

FY 2008 ECR Policy Report to OMB-CEQ

On November 28, 2005, the Director of the Office of Management and Budget (OMB), and the Chairman of the President's Council on Environmental Quality (CEQ) issued a policy memorandum on environmental conflict resolution (ECR).

The memorandum requires annual reporting by departments and agencies to OMB and CEQ on progress made each year. This joint policy statement directs agencies to increase the effective use and their institutional capacity for ECR and collaborative problem solving.

ECR is defined in Section 2 of the memorandum as:

“third-party assisted conflict resolution and collaborative problem solving in the context of environmental, public lands, or natural resources issues or conflicts, including matters related to energy, transportation, and land use. The term “ECR” encompasses a range of assisted negotiation processes and applications. These processes directly engage affected interests and agency decision makers in conflict resolution and collaborative problem solving. Multi-issue, multi-party environmental disputes or controversies often take place in high conflict and low trust settings, where the assistance of impartial facilitators or mediators can be instrumental to reaching agreement and resolution. Such disputes range broadly from administrative adjudicatory disputes, to civil judicial disputes, policy/rule disputes, intra- and interagency disputes, as well as disputes with non-federal persons/entities. ECR processes can be applied during a policy development or planning process, or in the context of rulemaking, administrative decision making, enforcement, or litigation and can include conflicts between federal, state, local, tribal, public interest organizations, citizens groups and business and industry where a federal agency has ultimate responsibility for decision-making.

While ECR refers specifically to collaborative processes aided by third-party neutrals, there is a broad array of partnerships, cooperative arrangements, and unassisted negotiations that federal agencies enter into with non-federal entities to manage and implement agency programs and activities. The Basic Principles for Agency Engagement in Environmental Conflict Resolution and Collaborative Problem Solving presented in Attachment A (of the OMB/CEQ ECR Policy Memo) and this policy apply generally to ECR and collaborative problem solving. This policy recognizes the importance and value of the appropriate use of all types of ADR and collaborative problem solving.”

The report format below is provided for the third year of reporting in accordance with this memo for activities in FY 2008.

The report deadline is January 15, 2009.

We understand that collecting this information may be challenging; however, after compiling previous reports, the departments and agencies can collect this data to the best of their abilities. The 2008 report, along with previous reports, will establish a useful baseline for your department or agency, and collect some information that can be aggregated across agencies. Departments should submit a single report that includes ECR information from the agencies and other entities within the department. The information in your report will become part of an analysis of all FY 2008 ECR reports. You may be contacted for the purpose of clarifying information in your report. For your reference, copies of the analysis of FY 2006 and FY 2007 ECR reports will be available at www.ecr.gov.

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Name and Title/Position of person responding:	<u>James Payne, Senior Counsel ADR</u>
Division/Office of person responding:	<u>Env't and Nat Resources Division</u>
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Date this report is being submitted:	<u>March 6, 2009 (under extension)</u>

Section 1: Capacity and Progress

1. Describe steps taken by your department/agency to build programmatic/institutional capacity for ECR in 2008, including progress made since 2007. If no steps were taken, please indicate why not.

[Please refer to the mechanisms and strategies presented in Section 5 of the OMB-CEQ ECR Policy Memo, including but not restricted to any efforts to a) integrate ECR objectives into agency mission statements, Government Performance and Results Act goals, and strategic planning; b) assure that your agency's infrastructure supports ECR; c) invest in support or programs; and d) focus on accountable performance and achievement. You are encouraged to attach policy statements, plans and other relevant documents.]

The US Department of Justice conducts more mediation for environment and natural resource cases than for all other types of cases combined. Over half of the Department's annual mediation budget is applied to environment and natural resource cases.

Recent steps include:

1. Webpage

The Department continued to refine its external and internal webpages on use of mediation and other forms of environmental conflict resolution in order to facilitate and promote use of ECR. For example, the internal webpages have improved cross-references to internal and external resources for selecting neutrals. The external webpage has policy statements and other relevant documents. See <http://www.usdoj.gov/odr/documents.htm>.

2. Consultation

To assist attorneys, the Department has an Office of Dispute Resolution and resource persons in various components, including a Senior Counsel for Alternative Dispute Resolution in the Environment and Natural Resources Division (ENRD). This counsel routinely assists attorneys on mediation and other forms of environmental conflict resolution. One recent consultation involved constitutional considerations with federal use of binding arbitration.

3. Bankruptcy Cases

ENRD made unprecedented use of mediation in a bankruptcy case involving a series of environmentally contaminated sites across the country. See Section 7, below.

Section 2: Challenges

2. Indicate the extent to which each of the items below present challenges or barriers that your department/agency has encountered in advancing the appropriate and effective use of ECR.

	Extent of challenge/barrier			
	Major	Minor	Not a challenge/barrier	N/A
	<i>Check <u>only one</u></i>			
a) Lack of staff expertise to participate in ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b) Lack of staff availability to engage in ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
c) Lack of party capacity to engage in ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
d) Limited or no funds for facilitators and mediators	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
e) Lack of travel costs for your own or other federal agency staff	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
f) Lack of travel costs for non-federal parties	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
g) Reluctance of federal decision makers to support or participate	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
h) Reluctance of other federal agencies to participate	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
i) Reluctance of other non-federal parties to participate	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
j) Contracting barriers/inefficiencies	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
k) Lack of resources for staff capacity building	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
l) Lack of personnel incentives	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
m) Lack of budget incentives	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
n) Lack of access to qualified mediators and facilitators	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
o) Perception of time and resource intensive nature of ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
p) Uncertainty about whether to engage in ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
q) Uncertainty about the net benefits of ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
r) Other(s) (please specify): <u>Practice is to work through any potential barriers</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
s) No barriers (please explain): <u>as over half of Dept's mediations are ECR.</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Section 3: ECR Use

3. Describe the level of ECR use within your department/agency in FY 2008 by completing the table below. [Please refer to the definition of ECR from the OMB-CEQ memo as presented on page one of this template. An ECR "case or project" is an instance of neutral third party involvement to assist parties in reaching agreement or resolving a dispute for a particular matter. In order not to double count processes, please select one category per case for decision making forums and for ECR applications.]

Context for ECR Applications:	Cases or projects in progress ¹	Completed Cases or projects ²	Total FY 2008 ECR Cases ³	Decision making forum that was addressing the issues when ECR was initiated:				Of the total FY 2008 ECR cases indicate how many your agency/department	
				Federal agency decision	Administrative proceedings/appeals	Judicial proceedings	Other (specify)	Sponsored ⁴	Participated in but did not sponsor ⁵
Policy development	—	—	0	—	—	—	—	—	—
Planning	—	—	0	—	—	—	—	—	—
Siting and construction	—	—	0	—	—	—	—	—	—
Rulemaking	—	—	0	—	—	—	—	—	—
License and permit issuance	—	—	0	—	—	—	—	—	—
Compliance and enforcement action	—	—	0	—	—	—	—	—	—
Implementation/monitoring agreements	—	—	0	—	—	—	—	—	—
Other (specify): _____	—	—	0	—	—	—	—	—	—
TOTAL *	0 (the sum should equal Total FY 2008 ECR Cases)	0	40*	0	0	40*	0	*	10 (the sum should equal Total FY 2008 ECR Cases)

¹ A "case in progress" is an ECR case in which neutral third party involvement began prior to or during FY 2008 and did not end during FY 2008.

² A "completed case" means that neutral third party involvement in a particular matter ended during FY 2008. The end of neutral third party involvement does not necessarily mean that the parties have concluded their collaboration/negotiation/dispute resolution process, that all issues are resolved, or that agreement has been reached.

³ "Cases in progress" and "completed cases" add up to "Total FY 2008 ECR Cases".

⁴ Sponsored - to be a sponsor of an ECR case means that an agency is contributing financial or in-kind resources (e.g., a staff mediator's time) to provide the neutral third party's services for that case. More than one sponsor is possible for a given ECR case.

⁵ Participated, but did not sponsor - an agency did not provide resources for the neutral third party's services for a given ECR case, but was either a party to the case or participated in some other significant way (e.g., as a technical expert advising the parties).

* There are 40 cases in which the Department paid for an outside mediator. In addition, magistrate judges and other court officials routinely serve as mediators without payment by the Department. See Sections 5 and 9, below. Courts generally urge parties to consider mediation or other forms of ECR.

4. Is your department/agency using ECR in any of the substantive priority areas (i.e., NEPA, Superfund, land use, etc.) you listed in your FY 2007 ECR Report? Please also list any additional priority areas identified by your department/agency during FY 2008, and indicate if ECR is being used in any of these areas.

List of priority areas identified in your department/agency FY 2007 ECR Report	Check if using ECR	Check if use has increased since FY 2007
<u>ECR continues to be used in full range of civil ..</u>	<input type="checkbox"/>	<input type="checkbox"/>
<u>.. environmental enforcement and defensive cases.</u>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<u>_____</u>	<input type="checkbox"/>	<input type="checkbox"/>
<u>_____</u>	<input type="checkbox"/>	<input type="checkbox"/>
<u>_____</u>	<input type="checkbox"/>	<input type="checkbox"/>
<u>_____</u>	<input type="checkbox"/>	<input type="checkbox"/>
<u>_____</u>	<input type="checkbox"/>	<input type="checkbox"/>
<u>_____</u>	<input type="checkbox"/>	<input type="checkbox"/>
List of additional priority areas identified by your department/agency in FY 2008	Check if using ECR	
<u>See above.</u>	<input type="checkbox"/>	
<u>_____</u>	<input type="checkbox"/>	
<u>_____</u>	<input type="checkbox"/>	
<u>_____</u>	<input type="checkbox"/>	

Please use an additional sheet if needed.

5. It is important to develop ways to demonstrate that ECR is effective and in order for ECR to propagate through the government, we need to be able to point to concrete benefits; consequently, we ask what other methods and measures are you developing in your department/agency to track the use and outcomes (performance and cost savings) of ECR as directed in Section 4 (b) of the ECR memo, which states: *Given possible savings in improved outcomes and reduced costs of administrative appeals and litigation, agency leadership should recognize and support needed upfront investments in collaborative processes and conflict resolution and demonstrate those savings and in performance and accountability measures to maintain a budget neutral environment* and Section 4 (g) which states: *Federal agencies should report at least every year to the Director of OMB and the Chairman of CEQ on their progress in the use of ECR and other collaborative problem solving approaches and on their progress in tracking cost savings and performance outcomes. Agencies are encouraged to work toward systematic collection of relevant information that can be useful in on-going information exchange across departments?* [You are encouraged to attach examples or additional data]

The Department increased its use of paid mediators in environmental and natural resource cases. The Department conducts more mediation in environment and natural resource cases than for all other kinds of cases combined. Compared to 2007, the Department increased its ECR funding from \$429,900 to over \$612,800.

In addition, court officials such as magistrate judges commonly serve a mediator role in cases throughout the federal courts including ECR cases. Court officials have a significant role as neutrals. Court mediators assist in approximately half of ECR appellate cases, playing an invaluable role in resolving process issues and occasionally helping the parties reach an overall settlement. See Section 9.

6. Describe other significant efforts your agency has taken in FY 2008 to anticipate, prevent, better manage, or resolve environmental issues and conflicts that do not fit within the Policy Memo's definition of ECR as presented on the first page of this template.

The Department negotiates resolutions to well over 90% of environmental and natural resource cases. For example, attorneys negotiate proposed resolutions to most civil environmental enforcement cases prior to filing. The result is that the court case begins with the filing of a complaint and lodging of a proposed consent decree that undergoes public review and comment. The Department also advises agencies upon request on how to resolve cases through mediation or otherwise without litigation.

Section 4: Demonstration of ECR Use and Value

- 7 Briefly describe your departments'/agency's most notable achievements or advances in using ECR in this past year.

A notable achievement and advance involved the use of mediation to facilitate a global resolution of a major bankruptcy case.

In 2005, the mining company ASARCO filed for bankruptcy protection in the US District Court for the Southern District of Texas. The United States filed claims for cleanup and other liabilities for scores of environmentally contaminated sites across the country.

In July 2007, the United States and other parties decided to mediate environmental claims for 13 of the most contaminated sites. These sites had been scheduled for trial in the bankruptcy proceeding. The result was the first widespread use of mediation by the United States in a complex, nationwide bankruptcy case. The mediations have been highly successful, resulting so far in mediated settlements for five sites totaling over \$ 198 million in allowed claims for environmental cleanups and natural resource damages. The successful mediations provided a foundation for negotiations to resolve the full bankruptcy case.

In addition to these site specific mediations, in late 2007 and early 2008 the United States participated in broader mediation of its remaining claims of environmental liability and other matters. This mediation provided a helpful basis for resolving, in principal, most of the United States' claims of environmental liability. It also yielded potential agreements with other key creditors. At times, subsequent events required revisiting the proposed resolutions in part.

Mediation has been the key process for pursuing global resolution of this complex bankruptcy involving contaminated sites across the country. The mediation has been highly successful.

8. ECR Case Example

- a. Using the template below, provide a description of an ECR case (preferably completed in FY 2008). Please limit the length to no more than 2 pages.

Name/Identification of Problem/Conflict

Overview of problem/conflict and timeline, including reference to the nature and timing of the third-party assistance

In 2007, after unsuccessful negotiations, DOJ filed a complaint to enforce the Clean Air Act at one of the largest cement facilities in the country. The facility was the largest source of nitrogen oxide - a smog-producing chemical - in California. The case proceeded into intensive litigation including discovery of fact and expert witnesses and motion practice. In the second half of 2008, the case also proceeded on a parallel track of mediation in accordance with standard court procedures. Trial was scheduled for January 2009.

Summary of how the problem or conflict was addressed using ECR, including details of how the principles for engagement in ECR were used (See Appendix A of the Policy Memo, attached)

The mediation proceeded with a private neutral chosen by the parties. The mediator convened the parties on a regular basis and provided a process to focus on settlement prospects notwithstanding the press of litigation demands. The discussions were informed by ongoing disclosures during the discovery process.

Identify the key beneficial outcomes of this case, including references to likely alternative decision making forums and how the outcomes differed as a result of ECR

The settlement was the largest yet in a cement kiln enforcement initiative. The consent decree included stringent new limits for nitrogen oxide that will reduce emissions by 1,890 tons per year, a nearly 40% reduction. The facility must pay a \$2 million civil penalty. The environmental work is scheduled to start sooner than what otherwise would have been anticipated in the court case.

Reflections on the lessons learned from the use of ECR

The case was an example of a mediator providing a calm, ongoing process to facilitate settlement discussions amidst an otherwise adversarial context.

- b. Section I of the ECR Policy identifies key governance challenges faced by departments/agencies while working to accomplish national environmental protection and management goals. Consider your departments'/agency's ECR case, and indicate if it represents an example of where ECR was or is being used to avoid or minimize the occurrence of the following:

	Check <u>all</u> that apply	Check if	
		Not Applicable	Don't Know
Protracted and costly environmental litigation;	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Unnecessarily lengthy project and resource planning processes;	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Costly delays in implementing needed environmental protection measures;	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Foregone public and private investments when decisions are not timely or are appealed;	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Lower quality outcomes and lost opportunities when environmental plans and decisions are not informed by all available information and perspectives; and	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Deep-seated antagonism and hostility repeatedly reinforced between stakeholders by unattended conflicts.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

9. Please comment on any difficulties you encountered in collecting these data and if and how you overcame them. Please provide suggestions for improving these questions in the future.

In addition to the 40 mediations with paid mediators in FY 2008 listed in Section 3, the Department routinely engages in mediation of environmental and natural resources cases with Magistrate Judges and other court officials. Court officials routinely work with parties to explore potential avenues for settlement. For example, appellate court officials successfully mediate process issues in over half of the appeals in environmental and natural resource cases. And court officials mediate some cases to resolution. It would be difficult to track or quantify the full range of these mediation activities in environmental and natural resource cases.

Please attach any additional information as warranted.

Report due January 15, 2009.

Submit report electronically to: ECRReports@omb.eop.gov

Attached A. Basic Principles for Agency Engagement in Environmental Conflict Resolution and Collaborative Problem Solving

**Basic Principles for Agency Engagement in
Environmental Conflict Resolution and Collaborative Problem Solving**

Informed Commitment	Confirm willingness and availability of appropriate agency leadership and staff at all levels to commit to principles of engagement; ensure commitment to participate in good faith with open mindset to new perspectives
Balanced, Voluntary Representation	Ensure balanced inclusion of affected/concerned interests; all parties should be willing and able to participate and select their own representatives
Group Autonomy	Engage with all participants in developing and governing process; including choice of consensus-based decision rules; seek assistance as needed from impartial facilitator/mediator selected by and accountable to all parties
Informed Process	Seek agreement on how to share, test and apply relevant information (scientific, cultural, technical, etc.) among participants; ensure relevant information is accessible and understandable by all participants
Accountability	Participate in the process directly, fully, and in good faith; be accountable to all participants, as well as agency representatives and the public
Openness	Ensure all participants and public are fully informed in a timely manner of the purpose and objectives of process; communicate agency authorities, requirements and constraints; uphold confidentiality rules and agreements as required for particular proceedings
Timeliness	Ensure timely decisions and outcomes
Implementation	Ensure decisions are implementable consistent with federal law and policy; parties should commit to identify roles and responsibilities necessary to implement agreement; parties should agree in advance on the consequences of a party being unable to provide necessary resources or implement agreement; ensure parties will take steps to implement and obtain resources necessary to agreement