96044

Department of Justice

ADDRESS

OF

THE HONORABLE CAROL E. DINKINS
DEPUTY ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE CONSERVATION FOUNDATION CONFERENCE

12:00 NOON
MONDAY, OCTOBER 1, 1984
MARRIOTT HOTEL
WASHINGTON, D.C.

SHALL WE FIGHT OR WILL WE FINISH: ENVIRONMENTAL DISPUTE RESOLUTION IN A LITIGIOUS SOCIETY

Good afternoon. It is a pleasure to have an opportunity to visit with you here today at the Second Annual Conference on Environmental Dispute Resolution. Conferences such as these are quite important because they pull each of us out of our routines and force us to focus on problems we see everyday, but do not take the time to address. Hopefully, at the close of this conference, each of us will have a better understanding of problems we face in finding the most effective methods of resolving environmental disputes.

I have spent most of my professional career involved in the environmental practice and, like many of you, have watched it expand and grow from a cottage industry in the sixties into a significant, diverse area of practice in the eighties. The dramatic growth in environmental law has stemmed, of course, from the enactment during this period of numerous environmental and resource-related statutes. The 1970's began with the enactment of NEPA (the National Environmental Policy Act), which was designed to encourage federal decision-makers to focus on the environmental ramifications of their actions. Later in this same decade, Congress not only reenacted the Clean Air Act as well as the Clean Water Act, but also enacted TOSCA, FIFRA,

the Safe Drinking Water Act, RCRA, and began developing the Comprehensive Environmental Response, Compensation and Liability Act of 1980, also known as CERCLA or Superfund. I believe that no area of law has expanded as dramatically in scope, coverage and complexity as has the environmental area over the past 15 years.

During this period, as we have seen the evolution of environmental law, we also have witnessed significant changes in the way we practice and use those statutes. One of the most obvious changes is that statutory schemes have become far more complex. The Clean Air Act is perhaps the best example of how a fairly complex statutory scheme has been transformed into an even more complex statute that has placed severe demands upon the regulating agency and the regulated community. Similarly, we have witnessed dramatic expansion of accompanying regulatory regimes. The extremely complex regulations developed under RCRA provide a particularly vivid example. Finally, if things were not sufficiently perplexing, we have seen a blending of disparate legal concepts in the environmental practice. For example, under CERCLA, general environmental and administrative law principles have been integrated with historic tort concepts, and this melding of administrative and common law principles has posed significant challenges for both practitioners and the courts.

Quite naturally, the enormous increase in the number as well as the complexity of environmental laws and regulations has spawned a correlative increase in the amount of litigation relating to environmental issues. The growth in environmental litigation has had a particularly dramatic effect on the government. In the past decade, the government has been required to spend more time and money in court defending its actions and enforcing environmental standards. For example, in the years 1980 to 1983, the number of environmental enforcement attorneys at the Department of Justice more than doubled, and the Department during this period filed more than 500 environmental enforcement actions. In the criminal enforcement area, our convictions in FY 1983 exceeded the combined total for all prior years. The growth in the government's environmental litigation burden is traceable to the Government assuming an aggressive litigation posture in protecting federal initiatives from legal challenges as well as to the private bar's aggressive and imaginative efforts in developing and pursuing causes of action.

To place in context any discussion of alternatives to litigation, we first must identify the proper role of litigation. Although litigation is often cumbersome, divisive and costly, it does serve an essential function in the dispute resolution process,

particularly when viewed from a global context. Congress at best is often imprecise. Congress creates its laws in a climate of competing interests where conflict is ultimately forged into compromise. The resulting product often contains ambiguities, apparently irreconcilable provisions, and indefinite standards. Litigation is an important tool to help resolve these problems in statutes -- to sharpen and hone legal requirements and to define more clearly the respective rights and correlative responsibilities of parties under the law.

For example, in the past several years, the Department has committed considerable litigation resources to define more precisely the boundaries and requirements of CERCLA. To develop a lawful and effective enforcement program under CERCLA, we must resolve issues of joint and several liability, retroactive application of the Act, generator liability and many other questions essential to the ultimate character of compelling hazardous waste clean-up. Judicial construction of CERCLA has clarified our understanding of this key statute and, to a certain extent, has focused our mutual scope of inquiry to fewer, more salient issues.

Similarly, litigation often is necessary to define the roles, rights, and responsibilities of the various institutions and branches of government in regulating environmental matters. For example, last

year in an important case, NRDC v. Ruckelshaus, the Supreme Court ruled on a question of broad-ranging implications for administrative law. The Supreme Court held that an agency is empowered to fashion definitions for critical terms in statutes where Congress has been silent or ambiguous. The Court held that once an agency has fashioned such a rule, the judiciary is "without jurisdiction" to consider the propriety of that definition so long as the definition fits within the statutory context.

But having recognized that litigation provides the most certain and efficient method to resolve disputes relating to the law, it is an undeniably cumbersome and inefficient mechanism to deal with facts. Once the legal ground rules are established, once the relative rights and responsibilities of the parties are precisely defined, litigation is not a satisfactory means to resolve disputes. The adversary process is not designed to quickly and fairly sort out the facts of a case. Rather, in litigation, facts are developed through a complex discovery process, in which each side will typically provide as little information as possible. Throughout the process, attorneys present their cases so that the court record is most favorable to their client's interest, and not necessarily to present a clear picture of what happened. As I see it, alternative mechanisms for

dispute resolution could be of great use in helping resolve factual disputes once litigation has interpreted the requisite legal framework provided by Congress.

Now that we have examined the litigation context of dispute resolution, let us reflect upon the numerous alternative dispute resolution mechanisms available to focus on the facts of a case. In their most informal context, these alternatives suggest nothing more sophisticated than face-to-face settlement discussions which either could forestall litigation or conclude it short of a trial. Beyond settlement, we inject more order and structure into the process as we move into the realm of mediation and arbitration where third parties play a key role in the resolution of a dispute. As the role of the third party becomes more formalized, the process becomes quasi-judicial with administrative adjudication.

Each of these alternatives to litigation is valuable in resolving differences outside of the courthouse. Each method is limited to some extent in its effectiveness, and each exacts its own costs from the participants. And, in the environmental area, some methods are effective in some contexts (such as in an enforcement action) but are less helpful in other contexts (such as defensive actions). This afternoon I would like to share with you the

Department's perspective as to how alternative dispute resolution mechanisms have worked in the environmental law context, how their use can be encouraged, and how they can serve a more useful and valuable function.

Perhaps the oldest and most often used alternative to litigation is settlement. Settlement allows parties to weigh the potential benefits of litigation against transactional costs and uncertainties, and can enable parties to avoid a long, expensive courtroom battle. In viewing settlement as an alternative dispute resolution mechanism, we must focus on the mechanics of settlement and how we can develop a system which encourages settlement.

Over the past few years, we have, for example, tried to make greater use of settlement in the area of environmental enforcement. Our basic premise is that an active, effective enforcement program is vital to assure that our environmental goals are something more than good intentions set down on paper. Yet, all too often, the effectiveness of an enforcement program is simplistically gauged by the number of cases referred to the Justice Department for judicial enforcement. While the "bean counters" take great comfort when these figures increase, they must realize that, unlike the iceberg, the Justice Department referrals do not necessarily reflect the enforcement effort that lies beneath them.

Judicial referrals, in and of themselves, cannot give us the enforcement program that we need in the environmental area. The simple truth is that we cannot bring every enforcement action or even a significant number of these actions to court. For example, we cannot, under the Clean Air Act, bring every auto tampering case to federal district court. Neither we nor the courts have the resources to deal with the thousands of cases that could arise every year, given that, according to a 1983 study, as many as 16 percent of the catalytic convertor automobile systems have been dismantled or rendered inoperative. Yet, despite recognized limitations on our judicial resources, it is imperative that we mount a strong enforcement effort, so that we can decrease the lead concentrations in the air, particularly in our cities.

The auto tampering cases vividly illustrate the central issue in environmental enforcement -- how to bring a sufficient number of cases to deter would-be violators while, at the same time, not clog our court system with relatively minor enforcement actions. The answer lies in the establishment of an integrated enforcement program. Such a program makes extensive use of an agency's administrative authority to establish the salient facts and to resolve the disputes. The judicial enforcement process is used only in

those small fraction of disputes in which the size and magnitude of the offense makes settlement inappropriate.

To be effective, an integrated enforcement scheme must provide substantial incentives for settlement. The Corps of Engineers in its enforcement program under Section 404 of the Clean Water Act is a good example of a sequential enforcement scheme that works. In the 404 program, the initial contacts with violators are informal with primary emphasis being resolution of the problem. Subsequent contacts are more formalistic as a formal "notice of violation" is issued and the violator finds his options are fewer, more restrictive and more expensive. Finally, when all else fails, the action is referred to the Justice Department for judicial enforcement. Once the matter is referred to the Justice Department, the violator finds his settlement options to be even more restrictive and more expensive, and in appropriate cases finds his life complicated by the government's efforts to enjoin any further actions.

This sort of sequential, integrated approach to enforcement can drastically reduce the number of enforcement actions requiring the attention of the courts. In fact, last year the Corps handled over 2,000 cases involving violations of Section 404 and only five percent were ultimately referred to the Department of Justice for

filing. The remaining 95 percent were resolved using restoration agreements or by violators voluntarily submitting to the Section 404 permitting process.

In the area of environmental enforcement, we have all too often found that governmental policies have inadvertently deterred rather than encouraged settlements. In certain situations, the negotiating position of the United States was inflexible, thus giving the violator little incentive to resolve the matter early. In other instances, officials emphasized increasing the apparent size of the iceberg by developing case referrals for the Department of Justice with little thought to preliminary negotiations with defendants. As a result, meaningful discussions commenced only after the case reached the Department of Justice and was ready for filing. In still other instances, settlement policies were vague, inconsistent or not widely publicized, and thus the government failed to inform the regulated community how and when to settle cases.

Both the regulatory agencies and the Department of Justice have worked hard to develop integrated enforcement programs. The agencies are working to develop enforcement procedures that demonstrate flexibility and reasonableness in the first instance, and which place a premium upon developing and sharing information. When

this approach is successful, the law is served by compliance and the environmental problem is rectified at less cost to the government as well as to the potential defendant. If it fails to achieve a positive result with this approach, the agency will develop the case into a judicial referral where the Justice Department plays its role by filing cases in a timely manner and by taking an aggressive and less conciliatory approach to enforcement. Moreover, federal enforcement officials seek to clearly define enforcement goals and the processes of both the regulator and the litigator so that violators know that any escalation of the dispute will ultimately make compliance more expensive and more restrictive.

By developing this sequential approach to enforcement, the federal government provides more substantial inducements for settlement. We are currently working with the EPA, the Corps of Engineers, the Department of the Interior and other federal regulatory agencies to fine-tune our enforcement programs and to develop broad-based enforcement strategies. Ultimately, we expect these efforts to return significant dividends by encouraging settlement and reducing our need to go into court, and ultimately, by promoting greater compliance with the applicable environmental statutes and regulations.

The same sort of sequential and flexible approach to settlement has been employed on the defensive side of our docket as well. For example, EPA and other federal agencies have begun experimenting with negotiated rulemaking to supplement existing rulemaking procedures, which too often have resulted in bitter confrontation, unnecessary delays and expenses, as well as rules unsatisfactory to all concerned. Use of negotiated rulemaking may help us reduce the potential for litigation. Informal consultation procedures enacted by Congress may also help reduce the potential for litigation. For example, Section 19 of the Outer Continental Shelf Lands Act allows states which may have some interest in or suffer some impact as a result of OCS development to comment informally on a proposed lease sale, and to suggest changes in the time, size and location of potential sales. So you see that from the perspective of the government litigator who demands compliance with the law and who wants to avoid litigation delays of agency actions, settlement is an important and much used tool as an alternative dispute resolution mechanisms.

The transition from settlement into the more formalistic processes of mediation and arbitration comes as we inject a third party into the dispute resolution process. In most situations, when only private parties are involved, the process of dispute

resolution gains an element of structure when the new player sits down at the table. However, when the federal government is involved, the injection of this third party raises substantial legal concerns. Concepts of sovereign immunity, authority to compensate, the Anti-Deficiency Act, and other considerations unique to the federal government pose serious constraints on the ability of federal officials to use these alternative mechanisms.

Nonetheless, government officials have experimented in certain situations with both mediation and arbitration. The Department of Justice has made some use of mediation and has found that, in certain cases, it can make a significant difference. One case in which we were quite successful in using mediation was Conservation Law Foundation of New England v. Myers. Our client agency in that case, the Soil Conservation Service, was funding a water and flood control project in eastern Massachusetts. The Conservation Law Foundation challenged the assessment of forest lost in the environmental impact statement prepared for the project. Our client was anxious to settle the controversy as quickly as possible because the project would have lost its funding if the project contracts were not signed by the end of that fiscal year and any delay would cause the project to become far more expensive. Plaintiffs were also anxious

to settle the controversy because the challenged project was to provide a much-needed water supply to the community.

After agreeing to mediation, the parties began a series of face-to-face meetings assisted by a mediator from The Mediation Institute. A crucial question of fact evolved during these face-to-face meetings relating to degree to which alternative ground water sources were contaminated and therefore not feasible alternatives to the project. The government was able to show to the plaintiff's satisfaction that there was no feasible alternative to the water project. Subsequent negotiations resulted in the Massachusetts Department of Environmental Management agreeing to use its best efforts to require municipalities to reimburse the state for forest and park lands taken for the municipal water supply projects. As a result, in August 1982, the parties were successful in their joint motion for dismissal with prejudice.

The use of mediation enabled quick resolution of the controversy, prevented unnecessary delays and increases in project costs, and allowed the parties to resolve their differences in an amicable fashion. This case was particularly well-suited for mediation because both parties had a strong interest in settlement, and each had a realistic view of what they wanted and what they could

ultimately achieve in litigation. Certainly there are other cases where, if mediation was available, litigation might be avoided.

An even more formal, nonjudicial means of dispute resolution by a third party is arbitration. As most of you know, unlike a mediator, an arbitrator is given authority by the parties to render a decision resolving the dispute. Arbitration has found a home in commercial and labor law, and has been extended to other areas of practice as well. In many contexts, arbitration is a particularly attractive alternative to litigation in that it informally replicates many of the essential elements of the courtroom.

Congress has recognized that arbitration may be a useful mechanism to resolve environmental disputes in the claims area and has sanctioned use of arbitration in CERCLA on a preliminary basis. Under Section 112 of CERCLA, a party asserting a claim against the Fund for monies spent in cleaning up a site can apply to the Fund for reimbursement and, in the event EPA disputes the claim, the matter is to be submitted to arbitration for resolution. This provision of CERCLA is quite innovative and we all will closely monitor actions once claimants begin to use it. Once we gain experience under this provision of CERCLA, we also may gain a better understanding

to settle the controversy because the challenged project was to provide a much-needed water supply to the community.

After agreeing to mediation, the parties began a series of face-to-face meetings assisted by a mediator from The Mediation Institute. A crucial question of fact evolved during these face-to-face meetings relating to degree to which alternative ground water sources were contaminated and therefore not feasible alternatives to the project. The government was able to show to the plaintiff's satisfaction that there was no feasible alternative to the water project. Subsequent negotiations resulted in the Massachusetts Department of Environmental Management agreeing to use its best efforts to require municipalities to reimburse the state for forest and park lands taken for the municipal water supply projects. As a result, in August 1982, the parties were successful in their joint motion for dismissal with prejudice.

The use of mediation enabled quick resolution of the controversy, prevented unnecessary delays and increases in project costs, and allowed the parties to resolve their differences in an amicable fashion. This case was particularly well-suited for mediation because both parties had a strong interest in settlement, and each had a realistic view of what they wanted and what they could

ultimately achieve in litigation. Certainly there are other cases where, if mediation was available, litigation might be avoided.

An even more formal, nonjudicial means of dispute resolution by a third party is arbitration. As most of you know, unlike a mediator, an arbitrator is given authority by the parties to render a decision resolving the dispute. Arbitration has found a home in commercial and labor law, and has been extended to other areas of practice as well. In many contexts, arbitration is a particularly attractive alternative to litigation in that it informally replicates many of the essential elements of the courtroom.

Congress has recognized that arbitration may be a useful mechanism to resolve environmental disputes in the claims area and has sanctioned use of arbitration in CERCLA on a preliminary basis. Under Section 112 of CERCLA, a party asserting a claim against the Fund for monies spent in cleaning up a site can apply to the Fund for reimbursement and, in the event EPA disputes the claim, the matter is to be submitted to arbitration for resolution. This provision of CERCLA is quite innovative and we all will closely monitor actions once claimants begin to use it. Once we gain experience under this provision of CERCLA, we also may gain a better understanding

of the usefulness of arbitration in resolving certain types of environmental disputes.

Notwithstanding the inherent limitations upon the use of arbitration by the executive branch, arbitration can play a role in resolving disputes that are collateral to a federal environmental action. For example, one of the preliminary proposals from the Clean Sites, Inc. Working Group has been to use arbitration to apportion the contribution of responsible parties in clean-up actions initiated by the Government under CERCLA and RCRA. While we need to evaluate carefully how such a mechanism would work in the event a federal agency was among the potentially responsible parties at a given site, we believe the proposal basically is a fair and an effective way to reach agreement outside the courtroom for sharing the costs of clean-up.

Let's look at one last alternative dispute resolution mechanism--the administrative process. In a number of areas such as energy regulation and disputes arising under federal land management laws, we have developed sophisticated administrative law systems which provide more informal fact-finding processes than the courts. The administrative alternative has been successfully applied in the environmental area. For example, the Interior Board of Land Appeals, created in 1970, routinely considers federal land management decisions.

These matters include mineral claims, geothermal leasing, oil and gas leasing, coal lease readjustments, herbicide spraying, and timber management and surface mining decisions. The Board received 1,160 appeals in 1983 and decided all but 10 of these cases. From 1970 to 1983, the Board issued 8,377 reported decisions, and only 466 of these decisions were appealed to federal court -- less than six percent.

The administrative court option has also been used successfully in disputes arising under FIFRA and TOSCA, and should be expanded to other areas of environmental law. Unfortunately, at this time, the ability of the regulatory agencies to use this alternative is sharply constrained by Congress. For example, under the Clean Air Act, the authority of the EPA to enter administrative orders is limited to 30 days, thereby preventing the development of any effective administrative alternative. This leaves EPA in the untenable position of treating an auto tampering case in the same way it treats a major stationary source violation, preparing each for litigation in federal district court. Clearly, the administrative court alternative makes more sense, and is more effective for less significant cases.

With this understanding of the available alternatives and the uses and constraints of each, I conclude by recognizing that the litigation explosion in environmental law has not been the creation of any one branch of government. Our courts have been far too liberal in hearing cases that are not a proper subject for judicial resolution and that should have been left to settlement by the parties. Executive branch attorneys too often have resorted to litigation, when cases might have settled. And Congress, in enacting a myriad of environmental laws, at times has ignored the need to create, or authorize use of, alternatives to litigation. The three branches of our government must all recognize their role in ending the congestion in the courts and in encouraging use of alternatives to litigation.

Solving our litigation problem will also require the help of the private sector. Attorneys in the private sector, as well as government, must be willing to compromise and discuss issues in a spirit of candor, foregoing minor tactical advantages to achieve a workable consensus. Moreover, the regulated community must recognize that the costs of fighting disputes to the bitter end will often outweigh the benefits. And, environmental interests must learn to approach environmental disputes with a greater sense of realism, viewing their ultimate objectives in light

of the purposes and likely outcome of litigation. The public, and those of us privileged to serve the public, must recognize that many problems are better solved by compromise rather than conflict.

Given the size of this gathering, it is clear that we are finally beginning to face the question of how we can most effectively resolve the massive number of disputes which have arisen under the far-reaching environmental statutes enacted over the past two decades. The solution of relying solely on our court system is outmoded in the maturing area of environmental regulation and simply will not work. I commend the Conservation Foundation for enabling us to share our ideas on how we all can discipline ourselves to use alternatives to litigation.

END