

FY 2009 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 fourth year of reporting in accordance with this memo for activities in FY 2009.

The report deadline is January 15, 2010.

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 2009 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 2009 ECR reports. You may be contacted for the purpose of clarifying information in your report. For your reference, copies of prior year synthesis reports are available at www.ecr.gov.

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Date this report is being submitted:	18 Dec 2009

Section 1: Capacity and Progress

1. Describe steps taken by your department/agency to build programmatic/institutional capacity for ECR in 2009, including progress made since 2008. 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.]

During FY 2009, the Army has taken the following steps to promote ECR.

1. Educational Support.
 - a. Provided ECR training to regional environmental law specialists 18 Sep 2009
 - b. Provided ethics in mediation training to environmental law division personnel 17 Dec 2008
 - c. Initiated a plan to implement additional training for environmental law specialists and to develop an ECR/ADR Q & A web page on the USALSA ELD site.
2. Supported Army's ADR policy.
 - a. Evaluates every environmental dispute for the potential of ECR.
 - b. Tracks every dispute using ECR.

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
Check only one			
a) Lack of staff expertise to participate in ECR at local ELS level	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
b) Lack of staff availability to engage in ECR at local ELS level	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
c) Lack of party capacity to engage in ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
d) Limited or no funds for facilitators and mediators	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
e) Lack of travel costs for your own or other federal agency staff at local ELS level.	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

f) Lack of travel costs for non-federal parties at local ELS level.	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
g) Reluctance of federal decision makers to support or participate	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
h) Reluctance of other federal agencies to participate	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
i) Reluctance of other non-federal parties to participate	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
j) Contracting barriers/inefficiencies at local ELS level	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
k) Lack of resources for staff capacity building at local ELS level	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
l) Lack of personnel incentives	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
m) Lack of budget incentives at local ELS level	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
n) Lack of access to qualified mediators and facilitators	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
o) Perception of time and resource intensive nature of ECR	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
p) Uncertainty about whether to engage in ECR	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
q) Uncertainty about the net benefits of ECR	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
r) Other(s) (please specify):	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
s) FFA DSMOA CD or other acting agreement does not allow the Army to participate in ECR.			
t) Complicated cases, parties entrenched in positions too far apart to settle.			
u) No barriers (please explain): _____	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

Section 3: ECR Use

3. Describe the level of ECR use within your department/agency in FY 2009 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.]

	Cases or projects in progress ¹	Completed Cases or projects ²	Total FY 2009 ECR Cases ³	Decision making forum that was addressing the issues when ECR was initiated:				Of the total FY 2009 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
<i>Context for ECR Applications:</i>									
Policy development	___	___	___	___	___	___	___	___	___
Planning	___	___	___	___	___	___	___	___	___
Siting and construction	<u> 1 </u>	___	<u> 1 </u>	<u> 1 </u>	___	___	___	___	<u> 1 </u>
Rulemaking	___	___	___	___	___	___	___	___	___
License and permit issuance	___	___	___	___	___	___	___	___	___
Compliance and enforcement action	<u> 0 </u>	<u> 3 </u>	<u> 3 </u>	<u> 1 </u>	<u> 0 </u>	<u> 1 </u>	<u> 0 </u>	<u> 2 </u>	<u> 0 </u>
Implementation/monitoring agreements	<u> 0 </u>	<u> 1 </u>	<u> 1 </u>	<u> 1 </u>	<u> 1 </u>	___	___	___	<u> 2 </u>
Other (specify): CERCLA Third Party Sites in litigation _____	<u> 3 </u>	<u> 2 </u>	<u> 5 </u>	<u> 0 </u>	<u> 0 </u>	<u> 5 </u>	<u> 0 </u>	<u> 0 </u>	<u> 5 </u>
TOTAL	<u> 4 </u>	<u> 6 </u>	<u> 10 </u>	<u> 3 </u>	<u> 1 </u>	<u> 6 </u>	<u> 0 </u>	<u> 2 </u>	<u> 8 </u>
	(the sum should equal Total FY 2009 ECR Cases)			(the sum of the Decision Making Forums should equal Total FY 2009 ECR Cases)				(the sum should equal Total FY 2009 ECR Cases)	

¹ A “case in progress” is an ECR case in which neutral third party involvement began prior to or during FY 2009 and did not end during FY 2009.

² A “completed case” means that neutral third party involvement in a particular matter ended during FY 2009. 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 FY2009 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).

4. Is your department/agency using ECR in any of the substantive priority areas you listed in your prior year ECR Reports? Indicate if use has increased in these areas since they were first identified in your ECR report. Please also list any additional priority areas identified by your department/agency during FY 2009, and indicate if ECR is being used in any of these areas. Note: An overview of substantive program areas identified by departments/agencies in FY 2008 can be found in the FY 2008 synthesis report.

List of priority areas identified in your department/agency prior year ECR Reports	Check if using ECR	Check if use has increased in these areas
Environmental Litigation CERCLA third party sites.	×	<input type="checkbox"/>
Affirmative litigation and compliance	×	×
BRAC	×	×
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
List of additional priority areas identified by your department/agency in FY 2009	Check if using ECR	
Some NEPA/BRAC processes use public comment periods, advisory boards but in some disputes ECR is being considered	<input type="checkbox"/>	
SHPO Programmatic Agreement	×	
_____	<input type="checkbox"/>	
_____	<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]

METHODS AND MEASURES TO TRACK USE AND OUTCOMES OF ECR

Provide ECR training to regional environmental law specialists and establish an ECR Q & A page on the Army Environmental Law web page. This will help Army employees recognize how ECR can be easy to use and, when applied to the appropriate cases, more effectively resolve their cases.

Ensure that cases in mediation remain tracked.

Develop a better cost benefit analysis that more directly shows how ECR benefits Army, by not only saving money but also providing Army more time and opportunity to identify and address the crucial issues that are blocking settlement or progress on an issue. To get a more accurate benefit assessment of ECR, Army should further define what costs and benefits to include in the assessment and the method of the analysis. This fiscal year cost savings were estimated, but not obtained in actuality, as many mediations failed to reach settlement and continue to incur costs as they proceed to negotiations and/or litigation. In one successful mediation, however, the cost savings were clear. The approximate costs of the mediation were \$15,000, while the estimated cost of litigation would be in the millions.

Focus on perception analysis. Assess how the parties see their position and analyze their perceptions to find new ways to look at the situation and work to move closer to settlement. This fiscal year, some cases were not resolved through ECR and are back in litigation and the costs are anticipated to grow. One reason is that the parties are entrenched in positions that are too far apart and the mediators were unsuccessful in moving them closer to settle. Another reason is that some parties perceive their case having a high potential for success if litigated. In these cases it is important to have a good mediator who can work with the parties' perceptions to move entrenched parties closer to settlement

Outside of those cases in litigation, many environmental matters that reach conflict are governed by dispute resolution provisions in formal agreements, partnerships and cooperative arrangements. These procedures do not include the ECR process, but require negotiations up the chain of command. These agreements and the model language should be reviewed to address whether we can change the dispute resolution provisions to allow for the use of ECR as appropriate.

6. Describe other significant efforts your agency has taken in FY 2009 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.

EFFORTS TO MANAGE DISPUTES OUTSIDE OF ECR

Many Army installations reported that they had no cases in ECR because they maintain open discussions and a good working relationship with environmental regulators. The few disputes that arose were resolved informally through discussions/negotiations.

For the disputes that are not resolved at a lower level, the Army continues to use negotiations and the dispute resolution procedures set forth in Federal Facility Agreements, partnerships and other agreements.

One installation, who reported no use of ECR, reported that this is because it is actively engaging the public and environmental stakeholders through the Installation Strategic Planning process, encouraging public involvement through the NEPA process regarding the installation's projects, and has implemented the Army Compatible Use Buffer and Joint Land Use Study program to engage local communities in compatible land use. The installation has offered to form a Restoration Advisory Board, but the citizen stakeholders have shown a lack of interest, indicating a vote of confidence in how the installation is handling their environmental planning.

Army has been able to resolve some BRAC disputes, without formally entering into ECR. For example one base established a Board of Advisers to engage with the stakeholders during BRAC implementation. Close communications between the base commander and the board members ensured that issues were being addressed and communications channels were open. Regarding another BRAC site, the Army has extended the period for public comment and is considering a public meeting, or potentially going to ECR. Another BRAC case involved the use of an Advisory Council to resolve issues between Army and the SHPO. Finally, in another BRAC case, Army is considering ECR because the stakeholders are hesitant to sign a PA because they feel Army has not adequately engaged in consultation.

The Army Environmental Law Specialists are becoming more aware of the availability of ECR and have it as a tool that they can use when necessary. For example, the Army was able to collaborate with stakeholders to address water usage and Endangered Species Act issues to address a dispute involving a pipeline project. Another ELS is considering ECR in a noise dispute.

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.

ARMY'S NOTABLE ECR ACHIEVEMENTS

The Army environmental law specialists at the installations are becoming more aware of the availability of ECR and are using it to resolve difficult issues. One base used ECR to assist the Army to draft a programmatic agreement with a SHPO. Another Army installation considered the use of ECR to address NEPA related issues regarding a BRAC move.

Many cases in the Affirmative Claims Branch are still being developed and are not yet ripe for ECR. One case was ready for ECR and the ECR was successful. The mediator was very helpful in assessing the strengths and weaknesses of each side and projecting to the parties a realistic view of the case. The parties attended the mediation with a willingness to work toward settlement. The settlement avoided costly, drawn out litigation.

The Army National Guard reported one compliance action where they received from EPA an order related to an underground storage tank violation. The case went into EPA's Administrative Hearings Process. During the negotiation stage, EPA and NGB entered a joint motion to enter into ECR, which the Administrative Judge granted. ECR provided the parties additional time to work out a mutually agreed upon Supplemental Environmental Project that reduced the fine and provided additional environmental protection to the facility

In three CERCLA defense cases, ECR did not result in a settlement, but did provide the Army more time to address the disputes, avoiding the time pressures of court ordered deadlines. For example, in one case, when one of the terms of the agreement fell apart, the parties resumed ECR to avoid going back to court.. In another case, the mediation provided the parties additional time to define the demand amount and to raise money. A third, court ordered ECR resulted in a settlement in principal, avoiding imminent trial, but the terms of the settlement document are still in dispute and a trial date is still looming.

In two other cases, the mediators were unable to move the parties toward an agreement. The parties were too far apart. One party felt their case would win at court so they would not settle.

8. ECR Case Example

- a. Using the template below, provide a description of an ECR case (preferably completed in FY 2009). 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
RCI privatization of housing project. One Army installation was mandated to privatize its housing on the base. A number of the homes included in the plan were historic buildings. The base had to obtain a programmatic agreement with the State Historic Preservation Office (SHPO). Initial discussions were not moving the project forward. The SHPO did not concur with the privatization plan. After about six months of failed negotiations, the base sought a third party neutral to mediate a signed programmatic agreement.
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 third party neutral held discussions with the Army and the SHPO to identify and resolve the issues.
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 ECR resulted in a completed programmatic agreement that allows the Army to proceed with its privatization plan in a much more efficient manner.
Reflections on the lessons learned from the use of ECR
Turning to a third party neutral to assist in communications between the Army and the SHPO allowed the parties to work through the issues and generate an agreed upon plan.

- 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 type="checkbox"/>	<input type="checkbox"/>
Unnecessarily lengthy project and resource planning processes;	✗	<input type="checkbox"/>	<input type="checkbox"/>
Costly delays in implementing needed environmental protection measures;	<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"/>
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"/>
Deep-seated antagonism and hostility repeatedly reinforced between stakeholders by unattended conflicts.	✗	<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.

Because of the way some cases were structured, the Department of Justice managed/sponsored the ECR on behalf of the Army. Thus, Army did not directly observe or participate in these mediations. The DOJ counsel involved in these cases provided Army with information on their views of the mediation process for the report.

Please attach any additional information as warranted.

Report due January 15, 2010.

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