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Public Involvement and Dispute Resolution — Volume 2

A Reader on the Second Decade of Experience at the Institute for Water Resources

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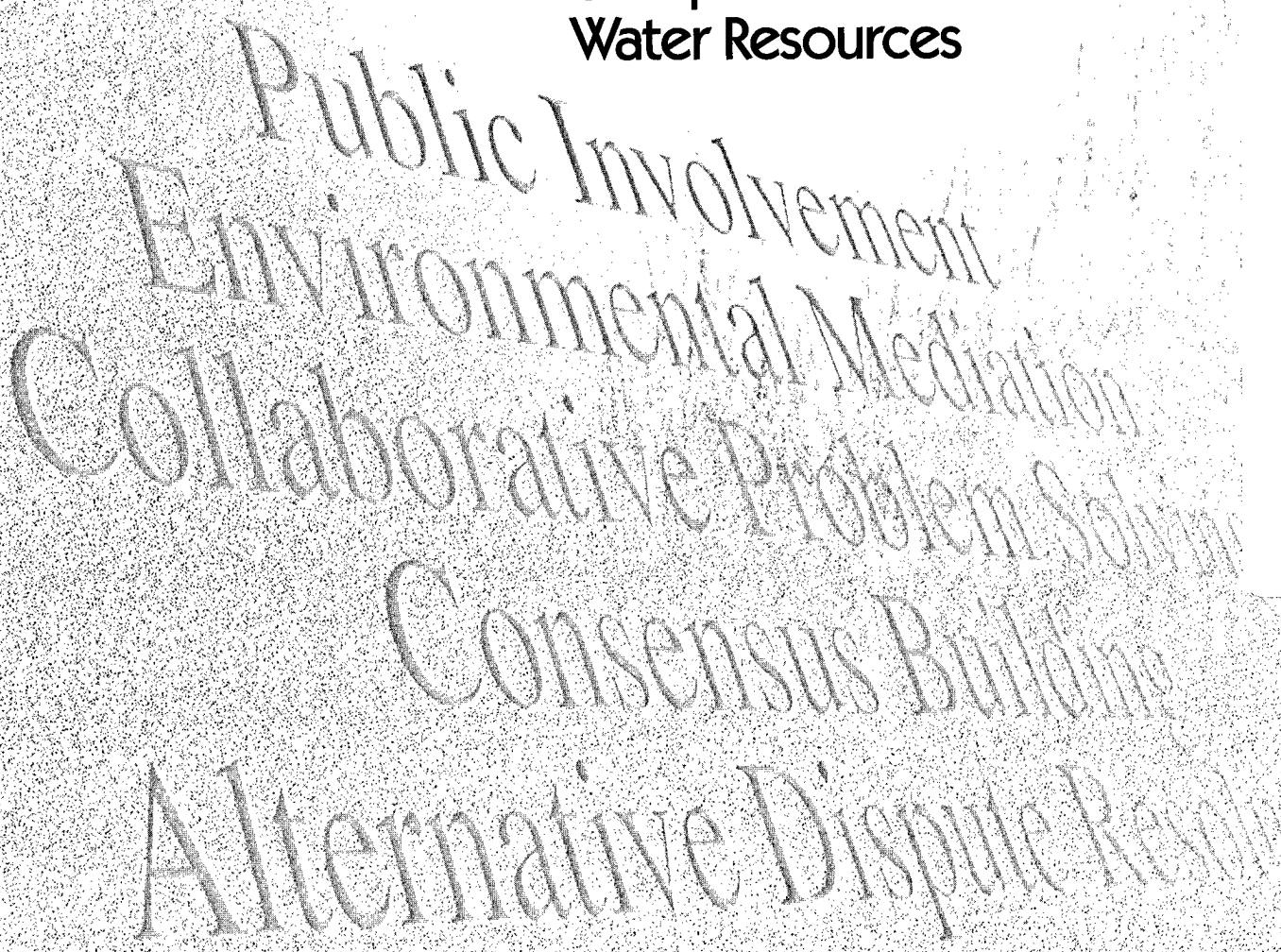

PUBLIC INVOLVEMENT AND DISPUTE RESOLUTION

A Reader Covering the Second Decade of Experience at the Institute for Water Resources

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SECTION I: INTRODUCTION AND OVERVIEW

Chapter 1

INTRODUCTION

by
Jerome Delli Priscoli, Ph.D.

This reader, together with its companion volume, *Public Involvement: A Reader of Ten Years Experience at the Institute for Water Resources* (IWR Research Report 82-R1), documents the evolution, over a period of twenty years, of new processes by which governmental agencies reach decisions and resolve conflicts. The two readers focus primarily on the experience of the U.S. Army Corps of Engineers, but are not intended to be just a compendium of case studies. Instead, they portray one agency wrestling with trends, demands, and pressures faced by all agencies with responsibilities related to natural resources in virtually the entire industrialized world. These readers are a communication from the Corps to other organizations: "This is what we've learned. This is what worked for us. Here are the tools we found helpful."

Much of the material in this reader is drawn from materials developed in the late 1980s to early 1990s for the Corps Alternative Dispute Resolution (ADR) program, just as material in the first reader was drawn from the public involvement program in the 1970s and early 1980s. This reader, however, also provides information on how the public involvement program has changed since the 1970s, and how its concepts are being used in new circumstances within the Corps.

Section I includes an historical overview of the use of public involvement in the Corps and chapters describing how the public involvement activities of the 1970s fit with the dispute resolution activities of the 80s and 90s.

Section II contains public involvement case studies as well as an analysis of how public involvement contrasts with environmental mediation.

Section III visits the subject of collaborative problem solving. While collaborative problem solving was at the heart of public involvement, the Corps has used it to address new areas such as customer service and complaints about noise around military installations.

Section IV provides insights and lessons learned about specific and novel applications of collaborative problem solving processes and techniques for planning, decision making, consensus building, and large group response formats.

Section V begins the discussion of ADR. This section provides an overview of the principles of ADR and discusses how ADR is used in the Corps.

Section VI presents two overviews to ADR techniques, the first showing the range of techniques available, and the second discussing criteria for selection of specific techniques. This is followed by a discussion of many of the key ADR techniques, authored by practitioners who have substantial experience resolving conflict in difficult situations.

Finally, Section VII contains case studies illustrating the use of each technique and concludes with a discussion of lessons learned from these cases.

This reader offers an informative journey into the Corps' past as well as a provocative glimpse of our future. Hopefully, it will provoke new applications and extensions of the experience base contained in these pages.

Chapter 2

HISTORICAL PROFILE OF PUBLIC INVOLVEMENT IN THE U.S. ARMY CORPS OF ENGINEERS: KEY MILESTONES SINCE 1960

by
Stuart Langton, Ph.D.

The purpose of this document is to identify key milestones in the evolution of public participation efforts within the Corps since the 1960s. This document is not intended as a comprehensive historical study of public involvement within the Corps of Engineers. It is rather an attempt to summarize relevant developments concerning public involvement activities and regulations. It also identifies Federal regulations that have influenced the conduct of the Corps in undertaking public involvement activities.

This document is organized chronologically. Each section summarizes highlights of a five year period. A brief introductory statement to each section identifies influential socio-political forces during the period and major trends within the Corps relevant to public involvement.

In selecting items for inclusion in this profile, priority has been given to plans, regulations, and activities of system-wide significance to the Corps. While an attempt has been made to identify a number of initiatives within Corps districts that are relatively well recognized throughout the Corps, scores of other successful district efforts could be identified beyond the scope of this report.

INTRODUCTION

Public involvement has become increasingly important to government agencies since the 1960s. The decline in the influence of political parties and the rise of interest group politics has made it difficult for government agencies to define the public interest and achieve consensus. Public involvement refers to the variety of ways in which public agencies seek to inform and involve the public to assure a workable degree of consensus in relation to their mission and proposed activities, to improve their policies and plans, and to increase public appreciation and trust.

Since 1970, the U. S. Army Corps of Engineers (Corps) has devoted considerable attention and resources to involve the public in planning and policy-making activities. While this commitment to public involvement has coincided with that of other Federal agencies, states, and local governments, Corps public involvement and public affairs activities are unique in three respects. First, is the amount of investment. One estimate, for example, suggested that in 1978 the Corps spent as much as $80 million on public involvement activities, more than any other Federal

agency (Rosenbaum, 1979). Second, is the range of public involvement activities including such diverse areas as civil works and military construction, wetlands regulations, recreation management, and environmental clean-up activities. Third, is the variety of support for public involvement through regulations and guidance directives, training programs, research, publications, and technical assistance.

This paper identifies milestones that profile the historical development of public involvement policy and practice within the Corps since the 1960s. The milestones include legislation and regulations, demonstration projects, meetings, research, district projects, training programs, and publications. The milestones also include actions by the Corps as well as by Congress and the administration that influenced public involvement procedures and practices within the Corps.

This report is organized into eight sections. The first section identifies milestones prior to 1960. Subsequent sections are organized according to five year segments from 1960 to 1989. A short concluding section addresses the period 1990 to 1993. Each section includes a brief overview of selected influential political, social events, or forces for each period. A five page bibliography is included as an appendix.

PUBLIC INVOLVEMENT PRIOR TO 1960

Context

Since its founding in 1802, the Corps has served many of the military and civil engineering needs of the United States. The nature of its engineering and regulatory assignments have required considerable cooperation with Congress, Federal, state, county, and local government agencies. Until the 1960s, the experience of the Corps in dealing with the public was oriented principally to working with and through elected and appointed officials. This is not to say that there were not instances in which particular attention had to be given to the concerns of landowners, business interests, and others. However, such attention was episodic, relatively limited in scope, and subsequent to the opinions of public officials.

By the 1960s, changes in American political culture forced the Corps to involve the public more fully and directly. One such force was the environmental movement, initially referred to as the "conservation movement." In interviews conducted during this project, many Corps officials observed that the environmental movement was influential in demanding and requiring more public involvement opportunities in Corps planning and regulatory activities. A number of references are made to developments in the environmental movement in this report to illustrate how they coincided with efforts to increase public involvement within the Corps.

In the 1920s, the Corps experienced its first significant conflict with conservationists over the Currituck Sound in Virginia and North Carolina. This event presaged later encounters the Corps would experience with environmentalists as well as with other citizen interest groups. At issue

was the fact that the Sound, an exceptional Black Bass fishery and waterfowl area, was being salinized and polluted by a canal from the Chesapeake Bay. Conservationists, led by the Izzak Walton League, wanted a lock built, but the Corps refused. Eventually, the conservationists won out through successful lobbying with Congress and the President, and the lock was constructed in 1931.

For the next 25 years the Izzak Walton League, the largest and most influential conservation group of the period, the Sierra Club, and the Wilderness Society, lobbied to make the Corps more responsive to their interests. In 1934, their efforts were reflected in the Fish and Wildlife Coordination Act which required the Corps to consult with the U. S. Bureau of Fisheries before constructing dams and reservoirs (Robinson, 1989, p. 14f).

While the Currituck Sound experience forced the Corps into an action it did not want to take, in the 1940s it experienced its first case of environmental interests stopping the construction of a dam it proposed to build at the Mill Creek on the Clarion River in Western Pennsylvania. The Mill Creek experience illustrates how a combination of sportsmen groups, a state legislature, and local elected officials could mobilize influence to stop a project proposed by the Corps (Robinson, 1989, p. 17f).

Following is a list of five selected regulations and proposals from the end of World War II to 1960 that illustrate the beginning of a trend toward greater involvement of other agencies and the public in Corps planning.

Milestones: 1945-1959

1945

The River and Harbor Act of 1945 called for state involvement in the development of Corps Plans: "Investigations which form the basis of...plans, proposals, or reports shall... give to the affected state or states...opportunities for consultation regarding plans and proposals, and to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations" (P. L. 79-14, Sec.1(a)).

1946

In a proposal that presaged the creation of the Environmental Advisory Board in 1970, Col. Clark Kittrell, Division Engineer of the Upper Missouri Division, suggested to Lt. Gen. R. A. Wheeler, Chief of Engineers, that officials of conservation groups "sit in conference" with the Chief and, "clear the air and to carry out exploratory conversations." Wheeler declined the suggestion claiming the Corps gives "all interested parties full opportunity to make known their views and participate in the formulation of our civil works program." He promised to provide advance notice of all public hearings (Robinson 189, p. 22).

1946

The Administrative Procedures Act of 1946 provided (and still provides) a general series of requirements for all Federal agencies to inform the public of proposed policies and procedures through notice in the *Federal Register*, and to provide opportunities to participate in rule-making through submission of written material (Langton, 1981).

1946

The Fish and Wildlife Act of 1946 included provisions that the Corps must coordinate with relevant state agencies as well as the Fish and Wildlife Service in civil works activities.

1958

To better inform other agencies and the "public generally," a manual was distributed (EM 1165-2-108) 17 December 1958, *Water Resources Policies and Authorities: Coordination of Public Construction Programs.* The manual directed District Engineers to prepare and distribute a project sheet including a map illustrating plans for each authorized project. A sample letter was provided for transmittal to public agencies concerned with each project.

PUBLIC INVOLVEMENT FROM 1960 TO 1964

Context

The early 1960s was a period of significant social and political change in the United States. The election of John F. Kennedy as President represented a generational shift in American politics. A major feature of this change was the rise of interest group politics represented by the civil rights movement and the development of the environmental movement. One result of the civil rights movement was the passage of the Economic Opportunity Act of 1964, referred to as the "War on Poverty." One feature of this legislation was a requirement for the "maximum feasible participation" of the poor in programs that might affect them. This regulation reflected a growing demand and expectation among all elements of the public to have opportunities to be informed and involved regarding the plans and polices of government agencies that might affect them.

The environmental movement gained momentum during this time influenced by the publication of two influential books: Stuart Udall's, *The Quiet Crisis* in 1962, and Rachel Carson's, *Silent Spring* in 1963. Concerned about the lack of coordination in water resources management, President Kennedy established the Water Resources Council in 1961. In 1964 the Water Resources Research Act was passed establishing water resources research institutes at Land Grant Universities and clarifying responsibilities for coordinating research among agencies.

This was a challenging period of growth for the Corps. Between 1954 and 1964, Congress authorized over 690 Corps managed water resources projects costing more than $9 billion (Moore and Moore, 1989, p. 19). Concern grew within Congress about flooding in areas developed after World War II grew. The Senate Select Committee on National Water Resources proposed an active planning and regulatory approach for entire river basins to control flooding.

Milestones: 1960 to 1964

1960

The Flood Control Act of 1960 (Section 206) authorized the Corps to provide information to local communities about floods and flood control damage and to provide technical assistance to them in regard to flood plain management issues. The Corps organized a Flood Plain Information Services program to inform local communities on flood related issues.

1962

Senate Document 97 established interagency standards in planning water resource projects. It required that all views be heard in adopting plans and that multiple objectives and needs, including economic, environmental, and social, be weighed.

1963

Eugene Weber, Chief of the Civil Works Planning Division proposed a greater involvement of conservation groups: "the participation of such conservation groups should begin at the outset of every planning effort and should be continuous through the project formulation and evaluation process" (Robinson, 1989, p. 26).

1964

Guidance regarding "Participation in locally organized meetings" was provided in Section IX, Public Hearings, in an Engineers Manual (EM 1120-2-101) entitled *Survey Investigation and Reports, General Procedures*, published 12 October 1964. The manual advised, "utmost caution and discretion in participating in meetings initiated by local interests. . ." It further advised, "Participation in a meeting from which the press or any interested segment of the public is excluded, except for reasons of security are not condoned."

1964

The Secretary of the Army, Cyrus Vance, appointed a Civil Works Study Board to determine ways in which the Corps should change to adapt to changes in the water resource environment. The intent of this action was to determine how the Corps could be more efficient and effective in comprehensive planning functions (Moore and Moore, 1989, p. 80f).

PUBLIC INVOLVEMENT FROM 1965 TO 1969

Context

The period between 1965 and 1969 was a time of significant unrest in American society. Opposition to the Vietnam War was one of many expressions of public distrust and disaffection with government leadership and performance. The Corps received much criticism during this period because it proposed many large civil works projects that were strongly opposed by elements of the public.

Anticipating the growing distrust in government authority, President Lyndon Johnson issued a directive to all Federal agencies in 1965 to improve their communications with the public. This led to a study undertaken by the Technical Liaison Office of the Corps in 1967/68 and the initiation of a demonstration communication-participation project in the Susquehanna River Basin in 1968.

During this period, the environmental movement grew substantially. Almost all national environmental groups increased membership and income. Further, a host of new environmental organizations were created including the Environmental Defense Fund (1967), Friends of the Earth (1969), the National Resources Defense Council (1970), and Environmental Action (1970).

Meanwhile, the Corps became embroiled in a host of environmental controversies including the Tocks Island Dam on the Delaware River, the Trinity River Seaport Project in Dallas, the Cross-Florida Barge Canal Project, and the Dickey-Lincoln School Lakes project in Maine, among others. The Corps experienced pressures from within and without during this period to improve management of planing issues. As a result, planning divisions were required in Corps division and district field offices. A new headquarters Policy and Analysis Division was created to strengthen the analytical ability of the Corps in policy development.

Milestones: 1965-1969

1965

Congress passed the Water Resources Planning Act of 1965 (P. L. 89-80). Section 2 specified that "water related initiatives be conducted on a comprehensive and coordinated basis by the Federal Government, state, localities, and private enterprise with the cooperation of all affected Federal Agencies, states, local governments, individuals, corporations, business enterprises, and others concerned."

Through this Act (Section 101), the Water Resources Council was given legislative authority to coordinate water resources efforts among Federal agencies, establish river basin commissions, and develop standards and procedures for the operation of the Commission (Reuss, 1991, p. 27; Stevens, 1975, p. 8).

1966

On 22 March, the Chief of Engineers required that Corps field division and district officers create planning units "parallel to and of stature equal with the engineering function."

1966

On 26 July, a Policy and Analysis Division was created in the Directorate of Civil Works in the Office of the Chief of Engineers to strengthen policy-making functions throughout the Corps and to improve coordination within other branches and levels of government (Moore and Moore, 1989, p. 83f).

1968

The Technical Liaison Office (forerunner to the Public Affairs Office) of the Office of the Chief of Engineers published a report of a two year study on how to improve *Communication with and Services to the Public.* While the term "public involvement" was not used in the study, many references to "communication" referred to what later was called "public involvement." Among major findings of the study were: internal communications within the Corps needed to be strengthened, a proper balance was needed to assure coordination between centralized and decentralized units, reservoir personnel needed better training in how to relate to the public, and the growth in recreational properties managed by the Corps meant, "the Corps must face up to the fact that it is in the recreation business" (p. 56). Engineers, it was found, considered public hearings to be more of a tool of public relations than engineering. Instead they recommended, "closer rapport with opposition and proponent groups through individual contacts" (p. 31).

1968

The Corps undertook an experimental program in open planning, participation, and communications utilizing strategies and methods from the emerging field of Applied Social Science. The project, conducted in the Susquehanna River Basin, was assisted by consultants from Rensis Likert's Institute for Social Research and the School of Natural Resources at the University of Michigan. The project involved methods, such as outreach to identify relevant parties of interest, descriptive documents designed for the public, and the use of small groups to obtain opinions and suggestions from the public.

1969

In April 1969, the Corps established the Institute of Water Resources (IWR) to undertake "research in all phases of water resources planning to evaluate existing networks, procedures, and criteria, and to develop new and innovative techniques" (Reuss, p. 5). Immediately, IWR became the headquarters resource in developing public participation policies, research, and technical assistance.

PUBLIC INVOLVEMENT FROM 1970 TO 1974

Context

Between 1970 and 1974, the environmental movement became institutionalized in American society. Environmental laws, regulations, and government agencies created to provide environmental protection were expanded. Environmental groups experienced great membership increases, and public concern about the environment grew significantly.

The early 1970s was a period of dramatic growth in requirements for public participation among Federal agencies. For example, strong requirements for public participation were included in the Federal Water Pollution Control Act (1972), the Coastal Zone Management Act (1973), the Highway Safety Act (1973), and the Crime Control Act (1973). To illustrate the growth of Federal public involvement mandates, seven were published in 1966/67, but in 1970/71, 23 were published, and in 1972/73, 81 were published (U. S. Federal Regional Council, 1978).

During this period the Corps launched an unprecedented effort to promote public involvement. Initiated under the leadership of Lt. General Frederick T. Clark, an extensive program of training, publications, research, and technical assistance was carried out by the Institute of Water Resources under the leadership of Bernard Dodge, David Aggerholm, and James R. Hanchey.

Milestones: 1970-1974

1970

Congress passed and President Nixon signed the National Environmental Policy Act (NEPA) (42 U.S.C. 4231). A major provision of this historic legislation required Federal and local sponsors of public works projects to assess the impacts upon the environment. In commenting on the legislation, the President said it establishes a new dimension for citizen participation and citizen rights. Prior to NEPA, Corps studies were based primarily on technical and economic criteria. By requiring "Environmental Impact Statements," NEPA provided a basis for the public to raise broader quality of life issues.

1970

On 2 April 1970, Lt. General Frederick T. Clarke established the Environmental Advisory Board (EAB) consisting of six environmental leaders from throughout the nation. Among the functions of the Board were: 1) Examine existing and proposed policies, programs, and activities from an environmental point of view to define problems and weaknesses and suggest remedies; 2) Advise on how the Corps can improve its relations with the conservation community and general public; 3) Review problems or issues pertinent to specific plans or projects. The EAB has continued to function since 1970 (Reuss, *Shaping Environmental Awareness*, p. 7).

1970

The Institute for Water Resources (IWR) published a "concept report" for developing public participation programs: A. Bruce Bishop, *Public Participation in Water Resources Planning.* Bishop's report reflected the influence of applied social scientists at this time. For example, Warren Bennis and Ronald Lippitt emphasized the importance of participation in planning efforts to change institutions, communities, and society. Bishop's report also adapted earlier work he provided for the California Bureau of Roads and the Division of Highways while a graduate student at Stanford University. The report became an influential resource for IWR in developing suggestions for Corps policies and strategies regarding public involvement.

1970

On 1 September 1970, the Corps published an Engineering Circular (EC 1120-2-55) entitled, *Investigation, Planning, and Development of Water Resources. Public Meetings in Planning.* In a cover memo, Major General F. P. Koisch, Director of Civil Works explained the circular, "concerns itself with the holding of formally arranged meetings, which is a departure from public hearings terminology..." He added, "other means of fostering participation should also be pursued." Changes reflected in the circular included, "a new tone to encourage informality and a sincere, meaningful, two-way communication." In an internal memo, B. H. Dodge, of the Institute of Water Resources, criticized the proposed circular, noting "the only changes from past experience were to promote new names for public hearings and notices and to add one other meeting to the established pattern of two or three." Dodge added, "the most serious objection is that it gives the impression of flying in the face of, or at best ignoring, all that we have learned from the Susquehanna efforts" (Dodge, 1970).

1970

On 30 November 1970, the Office of the Chief of Engineers published, *Environmental Guidelines for the Civil Works Program of the Corps of Engineers* (ER 1165-2-500). This document expressed the Corps' commitment to address environmental factors and effects in planning, development, and management and obligated the Corps to insure public participation.

1971

The first Corps "Short Course on Public Participation in Water Resources Planning" was held at Georgia Institute of Technology, Atlanta, Georgia, February 1-7. Participants included both planning and public affairs officials from each division, district, centers, and headquarters. Lt. General F. J. Clark, Chief of Engineers, said to participants, "I consider public participation in planning of critical importance to the Corps' effectiveness as a public servant. It is . . . an area I won't be satisfied with until we can truly say the Corps is doing a superb job" (Dahlgren: 4.0.H-A, p. 2).

1971

On 28 May 1971, the objectives, policies, procedures, and responsibilities of the Corps' public participation activities were published in EC 1165-2-100, "Water Resources Policies and Authorities Public Participation in Water Resources Planning." The three objectives outlined were: "to insure that solutions to water resource problems satisfy the needs and preferences of the public to the maximum degree possible; to seek a clear consensus ... by facilitating the resolutions of a controversy; and to build confidence and trust in the Corps' planning process." The document required that public participation plans be an integral part of each Plan or Survey. In regard to instructions, the document advised, "there is no single best approach to public participation. Program plans must be targeted to the particular 'publics' concerned."

1971

The Institute for Water Resources (IWR) initiated a Technical Assistance Program (TAP) to provide thirteen districts and two divisions which volunteered to participate with assistance from consultants to assist in expanding and improving public participation activities. The TAP program was overseen by James R. Hanchey, a design engineer from the New Orleans District who had recently spent two years of graduate study at Stanford University. Mr. Hanchey assumed primary responsibility for managing IWR efforts to promote public involvement activities for the next five years.

1972

The Federal Water Pollution Control Act Amendments of 1972 (P. L. 92-500) provided requirements for public participation. These requirements were made explicit for the Environmental Protection Agency (EPA) and the States, and indirectly apply to the Corps (Section 101 (e)). Section 404 granted authority to the Corps to issue permits for the discharge of dredged or fill materials and required notice and opportunity for public hearings.

1972

The Marine Protection, Research, and Sanctuaries Act authorized the Secretary of the Army, acting through the Chief of Engineers, to dump dredged material in the ocean. The authority required public notice and opportunity for public hearings.

1972

On 26 May 1972, Brigadier General K. B. Cooper, Deputy Director of Civil Works, sent a memo to Division and District Engineers urging continued and greater efforts to promote public participation. He particularly urged that every District and Division develop and maintain a "current and comprehensive list of interested organizations and individuals who should be involved in a specific planning effort."

1972

The importance of public meetings as a public participation procedure was stressed in an Engineering regulation published on 4 December 1972, ER 1105-2-502, *Planning: Public Meetings.* The regulation stated, "all interested individuals and agencies are to be informed and afforded an opportunity to be fully heard and their views considered. . . . Formally organized and announced public meetings provide one important means of accomplishing this objective. . . . They are not, however, a substitute for other desirable public participation and information measures." Similar to the 1970 circular on public meetings, this regulation emphasized a stronger level of public involvement at meetings and encouraged other methods as well.

1972

The Seattle District utilized "Fishbowl Planning" process as a part of a re-study of flood control plans for the Middle Fork of the Snoqualmie River basin. The project was unprecedented because it was sponsored jointly by the Seattle Districts and the Department of Ecology of the State of Washington. The Fishbowl process was designed to be highly visible, open and participative. The process involved four procedures: workshops, a study brochure which was revised several times and became a public workbook, public meetings, and citizen committees. By the late 1970s this approach was adopted by the Seattle District for all studies (Sargent, 1972, pp. 54-57; Mazmanian and Nienaber, 1979, pp. 132-157).

1972

The Federal Advisory Committee Act of 1972 (P. L. 92-463) provided guidelines for advisory committees to assure balance in representativeness.

1973

The Water Resources Council published its, *Principles and Standards for Planning Water and Related Land Resources.* Reflecting its authority and the intent of the 1965 Water Resources Planning Act, the "principles and standards mandated that environmental quality be given equal consideration to economic development in water resources planning." The Principles and Standards also included requirements for public involvement (Reuss, 1991, p. 32; Moore and Moore, 1989, p. 105).

1973

The first training course in Public Involvement led by outside consultants was sponsored by IWR. The course was conducted by Synergy Consultation Services and a manual was prepared for the one-week course. The origin of this course is interesting. According to James R. Hanchey, the course resulted from a response to a RFP published in *Commerce Business Daily* in 1971 for consultants to assist in the proposed Technical Assistance program. James L. Creighton of Synergy Consultation Services wrote a letter indicating that he was not interested in doing consulting, but recommended consideration of a

training program designed by his firm. Hanchey met with Creighton and decided that a training program would indeed serve the needs of IWR and the Corps. During the next three years IWR sponsored 10 to 12 public involvement courses annually throughout the nation.

1973

IWR contracted with Thomas Wagner and Leonard Ortolono of the Civil Engineering Department of Stanford University to field-test and evaluate an open and iterative planning process in addressing flooding problems in the San Pedro Creek in Pacifica, California. The project was conducted between the Fall of 1973 through 1975. The results were published in 1976 by IWR (Wagner and Ortolono, 1976).

1973

TAP and the public involvement activities of the Seattle and Rock Island District were evaluated by James F. Ragan, Jr. through a contract with IWR. The scope of the evaluation was expanded once field work began to review public involvement at the district level using TAP as only one influence. Ragan's conclusions were that public participation efforts were minimal in most districts, except Seattle, and that public meetings, "remains the principal—and frequently the only—method that field offices employ to inform and obtain comments from the public" (Ragan, 1975, p.1).

1974

The Comptroller General of the United States published a report to the Congress, *Public Involvement In Planning Public Works Projects Should Be Increased.* The report reviewed public involvement activities of the Corps of Engineers, Federal Aviation Administration, and Federal Highway Administration. The report recommended that the Corps revise its regulations to require that citizens potentially affected by a water resources project be identified and directly notified of involvement opportunities. It also proposed that district engineers provide "public involvement activities before the issuance or reissuance of permits for structures or work in navigable waters."

1974

The Freedom of Information Act of 1974 (P. L. 93-502) established policies to encourage Federal agencies to be responsive in making public documents available to the public.

1974

On 5 July 1974, the Corps published "Proposed Policies and Procedures" for an Urban Studies Program to assist urban areas with water resource planning. Detailed guidelines for public involvement were described, including ongoing monitoring and adjusting of public involvement efforts.

1974

By 1973 and 1974, a resident scholar, Jeanne Nienaber, conducted a study of the Corps' ability to adapt organizationally to address environmental issues. Her study identified the strong link between environmental concerns and public participation: "Public participation and environmental concerns were thus a two pronged attack on the old way of doing things." (Nienaber, 1975, p. 13). Her findings indicated that by 1973 interdisciplinary study teams in Corps district offices had grown significantly, but that positive and ongoing contacts with representatives of environmental groups was minimal.

PUBLIC INVOLVEMENT FROM 1975 TO 1979

Context

Public involvement initiatives in Federal agencies reached a peak during the Presidency of Jimmy Carter (1977-80). Not unlike the Corps of Engineers, almost every Federal agency developed training programs, manuals, and technical assistance to promote public involvement in this period. In 1976, the Interagency Council on Citizen Participation (ICCP), an association of over 100 Federal employees with responsibility for public involvement activities, was created. In 1977, ICCP sponsored a conference and published a report, *At Square One*, to encourage development and professionalism in dealing with citizen participation. In 1978, over 800 Federal employees and leaders from throughout the United States attended the National Conference on Citizen Participation in Washington, D. C. (Langton, 1979).

On September 26, 1979, President Carter issued a Consumer Executive Order (Executive Order 12160), the strongest requirement for public involvement ever issued by a President. Among its requirements were a Consumer Affairs Council to coordinate participation efforts, revisions and updating of participation requirements of every Federal agency within 90 days, and information to be submitted with budget requests to the Office of Management and Budget indicating what resources would be devoted to informing and involving consumers in agency proceedings.

Milestones: 1975-1979

1975

On 2 April 1975, an Engineering Regulation was published (ER 1105-2-800), *Planning: Public Involvement; General Policies.* The regulation updated and expanded the Corps' approach to public involvement in all civil works activities. An important addition to this regulation was the requirement that each report should contain a summary of how public involvement influenced the decision of any study.

1975

On 10 November 1975, an Engineering regulation was published (ER 1105-2-000), *Planning Process: Multiobjective Planning Framework.* The regulation emphasized the

importance of an "early and active" program of public involvement. It also called for the use of interdisciplinary teams throughout the planning process.

1975

IWR published a report to encourage a more systematic and sequential approach to public involvement. The document, *Public Involvement in the Corps of Engineers Planning Process* by James R. Hanchey, was reported to be the most widely requested IWR publication, according to IWR sources. The report provided direction in relating public involvement activities to the three stages of Corps planning. While not prescribing specific methods, the report suggested approaches and alternatives in communicating with the public and obtaining citizen input, informing and educating the public, monitoring and evaluating public involvement, and organizing and budgeting.

1976

In 1976, leadership for IWR efforts to promote public involvement within the Corps was transferred from James Hanchey to Dr. Jerome Delli Priscoli. In addition to continuing many of the efforts of the early 1970s, the first chairman of the ICCP, Dr. Delli Priscoli, established working relations with other agencies and published a number of articles describing the public involvement activities of the Corps.

1976

The first Executive Course on Public Involvement was sponsored by IWR. A workbook was created and the training was undertaken by Synergy Consultation Services under the direction of James Creighton. The course concentrated on the selection and implementation of a variety of procedures to serve different public involvement objectives.

1979

IWR sponsored a seminar, "Public Involvement in Corps Regulatory Programs," in cooperation with the Jacksonville District. A manual was published and made available for the course (Creighton, 1979).

1979

A study of public participation practice in 33 of the 37 Corps districts was conducted by Charles Crist and Ronald Lanier of the Colorado Water Resources Research Institute of Colorado State University. Responses to a survey questionnaire indicated:

- The average cost of public involvement activities in most studies was 9 percent to 12 percent of the budget and 16 percent in urban projects.

- Less than half of the study managers utilize OCE guidance materials on public involvement, and only 3 of the 33 districts indicate the establishment of specific guidelines for their district.

- The most frequent references to procedures used were: informal contacts, public meetings, workshops, written materials, and citizen committees.

- Workshops and informal contacts were identified as the most successful methods.

- The groups most dominant in public meetings were environmental interests (55 percent), local elected officials (40 percent), and landowners/affected public (35 percent).

1979

Daniel Mazmanian and Jeanne Nienaber's book, *Can Organizations Change? Environmental Protection, Citizen Participation, and the Corps of Engineers,* was published. This work described and evaluated the effects of the Corps during the 1970s to promote public involvement. It concluded: "the Corps is already doing better than most other Federal agencies, even with its modest requirements for public participation in planning. We strongly suggest, however, that only outside pressure of the sort generated in the late 1960s and early 1970s will prompt the agency to institute an agency-wide open planning program . . . or seek dramatically different forms of public involvement" (Mazmanian and Nienaber, 1979, pp. 190-191).

1979

An Evaluation of a project to develop a general permit at Sanibel Island, Florida, was published (Rosener, 1979). The evaluator, Dr. Judith Rosener, determined that the Corps and citizens have very different goals, objectives, and criteria for evaluating the success of a public involvement activity. Whereas, the goals of the Corps were primarily concerned with the process, the goals of local citizens including residents, developers and environmentalists were concerned more with impact or substance of a decision.

1979

The Corps adopted a "project/study manager approach" to overseeing civil works projects through a number of phases (Reconnaissance, Feasibility, and Planning) which were previously overseen by different managers. This organizational innovation is widely viewed as helping to provide continuity in public involvement and providing greater accountability.

PUBLIC INVOLVEMENT FROM 1980 TO 1984

Context

The election of Ronald Reagan in 1980 was followed by a decline in the extent and intensity of public involvement activities among Federal agencies. In most Federal agencies, participation requirements and activities were reduced and staff who worked in participation programs were reassigned to other tasks or let go. The Interagency Council on Citizen Participation was ordered to disband by Consumer Affairs Secretary Virginia Knauer in 1981.

The early 1980s were marked by ongoing tensions between the Reagan administration's desire to reduce regulations and the need to implement the unprecedented variety of environmental legislation passed in the 1970s. The actions of Interior Secretary James Watt and EPA Administrator Anne Gorsuch Buford, while threatening to environmental groups, had the effect of increasing their membership and financial support and forced groups to collaborate. As a consequence, the environmental movement grew significantly in strength and influence during this period (Langton, 1984, p. 2f).

During the early 1980s, three long-standing issues within the Corps grow in intensity. The first was an attempt to achieve greater centralized authority to assure more uniformity in policy implementation at the district level. The second was to increase productivity and reduce "red tape" in Corps studies. Under the leadership of William Gianelli, Assistant Secretary of the Army for Civil Works, the Water Resources Council was eliminated and its *Principles and Standards* were revised in 1983. The third issue, which would not be resolved until 1986, was to require greater cost-sharing in civil works projects to increase efficiency and reduce waste (Reuss, 1991, p. 81f).

The emphasis on these policies had the effect of reducing attention to public involvement at the Federal level, although demands were considerable at the regional and local levels. In 1981, the Environmental Advisory Board reviewed the public involvement activities of the Corps and made a series of recommendations for improving them.

Milestones 1980-1984

1981

In preparation for the Environmental Advisory Board meeting in July, 1981, the Institute of Water Resources sent a Public Involvement Questionnaire to 40 Corps districts and divisions. Among the major findings of the questionnaire were the following:

- Of the 40 divisions and districts responding, 93.5 percent agreed or agreed strongly that "on balance, public involvement in the Corps has been successful."

- Major positive benefits of public involvement were identified as increased public confidence in the Corps, better understanding of the Corps' process, and more effective relations with the public.

- The major negative effects of public involvement were increased costs and time and some groups using forums for their own ends.

- The most common recommendations for changing Corps Public Involvement were: encourage informal approach, encourage workshop format, and more training for staff.

1981

Public Involvement was a major issue of attention at the 14-17 July 1981 meeting of the EAB in San Francisco. A total of 21 recommendations were made by the EAB for improving public involvement within the Corps. The following recommendations were made:

- Review and update Guidance Statement on Public Involvement

- Develop public involvement program in all functional areas

- Recognition for effective use of public involvement

- Reporting on public involvement in project reports

- Corps-wide and district-wide evaluation of public involvement

- More effective identification of publics

- Better feed-back to public

- Encourage more informal public meetings and contact

- Prepare a public involvement reader

- OCE should sponsor a Corps-wide Public Involvement Conference

- Re-establish a public involvement R & D program

1981

On 28 September 1981, Major General E. R. Heiberg, III, Director of Civil Works, sent a memo to all Corps units to discontinue over 50 advisory committees at the direction of the Department of the Army responding to directives from the Reagan Administration.

1982

On 5 February 1982, the Corps published an Engineering Pamphlet (EP 1105-2-35) entitled, *Planning Public Involvement and Coordination.* The pamphlet distinguished and explained the differences between public involvement and public information. It urged that the District Public Affairs Office (PAO) should be a participant in any study, and "the responsibilities of the study manager and PAO should be defined early in the process." The pamphlet continued to reflect the policy of earlier Corps documents urging flexibility in approach and design. It encouraged strategic approaches to public involvement, early "scoping" activities to identify critical issues, and a high degree of coordination with other agencies.

1982

On 5 April 1982, the Office of the Chief of Engineers delivered an "OCE Response to EAB Recommendations on Public Involvement." The OCE responded to each of the 21 recommendations of the Environmental Advisory Board, identified proposed actions, and provided a rationale for each action.

1982

A case study review of six Corps public involvement projects was published by IWR (Langton, 1982). Among the findings of the review was that despite the effectiveness of public involvement, interagency relations and dynamics may have an equal or greater effect on project outcomes, especially with EPA.

1983

IWR published a document highlighting its experience with public involvement since the early 1970s. The nearly 500 page document, *Public Involvement: A Reader of Ten Years Experience at the Institute for Water Resources* (Creighton, et al., 1983), included material from its training and research activities. The five page Introduction by James R. Hanchey provided a historical summary of the initiatives of the IWR to promote public involvement since the early 1970s.

PUBLIC INVOLVEMENT FROM 1985 TO 1989

Context

Between 1985 and 1989, the Corps' headquarters efforts to promote public involvement were considerably reduced. The Institute of Water Resources, with sponsorship from the Office of Chief Legal Counsel, concentrated its efforts in promoting the use of Alternative Dispute Resolution (ADR) procedures within the Corps.

In 1986, the Installation Restoration Program (IRP) of the Department of Defense was established under the Superfund Amendment and Reauthorization Act of 1986. Under the IRP, the Corps assessed and remediates hazardous waste sites at defense installations. Public involvement was required in all IRP projects.

Also in 1986, the Water Resources Development Act of 1986 was passed. The Act required cost-sharing by local partners in water resource projects. Public involvement was required by the Act. Local sponsors were allowed to manage public involvement activities as an in-kind cost-shared contribution to projects.

Milestones 1985-1989

1985

On 11 December 1985, the Corps published regulation No. 1130-2-432 which provided policy guidance in accepting the services of volunteers. The regulation entitled, *Project Operation The Corps of Engineers Resource Volunteers (CERV) Program,* RCS DAEN-CWO-72, reflected authorization by Congress in P. L. 98-63 to authorize volunteering within the Corps. This legitimized another dimension of citizen involvement within the Corps.

1986

In an IWR report entitled, *The Future of Intergovernmental Relations and the U. S. Army Corps of Engineers*, Mark Sickles raised questions concerning how cost-sharing projects may affect public involvement activities within the Corps in the future (Sickles, 1986, p. 71). The report suggested that the Corps might have to share authority in managing public involvement activities in the future with co-sponsors.

1986

IWR offered its first training program on "Conflict Management and Negotiations." A manual was prepared by Christopher Moore and Jerome Delli Priscoli. Over the next three years the course was offered four more times. By 1989, 350 persons had participated in the course.

1986

The Water Resources Development Act of 1986 was amended to require "opportunity for public review and comment" regarding any changes in the operation of reservoirs requiring a reallocation of storage space (P. L. 100-676, 33USC2312, Section 5).

1988

The Corps with sponsorship of the Chief Counsel's Office launched a three year project of training, technical assistance, and evaluative research to promote the use of Alternative Dispute Resolution (ADR) within the Corps. The strategy of the project was similar to that employed by the Corps in promoting public involvement during the 1970s (Delli Priscoli, 1989 and Edelman, 1990).

1988

The *Report of the Corps of Engineers Panel on Project Development in Partnerships* was published 1 March 1988. At the direction of the Chief of Engineers, the panel addressed the implications of "partnership provisions" of the Water Resources Development Act of 1986 and offers recommendations concerning the Corps' effort to guide the field and to propose needed changes in project development practices. The report made clear that one of the implications of the "cost-sharing" provisions was that: "Involving the interested and affected public should be an important joint responsibility of the Corps and sponsors" (p. 7).

1989

The IWR published the first in a series of Case Studies on Alternative Dispute Resolution. The first case study was about the use of a mini-trial in 1985 between the Corps and a contractor on the Tennessee-Tombigbee Waterway project. During 1989, IWR also published its first pamphlet in the ADR Series entitled, *The Mini-Trial* which described the purpose and nature of this ADR procedure (Edelman, et al., 1989).

PUBLIC INVOLVEMENT FROM 1990 TO PRESENT

Context

Since 1990, the Corps has experienced significant public controversy, public appreciation, and a reorganization initiative. The controversy involved the Corps' role in helping to develop a Joint Wetlands Delineation Manual with four other agencies at the close of the Reagan administration. A proposed expanded definition of wetlands led to considerable public misunderstanding and opposition to the proposed manual from 1990 through 1992. The outstanding performance of the Corps in Desert Storm and in relief efforts in Hurricane Andrew and Hurricane Iniki provided the Corps with much public praise. The announcement of a proposed reorganization plan on 19 November 1992 created a sense of uncertainty and frustration among a number of Corps personnel.

The issue of public involvement received little corporate attention from headquarters during this period and was eclipsed by other concerns. However, efforts to involve the public had become widespread at the district level. The ADR program continued, but the number of persons attending the Public Involvement courses sponsored through the Training Department at the Huntsville Division declined.

Despite the lack of emphasis on public involvement as an issue and concept, the "Relations Workshop" convened at the Senior Leadership Workshop 1-12 November 1992, identified issues relevant and related to public involvement as a value and process.

Milestones 1990-1993

1990

On 7 July 1990, the Corps published regulations on *Shoreline Management on Civil Works Projects* (327.30) as an addition to *Rules and Regulations Governing Public Use of Water Resource Developments Administered by the Chief of Engineers* (36 CFR Part 327). The regulation called for the development of shoreline management plans to "achieve a balance between permitted private uses and resource protection for general public use" in all civil works water resource development projects under Corps jurisdiction. Section (d) (6) required: "District Commander will ensure public participation to the maximum practicable extent . . . public participation will begin during the initial phases and must be broad-based to cover all segments of the public interest."

1990

The Water Resources Development Act of 1990 expanded the mission of the Corps to include Environmental Protection, "The Secretary should include environmental protection as one of the primary missions of the Corps of Engineers" (P. L. 101-640, November 28, 1990).

1990

In Working Paper #2 of the Alternative Dispute Resolution Series, Jerome Delli Priscoli discussed the connection and developmental continuity between, *Public Involvement, Conflict Management, and Dispute Resolution in Water Resources and Environmental Decision Making* (Delli Priscoli, 1990). The working paper reflected a point the author had made in an earlier article that conflict management and public involvement "were different sides of the same coin. Indeed, it was becoming more difficult to differentiate between CM mediation and PI facilitatio" (Delli Priscoli, 1989, p. 32).

1990

The U. S. Army Toxic and Hazardous Materials Agency published a *Commander's Guide to Public Involvement in the Army's Installation Restoration Program.* The guide

explained the requirements and elements of the program and how to develop public involvement in relationship to it.

1992

James L. Creighton completed a study and reported on a project to develop a public involvement strategy for the Corps in the Columbia River system (Creighton, 1992). The report identified many troubling findings. Among those were: the Corps was perceived as rigid, defensive, and closed minded; it did not relate effectively to major influential leaders in the region; its Public Involvement activities were perceived as pro forma; many Corps officials lacked people skills and made poor public presentations; Public Affairs Offices were seen as inadequate and were being reduced in size, and few Corps staff received any public involvement training during the 1980s.

1992

The "Relations Workshop" at the Corps Senior Leadership Conference on 9-12 November, while not focused on the issue of public involvement, identified many issues related and relevant to it. Many of the issues and suggestions raised relating to customers and partners were similar to those developed in the Corps' public involvement literature since the 1970s.

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Chapter 3

THE EVOLUTION OF PUBLIC INVOLVEMENT AND CONFLICT MANAGEMENT

by
James L. Creighton, Ph.D.

THE DEMAND FOR "INVOLVEMENT"

It is not unusual when there is a low voter turnout for newspapers to carry editorials saying, "It's a shame people don't take a greater interest in government." But nobody says, "The vote doesn't count. We have to make that decision over." In effect, we have a social consensus—embedded in laws and administrative requirements—that when a defined process is carried out, the decision counts. The process creates legitimacy for the decision.

Since the 1960s there has been a fundamental change in the level of involvement the public expects in decision making before the decision making process is considered sufficiently legitimate. Once a decision is announced, it actually happens, it counts. By "count," I mean that the organization is actually able to implement the decision, overcoming potential barriers such as protests, lawsuits, even civil disobedience.

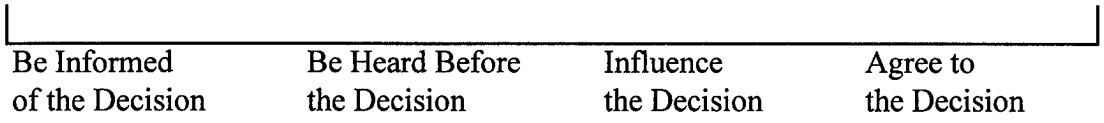

Figure 1
What Does It Take
For A Decision To "Count"?

In the 1950s, what it took for a decision to count was to keep the public informed. The public generally trusted government and other large governmental entities to act on its behalf. So, as long as the public knew what organizations were doing, and something about why these organizations could make decisions that counted. (See the left hand part of the scale in Figure 1 above).

Somewhere in the 1960s, the expectation began to change. In the U.S. protests became the norm on issues such as freeway location, water projects, forest management practices, and, with the advent of noisier jet airplanes, airport expansion.

The Congressional response to these protests was to establish legal requirements for public hearings, or what could be called "formalized public involvement." Typically, the agency would come to the public knowing exactly what it wanted to do, but just before it went ahead with implementation, it would hold a hearing at which the public could comment on the proposed action. But because it was so late in the decision making process, comments were essentially "thumbs up" or "thumbs down." There was little potential for compromise, for identifying creative alternatives, or for redefining the problem.

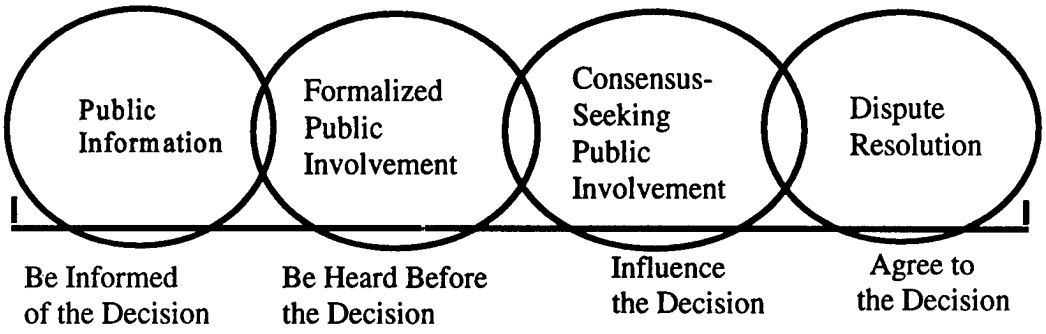

Figure 2
What Does It Take for
A Decision to "Count"?

When I was young there was a radio show called "Queen for a Day." Each contestant would come on and present her sob story. Then there would be audience applause, measured by an applause meter. The contestant who got the highest reading was crowned as queen for the day (meaning she won a lot of prizes). Sometimes when I watched the hearings of the 1960s I had a fantasy that the agencies had a protest-meter in the back of the room, and essentially said: "This is what we're going to do unless you can make enough noise to stop us." Then they would watch the protest-meter. When it went over into the red, then, and only then, would they reconsider the proposed actions. It was a simple decibels game. Of course the public soon caught on and got better and better at making the meter go over into the red.

The public got good enough at this game that by the 1970s, simply being heard before the decision was made wasn't good enough. People wanted to have some genuine influence on the decision. They wanted to be included in defining the problem. They wanted to suggest alternative approaches. Before the choice was made between alternatives, they wanted to participate in evaluating the alternatives. Also during this era, numerous environmental laws were passed which required that the environmental consequences of decisions be exposed to the public.

Public information or public relations was the appropriate tool when the public simply wanted to be informed. Formalistic involvement techniques, such as public hearings, may have been appropriate when the public demanded to be heard prior to the decision. However, the expectation of the public, who had the right to influence decisions, led to the full blown development of a kind of public involvement that could be called "consensus-seeking public involvement." The agency still retained ultimate decision making authority and total consensus was not always reached, but the agency would work closely with the key groups and interests in an effort to hammer out an approach that would enjoy broad support. If not everybody could agree with the decision and the process had been sufficiently open and responsive, virtually all could at least consent to the decision.

Sometimes public involvement produced a high level of consensus, and agencies became clear winners by simply adopting the decisions that were already supported by virtually all interests, But sometimes, by listening carefully to the public, all the agencies or organizations learned was that the public was bitterly divided. Given these circumstances, some agencies tried to simply make a choice and proceed anyway. Occasionally it worked, however, infrequently the agencies found they announced a decision but their ability to actually carry out that decision was very limited.

By the 1980s it was clear that while public involvement was part of the solution and worked well in a number of instances, circumstances remained where the public was so divided, or some interests saw the decision as being of such consequence to their interests, that no decision would "count" unless all parties agreed to the decision. In fact, in some cases, there had to be a formal agreement, signed by all the parties, or nothing could happen.

There have been several basic approaches to wrestling with this problem of providing involvement when nothing short of "agreeing to" a decision would count: environmental mediation, public involvement as a consensus-building tool, and negotiated regulations.

Environmental Mediation

During the 1970s, a number of people worried that environmental conflicts were so antagonistic that they were not productive for anyone. From this concern came the idea to use the techniques—particularly mediation—that had worked in labor/management negotiations, and apply them to resource decisions. These initial efforts at environmental mediation efforts were funded heavily by such foundations as the Ford, ARCO, and Kettering Foundations.

Over the past fifteen years, environmental mediation has had some notable successes. But it has also become clear that one of the key skills a mediator must possess is to analyze whether the circumstances prevail under which mediation can be successful (Creighton, Chapter 5; Moore, Chapter 28). A wise mediator will frequently conclude that issues are still not sufficiently

"mature" for mediation to work. Attempting mediation when these conditions do not prevail can, in fact, exacerbate the level of conflict and bad feeling.

Public Involvement as a Consensus-Building Tool

The other response to the problem of conflicts that would not go away just because people felt listened to was to move public involvement further and further away from simply "listening" to a genuinely "consensus-building" approach.

This can be illustrated with an example from the first reader. In the United States, the Army Corps of Engineers has been given the authority to regulate wetlands. Anyone who wants to fill in any wetlands must be granted a permit by the Corps. In the Southeast United States, in states such as Florida, many if not most developments require wetlands permits. In fact, so many permits were required in one well-known resort island, Sanibel Island, that the Corps wanted to issue what is known as a "general permit." Instead of having to go through the development of environmental documents and hold public meetings for each of several hundred annual permits, the Corps would go through the process once, then issue a general permit which established the requirements governing all permits. Staff could then take each permit application, compare it with the requirements in the general permit, and, if it complies, issue an immediate permit. The Corps wanted a general permit because it would substantially reduce the amount of permit processing. Developers liked the idea because it would create predictability. They would know the conditions of the general permit, and could confidently expect their permit as long as they complied. There was even a chance that Sanibel Island's very active environmental community would like a general permit, depending on the conditions contained in the permit.

Knowing the history of political controversy on the islands and the potential for lawsuits and continued controversy, the District Engineer, Colonel James Adams, decided to adopt a process that could lead to a consensus. First he retained a consultant who was well known to local environmental groups. This consultant worked with all the groups, including developers, to get agreement on a reasonable number of people who represented all viewpoints. These representatives were assembled and Colonel Adams made a speech in which he essentially said (although more politely): "I'm going to issue a General Permit. We can do it either of two ways. Either I'll write the conditions of the permit, or, if you can all agree on them, you can write the conditions. If you can reach agreement on conditions, I'll accept them as mine and sign the permit using your conditions. I'll provide you with technical assistance, I'll provide facilitators, I'll help out anyway I can. But I'll only sign a permit with your conditions if you all agree to it."

In this case, it worked. Over a period of several weeks the interest group representatives hammered out the conditions. After the requisite environmental documents were prepared and hearings held, Colonel Adams accepted these conditions as his own, and there were no protests or lawsuits. Over the three year life of the General Permit, more than 500 individual permits were granted without protest from any of the groups.

Another response to the demand for increased involvement has been to extend public involvement opportunities into the fundamental policy-making of an agency. The Bonneville Power Administration, for example, received complaints from major constituencies that it provided public involvement opportunities on a project by project basis, but failed to consult on major strategic decisions and on the budget. BPA now regularly consults extensively with the public on policy decisions. After consultation with the Office of Management & Budget (which has placed limits on consultation on budgets before they are adopted by the President), BPA now provides the opportunity for discussion of strategic issues one year, to be followed by a discussion of alternative program levels every second year. The conclusions reached based on this consultation then lead directly into BPA's rate-setting process. Not only has public response been very favorable, the amount of litigation surrounding BPA's rate-setting process has been dramatically reduced.

Negotiated Regulations

Another variant on the consensus building approach, one that blends aspects of both public involvement and negotiated settlements, is the negotiated rulemaking (or Neg-Reg) process used by the Environmental Protection Agency. Prior to issuing a draft rule, EPA creates a panel with representatives from all the key interests who see themselves affected by the upcoming rule. This panel is asked to develop a consensus rule, with the understanding that if they do reach agreement on such a rule, EPA will use that consensus as the basis for its draft rule. Everybody understands, however, that this draft rule is then exposed to an extensive public review process, and in response to that review, EPA may make changes in the final rule.

THE CORPS RESPONSE TO DEMANDS FOR INVOLVEMENT

These changes in public attitudes affected the Corps of Engineers, as it did all Federal agencies. During the 1970s, the Corps initiated a significant agency-wide program to encourage public involvement. A public involvement policy was promulgated. Numerous public involvement guides and manuals were developed. Five different levels of public involvement training were developed for Corps personnel. Most of these materials were developed under the guidance of the Institute of Water Resources, a Corps think-tank located at Fort Belvoir, VA. Most of the materials developed during the 1970s were not generally available to other agencies or to the public. So, in 1983 the Corps published a compendium of these materials entitled, *Public Involvement: A Reader of Ten Years Experience at the Institute for Water Resources* (IWR Research Report 82-R1).

FINDING ALTERNATIVES TO LITIGATION

The demand for greater involvement in decision making was not the only social trend during the 1970s-80s. Another societal trend was the tremendous growth of litigation as a primary means of resolving disputes. In fact, the dramatic increases in litigation has caused a growing

recognition—by attorneys in particular—that the costs of litigation are becoming untenable in our society, and may even put the United States at a competitive disadvantage with other nations. For example, the Corps, which likes to think of itself as an engineering organization, now finds itself with more attorneys than any Federal agency except the Federal Bureau of Investigation.

The Corps, like many large organizations, finds itself involved in numerous disputes. For example:

Construction Claims: As managers of the construction of some of the largest public works projects in the world, the Corps is often involved in claims disputes between the Corps and contractors or sub-contractors, involving interpretations of the contract, differing site conditions, change orders, and so on.

Local Cost Sharing: Recent legislation governing public works projects requires greater economic participation of local communities. Thus, a part of every new project is the negotiation of a Local Cost-sharing Agreement, which specifies the role each of the agencies play in the project. In negotiating Local Cost Sharing Agreements, disputes can arise over the proportion of costs to be borne by local government, the design standards of the project, construction schedules, valuation of real estate, or even the accounting methods to be used in assigning cost.

Regulatory Functions: Because of its legislatively-mandated role as the regulator of the nation's wetland, the Corps must often address disputes regarding how much development should be permitted in wetlands, what the balance should be between development and protection of wildlife habitat, and what mitigation measures should be required of developers.

Operations: As managers of many of the nation's largest dams and locks, the Corps makes many decisions that are potential sources of dispute, such as the level of flood protection provided, available water supply for communities and industry, navigation rules along the rivers, the water level of reservoirs which are used for recreation, flood protection, and so on.

Planning: In planning new facilities, the Corps is often involved in disputes about whether a new facility should be built, which alternative is preferable, what mitigation will be provided to people affected by the project, and many other issues.

Military Construction: Even in its military construction role, disputes may arise between the Corps and its "clients" both within the Army and within other service organizations for whom the Corps provides construction services. There may be different expectations about what is required, different schedules, and different ways of operating. All of which may lead to disputes.

Currently, a number of these disputes are resolved through litigation. In the case of the Corps' relationship with its military "clients," disputes are not always resolved by litigation, they may result in an impasse which pollutes the relationship between the organizations.

Whether the result is litigation or impasse, there are costs to the organization and to the tax-paying public. For example, contract claims have more than doubled in the past eight years. Not only has this required larger budgets for additional staff and attorneys, the courts and the Contract Appeals Boards are so jammed that resolution of cases may take years, with great costs to both the Corps and the other parties. Even supposedly expedited procedures may take as long as three-four years to produce resolution. There may also be considerable delays in the completion of projects or cost overruns due to the failure to resolve issues in a timely manner.

When disputes remain unresolved for prolonged periods of time there is damage to important relationships. It does no one any good when badly needed projects are delayed because of the inability to complete a Local Cost Sharing Agreement. Both contractors and the Corps have a stake in maintaining an effective working relationship, both on current projects and for the future. Disputes over wetland development can sometimes result in the worst outcome, achieving neither environmental protection nor economic development. The Corps can be seen as "the enemy" by communities who depend on river-related facilities.

THE CORPS RESPONSE TO INCREASED LITIGATION

The Corps responded to this challenge by developing a program to encourage line managers to use Alternative Dispute Resolution (ADR) techniques as a way of resolving disputes. The term "alternative dispute resolution," or the common shorthand "ADR," is an imperfect term because it defines the field in terms of what it is not rather than what it is. The name contrasts ADR with normal litigation which is distinguished by: (1) an adversarial process, (2) a decision reached by a third-party (a judge), and (3) an imposed decision, whether or not it is acceptable to the parties.

ADR, in contrast, strives to arrive at *mutually acceptable decisions* (although admittedly this sometimes occurs when the threat of a court date looms near). ADR—at least as used by the Corps of Engineers—*does not use third-parties who make binding decisions*, as would a judge. In ADR, third parties are more likely to be called "facilitators," "mediators," or "neutral advisors." Third parties are used to facilitate and encourage resolution, or provide counsel on possible bases for resolution. But in ADR it is finally up to the parties to reach an agreement.

In 1984, the Corps began a pilot program using an alternative dispute resolution technique called the mini-trial. The mini-trial technique proved effective in resolving several complex contract disputes. The Corps began to also use techniques such as dispute review boards and non-binding arbitration on a pilot basis. The techniques were promising, but it was clear they represented a substantial departure for many Corps staff, and training and other technical assistance would clearly need to be provided.

In 1988, Lester Edelman, the Corps Chief Counsel, developed the Corps ADR Program, and turned to the Institute for Water Resources to implement the program. The ADR Program is a three-tier program designed to encourage the use of alternative dispute resolution techniques. The three-tier approach is based on the successful model to institutionalize public involvement that the Corps of Engineers used in the late 1970s and early 1980s. The three tiers are: training, research and evaluation, and field assistance and networking.

Training

If ADR is to be adopted, old attitudes must change. The Corps has found that mindsets can be changed, and that skillfully developed training is crucial to this change. The key is to reach a broad cross-section of the organization. This cannot be done on a "one shot" approach. Therefore, the Corps developed an ADR training program which would become part of the mainstream training options for managers and executives.

Annually over the last five years, the Corps has presented two to four sessions of a five-day conflict management and negotiations training course for mid-level to senior level employees. More than 800 Corps employees have attended this course, which covers ADR philosophy, techniques, applications, negotiations and bargaining. The course is built on a "learn by doing" model.

Over the years, many of the mid-level managers responded positively to the training course but also said that their senior supervisors would not let them implement the techniques and philosophies they had learned. The Corps has now developed and conducted a number of two-day executive training courses for all senior Corps executives and commanders which will complement the five-day training. The Chief of Engineers has personally encouraged executives to attend the training and implement ADR procedures. Approximately 135 senior commanders and senior executives have attended this training.

This course exposes senior executives to the range of ADR techniques and asks them to encourage their subordinates to use ADR. The course is designed to acquaint managers with the strategic options available to them for resolving disputes.

The overall objective is to establish executive and mid-level management training that will be available on a routine basis and included in the core curriculum of managers as they progress up the supervisory ladder within the organization.

Field Assistance and Networking

Technical assistance is vital to adopting new ideas in any organization. The technical assistance program supports Corps field activities by:

- Designing special "on-site training," based on specific real time problems.
- Helping commanders prepare for negotiations by: scoping optional approaches to negotiations/ bargaining and identifying issues, interests, and positions of major interested parties.
- Assisting in the development of single text negotiation techniques including drafting and revising text.
- Applying principles of interest-based bargaining conciliation, mediation, and third party intervention to specific Corps functions.
- Mediating disputes both where the Corps is a party and where the Corps is a facilitator.
- Employing ADR techniques to internal Corps conflict situations where appropriate and when requested by field offices and others.
- Assisting field offices in locating and employing credible third parties where needed.

Research and Evaluation

Like all programs, ADR evaluation and feedback is important, but rarely done. The ADR program is setting up a monitoring program to determine what works and what does not work, and how the costs and benefits should be assessed. A number of case study assessments have been completed and more are planned. Success stories need to be documented and disseminated throughout the agency and the government to show others the possibilities of ADR. Likewise, failures need to be documented to understand the risks associated with applying ADR within an organization. The focus of this evaluation program is case studies and retrospective assessments.

CONCLUSION

In the late 1980s there has been a merging of the previous work the Corps has done in public participation with the new work in dispute resolution. As can be anticipated, the convergence of these two approaches has produced both mutual benefit and occasional discomfort. The work during the 1970s can be described as having a "social science" orientation, with a particular concern for the manner in which "process" affects decision making. People with this orientation were also concerned with how to bring about organizational change, such as acceptance of the need for public involvement or ADR. The ADR program, on the other hand, was created at the urging of attorneys who were less concerned with major public policy decisions, and more likely to be involved in contractual disputes, or other specific issues with well defined parties. Needless to say, these two cultures do not always speak the same language.

On the other hand, the merging of these two "cultures" has been productive. The Corps ADR program is unique among Federal ADR programs in that the emphasis is put on the line manager

rather than on the attorneys. It's thrust is to resolve disputes, when possible, before they become a matter for litigation. This may be done through the use of preventative approaches, such as "partnering." Line managers may use ADR techniques to resolve existing disputes, with the support and counsel of attorneys. Even when disputes are clearly in the province of attorneys, they are encouraged to consider the use of ADR techniques. The Corps believes its philosophy that dispute management is a line management function is central to the success of its program.

Chapter 4

PUBLIC INVOLVEMENT, CONFLICT MANAGEMENT, AND DISPUTE RESOLUTION IN WATER RESOURCES AND ENVIRONMENTAL DECISION MAKING[1]

by
Jerome Delli Priscoli, Ph.D.

INTRODUCTION

Many professionals see public awareness primarily as educating the public. This is understandable. After all, most of the public and many decision makers understand little about water resources. However, experiences of the last 15 years in the United States indicate that public awareness, in its broadest sense, is more than educating publics and officials or providing information to such officials and publics. Public awareness also includes receiving information from and being educated by various publics and officials.

The process of providing information to, and receiving information from, publics has come to be called public participation or public involvement. To some, public involvement is a stronger term than participation, because it ultimately means sharing power, or, at least, influencing decisions traditionally in the purview of technical experts.

Since the National Environmental Policy Act (NEPA) 1969, we in the United States have moved from public involvement that meant informing and educating the public to involvement that means receiving information from, and being educated by, the public. Today, the major concern is how can interested parties agree? In short, we have removed from educating the public to being educated by the public to now mutually deciding with the public.

This paper outlines six important concepts of public involvement and conflict management. I will begin by asking, "Why public involvement and conflict management?" A discussion of the six key concepts will follow. Finally, I will briefly outline ways these concepts have been applied.

Why Perform Public Involvement and Conflict Management in Water Resources and Environmental Decision Making?

One can answer simply, "Because the law mandates public involvement." But what is behind the laws? To begin with, NEPA introduced an era of environmental concern. Values throughout

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[1] Speech Delivered at *The International Workshop on Water Awareness in Society Policy and Decision Making.* Skokloster, Stockholm Region, Sweden, June 27-July 1, 1988.

industrial society have been shifting. There is increasing concern for environmental quality and public health (Milbraith, 1984).

These concerns have manifested as new demands on the technical decision making in the water resource field. Environmental values must now be integrated into actual engineering design and not simply as afterthoughts for predetermined solutions. This has meant broadening the alternatives considered from traditional structural measures to non-structural and behavioral measures.

Initially, public involvement was greeted with skepticism within technical agencies and a naive euphoria among environmental interest groups. With more experience, the subtleties of public involvement have become apparent. What happens after everybody has articulated their interests? What happens after we have listened to the different and competing views? These questions have been prominent for the last four or five years. Can public involvement by raising and articulating interests lead to consensus or agreement sufficient for action?

Many in the environmental community have been surprised that public involvement does not always lead to ideal environmental solutions. Many professionals in technical agencies have seen public involvement as producing more legal stalemate by providing access for new interest groups. Many have seen public involvement as a means to stop or stalemate decision processes. As such, public involvement has become another straw on the camel's back burdening the legal court system. Indeed, the courts have become the major instrument for resolving environmental disputes.

However, the court system in the United States has become overloaded. Litigation takes a long time and rarely produces solutions that are satisfying to any of the parties involved. Also, solutions are reached in a way that separates rather than brings together those with substantive technical environmental expertise. Even though the court system or adversarial process predominates the U. S. System, more than 80% of those cases that start in the adversarial process are solved outside of court. So public involvement and conflict management have taken on new meaning, that is, to "off-load" the legal system.

Throughout the western democracies, administrative processes, which some once thought to be purely technical, are more clearly recognized as having political dimensions. Many decisions thought to be purely technical are actually political, that is, they affect the distribution of values throughout society. Most managers in administrative agencies are actually managing the gray area between technical and political. While asked to be technically competent, they must be politically realistic. Public involvement has become a means for managing this gray area between the technical and the political.

Within the U.S. Corps of Engineers organization, one of the largest public engineering organizations in the world, contract claims have doubled in the last 8 years. At any given month,

there can be hundreds of millions of dollars in construction claims against the organization. The same organization issues close to 20,000 permits for construction in the navigable waters and wetlands throughout the United. States These permits can generate enormous amounts of conflict which carry high administrative overhead for both government and the private sector. So, in a utilitarian sense, the agency is seeking alternatives to the strong adversarial system for resolving disputes. Such alternatives are essentially negotiations, involvement or other ways of coming to agreement.

Generally, the following six goals for public involvement and conflict management are the most common. While all are rarely achieved, mixes of these goals may be achieved.

- To build credibility with those who will be affected, those who will pay and those who will use the project. While the point does not need to be elaborated, many recognize that a credibility gap has existed among the policymakers and significant segments of the public.

- To identify public concerns and values. There are many techniques that do this in a form that is relatively open and straightforward.

- To develop consensus among the impacted parties, users and those who pay. In difficult controversies, consensus is rarely achieved, but it is satisfying when it is.

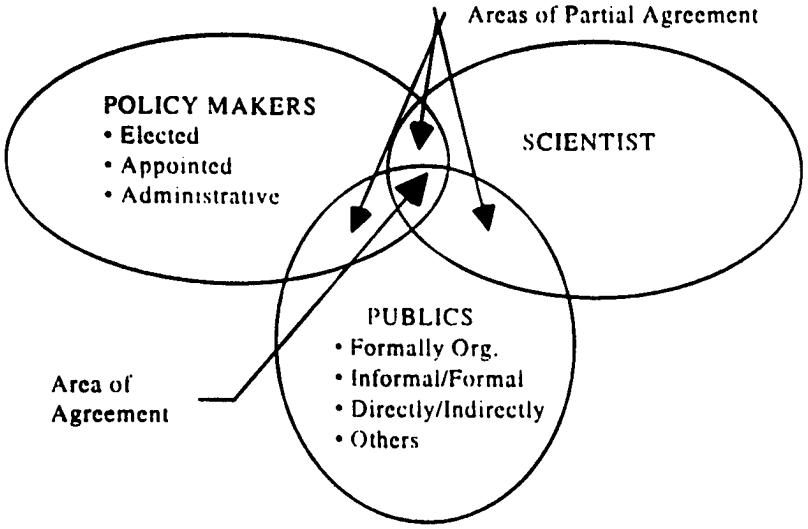


Figure 1
Policy World

- To create the greatest number of "unsurprised apathetics." In many cases, not everybody needs to be involved or wants to be involved in every issue, all of the time. Most people are partially involved, but these people should not be surprised. They should be kept informed, in other words, "unsurprised."

- To produce better decisions. Public involvement can often produce better "technical decisions" than a strictly technically oriented decision process.

- To enhance democratic practice.

SIX CONCEPTS OF PUBLIC INVOLVEMENT AND DISPUTE RESOLUTION

Levels of Conflict

In this conference we have divided the policy world into policy makers, scientists, and publics. Through public awareness, public involvement, and conflict management, we seek to find agreement among these three divisions of the world. Figure 1 outlines this world. As we can see, the policymakers are not one entity. They include elected officials and administrative officials of various types. We all know that elected officials can have tremendous disagreements among themselves. This is also true of administrative officials and professional civil servants who frequently represent agencies with different missions. Indeed, scientists themselves often disagree. It doesn't take experience with too many controversies until one can recognize a variant of Newton's Second Law, "For every Ph.D., you can find an opposite and equal Ph.D."

There are many ways of looking at the public. Indeed, there is no one public but rather, many publics. For a controversy, we might find formally organized publics or informally organized publics. We may find publics who are directly affected and those who are indirectly affected. I am sure we can draw clearer distinctions; however, the point for this conference is that we are seeking to understand how public awareness helps us reach some agreement among these three elements, no matter how we subdivide them. This agreement is represented by the overlapping area in the middle of these circles. However, agreement itself should be explored further.

Figure 2 explores the nature of agreement in a simple two-by-two table presented by Dr. Vlachos (Vlachos, 1988). This table outlines agreement or disagreement among these three distinct groups over either the goals or the nature of a problem. Depending on the nature of agreement, different analytical activities on policy processes are called for. As the table demonstrates, Cell 1 is called Objective Analysis. Such analysis is appropriate here because agreement on the goals and the nature of the problem exists. Cell 4 indicates disagreement on the goals and disagreement on the nature of the problem. Such a situation requires some type of inspiration or other charisma. While we frequently act, as if we are in Cell 1, the normal condition for water resource situations is Cell 4. While frequently not conscious of our behavior, we usually seek to move immediately from Cell 4 into Cell 1; however, this doesn't work and usually we are frustrated.

Cell 2 represents a disagreement over goals but a general agreement on the nature of the problem. In this cell, we use analysis or other forms of negotiations. In Cell 3, we find disagreement on

the nature of the problem and some general agreement over the goals. In this case we look at joint problem solving, negotiations, or other collaborative approaches.

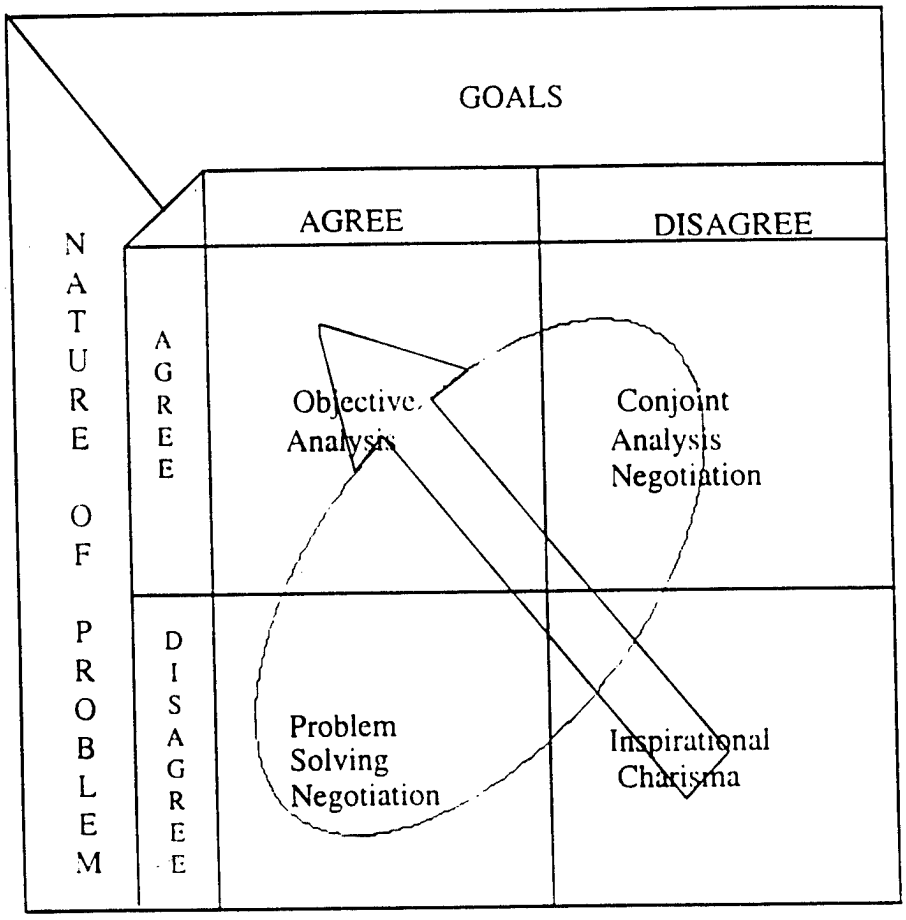


Figure 2
Nature of Agreement in Policy

The point is that to get to Cell 1—that place where most technical people are most comfortable—we must usually move through either Cell 3 or Cell 2. This is true because much of the environmental conflict we encounter is not based primarily on "facts" but values. Resolution depends on dealing with the interest and values or other causes at stake in a controversy. These causes usually are beyond facts.

Actually we usually spend much time moving between Cell 2 and 3, that is, discussing goals, coming to agreement on the goals and then redefining the nature of the problem, and then going back to goals. This iterative process is the crux of planning. It is not possible to state how much iteration is necessary between 2 and 3. It is only important to know that we must move through analytical activities implied by Cells 2 and 3 before we move to what is identified as the

Objective Analysis in Cell 1. In other words, we must understand the sources of conflict and design processes to deal with the sources. That is what is implied by moving between Cell 2 and Cell 3.

The conflict management literature distinguishes four main causes of conflict (Negotiating, 1986). The first is conflict over data.

Data conflicts result from a lack of information, misinformation, different interpretations of data, and different views of other relevant data. For example, controversy often develops because of failure to exchange information necessary to fully understand issues. Government agencies and technical groups are inclined to dispense material written so as to be unintelligible to the average people. Companies prepare reports according to government regulations, but often exclude information that is not required by law but may be necessary for citizens or the agency to understand the rationale for actions. Public interest groups frequently express their views of a situation in such apocalyptic terms that the information is lost in the actual way it is delivered. Disputing parties often have different standards for evaluating information and different views of the relevance of data. Conflicts generated by data disagreements are the easiest to solve.

The second cause of conflict is called interest conflict. Conflicts can develop over seemingly incompatible interests. Interests or needs are tangible results that are satisfied through the outcome of a dispute so that the settlement will be satisfactory and durable. Interests can be substantive in nature. They may refer to the process by which a settlement is reached, or they may refer to the psychological needs of the people in the conflict.

Conflicts may also be generated by value differences. Value conflicts develop when disputants use different criteria for evaluating conflicting outcomes, espouse different lifestyles or goals, or they profess diverse ideologies, different religious beliefs, or views of the way the world ought to be. Values are the foundation for interests and needs.

Conflicts can also be generated over relationship issues. Relationship conflict often results from the build-up of poor expressions, strong emotions, stereotyping, poor communication skills, and repetitive negative behavior. The resulting disputes are often unnecessary because they are not based on substantive disagreements. Relationship conflicts require us to focus on building positive relationships or good feelings, anchor positive perceptions, and productive communications. Because personal relationships are of primary importance, relationship conflicts must be dealt with "up-front" before dealing with substantive issues. Throughout the conflict resolution process, we must constantly attend to relationship conflicts.

Technical professionals frequently want to treat conflicts in their technical area of expertise as primarily data conflicts. In other words, they prefer to be in Cell 1 of Figure 2. However, in most water resource disputes, we find ourselves in Cell 4 or perhaps 3 and 2. In any of these

situations, the primary cause of the conflict is rarely data. It is more likely values, interests, or possibly relationship issues.

Let me summarize the first concept. Conflicts are generated for at least four reasons. We must understand these reasons and design public involvement and conflict management processes appropriate to them. We cannot expect that conflicts will be resolved by processes adequate for one cause of conflict when, indeed, most conflicts are being driven primarily by totally different causes.

Design to Values

Experience has shown that values are a primary source of environmental conflicts. Figure 3 outlines a recent case where water resources planners needed a projection for electrical energy demand in the Pacific Northwest of the United States to the year 2000. Four professional projections were available (Delli Priscoli, 1987b). Each projection was internally consistent and done by fine modeling methods.

Not surprising, utility interests projected an increased need, while environmental interests projected a decreased need for electric energy. Projections made by a major university and a consulting firm fell in between. Although one cannot predict the absolute number, by simply knowing who made the projection one can easily project their relative positions of the projections. Essentially, these professional and technical projections are elegant statements of how these organizations feel the world "ought to be." That is, they contain a political message.

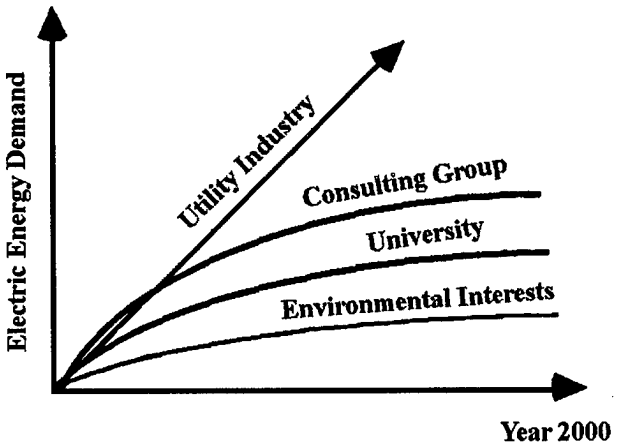


Figure 3
Electrical Energy Needs in the Year 2000
for the Pacific Northwest

Even if rarely acknowledged, it is no surprise that projections are value based and assumption driven. However, to engage in the crucial assumption game requires a working knowledge of

modeling and technical proficiency. Consequently, those whom these projections serve, are frequently excluded from the game. Therefore, it is little wonder that the people whom the projections serve feel no ownership in the projections and subsequently either ignore or reject the projections.

In short, the projections are neither purely technical nor political. They are a hybrid. The water resources professional must now be able to both draw the lines that we see in Figure 3 and to encourage a broadly based value consensus around the assumptions underpinning these lines. It is the second point which we ought to emphasize. The professionals must understand values underlying the conflicts. Once understanding these values, alternatives must be designed which service the range of values. It is these alternatives which then can be used to negotiate consensus. That is, we must start our engineering design only after understanding the range of values. Designs and alternatives must be created for the different values. We must understand that traditional technical alternatives frequently carry with them sets of values which represent a far more narrow set of values than is necessary to satisfy this requirement. So, the second major concept is that we must design to values rather than unconsciously dictate values through advocacy of narrow technical and predetermined solutions.

Visibly Isolate Extremes

Practically, public involvement and conflict management programs should be visibly isolate extremes. This sounds manipulative and somehow distasteful. Let me explain. Programs should create incentives for participants to find and move to a middle ground. Public involvement programs should facilitate a shared ownership of solutions, alternatives, and recommendations such that alternatives may be implemented. This means create an environment where compromise is acceptable. As we have learned, public awareness rapidly becomes more than public information. Public information and public relations are critical skills to be used by doing involvement but they are not sufficient in and of themselves.

While practical people understand that all conflict will not always be solved short of court, war or other adversarial methods, public involvement programs seek to solve as much conflict as possible without going the expensive route of litigation. Public involvement and conflict management programs attempt to create an environment where the clash of alternative viewpoints are synergized into creative solutions which have not been previously conceived, rather than canceling out one another.

Figure 4 graphically outlines this concept. In a traditional adversarial model, as shown in Figure 4(A), the only way to play is to be "for" or "against." The pressures are to move to the extremes and out of the middle ground. Those in the middle will either drop out or gravitate to the extremes. We hire our lawyers to characterize and to do battle for us. There is little reward to be in the center.

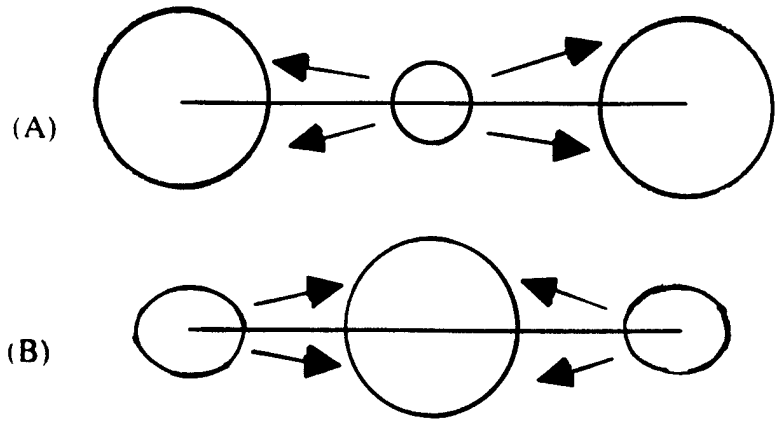


Figure 4
Visibly Isolating Extremes

But the successful resolution begins with finding shared middle ground and creating alternatives, as represented in Figure 4(B). To a great degree, excessive reliance on the adversarial paradigm excludes building the shared ground. Although useful and necessary, the adversarial model is not always useful. In planning water resources development, once we assume that we will resort to the adversarial model or to the courts, all of our planning documentation subtly transforms our professional problem analysis into building a "case" under the legal "rules-of-evidence." In short, the means—litigation—has become the end. It has become the pervasive normative guide for data collection across disciplines. Polarization is thus assured. The system, whose conflict resolution ability we strongly believe in, begins to generate more intractable conflict than it solves.

So what do we do? First of all, extremes exist; we all know it and we should recognize them. Ignoring extremes does little good. Figure 4 seeks to show that we should visibly isolate such extremes. That is, we should recognize and publicize such extremes. In so doing, those who participate at the extremes do so publicly. That is, the cost for participation at the extremes is to be identified with extreme position. By providing "reasonable" alternatives to what appear to be "irrational" extremes, it is hard for extreme positions to maintain broadly based constituencies.

Many who are at the extremes are committed and have valid and important reasons for being at such extremes. One of the more important reasons is that by so locating themselves, they help move society's consciousness toward what they view are important and truthful values. However, for a public agency the objective is usually to find sufficient ground on which to build enough will to act. This means assuring that broadly based constituencies have alternatives. If there are broadly based constituencies supporting extreme positions, then, indeed, solutions will move in their direction. However, we have frequently found that the reliance on adversarial

models allows the claim for broadly based constituencies by extreme positions without clear and visible proof of such constituency support.

To many, this model appears counter-intuitive. After all, it requires a certain faith in the ultimate reasonableness of humans. However, such faith and reasonableness is, to a great degree, what our democratic systems are about. Indeed, much of our public involvement, conflict management activities, and administrative processes are about helping our democratic systems adapt to changing conditions. This adaptation itself is built on such faith in reasonableness. Indeed, many of the decisions that we seek in the environmental area are, in fact, a search for the "reasonable" as opposed to some view of the "rational" decision.

So, my third point is to visibly isolate the extremes.

Negotiate on Interests Rather than Positions

Traditionally, negotiations have been viewed as moving from one position to a counter position and to a compromise settlement. However, our experience in the environmental negotiations and other areas has shown that the joint problem solving approach which attempts to identify interests prior to examining specific solutions can be beneficial. This approach has come to be called interest-based-bargaining (Fisher, 1982; Negotiations, 1986). It involves the collaborative effort to jointly meet each other's needs, interests, and to satisfy mutual interests. After interests are identified, the negotiators jointly search for a variety of alternatives that may satisfy all interests rather than argue for any single position. Parties select a solution from mutually generated options. This approach is also frequently called integrated-bargaining because of its emphasis on cooperation, meeting mutual needs, and the efforts by parties to expand bargaining options so that a wiser decision with more benefits to all can be achieved. In this sense, it is more than a simple compromise.

The approach depends on distinguishing among interests issues and positions. Issues are the what of our discussions. Interests are the why. The positions are the how. Throughout this approach to negotiations, participants and mediators constantly appeal to what has been called the best alternative to a negotiated agreement or BATNA (Fisher and Ury, 1981).

In this approach, negotiators constantly seek to educate one another on their interests. In this sense, negotiations are seen as a social learning exercise. It is also a creative exercise, in that it seeks to generate a range of options and to create options that no one party may have conceived of before negotiations. In such an approach to negotiations, resources are not seen as limited (Negotiations, 1985). Negotiators' interests must be addressed for an agreement to be reached. Throughout the process, the main focus is on interests, before positions. Parties often look for objective, verifiable or fair standards that all can agree to. There is a belief that there are probably multiple satisfactory solutions. Negotiators become cooperative problem solvers rather than merely opponents.

So, my fourth point is that negotiations should be conducted around interests rather than positions.

Durable Settlements Depend on Achieving Procedural, Substantive and Psychological Satisfaction

To achieve a durable settlement, there are at least three types of interests which generally must be met (Lincoln, 1986). These are:

- Substantive interests: that is, content needs, money, time, goods, or resources.
- Procedural interests: that is, the needs for specific types of behavior or the "way that something is done."
- Relationship or psychological interests: that is, the needs that refer to how one feels, how one is treated, or conditions for ongoing relationships.

These interests can be seen in Figure 5. This is often called the satisfaction triangle. The above interests are represented on three sides of the triangle. Ideally, any public involvement and conflict management process would be designed to seek point A. This point, in some sense, represents an optimal satisfaction of the procedural, psychological, and substantive interests of each of the parties. Frequently, technical professionals, in designing conflict management and public involvement processes, implicitly or subconsciously behave as if they are reaching for point B.

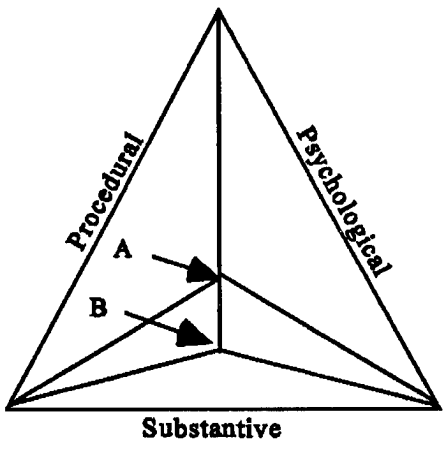


Figure 5
Satisfaction Triangle

This point represents a situation which is high on the substantive or content aspects of the situation but relatively low on the psychological and procedural aspects. The point of this triangle is that public involvement and public awareness require an explicit design that seeks to maximize procedural, psychological, as well as substantive concerns. This is often uncomfortable and, in fact, often beyond the skill of many water resources professionals.

We know we have achieved procedural satisfaction when the parties to the process say they would use the process again. We will speak in a moment of different process techniques that have been developed over the last 10 or 12 years. Substantive satisfaction is familiar to us. It is the water resources content with which we spend our lives. We know when we have achieved it.

Psychological satisfaction is a little more difficult to conceive. Figure 6 outlines one way to understand psychological satisfaction. The figure contains two columns: "Won" and "Lost." The words under each column indicate how one may feel when they perceive they have either won or lost in a dispute (Lincoln, 1986). As you read down each column, you probably can

How One Felt When They

(Won) (1)	(Lost) (2)
Great	Taken Advantage of
Victorious	Demoralized
Wonderful	Helpless
Superior	Inferior
Strong	Weak

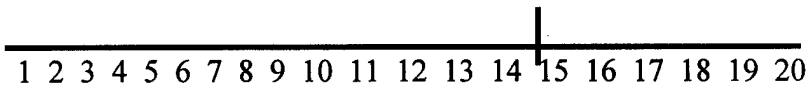
Figure 6
Defining Psychological Satisfaction

think of other words which express your own feelings when you have either won or lost in a dispute. Now, the following questions can be posed. What possibility exists for a durable settlement if one party feels the way that is described by the words in column (1) and the other party feels the way described by the words in column (2)? Can a durable settlement exist when both parties feel as described by the words expressed in column (2)? The answer in both cases, is little or no possibility! Parties must come close to feeling as described by the words in column (1) for durable settlements to exist. The point for us, as technical professionals in water resources, is that we must explicitly design processes which will result in such feelings.

The fifth point is that durable settlements depend on at least three dimensions: procedural, psychological, and substantive satisfaction. We must design processes to assure satisfaction on these dimensions.

Use Techniques Which Help Parties to Own Both the Problem and the Solution

Figure 7 outlines a continuum of dispute resolution techniques. At the far left of the continuum we have what could be called the California "hot tub" approach. In this case we all jump in the hot tub and somehow reach agreement. On the right hand extreme we have the high adversarial approach. This is either going to war, court, or litigation. And in-between these extremes we can see a wide range of alternatives. Close to the right-hand column we find familiar arbitration which can be court ordered, binding, or non-binding. These cases, while not following the full legal model, in many ways reflect legalistic approaches. Somewhat near point 14, but to the right of point 14, we find what has been called the mediation-arbitration approach.



1. Hot Tub
2.
3.
4.
5. Negotiation
6. Facilitation/Collaborative Problem Solving
7. Mediation
8. Conciliation
9.
10.
11. Mini-Trial
12.
13.
14. Dividing Point Between Decisions Made by Parties and Decisions Made by Third Parties
15. Med-Arb
16. Arbitration
17. Court Ordered Arbitration
18. Rent-A-Judge
19.
20. Litigation/War

Figure 7
Dispute Resolution: A Continuum of Techniques

Point 14 represents a dividing line. This is the dividing line between decisions made by the parties of interest and decisions made by a third party. In principle we try to use techniques to the left of point 14. That is because techniques in this area still leave decisions in the hands of the interested parties. The techniques to the left of point 14 encourage parties to own and solve their own problems. Once we start moving to the right of point 14, the decisions and outcomes tend to be handed over to outside parties. To the left of point 14 we identify facilitation, collaborative problem solving, mediation, and conciliation. Each of these techniques are built on the principle that a third party can help the parties come to agreement by designing and nurturing a process of dialogue among the interested parties. The processes are fully voluntary and vary from informal to formal. The most informal is closest to the hot tub on the extreme left and the most formal is closest to point 14. However, in all cases they are built on the assumption that we separate the process by which we communicate and the content of the dispute. By bringing in a third party who is neutral and primarily concerned with process, we often liberate ourselves to more innovatively discuss the content of a dispute.

Facilitators are thought to be caretakers to the process. That is, they are pure process people. They engage in little or no discussion of the content. Their purpose is to suggest different ways of dialoguing so the parties may come to some agreement. Mediators, on the other hand, also take care of the process, however they are more likely to engage in the content. They engage in content by listening to parties, by individually caucusing and perhaps helping the parties to develop substantive alternatives. The mini-trial is an interesting variation of these techniques which has gained popularity in the United States. The mini-trial looks like a trial, however, it is really a structured discussion among the various parties of interest. It is voluntary. Discussion is structured in a way that looks similar to the court. After evidence is presented by both parties, the principles meet again to consider what they heard. Then a decision is hopefully reached among the principles. The whole process is managed by a neutral third party.

The sixth and final point is twofold. First, we should employ techniques which help parties to talk directly with one another. This is done to encourage parties to own both the problem and the eventual solutions. In the long run, shared ownership means that the solutions are more likely to be durable. It also means that the solutions are likely to be better technical solutions. Second, a range of alternative techniques exist to achieve this end.

CONCLUSIONS AND APPLICATIONS OF THE CONCEPTS

Use of the concepts described above is rapidly growing throughout the United States. However, three policy arenas can be used to illustrate how the concepts apply in a large water resources development agency. Over the last several years the Corps of Engineers has successfully used mini-trials several times in construction contract claims cases. Settlements in these cases have ranged from $20,000 to over $20 million.

Typically, at the end of a large construction effort, a number of disputes are outstanding. These disputes have traditionally been handled through an adversarial legal process. In such a process, the case goes through construction claims court at which point the settlement can be accepted or appealed. During the last eight years the number of claims against the Corps have been doubled. Also, the number of appeals of those claims settled by initial courts is also growing. Therefore, in the last 1-1/2 hears the Corps has applied many of the ADR techniques identified above.

The mini-trial has been particularly successful in a number of contract claims cases. In the mini-trial, the parties prepare the cases and the best arguments for their positions. These arguments represented much the same way they may be presented in a court. However, the case presentation and hearings are managed by a neutral third party. In reality, mini-trial discussions are structured negotiation sessions. After hearing the cases, the parties meet and discuss what may be suitable claims. Usually the successful mini-trial cases last one or two days, at which time parties agree to settlement terms. This time can be contrasted to the typical minimum of three years for settlement under routine procedure.

Mini-trials have been used in cases where the conflict has ripened and been fairly well developed. However, we also desire to prevent conflict and to reduce the potential of conflict. One way to do so is through collaborative problem solving. One good example of such preventative collaboration can be seen on a $80 million replacement lock and dam in the southern region of the United States. In this case, the Corps of Engineers' managers and executives sat down with the managers and executives of the contracting firms for four days before construction began. During these days, private and public sector managers identified their mutual or shared interests. They also identified the areas and situations which, from experience, they knew could generate conflict. Then the managers developed and agreed to a seven step process with time limits on each step, to resolve eventual conflicts.

During the process, the construction firm divulged their profit margin. This margin could be achieved at the end of the contract if there were no outstanding disputes. Therefore, a "bottom-line" shared goal of completing construction without outstanding disputes has been adopted. Achieving this goal will also maximize profit for the private contractor. If this goal of no dispute at termination is achieved, it will be the first time on any project of this scope. As a result of the collaboration, the project is ahead of schedule and the morale within both the public and the private contractor teams is high.

The regulatory program of the Corps of Engineers offers another example of applying collaborative problem solving. The Corps issues permits for construction in navigable waterways and wetlands. It issues close to 20,000 such permits a year. A number of these permits can be quite controversial. In a number of cases the Corps is allowed to issue what is called a general permit. A general permit can be issued for a certain type of activity in a region or the nation. It can also be issued for a clearly defined region. A general permit consists of a list of technical specifications or conditions to be met for any work that is proposed. With a general

permit, individual applicants may apply by simply signing a statement saying that they will conform to the specifications. In this way, the long permitting process can be reduced. Thus, the overhead to the permit applicant, as well as to the Government, will be reduced.

Environmental interests usually see general permits as a threat. However, the Corps has used the general permit as an opportunity for a forum in which parties that are likely to conflict over individual permits can come together and agree on technical specifications for an overall activity arena. Essentially, the Corps has said, "If the parties who are likely to be in conflict can agree on technical specifications, those specifications will be the general permit." In the cases where this has been tried, the Corps has used a facilitator/mediator approach. The facilitator, as a neutral third party, convenes the parties who will be in conflict. These parties then negotiate and agree to technical specifications. The reason parties agree usually revolves around certainty of the future for private applicants. This certainty can actually mean increased profits. To environmental interests, this certainty means that energies can be devoted to other more important environmental conflicts without having to worry about a large number of individual cases. The success of this facilitate approach depends on the perceived fairness of the process. That fairness has been achieved by using a neutral third party as caretaker to the process.

These are general and brief descriptions of a few water policy arenas where the principles discussed above have been applied. My principle message is that alternative ways to resolving disputes exist; these alternatives have evolved from the experience of directly involving the public and interested parties in management and development decisions in water resources planning.

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Chapter 5

COMPARING PUBLIC INVOLVEMENT AND ENVIRONMENTAL MEDIATION

by
James L. Creighton, Ph.D.

When the first wave of the environmental movement hit Federal agencies in the late 1960s and early 1970s, many of these agencies went from being "heroes" to "villains" seemingly overnight. Suddenly, everything they did was controversial. Many project decisions that the agencies felt had already been made, although not yet implemented, were up for grabs again. Everything was a subject of dispute.

Throughout the decade of the 1970s, there was considerable experimentation to find ways of resolving these issues other than through constant litigation. Many new planning processes were developed to ensure that there was a well-defined basis for decision making. The passage of the National Environmental Policy Act (NEPA) established requirements for the level of study and documentation that needed to occur before decisions could be made. This moved agencies beyond consideration of engineering and economic feasibility alone to consideration of environmental and broad socio-economic impacts. Agencies were required for the first time to consult directly with impacted and concerned citizens and groups.

Agencies found themselves in the dispute resolution business—whether they wanted to be or not, and whether they recognized it or not. Among those agencies which worked hard to find better ways of making decisions that enjoyed public support, two approaches emerged that showed promise and have survived into the 1990s and beyond: public involvement and environmental mediation.

With nearly twenty years experience with both techniques, it is worthwhile to summarize what has been learned about both approaches, to understand their differences, and to discuss their potential use in the future.

PUBLIC INVOLVEMENT

NEPA, and a succession of other laws related to environmental clean-up that followed, all include requirements for "consultation," "involvement," or "participation" of affected or interested individuals or groups in agency decisions. In most cases, these laws were not very specific about how this involvement was to be done. That was left to the agencies (and possibly the courts) to determine. Most laws did include requirements for public hearings prior to decisions, but suggested additional involvement, without specifying when or what kind of involvement that would be.

Formalized Public Involvement

The first phase of public involvement was what I have called "formalized public involvement." It primarily consisted of a public information program followed by one or more public hearings. While this approach is still used by a number of agencies, and even parts of the Corps, most practitioners feel that this approach is largely unsuccessful in resolving disputes. Instead, the hearings are likely to turn into noisy circuses (or in more circumspect communities, ritualized dances).

There are a number of reasons why public hearings have proven to be unsatisfactory as a mechanism for resolving disputes (although an excellent method for developing the public record upon which the court case may rest). The most important reasons are:

- **Public hearings tend to exaggerate conflict.** Leaders of organized groups must, because their followers are in the audience watching them, wave their swords and defend the holy faith. People who are otherwise reasonable people before the hearing, become extremists and absolutists during the meeting so that their followers will be proud of them. This has the effect of polarizing the audience, and fixing positions. (The only exception to this, at least on controversial issues, is when there has been substantial public involvement before the public hearings, and the hearing is more of a testimonial about the process that has already occurred.)

- **The formal process used in public hearings encourages people to take positions, rather than share fundamental interests or engage in problem-solving.** One of the lessons learned over the last two decades is that if you want the possibility of a mutually acceptable solution, people need to focus on their fundamental interests, not on positions. But public hearings, by virtue of format, size, and tradition, encourage people to take positions. Rather than bringing people together, hearings push them apart.

- **Public hearings come too late in the process, often setting up a for/against choice.** Public hearings come very late in the decision making process, usually just before a decision is made. Most of the opportunities for modifying alternatives occur early in the process. By the time the hearing is held, many agencies are already intellectually even emotionally wedded to a proposed course of action. In some cases, hundreds of thousands of dollars have been invested in studies analyzing the alternatives. Wholesale changes in the alternatives could require reanalysis, throwing out much of the work already done. Simply put, by the time public hearings occur, inertia is pushing hard in a particular direction, and it takes much more energy to bring about change—even useful and appropriate change—than if the change were made earlier in the decision making process.

- **If the public does not accept the fact that there is a problem, it will not accept the proposed solution.** Virtually all people, when faced with the need to take an action involving cost or potentially undesirable side-effects, try first to convince themselves there's no problem. Only when convinced there is a problem will they make the hard choices between alternatives. Agencies are no different. They don't like hard choices either. But before a decision process reaches a public hearing, an agency has had months, even years, to define and accept the problem. At the public hearing, the agency is focused on the choice between the alternatives, or is even advocating a single choice, while many in the public are still back wrestling with whether there is a problem big enough to justify making hard choices. It is no surprise then that the first point of attack in virtually all public hearings involving "noxious" facilities, e.g. solid waste sites, freeways, power lines, nuclear waste storage, and soon is on project need (for example, "we wouldn't need this power line if everyone practiced energy conservation").

  Some of this is tactical, with groups establishing a position. But some of this is just the way human beings have to come to grips with the fact that there is a problem before they're willing to accepts solutions that may have consequences. The agency has had months to go through this process, but expects the public to go through it in minutes. Some agencies don't even discuss project need, and go straight to the alternatives. Also, agencies tend to define the problem in ways that are amenable to the solutions they are able to offer. For example, an agency used to providing structures and physical facilities, but not used to regulating social behavior, will tend to define the problem so it can be solved with physical facilities. The public may end up defining the problem very differently, suggested alternatives outside those studied by the agency. However, this late in the decision process, organizational inertia will push the agency to defend the alternatives it has identified and analyzed, even though the public's definition of the problem may be wiser.

While most public involvement practitioners encourage agencies to avoid public hearings as their primary mechanism for public involvement, many agencies are required by law to hold them. Hearings serve a legal purpose, as well as a participatory purpose. Since they are required, the advice of practitioners[2] is (1) to be sure that your public hearing is at the conclusion of your public involvement process, rather than the beginning, and (2) to use interactive meetings formats that break up the adversarial nature of the hearing.

Improving on Formal Involvement

While some agencies continue to use only formalized involvement, most of these agencies do it simply because it is required. Few agencies find they learn much from the process, nor does the

[2] See Creighton, also Aggens, *Public Involvement Techniques: A Reader of Ten Years Experience at the Institute for Water Resources*. Ft. Belvoir, VA: Institute for Water Resources, 1983, pp. 244-278.

formalized process seem to lead to public support. In the case of relatively non-controversial decisions, the formal process may be sufficient so that affected or interested parties ("stakeholders") are willing to consent to the decision. But on controversial issues, the public hearing is simply something to be completed on the checklist before the battle shifts to another venue, such as the courts.

Agencies who approach public involvement as a dispute resolution mechanism, however, typically go well beyond the public hearing in providing opportunities for the public to participate. Many of the general principles that guide such programs are provided in the first IWR reader. A quick summary of these principles would include:

- Get the public involved early in the process, so they are involved in defining the problem, the range of alternatives considered, the criteria used to evaluate the alternatives, as well as the alternatives themselves.

- Identify who "the public" is—the individuals and groups likely to perceive themselves affected by the decision in terms of values, use, economics or proximity—then design forums that will be effective in reaching that public.

- Provide alternative mechanisms for participation, so people can participate at a level of involvement suitable to their level of interest.

- Integrate public involvement into the decision-making process, so you know why you are going to the public, which "public," and why at this particular point in time in the decision making process.

- Design public involvement mechanisms appropriate to each stage in the decision- making process.

- When there are arguments over facts, use third party mechanisms such as advisory groups or technical review panels, so that arguments are over values or interests, not facts.

- Use interactive formats, such as workshops or coffee klatches, in preference to public hearings or large public meetings.

The public involvement case studies presented by Langton (Chapters 7-10) and Delli Priscoli (Chapter 30) illustrate these principles.

Making the Decision After Public Involvement

The guidance above has been shown to significantly improve the involvement of the public in the decision making process. It often leads to increased support for decisions reached by the

agencies following this process. This support is probably the result of two things: (1) many of the concerns of the public have been addressed during the decision-making process, and incorporated in the agencies' decisions, and (2) the public is satisfied that the process was open and fair, and is therefore willing to accept the decision. For example, they have sufficient "procedural satisfaction" that they don't demand complete "substantive satisfaction."

But there are still occasions where no amount of process will lead to a decision acceptable to all the parties. The public itself may be bitterly divided. The stakes of the decision may be so substantial that groups cannot accept any substantive outcome that does not meet their interests. The issue may be over political power or influence, not over the substance of the issue, so groups will not be willing to accept a decision that is not a "win."

There may also be issues where the agency is unable to accept a consensus of the local community. For example, the Corps is often in the position where the local community would accept standards governing development in wetlands that are much more lax than those embodied in Federal law. If the issue were strictly one of popular support, the Corps could undoubtedly win favor in such communities by making decisions at odds with Federal law. In actuality, of course, the consensus would not be complete, because looser standards would not be acceptable to other Federal and state regulatory agencies.

This raises an important point: agencies are often not "neutral" creators of a process, but have interests and legal responsibilities that make them a clear party to the decision. In some cases, those responsibilities require them to enforce laws that favor interests that have a commodity use of the river. For example, the law may put the agency in a position of protecting the legal rights of irrigators, even though this means that the flows are not optimal for fish stocks on the river. It is also observable that agencies often go beyond their legal obligations to such interests, and begin to protect such groups as "our constituency." Clearly, when an agency has such legal obligations, it cannot accept a consensus that violates those laws. This can be used as an excuse, however. Agencies often reach legal interpretations that give them much more legal flexibility when they want to do something than when they don't. However, the constraints of mandate and law are often very real, and no agency can be expected to negotiate them away.

This gets to the heart of why some people have questions about public involvement. Public involvement clearly leaves decision making in the hands of the agency. In the hands of an agency that is open and responsive to the concerns of the public, public involvement is a mechanism by which the values, interests, and concerns of the public are incorporated and addressed in the decision making process. In the hands of an agency that is rigid, bent on protecting its traditional constituency, and already committed to a course of action, it is window-dressing at best.

Some theorists see the penultimate goal of public involvement as power-sharing.[2] (Arnstein) To the extent that agencies still retain the power to make the decision, the balance of power clearly remains in the agency's hands.

For others, the argument is more pragmatic: there are some issues that are simply not going to be resolved unless all the parties agree to the solution. Whether through legislative mandate, political influence or the outcry of public opinion, all of the actors have sufficient veto power that nothing will happen without agreement. It is this concern that led to the use of environmental mediation.

ENVIRONMENTAL MEDIATION

During the 1970s, a number of people worried that environmental conflicts were becoming so antagonistic that they were not productive for anyone. From this concern came the idea to use the techniques that had worked in labor/management negotiations—particularly mediation—and apply them to resource decisions. These initial efforts at environmental mediation efforts were funded heavily by such foundations as the Ford, ARCO, and Kettering Foundations.

Over the past fifteen years, environmental mediation has had some notable successes. But it has also become clear that there are many differences between the circumstances in which labor/management negotiations take place, and those affecting disputes in the natural resources or public policy arena. Some of the most important differences are:

- **In labor/management disputes there are normally only two parties**. In natural resources disputes there are numerous parties, sometimes 20-30. As anybody who has worked in multi-party disputes knows, it often feels like the complexity of resolving a dispute increases geometrically, not arithmetically, with the number of parties involved.

- **In labor/management disputes, the parties are well defined**. Everybody knows who management is and who can speak for it. Everybody knows who is authorized to speak for the union. With natural resources issues, the parties may be a whole neighborhood, with no formal organization and designated representatives; or a party may be a huge mass of individuals who, for example, recreate in a certain area, yet have no one who represents them, and may have little in common except the fact they recreate in that area. Even with environmental groups, there might be five or six, or even more, groups, often taking radically different positions. Who speaks for these people? Occasionally, in fact, mediators found that their first step had to be to help interests get organized, simply so they could develop a unified position, and there was someone who could speak for them.

- **In labor/management disputes, everybody acknowledges the right of the other parties to be at the table**. This was not true originally, and the battles to get labor accepted at the table as a legitimate party were long and bloody. But that fight is over.

Nobody is fighting about that any more. But in natural resources disputes there is still considerable conflict over the right of environmentalists and other "public interest" groups to be at the table. During the 1970s, many of the groups and organizations in the "development" camp spent much of their time arguing that environmental and other citizen groups could be listened to politely, but had no right to be included in the "real" decision making.

Questioning the legitimacy of environmental and citizen groups at the table has lessened over the years. Just as it took time for things to mature in labor/management relations, it has taken time for things to mature in resource decisions.

- **The other important difference between labor/management and resources decisions is the ability of the parties to commit**. The "developers" and resource agencies are formal organizations with the ability to make legally binding decisions. Typically, the ability of environmental and citizen groups to commit their presumed constituency is very limited. Some of the dramatic failures of environmental mediation were apparent successes, that is an agreement was reached, but either other environmental groups simply disowned the agreement, or in some cases, the membership of groups changed sufficiently in a year or two that the original parties to the agreement would disavow the agreement.

  From the perspective of the developers and agencies, they had given all they could, and then the other side reneged on their reciprocal obligations. This contributed further to the belief that environmental and other citizen groups could not be legitimate parties at the table, because they either could not or would not keep agreements.

  Some of these problems are inherent in the nature of volunteer organizations. First of all, such organizations tend to have about an eighteen-month to two-year institutional memory. That is about the time it takes for someone to be really active, become a leader, and burn out. Also, it is in the nature of such organizations to have internal squabbles over ideological purity. Leaders of volunteer organizations who become more moderate, either to gain influence over leaders of the established entities, or because of the simple social phenomenon of leaders identifying with other leaders, are often challenged by people within their own organization who see them as having sold out or having been coopted by the system.

  In fact, some of the notable successes of environmental mediation came in situations where the agreements reached were then incorporated in consent decrees accepted by the courts, or were incorporated in authorizing legislation, or enforced politically by governors or premiers or other key political figures who put their own political clout on the line to implement the agreements. In other words, there was some external mechanism to "bind" the agreement.

Experienced mediators talk about the need of an issue to "mature" before mediation is attempted. The "maturity" of an issue covers a number of things, such as: the groups have reached the point they no longer believe they can impose their will; the relative power of the interests is close enough that no one worries unduly about getting "rolled;" and all sides are sufficiently bloodied that they are convinced that they have a chance of getting more by reaching an agreement than by fighting on.

But it is also clear from the discussion above that some of the other preconditions for effective resolution include:

- Well-defined parties
- Acceptance of the need for all parties at the table
- Ability to commit constituencies
- Ability to bind the agreement

Not all of these preconditions must exist when a mediator begins, but experience suggests that if they do not, the mediator must bring them about in order for an agreement to be reached and implemented.

What this means is that one of the key skills a mediator must possess is the ability to analyze whether the circumstances prevail under which mediation can be successful. A wise mediator will frequently conclude that issues are still not sufficiently "mature" for mediation to work.

Attempting mediation when these conditions do not prevail can, in fact, exacerbate the level of conflict and bad feeling. Expectations can be raised by proposing mediation, and if the process is not successful, this serves as further proof that the other parties are unreasonable, "out to get us," nd untrustworthy.

For this reason, environmental mediation has to be judged as a highly useful tool that can be used only under certain conditions. Its strength is that when it works, there is an implementable agreement. If it fails, it may make things worse, and there are a number of conditions under which it is not advisable to proceed.

CHOOSING BETWEEN PUBLIC INVOLVEMENT AND ENVIRONMENTAL MEDIATION

In the late 1970s, there was a certain amount of competition between advocates of public involvement and those of environmental mediation. Public involvement specialists often came out of a "group process" tradition, while many in environmental mediation either came out of labor/management negotiations, or the environmental movement. Some in environmental mediation saw public involvement practitioners as only slightly better than "PR flacks" for the agencies. However, environmental mediation had its own problems. In an effort to ensure they

were not unduly influenced by who paid the bills, they refused to accept money from anyone who was a party to the negotiations. By the late 1970s, the foundation money was beginning to run out. Foundations wanted to provide seed money, but not permanently support environmental mediation. Mediators had taken a principled position, but they soon had no one willing to pay the bills.

During the 1980s, environmental mediation found new ways to grow and make a contribution, just as did public involvement. By the end of the decade, the fields had grown together to the point that some of the people who were well known in environmental mediation are now very active in public involvement. Some in public involvement also do mediation.

No one would now say the choice was "public involvement versus environmental mediation." They are not in competition. Instead the issue is which technique is appropriate in which circumstance.

If the agency believes it has a stake in the decision and must make the final decision, this rules out mediation. Yet the same agency may conduct a public involvement program that produces substantial resolution of the issues. If the agency is willing to be a party to the negotiations, as the Corps was in the Truman Dam case, then mediation is an option. The overwhelming advantage of successful mediation is that there is a signed agreement, acceptable to all the parties. The disadvantage is that mediation will not work in many cases, and may even exacerbate the situation. Public involvement may not result in a mutually agreeable decisions, but it rarely makes the situation worse. If public involvement is tried and is only partially successful, the option of mediation still remains. If environmental mediation is tried and does not result in an agreement, public involvement probably is not appropriate, at least for a period of time.

Like the other techniques discussed in this reader, these two techniques each have strengths and weaknesses. Used wisely, they can both be effective tools by which agencies can resolve disputes.

SECTION II: PUBLIC INVOLVEMENT

Chapter 6

THE MATURATION OF PUBLIC INVOLVEMENT IN THE LOS ANGELES DISTRICT

by
James Ragan
Nancy Art

In 1970, the Los Angeles District (LAD) held what turned out to be a contentious public meeting in Santa Barbara, California. There, the District Engineer presented his recommendation of a flood control plan consisting of a rectangular concrete box for Mission Creek, a naturally landscaped waterway that meanders westward from the Santa Ynez Mountains through the City of Santa Barbara to the Pacific Ocean. LAD managers had no suspicion that there would be any public opposition to the recommendation. There was. The opposition expressed at the meeting was so severe that the Corps ceased all project work and did not return to Santa Barbara for more than 10 years. By the time local officials asked LAD to reopen the study in the early 1980s, the District was ready to do what it had not done before—involve the public in its project planning. The result was a publicly acceptable plan providing a lower level of flood protection than proposed in 1970 and retaining the natural features in most of the creek. The Santa Barbara City Council approved the plan in the mid-1980s.

The major changes to public involvement in LAD that led to the dramatic turn of events in Santa Barbara began in earnest in 1978. Between then and 1985, public involvement evolved and matured to become an integral function of all planning and most design activities of LAD's civil works missions. By 1990, LAD had extended public involvement into some civil works construction operations, as well as military missions.

Why public involvement has attained such a firm position in LAD springs from three sources. First, attitudes, events, and conditions created an environment favorable to public involvement. Second, LAD took steps to institutionalize its public involvement approach. Finally, positive results manifested in publicly supportable projects have instilled confidence in the process.

CREATING THE ENVIRONMENT

In the early 1970s, LAD was certainly not alone among Corps districts in relying almost totally on the formal public meeting for public involvement. In 1975, one of the authors concluded:

> "[The Corps'] . . . public participation guidance [EC 1165-2-100, 28 May 1971] has not been applied by Corps field offices to their planning activities. The public meeting remains the principal—and frequently the only—method that the field offices employ to inform and obtain comments from the public . . . .

> "The Seattle District is the only field office which systematically tries to involve the public in all its studies . . . . Only a few other field offices have experimented with more intensive involvement with the public, and these experiments have usually been limited to single studies."[3]

Beginning in 1978, the environment for public involvement in LAD began to change.

The Changing of the Bureaucratic Guard

Within just two or three years in the late 1970s, retirement claimed four of LAD's long-time senior managers who controlled how the District applied Corps public involvement guidance. They were the chiefs of the Engineering Division, the Planning Branch, and the Water Resources and Coastal Resources sections. And they had largely ignored the Corps guidance. Their replacements, followed by entry-level new hires under them, were mainly younger professionals educated in the NEPA and public-sensitive environment. Increased public involvement made sense to them both practically and emotionally.

The Organizational Elevation of Planning and Environmental Evaluation

In about 1983, the Planning Branch—then under the Engineering Division—became a division itself. Public involvement benefited substantially, since the planning function broadened from a dominant engineering perspective to encompass—on more or less equal footing—other professional disciplines addressing public values such as urban planning, the natural and social sciences, and environmental design.

The placement of the environmental evaluation function in the reorganization was a major issue. The Engineering Division wanted to keep it. The new Planning Division got it and elevated it organizationally from a section to a branch. It might be argued that this decision started "the greening" of LAD. Environmental designers became almost equal partners in the planning process. They brought an in-house voice that echoed and promoted the concerns expressed by a growing segment of the public that, in earlier times, LAD had neglected. And since the environmental resources branch supported all LAD civil and military programs (not just civil works planning), the environmental professionals first sowed and then began to reap greater district-wide receptivity to public involvement.

The Managerial Rise of the New Professionals

We mentioned earlier the "changing of the bureaucratic guard." The 1980s were a period of the managerial rise and "infiltration" of the new professionals throughout LAD's organization.

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[3] James F. Ragan, Jr., *Public Participation in Water Resources Planning: An Evaluation of the Programs of 15 Corps of Engineers Districts, Summary of Evaluation and Recommendations,* Supplement to IWR Contract Report 75-6, November 1975, pp. 1-2.

Their personal commitment to integrating public involvement with planning and design demonstrates how important the "people factor" is in causing organizational change.

District Engineer Support

During this period of growth and change, six District Engineers have commanded LAD. All have supported increased public involvement and its integration into district projects. The greatest evidence of their support has been their approval of the financial resources required.

The LAD Water Resources Program

A robust civil works program generated the need for an equally robust public involvement effort in LAD. Rapid urbanization in Southern California, Arizona, and Southern Nevada brought with it major water resources problems that lend themselves to major water resources project alternatives. These, in turn, stimulated controversy over competing public values. For example:

- The flood threat along the Santa Ana River, located in Southern California's Orange, San Bernardino, and Riverside counties is the largest west of the Mississippi River. Public involvement from 1979 through 1985 in planning contributed substantially reconciling public concerns in the three counties, leading to Congressional authorization of a $1.4-billion project now entering construction.

- Los Angeles County and the Corps built and now operate the largest metropolitan flood control system in the United States. A combination of greater urbanization than system planners had originally foreseen and facility aging have made the system inadequate. The probable hundreds of millions of dollars required for system upgrading and the dozens of cities and millions of residents potentially affected make project formulation complex. Public involvement continues today as an important part of pursuing a publicly acceptable project.

- While flooding has always struck desert lands in the District, it caused little damage because so few people lived there. Now, however, periodic floods cause substantial property damage in communities such as rapidly growing Phoenix, Tucson, and Las Vegas. Projects now under construction and still in the planning phase have required extensive public involvement to educate people about the flood threat and the need for flood control improvements.

- The Los Angeles/Long Beach port complex is one of the busiest in the nation. Confronted with an explosion of trade with Pacific Rim nations and the need to accommodate larger ships, the ports and the Corps are planning a massive $5-billion expansion (including $150 million in Federal money). Public interest from a great variety of sources has been high.

INSTITUTIONALIZING PUBLIC INVOLVEMENT IN LAD

Benefiting from a favorable environment, LAD used the 1980s to move beyond public meetings to make public involvement an integral part of civil works and, to a lesser extent, military missions.

Planning Division Given Responsibility for Public Involvement throughout LAD

In the late 1970s and early 1980s, virtually all public involvement activity supported studies still in the planning stages. The authorized projects then moved to the detailed design stage and therefore to the Engineering Division. Public involvement was still required, since many public issues were yet to be resolved fully. While the planners by then knew how to conduct public involvement programs, understood the public issues, had relationships with the public participants, the Engineering Division's staff had virtually no public involvement experience or exposure. The District Engineer therefore assigned district-wide public involvement responsibility to the Planning Division upon its creation. The new division's chief then created the position of public involvement specialist to oversee the effort. While this assignment of responsibility initially produced tensions between the two divisions, the flaps had largely subsided by the late 1980s as the engineers gained more experience and comfort in dealing with the public and they came to value the role of the public involvement specialist in facilitating their work.

Public Involvement Training Ordered

In the late 1970s and early 1980s, LAD chiefs expected their project managers to attend the Corps-wide public involvement courses conducted by Synergy Consultation Services under the Institute for Water Resources' sponsorship. Most attendees returned to LAD with some public involvement skills and—perhaps most important—a receptivity to the need for public involvement in carrying out their studies and projects.

Public Involvement Contractors Hired

In 1978, LAD managers concluded that implementing full public involvement and integrating it with planning and design functions required perspectives and skills that neither they nor their staffs had. LAD awarded the authors' organization the district's first public involvement contract—focusing mainly on the massive Santa Ana River Flood Control Project. Throughout the 1980s, LAD competitively awarded a series of open-end one-year contracts for public involvement services supporting civil works projects. The services included public involvement planning, public interviewing, public meeting and workshop facilitation and recording, public information development, speechwriting, mailing list development, and public issue analysis. The authors received most of those contracts and implemented public involvement in over 20 water resources studies and projects. In attempting to integrate public involvement with

planning and design, LAD benefited from the continuity provided by one contractor over most of the period (the authors). The firm's personnel developed substantial understanding of and sensitivity to LAD's programs, projects, issues, and publics. The consultant's approach was conservative, recognizing that institutionalization of a new process in an organization such as the Corps must evolve. Two competitively awarded contracts to other public involvement contractors during the decade produced results that LAD was less than happy with.

In 1988, LAD awarded its first open-end public involvement contract to support a portion of the district's military mission. This need resulted from the environmental resources branch's growing work in preparing environmental impact statements for the district's military bases pursuing expansion (such as Fort Irwin's National Training Center) and those bases marked for closure.

LAD's use of public involvement contractors continues.

"Standard" Public Involvement Program Format Developed

In an attempt to overcome the bias of most public works agencies to equate formal public meetings with public involvement, public involvement literature of the 1970s emphasized a plethora of techniques. In 1976, for example, the U.S. Department of Transportation identified and described 37 different public involvement techniques.[4]

At least partially on the advice of the authors, LAD managers decided on a more conservative approach consisting of (1) experimenting with ways to make formal public meetings more effective, (2) adding more interactive types of forums, (3) greatly expanding the amount of objective information given to people to prepare them to participate, (4) constantly feeding back to participants the results of their participation, and (5) adding special techniques when it seemed appropriate.

There were several reasons for this approach. First, there was no evidence that the types of projects or issues that LAD was grappling with required some of the newer and experimental techniques to ensure effective public involvement. Second, one can't simply plunge in to a basically conservation organization such as the Corps with unheard of techniques that would demand a radical change in the way of making decisions. Third, many of the newer techniques applied more to collaborative problem solving over a relatively compressed period of time than to Corps planning efforts that typically spanned a period of years. Finally, experimentation with some of the most radically different techniques could run the risk of emphasizing process over issue discussion and resolution.

[4] *Effective Citizen Participation in Transportation Planning*, U.S. Department of Transportation, Federal Highway Administration, 1976.

While by the end of the 1980s LAD had developed and was implementing a standard public involvement program format applicable to most studies and projects, it is important to view that format as one that evolved—and is still evolving. One of the most stimulating and frustrating challenges in public involvement is that no matter how well one charts a course, the public dictates adaptation. Given that caveat, let's look at LAD's format.

Informing the Public. Stimulating the involvement of potentially affected and interested agencies, organizations, and individuals in a project became an important LAD goal. As a result, LAD public information efforts have evolved to achieve four objectives:

1. Prepare, use, and maintain a comprehensive mailing list for each project.
2. Announce and invite people to participate in public involvement events such as public meetings and workshops.
3. Prepare people to participate.
4. Keep people informed on project progress.

LAD decided that the best way to convey project information to the public was through the first-class mailing of information to everyone on a comprehensive project-specific mailing list. While LAD also uses the print media (mainly through news releases, but rarely with paid advertisements), direct mail has proven much more effective. The main reason is that, if the mailing list is truly comprehensive, direct mail ensures that the targeted publics will receive the information. The media, especially in the major metropolitan areas that are the focus of most of LAD's activity, are unreliable communicators of project information. LAD is rarely a news maker in the reporter's eye. And paid advertisements become buried amid consumer-oriented commercial advertisements in thick newspapers.

Until the late 1970s, public notices announcing public involvement events did not compete with other direct mailings stimulating public attention. A typical public notice consisted of an official assembly of paragraphs on LAD letterhead. LAD initially changed the format to a more attention-grabbing flyer, with simple graphics, that presented basic information on the public involvement event, the project, and the issues to be addressed.

By the late 1980s, the flyer had evolved into a combination flyer/project bulletin because of public demand. People argued that it was unfair to expect them to contribute meaningfully in project formulation and evaluation if they had to wait until the public involvement event to hear about the project and all the issues. While the full, highly technical, project documents were accessible for public review in local government offices and libraries, only the most committed publics sought them out.

The combination flyer/project bulletin seems to have satisfied the public demand. Printed on 11-by-17-inch colored cardstock and folded and stapled to produce an 8-1/2-by-11-inch self-mailer (address on the back cover), the bulletin has ranged in size from 4 to 16 pages. The cover presents key information on the public involvement event. The inside pages summarize, in lay language, the project documents to be addressed—interlaced with charts, maps, and other appropriate graphics. On its larger projects, LAD has produced newsletters to keep people up-to-date on project progress. Generally, however, LAD has used its summary of public involvement meetings—feeding back information to the public—to keep people informed.

Throughout the 1980s, technology facilitated the speedy transition of public information materials in LAD from manual pasteup to computer desktop publishing. Today, sophisticated word-processing, graphic, and page-layout computer software and laser printers permit the production of attractive and professional materials at a low cost.

Obtaining Public Input. LAD mainly uses informal public workshops and formal public meetings as the vehicles for public involvement. At a minimum, the opportunities include one or more public workshops at the beginning of each project study or design phase and at least one public meeting to hear public comments on the District Engineer's preliminary recommendations.[5] LAD provides additional workshop opportunities on large, complex, and potentially controversial projects.

LAD adapted a workshop format from one pioneered by Interaction Associates in the 1970s.[6] An independent professional facilitator normally moderates the workshop, which begins with a general session for introductions and project presentations and then moves to professionally facilitated and recorded small group discussions. Recording is on an easel pad in front of all participants. The workshop concludes with all participants reconvening in a general session to hear small group reports.

The workshop format evolved throughout the 1980s. Initially, LAD officials chaired the sessions, calling on the professional facilitators only for the small group discussions. Now the chief professional facilitator moderates the entire workshop, reinforcing his or her role as an independent professional charged with ensuring that everyone has the full opportunity to contribute. Another change has been in Corps staff participation in the small group discussions. While the public involvement contractor had always seen the staff roles as listening, answering questions, and correcting statements of fact made by participants, staff initially found those roles too restrictive. Instead, Corps representatives opted to debate in an attempt to defend their conclusions. These debate-oriented interventions occasionally turned into "shouting matches" that resulted in public

[5] The number of sessions depends on the size of the project area.
[6] Michael Doyle and David Strauss, *The New Interaction Method: How to Make Meetings Work*, New York, 1976.

perceptions that the Corps was promoting one rather objectively analyzing all project alternatives. By the late 1980s, Corps staff had come to accept and feel more comfortable with listening, answering questions, and correcting statements of fact.

Despite efforts to experiment with the formal public meeting format, LAD has not changed it. Since the District now limits the formal public meeting to receiving public comments on the District Engineer's preliminary recommendations, the District Engineer believes that he must preside and he does. Normally, the District Engineer summarizes the project, what he intends to recommend and why—and then opens the meeting up to time-limited (usually three minutes) comments that a court reporter records verbatim.

An interesting dynamic in the use of public workshops initially and public meetings later to obtain public input has been different perceptions as to what constitutes public involvement in LAD—depending on who sits in the District Engineer and Public Affairs Officer (PAO) chairs. While LAD's planning staff has been totally responsible for conducting public workshops with virtually no participation from the District Engineer and the PAO, as late as 1985, the public affairs officer controlled the public meeting process. The comment from a PAO to the planning staff illustrates the point: "You do public involvement. We do public meetings." By 1990, however, the Planning Division had assumed control of arranging for and designing public meetings, as well.

Feeding Back Information to the Public. Following each series of public meetings or workshops, LAD now prepares and distributes a "response summary" of the sessions to feed back to people the effects of their participation. The response summary evolved throughout the 1980s. Initially, it was simply a summary of public comments organized by issue category. The main value was that participants would have evidence that LAD had heard them.

By the middle of the decade, "response" had become an important addition, giving LAD the opportunity to answer questions its staff could not fully answer at the workshop or meeting and to indicate how public comments would be treated in the project or study.

Because LAD asks participants to suggest corrections or additions if they feel that the summary is incomplete or incorrect, the response summary has become a useful record of public comments to guide planners and decision makers.

Changing the Standard Format. Occasionally, the nature of a project or the public issues has dictated additions or modifications to the public involvement format just described. For example, LAD helped establish and worked with a citizens advisory committee on one project (discussed in more detail later). At times, LAD used in-depth interviewing of key community leaders to learn how they felt about project alternatives.

And it produced ten-minute videos on two of its largest projects to try to get larger public exposure in highly competitive urban media markets.

Involving the PAO. The first Corps public involvement regulation required that: "All public participation programs for planning activities will be developed, conducted, and evaluated jointly by planning and PAO personnel under the overall direction and management of planning."[7] The current applicable Corps regulation changes the relationship to say that the PAO ". . . particularly in contacts with the media . . . should be a participant . . . ."[8]

From the beginning of LAD's public involvement effort to the current day, the PAO's participation has been peripheral—mainly because of other district demands on a small PAO staff. By 1990, the PAO's participation had evolved to encompass a review of project public information materials and the distribution of news releases drafted by the planning staff.

Applying Public Involvement Skills to Other LAD Functions

As the 1980s progressed, LAD managers came to see that other district functions could benefit from the perspective and skills brought by the independent public involvement contractors.

The most notable ongoing effort has been LAD's use of the public involvement contractors to prepare project technical documents—especially reconnaissance and feasibility reports and general design memoranda. The rationale for this assignment was that the contractor's public-oriented writing skills were better than those of most engineers and planners to produce well organized, logical, and readable documents for review by both technical and non-technical people.

LAD has called on its public involvement contractors to apply their skills and experiences in other areas such as:

- developing and conducting a training course in negotiation skills for LAD organizational managers;
- developing and conducting a training course in public speaking for project managers;
- conducting team-building sessions for LAD professionals;
- analyzing and making recommendations on LAD's relationship with the U.S. Fish and Wildlife Service;
- interviewing local and regional governments on future needs that LAD might support;
- preparing speeches and other information for Congressional briefings;

[7] EC 1165-2-100, 28 May 1971.
[8] EP 1105-2-35, 2 February 1982.

- recording and summarizing the results of In-Progress Reviews; and
- developing and conducting an LAD course, "Planning in the Urban Environment," for Corps employees throughout the country.

ASSESSING PUBLIC INVOLVEMENT'S IMPACT IN THE 1980s

The positive environment for and the institutionalization of public involvement in LAD meant little, of course, unless it achieved the Corps-wide purpose of ensuring ". . . that U.S. Army Corps of Engineers programs are responsive to the needs and concerns of the public."[9]

LAD's public involvement has had two major impacts. First, it has contributed to public acceptance of LAD projects. Second, it has stimulated local agencies to increase their public involvement efforts generally following the LAD approach.

LAD Project Impacts

Between 1978 and 1990, LAD provided the opportunity for citizen contributions to plan formation through about 100 public sessions[10] on 21 projects. Overall, LAD has been able to accommodate the public concerns expressed in these sessions in plan formulation to the extent that the public has not stopped any District Engineer project recommendation. Viewed more positively, public involvement has been directly responsible for LAD's producing more publicly acceptable projects than district professionals would have produced without public input. Two among many examples support this conclusion.

Planning of the massive Santa Ana River Flood Control Project began in 1965, several years before the Corps as a whole began to experiment with public involvement. Congress authorized the project for construction in 1986, and construction began in 1990. From 1978 through 1985, LAD's public involvement in project planning and design consisted of:

- 31 general public workshops, "invitational" workshops, environmental scoping meetings, and formal public meetings;
- 15 public information bulletins on project issues;
- 3 newsletters;
- 2 descriptive project brochures; and
- 1 ten-minute video.

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[9] *Ibid.*

[10] Workshops, task force meetings, advisory committee meetings, environmental scoping meetings, and formal public meetings. These do not include the hundreds of meetings at the staff level with Federal and state resource agencies and many presentations to city councils.

One of the conditions that LAD benefited from in mounting a public involvement effort on the Santa Ana River project was that people accepted that the flooding threat was so severe that major structural improvements were necessary. This helped focus people positively on alternative solutions and their impacts instead of wrangling whether the Corps of Engineers should be doing anything at all.

The public had three major influences through public involvement in shaping the project now under construction. First, public concerns about the project's environmental impacts were instrumental in the incorporation of substantial enhancement and mitigation measures that included the purchase and preservation of about 1,000 acres for open space and the purchase and restoration of a 92-acre marsh at the mouth of the river.

Second, public concerns about alternative project measures originally preferred by LAD led to major modifications in two instances. One was to back away from the proposed concrete channelization of a river tributary to a plan calling for more publicly acceptable riprap channel lining. The other was to raise the existing dam on the river less than initially planned[11] and to obtain the rest of the needed flood capacity by constructing a new publicly acceptable (at the time) dam upstream.

Third, and perhaps most important, growing public opposition to the siting of the new upstream dam after completion of the Phase I General Design Memorandum in 1980 led to an intensive public involvement effort from 1981 through 1983 that produced consensus on relocating the dam farther upstream. The heart of this effort was a series of six professionally facilitated "invitational" workshops open to the general public. The "invitational" feature of the workshops was to ensure a continuity of participation by the same community leaders. Each workshop focused on successively narrowing the sites under consideration, beginning with a full range of potential sites and then eliminating alternatives at each stage according to technical, economic, environmental, and acceptability criteria. When only one alternative remained, the participants enthusiastically embraced it.[12]

When they returned to Santa Barbara's Mission Creek in the early 1980s, LAD managers developed a public involvement strategy in consultation with Santa Barbara officials.[13] They decided that, since Santa Barbarans regularly organize to promote and protect their interests, formation of a citizens advisory committee could be a more effective mechanism than general public workshops for pursuing consensus on a plan. However, LAD did not want to establish a

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[11] Prado, constructed by the Corps in 1941. By the mid-1970s, urbanization had come so close to the existing reservoir that substantial raising of the dam would have required massive residential relocations.

[12] For more information on this public involvement effort, see *How to Win Friends and Get a Dam Built*, by James Ragan, in *Planning, Journal of the American Planning Association*, November 1986, pp. 19-21.

[13] LAD first made a stop in Goleta, a neighboring city to the north, to study and make recommendations on its flooding problems. The public involvement effort associated with this study helped change LAD's image and reestablish its credibility in the community.

committee advising it, since the committee would fall under the web of the Federal Advisory Committee Act of 1972, which required Administration approval. At that time, the Reagan Administration was cautiously reviewing proposed committee charters. If the Administration approved any, it was only after long delays.

The option was for the City of Santa Barbara to create a committee to advise the city council on whether to accept the eventual LAD project recommendation. The council appointed committee members representing the many neighborhoods, commercial areas, and institutions affected by Mission Creek. LAD's public involvement consultant supported the committee in three ways. First, prior to the first meeting, a team of consultants interviewed committee members individually to get a sense of their feelings about the flooding problem, the potential solutions, the issues to be addressed, and their attitudes toward the Corps. Second, the consultant prepared, for the first meeting, a "non-attribution" summary of the interviews and a recommended set of committee by-laws. Third, the consultant facilitated the first committee meeting.

Committee officers then assumed control of committee business. Members met regularly with LAD over more than a year. The result was the publicly acceptable plan mentioned at the beginning of this article.

LAD Effects on Local Agencies

Public involvement has blended in with the "new partnership" with local sponsors created by the Water Resources Development Act of 1986. LAD has made a commitment to local project sponsors to be responsive to their constituents. This blending in, however, is not yet complete. There are still instances where local sponsor constituencies are more narrow than the broader public LAD is trying to reach resulting in a tug of war about the scope of involvement opportunities provided. Since local sponsors now share planning and design costs equally with the Federal Government, they have more leverage than ever before in determining what those opportunities will be.

Some local sponsors that worked with the LAD throughout the decade are now implementing their own public involvement programs based on the LAD model. Orange County, for example, has contracted with one of LAD's public involvement contractors to prepare information materials and conduct a series of public meetings on real estate acquisition activities associated with the Santa Ana River Flood Control Project. The county government had earlier applied the LAD-developed public involvement approach to planning activities in highway development, airport expansion, jail siting, flood control, and land-use planning.

Some LAD employees of the 1980s have moved to other public agencies where they have carried LAD's public involvement message. Dennis Majors, manager of the Santa Ana River Flood Control Project in the early 1980s, is now manager of a large new water supply reservoir project study for the Metropolitan Water District of Southern California. Prior to his joining the agency

in 1988, Metropolitan had a public affairs—but not a public involvement—program. After Majors' arrival, the agency contracted with one of LAD's public involvement contractors to develop and conduct a comprehensive public involvement program supporting the study. And that has led to the implementation of public involvement activities in other Metropolitan programs.

LOOKING TO THE FUTURE

Public involvement has been good to LAD. It has facilitated the incorporation of public needs and concerns leading to publicly acceptable projects. It has contributed to improving the Corps' public image, especially among the environmental publics. In the 1970s, many people attended public meetings ready to fight LAD because they assumed that it was an agency interested only in building massive concrete public works projects without regard for other public values. By the mid-1980s, the same people were applauding, although still cautiously, LAD's sensitivity and willingness to listen to them. While LAD had not become the champion and "darling" of people and organizations with conservation and preservation values, its image was consistently higher than that of other public works agencies at all levels of government.

Public involvement has also helped make LAD professionals better and more confident communicators with the public. In the late 1970s, many project managers were, at best, reluctant spokespersons. Their job was planning and design. Ten years later, they had come to embrace the importance of interacting with the public in getting their job done.

These substantial benefits suggest that public involvement will remain an integral LAD function. We do not forecast major changes, mainly because the current effort is working, and local sponsors are unlikely to want to experiment with the unknown. However, we do expect public involvement's evolution to continue. Experience alone, when applied, will contribute to greater effectiveness—avoiding or modifying approaches that went sour, and adapting successful techniques to specific circumstances. We expect LAD to continue to use public involvement contractors because of limited professional staff, high staff turnover, the special skills that the contractors have, and the success that LAD has had with most of them.

We also expect LAD organizational responsibility for public involvement to shift from the Planning Division to the Deputy District Engineer for Project Management—starting at the feasibility stage of a study. The individual project manager, by providing the managerial continuity for a project through completion and delivery to the local sponsor, is the logical person to ensure the same continuity in dealing with the public.

The volume of public involvement work is more speculative. LAD's civil works cupboard of the 1980s was stocked with large, complex projects requiring substantial interaction with the public. While the cupboard is far from bare, most of those large projects have graduated from the stages that required intensive public involvement. Smaller projects will probably stock the 1990s

cupboard. Public involvement will still be a part of their development, but the effort will be commensurate with their size.

Chapter 7

AN ANALYSIS OF SIX PUBLIC INVOLVEMENT CASE STUDIES[1]

by
Stuart Langton, Ph.D.

This study builds upon the interest of the U.S. Army Corps of Engineers (USACE) in increasing knowledge about citizen participation. In requesting the study, the Institute of Water Resources of the Corps acknowledged, "We know little about the impact of public involvement programs. There is a need to further refine our ability to apply social analysis strategies in public involvement programs and to use public involvement to enhance efforts at applying social analysis to water resources decision making."

To address this need the Corps requested that an analysis be made of six cases dealing with planning and regulatory decision making concerning water resource issues. Ideally, it was hoped that the six cases would 1) be projects that had been undertaken by the Corps or another Federal agency, 2) had been previously evaluated by an independent third party, and 3) involve three planning and three regulatory projects.

Unfortunately, there were only four cases which met all of these criteria. These include two regulatory cases involving efforts by the Corps to develop general permits to regulate filling and diking of wetlands at Sanibel Island, Florida, and in Southeast Florida. The first planning case was an effort by the Corps to develop an urban study plan for the Metropolitan Wheeling, West Virginia area and the second was an effort to develop plans to reduce flooding in San Pedro Creek in the California River Basin. In addition to these cases, two others were selected because of their general interest, the quality of the external evaluation, and the presence of social and political factors that are commonly present in water resource planning. One of these cases was the effort by the state of Florida to designate the Florida Keys as an area of Critical State Concern. While this case dealt with land use regulations, water resource issues were major considerations in the case. The other case involves North Carolina's attempt to develop a statewide water quality plan to comply with section 208 of the Federal Water Pollution Control Act of 1972. Because of the prominence of statewide water quality planning and planning to protect coastal areas throughout the nation it was determined that these were particularly relevant and exemplary programs in the field of water resource planning.

All the cases involved water resource issues that took place during the 1970s. Each of these cases involved a substantial commitment by one or several government agencies to conduct public involvement programs, and each case was evaluated by an external resource personnel.

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[1] This chapter is a summary of the conclusions reached as part of a much longer report prepared by the author for the Corps.

The outcomes of these cases differed significantly. The Florida Keys and Sanibel cases led to changes in development practices; whereas, because of continuing disagreement, no changes occurred in the Southeast Florida case. While consensus was reached on a plan of action at San Pedro Creek, no action resulted because the city felt it couldn't afford to pay for it. And the jury is still out regarding whether the plans produced in the Metropolitan Wheeling and North Carolina 208 programs have any real practical significance.

The major purpose in reviewing these cases has been to identify significant factors that may have contributed to the success or failure of each project.

GENERAL OBSERVATIONS

Before suggesting a number of findings that may be inferred from these six cases, there are several general observations that are appropriate to make, The first is that, with the exception of the Florida Keys case, there was not widespread or intense interest or involvement among the general public in these cases. This observation is consistent with an earlier study of water resource cases (Ragan, 1975) which found that general public interest in water resource planning issues is not great unless focused on local, controversial, short-lived issues.

A second and related observation is that the level of interest and involvement tended to decrease in most of these areas. An exception to this pattern was an apparent effort by environmentalists in the Southeast Florida case to "pack the house" at the last workshop. Another exception was the attendance by 1,500 people at the Florida Keys public hearing chaired by the Governor. In each of these instances, it should be observed the increase in citizen involvement resulted from organizing efforts by interest groups, rather than by government agencies sponsoring the project.

Third, the patterns and outcomes of each of the six cases reviewed in this study are highly diverse. This diversity can be seen in the table of estimates of critical items which follows on the next page. The table was developed as a work sheet to estimate similarities and differences in each case concerning three general areas. The first set of items involves conditions in regard to the setting and the intensity of the problem being addressed in the public involvement program. The second set of items consists of a series of practices or conditions related to the participation process. The third set of items reflects six different kinds of outcomes that might have been achieved in the project.

Table 1
ESTIMATES OF CRITICAL ITEMS

	FLORIDA KEYS	SANIBEL ISLAND	S.E. FLORIDA	METRO WHEELING	SAN PEDRO CREEK	N. CAROLINA
SETTING						
Intensity of interest	High	Moderate	Mod. to High	Low to Mod.	Low to Mod.	Low to Mod.
Intensity of Conflict	High	Low	High	Low	Low	Low
Intensity of Problem	High	Moderate	High	Mod. to High	Mod. to High	Low to High
PARTICIPATION						
Integration/ Management of Process	Low	High	High	High	High	High
Public Information	Mod/High	Moderate	Moderate	High	Moderate	High
Public Input	Moderate	Mod/High	Moderate	Low/Mod	Low/Mod	Low/Mod
Interagency Coordination	Low/Mod	Moderate	Low/Med	High	High	High
Interaction/Dialogue	Low	High	Moderate	Low/Mod	Moderate	Mod/High
Utilization of Input	Moderate	High	Low	Moderate	Mod/High	High
Adaptability of Process	High	High	Low	Low	Moderate	Low
Commitment of Leadership	Moderate	High	High	High	Moderate	Mod/High
Diversity of Interests	High	High	Low/Mod	Low/Mod	Moderate	Low/Mod
OUTCOMES						
Attitudes towards Agency	Unknown	High	Unknown	Mod/High	Mod/High	High
Attitudes towards Process	Unknown	High	Low	Mod/High	Mod/High	High
Attitudes towards Decision	Split	High	Low	Mod/High	Mod/High	High
Level of Consensus	Low	High	Low	Mod/High	High	Mod/Hi
Final Product	Achieved	Achieved	Not Ach.	Achieved	Achieved	Achieved
Consequent Action	Achieved	Achieved	Not Ach.	Unknown	Not Ach.	Unknown

What is "Successful" Public Involvement?

These cases show no clear and simple formula for successful public involvement. One obvious reason for this is that the success of a participation program may be judged by different criteria. This point has been established by Mazmanian and Nienaber (1979) who found that environmentalists may have high evaluations of a Corps of Engineers participation program, while having negative attitudes in regard to a final decision reached through the participation process. What this suggests is that estimates of success of public involvement programming should always be modified by asking: success according to whom and according to what outcomes?

The only case among the six which seems to have been rated highly according to almost all of the outcome items by all effected interests was the Sanibel Island General Permit process. Even here, however, it is difficult to ascertain without further follow-up study that the intended consequent action was achieved to the satisfaction of all concerned interests. Further, one should be cautious about comparing success because of the degree of difficulty involved in each case. For example, is the success of the Florida Keys case greater than that of Sanibel Island because

the level of intensity and conflict was so much greater at the outset? The answer to this question would, in part, be based on the relative priority one would give to achieving a final product that led to regulatory action and the relative value placed on consensus and attitudes toward the agency, process, and decision. Indeed, this suggests that success is a very relative matter that needs to be understood in the context of each individual case.

Fourth, the evaluative data available in each case is limited. However, in conducting this study three evaluative models were found to provide different kinds of information that were more helpful than others in understanding different types of items. For example, the post-event evaluation of the Florida Keys case based upon review of materials and interviews with key actors revealed the greatest amount of information about the setting of the case and ongoing dynamics among all concerned. The exchange model utilized in the North Carolina 208 project provided the most extensive information about participation items. The goal identification model used in the Sanibel case, in which various interest groups identified their own goals and success was measured for each set of goals, provided the most interesting assessment of outcomes because it considered differences in criteria among groups with a stake in the process. Among these models, the North Carolina 208 evaluation model was the most refined. The goal identification evaluation model used in the Sanibel Island and Southeast Florida case was the least well refined since it was being tested for the first time.

These differences in evaluation models suggest that there is not a best evaluation model for public involvement programs, but rather that some models are better than others in helping to describe and interpret various elements of public participation processes. Accordingly, one or several of these models could be appropriate in conducting evaluation activities, and the most thorough and interesting evaluation model would be an eclectic approach drawing upon all three models.

Fifth, none of the six cases involved representatives of interest groups with a stake in the project in the planning of the participation processes. Each of the cases was an example of participation programs designed by planners without citizen input. A slight exception to this case was the Florida Keys case in which competing interest groups lobbied for a public hearing. That hearing was the best attended single event among all of the cases. The relatively low level of participation in most of the cases raises the question as to whether or not the level of public participation may be increased if representatives of effected groups share in the planning and promotion of the process.

Sixth, there was little adaptation or change in the public participation programs designed for each project. None of the projects, with the exception of the Florida Keys case, was significantly modified; and the Keys design was modified in three instances as a result of legal threat, disagreement among government officials, and strong lobbying efforts. The Metropolitan Wheeling project did not adapt to the evaluators suggestions to increase involvement activities or involve more leaders of environmental groups. In the North Carolina 208 case, the evaluative

data following Stage I did not result in efforts to involve more environmentalists. In the Southeast Florida case, the Corps was not willing to add additional workshops in the face of late challenges by environmentalists. One can only speculate if changes had been made to address these issues if the outcomes might have differed in these cases.

MAJOR FINDINGS

In reviewing these six cases, a number of findings emerge that may be instructive to other public participation programs in the future. These findings include both conditions and actions that seem to foster or inhibit participation, as well as findings concerning the relationship between participation and other project outcomes.

- **Consensus Achieved Through Participation Does Not Necessarily Lead to Acceptance of a Policy or Implementation of a Plan.** This principle is demonstrated in the San Pedro Creek project in which an accepted plan which was supported by all parties was not implemented for economic reasons. In the Florida Keys case the converse of this principle was demonstrated: Implementation of a policy or plan may be achieved without consensus. In the Florida Keys case, an Area of Critical State Concern designation was made at the close of the participatory process despite strong opposition from developers.

  This does not mean, however, that consensus achieved through participation may not be important in policy making or planning. For example, in the Sanibel Island case consensus was an extremely important variable in establishing the general permit, and, in the Southeast Florida case the lack of consensus led the agency to reject the general permit. Therefore, while consensus achieved through participation may be a very important factor in adopting a policy or plan, it should not be assumed that this will necessarily be so in every case.

- **A Pseudo Consensus May Be Achieved in a Participatory Process by Excluding Key Interests.** This principle was dramatically illustrated in the Southeast Florida case. The absence of environmentalists at the third workshop led to a consensus on a draft of the general permit. However, this consensus was overturned at the fourth workshop which was heavily attended by environmentalists. In a less dramatic fashion this same dynamic seemed to present in the Metropolitan Wheeling and the North Carolina 208 uses. Neither case attracted significant involvement of environmentalists, a key interest constituency. Although environmentalists have not opposed the plans developed in these projects, this may well be because they are numerous and general in nature and not yet perceived to be of sufficient a threat to fight over yet.

- **Controversy Regarding a Policy or Plan Stimulates a Higher Level of Participation.** This certainly was true in the Florida Keys case. It also was true, to an extent, in the Southeast Florida case when disagreement with the proposed general permit plan led to

an increase in participation between the third and fourth workshops. The other cases reviewed in this study were essentially non controversial and the amount of participation in almost all of the activities was comparatively modest.
It is tempting to conclude that quantitative increases in participation sparked by controversy are not accompanied by qualitative increase in citizen input. Although this may be true for many who participate to demonstrate support for a position, it is not necessarily true that such show of force is devoid of more thoughtful input by some of these aroused citizens. Certainly in the Florida Keys case, the growth of citizen participation was accompanied by much thoughtful testimony and the preparation, at one point, of an alternative report. Therefore, it seems just as fair to offer the hypothesis that a rise in the amount of citizen participation over controversy may be accompanied by a corresponding increase in well reasoned and well documented arguments.

- **Public Involvement Input May Significantly Shape or Alter a Government Agency Policy or Plan.** Although this does not always happen, it appears that such was the case in all six projects reviewed in this study. This was very much the case in the Sanibel Island, Florida Keys, Southeast Florida, and North Carolina 208 cases. To a slightly lesser extent this was true in the San Pedro Creek case, while it was true to a limited extent in the Metropolitan Wheeling Urban Study.

  In several of these cases (particularly Sanibel Island, the North Carolina 208 project, San Pedro Creek, and the Florida Keys), professional planners reported that public input was helpful in altering technical or design decisions. This finding is important in that it demonstrates that public involvement may contribute to the "perfectibility" of a decision on rational or technical grounds which are critical considerations for professional planners. In this sense, public involvement moves beyond a political process concerned with consensus formation by becoming a mechanism for mutual technical problem solving for those citizens who are so inclined and for those planners who are capable of benefiting from this kind of citizen interest.

- **Citizen Influence Increases with Greater Opportunity for Interaction and Dialogue with Professional Planners.** This was one of the major findings of the North Carolina 208 study. It was also demonstrated in the Sanibel Island and Southeast Florida projects. One of the important practical implications of this finding is that open informal public involvement procedures, such as workshops, task forces, and advisory committees, provide the best settings for informing citizens and obtaining information and suggestions from them that will be most beneficial to professional planners.

  Another important implication of this finding is that the utility of such procedures as public hearings and public surveys is limited in regard to generating data and ideas that may significantly influence professional planners.

- **Outreach Efforts May Be Necessary to Attract the Participation of Environmentalists.** The participation of environmental organizations is not guaranteed in every case concerning environmental issues. In practical terms, no agency should make assumptions about the participation of representatives of environmental groups. A public participation program dealing with environmental issues does not guarantee the interest and involvement of representatives of environmental groups. This fact is evident in the lack of participants among environmental group representatives in the Metropolitan Wheeling and the North Carolina 208 cases, and the erratic level of participation in the Southeast Florida case. The success of the Sanibel Island case illustrates the value of an agency making affirmative efforts to contact and encourage the participation of environmentalists. The dangers of not making such an effort is that without involving environmentalists (or another crucial interest group) a pseudo consensus may be achieved that may be torn asunder at a later time.

- **Interagency Communication and Cooperation May Play an Influential Role in a Participatory Process.** Among the six cases of this study, there have been a number of examples of the importance of interagency communication and cooperation. The Metropolitan Wheeling Urban study, the North Carolina 208 study, and the San Pedro Creek case are all examples of a high level of interaction among effected agencies. One of the benefits of cooperation in all three of these cases is that a relatively strong consensus seems to have emerged among the cooperating agencies. Another benefit which was demonstrated in the Metropolitan Wheeling case is that an other agency can provide a direct service in assisting the agency sponsoring the public improvement program as the Bel-O-Mar Regional Planning Agency did with the Corps. A variation of this theme is seen in the North Carolina 208 study in which representatives of a number of agencies conducted a technical study and managed participatory activities through the Agricultural Task Force. A third benefit in interagency communication and cooperation is that agency policy makers and concerned citizens will be aware of plans of other agencies that may influence alternatives under consideration and require trade-offs in decision making. This was evident in the San Pedro Creek case in which the by-pass plan was not pursued when citizens and planners were informed of the road relocation plans of the California Transportation Department.

  The corollary to this principle is that: the lack of inter-agency communication and cooperation may undermine a public participation process. This principle was illustrated quite vividly in the Southeast Florida case when the Environmental Protection Agency took a position in opposition to issuing a general permit by requesting a public hearing and the preparation of an environmental impact statement. In even more dramatic fashion, the Florida Keys case illustrated this point in the conflict between the Commissioners of Monroe County and the South Florida Regional Planning Commission. In that instance lack of cooperation grew into open conflict and the creation of competing citizen groups

which were undermined. The result was that the public participation process at this stage of the case fell apart.

- **Public Involvement is More Beneficial Than Public Information in Perfecting Decisions and in Generating Consensus.** The two major elements of a public participation process involve public information and public involvement opportunities. A critical issue in public participation planning is to strike the most appropriate balance between these two activities. The danger that is present in some cases is that public information efforts will be confused as constituting an adequate public participation effort when there are not sufficient opportunities for public involvement. This seems to have been the case in the Metropolitan Wheeling Urban Study in which an extensive public information campaign crowded out the development of public involvement procedures. The result was a comparatively limited and weak public involvement effort with only four recommendations being integrated into the project plan.

  In contrast, the North Carolina 208 project seems to have had more balance among the two activities, and this resulted in the integration of 50 recommendations among 76 developed through the public involvement process. Further, the high level of public involvement activity in the Sanibel Island case took place with limited public information activities and with a very successful outcome. These experiences suggest that when seeking a balance between public information and public involvement that public involvement activities have greater potential for providing benefits to the agency.

CONCLUSION

The six water resource cases reviewed in this study offer a number of lessons for government agencies that would conduct public participation programs. In concluding this study, a number of these lessons are identified as suggested principles that might be constructively employed in other situations. In identifying these guidelines, items have been selected which appear to contribute to two general participation goals: the development of workable levels of consensus, and the perfecting of policy and planning alternatives through the introduction and utilization of empirical data, logical arguments, and normative preferences from the public.

This clarification does not intend to ignore the fact that there are other general purposes that government sponsored public participation programs might serve, such as public education, strengthening personal efficacy, and developing public appreciation for an agency. These kinds of goals are not considered in offering the guidelines for two reasons: (1) the data available through the evaluations of the six cases in regard to these issues are limited and inconclusive, and (2) these are judged to be secondary goals that are not directly related to the basic function of public planning and policy making which is ideally to achieve the most rational and supportable decision which is in the public interest.

The principles which follow are of two types. The first set includes procedures and practices which contributed to the development of consensus or the improvement of decision making in several of the cases. The second set of principles includes suggested approaches that would be responsive to some common problems and needs that arose among the cases.

Among the principles which contributed to successful outcomes in one, or several, of these cases are the following:

1. The development of procedures for interagency communication and cooperation.

2. A clear and visible interest and commitment from senior agency officials.

3. The presence and active involvement of professional planners in meetings with citizens.

4. Efforts to identify and encourage the involvement of representatives of various interest constituencies with a stake in project decisions.

5. The use of non-agency personnel to help facilitate the public participation process.

6. Sufficient opportunities for interaction among representatives of competing interest groups.

7. Sufficient opportunities for dialogue and interaction among project planners and representatives of various interest groups.

8. Formal procedures for recording and reviewing information provided by citizens.

In addition to these principles, the following can be suggested as a result of problems encountered in one or several of the cases:

1. Involving representatives of appropriate interest group constituencies in planning a developing public participation activities as a way of increasing the extent of public involvement.

2. Placing greater emphasis on process evaluation and developing procedures for reviewing and utilizing evaluative data at key points during a project.

3. Remaining somewhat flexible and adaptive in developing public participation activities. This suggests that project staff anticipate altering project plans, as necessary, to respond to evaluative feedback.

4. Developing formal procedures to continuously inform staff of new input from interested citizens throughout the history of a project.

5. Establishing more realistic time frames for participation activities. This suggests flexibility in extending project deadlines to sufficiently address issues of disconsensus among the public.

6. Clearly informing the public of public participation procedures and the conditions under which they might be altered.

7. Developing procedures for adequately informing citizens who join public participation activities at a later stage of project development.

The identification of these principles is not intended as a comprehensive list of strategies, procedures, and practices which should guide public participation planning among government agencies. It is, rather, an attempt to identify a number of suggestions that are reflective of, and responsive to, the major findings of this study. To be sure, there are many other principles to guide government sponsored public participation programs, based upon a wide variety of other research and reflections of practitioner experience. These suggestions simply seek to confirm and add to an ever expanding body of knowledge concerning how processes of citizen participation may contribute to the public interest.

Chapter 8

PUBLIC INVOLVEMENT RELATED TO HAZARDOUS, TOXIC, AND RADIOACTIVE WASTE PROBLEMS ASSOCIATED WITH THE EXPANSION OF THE WINFIELD LOCKS AND DAMS

by
Stuart Langton, Ph.D.

BACKGROUND

The busiest navigation locks in the United States in terms of number of lockages are the Winfield locks located on the Kanawha River near Charleston, West Virginia. The Winfield Locks and Dam, completed in 1937, are one of a series of three such navigational facilities along the river which allow barges to travel to the Ohio River. Traffic through the Winfield locks has grown dramatically as demand has increased for low-sulfur West Virginia coal which is transported in barges on the river. Between 1985 and 1992 lockages increased from 16,000 to 22,000 annually. As a result of increased use, barges wait in turn for up to 24 hours to pass through the locks which increases cost for producers, the navigation industry, and consumers. Assuring timely barge traffic is important in its environmental implications, since to transport the equivalent of one barge would require 58 trucks and a typical 15 barge tow, it would require 870 truck loads.

The U. S. Army Corps of Engineers (Corps) which operates the Winfield Locks through its Huntington, West Virginia, district office began planning efforts to construct an additional lock in 1982. In 1986, authorization was signed by the President for the Corps to proceed with engineering and design and land acquisition activities to construct an additional 110-foot by 800-foot lock at the Winfield Locks and Dam. The Corps' schedule for completing construction of the project was 1996, and the estimated cost was $210 million, half of it provided by the Inland Waterways Trust Fund.

In 1987, the Corps initiated efforts to acquire 44 tracts of land totaling 338 acres in order to build the new lock. Among the properties to be acquired was a 22-acre property owned by A.C.F. Industries (ACF) used as a rail car service and repair facility. Between 1956 and 1986, ACF maintained and serviced a fleet of up to 47,000 rail cars used for solid and liquid chemicals transport. In 1986, ACF discontinued operations at the site.

On 30 November 1988, the Corps initiated environmental investigations to determine if hazardous and toxic wastes were present on the ACF property. On 1 December, the Corps met with company officials to discuss environmental testing. On 5 December, the West Virginia Department of Natural Resources (WVDNR), responding to a public complaint, conducted an investigation of the site. On 14 December, an initial site reconnaissance of the property was

conducted by the Corps. However, follow-up scheduled environmental testing was not conducted because ACF would not allow additional entry or sampling on the property.

In February 1989, the WVDNR conducted an inspection of the site and observed various drums of waste material and areas of the property devoid of vegetation. ACF agreed to sample the drums and designated soil areas. In May, under order from WVDNR, ACF had a study undertaken by Allstates Environmental Services, Inc. which defined areas of soil contamination and identified a number of chemical contaminants. In June, ACF informed the Corps they wanted to clean up the site at their own expense. In October 1989, WVDNR ordered ACF to clean up areas identified as contaminated. On 6 December 1989, WVDNR approved a site work plan to be undertaken by Allstates for ACF. Two days later, the Corps filed a Declaration of Taking in U. S. District Court.

By 11 April 1990, Allstates completed their clean-up work for ACF. On 1 May, the Corps took possession of the property, and on 7 May the WVDNR issued an order stating that ACF had satisfied the requirements of its order of the previous October.

Following a storm later in May 1990, representatives of the Huntington, West Virginia, District Office of the Corps observed discolored water seeping through the walls of an excavation pit that had been dug for ACF by Allstates Environmental Services. The Corps proceeded to conduct tests on the site as well as from the water wells of Eleanor, West Virginia, an adjacent community of 2,500. While no contamination was found in the town wells, seepage from the pit walls had high levels of contamination. The Corps proceeded to inform ACF that they believed the company was still responsible for remaining contamination of the site. On 14 August 1990, ACF responded that the clean-up of the site was completed as required by the WVDNR and the company would not return to conduct additional testing or clean-up work.

TRIGGERING EVENTS

On 17 August 1990, an equipment operator for a Corps contractor became ill from fumes from the ground while digging a utility trench to the Operations Shop Building. The Corps issued an order to cease work and initiated additional testing for contamination. The Nashville District Office of the Corps, the office within the Corps' Ohio River Division designated for specialization in dealing with Hazardous, Toxic, and Radioactive Waste (HTRW), was called in to help. In September, personnel from the Huntington and Nashville district Corps offices and Nashville's contractor, TCT-St. Louis, began testing the site using soil-gas surveys, soil and water sampling, and groundwater monitoring wells.

In December 1990, at a meeting with regional Environmental Protection Agency (EPA) officials, it was determined that the Corps, as an agency of the Department of Defense rather than EPA, would be responsible for site clean-up because the ACF site had become a Federal facility but was not designated on the National Priorities List (NPL). Consequently, it was determined that

Environmental Response, Compensation, Liability Act of 1980 (CERCLA) and pursuant to the National Contingency Plan (NCP) regulations (Code of Federal Regulations, 40, Part 300, July 1, 1991).

Throughout 1991, the Corps continued to conduct tests on the ACF site. Successive tests on different sections of the property indicated widespread contamination. By late November, a total site study led to the conclusion that there were 61,000 cubic yards of contaminated soil at the property, including 130 types of organic compounds and 10 forms of dioxins, furans, and metals- "a witch's brew of chemicals," as one West Virginia regulatory official commented. To illustrate the severity and complexity of contamination on the site, one area had in excess of 19,000 parts per billion of dioxin, whereas the acceptable EPA level is 2 parts per billion. Also, there were 140 types of contaminants identified, whereas most super-fund clean-up sites have only two or three.

As the severity of contamination at the ACF site became increasingly clear during 1991, the Corps increased attention to ways of cleaning up the site and informing and involving the public. The protocol in regard to these two needs was framed by Federal regulations established by CERCLA. The process required under CERCLA included the following: 1) Maintaining an Administrative Record, copies of which must be made available to the public; 2) Preparation of an Engineering Evaluation/Cost Analysis (EE/CA) report that analyzed the nature of contamination, identified alternatives, and proposed preferred actions; 3) Public notice regarding the EE/CA and a 30-day period for written comments from the public; and 4) The preparation of an "Action Memorandum" including a description of proposed actions and a summary of public comments and responses.

In late November 1991, the senior public affairs officer of the Huntington District completed a proposed public affairs plan to meet the public involvement requirements of CERCLA. Among the elements of the plan was a proposal to keep all concerned parties informed of "major findings, activities, and decisions in an effective way." In addition, the plan recommended to, "provide local residents, concerned interest groups, local and state officials, and congressional delegation with the opportunity to comment on remedial action alternatives before final selection of a remedy." The intent of this proposal was to obtain public involvement prior to publishing the EE/CA report.

CRITICAL DECISIONS AND THEIR IMPACT

As events transpired, the Corps proceeded to prepare the EE/CA without preliminary public comment on remedial action alternatives. On 5 May 1992, the Huntington District released the EE/CA prepared by the Nashville District and announced it would cost approximately $100 million to clean up the contaminated soil. The report identified eight clean-up alternatives: 1) Physical/Chemical Solidification (mixing and forming soil into a solid form that can be disposed in a landfill); 2) off-site disposal in a secure Class I landfill; 3) thermal treatment (incinerating)

soil on-site; 4) washing soil on-site; 5) vacuum extraction of gas from dry wells on-site; 6) bioremediation (using microbes that multiply and degrade contamination); 7) off-site incineration; and 8) on-site disposal. The report proposed "on-site thermal treatment" among the alternatives. "This alternative," the report noted in summary, "can be instituted within a reasonable time frame to avoid delays in the lock construction schedule."

Public reaction to the Corps' proposal to incinerate contaminated waste on the former ACF site was immediate and strong opposition. Opposition to incineration had previously been suggested in informal conversations between public affairs staff and community leaders. As one environmental leader offered, "we will accept incineration when donkeys fly." In the weeks following publication of the EE/CA, there was widespread concern among citizens and elected officials that the 30 day comment period for public comments on the EE/CA was too short. Citizens signed petitions to extend the date and many wrote letters to the Huntington District office.

The mayor of Eleanor asked the Corps to send a representative to a meeting at the Town Hall to discuss the EE/CA on 22 May. Senior officials at the Huntington District advised the District Commander not to attend, and instead to send a representative. The rationale for this advice was that the District Commander should wait and make a public presentation at a formal meeting organized by the Corps.

The 22 May meeting was a severe public relations setback for the Corps. As it turned out, 150 people from Eleanor and surrounding communities heard about the meeting and showed up. A *Charleston Daily Mail* article reporting the meeting was captioned, "Army Corps Credibility Called a Problem." *The Charleston Gazette* characterized the meeting with a headline, "Residents Criticize Incineration Project." The Corps representative was quoted as saying, "At the very least large amounts of carbon dioxide will be admitted into the atmosphere....But we know of no other way to get rid of it." Among the points made by citizens at this meeting was a lack of trust in an agency that would purchase a piece of property without knowledge of the extent of contamination, a request to extend the period for public written comment beyond 30 days, and proposals for the Corps to explore other methods of disposing of contaminants.

Prior to the 22 May meeting with the Mayor of Eleanor, the Corps had made plans to convene a major public meeting although this was not required by CERCLA. The meeting was scheduled for 11 June, at the Eleanor Middle School. As the Corps planned for the meeting, it also extended the period for public comment on its EE/CA until 5 July. The 11 June meeting was attended by over 200 people. The District Engineer made a presentation with the use of slides. The public then commented and, for the most part, comments were critical of the Corps and in opposition to the proposed incineration proposal. The meeting lasted until 12:30 a.m. as the District Engineer was particularly concerned that everyone present have an opportunity to speak.

CHANGING SITUATION

On the day of the 11 June 1992, public meeting, the local congressman from the district, Bob Wise, called the District Engineer (DE) to express concern about the need for more and better public involvement in regard to plans to clean-up the ACF site. In the conversation, the DE, Colonel James Van Epps, and the congressman agreed that it would be beneficial to create a citizens advisory committee and to seek $50,000 to provide technical assistance for such a group as is the case in the EPA Technical Assistance Grant (TAG) program at Super-fund sites.

Several days later, on 16 June, Congressman Wise met with the Assistant Secretary of the Army for Civil Works, Nancy Dorn, and several Corps officials in Washington. He expressed concern that the Corps was rushing the process of dealing with contamination at the ACF site without public involvement. He proposed the establishment of a citizens advisory committee and asked the Corps to provide a $50,000 grant to provide technical assistance. He then proposed that the Corps and the community might be best served by "bifurcating" the removal and remedial stages of clean-up efforts. He suggested that the Corps could excavate and store the contaminated soil so as to remain on schedule in their work on the new lock. This would also provide more time to evaluate remedial alternatives in cooperation with a citizens advisory group. Secretary Dorn said the Corps was open to considering such an alternative if EPA and WVDNR would also agree. Eventually they did.

On 27 June and 1 July 1992, the Corps sponsored two eight-hour public workshops in Eleanor, each attended by approximately 50 people. The format of these informal meetings included the presence of technical experts on various subjects available at tables set up in the town hall for conversations with the public. Among the experts made available was an EPA consultant expert on incineration. At the July 1 workshop, an EPA representative discussed dechlorination as an alternative to incineration for the treatment of dioxin. While several Corps officials concluded the meetings were beneficial in informing the public, newspaper accounts suggested otherwise. One such account had the headline, "Consultant Recommends Burning Dioxin-Contaminated Soil." The article quoted the consultant as saying, "Only incineration will take the dioxin away." The article also included the following quote from a citizen, "This is exactly what we expected from the Corps. There's nobody here to talk about alternatives to burning. All this was set up for was to dispel fears of incineration."

By the 27 June workshop, the West Virginia Citizen Action Group had organized a community group to oppose incineration. The group, called PROTECT (People's Response Organization Tackling Environmental Concerns through Teamwork), had representatives at the 27 June workshop who requested, and were given permission to set up a table.

In early July, the Corps extended its deadline for public comments for another 30 days in response to public concern. Meanwhile, PROTECT attempted to sign-up members in the community. On July 18, Congressman Wise held a meeting with 100 residents to discuss the

situation at the ACF site. One consequence of the meeting was an agreement to ask the Assistant Secretary of the Army to visit the site. A citizen committee was also organized to evaluate threats to the water supply in Eleanor, since the possible contamination of the water supply was of growing concern among the public.

By early August 1992, the Corps arranged to provide alternative water supply for Eleanor. On 3 August, Assistant Secretary of the Army Nancy Dorn visited Eleanor. Secretary Dorn held a public meeting and press conference and announced the Corps would pay for alternative water sources for Eleanor and conduct further monitoring of water wells in the town. She also announced the Corps would decide on whether to bifurcate the clean-up and disposal process within 60 to 90 days.

NEW DYNAMICS

On 21 September 1992, ACF held a public meeting in Eleanor to present the findings of a study of the site it had commissioned Burlington Industries to undertake. By this time, it had been publicized that the Corps, through the Justice Department, was likely to sue ACF to recover costs for cleaning up the site. The study said the Corps' costs were grossly exaggerated. The amount of contaminated soil they claimed was 8,950, rather than the 61,000 cubic yards, and their cost estimate was $10 million rather than $100 million.

In October 1992, PROTECT sponsored a public meeting in Eleanor. Approximately 50 people attended. Six representatives from the Corps attended, including the newly assigned District Engineer. A speaker discussed the dangers of toxic wastes and dioxins. According to a Corps summary of the meeting, the audience "stated that they did not resent the Corps efforts and trusted the Corps' position to be closer to the truth than ACFs."

By early November 1992, Congressman Wise proposed a structure for a Winfield Lock and Dam Advisory Group including the mayors or their representatives from Eleanor and five other surrounding communities, citizens at large from each of the communities, the County Commissioners, four state delegates, three representatives from PROTECT, four state representatives, two state senators, a representative from local fire departments, and the Putnam County Emergency Service. On November 9, Congressman Wise sent a letter inviting representatives to join what he referred to as an "umbrella organization" and promised to set up an organizational meeting.

In keeping with CERCLA requirements, in September 1992, the Nashville and Huntington Districts of the Corps published an "Action Memorandum," and on 9 December 1992, it was signed. The Memorandum did not propose incineration as had the earlier EE/CA proposal. Instead it recommended the "bifurcation" which included removal and storage of the soil and further studies to "thoroughly examine all available technologies." Public reaction to the Action Memorandum was positive. In a press release, Congressman Wise commented, "I am most

encouraged by the Army Corps' promise to open up a second phase of the clean-up process, to conduct a feasibility study of all methods for final disposal of the hazardous wastes and to allow for additional public involvement in the process."

Following the publication of the Action Memorandum, public unrest regarding the ACF site diminished. The "Umbrella Group" was called together for its first meeting in January 1993. Congressman Wise chaired the initial meeting. Subsequent bi-monthly meetings were chaired by Susan Small of Congressman Wise's Charleston office. The Umbrella Group organized committees to address issues such as citizens' health and safety, emergency response systems, project monitoring, and technology evaluation. Corps representatives attended meetings once a month with the group.

On 24 February 1993, a symposium was held in Huntington, West Virginia, for approximately 100 officials from Federal, state, and local agencies and members of the Umbrella Group. Plans were explained for continuing the necessary construction of the new lock while removing and storing contaminated soil as called for in the Action Memorandum. In planning the symposium, some senior officials of the Huntington office argued against including Umbrella Group representatives. However, when the meeting was discussed with staff from Congressman Wise's office, they inferred the Umbrella Group would be included. After considerable disagreement and discussion within the Corps and among all parties, it was decided to include the umbrella group.

On 15 May 1993, the Huntington District of the Corps sponsored a "Partnering Workshop" at the Eleanor Town Hall "to build cooperative relationships, etc." Among the partners were the West Virginia Department of Environmental Protection, the Umbrella Group, Towing Industries, Town of Eleanor, and others. The agenda for the workshop included developing a name, goals, and mission statement for the partnership. While some Corps officials expressed satisfaction with the meeting, several persons outside of the Corps said it was "a waste of time" and "an attempt to create another group." Representatives of the Umbrella Group declined to sign the Partnering agreement.

In the summer of 1993, the Umbrella Group elected officers, and a local resident became Chairman of the group. In August, Dames and Moore completed a report on the *Preliminary Exposure Scenarios for Potentially Exposed Populations.* On 24 August, the Umbrella Group met with Dames and Moore's representatives and suggested several corrections. Reportedly, the consultant said they would not change the report. A member of the Umbrella Group wrote after the meeting: "Their concern appeared to be in defending their report rather than soliciting input from members of the Umbrella Group....We came to the meeting prepared to discuss our concerns, and left thoroughly disillusioned."

The Umbrella Group intends to continue to work closely with the Corps and its consultants in the future. "We don't want to bond with them, but we want a good working relationship," comments

a member. "I have found them to be accessible and willing to provide information when asked. And, the Colonel and his staff seem to be making a real effort."

An important need of the Umbrella Group is to have independent technical assistance available to them. West Virginia University has provided some assistance through an appropriation sponsored by Senator Robert Byrd. Recently, the state of West Virginia, through the office of the Governor, has made a $25,000 grant to the group. An appropriation for another $100,000 sponsored by Congressman Wise may also be available to the Umbrella Group in the future. "Given the complexity of the issues here," says a group member, "we need a lot of technical assistance. That is the only way we can be real partners with the Corps."

PERSPECTIVE AND OUTCOMES

This case represents one of the most, if not the most, complex and serious Hazardous and Toxic Waste problems that the Corps has had to address. Addressing the problems of the ACF site was an ancillary challenge for the Corps. Its primary and ongoing focus was to construct the new lock at the Winfield Dam. Throughout this case, the Corps provided ongoing and timely communication with navigational interests which provided financial support for the project. The fundamental and recurring issue for the Corps in relation to the project was to maintain its construction schedule.

The problems associated with the ACF site increased over time as the Corps recognized the severity of pollution on the site. As public concern increased, the Corps had to devote more attention to public involvement in relation to the ACF site. Consequently, a navigational construction project became a major hazardous and toxic waste clean-up challenge that would cost half as much as the total construction expenses of the new lock. Further, the public involvement challenges escalated from a supportive public to a public that was fearful and distrustful.

The outcome of this case remains to be seen. An interim solution has been achieved by "bi-furcating" the process. For now, the ACF site will be excavated and the polluted soil will be stored until a final solution is agreed upon for its disposal. The new Winfield lock will be built, which was the original goal of the Corps that has always been supported by the community.

The public involvement challenges of the Corps in dealing with the public and their elected officials will continue for many years to come in regard to disposing of or treating contaminants from the ACF site. It is ironic that the Town of Eleanor, West Virginia, adjacent to the ACF site, is called "the Cleanest Town in West Virginia." This lovely and active community named after Eleanor Roosevelt was developed as a planned community during the Great Depression. The challenge to the Corps and the community is to work together to assure that its motto is restored.

SUGGESTED LEARNINGS

What should the Corps learn about public involvement from their experience in developing plans to clean up the ACF site at the Winfield Locks and Dam? This question was asked of a number of Corps officials, citizens, and public officials, and others familiar with the project. The most frequent suggestions are as follows:

- **Involve citizens and public officials actively and as early as possible in weighing alternatives.** It would have been wise and cost-effective to involve the public prior to publishing the EE/CA. "The Corps made a mistake," commented one official, "in dealing with the EE/CA as a technical document while not anticipating and addressing its potential political impact on the community." "An ounce of prevention would have been worth a pound of cure in this instance," says another Corps official.

- **Be aggressive and pro-active in communicating with the public.** "My impression of the Corps," a reporter observes, "is that they try to be open, but they very often find themselves in a reactive and defensive position." Several Corps officials suggest that the Corps should not assume the public will be patient or ready to hear from the Corps when it is ready to communicate. "In retrospect, it would have been better if the District Engineer had gone to the meeting with the Mayor of Eleanor," concluded a senior official.

- **Provide sufficient time or flexibility in a schedule for adequate public involvement.** "Civil works projects are schedule-driven," comments a Corps official. He and several colleagues suggest that an important criteria for advancement within the Corps is, "to be on time and on budget." In this case, that dynamic was perceived to be at work by many public officials and citizens as the Corps developed plans to remediate the ACF site. In the long run, several Corps officials suggest that by not taking time to provide for greater public involvement, more time was actually lost on the project schedule. "The Corps takes all kinds of time and spends all kinds of money on engineering studies, but they short-cut and short-change dealing with the public and this undermines the Corps' image and schedule."

- **Stress listening as much as communicating to the public.** Many people within and outside the Corps acknowledge the quality of much of the written and visual material provided by the Corps in this case. They also acknowledge that the Corps made available experts to answer questions at public meetings and workshops. "This was good, but it had the down-side of seeming like a dog and pony show," one person observed. Another observed, "The Corps was geared up to provide answers to defend their plans and not to really listen. They need to figure out if they don't know how to listen, don't want to, or can't for political reasons."

- **Streamline and clarify the decision making process.** A number of citizens and non-Corps officials point out their confusion and frustration in regard to understanding and dealing with the Corps' decision-making process in this case. "You go through this incredible bureaucracy, and deal with so many people who can't make a decision, you feel like you're getting blown off or getting screwed," said one citizen. Another adds, "We never could get straight whether Nashville, Huntington, or the Cincinnati Division Office or Washington was making this or that decision. It seemed like they didn't know." An Umbrella Group member said, "We liked most of the people from the Huntington Office, but decided they were message carriers after awhile. This was not fair to them." Another person added, "We imagine they wouldn't let a Colonel make a hundred million dollar decision, so we decided to go around them and go right to the top."

- **Develop adequate public involvement strategy and coordination.** "It is not for lack of trying," summarizes a Huntington official in characterizing the District's effort in public involvement. The several district engineers involved throughout this case, the Project Manager, the Engineering Specialist who managed HTRW issues, and the public affairs officer are given high marks for their effort, commitment and openness by persons in and outside the Corps. "Our project management system was not enough in this case," reflects a senior official, "What we could have used was a strategy team and a good strategy in addressing the many complex and delicate problems in dealing with the public." Another official suggests that in addition to strategy, a better system of ongoing coordination of public involvement was and is needed because of the many entities involved within the Corps and the fact that there has been and is a lot of turnover in personnel associated with the case.

- **Assure that all staff and consultants who meet with the public have the appropriate skills**. In particular, three skills have been suggested. "We should always be sure that anyone who meets with the press knows how to handle the situation," is one suggestion. Another is to provide technical people who can communicate with the public. "We are not stupid and we don't like technocrats to talk down to us. We like clear explanations," suggests a citizen. Third, it is important to have people who represent the Corps who listen and reflect respect and empathy. "One arrogant speaker can undo the positive contributions of five others. People do not forgive or forget arrogance," advises a Corps official.

CONCLUSIONS AND QUESTIONS

The technical and public involvement challenges associated with dealing with HTRW problems at the ACF site were enormous. This case raises serious questions about Corps' procedures in acquiring sites that may have HTRW problems or its dependence upon a state agency to provide regulating assessment. It is encouraging that both of these issues have since been addressed in new Corps regulations.

A critical question in this case is: should the Corps have purchased the ACF property in the first place? A related and important question is: should the Corps have been more aware and forthcoming about the environmental problems at the site, even if its purchase was unavoidable? Among those interviewed for this case, several reported that the Corps had been informed prior to the purchase of the ACF property of the potential of pollution problems. Further, while the purchase was being completed and shortly thereafter, several Corps employees indicated their concerns about the extent of pollution at the ACF site. It has been reported that their concerns were not adequately considered. "By the internal rigidity exhibited in not listening to environmental concerns voiced by technical staff," one person observed, "we didn't have a prayer in formulating a successful public involvement process in dealing with the HTRW issue."

This case took place during the tenure of three District Engineers. From all reports, each desired strong and open public involvement efforts. The Public Affairs officer provided plans consistent with this approach, and both the Project Manager and HTRW manager were eager to comply. Guidance, as reported to have come from the Division and Assistant Secretary of the Army level, to not actively involve the public prior to the EE/CA exacerbated problems with the public. Senior staff guidance to discourage the District Engineer from attending a meeting with the Mayor of Eleanor compounded problems. It was all up-hill from there. Once Congressman Wise joined in, the equation changed. Whether the Corps should have altered its approaches to its planned public meeting and workshops at that point is a good strategic question. Should the Corps have altered its approach or was it capable of doing so?

The visit of Assistant Secretary Nancy Dorn served to convince the public of how seriously the Corps considered this case. Should more have been done to follow-up and should stronger connections have been forged with Congressman Wise as he proceeded to develop the Umbrella Group? Was the Partnering workshop necessary and, if so, how might it have been differently planned and structured in relation to the Umbrella Group? What should the Corps have done or do to assure that its contractors relate effectively to the public? These are difficult questions for an organization that has or does face difficult challenges in this case. The Corps should be encouraged that so many of its district personnel remain well regarded. A final question is how to best relate to this situation in balancing centralized and decentralized approaches in dealing with the public?

Chapter 9

THE EXPERIENCE OF THE WHITE RIVER DISSOLVED OXYGEN COMMITTEE

by
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BACKGROUND

The White River begins in the Ozark Mountains in northwest Arkansas, flows into southwest Missouri, and returns to north central Arkansas where it continues south through the state until it joins the Mississippi. In the 1940s, 1950s and 1960s, the U. S. Army Corps of Engineers constructed six flood control dams, five with hydroelectric generating capacity, along the White River and three of its tributaries: the North Fork, Black, and Little Red Rivers.

The Construction of these dams created large reservoir lakes: Beaver and Bull Shoals on the upper White River in Arkansas; Table Rock on the White River and Clearwater on the Black River in Missouri; Norfork on the North Fork River; and Greers Ferry on the Little Red River in Arkansas. These dams resulted in the loss of smallmouth bass fisheries due to the release of cold water. To partially mitigate this loss, trout were stocked once it was determined they could live in the release. Recreational demands on these lakes has grown dramatically in the last two decades. The tailwaters below the dams have also spawned great recreational interest. The reason for this is that the reservoir lakes stratify, with cold, nutrient-rich water settling on the bottom. When released at the base of each dam, the water is sufficiently cold to support trout. Consequently, the upper White River and its tributaries have become world-class trout waters which support stocked rainbow and cut-throat trout, as well as brown trout that have been successful in reproducing. The largest Federal trout fish hatchery in the nation was, therefore, created along this river. In recent years, the world record brown trout was caught in the Little Red, and trout over 30 pounds have been taken from the White River. Today, the value of trout fishing to the State of Arkansas is over $143 million annually, making it one of the single largest revenue-producing industries in the state.

There is a problem that does occur in relation to the tailwaters below dams. Quite simply, in the late summer and fall the amount of oxygen at the bottom of each reservoir lake becomes deficient until water re-circulates or "turns over," as it does annually in early winter. As a result, the amount of oxygen in the water that is released at the base of each dam to generate electricity is deficient in oxygen. When there is less than 6 parts per million (ppm) of dissolved oxygen (DO) in the water, it may be stressful to trout. Below 4 ppm, they will be impacted and possibly die. Below 2 ppm, they are likely to die. In some years, this problem is worse than in others. When low dissolved oxygen is a problem, those interested in trout want hydroelectric facilities to

reduce the level of water they release, and, if possible, to add air to the discharge. Hydropower interests have historically been reluctant to do this because the reduction of water levels would produce less electricity at such times and thereby reduce revenue.

Tensions between hydropower and trout interests have been growing for years throughout the nation. On the White River alone this tension was exacerbated by fish kills in 1954, 1963, 1964, 1971, and 1972. Opinions differ on the causes of these events. The protagonists in this case were the U. S. Army Corps of Engineers, which maintained the dams and produced hydroelectric power, and the Southwestern Power Administration (SPA), a Federal agency, which markets and transmits hydroelectric power. In opposition to the Corps and SPA were state fish and wildlife agencies, a state environmental and tourism agency, sport groups (such as Trout Unlimited), and commercial establishments and outfitters that catered to trout fishermen.

The Corps and SPA position for many years was to maintain reservoirs within their mandates to provide flood control and hydropower while also trying to give fair consideration to recreational, fish, and wildlife concerns. The Corps and SPA maintained that the world-class cold water trout fishery on the White River (and its tributaries) was made possible by the dams and was supported by the Federal trout hatchery. The position of opponents was that the Federal Government, through the Corps and SPA, were undermining the trout fishery resource it had created and was supporting. They argued that the Corps should be required at dam sites to meet Clean Water Act requirements with minimum requirements of 6 ppm of dissolved oxygen. The Corps argued that in previous legal cases it had been determined that reservoir releases are not considered point-source pollutants and that the Corps was exempt from requirements of meeting state water quality standards on dissolved oxygen.

TRIGGERING EVENT

In October 1990, a number of stocked trout, as well as some naturalized brown trout, were reported to have died downstream of the dam at Bull Shoals Reservoir. Testing by state officials indicated the water below the dam to be less than 2 ppm. The Arkansas Game and Fish Commission (AGFC) asked the Corps to reduce the level of released water. The Arkansas Department of Pollution Control and Ecology (ADPCE) issued an order citing the Corps and SPA as violating state water quality standards. The Arkansas Department of Parks and Tourism (ADPT) and Trout Unlimited also initiated action to intervene with ADPCE to compel the Corps to reduce discharges at the dam.

The Corps and SPA did reduce outlet flow and vented turbines in early November. They established an operating target of 4 ppm which was claimed to allow trout to survive while not seriously curtailing hydropower operations. Temporarily, this brought the conflict to an impasse.

On 27 November, Arkansas Governor Bill Clinton requested a meeting of Corps officials from the Little Rock District, as well as officials of SPA, AGFC, Arkansas Soil and Water

Conservation Commission, ADPCE, and ADPT. He requested that representatives of all the agencies establish a committee to develop short and long-term solutions regarding the dissolved oxygen issue. At about the same time, as a result of citizen action by resort owners below Bull Shoals dam, both U. S. Senators from Arkansas also requested the Corps to participate with state agencies to work out a solution. All parties agreed.

The "Ad-Hoc Committee on Project Operations—White River" was organized following the meeting with a representative of Governor Clinton. The Committee consisted of representatives of the Corps, the SPA, and the four state agencies. The Committee was organized into two functional groups, an "Operational Committee" and a "Long-Term Solution Committee." Each group was chaired by a Corps representative. The membership of the committees were overlapping, and as a rule, when the committee members met they would split their meeting time between considerations of short-term "operational" issues and long term considerations.

INITIAL AGREEMENTS

By June 1991, the "Ad Hoc Committee" had completed an inter-agency agreement for dealing with the dissolved oxygen problem below the Bull Shoals and Norfork Dams for the 1991 season. The agreement required compromise from all parties and was not achieved without conflicts among the representatives. "We brought a history of distrust among the agencies into the group," observed one participant. "We had to learn a lot about the practical and technical concerns of each agency," commented another member of the group.

Among the elements of the agreement achieved by the Ad Hoc Committee for the 1991 season were the following: The Corps and the U. S. Geological Survey (USGS) would monitor the levels of oxygen in the reservoirs and below the dams. The information would be shared through the Corps' online computer program, allowing all agencies to monitor oxygen levels simultaneously. The costs for the monitoring were to be shared. When DO levels fell to 6 ppm, the Corps would alert other agencies, recommend reduction in the amount of water release, block open vents on the turbines to add oxygen to the water, and spread the reduced hydropower load over several turbines to increase air intake as well as downstream DO levels. The AGFC would cease stocking trout immediately below the dams during such periods. When the DO level reached 5 ppm, the Corps would calculate when it might reach 4 ppm, requiring a further curtailment in the release of water, so that SPA could notify its customers of a potential reduction in electric generating capacity.

The operational plan to hold turbine releases to a 4 ppm target was implemented successfully between July and December 1991. There were no major fish kills and operational arrangements between the agencies proceeded as agreed. Meanwhile, explorations of long-term solutions made it clear that the major options would be very difficult and costly. One option was for the Corps to undertake a major study of the White River basin, or at least part of it, to identify alternative remedial actions, their costs and impacts, and make recommendations to Congress,

possibly altering policies and procedures for managing reservoirs on the river basin and their outflows. Half of the cost for such a study would have to be borne by the state of Arkansas. A combination of factors, including cost and uncertainty regarding the results, made this option unattractive to the state agencies. The other options included filing legislation with Congress or filing a court suit against the Corps to change policy and procedures. The Corps, not surprisingly, could not be party to such action against itself. The state agencies were reluctant for reasons of cost and their ongoing desire to work with the Little Rock District of the Corps to pursue remedial action. Consequently, attention to long-term solutions was devoted to the exploration of technological options.

In January 1992, the Ad Hoc Committee met to evaluate the first years implementation of their joint agreement. A representative from one of the Arkansas state agencies described the progress of the group as follows:

> "When the committee sat down in February 1992 to evaluate the operation plan experience, it was a different group than was brought together in the Governor's Conference Room in November 1990. Each member had a better understanding of the other's obligations and clientele. They had more appreciation for the technical discipline of the other members and more confidence in their collective ability to develop and share accurate information. Communication between technical and administrative elements in each organization improved. SPA quantified the cost to utility customers from generation restrictions imposed by the operational plan and cautioned that we could not always depend on favorable weather or no shut-downs at other plants in their system. COE found that turbine venting and load reduction did not cause the damage to vanes and bearings which they had feared. AGFC detailed the extent of trout stocking deferred because of low DO but experienced little negative reaction from anglers and resort owners because of effective public involvement and information efforts. The experience gained eased the way for a 1992 operational plan which was equally successful."

ADDITIONAL PROGRESS IN 1992

The 1992 operational plan included a continuation of the 1991 agreements. Additionally, the Committee agreed the state would undertake a fish monitoring study to better understand the impact of low DO on rainbow and brown trout. Part of this study was a project to insert radio transmitters in a small sample of trout to track their behavior during low DO periods.

During the period of low DO between September and mid-November 1992, water discharges were curtailed and electrical generating capacity was reduced to less than 50% of capacity at Bull Shoals Dam. While no fish kills occurred below Bull Shoals in 1992, a minor kill occurred below Norfork dam on October 24-25 due to low DO levels at night following several hours

without any hydropower release. An agreement was quickly reached among all parties to provide additional water releases at night. No further fish kills occurred during 1992.

In early October 1992, many of the members of the Ad Hoc Committee traveled to Knoxville, Tennessee, to learn about efforts by the Tennessee Valley Authority (TVA) to deal with the DO problem. "The trip was helpful in three respects," commented a participant. "It gave many of us a chance to get to know each other better. It introduced us to some promising technology, and it demonstrated a comprehensive approach undertaken by TVA in dealing with reservoir management issues."

Following the TVA visit, the Corps Little Rock District investigated the possibility of utilizing a technological innovation at Bull Shoals and Norfork dams used at several TVA dams. The technology involved the use of hub baffles on power plant turbines to pull more air into the turbines to increase DO levels. As events occurred, the Corps canceled tests related to the potential use of hub-baffles because the Bull Shoals reservoir was beginning to "turn over" and Corps officials feared the tests would be inconclusive. This event upset a number of Committee members. "Whatever the reasons, this slowed our progress," commented a participant, "and it gave the perception—whether fair or not—that the Corps was dragging its feet or not able to get through its bureaucracy to make a timely decision."

The controversy over the cancellations of the hub-baffle tests was aired at a 2 November 1992 meeting of the Committee. It was agreed that "lack of communication" caused the controversy. Corps representatives committed to provide the Committee with the proposal from its Waterways Experiment Station (WES) to undertake tests at a future date.

1993 DEVELOPMENTS

In January 1993, all of the participating agencies agreed, in concurrence with the Arkansas Governor's office, to formally combine the short and long-term committees into a single committee known as the "White River Dissolved Oxygen Committee." The new committee also included two agencies from the state of Missouri, the Department of Conservation and the Department of Natural Resources. While the previous short and long-range committees had been chaired by representatives from the Corps, the representative from SPA was elected as chair of this new committee.

The revised or reformulated committee, while including two new agency representatives, included most of the individuals who had previously represented their agencies. The revised committee identified three study sub-committees that had been developed in the previous two years. An Operations Sub-Committee was responsible for developing an implementation plan for dealing with DO during 1993. A Biological Sub-Committee was responsible for research concerning the biological effects of DO. A Public Affairs Committee was responsible for preparing, reviewing, and coordinating press releases.

In early February 1993, Senator Dale Bumpers asked to meet with Committee representatives to review progress in addressing the DO issue on the White River. The meeting was prompted by a request from resort owners who perceived that sufficient progress was not being made. It was agreed that the Corps would prepare a report in the fall of 1993 describing turbine venting modifications at Bull Shoals and Norfork to increase oxygen below the dams during low DO periods.

By August 1993, the White River Dissolved Oxygen Committee had agreed upon an operational plan for this low DO season for the third year in a row. As a result of Committee efforts, additional DO monitoring stations had been established. The Corps had undertaken preliminary tests and had installed hub-baffles on turbines at Bull Shoals and Norfork dams to conduct additional tests.

PUBLIC INVOLVEMENT

This case demonstrates the complexity and changing nature of public involvement within the Corps. In regard to the DO problem at Bull Shoals reservoir in particular and other White River reservoirs more generally, the Little Rock District had to relate to three publics: other agencies with particular interests in the situation, public interest groups including trout fisherman and resort owners, and elected public officials including a governor and two U. S. Senators.

The essence of the public involvement strategy of the Little Rock District (LRD) was to work with and through the Dissolved Oxygen Committee. The Committee itself was the vehicle for the Corps to work with the agencies, and it also became a vehicle for relating to interested citizen groups and elected officials. In the later instances, responsibilities were shared among agencies. For example, the AGFC provided written information for fishermen and resort owners. SPA communicated with electrical users. Several joint press releases were developed to inform the public. Representatives of the Corps and other agencies spoke to groups, such as Trout Unlimited. Informal visits were made to resort owners. In the beginning, Trout Unlimited was invited to attend Committee meetings, but eventually they decided to remain informed and involved in other ways.

OUTCOMES AND PERSPECTIVE

For three years, the Corps LRD, in concert with the other agencies, has demonstrated the ability to develop cooperative operational procedures to manage the DO problem at Bull Shoals and Norfork dams. Further, the agencies initiated studies regarding trout behavior and technological approaches in relation to the DO phenomenon. In addition, the agencies have worked together to inform and involve interested citizens and elected officials.

Long-term permanent solutions have been more elusive. This is understandable for many reasons. One reason is that the issue of DO is a broader national policy concern, especially in

relation to the Corps. The Corps operates hundreds of reservoirs and dams throughout the nation that are exempt from Federal Clean Water Act regulations. The dams constructed by the Corps were created in an earlier era for purposes of flood control and energy production. Increasingly, for several decades, public interest has grown in recreational amenities provided by the reservoirs and dam tailwaters. While the Corps has attempted to come to grips with these changes and competing demands, neither Congress nor successive administrations have provided clear policy guidelines regarding these matters. While the Corps, and each of the districts, attempt to accommodate the growth in recreational interests, no clear mandate or particular guidance has emerged.

Because of this situation, the Corps was cautious in this case. It was cautious in proceeding in regard to potential costs and in regard to establishing a precedent. It was cautious because of the need to ascertain damage or accelerated wear that turbine venting might have on turbine equipment. It was also cautious because of a potential law suit from the State of Arkansas. The suit has remained a threat throughout the process, illustrated by the fact that the Arkansas Department of Pollution Control and Ecology, which originally filed a legal action against the Corps, was never willing to be a signatory of the three annual agreements developed by the interagency committee.

The Corps' dilemma in regard to these long-term considerations is poignantly reflected in the following statement included in the 1993 plan of the Committee: "It is recognized there are legal and technical considerations for each agency that go beyond the goals of the short term action plan for 1993. The participation by an agency representative in the development of the 1993 plan does not preclude that agency from pursuing any action deemed appropriate relative to its long term needs and goals."

What is most remarkable about this case is how much was achieved in the short-term with a longer-term perspective reflected in the statement quoted above. It is a tribute to all of the individuals involved on the Committee that so much incremental progress has been achieved. It is a tribute to the LRD to proceed despite the potential of legal threats. It is a challenge to all concerned to seek a broader and constructive resolution of the DO issue and related concerns in Arkansas and throughout the nation.

SUGGESTED LEARNINGS

The experience of the White River Dissolved Oxygen Committee illustrates the capacity of the Corps to work actively with other agencies to address an issue of critical public concern. The successes achieved in this case were significant, albeit not easy to achieve. The experience of the White River Dissolved Oxygen Committee suggests many learnings for the Corps, other agencies, and the public in establishing policies and practices. Among the lessons suggested by those familiar with this case are as follows.

- **Be Willing to Share Control and Responsibility.** An important factor in the success of the Committee was that control and responsibility were shared. Different agencies took the lead in various activities and also were willing to share costs. At the outset, the Corps exerted control and chaired the short and long range committees, but over time determined that this was neither in the Corps' nor the Committee's interest. "We like to have control," observed one Corps official. "Our inclination is to take over because we feel we have to balance our interests and the competing interests of others. This gives the perception that we are dictating. One of the things we learned was that if you are going to build a real partnership you have to let go and share control."

- **Establish a Common and Achievable Objective**. A key building block for the Committee at the outset was the clear objective of a shared operational plan for increasing DO at Bull Shoals and Norfork for the 1991 season. "There were times in the beginning when we got real frustrated with each other," said one participant. "But we finally put a lot of the turfing and posturing behind us to get a plan adopted."

- **Share Information openly**. The sharing of information contributed to the success of the Committee. At the outset, a number of persons reported, it was necessary for the Committee members to learn about the technical and political concerns of each agency. "We could not have proceeded without understanding where each of us was coming from," said one participant. "This takes time, but we moved ahead when people were more forthcoming." A Corps official added, "It goes beyond willingness to share information. What I found is that you had to volunteer it, anticipating the concerns of other agencies."

  An important role regarding shared information was the sharing of online technical data available on DO from the gauging stations established at Bull Shoals and Norfork dams. "This meant nobody had a black box or could manipulate data," commented a member. "With equal access we could have equal responsibility in carrying out the operational plan."

- **Utilize Work Groups**. The establishment of sub-committees to deal with technical, biological, and public affairs issues were helpful in several respects. It was an efficient way to organize and carry out Committee tasks, but, as one participant observed, "this was a good vehicle for team-building. It furthered communication and appreciation for a lot of the people involved. You just got to know each other better than in the big group meetings."

- **Build Upon Success**. The success of the Committee grew incrementally over a three-year period. Having achieved an operational plan for 1991, the Committee did so again in 1992 and 1993, expanding its range of activities and the scope of its agreements. While a permanent "long-range" solution has not been achieved, the Committee has

continued and increased its capacity for joint action. "Achieving operational plans for three seasons has generated both pride and confidence in our ability to work together," commented one member. Another observed, "Our trip together to TVA gave us a boost. It gave a lot of us a chance to know each other personally. It also gave a lot of us some ideas how the DO issue might be addressed longer term and on a basin wide basis."

- **Establish Effective Mechanisms for Involving the Multiple Interests within the River Basin**. One Corps official suggested that, "If we had better dialogue among the agencies back in 1990, we probably would not have had the DO problem the way we did." At that time, however, the Corps did have a White River Coordinating Committee in existence, which met annually. "The limitation of that group," it has been suggested, was that it was primarily a sounding board for the District rather than an agenda setting or trouble-shooting body." Another observed, "The role of that Committee was to listen and advise on what the District wanted to do rather than what needed to be done." While the White River Coordinating Committee continues to exist, the Little Rock District has recently created a White River Basin Ad-Hoc Work Group designed specifically to develop new operational plans for the management of reservoirs that respond to the competing needs among the many users of the White River.

- **Manage the Gap between Intent and Perception**. One Corps employee noted that, "We have a problem in wanting to do the right thing but not doing it quite right." He went on to say, "Some of our people want to deal in an open, timely, and flexible manner. Others want to hide behind Congressional authority issues. And others can't budge from their preferred technical approach no matter what others think." One agency representative said, "Some of the Corps' people are terrific, but they are like a fragmented system. They overwhelm you with a lot of people, but no one seems to have the authority to make a decision." Another person said, "Their approach is slow, they are like a dinosaur." A related comment was, "They act like it was still the 1950s, they have difficulty accepting new realities and situations."

  Whether these comments are accurate or fair are important questions that cannot be answered fully here. Clearly, the Corps made a significant commitment in this case, they did in fact alter practices, and they made structural changes in equipment. Yet, in so doing, some people, including Corps employees, perceive the Corps was not "doing it quite right." Such a perception is important to accept and appreciate in regard to its implications. It points to the need, as one Corps representative suggests, "to manage the gap between our intentions and how they get perceived by others." This implies the importance of such management approaches as: speaking with one voice, clarifying decision making processes, assuring timely decisions, and appearing open and sensitive to the concerns of others.

CONCLUSIONS AND QUESTIONS

The experience of the White River Dissolved Oxygen Committee was a good example of a successful interagency effort to address a critical public policy issue. It was an important case for the Corps in that it addressed the DO problem, a long-standing and controversial issue throughout the nation. The Committee experience demonstrates the positive outcomes that can be achieved when the Corps chooses to develop a strong and collaborative partnership with other agencies. Because of changes in public interests and expectations in regard to reservoirs and their tailwaters, it is likely that Corps districts will increasingly need to enter into arrangements such as those represented in this study.

This case illustrates that strong participatory practices that require collaboration are not easy to achieve. They require time, willingness to take risks, and the capacity to change. This is not altogether easy for the Corps, because it is a large and complex organization that must balance the interests of multiple constituents, and is bound by both congressional authorizations and administrative oversight. Further, the Corps itself at the District, Division, and Headquarters levels experiences tensions among those assigned to serve planning, engineering, operational, legal, regulatory, and public affairs interests. These factors make it more difficult for the Corps to change and respond in a timely manner to matters they do not consider to be an emergency. Yet, as this case illustrates, the Corps is willing and capable of responding to a critical public concern in concert with others and with effectiveness. While the Corps response time may make this task more difficult, as their reputation promises, they can get the job done.

Several questions arise from this case. In retrospect, could the White River Coordinating Committee, in existence since the 1980s, have been used more effectively to place an issue such as the DO problem on the agenda of the Little Rock District? In the process of this case, could the Corps have done anything more, or have done it differently? The case seems to be a success story, but could it have been a success with greater impact? In prospect, what should the Corps do in regard to its corporate strategy to address the DO issue throughout the nation and when addressing the growing recreational interests associated with the reservoirs it operates, without breaking its covenant to the original flood control and power customers?

Chapter 10

THE FORT ORD REUSE CASE

by
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BACKGROUND

Fort Ord (the Fort) was a large Army base located in Northern Monterey County, California, adjacent to the Pacific Ocean. The Fort encompassed 44 square miles in size and was bordered by five small cities (Del Rey Oaks, Marina, Monterey, Sand City, and Seaside). Other cities in close proximity to Fort Ord were Pacific Grove and Salinas.

Established in 1917, Fort Ord was the headquarters for the Army's 7th Light Infantry Division. Over 17,000 military personnel and 5,000 civilians were employed at the Fort in 1992.

Fort Ord had three major developed areas. The Main Garrison was the major housing, administrative, and support area for the installation. It included office buildings, a commissary, a hospital, troop areas, executive housing, and schools, as well as recreational and training facilities. The East Garrison included barracks, storage, and repair facilities. The Fritzche Army Airfield was an airfield and light industrial complex with storage and maintenance facilities for aircraft.

In 1990, two important Federal Government policy decisions were made regarding Fort Ord. The Defense Department announced plans to reduce military activities and personnel at the Fort. The Environmental Protection Agency (EPA) also declared the Fort as a Superfund site and put it on the National Priorities List (NPL) to receive funds for hazardous waste clean-up.

The U. S. Army Corps of Engineers (USACE) has been actively involved at Fort Ord since 1990 in several respects. On a contractual basis, the Corps managed hazardous waste clean-up activities as well as responsibilities associated with the closure of Fort Ord as an infantry training and staging facility. Through its Sacramento District office, the Corps managed hazardous waste clean-up locations with Fort Ord, it prepared an Environmental Impact Statement required for base closure, and it managed the transfer of various parcels of property to state and local institutions and for private sale. The Corps has selected and oversees the work of private companies in these various activities and must inform and involve the public in the process. The nature and major learnings associated with the experiences are summarized below.

TRIGGERING EVENTS

In January 1990, the Defense Department (DOD) released a list of bases it was studying for realignment and closure. DOD announced it intended to close Fort Ord and move the 7th Light Infantry Division to Fort Lewis, Washington. This announcement reflected the commitment of the Federal Government to "downsize" many military installations to save money and as an adjustment to the end of "Cold War" military competition.

In February 1990, Congressman Leon Panetta sponsored a meeting of local leaders to oppose the reduction in force of Fort Ord. A Task Force of elected and government officials, as well as concerned citizens was formed. Within six weeks the Task Force prepared a report arguing that "downsizing" or closing Fort Ord was an unwise plan in terms of defense interests, and it would have a terrible economic impact on surrounding communities.

The efforts of the Task Force, Congressman Panetta, and others to save Fort Ord from being closed down as a major military installation were to no avail. By April 1991, over 100 military installations throughout the country, including Fort Ord, were identified for downsizing or closure. The Defense Department's plans for Fort Ord included moving its infantry operations (the 7th Infantry unit) to Fort Lewis in Washington State, retaining a few military-related functions within of the property, and turning over the majority of the land to the community to be used for purposes the community would determine.

Following the decision of the Defense Department, the Task Force redirected its energies to prepare for the eventual closing of Ft. Ord. Accordingly, advisory committees were organized to address considerations concerning Economic Development, Education, Health and Human Services, Housing, Land Use, Pollution clean-up, utilities, and infrastructure.

By June 1992, the Fort Ord Community Task Force, which involved over 350 citizen volunteers, had prepared a 760 page report. It was called a "strategy" report because the Task Force members acknowledged that their efforts were advisory in nature and that final decisions regard the disposition and future use of Ft. Ord would rest in the hands of the Defense Department and elected officials at the state and local levels. The "strategy" of the Task Force was to create "A statement of community consensus regarding the reuse and development of Fort Ord to include a series of prioritized alternatives."

In October 1992, Monterey County and the cities of Del Rey Oaks, Marina, Monterey, Sand City, Seaside, and Monterey County established the Fort Ord Reuse Group (FORG) as an intergovernmental organization to coordinate planning for the reuse of Fort Ord. An office was opened and a coordinator was hired. The mission of FORG was to develop a plan for the reuse of Fort Ord land and facilities and to develop community support for its implementation.

THE ROLE OF THE CORPS IN PREPARING AN ENVIRONMENTAL IMPACT STATEMENT

The U. S. Army Corps of Engineers (USACE) provide support services to Army installations. The Sacramento District Office of the Corps managed and continues to manage a large number of planning, design, construction, and environmental documentation efforts at Ft. Ord. Therefore, in 1990, when the possibility of closing Fort Ord was announced, the Corps was asked to conduct an Environmental Impact Statement (EIS) of the Fort for the Army. Because community leaders opposed the closing of Ft. Ord, they also opposed work on the EIS. As a result of opposition from the Task Force, Congressman Panetta and other community leaders, work on the EIS was limited to collection of base line data that could be used to continue to operate the base, realign missions, or close the base.

After the Defense Department announced its final decision to close Fort Ord in 1991, the Corps again was asked by the Army to conduct an EIS. The Corps' client was with Forces Command (FORSCOM) in Atlanta. FORSCOM, one of the major commands of the Army, is responsible for active duty troop units in the United States. Among its responsibilities is overseeing base realignments and closures of bases under its jurisdiction. The Sacramento District Office of the Corps has been responsible to FORSCOM as well as to the Fort Ord Garrison Command, and to the Headquarters of the Corps and the Department of the Army in Washington, DC, for various assignments relating to realignment and closure. FORSCOM has been responsible for the closure of Ft. Ord.

An EIS of the scope required for Fort Ord would normally require approximately 2 $^1/_2$ to 3 years to complete. However, in a rider Congressman Panetta had added to a Congressional bill, Congress directed the Corps to complete the EIS in 18 months, and to address social and economic impacts as well as environmental impacts.

In February 1992, the Corps published its notice of intent to conduct an EIS, and in March 1992, a public scoping meeting was held. Shortly thereafter, the Corps proceeded as quickly as possible to conduct an EIS on an accelerated schedule in order to meet its mandate of completing it within 18 months.

The function of the EIS was to determine the impacts on the economic, physical, and social environment according to alternative plans for the disposal and reuse of Fort Ord. When the Corps began to work on the EIS in April 1992, the Task Force of community leaders was still completing their report, which was not completed until June 1992.

The history of relations between the Corps and the Task Force until this time was marked by tension. Many community leaders opposed earlier efforts by the Corps to conduct an EIS, and viewed the Corps as one of the agencies of the Army that posed economic and social threats to the community in closing and realigning Fort Ord.

Although relations between the Corps and the community were strained, Corps officials met with the Task Force as early as the Fall of 1991, and continued to do so throughout the preparation of the EIS. Likewise, although strained relations developed between the Corps and FORG, meetings were held regularly between officials. However, two dynamics compounded efforts to work together. One was that there were substantial differences among the many communities and local governments regarding reuse preferences for Fort Ord. A related factor was the fast-track 18-month schedule with which the Corps had to comply in completing the EIS.

PUBLIC INVOLVEMENT AND THE ENVIRONMENTAL IMPACT STATEMENT PROCESS

The Corps made a variety of efforts to involve the public in preparing its EIS. In the first half of 1992, public meetings were held in each of the surrounding and adjacent communities to identify concerns and obtain suggestions regarding future uses of Fort Ord. A mailing was sent to governmental and non-profit agencies regarding their potential interest in use of the property. As a result, approximately 5,000 agencies and individuals were informed and/or involved in the EIS process, and 100 agencies expressed interest in converting, using, and building facilities on all but 3,000 of the 28,000 acres of Fort Ord. Discussion and negotiations ensued with the various agencies in selecting those that were eventually identified in the final EIS. Also, on an ongoing basis the Corps met with the Task Force and FORG.

In June 1992, the Task Force completed its strategy report. This report was reviewed and described as one of the alternatives in the EIS. In December 1992, the Corps released a draft of the EIS prepared for FORSCOM by the consulting firm it had retained, Jones and Stokes. Nearly 800 copies of the EIS were disseminated. At the time the draft EIS was distributed, it was announced that a public hearing would be held on 11 February 1993, and a comment period would run until 22 February 1993. The objective of the Corps, at that time, was to receive public input to be considered in revising the EIS so that the final EIS could be completed within the 18-month schedule and a Record of Decision (ROD) could be achieved by August 1993.

On 11 February 1993, a public hearing was held in Monterey to receive comments on the EIS. The hearing which was announced in the local media was attended by 66 people, of whom 23 made comments. By the end of the comment period on 22 February 1993, 64 letters of comment were in receipt from organizations and interested citizens.

In March 1993, FORG published a 114-page *Initial Base Reuse Plan.* A preliminary draft of the plan had been shared with the Corps and other Army entities in December 1992. Between December 1992 and 15 February 1993, the preliminary plan was reviewed by many citizen groups. Revisions were made, and between 2 March and 16 March 1993, the five cities and Monterey County which sponsor FORG, approved the plan as a point of departure to develop a reuse plan.

After the FORG *Initial Base Reuse Plan* was published, FORSCOM determined that the EIS already had a very wide range of alternatives. The FORG plan could not be implemented, because it did not reflect the request from Federal and local agencies for land, and because of the significant impacts resulting from the extensive development proposed in the FORG initial plan. The Army decided not to attempt to integrate or reconcile it with the EIS, because it would slow down the process of reaching a ROD by August. The Army offered to prepare a supplemental EIS for a revised FORG plan if FORG made changes to make it workable. A report was prepared for the Army by the Corps in April 1993, concluding that the FORG *Reuse Plan* was unworkable.

TENSIONS BETWEEN THE ARMY AND THE COMMUNITY

In May 1993, tensions between FORG and the Corps were exacerbated at a meeting in which the Corps anticipated resolving differences with FORG. Instead, the Corps was challenged, under media scrutiny, in a public meeting. Nonetheless, before and following this meeting, Corps and FORG representatives continued to meet together bi-weekly. An accommodation suggested prior to the May meeting was further developed following the May meeting in anticipation of the final release of the EIS. The accommodation was that while the Corps should not substantially alter the EIS, a supplemental Environmental Agreement could be developed by the Corps, FORG, and other appropriate parties. In June 1993, the Corps, other Army representatives, and FORG met and agreed to develop a partnering arrangement and to work together in advancing future plans for the reuse of Fort Ord.

In July of 1993, President Clinton issued a five point Plan for Revitalizing Base Closure Communities. The plan had the two-fold effect of supporting an accelerated process while assuring community leadership in the planning process. The practical impact of this plan was to strengthen the leadership responsibility of FORG and to promote a cooperative ethos between the Army, the Corps, and FORG.

In June 1993, the Army released the EIS for the Disposal and reuse of Fort Ord. The EIS proposed establishing a 1,500 acre Presidio of Monterey (POM) annex to support military services remaining in the area, a 12-acre complex to support Army reserve activities, and to dispose of the remaining property. All but approximately 3,000 acres of the property to be disposed would go to Federal and local agencies in support of their programs at little or no cost.

The EIS examined six reuse alternatives for Fort Ord and 3 sub-alternatives. The alternatives ranged from high-intensity mixed use, to low-intensity mixed use, to open space preservation. The EIS included a preferred Alternative 6R, Anticipated Reuse (Revised), which included the establishment of the POM, an Army reserve center, and turning over approximately 23,500 acres to a variety of local, state, and Federal agencies that had been identified through the real estate screening process. An additional 3,000 acres would be "disposed to private entities without the Army determining future use." The preferred alternative would provide for developing

approximately 14 percent of undeveloped land and a corresponding buildout population of about 22,800. This contrasted to a high-density proposal from some local entities to develop 65 percent of the undeveloped land for a buildout population of 250,000.

On 23 December 1993, the Army released the ROD concerning Ft. Ord. The ROD reflected a compromise between the Army's desire to dispose of property as quickly as possible, while allowing surrounding and nearby communities time to complete their reuse plan. In announcing the ROD, Michael W. Owen, Acting Assistant Secretary of the Army, said the following: "Because the local communities' reuse plan has not been finalized, the Army does not adopt a specific plan in this ROD."

The ROD summarized the various alternatives for reuse that were examined in the EIS released in June 1993. While not adopting a reuse plan, the ROD said that it is anticipated that the resulting reuse plan will be consistent with a scenario it attached to the ROD, which essentially reflected the preferred scenario in the EIS. However, the ROD then immediately stated, "The local communities will develop and adopt general plans to guide reuse."

PUBLIC INVOLVEMENT IN ENVIRONMENTAL CLEAN-UP

Prior to and simultaneous with the EIS process, the Corps was also involved in environmental clean-up activities at Fort Ord requiring public involvement activities. While the Corps encountered difficulties and experienced conflict in dealing with the public in the EIS process, public involvement related to environmental clean-up has proceeded positively and with little to no conflict.

In February 1990, the U. S. Environmental Protection Agency (EPA) placed Fort Ord on the National Priorities List as a Superfund site, because of the threat of groundwater contamination and other environmental problems. A Federal Facilities Agreement (FFA) was developed with appropriate Federal and state agencies under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Under this agreement, remediation efforts were directed to address soil and groundwater contamination on multiple sites at Fort Ord including: three landfill areas, two vehicle maintenance facilities, a used equipment cannibalization areas, two fire drill areas, and 14 other areas of potential concern.

The Corps was given responsibility by Fort Ord to manage the clean-up process under CERCLA. The Sacramento District of the Corps retained the firm of Harding, Lawson, and Associates to manage the clean-up, including public involvement activities.

The Community Relations Plan developed by Harding, Lawson and Associates, in compliance with CERCLA, has included the following: a Community Relations Coordinator has managed and overseen public involvement activities; information repositories have been established at the

Fort Ord Post Library and Seaside Branch Library; and public meetings and comment periods have been made available in regard to each clean-up activity.

One of the most exemplary features of this public involvement effort has been the creation of a series of fact sheets and information papers. They are very clear and understandable to the average citizen because of their style, the use of graphics, layout, and photographs. The public involvement effort has also included active efforts to communicate with the press and to establish a Technical Review Committee to review documents and evaluate progress. The Committee includes representatives of appropriate local, state, and Federal agencies. The presence of public involvement staff, on site, working on a day to day basis with base officials, has proven to be successful in connecting the efforts of consultants with Army staff at Fort Ord.

In many respects, the public involvement activities associated with environmental clean-up at Fort Ord is a model of success. If there is any concern among those involved, it is in attracting more public interest. However, according to one theory of public involvement, modest participation may be a reflection of community confidence. In this case, given the quality of planning efforts, materials, and management, modest public involvement and the lack of conflicts may be reflective of an outstanding public involvement initiative.

PERSPECTIVE AND OUTCOMES

The combination of planning for the reuse of Fort Ord and the environmental clean-up activities being undertaken have been complex and demanding. While considerable controversy and conflict between the Army and the public have occurred concerning reuse, environmental clean-up has proceeded with relative accord and modest public interest.

The conflicts and tensions regarding reuse are understandable. The closing of a major military installation like Fort Ord impacts the community with a triple "whammy." First, the decision is a profound economic and emotional shock to the community. Second, planning for reuse draws out competing community values and visions for the future use of the property that must be resolved. Third, the communities and their leaders must work with some of the most complex bureaucracies in the nation (such as Army, EPA, and so on) and a host of complicated regulations.

From the perspective of the Army and the U. S. Army Corps of Engineers, the experience in preparing for the reuse of Ft. Ord has been made more complicated by the imposition of an 18-month schedule mandate for preparing an EIS. The development of simultaneous reuse plans, the Army's EIS and the FORG Initial Reuse Plan, was less than a desirable situation in regard to economy of effort and public involvement. While the Corps completed its EIS on schedule, its proposed ROD was delayed four months, and the final ROD turned out to be a study with a recommendation rather than a plan. At the same time, the community had not agreed on a final plan at the time the ROD was completed. Nonetheless, beyond earlier conflicts, the Corps, the

Army, and FORG strengthened their relationships, and by the time the ROD was completed, established a relatively strong partnering arrangement. It remains to be seen what the final outcome of planning and implementation for the reuse of Fort Ord will be. At the same time, it is not inappropriate to consider how much more might have been achieved in the same amount of time if the Army, the Corps, and the community had established a strong partnering relationship from the outset.

By way of additional perspective, there were a number of other dynamics that complicated this case. One was that Federal Government and Army policy changed during the process. Initially, the policy was to close or dispose of property as quickly as possible, under the Army's military commands, and to sell some real estate to make money to cover the cost of environmental clean-up. This policy changed under a new administration when President Clinton issued his five point program stressing a community oriented planning process.

Another significant dynamic was disagreement among local communities. The communities of Seaside and Marina, for example, preferred a more intensive level of development, but this was not consistent with the preferences of other communities. Whereas, the Community Task Force developed a relatively low-density community strategy plan, FORG initially proposed a plan of more intensive development. Some communities liked the FORG plan, while others felt it was unrealistic in not dealing with the environmental and physical constraints identified by the Task Force and by the Army. The Corps was asked to write a report challenging the original FORG plan. This increased tensions between the Corps and FORG. However, as a result of many meetings and communications between October 1992 and December 1993, FORG revised elements of their plan to consider environmental and physical limitations. FORG also participated in developing a hybrid disposal/reuse plan that was attached to the ROD.

A further dynamic in this case was that the Corps was working for FORSCOM. "At many points," observed a Corps official, "the Corps was being instructed by our customer to do certain actions, or to do them in a certain way that was both supported and opposed by different parts of the group of affected communities composing FORG." The Corps also had to deal with local communities that had autonomous land use authority as well as with FORG. The Corps clearly was in the middle in this case.

SUGGESTED LEARNINGS

This case is important in that it represents one of the first experiences in planning and guiding the reuse of a major military facility that has been essentially closed except for modest continuing military activities. The associated environmental clean-up activities are also instructive as an example of a CERCLA related effort. Those interviewed in regard to this case were clear, forthright, and constructive in suggesting learnings relevant to others in similar circumstances. Following are a series of descriptions of important learnings from the Fort Ord experience that may be instructive to others in regard to public involvement.

- **Undertake the EIS in partnership with community leaders**. The major learning from the Fort Ord case is that it is preferable to coordinate all resources in developing one EIS and reuse plan. "We should have been connected at the hip from the outset," advises one official. Another official suggests, "It is dysfunctional to create one approach from the Army and another from the community. We should have worked together from day one." Several of the following points have been made to reinforce this key learning.

- **Create a vehicle for coordination and partnering at the outset**. It has been suggested by a number of persons that it is wise to devote the necessary time to establish a group of leaders representing the Army, the community, and others who would agree to work together in planning and implementing reuse activities. "Front end time in assuring collaboration saves silly time lost in fragmentation later on," advises one Army official. A community leader proposes, "One legitimate structure needs to be established at the outset. Everybody should buy into it. If we create alternative vehicles, we will crash at a later intersection and we will all be damaged in our progress."

- **Avoid the tyranny of time**. Demands and expectations of time seem to be an important force in this case. The prescription to "avoid the tyranny of time" was suggested by one official. However, the issue of time and deadlines is viewed from multiple perspectives. "It is good to have a deadline," suggests a community leader, "but it must be realistic and manageable. It should not force one party off to do their own thing." A number of persons related to this case comment that an 18-month deadline for the EIS undermined the quality of the process. "What you need," proposes one official, "is a realistic timetable that all the players agree to, and is not imposed from outside." This issue, a number of persons have observed, must be resolved according to the complexity of issues and players involved." The schedule must be realistic and obtainable," suggests one leader, "or the process will self-destruct."

- **Be proactive and encourage early public involvement.** Several Corps officials and consultants in this case advise that the key to effective public involvement is to actively identify key leaders and institutions and build relationships with them. "We need to be aggressive rather than casual in attracting participation," advises one official. He adds, "sending a notice is not enough, we need to get in dialogue and encourage people and institutions to be active partners." Another official advises, "This is not a consumer invitation, it is a request for real involvement. We need to make this clear from the git-go. We also need to be prepared to accommodate them as real partners."

- **Connect with regulatory agencies at the outset**. A number of officials point out that state and regulatory agencies are critical to the public involvement process. "Other agencies define the agenda and have their own needs and expectations regarding the public," advises a Corps official. A consultant adds, "Agencies represent public interests and want to see that public interests are represented. They need to be factored in as a part

of the public involvement process from early-on. Otherwise they can side-swipe you. They must be partners."

- **The Corps must appear as user-friendly as possible**. Several community leaders observed that Corps representatives in committee meetings and public presentations have a distinctive impact on them. "Some of the Corps people are very effective and inspire confidence," observes a community leader. The leader further observes, "some technical people are a total turn-off. They are arrogant or seem like they are from outer-space and don't give a hoot about anything other than their lofty opinions." Another suggests, "Some Corps people need a Dale Carnegie course. They just do not know how to influence people."

- **The Corps should be a facilitator.** Two important points were raised in the case regarding the role of the Corps in base reuse dynamics. The first point was that the nature of base reuse efforts forces the Corps into the business of community organization. "The Corps," suggests a local leader, "needs to become a catalyst and facilitator. They cannot act like a big engineering company that wants to roll over us. They must establish themselves as our helper. Otherwise, they are the enemy." The second point is that the Corps must help local communities to come together. "The Corps has to be effective in the community empowerment business," proposes one official. "They cannot assume the community is ready to be a good partner. They have to be able to help the community get their act together. Otherwise," he adds, "the community might bite off their toes."

LESSONS, QUESTIONS, AND CONCLUSIONS

Beyond the learnings suggested above, this case illustrates two important lessons for the Corps that may be relevant to the future of public involvement practice. One lesson is that when "doing work for others," as in this case, the nature of how the Corps deals with and is perceived by the public may be significantly shaped by their "customer." This may create problems for the Corps in cases where they may prefer to deal with the public in ways in which a client does not. How can the quality of public involvement be nurtured by the Corps in its work with customers? Are there principles and procedures that should be negotiated at the outset? Should there be processes for evaluating public involvement concerns and activities jointly? To what extent, if any, will the Corps compromise quality in public involvement practice, to serve and at the direction of a customer? These questions are relevant to the future reputation and capacity of the Corps in its dealing with the community.

The second lesson in the Fort Ord Case, which is also evident in the other cases undertaken in this project, is how much public involvement can be influenced by political dynamics. The political dynamics in this case ranged from differences among local communities to substantial changes in national policy. This case was about more than an EIS. It was also about local

differences between economic development and environmental values, and it was about the extent of community influence versus that of the Army in base reuse and closure decisions.

The Corps is not immune from cases such as this that are politically charged and complex. It is more rather than less likely that the Corps will need to deal with strong and complex political dynamics associated with future projects. These dynamics influence public involvement practice. How can the Corps best plan public involvement initiatives in relation to political dynamics that shape and influence each initiative? Do most project managers have the skills to relate effectively to influential political forces, and if not, what must the Corps do to promote greater sophistication among managers to do so? Finally, what must the Corps do to adequately manage politically charged cases between the district, division, and headquarters levels?

This case, in concert with the other activities associated with the Public Involvement Assessment Project, illustrates the importance of the question cited above to the future of the Corps. While the Corps has much to be proud of regarding its commitment to public involvement, it must renew and expand its capacity for the future. As the Organizational Assessment suggests earlier in this document, this will require a commitment by the Corps to clarify policy, strengthen capability, promote quality, reinforce commitment, and assume leadership in regard to public involvement. To not address these challenges adequately will weaken the Corps as an institution and reduce its viability for future service to the nation.

SECTION III: COLLABORATIVE PROBLEM SOLVING

Chapter 11

COLLABORATIVE PROBLEM SOLVING FOR INSTALLATION PLANNING AND DECISION MAKING

by
C. Mark Dunning, Ph.D.

No single conflict management approach is suitable for all circumstances. However, many conflicts are amenable to solution through collaborative problem solving. Collaborative Problem Solving (CPS) processes facilitate the ability of groups in conflict to work together to develop solutions to their disputes which satisfy their interests and needs. The major principles which provide the foundation for CPS are described below.

GENERAL PRINCIPLES

Several basic principles apply in collaborative problem solving.

Participation. This principle is derived from an essential assumption undergirding democratic practice: people should have the right and the responsibility to manage their own affairs. From this assumption a number of implications follow:

- When people feel a sense of genuine participation in the decision-making process, and they feel that their participation can make a difference in the outcome, they are more likely to participate seriously and cooperatively.

- When people feel they have some control over the process that generates options, they are likely to be more willing to consider them and evaluate them in a serious and responsible manner.

- When people feel that their participation has been genuine, that the process for reaching a decision has been fair, and that all sides have had a chance to influence the outcome, they are far more committed to implementing the solutions that have been developed.

Process. The way in which something is decided often is as important as what is decided. When people have some ownership in the process that has generated a solution, they are more committed to implementation of the solution than if it were imposed upon them.

Getting Your Own Needs Met by Ensuring that Others' Needs Are Met. People and organizations act to protect their own interests and values. While it is only natural to enter into a planning or decision-making situation with the attitude of trying to make sure that your side

"wins"—in the sense that your needs are met in the outcome—it is equally likely that others are approaching the situation in much the same manner. Conflict and disagreements in planning often result when people feel that their needs will be met by a particular outcome.

In some situations it may be possible to dominate a decision-making process and ensure that your needs are met while ignoring the needs of others; but in a pluralistic society such as our own, this approach is not generally effective. People who feel they have been wronged have too many ways to seek redress to their grievance—courts, press, civil disobedience, etc. While it may be possible to dominate a decision at one point in time, the decision can be derailed later on, or the future ability to work with those who have not been dominated may be ruined. Since the obstacles to successfully dominating a decision are significant, the most likely way to ensure that your own needs are met when you cannot dominate is to work with others to find ways to see that their needs are met as well.

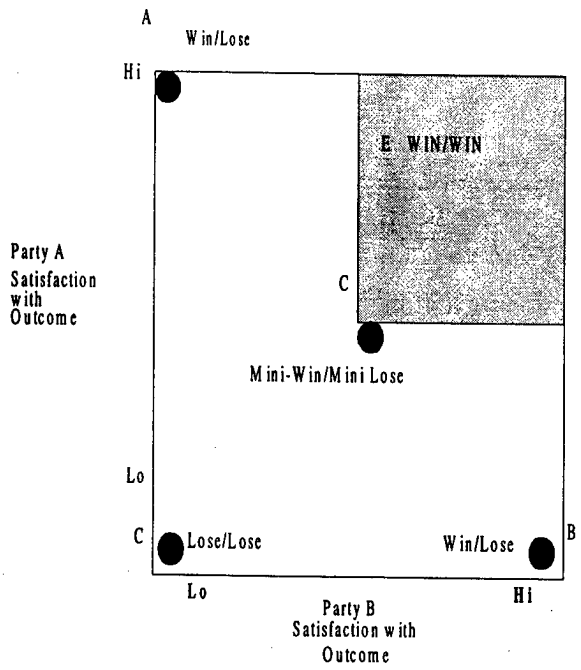
To identify how this objective can be achieved, it is helpful to contrast the CPS approach with the more traditional way in which solutions to problems are reached.

THE TRADITIONAL WAY: POSITIONAL BARGAINING

A party's solution to a problem can be referred to as the party's *position.* The position generally represents the party's idea of what it thinks will best meet its needs. The problem is, however, that this position has probably been generated in isolation, without considering the needs of others who have a stake in the outcome. If anyone follows this logic in developing solutions, the result is a number of competing solutions to the problem, which represent preferred outcomes from the point of view of the parties. When taken together, the positions are likely to be incompatible and in competition with one another.

The dynamic then introduced is one of each side arguing for its own position and seeking to "win" its position. If positions are in competition, however, to the extent that one party "wins," it is likely that other parties "lose." This situation is graphically represented in Figure 1 (page 137). If one side has greater resources, it may likely achieve a solution more in its favor. Points A and B show situations where one side wins and the other side loses. If both parties have sufficient will and resources, however, they may prevent one another from reaching their preferred solution. Instead, some accommodation may be reached, as in Point C. This point represents a compromise, a "mini-win/mini-lose" outcome. While this outcome is usually regarded as satisfactory in problem solving, it holds some dangers. Point D shows a situation in which both sides had enough resources to prevent the party from achieving its position; however, no compromise was reached. Instead, a stalemate ensued, neither party achieved its needs and the problem continued to fester and probably grew worse.

Figure 1
OUTCOMES OF A DISPUTE



In addition to the risks inherent in such an approach, in a compromise, neither side is completely satisfied. The figure illustrates that another outcome is theoretically possible. Area E shows a situation in which both parties have achieved all their needs—a "win/win" outcome. In this situation, both parties had identical positions—that is, no disagreement. If, however, there are differences in positions—and disagreement—can solutions to problems typified by Area E be achieved? The answer is yes; however, the search for such win/win outcomes requires abandoning the emphasis on the positions with which parties in a disagreement begin. Instead, a procedure termed "interest-based bargaining" is employed. This approach is described in the next section.

THE CPS APPROACH: INTEREST-BASED BARGAINING

CPS relegates to the background of concern with the parties' specific positions on solutions and focuses on identifying the underlying motivators of their particular positions. These underlying motivators are termed "interests" or "needs;" they refer to material and psychological factors that must be provided to enhance an individual's or group's satisfaction.

The key assumption of the interest-based approach is that the position advanced by parties is only one of a set of ways in which their needs can be satisfied. By focusing explicitly on what these needs are before the search for solutions begins, creating new options for resolving the conflict is more likely than if positional bargaining approaches were employed.

After identifying all the interests that a solution to the problem should meet, it will likely be found that parties share a number of interests. In addition, some interests, while not identical, will be complementary; that is, the attainment of one party's interest will not diminish the attainment of the other parties' interests. These areas of common or complementary interests provide a valuable common ground that encourages cooperation among parties. They can provide additional incentive for parties to continue to work together to try to find ways to reconcile interests that may be in opposition.

CPS processes result in the following:

- Encourage participation by involving those with a stake in the outcome of a planning or decision-making process;
- Attend to the way things are decided in addition to the substance of the decisions themselves;
- Focus on trying to find ways to meet the needs of all the parties involved in the planning or decision-making process.

CPS MEETINGS

The most essential element in CPS processes are meetings in which those with a stake in the dispute sit down together and try to jointly solve the problems confronting them. CPS meetings are different from many meetings you may have attended because they include two new roles. Figure 2 shows how a CPS meeting might be structured. Two of the roles shown—those of participant and leader—are common to almost any meeting. However, CPS meetings have two additional roles—those of facilitator and recorder. Each role is described below.

- **Substantive Participant.** Substantive participants have a direct stake in the outcome of the planning or decision-making process. They will likely be affected in some way by the outcome. They will stand to lose or gain control over or access to resources as a result of the process. They will be pursuing their interests in the CPS process.
- **Facilitator.** The CPS facilitator is a leader of the CPS process. The basic job is to insure that the process is conducted consistent with basic CPS principles. A facilitator has been referred to as a "meeting chauffeur" (Doyle and Strauss, 1976). This term conveys the

idea that the facilitator's primary objective is to help the group get from point A to point B with as little trouble as possible.

In CPS processes, facilitators take on the following functions:

- Keep meeting discussion on track and schedule
- Summarize discussion and identify key points
- Focus discussion
- Orient group to objectives
- Create and maintain a non-threatening environment that encourages people to participate

Facilitators are outcome neutral—they are not committed to any specific solution. Instead, the facilitator is committed to establishing and maintaining conditions conducive to group problem solving so that workable solutions emerge. If an individual cannot divorce himself from advocating a particular solution, he cannot be an effective facilitator. Further, if the group believes that the facilitator is focusing on the substance of the meeting rather than the process, the group is likely to resist the facilitator's efforts.

The requirement that facilitators be neutral with regard to the specifics of the outcome should not prevent installation planners from facilitating CPS processes. The primary goal of planners is to reach solutions to problems which meet the spirit of regulations and which can be implemented. Because, generally, a wide latitude exists for creating solutions within the framework of regulations, planners need not be tied to any specific outcome.

- **Recorder.** The recorder employs a technique called visual recording to create a group memory—a common record—of the deliberations and outcomes of the CPS process. The record identifies what happened—major points of discussion, what was agreed upon, who is responsible for implementing. As with the facilitator, the recorder serves to assist in directing the meeting process, and essentially has a passive role. A recorder must be able to listen to the flow of discussion and to capture its essence in short sentences written on a flip chart in full view of the participants. Meeting participants can then review what is being written and call attention to something they feel has not been recorded correctly.

  Visual recording is an important way to keep CPS processes focused on the main issues of concern. Too often in meetings people ramble or repeat themselves. By referring to the visual record, the facilitator can refocus the group on the major issues, or can show people who keep repeating the same point that their point has been captured and is part of the record.

In some situations the facilitator will play both the facilitator and recorder roles. Conversely, in some complex meeting situations, a facilitator may have two or more recorders to ensure that everything is captured.

- **Substantive Leader.** Some planning and decision-making situations have someone who is authorized to be in charge—the group leader or chairperson. Experience has shown that the substantive leader should not play either the facilitator or recorder roles. When they do, leaders can be perceived by other participants as trying to dominate the problem solving process, whether or not they actually are.

  Leaders can play two basic roles in the CPS process; however, it is important that the group fully recognize the leader's role before the CPS process begins. In the first role, a leader is responsible for making the final decisions. The CPS process becomes a way to inform the leader about issues and options so that she can ultimately make a decision which has the agreement of those who must implement or abide by the decision; it thus has a better chance of lasting. In the second role, the leader gives up decision-making authority and agrees to be bound by the group's decision that will emerge as part of the CPS process.

CONDITIONS FOR CPS

Several prerequisites must be met before CPS meetings can be effective. The first is that parties to the planning or decision making must agree to meet with one another. This condition presupposes that parties are not so hostile to one another that they would not agree to talk. Parties should also have enough trust in one another's sincerity in approaching the problem-solving process to be willing to work collaboratively. Another prerequisite is that no one party should feel that it has sufficient power to unilaterally determine the outcome in its favor with little party to participation in the CPS process. Finally, those conducting the CPS process should be seen by all the parties as being capable of acting fairly and impartially in the CPS meetings.

These conditions need to be present in order for CPS meetings to be a realistic alternative for dealing with planing and decision-making issues. If the conditions are not present, they may be brought about before CPS is tried.

CONCLUSION

In contrast to other problem solving approaches, CPS:

- Encourages the participation of those with a stake in the outcome of the process,
- Attends to the process by which solutions are reached, and
- Tries to find ways to meet the needs of all the participants in the problem-solving process.

Chapter 12

DEVELOPING A COLLABORATIVE PLANNING APPROACH FOR MANAGING NOISE AND LAND USE ISSUES AROUND U.S. ARMY INSTALLATIONS

by
C. Mark Dunning, Ph.D.
J. Phillip Huber
Darrell G. Nolton

For some time the Army has recognized that its future ability to conduct training is being threatened by residential and other noise-sensitive development adjacent to its installations. As new residential development occurs around Army installations, more and more people are exposed to the noise generated by training and other Army activities. Noise complaints from citizens have led to more litigation as well as more Congressional pressure to control noise. Consequently, limitations have been placed on the Army's ability to conduct critical training activities at some installations. In an effort to cope with this problem, the Army has initiated a program which goes by the name, Installation Compatible Use Zones (ICUZ). Fundamentally, the goal of ICUZ is to encourage development around Army installations which is compatible with the kind of noise generated by Army activities. Achieving this goal would permit the Army to continue its necessary training activities and at the same time permit local communities to enjoy a quieter living environment.

The ICUZ program was initially developed to address aircraft noise issues at Air Force and Navy installations. The Army, dealing with a much broader spectrum of noise producers, began developing its program in 1982. The general ICUZ study process begins by first mapping the noise footprint created by all noise sources at an installation. Where high noise levels extend beyond installation boundaries, an effort is made to (1) influence future development away from residential or other noise-sensitive uses to less sensitive uses such as industrial or agricultural, and (2) to reduce mission-related noise when possible.

The U.S. Army is a large and diverse organization composed of several different commands, each charged with its own mission. Because of its size and diversity, the Army uses a decentralized form of management, meaning that major commands have some flexibility in implementing Army policies. Consequently, each of the major commands developed a different approach for conducting ICUZ studies. This paper describes the ICUZ approach taken by the U.S. Army Training and Doctrine Command (TRADOC), one of the major commands within the Army. The primary mission of TRADOC is to train the Army's troops for combat. This requires training for all battle conditions, at all hours of the day and night, and in a variety of weather conditions. Training also requires the use of many different kinds of noise generating equipment

such as tanks, helicopters, artillery, explosives, and air-cushion landing craft. The TRADOC ICUZ approach, developed by the U.S. Army Corps of Engineers Institute for Water Resources (IWR), emphasizes engaging both installation planners and representatives from local communities in a collaborative search for solutions to noise and land use problems.

DEVELOPMENT OF THE STUDY PROCESS

Initially, IWR worked with TRADOC to identify the issues to be addressed in designing a study approach. Chief among them was the degree of reciprocity which the TRADOC command levels were willing to contemplate in the study process. The character of the study process was greatly influenced by TRADOC's willingness to consider compromise and accommodation. If TRADOC were completely inflexible and unwilling to make changes in its noise-making activities, then its only hope would have been to "sell" the community on the need for land use controls. Conversely, if TRADOC were willing to consider modifying its noise-making activities in order to reduce the noise impacts on local communities, then a public interaction strategy based on collaborative problem solving could be developed. After management review, TRADOC committed to a collaborative approach in which the goal was to develop reciprocal agreements between installations and communities which would identify how each would contribute to solving the noise/annoyance problem.

In developing the approach to this study, IWR relied on the following principles:

- When people feel a sense of genuine participation in the decision making process, they are far more committed to implementing that decision. By getting the local community emotionally invested in solving the problem, a political climate of cooperation can be developed which facilitates implementation. Once participation in a decision has occurred, self-esteem rides on making it work.

- The entire process must be open and visible. People trust what they see and understand. When decisions are made internally, without an opportunity for people to see and understand the factors considered, suspicions build which reduce credibility. Visibility breeds credibility.

- Solutions to problems which satisfy the needs of all interests have the best chance of being implemented. The different values and competing interests among parties can produce conflict and hinder the development of implementable solutions to problems. In order to reduce conflict, the values and interests of all parties concerned must be identified and addressed in the planning process. Community Involvement (CI) can help to identify and eliminate some of the sources of conflict which are based on poor communication and misunderstanding, and ultimately, can lay the groundwork for implementing decisions.

Based on these principles, the following specific goals were developed for the TRADOC ICUZ community involvement planning effort:

- To achieve mutual agreements with local communities which protect the mission of the installation and minimize noise impacts on communities.
- To build credibility with local communities regarding the Army's willingness to listen to their concerns and to work with them in developing noise and land use management strategies.
- To search for ongoing solutions that meet the Army's continuing need to train its troops, and communities' continuing need for local development and a pleasing environment.

THOUGHT PROCESS

In order to achieve these goals, it is first necessary to establish a method of interaction between an installation and the local community. For this purpose, a process was developed to aid planners in their efforts to generate community involvement. The central component of the CI planning effort is the use of an involvement "thought process" which helps planners identify the scope and intensity of their interaction with the public. This "thought process" is a valuable guide or template for designing CI programs. It leads planners through an analysis of the public involvement issues by asking them to answer these questions:

1. What are the objectives for this stage in the study?
2. What information needs to be exchanged with the public at this stage to accomplish these objectives?
3. What part of the community needs to be reached at this stage?
4. What special circumstances exist which could affect the choice of techniques used to interact with the community?
5. Which techniques for interacting with the community are appropriate; how should they be sequenced?

The first question requires planners to identify exactly what they are trying to accomplish at each stage of the study. The central assumption is that CI activities should be coordinated with and support the overall objectives of the study, rather than be treated as a separate activity. With the objectives clearly in mind, the remaining questions enable planners to tailor the CI effort to the study objectives and circumstances.

Question two asks planners to identify the information to be exchanged with the public in order to accomplish the study objectives. The exchange of information must be an exchange. Planners must identify the information they need from the public as well as the information they need to provide to the public. This seemingly obvious point is often overlooked, thus creating unnecessary conflicts.

The next question asks planners to identify which groups in the community should be targeted for the information exchange. It reminds planners that there are actually a variety of groups or elements of the community which need to be involved, each needing and providing different kinds of information. Furthermore, the groups which are interested in specific issues may differ from one phase of the study to the next. For example, relatively technical phases of the study may be of great interest to local planners or highly organized groups, but often will be of little interest to the general public.

Question four asks planners to identify unique circumstances which might influence the kinds of CI techniques chosen to interact with the public. Such factors as availability of resources, level of interest of parties, salience of the issues, dispersion of interested groups, or past history of involvement can influence the manner in which the information exchange is approached and the type of CI techniques employed.

The final question asks planners to identify—given the analyses performed in the preceding questions—the techniques which can best accomplish the required information exchange with the appropriate publics. In some circumstances, a formal public meeting might be an appropriate exchange technique; in other circumstances, informal workshops, interviews, or briefings might be selected. The key point is that different situations and circumstances require different interaction techniques.

The use of this "thought process" helps planners to establish the necessary interaction between an installation and the local community. Furthermore, it helps to keep CI efforts integrated with the study effort rather than becoming a jumble of "techniques looking for an application." Since each installation is different, with varying noise problems and different relationships with local communities, CI plans developed using the thought process are quite different from one another. However, the discipline provided by the process makes it less likely that important issues and details will be overlooked.

COLLABORATIVE PROBLEM SOLVING PRODUCT

Once CI has been established, the TRADOC ICUZ process uses this involvement to build the conditions for collaborative problem solving between installations and local communities. Collaborative problem solving provides a means of producing agreements between the installation and communities. These agreements specify the actions the installations will take to curb noise impacts and the reciprocal actions the community will take to regulate development.

These proposed actions are summarized in informal, non-legally binding agreements. They represent a written "handshake" or gentlemen's agreement symbolizing the intent and commitment to carry out actions to reduce noise and ensure future land use compatibility.

ASSISTANCE IN IMPLEMENTING THIS PROCESS

IWR developed a number of products to train and support TRADOC personnel in implementing the ICUZ study process. The first challenge was to gain the support of military commanders who were more used to unilateral decision making. To encourage this support, an executive briefing was developed which introduces ICUZ and explains the interactive study process. This briefing is given at each installation prior to the initiation of the ICUZ study.

IWR also developed a comprehensive five-day training course to provide an ICUZ study team with the necessary skills to conduct the interactive study process. This course marks the first time that the group assembles as a team. Consequently, considerable effort is made during the class to engender a "team spirit" and establish good working rapport among team members. The study team produces a "first draft" CI plan as an output of the training exercise conducted in the course. To date, over one hundred persons have attended the course. They represent teams now conducting ICUZ studies at twenty TRADOC installations.

In addition to the executive briefing and training course, a guidance manual on concepts and techniques for conducting the ICUZ CI study process was developed. IWR also produced a series of public information brochures and videotapes to be used by installation ICUZ study teams.

LESSONS LEARNED

In-depth evaluations have been performed in ICUZ studies at two TRADOC installations to determine how the process is working. In addition, informal discussions with installation personnel and administrators at TRADOC headquarters have produced information about the status of ICUZ studies at other installations. From these sources a number of conclusions about conducting ICUZ studies have emerged. These "lessons learned" are reported below:

Value Of Communication

The foremost lesson learned concerns the value of communication between an installation and the surrounding communities. Community officials, planners, and citizens have appreciated being invited to participate in the ICUZ study effort. It appears that the very act of approaching communities and asking them to participate creates a positive climate for problem solving. Communication with the surrounding communities promoted by the ICUZ study process appears likely to improve relationships between the installation and its

neighbors. Ultimately, these new channels of communication may lead to increased cooperation on other issues of interest to both installations and communities.

Process Versus Product Focus

ICUZ is fundamentally a "change management" process. The "solution" to noise and land use issues facing installations and communities is for the installation and communities to begin talking with one another. This communication can facilitate arrangements that are mutually acceptable. Study teams that approach ICUZ openly have the best chance of achieving their goals. However, there is a tendency to approach ICUZ as a traditional study in which the primary emphasis is on producing a document. Documents in and of themselves are seldom change agents. Where the emphasis is on producing an ICUZ study report rather than communicating with local communities, it is more likely that one more study will be added to someone's bookshelf and that noise and land use issues will remain unresolved.

Noise Studies

The development of noise zones is an important part of an ICUZ study. Noise zones highlight areas with potential land use incompatibilities. It is therefore important to obtain data that accurately portray current and planned noise-making activities on an installation. However, the meaning and limitations of noise zones needs to be kept in mind. Noise zones represent a range within which it can be expected that a certain proportion of the population would report being highly annoyed with the level of noise. This method of impact representation is clearly appropriate and subject to considerable variation. Given this limitation of noise zones, it seems unwise to treat them as anything but a means to focus attention on areas where potential problems with land use could emerge. However, in some cases installations have become so preoccupied with producing noise zone contours, they have postponed communicating with the public until they develop noise contours that respond to minor day-to-day operational changes. In these situations the noise contouring process becomes an impediment to ICUZ rather than an aid. It diverts attention and energy away from the real problem-solving focus of the program, and into a never-ending quest for absolutely accurate noise contours.

ICUZ Team Composition And Consistency

It is important to create an ICUZ study team that is composed of representatives of all organizations that could be affected by noise policies which might emerge from an ICUZ study. However, a small core group that is most active in the study, but which keeps the larger team informed about the study's progress, seems to be more efficient than trying to manage a large team. At TRADOC installations, key team members have been the Environmental Officer, the Deputy or Executive Officer from the Directorate of Plans and Training, the Public Affairs Officer, and lawyers from the Staff Judge Advocates Office.

Consistency in team composition is also important; having the same individuals involved for the duration of the study facilitates progress and study continuity. Efforts should be made to assign military personnel who have sufficient time for completing the study before reassignment. ICUZ study teams should be composed of decision makers or persons who communicate directly with decision makers.

CONCLUSION

The TRADOC ICUZ program is a "change management" process directed at protecting the military mission of TRADOC installations from noise sensitive development. The collaborative problem solving approach embodied in this process offers a viable way of reaching the goals of ICUZ. The TRADOC experience to date suggests that communicating with local communities and having a committed ICUZ team are positive steps towards reaching not only the goals of ICUZ, but also the Army's overall goal of improving relations with neighboring communities.

Chapter 13

KEEPING CUSTOMERS HAPPY

by
C. Mark Dunning, Ph.D.
Claudia M. Rogers, Ph.D.

Satisfied customers are a key to success for business and government. Many organizations' commitments to keep customers happy are manifest in ad hoc programs involving little more than slogans and consciousness-raising measures. Generally, such programs accomplish little. As more immediate problems demand attention, emphasis on customer satisfaction wanes. In contrast to ad hoc approaches, management consultants have recommended that organizations approach the issue of keeping customers happy as they would for any other vital activity; that is, through applying consistent and systematic management.

This article describes a systematic approach for keeping customers happy. The Customer Satisfaction Enhancement System (CSES) was developed by the U.S. Army Corps of Engineers (USACE) to improve delivery of engineering and construction management services to military customers. Key CSES features are customer feedback questionnaires and problem-solving workshops where the service provider and customer develop mutually agreeable ways to address customer-satisfaction issues.

To illustrate the use of CSES, we describe its application at one of the Corps' 37 field offices, the Mobile District in Alabama. This program is tailored to one agency's circumstances, but the model embodies principles valuable to many customer-service situations in government and business.

CORPS OF ENGINEERS AND ITS MILITARY CUSTOMERS

The Army Corps of Engineers (COE), with 38,000 civilian employees, is the largest public engineering agency in the world. Principal customers are commanders of military installations. Their wishes and satisfaction, or lack thereof, generally are communicated through the facilities engineer; for the Army, that person is the Director of Engineering and Housing (DEH); for the Air Force, Base Civil Engineer (BCE). Together with their staffs, they are the most visible and vocal of Corps military customers and are among the primary individuals the organization targets for "customer care." The Corps has other constituencies to satisfy, including taxpayers footing the bills for engineering and construction management work, who, through committees and agencies, demand value and accountability.

Each district is quasi-independent in performing centrally developed policies and business.

MODEL FOR CUSTOMER SATISFACTION EVALUATION SYSTEM

The CSES model (Figure 1) specifies three requirements: executive commitment, communication, and change. There are four support activities: assessment, problem-solving, implementation, and evaluation.

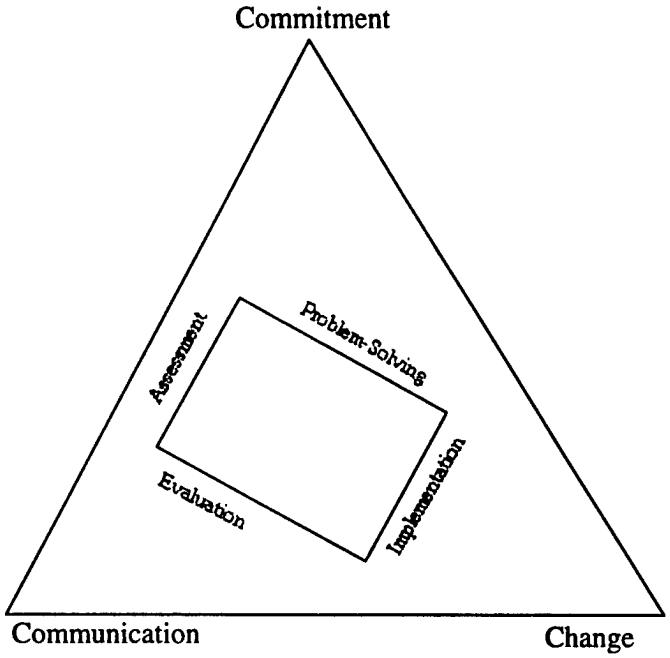


FIGURE 1
MODEL

- *Commitment* means the resolve of district executives to improve customer care, recognizing that such a program will require use of resources and will subject policies and procedures to scrutiny. Such commitment is vital to success of the program: Unless commitment is present, the program will fail and may do more harm than good.

- *Communication* effectively identifies customer perceptions of strengths and weaknesses of the quality of services and products, and informs the customer of differing points of view, pertinent information, and actions being taken that might affect those perceptions.

- *Change* refers to modifying customer and district perceptions about quality of service and products. Altering perceptions usually involves fixing the problem—the source of dissatisfaction; however, it may involve providing more information to reevaluate the same situation.

The CSES accomplishes these requirements through a program involving assessment surveys, problem-solving workshops, and implementation and feedback programs—all monitored and supported by executives within the organization. Each component is described below.

Assessment

The CSES uses questionnaires to start the process of improving communications between Corps and customers. District staff send questionnaires annually to installation commanders and base civil engineers. Divided into four parts, the questionnaire essentially asks: How well have we been doing in providing you with engineering and construction management services?

Part I asks for an overall judgment of the respondent's satisfaction.

Part II asks about satisfaction with Corps' performance of 28 key services in the design, construction, and post-construction stages of project development.

In Part III, respondents choose services most important to developing a successful project. This ranking helps the district differentiate major from minor problems.

A final section requests occupational data of the person responding. By sending the questionnaire to the installation commander, DEH/BCE, two levels of customer satisfaction perception are gained.

Results of questionnaires are one way to report objectively customers' opinions. Some may feel subjective perceptions are too ephemeral; however, Tom Peters points out in *A Passion for Excellence*:

> "...perception is all there is. There is no reality as such. There is only perceived reality, the way each of us chooses to perceive a communication, the value of a service, the value of a particular product feature, the quality of a product. The real is what we perceive."

Perceptions are subjective, but people generally perceive many of the same situations similarly. Consistencies displayed among customers' satisfaction ratings suggest questionnaires tap into something with an underlying reality, rather than obtain random viewpoints.

When the questionnaires' data are aggregated, they point out areas where a district is doing well or doing poorly in satisfying customers. Services considered poor are targets for improvements. As data accumulate, patterns emerge about how satisfied customers really are. Answers be given for questions like: How effective have our efforts been in fixing customer-identified problems? Questionnaires provide a valuable source of feedback about problems or situations needing individual attention.

In the Mobile District, questionnaires have been sent out since 1986. Figure 2 shows responses for 1986-87 surveys. Figure 3 shows respondents' satisfaction with the 10 most important Corps' services. Ranking of factors, couple with satisfaction ratings, allows a quick idea of where district resources should be targeted.

Problem Solving

Questionnaires identify problems. The issue becomes how to accomplish the fix. Most customers have ideas to help. While "the customer is always right," things are more complex. Engineers generally have good reasons for doing things and have strong views. It may be that particular policies have more to do with making life easier for those "inside" the providing organization than for customers. The important point is that there may be insiders with vested interests that need to be assessed. In a military organization, you might think a simple order would bring about desired change, but it is not so painless. Unless a way can be found to satisfy needs of insiders, it is unlikely that "fixes" based on customer suggestions will be implemented.

James O'Toole in *Vanguard Management* addresses the problem of creating change when organizations need to broker among competing constituencies:

> "...shareholders are best served in the long-run when corporations attempt to satisfy the legitimate claims of all the parties that have a stake in their companies-consumers, employees, suppliers, dealers, special interest groups, host communities, government , as well as shareholders. In fact, the task of management is defined as resolving conflict between the competing claims of these groups."

The CSES has a similar premise. While input from the installation customer is vital, other important constituencies need to support plans or changes. Given these complicating factors, the CSES employs problem solving workshops between customers and the Corps. Two key concepts are involved in workshops: participation and interest-based negotiation.

Participation: Installation customers and district technical experts work together to develop acceptable solutions. Solutions are more likely to be palatable to customers and the district staff if both assist in their creation and implementation.

Interest-based Negotiation: Trained facilitators help participants engage in interest-based negotiation. This requires district staff and customers to postpone talking about how to fix the problem and focus instead on defining why it exists and how they would recognize a good solution. This discipline identifies basic interests underlying a particular fix. As presented in *Getting to Yes* (Fisher and Ury, 1981) and elsewhere, by focusing on interests rather than on particular positions of parties concerned, it is more likely that solutions can be reached that both sides support.

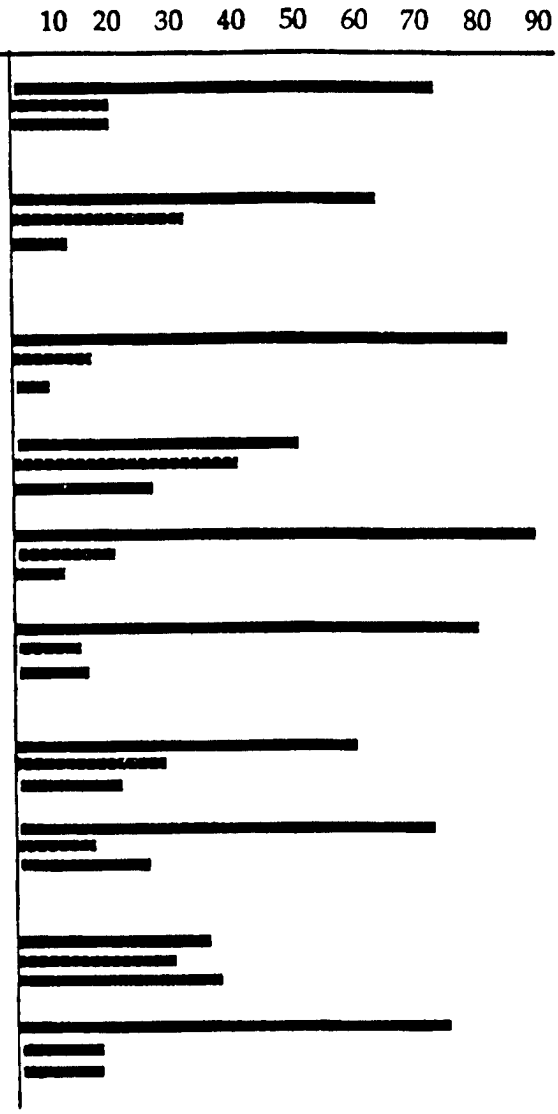
	PERFORMANCE FACTORS	RATINGS			
		ARMY		AIR FORCE	
		1987	1986	1987	1986
	DESIGN				
1.	Assistance with program development when requested (1391.PDB, etc.)	•	•		
2.	Concept design development and review	•	•	•	
3.	Design reflects lessons learned from past mistakes	•	X	X	
4.	Adequately addressing safety concerns and features in design	•	•		
5.	Use of standard items vs. outdated non-standard items	•			
6.	Timely provisions of design documents	•	•	•	
7.	Responsiveness to recommended design changes as a result of user/customer review design				X
8.	Responding to DEH/BCE review comments	•			
9.	Accuracy of cost estimation	•	X		
10.	Cost effectiveness of project design	•		•	
11.	Conformance of facility to project requirements as originally stated in the program document	•	•	•	
	CONSTRUCTION				
12.	Preconstruction conferences	•	•	•	
13.	Quality of materials and workmanship	•	•	•	
14.	Adequate information about project status during construction	•	•	•	
15.	Adequate on-site inspection during construction	•	•	•	
16.	Staying on schedule	•	•	•	
17.	Adequate explanation of schedule charges	•		•	
18.	Balancing concern for quality with concern for timelines and cost	•	•	•	
19.	Adequate coordination between design and construction	•	•	X	
20.	Speed in processing change orders	•			
21.	Response to customer and/or user requested changes	•	•	•	
22.	Timely correction of punch list items	•	•		X
	POST CONSTRUCTION				
23.	Acceptance and turnover	•		•	
24.	Adequate explanation for cost overruns	•		•	
25.	Providing as-built drawings to installation engineer in a timely manner	•		X	
26.	Transferring of O&M Manuals	•	•	•	
27.	Corps of Engineers support during warranty period	•		X	
28.	Contractor warranty execution	•		X	

LEGEND
X 24 percent or more dissatisfied • 75 percent or more satisfied

FIGURE 2. CUSTOMER SATISFACTION WITH RPS PERFORMANCE (1987 AND 1988)

FIGURE 3. SATISFACTION BY RELATIVE IMPORTANCE RANKINGS/MOST IMPORTANT PERFORMANCE FACTORS

Rank	Performance Factor
1	15. Adequate on-site inspect during construction.
2	7. Responsiveness to recommended design changes as a result of of user/customer review of design.
3	6. Timely provision of design documents.
4	9. Accuracy of cost estimation.
5	11. Conformance of facility to project requirements as originally stated in the program document.
6	13. Quality of materials and workmanship.
7	19. Adequacy of coordination between design and construction.
8	21. Response to customer and/or user requested changes.
9	22. Timely correction of punch list items.
10	8. Responding to DEH/BCE review comments.



LEGEND

Percent Satisfied

Percent No Opinion

Percent Dissatisfied

Implementation

Ultimately, district executives evaluate and decide whether to implement solutions. In the Mobile District, Corps technical experts refined solutions from problem solving workshops, developing detailed implementation plans with milestones, persons responsible, and resource requirements. Plans were then presented to senior managers for consideration and evaluation.

Evaluation

Continuation of the CSES process enables evaluation of program effectiveness. Each subsequent round of questionnaires measures the effect of prior efforts on current ratings. In the Mobile District, for example, the second round of questionnaires showed increased customer satisfaction ratings in many areas, indicting the effectiveness of the Mobile program of customer care initiated in 1986 (Figure 2). However, it showed some disparity between responses of commanders and facility engineers. Commanders were more critical of district performance on several items, giving ratings of "dissatisfied" when the engineers provided "satisfied" ratings. The district response has been to observe closely each problem area involving project manager, area engineer, installation engineer, and commander in periodic briefings so that information and ideas are shared and expectations remain realistic.

LESSONS LEARNED

The CSES is being applied in several Corps offices. As experience with the program accumulates, lessons are emerging. Three seem especially important.

- **Follow-through is vital once CSES is initiated.** The implicit premise in inaugurating CSES is that "we value your comments." If this information is collected and not used, a different message is conveyed. Customers may feel betrayed; instead of increasing their satisfaction, the program may create a worse perception of the Corps office.

- **The CSES is not a report card.** Quantitative information lends itself to analysis and comparison. Unfortunately, comparisons can be used to "grade" performance by superiors. This tendency should be avoided or managers and employees will lose incentive to support CSES.

- **Executives must recognize that embarking on a CSES program will require resources.** They must evaluate how intensive an effort they are willing to support before implementation. For example, feedback questionnaires on each project yield the best data regarding customer satisfaction, but require more resources to administer than yearly questionnaires. By carefully considering such trade-offs, a program can be developed that executives will realistically and enthusiastically support.

CONCLUSION

Keeping customers satisfied is important to any organization committed to professionalism and service. Customer satisfaction can be improved by fostering a climate of partnership between service provider and customer. The CSES fosters this climate by applying principles of commitment, communications, and change. While the approach to CSES has been tailored to the U.S. Army Corps of Engineers, underlying principles have broader application and, in fact, constitute a basic model for managing customer satisfaction in a systematic and effective manner.

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SECTION IV: COLLABORATIVE PROBLEM SOLVING TECHNIQUES

Chapter 14

EVERYBODY GETS TO WRITE ON THE WALLS: A LARGE GROUP RESPONSE TECHNIQUE

by
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PURPOSE

The large group response technique is a means to elicit, display and summarize responses of a large group of people to a set of questions. It was developed and successfully used by the Corps of Engineers in public workshops in South Florida in December 1993. Each workshop was attended by several hundred people. Some background on the context within which the process was used is provided in this paper; however, our major focus is the large group response technique, how it was used during those public workshops, and observations based on that experience.

BACKGROUND: CENTRAL AND SOUTHERN FLORIDA PROJECT COMPREHENSIVE REVIEW

The Central and Southern Florida (C&SF) Project is a series of canals, levees, pumps, and other structures across central and south Florida. In late 1992, Congress charged the U.S. Army Corps of Engineers to review the existing project to identify modifications that may be needed to improve environmental quality, water supply, and other purposes (Committee on Public Works and Transportation, 1992; Water Resources Development Act, 1992). Study funding was provided, and, in July 1993, the Corps initiated the Reconnaissance Phase of the C&SF Comprehensive Review Study (hereafter referred to as the Review Study). The Review Study's purpose was "to reexamine the Central and Southern Florida Project in light of current demands to determine the feasibility of structural or operational changes to the project essential to restoration of the Everglades and Florida Bay ecosystems while providing for other water related demands" (U.S. Army Corps of Engineers, 1993).

The purpose of a reconnaissance study is to define an area's water resource problems and opportunities as well as potential solutions; determine whether planning should proceed further into a feasibility phase; estimate feasibility time and costs; and assess non-Federal support in proceeding further (U.S. Army Corps of Engineers, 1990). By law, a reconnaissance phase study must be complete in no more than eighteen months (Water Resources Development Act, 1986).

The Review Study reconnaissance phase was designed to be accomplished by an interdisciplinary and inter-agency Study Team working through four major planning tasks:

problem identification, formulation of conceptual plans, evaluation of conceptual plans, and recommendations. In the first task of problem identification, "public concerns are identified, technical analyses are conducted to investigate the public and scientific concerns, and planning objectives and constraints are developed" (U.S. Army Corps of Engineers, 1994a). Additional background and information about conditions in central and southern Florida and the Corps study are presented in the Reconnaissance Report (U.S. Army Corps of Engineers, 1994c).

FIRST ROUND PUBLIC INVOLVEMENT

Because of the high visibility and interest in ecosystem restoration, the Study Team initially articulated two goals for the study's public involvement work: (1) gather input from diverse groups outside of the Corps of Engineers to assist in identifying problems and opportunities and potential solutions, and (2) develop relationships critical to the success of the study and the implementation of the study's recommendations. After the study began, a third goal of managing expectations was added in view of the intense publicity which surrounded the Review Study and the mounting anticipation of a solution that would be developed and implemented.

The overall strategy for public involvement was to focus on a communications effort which would solicit information from the public for the Study Team, and then provide feedback to the public on how the information was used. The primary means for accomplishing this exchange was to be through public workshops, which would support the major reconnaissance planning tasks. Three rounds of workshops were designed. The Round One public workshops were to provide information for the initial "problem definition" phase of the Review Study; Round Two workshops would focus on exploring alternative plans to solve the identified problems; and Round Three workshops would focus on presenting the array of alternative plans and study recommendations. Much like the Review Study's overall public involvement program, Round One activities reflected the collective ideas and criticisms of a cooperative effort among the Study Team and the study's Public Involvement Technical Input Group (which included representatives from the Corps, the South Florida Water Management District, and Everglades National Park).

Several objectives drove the selection of the design and the locations of the Round One workshops. First, the need to begin planning with public input about local problems and opportunities is a long-recognized principle in Corps water resources planning. As Hanchey (1972) noted:

> "Quite frequently water resources projects have been rejected by the public because the planner and the public had a different view of the local problems which needed solution....Public participation techniques should provide the planner with an opportunity to test his perceptions of the local problems and needs by comparing them to those of a representative segment of the local community, prior to beginning the search for possible solutions."

Further, Creighton (1976) acknowledged that early public input is essential, rather than optional and advisory, for planning to succeed in addressing local concerns:

> "If public participation is integral to the planning process then it will be similar to certain technical studies which must be completed as part of the planning process not because they are required by law, but because without the information derived from these studies decisions cannot be made. As the guidelines of one agency state: 'The planning process should be designed so progression from one stage to another cannot take place without certain well-defined inputs from the public.'"

Accordingly, the primary purpose of Round One was to ask the public to help us accomplish the Review Study's problem identification phase. Specifically, what did people perceive to be the problems and opportunities in the Everglades ecosystem? Second, in order for the public to understand why we were having workshops and asking for their help, we had to educate them about the study: why was it being done, and what was it supposed to accomplish? Third, we recognized the intense and often emotional nature of many people's ideas and beliefs concerning the Everglades, and we needed to provide an open forum for anyone to express any views they wished to share with us. Fourth, the workshops needed to foster information exchange, specifically that members of the Study Team were able to have personal contact and understand the concerns of the various members of the public. Finally, we were also aware that government was viewed with some suspicion in South Florida, and that the process we designed could not depart radically from traditional public involvement activities.

In addition to our objectives, we also agreed to provide the South Florida Federal Science Sub-Group (a group of natural scientists from the Federal resource agencies) with meeting time during which they could inform the public about their recent scientific findings concerning Everglades restoration.

Because interest was high and the potential impacts of any solution could be geographically far reaching, the Public Involvement Technical Input Group initially identified locations throughout South Florida for six public workshops: Stuart, Okeechobee, Fort Myers, Clewiston, Fort Lauderdale, and Tavernier. After a number of requests from the public in the Miami area, we also scheduled a workshop for Coral Gables, a Miami suburb. Additional workshops to hear from particular special interest groups were scheduled in Clewiston (Everglades Agricultural Area interests), at Homestead (Dade County agricultural interests), and at Miami (local governments). The resulting ten workshops would ensure that at least one meeting would be easily accessible to what we perceived to be the region's major public interests.

With these objectives in mind, we designed a four-part public workshop:

Part I - Presentation about the Corps C&SF Comprehensive Review Study (fifteen minutes) - The Corps' Study Manager would present an overview of the study and an explanation of the workshop format.

Part II - Problem definition workshop (sixty minutes) - The second part of the workshop was directed at eliciting the public's responses to the three questions at the heart of the study's problem definition task: What are the important ecosystem resources? What are the ecosystem's problems and opportunities? How would you recognize successful ecosystem restoration? The Study Manager would facilitate this part of the workshop, and the emphasis would be on "work" over a more formal public hearing approach.

Part III - Presentation about the Science Sub-Group Report (fifteen minutes) - Representatives from the Federal Science Sub-Group would present the background and findings from their November 1993 report on restoration of the Everglades ecosystem (Science Sub-Group, 1993).

Part IV - Public comment period - Participants would be provided the opportunity to speak for three minutes to present their ideas and views to all the workshop attendees. This part of the workshop would last until all attendees who wanted to speak had spoken.

The Study Team agreed that Parts I, III, and IV were to be straightforward and traditional. The Part I and Part III presentations were to be brief talks accompanied by slides. During Part IV, members of the public could speak from a podium at the front of the room. In anticipation of large crowds, we limited speakers to three-minute talks during Part IV to ensure that everyone had an opportunity to speak within a reasonable time.

In planning the Part II workshop, we focused on our purpose of eliciting the public's help in defining what the Corps Review Study should address. In addition, the Study Team considered several other factors in developing a workshop process. First, the process in Part II needed to be as objective and focused as possible so that the results would truly reflect public views, and would be the most useful in developing the study's planning objectives and constraints. Second, the intense public interest in the problems of Everglades ecosystem restoration could attract several hundred people to any given workshop. Therefore, the process should be successful with large groups. Third, given the controversial and often emotional nature of the situation, the process should at least initially avoid confrontations that could derail an entire workshop. Finally, the logistical problems and costs of conducting ten workshops encouraged us to find a modest, low-tech, friendly workshop approach that would minimize complications.

A process for the Part II problem definition workshop evolved from several planning sessions among the Study Team, the Public Involvement Technical Input Group, and others. This process, which we now call the "large group response technique," was adapted in part from two other meeting techniques that team members had experience using. First, the nominal group

technique (Delbecq et al 1986) was the basis for our opening steps in posing a question followed by silent idea generation by individuals. Second, the "wall walk" display process was drawn from practices developed by the Corps' Fusion Center, where a variety of large display techniques are used to exchange and discuss ideas within and among small groups (Devries, 1994). Our resulting process appeared to meet all of our major concerns, and we were confident that it was likely to succeed in meeting the study's problem definition needs.

LARGE GROUP RESPONSE TECHNIQUE

The large group response technique was developed and refined over the course of the Reconnaissance Study's problem definition phase. The following section describes the six technique steps (Table 1) that we used for the Round One workshops, including occasional suggestions about other assumptions or ways to accomplish specific tasks.

TABLE 1 - LARGE GROUP RESPONSE TECHNIQUE STEPS

Step 1 - Preparation

- Prepare meeting questions.
- Prepare work sheets (optional).
- Prepare moderator's script (optional).
- Select meeting site.

Step 2 - Setup

- Setup flip charts.
- Provide attendees with materials.

Step 3 - Questions and Responses

- Explain the procedure.
- State first question and write responses.
- Repeat question-response for remaining questions.
- Identify most important responses.

Step 4 - Wall Walk

- Display responses.
- Prepare summary of responses.

Step 5 - Summary

- Present and verify summary of responses.
- Discuss summary of responses.
- Collect responses (optional).

Step 6 - Analysis (optional)

Step 1 - Preparation

Two of the most important process tasks occurred prior to the Round One workshops: preparation of the questions to be asked and selection of the meeting rooms.

The Round One questions were developed through extensive debate and discussions among our Study Team members and the team's Public Involvement Technical Input Group. We recognized that the questions to be asked needed to be brief, direct, and carefully worded to ensure that they would lead to information that would be useful in the problem definition task. Our questions were developed over several months of debate; their evolution is illustrated in Table 2 on the next page. The resulting questions, and the reasons for including them, were:

> QUESTION #1 - "What are the important resources in the South Florida ecosystem?" This question was included as a means of "scoping" the significant issues to be addressed in the Review Study, in the spirit of the National Environmental Policy Act's implementing regulations (Council on Environmental Quality, 1978).
>
> QUESTION #2 - "What do you think are the problems and opportunities in the ecosystem?" This question was intended to elicit responses that could be used as the base for the study's planning objectives.
>
> QUESTION #3 - "How will you recognize successful restoration of the ecosystem?" The final question was intended to help the team define results, even "targets," that could be used to measure progress in solving problems and realizing opportunities.

Because the moderator's remarks introducing each question can provide participants with examples and guidance about the types and detail of information requested, we prepared and rehearsed the Study Manager's dialogue for this part of the workshop as a part of our advance preparations.

We also elected to prepare a preprinted work sheet as the recording instrument for participants to write their responses to the three questions. The Round One work sheet consisted of a single sheet of yellow paper, with the front side divided into three equal sections marked 1, 2, and 3. The one-third page size of each "answer box" defined the length (and, to some extent, the detail) of expected responses. The back side of the sheet was marked for "other comments" and provided space to continue answers to the three questions as well as other ideas. Yellow paper was used so that the sheets would be readily identifiable for collection at the workshop sites; the Round One sheets naturally came to be called the "yellow sheets."

TABLE 2 - EVOLUTION OF QUESTIONS

31 August 1993

- What are the problems and opportunities in the study area?
- How do you know there is a problem?
- How will you know when it is fixed?

8 November 1993

- What are the important resources in the area?
- What are the resource problems and opportunities?
- How do you know about the problems and opportunities?
- How would you measure successful restoration?

22 November 1993

- What are the important resources in the South Florida ecosystem?
- Do you think there are any problems and opportunities in the ecosystem?
- What would a successful restoration of the ecosystem look like?

1 December 1993

- What are the important resources in the South Florida ecosystem?
- What do you think are the problems and opportunities in the ecosystem?
- How will you recognize successful restoration of the ecosystem?

15 December 1993 (from transcript of Fort Lauderdale workshop)

- What do you think are the most important resources that we have here in south Florida?
- What do you think are some of the problems and opportunities here in the south Florida ecosystem?
- How would you recognize successful restoration, and what does that mean to you?

The questions were not printed on the work sheet in order to focus participants solely on the questions, as they were presented during the workshop, and to evoke their first (and, therefore, presumably their most important) impressions. Preprinted work sheets are optional, and, in other instances, it may be just as easy to use blank notebook paper or other means to record participants' responses.

We should also note, however, that in publicizing the workshops, the notices included the three questions. Additionally, after the first workshop the questions were included in stories that appeared in local newspapers.

In addition to the "yellow sheet," we also preprinted take-home work sheets on green paper. The "green sheet" was identical to the "yellow sheet," except that the three questions were included in their respective "answer boxes" and a return mailing address was included on the back side of the sheet. The "green sheet" was made available to workshop participants as a method they could use to record and send us additional ideas and comments in the days after the workshops.

Our requirements for Round One meeting rooms were: first, flat writing surfaces and, second, ample room for participants to walk about and view flip charts from a distance. After considering a variety of different room arrangements, we selected school cafeterias, equipped with tables in a familiar lunch-room arrangement. The tables and chairs provided a less confrontational arrangement than the traditional auditorium style setup. The tables also enabled members of the study team to spread out maps and other materials during discussions with small groups of people before and after the workshops.

In other instances, other types of meeting sites, such as auditoriums equipped with retractable writing tables or rooms set up with tables and chairs, may also be effective. In some cases it may even be safe to assume that participants will arrive with a notebook or a pad of paper, and there will be no need to make provisions for writing surfaces.

Step 2 - Setup

Two setup tasks were required on the day of (usually immediately before) each workshop: setup of each participant's seating area, and flip chart setup.

Study Team members placed a yellow work sheet and a pencil on the cafeteria tables at each participant's seat. It may be safe to assume that participants will arrive with these materials. If not, a preprinted work sheet or blank paper and a pen or pencil will need to be distributed to each expected participant's seat.

Concurrently, other Study Team members assembled the flip charts on stands, and placed them in sets to form "walls" of writing paper. A separate set of charts was set up for each of the three Round One questions. Each set consisted of three stands (four stands for the larger workshops). The sets were located as far apart as practicable to reinforce the distinctions among questions and

minimize circulation congestion during the "wall walk." A box of felt-tip marking pens and a roll of masking tape was included at each set of stands. In other uses of this technique where flip chart stands are not available or advisable, three or four adjacent sheets of flip chart paper or sheets of newsprint may be attached to the walls in various locations around the room (paper should be several layers thick to prevent ink from bleeding through onto the wall).

The Round One question to be answered during the Step 4 "wall walk" at each set of charts was displayed so that participants could see it from any place in the room. The questions were preprinted in bold six-inch high letters across poster boards that were easily attached to the tops of the flip chart stands. The questions were not displayed in advance of the Step 3 questions-responses so that participants would focus solely on the questions as they were presented. The preprinted displays were optional, and the questions could have been written on flip chart papers and displayed near the stands.

Step 3 - Questions and Responses

The Corps Study Manager led and facilitated the four-part Round One workshops. After completing the Part I study overview presentation, the Study Manager introduced Part II—the large group response technique—by explaining its purpose and the procedure the group would follow. Next, the Study Manager presented the following one-minute introductory explanation of the first question:

> "As citizens of the United States, we enjoy a vast amount of natural resources. We take pride in the bald eagle, the Grand Canyon, and the California redwoods. These are what we share as nationally significant resources. Please think about the important natural resources in South Florida, and in the box numbered one on your yellow sheet, please list what you think are the important resources of the South Florida ecosystem."

The participants were then given three minutes to complete their responses to the first question on their "yellow sheets." This process of one minute explanations followed by three minutes of participant response on "yellow sheets" was repeated for the second and third questions; and, after less than fifteen minutes, each participant had completed their "yellow sheet" with their individual responses to the three questions. As the Study Manager introduced each question, a member of the Study Team displayed the question above its set of flip charts so that it was visible while responses were being written.

After the three questions were complete, the Study Manager asked the participants to review their responses to each question, and circle what they believed was their "most important" response to each question. Another three minutes was allowed for individual review and selection of responses.

Step 4 - Wall Walk

Next, the Study Manager instructed the participants to write their "most important" response to each question on the corresponding set of flip charts located around the meeting room. The Study Manager also stated that each circled ("most important") response needed to be shown for each question, even if someone else had already written the same or a similar response. Participants then visited each set of charts and wrote their "most important" response, thereby producing a collective display of the group's ideas about the "most important" responses to the questions. This step became known as the "wall walk" part of the workshop.

During the Round One workshops, two Study Team members were stationed at each set of flip charts to ensure that participants received a marker and to otherwise provide assistance. Team members marked each page of flip chart paper with a brief code that indicated the workshop location, the question number, and the page number. Team members also removed pages as they were filled, and taped them to the wall next to the charts. Although we did not collect participants' "yellow sheets" until the end of the workshop, collection boxes could have been placed at each set of charts for participants to deposit their work sheets after their last responses were written.

The "wall walk," incidentally, provided attendees with opportunities to not only read, but also to discuss ideas with others. This was an especially important aspect of the Fort Lauderdale and Miami "wall walks," where several highly charged exchanges among participants from urban and agricultural areas appeared to be the beginning of personal understandings among people who were traditionally in conflict with one another.

After all the participants wrote their "most important" responses, the Study Manager visited each set of flip charts; and, with assistance from attendant Study Team members, reviewed the responses and prepared notes that briefly summarized the results. The summary tended to capture the most frequent "top three" responses to each question; any apparent major areas of conflict among responses and the most creative response could be included.

Step 5 - Summary

With summary notes complete, the Study Manager asked the participants to return to their seats, and presented the summary of the responses to each question. This presentation was followed by group discussion of the results—what did the participants think about what they have seen displayed, and did they agree with the Study Manager's summary? This discussion finished Part II of the workshop, and the workshop continued through the completion of Part III (Science Sub-Group Report presentation) and Part IV (general public comments). Many participants picked up a "green sheet" as they departed the meeting room.

Immediately after the conclusion of each workshop, the Study Team collected the completed "yellow sheets," flip chart pages, and the Study Manager's notes. During the week after the last

workshop, Team members prepared a notebook for each Round One workshop. The notebook included each workshop's "yellow sheets," as well as documentation from the Part IV public comment section of each workshop (prepared statements, transcript, and team notes on speakers' statements). Mailed-in "green sheets" and letters of comment were compiled in separate notebooks. In addition, the Study Manager's summary notes, as derived from each workshop's flip chart pages, were collected in a single Round One workshop synopsis. The synopsis, which is shown in Table 3, was sent to all participants and other interested parties about a month after the final workshop.

Step 6 - Analysis

The summary prepared during the meeting may provide an adequate conclusion and report of the workshop results, and no additional analysis may be desired. However, the completed work sheets may be a rich source of ideas that could be further investigated following the meeting. Analysis can range from simply reading the collective responses in order to be fully informed about participants (ideas), to key work and content analyses of responses.

Following the Round One workshops, the study team developed a data base of all of the workshop attendees' "most important" responses (reported in an *Inventory of Public Concerns*), and an ad hoc software program to analyze the responses (U.S. Army Corps of Engineers, 1994b). These tools permitted us to rapidly identify how frequently words were used, and listed all the public's statements about any given topic that was included in their "most important" responses. From these analyses, we synthesized the basic list of the team major areas of public concern, and prepared the detailed catalog of concerns that was included in the Reconnaissance Report (U.S. Army Corps of Engineers, 1994c). A brief description of each of the major areas of concern that were identified by our analysis is in Table 4.

Our analysis gave us enough of a sense of the public's priorities to permit a general ranking of concerns. However, we continually stressed that the process was not a voting exercise in which responses would be counted or compared. A count and comparison of numbers of responses would be meaningful only if the complete universe of a defined population participated in the process, for example, all attendees at a professional conference, or all members of a graduating class.

Several sophisticated computer software programs for text analysis are commercially available and could provide various types of findings and reports using large group response process documentation.

TABLE 3 - MOST COMMON RESPONSES TO WORKSHOP QUESTIONS

WORKSHOP LOCATION AND DATE	#1 - WHAT ARE THE IMPORTANT RESOURCES IN THE SOUTH FLORIDA ECOSYSTEM?	#2 - WHAT DO YOU THINK ARE THE PROBLEMS AND OPPORTUNITIES IN THE ECOSYSTEM?	#3 - HOW WILL YOU RECOGNIZE SUCCESSFUL RESTORATION OF THE ECOSYSTEM?
Stuart, FL Dec. 6, 1993	• water • Everglades • St. Lucie estuary • Indian River lagoon	• growth • St. Lucie	• balance • biodiversity • managed growth
Okeechobee, FL Dec. 7, 1993	• people	• government agencies	• balance • leave Kissimmee alone
Ft. Meyers, FL Dec. 13, 1993	• water • wildlife	• pollution • ecosystem restoration	• water • restoration of wildlife habitats
Ft. Lauderdale, FL Dec. 15, 1993	• people and families • water • ecosystem	• population control • opportunity through coexistence between environment and development	• health habitat • water quality • people • balance
Travenier, FL Dec. 16, 1993	• Florida Bay water quality	• lack of water in Florida Bay	• clean, fresh water
Local Government Workshops, Dec. 20, 1993	• water • Biscayne Bay • wetlands • people • quality of life	• water management	• balance • quality of life • growth • ecosystem
Miami/Coral Gables, FL Dec. 20, 1993	• people • families • agriculture • clean water • Everglades	• overpopulation • loss of wetlands • water quantity and quality	• healthy ecosystem • balance • jobs • sustainable development

TABLE 4- Summary of Public Concerns

Ecosystem. In general, the public recognized a decline in both the quality and extent of the South Florida ecosystem, particularly in the historic Everglades. They noted changes in habitats, such as the sawgrass, mangroves, and other native wetland habitats, as well as changes in hydrology and other physical characteristics. Many people believe that changes in historic sheetflow and hydro patterns brought about by man's water management activities, including the Central and Southern Florida Project, are important causes of ecosystem decline. People expressed concern about many native fish and wildlife species, such as herons, alligators, and lobsters, as well as endangered species, such as the Florida panther, manatee, and wood storks. The adverse effects of invasive non-native species, such as melaleuca, Brazilian pepper and Australian pine, were also of concern to many.

Growth. Another major public concern was growth of the human environment of South Florida, particularly the perceived problems of overpopulation and overdevelopment and their effects on the ecosystem and water resources.

Water quality. The public expressed concerns about environmental pollution, including water and air quality and solid waste disposal. Water quality concerns focused on six major areas: pollution of Lake Okeechobee, regulatory releases from Lake Okeechobee, outflow from the Everglades Agricultural Area, salinity in Florida Bay, urban water quality, and system-wide mercury pollution.

Water supply. Public perceptions concerning water supply problems and opportunities recognized three main water users: the environment, the urban areas and agriculture. Problems identified included conflicting demands among the water users, the waste of water, an inadequate water system, the need to increase the supply of water, and the need for water conservation to reduce water demands.

Balance. A major public concern dealt with the issue of balance. This idea was expressed in two general ways. First, many people believed that ecosystem restoration in South Florida will require balance between "man and nature;" many people spoke about the need for "sustainable development." Second, achieving balance will require the area's interest groups to cooperate and work together.

"They're the problem." In answering the question "What do you think are the problems and opportunities in the ecosystem?," a considerable number of people identified other people, other groups, other areas, other agencies, or others in general as responsible for problems in the South Florida ecosystem. In short, "they're the problem." Public responses about who they believed is responsible for problems

TABLE 4- Summary of Public Concerns (continued)

fell into two categories: government and others. Many people from the Kissimmee River area, the Everglades Agricultural Area, and the urban east coast simply asked to be "left alone."

Flood Control. Public concerns about flood control generally centered on preservation of existing flood protection provided by the Central and Southern Florida Project, in balance with the needs of the ecosystem. The Miccosukee and Seminole Indian Tribes expressed a need for improved flood protection on tribal lands.

Recreation. Several people described recreational navigation problems on the Okeechobee Waterway (St. Lucie Canal - Lake Okeechobee - Caloosahatchee River), particularly if water levels in the lake are changed.

Economy. Public statements about problems and opportunities in the south Florida economy covered the link between the economy and the ecosystem, major regional businesses--agriculture, commercial fishing and tourism--jobs, and the role of government. While many people recognized the need for a healthy ecosystem to support the region's economy and jobs (particularly tourism and Florida Bay), others were concerned that potential restoration projects would displace farms and other businesses and related jobs.

Social Considerations. Public comments covered many social considerations, including concern about communities, people, and social issues. As with the economy, there was some concern about potential restoration projects displacing communities and people.

Reference: U.S. Army Corps of Engineers 1994a

OBSERVATIONS

Although our experience has been limited to seven workshops for a single planning problem, we were pleased with the performance and results of our first use of the large group response technique. In reflecting on our Round One workshops, we believe the technique has the following benefits to offer anyone who wants to learn about the thinking of a large group:

Large Group - As we have tried to reinforce by its name, the technique works for a large group. As shown in Table 5, public attendance at the seven workshops where we used the technique ranged from 45 to 400. In contrast to a more traditional approach in which "large groups can be broken into small groups which can work effectively and then report back to large groups" (Delli Priscoli 1988), our approach maintained the integrity and dynamics of the single large group.

Quick - Full participation by a large group can be completed and results known in about one hour. Table 7 lists the duration of technique Steps 3, 4, and 5 as conducted during the Round One workshops.

Flexible - The overall four-part workshop agenda proved to be a flexible approach for the first round of the Review Study's public involvement program. When it became apparent that attendees did not wish to participate in the large group response technique (Part 2) at three of the workshops (the two workshops in Clewiston, and the Homestead workshop), it was readily deleted in favor of the attendee' desires to move as quickly as possible to the public comment period (Part 4). It might also be noted that many of the participants in these three workshops subsequently attended and were in favor of the process at other later workshops.

Our experience demonstrated the ease of using three questions which were relevant to our needs. The number of questions depends on the requirements of the meeting planner. Addressing only one or two questions at a meeting might seem inefficient, although there may be situations where only a single question is necessary or advisable. While more than three can be addressed with little increase in meeting time or cost, the quality of the participants' response may decline if too many questions are added.

Inexpensive - Costs are limited to the types of costs that are expected for any large meeting, including: staff salaries, meeting room rent, and expenses for materials such as flip charts and work sheets. Expenses for break-out rooms, small group facilitator, and recorders are eliminated. Additional costs to use this process over the traditional public meeting or workshop are minimal and may actually be reduced if facilitators for small groups were originally planned. Flip charts are usually available or the paper can be secured on the wall. There might be some small costs for supplies, such as printing or other materials. The optional additional data analysis may add cost to the overall effort if it is not already a part of the planned data gathering effort.

Low-Tech - The process can be completed using readily available materials and facilities that avoid mechanical, electrical, and operator problems that could be associated with more

sophisticated technology. Its simplicity is an advantage to participants who are not familiar with, or may even be hostile toward, more sophisticated procedural or computerized techniques.

Self-Recording - The process does not require a traditional "recorder." The process is self-recording by participants, and leaves a clear and immediate paper trail of results documented on the work sheets, flip chart pages, and the moderator's summary notes.

Easy - The steps are straightforward and easily explained and understood. The technique appeared to be accessible and accepted by individuals with a wide variety of experience, education, and interests. Required equipment, materials, and facilities are familiar, readily available, and not easily flawed. While forethought is necessary to prepare the questions and select the meeting site, no specialized training is needed to conduct the process. The special needs of any audience can be met with some forethought: bilingual translations, sign language for the deaf, or additional writing help for those who might need assistance.

Friendly - The technique is user-friendly and accessible to a wide variety of participants. People who attended our workshops appeared to enjoy the process and accept its results. Many were particularly pleased with being asked to publicly display their responses on the flip charts, as well as quickly being able to see and compare how others responded. It provided a forum for participation which did not entail public speaking which can be a deterrent.

Built Understanding and Trust - In describing the general principles of collaborative problem solving, Dunning (1986) noted:

> "When people feel a sense of genuine participation in the decision making process, and they feel that their participation can make a difference in the outcome of a decision making process, they are more likely to participate seriously and cooperatively."

Because the Study Team went out early and asked people what they thought about the workshop, provided feedback on what was heard, and then used this information to move forward with the study, the process helped build a basis of understanding and trust between the team and the public. Additionally, because the venue was open and the process provided opportunities for people from varying backgrounds to come together, either at a table or at the flip charts, there was a greater understanding of the common feelings among the different groups. While the process is not meant as a consensus building effort, the sharing of these common concerns is one stepping stone to a widely acceptable solution.

Voluntary - While we observed some people leaving the workshops with their work sheets, it is reasonable to conclude that between about one-quarter and one-third of the attendees did not choose to complete a work sheet or write on the flip charts. We also observed a limited number of individuals who did not appear to complete a work sheet but wrote responses on the flip charts; or who completed a work sheet but did not display their answers on the flip charts; or who

only participated in the summary discussion or final public comment part of the workshop. The voluntary nature of the process accommodated this behavior without penalty to the participants. Note that, because we observed this behavior to be limited, we believe that it did not harm the validity of the overall group's results.

Credible - At the final Round One workshop, several members of the audience suggested that, because it was the last workshop and many people already knew what the questions were, the meeting should skip the questions and wall walk and instead move directly to hearing public comments. Several other attendees objected:

Unidentified Male: "At the other meetings, the Army Corps took control and conducted the meeting in a very professional and systematic type method so that all of the aspects, all of the study were heard. Why don't we do the same thing here?"

Unidentified Male: "These people that live here haven't had the opportunity that we've had."

The openness and visibility of the process quickly builds credibility among participants. Everyone is given the same instructions and accomplishes the same task at the same time. While the host controls the process, he/she does not influence the results. The results are neither hidden nor changed, and are immediately plain for all to see at the same time.

Ownership - Again, Dunning (1986) noted:

> "The way in which something is decided often is as important as what is decided. When people have some ownership in the process which has generated a solution they are more committed to implementation of the solution than if it were imposed upon them."

By virtue of having written their responses in public—visible to their neighbors, friends, and adversaries—participants appeared to have a strong sense of ownership in the collective group results. Audience members would occasionally refer to the "wall walk" material as evidence of their case, or to emphasize their point, especially in addressing the Study Manager.

Increased Participation - This technique can substantially increase the percentage of people that provide information over traditional discussion or public comment forms of meetings. The significant increase in participation in the Round One workshops is illustrated in Table 5. Of the estimated 1,280 people who attended the seven workshops where the process was used, at least 67% of the attendees participated in the question-response exercise (as measured by collected work sheets), while only 13% of the attendees spoke during the final public comment part of each workshop. While there may have been more speakers in the absence of the question-response process, the results show that there was over a five-fold increase in participation using the Round One workshop approach. This rate of participation

TABLE 5 - WORKSHOP PARTICIPATION

		Work Sheets		Public Speakers		
Workshop Location and Date	Total Number of Workshop Attendees	Total Number of Worksheets Collected	Number Collected as a % of Attendees	Total Number of Speakers	Number of Speakers as a % of Attendees	Ratio of Worksheets to Speakers
Stuart, FL Dec. 6, 1993	90	64	71%	19	21%	3.4:1
Okeechobee, FL Dec. 7, 1993	140	82	59%	12	9%	6.8:1
Ft. Myers, FL Dec. 13, 1993	45	35	78%	7	16%	5.0:1
Ft. Lauderdale, FL Dec. 15, 1993	320	248	78%	34	11%	7.3:1
Tavernier, FL Dec. 16, 1993	240	156	65%	33	14%	4.7:1
Local Government (Miami), Dec. 20, 1993	45	28	62%	12	27%	2.3:1
Miami/Coral Gables, FL Dec. 20, 1993	400	243	61%	47	12%	5.2:1
TOTAL	1280	856	67%	164	13%	5.2:1

gave the Study Team improved confidence that we were hearing from a cross-section of the public rather than a traditional vocal minority of speakers.

Focused - In the case of the Round One workshops, the three questions served to clearly focus attendees' attention on the type of information that had been defined as necessary for the Review study. While people did not limit their responses strictly to the three questions or necessarily ecosystem-related issues, their answers were more directed than rambling, and consequently minimized our need to interpret their responses.

Provides Needed Information - When planning, the objectives that provide the bases for developing alternative plans are based on concerns expressed by the public. The Round One large group response process provided the necessary basis from which the Study Team was able to identify public concerns, and, in conjunction with supporting technical analysis, state the study's objectives and constraints (Table 5). The link between the public concerns identified through the large group response technique and the final study objectives and constraints is shown in Table 6. The public concerns, objectives, and constraints, as defined through this process, were included in the "Review Study News" (U.S. Army Corps of Engineers 1994a) that was distributed throughout South Florida in June 1994 prior to the Round Two public workshops, and became the basis for further work in the restoration of the South Florida ecosystem.

FURTHER DEVELOPMENT

This paper outlines a one-time experience with a large group response technique. Other applications which should be explored are:

Plenary Sessions - Conferences often feature plenary sessions in which the information is, for the most part, one-way. A speech or panel followed by the large group process could gather more feedback than a traditional ten-minute question period. For instance, the audience might be asked what is the largest barrier to implementing a speaker's suggestion.

Identifying priorities - At the remaining seven Round One workshops, while the large group response technique was consistently repeated with successful conclusions, the six-step process is also amenable to change. For example, although our Round One process was designed to end with a short list of results, participants could go on to identify their collective priorities for the results using, for example, the very visual "colored dot" ranking and scoring approach.

Repeat Usage - Our use of the large group response techniques was limited to one set of workshops, which were held over a two-week period. Research should be done on whether the process can be used repeatedly without becoming invalid or hackneyed.

Generating solutions - Another use for the process might be to take time to generate an extensive brainstorming list of solutions to problems. Next, ask participants to mark and share in the wall walk, the most creative, the most acceptable, and the least acceptable solutions.

TABLE 6 - Public Concerns and Resulting Planning Objectives and Constraints

Public concerns about the ECOSYSTEM resulted in:
- Objective #1 - Increase the total spatial extent of wetlands.
- Objective #2 - Increase habitat heterogeneity.
- Objective #3 - Restore hydrologic structure and function.
- Constraint #1 - Protect threatened and endangered species.

Public concerns about WATER QUALITY resulted in:
- Objective #4 - Restore water quality conditions.
- Constraint #2 - Deliver water that meets applicable water quality standards.

Public concerns about WATER SUPPLY resulted in:
- Objective #5 - Improve the availability of water.
- Constraint #3 - Minimize salinity intrusion into freshwater aquifers.
- Constraint #4 - Minimize loss of water supply provided by the C&SF Project.

Public concerns about FLOOD CONTROL resulted in:
- Objective #6 - Reduce flood damages on Seminole and Miccosukee tribal lands.
- Constraint #4 - Minimize loss of existing flood damage protection provided by the C&SF Project.

Public concerns about RECREATION resulted in:
- Constraint #4 - Minimize loss of navigation opportunities provided by the C&SF Project.

Public concerns about the ECONOMY resulted in:
- Constraint #5 - Minimize regional and local disruption of jobs, and disruption of agriculture, tourism, commercial fishing, and other businesses.

Public concerns about SOCIAL CONSIDERATIONS resulted in:
- Constraint #5 - Minimize regional and local disruption of communities.

Public concerns about GROWTH, BALANCE and "THEY'RE THE PROBLEM" did not result in objectives or constraints, but were addressed through other study means.

Reference: U.S. Army Corps of Engineers, 1994c.

TABLE 7 - Time Requirements

Approximate durations of the large group response technique steps conducted during the actual course of the Round One workshops were:

Step 3 - Questions and Responses

Moderator explained procedure. 5 minutes

Moderator stated question #1 (identify important resources) and attendees wrote responses. 5 minutes

Moderator stated question #2 (identify problems and opportunities) and attendees wrote responses. 5 minutes

Moderator stated question #3 (describe successful restoration) and attendees wrote responses. 5 minutes

Moderator asked for identification of "most important" responses and attendees identified "most important" responses. 5 minutes

Step 4 - Wall Walk

Attendees wrote "most important" responses on flip charts, and moderator summarized results as the last responses were written. Duration of this step was a function of the number of attendees, as well as the amount of interaction desired among the participants and the Study Team. 15-30 minutes

Step 5 - Summary

Moderator presented and verified a summary of the "most important" responses, and attendees commented on and discussed results. Duration of this step was a function of the nature of the results. 5-15 minutes

TOTAL TIME 45-70 minutes

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Chapter 15

USING A COMBINED TEAM BUILDING/ ALTERNATIVE FUTURES PLANNING PROCESS TO DEVELOP SHARED VISION

by
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Corps of Engineers' Commanders face a unique management challenge. They know, and their staff knows, that they will occupy their management role for only three years—one tour of duty. They also have no role in selecting their key staff, unless they have the opportunity to fill a position which opens up during their tour of duty.

While it is not unusual for CEOs of corporations or heads of governmental agencies to hold their position for only three years, this is rarely known when the individual takes office. Most also select their key staff.

It is not unheard of in the Corps, for civilian employees who report to Corps commanders to simply "outlast" a Commander whose approach and vision is different than their own. As a result, effective Commanders must be able to create a management approach or vision which unites the staff, without using the usual management rewards/punishments characteristic of other executives. Loyalty must be won, and emotional commitment granted freely.

While these problems exist for all Corps Commanders, they are magnified for the Commander of the Corps' Pacific Ocean Division (POD) and Missouri River Division (MRD). In the case of POD, the problem is geography. The commanding officer in POD, a brigadier general, supervises a far-flung enterprise that delivers engineering throughout the entire Pacific Rim area. From his office in Honolulu, he supervises three district commanders in Japan, Korea, and Hawaii. Except for the work performed in the Hawaiian Islands themselves, every project is at least 2500 miles — and usually more. Communication amongst the executive team in Hawaii can be personal and informal, but communication to Japan and Korea is usually electronic or telephonic. Unlike most Corps divisions, there are also numerous foreign governments to be dealt with, in addition to the challenges of different cultures and time zones. The Missouri River Division (MRD) is unique in that, in addition to normal responsibilities, the Commander of MRD has national management responsibility for construction on a number of major missile programs.

As an overlay, the Corps of Engineers is undergoing considerable change in its mission. The civilian "civil works" mission has been declining in many regions. The military program grew during the Reagan Administration, but was already showing signs of decreasing during the period in which the programs described in this article took place. Finally, the Corps is being offered opportunities to perform new missions, many in the environmental cleanup arena.

As a result of all these changes, there was no straight-line version of the future on which to rely. There were enough variables that there were many alternative futures.

General Robert Ryan, who commanded first the POD and subsequently the MRD, recognized the need to create a sense of "team" and shared vision within his management groups. For assistance in this enterprise he turned to Dr. Jerome Deli Priscoli, a senior analyst at the Corps' Institute for Water Resources in Alexandria, VA., who has advised Corps management on many "process" issues. He in turn included Dr. James L. Creighton, who has experience involving groups in alternative futures planning processes.

The challenge was to design a process that built a sense of team, and a shared vision, and also took into account the range of possible future alternatives. There are many instances in the management literature of companies with strong corporate cultures and well-defined visions for the future—but the culture and the vision were flat-out wrong for the circumstances they faced. If shared visions are not going to be just a communal crap shot, they must be sufficiently flexible and probabilistic so that they can ensure accommodation to very different events than were originally expected.

In this case, the authors integrated traditional team-building activities with an alternative futures planning process originally developed by one of the authors[1] to develop alternative forecasts of water needs, land use demands, and so on. Figure 1 provides an overview of the process which resulted from this hybrid. The process described below was completed over a two-day schedule.

THE PROCESS

The specific steps in the process were as follows:

Identify the factors which could affect the organization over the next five years

The first step in the process is to use the rules of brainstorming—no evaluation while people are generating ideas, and that way-out ideas are encouraged—to develop a list of factors, both internal and external, that could affect the future of the organization. The purpose of this step are: a) to get team members to share information about the factors that impact part of the organization, and b) to encourage recognition of the many variables that influence the future of the organization. The value of brainstorming is to help the group break out of group-thinking about what factors matter to the organization, and to also encourage everyone to participate.

[1] Creighton, James L. "New Processes for Alternative Futures Planning." World Future Society Bulletin, Vol. XI, No. 1. January-February 1977, pp. 3-11.
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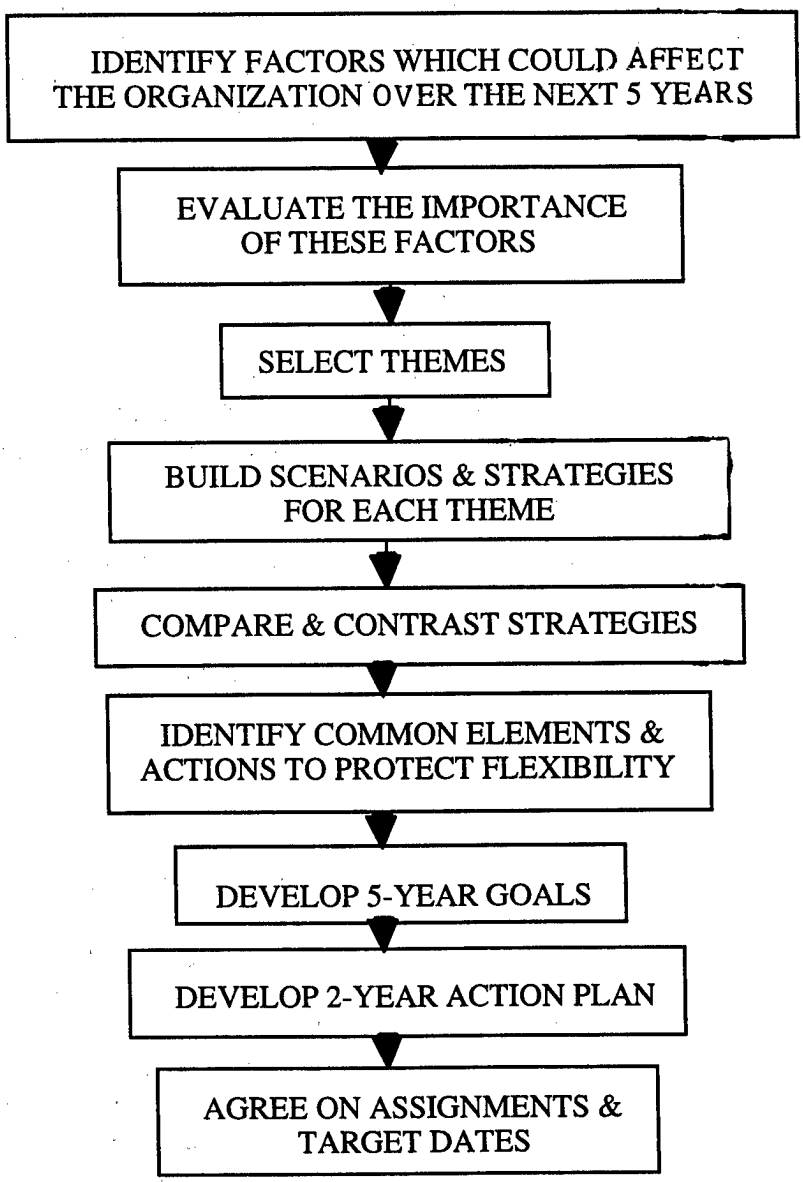

Figure 1
Executive Planning Session
Process Steps

Evaluate the importance of the factors

Evaluating every factor on a brainstorming list is a time consuming and cumbersome process. So the next step is to use a simple ranking process to identify those factors that were most important. This begins by reviewing the list to be sure that all the items on the list are understood. There may also be some discussion of the significance of items that are known to some members of the group but not to others, but this discussion should not be permitted to slip into full-fledged evaluation of the items. The group should also discuss whether there are items that need to be consolidated. Then participants are given five colored dots, and told to come up to the flip chart sheets on which the brainstorming ideas were recorded, and vote with their dots. Participants are permitted to distribute the dots any way they wished, for example, one each on five different items, all five on one item, and so on.

The colored dot ranking technique is used because of its simplicity, and because participants enjoy the process. On other occasions, one of the authors has asked participants to rank ideas on two scales, one evaluating the significance of the factor if it did occur, and the other evaluating the likelihood that it will occur. This approach leads to important discussions about how much impact some factors would have, even though they may not seem likely. Mechanically, however, the tallying of the scores is cumbersome unless the exercise occurs before a lunch or overnight, allowing enough time to tally the scores.

Select themes

Typically a limited number of factors emerge as clearly most significant. Often the scores show 4-7 factors as most important, with a clear drop-off in scores after that.

The first step of the process simply leads to lists of factors, such as "legislative support for Corps' environmental cleanup mission." This phrasing does not say whether legislative support is increased or decreased. Obviously, to develop an image of the future, some sense of direction must be projected for each of these factors.

Following the scoring, the group uses the major factors as the basis for selecting unifying themes around which scenarios of the future can be built. If a key factor is "legislative support for Corps' environmental cleanup mission," one theme might stress greatly increased legislative support, the other might assume that Congress curtails any further Corps activities in the environmental cleanup arena.

Even with only 4-5 major factors, by the time you visualize each of the factors going in two or three directions, the number of potential scenarios becomes unmanageable. Our experience to date suggests that the most efficient process is for the facilitators to present a proposal of themes to the group, based on the factors which the group ranked high, inviting the group to modify and accept the proposal. One important consideration in proposing themes to the group is to include

themes which "bracket" the most important possibilities. It is not possible to consider every future possibility, but it is important to include themes that may lead to scenarios that are sufficiently different so that the group will recognize that the future is not a straight-line projection from the present.

To illustrate, here are the lists of themes selected by the MRD work team:

MRD THEMES

Theme A: CIVIL WORKS - CURRENT TRENDS:
This theme assumed continuation of current trends, which means that the civil works program has already declined, and the size and character of the projects has already changed.

Theme B: CIVIL WORKS - EXPANDED MISSION:
This theme assumed MRD would be able to expand the mission of the civil works program in such a way that the program would be maintained, even expanded.

Theme C: HAZARDOUS/TOXIC WASTE PROGRAM INCREASE:
This theme assumed that MRD would play an expanding role in delivery of services in the hazardous and toxic waste field.

Theme D: INCREASE IN MILITARY PROGRAM:
This theme assumed that MRD's military program would expand as a result of serving customers outside of MRD's area: added programs with old customers or additional responsibilities gained through Corps reorganization.

Theme E: DECLINING MILCON (MILITARY CONSTRUCTION) PROGRAM: This theme assumed that the military construction program had reached its peak and would decline, either because major needs have been met over the past eight years due to a change in administration or because MRD's customers turn to alternative service providers.

Theme F: NEW MISSIONS OUTSIDE CIVIL WORKS PR MILCON:
This theme assumed that MRD would provide its services to other Federal, state, or local governmental agencies in support of programs such as highway construction, building of the super collider, or by performing other services for clients such as the Veterans Administration, State Department, or Department of Justice.

Build scenarios and strategies for each theme

Participants are then divided into working groups, with each group assigned the task of developing a scenario based on that theme, and a strategy they would recommend for the organization if they anticipated that scenario would, in fact, occur. Scenarios are short-word descriptions of what the future would be like, given the occurrence of the theme.

Then the working groups develop a proposed strategy for how the organization could cope effectively if the scenario they identified would occur.

Compare and contrast strategies

Participants then reconvene and present their scenarios and strategies, inviting feedback from the other groups. The key questions which need to be addressed are: Are the assumptions in our scenario reasonable? Are there other critical assumptions that should be substituted or added? Does our strategy appear effective? Are there other possible strategies?

Once there is agreement on the scenarios and strategies, the next step is to compare and contrast the strategies. The intent of this step is to analyze the degree to which commitment to one strategy forecloses the ability of the organization to implement the strategy in one of the other scenarios. Examples of actions which might foreclose other strategies include: commitment of capital resources, reducing the organization's expertise in particular areas, abandoning a specific class of customer, and so on.

The key concept during this step is to get participants to think about which actions foreclose options, and which maintain them. Another important consideration is which actions must be taken now to protect future options, for example, you may foreclose options by taking an action, but you may also foreclose options by failing to take action. If the Corps fails to develop its expertise in the environmental cleanup area now, for example, it will likely foreclose that as a future mission.

Identify common elements and actions to protect flexibility

Having analyzed which actions create/foreclose options, the next level of analysis is to look at those actions that are common throughout most or all of the scenarios. These actions, and the actions to protect flexibility identified in the previous step, are all potential candidates for inclusion in a final organizational strategy.

Develop five-year goals

At this point the process becomes more like the traditional planning process: Goals -> Objectives -> Plans. The difference is the context in which the goals are set is much broader, and

the group has a much expanded image of what the future could be like and which steps play a role in shaping how the organization is positioned to meet those futures.

The five-year time frame was selected because, in our experience, it represents the outer limits beyond which managers become so overawed with the uncertainties that they have difficulty planning effectively. On the other hand, it is a long enough period of time that managers can imagine significant change taking place.

Develop two-year action plan

In our experience, two-year action plans provide not only a guide for action, but a sense of direction and change. Much beyond this, and managers begin to waffle, wanting more feedback from the external environment before proceeding.

Agree on assignments and targets

Not infrequently, executive retreats end with many virtuous words but result in little action. This often leaves people convinced that these sessions are pleasant but unproductive. To ameliorate this problem, it is important to agree on assignments and targets before leaving the retreat. This provides a practical transition back to the real world.

ADVANTAGES OF THIS PROCESS

The process described in this article blends team-building with futures planning, and based on our experience, has the advantages of both. The payoffs frequently mentioned for team building are: increased trust, improved communication, development of stronger interpersonal relationships, and emotional "ownership" for group agreements. We believe the addition of the futures planning process provides the following additional benefits:

- Consideration of a range of possible futures, not just a version of the future based on tradition or groupthink.

- Opportunities for different parts of the organization to describe external trends—and the significance of those trends to the organization—of which others within the organization may not be aware.

- Strategic planning is based on an appreciation on the potential consequences of action or inaction on future flexibility and responsiveness of the organization.

- Group commitment is created for both a vision of the future, and a shared program to achieve that future.

Chapter 16

"IF I WERE THE CEO...:" A NEW TOOL FOR CONSENSUS BUILDING

by
James L. Creighton, Ph.D.
Jerome Delli Priscoli, Ph.D.

Necessity is the mother of invention. In the authors' case, necessity led to the development of a new tool for creating consensus among people with divergent interests.

Imagine yourself for a moment, leading a group whose mandate it is to develop a new energy policy for the United States. This is not an entirely theoretical exercise. Around the table sit the CEO of one of the nation's largest oil and gas exploration companies, a former Governor who is biding his time as President of a university possibly awaiting an opportunity to run for the United States Presidency or accept an appropriate cabinet position, one of the nation's leading environmentalists with particular expertise in energy matters, the Department of Defense's top procurement official, and more than fifteen other high-level people representing most of the stake holders in United States energy policy. The challenge, get an agreement on United States energy policy in just slightly over two hours, as the concluding chapter of the National Energy Consensus Experiment. As the designated facilitators for the session, the authors were expected to propose a procedure for bringing about consensus. What to do?

While these circumstances may have been slightly more stressful than usual, they are not significantly different than those faced by many corporate or governmental policy makers. Among the characteristics of this group were:

- **Unrealistic Expectations of Support**. Many of the participants came into the meeting convinced that they knew what the United States energy policy should be—after all had not all their friends and business associates agreed that was what was needed—and expected others to support their position? Like many policy makers, they tend to talk only to people of equivalent social status, and often are unaware of how controversial their own view points are because they share the views of most with whom they work or socialize.

- **Limited Perspective Based on Self-Interest**. Participants, even those with penetrating insights into how United States energy policy (or lack thereof) affected their interest, saw things through the filter of their own personal or corporate interest. Few had the perspective of someone whose job it is to balance numerous competing interests.

- **Not Knowing What Would Be Acceptable to the Other Side.** Participants either had relatively limited exposure to the other participants, or, if they did relate, did so in polarized roles. As a result, they often knew more about what each other was "against" rather than what they were "for." As a result, they often had difficulty imagining a common ground on which they could agree.

- **Difficulty in Making Concessions.** Although the participants in the National Energy Consensus Experiment participated as individuals, they were also aware that they would be seen as speaking for their industry or interest. As a result, it was difficult to discuss possible concessions or even common ground without the fear of "selling out" themselves and others. This problem is not unique. One of the problems with most negotiations is that it is difficult for the sides to surface possible compromises, because once the topic has been broached by one of the sides, everybody knows there are conditions under which that side will make concessions. In adversarial situations, that gives the other side leverage in the negotiations.

- **Significant Egos.** While probably no more than in the average corporate board room, there were a number of people gathered around the table who possessed sizable egos. They were not likely to take kindly to feedback or criticism.

A CONSENSUS BUILDING PROCEDURE

So what did Mother Necessity brew up for the occasion?

We realized that our first challenge was to get participants to think globally; to think in terms of something that everyone could accept, to think, in short, like the Secretary of Energy has to think. This gave us the first clue to developing the procedure: We needed to start with everybody writing a plan starting on the premise: "If I were the Secretary of Energy what I would include in the national energy policy would be...."

With this as the starting point we developed the procedure shown below, except that we have changed it from "If I were the Secretary..." to "If I were the CEO."

PHASE 1

1) Select a group that represents all the key interests or viewpoints on whatever issue you want to address.

2) Position all participants around a table.

3) Give everyone the same assignment: Pretend you are the CEO. On one side of a piece of paper write the major points of components of a plan to...(whatever issue on which you are trying to develop a consensus). Keep in mind that this plan is unlikely to be implemented unless you can gain the support of most of the interests (viewpoints) represented in this room.

4) After they have completed their proposal, ask each participant to write at the top of their page the words "agree" and "disagree" with a line after each. The line allows other participants to record their reactions.

5) Have each participant hand in his/her proposal when it is completed. The meeting leader should then shuffle the proposals, putting a mark (but not a name) on the proposal at the top of the stack. The marked proposal is given to someone near you, so you can see it when it has circulated around the circle. Then redistribute the remaining proposals to the group so that everyone has a proposal in front of him/her.

6) Each participant should then read the proposal in front of him/her, putting a check (✓) mark by either "agree" or "disagree." If they disagree, they are to turn the paper over and briefly describe why they disagree (In practice, most participants will read the comments of all previous reviewers, whether or not they agree or disagree with the proposal).

7) Then they are to pass the paper to the person next to them, so that all the papers are traveling in a circle. Each person should read each proposal, checking the appropriate line and writing comments as appropriate.

8) When the marked copy returns to the person who read it first, take a break.

PHASE II

The purpose of Phase II is to "educate" the participants by letting them read the comments on their proposal, then use this information to build a consensus approach. We see two approaches you might consider at this point:

Option A: Use the Proposal with the Most Votes as the Basis for Discussion

One option is to take one or at most two proposals that received the most support and use them as a "single-text" negotiating document.

The term "single-text negotiating document" comes from the field of mediation. Mediators are aware that there are times when all sides might be willing to consider a plan which involves concessions from their position, but neither side feels it can afford to be the first to "give ground." To handle this circumstance, mediators will sometimes

communicate individually with all the participants in the negotiation, then develop a single-text negotiating document to which all groups might be able to agree, so long as someone else brings up the idea first. Because the single text negotiating document surfaces these ideas, no one weakens his/her position by considering it, and groups also get to see all the tradeoffs or reciprocal concessions at the same time.

If you are going to use the proposals with the most votes as a single-text document, you will need to use the time during the break as an opportunity to photocopy the proposal(s) with the most votes, or write it up on a flip chart. If you had the opportunity of doing Phase I in one day, and Phase II the next, you could do much more detailed analysis about which features made plans acceptable/unacceptable.

Before discussing the "single text" proposal, however, pass out the proposals again, letting each participant read the comments on his/her proposal. This is an essential part of "softening up" people's precommitment to their own proposal.

Option B: Start from Scratch to Develop a Joint Proposal

This alternative assumes that, having seen the comments of the other participants, all participants now have a clear idea of which ideas will gain acceptance and which will not. Thus it will now be possible to develop a single document on a flip chart based on suggestions from the group. This has the advantage of the fewest logistic problems in getting ready for Phase II. Instead, Phase II begins simply by handing out the proposals to the group, giving each participant the opportunity to read the comments on his/her proposal.

(This is the strategy we used with the National Energy Consensus Group. However, we also used the "no evaluation" rule from the brainstorming technique to develop our single text proposal. In brainstorming, every idea is written down, with no evaluation. Then a separate evaluation period follows. Our approach differed from that used in brainstorming in that we did not encourage "way out" ideas (an important part of brainstorming), but rather asked for components to an energy plan participants thought would be acceptable.)

THE RESULTS

Our experience using this technique during the National Energy Consensus Experiment was bittersweet. We came away convinced that the technique worked extremely well, but that we were 30-60 minutes shy of being able to achieve a significant consensus. We were successful in brainstorming a list of the major components that might belong in a national energy policy, but when we went back through the list during the evaluation period to see if there was agreement, we were not able to get unanimity on some of the substantive items. In many cases, only one or

two people withheld support, and we felt that with more time to explore their concerns we might have been able to make minor modifications to the wording of the proposal sufficient to get their support. On a few issues, though, it was clear the group was still substantially divided. Our own evaluation, though, and the evaluation of a number of participants with whom we talked, was that we were just minutes away from more agreement on energy policy than anyone would have hoped for from a group as diverse as this.

One of the limiting factors with the group we were facilitating during the National Energy Consensus Group was the number of participants, about twenty-two. Some participants began to be restless by the time they had reviewed twenty-two proposals, and this was also a large group in which to try to achieve unanimity in a short period of time.

Based on this experience, though, one of us (Creighton) used the same technique with great success to build consensus between a number of governmental agencies. A group of eleven Southern California solid waste management agencies wanted to discuss the possibility of some form of coalition or intergovernmental entity to oversee the marketing of recyclable waste generated within their service areas. By pooling their waste, they hoped to be able to guarantee a sufficient waste stream to gain long term contracts for the waste. This would have the advantage of providing predictability in their planning.

This time, participants were asked to pretend they were "The Solid Waste Czar of Southern California" and could dictate the kind of organization they thought would be most workable. After reading each others' proposals and reviews, this group was able to quickly develop a list of general principles on which they could all agree. Then subcommittees went of in other rooms to develop specifics for each of the major principles. The subcommittees later reported back to the full group, and their reports were accepted with complete agreement. Steps are being taken now to establish a workable organization.

WHY "IF I WERE THE CEO..." WORKS

We believe "If I Were the CEO..." is an extremely useful tool for anyone trying to build consensus in a group with divergent viewpoints. In our judgment, the reasons it works are:

- People can find out what is acceptable without having to take a significant personal or organizational risk.

- The technique focuses on those ideas that are acceptable, without large quantities of time spent on those issues that divide the group.

- No one feels attacked—no one knows whose plan they are commenting on, and no one knows whose comment they are reading.

- Ideas are surfaced from every participant in the group; it arrids a situation where just a few people dominate discussion.

- All ideas must win support based on their merits, not on the status of the person proposing them (nobody knows who proposed them initially).

We believe there are many potential applications for this technique, and look forward to hearing from others about its use.

SECTION V: PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION

Chapter 17

OVERVIEW OF ALTERNATIVE DISPUTE RESOLUTION (ADR)

by
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INTRODUCTION

As a U.S. Army Corps of Engineers (USACE) manager, you cope with disputes everyday. They occur in all Corps units, whether planning, real estate, regulatory functions, construction, operations, or human resources. You may find yourself resolving disputes over policy or regulations, or acting as a referee between functions. You also represent the Corps in disputes with other organizations. The truth is that while functions, regulations, and structure may change, whenever you manage people there will be disputes.

Disputes are a fact of life. The question is how you manage them. You can avoid a dispute, but that has a way of coming back to haunt you. You can engage in confrontation, however, sometimes that leads to bitter battles that are not only costly but may damage important working relationships. You can get a decision from a higher authority, whether a boss or a judge, but there are always costs and risks associated with that as well.

The best solution is an agreement between the parties to the dispute. But how can you get such an agreement? That is what Alternative Dispute Resolution—or the common shorthand "ADR"—is about. ADR provides you, the Corps manager, with new tools to reach *mutual agreements*. These tools can be used to get agreements within your own organization, reducing the amount of energy lost to unproductive conflict or personal animosity. These tools are also helpful in getting agreements between the Corps and other organizations, getting a commitment to a common goal, and reducing the costs and delays associated with litigation.

This guide provides an overview to the basic concepts behind ADR, and the range of ADR techniques you may find helpful as a manager. The appendices provide more information about how ADR has been used in the Corps, and the resources upon which you can draw.

What Is A Dispute?

Different people have different goals and interests. That is so obvious it is almost a cliché. However, it is also why we have conflict. Most of the time, we simply pursue our different interests, but occasionally, as people pursue those goals and interests, they clash. When they

reach a point of incompatibility or non-reconciliation, we describe it as a dispute or conflict.[1] There is always the potential for conflict, but it takes something more to create the spark that brings about a dispute.

Sometimes that spark is provided by competition or by change. The situation itself may force a clash. Some typical situations that can lead to disputes include:[2]

- interdependence of people and tasks
- jurisdictional ambiguities
- functional overlap (turf)
- competition for scarce resources
- differences in organizational status and influence
- incompatible objectives and/or methods
- differences in behavioral style
- differences in information
- distortions in communication
- unmet expectations
- unmet needs or interests
- unequal power or authority
- misperceptions

Disputes always involve at least two parties, each of whom is trying to do a good job of meeting his or her own objectives. By the nature of the situation or circumstances, they come to see each other as obstacles to meeting their objectives. Now we have a dispute.

Unless there is some sort of intervention, this dispute may grow to the point where the parties come to see each other as adversaries, even as "the enemy." Communication becomes distorted. People view each other as stereotypes, not as human beings. Each new escalation in aggressive behavior is justified as a counter-response to the other person's perceived aggression. When this kind of polarization occurs, most of us assume that we are now in a struggle to "win," even if it means that the other person will lose. We have a "win/lose" battle. Or, as it is sometimes called, a "zero-sum game," meaning that everything you gain—dollars, status, power, authority—must be at someone else's expense (or vice versa).

When this kind of dispute occurs, it is usually dysfunctional, whether within or between organizations. It can prevent people from working together even when they share common goals. It can cause such anger and stress that the relationship is destroyed, even though it has

[1] In this paper we have used the term "dispute" and "conflict" as if they are interchangeable. In the academic literature, some scholars do define a difference.

[2] This list is compiled from pages 2, 8-10, of *Negotiating, Bargaining and Conflict Management.* a manual written by Christopher W. Moore, Ph.D., CDR Associates, for the U.S. Army Corps of Engineers. This manual is used as part of a five-day course presented by the U.S. Army Engineering and Support Center, Huntsville, Alabama.

been and could continue to be of benefit to the parties. Disputes chew up time and resources needed for more productive projects.

While conflict is inevitable, it does not have to end in polarized disputes. In fact, if handled well, conflict can even be healthy. Among the positive things conflicts can bring about are: (1) conflicts identify problems that need to be solved; (2) conflicts bring about change, permitting adjustments to be made without threatening the stability of the relationship; (3) conflicts can change the way we think about things, preventing "group think;" and (4) conflicts help clarify our purpose, what's important to us or the organization.

The difference is how the conflict is managed. That is one of the key concepts in the Corps' ADR program: one of the key jobs of a manager is to manage conflict so that it does not become dysfunctional. Just turning it over to the attorneys is not a solution. Dispute resolution *is* management.

What is Alternative Dispute Resolution (ADR)?

As the Corps uses the term "alternative dispute resolution," ADR is an effort to arrive at *mutually acceptable decisions.* It is an alternative to adversarial processes such as litigation or administrative processes that result in "win/lose" outcomes. ADR involves structuring the process to minimize the destructive elements and promote productive uses of conflict. It involves the application of theories, procedures, and skills designed to achieve an agreement that is satisfying and acceptable to all parties.

The method ADR uses to achieve a "win/win" solution is *interest-based bargaining.* It is distinct from *positional bargaining*, the form of bargaining with which most people are familiar. Here is a comparison of these two approaches:

- **Interest-Based Bargaining.** Interest-based bargaining involves parties in a collaborative effort to jointly meet each other's needs and satisfy mutual interests.[3] Rather than moving from positions to counter-positions to a compromise settlement, negotiators pursue a joint problem-solving approach, identifying interests **prior** to examining specific solutions. After the interests are identified, the negotiators jointly search for a variety of alternatives that might satisfy all interests, rather than argue for any single position. The parties select a solution from among these mutually generated options. In this approach, the emphasis is on cooperation, meeting mutual needs, and the efforts of the parties to expand the bargaining options so that a wiser decision, with more benefits to all, can be achieved.

[3] This paragraph was taken from Christopher W. Moore, *Decision Making and Conflict Management.* Boulder, Colorado: CDR Associates, 1986. Copyright, 1986, CDR Associates. All rights reserved. Used with permission.

- **Positional Bargaining**. Positional bargaining is a negotiation strategy in which a series of **positions** (alternative solutions that meet particular interests or needs) are presented to other parties in an effort to reach agreement. The first or opening position represents the maximum gains hoped for or expected in the negotiations. Each subsequent position demands less of an opponent and results in fewer benefits for the person advocating it. Agreement is reached when the negotiators' positions converge and they reach an acceptable settlement range.

The difference between interest-based bargaining and positional bargaining is not just procedural. Rather, they reflect fundamentally different attitudes about how to handle disputes, as shown in Figure 1 below:[4]

Attitudes of Interest-Based Bargainers	Attitudes of Positional Bargainers
• Resources are not limited. • All negotiators' interests must be addressed for an agreement to be reached. • Focus on interests not positions. • Parties look for objective or fair standards to which they can agree. • Negotiators believe there are multiple satisfactory solutions. • Negotiators are cooperative problem-solvers rather than opponents. • People and issues are separate. Respect people, with emphasis on interests. • Search for win/win solutions.	• Resources are limited. • The other negotiator is an opponent; be hard on him/her. • A win for one means a loss for the other. • The goal is to win as much as possible. • Concessions are a sign of weakness. • There is a right solution—mine! • Be on the offensive at all times.

Figure 1
Attitudes Underlying Bargaining Approaches

Why worry about reaching mutually-acceptable agreements? The reason is that people act differently when they have participated in a decision and feel they have control over the outcome. For example:

[4] See Moore, *Decision Making and Conflict Management*. See also Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*. New York, NY: Penguin Books, 1981.

- When people feel that their participation can make a difference in the outcome of a decision-making process, they are more likely to participate seriously and cooperatively.

- When people feel they have some control over the process which generates solutions, they are more likely willing to consider and evaluate the alternatives in a serious and responsible manner.

- When people believe that their participation has been genuine, that the process for reaching a decision has been fair, and that all sides had a chance to influence the outcome, they are far more committed to implementing the solutions that have been developed.[5]

Why The Corps Uses ADR

For the Corps, ADR includes both conflict management and conflict prevention. That is, it uses ADR to resolve disputes that have already occurred, as well as to prevent potential disagreements from turning into disputes. In this sense, ADR is far more than just an alternative to litigation. It is a part of how managers manage.

The Corps, like many large organizations, finds itself involved in numerous disputes. Some of the areas in which disputes occur include:

- **Construction Claims.** As managers of the construction of some of the largest public works projects in the world, the Corps is often involved in claims disputes between the Corps and contractors or sub-contractors, involving interpretations of the contract, differing site conditions, change orders, etc.

- **Local Cost Sharing.** Recent legislation governing public works projects requires greater economic participation of local communities. Thus, a part of every new project is the negotiation of a Local Cost-sharing Agreement, which specifies the role which each of the agencies will play in the project. In negotiating Local Cost-sharing Agreements, disputes can arise over the proportion of costs to be borne by local government, design standards of the project, construction schedules, valuation of real estate, or even the accounting methods to be used in assigning cost.

- **Regulatory Functions.** Because of its legislatively-mandated role as the regulator of the nation's wetlands, the Corps must often address disputes over the amount of development in wetlands, what the balance should be between development and protection of wildlife habitat, and what mitigation measures should be required of developers.

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[5] From *Collaborative Problem-Solving for Installation Planning and Decision Making*, by C. Mark Dunning, IWR Report 86-R-6, pp. 11-12.

- **Operations.** As managers of many of the nation's largest dams and locks, the Corps makes many decisions which are potential sources of dispute, such as the level of flood protection provided, available water supply for communities and industry, navigation rules along the rivers, the water level of reservoirs which are used for recreation as well as flood protection, and so on.

- **Planning**. In planning new facilities, the Corps is often involved in disputes about whether or not a new facility should be built, which alternative is preferable, what mitigation will be provided to people affected by the project, and many other issues.

- **Military Construction.** Even in its military construction role, disputes may arise between the Corps and its "clients" both within the Army and with the other service organizations for whom the Corps provides construction services. There may be different expectations about what is required, different schedules, different ways of operating. All of these may lead to disputes.

Currently, a number of these disputes are resolved through litigation. In the case of the Corps' relationship with its military "clients," disputes are not resolved by litigation, but can result in an impasse that pollutes the relationship between the organizations.

Whether the result is litigation or impasse, there are costs to the organization, and to the tax-paying public. For example, contract claims have more than doubled in the past eight years. Not only has this increased budgets for additional staff and attorneys, but the courts and the Contract Appeals Boards are so jammed that resolution of cases may take years with great costs to both the Corps and the other parties. Even supposedly expedited procedures may take as long as three to four years to produce resolution. There may also be considerable delays in the completion of projects, or cost overruns due to the failure to resolve issues in a timely manner.

When disputes remain unresolved for prolonged periods of time there is damage to important relationships. It does no one any good, for example, when badly needed projects are delayed because of the inability to complete a Local Cost-sharing Agreement. Both contractors and the Corps have a stake in maintaining an effective working relationship, both on current and future projects. Disputes over wetland development can sometimes result in the worst outcome, achieving neither environmental protection nor economic development. The Corps can be seen as "the enemy" by communities who depend on river-related facilities.

There are internal costs, as well, when disputes remain unresolved. Studies have shown that 30 percent of first-line supervisors' time and 25 percent of all management time is spent on resolving disputes. More than 85 percent of those leaving jobs do so because of some perceived conflict. Almost 75 percent of job stress is created by disputes.

Benefits of Using ADR

Managers who want to resolve problems and get things moving find ADR is a valuable tool for taking control and making things happen. ADR is consistent with the "can do" spirit of the Corps.

Some of the benefits of ADR include:[6]

- **Voluntary Nature of the Process.** Parties choose to use ADR procedures because they believe that ADR holds the potential for better settlements than those obtained through litigation or other procedures involving third-party decision makers. No one is coerced into using ADR procedures.

- **Expedited Procedures.** Because ADR procedures are less formal, the parties are able to negotiate how they will be used. This prevents unnecessary delays and expedites the resolution process.

- **Non-judicial Decisions.** Decision-making is retained by the parties rather than delegated to a third-party decision maker. This means that the parties have more control over the outcome and there is greater predictability.

- **Control by Managers.** ADR procedures place decisions in the hands of the people who are in the best position to assess the short- and long-term goals of their organization and the potential positive or negative impacts of any particular settlement option. This means decisions are made by those who best know their organization's needs. Third-party decision making often asks a judge, jury, or arbitrator to make a binding decision regarding an issue about which he or she may not be an expert.

- **Confidential Procedure.** ADR procedures can provide for the same level of confidentiality as is commonly found in settlement conferences. Parties can participate in ADR procedures, explore potential settlement options, and still protect their right to present their best case in court at a later date without fear that data divulged in the procedure will be used against them.

- **Greater Flexibility in the Terms of Settlement.** ADR procedures provide an opportunity for the key decision makers from each party to craft customized settlements that can better meet their combined interests than would an imposed settlement by a third

[6] Taken from *The Executive Seminar on Alternative Dispute Resolution (ADR) Procedures*, written by Christopher Moore, Ph.D. of CDR Associates and Jerome Delli Priscoli, Ph.D. of the Institute for Water Resources. This is a two-day course for senior level management given by the U.S. Army Engineering and Support Center, Huntsville, Alabama.

party. ADR enables parties to avoid the trap of deciding who is right or who is wrong, and to focus the key decision makers on the development of workable and acceptable solutions. ADR procedures also provide greater flexibility in the parameters of the issues under discussion and the scope of possible settlements. Participants can "expand the pie" by developing settlements that address the underlying causes of the dispute, rather than be constrained by a judicial procedure that is limited to making judgments based on narrow points of law.

- **Savings in Time.** With the significant delays in obtaining court dates, ADR procedures offer expeditious opportunities to resolve disputes without having to spend years in litigation. In many cases, where time is money and where delayed settlements are extremely costly, a resolution developed through the use of an ADR procedure may be the best alternative for a timely resolution.

- **Cost Savings.** ADR procedures are generally less expensive than litigation. The cost of neutrals is typically less than for attorneys. Expenses can be lowered by limiting the costs of discovery, speeding up the time between filing and settlement, and avoiding delay costs. These front-end expenses are often the most costly components of legal costs. These savings are in turn passed on to the taxpayer. Relieving the burden on the courts caused by unnecessary or inappropriate lawsuits can help save valuable public resources.

THE POLICY AND LEGAL MANDATE FOR ADR

The use of ADR is both encouraged by Corps policy and explicitly authorized by Federal law.

One of the strengths of the Corps program has been that it has been sponsored since 1984 by the Corps' Chief Counsel. The ADR program is not intended as a replacement for a legal system. Instead, ADR is a means to "off-load" the pressure on the legal system. Attorneys within the Corps see the need to provide line managers the skills and support they need so that more disputes are resolved outside of litigation.

This approach has been echoed in an ADR policy statement issued by the Chief of Engineers in August 1990 and reaffirmed in 1993. This policy states that it is the policy of the Corps of Engineers to resolve disputes at the first appropriate management level through negotiation, and where appropriate, ADR techniques. ADR is viewed as a management tool for dealing effectively with conflict while avoiding the expense and delay of adversarial proceedings. In particular, the Chief stresses the use of preventative approaches to dispute resolution.

A further impetus for the Corps program has been the Administrative Dispute Resolution Act 1990 (Public Law 101-552) which specifically authorizes and encourages the use of ADR

techniques by Federal agencies.[7] In 1991, the President issued an Executive Orders clarifying some provisions of the Act. Although EO 12988 (February 5, 1996) revokes EO 12788 (October 23, 1991), both encourage the use of dispute resolution techniques. A brief description of the Act and the Executive Orders is provided below:

- **Administrative Dispute Resolution Act, Public Law 101-552, November 15, 1990**

  The Administrative Dispute Resolution Act establishes a statutory framework for Federal agency use of ADR. It is premised on Congress' findings that ADR can lead to more creative, efficient, stable, and sensible outcomes. The Act seeks to prod Federal agencies to use ADR methods to enable parties to foster creative and acceptable solutions, and to produce expeditious decisions requiring fewer resources than formal litigation. The legislation aims to broaden agency authority and prompt agencies to use more consensual processes to enhance the possibility of reaching agreements expeditiously within the confines of agency authority. The Act requires that:

  — an agency appoint a dispute resolution specialist;

  — an agency review its programs (including entitlement programs, grants, contracts, insurance, loans, guarantees, licensing, inspections, taxes, fees, enforcement, services, economic regulation, management, claims, or other agency or private party complaints) for application of ADR techniques;

  — an agency appoint a senior official to be the dispute resolution specialist of the agency;

  — an agency make training available to its specialist and other employees involved in implementing the Act; and

  — an agency with grant or contract functions review its standard contracts for inclusion of ADR clauses.

  The Act authorizes parties to administrative proceedings, including agencies, to agree to binding arbitration. However, it provides that the arbitration award does not become final and binding on an agency for 30 days. During that 30 days, the agency head has unrechangeable authority to vacate the award. In such cases, the agency will assume all attorney fees and expenses of the arbitration process unless an adjudicative office or other designated official of the agency finds that the award of expenses is unjust. After 30 days, the award would become final and enforceable on the agency, and on the other

[7] At this time, the ADR Act of 1990 has expired under a Sunset provision. However, Congress is considering several bills to continue support for ADR.

parties with the force of law, although it does not set a legal precedent, nor is it subject to legal appeal except under extraordinary circumstances. The Act recognizes that certain kinds of government decisions will not be suitable for ADR, particularly binding arbitration. In fact, the Corps does not favor binding arbitration, except in labor-management dispute panels, and only if the parties contract for this outcome. Rather, the Corps prefers to have decisions made by the appropriate decision makers. Section 582(b) of the Act delineates the factors that agencies (and reviewing courts) should consider in deciding to use ADR,[8] The Act specifies that an ADR proceeding not be used:

— if the decision will set an authoritative precedent;

— if the decision involves a governmental policy that requires additional procedures before a resolution can be made;

— in a situation where it is important that variations among individual decisions are not increased, and the proceeding would not maintain consistent results among individual decisions;

— if the matter significantly affects persons or organizations that are not party to the dispute;

— if a full public record is important, and the proceeding cannot provide such a record; or

— if the agency needs to maintain the authority to alter the decision based on changed circumstances, and the ADR proceeding would interfere with that flexibility.

The Act also authorizes the use of "neutrals" who may act as conciliators, facilitators, or mediators. Such individuals may be government employees or other individuals acceptable to the parties. Before it was disestablished, the Administrative Conference of the United States was directed to establish standards for neutrals, maintain a roster of individuals who meet such standards, and develop procedures to permit agencies to obtain the services of neutrals.

In addition, the Act covers the issue of confidentiality and specifically amends existing legislation.

[8] From *The Administrative Dispute Resolution Act: Guidance for Agency Dispute Resolution Specialists*, Office of the Chairman, the Administrative Conference of the United States, Washington D.C., February 1992.

- **Executive Order 12788, Civil Justice Reform, October 23, 1991**

  This Executive Order encourages voluntary dispute resolution to relieve the American Court system of the number of cases brought before it, given the tremendous growth in civil litigation. It is primarily addressed to lawyers, but it is also a supporting instrument of the ADR Act of 1990.

  It asks that, where appropriate, counsel should suggest a suitable ADR technique to private parties. Furthermore, it encourages claims to be resolved through informal resolution procedures, such as informal discussions or negotiations, as opposed to litigation or structured ADR processes.

  The Order interprets any ADR technique as binding arbitration "if an agency is bound, without exercise of that agency's discretion, to implement the determination arising from the ADR technique" and seeks to be consistent with the terms for arbitration in the ADR Act of 1990.

- **Executive Order 12988, Civil Justice Reform, February 5, 1996**

  The use of ADR is encouraged rather than formal court proceedings. Resolution of disputes should be expeditious, and ADR may be appropriate if it contributes to prompt, fair, and efficient dispute resolution. Also, litigation counsel should be trained in ADR techniques. The Executive Order (EO) does not refer to binding arbitration and imposes limitations on the use of binding arbitration, as was done in the prior EO.

There are other mandates and appeals for the use of ADR in government. The Federal Acquisition Regulation endorses the use of ADR to the "maximum extent" as a matter of policy and advocates the use of neutral third parties to focus on deriving agreements early in the process. Executive Order 12871, "Labor-Management Partnerships," 1994 directs Federal agencies to create labor-management partnerships, and to avail consensual methods of dispute resolution and interest-based bargaining and negotiation so as to transform adversarial relationships into a partnership for reinvention and change. The National Performance Review, initiated by President Clinton and Vice-President Gore in 1993, recognizes that transforming labor-management relations will require a significant change in the relationship of the partners. Training in dispute resolution is germane to this objective.

The Department of the Army and the Corps of Engineers actively promote the use of ADR. The Secretary of the Army and the Chief of Engineers have each issued policy statements endorsing the use of ADR (see Appendix IV for the Corps' ADR policy letter). In fact, the Corps of Engineers was awarded a "Hammer Award" by Vice-President Gore in 1995 for its contributions to government reform through the application of ADR and Partnering techniques. Working

groups and dispute resolution specialists have been put in place to facilitate the spread of training and application of dispute resolution principles and methods throughout the Army.

USING ADR

There are certain general principles that underlie the use of ADR. These include:[9]

- **Define the problem, rather than propose solutions or take positions**

  This step is rooted in three observations about human behavior:

  — *Everybody starts out with a different definition of the problem.* Because of differences in roles, organizational responsibilities, personal values, different information bases, etc., people have very different perceptions of what the problem is. An environmental specialist may view a tree alongside the road as a "visual resource." A timber expert might view the same tree as a "renewable resource," while a traffic safety expert sees it as "a fixed hazardous object." All of these perspectives are accurate but limited by the confines of that individual's role. Whenever you start to address an issue, you must spend time understanding what the problem is as others see it.

  — *People won't accept there is a need for a solution until they accept there is a problem.* No one wants to accept an onerous solution until he or she is first convinced there is a compelling problem that needs to be solved. The expert who sees the tree as a visual resource does not have a problem (assuming the tree is healthy) until the other two experts propose to cut it down; one, because it is dangerous to drivers, and the other, because of its economic value. Since the visual expert does not have a problem, he or she is very unlikely to accept the need to cut the tree down. Until people buy into a common definition of a problem, they are not willing to talk about solutions that impact them.

  — *The solution first proposed becomes the definition of the problem.* Both the safety expert and the timber expert might propose that the tree be cut down. But in so doing they have not only set off a controversy, they have limited the range of possible solutions. They have defined the problem as "whether or not to cut down the tree." In doing so, they cut out many possible solutions. If, instead, the problem were defined as "how to provide safety to motorists," then the alternatives to cutting down the tree might include safety barriers or a minor relocation of the road. If the problem

[9] Many of the principles in this section are taken from *Managing Conflict in Public Involvement Settings*, prepared for the Bonneville Power Administration by James L. Creighton, Ph.D., Creighton & Creighton, Inc.

is "providing sufficient harvestable timber," then there may be solutions that are less visually sensitive than cutting down a tree located right next to the road.

The central theme that emerges from these observations is the need to define the problem well and get commitment to that problem definition before even beginning to consider solutions. Otherwise, people begin reacting to each others' proposed solutions (positions), and the problem is defined in ways that are not acceptable to all parties, limiting the potential for a mutually acceptable solution.

- **View the Situation as an Opportunity for Collaboration, Not Competition**

  Look for "win/win" solutions rather than "win/lose" or "winner-take-all" outcomes. Since disputes often come up in competitive situations, where there are perceived or actual incompatible goals or scare resources, it is easy for the emphasis to be placed on competition, rather than on the shared goals and mutually beneficial aspects of the relationship. In fact, competition can easily turn into an adversarial relationship, which at the extreme may involve extremely distorted communication, behavior designed to "get even" with the other side, or even abusive behavior.

  By shifting the emphasis to the fact there are shared goals, it is possible to collaborate, even if some interests are not compatible or are in competition. At their core, all ADR techniques assume a willingness to collaborate, although most techniques assume that the willingness to collaborate will grow as people build increased trust and confidence in each other. However, to even initiate ADR, the parties must believe that some collaboration is at least possible, and worth the risk of trying.

- **Negotiate Over Interests, Not Positions**

  While people's interests must be met for them to be satisfied, this does not mean that the final solution must correspond with their initial position: this is one way in which ADR differs from traditional negotiation approaches. The traditional form of negotiation, positional bargaining, starts out with both sides taking fixed positions, often accompanied by accusations about how the other person's behavior has done the first person damage. Then the parties make a series of reciprocal concessions until they are able to achieve an agreement. Because they start from positions, and then make concessions from them, the best that can occur in positional bargaining is a compromise. That is, the agreement inevitably does not meet some of the parties' needs, but meets just enough that the agreement is still tolerable.

  People's positions are not necessarily the same as their interests. Interests are the fundamental desires and needs that people are trying to meet through negotiation. They are the reasons behind the positions people take. If a union takes the position that a pay-

raise must be at least 8 percent, it is doing so on behalf of such interests as the economic well-being of the workers and the need of the union to be perceived as effective on behalf of the workers. There might be other ways to meet those interests, but the union has chosen the position that an 8 percent pay-raise is the solution.

The point is, if you concentrate on interests, there are many ways those interests can be met. If you concentrate on positions, then any concession is perceived as a loss. In addition, the position you pick may be unacceptable to the other party, whereas some other way of meeting your interests completely might be entirely acceptable.

In interest-based negotiation, parties go through the following steps:

1. Educate each other about fundamental interests

2. Jointly identify options that could be mutually beneficial

3. Agree on criteria for how to determine when an acceptable solution has been identified

4. Jointly create a solution that meets all parties' needs

With interest-based negotiation, the possibility exists that all parties may be able to meet all their needs in the situation—something considerably better than a compromise—although these needs may not be met in the ways people expected when they started the process.

- **Employ Effective Communication Skills**

To create the circumstances for collaboration, participants need to employ communication skills that encourage collaboration rather than make others feel defensive or adversarial. In tense situations, most of us resort to accusation, negative characterizations of others' positions, or even personal attacks, in an effort to get our way. The result, of course, is that people dig in more and defend themselves. Also, many people listen just enough to get their own argument ready.

People who are skilled at ADR receive specific training both in listening skills and in communicating feelings and concerns in a way that does not increase defensiveness. Sometimes these skills are brought into the situation by a third party who helps people communicate more effectively. If people cannot listen effectively, the third party helps them to understand each other's position, and restates accusations in ways that feelings are communicated without putting the other person down or making the situation more adversarial.

- **Design the Process to Address the Type of Conflict**

  There are very different types of conflict, and it is important to recognize these different types because very different dispute resolution strategies are needed depending on which type of conflict is involved in your situation. Many conflicts involve more than one of these sources of conflict, so it may be necessary to employ several different strategies, or approach the different types of conflict sequentially.

  The five basic sources of conflict are:

  1. *Relationship Conflict*

  This is conflict rooted in poor communication, misperceptions, dueling egos, personality differences, and stereotypes. This kind of conflict produces strong emotions and often must be addressed before people are able to resolve other forms of conflict. Sometimes this kind of conflict is resolved by increased communication or by getting to know each other better. But in polarized situations, increased communication may actually reinforce misperceptions and stereotypes. In such situations, the intervention of a third party is often needed to create an appropriate climate for better communication.

  2. *Data Conflict*

  This conflict results from a lack of important information, or contradictory information or misinformation. It may also involve different views as to which information is important or relevant, different interpretations of the data, or different assessment procedures. In a conflict situation, conflicts over data are sometimes hidden because people may break off communication. They do not even know that they are arguing from a different set of facts. These conflicts are often resolved quickly once communication is reestablished and there is an open exchange of perceptions and information. In other situations the information needed may not exist, or the procedures used by the parties to collect or assess information is not compatible. In this situation, resolution may require that the parties agree on a strategy to get the information they need to resolve the issue.

  3. *Values Conflict*

  Values conflicts occur when people disagree about what is good or bad, right or wrong, just or unjust. While people can live with quite different values systems, values disputes occur when people attempt to force one set of values on others or lay claims to exclusive values systems which do not allow for divergent beliefs. Resolution of values disputes sometimes occurs, at least over time, as people educate

each other about the basis for their beliefs. Beliefs about environmental values, for example, have changed considerably over the past two decades, at least in part due to this education process. Values conflicts can also be resolved when people build upon their many shared values, rather than concentrate on their differences. Or, values conflicts may be resolved when the situation is structured so that it is not necessary to resolve the differences.

4. *Structural Conflict*

Structural conflict means that the situation is set up in such a way that conflict is built in. The "structure" that causes the conflict may be the way in which roles and relationships have been defined, or by unreasonable time constraints, unequal power or authority, unequal control of resources, or geographical or physical constraints. For example, disputes over contracts often occur when organizations define the relationship as a competitive situation in which each side tries to get the best of the deal. If everybody does the best possible job of trying to "protect" his or her organization, they may create a situation where all the organizations suffer, yet individuals continue to be rewarded for their efforts to protect. Structural conflicts can be resolved by redefining roles or responsibilities, realigning rewards and punishments, or adjusting the distribution of power or control over resources.

5. *Interest Conflict* [10]

Interest-based conflicts occur over substantive issues (money, physical resources, time), procedural issues, (the way the dispute is to be resolved), or psychological issues (perceptions of trust, fairness, desire for participation, respect). For an interest-based dispute to be resolved, all parties must have a significant number of their interests addressed and/or met by the proposed resolution in each of these three areas. Often it is necessary to address data conflict or relationship conflict before addressing interest conflict. If there are conflicts over interests, the dispute will not be addressed to people's satisfaction until their interests have been addressed.

- **"Satisfaction" Means Meeting a Mix of People's Substantive, Procedural, and Psychological Interests**

Being "satisfied" by a proposed solution means that you are comfortable with the combination of substantive, procedural, or psychological needs that have been met. Substantive interests are your content needs: money, time, goods, or resources. Procedural interests have to do with your needs for specific types of behavior or the "way

[10] For our purposes, "needs" and "interests" are used interchangeably. In the academic literature there are some who argue that "needs" overarch "interests."

that something is done." Relationship or psychological interests refer to how one feels, how one is treated or conditions for an ongoing relationship. These interests are shown in the "Satisfaction Triangle" below[11]:

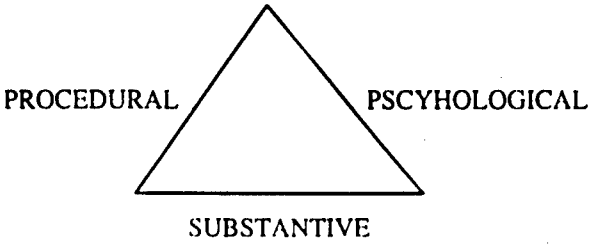

Figure 2
THE SATISFACTION TRIANGLE

The message of the satisfaction triangle is that the three interests are interdependent. All three must be met—to a greater or lesser degree—for there to be "satisfaction." This is why people sometimes refuse solutions that appear to meet their substantive needs if the solution requires them to lose face, or if they have not been treated fairly. Or people may say that while they do not disagree with an action, they believe that the decision-making process was not good because certain expected procedures were not followed.

Because these three sets of needs are interdependent, there can be "trade-offs" made between them. For example, if someone has been excluded from decision making in the past, he/she may be satisfied at being included in future decision making (a procedural gain), even though he/she will just be one of the parties at the table making decisions about the substantive outcome.

The bottom line is, unless people are satisfied that their needs have been met, the problem does not go away. Efforts to impose an outcome that does not meet these needs are usually unproductive or unstable. People just keep raising the dispute in different forms until their needs get addressed. Force or coercion must be used to impose resolution. This often breeds the use of counter force or behaviors that undermine or subvert trust and cooperation.

If you walk away from a dispute with any person feeling he or she has "lost," you probably do not have a resolution that will last. Either the relationship will be destroyed, or there will continue to be dysfunctional behavior. Thus, the goal of ADR is to find solutions that address all parties' needs. When all parties walk away satisfied with the outcome, they all have a stake in making the resolution work and last.

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[11] Christopher W. Moore. *Decision Making and Conflict Management.* Boulder, Colorado: CDR Associates, 1986. Copyright, 1986, CDR Associates. All rights reserved. Used with permission.

- **Consider a Wide Range of Alternatives**

  One of the crucial preconditions to finding a win/win solution is to jointly develop a wide range of alternatives. Otherwise, the first solutions people propose are likely to be thinly disguised positions. By getting all the parties to identify multiple alternatives, they are less likely to stake out and defend any particular solution.

- **Agree on Principles or Criteria by Which to Evaluate Alternatives**

  Once alternatives have been generated, getting agreement on a single solution often degenerates into a contest of wills. The insurance adjuster may offer you $8,000 to replace your car (destroyed in an accident) and announce, "this is as high as we can go." But, there is no principle or criterion involved here, just a contest of your will versus the insurance company's. It may or may not be a fair offer. Examples of possible principles or criteria include: "the average of cars of the same age and with the same equipment advertised in the newspaper" or "the average of three estimates from used car dealers," or "retail Kelly Blue Book." Each of these gives an objective basis from which both parties can evaluate the alternatives and decide whether a proposed agreement is "fair." If both accept the same principle or criterion as fair, then both can see that the answer resulting from that principle is also fair.

- **Document the Agreement to Reduce the Risk of Subsequent Misunderstanding**

  Verbal agreements run the risk of misinterpretation and there can be honest differences in how an agreement is remembered. However, the documentation should be tailored to the complexity of the situation. If you are resolving a contract dispute, the resolution and its justification need to be documented as carefully when you use ADR as when you do not. If you are in a less formal situation, documentation might consist of recording all the key points on a flipchart, getting the flipchart sheets typed up, and distributing it for everybody's review. If there is a good level of trust between the parties, one person might take on writing up a summary of the agreement and distributing it for review. However, when there is still mistrust, it is better to get agreement on the language while everyone is present. Otherwise, there is a danger that a legitimate misunderstanding may be interpreted as an effort to manipulate the process.

- **Agree on the Process by Which Agreements Can Be Revised**

  In some cases, the resolution is a single, one-time action (e.g. a payment is made to settle a contractual dispute over costs). However, ADR is also used to create agreements that may guide actions for a period of years. If an agreement governs an ongoing relationship, it is important that one party not unilaterally void an agreement, because when this occurs there are now two problems: the original problem, plus the mistrust and suspicion created when the agreement is broken.

Yet conditions may change in ways that require organizations to seek adjustments in agreements. Rather than create a situation where people feel the only way out of an agreement is to break it, it is better to include a mechanism for modifying the agreement within the agreement itself. This way, changes in the agreement do not threaten the ongoing relationship. Also, putting mechanisms for change in an agreement often makes it easier to reach the agreement in the first place. Parties who might be afraid of an agreement that locks them in permanently may accept an agreement that includes provisions for modification.

ADR TECHNIQUES

The term "ADR" is an umbrella term that encompasses a wide spectrum of techniques. The techniques vary amongst themselves based on the degree of structure/formality, the kind of involvement of intervenors (such as facilitators or mediators), and the degree of direct involvement of the parties.

Figure 2, on the next page, shows the range of dispute resolution techniques typically used in the Corps of Engineers. Disputes may be resolved directly between the parties, without any outside assistance, through informed discussions or negotiation. These are the "Unassisted Procedures" in Figure 2.

When unassisted approaches no longer prove effective, a third party may be called in to assist the parties in reaching agreement, i.e. "third-party assisted" techniques. Some of these techniques involve assistance with the "process"—helping people communicate better, setting up a structure the parties perceive as fair, suggesting procedures that might lead to resolution. Other techniques involve assistance in determining what would be an equitable settlement. All "third-party assisted" techniques leave the decision making authority in the hands of the parties. Settlement is reached by mutual agreement. When settlement cannot be reached in this manner, then resolution can only occur through "third-party decision making," e.g. in an administrative hearing or courtroom. Finally, some ADR techniques are designed to be "preventative" by improving communication and by providing mechanisms for discussing disagreements before they turn into full-blown disputes.

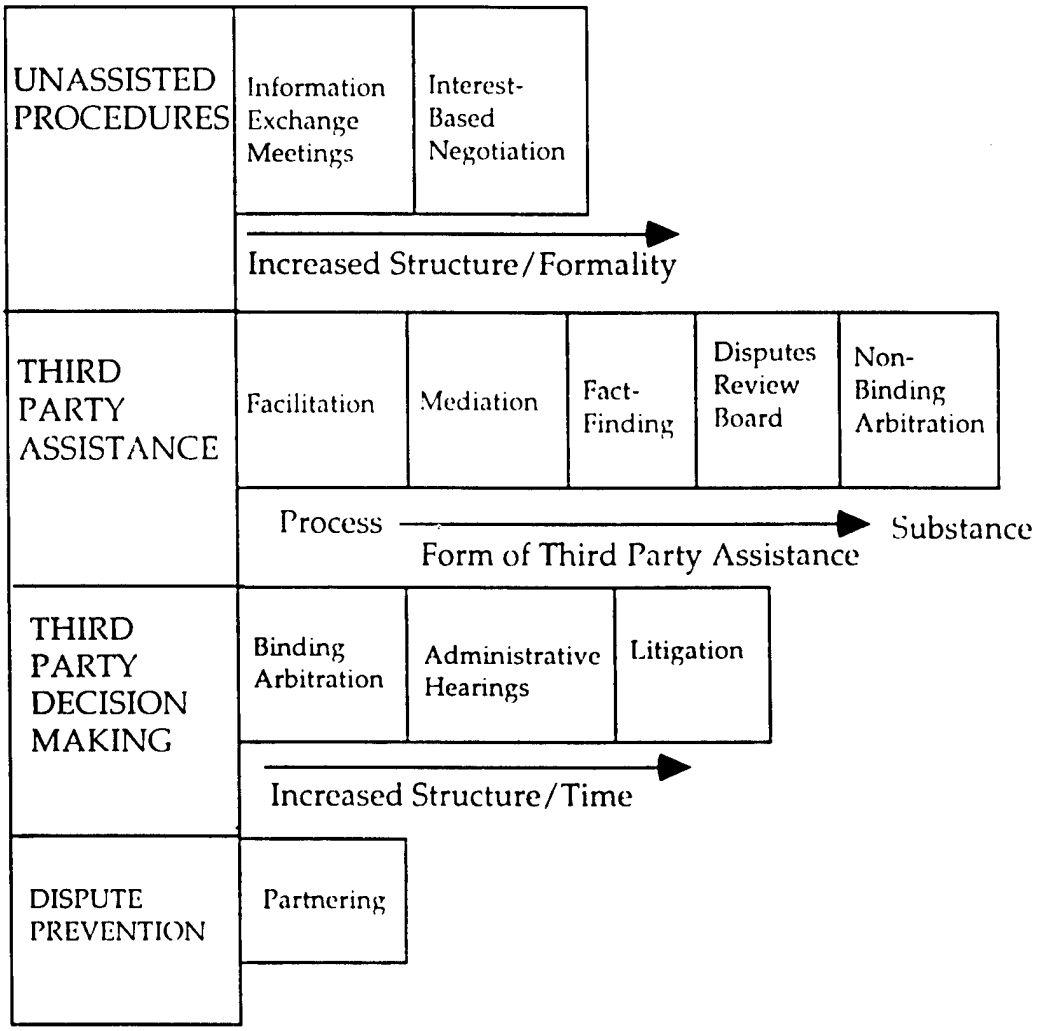


Figure 3
DISPUTE RESOLUTION TECHNIQUES

Except for binding arbitration, all the ADR processes utilize interest-based bargaining. This approach encourages parties to look for mutual gain whenever possible, and follows principles and procedures designed to achieve mutual agreements.

A more detailed discussion of individual ADR techniques is provided below. Sometimes techniques can be combined.

Unassisted Procedures

In the vast majority of disputes, people work out a resolution without assistance. At the simplest level, two people get together, discuss the issue, and work out the problem. But that does not always work. In fact, sometimes such discussions end up with both people polarized and convinced that the other person is unfair and unreasonable. At this point, something more structured may be needed. The two techniques used more frequently in the Corps are Information Exchange Meetings and Interest-Based Negotiation.

- **Information Exchange Meetings**

  Information exchange meetings are meetings in which parties share data and check out perceptions of each other's issues, interests, positions, and motivations in an effort to minimize unnecessary conflicts over the facts of the case. Typically these meetings are set up with the understanding that no formal effort will be made to reach an agreement during the meeting. This takes the pressure off people so they feel more open and comfortable. Information exchange meetings are often the first step toward productive problem solving or negotiations.

- **Interest-Based Negotiation**

  Although the principles of interest-based negotiation underlie all ADR techniques, interest-based negotiation is also a set of procedures that can be followed by parties to reach a mutual agreement. Although the procedures may be different from traditional positional bargaining, this is still a formal negotiation process between participants who have the authority to make commitments on behalf of their organizations.

Third-Party Assistance

Most ADR techniques involve the assistance of a neutral third party, usually someone who is skilled in encouraging resolution of disputes. The third party might not be a technical expert in the subject matter of the dispute, but someone skilled in creating a process that contributes to resolution. Instead of influencing what the resolution will be, the third party concentrates on structuring how the parties work together, knowing that how people work together can significantly affect whether or not they reach an agreement. Other ADR processes use third parties as technical experts, calling on them to provide neutral counsel to all parties on substantive issues. In other words, techniques range from those that provide process assistance to those that provide counsel on what constitutes an equitable substantive outcome. The major third-party assistance techniques are shown below, beginning with those that concentrate on process, then moving to those with increasing involvement of the third party in the substance of the decision.

- **Facilitation**

  Facilitation involves the assistance of an individual who is impartial towards the issues or topics under discussion in the design and conduct of problem-solving meetings. A facilitated meeting has the feel and structure of a business meeting, working on an agenda that has been jointly created by the parties. A facilitator will make sure that all parties feel listened to, will make sure that the meeting stays on track, and may suggest procedures which are helpful in arriving at a solution. Typically, the facilitator is granted considerable influence over how the meeting is run, but is not permitted to influence the substance of the decisions reached. Facilitators often support collaborative problem solving.

- **Mediation**

  Mediation can be described as an interest-based negotiation under the guidance of a third party. The parties choose an intervenor to "guide" them in designing a process and reaching agreement on a mutually acceptable solution. Although the mediator makes recommendations about the process, the parties themselves make the important decisions about the problem-solving process and the outcome. The presence of the mediator creates a "safe" environment for the parties to share information, address underlying problems, and vent emotions. A successful mediation can give the parties the confidence in themselves, each other, and consensual processes to negotiate without a third party in the future.

- **Fact-Finding**

  Fact-finding can be used in scientific, technical, or business disputes in which knowledge is highly specialized. A third-party subject-matter expert is chosen by the parties to act as a fact-finder or independent investigator. The expert then submits a report or presents the findings at a mini-trial, arbitration proceeding, or for whatever process has been designated. The emphasis is on determining the facts or legal issues pertinent to the dispute and is most often used in the early stages of a conflict. Fact-finding can, however, be implemented in a process whenever facts or points of law cannot be agreed upon. After the report or testimony, parties may negotiate, use further proceedings, or conduct more research.

- **Mini-Trial**

  The mini-trial is not really a trial. In fact, the mini-trial is a structured form of negotiated settlement. But a key element of the mini-trial, which in the Corps is called the "mini-trial conference," looks much like an abbreviated trial. Attorneys or other representatives for the two parties each have a specified period of time, ranging from a few hours to a

day, to present their "case" in front of representatives of senior management from the parties to the dispute. Once the cases are presented, however, the management representatives, instead of trying to reach a judicial decision, negotiate a mutual agreement. The management representatives are assisted in their negotiating efforts by a "neutral advisor." The exact role of the neutral advisor is determined by the parties' representatives. The neutral advisor might simply act like a facilitator or might be a technical expert who can provide objective analysis of the technical or legal merits of the cases presented.

- **Disputes Review Board or Disputes Panel**

  This technique is particularly suitable for resolution of claims involved with large construction projects. One of the barriers to resolving disputes is that the parties lose their objectivity about the merits of their position. The idea of a disputes review board is to provide the parties with an objective evaluation of the dispute by fully qualified technical experts. A disputes review board or disputes panel is established at the beginning of the contract. The Corps and the contractor both appoint a qualified technical expert to sit on the board, and these two technical experts in turn select a third member of the board who is acceptable to both parties. As disputes arise, they are presented to the board. The opinion of the board is advisory, with the parties negotiating a final resolution. Normally opinions of the disputes review board are extremely influential and helpful in resolving the dispute in a timely manner.

- **Non-Binding Arbitration**

  In non-binding arbitration, the parties present their sides of the dispute to a neutral arbitrator who recommends a basis for settlement. The parties are then free to accept or reject that recommendation. The arbitrator is often an attorney, a judge, or a technical expert in the subject matter of the dispute, selected by agreement of the parties because he/she is believed to be impartial, objective, or knowledgeable. Arbitration hearings differ in their degree of formality. Some hearings are relatively informal, permitting interaction between the parties. Other hearings are quasi-judicial, with opportunities for cross-examination and closing statements. The arbitrator may also conduct additional research to validate the claims made.

  In non-binding arbitration the arbitrator issues an opinion on the merits and appropriate forms of resolution, but this opinion is advisory. It is still up to the parties to negotiate an agreement. However, because the arbitrator is both neutral and qualified to review the technical merits of the case, the arbitrator's opinion is often extremely influential and can push the parties closer to an agreement.

Third-Party Decision Making

ADR techniques are primarily an alternative to third-party decision making. Of the three third-party decision-making processes shown in Figure 2—binding arbitration, administrative hearings, and litigation—only binding arbitration is normally considered an ADR technique because it was selected through collaboration. By pre-agreement of all parties, the arbitrator renders a binding decision.

Dispute Prevention

Disputes are a bit like a grass fire: relatively easy to take care of while they are still small, very hard to put out once they have grown. As a result, the best approach is often prevention, rather than trying to achieve resolution after there is a full-blown dispute. Typically, dispute prevention involves improving communication, building stronger personal relationships with people with whom disputes could occur, and establishing procedures for addressing issues before they become disputes. Partnering is the most frequently used dispute prevention technique in the Corps.

- **Partnering**

  Partnering is a dispute prevention technique that has been used primarily during contract performance. Its primary goal is to change the traditional adversarial relationship to a more cooperative, team-based approach. The contract is awarded on the usual competitive basis, but after the contract is awarded, the contractor is invited to participate in Partnering. Once an agreement is reached, representatives of all the key parties to the contract go through a joint process to help define common goals, improve communication, and foster a problem-solving attitude among the people who must work together on the contract. Participants come to understand and appreciate the roles and responsibilities each will have in carrying out the project. Often the teams identify cost or quality goals and work together to achieve them, sharing in the benefits when they are accomplished. There may also be agreement on ADR processes to be used when issues cannot be resolved by first-level managers.

  Partnering usually involves a series of meetings, beginning with a session that lasts several days to a week, with regular quarterly "tune-up" meetings among the parties. It also normally involves the use of a facilitator or facilitator team.

A further comparison of the different processes and their potential applications is provided in Figure 4 found later in this section.

CHOOSING AN ADR TECHNIQUE

Deciding to use ADR is a two-step process. The first step is to decide if your situation is appropriate for alternative dispute resolution. The second step is to decide which ADR process is most appropriate.

Is ADR a Good Choice?

Below are some questions designed to help you take into account the crucial factors in deciding if ADR is suitable for a particular dispute. You might want to answer these questions jointly with your legal counsel.

The weight given to each of the following questions will depend on the individual dispute and the decision-makers. However: a negative response to the first five questions is critical, because a negative response to these questions says there could be a problem with enforcing an agreement worked out as the result of using an ADR procedure.

- Are there persons with authority available to represent your party?

  There needs to be a person available with knowledge of the issues and with authority to effect a decision. It is sometimes difficult, especially in a public policy dispute to identify the authoritative person. You may want to hold off on going ahead with a process until that person has been identified and available. The agreement will be ineffective if a person without authority signs an agreement. Or, a potential resolution can fall apart if at the moment of agreement someone says, "I have to check with headquarters first."

- Can this issue be resolved without involving other overarching disputes that could develop in the foreseeable future, nullifying any decision on this one?

  Resolving a small issue that is dependent upon the outcome of an overarching one is no resolution at all. You must get to the root of the dispute, or your efforts may have been in vain. For instance, a decision among the Corps, local authorities, and State officials might be meaningless if there is a larger dispute between the Corps and other Federal agencies that would not permit that decision to be implemented.

- Can you resolve this dispute without the need to set a precedent, or do you want an all-or-nothing decision?

  With your legal counsel, review the regulations and statutes that may affect a decision, or be affected by it. There are disputes where the Corps would like to see a legal precedent established. If so, you need to have the decision made by a judge (whether administrative

or civil). In other cases, the law is well defined, and the dispute turns on questions of fact and interpretation. These are more appropriate for ADR.

- Do you believe it will be possible to "enforce" the contract; that is, are the mechanisms in place to ensure that all parties will abide by the terms of the agreement?

  A process that results in an unenforceable decision wastes time and money. A decision may be unenforceable because of legal considerations, financial considerations, or lack of real commitment.

- Can the dispute be resolved without endangering the parties' need for confidentiality?

  Since ADR is a voluntary process, there is no guarantee it will resolve the issue. People may be concerned that by engaging in ADR they are making information available that could be used against them if the issue ultimately comes before a judge. Normally the participants in an ADR process make an agreement to protect confidentiality in the event the ADR process does not result in resolution. However, keep in mind that a court can order disclosure of information or testimony from a process to prevent a gross injustice or to prevent violation of the law if one of those considerations outweighs the integrity ofthe ADR process.

While the five questions above raise issues that could prove to be "fatal-flaws," there are other issues that are important to the success of an ADR process including:

- Is there an imbalance of power? Can you overcome it?

  Voluntary agreements are more likely to be reached when the power of the parties is approximately equal. Otherwise people fear they may be negotiating at a disadvantage or will be unable to get the other party to comply with the terms of any agreement.

ARBITRATION	DISPUTES REVIEW BOARD (DRB)
Definition • Third-party neutral, or panel with expertise, makes decision after hearing arguments and reviewing evidence Characteristics • Can be binding or non-binding • Highly structured, but less formal than adjudication • Counsel for each party presents proofs and arguments • Parties select third party(ies) and set rules • Parties can select norms to apply, i.e., a particular body of law or regulation • For small number of parties Application • When prompt decision needed, can be used at various stages • Good for mixed questions of law and fact when a decision based on a general standard is needed • Used when there is a high level of conflict and, often, when no future close relationship is foreseen	Definition • Establishes forum that fosters cooperation between owner and contractor • Neutral experts offer informed finding for decision by the parties • Set in place at beginning of project before disputes arise Characteristics • Neutrals form panel of 3 technical experts • Disputes, delays and resolution costs are minimized • Disputes addressed as they arise • Ongoing during life of project Application • Good when there can be substantial money claims and for complex, ongoing projects • For disputes over technical data

Figure 4
COMPARISON OF ADR PROCESSES

FACILITATION	FACT FINDING
Definition • Information exchange and generation of options with assistance of a third party skilled in meeting leadership • Low level to medium level of conflict Characteristics • For 3 or more parties, who follow an agenda • Has the feel and structure of business meeting • Can be conducted by or without a neutral • Facilitator may not influence decision, but can have influence over how session is conducted Application • For definition of problems and goals, and to identify personal and institutional support • Can be preliminary step to identify a dispute resolution process	Definition • Third-party subject matter expert selected by parties to act as fact finder and independent investigator Characteristics • Can identify areas for agreement or disagreement • After report, parties may negotiate, use further proceedings, or conduct more research • Expert submits report and can offer evaluation, if requested Application • Can be used during dispute resolution process whenever necessary, although often used in initial stage • For disputes where there is seemingly contradictory data or not enough data • For technical or factual disputes

Figure 4
COMPARISON OF ADR PROCESSES - CONTINUED

MEDIATION	MINI-TRIAL
Definition • Parties select third-party neutral to help them design and guide them through a process to reach a mutually acceptable solution Characteristics • Parties make decision • Parties share information and address underlying problems in presence of mediator • Allows parties to vent emotions • Can be basis for parties to negotiate in the future without a third party Application • Especially good when parties will have ongoing relationship • Useful when negotiations have reached an impasse and one party feels injured or ignored	Definition • Structured settlement process during which authorized representatives hear case and negotiate an agreement Characteristics • Parties select neutral and make rules for procedure • Parties can present summary proofs and arguments • Neutral can advise, mediate, or make advisory opinion • Party representatives, with authority to settle, negotiate after hearing the presentations • Can be used in various stages of dispute Application • For use in disputes over technical data or for questions with a mixture of law and fact • For a small number of parties when prompt decision is needed

Figure 4
COMPARISON OF ADR PROCESSES - CONTINUED

NEGOTIATION	PARTNERING
Definition • Parties attempt to resolve differences by compromise or using interest-based principles without a third party Characteristics • Unstructured process without formal rules or agenda • For low-level conflict, more casual and informal than other processes • Can be in the home or office of one of parties Application • Often the first step toward resolving a conflict • When issues are clearly defined and there are enough issues for give-and-take • For non-technical disputes when no question of law • When history of relationship among parties has been good or when a relationship is being created	Definition • Two or more parties, engaged in enterprise requiring interdependence, work to create a working relationship conducive to trust, mutual understanding, and the pursuit of mutually acceptable goals • Parties make agreement that in principle commits each to sharing risks involved in completing projects and promoting cooperation Characteristics • Set up before start of project • Voluntary, relationship-building experience focuses on interests • Seeks to address problems before they become disputes • Partnering agreement can stipulate an ADR process, just as use of a Dispute Review Board Application • Initially used on heavy construction projects • Good for preventing conflicts • Good when there will be future relationship or for long, ongoing projects

Figure 4
COMPARISON OF ADR PROCESSES - CONTINUED

Sometimes the power of the parties is dissimilar, but there is some external force—such as a judge, a powerful political figure, a coalition of interested parties, or even a circumstance—that serves to equalize the power.

Power is relative, and there are many types of power. Types of power include legal power, personal or party credibility, political power, resources, sanctions, nuisance power, or procedural power.[12]Can you balance the power of the other party? Be realistic, but do not let the obvious power of the other party intimidate you. Look carefully for hidden assets.

- Do you need to maintain a long-term relationship with the other party or parties?

  Judges often make decisions that resolve the issue but destroy the relationship between the parties. Because ADR results in agreements acceptable to both parties, ADR can contribute to maintaining an ongoing relationship with the other parties. If you do not care about any future relationship—and there are not other reasons for using ADR—ADR may not be applicable.

- Are the other parties committed to using a consensual process?

  Lack of firm commitment by one of the parties can keep an otherwise effective ADR process from working. People sense the lack of commitment, and this lowers trust and delays progress. Hardened positions can be a sign of resistance to a consensual process.

- Is there a high level of trust and respect among the parties?

  Mutual trust and respect among the parties enhances the chances of resolving the dispute using an ADR forum. If people trust each other, communication is more open and the chances of resolution are higher. Also, if there is trust, there is less need to find guarantees to ensure that the other person will keep the agreement.

- Can you identify the major issues?

  A dispute—particularly a public policy dispute—may not have matured or developed to the point where the issues are well defined. If this is true, the parties may not be ready to negotiate, or unrecognized issues can surface later, disrupting the process.

[12] Moore and Delli Priscoli, *Executive Seminar*, pp. 92-93

- Is it important to act quickly to prevent escalation?

  Sometimes, the longer an issue goes on, the more polarized it gets. It may be wise to intervene with an ADR process as soon as possible. An adjudicative process usually takes longer to complete, and can fuel the tension leading to hardening of positions.

- Are the issues politically sensitive or controversial?

  Issues that are likely to be high profile or politically sensitive need to be examined closely to determine whether ADR is suitable for resolution. In such cases the "public's right to know" may be the strongest value. This may be at odds with privacy, an important element in ADR proceedings. For the public to be satisfied that no "secret deals" were cut, an adjudicative process may be necessary.

- Will a consensual process have a positive effect on staff morale?

  Sometimes staff feel that an ADR process results in a sell-out. It is bad enough if a judge rules against them. If Corps management voluntarily agrees that the other parties had some legitimacy to their complaints, it may be seen as under-cutting staff. On the other hand, of course, Corps management has a responsibility to do what is good for the organization as a whole, even if some staff are offended. Balancing potential morale problems with the risks of proceeding with litigation is always an individual decision, dependent on the circumstances of a particular dispute. Experience shows that both education about ADR and involving staff in the decision whether to use ADR, may be reassuring and result in staff support for an ADR process.

- Is ADR likely to be cost effective?

  It is unlikely that you would use an ADR technique if you were not satisfied that it was cheaper, or at least as cheap as litigation, or whatever other mechanisms exist for resolving the dispute. With litigation, for example, there are costs associated with lawyers, time delays, and so on. However, there are still costs associated with ADR techniques (in both time and money), with some techniques being more expensive than others. So, assess the relative costs of the ADR techniques and how those costs compare with your other options. Keep in mind, however, that even if the costs are nearly equal, ADR may still do a better job of maintaining the relationship with the other party than a winner-takes-all court decision. While it may not be possible to put a price on that relationship, it is still an important value to consider.

- Are you willing to accept the level of liability or risk associated with litigation?

  Unless you have an airtight case, litigation—when the level of liability is very high—can be a high-stakes gamble. An assessment has to be made whether the chance of winning 100 percent is worth the chance of losing 100 percent. There may be conditions where this is the case. However, often the outcome is not obvious or is problematic. In these cases, ADR—because the issue is resolved only when the parties reach an agreement—gives you greater control over the outcome, and puts limits on the level of liability.

- Is there organizational pressure to reach a settlement?

  On some occasions, there may be organizational pressure to resolve the dispute more rapidly than would be possible through litigation. Ordinarily, for ADR to work, all parties must feel some urgency or desire to reach a timely settlement. Once the desire to reach a settlement is present, ADR techniques permit you to establish a mutually acceptable time-table for settlement.

Which Technique Should I Use?

Selecting the right ADR technique is hardly a science. In fact, you are encouraged to produce hybrids or variations on techniques if you are convinced they will do a better job of solving your problem. However, there are some basic considerations that help discriminate between techniques:

- Are you trying to prevent disputes, or resolve a dispute that already exists?

  If you are designing a preventative approach you would want to consider partnering or a disputes review panel. Partnering, described above, includes the use of a facilitator. A disputes review panel, also described above, involves the use of neutral subject-matter experts.

- Are key parties willing to meet?

  If the key parties are willing to meet, you may be able to proceed with direct negotiations. If not, or if things are highly polarized, you probably need some form of third-party assistance. Depending on some of your answers to subsequent questions, you might consider techniques such as facilitation, mini-trial, mediation, or non-binding arbitration.

- Are the technical and legal resources of the parties balanced?

  Negotiation works best when the technical and legal resources of the parties are balanced. If they are not balanced, you may need third-party assistance. A facilitator or mediator may create greater balance between the parties, or know how to use the resources of the parties, so they serve the whole process, not just the interests of one party.

- Are there few or many parties or issues?

  If there are a number of parties, or a number of issues, it gets harder to use either a mini-trial or non-binding arbitration. These processes can become cumbersome and time-consuming unless they are focused on a few issues. When there are numerous issues, or a lot of people involved with the issues, either facilitation or mediation may be helpful.

- Are the key parties antagonistic?

  If the key parties are antagonistic, then third-party assistance is virtually required. If things are badly polarized, you may need a mediator to work with the parties individually before they ever come together.

- Which is more important: timeliness and minimal cost, or control over the procedures and outcome?

  If your priority is to get quick resolution, at lowest cost, then either a mini-trial or non-binding arbitration may be your approach. With a mini-trial you still maintain control over the outcome and process, but there is certainly pressure to settle. In non-binding arbitration, you are not required to accept the proposed settlement, but a climate may exist where it is hard for you not to accept it.

  Both facilitation and mediation are potentially more time-consuming, but nobody feels that the process was imposed on them, or that they were pressured to reach a particular outcome.

- Is the outcome of the dispute of great concern to senior managers?

  Some techniques, such as a mini-trial, involve a considerable commitment of time from senior management. As a result, a mini-trial is possible only if senior management is willing to commit the time to participate, either because of the dollar value of the claim or the issues involved. The same point applies if you are going to involve senior managers in direct negotiation.

Figure 5 - ADR TECHNIQUES AND CORPS ACTIVITIES

APPROACHES/ PROCEDURES / AREAS OF CORPS ACTIVITIES	COOPERATIVE DECISION MAKING	THIRD PARTY ASSISTANCE			THIRD PARTY DECISION MAKING
	Unassisted	Relationship Building Assistance	Procedural Assistance	Substantive Assistance	ADR Procedures Public Procedures
CONTRACT CLAIMS	• Cooperative Problem Solving			• Mini-Trials	
CIVIL WORKS PLANNING/ LCA's	• Cooperative Problem Solving		• Training	• Disputes Panels	• Non-Binding Arbitration • Administrative Hearings • Adjudication
REGULATORY FUNCTIONS	• Cooperative Problem Solving • Negotiation	• Team Building	• Facilitation • Mediation • Training		
SUPERFUND TOXICS & HAZARDOUS WASTE				• Mini-Trials	
OPERATIONS	•Negotiation		• Mediation		
CONSTRUCTION CIVIL WORKS & MILCON	• Cooperative Problem Solving	• Partnering • Team Building	• Facilitation • Training		

If the alternative is litigation, however, a mini-trial may be a very worthwhile investment. Senior management may be required to spend as much or more time preparing for litigation, with less control over the outcome.

Figure 1 provides some examples of how the Corps has used various ADR techniques.

CONCLUSION

ADR is a relatively new and rapidly changing field. It holds considerable promise for Corps managers, because it puts control of the process and timing of dispute resolution back in the hands of line managers, who possess greater flexibility in resolving disputes than exists in litigation. New ADR techniques continue to be developed, and many variations in format are being tried for existing techniques.

The Corps' experience with ADR can best be summarized by testimony of Lester Edelman, Chief Counsel of the Corps, before the Committee on the Judiciary, Subcommittee on Courts and Administrative Practice, United States Senate, May 25, 1988:

> "Some of the more significant lessons from our experience indicate that ADR can bring the resolution of issues closer to factual realities because ADR encourages those closest and most knowledgeable in the technical aspects to work out agreements directly. Moreover, ADR permits the decision makers to make the decision, rather than have them made by third parties. ADR can decrease the load on the litigation system by ensuring that only major precedent-setting claims go the full litigation route. Lastly, ADR can re-establish trust between government and industry.... If we're serious about making a dent in litigation now and in the future, ADR is available. With ADR, the future is now."

Chapter 18

ADR IN GOVERNMENT: AN AGENCY'S EXPERIENCE[1]

by
Lester Edelman

Ironically, today's best chance for systematic government use of Alternative Dispute Resolution (ADR) has its genesis in dissatisfaction with the Federal Government's contract claims resolution system. Ironic because the present system, comprised of agency Boards of Contract Appeals, was itself originally intended as an alternative to litigation in the Court of Claims. In the 1960s, however, procedures in the boards of contract appeals became more judicialized. With the increase in procedural requirements and an increase in claims, the boards' dockets expanded, as did the expense and time involved in reaching a decision. The U.S. Army Corps of Engineers (USACE) began in earnest to search for solutions to the problems of litigating contract claims in 1984. ADR procedures promised efficient and effective ways of resolving conflicts, and the Corps had been involved in some isolated but successful experiences with ADR. It was decided that a period of systematic experimentation in using ADR would begin, and soon after, the Corps published an Engineer Circular to provide guidance on the mini-trial as a procedure for resolving contract disputes. Since that time, the Corps has experimented with a number of different ADR techniques. Now the agency has taken the next step in promoting ADR by establishing a multi-faceted program designed to institutionalize ADR as part of the Corps manager's tool kit for effective problem solving. This paper will trace the history of the Corps ADR experience and will describe the Corps' new program.

REASONS FOR ADR

Three primary reasons can be distilled from the Corps of Engineers' experience which led the agency to consider ADR for resolving contract disputes. These reasons are: 1) the costs of litigation; 2) delays in obtaining decisions from administrative contract appeals boards; and 3) disruptions to management in defending litigation.

Although the direct costs of litigation are more readily apparent to the contractor, the government also incurs considerable direct and indirect costs. Since almost every contractor is now represented by an attorney, the most obvious costs are attorney fees. Given that discovery practice before boards of contract appeals is as extensive as such practice before the courts, attorney fees for contractors can be substantial. For the government, attorney costs are not as apparent, but the increasing number of attorney hours devoted to more numerous and more complex contract appeals has had a noticeable impact on personnel allocations and costs within the agencies. Additionally, both parties incur common expenses for discovery, fees for expert

[1] Presented at ABA Annual Meeting on ADR for the Administrative Law and Public Contract Law Sections, 1991-1992.

witnesses and, sometimes, computerized litigation support services. All of these costs make litigation extremely expensive, and in some cases, reduce the recovery, if any, by a sizable amount.

Delays in getting a decision from a board of contract appeals are now well known. In appeals not heard under the board's accelerated procedures, the time between filing an appeal and receiving a decision can ruin from two to four years. A recent Armed Services Board of Contract Appeals (ASBCA) report reflects that for all cases, including accelerated hearings, the average time on the ASBCA docket is well over one year (450 days). Considering that Rule 12 cases (accelerated procedures) are included, this statistic is not encouraging.

The causes for such delays concern all parties practicing before the contract appeals boards. Since the enactment of the Contract Disputes Act of 1978, caseloads of the boards of contract appeals have risen dramatically while the number of administrative judges has remained about the same. At the ASBCA alone, the number of docketed appeals doubled between 1978 and 1988. Likewise, the Corps of Engineers Board of Contract Appeals (Engineer Board) has experienced an increasing number of appeals on its docket, growing from nearly 200 cases in 1982 to over 350 in 1988. These figures result from continual yearly increases in the number of appeals filed at the boards of contract appeals.

A final significant concern that confronts both the government and the contractor is the disruption to management during litigation. Litigation requires not only an attorney's time and efforts but the dedication of many other personnel. Certainly, anyone directly connected with the factual basis for the claim can be involved for substantial amounts of time during discovery and, of course, at the hearing. Also, in complex cases, litigation support teams are often formed. Such teams, consisting of technical experts, auditors, and mangers, consume many additional hours and divert valuable resources from current projects. This disruption in order to support litigation is not productive for either party.

Undoubtedly, there are many other adverse impacts of litigation besides the three discussed above. Perhaps the least obvious of these is that lengthy litigation can cause hardships and destroy otherwise good business relationships. Neither party desires these results when initiating litigation.

The cost of litigating a claim, the delays in obtaining decisions, the disruption to management, and the other adverse impacts of litigation make the present system unsatisfactory to many litigants. For these reasons, government agencies and contractors have begun using ADR.

ADR AND CONTRACT DISPUTES

In an effort to avoid the problems discussed above and to provide a less costly and more expeditious alternative to contract litigation, several government agencies have used ADR.

Currently, at least four ADR methods have emerged in government contracting: mini-trials, dispute review panels, non-binding arbitration, and summary review board proceedings. These methods will be summarized, and then considered in more detail on the following pages.

None of these ADR methods is a replacement for traditional negotiations conducted by attorneys representing the parties. Negotiations have been used successfully to resolve numerous contract disputes. Clearly this is the method by which most contract appeals are settled at this time and will probably continue to be the method of choice in the future. However, negotiations alone have not been able to stem the rising tide of caseloads at the boards of contract appeals. In addition, too many appeals are settled by negotiations on the courthouse steps only after time-consuming and costly discovery has been completed. Other methods are needed to supplement traditional negotiations as an alternative to litigation. ADR meets this need.

Of the four ADR methods currently being considered, the **mini-trial** is used most frequently. The mini-trial was originally developed in 1977 to resolve a patent infringement suit. Several years later, in 1982, NASA became the first government agency to use a mini-trial to settle a dispute in a contract case. However, the mini-trial was not fully implemented in government contracting until the Corps of Engineers began a pilot program in 1984. The Corps used the mini-trial to expeditiously resolve a number of complex contract disputes, and subsequently published a regulation outlining its mini-trial procedures. Recently, the Navy also used the mini-trial successfully to resolve several contract disputes.

The **dispute review panel** is another ADR method being developed by the corps of Engineers for use in contract disputes. So far, the Corps has included a provision in three contracts advising the contractor of the availability of this ADR method. To date, three disputes have been referred to a dispute review panel. Two were resolved by the parties accepting the panel recommendations; the third is pending.

A third ADR method available in government contracting is **nonbinding arbitration**. At least one government agency, the Corps of Engineers, has used this ADR method with satisfactory results. Binding arbitration, which is used extensively to resolve private contract disputes, cannot be used by a government agency. In numerous decisions, the Comptroller General has stated a contracting officer cannot submit a contract claim to binding arbitration.

The most recently developed ADR method is the **summary board proceeding** before boards of contract appeals. This ADR method was developed by the Department of the Navy in early 1987 and was used to resolve one dispute at the ASBCA. Currently, the boards of contract appeals are developing a summary proceeding process for pending appeals. The Engineer Board has circulated a docketing Notice Regarding Alternative Methods of Dispute Resolution which includes the summary board process described below.

Each of these ADR methods, although similar in purpose, uses different procedures. The selection of a particular ADR method will depend upon the needs of the parties and the nature of the dispute. No single ADR method is a panacea that can be used by every government agency to resolve all contract disputes. Furthermore, not every dispute can be resolved—some cases must be litigated.

ALTERNATIVE DISPUTE RESOLUTION IN THE CORPS OF ENGINEERS BOARD OF CONTRACT APPEALS

The Corps of Engineers Board of Contract Appeals has circulated a Notice promoting ADR procedures in practice before the Board. This Notice was drafted from the model developed by the ADR Committee of the ABA Section of Public Contract Law. The Notice quotes the statement in the Contract Disputes Act of 1978 that boards of contract appeals shall provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes. To this end, the statement recommends that parties consider ADR procedures.

Before describing certain procedures which have been used in the past, the statement notes that the procedures described are not exclusive, nor is participation by Board personnel required. Any ADR method may be selected by the parties without regard to the dollar amount in dispute. The Board requires only that an ADR procedure be requested by the parties jointly. If participation by Board personnel is desired by the parties, the presiding administrative judge and the Board chairman will act jointly to select the person from the Board who will be involved. The Notice also states that if a nonbinding ADR effort is unsuccessful, the appeal will be restored to the active docket of the Board. No Board personnel who have participated in the failed procedure will have any further participation in the restored appeal, nor will there be any discussion of the effort with other Board personnel.

Confidentiality in the settlement discussions is guaranteed, unless otherwise specifically agreed by the parties. The parties are also allowed to establish their own guidelines and procedures for the ADR effort by agreement.

The Board then describes three consensual and voluntary ADR methods. The procedures mentioned are settlement judges, mini-trial, and summary trial with binding decision. As described by the Board, a **settlement judge** is a Board decision-making authority in the appeal. He/she is appointed for the purpose of facilitating settlement. This may be accomplished by any sort of discussion of the strengths and weaknesses of each party's position, either in a joint session or individually. The settlement judge's recommendations are not binding on the parties.

The **mini-trial** is the second ADR method mentioned by the Board in its ADR Notice. It is essentially identical to the procedure described previously in this paper, with the one exception being that the neutral advisor is appointed by the Board.

The ADR Notice describes a third ADR method called the **summary trial** with binding decision. (Some would argue that this is not really an ADR procedure, but rather an expedited form of litigation.) The Notice describes this method as using an expedited schedule for an informal trial proceeding before an Administrative Judge or panel of judges. A summary decision is then rendered, either from the bench at the conclusion of the trial, or within ten days thereafter. This ADR method is distinguished from the others by being binding on the parties, who must also agree that all decisions, rulings, or orders shall be final, conclusive, and not appealable. Pre-trial, and post-trial procedures may all be modified or eliminated to promote a speedy appeal.

With the Notice, the Board has formally recognized that consensual and voluntary ADR methods can be a valuable asset in resolving contract appeals and relieving some part of the docket burden. The Notice provides parties with the flexibility to tailor nonbinding ADR methods to their own needs and the requirements of the appeal, and the Board goes on to offer a biding summary trial option as well.

ADR AND OTHER CORPS OF ENGINEERS MISSIONS

The Corps is looking beyond its successful application of ADR in construction disputes. Many of the environmental and cooperative efforts that involve the Corps, public interest groups, local governments, and other Federal agencies could benefit from the use of ADR techniques in appropriate situations. The Corps has begun to apply traditional ADR methods to nontraditional areas such as Superfund and local cost-sharing of water resource projects. Some illustrations of how the process has worked may be helpful.

Environmental Disputes

What we now refer to as ADR is not new to the Corps of Engineers in environmental disputes. Before the Corps developed a comprehensive mini-trial program, an innovative district Engineer successfully used an ADR technique to avoid litigation over environmental issues involved with the issuance of a Corps permit at Sanibel Island in Florida.

In 1979 a Sanibel Island developer applied for a Corps of Engineers permit under Section 404 of the Clean Water Act, which authorized the discharge of dredged or fill material into the navigable waters of the United States. The District Engineer of the Jacksonville District brought together all of the parties who usually are in conflict over the Corps' permit program. Included in the process were local business development interests, environmental groups, the mayor, and various other special interest groups and associations. Development of a general permit was presented to the parties as the best tool for balancing long-term planning and conservation needs. The District Engineer indicated that if the people at the table could agree on technical specifications and parameters, the Corps would incorporate that information into the terms of the general permit. In essence, the price for this permit, consensus among the parties, was more than

offset by the commonly desired goal of long-term certainty for developers, environmentalists, and local citizens regarding the scope of proposed development in the area.

More recently, the same procedures were successfully employed to obtain a general permit for exploratory oil drilling. In this case, environmental interests had already filed suit as the process began. The ADR was conducted by Corps of Engineers personnel in the Vicksburg District who acted as facilitators and mediators throughout the process.

The ADR frameworks used by the Jacksonville and Vicksburg Districts were uniquely molded by the Corps in an effort to design the most effective mechanism possible, given the particular set of circumstances and people. The point is that each controversy is unique and requires a measure of flexibility to handle the differences in issues and parties. Nonetheless, experience with ADR indicates that certain basic elements should be present if ADR is to function according to its potential.

Superfund

The Department of Defense (DoD) has long recognized the need to clean up hazardous waste from its installations. The passage of the Superfund Amendments and Reauthorization Act in 1986 enacted a Defense Environmental Restoration Program (DERP) to clean up existing as well as formerly used DoD installations. The Corps of Engineers acts on behalf of all the DoD agencies in addressing environmental remediation of formerly used sites. In many instances, the end of DoD ownership may have predated by decades the identification of contamination on the site. This makes it harder to determine whether DoD has full responsibility for the clean-up efforts, or whether some of the problems may have been created by subsequent owners of the property. The necessity to deal with enforcement personnel at both state and Federal levels adds to the complexity of avoiding litigation in such matters. In this Superfund-related environmental restoration program, the Corps is using ADR processes in an attempt to resolve disputes about the extent of DoD responsibility for site contamination.

Water Resources Planning: Cost Sharing

The 1985 Supplemental Appropriations Act (P.L. 99-88) provided funds for the Corps of Engineers to initiate forty-one new water projects if the Corps and non-Federal project sponsors entered into cost-sharing agreements by June 30, 1986. By allowing water projects to move forward under new cost-sharing formulas, P.L. 99-88 signaled a new beginning for water resources development. If agreements could be reached with non-Federal project sponsors, the efficacy of the new cost-sharing principles would be demonstrated to Congress and permanent legislation making cost sharing applicable to all new projects could be enacted.

The Corps successfully concluded cost-sharing agreements by June 30 in all but one instance in which agreement was sought. Less than five months later, Congress enacted into law the Water

Resources Development Act of 1986 (P.L. 99-662), which requires that many of the Corps' civil works projects be constructed in cooperation with a non-Federal sponsor that is responsible for a percentage of the project's cost. The cost to the project sponsor generally includes providing all real estate needed for the project. Other non-Federal obligations include operating and maintaining the project after completion (except for commercial navigation projects) and agreeing to indemnify the Corps for damage claims not resulting from the negligence of the Corps or its contractors.

Mandatory cost sharing, with its sharing of risk and responsibility, is the new reality for the Corps and non-Federal sponsors. Legally required cooperation, however, is not necessarily free from dispute. In fact, because both parties to cost-sharing agreements usually are sovereign entities dominant in their own spheres, the potential for serious disagreement seems great. Issues concerning project modifications, construction schedules, calculation of real estate interests, or even the choice of accounting methodologies will arise in almost all cost-shared projects. How those issues ultimately get resolved will, in large part, determine whether cost sharing succeeds or fails.

Since ongoing cooperation is essential in the construction and operation of major water projects, and because cost sharing in general will continue to be scrutinized closely by Congress and interest groups, some type of dispute resolution mechanism needs to be available to address the issues certain to arise under cost-sharing agreements. The cost, divisiveness, and negative publicity associated with litigation clearly are incompatible with the goals of cost sharing; thus, the Corps cannot afford to have disputes settled in traditional judicial forums. ADR, on the other hand, seems especially compatible with the principles underlying cost sharing and cooperative agreements between public entities.

CURRENT ADR PROGRAMS IN THE CORPS OF ENGINEERS

The early experimentation phase of the Corps of Engineers ADR effort proved that the concept could help resolve disputes efficiently and effectively. It was clear, however, that use of ADR would be limited to isolated cases unless the ideas and concepts behind it were institutionalized in the Corps. Corps decision makers at all levels had to be made aware of the range of procedures available, and of the benefits and costs of using ADR. To this end, the Corps established a comprehensive program designed to promote ADR. In designing the program, the Corps addressed the major obstacles to greater use of alternative procedures found in the Federal Government's contract claims culture.

The Contract Claims Culture: Obstacles to ADR

If ADR is to be adopted by Federal agencies, the mindsets created by the current contract claims system must change. Too often, it is easier to follow the established pattern of dispute resolution than it is to seek innovative solutions to disputes through less familiar means. Opportunities to resolve disputes are being missed because there is no institutional attitude that spurs the search

for alternatives. There is security and a sense of comfort in following prescribed patterns, especially where the institutionalized pattern is statutory. For ADR to be used extensively, it must become part of the way government managers approach disputes. This can occur only when managers understand the concepts behind ADR and feel that their efforts to resolve disputes in a creative way will be supported.

A number of factors combine to produce obstacles to increased use of ADR procedures. As noted, the contract claims system creates its own inertia once an appeal has been filed, which favors the litigation track and negotiation only at the courthouse door. Related to this is the understandable reluctance to explore new and unknown procedures.

Those familiar with ADR know, however, that many ADR procedures are in essence no more than structured negotiation strategies designed to create a common understanding of the dispute and to promote a climate conducive to settlement at an early stage. There is little risk in using ADR techniques: the expense is usually small, and since the process is voluntary, no one needs to accept a bad settlement.

The obvious way to overcome the lack of knowledge about ADR is through a program which includes conceptual training. The Corps' training program in ADR, outlined below, is intended to stress that ADR is an alternative to litigation and is not a substitute for negotiation. Negotiation is incorporated in each nonbinding ADR process. Also, by establishing a training program, the Corps is able to de-mystify ADR and acquaint managers with the variety of alternative procedures available. Frequently, training produces an eagerness to try out new techniques, especially in areas such as dispute resolution where the existing system is much criticized.

Managers are also reluctant to use ADR because of fear of criticism both from external sources and from within their organizations. The government's contract claims system includes oversight of decisions by watchdog agencies. For the Department of Defense, the Office of the Inspector General has the power to review operations of DoD agencies.

The problem of internal criticism or dissatisfaction with a negotiated settlement may be a product of the intense feeling of personal investment in a position by management and technical staff. Anything short of a complete validation of the government's position may seem to be a challenge to their professional skills or integrity. These people may consider settlement in such cases to be an unwarranted waste of public funds. They may also feel that the negotiators have failed to support the line managers and technical staff, and that the staff has been overruled. Despite these pressures, Corps managers must look at the complete picture of the dispute, from a relatively uninvolved perspective, and consider the many policy ramifications that may also have bearing on the dispute.

The Corps' solution to this difficult problem is twofold. First, an aggressive training program is designed to give Corps personnel a greater understanding of the philosophy and methodology of

ADR. As managers and technical staff know more about the principles of ADR, they will be more comfortable with negotiated settlements. More importantly, however, the Corps is committed to involving its personnel at all levels in the process of dispute resolution. A major emphasis in the Corps' ADR program is the need to consider ADR at the earliest possible time and at the first appropriate management level. Rather than making ADR the sole province of upper management decision makers, the Corps' program stresses that, to be most effective and efficient, consideration of ADR must be pushed down in the hierarchy and applied as early in the development of a controversy as possible. Accordingly, the Corps' training programs include courses for mid-management personnel as well as executives and commanders. The training emphasizes the variety of techniques on the continuum of ADR, giving insight into the appropriate tools of dispute resolution to use at the varying stages of development of a controversy.

Another barrier to the use of ADR is the perception that, by offering to engage in an alternative procedure, an organization sends the message that its position is weak. In a culture based on adversarial relationships, there is reluctance to show any signs of weakness. However, the strength or weakness of the government's legal position is only one factor in determining whether a case should be settled or litigated. Other factors mentioned before are the cost and delays of litigation and the disruption to management involved in litigation. The solution to the problem of perceived weakness in an offer to use ADR is to establish an agency policy which endorses alternative procedures. A policy statement removes any implication of weakness from the offer to try ADR procedures and sends an important endorsement of ADR to agency personnel. The Corps has issued such policy statements, and the Administrative Conference of the United States has recommended that agencies adopt ADR policy statements as one of the first steps in promoting greater use of ADR in government contracting disputes.

The Corps of Engineers multi-faceted ADR program seeks to address these major obstacles through ADR training, technical assistance and networking, continuing evaluation of ADR procedures, and by supporting decision makers with ADR policy statements. The Corps' program is described in more detail in the following sections.

Training

If ADR is to be adopted by Federal agencies, mindsets must change. The Corps of Engineers has found that mindsets can be changed and that skillfully developed training is crucial to this change. The key is to reach a broad cross-section of the organization. This cannot be done in a one-shot approach. Therefore, the Corps has developed ADR training programs which have become part of the mainstream manger training options.

For the last five years, the Corps of Engineers has presented two to four sessions each year of a five-day conflict management training course for mid- to senior-level employees. More than 350 Corps employees have attended this course since it began. The course covers ADR philosophy, techniques, and applications and is built on a learn-by-doing model.

Currently the Corps of Engineers is developing a special two-and-one-half-day executive training course in ADR for all Corps executives to complement the five-day conflict management training course. The first sessions of this Executive Seminar were held in February 1989. In addition, ADR audio/visuals and self-learning training packages are also planned. The Corps' objective is to put in place executive and mid-level management training that will be available on a certain basis over the next 5-7 years.

Technical Assistance/Networking

Technical assistance is vital to encouraging the adoption of new ideas in any organization. Throughout the 1970s the Corps had an effective Technical Assistance program to support the use of new public participation techniques. A similar program for ADR is now being developed.

This program will provide support, such as the following, to Corps' field elements:

- Designing special on-site training, based on specific real-time problems.

- Helping commanders prepare for negotiations by:

  — Scoping optional approaches to negotiations/bargaining;
  — Identifying issues, interests, and positions of major interested parties;
  — Assisting in the development and use of single-text negotiation techniques including drafting and revising texts;
  — Applying principles of interest-based bargaining, conciliation, mediation, and third-party intervention to specific Corps functions;
  — Mediating disputes, both where the Corps is a party and where the Corps is a facilitator;
  — Employing ADR techniques to internal Corps conflicts where appropriate and requested by field offices and others; and
  — Assisting field offices in locating and employing credible third parties where needed.

Evaluation

It is vital to monitor ongoing ADR programs to determine what works and what does not. Also, costs and benefits should be assessed. Finally, success stories need to be documented and disseminated throughout the agency and the government to show others the possibilities of ADR. Therefore, research documentation is an important part of the new Corps of Engineers ADR program. Studies are being written and learning materials developed which build on the Corps experience in ADR.

LESSONS LEARNED

Clearly, the Corps of Engineers' record has established that ADR can be used to resolve disputes arising in government. Contracting ADR provides the opportunity to resolve disputes without

the cost, delay, and disruption of litigation. However, even if the dispute is not resolved, ADR still provides clear benefits to the parties. At the very least, the ADR process forces the parties quickly to narrow the issues underlying the dispute and to develop all relevant facts that support the parties' positions.

The Corps of Engineers has extensive experience with ADR. Some of the more significant lessons learned from these experiences indicate that ADR can:

- Bring the resolution of issues closer to factual realities, because ADR encourages those closest and most knowledgeable in the technical aspects to work out agreements directly.
- Permit the decision makers to make the decisions, rather than have them made by the legal system or third-parties.
- Decrease the load on the litigation system by assuring that the parties have fully considered ADR before going the complete litigation route.
- Reestablish trust between government and industry by encouraging parties to work collaboratively and jointly on solutions.

CONCLUSION

The Federal Government is rapidly recognizing the need to use more innovative approaches to resolve disputes. Relying exclusively upon traditional negotiations and the judicial process is not working in today's litigious environment. Obtaining a decision is both costly and time consuming.

ADR methods such as the mini-trial, dispute review panel, nonbinding arbitration, summary board proceedings, and settlement judges hold the promise for a system which can resolve disputes quickly and efficiently. Already, several government agencies have used some of these ADR methods successfully. The Claims Court, boards of contract appeals, and other government agencies have also expressed a willingness to participate in varying forms of ADR.

The need for ADR is critical. The potential for ADR is limitless. The support for ADR is developing. The skills and techniques for ADR are proven. If we are serious about making a dent in litigation now and in the future, ADR is available. With ADR the future is now.

Chapter 19

GETTING PEOPLE TO THE TABLE

by
William R. Potapchuk
James H. Laue
John S. Murray

Many parties are reluctant to come to the table because of fear—fear of losing, of co-optation, of something new, of unpredictability, of other parties, of losing constituents, or of being vulnerable. Parties may be forced to come to the table with a show of power, but it is unlikely they will be ready to participate with a cooperative frame of mind. Fear is not overcome by a show of power, coercion, or heavy-handed persuasion. Parties coerced to the table often participate only to sabotage the process later.

In the academic literature, getting to the table is often linked with conciliation, which is defined as the conversion from a state of hostility or distrust, or the promotion of good will by kind and considerate measures. Conciliation overcomes forces that drive parties away from the table by opening up communication channels, initiating trust-building activities, and clearing up misperceptions.

Bringing parties to the table also implicitly legitimates the concerns of everyone at the table. Yet, one need only look at the deep-rooted conflicts in the Middle East or Northern Ireland to recognize that there are times when one group is unwilling to recognize the legitimacy of another group. Conciliation activities will be slow and difficult, at best, when some parties do not accept the legitimacy of others as a matter of principle. Deep-seated mistrust may not be as visible, but it can be an equally effective block to collaborative efforts.

As you design and develop the forum, you need to identify all barriers and consider them real and legitimate. If parties are going to participate effectively in a conflict resolution process, they must be able to work jointly through their concerns about the process. Working jointly through process issues may be a good start at lowering the barriers of fear and mistrust.

POWER ISSUES

Some say that all conflicts are over power and resources, and that all conflicts over resources are over power. Power disparities among the parties—especially when low-power parties believe they will be unable to successfully protect their interests at the table—can pose significant barriers.

Low-power parties are typically skeptical of consensus decision making and believe that, somehow, high-power parties will use their power to push through an agreement against the principles and better judgment of low-power parties. Joint analysis of the concerns of low-power parties can lead toward development of a process that directly responds to those concerns, thereby helping create a fair process—the so-called level playing field—for all participating groups.

Low-power parties usually have highly refined skills in obstructing proposals that other parties put forward, but they may not feel comfortable at the negotiating table. Joint or separate training in negotiation skills can be provided prior to actual negotiations, or funds can be raised to allow low-power groups to hire technical assistance, negotiation assistance, or attorneys, as well as pay for travel, lodging, and other expenses of the negotiation team. These responses can help a low-power party be an effective participant.

Some low-power groups maintain an organizational culture that nurtures trust and openness, and therefore avoid situations where only a small group may participate. Faced with this situation, you may want to explore the use of meetings where observers are allowed, public meetings, or a mixture of public and private meetings as function dictates.

Creating a process that allows for representatives of low-power groups to communicate with their constituencies as well as one that reflects the inability of a representative to bind the group without consultation, may also respond to the concerns of low-power groups.

High power groups generally are accustomed to getting what they want. Their attempt to use power may scuttle the process. Special ground rules or pre-negotiation agreements may be needed for working with high power groups who commonly control processes to suit their own interests.

JOINT DECISION MAKING AS UNWELCOME CHANGE

Many parties have never participated in a formal joint decision making process, and therefore, may resist participation because of its unfamiliarity. Training can help familiarize potential representatives with the process prior to negotiations. Another way to help educate those unfamiliar with joint decision making is to encourage contact with a peer who is knowledgeable about its use. Peers can best interpret the relative advantages and disadvantages of participation because they usually are trusted more than another party or an outside facilitator or mediator.

Others may resist joint decision making because the process seems to contradict their cultural norms. Many Asian peoples, for example, avoid face-to-face negotiations and prefer to conduct discussions through an elder. Hispanics often are sensitive to the location of discussions and are distrustful of bureaucratic environments. When working in a situation that involves persons from other cultures, it is essential to understand and respect differences in cultural norms.

Negotiation processes are present in every culture, but they vary widely. Finding a forum and process that responds to cultural concerns will create an effective work environment.

Joint decision making may be resisted because of its unpredictability. Moreover, the flexibility of joint decision making often leads to new and creative solutions. Rules can constrain as well as empower, so the lack of formal rules by itself should not be a substantial barrier. Development of very specific protocols, including the order in which issues will be addressed and the steps of the process, can help allay these fears.

RELATIONSHIP ISSUES

Hostility, distrust, and a lack of respect often permeate relationships in contentious disputes. As mentioned in the first section, relationships need to be assessed from three perspectives: past, present, and goals for the future. While present relationships may not be characterized as healthy, the parties in a dispute may have a healthy past relationship that can serve as a positive reference point, or a desire for a good future relationship which can provide motivation for change.

The level of interdependence between the parties also affects the relationship. If some parties realize they need others if they are to accomplish their goals, they are likely to try harder to find ways to work together. After a lengthy period of non-decision, as proposal after proposal is blocked by the other side, parties may recognize that at a minimum they need the concurrence of the others in order to proceed. Interdependence is a strong incentive for parties to come to the table, and anything that increases that sense of interdependence will help overcome barriers to joint decision making.

The level of trust is the key to bringing parties to the table. If you strongly believe another person's word cannot be trusted, it is unlikely that you will think negotiation is a viable option. There are several ways to move from mistrust to trust; the thrust of each is that consistent communication and interaction between the parties can build a common perspective and, from that, small agreements, which foster a sense of acceptance and reliability. The work of the initiating committee can serve as a bridge between parties who distrust each other, and trusted go-betweens can also help.

Mistrust is frequently based on conflicting perceptions of the same events. Establishing regular communication focused on a joint analysis of the situation can be a vehicle for working through perceptual disagreements. Keeping the relationship focused on the specific issues at hand can help build agreements on those issues even when the parties will agree to disagree on other issues.

Truly fractured relationships may require team-building activities, or the actions of a third party to conciliate. The roles of third parties will be discussed more fully in the next section.

ECONOMIC ISSUES

Joint decision making can be expensive. The significant commitment of staff time, costs of travel, costs of third parties, and the costs of lost opportunity due to long negotiations are only a part of the actual cost. However, litigation and non-action can also be expensive. Complex litigations start with six-figure cost estimates which do not even include the expense of lost opportunities or the adversarial and unhealthy relationships caused by the litigation process.

When economic issues are raised, you should calculate the range of potential costs in several competing processes. These costs include the transaction costs of joint decision making and its alternatives, the costs of inaction, the costs in constituent and public relations, and the costs of potential litigation. You can then compare the potential costs in light of the size and stakes of the project and the potential benefits rising from the use of each process. In that context, financial issues can be more fairly evaluated.

Joint decision making may prove to be a wise financial investment, but that feature does not increase the capacity of the parties to pay for it. Some parties may be unable to share in the expenses and may even have difficulty in paying for the costs of their own participation.

If the effort is worthwhile to others, there may be many ways to compensate for these inequalities. However, if the costs are not to be shared equally, control of the process must be consciously separated from paying sponsors. Otherwise, those who did not contribute to the budget will perceive that the process is biased in favor of those who paid, or those who paid may act as though they own or control the process.

STRUCTURAL ISSUES

Structural issues are the legal, institutional, or political characteristics of the situation that can constrain the initiation of a process. Some officials from public agencies turn down opportunities to participate in joint decision-making processes because they are charged with making the decision. This reasoning, however, confuses formal authority to make the decision with the process of generating the best options. Joint decision making is a voluntary process, and therefore participation does not abdicate the responsibility to decide. The agency will only choose to support a joint agreement if that agreement is a responsible solution in the agency's judgment. If the parties are not able to develop an agreement that is also acceptable to the agency, the agency can always move forward with a unilateral decision.

Conflicts are common on issues where statutes or regulations clearly define procedures. Environmental Impact Assessments and other requirements of the National Environmental Policy Act, Federal highway planning, and the Community Development Block Grant program are just a few of the many frameworks that prescribe procedures. Many successful joint

decision-making efforts have taken place as parallel processes linked to the formal process by having informal agreements precede the formal decision.

Political constraints also occur. The most predictable are the regular elections at all levels and their effect on particular disputes. In Missouri, the proposed damming of the Meramec River was put on hold during several elections in localities where the dam had become a major issue, and again when an advisory referendum was placed on a special regional ballot. Parties trying to work jointly have difficulty arriving at a final agreement if the issue in contention is also an election campaign issue. They also may not be able to act if the incumbent officials have chosen not to run again. Often, public agencies or private interests cannot affect a political constraint, but must be satisfied with scheduling their efforts to miss or take advantage of political constraints.

Organizational constraints, especially in citizen groups, can be serious impediments to effective joint work. As discussed earlier, citizen groups often do not have the leadership patterns to ensure prompt and timely decision making—or indeed the capacity to implement agreements made with agencies or other organizations. The timing of meetings, the participants at each meeting, and the separation of the various phases of the process should be adjusted to respond to such organizational limitations.

CONCLUSION

Each barrier issue can be addressed in a getting-to-the-table process, but barriers sometimes present themselves in droves. Serious conflicts exist because power, relationship, economic, and structural issues have combined to drive the parties apart. In these circumstances, the services of a third party may help the parties achieve the best possible outcome.

Chapter 20

ADR ROUNDTABLE[1]
(U. S. Army Corps of Engineers, South Atlantic Division, Corporate Contractors, and Law Firms)

by
Charles L. Lancaster, Esq.

MEETING SUMMARY

On June 8, 1989, the South Atlantic Division of the U.S. Army Corps of Engineers sponsored a Round Table meeting on Alternative Dispute Resolution (ADR) in Atlanta, Georgia. Participants at the Round Table represented the Corps, major corporations who do contract work for the Corps, and law firms which serve as outside counsel or the contractors. The session was facilitated by Marguerite S. Millhauser, Esq., of Conflict Consulting, who presented an overview of ADR and guided group discussions. More than thirty participants took part in the meeting, including Corps Chief Counsel Lester Edelman, who summarized the Corps ADR program, and Judge Richard Solibakke, Chairman of the Engineer Board of Contract Appeals, who was a participant and the luncheon speaker. Also attending was Major General Robert M. Bunker, South Atlantic Division Engineer who was the host, and Stephen Lingenfelter, Division Counsel and organizer of the Round Table session. Charles Lancaster, Assistant Program Manager for the Corps ADR Program, also attended the Round Table and prepared this working paper.

There were two main purposes for the ADR Round Table. First was the desire to promote ADR by giving participants the opportunity to learn more about this developing field and the Corps of Engineers' program to promote ADR. Second, the Round Table offered the opportunity for a dialogue among those directly involved in business relationships which have become entangled in the modern-day web of litigation. In the spirit of cooperation which underlies successful ADR efforts, it was hoped that a genuine exchange of perceptions could occur, including obstacles to ADR and opportunities for promoting greater use of ADR procedures to resolve disputes.

In this spirit, what follows is a summary of the discussion comments of participants on obstacles to and opportunities for ADR, as well as specific suggestions for individual action to promote ADR. These are not detailed "minutes" nor are any comments attributed to any individual speaker. The purpose is to convey a sense of the discussion and memorialize some of the insights offered by participants. The ideas and perceptions are those of the individual participants presented, as they were solicited, without judgment or endorsement of any position. There was no attempt to reach a group consensus of Round Table participants—the goal was to

[1] Hosted by: Major General Robert M. Bunker, Division Commander, and Stephen Lingenfelter, Division Counsel; Facilitated by: Marguerite S. Millhauser, Esq.

acquaint participants with ADR procedures and promote a productive dialogue. It is hoped that this summary will spur further dialogue and increased cooperation among those involved.

PERCEIVED OBSTACLES TO IMPLEMENTING ADR

Participants were asked to consider and list their perceptions of the major obstacles to greater use of ADR that exist today from their knowledge of the Corps, the contractor community, and outside law firms. The following is a summary of the written lists and a reflection of the discussion at the Round Table session.

- **Obstacle: Tradition/corporate culture favoring the usual way of doing business (including litigation) while avoiding ADR as an unknown.**

  This obstacle might also be called "institutional resistance to ADR." Participants felt that each of the groups represented (Corps, contractors and counsel) faced this obstacle in their organizations. Comments on the institutional resistance to ADR included:

  — wariness of new roles and procedures
  — "turf" protection
  — organizational inertia
  — perceived threat to career if ADR fails
  — reluctance to appear to oppose field staff by suggesting settlement

  The overall sense of the discussion was that organizations faced a mindset which preferred the known quantity of dispute resolution through litigation, rather than the unknown risks of ADR.

- **Obstacle: Lack of incentives to settle.**

  Related to the first obstacle, participants noted that the present dispute resolution system does not include any significant incentives for decision makers to settle disputes more efficiently. There seems to be no mandate or policy which favors settlement—it was even commented that "no one gets hurt by saying 'no' to ADR." Thus, the usual way of dispute resolution through the Contracts Disputes Act (CDA) becomes the "safe" way, and there is no incentive to use ADR.

- **Obstacle: Professional vanity—unwillingness to appear to be mistaken in a professional opinion.**

  This obstacle is also related to the first two since corporate culture prizes and rewards professional acumen and provides no incentives to promote management decisions based on facts rather than assigning blame for errors. Professionals may feel that by

recognizing that their opponent's case may have some merit, they admit that their own judgments were somehow wrong. Technically trained professionals may feel there is only one 'right' answer to a technical problem. Recognizing another interpretation is then a blow to their professional self-esteem.

- **Obstacle: Lack of trust.**

  This obstacle was noted as a barrier to the problem-solving spirit that is needed for ADR procedures to be effective. Participants voiced a number of perceptions which show how willing we are to think the worst of the motives of those we disagree with:

  — contractors are perceived as "claims artists" contractor managers are rumored to receive a percentage of the claims they recover
  — the Corps threatens contractors with protracted litigation
  — outside counsel is only interested in amassing billable hours
  — the system/bureaucracy is deliberately unresponsive
  — contractors count on claims to makeup for bidding errors

  These perceptions, all indicating a basic lack of trust, can block an ADR effort before it can get started.

- **Obstacle: ADR as a signal of a "weak" case.**

  There was overall support for the perception that initiating discussion of ADR may be seen as the signal that one's own position is somehow weak, or not worthy of the full investment of time and energy needed to win a court judgment. No one at the Round Table session endorsed this view but many were concerned that this unintended message could have a negative effect on the chances of using ADR to resolve the dispute. Ironically, it was felt that the suggestion to attempt settlement through ADR might stiffen the resolve of the other side to carry on with litigation.

- **Obstacle: The need to justify the ADR settlement.**

  This obstacle applies to the government in its ability to enter settlement agreements. The government settlement must be supportable; must be documented; must comply with procedural requirements; and the settlements are subject to review by a number of audit and investigative agencies including the Office of the Inspector General. A financial justification is required which must show that the government's settlement decision was reasonable. A number of participants commented that the paperwork required to justify a settlement needed to be simplified to remove the disincentive to settlement.

- **Obstacle: ADR is counter to the financial interest of outside counsel.**

  Outside counsel were perceived to be reluctant to use ADR because a process which provides a more efficient resolution of disputes would not generate the same number of billable hours as litigation. Thus, there would be no financial incentive for outside counsel to be interested in ADR. (It should be noted that this perception was strongly contested by the outside counsel present.)

  Outside counsel's fear of disappointing the client's desire for a strong advocate. Participants commented that this obstacle may stem from the 'hired gun' attitude which stresses defeating the other side as the primary objective. Reputations are made as tough litigators, not effective problem-solvers. For outside counsel to suggest ADR would seem to be in a surrendering of the advocate's role. Clearly, this obstacle is linked to the perception that suggesting ADR indicates a weak case. A number of other factors were suggested by participants, however. Outside counsel may feel that they lose authority and control of a case when ADR is used. ADR may mean to some that the maximum recovery was not obtained. There may also be a problem in educating and convincing a client that ADR can be a beneficial option, especially when the client believes strongly in the case. Both the client and counsel may be unwilling or unable to perceive the merit of the other side's position.

- **Obstacle: Participants mentioned a number of other obstacles to increased use of ADR including:**

  — Uneasiness about the seeming lack of structure of ADR proceedings.
  — Government auditors seem to control, dictate or determine the government's position on a claim—they pose an obstacle to ADR.
  — Lack of faith in the people involved—Who will be the neutral advisor? Will we have the right decision maker involved?
  — Is ADR a fair process?
  — Current contract language does not expressly permit ADR procedures.
  — Fear of the consequences of failure: cost, wasted effort, revealing your case to the other side.

STRATEGIES TO OVERCOME THE MAJOR OBSTACLES

Following the discussion of major obstacles to using ADR, Round Table participants were asked to suggest strategies to overcome these barriers. The discussion generated creative responses, many of which were complementary. The obstacles discussed will be restated below along with the suggested solutions.

- **Obstacle: Tradition/corporate culture.**

  Suggested solutions:

  — Training for greater familiarity with ADR.
  — Promote a new problem-solving paradigm.
  — Leadership.
  — Success models of ADR use.
  — Include mention of ADR options in contracts.
  — Dispute resolution should be made part of the performance evaluation of Corps and contractor personnel.
  — Establish a Federal office to promote ADR.

- **Obstacle: Lack of incentives to settle.**

  Suggested solutions:

  — Push responsibility and authority for settlement down in the organization.
  — Job description should include effective dispute resolution.
  — Compensation/bonuses based on ADR success.
  — Efficiency ratings and evaluations could include dispute resolution measures.
  — Promote the attitude that litigation is a failure.

- **Obstacle: Professional vanity.**

  Suggested solutions:

  — Reward settlements.
  — Involve objective decision makers, not those to closely associated with the project.
  — Minimize personal threats to people and reputations.
  — Focus on results.

- **Obstacle: Lack of trust.**

  Suggested solutions:

  — Cooperative training courses for Corps and contractors.
  — Use more partnering and team building activities.
  — Recognize and reward successful use of ADR.
  — Share project information through regular communication sessions.
  — Establish mutually acceptable audit procedures.
  — Get participation and support from top management for ADR procedures.

- **Obstacle: ADR as the signal of a weak case.**

  Suggested solutions:

  — Establish an organizational policy to use ADR.
  — Establish a pattern of communication or joint meetings to discuss problems.
  — The Corps should take the initiative as the "instigation office" for ADR.
  — Boards of Contract Appeals should suggest ADR in the early proceedings.
  — Include the ADR option in the contracting officers' decision.
  — Establish a mechanism for earlier use of ADR.
  — Set up a joint investigative process to pursue settlement.
  — Involve senior management in a dispute automatically after a given time period or event.
  — Establish the position of ADR advocate.

- **Obstacle: The need to justify the ADR settlement.**

  Suggested solutions:

  — Change the regulations and procedures for justification.
  — Contracting officer's signature should be sufficient for settlement without the need for justification.
  — Give more authority to managers for settlement decisions.
  — Education about and clarification of the justification procedures.

- **Obstacle: ADR is counter to the financial interest of counsel.**

  Suggested solutions:

  — Emphasize better client direction and counseling through knowledge of ADR.
  — Use value-base fee contracts rather than hourly fees.
  — Increase awareness that ADR can be profitable.
  — Emphasize problem-solving capabilities.

- **Obstacle: Outside counsel's need to be a strong advocate.**

  Suggested solutions:

  — Better communication between client and counsel.
  — Bring counsel in on a dispute earlier.
  — Early assessment of the legal budget will make clients more favorable to ADR.
  — Train inside and outside counsel together in ADR.

CONCLUSION—IMPLEMENTING ADR

What can be learned from the listing of obstacles to ADR and proposed solutions? Some conclusions can be grouped around major points of emphasis found in the responses. A review shows several themes:

Awareness

Training in ADR was frequently mentioned as a way to overcome barriers. Familiarity with the goals and procedures of any new initiative will increase acceptance and use of the new method. A primary way to address institutional resistance to ADR is through educating people in ADR. Significantly, several Round Table participants mentioned cooperative training in ADR. The idea of fostering a cooperative, problem-solving spirit by involving Corps and contractor personnel and outside counsel in joint training programs was an innovative suggestion.

Incentives

Many participants mentioned ways that dispute resolution incentives could be built into an organizational system. Participants recommended effective dispute resolution as part of the evaluation of management performance and compensation, and increased recognition for successfully resolving disputes. Dispute resolution could also be included in job descriptions. These suggestions would provide personal and organizational incentives to try ADR and raise the visibility and acceptance of dispute resolution.

Communication

Another emphasis in many responses was on the benefits of open communication among those involved in business relationships. Communication before disputes arise helps head off problems an dispel bad feelings and false perceptions. After a dispute arises, communication is the basis for collaborative problem-solving. Participants recommended regularly scheduled communication sessions in the course of project performance.

Early action

Participants agreed that dispute resolution was the most effective when used early in the development of a conflict. If problems become 'institutionalized' it is more difficult to resolve them. If alternative ways of resolving disputes are to be most effective, they should be used early enough to avoid the expense of litigation.

ADR BENEFITS AND OPPORTUNITIES

Round Table participants were asked to consider and list some benefits of and opportunities for ADR from the point of view of each of the three groups represented, the Corps, contractors and law firms. The purpose of the exercise was to brainstorm ideas and new viewpoints which might be used to overcome obstacles, or as new initiatives, to increase the use of ADR. Too often, we concentrate on the negatives of a situation rather than thinking about the positive benefits and opportunities that are presented by a new course of action. The following suggests many positive aspects and opportunities for promoting ADR.

Benefits

Those who listed benefits of ADR for the Corps and contractors stressed the ability to realize important gains by closing out projects rather than having them continue as unresolved claims. The Corps is able to clear its backlog of projects and can devote resources to new work. Contractors get paid more quickly without waiting for lengthy claims procedures, and good working relations with the Corps are preserved.

There was a greater variety of potential benefits of ADR listed for outside counsel. Participants mentioned improved client relations and satisfaction with legal services which would result from more efficient and effective dispute resolution. Law firms would also benefit by building expertise in a new field that seems to be gaining momentum. It was also suggested that ADR might help avoid the 'boom-or-bust' syndrome of a litigation practice, where law firms are either swamped with trial activities or looking for ways to fill in the gaps between trial preparation periods. ADR could even out the work load and improve a law firm's reputation for problem solving.

Opportunities

Those who listed opportunities to increase the use of ADR mentioned many specific suggestions which can be discussed in four topics.

Education about ADR.

All aspects of making more people aware of ADR were mentioned by participants. Training courses, including joint training efforts, were mentioned as ways to begin to change the mindset on dispute resolution for the corps and contractors. For law firms, education in ADR was seen as an opportunity to provide a valuable service to clients and another option for achieving the client's goals.

Change existing regulations or policies.

The Corps is affected most obviously by this category of suggested opportunities. Participants noted the opportunity to simplify the paperwork required to resolved disputes, especially the requirements for justifying the settlement of a claim. It was also suggested that regulations could be changed to provide more incentive for ADR. Clear policy direction can promote ADR.

Corporate policies on dispute resolution were also mentioned as opportunities to promote ADR use. A clear policy favoring early dispute resolution can eliminate the perception that willingness to propose settlement means that the claim is weak. A clear statement of policy can also go a long way toward changing the organizational mindset toward collaborative problem solving.

Change the decision making level for ADR.

A number of participants noted the opportunity for the Corps and contractors to change decision making authority for using ADR. There seems to be two complementary ideas at work. First, some said that an opportunity to promote ADR could be realized if those higher in the organization (for the Corps, a level above the contracting officer) were responsible for deciding to use ADR in a particular case. This would allow a decision maker who is not personally invested in the dispute to decide whether ADR should be used. Similarly, a contractor's project managers might not be as favorable disposed to settlement of a particular dispute as would an uninvolved executive. On the other hand, some participants felt that the opportunities of early resolution of disputes could best be realized by pushing authority down in the hierarchy. These two seemingly divergent suggestions may be complementary if the emphasis is placed on the time in the development of a dispute when there should be a new view. Early resolution of disputes requires authority at the project level for settlement. If a dispute has escalated and has involved personalities, data conflicts, motions, or other barriers

that are blocking resolution of the dispute, there may well be some benefit in another view of the potential for ADR. Striking the right balance between these two views will be important in promoting effective use of ADR.

There was another suggestion that deserves mention here. One participant felt that the Boards of Contract Appeals might be allowed to initiate ADR once an appeal of a contracting officer's decision had been filed. There have been experiments in some Federal District Courts with such techniques as summary jury trials as a possible model should such a suggestion be adopted.

Early evaluation of disputes.

As noted above, early resolution of disputes is most desirable. Working relations are preserved and the greatest savings in resources and time are realized. It was suggested that some form of early dispute evaluation could be used by the Corps and contractors to promote an examination of the potential for ADR.

SUGGESTIONS FOR ACTION

As a trial exercise, Round Table participants were asked to consider specific ways that they could promote ADR in their work. Each person told the group his or her suggestion for personal action:

- Establish internal training programs in ADR;
- Set a personal goal of trying an ADR procedure;
- Institute ADR training at the project level;
- Establish a corporate policy favoring ADR;
- Spread the word about the availability of alternative procedures to management, colleagues and outside counsel;
- Make ADR availability known through contract documents or clauses, and at professional conferences;
- Increase personal awareness of ADR opportunities;
- Inform staff of the ADR Round Table and its message;

- Work to change the mindset that currently favors the litigation track as the only dispute resolution option;
- Review existing cases for ADR potential;
- Promote a corporate policy favoring ADR to counter any perceived weakness associated with suggesting settlement;
- Open issues up to resolution at lower organizational levels;
- Raise the ADR option at early stages of disputes;
- Send a clear message to outside counsel favoring the ADR option;
- Include negotiation and ADR training as part of the training for Contracting Officers;
- Seek methods to create clear institutional support for staff use of ADR;
- Work to share ADR training among government and private contractors;
- Spread the word that the Corps is serious about ADR, and will make it available for smaller contractors also;
- Address business groups on the availability and variety of ADR procedures;
- Promote ADR education of all parties (Corps, contractor and counsel);
- Institutionalize ADR as part of the normal way of doing business; and
- Explore the possibility of an organizational ADR advocate.

The breadth, variety and innovation shown in these concrete suggestions for action is remarkable. Some are directed to solving a particular problem or overcoming a barrier to ADR, while others take an over-arching view of the subject, and still others make suggestions for action in terms of their personal attitudes to ADR. Those who are interested in promoting more efficient and effective resolution of disputes can draw many important suggestions from this list.

Overall, the Round Table session produced a spirit of movement toward common goals that was heartening. The Corps of Engineers ADR initiative was furthered by the Round Table. The Corps pledges its continued efforts to promote efficient and effective resolution of disputes where possible.

CONCLUSION

The idea for the ADR Round Table was a product of the Corps Executive Seminar in ADR Procedures, held in Atlanta in February 1989. SAD Counsel Steve Lingenfelter and Marguerite Millhauser, who was a luncheon speaker at the session, talked about convening such a group. Steve then took the initiative, with the support of the Division Engineer, MG Robert Bunker, Corps Chief Counsel Lester Edelman and the Corps Institute for Water Resources. As with so much of the large Corps ADR program, the ADR Round Table was a new learning experience and the first time such a session had been convened. Though the Round Table was not planned as a prototype or the first in a series of such meetings, its success suggests that these kinds of meetings may provide an unusual opportunity for promoting ADR. Meeting in a common forum and allowing ample time for discussion among the participants seemed to create the cooperative spirit which will lead to greater use of ADR in the future. The SAD ADR Round Table may well provide a model for other regional or national meetings between Corps personnel, contractors and the outside bar.

The outcome of the Round Table session gives a good indication that a step has been taken toward greater use of ADR. Obstacles and problems were discussed in a cooperative way and mutual difficulties were shared. The suggestions for overcoming obstacles and the action lists show similarities. The list of opportunities gave participants a chance to express ideas for new initiatives and the action list gave participants a chance to commit themselves to personal action.

SECTION VI: ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES

Chapter 21

FROM HOT-TUB TO WAR: ALTERNATIVE DISPUTE RESOLUTION (ADR) IN THE U.S. ARMY CORPS OF ENGINEERS

by
Jerome Delli Priscoli, Ph.D.

INTRODUCTION

A new age of resolving disputes has come upon us. Unless we find better ways to resolve disputes, we will be buried by them. Chief Justice Burger (1984) has stated, "Our system is too costly, too painful, too destructive, too inefficient for truly civilized people. To rely on the adversarial process as the principle means of resolving conflicting claims is a mistake that must be corrected." The U.S. Army Corps of Engineers (USACE) has responded to this challenge by instituting a major Alternative Dispute Resolution (ADR) program. This program is sponsored by the Chief Counsel and Senior Corps executives. It stresses internal development of ADR skills along with the use of external advisors and consultants.

FROM HOT-TUB TO WAR: A CONTINUUM OF ADR TECHNIQUES

There are many ways of resolving disputes, some with assistance, some without. Figure 1, on the next page, describes a continuum of ADR techniques. This continuum is the central metaphor throughout the Corps ADR program.

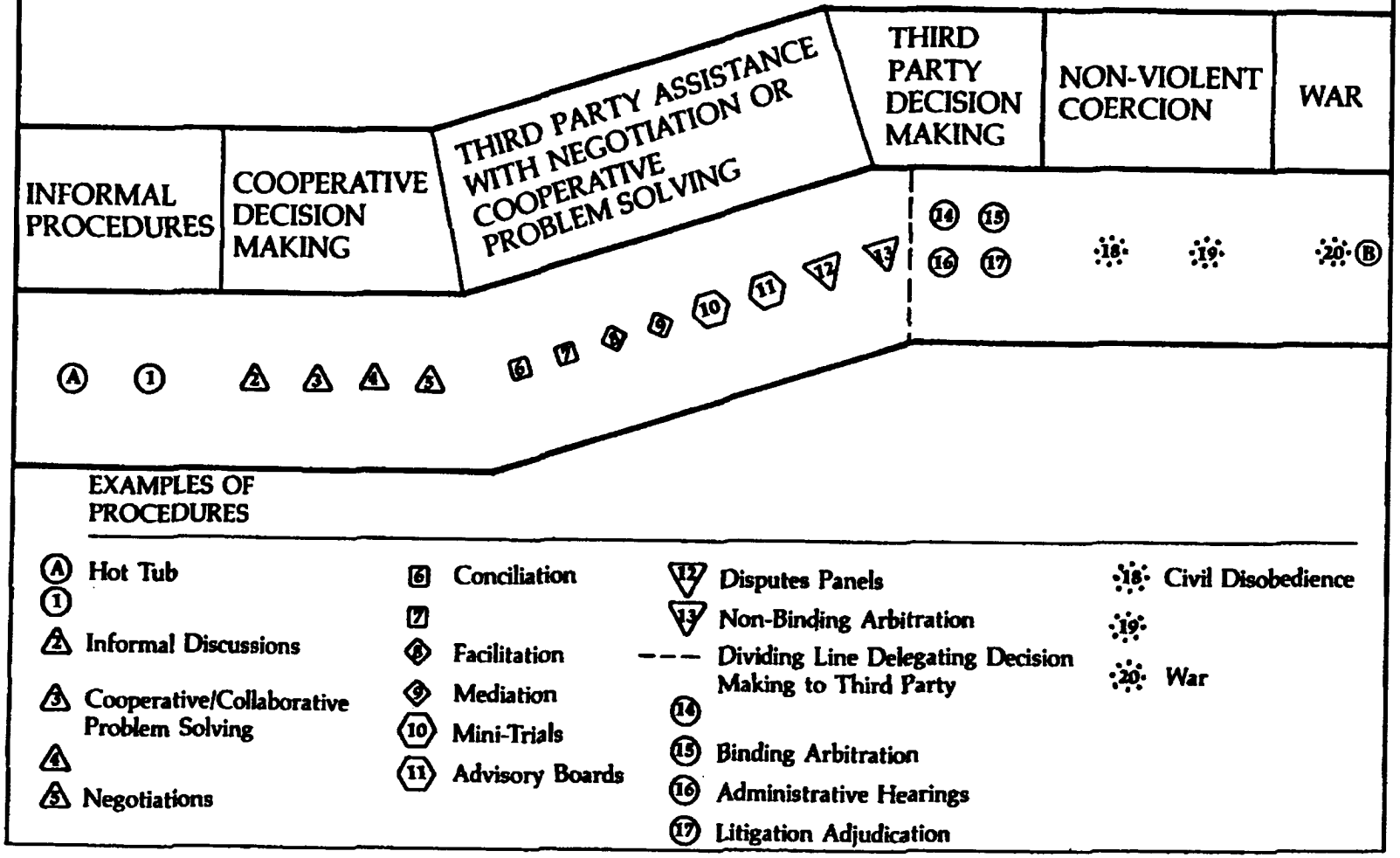
At Point A on the scale, is what is colloquially called the "Hot-tub Approach." That is, we all jump into the Hot Tub and somehow come to agreement. At Point B on the scale, the opposite extreme, we could go to war. Just short of Point B we use a highly adversarial approach such as litigation. ADR addresses the numerous possibilities between these points. Some are well known, others are emerging and most make common sense.

Four points should be made about the continuum in Figure 1. First, as we move from Point A to Point B, we gradually give over the power and authority to settle to outside parties. A dividing line, roughly at 13-14 on the scale, symbolizes that point at which the power to resolve disputes moves out of the hands of the disputants and into the hands of an outside party. The thrust of the Corps' ADR program is to encourage managers and executives to explore techniques to the left of this dividing line which will enable them to retain decision making authority and resolve disputes efficiently and effectively.

ALTERNATIVE DISPUTE RESOLUTION (ADR)

A Continuum & Procedures

Figure 1



Second, the basic principles of interest-based negotiations and bargaining as explained in Fisher (1981), can be applied with any technique along this continuum. Interest-based bargaining, in contrast to positional bargaining, can be appropriate for facilitation, problem solving meetings, mediations, mini-trial deliberations, and fact finding.

Third, the unnamed points in the continuum are meant to indicate that there is much to learn. Possibilities exist to create new procedures across the continuum. The last word on ADR is not in. In fact, the Corps' program invites managers to innovate and to create new ADR procedures.

Fourth, since communications contain, at least, content and process, the way we talk, or our process of dialogue, often can determine how and if people listen to the content of that dialogue. A premise of ADR techniques is, that by separating the process and the content roles in a dispute, we can better manage the discussions and promote agreement. The separation of process and content roles often leads to using neutral parties, sometimes called "interveners." Such neutral parties, in a variety of ways, become caretakers to the process of dialogue in the dispute.

Figure 2 describes techniques from cooperative to third-party decision making. It groups these techniques into the following categories: unassisted procedures; relationship building assistance; procedural assistance; substantive assistance; advisory and non-binding assistance; and binding assistance (Delli Priscoli, Moore, 1989).

To some, this continuum and categorization may seem either too discrete or overly defined. However, the point of the continuum is to show managers that numerous techniques are available. It also attempts to show managers that many possibilities for innovation also exist. In other words, the continuum tries to place techniques in a context which helps us to catalog and share our growing ADR experiences.

A CONTINUUM OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

Figure 2

COOPERATIVE DECISION MAKING	THIRD-PARTY ASSISTANCE WITH NEGOTIATIONS OR COOPERATIVE PROBLEM SOLVING			THIRD-PARTY DECISION MAKING	
Parties are Unassisted	Relationship Building Assistance	Procedural Assistance	Substantive Assistance	Advisory Non-Binding Assistance	Binding Assistance
• Conciliation	• Counseling/ Therapy	• Coaching/ Process Consultation	• Mini-Trial	• Non-Binding Arbitration	• Binding Arbitration
• Information Exchange Meetings	• Conciliation	• Training	• Technical Advisory Boards/Disputes Panels	• Summary Jury Trial	• Med-Arb
• Cooperative/ Collaborative Problem-Solving	• Team Building	• Facilitation	• Advisory Mediation		• Mediation-then-Arbitration
• Negotiations	• Informal Social Activities	• Mediation	• Fact Finding		• Disputes Panels (binding)
			• Settlement Conference		• Private Courts/Judging

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Chapter 22

DECIDING TO USE AN ALTERNATIVE DISPUTE RESOLUTION (ADR) PROCEDURE

by
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David Fairman

INTRODUCTION

This guide is designed to help U.S. Army Corps of Engineers (USACE) senior managers, executives, and commanders think strategically about managing disputes. It presents a framework for analyzing actual and potential disputes commonly faced by Corps managers, including disputes over construction contracts, development permits, facility operations, and the formulation of regulations and policies.

The guide identifies eight important questions to consider when analyzing a dispute:

1. What are the issues, who are the parties in dispute, and what are each party's interests?
2. What is the standard Corps procedure for handling this dispute?
3. What is the most likely outcome if the standard procedure is used?
4. Can an Alternative Dispute Resolution (ADR) procedure be used to achieve a better outcome?
5. Which ADR procedure is most likely to resolve the dispute?
6. Is the Corps prepared to use the ADR procedure?
7. Are other parties prepared to use the ADR procedure?
8. What issues need to be addressed before the Corps and other parties begin to use the ADR procedure?

The guide is designed to help you develop accurate answers to these questions in a timely and efficient way.

By using this guide, managers confronted with a dispute should be able to maximize the chances for the best possible outcome. By identifying and analyzing a dispute in its early stages, you may be able to prevent it from escalating. Where a dispute is ongoing, you may find that using an ADR procedure creates a better outcome for all parties. You should also be able to use the guide to determine which ADR procedure is most appropriate and when ADR procedures are inappropriate.

Following is a review of each of the key questions posed above. A schematic flowchart is also attached, showing how your answers to each question direct you toward specific dispute resolution procedures.

What are the issues, who are the parties in dispute, and what are each party's interests?

In order to choose an appropriate procedure to resolve disputes, Corps managers must clarify what issues are being disputed, identify the parties involved, and then understand the interests of each party.

In some disputes, such as construction contract claims, the parties and issues will be easy to identify. In others, such as the creation of new regulations, it may be necessary to analyze background information to identify issues, and to contact potentially affected individuals and groups to determine whether they see themselves as "stakeholders" in an upcoming negotiation or consensus-building procedure.

You must also determine the interests of each party, including your own. Interests are the broader goals each party is trying to achieve in the context of the dispute. Interests must be distinguished from positions—"tough" or "hard" public statements or initial negotiating demands that each party makes. Managers must try to look behind each party's positions to identify its underlying interests.

By analyzing interests, you can find out whether there is potential for the parties to reach a mutually acceptable resolution of their differences. When you understand the parties' interests, you can see which ones are "low priority" vis a vis the Corps and "high priority" for the other stakeholders. You can then identify potential mutual gains. Mutual gains are achieved when parties trade a less-favorable outcome on a low priority interest for a highly favorable agreement on a high priority interest.

A "dispute matrix" is a useful tool for analyzing issues, parties, and interests. A simple dispute matrix for a construction claim is shown in Figure 1.

In this matrix the interests of each party are listed under the party's name, with a number indicating the priority each party attaches to each interest (1 = most important). There is an apparent conflict between the Corps' desire to contain costs and the contractor's interest in

recovering costs, but there are also mutual interests in completing construction and settling the claim. The parties, however, assign different priorities to these common interests.

For purposes of a conflict analysis, assume that the claim has some merit, and that the contractor has refused to do any more work on the project until the claim is settled. If completing construction is the Corps' highest priority, it may be willing to settle the claim for a somewhat

PARTIES AND INTERESTS

ISSUES	Corps	Contractors
-Costs	-Contain costs (2)	-Recover costs (1)
-Project Completion	-Complete project (1)	-Complete project (3)
-Settlement	-Settle claim (3)	-Settle claim (2)

Figure 1
CONSTRUCTION CLAIM

higher amount than a strict emphasis on cost minimization would suggest, in order to get the contractor back to work. Settlement is a common interest of both parties, but for different reasons: the Corps wants to complete the project on schedule, and the contractor wants to minimize the legal costs on an outstanding claim. Since recovering costs is the contractor's highest priority, it will agree to settle the claim and complete construction if the Corps is willing to offer an amount that allows it adequate cost recovery.[1]

Having analyzed the substance of the dispute, the Corps manager can know where there are common interests, and where there are conflicts. With this information, you are equipped to take the next step, to determine which dispute resolution procedure is most likely to produce a good agreement.

[1] On the other hand, if cost minimization were the Corps' highest priority, and completing construction were the contractor's highest priority, the settlement amount might favor the Corps.

A more complex matrix for a policy dispute might look like the one on the facing page. In this case there are more issues, the parties' interests are more broadly defined than in a construction contract dispute, and the parties' priorities differ significantly among the issues. Each of these facts increases the probability that a satisfactory agreement can be found. The matrix suggests tensions among economic, social and environmental interests, and among various governmental interests, but does not identify many clear conflicts of interest.

Under these circumstances, the choice of a dispute-handling process becomes highly important to maximizing the chances for a mutually acceptable outcome. For example, in 1980 the Corps participated in creating an integrated plan for conservation and development in the Columbia River estuary. A large number of Federal, state, regional, local agencies, and interest groups met to identify land-use needs and areas for conservation. With the help of a mediation team, the participants agreed not to finalize the status of any one area until agreement had been reached on all areas. Developers and businesses then traded acceptance of some conservation areas for environmental and residential groups' acceptance of other areas where development could be undertaken. Corps and other government representatives participated to ensure that their overall policy goals were achieved and their permitting requirements met. Because the parties defined their objectives in terms of the estuary as a whole, rather than fighting over each of its parts, they were able to develop a mutually acceptable plan.[2]

As a final comment on issues, parties, and interests, it is important to realize that it can be difficult to identify some parties or define their interests. This is particularly true if a policy or project is expected to have widespread but subtle socio-economic impacts.

To increase the likelihood that all interests will be identified and represented, a variety of public information and public participation techniques can be used. When the Corps undertook a comprehensive study to identify impacts of a planned waterway, it organized a committee representing a wide variety of local and regional governments and interest groups. The Corps also held a series of public meetings to inform people in the area about the study. As a result of increased public awareness, minority groups with an interest in economic development decided that they wanted the Corps to provide training and equipment for their constituents, to ensure their access to the study database.[3]

With adequate information about key issues and involvement of all parties involved (including their underlying interests), you can begin to forecast the probable course of a dispute. Your goal should be to choose a dispute-handling procedure that is likely to lead to a satisfactory outcome

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[2] See Verne C. Husser, "The Crest Dispute: A Mediation Success," in Christopher Moore and Jerome Delli Priscoli, eds. "Section 14, Case Studies," *The Executive Seminar on Alternative Dispute Resolution (ADR) Procedures*. Ft. Belvoir, VA: IWR, USACE, 1989.

[3] See "Case Study: Tennessee-Tombigbee Corridor Study," ibid., and J. Crieghton, J. Delli Priscoli, and C. M. Dunning. *Public Involvement Techniques: A Reader of Ten Years Experience at the Institute for Water Resources*. IWR Research Report 82-R1. Ft. Belvoir, VA: IWR, USACE, 1983.

for the Corps, for other parties whose agreement is necessary to achieve the Corps' goals, and for the public at large.

What is the standard Corps procedure for handling this type of dispute?

Corps managers are trained to use standard procedures and guidelines to handle a wide range of disputes. These procedures and guidelines are designed to govern the way managers respond to complaints, conduct investigations, and incorporate public comment. They yield decisions by Corps managers involved in judging construction claims, issuing or denying permits, beginning or modifying facility operations, and enacting or amending policies and regulations.

Standard procedures are appropriate for many situations, but they do not always yield optimal outcomes for the Corps, other parties, and the public. When those affected by a Corps decision feel that their interests are not being met, they are likely to appeal to other decision-makers and look for other procedures.

Even if successful in an initial defense of a controversial decision, Corps managers should expect that their decisions will be challenged again, if the basic interests of other key stakeholders have not been met. Each successive challenge to a decision is likely to increase the intensity of the conflict: increasingly powerful decision-makers may become involved, and increasingly disruptive procedures may be used. Frequently-encountered challenges include:

- appeals to higher authorities within the Corps;
- litigation in court;
- legislative action at the local, state, or Federal level; and
- direct action, such as public demonstrations, civil disobedience, and so on.

Therefore, the answer to the question "what is the standard procedure for handling this dispute?" must include some consideration of the possibility of challenges to the Corps manager's initial administrative decision.

In developing an answer, the manager must grapple with the problem of uncertainty. The greater the potential for a higher-level challenge, the greater the uncertainty in predicting how the dispute is likely to be resolved. Ultimately, a manager will have to make his or her "best guess" as to how a Corps administrative decision will be received, what actions other parties are likely to take if the decision does not meet their interests, and what further steps may be necessary to resolve the dispute.

What is the most likely outcome if the standard procedure is used?

Predicting the outcome of a dispute is never easy. After gathering accurate information on issues, parties, and interests, a manager must also assess the relative power of each party to influence the outcome of the dispute.[4]

The key questions to ask in order to predict the outcome of the dispute are:

- Does any party have the power to block a decision it considers unacceptable?
- Does any party have the power to intensify the conflict by appealing to higher or outside authorities?
- Does any party have the power to sustain the conflict over a long period of time?
- Is maintaining a good relationship with one or more of the stakeholders a high priority for the Corps?

To answer these questions, you will need to evaluate the types of power available to each party, such as money, property, information, prestige, leadership, large and/or well-organized membership, individual and/or institutional allies.[5]

If your answer to all four questions is "no," then the Corps will probably be able to implement and uphold the decision it reaches using standard procedures. If your answer to any question is "yes," however, the outcome of the dispute, using standard dispute resolution procedures, may produce either a stalemate or a loss for the Corps.

If a stalemate or loss is likely, it makes sense to ask whether using a different dispute resolution procedure could increase the chances for a more positive outcome. Even in situations where a decision could be imposed by the Corps, an ADR procedure may nevertheless be useful. ADR's cooperative problem-solving approach increases the chances for producing an agreement that serves both the Corps' substantive interests and those of other parties. In situations where the Corps has ongoing relationships with other parties, ADR is more likely to foster positive interactions in the future.

[4] Managers familiar with the concept of "BATNA"—best alternative to a negotiated agreement—should think of this task as determining the Corps' BATNA.

[5] For a more-extensive discussion of sources of power, see W. Potapchuk, J. Laue and J. Murray. *Getting to the Table.* IWR Working Paper 90-ADR-WP-3. Ft. Belvoir, VA: IWR, USACE, October 1990, pp. 11-14.

Can an ADR procedure be used to achieve a better outcome?

Over the past decade, the Corps has used ADR procedures successfully to produce better outcomes, both for the Corps and for other parties, than would be expected if standard procedures were used. ADR procedures help parties in a dispute reach a mutually acceptable resolution through a process of joint problem-solving.

As mentioned above, ADR procedures may be especially preferable when the Corps needs to maintain positive relationships with other parties. ADR procedures often have other comparative advantages over standard procedures, including:

- time savings for managers, technical and legal staff (in expedited scheduling, less-formal documentation and presentation of positions, expedited decision-making, avoided appeals);
- cost savings for Corps (in expedited project timetable, avoided legal costs, avoided staff and consultant hours);
- better outcomes for all participants (because participants focus on meeting each other's interests, rather than promoting and defending their own positions);
- greater control of process by participants (through joint selection of ADR procedure);
- greater control of terms of agreement (through joint development of settlement options);
- greater opportunity for collaborative problem-solving (participants who voluntarily commit to ADR procedure are more likely to cooperate than participants in mandated standard procedure); and
- higher probability that agreement will be upheld over time (because participants have voluntarily and collaboratively created the outcome).[6]

In practice, these general advantages of ADR will only be obtainable if the dispute is well-suited to resolution through an ADR procedure. To find out whether ADR can be used effectively in a particular case, you will need to answer several questions about the parties, their interests, and the issues for negotiation.

There are some disputes where ADR is not appropriate. If you answer "yes" to either of the following questions, the dispute is probably not well-suited to ADR:

[6] For a more extensive discussion of advantages of ADR, see "Benefits of ADR Procedures," in Moore and Delli Priscoli, op. cit., pp.39-41.

- **Does the dispute involve major issues of legal jurisdiction or precedent?**

  To answer this question, Corps managers should consider not only the Corps' interests, but also the interests of other parties. ADR procedures are unlikely to satisfy parties who feel that they need a formal administrative or court decision to establish their jurisdiction or set a precedent.

  As you develop your answer to this question, you should try to engage other parties in discussion, particularly those who have stated that they intend to file suit or pursue other formal actions. If your review of similar disputes shows that formal decisions have not set precedents, you may be able to convince others that a formal decision will not clarify the issues in a definitive way.[7]

- **Can other parties take further formal action without significantly increasing their disputing costs (time, effort, money, prestige, and so on)?**

  One or more key parties may feel that further legal or administrative steps can resolve the dispute in their favor, and will not impose serious costs in any case. These parties are unlikely to forego formal action by agreeing to an ADR procedure.

  As with issues of precedent, a Corps manager should explore cost issues with the other parties. A skillful manager can be the "agent of reality" for other parties, by pointing out possible costs that others may not have seriously considered. It may also be possible to work out an agreement for others to try ADR without giving up the right to pursue legal action if ADR fails. In any case, a manager should not threaten to impose higher costs if another party chooses to pursue legal action.

If your answer to both of these questions is "no," then an ADR procedure may be an effective way to achieve a better outcome for all parties. The next step is to choose an ADR procedure which fits the circumstances of the dispute.

Which ADR procedure is most likely to resolve the dispute?

The first decision a manager will have to make when choosing an ADR procedure is whether to use an "unassisted" or an "assisted" procedure.

[7] Corps managers are not advised to try to argue other participants into agreeing that they have a weak case. The issue to discuss is whether the case is likely to set a strong precedent even if is decided in favor of one side.

Unassisted ADR Procedures

Unassisted ADR procedures involve only the parties in dispute. Assisted ADR procedures involve both the parties and a neutral party (in the role of facilitator, mediator, and/or arbitrator) who does not have a stake in the outcome of the dispute.[8] If an assisted procedure is used, the participants can choose how much control over the process and control over the final outcome they wish to give to the neutral.

Unassisted ADR procedures provide a framework for collaborative problem-solving and decision-making. They include the following:

- **Conciliation:** informal contacts between representatives of the parties.[9]

  — Use: to decrease interpersonal tensions, build trust, and establish a basis for direct negotiations.

  — Time Required: varies.

  — Examples: making casual conversation (unrelated to the issues in dispute); traveling together to a meeting or site; dining or socializing together.

- **Joint Fact-Finding**: exchange and development of factual information between participants.

  — Use: to establish a shared framework for analyzing a dispute, resolve disputes on matters of fact, and clarify disagreements on interpretations of fact.

  — Time Required: varies from 1 day (data-exchange) to 2-3 months (collection and analysis of new data).

  — Examples: exchange of technical staff and consultants' reports; choosing a mutually acceptable source of data; joint hiring of a consultant to provide or review data.

- **Negotiation**: direct discussion of issues and interests by the participants.

  — Use: to soften "hard" positions, explore underlying interests, develop options that could meet interests, and reach a mutually acceptable resolution of the dispute.

[8] The term "neutral" is used to designate a person or organization providing impartial dispute resolution assistance to the participants in the dispute.
[9] Conciliation can also be aided by a skilled neutral.

— Time Required: varies from half-day (contract claim) to 1 year (development of major project design).

— Examples: negotiated contract claims settlement, negotiated wetlands permitting.

Unassisted ADR procedures are more likely to succeed where disputes have not yet reached an impasse, and where there are a fairly small number of participants and issues. To decide whether unassisted ADR is the right choice, ask yourself the following three questions. If you answer "yes" to all of them, unassisted ADR has a good chance of success. If you answer "no" to any of them, an assisted ADR procedure is preferable.

1. ***Are all key parties still willing to meet to discuss settlement options?***

   If parties with the power to block agreement are not willing to meet, a neutral "go-between" may be necessary to restore communication and build momentum toward settlement.

2. ***Are Corps staff and the other parties able to discuss the dispute without debilitating hostility?***

   Feelings of hostility and anger can easily jeopardize settlement attempts. It is extremely difficult for participants to engage in collaborative problem-solving when they have strong hostile feelings toward each other.

   In some cases, a senior manager who has not been directly involved in the dispute may be able to intervene and assess the dispute objectively. If so, the manager will need to find out whether other parties are also prepared to introduce objective decision-makers and reduce emotional antagonism.

3. ***Are there a relatively small number of issues and parties?***

   When a dispute involves a large number of different groups and organizations, and raises a wide range of issues, negotiations may stall at the agenda-setting stage. Different participants may want to give priority to very different discussion items. If a dispute involves public interest representatives, they may need neutral assistance to clarify complex technical or legal issues under discussion.

As a rule of thumb, managers should not use an unassisted ADR procedure if a dispute involves any of the following:

- more than three parties;

- more than two parties with unequal access to technical or legal information or expertise;
- more than two different issue-areas (for example, engineering, legal, financial, environmental, socio-economic, and so on); or
- more than five discrete issues within an issue-area.

Again, if you can answer "yes" to all three questions listed above, it makes sense to try to bring the other parties to the table, using conciliation, information-sharing, and negotiation to resolve the dispute. If you have answered "no" to any of the questions, you should consider using an assisted ADR procedure.

Assisted Procedures

Assisted procedures use a neutral to expedite the process of dispute resolution. They may also give the neutral some decision-making power.[10] They include the following:

- **Facilitation**: assisted identification of potential participants, clarification of issues and interests, exchange and collection of information, and joint evaluation of information.
  - — Use: to prevent disputes through joint project planning and to resolve disputes which arise during project implementation.
  - — Time Required: varies from 2-4 weeks (meetings of a small project impact assessment team) to 18 months (for planning a major dam).
  - — Role of the Facilitator: encourages participation from affected groups, promotes clear communication, coordinates agenda, identifies areas for fact-finding, arranges for presentations and reports from independent experts, assists in development of recommendations and/or agreements.
  - — Examples: facilitated development of policies and regulations.[11]

[10] Each of the unassisted procedures can also be structured as an assisted procedure: an impartial conciliator can be used as an agent of communication to help participants learn more about each others' backgrounds and goals; a fact-finder can help the parties find impartial sources of data and clarify interpretation disputes; an impartial negotiation advisor can train participants to make the most efficient use of negotiating sessions.

[11] For examples of successful facilitation, see "Case Study: Tennessee-Tombigbee Corridor Study," and "Case Study: Sanibel Island General Permit," In Moore and Delli Priscoli, "Section 14: Case Studies," op.cit.; Jerome Delli Priscoli, "Conflict Resolution in Water Resources: Two 404 General Permits," In *Journal of Water Resources Planning and Management*, Vol.114, No.1., Jan. 1988, pp.66-77; Lawrence Susskind and Jeffrey Cruickshank, *Breaking the Impasse*. New York, NY: Basic Books, 1987.

- **Mediation**: assisted clarification of issues and interests, exchange and collection of information, joint evaluation of information, development of options for resolving dispute, and structuring of agreements to ensure their fairness, efficiency, and stability.[12]

  — Use: to resolve disputes when parties have reached an impasse; may be used as part of an ongoing facilitation process.

  — Time Required: varies from half-day (contract claim) to 1 year (general permit development).

  — Role of the Mediator: promotes clear communication, coordinates agenda, clarifies issues and interests, acts as "agent of reality" to overcome emotional obstacles to settlement, assists in development of agreement options, drafts agreements to ensure all interests are addressed.

  — Examples: mediated settlement of contract claims, mediated revision of dam operating procedures.[13]

- **Mini-Trial**: expedited presentation of positions and evidence to a panel composed of senior decision-makers representing each participant and a third party.

  — Use: to resolve complex technical issues where costs of presenting evidence in court are potentially very high, and senior decision-makers want maximum control of terms of settlement.

  — Time Required: 1-3 days, plus preparation time.

  — Role of Senior Decision-Maker Panelists: listen objectively to presentations from own organization and others, evaluate case history and technical information, determine key organizational interests to be addressed in settlement, negotiate settlement with other senior decision-maker panelists.

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[12] Mediation and facilitation are very similar procedures. The term "mediation" is more often applied when a third party helps resolve a dispute which has already escalated and reached impasse; "facilitation" is more often applied when a third party helps prevent disputes by assisting in joint planning. Cf. Susskind and Cruickshank, ibid., Chapter 6.

[13] For case studies of successful mediations, see L. Dembart and R. Kwartler, "The Snoqualmie River Conflict," excerpted from R. Goldman, ed., Roundtable Justice: Case Studies in Conflict Resolution, Reports to the Ford Foundation (Boulder, CO: Westview Press, 1980), and Husser, "The Crest Dispute: A Mediation Success," In Moore and Delli Priscoli, "Section 14: Case Studies," op. cit.

— Role of Neutral Panelist: listens objectively to presentations, evaluates case history and technical information, assists senior decision-makers in negotiating settlement; if authorized by decision-makers, may propose elements of a settlement.

— Examples: mini-trial resolution of complex contract claims.[14]

- **Arbitration**: impartial judgment (advisory or binding) by individual or panel with expertise on the issues in dispute.

— Use: to provide fair, efficient, and stable resolution of disputes when parties are unable to undertake collaborative negotiation, but wish to save time and money by settling out of court.

— Time Required: 1-2 days, plus preparation time; final decision may not be issued for 1-2 weeks.

— Role of Arbitrator(s): listen objectively to presentations, evaluate case history and technical information, propose settlement (if non-binding) or determine settlement (if binding).

— Examples: arbitration of contract claims.[15]

These assisted ADR procedures differ in cost, time, and suitability for different types of disputes.[16] They also differ in the degree of decision-making power they give to the neutral. To choose an assisted ADR procedure for a particular dispute, you will first need to prioritize your procedural goals—control of costs, time, deadlines, procedure, terms of settlement, and/or implementation of agreement:

If your goals are to

- minimize the cost of the procedure;
- minimize time spent using the procedure (senior manager's time, staff time, consultant time); and/or
- meet external deadlines (such as contract expiration, filing deadline, and so on),

[14] For case studies of successful mini-trials, see Corps of Engineers ADR Series, IWR Case Studies 89-ADR-CS-1, CS-4, and CS-5. Ft. Belvoir, VA: IWR, USACE, 1989. For a more extensive discussion of the mini-trial concept, see Corps of Engineers ADR Series, Pamphlet 1, *The Mini-Trial*, IWR Pamphlet 89-ADR-P-1. Ft. Belvoir, VA: IWR, USACE, 1989. See also Eric Green, "The CPR Mini-Trial Handbook" In *Corporate Dispute Management*. New York, NY: Mathew Bender & Co., 1982.

[15] For case studies of successful non-binding arbitrations, see Corps of Engineers ADR Series, IWR Case Studies 89-ADR-CS-2, and CS-3. Ft. Belvoir, VA: IWR, USACE, 1989.

[16] For a more extensive discussion of unassisted and assisted ADR procedures, see "Procedures for Resolving Disputes: A Continuum." In Moore and Delli Priscoli, op.cit., pp.23-38.

and there are a small number of issues and parties,

then choose a mini-trial or arbitration.

Mini-trials and arbitration offer highly structured settings for presenting positions, discussing issues, and reaching decisions. These procedures work best when the set of issues and participants is limited enough to allow full presentations within a one- to three-day time frame. The key difference between the two procedures is the role of the participants in shaping the terms of settlement.

- **If limiting cost and time is your highest priority, but you also want maximum control over the terms of settlement, choose a mini-trial.** As noted in the description of the mini-trial, senior decision-makers representing each participant are the ones determining the settlement, with the assistance of a third party panelist. In order for this procedure to work, the senior decision-makers must be authorized by their organizations to resolve the dispute.

- **If limiting cost and time is your highest priority, and the outcome of the dispute is not of great concern to senior decision-makers, choose arbitration.** Arbitration is most useful when all parties want to get the dispute resolved in order to resume an ongoing project or relationship, or when the stakes are low enough that even a less-than-optimal outcome will not concern senior decision-makers.

  Non-binding arbitration (also called "advisory judgment") is a useful alternative to binding arbitration when the parties are not willing to give up their right to pursue future administrative or judicial action, or when the stakes are high enough to concern decision-makers, but not high enough for them to commit time to a mini-trial procedure.

If your goals are to

- maximize control over procedure (e.g. exchange of information, confidentiality, etc.);
- maximize control of the terms of settlement;
- maximize chances for stable implementation of agreement;

then choose facilitation or mediation.

Facilitation and mediation tend to be more time- and cost-intensive than other assisted procedures, but offer more control over the process and increase the chances for a comprehensive (and therefore stable) settlement.

- **If there are many issues and parties, but not all issues and parties have been identified, then choose facilitation.** Facilitation is best-suited for large groups of participants, dealing with multiple issues which need to be clarified before negotiations can begin. It is particularly useful for advisory groups, to assist them in developing consensus-based recommendations for decision-makers. As noted in the description above, facilitation has been used effectively in public planning processes, including general permitting for regional wetlands development and design studies for navigation corridors. In some permitting cases, Corps managers and technical staff have served as facilitators, explaining the permitting requirements and assisting all affected parties to draft a mutually acceptable permit within the framework of the law.[17]

- **If there is a clear set of the issues and parties' and negotiations have reached an impasse, then choose mediation.** Mediation is most useful for disputes where the parties have already been identified and the issues are clear. A mediator is often called upon to revive settlement efforts when the parties have reached an impasse. Unlike the mini-trial or arbitration procedures, mediation is adaptable to large numbers of participants and issues. The mediation process can be limited by a deadline, or can be open-ended to allow for maximum discussion and development of comprehensive solutions.

  This outline of questions and choices should help you pick the ADR procedure best-suited to the particular circumstances of the disputes you face. Having made this choice, you will need to consider whether the Corps and other parties are prepared to use the procedure effectively.

Is the Corps prepared to use the ADR procedure?

As the Corps manager initiating an ADR procedure, you will need to make sure that the Corps' goals are clearly defined, the staff involved are competent to use the procedure effectively, and the staff has some latitude to be creative in reaching the Corps' goals. You can use the following questions as a checklist to help confirm that the Corps is well-prepared before proposing an ADR procedure to other potential participants.

Do you have enough information and experience to negotiate the terms of an appropriate settlement?

You must have a clear understanding of issues in dispute and the Corps' settlement goals in order to negotiate effectively. If you have followed the steps outlined in this guide, you should have adequate information about the dispute.

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[17] See "Case Study: Tennessee-Tombigbee Corridor Study," and "Case Study: Sanibel Island General Permit," in Moore and Delli Priscoli, "Section 14: Case Studies," op.cit., and Delli Priscoli, op.cit.

The manager who will be representing the Corps should also have some training and experience in problem-solving negotiations. If the stakes are very high, past negotiation experience is a prerequisite. Managers who do not have extensive negotiation experience should consider using advisors (legal counsel and project managers) who are experienced in using ADR.

Do you have adequate resources (staff time, funding, access to legal and technical assistance) to use the procedure?

Time: Assuming that you have a limited amount of time to work with, you should set deadlines and establish maximum staff commitments for the ADR procedure you choose. You will need to estimate the amount of time that will be needed to prepare your case (for arbitration or mini-trial); to clarify all issues and work out a comprehensive settlement (for mediation or negotiation); or to identify parties and issues and conduct a series of meetings (for facilitation or fact-finding). Allow time to address new issues that arise and to resolve the most difficult issues.

Cost: The major costs associated with ADR are the costs of staff, legal, and technical consultant time, the costs of gathering, exchanging, and analyzing technical information, and any travel or other expenses required for meetings. If you are using a neutral, his or her costs will also have to be paid; it is often possible for participants to split these costs. If public interest groups are involved as well, they may need help covering the costs of gathering background information or technical assistance.

Legal and Technical Assistance: You may need to obtain the services of Corps attorneys and technical experts not directly associated with the dispute. There are two reasons for seeking this type of assistance. First, the dispute may raise issues which go beyond the expertise or authority of the staff who are directly involved. Second, the staff who are directly involved may have lost the ability to see the dispute objectively and unemotionally.

Managers should be careful to arrange for technical assistance staff to work with staff who have been directly involved in the dispute. Staff who have been involved should not feel that they are being "shut out" of the ADR procedure. If they feel that they are part of the ADR team, they are more likely to cooperate in resolving the dispute.

Do you have personal incentives and organizational support for using an ADR procedure?

As the lead Corps officer or executive on the ADR team, you will be staking some of your personal reputation on the ADR procedure's outcome. If the stakes are low, the potential career gain or setback will also be low. If the stakes are high, you will need to consider best-case, worst-case, and most-likely outcomes, and their respective probabilities. You can then decide whether the "probability-adjusted career impact of the worst-case outcome" is bad enough to deter you from using ADR, or whether the potential gain from the likely or best-case outcome is great enough to justify some risk.

During the course of an ADR procedure, you may encounter pressure against settlement from Corps staff who have been involved in the dispute. You may also encounter pressure for settlement from superiors who have been directed to encourage the use of ADR. Responding to these internal pressures, while simultaneously negotiating with other ADR participants, can be a significant personal challenge. Part of your job in preparing to use ADR is to identify internal ADR proponents and opponents, and to do what you can to create internal support for your approach, without limiting your discretion during the ADR procedure. Support from other staff and superiors will also reduce your personal responsibility if the procedure is unsatisfactory.

Will you have the authority you need to commit the Corps to a negotiated settlement?

Depending on your seniority and the importance of the dispute to your superiors, you may need authorization to use the ADR procedure. You can speed the decision-making process by presenting a concise summary of the issues in dispute, the Corps' goals, the alternatives you have considered, the proposed ADR procedure, and the proposed Corps representative or team.

As mentioned above, you should try to maximize internal support for your goals, without unduly limiting your discretion to develop creative solutions. If a proposed settlement meets the Corps' goals in a somewhat unorthodox way, you can ask other participants for time to bring the proposed settlement to your superiors for review. You should not make significant new commitments (commitments that go beyond what you have previously been authorized to offer) until you have cleared them with your superiors.

While you are finding out whether you are prepared to use ADR, you should also take the time to find out whether other potential participants are equally prepared. Your counterparts should be as ready as you are to resolve the dispute through ADR.

Are other parties prepared to use the ADR procedure?

The questions you need to ask about the other parties mirror the questions you have asked about yourself:

- Do other parties have adequate information and experience to negotiate a settlement?
- Do they have adequate resources to use the ADR procedure effectively?
- Do they have career incentives and organizational support for using an ADR procedure?
- Do they have the authority to commit their organizations to whatever settlement may be reached?

The only way to answer these questions is to explore the possibility of using an ADR procedure with your counterparts. If you have prepared an ADR proposal for review by your superiors in the Corps, you can modify it for review and discussion with other potential participants. In presenting the idea of ADR for consideration, you should ask open-ended questions that allow your counterparts the opportunity to clarify their interests and concerns about the procedure, e.g. "What other kinds of information would you want to see to help you decide whether mediation makes sense for you?" or "Are there other people on your staff that you'd like me to talk with about this possibility?"

It is often difficult, however, for someone who is party to a dispute to develop accurate assessments of the other parties' capabilities. In most disputes, mistrust increases as communication deteriorates. Each party then begins to question whether the other parties' proposals are being made in good faith. When there is no framework for direct communication, and where the communication that does take place is clouded by mutual suspicion, you should consider calling on a neutral to conduct a "dispute assessment."

The third party assessor can review the work you have done to identify issues, parties, and interests, review the proposed ADR procedure and the Corps' readiness to use it, and then interview the other parties to answer the questions listed above. If the neutral's interviews suggest that there is common ground on which to build a settlement, and that key parties are prepared to participate, he or she can convene an initial meeting to review the proposed procedure and assist the participants in setting ground rules.

What process issues need to be addressed before the Corps and other parties begin to use the ADR procedure?

If you have reached this stage in deciding to use ADR, you should be firmly convinced that it is in the Corps' best interest to try an ADR procedure to resolve the dispute. The last step, and often a difficult one, is making process adjustments and arrangements to bring the other parties to the table.

There are two key procedural issues that need to be resolved by the participants before an ADR procedure can begin: the ground rules for the procedure, and the choice of a neutral party, if one is going to be used.

The ground rules should cover the following areas:

- schedule for meetings (with deadlines, if necessary);
- format for meetings (highly detailed for arbitration or mini-trial; less detailed for other procedures);
- rules for presentation, exchange, and review of information (highly detailed for arbitration and mini-trial; less detailed for other procedures);

- roles and decision-making power of participants (decision-making and/or advisory powers of participants; role of observers, if allowed); and
- confidentiality and inadmissibility of information as evidence (and guidelines for discussing ADR procedure with media and the public).

As the Corps representative, you will need to pay particular attention to the Corps' decision-making role when the issues include regulatory and statutory responsibilities. The Corps has used facilitation and mediation procedures effectively to develop policies, regulations, and project plans, while limiting the "veto power" of other participants and reserving final authority to enforce relevant laws. More serious concerns could arise if a binding mini-trial or arbitration procedure were being used in a potentially precedent-setting case.[18]

You will also need to be sensitive to issues of confidentiality, particularly when the Corps and other participants must meet public notification and open meeting requirements. In some cases, working groups can accomplish certain tasks between meetings that are open to the public; their recommendations can then be made public at meetings of the full participant group.

If a neutral is used, all of the participants should have some role in identifying or choosing him/her/them. Ideally, the neutral should have some understanding of major substantive issues, as well as extensive experience and references from past service as a facilitator, mediator and/or arbitrator. A neutral who has already conducted a dispute assessment may be able to continue, if the participants are satisfied with his/her/their competence and impartiality. If there has been no neutral involvement, the Corps (or other participants) can propose a neutral, provide a list of potentially qualified neutrals, or seek a neutral or list of candidates from a dispute resolution service or agency.

The neutral's role should also be made clear in the ground rules. You may wish to refer back to the descriptions of neutral roles to see the kinds of tasks they are asked to perform. The scope of a neutral's work may be expanded by mutual agreement of the participants, for example, changing a strict arbitrator's role to that of a mediator-arbitrator (who only determines the settlement if the participants cannot reach an agreement).

CONCLUSION

By answering the questions posed in this guide, Corps managers should be able to make a well-informed decision about whether to use an ADR procedure to resolve a dispute. You should also be able to choose the ADR procedure which is best-suited to your particular circumstances.

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[18] The Administrative Dispute Resolution Act of 1990 allows Federal agencies a 30-day period to reject the decision of an arbitrator. The Act also provides clear guidelines (on the use of neutrals, confidentiality, authority of arbitrators, arbitration procedures, and judicial review of arbitration decisions) for Federal agencies which administer ADR programs.

After assessing the ability of the Corps and other potential participants to use the procedure effectively, you should be able to work with other participants, including any neutral services, to tailor the ADR procedure to your particular needs.

Once you are engaged in problem-solving negotiations with other participants, you should work hard to identify potential mutual gains. Creative trades will produce better outcomes for all participants than a win-lose procedure will produce. At this stage, your background information on issues, parties, and interests, the time you have spent to clarify Corps' goals and the ADR procedural ground rules, and the time you have spent building a solid foundation for open and honest discussion, should pay off with a positive outcome for the Corps and other participants.

No guidebook can pretend to offer a single set of steps appropriate for all circumstances. You will use this Guide best if you use it as a starting point for your own in-depth exploration of the next dispute you face. Over time, as you experiment with ADR procedures in a variety of situations, you will develop an intuitive sense of how to answer the questions raised here. When you have gained a great deal of experience with ADR, you should be able to identify potential disputes earlier and resolve them more quickly.

Chapter 23

FACILITATION

by
James L. Creighton, Ph.D.

Whenever people work together, they communicate at two levels:

- Content: People communicate about the subject matter, the facts of the case, the information.

- Relationship: People also communicate how much they accept each other, care about each others' needs and problems, and how concerned they are about preserving the relationship.

In meetings, "relationship" is often not communicated directly, but is communicated by who gets to speak and for how long, whose needs take precedence, who gets to establish the agenda, who gets cut off or put down, and so on. In other words, how a meeting is run—the "process"—tells the participants how important they are, whether their opinions matter, and what their relative relationship is to each other.

THE NEED FOR PROCEDURAL ASSISTANCE

When there is a dispute, people often fight over the meeting format or procedures as a way of defining their relationship or gaining an advantage. The most famous such example was the fight over the shape of the table at the Vietnam Peace Talks. In that case, the debate dragged on for months, while people continued to be killed and maimed. Of course, the shape of the table wasn not really what the dispute was about. The first real issue was whether the sides really wanted to resolve issues through negotiation. The second issue—which found expression in discussions about the shape of the table—was what the relationships would be between the parties.

Even when the dispute is less dramatic, participants often fight for leadership of the meeting, disagree over how the meeting is to be run, fight over what should be included on the agenda, and strive for dominance during the meeting. All of which usually just makes matters worse. The sides become more polarized. All their worse fears have been confirmed.

The idea of "procedural assistance" is to remove process issues, such as how meetings are run, as a source of dispute by delegating them to a third party who is impartial about the substantive outcome and who will act on behalf of all the participants.

The two basic forms of procedural assistance are "facilitation," the topic of this paper, and "mediation," the subject of the next chapter.

WHAT IS A FACILITATOR?

A facilitator is a trained specialist who helps people design effective meetings and problem solving sessions, and then acts as the meeting leader on behalf of the group. A facilitator does not have the authority to make substantive decisions for the group. A facilitator will, however, make some decisions about how the meeting is run, and will consult with the group about major process decisions, such as a significant change in agenda or meeting procedures. In those cases where the facilitator consults with the group, his or her job is to identify why a decision is needed, identify options for participants to consider, and, if appropriate, make a recommendation. But the ultimate decision-making authority, even for process issues, lies with the participants. It is more efficient to leave all except the large process decisions in the hands of the facilitator.

WHEN WOULD A FACILITATOR BE USEFUL?

Circumstances where a facilitator might be useful include the following:

- Conducting public meetings, workshops, or hearings
- Conducting an information-exchange meeting between parties to a dispute
- Conducting a collaborative problem-solving session to resolve an issue or dispute
- Conducting a team building or partnering session
- Conducting inter-agency or multiple-party meetings where there is sensitivity about any one participant having more power than the others

WHAT DOES A FACILITATOR DO?

Typically in a meeting, a facilitator uses a style of leadership that is less directive than leadership associated with "chairing" a meeting. Some people, when chairing a meeting, make rulings, determine procedures, rule people out of order, and so forth. A facilitator proposes, suggests, invites, and then consults with the participants to generate a consensus.

This is not because a facilitator is a "weak" leader. Facilitation often takes far more skill than being a traditional chair of a meeting. A facilitator may exercise considerable influence over the meeting. The key point is that the facilitator is concerned that everybody feel included and accepted. If the meeting leadership is too heavy-handed or authoritarian, participants may

become upset or resentful, or may conclude that the facilitator is biased against them. This makes it that much more difficult to achieve mutual agreement. The facilitator has the job of helping to create the climate of mutual respect and psychological safety making it possible for people to consider creative new solutions and move from preconceived positions.

Here are some of the things a facilitator does to help bring about an atmosphere conducive to collaborative problem solving:

- **Assist with designing the meeting**: Facilitators are often able to suggest meeting formats that avoid pitfalls or have proven effective in addressing issues. For example, a facilitator may recognize when a meeting format is likely to push everybody into taking adversarial positions, or begin proposing solutions before there is agreement on the definition of the problem. The facilitator may then suggest an alternative format that addresses the same issues, but does so in a way that is less likely to be adversarial. A facilitator may also suggest a meeting activity that is particularly efficient at identifying or evaluating options. The facilitator can also assist with deciding who to involve in the meeting, what technical or backup information is needed to make the meeting effective, and defining the purpose of the meeting.

- **Help keep the meeting on track, focused on the topic**: Facilitators are skilled at pointing out when the discussion has drifted, or at restating the purpose of an activity. Facilitators also play the "traffic cop" role of regulating how long people speak, or putting limits on behavior, such as accusations or emotional tirades. Often this is done by working with the participants to establish ground rules that everyone feels are fair. Therefore, when a facilitator intervenes, everyone understands that the intervention is on behalf of an effective meeting, not because of prejudice or bias.

- **Clarify and accept communication**: It is one of the fundamentals of human nature that until we feel our concerns have been understood and accepted, even if people do not agree with them, we will keep saying them over and over again in new and different ways, often with accelerating intensity that is likely to produce a counter-reaction. For this reason, one of a facilitator's primary tasks is to be sure that everybody feels listened to and understood. The facilitator may do this by providing a verbal summary of what was said, by relating one participant's ideas to another, by inviting expansion of a comment, or by asking clarifying questions. Sometimes a facilitator writes a summary of comments on a flip chart, or is assisted by another staff person, called a recorder, who keeps a summary of comments on the flip chart. A facilitator might also point out when a participant's contribution was cut off and invite him or her to complete the idea.

- **Accept and acknowledge feelings**: During disputes, people are often upset or angry. Telling them not to feel that way simply makes those feelings stronger. In some disputes it is necessary to let everybody ventilate their feelings before its possible to begin talking

about solutions. The facilitator will structure a situation in which it is safe to express feelings, without those feelings causing a permanent breech in communication between the parties. Even in normal problem solving, strong feelings may emerge. The facilitator will make sure these feelings are acknowledged so that they do not continue to build in intensity.

- **State a problem in a constructive way**: Often problems are stated in such a way that they seem like efforts to fix blame or accuse the other parties of unacceptable, dishonest, or even illegal actions. This simply causes the other parties to counter with blame and accusations of their own, making the conflict escalate. A facilitator can help by restating comments so they do not blame any party, or so they define the problem without implying there is only one possible solution.

- **Suggest a procedure or problem-solving approach**: During a meeting a facilitator may suggest a procedure, such as brainstorming or a structured sequence of problem solving steps, to help the group work more effectively. A facilitator may also help break an impasse by suggesting alternative ways of addressing the issue, or even suggesting a break.

- **Summarize and clarify direction**: Often participants are so involved with the subject being discussed that they loose track of the overall picture. In this instance, a facilitator may restate the purpose of the meeting, or clarify its direction: "we've completed the first two issues, now we're ready to start talking about alternatives for...."

- **Consensus-Testing**: One of the important responsibilities of a facilitator is to sense when participants are coming to agreement. They can verify that agreement has been reached by stating the potential basis for agreement and checking to see whether it has support from the participants. Since the facilitator does not make decisions for the group, this takes the form of: "It sounds like you are in agreement that...Is that acceptable?" Such agreements are usually written on the flip chart by either the facilitator or recorder.

Because the facilitator needs to remain neutral on the outcome of the meeting and wants to create a climate for collaborative problem solving, there are also certain behaviors a facilitator should avoid.

Facilitators should avoid:

- judging or criticizing the ideas of participants;

- using the role of facilitator to push his or her own ideas;

- making significant procedural decisions without consulting the participants; and
- taking up the group's time with lengthy comments.

ADVANTAGES OF FACILITATION

Facilitation can provide the following in a dispute situation:

- Decision makers can participate in the substance without having to worry about the process.
- There is increased confidence that meetings are being run for everyone's benefit.
- Process issues are removed as a likely source of disagreement.
- The facilitator will help create the climate for a collaborative problem solving process, and will help frame the problem so it is solvable.
- The facilitator will suggest format or procedural options to help the group work more effectively.

There is also one unexpected side-benefit to facilitation: as participants watch a facilitator work, they often become more observant about process issues, and even let the facilitator know when he or she has missed something or stepped out of role. Some work groups have improved their effectiveness by providing facilitation training for all group members, then rotating meeting leadership so that everybody keeps their skills honed. Because so much work in a large organization takes place in teams involving many parts of the organization, facilitation is a very useful skill internally, even when no external facilitator is retained.

CONCERNS/PROBLEMS WITH FACILITATION

Some manager have concerns about using facilitation. Since U.S. Army Corps of Engineers (USACE) managers—from the Chief of Engineers on down to branch chiefs—have already used facilitation quite successfully, many of these concerns have proven to be more a matter of anxiety and unfamiliarity with the process, rather than based in fact. Here are some of the concerns managers have expressed, and some of the actual experiences managers have had that address those concerns:

- **Will Using a Facilitator Mean a Loss of Control?**

  It is true that you will not be directly controlling the meeting. But in a dispute, where there are two or more parties, efforts by one party to control the meeting will usually be

met by reciprocal efforts of the other party to control the meeting, and the situation will deteriorate. The situation itself demands joint control, so instead of fighting over it, you jointly delegate it to someone who is skilled at acting on behalf of the interests of all the parties.

In the final analysis, you do retain control. The facilitator does not make significant decisions, even procedural decisions, for the group, but consults with you on these decisions. You—and the other parties—retain ultimate control over decision making. The facilitator is a servant—a highly skilled and knowledgeable servant—of the participants.

Many managers who have used facilitation have found that being free of the obligation to lead the meeting actually frees them up to discuss the substance of the meeting. Where before they had to be careful not to take sides too soon, or express their own feelings too strongly, as participants they can be strong actors in bringing about a solution to the problem or dispute. In return for giving up some direct control over meeting leadership, you may actually gain control over the substantive outcome.

Remember also that you—and the leaders from the other parties—have both the right and the obligation to instruct the facilitator on your needs, and work with the facilitator to be satisfied that the meeting design will meet those needs. A good facilitator will let you know if he or she believes those instructions are not conducive to a collaborative problem solving atmosphere, and you may then need to do some joint problem solving with the facilitator. But you cannot be forced to concur with anything that is unacceptable to you.

- **Will Using a Facilitator Undermine My Authority?**

Typically a facilitator is used in a situation where you need or want a mutually acceptable decision. If there is a dispute, the dispute will not be resolved by one person making a unilateral decision. If there is a problem involving several parts of the organization, you may get more commitment to implementation by jointly agreeing on a plan than by issuing an order, particularly if you do not have line command over all the different parts of the organization. If there are other agencies involved who get rankled if the Corps plays a leadership role, you may have more productive meetings if you are not fighting over how the meeting is run. Even if you will be making the final choice between alternatives, you may decide that you want participation from others in evaluating the situation and in identifying or evaluating the alternatives.

In these situations, you are not abandoning your leadership functions by using a collaborative process, or using a facilitator. You are simply utilizing the leadership approach most appropriate to achieve your goals and fulfill your responsibilities. You (and other parties to the issue or dispute) make the decision to use a collaborative

approach. You make the decision to use a facilitator. You work with the facilitator to define his or her role and the expectations for the meeting or process. You must concur with any decision made during the meeting or process.

In addition to these "perceptual" concerns, there are some concrete issues that need to be addressed if you are going to use a facilitator:

- **What Costs Can I Expect?**

  Qualified facilitators charge from $500 a day to over $3,000 a day. These differences in cost reflect the fact that there are significant differences in experience and skill among facilitators. However, the difference in price does not necessarily reflect a difference in skill. It may reflect differences in reputation, or simply the fact that some facilitators are used to working for private industry, where higher rates are paid. There are a number of highly skilled and knowledgeable facilitators in the $750 - $1,500/day range.

- **What Contracting Procedures Will Be Used?**

  Federal procurement regulations may require a competitive bidding process. Enough time needs to be allowed to satisfy these requirements. Your Training Officer may already be using facilitators, or may know how to meet the procurement requirements expeditiously.

- **Does the Facilitator Need to Be Knowledgeable about the Corps or the Subject Matter?**

  It is helpful—but not mandatory—that the facilitator know about the organizations involved and about the subjects of discussion. As a minimum, the facilitator needs to know enough to be able to follow the discussion. Since agencies often use numerous acronyms and technical jargon, this can be an important issue. On the other hand, if the facilitator is too directly involved in the subject matter, he or she may have opinions about the issue that make it hard to remain neutral, or he or she may be seen by one of the parties as biased or partial toward a particular point of view or organization.

  On some issues, it may be possible to use an internal facilitator. The two issues that have to be considered are the acceptability of the facilitator to all parties and the skill level required for this particular meeting. An outside facilitator may be more acceptable in a dispute. Outside facilitators, because they spend their entire professional life doing facilitation, may—but do not always—have a higher skill level or base of experience.

THE DIFFERENCE BETWEEN A FACILITATOR AND A MEDIATOR

If you were to observe a facilitator in action, and then a mediator, you might not be able to tell the difference. Of course, the differences you observe may have more to do with the personal styles of the facilitator or mediator than their roles. There are differences, but it is also true that the roles overlap and use many of the same skills. There are, however, some distinctions.

First, the venue is different. The facilitator is typically the leader of a meeting, workshop, or collaborative problem solving session. The mediator is the leader during negotiations. To make things more complicated, many of the best approaches to mediation are a form of collaborative problem solving.

A facilitator might come from one of the participating organizations, so long as everyone is comfortable that the facilitator is neutral on the issues. A mediator very rarely has an ongoing relationship with any of the parties.

Facilitation is useful even if the parties are not well defined. In a public meeting, for example, people decide for themselves whether to attend. In mediation there are designated representatives of the various parties.

In facilitation the issues may also be less well defined. The outcome of a facilitated session may simply include sharing of feelings, team building, identifying options, or reaching agreements. The outcome of mediation is a decision made by the parties.

Another area where there are differences is in what happens between meetings. Between meetings a facilitator would typically only meet with the parties to plan the next meeting. While a mediator might participate in a planning meeting, he or she might also meet with the parties individually to help them shape proposals that might be acceptable, or help them assess their position. A mediator may also assume control over the schedule of meetings, timing them so they will be most productive and avoiding them when they could polarize the situation further. At some point in the process, a mediator might even develop a proposal, on behalf of the group, that might embody a number of reciprocal concessions that the groups are considering in private, but feel they cannot propose without weakening their position.

Both facilitation and mediation are valuable forms of assistance. They simply represent different levels of formality and structure to the kind of assistance that is given.

Chapter 24

PARTNERING[1]

by
Lester Edelman
Frank Carr
Charles L. Lancaster

Partnering is designed to create a positive, disputes-avoidance atmosphere during contract performance. Partnering uses team-building activities to help define common goals, improve communication, and foster a problem-solving attitude among a group of individuals who must work together throughout the contract. While Partnering can be used to improve all kinds of working relationships, this article will concentrate on owner/contractor relations in construction contracts.

A central objective of Partnering is to encourage contracting parties to change their traditional adversarial relationships to a more cooperative, team-based approach and to avoid disputes. The Partnering concept, therefore, is significant because it offers the most efficient form of dispute resolution—dispute prevention. Indeed, the benefits of successful Partnering go beyond avoiding disputes and include improved communication; increased quality, efficiency and on-time performance; improved long-term relationships; and a fair profit and prompt payment for the contractor.

What is Partnering?

How many times have you reached the end of a construction project only to be faced with a number of unresolved conflicts, many of them in litigation? As an alternative to litigation, ADR offers techniques for resolving conflicts during construction by establishing a partnering relationship between the owner and the contractor. Partnering lays the foundation for better working relations on a project, including better dispute resolution. Partnering helps develop a cooperative management team by taking steps before construction begins to change the adversarial mindset, to recognize common interests, and to establish an atmosphere of trust and candor in communications,. This team has the ability to appreciate the roles and responsibilities each will have in carrying out the project.

Partnering is the re-creation of an owner-contractor relationship that promotes achievement of mutually beneficial goals. It involves an agreement in principle to share the risks involved in

[1] See also Edelman, Lester, Frank Carr, and Charles L. Lancaster. *Partnering.* IWR Report 91-ADR-P-4. Ft. Belvoir, VA: IWR, USACE, 1991.

completing the project, and to establish and promote a nurturing partnership environment. Partnering is not a contractual agreement, however, nor does it create any legally enforceable rights or duties. Rather, Partnering seeks to create a new cooperative attitude in completing government contracts. To create this attitude, each party must seek to understand the goals, objectives and needs of the other—their "win" situation—and seek ways that these objectives can overlap.

Why Use Partnering?

From the beginning of a typical construction project, the structure of the relationship promotes an adversarial attitude between the parties. There are two distinct management teams, each making independent decisions with the intent of reaching their own goals for the project. These decisions directly affect the path each party chooses to achieve its goals—but they are often made in a vacuum, without regard for the other party's interests and expectations. Communication may be limited—or non-existent! Conflicts are inevitable as paths diverge and expectations are not met. Each party remembers the worst stereotypes of the other, and they seem to block the way to its goals. An adversarial management style takes over and the goals each party had for the project get lost in preparation for litigation. The stage is set for future conflict and, often litigation. It's as if two people are planning to travel together to a common destination, but each has his own map and refuses to show it to his companion!

The bottom line is clear: The adversarial management relationship jeopardizes the ability of either side to realize its expectations. The result is increased costs for the taxpayer and declining profit margins for the contractor. This is truly a lose-lose outcome for all.

Both the government and contractors have recognized the need for a better way of doing business. Efficiency and productivity must be increased. Neither group can afford the costly posturing that the present adversarial climate promotes. Partnering offers the chance to change from an adversarial style to a more cooperative, synergistic relationship that takes full advantage of the strengths of all team members.

Perhaps it was best summed up by Dan Burns, former Chief of Construction in Mobile:

> "The end and result [of current 'adversary management'] is a continuing upward spiral of risk and cost: risk of the contractor going broke, risk of projects taking much longer than necessary for completion, and risk of significant cost overruns. These costs do not go to productive facilities, but instead to overhead, litigation, and contesting experts. Partnering seemed to offer the opportunity of harnessing the capabilities, talents, and positive energies of both owner and contractor groups and focusing them on mutually agreed-upon goals. It offered the opportunity for all parties to change preconceived attitudes in order for both to win in the long run."

How Does Partnering Work?

Partnering creates a climate for success by building a cooperative management team, each dedicated to a win-win atmosphere. To do this, the members of the team must undergo a change in mindset and discover how it is in their best interest to cooperate. The concepts of principled negotiation, where solutions are sought that serve the fundamental interests of both negotiating parties, are introduced.

There are three basic steps involved in establishing the Partnering relationship. Since Partnering is an attitude change aimed at building a new relationship, it is important as a first step to establish the new relationship through personal contact. Success in a Partnering arrangement depends on the personal commitment of the management team. This commitment is built through personal relationships that must be formed early and reinforced throughout the project. The second step in Partnering is crafting a joint mission statement that includes common objectives in specific detail. Achieving these objectives will mean success for both the owner and the contractor. Finally, Partnering identifies specific disputes avoidance processes designed to head off problems, evaluate performance, and promote cooperation.

These steps instill the Partnering relationship, but team spirit is also an essential ingredient of partnering. Through a series of joint workshops, guided by professional facilitators, Partnering builds team spirit. The emphasis in the workshops is on identifying shared interests and focusing on cooperative effort.

There are, however, other elements in Partnering. Here's a list of some of the considerations:

- Prepare early for Partnering.
- Secure top management support and commitment to Partnering.
- Identify Partnering Champions.
- Choose participants for the Partnering workshop.
- Select neutral facilitators for the Partnering workshop.
- Conduct the joint workshop.
- Create a partnering Charter.
- Arrange regular follow-up sessions.
- Plan combined activities.

Establishing cooperative processes for evaluating progress and solving problems is another feature of Partnering. Evaluation mechanism should be specific in measuring the achievement of the objectives that will make the project a success.

A system for problem solving, which will provide for expedited decisions, should be established.

The last but the most essential element is committed people. Partnering needs champions at a high management level and other champions throughout the organization who are willing to take risks, use professional judgment, and make decisions in a new cooperative environment. Partnering is people who believe in cooperation, rather than confrontation, as the most effective and efficient way to achieve their goals.

How Do We Know It's Working?

When Partnering is working, old adversarial patterns change and a new spirit pervades the working relationship. This new spirit has many indicators. Look for these signs of successful Partnering.

- **Sharing**. The partners share a common set of goals.
- **Clear Expectations**. Each partner's expectations are clearly stated up front and provide the basis for working together.
- **Trust and Confidence**. Partners' actions are consistent and predictable. Trust is earned when one's actions are consistent with one's words. We must "walk the talk."
- **Commitment**. Each partner must be willing to make a real commitment to participate in the partnership.
- **Responsibility**. Responsibility is recognizing and accepting the consequences of our choices. Partners are accountable to each other and should agree up front on measures for mutual accountability.
- **Courage**. Partners have the courage to forthrightly confront and resolve conflict.
- **Understanding and Respect**. Partners understand and respect each other's responsibilities, authorities, expectations and boundaries, as well as any honest differences between them.
- **Synergy**. The partnership is more than the sum of the partners. The relationship is more powerful than any of the partners working alone because it is based on the collective resources of the partners.
- **Excellence**. Partners expect excellence from each other and give excellence in return.

These are the positive indicators of a successful Partnering effort. If you look closely at the list again, it's clear that most of these indicators are based on the ability of the partners to communicate and solve problems.

What Concerns Are There About Partnering?

Some people have expressed a concern that Partnering may place the owner and the contractor "too close," and that distance between the parties is needed to maintain objectivity and proper oversight. Unfortunately, this adversarial attitude leads to some very expensive and counterproductive actions. Not only is the climate of trust and communication hindered, but distance between the parties can allow room for an expensive "wall of paper" to rise between the parties. Documents are exchanged to being building a case for litigation.

Another concern is the view that contract requirements may be relaxed in the interest of Partnering. This concern, however, is based on a misconception about the nature of Partnering. Partnering does not mean that the public interest should take a back seat to the interests of the parties. All Federal procurement laws and regulations must be complied with by the parties. But this does not mean that the government and the contractor may not seek to cooperate to achieve project goals that will benefit all involved. In a Partnering relationship, the contractor should understand and appreciate government regulatory requirements; and the government should understand and appreciate the contractor's expectations.

Some individuals have said that Partnering is all relationships and no substance, that the benefits are intangible and not worth the extra effort and expense. Experience has shown others that there are benefits, both tangible as well as intangible. And the expense is not great, even when a facilitated initial workshop and follow-up sessions are used. Costs are shared by the government and the contractor.

Perhaps the most telling comment, however, may be that, no matter what the tangible advantages, Partnering represents the fair way of doing business. One Corps manager wrote: "I have field employees who say it's a pleasure to come to work and not be afraid to advise the contractor of any perceived problem and be proud of working on the project as a team member."

Chapter 25

PARTNERING: WIN-WIN STRATEGIC MANAGEMENT IN ACTION

by
Donald Mosley
Carl Moore
Michelle Slagle
Daniel Burns

A positive force is revolutionizing the American construction industry. As anyone knows who has had the experience of having a building or home constructed, there is a large potential for communications to breakdown and for an adversarial relationship to develop between owner and contractor. On large scale construction projects involving millions of dollars, many contractors, and subcontractors, and lasting for several years, the potential adversarial relationships and negative consequences are multiplied.

The authors report and discuss partnering from two different perspectives—owner and consultants. The Chief of Construction for the U.S. Army Corps of Engineers District, the moving force in introducing Partnering to the government sector, represents the owners' perspective. The consultants are university professors who are involved as facilitators in seven Partnering projects totaling more than two billion dollars.

WHAT IS PARTNERING?

Traditionally, large scale construction projects have presented a number of management challenges with respect to productivity. The owner and the contractor represent two distinct management groups with separate sets of objectives and operating procedures. In most cases, members of these management teams do not know one another prior to the start of the project and, communication is restricted between the two parties. In many cases the separate management processes followed by the owner and the contractor create an adversarial relationship during the life of the project. For example, each makes decisions based on the goals and objectives of the individual organization irrespective of the impact the decision may have on the other Partnering party to the contract. The decision process is treated as privileged information, and the other party is not involved. Management of both organizations spend time in "posturing" rather than working on problems at hand. The confrontational process results in decisions that are most defensible when challenged in the legal system by the other party. This adversarial relationship is reflected in construction delays, difficulty in resolving claims, cost overruns, litigation, and a win-lose attitude.

Partnering is an alternative management process that creates organizational change to resolve these traditional problems. The objective of the partnering process is to create for each project an effective management team composed of personnel from both the owner and the contractor, thus leading to productivity improvement and a single culture with one set of goals and objectives for the project.

Partnering is essentially principled-based leadership that establishes joint relationships based on honor and shared values. Partnering recognizes and promotes the development of common goals. Within the framework of these goals is an opportunity to create synergy for true project success from the point of view of all parties. Partnering imbeds shared values as the path to excellence, and elevates problem resolution to a joint venture based on a philosophy of "win-win."

Partnering is not just another quality improvement program. It is a management process for productivity improvement. A quality improvement program is limited in scope and is of finite duration. The partnering process is continuous in nature, and is an integral component of the organization structure to be used for the life of the construction project. Quality programs are generally tactical in nature, while the partnering process is designed with a more strategic focus. The focus is on developing and maintaining a process which is a part of everyone's responsibility.[1] An essential element of this responsibility is the recognition by both the owner and the contractor of the shared risk inherent in the partnering process.

The partnering process ideally involves all of the functions represented in the construction project. These include engineering and design, the Site Management Team, and the Home Office Support Teams. Finally, the process must receive support from the top management of both parties. Establishing and maintaining a partnering process is an organizational change effort, and the responsibility for the effort cannot be delegated. Top management must lead the effort and provide continuing support throughout the life of the project.[2]

THE DUPONT FLUOR DANIELS EXPERIENCE

The initiator in developing the partnering process for large scale construction projects was DuPont Engineering in the mid-1980s. The reason for the change in approach was increased international competition and an internal mind-set that refused to recognize DuPont's vulnerability. As a DuPont spokesman phrased it: "We were no longer competing with our normal domestic competitors but with foreign companies who were integrated with their governments, had cheaper costs, had developed technical capabilities in many cases as good as

[1] These concepts of productivity improvement are taken from *Productivity Plus* by John Belcher, American Productivity Center, Gulf Publishing Company, pp. 16-18.
[2] A number of organization development professionals emphasize this point. For example, see Richard Beckhard, *Organizational Development: Strategies and Models*. Reading, MA: Addison-Wesley Publishing Company, 1969, pg. 9.

ours, and who were playing by different rules - rules designed to maximize the use of their resources to further a long-term goal of increasing worldwide market share to the point of total dominance; not rules designed to provide a quarterly increasing dividend return to the stockholders."[3]

DuPont decided the key to becoming competitive was to do things differently. After considerable study, the concept of "partnering" was the vehicle chosen. Fluor Daniel was one of the first prime contractors to engage in the partnering process with DuPont. Partnering has resulted in improved designs, and time and cost savings. As a result of their experience they are now strong proponents of the process.[4]

THE PIONEERING GOVERNMENT PROJECT

The Owner's Perspective

Management at the Corps find themselves today with increasing pressure for efficiency and effectiveness involved in construction contracting within the Federal arena. The fixed price competitive bidding requirement, with award based only on the initial price, places extreme pressure on bidders to provide a marginally adequate bid to cover the work with little margin for contingency and/or profit. They bid, however, with the full expectation that those facets will be covered by claims, change orders, and additional work to be added to the contract. The situation tends to attract firms that are willing to take a fairly substantial risk and rely on their ability to negotiate, both with the owner for increased funding and work, and with their subcontractors and suppliers for people to perform the work. This practice encourages greater and greater "brokering" and less and less direct prime management involvement in the physical execution of the project. As a result, the owner's cost of construction management shifts from field execution to the area of administration. This partnering process includes changes, claims, and disputes, often carrying on long after the physical work has been completed, or greatly interfering with the ability of the parties to accomplish the physical work. The result of current practices is a significant backlog of disputes. These disputes consume resources and cost money for both parties, often have unpredictable outcomes, and thereby substantially increase risk. Most of all, the time consumed between the initial agreement/initiation of the project and the final resolution of all of the administrative problems and financial responsibilities is sometimes two or three times the duration of the actual field construction.

Complicating this situation is the difficulty perceived by both parties for changing this relationship. The government regulations and law relating to contracting procedures are extensive. The public policies and pressures are such as to make both government entities and contracting parties leery of their ability to change them, and weary of investing much of their

[3] From a talk by Art J. Holvek to the Construction Industry Institute, Snowmass, Colorado, August 5, 1987.
[4] From a presentation by Fluor Daniel to the Army Corps of Engineers, Birmingham, Alabama, April 4, 1988.

resources and energy into that process. There is also a perceived public image problem; any relationship other than outright combat between the owner and the contractor is often perceived as too close and as conspiratorial with respect to the object of the contract relationship. The end result is a continuing upward spiral of risk and cost: risk of contractor going broke, risk of projects taking much longer than necessary for completion, and risk of significant cost overruns. These costs do not go to productive facilities, but instead to overhead, litigation, and contesting experts.

Recently the private sector construction industry has begun to look at ways for improving productivity. The Construction Industry Cost Effectiveness (CICE) work-group of the Business Roundtable has looked at risk sharing and Partnering other concepts to enhance the accomplishment of projects that United States business and industry so badly need to be competitive in the global economy.

One of these initiatives or innovations between owners and construction organizations was labeled "Partnering." In these Partnering relationships an effort is made for both parties to understand each other's long term goals and to make a long term commitment to work as partners rather than adversaries on projects. It is in both parties' interest to work together to develop more effective communication techniques and is an earlier warning system for problems associated with the particular projects.

The challenge as seen by Corps management was, "can partnering be applied in the Federal sector, particularly the Corps of Engineers' sector of work?" There were several correlated questions, such as: What would be the contract considerations and/or the impact thereon? What would be the implications with respect to people and perceptions? How would such new behaviors be interpreted by both the participants and by the public at large? Last was a question about the contractor's willingness to approach this idea without clear financial rewards being identified and authorized.

The first attempt at "partnering" is an 80 million dollar project with a construction time of four years. This pilot project was selected because it was of sufficient scope that it could carry the cost of extra up-front effort. Moreover, this project would be sufficiently demanding and challenging to determine whether partnering could be beneficial on a large scale government construction project.

The successful bidder quickly agreed to try this innovative approach. Both their top management and on-site management teams endorsed the concept. The Corps decided that it was essential to have outside facilitation to assist in building trust and team relationships, and to help overcome initial perceptions that one or the other party might try to seek some advantage of the partnership.

The design called for a four and one-half day retreat prior to the start of construction. The retreat was conducted at a neutral site and included key managers from home offices as well as the site

managers from both the contractor and the Corps. Our thrust was to develop team building, trust, communication, and mobilization of talent and resources around agreed upon objectives. We came to the conclusion that both parties needed to see the project as a "win-win" proposition for the partnering to succeed. In addition, two-day follow-up workshops were planned every three to six months with the consultants serving as facilitators.

What have been the outcomes? Does Partnering work on a difficult and challenging government construction project? The answer is "yes," and the following outcomes represent tangible results:

1. There has been an ability to listen to others' viewpoints (even accept disagreement) without the tension/rancor previously exhibited.

2. There has been an increased number of contractor-originated suggestions for cost reducing alternatives.

3. There has been an increased willingness on the part of the government to positively (and promptly) consider contractor-offered alternatives.

4. There has been more active involvement throughout both contractor and government organizations, providing structured, in-depth support of the field "team."

5. There has been a positive developmental impact on both government and contractor managers involved, with a growing understanding of each other's difficulties.

6. The mutually agreed resolution of a dispute involving sand specifications is estimated to have resulted in a $600,000 savings.[5]

The project has not been without problems or tension. At this point the project is three months behind schedule, primarily because of the problem with sand specifications and suppliers. For the contractor, time is money. At the Partnering third workshop, the partnering team jointly worked out a plan and schedule that both parties were confident would get the project back on schedule.

Consultant's Perspective

The Partnering design called for a pre-construction workshop, a two-day workshop three months after the initial work began, and then six-month on-site data gathering visits with follow-up two-day workshops with all key players. The consultant role has been that of facilitator and process

[5] These figures were developed by Captain Robert Keyser, Project Coordinator for the Oliver Lock and Dam Project.

adviser. Interestingly, at the start of the initial workshop a few of the participants seemed to view the consultants as referees.

The pre-construction workshop focused on team building, action research and planning, including advance conflict resolution methods, developing a shared vision, and strategic planning with a common set of goals and objectives. Barbara Gray's excellent work on collaborating highlights the essence of what takes place in Partnering. She emphasizes that collaborating incorporates two interrelated processes: conflict resolution and the advancement of shared visions. In her words, "To put it simply, collaborating is a process in which those parties with a stake in the problem actively seek a mutually determined solution. They join forces, pool information, knock heads, construct alternative solutions, and forge an agreement."[6] The Conflict Resolution Model in Figure 1 demonstrates how partnering ideally works, with quadrant four behavior on all issues the ultimate goal of partnering.

This spirit of teamwork and open communication carried the project for a year without major problems. However, the "knocking of heads" Gray refers to occurred at the third workshop. Thirteen months into the project the issue was sand specifications, and until this time the parties had truly been operating in quadrant-four partnering. On this issue, which involved a significant expenditure, both parties resorted to quadrant-three dominance, and it appeared that a major claim, and perhaps litigation, would be the result. After considerable "head knocking," with emotions simmering on high, the parties shifted back into quadrant-four by moving from hard positions to developing a common interest which was used to attack the problem.

Specifically, all members of both site and home support teams for the Corps and the contractor met at a neutral site. The original partnering facilitators coordinated the session. Key elements in the successful move back to quadrant four included face to face discussion, the presence of key decision makers, a role-playing exercise where Corps personnel presented the contractor position and contractor personnel presented the Corps position, and an environment where participants were figuratively "locked up together" until they identified their common interests and developed an approach to address the conflict in a way that satisfied the concerns of both parties.

The final solution involved compromise by both parties, but met the common interest by providing a reasonable sand supply which did not reduce the quality of the product, and resolved a major problem that resulted in multiple gains for both the owner and the contractor. In addition to an estimated $600,000 savings for the contractor, the solution prevented time lost in procuring sand to specification, and kept the contractor pouring concrete.

[6] Gray, Barbara. *Collaborating.* San Francisco, CA: Jossey-Bass Publishers, 1989, p. xviii.

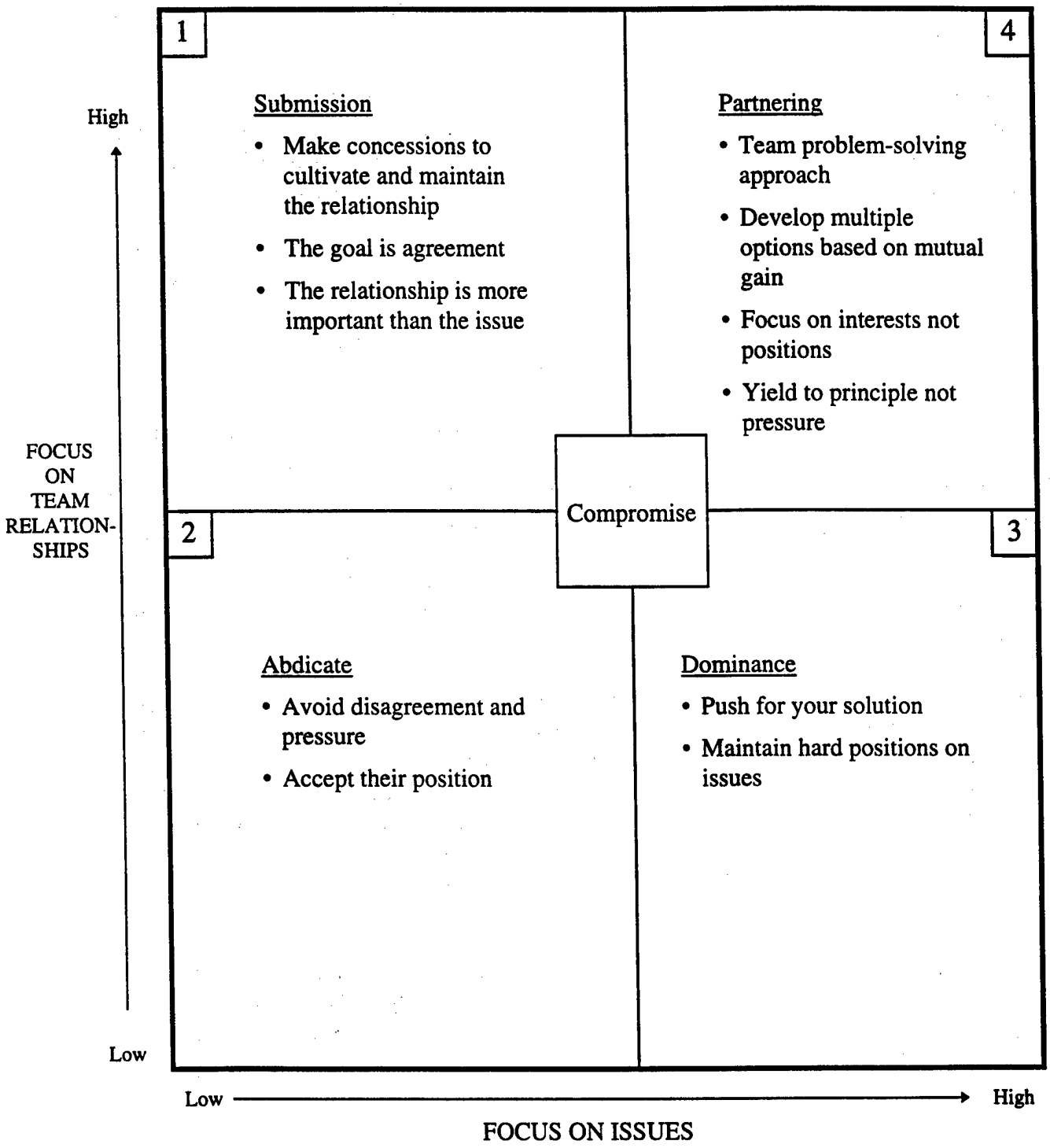

Figure 1
CONFLICT RESOLUTION MODEL

Partnering

Although the project is far from complete, information gathered through questionnaires administered to all team members at the initial workshop and subsequent follow-up sessions show positive attitudes, behaviors, and perceptions of the partnering process. While scores have fluctuated in response to problems, such as sand specifications and scheduling, participants have reported favorable attitudes relative to communication and teamwork when compared to their experience on prior projects.

When reporting on behavior, all participants report better results than on previous "non-partnered" projects. These behaviors include acknowledging and facing concerns and problems promptly, the degree of cooperation among team members, and both "their" and "our" response to issues. The sand and scheduling problems again correspond to drops in scores, particularly with response to issues. Interestingly, Corps and contractor team members admit that both "our" and "their" responses to issues declined at the time of those problems.

On questions relating to several processes used in partnering, responses indicate significant difficulty in establishing the new processes and procedures as routine. To address this difficulty, one individual has been designated to see that partnering procedures are used routinely at regularly scheduled meetings.

Despite the problems with sand and scheduling, when asked if they perceive partnering as a detriment or as a help to their organization effectiveness, Corps and contractor home support and site teams are overwhelmingly positive. To this point then, although partnering has not solved all problems, the perception of the participants is that the process is an improvement over the traditional adversarial approach to construction.

CONCLUSION

The top management in the Corps of Engineers of the first district to use partnering has been most supportive of partnering and has followed the lock and dam project closely. As a result of the favorable reports on the initial partnering project, partnering is now being utilized in several other major government projects in that district involving NASA, the Air Force, the U. S. Navy, and contractors.

Partnering has not been limited to one district of the Corps of Engineers. The Chief of Construction of the Oregon district heard about the initial project on a trip to Washington. With the support of the commander of the Oregon district, he visited the site of the project and received first-hand reports of the benefits of partnering. Shortly thereafter, a three-day partnering workshop was initiated with the contractor on a project in Oregon. The partnering effort was so well received that plans are to incorporate partnering on other major construction projects in Oregon.

The proponents of partnering are communicating the benefits similar to the spread of a brush fire ignited by lightning in a national park. The subject was addressed at the Corps Worldwide Chiefs of Construction Conference in May of 1989. The Engineer Inspector General of the Corps has identified partnering explicitly as a positive force on large scale construction contracts, and is promulgating it in briefings with various Corps districts. As a result of the Corps experience, the Department of Energy is considering the use of Partnering in its management plan for the $5 billion super collider project in Texas.

Partnering is not a new concept in America. Rosabeth Moss Kanter recently described how partnering is being used to change relationships across companies from adversarial to allies in situations ranging from joint ventures to service alliances.[7] However, it is a new concept for large scale government construction projects, and in the process is improving the management of these projects.

Similar to the field of organization development, Partnering can be defined in many different ways. In examining fourteen definitions of Organization Development (OD), there is one by Warner Burke that captures the essence of partnering in the government sector. Burke defines OD as follows: "Organization development is a process of change in an organization's culture through the utilization of behavioral science technology, research, and theory. More specifically, for an intervention in an organization to OD, it must (1) respond to a felt need on the part of the client, (2) involve directly and collaboratively the client in the planning and implementing of the intervention, and (3) lead to change in the organization's culture."[8] The basic difference between Burke's definition and partnering is that you are dealing with two or more organizations in changing the culture.

Partnering is not a panacea to solve all problems and bail out a partner with financial and management problems, However, with commitment between partners with ability and integrity, it is a tremendous positive force that is revolutionizing the construction industry.

[7] Kanter, Rosabeth Moss. "Becoming Pals: Pooling, Allying, and Linking Across Companies." In *The Academy of Management Executive*, Vol. III, No. 2, August 1989, pp. 183-193.
[8] Plovnick, Mark S., Ronald E. Fry, W. Warner Burke. *Organization Development Exercises, Cases, and Readings.* Boston, MA: Little Brown and Company, 1982, p. 8.

Chapter 26

THE MINI-TRIAL[1]

by
Lester Edelman
Frank Carr, JD
James L. Creighton, Ph.D.

This pamphlet describes "the mini-trial," one of a number of alternative dispute resolution techniques which the U.S. Army Corps of Engineers is using in an effort to reduce the number of disputes requiring litigation. The pamphlet describes what the technique is, how it has been used, and then provides guidance on how to go about conducting the mini-trial process.

What is a Mini-Trial?

First of all, a mini-trial isn't a trial. There's no judge nor lengthy procedures. Decisions are reached quickly and made by managers who understand engineering issues, not by third parties such as judges. In fact, the mini-trial is a structured form of negotiated settlement. All parties enter into a mini-trial voluntarily, and any party can drop out when it wants to. A mini-trial is successful when there is a mutual agreement.

Here's what a mini-trial might look like:

- Two or more organizations involved in a dispute would agree to use a mini-trial as an alternative to going to court, a contract appeals board, or some other judicial body.

- Each participating organization would designate a senior manager to represent the organization and to make binding commitments on behalf of the organization. Normally this manager would not have had any substantial previous involvement in the dispute.

- The management representatives and their attorneys would then jointly develop a mini-trial agreement. Since the mini-trial is to help them make decisions, they need to define what they want to happen before and during the mini-trial. This agreement serves as a guide for the entire process, specifying roles, time limits, schedule and the procedures which will be used during the mini-trial itself. The mini-trial agreement also specifies dates when "discovery"—the legal process of collecting evidence—will be concluded, and agreements regarding limits which will be placed on discovery or commitments of

[1] See also Edelman, Lester, Frank Carr, and James L. Creighton. *The Mini-Trial.* IWR Report 89-ADR-P-1. Ft. Belvoir, VA: IWR, USACE, 1989.

the parties to exchange information. While the mini-trial agreement establishes a clear structure, it is also highly flexible, because the management representatives can agree upon whatever procedures will work for them.

- Attorneys for the participating organizations would then go about preparing their case, advocating the position of their organizations. One unique thing about these preparations, though, is that the attorneys know that they will have only a few hours, or at most several days, to present their case. This means they must focus on their best arguments and strongest supporting evidence, presenting those things which will be most persuasive to the management representatives. The amount of time attorneys will have to present the case of their organizations will be specified in the mini-trial agreement.

- The mini-trial agreement will also include a provision that statements made by participants during the mini-trial cannot be used against participants in court if no agreement is reached during the mini-trial. This means that concessions made in the relatively informal mini-trial conference cannot be dragged up later on in court.

- Normally the mini-trial agreement will specify that both parties will prepare short position papers outlining their case. These papers will be exchanged at an agreed-upon time before the mini-trial so that management representatives will be able to read them prior to the mini-trial itself.

- At the agreed-upon date, attorneys for the participating organizations will present their cases in front of the management representatives of the organizations. This presentation is referred to in this pamphlet as "the conference." As suggested earlier, these presentations will usually be limited to just a few hours. There may also be a question and answer period following each presentation.

- In many mini-trials, the management representatives are assisted by an impartial neutral advisor. This is optional. If used, the neutral advisor can play different roles, depending on the preferences of the management representatives. The neutral advisor might actually preside over the presentation portion of the mini-trial. Or the neutral advisor might simply advise on points of law or technical matters. Many mini-trial neutral advisors have been retired judges or law professors, who could discuss those arguments they found most impressive, given the law. On other occasions, the neutral advisor has been a technical expert on the subject matter of the dispute, able to advise on normal engineering practice or other technical issues. Any opinions provided by the neutral advisor are just that, advisory. The decisions are made by the management representatives, after the formal mini-trial presentations are over.

- Following the presentations and any questions, the management representatives would then move to another room, without their staffs, and attempt to resolve the dispute. No

one is bound to come up with an agreement. But almost always, agreements are reached which effectively resolve the dispute.

- The results of the mini-trial are then documented as carefully as any other negotiated settlement which could be subjected to review by whoever has an interest in whether the negotiated settlement is fair.

As you can see, mini-trials are:

Voluntary: Nobody is pressured into using a mini-trial. Any organization agreeing to participate in a mini-trial does so because it believes it is advantageous to do so. Any participant can drop out at any time, even during or after the conference.

Expedited: Participants commit themselves to an expedited schedule. Issues cannot drag on forever. Since time for presentation of their cases will be strictly limited, attorneys must focus on only their best arguments.

Non-Judicial: Decisions are made by negotiation between the management representatives. No judges make the decisions for the parties.

Informal: The conference does not have to comply with strict rules for how it should be conducted. Participants can decide what procedures they want to use, what roles people will play, and what issues will or will not be discussed. There is a structure, but it is flexible because the mini-trial can be conducted any way the management representatives feel will get them the information they need to make a good decision.

Confidential: Since no one knows for sure in advance whether a mini-trial will result in a settlement, everyone wants to protect their ability to go to court if an agreement cannot be reached, and not have statements made during a mini-trial conference used against them. Confidentiality alleviates this concern and encourages the parties to make frank comments and concessions during the mini-trial conference.

Why Use a Mini-Trial?

What are the advantages of a mini-trial over more traditional ways of resolving disputes, such as litigation or formal administrative procedures? There are a number of advantages:

- **Puts the Decision Back in the Hands of Managers**: Typically, disputes are handled by middle level managers. By the time senior managers get involved in a dispute, sides are already polarized. The senior manager is likely to hear only his organization's position. Mini-trials put facts before senior managers. They get to hear all sides of the issue, not just their own, and can take into account the relative strength of their organization's case,

the risks involved in proceeding to court, the added costs of a court case, and so on. Typically, middle level managers do not have the authority to make these kinds of trade-offs. Senior managers retain the decision making authority, and their decisions can be based upon a complete review of the facts.

- **Greater Flexibility in Possible Settlements**: Normally managers enjoy greater flexibility in the options they can consider than do judges. Judicial decisions usually require deciding one side is right and the other wrong, resolving the dispute but potentially destroying the business relationship between the parties. Sometimes judges are forced to make decisions based on relatively narrow points of law, such as whether the proper procedures have been followed, rather than the equity of a decision. Neither judges or attorneys can ever know as much as line managers about how the interests of the participants converge, and what creative solutions are possible in which both parties could win. This is not to suggest that managers do not work within limits. In contract claims, for example, Corps managers remain bound by government procurement regulations. The mini-trial provides a structure which respects what the law requires, but gives managers maximum flexibility within these laws.

- **Protect the Relationship**: Many of the parties involved in disputes with the Corps of Engineers are people with whom the Corps has worked effectively in the past, and would like to work with again in the future. Parties to a dispute might include contractors, suppliers, local governments, even other Federal agencies, whose expertise and goodwill the Corps needs to retain. They equally have an interest in maintaining their relationship with the Corps. When disputes are decided by the courts, there is often a breach in the relationship between the parties. Whoever loses is unlikely to want to work with the other party again in the future. But when issues are resolved by negotiated agreements, with both parties thinking they got a fair deal, they also feel good about each other and can rebuild the relationship needed to work together effectively.

- **Time-Savings**: It is now normal for major disputes to take 1-2 years to get to trial and 3-5 years to get a decision from a judge or judicial panel such as a contract appeals board. In part, this is because court dockets are already crammed. In part it is due to time spent in "discovery"—the formal process of gathering evidence and taking depositions—which precedes a trial. Mini-trials can expedite the discovery process, saving weeks or months. And the mini-trial conference is typically weeks, even months, shorter than a court trial. In total, years may be saved in reaching a final settlement of the dispute. More important, the participants can decide when they want the mini-trial. If they decided almost immediately to use a mini-trial, the issue might be resolved in just a few months, instead of years.

- **Cost Savings**: In some cases, time alone costs money. For example, if a settlement would involve payment of interest, the interest costs building up over several more years

can add significantly to the cost of the settlement. But mini-trials also save in other ways. One major area of saving is the reduced costs of discovery, the gathering of legal evidence (such as taking depositions or making interrogatories). Since attorneys will have only a short time to present their case, they must focus on the key issues supporting their positions. This not only saves time during the conference itself, but also sharply reduces the amount of evidence which must be gathered before the conference. Also, since time is short, attorneys will present only a limited number of witnesses (if any), so they do not have to get as many witness and experts prepared to testify. If there are expert witnesses, there are only a few, their time is limited, and there is no extended cross-examination. The other major cost savings is the relatively modest cost of the mini-trial conference versus the cost of a full-blown court case. The costs for attorneys, witnesses, and experts to appear in court, sometimes for several weeks or more, can be very high. A one or two day conference is simply going to cost much less than a court case which goes on for weeks or months.

- **Protect Management Time**: Full-scale litigation does not just involve attorneys. Typically it also involves substantial key manager and consultant time to prepare the case, brief the attorneys, and serve as witnesses. Often both managers and staff must be pulled away from other priority projects to devote full attention to the court case. While the case goes on, they cannot do the work they need to carry out the rest of their job. There is no question that a mini-trial does make demands on their time, but significantly less.

Concerns Expressed About Mini-Trials:

Every dispute resolution technique has its strengths and weaknesses, and mini-trials are no exception. Some concerns expressed about mini-trials are not, however, well-founded. Here is a list which includes both very real limitations of mini-trials, and concerns expressed by people who have not used the technique:

- **Not Appropriate for Some Issues**: Mini-trials are not appropriate for some issues but they are appropriate for factual disputes, which are the most frequent type of dispute with which the Corps deals. The Corps of Engineers confines the use of mini-trials to cases where the law is well established, where settlement turns on the facts of the case. A great value of the mini-trial is that it returns to managers the authority to make decisions based on an appraisal of all the risks and costs to the organization. But some decisions are more appropriate to be made by a judge. Interpretation of a new law or regulation, for example, would not be an appropriate issue to resolve by using a mini-trial.

- **Extra Work for Managers**: A mini-trial does take a concentrated commitment of time from a senior manager and attorney. Time will be spent reviewing the mini-trial agreement, getting briefed prior to the mini-trial, participating in the mini-trial

conference, and then participating in the negotiations which follow. If the dispute were to go to court, however, the trial will take much more staff time, and it is probable that the time required of the senior manager is also greater. Although broken up into smaller pieces—and therefore easy to forget about—the time a senior manager spends on a court case is often very substantial. However, the time spent in the mini-trial is highly intensive, requiring more time for a short period. One advantage of a mini-trial is that managers have some choice about when they schedule it. With a court case, you typically go to trial whenever the judge is able to schedule the case.

- **Cost of Preparation**: Some attorneys, particularly attorneys who have not participated in a mini-trial, worry about the costs of preparing for a mini-trial, since they may have to go to court afterwards anyway. Attorneys who have participated in mini-trials say that virtually all the preparation they did for the mini-trial they would have done for the court case anyway, so most of the cost incurred for the mini-trial reduces the cost of the court case. In addition, even when mini-trials do not result in full agreement they often clarify the key issues, or remove some issues. This means that the remaining discovery can be more focused and efficient. Attorneys who have used mini-trials also point out that the mini-trial gives them a chance to test their case, to discover which arguments are persuasive and which are not. This can actually strengthen their ability to present their case in court if they need to.

- **Is It the Best Possible Deal**: Just because a mini-trial decision is made quicker or cheaper than a trial court decision does o't automatically make it better, so it is easy to play a "what if" game to argue that the organization would have done better in front of a judge. Managers may even be vulnerable to criticism within their own organization that they "gave away the store." This could happen because only the senior manager has heard the other participants' cases, while people within the organization tend to have heard only one side of the story.

- **Protection Against Lying**: Because mini-trials are an informal process, without a judge, there is no oath administered and most mini-trials do not include cross-examination. Some people fear that this does not provide protection against fraudulent statements or mistruths. While there can be some risk, just as there is with a court case, attorneys who've used mini-trials feel they usually have sufficient information about the case to protect their client from clearly misleading information. One attorney who has used mini-trials commented: "Everybody wants to use cross-examination until they have actually seen a mini-trial. Then they realize it is unnecessary."

- **To Offer to Use a Mini-Trial Says We Have a Weak Case**: Some managers fear that by offering to use any ADR technique, including a mini-trial, you are communicating that your case is weak. As a result, the other side may dig in even more, thinking it can win or negotiate a more favorable settlement. This attitude is becoming less prevalent, and

some managers have taken steps to remove this barrier by issuing a policy to offer to use ADR techniques on all disputes before going to court. By making it a policy, they remove any suggestion that offering to use ADR suggests weakness on any particular case.

- **It's Not Supporting the Field**: The Corps has a long tradition of supporting decisions made in the field. To some, having a senior Corps manager make a decision which alters an earlier decision made in the field violates this tradition. It is one thing if a judge overrules them, but still another if someone from their own organization decides the other guys might have had a point. However, judges do not weigh the impact of decisions on the organization, while a senior Corps managers understands how this decision fits into the Corps' overall program.

To sum up this introduction to the mini-trial, it is important to remember that despite its name, the mini-trial technique is designed to assist managers in making settlement decisions rather than turning decisions over to judges. The settlement negotiations are helped along by the structured, fact-based format of the mini-trial conference. And because the mini-trial is voluntary, it fosters a cooperative spirit among the representatives, which can promote settlement of disputes which would otherwise be destined for litigation.

MINI-TRIALS IN PRACTICE

Corps' Experience with Mini-Trials:

In its first mini-trial, the Corps of Engineers successfully resolved a contract claim that was pending before the Armed Services Board of Contract Appeals (ASBCA). The mini-trial involved an acceleration claim in the amount of $630,570 by Industrial Contractors, Inc. The principals resolved the claim in less than three days, and the dispute was settled for $380,000. At the mini-trial, the government was represented by the Corps' South Atlantic Division Engineer, while the contractor was represented by its president. The neutral advisor was a retired senior claims court judge from the U.S. Claims Court.

The Corps' second mini-trial involved a dispute arising out of the construction of the Tennessee-Tombigbee Waterway. The $55.6 million claim (including interest) involved differing site conditions, and was filed at the Corps of Engineers Board of Contract Appeals by Tenn-Tom Constructors, Inc., a joint venture composed of Morrison-Knudsen, Brown & Root, and Martin K. Eby, Inc. A vice-president for Morrison-Knudsen acted as principal for the joint venture, and the Ohio River Division Engineer represented the government. A law professor, who is an expert on Federal contract law, was the neutral advisor. One interesting aspect of this case is that following a three-day mini-trial conference the senior managers met, but decided that they could not resolve the issue without additional information and scheduled a follow-up one day mini-trial

conference two weeks later. Following this second conference, the principals agreed to settle the claim for $17.2 million, including interest.

After this mini-trial was concluded, the settlement was investigated by the Department of Defense Inspector General. The investigation was initiated because of a "hotline" inquiry about the appropriateness of the settlement. After conducting an extensive review, the Inspector General made a formal report. The Inspector General found that the settlement was in the best interest of the Government and concluded that the mini-trial, in certain cases, is an efficient and cost-effective means for settling contract disputes. This conclusion provides a strong validation of the mini-trial as an ADR method for resolving Government contract disputes.

The Corps has also recently successfully concluded a mini-trial over financial responsibility for clean-up of a Superfund site, with the Corps acting on behalf of the Department of Defense. In this case, the mini-trial led to a successful resolution of cost-sharing, when other forms of negotiation had been unsuccessful.

Other Corps' uses of mini-trials included:

- Resolution of $105 million of claims arising out of the construction of the King Khalid Military City, Saudi Arabia. This involved some sixty claims which were ultimately settled for $7 million.

- Resolution of claims for $765,000 from construction of a visitor's center at a recreation area. A settlement was reached for $288,000.

- Nine appeals arising from a contract for the repair and modification of tainter gates at Greenup Lock and Dam, on the Ohio River, were settled after a two and one-half day mini-trial. The total amount claimed was $515,000, which was settled for $155,000.

- Seven disputes regarding the construction of the Consolidated Space Operations Center in Colorado were resolved using a mini-trial. The claims, totaling $21.2 million were from the prime contractor and a subcontractor. These claims were settled for $3.7 million.

Experience of Other Government Agencies:

Following the Corps' lead, both the Department of the Navy and the Department of Energy have begun to use mini-trials. The Navy has participated in three mini-trials. Two of the mini-trials resulted in negotiated agreements. The third mini-trial succeeded in narrowing the issues at dispute, but did not result in a negotiated settlement. Recently, the Navy has developed two additional mini-trial agreements to resolve disputes, only to have the other parties settle the dispute prior to the actual mini-trial. Apparently whatever psychological/legal barriers were surmounted in deciding to participate in the mini-trial led to an immediate settlement.

Corporate Experience with Mini-Trials:

A number of companies have used mini-trials, including Allied Corporation, American Can Company, American Cynamid, AT&T, Borden, Control Data, Shell Oil, Standard Oil of Indiana, Texaco, TRW, Union Carbide and Xerox. Mini-trials have been used in cases involving breach of contract, antitrust, construction, unfair competition, unjust discharge, proprietary rights, and product liability claims. They have also been used in complex multi-party cases, and international commercial disputes.

Nearly 500 companies or major law firms are members of the Center for Public Resources, Inc. (CPR), a non-profit organization which advocates the use of ADR techniques in the corporate world. A recent study of 114 companies by CPR looked at which ADR techniques were being most frequently used by companies. The mini-trial (39 percent of the cases) was by far the most frequently used technique, used more than twice as often as mediation (17 percent) and private arbitration (12 percent), the other techniques in the top three on the list.

PLANNING FOR A MINI-TRIAL

How do you actually go about initiating and conducting a mini-trial? This section provides guidance on the specifics of preparing for and conducting a mini-trial.

The basic steps in conducting a mini-trial are:

1) Determine whether a mini-trial is appropriate for a particular dispute.
2) Obtain any needed Corps management commitments.
3) Approach the other parties to get their agreement to participate.
4) Select management representatives for each organization.
5) Select a neutral advisor.
6) Develop a mini-trial agreement.
7) Complete "discovery," as defined in the mini-trial agreement.
8) Exchange position papers.
9) Hold a preliminary meeting between the neutral advisor and the management representatives.
10) Conduct the mini-trial conference.
11) Conduct negotiations following the conference.
12) Document any agreements reached.

Further information on each of these steps is provided below:

When is a Mini-Trial Appropriate:

The first criteria for a mini-trial, of course, is that both (or all) sides agree to use a mini-trial. But before suggesting the use of a mini-trial to other parties to a dispute, there will always first be an internal process of consultation and analysis to determine whether a mini-trial is appropriate for a particular dispute. This is normally done before any discussion with the other party, so that they do not feel an offer was made, then withdrawn.

The Corps believes that managers should make decisions about how to resolve disputes, so there is no "dispute resolution staff" held responsible for identifying disputes where a mini-trial is appropriate. The idea that a mini-trial might be effective could start with a district counsel; a district engineer; a reviewer at Division or OCE; or a manager in engineering, construction and operations, contracts, regulatory—wherever disputes occur. Of course, a contractor could also suggest a mini-trial. Typically the first step is to discuss the idea with others at a local level, so that you know enough about the dispute to make an analysis as to whether a mini-trial fits this particular situation.

The first level of analysis is very practical: Does this dispute justify the time and expense of a mini-trial? Although mini-trials are much less expensive than a full court case, or a case before the Board of Contract Appeals, they are still expensive. If the dispute is quite small, the costs of the mini-trial might exceed the benefits to the Government. In the contracts area, there are expedited procedures at the boards of contract appeals for disputes under a certain dollar amount. If the dollar amount is small, you may find that mediation or non-binding arbitration are less expensive ways to resolve the dispute than a mini-trial.

Once you have decided that the size and importance of the dispute would justify consideration of a mini-trial, you need to look at whether this is a dispute about what the law means, or whether it is a dispute about the facts of a case—who did what to whom. It is Corps policy not to use mini-trials to resolve issues that do not have clear legal precedent already established, However, since the vast majority of claims involve factual rather than legal disputes, only a small number of claims will be affected. If in doubt, District or Division Counsel will be able to provide guidance to Corps managers on which issues may involve purely legal disputes.

The other circumstance where mini-trials are not appropriate is in disputes where the only alternative is to declare one side or the other completely right, the sort of thing a judge does in issuing a summary judgment. Because mini-trials are essentially a negotiation process, it is unreasonable to think that you can negotiate an agreement in which either side completely capitulates.

Who Decides to Propose a Mini-Trial:

After discussions at a local level, it is necessary to obtain approval from the appropriate Corps manager before proposing the use of a mini-trial to the other party. In the case of a dispute over a contract, for example, this could be the Contracting Officer, or the Division Engineer. For a dispute over a Defense Environmental Restoration Program Superfund site, officials in the Department of Defense also may need to be consulted. The point is that for the mini-trial to work, representatives must be able to commit their organizations to any agreements reached. There is no point in proposing a mini-trial to another party unless the manager in the Corps who can make such commitments agrees to the mini-trial. This does not automatically mean that the person who has this authority when a mini-trial is proposed has to be the Corps management representative. The binding authority to resolve a dispute might be delegated or transferred to another qualified senior manager.

Propose a Mini-Trial to the Other Party:

There are two questions to ask in determining how to propose the use of a mini-trial to another party. When in the course of a dispute is it appropriate to propose a mini-trial? Who should make the contact with the other party?

One answer to the question of when to propose a mini-trial is: whenever you think the other parties will be receptive. But the Corps'experience with mini-trials suggests that mini-trials are more effective after the basic facts have been gathered, and the issues defined. On the other hand, if a major purpose of mini-trials is to save time and legal expense, there is less benefit from a mini-trial in waiting until a significant percentage of the legal costs has already been incurred. The most effective time for proposing a mini-trial seems to just before the contracting officer reaches a final decision or, if already in litigation, early in the process of "discovery," but before there are significant legal costs.

Most often, the suggestion to use a mini-trial comes from attorneys representing the parties. But in some cases, a senior Corps' manager, such as a district engineer or division engineer, may want to contact a senior executive for the other party to suggest a mini-trial. There is always a certain appeal in having a senior executive from one organization suggest to a senior executive of another that: "We're practical people used to making hard decisions, and we should be able to resolve this thing."

One of the main problems in getting a commitment from another party—especially if the other party is not familiar with mini-trials—is providing enough information about mini-trials to the other party so that they are comfortable that it is a fair and equitable forum. If they are not familiar with mini-trials, they may fear it gives the Corps some advantage, or they may feel uncomfortable simply because they have not done it before. One way to start might be to give them this pamphlet. Or you might provide them with some of the other resource materials

described in the bibliography. When disputes are going to be resolved in a contest where there will be a winner and a loser, there may be some advantage if your opponent knows less about the process than you do. But in any dispute resolution process where the emphasis is on achieving a mutual agreement—such as in a mini-trial—then the process is more likely to be a success if both sides become skilled in the use of the process. For the process to work, the other party needs to be comfortable with the mini-trial process, and understand as much as possible about how it works. Also, by being forthcoming with any assistance you can, you are helping to build the atmosphere which could contribute to an agreement.

Selecting the Management Representatives:

The senior management people who will represent each organization are normally selected before the mini-trial agreement is developed. This is done so that they can participate in developing the agreement. While the mini-trial is a structured negotiation process, there is considerable latitude in how the mini-trial is conducted. The management representatives need to ensure that the procedures described in the agreement will serve their needs.

There are two basic criteria for selection of the senior managers to represent the organizations:

- **Not Previously Associated with the Issue**: One of the advantages in the participation of senior managers who have not been previously involved in the dispute is that they come to the issue fresh. They are not already locked into rigid ways of viewing the issue. This advantage is lost, of course, if the senior manager representing the organization is someone who was intimately involved in the issue, particularly if this means he or she will need to defend previous decisions. You want people who can consider the issues without feeling defensive.

  While this logic holds true as a general principle, some smaller companies—particularly something like a family-owned company—may have no senior managers who have not been involved to some extent. Even within the Corps, it may be desirable, depending on the dispute, to involve a senior manager who is quite familiar with the dispute, so long as he will no't end up defending decisions he made earlier.

- **Able to Commit the Organization**: The mini-trial will work only if both sides know that the senior managers who are present can make decisions which will count. It is not going to work if the senior managers do not have the authority to commit their organizations. In a contract dispute, the Corps' management representative must have contracting officer authority.

Selecting the Neutral Advisor:

A neutral advisor has been used almost every time the Corps has conducted a successful mini-trial, and they have proved valuable. Although it is not mandatory that a neutral advisor be selected, there are distinct advantages in using a neutral advisor. The advantage of early selection of the neutral advisor is that the neutral advisor may be able to assist in developing the agreement. There may still be some suspicion or even hostility between the parties, and suggestions coming from the neutral advisor may be treated with more openness than those coming from the other side. The neutral advisor can also provide a communication link, if communication between the parties becomes difficult. The neutral advisor can encourage the management representatives to take charge of the mini-trial agreement, to make sure it meets their needs.

The exact role of the neutral advisor can be agreed upon beforehand, or it can be covered in the mini-trial agreement. The original idea of the neutral advisor was to introduce both an impartial opinion and an element of mediation into the proceedings. The history of mini-trials suggests that the negotiation period can be rocky, and the neutral advisor may be able to keep the negotiations moving.

Among the roles which the neutral advisor can play are:

- Advising the management representatives on how a judge might apply the law;
- Pointing out the strengths and weaknesses of each organization's position;
- Helping devise new compromises or redefine the issues in ways which lend themselves to resolution;
- Helping to bring the parties to the table, and helping to keep them there;
- Chairing the conference and help set the proper procedural ambiance for negotiation;
- Helping the parties clarify the worth of various claims and derive reasonable prices;
- Deflating unreasonable claims and break down entrenched positions; and
- Articulating the rationale for a solution, making it easier for both sides to buy-in than if the rationale were proposed by one of them.

As can be seen from this list, there are several aspects to the neutral advisor's role. The neutral advisor can act like a technical expert or consultant. The neutral advisor can act like an arbitrator in a non-binding arbitration, suggesting what a reasonable outcome might be, but with no

authority to bind the parties. Finally, the neutral advisor can act like a facilitator or mediator, helping to keep communication open, clarifying positions, and seeking out new compromises. Clearly the role you decide upon will influence your selection of a mini-advisor.

To date, most neutrals have been retired judges, or law professors with special expertise in the issues under discussion. Technical experts have also been used, where management representatives primarily wanted advice on technical rather than legal issues. In at least one mini-trial, there was a small panel of neutral advisors including an attorney, and two technical experts. Some organizations have also talked of using a mediator as a neutral advisor, putting the emphasis on helping the negotiation process. Since neutral advisors are to be neutral, employees of either of the parties, or anybody else standing to gain from the manner in which the dispute is resolved, cannot be considered.

Among the questions which should be addressed before you decide what kind of neutral advisor you want are:

- Will the neutral advisor assist in developing the mini-trial agreement?
- Will the neutral advisor hold any meetings (formal or informal) between the management representatives prior to the conference?
- Will the neutral advisor preside over the conference?
- What kinds of information do you want from the neutral advisor, and at what point in the conference or negotiation process?
- Do you want the neutral advisor to make recommendations or suggest possible rationales for compromise?
- Will the neutral advisor be present during the negotiations?
- Do you want the neutral advisor to assist with negotiations, or just respond when asked questions?
- Does the neutral advisor play any further role if the initial negotiations are not successful?

The Office of Chief Counsel can provide guidance in selecting an appropriate neutral advisor.

Developing a Mini-Trial Agreement

The mini-trial agreement spells out all the procedures and ground rules which will be followed during the mini-trial. While the attorneys representing each organization will be very involved in

developing the mini-trial agreement because it includes a number of procedural issues which affect them very directly, it is important for senior managers to view the mini-trial agreement as serving their purposes. If you are a senior manager, the mini-trial agreement spells out how you want the information to be gathered and presented for you to make a decision. So you need to take an active role in ensuring that the mini-trial agreement contains those procedures you believe will do the best job of getting you the information you will need in order to negotiate. Topics to be covered in the mini-trial agreement include:

Discovery: Attorneys refer to the process of gathering facts or evidence as "discovery." The purpose of discovery is to find out all the facts the other side has which support its case. It is also designed to ensure there is no surprise evidence. The kind of surprises which used to resolve all the Perry Mason mysteries would not occur in modern litigation. In a mini-trial, the time for discovery is compressed. As a result, it may be necessary to place limits on the number of depositions which will be taken, or the number of interrogatories which attorneys can submit to each other. Responding to discovery requests should not place an undue burden on either party. The agreement might also include commitments regarding the materials which will be submitted to each other, time schedules for delivery of materials, and so on.

Date, Time, and Place: Setting the date and time of the mini-trial is important because it sets a goal which drives the process. Both parties know how much time they have for discovery and how much time to get their presentations prepared. Time extensions are not permitted except in the most exceptional circumstances.

Ordinarily, the mini-trial is held at a place which is neutral, not clearly identified with either party. This is not an absolute rule, however, as Corps mini-trials have occurred at offices of one of the parties. Comfort is also important. A physical setting can either help both sides be comfortable and more relaxed, or may contribute to a tense atmosphere.

Participant's Obligation to Present Best Case and Negotiate: The mini-trial agreement usually contains language in which both parties commit to present their best case and negotiate in good faith. The term "best case" implies that the parties will focus in on those issues which are most important and which they think are the strongest points for their positions. It may also mean that attorneys focus on those issues which count the most in resolving the dispute. In a contractual dispute, for example, most of the dollars may turn on just a few points, so these should be the primary focus of the conference. Negotiation "in good faith" means that both parties will make a determined effort to resolve the issue, not just go through the motions, holding back until they are in front of a judge.

The Role of the Neutral Advisor: As discussed earlier, the neutral advisor can play a variety of roles, so the role of the neutral advisor is usually spelled out in the mini-trial agreement, and it may be useful to involve the neutral advisor in developing the mini-trial

agreement. Past experience shows, however, that the role of the neutral advisor often evolves in response to circumstances and the desires of the management representatives. The mini-trial agreement will spell out both parties' expectation of the neutral advisor at the beginning of the process, but there should be some understanding that this may change over time.

The Name of the Neutral Advisor, (or the Process Which will be Used to Select the Neutral Advisor): The mini-trial agreement will state the name of the neutral advisor, assuming that the neutral advisor has been selected prior to completion of the agreement. If the neutral advisor has not been selected prior to completion of the agreement, then the agreement should specify how the neutral advisor will be selected.

The Exchange of Position Papers: Management representatives usually find position papers very helpful in providing a context for the presentations made during the mini-trial. The mini-trial agreement should specify the length and character of the position papers, and the date at which papers will be exchanged. Normally, position papers are limited to 20-25 pages, both because management representatives are not likely to read longer documents, and because it forces both sides to concentrate on the major issues.

Confidentiality of Statements: Attorneys are anxious to protect their organization's ability to make a strong case in court, so they are worried that statements made in the mini-trial—such as granting the other side's point on a particular issue or indicating a willingness to compromise—may be used against them if the mini-trial does not result in an agreement and the dispute ends up in court. Typically the mini-trial agreement will specify that all of the statements made during the mini-trial are confidential, and cannot be used in court. The agreement also specifies that the neutral advisor cannot be used as a witness, consultant or expert in the dispute or any related dispute.

Allocation of Expenses: Normally all expenses such as the costs of the neutral advisor or the meeting facilities, are paid for on a 50/50 basis by the participants. All costs of preparing and presenting one's case, and the costs of participation by attorneys, witnesses, or management representatives are carried by the individual organizations.

Pending Litigation: If there is pending litigation, or the mini-trial comes during an ongoing discovery process, the agreement should specify that both parties are suspending any further litigation or discovery (except that covered by the mini-trial agreement), until after the mini-trial.

The Roles of People to be Present During the Mini-Trial: As suggested previously, the mini-trial agreement should specify the role of the management representatives, the neutral advisors, and the attorneys making the presentations for the organizations.

The Number of People in the Room: Often a sizable staff from the organizations will want to attend, so in order to keep an informal atmosphere it may be necessary to limit the number of people in the room. Such limits should be included in the agreement.

Schedule/Agenda: One of the most important things in the mini-trial agreement is the schedule and agenda which will be followed during the mini-trial conference. Here is a rather typical mini-trial conference format:

- Other Party's Opening Statement
- Corps' Opening Statement
- Other Party's Presentation
- Corps' Rebuttal
- Questions from management representatives
- Corps' Presentation
- Other Party's Rebuttal
- Questions from management representatives
- Other Party's closing arguments
- Corps' closing arguments
- Open Question Period
- Neutral Advisor's preliminary opinion

Although this is presented as a "typical" conference agenda, there is considerable variation in how the mini-trial conference can be conducted, and senior managers need to satisfy themselves that the procedure will meet their needs. For example, some mini-trials permit cross-examination of witnesses, although most do not. Not all mini-trials include rebuttal periods. There may or may not be a formal question period following each presentation. Questions from management representatives are normally permitted throughout the presentations, so long as these questions are genuine requests for information or clarification and not efforts to challenge an opponent's position. However, attorneys are normally not permitted to interrupt each other's presentations with questions. Most attorneys want to have opening and closing statements, but they are not mandatory.

It is often desirable to have a neutral person—such as the neutral advisor—preside over the conference, as the two attorneys are going to be anxious to present their strongest case, and will vie to make their points as best they can. Some control over the meeting is usually needed, and if a management representative chairs the conference, he may not be seen as neutral.

Because the mini-trial is a relatively new technique, further experimentation with the conference procedure is appropriate before too many rules are made about how the conference should be conducted. Senior managers are encouraged to develop conference formats which will do the best job of getting them the information they need. Above all, the

mini-trial is a flexible technique which should be altered where necessary to meet the need of the organization.

Termination: Either side may drop out of the mini-trial process before, during, or after the mini-trial conference. The agreement should specify what notice is required if either party decides to drop out of the process, and what rights and obligations both parties have if this occurs. The termination language should clearly specify that the language of the mini-trial agreement may not itself become the basis for litigation.

Other Procedures the Management Representatives Want: As suggested several times earlier, the mini-trial agreement is the vehicle by which the management representatives create the process which will serve them best. As a result, it is not unusual for procedures other than those outlined above to be included in the agreement.

A sample mini-trial agreement for a contract dispute is provided in Appendix I, although this agreement does not include language on all the issues discussed above. This sample agreement can be tailored for other types of disputes.

Complete Discovery

Once the mini-trial agreement has been signed, the attorneys can complete the discovery process, as defined in the agreement. Although the mini-trial process is a voluntary process, with no judicial penalties if agreements are broken, the terms of the agreement should be observed scrupulously. Violations of the agreement during the discovery stage will usually poison the atmosphere between the parties sufficiently to doom the mini-trial to failure.

Exchange Position Papers

The parties will then exchange position papers, observing the scope and length requirement specified in the mini-trial agreement, and the schedule for exchange of papers.

Preliminary Meeting with Neutral Advisor

Some neutral advisors like to have a meeting, or dinner, attended by both management representatives, prior to the mini-trial conference. The purpose of this meeting is not to discuss the content of the issues, but to get to know each other and discuss the procedures which will be followed. Most of all, the meeting allows these key figures in the mini-trial to begin to get comfortable with each other and the procedure before the mini-trial conference.

Conduct the Mini-Trial Conference

The mini-trial conference will follow the agenda shown in the mini-trial agreement, except that it can be changed at any time by mutual agreement of the management representatives. The attorneys are given great leeway in how they make their presentations. They may choose to make the entire presentation themselves, or present experts or witnesses. They may choose to use visuals, slides, exhibits, or even movies. The whole idea is that each attorney gets a chance to make his best case, anyway he wants within the limited time available to him.

Although there is generally great freedom in the presentations, both attorneys need to be aware that in order for there to be any payment from the government, there must first be a legal basis for any costs, expenses, or injuries which are claimed. This could require the testimony of auditors, or other evidence of actual cost.

The Negotiation Process

Once the conference is over, and the management representatives have asked all their questions, the management representatives adjourn to another room to begin negotiations. Depending on the role defined for him, they may be accompanied by the neutral advisor. No other attorneys or staff are normally present for the negotiations. Once in the negotiation room, the management representatives may conduct the negotiations any way they want. Usually the negotiations are relatively informal. Either representative can leave the room to request information of his own staff, or review legal points. If both management representatives decide they want to hear additional presentations on specific points, they can request it.

It is not necessary to resolve the issue in a single session. Some mini-trials have resulted in agreements in principle within 30 minutes, while others have involved several negotiation sessions, spread over several days.

There are skills to negotiation, and the Corps provides training in negotiation skills. The Corps can also provide technical assistance to Corps managers, or even to the other party, on how to structure the negotiation process. As suggested earlier, in negotiation it helps if both people are skilled in the negotiation process.

To date, every time the Corps has used a mini-trial, a negotiated settlement has been reached.

Documentation

Frequently the management representatives will develop an agreement in principle, then request the attorneys to prepare more detailed agreements implementing the agreement. This agreement in principle should be put in writing, with copies given to both parties, to be used as guidance by

the attorneys. The management representative's summary also can be referred to in case there are later questions about the intent of the agreement.

Even though the mini-trial results in a mutual agreement, the Corps is still obligated to document the basis for the agreement to the same standards as any other settlement.

CONCLUSION

Mini-trials are one of a number of promising ADR techniques. Because the field of ADR is new, many techniques are still undergoing refinement and change. Corps managers are encouraged to approach the use of mini-trials with a spirit of innovation. One of the primary advantages of the technique is that it can be structured to serve the needs of the managers who must make the decisions.

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Chapter 27
NON-BINDING ARBITRATION[1]

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This pamphlet describes "non-binding arbitration," one of a number of alternative dispute resolution techniques which the U.S. Army Corps of Engineers is using in an effort to reduce the number of disputes requiring litigation. The pamphlet describes what the technique is, how it has been used, and then provides guidance on how to go about conducting non-binding arbitration.

WHAT IS NON-BINDING ARBITRATION?

Have you ever been in the midst of a conflict and longed for just one person who could be fair and objective? Normally, the people representing each side have decidedly fixed or biased viewpoints. This is hardly surprising. People's perceptions are often skewed by self-interest. In addition, both sides tend to be aware only of the facts which support their positions. More than that, there are often organizational pressures not to "give in." Acknowledging that the other side may have a legitimate point often implies a criticism of those people within your own organization who played a role in creating the impasse.

So it's hardly surprising that the people involved in the conflict have trouble seeing each other's point of view. But how would a fair, impartial person view the same issue? What would such a person think was a fair resolution of the conflict?

The idea of finding out what a fair, impartial person would feel about the issue is at the heart of non-binding arbitration. Essentially the two parties present their facts and positions to a qualified neutral person, and this person advises the parties as to what he or she believes would be a fair settlement. In non-binding arbitration this opinion is just advisory. But normally it carries a great deal of weight. Both parties recognize that if they completely ignore the arbitrator's opinion, it will probably mean that the issue will be resolved only through costly litigation. So both sides are under pressure not to stray too far from the arbitrator's opinion. But in the final analysis, when non-binding arbitration is used, any settlement is a negotiated agreement entered into freely by both parties.

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[1] See also Edelman, Lester, Frank Carr, Charles Lancaster, and James L. Creighton. *Non-Binding Arbitration.* IWR Report 90-ADR-P-2. Ft. Belvior, VA: IWR, USACE, 1990.

Clearly it would be possible to have the arbitrator's opinion be binding; that is, both parties could agree in advance to accept the arbitrator's decision. At the present time, though, for reasons to be discussed later, attorneys for Federal agencies do not have the authority to use binding arbitration, at least on disputes that arise out of contractual law. So this pamphlet focuses solely on the use of non-binding arbitration.

Why Use Non-binding Arbitration?

Why would you use non-binding arbitration? There are several reasons:

- **Unbiased Judgment**

  The first reason for using non-binding arbitration has already been mentioned, that is, to get the opinion of an informed, but unbiased person about the merits of the respective cases, and what a "fair" resolution would be. All parties participate in selecting the arbitrator, so presumably all sides believe the arbitrator's conclusions are fair and unbiased. The acknowledged need for a neutral party implies, of course, that you have already decided that the issue cannot be resolved through face to face negotiation. This could be either because you have tried negotiation and it failed to produce an agreement, or there is a past history of unsuccessful negotiation which makes one or several parties unwilling to negotiate. The inability to negotiate successfully is most likely to occur, of course, when the parties are dogmatic in their conviction that they are "right," and are so polarized that they are unable to appreciate each other's concerns. An arbitrator, not having any history or stake in the issue, can see the merits (or weaknesses) of both sides' positions, in a way that they are unable to do.

- **Avoid Problems of Litigation**

  Even if both sides are polarized, it would still be possible to resolve the issue in a court of law. Why not let the judge decide? There can be a number of reasons: (1) there are significant costs associated with litigation; (2) litigation may delay any resolution for several years; (3) judges, because their expertise is primarily in the law, will approach the issue primarily as a question of law; while it might be preferable to have a neutral person whose expertise was in the technical issues being fought over; (4) a judicial decision may be an all-or-nothing decision (a risk both parties must bear), while an arbitrator has greater flexibility to adjust the settlement based on his or her perception of equity; and (5) a negotiated agreement, even if achieved through arbitration, is more likely to maintain the working relationship between the parties.

- **Prevents Loss of Face**

  Not infrequently negotiators face pressures from people within their own organization to "hang tough" or "not let those guys get away with it." This may so tie negotiators' hands that they are unable to negotiate a reasonable agreement for fear of losing face within their own organizations. When an arbitrator makes a recommendation, the negotiators can "give in" to the arbitrator's recommendation without having "sold out" the organization to the other side. Because the arbitrator is presumed to be "reasonable," there is less danger of appearing too "soft" if you accept a settlement proposed by the arbitrator. If there is any blame, it is put on the arbitrator (for failing the "understand" the wisdom of your position), rather than on the negotiator.

- **Encourages a Decision**

  Even though an arbitrator's recommendation (in non-binding arbitration, at least) does not "decide" the issue, it creates considerable pressure for a decision. It pushes the parties to make a decision, and get the issue resolved. After the arbitrator's recommendation, any party avoiding a decision will be clearly seen as "foot-dragging" or "unwilling to bite the bullet," putting some pressure on them to act. During negotiation, this failure to make a hard decision might be disguised for some time in the by-play of negotiation.

Comparison with Other ADR Techniques

Even if you are convinced that the sides are too polarized for one-on-one negotiation, and you know you do not want to go to litigation, why would you use non-binding arbitration in preference to other alternative dispute resolution (ADR) techniques?

The two most likely alternatives to non-binding arbitration are mediation or the mini-trial. In mediation, a neutral party would be brought in. But rather than trying to render any judgment as to the merits of the case, a mediator would try to bring about a negotiated settlement by ensuring a fair process, trying to improve communication between the parties, maybe even helping forge an agreement by serving as the communication link between the parties. The emphasis remains, though, on negotiation between the parties. That is both the strength and weakness of mediation. The parties retain total control over the decision. But if they are highly polarized, they may unable to reach a negotiated settlement even with the aid of a mediator. The mediator cannot "make" the parties reach an agreement. In non-binding arbitration, the arbitrator cannot "make" the parties reach an agreement either, but there is much more pressure or influence brought to bear on the parties. So, one of the important factors in deciding to use non-binding arbitration, rather than mediation, is an assessment of whether the parties are capable of reaching a negotiated settlement without the added authority or influence that an arbitrator will add.

The mini-trial, which is the other major option, is a structured process in which the sides make the presentation of facts and positions not to an arbitrator, but to senior management representatives of each of the parties who have little or no prior involvement in the dispute, but do have the authority to commit their organizations to a binding agreement. After the presentation, the management representatives get together, usually without attorneys or other staff not present, and seek to reach a negotiated settlement. The advantage of the mini-trial is that it is entirely voluntary. No authority or power is given up to the arbitrator. There is no loss of control. The disadvantage of the mini-trial is that it may involve a significant commitment of time from very senior management of each of the parties. As a result, it is a process that can be used on only a few important disputes each year.

These comparisons between non-binding arbitration and either mediation or the assume that the techniques are being used in their "pure" form. As the case studies below will show, the boundaries between these techniques can get very blurred. An arbitrator may choose to act in a way which encourages voluntary agreement, rather than place the emphasis on the arbitrator's recommendation. The manner in which the arbitrator's recommendation is reported back to the organizations can be handled in a way which encourages negotiation between senior managers.

In point of fact, one of the advantages of virtually all ADR techniques is that you can design them to meet the needs of your particular situation. There are not any fixed protocols or procedures to be followed. Within the confines of adequately documenting the decision, the only people who have to be satisfied by the procedures are the immediate parties to the conflict. So whether you call it non-binding arbitration, or mediation, or a mini-trial, it is really up to you to design any hybrid of those processes that will work in your situation.

Concerns About The Use Of Non-binding Arbitration

Some attorneys are concerned that arbitrators will use a "split the distance" approach. Their concern is that, rather than really make hard judgments about the relative merits of the positions, the arbitrator will just assume that both sides have equally valid cases and then recommend a settlement which is just the mid-point between the two positions. As advocates for their clients, attorneys usually believe they have a stronger case than the opponent, and do not feel that merely splitting the distance is, in fact, an equitable outcome.

It is hard to say whether this is a concern which is based on the facts of arbitration or not. There may be some basis for the concern, but some attorneys are also uncomfortable with processes which relinquishes any amount of control over the outcome except in full-blown litigation. If there is a concern about this, the remedy is for the parties to agree on the instructions to the arbitrator. The arbitrator's role is defined by the parties, so the arbitrator can be instructed to make judgments as to the relative merits of the cases. Or, the arbitrator could be instructed not to recommend a specific dollar settlement, but instead recommend the principles or process by which the dollar figure should be calculated. For example, if you are negotiating with your

insurance company about a car totaled in a car accident, a "principle" or process which could be used to establish a fair price might be to use the Kelly Blue Book price, or alternatively, the average of prices in newspaper advertisements for the same car, or even an appraisal made by an independent appraiser. If the parties can agree on which of these approaches is "fair," than the process of determining the price is almost mechanical. In the same way, if the arbitrator could recommend a principle or process for settlement, the parties may then be able to negotiate the actual price, and it will not be based on simply splitting the distance.

Another concern is that arbitration may not be suitable for all cases. This is entirely true. The Corps of Engineers confines the use of non-binding arbitration and other ADR techniques to cases where the law is established and where settlement turns on the facts of the case. Interpretations of a new law or regulations, for example, would not be an appropriate issue for non-binding arbitration, and would be settled better by a judge.

The Use Of Binding Arbitration

In non-binding arbitration, of course, the arbitrator's recommendation is not final. The parties chose whether to accept it, and if they didn't like the recommendation, the dispute may drag on. In situations where getting a prompt resolution is a prime consideration, it might be preferable to use binding arbitration, where both parties commit in advance to accept the arbitrator's recommendations as binding and final.

At the present time, Federal attorneys—including Corps of Engineers' attorneys—do not have the authority to use binding arbitration. The Comptroller General has concluded that, in the absence of a Federal statute specifically authorizing the use of non-binding arbitration, Federal attorneys may not submit a contractual dispute to binding arbitration. (Binding arbitration might, however, be used to resolve other kinds of disputes.) The Administrative Conference of the United States has recommended the use of binding arbitration as a means of resolving some controversies. The Corps of Engineers would welcome the opportunity to try binding arbitration as an additional voluntary method of resolving construction contract disputes, and has advised the Conference of its willingness to participate in appropriate pilot programs.

HOW NON-BINDING ARBITRATION HAS BEEN USED IN THE CORPS

The Corps has recently used non-binding arbitration to resolve three major disputes. The Corps considers non-binding arbitration to have been successful in all three cases, although in one case there is a remaining unresolved issue. These cases also illustrate the many variations in how the non-binding arbitration process can be structured to meet the specific needs of the parties.

The Sand Source Claim

The Corps issued a contract to construct a lock and dam as part of construction of a major waterway. At the time the contract was awarded, the Corps was in the process of negotiating the purchase of a large plot of land required for construction of the waterway. This land also was the source of sand which the contractor needed to make concrete. When negotiations between the Corps and the landowner broke down, the Corps was forced to condemn the property, thereby forcing the contractor to seek an alternative sand source.

The contractor examined at least eight different sand sources before finding a suitable one. However, the quality of the sand was inferior to the original source. Using the new site contributed to reduced cement production, longer than expected hauls, and caused numerous delays and increased costs. As a result, the contractor filed a claim for $3 million, stating that the site conditions differed from those specified in the Request for Proposal because Corps' actions had prevented it from using the approved sand source.

The Corps claimed that the contractor knew the site was going to be condemned and had time to stockpile a sufficient amount of sand for the project. In addition, the condemnation of property is a sovereign act protected by law. Despite this position, a review of the case by attorneys at the division level resulted in a recommendation to settle the case. The contractor was also extremely anxious to settle the dispute in an expeditious manner. However, the Corps and the contractor were far apart on what constituted a reasonable settlement. At the instigation of the contractor's attorney, the Corps and the contractor finally agreed to use an ADR technique, and after some further negotiation, a decision was made to use non-binding arbitration.

The attorneys for the Corps and contractor formulated the ADR agreement. They also agreed that the neutral arbitrator would be an expert in mass concrete construction, and that the presentations to the arbitrator would be made by technical experts, with no lawyers present during the hearing. There would also be no cross-examination, although the arbitrator would be free to ask questions at any point in the presentation. If either side wanted specific questions asked, they could submit these questions in writing to the neutral, who could choose whether or not to ask these questions.

They also agreed that position papers and exhibits would be exchanged between the parties and submitted to the arbitrator seven days before the hearing, but there would be no written record of the presentations themselves. They also agreed that all information generated during the arbitration procedure would be confidential, and if there was subsequent litigation (because an agreement could not be reached), the arbitrator was disqualified from testifying for either side.

The hearing itself lasted for two days, with each side getting about five hours to present its case, followed by a rebuttal, and then a further response from the party making its case. The arbitrator then had ten days to develop his recommendation.

At the end of this period the arbitrator presented his report verbally (and in written form) to the decision makers for the two parties, the District Engineer and the CEO of the construction company. During this four-hour meeting the decision makers were able to ask questions about specific recommendations. Afterwards, the two parties met with their own staffs and attorneys, and then sat down together to negotiate an agreement. After about a half hour of discussion, they decided to accept the arbitrator's recommendation.

During the hearing, the contractor pointed out that the contract specified that the original sand source would be available. The contractor also stated that the Real Estate Division of the Corps informed them that the sand site would be condemned after completion of their project. The contractor also contended that the Corps could have acquired them property in two stages, at an additional costs of only a few thousand dollars, allowing the contractor to use the sand site.

The Corps claimed that the contractor knew the site was going to be condemned and sharply questioned the figure that contractor had developed as to costs incurred by having to use a different site.

The arbitrator determined that the contractor did have a justified claim, because the contract did specify that they had the right to mine from the area. But he disagreed with the way the contractor calculated the losses which resulted from changing the sand source, and, relaying on his own expertise in the construction industry, suggested an alternative way of calculating the impacts. He recommended that the final settlement be for $725,630 plus interest. Both sides were somewhat disappointed in the recommendation. The figure proposed by the arbitrator was higher than the Corps expected, but the District Engineer felt the arbitrator had built a strong case for his recommendation. The contractor felt disappointed with the recommended amount, as it was considerably less than expected, but decided to settle because they did not believe the Corps would ever go higher, and they were anxious to resolve the dispute in a timely manner. Both sides were satisfied with the process and felt they were afforded a fair hearing and presented their cases well.

The Fish Ladder Case

The Fish Ladder case involved an unresolved dispute on an already-completed project. The contractor filed a claim stating that the site conditions differed substantially from those specified in the Request for Proposal, resulting in increased costs.

This project involved the reconstruction of an existing fish ladder. The reconstruction work had to be done during the winter because the fish ladder was in use at all other times. To do the work, the contractor had to keep the work area dry. Three bulkhead gates were expected to virtually seal the area from water. However, an imperfect seal was obtained on one of the bulkhead gates, and water leaked onto the site. Sealing the bulkheads was done by the contractor, but under the supervision of a Corps employee. In addition, the contractors needed to maintain low water levels in a junction pool, but when a major leak occurred divers were sent down and discovered that the Corps had failed to properly close a valve. To compound the problems, there was a spell of freezing temperatures, making it very difficult to de-water the site.

The Corps acknowledged the problems created by the opened valve, but was unable to get agreement on the damages resulting from it. But the major claim was based on the failure of the gate to provide a water-tight seal. The Corps maintained that under the contract it was the contractor's responsibility to lower the gates and assure a proper seal. The contractor argued that he lowered the gates under the Corps' direction, and that furthermore the lack of a water tight seal was due to bad maintenance and age. The Corps believed that all that had to be done to solve the problem was lift the gates, clean out any rock or debris, and reseal.

The Corps attorney suggested the use of an ADR technique because normal negotiations had been unsuccessful, but the attorney felt the Corps did have some liability. As a result, he assessed the Corps' chance of winning the case in front of the Claims Board at only 60 percent/40 percent. He proposed non-binding arbitration because the claim was small enough ($185,000) that he did not believe it would justify the amount of senior management time a mini-trial would require. The contractor's in-house attorney was amenable to non-binding arbitration, but his external attorney was cautious, fearing that the arbitrator would simply split the distance without really evaluating the legitimacy of the claims.

Normally, non-binding arbitration is done with a single arbitrator, but in this case the parties agreed to have a three-person panel consisting of an expert in contract law and two cement construction experts.

The hearing in front of the panel lasted two days. The panel felt that both parties had liability, and determined that the contractor was 55 percent responsible for the additional costs. However, the panel did not accept the documentation of costs submitted by the contractor, and used an audited statement of costs prepared by the Corps. The panel recommended a payment of $57,000.

A settlement agreement was signed and the contractor paid, but then the contractor filed an additional claim for $21,000 to recover legal fees. The claim is based on the Equal Access to Justice Act, which states that in out-of-court settlements, the claimant is entitled to legal fees.

This issue had not been addressed in the non-binding arbitration agreement. This appeal was denied, and is the docket for the Claims Board.

The Heating Plant Case

A contract was issued for nearly $32,000,000 to construct a coal-fired central heating plant for an Air Force Base. Following construction, the contractor filed a number of claims totaling in excess of $6,000,000. The basic thrust of these claims was that additional costs were incurred due to delays caused by the Corps, or through inadequate or unclear contract specifications.

The contractor showed little interest in negotiation, apparently based on prior experience negotiating with the Corps on another contract, but did agree to consider the use of an ADR technique, when approached by the Corps with this proposal. The parties quickly agreed to use non-binding arbitration, but then there were delays arguing over costs. The original proposal was that if either party did not accept the arbitrator's recommendation, it would bear the full costs of the proceedings. Later this was amended so that both sides split the costs, regardless of outcome.

Unlike the Sand Source Case, the proceedings in this case were very formal. Each side had forty hours to present its case. This forty hours included cross-examination and rebuttal. Since there were also subcontractors involved, the subcontractors' presentations came out of the contractors' forty hours. There were a number attorneys present, including two for the contractor, and four more for various subcontractors. The hearing took a total of two weeks. The government was represented by one attorney, accompanied by two contracts experts.

The arbitrator, an attorney with extensive government contract experience, was required to produce his recommendation within thirty days from the hearing (he was actually three weeks late in getting his recommendations done). He was asked not only to indicate a proposed settlement amount, but also to provide a brief rationale for each settlement.

The arbitrator ruled in favor of the Corps on a claim that the contractor should be compensated for delays brought about by a strike, since the arbitrator concluded that the strike was against the contractor, not the government, and within the power of the contractor to settle at any time. On the other claims, the arbitrator noted that there were relatively few disagreements on facts, and that most of the dispute was around the interpretation of contract language. The arbitrator concluded that most of these claims could be resolved through either a careful reading of the contract language, or apply relevant principles from contract law. The arbitrator felt the contractor had justified claims totaling approximately $3.2 million dollars. Subsequently, both sides accepted the arbitrator's recommendations.

These cases effectively illustrate the flexibility available in designing non-binding arbitration proceedings. In two of the cases there was a single arbitrator, but in the third case there was an arbitration panel. In one case the presentation was relatively brief, only two days, with no attorneys present, and with no cross-examination or other formalized procedures. In another the presentation took two weeks, there were a number of attorneys present, and formal procedures such as cross-examination were used. In some cases the arbitrators were technical experts, in others they were attorneys. In one of the cases the arbitrator made his presentation directly to senior management representatives, who negotiated an agreement on the spot. In others, the arbitrator's recommendations were submitted only in written form. The key point is that the parties are free to design procedures which fit their particular needs and situation.

PLANNING TO USE NON-BINDING ARBITRATION

How do you actually go about initiating and conducting non-binding arbitration. This section provides guidance on the specifics of preparing for and conducting non-binding arbitration.

The basic steps in conducting non-binding arbitration are:

1) Approach the other parties to assess willingness to use an ADR technique.
2) Determine, by mutual agreement with the other parties, that non-binding arbitration is the most suitable technique.
3) Negotiate an agreement governing the procedures to be followed during the non-binding arbitration proceedings.
4) Select an arbitrator or arbitration panel.
5) Exchange exhibits or position papers prior to the presentation.
6) Hold a formal presentation at which all parties present their facts and positions to the arbitrator.
7) Review the arbitrator's report and assess whether to accept the recommendations.

Proposing the Use of an ADR Technique

Corps of Engineers' policy firmly endorses the use of Alternative Dispute Resolution techniques such as non-binding arbitration. Nevertheless, the decision to use ADR must be made on a case-by-case basis, depending on individual circumstances. The Corps may either propose ADR to the other parties, or the other parties may make the initial proposal to the Corps.

Normally the proposal to use ADR occurs because conventional negotiation is not working, or resolution is not occurring in a timely manner. This may be because of past history, because of rigid positions, or simply because both sides believe they have a strong case and can win through litigation.

The proposal to use ADR normally comes from one attorney to another attorney. In cases where the attorneys seemed to be locked in rigid positions, it may be necessary for someone in a senior management position, such as the District Engineer, to take the proposal to someone in a comparable management position in the other organization. Both managements must give approval before proceeding with the use of ADR.

Selecting Non-Binding Arbitration

The next step is to determine which ADR technique is appropriate. There is a brief discussion on page 5 comparing non-binding arbitration to two other ADR techniques, mediation and the mini-trial. Mediation might be the preferred technique if you concluded that direct negotiation might still be successful, if assisted by a neutral outside party. A mini-trial might be preferred if the case justifies the extended time commitment of a senior manager which a mini-trial requires.

Often the choice of an ADR technique is based upon the familiarity and confidence of the parties with a particular techniques. Because ADR techniques are still somewhat new, and many attorneys have not used them, there is a tendency to use the technique with which they are most comfortable.

Developing a Procedural Agreement

Once there is an agreement in principal to use non-binding arbitration, the next step is to negotiate an agreement on the exact procedures to be followed. Typically this is negotiated by attorneys for the Corps and the other parties. Among the topics to be covered in this agreement are:

- How the arbitrator will be selected
- The nature of the recommendations desired from the arbitrator
- When and in what form exhibits or other documents will be exchanged (and what occurs if documents are submitted late)
- How the presentation itself will be structured, including:
  - — How formal the presentations will be
  - — Whether presentations will be made by attorneys or technical people
  - — Who will be present during the presentations
  - — How long each party will have to present its case
  - — Whether there will be cross-examination
  - — The total time for the presentation
- The confidentiality of materials and presentations in the event no settlement is reached
- How the costs of the proceedings will be shared
- Responsibility for legal fees in the event of an agreement
- When the arbitrator's recommendations are due
- How the arbitrator's recommendations are to be submitted
- The process for acceptance/non-acceptance of the arbitrator's position

Selecting an Arbitrator

The first step in selecting an arbitrator is to determine what kind of arbitrator you want. In one of the cases above, for example, the decision was made to select a technical expert, fully qualified in the construction practices which were at the heart of the dispute. In another case, the arbitrator was an attorney. In the third case, an arbitration panel was established, with both technical and legal expertise. It is entirely up to the parties to determine what kind of arbitrator they want, considering the issues in the dispute.

Another issue to consider is what kind of recommendation you want from the arbitrator. Do you want just a dollar figure? Do you want to know what entitlement the arbitrator believes each party has? Do you want a proposed basis for settlement, but not an actual dollar figure? Answering these questions may also influence the arbitrator selected.

Once you are in agreement on what kind of arbitrator you want, the next step is the actual selection. This is often done by having each side submit three names of acceptable arbitrators to the other parties, and finding a name on those lists that everyone can agree upon. On occasion, the arbitrators are jointly evaluated. In one of the cases above, a panel representing all the parties interviewed a short list of possible arbitrators.

Exchanging Exhibits or Position Papers

The procedural agreement should describe what kinds of documents will be exchanged prior to the formal presentation. This might include the nature of the materials to be exchanged, the length of the materials exchanged (sometimes this is limited to a maximum number of pages, to hold down the amount of material which must be mastered before the presentation), and the deadline for exchange of information. The deadline issue is important because in some cases important papers were not exchanged until the last minute, making it difficult to prepare.

The Format of the Presentation

As the case studies above show, you have considerable flexibility in how you wish to structure the actual presentation to the arbitrator. The procedural agreement should cover who makes the presentation, how much time is available, whether cross-examination is permitted, whether time taken to answer questions from the arbitrator is taken from each parties' time limit, etc. The best advice is simply to design the presentation to meet your specific needs, rather than assume there is a single right way to do it.

How the Arbitrator's Findings are Presented

The philosophy that procedures should be designed to meet your specific needs also prevails in determining what kind of report you want from the arbitrator, the timing of this report, and to

whom this report should be give. In the Sand Source Case, for example, a non-binding arbitration process was turned into a kind of hybrid mini-trial procedure by having the arbitrator issue his report verbally to senior managers representing the two parties, who had agreed to negotiate following that briefing.

Negotiating Final Agreement

Normally there are time limits placed on how many days the parties have to decide whether or not to accept the arbitrator's recommendations. You may also want to specify whether a negotiation session will be held prior to this decision, or each party makes this decision in isolation. It is somewhat difficult to "tinker" with an arbitrator's decision and negotiate a different agreement, because upsetting the balance within the recommendations may cause the entire package to become unacceptable.

CONCLUSION

Non-binding arbitration is one of a number of promising ADR techniques. Because the field is new, many techniques are still undergoing refinement and change. Corps managers are encouraged to approach the use of non-binding arbitration with a spirit of innovation. The procedures established should be structured so that they serve the specific needs of the particular situation.

Chapter 28

MEDIATION[1]

by
Christopher W. Moore, Ph.D.

WHAT IS MEDIATION?

Most disputes are resolved by informal conversations, some form of cooperative problem solving or negotiation. Involved parties reach an acceptable settlement of their differences through direct unassisted interaction. But not all conflicts can be resolved in this manner.

Some conflicts which involve strong emotions, significant differences in the ways that data are interpreted, perceived or actual conflicts of interest, or extreme bargaining positions, result in impasse. The parties are deadlocked and are either unable to start negotiations, or where negotiations have been initiated, they are stalled and no progress is possible. In conflicts characterized by the above conditions, the parties may need the assistance of a third party to reach an acceptable negotiated settlement. Mediation is one of the major procedures which can be used to aid parties in the resolution of intractable disputes.

Mediation is familiar to most people as a means of resolving labor-management and international disputes, but it also has been used to settle contract, interpersonal, personnel, EEO, operational, site specific and policy conflicts. Mediation involves the intervention of a third person, or mediator, into a dispute or negotiation to assist the parties to negotiate an acceptable resolution of issues in conflict. The mediator is neutral in that he or she does not stand to personally benefit from the terms of the settlement, and impartial in that he or she does not have a preconceived bias about how the conflict should be resolved.

The mediator is asked by the disputing parties to assist them to voluntarily reach an agreement. The mediator has no decision-making authority. The parties maintain all control over the substantive outcome of the dispute. However, the mediator does have influence in that he or she provides procedural assistance to the parties that they need to reach agreement. Mediation assistance involves working with the parties to improve their bargaining relationship and communications, clarifying or interpreting data , identifying key issues to be discussed, uncovering hidden interests, designing an effective negotiation process, generating possible settlement options, and helping to identify and formulate areas of agreement.

[1] See also Moore, Christopher W. *Mediation.* IWR Report 91-ADR-P-3. Ft. Belvoir, VA: IWR, USACE, 1991.

Here is what a mediated assistance in a negotiation or dispute looks like:

Two or more individuals or organizations are involved in a dispute. Negotiations may not have been initiated, or may have started and the parties reached an impasse. Each party believes that the other is badly motivated, is hiding information, is not communicating, and is making unreasonable demands. There are no good settlement options "on the table." The parties see their positions on the issues as being far apart and perceive little chance of reaching an agreement.

One or more parties assesses its procedural and substantive alternatives to reaching a negotiated agreement ignoring the conflict and maintaining the status quo, pursuing a third party settlement or escalating the conflict and decides that a negotiated settlement may be more acceptable than its best alternative procedure or outcome. The party decides to explore whether mediation assistance might promote successful negotiations.

One or more parties proposes mediation to the other party, or contacts a mediator or mediation organization and asks the third party to set up a mediation session. If an organization is contacted, the parties may have a choice in the selection of the third party who will work with them.

At the beginning of mediation, the mediator will usually meet with each of the disputing parties, either jointly or separately, to explain the mediation process. He or she will clarify the voluntary nature of mediation and describe how the mediator will assist the parties to negotiate more effectively. The mediator may also establish some procedural and behavioral guidelines which will foster more productive negotiations. These include guidelines on who talks, limits of confidentiality, how relevant data will be exchanged, and a description of the mediation process itself.

At the first joint meeting, the parties will each be asked to outline in an opening statement the key issues which they wish to discuss and to identify some of the interests which they must have addressed or met to reach an acceptable agreement. This educational process assures that all of the parties and the mediator understand the issues and some of the underlying interests.

The mediator may propose or will work with the parties to develop an acceptable negotiation agenda, the sequence of issues and procedures to be used to address each item.

The mediator may assist the parties to handle strong emotions, misperceptions, stereotypes, or miscommunication by listening and legitimizing (but not necessarily agreeing with) feelings, clarifying communications, summarizing statements, and proposing more effective communication structures.

The mediator will ask the parties to jointly discuss each of the issues, and to identify the various interests or needs to be satisfied. Mediators will usually reframe or define issues to be addressed in terms of meeting the parties' joint interests.

Many disputes are caused by the inability of a team or organization to reach internal agreements on a negotiation strategy or acceptable settlement options. Mediators often assist a team or spokesperson to build an internal consensus or approach to negotiations.

The mediator will assist the parties to back off of extreme or hard line positions, preferred solutions which are advocated by each of the parties; and to generate alternative settlement options. Option generation may occur either in joint meetings or in separate caucuses where the mediator meets in private with each of the parties.

Impasse commonly occurs because parties dislike and dismiss options on the negotiation table, but fail to assess the benefits and costs of alternative resolution procedure and potential outcomes that may result from their use. Mediators often help parties to evaluate the merits of settlement by means of negotiations in contrast to non-negotiated alternatives.

The mediator helps prepare the parties to make "yesable" proposals that will be more acceptable or readily agreed to by the other party or parties. They do this by assisting parties to make offers which meet both their own and other's interests, and by improving the form or manner in which offers are communicated.

As parties make offers, the mediator may translate or interpret them to the other side. He or she may do this by "shuttle mediation," where the intervenor travels between private meetings with the parties, or directly in a joint session.

The mediator assists parties to identify and define areas of agreement by "testing" for consensus. The mediator listens for and restates common or overlapping views. Since parties in dispute often talk past an agreement, the mediators' assistance is often invaluable in identifying areas of agreement.

As the parties reach agreements, the mediator may act as a scribe who captures the settlement in a Memorandum of Understanding (MOU). This MOU, where appropriate, may later be drafted in the form of a contract or other legal document.

In conclusion, mediation is:

Voluntary: No party is forced to use a mediator nor are they forced to agree to a particular settlement. The agreement to use the process and any settlement which results is voluntary. The mediator does not decide for the parties; she or he helps them to make their own decision.

Enhanced Negotiation: Mediation involves negotiation plus the assistance of a neutral and impartial third party who is dedicated to helping the parties reach a fair, just, and mutually acceptable settlement. The mediator provides specialized relationship building and procedural assistance which enables the parties to negotiate their own agreements more efficiently and effectively.

Non-Judicial: Decisions are made by the parties themselves. No judges are present in this process. The mediator provides relationship-building and procedural assistance, and may also help to develop new substantive options, but he or she never decides for the parties.

Informal: The parties, in cooperation with the mediator, have direct control over the proceedings. They can utilize a variety of procedures to identify issues, explore interests and generate creative settlement options. They can also address a wider range of issues than is possible under normal legal proceedings.

Confidential: The parties and the mediator can jointly establish the limits of confidentiality for mediated negotiations. Mediated negotiations can be treated as settlement conferences where information revealed or settlement options which are explored cannot be used in any later court action. This level of confidentiality allows parties to explore possible areas of agreement while protecting future procedural options.

Expedited: Mediated negotiations, because of their informal nature and flexible process, are often a more rapid means of reaching agreement. Mediation conferences may be scheduled in a matter of days or weeks depending upon the needs of the parties.

WHY USE MEDIATION?

What are the advantages of using mediation over other means of resolving disputes, such as litigation or formal administrative procedures? There are a number of advantages:

Protection of the Relationship: In a significant number of conflicts, the parties have or will have an ongoing relationship. Adversarial or win/lose forms of dispute resolution often result in damaged relationships which may preclude the parties working together in the future. Mediation generally results in a settlement that both parties can accept and support, promotes better communications between them, and encourages a respectful and cooperative relationship.

Time Savings: Mediation assistance is generally available on short notice. The speed and schedule of settlement is entirely dependent on the parties' willingness to address and reach agreement on the issues.

Cost Savings: Mediation involves direct negotiations between the parties. While legal advisors may be present, key decision makers are usually the main actors. This means that legal costs are generally lower in the mediation process. Also, since the parties share the cost of hiring the mediator, expenses are kept down.

Greater Flexibility in Possible Settlements: Traditional litigation or administrative procedures are generally constrained as to the range of possible settlement options by the law or contract limitations. This means that the types of issues which can be raised or addressed by the parties is often rather narrow. Structural constraints often force parties to address "relationship" or "personality" issues, or issues not covered under the contract, indirectly using an unsuitable forum or procedure. Mediation, because of its more flexible format and lack of structural constraints, allows the parties to address relationship, procedural and substantive issues. It allows people to get to the "root of the problem" without having to "force-fit" a problem into an inappropriate process. Mediation also allows parties to develop customized creative solutions which are tailored to meet specific concerns or interests.

Keeps the Decision Making Authority in the Hands of the Parties: Procedures such as litigation, administrative hearings and arbitration, rely on third party decision makers to break deadlocks and render a decision. These procedures remove decision-making authority and responsibility from the parties who often are the most informed about the issues and options. Mediation keeps the decision-making authority with the people who best know the problems and it preserves both individual and organizational authority.

CONCERNS EXPRESSED ABOUT MEDIATION

People who are considering using mediation often have concerns about the impact of the process and the appropriateness of using it in certain cases.

Listed below are some of the most frequently raised questions and some responses:

Doesn't the manager lose control and have his or her authority undermined by using mediation?

On the contrary—mediation keeps decision-making authority in the hands of the key parties. Litigation, administrative processes and arbitration remove the authority to decide. In mediation, the parties evaluate whether settlement options developed through negotiations meet their needs, and can reject them if they are unacceptable. Agreement is voluntary and authority is preserved.

Doesn't Mediation Just Result in a Compromise?

Occasionally settlements arrived at through mediation are compromises, but often they are more creative and customized agreements which meet the specific needs of the involved

parties. Mediated settlements are generally more creative solutions to problems than would be developed through the use of other more adversarial procedures. Mediation helps parties to "expand the pie," negotiate over a broader range of issues, create more comprehensive settlements, alternate satisfaction of interests, trade items that are valued differently and develop elegant "win/win" solutions.

Where Can a Manager find a Competent and Experienced Mediator?

Mediators practice in all 50 states and in many foreign countries. Many of them specialize in resolving particular kinds of disputes—contracts, personnel, EEO, organizational, environmental, and public policy. The Institute for Water Resources, of the U.S. Army Corps of Engineers, maintains a roster of professional mediators familiar with Corps-related issues. They will be glad to assist managers in finding an appropriate third party. Call (703) 428-6372 for more information.

How Can a Manager be Assured that a Mediator will Remain Impartial and Not Take Sides?

Professional mediators are trained not to take sides. Standard practice and the Code of Ethics of the Society of Professionals in Dispute Resolution (SPIDR) guide mediators to assure impartial behavior. Besides, if any of the parties are not satisfied with the mediator's performance or feel that the intervenor is acting in a partial manner, they may dismiss him or her without question. The mediator serves at the pleasure of the parties.

Won't a Request for Mediation be Perceived as an Indication of a Weak Case?

Mediation is selected as the means of resolving disputes because the parties believe that it is the best way of achieving their goals, in comparison to other alternative means at their disposal. If a more predictable, less risky or cost-effective method was available, the parties would probably use it. Parties jointly use mediation because both of them may incur unwanted risks if they use other methods. In proposing mediation, a party should stress that both parties can gain more predictably by negotiating with the assistance of a mediator.

A call for mediation may also indicate a desire to create a better solution which does not result in a win/lose outcome. Rather than a sign of weakness, initiation of mediation may be an indicator that both parties' interests need to be taken into consideration.

Also by making the use of assisted negotiations a common practice, the parties can remove any suggestion that mediation indicates weakness on any particular case.

Won't Mediation Undermine Field Decisions?

It is often easier to refer a difficult case either to a higher level authority in the organization or to send it to a third party decision maker, than to make a decision that will be unpopular in the field. The judge can make the call and take the blame, not the manager. It is also often difficult to reverse or modify a decision made in the field without being perceived as being unresponsive or unsupportive of a subordinate's decision.

These two facts make it imperative for the manager who decides to negotiate a settlement with the assistance of a mediator, to communicate his or her rationale for the settlement to subordinates in the field. People involved or affected by the negotiated agreement need to see the "big picture" and understand the factors which led to the decision projected costs/benefits, risks avoided, and predictability achieved.

Doesn't mediation imply a sacrifice of principles?

If the goal of settling a dispute is to establish a principle or create a legal precedent, mediation may not be the best process to use. But relatively few cases involve issues of principle. Most cases allow for some give and take in the satisfaction of the parties' interests. Also, most cases have some "right" on both sides. Parties will often do well to focus on meeting interests and to avoid issues of who was right and who was wrong.

CONCLUSION

Mediation is a very effective means for resolving a wide variety of disputes. The process is highly flexible and can be adapted to meet the needs of particular parties or situations. Corps managers are encouraged to explore the variety of situations and conflicts where mediation may be of assistance in developing fairer, more creative, efficient and cost effective settlements of disputes.

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Chapter 29

NEGOTIATION

by
Christopher W. Moore, Ph.D.

DEFINITION OF NEGOTIATION

Negotiation is one of the most common approaches used to make decisions and manage disputes. It is also the major building block for many other alternative dispute resolution procedures.

Negotiation occurs between spouses, parents and children, managers and staff, employers and employees, professionals and clients, within and between organizations, and between agencies and the public. Negotiation is a problem-solving process in which two or more people voluntarily discuss their differences and attempt to reach a joint decision on their common concerns. Negotiation requires participants to identify issues about which they differ, educate each other about their needs and interests, generate possible settlement options, and bargain over the terms of the final agreement. Successful negotiations generally result in some kind of exchange or promise being made by the negotiators to each other. The exchange may be tangible (such as money, a commitment of time, or a particular behavior) or intangible (such as an agreement to change an attitude or expectation, or make an apology).

Negotiation is the principal way that people redefine an old relationship that is not working to their satisfaction or establish a new relationship where none existed before. Because negotiation is such a common problem-solving process, it is in everyone's interest to become familiar with negotiating dynamics and skills. This section is designed to introduce basic concepts of negotiation and to present procedures and strategies that generally produce more efficient and productive problem solving.

CONDITIONS FOR NEGOTIATION

A variety of conditions can affect the success or failure of negotiations. The following conditions make success in negotiations more likely:

- **Identifiable parties who are willing to participate**. The people or groups who have a stake in the outcome must be identifiable and willing to sit down at the bargaining table if productive negotiations are to occur. If a critical party is either absent or is not willing to commit to good faith bargaining, the potential for agreement will decline.

- **Interdependence**. For productive negotiations to occur, the participants must be dependent upon each other to have their needs met or interests satisfied. The participants need either each other's assistance or restraint from negative action for their interests to be satisfied. If one party can get his/her needs met without the cooperation of the other, there will be little impetus to negotiate.

- **Readiness to negotiate**. People must be ready to negotiate for dialogue to begin. When participants are not psychologically prepared to talk with the other parties, when adequate information is not available, or when a negotiation strategy has not been prepared, people may be reluctant to begin the process.

- **Means of influence or leverage**. For people to reach an agreement over issues about which they disagree, they must have some means to influence the attitudes and/or behavior of other negotiators. Often influence is seen as the power to threaten or inflict pain or undesirable costs, but this is only one way to encourage another to change. Asking thought-provoking questions, providing needed information, seeking the advice of experts, appealing to influential associates of a party, exercising legitimate authority, or providing rewards are all means of exerting influence in negotiations.

- **Agreement on some issues and interests**. People must be able to agree upon some common issues and interests for progress to be made in negotiations. Generally, participants will have some issues and interests in common and others that are of concern to only one party. The number and importance of the common issues and interests influence whether negotiations occur and whether they terminate in agreement. Parties must have enough issues and interests in common to commit themselves to a joint decision-making process.

- **Will to settle**. For negotiations to succeed, participants have to want to settle. If continuing a conflict is more important than settlement, then negotiations are doomed to failure. Often parties want to keep conflicts going to preserve a relationship (a negative one may be better than no relationship at all), to mobilize public opinion or support in their favor, or because the conflict relationship gives meaning to their life. These factors promote continued division and work against settlement. The negative consequences of not settling must be more significant and greater than those of settling for an agreement to be reached.

- **Unpredictability of outcome**. People negotiate because they need something from another person. They also negotiate because the outcome of not negotiating is unpredictable. For example: If, by going to court, a person has a 50/50 chance of winning, they may decide to negotiate rather than take the risk of losing as a result of a judicial decision. Negotiation is more predictable than court, because if negotiation is

successful, the party will at least win something. Chances for a decisive and one-sided victory need to be unpredictable for parties to enter into negotiations.

- **A sense of urgency and deadline**. Negotiations generally occur when there is pressure or it is urgent to reach a decision. Urgency may be imposed by either external or internal time constraints or by potential negative or positive consequences to a negotiation outcome. External constraints include: court dates, imminent executive or administrative decisions, or predictable changes in the environment. Internal constraints may be artificial deadlines selected by a negotiator to enhance the motivation of another to settle. For negotiations to be successful, the participants must jointly feel a sense of urgency and be aware that they are vulnerable to adverse action or loss of benefits if a timely decision is not reached. If procrastination is advantageous to one side, negotiations are less likely to occur, and, if they do, there is less impetus to settle.

- **No major psychological barriers to settlement**. Strong expressed or unexpressed feelings about another party can sharply affect a person's psychological readiness to bargain. Psychological barriers to settlement must be lowered if successful negotiations are to occur.

- **Issues must be negotiable**. For successful negotiation to occur, negotiators must believe that there are acceptable settlement options that are possible as a result of participation in the process. If it appears that negotiations will have only win/lose settlement possibilities and that a party's needs will not be met as a result of participation, parties will be reluctant to enter into dialogue.

- **The people must have the authority to decide**. For a successful outcome, participants must have the authority to make a decision. If they do not have a legitimate and recognized right to decide, or if a clear ratification process has not been established, negotiations will be limited to an information exchange between the parties.

- **A willingness to compromise.** Not all negotiations require compromise. On occasion, an agreement can be reached which meets all the participants' needs and does not require a sacrifice on any party's part. However, in other disputes, compromise—willingness to have less than 100 percent of needs or interests satisfied—may be necessary for the parties to reach a satisfactory conclusion. Where the physical division of assets, strong values, or principles preclude compromise, negotiations are not possible.

- **The agreement must be reasonable and implementable**. Some settlements may be substantively acceptable but may be impossible to implement. Participants in negotiations must be able to establish a realistic and workable plan to carry out their agreement if the final settlement is to be acceptable and hold over time.

- **External factors favorable to settlement**. Often factors external to negotiations inhibit or encourage settlement. Views of associates or friends, the political climate of public opinion, or economic conditions may foster agreement or continued turmoil. Some external conditions can be managed by negotiators while others cannot. Favorable external conditions for settlement should be developed whenever possible.

- **Resources to negotiate**. Participants in negotiations must have the interpersonal skills necessary for bargaining and, where appropriate, the money and time to engage fully in dialogue procedures. Inadequate or unequal resources may block the initiation of negotiations or hinder settlement.

Why Parties Choose to Negotiate

The list of reasons for choosing to negotiate is long. Some of the most common reasons are to:

- Gain recognition of either issues or parties;
- Test the strength of other parties;
- Obtain information about issues, interests and positions of other parties;
- Educate all sides about a particular view of an issue or concern;
- Ventilate emotions about issues or people;
- Change perceptions;
- Mobilize public support;
- Buy time;
- Bring about a desired change in a relationship;
- Develop new procedures for handling problems;
- Make substantive gains; and
- Solve a problem.

Why Parties Refuse to Negotiate

Even when many of the preconditions for negotiation are present, parties often choose not to negotiate. Their reasons may include:

- Negotiating confers sense and legitimacy to an adversary, their goals, and needs;
- Parties are fearful of being perceived as weak by a constituency, by their adversary, or by the public;
- Discussions are premature. There may be other alternatives available—informal communications, small private meetings, policy revision, decree, elections;
- Meeting could provide false hope to an adversary or to one's own constituency;
- Meeting could increase the visibility of the dispute;
- Negotiating could intensify the dispute;
- Parties lack confidence in the process;
- There is a lack of jurisdictional authority;

- Authoritative powers are unavailable or reluctant to meet;
- Meeting is too time-consuming;
- Parties need additional time to prepare; and
- Parties want to avoid locking themselves into a position; there is still time to escalate demands and to intensify conflict to their advantage.

Definitions

For negotiations to result in positive benefits for all sides, the negotiator must define what the problem is and what each party wants. In defining the goals of negotiation, it is important to distinguish between issues, positions, interests, and settlement options.

- An **issue** is a matter or question parties disagree about. Issues can usually be stated as problems. For example, "How can wetlands be preserved while allowing some industrial or residential development near a stream or marsh?" Issues may be substantive (related to money, time, or compensation), procedural (concerning the way a dispute is handled), or psychological (related to the effect of a proposed action).

- **Positions** are statements by a party about how an issue can or should be handled or resolved; or a proposal for a particular solution. A disputant selects a position because it satisfies a particular interest or meets a set of needs.

- **Interests** are specific needs, conditions, or gains that a party must have met in an agreement for it to be considered satisfactory. Interests may refer to content, to specific procedural considerations, or to psychological needs.

- **Settlement Options** are possible solutions which address one or more party's interests. The presence of options implies that there is more than one way to satisfy interests.

Selecting A General Negotiation Approach

The negotiator will need to select a general negotiation approach. There are many techniques, but the two most common approaches to negotiation are positional bargaining and interest-based bargaining.

POSITIONAL BARGAINING

Positional bargaining is a negotiation strategy in which a series of positions, alternative solutions that meet particular interests or needs, are selected by a negotiator, ordered sequentially according to preferred outcomes, and presented to another party in an effort to reach agreement. The first or opening position represents the maximum gain hoped for or expected in the negotiations. Each subsequent position demands less of an opponent and results in fewer benefits

for the person advocating it. Agreement is reached when the negotiators' positions converge and reach an acceptable settlement range.

When is Positional Bargaining Often Used?

- When the resource being negotiated is limited (time, money, psychological benefits, and so on)
- When a party wants to maximize his/her share in a fixed sum pay off
- When the interests of the parties are not interdependent, are contradictory, or are mutually exclusive
- When current or future relationships have a lower priority than immediate substantive gains

What are Attitudes of Positional Bargainers?

- Resources are limited
- Other negotiator is an opponent; be hard on him/her
- Win for one means a loss for the other
- Goal is to win as much as possible
- Concessions are a sign of weakness
- There is a right solution—mine
- Be on the offensive at all times

How is Positional Bargaining Conducted?

1. Set your target point—solution that would meet all your interests and result in complete success for you. To set the target point, consider the following:

   - Your highest estimate of what is needed (What are your interests?)
   - Your most optimistic assumption of what is possible
   - Your most favorable assessment of your bargaining skill

2. Make your target point into opening position.

3. Set your bottom line or resistance point—the solution that is the least you are willing to accept and still reach agreement. To identify your bottom line, consider the following:

   - Your lowest estimate of what is needed and would still be acceptable to you
   - Your least optimistic assumption of what is possible
   - Your least favorable assessment of your bargaining skill relative to other negotiators
   - Your Best Alternative To a Negotiated Agreement (BATNA)

4. Consider possible targets and bottom lines of other negotiators.

   - Why do they set their targets and bottom lines at these points? What interests or needs do these positions satisfy?
   - Are your needs or interests, and those of the other party, mutually exclusive?
   - Will gains and losses have to be shared to reach agreement, or can you settle with both receiving significant gains?

5. Consider a range of positions between your target point and the bottom line.

   - Each subsequent position after the target point offers more concessions to other negotiator(s), but is still satisfactory to you.
   - Consider having the following positions for each issue in dispute:

     — Opening position
     — Secondary position
     — Subsequent position
     — Fallback position—(yellow light that indicates you are close to bottom line; parties who want to mediate should stop here so that the intermediary has something to work with)
     — Bottom line

6. Decide if any of your positions meet the interests or needs of other negotiators.

   - How should your position be modified to do so?

7. Decide when you will move from one position to another.

8. Order the issues to be negotiated into a logical (and beneficial) sequence.

9. Open with an easy issue.

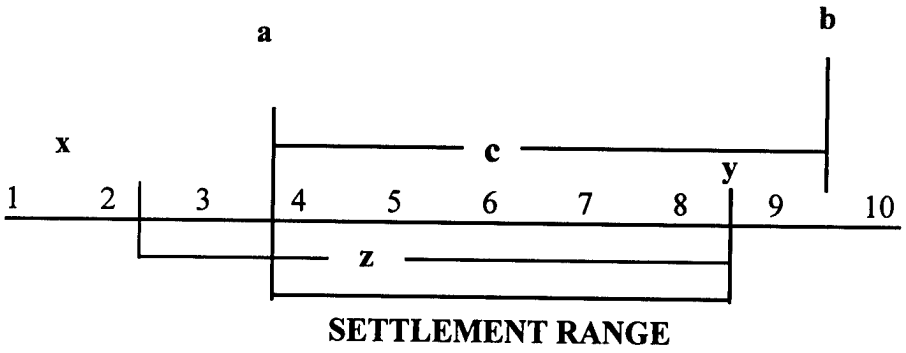
10. Open with a position close to your target point.

    - Educate other negotiator(s) on why you need your solution and why your expectations are high.
    - Educate them as to why they must raise or lower their expectations.

11. Allow other side to explain their opening position.

12. If appropriate, move to other positions that offer other negotiator(s) more benefits.

13. Look for a settlement or bargaining range—spectrum of possible settlement alternatives any one of which is preferable to impasse or no settlement.



a = Party A's resistance point
b = Party A's target
c = Acceptable options for Party A
x = Party B's target
y = Party B's resistance point
z = Acceptable options for Party B

Figure 3

14. Compromise on benefits and losses where appropriate.

15. Look for how positions can be modified to meet all negotiators' interests.

16. Formalize agreements in writing.

Characteristic Behaviors of Positional Bargainers

- **Initial large demand**—High or large opening position used to educate other parties about what is desired or to identify how far they will have to move to reach an acceptable settlement range.

- **Low level of disclosure**—Secretive and non-trusting behavior to hide what the settlement range and bottom line are. Goal is to increase benefits at expense of other.

- **Bluffing**—Strategy used to make negotiator grant concessions based on misinformation about the desires, strengths or costs of another.

- **Threats**—Strategy used to increase costs to another if agreement is not reached.

- **Incremental concessions**—Small benefits awarded so as to gradually cause convergence between negotiators' positions.

- **Hard on people and problem**—Often other negotiator is degraded in the process of hard bargaining over substance. This is a common behavior that is not necessarily a quality of or desirable behavior in positional bargaining.

Costs and Benefits of Positional Bargaining

- **Costs**

  — Often damages relationships; inherently polarizing (my way, your way)
  — Cuts off option exploration. Often prevents tailor-made solutions
  — Promotes rigid adherence to positions
  — Obscures a focus on interests by premature commitment to specific solutions
  — Produces compromise when better solutions may be available

- **Benefits**

  — May prevent premature concessions
  — Is useful in dividing or compromising on the distribution of fixed-sum resources
  — Does not require trust to work
  — Does not require full disclosure of privileged information

INTEREST-BASED BARGAINING

Interest-based bargaining involves parties in a collaborative effort to jointly meet each other's needs and satisfy mutual interests. Rather than moving from positions, to counter positions, to a compromise settlement, negotiators pursuing an interest-based bargaining approach attempt to identify their interests or needs and those of other parties prior to developing specific solutions. After the interests are identified, the negotiators jointly search for a variety of settlement options that might satisfy all interests, rather than argue for any single position. The parties select a solution from these jointly generated options. This approach to negotiation is frequently called integrated bargaining because of its emphasis on cooperation, meeting mutual needs, and the efforts by the parties to expand the bargaining options so that a wiser decision, with more benefits to all, can be achieved.

When is Interest-Based Bargaining Used?

- When the interests of the negotiators are interdependent.
- When it is not clear whether the issue being negotiated is fixed-sum (even if the outcome is fixed-sum, the process can be used).
- When future relationships are a high priority.
- When negotiators want to establish cooperative problem-solving rather than competitive procedures to resolve their differences.

- When negotiators want to tailor a solution to specific needs or interests.
- When a compromise of principles is unacceptable.

Attitudes of Interest-Based Bargainers

- Resources are seen as not limited.
- All negotiators' interests must be addressed for an agreement to be reached.
- Focus on interests not positions.
- Parties look for objective or fair standards to which all can agree.
- Believe that there are probably multiple satisfactory solutions.
- Negotiators are cooperative problem-solvers rather than opponents.
- People and issues are separate. Respect people, bargain hard on interests.
- Search for win/win solutions.

How to Do Interest-Based Bargaining

Interests are needs that a negotiator wants satisfied or met. There are three types of interests:

- **Substantive interests**—Content needs (money, time, goods, or resources, etc.)

- **Procedural interests**—Needs for specific types of behavior or the "way that something is done."

- **Relationship or psychological interests**—Needs that refer to how one feels, how one is treated or conditions for ongoing relationship.

1. Identify the substantive, procedural, and relationship interest/needs that you expect to be satisfied as a result of negotiations. Be clear on the following:

   - State why the needs are important to you.
   - State how important the needs are to you.

2. Speculate on the substantive, procedural, and relationship interests that might be important to the other negotiators.

   - Assess why the needs are important to them.
   - Assess how important the needs are to them.

3. Begin negotiations by educating each other about your respective interests.

   - Be specific as to why interests are important.
   - If other negotiators present positions, translate them into terms of interest. Do not allow other negotiators to commit to a particular solution or position.
   - Make sure all interests are understood.

4. Frame the problem in a way that it is solvable by a win/win solution.

   - Remove egocentricity by framing problem in a manner that all can accept.
   - Include basic interests of all parties.
   - Make the framing congruent with the size of the problem to be addressed.

5. Identify general criteria that must be present in an acceptable settlement.

   - Look for general agreements in principle.
   - Identify acceptable objective criteria that will be used to reach more specific agreements.

6. Generate multiple options for settlement.

   - Present multiple proposals.
   - Make frequent proposals.
   - Vary the content.
   - Make package proposals that link solutions to satisfy interests.
   - Make sure that more than two options are on the table at any given time.

7. Utilize integrative option generating techniques.

   - Expand the pie—ways that more resources or options can be brought to bear on the problem.
   - Alternating satisfaction—each negotiator gets 100 percent of what they want, but at different times.
   - Trade-offs—exchanges of concessions on issues of differing importance to the negotiators.
   - Consider two or more agenda items simultaneously.
   - Negotiators trade concessions on issues of higher or lower importance to each. Each negotiator gets their way on one issue.
   - Integrative solutions—look for solutions that involve maximum gains and few or no losses for both parties.

8. Separate the option generation process from the evaluation process.

9. Work toward agreement.

   - Use the Agreement-in-Principle Process (general level of agreements moving toward more specific agreements).
   - Fractionate (break into small pieces) the problem and use a Building-Block Process (agreements on smaller issues that, when combined, form a general agreement). Reduce the threat level.
   - Educate and be educated about interests of all parties.
   - Assure that all interests will be respected and viewed as legitimate.
   - Show an interest in their needs.
   - Do not exploit another negotiator's weakness. Demonstrate trust.
   - Put yourself in a "one down position" to others on issues where you risk a small, but symbolic loss.
   - Start with a problem solving rather than competitive approach.
   - Provide benefits above and beyond the call of duty.
   - Listen and convey to other negotiators that they have been heard and understood.
   - Listen and restate content to demonstrate understanding.
   - Listen and restate feelings to demonstrate acceptance (not necessarily agreement) and understanding of intensity.

10. Identify areas of agreement, restate them, and write them down.

Costs and Benefits of Interest-Based Bargaining

- **Costs**

  — Requires some trust
  — Requires negotiators to disclose information and interests
  — May uncover extremely divergent values or interests

- **Benefits**

  — Produces solutions that meet specific interests
  — Builds relationships
  — Promotes trust
  — Models cooperative behavior that may be valuable in future

AN INTEGRATED APPROACH

Naturally, all negotiations involve some positional bargaining and some interest-based bargaining, but each session may be characterized by a predominance of one approach or the other. Negotiators who take a positional bargaining approach will generally use interest-based bargaining only during the final stages of negotiations. When interest-based bargaining is used

throughout negotiations, it often produces wiser decisions in a shorter amount of time with less incidence of adversarial behavior.

DYNAMICS OF NEGOTIATION

Examining the approaches to negotiation only gives us a static view of what is normally a dynamic process of change. Let us now look at the stages of negotiation most bargaining sessions follow.

Negotiators have developed many schemes to describe the sequential development of negotiations. Some of them are descriptive—detailing the progress made in each stage—while others are prescriptive—suggesting what a negotiator should do. We prefer a twelve-stage process that combines the two approaches.

Stages of Negotiation

Stage 1: Evaluate and Select a Strategy to Guide Problem Solving

- Assess various approaches or procedures—negotiation, facilitation, mediation, arbitration, court, and so on—available for problem solving.
- Select an approach.

Stage 2: Make Contact with Other Party or Parties

- Make initial contact(s) in person, by telephone, or by mail.
- Explain your desire to negotiate and coordinate approaches.
- Build rapport and expand relationship
- Build personal or organization's credibility.
- Promote commitment to the procedure.
- Educate and obtain input from the parties about the process that is to be used.

Stage 3: Collect and Analyze Background Information

- Collect and analyze relevant data about the people, dynamics, and substance involved in the problem.
- Verify accuracy of data.
- Minimize the impact of inaccurate or unavailable data.
- Identify all parties' substantive, procedural, and psychological interests.

Stage 4: Design a Detailed Plan for Negotiation

- Identify strategies and tactics that will enable the parties to move toward agreement.
- Identify tactics to respond to situations peculiar to the specific issues to be negotiated.

Stage 5: Build Trust and Cooperation

- Prepare psychologically to participate in negotiations on substantive issues. Develop a strategy to handle strong emotions.
- Check perceptions and minimize effects of stereotypes.
- Build recognition of the legitimacy of the parties and issues.
- Build trust.
- Clarify communications.

Stage 6: Beginning the Negotiation Session

- Introduce all parties.
- Exchange statements which demonstrate willingness to listen, share ideas, show openness to reason, and demonstrate desire to bargain in good faith.
- Establish guidelines for behavior.
- State mutual expectations for the negotiations.
- Describe history of problem, and explain why there is a need for change or agreement.
- Identify interests and/or positions.

Stage 7: Define Issues and Set an Agenda

- Together identify broad topic areas of concern to people.
- Identify specific issues to be discussed.
- Frame issues in a non-judgmental neutral manner.
- Obtain an agreement on issues to be discussed.
- Determine the sequence to discuss issues.
- Start with an issue in which there is high investment on the part of all participants, where there is not serious disagreement, and where there is a strong likelihood of agreement.
- Take turns describing how you see the situation. Participants should be encouraged to tell their story in enough detail that all people understand the viewpoint presented.
- Use active listening, open-ended questions, and focusing questions to gain additional information.

Stage 8: Uncover Hidden Interests

- Probe each issue either one at a time or together to identify interests, needs, and concerns of the principal participants in the dispute.
- Define and elaborate interests so that all participants understand the needs of others as well as their own.

Stage 9: Generate Options for Settlement

- Develop an awareness about the need for options from which to select or create the final settlement.
- Review needs of parties which relate to the issue.
- Generate criteria or objective standards that can guide settlement discussions.
- Look for agreements in principle.
- Consider breaking issue into smaller, more manageable issues and generating solutions for sub-issues.
- Generate options either individually or through joint discussions.
- Use one or more of the following procedures:
  - — Expand the pie so that benefits are increased for all parties.
  - — Alternate satisfaction so that each party has his/her interests satisfied but at different times.
  - — Trade items that are valued differently by parties.
  - — Look for integrative or win/win options.
  - — Brainstorm.
  - — Use trial and error generation of multiple solutions.
  - — Try silent generation in which each individual develops privately a list of options and then presents his/her ideas to other negotiators.
  - — Use a caucus to develop options.
  - — Conduct position/counter position option generation.
  - — Separate generation of possible solutions from evaluation.

Stage 10: Assess Options for Settlement

- Review the interests of the parties.
- Assess how interests can be met by available options.
- Assess the costs and benefits of selecting options.

Stage 11: Final Bargaining

Final problem solving occurs when:

- One of the alternatives is selected.
- Incremental concessions are made and parties move closer together.
- Alternatives are combined or tailored into a superior solution.
- Package settlements are developed.
- Parties establish a procedural means to reach a substantive agreement.

Stage 12: Achieving Formal Settlement

- Agreement may be a written memorandum of understanding or a legal contract. Detail how settlement is to be implemented—who, what, where, when, how—and write it into the agreement.
- Identify "what ifs" and conduct problem solving to overcome blocks.
- Establish an evaluation and monitoring procedure.
- Formalize the settlement and create enforcement and commitment mechanisms:

  — Legal contract
  — Performance bond
  — Judicial review
  — Administrative/executive approval

SECTION VII: ALTERNATIVE DISPUTE RESOLUTION CASE STUDIES

Chapter 30

CONFLICT RESOLUTION IN WATER RESOURCES: TWO 404 GENERAL PERMITS[1]

by
Jerome Delli Priscoli, Ph.D.

INTRODUCTION

This paper has two objectives: first, to demonstrate how alternative dispute resolution techniques can be used in water resources by looking at two cases; second, to evaluate the experience of these cases against current theory of bargaining and negotiations.

Conflicts among environmentalists, developers, and Federal, State, and local agencies are well known. These conflicts involve planning, constructing, operating, and regulating water resource projects. In this paper I will compare two Section 404 permit cases. The first in 1980, is the issuance of a general permit (GP) for wetland fill on Sanibel Island, Florida (Lefkoff et al. 1983).

The second in 1987, is the issuance of a general permit for hydrocarbon exploration drilling throughout Louisiana and Mississippi.[2] Under Section 404 of the 1972 Water Pollution Control Act, the U.S. Corps of Engineers grants individual permits for most forms of construction activities in wetlands such as drilling, filling land, and building dikes. Generally, permits are granted on a case-by-case basis but the law also allows Corps district engineers to issue general permits when the activities that will be conducted are similar and do not produce negative cumulative impacts.

On a national basis, the Corps program regulates activities that involve approximately 150,000,000 yd3 of dredge material annually, and roughly 15 percent of the inorganic point source pollution in rivers of the United States. The program's jurisdiction includes roughly: 25,000 mi of navigable waterways, 3,000,000 mi of river, 124,000 mi of tidal shoreline, 4,700,000 mi of lakes shoreline, 30,000 mi of canal shoreline, and approximately 148,000,000 acres of wetlands. Together with its older Section 10 authorities for issuing permits in navigable waters, the Corps issues around 18,000 permits/year.

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[1] The views presented are those of the writer and do not necessarily reflect those of the U.S. Army Corps of Engineers; See also Delli Priscoli, Jerome. "Conflict Resolution in Water Resources: Two 404 General Permits." In *Journal of Water Resources Planning and Management*. Vol. 114, No. 1, January 1988, pp. 66-77.

[2] The information in this paper concerning the Louisiana/Mississippi GP in the Vicksburg district is based on interviews with the Corps facilitators, Anna Schoonover and Peggy Holliday, and with the consultant to the project Dr. Merle Lefkoff.

Even before the Reagan administration, the Federal government has been seeking ways to streamline the permitting process and to reduce costs for the applicant while fulfilling its Federal responsibilities for environmental protection. The Sanibel and Louisiana/Mississippi GPs demonstrate how the techniques of collaborative problem solving and mediation can help the Corps, and other Federal agencies, meet these often conflicting objectives.

In both cases the Corps adopted what is still a revolutionary approach to general permitting. Rather than writing "in-house," the respective Corps districts, Jacksonville and Vicksburg, suggested that those parties who would probably conflict over individual permit applications, come together to write the technical specifications for a general permit. This was a revolutionary idea five years ago with the Sanibel GP and remains so today with the Louisiana/Mississippi GP.

The Corps said to environmentalists, citizens, contractors, industrialists, developers, and representatives of other Federal, State, and local agencies, "If you could agree to the specifications of a permit within the broad legal constraints of the 404 law, the Corps would simply confirm that agreement and call the agreement a general permit." The price to achieve such agreement, which would obviously have teeth, was consensus among those parties who are normally in conflict over individual permit applications. In this way, the Corps moved beyond the role of technical evaluator of proposals to that of facilitator of consensus among the locally affected and interested parties. This is the innovative idea.

In both cases the Corps used its authority as a carrot. In both cases, the general permit was issue. Jacksonville District's Sanibel permit has held and operated with no challenges for five years, the legal life of such a permit. The Vicksburg district's permit has just been issued. Each case used neutral facilitators and four workshops over 2-3 months.

How did such competing interests get together? How could the Corps be perceived as neutral? What are the similarities and differences? What do these cases say about the emerging theories of negotiations?

THE CASES: PARTIES, ISSUES, INTERESTS POSITIONS AND BACKGROUND

Jacksonville District, Corps of Engineers, Sanibel Island General Permit

In 1980, Sanibel Island had a new city government. This government had emerged after two decades of debating home rule for the island. Because Sanibel is a unique environment, much of the debate revolved around protecting natural resources while maintaining a reasonable level of development. Consequently, Sanibel Island had developed a comprehensive land use plan (CLUP) which gained world-wide recognition as a pioneering attempt to relate growth to ecological limits. However, many properties that were purchased for sizable developments became zoned for minimal use. Some owners started taking grievances to court over their downzoning; others complained about the time required for approval. Overall, the newness of the city government, the unique quality of Sanibel's environment, and the CLUP created permit

processing delays. By relying on individual permitting, the Corps compounded these delay problems.

When the Corps suggested a general permit, the mayor and other officials expressed interest because anything that speeded the permitting process might also reduce criticism of the city's CLUP. The city government however was dominated by environmentalists who generally were wary of the Corps and the possibility of a general permit. Initially, they viewed the workshop approach to general permits as a way to subvert their opportunities to review each permit. The position of the city despite early suspicion was to cooperate and be positive. Without a GP the Corps expected roughly 10-12 individual permit applications each year.

Developers were interested in an acceptable and more easily understood permitting process. They felt that a general permit would speed up permitting which had been troubled by delays. Special conditions for fill activities that everyone agreed upon and understood would work to the developer's advantage. But, they were also concerned that environmental interests on the island would dominate the workshops, and were skeptical about a process which changed the behind the scenes "business as usual." While officially supporting the workshops and a possible general permit, the developers limited their participation in the beginning.

Environmentalists, including the representatives of environmental groups as well as individual island residents unaffiliated with organizations, historically mistrusted the Corps. Much of the mistrust was based on negative perceptions of Corps flood control, dams, and other structures. Their interests would not be served by a permitting process which speeded up permitting to the detriment of the natural environment. However, the absence of a detailed set of criteria for granting permits was also working against their interests. Many developers and homeowners were building structures without obtaining necessary permits. So the environmentalists and developers shared an interest in a permitting process which spelled out special conditions for constriction activities. They also shared an interest with the city in assuring that special conditions did not subvert the CLUP requirements. At the beginning, environmentalists were split; some were adamantly opposed to a general permit on principal and others were willing to try developing special conditions.

Vicksburg District, Corps of Engineers, Hydrocarbon Drilling Permit

The proposed GP in the Vicksburg District was for hydrocarbon exploration drilling across Mississippi and Louisiana. Where Sanibel covered a small geographic area and a broad range of construction activities, the Vicksburg GP covered a broad geographic area and a specific activity. Across Mississippi and Louisiana, hydrocarbon drilling was bearing return rates as high as 98 percent. A little-used general permit, fraught with bad feeling among the environmental community, industry, and the Corps, had been in place for five years. It was not working well; in fact, it was a negative symbol. Some of the hydrocarbon exploration drilling covered by the GP was in the Washatu Fish and Wildlife Preserve which recently experienced oil spills and bird

habitat destruction. Interestingly, Washatu was built from Corps land purchases resulting from previous fish and wildlife mitigation.

Environmentalists were ready to fight on every issue. The Corps of Engineers knew there would be problems and difficulties in issuing another general permit. The Sierra Club had already filed lawsuits.

Since the Corps could expect about 200 applications a year, the case-by-case review could require enormous staff time, produce delay costs to industry and encourage frustrating litigation. Nobody liked the Corps; some thought it was too weak, some thought it was too strong, and some thought the Corps did not know what it was doing.

Vicksburg district wanted a workable general permit. The oil and gas industry felt that a GP would save time and money. The environmental community, which included local environmental interests along with national representatives of the Audubon Society and the Sierra Club, were opposed to a general permit. Their interests were basically to protect the environment and to save as many of the fish and wildlife lands as possible.

For the previous five years, most state agencies from Louisiana and Mississippi had maintained good operating relations with industry. One interested state agency, the Arkansas Water Quality Board, declined to participate. Since permit actions in areas covered by that agency amounted to less than one percent of total actions, loss of their participation was not fatal. The water quality board, oil and gas boards, and various fish and wildlife organizations from the states of Mississippi and Louisiana participated. Initially, they showed little interest and no position other than curiosity. Three representatives from local and regional fish and wildlife organizations participated. Basically, their interest was to use Section 404 to control industry in the Upper Washatu Fish and Wildlife Preserve and across the rest of the states of Mississippi and Louisiana. While the states generally maintained better relations with industry than the Federal government, there was no clear consensus on the threat to wetlands among State agencies. As the workshop process evolved the State representatives were key players in forging compromises.

PROCESSES AND OUTCOMES

Sanibel

A team of four consultants assisted Jacksonville in the design, implementation, and evaluation of the Sanibel process. In the month before the process began, consultants helped the Jacksonville staff review all Corps material and permit history on Sanibel Island. For example, there had been exchanges on the possibility of a general permit between the Corps and city hall, and preliminary language for special conditions had already been discussed. However, the district engineer felt it was important to widen public input. The consultants also carefully studied the Comprehensive Land Use Program (CLUP), along with the Corps jurisdictional responsibilities. An independent evaluator was chosen and was present at all planning sessions and throughout the process.

The most important preworkshop element was training the Corps facilitators. The Jacksonville districted selected eight staff members to serve as facilitators. In a half day before the workshops began, the district engineer had given them two missions: to gain new skills from "on the job training" in a real situation, and to help the citizens reach consensus on necessary criteria for the general permit. Their job was to keep the workshop process moving without imposing their own values, judgments, or official expertise—a difficult task. The consultants' job was to prepare the facilitators for the group process and to ally their fears and insecurities by equipping them with basic group process and communication tools.

The first workshop drew roughly 50 people and lasted a day. At first some citizens announced that they were suspicious of the proceedings and even more suspicious of what a general permit would do to Sanibel's ecology. After the district engineer explained that everybody would be randomly assigned to one of six groups, the groups went off with their facilitators to "scope all the possible issues for general permit on the island." When the groups returned at around 3:00 p.m., the results were remarkable; reporters selected by the groups themselves delivered summaries that demonstrated major agreement on the basic problems to be solved. The experience of the small groups in discerning agreement moved many participants to see the process as a success and to allay their suspicions of the Corps.

At the second workshop, the Corps asked individuals to focus on their special concerns. Therefore, participants were not randomly assigned to groups but rather chose areas of expertise. The second workshop refined the large range of issues and began the detailed work of writing language for special conditions.

The third workshop was crucial because the special conditions had to be written at this time, so that the broader community could respond to the special conditions language at a final workshop. Therefore, the Corps returned to a format where each of the small groups addressed all of the issues and language under consideration. Consensus was reached by the end of the day. It was clear that participants had been discussing the issues with their constituencies between the workshops; it was also clear that joint ownership of the GP was emerging and that finalizing the language would be straightforward.

The final workshop was primarily an explanation of the permit to all interested parties. Because some citizens might not have previously participated, the Corps asked those who had emerged as leaders in the workshops to serve on a panel to answer questions from the floor. Since the citizens themselves had developed these special conditions, they were the ones to explain their work before their friends. In this way the Corps was not in a defensive posture and also demonstrated the joint ownership of the permit.

The give and take among the panelists and audience was easy and informal. The district engineer was there to answer the difficult procedural questions which the citizens could not address themselves. This meeting produced some minor changes in the language of the special conditions and much mutual and self congratulations.

Using the group's agreement, a public notice, or what is called a "green sheet," was issued. Only a few comments and no major protests were received. There was not a demand for a public hearing. After the language was changed slightly for a final permit, the GP was issued and held for five years.

Vicksburg

Like Sanibel, the recent Vicksburg permit used four meetings and the facilitation was done by Corps personnel. Also, like Sanibel, a consultant was hired to advise Corps personnel and to assist them at difficult moments during the process. Roughly 30 people participated in each of the workshops. These participants broke into two working groups which were equally balanced among the various interests. Five oil and gas industry representatives participated, one of whom was hired by the industry to professionally represent their interests. There were five representatives of environmental organizations along with various representatives of the state and Federal agencies.

Like Sanibel, the period prior to the first workshop was critical. Lists of interested and influential citizens and officials were developed from past permit actions and from the general familiarity of the Corps personnel with the industry. Because suspicion and bad feelings were rampant, Corps administrators hired a consultant after they contacted the interested parties and before the first meeting. Based on their previous Corps public involvement training, these administrators felt that they and their supervisors needed refresher training on how to facilitate groups. The consultant was brought into the Corps district for one week to advise, help design, and reemphasize various aspects of group process techniques. The Corps wisely demanded that agency, industry, and environmental representatives possess the authority to negotiate for their agency or organization.

The first workshop, where much posturing and positioning occurred, was held at a central location. At that time the main group was divided into two groups to scope the issues and then narrow and refine them. The consultant was present at the first meeting and explained the consensus building process and the objectives of joint ownership. The consultant also explained how and where such processes had been successful in the past. At this meeting and others, Corps personnel were present to answer technically oriented questions and to assure that special conditions would remain within the broad legal authority of the Corps. Two Corps personnel facilitated both groups.

A second one-day workshop was held roughly four weeks after the first workshop. But, like Sanibel, it was the third workshop that proved crucial. At that time, a clear feeling of joint ownership over the scoping and content of special conditions emerged. However, a split between industry representatives and environmentalists also emerged, and one industry representative walked out. The Corps representatives thought they would lose the whole activity at this point. Two ad-hoc committees, one focusing on mitigation and one on consolidation of the wording of the special provisions were formed from both groups.

At this point another important event occurred. The Corps facilitators switched into mediator roles. Because they had been acting as neutral facilitators, the group now accepted them as neutral. Between the third and fourth meeting, two Corps facilitators shuttled among industry and environmental representatives to refine the mitigation issues.

Now the facilitators began to look like mediators because they were caucusing, developing alternative proposals, and carrying them individually to the separate interests. Two agreements emerged from this process. First, participants agreed to an eligibility clause which said that applicants had to be "in compliance with other permits before operating under this general permit." Second the word mitigation was dropped but a conservation initiative which involved $200 contribution by a permit applicant was added. This contribution would be earmarked for the purchase and preservation of wetlands in the state where drilling would occur.

At the fourth meeting all 30 participants remained as one group. The wording of the special provisions, the eligibility clause, and the conservation initiative were presented. After much discussion participants agreed to each. After mutual self-congratulations the special conditions were published in the "green sheet." Like Sanibel, only a few comments and no demands for public hearings were received. The general permit has recently begun.

COMPARISONS

What motivated agreement? In both cases, fostering joint ownership in the process assured that the permit would be implemented. In both cases, the Corps of Engineers helped the parties to understand that they all had something to gain from the general permit and that they had something to lose without a general permit. However, the bottom line was really time and money.

Environmental groups at Sanibel Island felt that a general permit, while it allowed more fill than they ideally wanted, also stabilized the situation. Therefore their resources could be freed to fight other more salient issues.

In Vicksburg, environmentalists felt the general permit could guarantee that their conditions would be met. Also environmentalists were concerned about expending their limited resources and time fighting many of the 200 possible individual permits.

Industry and development interests also responded similarly in the Vicksburg and Jacksonville cases. For Sanibel, the question was time and money. While developers might not be able to build as much as they wanted, getting permits within a few weeks and knowing which ones would be feasible over a five-year period was better than the uncertainty of a case-by-case approach. They could plan and avoid unnecessary delay costs. For Mississippi and Louisiana, the oil and gas industry also liked the idea of drilling within two weeks of an application. Also, if they did not want to comply, they could go to an individual permit.

State and Federal agencies in the Vicksburg district case were also concerned over the time and resources their people could spend on individual permit applications. The consensus on special conditions meant that fewer people would be tied up in review and evaluation roles on individual permits.

So the motivations were similar, and they should surprise few. The important points are that the facilitation process encouraged the participants to go beyond their positions and to discover shared interests, and on the basis of shared interests, to negotiate the issues which became the specifications of the general permit. In both cases, this occurred because the Corps was able to separate process and content, to be accepted as a neutral party. One major difference is worth mentioning again. In Vicksburg the Corps moved beyond simply facilitating a discussion into actively mediating the content agreement. This is something new for the Corps and the dispute resolution literature.

In both cases, better working relationships among industry, the environmental community, and state agencies emerged. Nobody really likes the regulator process. Those who carry out the regulatory process often feel like the messenger who is killed because he bears the bad news.

The processes adopted in these cases by the Corps brought all parties of concern into the shared ownership and responsibility for the respective GPs. In Sanibel, the Corps' independent evaluation actually measured positive attitude change toward the Corps. Interestingly enough, in both cases Corps professionals felt that the general permits were stronger and technically more complete than anything the Corps would have been able to generate internally. Not only did the areas have more implementable permits, they also had better technical permits.

In both cases, many participants remarked that this was the first time they actually sat down and worked together. In Vicksburg, it was the first time that many had met. In both cases, greater mutual respect and understanding of the permitting process resulted. Both cases produced greater empathy, humanized the situations, reduced the stereotypes, and encouraged individuals to talk with each other rather than at each other.

Finally, both cases show the importance of training. Facilitation does not just occur. Personnel need to understand its principles and learn techniques. Training for Corps personnel was critical in both cases before the GP workshops began.

LESSONS LEARNED: HOW DO THESE EXPERIENCES FIT INTO EMERGING THEORY FROM THE FIELD OF NEGOTIATIONS?

What do the lessons of these cases say about negotiation? Let's look at 13 hypotheses from the emerging negotiation and alternative dispute resolution (ADR) field (Susskind 1985).

1. **People bargain as long as they believe negotiations will produce an outcome as good or better than outcomes that would result from other methods.**

   In the literature this is called BATNA: the best alternative to a negotiated agreement (Fisher 1981). This hypothesis is clearly supported by both cases. In Jacksonville, the district engineer might have tried issuing a general permit which would probably have been unsuccessful. Without the general permit the Corps would simply react to individual permit applications. In Vicksburg, the district engineer would probably have issued a general permit. This would have intensified frustration and discontent over the permit process. In both cases the Corps might have been pulled into what we affectionately call the "Colonel Krammit methods," i.e., forcing the permits. Without the GPs posturing among fish and wildlife, environmental groups, industry, developers, and the Corps would not only continue but be encouraged. Finally, many individual permits would become lawsuits and end up in litigation. In both cases, the Corps helped the interested parties understand that these alternatives, which were known at some level, would not be as good as a negotiated agreement alternative. Because the Corps acted neutrally, the parties were more easily able to see the possibility of a negotiated agreement. BATNA was important in these cases.

2. **Issues must be readily apparent and parties must be ready to address them.**

   This assertion, frequently found throughout the international negotiation literature, is often called "ripeness." These cases are inconclusive on ripeness. It is hard to argue that the Sanibel GP was ripe. Just the opposite, the idea of a general permit was novel. On the other hand, there was a history of general permits, bad feelings, and a fairly clear understanding of the issues and conflicts surrounding the Vicksburg GP. Since interested parties knew that the existing GP was terminating and a new GP likely, the Vicksburg case could be seen as ripe.

3. **Success depends on having a large enough range of issues or options to either trade-off or to create new options (Susskind 1985; Raifa 1982).**

   Both cases support this assertion. However, facilitation processes do not simply identify zero-sum trade-offs. They also encourage parties to create win-win possibilities beyond win-lose. They help parties to create options, which no one party thought of before the process began. This happened in both cases. The facilitation process enlarged the perspective of the parties so that entirely new positions were created.

4. **Agreement is unlikely if parties must compromise fundamental values. Who could argue with this assertion?**

   Both these demonstrate that while parties characterize their positions in fundamentally and unchanging value terms, their behaviors within different situations can be negotiated. It is not that the parties are dishonest or that they do not hold the values they espouse. Rather, parties discover that their interests can be substituted in different circumstances. In both the

Sanibel and Vicksburg cases, the parties discovered that their basic values of environmental quality and development could be maintained with integrity. They discovered that they could define shared interests and negotiate agreements without giving up their basic values.

5. **If power is unequal the parties will not negotiate. Parties must perceive interdependence and be constrained from acting unilaterally.**

   Much research is needed to flush out this assertion because power has many dimensions, e.g., knowledge, influence, and authority. Both Sanibel and Vicksburg demonstrate that parties do not always accurately assess their own power or that of those with whom they will be negotiating. The facilitated process helps parties mutually educate each other to their relative power. In these cases environmental groups had power of delay while industry had power of money and resources. However, agencies and environmental groups also had a certain amount of influence based on knowledge and a certain amount of authority based on public perception of their protecting public health and quality of life. These are only a few dimensions of power that become apparent in open forum discussions.

   In some cases facilitation might equalize unequal power or empower those less powerful. Facilitation also helps the parties to understand that power is shared. After all, the fact that parties are negotiating or working collaboratively affirms that power is shared. One of the most exciting aspects of facilitation is that parties often come to understand that consensus or agreement equals power. They come to see that if people normally in adversarial positions can agree, that is power!

6. **There is a rough practical limit in the numbers of participants, of around 15 parties (Creighton, et al. 1983).**

   Much research needs to be done in this area. Neither the Sanibel nor Vicksburg case support this limit. The idea of 15 parties, which comes from regulatory negotiations literature, is really built on the optimal size of small working groups. However, as we have found with public involvement, large groups can be broken into small groups which can work effectively and then report back to large groups. In both Sanibel and Vicksburg small groups were used. As long as participants see that breaking into small groups is for going into detail and not for dividing and conquering, participants will accept the large to small to large group movements. Other experiences have shown such processes to work with over 100 people. The absolute limit is not supported and needs far more research.

7. **The pressure for deadline must be present.**

   This also is not supported in both Sanibel and Vicksburg. We all know that people tend to agree as the meeting time wanes. However neither Sanibel nor Vicksburg had a necessary time limit. While each case used four workshops over 1-2 months, these were not necessary time limits. The necessity of time comes after the issuance of a "green sheet" or upon a

demand for a public hearing. Of course public hearings were not demanded in either case because issues were negotiated before the public notice. Actually, the need for or even the possibility of a negotiated agreement was not known until the Corps raised the prospect.

8. **Some means of implementing the final agreement must be available and acceptable to the parties.**

   Mediation and negotiation literature repeatedly emphasizes this assertion. Both the Vicksburg and Sanibel cases reaffirm it. In both cases there was discussion and agreement on the procedures for monitoring and enforcing the general permit. Understanding that the special conditions and their enforcement are themselves tools by which the interests will be met was a crucial motivator in both cases. The actual content of these negotiations, the special condition for GPs, really became the tools of implementation.

9. **Successful negotiation depends on mutual education (Lincoln 1986; Moore 1986; US Army Corps of Engineers 1986).**

   Both cases support this. Sanibel documented changes from negative to positive perceptions of the Corps as well as of the process. While not quantitatively documented, the same occurred in the Vicksburg case. In both cases, fear was reduced, and the parties came to see each other in a different light. This is not to say that participants came to agree with each other's positions. However, they did come to better understand their own interests, the relationship of issues to each other's interests, and their relative power. Having said this we must also remember that perfect information could just as easily be a perfect description of conflict. While better understanding of each other's interests and positions in both these cases led to inventing new options and to joint ownership of solutions and to mutual gain, this is not always true. However, mutual education is one of the keys to facilitating a collaborative problem-solving process.

10. **Durable agreements depend on procedural, psychological, and substantive satisfaction (Lincoln 1986).**

    Procedural, substantive, and psychological satisfaction are held out as the keys to durable settlements. They were clearly achieved in these cases. As already noted, psychologically participants saw each other in a different light and changed their views. One test of procedural satisfaction is: "Would you use the process again?" In both Sanibel and Vicksburg, participants recommended that the processes be used again. Substantive satisfaction was achieved in that participants felt their values were preserved while their interests of time and money were also satisfied.

11. Process can make a difference (Priscoli, 1983).

Both cases support this assertion. It is the point of this paper. Process made a difference in these cases because it separated people and problems, it separated interests and positions, and it helped parties to focus on the interests behind positions. Parties were able to bargain not over the positions, but over interests and understand possibilities of mutual gain. None of this would have occurred without a facilitation process.

12. Facilitators must be perceived as neutral parties to conflict.

Perhaps this is truism, however it is affirmed in both cases. In the Vicksburg case, the Corps personnel, charged with permit responsibilities in the conflict situation, not only were neutral facilitators, but also became mediators. Since the Corps was legally mandated to play a role that looked neutral and acted neutrally, they were accepted as neutral, even though they play non-neutral roles in other arenas often involving the same parties. These cases indicate that the imperatives of role can, in certain circumstances, overcome historical perceptions.

13. Conflict can be positive (Coser 1956).

Both Vicksburg and Sanibel bear out Coser's view that resolving conflict can produce positive benefits. Conflict is a relationship, something we often forget. It can be relationship building as well as relationship destroying. In both these cases the working environment was improved.

CONCLUSION

I have briefly examined two Section 404 general permitting cases and argued that facilitation, mediation, and collaborative problem-solving techniques can make a difference. Expensive adversarial battles can be avoided. Durable agreements can be reached among seemingly irreconcilable adversaries. Productive relationships can be built out of conflict. Mutual interests can be discovered among environmental, development, industrial, Federal, private, and public interests. The cases outlined offer an approach to permitting that could be adopted by the Federal government in other areas. In many instances, the Federal government can decide to be a facilitator of agreement as opposed to the technical evaluator of, or advocate for, positions. Adopting such approaches can enhance partnership among state, local, and Federal organizations.

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Chapter 31

USE OF A FACILITATED TASK FORCE TO DEVELOP A GENERAL PERMIT IN COLORADO[1]

by
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ABSTRACT

In this case, a facilitated task force was used to try to develop a consensus on the terms of a 404 General Permit covering stream modifications in El Paso and Teller Counties, Colorado. Participants in the task force included Federal, state, county and city agencies; developers; and citizen representatives including environmentalists. The author served as facilitator for the task force.

Although the task force met periodically for nearly a year and drafted permit language, the draft language was opposed by the City of Colorado Springs and developers. Nevertheless, the U.S. Army Corps of Engineers (USACE) issued a General Permit using the language that had been developed. No lawsuits were filed against the permit. Subsequently, the City of Colorado Springs has proposed to revise its basin-wide planning process, using citizen input. Several members of the original task force are now serving as part of the City's Citizen Advisory Committee.

BACKGROUND

In recent years there has been dramatic regional growth and development throughout the Front Range of Colorado, including the City of Colorado Springs. Colorado Springs, like many communities in the Pikes Peak area, has been the scene of numerous disputes between development interests and groups promoting environmental values.

In the years immediately preceding the start of the Alternative Dispute Resolution (ADR) process described in this article, the city saw numerous environmental conflicts over drainage policies. Large developments—in particular, "Corporate Center," "Park Vistas," and the "Stetson Hills" project—involved major stream modifications, leading to numerous engineering studies and litigation. Many of the conflicts centered around the competing approaches of the City's Public Works Department and that of planners from El Paso and Teller Counties. Environmental groups also demanded recognition as stakeholders in these conflicts.

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[1] See also Lefkoff, Merle S. *Use of a Facilitated Task Force to Develop a General Permit in Colorado.* IWR Case Study 95-ADR-CS-13. Alexandria, VA: IWR, USACE, 1995.

One of the most controversial issues was the City's practice of "hard lining" streams (essentially, paving the stream beds) to control erosion resulting from the impact of developments. Channelization (containing the flow within concrete walls) was also a normal practice. These approaches had major advantages for developers, who could build right up to the edge of the concrete channels rather than leave undeveloped land in a floodplain. However, many environmental groups were upset by the aesthetics of "concrete streams," and argued for more natural regimes to deal with flooding and stream control.

In an effort to address these issues, the City developed a new drainage criteria manual. Citizen interest groups were not included in negotiations about the manual's language, so when it was presented to the City Council for approval, a number of citizens criticized it as being an engineering, rather than a policy, document. It was clear that the real conflicts were not resolved by the publication of the document. The City was also involved in controversies with Federal agencies with responsibilities for regulating streambeds and wetlands, because the City's criteria differed from Federal guidelines. In fact, during the period of this case study, the U.S. Environmental Protection Agency (EPA) was in litigation against the City of Colorado Springs.

The Federal agencies were also in growing conflict with one another. The Corps of Engineers had granted a number of 404 permits for hard lining streams. EPA, concerned with the loss of wetlands and diminished aesthetic values, threatened to shut down the permitting process. EPA argued that the Corps was not fulfilling its responsibility to consider the cumulative impacts of the permits it had granted.

In response to these concerns, the Corps initiated a General Permit Process. When Congress gave the Corps the mission of regulating the nation's wetlands, it gave the Corps the option of issuing permits that cover a single project in a specific wetland, or issuing General Permits. As a general rule, a General Permit defines permit criteria for some particular type of activity within an entire geographic area. Any action that conforms with the criteria in the General Permit can be permitted quickly, without public meetings and with few administrative requirements. However, the Corps must consult with other agencies and hold public meetings as part of the process of issuing the General Permit itself.

This case study describes the process used by the Corps and its outcome.

It should be noted that while the issues of drainage policies, erosion control, stream modification and flooding were the subject of immediate discussion, these issues also symbolized a much broader debate about environmental quality in the Pikes Peak area. As a result, the General Permit also became the battleground for various interests vying for control of policy regarding future development in the area.

CHRONOLOGY OF THE PROCESS

Early Events

The Corps' Albuquerque District, which has responsibility for parts of Colorado, initiated development of a General Permit in 1986. In November 1986, the Corps' local office, an area office in Pueblo, Colorado, held several public meetings which produced a long list of concerns. A task force was then established by the Corps to consider these concerns. The Pueblo office determined the membership of the task force based on its knowledge of the key stakeholders. Members of the task force included the Corps, EPA, environmentalists (including Federal and state wildlife representatives and citizen groups), developers, local and county planners and engineers, and the City of Colorado Springs Public Works Department. The task force's assignment was to negotiate conditions for a regional permit for stream modification, based on consideration of the citizen concerns listed at the public meetings.

The first two task force meetings were difficult and conflicts surfaced quickly. The task force members had little experience working collaboratively; most prior interactions had been confrontational. The meetings degenerated to the point that a third meeting of the task force seemed unlikely.

In analyzing what to do next, it became apparent to the Corps that one of the problems was that the Corps' regulatory staff, who were facilitating the meetings, were caught in the bind of trying to be neutral facilitators while at the same time representing the Corps' interests and advocating for a General Permit. This was proving to be untenable.

A professional, neutral facilitator was hired at that point to attempt to get the task force on track. Selection was based on a recommendation from the Institute for Water Resources, a division of the Corps.

During the first meeting among the facilitator and the District Engineer and his staff, the key issue was to clarify the Corps' role in the process. Based on the first two unproductive meetings, the District Engineer had become frustrated and had drawn up a list of Corps' "demands." At first he insisted that the next meeting of the task force start with that list. After discussion with the facilitator, an agreement was reached that the Corps' role as convenor of the process was to participate and listen, not to make demands. The Corps agreed to abandon the list of demands and to accept the consensus of the task force on the permit conditions (as long as they did not violate Federal law).

Interests And Positions Of Key Actors

As the facilitated process began, there were significant differences in the positions and interests of the participants. The description on the next page of the interests and positions of the parties is the facilitator's own understanding as a result of the process. No additional research or

interviews were conducted to verify whether the parties accept this interpretation of their interests, or believed themselves to have interests that are not shown.

- **U.S. Army Corps of Engineers**

  The Corps was neutral in terms of the permit conditions as long as the conditions conformed with Federal law. However, the Corps took a position in favor of issuing a General Permit. The Corps' interests in having a General Permit in place were to streamline the permit process and to ease administration. The Corps also had several interests related to its relationship with other Federal agencies. The Corps hoped to forestall EPA's threat to halt the permit process over the question of cumulative impact. It also hoped to avoid having either EPA or the U.S. Fish & Wildlife Service insist that the permit be elevated for discussion by higher level managers in those organizations. The Corps also genuinely desired the public's assistance in identifying the issues and getting some sense of what constituted a balanced public interest in this situation.

- **Environmental Protection Agency (EPA)**

  Initially EPA was somewhat mistrustful of the Corps' motives in proposing a General Permit, and entered the process reluctant to support the concept of a regional permit. But as the dialogue progressed and trust in the process itself began to take hold, the EPA played an active role in the negotiations, advocating strict environmental controls. Water quality and water supply issues and issues of biological character and change were paramount for EPA. EPA strongly opposed the common, past practice of using refuse, old tires, construction debris, and so on, as protection against erosion. As expected, EPA was also greatly concerned about the question of cumulative impact. At the time of the process, EPA was also in litigation against the City of Colorado Springs and was interested in "sending a message" to the City that it needed to be more sensitive to environmental concerns.

Environmentalists (Including Federal and State Wildlife Agencies and Citizen Groups)

The three "citizen representatives" selected by the Corps to be on the task force were strong advocates for environmental quality. The representatives of the Colorado Division of Wildlife and the U.S. Fish & Wildlife Service also joined the "environmental side" at different points in the process.

The environmental representatives strongly distrusted local jurisdiction over stream modifications and drainage. One of their positions was that Federal control and oversight was needed over any local administration. They also distrusted local decision making processes due to the perceived absence of citizen participation in land use decisions. Environmentalists strongly favored more natural stream regimes, in order to preserve habitat and mitigate the effects of development.

Environmentalists supported the General Permit concept only for minor projects, and wanted some mechanism by which major projects could be subjected to additional review.

Beyond specific proposals for permit language, though, the underlying interest of the environmentalists was a desire—as stated by one of the environmentalists in response to the facilitator's request for written goals—to "create an attitude change that indicates that aesthetics and environmental preservation are important." This often translated into a desire to "send a message" to governmental entities that more attention should be paid to environmental concerns. This message was strong enough that it was captured in the Permit Evaluation and Decision Document that stated:

> "Many of the task force members were intensely dissatisfied with the way the COE and various local governments were handling drainage issues. About half ... of the task force members felt that sending a message to the entities who governed drainages was a valid purpose of the regional permit and was still needed."

Developers

The developers had one major concern, which was to reconcile the conflict between the local jurisdictions' philosophy, policies, and criteria with the goals, policies, and regulations of state and Federal environmental agencies who have jurisdiction over the 404 permitting process. The fundamental interest of the business and development community was a timely, predictable, and less-expensive permit process. They were getting trapped by the differing demands of the agencies, and the conflicts were causing them intolerable delays. Another important issue for the developers was that the permits allow large as well as small projects. Without this assurance, there was concern that a General Permit would not be useful.

County Planners

County planners (though not monolithic in their thinking) wanted to meet local concerns for more aesthetic stream channels, while providing adequate flood control and erosion control without increased engineering costs. Their issues were quality of life, safety, and keeping costs down. They were very concerned that the permit would be too stringent, fearing this might slow down development or cost local jurisdictions more money. Their most fundamental interest appeared to lie in finding a way to respond to a growing environmental constituency in suburban areas under heavy pressure from growth and development.

City of Colorado Springs Public Works Department

As the entity that authorized many of the past practices, the City was not willing to acknowledge that these past practices were detrimental. As a result, the City of Colorado Springs Public Works Department quickly positioned itself as the defender of past and present policies.

The Public Works Department's most important interest was retaining its historic control over drainage decisions. To quote from a letter to the Corps from the City Engineer:

> "At best, the proposed regional permit is an exercise in paperwork and construction by committee which accomplishes nothing. At worst, it represents an unsuccessful and highly objectionable attempt to intrude on the domain of local land use authority" (Sept. 9, 1987).

The Facilitated Process

The facilitator recommended the use of a "one-text process," an iterative procedure that allows a group to build consensus around a written document, beginning with a "straw man" draft prepared by the facilitator. This approach was useful in surfacing issues and underlying interests, and was comfortable for the technical people on the task force, since it allowed them to deal with the precise wording and detail they would need for permitting. This approach required considerable staff time, as the task of revising the text each time was quite arduous. However, the Corps was willing to provide the staff support to make the process work.

Meetings of the task force were held once a month. The time between meetings allowed the Corps to revise the text based on the discussion in each meeting and distribute it to task force members before the next meeting. More frequent meetings would probably have lost some task force members, who were donating their time. No time constraints were placed on the process until about the eighth meeting, when the process appeared to be nearing completion. While "public recording" (newsprint notes hung around the room for group reference) was used as a facilitation tool during the meetings, minutes based on the tear sheets were augmented by notes taken by a group secretary.

Based on discussions with the Corps, the facilitator concluded that one of the problems at the two meetings before the facilitator was involved was that many of the task force members had little experience working collaboratively in groups. So, at her first meeting with the task force, the facilitator conducted a brief training course on the difference between positional and interest-based bargaining. Participants were then asked to help the facilitator "catch-up" with the issues by brainstorming a list of objectives for the permit.

Each task force member was also asked to prepare a list of individual goals for the process and to submit it before the next meeting along with their first mark-up of the "straw man" permit language. At the next meeting, these goals were shared and discussed. Most task force members defined their goals in terms of what they hoped to accomplish through the permit, rather than goals for the process itself. But when the facilitator also shared her goals for the process, a considerable discussion of process issues ensued.

The process issue of greatest concern was the meaning of the word "consensus." Most feared that it meant "unanimity," and they worried whether that was achievable. After considerable

discussion, the group agreed that the term "consensus" did not mean "unanimity;" rather, it meant that there was enough agreement that no major interest would oppose the draft language.

Through the discussion of goals for the process in this and successive meetings, the task force was able to agree to the following list of shared goals for the permit:

- To streamline the permitting process for non-controversial projects;
- To protect or enhance existing environmental values while providing for health, safety, and general welfare;
- To encourage cross-disciplinary, basin-wide planning and management of basins;
- To encourage permit consideration at an early stage of project planning;
- To encourage local participation and administration of the regional permit; and
- To have ongoing review and enforcement of authorized activities and the permitting process.

Throughout these early meetings, and despite the successes described above, the discussion often became heated. The facilitator frequently intervened by asking participants to restate what they had just heard before making their own comments. This helped improve listening, as people realized they might be asked to restate the position of someone with whom they disagreed before they could make their own argument.

As the monthly meetings continued, the facilitator assigned specific tasks and "homework." Some task force members were asked to work together on items which needed new wording, to be brought to the next meeting. The work was reported both orally to the full task force and in written form as "working papers" for everyone to have in hand during the task force meetings.

When the majority of the task force proceeded to draft a permit containing strict environmental protections, in direct conflict with the City's drainage ordinances, the City drafted an alternate permit and presented it to the Corps on its own, stating: "The City Engineer's version addresses the construction techniques in a manner which can be accepted in today's drainageway management procedures, while at the same time addressing the protection of [the environment]."

Some on the task force suggested to the City that an ultimate solution to the dispute was not a regional permit, but an "updating" of the City of Colorado Springs' basin plans. To be credible, such a revision would include public participation and include the environmental interests in forming a community consensus. The City appeared to adopt this idea, although other parties interpreted this support as an effort to slow down the consensus that was building on the

language of the permit. The City also suggested some "compromises" that, in the end, were not accepted by the remainder of the task force.

Late in the process, the representative from the City of Colorado Springs Public Works Department tried to seat the City Attorney at the table. The facilitator stated that it would violate the non-adversarial, consensus building process that the task force was following to introduce attorneys as advocates for stakeholders, particularly late in the process. While the City's representative was not happy with this judgment, the City Attorney agreed to be seated away from the table and to take questions from the task force members as needed.

After nearly a year of meetings, the task force remained divided. The City of Colorado Springs remained opposed to the draft permit, which was in conflict with its local basin plans. Developers also opposed it because it did not resolve the differences between local and Federal regulations, leaving the developers caught between the agencies and uncertain about the criteria that would apply on their projects.

A public hearing on the permit was requested by the City, at which the City pressed its argument that the General Permit violated local control. Following the hearing, the Corps issued the General Permit using the final language written by the task force. No law suits were filed. Neither the EPA nor the U.S. Fish & Wildlife Service requested that the permit be elevated to higher levels to resolve issues between the agencies.

Since the permit has been in place, the City of Colorado Springs has promised to revise its basin-wide planning process, using citizen input and looking at environmental criteria in a new way. The City has set up a Citizen Advisory Committee, and some members of this committee are people who were on the ADR task force. As stated in a letter from Gary R. Haynes, City of Colorado Springs Engineer to Lt. Col. Kent R. Gonser, of the Corps, February 10, 1988:

> "The City intends to restudy the most urgent master drainage basins in 1988 and incorporate into the basin study environmental issues in an attempt to mitigate the environmental concerns of the 404 requirements....I wish to work with your staff in developing these master drainage basin restudies so that we can eliminate as many of these conflicts as possible. I also am intending to work with the local citizen groups through the planning study revisions so that I can assemble a good measure of input from these groups...."

EVALUATING THE SUCCESS OF THE PROCESS

The immediate outcome of the facilitated task force process was succinctly stated by the Corps in the Permit Evaluation and Decision Document:

> "... (e) The comments received at the 14 December public hearing represent two views: that the proposed regional permit is valuable because of its environmental

> considerations and should be issued, and that the proposed regional permit is unworkable and conflicts with local Municipal Drainage Plans and should not be issued....The...process may have aided the general public in their formulation process of consensus, but it would not determine the final outcome...." (p. 48).

One of the process problems throughout these discussions was that the participants from the Colorado Springs Public Works Department often felt that the other task force members were teaming up against them. In fact, participants representing environmental interests, including some local and state officials, did quickly coalesce as a sub-group within the committee, often forcing the Public Works representatives into a defensive posture. Also, EPA and the Corps, often in disagreement over the issuance of 404 permits, found themselves in more agreement over environmental criteria than they would have supposed, lending support to the environmental side of the table.

On the other hand, the League of Women Voters representative assumed a cautious, mediating role within the group, assisting it in moderating the dialogue as the process progressed. The "business representatives," including the Home Builders Association, surprised their historic environmental foes with both their willingness to listen and their artful presentation of the issues.

While the process did not result in a consensus, opinions about whether it was a success depend on which group was asked.

The success of a process such as this can be measured by some mix of procedural, substantive, or psychological satisfaction. The City of Colorado Public Works Department was not happy with the process using any of these criteria. They did not feel either procedural or substantive—and certainly not psychological—satisfaction. The City representatives disagreed with the language of the permit. They felt under attack throughout much of the process. They felt their attorney was unfairly denied a seat at the table. They thought the group had accepted a "compromise" which would allow the permit to go forward exempting the City of Colorado Springs. (No one else on the task force remembers agreeing to the "compromise" and there is no record of such in the minutes.) As a representative of the City stated in a letter:

> "From my perspective, there were no compromises...only minor movement away from strict environmental issues. No consideration was given to the requirements of the local ordinances" (Feb. 11, 1988).

The developers certainly felt no substantive satisfaction or ownership in a permit that substituted stricter, more expensive environmental criteria for a less restrictive nationwide permit, and which neither applied to larger projects nor streamlined the process. They still felt trapped between different Federal and local requirements.

The citizen representatives were happier with the process, even though it did not result in a consensus. As one of the task force participants stated at the public hearing:

> "We spent a lot of time (on the permit issues), but they are not the true issue. I think the true issue is the purpose statement....It took us months to come up with that purpose statement. I believe the citizens...involved in the task force thought that the purpose statement was a victory in itself because we felt that environmental concerns were not being addressed in the local community, and the purpose statement gave that to us...." (Proceedings, p. 19).

In a letter to EPA, another task force participant stated:

> "COE and its task force developed a...permit which...was not acceptable to the City....However, the task force did strike a bargain concerning all future basin plans including the three that will be re-studied beginning this year. Wildlife habitat, recreational potential and aesthetic considerations will become integral to the basin planning process. The goal is to secure a 404 permit for each of the 22 basins in the urban area and draft a General Permit covering small projects for the balance of the COE study area. In my view, the above agreement is a landmark event of lasting significance...." (Letter from John Covert to Gene Reetz, January 8, 1988).

THE FACILITATOR'S EVALUATION OF THE PROCESS

From the perspective of the facilitator, one of the less desirable characteristics of the process was that the facilitator did not have the opportunity to design the process from the beginning. By the time the facilitator was brought in, the positions had already hardened and the process was already in motion.

As Carpenter and Kennedy have pointed out in their book Managing Public Disputes:

> "In the complexity and uncertainty of public disputes, the more attention given at the beginning to preparing a conflict management program, the better the chances of a successful outcome. The preparation stage involves all the activities that occur prior to bringing parties together for face-to-face discussions."[1]

Even though neutral third party assistance was late, the process that emerged resulted in a powerful and positive outcome for the future of the City and the way it plans for protection of its resources. The issues were ripe for discussion in a new forum; a broad range of detailed technical issues involving engineering criteria was available for tradeoffs; a manageable number of actors were involved in the process; and a consensus emerged that the status quo would have to change in light of new environmental realities. But the exact manner in which that challenge will be met was left for another time and process.

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[1] Susan Carpenter and W.J.D. Kennedy Managing Public Disputes, San Francisco: Jossey-Bass, 1988, p. 68.

Although no agreement on substance was reached, there were a number of important process accomplishments.

- One of the most important outcomes, as expected in all similar processes, was the opportunity for mutual education.

- Power at the table was perhaps more equal than it had ever been in a public dialogue in Colorado Springs. Citizen representatives felt empowered by the process in a new way.

- New alliances and communication networks were formed at several levels. Participants learned much about the way human relationships mature in an atmosphere of candid discourse and mutual respect. Including citizen representatives from the General Permit task force on the City's advisory committee demonstrated the trust that had built up between the City representatives and these individuals.

- Finally, the City's commitment to revise its basin plans, addressing environmental issues and including public involvement, is a sign that, while the City could not agree to the language of the permit, it was educated to a degree on the need for greater environmental sensitivity and inclusion of the public in decision making. The City's new advisory committee is concrete (excuse the pun) evidence that the City has learned much.

Chapter 32

WHAT THE CORPS ADR CASES TELL US

by
James L. Creighton, Ph.D.

As part of the U.S. Army Corps of Engineers (USACE) Alternative Dispute Resolution (ADR) Program, the Corps has been preparing case studies of its uses of ADR. As of this writing, nine cases have been published, and several others are in various stages of development. Since the full case studies are available from the Institute for Water Resources upon request, this article presents a brief synopsis of each of the nine cases, then offers an analysis of lessons learned from the cases. (This analysis is, of course, the author's, and does not represent Corps policy).

SUMMARY OF CASES

Here are brief summaries of the nine case studies prepared to date:

- **TENN TOM CONSTRUCTORS INC.**
  (IWR Case Study 89-ADR-CS-1)

  This case involved settlement of a $55,600,000 claim (including interest) for the amount of $17,250,0000 through the use of a mini-trial. The dispute involved a claim that the soil conditions were different than expected based on the Request for Proposal. From the very beginning the contractor found increased moisture in the soil, which created conditions that added extra travel time to each truckload, as well as added maintenance and repairs. Since the project involved the removal of 95 million cubic yards of earth, this added up to substantially increased costs. The Corps acknowledged that soil conditions were slightly different, but not enough to justify a claim. When negotiations proved unsuccessful, a mini-trial process was proposed and accepted by both parties. A third party neutral was selected who was expert in government contracting law. At the end of the scheduled mini-trial, the senior executives representing the parties felt they needed additional material. This was presented in a short briefing three weeks later. Following this briefing the parties were able to achieve an agreement. However, some Corps technical staff were unhappy with the agreement, believing that the Corps could have won the case in litigation. Someone protested the settlement to the Department of Defense Inspector General who conducted an investigation. The Inspector General concluded that "the use of the mini-trial appears to have been valid and in the best interests of the government." The Inspector General did recommend more careful documentation of the reasons for settlement.

- **GRANITE CONSTRUCTION COMPANY**
(IWR Case Study 89-ADR-CS-2)

This case involved the settlement of a claim of $1,770,000 for the amount of $725,000 using a "hybrid" non-binding arbitration. The "hybrid" results from the fact that the process was designed so that following the recommendations of the arbitrator, senior executives from the parties would then meet to negotiate a final agreement. The claim came about when a sand source that the government expected to acquire was not available, and the contractor, Granite Construction, was forced to seek an alternative source. Sand from the new site was of inferior quality, leading to reduced cement production, delays, and longer hauls. ADR was proposed when negotiations were unsuccessful. Granite Construction preferred a mini-trial, but the Corps was concerned about the management time involved. The parties then agreed to a process in which both sides presented their case to a neutral arbitrator, an individual who was expert in mass concrete construction. Once the arbitrator presented his recommendations, the senior executives would then meet and negotiate a deal. Once the arbitrator's report was presented, both sides met independently with their own counsel and technical staff and concluded it was best to accept the arbitrator's recommendation. The negotiation session was over in thirty minutes, although a side issue about the basis on which interest would be paid was settled subsequently. The decision makers and attorneys were satisfied with the process. One or more technical staff were less satisfied, but admit the outcome was probably as good as would have come out of a decision by the Board of Contract Appeals.

- **OLSON MECHANICAL AND HEAVY RIGGING**
(IWR Case Study 89-ADR-CS-3)

This case involved settlement of a claim of $185,000 (plus interest) for $57,000 (plus interest) using a non-binding arbitration panel. The project involved the redesign and reshaping of the concrete weirs of the east fish ladder of the Dalles Lock and Dam on the Columbia River. Three bulkhead gates at the upstream entrance were to keep the area free of water. But a water-tight seal was not obtained on one of the gates, and the project was plagued by water during contract performance. Freezing winter temperatures added to the problem. Both parties claimed the other was responsible for the faulty seal. A second claim involved an improperly sealed infuser valve. The government admitted responsibility, but the parties differed on the amount of the damages. Initially technical staff were concerned about the use of ADR, but the District Counsel worked with staff to show them the risks of proceeding with litigation. The arbitration panel was able to establish a percentage allocation of responsibility, but recalculated the basis for the contractor's claims. Both the Corps and the contractor agreed to the settlement, but subsequently the contractor filed a new claim for $21,000 in lawyers' fees under the Equal Access to Justice Act, which states that in out-of-court settlements, the claimant is entitled to legal fees. Subsequently this claim was disallowed by the Board of Contract

Appeals. However, the fact that the contractor filed the claim was some indication that he was dissatisfied with the original settlement, even though he agreed to it.

- **BECHTEL NATIONAL INC.**
(IWR Case Study 89-ADR-CS-4)

In this case a mini-trial was used to settle claims totaling $21.2 million (including interest) for the amount of $3.7 million. This case involved construction of the Consolidated Space Operation Center in Colorado Springs, Colorado. The project began with incomplete design plans and ambitious completion dates. At several points in the process the Corps issued unilateral notices of acceleration, with the question of compensation to be settled later. The contractor also complained of numerous requests for additional information from subcontractors. By the end of the contract, 50 percent of the subcontractors had gone bankrupt. Despite this, an independent contractor retained by the Corps to assess the claims concluded that the contractor owed the Corps money, rather than the other way around. However, the Corps acknowledged entitlement on at least two of the claims. One of the unique challenges of setting up a mini-trial format was the role of the subcontractors in the proceedings. The Corps wanted Bechtel, the prime contractor, to negotiate on behalf of the subcontractors, while some of the subcontractors wanted to be full parties to the proceedings. Ultimately, the subcontractors presented their own case in the mini-trial, and were physically on-site during the negotiations so that Bechtel could consult with them as the negotiations proceeded. The third party neutral was an expert on government contracting law. Settlement was reached on all claims, except that one of the subcontractors had gone bankrupt (insufficient information was presented) and another had already reached the Board of Contract Appeals. All parties expressed satisfaction with the outcome.

- **GOODYEAR TIRE AND RUBBER**
(IWR Case Study 89-ADR-CS-5)

This case involved negotiation of the relative financial responsibility for cleanup of a Superfund site near Phoenix, Arizona. During World War II, the Navy and Goodyear (the Navy's contractor) operated adjoining facilities used for repair and servicing of Navy aircraft. Goodyear also operated on its portion of the site from the Korean War until the facility was sold in 1986. In 1981, trichlorethylene (TCE), a human carcinogen, was discovered in the groundwater. In 1983, the Environmental Protection Agency (EPA) added the site to the Superfund National Priorities List. The Corps of Engineers represented the Department of Defense in efforts to settle the case. The primary issue was the relative responsibility of the Department of Defense and Goodyear for the TCE, and therefore, the cost of cleanup. Once again, Corps technical staff had many questions about the use of ADR, but eventually supported its use. Both sides were heavily influenced by the threat of a potential EPA Administrative Ruling that could allocate responsibilities and even assess treble damages. The mini-trial focused solely on the

allocation of costs between the parties. A panel of technical experts representing the parties met simultaneously to hammer out a sidebar agreement on the costs to which this allocation would be applied. The parties were not able to reach agreement during the first day of negotiations, but the next morning each tried out some "trial balloon" figures on the neutral expert (a mediator with general knowledge of Superfund issues), and when the figures were close, were able to reach settlement that morning. The final allocation distributed responsibility one-third to the Department of Defense and two-thrids to Goodyear. All parties felt the outcome of the mini-trial was acceptable.

- **TRUMAN DAM HYDROPOWER DISPUTE**
(IWR Case Study 91-ADR-CS-6)

This case involved used of mediation to settle a decade-long dispute over the operations of the Harry S. Truman Dam hydropower facilities. Truman Dam is immediately upstream of the Lake of the Ozarks, one of the premier recreation areas in the Midwest, and its reservoir is only slightly smaller than Lake of the Ozarks. The project was built to combine both flood control and hydropower generation, with six generating units installed at the dam. The dam was designed as a pump-storage facility, with water released to Lake of the Ozarks during times of peak energy demand, then pumped back up during off-peak times. The dispute involved numerous concerns about protection of fisheries, recreation, downstream boating safety, fluctuations of water levels, bank erosion, and other issues. There was controversy both before and following construction of the dam, but some of the State of Missouri's concerns were temporarily handled because the hydropower generation was being phased in gradually. In 1982, a three-hour trial of pumpback operations proved successful as far as power generation and volume of water moved, but 2,000 pounds of fish were drawn into the pumps and killed. In 1987, a test was made of five unit operations, without pumpback. This resulted in renewed protests and an armada of boats to monitor downstream conditions. The hydropower interests were furious that public interest groups and State agencies were blocking the operation of an authorized project. State officials were discussing lawsuits. The District Engineer proposed that an ADR approach be used, and presented options. After discussion, there was agreement to use mediation. The first two negotiation sessions proved highly successful in resolving issues, and the parties felt that an agreement might be reached in the third session. However, negotiations broke down over the question of five-unit operations. The mediator prepared a "single-text negotiating text" to outline options and their impacts and distributed it to the parties. There were also meetings between the Governor and several of the parties. Agreement was then reached in a final negotiation session. Three people showed up at a public meeting to review the agreement. The agreement was implemented.

- **BRUTOCO ENGINEERING AND CONSTRUCTION INC.**
(IWR Case Study 92-ADR-CS-7)

In this case, mediation was used to resolve a claim for $3,086,038. The final settlement figure was $1,155,700. Brutoco was given a $12,600,000 contract to construct a bypass channel for flood control in Walnut Creek, California. Brutoco excavated a portion of the channel, then stockpiled materials near the excavation. The Corps became convinced that the walls of the channel had been cut at a steeper grade than they should have been, and more material was being stockpiled in unstable soil near the excavation than was prudent. Worried about a collapse as winter approached, the Corps issued an emergency directive to Brutoco to construct an earthen buttress to stabilize the area. Brutoco complied with the directive, The Corps issued a modification order to cover the work, estimated at $100,000. Brutoco felt that figure was totally unrealistic. Several misunderstandings occurred during negotiations that convinced Brutoco that the Corps was negotiating in bad faith. By the time a new District Engineer arrived, Brutoco's claim had risen to $3.1 million. The new Colonel proposed mediation as a way of resolving the issue. A neutral mediator was selected by the parties. The mediator requested 10-page briefing papers from both parties and scheduled a one-day negotiation session. Followed brief presentations by both sides, the mediator had the parties go to separate room, and the mediator moved back and forth between the rooms. The mediator also announced that if they were not showing signs of progress by 3:00 p.m. they would go home. By 3:00 p.m. the basic outlines of an agreement were falling in place, and by 8:00 p.m. the settlement agreement was signed.

- **BASSETT CREEK WATER MANAGEMENT COMMISSION**
(IWR Case Study 92-ADR-CS-8)

The Corps and the Bassett Creek Water Management Commission were collaborating on a flood control project. Under the 1986 Water Resources Development Act, a local sponsor must provide 25 percent of the project's cost. No less than 5 percent must be in cash, but the remainder can be in lands, rights-of-way, and easements. In this case, one of the cities that was part of the Commission had acquired easements that were necessary for the project. An appraiser was retained by the city to establish the value of the city's contribution to the project. The appraisal was for $347,000. However, the Corps felt the methodology was faulty, and retained another appraiser who estimated the value at $116,000. Negotiations soon reached an impasse. The Local Cooperation Agreement between the Corps and the City of Minneapolis contained an ADR clause, and the parties decided to use it, agreeing to use non-binding arbitration. The arbitrator selected was a well-known expert in real estate appraisal. Although called an arbitrator, he acted more like a mediator, working with the sides to develop agreement on appraisal methodology for each segment of the property. Only when there was agreement on how the land was to be appraised did he calculate a total dollar value for the land. At the end of the day, he proposed a settlement figure of $270,00 based on the appraisal methods discussed. Both

sides discussed the proposed settlement with their attorneys, then agreed to accept the settlement recommendation. Participants were satisfied with the ADR procedure, and were pleased that the settlement was based on objective standards.

- **GENERAL ROOFING COMPANY**
(IWR Case Study 92-ADR-CS-9)

  In this case, a mini-trial was used to resolve three construction contract claims totaling $1,173,480. The claims were ultimately settled for approximately $300,000. The project involved a new roof for the Warren, Michigan Arms Tank Plant, one of the largest roofs in the world, covering 25 acres. The contract was worth nearly $8,000,000. From the outset General Roofing (Genro) had trouble getting the roofing system it had selected to pass the required Underwriter's Laboratories tests. Genro requested relief to switch from a "Class A unlimited" to "Class B Limited" standard. At first the Corps refused, but later relented. Genro ultimately filed a claim for defective specifications, alleging that delays and impact costs were caused by impossible specifications and test requirements. Genro also filed two other claims related to "built-up walkways" (a difference over what the design standards were for walkways), and another having to do with restrictions on access. When negotiations failed, a mini-trial was proposed and agreed upon. The neutral expect was a judge from the Engineers Board of Contract Appeals, since the parties wanted someone who could give them legal opinions on specifics of the case. However, the ADR agreement specified that the judge was not to give them opinions on the whole claim. The mini-trial was scheduled for Wednesday and Thursday, with the option of extending to Friday if necessary. By Saturday morning the negotiators were still at it. Both sides ended up wanting the judge to give them opinions on the overall merits of the three claims, in spite of their ADR agreement. Late on Saturday the teams were almost ready to give up, but the idea then emerged of a "global" settlement of $570,000 of which $300,000 would be attributable to the three claims. A skeleton document had been prepared previously, and by filling in the figures, an agreement was signed just 45 minutes before the Corps' staff plane was ready to depart. Both sides were satisfied with the settlement. The judge also felt the settlement was justified, although he noted that the outcome might have been different before the Contract Appeals Board, because it frequently has to decide issues on an all-or-nothing basis.

All of the cases summarized above used ADR techniques as a way of resolving disputes that had not been resolved through normal negotiation, In effect, these were all disputes that had festered for some period of time, and would probably have been otherwise addressed by litigation.

Some of the cases currently in preparation reflect a new trend in the Corps—a preventative approach to disputes. An analogy may be made to health problems: it is often easier, and cheaper, to engage in preventative actions to preserve health than to cure an acute illness once it has occurred. In the same way, it is probably easier and cheaper to prevent disputes than it is to resolve them once they have broken into a bitter confrontational battle.

The two preventative techniques the Corps is employing are "Partnering" and the use of disputes review panels. In Partnering, almost immediately after the contract is issued (using normal competitive bidding processes) an invitation is extended to the contractor to enter into Partnering. The first step in Partnering is a joint team building activity, with all key members of the Corps and contractor team participating. A major purpose of this team building activity is to build relationships between the participants, but typically the team will also agree on objectives for the project—sometimes including very specific time, cost, and safety objectives—and discuss mechanisms for resolving disputes that do occur. Normally there is a quarterly follow-up meeting during which the team assesses its progress and irons out problems that have arisen. The fundamental idea behind partnering is that all parties share a common interest that the project be completed on time, in budget, safely, and with as few disputes as possible. The adversarial relationship that sometimes develops between the agency and the contractor often mask this shared interest. Partnering is an effort to build a sense that both the government and the contractor are a team, trying to reach these common objectives.

A disputes review panel is essentially a preventive version of a non-binding arbitration panel. The basic idea is that disputes will inevitably occur; therefore, the emphasis should be on resolving them quickly and effectively before they begin to poison the relationship. The disputes review panel is established shortly after the contract is let, and arrangements are made so that the panel can be assembled promptly to resolve any disputes that occur and are not readily resolved through collaborative problem solving. The panel may meet regularly (for example, quarterly), or may be assembled as required. Members of the panel are independent technical experts, with knowledge of the type of construction involved in the contract. The Corps appoints one member of the panel, the contractor appoints one, and these two members select a third member. When a dispute is referred to the panel, both sides make presentations before the panel, then the panel develops recommendations to both parties. These recommendations are not binding on the parties. The parties may either accept the recommendations or engage in further negotiations.

These "preventative" approaches round-out the Corps approach to ADR, providing managers with tools for resolving disputes from the beginning to end of the contract.

ANALYSIS OF THE CASES

The case studies described above contain a number of recommendations or observations on how to improve the effectiveness of ADR. A series of general observations about ADR, drawing from all the cases, is provided below, followed by comments about specific ADR techniques or procedural issues.

ADR Is Effective in Resolving Disputes

The first, rather obvious, conclusion is that ADR is effective in resolving disputes. In all of the cases, an agreement was reached. In some cases agreement was reached in part because of a concern for the risks and costs of litigation as the only alternative. But those risks and costs are

real for all parties, and agreement was consistently seen as preferable. The "satisfaction level" of all parties was clearly higher than would have occurred if all-or-nothing judicial decisions had been reached. One of the points of particular interest is that ADR proved equally effective in resolving cases involving many millions of dollars as it was in cases involving only $100,000.

ADR Is Effective in Identifying a Rationale for Settlement

One of the concerns about ADR, particularly of non-binding arbitration, is that it would result in "split-the-distance" decisions; that is, decisions where settlement is reached based not on some rationale or principle, but a desire to get an agreement any way possible. In fact, ADR proved particularly effective at developing a rationale or methodology for determining what the dollars should be. Many of the facilitators, mediators, or arbitrators stressed development of objective criteria as a preliminary step, resisting discussion of final figures until some rationale had been identified. This is particularly important in government contracting where documentation of the rationale for the settlement is as important as the dollar amounts.

Mutual Respect Is an Essential Part of Reaching Agreement

In virtually all cases, the principals reported that the respect they gained for each other as individuals was essential to their ability to reach an agreement. Many of the mediators and arbitrators stressed pre-process activities, such as shared meals or social activities, as a means of building this respect. In most cases the principals were requested to eat meals with each other, rather than with their staffs. In addition, during mini-trials the senior managers were seated together with the neutral at a single table, rather than with their staffs, to emphasize their role as a team in solving the problem. Although good relationships are the "soft" part of reaching settlement, they appear to be an essential precondition of settlement.

ADR Helps Preserve Relationships

In at least a majority of the cases, reaching a settlement using ADR restored or even improved relationships between the Corps and the contractor. This was evidenced either by a willingness of both parties to work together on future contracts, or by increased effectiveness in resolving disputes on the remainder of an existing contract.

ADR Helps Create a Problem Solving Climate

The value of ADR may extend beyond its usefulness in resolving a specific dispute. There was evidence in several of the cases that participation in ADR served to teach skills and attitudes of collaborative problem solving that led to more effective problem solving on other issues. This suggests that the long term value of ADR is not just in the thorny disputes it resolves, but the large number of issues that will get resolved using collaborative problem solving, obviating the need for techniques, such as mini-trials, mediation, and so on. In effect, a problem solving

"culture" is created, consisting of values supporting problem solving skills and knowledge of problem solving techniques.

ADR Is Used in Cases Where Both Sides Felt Some Risk

In each of the cases there was a discussion with the principals about their reasoning in deciding to use ADR. While the potential cost and delays of litigation were consistent motivators, in virtually all cases, the awareness that there was some weakness in their case, or shared responsibility for the situation, contributed to the willingness to use ADR. In fact, one of the tactics frequently used by mediators and arbitrators was to educate both sides to the weaknesses in their cases. Often both sides had unrealistic perceptions of the strength of their case, and only when these perceptions were altered was settlement possible.

Managers Are Able to Customize ADR Processes to Meet Their Circumstances

In several of the cases, senior managers created a hybrid or custom process to meet their unique needs. These processes were at least equally successful to those following "standard" ADR formats. One of the virtues of ADR is that the participants are in charge of creating their own process, so are able to create a process suited to their particular needs.

Technical Staff May Resist ADR and Need to Be Consulted in the Decision to Use ADR

In several cases, senior managers were satisfied with the outcome, however, some technical staff (particularly Corps staff) were upset that their organizations did not attempt to "win" through litigation. Dissatisfaction of Corps staff with the Tenn-Tom Constructors' case was strong enough to slow the willingness of other Corps districts to use ADR.

One problem was that these technical staff were the very people who made the decisions that created the dispute. They felt they had made the right decision at the time, and as is the nature of disputes, they became more antagonistic and the sides became even more entrenched in their decisions. The decision to use ADR is made by Corps management, with the advice of counsel. A decision to use ADR may be seen by technical staff as a "failure to support the field" or as a commentary on their performance.

In several cases, technical staff were brought into the decision to use ADR. District counsel played a particular important role in educating staff to the potential legal and financial risks associated with litigation. This is, of course, a tricky job. The counsel must educate the staff to the risks associated with their case without alienating the staff, with whom counsel must continue to work on many other issues. In those cases where staff were brought into the decision to use ADR, staff ended up supporting its use.

Technical staff resistance is potentially the single greatest barrier to using ADR. A wise manager will recognize that educating and consulting staff is at least as important a step in getting to the table as are discussions with the outside parties.

It Is Helpful to Include an ADR Clause in Contracts or Agreements

In several cases, ADR clauses were already contained in the contract or agreement. Discussions with participants suggest this made it much easier to get the parties to the table. One of the barriers to using ADR, particularly when one or more of the parties is unfamiliar with it, is that the suggestion to use ADR may be perceived as a sign that the person making the suggestions thinks his or her organization has a weak case. This may actually encourage other parties to "hang tough," rather than use ADR. Based on the reports of participants, when an ADR clause was already in the contract or agreement, it was easier for the parties to raise the question of using ADR without any loss of face or risk that this signaled a weak case.

Managers Choose Technical Experts as Neutrals

In most cases, managers chose neutrals who were technically expert in their field, such as contract law, construction practices, property appraisal, etc., in preference to someone who possesses facilitation or mediation skills. However, in those cases where the neutral was selected primarily because of mediation skills, the parties were highly satisfied with the neutrals' performance. In cases where the neutrals were technical experts, their expertise was considered important in reaching a settlement. However, the fact that they gave opinions and evaluations led to greater discussion of whether or not they were truly neutral. In at least one case, some people became convinced that the neutral expert had so many opinions that at times they detracted from the process.

Staff May Meet Separately to Settle Side-issues

In several of the processes, technical staff met simultaneously, but separately, to resolve technical issues. For example, during the Goodyear Case, the senior managers worked on the parties' percentage of responsibility. While the staff worked out the cost figures to which those percentages would apply. The efforts of management to reach a mutually acceptable solution gives added incentive to staff to do likewise.

The Role of Attorneys in the ADR Process Varies Considerably

While non-attorneys may sometimes think of attorneys as seeking opportunities for litigation, this was decidedly not true in these cases. In fact, attorneys (both within and outside the Corps) were often the source of the suggestion that ADR be used, and played an important role in educating their clients about its potential value. Attorneys also educated clients about the potential risks of proceeding to all-or-nothing decisions.

Attorneys played an important role in negotiating ADR agreements. This also meant that attorneys were then supportive of the process. However, two problems did occur: (1) Senior managers sometimes preferred a much more informal process of acquiring information from experts than did attorneys, who are used to formal discovery and cross-examination procedures; and (2) Senior managers sometimes broke procedural agreements that had been reached between attorneys, apparently because they were unaware of them, or unaware of their importance.

The processes differed substantially in whether attorneys were used to make presentations on behalf of the client. In some cases, technical experts made the presentations, in other cases the attorneys. No clear picture emerged as to which is preferable. However, several attorneys noted that it was very difficult to both make the presentation and be a wise counselor to senior management. They recommended that if an attorney makes the presentation, another attorney should serve as counsel to his management.

Several attorneys for contractors came into the ADR process using adversarial strategies more appropriate to the courtroom, whereas attorneys experienced with ADR tend to use more of a problem-solving approach. When this occurs, it tends to push the attorney using the problem solving approach into a more adversarial style. Some discussion between attorneys about style and tactics should occur prior to the ADR process itself.

Senior Management Time Is Clearly an Issue of Concern in Technique Selection

In several of the cases where non-binding arbitration was used, one of the major considerations in selecting arbitration was a concern for the amount of senior management time required for mini-trials. In addition to the advance preparation time, senior managers involved in a mini-trial will devote 4-5 days of uninterrupted time to the mini-trial process. This can be justified only on issues that have high dollar value or some other distinguishing significance. However, when a comparison is made to the costs of litigation, mini-trials begin to look very economical.

CONCLUSION

The first observation—that ADR techniques are effective in resolving disputes—remains the most important one. As the use of ADR spreads throughout the Corps and other organizations, we will all learn more about how to make effective use of ADR, and create problem solving climates to prevent issues from turning into disputes.

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13. ABSTRACT (Maximum 200 words) This reader, together with its companion *volume, Public Involvement Techniques: A Reader of Ten Years Experience at the Institute for Water Resources (*IWR Research Report 82-R-1), documents the evolution, over a period of twenty years, of new processes by which governmental agencies reach decisions and resolve conflicts. The two readers focus primarily on the experience of the U.S. Army Corps of Engineers, but are not intended to be just a compendium of case studies. Instead, they portray one agency wrestling with trends, demands, and pressures faced by all agencies with responsibilities related to natural resources in virtually the entire industrialized world. These readers are a communication from the Corps to other organizations: "This is what we've learned. This is what worked for us. Here are the tools we found helpful."

Much of the material in this reader is drawn from materials developed in the late 1980s to early 1990s for the Corps Alternative Dispute Resolution (ADR) program, just as material in the first reader was drawn from the public involvement program in the 1970s and early 1980s. This reader, however, also provides information on how the public involvement program has changed since the 1970s, and how its concepts are being used in new circumstances within the Corps.

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