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Industry Representative

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EPA Interviewer: This is an interview with Jerry Prout, Vice President for Government Affairs, FMC Corporation. We're conducting the interview on August 30, 2005, for an oral history project in conjunction with the 25th anniversary of the Superfund program.

Welcome. Thank you for agreeing to be interviewed today. I wanted to begin by talking about some background issues, starting with the pre-Superfund period, before 1980. You've had a 27-year career in FMC Corporation. When did you join the firm, and can you tell me a little bit about FMC and the positions you've held there?

Prout: FMC is a chemical company, but when the Superfund program started, we were a traditional conglomerate. We had a defense business that engaged in government contracting. Our machinery group sold a range of heavy equipment. You still see some of our cranes around town, on the Wilson Bridge Project, for example. "Food Machinery," which is where the FMC acronym comes from, produced equipment both for farming and food processing. And then, separate from these machinery businesses, we had a diversified chemicals business. In the mid-'90s we sold our defense business and a stand-alone gold company, and in 2001 we spun off the remainder of our machinery business, leaving the chemical business. So today, FMC is a pure chemical company, producing lithium, hydrogen peroxide, persulfates, soda ash, biopolymers, and agricultural chemicals. But through the duration of Superfund's life and basically over the last century, we were a highly diversified, old-style conglomerate. FMC was started in about 1894 in the Central Valley of California, so we are over a century year old company. Thus, we have a legacy in terms of environmental liability going back to the manufacturing sites that we had in about 40 states during the last 100 years or so. I joined the company in 1979, and the first encounter I had with Superfund was when Anne Gorsuch announced the first NPL [National Priorities List]¹, around Christmas or right before Christmas of 1981 or 1982.

I was the one that actually fielded the call to inform us that we had the number one ranked site on the just-released NPL. I happened to be the only person around, because everybody above me in the organization was gone on holiday break. That was my first exposure to Superfund, and quite a baptism by fire. The site was at Fridley, Minnesota, and was a government-owned, contractor-operated site making equipment for the Navy. Our site was designated as the number one site because we were within proximity to the St. Paul-Minneapolis Water Works. So the Mitre score², which was what was used then to determine

¹ The first National Priorities List was proposed on December 30, 1982 (47 FR 58476).

² The MITRE Corporation was a contractor to the US EPA, and was involved in the development of the Hazard Ranking System, the principal mechanism EPA uses to place sites on the NPL.

the ranking, exaggerated the real risk. It was agreed later that our score was unnecessarily high, but that was our first encounter with Superfund. Nonetheless, over the ensuing decade we had several sites that went on the NPL, and so we dealt with the program in its infancy.

I think it was probably in the late 1980s or early 1990s that we decided, based on our experience with the program, it needed to be revisited legislatively. I think the common experience among PRPs [potentially responsible parties] was that the program was very well-intentioned and had good management, but that the law itself drove some behaviors that were just not commonsensical. What we were hoping to accomplish with legislative reform was to bring some balance back to the way the law was administered.

EPA Interviewer: Thinking back to the time period prior to Superfund's statute in your work at FMC, did you encounter any of the issues that ultimately brought abandoned hazardous waste sites to public attention?

Prout: I didn't personally have any knowledge of that. Our first real environmental episode as a company was a situation that involved the discharge of carbon tetrachloride into the Kanawha River in 1978, which was a major episode that really brought awareness to our company that protection of the environment was important and we were not addressing it the way we needed to. This spill occurred prior to my joining the company, and so by the time I got there, we had a significant environmental department and a legal team devoted to environmental issues. So basically, the awakening that we had at FMC to the importance of environmental stewardship was a result of the Clean Water Act. But we had, as any industrial firm did with a century legacy, a lot of sites around the country where wastes had been disposed and not always properly by today's standards, though it may have been conventional practice and lawful at the time.

EPA Interviewer: Were those sites perceived as any kind of emerging problem? What was the industry's perception of the scope of the problem?

Prout: I think industry generally knew it had a problem, but it's like everything else at that time in the environmental movement. Many of us who lived through that infancy may have some perspective. It's almost hard to take yourself back to that point in time and the emergence of a stronger environmental ethic. But I guess one of the points I'd like to make is: what's so encouraging about what's happened in the ensuing years is that the generation of people who are now managing Superfund, both inside industry and outside industry, came of age after Earth Day, so you have a totally different mentality and different approach to environmental issues than before. I think there's now much more commonality of purpose, though there may not always be agreement on how to get there, but there's at least a shared set of objectives and goals, and that's what makes this period of the Superfund program so different from the period that preceded it. I can't really speak to the early days, but you know, I think the priorities were different for the country. A good example might be the Front Royal site [Avtex Fibers, Inc.], a site the government actually operated during World War I. A site that was owned by a company we subsequently acquired, and was disposing of waste in a manner that was clearly, by today's standards, improper. That disposal during a wartime situation became a legal issue under Superfund and that's an example, I think, of the disconnect between today's perspectives and those pre-1980.

EPA Interviewer: You've mentioned a bunch of sites—Fridley, Minnesota, and the Avtex site in Front Royal, that's what you were just referring to—and then a spill, carbon tetrachloride spill into the Kanawha River in West Virginia. Are there any other sites in this time period that come to mind, or anything that you want to add?

Prout: We have approximately 30 different sites I am aware of where we have some involvement on the NPL. At one point we were a \$6 billion conglomerate, back in the mid-'80s, so we had our share of sites on the NPL and others that today we are addressing under state cleanup requirements or Brownfields statutes.

EPA Interviewer: Let's move on to the period of time after the enactment of the statute and early implementation of the statute, let's say pre-SARA. I understand you were part of an organization entitled the Business Roundtable. Can you tell me a little bit about that group?

Prout: The Business Roundtable is a CEO [Chief Executive Officer]-driven organization of about 200 of the nation's top CEOs, and it's basically dedicated to public policy and corporate input to public policy. It is particularly strong in agenda-setting and formulation of white papers and think tank-like pieces to generate thought around issues including Superfund reform, specifically. There was as much contentiousness within the business community around Superfund implementation, particularly the liability issues, just as there was outside the business community. Strict, joint and several liability obviously has had its aberrations as it has played out, so what we tried to do was construct a fairly sophisticated computer model that would predict how the program might play out under different liability and cleanup scenarios.

Because the debates at the table would get so contentious, we brought in a former OMB [Office of Management and Budget] manager who had overseen the Superfund program and some computer experts and constructed a very sophisticated computer model that was actually housed at the mainframe computer out at American University. And we worked through—I guess it turned out to be in the 140 to 150 range—model runs with variables around liability, orphan share, pace of program, cleanup methods, etc. And that exercise really was kind of a calming influence on people who had strong opinions about the way the program should work, but didn't necessarily know how their assumptions about reform would play out in the real world. I'm not sure a computer model necessarily gets you there, but at least it gives you some framework to debate. And so we would try to be sympathetic to the insurers, to the big taxpayers, to the large PRPs, all of whom were in the Roundtable, and try to center a consensus approach to how the liability might be changed, and to some extent how the remedial assumptions might play into a reform effort.

EPA Interviewer: Now let me see if I understand it. The model's purpose was to run different scenarios, changing liability in this way or that, to see who would ultimately end up paying what?

Prout: It was very interesting, and in fact it was so interesting that I think it became an end in itself. We all got enamored with the model and ended up doing a lot more model runs than we should have. We probably could have cleaned up a Superfund site with the amount of money it cost to run the model. But it did have, I think, a positive effect on the policy debate, because we were able to, one, calm down the adversarial debate within our own community

(i.e. business), but also I think we were able to contribute substantively to some of the bills that were being drafted at the time. Congressional staff became very interested about what the next model run would say, and in fact asked us if we could tweak some of our assumptions as they began to amend their bill drafts.

EPA Interviewer: Expanding on that. Can you tell me a little bit about what role you and the Business Roundtable played in the legislative task force?

Prout: Well, let me back up two steps. FMC was also part of a business coalition called the Western Business Roundtable, a group of companies with assets in the West. That organization convened a roundtable with what turned out to be about 18 Senators in a very small room off the Capitol, I think around 1989—I'm not sure that's the exact date, but in that time frame. [Senator] Max Baucus was then the Chair of the Environment and Public Works Committee, and he was among the attendees. What we were trying to do was illustrate some of the things that were happening in the field with the Superfund program that we thought could be corrected, if the law was addressed—in other words, reformed.

FMC had a particular site, Mouet [Mouet Industries] in Montana that illustrated what we thought was the way that the law was driving behaviors that weren't in anyone's best interests, and Senator Baucus had a keen interest in this example. My recollection is that Mouet was a small chromium plating plant which FMC neither owned nor operated. We had only been there in the capacity as technical advisors to smooth out some technical glitches in their manufacturing processes. I think our advisors were there all of six months. But when the company went bankrupt, FMC was the only party that the Agency could find that had anything to do with the site, so we became the PRP without ever really owning the site or operating the site or doing anything other than providing some engineering advice that had nothing to do with waste generation or disposal. Obviously, this is an extreme example, but it was glaring to us.

Similarly at this same site, on the remedy side of the coin, the Agency decided to try out a new remedial technology which essentially stabilized chromium into concrete bricks. Unfortunately, all this was being done without any community participation, so what happened over time was a new plant was erected next to the existing idled plant that turned out to be bigger than the existing plant. The bricks were stacked up on the back 40 and began to be an eyesore for the community. The community became concerned, and so we ended up engaging the community in figuring out a different solution. All that said, and you know, there are always bad examples in any program or system, be it private or public sector. But this was one of those poster child examples. I think it really was the first time I had seen Senators really focus on some of the things that were happening in the field. That little meeting off the Senate floor was a real watershed, since it brought Members [of Congress] from both parties together. They spent significant time just shaking their heads.

Subsequently FMC was invited to participate in the National Superfund Commission, which I think was the real watershed in the reform effort. Now, I'm biased because we were part of it, but it was a significant effort because it helped take the "adversarialness" out of the reform debate to some extent. I mean it's still there—has to be there, will always be there, and should be there. Some tension is always going to exist. But at least in terms of trying to improve the way the program operated by changing the statute, which was driving these

behaviors, the commission had a major impact. Even though its final work product—the commission report—once translated into legislative language, passed through every committee of Congress—all five—it didn't make it to the finish line. Nonetheless, the commission's efforts still translated into the Agency changing some of the ways it interpreted the law and did things, the so-called administrative reforms.

I think it's had a great beneficial effect over time. Maybe that's taking too much credit for the commission, but I think those who worked on it would probably share that view, and so that was our experience. The commission had environmental, academic, industry, insurers, environmentalists, community members, et. al. all trying to reach an agreement. It took us about a year and a half to get there, but we did. The experience we've had on the program was sort of threshold, and I think that the Browner³ EPA, in particular, and Elliott Laws⁴, were very good in trying to figure out ways to implement some reforms within the Agency that really made the program work better, even though the bill didn't pass. That's a 50,000 foot view, but it's our experience and our perspective. You had the infancy of the program, which was a lot of misplaced energy, and then you have the adolescent phase where everybody is a little awkward about how do we make this thing work, and now I think you're in this early adult or middle-aged phase, and we're certainly in a comfort zone with the way Superfund operates. We have major disagreements with other PRPs and the Agency, but I think the bandwidth of disagreement is a lot less than it was 15 or 20 years ago, and the adversarialness and the polarization of viewpoints have been ameliorated by a lot of factors. I think the commission and the Browner EPA certainly should get a lot of credit for that.

EPA Interviewer: I have a number of follow-up questions on the commission. Could we go back, just for one moment, to tie up a couple of loose ends on the earlier periods of time? Thinking back to when the original statute first came out, when did industry folks, or you personally, become aware of the language about strict, joint and several liability, and what was the initial reaction? Was there an immediate reaction of any kind with the parts of the statute that folks immediately knew they wanted to change?

Prout: This is all speculative on my part, because I really wasn't there, but my sense was the industry obviously thought the concept of strict, joint and several liability, and its implementation, was unfair. So yes, there was a lot of resistance to it, and I think that was one aspect of law that was the most difficult for industry to swallow, particularly when they got to the actual cost. Then you couple that unfair aspect of assigning responsibility with the cost of cleanup, as in the case of Moat, and the Agency's preference for permanent remedies, which the Agency was interpreting very religiously from the law and without much flexibility. This simply compounded the costs when you had a strict liability regime on top of it. I think it just got out of balance, and that's been our experience.

³ Carol Browner was Administrator of the US Environmental Protection Agency from January 1993 through January 2001.

⁴ Elliott Laws was Assistant Administrator of the US Environmental Protection Agency's Office of Solid Waste and Emergency Response from October 1993 through February 1997.

EPA Interviewer: Tell me what impressions you had, if any, to the changes that were made to the statute by the Superfund Amendments and Reauthorization Act in 1986? Did that affect things for FMC or for industry generally?

Prout: Ironically, one part that actually turned out to be, in retrospect, more positive than negative, though that was not our thought going in, was the Right-to-Know provisions, the Community Right-to-Know. Although it has had some unintended consequences post 9-11, our experience over time with the Superfund statute has been that when we can engage communities around cleanup decisions, it is usually to everybody's benefit. That's a blanket statement, not always true. It's much more difficult in practice, but it tends to be the case. We certainly found that out at [the Avtex site in] Front Royal and found it at other sites, Front Royal being the most dramatic, because it's the largest site in this complex, but in others where there's property reuse potential and you can bring the community in. We're doing one right now in Pocatello, Idaho. A site was closed there in Region 10. We are looking at what the community wants for that site. We've had a similar process to the one we had in Front Royal, which is participative and allows the community significant input into what the future use of the site will be.

EPA Interviewer: Getting back to the National Commission on Superfund, tell me a little bit about what the commission's mission was when it was initially assembled?

Prout: It was to see if there could be agreement and consensus around the table on reforms that needed to be made to Superfund so that—and this was the important piece—you could actually accelerate the pace of cleanup. When we came to the table, I think all parties were dissatisfied—the environmental community, particularly, because the pace was so slow. Companies, PRPs, the insurance industry, had a little different perspective around predictability of costs, which also drove decision-making to be slow. So I think that it was, “How do we get the pace of cleanup accelerated and take some of the edge off some of these statutory provisions that seem to be driving bad behaviors?”

EPA Interviewer: How did you come to be a part of the commission?

Prout: It was my Chairman, Bob Burt, who was actually part of the commission. He was selected because he chaired the Environmental Committee for the Business Roundtable, and had developed a very good reputation around environmental circles. He had taken on the Roundtable responsibility after we, as a company, raised our head out of the foxhole on Superfund. I referred to the Western States Superfund Conference example earlier to illustrate how we were becoming frustrated enough that we were trying to get opinions changed on Capitol Hill around the statutes. Bob was becoming recognized as a responsible leader in this effort. He had a very good capacity, not true of all CEOs, to listen very carefully and hear what others were saying, even when they did not agree with our point of view. So this reputation helped him assume leadership, and one thing led to the other and he was named to the commission, along with Dick Mahoney from Monsanto, Dean Buntrock of Waste Management, and Bill Ruckelshaus of Browning Ferris. There were, I think, five or six CEOs on the commission, and Bob was one of those.

EPA Interviewer: So the whole group was five or six CEOs?

Prout: No, it was much larger—about 25 to 30 people from a diverse range of stakeholders who were interested in Superfund reform for a variety of reasons. It was atypical multi-stakeholder confab that, frankly, nobody had much hope for, and ended up with, at the end of the day, a rather significant report that became the template for the legislation that was introduced and that passed every committee, but not through the House, etc. as I have already described.

EPA Interviewer: Can you tell me a little bit about what it was like to be part of the group at that time?

Prout: I think the most important part of the group was that they—and this goes back to some of the original questions—had been traditional adversaries in the field around Superfund, including in particular the environmental groups and the companies (in other words, the PRPs). I think these two traditional adversaries under the program really got to know each other and got to understand each other's perspectives in a way that you just can't do by reading testimony and position papers. So there was just, as happens in those kinds of alternative dispute resolution mechanisms, a lot of personal interaction that was really constructive to generating a positive outcome. There were friendships built, and people got to know each other in ways that otherwise they would not have. And so, we had some really difficult sessions but, in the end, agreement around what we called a "fair share approach to liability," an agreement around a risk-based approach to remedy, significant beefing up of community involvement in the process, a component for environmental justice, and so on. There were a lot of different ways that the program addressed various peoples and parties and interests, needs.

EPA Interviewer: I've been told that you personally played a significant role in efforts to reform Superfund for the passage of the bipartisan bill that you referred to coming through five Committees. Can you share a little bit of your thoughts on that process and its outcome? Anything that you would do differently? Anything that you're particularly proud of?

Prout: I think the process was a terrific success, though someone exaggerated my role in it. I am not sure since that time that there has been any environmental legislation that's moved as far. Well, that's not quite right—of course there has been—but I mean nothing as comprehensive and far-reaching as that effort. It did fail ultimately, but it failed I think for some reasons that probably were outside of our control as a group. But what was particularly positive about that was, you were walking the halls with Bill Roberts from the Environmental Defense Fund and Jonathan Lash with World Resources Institute. I mean, you had people that were usually on opposite sides all supporting the same bill. It was a really positive experience from that perspective. And those kinds of relationships lasted beyond just the bill. It was unfortunate it didn't pass. On the other hand, in retrospect, as you look back, the Agency, within their power, because they were living under the statute, did make some significant modifications in the way they interpreted the statute which were very beneficial, at least to the PRP community, and I think it's accelerated the pace of cleanup. And so many of the objectives that we were seeking I think were achieved. And who knows? Had you passed that bill, you would have had a different statute to address, and it's the devil you know versus the devil you don't know.

Some of us in retrospect have said maybe it was fortunate it did not pass after all, because certainly the fair share piece—which would have resulted in an administrative law judge sitting with the parties trying to wrestle through fact patterns and figure out how to assess liability fairly—was certainly unknown territory and could have ultimately proved just as contentious and lethargic as the old system. Now, in essence this happens when PRPs get together to try to determine liability. It's not clear how that new system would have worked out, and we were concerned about, as I recall, that it did require a much more significant orphan share, which put pressure on the Fund, which in turn put pressure on the tax base, which arguably might have caused its own generation of legislative issues. I think the commission (or perhaps the legislation drafted as a result of the commission report) capped the orphan share at something like \$500 million, as my recollection. So we were going to have to deal with issues like: what if the demands on it are greater than 500 million? How do you allocate that among taxpayers or PRPs? And I think we came up with a couple of different off-ramps to smooth the orphan share burden. One in particular I remember was to assess a *pro rata* share among all the PRPs across all sites as a way of increasing their EIT [environmental income tax] share. But that was the kind of new territory, and who knows how it would have played out in practice? So what I am trying to say is that there may have been some benefit to the bill not passing. Of course that was hardly our perspective at the time, and we were really dedicated to its passage, and I think all the environmental community was as well.

EPA Interviewer: Going back to the administrative reforms, as you mentioned, the National Commission issued a report, a final report and that laid the groundwork for the reforms. What specific role did the commission, or you personally, play in the development and implementation of the administrative reforms, if any?

Prout: I didn't personally, but I think several people in the business community concurrently with the commission were very instrumental. Based on the legislative pressure, and based on the fact that there were bills before the Congress, and based on this universal need for reforming the statute, I think the Agency, based on its own experience, came to the conclusion that there were some things that they could do differently. For example, redefining the approach to *de minimis* shares, the greater flexibility around preference for permanence so that we're addressing hot spots. But there's now more of a risk-based approach to overall site cleanup, and on liability it is our experience that the Agency and the Justice Department are now more aggressive in identifying all the PRPs at a site and bringing them to the table, rather than on leaning on PRPs to initiate this, though this is not universally the case. Clearly the momentum, at least until the recent Aviall decision, was towards getting PRPs around the table and finding a way to fairly allocate. I think Elliott Laws and Carol Browner were very innovative. And all the people that worked with them were very innovative around the way they addressed many of the concerns raised by the commission.

EPA Interviewer: Did you have an opinion of the reforms when they were initially proposed? Did you think they would be successful?

Prout: It's like with everything else where you have a consensus. There was a lot we didn't like about the commission report. I remember going to industry meetings and people saying that, "We've sold out, how could you do this, and you've given up." That's a natural function of a process like that, and you just live with it. I think the benefits of, again, being

up on the Hill with the people that you were traditionally adversarial with, far outweighed that, and we succeeded to the extent that we made the program better than it was.

EPA Interviewer: You mentioned some of the specific reforms and what you thought the outcomes were from them. Maybe we can go back to that for a minute. Do you think the reforms were a success? What effect do you think they had on issues such as risk assessment and risk management?

Prout: My sense from talking to our people is that there's a lot more attention now to future land use considerations. Not in the sense of putting health considerations at risk, but at least future land use is allowed to be a critical factor now in terms of remedy. I think we've all kind of wrapped our arms around the inexact science of risk assessment and learned how it can be helpful on cleanup decision making. And there is also more in the way of community participation in the decision making at many sites, and that is a good thing. My sense—and this is a long-distance view since I am not very close to the day-to-day operation anymore—but from talking to our people, you now have counterpart bureaucracies in the PRP community and the Agency and the state agencies that have dealt with each other on a lot of different sites, understand where each other are coming from, and it's sort of the old shoe syndrome. There's a comfort zone level now—and again this is a blanket generalization—we've got sites where we're at loggerheads with the Agency but we know, and the Agency knows, where the boundaries are, and there's that sort of familiarity that comes only with experience. So I think we're sensing there's a lot more progress around the Superfund program now than there was pre-1986 and pre-1992. It seems to be at least functioning in the way that everybody understands the bounds, the natural tensions that will always exist, and have learned how to manage through them.

EPA Interviewer: You mentioned the liability scheme and the reforms' effect on that. Obviously Superfund's liability system evolved over the years. Can you share with me your thoughts on the various exemptions from liability that have emerged since the original statute? In particular, do you think that Superfund's become more or less fair over the years?

Prout: Well, we still have the same statutory requirements. I think the implementation's fairer. We're concerned with this most recent Supreme Court decision⁵ [Aviall]. I'm not a lawyer, so I hesitate to comment, but as I understand it, the decision has the real potential to interrupt the forward momentum that was established at having PRPs agree on an RI/FS [remedial investigation/feasibility study] and move forward. Because the decision, in essence, rewarded, and I'm going to overstate this, but it rewarded the recalcitrant who stayed away from the table, and that's certainly counter to the spirit of everything we were trying to achieve in the early 1990s. I think that it was an organizing principle among responsible PRPs over the last 10 years to get everybody to the table, force them to come to a fairly rapid decision around a remedy, and move forward. And we're disappointed in that the Aviall decision seems to fly in the face of all of that.

⁵ Aviall Industries, Inc. is a party in a case that reached the U.S. Supreme Court. The case concerned Aviall's ability to get a share of its costs—known as “contribution”—for hazardous site cleanup from another company. The official name and citation of the case is *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S.Ct. 577 (2004); the case is often referred to as “Aviall.” The U.S. Supreme Court issued its decision on December 13, 2004.

More broadly and to your question, I don't think the exemptions... Well, let's just say the exemptions were hard-fought, municipal, *de minimis*, *de micromis* definitions, and so forth, but they are what they are and are politically driven to some extent, so I will just leave it there.

EPA Interviewer: Just to go back and clarify, you're speaking of the Aviall decision when you refer to the Supreme Court decision, just for the record.

Prout: Yes, that is one issue. Another issue is the disparity between implementation of Superfund from region to region within EPA. I think that is consistent with other PRPs. We prefer the interpretations of some regions more than others. Then the third is affordability, because of the shrinking manufacturing base, and because there are other competing environmental priorities out there. So I think it's a matter of continuing to try to balance the cost of cleanup in the most effective way. That's just a broad statement, but over time I think the Agency is becoming more sensitized to that. And there have been some improvements in remedy design which may get us away from the "pump-and-treat syndrome" and towards more aggressive targeting of hot spots.

EPA Interviewer: I'm not familiar with that.

Prout: Well, I am particularly familiar because FMC has a new technology that can address many contaminants found at Superfund sites and avoid the use of conventional pump-and-treat technology. Ours is an *in situ* chemical oxidation technology, which basically addresses most volatile organic compounds and MTBE [methyl tert-butyl ether]. We're pretty excited about it, as are many of the contractors who have worked for us at sites around the country. It's been successful in its early demonstration. There is a comfort level with some of the traditional technologies, because they're predictable overtime—pump-and-treat in particular. You kind of establish an annuity, but you don't necessarily address the remedial issues in the most effective way. So we're hopeful we can challenge conventional thinking a little bit, but it's going to take time.

EPA Interviewer: To follow up on that, there's an interesting point I hadn't thought of earlier. Has Superfund driven or advanced technology in any way do you think? Cleanup technology or waste minimization technology or any other kind of...?

Prout: Absolutely. That was one of the things we said in the commission that the Community Right-to-Know amendment probably has as much to do with that as any thing else. You know when it's a matter of public record as to what your emissions are, it makes you a lot more attentive. Clearly the liabilities and the insurability are very important financial incentives for behavior, and that has been one of the salutary impacts of the statute from the environmental standpoint. But we should not dismiss the community's reaction, particularly when the volumes reported are divorced from any consideration of risk.

EPA Interviewer: Going back to the administrative reforms and some of their outgrowths, are you familiar with the Superfund Accelerated Cleanup Model, or SACM? Do you have any thoughts on its impact on the efficiency or effectiveness of the program?

Prout: No. I remember the acronym. I remember the program, but I had better not comment.

EPA Interviewer: OK.

Prout: Was that an extension of the administrative reform effort at one point, or was that sort of a stand alone...?

EPA Interviewer: My understanding is that it was trying to leverage the successes of the removal program to do early cleanups, even at a site where we knew that there would be ongoing cleanup for many years.

Going back on the issue you had raised—the funding, the dual funding issue—looking back, do you feel that the Superfund tax was a good idea? And now that the tax has expired, EPA's continuing to focus on a "polluter pays, enforcement first" philosophy. Do you think there is any there any likelihood that the tax is going to be reinstated in the future?

Prout: One of the things I've learned out of the experience with the modeling and federal funding was the way in which the Superfund, the Fund itself, was being used. It was kind of eye-opening to me as to how the government accounted for the Superfund itself. I'm not sure there's a direct connection between the size of the Fund and pace of the program. You know, the Agency's ability to address cleanups is not necessarily a function of the Fund, at least that's my understanding of the way in reality it plays out. I may not state that properly, but I think that's close. In other words, even now, with the Fund depleting, the real operating budget for Superfund derives from appropriated dollars, and not from the size of the Fund.

That's a way of saying I am not sure the size of the Fund is as critical as how the appropriators address the priority of the program going forward and what resources they think the Agency needs to run it. I think the liability provisions have been a good driver of behavior, and one of the things we dealt with in the commission regarding fair share was simply to provide some fairness to the concept that the polluter pays. The polluter should pay, but they should pay their fair share. That was the whole premise and the problem with the tax. It's like any mechanism like that. There are a lot of folks who are paying that probably aren't as liable for the hazardous waste profile in the U.S. as others. There are fairness elements in the tax that need to be addressed. So if we go back and revisit it at some point, I think that's something that should be looked at. The environmental income tax—to me, and I think a lot of others—had a lot of virtue in that it was a way of not trying to get too fine-tuned on the polluter pays aspect, at least for the tax mechanism. But, in fact, the real dollars for cleanup come from PRPs, and I think that [the] polluter pays concept is best addressed in the liability provisions of the statute rather than trying to develop some tax mechanism that reflects this.

EPA Interviewer: I'm hoping that I have given you enough of an opportunity to answer questions on the National Commission.

Prout: Yes.

EPA Interviewer: Because you have alluded to different things and I've tried to make sure that I followed up on them, but is there anything in particular that I have overlooked that you'd like to call attention to?

Prout: I'd just like to reemphasize the one thing that the commission did, which was unexpected for us, which really sensitized us more to the communities' needs and particularly low-income communities. That was something that spun out of the commission that we didn't anticipate and was a very positive benefit. Our Chairman actually got pretty involved in that side of the commission's report, and so that would be the only point I would go back to and reemphasize.

EPA Interviewer: As a follow up to that, I understand you served on the National Environmental Justice Advisory Council.

Prout: Yes.

EPA Interviewer: In recent years, environmental justice and the revitalization of both NPL sites and what we call brownfields have emerged as issues for the Superfund program. What are your thoughts on environmental justice issues? Do these issues pose particular challenges or opportunities for companies like FMC?

Prout: Well, you know the reality is a lot of these sites are in communities with color or low-income communities. So the issue is: in the prioritization of sites, have we prioritized properly and given appropriate weight to those sorts of communities? Are they getting the same attention as other sites? I think certainly on the commission there was some fairly compelling evidence that we weren't, and we hadn't, and the NPL was skewed. You can do a lot with data, but I think we were all convinced that the EJ case was reasonable. Maybe the emphasis by the folks who were advocating it went a little bit too far, but that's what you do when you need to wake people up. I think they made a good point, and I think it registered with a lot of us. I think a lot of us looked at our own site profile and said, "You know? We need to be more attentive to this issue." Not only at Superfund sites, but also in the operation of our plants in those kinds of areas where there are impacts that just occurred de facto because of the way zoning has been done over the years and just the natural sort of flow of capital. It was not deliberate, it was not motivated by any racial bias, but it did occur and so now it needs to be addressed to the extent practical. So I think those realizations are very good, very much of a benefit. Now how you address that in a policy sense is more challenging, but it spoke to us at least about the need to have something in the statute that gave communities more voice in cleanup decisions.

EPA Interviewer: With regard to the revitalization of NPL sites and brownfield sites, what role, if any, have you observed the Superfund program playing in the redevelopment of properties?

Prout: The one clear example for us was our Avtex site where the Agency—at Carol Browner's direction, more than anything else—decided it was such a complex site. And the government had some liability, which I think helped, and used what would be a Brownfields model and applied it to the site in the sense that they dealt with the site on the basis of future land use, brought in the community, and addressed cleanup less as a series of OUs [operable units], but rather holistically. Looking at what the future land uses for the site might be, and then essentially coming to agreement on the site as a whole rather than piecemeal. And it was done fairly rapidly, at least the decisions to proceed, and though the

cleanup will take years, the decision-making process was accelerated once we adopted this sort of “land use” model. I think it was also helped by the fact that we were the sole industry PRP, and the government did have a stake in it. Like the Fridley site, we had operated that site at the direction of government.

Our ownership occurred in the middle of the site’s history. After we acquired it from American Viscose, we sold it to Avtex. The original owner, American Viscose, had been contracting with the government to make rayon during World War II, and there was a lot of evidence that the government had encouraged the very disposal practices that caused the site to be listed. So after Avtex went bankrupt and we were the sole PRP, we took the Superfund liability case into court and proved that indeed the government was liable as an operator under CERCLA. So the dynamic at the Avtex site may be a little different at other Superfund sites in that the government must now take on some of the costs of cleanup.

But regardless, we brought the community into a series of stakeholder discussions around, “How do you want this land to be reused, and what are the environmental consequences of each of your choices?” And from that community-based process we essentially had agreement on a remedial path forward. It is still an ongoing process, but basically we have agreement on how to proceed, or what the future use should be for various parts of the site and thus for us some clear path forward on the range of remedial options available to achieve the community’s vision.

EPA Interviewer: What’s going on at Avtex now? What stage of redevelopment is it at?

Prout: We’re probably four or five years away from completion of that site. There were three components. We have holding ponds which need to be de-watered, remediated; we have spent rayon which is the material in waste piles; and then we have the buildings themselves that need to be decontaminated and brought down. And so the buildings have been decontaminated, and the last one will be imploded in a couple of weeks—September 19 [2005], I think. And then we have some areas down by the Shenandoah that we were going to make into a nature conservancy, wetlands restoration, soccer fields, light industrial, and so forth according to the plan. There are some significant future commercial interests that have already identified the site as a potential for future commercial development. The community made some decisions around the options for potential commercial redevelopment which would add jobs back to the area. The community is still involved through the Economic Development Authority, and will be in the future decisions as we move along. And though we’re four or five years away from really getting that site back up and operating in all of its planned future dimensions, this is after the site just sat there for I think a 15-year period where nothing happened. It was just gridlock. So the Brownfields sort of land use model to engaging the community and driving the decision making process really did work. Or at least is working.

EPA Interviewer: And at what point in the cleanup process was the community brought in? It sounds like around remedy selection?

Prout: Oh, yeah, it was in the FS [feasibility study] process.

EPA Interviewer: So, from your point of view, was Avtex a successful [project]?

Prout: Yes. It's still in a work in progress, but I think that there were several things that were helpful there. And again, the liability component was not as much as an inhibitor there because of the government's role. But the real take-away is that the ability to look at the site from a risk-based perspective with a significant community involvement was a feature that I think drove the resolution.

EPA Interviewer: If we can go back and tie up one loose end, you had made an interesting comment about the regional decentralization of the Superfund program. Any thoughts on how the program was implemented? There was, I guess, a decision that was made early on in the program's formulation that it would be a decentralized program, different from some other federal programs. Any thoughts on whether or not that was a wise decision or an unwise decision? What are your thoughts on that?

Prout: It just... Our experience has been that it's varied greatly. We've had really different experiences in different regions and I don't want to name any particular, because some of them will come back and take issue, you know... [*Laughing*] But it's just that there have been disparities, so decentralization has been both positive and negative for us, and I don't know if we would say whether it is good or bad.

EPA Interviewer: Mixed bag!

Prout: I'm not sure we have an overall viewpoint.

EPA Interviewer: I'd like to move on to some more of the legacy questions, long-term impacts to Superfund. Is there anything from before that I should circle back to?

Prout: No.

EPA Interviewer: Looking back over the years, do you think that Superfund has changed the behavior of businesses with respect to environmental issues, and has it had any effect on preventing future hazardous waste sites?

Prout: Absolutely. I mean categorically I would say, "Yes." Coupled with the fact that you have a new generation of managers who understand environmental priorities and kind of grew up, if you will, with environmentalism [and] that may have a different view of how to achieve some of the objectives. Clearly there are legal and insurance reasons to behave correctly, but there are also very good business reasons. Good environmental management is usually the most efficient sort of business behavior, if we are allowed to do it with a performance goal in mind. Clearly, part of the mantra of any chemical engineer now is efficient waste management—recycling, pollution prevention, and all those concepts that just are now accepted as normal business behaviors. I'm not sure how much of it is attributable to Superfund. Some of it is, clearly. Some of it is just been business practice. But I mean, in the end, who cares? It's a lot better than it was pre-1980, and it should get better and better over time.

EPA Interviewer: Do you think that if that process actually comes to fruition that there will be a day when all of the sites will be cleaned up and we won't need Superfund anymore?

Prout: Sure, ultimately. It may be a long time out there and the priorities change. You know it's like a lot of government programs. They do outlive their usefulness and behaviors change and therefore they are not necessary. We've got a long way to go, but I think the decibel level nationally is down, and the decisions which will propel the pace of cleanup are more localized, as it should be, which I think gives the community greater say. I think there is also an increased aggressiveness on the part of industry to get these sites behind us. And I know in our company, we like the predictability of knowing that there are not going to be aberrations or spikes in terms of expenditures. But it's understood that we have a legacy we have to address. We have to do it responsibly, and we are going to that responsibly. We also want to do it intelligently. And while we have our own view of what that is and that'll differ at times with the community and at times with the Agency, I think there's a common commitment there among all parties to move forward. That's what my earlier point was about the current generation of site managers on both the public and private side. I think that bodes well for this program. Maybe 50 years? Who knows how long it will be before these sites get cleaned up? [Thomas] Jefferson thought it would take us 1,000 years to reach the Pacific.

EPA Interviewer: Following up on that, while Superfund is a construction program which seeks to clean up contaminated properties, it is at heart a public health protection program. Do you think Superfund has brought increased health protection for Americans, and are there any other benefits of that nature that you think might stem from the program?

Prout: Sure it has, but the question I think would be at what cost and could those dollars in some cases have been more effectively deployed? And that is where the program really has to be realistic in terms of the other environmental priorities we have is—to what extent and at what cost, given all the other risks out there, do we continue to argue and litigate over the “nth degree” of cleanup? I think that's the question we all need to keep putting in front of the regulatory community. Clearly, some of these sites pose real risks and need to be addressed on a priority basis. For others, containment or institutional kinds of strategies are more appropriate. But we are finding that the ground keeps shifting at some sites and new issues emerge that complicate rather than facilitate decisions. For example, when you are going to build a new building on a site that's been contaminated, you've got a lot of issues. But one of the new issues that has intruded that was not even on anyone's horizon as late as the late 1990s is vapor intrusion. This wasn't an issue when Superfund started, wasn't even an issue when we started many of these site cleanups. We're learning more all the time, so the program has to have some adaptability. But we also need some realism about when done is done.

EPA Interviewer: What do you see as the biggest challenge facing the Superfund program today and in the future?

Prout: I think it's to sustain the momentum, however you want to characterize it. You know some would still say it's moving too slowly, and it probably is. But we at least need to sustain the current momentum. We're very concerned about the Aviall decision in that regard, because it has the potential effect to set us back significantly, because it removes the incentive for PRPs to come to the table cooperatively since it rewards the recalcitrant. And so I think the biggest challenge is now that the spotlight moves away from the program and there's no crises perceived, and it gets more institutionalized, it has the potential to slow the cleanup process. I think that's one thing that the Agency and the environmental community

need to be on guard against going forward. On the other hand, maybe the key in that regard is the insertion of property value and the reward from redeveloping these sites back to productive use just as in the brownfields experience to moving these sites forward. So if we can somehow continue to keep that in the forefront, I think that'll have a positive impact and maybe counterbalance the tendency of any program that is 25 years old to attenuate over time.

EPA Interviewer: Do you think that Superfund cleanups have an impact on property values?

Prout: Sure. Well, you know, that works both ways. There are sites that don't want to go on the NPL, obviously, but those that have been there and get cleaned up often are revitalized. I think we're looking at several sites that have positive value going forward, just because people are more realistic about the success of some of these other sites around the country; i.e., the success stories and success breeds success. There's a stigma, obviously, to being put on the NPL, and that remains an important issue.

EPA Interviewer: The stigma of listing on the NPL remains an issue?

Prout: I think so. But what I am suggesting at the same time is: I think maybe that's attenuated over time, just because of the positive experience at some sites and the attention it brings to getting cleanup issues resolved. I think our Front Royal site will be an interesting model in that regard, if we can turn that property around. You know that's going to be a significant boost, and there are other sites around the country that I think have proven that.

EPA Interviewer: I've been to that site. It's waterfront property.

Prout: Waterfront property indeed, and we are looking at ways that the community can access the Shenandoah River from that site in the future.

EPA Interviewer: Do you have any other final thoughts or issues that I haven't brought up that you feel should be discussed?

Prout: Well, you know to the extent that this 25th anniversary gets any attention, I think it has some value, because there is a tendency, as we talked here, for the program to lose momentum, and that's not in anybody's interest. You tend to move on to other issues. And it's a dynamic program and you need to look at it both from a regulatory standpoint and probably legislatively over time. And you know, just because previous legislative efforts didn't succeed, and we may not need to overhaul the statute, there may still be some things, Aviall or the taxes or other issues, that need to be addressed legislatively. You know the regulatory aspects of this program are always in flux and need to be the subject of legislative oversight. So what you're doing with this retrospective, I think, has value for people to look back and say where have we been collectively and where do we need to go.

EPA Interviewer: One other follow-up question, because you've mentioned Aviall three times and I don't think I've ever asked this. What's been the industry response to the case at this point? Are folks still trying to sort out where they stand and how things are going to be addressed?

Prout: Yes. I think that companies like ours that take our responsibilities seriously are really dissatisfied and concerned about it. There may have been legitimate reasons to challenge the remedy by the party that did. But if it's creating a situation that's going to be used as an excuse, rightly or wrongly, for PRPs to stay away from the table, then that's not good. I think I've heard some discussion around legislative remedies, and I think there is some momentum toward that. The problem is based on everything we talked about in terms of the experience of 10 years ago. There's a reluctance to take anything into the legislative arena, because there's the tax component and there's all the other aspects of Superfund that get reopened if you start to tweak it here or there.

But somehow we need to find a way to do that. I think if this bad decision [Aviall] has the ripple effect that some people predict, it needs to be addressed. Not sure the courts can have much more say.

EPA Interviewer: I guess you wait for other cases to arrive and clarify the decision?

Prout: Maybe.

EPA Interviewer: It's been a pleasure interviewing you. Thank you so much for agreeing to come over and agreeing to share your experiences with us.

Prout: My pleasure.