Environmental Conflict Resolution in the Federal Government

Analysis of FY 2011 ECR Reports
Submitted by Federal Departments and Agencies
Pursuant to the OMB/CEQ ECR Memorandum of
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Table of Contents

Executive Summary 3
I. Introduction 6
II. Use of ECR 8
III. Building Capacity 16
IV. Collaboration without a Third Party 20
V. Tracking and Evaluating ECR 22
VI. Challenges to Engaging in ECR 24
VII. Substantive Programs where ECR is Used 26
VIII. Cases 28
IX. Conclusion 30
Appendix A. ECR Report Temptlate for FY 2011 31

Table of Tables

Table 1. Distribution of ECR cases in the federal government FY 2007 through FY 2011 8
Table 2. ECR cases completed and in progress by year (FY 2007 through FY 2011) 9
Table 3. Context profile of ECR cases across the federal government 10
Table 4. Agency participation in or sponsoring of ECR cases for FY 2011 12
Table 5. Agency forums where cases were initiated: FY 2007 through FY 2011 13
Table 6. Distribution of cases by decision making forums by agency (FY 2007 to FY 2011) 14
Table 7. Programmatic areas that can benefit from ECR 26

Table of Figures

Figure 1. ECR context profiles by agency for FY 2011 11
Figure 2. Major and minor challenges to ECR in FY 2011. 25

Analysis of FY 2011 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 2011 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 2011 ECR reports:

- Department of Defense (DoD)
- Department of Energy (DOE)
- Department of the Interior (DOI)
- Department of Transportation (DOT)
- Department of Veterans Affairs (VA)
- National Oceanic and Atmospheric Administration (NOAA)
- USDA Forest Service (USFS)
- Environmental Protection Agency (EPA)
- Federal Energy Regulatory Commission (FERC)
- 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 2011.

- ECR use in the federal government increased, with 451 cases reported in FY 2011 compared to 425 cases in FY 2010.

- ECR is being used to reduce environmental conflicts and improve environmental decisions in mission critical areas that include: National Environmental Policy Act (NEPA) issues; transportation infrastructure; 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 2011 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 decision-making on proposed projects and grant applications, policy development, rulemaking, permitting, licensing, enforcement and compliance, and administrative proceedings.

I. Introduction

The FY 2011 ECR Reports are the sixth 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 2011 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 2011 findings by referencing key elements of previous annual reports. For example, the *FY 2008, FY 2009, and FY 2010 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 2011 Report

As was the case with the previous reports, the FY 2011 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 2010, as the Forum determined that the previously adopted questions were yielding useful data. In addition, several members of the Forum had commented in response to the FY 2009 Template about the importance of consistency in the data collected

[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.

through the template. One way of ensuring consistency, these members suggested, would be to ask similar questions from year to year.

B. FY 2011 ECR Reports

The following 12 agencies submitted FY 2011 ECR reports:

- Department of Defense (DoD)
- Department of Energy (DOE)
- Department of the Interior (DOI)
- Department of Transportation (DOT)
- 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, DoD, and DOT have a number of "sub-agencies" whose ECR activities are included in their respective reports. DOI's ten 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 (BOEM), the Bureau of Safety and Environmental Enforcement (BSEE); 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). DOT noted in its report which of its subagencies were involved in particular ECR activities.

[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 2011 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 2011 is 451. 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 increased for the third consecutive year. As with prior years, the level of ECR use is distributed across several agencies, with EPA (119 cases) being the agency most frequently involved in ECR, followed by DOI (97 cases), DoD (88 cases), FERC (78 cases), USFS (56 cases), NOAA (9 cases), DOE (2 cases) and DOT (2 cases). Agencies were also asked to identify whether their cases were in progress or completed. Of the 451 cases, 276 (61%) were identified as in progress, and 175 (39%) were identified as completed (Table 2).

Table 1. Distribution of ECR cases in the federal government FY 2007 through FY 2011

	Number and Percent of ECR Cases				
	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
DoD	74 (23%)	82 (20%)	94 (23%)	104 (24%)	88 (20%)
DOE	See Note*	See Note*	See Note*	6 (1%)	2 (0%)
DOI	46 (14%)	81 (19%)	92 (22%)	98 (23%)	97 (22%)
DOT	12 (4%)	3 (1%)	No Report Submitted	No Report Submitted	2 (0%)
EPA	90 (28%)	142 (34%)	131 (32%)	106 (25%)	119 (26%)
FERC	21 (7%)	16 (4%)	19 (5%)	53 (13%)	78 (18%)
NOAA	8 (2%)	2 (0%)	6 (1%)	8 (2%)	9 (2%)
NRC	3 (1%)	1 (0%)	1 (0%)	1 (0%)	0 (0%)
USFS	63 (20%)	92 (22%)	69 (17%)	49 (12%)	56 (12%)
VA	3 (1%)	0 (0%)	0 (0%)	0 (0%)	0 (0%)
Total	320 (100%)	419 (100%)	412 (100%)	425 (100%)	451 (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 451 ECR cases for FY 2011 do not include the 66 cases reported by USIECR. As cross-agency providers of ECR, the USIECR (and in previous years, DOJ) cases would be duplicative of cases included in the reports of other agencies. USIECR provides independent third-party assisted collaboration and conflict resolution services to agencies directly involved in conflict and those agencies provide a report that includes the cases involving the USIECR. In addition, the reported 451 cases for FY 2011 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 2011, Nuclear Regulatory Commission 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 FY 2011)

	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%)
2011	276 (61%)	175 (39%)

	Average Number of Cases in Progress	Average Number of Cases Completed
2007-2011	238	159

*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)

Through an analysis of overall number of cases along with the cases completed, past reports allow us to estimate how many new cases agencies have been involved with from the fiscal years 2007 to 2011, 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), 425 (2010), and 451 (2011) thus averaging close to 430 cases for those years (Table 2). The percentage of cases completed during those years was 43% (2008), 38% (2009), 42% (2010), and 39% (2011) thus averaging about 40% for those years. Thus, in order to reach a level of approximately 430 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, 36% (162 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 27% (120 cases) of all federal ECR activity. These cases come primarily from agencies with significant land management

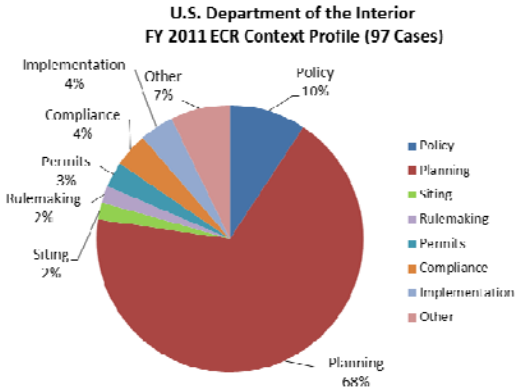
responsibilities, such as DOI, USFS, and DoD. The implementation and monitoring agreements category made up 15% of the total number of cases. Policy development accounted for 6% of all ECR in FY 2011, with licenses and permits (3%), rulemaking (2%), siting and construction (6%), and "other" (5%) accounting for the remainder of cases.

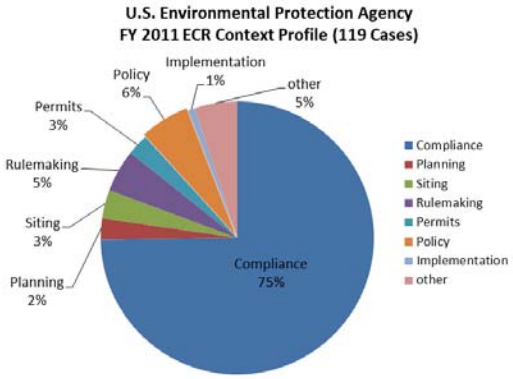
Research undertaken by EPA and described in its FY 2010 and FY 2011 reports indicates that the context and forum for an ECR case can impact the degree to which ECR provides benefits for participants to a process. For example, the research showed that ECR might have a more beneficial effect on relationship-building 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 six agencies that engage in the majority of federal ECR cases.

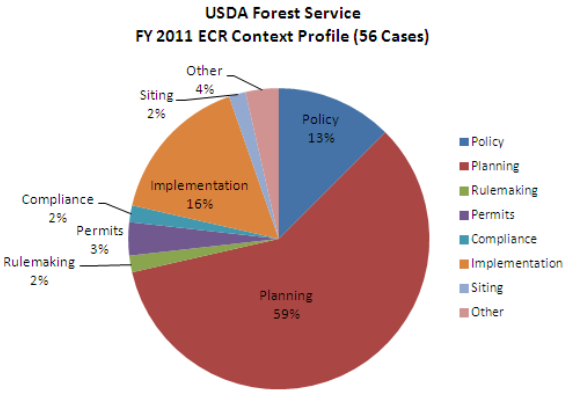
Table 3. Context profile of ECR cases across the federal government

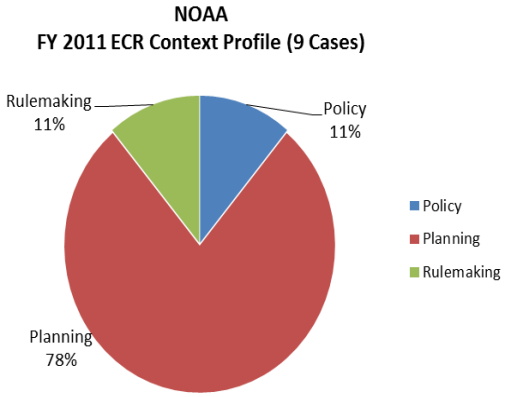
	Number and Percent of FY 2011 ECR Cases
Compliance and enforcement action	162 (36%)
Planning	120 (27%)
Implementation and monitoring agreements	69 (15%)
Siting and construction	26 (6%)
License and permit issuance	13 (3%)
Policy development	29 (6%)
Other	22 (5%)
Rulemaking	10 (2%)
Total	451 (100%)

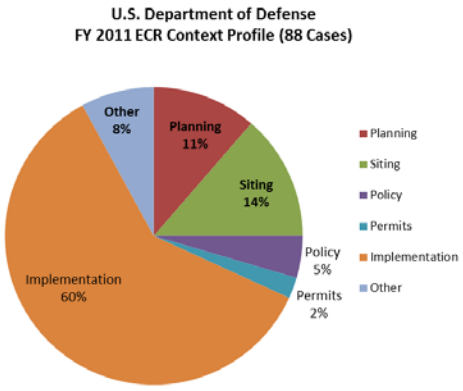
Figure 1. ECR context profiles by agency for FY 2011

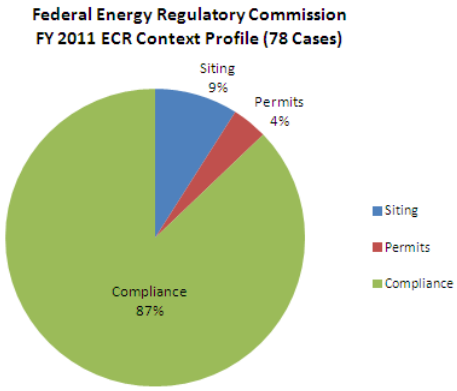












Note: DOT reported two ECR cases in the implementation and monitoring agreements context.

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 varies amongst agencies.

DoD reported being involved as a non-sponsor participant in 33% of its cases. USFS reported being involved as a non-sponsor participant in 25% of its cases. EPA and DOI reported being involved as non-sponsor participants in 19 % and 15% of their cases, respectively.

Table 4. Agency participation in or sponsoring of ECR cases for FY 2011

	Number and Percent of Cases		Total Number Of Cases
	Sponsored	Participated but did not sponsor	
EPA	96 (81%)	23 (19%)	119
DoD	68 (77%)	20 (33%)	88
DOI	82 (85%)	15 (15%)	97
FERC	78 (100%)	0 (0%)	78
USFS	42 (75%)	14 (25%)	56
NOAA	9 (100%)	0 (0%)	9
DOE	1 (50%)	1 (50%)	2
DOT	2 (100%)	0 (0%)	2
			451

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.*[5]

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 2011

FY 2007 through FY 2011	Federal Agency Decision	Administrative Proceedings/ Appeals	Judicial Proceedings	Other
	Number and Percent (%)			
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%)
FY 2011	258 (58%)	89 (20%)	29 (7%)	75 (17%)

Table 5 shows that 258 cases (58%) fall into the upstream "Agency Decision" category, with 82 coming from DOI. Agencies categorized 89 cases (20%) as Administrative Proceedings and Appeals, with 68 of these coming from EPA, which is consistent with its large proportion of compliance and enforcement ECR cases. Agencies categorized 29 (7%) of their cases as "Judicial Proceedings", and 75 cases (17%) as "Other."

At the agency level, the distribution of cases across decision-making forums has not changed significantly from FY 2007 through FY 2011 (Table 6).

[5] See *2006 Analysis, pp 12-13.*

Table 6. Distribution of cases by decision making forums by agency (FY 2007 to FY 2011)

FY 2007	Federal Agency Decision		Administrative Proceedings/ Appeals		Judicial Proceedings		Other	
	Number and Percent (%)							
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	
	Number and Percent (%)							
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	
	Number and Percent (%)							
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	
	Number and Percent (%)							
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%

FY 2011	Federal Agency Decision		Administrative Proceedings/ Appeals		Judicial Proceedings		Other	
	Number and Percent (%)							
DoD	25	10%	5	6%	2	7%	56	75%
DOE	1	0%	0	0%	0	0%	1	1%
DOI	82	32%	11	12%	4	14%	0	0%
DOT	2	1%	0	0%	0	0%	0	0%
EPA	16	6%	68	76%	22	76%	13	17%
FERC	78	31%	0	0%	0	0%	0	0%
NOAA	9	3%	0	0%	0	0%	0	0%
NRC	0	0%	0	0%	0	0%	0	0%
USFS	45	17%	5	6%	1	3%	5	7%
VA	0	0%	0	0%	0	0%	0	0%
Totals	**258**	100%	**89**	100%	**29**	100%	**75**	100%

E. Six Year Overview: Data on Cases

The six 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 shown a steady increase since then, with 412, 425, and 451 cases reported from FY 2009 to FY 2011. It appears from the 2008-2011 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 better developed their ability to collect ECR data. Thus, the FY 2007 Report may have missed ECR cases simply because agencies had not yet fully established and implemented their procedures for identifying, collecting and reporting ECR cases. Having said that, the data does show a 7% increase in cases from FY 2008 to FY 2012, which suggests that

federal agencies are increasingly using third-party neutrals to help resolve environmental conflict.

The six 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 environmental conflict can influence the degree ECR can impact on the outcome of a process. EPA's Report 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 2011:

- To identify and leverage opportunities for collaborative efforts and to create a joint national dialogue for water priorities between states, tribes and the federal resource agencies, USACE led the Building Strong Collaborative Relationships for a Sustainable Water Resources Future Initiative (www.building-collaboration-for-water.org/). In FY11, USACE formally recognized the new Collaboration and Public Participation Community of Practice (CoP) and designated the Director of Civil Works as the CoP's Champion. The CoP is directed by a steering committee from across USACE, promotes information sharing across its 270+ members through an interactive web portal, webinars, and hosts a network of USACE facilitators from across USACE divisions and business lines.

- The Air Force Negotiation Center of Excellence, based at Air University in Montgomery Alabama, has successfully embedded negotiation and conflict management skills into every level of commissioned officer and non-commissioned officer Professional Military

Education (PME). Additionally research projects and ongoing electives continually refresh the training with scenario-based learning to realistically reflect circumstances which Air Force personnel will face in their duties.

- DOE sponsored a Joint Contractor/ Environmental Attorneys' Training Workshop which was held on October 18 and 19, 2011, and drew 82 attendees and 14 teleconference participants. The workshop featured training on: ECR, provided by the U.S. Institute for ECR; Native American Tribal Cultural Issues; Environmental Justice; the National Environmental Policy Act (NEPA), and other issues.

Other initiatives included:

- Requiring conflict management elements in management performance plans (DOI);
- 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 2011 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:

For the second year, the inter-agency (FS, BLM, and NPS) distance learning course entitled "Managing by Network" was offered to employees. Through peer-learning sessions, employees are introduced to emerging skill sets for managing public resources in a complex, networked environment—including the use of partnerships, collaboration, volunteers and alliances. Approximately 20 Forest Service employees joined over 80 DOI employees in this collaborative learning experience.

USACE has multiple nationwide MOU's and MOA's with various other federal agencies (e.g. US Fish and Wildlife Service, Federal Energy Regulatory Commission, Nuclear Regulatory Commission, Natural Resources Conservation Service, the U.S. Geological Service, the Bureau of Reclamation, the Federal Highway Administration, DOE's Sandia and Oak Ridge National Laboratories) where issues are identified early on, and dealt with through pre-existing relationships and understandings prior to conflict development, and joint programs are developed. Similarly USACE District and Division offices execute regional agreements with States (e.g. Natural Resource offices, Offices of Historic Preservation), develop Lake-wide Area Management Plans, form Regional Sediment Management teams with other agencies, and hold regular multi-agency management and coordination meetings.

Other examples of agencies leveraging resources include:

EPA working with the Department of Agriculture and the Department of the Interior on air quality; FERC working with other agencies through its Integrated Licensing Process; 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; 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. USACE has embraced collaborative approaches to environmental problems through its Campaign Plan and the newly released 2011-2015 Civil Works Strategic Plan. Collaboration and Partnering is one of the new Strategic Plan's cross cutting strategies. 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 is implementing Administrator Lisa Jackson's 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." ECR is encompassed within the overall Air Force ADR Program that was established through AF Policy Directives. AF Policy Directive 51-12 specifically references the use of ADR in environmental disputes.

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 policy and guidance 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 2011 reports show that:

- More than 100 environmental collaboration and conflict resolution training sessions were sponsored by federal departments and agencies in FY 2011.
- 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 senior leadership and staff, (including legal and programmatic 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 cultural change in federal agencies to "face the challenge of balancing competing public interests and federal agency responsibilities in 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. The USACE Campaign Plan, as noted above, contains two goals related to collaboration. In addition, the USFS Launched its "Empowering Collaborative Stewardship" effort, which engaged hundreds of agency employees in the development of critical new resources and strategies for collaborative leadership direction, performance evaluation, policy practice and learning, also as an effort to promote a more collaborative culture in the Forest Service.

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. Six Year Overview: Capacity Building

The reports show that agencies that actively engage in ECR have made great strides over the past six 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 has been consistent since the first annual report in FY 2006.

IV. Collaboration without a Third Party

The ECR Memorandum recognized the "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, environmental compliance, and public participation.

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. Through its administration of the Environmental Justice Showcase Communities Project, The EPA Office of Environmental Justice provides funding to EPA Regional offices in support of efforts that bring together governmental and non-governmental organizations and pools their collective resources and expertise to achieve real results in communities. The successes and lessons learned in these demonstration projects will be used to help guide the design and implementation of future environmental justice projects and will help EPA increase its ability to address local environmental challenges in more effective, efficient, and sustainable ways.

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. The DOT Maritime Administration (MARAD) has undertaken a review of its NEPA implementing procedures and begun revising its NEPA procedures and processes in an effort to clarify when and how the public and stakeholders will be engaged in an effort to focus on collaboration and thereby reduce the likelihood that environmental conflicts will arise. That process will continue in FY2012.

The EPA NEPA program conducted an unassisted dialogue process regarding water rights on the Colorado River. These self-facilitated meetings between the Army Corp of Engineers, Colorado's Department of Natural Resources, the United States Forest Service and United States Fish and Wildlife Service are intended to enhance understanding and cooperation between the parties regarding use of this limited natural resource.

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.

NOAA reported that the National Weather Service is participating in the revision of NOAA Administrative Order 216-6, which addresses collaborative negotiation and conflict resolution.

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." In addition, Region 10 of EPA continues to utilize the administrative dispute resolution processes articulated in administrative orders on consent and consent decrees to resolve disputes without the assistance of a neutral. The Region also provides opportunities for pre-filing negotiations in most administrative enforcement actions. This frequently results in the EPA resolving the underlying matter without filing a case.

Assisted Non-Agreement Seeking Processes

EPA modified its report to separately track cases where third parties were used to facilitate non agreement-seeking processes. A non agreement-seeking case is one in which the parties are not using a third party to help them reach agreement. EPA reported 101 such cases in FY 2011.

E. Collaborating Without a Third party: The Six 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 2010 reports, the FY 2011 reports show that agencies are best able to track 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.

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. EPA reported that it has three methods for gathering data about the use of ECR: its Conflict Prevention and Resolution Services contract; 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).
- EPA reported that it is refining the aggregate analysis of EPA ECR cases that it conducted in FY 11 and has reached the following conclusions:
  - How parties address substantive issues is highly relevant. 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;
  - How parties view mediators and facilitators has a relationship to certain case outcomes such as agreement durability, expectations of working together in the future, and the extent to which parties would recommend the process to others;
  - There are differences in case outcomes related to whether a case arose from a pending federal agency decision, an administrative decision, or a judicial decision and whether a case is classified as upstream or downstream; and
  - Some ECR case outcomes vary with ECR process inputs or case characteristics that have not been identified.

C. Six Year Overview: Tracking and Evaluating

The tracking of ECR has increased 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. Improvements in how agencies are tracking data is one of the reasons, (along with an increased number of cases), for this reported increase.

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, USIECR has interpreted this data as showing that:

- 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 2011 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, 2009, and 2010.

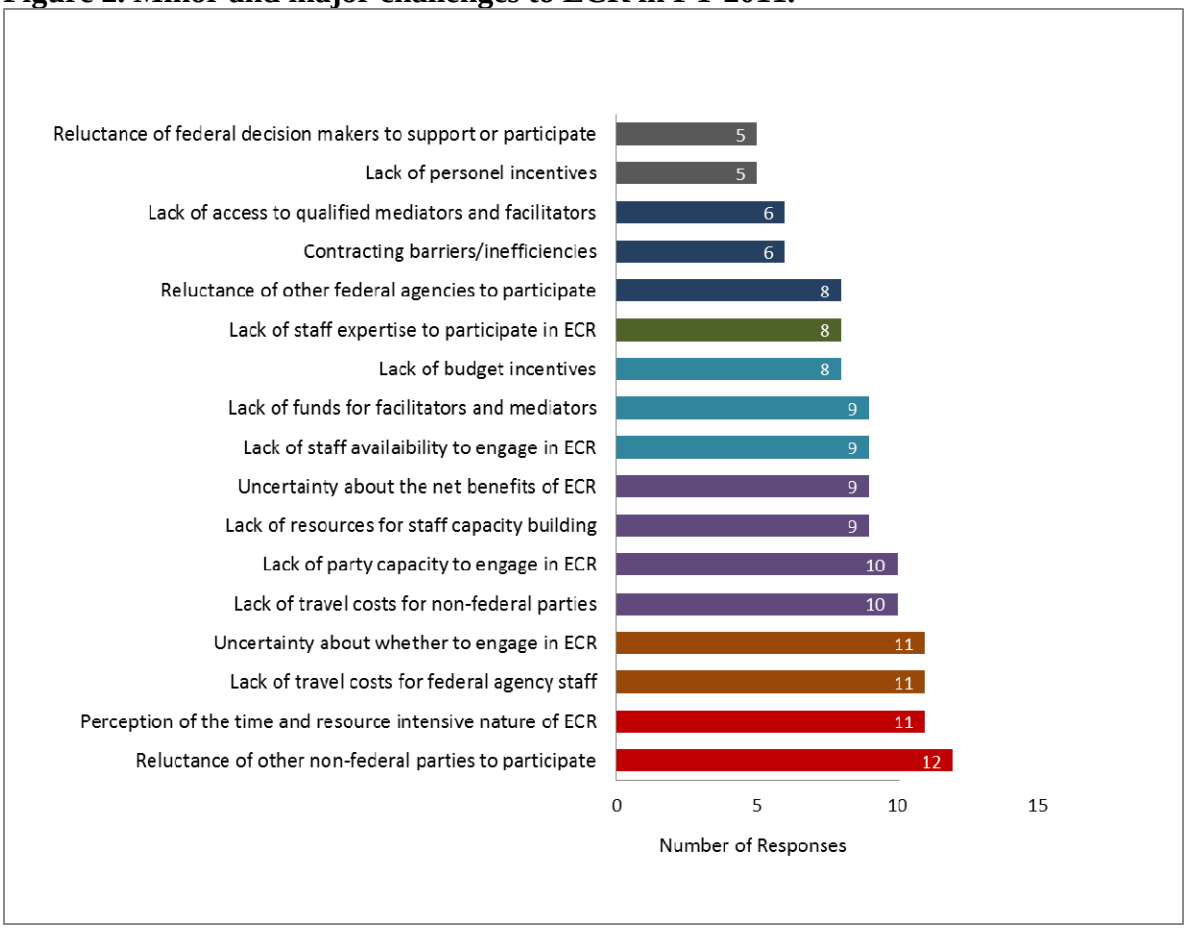
Eleven agencies considered the "perception of the time and resource intensive nature of ECR" as either a minor or major challenge. Eleven agencies reported "lack of travel costs for federal agency staff" as a major challenge. Probably due to budget constraints, this is the first report in which this challenge has been one of the most frequently cited challenges. Lack of travel costs for non-federal parties was also frequently cited, as 10 agencies noted this as a major or minor challenge. Twelve agencies 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 2011. (Figure 2).

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

What do six years of reports say about challenges?

The data for FY 2011 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 over the past several years. "Lack of travel costs" has become more frequently cited over the past few years, probably due to agency budget constraints. "Uncertainty of Net Benefits," and "Lack of Funding" are the next most cited challenges over the six-year period. "Lack of Access to Qualified Mediators and Facilitators," has been the least cited challenge in the 6 years of annual reports.

Figure 2. Minor and major challenges to ECR in FY 2011.



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 2011.

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 2011	Increased use in at least one priority area
DoD	*Priority areas where ECR was applied during FY 2011:* 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. *New priority areas identified in FY 2011:* Land use watershed management and privatization of housing (Army).	✓
DOE	*Priority areas where ECR was applied during FY 2011:* 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.	
DOJ	*Priority areas where ECR was applied during FY 2011 and where new priority areas were identified:* Continues to be used in full range of environmental enforcement and defensive cases.	✓

DOI	*Priority areas where ECR was applied during FY 2011:* 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. *New priority areas identified in FY 2011:* National Ocean Policy Initiative; Energy Fast Tracked Projects; Occupancy of Residential Structures; and Indian Water Rights Claims.	✓
EPA	*Priority areas where ECR was applied during FY 2011:* Interagency disputes, National Environmental Policy Act, superfund program, regulation development, wetlands program, climate change, environmental justice, and external civil rights.	✓
FERC	*Priority areas where ECR was applied during FY 2011:* Natural gas facility certificate applications, hydropower licensing/relicensing applications, and liquefied natural gas facility authorization applications.	
NOAA	*Priority areas where ECR was applied during FY 2011:* Take reduction teams	
USFS	*Priority areas where ECR was applied during FY 2011:* 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 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:

FERC
Since this matter was resolved, neighbors of the original landowner have contacted the DRS with questions and concerns about the most appropriate process to resolve their disputes. As importantly, since this matter was resolved, the pipeline company has been proactive in requesting DRS-guided mediation as an alternative to litigation.

DoD (Army)
The key beneficial outcome of this case was that all parties were able to get on the same page about the parameters with which the project could move forward. The initial goal was to leave the series of workshops with a clear path forward. Discussions had a sense of more openness and accountability. A suite of potential alternatives that could be further explored was decided upon and data gaps were identified. A technical advisory committee was created as a result of these meetings to help fill in those data gaps; the committee initiated meetings in December of 2011.

DOI (Bureau of Reclamation)
This facilitative process has been successful in bringing together individuals who represented a diverse group of interests. By working collaboratively with one another, the group has become solution-oriented and dedicated to addressing the challenges facing the basin. It is actively considering the uses and needs of Reclamation's Yellowtail Dam, the National Recreation Area, and the Bighorn River system to find an appropriate balance of public benefits while recognizing the respective agencies' commitments to authorized project purposes, legal obligations, contemporary needs, and public expectations.

DOT (FHWA)

The interviews identified several areas of agreement as well as the points of disagreement listed above. With regard to the collaborative process, there was general agreement that the interagency impasse needed to be resolved, and this was a good time to seek a collaborative process to the barriers to moving forward. There were also some agreements on the project itself, including that the project will seriously impact very valuable natural areas and if it proceeds, the project needs to be built in an environmentally sensitive way. There is also agreement that the Appalachian Trail needs to be protected, and that the natural environment creates economic benefits that need to be preserved and enhanced where possible.

EPA

The Oregon Fish Consumption Rate and Water Quality Standards Rule facilitated dialogue has been a viable example of proactive intergovernmental collaboration. At all times during this process, with the guidance and on-going assessments of the facilitation team, the three-governments worked with each other to identify the necessary people, materials, presenters and topics that would help further their understanding— and the understanding of all involved— of the complex issues that could emerge from an increased human health criteria in Oregon.

DOE

The Western Valley Demonstration project (WVDP) has experienced and continues to experience considerable success over the last few years by using tailored ECR techniques to resolve long-standing disputes between DOE and the New York State Research and Development Authority (NYSERDA) under their cooperative agreement for the implementation of WVDP and to facilitate future cleanup work. Resolving these disputes has increased project performance, resulting in substantial cost savings. Both DOE and NYSERDA expect to continue to use the third-party neutral over the next six to eight years.

IX. Conclusion

The FY 2011 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 has increased about 7% from FY 2008 through FY 2011. Departments reporting consistent increases in use from FY 2007 through FY 2011 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, lack of budget for travel, 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 sixth annual ECR Reports build on the information submitted in the five 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 2011

FY 2011 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 sixth year of reporting in accordance with this memo for activities in FY 2011.

<u>The report deadline is February 15, 2012</u>.

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 2011 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 2011 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 2011, including progress made since 2010. 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 **only** one		
a) Lack of staff expertise to participate in ECR	☐	☐	☐
b) Lack of staff availability to engage in ECR	☐	☐	☐
c) Lack of party capacity to engage in ECR	☐	☐	☐
d) Limited or no funds for facilitators and mediators	☐	☐	☐
e) Lack of travel costs for your own or other federal agency staff	☐	☐	☐
f) Lack of travel costs for non-federal parties	☐	☐	☐
g) Reluctance of federal decision makers to support or participate	☐	☐	☐
h) Reluctance of other federal agencies to participate	☐	☐	☐
i) Reluctance of other non-federal parties to participate	☐	☐	☐
j) Contracting barriers/inefficiencies	☐	☐	☐
k) Lack of resources for staff capacity building	☐	☐	☐
l) Lack of personnel incentives	☐	☐	☐
m) Lack of budget incentives	☐	☐	☐
n) Lack of access to qualified mediators and facilitators	☐	☐	☐
o) Perception of time and resource intensive nature of ECR	☐	☐	☐
p) Uncertainty about whether to engage in ECR	☐	☐	☐
q) Uncertainty about the net benefits of ECR	☐	☐	☐
r) Other(s) (please specify): _____	☐	☐	☐
s) No barriers (please explain): _____	☐	☐	☐

Section 3: ECR Use

3. Describe the level of ECR use within your department/agency in FY 2011 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[6]	Completed Cases or projects [7]	**Total FY 2011 ECR Cases**[8]	**Decision making forum that was addressing the issues when ECR was initiated:**				Of the **total FY 2011 ECR cases** indicate how many your agency/department	
				Federal agency decision	Administrative proceedings /appeals	Judicial proceedings	Other (specify)	Sponsored[9]	Participated in but did not sponsor[10]
Context for ECR Applications:									
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 2011 ECR Cases**)	_____	_____	_____ (the sum of the Decision Making Forums should equal **Total FY 2011 ECR Cases**)				_____ (the sum should equal **Total FY 2011 ECR Cases**)	

[6] A "case in progress" is an ECR case in which neutral third party involvement began prior to or during FY 2011 and did not end during FY 2011.
[7] A "completed case" means that neutral third party involvement in a particular matter ended during FY 2011. 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.
[8] "Cases in progress" and "completed cases" add up to "Total FY2011 ECR Cases".
[9] 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.
[10] 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 2011, 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 2010 can be found in the FY 2010 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
_____	☐	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐

List of additional priority areas identified by your department/agency in FY 2011	Check if using ECR
_____	☐
_____	☐
_____	☐
_____	☐

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 2011 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.

Section 4: Demonstration of ECR Use and Value

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

8. ECR Case Example

a. Using the template below, provide a description of an ECR case (preferably completed in FY 2011). 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 all that apply	*Check if*	
		Not Applicable	Don't Know
Protracted and costly environmental litigation;	☐	☐	☐
Unnecessarily lengthy project and resource planning processes;	☐	☐	☐
Costly delays in implementing needed environmental protection measures;	☐	☐	☐
Foregone public and private investments when decisions are not timely or are appealed;	☐	☐	☐
Lower quality outcomes and lost opportunities when environmental plans and decisions are not informed by all available information and perspectives; and	☐	☐	☐
Deep-seated antagonism and hostility repeatedly reinforced between stakeholders by unattended conflicts.	☐	☐	☐

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, 2012.
Submit report electronically to: ECRReports@omb.eop.gov

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

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

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

Acknowledgements:

This report was compiled by David Emmerson, Senior Conflict Management Specialist, Office of Collaborative Action and Dispute Resolution (CADR), U.S. Department of the Interior. David Emmerson worked on behalf of OMB, CEQ, and in conjunction with the U.S. Institute for Environmental Conflict Resolution and Agency ECR Points of Contact to create this government-wide perspective on the experiences reported by agencies in their annual ECR reports. Sincere thanks are due to David Emmerson and CADR for supporting this effort.