

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.

The report deadline is February 15, 2012.

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.

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Name and Title/Position of person responding:	Carrie Greco
Division/Office of person responding:	Environmental Law Division
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Date this report is being submitted:	January 2012

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.]

The Army continues to assess all environmental matters for the potential for ECR. Currently, the Army uses the Tiered Partnering Process and the Dispute Resolution, processes as outlined in the Federal Facility Agreements, to resolve most of its disputes at environmental remediation sites. Army also avoids or alleviates disputes through the early involvement with stakeholders. Monthly meetings allow the parties to identify issues and concerns early on. These meetings promote open communication and build trust and understanding among the parties.

Unfortunately, no progress has been made on establishing a cost benefit analysis template for people to use in evaluation of cases for ECR. Army needs to develop a quantifiable factor checklist for evaluating when to use ECR.

The Environmental Law Division sees a growing need to use ECR in the affirmative litigation branch.

Section 2: Challenges

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

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

Section 3: ECR Use

3. Describe the level of ECR use within your department/agency in FY 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 ¹	Completed Cases or projects ²	Total FY 2011 ECR Cases ³	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 ⁴	Participated in but did not sponsor ⁵
<i>Context for ECR Applications:</i>									
Policy development	_____	_____	_____	_____	_____	_____	_____	_____	_____
Planning	_____	_____	_____	_____	_____	_____	_____	_____	_____
Siting and construction	_____	_____	_____	_____	_____	_____	_____	_____	_____
Rulemaking	_____	_____	_____	_____	_____	_____	_____	_____	_____
License and permit issuance	_____	_____	_____	_____	_____	_____	_____	_____	_____
Compliance and enforcement action	_____	_____	_____	_____	_____	_____	_____	_____	_____
Implementation/monitoring agreements	_____	_____	_____	_____	_____	_____	_____	_____	_____
Other (specify): CERLCA or State cleanup actions	<u> 3 </u>	<u> 0 </u>	<u> 3 </u>	_____	_____	_____	_____	_____	_____
TOTAL	<u> 3 </u>	<u> 0 </u>	<u> 3 </u>						<u> 3 </u>
	(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)	

¹ 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.

² 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.

³ “Cases in progress” and “completed cases” add up to “Total FY2011 ECR Cases”.

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

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

4. Is your department/agency using ECR in any of the substantive priority areas you listed in your prior year ECR Reports? Indicate if use has increased in these areas since they were first identified in your ECR report. Please also list any additional priority areas identified by your department/agency during FY 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
Superfund Litigation	X	<input type="checkbox"/>
Compliance Actions/Orders	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
_____	<input type="checkbox"/>	<input type="checkbox"/>
List of additional priority areas identified by your department/agency in FY 2011	Check if using ECR	
NEPA Scoping	<input type="checkbox"/>	
Consultation with Tribes and Federal Agencies	<input type="checkbox"/>	
Regulatory Actions, NOV's	<input type="checkbox"/>	
Land and Watershed Management and Privatization of Housing	<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]

We do not have a specific cost benefit savings analysis or checklist to determine the appropriateness of ECR. We do acknowledge that the specific cases that have successfully used ECR have avoided lengthy litigation, litigation costs and extended man hours. It is difficult to assess the actual costs saved.

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.

Other areas where our agency has acted to prevent or resolve environmental issues without the use of ECR include the following.

Tiered Partnering Process

Dispute Resolution provisions in Federal Facility Agreements

Consultation processes with Tribes and Federal agencies under various statutes to includes FWS and NMFS

Town Hall Meetings and Restoration Advisory Boards (RABs)

Negotiations with Regulators and other stakeholders and parties to 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.

The National Fireworks Site in Hanover, Massachusetts involves an old fireworks and munitions manufacturing facility that the Massachusetts Department of Environmental Protection identified as an environmental hazard. In April 2000, four potentially responsible parties entered into a Consent Decree to fund the site investigation. That work is now complete and the potentially responsible parties have implemented ECR to move toward an agreement in principal that would fund the remedy at the site. The ECR brought the parties together and moved the case forward. An agreement in principal has been reached that can potentially avoid lengthy litigation and additional costs.

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
After the work under the Consent Decree had been completed, the parties needed to reach an agreement to fund the remedy. The Army saw ECR as a means to assist the parties in reaching an agreement. The parties agreed and selected a mediator and entered into a mediation agreement. Department of Justice funded the Federal parties' share of the mediation.
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)
The purpose of ECR was to allow the parties an avenue to have a third-party neutral listen to each side and facilitate discussions to move the issues forward. The specific processes used cannot be disclosed due to a confidentiality agreement. In general, however, the ECR process allowed for party accountability as we set terms and goals for the mediation. It allowed for openness in discussion among the parties. The parties are still working on a final settlement, but ECR allowed the parties to reach an agreement in principle earlier than if the case had moved into litigation.
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 case has not been fully settled through ECR, so the beneficial outcomes are not final at this time.

Reflections on the lessons learned from the use of ECR

Although ECR can create a more efficient means to resolve conflicts it still is time intensive. The parties spent a significant amount of time preparing for and conducting the mediation. Despite the work and time required, we saw a continued need to try to move things forward in this slow moving train. ECR helped the parties move toward an agreement in principal, but it was still a slow process.

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

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

None

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