

**Analysis of 2006 Annual ECR Reports
Submitted by Federal Agencies
Pursuant to
OMB/CEQ Joint Memorandum of
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**Office of Management and Budget
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Table of Contents

	Page
Executive Summary	3
Introduction.....	5
II. How ECR Can Help Agencies Address Challenges.....	9
III. Existing Use of ECR	10
IV. Programmatic Areas That Can Benefit From ECR.....	14
V. Interagency Conflict.....	15
VI. Level of Agency Support for ECR.....	16
VII. Actions Taken in Response to Policy Memorandum	19
Appendix A. Report Template.....	23
Appendix B. Negative Consequences That Can Be Overcome by ECR	24
Appendix C. Response to Question Three of Template	27
Appendix D. Spectrum of Processes.....	28
Appendix E. Responses to Question Five of Template	29
Appendix F. Statutory Program Areas Where ECR Could Be Useful.....	30

Analysis of First Annual ECR Reports

Executive Summary

On November 28, 2005, Joshua Bolten, Director of the Office of Management and Budget (OMB), and James Connaughton, Chairman of the Council on Environmental Quality (CEQ), issued a Joint Memorandum on Environmental Conflict Resolution¹ (ECR) that directs federal agencies involved in implementing the National Environmental Policy Act (NEPA) and other environmental laws to “increase the effective use of environmental conflict resolution and build institutional capacity for collaborative problem-solving.” The Memorandum also requires these agencies to submit annual reports on their use of ECR.

The Memorandum directed the United States Institute for Environmental Conflict Resolution (USIECR) to convene quarterly senior level interagency forums to “provide advice and guidance and facilitate interagency exchange on ECR.” Chairman Connaughton requested that each department and agency² designate an ECR point of contact at the Deputy Assistant Secretary level to participate in these quarterly forums, which began in January 2006. In June 2006, OMB and CEQ distributed a template for the first annual report that contained five open and close-ended questions. A follow-up request for reports was sent by OMB and CEQ in November 2006 to 32 agencies, establishing December 15, 2006 as the deadline for report submission. From December 2006 to January 2007 twenty agencies responded to this request by submitting ECR reports.

On the whole, the reports reflect the progress that many federal agencies have made in using ECR, as well as the important role that ECR plays in agencies charged with implementing environmental laws. The reports also show that agencies can improve in how they use ECR, how they collect ECR data, and in how they report on their use of ECR.

The reports reveal how difficult it was for some agencies to collect data on ECR. Most agencies were unable to readily retrieve ECR data because they lack ECR tracking systems. In addition, certain shortcomings of the report template limited government-wide data analysis. For instance, the open-ended nature of four of the five questions in the report template has elicited responses that vary in specificity and substance. Further, the quantitative data of ECR use submitted by agencies are often inadequately qualified or defined, making them appear in some reports to be lacking in context, or unsuitable for cross-agency aggregation. For example, the raw number of ECR cases in which an agency

¹ [OMB CEQ Joint Statement \(http://www.whitehouse.gov/ceq/joint-statement.html\)](http://www.whitehouse.gov/ceq/joint-statement.html)

² For the purpose of this analysis, the term “agency” will refer to both departments and agencies, unless otherwise noted.

has engaged does not indicate the degree of complexity of the cases, or the agency's effectiveness in using ECR.

Despite these qualifications, almost all of the reporting agencies acknowledge that ECR can help minimize significant negative consequences associated with environmental conflict when used appropriately. In addition, several agencies expressly affirmed that the use of ECR helps them achieve their missions.

The reports show that agencies engage in ECR in a variety of roles. Agencies initiate and manage, as well as participate in ECR processes. They sometimes assume the role of third-party neutrals by mediating, facilitating, and convening ECR processes. As participants and negotiators they advocate for their interests. They also manage and oversee ECR contracts, develop ECR policy, and administer ECR programs. It appears that the role agencies play can influence their willingness to engage in ECR, the level of resources at their disposal, how they prioritize environmental objectives against other objectives, and how they interact with stakeholders, among other things.

Government-wide, the majority of ECR activity appears to be concentrated in five agencies: the Environmental Protection Agency (EPA); the Department of Defense (DoD); the Department of the Interior (DOI); the Department of Agriculture (USDA); and the Federal Energy Regulatory Commission (FERC). Two other reporting agencies have significant involvement in ECR. The United States Institute for Environmental Conflict Resolution (USIECR) is involved in ECR as a convener of ECR processes as well as a provider of ECR-related services, and the Department of Justice (DOJ) is involved in ECR as the legal representative of the United States Government in federal court litigation.

Not all reporting agencies were regular users of ECR in FY2006. Thirteen of the reporting agencies reported infrequent to no use of ECR in FY 2006. However, several of these agencies reported some successful experiences with ECR, either in or prior to FY 2006. Most of these agencies also reported they would use ECR in appropriate circumstances. A few of the agencies that reported minimal to no use of ECR appear to associate ECR primarily with formal adjudicative processes. On the other hand, agencies that use ECR more frequently tend to associate it with a broader spectrum of processes, from informal processes focused on preventing conflict, to processes addressing escalated conflict in formal administrative or judicial forums.

In terms of the operational aspects of ECR, the reports showed:

- several agencies have established programs with full time staff to help meet their ECR needs;
- government-wide, most mediation and facilitation of ECR processes is performed by private practitioners; and
- ECR is used to resolve conflict in important mission areas such as the National Environmental Policy Act (NEPA),

environmental restoration and cleanup, species conservation, Tribal Consultation, historic preservation, natural resource management, coastal zone management, water rights, Clean Water Act issues, among others.

The reports also indicate that many agencies are responding to the Memorandum by implementing training programs, establishing infrastructure, establishing or refining Alternative Dispute Resolution (ADR) and ECR policies, and developing performance measurement goals for ECR.

The reports reveal opportunities for improvement. For example, the US Army Corps of Engineers (USACE) report recognizes the significant role that ECR had played in helping the USACE achieve its mission from the 1970s until the 1990s, but also noted that a recent survey had shown that its current workforce had “little systematic knowledge of [ECR] tools and needs.” In addition, a number of reports suggested that ECR was not being applied frequently enough in interagency conflicts where it may assist in promoting more efficient governance. Moreover, most agencies acknowledged that ECR could be used more often, indicating it was not being used to its full potential in these agencies.

Moving forward, the reports show a need to revise the report template so that it will provide better guidance for agencies as they prepare future reports, and allow for more standardized reporting. A revised template could also elicit information on barriers to ECR as well as the opportunities agencies have for ECR, both of which can be critically important to ECR initiatives and were not sufficiently addressed in the first report template.

In sum, the first annual ECR reports reveal both strengths and weaknesses in how federal agencies use ECR. The reports serve as a starting point for the collection and analysis of agency ECR data, revealing the types of perspectives that agencies bring to ECR; the nature and degree to which ECR is used; the types of resources that agencies use to support ECR; and the actions that agencies have taken in response to the ECR Memorandum.

Analysis of First Annual ECR Reports

I. Introduction

On November 28, 2005, Joshua Bolten, Director of the Office of Management and Budget (OMB), and James Connaughton, Chairman of the Council on Environmental Quality (CEQ), issued a Joint Memorandum on Environmental Conflict Resolution (ECR).³ The Memorandum was the product of more than a year of dialogue among leaders in the federal environmental and environmental conflict resolution communities. The impetus for this effort is described in Section One of the Memorandum as the “fundamental governance challenge” of “balancing competing public interests and federal agency responsibilities when striving to accomplish national environmental protection and management goals.” Director Bolten and Chairman Connaughton found that the challenge manifests itself through:

- protracted and costly litigation;
- unnecessarily lengthy planning processes;
- costly delays in implementing environmental protection measures;
- foregone investments when decisions are not timely;
- lower quality outcomes and lost opportunities when [information is lacking] and;
- deep-seated antagonism between stakeholders.

To help address this challenge the Memorandum directs federal agencies involved in implementing the National Environmental Policy Act (NEPA) and other environmental laws to “increase the effective use of environmental conflict resolution and build institutional capacity for collaborative problem-solving.” The Memorandum defines ECR as “third-party assisted conflict resolution and collaborative problem-solving in the context of environmental, public lands, or natural resource issues or conflicts, including matters relating to energy, transportation, and land use.”⁴

The Memorandum also directs agencies to support up-front investments in ECR and demonstrate the results and savings achieved; to build internal agency capacity for ECR using appropriate mechanisms, strategies, and approaches; and to implement best ECR practices called the “Basic Principles for Agency Engagement in ECR and Collaborative Problem Solving.” Section Four of the Memorandum asks agencies to submit annual reports on their progress in the use of ECR to the Director of OMB and the Chairman of CEQ, and directs the United States Institute for Environmental Conflict Resolution (USIECR) to convene an interagency senior level forum to “provide advice and guidance and facilitate interagency exchange on ECR.”

³ OMB CEQ Joint Statement (<http://www.whitehouse.gov/ceq/joint-statement.html>)

⁴ The Memorandum also acknowledges the importance of unassisted collaborative processes, noting that “there is a broad array of partnerships, cooperative arrangements, and unassisted negotiations [used by federal agencies] to...implement agency programs...”

This interagency forum was convened in January 2006 and began meeting quarterly. In these meetings the members of the senior level forum have had the opportunity to discuss and learn about a variety of ECR issues that impact federal agencies. They have heard presentations on evaluation, particular ECR cases, performance measurement, the ECR reporting process, and other topics. In June 2006 the forum completed a report template to guide agencies in the preparation of their first annual reports. The template (Appendix A) asked agencies to identify:

- whether ECR could help minimize the six consequences of the fundamental governance challenge identified in the Preamble to the Memorandum;
- the extent to which they use ECR;
- the priority areas that could be suitable for ECR;
- the level at which they support ECR; and
- the actions they have taken to implement the Memorandum.

The request for reports was sent in November 2006 to 32 agencies, establishing December 15, 2006 as the deadline for report submission. From December 2006 to January 2007, the following 20 agencies responded to the call by submitting ECR reports:

- Department of Agriculture (USDA)⁵
- Department of Commerce (DOC)⁶
- Department of Defense (DoD)
- Department of Energy (DOE)
- Department of Health and Human Services (HHS)
- Department of Homeland Security (DHS)
- Department of the Interior (DOI)
- Department of Justice (DOJ)
- Department of Transportation (DOT)
- Department of Veterans Affairs (DVA)
- Army Corps of Engineers (USACE)
- Environmental Protection Agency (EPA)
- Federal Energy Regulatory Commission (FERC)
- General Services Administration (GSA)
- National Aeronautics and Space Administration (NASA)
- National Capital Planning Commission (NCPC)
- National Indian Gaming Commission (NIGC)
- Nuclear Regulatory Commission (NRC)
- Tennessee Valley Administration (TVA)

⁵ The Report for USDA contains only USDA Forest Service information.

⁶ The Report for DOC contains only National Oceanic and Atmospheric Administration (NOAA) information.

- The United States Institute for Environmental Conflict Resolution (USIECR)

This is an analysis of these reports.⁷

The Reports

This was the first time many agencies had been asked to collect information on ECR. A general lack of centralized tracking systems for ECR activity⁸ meant that information was collected primarily ad hoc, requiring in some cases significant research, preparation, and coordination amongst various levels within the reporting agency. While the lack of tracking systems may have made it difficult for some agencies to collect information, several agencies have since reported that the exercise of collecting data had the beneficial side effect of exposing a number of agency personnel to the Memorandum, and to ECR in general.

With only five questions in total, and four of these being open-ended, the template has elicited responses that vary in substance, tone, detail, and quantity of information. With these qualifications in mind, the reports do nonetheless help to provide a rough overview federal ECR activity.

Overall, the reports show that agencies approach ECR from one or more of the following perspectives:

- regulator/enforcing agency;
- regulated agency;
- project proponent/lead agency;
- cooperating/impacted agency;
- natural resource manager;
- environmental policy maker;
- agency representative/advocate; and
- ECR service provider.

Most reporting agencies participate in ECR from several perspectives. An agency can be a lead agency in one NEPA process, and a cooperating agency in another. It might be a regulated agency with respect one program, but a regulating agency with respect to another. Two reporting agencies have a more concentrated focus. The USIECR participates in ECR as a convener of ECR processes and as a provider of ECR services. DOJ participates in ECR exclusively as the legal representative of the United States Government for matters that are in litigation.

⁷ The information in some reports has been supplemented or clarified in subsequent conversations between reporting agencies and OMB.

⁸ FERC reports that it does have an ECR tracking system in place.

The reports make clear that perspective often coincides with mission, and may determine how much control an agency has over an ECR process, the level of resources at its disposal, how it prioritizes environmental objectives against other objectives, how it interacts with stakeholders, and the degree to which it wishes to cooperate with the other parties involved in a conflict. All of these factors can influence an agency's decision on whether to initiate or participate in an ECR process.

The mission of an agency can determine the types of conflict an agency tends to experience, as well as the types of parties with whom an agency comes into conflict. Resource managers, for example, are often faced with localized conflict that relates primarily to a particular resource, whether it is a national park, wildlife refuge, national forest, or other category of federal land. These managers live and work in close proximity to many of their stakeholders, and interact with them on a variety of issues in an ongoing manner. As a result, reports issued by resource management agencies (USDA, DOI) tend to emphasize the importance of building sustainable relationships that can outlast particular projects. By contrast, a national policy issued by an agency at the headquarters level, or an enforcement action, might involve a different type of conflict dynamic.

II. How ECR Can Help Agencies Deal With Challenges

Agencies were asked in the report template whether ECR could help minimize any of the following consequences of the “fundamental governance challenge” identified in the Preamble to the Memorandum:

- protracted and costly 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 information and perspectives; and
- deep-seated antagonism and hostility repeatedly reinforced between stakeholders by unattended conflicts.

Nine agencies (DOI, DoD, DOJ, DOT, EPA, GSA, USACE, USDA, and USIECR) reported that ECR could help minimize each of these consequences. Most of the other responding agencies selected at least two that could be minimized by using ECR. The consequences noted most frequently were:

- Protracted and lengthy litigation (11 agencies)
- Unnecessarily lengthy project and resource planning processes (12 agencies); and

- Deep-seated antagonism and hostility repeatedly reinforced between stakeholders by unattended conflicts (13 agencies).

III. Existing Use of ECR

Agencies were asked in the report template to select their level of ECR use from these five categories:

- Not at all, not applicable
- Not at all, but might be useful
- Sometimes used, but could be used more frequently
- Use often, but could be used more
- We make full use of ECR, as applicable

Fourteen of the 18 agencies responding to this question indicated that they use ECR at least sometimes.⁹ Three agencies, USIECR, DOJ, and FERC responded that they “make full use of ECR, as applicable.” The USIECR response reflects its mission, which is to provide ECR services to agencies that are directly involved in environmental conflict. DOJ reports that it always considers ECR as an option to resolve litigation. Two agencies, EPA and DOC, responded that they use ECR “often, but [it] could be used more.” Most agencies indicated that ECR was “sometimes used, but could be used more frequently.” In total, 11 agencies selected a response that included ECR “could be used more [often].” These responses suggest that these agencies believe ECR is not being used to its full potential. Three agencies (HHS, DHS, and GSA) responded they did not use ECR “at all, but [it] might be useful.” One agency (NASA) indicated that ECR was not applicable.

The report template also asked agencies to further characterize the extent of their ECR use, using quantifiable indicators where possible. Several agencies reported on the importance of ECR in helping them achieve agency missions and goals. For example, FERC reported “[t]he Commission has for some time encouraged early collaborative problem-solving among all stakeholders in the environmental review processes for both hydropower and natural gas projects.” EPA reported “[d]uring the past 30 years EPA has sponsored or participated in ECR cases addressing issues related to all aspects of the agency’s mission.” DOI reported “DOI is committed to increasing and improving our ability to use ECR and collaborative problem-solving processes in all areas of the Department’s work.”

Agencies that do not use ECR frequently acknowledged that it could be helpful in appropriate situations. HHS stated in its report “[w]hile not a priority, [it] recognizes the potential benefit of ECR and will take steps to educate key personnel as to the applicability and availability of ECR mechanisms.” TVA noted in its report “Improved interaction among stakeholders ... may mutually benefit TVA and stakeholders through enhanced identification and understanding of issues and potential solutions.”

⁹ For Table of Responses see Appendix C.

The USACE report gave a candid appraisal of the state of ECR in that agency, noting that a survey had been taken of its field-level employees that showed “little systematic knowledge of [ECR] needs and tools.” This report also noted, however, that the demand for ECR training was increasing, and that until recently ECR had played a significant role in helping the USACE achieve its mission.

The reporting of quantitative data is generally uneven and inconsistent throughout the annual ECR reports. Some agencies reported ranges of ECR activity, while others gave precise measures of use. Some agencies aggregated their data across field, regional, sub-agency and headquarters levels, while others submitted disaggregated data from field and program offices within an agency. Some reported just on FY 2006 (as was requested in the template), and others included data from periods of up to three or four years. Some reported on their experience as lead agencies, while others reported on their experience as participants and as lead agencies in ECR processes. Some agencies submitted data for some sub-agencies, but not for others. Several agencies distinguished between their use of mediation from other third-party processes, such as facilitation and conflict coaching. Other agencies reported instances of collaborative problem-solving that did not involve third-party neutrals.¹⁰ Despite the lack of uniformity, the reports do reflect the following:

- EPA is the agency most frequently involved in ECR, with over 100 cases in FY 2006. These cases covered the gamut of EPA’s activities, and included civil enforcement, policy making, rulemaking, permitting, and other activities;
- DOI’s bureaus engaged in ECR in at least 20 instances during FY 2006, with uses covering the spectrum of DOI’s missions, including the development of a resource management plan, a hydropower re-licensing process, the regulation of off-road vehicle use at a National Seashore, and the resolution of a timber sales dispute in Oregon;
- USDA reported involvement in nine mediations and 22 instances of other types of ECR;
- DoD also reported a varied use of ECR. The Department of the Navy’s (DON) 46 facilitated environmental restoration teams are engaged in ECR on an ongoing basis. DON and the US Air Force also reported that they each had engaged in seven mediations in FY 2006;
- FERC reported 32 instances of ECR use for FY 2006;
- DOE used third parties to resolve or prevent conflict relating to issues at the Waste Isolation Pilot Plant (WIPP) project in New Mexico, Rocky Flats in Colorado, and Stanford Linear Accelerator Center in

¹⁰ FERC reported 54 instances in which agency personnel worked directly with parties to resolve environmental conflict. DOE reported that three of its sites used the dispute resolution process in Federal Facilities Agreements without third-parties to resolve conflict related to environmental cleanup at these sites; fourteen sites used unassisted collaborative decision-making with their regulators and decision-makers; and 15 sites used collaborative problem-solving in public participation efforts under CERCLA and NEPA.

FY 2006;

- most agencies reported that they were involved in fewer than 5 instances of ECR in FY 2006;
- DOJ reports being involved in 32 cases involving paid mediators, and more cases that involved unpaid, volunteer mediators; and USIECR reports being involved in 50 cases as a provider of ECR-related services.¹¹

The nature of these statistics limits the conclusions that might be drawn about ECR use. They do not take into account qualitative factors such as the complexity of a process, or the number of parties involved in a process. One agency might devote more resources to the resolution of a single complex multi-party conflict than another might devote to the resolution of ten relatively simple two-party conflicts. Similarly, the reports do not reflect the extent of a particular agency's opportunity for applying ECR relative to the number of times it was actually used. Without better contextual information, it could be misleading to draw broad conclusions about the extent of an agency's use of ECR, or the effectiveness of ECR when used.

However, the reports indicate that at least seven agencies¹² engage in ECR on what appears to be a steady basis—each reporting from 20 to more than 100 known ECR cases or projects in FY 2006. In addition, 13 agencies reported using ECR in fewer than 5 instances in FY2006.

Agencies use ECR in processes designed to yield advice as well as in direct decision-making processes. DOI and DoD report that its bureaus use third party facilitators to help members of advisory committees reach consensus advice on difficult issues.¹³ ECR is also used by agencies to reach agreement in direct decision-making processes such as:

- planning;
- policy development;
- licensing and permitting;
- rulemaking (negotiated and traditional);
- civil enforcement; and
- adjudicative processes.

These processes form a wide-ranging spectrum of opportunities for ECR use. To borrow

¹¹ It appears that many of the cases reported by DOJ and USIECR are also reported by the agencies that were directly involved (as opposed to being involved as the legal representative of the United States Government (DOJ), or as a provider of ECR services (USIECR)) in these cases.

¹² These agencies are DoD, DOI, USDA, FERC, EPA, DOJ (as the legal representative of the United States Government), and USIECR (as an ECR service-provider).

¹³ DOE also uses advisory committees (Site-Specific Advisory Boards) to provide the agency with advice on important issues. However, it does not use third-party neutrals to assist committee members in reaching consensus agreements.

a metaphor that is used often in the ECR field,¹⁴ the spectrum flows from upstream processes where parties are dealing directly with one another in an informal setting, to downstream processes, where parties are often represented by attorneys in a formal adjudicative forum (See Appendix D for graphic of the Spectrum). At the upstream end of the spectrum ECR is usually focused on managing and preventing conflict before it escalates and diverts parties away from their common goals and objectives. Downstream ECR is usually focused on resolving conflict that has already escalated between parties.

The reports show that federal agencies on the whole use ECR at all points along this spectrum, from the more informal upstream planning and policy development processes, to the more formal downstream administrative adjudicative processes.

Planning and policy development are upstream opportunities for agencies to use ECR to prevent and resolve environmental conflict. Working through advisory committees, DOI's Bureau of Land Management has used third parties on a number of occasions over the past several years to help multiple parties with competing interests reach consensus agreements on issues related to land use planning. DOI and DOT used ECR successfully in the development of an Environmental Impact Statement (EIS) for the multi-party, multi-issue St. Croix River Crossing project involving local, state, and federal interests. DOC's National Oceanic and Atmospheric Administration (NOAA) reports using a third party to help develop with stakeholders its Right Whale Ship Strike Reduction strategy, and DOI reports using ECR to develop consensus agreements on proposed regulations through a facilitated negotiated rulemaking process.¹⁵ FERC reports using ECR to work with prospective hydropower and natural gas licensees before they file an application for a license to operate a hydropower or natural gas facility.

Not unexpectedly, DOJ reports using ECR exclusively to resolve downstream conflict—representing the United States Government in 32 environmental cases that were mediated by professional mediators, and more that were mediated by unpaid mediators in FY 2006. DOI and EPA also report downstream use, integrating ECR into their respective downstream administrative adjudicatory forums. DOI's Board of Land Appeals and Board of Indian Appeals are increasing the use of ECR to resolve administrative appeals. EPA's Office of Administrative Law Judges mediation program is used to facilitate settlements of administrative civil penalty enforcement cases. Other down to mid stream uses of ECR include the use of ECR to delineate roles and responsibilities for environmental cleanup (DoD, DOE, and DOI), the use of ECR in environmental permitting (EPA, DoD), and the use of ECR to cooperatively assess natural resource damages (NOAA). The reports indicate that several of the agencies that do not use ECR

¹⁴ Kirk Emerson, Tina Nabatchi, Rosemary O'Leary, and Tom Stephens, "The Challenges of Environmental Conflict Resolution", in *The Promise and Performance of Environmental Conflict Resolution*, Rosemary O'Leary and Lisa B. Bingham, Editors, (Washington DC, RFF Press, 2003)

¹⁵ The Negotiated Rulemaking Act reflects many of the best practices of ECR. Among other things, it requires agencies to use a facilitator to assist in the development of a consensus-based proposed regulation. It also requires agencies to work through the structure of a FACA Committee, which share many of the same principles as the best practices of ECR, including an emphasis on fair process, transparency in decision-making, and inclusiveness of process membership.

regularly tend to view it as an alternative to downstream processes such as litigation.¹⁶

IV. Programmatic Areas that Can Benefit from ECR

Agencies identified a number of program areas that could benefit from the use of ECR. Many reports show that ECR is already being used in each of these areas. Programmatic areas noted by more than one agency included:¹⁷

NEPA:

Several reports suggested that ECR could be used in various ways to resolve conflict under NEPA. Federal decision makers must always be mindful of NEPA when making decisions that have environmental impacts. NEPA analyses are triggered by federal actions that may affect the quality of the human environment, and often run concurrently with actions that were initiated under other laws. Several agencies noted that the foundations underlying NEPA overlap with several of the best practices of ECR, something which is emphasized in CEQ's draft *NEPA Collaboration Handbook*.¹⁸ In addition, several reports noted that the actions that are the subject of NEPA analyses can involve highly-charged competing interests. These are often the types of conflict that are well-suited to ECR. Almost all of the agencies that are regularly involved in ECR identified NEPA as an area that could benefit from the use of ECR.

Environmental Cleanup/Restoration:

Seven agencies reported a need for ECR in resolving conflict over environmental cleanup and restoration work. These agencies focused on conflict under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), natural resource damage assessments, and federal facilities agreements. Some notable examples of how ECR is being used to resolve conflict over environmental cleanup and restoration include:

- The Department of Navy's 46 Environmental Restoration Partnering Teams, in which representatives of EPA, Navy, state agencies, and contractors work together to prevent and resolve conflict over the cleanup of Navy Superfund sites;
- NOAA's Natural Resource Damage Assessment Program, in which NOAA seeks to work cooperatively (sometimes with the assistance of a third-party neutral) with co-trustees and parties responsible for pollution to assess environmental damages.
- EPA's regular use of ECR to resolve conflict under CERCLA.

¹⁶ See reports of DVA, HHS, NCPC.

¹⁷ See Appendix F for list of all programmatic areas cited by agencies as areas that could benefit from ECR.

¹⁸ The draft Handbook was developed by an interagency team consisting of many of the agencies that submitted ECR reports and is presently available for comment at www.nepa.gov.

Natural Resource Conflict on Federal Lands:

Agencies with resource management responsibilities noted the importance of using ECR to manage and resolve conflict over resource use on federal lands. The DOI report shows that ECR is being used to reach agreement between multiple parties on the multiple issues involved in proposed rulemakings at Cape Hatteras National Seashore (off-road vehicle use) and Golden Gate National Recreation Area (off-leash dog walking). USDA and DOI both reported that ECR is being used to resolve conflict under the Healthy Forest Restoration Act, as well as conflict under grazing and other permitting processes. USDA noted that while it does engage in ECR, it tries first to work collaboratively with parties before turning to a third-party for help.

Species Conservation:

Several agencies noted that ECR could help resolve conflict between agencies over issues relating to species conservation, including takings issues under the Marine Mammal Protection Act (MMPA), and Section 7 Consultations under the Endangered Species Act (ESA).

Other Programmatic Areas:

Other programmatic areas noted by more than one agency where ECR could be used include:

- hydropower and natural gas (DOI, FERC);
- coastal zone management (NOAA, DoD);
- historic preservation (DOI, DoD, NOAA);
- tribal consultation (DoD, DOI);
- transportation (DOT, DOI);
- property rights (DoD, DOI);
- water rights; and
- Clean Water Act issues (USACE, DOI).

V. Interagency Conflict:

Almost all of the agencies that are faced with environmental issues reported that ECR should be used more frequently to address interagency conflict. The DOC report noted that the Coastal Resource Management program of NOAA sometimes serves as a third party neutral to resolve conflict between state and federal agencies relating to coastal zone management issues. Other reports noted ongoing interagency conflict that is being aided by third-party neutrals, such as the conflict between the FAA and the National Park Service over the regulation of air tours over Grand Canyon National Park.

It is apparent from several reports that federal and sometimes state agencies may have competing interests under the requirements of environmental statutes such as NEPA, CERCLA, ESA, MMPA, and the Coastal Zone Management Act. It is also apparent from the reports that many agencies would like to work more harmoniously and cooperatively with other agencies to constructively resolve conflicts under these authorities. Although this spirit of interagency cooperation appears genuine, there is evidence in the reports that agencies do not always agree on the value of using ECR in particular situations or specific program areas. The following example (a composite of the information contained in several reports) illustrates this point:

- Agency A, as a regulated agency, reports it would like to engage Agency B, its regulator, in ECR over Program X;
- Agency B as a regulator says nothing in its report about Program X, but does report it would like to engage Agency A in ECR over Program Y, a program in which it lacks enforcement authority over Agency A; and.
- ECR is not taking place in either Program X or Y.

There could be a variety of reasons why Agencies A and B want ECR in one context but not in another. It could be related to differences in perspective, from one program to the next. It could also be due to something as simple as a lack of communication—maybe Agency A and Agency B have never communicated over how to resolve the conflict over Programs X and Y. Future report templates could find out more about why agencies might advocate for ECR in one interagency context but not in another.

VI. Level of Agency Support for ECR

Agencies reported providing institutional support for ECR in a variety of ways. Government-wide, agencies have designated ECR points of contact and set up ECR programs with staff positions. They have hired private practitioners to mediate, facilitate, and to train agency personnel in ECR principles and practices. Agency personnel engage in ECR as participants and negotiators in ECR processes, third-party neutrals, process conveners, ECR policy makers, internal ECR consultants, trainers, ADR program administrators, and contract managers, among other roles.

The data relating to agency commitment of resources to support ECR is subject to the same limitations as the data on ECR use. Sheer numbers of staff or fiscal resources do not necessarily reflect on the level of an agency's effectiveness at using ECR. In addition, it is apparent from the reports that the data relating to level of support is incomplete. Several agencies reported involvement in ECR, for instance, but did not provide information on the cost of using external third party neutrals, or the time spent by agency personnel engaged in planning or participating in these processes.

With these caveats in mind, the reports show that four agencies, USIECR (24) (as an ECR service provider); EPA (8)¹⁹; DOI (6.5)²⁰; and FERC (5), have fulltime equivalent (FTEs) positions dedicated to ECR. These FTEs perform a variety of tasks including:

- advising agency management on conflict resolution and conflict management;
- designing and overseeing conflict resolution systems;
- participating in intra and inter-agency ECR initiatives;
- providing and overseeing mediation, facilitation and other conflict resolution services;
- designing, providing, and overseeing conflict resolution training;
- developing and administering contracts for ECR professionals; and
- policy leadership for ECR activities.

The reports also show that several agencies dedicate personnel to ECR processes in assignments that are collateral to their primary functions. Agency personnel might serve as participants in ongoing collaborative processes, or work in a role that supports an ECR function or an ECR process. For example:

- The Bureau of Land Management in DOI has one individual in each of its state offices who serves as an ADR liaison;
- The Department of Navy has representatives on 46 ongoing environmental restoration partnering teams;
- Two senior level FTEs in NOAA's Coastal Resource Management Office spend anywhere from twenty-five to seventy-five percent of their time as third parties resolving conflict involving Coastal Zone Management Act issues;
- NRC dedicates one FTE exclusively to setting up town hall meetings, which could involve elements of ECR;
- EPA has a dedicated ECR point of contact in each regional office; and
- The DOJ Office of Alternative Dispute Resolution and the Senior Counsel for ADR in the Natural Resources Division of DOJ devote time to ECR issues.

Several agencies reported that they regularly contract with private ECR service providers to assist with ECR needs. EPA, for instance, reported that it spent over \$5 million in FY 2006 on ECR service providers. DOJ, USDA, DOE, and DOI also reported that they use private practitioners to meet at least part of their ECR needs. Government-wide, agencies

¹⁹ Includes personnel in EPA Center for Prevention and Resolution of Conflict (CPRC), and Regional Office Personnel.

²⁰ Includes 2.5 FTE in DOI's Office of Collaborative Action and Dispute Resolution (CADR), 1 FTE in the Office of the Solicitor, 1 FTE in the Bureau of Land Management, and 1 FTE in the US Geological Survey. All of these positions have additional responsibilities for promoting and overseeing the use of ADR outside of the ECR arena and are not dedicated full-time to ECR efforts.

appear to rely primarily on private contractors to meet most of their mediation and facilitation needs. Agencies use a combination of private and internal resources to provide training and consultation services on ECR. Other functions, such as participating in ECR processes, developing ECR policy and guidance, overseeing and administering agency ADR programs, promoting the use of ECR processes, and managing contracts for ECR services are performed exclusively by federal personnel.

Two agencies reported that they had in place rosters of private practitioners or ongoing contracting instruments that allow them and other agencies to identify and procure the services of qualified third-party neutrals in a relatively expedited fashion. USIECR manages a national roster that provides electronic access for federal agencies and non-federal stakeholders to 266 qualified environmental mediators and facilitators in 44 states. Many agencies have procured mediators and facilitators from the roster to help them resolve environmental conflict. EPA has a contract with a private vendor that affords it access to over 70 different ECR service providers. DOI has an Economy Act agreement with EPA that allows it to access the providers under the EPA contract.

VII. Actions Taken in Response to the Policy Memorandum

The overwhelming majority of agencies reported that they had taken some action in response to the Memorandum.²¹ The responses show that some agencies have become better educated about ECR as a result of the Memorandum. Agencies like DVA and HHS have formed ECR teams and designated individuals to be points of contacts for ECR. Agencies that had some involvement with ECR prior to the Memorandum have responded by taking a more structured approach to ECR. DOE, for example, has established a working group for ECR that is comprised of members from 10 of its offices. The USACE, as another example, has begun the process of creating agency-wide indices to track the use of ECR.

Agencies that engaged in significant levels of ECR activity prior to the issuance of the Memorandum have since expanded the volume and breadth of their activity. Since the issuance of the Memorandum the USIECR has taken a lead on implementing the Memorandum, setting up meetings, following up with points of contact, leading work groups, and designating four-fifths of an FTE to staff and help administer the Memorandum implementation process. DOI established a senior counsel position for collaborative action and dispute resolution in the Office of the Solicitor to ensure coordinated leadership and consistent policy and legal guidance on the effective use of ECR. EPA's Center for the Prevention and Resolution of Conflict and DOI's Office of Collaborative Action and Dispute Resolution have developed strategic plans for increasing and improving their agencies effective use of ECR. USIECR, EPA and DOI are systematically evaluating ECR processes to better understand their use and effectiveness. USIECR is leading (with the cooperation of several other federal agencies)

²¹ See Appendix E.

the Multi-Agency Evaluation Study (MAES), which evaluates agreement-seeking processes that have used third-party neutrals. EPA initiated the Systematic Evaluation of Environmental and Economic Effects Study (SEEER), to assess the environmental and economic effects of particular ECR cases. DOI is also participating in this study.

Several agencies reported on ECR training initiatives. In 2006 USIECR provided training to over 500 individuals representing federal, state, local, and tribal governments, non-governmental organizations (NGOs), environmental and community groups, science and technical experts, and dispute resolution professionals. DOI reported on a conflict management skills training workshop that it developed for senior managers that was attended by 350 managers in 2006. DOI also reported on a natural resources course provided by the Bureau of Land Management for its State offices, as well as a negotiation skills courses provided by the US Geological Survey. DOE reported that its Hanford site in Richland, Washington, has for the past several years sponsored training classes for its employees, contractors, managers and regulators on “Collaborative Negotiation.” In 2006, DOE’s Office of General Counsel sponsored a one-day ECR training session which included presentations by ECR professionals and DOE field environmental attorneys who have used ECR in the past.

A number of agencies including USDA, FERC, DOI, DHS, DOE and DOT reported integrating ECR into their strategic planning processes. Several agencies also reported integrating ECR criteria into performance measurement goals, as well as GPRA goals. Several agencies reported they are studying different uses of ECR. DOJ reported that it frequently evaluates the potential for ECR in appellate litigation. USACE is considering institutionalizing its ECR capability by establishing an ECR program.

VIII. Conclusion

The primary goal of the first annual ECR report was to explore the types of information that agencies could provide on the use of ECR and develop a preliminary understanding about the state of ECR use throughout the federal government. Generally speaking, the reports accomplish this goal. They reveal the types of perspectives that agencies bring to ECR. They show the nature and degree to which ECR is used; the types of resources that agencies use to support ECR; and the actions that agencies have taken in response to the Joint Memorandum.

Among the major findings of this summary analysis are:

- 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;
- almost all of the responding agencies report that ECR has or could help minimize negative effects associated with poorly managed or escalating

environmental conflict;

- more than half of the reporting agencies believe ECR could be used more frequently;
- almost all of the 20 reporting agencies are taking some measures to implement the ECR Memorandum of November 28,2005;
- agencies that had not considered ECR in the past have begun setting up infrastructure that would allow them to make informed decisions about ECR in the future;
- the agencies that were involved in the majority of reported ECR cases for FY 2006 show continued support for using ECR to help accomplish their missions;
- several agencies that did not use ECR regularly in FY 2006 nevertheless reported some successful experiences with ECR;
- four agencies (USIECR, EPA, DOI, FERC) have established programs with full time staff to use ECR to help accomplish their missions (USIECR's mission is specifically to advance ECR within the federal government);

The reports also show that agencies believe ECR can be of use in addressing a broad array of environmental policy areas where conflicts can arise, including:

- NEPA;
- environmental restoration and cleanup;
- natural resource management on public lands;
- species conservation;
- transportation and land use;
- energy production and transmission;
- coastal zone management and marine protection;
- water quality and water rights;
- tribal consultation; and
- historic preservation.

Importantly, interagency conflicts were noted frequently in the agency reports as areas with potential for greater ECR use.

Opportunities for Improved Reporting

The reports show that there is room for improvement in future reporting on ECR. The unevenness in how data was reported for the first annual reports makes it difficult to compare agency responses. Further, the lack of ECR tracking systems made it difficult for some agencies to collect information.

The responses also reveal gaps in the reporting template. The template did not ask agencies, for example, to describe the barriers that they face in attempting to undertake ECR. The template also failed to elicit information relating to the opportunity that each agency might have for ECR use. Without this information it is difficult to ascertain whether a particular agency is achieving its full potential for ECR.

Recommended Next Steps

Improve Reporting by:

- 1) Requesting information from agencies about their progress in developing tracking systems for ECR activity. One of the primary reasons for unevenness in reporting is a general lack of ECR tracking systems.
- 2) Encouraging consistent and uniform information. The template could be revised to more precisely state the type of information that should be included in reports, and the form in which it should be provided.
- 3) Collecting information relating to barriers to ECR. None of the questions in the first template ask agencies about the barriers they encounter in attempting ECR processes. Yet, many agencies implicitly acknowledged the existence of barriers by responding to question three of the report template that they could use ECR more often. A description of barriers would likely uncover the reasons why agencies believe they are not using ECR to its full potential.
- 4) Asking agencies about ECR opportunities. A template question relating to the opportunities an agency has to apply ECR would place into context the data the agency has submitted relating to the number of times it engages in ECR. It would enable the report to better measure whether an agency is reaching its full potential for using ECR and suggest opportunities to address these barriers.
- 5) Enhancing the objectivity of the reporting process. Several agencies reported receiving feed back that the close-ended questions in the template were of a leading and biased nature. These questions could be revised to alleviate these concerns.

Other Next Steps:

- 6) Continue the work of the senior level interagency forum. Since the issuance of the Memorandum, the forum has served as a means for agencies to discuss and learn about ECR issues from a variety of perspectives. Through presentations on evaluation, case studies, performance measurement, the ECR reporting process,

- and others, the forum has kept senior agency leadership abreast of new developments in ECR, as well as lessons that agencies have learned in using ECR.
- 7) Integrate the work of similar interagency initiatives into the implementation of the Memorandum. CEQ, for example, is presently undertaking an initiative designed to modernize the implementation of NEPA. As noted above, one of the products of this initiative is the NEPA Collaboration Handbook, which advocates for the use of ECR in NEPA processes, where appropriate. This and other interagency initiatives could help advance the goals of the Memorandum.

In sum, the first annual ECR reports reveal strengths and weaknesses in how federal agencies use ECR, and should serve as a starting point in the collection and analysis of ECR data, from which agencies can measure their future efforts to increase the use of ECR.

Appendix A

Report Template

First ECR Annual Report to OMB-CEQ

On November 28, 2005, Joshua Bolten, then Director of the Office of Management and Budget (OMB), and James Connaughton, Chairman of the President's Council on Environmental Quality (CEQ) issued a policy memorandum on environmental conflict resolution (ECR). 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 and is included in the accompanying footnote.²²

The memorandum requires annual reporting by departments and agencies to OMB and CEQ on progress made each year. The report format below is provided for the first year of reporting in accordance with this memo for activities in FY06. The report deadline is December 15, 2006.

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:	_____

1. Do you think that the use of ECR would help your department/agency minimize the occurrence of any of the following?

Check <u>all</u> that apply	
<input type="checkbox"/>	Protracted and costly environmental litigation;
<input type="checkbox"/>	Unnecessarily lengthy project and resource planning processes;

²² Under this policy, Environmental Conflict Resolution (ECR) is defined 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 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.

<input type="checkbox"/>	Costly delays in implementing needed environmental protection measures;
<input type="checkbox"/>	Foregone public and private investments when decisions are not timely or are appealed;
<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"/>	Deep-seated antagonism and hostility repeatedly reinforced between stakeholders by unattended conflicts.

2. Are there any priority areas where you think ECR could be helpful in addressing any of the above challenges for your department/agency?

If so, please list.
If not, please explain.

3. To what extent does your department/agency already use ECR?

Check <u>only</u> one	
<input type="checkbox"/>	Not at all, not applicable
<input type="checkbox"/>	Not at all, but might be useful
<input type="checkbox"/>	Sometimes used, but could be used more frequently
<input type="checkbox"/>	Use often, but recognize it could be used more
<input type="checkbox"/>	We make full use of ECR, as applicable

Please discuss briefly the extent of your use of ECR and, if available, provide any quantifiable indicators of use (e.g., # of cases/matters referred to mediation, # of projects handled through ECR).

4. Characterize your current level of support for ECR within your department/agency (e.g., # dedicated FTEs, required training, budget for hiring neutrals or supporting processes).

5. Has your department/agency taken any action this year in response to the November 2005 ECR Policy Memo (please refer to Section 5 of the ECR Policy Memo)?

If so, please describe.

If not, please explain.

Appendix B

Negative Consequences that Can Be Overcome by ECR

The following table depicts the categories selected by each agency:

	Lengthy litigation	Lengthy processes	Costly Delays	Foregone public and private investment	Lower quality outcome	Deep seated hostility
DHS	✓					✓
DHHS	✓					
DOD	✓	✓	✓	✓	✓	✓
DOE ²³						
DOI	✓	✓	✓	✓	✓	✓
DOJ	✓	✓	✓	✓	✓	✓
DOT	✓	✓	✓	✓	✓	✓
DVA	✓					
EPA	✓	✓	✓	✓	✓	✓
FERC	✓	✓	✓			✓
GSA	✓	✓	✓	✓	✓	✓
NASA						
NCPC		✓				✓
NIGC		✓				✓
NOAA	✓	✓				
NRC					✓	✓
TVA		✓			✓	
USACE	✓	✓	✓	✓	✓	✓
USDA	✓	✓	✓	✓	✓	✓
USIECR	✓	✓	✓	✓	✓	✓

²³ DOE reported that 57 percent of its field sites believed that one or more of the challenges could be minimized by ECR.

**Appendix C
(Responses to Question Three of Template)**

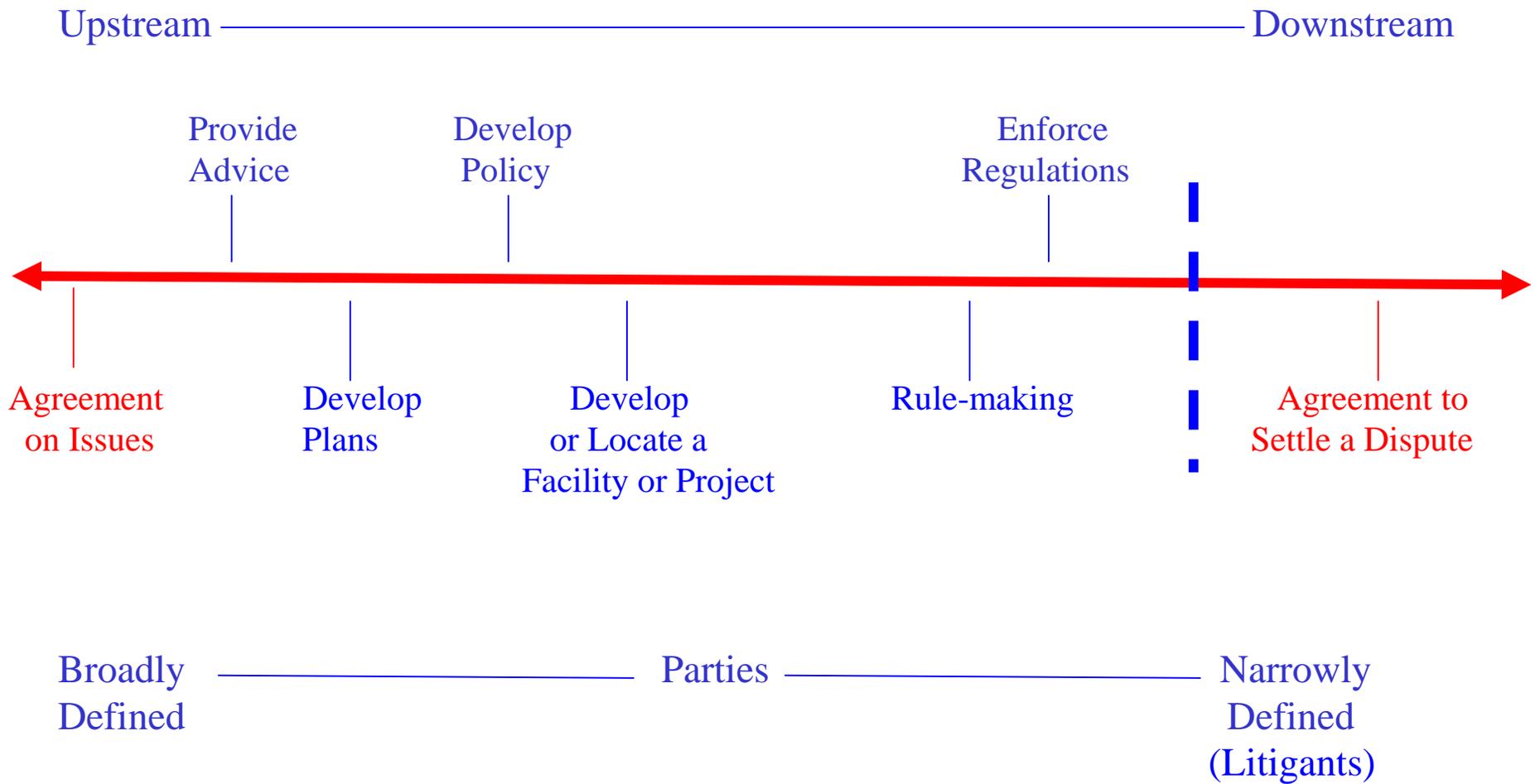
Extent of Agency ECR use

Response	Agencies²⁴
Not at all, not applicable	NASA
Not at all, but might be useful	DHS, GSA, NCPC,
Sometimes used, but could be used more frequently	HHS, DOI, DOT, DVA, NIGC, NRC, TVA, USACE, USDA
Used often, but could be used more	EPA, DOC
We make full use of ECR, as applicable	DOJ, FERC, USIECR

²⁴ DoD reported the response of each DoD agency rather than a single, centralized response. These responses included narrative (Army), percentages of respondent selections from a sub agency (Navy), and “full use” (Air Force). DOE reported the responses of each of its field offices, rather than a centralized response.

Appendix D

Spectrum of Processes



Spectrum provided by USIECR.

Appendix E

(Responses to Question Five of Template)

Measures Taken to Implement Memorandum ²⁵

	Integrate ECR into Plans	Performance Standards	Training	GPRA	Building Infrastructure	Studying New Uses
HHS	✓				✓	
DHS	✓					
DOD	✓		✓			
DOE			✓		✓	
DOI	✓	✓	✓	✓	✓	✓
DOJ	✓		✓			✓
DOT	✓		✓			✓
DVA					✓	
EPA	✓		✓			
FERC	✓	✓	✓	✓		
NASA						
NCPC						
NIGC						
NOAA						
NRC				✓		✓
TVA				✓		✓
USACE			✓		✓	✓
USDA	✓			✓		
USIECR	✓	✓	✓	✓	✓	✓

²⁵ This Table was developed from the responses to Question Five of the 2006 Template, which was an open-ended question, asking agencies to explain the actions they have taken to implement the Joint Memorandum. Because of the question's open-ended nature, an agency's failure to mention a particular activity that is designated on this chart does not necessarily indicate that the agency did not undertake this particular activity.

Appendix F

Statutory Programmatic Areas (as noted in reports) where ECR could be useful

The Atlantic Coastal Fisheries Management and Conservation Act
The Clean Water Act
The Coastal Zone Management Act
The Comprehensive Environmental Response, Compensation and Liability Act
The Endangered Species Act
The Energy Policy Act
The Federal Power Act
The Federal Lands Protection Management Act
The Fish and Wildlife Coordination Act
The Magnuson-Stevens Fisheries Management and Conservation Act
The Marine Mammal Protection Act
The National Environmental Policy Act
The National Historic Preservation Act
The National Marine Sanctuaries Act
The Native American Grave Repatriation Act
The Natural Resource Damage Assessment Act
The Negotiated Rulemaking Act
The Oil Pollution Act