was working on that brought me in contact with the Members. That was a chance for some of the Members who were involved to say really nice things to me, about personal thanks. It in some cases cemented relationships that had them rely on me in future years as well. It was a nice day. I am in the part of the room that is not in the pictures. [*Laughing*] I'm just staff, so get the Members up there, whether or not they had anything to do with it or not, get the Members up there. But I got my pen.

EPA Interviewer: Before we move on to the implementation and then the '86 amendments, is there anything else that you'd like to discuss about the creation of the law and passing it?

Cummings: There probably is, but I just wanted to mention in terms of pens. In the Senate, at least one thing that is often done to commemorate legislation is there's a special version that's printed where the first and last page with a red edge and sometimes the pen's next to it. Senator Randolph gave me his. It's addressed to him, but he said it should be addressed to me. That's one of my office mementos that I cherish from that time. That and a cartoon, an Oliphant cartoon, that shows the passage of Superfund. Okay, moving on to '86.

EPA Interviewer: We'll do '80 and '81. Superfund had a little bit of a rough start there in getting the implementation going.

Cummings: A rough start, yes; that's a good way to put it.

EPA Interviewer: Do you remember some of your first indications that this wasn't going as intended, or what you had intended?

Cummings: Yes. When the Executive Order that President Carter had issued implementing some key provisions of the bill

EPA Interviewer: He did that in 19...

Cummings: He did it, I think it was probably in January, before the inauguration. One of the interesting ideas in the Superfund legislation is that the authorities are essentially authorized to the President; they can be delegated. As a practical matter to make some of them work,



they need to be delegated to EPA and other response agencies as appropriate. The Executive Order did that. It was mostly unremarkable, but it was rushed so it would get done before the transition. One of the first signs that there was going to be a problem with implementation of the law was the rescission of that Executive Order. In fact, that led to quite a period of delay before the law was implemented. The issues involved in the possible changes to the Executive Order were pretty frightening, especially with regards to non-implementation with respect to defense installations and things of that kind.

The second piece was the delay in appointing officials to the Agency. Although given the appointments made, perhaps we would have thought the delay was appropriate, because that was the third piece. The Administration appointed officials to the Agency who were not capable of implementing the law, and apparently not dedicated to implementing the law either, one of whom went to jail for that or more particularly for lying to our committee about it.

EPA Interviewer: Rita Lavelle.

Cummings: Right. So in 1981 those were the signs. We had a number of hearings over that year. Some of which were nomination hearings, some of which were oversight hearings because Senator Stafford was not pleased with what he saw either. He was the Chair at that time.

EPA Interviewer: What were those oversight hearings like? I haven't heard a lot about those oversight hearings.

Cummings: Once the Reagan team was in place and beginning to make decisions, the hearings focused on the adequacy of the cleanup ordered, I guess would be the best way of putting it. Some other aspects were of enforcement, but particularly sweetheart deals. There is a direct connection between the attitudes the committee saw in the Administration and were concerned about, and the 1984 RCRA Amendments and the 1986 [Superfund Amendments and Reauthorization Act], particularly the Section 121 cleanup standards provisions. You know it is often the case with legislation, the barn doors being swung shut after the horse has long escaped. There were reactions. Particularly I think about the '84 legislation being so particularistic, and it was really a reaction to things that had been wrong but were not necessarily still wrong and maybe were overreactions in some cases. But I was just minority counsel then.

EPA Interviewer: Eventually Rita Lavelle resigned, Anne Gorsuch resigned, and Ruckelshaus came back and Lee Thomas. Did you see changes then?

Cummings: Oh, yeah. Lee Thomas got into the business, for the record, by being the FEMA [Federal Emergency Management Agency] connection to Times Beach. Times Beach was mishandled by the Agency, but FEMA did a fairly good job.

EPA Interviewer: Times Beach was mishandled by EPA?

Cummings: Yes. Lee was both directly, personally responsible for that, and institutionally responsible for that. That, I think, was his first exposure to environmental issues at all, and

particularly to Superfund issues. But, he was a quick learner and a serious public servant, which was not the case with the previous occupants of that spot. I think he did a good job. I didn't agree with everything Lee said. One of the things that concerned me at the time was the extent to which he was like a third party to the discussions in the 1986 CERCLA amendments process. I had never been really comfortable with having the Administration be at the table talking. It came from the way the Finance Committee and the Joint Committee on Taxation dealt with issues by having Treasury folks involved. The difference is that in that case they were experts, not just policy officials. It's a different concept. During the development of the '86 legislation, I wasn't always comfortable. It's easier to argue with a Senator or a Congressman than it is with the Administrator of an agency when you're just a staff person. I think that Lee did a great job and Linda Fisher, who was his special assistant at that time, did a really good job in implementing the program, and trying to drag it back from the lost and wayward situation it was in. Professionalizing the management of it anyway...

EPA Interviewer: There were a couple of different issues that came up between '80 and '86. For example, "How clean is clean?" Whether or not Superfund was fair, enforcement fairness specifically. Were you involved with any of those issues from the Congressional level? What about "How clean is clean?" What were some of those things you were trying to focus on and address?

Cummings: Well... [Pause]

EPA Interviewer: Because that was a very difficult thing to figure out.

Cummings: It was. Once again it was a reaction. The Congressional interest in that question was largely a reaction to the allegations of sweetheart deals, and some of the lead sites that had been decided early on. If you look at the legislation passed by the two bodies that year, we had a much more general provision in the Senate bill on how clean is clean. We did not have the detail that is in the eventual statute or was in the House bill. We were interested in the issue, but at that moment—that is, while the Senate was still considering the bill—we were not focused on providing the legislative details that eventually got in. We were knowledgeable, that was one of the things I followed. What happened is when we got to the conference process, the fascinating conference, we worked with the Members of the House conferees that were very interested in that provision, once again including Jim Florio, to develop a proposal that came from the Senate and was offered to the House conferees and they accepted although they were initially suspicious. Particularly John Dingell was suspicious.

EPA Interviewer: What were some of the details of the proposal? Do you remember?

Cummings: Oh yes. What's enacted [in Section 121]?

EPA Interviewer: How did you go about addressing the question: EPA was in a meeting with some industry people talking about enforcement and the liability schemes and somebody said, from industry, "This isn't fair." And the response was, "It isn't meant to be fair." That kind of thought has always hung around. What's your reaction to those types of thoughts?

Cummings: Fairness with respect to which part of it?

EPA Interviewer: Partially the liability scheme, and who was going to pay for what.

Cummings: It sounds harsh to say it wasn't meant to be fair, but the essential concept of joint and several liability is to assure that everyone who has the ability to prevent or mitigate harm does so. That the moment you are concerned with recovery or compensation that every bit of harm or compensation is mitigated, notwithstanding the availability or economic viability of some of the responsible parties. The consequence of that is it might mean sometimes that a party who contributed fractionally to the overall problem—a small amount of waste in a disposal site or something like that—bears a larger part of the overall cost. The fairness of that is with respect to the victim, not to the array of responsible parties. The fairness with respect to a particular responsible party can be achieved by the responsible party keeping their waste out of the site.

Yes, the bill includes a backward look to behaviors that existed before the federal regulatory statute, but *Rylands v. Fletcher* was decided in the 17<sup>th</sup> century, I think. So the principles for responsibilities for handling dangerous instrumentalities is long established in common law. It's not unfair to hold people responsible for their activities of that kind. As a deterrent matter, joint and several liability magnifies the deterrence effect.

If you were talking about cleanup as opposed to liability, some people have suggested that having the government do the cleanup and then charging its cost to the private parties is unfair because it's so costly. That's again an incentive to the private parties. I mean if Superfund worked frictionlessly, first, the release and exposure would not occur. Secondly, once it occurred, the private responsible parties would clean it up to some objective protective standard. It's only when it's not working frictionlessly that the government has to go in and impose these burdensome cleanup costs.

Now if someone were to say that it's unfair because X gets sued and Y doesn't get sued, that's a different kind of unfairness claim. I don't think people on a whole were complaining that not enough folks were sued. There were a lot of cases where the government strategy was to first sue a short list of responsible parties and depend on those responsible parties to do the discovery and broaden the field by bringing in other responsible parties. That's a different kind of fairness issue. The multiple party aspect was definitely on the committees' minds in 1986, but was not thought of particularly in '80 as much.

EPA Interviewer: It was about '84 or '85 when you started thinking about the amendments for '86. What was that process like?

Cummings: My recollection is that there was amendatory legislation introduced in '84. You know, we've talked about some of the reasons why things that were found not quite being implemented. Mostly the legislation had to do with problems with implementation and not underlying problems.

EPA Interviewer: So from your perspective, what were the top few things that had to be addressed in '86?

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<sup>5</sup> *Rylands v. Fletcher* was decided in the 1860s, and therefore the 19<sup>th</sup> century.

Cummings: I did think that cleanup standards needed to be addressed. The reason why our committee did not do more than a paragraph on it had to do with internal focus, not my judgment. There were a number of things that came to us that were not necessary. There was a package, for example, that we got from the Justice Department. It was a package that had to do with increasing the likelihood of settlement. Maybe that was the name of it, the Settlement Incentive Package, something like that. Not all the issues in it were about that, but trying to short circuit litigation to get the cleanup faster. I would say that everything we thought of as a necessary amendment to the act had to do with getting more cleanup faster. One of the things that we had in mind, obviously incentive to the legislation, was reauthorizing and expanding the Fund. It was clear that the \$1.6 billion that we agreed on... Do you know the story about how that came about?

EPA Interviewer: I only know bits and pieces. I'd be interested in hearing yours.

Cummings: It was finally crystallized because [Senator] Bob Stafford asked [Senator] Jesse Helms, "How much can you go on this legislation?" And Helms said, "Oh, about \$1.6 billion." I think, thinking that Stafford would ask for more. And he said, "Okay, we'll do it," because we knew it would grow. It didn't matter what the first dollar authorization was. We had what turned out to be a really accurate idea about the eventual magnitude of the program. Namely that it's a bottomless pit [*laughing*], or a pit full of nasty stuff that's going to take some money to get bottomless. Anyway, reauthorization of the Fund and the mechanism for funding by itself was a major motivation for amendments.

EPA Interviewer: What was the environment like six years later now to getting these changes passed?

Cummings: It wasn't an environment in which repeal would be considered. Nobody wanted the program to lapse. It had become very popular. In some places extremely popular, politically popular, politically important. Places like New Jersey, for example. It was important enough that the Administration actually supported reauthorizing it, and funding it more or less adequately, at least at a higher level. The Administration had its own package of things that they wanted. You know there were some things that were enacted in that legislation that I don't think worked out as people had hoped.

EPA Interviewer: Anything specific?

Cummings: I think one example is 113(h), the bar on pre-enforcement review. I think that came from a desire by the Justice Department to always win. Understandable. It's really decreased the accountability of the program. I think it's made it difficult for anyone to get the Agency to take seriously, at times, the implications of proposals for remediation and to consider alternatives. Talk about multi-committee involvements. That package, particularly the pieces that the Justice Department put forward in the '86 legislation, were fronted in the Senate by the Judiciary Committee and particularly by the staff and the Chair. The Chair was [Senator Strom] Thurmond at that time.

It was a curious committee. This is at the conference stage basically, because those amendments were offered on the floor. I think they may have had a markup, because I remember their report, but we were not involved in that process, but we were involved in the

conference. I remember the people I was staffing were [Senators] George Mitchell and Ted Kennedy and they, unusually so, were not sufficiently persuasive that day. [Pause] I am trying to think of some other strands that were...

EPA Interviewer: One of the things I found different in '86 was a focus on communities and citizens having a voice in the cleanup process. Specifically, there were technical assistance grants. Can you talk about that? We did institute a new technical assistance program.

Cummings: Right. At that time, that is before 1986, to contrast that with the Superfund reform legislation that was considered in the late '90s, community participation was not so controversial. Therefore, it was not so sharply challenged or delineated in the legislation. It was pretty broadly supported. Do you know what I mean when people aren't thinking about it real hard? They think about the problems and the issues and perhaps don't give as much guidance or shape to it as they might. Which meant, in my perspective, at least, much of the development of the concept was administrative. It had been administrative before that; it was administrative after that. It was shaped very much by both the individuals at the federal level doing it, and the professional participants at the community level.

EPA Interviewer: And was Rena Steinzer integral, on the House side, in getting the technical assistance grant program?

Cummings: Right. Some people had questions about that. That was probably the most controversial part of it. It's kind of a New Jersey thing. I don't mean that in a denigrating way, but you know it was something that perhaps there was special clientele for or some state experience that made that. On our side, Senator Lautenberg was extremely interested in that.

EPA Interviewer: We also, in '86, had the Hazardous Substance Research Centers go forward in specific areas. Do you remember anything with that? Was that more of a minor part in the legislation? That's just one I am familiar with.

Cummings: I wouldn't want to say it was a minor part, but I would say it reflected a specific legislative interest of some Member or Members and was included in the legislation to reflect that interest.

EPA Interviewer: Is there anything else about the '86 amendments that you want to add in?

Cummings: One of the other things that's interesting—there are two things—is the whole area of taking deterrence in a new direction in terms of information management and disclosure. The Title 3 provisions, which had precedents at the state level, particularly Proposition 65 in California, but that turned out to be information as quasi regulation, turned out to be really powerful. That was something on the Senate side, which was championed by and shaped by Senator Lautenberg. In the development of that I was representing Senator Bentsen, who was the Ranking Member of the committee at that time. So here I am trying to temper and make it workable, that's my piece, and then we get to conference, and I'm trying to push it. That was, I think, a dramatic new direction for federal environmental law that has had a lot of effect already and probably still will in the future, when legislation can't be passed for one reason or another. It's been a decade since any federal environmental legislation

really was passed; more than a decade maybe. Then telling people what they are supposed to do has a lot of effect on producing pressure to reduce and find alternatives to... That was an important part of the act.

The second thing was in 1986 a lot of the parties affected by the legislation for its first six years were active in trying to get amendments or shape things or at least inform the Congress about what's going on. There was a group who were interested in modifying the strict, joint, and several liability provisions in some way. One big example of that was the insurers who—just a small little side light, did Curtis mention the silver bullet amendment?

EPA Interviewer: No, he didn't.

Cummings: Well, there was a time when he, especially with insurers, developed legislation that would have eliminated the insurers from responsibility for policies made in the past, long-tail policies. It didn't pass because, not surprisingly, the chemical companies thought it was an awful idea. That's just an example of the caldron of competing interests that was going on during that time. Notwithstanding all that effort and a lot of language in [Sections] 107 and 113, pieces of the law that deal with litigation over liability. Somebody, I used this line in an article I wrote for one of the environmental magazines recently, somebody characterized, you know, the '86 amendments acronym is SARA, which actually was chosen to memorialize Curtis Moore's daughter. Did he tell you that?

EPA Interviewer: *[Laughing]* No.

Cummings: Sara is his daughter's name, and initials, which were suggested by another member of the staff to honor Curtis's contribution. One of my friends, in law practice in California, said, "It probably shouldn't be called SARA. It probably should be called RACHEL: the Reauthorization Act Clarifying How Everybody's Liable."

And I think that's true on several levels. Notwithstanding a lot of discomfort on the act by the various parties, both how it was implemented and how it fell on them, the Congress chose to reauthorize the central provisions of the act, strengthened at least. It's a very interesting history. It's been a very hard act to amend since. Very hard.

EPA Interviewer: So, how long were you on the Hill?

Cummings: 18 years.

EPA Interviewer: You left in?

Cummings: 1988.

EPA Interviewer: What have you seen since 1986? You were there for two more years. What are you doing now?

Cummings: A lot of my practice involved working with the committee and other folks on the Hill on related issues and at the Agency. I was a close follower, for example, of the FACA

[Federal Advisory Committee Act] of a couple of years ago, the NACEPT [National Advisory Council for Environmental Policy and Technology] Committee in 2002.

Maybe the problems with the program now, or historically, say the last five or six years, have to do with how to come to closure on some of the most difficult, sizeable units. Sites that need remediation. And how to do that with what may turn out to be, ultimately, finite resources. Right now in one sense there is no money, and in another sense, my friend Frank Cushing, Staff Director of the House Appropriations Committee, used to be clerk for the subcommittee then [at] EPA. He's told me that Congress will always, always appropriate money for Superfund as long as the need is there. But without the specialized taxes, the dedicated revenues to support that fund, it does make it more difficult to sustain. The challenge is how to implement these massive cleanups to get the most out of the money that is available and to manage the list, that's shrunk but hasn't disappeared, of contaminated sites. Plus, having a mechanism that's still flexible and responsive to issues that appear, either new releases or new types of threats that may not have been specifically on one of the lists previously.

EPA Interviewer: Just for clarification, what did you do after you left the Hill?

Cummings: For the law firm McCutchen, Doyle, Brown, and Emerson—a California-based law firm. I was in their Washington office. I did a lot of legislative work, but also compliance counseling and strategic planning and things of that kind. A lot of air work. A lot of sediment remediation issues. One of my major clients has been GE. At one time they had the largest inventory of sites on the list. They have diligently worked their way along the list, but they have several major sites, some of which are sediment remediation sites. I moved to a consulting firm, joining with some friends who were not lawyers for several years. I left that when my wife came to seminary in Texas, and have been a sole practitioner/consultant since then, part-time.

EPA Interviewer: Just so we have that background for this next couple of questions. You mentioned the tax and needing that. There has been a lot of talk right now that we need the tax to keep the program going. But the fact is that even if we have a tax, Congress still needs to appropriate the money. Do you have any concern about that, or do you think that's just the way life is?

Cummings: Well, that's the way life is. I mean that's the way the program was set up. Given the way the Budget Act works and other things, that's the way life is. It will always be that way. I expect those are the constraints of legislating. In fact, the Superfund program enjoys a fair amount of, sort of, direct-privileged movement of funds to the responsible agency without the appropriation action being quite so key. I also think my friend, Frank, is right, especially as long as the funds are there in a dedicated fund, they are likely to be appropriated. In some ways the perversities of the budget process make general budgetary needs a better argument for enacting the tax than the needs of the Superfund program itself. I don't think it's feasible to have a tax which is actually polluter pays, which actually relates to risk-causing behaviors of entities. And the tax mechanisms that were finally enacted, and are likely to be enacted in any reauthorization, are much more general mechanisms. The existence of the Fund and the dedicated taxes for it really helps the budget. And the year that the bill was reauthorized in sort of a stealth amendment in the conference committee, and the more

recent considerations of reauthorization of the tax have all been driven by the use of those revenues to offset other cuts or needs in the budget, not by the needs of the Superfund program, but by the fact that trust funds help the budget. Just like the Social Security Trust Fund helps balance the budget, these other special revenues do so. I can see the tax extended without any discussion at all of the environmental benefits, without any consultation of the Appropriations Committee or the Agency just in order to get, whatever, \$3 billion or \$5 billion on the books to help balance the budget. I don't think I answered your question though.

EPA Interviewer: Do you want to? Looking at Superfund in the next 25 years, where do you see it going?

Cummings: I think at some point during that period I would hope that enough progress has been made on the inventory of sites that the program can split. Some parts of it can fall away to a much more residual level while the deterrent aspects continue. I don't think you'd ever want to repeal the core provisions of the program, particularly Section 107, because they help prevent the reoccurrence of contamination, but I think there will be a time when, hopefully, the sites have been turned into a manageable list for a fairly low-level program. I think that part of that is that state programs continue to take more responsibility, and they'll be carrying out a bigger share of cleanups.

EPA Interviewer: Did you ever imagine that Superfund would grow to be the program it is today?

Cummings: Oh, yes. I mean, the need for it has been; it was clear to us earlier on. I guess I didn't quite imagine that it would grow to be the political sacred cow that it has today. Pardon me for borrowing a religious metaphor. I didn't realize how difficult it would be to adjust and fine tune it in the future. In 1980, we were raised and we were used to a cycle of periodic reviews of legislation and reauthorizations. Anywhere from a two- to a five- to a seven-year cycle in all the other environmental statutes. Well, we haven't been able to do that with all the other environmental statutes either since about 1986 or so. But in '80 I wouldn't have anticipated that it would be so hard to fine-tune Superfund.

EPA Interviewer: Is there anything else you'd like to add or talk about? We've covered a lot in about two hours, but I am sure there are things we didn't.

Cummings: Well, I am afraid I did not do justice to all the people involved who really contributed to the process. There were a lot of folks who worked really hard who I didn't see at all because they were working in another place. They were working in the House to get the House to pass this legislation, or they were working the administration side. They were working purely at the community action side. I didn't mention nearly all the staff who played a part in this. Most of the ones I would mention, I would do so positively, but you know, I have to apologize to them and myself for not listing everybody.

That period that led up to December 11, 1980, was like the work that we had done on other legislation. The 1972 Clean Water Act required 39 committee meetings and 44 conference sessions over two years, plus all the staff work and individual conversations with Members and things around that. Superfund wasn't unique in the amount of effort that went into it, but it was still a really valuable use of the time that people put into it. It was worth the



effort. There was a lot of effort. It was very difficult, politically difficult. '86 was nothing compared to what was politically necessary in '80. The courage that people showed in 1980 was just dramatic. I guess that is what I would end with.

EPA Interviewer: Thank you very much for participating and for your time. I enjoyed talking with you.