

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

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Date this report is being submitted:	February 15, 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.]

The U.S. Department of Transportation (DOT) has taken the following steps to build programmatic and institutional capacity for ECR in FY2012:

- The Federal Transit Administration (FTA) increased internal infrastructure support for the environmental review process, including ECR, by creating permanent Environmental Protection Specialist (EPS) positions in several regional offices. EPSs manage the environmental process, including preventing, identifying, and resolving environmental issues and conflicts. Additionally, FTA has engaged EPS contractor support, which will further increase FTA's capacity for environmental management.
- The FTA is also investing in the creation of an environmental database for tracking the environmental review process for projects around the country and will include ECR as a potential issue/tracking component. The FTA also provided in-person training on managing the environmental process to all ten of its regional offices to increase the knowledge and understanding of the environmental process, as well as to encourage involvement earlier in the process to help resolve conflicts before they become further entrenched.
- Under the Federal Highway Administration's (FHWA) Office of Project Development and Environmental Review's IDIQ contract, there is an identified task for conflict resolution, facilitation and mediation of environmental disputes. This task includes pre-approved third party neutrals that can be utilized for specific project- and/or program-related conflicts, disputes and issues. Funding has been allocated to this task to perform these services when requested.
- The Federal Aviation Administration (FAA) works collaboratively with other parties, including the public and other stakeholders, to resolve potential environmental conflicts arising as a result of FAA actions. In addition, the Chief Counsel's training curriculum guide includes environmental conflict resolution training courses.
- The Department continues to publicize the availability of ECR online. As an example, DOT's Center for Alternative Dispute Resolution maintains a link to <http://www.ecr.gov>, the website operated by the U.S. Institute for Environmental Conflict Resolution. As another example, FHWA's online "Environmental Review Toolkit" includes a webpage dedicated to "Conflict Resolution," including papers on ECR and links to websites operated by the U.S. Institute and the National Policy Consensus Center.

**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 <b>only</b> 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 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 <sup>1</sup>	Completed Cases or projects <sup>2</sup>	Total FY 2012 ECR Cases <sup>3</sup>	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 <sup>4</sup>	Participated in but did not sponsor <sup>5</sup>
Context for ECR Applications:									
Policy development	_____	_____	_____	_____	_____	_____	_____	_____	_____
Planning	_____	_____	_____	_____	_____	_____	_____	_____	_____
Siting and construction	_____	_____	_____	_____	_____	_____	_____	_____	_____
Rulemaking	_____	_____	_____	_____	_____	_____	_____	_____	_____
License and permit issuance	_____	_____	_____	_____	_____	_____	_____	_____	_____
Compliance and enforcement action	_____	_____	_____	_____	_____	_____	_____	_____	_____
Implementation/monitoring agreements	_____	2	2	2	_____	_____	_____	2	_____
Other (specify): _____	_____	_____	_____	_____	_____	_____	_____	_____	_____
<b>TOTAL</b>	_____	<b>2</b>	<b>2</b>	<b>2</b>	_____	_____	_____	<b>2</b>	_____
	(the sum should equal <b>Total FY 2012 ECR Cases</b> )			(the sum of the Decision Making Forums should equal <b>Total FY 2012 ECR Cases</b> )				(the sum should equal <b>Total FY 2012 ECR Cases</b> )	

<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> “Cases in progress” and “completed cases” add up to “Total FY2012 ECR Cases”.

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

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

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
Dealing with complex and controversial transportation projects	✓	<input type="checkbox"/>
Early involvement and trust building among other federal agencies and the public regarding the transportation project development process	✓	<input type="checkbox"/>
Assisting in the timely delivery of transportation projects	✓	<input type="checkbox"/>
Dealing with differing opinions on one or more major environmental issues	✓	<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]

- Two items FTA reported last year are still ongoing, as they are components of larger, long-term projects. First, FTA is developing an environmental database and hopes to include an ECR element (e.g., track costs of environmental conflicts, track requests for ECR assistance). A contractor is aiding FTA in developing the database and is currently developing the overall workflow for the system. The database is expected to be operational in 2013. Second, an overview of ECR and an FTA position statement in support of ECR will be placed on FTA's website. The FTA is currently redesigning its environmental webpages with the use of contractor support.
- The FHWA is actively developing and implementing the use of tracking systems that will track the milestones and time required for the completion of NEPA and may also capture data useful to the ECR process.

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.

- Through the DOT Center for Alternative Dispute Resolution, DOT offers conflict management skills training to all managers and employees, thereby increasing DOT staff's skills in communication and interest based negotiation principles, enabling them to have more productive communication with stakeholders.
- The Maritime Administration (MARAD) works with the shipbuilding industry to find technological solutions to environmental problems associated with the construction and design of ships, and also encourages cooperative research programs in regional and international bodies that are working to solve these problems. More generally, MARAD is currently revising its NEPA processes and procedures in an effort to enhance transparency as well as to clarify procedures and requirements to the public and stakeholders. That process will continue in FY2013.
- The FHWA promotes the use of collaboration and issue resolution at the earliest time with the appropriate parties involved. The FHWA continues to fund an interagency agreement with the U.S. Institute for Environmental Conflict Resolution to facilitate ECR by providing assessment and analysis services, convening workshops, and providing related trainings. The FHWA also funds a task for dispute resolution and facilitation services. In addition, FHWA's Every Day Counts initiative is currently promoting the use of programmatic agreements as a time saving and streamlining measure. Furthermore, FHWA promotes the principles of Planning Environment Linkages (PEL), which allow, under certain conditions, the adoption of planning products into the NEPA process, potentially reducing redundancy in the two processes. Encouraging collaboration and coordination between the planning staff and environmental staff within FHWA is critical to this effort and allows the agency to identify potential issues early in the environmental review process.
- The FTA regional offices are generally following the ECR principles (found in Attachment A) on their projects, thereby informally applying ECR to FTA projects.
- The National Highway Traffic Safety Administration's (NHTSA's) main environmental initiative is the development of environmental impact statements (EIS) for the agency's Corporate Average Fuel Economy (CAFE) rulemakings, which set fuel economy and fuel efficiency standards for light-duty vehicles and medium- and heavy-duty trucks sold in the United States. Although NHTSA has not taken affirmative steps to build programmatic/institutional capacity for traditional ECR, through the EIS program, NHTSA incorporates ECR objectives by recognizing the need to partner with other federal agencies, tribes, stakeholders, and the public to achieve its goals.
- Although PHMSA does not participate in the construction of infrastructure, PHMSA often becomes aware of disputes between landowners and pipeline operators. These disputes most often arise during construction of a pipeline, but can also arise after a pipeline is operational. In an effort to assist with resolution of these disputes, PHMSA created the Community Assistance and Technical Services (CATS) Program. The mission of the CATS Program is to advance public safety, environmental protection and pipeline reliability by facilitating clear communications among all pipeline stakeholders, including the public, the operators and government officials. CATS

managers provide information about the Office of Pipeline Safety programs to pipeline safety stakeholders and also work with pipeline operators to encourage prudent land use planning and to prevent or mitigate excavation damage and encroachment.

- Where the Federal Railroad Administration (FRA's) NEPA obligations are triggered, the common practice of the agency is to work closely with stakeholders and grantees throughout the environmental process and encourage collaboration. This hands-on approach lets FRA identify issues and discuss them with the relevant parties before they result in a more protracted dispute. By closely engaging stakeholders and spotting issues early, FRA is able to reduce the amount and severity of environmental conflicts. The FRA finds this reduces the frequency and severity of disputes and avoids the need for a more formalized ECR process.
- Within FAA, the Business Plan for Air Traffic includes mandatory training for executive- and managerial-level staff as a core activity, which includes conflict management. In addition, facilitation is a core business initiative, which provides highly trained and experienced internal facilitation resources for service units, including conflict resolution.
- In addition, FAA has managed and resolved several environmental conflicts without the assistance of neutrals. The FAA Office of Chief Counsel, working with the Office of Airports, regularly undertakes such efforts during the environmental review process and if a matter proceeds to litigation. Below are several examples of such efforts in FY 2012.
  - In September 2011, FAA signed a Record of Decision (ROD) for enhancements at T.F. Green Airport in Warwick, RI. After issuance of the ROD, the City of Warwick filed suit, alleging environmental violations. The Rhode Island Airport Corporation (RIAC), the airport operator, moved to intervene. The City and RIAC entered into settlement discussions, resulting in a draft Memorandum of Understanding (MOU). The FAA was asked to review the MOU. This provided a comfort level to the parties and, in May 2012, the City moved to dismiss the action with prejudice. The motion was granted.
  - In January 2009, FAA issued a ROD approving the expansion of Fort Lauderdale-Hollywood International Airport (FLL). The City of Dania Beach sued Broward County, alleging a violation of a 1995 agreement that resulted from earlier litigation involving FLL. The FAA was asked to review terms of a potential settlement agreement between Dania Beach and Broward County and also later met with the parties. The parties met again on May 3, 2012 to discuss modifications to the draft. While the City of Dania Beach ultimately voted to void the settlement agreement and continue litigation, FAA made efforts to prevent this dispute.
  - During the preparation of the EIS for the proposed runway at Taos Regional Airport in New Mexico, FAA determined under Section 106 of the National Historic Preservation Act (NHPA) that there would be adverse effects in some parts of the historic district as a result of the proposed action. As part of the Section 106 process, FAA, the Taos Pueblo and other consulting parties negotiated the terms of a Memorandum of Agreement to resolve adverse effects to Taos Pueblo traditional cultural properties. As a result, FAA issued the ROD approving the project without a challenge in the U.S. Court of Appeals, despite the controversy that has lasted for approximately 20 years.

## 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.

- *NEPA/404 Merger Meeting:* On May 30 and 31, representatives from the Illinois Department of Transportation (IDOT), the FHWA Illinois Division, the U.S. Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (FWS), and the U.S. Army Corps of Engineers (USACE) met to develop strategies to improve implementation of the NEPA/404 merger process and related coordination in the Chicago area. These agencies are currently operating under the Statewide Implementation Agreement (SIA), “National Environmental Policy Act and Clean Water Act Section 404, Concurrent NEPA/404 Processes for Transportation Projects in Illinois” (merger process). A third party neutral was engaged to facilitate this meeting. During the one-and-a-half day meeting, the agencies shared their perspectives and jointly developed a set of strategies and follow-on activities. Their goals were to take advantage of the opportunities afforded by the merger process and to improve its implementation to better serve the interests of all the agencies. (Additional detail is provided in response to question 8, below).
- *Tappan Zee Bridge Replacement:* The Tappan Zee Bridge Replacement is a Presidential Priority Project. The project involves many environmental issues and is on a compressed schedule for completion of the environmental review process, including coordination with other agencies such as EPA, FWS, the National Marine Fisheries Service, and the State Historic Preservation Office. The Tappan Zee Bridge Replacement would be the first major design-build project in the state of New York. The resource agencies involved in the project had no prior experience with the design-build contracting method and how it would impact the environmental review process, environmental commitment decisions, mitigation requirements and the permitting processes. Staff from the FHWA Resource Center, who had not otherwise been involved in this project, facilitated a discussion with all interested parties regarding the design-build process and how it might ultimately affect the environmental review process decisions, especially those related to environmental commitment compliance and permit conditions. After a lengthy facilitated discussion, most of the major concerns regarding the potential effects of the design-build process on the previous decisions and mitigation commitments were adequately addressed.

## 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
Representatives from the IDOT, FHWA, EPA, FWS, and USACE met in Chicago on May 30-31, 2012, to develop strategies to improve implementation of the NEPA/404 merger process and related coordination in the Chicago area. These agencies are currently operating under the Statewide Implementation Agreement (SIA), “National Environmental Policy Act and Clean Water Act Section 404, Concurrent NEPA/404 Processes for Transportation Projects in Illinois” (merger process). Third party facilitators were hired through an established FHWA contracting mechanism for facilitation and conflict resolution project situations.
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)
During the meeting, the agencies shared their perspectives and jointly developed a set of strategies and follow-on activities. Their goals were to take advantage of the opportunities afforded by the merger process and to improve its implementation to better serve the interests of the agencies.
Topics discussed during this meeting included: <ul style="list-style-type: none"><li>• Aspects of the merger process that were and were not working well;</li><li>• The roles of the various agencies involved; and</li><li>• What was needed to achieve timely concurrence on Purpose and Need.</li></ul>
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
Meeting participants developed process improvement strategies, including: <ul style="list-style-type: none"><li>• Steps to achieve a higher rate of concurrence in a more timely way;</li><li>• Steps to improve the structure of merger meetings; and</li><li>• Steps to better coordinate the NEPA/404 and Context Sensitive Solutions processes and to ensure that decision making for both processes is concurrent.</li></ul>
The agencies agreed upon next steps, including: <ul style="list-style-type: none"><li>• Meeting again to continue the discussion, to reach decisions on Purpose and Need, and to focus on programmatic issues and how they can be addressed at the project level; and</li><li>• Scheduling cross-training for the transportation and resource/regulatory agencies.</li></ul>
The outcome of the meeting was very positive with each agency gaining a better understanding of its

respective role in the merger process and a mutual agreement to work together more closely on programmatic issues in a systematic manner.

#### Reflections on the lessons learned from the use of ECR

The IL FHWA Division Office appreciated the ease and timeliness of obtaining facilitators and also appreciated the service they provided. It is extremely helpful to have a contracting mechanism—with associated identified funding in place—that can be put to use in such situations.

- 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;		✓	
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.

Agencies might benefit from additional visibility for and emphasis on environmental conflicts that have been resolved without the assistance of third party neutrals. In addition, it would be helpful to receive additional information about when to engage in ECR, the time and resources required for ECR, and the benefits of ECR.

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

Report due February 15, 2013.

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

<b>Informed Commitment</b>	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
<b>Balanced, Voluntary Representation</b>	Ensure balanced inclusion of affected/concerned interests; all parties should be willing and able to participate and select their own representatives
<b>Group Autonomy</b>	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
<b>Informed Process</b>	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
<b>Accountability</b>	Participate in the process directly, fully, and in good faith; be accountable to all participants, as well as agency representatives and the public
<b>Openness</b>	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
<b>Timeliness</b>	Ensure timely decisions and outcomes
<b>Implementation</b>	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