

First Quarterly ECR Forum

Council on Environmental Quality

722 Jackson Place, NW

May 11, 2006

MEETING SUMMARY

Participants:

Dinah Bear, General Counsel - Council on Environmental Quality

Kathleen Binder, Director, Office of Dispute Resolution – Department of Energy

Jim Connaughton, Chairman – Council on Environmental Quality

Kirk Emerson, Director – U.S. Institute for Environmental Conflict Resolution

Diana Espinosa, Deputy Assistant Director for Management –
Office of Management and Budget

Jan Frye, Deputy Assistant Secretary, Office of Acquisition & Material Management –
Department of Veterans Affairs

Tina Gargus, Special Projects Coordinator – U.S. Institute for Environmental
Conflict Resolution

Marsha Gransee, Deputy General Counsel – Federal Energy Regulatory Commission

Joseph Gray, Associate General Counsel – Nuclear Regulatory Commission

Will Hall, Conflict Prevention and Resolution Center – Environmental Protection Agency

Paul Hoffman, Deputy Assistant Secretary, Performance, Accountability and Human
Resources – Department of the Interior

Sam Hunter, Assistant Commissioner, Office of Applied Science –
General Services Administration

Judy Kaleta, Chief Counsel – Department of Transportation

Jeff Lape, Director, Conflict Prevention and Resolution Center –
Environmental Protection Agency

Andrew Lawrence, Deputy Assistant Secretary for Environment, Office of Environment –
Department of Energy

Robert Manley, ADR Attorney – Department of the Navy

Roger Martella, Principal Deputy General Counsel – Environmental Protection Agency

Matt McKeown, Principal Deputy Assistant Attorney General, Environment and Natural
Resources Division – Department of Justice

Mary Neumayr, Deputy General Counsel for Environment and Nuclear Programs –
Department of Energy

Deborah Osborne, Dispute Resolution Specialist – Federal Energy Regulatory Commission

Lynda O’Sullivan, Assistant Deputy General Counsel – Department of the Air Force

James Ray, Chief Counsel – Federal Highway Administration

David Reese, Office of Safety & Environmental Programs – Department of Homeland Security

Ruth Rentch, Environmental Protection Specialist – Federal Highway Administration

Jeffrey Senger, Office of the Associate Attorney General – Department of Justice

Charlotte Skidmore, Program Examiner – Office of Management and Budget

Beverly Stephens, Environmental Protection Specialist – Department of Energy

Convener's Welcome - Kirk Emerson, Director, USIECR

Kirk Emerson welcomed the group and introductions were made. She introduced CEQ Chairman Connaughton who opened the meeting.

Introductory Remarks

Jim Connaughton, Chairman, CEQ

Chairman Connaughton discussed the significance of the jointly issued OMB-CEQ policy memo on Environmental Conflict Resolution (ECR) and encouraged departments and agencies to increase their effective use of ECR.

Diana Espinosa, Deputy Assistant Director for Management, OMB

Diana Espinosa expressed OMB's interest in the policy memo. She indicated her eagerness to address the challenge of quantifying the use of ECR as well as the costs saved and resulting benefits.

ECR & the ECR Policy Memo - Kirk Emerson

Key points on ECR:

- ECR has been developing and growing for more than 30 years. EPA has been employing mediators for the last 20 years or more; DOI began developing its program over eight years ago. Congress set up the U.S. Institute in 1998 to provide an additional resource for federal agencies to resolve environmental conflicts and improve environmental decision making in furtherance of NEPA Section 101. So ECR is not new, it has developed a proven track record and the intent of OMB-CEQ policy memo is to increase its use throughout the federal government.
- ECR builds on the field of ADR and the use of interest-based and joint gains negotiation to optimize benefits for all parties while minimizing costs or pain as necessary.
- The use of 3rd party neutrals helps level the playing field, particularly where there is low trust and a history of conflict, and where multiple parties are engaged in complex negotiations.
- ECR is no longer viewed as an alternative to litigation per se. In fact much of the work done in ECR is well in advance of any filing of lawsuits and includes a broad spectrum of applications, including planning, rulemaking, policy development, administrative appeals, etc.
- Finally, ECR is NOT the answer for all environmental issues. ECR is appropriate under certain circumstances and conditions. It is not intended to be used when

precedents need setting, when federal laws must be enforced. It is not intended to undermine the administration of federal law or the decision making responsibilities of federal agencies.

Kirk reviewed the background for the ECR policy memo and recognized the interagency staff that had worked over the past three years and are participating on the ECR Policy steering group. Following the leadership meeting called by Chairman Connaughton in June 2005, the interagency staff conducted a survey on the use of ECR within federal department and agencies and developed draft guidance that provided the basis for the OMB-CEQ policy memo.

Four points were made about the memo:

1. Leadership – the memo is intended to encourage leadership to get involved, generate internal discussion about the use of ECR and encourage department and agency policy direction.
2. Incorporation of principles – the memo includes a set of eight basic principles for agency engagement in environmental conflict resolution and collaborative problem solving. These reflect the longstanding experience in the field of ECR and should be useful for improving the effectiveness of ECR.
3. List of mechanisms and strategies – the memo includes a detailed list of recommended approaches to increasing the use of ECR for departments and agencies to consider when responding to the policy direction in the memo.
4. Focus on accountability – the memo encourages ECR performance evaluation and identifying how the outcomes of ECR have been beneficial and how they have avoided future costs and saved time and resources in the long run.

ECR Policy Requirements - Dinah Bear & Diana Espinosa

Annual Report

Dinah Bear discussed the draft Annual Report Template and commented that she would be surprised if the reporting requirements in year five were the same as for year one.

Diana Espinosa commented that at this point for the first year, she anticipates the reporting to be more of a collection of data and that the report would likely be refined over time. Kirk added that it was important to make sure that the report wasn't seen as a disincentive for responding to the memo, but rather a useful tool for gathering information. Some of the more salient points of the discussion are presented in a question and answer format below:

Question: Does OMB intend to communicate to agency CFO's of this reporting requirement?

Answer: OMB hopes to reinforce the need for information on ECR within agencies, understanding that there is still a lot that is not known about what the appropriate measures are.

Question: How do we demonstrate performance, particularly improvement in performance is a department is just beginning.

Answer: The first annual report is focused on establishing a baseline, not progress per se in the first year.

Question: How historical should the use of ECR go back to?

Answer: The report should reflect activity in the prior fiscal year (FY 2006). Agencies may also include information from previous fiscal years.

Question: Lynda O'Sullivan (Air Force) asked whether the reporting calls for information about unassisted complex multi-party negotiation cases.

Answer: Kirk responded that ECR is part of the larger approach to collaborative problem solving. She clarified that the ECR annual report is not intended to take the place of the cooperative conservation reporting requirements.

Question: Should reporting on cost avoidance be done on a case-by-case basis or in aggregate?

Answer: Both are welcome. Depending on the volume of ECR applications and comparisons with alternative forums. This first year is intended to gather a range of approaches and think through how to best calculate such performance. *

*Paul Hoffman indicated he would work on the St. Croix case as an example that might provide measurement approaches for others.

Implementing ECR Policy

Paul Hoffman, Deputy Assistant Secretary, Performance, Accountability, and Human Services, US DOI

Paul Hoffman informed the group that the Department of the Interior has been using ECR for about 10 years. One example he gave was Grand Canyon Noise Over flight Case. He added that it took two years to get the FAA and the NPS to meet and at this time, he is confident that a resolution will come out of this process.

Another ECR case example he gave included a DOT project concerning the conservation of an historic lift bridge and the construction of a new bridge over the St. Croix River. This dispute has lasted over 20 years and they are currently working on a decision of record through a fully collaborative EIS process.

One challenge he sees going forward is getting people to engage in ECR before litigation. He added that the cultural change that needs to take place is getting started. He discussed the

cooperative conservation tools that exist and added that the trick will be documenting these processes. If ECR processes cost more money, documentation will be important.

Andrew Lawrence, Deputy Assistant Secretary for Environment, US DOE

Andy Lawrence updated the group on the activities that have taken place at DOE since the ECR policy memo was first out. So far, the DOE has:

- Distributed the ECR policy memo throughout their department.
- Requested points of contact within the department to work on implementation of the policy.
- DOE has offices in 20 states. Points of contact from headquarters will be reaching out to field office points of contact.
- DOE's Office of General Counsel has held a one-day workshop on ECR for their environmental attorneys at headquarters and in the field.
- DOE has set up a working schedule to complete the first annual reporting requirement this December.
- DOE is reviewing its ADR policy – since it was broadly created some time ago. They might be revising the policy to meet both the needs of DOE and the ECR policy memo.
- DOE is working on incorporating ECR policy language into their strategic plan.
- DOE has a standing group of people working on all of this.

Roger Martella, Deputy General Counsel, US EPA

Roger Martella informed the group that the EPA is very active in ECR. The EPA's Conflict Prevention and Resolution Center (CPRC) has nine employees and all of EPA's ECR issues are addressed through the CPRC. He then gave a brief history of ECR and the CPRC and informed the group that EPA averages about 40-60 ECR cases a year.

Some ECR case examples at EPA include:

- Negotiated rulemaking under Brownfields.
- Washington Navy Yard Anacostia
- Air craft drinking water regulations

One important theme he sees in the field of ECR is that of cost-avoidance. The investment upfront in ECR is a great return on investment both environmentally and economically. Some challenges in ECR EPA faces is convincing people that ECR is worthwhile, timing and reaching out to their regional offices.

Next Steps/Q&A

Kirk informed the group that a separate working group would be developed to address performance evaluation, accountability and cost-effectiveness of ECR. She added that there might not be sufficient data on multiparty processes or cost analyses of such complex

efforts. Once the first annual reports are completed, the next step will be to develop metrics for measuring performance.

A meeting will be scheduled in July 2006 to focus on performance evaluation, accountability and cost-effectiveness.

Comments or questions on the annual report template are to be forwarded to Kirk Emerson as soon as possible. The final draft is scheduled to be complete by June 1.

Kirk commented that one of the benefits of the ECR Policy Steering Group has been the ability to assemble people for both general counsel offices and programs. Attorneys and policy makers are working together and eventually will include budget people. Kirk added that for those agencies not currently involved in ECR, a separate introductory meeting or workshop could be held as well

The next quarterly ECR Forum will be held in September 2006 in Washington, DC.