

Environmental Conflict Resolution in the Federal Government

Analysis of FY 2010 ECR Reports
Submitted by Federal Departments and Agencies
Pursuant to the OMB/CEQ ECR Memorandum of
November 28, 2005

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Analysis of FY 2010 ECR Reports Executive Summary

On November 28, 2005, the Office of Management and Budget (OMB) and the President's Council on Environmental Quality (CEQ) issued a joint policy memorandum on environmental conflict resolution (ECR Memorandum). The ECR Memorandum directs federal agencies to increase the effective use of ECR and their institutional capacity for collaborative problem solving. This report synthesizes the 2010 federal agency annual reports submitted to OMB and CEQ in response to the policy memorandum.

The impetus for the ECR Memorandum was the increasing recognition of environmental governance challenges such as protracted and costly environmental litigation, unnecessarily lengthy resource planning processes, costly delays in implementing needed environmental protection measures, and conflict between stakeholders involved in environmental issues. To address these challenges, change from “business as usual” was needed in the federal government.

The ECR Memorandum supports increasing the effective use of ECR by building on existing authorities and guidance including:

- Administrative Dispute Resolution Act of 1996;
- Regulatory Negotiation Act of 1996;
- Contract Disputes Act of 1978;
- Alternative Dispute Resolution Act of 1998;
- Environmental Policy and Conflict Resolution Act of 1998;
- Executive Order 12988, “Civil Justice Reform” (February 5, 1996);
- Presidential Memorandum, “Designation of Interagency Committee to Facilitate and Encourage Use of Alternative Means of Dispute Resolution and Negotiated Rulemaking” (May 1, 1998);
- Environmental Policy and Conflict Resolution Advancement Act of 2003; and
- Executive Order 13352, “Facilitation of Cooperative Conservation” (August 4, 2004).

The ECR Memorandum defines ECR as third-party assisted conflict resolution in the context of environmental, public lands, or natural resources issues. The Memorandum acknowledges, however, that 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 Memorandum requires periodic leadership meetings, quarterly interdepartmental senior staff meetings, and annual reporting by departments and agencies to OMB and CEQ on progress made each year. The meeting and reporting requirements are designed to provide advice and guidance, and to facilitate on-going information exchange on ECR. Many agencies, including the most frequent users of ECR, have reported that the forums and reporting requirements have proven beneficial to advancing the goals set out in the policy memorandum.

The following departments and agencies submitted FY 2010 ECR reports:

- Department of Defense (DoD)
- Department of Energy (DOE)
- Department of the Interior (DOI)
- Department of Justice (DOJ)
- Department of Veterans Affairs (VA)
- National Oceanic and Atmospheric Administration (NOAA)
- U.S.D.A. Forest Service (USFS)
- Environmental Protection Agency (EPA)
- Federal Energy Regulatory Commission (FERC)
- National Aeronautics and Space Administration (NASA)
- Nuclear Regulatory Commission (NRC)
- U.S. Institute for Environmental Conflict Resolution (USIECR)

Agency reports highlight the progress being made in meeting the goals of the ECR Memorandum. The following is a summary of progress as reported by federal departments and agencies for FY 2010.

- ECR use in the federal government remained relatively constant, with 425 cases reported in FY 2010 compared 412 cases in FY 2009.
- ECR is being used to reduce environmental conflicts and improve environmental decisions in mission critical areas that include: National Environmental Policy Act (NEPA) issues; environmental cleanup and restoration; natural resource management on federal lands; species and habitat conservation; coastal zone management; historic preservation; tribal consultation; and energy infrastructure development and management.
- Government-wide, ECR use is greatest in the areas of compliance and enforcement, planning, and monitoring and implementing of agreements. ECR is also used in the contexts of policy development, permitting, rulemaking, and siting and construction.
- A critical component of this effort is documenting ECR's role in minimizing the costs of conflict and maximizing the benefits of collaboration. Agencies reported a wide spectrum of benefits from the use of ECR, including litigation costs avoided, expedited work on projects, innovative solutions, cost-effective solutions, and improved working relationships among stakeholders that help solve issues now and help manage issues in the future. Even when agreements are not reached the benefits of ECR are highlighted, including narrowing the issues that may end up in litigation.
- Agencies report that greater use could be made of ECR to more effectively address current environmental governance challenges in their program areas. Most agencies regularly using ECR have invested in training to build competencies in conflict resolution and collaborative-problem solving. Training is seen as a key to increasing the effective use of ECR. Trainings have focused on federal agency staff, but broader audiences of

affected stakeholders have been reached including state and local governments, tribal nations, NGOs, environmental advocates, community-based groups, and environmental and natural resource attorneys.

The FY 2010 Report is consistent with previous reports as it shows that:

- almost all reporting agencies were taking some measures to implement the ECR memorandum;
- agencies use ECR in a variety of contexts to further their respective missions;
- agencies are reporting greater use and acceptance of ECR; and
- agencies use ECR in a broad range of settings that include planning and policy development, rulemaking, permitting, licensing, enforcement and compliance, and administrative proceedings.

I. Introduction

The FY 2010 ECR Reports are the fifth annual reports submitted by agencies in response to the November 28, 2005 Memorandum on Environmental Conflict Resolution (ECR Memorandum) issued by the Office of Management and Budget (OMB) and the Council on Environmental Quality (CEQ). Among other things, the ECR Memorandum directs federal agencies to 1) increase the effective use of ECR; 2) integrate ECR objectives into agency mission statements, Government Performance and Results Act goals, and strategic planning; 3) assure that agency infrastructure supports ECR; 4) invest in support of ECR programs; and 5) focus on accountable performance and ECR achievement.

This analysis synthesizes and offers a government-wide perspective on the experiences reported by agencies in their FY 2010 ECR reports. It covers the following:

- the strengths and weaknesses of agency data;
- how ECR is used by agencies;
- the contexts in which ECR is used;
- how agencies are building capacity in ECR;
- how agencies are tracking and evaluating ECR;
- the challenges that agencies face in using ECR;
- collaborative problem-solving efforts that do not use third parties;
- the substantive areas in which ECR is employed, and
- specific cases highlighting the use of ECR.

This analysis also provides context for the FY 2010 findings by referencing key elements of previous annual reports. For example, the *FY 2007, FY 2008, and FY 2009 Analyses* found that:

- almost all of the reporting agencies were taking some measures to implement the ECR Memorandum;
- agencies use ECR in a variety of contexts to further their respective missions;
- agencies are reporting greater use and acceptance of ECR; and
- agencies use ECR in a broad range of settings from planning and policy development, to rulemaking, permitting, licensing, enforcement, administrative proceedings and appeals, and in judicial proceedings.

A. Development of the Template for the FY 2010 Report

As was the case with the previous reports, the FY 2010 reports were prepared in response to a template of questions developed by the ECR Senior Level Forum (Forum).¹ The template is substantially the same as it was in FY 2009, as the Forum determined that the previously adopted questions were yielding useful data. In addition, several members of the Forum had commented

¹ This Interagency Forum was convened by the US Institute for Environmental Conflict Resolution (USIECR) pursuant to the ECR Memorandum. It consists of senior level representatives from the agencies affected by the Joint Memorandum, and its purpose is to give advice and guidance and facilitate interagency exchange on ECR.

in response to the FY 2009 Template about the importance of consistency in the data collected through the template. One way of ensuring consistency, these members suggested, would be to ask similar questions from year to year.

B. FY 2010 ECR Reports

The following 12 agencies submitted FY 2010 ECR reports:

- Department of Defense (DoD)
- Department of Energy (DOE)
- Department of the Interior (DOI)
- Department of Justice (DOJ)
- Department of Veterans Affairs (VA)
- National Oceanic and Atmospheric Administration (NOAA)²
- U.S.D.A. Forest Service (USFS)
- Environmental Protection Agency (EPA)
- Federal Energy Regulatory Commission (FERC)
- National Aeronautics and Space Administration (NASA)
- Nuclear Regulatory Commission (NRC)
- U.S. Institute for Environmental Conflict Resolution (USIECR)

DOI and DoD have a number of “sub-agencies” whose ECR activities are included in their respective reports. DOI’s nine bureaus (the Bureau of Land Management (BLM), the Fish and Wildlife Service (FWS), the Bureau of Indian Affairs (BIA), the Bureau of Indian Education (BIE); the National Park Service (NPS); the Bureau of Ocean, Energy, Management, Regulation and Enforcement (BOEMRE); the Office of Surface Mining (OSM); the United States Geological Survey (USGS); and the Bureau of Reclamation (BOR)), submitted their own reports to the DOI Office of Collaborative Action and Dispute Resolution (CADR). CADR then collated this information and submitted a single DOI ECR report to OMB and CEQ. DoD’s report also contains information from several agencies. DoD submitted its own report, and attached separate reports from the Departments of Navy (DON), Army (DOA), Air Force (USAF), and the Army Corps of Engineers (USACE).

² NOAA submitted its Report on behalf of the Department of Commerce.

II. Use of ECR

Section Five of the ECR Memorandum directs agencies to increase their effective use of ECR. The FY 2010 Agency ECR Reports indicate that agencies are achieving this goal.

A. Which agencies are engaging in ECR? How frequently are they engaging in ECR?

The total number of reported individual cases for FY 2010 is 425. This figure should be viewed as an approximation, as agency representatives acknowledge that it is likely that the tracking systems in place do not record all ECR activity that is taking place throughout the federal government.³ Moreover, it is clear that some multi-agency cases were reported more than once.⁴

ECR use in the federal government in FY 2010 remained consistent with FY 2009 and FY 2008 levels (Table 1). As with prior years, the level of ECR use is distributed across several agencies, with EPA (106 cases) being the agency most frequently involved in ECR, followed by DoD (104 cases), DOI (98 cases), FERC (53 cases), USFS (49 cases), NOAA (8 cases), DOE (6 cases) and NRC (1 case). Agencies were also asked to identify whether their cases were in progress or completed. Of the 425 cases, 247 (58%) were identified as in progress, and 178 (42%) were identified as completed (Table 2).

Table 1. Distribution of ECR cases in the federal government FY 2007 through FY 2010

	Number and Percent of ECR Cases			
	FY 2007	FY 2008	FY 2009	FY 2010
DoD	74 (23%)	82 (20%)	94 (23%)	104 (24%)
DOE	See Note*	See Note*	See Note*	6 (1%)
DOI	46 (14%)	81 (19%)	92 (22%)	98 (23%)
DOT	12 (4%)	3 (1%)	No Report Submitted	No Report Submitted
EPA	90 (28%)	142 (34%)	131 (32%)	106 (25%)
FERC	21 (7%)	16 (4%)	19 (5%)	53 (13%)
NOAA	8 (2%)	2 (0%)	6 (1%)	8 (2%)
NRC	3 (1%)	1 (0%)	1 (0%)	1 (0%)
USFS	63 (20%)	92 (22%)	69 (17%)	49 (12%)
VA	3 (1%)	0 (0%)	0 (0%)	0 (0%)
Total	320 (100%)	419 (100%)	412 (100%)	425 (100%)

*DOE submitted ECR reports to OMB and CEQ for the years FY 2007 through FY 2009, however DOE only began reporting the number of third-party assisted ECR cases per the Memorandum definition in FY 2010.

The 425 ECR cases for FY 2010 do not include the 30 cases in which DOJ reported using a paid neutral, or the 51 cases reported by USIECR. As cross-agency providers of ECR, the DOJ and USIECR cases should theoretically be included in the reports of other agencies. DOJ is involved in cases as the legal representative of the United States in Federal Court. The agency directly involved in the litigated matter would presumably report the conflict in its ECR report. Similarly, USIECR provides independent third-party assisted collaboration and conflict resolution services to agencies directly involved in conflict. In addition, the reported 425 cases for FY 2010 only represents agreement-seeking third-party assisted cases to ensure consistent use of the ECR definition across agencies and across years.

³ See Discussion on Tracking of ECR, Section IV, *Infra*.

⁴ The Missouri River Recovery Implementation Case (MRRIC) was reported by both DOI and USACE.

Two agencies reported that they did not engage in any ECR cases in FY 2010, NASA, and the Department of Veterans Affairs. These agencies indicated they are infrequently faced with environmental conflict. For example, VA reports “historically, there have not been a significant number of VA projects in which [ECR] would be appropriate.”

Table 2. ECR cases completed and in progress by year (FY 2007 through FY2010)

	Number and Percent of Cases	
	In Progress	Completed
2007*	176 (63%)	105 (37%)
2008	237 (57%)	182 (43%)
2009	256 (62%)	156 (38%)
2010	247 (58%)	178 (42%)

	Average Number of Cases in Progress	Total Number of Cases Completed
2007-2010	229	621

*Some agencies did not report all their cases in response to this question, which is why the number of cases identified as in progress or completed (281) is less than the overall number of cases for FY 2007 (320)

By analyzing the overall number of cases along with the cases completed, we can get a rough idea of how many new cases agencies have been involved with from the fiscal years 2008 to 2010, although the template does not directly ask agencies to identify cases that are new. The number of cases during those years was 419 (2008), 412 (2009), and 425 (2010), thus averaging close to 420 cases for those years (Table 2). The percentage of cases completed during those years was 43% (2008), 38% (2009), and 42 % (2010), thus averaging about 40% for those years. Thus, in order to reach a level of approximately 420 cases in each of those years, the 40% of cases that were completed had to be replaced by new cases. This would amount to about 170 new cases per fiscal year for the fiscal years in question.

B. What is the context for ECR?

As was noted in the previous annual reports, the categories of ECR activity within a particular agency tend to be heavily dependent on the agency’s mission (Figure 1). Agencies like EPA that engage in a significant amount of enforcement and compliance tend to use ECR in those areas. Agencies that engage in a significant amount of planning, such as DOI and USFS, tend to use ECR in those areas.

Government-wide, 32% (137 cases) of ECR took place in compliance and enforcement (Table 3). This is primarily because EPA had the largest number of ECR cases and most of these fell into this category. The Planning category constituted 26% (109 cases) of all federal ECR activity. These cases come primarily from agencies with significant land management responsibilities, such as DOI, USFS, and DoD. The Implementation and Monitoring Agreements

Category made up 19% of the total number of cases. This portion comes primarily from the partnering teams⁵ established by the Department of the Navy to implement the terms of agreements to cleanup Superfund sites. Policy development accounted for 5% of all ECR in FY 2010, with licenses and permits 5%, rulemaking 3%, siting and construction 6%, and “other” 4% accounting for the remainder of cases.

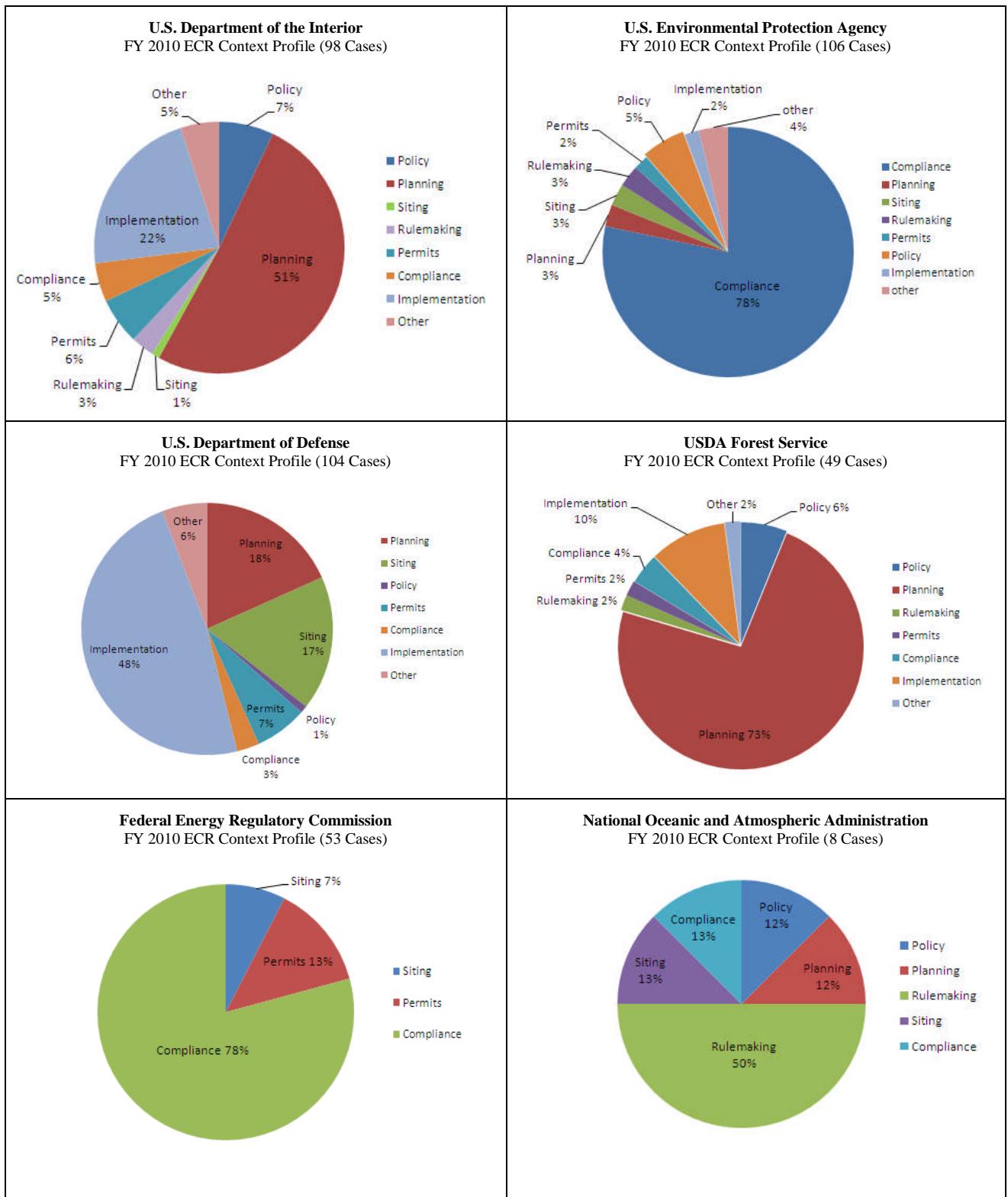
Research undertaken by EPA and described in its FY 2010 report indicates that the context and forum for an ECR case can impact the degree to which ECR provides benefits for participants to a process. For example, the research showed that ECR might have a more beneficial effect on relationship-building in the more informal or pre-decisional ECR cases than in the more formal or post-decisional cases that occur mostly in the compliance and enforcement context. This is discussed further in Section V(B) of this report. Figure 1 shows the ECR context profiles for the 6 agencies that engage in the majority of federal ECR cases.

Table 3. Context profile of ECR cases across the federal government

	Number and Percent of FY 2010 ECR Cases
Compliance and enforcement action	137 (32%)
Planning	109 (26%)
Implementation and monitoring agreements	81 (19%)
Siting and construction	27 (6%)
License and permit issuance	23 (5%)
Policy development	19 (5%)
Other	17 (4%)
Rulemaking	12 (3%)
Total	425 (100%)

⁵ These partnering teams are organized in a three tier structure and chartered to address installation restoration issues. Collectively, the teams worked on 1,384 sites.

Figure 1. ECR context profiles by agency for FY 2010



Note: NRC reported one ECR case in the rulemaking context.

C. Participant or Sponsor?

Question three also asked agencies to identify whether they were sponsors or non-sponsor participants of particular ECR cases (Table 4). While all agencies were more likely to be sponsors than participants, the degree to which they sponsored processes appears to be dependent on their missions.

Agencies with substantial enforcement and compliance missions such as EPA reported that they engaged in ECR as a sponsor in 84 percent of their ECR cases. Agencies engaging in ECR in the more informal upstream processes such as planning, policy development, licensing, and permitting reported a relatively higher percentage of being involved in ECR as non-sponsor participants. USFS, for example, reported that it is involved primarily as a non-sponsor participant in 37% of its ECR cases. DOI, with several of its agencies having land management missions that are similar to USFS, reported being involved as non-sponsor participants in 34% of its ECR cases. According to USFS staff,⁶ USFS's relatively high percentage of involvement as a non-sponsor participant relates directly to its status as a land manager. In that role USFS is often invited to participate in processes that are initiated or sponsored by neighboring federal, state, local, and Tribal agencies.

Table 4. Agency participation in or sponsoring of ECR cases for FY 2010

	Number and Percent of Cases		Total Number Of Cases
	Sponsored	Participated but did not sponsor	
EPA	89 (84%)	17 (16%)	106
DoD	64 (62%)	40 (38%)	104
DOI	65 (66%)	33 (34%)	98
FERC	53 (100%)	0 (0%)	53
USFS	31 (63%)	18 (37%)	49
NOAA	6 (75%)	2 (25%)	8
DOE	6 (100%)	0 (0%)	6
NRC	1 (100%)	0 (0%)	1
			425

⁶ Based on a conversation with Martha Twarkins, USFS, 3/14/2008

D. Decision Making Forum

Agencies were also asked to identify the decision making forum where issues were being addressed when ECR was initiated. The choices in this part of question three were intended to generally approximate the continuum of conflict as expressed in the *FY 2006 Analysis*.⁷

In the continuum of conflict, cases that are in formal administrative or judicial forums are considered “downstream” cases. Cases that are in the informal phases, such as planning, and policy decisions, are considered “upstream” cases. “Federal Agency Decision” was the most upstream category in this part of question three. “Administrative Proceedings” was the category next furthest downstream, and “Judicial Proceedings” was the furthest downstream category. Cases that did not fit into any of these categories would fall in the “Other” category.

Table 5. Agency decision-making forums where cases were initiated: FY 2007 through FY 2010

FY 2007 through FY 2010	Federal Agency Decision	Administrative Proceedings/ Appeals	Judicial Proceedings	Other
	<i>Number and Percent (%)</i>			
FY 2007	186 (58%)	43 (14%)	30 (9%)	61 (19%)
FY 2008	197 (47%)	116 (28%)	47 (11%)	59 (14%)
FY 2009	186 (45%)	116 (28%)	52 (13%)	57 (14%)
FY 2010	208 (48%)	94 (23%)	57(14%)	66 (15%)

Table 5 shows that 208 cases (48%) fall into the upstream “Agency Decision” category, with 71 coming from DOI. Agencies categorized 94 cases (23%) as Administrative Proceedings and Appeals, with 65 of these coming from EPA, which is consistent with its large proportion of compliance and enforcement ECR cases. Agencies categorized 57 (14%) of their cases as “Judicial Proceedings”, and 66 cases (15%) as “Other.”

At the agency level, the distribution of cases across decision-making forums has not changed significantly from FY 2007 through FY 2010 (Table 6).

⁷ See *2006 Analysis*, pp 12-13.

Table 6. Distribution of cases by decision making forums by agency (FY 2007 to FY 2010)

FY 2007	Federal Agency Decision		Administrative Proceedings/ Appeals		Judicial Proceedings		Other	
	<i>Number and Percent (%)</i>							
DoD	14	8%	1	2%	13	43%	46	76%
DOI	34	18%	5	12%	5	17%	2	3%
DOT	11	6%	0	0%	1	3%	0	0%
EPA	32	17%	35	81%	10	33%	13	21%
FERC	21	11%	0	0%	0	0%	0	0%
NOAA	8	4%	0	0%	0	0%	0	0%
NRC	3	2%	0	0%	0	0%	0	0%
USFS	63	34%	0	0%	0	0%	0	0%
VA	0	0%	2	5%	1	3%	0	0%
Totals	186	100%	43	100%	30	100%	61	100%

FY 2008	Federal Agency Decision		Administrative Proceedings/ Appeals		Judicial Proceedings		Other	
	<i>Number and Percent (%)</i>							
DoD	17	8%	0	0%	17	36%	48	82%
DOI	54	27%	14	12%	8	17%	5	8%
DOT	2	1%	0	0%	1	2%	0	0%
EPA	21	11%	96	83%	19	41%	6	10%
FERC	16	8%	0	0%	0	0%	0	0%
NOAA	1	1%	1	1%	0	0%	0	0%
NRC	1	1%	0	0%	0	0%	0	0%
USFS	85	43%	5	4%	2	4%	0	0%
Totals	197	100%	116	100%	47	100%	59	100%

FY 2009	Federal Agency Decision		Administrative Proceedings/ Appeals		Judicial Proceedings		Other	
	<i>Number and Percent (%)</i>							
DoD	28	15%	2	2%	16	31%	48	84%
DOI	70	37%	14	12%	6	12%	3	5%
EPA	19	10%	86	74%	20	38%	6	11%
FERC	19	10%	0	0%	0	0%	0	0%
NOAA	5	3%	0	0%	0	0%	0	0%
NRC	1	1%	0	0%	0	0%	0	0%
USFS	44	24%	14	12%	10	19%	0	0%
Totals	186	100%	116	100%	52	100%	57	100%

FY 2010	Federal Agency Decision		Administrative Proceedings/ Appeals		Judicial Proceedings		Other	
	<i>Number and Percent (%)</i>							
DoD	22	11%	13	14%	18	32%	51	77%
DOE	3	1%	2	2%	1	1%	0	0%
DOI	71	34%	6	6%	18	32%	3	5%
EPA	15	7%	65	69%	19	33%	7	11%
FERC	53	25%	0	0%	0	0%	0	0%
NOAA	7	3%	1	1%	0	0%	0	0%
NRC	1	1%	0	0%	0	0%	0	0%
USFS	36	17%	7	8%	1	2%	5	7%
VA	0	0%	0	0%	0	0%	0	0%
Totals	208	100%	94	100%	57	100%	66	100%

E. Five Year Overview: Data on Cases

The five years of accumulated data show clear trends in terms of reported number of cases. ECR Report Templates began asking agencies to report the number of ECR cases in which they were involved in FY 2007. In that year, agencies reported 320 cases. This number jumped to 419 in FY 2008, and has remained around this level for FY 2009 (412), and FY 2010 (425). It appears from the 2008-2010 data that the 2007 data can be viewed as an anomaly. The 325 cases reported in that year were almost one-third less than the number reported by agencies in the years that followed. While it is possible that one of the reasons for the increase is that the number of ECR cases from FY 2007 to FY 2008 and beyond did substantially increase, the more likely reason for most of this increase is that beginning in FY 2008 agencies had started to mature in their ability to collect ECR data. If this was the case, the FY 2007 Report may have missed ECR cases simply because agencies had not yet mastered the task of identifying, collecting and reporting ECR cases.

The five years of data also shows that over 95 percent of ECR takes place in five agencies: DoD, DOI, EPA, FERC, and USFS. As noted in Section II (B) of this report, the locus of ECR activity differs, depending on agency mission. Most of the ECR that takes place in EPA and FERC is in enforcement and compliance, and takes place in the more downstream forums of administrative proceedings/appeals. On the other hand, most of the ECR that takes place in DOI, USFS, and DoD is in the agency decision making forum, the upstream side of the conflict continuum.

The difference in the source of ECR can influence the degree of its impact on the outcome of a process. As noted above, EPA's FY 2010 Report included research on its cases and noted: "(t)here are differences in ECR case outcomes related to whether the case arose from a pending federal agency decision, an administrative proceeding, or a judicial proceeding and whether the case is classified as upstream (pre-decision) or downstream (post-decision). For example, downstream and litigation-related ECR cases are less likely to have improved relationships among the parties relative to upstream or federal agency decision ECR cases."

III. Building Capacity

Section Five of the ECR Memorandum also directs agencies to build institutional capacity for collaborative problem-solving. Agency ECR Reports have shown progress in building institutional capacity through the development of infrastructure; investment in ECR; the leveraging of resources; strategic planning; the development of policies; guidance and procedures; the integration of science into ECR; and education, awareness and training.

A. Programmatic Capacity: Infrastructure, Personnel and Operations

Almost all of the agencies that engage in ECR reported on the importance of building infrastructure and dedicating staff to increase the appropriate and effective use of ECR. Among other actions, agencies took the following measures during FY 2010:

- Continued support of a newly established Conflict Resolution & Public Participation Center in carrying out its mandate to anticipate, prevent, and manage water conflicts (USACE);
- Building structured communities of practice to support public participation (USACE);
- Investing more funding in the mediation of environmental cases than for any other type of case (DOJ);
- Requiring conflict management elements in management performance plans (DOI);
- Continuing to fund and support offices that are dedicated full time to ECR (EPA, FERC, DOI, USACE, USIECR);
- Sustaining an integrated conflict management program allows for linkage between ECR and work place conflict management (DOI); and
- Ongoing use of new business rules that help USFS measure the performance of ECR-related activities (USFS).

Overall, the FY 2010 reports showed that agencies that engage in ECR invest in related infrastructure. EPA, DOI, DoD, FERC, DOJ, and USACE reported that they continue to fund full or part time ECR or ADR-related positions as well as invest in training and other ECR services.

B. Leveraging Resources: Interagency Agreements and Partnering

All of the agencies that engage in ECR reported using interagency agreements and partnering to leverage resources to help them achieve their goals. Specific examples include:

EPA working with the Department of Agriculture and the Department of the Interior on air quality; USACE working with federal and state agencies on California water issues; DOE working with federal and state agencies on issues pertaining to Hanford Reach, Washington; FERC collaborating with Harvard University to produce a study of ADR in the energy industry; The Department of the Navy working with federal, state, and private partners to oversee restoration efforts at over 1,000 Department of Navy sites; and DOE and DoD relying on dispute resolution language in Federal Facility Agreements to help resolve conflict among agencies.

C. Strategic Planning

Several agencies reported on the importance of strategic planning in carrying out their ECR objectives, in accordance with Section 5 of the ECR Memorandum. EPA reported that its ECR program “furthers all five goals in EPA’s Strategic Plan: 1) clean air and climate change; 2) clean and safe water; 3) land preservation and restoration; 4) healthy communities and ecosystems; and 5) compliance and environmental stewardship.” Other examples of strategic planning related to ECR include: GPRA goals that include ECR and ADR objectives (FERC, USFS); and being “guided by a shared mission and a 5-year strategic plan to grow the Department’s ECR capacity and utilization while transforming the Department into a more collaboration driven culture.” (DOI).

D. Policy/Guidance/Procedures

Several agencies reported on developing policies, guidance, or procedures to further the goals of the ECR Memorandum. EPA reported that, consistent with the initiative to promote open government, Administrator Lisa Jackson issued a memorandum entitled “Transparency in EPA’s Operations,” in which she articulated a set of general principles requiring agency employees to “provide for the fullest possible public participation in decision-making.”

USACE reported that its Conflict Resolution and Public Participation Center of Expertise has the following five goals: consultation services, capacity building, information exchange, policy support, and research.” USACE noted that these goals support the overall USACE campaign plan to “deliver enduring and essential water resource solutions through collaboration with partners and stakeholders,” and to communicate “strategically and transparently.”

Other areas of strategic planning related to ECR include: GPRA goals that include ECR and ADR objectives (FERC, USFS); and being “guided by a shared mission and a 5-year strategic plan to grow the Department’s ECR capacity and utilization while transforming the Department into a more collaboration-driven culture.” (DOI).

E. Education/Awareness/Training

All of the agencies that engage in ECR reported education, awareness and training activities. Most agencies are utilizing training to further the goals of the ECR Policy Memorandum. The FY 2010 reports show that:

- More than 100 environmental collaboration and conflict resolution training sessions were sponsored by federal departments and agencies in FY 2010.
- Sponsors have included a variety of DOI agencies (BIA, BIE, BLM, BOR, FWS, NPS, MMS, CADR, OSM, USGS, OSM), EPA, DOE, DoD (Departments of Navy, Air Force, and Army), EPA, FAA, FERC, TSA, USACE, and USIECR. The trainings ranged from introductory informational sessions delivered within a single working day, to more in-depth trainings spanning several days to a week.
- The training content ranged from basic to advanced; off-the-shelf to customized; and was delivered in a range of settings, from traditional training rooms to personal computers. Advanced training included USIECR’s offering of Multi-Party Environmental Mediation training, which is a three-day training that includes exercises, as well as lecture on the

principles of environmental mediation. Off-the-shelf training includes standard 3-4 day mediation training that is offered by several agencies. An example of a customized training is DOI's "Getting to the Core of Conflict," which focuses on conflict prevention, while also emphasizing the fundamentals of interest-based negotiation.

- Primary audiences for training were federal agency staff, but also included non-federal participants in some offerings.

Agencies also offered training in areas related to ECR such as: ADR in the environmental context; conflict management; collaboration; collaborative governance; negotiation; facilitation; leadership public participation; partnering; conservation; communication; NEPA; assessments; cross-cultural topics and other areas related to ECR.

F. Leadership Commitment and Cultural Change

One of the underlying themes of the ECR Memorandum is the need for a cultural change in federal agencies to "face the challenge of balancing competing public interests and federal agency responsibilities when striving to accomplish national environmental protection and management goals." Several agencies reported on activities that were designed to promote a pro-ECR culture in their agencies. USACE noted its continuing effort to foster a collaborative culture through the activities of its newly formed Conflict Resolution and Public Participation Center. For example, the USACE Campaign Plan contains two goals related to collaboration: the commitment of USACE "to deliver enduring and essential water solutions through collaboration with partners and stakeholders", and its commitment to "communicate strategically and transparently."

DOI's CADR Office reported on the linkage of its Integrated Work Place Conflict Management System, "CORE PLUS", with ECR capacity. The DOI Report notes "[t]he Department believes managers and employees strengthen the capacity of the organization to effectively manage conflict situations with external parties and stakeholders when they are comfortable using the same tools to effectively manage conflicts and disputes that arise within the organization as well."

G. Five Year Overview: Capacity Building

The reports show that all of the agencies that engage in ECR have made great strides over the past five years. ECR goals have been inserted in strategic plans, employee performance plans, and GPRA goals, among other things. Agencies also appear more willing to dedicate financial and human resources to ECR, as evidenced by the increase in the numbers of people who are carrying out the work, and by the thousands of individuals who have received ECR-related training. Agencies, including EPA, DOI, USIECR, and USACE also hosted conferences for federal employees and private practitioners to encourage the easy exchange of information and ideas amongst the ECR community. This overall trend towards building greater capacity for ECR is perhaps best exemplified by the experience of the US Army Corps of Engineers (USACE).

In FY 2006 USACE noted in its report that while ECR had played a significant role in the agency in years past, it was not playing an important role at that time. The FY 2006 Report also noted, however, that the demand for ECR training was increasing. In FY 2007, the USACE ECR Report noted USACE had initiated an ECR program and had established at its Institute for Water

Resources. In FY 2008, the USACE Director of Civil Works, Major General Don Riley issued a memorandum to all commanders in Corps regional offices that promoted the use of Shared Vision Planning and other collaborative processes and tools. High level support for the USACE programs was also supplied in 2008, by Assistant Secretary of the Army for Civil Works J.P. Woodley, who stressed in a memorandum that: “[USACE] *will broaden [its] collaboration with others to enhance the chances of balancing water uses and making wise investments and trade-offs decisions.*”

In FY 2009, USACE formally established a Conflict Resolution and Public Participation Center of Expertise and Directory of Expertise, and undertook a collaborative capacity assessment analysis that involved workshops and assessments throughout the agency. Along with promoting the use of collaborative problem-solving in individual cases, USACE furthered its capacity building initiatives in FY 2010, setting up a structured Community of Practice in Public Participation.

The five ECR Reports submitted by USACE depict an agency that has gone from a minimal presence in the ECR community to one that is embracing ECR and collaboration as a means to prevent and solve environmental conflicts and further its mission.

IV. Collaboration without a Third Party

The ECR Memorandum acknowledged that “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.” In many cases, these activities do not fit within the definition of ECR under the ECR Memorandum, as they do not use third parties to resolve environmental conflict. Many agencies reported that the resolution of conflict without the use of a third party is critical in carrying out their respective missions. The contexts in which agencies utilized collaborative problem-solving without the aid of a third party included, among other things, advisory committees, community outreach, interagency agreements, NEPA and environmental compliance, public participation, and unassisted negotiation.

A. Advisory Committees

Advisory committees are often comprised of experts and advocates that represent a diverse array of perspectives. It is clear from the ECR reports that agencies often rely on this expertise and these perspectives in seeking solutions to complex environmental problems.

DoD agencies reported that they regularly use Resource Advisory Boards (RABs) to provide DoD agencies with input. EPA reported that its Clean Air Act Advisory Committee continues to use a facilitated process to provide EPA with advice on the implementation of partnerships and community-based programs with respect to its climate change initiative.

USFS reported that a number of forests are actively involved in local natural resource and council groups, as well as Provincial Advisory Committees (PACS), and Resource Advisory Committees (RACs). USACE reported that it is able to work collaboratively with stakeholders through a variety of committees and groups, including the Interagency Coordination Teams in Galveston, Texas; the Lower Columbia River Solutions Group; the Delta Stewardship Council; the Mobile Bay National Estuary Program; and the Gulf of Mexico Program.

DOI reported that several of its agencies rely on Federal Advisory Committees to provide them with consensus-based recommendations. The BLM utilizes Regional Advisory Councils (RACs) to provide it with advice. NPS often relies on park-specific advisory committees for recommendations.

B. Public Participation/Community Outreach

Several agencies reported on their use of collaborative problem-solving in the context of community outreach and public participation. The Seattle Regional Office of EPA (Region 10) reported meeting with Indian tribes and environmental justice community groups, and received requests from these groups pertaining to permitting, enforcement, and other matters. EPA also reported that it continues to engage the public on local and national environmental issues in a number of places, including the Elizabeth River Project (Virginia), the Monocacy Project (MD), and its effort relating to climate change.

NOAA reported that its Aquaculture Program conducted outreach to stakeholders concerned about the potential environmental impacts of marine aquaculture by providing opportunities for discussions among industry, non-governmental organizations, the research community, government, and the public.

Agencies also reported using the principles of collaborative problem-solving in the context of public participation. VA reported that public outreach is “an internal component of how it conducts business.” Several other agencies, including EPA, DOI, FERC, USFS, reported using collaborative problem-solving in the context of public engagement.

C. NEPA/Environmental Compliance

Many agencies reported engaging in collaboration with agencies and stakeholders in processes under NEPA and other environmental statutes. USFS reported that “many forests pointed to the importance of early public involvement [in NEPA], especially before embarking on potentially controversial projects.” Interagency Coordination Teams (ICT) in the Galveston District of the USACE are standing teams that attempt to reach consensus on general investigation studies where an Environmental Impact Statement will be prepared. ICTs are chartered, and all state and federal resource agencies are invited to participate. DOI reported that during the NEPA review process the National Park Service utilized a stakeholder committee to reach consensus on the guiding principles for the management of dog walking at Golden Gate National Recreation Area. These are just a few of the examples cited in the ECR reports of collaboration within the context of NEPA.

D. Unassisted Negotiation/ Assisted Non-Agreement Seeking Processes

Unassisted Negotiation

Almost all agencies reported the use of unassisted negotiation to resolve environmental conflict. VA reported it “has a history of successfully settling enforcement actions through an informal process and without the assistance of a third party.” EPA reported that its Region 7 has adopted the practice of using pre-filing negotiations in all administrative enforcement actions seeking a monetary penalty. DOJ reported that it negotiates resolutions to well over 90% of environmental

and natural resource cases, with many of these settlements occurring contemporaneously with the filing of the action, as a result of pre-filing negotiation.

Assisted Non-Agreement Seeking Processes

EPA separately tracked the use of third parties to facilitate non agreement-seeking processes, reporting 102 such cases in FY 2010.

E. Collaborating Without a Third party: The Five Year Story

Since the first reporting year of FY 2006 agencies have reported on the importance of collaborating with the public and stakeholders. All of the agencies that submit ECR reports, including those that do not have occasion to use third-party neutrals to resolve conflict, have consistently noted that they engage in unassisted collaboration on a daily basis in furtherance of their agency missions. Several agencies noted, however, that it is difficult to track unassisted environmental conflict resolution, as unassisted conflict resolution takes place frequently on a daily basis throughout the federal government.

V. Tracking and Evaluating ECR

Agencies were asked to describe the methods and measures by which they are tracking the use of ECR and evaluating its effectiveness, as directed by section 4(b) and Section 5(a)(3) of the ECR Memorandum. Agencies responded by noting how they track ECR, survey its participants, and assess the outcomes of ECR cases.

A. Tracking ECR Cases

As was the case with the 2006 through 2009 reports, the FY 2010 reports show that agencies are most successful at tracking ECR that occurs in formal administrative or judicial proceedings. Formal proceedings are tracked regardless of whether ECR is taking place, through agency or judicial docketing systems. These systems make it easier to track ECR when the parties to a case choose alternative dispute resolution to resolve their differences. The Interior Board of Land Appeals, for instance, uses its docketing system to track ECR in implementing its ADR pilot program. FERC reports that since 2000 its Dispute Resolution Service (DRS) has tracked its ADR activities and workload, inclusive of ECR activities, in a database and has developed a case evaluation survey to measure participant feedback. Also, the DoD Army Environmental Law Division maintains a database that captures a description of the type of ECR and the ultimate outcome. Similarly, DOJ reports tracking ECR through the procurement process it uses to hire external mediators.

Additionally, agencies such as DOI and USFS reported that the act of completing their respective annual ECR Reports has enhanced their capability of tracking ECR activity. Despite the success of the Report Template in engaging field offices, the tracking of ECR in the more upstream settings⁸ remains in the developmental phase in most agencies. In these settings, which would encompass planning, policy development, siting and construction, rulemaking, and the implementation of upstream agreements, there do not appear to be any agencies that require centralized reporting of ECR other than that which is required for annual ECR Report.

⁸ See *2006 Analysis*, pp 12-13, for discussion on upstream and downstream use of ECR.

EPA reported that it has four methods for gathering data about the use of ECR: its Conflict Prevention and Resolution Services contract; its interagency agreement with USIECR; its network of headquarters office and regional staff members who are designated to assist with the ECR annual reporting process, and the CPRC's request and services tracking system, in which CPRC staff log requests received for ADR/ECR services and record the services that are provided in response.

B. Evaluation

Several agencies reported progress in evaluating the performance of ECR. For example:

- The USIECR reported that it integrates evaluation feedback into case briefings that document the outcomes and lessons learned from collaborative processes.
- The USACE designed a survey instrument, which is based on the USIECR Multi Agency Evaluation Study (MAES) instruments. The survey will evaluate the use of collaborative modeling for planning and conflict resolution which may include the use of a third party neutral. It will document the process characteristics, output, and outcomes of collaborative processes, including shared learning, trust and relationship building, acceptability of the decision, and the ease of implementation (lack of resistance/objection).
- FERC continued to work with the Harvard Negotiation & Mediation Clinical Program (HNMCP) to study alternative dispute resolution (ADR) in the energy industry, inclusive of ECR, in three regulated energy sectors: electricity, hydropower and natural gas. The study will help FERC better understand how energy companies view ECR as a tool for energy conflict prevention and resolution and what measures can be taken to improve the capacity and entry points for ADR/ECR in energy and environmental-related decision-making and problem-solving processes. In FY 2010 the study moved into Phase II, which will assess how energy conflicts are being handled by different FERC offices.
- EPA reported that it had conducted an aggregate analysis of EPA ECR cases evaluated since 2003 to assess the relationships between various aspects of the ECR process and case outcomes. The study's early findings include:
 - Identifying key differences among the parties on issues, seeking solutions to common needs, and having quality information seem to be particularly important ECR process inputs based on the number of relationships they have with case outcomes.
 - The neutral third party contributions evaluated have a limited direct relationship to case outcomes, but may have an indirect relationship through interaction with other case inputs
 - There are differences in ECR case outcomes related to the context in which the case took place, and whether a case took place in the upstream or downstream side of the continuum of conflict.
 - Some ECR case outcomes vary with ECR process inputs or case characteristics that have not been identified and are not being evaluated, and
 - The aggregate case results are being used to inform EPA's contribution to the upcoming revision of the interagency ECR evaluation instruments.

C. Five Year Overview: Tracking and Evaluating

The tracking of ECR has improved dramatically since the first ECR report. The reports submitted from FY 2008 - FY 2011 showed a dramatic increase (approximately 33 percent) in the numbers of cases reported compared to the reports submitted in FY 2006 and FY 2007. As noted previously, it is unlikely that this large an increase can be attributed solely to increases in the use of ECR. Rather, it is more likely that most of this increase is due to improved data collection and recording systems that have been set up in agencies to track ECR.

The evaluation of ECR has also advanced significantly in the past five years. From 2005 to 2007, USIECR undertook its Multi Agency Evaluation Study (MAES) of ECR cases. The study surveyed participants and mediators of ECR cases. Almost all of the cases studied came from the federal agencies that submit ECR reports. Among other things, the majority of survey respondents believed:

- ECR resulted in progress on solving environmental problems and environmental issues;
- ECR significantly improved relationships and build trust among stakeholders; and
- More progress and better outcomes were achieved through ECR than alternative processes, such as litigation.

As noted above, EPA has recently studied its own cases noting the differences in its data from the MAES dataset of cases that came from multiple agencies. Some of these findings relate to the context and forum in which ECR is undertaken at EPA. It is likely that the rich data from the interagency evaluation instruments will yield more studies that will advance the level of knowledge of the impact of ECR.

VI. Challenges to Engaging in ECR

Question 2 of the FY 2010 Template asked agencies to rate a list of potential challenges to ECR as either “major,” “minor,” or “not applicable.” The responses to this question were generally similar to the responses indicated in 2007, 2008, and 2009.

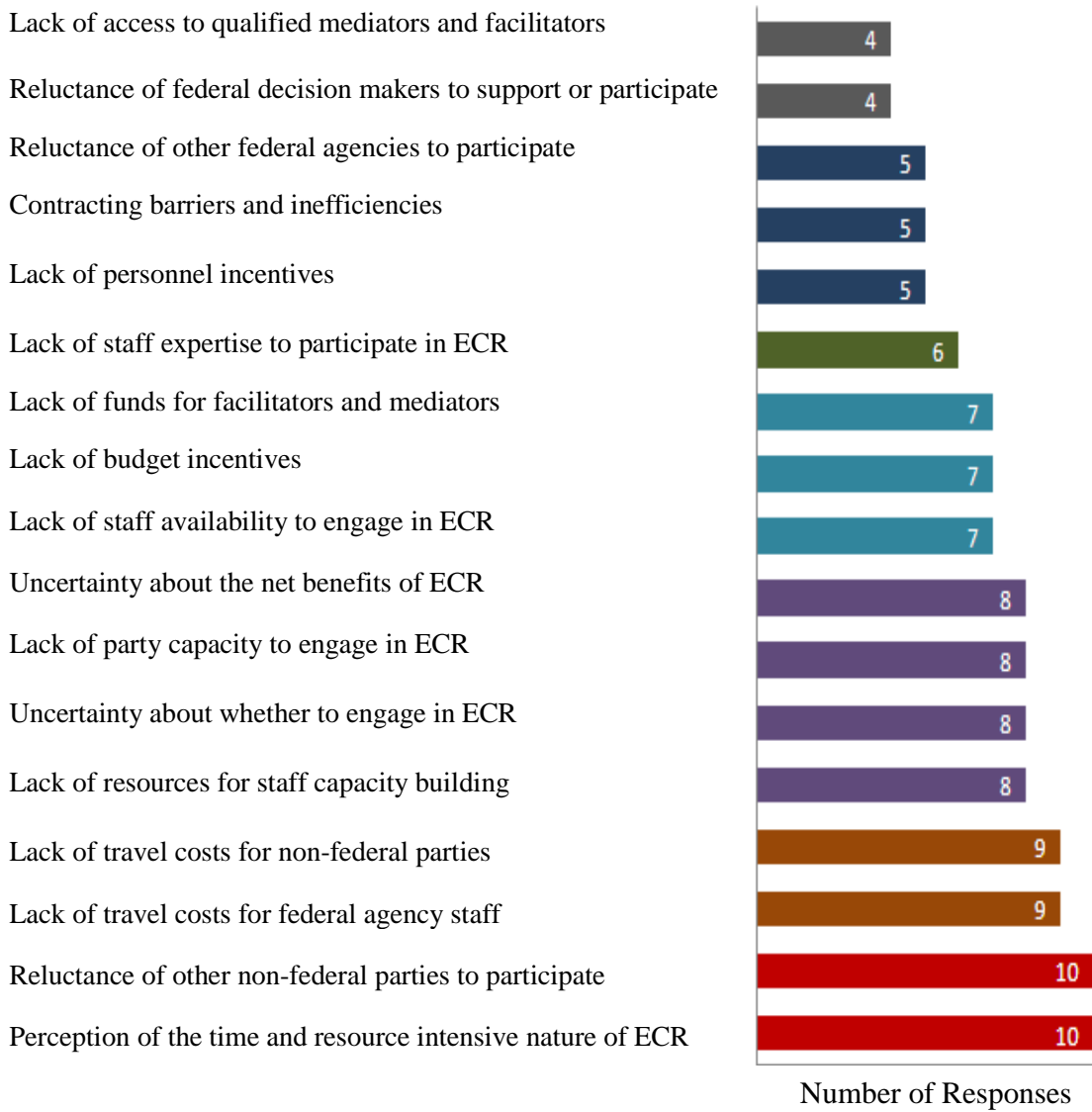
Ten agencies considered the “perception of the time and resource intensive nature of ECR” as either a minor or major challenge. Ten agencies also considered “reluctance of other non-federal parties to participate” as either a minor or major challenge. These were the most frequently cited challenges for FY 2010. Nine agencies reported “lack of travel costs for federal agency staff” and “lack of travel costs for non-federal parties” as challenges. (Figure 2).

Reponses from all reporting agencies, including those from DOJ, USIECR, and DoD are included in the above summary of results.

What do five years of reports say about challenges?

The data for FY 2010 is consistent with the responses to this question in previous ECR Reports. “Perceptions of time and the resource-intensive nature of ECR” has been the most often cited major challenge to ECR. “Uncertainty of Net Benefits,” and “Lack of Funding” are the next most cited challenges over the five-year period. “Lack of Access to Qualified Mediators and Facilitators,” has been the least cited challenge in the 5 years of annual reports.

Figure 2. Minor and major challenges to ECR in FY 2010.



VII. Substantive Programs where ECR is Used

Programmatic Areas that Can Benefit from ECR

Agencies were asked in Question 4 if they continue to use ECR in any of the priority areas that they identified in their previous annual ECR reports. They were also asked if usage had increased in these areas, and if they had identified new priority areas during FY 2010.

In response to question 4, several agencies reported increased use of ECR in existing priority areas (Table 7). In addition, several agencies identified new priority areas where ECR can be of assistance. As Table 7 shows, the reports highlight the diversity of applications of ECR across the federal government, as well as ECR's continued use in areas that are traditionally associated with environmental conflict:

Table 7. Programmatic areas that can benefit from ECR

	Priority areas where ECR was applied during FY 2010	Increased use in at least one priority area
DoD	<p><i>Priority areas where ECR was applied during FY 2010:</i> Navigation, Flood risk management, Hydropower, Water Supply; Recreation; Emergency Management; Ecosystem restoration, Regulation; Superfund litigation; Addressing intra-Navy and intra-DOD conflicts that arise from different interpretations and applications of laws, regulations, and policies; resolving the impasse with non-governmental organizations over the Navy's use of mid-frequency active SONAR; Concluding a current formal consultation with U.S. Fish and Wildlife Service, where a disagreement has exceeded the statutory time limit for such consultations, Addressing Coastal Zone Management Act; CERCLA; EAJA; and NEPA.</p> <p><i>New priority areas identified in FY 2010:</i> Land use contamination of drinking water wells due to natural gas drilling by private enterprise, Land use encroachment by private land developers, NEPA and BRAC construction</p>	✓
DOE	<p><i>Priority areas where ECR was applied during FY 2010:</i> Groundwater issues, conflicts in environmental cleanup decisions, environmental cleanup decision making, relationships with regulators, multi-issue and multi-party environmental disputes, hazardous waste facility permit modifications, NEPA, public engagement activities, NPDES permits, Title V Air Permitting Program and Hanford Natural Resources Trustee Council.</p>	

DOJ	<p><i>Priority areas where ECR was applied during FY 2010 and where new priority areas were identified:</i> Continues to be used in full range of environmental enforcement and defensive cases.</p>	✓
DOI	<p><i>Priority areas where ECR was applied during FY 2010:</i> Natural resource and environmental litigation, project and resource planning, stakeholder involvement in planning and decisions, land use, off-road vehicle use, wild and scenic river studies, grazing permits, habitat conservation, administrative appeals, natural resource damage assessments, species recovery, land conveyances, timber sales, wildlands fire management, Endangered Species Act, NEPA, adaptive management, water rights adjudication, hydropower licensing, fees to Trust Status, False Claims Act Litigation, three party MOAs for Marine Mammals, collaborative policy making for science and technical areas, collaborative decision making for project operations, comprehensive conservation planning for National Wildlife Refuges, Fish species recovery and conservation, tribal consultation, rulemaking and policy formulation, royalty and other revenue disputes, administrative appeals or orders to pay, multi-party revenue appeals, compliance and enforcement, and grazing disputes.</p> <p><i>New priority areas identified in FY 2010:</i> False Claims Act, Multi party revenue appeals, Indian water rights claims, and occupancy of residential structures.</p>	✓
EPA	<p><i>Priority areas where ECR was applied during FY 2010:</i> Interagency disputes, National Environmental Policy Act, superfund program, regulation development, wetlands program, climate change, environmental justice, and external civil rights.</p>	✓
FERC	<p><i>Priority areas where ECR was applied during FY 2010:</i> Natural gas facility certificate applications, hydropower licensing/relicensing applications, and liquefied natural gas facility authorization applications.</p> <p><i>New priority areas identified in FY 2010:</i> Renewable energy interconnections</p>	
NOAA	<p><i>Priority areas where ECR was applied during FY 2010:</i> Take reduction teams</p>	
USFS	<p><i>Priority areas where ECR was applied during FY 2010:</i> Protracted and costly environmental litigation, unnecessarily lengthy project and resource planning processes (planning delays), costly delays in implementing needed environmental protection measures, forgone public and private investments when decisions are not timely or appealed (administrative appeals) lower quality outcomes when environmental plans and decisions are not informed by all available information and perspectives, deep-seated antagonism and hostility</p>	✓

	repeatedly reinforced between stakeholders by unattended conflicts.	
USIECR	USIECR works with multiple federal agencies and provides assistance across a spectrum of substantive areas of regulation or management. These include: (1) Watershed and river basin collaborative management; (2) Planning for and managing species and habitat conservation under the ESA where multiple agencies and stakeholders are involved; (3) Addressing conflicts over multiple-uses on public lands and adjacent public and private lands (including recreation); (4) Federal highway planning; shipping (ports development, rail freight, multi-modal transportation); and (5) Integrating collaboration and conflict resolution into NEPA review processes and decision making.	✓

VIII. Cases

Several common themes were highlighted in case studies provided. They showed that ECR helps minimize the costs of conflict and maximize the benefits of collaboration. Agencies reported that in these cases projects moved quicker, solutions were cost-effective, litigation costs were avoided, and working relationships were improved. The reports show that even when agreements were not reached ECR helped to narrow issues that might possibly end up in litigation.

The following are examples of comments made by agencies about the value of ECR as it pertained to specific cases:

“Provid(ed) alternative energy access to an improved energy grid...to carry Kansas wind power to out-of-state markets.” (FERC)

“The US used mediation to achieve global resolution of a 30-year water rights case...It was Colorado’s largest water rights case ever...The mediated settlement of water rights claims will protect the Park for future generations...The US proposed mediation because a litigated outcome would be expensive, time-consuming and uncertain. Trial in a comparable case had lasted more than a year and cost the Government millions of dollars without any assured water rights.” (DOJ – Black Canyon of Gunnison National Park in Colorado)

“Improved flood control and roadway and recreation capacity for the City of Dallas.” (DoD)

“Reduced tension in a high conflict/low trust setting, resulting in good faith communication and the effective balancing of all parties’ interests...promoted a shared understanding of the issues and provided an effective forum to explore options for the next steps.” (Department of Navy- Naval Air Station Key West Aircraft Noise Case, FL)

“Helped speed up resolution of the issues and ensure better protection of water quality.” (US Air Force- Air Force Academy’s MS4 Permit Case)

“Resulted in a completed programmatic agreement that allows the Army to proceed with its privatization plan in a much more efficient manner.” (US Army Legal Services Agency - Housing Privatization and State Historic Preservation Office Compliance Case)

“Resulted in a more effective groundwater investigation, which saved both site and ODEQ resources.” (DOE - National Energy Technology Lab Data Sharing with Oregon Department of Environmental Quality, OR)

“Resulted in an expedited process and a permit that was accepted by the public.” (DOE - Sandia Site Permitting Process, NM)

“[ECR process] will potentially end a decades-long conflict between the NPS and FAA and establish a final rule on air tour operations at Grand Canyon.” (Department of Interior - Management Plan for Over Flights at Grand Canyon National Park, AZ)

“A litigated outcome would be more expensive, time-consuming and uncertain. Trial in a comparable case had lasted more than a year and cost the Government millions of dollars without any assured water right.” (Department of Justice - Black Canyon of Gunnison National Park Water Rights Case, CO)

“Allowed this project to move through the regulatory process, saving litigation and regulatory expenses.” (Federal Energy and Regulatory Commission - Kansas Wind Power Case, KS)

“Improved early public involvement in and understanding of the processes associated with travel management...Allowed for a better and broader understanding of forest-user needs and desires.” (USDA Forest Service - Cibola National Forest and National Grasslands Travel Management Case, NM, TX, OK)

“Ensured injured resources would be restored in a timely fashion as opposed to litigation.” (NOAA National Ocean Service - Commencement Bay Superfund Site, WA)

In the words of participants, an array of social, economic, recreational, natural resource and environmental benefits will result from the process, including: “Wildlife/scenic/threatened and endangered species of special values protected and enhanced” and “Increased work for Forestry related business, including mills.” (USIECR - Collaborative Management Planning Forums for the Dinkey North and South Areas of the Sierra National Forest, CA)

IX. Conclusion

The FY2010 ECR Reports provide greater insight into how ECR is used throughout the Federal government. The ECR Reports show that:

- Across the federal government the level of ECR use was consistent from FY 2008 through FY 2010. Departments reporting consistent increases in use from FY 2007 through FY 2010 include the Department of Defense and the Department of Interior.
- The accumulation of the data shows that context of ECR use is clearly related to agency mission. Regulatory agencies use ECR more in enforcement cases, and land and natural resource management agencies use ECR more frequently in upstream contexts such as planning and policy development. Agencies whose missions focus primarily on areas other than natural resources and the environment tend to make more limited use of ECR.
- Even where ECR does not prevent litigation agencies still perceive it as an important tool in resolving conflict. As the Department of the Army reported in its FY 2008 Report, “[e]ven if the ECR does not result in a settlement of the matter, it might result in narrowing the issues, or getting a better more accurate assessment of the litigation risk.”

The ECR Reports also show that agencies continue to take measures to build capacity in ECR such as:

- investing in training
- building infrastructure, and
- evaluating the performance of ECR.

Similar to the previous annual reports, agencies identified resource-related challenges as the biggest and most frequent impediments to undertaking ECR. Resource-related challenges such as lack of sufficient funding and time, and the resource-intensive nature of ECR, were the most frequently cited major challenges. None of the agencies that engage in ECR found that access to qualified mediators was a major challenge.

Agencies reported continuing to use ECR in such priority areas as NEPA, environmental cleanup and restoration, natural resource conflict on federal land, species and habitat conservation, hydropower and natural gas, coastal zone management, historic preservation, tribal consultation, property rights, and conflicts under the Clean Water Act.

Finally, agencies reported using unassisted collaborative problem-solving in a variety of settings, including: advisory committees, partnerships, direct negotiation, federal facility agreements, licenses and permits, and public participation.

In sum, the fifth annual ECR Reports build on the information submitted in the four previous annual reports. On the whole, they show that agencies are making significant progress in increasing the use of ECR in accordance with the ECR Memorandum.

Appendix A. ECR Report Template for FY 2010

FY 2010 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 fifth year of reporting in accordance with this memo for activities in FY 2010.

The report deadline is February 15, 2011.

We understand that collecting this information may be challenging; however, after compiling previous reports, the departments and agencies are requested to collect this data to the best of their abilities. The 2010 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 2010 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.

Name of Department/Agency responding:

Name and Title/Position of person responding:

Division/Office of person responding:

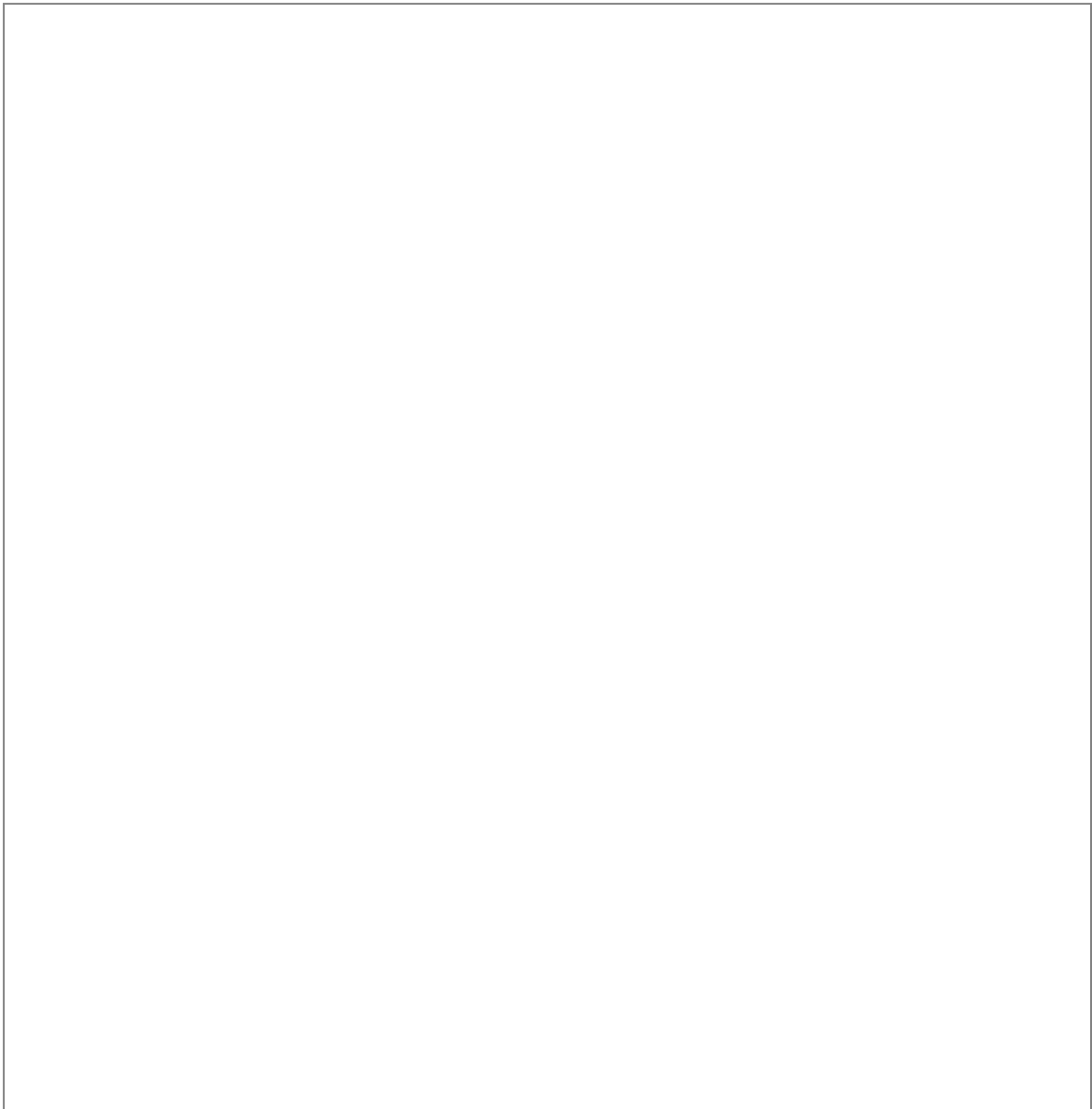
Contact information (phone/email):

Date this report is being submitted:

Section 1: Capacity and Progress

1. Describe steps taken by your department/agency to build programmatic/institutional capacity for ECR in 2010, including progress made since 2009. 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.]



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 <u>only</u> one		
a) Lack of staff expertise to participate in ECR	<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"/>
c) Lack of party capacity to engage in ECR	<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"/>
e) Lack of travel costs for your own or other federal agency staff	<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"/>
g) Reluctance of federal decision makers to support or participate	<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"/>
i) Reluctance of other non-federal parties to participate	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
j) Contracting barriers/inefficiencies	<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"/>
l) Lack of personnel incentives	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
m) Lack of budget incentives	<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"/>
o) Perception of time and resource intensive nature of ECR	<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"/>
q) Uncertainty about the net benefits of ECR	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
r) Other(s) (please specify): _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
s) No barriers (please explain): _____	<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 2010 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 ⁹	Completed Cases or projects ¹⁰	Total FY 2010 ECR Cases ¹¹	Decision making forum that was addressing the issues when ECR was initiated:					Of the total FY 2010 ECR cases indicate how many your agency/department	
				Federal agency decision	Administrative proceedings /appeals	Judicial proceedings	Other (specify)	Sponsored ¹²	Participated in but did not sponsor ¹³	
<i>Context for ECR Applications:</i>										
Policy development	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
Planning	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
Siting and construction	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
Rulemaking	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
License and permit issuance	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
Compliance and enforcement action	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
Implementation/monitoring agreements	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
Other (specify): _____	_____	_____	_____	_____	_____	_____	_____	_____	_____	_____
TOTAL										
	(the sum should equal Total FY 2010 ECR Cases)			(the sum of the Decision Making Forums should equal Total FY 2010 ECR Cases)					(the sum should equal Total FY 2010 ECR Cases)	

⁹ A “case in progress” is an ECR case in which neutral third party involvement began prior to or during FY 2010 and did not end during FY 2010.

¹⁰ A “completed case” means that neutral third party involvement in a particular matter ended during FY 2010. 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.

¹¹ “Cases in progress” and “completed cases” add up to “Total FY2010 ECR Cases”.

¹² 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.

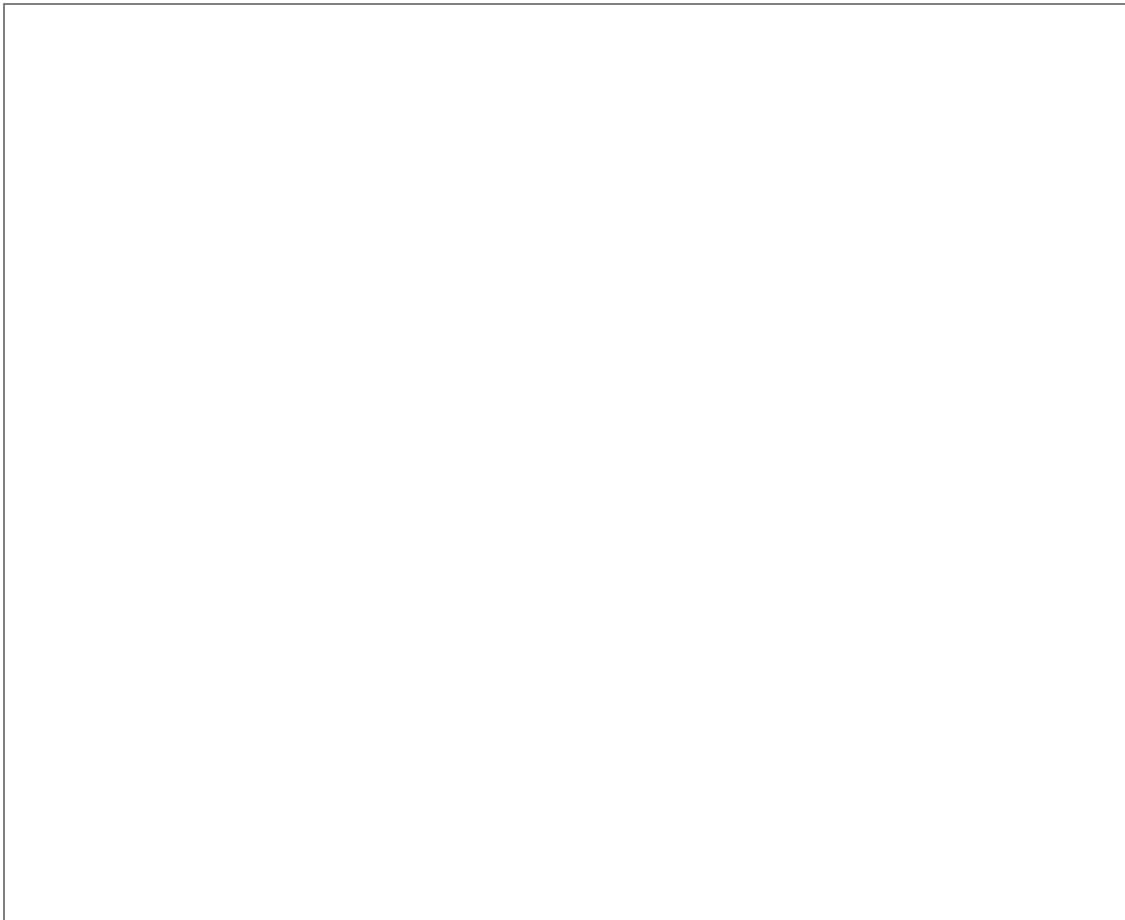
¹³ Participated, but did not sponsor - an agency did not provide resources for the neutral third party's services for a given ECR case, but was either a party to the case or participated in some other significant way (e.g., as a technical expert advising the parties).

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 2010, 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 2009 can be found in the FY 2009 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
_____	<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"/>
_____	<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 2010	Check if using ECR	
_____	<input type="checkbox"/>	
_____	<input type="checkbox"/>	
_____	<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]



6. Describe other significant efforts your agency has taken in FY 2010 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.

A large, empty rectangular box with a thin black border, intended for the user to provide details about their agency's efforts in FY 2010.

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 large, empty rectangular box with a thin black border, intended for the user to provide a detailed response to the question above. The box occupies most of the page's vertical space below the question.

8. ECR Case Example

- a. Using the template below, provide a description of an ECR case (preferably completed in FY 2010). 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, and how the ECR effort was funded
Summary of how the problem or conflict was addressed using ECR, including details of any innovative approaches to ECR, and how the principles for engagement in ECR were used (See Appendix A of the Policy Memo, attached)
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
Reflections on the lessons learned from the use of ECR

- 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"/>	<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 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.

Please attach any additional information as warranted.

Report due February 15, 2011.

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

Acknowledgements:

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