

## 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](http://www.ecr.gov).

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Division/Office of person responding	<u>Environment &amp; Nat Resources Div</u>
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Date this report is being submitted	<u>March 8, 2011 (by extension)</u>

## 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.]

The US Department of Justice invests significantly in mediation for environmental and natural resource cases. The Department applies a quarter of its entire annual mediation funds to environmental and natural resource cases.

The US Department of Justice usually avoids litigation expenses and saves attorney and staff time when it resolves a case by mediation instead of litigation.

In FY 2010, as a result of using mediation/ECR to resolve environmental and natural resource cases, DOJ avoided an estimated \$900,000 in out-of-pocket litigation expenses (e.g., fees for expert witnesses and transcripts), and saved an estimated 3.2 years of attorney and staff time, according to the DOJ Office of Dispute Resolution.

Ongoing steps to promote mediation as well as other forms of ECR include:

1. Webpage

The Department continues to refine its external and internal webpages that promote use of mediation and other forms of environmental conflict resolution. The external webpage posts policy statements and other relevant documents. See <http://www.justice.gov/odr/documents.htm>.

2. Consultation

The Department has an Office of Dispute Resolution as well as resource persons in various components, including a Senior Counsel for Alternative Dispute Resolution in the Environment and Natural Resources Division (ENRD). This counsel routinely assists attorneys with mediation and other forms of environmental conflict resolution.

3. Survey

The Office of Dispute Resolution conducted a Department-wide survey of use of mediation and found that the Department applies a quarter of its entire mediation funding into ECR cases.

4. Bankruptcy Cases

ENRD made unprecedented use of mediation to resolve a bankruptcy case involving over 80 environmentally contaminated sites across the country. The use of mediation in this case is a model for future bankruptcy cases. See Paragraph 7, below.

## Section 2: Challenges

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

	Extent of challenge/barrier		
	Major	Minor	Not a challenge/barrier
	Check only 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): <u>Practice is to work through barriers-</u>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
s) No barriers (please explain): <u>23% of mediation funds go to ECR.</u>	<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.]

Context for ECR Applications:	Cases of Completed Projects (Cases of Progress)	Total FY 2010 ECR Cases <sup>3</sup>	Cases in progress for which the issue when ECR was initiated	Of the total FY 2010 ECR cases indicate how many your agency/department	
				Sponsored <sup>4</sup>	Participated in but did not sponsor <sup>5</sup>
Policy development					
Planning					
Siting and construction					
Rulemaking					
License and permit issuance					
Compliance and enforcement action					
Implementation/monitoring agreements					
Other (specify): <u>Litigation</u>		30*			
<b>TOTAL</b>	<b>30</b>	<b>30*</b>	<b>30*</b>		*
					(the sum should equal Total FY 2010 ECR Cases)

<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> "Cases in progress" and "completed cases" add up to "Total FY 2010 ECR Cases".

<sup>4</sup> 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.

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

\*There are 30 cases in which the Department paid for an outside mediator. These cases all involve litigation, largely related to permitting and enforcement. In addition, magistrate judges and other court officials routinely serve as mediators without payment by the Department. See Paragraphs 5 and 9, below. Courts generally urge parties to consider mediation or other alternative techniques for conflict resolution.

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"/>
<u>ECR continues to be used in full range of</u>	<input type="checkbox"/>	<input type="checkbox"/>
<u>environmental enforcement and defensive</u>	<input type="checkbox"/>	<input type="checkbox"/>
<u>cases.</u>	<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	
<u>See above.</u>	<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]

The US Department of Justice usually avoids litigation expenses and saves attorney and staff time when it resolves a case by mediation instead of litigation.

In FY 2010, as a result of using mediation/ECR to resolve environmental and natural resource cases, DOJ avoided an estimated \$900,000 in out-of-pocket litigation expenses (e.g., fees for expert witnesses and transcripts), and saved an estimated 3.2 years of attorney and staff time, according to the DOJ Office of Dispute Resolution.

The Department applies a quarter of its entire mediation funding to ECR cases. There were 30 contract mediators for ECR cases during FY 2010. See Paragraph 3, above.

In addition, court officials commonly serve in a mediator or facilitator role in cases throughout the federal courts. Court officials such as magistrate judges and court mediators have a particularly significant role in environmental and natural resource cases. For example, court mediators assist in approximately half of appellate cases in this area, playing an invaluable role in resolving process issues and occasionally helping the parties reach an overall settlement. See Paragraph 9, below.

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.

The Department negotiates resolutions to over 90% of environmental and natural resources civil cases. For example, attorneys negotiate proposed resolutions to most civil environmental enforcement cases prior to filing. The result is that these court cases generally begin with the filing of a complaint and the lodging of a proposed consent decree that undergoes public review and comment. The Department also advises agencies, upon request, on how to resolve cases through mediation or other techniques for conflict resolution without litigation.



#### Section 4: Demonstration of ECR Use and Value

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

A notable achievement and advancement was the use of mediation to help resolve one of the nation's most complex environmental bankruptcy cases.

The ASARCO bankruptcy case began in 2005 when this mining company filed for bankruptcy protection in the US District Court for the Southern District of Texas. The United States filed claims for cleanup and other liabilities at more than 80 environmentally contaminated sites in 19 states.

In July 2007, at the urging of the United States, the parties decided to mediate environmental claims for 13 of the most contaminated sites. These sites had been scheduled for trial in the bankruptcy proceeding. The mediations were highly successful, resulting in mediated settlements for five sites totaling over \$198 million in allowed claims for environmental cleanups and natural resources damages.

In late 2007 and early 2008, the United States participated in broader mediation to attempt to resolve its claims for the remaining sites and create a potential plan for resolving the bankruptcy case as a whole. This mediation provided a helpful basis for resolving, in principle, most of the United States' claims of environmental liability. The mediation also helped create a foundation for attaining a plan of reorganization agreeable to key creditors.

In FY 2010, building on the results of the mediations, the ASARCO bankruptcy concluded with \$1.79 billion paid to fully reimburse environmental claims including interest. The cleanup and restoration payments included \$776 million to the United States and \$321 million to 14 participating States.

In sum, mediation was a key tool for achieving the nation's largest environmental recovery in a bankruptcy case. This case is a model for using mediation to resolve environmental claims in complex bankruptcy cases.

## 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

The Klamath River Basin runs from southern Oregon, through northern California, to the Pacific Ocean. The Basin is home to Tribes, federal irrigation projects and national wildlife refuges. It is a historically large producer of salmon. For 30 years, the Basin has been the subject of intense litigation including over tribal and federal water rights and the Endangered Species Act. Ten years ago, federal marshals responded to civil unrest over water allocations. Federal, state, tribal and local officials desired a global settlement, and turned to environmental conflict resolution (ECR) techniques. Two agencies were willing to fund a neutral professional to serve as an ECR facilitator/mediator.

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)

An ECR facilitator/mediator led the parties to reach a global settlement protecting the water, fish and hydropower resources of the Klamath River Basin. This person organized settlement discussions among nearly 50 parties for several years. The parties included four federal agencies, four Tribes, two States, a hydropower utility, a water users association and numerous environmental groups. This person helped the parties move beyond previously contentious relationships. The agreement includes provisions relating to water allocation, fish habitat, farmland retirement (to reduce water demands) and possible removal of four privately-owned dams to increase river flows and fish access.

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 key outcome was a long-term settlement to protect the resources of the Klamath River Basin consistent with the interests of the federal agencies and other interested parties. The resolution addresses topics, and includes creative approaches, that go beyond the scope of what litigation could have reached. The global resolution is premised on Congress and the California and Oregon legislatures passing implementing legislation; Oregon has since passed its legislation. The ECR resolution avoided the expensive, time-consuming and uncertain outcome of litigation.

Reflections on the lessons learned from the use of ECR

The Department gave its prestigious John Marshall Award for Alternative Dispute Resolution to the legal team representing the United States in this precedent-setting ECR process. ECR attained what 30 years of litigation could not. It was helpful that the US Department of the Interior and the US Department of Justice were able to provide funding to retain the ECR facilitator/mediator.

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

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

In addition to the 30 cases with contract mediators in FY 2010 as shown in Section 3, the Department routinely engages in mediation of environmental and natural resource cases with magistrate Judges and other court officials. Court officials routinely work with parties to explore potential avenues for settlement. For example, appellate court officials provide effective mediation assistance with process issues in over half of the appeals in environmental and natural resource cases. Court officials also mediate some cases to resolution. It would be difficult to track or quantify the full range of these mediation activities in environmental and natural resource cases.

***Please attach any additional information as warranted.***

Report due February 15, 2011.

Submit report electronically to: [ECRReports@omb.eop.gov](mailto:ECRReports@omb.eop.gov)