

FY 2012 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 seventh year of reporting in accordance with this memo for activities in FY 2012.

The report deadline is February 15, 2013.

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 2012 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 2012 ECR reports. You may be

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

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Date this report is being submitted:	January 11, 2013

Section 1: Capacity and Progress

1. Describe steps taken by your department/agency to build programmatic/institutional capacity for ECR in 2012, including progress made since 2011. 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.]

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, in addition to disputes in other subject matter areas. The resources of the Air Force ADR program are, and have been, available to support the use of ECR and to train Air Force personnel in negotiation and communication skills within the context of ECR.

The Air Force continues to expand education and training in interest based conflict resolution skills through, inter alia, the following initiatives:

- The Air Force Negotiation Center of Excellence, based at Air University in Montgomery Alabama, has successfully imbedded negotiation and conflict management skills into every level of commissioned officer and non-commissioned officer Profession Military Education (PME). Additionally research projects and ongoing electives continually refresh the training with scenario-based learning to realistically reflect circumstances under which Air Force personnel will be faced in their duties.
- Training in ECR has been institutionalized as a module at the yearly Negotiation and Dispute Resolution course given every year at the AF JAG School.
- The Dispute Resolution Division of the General Counsel's Office is continually improving and expanding training in basic negotiation, communication, and ADR skills, and supporting delivery to an ever-widening audience within the Air Force.
- Following on last year's report, during FY 2012, the Dispute Resolution Division (GCD), in collaboration with the Installations, Energy & Environment Division (GCN), provided an intermediate two day training course on negotiation skills to engineers, program managers, and lawyers from the Air Force Real Property Agency (now part of the Air Force Civil Engineer Center (AFCEC)). In addition to providing interest based negotiation training, a multi-party two-stage negotiation scenario based upon a negotiation involving an enhanced use lease was employed as a teaching tool.

- In FY 2013, further initiatives are planned to provide an advanced-level course for AFCEC as well as a repeat basic negotiation class for new personnel. GCN, with GCD assistance, is exploring ways of expanding negotiation training to the Air Force engineering community more broadly in FY13, including leveraging the experience of individuals who have already received training.

Section 2: Challenges

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

	Extent of challenge/barrier		
	Major	Minor	Not a challenge/barrier
Check only one			
a) Lack of staff expertise to participate in ECR	<input type="checkbox"/>	<input type="checkbox"/>	x
b) Lack of staff availability to engage in ECR	<input type="checkbox"/>	<input type="checkbox"/>	x
c) Lack of party capacity to engage in ECR	<input type="checkbox"/>	<input type="checkbox"/>	x
d) Limited or no funds for facilitators and mediators	<input type="checkbox"/>	<input type="checkbox"/>	x
e) Lack of travel costs for your own or other federal agency staff	<input type="checkbox"/>	<input type="checkbox"/>	x
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"/>	<input type="checkbox"/>	x
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"/>	<input type="checkbox"/>	x
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"/>	<input type="checkbox"/>	x
p) Uncertainty about whether to engage in ECR	<input type="checkbox"/>	<input type="checkbox"/>	x
q) Uncertainty about the net benefits of ECR	<input type="checkbox"/>	<input type="checkbox"/>	x
r) Other(s) (please specify): _____	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

s) No barriers (please explain):

Section 3: ECR Use

3. Describe the level of ECR use within your department/agency in FY 2012 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 2012 ECR Cases ³	Decision making forum that was addressing the issues when ECR was initiated:				Of the total FY 2012 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	1	39	40	40	_____	_____	_____	40	_____
Siting and construction	5	2	7	_____	3	4	_____	2	5
Rulemaking	_____	_____	_____	_____	_____	_____	_____	_____	_____
License and permit issuance	_____	_____	_____	_____	_____	_____	_____	_____	_____
Compliance and enforcement action	_____	_____	_____	_____	_____	_____	_____	_____	_____
Implementation/monitoring agreements	1	_____	1	_____	_____	1	_____	1	_____
Other (specify): water rights	1	_____	1	_____	_____	1	_____	_____	1
TOTAL	8	41	49	40	3	6	_____	43	6
	(the sum should equal Total FY 2012 ECR Cases)			(the sum of the Decision Making Forums should equal Total FY 2012 ECR Cases)				(the sum should equal Total FY 2012 ECR Cases)	

¹ A “case in progress” is an ECR case in which neutral third party involvement began prior to or during FY 2012 and did not end during FY 2012.

² A “completed case” means that neutral third party involvement in a particular matter ended during FY 2012. 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 FY2012 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 2012, 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 2011 can be found in the FY 2011 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
CERCLA	x	<input type="checkbox"/>
NEPA	x	x
Land Use/Encroachment	x	x
Water Rights	x	<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 2012	Check if using ECR	
_____	<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]

Air Force environmental conflicts and disputes tend to be wide-ranging and the volume is not as high as agencies, for example, with licensing and enforcement as their primary mission. Senior leadership has long recognized the value of ADR and its contribution to mission accomplishment through its creative problem-solving attributes as well as savings in cost and time. ADR is treated by the Air Force as “budget neutral” with a positive impact on mission accomplishment. Air Force leadership fully supports the need for up-front investment in training in the use of collaborative processes and conflict resolution.

6. Describe other significant efforts your agency has taken in FY 2012 to anticipate, prevent, better manage, or resolve environmental issues and conflicts that do not fit within the Policy Memo's definition of ECR as presented on the first page of this template.

The Air Force continues the education, training, and outreach efforts described more fully in response to Section 1 above.

Throughout FY 2012, the Air Force participated in 98 Restoration Advisory Boards (RABs), the great majority of which do not conform to the Policy Memo's definition of ECR because they do not utilize third party neutrals. These advisory boards include community and regulator representatives and employ collaborative decision making processes for many cleanup issues.

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.

Duncan Canal: The Air Force successfully used innovative collaboration, alternate dispute resolution and negotiation awareness, understanding, and skills to resolve an intractable and costly cleanup project, thereby averting threatened litigation. The dispute involved issues of cleanup responsibility and control at a former radio relay station in Alaska.

A six-member Air Force team composed of three environmental attorneys and three restoration engineers assisted the Department of Justice in resolving this dispute between the Air Force and Department of Agriculture and getting the cleanup back on track. This team's proactive involvement, conciliatory approach, and facilitative efforts were instrumental to the successful outcome.

8. ECR Case Example

- a. Using the template below, provide a description of an ECR case (preferably completed in FY 2012). Please limit the length to no more than 2 pages.

Name/Identification of Problem/Conflict
Overview of problem/conflict and timeline, including reference to the nature and timing of the third-party assistance, and how the ECR effort was funded
The United States owned former Air Force Plant 36 (Plant 36) in Evendale, Ohio, and leased it to General Electric Corp. (GE) to manufacture and overhaul jet engines. The Air Force transferred this Government Owned Contractor Operated (GOCO) to GE in 1989 and there have been issues over liability for environmental remediation at the site. Cleanup actions have been ongoing but the dispute involved allocation of liability for past and future costs.
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)
USAF used a neutral mediator and did facilitated mediation over 2 days, resulting in an agreement in principle, followed up with a Consent Decree. The mediator stayed involved throughout the drafting process. The mediator was selected by consensus between the US (Air Force and DOJ counsel) and GE (outside and in-house counsel). Each side submitted three names on a given date and each called the other sides' choices. The parties settled on one by mutual agreement. Both sides had teams for technical, allocation, and legal issues. The parties met together, met with the mediator separately, and the mediator shuttled back and forth. There were also small groups meetings with the main attorneys and the mediator.
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 mediated Consent Decree provided benefits not available through judicial resolution. It gave the Air Force the opportunity to directly consult with GE on cleanup at Plant 36 and ensured that GE would not seek to recover expenditures back against existing government contracts. The US was also able to negotiate the terms of the liability release from GE. The parties were able to agree on allocations for past and future cleanup costs at the site allowing both parties to avoid potentially unfavorable judicial decisions on allocation.
Reflections on the lessons learned from the use of ECR
It is critical to have a good team with all the key players and face-to-face meetings with all the parties were very helpful. This was a very complicated case and the mediator's expertise with complex CERCLA cases was invaluable.

- 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	x	<input type="checkbox"/>	<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.

Previous years comments remain applicable. We strongly urge that next year this is done through a more simplified report format for agencies whose mission focus is not licensing, permitting, or environmental enforcement.

Please attach any additional information as warranted.

Report due February 15, 2013.

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