

Regulatory Guidance Letter 87-04

SUBJECT: Use of Alternative Dispute Resolution in Regulatory Actions

DATE: April 14, 1987 EXPIRES: December 31, 1989

1. Alternative Dispute Resolution (ADR) is a general term for a number of methods to resolve conflict without litigation. ADR techniques can be useful to seek consensus among widely differing views regarding a discretionary regulatory action. ADR is an "umbrella" concept encompassing several techniques, such as collaborative problem solving/conciliation, formal negotiation, mediation, and arbitration. ADR generally involves bringing representatives from the different viewpoints together, face-to-face, to talk out disagreements. Assistance of a mediation facilitator may or may not be required.

2. This ADR method of resolving conflict has, on occasion, been used effectively in the Corps regulatory program. Use of ADR appears to have the greatest potential for discretionary regulatory actions such as developing regional permits or Special Area Management Plans (SAMPs) where a consensus among developmental and environmental interests may be difficult to achieve under traditional methods. An identifiable applicant group who can be represented is another important ingredient of a successful ADR process. Although there may be exceptional cases, as a general rule the ADR process does not appear to be suitable for use on individual permit decisions.

3. In ADR, the participants (developers, local interests, environmental interests) attempt to resolve differences through direct discussions, with assistance from one or more "facilitators" who help the process to work and keep the discussions constructive. An essential responsibility of Corps participants is to ensure that the public interest is best served and is not abrogated by the ADR process. The Corps regulatory staff must make clear at the outset of any ADR process that, although the consensus reached by the group will greatly influence the final action, it must be reviewed and approved by the district engineer. In addition to ensuring that the participants are aware that the Corps is the ultimate decision-maker, the Corps representatives must make the following points clear to the participants before the process begins:

- a. The ADR process must yield a product which the district engineer agrees is in compliance with all applicable laws and regulations and is not contrary to the public interest
- b. Any potential permit conditions developed must be in accordance with 33 CFR 325.4, must be reasonable, and must demonstrate balance between the protection and utilization of water resources.

4. A number of Corps districts have successfully used the formal ADR process to develop regional permits. For example, in 1979, the Jacksonville District developed a regional permit for residential fills on Sanibel Island by involving local government, local property developers, environmental interests, and various state and Federal agencies. More recently, the Vicksburg District reissued, with modifications which resulted from the ADR process, a regional permit for activities in conjunction with exploration for and subsequent production of oil and gas. This ADR process involved representatives from the oil and gas development industry, environmental groups and various state and Federal agencies.

5. This guidance expires 31 December 1989 unless sooner revised or rescinded.

FOR THE CHIEF OF ENGINEERS: